OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-019-574-01

ISSUE

- Whether Respondents met their burden of proof in establishing a willful safety rule violation.

FINDINGS OF FACT

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

1. Claimant was employed by 5280 Towing, Inc., as a truck driver when he suffered an admitted work injury that left him partially paralyzed. On July 5, 2016, Claimant was hauling a forklift from Denver to Delta, CO. He drove a 2013 Silverado 18-foot pick-up truck attached to a flatbed 25-foot gooseneck trailer. The forklift was on the trailer.

2. En route, Claimant stopped at least twice to assess the vehicles. His last stop was just prior to getting on Highway 50. He remembers heading East on Highway 50. His next memory is waking up in the hospital.

3. One hundred sixty seven feet east of milepost 57 on Highway 50, Claimant's truck went off the road at between sixty five and seventy five miles per hour. The truck traveled approximately four hundred thirty feet, knocking out highway posts, and skidding sideways. The truck finally stopped after rolling over. The truck was crushed, and every side of the vehicle retained significant damage, including the roof.

4. When first responders arrived at the scene, Claimant remained upright in the driver's seat. Claimant's spine was crushed, resulting in paraplegia. The Colorado State Patrol accident report indicates that the truck was equipped with a shoulder and lap belt. The state patrol officer wrote "Unknown" where the report addressed whether safety equipment was in use. The report also indicates that the truck was not equipped with air bags.

5. Respondents admitted liability and began paying Claimant full benefits.

6. Eight months later, Respondents asserted that Claimant violated Employer's safety rule by failing to wear a seatbelt at the time of the accident.

7. Levi Medeiros is the Owner / Manager of Employer. Employer only hires "qualified professionals" to drive their vehicles. Claimant, who had a commercial driver's license (CDL) in order to drive large trucks and dump trucks, was hired by 5280 Towing on June 27, 2016. Mr. Medeiros stated that he did not believe that Claimant had any safety violations prior to coming to work for Employer. He based this on the

knowledge that Claimant was added to Employer's insurance without any rate hikes or additional premiums.

8. As part of the hiring process, Claimant passed a drug screen and signed a variety of employment related documents. Those documents included that:

- Claimant was issued a hard hat;
- Claimant was responsible for property damage
- There was a 90 day probationary period for all new employees
- Claimant may be responsible for additional insurance premiums
- Claimant could log himself as "off-duty" during certain situations
- Claimant agreed to "familiarize" himself with Federal Motor Carrier Safety Regulations Pocketbook, and received a copy of the book from Employer.

None of these documents explained that Employer had a policy requiring employees, such as Claimant, to wear a seatbelt.

9. Although Mr. Medeiros testified that Employer provided Claimant with an employee handbook, he conceded that Claimant did not sign a receipt for the employee handbook as he did for numerous other employment documents. The employee handbook was the only written evidence provided at the hearing that stated that employees must wear seatbelts. Claimant testified that he had never seen the employee handbook before, and that he had signed all of the documents Employer put in front of him during the hiring process. Additionally, Claimant testified that he never reviewed any documentation from Employer stating that drivers had to wear their seatbelts.

10. Claimant testified that no employee of Employer ever specifically told him that Employer had a policy that he had to wear a seatbelt while driving for Employer.

11. Even so, Claimant testified that he always wore his seatbelt. When questioned why he would wear his seatbelt if Employer did not require him to do so, Claimant stated "It's just what you do."

12. Claimant received his CDL in 2009. Since then, Claimant has worked for four or five companies as a truck driver. Claimant testified that he has never been written up by any of his employers for a safety violation, let alone failure to wear a seatbelt. Employer did not provide persuasive evidence to the contrary. Employer did not issue Claimant a safety violation during the period of time he worked for Employer. Claimant has never received a traffic citation for failure to wear a seatbelt, including in this accident.

13. When Claimant first had a driver's license at the age of sixteen, he did not always wear his seat belt because not all cars had seatbelts and "you didn't have to." However, since he received his CDL, he has worn a seatbelt "every day" because it is "required by law." He testified that he wears his seatbelt while he is driving a truck for work and when he is driving in a regular car because it is "required by law."

14. Claimant testified that the truck he was driving on the date of his accident had a safety belt alert system that would tell him if he was not wearing his seat belt, presumably because every car has one. Respondents provided no specific evidence that the safety belt alert system was working on the day of the crash or that it would have properly alerted Claimant if he was not wearing a seatbelt.

15. Claimant does not specifically remember if he was wearing his seatbelt at the moment of the accident. However, he believes he was wearing his seatbelt at the time of the accident because he always wears his seatbelt. Even when he was questioned about his multiple breaks during the drive, Claimant responded that it was "not possible" that he got back in the truck without fastening his seatbelt.

16. Mr. Voitel, an engineer Respondents hired, performed an accident investigation. He determined that for unknown reasons, the truck veered off the road and rolled over, eventually landing in an upright position. He also examined the data recorded by the truck's airbag module and determined that the driver's seatbelt was not engaged at the time of the accident. He examined the seatbelt which he determined revealed no signs of being worn. However, the black box can only record if the seatbelt was engaged. It is possible that Claimant believed the seatbelt was buckled, without it being properly latched. Mr. Voitel provided no scientific theories or methodologies for examining/observing a seatbelt after an accident.

17. Shortly after the accident, emergency responders extricated Claimant from the truck and flew him to St. Mary's Hospital. Per the flight nurse, Claimant was not ejected from his vehicle, rather, he was found inside of it. It was unclear to the flight nurse whether he was wearing his seatbelt. The following morning, James Hanosh, MD, reported that Claimant was "apparently a restrained passenger of a semi involved in a rollover with prolonged extrication." Amy Lynn Clark, PA-C, also noted that Claimant was a restrained passenger.

18. Claimant underwent surgery at St. Mary's Hospital and then was transferred to Craig Hospital in Denver. The admission documents describe Claimant's injury as, "Vehicle-Auto W/Seat Belt." Claimant continued to report to all of his providers that he believed that he did have his seatbelt on. These conversations all occurred long before Respondents alleged a safety rule violation.

19. Respondents' medical examiner, Sharon Walker, M.D., determined that because the air bag module stated that Claimant was not wearing his safety belt, then he met the criteria of a safety rule violation regarding "the willful failure of the employee to use safety devices provided by the Employer." First, Dr. Walker did not take into consideration or comment on Claimant being found in the driver's seat – he had not

moved during the major rollover truck accident, making it possible that the black box was wrong. Second, Dr. Walker did not speak to Claimant to determine his state of mind at the time of the accident, but rather performed only a record review. Even assuming Claimant was not wearing his seatbelt at the time of the crash, Dr. Walker has no expert skills or authority to determine whether Claimant "willfully" violated a safety rule, or whether he accidentally or mistakenly did not wear his seatbelt. For these reasons, the ALJ finds Dr. Walker's opinion of Claimant's state of mind to be speculative and unfounded, and therefore not credible or persuasive.

20. Dr. Walker determined that Claimant's failure to wear a seatbelt caused his spinal injury and right clavicle injury. Her opinion about the spinal cord injury was based on just one study of rollover single car accidents with an extremely small sample size of twenty people. Importantly, the study Dr. Walker cited does not concern the type of injury that Claimant sustained – a T4 spinal injury. Rather the study only discussed seatbelt v. non-seatbelt injuries to the thoracolumbar junction (T11 – L2). This study is inapposite to the type of spinal injury Claimant sustained to his upper thoracic spinal, multiple levels above the thoracolumbar junction. Dr. Walker did not discuss how the study of a different part of the spine related to Mr. Nunn's injury. The ALJ finds that Dr. Walker's opinions in this matter are not supported by a relevant scientific study, nor does she have any particular expertise in determining seatbelt v. non-seatbelt injuries. The ALJ finds that Dr. Walker did not provide credible or persuasive scientific or medical sources for her determination that Claimant's clavicle fracture was caused by his alleged lack of seatbelt. The ALJ does not find Dr. Walker's opinions to be credible or persuasive on the issue of causation.

CONCLUSIONS OF LAW

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

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

It is the ALJ's sole prerogative to assess the credibility of witnesses and the probative value of the evidence to determine whether a party has met its burden of proof.

A workers' compensation case is decided on its merits. § 8-43-201, C.R.S. The requirements of proof for civil non-jury cases in the district courts apply in workers' compensation hearings. § 8-43-210, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of this issues involved; the ALJ has not addressed every piece of evidence that may lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App 2000).

Under § 8-42-112(1)(a)&(b), it is the respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule or willful failure to use a safety device provided by the employer. *Triplett v. Evergreen Builders Inc.*, W. C. No. 4-576-463 (May 11, 2004). The question whether the respondents met their burden to prove a willful safety rule violation is one of fact for determination by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995).

Section 8-42-112(1)(a)&(b), C.R.S., provide for a fifty percent reduction of compensation benefits where the industrial injury, "results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." Therefore, in order to prove a safety rule violation, Respondents must prove that 1) there was a known safety rule, 2) Claimant "willfully" violated the enforced safety rule, and 3) Claimant's injury was proximately caused by a willful violation of a safety rule. *See, Bennett Properties Co. v. Indus. Comm'n*, 165 Colo. 135, 143 (1969), *Johnson v. Denver Tramway Corp.,* 115 Colo. 214 (1946); *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). If Respondents are unable to meet even one of the elements, Respondents have not met their burden.

Employer Did Not Communicate a Safety Rule Communicated to Claimant Regarding Wearing a Seatbelt

In order for Respondents to establish a safety rule, they must either show that there was a written or oral rule that is given by someone generally in authority and heard and understood by the employee. *Bennett*, 165 Colo. at 143; *Jentzen v. Northwest Transport*, W.C. # 4-009-435 *1 (ICAO, Apr. 24, 1992) (employee must know of the device or the rule).

As more fully set out in the findings of fact, here, Respondents produced no written evidence that Employer had a rule requiring employees to wear a seatbelt while driving. Although Employer provided a copy of the Federal Motor Carrier Safety Regulations Pocketbook to its employees, Employer asked Claimant only "to familiarize" himself with the book. No written documentation stated Employer required every rule in the handbook to be followed or that the Employer adopted all of the rules and required all of them to be followed. Additionally, Respondents did not provide persuasive evidence from any other employee drivers that they understood there was a safety rule requiring them to wear a seatbelt. Further, Claimant testified that he was never told by management or otherwise to wear a seatbelt while working for Employer. Finally, no persuasive evidence supports the conclusion that the employee handbook, which mentioned that employees must wear seatbelts, was provided to Claimant. The ALJ finds and concludes that Employer did not have a safety rule which it conveyed to Claimant regarding seatbelts. Therefore, there could not have been a violation of a known safety rule.

Assuming that Mr. Nunn Was Not Wearing His Seatbelt at the Time of the Accident, It Was Not an Intentional Act, But Rather Mere Oversight or Negligence.

A "willful" violation is one which results from deliberate intent, and not mere careless, negligence, inadvertence, forgetfulness, remissness, or oversight. *Johnson v. Denver Tramway Corp.,* 115 Colo. 214, 171 P.2d 410 (Colo. 1946); *City of Las Animas v. Maupin*, 804 P.2d 285, 286 (Colo. App. 1990). The employer bears the burden to show that a claimant's conduct was willful. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715, 719 (Colo. App. 1995). An employer only satisfies the burden of proof by showing that the employee intentionally performed a forbidden act despite knowing of the rule. *See Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 144, 437 P.2d 548, 552 (1968). Willfulness may be inferred from evidence of repeated warnings, knowledge of the risks arising from violations of the safety rule at issue, and the degree of carelessness or indifference to obvious risks. *See Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 74-75, 246 P.2d 902, 906 (1952); *Juarez v. Pillow Kingdom,* Inc., W.C. No. 4-364-252 *2 (ICAO Jan 22, 1999) (the ALJ could infer that the claimant acted with deliberate intent when the claimant was "repeatedly warned of the safety rule that he violated).

Evidence of willful misconduct may also be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer, such as engaging "in a pattern of behavior that would show a disregard or disrespect for the respondents' regulations." *Miller v. City and County of Denver*, W.C. No. 4-658-496 at *3 (ICAO Aug. 31, 2006).

As more fully set forth in the findings of fact, Respondents failed to provide credible or persuasive evidence that Claimant willfully violated a safety rule of the employer regarding the use of a seatbelt. First, Claimant believes that he was wearing his seatbelt at the time of the accident because he "always" wears his seatbelt. Second, Claimant never received any prior warnings with respect to any safety rule violations at any of his employers since he began working as a CDL truck driver in 2009, let alone for not wearing a seatbelt, that would show a pattern of behavior. Third, during his treatment Claimant told his doctors that he was wearing his seatbelt. The ALJ finds and concludes that Claimant more likely than not was wearing his seatbelt at the time of the accident.

The only doctor who opined on Claimant's mental state concerning seatbelt use was Dr. Walker, who did not even speak with Claimant to determine his mental state at the time of the crash. The ALJ found above and concludes now that Claimant did not willfully disobey a safety rule or use of a safety device. Rather, assuming that Claimant's seatbelt was not buckled, it is more likely than not that Claimant accidentally, negligently, inadvertently, or mistakenly was not wearing his seatbelt. That conclusion alone requires the ALJ to deny Employer's claim of a safety rule violation.

Assuming That Mr. Nunn Was Not Wearing a Seatbelt at the Time of the Accident, Respondents Have Not Proven That Not Wearing a Seatbelt Proximately Caused Claimant's Injuries

In order to determine that there was a safety violation, the claimant's injury must have been proximately caused by a willful violation of a safety rule. *See Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). The question of whether Respondents proved Claimant's violation of the safety rule was a proximate cause of the injury is one of fact for determination by the ALJ. *Tatum-Reese Development Corp. v. Industrial Commission*, 30 Colo. App. 149, 490 P.2d 94 (1971). The mere concurrence of an injury and an alleged cause does not require the ALJ to draw the inference of causation. *See J.C. Carlile Corp. v. Anataki,* 162 Colo. 376, 426 P.2d 549 (1967) (under prior statute, blood alcohol level of .173 did not require inference that decedent's automobile accident was caused by intoxication).

As more fully set forth in the findings of fact, Respondents failed to produce credible or persuasive evidence that Claimant's alleged failure to wear his seatbelt proximately caused his injuries. Dr. Walker, was the only doctor to opine on whether a lack of seatbelt caused Claimant's injuries, and she is not an expert in spine injuries and seatbelts. Dr. Walker did not discuss that Claimant was found sitting upright in the driver's seat and was extricated from the driver's side of the cab. These factors make it more likely than not that Claimant was wearing a seatbelt. Dr. Walker did not personally examine Claimant nor did she consult with any of Claimant's treating doctors at Craig Hospital, who are experts in the field. Additionally, the medical study she relied upon to determine that Claimant's spine injury was caused by the lack of a seatbelt is not valid for the type of spinal injury that Claimant sustained, and she had no medical sources to determine that Claimant's clavicle break was the result of not wearing a seatbelt. It is more likely that the proximate cause of Claimant's injuries was the truck rolling over and crushing him, especially considering he remained in the driver's seat the whole time. The ALJ specifically finds and concludes that Respondents have not met their burden of proving that the proximate cause of Claimant's injuries was his willful failure to wear a seatbelt.

ORDER

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

1. Respondents are not entitled to reduce Claimant's temporary or permanent compensation or benefits by 50% for any alleged safety rule violation. Respondents' claims for a reduction are denied and dismissed.

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

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

DATED: January 2, 2018

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

ISSUES

I. Whether Claimant has established, by a preponderance of the evidence, that the arthroscopic surgery recommended by Dr. Bowman is maintenance medical treatment.

II. Whether Claimant has established, by a preponderance of the evidence, that the arthroscopic surgery recommended by Dr. Bowman is reasonable, necessary, and related.

STIPULATIONS – PROCEDURAL MATTERS

The parties agreed that the case was closed pursuant to a Final Admission of Liability, but that Respondents admitted liability for maintenance medical treatment. Claimant did not endorse the issue of reopening. Therefore, the issue of reopening was not heard by this court.

FINDINGS OF FACT

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

1. On November 17, 2015, Claimant suffered a compensable injury to his left shoulder when a ceiling tile fell and hit his left shoulder. According to the medical records, the injury occurred when Claimant reached up to pull some paper towel off a shelf. The paper towel was holding up a ceiling tile. After Claimant pulled the paper towel off the shelf, the ceiling tile fell and hit Claimant on the backside of his left shoulder and neck.

2. On the day of the accident, Claimant went to Concentra Medical Center and was evaluated by Hanna Bodkin, PA-C. Claimant complained of left sided shoulder pain and inner upper arm pain which he rated at a 5-8/10. On physical examination, Claimant's left shoulder had decreased range of motion. Claimant was diagnosed as suffering from an injury to the left shoulder, shoulder contusion, and a superficial injury to the back wall of the left thorax. Claimant was prescribed a sling, ibuprofen, and physical therapy.

3. On November 24, 2015, Claimant returned to Concentra and was again evaluated by PA Bodkin. Claimant stated his pain was about the same, or

maybe worse. Claimant complained of pain in the top of his shoulder that radiated into his elbow.

4. On November 24, 2015, Claimant underwent physical therapy. According to the physical therapy notes, Claimant was doing better and had better range of motion.

5. On December 3, 2015, Claimant underwent additional physical therapy and told the physical therapist he was getting a little better, but still had soreness in the shoulder which progressed through the day.

6. On December 8, 2015, Claimant returned to PA Bodkin. Claimant complained of being in pain every morning and that he was feeling worse. Claimant also underwent physical therapy on this day as well. He advised the physical therapist that he was hurting really bad and that he stopped taking his pain medication because he felt the medication was masking his pain and causing him to overdo it.

7. On December 22, 2015, Claimant returned to PA Bodkin. Claimant stated he had been pain free for a week, although sore, and that he was 75% better.

8. On December 22, 2015, Claimant was evaluated by Dr. Cary Motz, an orthopedic surgeon. Dr. Motz noted in his report that a ceiling tile fell and hit Claimant in the supraclavicular area. Dr. Motz performed a physical examination and noted that Claimant was non-tender over the AC joint. He also noted very mild limitation of range of motion with internal rotation and slight crepitus which he thought was coming from Claimant's subscapular area. He also noted Claimant's rotator cuff strength was 5/5 in external rotation and 4+/5 with abduction. His impression was left shoulder contusion and possible chronic rotator cuff tear. Dr. Motz went on to state that Claimant's exam was fairly benign regarding the contusion to the shoulder. He also stated that although Claimant has some weakness with abduction, the mechanism of injury would not cause a rotator cuff tear and therefore it would not be work related if he had one. Dr. Motz said he would re-evaluate Claimant in a month and that he would expect that Claimant could be released.

9. On January 12, 2016, Claimant returned to PA Bodkin. Claimant noted a significant increase in pain and stiffness since he had not gone to physical therapy for 10 days. Claimant was, however, feeling about 80% better.

10. On January 12, 2016, Claimant returned to Dr. Motz. Claimant stated that he had improved with physical therapy and massage therapy. Dr. Motz performed a physical examination and noted excellent shoulder range of motion. He also noted some crepitus at the superomedial border of the scapula with some tenderness over the trapezius and that Claimant was not tender over the deltoid. Claimant's rotator cuff strength was 4+/5 with external rotation and abduction. Dr. Motz' impression was resolving left shoulder contusion and possible left

shoulder chronic rotator cuff tear. Dr. Motz concluded that Claimant did not require any more treatment due to the shoulder contusion. He also concluded that any additional symptoms which might be consistent with a rotator cuff tear were not related to the work accident.

11. On January 18, 2016, Claimant underwent an MRI of his left shoulder. The MRI demonstrated a mild subacromial subdeltoid bursitis, mild osteoarthritis of the chronic fibular joint, a small amount of bursal surface fraying, and mild tendinopathy of the supraspinatus tendon. There was no full thickness rotator cuff tear, tendon retraction, or focal rotator cuff muscle atrophy.

12. On January 26, 2016, Claimant was evaluated by Dr. Mark Montano. Dr. Montano evaluated Claimant's left shoulder and noted Claimant had pain with overhead reaching, but normal range of motion which was similar to his right sided range of motion. He also noted Claimant had good shoulder strength with external and internal rotation. Dr. Montano's assessment was shoulder contusion, superficial injury to the left back wall of the thorax, and supraspinatus tendinitis.

13. On February 4, 2016, Claimant returned to Dr. Montano and complained of numbness in his left hand which he said started the day before. Claimant thought the left handed numbness was due to a hard day at work, which included shoveling snow. Claimant stated that he also had pain in the left side of his neck and that his shoulder was very sore.

14. On February 17, 2016, Claimant returned to PA Bodkin and complained of worsening shoulder pain. Claimant's treatment remained the same, which consisted of physical therapy, acupuncture, and massage therapy.

15. On February 24, 2016, Claimant saw Dr. Sacha and he prescribed Lyrica and recommended a shoulder injection. After seeing Dr. Sacha, Claimant saw PA Bodkin and complained of increasing shoulder pain.

16. On March 2, 2016, Dr. Sacha administered a steroid injection into Claimant's left shoulder.

17. On March 9, 2016, Claimant returned to physical therapy. The therapy notes indicate the injection increased Claimant's range of motion but did not help his pain.

18. On March 18, 2016, Claimant advised his physical therapist that his shoulder locked up and that he had significant pain lifting his arm out away from his body. Claimant also stated that his pain gets so bad that he gets sick to his stomach. On March 23, 2016, Claimant told his physical therapist that his shoulder pain was very bad and that he vomited due to the pain. Claimant rated his pain at a 5-6/10.

19. On March 29, 2016, Dr. Sacha administered an injection into Claimant's left subacromial bursa – shoulder.

20. On April 7, 2016, Claimant advised his physical therapist that he has been pain free for the last 4 days. He stated that he had a steroid shot in his shoulder 10 days ago and that he has been on vacation and has not worked.

21. On April 12, 2016, Claimant reported to his physical therapist that he was doing much better and had no pain at all. Claimant also stated that he was able to work his normal shift the day before without increased pain. Claimant returned to physical therapy on April 14, 2016, and stated that he was doing much better and was able to return to all normal activities without limitation. Claimant returned on April 26, 2016, and stated that he had no shoulder pain and was able to perform all normal activities without limitations.

22. On April 26, 2016, Claimant was evaluated by Dr. Montano. Claimant was doing much better. Dr. Montano noted that Claimant had been pain free for weeks after he received the shoulder injection from Dr. Sacha. It was also noted that Claimant had been working full duty and performing all activities of life without pain, although he might have been sore due to physical therapy. Dr. Montano's assessment at that time was contusion of left shoulder, injury of left shoulder, superficial injury of back wall of thorax, and supraspinatus tendinitis. He anticipated Claimant would be at MMI within 2 weeks.

23. On May 6, 2016, Claimant advised his physical therapist that he had been overworked at work since his boss quit and he was having pain around the long head of his bicep. On May 10, 2016, Claimant reported to his physical therapist that he had more pain over the top and along the posterior of his left shoulder.

24. On May 27, 2016, Claimant was evaluated by Dr. Montano. Claimant indicated that although his shoulder was sore, he had improved significantly. Claimant also complained of some clicking in his shoulder. Dr. Montano placed Claimant at MMI and determined Claimant did not have any impairment due to his work injury. He did, however, recommend maintenance care in the form of a gym pass for one year and two visits with Dr. Sacha over the next 12 months.

25. Claimant testified that during April he was pain free. Claimant also testified that he felt like the effects of the shoulder injection were starting to wear off in May of 2016. Claimant's testimony is consistent with the medical records and is found to be credible regarding his lack of shoulder pain during the majority of April and that he had some pain in May of 2016.

26. As agreed to by the parties, Respondents filed a Final Admission of Liability based on Claimant being placed at MMI by Dr. Montano on May 27, 2016 and admitted liability for maintenance medical treatment. Claimant did not object to the FAL and his case closed.

27. In August of 2016, Claimant quit working for Employer.

28. On August 16, 2016, approximately 2 ½ months after being placed at MMI, Claimant returned to Concentra and was seen by Dr. Scott Richardson. Claimant's only complaint was increased clicking in his left shoulder. Claimant denied having any shoulder pain. Dr. Richardson physically evaluated Claimant's left shoulder and noted there was no tenderness. He also noted that Claimant's shoulder had full range of motion. He further noted that rotator cuff tests were negative and that labrum and stability tests were also negative. Dr. Richardson referred Claimant to an orthopedic specialist due to the clicking in his shoulder.

29. Approximately five days after his appointment with Dr. Richardson, Claimant moved to Astoria, Oregon.

30. Since moving to Oregon, Claimant has worked as a server and has also opened up his own food cart business.

31. On September 22, 2016, Claimant was evaluated by Dr. Ronald Bowman, an orthopedic surgeon in Oregon. By the time Claimant moved to Oregon and was evaluated by Dr. Bowman, Claimant had additional complaints. In addition to the clicking Claimant described to Dr. Richardson, Claimant complained of pain and instability in his left shoulder. Dr. Bowman examined Claimant and noted Claimant was tender at the AC joint and acromion and over the greater tuberosity. He also noted Claimant was tender at the anterior and posterior glenohumeral joint and that he had a very positive O'Brien test and a slightly positive open can test. He also found Claimant had a minimally positive Neer, Hawkins impingement, and anterior glide. Based on his examination, Dr. Bowman thought Claimant might have a labrum injury. Therefore, he recommended Claimant undergo another MRI with an arthrogram.

32. On November 10, 2016, Claimant returned to Dr. Bowman. Claimant advised Dr. Bowman that he could not undergo another MRI because he has a cochlear implant. Dr. Bowman noted Claimant did undergo a CT arthrogram which showed an interstitial longitudinal tear of the subscapularis tendon without retraction. He noted that the labrum appeared well attached and determined it was unlikely Claimant had a labral tear. Therefore, he recommended a subacromial injection and a glenohumeral injection, if the subacromial injection did not help.

33. On November 16, 2016, Claimant underwent a cortisone injection into his subacromial space. The medical note from that date indicates Claimant had a 50% reduction in pain at rest.

34. On December 8, 2016, Claimant returned to Dr. Bowman and indicated the injection helped for about 2 days. Dr. Bowman determined that the subacromial injection did not help isolate Claimant's pain. Therefore, he recommended Claimant undergo a glenohumeral joint injection.

35. On December 16, 2016, Claimant underwent a glenohumeral joint injection. It was noted that Claimant had sharp shooting pain in his subacromial bursa with reaching.

36. On February 2, 2017, Claimant returned to Dr. Bowman. Claimant reported that he was getting a little worse. Because Claimant could not undergo an MRI due to his cochlear implant, Dr. Bowman recommended a diagnostic arthroscopy and a possible rotator cuff repair and/or labral repair. Although Dr. Bowman indicated on November 10, 2016, that it was unlikely Claimant had a labral tear, he indicated on February 2, 2017, that Claimant might require a labral repair. However, before proceeding with surgery, Dr. Bowman referred Claimant to a physiatrist to see if there might be any other non-surgical treatments that might benefit Claimant.

37. On February 16, 2017, Claimant was evaluated by Dr. Bradford Lorber, a physiatrist. At this appointment, Claimant complained of pain in the anterolateral shoulder which felt like a needle was stuck in his shoulder. Claimant noted any movement caused increased needle like pain. Claimant indicated that nothing helps reduce his symptoms. Claimant also complained of occasional shooting pulses up to his neck and occasional radiation of symptoms into his arm and finger numbness that involves digits two, three, and four. Dr. Lorber stated that he could not rule out cervical radiculopathy as the cause of Claimant's shoulder pain. Despite not being able to rule out cervical radiculopathy as the cause of Claimant's shoulder pain, Dr. Lorber stated that proceeding with shoulder surgery would be the most advisable step.

38. On March 19, 2017, Dr. Failinger performed a records review. He determined that Claimant was not a surgical candidate as it relates to the industrial injury. Dr. Failinger also testified, via his deposition. Dr. Failinger's testimony was consistent with his report.

39. On March 23, 2017, Claimant returned to Dr. Bowman. Dr. Bowman noted that in order to rule out a labral injury, he recommended a diagnostic arthroscopy. He noted that it was possible that Claimant could be found to have normal tissue. He also noted that although Claimant did not have bicep tendon findings initially, it is common for these problems to develop over time with instability or damage to the labrum/glenoid interface. Dr. Bowman went on to state that:

> [T]he decision for medical treatment irrespective of causation issues for biceps pathology is a clinical decision more so than one may have had surgery and needs to be decided beforehand. I have done that appropriately and I continue to request that.

Although the above statement made by Dr. Bowman is not clear, this ALJ finds that based on his March 23, 2017, report, Dr. Bowman has indicated that Claimant has developed a problem with his biceps tendon and that the surgery

he has recommended will also be directed towards the biceps tendon, regardless of whether the biceps tendon condition was caused by the work accident.

40. Dr. Bowman also stated in his March 23, 2017, report that Claimant has ongoing symptoms from his industrial injury and the only way to determine the cause of the symptoms is to perform a diagnostic arthroscopy.

41. On April 13, 2017, Claimant returned to Dr. Bowman. Claimant complained of severe pain at times in his left shoulder. Claimant also noted that he continued to work in his new restaurant in Astoria and that his shoulder was painful after mopping the floor.

42. On May 25, 2017, Claimant returned to Dr. Bowman. Claimant indicated his symptoms were worse. He also complained of having estheisa in his thumb and index finger of his left hand. Dr. Bowman indicated that he thought Claimant was having more symptoms from rotator cuff pathology.

43. On July 6, 2017, Claimant returned to Dr. Bowman. Dr. Bowman noted that Claimant underwent EMG nerve conduction studies with Dr. Lorber and that the testing was normal. Dr. Bowman evaluated Claimant and thought that some of Claimant's pathology is the biceps tendon. Dr. Bowman stated that Claimant still required a diagnostic arthroscopy and that Claimant will likely "need a biceps tendinosis as well."

44. Dr. Bowman testified, via his November 15, 2017, deposition. Dr. Bowman testified that the arthroscopy he wants to perform is a two-step process. Dr. Bowman testified that the first step of the procedure is to view the structures of the shoulder and identify pathology which might be causing Claimant's shoulder pain. Then, the second step of the procedure is to fix the pathology which might be causing Claimant's shoulder pain. Dr. Bowman testified that he believes Claimant has something wrong with his shoulder and that that there is a real good chance the surgery will help. Dr. Bowman also testified that based on Claimant's response to the subacromial injection, Claimant would likely benefit from a decompression or acromioplasty, in which bone would be burrowed back to make the space larger. Dr. Bowman also stated in his July 6, 2017, report that Claimant will likely "need a biceps tendinosis as well." Therefore, the intent and purpose of the arthroscopic surgery is not purely diagnostic. The intent and purpose of the arthroscopic surgery proposed by Dr. Bowman is to cure or improve Claimant's underlying shoulder condition in order to reduce Claimant's pain complaints and increase Claimant's function.

45. Dr. Bowman also testified that even if Claimant could undergo an MRI – arthrogram, and it was normal, he would still recommend the arthroscopic surgery. Therefore, Dr. Bowman is not recommending the surgery because Claimant cannot undergo the MRI – arthrogram, he is recommending the surgery because he believes the surgery will cure or improve Claimant's underlying condition.

46. Claimant testified that at the time he was placed at MMI, he felt the latest cortisone injection was starting to wear off. He testified that his pain would wax and wane at that time depending on his workload. Claimant also stated that in order to minimize his work load at that time, he had to bring in extra labor.

47. Claimant also testified that since being placed at MMI, his condition has gotten worse. At the time Claimant was placed at MMI on May 27, 2016, he advised Dr. Montano that although his shoulder was sore, he was significantly better. At hearing, Claimant testified that his current shoulder condition sometimes prevents him from being able to lift his shoulder or put on his socks.

48. The purpose of the surgery recommended by Dr. Bowman is to cure or improve Claimant's shoulder condition.

49. The surgery has been recommended due to the alleged worsening of Claimant's condition since being placed at MMI and is an attempt to improve his condition. The proposed surgery is not designed to relieve Claimant from the effects of the work injury and prevent deterioration.

50. Because the purpose of the arthroscopic surgery is to cure or improve Claimant's condition, the medical treatment at issue is not *Grover*-type maintenance medical treatment.

CONCLUSIONS OF LAW

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

GENERAL PROVISIONS

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

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to

a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

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

I. Whether Claimant has established, by a preponderance of the evidence, that the arthroscopic surgery recommended by Dr. Bowman is maintenance medical treatment.

In cases where Respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When Respondents challenge Claimant's request for specific medical treatment, Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO February 12, 2009).

Pursuant to § 8-42-107(8)(b)(I), C.R.S., an authorized treating physician shall make the initial determination concerning the date of MMI. Once an authorized treating physician makes a determination of MMI, the termination of medical care is triggered and the ALJ lacks jurisdiction to conduct a hearing concerning the accuracy of the authorized treating physician's determination until a DIME is conducted. §8-42-107(8)(b)(III), C.R.S.; *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). The Colorado Supreme Court has noted that the DIME procedure is "the only way for an injured worker to challenge the treating physician's findings -- including MMI, the availability of post-MMI treatment, degree of non-scheduled impairments, and whether the impairment was caused by an on-the-job injury...." *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003).

The ICAO has held that "once an authorized treating physician places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits for the purposes of curing the industrial injury and assisting the claimant to reach MMI unless the claimant undergoes a DIME." *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001). See also *Anderson-Capranelli v. Republic Industries, Inc.*, W.C. No. 4-416-649 (November 25, 2002) (following MMI, "In the absence of a DIME the ALJ lacks jurisdiction to adjudicate a request for additional medical benefits to cure the effects of the injury."); *Toledo-Zavala v. Excel Corp*., W.C. Nos. 4-534-398, 4-534-399 (November 14, 2003) (same); *Cass v. Mesa County Valley School District*, W.C. No. 4-629-629 (August 26, 2005) ("[I]f an ATP places the claimant at MMI, an ALJ lacks

jurisdiction to award additional medical benefits to improve the claimant's condition unless a DIME has been conducted on the issue of MMI.").

However, in *Grover v. Industrial Commission*, 759 P.2d 705, 710 (Colo. 1988), the Supreme Court construed § 8-42-101 (1)(a) as requiring Respondents in workers' compensation claims to provide medical care to injured workers without regard to any time limitation as long as further medical treatment is reasonably necessary "to relieve the worker from the effects of the industrial injury …." The Court found justification for the ruling by observing "[i]t is an obvious fact of industrial life, however, that an injured worker can reach maximum medical improvement from an injury and yet require periodic medical care to prevent further deterioration in his or her physical condition." Id.

In 1991 the definition of MMI in § 8-40-201 (11.5) was added to the statute. In that amendment, MMI referenced a point when any physical impairment is stable and "no further treatment is reasonably expected to improve the condition." That definition excluded from 'further treatment' any "future medical maintenance." In *Milco Construction v. Cowan*, 860 P.2d 539 (Colo.App. 1992) the court noted this amendment. Consequently, when applying the obligation in § 8-42-101(1)(a) to the Respondents to provide medical care "to cure and relieve" the effects of the injury, the term "cure" was to necessarily be limited to care prior to MMI, while the phrase "relieve" could include post MMI treatment.

Therefore, the obligation to provide treatment to "cure" or improve Claimant's condition terminates when the Claimant reaches MMI. This is true because MMI is defined as the point in time when the Claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." § 8-40-201 (11.5). *See Chism v. Walmart*, W.C. No. 4-809-103-03 (January 9, 2017).

However, surgery is not as a matter of law "curative" treatment. *Hayward v. Unisys Corp*. W.C. No. 4-230-686 (July 2, 2002), *affd, Hayward v. Industrial Claim Appeals Office*, (Colo. App. No. 02CA1446, January 9, 2003) (knee surgery may be curative or may be a form of *Grover*-style maintenance treatment designed to alleviate deterioration of the Claimant's condition). Medical treatment which does not tend to cure or improve Claimant's condition may nevertheless be ordered under *Grover* upon the presentation of substantial evidence that such treatment "will be reasonably necessary to relieve a claimant from the effects of the injury or to prevent further deterioration of his or her condition" after MMI. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609, 611 (Colo. App. 1995). Further, the question of whether medical treatment is administered for the purpose of "curing" or merely "relieving" Claimant's condition does not depend on the type of treatment, but rather the reason for the treatment. The following statement from *Milco Construction v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1992), is pertinent:

> We hold, therefore, that, if the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be

> expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far, such medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition.

Therefore, the issues before this ALJ are limited to whether the surgery recommended by Dr. Bowman is *Grover*-type maintenance medical treatment, and if so, whether the treatment is reasonable, necessary, and related to Claimant's industrial accident.

Consequently, the threshold issue for this ALJ to determine is whether the surgery recommended by Dr. Bowman is *Grover*-type maintenance treatment.

In this case, Claimant suffered an industrial injury to his left shoulder on November 17, 2015. Respondents admitted liability for the claim and provided medical treatment. Claimant was placed at MMI on May 27, 2016. At the time Claimant was placed at MMI he still had some pain in his shoulder and some clicking. Moreover, Claimant testified that at the time he was placed at MMI, his shoulder pain would wax and wane depending on his workload. Respondents filed a final admission of liability and admitted for *Grover*-type maintenance medical treatment. The parties agreed that the case was closed, except for the issue of *Gover*-type maintenance medical treatment.

As found, after being placed at MMI on May 27, 2016, Claimant was provided maintenance medical treatment. On August 16, 2016, approximately 2 ½ months after being placed at MMI, Claimant returned to Concentra and was seen by Dr. Scott Richardson. Claimant's only complaint was increased clicking in his left shoulder. Claimant denied having any shoulder pain. Dr. Richardson physically evaluated Claimant's left shoulder and noted there was no tenderness. He also noted that Claimant's shoulder had full range of motion. He further noted that rotator cuff tests were negative and that labrum and stability tests were also negative. Dr. Richardson referred Claimant to an orthopedic specialist due to the clicking in Claimant's shoulder.

Approximately 5 days after his appointment with Dr. Richardson, Claimant moved to Oregon. Since moving to Oregon, Claimant has worked as a server and has also opened up his own food cart business.

By the time Claimant moved to Oregon and was evaluated by Dr. Bowman, an orthopedic specialist, on September 22, 2016, Claimant was complaining of more than just clicking in his shoulder. Claimant was complaining of pain and instability. Based on his initial examination, Dr. Bowman opined that Claimant might be suffering from a labrum injury. As time went on, Claimant's pain complaints increased and the nature of his symptoms changed. Dr. Bowman ultimately recommended an arthroscopic surgery. Although Dr. Bowman has at times described the arthroscopic surgery as being purely

diagnostic in his medical records, this ALJ found that based on his deposition testimony and medical records, the purpose of the surgery is to cure and improve Claimant's shoulder condition. As testified to by Dr. Bowman, and found by this ALJ, Dr. Bowman expects to find pathology and perform certain procedures during the arthroscopy, including, but not limited to, a decompression or acromioplasty and a "biceps tendinosis." (Although Dr. Bowman's reports indicate the possible performance of a "biceps tendinosis," he might be referring to the condition he will surgically correct, and not the actual procedure. Regardless, such matter does not alter this ALJ's findings and conclusions.) In addition, as found by this ALJ, Dr. Bowman expects the surgery to improve Claimant's underlying condition by reducing his pain complaints and increasing his level of functioning.

As found by this ALJ, the reason for performing the arthroscopic surgery recommended by Dr. Bowman is to cure or improve Claimant's shoulder condition. Therefore, this ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that the surgery recommended by Dr. Bowman is *Grover*-type maintenance medical treatment.

II. Whether Claimant has established, by a preponderance of the evidence, that the arthroscopic surgery recommended by Dr. Bowman, is reasonable, necessary, and related.

Because the surgery recommended by Dr. Bowman has been found to be curative, and not *Grover*-type maintenance treatment, the issue of whether the arthroscopic surgery is reasonable, necessary, and related is moot and will not be addressed.

ORDER

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

1. Claimant's request for *Grover*-type maintenance medical treatment in the form of the arthroscopy recommended by Dr. Bowman is denied and dismissed.

2. Claimant did not endorse the issue of reopening and that issue has not been addressed by this ALJ. Therefore, whether Claimant's work related condition has worsened and whether his case should be reopened has not been addressed.

3. The sole issue decided by this ALJ was the threshold question as to whether the surgery recommended by Dr. Bowman qualified as *Grover*-type maintenance treatment.

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

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

DATED: January 3, 2018

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-053-110-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED
Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 19, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 12/19/17, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM).

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. Respondent's Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on December 28, 2017. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained an occupational disease, to wit, the gradual onset of a right shoulder strain

with a date of last injurious exposure of July 7, 2017, and, if so, the Claimant's entitlement to medical benefits.

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

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant (d.o.b. January 23, 1955) began work for the Employer in approximately April of 2017.

2. The Claimant's daily work duties were performed in the floral department of the Employer.

3. The Claimant's specific work duties, on a daily basis, consisted of moving and lifting plants with or without pots or containers, generally lifting/moving/arranging flowers and plants, and watering all flowers and plants, among other duties within the floral department, inside and outside.

4. The watering the flowers and plants located outside the Employer's store building consisted of repetitive overhead reaching in order to pull down watering hoses which were stored overhead on reels.

5. Ordinarily, the daily duties of employees in the floral department of the Employer's store were performed by at least two employees, but not on July 6 and July 7, 2017.

Findings

6. On Thursday, July 6, 2017, the Claimant performed her work duties for a full shift in the Employer's floral department by herself, without another employee also assigned to the floral department that day.

7. The next day, on July 7, 2017, the Claimant again performed the entire necessary duties of the floral department by herself. These duties consisted of continual lifting and moving sometimes heavy object, and repetitive overhead reaching involved in plant/flower watering activities, mainly performed outside.

8. According to the Claimant, she suffered from numerous physical complaints following these two days of working alone in the floral department. Her complaints consisted of, but were not limited to: sunburn, pain and discomfort in her right arm/shoulder, upper back and neck.

9. The Claimant timely reported the physical problems she related to her two days of solo work in the floral department to an authorized supervisor of the Employer. She was then directed by the Employer to an initial medical provider, Colorado Occupational Medical Partners, Inc. (Hereinafter "COMPI) where she ultimately came under the care and treatment of Matthew Lugliani, M.D., her authorized treating physician (ATP).

Employer Witnesses

10. Natasha Hatch, the Operations Assistant Manager of the Employer's store where the Claimant worked, testified that the Claimant first reported a sunburn that was making her right shoulder hurt, caused by watering plants at work on July 10, 2017 (*See* Respondent's Exhibit J). The ALJ infers and finds that Hatch confused the reporting date, stated by the Claimant, with the date of last injurious exposure.

11. The Claimant's ATP supports "repetitive lifting" as the cause of the Claimant's right shoulder problems, which is consistent with the Claimant's medical histories given to medical providers. The ALJ further finds that Hatch's testimony, essentially, does not contradict the Claimant's version of events, which is corroborated by the aggregate medical evidence, with the exception of the opinions of John Burris, M.D., Respondent's Independent Medical Examiner (IME).

11. Audrey Alire testified by telephone and corroborated Hatch's testimony--that the Claimant said she got a sunburn at work, causing her right shoulder to hurt. The ALJ infers and finds that although the Claimant may have thought, at first that the sunburn caused her right shoulder pain, on further reflection she realized that watering plants and repetitive lifting caused her right shoulder problems. In this respect, the ALJ finds the Claimant credible. Although Alire did not remember the Claimant's mentioning right shoulder pain, Alire selectively remember the "sunburn." The ALJ further finds that Alire's telephone testimony, essentially, does not contradict the Claimant's version of events, which is corroborated by the aggregate medical evidence, with the exception of the opinions of Dr Burris, Respondent's IME.

12. Kendra L. Slaughter testified that she worked with the Claimant in the floral department and the Claimant did not look like she was hurt on the day in question, July 8, 2017. The ALJ finds that Slaughter's telephone testimony does not effectively detract from the Claimant's version of events or from the aggregate, credible medical evidence.

Medical

13. On July 11, 2017, the Claimant was seen by Tom Chau, PA-C (Physician's Assistant-Certified) at COMPI, who examined her, and stated a diagnosis of: "R shoulder str."

14. PA-C Chau stated specifically that: "Right shoulder pain status post repetitive lifting with vague symptoms of headaches, fever, and sunburn."

15. In the form designated as "Physician's Report of Workers' Compensation Injury" (Claimant's Exhibit 5), dated August 4, 2017, Dr. Lugliani indicated that his objective findings were consistent with a work-related mechanism of injury. Dr. Lugliani released the Claimant to return to modified work from August 5 to August 15, 2017, with a 10 lbs lifting restriction. In a narrative report of the same date, Dr. Lugliani's assessment was "status post overuse injury, sustaining: (1) right shoulder pain; (2) cervicalgia; (3) symptoms of myogenic thoracic outlet syndrome;; (4) possible 1st rib subluxation; and, (5) right upper extremity neuropathic complaints. The ALJ finds that Dr. Lugliani has rendered an opinion, to a reasonable degree of medical probability, that the Claimant sustained an "occupational disease" to her right shoulder, arising out of the course and scope of her employment with the Employer.

16. On October 9, 2017, the Claimant presented to Morgan Campbell, D.O., of the Partners in Health Family Medicine, who diagnosed "rotator cuff syndrome of the right shoulder, active." Dr. Campbell indicated that the Claimant's "symptoms were not greatly (*sic*) [improved] with physical therapy. An MRI (magnetic resonance imaging) has been ordered today for further evaluation…."

Independent Medical Examination (IME) by John Burris, M.D.

17. On October 17, 2017, at the Respondent's request, an IME was performed on Claimant by Dr. Burris. Among other things, Dr. Burris concluded in his report of that same date that the Claimant did not suffer a workplace injury with the Employer, primarily because "there is no evidence of a specific mechanism which would constitute a workplace injury." Dr. Burris failed to adequately explain what "mechanism of injury…would constitute a **workplace** (emphasis supplied) injury." The ALJ declines to take his statement on faith. Further, ATP Dr. Lugliani contradicts Dr. Burris' opinion. The ALJ infers and finds that the scope of Dr. Burris' IME concerned the existence of a traumatic event (there was none per se), to the exclusion of a consideration of an occupational disease with gradual onset.

Ultimate Findings

18. The ALJ finds that Claimant's testimony to be credible. Further, the ALJ finds the testimonies of the lay witnesses called by the Respondent, although not lacking in credibility, do not detract from the credibility of the Claimant's testimony. Additionally, the ALJ finds the opinions of all the treatment providers at COMPI, including ATP Dr. Lugliani, as well as Dr. Campbell at Partners in Health Family Medicine, to be significantly more credible than the opinions of Respondent's IME, Dr. Burris.

19. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's version of events and the opinions of her authorized treatment providers, including ATP Dr. Lugliani and Dr. Campbell, and to reject all testimonies and opinions to the contrary.

20. The Claimant has proven, by a preponderance of the evidence that she suffered an occupational disease of her right shoulder, resulting directly from the repetitive lifting conditions under which her work was performed, which followed as a natural incident of her work and can be fairly traced to her employment as a proximate cause; and, does not come from a hazard to which she would have been equally exposed outside of her employment for the Employer.

21. The Claimant has proven, by preponderant evidence that all of her medical care and treatment for her work-related right shoulder condition at COMPI was authorized; referrals from COMPI were within the chain of authorized referrals; the treatment for the right shoulder condition was and is causally related to the Claimant's work-related occupation disease and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible and the testimonies of the witnesses called by the Respondent, although not lacking in credibility, did not detract from the credibility of the Claimant's testimony. As further found, the opinions of all the treatment providers at COMPI, including ATP Dr. Lugliani, as well as Dr. Campbell at Partners in Family Medicine, to be more credible than the opinions of Respondent's IME, Dr. Burris.

Substantial Evidence

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

treatment providers, including ATP Dr. Lugliani and Dr. Campbell, and to reject all testimonies and opinions to the contrary.

Occupational Disease

c. An "occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). An occupational disease might be said to "occur" when the disease becomes **disabling.** *See Union Carbide Corporation v. Indus. Claim Appeals Office,* 128 P.3d 319 (Colo. App. 2005). As found, Claimant has proven an occupational disease to her right shoulder with a date of last injurious exposure of May 7, 2017.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent shall pay the costs of all authorized, causally-related and reasonably necessary medical care and treatment for the Claimant's compensable

occupational disease of her right shoulder, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this_____day of January 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

I. Did Claimant overcome the Division Independent Medical Examination (DIME) on the issues of maximum medical improvement (MMI) and permanent partial disability (PPD)?

II. Maintenance medical treatment after MMI was admitted on the Final Admission of Liability.

III. The parties previously stipulated to reserve the issue of permanent total disability (PTD).

FINDINGS OF FACT

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

1. Claimant sustained an admitted industrial injury on July 11, 2016.

2. John Burris, M.D., an authorized treating physician, placed Claimant at MMI with no impairment and no work restrictions on December 7, 2016.

3. At the request of Claimant, a DIME was done by Dr. Orgel on June 7, 2017. Dr. Orgel determined Claimant reached MMI on December 6, 2016. He provided an impairment rating of 7% whole person for the lumbar spine. Lumbar flexion was invalid on the initial testing and again on June 8, 2017.

4. Dr. Orgel considered whether complaints of neck and thoracic back pain were causally related to the work injury. Dr. Orgel declined to provide an impairment rating for the neck or thoracic back.

5. Respondents filed a Final Admission of Liability on June 23, 2017 accepting the DIME opinions on MMI and impairment.

6. Claimant obtained an independent medical examination (IME) with Carolyn Gellrick, M.D. In her report of September 19, 2017, Dr. Gellrick agreed with the date of MMI as assigned by the DIME physician, Dr. Orgel. She noted there was no evidence of thoracic spine dysfunction or cervical spine dysfunction. She provided an impairment rating for the lumbar spine only. She and Dr. Orgel both used a Table 53 rating of 5% whole person. Dr. Gellrick noted that during her evaluation of Claimant, the range of motion testing was valid. She assigned 5% whole person based on range of motion for a total rating of 10% whole person for the lumbar spine.

7. Dr. Gellrick noted there was a difference of opinion between her impairment rating and the one assigned by the DIME. The difference was based upon whether range of motion measurements were valid. Dr. Gellrick did not identify any error made by the DIME physician in determining Claimant's impairment rating.

8. Dr. Orgel noted there were nonphysiological elements to Claimant's presentation including pain with light touch and voluntary motion observed much greater than voluntary movement on request.

9. Jonathan Bloch, M.D., another of the authorized treating physicians, stated in a report dated November 11, 2016 that Claimant had new overriding neck and right shoulder pain however the claim was for the low back only. In his opinion, "it most likely represents symptom magnification for purposes of obtaining WC benefits or prolonging this claim."

10. Claimant testified that she hurt her back and neck when she fell on July 11, 2016. She testified Dr. Zimmerman recommended medial branch blocks and Dr. Bloch recommended an EMG but she did not have either. She does not feel the doctors paid attention to her neck. Claimant testified she disagrees that she is at MMI and she feels she needs treatment for her back and neck.

11. On November 11, 2016, Dr. Bloch indicated the medical treatment guidelines would not indicate a rhizotomy without a diagnostic response to injection. He indicated he would order an EMG to further evaluate radiculopathy; however, he transferred care to the delayed recovery specialist.

12. Dr. Burris did not recommend a rhizotomy, medial branch block or an EMG. When he placed Claimant at MMI, his only recommendation for maintenance treatment was to complete two sessions of massage therapy.

13. The DIME physician, Dr. Orgel, stated there was no specific maintenance treatment needed. He encouraged activity and use of over-the-counter analgesics.

14. Claimant's IME physician, Dr. Gellrick, indicated Claimant needed to continue an exercise program and should continue NSAIDs. There were no other recommendations for maintenance treatment.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

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

5. MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

6. As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury, including whether the various components of the Claimant's medical condition are causally related to the industrial injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Martinez v. Industrial Claim Appeals Office, 176 P.3d 826*. Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

7. A DIME physician must apply the AMA Guides when determining Claimant's medical impairment rating. C.R.S. §8-42-101(3.7); C.R.S. §8-42-107(8)(c). The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

8. Dr. Burris, Dr. Orgel and Dr. Gellrick all agree Claimant reached maximum medical improvement by December 6, 2016. Claimant's testimony to the contrary does not meet the burden of clear and convincing evidence. Claimant has failed to overcome the Division IME on the issue of maximum medical improvement.

9. The DIME physician, Dr. Orgel, invalidated flexion range of motion measurements based on measurements taken on two different dates. While Claimant's expert, Dr. Gellrick, found the flexion range of motion measurements to be valid on the date of her examination, she made no representation that the rating done by Dr. Orgel was incorrect. A mere difference of opinion between physicians does not necessarily

rise to the level of clear and convincing evidence. Claimant has failed to overcome the Division IME on the issue of permanent impairment.

ORDER

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

1. Claimant has failed to overcome the Division IME on the issues of maximum medical improvement and permanent impairment.

2. Per prior Order, the issue of permanent total disability is reserved for future determination.

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

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

DATED: January 3, 2018

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage is $1,163.00.

FINDINGS OF FACT

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

1. Claimant commenced employment for the employer on June 6, 2017. The employer is a drilling company. Claimant worked at Rig 461 located in the area of Ft. Lupton, Colorado. Claimant was hired as a floorhand, which is an entry-level position. Claimant's job duties include throwing tongs, pulling slips, and general rig cleanup. The slips can weigh in excess of 300 pounds. Claimant's regular work shift was from 5:45 pm to 6:00 am, 14 days on, then 14 days off.

2. Claimant sustained a compensable left upper extremity injury on June 7, 2017 while pulling slips with a co-worker. Claimant estimated the weight of the slip he was pulling at the time of the accident was approximately 250 pounds. Claimant initially received medical care onsite with Axiom, an online nursing service.

3. On June 8, 2017, Claimant was seen at Banner Health by Dr. James Hebard, the authorized treating physician (ATP). Dr. Hebard reported that Claimant was able to return to modified duties beginning on June 8, 2017. He was generally to refrain from use of his left hand and arm. Dr. Hebard completed a Physician's Report of Workers' Compensation Injury on June 8, 2017, outlining Claimant's restrictions. Dr. Hebard also indicated that Claimant was to remain on modified duty until at least his next appointment, which was scheduled for June 22, 2017. (Respondents' Submission, p. 57) The ALJ credits Dr. Hebard's June 8, 2017, report as it relates to Claimant's restrictions and inability to perform his regular job duties.

4. Following his medical appointment with Dr. Hebard, Claimant returned to the jobsite where he went to sleep in the company-provided crew quarters. After Claimant awoke at approximately midnight, Claimant was directed to find Joey Strath, the rig supervisor, to discuss modified job duties that the employer had available for Claimant.

5. Joey Strath was a rig supervisor on location at Rig 461. During the period of time that Claimant slept on June 8, 2017, he received a modified job offer from corporate headquarters based on the restrictions assigned by Dr. Hebard, to present to Claimant.

6. This modified job offer (RS 58-59) was addressed to Claimant. It included a transitional work plan (TWP) within the restrictions assigned by Dr. Hebard. The TWP position was as a Modified Floorhand at full wages and full-time hours. The modified position called for Claimant to perform general administrative and other duties assigned within the restrictions assigned by Dr. Hebard in his Work Status Report. (RS 57) The TWP provided that the modified job being offered would not exceed the physical limitations outlined by Dr. Hebard. The modified job offer provided that Claimant would only be assigned tasks consistent with Claimant's physical abilities, knowledge and skills, and if necessary, training would be provided.

7. The modified job was for a limited period of time. The modified job was from June 8, 2017 through June 22, 2017. The modified job offer also indicated that "after each appointment with an Examining Physician or Treating Physician, a new Bona Fide Offer of Employment will be generated by Human Resources for your signature." (RS 58-59)

8. Claimant and Joey Strath met sometime around midnight on either June 8, 2017, or in the early morning hours of June 9, 2017, which was during Claimant's regular work shift. Mr. Strath handed the TWP to Claimant who held onto and looked at the document. Mr. Strath assumed Claimant was reading the TWP. Claimant returned the document to Mr. Strath, who put it down on his desk where Strath and Claimant were sitting. Mr. Strath went through the TWP with Claimant point-by-point, including the fact that Claimant would receive a full rate of pay, full-time hours, and that the company was offering him a modified position within the work restrictions assigned by Dr. Hebard. Mr. Strath advised Claimant that he would be reviewing company documents such as prior safety alerts, training manuals, the new employee orientation handbook, and other documents located in the safety room.

9. Mr. Strath handed the document back to Claimant. Claimant verbally declined the modified job offer for the period of June 8, 2017, through June 22, 2017, and told Strath that he did not want to read books for 12 hours a day for two weeks. After Claimant verbally declined the modified job offer, Mr. Strath handed the TWP to Claimant and asked him to sign the document confirming that he was declining the modified job offer.

10. Claimant initialed a line on the TWP which stated, "I have read and declined this Bona Fide Offer." Claimant signed the document, printed his name, and dated the document June 8, 2017. At Claimant's request, he was then given a ride home.

11. Claimant does not contend that the modified job duties offered were outside of the physical restrictions assigned by Dr. Hebard. Rather, he contends that he did not understand what he was signing. He agrees that he completed the form with his initials, signature, handwritten name and date. Claimant contends that when the job offer was made, Joey Strath treated him like a child. The ALJ does not find Claimant's contentions that he did not understand what he was signing, or that Mr. Strath was treating him like a child, to be credible or persuasive.

12. Mr. Strath met with Claimant to offer the transitional work assignment. He did so in a straightforward manner. He was calm, not nasty or aggressive. Mr. Strath denies that he spoke to Claimant in a demeaning manner and further stated that it was absolutely not true that he treated Claimant like a child. In Mr. Strath's observations, Claimant fully understood the document and at no time during their meeting did Claimant ask questions indicating that he did not understand what he was signing. Claimant was aware of his surroundings and what was being discussed.

13. The ALJ finds Mr. Strath's testimony to be credible.

14. Although Dr. Hebard's June 8, 2017, report indicates Claimant was to return for a follow up evaluation on June 22, 2017, and that work restrictions would be addressed, no records were submitted which indicate Claimant returned to Dr. Hebard on June 22, 2017.

15. On July 17, 2017, Claimant returned to Banner Occupational Health Clinic and was evaluated by Dr. Kevin Vlahovich. Dr. Vlahovich evaluated Claimant and modified his restrictions to no lifting of more than 5 pounds with his left upper extremity and restricted Claimant from doing any overhead work with his left arm. Dr. Vlahovich continued to restrict Claimant to modified duty. This ALJ credits Dr. Vlahovich's report as it relates to Claimant's restrictions and inability to perform his regular job from June 8, 2017, through at least July 17, 2017.

16. Claimant's June 7, 2017, industrial injury was disabling and prevented Claimant from performing his regular job duties as a floorhand.

17. Claimant's disability and inability to perform his regular job duties as a floorhand lasted more than three work shifts.

18. Claimant has not worked a shift for Employer since he was injured on June 7, 2017.

19. Claimant's injury and disability is the cause of his actual wage loss.

20. The earliest date on which Claimant could have become entitled to temporary disability benefits was June 11, 2017.

21. Even though Claimant refused an offer of modified employment for a limited period of time, his refusal occurred on June 8, 2017, or June 9, 2017, which is before Claimant missed three work shifts and became entitled to temporary disability benefits.

22. On July 19, 2017, Respondents filed a General Admission of Liability for medical benefits only. Respondents did not admit liability for temporary disability benefits and have not paid any temporary disability benefits.

23. Based on the stipulation of the parties, Claimant's average weekly wage is $1,163.00. This results in a weekly temporary total disability ("TTD") rate of $775.33.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits.

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As found, Claimant's June 7, 2017, industrial injury was disabling and prevented Claimant from performing his regular job duties as a floorhand. This finding was based on the work restrictions issued by Dr. Hebard on June 8, 2017, which basically precluded Claimant from using his left upper extremity, and restricted Claimant to modified duty. This finding was also supported by the fact that Employer offered Claimant modified employment as a Modified Floorhand around midnight on June 8, 2017, or the early morning of June 9, 2017, consistent with the work restrictions set forth by Dr. Hebard on June 8, 2017.

As found, Claimant's industrial injury caused Claimant to miss more than three work shifts and is the cause of his wage loss. This finding is based on the fact that Claimant was precluded from performing his regular job as of June 8, 2017, and Claimant has not returned to work for Employer in any capacity since his injury. The fact that Claimant refused an offer of modified employment, which was made before he became entitled to temporary disability benefits, does not negate this finding.

Respondents argued that Claimant's refusal to accept the offer of modified employment is the cause of Claimant's wage loss and not the industrial injury and that Claimant is not entitled to TTD in the first instance. This ALJ does not find such argument to be persuasive. As found, Claimant's injury and restrictions preclude him from performing his regular job duties and is the cause of his wage loss. Claimant's

wage loss is not due to his refusal to accept a modified job for a limited period of time which was made before Claimant became entitled to temporary disability benefits.

Refusal of an offer of modified employment can be the basis for the termination of temporary total disability benefits pursuant to §8-42-105(3)(d)(1), C.R.S. However, Respondents are not seeking to terminate Claimant's temporary total disability benefits pursuant to §8-42-105(3)(d)(1), C.R.S., based on the refusal of an offer of modified employment since at the time Claimant refused the offer of modified employment, he was neither entitled to, nor receiving, temporary total disability benefits. (*See Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374 (Colo. App. 2016)(Temporary total disability benefits cannot be terminated pursuant to §8-42-105(3), C.R.S., when temporary total disability benefits have yet to commence.)

Therefore, this ALJ concludes that Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits from June 8, 2017 and continuing, until terminated by law. Claimant is entitled to temporary total disability benefits at a weekly rate of $775.33, which is based on an average weekly wage of $1,163.00, subject to any offsets.

ORDER

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

1. Respondents shall pay Claimant temporary total disability benefits at a weekly rate of $775.33, subject to any offsets, from June 8, 2017 and continuing, until terminated by law.

2. Claimant shall be paid interest at the rate of 8% per annum on compensation benefits not paid when due.

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

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

DATED: January 8, 2018

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-043-568-02

ISSUE

- Whether claimant has proven by a preponderance of the evidence that her average weekly wage should be increased?

FINDINGS OF FACT

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

1. Claimant has worked as a temporary seasonal employee for Employer for several years. Claimant also does some occasional work for other employers.

2. Claimant's earnings from 2012 through 2016 have been $10,631, $11,031, $11,287, $7,408, and $10,053, respectively.

3. Claimant suffered a work-related injury on March 24, 2017. Respondents filed a General Admission of Liability on May 2, 2017.

4. Claimant testified that she typically worked for Employer from January 1st or 2nd through the end of the tax season. Her 2017 earnings from Employer through the date of her injury were $5,215.18.

5. After the tax season ends, she does not work another regular seasonal position during the year. She additionally works for Boulder County during elections, and has some childcare jobs.

6. Claimant was able to work for Boulder County in October 2017 during the elections and earned $1,360.44.

7. Claimant testified that at the time she was injured, she was also working for Boulder Valley Christian Church in childcare. Claimant testified that she earned she earned $45 for January, $45 for February, and $90 for March 2017. Claimant's employment extended through May, 2017 at $90 per month for Boulder Valley Christian Church, but she was unable to work April and May 2017 due to her work injury.

8. Respondents admitted to an average weekly wage of $114.58 with a compensation rate of $76.39. Respondents arrived at this amount purportedly by adding Claimant's earnings from March 25, 2016 through March 10, 2017 arriving at $5,843.66. And then dividing that amount by fifty-one weeks. This calculation is in error. First, when the ALJ sums Claimant's earnings from Employer for the same period, the amount is$5,188.90. Second, the period of time calculated equals fifty weeks, not fifty-one.

9. The calculation sheet attached to Respondents' General Admission shows that Claimant earned $6,417.24 during the fifty-one week period from March 25, 2016 through March 17, 2017.[1] Claimant's average weekly wage from Employer is $125.82, with a corresponding TTD rate of $83.04.

10. Claimant's wages for her concurrent employment with Boulder Valley Christian Church for January through March, 2017 equal $180. But for Claimant's injury, she would have earned an additional $180 for April and May, at which time the church eliminated the position. By dividing the total amount Claimant would have earned, $360, by the five months she worked, results in a monthly average of $72. To arrive at Claimant's average weekly wage for her concurrent employment, we multiply $72 by 12, and then divide that amount by 52 weeks. Claimant's average weekly wage for her concurrent employment equals $16.61, with a corresponding TTD rate of $10.96.

11. Combining Claimant's earnings from Employer and her concurrent employer yields an AWW of $142.43. Her corresponding TTD rate is $94.00.

CONCLUSIONS OF LAW

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

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

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

The average weekly wage of an injured employee is the basis upon which to compute compensation payments. C.R.S. section 8-42-102(2) provides that a claimant's average weekly wage is determined based on her earnings at the time of injury. A judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of the injury. *Pizza Hut . ICAO*, 18 P.3d 867, 869 (Colo. App. 2001). However, C.R.S. § 8-42-102(3) authorizes a judge to exercise discretionary authority to calculate an average weekly wage in another manner if the prescribed methods will not fairly calculate the average weekly wage based on the particular circumstances of the case. *Campbell v. IBM Corp.*, 867 P.2d 77, 88 (Colo. App. 1993).

[1] Although it appears that Employer calculated Claimant's earning on March 30, 2017; the amount did not include Claimant's earnings for the last week of her pre-injury employment.

The objective in calculating an average weekly wage is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, C.R.S. § 8-42-102(3) grants a judge substantial discretion to modify the average weekly wage if the statutorily prescribed method will not fairly compute a claimant's wages based on the circumstances. *In re Broomfield*, W.C. No. 4-651-471 (ICAO, March 5, 2007).

Where an injury impairs a claimant's ability ability to earn from concurrent employment, a "fair" computation of the average weekly wage may warrant inclusion of all such wages. *Jefferson County Pub. Sch. V. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

Claimant has worked for Employer for several years as a temporary seasonal employee during the tax season. On March 24, 2017, Claimant sustained an on-the-job injury. Respondents filed a General Admission of Liability, admitting to the claim and admitting to temporary total disability benefits. However, Respondents miscalculated Claimant's average weekly wage by using an incorrect wage amount, an incorrect time period, and by failing to include her concurrent employment.

Claimant seeks to increase her average weekly wage by using the amount of her seasonal earnings and extending them throughout the year. The ALJ finds that doing so would not fairly approximate Claimant's wage loss during 2017.

Claimant's average weekly wage is $142.43. Her corresponding TTD rate is $94.00.

ORDER

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

1. Claimant's average weekly wage is $142.43. Her corresponding TTD rate is $94.00.

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

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

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

DATED: January 8, 2018

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the right shoulder surgery Claimant underwent on March 2, 2017, and subsequent treatment, is reasonable, necessary and related to Claimant's July 26, 2016, work injury; and

2. Whether Claimant proved by a preponderance of the evidence that she was disabled from her usual employment and is therefore entitled to Temporary Total Disability (TTD) benefits from March 2, 2017, until June 6, 2017, when she was released to full duty.

STIPULATIONS OF FACT

1. The parties stipulate and agree that Claimant, on July 26, 2016, sustained a compensable right shoulder injury that arises out of and in the course of her employment with Employer;
2. The parties stipulate and agree that Claimant's average weekly wage (AWW) is $354.31; and
3. The parties stipulate and agree that Respondents will pay Claimant $2,600.00 as compensation for lost wages resulting from her work injury from July 26, 2016, to March 1, 2017.

FINDINGS OF FACT

1. Claimant, who was 44 years old at the date of hearing, worked in Gunnison, CO for Employer as a housekeeper. Her job duties consisted of cleaning and organizing hotel rooms, including bed-making. On July 26, 2016, Claimant sustained an injury to her right shoulder that arises out of and in the course of her employment with Employer. The injury occurred while she was putting new linens on a mattress. As she flared the flat sheet out, up and away from her body to spread the linen over the mattress her right shoulder popped and she felt immediate pain.

2. Claimant did not complete her shift on July 26, 2016, and she reported a right shoulder injury to Employer. An Employer's First Report of Injury was filed. She was sent for treatment at Gunnison Valley Health Emergency Services (GVH).

3. Claimant was examined by Michael Meeuwsen, MD, on July 26, 2016, at GVH. Claimant reported she was injured earlier that day while making beds at work. She was diagnosed with a right shoulder rotator cuff strain, prescribed Ibuprofen 600mg, and referred for physical therapy (PT). Claimant was released to modified duty with the following restriction: "Patient is to avoid making beds or performing other weighted lifting activities while reaching away from [the] body for 2 weeks."

4. Claimant began treatment for her work injury at Gunnison Valley Health Family Medicine Clinic (FMC) on August 10, 2016. She reported a right shoulder injury that occurred at work while making beds and the inability to lift her right arm above 90 degrees. She reported she was working modified duty and was limited to dusting, vacuuming and bed-making with help. She was diagnosed with suspected right rotator cuff injury, and referred for an orthopedic evaluation and PT.

5. The following day, August 11, 2016, Claimant was examined by Dr. David Elfenbein, MD, for orthopedic evaluation. Dr. Elfenbein is an orthopedic surgeon. She reported a right shoulder injury that occurred at work while making beds, and the inability to lift her arm without pain. Dr. Elfenbein noted diffuse tenderness throughout the right shoulder, which was worse in the bicipital groove and radiated down her arm and upwards into her neck. Dr. Elfenbein diagnosed right bicipital and rotator cuff tendinitis. He assigned work restrictions of no lifting over 10 lbs. and no reaching overhead.

6. Claimant began a course of PT on August 25, 2016. She regularly reported her right shoulder symptoms were exacerbated by her work activities.

7. On September 8, 2016, Claimant returned to Dr. Elfenbein. She reported significant pain in the right bicipital groove and mild pain in the subacromial space. Dr. Elfenbein recommended an injection of Betamethasone and Lidocaine into the bicipital groove and biceps tendon sheath. Claimant received the injection that day. Dr. Elfenbein noted Claimant was being required to perform work duties beyond what her work restrictions permitted. He maintained Claimant's light duty status and added a "no bed making" restriction. Claimant was released to work light duty.

8. Claimant returned to Dr. Elfenbein on September 22, 2016. She reported significant pain in the right bicipital groove, but reduced pain in the subacromial space. Dr. Elfenbein noted Claimant was still being required to perform work beyond the limitations set forth by her work restrictions, including routinely doing 45 rooms per day and making beds despite her restrictions. Dr. Elfenbein discontinued PT and ordered an MRI. He maintained Claimant's work restrictions and light duty status.

9. Claimant underwent an MRI on September 30, 2016. It indicated inflammation of the shoulder joint and strain of the biceps tendon.

10. On October 6, 2016, Claimant returned to Dr. Elfenbein. She reported reduced pain in the bicipital groove and subacromial space since the injection on September 8, 2016, but increased pain in the acromioclavicular (AC) joint. Dr. Elfenbein reviewed the MRI.

He diagnosed Claimant with AC joint arthritis, subacromial spur, and bicipital and AC joint tendinitis. He recommended an injection of Betamethasone and Lidocaine into the AC joint tendinitis. Claimant received the injection that day. Dr. Elfenbein noted Claimant was still being required to do more at work than her restrictions permitted. He maintained Claimant's work restrictions and light duty status.

11. Claimant returned to Dr. Elfenbein on October 20, 2016. She reported increased pain in the bicipital groove and subacromial space, but reduced pain in the AC joint arthritis since the injection on October 6, 2016. Dr. Elfenbein recommended restarting PT. He maintained her work restrictions and light duty status, but noted she was being required to perform work prohibited by her restrictions.

12. On November 10, 2016, Respondents filed a Notice of Contest (NOC). On November 17, 2016 Claimant returned to Dr. Elfenbein. She reported she was doing better because she was not working, but still had pain in the bicipital groove, AC joint, and subacromial space. Dr. Elfenbein recommended right shoulder surgery, inclusive of subacromial decompression (SAD), distal clavicle resection (DCR), and biceps tenodesis. He maintained Claimant's restrictions and light duty status.

13. Respondents denied the request for surgery but permitted Claimant to continue conservative treatment. Claimant returned to Dr. Elfenbein on February 8, 2017. She reported severe right shoulder pain that was waking her at night. Dr. Elfenbein noted Claimant was being required to work full duty despite her continued work restrictions. He took her off work completely because Claimant's restrictions were not honored.

14. On February 16, 2017, Claimant returned to Dr. Elfenbein. She reported pain in the right bicipital groove, AC joint and subacromial space. Dr. Elfenbein continued Claimant's no work status. Claimant returned to Dr. Elfenbein on February 23, 2017. She reported worsening right shoulder pain that was making her miserable and preventing her from sleeping. She decided to proceed with surgery because she could no longer bear the pain. Dr. Elfenbein continued Claimant's no work status and scheduled her for surgery.

15. On March 2, 2017, Claimant underwent right shoulder surgery, inclusive of SAD, DCR and biceps tenodesis. It was performed by Dr. Elfenbein. The operative report indicates there was fraying and tearing of the superior labrum at the level of the biceps insertion, large subacromial spur and AC joint arthritis. Dr. Elfenbein opined the surgery Claimant underwent on March 2, 2017, was reasonable, necessary and related treatment because her work injury caused biceps fraying and tearing near the labrum (*i.e.* tendinitis), rotator cuff tendinitis and aggravated Claimant's preexisting AC joint arthritis.

16. Dr. Elfenbein credibly opined the biceps tenodesis was reasonable and necessary to treat the fraying and tearing of the superior labrum at the level of the biceps insertion because it was caused by Claimant's work injury. He opined the SAD and DCR procedures were reasonable, necessary and related to her work injury because the

injury aggravated her preexisting AC joint arthritis. He further credibly opined that all these procedures were done at the same time to avoid prolonged recovery and revision surgery, and thus were reasonable, necessary and related treatment.

17. Dr. John Schwappach, an orthopedic surgeon, testified Employer's failure to adhere to Claimant's work restrictions was a potential contributor to the lack of improvement she experienced through conservative treatment. Dr. Elfenbein opined this was a new injury. Dr. Schwappach testified this was a preexisting injury. The preponderance of the evidence establishes the fraying and tearing is a preexisting condition as Dr. Schwappach opined. The substantial evidence establishes Claimant's work injury aggravated, accelerated, or combined with the preexisting fraying and tearing to cause the need for surgery. Of note is the evidence that Claimant's right shoulder was asymptomatic prior to suffering her work injury.

18. The evidence established that Claimant underwent conservative treatment to no avail. She received selective injections that provided temporary relief, but no long tern benefits. This treatment is indicated by the Guidelines but failed to help Claimant recover from her industrial injury because the benefits of treatment were not supported by adherence to Claimant's work restrictions. Thus, her treating physician determined she was a surgical candidate and recommended surgery. Claimant credibly testified the surgery reduced her shoulder pain and improved her range of motion. Dr. Elfenbein, her treating orthopedist, opined the surgeries were reasonable, necessary, and related to her work injury because conservative measures and injections did not improve her condition.

19. Claimant was released to full duty on June 6, 2016. Claimant has not been placed at MMI.

CONCLUSIONS OF LAW

General legal principles

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

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

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

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

5. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. Section 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the judge. *Faulkner,* 12 P.3d at 846.

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

Reasonable, necessary and related medical treatment

7. Here, Claimant suffered a work injury to her right shoulder on July 26, 2016, that caused biceps tendinitis, rotator cuff tendinitis, and aggravated her preexisting AC joint arthritis. Claimant had no issues with her right shoulder prior to

suffering this injury. Her preexisting subacromial spur and AC joint arthritis were asymptomatic and did not cause her pain or mobility issues prior to July 26, 2016. As indicated in the operative report, prior to undergoing surgery, there is objective evidence of labral fraying and tearing where the biceps tendon connects to the labrum. This area of the shoulder is located in the bicipital groove; where Claimant's pain was most centralized throughout her course of treatment.

8. Dr. Elfenbein opined this was a new injury. Dr. Schwappach testified this was a preexisting injury. The preponderance of the evidence establishes the fraying and tearing is a preexisting condition as Dr. Schwappach opined. The substantial evidence establishes Claimant's work injury aggravated, accelerated, or combined with the preexisting fraying and tearing to cause the need for surgery. Of note is the evidence that Claimant's right shoulder was asymptomatic prior to suffering the July 26, 2016, work injury and her course of treatment was not supported by the Employer's continued assignment of duties beyond her work restrictions.

9. The *AMA Guides* acknowledge that "reasonable medical care may include deviations from the Guidelines in individual cases." See WCRP Rule 17-4(A). When requested treatment deviates from the *AMA Guides* the provider is directed to Rule 16-10 (B) to make the request to the insurance carrier, and then to Rule 16-11(C)(3) to have any unresolved dispute determined by an judge. Because a judge is designated as an arbiter for disputes pertinent to treatment requested outside of the *AMA Guides*, Section 8-43-201(3) provides that an judge is "not required" to use the *AMA Guides* as the sole basis for a determination that a medical treatment is reasonable or necessary. *Cordova v. Walmart Stores, Inc.*, W.C. No. 4-926- 520-05 (ICAO Mar. 14, 2017).

10. Throughout her course of treatment, Claimant regularly reported Employer was not respecting her work restrictions and requiring her to perform duties she was supposed to avoid. At hearing, Claimant testified Employer did not respect her work restrictions and regularly required her perform tasks she was supposed to refrain from doing, including making up to 45 rooms per work shift. Dr. Schwappach testified that work restrictions and treatment are important and failure to adhere to a worker's restrictions can have an impact on the recovery process.

11. The evidence established that Claimant underwent conservative treatment to no avail. She received selective injections that provided temporary relief, but no long tern benefits. This treatment is indicated by the Guidelines but failed to help Claimant recover from her industrial injury. Thus, her treating physicians determined she was a surgical candidate and recommended surgery. Claimant credibly testified the surgery reduced her shoulder pain and improved her range of motion. Dr. Elfenbein, her treating orthopedist, opined the surgeries were reasonable, necessary, and related to her work injury because conservative measures and injections did not improve her condition.

12. Thus, the preponderance of the evidence establishes the surgery Claimant underwent on March 2, 2017, is reasonable, necessary, and related treatment to cure and relieve the effects of her July 26, 2016, work injury. The substantial

evidence also supports that Claimant's post-surgery physician follow-ups and PT sessions are reasonable, necessary, and related to her July 26, 2016, work injury.

TTD benefits

13. An employee is eligible for TTD benefits if: (1) the injury causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. Sections 8–42–103(1)(a) and (b), 8–42–105(1), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 546 (Colo. 1995). To obtain TTD benefits Claimant must establish a causal connection between his work-related injury and a subsequent wage loss. Section 8-42- 103(1)(a), C.R.S.; *PDM Molding, supra.*

14. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). TTD benefits ordinarily continue until one of the occurrences listed in Section 8-42- 105(3), C.R.S.; *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997).

15. The parties stipulated to lost wages from the date of injury, July 26, 2017, until the day before surgery, March 1, 2017. The preponderance of the evidence establishes Claimant is entitled to TTD benefits from her date of surgery, March 2, 2017, until she was released to full duty on June 6, 2017.

16. The surgery Claimant underwent on March 2, 2017, caused Claimant to miss work and suffer lost wages. The surgery, as noted above, is reasonable, necessary, and related treatment. Thus, Claimant's work injury (1) caused disability; (2) that resulted in her leaving work; (3) and the disability is total and lasted more than three regular working day. Therefore, the substantial evidence establishes that Respondents are liable to Claimant for lost wage benefits until she was released to full duty on June 6, 2017.

ORDER

1. Respondents shall be liable for Claimant's March 2, 2017, surgical procedure as it was shown to be reasonable, necessary and related to her July 26, 2016, work injury.

2. Respondents shall also be liable for the physician follow-ups and physical therapy post-surgery as these medical benefits are reasonable, necessary and related to her July 26, 2016, work injury.

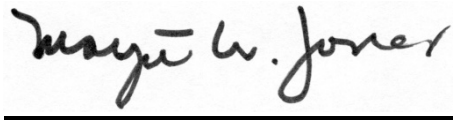
3. Respondents shall be liable to Claimant for TTD benefits from March 2, 2017, to June 6, 2017.

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

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

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

DATED: January 8, 2018



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

ISSUES

- Whether Claimant proved by a preponderance of the evidence that labral surgery on her hip is reasonable, necessary, and related to the industrial injury.

FINDINGS OF FACT

1. Claimant began working for Employer in approximately 2008. She worked as a paraprofessional in the classroom, assisting autistic children.

2. Claimant's medical history was significant, as she was diagnosed with fibromyalgia prior to 2016. Records from John McLaughlin, M.D. were admitted at hearing. Claimant was evaluated by Dr. McLaughlin on August 29, 2014. At that time, Claimant reported numbness in her hands and feet, ongoing pain in the muscles all over her body, as well as anxiety. Dr. McLaughlin's assessment was anxiety. In a follow-up appointment on September 30, 2004, Dr. McLaughlin diagnosed anxiety, as well as myalgia, raising the possibility of fibromyalgia.

3. On October 28, 2014, Claimant was evaluated by Michael Charney, M.D. at Denver Arthritis Clinic. Claimant described pain in all four extremities, including a burning sensation in both upper and lower extremities. Dr. Charney noted mild myofascial tenderness, but no inflamed joints at the time of the examination. His impression included dysesthesias/paresthesias in a non-anatomic distribution, which raised concern about either a primary neuropathic process or a less likely underlying systemic autoimmune disease. Dr. Charney recommended a follow-up with the neurologist and serology testing. The ALJ noted Dr. Charney did not document any hip pain at this evaluation.

4. There was no evidence in the record Claimant required right hip treatment prior to October 4, 2016, secondary to the fibromyalgia diagnosis.

5. Claimant sustained an admitted industrial injury on October 4, 2016 while working for Employer. Claimant was injured while helping an autistic student on a balance beam. She bent down to pick up a visual cue card and was pulled by the student to the right. Claimant testified she felt pain on the right side of her pelvis and right hip. Claimant said she had not experienced pain like that before.

6. On October 4, 2016, Claimant was evaluated by Matthew Lugliani, M.D. at Health One. On examination, Claimant ambulated with an antalgic gait and mild paralumbar tenderness was noted on examination. Dr. Lugliani's assessment was right hip and low back pain after attempting to assist a special needs student. Claimant was given a prescription for Norco, ibuprofen and Flexeril. In the M-164, Dr. Lugliani noted

her injuries were consistent with her history and/or work-related mechanism of injury. In the follow-up appointment on October 18, 2016, Claimant reported massage therapy caused increased pain.

7. Claimant's treatment was transferred to Paul Ogden, M.D. at Workwell. Dr. Ogden evaluated Claimant on October 20, 2016. Dr. Ogden noted limited range of motion ("ROM") on extension, flexion, as well as tenderness over the right SI area. Tenderness and limited ROM was found at the greater trochanter, as was a positive FABER test. Dr. Ogden's diagnosis was: strain of muscle, fascia and tendon of lower back-initial encounter; radiculopathy, lumbosacral region; strain of muscle, fascia and tendon of right hip-initial encounter; fibromyalgia. Dr. Ogden issued work restrictions, ordered massage therapy and physical therapy ("PT").

8. Dr. Ogden oversaw Claimant's treatment, evaluating her at regular intervals. Claimant received conserved treatment, including PT, chiropractic and massage treatments, as well as medications. Dr. Ogden's diagnoses remained the same over these evaluations. Claimant testified she had ongoing right hip pain.

9. In December 2, 2016, Claimant underwent an MRI of her lumbar spine and right hip. The latter films were read by Charles Wennogle, M.D., whose impression was chondrolabral separation of the superior labrum, without chondral attenuation. In the MRI of the lumbar spine (from T12-L1 to L5-S1), no disc disease was present, no facet arthropathy was seen and there was no stenosis. Dr. Wennogle characterized this as a normal lumbar spine MRI.

10. Claimant underwent a right hip aspiration, arthrogram and local anesthetic injection/block on January 24, 2017. This was performed by David Solsberg, M.D. Dr. Solsberg found the hip joint to be normal and there were no complications with the procedure. Claimant's pain level prior to the procedure was 7/10, as was her pain level following the procedure.

11. On February 14, 2017, Claimant was evaluated by Scott Resig, M.D. He found tenderness over the great trochanter, as well as limited ROM of the right hip. Dr. Resig's assessment was: bursitis of the hip; labral tear; neurogenic pain. Dr. Resig administered a hip injection. Claimant's response to the injection was not documented. Claimant returned to Dr. Resig on February 14, 2017, at which time he administered another hip injection. No immediate pain relief was noted. Dr. Resig thought the pain could be coming from the back and recommended consideration of a physiatrist. Dr. Resig did not believe a hip scope would help her, but noted Claimant might need to see a hip arthroscopy specialist.

12. Claimant was evaluated by Samuel Chan, M.D. (Physiatrist) on March 27, 2017. Claimant described chronic pain in the lumbar spine area, which radiated to the right anterior hip. Prolonged standing and sitting exacerbated her pain complaints. She also experienced numbness and tingling in the posterior thigh to the knee, as well as the right foot. On examination, tenderness to palpation was noted over the lumbosacral paraspinal musculature on the right side, with no tenderness over bilateral sacral

sulcus. Claimant's bilateral hip ROM was full. Dr. Chan's diagnosis was: right hip-MRI showed chondrolabral separation of the superior labrum; rule out lumbosacral radiculopathy on the right side. Dr. Chan noted despite negative diagnostic injections to the trochanteric bursa or the right hip intra-articularly, Claimant had positive MRI findings. Dr. Chan recommended consideration of a lumbar spine MRI and EMG testing.

13. Claimant underwent an MRI of the lumbar spine on April 1, 2017. The films were read by Matthew Chanin, M.D., who noted mild degenerative disc disease without impingement; transitional anatomy at L5-S1; no asymmetric right-sided findings to explain patient's rightward pain and radiculopathy; no STIR signal abnormality to suggest an acute bone or soft tissue injury.

14. On April 11, 2017, Claimant was evaluated by Nathan Faulkner, M.D. He noted her pain was localized over the groin, but radiated into the lateral hip and buttock. She reported pain was worse with twisting movements, squatting and walking. Dr. Faulkner's diagnoses (confirmed by the radiographs) included tear acetabular labrum; hip dysplasia; as well as a cam deformity consistent with femoral acetabular impingement. The MRI confirmed the labral tear. Dr. Faulkner opined that Claimant's work related injury was more likely than not the cause of her labral tear, as she had no antecedent hip symptoms prior to the injury even though there was some radiographic evidence of preexisting hip dysplasia and bony abnormality. Dr. Faulkner stated Claimant would likely require surgery to fix the labral tear. Dr. Faulkner recommended another opinion by Brian White, M.D.

15. The electrodiagnostic study of the right lower extremity, which was performed on April 11, 2017 by Yusuke Wakeshima, M.D., was normal. Dr. Wakeshima opined there was no electrophysiologic evidence of lumbar radiculopathy on the right and no electrophysiologic evidence of sural, superficial peroneal, peroneal or tibial neuropathy on the right.

16. Claimant returned to Dr. Ogden on April 17, 2017. Claimant reported continued right hip pain and Dr. Ogden documented a limp. Claimant was unable to reach FABER position with the right hip. Dr. Ogden's diagnosis was: strain of muscle, fascia and tendon of lower back-initial encounter; radiculopathy, lumbosacral region; other sprain of right hip-initial encounter; fibromyalgia; unilateral osteoarthritis resulting from hip dysplasia, right hip.

17. Claimant was evaluated by Brian White, M.D. on May 10, 2017. She reported none of the treatments received thus far provided long-term relief. However, Claimant indicated the injection into the joint gave her 50 percent relief of her symptoms for a few hours. On examination, significant discomfort was noted with the anterior impingement maneuver on the right side. Dr. White stated the MRI confirmed a labral tear with well-preserved joint space overall. Dr. White's assessment was right hip dysplasia (significant) with labral tear. He felt Claimant was a reasonable candidate for hip arthroscopy, with femoral osteoplasty with an acetabular rim trimming and likely

labral reconstruction, and Ganz osteotomy. Dr. White noted the procedures would be staged by a week or two.

18. On June 8, 2017, Dr. White requested authorization for a proposed right hip femoroplasty, acetabuloplasty, unlisted procedure arthroscopy, osteotomy periacetabular with internal fixation.

19. Respondent denied authorization for the proposed surgery.

20. On August 14, 2017, Gary Zuehlsdorff, M.D. performed an Independent Medical Examination ("IME") at the request of Claimant. Claimant reported right groin pain, worsening at the end of the day. Tenderness was found on internal and external rotation. Dr. Zuehlsdorff's assessment was: pulling twisting injury with acute subjective complaints of right hip/groin /low back complaints; right hip x-rays/MRIs consistent with superior labral pathology, wither significant acute on chronic or totally acute in origin; pre-existing right hip dysplasia-moderate-with CAM type femoral acetabular impingement syndrome; mild secondary lumbar pain complex with essentially negative MRIs X 2; secondary trochanteric bursitis post injection-basically resolved. Dr. Zuehlsdorff opined that, given the congenital abnormalities, simply repairing the labrum was not the standard of care within the community and recommend the two-stage procedure recommended by Dr. White.

21. A letter from Dr. White, dated August 23, 2017 was admitted into evidence.[1] In this correspondence, Dr. White provided additional information concerning Claimant's condition and the proposed surgery. He noted Claimant's need for surgery was because of the injury on October 4, 2016. While Claimant may have had some predisposing labral pathology, she had no pain before her injury and this became a symptomatic hip or a symptomatic labral tear. Dr. White also noted that the congenital condition played a role in the hip. Claimant had a dyplastic cup which caused the labrum to be overloaded. Dr. White opined there was probably some dysfunction to the labrum, but it was subclinical prior to the injury. Dr. White concluded that the October 4, 2016 incident caused the baseline dysfunction to become symptomatic. The ALJ credited this analysis by Dr. White.

22. Dr. White also provided additional information regarding correction of Claimant's congenital condition. He said surgery was required to correct the labral tear with a labral reconstruction, as well as treating the underlying biomechanics. The procedure included re-shaping the ball and redirecting the cup to a more appropriate position. This would allow for the labral reconstruction to incorporate or heal. Dr. White opined that if the dysplasia and underline congenital issues were not addressed, she would not have a good result from the surgery.

23. An independent medical examination was performed by Carlos Cebrian, M.D. on behalf of Respondent on September 5, 2017. Dr. Cebrian noted Claimant denied prior history of right hip problems at the beginning the report. When discussing

[1] Exhibit JJ.

fibromyalgia, Dr. Cebrian documented Claimant reported bilateral hip pain, more on the right than left. On examination, diffuse tenderness to palpation was noted over the paralumbar muscles. The work-related diagnoses were: lumbar strain and right hip contusion/greater trochanteric bursitis. The non work-related diagnoses were: fibromyalgia; chronic pain disorder; anxiety; GERD; bilateral hip pain, greater right than left; right hip dysplasia, with femoroacetabular impingement ("FAI") and labral tear.

24. Dr. Cebrian opined that Claimant's right congenital hip dysplasia, with labral tearing and femoroacetabular impingement, her current symptoms and her need for surgery were independent, unrelated and incidental to the work injury that occurred on October 4, 2016. Dr. Cebrian's IME report contained a detailed description of hip anatomy, as well as hip dysplasia and FAI. He postulated that Claimant's pre-existing hip complaints were likely due to hip dysplasia, FAI and labral pathology.

25. A General Admission of Liability ("GAL") was filed on behalf of Respondent on September 26, 2017. The GAL admitted for temporary disability and medical benefits.

26. Claimant testified she wishes to undergo the hip surgery recommended by Dr. White.

27. Dr. Cebrian testified as an expert in the field of Occupational Medicine. He is Level II accredited pursuant to the WCRP. Dr. Cebrian opined that Claimant's congenital dysplasia, femoral acetabular impingement and labral pathology were not caused by, nor were they aggravated by the work incident.[2] Dr. Cebrian testified the Colorado Division of Workers' Compensation Lower Extremity Injury Medical Treatment Guidelines ("Medical Treatment Guidelines" or "MTG") applied to the diagnosis and treatment of labral pathology. To confirm the diagnosis of a labral tear, the patient should demonstrate changes on a pain scale accompanied by recorded functional improvement post-injection. There was no such confirmation in this case. He reasoned, after reviewing all the records, the pain generator had not been clearly identified and it was unknown whether she was having pain from the labrum or her hip joint itself.

28. Dr. Cebrian testified confirmation of pathology on an MRI and Claimant's subjective complaint were not bases to perform surgery. As referenced in the MTG, surgery sometime will be performed for conditions that don't require it. Dr. Cebrian reviewed the recording of the IME and said Claimant told him she had bilateral hip pain even before he had questioned her.[3] Dr. Cebrian acknowledged the medical records did not show Claimant complained of bilateral hip pain. Dr. Cebrian believed the congenital conditions were the reason for the complaints of hip pain, but it was attributed to fibromyalgia. Dr. Cebrian opined that given her dysplastic hip and the FAI, the separation of Claimant's labrum was most probably pre-existing, as opposed to

[2] Cebrian Deposition ("Cebrian depo."), p. 8:8-14.

[3] Cebrian depo, p. 16:7-10, 16-21.

anything caused by the minor injury mechanism. Dr. Cebrian did not believe the injury was a high energy trauma.[4] Dr. Cebrian stated the proposed surgery was not reasonable or necessary because it was not confirmed that the labral pathology was the cause of Claimant's pain. He agreed that correction of the congenital hip conditions, along with the labral tear was required.

29. Dr. Zuehlsdorff testified at hearing as an expert in the field of Internal Medicine the specialty in which he is board–certified. He is Level II accredited pursuant to the WCRP. Dr. Zuehlsdorff testified Claimant was in a vulnerable position anatomically when the injury occurred and high to moderate forces were operating on her hip. Dr. Zuehlsdorff noted Claimant had previously been diagnosed with fibromyalgia, which was diffuse pain, but had not treated for hip symptoms. The MRI showed no arthritic changes, but revealed a chondrolabral separation of the superior labrum. Claimant also had hip dysplasia and femoral acetabular impingement, which were pre-existing. Dr. Zuehlsdorff believed the injury caused further damage to the labrum, along with symptoms in the groin.

30. Dr. Zuehlsdorff opined the proposed surgery was reasonable and necessary. He disagreed with Dr. Cebrian's conclusion that Claimant was not a surgical candidate because the pain generator had not been identified. Dr. Chan had ruled out the low back as the source of Claimant's pain complaints. He also noted the MTG were not absolute on the question of a patient's response to injections. Dr. Zuehlsdorff testified that in general patients with arthritis would generally have a more positive response to injection. He believed Claimant's pain was coming from the hip joint. He distinguished between Claimant's fibromyalgia pain and the pain in the hip after her injury. The ALJ was persuaded by Dr. Zuehlsdorff's testimony.

31. The ALJ finds that the medical analyses and opinions of Claimant's expert, Dr. Zuehlsdorff are credible and more persuasive than the opinions of Respondent's expert, Dr. Cebrian.

32. The ALJ found Claimant proved by a preponderance of the evidence that the surgery recommended by Dr. White is reasonable, necessary, and related to the compensable injury of October 4, 2016.

33. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

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

[4] Cebrian depo, p. 19:22-20:4.

litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1),C.R.S.

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

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

Medical Benefits-Proposed Right Hip Surgery

Respondent is liable for medical treatment reasonably necessary to cure or relieve the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability, which may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. The ALJ considered the MTG when deciding whether Claimant's need for hip surgery was proximately caused by the industrial injury.

When determining the issue of whether proposed medical treatment is reasonable and necessary, the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he or she determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009). MTG Rule 17, Exhibit 5, Section E(3)(h)[pp.127-128] has application to the case at bench:

h. Impingement/Labral Tears:

i. Description/Definition: Two types of impingement are described. Pincertype impingement results from over-coverage of the acetabulum. Camtype impingement, results from the head of the femur being misshapen at the junction of the head and neck of the femur. Labral tears can also be isolated; however, they are frequently accompanied by bony abnormalities. Patients usually complain of catching or painful clicking which should be distinguished from a snapping iliopsoas tibial tendon. A pinch while sitting may be reported and hip or groin pain. Patients frequently complain of difficulty squatting or using stairs.

ii. Occupational Relationship: Impingement abnormalities are usually congenital; however, they may be aggravated by repetitive rotational force or trauma. Labral tears may accompany impingement or result from high energy trauma.

iii. Specific Physical Exam Findings: Positive labral tests. May have some range of motion deficits with impingement. No physical exam tests can reliably identify impingement or labral pathology in isolation.

…

MRI may reveal abnormality; however, false positives and false negatives are also possible. MRI arthrogram with gadolinium should be performed to diagnose labral tears, not a pelvic MRI. Intra-articular injection should help rule out extra-articular pain generators.

To confirm the diagnosis of labral tear, the patient should demonstrate changes on a pain scale accompanied by recorded functional improvement post-injection. This is important, as labral tears do not always cause pain and over-diagnosis is possible using imaging alone.

…

ix. Surgical Indications/Considerations:

A) Surgery is indicated when 1) functional limitations persist after 8 weeks of active patient participation in treatment, 2) there are clinical signs and symptoms suggestive of the diagnosis and 3) other diagnoses, such as trochanteric bursitis or iliotibial band snapping have been ruled out. Iliotibial band pathology usually responds to physiotherapy. Bursitis is treated with lifestyle changes and steroid injections. Surgery is rarely required for these diagnoses.

In the case at bench, there was a conflict in the evidence as to whether the proposed surgery was reasonable and necessary, as well as related to the industrial injury. The ALJ concluded Claimant satisfied her burden of proof with regard to the

need for surgery on the right hip. As a starting point, the medical records admitted at hearing revealed Claimant had congenital hip dysplasia and femoral acetabular impingement, as well as evidence of labral tear. The physicians did not disagree the two former conditions were congenital and pre-existing. As found, there was no record of Claimant having hip symptoms before October 2016. (Finding of Fact 4). There was no record of any treatment for such hip symptoms before the industrial injury.

The ALJ concluded the proposed surgery was reasonable and necessary, as well as related to the industrial injury. First, the findings of Claimant's ATPs, including Dr. White supported the need for surgery. As found, Dr. White opined that Claimant's underlying hip dysplasia condition, although pre-existing, was sub-clinical before the injury. Accordingly, based upon the opinions of these physicians, Claimant's need for surgery was the result of the work injury. As part of this analysis, the ALJ concluded the proposed surgical procedure recommended by Dr. White was reasonable and necessary. In addition, the proposal that the procedure be performed in two parts, including the repair of the hip dysplasia was also found to be reasonable and necessary. (Finding of Fact 17).

In making this determination, the ALJ also considered Respondent's contention that the proposed surgery did not meet the Medical Treatment Guidelines because Claimant did not have a diagnostic response/pain relief when she received hip injections. The MTG go on to document there is a potential problem of over diagnosis of labral tears. The ALJ found that a labral tear was diagnosed by Claimant's ATPs. (Findings of Fact 11 [Dr. Resig], 12 [Dr. Chan] and 17 [Dr. White]). In this regard, the ALJ credited the expert opinions of Dr. White, as well as the testimony of Dr. Zuehlsdorff that the labral tear was either caused or worsened by the industrial injury. Therefore, under these facts, the Medical Treatment Guidelines support the request for surgery in this case. (MTG, Rule 17, Exhibit 5, Section E(3)(h) subsection ix. Surgical Indications/Considerations).

The ALJ also considered Respondent's argument that Claimant's underlying conditions, including the hip dysplasia and cam deformity were congenital, as well as pre-existing. This was supported by the testimony of Dr. Cebrian, who also opined that Claimant's previous pain complaint attributed to fibromyalgia were related to her underlying hip conditions.

As found *supra*, the weight of the evidence established the injury caused Claimant's right hip to require treatment. As determined in Findings of Fact 21-22, the ALJ determined that a necessary component of treating the symptomatic labral tear which resulted from the industrial injury was to correct these congenital conditions, crediting the findings of Dr. White. This is analogous to the situation in *Public Service Company v. Industrial Claim Appeals Office*, 979 P.2d 584, 585 (Col. App. 1999) in which the Court of Appeals affirmed the ICAO decision requiring Respondent-Employer to pay medical benefits for treatment of a bipolar disorder to stabilize that condition before surgery was performed on Claimant's injured neck. As the Court noted:

"[W]e conclude that ancillary treatment is a pertinent rationale for reasonably necessary care of a non-industrial disorder when such must be given 'in order to achieve the optimum treatment of the compensable injury' [5 Larson's Workers' Compensation Law]". *Id.*

In the case at bench, Dr. White concluded a repair of not only the labral tear, but also the hip joint and the socket was required. Dr. Zuelsdorff agreed with these opinions and the ALJ was persuaded that the proposed surgery which entails correction of the congenital conditions is required to treat the industrial injury.

ORDER

It is therefore ordered:

1. Respondents shall pay for the right hip surgery recommended by Dr. White as it is reasonable, necessary, and related to Claimant's October 4, 2016 industrial injury.

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

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

DATED: January 8, 2018

Digital signature

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

Claimant has two pending claims against Employer. W.C. No. 5-019-321 is an upper extremity cumulative trauma claim with an April 20, 2016 date of injury. W.C. No. 5-019-320 involves accidental injuries occurring on May 9, 2016. The claims were consolidated for purposes of hearing and this order will address both claims.

ISSUES

- Did Claimant suffer a compensable occupational disease injury involving his upper extremities (W.C. No. 5-019-321)?

- Did Claimant suffer a compensable injury arising out of and in the course of his employment as a result of a motorcycle accident on May 9, 2016 (W.C. No. 5-019-320)?

FINDINGS OF FACT

1. At the time of his alleged injuries, Claimant worked for Employer as an in-school suspension officer and attendance liaison. He started that position in January 2016. Before that, he worked for Employer as a truancy officer. He worked on an annual contract basis. Claimant's employment ended at the end of the school year in May 2016 and his contract was not renewed.

Findings specific to April 20, 2016 claim (W.C. No. 5-019-321)

2. Claimant's primary duties involved monitoring students serving in-school suspensions. He used a laptop computer with an external mouse intermittently to complete reports and make notes regarding individual students. The length of the reports varied "from one paragraph to pages." Claimant testified he used the computer 4-6 hours per day "mostly typing."

3. Claimant began experiencing pain and numbness in his upper extremities in approximately April 2016.

4. He reported the symptoms to Employer as a potential cumulative trauma injury caused by "writing and typing." Rhonda Hribar, Employer's Risk Management Coordinator, completed an Employer's First Report on April 27, 2016, using April 20 as the date of injury. The injury description states "No accident. His arms have been hurting so he saw his family and VA doctor. Both stated he has tennis elbow and has to wear braces. Doctors told him it [was] from writing and typing motions from his job."

5. Employer referred Claimant to Dr. Douglas McFarland in Trinidad for authorized treatment. At his initial visit on May 3, 2016, Claimant described 1-2 months of bilateral elbow pain (worse on the right) and numbness in the fourth and fifth fingers of both hands. He told Dr. McFarland he spent approximately 4-6 hours per day typing, but

"is not using a mouse much." Physical examination showed lateral epicondyle tenderness bilaterally and positive Tinel's at both elbows. Dr. McFarland diagnosed bilateral lateral epicondylitis and cubital tunnel syndrome. Based on the initial information, he opined that the diagnoses were work-related. He released Claimant to work with instructions to avoid repetitive lifting and minimize repetitive motion with his upper extremities.

6. Respondents obtained a Job Demands Analysis of Claimant's position in January 2017. Since Claimant was no longer working for Employer, the JDA evaluated a different employee performing the job. But Employer's witnesses persuasively testified the JDA accurately depicted Claimant's job as he performed it. The JDA showed substantially less keyboard and mouse use then estimated by Claimant, with typing less than two hours and mousing less than one hour per day. Elbow flexion > 90 degrees occurred at most 2.2 hours per day. The evaluator determined that the risk factors identified in the Medical Treatment Guidelines (MTGs), including force and repetition, awkward postures, extensive elbow flexion, supination/pronation, and four hours of mouse use, were "not present."

7. Claimant attended an Independent Medical Examination (IME) with Dr. Jonathan Sollender at Respondents' request on January 24, 2017. Dr. Sollender agreed with the diagnoses of bilateral epicondylitis and cubital tunnel syndrome, but opined these conditions were not causally related to Claimant's employment. Dr. Sollender noted a significant discrepancy between Claimant's estimation of his work activities and the objective findings of the JDA. He concluded Claimant's job entailed "no exposure to any of the required occupational risk factors necessary to establish any causal link between his former work with [Employer] and his current symptoms." At hearing, Dr. Sollender emphasized that Claimant's job had no primary or secondary risk factors for development of cumulative trauma disorders as outlined in the MTGs. He opined Claimant's work-related exposures were "not even close" to levels considered causative of lateral epicondylitis or cubital tunnel disorder. Dr. Sollender noted the CTD MTGs were updated in 2017 and testified "he comes nowhere close to any of those thresholds that are contained in the 2010 version or the 2017 version of Rule 17, Exhibit 5."

8. On March 7, 2017, Dr. McFarland reviewed the JDA and Dr. Sollender's report and opined:

> I agree with Dr. Sollender's opinion that [Claimant's] upper extremity problems are probably not related to the reported job at which he was employed on 4/20/2016. . . . A detailed analysis of his job duties also indicated that he did not have the occupational risk factors necessary to establish a causal link between his work at [Employer] and his current upper extremity symptoms.

9. Dr. Sollender's opinions regarding causation of Claimant's upper extremity complaints are credible and persuasive.

10. Claimant failed to prove by a preponderance of the evidence he suffered a compensable occupational disease involving his upper extremities as a result of his work.

Findings specific to May 9, 2016 claim (W.C. No. 5-019-320)

11. On May 9, 2016, Claimant was involved in a motorcycle accident which forms the basis for W.C. No. 5-019-320. At approximately 4:30 PM on that date, he left the John Mall High School where he works to go to the school district administration building. His primary purpose was to pick up some COBRA documents in anticipation of the upcoming summer layoff. He also planned to retrieve any mail for the school that might be waiting at the administration building. Claimant testified he normally worked 7:30 AM to 5:30 PM four days per week, and he planned to return to the school after visiting the administration building.

12. The most direct route from the school to the administration building is to go south on Main Street, turn left on 5th Street and go one block east to the administration building, located on the southeast corner of 5th and Russell Street.

13. Main Street crosses a pair of railroad tracks at the intersection of 4th Street (one block north of 5th Street). As Claimant rode over the railroad tracks, he heard a noise "like something had banged up against the bottom of my bike or something had fallen off the bike." Claimant could not pull over immediately due to heavy traffic, so "I figured I'll just go around the block and park on the side and check to see what it was." Claimant turned left onto 5th Street, headed east one block and turned left onto Russell Street, passing by the administration building. As he was headed north on Russell Street (away from the administration building), a vehicle pulled out in front of him from an alleyway. Claimant "laid down" the motorcycle and slid approximately 40 feet. He suffered significant injuries as a result of the accident, including a head injury.

14. Although Claimant's trip to the administration building had its origin in his job duties and was sufficiently related to those duties to be reasonably considered an incident of his employment, he was engaged in a personal deviation at the time of his accident. As a result, his injuries did not arise out of and in the course of his employment.

CONCLUSIONS OF LAW

A. General compensability standards

To receive compensation or medical benefits, a claimant must prove he suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally, for either claimant or respondents. Section 8-43-201.

B. Compensability of the April 20, 2016 claim (W.C. No. 5-019-321)

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equally exposing stimulus requirement effectuates the "peculiar risk" test and requires that the hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). In other words, the claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

The mere fact that an employee experiences symptoms at work duties does not compel an inference that the condition was caused by the work. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the claimant must prove there is a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Director has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP Rule 17, Exhibit 5 addresses cumulative trauma conditions including, but not limited to, lateral epicondylitis and cubital tunnel syndrome. The ALJ may consider the MTGs as an evidentiary tool, but the ALJ is not bound by the MTGs when determining whether requested medical treatment is reasonable, necessary, or injury-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

As found, Claimant failed to prove by a preponderance of the evidence he suffered a compensable work-related occupational disease. After reviewing all the evidence, the ALJ is not persuaded that any of Claimant's work duties, either singly or in combination, caused his condition. The JDA report, Dr. Sollender's opinions, and Dr. McFarland's March 7, 2017 report persuasively show Claimant was not consistently exposed to upper

extremity risk factors identified in the MTGs.[1] As Dr. Sollender noted, the levels of exposure were "not even close" to the causal thresholds described in the MTGs. Dr. Sollender persuasively opined that Claimant's lateral epicondylitis and cubital tunnel syndrome were not likely caused by his work, and Claimant presented no persuasive evidence to refute his expert opinion. Although Dr. McFarland initially opined the condition was work-related, he changed his opinion after reviewing the JDA and Dr. Sollender's report. While Claimant may have first noticed symptoms at work, that does not convince the ALJ to depart from the evidence-based principles in the MTG causation matrix. Claimant failed to prove by a preponderance of the evidence he suffered a compensable occupational disease.

C. Compensability of the May 9, 2016 claim (W.C. No. 5-019-320)

Claimant clearly suffered significant injuries in the motorcycle accident on May 9, 2016. But the critical question is whether those injuries occurred while performing service arising out of and in the course of his employment. Section 8-41-301(1)(b). The terms "arising out of" and "in the course of" are not synonymous. The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower, and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). "Many job functions involve discretionary or optional activities on the part of the employee, devoid of any duty component and unrelated to any specific benefit to the employer, but nonetheless sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment." *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The ultimate question is whether the activity is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Price, supra* at 210. Whether an injury arises out of and in the course of employment are questions of fact for the ALJ. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998).

Respondents argue that, even if Claimant was travelling for a work-related purpose, his injuries are not compensable because they occurred during a "personal deviation." The ALJ agrees with Respondents' argument. If an employee's work takes him away from the employer's premises, he is generally considered under continuous

[1] The most current version of the CTD MTGs became effective March 2, 2017, after the Claimant's alleged date of injury. The ALJ notes many of the durational thresholds have been lowered in the 2017 version of the MTGs, particularly with respect to secondary risk factors. The ALJ has considered both versions of the MTGs, and concludes Claimant does not satisfy the criteria of either.

coverage except when he makes a distinct departure on a personal errand. *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). When a personal deviation is asserted, the question is "whether the claimant's conduct constituted such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing the activity for his sole benefit." *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). A deviation must be "substantial" to remove the claimant from the course and scope of employment. *Kelly v. Industrial Claim Appeals Office*, 214 P.3d 516 (Colo. App. 2009).

As found, Claimant's accident occurred during a substantial personal deviation. At the time of the accident, Claimant was not performing any action in furtherance of, or incidental to, his employment. Rather, he was engaged in a purely personal deviation from the otherwise work-related travel to the administration building. The deviation becomes strikingly apparent upon viewing the map of Claimant's route attached to the police report. The work-related aspect of his travel was complete when he reached the administration building on the corner of 5th and Russell. Although Claimant had arrived at his destination, he chose to turn left and head away from the administration building for his sole benefit. These factors persuade the ALJ that Claimant was engaged in a personal deviation at the time of his accident. Accordingly, his injuries did not arise out of and occur within the course of his employment.

ORDER

It is therefore ordered that:

1. Claimant's claims for workers' compensation benefits in W.C. No. 5-019-320 and W.C. No. 5-019-321 are denied and dismissed.

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

DATED: January 10, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Does the ALJ even have jurisdiction to hear this DIME case at all, based upon *Harman-Bertstedt v. Loofbourrow*?

II. Assuming jurisdiction is so found, has Respondent, by clear and convincing evidence, overcome the DIME of Dr. Sharma on the issue of MMI and/or Impairment?

III. Assuming the Respondent has overcome the DIME, is Claimant entitled to any impairment rating?

JURISDICTION

As a condition precedent to this ALJ hearing Respondent's DIME challenge at all, Respondent's allege that under *Harman-Berstedt v. Loofbourrow, 320 P. 2d 327 (Colo. 2014),* the DIME process that was followed herein is in effect a nullity, thus depriving the ALJ of the ability to uphold or otherwise rule on the validity of this DIME examination. In this case, the ALJ has read the positions of the parties as thoroughly outlined in Respondent's Assumed Motion to Strike DIME, which was DENIED by Prehearing Administrative Law Judge Steninger on July 12, 2017. Such Motion and Order will be made part of the record herein.

Respondent's position herein is identical to that outlined in that Motion. The ALJ adopts in its entirely this ruling from PALJ Steninger. While that Order does not elaborate on the rationale for the denial, this ALJ finds compelling the argument of Claimant, to wit: This case is distinguishable from *Loofbourrow,* in that a Final Admission of Liability was filed by Respondents, thus properly triggering the DIME process. To conclude otherwise would effectively preclude a Claimant, such as here, from availing himself of the DIME process in order to challenge a finding of "No Impairment" by an ATP simply because no work is missed. The ALJ is not willing to deprive Claimant of such opportunity. Due process demands it.

FINDINGS OF FACT

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

1. Claimant worked as a glazier for Respondent since 2011, and prior to that since 1998. His job duties include installing and maintaining windows for Colorado Springs School District 11.

2. Claimant sustained work related injuries on September 23, 2016, while standing on a ladder installing a large piece of glass, when a gust of wind blew the

glass, causing Claimant to twist his back to his left, in order to hold onto the glass, before ultimately dropping it.

3. Claimant promptly reported this injury to his employer. Respondent provided medical treatment. Claimant did not miss any time from work, but was placed on work restrictions by his ATP.

4. On September 26, 2016, Claimant presented to ATP Dr. Autumn Dean M.D., with low back pain. Dr. Dean diagnosed a lumbar strain/spasm and referred Claimant to physical therapy. She stated Claimant could continue working full duty. (Ex. F, p. 20). Claimant made regular follow-ups with Dr. Dean until she placed him at MMI, on 3-16-17.

5. On December 13, 2016, Claimant underwent an MRI requested by Dr. Dean, which revealed the following impressions:

> 1. 6 nonrib-bearing lumbar-type vertebral bodies, with segmental nomenclature as described: Please correlate carefully with radiographs prior to any planned intervention.
> 2. Moderate lumbar scoliosis. Lumbar spondylosis, with borderline central spinal canal stenosis at L3-L4. The *left* lateral canal is asymmetrically severely narrowed at this level secondary to a leftward lateralizing disc protrusion, which dorsally displaces the descending nerve and could account for radicular symptoms if present.
> 3. Multilevel foraminal stenoses bilaterally as described, most pronounced on the *left* at L5-L6.
> 4. T2-hypertense lesions within the visualized posterior right hepatic lobe, incompletely evaluated…..(Ex. A, p. 3)(emphasis added).

6. Claimant treated with Dr. Sparr, who diagnosed lumbar facet joint arthropathy and myalgia. On February 9, 2017, Dr. Sparr wrote a letter to Dr. Dean, stating Claimant's left-sided back pain is under control. Claimant responded extremely well to trigger point injections and aggressive manual physical therapy providing Claimant with a substantial decrease in myofascial tightness and his facet loading is now negative bilaterally. Dr. Sparr discharged Claimant and anticipated Claimant was near MMI. (Ex. B, pp. 2-3).

7. Claimant also treated at Action Potential Physical Therapy. On February 11, 2017, Andrew Fox, PT supplied a Discharge Summary for Claimant. (Ex. C, pp. 4-5). He noted that four listed goal achievements were made on Feb. 9, 2017, to include:

> Palpation: Lumbosacral Region: Musculature, Posterior, Hypertonic
> Palpable Improvements: *Spasm Decreasing to: Complete Elimination.*

8. Claimant filed a Worker's Claim for Compensation on March 2, 2017, claiming to have a permanent impairment.

9. On March 7, 2017, the Division of Workers Compensation ('Division') sent a letter to Claimant's attorney acknowledging receipt of the Workers' Claim for Compensation and advising him the insurance carrier had 20 days to decide whether benefits would be paid. By copy of the letter, the Division notified Respondent that a position must be stated on the claim within 20 days of the date of the letter.

10. In response to the Division's letter, Respondent filed a General Admission of Liability ('GAL') for medical benefits only, on March 10, 2017. Based on the facts of this case, and as required by W.C.R.P. 5-5(B), the GAL stated there had been no lost time.

11. On March 16, 2017, the ATP, Dr. Dean placed Claimant at MMI with no permanent impairment, and no further medical maintenance. Dr. Dean stated Claimant has normal range of motion in his low back, normal strength, no tenderness and no spasm. Dr. Dean opined Claimant's disc protrusion is not causing his symptoms, as this disc bulge is not likely from his work injury. Further, the lumbar scoliosis and stenosis are chronic/congenital issues and not work related. (Ex. D, p. 13.)

12. During Claimant's regular visits with Dr. Dean, she noted that his Lumbar back showed *spasm* on the following dates: 9-26-16, (Ex. 11, p. 191), 10-24-16 (Ex. 11, p. 154), 11-14-16 (Ex. 11, p. 139), 12-5-16 (Ex. 11, p. 133), 12-15-16 (Ex. 11, p. 114), 1-12-17 (Ex. 11, p. 100). During Claimant's continued regular visits with Dr. Dean, she noted the *absence of spasms* of his Lumbar back on the following dates: 2-2-17 (Ex. 11, p. 76) 2-23-17 (Ex. 11, p. 67), and 3-16-17 (Ex. 11, p. 50).

13. Dr. Dean's office further noted Claimant's vital signs on the 2-23-17 visit as follows: BP: 140/82, Pulse: 87, Temp: 36.6, Resp: 18, Wt: 61.1 kg, SpO2: 97%, BMI: 18.26 kg/m2 (Ex. 11, p.58). His vital signs on the 3-16-1 visit were listed as follows: BP: 132/84, Pulse: 78, Temp: 36.8, Resp: 14, Wt: 62.6 kg, SpO2: 97%, BMI: 18:72 kg/m2 (Ex. 11, p. 47). Dr. Dean further noted *tenderness* of his right side paraspinals on the 2-23-16 visit (Ex. 11, p. 59), but *no tenderness* is noted on the 3-16-17 visit (Ex. 11, p. 47). On 2-23-17, Claimant circles his pain chart at "1 to 3" (Ex. 11, p. 72). On 3-16-17, Claimant circles his pain chart on both "0" *and* "1 to 3" (Ex. 11, p. 56). On both dates, Dr. Dean notes that surgery would not be appropriate, because the disc protrusion issue is not causing his symptoms, and is not likely work related. *Id.*

14. Dr. Dean also makes the following notation in Claimant's file from the 2-23-17 visit, after recommending continued physical therapy:

> ….He [Claimant] also mentioned that he has retained legal counsel and his lawyer and his friends (bosses wife) have been telling him to try and prolong his restrictions so they can "get things together", and even encouraged him to see a spine surgeon..(Ex. 11, p. 57).

15. On March 17, 2017, as required by W.C.R.P. 5-5(E)(1)(a), Respondent filed a Final Admission of Liability ('FAL') for medical benefits paid. The FAL specifically noted that no TTD, TPD, or PPD was admitted or paid, nor continuing medical treatment.

16. On March 21, 2017, Claimant timely filed an Objection to Final Admission of Liability and a Notice and Proposal to Select an Independent Medical Examiner. Respondent filed a Notice of Failed IME Negotiation on March 22, 2017.

17. On April 6, 2017, Claimant timely filed an Application for a Division Independent Medical Examination ('DIME'). Anjmun Sharma, M.D., was eventually confirmed as the DIME physician.

18. Dr. Sharma performed the DIME on June 7, 2017. His report dated June 11, 2017, stated he agreed with the ATP's date of MMI. However, in his DIME report, Dr. Sharma states that "I concurred with the **MMI date of *12/05/2016***", and attributes this finding of MMI on this date to Dr. Dean. (Ex. F, pp. 12-13). Dr. Dean said no such thing on December 5, 2016. Instead, Dr. Dean continued to treat Claimant until she found him to be at MMI on 3-16-17.

19. Dr. Sharma also determined Claimant had a 10% whole person impairment as a result of his injury. Dr. Sharma calculated a 3% range of motion impairment and simply stated Claimant met the criteria for Table 53 diagnosis referencing section **II-C,** assigning a 7% impairment. (Exhibit F, p. 13.) Dr. Sharma testified at hearing as an expert in family medicine, and stated his report was based on the 'small amount' of medical records he received.

20. Respondent timely filed an Application for Hearing and a Motion to Strike the DIME.

21. The Motion was denied by a Prehearing ALJ, and parties went to hearing on October 25, 2017.

22. Dr. Ridings was offered as an expert in physical medicine and rehabilitation by Respondent and accepted as such by Claimant. Dr. Ridings testified he conducted an IME for Claimant on August 9, 2017, finding a zero percent impairment rating. Dr. Ridings testified Dr. Sharma erred in determining a 10% impairment rating because Dr. Sharma inappropriately applied Table 53. Dr. Ridings testified under the AMA Guides to the Evaluation of Permanent Impairment, Section 3.3, at 78-81 and 96-101 (3d. ed. 1991), Table 53 II-B is only applicable when a claimant presents abnormal muscle tone in the lumbosacral spine equating to "rigidity". Further, Table 53, II-C, requires "moderate to severe degenerative changes on structural tests; includes un-operated herniated nucleus pulposus with or without radiculopathy." (Ex. G.) Dr. Ridings testified while Claimant's lumbar MRI showed a degenerative disc protrusion at

L3-L4, Dr. Sharma only diagnosed Claimant with a **lumbar strain,** which cannot cause "moderate to severe" changes on structural tests as required for Table 53, II-C.

23. Dr. Sharma testified he did not have complete medical records from Dr. Dean or Dr. Sparr, nor was he aware that Claimant was placed at MMI on March 16, 2017. Dr. Sharma testified that *he did not see or review the MRI that was taken of Claimant, nor the radiologist's narrative.* In fact, he only had a total of three of Dr. Dean's reports, dated 9-26-16, 10-3-16, and 12-5-16. He never inquired of anyone if there were more to come from any providers. Dr. Sharma testified his basis for using Table 53 was "the posture of the patient, how he presented, the fact that he had pain, the fact that he was having difficulty walking, the fact that he had an antalgic gait, the fact the he exhibited quite a bit of rigidity and spasm". Dr. Sharma testified that he was not sure if he had failed to dictate the results of his DIME physical examination, or if he had done so, whether a member of his staff may have failed to transcribe it. He further faulted the Division of Workers Compensation for not informing him of the incompleteness of his DIME report.

24. Dr. Ridings testified that under the Table 53 guidelines, those subjective symptoms are not enough to meet the *moderate to severe degenerative changes on structural tests* standard required to provide a Table 53 II-C impairment rating. Dr. Ridings testified under the AMA Guides 3rd Edition, in order to use Table 53-or any table at all- the physician must be able to correlate a claimant's symptoms with the injury. Dr. Ridings testified impairment ratings must be based on objective pathology, and cannot simply be performed based solely on subjective complaints. Nor can a physician determine a rating where abnormalities were *not caused or made worse by the injury*.

25. Dr. Sharma, Dr. Dean, and Dr. Ridings all agree Claimant's injury was a lumbar strain and on the date of MMI there was no lumbar rigidity. Table 53 requires 6 months of pain *and* rigidity in order for a diagnosis to exist. In this case, Dr. Ridings opined that the history contained in the medical records does not support the condition precedent. Thus, there is no Table 53 diagnosis, and Dr. Sharma erred in calculating a 7% impairment rating under Table 53 II-C.

26. Dr. Ridings testified he agreed with Dr. Dean's opinion stating the left disc protrusion revealed in Claimant's MRI is not related to the work injury. Further, the disc protrusion was on the left, whereas all of Claimant's complaints were on the right low back. This is consistent with the mechanism of the injury, given Claimant twisted left, straining the right low back muscles. Dr. Ridings testified a disc injury would have caused pain in the midline, paraspinals, and radiating into the buttock. However, there is no reporting of pain that is discogenic in nature. Accordingly, Claimant was diagnosed with a lumbar strain, which was successfully treated with trigger point injections and two courses of physical therapy. (Ex. G.) Dr. Ridings testified Claimant was at MMI on March 16, 2017, with no impairment, because he had full range of motion, and no rigidity or symptoms invoking the use of Table 53.

27. A transcript of Dr. Ridings' IME was offered by both parties. (Claimant's Ex. 17 {entire transcript}, Respondent's Ex. G {excerpts only}. During the IME, Claimant insisted to Dr. Ridings several things:

1). Claimant was told by Dr. Sparr, and also by Dr. Dean, that if he had surgery, he would probably wind up in a wheelchair.

2). That he listed his pain in his 3-16-17 visit to Dr. Dean as "seven, eight, nines".

3). The shots he received from Dr. Sparr did not have any significant beneficial effect until April of 2017.

4). At the DIME exam, Dr. Sharma never took range of motion measurements with inclinometers. Rather, Dr. Sharma merely placed his thumb on his back, and told him to bend. Not three times, just once. Claimant 'swore to God' to Dr. Ridings of this.

5). Also at the DIME exam, Dr. Sharma never performed a physical examination of Claimant. Claimant remained fully clothed, never even removing his jacket.

The ALJ notes further that throughout the IME, Dr. Ridings appears to be unfailingly polite, straightforward, and professional with Claimant. Claimant was encouraged to explain his position thoroughly. In return, Claimant appears to cooperate in the IME without voicing any complaint.

28. Claimant also testified at hearing. In summary, Claimant testified that he has never been treated for back problems prior to this incident. (The ALJ finds this particular assertion to be credible). He further testified that his pain has not abated, with some days better than others. He stated he has missed work because of his injuries. He further testified that, in summary:

1). The shots from Dr. Sparr (which had ended in February of 2017) would wear off in about two days, then he was back to experiencing pain each time.

2). On the date he was placed at MMI, Dr. Dean performed no physical examination- no range of motion, never placed her hands on him at all. "She did nothing. All she did was she looked at me, she goes 'Well, we're done,'".

3). He was dissatisfied with the manner with which Dr. Ridings performed his IME.

4). He was also dissatisfied with Dr. Sharma, and Dr. Dean, and that a malpractice claim against Dr. Dean was forthcoming.

5). He could no longer remember if Dr. Sharma used inclinometers on him or not at the DIME exam, since "that was a long time ago".

CONCLUSIONS OF LAW

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

Generally

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

B. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

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

Overcoming a DIME, Generally

D. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 400 (Colo. App. 2009). As a matter of diagnosis, the assessment of impairment requires a rating physician to identify and evaluate all losses and restrictions which result from the industrial injury. *Egan v. Indus. Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995).

E. A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. C.R.S. §8-42-101(3.7); C.R.S. §8-42-107(8)(c). The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000). Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003); *Adams v. Manpower*, W.C. No. 4-389-466 (I.C.A.O. August 2, 2005). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Overcoming the DIME-Table 53, II-C

F. At the outset, the ALJ finds that Dr. Sharma's DIME examination includes not only his written DIME report, but his supplemental testimony at trial as well. Assuming, arguendo, that Dr. Sharma's medical *observations* are accurate, his *conclusions* are not. His impairment rating under Table 53 II-C is not based, in any fashion, on *moderate to severe degenerative changes on* ***structural tests.*** Dr. Sharma never had the MRI results to review; it appears he never knew they even existed. Nor did he inquire, instead deflecting that oversight to the Division. He certainly did not address the conclusions of Dr. Dean and Dr. Ridings that any structural abnormalities noted therein were not the cause of his pain, nor were they work related.

G. By his own admission, he based his Table 53 II-C results purely on his *observations* of Claimant-observations which were never *documented* in any fashion until he testified from memory, months after the DIME exam. Further, his final diagnosis

was simply *lumbar strain.* As Dr. Ridings correctly points out, this does not constitute sufficient objective evidence of any *work related structural pathology.* The ALJ concludes that it has been shown, by clear and convincing evidence, that the 7% whole person rating assigned to Claimant under Table 53, II-C is wrong. The DIME, therefore, has been overcome.

Impairment Rating under Table 53, II-B

H. Has, however, Claimant shown, now by a preponderance of the evidence, an impairment rating under Table 53, II-B? Table 53, II-B requires none-to-minimal degenerative changes on structural tests. The record is devoid of any work-related structural changes; however, none are required under Table 53, II-B. Claimant has certainly shown that he has a medically documented injury. What must be shown, in addition, is a minimum of *six months of medically documented pain* ***and*** *rigidity, with or without muscle spasm.* As such, the accuracy of the medical records, as well as the witnesses' testimony, is in play.

Claimant's Reliability as a Witness and Medical Historian

I. Claimant would now have the ALJ selectively believe some things Claimant has had to say-such as that Dr. Dean never examined him- but certainly not others-including that Dr. Sharma never examined him. Respondent would now have the ALJ selectively believe some things Claimant has had to say-such as that Dr. Sharma never examined him- while disbelieving others- such as that Dr. Dean never examined him. The ALJ can do neither. Claimant has stated things-with great certainty-that are either at odds with other of his own statements, at odds with reliable evidence, or at odds with ordinary medical practice. Either Dr. Dean examined Claimant on all dates documented, or Dr. Dean is a willful falsifier of her own medical records. Once Claimant has sorted out friend from foe (legally speaking), his assessments of Dr. Ridings and Dr. Sharma have shifted. Claimant appears to have been candid and cooperative with his medical providers, up until he was placed at MMI. Since that time, his anger has rendered him an unreliable source of information.

Reliability of Records of Claimant's ATPs

J. In summary, there is no reason to question the accuracy of the records of Dr. Dean, Dr. Sparr, or Claimant's physical therapy providers. While it appears Dr. Dean (correctly, the ALJ finds) stated that surgery was not appropriate (neither pain nor work related), nothing would suggest that she or Dr. Sparr would state that surgery would risk "putting Claimant in a wheelchair". Dr. Dean accurately tracked Claimant's symptoms at each visit, including vital signs, which vary-within predictable parameters-with each visit. She last noted that *spasm* (which would, if present, constitute *rigidity)* was present on 1-12-17. She noted that *tenderness* (which does not constitute rigidity) was last present on 2-23-16. If Dr. Dean could somehow be said to have an ulterior motive, it would be to keep treating the Claimant and billing the file. Instead, she just did her job. The ALJ finds that Dr. Dean's records are accurate and reliable, as are the other ATPs.

Reliability of Dr. Ridings' Examination and Testimony

K. In summary, the ALJ finds that Dr. Ridings' examination of Claimant was done professionally and accurately. He found no rigidity or spasm when he examined Claimant at his IME on August 17, 2017. Further, after a review of the available records, he noted that evidence of rigidity was last noted on February 9, 2017 by Dr. Sparr. That is 4 ½ months post injury, before it ends. Dr. Dean had noted the absence of spasm even sooner. Dr. Ridings also provided an accurate analysis of the application of Table 53 II-B, and Table 53 II-C to Claimant's situation. If no evidence of rigidity for a minimum of six months, no Table 53 rating.

Reliability of Dr. Sharma's Report and Testimony

L. If evidence of rigidity was last documented on 2-9-17, how can it now be a minimum of six months, to qualify for Table 53, II-B? First, Dr. Sharma never *documented* any rigidity from his DIME exam. He prepared a narrative his physical examination, but only referenced his range of motion numbers. No palpation is *documented* in writing or dictation to have occurred at all. If Claimant is to be believed, Dr. Sharma never touched him except with a thumb. Dr. Sharma testified that he did note "quite a bit of rigidity and spasm." However, Dr. Sharma failed to request any more medical records, despite the facial deficiency of what he was tendered. His narrative describes Claimant "standing in waters", and handling a large piece of glass "7 *inches* X 31 inches." He erroneously adopted an MMI date of 12-5-16, simply on the basis, it appears, that this was the latest record from Dr. Dean that he was presented. Even if he did observe rigidity, he erroneously applied his findings to Table 53II-C instead of 53II-B. He testified further that he does not always proofread his DIME reports "because of other competing tasks at hand." The ALJ finds that such other competing tasks of a busy practice prevented a reliable DIME physical exam. As such, the ALJ is unable to conclude, by a preponderance of the evidence, that Dr. Sharma medically documented "quite a bit" of rigidity and spasm-or any at all- such that at least 6 months have now been documented. Thus, a Table 53, II-B rating is not established.

Range of Motion

M. Because the Claimant has not shown that a Table 53, II-B ***or*** II-C applies, the ALJ declines to find further whether Dr. Sharma's or Dr. Ridings or Dr. Dean's range of motion figures are most accurate. The point is moot.

Maximum Medical Improvement

N. During the hearing, Respondent argued that MMI was not before the ALJ at this hearing. Claimant argued that it was. However, Claimant's Position Statement concedes that MMI was correctly found, and asks the ALJ not to overcome that aspect of the DIME. Therefore, Claimant asks the ALJ to find that MMI was reached on 12-5-16. The DIME has now been overcome. While it is likely now a moot point, the ALJ finds that the MMI date of 12-5-16 in the DIME report is plainly erroneous, and not

based upon the medical records. Instead, the ALJ finds, by clear and convincing evidence, that MMI was reached on 3-16-17, as found by Dr. Dean.

ORDER

It is therefore ordered that:

1. Claimant's claim for Workers Compensation benefits is denied and dismissed.

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

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

DATED: January 10, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-044-940-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 19, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 12/19/17, Courtroom 1, beginning at 1:30 PM, and ending at 3:30 PM).

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection. Respondents' Exhibits A through I were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ordered post-hearing briefs. Claimant's opening brief (labeled as "Proposed Specific Findings of fact, Conclusions of Law, and Order") was filed on December 27, 2017. On December 28, 2017, the ALJ issued a Procedural Order, indicating that Respondents' answer brief was still due within 5 working days of December 27, 2017. Respondents' answer brief was filed on January 4, 2018. Claimant's reply brief was filed on January 10, 2018. Consequently, the matter was deemed submitted for decision on that date.

ISSUES

The issues to be determined by this decision concern whether the Claimant suffered a compensable aggravation/acceleration of pre-existing right hip and shoulder conditions, or traumatic injuries to his right hip and shoulder in an auto accident on his way to pick up a prospective employee to help him in his work for the Employer. Also, did the Claimant's injuries, if compensable, arise out of the course and scope of his employment, specifically, whether the general "going to and coming from" rule applies; or, does an exception, involving the "dual purpose" doctrine apply. If the Claimant sustained a compensable injury, is he entitled to medical benefits that are causally-related to the auto accident of November 11, 2015? Also, if the claim is compensable, is the Claimant entitled to temporary partial disability (TPD) benefits.

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

FINDINGS OF FACT

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

Preliminary Findings

1. In November of 2015, the Claimant received a call from Wojciech Zdanowicz, the head of the Employer's business. At the time, the Claimant was living in Arizona and Zdanowicz lived and ran his business out of Colorado. Zdanowicz and the Claimant knew each other because the Claimant had worked for Zdanowicz in Colorado before moving to Arizona.

2. The Claimant resigned his position with the Employer for the first time shortly after being hired by the Employer in August of 2015. The Claimant had decided to move from Colorado to Arizona. When the Claimant resigned, he had a conversation Wojciech Zdanowicz, who owns and operates the Employer, regarding whether the Claimant would be willing to perform work for the Employer in the future. The Claimant stated that he planned to be back in Colorado to attend to personal domestic matters later in 2015. The Employer was agreeable to hiring the Claimant to perform work when the Claimant was in Colorado for his own personal affairs.

3. During their conversation, Zdanowicz asked the Claimant if he could come to Colorado to do a few days of fabrication work for twenty dollars an hour. The Claimant agreed and returned to Colorado on November 10, 2015.

4. When Claimant arrived in Colorado, according to the Claimant, Zdanowicz asked the Claimant how he would get from the airport at the airport to town. The Claimant told Zdanowicz that he rented a car and could drive himself.

5. According to Zdanowicz, he did not request that the Claimant return to Colorado on November 10, 2015. Rather, as Zdanowicz testified, he allowed the Claimant to work for him when he was in Colorado for personal reasons. As far Zdanowicz was aware, the Claimant had returned to Colorado in November of 2015 for his own personal reasons, and not for the express purpose of performing work for the Employer. The Employer did not request that the Claimant travel to Colorado for the express purpose of performing work. The ALJ finds a significant conflict between Zdanowicz's testimony regarding the reason the Claimant came to Colorado and the Claimant's testimony in this regard. The ALJ, however, resolves this conflict by finding that Zdanowicz and the Claimant had agreed on the Claimant doing work for Zdanowicz before the Claimant embarked on his trip to Colorado. Consequently, the ALJ finds that the Claimant came to Colorado for the dual purpose of doing work for the Employer and attending to personal business.

6. Zdanowicz had sheet metal fabrication work for the Claimant to perform in November of 2015. When the Claimant returned to Colorado in November of 2015, he told Zdanowicz that he wanted to use his own selected helper to assist him in the performance of the fabrication work. The Claimant selected Samuel Graham to be his helper. The Employer was agreeable to the Claimant's request. Indeed, Zdanowicz acquiesced in Graham becoming his employee at this time and when the Claimant left to return to Arizona in November 2015, Zdanowicz continued to pay Graham. Zdanowicz would have the ALJ believe that he had no role in Graham's employment and that the Claimant went to pick Graham up on his own initiative. The ALJ does not find this credible. Importantly, Zdanowicz did not **conditionally** accept Graham subject to Zdanowicz approval when Graham got to the shop. Mr. Graham's employment was to be finalized upon his arrival at the Employer's place of business on November 11, 2015.

7. On the evening of November 10, 2015, the Claimant slept in his car in a Walmart parking lot.

Findings: Preceding the Accident

8. According to the Claimant, on November 11, 2011, he went to the job site in Centennial. When he arrived, he was surprised by how much work there was for the job. The Claimant then told Zdanowicz that he needed an assistant to get the job done on time. According to the Claimant, Zdanowicz told him that it was fine if he needed an assistant and to take care of it himself. Respondents' answer brief posits the argument

that the Claimant went directly from sleeping in his car to pick up Graham. The Claimant's version makes more sense because there was no persuasive evidence that Zdanowicz agree, in advance to hire two people. He agreed to hire the Claimant only. It was only after the Claimant saw how much work there was, did he ask Zdanowicz if he could get a helper. This was after the Claimant arrived at the shop. The totality of the evidence concerning Graham establishes that the Claimant became Zdanowicz agent in hiring a helper and bringing him to the shop. Therefore, the ALJ finds the Claimant more credible than the statement attributed to Zdanowicz in the Respondents' answer brief.

9. With authority from Zdanowicz, the Claimant asked his friend and former coworker, Sam Graham, to be his assistant. Graham agreed but told the Claimant that he would need a ride from his home in Arvada to the job site in Centennial. Respondents argue that Zdanowicz never instructed the Claimant to pick up Graham; the Claimant's work did not require travel and Zdanowicz did not compensate the Claimant for travel. On the other hand, the ALJ infers and finds that without Graham, the Claimant would not have done the job alone; and, without the Claimant going to pick up Graham from his home in Arvada, neither the Claimant nor Graham would be doing the work for Zdanowicz.

Findings: Concerning the Accident

10. The Claimant then went to pick Graham up in Arvada. On his way to pick up Graham, the Claimant's rental car slid on some black ice, totaling the car and injuring the Claimant's neck, shoulders, knees, and left hand.

11. Aurora Police Department Officer Javen T. Harper responded to the scene of the car accident (Respondents' Exhibit B). Officer Harper noted at least three times in his accident report that there were no injuries in the collision (*Id.* at p. 4, 12).

12. Zdanowicz came to the scene of the collision after receiving a telephone call from Graham. Zdanowicz asked the Claimant whether he was injured in the collision or in need of medical care. The Claimant warranted that he was not injured and was not in need of medical attention.

13. Thereafter, Zdanowicz went to get Graham himself and brought him to the job site. Graham testified that someone from the Employer came to get him after the Claimant had the auto accident. The ALJ infers and finds that there was no one else other than Zdanowicz who knew about picking up Graham. Zdanowicz did not have a clear recollection of picking Graham up. The ALJ infers and finds that Zdanowicz picked up Graham after the Claimant had the auto accident.

14. Despite the accident, the Claimant and Graham worked the rest of the day. Graham was paid for his work by Zdanowicz. That night, the Claimant slept in Zdanowicz' s shop and Zdanowicz drove Graham back to Arvada.

15. After the collision, the Claimant and Graham worked for the Employer performing sheet metal fabrication work on the date of November 11, 2015. The Claimant and Graham also performed sheet metal fabrication work on the date of November 12, 2015. Both Zdanowicz and the Claimant testified that the Claimant performed a significant amount of work. The Claimant had no difficulty performing the work, and made no complaint of injury or pain to Zdanowicz.

16. On November 12, 2015, Zdanowicz picked Graham up again-- from Arvada. The Claimant and Graham worked throughout the day. That night, Zdanowicz paid for the Claimant and Graham to sleep at a hotel in Centennial. Zdanowicz does **not** deny that he paid for the hotel for Graham and the Claimant.

17. Because the Claimant's rental car was not drivable, and because Graham did not have any means of transportation to or from work, Zdanowicz paid for a hotel room for Graham and the Claimant, and picked them up from the hotel and dropped them off at the hotel after work. Zdanowicz testified that he provided the hotel for. Graham and the Claimant as a friendly gesture due to the collision, not as a condition or benefit of the Claimant's employment. The ALJ, however, infers and finds that Zdanowicz received a significant work-related benefit by paying for the hotel, *i.e.,* he had the certainty of having the Claimant and Graham available to do the work, as opposed to the inefficiency and uncertainty of having the Claimant fend for himself and having to pick Graham up in Arvada before work and drive him home afterwards.

18. The Claimant missed his flight back to Arizona. The Claimant paid for his own flight back to Arizona, but Zdanowicz paid for the Claimant's flight change fee. Again, according to Zdanowicz, he did so as a gesture to the Claimant, not as a condition or benefit of the Claimant's employment. The ALJ, however, infers and finds that this gesture helped assure Zdanowicz that the Claimant would work for him again. Graham eventually finished the job by himself and Zdanowicz paid Graham twenty dollars an hour for his work.

19. The Claimant again returned to work for the Employer in December of 2015. Again, the Claimant worked for the Employer when he was in Colorado. The Claimant was again able to perform sheet metal fabrication work without problems. He did not complain of any injury or desire for medical care during his December of 2015 sojourn in Colorado while working for the Employer.

Compensability

20. Prior to his employment with the Employer, the Claimant had pre-existing conditions relating to his neck, low-back, shoulders and hands. The Claimant had a prior work-related injury to his cervical spine which required a three level cervical fusion surgery in 2003. This injury resulted in a 25% impairment rating for the Claimant's cervical spine.

21. The Claimant was then involved in a non-work related automobile collision which occurred in 2009. He treated for injuries sustained in that collision at Spine One and The Surgery Center at Lone Tree. The Claimant's diagnoses to his neck included cervical spondylosis, cervical disc displacement, cervical disc degeneration, cervical radiculopathy, cervical post-laminectomy syndrome, and right foraminal disc herniation at C4-C5 with foraminal stenosis (Respondents' Exhibit G, p. 22, 130). The Claimant's diagnoses for his low-back included lumbar disc displacement, lumbar degenerative disc disease, lumbar radiculopathy and lumbar spondylosis (*Id.* at p. 43, 66). He had bulging discs in his lumbar spine at L3-L4 and L4-L5. (*Id.* at p. 110). The Claimant also complained of "upper limb pain and parathesias, left greater than right…." (*Id.* at p. 130). The Claimant underwent treatment including but not limited to several transforaminal epidural steroid injections into the lumbar spine and cervical spine (*Id.* at p. 22, 43, 66, 90, 110, 130). The Claimant also underwent physical therapy (PT) at Active Motion Physical Therapy (Respondents' Exhibit H). At times, the Claimant would fill out pain diagrams when he would present for treatment. He noted on several occasions that he had arthritis in his shoulders and hands (*See, e.g., Id.* at p. 77, 100, and 120). The Claimant testified at hearing that he has had arthritis in his shoulders for years prior to the alleged injury which is the subject of the present hearing.

22. The Claimant treated through 2011 for his injuries sustained in the 2009 automobile collision. The Claimant testified that he sustained a 15% impairment rating as a result of the 2009 collision.

23. The Claimant sought no medical care after the November 11, 2015 auto accident, until he presented for treatment with Lori Burke, N.P. at Partners in Primary Care (part of the Hatfield Medical Group) in Chandler, Arizona on September 9, 2016, approximately 10 months after the auto accident in question (Respondents' Exhibit I, p. 169). The Claimant went there to establish care, and to treat for a testicular lump and Hepatitis C, which had nothing to do with the auto accident. Except for the symptoms mentioned by the Claimant in the "History of Present Illness", Burke noted that all other symptoms were negative. The Claimant underwent a physical examination. Under the heading titled, "Musculoskeletal," Burke noted "Spine: no pain." (*Id.* at p. 170). There were no noted complaints of any pain in the Claimant's neck, low-back, shoulders, knees, hip or hands. The Claimant made no mention of the automobile collision of November 11, 2015. He was not placed on work restrictions. In his telephone testimony, the Claimant offered no plausible explanation for **not** mentioning the auto accident at this medical appointment.

24. The Claimant filled out a pain diagram on September 9, 2016. (*Id.* at p. 172). Under the heading titled "Present Health Concern" the Claimant wrote: "Lump in Testicle, Hep-C." Under the heading titled "Personal Medical History" the Claimant was asked to indicate whether he had any of a list of medical problems. The section titled "Other Problems" was left blank by the Claimant. Again, the Claimant offered no plausible explanation for leaving this blank.

25. The Claimant returned to visit NP Burke on October 4, 2016. (*Id.* at p. 178). Burke noted that the Claimant was there for a review of laboratory work, and had "no complaints." There were no symptoms noted. Another physical examination was performed, and again it was noted that the Claimant had no spine pain. There were no noted complaints of any pain in the Claimant's neck, low-back, shoulders, knees, hip or hands. Again, the Claimant made no mention of the automobile collision of November 11, 2015. He was not placed on work restrictions. Again, the Claimant offered no plausible explanation for not mentioning the auto accident.

26. The Claimant did not submit a Workers' Claim for Compensation until February 22, 2017, more than 15 months after the accident (Respondents' Exhibit E). In the form, he complained of pain in his back, neck, shoulder, hip and knee pain.

27. Following his appointment with NP Burke in October of 2016, the Claimant waited until November 1, 2017 to seek further medical treatment. On November 1, 2017, the Claimant returned to the Hatfield Medical Group and treated with Tyler Dennison, PA (Respondents' Exhibit I, p. 181). He told PA Dennison that he had chronic right shoulder pains and right hip pains. The Claimant told Dennison that he is a steelworker, and that he used to see an "Ortho" for cortisone injections that "bought him time." He stated that he "was told there's rotator cuff damage that would eventually require surgery. Patient states also [sic] degenerative changes." The Claimant denied any further musculoskeletal symptoms (*Id.* at p. 182). Physical examination of the Claimant's neck and lower-extremities were normal. There were no noted complaints of any pain in the Claimant's neck, low-back, knees, or hands. The Claimant made no mention of the automobile collision of November 11, 2015. He was not placed on work restrictions. The Claimant was referred for an MRI (magnetic resonance imaging) of the right-shoulder.

28. An MRI of the right-shoulder was performed on November 12, 2017 (*Id.* at p. 184). The MRI showed an "age indeterminant full-thickness tear" of the supraspinatus and partial tears of the subscapularis. The Claimant had degenerative changes in the acromion and humeral head.

29. According to the Claimant, long after he returned to Arizona (beginning in late 2016 or early 2017), he began to experience increasing pain and stiffness in his neck. His shoulders also began to make a crunching sound when he rotated them. He also had pain and numbness from his knee to upper thigh and in his left hand. His Workers' Claim for Compensation, dated February 2, 2017 (Respondents' Exhibit C), he indicates that he had no initial treatment. The ALJ infers and finds that this long delay in reporting any alleged injury consequences of the auto accident of November 11, 2015, significantly undermines the credibility of the Claimant's injury claim.

30. According to the Claimant, he can no longer work at fabrication work. Instead, he works as a guitar teacher for which he receives $10 an hour and works about 10 hours per week, thus, earning about $100.00 per week. His testimony in this regard is undisputed.

DISCUSSION

Picking Up Graham

The Claimant requested that Zdanowicz allow him to bring on an assistant to help him complete the job AND Zdanowicz acquiesced. The Claimant made this request on November 11, 2015, after reporting to the job site and seeing the amount of work required. After Zdanowicz agreed to the Claimant bringing on an assistant, the Claimant drove to get. Graham in Arvada. Zdanowicz had no clear recollection of agreeing to the Claimant bringing on an assistant. On the way to pick up Graham, the Claimant was involved in the auto accident in question before he could get to Graham. Nonetheless, Zdanowicz went to pick up Graham himself and brought him to the job site. Graham then worked for Zdanowicz, and was paid by Zdanowicz, until the job was complete. Because Graham worked for Zdanowicz, once he arrived in Centennial, the act of picking him up conferred a benefit on Zdanowicz. This is further established by the fact that Zdanowicz picked Graham up himself after the auto accident, when the Claimant was unable to do so. Furthermore, Zdanowicz continued to act as transporter for Graham on the night of November 11 and on the morning of November 12. Consequently, Graham was necessary to complete the job and the Claimant would have benefited Zdanowicz when he drove to Arvada to bring Graham to the job site in Centennial.

As found, Zdanowicz had knowledge that the Claimant, who had effectively commenced work for the Employer, left the Employer's premises to go pick up Graham to assist the Claimant in his work for Zdanowicz. If Graham had started out for the job site in his own vehicle and had the accident where he (Graham) was injured, Graham would be within the purview of the "coming to" rule and he would not be within the course and scope of his job. This did not happen.

Despite the fact that the Claimant's auto accident was within the course and scope of his employment for the Employer, as found, herein below, the Claimant has failed to prove that he sustained an aggravation/acceleration of a pre-existing condition or new compensable injuries arising out of the auto accident.

Claimant's Argument Concerning "Travel Status"

As a catch-all argument, the Claimant argues that because he was required to travel from Arizona to Colorado to work for Zdanowicz, he qualifies as a traveling employee. The ALJ determines that the Claimant misapplies the "travel status" doctrine because the Claimant, while in Colorado, became a "Colorado employee." Had Zdanowicz's business been in Arizona and had he the Claimant temporarily deploy to Colorado where the Claimant was injured in a compensable injury, then, the "travel

status" doctrine would apply. The Claimant cites several "travel status" cases herein below, but they are not germane to the facts of this case.

The traveling employee doctrine applies when an employee "is required to travel away from his home city or town, where he works, on his employer's business." *Tatum-Reese Development Corp. v. Industrial Commission*, 490 P.2d 94, (Colo. Ct. App. 1971). When an employee is on travel status, he is protected by the Workers' Compensation Act until he either (1) returns home; (2) makes a special deviation unrelated to his employment. *Id*. In determining if a claimant is on travel status, the court looks to whether the employer paid for transportation, lodging, and meals; however, "the absence of one or more of these factors does not, in and of itself, disqualify a claimant from receiving benefits." *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9, (Colo. Ct. App. 1995). The ALJ concludes that an employee must be on "travel status" from his place of employment which, in this case, would be Arizona. The fact is that he came from Arizona to take a job in Colorado, regardless of how short the duration of the job makes him a Colorado employee.

The fact that the Claimant left his home in Arizona to perform work for Zdanowicz in Colorado in November of 2015; when Claimant arrived, Zdanowicz offered to pick him up at the airport, but the Claimant rented and paid for a rental car (he was not reimbursed by Zdanowicz nor was there an agreement for reimbursement) illustrate that the Claimant became a Colorado employee as defined by the Workers' Compensation Act. The Claimant then stayed in Zdanowicz's shop during his second night in Colorado. On the third night, Zdanowicz paid for the Claimant and Graham to stay in a hotel close to the Employer's job site. Thereafter, as found, the Claimant missed his flight back to Arizona and Zdanowicz paid for Claimant's change fee for the flight back to Arizona. The Claimant had paid for the airline ticket himself and was not reimbursed for it. Although Zdanowicz did not cover all of Claimant's expenses, he provided lodging and transportation for both the Claimant and Graham. Indeed, the Claimant argues for a reverse application of the "travel status" doctrine, which argument the ALJ rejects.

Special Errand

Respondents argue that the Claimant's injury does not meet the **"**special errand**"** exception to the **"**going **to** and coming **from"** rule. Respondents weighed the following factors from *Madden*: (1) whether the travel occurred during work hours; (2) whether the travel occurred on or off the employer's premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger." In weighing these factors, Respondents concluded that none of the factors apply to the Claimant's injury. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999).

Respondents err in weighing the third factor to the facts in the present case. To determine whether an employee's travel is contemplated by the employment contract, a court must conduct a fact intensive analysis to see if there is evidence of "a causal

connection between the employment and the injury such that the travel to and from work arose out of and in the course of employment." *Staff Administrators, Inc. v. Reynolds*, 977 P.2d 866, 868 (Colo. 1999).

To arise out of employment, the injury must have its "origin in" an employee's work-related functions." To determine if the injury has its origin in the employee's work-related functions, a court applies "but-for" test in which it ask: "if it [the injury] would not have occurred but for the fact that the conditions and obligations of the employment placed the claimant in the position where he or she was injured." *City of Brighton v. Rodriguez,* 318 P.3d 496, 511, 2014 CO 7.

By applying the "but-for" test, courts have reached the following outcomes:

The Supreme Court held in favor of a claimant who was killed by lighting while returning from a neighbor's farm after the employer sent him to work there. *Aetna Life Ins. Co. v. Indus. Comm'n of Colo*., 254 P. 995, 996 (Colo. 1927).

In another opinion, the Court of Appeals held that a claimant suffered a compensable injury when he was shot by a co-worker while both were waiting in a parking lot for their employer to arrive. *Kitchens v. Dep't of Labor and Empt', Div. of Labor*, 486 P.2d 474, 477 (Colo. App.1971).

In *Reynolds*, *supra,* the court determined that, although the claimant was using his own car, he suffered a compensable injury when he drove to a construction site after missing a rendezvous with his co-workers to carpool to the site.

In the present case, Respondents implicitly admit that the Claimant was involved in an auto accident when he went to pick up Graham. Respondents further admit that the purpose of the Claimant driving to pick up Graham was for him to assist the Claimant in the fabrication work for the Employer. As found, the Claimant and Zdanowicz spoke about getting an assistant for the fabrication work and that. Zdanowicz agreed to the request.

Additionally, as found, Zdanowicz went to pick up Graham after the Claimant was unable to do so because of the auto accident. Zdanowicz also drove Graham back home after the first day of work and picked him up and drove him to the work site the following morning. Zdanowicz's actions clearly demonstrate that.Graham was necessary in completing the fabrication work because once the Claimant was unable to pick him up, Zdanowicz himself drove to get him and bring him back to the work site.

Furthermore, in applying the "but-for" test to these facts, it is clear. Had it not been for the Claimant's employment with Zdanowicz, the Claimant would have never driven to pick up Graham. Likewise, had it not been for his employment with Zdanowicz, the Claimant would not have been involved in the auto accident on November 11, 2015.

Ultimate Findings

31 The Claimant's telephone testimony was consistent concerning the circumstances of his embarkation to pick Graham up and bring him to Zdanowicz's shop to begin work, the Claimant already having reported to the shop. The circumstances of the auto accident and the Claimant's injuries are, essentially, undisputed. To fully accept Zdanowicz's version of events, the ALJ would be required to reject the Claimant's testimony that when he saw the amount of work at the shop, he determined that he needed help, which led him to pick up Graham, with Zdanowicz's approval.. To accept Zdanowicz version of this event, the ALJ would be required to infer that the Claimant, entirely on his own, "out-of-the-clear-blue-sky" went to pick up Graham before even reporting to Zdanowicz's shop. Under the totality of the evidence, this makes no sense. Indeed, Zdanowicz's testimony regarding the Claimant going to pick up Graham is fuzzy, whereas the Claimant's testimony in this regard is quite clear. Therefore, the ALJ finds the Claimant more credible on the issue of the Claimant embarking to pick up Graham than Zdanowicz's testimony in this regard.

32. The Claimant continued working without difficulty after the auto accident; he did not seek any specific medical attention for anything for approximately 10 months; when he presented for medical attention in Arizona, he did not mention the auto accident or injuries claimed as a result thereof (he gave a history of testicular problems); he had similar problems to the injuries claimed herein on the Worker's Claim for Compensation as a result of disabling injuries sustained in 2009; and, the first mention of injuries allegedly related to the auto accident of November 11, 2015, was in the Claimant's Worker's Claim for Compensation, dated February 22, 2017. All of these facts significantly impact the credibility of the claimed occurrence of compensable

injuries on November 11, 2015. Although the auto accident was within the course and scope of his employment, the ALJ does not find the Claimant's claim of disabling injuries resulting from the November 11, 2015 auto accident **credible.**

33. Between conflicting versions of events regarding the Claimant's going to pick up Graham to assist him in his work for the Employer, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's version of events and to reject evidence to the contrary,

34. The Claimant meets the requirements for the "special errand" exception to the "going to and coming from" rule because he reported to the job site before receiving approval from Zdanowicz to have Graham work as his assistant and to go pick up Graham and bring him to the jobsite. On his way to pick Graham up, the Claimant was involved in the auto accident in question.

35. The ALJ further finds that the Claimant was **not** on "travel status" within the meaning of the Workers' Compensation Act and the case law arising thereunder, at the time of the auto accident.

36. Although the auto accident of November 11, 2015 happened within the course and scope of the Claimant's employment with the Employer, the Claimant failed to prove by preponderant evidence that he suffered compensable injuries, or an aggravation/acceleration of pre-existing conditions, as a result of the November 11, 2015 auto accident. For this reason, any determinations concerning medical benefits, average weekly wage and temporary disability are moot.

37. There is no persuasive medical evidence connecting the Claimant's alleged injuries to the November 11, 2015 auto accident, other than the Claimant's lay testimony which, under the totality of the evidence, is insufficient to overcome the lack of medical opinions causally connecting the auto accident to the alleged injuries.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo.

App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, The Claimant's telephone testimony was consistent concerning the circumstances of his embarkation to pick up Graham and bring him to Zdanowicz's shop to begin work, the Claimant already having reported to the shop. The circumstances of the auto accident and the Claimant's injuries are, essentially, undisputed. Consequently, as found, the Claimant was more credible on the issue of his embarkation to pick up Graham than Zdanowicz's testimony in this regard.

b. As further found, the Claimant continued working without difficulty after the auto accident; he did not seek any specific medical attention for anything for approximately 10 months; when he presented for medical attention in Arizona, he did not mention the auto accident or injuries claimed as a result thereof (he gave a history of testicular problems); he had similar problems to the injuries claimed herein on the Worker's Claim for Compensation as a result of disabling injuries sustained in 2009; and, the first mention of injuries allegedly related to the auto accident of November 11, 2015, was in the Claimant's Worker's Claim for Compensation, dated February 22, 2017. All of these facts significantly impacted the credibility of the claimed occurrence of compensable injuries on November 11, 2015. Although the auto accident was within the course and scope of his employment, as found, the Claimant's claim of disabling injuries resulting from the November 11, 2015 auto accident is not **credible.**

c. As found, there is no persuasive or credible medical opinion connecting the Claimant's claimed injuries to the auto accident of November 11, 2015. It is primarily the Claimant's lay testimony that does so and, as found, it is insufficient to overcome

the lack of persuasive medical evidence, or to invoke the application of the holding in *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Substantial Evidence

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

Course and Scope of Employment/Special Errand

e. As found, the Claimant met the requirements for the "special errand" exception to the "going to and coming from" rule because he reported to the job site before receiving approval from Zdanowicz to have Graham work as his assistant and to go pick up Graham and bring him to the jobsite. On his way to pick Graham up, the Claimant was involved in the auto accident in question. *See Staff Administrators, Inc. v. Reynolds*, 977 P.2d 866, 868 (Colo. 1999**);** *City of Brighton v. Rodriguez,* 318 P.3d 496, 511**, 2014 CO 7**; *Aetna Life Ins. Co. v. Indus. Comm'n of Colo*., 254 P. 995, 996 (Colo. 1927); *Kitchens v. Dep't of Labor and Empt', Div. of Labor*, 486 P.2d 474, 477 (Colo. App.1971) [each opinion applies the "but for" the employment, brings a situation within the course and scope of employment].

Compensability

f. Essentially, *City of Brighton v. Rodriguez, supra,* creates a presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related

factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant failed to show that his alleged injuries arose out of the auto accident of November 11, 2015. Therefore, he did **not** sustain an aggravation/acceleration of his previous conditions of 2009, nor did he sustain new compensable injuries as claimed. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997)*.* An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, none of the above circumstances were proven.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain his burden of proving compensable injuries arising out of the auto accident of November 11, 2015.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for Workers' Compensation benefits are hereby denied and dismissed.

DATED this_____day of January 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

a. Whether Respondent overcame the opinion of Dr. Timothy Hall, Division independent medical examiner (DIME), by clear and convincing evidence regarding whether Claimant's left hip injury and resulting impairment is causally related to the admitted January 28, 2016, injury;

b. Whether Respondent has produced clear and convincing evidence to overcome Dr. Hall's DIME opinion that Claimant's left knee chondromalacia and resulting impairment is causally related to the January 28, 2016, slip and fall;

c. If the left hip injury is determined to be causally related, whether Claimant has established by a preponderance of the evidence that the 3% scheduled impairment rating should be converted to a 1% whole person rating; and

d. Whether Claimant has proven by a preponderance of the evidence that he is entitled to ongoing maintenance medical care for the left knee and/or left hip.

FINDINGS OF FACT

1. Claimant is a 55 year old man who worked for Employer on January 28, 2016, as an electrical inspector. On this date, he was walking away from a construction site and slipped on ice, landing on his left side. Claimant sought treatment from Dr. Bryan Counts at Concentra Medical Centers the same day. He reported to Dr. Counts that he landed on the left side of his body. Claimant initially felt that he was okay after the fall, but his knee began aching while driving shortly thereafter along with tightness in his thigh. Claimant told Dr. Counts on January 28, 2016, that he was experiencing pain in his left hip, thigh and knee, noting that the knee was the most bothersome at the time.

2. Dr. Counts performed a physical examination. The examination of the left hip documented tenderness to the anterior hip joint and greater trochanter bursa with complaints of stiffness. Examination of the left knee documented effusion, tenderness to the lateral knee and painful restricted range of motion. Dr. Counts diagnosed Claimant with a sprain of the left knee and a contusion of the left hip and thigh from the slip and fall. Dr. Counts prescribed Norco and Naproxen, along with physical therapy, x-rays of the left hip, a hinged brace for the left knee and x-rays of the left knee.

3. Claimant began physical therapy the same day as the injury and his appointment with Dr. Counts. The mechanism of injury was documented as, "Patient states he injured his left hip and knee when he slipped and fell on the ice." Claimant was experiencing constant pain around his patella with popping and clicking of the knee, and pain in his left quad running to his left hip. Claimant reported that he had no functional restrictions prior to the slip and fall.

4. Claimant followed up at Concentra on February 2, 2016, with Dr. Amanda Cava. Claimant's knee was the primary complaint, for which an MRI was ordered due to a suspected meniscal tear. Two days later, Claimant reported "increasing hip and quad pain" to his physical therapist. The therapist noted that Claimant had a positive squish test of the SI joint for posterior rotation on the left. Claimant was noted to walk with an antalgic gait.

5. Claimant underwent the left knee MRI on February 10, 2016. The MRI showed a small joint effusion, a multiplanar tear of the body and anterior horn of the lateral meniscus, a .6 mm displaced meniscal fragment versus loose body near the root attachment of the anterior horn of the lateral meniscus, a large 1.9 by 0.8 cm full-thickness cartilage defect central weightbearing surface medial femoral condyle and a partial thickness cartilage fissure patellar apex.

6. Claimant presented to Colorado Orthopedic Consultants on March 14, 2016, for an initial evaluation regarding his left knee injury. Dr. Michael Hewitt reviewed the MRI, examined Claimant and obtained a medical history. It was his opinion that surgery was indicated because Claimant had not progressed after six weeks of physical therapy.

7. Claimant followed up at Concentra with Dr. Counts on April 1, 2016, prior to his surgery. Claimant continued complaining of left knee and left hip pain. Claimant was seen at Concentra again by Darla Draper on April 18, 2016, during which Claimant reported left hip pain.

8. Dr. Michael Hewitt performed surgery on Claimant's left knee on April 19, 2016. The preoperative diagnoses included, "left knee displaced lateral meniscal tear" and "left knee chondromalacia." The post-operative diagnosis was a grade four chondral lesion of the medial femoral condyle, a grade three chondral lesion of the lateral femoral condyle, and a grade four chondral lesion of the central trochlea. Surgery included a left knee partial lateral meniscectomy, and a medial and lateral femoral condyle and trochlear chondroplasty. Claimant underwent post-surgery therapy.

9. As of August 3, 2016, Claimant reported that he had been improving; however, he still had pain in his lateral knee with painful popping, and still reported cramping of the left hip with hip flexion. Dr. Counts recommended more therapy for Claimant's left hip pain. On August 23, 2016, the physical therapist document Claimant's report of ongoing intermittent left hip pain, especially when walking, that

would range from a level two out of ten to a level seven out of ten. By September 12, 2016, Claimant was still reporting left mid-thigh and left hip pain.

10. Dr. Counts placed Claimant at maximum medical improvement (MMI) on October 4, 2016. Claimant reported that he was still having very frequent crepitus just superior to the patella in his left knee, but that he was ready for case closure. Physical examination documented crepitus on palpation. Despite Claimant reporting ongoing hip pain, Dr. Counts did not report examination of the left hip. Dr. Counts assigned a 9% scheduled rating for Claimant's left knee. Claimant was given 4% for range of motion loss per table 39 of the *AMA Guides*, and 5% per table 40 for a partial meniscectomy and due to persistent crepitation. Dr. Counts did not provide a rating for Claimant's left hip, nor did he discuss why no rating for the hip was given, despite complaints of hip pain for the past 10 months and considerable therapy provided for the hip injury. Dr. Counts recommended ongoing maintenance care in the form of a six month gym membership and to see either himself or Dr. Hewitt as needed for twelve months.

11. Claimant subsequently underwent a Division independent medical examination (DIME) with Dr. Timothy Hall on February 15, 2017. Claimant reported ongoing left knee pain along with hip pain, some back pain and some groin pain on the left side. It was reported that the knee hurts "pretty much all of the time." Claimant's left hip pain was documented to be at the iliac crest along into the quadratus and his back, laterally down the hip and into the groin. The pain was described as being "deep" in the hip and groin area and that the pain was significantly increased when sitting for a long period of time and then standing. Physical examination of the left hip revealed tenderness through the left quadratus lumborum, exquisite tenderness through the left psoas, and a lack of hip extension on the left side. Physical examination of the left knee documented range of motion loss and "significant crepitus" on range of motion.

12. In the DIME report, Dr. Hall found that Claimant was not at MMI for his left hip condition. Dr. Hall reviewed and took into account previous medical records documenting left hip pain. These records are reflected at Respondents' exhibits K and L. Claimant had slipped and twisted on September 10, 2012, resulting in bilateral hip pain. He was diagnosed with a bilateral hip strain with iliopsoas muscle spasm. Claimant underwent therapy for the hip and was placed at MMI for that injury on February 19, 2013. Claimant was provided a permanent impairment rating for his right hip by Dr. Robert Kawasaki. Claimant was given a 3% scheduled rating for the right hip for range of motion loss.

13. Dr. Kawasaki specifically noted in the MMI report on February 19, 2013 that Claimant initially was complaining of bilateral hip pain; however, the left hip symptoms resolved after treatment.

14. Dr. Hall recommended Claimant undergo a left hip MRI and diagnostic injections of the left hip. Dr. Hall acknowledged that Claimant has a history of osteoarthritis in his hips and felt the fall may have created further local pathology in the hip. Dr. Hall assigned provisional impairment ratings for both the left knee and left hip.

Dr. Hall assigned 10% for the left knee based on the partial menisectomy per table 40 of the *AMA Guides* and another 10% under the same table for "arthritis due to any cause including trauma; chondromalacia." Dr. Hall assigned a 3% impairment rating of the left hip for range of motion loss. Dr. Hall further opined that Claimant's hip/groin injury was affecting his lower back. Because Claimant does not have a specific impairment for his low back, he felt it was reasonable that the rating for the hip be converted to a whole person rating.

15. Claimant had a MRI of his left hip performed on April 7, 2017. The MRI showed moderate joint space narrowing of the left hip with moderately severe diffuse thinning and irregularity of the articular cartilage, a small joint effusion with synovial irregularity suggesting synovitis, a diffusely degenerated labrum, and tendinosis of the gluteal minimum and medius tendon.

16. Claimant was evaluated by Dr. John Schwappach, an orthopedist, on May 1, 2017, for his ongoing hip complaints. Dr. Schwappach reviewed the MRI, examined Claimant, and took a medical history. He diagnosed Claimant with an acute exacerbation of underlying osteoarthritis of the left hip. Dr. Schwappach felt an intraarticular cortisone injection would be appropriate to try. He also opined that Claimant could contemplate a total hip arthroplasty at an undetermined date in the future. Dr. Schwappach felt the total hip replacement would not be work related due to long standing underlying pathology, despite his acknowledgement that the slip and fall caused an exacerbation of Claimant's underlying osteoarthritis.

17. Claimant decided that he was not interested in pursuing a total hip replacement and this information was conveyed to Dr. Hall via letter on May 26, 2017, from Respondent's counsel. Dr. Hall responded on June 12, 2016, indicating that Claimant would therefore be at MMI effective the date of the evaluation with Dr. Schwappach, May 1, 2017, due to Claimant not wanting further potential curative treatment at that time.

18. Respondents retained Dr. Gwendolyn Henke to perform a records review and she authored a report dated June 30, 2017. It was Dr. Henke's opinion that Claimant's only work-related diagnoses included the displaced anterior horn tear of the left lateral meniscus and a contusion of the left lateral thigh. Dr. Henke opined that Dr. Hall incorrectly assigned a 10% rating for chondromalacia because it was her opinion that Claimant had pre-existing left knee arthritis that was not affected by the work injury. Dr. Henke further opined that Claimant should not receive a rating for his hip because he had pre-existing bilateral hip arthritis prior to the date of the injury. *Id.* Dr. Henke based her opinion solely on the fact that imaging documented arthritis existed prior to the injury. *Id.* She provided no discussion as to whether the fall aggravated or accelerated the underlying condition, or affected Claimant's functional abilities.

19. Dr. Henke testified at hearing on behalf of Respondents. It was her testimony that the meniscectomy performed by Dr. Hewitt was reasonably necessary and related to the work incident, but felt that the chondroplasty that was also performed

was not related to the claim because it was a degenerative finding. She opined that Dr. Hall should not have provided a 10% rating for the chondromalacia because it was a pre-existing condition, i.e., arthritis. She further testified that Claimant's current hip symptoms were unrelated to the January 28, 2016, fall and were solely the result of a pre-existing degenerative condition. It was her opinion that Claimant sustained nothing more than a temporary exacerbation of his hip and that there was "no evidence that he injured the hip in the fall." Based on this, she opined Claimant should not receive any rating for the hip.

20. Claimant testified at hearing regarding his previous hip injury of September 2012. He recalled that he slipped and tweaked his body. Claimant clarified that he slipped, but did not fall, and that the slip caused him to develop some anterior left hip pain. Claimant testified that he received no additional treatment for his hip after being released at MMI on February 19, 2013. Claimant indicated that he was "fine" leading up to the January 28, 2016, incident, and that he was able to perform his job without limitation or pain. His job required him to walk or otherwise be on his feet for approximately seven out of eight hours per day. It was not until after the fall in January of 2016 that he felt his knee and left hip begin tightening up and experiencing pain. His left hip continues to cause him pain to this day and he continues to take over the counter medication to help alleviate this pain. Claimant explained that he did not have left hip pain prior to the fall, and that the left hip pain has been continuous since the fall.

21. The ALJ finds that Dr. Hall appropriately rated Claimant's chondromalacia as being causally related to the January 28, 2016, incident. There is no dispute that Claimant likely had pre-existing arthritis in his left knee prior to the fall at work; however, there is no credible or persuasive evidence to suggest Claimant's pre-existing arthritis caused any significant pain or functional limitation prior to January 28, 2016. Table 40 of the *AMA Guides* addresses impairment ratings of the lower extremity for other disorders of the knee. Number five states a 0-20% rating can be provided for "Arthritis due to any cause including trauma; chondromalacia."

22. The ALJ finds that the traumatic event of January 28, 2016, more likely than not permanently aggravated an underlying condition in Claimant's left knee due to the fact that the left knee was reportedly asymptomatic prior to the fall. Because the *AMA Guides* allows for a rating for arthritis from "any cause" and also for chondromalacia, which was treated surgically under this claim by Dr. Hewitt, Dr. Hall did not err in finding the chondromalacia to be causally related and assigning the additional 10% rating accordingly.

23. Furthermore, the DIME report of Dr. Hall documents that Claimant was having back pain associated with his left hip injury at the time of his evaluation. Dr. Hall was able to determine the pain was going up Claimant's iliac crest into the quadratus lumborum muscle of the back. Physical examination confirmed Claimant's subjective complaints by documenting tenderness through the left quadratus lumborum. The ALJ therefore finds that Claimant has functional impairment not on the schedule of impairments and the 3% scheduled rating is converted to a 1% whole person rating.

CONCLUSIONS OF LAW

General Legal Principles

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

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

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

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

5. For an injury to be compensable under the Act, it must “arise out of” and “occur within the course and scope” of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any

compensation is awarded. Section 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the judge. *Faulkner,* 12 P.3d at 846.

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

7. The ALJ finds Claimant to be credible. Claimant's testimony regarding his left hip condition prior and subsequent to the January 28, 2016 incident is corroborated by the medical records. There are no records to suggest that Claimant had ongoing symptoms with his left hip after being placed at MMI in 2013 for his 2012 injury. In fact, it is documented that his left hip complaints had entirely resolved prior to MMI and that it was his right hip that was given a permanent impairment rating in 2013.

Overcoming the DIME regarding Causation of the Left Hip Injury and Resulting Permanent Impairment

8. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). To overcome a DIME physician's opinion regarding permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physician's determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* W.C. No. 4-782-625 (ICAO, May 24, 2010).

9. The ALJ finds that Respondent failed to prove by clear and convincing evidence that Claimant's left hip injury and resulting impairment are not causally related to the January 28, 2016 fall. Claimant did sustain an injury to both of his hips in 2012 and was released at MMI for that claim on February 19, 2013, with no permanent impairment to his left hip. The MMI report specifically stated that Claimant's left hip symptoms had resolved. There are no medical records between February 19, 2013,

and January 28, 2016, to rebut Claimant's assertions at hearing that his left hip was asymptomatic prior to the January 2016 fall.

10. The ALJ finds the opinions of Dr. Henke to be unpersuasive. Dr. Henke opined that Claimant's ongoing symptoms are entirely a result of his underlying arthritis and that the fall on January 28, 2016, caused no more than a temporary exacerbation of his pain complaints. Her opinions are not supported by the record. Claimant reported to his physician on the day of the injury that he landed on his left side and was experiencing left hip pain. Claimant routinely reported ongoing left hip pain through the duration of his treatment to his multiple physicians and therapists as documented in the record. Claimant reported ongoing hip pain at the time of his MMI evaluation on October 4, 2016. He continued to report the same ongoing pain to Dr. Hall on February 15, 2017, and again at hearing on July 26, 2017. Claimant has reported left hip pain continuously for approximately 18 months from January 28, 2016, through July 26, 2017, that did not exist prior to January 28, 2016.

11. Therefore, the ALJ finds that Claimant sustained a permanent aggravation that warrants an impairment rating. Respondents have failed to show by clear and convincing evidence that Dr. Hall erred in finding Claimant's hip condition to be causally related to the admitted injury.

Overcoming the DIME regarding Causation of Claimant's Left Knee Chondromalacia

12. The ALJ finds that Dr. Hall appropriately rated Claimant's chondromalacia as being causally related to the January 28, 2016, incident. There is no dispute that Claimant likely had pre-existing arthritis in his left knee prior to the fall at work; however, there is no credible or persuasive evidence to suggest Claimant's pre-existing arthritis caused any significant pain or functional limitation prior to January 28, 2016. Table 40 of the *AMA Guides* addresses impairment ratings of the lower extremity for other disorders of the knee. Number five states a 0-20% rating can be provided for "Arthritis due to any cause including trauma; chondromalacia."

13. The ALJ finds that the traumatic event of January 28, 2016, more likely than not permanently aggravated an underlying condition in Claimant's left knee due to the fact that the left knee was reportedly asymptomatic prior to the fall. Because the *AMA Guides* allows for a rating for arthritis from "any cause" and also for chondromalacia, which was treated surgically under this claim by Dr. Hewitt, Dr. Hall did not err in finding the chondromalacia to be causally related and assigning the additional 10% rating accordingly.

Conversion of the 3% Scheduled Rating of the Left Hip

14. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. Section 8-42-107(l)(a), C.R.S. The term "injury" contained in Section 8-42-107(l)(a), C.R.S. "refers to the situs of the

functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390, 1391 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App.1996). Depending upon the facts of a particular claim, therefore, damage to the lower extremity may or may not reflect functional impairment enumerated on the schedule of benefits. *See Strauch v. PSL Swedish Healthcare System, supra; see also Abeyta v. Wackenhut Services*, W.C. No. 4-519-399 (September 16, 2004).

15. The question of whether the claimant sustained a scheduled injury within the meaning of Section 8-42-107(2), C.R.S. or a whole person medical impairment compensable under Section 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. *Walker v. Jim Fuoco Motor Co., supra*. The DIME report of Dr. Hall documents that Claimant was having back pain associated with his left hip injury at the time of his evaluation. Dr. Hall was able to determine the pain was going up Claimant's iliac crest into the quadratus lumborum muscle of the back. Physical examination confirmed Claimant's subjective complaints by documenting tenderness through the left quadratus lumborum. The ALJ therefore concludes that Claimant has functional impairment not on the schedule of impairments and the 3% scheduled rating is converted to a 1% whole person rating.

Medical Maintenance Care

16. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for Grover medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended, nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v ICAO*, 992 P.2d 701 (Colo. App. 1999). Claimant must prove entitlement to Grover medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc*., 77 P.3d 863, 866 (Colo. App. 2003).

17. The ALJ finds that Claimant has proven by a preponderance of the evidence that he is entitled to a general award of future medical benefits for his left knee and left hip injuries stemming from the January 28, 2016, industrial injury. Claimant's ATP, Dr. Counts, indicated at the time of his MMI determination that Claimant should be afforded maintenance care to follow up with himself or Dr. Hewitt as needed for the next twelve months.

18. As of the July 26, 2017, hearing, both Claimant's left knee and hip remain symptomatic, and Claimant received a left hip injection as recently as June 28, 2017, for his ongoing claim related left hip pain. Claimant followed up with Dr. Counts as recently

as June 30, 2017, with complaints of ongoing left knee and left hip pain, for which medication was prescribed and a work excuse from June 28, 2017, through July 2, 2017 was given. Claimant is therefore entitled to all reasonable, necessary, and related medical care to prevent deterioration of his knee and left hip.

ORDER

1. Claimant's left hip injury is causally related to the January 28, 2016, incident.

2. Claimant's 3% scheduled rating for the left hip is converted to a 1% whole person rating.

3. Claimant's left knee chondromalacia and 10% rating for said chondromalacia are causally related to the January 28, 2016, incident and Respondents shall pay a PPD award in accordance with this rating, as well as the additional rating for the knee provided by Dr. Hall that was not challenged by Respondents, for a combined 19% impairment rating for the left knee.

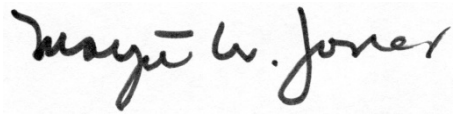
4. Respondents shall pay for all reasonable, necessary, and related treatment for Claimant's ongoing left knee and left hip symptoms that is intended to prevent further deterioration of his condition consistent with *Grover, supra*.

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

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

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

DATED: January 11, 2018



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

ISSUES

I. Whether Claimant established her bilateral knee injuries – including her torn meniscus - were caused by the June 4, 2015, work accident, and that she was not at MMI on November 3, 2015.

II. Whether Claimant is entitled to reasonable and necessary medical treatment for her knees due to her June 4, 2015, work accident.

III. Whether Claimant's November 25, 2015, knee surgery is related to the June 4, 2015, work accident.

IV. Whether Claimant's November 25, 2015, knee surgery was reasonable and necessary.

V. The issue of whether Claimant's November 25, 2015, knee surgery was authorized and provided by an authorized provider was reserved by the parties.

FINDINGS OF FACT

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

1. On June 4, 2015, Claimant was involved in an accident while taking a break at work.

2. Although Respondents have admitted liability for the accident, there is a dispute regarding the extent of Claimant's injuries which were caused by the accident.

3. There is surveillance video of the accident. The video, however, is very grainy and not real clear.

4. On June 4, 2015, Claimant took her service dog outside to go to the bathroom. Claimant took her dog to a bark covered island in the parking lot. While Claimant was standing just next to the island, with her service dog on the island, a car backed into Claimant. The car hit the Claimant's backside and caused her to fall forward onto the island. Claimant landed on her hands and knees and then immediately stood up.

5. At the time of impact, Claimant's backside was just about parallel with the back of the car.

6. An ambulance was called and when the ambulance arrived, Claimant was ambulatory. Claimant complained of generalized aching over her entire body.

Claimant denied any localized pain which was greater in any particular part of her body. She said she felt like she was hit by a football player. Although Claimant did complain about numbness and tingling in her lower extremities, she said it was normal due to her preexisting history of cerebral pseudotumor syndrome.

7. Prior to the accident, Claimant had been diagnosed with cerebral pseudotumor syndrome. The condition necessitated the need for her service dog. Claimant also suffered from a prior left foot fracture of the fifth metatarsal which was diagnosed around August 7, 2013.

8. The ambulance took Claimant to Denver Health. A Denver Health Report of Injury, dated June 4, 2015, contains triage notes. The notes indicate Claimant complained of back pain and also indicated that she will call back to give additional information. On June 5, 2015, Claimant called back and provided additional information about the accident and her complaints. Claimant complained of pain in her upper shoulders, neck, and mid-back down to her knees.

9. On June 4, 2015, Claimant's chief complaint in the emergency room was back pain. X-rays were taken of Claimant's back and an ultrasound was taken of her abdomen. The x-rays and ultrasound were normal. Claimant was diagnosed with a lumbar and cervical strain. Claimant was ultimately released the same day.

10. On June 5, 2015, Claimant went to Concentra Medical Center and was evaluated by Eliazbeth Palmer, PA-C. Claimant told PA Palmer that she was standing with her back to the parking lot when a car backed into her. Claimant stated that she twisted funny and injured her back. She also stated that she stumbled down but did not have a traumatic fall onto her back or head. She further stated that she was there for neck pain as well as left foot pain. Due to her left foot pain, Claimant was advised to wear her walking boot which she had due to her prior fracture of her left fifth metatarsal. Claimant did not complain of any knee pain or swelling.

11. On June 8, 2015, Claimant returned to Concentra and was seen by Dr. Carlos Guerrero. Claimant complained of worsening neck and back pain. Claimant also stated that her hands were numb and tingling at times. She also complained of worsening headaches, with visual disturbances, which included seeing flashed lines. Claimant did not complain of any knee pain or swelling.

12. On June 8, 2015, Claimant went to Advanced Orthopedics due to her left foot pain. Claimant was evaluated by Dr. Keith Jacobson. The medical report indicates Claimant presented with "pain and fracture on the left side." Claimant indicated that her left foot had been symptomatic since her June 4, 2015, auto accident. Dr. Jacobson evaluated Claimant and concluded that he did not think she had a fracture involving her left fifth metatarsal. He did, however, comment that Claimant had significant complaints of belly pain, back and cervical pain

along with pain radiating around her left leg. Claimant did not, however, complain of any knee pain or swelling.

13. On June 9, 2015, Claimant went to the emergency room due to worsening back pain, with radiation into her legs. Claimant did not complain of any knee pain or swelling.

14. On June 18, 2015, Claimant returned to Concentra and was seen by Dr. Danahey. Claimant complained of back pain with radiation into her left lower extremity. Dr. Danahey diagnosed Claimant as suffering from a lumbar strain. He continued Claimant's physical therapy and considered a re-evaluation with Dr. Bennett for Claimant's worsening headaches. He also referred Claimant to a physical medicine specialist. Claimant did not complain of any knee pain or swelling.

15. On June 30, 2015, Claimant was evaluated by Dr. Draper. Claimant complained of chronic headaches which she alleged became worse since her accident. Claimant also complained of back pain with symptoms radiating into her left lower extremity. Claimant stated that she was going outside of the workers' compensation system to see a spine physician for her back pain. Claimant also complained of neck pain. Claimant did not complain of knee pain or swelling.

16. On July 8, 2015, Claimant went to Advanced Orthopedics and was evaluated by Dr. Michael Shen. Claimant presented with acute low back pain with lower extremity radiculopathy for the past month. Claimant did not complain of any knee pain or swelling. Dr. Shen evaluated Claimant and reviewed the MRI of her lumbar spine. Since he was not an authorized provider, they discussed transferring Claimant's care to him. He also recommended steroid injections for her low back pain.

17. On July 9, 2015, Claimant returned to Dr. Danahey. Claimant complained of significant back and left leg pain. Claimant also started complaining of right foot pain, bilateral hand pain, and headaches. Claimant did not complain of any knee pain or swelling. Dr. Danahey diagnosed Claimant as suffering from a lumbar strain.

18. Between June 6, 2015, and July 23, 2015, Claimant did not have any knee pain or swelling.

19. On or about July 24, 2015, according to the Genex case manager notes dated August 3, 2015, Claimant advised her physical therapist that her right knee was bothering her due to her altered gait. Claimant did not indicate her knee had been hurting since the accident with the motor vehicle. The physical therapist taped Claimant's right foot in an attempt to correct her altered gait. Therefore, Claimant noted the onset of some mild right knee pain 50 days after the June 4, 2015, accident.

20. On July 29, 2015, Claimant was again evaluated by Dr. Danahey. Claimant reported "compensatory" right knee pain. Claimant indicated that she had an extensive surgical procedure to her right knee when she was 12. Again, Claimant did not indicate her right knee pain started at the time of the work accident.

21. On July 29, 2015, Claimant went to physical therapy. It was noted that she had a 50% reduction in knee pain with tape to supinate her right foot.

22. On July 30, 2015, Claimant was evaluated by Dr. Aschberger. Claimant reported right knee pain. Dr. Aschberger evaluated her knee and noted mild crepitus and that her knee looked a little bit swollen on the lateral side and patella. Dr. Aschberger did not note any other abnormalities regarding her knee.

23. On August 1, 2015, while walking down some stairs, Claimant developed the immediate onset of severe pain and felt a pop in her right knee. While walking down the stairs, Claimant tore her meniscus.

24. On August 3, 2015, Claimant called the medical case manager on her case. According to the case manager notes, Claimant indicated she hurt her knee on August 1, 2015, when she was going down some stairs and her right knee popped. Claimant also stated that her knee had been bothering her for about 10 days. Claimant stated that the physical therapist taped her foot last week as her gait was altered.

25. On August 3, 2015, Claimant went to Advanced Orthopedics and was evaluated by Dr. James Ferrari. Claimant told Dr. Ferrari that her right knee symptoms began on June 4, 2015, the date of the car accident. Claimant also stated that her symptoms occur constantly and they are moderate to severe. Dr. Ferrari ordered an MRI.

26. On August 6, 2015, Claimant was evaluated by Dr. Andy Motz at Advanced Orthopedics. Claimant stated that her symptoms were acute and traumatic and began on June 4, 2015, after being hit by a car. Dr. Motz reviewed the MRI and indicated that it demonstrated an acute tear of the medial meniscus. Dr. Motz also stated that he was able to review the surveillance video and that he thought it was a pretty high energy injury. He also stated that "I'm surprised she was able to walk away from it. There was a large valgus stress."

27. On August 7, 2015, Claimant returned to Dr. Danahey and he evaluated her right knee. The medical report from this visit is brief and does not discuss the cause of Claimant's right knee pain.

28. On August 18, 2015, Claimant was evaluated by Dr. Aschberger. Claimant told Dr. Aschberger that she tore her meniscus in her right knee while walking down some stairs. Dr. Aschberger noted that he reviewed her case regarding the right knee with Dr. Danahey. He also noted that physical therapy had apparently identified some pelvic asymmetries and some intervention was performed. Dr.

Aschberger stated that although it could be possible that she suffered some aggravation of the knee, it is not likely that any pelvic asymmetries were a direct source of her meniscal tear. He indicated that he would not expect an acute onset if pelvic asymmetries were involved.

29. On November 3, 2015, Claimant was evaluated by Dr. Danahey. Dr. Danahey was one of Claimant's authorized treating physicians. His final assessment regarding her work related injury was lumbar strain and muscle spasm. Dr. Danahey did not relate Claimant's right knee condition to her work accident. He placed Claimant at MMI as of November 3, 2015, without any impairment.

30. On November 25, 2015, Claimant underwent surgery on her right knee. Dr. Motz performed a right knee arthroscopy, medial meniscal repair, partial lateral meniscectomy, and resection of multiple bone spurs with chondroplasty.

31. On January 13, 2016, Claimant returned to Dr. Danahey. He noted that the right knee injury was not related to the June 4, 2015, accident.

32. On March 3, 2017, Claimant underwent an IME with Dr. Cebrian. The purpose of the IME was to determine the extent of her injuries from the June 4, 2015, accident and to determine whether she had any permanent impairment. While being evaluated by Dr. Cebrian, Claimant attributed her initial knee problems to her off balance gait. She indicated that she first noticed her knee pain during physical therapy. She then told Dr. Cebrian that she ultimately tore her meniscus while walking down some stairs. Dr. Cebrian concluded that it is not medically probable that Claimant's right knee complaints are causally related to the June 4, 2015, accident as she did not have right knee complaints for almost 2 months after the injury and when she did have significant right knee complaints, they were reported to have occurred while walking down stairs when she experienced a pop in her right knee. He indicated that there was a temporal delay of almost 2 months after the June 4, 2015, injury. Dr. Cebrian also indicated that Claimant attributed her right knee complaints due to gait abnormalities secondary to the June 4, 2015, claim and that Claimant's gait abnormalities would have been of limited duration as she was in a walking boot for only a few weeks. Dr. Cebrian went on to state that gait related abnormalities can lead to temporary muscular soreness from limping or inactivity, however, it is not medically probable that a gait related abnormality would cause, aggravate, or accelerate underlying meniscal pathology.

33. Dr. Cebrian also commented on the video of the accident. Dr. Cebrian stated that he reviewed two different videos of the incident. He indicated that although both videos are not real clear, Claimant can be seen being pushed forward by the car and her knees bend in flexion. He went on to indicate that there was not valgus stress on the knee joint as she was hit from behind and that in order for a valgus stress to occur, Claimant would have to have been standing sideways when hit by the car.

34. Dr. Cebrian also stated in his report that it was his medically probable opinion that Claimant's right knee complaints are related to the degenerative pathology in her right knee. Dr. Cebrian stated that research completed in the past several years has shown that it is more likely than not that Claimant's medical meniscal tear was not caused by trauma, but rather occurred as a consequence of her underlying degenerative pathology in her right knee. Dr. Cebrian stated that this was further substantiated by her history of no traumatic event with a temporal relationship to the development of symptoms. He also stated that it is clear that arthroscopic surgeries in this scenario have very little chance for long term success. He went on to state that there is often the assumption that the meniscal tear is a reflection of trauma sustained as opposed to being due to the underlying degenerative osteoarthritis. He also stated that it is more likely than not that the trauma reported did not cause the medial meniscus tear. He also said that the loss of joint cartilage is considered the structural hallmark of osteoarthritis. He also indicated in his report that the last decades of research have shown "osteoarthritis to be a whole joint disorder involving additional tissues such as subchondral bone, ligaments, synovial membrane, muscle, and the menisci." He went on to state that "Osteoarthritis can lead to spontaneous horizontal, flat, and/or complex tears; maceration; or destruction."

35. Dr. Cebrian also stated in his report that it is not medically probable that Claimant's left knee complaints are casually related to the June 4, 2015, incident due to the temporal delay in the development of those complaints which occurred even later than the right knee complaints.

36. Dr. Cebrian also testified at hearing. Dr. Cebrian testified consistent with his reports. Dr. Cebrian testified about Claimant's MRI findings. He testified that Claimant's MRI demonstrated that in the medial aspect of her knee, where Claimant had the tear in her medial meniscus, there was degeneration of the cartilage itself over the medial femoral condyle in which approximately 50% had worn away. He also testified that the radiologist noted extrusion or elevation of a portion of the medial meniscus around the posterior horn of the medial meniscus at the root attachment. He also testified that there were osteophytes in all three compartments of the knee, which also goes along with osteoarthritis and degeneration in the knee. He also indicated that there were cystic changes in the knee itself at the tibial attachment of the PCL which also goes along with the long-term degenerative condition. He also stated that the radiologist noted there was intrasubstance degeneration in the posterior horn of the meniscus. Lastly, he noted that the MRI was negative regarding any injury to the medial collateral ligament.

37. Dr. Cebrian concluded that Claimant did not injure her left or right knee on June 4, 2015.

38. Dr. Cebrian concluded that Claimant did not tear her meniscus or tear her medial collateral ligament in her right knee on June 4, 2015.

39. Dr. Cebrian also concluded that Claimant's June 4, 2015, accident - including any altered gait caused by the accident - did not aggravate or accelerate Claimant's underlying right or left knee conditions.

40. The ALJ finds Dr. Cebrian's opinions to be credible and persuasive.

41. The ALJ is persuaded by the lack of a temporal relationship between the accident and the development of ongoing pain and swelling in Claimant's right or left knee. Although Claimant did complain of generalized pain from her neck down to her knees the day after the accident, she did not have the onset of persistent pain and swelling in her right knee until approximately 50 days after the accident. The time between the work accident and symptoms in her left knee is even longer – approaching almost two years. The ALJ is also persuaded by the degenerative changes described by Dr. Cebrian which were evident on Claimant's MRI and included intrasubstance degeneration of the meniscus. Although the intrasubstance degeneration was noted in the posterior horn, and according to Dr. Motz the tear was located in another portion of the meniscus, the fact that the meniscus was showing signs of degeneration supports Dr. Cebrian's opinion that the torn meniscus was due to degeneration and not due to an acute injury.

42. Dr. Cebrian also indicated that because Claimant's right knee condition and torn meniscus was due to degeneration, the surgery performed by Dr. Motz in November of 2015 would not provide long term relief. As predicted by Dr. Cebrian, Claimant has ongoing pain in her right knee and Dr. Motz subsequently indicated in June of 2017 that further surgery may be necessary. This further supports Dr. Cebrian's opinion, which the ALJ credits, that Claimant's knee complaints relate to the preexisting osteoarthritis – degeneration – and not he work accident.

43. On March 23, 2017, Claimant was evaluated by Dr. Motz for complaints of right and left sided knee pain. Dr. Motz indicated in his report that:

> Ally was struck by a car. There was video footage of this available and I have reviewed this video. The video is quite striking showing a significant valgus stress to the right knee and then the patient landed on both knees. She immediately got up and ambulated which is quite amazing to me given the significance of the trauma.

44. Dr. Motz also stated in his March 23, 2017, report that Claimant has had ongoing pain in her left knee as well since the June 4, 2015, accident and that they were waiting to see if her left knee pain would improve with time. Such statement is inconsistent with Claimant's prior medical records. Claimant's prior medical records, including those of Dr. Motz, do not indicate Claimant has had left sided knee pain since June 4, 2015. In addition, the records do not indicate Dr. Motz has been waiting since June of 2015 to see if her left sided knee pain improved

before considering additional treatment. The ALJ does not find Dr. Motz' statements regarding the onset and duration of Claimant's left knee pain to be credible. Therefore, the ALJ does find Dr. Motz' opinions regarding causation to be persuasive.

45. On April 19, 2017, Claimant underwent a Division of Workers' Compensation Independent Medical Examination ("DIME"), which was performed by Dr. John Hughes. As set forth in his report, Dr. Hughes obtained her history, performed a physical examination, reviewed her medical records, and reviewed the video of the accident. At the time of the evaluation, Claimant complained of right-worse-than-left knee pain of an achy quality. Dr. Hughes reviewed and considered Dr. Aschberger's July 30, 2015, report in which he referenced Claimant's complaints. He also reviewed and considered Dr. Aschberger's August 18, 2015, report in which Claimant noted that she tore her meniscus while walking down some stairs and where Dr. Aschberger noted that he and Dr. Danahey discussed Claimant's claim and determined the knee was not related to the work accident.

46. Dr. Hughes disagreed with Dr. Danahey and Dr. Cebrian that there was no evidence of permanent impairment due to the work accident. Dr. Hughes determined Claimant suffered impairment to her lumbar spine and provided her a 10% whole person impairment rating.

47. Dr. Hughes was also asked to address Claimant's cervical spine. Dr. Hughes determined that although Claimant had early documentation of cervical spine pain, there was no evidence of persistent traumatic pathology in the region of her cervical spine. Therefore, he did not rate her cervical spine.

48. Dr. Hughes was also asked to address her right hand. Dr. Hughes stated that Claimant gave him a clear history of striking the motor vehicle with her right hand. Dr. Hughes noted that in the video he reviewed, he saw no evidence of such event. He also noted that it was not discussed early on in the medical records, but was discussed later on. Therefore, he determined that her right hand complaints were not related to the work accident.

49. Dr. Hughes was also asked to address Claimant's mid back – thoracic spine. Dr. Hughes did not find any separate and distinct traumatic pathology in her thoracic spine. He determined that any pain complaints in her thoracic spine were merely reactive to the low back. Therefore, he determined that she was not entitled to an impairment rating for her thoracic spine.

50. Dr. Hughes was also asked to address Claimant's bilateral knees. Dr. Hughes noted that there is evidence that Claimant was struck by the motor vehicle and that she fell forward. However, he also noted that there is no documentation of initial knee injuries, and emergence of right knee symptoms in the medical records came two months later, and that the history regarding the onset of her knee complaints is "rather clouded." Therefore, Dr. Hughes determined

Claimant's bilateral knee problems were not related to her work-related collision and fall on June 4, 2015.

51. Dr. Hughes concluded that Claimant reached MMI on November 3, 2015, and that she sustained a 10% impairment of the whole person pursuant to the AMA Guides.

52. The ALJ finds Dr. Hughes' opinions to be credible and persuasive.

53. On May 15, 2017, Respondents filed a Final Admission of Liability consistent with Dr. Hughes' DIME report, which determined Claimant reached MMI on November 3, 2015, and suffered a 10% whole person impairment to her lumbar spine. Respondents denied liability for maintenance medical treatment.

54. On June 19, 2017, Claimant was evaluated by Dr. Motz for bilateral knee pain. Due to her pain complaints, Dr. Motz ordered an MRI of each knee. Dr. Motz also wrote a report that day and again indicated Claimant suffered a medial meniscal injury due to the June 4, 2015 accident. He also indicated that Claimant suffered a medial collateral ligament injury at the same time. He further noted that Claimant had some patellofemoral stress syndrome that appeared chronic. He went on to state that the June 4, 2015, accident could have easily exacerbated her bilateral patellofemoral stress syndrome.

55. On June 22, 2017, Claimant returned to Dr. Motz to go over the results of her knee MRIs. Dr. Motz stated in his report that:

> Both knees show progression of patellofemoral arthritis which is not surprising given the injury where she had that huge stress when she was struck by the car and then fell on both knees. I think this progression of arthritis in the patellofemoral joint is secondary to this injury. It should be part of her claim. The medial meniscal repair appears intact on this follow-up MRI and the medial collateral ligament injury appears to have healed. I discussed further treatment options including steroid injections, Synvist injections, arthroscopic debridements, partial knee replacements and total knee arthroplasty. Given the extent of the arthritis she is probably going to need either partial or total knee arthroplasty. She will think over these options and let me know if she decides to proceed with any of them.

56. On September 8, 2017, Dr. Cebrian issued a supplemental report based on his receipt and review of additional medical records. The review of additional records did not alter the opinions previously rendered by Dr. Cebrian. He again concluded that Claimant's knee conditions were not caused or aggravated by the June 4, 2015, accident.

57. Dr. Motz testified, via deposition, on November 16, 2017. Dr. Motz testified consistent with his records and reports. Dr. Motz testified that Claimant suffered a radial tear of her meniscus due to the work accident. Dr. Motz also testified that based on his review of the video, he determined that the car hit Claimant on the side of her knee and it put "valgus stress" on her knee. He went on to testify that a radial tear of the meniscus is consistent with being hit on the side of the knee. He also testified that Claimant suffered an injury to her medial collateral ligament.

58. Dr. Motz testified that he disagreed with Dr. Cebrian's opinion that Claimant's torn meniscus was degenerative and due to her osteoarthritis. Dr. Motz testified that the type of tear he observed was inconsistent with degeneration. He also testified that Claimant could not have a degenerative tear of her meniscus because Claimant did not have degenerative arthritis in the compartment of the knee that suffered the meniscal tear.

59. This ALJ does not find Dr. Motz' opinions to be persuasive for a number of reasons. First, Dr. Motz' testimony and reports indicate that the accident and associated trauma to Claimant's right knee was significant. For example, in his August 6, 2015, report, he stated that:

> I was able to review surveillance video footage of the auto versus pedestrian accident that occurred on June 4, 2015. It was a fairly high energy injury. I'm surprised she was able to walk away from it. It was a large valgus stress.

Dr. Motz again stated in his June 19, 2017, report that:

> I'm surprised she was able to walk away as there was significant stress to the knee.

Then, after reviewing Claimant's 2017 MRIs which showed progression of Claimant's arthritis, Dr. Motz indicated in his June 22, 2017, report that Claimant's:

> [P]rogression of patellofemoral arthritis is not surprising given the injury where she had that huge stress when she was struck by the car and then fell to both knees.

The magnitude of the accident and resulting injury described by Dr. Motz in his medical reports and deposition testimony is in stark contrast to Claimant's medical records after the accident which fail to document a discrete injury to either knee and fail to document the onset and continuation of knee pain or swelling after the accident. According to Dr. Motz, the magnitude of the accident tore Claimant's medial collateral ligament and meniscus in her right knee. As indicated by Dr. Motz, an injury like this would be expected to prevent someone from walking after the accident. Despite Dr. Motz' opinions, Claimant got up right after the accident and was able to walk around. In addition, except for a

generalized comment of pain from her neck down to her knees on June 5, 2015, Claimant had no knee pain or swelling for almost two months. Moreover, when Claimant experienced some knee pain in July of 2015, she associated it with having an altered gait. Then, Claimant associated her increase in knee pain and torn meniscus to walking down stairs on August 1, 2015, when she felt a pop in her knee.

Second, Dr. Motz testified that the temporal proximity between the incident and onset of symptoms is important in analyzing causation. He testified that he was advised by Claimant that she has had knee pain since the incident. Dr. Motz also testified that although it is not always true that people have pain immediately after tearing their meniscus, they do develop pain as time goes on. And, when pressed and asked if most of his patients would develop pain in one to two weeks after an accident, he said yes. Although the ALJ does not find Dr. Motz' testimony persuasive that it could take some patients 1-2 weeks to develop pain after tearing their meniscus, Claimant did not develop specific knee pain within 1-2 weeks of the accident. As stated above, Claimant did not develop knee pain for almost two months.

Third, Dr. Motz testified that meniscal injuries usually do not swell up until the following day. Claimant's medical records fail to demonstrate that Claimant developed swelling in her right knee shortly after the accident. The first time there was any swelling noted was in Dr. Aschberger's July 30, 2015 medical report.

Fourth, Dr. Motz also indicated that the June 4, 2015, accident aggravated Claimant's bilateral patellofemoral stress syndrome. In essence, Dr. Motz indicated that Claimant's injury on June 4, 2015, was significant enough to aggravate her underlying patellofemoral stress syndrome in both knees, but yet was not significant enough to cause immediate and persistent pain in both knees.

Fifth, as found above, Dr. Motz stated in his March 23, 2017, report that Claimant has had ongoing pain in her left knee since the June 4, 2015, accident and that they were waiting to see if her left knee pain would improve with time. Such statement by Dr. Motz is inconsistent with Claimant's prior medical records. Claimant's prior medical records, including those of Dr. Motz, do not indicate Claimant has had left sided knee pain since June 4, 2015, and that Dr. Motz was waiting to see if her left sided knee pain would improve before considering additional treatment.

Therefore, this ALJ does not credit Dr. Motz' opinions regarding causation.

60. Claimant testified inconsistently regarding what information she reported to physicians and medical providers regarding pain and symptoms in her right knee. On direct examination, Claimant recalled reporting the condition in her knee to Drs. Danahey and Aschberger. However, on cross examination, Claimant showed a remarkable lack of memory in what she reported to multiple other

physicians. Therefore, the ALJ finds Claimant is not a reliable historian regarding the onset and duration of her knee pain.

61. Claimant did not injure her left or right knee on June 4, 2015.

62. Claimant did not injure her meniscus or medial collateral ligament in her right knee on June 4, 2015.

63. The June 4, 2015, accident - including any altered gait caused by the accident - did not cause, aggravate, or accelerate any condition in Claimant's right or left knee.

64. The June 4, 2015, accident did not cause the need for any medical treatment to either of Claimant's knees. Any need for treatment was due to Claimant's preexisting degenerative arthritis.

65. Claimant reached MMI on November 3, 2015.

CONCLUSIONS OF LAW

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

GENERAL PROVISIONS

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

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

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

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Where the medical evidence is subject to conflicting inferences, it is the ALJ's sole prerogative to resolve the conflict. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

Claimant is entitled to receive medical treatment for conditions that were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms after a work related accident does not require the ALJ to conclude that the work accident caused the symptoms, or that the work accident aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms after a work related accident may represent the result of the natural progression of a pre-existing condition that is unrelated to the work accident. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

I. Whether Claimant established that her bilateral knee conditions – including her torn meniscus - were caused by the June 4, 2015, work accident, and that she was not at MMI on November 3, 2015.

At the outset of the hearing, the parties agreed that the issue to be decided was whether Claimant reached MMI on November 3, 2015, as determined by an authorized treating physician and the DIME. In this case, whether Claimant reached MMI on November 3, 2015, is dependent upon whether Claimant suffered an injury to either of her knees during the June 4, 2015, accident.

Claimant asserted that because the issue before the court involves the compensability or relatedness of an extremity-scheduled injury, or injuries, Claimant only had to establish by a preponderance of the evidence that her knee conditions were caused by the industrial accident. Respondent, on the other hand, asserted Claimant had to overcome the opinion of the DIME regarding MMI by clear and convincing evidence in order to establish that her knee conditions were caused by the industrial accident.

The requirements for overcoming a DIME regarding MMI by clear and convincing evidence under §8-42-107(8) apply to non-scheduled and scheduled injuries. *See Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion*, W.C. 4-732-992 (ICAO April 26, 2010).

Although Claimant contends *Egan v. Industrial Claim Appeals Office of State*, 971 P.2d 664, (Colo. App. 1998) provides that disputes regarding the cause of an extremity injury is not subject to the DIME procedures and the heightened burden of proof, the ALJ is not persuaded that *Egan* applies to the facts of this case. The language referred to by Claimant in *Egan* indicates that the preponderance standard applies to cases that involve only an extremity or scheduled condition. In this matter, Claimant's alleged injuries involve scheduled and non-scheduled conditions and Claimant is challenging a finding of MMI. Therefore, the ALJ does not find *Egan* controls in this matter.

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of Claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that Claimant needs additional medical treatment (including surgery) to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining Claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora*, WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.*, W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra.* Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

In this Case, Dr. Hughes - the Division Examiner - determined Claimant reached MMI on November 3, 2015. He also determined that Claimant's bilateral knee conditions were not related to the June 4, 2015, work accident. As found, Dr. Hughes noted that there is evidence that Claimant was struck by the motor vehicle and that she fell forward. However, he also noted that there was no documentation of initial knee injuries, and emergence of right knee symptoms in the medical records came two months later, and that the history regarding the onset of her knee complaints is "rather clouded." Therefore, Dr. Hughes determined Claimant's bilateral knee problems and need for treatment was not caused by the work-related collision and fall on June 4, 2015. The ALJ found Dr. Hughes' opinion to be credible and persuasive.

In addition, Claimant was evaluated by Dr. Cebrian. The ALJ found that Dr. Cebrian credibly opined that Claimant's right and left knee problems were due to Claimant's preexisting arthritis and the work accident did not cause, aggravate, or accelerate Claimant's underlying arthritis and necessitate the need for medical treatment. As found, Dr. Cebrian credibly opined that Claimant's torn meniscus, for which she had surgery on November 25, 2015, was degenerative and was not caused or aggravated by the June 4, 2015, accident or any altered gait. As found, Dr. Cebrian also credibly opined that because the torn meniscus was degenerative in nature, surgery was unlikely to provide long term relief. Consistent with Dr. Cebrian's opinion, Dr. Motz has indicated that additional treatment is necessary and such treatment could include a partial or total knee replacement. In other words, the surgery performed by Dr. Motz did not provide long term relief because Claimant's knee condition is degenerative and was not caused by a specific traumatic event as alleged by Claimant. Moreover, like Dr. Hughes, Dr. Cebrian's opinion was also based on the fact that Claimant did not complain of specific and persistent knee pain and swelling until almost two months after the accident.

Claimant contends that the medical evidence and opinions provided by Dr. Motz establishes by clear and convincing evidence that she was not at MMI on November 3, 2015, because she suffered from a torn meniscus in her right knee which required surgery at the time she was placed at MMI, and that she had problems with her left knee as well. As found, Dr. Motz' opinions regarding causation are not found to be credible. As found, the magnitude of the accident and resulting injury described by Dr. Motz in his various medical reports and deposition testimony is in stark contrast to the Claimant's medical records after the accident. According to Dr. Motz, the magnitude of the accident tore Claimant's medial collateral ligament and meniscus in her right knee. As indicated by Dr. Motz, an injury like this would be expected to prevent someone from walking after the accident. Despite Dr. Motz' opinions, Claimant got up right after the accident and was able to walk around. In addition, except for a generalized comment of pain down to her knees on June 5, 2015, Claimant had no knee pain for almost two months. Moreover, when Claimant experienced some right sided knee pain in July of 2015, she associated it with having an altered gait. Then, Claimant associated her increase in knee pain and torn meniscus to walking down some stairs on August 1, 2015, when she felt a pop in her knee.

Claimant's development of left sided knee pain developed even later than her right sided knee pain. Dr. Motz has opined that Claimant's fall onto her knees on June 4, 2015, also aggravated her bilateral patellofemoral stress syndrome. Again, this ALJ did not find this testimony to be persuasive due to the late onset of Claimant's symptoms. Dr. Motz' opinion that Claimant's left sided knee pain was caused by the June 4, 2015, accident, the onset of which is even more remote than the right sided knee complaints, is even more tenuous, and makes his opinions less credible overall.

Therefore, the ALJ concludes that Claimant has failed to overcome the opinion of the DIME regarding MMI by clear and convincing evidence. Claimant has failed to establish that the June 4, 2015, work accident either caused her knee conditions or aggravated any preexisting knee conditions. Claimant's knee conditions are not related to her June 4, 2015, accident. Therefore, Claimant reached MMI on November 3, 2015.

As stated above, Claimant contends that because this claim involves an extremity - scheduled injury - she only needs to establish by a preponderance of the evidence that her knee conditions are causally related to the June 4, 2015, accident. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

The ALJ also concludes, for the same reasons stated above, Claimant has failed to establish by a preponderance of the evidence that her knee conditions were caused or aggravated by the June 4, 2015, accident. Therefore, regardless of the burden of proof, Claimant has failed to establish that her knee conditions were caused or aggravated by the industrial accident.

II. Whether Claimant is entitled to reasonable and necessary medical treatment for her knees due to her June 4, 2015, work accident.

Based on the above findings and conclusions, Claimant is not entitled to reasonable and necessary medical treatment for her knees.

III. Whether Claimant's November 25, 2015, knee surgery is related to the June 4, 2015, work accident.

Based on the above findings and conclusions of law, Claimant's November 25, 2015, knee surgery is not related to the June 4, 2015 work accident.

IV. Whether Claimant's November 25, 2015, knee surgery was reasonable and necessary.

Based on the above findings and conclusions of law, this issue is moot.

ORDER

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

1. Claimant's knee conditions are not related to the industrial accident.

2. Claimant's claim for medical benefits to treat either knee is denied and dismissed.

3. Claimant reached MMI on November 3, 2015.

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

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

DATED: January 11, 2018

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

ISSUES

I. Whether Respondents accurately calculated Claimant's average weekly wage as $184.12/week.

II. Whether Dr. Kenneth Danylchuk is an authorized treating provider.

III. If Dr. Danlychuk is an authorized treating provider, whether Respondents authorized the lumbar spine surgery he performed.

IV. Whether the surgery performed by Dr. Danylchuk was reasonable, necessary and related to Claimant's work injury.

V. Whether Respondents presented clear and convincing evidence establishing that the Division Independent Medical Evaluation (DIME) physician, Dr. Kenneth Finn, erred in performing a requested DIME since he had previously evaluated Claimant for injuries related to the same body parts involved in the current workers' compensation claim.

VI. Whether Respondents presented clear and convincing evidence establishing that Dr. Finn erred in opining that Claimant had not attained maximum medical improvement (MMI) at the time of the DIME.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Drs. Danlychuk and Cebrian, the ALJ enters the following findings of fact:

1. Claimant is a long-term taxicab driver for Employer having worked for Employer for the past 13 years.

2. Claimant was involved in an admitted work related motor vehicle accident (MVA) on October 2, 2015 while driving his taxicab. Claimant testified and the record evidence establishes that that he was proceeding through an intersection when a second vehicle struck Claimant's taxi at a high rate of speed causing severe damage to the front and right side of his vehicle.

3. As a taxi driver, Claimant testified that he was paid on a commission basis and earned 33% of the fares that he collected. Respondents calculated Claimant average weekly wage (AWW) to equal $184.12 per week.

4. Claimant testified that he worked anywhere from 40-60 hours per week;

however, he offered no testimony and presented no evidence regarding how many fares he picked up during these hours or how much he earned through commissions. He did not assert any particular dollar figure as his average weekly wage nor did he provide any documentation regarding his earnings or his AWW. Rather, Claimant testified that he earned approximately $14,000.00 in 2014 and $13,026.00 up to the date of his injury on October 2, 2015. The ALJ finds Claimant's testimony regarding his earnings speculative and unsubstantiated based upon the evidence presented.

5. Respondents submitted wage records, which establish Claimant's earnings for parts of 2014 and 2015. Specifically, Respondents tendered wage records covering the period from September 18 through December 31, 2014 and January 1 through August 13, 2015. These records establish that Claimant's earnings vary from week to week. They also establish that Claimant earned $3,811.39 for the 15 week time period submitted for 2014 and $9,408.72 between January 1 and August 13, 2015. The ALJ finds Claimant's 2014 wage records too far removed from the date of his injury to provide any meaningful information regarding his average weekly wage at the time of his MVA. Instead, the ALJ relies upon the wage records submitted from 2015 as they provide approximately eight and one half months of earnings from which an average wage closer in time to the MVA and Claimant's injuries can be calculated. Based upon the evidence presented, the ALJ calculates Claimant's AWW to equal $292.71 per week ($9,408.72 ÷ 225 days between 1/1/2015 and 8/13/2015 = $41.82/day × 7 days/week = $292.71).

6. Claimant testified as to the severity of the impact the cab absorbed on October 2, 2015. He reported that the air bags deployed and that he could actually feel the distortion of the frame of the vehicle through the floorboard at the point of impact. According to Claimant, the vehicle was a total loss. While Claimant did not hit his head or lose consciousness, he experienced immediate pain in both hands, both arms, both shoulders and his neck and back. Nonetheless, he was able to exit the cab for transport to the Emergency Room (ER) at St. Mary Corwin Hospital by ambulance.

7. Claimant testified that while he had back, neck and upper extremity pain, his primary concern following the accident was the integrity of a femoral artery graft that had been placed approximately six weeks previously.

8. Claimant testified while in the ER medical personnel confirmed that the condition of his femoral artery graft was stable and unchanged. Medical records indicate that Claimant reported "nonradiating neck and back pain without bowel or bladder incontinence or sensory or motor deficits." It was noted that Claimant had "chronic back pain status post remote discectomy" and while Claimant was observed to have first and second degree burns to the posterior aspect of the bilateral hands due to air bag deployment, no other deformities of the extremities were present upon inspection. Physical examination revealed "diffuse cervical and lumbosacral spinal and bilateral paraspinal muscular tenderness without traumatic lesions." CT scan of the cervical spine revealed reversal of the normal lordotic curve consistent with muscle spasm and/or positioning as well as "extensive chronic changes of the cervical spine.

No acute pathology of the lumbosacral spine was noted on x-ray per radiologist interpretation. Claimant was assessed with acute low back pain, airbag injury, and cervical strain. He was given Motrin and Norco for pain and instructed to follow-up with the workers' compensation clinic.

9. Claimant left the ER and presented to Employer's designated provider, Southern Colorado Clinic, the same day. Physician Assistant (PA), Terry Schwartz, evaluated him. Upon questioning, Claimant reported 7/10 "neck, lower back, bilateral wrist, left ribs (sic), right lower quadrant and bilateral ankles" (sic) pain. PA Schwartz reviewed Claimant's past medical history from August 15, 2013 and noted that no changes were necessary. He documented a past medical history to include "back problems" including a L4-L5 discectomy with fusion in 1978 as well as a prior history of MVA in 2001 resulting in a fusion with hardware placement. Physical examination revealed L3-L5 tenderness, a bow legged gait with external rotation of the right foot and reported discomfort with position changes. Claimant was assessed with acute neck and low back pain. Claimant was referred to physical therapy and returned to modified duty with physical restrictions of no lifting over 25 pounds, no repetitive lifting over 5 pounds, no pushing/pulling greater than 25 pounds were imposed

10. Claimant returned to the Southern Colorado Clinic for a follow-up appointment on October 15, 2015, where he was evaluated by Dr. Terrance Lakin. During this encounter, Claimant reported 5/10 persistent low back, neck, bilateral wrist, bilateral shoulder and bilateral knee pain. Claimant reported radiation of his back pain down the "posterior aspect of both legs" along with "numbness and tingling" in the bottom of his feet bilaterally. Given his radicular pain and pre-existing low back pathology, Dr. Lakin documented his intention to "initiate" a consultation with Dr. Michael Sparr for further evaluation and treatment. Concern for delayed recovery was expressed along with the need to identify Claimant's baseline level of pain given his pre-existing condition. It is difficult to ascertain what Dr. Lakin was trying to convey regarding Claimant's baseline level of pain from the content in his October 15, 2015 note. Based upon his report, the ALJ understands that Dr. Lakin documented Claimant's baseline level of pain prior to the October 2, 2015 MVA as 4-6/10 and following the MVA, his pain level increased to 7-8/10. Dr. Lain ordered an MRI of the lumbar spine.

11. The aforementioned MRI was completed on October 22, 2015.

12. Claimant presented to the Southern Colorado Clinic in follow-up on November 5, 2015, where he complained of continued back and neck pain. Dr. Lakin noted that Claimant had suffered a "significant exacerbation" of his pre-existing musculoskeletal degenerative changes and that while physical therapy had helped "a lot", Claimant remained concerned about back pain including a new onset of "radicular-type pain going down both legs to [the] bottoms of his feet." Dr. Lakin's November 5, 2015 report reflects that Claimant had central canal and foraminal lumbar spine stenosis. It was hoped that Dr. Sparr would be able to "calm" down the symptoms associated with the aggravation of these conditions without surgical intervention. Dr.

Lakin also noted that Claimant had additional spondylolisthesis in the lumbar spine; however, he questioned the relatedness of this to Claimant's MVA, noting that the spondylolisthesis was more likely related to the progression of Claimant's pre-existing degenerative joint disease (DJD).

13. Dr. Sparr evaluated Claimant on November 11, 2015. In a report following Claimant's appointment, Dr. Sparr outlines a prior medical history significant for polio as a child, necessitating a right ankle triple arthrodesis and heel cord lengthening. He also references Claimant's prior lumbar laminectomy/discectomy with L4-L5 fusion performed in 1978, which subsequently destabilized following a 2001 MVA prompting Claimant's second lumbar spine surgery. Questioning regarding Claimant's pain history revealed that he felt 20% improved overall but that his pain persisted in the neck, left shoulder, mid and low back as well as his wrists, legs, ankles and feet. According to Dr. Sparr's report, Claimant had 7/10 pain at the time of his evaluation. His typical pain was listed as 6-7/10 in intensity. His best pain level was reported as 4/10, and at its worst, Claimant's pain climbed to 7.5/10. Regarding his back pain and the condition of his lower extremities, Claimant reported the following: pain at and below the belt line with radiation into the buttocks and posterior thighs bilaterally; radiating pain into the calves and ankles with activity and numbness, tingling, and intermittent burning affecting his legs and feet. Finally, bending, twisting, rolling in bed and prolonged sitting, standing and driving caused increased back pain. Claimant also complained of neck pain extending from the base of the skull through the posterior lateral cervical region left greater than right sided. Claimant's neck pain increased with movement but did not radiate into the upper extremities. Claimant reported headaches approximately every week to week and a half, which represented an improvement over the constant headache Claimant, experienced immediately following his MVA. Dr. Sparr noted the need to review Claimant's recent lumbar spine MRI. He assessed Claimant with, among other things, occipital headache, cervical strain/sprain, cervical facet joint pain, lumbar radiculopathy and sacroilitis. He recommended that future consideration be given toward an "epidural steroid injection, possibly sacroiliac joint or gluteal trigger point injections, [and] possibly a trochanteric bursa injection."

14. Based upon the evidence presented, the ALJ finds that no injection therapy was administered on November 11, 2015.

15. Claimant subsequently presented to Dr. Sparr on December 2, 2015. He reported no change in his pain symptoms since his initial evaluation on November 11, 2015. Claimant's MRI had been received and was discussed with Claimant. According to Dr. Sparr, Claimant's MRI demonstrated status post bilateral L4 laminectomy with placement of left-sided pedicle screws and rod and an interbody spacer at L4/L5. He also noted that at the L4/L5 level there was grade 1 anterolisthesis at L4 upon L5 and grade 1 retrolisthesis of L5 upon S1, and grade 1 anterolisthesis of L3 upon L4, which was new when compared to radiographs taken in 2007. In addition to the movement noted above at L3/L4, L4/L5 and L5/S1, diffuse "age-related changes [were] noted with findings most severe at L3-L4 where there [was] severe central canal stenosis" and "moderate to severe right and moderate neural foraminal stenosis" noted. Dr. Sparr

documented that Claimant was scheduled to see Dr. Danylchuk for a surgical consultation on December 18, 2015 "using his primary insurance" because he wanted Dr. Danylchuk to review the MRI since he was the physician who provided the previous fusion. Because Claimant had continued tenderness over the upper cervical facet joints bilaterally in addition to reproducible headache symptoms with palpation of the occipital nerves, Dr. Sparr who administered occipital nerve blocks. The blocks consisted of 2 ccs of Marcaine, 2 ccs of Lidocaine and 1 cc of dexamethasone. The injections were completed without complication.

16. Claimant returned to Dr. Lakin later in the day on December 2, 2015. At this appointment, Claimant reported to Dr. Lakin that he was doing "pretty well" and was "making progress" He further reported that he had undergone injections with Dr. Sparr and that greatly "improved his cervical pain and range of motion." Regarding his low back, Dr. Lakin noted the Claimant was set to see Dr. Danylchuk who was "familiar with his back fusion." Dr. Lakin did not feel it was necessary for Claimant to see an orthopedic surgeon (Dr. Danylchuk) under workers' compensation because he had shown improvement with regard to his work related conditions. The report from this date of visit supports an inference that Dr. Lakin did not advocate that Claimant not see Dr. Danylchuk. Rather, the ALJ reads the report to indicate that because Claimant did have an appropriate concern regarding continued low back pain as well as pain and paresthesias in his lower extremities, a visit to Dr. Danlychuk to assess non-work related low back conditions was appropriate. In other words, Dr. Lakin's December 2, 2015 report persuades the ALJ that he did not feel it necessary that Claimant see Dr. Danlychuk under the comp case because the persistent back and leg symptoms were likely caused by a new spondylolisthesis at the L3-L4 level, which was related to a "transient progression" of Claimant's pre-existing degenerative joint disease" rather than the MVA. Thus, while he did not feel an orthopedic evaluation was necessary for conditions related to the MVA, Dr. Lakin felt it was appropriate for Claimant to see Dr. Danylchuk for continued back and leg pain caused by the natural progression of a pre-existing, non-industrial L3-L4 spondylolisthesis.

17. Claimant testified that he wanted to see Dr. Danylchuk because he had confidence in him given the successful result he enjoyed as a consequence of his second lumbar surgery, and also because he lost confidence in Dr. Lakin and Dr. Sparr. In support of his asserted lack of confidence in Drs. Lakin and Sparr, Claimant testified that they were only treating his symptoms and not the core of his problem. Consequently, he testified that he did not feel he was receiving proper care. However, on cross-examination, Claimant conceded that he is not a medical doctor and has no medical training, so could not say what would have constituted proper treatment

18. Claimant also testified that he told Dr. Sparr that he was allergic to certain medications before any injections were administered. As found, no injections were provided during Claimant's initial evaluation on November 11, 2015; however, the November 11, 2015 record indicates that Claimant was allergic to, among other things Lidocaine. Consequently, the ALJ finds that Claimant, more probably than not, told Dr. Sparr, before any injections were given, that he was allergic to Lidocaine.

19. According to Claimant, he suffered an allergic reaction to the injection administered by Dr. Sparr on December 2, 2015. Claimant testified that when he returned to Dr. Sparr's office for a follow-up appointment after this injection, Dr. Sparr was going to inject him for a second time with the same injection cocktail. Based on these events, Claimant testified that he did not believe that Dr. Sparr was listening to him prompting him to question Dr. Sparr's ability to properly treat the injuries associated with his MVA. According to Claimant, he lost all confidence in Dr. Sparr.

20. Similar to the November 11, 2015 report, the content of Dr. Sparr's December 2, 2015 medical record documents that Claimant was allergic to Novocain, Lidocaine and Morphine. Nonetheless, Dr. Sparr injected Claimant with both Marcaine and Lidocaine on December 2, 2015. While a December 9, 2015 report from Dr. Sparr is devoid of any report concerning difficulties or reactions to the December 2, 2015 injection, the report again reflects Claimant's allergies to Novocain, Lidocaine and Morphine. It also references that additional trigger point injections, as well as repeat occipital nerve blocks may be appropriate.

21. Claimant presented to Dr. Danylchuk on December 10, 2015. Dr. Danylchuk reviewed Claimant's October 22, 2015 MRI, concluding that it demonstrated severe spinal stenosis at the levels above the previous surgery, specifically L3-4 and L2-3. After performing an examination, Dr. Danylchuk indicated that while Claimant could benefit from lumbar epidural injections, however, his spinal stenosis was severe making him a candidate for future "extension of the decompression laminectomy and interbody fusion with posterior stabilization to incorporate at least the L3-4 level and perhaps the L2-3 level." Claimant agreed that surgery was necessary. Dr. Danylchuk indicated that he would allow Claimant and his "pain management injection doctor" to make the decision to proceed with additional injections and if injections were not undertaken, to return and Dr. Danylchuk would "proceed with surgery."

22. Claimant returned to Dr. Sparr on December 16, 2015 for the repeat trigger point injections that had been referenced as being appropriate following Claimant's December 9, 2015. Instead of proceeding with the anticipated injections, Claimant deferred citing diffuse "itchiness" which he reported developed after his occipital blocks. The record from this date of visit indicates that Claimant thought he was allergic to "caines." Despite Dr. Sparr's suggestion, that Claimant <u>thought</u> he was allergic to "caines", the ALJ finds that he was injected with a substance from the list of medications he was known to be allergic to, specifically Lidocaine (emphasis added). The report also documents Claimant's subsequent refusal to submit to injections of saline and dexamethasone or take additional/different medications recommended by Dr. Sparr. The ALJ finds the content of the December 16, 2015 report to support Claimant's assertion that he questioned Dr. Sparr's treatment plan as evidenced by his refusal to accept any of Dr. Sparr's treatment recommendations.

23. Regarding the condition of Claimant's low back, Dr. Sparr's December 16, 2015 report indicates that Dr. Danylchuk recommended injections or additional surgery

in the form of a repeat fusion. Dr. Sparr recommended a second opinion with Dr. Frey.

24. While the ALJ understands Claimant's reluctance to treat with Dr. Sparr, the suggestion that he sought treatment with Dr. Danylchuk only after he lost confidence in Dr. Sparr, because he was injected with Lidocaine, is unpersuasive. The evidence presented persuades the ALJ that Claimant had scheduled an appointment to see Dr. Danylchuk before his injection on December 2, 2015. Indeed, the December 2, 2015 record establishes that before his injection, Claimant reported that he was going to see Dr. Danylchuk for a surgical consultation on December 18, 2015 "using his primary insurance" because he wanted Dr. Danylchuk to review the MRI since he was the physician who provided the previous fusion. Moreover, the medical records persuade the ALJ that Claimant reported his purported allergic reaction after he discussed surgical options with Dr. Danlychuk on December 10, 2015. Based upon the evidence presented, the ALJ is persuaded that Claimant concluded that surgery was necessary and that further injections were not going to treat the "core" of his problem after meeting with Dr. Danylchuk on December 10, 2015. The evidence presented supports a reasonable inference that Claimant's insistence on proceeding to surgery and foregoing additional injections, rather than his alleged allergic reaction/lost confidence in Dr. Sparr formed the impetus for the decision to proceed with surgery with Dr. Danlychuk.

25. On January 5, 2016, Claimant called into the offices of Dr. Danylchuk to establish whether he would support Claimant's "decision to stop working until he [recovered] from surgery." Dr. Danylchuk supported Claimant's decision as evidenced by a January 7, 2016 work release form he completed removing Claimant from work from January 11, 2016 through June 21, 2016. While it is unclear from the evidence presented whether Claimant would have stopped working had Dr. Danylchuk not supported his decision, the content of the exchange with Dr. Danylchuk's office persuades the ALJ that Claimant had resolved to proceed with surgery regardless of the recommendation by Drs. Sparr and Lakin that he get a second opinion.

26. On February 4, 2016, Claimant returned to Dr. Lakin complaining of persistent 8/10 pain. He requested that he be returned to Dr. Sparr for additional injections in the neck without Lidocaine.

27. On February 22, 2016, Claimant presented to Dr. Danylchuk's office requesting that the staff there get the surgery recommended by Dr. Danylchuk authorized through workers' compensation. He gave the staff the information necessary to contact Pinnacol Assurance. A prior authorization requesting approval to proceed with a hardware removal at L4-5 along with a L2-4 laminectomy and posterior interbody fusion with cages and pedical screw fixation was forwarded to "Ryan" at Pinnacol Assurance on February 22, 2016. The written materials admitted into evidence submitted do not contain a response to the prior authorization request. Nonetheless, the testimony of Claimant and Dr. Danylchuk persuade the ALJ that the request was denied in accordance with workers' compensation rules of procedure.

28. Dr. Danylchuk performed a L3-4 bilateral discectomy with laminectomy

and posterior lumbar interbody fusion in association with a L4-5 hardware removal and L3, L4, and L5 hardware reinsertion procedure on April 6, 2016.

29. Claimant returned to Dr. Lakin on April 15, 2016 reporting that his pain had decreased from an 8/10 to a 3/10 following his surgery.

30. During examination, Claimant conceded that he had not been given a referral to Dr. Danylchuk and that Dr. Danylchuk was not an authorized treating provider under the workers' compensation claim. Claimant further testified that he was fully aware that Pinnacol Assurance did not authorize the surgery as part of this workers' compensation claim. Claimant testified that it did not matter to him who paid for the surgery. He testified further that he had resolved to proceed with surgery despite the denial by Pinnacol Assurance so that he would not become a paraplegic. Claimant presented no persuasive objective evidence establishing that the surgery performed by Dr. Danylchuk was emergent and designed to thwart neurologic damage and otherwise prevent him from becoming a paraplegic.

31. Based upon the evidence presented, the ALJ finds that Claimant sought treatment with Dr. Danylchuk under his personal insurance without first securing a referral from an authorized provider or a change of physician from Insurer. Consequently, the ALJ finds the treatment, including the April 6, 2016 surgery performed by Dr. Danylchuk unauthorized.

32. Respondents sought an opinion from Dr. Michael Janssen regarding the relatedness of Claimant's April 6, 2016 surgery to the October 2, 2015 MVA. Dr. Janssen completed a records review, MRI review and authored a June 23, 2016 narrative report following that review. Dr. Janssen opined that the imaging studies showed classic adjacent level disease with spinal stenosis, disc herniation, instability and degenerative spondylosis. He concluded that while the surgery performed by Dr. Danylchuk may have been reasonable and necessary to address the changes to the lumbar spine, the surgery was not in any capacity related to the October 2015 MVA. Instead, Dr. Janssen opined that the indication for surgery as performed arose strictly from Claimant's longstanding pre-existing deformity and the natural history of the his progressive pre-existing disease. According to Dr. Janssen, there was no new anatomical condition caused by the MVA that warranted surgery.

33. With regard to MMI, Dr. Janssen opined that Claimant would have reached MMI from the MVA within approximately 2-3 months for the causally related myofascial symptoms.

34. Dr. Janssen's report was forwarded to Dr. Lakin for review on June 28, 2016. Dr. Lakin concurred with Dr. Janssen's findings and conclusions prompting his decision to place Claimant at MMI effective February 14, 2016. In this regard, Dr. Lakin noted: "I believe an MMI date of 2/14/2016 would be appropriate. We had completed a good course of conservative care, EDx study was completed and did not confirm additional acute lumbar injury, he had noted good gains up until surgical intervention

was offered, he had benefit form cervical/occipital injections months prior, had requested additional injections for cervical on appointment 2/3/2016 but failed to take action to make appointments for several months, and his wrist complaints had been treated conservatively with return to baseline function."

35. Regarding the condition of Claimant's cervical spine, Dr. Lakin noted that Claimant had requested additional injections, yet failed to take the "initiative to call Dr. Sparr for an appointment." He went on to indicate that Claimant's past medical records established that he had reported neck pain and crepitus prior to the MVA and that up until May and June of 2016 Claimant maintained good range of motion. According to Dr. Lain, Claimant's recent range of motion loss was attributable to the progression of his pre-existing degenerative joint and degenerative disc disease (DJD/DDD). In this regard, Dr. Lakin opined that "no further work up is needed regarding his cervical spine as it relates to the October 2, 2015 MVA injury. [Claimant] has been treated appropriate (sic) for soft tissue injury and improved with soft tissue injections, he now progresses over time with known extensive severe DJD/DDD cervical spine by CT on 10/2/2015."

36. Dr. Lakin also concluded that Claimant had not sustained any permanent impairment and required no maintenance medical care.

37. The ALJ is not persuaded by Dr. Lakin's opinions concerning MMI. Claimant received one series of injections before refusing additional therapy secondary to an allergic reaction. The ALJ finds it understandable that Claimant would refuse, out of fear of another reaction, additional injections initially after he was given a medication he was allergic to. Based upon the evidence presented, the ALJ finds that a viable treatment option exists that may cure and relieve Claimant of ongoing symptoms the ALJ finds to be related to his October, 2, 2015 MVA, namely injections which do not contain "caine" medications. As Dr. Sparr has recommended such injections and Claimant has requested but not received the same, the ALJ finds Dr. Lakin's opinions concerning the need for further cervical spine treatment unpersuasive.

38. Respondents filed a final admission of liability on July 19, 2016. Claimant sought a Division Independent Medical Examination (DIME). In keeping with the accepted practice provided for by the Workers' Compensation Rules of Procedure, Dr. Kenneth Finn was selected to perform Claimant's requested DIME.

39. Dr. Finn completed the requested DIME on December 9, 2016. As part of the DIME, Dr. Finn took a history, reviewed "accompanying" medical records and completed a physical examination. Claimant was noted to be a "poor to fair" historian and the medical records received by Dr. Finn for review focused on his October 2, 2015 MVA. While Dr. Finn noted that Claimant had a "history of spinal stenosis", he did not have records pre-dating his October 2, 2015 injury, which outlined prior symptoms and/or treatment for his low back condition. He referenced only two records predating 2015, both from 2003. Given Claimant's pre-existing spinal stenosis and the lack of records outlining lumbar symptoms and/or treatment prior to the 2015 MVA, Dr. Finn opined that the treatment Claimant received for his low back was 100% related to his

MVA and he assigned 17% impairment for his lumbar spine condition. Dr. Finn concluded that Claimant had no further treatment needs concerning his low back since he underwent "definitive" treatment, i.e. surgery for the same. Concerning Claimant's cervical spine, Dr. Finn noted that he suffered a "classic whiplash" superimposed on "underlying spondylosis which became symptomatic at the time of his injury as I do not have any medical records showing any testing or treatment for neck issues predating his injury." As he felt that Claimant could benefit from "investigation of the cervical facet joint levels from C2-C4 which may involve cervical branch [blocks]" and further radiofrequency ablation, if Claimant responded to the blocks favorably, Dr. Finn opined that Claimant was not at MMI. Similar to the situation involving impairment for the lumbar spine, Dr. Finn assigned an advisory impairment rating of 13% for the cervical spine.

40. While no records outlining prior symptoms/treatment to the neck and back were included in DIME packet sent to Dr. Finn, the evidence presented supports a finding that Claimant undertook treatment primarily directed to the low back in 2007 after suffering two car accidents. While the 2007 and beyond records reference cervical spine stenosis, the ALJ finds that Claimant's treatment following the 2007 car accidents was predominately directed to Claimant's low back with minimal treatment for his pre-existing neck condition. The records also support that one of the aforementioned accidents was work related. Careful review of the records associated with this accident reveals that it aggravated the underlying condition of Claimant's low back causing bilateral leg pain prompting Dr. Daniel Olson to refer Claimant to Dr. Finn for an electrodiagnostic study (EMG).

41. Dr. Finn evaluated Claimant on April 15, 2008. Dr. Finn's physical examination was limited to the thoracolumbar spine and the lower extremities. He completed the EMG, which produced normal results. Although the report from this date of visit indicates that Claimant was to tentatively scheduled for a facet injection, the evidence presented does not indicate that this injection was completed or that Dr. Finn treated Claimant beyond completion of the EMG study.

42. Following Claimant's December 9, 2016 DIME, Respondents sought an IME of Claimant with Dr. Carlos Cebrian. In advance of the IME, Respondents forwarded 12 inches of records to Dr. Cebrian for review. The records included reports concerning Claimant's prior fusion surgery in 2002, records regarding Claimant's two 2007 MVA's, and Claimant's current medical treatment records and DIME report. Dr. Cebrian undertook careful review of the extensive medical records forwarded. He also took a personal history from Claimant and completed a physical examination, after which he issued a 70-page report on April 7, 2017.

43. In his IME report, Dr. Cebrian, agrees that Claimant suffered a both a cervical spine strain with temporary aggravation of an underlying cervical spine degenerative disc disease and a lumbar spine strain with temporary aggravation of an underlying lumbar degenerative disc disease and spinal stenosis. He opined further that Dr. Lakin properly placed Claimant at MMI on February 14, 2016. He did not

ascribe Claimant's need for surgery as performed by Dr. Danylchuk to the October 2, 20156 MVA. To the contrary, Dr. Cebrian, much as Dr. Janssen did, concluded that there was no objective evidence of change in Claimant's underlying chronic condition attributable to the MVA. He also opined that even if the surgery performed by Dr. Danylchuk was determined to be related to Claimant's October 2, 2015 MVA, the surgery was not reasonable or necessary.

44. Dr. Danylchuk testified by deposition of October 17, 2017. Dr. Danylchuk testified that he was familiar with Claimant's premorbid condition having performed surgery on Claimant previously. He also opined was that the need for the lumbar surgery was precipitated and causally related to the high velocity impact sustained in the motor vehicle accident. According to Dr. Danylchuk, the motor vehicle accident heralded the onset of increasing back and leg pain to the point where Claimant was having trouble dealing with it.

45. As noted, Dr. Danylchuk attributed Claimant's injury and low back treatment, including surgery to the October 2, 2015 MVA, stating: [I] this case, [Claimant] was doing extremely well, and then what started it was the accident, and that heralded the onset of complaints." Dr. Danylchuk was not swayed by the opinions of Dr. Janssen that Claimant's need for surgery was related to progressive nature of his pre-existing adjacent level disease citing the mechanism of injury, the onset of symtoms immediately after the MVA and Claimant's functional status prior to the accident.

46. Based upon the evidence presented, including the opinions of Dr. Danylchuk, the ALJ finds that Claimant's October 2, 2015 MVA, more probably than not, aggravated his underlying pre-existing degenerative disc disease as well as a pre-existing, yet asymptomatic L2-3 spondylolisthesis. While Claimant's adjacent level disease (L2-3 spondylolisthesis) likely preexisted Claimant's MVA, the immediate onset of symptoms combined with Claimant's rapid functional decline persuades the ALJ that the MVA, more probably than not, accelerated the deterioration associated with this condition giving rise to the need to stabilize lumbar spine. Accordingly, the ALJ finds the April 6, 2016 spinal surgery performed by Dr. Danylchuk related to the October 2, 2015 MVA. The evidence presented also convinces the ALJ that Dr. Danylchuk's April 6, 2016 surgery was reasonable and necessary.

47. While Claimant suffered a compensable aggravation/acceleration of a pre-existing condition resulting in Claimant's need for surgery, the evidence presented persuades the ALJ of the following: First, Dr. Danylchuk is not an authorized workers' compensation provider under the instant claim and second, Respondents did not authorize the April 6, 2016 spinal surgery. Consequently, Respondents are not liable for the costs associated with Dr. Danylchuk's April 6, 2016 surgery.

48. Concerning the DIME conducted by Dr. Finn, Dr. Cebrian opined that Dr. Finn erred in accepting the DIME assignment in the first instance. In this regard, Dr. Cebrian noted that Dr. Finn's prior "doctor-patient relationship" with Claimant, albeit under a different claim affected his "ability to be independent" with regard to the instant

claim. According to Dr. Cebrian, Dr. Finn likely knew or should have known that he had previously been a treater to Claimant and should have rejected the appointment.

49. As to the question of MMI, Dr. Cebrian opined that Dr. Finn erred in when he relied on the fact that he did not have pre-existing medical records to indicate prior pathology. According to Dr. Cebrian, this statement constituted error as there were "multiple medical records indicating pre-existing pathology in the cervical and lumbar spine. Per Dr. Cebrian, Dr. Finn erred when he did not request Claimant's pre-existing records. Dr. Cebrian testified that since Dr. Finn had knowledge, both as a prior treater and through the information provided by Claimant at the DIME, that Claimant had been involved in two prior MVAs, that Dr. Finn should have requested additional records before rending his DIME opinion. He opined that without those preexisting medical records, which were critical in terms of determining whether Claimant's current complaints were related, Dr. Finn was left to rely solely on Claimant's subjective complaints and inaccurate history.

50. Based upon the evidence presented, the ALJ finds the opinions expressed by Dr. Finn regarding the cause of Claimant's back and neck symptoms supported by the content of the medical records presented to him for review. Even Dr. Cebrian, Respondents' retained expert, agrees that Claimant suffered aggravations of his pre-existing back and neck conditions. As found, the evidence presented persuades the ALJ that the treatment to Claimant's back and neck are related to these aggravations. Dr. Finn believes that Claimant could benefit from further treatment directed to his cervical spine and is therefore not at MMI for the aggravation the caused by the MVA. While Dr. Cebrian disagrees, the ALJ finds his report and testimony unpersuasive.

51. The ALJ finds a paucity of evidence to suggest that Dr. Finn erred in the completion of his DIME, including his opinions concerning MMI and/or the methodology he employed to reach a total combined whole person impairment rating in this case. To the contrary, the evidence presented persuades the ALJ that there is a mere difference of opinion between the Dr. Finn as the division independent medical examiner and Respondents' retained medical expert, Dr. Cebrian concerning causation, MMI and impairment. Concerning, Respondents suggestion that the DIME should be set aside because the record demonstrates that Dr. Finn previously evaluated Claimant under the 2007 work related MVA, the ALJ is not convinced. In this case, Respondents failed to present persuasive evidence that Dr. Finn knew he had previously evaluated Claimant or that his opinions concerning MMI were somehow tainted by this prior encounter. To the contrary, the evidence presented persuades the ALJ that Dr. Finn did not have an extensive treatment history with Claimant or was one of his "treaters" as Respondents suggest. Rather, the record supports that Dr. Finn evaluated Claimant on one occasion for an EMG in excess of seven years before he completed the IME in this case. The record evidence persuades the ALJ that Dr. Finn had no recollection of this encounter or if he did, that he was biased in favor of Claimant. For these reasons, the ALJ finds that Respondents have failed to meet their required legal burden to set Dr. Finn's opinion regarding MMI aside. Because the ALJ finds Claimant not at MMI, the percentage of any permanent impairment associated with Claimant's back and neck

injuries is premature.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). In this case, the ALJ concludes that Dr. Finn's opinion concerning MMI is supported by the content of the medical records he reviewed. As such, the ALJ finds his opinion credible. There is also a lack of persuasive evidence to support a conclusion that Dr. Finn deviated from the accepted methodology of the AMA Guidelines in reaching his opinion concerning MMI. While it is true that Dr. Finn saw Claimant in 2008 for an EMG, Respondents failed to present clear and convincing evidence that his opinions concerning MMI in the instant case are highly probably

incorrect based on that prior contact. Moreover, the ALJ is not persuaded that Dr. Finn's MMI opinion is in error based upon the fact that he relied on Claimant's verbal history and the records sent to him for review. The ALJ rejects Dr. Cebrian's contrary opinions as unpersuasive.

Claimant's Average Weekly Wage

D. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).* The ALJ concludes that Claimant's wage records constitute the best evidence concerning his earnings around the time he was injured. The wage records support that Claimant's earnings varied during his employment. Respondents calculate Claimant's AWW to equal $184.12 based upon a 13.43-week work history. The ALJ agrees with Claimant that Respondents admitted AWW is not a fair representation of his average earnings because it accounts for a relatively short period of earnings. Given the nature of Claimant's work and his highly variable earnings, the ALJ concludes that Claimant's average weekly wage (AWW) is best calculated using the total earnings for 2015 as admitted into evidence. As found above, this methodology yields an AWW of $292.71 ($9,408.72 ÷ 225 days between 1/1/2015 and 8/13/2015 = $41.82/day × 7 days/week = $292.71).

Dr. Danylchuk's Status as an Authorized Treating Physician and Respondents' Denial of the April 6, 2016 Spinal Surgery

E. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Under §8-43-404(5)(a)(I)(A), C.R.S. 2014 the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S. 2005; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); Pickett v. Colorado State Hospital, 32 Colo. App. 282, 513 P.2d 228 (1973).

F. Under § 8-43-404(5)(a), C.R.S., the employer or insurer is afforded the right in the first instance to select a physician to treat the injury. The statute requires the employer or insurer to "provide a list of at least two physicians, . . . in the first instance, from which list an injured employee may select the physician who attends said injured employee." Similarly, Workers' Compensation Rules of Procedure, Rule 8-2(A), 7 Code Colo. Reg. 1101-3, states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written

list . . .." In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 545 (Colo. App. 1987). The failure to tender the "services of a physician ... at the time of injury" gives the employee "the right to select a physician or chiropractor." The employer's duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo. App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (Industrial Claim Appeals Office, September 6, 2011). In this case, Claimant sought treatment, including surgery through Dr. Danylchuk on his own under his health insurance after Respondents had designated Dr. Lakin as his authorized treating physician (ATP). Moreover, he sought treatment with Dr. Danylchuk without first securing a referral from an authorized provider or a change of physician from Insurer. There is a lack of credible evidence to establish that the right to select a medical provider somehow passed to Claimant. Indeed, Claimant makes no such claim. Instead, Claimant asserts that his treatment with Dr. Danylchuk should be considered authorized because he lost confidence in Dr. Sparr's office as a result of "two bad experiences he had with bungled medication administration. According to Claimant, these events entitled him to "seek care elsewhere." As found above, the ALJ is not persuaded. Here, the evidence presented persuades the ALJ that Dr. Danylchuk is not an authorized provider. The evidence also convinces the ALJ that Respondents' denied his request for authorization to proceed with his recommended surgery. Accordingly, the ALJ concludes that Respondents are not liable for the costs of Claimant's treatment with Dr. Danylchuk.

The Relatedness of Claimant's Need for Low Back Treatment to his October 2, 2015 Motor Vehicle Accident

G. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

H. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*,

805 P.2d 1167, 1169 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). Here, the evidence presented supports a conclusion that Claimant likely had generalized pre-existing degenerative disc disease in his lumbar spine. He probably also had pre-existing disease in the spinal levels adjacent to his L4-5 fusion. Nonetheless, the record evidence fails to demonstrate that Claimant's low back was actively symptomatic or that he was in need of or recently received low back treatment prior to the October 2, 2015 MVA. Moreover, the evidence presented fails to demonstrate that Claimant's pre-existing condition was functionally limiting to him prior to the MVA. Indeed, on July 23, 2008, Dr. Olson released Claimant from his care without permanent impairment following his 2007 work related MVA. While Drs. Lakin, Janssen and Cebrian conclude that Claimant's current symptoms are related to the natural and probable progression of his pre-existing degenerative disc disease, the undersigned is not persuaded. Rather, the ALJ relies on the medical records predating the October 2, 2015 MVA, the accident report and the opinions of Dr. Danylchuk to conclude that Claimant's MVA probably aggravated his pre-existing degenerative lumbar spinal stenosis as well as his adjacent level disease to produce his symptoms and his need for spinal surgery. Consequently, the ALJ concludes that Claimant has established a causal connection between his admitted October 2, 2015 MVA and his need for additional low back surgery. Regardless, Dr. Danylchuk is not an authorized provider and Respondents did not otherwise authorize the surgery. Accordingly, Respondents are not liable for the costs associated with the surgery or treatment incidental thereto.

Overcoming the DIME

I. A DIME physician's findings concerning causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

J. In resolving the question of whether the DIME physician's opinions have

been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

K. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Here, the weight of the persuasive evidence demonstrates that Claimant's need for additional cervical spine treatment is directly related to an aggravation of a pre-existing condition resulting from Claimant's MVA while he was in the course and scope of his duties as a taxi driver. Because this treatment has not been afforded and it presents a reasonable prospect for curing and relieving Claimant of the ongoing effects caused by the aggravation of his pre-existing degenerative disc disease, Claimant is not at MMI. See *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001), *aff'd. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA0401, February 14, 2002)(*not selected for publication)* (citing *PDM Molding v. Stanberg,* 898 P.2d 542 (Colo. App. 1995*)* and *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995)]; *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000).

L. After considering the totality of the evidence presented, including the DIME report of Dr. Finn and the conflicting reports of Drs. Lakin, Janssen and the stated opinions of Dr. Cebrian, the ALJ concludes that Respondent has failed to produce unmistakable evidence establishing that Dr. Finn's determination regarding MMI is highly probably incorrect. Rather, the ALJ concludes that the evidence presented fails to establish that Dr. Finn was biased in favor of Claimant because he had previously completed an EMG in 2008. Indeed, the record presented persuades the ALJ that Dr. Finn had no recollection of seeing Claimant in 2008. Because he had no recollection of seeing Claimant previously, the ALJ finds Dr. Cebrian's suggestion that DIME in this case is irreparably tainted unconvincing. Moreover, evidence presented persuades the ALJ that the remaining errors asserted by Dr. Cebrian constitute a mere difference of opinion regarding causation between Dr. Finn and himself. A professional difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Finn's opinion concerning MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set his MMI determination aside.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $292.71 per week ($9,408.72 ÷ 225 days between 1/1/2015 and 8/13/2015 = $41.82/day × 7 days/week = $292.71).

2. Dr. Kenneth Danylchuk was and is not an authorized provider in the chain of referral.

3. Respondents did not authorize Dr. Danylchuk's April 6, 2016 spinal surgery; therefore, Respondents bear no responsibility for payment or any other remuneration to Dr. Danylchuk or to Claimant related to this surgery.

4. Claimant has proven, by a preponderance of the evidence, that the April 6, 2016 lumbar fusion was reasonable, necessary and related to his October 2, 2015 MVA.

5. Respondents request to set aside the DIME opinion of Dr. Finn regarding causation and MMI is denied and dismissed. Because the ALJ determines that Respondents have failed to overcome the MMI determination of Dr. Finn, assignment of permanent impairment associated with Claimant's back and neck injuries is premature.

6. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the ongoing effects of his cervical and low back injuries, including but not limited to additional injections as recommended by Dr. Sparr.

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

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

DATED: January 12, 2018

/s/ Richard M. Lamphere

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

ISSUES

I. Have Respondents shown, by a preponderance of the evidence, that they are entitled to penalties, due to *fraudulent* receipt by Claimant of Temporary Total Disability ("TTD") benefits while he was also receiving a full-time salary?

STIPULATION

The parties have stipulated that Claimant received an overpayment of TTD payments of $15,648.49, from the fall of 2016, until the spring of 2017. Respondents concede that this was a *mistake* on the part of Insurer. The issue before this ALJ is whether receipt by Claimant of such TTD payments was *fraudulent*, thus entitling Respondent to *penalties,* in addition to repayment.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed as a Guest Services Manager, and suffered an admitted work injury on 8-27-16 when he was unloading luggage from Employer's customer shuttle. His hamstring was injured, and he promptly reported this injury to Employer, and was treated by an Authorized Treating Physician.

2. He was paid a full time salary, with an Average Weekly Wage which the parties agree was $923.08. This was paid by Employer, via direct deposit, on a bi-weekly basis. The TTD Workers Compensation benefit was therefore calculated at $615.39. Those TTD payments were paid on a biweekly basis by Insurer, in the form of checks made payable to Claimant, sent to his home address.

3. Claimant remained off work for seven weeks, after which he was cleared by his ATP to return to work for Employer on a part-time basis. Claimant promptly informed Employer of his medical clearance to return to work part-time. TTD payments were made during the period he was off work, such period ending ended on 10-21-16.

4. Employer then allowed Claimant to return to work on a part-time basis (Claimant believed it was 4 hours per day, Employer's HR director recalled it to be 6 hours per day. The ALJ finds this is a good faith difference in recall, and not material to the issue herein). In either event, Employer allowed Claimant to return to work part-time, but agreed to resume paying Claimant his full salary, effective 10-22-16. His full salary was paid until Claimant separated from employment in 2017 (the ALJ has heard no evidence to the contrary).

5. TTD payments had also been paid to Claimant, beginning on 9-3-16, but were only discontinued, effective in April, 2017, when Insurer filed a Petition to Modify his TTD payments, based upon an intervening medical condition involving Claimant's heart. While this issue was not discussed by either party at hearing, it appears that it was during this same period that Employer and Insurer began to compare notes, and realized there had been a TTD overpayment, since Claimant had resumed working part-time, but at full salary. By all accounts, and by stipulation of the parties, such overpayment of TTD benefits was calculated to be $15,648.49.

6. Claimant was called by Respondents to testify by telephone, and does not dispute the essential facts of this case as found above. He testified that he is not familiar with the Workers Compensation statutes. He believed he was being paid 60% (not 66.67%) of his salary as compensation for his medical inability to work full-time, despite being salaried full-time. He believed he was entitled to the TTD payments he received, until he was informed otherwise.

7. Claimant testified that at no point did he misrepresent to either Employer or Insurer that he was receiving TTD payments once he returned to work. At no point was he asked by Insurer if he was working again, or if he was still receiving TTD checks. At no point did Employer ask him if he was receiving TTD checks. Claimant further testified that once he returned to work, he emailed his adjuster, Beatrice Calvert, of this fact. To his knowledge, it went to her inbox. He never got a response from her. This email was sent from his work email address, and he is not able to retrieve his emails now, since he separated from work.

8. Claimant also testified that his HR supervisor, Debbie Betts, told him that she was having difficulty reaching Calvert as well. Further, Claimant's physical therapy had been discontinued in December, 2016, for reasons that were never communicated to him by Insurer. Claimant testified that he was surprised to find out in the spring of 2017 that he was not entitled to these TTD payments, and does not feel he did anything wrong. He does acknowledge the need for repayment.

9. Claimant's HR supervisor, Debbie Betts, also testified by telephone. In summary, Ms. Betts testified that she also notified Insurer's adjuster by email that Claimant had returned to work in the fall of 2016. She never received a response back from Beatrice Calvert either. At no point did she ask Claimant if he continued to receive TTD checks until the overpayment was discovered in the spring of 2017. At no point did Claimant misrepresent to her that he was not receiving said checks.

CONCLUSIONS OF LAW

Based upon the forgoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Concealment of Material Facts by Claimant

C. In this case, the ALJ finds Claimant to be credible. Claimant is not legally sophisticated, and it is unreasonable to expect a claimant in a Workers Compensation case to understand the statutory scheme, or the policy reasons supporting it. Claimant testified, in effect, that he trusted the process to work as it should. The ALJ finds that his reliance was reasonable. If any interested party had simply asked him, he would have been forthcoming with his work status, and receipt of TTD payments. While erroneous, his belief that he was still entitled to the TTD payments upon returning to work is not so outrageous as to convince the ALJ that his intentions were fraudulent. While there might be circumstances creating an affirmative duty to point out errors in one's favor (such as a person who awakens to find a few extra digits added to his bank account, then spends the excess money in haste), such is not the case here. Claimant had a good faith belief in his entitlement to these TTD checks.

D. In this instance, the ALJ further finds that Claimant did inform his adjuster of his return to work by email. This is bolstered by Respondent's own witness, Debbie Betts, who had a similar experience with a non-communicative adjuster. Their testimony is plausible, and uncontradicted by Insurer. Claimant is now in the unenviable position of being unable to prove, except through his own testimony, that he sent this email. The ALJ finds his testimony sufficient. It was an open secret to the world-except the adjuster, it appears- that Claimant was working and being paid for it. Further, Claimant was regularly endorsing the TTD checks that Insurer was freely sending him, with no possible hope of *concealing* this fact. The ALJ cannot infer a fraudulent intent from these facts.

E. At no point did Claimant *conceal* a material fact which in equity and good conscience should have been disclosed to Insurer.

ORDER

It is therefore ordered that:

1. Claimant has received an overpayment of TTD benefits in the amount of $15, 648.49. Repayment will be made according to law, or as otherwise agreed by the parties.

2. Respondents' request for penalties is denied and dismissed.

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

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

DATED: January 16, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment with respondent on June 8, 2017.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that medical treatment he received was reasonable and necessary to cure and relieve him from the effects of the injury.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that the medical treatment he received was authorized.

- If claimant proves a compensable injury, what is claimant's average weekly wage (AWW)?

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary partial disability (TPD) benefits.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that his compensation should be increased by 50% pursuant to Section 8-43-408, C.R.S.**,** for employer's alleged failure to obtain and maintain worker's compensation insurance.

FINDINGS OF FACT

1. Claimant began employment with employer in May 2017. Claimant worked as a semi-truck driver hauling loads for employer. Claimant was paid 25% of the load. Claimant testified that he worked four days per week and averaged pay of $375.00 per day, for a total of $1,500.00 per week.

2. On June 8, 2017 claimant was hauling a load for employer from Beaver, Utah to Fallon, Nevada. While making a turn the trailer claimant was hauling shifted and the trailer turned over, resulting in an accident. Claimant was initially treated at the scene by emergency personnel.

3. Claimant immediately notified employer of the accident. Mr. Fisher, owner of employer, made arrangements to transport claimant back to Grand Junction, Colorado and instructed claimant to seek treatment at Community Hospital.

4. Upon returning to Grand Junction on June 9, 2017, claimant sought treatment at Community Hospital as directed. At that time, claimant reported pain in his neck, left shoulder, and left knee.

5. Claimant testified that it is his understanding that at the time of the June 8, 2017 accident, employer did not have workers compensation insurance. Claimant based this belief, in part, on the knowledge that Mr. Fisher scheduled an appointment for claimant to be seen at Grand Valley Family Practice. Claimant testified that Grand Valley Family Practice refused to see him because the appointment would not be covered by workers' compensation.

6. Other than the directive to seek initial treatment at Community Hospital and the attempted appointment with Grand Valley Family Practice, respondent did not provide claimant with the name of any other medical provider. Claimant testified that respondent did not provide him with a list of designated medical providers.

7. In addition to the initial treatment he received at Community Hospital, claimant also received treatment for his neck, left shoulder and left knee from St. Mary's Hospital, Dr. Robert Replogle, and Arianna Anderson, FNP.

8. On June 21, 2017, claimant was seen by Dr. Robert Replogle for a neurosurgery consultation. Dr. Replogle diagnosed a musculo-ligamentous strain, but determined that claimant could stop using the neck collar. Dr. Replogle opined that physical therapy might be appropriate for claimant if his neck pain continued.

9. On July 13, 2017 claimant returned to Community Hospital and was seen by Ariana Anderson, FNP. At that time, claimant reported that he was doing well with "occasional twinges in [his] knee and back" and his shoulder was "almost back to normal". Ms. Anderson observed that claimant had good range of motion in all joints and had no knee instability. Ms. Anderson determined that claimant could return to work.

10. Claimant testified that since the June 8, 2017 accident his left knee has felt "wobbly" and at times it has "collapsed". As a result, claimant is unable to be on ladders or scaffolding. Claimant testified that his current left shoulder symptoms include pain and a reduction in his range of motion. Claimant testified that his current neck symptoms include pain and stiffness, but these neck symptoms improve throughout the day.

11. Claimant testified that after the June 8, 2017 accident he did not return to employment with employer. Claimant was able to obtain to employment in late July 2017 with Energy Pro Insulation. Based upon claimant's testimony at hearing and payroll records entered into evidence, claimant's earnings with Energy Pro Insulation were less than the wages he earned with employer. For the ten week period

represented in the record, claimant averaged $563.10 per week while working for Energy Pro Insulation.[1] Claimant also testified that during the week of September 18, 2017 through September 24, 2017 he requested time off from his position at Energy Pro Insulation because of instability in his left knee.

12. Claimant testified that his employment with Energy Pro Insulation ended during the week of October 14, 2017. Claimant testified that he was discharged from Energy Pro Insulation because he was unable to keep up with production. Claimant also testified that his inability to keep up with production was caused by the injuries he sustained on June 8, 2017. Claimant further testified that he has not worked since October 14, 2017.

13. The ALJ credits claimant's testimony at hearing and finds that claimant has demonstrated that it is more likely than not that on June 8, 2017 he suffered an injury that arose out of an in the course and scope of his employment with respondent.

14. The ALJ credits claimant's testimony at hearing and finds that claimant has demonstrated that it is more likely than not that respondent failed to select a medical provider for claimant related to his work injury. Therefore, claimant has demonstrated that it is more likely than not that the choice of physician passed to claimant.

15. The ALJ credits claimant's testimony at hearing and the medical records entered into evidence and finds that claimant has demonstrated that it is more likely than not that the treatment he has received for his neck, left shoulder, and left knee constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the June 8, 2017 work injury.

16. The ALJ credits claimant's testimony at hearing and finds that claimant has demonstrated that it is more likely than not that claimant was unable to work from June 9, 2017 through June 30, 2017; from September 18, 2017 through September 24, 2017; and from October 16, 2017 and ongoing. The ALJ further credits claimant's testimony at hearing and finds that claimant has demonstrated that it is more likely than not that he was unable to work during these periods because of the injuries he sustained June 8, 2017.

[1] The payroll records from Energy Pro Insulation show that claimant's earnings were as follows: For the pay period July 31, 2017 through August 6, 2017, gross earnings of $402.00. For the pay period August 7, 2017 through August 13, 2017, gross earnings of $456.00. For the pay period August 14, 2017 through August 20, 2017, gross earnings of $660.00. For the pay period August 21, 2017 through August 27, 2017, gross earnings of $705.00. For the pay period August 28, 2017 through September 3, 2017, gross earnings of $468.00. For the pay period September 4, 2017 through September 10, 2017, gross earnings of $348.00. For the pay period September 11, 2017 through September 17, 2017, gross earnings of $1,149.00. For the pay period September 25, 2017 through October 1, 2017, gross earnings of $552.00. For the pay period October 2, 2017 through October 8, 2017, gross earnings of $597.00. For the pay period October 9, 2017 through October 15, 2017, gross earnings of $294.00.

17. The ALJ credits claimant's testimony at hearing and the payroll records entered into evidence and finds that claimant has demonstrated that it is more likely than not that for the period of July 31, 2017 through September 17, 2017 and during the period of September 25, 2017 through October 14, 2017 that he worked for Energy Pro Insulation. The ALJ further credits claimant's testimony at hearing and the payroll records entered into evidence and finds that claimant has demonstrated that it is more likely than not that during those same time periods claimant earned less than his AWW because of June 8, 2017 work injury.

18. The ALJ credits claimant's testimony at hearing and finds that claimant has demonstrated that it is more likely than not that at the time of claimant's compensable work injury his AWW was $1,500.00.

19. The ALJ credits claimant's testimony at hearing and finds that claimant has demonstrated that it is more likely than not that respondent did not have workers' compensation insurance at the time of claimant's work injury on June 8, 2017.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also*

Subsequent Injury Fund v. Thompson, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has demonstrated by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment with respondent on June 8, 2017. As found, claimant's testimony on this issue is credible and persuasive.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, claimant has demonstrated by a preponderance of the evidence that the treatment he received for his neck, left shoulder, and left knee constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the June 8, 2017 work injury. As found, claimant's testimony and the medical records are credible and persuasive on this issue.

7. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

8. As found, upon learning of claimant's work injury respondent failed to provide claimant with a list of designated medical providers. As found, claimant has demonstrated by a preponderance of the evidence that choice of medical provider passed to claimant. Therefore, medical treatment claimant received as a result of the June 8, 2017 work injury is authorized medical treatment. As found, claimant's testimony on this issue is credible and persuasive.

9. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

10. As found, claimant's AWW at the time of the work injury was $1,500.00. As found, claimant's testimony is credible and persuasive on this issue.

11. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

12. As found, claimant has demonstrated by a preponderance of the evidence that because of the June 8, 2017 work injury he was unable to work from June 9, 2017 through June 30, 2017; from September 18, 2017 through September 24, 2017; and from October 16, 2017 and ongoing. Therefore, claimant is entitled to TTD benefits during these periods. As found, claimant's testimony on this issue is credible and persuasive.

13. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Temporary partial disability payments ordinarily continue until either claimant reaches maximum medical improvement or an attending physician gives claimant a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. *See* 8-42-106, C.R.S.

14. As found, claimant has demonstrated by a preponderance of the evidence that as a result of the June 8, 2017 work injury claimant's wages were less than his AWW from July 31, 2017 through September 17, 2017; and from September 25, 2017 through October 14, 2017. Therefore, claimant is entitled to TPD benefits during these periods. As found, claimant's testimony on this issue and the payroll records are credible and persuasive.

15. Section 8-43-408(1) C.R.S., provides that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits provided in said articles shall be increased fifty percent.

16. As found, claimant has demonstrated by a preponderance of the evidence that respondent did not have workers' compensation insurance at the time of claimant's June 8, 2017 work injury. Therefore, claimant's compensation for this claimant shall be increased by 50%. As found, claimant's testimony on this issue is credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury on June 8, 2017 that arose out of and in the course and scope of his employment with respondent.

2. Respondent is responsible for payment of reasonable medical treatment necessary to cure and relieve claimant from the effects of the June 8, 2017 work injury.

3. Claimant's average weekly wage (AWW) for this claim is $1,500.00.

4. Respondent shall pay claimant temporary total disability (TTD) benefits for the periods of June 9, 2017 through June 30, 2017; September 18, 2017 through September 24, 2017; and October 16, 2017 and ongoing.

5. Respondent shall pay claimant temporary partial disability (TPD) benefits for the periods of July 31, 2017 through September 17, 2017; and September 25, 2017 through October 14, 2017.

6. Claimant's benefits shall be increased by 50% because of respondent's failure to obtain and maintain workers' compensation insurance.

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

8. In lieu of payment of the above compensation and benefits to the claimant, respondent shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $50,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee;

OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $50,000.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

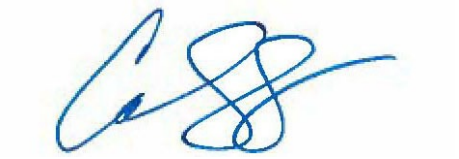
9. It is further ordered that respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

10. It is further ordered that filing of any appeal, including a petition to review, shall not relieve respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

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

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

Dated: January 3, 2018



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

ISSUES

- Did Claimant prove by a preponderance of the evidence she injured her right shoulder as a result of her admitted March 10, 2017 industrial accident?
- Did Claimant prove entitlement to TTD benefits commencing July 21, 2017?
- If Claimant is entitled to TTD benefits, is Respondent entitled to an offset for PERA retirement benefits?

FINDINGS OF FACT

1. Claimant worked as a probation officer and victim witness assistant for Employer. She was injured on March 10, 2017 while intervening in an altercation between a male probationer and his girlfriend in the hallway outside her office. Another probation officer attempted to restrain the male probationer while Claimant escorted the girlfriend down the hallway. The male broke free, ran down the hallway and physically assaulted Claimant and the girlfriend. He flung Claimant to the ground, severely fracturing her left femur.

2. Respondent admitted liability for the left leg/hip injury and covered all treatment relating to it. The present dispute involves whether Claimant also injured her right shoulder as a result of the accident.

3. A video surveillance camera was trained on the incident but there is a significant glare or other distortion on the lens that obscures the precise moment of injury. The ALJ viewed the video numerous times trying to get a clear view of the incident, without success. Although Claimant was thrown to the ground, it is impossible to draw definitive conclusions regarding the exact manner in which she fell or which part or parts of her body were injured.

4. Claimant was transported by ambulance to the Mount San Rafael emergency room in Trinidad. She was given fentanyl en route due to severe 10/10 pain in her left leg and hip. The paramedics' report does not mention any right upper extremity issues.

5. The ER physician, Dr. Jennifer Case, documented "the patient was at the courthouse and attempting to break up an altercation when she was shoved causing her to fall directly onto her left hip. . . . She reports immediate pain in the hip and is unable to move or bear weight on the hip since the injury. She denies head injuries or other injuries associated with the fall." X-rays showed a comminuted subtrochanteric fracture of the left femur, with 5 cm of superior displacement of the femoral shaft. The ER records contain no mention of any right arm or shoulder issues.

6. Claimant was transferred to Parkview Hospital in Pueblo for a "higher level of care." The admitting physician's report states "Patient is a probation officer with a probationer who 'went berserk,' picked her up and threw her down. Landed on left hip. . . . No other injuries or complaints." Claimant was "very uncomfortable [and] tearful." On examination, her left leg was externally rotated and shortened. The report also notes "normal" upper extremity examination, including normal range of motion." Claimant was admitted and scheduled for surgery the next morning.

7. Dr. Kenneth Danylchuk performed an open reduction with internal fixation on March 11, 2017.

8. Claimant was discharged from the main hospital and transferred to the acute rehabilitation unit on March 14. It appears Claimant was confined to bed for most of the time she was in the hospital as she was limited to "toe-touch weight-bearing" on the left leg.

9. The rehab unit records confirm Claimant reported issues with her right shoulder. For example, the she reported pain in the "R shoulder" during "Session 1" of occupational therapy starting on March 23, 2017. Also on March 23, a nurse documented "pt reports she has pain in her right shoulder after doing stairs in therapy yesterday, requested warm blanket." Later that day a nurse applied Voltaren Gel to the right shoulder. Similarly, OT records state "pt tried to lock R brake [on her wheelchair] but wasn't successful due to R shoulder pain." She had reduced shoulder range of motion which improved somewhat after massage and application of a cold pack. Records from March 24 indicate the right shoulder was feeling "much better."

10. Claimant was discharged from the rehab unit on March 25, 2017.

11. CCOM in Pueblo has been Claimant's primary ATP since her release from the rehab hospital. At her initial visit on March 27, 2017, Claimant was still maintaining "toe-touch weight-bearing using a walker and/or a wheelchair." She was having an "expected" level of postsurgical pain but felt she was improving. Claimant did not complain of shoulder pain and there is no indication her shoulder was examined.

12. Claimant returned to CCOM on April 11, 207. Her hip was slowly improving, although she was still toe-touch weight-bearing and ambulating with a walker. Claimant also reported "she did trip and fall when at home but did not injure her left hip, but her right shoulder [is] somewhat sore after this trip."

13. Claimant saw PA-C Pete Sloan at Dr. Danylchuk's office on May 25, 2017. She was still using a walker to ambulate, but her hip was doing better. PA-C Sloan also noted "she complains of left[1] shoulder pain and limitation of motion and weakness. She relates that she reviewed the security tape of her injuries and landed on that shoulder when she was knocked down. She complains of constant right shoulder pain with

[1] The ALJ finds the reference to the "left" shoulder is likely a dictation or transcription error, because Claimant has not otherwise reported any problems with her left shoulder and all of the significant clinical findings relate to the right shoulder.

increased pain with movement as well as inability to abduct and forward flex." The right shoulder was tender on examination with reduced flexion, extension, and external rotation. PA-C Sloan ordered a right shoulder MRI "to rule out rotator cuff tear."

14. The right shoulder MRI was done on June 12, 2017, which showed a full thickness tear of the supraspinatus tendon with "mild" retraction.

15. Claimant underwent right shoulder surgery with Dr. Danylchuk on July 21, 2017. Before surgery, Dr. Danylchuk noted "this is a relatively recent injury and I believe it most likely is repairable." He performed a rotator cuff repair, open acromioplasty and a distal clavicle excision.

16. Claimant saw Dr. Tashof Bernton for an IME at Respondent's request on October 23, 2017. Dr. Bernton opined the records he reviewed did not support a probable causal link between the March 10 accident and Claimant's right shoulder injury. He noted the April 11, 2017 CCOM report contained the first mention of right shoulder issues in the records he reviewed. He opined "she had a complete tear of the rotator cuff, and although that might have been missed acutely while she had a fracture and was being treated with high doses of narcotics, it would clearly have been noted in the rehabilitation process while training the patient on bed transfers, et cetera, as it would have interfered with some of these functions." Dr. Bernton concluded, "the medical record is consistent with a subsequent and nonwork-related fall onto the right shoulder in April 2017, which is the probable cause of her right shoulder rotator cuff tear."

17. Dr. Bernton's testimony at hearing was largely consistent with the opinions expressed in his IME report. He had viewed the surveillance video "many times" and felt it was not clear enough to determine the exact mechanism of injury. He opined Claimant fell directly on the left hip, which is not a plausible mechanism for injuring the right shoulder. He opined the rotator cuff tear was "acute" and would have been very painful immediately or shortly after it occurred. He maintained his opinion that the rotator cuff tear did not occur during the March 10 incident. Based on the records he reviewed, he thought the tear probably occurred during the incident at home described in the April 11 CCOM record. Dr. Bernton agreed the shoulder surgery was reasonably necessary, but not causally related to the March 10 industrial accident.

18. On cross-examination, he admitted he did not have access to the acute rehab facility records, which undercut his theory that there was no documentation of shoulder problems until April 11.

19. In her hearing testimony, Claimant credibly recounted two falls at home while recovering from her accident. Claimant did not provide a clear timeline, so the ALJ cannot determine precisely when each event occurred. In one incident, Claimant's leg gave way while lifting her walker over a doorway threshold. Claimant fell forward and arrested her fall by catching a doorknob with her right arm.

20. The other incident occurred while Claimant was taking her trash to the curb, which required her to walk down a small hill. She was using the handles of her wheeled

garbage can for support as she walked toward the curb. At the steepest part of the hill, her left leg buckled and gave way due to injury-related weakness. The garbage can kept rolling downhill and she fell to the ground.

21. Dr. Bernton did not have details regarding either incident. He assumed the fall at home was due to pre-existing lower extremity neuropathy.

22. Claimant credibly testified she has never fallen because of neuropathy.

23. Following the injury, CCOM released Claimant to modified work sitting 95% of the time. Claimant returned to modified duties on March 28, 2017 at her full wages. On May 22, 2017 Claimant submitted her notice of retirement, effective June 30, 2017. At the time of retirement, Claimant was working regular shifts and being paid her preinjury wage.

24. The shoulder surgery on July 21, 2017 caused a worsening of Claimant's condition and a corresponding increase in her injury-related limitations. Claimant's dominant right arm was in a sling for 6-8 weeks post-surgery and her pain levels were increased. Claimant credibly explained she could not have performed her regular job or even modified duty work after the surgery.

25. At the time of her injury and thereafter, Claimant has been eligible for and receiving PERA retirement benefits.

26. Claimant proved by a preponderance of the evidence the torn rotator cuff is causally related to the March 10 assault.

27. Claimant proved by a preponderance of the evidence her condition worsened as a result of shoulder surgery on July 21, 2017, causing increased disability and additional loss of earning capacity.

28. Respondent failed to prove it is entitled to offset TTD benefits by Claimant's PERA retirement benefits.

CONCLUSIONS OF LAW

A. Claimant's right shoulder injury is causally related to the admitted accident

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals*

Office, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonably necessary if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

A claimant does not have to identify the precise moment of injury, as long as she proves her work caused the injury. *Hubbard v. City Market*, W.C. No. 4-934-698-01 (November 21, 2014). A claimant can satisfy her burden to prove a causal relationship if the evidence as a whole justifies an inference the condition is work-related, even if the exact medical cause of the injury remains "shrouded in mystery." *Industrial Commission v. Riley*, 441 P.2d 3 (Colo. 1968).

As found, Claimant proved she injured her right shoulder as a result of the industrial accident. As Dr. Bernton explained, the rotator cuff tear was likely "acute," and given the lack of persuasive evidence suggesting Claimant had any pre-injury right shoulder problems, the ALJ is confident the tear occurred sometime on or after the date of injury. The evidence shows several potential work-related causes of Claimant's rotator cuff tear: she may have torn it during the original accident, or in therapy at the rehab hospital, or when she fell at home due to leg weakness. Another plausible explanation is that she strained or partially tore the rotator cuff in the original accident (which would account for the symptoms documented in the rehab records) and completely tore the cuff later when she fell at home. Each scenario is more probable than some undocumented accident outside of work or a spontaneous tear with no identifiable cause.

Claimant established at least four potential theories of causation linking her torn rotator cuff to the industrial accident. On the other hand, there is no persuasive evidence of any plausible nonwork-related cause to account for the pathology. Although the ALJ is not certain which theory of causation is correct, the ALJ is persuaded the cuff tear was more likely than not caused by one of these mechanisms of injury. Dr. Bernton believes Claimant injured the shoulder falling at home, but the persuasive evidence shows all post-injury falls were injury-related. Since all reasonably likely explanations are directly or indirectly related to the accident, it follows that Claimant's shoulder injury was more likely than not caused by the accident.

There is no significant dispute that the surgery was reasonably necessary. Therefore, Respondent is liable for treatment of the right shoulder, including but not limited to the July 21, 2017 surgery.

B. Claimant is entitled to TTD benefits commencing July 21, 2017

Sections 8-42-103(1)(g) and 8-42-105(4) preclude an award of TTD benefits if a claimant was "responsible for termination" of her employment. Claimant concedes she

was “responsible” for her termination by resigning on June 30, 2017, but requests TTD commencing with the shoulder surgery on July 21, 2017.

The termination statutes are not a permanent bar to receiving temporary disability benefits, and a claimant can reestablish eligibility for TTD by showing a worsened condition which causes a subsequent wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004). A post-termination wage loss is “caused by a worsened condition” if the worsening results in limitations or restrictions which did not exist at the time of the termination, and which cause a limitation on the claimant’s temporary earning capacity that did not exist when she caused the termination. *Martinez v. Denver Health*, W.C. No. 4-527-415 (ICAO, August 8, 2005). The mere imposition of additional work restrictions does not automatically establish a worsened condition. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630 (Colo. App. 2014). The burden of proof to establish a subsequent worsening and consequent decrease of earning capacity is on the claimant. *Green v. Job Site, Inc.*, W.C. No. 4-587-025 (ICAO, July 19, 2005).

As found, Claimant proved that her injury-related medical condition deteriorated and caused greater limitations on her ability to work than were present at the time of her resignation. Claimant’s dominant arm was in a sling for 6-8 weeks while convalescing from shoulder surgery, and the ALJ is persuaded by Claimant’s testimony she could not have performed even modified sedentary duties in that condition.

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3), none of which have occurred yet. Accordingly, Claimant is entitled to TTD benefits commencing July 21, 2017 and continuing until terminated by law.

C. Respondent is not entitled to an offset for PERA retirement benefits

Section 8-42-103(1)(c)(II.5) provides:

> In cases where an employer does not participate in federal old-age, survivors, and disability insurance, and it is determined that employer-paid **retirement** benefits are payable to an individual and the individual’s dependents, the aggregate benefits payable for **permanent total disability** pursuant to this section shall be reduced, but not below zero by an amount determined as a percentage of the employer-paid retirement benefits . . . . (Emphasis added).

By contrast, temporary disability benefits are only subject to offset by PERA “disability” benefits. Section 8-42-103(1)(d)(I). Since Claimant is only receiving PERA retirement benefits, Respondent is not entitled to an offset.

ORDER

It is therefore ordered that:

1. Respondent shall pay for all reasonably necessary medical treatment to cure and relieve the effects of the compensable injury to Claimant's right shoulder, including, but not limited to, the July 21, 2017 surgery.

2. Respondent shall pay Claimant TTD benefits commencing July 21, 2017 and continuing until terminated according to law.

3. Respondent's request for an offset against TTD benefits because of Claimant's PERA retirement benefits is denied and dismissed.

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

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

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

DATED: January 17, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that her average weekly wage (AWW) should be increased.

- Whether claimant has demonstrated by a preponderance of the evidence that her scheduled impairment rating should be converted to a whole person impairment rating.

- Whether claimant sustained a serious permanent disfigurement to areas of her body normally exposed to public view, resulting in additional compensation.

FINDINGS OF FACT

1. Claimant began working for employer on January 26, 2015. Claimant's job duties included selling lightbulbs and light fixtures. On February 6, 2015, claimant suffered an admitted injury to her left ankle. Claimant testified that the injury occurred when she fell from a set of stairs in employer's showroom.

2. At the time of her injury claimant was paid $13.00 per hour. Claimant testified that at that time she was in a training period and her hours with employer were "limited". A paystub entered into evidence indicates that during the pay period of January 25, 2015 through January 31, 2015, claimant worked 27.5 hours. [1]

3. Claimant testified that when she was hired by employer she was told that at the conclusion of a two week training period she would work 40 hours per week and receive an increase in pay to $14.00 per hour. In addition, claimant would have the opportunity to earn a 2% commission on certain products.

4. Ms. Schwanke testified that claimant was hired to work part time, with the possibility of full time hours. Ms. Schwanke further testified that claimant was not going to complete a training period in two weeks. On the contrary, Ms. Schwanke explained that it can take up to a year to fully train an individual in the sales position held by claimant and at least six months of training to be able to begin earning commissions "consistently".

5. On February 6, 2015, Dr. Andreas Sauerbrey performed surgery on claimant's left ankle which included open reduction and internal fixation of a pilon fracture and an open reduction and internal fixation of a of a malleolus fracture.

[1] This is the week prior to claimant's date of injury.

Ultimately claimant was released to return to work on December 2, 2015. Claimant testified that she believed she would return to her position with employer once she was released to return to work by her doctor. However, claimant did not return to work with employer.

6. On December 7, 2015, claimant obtained employment with JMP Holdings. While working for JMP Holdings, claimant was paid a salary equal to $38,000.00 per year. In addition, JMP Holdings paid $1,800.00 per year for claimant's health insurance.

7. Claimant underwent a second surgery to her left ankle on February 11, 2016. That surgery was performed by Dr. Eric Verploeg and involved arthroscopy, debridement and hardware removal.

8. Following the February 11, 2016 surgery, claimant was eventually released to return to work in May 2016. Thereafter, claimant obtained employment with Affordable Flooring Warehouse. At that time, claimant was paid $15.00 per hour and worked 40 hours per week.

9. Claimant testified that currently she does not have full range of motion in her left ankle. As a result, claimant has difficulty walking up and down stairs, has pain in her low back, and feels that her body is "off kilter".

10. On October 27, 2016, Dr. John Tobey determined that claimant was at maximum medical improvement (MMI). At that time, Dr. Tobey assessed a permanent impairment rating of 17% for claimant's left lower extremity.

11. Claimant testified that when she was placed at MMI on October 27, 2017, she was earning $18.50 per hour with Affordable Flooring Warehouse. Claimant also testified that as of the date of the hearing she is still employed by Affordable Flooring Warehouse.

12. On November 30, 2016, respondents filed a Final Admission of Liability (FAL) admitting for the date of MMI and impairment rating as determined by Dr. Tobey and the AWW of $357.50.

13. On March 1, 2017, claimant returned to Dr. Verploeg. At that time, Dr. Verploeg assessed a permanent impairment rating of 35% for claimant's left lower extremity, based upon the existence of ankylosis.

14. Claimant timely contested the November 30, 2016 FAL and requested a Division-sponsored independent medical examination (DIME). On April 12, 2017, claimant was seen by Dr. Richard Stieg for that DIME. At that time, Dr. Stieg agreed that claimant reached MMI on October 27, 2017. However, Dr. Stieg assessed a permanent impairment rating of 36% for claimant's left lower extremity. Based upon Dr. Stieg's DIME report, respondents filed an amended FAL on June 9, 2017 admitting for the impairment rating of 36% for claimant's left lower extremity.

15. Claimant testified that while she was working for employer she also had employment with All Seasons Carpet and Upholstery. Claimant testified she worked variable hours for All Seasons Carpet and Upholstery. Claimant also testified that because of her February 6, 2015 work injury with employer she was unable to continue her employment with All Seasons Carpet and Upholstery.

16. Claimant provided W-2 forms from All Seasons Carpet and Upholstery for the years 2013 and 2014. These records indicate that in 2013 claimant had gross earnings of $5,526.31 with All Seasons Carpet and Upholstery. In 2014 claimant had gross earnings of $4,750.00. Based upon the W-2 forms entered into evidence, the ALJ calculates that claimant's average earnings with All Seasons Carpet and Upholstery equate to $98.81 per week.

17. Claimant asserts that her AWW should be increased to reflect her concurrent employment with All Seasons Carpet and Upholstery. Claimant also asserts that her AWW should be recalculated to take into account either: 1) the understanding that she would be paid $14.00 per hour after a training period with employer; or 2) her earnings following the first surgery with JMP Holdings; or 3) her earnings following the second surgery with Affordable Flooring Warehouse.

18. The ALJ credits claimant's testimony regarding her understanding of her wages with employer over the contrary testimony of Ms. Schwanke. Therefore, the ALJ finds that had claimant not been injured, she would have been paid $14.00 per hour and scheduled 40 hours per week at the conclusion of her two week training period. Thus, the ALJ finds that the appropriate calculation of claimant's AWW would be based upon the rate of $14.00 per hour at 40 hours per week, for weekly total of $560.00. The ALJ declines to include an additional amount for possible commissions as there is no clear evidence in the record of what such commissions might be.

19. The ALJ credits claimant's testimony and the payroll records entered into evidence and finds that claimant has demonstrated that it is more likely than not that at the time of her injury while working for employer she had concurrent employment with All Seasons Carpet and Upholstery. The ALJ calculates that claimant earned an average of $98.82 per week with that concurrent employer.

20. The ALJ finds that claimant has failed to demonstrate that it is more likely than not that she has suffered any functional impairment that is not contained on the schedule. Therefore, the ALJ declines to convert claimant's scheduled left lower extremity impairment rating to a full person impairment.

21. At the November 9, 2017 hearing, claimant demonstrated that as a result of the February 6, 2015 injury and related surgeries she has well healed surgical scars on her left ankle. Specifically, claimant has 1) a scar on the inside of her left ankle that measures 5 ½ inches long and approximately 1/8 of an inch wide; 2) a scar on the outside of her left ankle measuring 3 ½ inches long and 1/16 of an inch wide; and 3) two arthroscopic scars each measuring approximately ½ of an inch in diameter. In addition,

claimant has a slight antalgic gait and noticeable swelling in her left ankle when compared to her right ankle.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., (2015). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

4. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

5. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on her earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon her AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

6. As found, claimant's AWW is properly calculated to be $658.82 ($560.00 plus $98.82 for concurrent employment. Although claimant was working "limited" hours and earning $13.00 per hour for employer as of February 6, 2015, the parties had agreed that at the conclusion of the two week training period claimant's wage was to be increased to $14.00 per hour and she would be scheduled 40 hours per week. The ALJ concludes that had claimant not been injured her earnings would have been $560.00 per week.

7. As found, claimant has demonstrated by a preponderance of the evidence that she had concurrent employment at the time of her work injury, resulting in wages averaging $98.82 per week.

8. The ALJ declines to incorporate claimant's wages with either JMP Holdings or Affordable Flooring Warehouse in calculating her AWW, as to do so would not accurately reflect claimant's average wages at the time of the injury.

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

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

10. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

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

12. As found, claimant has failed to demonstrate by a preponderance of the evidence that she has suffered any functional impairment that is not contained on the schedule. Therefore, claimant's request to convert her scheduled impairment rating to a whole person impairment is denied.

13. Section 8-42-108 (1), C.R.S. provides that at claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

14. As found, as a result of her February 6, 2015 work injury, claimant has a visible disfigurement to her body consisting of scarring and swelling on her left ankle and a slight antalgic gait. Therefore, claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage (AWW) for this claim is $658.82.

2. Claimant's request to convert her scheduled impairment to a whole person impairment is denied and dismissed.

3. Respondents shall pay claimant $2,000.00 for her disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

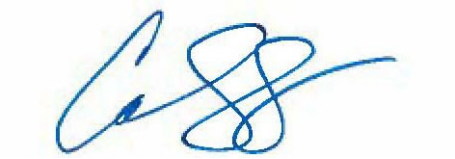
4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

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

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

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

Dated: January 18, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, CO 81501

ISSUES

I. Whether Claimant has established, by a preponderance of the evidence, that the arthroscopic surgery recommended by Dr. Bowman is maintenance medical treatment.

II. Whether Claimant has established, by a preponderance of the evidence, that the arthroscopic surgery recommended by Dr. Bowman is reasonable, necessary, and related.

STIPULATIONS – PROCEDURAL MATTERS

The parties agreed that the case was closed pursuant to a Final Admission of Liability, but that Respondents admitted liability for maintenance medical treatment. Claimant did not endorse the issue of reopening. Therefore, the issue of reopening was not heard by this court.

FINDINGS OF FACT

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

1. On November 17, 2015, Claimant suffered a compensable injury to his left shoulder when a ceiling tile fell and hit his left shoulder. According to the medical records, the injury occurred when Claimant reached up to pull some paper towel off a shelf. The paper towel was holding up a ceiling tile. After Claimant pulled the paper towel off the shelf, the ceiling tile fell and hit Claimant on the backside of his left shoulder and neck.

2. On the day of the accident, Claimant went to Concentra Medical Center and was evaluated by Hanna Bodkin, PA-C. Claimant complained of left sided shoulder pain and inner upper arm pain which he rated at a 5-8/10. On physical examination, Claimant's left shoulder had decreased range of motion. Claimant was diagnosed as suffering from an injury to the left shoulder, shoulder contusion, and a superficial injury to the back wall of the left thorax. Claimant was prescribed a sling, ibuprofen, and physical therapy.

3. On November 24, 2015, Claimant returned to Concentra and was again evaluated by PA Bodkin. Claimant stated his pain was about the same, or

maybe worse. Claimant complained of pain in the top of his shoulder that radiated into his elbow.

4. On November 24, 2015, Claimant underwent physical therapy. According to the physical therapy notes, Claimant was doing better and had better range of motion.

5. On December 3, 2015, Claimant underwent additional physical therapy and told the physical therapist he was getting a little better, but still had soreness in the shoulder which progressed through the day.

6. On December 8, 2015, Claimant returned to PA Bodkin. Claimant complained of being in pain every morning and that he was feeling worse. Claimant also underwent physical therapy on this day as well. He advised the physical therapist that he was hurting really bad and that he stopped taking his pain medication because he felt the medication was masking his pain and causing him to overdo it.

7. On December 22, 2015, Claimant returned to PA Bodkin. Claimant stated he had been pain free for a week, although sore, and that he was 75% better.

8. On December 22, 2015, Claimant was evaluated by Dr. Cary Motz, an orthopedic surgeon. Dr. Motz noted in his report that a ceiling tile fell and hit Claimant in the supraclavicular area. Dr. Motz performed a physical examination and noted that Claimant was non-tender over the AC joint. He also noted very mild limitation of range of motion with internal rotation and slight crepitus which he thought was coming from Claimant's subscapular area. He also noted Claimant's rotator cuff strength was 5/5 in external rotation and 4+/5 with abduction. His impression was left shoulder contusion and possible chronic rotator cuff tear. Dr. Motz went on to state that Claimant's exam was fairly benign regarding the contusion to the shoulder. He also stated that although Claimant has some weakness with abduction, the mechanism of injury would not cause a rotator cuff tear and therefore it would not be work related if he had one. Dr. Motz said he would re-evaluate Claimant in a month and that he would expect that Claimant could be released.

9. On January 12, 2016, Claimant returned to PA Bodkin. Claimant noted a significant increase in pain and stiffness since he had not gone to physical therapy for 10 days. Claimant was, however, feeling about 80% better.

10. On January 12, 2016, Claimant returned to Dr. Motz. Claimant stated that he had improved with physical therapy and massage therapy. Dr. Motz performed a physical examination and noted excellent shoulder range of motion. He also noted some crepitus at the superomedial border of the scapula with some tenderness over the trapezius and that Claimant was not tender over the deltoid. Claimant's rotator cuff strength was 4+/5 with external rotation and abduction. Dr. Motz' impression was resolving left shoulder contusion and possible left

shoulder chronic rotator cuff tear. Dr. Motz concluded that Claimant did not require any more treatment due to the shoulder contusion. He also concluded that any additional symptoms which might be consistent with a rotator cuff tear were not related to the work accident.

11. On January 18, 2016, Claimant underwent an MRI of his left shoulder. The MRI demonstrated a mild subacromial subdeltoid bursitis, mild osteoarthritis of the chronic fibular joint, a small amount of bursal surface fraying, and mild tendinopathy of the supraspinatus tendon. There was no full thickness rotator cuff tear, tendon retraction, or focal rotator cuff muscle atrophy.

12. On January 26, 2016, Claimant was evaluated by Dr. Mark Montano. Dr. Montano evaluated Claimant's left shoulder and noted Claimant had pain with overhead reaching, but normal range of motion which was similar to his right sided range of motion. He also noted Claimant had good shoulder strength with external and internal rotation. Dr. Montano's assessment was shoulder contusion, superficial injury to the left back wall of the thorax, and supraspinatus tendinitis.

13. On February 4, 2016, Claimant returned to Dr. Montano and complained of numbness in his left hand which he said started the day before. Claimant thought the left handed numbness was due to a hard day at work, which included shoveling snow. Claimant stated that he also had pain in the left side of his neck and that his shoulder was very sore.

14. On February 17, 2016, Claimant returned to PA Bodkin and complained of worsening shoulder pain. Claimant's treatment remained the same, which consisted of physical therapy, acupuncture, and massage therapy.

15. On February 24, 2016, Claimant saw Dr. Sacha and he prescribed Lyrica and recommended a shoulder injection. After seeing Dr. Sacha, Claimant saw PA Bodkin and complained of increasing shoulder pain.

16. On March 2, 2016, Dr. Sacha administered a steroid injection into Claimant's left shoulder.

17. On March 9, 2016, Claimant returned to physical therapy. The therapy notes indicate the injection increased Claimant's range of motion but did not help his pain.

18. On March 18, 2016, Claimant advised his physical therapist that his shoulder locked up and that he had significant pain lifting his arm out away from his body. Claimant also stated that his pain gets so bad that he gets sick to his stomach. On March 23, 2016, Claimant told his physical therapist that his shoulder pain was very bad and that he vomited due to the pain. Claimant rated his pain at a 5-6/10.

19. On March 29, 2016, Dr. Sacha administered an injection into Claimant's left subacromial bursa – shoulder.

20. On April 7, 2016, Claimant advised his physical therapist that he has been pain free for the last 4 days. He stated that he had a steroid shot in his shoulder 10 days ago and that he has been on vacation and has not worked.

21. On April 12, 2016, Claimant reported to his physical therapist that he was doing much better and had no pain at all. Claimant also stated that he was able to work his normal shift the day before without increased pain. Claimant returned to physical therapy on April 14, 2016, and stated that he was doing much better and was able to return to all normal activities without limitation. Claimant returned on April 26, 2016, and stated that he had no shoulder pain and was able to perform all normal activities without limitations.

22. On April 26, 2016, Claimant was evaluated by Dr. Montano. Claimant was doing much better. Dr. Montano noted that Claimant had been pain free for weeks after he received the shoulder injection from Dr. Sacha. It was also noted that Claimant had been working full duty and performing all activities of life without pain, although he might have been sore due to physical therapy. Dr. Montano's assessment at that time was contusion of left shoulder, injury of left shoulder, superficial injury of back wall of thorax, and supraspinatus tendinitis. He anticipated Claimant would be at MMI within 2 weeks.

23. On May 6, 2016, Claimant advised his physical therapist that he had been overworked at work since his boss quit and he was having pain around the long head of his bicep. On May 10, 2016, Claimant reported to his physical therapist that he had more pain over the top and along the posterior of his left shoulder.

24. On May 27, 2016, Claimant was evaluated by Dr. Montano. Claimant indicated that although his shoulder was sore, he had improved significantly. Claimant also complained of some clicking in his shoulder. Dr. Montano placed Claimant at MMI and determined Claimant did not have any impairment due to his work injury. He did, however, recommend maintenance care in the form of a gym pass for one year and two visits with Dr. Sacha over the next 12 months.

25. Claimant testified that during April he was pain free. Claimant also testified that he felt like the effects of the shoulder injection were starting to wear off in May of 2016. Claimant's testimony is consistent with the medical records and is found to be credible regarding his lack of shoulder pain during the majority of April and that he had some pain in May of 2016.

26. As agreed to by the parties, Respondents filed a Final Admission of Liability based on Claimant being placed at MMI by Dr. Montano on May 27, 2016 and admitted liability for maintenance medical treatment. Claimant did not object to the FAL and his case closed.

27. In August of 2016, Claimant quit working for Employer.

28. On August 16, 2016, approximately 2 ½ months after being placed at MMI, Claimant returned to Concentra and was seen by Dr. Scott Richardson. Claimant's only complaint was increased clicking in his left shoulder. Claimant denied having any shoulder pain. Dr. Richardson physically evaluated Claimant's left shoulder and noted there was no tenderness. He also noted that Claimant's shoulder had full range of motion. He further noted that rotator cuff tests were negative and that labrum and stability tests were also negative. Dr. Richardson referred Claimant to an orthopedic specialist due to the clicking in his shoulder.

29. Approximately five days after his appointment with Dr. Richardson, Claimant moved to Astoria, Oregon.

30. Since moving to Oregon, Claimant has worked as a server and has also opened up his own food cart business.

31. On September 22, 2016, Claimant was evaluated by Dr. Ronald Bowman, an orthopedic surgeon in Oregon. By the time Claimant moved to Oregon and was evaluated by Dr. Bowman, Claimant had additional complaints. In addition to the clicking Claimant described to Dr. Richardson, Claimant complained of pain and instability in his left shoulder. Dr. Bowman examined Claimant and noted Claimant was tender at the AC joint and acromion and over the greater tuberosity. He also noted Claimant was tender at the anterior and posterior glenohumeral joint and that he had a very positive O'Brien test and a slightly positive open can test. He also found Claimant had a minimally positive Neer, Hawkins impingement, and anterior glide. Based on his examination, Dr. Bowman thought Claimant might have a labrum injury. Therefore, he recommended Claimant undergo another MRI with an arthrogram.

32. On November 10, 2016, Claimant returned to Dr. Bowman. Claimant advised Dr. Bowman that he could not undergo another MRI because he has a cochlear implant. Dr. Bowman noted Claimant did undergo a CT arthrogram which showed an interstitial longitudinal tear of the subscapularis tendon without retraction. He noted that the labrum appeared well attached and determined it was unlikely Claimant had a labral tear. Therefore, he recommended a subacromial injection and a glenohumeral injection, if the subacromial injection did not help.

33. On November 16, 2016, Claimant underwent a cortisone injection into his subacromial space. The medical note from that date indicates Claimant had a 50% reduction in pain at rest.

34. On December 8, 2016, Claimant returned to Dr. Bowman and indicated the injection helped for about 2 days. Dr. Bowman determined that the subacromial injection did not help isolate Claimant's pain. Therefore, he recommended Claimant undergo a glenohumeral joint injection.

35. On December 16, 2016, Claimant underwent a glenohumeral joint injection. It was noted that Claimant had sharp shooting pain in his subacromial bursa with reaching.

36. On February 2, 2017, Claimant returned to Dr. Bowman. Claimant reported that he was getting a little worse. Because Claimant could not undergo an MRI due to his cochlear implant, Dr. Bowman recommended a diagnostic arthroscopy and a possible rotator cuff repair and/or labral repair. Although Dr. Bowman indicated on November 10, 2016, that it was unlikely Claimant had a labral tear, he indicated on February 2, 2017, that Claimant might require a labral repair. However, before proceeding with surgery, Dr. Bowman referred Claimant to a physiatrist to see if there might be any other non-surgical treatments that might benefit Claimant.

37. On February 16, 2017, Claimant was evaluated by Dr. Bradford Lorber, a physiatrist. At this appointment, Claimant complained of pain in the anterolateral shoulder which felt like a needle was stuck in his shoulder. Claimant noted any movement caused increased needle like pain. Claimant indicated that nothing helps reduce his symptoms. Claimant also complained of occasional shooting pulses up to his neck and occasional radiation of symptoms into his arm and finger numbness that involves digits two, three, and four. Dr. Lorber stated that he could not rule out cervical radiculopathy as the cause of Claimant's shoulder pain. Despite not being able to rule out cervical radiculopathy as the cause of Claimant's shoulder pain, Dr. Lorber stated that proceeding with shoulder surgery would be the most advisable step.

38. On March 19, 2017, Dr. Failinger performed a records review. He determined that Claimant was not a surgical candidate as it relates to the industrial injury. Dr. Failinger also testified, via his deposition. Dr. Failinger's testimony was consistent with his report.

39. On March 23, 2017, Claimant returned to Dr. Bowman. Dr. Bowman noted that in order to rule out a labral injury, he recommended a diagnostic arthroscopy. He noted that it was possible that Claimant could be found to have normal tissue. He also noted that although Claimant did not have bicep tendon findings initially, it is common for these problems to develop over time with instability or damage to the labrum/glenoid interface. Dr. Bowman went on to state that:

> [T]he decision for medical treatment irrespective of causation issues for biceps pathology is a clinical decision more so than one may have had surgery and needs to be decided beforehand. I have done that appropriately and I continue to request that.

Although the above statement made by Dr. Bowman is not clear, this ALJ finds that based on his March 23, 2017, report, Dr. Bowman has indicated that Claimant has developed a problem with his biceps tendon and that the surgery

he has recommended will also be directed towards the biceps tendon, regardless of whether the biceps tendon condition was caused by the work accident.

40. Dr. Bowman also stated in his March 23, 2017, report that Claimant has ongoing symptoms from his industrial injury and the only way to determine the cause of the symptoms is to perform a diagnostic arthroscopy.

41. On April 13, 2017, Claimant returned to Dr. Bowman. Claimant complained of severe pain at times in his left shoulder. Claimant also noted that he continued to work in his new restaurant in Astoria and that his shoulder was painful after mopping the floor.

42. On May 25, 2017, Claimant returned to Dr. Bowman. Claimant indicated his symptoms were worse. He also complained of having estheisa in his thumb and index finger of his left hand. Dr. Bowman indicated that he thought Claimant was having more symptoms from rotator cuff pathology.

43. On July 6, 2017, Claimant returned to Dr. Bowman. Dr. Bowman noted that Claimant underwent EMG nerve conduction studies with Dr. Lorber and that the testing was normal. Dr. Bowman evaluated Claimant and thought that some of Claimant's pathology is the biceps tendon. Dr. Bowman stated that Claimant still required a diagnostic arthroscopy and that Claimant will likely "need a biceps tendinosis as well."

44. Dr. Bowman testified, via his November 15, 2017, deposition. Dr. Bowman testified that the arthroscopy he wants to perform is a two-step process. Dr. Bowman testified that the first step of the procedure is to view the structures of the shoulder and identify pathology which might be causing Claimant's shoulder pain. Then, the second step of the procedure is to fix the pathology which might be causing Claimant's shoulder pain. Dr. Bowman testified that he believes Claimant has something wrong with his shoulder and that that there is a real good chance the surgery will help. Dr. Bowman also testified that based on Claimant's response to the subacromial injection, Claimant would likely benefit from a decompression or acromioplasty, in which bone would be burrowed back to make the space larger. Dr. Bowman also stated in his July 6, 2017, report that Claimant will likely "need a biceps tendinosis as well." Therefore, the intent and purpose of the arthroscopic surgery is not purely diagnostic. The intent and purpose of the arthroscopic surgery proposed by Dr. Bowman is to cure or improve Claimant's underlying shoulder condition in order to reduce Claimant's pain complaints and increase Claimant's function.

45. Dr. Bowman also testified that even if Claimant could undergo an MRI – arthrogram, and it was normal, he would still recommend the arthroscopic surgery. Therefore, Dr. Bowman is not recommending the surgery because Claimant cannot undergo the MRI – arthrogram, he is recommending the surgery because he believes the surgery will cure or improve Claimant's underlying condition.

46. Claimant testified that at the time he was placed at MMI, he felt the latest cortisone injection was starting to wear off. He testified that his pain would wax and wane at that time depending on his workload. Claimant also stated that in order to minimize his work load at that time, he had to bring in extra labor.

47. Claimant also testified that since being placed at MMI, his condition has gotten worse. At the time Claimant was placed at MMI on May 27, 2016, he advised Dr. Montano that although his shoulder was sore, he was significantly better. At hearing, Claimant testified that his current shoulder condition sometimes prevents him from being able to lift his shoulder or put on his socks.

48. The purpose of the surgery recommended by Dr. Bowman is to cure or improve Claimant's shoulder condition.

49. The surgery has been recommended due to the alleged worsening of Claimant's condition since being placed at MMI and is an attempt to improve his condition. The proposed surgery is not designed to relieve Claimant from the effects of the work injury and prevent deterioration.

50. Because the purpose of the arthroscopic surgery is to cure or improve Claimant's condition, the medical treatment at issue is not *Grover*-type maintenance medical treatment.

CONCLUSIONS OF LAW

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

GENERAL PROVISIONS

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

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to

a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

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

I. Whether Claimant has established, by a preponderance of the evidence, that the arthroscopic surgery recommended by Dr. Bowman is maintenance medical treatment.

In cases where Respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When Respondents challenge Claimant's request for specific medical treatment, Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO February 12, 2009).

Pursuant to § 8-42-107(8)(b)(I), C.R.S., an authorized treating physician shall make the initial determination concerning the date of MMI. Once an authorized treating physician makes a determination of MMI, the termination of medical care is triggered and the ALJ lacks jurisdiction to conduct a hearing concerning the accuracy of the authorized treating physician's determination until a DIME is conducted. §8-42-107(8)(b)(III), C.R.S.; *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). The Colorado Supreme Court has noted that the DIME procedure is "the only way for an injured worker to challenge the treating physician's findings -- including MMI, the availability of post-MMI treatment, degree of non-scheduled impairments, and whether the impairment was caused by an on-the-job injury...." *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003).

The ICAO has held that "once an authorized treating physician places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits for the purposes of curing the industrial injury and assisting the claimant to reach MMI unless the claimant undergoes a DIME." *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001). See also *Anderson-Capranelli v. Republic Industries, Inc.*, W.C. No. 4-416-649 (November 25, 2002) (following MMI, "In the absence of a DIME the ALJ lacks jurisdiction to adjudicate a request for additional medical benefits to cure the effects of the injury."); *Toledo-Zavala v. Excel Corp*., W.C. Nos. 4-534-398, 4-534-399 (November 14, 2003) (same); *Cass v. Mesa County Valley School District*, W.C. No. 4-629-629 (August 26, 2005) ("[I]f an ATP places the claimant at MMI, an ALJ lacks

jurisdiction to award additional medical benefits to improve the claimant's condition unless a DIME has been conducted on the issue of MMI.").

However, in *Grover v. Industrial Commission*, 759 P.2d 705, 710 (Colo. 1988), the Supreme Court construed § 8-42-101 (1)(a) as requiring Respondents in workers' compensation claims to provide medical care to injured workers without regard to any time limitation as long as further medical treatment is reasonably necessary "to relieve the worker from the effects of the industrial injury …." The Court found justification for the ruling by observing "[i]t is an obvious fact of industrial life, however, that an injured worker can reach maximum medical improvement from an injury and yet require periodic medical care to prevent further deterioration in his or her physical condition." Id.

In 1991 the definition of MMI in § 8-40-201 (11.5) was added to the statute. In that amendment, MMI referenced a point when any physical impairment is stable and "no further treatment is reasonably expected to improve the condition." That definition excluded from 'further treatment' any "future medical maintenance." In *Milco Construction v. Cowan*, 860 P.2d 539 (Colo.App. 1992) the court noted this amendment. Consequently, when applying the obligation in § 8-42-101(1)(a) to the Respondents to provide medical care "to cure and relieve" the effects of the injury, the term "cure" was to necessarily be limited to care prior to MMI, while the phrase "relieve" could include post MMI treatment.

Therefore, the obligation to provide treatment to "cure" or improve Claimant's condition terminates when the Claimant reaches MMI. This is true because MMI is defined as the point in time when the Claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." § 8-40-201 (11.5). *See Chism v. Walmart*, W.C. No. 4-809-103-03 (January 9, 2017).

However, surgery is not as a matter of law "curative" treatment. *Hayward v. Unisys Corp*. W.C. No. 4-230-686 (July 2, 2002), *affd, Hayward v. Industrial Claim Appeals Office*, (Colo. App. No. 02CA1446, January 9, 2003) (knee surgery may be curative or may be a form of *Grover*-style maintenance treatment designed to alleviate deterioration of the Claimant's condition). Medical treatment which does not tend to cure or improve Claimant's condition may nevertheless be ordered under *Grover* upon the presentation of substantial evidence that such treatment "will be reasonably necessary to relieve a claimant from the effects of the injury or to prevent further deterioration of his or her condition" after MMI. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609, 611 (Colo. App. 1995). Further, the question of whether medical treatment is administered for the purpose of "curing" or merely "relieving" Claimant's condition does not depend on the type of treatment, but rather the reason for the treatment. The following statement from *Milco Construction v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1992), is pertinent:

> We hold, therefore, that, if the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be

> expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far, such medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition.

Therefore, the issues before this ALJ are limited to whether the surgery recommended by Dr. Bowman is *Grover*-type maintenance medical treatment, and if so, whether the treatment is reasonable, necessary, and related to Claimant's industrial accident.

Consequently, the threshold issue for this ALJ to determine is whether the surgery recommended by Dr. Bowman is *Grover*-type maintenance treatment.

In this case, Claimant suffered an industrial injury to his left shoulder on November 17, 2015. Respondents admitted liability for the claim and provided medical treatment. Claimant was placed at MMI on May 27, 2016. At the time Claimant was placed at MMI he still had some pain in his shoulder and some clicking. Moreover, Claimant testified that at the time he was placed at MMI, his shoulder pain would wax and wane depending on his workload. Respondents filed a final admission of liability and admitted for *Grover*-type maintenance medical treatment. The parties agreed that the case was closed, except for the issue of *Gover*-type maintenance medical treatment.

As found, after being placed at MMI on May 27, 2016, Claimant was provided maintenance medical treatment. On August 16, 2016, approximately 2 ½ months after being placed at MMI, Claimant returned to Concentra and was seen by Dr. Scott Richardson. Claimant's only complaint was increased clicking in his left shoulder. Claimant denied having any shoulder pain. Dr. Richardson physically evaluated Claimant's left shoulder and noted there was no tenderness. He also noted that Claimant's shoulder had full range of motion. He further noted that rotator cuff tests were negative and that labrum and stability tests were also negative. Dr. Richardson referred Claimant to an orthopedic specialist due to the clicking in Claimant's shoulder.

Approximately 5 days after his appointment with Dr. Richardson, Claimant moved to Oregon. Since moving to Oregon, Claimant has worked as a server and has also opened up his own food cart business.

By the time Claimant moved to Oregon and was evaluated by Dr. Bowman, an orthopedic specialist, on September 22, 2016, Claimant was complaining of more than just clicking in his shoulder. Claimant was complaining of pain and instability. Based on his initial examination, Dr. Bowman opined that Claimant might be suffering from a labrum injury. As time went on, Claimant's pain complaints increased and the nature of his symptoms changed. Dr. Bowman ultimately recommended an arthroscopic surgery. Although Dr. Bowman has at times described the arthroscopic surgery as being purely

diagnostic in his medical records, this ALJ found that based on his deposition testimony and medical records, the purpose of the surgery is to cure and improve Claimant's shoulder condition. As testified to by Dr. Bowman, and found by this ALJ, Dr. Bowman expects to find pathology and perform certain procedures during the arthroscopy, including, but not limited to, a decompression or acromioplasty and a "biceps tendinosis." (Although Dr. Bowman's reports indicate the possible performance of a "biceps tendinosis," he might be referring to the condition he will surgically correct, and not the actual procedure. Regardless, such matter does not alter this ALJ's findings and conclusions.) In addition, as found by this ALJ, Dr. Bowman expects the surgery to improve Claimant's underlying condition by reducing his pain complaints and increasing his level of functioning.

As found by this ALJ, the reason for performing the arthroscopic surgery recommended by Dr. Bowman is to cure or improve Claimant's shoulder condition. Therefore, this ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that the surgery recommended by Dr. Bowman is *Grover*-type maintenance medical treatment.

II. Whether Claimant has established, by a preponderance of the evidence, that the arthroscopic surgery recommended by Dr. Bowman, is reasonable, necessary, and related.

Because the surgery recommended by Dr. Bowman has been found to be curative, and not *Grover*-type maintenance treatment, the issue of whether the arthroscopic surgery is reasonable, necessary, and related is moot and will not be addressed.

ORDER

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

1. Claimant's request for *Grover*-type maintenance medical treatment in the form of the arthroscopy recommended by Dr. Bowman is denied and dismissed.

2. Claimant did not endorse the issue of reopening and that issue has not been addressed by this ALJ. Therefore, whether Claimant's work related condition has worsened and whether his case should be reopened has not been addressed.

3. The sole issue decided by this ALJ was the threshold question as to whether the surgery recommended by Dr. Bowman qualified as *Grover*-type maintenance treatment.

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

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

DATED: January 3, 2018

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury in May of 2017.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits to treat his May, 2017 work injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from May 19, 2017 through August 25, 2017.

4. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant was hired to work for Employer on approximately May 3, 2017. Employer is a fencing company with three main divisions including residential/home, new construction, and commercial.

2. At an interview for the position, Claimant advised Employer that he had installed commercial fencing at an airport in his home country and that he was knew how to perform all aspects of fence installation.

3. Employer was impressed with Claimant's reported experience and set up an immediate second interview. Claimant was thereafter hired to work in the higher end commercial division as a 2nd Man, with duties involving helping the foreman to build a fence from start to end. The job is physical and can involve at various stages: digging holes, mixing concrete, setting poles, using equipment, and performing all aspects of fencing installation.

4. On May 11, 2017 an incident report was created. The report noted that the day prior, Claimant refused to work with the crew and sat in the truck while other crew members worked. The report indicated that Claimant sat in the truck for 4 working hours because it was too cold. *See* Exhibit I.

5. On May 17, 2017 a human resources note indicated that after two weeks of work and after evaluation, it was apparent that Claimant was unable to perform duties

stated on his resume. There was a plan to meet with Claimant the next day. *See* Exhibit I.

6. On May 18, 2017 a meeting was held with Claimant. Claimant was unhappy with his rate of pay. Sometime that day, Claimant made a comment that day that he could quit and make more money working at McDonald's. Claimant was sent home and told to return the next day for another meeting. *See* Exhibit I.

7. At that time, Employer had decided to terminate Claimant's employment and prepared to get a final check ready to give to Claimant the next day.

8. On May 19, 2017 Claimant was terminated from employment with Employer. Employer advised Claimant he did not have the experience he had claimed in the interviews. Claimant responded that the work with Employer was different than in his home country.

9. Claimant did not report an injury to Employer on any of the above dates. Claimant's initial job training that he completed just two weeks prior covered how to report injuries and near misses.

10. Employer was not made aware of Claimant's alleged injury until late May, 2017 when they were contacted by their insurance company.

11. On May 24, 2017 Claimant sought medical treatment at Rocky Mountain Medical and was evaluated by Naser Yazd, DNP. Claimant reported right index and middle finger numbness. Claimant reported that his symptoms happened during work due to heavy repetitive motion and that he had the loss of sensation in his finger. On examination Claimant was found to have limited range of motion in his right wrist with pain and numbness in the thumb, index, and middle fingers. Claimant was assessed with right wrist carpal tunnel syndrome and was referred to an orthopedic surgeon to follow up with the carpal tunnel syndrome that he reported happened at work. Claimant was given a prescription for a wrist support. *See* Exhibit G.

12. On May 26, 2017 Claimant filed a Worker's Claim for Compensation. Claimant indicated he was injured on May 17, 2017 and that his hand, fingers, neck, and headaches were the body part affected. Claimant indicated that the injury occurred after digging two days in hard land in the Louisville area. *See* Exhibit A.

13. On June 6, 2017 Claimant was evaluated by NP Yazd. Claimant reported that his right wrist carpal tunnel syndrome had persisted since the last visit with numbness and needling sensations. Claimant again reported that it was due to work and asked for some kind of x-ray or MRI. On examination, NP Yazd found sensory deficits of the right index and middle fingers with normal range of motion. NP Yazd noted Claimant would be sent for an MRI of the right wrist and would be sent to an orthopedic surgeon. *See* Exhibit G.

14. On July 11, 2017 Claimant underwent physical therapy. The treatment diagnoses were listed as pain in right hand and muscle spasm. The injury/onset/change of status date was listed as May 23, 2017. Therapeutic exercises were performed and after treatment Claimant had improved muscle spasm and tenderness. Claimant was provided exercises to perform at home. *See* Exhibits H, 1.

15. On August 15, 2017 Claimant was evaluated by NP Yazd. Claimant reported that his right wrist carpal tunnel syndrome had been better after receiving physical therapy with the finger numbness 95% better and only 5% still numb. Claimant again reported that this happened a few months ago at work while digging with a heavy shovel and manual digging tools and again indicated it was work related. Claimant reported that at the time of his injury he reported it to his supervisor, but that they fired him right away. The examination was found to be unremarkable. NP Yazd indicated that all of the visit sheets would be copied for Claimant's lawyer and there were no recommendations/plans for the right carpal tunnel syndrome. *See* Exhibit G.

16. Claimant testified at hearing. Claimant testified that he was on a two day project in Louisville where he could not use mechanical tools and had to manually dig holes for the fence posts. Claimant indicates that his gloves were torn and that they were not replaced and he worked without gloves during this time. Claimant testified that on the second day of digging he felt pain from his middle and pointer finger to his elbow, along with numbness and that he told the guys on his crew that he could not work anymore because his hand was injured. Claimant testified that he told people in the office the next day that he couldn't use his hand well and that he was then sent to a concrete job. Claimant testified that he went to the doctor after one week and initially thought it would heal on its own. Claimant testified that he could not work for three months due to the injury.

17. Mr. Macias, a human resources and safety manager for Employer, also testified at hearing. He indicated that he trained Claimant and went over the requirements for reporting an injury or a near miss. Mr. Macias testified that he had no indication that Claimant had any injury when Claimant was terminated on May 19, 2017.

18. Mr. Cruz, a project manager for Employer's commercial division, also testified at hearing. Mr. Cruz supervised Claimant during his 16 days of employment. Mr. Cruz acknowledged that the job duties were physical and testified to the general duties involved in a commercial fence installation. Mr. Cruz indicated that employees work on a 3 man crew. He indicated that a typical project is three days with the first day involving 4-5 hours of digging with special digging equipment including bobcats, augers, 2 man augers, post hole diggers, and hand tools. He testified that the rest of the day involves getting materials ready, the truck ready, and pulling string to mark the ground. Mr. Cruz testified that on the second day, the crews are involved in fixing/setting poles. Finally, he indicated that the third day involves hanging fabric. Mr. Cruz testified that employees receive two 15 minute breaks and one 30 minute lunch. Mr. Cruz also testified that Claimant had not reported an injury to him and that he was not aware of any alleged injury until the end of May.

19. Claimant's testimony overall is not found credible or persuasive. His testimony that he had to manually dig holes for two days straight is not consistent with the testimony provided by Mr. Cruz about the use of various tools on projects and is not consistent with the testimony provided by Mr. Cruz about the time that is typically spent digging. Further, Claimant's testimony that he told people of his injury and reported it is not consistent with the testimony of Mr. Cruz or Mr. Macias.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An occupational disease is a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. *See* § 8-40-201(14), C.R.S. A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999); *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). In deciding whether the Claimant has met his burden of proof, the ALJ is empowered to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Claimant has failed to meet his burden to establish that he sustained a compensable occupational disease to his right wrist, carpal tunnel, as a direct and proximate cause of his employment duties. Although Claimant testified that he dug holes manually for two days and that he believed it to have caused his condition, the ALJ finds this not credible or persuasive. Rather, the testimony of Mr. Cruz surrounding the typical job duties, the tools used, and the variation in what activities are performed is credited. Employees do not dig holes for two days. The work is more varied and involves getting materials ready, getting the truck ready, pulling string to mark the ground, and also involves breaks. Further, Mr. Cruz is found credible that the digging is done with varied tools. Although not a requirement for a compensability determination, it is noted that there has been no medical doctor that has performed a causation analysis in this case. NP Yazd repeats in his medical records the information provided to him subjectively by Claimant. There is no indication that NP Yazd questioned Claimant as to the number of hours spent performing various tasks including digging or that he received information specific to the risk factors for developing carpal tunnel syndrome. Further, Claimant's testimony on the amount of time spent digging is not found credible or persuasive. Although a large part of his duties might involve digging holes to set the fencing poles, Claimant is not credible that he dug holes manually without the varied tools available to

the crews for two days. Further, as found above, Claimant reported to physical therapy that the onset of symptoms was May 23, 2017, one day prior to him seeking treatment, and after the date on which his employment ended. This is also inconsistent with his testimony.

Additionally, Claimant's testimony that he reported the work related injury is not credible or persuasive. Employer's witnesses are credible that they were not aware of any alleged injury until after Claimant was terminated. Claimant did not mention the alleged injury in his May 18 meeting or at the time of his May 19 termination. Overall, the evidence presented is insufficient for Claimant to establish, more likely than not, that he sustained a work related occupational disease during his 16 days of employment with Employer.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a work related occupational disease in May of 2017 during his course and scope of employment with Employer.

2. As Claimant failed to meet his burden to establish a compensable injury, the remaining issues are not addressed. The claim is denied and dismissed.

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

DATED: January 24, 2018

/s/ Michelle E. Jones

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

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that the right total knee arthroplasty recommended by Dr. Kevin Borchard is reasonable medical treatment necessary to cure and relieve claimant from the effects of the September 18, 2015 work injury.

- Whether claimant has demonstrated by a preponderance of the evidence that the right knee surgery recommended by Dr. Kevin Borchard was automatically authorized due to respondent's alleged failure to comply with WCRP Rule 16-11.

- Whether claimant has demonstrated by a preponderance of the evidence that penalties should be imposed pursuant to Section 8-43-304, C.R.S. for respondent's alleged violation of Rule 16.

- Whether claimant has demonstrated by a preponderance of the evidence that penalties should be imposed pursuant to Section 8-43-304, C.R.S. for respondent's alleged dictation of claimant's care in violation of Section 8-43-503(3) C.R.S.

ISSUE ON REMAND

- The ICAO issued an Order of Remand on December 22, 2017 instructing the ALJ to make additional findings regarding whether the January 16, 2017 or January 20, 2017 requests for prior authorization were "completed requests" for purposes of Rule 16-10. [1]

FINDINGS OF FACT

1. Claimant suffered an admitted injury on September 18, 2015. Based upon the medical records entered into evidence, the injury occurred when claimant fell off a ladder and landed on his right leg. When claimant first began receiving treatment following the injury he complained of pain in his low back and right hip.

2. Prior to the September 18, 2015 injury claimant received medical treatment for his right knee. In October 2012, a magnetic resonance image (MRI) of claimant's right knee showed a complex medial meniscus tear, a lateral meniscus tear, chondromalacia, and scar tissue. Based upon these MRI results, on October 26, 2012, Dr. Robert LaPrade performed an arthroscopic partial medial meniscectomy and partial lateral meniscectomy, with synovectomy.

[1] The Order of Remand references Rule 16-10(F). However, based upon the specific language included in the Order of Remand regarding complete authorization requests, the ALJ understands the order to address the requirements of the most current version of Rule 16-10(E), which incorporated the language of prior promulgations of Rule 16-9(F).

3. On July 30, 2015, claimant sought treatment with Dr. Alexander Meininger and complained of aching pain in his right knee and cramps in his right calf. During the examination Dr. Meininger noted tenderness around the medial aspect of claimant's right knee and "trace" effusion. On that same date, x-rays of claimant's right knee showed a "normal well maintained knee joint". Dr. Meininger referred claimant to Dr. Timothy Wirt for a spinal consultation. On August 6, 2015, Dr. Wirt opined that he was not sure that claimant's right leg issues were related to his low back, but ordered an MRI of claimant's lumbar spine. Dr. Wirt did not specifically address claimant's right knee at that time. Thereafter, claimant was injured on September 18, 2015 as described above.

4. On September 19, 2015, claimant received treatment in the emergency department at The Memorial Hospital at Craig. Dr. Tinh Huyn diagnosed claimant with a gluteal strain and chronic back pain. Thereafter on September 21, 2015 claimant treated with Yampa Care Craig and reported back pain with difficulty walking and lifting.

5. Ultimately on November 4, 2015, claimant underwent repair of a tear in the right proximal hamstring. This surgery was performed by Dr. Kevin Borchard.

6. The medical records entered into evidence demonstrate that on December 23, 2015, claimant was seen at Dr. Borchard's office by Thomas Doty, PA-C. On that date, claimant reported that he was experiencing right knee pain that began a "couple years ago". On that date, Mr. Doty also recorded that claimant had "not addressed the problem because of right hip surgery in Nov[ember]" and that the right knee pain was "preventing [claimant] from full physical therapy benefit". Mr. Doty excused claimant from work from December 23, 2015 to January 2, 2016 due to a "right knee effusion", ordered x-rays of claimant's right knee, and administered a right knee injection.

7. On December 23, 2015, radiographs of claimant's right knee showed moderate knee joint effusion with moderately severe degenerative arthropathy involving the medial joint compartment.

8. Claimant continued to complain of right knee pain and on September 16, 2016, an MRI was taken of claimant's right knee. The MRI showed a high grade, near complete tearing of the anterior cruciate ligament (ACL), extensive degenerative tearing of the body and posterior horn of the medial meniscus, moderate degenerative arthrosis involving the medial femorotibal compartment, prominent bone edema throughout the medial tibial plateau, and mild degenerative arthrosis involving the patellofemoral and lateral femorotibial compartments.

9. On September 23, 2016, Sherri Boyle, adjustor with insurer, noted that claimant "did mention the knee throughout the claim so it needs to be included in the claim handling".

10. On October 13, 2016, Dr. Borchard completed a Physician's Report of Worker's Compensation Injury form (WC-164 form) and noted that claimant had a right ACL tear.

11. On November 17, 2016, claimant returned to Dr. Borchard and again reported pain in his right knee. Dr. Borchard recorded that claimant's "knee pain has been persistent throughout this time with more localized to the medial joint line" and that arthritis in claimant's right knee "has been much more symptomatic since his fall". At that time Dr. Borchard discussed treatment options including anti-inflammatory medications, injections, use of a knee brace, and possible surgery. On December 5, 2016, insurer authorized a brace for claimant's right knee.

12. On December 5, 2016, Ms. Boyle chose to obtain an independent medical examination (IME) of claimant "to see the relatedness of the knee". Ultimately, an appointment was scheduled with Dr. Brian Harrington.

13. Prior to claimant's evaluation by Dr. Harrington, Dr. Borchard recommended that claimant undergo a right total knee arthroplasty. A request for authorization for the recommended surgery was submitted to insurer on January 16, 2017 via facsimile (fax). Based upon the documents entered into evidence the January 16, 2017 request included a fax cover sheet and a "surgery authorization form".

14. A second request for this same right knee surgery was submitted to insurer on January 20, 2017. Based upon the documents entered into evidence the January 20, 2017 request included a fax cover sheet and a form titled "orthopedic surgery service pre-op orders" and the same "surgery authorization form" sent on January 16, 2017.

15. Initially the ALJ understood that the January 20, 2017 request also included the medical record from claimant's January 12, 2017 appointment with Dr. Borchard. On remand the ALJ has further reviewed the requests and finds that the faxes sent by Dr. Borchard's office do not indicate the number of pages included with the faxed requests. Therefore, the ALJ is unable to ascertain if additional documents were perhaps included. In addition, the copy of the January 12, 2017 medical record as included in claimant's exhibits does not appear to be attached to the January 20, 2017 request. As it appears in the record, the January 12, 2017 medical record is part of a 99 page document with a fax date of March 13, 2017. Based upon these records, the ALJ finds that the January 12, 2017 medical record was not included with the January 20, 2017 request for authorization. There is no other indication in the record that Dr. Borchard provided respondent with any documentation of his decision making process regarding the recommended knee surgery.

16. On January 16, 2017, Ms. Boyle sent a letter to Dr. Harrington asking him to opine whether claimant's right knee issues were related to the September 18, 2015 work injury and what treatment options were warranted.

17. On January 18, 2017, claimant was seen by Dr. Harrington who noted that insurer requested that he "render an opinion as a Level II provider on where to go with this patient's care plan or if he is at MMI". Dr. Harrington obtained a medical history from claimant, performed a physical exam, and reviewed claimant's medical records.

Dr. Harrington's review of claimant's medical records included information regarding claimant's prior treatment for his right knee.

18. Dr. Harrington opined that claimant's right ACL tear was related to the September 18, 2015 work injury. In support of this opinion, Dr. Harrington noted that he had "no evidence of an ACL tear prior to [claimant's] work related injury on September 18, 2015". Dr. Harrington opined that the mechanism of injury described by claimant "is certainly plausible for an ACL tear". Dr. Harrington also opined that although claimant had degenerative joint disease (DJD) related symptoms in his right knee prior to the September 18, 2015 work injury, the injury was an "incitement of post-traumatic arthritis". Dr. Harrington "deferred" to Dr. Borchard regarding whether it would appropriate to pursue surgery or more conservative treatment.

19. On January 27, 2017, Ms. Boyle sent a fax to Dr. Borchard's office that stated: [s]urgery is still pending as I am waiting on 2nd opinion from [doctor]".

20. On February 8, 2017, Ms. Boyle provided Dr. Borchard's office with verbal authorization for the recommended knee replacement surgery. Ms. Boyle testified at hearing and confirmed that between January 16, 2017 and her verbal authorization on February 8, 2017 she did not take any steps to contest the recommended surgery.

21. Based upon the verbal authorization from insurer, Dr. Borchard's office scheduled claimant's right total knee arthroplasty for March 27, 2017.

22. On March 24, 2017, counsel for respondent notified Dr. Borchard that respondent was revoking authorization for the surgery. The basis for respondent's revocation was that they were in receipt of new medical records that indicated claimant had a preexisting condition in his right knee.

23. On May 30, 2017, Dr. Timothy O'Brien performed a review of claimant's medical records and opined that claimant did not suffer a knee injury on September 18, 2015. Dr. O'Brien also opined that although knee replacement would be reasonable treatment for claimant's condition, that need is related only to claimant's long standing osteoarthritis and not any acute injury. Dr. O'Brien testified by deposition in this matter consistent with his written report.

24. The ALJ credits the opinions of Drs. Borchard and Harrington over the contrary opinion of Dr. O'Brien and finds that the ACL tear in claimant's right knee is related to the September 18, 2015 work injury, further resulting in the need for a total knee replacement.

25. The ALJ credits the opinions of Drs. Borchard and Harrington over the contrary opinion of Dr. O'Brien and finds that claimant's need for a total knee replacement is necessary to relieve claimant from the effects of the September 18, 2015 work injury.

26. The ALJ credits the testimony of Ms. Boyle and finds that respondent failed to take action to contest the requested surgery within seven days of the request. The ALJ also finds that respondent authorized the treatment when Ms. Boyle provided verbal authorization to the treating physician, Dr. Borchard, on February 8, 2017.

27. Respondent argues that the requests for surgery from Dr. Borchard did not comply with Rule 16-10, as neither request constituted a "completed request". Therefore, respondent argues that they are is not bound by the requirements of Rule 16-11. As found, the January 16, 2017 and January 20, 2017 did not include documentation related to Dr. Borchard's decision making process, nor his opinion regarding the reasonableness of the recommended surgery.

28. The ALJ finds respondent's action of authorizing the recommended surgery after obtaining the opinion of Dr. Harrington equates to acquiescence of the "completeness" of the authorization requests. However, based upon the definition of "complete" included in Rule 16-10 and the documents entered into evidence, Dr. Borchard's requests were insufficient to trigger the seven day timeline in Rule 16-11. Therefore, claimant has failed to show that it is more likely than not that respondent violated Rule 16-11.

29. Claimant argues that respondent directed claimant's care in violation of Section 8-43-503(3), C.R.S. when an attempt was made to revoke the prior authorization of surgery. The ALJ declines to apply this analysis in this case. Although respondent did contact the provider, Dr. Borchard, to state that authorization was revoked, this notice did not direct Dr. Borchard on whether or not to proceed with surgery. Therefore, claimant has failed to show that it is more likely than not that respondent violated Section 8-43-503(3), C.R.S.

CONCLUSIONS OF LAW

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

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

among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, claimant has demonstrated by a preponderance of the evidence that the recommended right knee surgery is reasonable medical treatment necessary to cure and relieve claimant from the effects of the September 18, 2015 work injury. As found, the opinions of Drs. Borchard and Harrington are credible and persuasive.

5. Rule 16-11 WCRP allows respondents seven days to contest a recommended medical treatment. If respondents fail to comply with the requirements of Rule 16-11, the requested treatment is deemed authorized. Rule 16-11(B) provides, in part:

> [i]f the payer is contesting a request for prior authorization for medical reasons, the payer shall, within seven (7) business days of the completed request: (1) Have all submitted documentation . . . reviewed by a physician or other health care professional, as defined in section 16-5(A)(1)(a), . . .
>
> (3) Furnish the provider and the parties with a written contest that sets forth the following information: (a) An explanation of the specific medical reasons for the contest, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion; (b) The specific cite from the Medical Treatment Guidelines exhibits to Rule 17, when applicable; (c) Identification of the information deemed most likely to influence the reconsideration of the contest when applicable; and (d) A certificate of mailing to the provider and parties.

6. WCRP 16-10(E) provides that for an authorization request to be "complete" the medical provider "shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting medical documentation." WCRP 16-10(E) further identifies supporting medical documentation as "documents used in the provider's decision-making process to substantiate the need for the requested service or procedure."

7. It is the claimant's burden to demonstrate that there was a "completed request" for purposes of assessing a penalty for violation of Rule 16. *See McDaniel v. Vail Associates. Inc.*, W.C. No. 3-111-363 (July 18, 2011). A respondent is not required to plead insufficiency of a request for authorization as an affirmative defense. *Id.*

8. Previously the panel has addressed the requirement that Rule 16 request for preauthorization include documents included in the provider's decision making process. *Lichtenberg v. J.C. Penney Corp.*, W.C. No. 4-814-897 (July 19, 2012); *See Aguirre v. Nortrak*, W.C. No. 4-742-953 (March 19, 2012); *McDaniel v. Vail Associates. Inc. supra; Skelly v. Wal-Mart*, W.C. No. 4- 632-887 July 31, 2008); *Cross v. Microglide*, W.C. No. 4-355-764 (September 2, 2003) aff'd, *Cross v. ICAO*, 03CA1807 (Colo. App. 2004) (not selected for publication); *Wilkens v. First Lutheran Church*, W.C. No. 4-369-843 May 17, 2001).

9. Finally, WCRP 16-11(E) provides, in pertinent part: "[f]ailure of the payer to timely comply in full with the requirements of section 16-11(A) or (B), shall be deemed authorization for payment of the requested treatment".

10. The purpose of Rule 16 is to protect the medical provider from providing treatment to a claimant which the insurer later challenges as unrelated, unnecessary or unreasonable. *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 20, 2007). Although the rule refers to "authorization," its purpose is to establish the reasonableness and necessity of treatment provided by an authorized provider. *Bray v. Hayden School District RE-1,* W.C. No. 4-418-310 (April 11, 2000).

11. As found, respondent received two authorization requests from Dr. Borchard for the recommended knee surgery. As found, Dr. Borchard's requests on January 16, 2017 and January 20, 2017 were insufficient to trigger the seven day timeline in Rule 16-11. Therefore, claimant has failed to show that by a preponderance of the evidence that respondent violated Rule 16-11.

12. Section 8-43-503(3), C.R.S., prohibits employers, insurers, and their representatives from dictating "to any physician the type or duration of treatment or degree of physical impairment".

13. As found, respondent made an attempt to revoke prior authorization of the recommended surgery. The ALJ concludes that this action did not constitute direction of claimant's care. On the contrary, respondent's attempted revocation did not dictate whether the surgery was to proceed or not. Therefore, penalties are not appropriate with regard to this issue.

14. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If respondent committed a violation of the statute, rule or order, penalties can be imposed only if respondents' actions were not reasonable under an objective standard. *Pioneers*

Hospital of Rio Blanco County v. Industrial Claim Appeals Office, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

15. As found, claimant has failed to prove by a preponderance of the evidence that respondent violated Rule 16-11.

16. As found, claimant has failed to prove by a preponderance of the evidence that respondent violated of Section 8-43-503(3), C.R.S.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the recommended right total knee arthroplasty, pursuant to the Colorado Medical Fee Schedule.

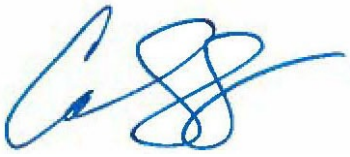
2. Claimant's request for penalties for an alleged violation of Rule 16-11 is denied and dismissed.

3. Claimant's request for penalties on the basis of direction of care is denied and dismissed.

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

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

Dated: January 29, 2018



Cassandra M. Sidanycz
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If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

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

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that his average weekly wage (AWW) should be increased to include the value of lodging.

- Whether respondents have demonstrated by a preponderance of the evidence that claimant's monetary benefits should be reduced by 50% for an alleged safety violation pursuant to Section 8-42-112(1), C.R.S.

- At hearing the parties stipulated to a "base" AWW of $832.00 prior to the ALJ's determination of whether an increase is appropriate.

FINDINGS OF FACT

1. Claimant resides in Fruita, Colorado. Claimant was hired by employer to work at a surface mine location near Vernal, Utah. Employer was performing work at that location pursuant to a contract with their client, U.S. Oil Sands. Claimant sustained an admitted work injury on June 8, 2017. Claimant testified that he was injured when he fell more than 14 feet from a structure at the mine.

2. Claimant attended training with employer on May 31, 2017. Thereafter, claimant was scheduled to begin work in Vernal, Utah on June 6, 2017. Claimant's job duties while employed with employer included preparing equipment for the mining process. This included building chutes, conveyors, and the crusher system. The crusher is a five story structure that operates to crush rock into sand. Claimant testified that he was assigned to an eight man crew. On claimant's first day at the mine location his crew was trained on the operation of a "man basket". During that training the safety instructor informed claimant's crew that they had two fall protection harnesses available for the eight man crew.

3. Mr. Barron testified that he provided safety training to claimant on May 31, 2017. Mr. Barron also testified that he was not an employee of employer on May 31, 2017, but worked for "KTW", an insulation company. Mr. Barron became employer's employee two days after claimant's' work injury.

4. With regard to safety issues, Mr. Barron testified that employees are expected to comply with appropriate safety regulations at the job side. Mr. Barron also testified that OSHA requires fall protection over 4 feet, while OSHA "construction" rules require fall protection over 6 feet. Mr. Barron also testified that there are different safety

rules administered by the Mine Safety and Health Administration (MSHA). Mr. Barron testified that MSHA requires fall protection any time there is risk for a fall.

5. Documents entered into evidence indicate that the Occupational Health and Safety Administration (OHSA) requires fall protection when "an employee is working at 6 feet or more above a lower level". U.S. Oil Sands, Inc. Contractor HSE Handbook indicates that fall protection is required if an employee is "walking or working within 15 feet of an unprotected edge that has a drop of 4 feet or more".

6. Mr. Barron testified that the job site where claimant was injured had an OSHA section and an MSHA section. As a result, different safety regulations applied depending upon the specific section. Mr. Barron also testified that the different sections were clearly marked.

7. On June 7, 2017, claimant's foreman, Larry Stoller, did not arrive at the job site until mid-day. As a result, claimant's crew assisted another crew with assembling chutes. When the foreman arrived, claimant's crew was assigned to install a fly wheel on the crusher structure. Claimant testified that that the fly wheel was to be installed on the third level of the structure. This process was completed with the use of a crane. Claimant testified that although members of his crew were on the third level of the structure, they had only two fall protection harnesses. Claimant did not wear a fall protection harness on that day.

8. On June 8, 2017, it was determined that the fly wheel had been installed incorrectly. As a result, claimant's crew was involved in removing and reinstalling the fly wheel in the correct position. Claimant testified that he and Mr. Stoller started that shift by looking for a part that was necessary for the project. Claimant and Mr. Stoller went to the fifth level of the crusher during this process. Claimant testified that he and Mr. Stoller were joined by two other employees, Doug and Travis. Claimant and his three coworkers did not use fall protection harnesses at that time.

9. Claimant testified that the four of them (claimant, Mr. Stoller, Doug and Travis) moved from the fifth level down to the third level where two other employees were working on the fly wheel. Claimant testified that at first they watched the other two employees work for few minutes. Then Mr. Stoller instructed claimant to assist those coworkers. Claimant did as instructed and moved toward the individuals working on the fly wheel. It was at that time that claimant fell through a hole in the floor. There was an opening in the floor of the third level because a grate had been removed to accomplish the removal and reinstallation of the fly wheel. It is estimated that claimant fell 14 feet to the ground.

10. Mr. Barron testified that on the date of claimant's injury on June 8, 2017, employer had 39 employees on location at the mine. Documents entered into evidence show that there were a total of seven fall protection harnesses available for these 39 employees.

11. Claimant testified that when he was hired by employer he was told by Heath Jewell, Project Manager, that he would be paid $16.00 per hour. Claimant testified that Mr. Jewell also informed him that because claimant would be traveling from Fruita, Colorado to Vernal, Utah that claimant could stay at the Springhill Suites. Claimant was not responsible for the cost of the hotel.

12. Claimant understood that he would be staying at the hotel for four nights each week. When claimant arrived in Vernal, Utah on June 5, 2017 he checked in at the Springhill Suites and identified himself as an employee of employer. The ALJ is persuaded by claimant's testimony on this issue and finds that if claimant had not sustained the injury on June 8, 2017 he would have stayed four nights per week in Vernal, Utah while employed by employer.

13. Claimant testified that he researched the cost of the room at the Springhill Suites in Vernal, Utah. Based upon that research, claimant believes the cost of the room was $109.00 per night.

14. Mr. Barron testified that claimant's hotel was not paid for by employer, but was paid for by employer's client, U.S. Oil Sands. The ALJ finds that employer's agreement with U.S. Oil Sands included the understanding that U.S. Oil Sands would pay for lodging for employer's employees.

15. The ALJ credits claimant's testimony with regard to the cost of the hotel room in Vernal, Utah. The ALJ is not persuaded by respondents' argument that because the room was paid for by employer's client, U.S. Oil Sands, that the value should not be included in calculating claimant's AWW. On the contrary, the ALJ finds that the hotel was provided by employer via employer's contract with their client, U.S. Oil Sands. Therefore, the cost of claimant's lodging was a fringe benefit provided to claimant, the value of which should be included in calculating claimant's AWW.

16. The ALJ credits claimant's testimony and finds that claimant has demonstrated that it is more likely than not that the hotel room rate was $109.00 per night. Therefore, claimant's AWW should be increased to reflect the value of lodging of $436.00; (four nights per week at a room rate of $109.00 per night).

17. The ALJ credits claimant's testimony and finds that respondents have failed to demonstrate that it is more likely than not that claimant engaged in a willful failure to follow a safety rule and/or a willful failure to utilize safety equipment. Although there were expectations at the job site related to the use of fall protection, the ALJ credits claimant's testimony and materials entered into evidence and finds that there were only two harnesses available for use by claimant's eight man crew. The ALJ recognizes that there were a total of seven harnesses at the job site. However, it is clear from the testimony provided that only two of those harnesses were made available to claimant's crew. As a result, claimant was effectively prevented from properly complying with employer's fall protection requirements due to the inadequate number of

harnesses available. The ALJ also finds that claimant behaved reasonably in following the instruction of his direct supervisor, Mr. Stoller, when he moved to assist the other employees.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include the reasonable value of any advantage or fringe benefit provided to the claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

4. Section 8-42-102(3), C.R.S. provides that in cases where "the foregoing methods of computing the average weekly wage of the employee, by reason of the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable earnings to be fairly computed thereunder or has been ill or has been self-employed or for any other reason, will not fairly compute the average weekly wage, the division, in each particular case, may compute the average weekly wage of said employee in such other manner and by such method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's average weekly wage."

5. As found, claimant has demonstrated by a preponderance of the evidence that his AWW should be increased to reflect the value of lodging provided to him while employed with employer. As found, claimant's AWW shall be increased by $436.00, for a total AWW of $1,268.00. As found, claimant's testimony is credible and persuasive on this issue.

6. Respondents argue that claimant's injury resulted from a willful violation of a safety rule. Section 8-42-112(1)(b), C.R.S. permits imposition of a fifty percent reduction in compensation in cases of an injured worker's "willful failure to obey any reasonable rule" adopted by the employer for the employee's safety. The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968).

7. The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondent to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission, supra; see also, Sayers v. American Janitorial Service, Inc.,* 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondent produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial Commission v. Golden Cycle Corp.,* 126 Colo. 68, 246 P.2d 902 (1952).

8. As found, respondents have failed to demonstrate by a preponderance of the evidence that claimant engaged in a willful failure to follow a safety rule and/or a willful failure to utilize safety equipment. Therefore, claimant's benefits will not be reduced. As found, claimant's testimony is credible and persuasive on this issue.

ORDER

It is therefore ordered that:

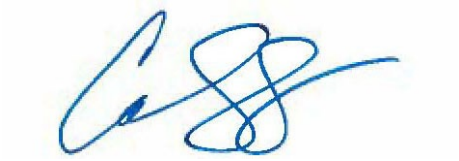
1. The stipulated AWW of $832.00 shall be increased by $436.00 to reflect the value of lodging, for a total AWW of $1,268.00.

2. Respondent's request to reduce claimant's monetary benefits by 50% is denied and dismissed.

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

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

Dated: January 29, 2018



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ISSUES

- Whether Claimant has demonstrated by a preponderance of the evidence that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with employer.

- If claimant proves a compensable occupational disease, whether claimant has demonstrated by a preponderance of the evidence that the medical treatment he has received is reasonable and necessary to cure and relive him from the effects of the occupational disease.

- If claimant proves a compensable occupational disease, whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

- In their position statements both parties indicated a stipulation regarding claimant's average weekly wage. Specifically, the parties have agreed that if claimant's claim if found compensable, claimant is a maximum wage earner for purposes of calculating any TTD benefits.

FINDINGS OF FACT

1. Claimant testified that he worked as an underground coal miner for a total of 22 years. Claimant was employed as a coal miner with employer beginning in November 2007. Claimant's job duties included operating the long wall shear. This involves working at the point in the mine where the mining occurs. As a result, miners working on the long wall are exposed to coal dust and other air borne particles.

2. Claimant provided specific testimony regarding his exposure to coal dust, diesel fuel, diesel smoke, hydraulic fluid, emulsion fluid, gear oil, transmission fluid, lime kiln dust, Touch N Seal foam packs, acetylene, rock lock, and degreasers. Claimant testified that he regularly came into contact with these various materials through inhalation and/or skin exposure while working for employer. Claimant also testified that he was not regularly exposed to these materials outside of his employment with employer.

3. Records from the Mine Safety and Health Administration (MSHA) were admitted into evidence. These records include Material Safety Data Sheets for lime kiln dust, Touch N Seal Foam Kits (both A and B), and transmission fluid. These items contain various levels of isocyanates.

4. The medical records entered into evidence indicate that claimant was reporting gastrointestinal (GI) symptoms as early as May 14, 2012. On that date claimant sought emergency treatment at Delta Memorial Hospital for abdominal pain, severe nausea, and vomiting and was hospitalized. Claimant also reported that he had experienced abdominal problems two years prior, but that taking Nexium "helps". Claimant has sought treatment at the emergency department for similar symptoms since that time. Claimant testified that prior to his employment with employer he did not have GI related symptoms.

5. Dr. Masi Khaja performed an upper GI endoscopy on August 27, 2012. At that time, Dr. Khaja diagnosed a small hiatal hernia and mild duodenitis. Dr. Khaja informed claimant that he was possibly suffering from cyclic vomiting syndrome and encouraged claimant to avoid the use of cannabis.

6. Claimant testified that he is not a tobacco smoker. Claimant testified that he has used edible CBD[1] cannabis to treat his GI symptoms. Claimant testified that he stopped using edible CBD cannabis at the end of 2015. Although he no longer ingests edible cannabis, claimant continues to experience GI symptoms. Although various medical records indicate that claimant was smoking marijuana, claimant credibly testified that he did not smoke marijuana. Instead, claimant ingested edibles with occasional use of CBD vapor. Claimant further testified that it is his understanding that the cannabis he ingested did not contain THC[2].

7. Claimant's final day of employment with employer was July 29, 2015. On that date, claimant reported his symptoms to his supervisor and employer provided claimant with a list of designated medical providers. From that list claimant selected Dr. Timothy Meilner. Claimant testified that he selected Dr. Meilner because he had been treated by him periodically since 2012. Claimant first treated with Dr. Meilner related to this claim on August 13, 2015. At that time claimant reported abdominal pain with nausea and vomiting. Dr. Meilner referred claimant to Dr. Masi Khaja for a gastroenterology consultation.

8. Claimant returned to Dr. Meilner on December 15, 2016 continuing to complain of abdominal pain, nausea, and vomiting. At that time, Dr. Meilner also referred claimant to pulmonology and GI experts at National Jewish Health.

9. Claimant testified that on July 29, 2015 in addition to his GI symptoms he was struggling to breathe. Claimant testified that after that date he began to notice that he could hear his breathing and would struggle to breathe with any type of exertion. Claimant also testified that he has had a cough for years and at times during his 20 plus years as a miner he would "cough up black stuff". It is unclear from the medical records when claimant began to report specific respiratory symptoms to his medical providers.

[1] Cannabidiol
[2] Tetrahydrocannabinol

10. Claimant was seen at National Jewish Health on August 15, 2016. While there he underwent a number of tests including pulmonary function testing, an exercise stress test, a chest x-ray, a computerized tomography (CT) scan of his chest, and an esophagram. While at National Jewish Health claimant was seen by Dr. Brigitte Gottschall for a pulmonary consultation.

11. Dr. Gottschall issued a written report in which she opined that although claimant met the diagnostic criteria for chronic bronchitis, she did not find manifestations of medical or legal pneumoconiosis. Dr. Gottschall recommended that claimant undergo a sleep study to determine whether he had sleep apnea. In her report, Dr. Gottschall stated that it was her understanding that GI issues are not caused by occupational exposures for coal miners.

12. Subsequently, Dr. Meilner referred claimant for testing and diagnosis at the Occupational Lung Disease Clinic at the Miners Colfax Medical Center. Claimant was seen by Dr. Akshay Sood on February 21, 2017 at that facility and reported "10 years of respiratory symptoms on and off". At that time Dr. Sood diagnosed claimant with chronic bronchitis and exertional dyspnea. Dr. Sood also diagnosed claimant with simple medical or clinical coal workers pneumoconiosis and the chronic phenotype of chronic obstructive pulmonary disease (COPD). Dr. Sood specifically referenced claimant's exposures to isocyanates, but determined that claimant did not have isocyanate asthma. Dr. Sood also opined that claimant did not meet the criteria for disability under the Black Lung Benefits Act. In that same report, Dr. Sood stated that claimant's "gastrointestinal symptoms remain unexplained".

13. Claimant was seen again by Dr. Sood on July 13, 2017 at the Occupational Lung Disease Clinic at the University of New Mexico. At that time, Dr. Sood diagnosed claimant with simple medical or clinical coal workers pneumoconiosis, chronic bronchitis phenotype of COPD consistent with legal pneumoconiosis, as before. However, Dr. Sood also diagnosed claimant with isocyanate asthma.

14. In his testimony, Dr. Sood explained that he changed his diagnosis in July 2017 to include isocyanate asthma because at that time claimant provided a more detailed work history and information regarding the various materials he was exposed to at work. Dr. Sood testified that claimant met the diagnostic criteria for isocyanate asthma given the duration, intensity, and latency of claimant's exposure to isocyanates. Dr. Sood also testified that claimant had experienced a significant decline in his lung capacity, which indicates a progressive lung disease.

15. Dr. Carrie Relich, Director of the Yale University Occupational and Environmental Medicine Program, testified at hearing. Dr. Relich is considered the U.S. expert on work related asthmas, including isocyanate asthma. Dr. Relich explained in her testimony that isocyanate asthma is caused in workers that are exposed to products containing isocyanates. Isocyanates are a range of chemicals that are widely used in polyurethanes, particularly as ingredients in various foams and coatings. Dr. Relich testified that even in small amounts, exposure to isocyanates can cause isocyanate asthma.

16. Dr. Relich testified that she agrees with Dr. Sood's diagnosis of isocyanate asthma. In support of this opinion Dr. Relich testified that claimant meets the diagnostic criteria for occupational/work related asthma including breathing tests, temporal association of the symptoms, and his work exposure to substances that cause asthma.

17. Claimant attended an independent medical examination (IME) with Dr. Michael Volz on September 7, 2016. Dr. Volz reviewed claimant's medical records, obtained a medical history from claimant, and completed a physical examination as part of the IME. Following the IME Dr. Volz opined that although claimant's respiratory issues might be due to pneumoconiosis, there was no objective confirmation. Dr. Volz also opined that there was no evidence based information to support a finding that claimant's GI symptoms were caused by his work exposures. Dr. Volz testified by deposition in this matter. Dr. Volz's testimony was consistent with his written report.

18. Claimant testified that his current symptoms include shortness of breath. Claimant also testified that his respiratory symptoms prevent him from working. Claimant testified that in 2015 he began using oxygen. Since that time claimant feels that his symptoms have improved. Claimant testified that although his abdominal and GI symptoms can return, he has better management of those symptoms.

19. The ALJ credits the opinions of Drs. Sood and Relich and finds that claimant has demonstrated that it is more likely than not that as a result of his work exposures while working for employer claimant developed isocyanate asthma, chronic bronchitis, simple medical or clinical coal workers pneumoconiosis and the chronic phenotype of COPD.

20. The ALJ recognizes that Dr. Sood amended his diagnosis based upon claimant's self-reporting of his exposure to isocyanates. The ALJ finds claimant's testimony regarding those exposures, and the related evidence regarding the specific exposure to isocyanates, to be credible and persuasive. The ALJ is not persuaded that claimant's use of cannabis has contributed to his respiratory symptoms.

21. The ALJ has considered all of the evidence and testimony presented at hearing and finds that claimant has failed to demonstrate that it is more likely than not that his GI symptoms are the result of his work exposures. It continues to be unclear what caused the onset of claimant's GI symptoms.

22. The ALJ credits claimant's testimony and finds that he has demonstrated that it is more likely than not that because of his respiratory symptoms he has been unable to work since July 29, 2015.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. As found, claimant has demonstrated by a preponderance of the evidence that he has an occupational disease arising out of and in the course and scope of his employment with employer. As found, claimant's diagnoses of isocyanate asthma, chronic bronchitis, simple medical or clinical coal workers pneumoconiosis, and the chronic phenotype of COPD are the result of claimant's work as a coal miner for

employer. As found, the opinions of Drs. Sood and Relich are credible and persuasive on this issue.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. As found, claimant has demonstrated by a preponderance of the evidence that medical treatment of his occupational respiratory disease (isocyanate asthma, chronic bronchitis, simple medical or clinical coal workers pneumoconiosis, and the chronic phenotype of COPD) is reasonable and necessary to cure and relieve him from the effects of the occupational disease. As found, the opinions of Drs. Sood and Relich are credible and persuasive on this issue.

8. As found, claimant has failed to demonstrate by a preponderance of the evidence that his GI related treatment is reasonable, necessary, or related to his respiratory occupational disease.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

10. As found, claimant has demonstrated by a preponderance of the evidence that he because of his respiratory occupational disease he has been unable to work since July 29, 2015. Therefore, claimant is entitled to TTD benefits from July 29, 2015 and ongoing until terminated by law. As found, claimant’s testimony is credible and persuasive on this issue.

ORDER

It is therefore ordered that:

1. Claimant has a compensable occupational disease (specifically isocyanate asthma, chronic bronchitis, simple medical or clinical coal workers pneumoconiosis, and the chronic phenotype of COPD).

2. Respondents are responsible for payment of medical treatment claimant has received as a result of his occupational disease.

3. Claimant's GI symptoms and treatment are not related to his occupational disease. Claimant's request for medical treatment related to his GI symptoms is denied and dismissed.

4. Claimant is entitled to temporary total disability (TTD) benefits beginning July 29, 2015 and ongoing until terminated by law.

5. The ALJ recognizes and adopts the stipulation of the parties that claimant is a maximum wage earner for purposes of determining the amount of any TTD benefits.

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

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

Dated: January 29, 2018

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

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the medical treatment of Dr. Eric Westerman, including prescriptions, is reasonable, necessary and related to Claimant's April 26, 1990 industrial injury.

II. Whether Claimant has been properly paid permanent total disability ("PTD") benefits.

III. Whether Respondents are subject to a penalty under Section 8-43-304 for an alleged failure to properly pay PTD benefits.

PROCEDURAL HISTORY

At hearing, counsel requested the ALJ take administrative notice of Claimant's DOWC file. The ALJ attempted to obtain the DOWC file and was informed the file is several hundred pages. The ALJ did not review Claimant's DOWC file as the parties had the opportunity to present documentary evidence from the file, and both parties agree there is no probative information in the file other than what was already admitted into evidence.

FINDINGS OF FACT

PTD/Penalties

1. Claimant's date of birth is October 28, 1947.

2. Claimant sustained a compensable industrial injury while working for Employer on April 26, 1990. Claimant was 42 years old at the time of injury.

3. Respondents filed a General Admission of Liability ("GAL") on June 18, 1990 admitting for an average weekly wage ("AWW") of $318.00, medical benefits, and temporary total disability ("TTD") benefits at a rate of $212.01.

4. Respondents filed a subsequent GAL dated April 3, 1991, admitting to TTD and temporary partial disability ("TPD") benefits. The GAL notes, "Respondents are claiming overpayments in the amount of $1,620.32 for disability paid since 2/03/90, this overpayment will be credited to PPD if any."

5. Respondents filed a Final Admission of Liability ("FAL") on May 8, 1991, admitting to a maximum medical improvement ("MMI") date of April 5, 1991, per the report of Dr. Angelika Voelkel. The FAL reflects an AWW of $318.00, with TTD paid at

$212.01 per week, TPD at a varied rate, and permanent partial disability ("PPD") benefits paid at a rate of $120.00 from April 5, 1991 to December 9, 1991.

6. Respondents filed a second FAL on September 25, 1991 admitting for a higher AWW of $390.61, TTD at a rate of $260.38, TPD at a varied rate, and PPD at a rate of $120.00. An overpayment of $959.17 would be credited to PPD.

7. An April 15, 1994 GAL reflects an admitted AWW of $390.61, TTD at $260.38, TPD at $58.52, and 313 weeks of PPD (9/17/94 through 3/17/2000) at a rate of $120.00, for a PPD total of $37,560.00. The GAL states, "Respondent is admitting to maximum permanent partial impairment – we have previously admitted and paid 2% in the amount of $4280.64."

8. Claimant requested a lump sum payment of PPD in the amount of $37,560.00. On June 2, 1994, the Division issued a Lump Sum Order ordering Respondents to pay Claimant a lump sum of $29,342.91, after a credit of $5,120.62 of previously paid PPD, and a lump sum discount of $3,096.47.

9. Claimant sought PTD benefits at a hearing before ALJ Martin Stuber on December 13, 1994. On January 17, 1995, ALJ Stuber issued Specific Finds of Fact, Conclusions of Law and Order in which he determined Claimant reached MMI as of November 10, 1993 and was permanently and totally disabled. ALJ Stuber ordered the following, *inter alia*: "Respondent-Insurer shall pay to Claimant permanent total disability benefits at the rate of $260.38 per week, commencing on November 10, 1993 and continuing thereafter for the duration of Claimant's life. Respondents may claim a credit for all permanent disability payments made subsequent to the date of maximum medical improvement."

10. ALJ Stuber issued a Corrected Order on February 15, 1995, based on a joint motion of the parties noting that Claimant worked for Employer until June 22, 1994. ALJ Stuber ordered that his January 17, 1995 order remained in full force and effect with the following correction:

> The Respondent-insurer shall pay to claimant permanent total disability benefits at the rate of $260.38 per week, commencing on June 23, 1994 and continuing thereafter for the duration of claimant's life. Respondents may claim a credit for all permanent disability payments made subsequent to the date of maximum medical improvement.

No evidence was presented indicating ALJ Stuber's order was appealed by either party.

11. Respondents subsequently filed a FAL on April 14, 1995, admitting for an AWW of $390.61, TTD at a rate of $260.38, TPD at a rate of $58.52, and PTD beginning June 23, 1994 for 313 weeks at $140.38. The FAL states, "Respondent has a credit on PT benefits for a max perm partial. Respondents reserves the right for SSDI offsett (*sic*)."

12. The April 14, 1995 FAL reflects that Respondents began taking credit for PPD previously paid by subtracting $120.00 per week from the ordered amount of $260.38

and paying PTD at the rate of $140.38 per week. By offsetting the PTD payments by $120.00 per week for 313 weeks beginning June 23, 1994, the ALJ finds the maximum PPD amount of $37,560.00 would have been fully recovered on June 22, 2000.

13. Claimant's attorney at the time, Steven H. Gurwin, issued a letter to the Division dated May 31, 1995 stating that Claimant accepted the April 14, 1995 FAL as it related to PTD, but objected to the FAL in all other aspects.

14. Records of the Social Security Administration indicate Claimant has been receiving social security disability insurance ("SSDI") benefits since December 1, 1994. The initial monthly award was $498.20, which would yield a reduction of any paid SSDI benefits by an amount of $57.48 per week. Claimant became entitled to social security retirement benefits as of October 2013 and began receiving social security retirement benefits in the amount of $667.00 per month beginning on or around November 1, 2013.

15. A June 20, 1996 check to Claimant reflects a payment of $280.76, which equates to a weekly PTD rate of $140.38, consistent with the admitted rate in the April 14, 1995 FAL.

16. A check dated July 18, 1996 reflects a payment of $326.58, which equates to a weekly PTD rate of $163.29.

17. A July 23, 1996 check was issued to Claimant in the amount of $3,795.86 for underpayment of PPD.

18. Claimant testified that she is currently receiving PTD at a rate of $163.29 and has been receiving PTD at such rate since at least 1996.

19. The DOWC periodically requested that Insurer's third party administrator provide the status of Claimant's claim. Correspondence from the applicable third party administrator to the DOWC dated May 20, 1997, September 27, 2000, July 6, 2005, April 27, 2007, June 9, 2009, June 13, 2011, April 30, 2013 and June 16, 2015 all note Claimant's weekly benefit rate as $163.29.

20. There is no documentation in Claimant's DOWC file explaining the change in rate. There is no evidence of a FAL reflecting the change in PTD rate.

21. A hearing was held before ALJ Margot Jones in 2002 on the issue of medical benefits. No dispute was heard regarding the rate of PTD or alleged penalties. Mr. Gurwin represented Claimant at the 2002 hearing.

22. An Application for Hearing on the issue of medical benefits was filed by Respondents on August 27, 2015.

23. Mr. Gurwin withdrew as Claimant's counsel effective September 17, 2015.

24. Claimant requested a copy of her DOWC file on December 8, 2015.

25. On March 16, 2016, Claimant filed a Request to the Director for Penalties against Respondents. Claimant requested penalties "under C.R.S. 8-43-304 for Respondents clear violation of C.R.S. 8-42-103(2)(c)(IV) beginning October 28, 2012 to present and continuing for every two week pay period in which respondents failed to amend their general admission and discontinue the offset is a separate penalty under CRS 8-43-305." Claimant alleged Respondents knew, or should have known, that Claimant was under age 45 at the time they began taking an SSDI offset and that they could not maintain the offset beyond age 65. Respondents filed a Response to Claimant's Request for Penalties, requesting a hearing.

26. The Director of the DOWC issued an order dated April 11, 2016 denying Claimant's motion for penalties, without prejudice. It was noted, in part, Claimant failed to state the date the SSDI offset began and failed to identify the amount of the offset.

27. Claimant filed an Application for Hearing on May 25, 2017 endorsing the issues of medical benefits, PTD and penalties. Regarding the request for penalties, Claimant stated,

> Claimants request for penalties under C.R.S. 8-43-304 for Respondents violation of C.R.S. 8-42-103(2)(c)(IV) for every two week pay period in which respondents failed to discontinue offsets taken for permanent total disability and Permanent partial disability. C.R.S. 8-43-305. Failure to pay medical bills of the authorized treating physician, Dr. Westerman and Pharmacy bills from IWP for prescriptions from the authorized treating physician to cure and relieve the effects of the admitted injury.

28. Claimant testified that she has suffered financial hardship as a result of not receiving PTD at a rate of $260.38 for the past several years.

Medical Benefits

29. Respondents contest the treatment of authorized treating physicians Dr. Eric Westerman and Dr. Robert Carson. Claimant testified that she had been regularly seeing Dr. Westerman since at least the year 2000. Respondents also contest Claimant's prescription medications. Claimant testified that at the time she was using Duragesic patches and Oxycontin.

30. On September 23, 2014, Dr. Lawrence Lesnak performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Lesnak physically examined Claimant and reviewed medical records dating back to January 2011. Dr. Lesnak noted Claimant has multiple non-work-related medical issues including, *inter alia*, chronic obstructive pulmonary disease, type 2 diabetes, and sleep apnea. Dr. Lesnak concluded Claimant may have sustained a lumbosacral strain/sprain on August 26, 1990, but that her other diagnoses, including ankylosing spondylitis and fibromyalgia, were not in any way related to the work injury. Dr. Lesnak diagnosed Claimant with chronic pain syndrome unrelated to her work injury. He opined that Claimant's opioid pain medications, antidepressant medications, and muscle relaxants

were not related to the work injury, and recommended Claimant wean from the patches and Oxycodone. Dr. Lesnak further opined that Claimant did not require any additional medical treatment as related to the April 26, 1990 industrial injury.

31. In early December 2014, Drs. Siva Ayyar and David Trotter performed peer reviews regarding the medical necessity of Claimant's Duragesic medication. Both doctors opined that the continued use of Duragesic DIS was not medically necessary, contending that there was no documentation of maintained increase in function or decrease in pain. Both doctors recommended Claimant taper her use of the Duragesic medication.

32. On December 15, 2014, Dr. Westerman issued a letter in which he opined that Claimant continued to require medication. Dr. Westerman stated,

> I have been following [Claimant] for many years as it relates to her chronic refractor pain, for which she has been on fentanyl 100 mcq q.3 days. This patient has made every attempt to be compliant with her healthcare over the years and we have found that the fentanyl at this does keeps her pain at least partially under control. I resent the fact that you had a physician contact me trying to talk to me into reducing her dose as this is, in my mind, extremely unethical based on just monetary concerns. This patient should <u>not</u> drop her dose as otherwise her pain with (*sic*) increase, which is multifactorial in nature.

33. On March 3, 2015, Dr. Westerman issued a second letter, noting he received Dr. Lesnak's IME report. Dr. Westerman declined to comment on Claimant's situation any further, stating,

> I find it interesting that Dr. Lesnik (*sic*) can relate that her pain is not related to her Worker's Compensation injury from 1990 when he has not been able to review any records prior to 2011. This, in my mind, has already been settled via the courts so I am perplexed as to why you are asking me these questions some 25 years after the Worker's Compensation injury. As such, I do not feel compelled to address your specific questions and will leave this to you and the patient, and presumably her attorney.

34. On November 24, 2015, Dr. Carson issued a Consultation Report, nothing that he has treated Claimant for over a decade. Dr. Carson stated that he and Dr. Westerman have managed Claimant's chronic pain with a variety of pain medications, including Duragesic, Oxycodone and Cymbalta, and that Claimant has been complaint with all chronic pain medication requirements.

35. Claimant testified that Respondents ceased paying for the treatment of Dr. Westerman subsequent to the issuance of Dr. Lesnak's IME report. A billing statement dated February 20, 2017 reflects a past due balance of $1,073.00. Claimant testified

that she cannot return to seeing Dr. Westerman until the past due balance has been paid. Claimant wants to continue treating with Dr. Westerman.

36. Claimant testified that she has been treating with Dr. Joseph Fillmore for her chronic pain. She stated that he has been able to reduce her Duragesic dose from 100mg to 75mg, and is working with her find alternatives to the opioids.

37. Claimant testified that the Duragesic patches and Oxycodone help reduce her chronic pain. Claimant said that she was able to continue to get the medication from the Injured Workers Pharmacy ("IWP"). An IWP statement dated July 11, 2016 reflects an outstanding balance of $9,374.12. Claimant testified that she is uncertain if that is the current balance.

38. Claimant's daughter, Rachel B., testified at hearing on behalf of Claimant. She has been living with her mother since the time of the injury with the exception of a three-year span. She testified that Claimant's prescribed pain medications reduced Claimant's pain, increased her function, and aided in the performance of activities of daily living.

39. Claimant's testimony is found credible and persuasive.

40. The ALJ credits the opinion of Dr. Westerman over the conflicting opinion of Dr. Lesnak and finds that Claimant has proven by a preponderance of the evidence that the medical treatment of Dr. Westerman, including the prescribed pain medications, reasonably necessary and related to the April 26, 1990 industrial injury.

CONCLUSIONS OF LAW

Generally

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

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

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

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Medical Benefits

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

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

ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant has established that it is more likely than not Dr. Westerman's treatment, including prescriptions, is reasonably necessary and related to Claimant's April 26, 1990 injury. The ALJ credits the opinion of Dr. Westerman, who has treated Claimant for several years and is familiar with Claimant's condition and need for treatment. Dr. Lesnak's opinion is based, in part, on a limited medical record review. Additionally, Claimant credibly testified that the medications assist in reducing her pain and increasing her functioning.

PTD Rate

Claimant contends she has been underpaid $97.09 per week since June 23, 2000 due to Respondents' failure to cease the PPD offset once fully recovered. Respondents contend that $163.29 is the accurate PTD rate based on the available information, the actions of the parties and the actions of the DOWC. Respondents also argue that $163.29 is arguably inclusive of reductions for SSDI and lump sum payments. Respondents further contend that, if $163.29 is found to be an inaccurate rate, Respondents would be entitled to an overpayment during certain periods for SSDI and PPD offsets.

It is undisputed that, since at least 1996, Claimant has not been paid PTD at the $260.38 rate ordered by ALJ Stuber. The evidence does not conclusively establish or allow even a reasonable inference as to why Respondents began paying PTD at a rate of $163.29.

Per the April 14, 1995 FAL, Respondents were taking a credit for the maximum PPD amount and reserved the right for a SSDI offset. Based on a $120.00 offset for 313 weeks beginning June 23, 1994, the full $37,650.00 PPD payment would have been fully recovered as of June 22, 2000. If solely considering ALJ's Stuber's ordered amount of $260.38 and the PPD offset, Claimant would have been underpaid $97.09 per week since June 23, 2000.

Nonetheless, determination of whether Claimant has been properly paid PTD benefits requires a consideration of other applicable offsets. Section 8-42-103(1)(c)(I), C.R.S. provides, in relevant part, that PTD benefits "shall be reduced, but not below zero, by an amount practically equal to one half" of SSDI benefits. Section 8-42-103(1)(c)(II), C.R.S. also provides for a 50% reduction of social security insurance retirement benefits. However, no offset of social security retirement benefits is applicable if the injury on which the PTD award is based occurred after the claimant reached forty-five years of age. §8-42-103(1)(c)(IV), C.R.S.

Claimant began receiving SSDI in December 1994. Respondents are entitled to an offset of SSDI benefits until Claimant reached age 65, as Claimant's injury occurred prior to her reaching 45 years of age. An offset for both SSDI and PPD would result in a

weekly PTD rate of $82.90 ($260.38 minus the $120.00 PPD offset and $57.48 SSDI offset).

From June 23, 1994 through June 22, 2000, Respondents are entitled to offset Claimant's PTD benefits based on overpayment of PPD by $120.00 per week. Respondents are also entitled to an SSDI offset of Claimant's PTD benefits in the amount of $57.48 per week from December 1, 1994 through October 31, 2013. Accordingly, Respondents shall pay Claimant PTD at a rate of $140.38 from June 23, 1994 through November 30, 1994, $82.90 from December 1, 1994 through June 22, 2000, $202.90 from June 23, 2000 through October 31, 2013, and $260.38 from November 1, 2013 and continuing thereafter for the duration of Claimant's life.

Penalties

Claimant seeks penalties for Respondents' alleged unreasonable failure to pay the PTD amount ordered by ALJ Stuber. Claimant's position statement states that Claimant originally believed Respondents failed to stop taking an offset for SSI but, upon further review, believes Respondents were in violation for continuing to take the PPD offset.

Respondents contend Claimant is not entitled to a penalty, as the penalty was not pled with specificity, the statute of limitations has tolled, and there is a rational basis for Respondents' payment of $163.29.

Pled with Specificity

Section 8-43-304(4) provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The statute then goes on to provide a procedure for curing violations of alleged penalties, and altering the burden of proof if the violation is cured. The Industrial Claim Appeals Office has held that the purposes of the specificity requirement are to provide notice of the allegedly improper conduct so as to afford the alleged violator an opportunity to cure the violation, and to provide notice of the legal and factual bases of the claim for penalties so that the alleged violator can prepare its defense. *Davis v. K Mart,* W.C. No. 4-493-641 (I.C.A.O. April 28, 2004); *Gonzales v. Denver Public School District Number 1,* W.C. No. 4-437-328 (I.C.A.O. December 27, 2001).

The OAC Application form contains the direction to the parties that if penalties are sought from an ALJ the party must check the box opposite "Penalties" and then must "Describe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the statute allegedly violated, and the dates on which you claim the violation began and ended."

Claimant's Application for Hearing requests penalties under Section 8-43-304 for violation of Section 8-42-103(2)(c)(IV) for every two week pay period Respondents failed to continue offsets for PTD and PPD. The application also cites Section 8-43-305

for failure to pay medical bills of the authorized treating physician. At hearing and in her position statement, Claimant requests penalties for Respondents' failure to comply with ALJ Stuber's order.

Section 8-42-103(2)(c)(IV) is a non-existent provision. Assuming Claimant was actually referring to Section 8-42-103(1)(c)(IV), such provision provides that the offset of SSI retirement benefits provided for in subparagraphs (II) and (III) of Section 8-42-103(1)(c) "only apply if the injury on which the award for permanent total disability was based occurred after the claimant reached forty-five years of age."

Based on the Application for Hearing and Claimant's Request to the Director, the basis upon which Claimant is requesting penalties is unclear. Furthermore, the Application for Hearing lists no beginning date of the alleged violation or beginning date for the penalty. Additionally, at hearing and in her position statement, Claimant requested penalties due to Respondents' failure to pay PTD at a rate ordered by ALJ Stuber. ALJ Stuber's order is not referenced in the Application for Hearing. Accordingly, the ALJ concludes Claimant failed to state with specificity the grounds on which the penalty is being asserted.

Statute of Limitations

Even assuming, *arguendo*, Claimant's request for penalties was pled with specificity as required, Claimant's request is barred by the statute of limitations.

Section 8-43-304(5), C.R.S. provides that a "request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty." Section 8-43-305, C.R.S. provides that each day an insurer "fails to comply with any lawful order" of the director constitutes a "separate and distinct violation thereof." Section 8-43-305 further provides that in an action to enforce a penalty "such violation shall be considered cumulative and may be joined in such action."

Section 8-43-304(5) was enacted in 1994 as a part of SB-94-193, and the act contains no legislative direction concerning the effective date of the bill and its provisions. 1994 Colo. Sess. Laws, ch. 309 at 1879. . Per Colo. Const. art. V §19, if no effective date is stated in an act, the act takes effect on its passage. Accordingly, the one-year statute of limitations for penalty claims became effective June 1, 1994.

Statutes of limitation are procedural and changes in such statutes may be applied to subsisting claims for relief without offending the constitutional prohibition against retrospective legislation. *See Vetten v. Industrial Claim Appeals Office,* 986 P.2d 983, 986 (Colo. App. 1999); *see also, Woodmoor Improvement Association v. Property Tax Administrator,* 895 P.2d 1087 (Colo. App. 1994). Section 8-43-304(5) is a procedural statute of limitations. *See* Margaret Jesse v. Loaf-N-Jug, WC 4-138-958 (ICAO March 1, 2010). See Arczynski v. Club Mediterranee, W. C. No. 4-156-147 (May 20, 2003); aff'd, Arczynski v.lndustrial Claim Appeals Office, No. 03CA1096 (Colo. App.

July 1, 2004) (not selected for publication), *Kessler v. Mountain Meadows Nursing Center,* W.C. No. 3-616-169 (September 27, 2001).

Thus, although Claimant's injury occurred prior to 1994, the statute of limitation set forth in Section 8-43-304(5) applies. Claimant has been receiving PTD at a rate of $163.29 for over 20 years. Mr. Gurwin's May 31, 1995 letter accepting the April 15, 1995 FAL as it related to PTD establishes Claimant was aware of the ordered PTD rate, the rate at which Respondents would be recovering the PPD overpayment, and that Respondents reserved the right for a SSDI offset. Mr. Gurwin continued to represent Claimant until September 2015, including at hearing before ALJ Jones in 2002 on a medical benefits issue. No evidence was presented establishing that Claimant's PTD rate or penalties were endorsed or addressed, when such issues would have been ripe.

As of July 1996 or, at the latest, the hearing before ALJ Jones in 2002, Claimant reasonably should have known that she was not receiving the amount ordered by ALJ Stuber or based upon any reasonable calculation of applicable credits and offsets. That Claimant's current counsel did not discover the discrepancies in PTD rates until Claimant ordered her file in December 2015 does not negate the fact that Claimant was aware of the amount ordered by ALJ Stuber and was aware of the amount she was receiving. Claimant was represented by counsel throughout the majority of the claim, spanning several years, during which time Claimant reasonably should have known Respondents were not paying the rate ordered by ALJ Stuber even considering applicable credits and offsets. Claimant failed to file within the one-year time frame required under Section 8-43-304(5), C.R.S., and thus the request for penalties is barred by the statute of limitations.

ORDER

It is therefore ordered that:

I. The medical treatment of Dr. Eric Westerman, including prescriptions, is reasonable, necessary and related to Claimant's April 26, 1990 industrial injury. Respondents shall pay the costs for Dr. Westerman's medical treatment and Claimant's prescriptions, including outstanding balances and reimbursement for expenses incurred for obtaining medication through the IWP. These payments shall be made pursuant to the Colorado Workers' Compensation Fee Schedule.

II. Respondents shall pay Claimant PTD at a rate of $140.38 from June 23, 1994 through November 30, 1994, $82.90 from December 1, 1994 through June 22, 2000, $202.90 from June 23, 2000 through October 31, 2013, and $260.38 from November 1, 2013 and continuing thereafter for the duration of Claimant's life.

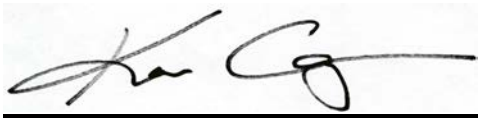
III. Claimant's request for penalties is denied and dismissed.

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

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

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

DATED: January 31, 2018



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

ISSUES

I. Has Claimant shown, by clear and convincing evidence, that the DIME opinion of Dr. Tyler has been overcome, on the issue of MMI, and therefore, causation?

II. If the DIME has not been overcome, has Claimant's condition worsened after MMI, such that his claim should be reopened?

III. Has Claimant shown, by a preponderance of the evidence, that he is entitled to medical benefits, in the form of cervical spine surgery?

IV. Has Claimant shown, by a preponderance of the evidence, that he is entitled to TTD benefits, effective December 8, 2017, as a result of his worsening condition?

STIPULATIONS

I. The parties agreed that the issues of Permanent Partial Disability and Permanent Total Disability were bifurcated from this hearing, and held in abeyance, pursuant to a Prehearing Conference Order dated October 24, 2017. Further, Claimant has admitted to the Average Weekly Wage as admitted by Respondents, and wishes to hold the issue of disfigurement in abeyance. These agreements were all adopted by the ALJ.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant worked for Employer as a Maintenance Technician at Tierra Vista Communities. On November 22, 2013 Claimant was repairing a section of the sliding garage door when he fell approximately 3 feet from a platform ladder, striking primarily his left side of his body.

2. Claimant was initially treated by the Peterson Air Force base fire department and by personnel from American Medical Response. Claimant's entire spine was immobilized as he was placed on the back board with straps. He was also placed in a cervical collar as "Fire stated that pt was having c-spine neck pain, left shoulder pain, right knee pain, and head pain." (Ex. 1, pp. 2-3).

3. Claimant underwent initial diagnostic testing including a CT scan of the cervical spine which showed an absence of any acute fracture or subluxation. It was noted by his emergency providers that he had a mild T9 compression fracture of indeterminate age. (Ex. 2, p. 31). Claimant's initial diagnosis was a left shoulder strain and a right pinky finger abrasion. After physical therapy Dr. Randall Jones (with Concentra) placed Claimant at MMI with no impairment effective December 13, 2013. (Ex. K, p. 88-89).

Dr. Jones noted in his report that "patient is "100%" back to normal. Patient has been working their (sic) full duty. Patient has not been taking their meds because his condition improved. Patient has had physical therapy and feels better…' (Ex. 3, p. 71). (It is duly noted that Claimant testified that he never told Dr. Jones these things).

4. Claimant went without treatment for almost one year, but followed-up with Dr. Jones on November 10, 2014. According to Claimant, during this timeframe he went to his personal physician, Dr. Robert Swanson, who advised him to follow with Dr. Jones. During this visit, Claimant complained of shoulder pain, but *denied* neck problems, except some left neck pain with shoulder motion. (Ex. 3, p. 69). This produced a recommendation for an MRI scan of the left shoulder by Dr. Wiley Jinkins. Claimant was then diagnosed with subacromial impingement syndrome with a partial thickness rotator cuff tear. (Ex. K, pp. 89-90).

5. An MRI of the cervical spine was performed on December 18, 2014. The pertinent findings for that exam were:

1. Mid and lower cervical *degenerative* change, greatest at C6-C7……

4. *Possible mild subacute* soft disc at C6-C7, *more likely chronic.* (Ex. F, p. 4)(emphasis added).

6. Upon questioning, Dr. Jones responded by stating that it was a greater than 50% likelihood claimant's left shoulder pain was related to the work injury, but nothing in his record review would indicate claimant's back, head or neck related to the work injury. (Ex. K, p. 90).

7. Dr. Wiley Jinkins, MD, initially treated Claimant's left shoulder with injections, but Claimant also underwent a second MRI indicating the shoulder pathology had progressed. Dr. Jinkins performed the arthroscopic repair of claimant's left shoulder on October 23, 2015. If Claimant had made cervical spine pain complaints while treating with Dr. Jinkins, Dr. Jinkins testified that would have referenced this in his reports. No such references exist in his reports.

8. Claimant was placed at MMI by Dr. Jones, effective May 20, 2016 and provided with a 20% scheduled impairment. Respondents filed an Amended Final Admission of Liability dated June 12, 2016 in accordance with the MMI opinion and impairment rating. (Ex. A).

9. Claimant initiated the DIME process which was conducted by Dr. John Tyler, MD. Dr. Tyler found the claimant was at MMI, effective July 14, 2016. Dr. Tyler provided Claimant with an 18% left upper extremity impairment. Respondents filed a Final Admission of Liability on February 1, 2017 accordance with Dr. Tyler's opinions. (Ex. D).

10. In assessing whether Claimant received any impairment to the cervical spine due to the injury Dr. Tyler found that:

> I do not find clear and convincing evidence that the patient had an *injury* to the cervical spine. I base this not only on the medical record review of the physician's notes but also on the forms completed by the patient and each of these forms show that his pain symptomatology is well-localized to the left shoulder and the patient himself does not even mark the cervical spine is an area of pain complaint or concern. (emphasis added).

During the examination of Claimant's cervical spine, Dr. Tyler found normal alignment with no segmental dysfunctions, no evidence of localized spasm or trigger points, with only a few localized trigger points within the left infraspinatus, rhomboid minor and superior trapezius. (Ex. 8, p. 193).

11. Claimant underwent an independent medical examination on June 30, 2016 with Dr. Lawrence Lesnak. In Dr. Lesnak's report Claimant denies posterior neck symptoms. On physical examination, Claimant had full range of motion in the cervical spine in all planes, without reproduction of any symptoms. Provocative testing of Claimant's cervical spine was negative, and palliative testing of claimant cervical spine produced no symptoms. (Ex. H, p.59, 69). Dr. Lesnak performed a Distress and Risk Assessment Method (DRAM) evaluation of Claimant. This showed that Claimant had a significant degree of psychological factors influencing his symptoms. In Dr. Lesnak's estimation, Claimant has a very disabled viewpoint. Id at 57.

12. Claimant returned to Dr. Jinkins on January 18, 2017. The hand-written notes accompanying Dr. Jinkins' narrative report indicate; "(L) shoulder, headache & neck pain. Increased neck pain." (Ex.4, p. 96). Dr. Jinkins injected the shoulder and recommended a repeat MRI.

13. An MRI of the cervical spine was performed on March 23, 2017. Dr. Jinkins reviewed the results on April 4, 2017; "…There was a large disc herniation at C6-C7, which is causing moderate to severe bilateral foraminal stenosis, being more symptomatic on the left than the right, with the disc herniation effacing the thecal sac in close proximity to the cervical spinal cord. He indicated that overall, there has not been a great deal of change as far as symptoms are concerned. He rates his pain level in the neck and trapezius area as a '6' on a scale of 1-10 and his shoulder as well. The pain radiates all the way down his left arm into the hand." (Ex. 4, p. 89).

14. Dr. Jinkins continued; "Physical examination revealed provocative testing for impingement still to be positive, however, more significantly, there does appear to be some slight triceps weakness on the left as compared to the right, which would be a corresponding spinal nerve being impinged. Rotation of the cervical spine elicited discomfort as well." Id.

15. Dr. Jinkins recommended a neurosurgical consultation, "…insomuch that he does have a significant disc herniation, as noted above. He indicated that prior to his fall at work, he had no problems with his cervical spine. Since that time, his symptoms have not abated, but in actuality have progressed…" (Id at p. 90).

16. Claimant saw neurosurgeon Dr. Manon on July 24, 2017. He reported; "…The patient presents for a clinic visit today regarding the cervical spine. He had surgery performed of the left shoulder by Dr. Jenkins [sic] in 2015 for 'bone spurs.' Despite successful surgery he continued to have radiating pain originating in the shoulder and radiating to the neck. Additionally, he reported radiculopathy extending from the base of the neck [on] the left down the shoulder, biceps, forearm, and third, fourth and fifth digits…He reports some limited range of motion of the neck with precipitating neck pain upon flexion and rotation towards [the] left. Also, rotation towards [the] left precipitates his left arm pain…" (Ex. 5, p. 142).

17. On physical examination of the cervical spine, Dr. Manon found "diffuse pain elicited along the cervical paraspinal musculature bilaterally, trapezius, and shoulder. ROM [range of motion] limited with flexion and extension, rotation…" (Id.) Dr. Manon reviewed the MRI findings and concluded, "…This is a 60 year old gentleman with a chronic history of left upper extremity radiculopathy secondary to a prominent C6-C7 disc bulge or herniation with associated significant neural foraminal stenosis. There is advanced cervical spondylosis associated with this. The patient will be best treated with surgical discectomy and artificial disc replacement versus a cervical fusion…" (Ex. 5 at 144).

18. Dr. Jinkins again saw Claimant on July 26, 2017. He reported, "…He did see Dr. Manon, who felt that he is a candidate for decompression at level C6-C7. He is actually scheduled for the surgery on his cervical spine on Tuesday, 08/01/17. He indicated that overall, *there has not been any notable change as far as his neck* and left arm are concerned…Physical examination revealed there to be tenderness in the paraspinous musculature, left and right...I would recommend proceeding with this surgical procedure, as recommended by Dr. Manon…" (Ex. 4, p. 87)(emphasis added).

19. Dr. Manon submitted a request for authorization of cervical spine surgery to Insurer on July 27, 2017. (Ex. 5, p.141). Insurer denied the request on August 2, 2017. (Id. at 140).

20. Dr. Jinkins testified by deposition as an expert in orthopedic surgery on December 4, 2017. Dr. Jinkins explained that Concentra referred Claimant to him only for evaluation and treatment of the shoulder injury, and that the shoulder was the only injury he was authorized to treat. Dr. Jinkins explained that the lack of reference to cervical spine complaints in some of his reports was due to Concentra's policy of allowing him to treat only the shoulder. (Dr. Jinkins depo pp. 17-18)

21. Dr. Jinkins explained that when he placed Claimant at MMI, it was for the shoulder injury, not the neck injury:

> *Q* The maximum medical improvement status for Mr. Romero, if the – is this just maximum medical improvement in your opinion relative to the

left shoulder that you were treating or is this maximum medical improvement for the injury?

A No, this is just the shoulder.

Q Is that ordinarily how you would evaluate a worker for a work injury, is to offer maximum medical improvement for just the component of injury that you're evaluating?

A Yes, that's – that's the way it was recommended that it be done from Concentra.

Q From Concentra?

A Yes.

Q Okay.

A Once again, I was not treating him for the cervical problem at that time. (Dr. Jinkins depo p. 36).

22. Dr. Jinkins testified that the work injury served to aggravate Claimant's cervical spine degenerative condition:

Q The diagnostic testing for Mr. Romero, at least as far as the Penrad Imaging study shows, has degenerative changes identified in the MRI. Would you agree with that?

A It did, yes.

Q Including bony formations that are working in concert with a potential disc to create impingement, correct?

A Correct.

Q If this is identified in the report as chronic in nature, which we've read, do you disagree with that radiologist's interpretation of this condition as chronic?

A No, I do not. In other words, the injury which he – which was incurred did not cause the degenerative condition. It was – it was there previously. It preexisted, but it did serve to aggravate it.

Q Okay. So, in your opinion, the degenerative condition predates injury, but injury happens and creates symptomatology in the neck, working together with that degenerative condition?

A Yes, sir. The neck is inherently close to the shoulder or the muscles that operate the shoulder do originate in the cervical region, the scapular region. And so they can be interrelated. (Dr. Jinkins depo. pp. 57-58)

Q You talked about the degenerative condition not being caused by Mr. Romero's work injury, but it being aggravated. Could you tell us how that happened?

A Yes. This is not uncommon, that we see people -- older people in the older people workforce where -- who will have pre-existing degenerative arthritis, most commonly seen probably in the knees, who are completely asymptomatic barring an injury. The injury can aggravate this underlying, silent arthritis and cause it to become symptomatic. Also an injury can accelerate the progression of the arthritic condition if it's a significant trauma.

Q And do you feel that's what happened in Mr. Romero's case?

A He's significantly symptomatic now with regard to the cervical region, probably more so than he was early on, so it is *probably a progression.* (emphasis added). (Dr. Jinkins depo p. 67).

23. Dr. Jinkins testified that Claimant's cervical spine condition has worsened:

Q Since the report in which it appears you first documented cervical spine problems, that being December 23, 2014, from then until the time you most recently saw Mr. Romero, has his cervical spine condition worsened?

A It seems to be a preponderance of his symptoms at the present time. It does appear that it has progressed, because this is his main complaint at the present. (Dr. Jinkins depo p. 71).

24. Dr. Tyler was deposed on December 8, 2017. Dr. Tyler further explained at his deposition what he meant by a cervical *injury* during his deposition the following:

Q. And basically you found - - or it's your opinion that there was no cervical spine injury or perhaps just ratable impairment, or is that a distinction without a difference?

A. You are hundred percent correct. There was nothing that was ratable. Did he suffer an *injury* to the cervical spine? Yes. That was reported in the very beginning of his notes when he fell off the ladder and his consciousness, but, I mean, it was reported by think even the paramedics. But there wasn't anything *ratable* based on my examination. (Dr. Tyler depo, pp.31- 32,).

A. ….based on what we have just reviewed, i.e., the CT scans, the X-rays, and putting on the [cervical] collar, *it doesn't state that there's an injury.*

Now, there's mention made by the ambulance service, the paramedics, that the patient was tender. That's the symptom; that's not a diagnosis. So it's – do you have any question that he was most likely suffering an *injury* to the cervical spine? The question is, no, I don't question that he suffered an *injury* to the cervical spine. You don't fall off a 3-foot ladder striking your shoulder, your hips, and not *strain the muscles* of your neck. Why? Because your head weighs between 10 and 16 pounds, depending on the size.

….you're most likely going to *strain the muscles* and surrounding tissues that are helping to hold or support the head, and that would be the cervical spine.

Q: But just to clarify, is it your testimony that *he did sustain in injury to his cervical spine, but* ***he simply does not have ratable impairment?***

A: That would be correct. (Dr. Tyler depo, pp. 53-55)(emphasis added).

25. Dr. Tyler testified regarding the way he conducts DIMEs. While dictating the review of the medical records component of his DIME report the patient is present, so as to allow for any input. In this instance, Claimant participated in generating part of Dr. Tyler's report through parenthetical offerings, as allowed by Dr. Tyler. (Dr. Tyler depo, pp. 7, 8, 10-12). When showed Dr. Lesnak's report describing no cervical symptoms upon provocative testing, Dr. Tyler agreed that this was consistent with his examination of Claimant's cervical spine. (Dr. Tyler depo, p. 44).

26. Dr. Tyler also addressed the issue of worsening of Claimant's condition, since the DIME report was issued:

Q: …..Based on all of that, do you have an opinion as to whether or not Mr. Romero is still at MMI?

A: I don't think I can answer that question.

Q: Why not?

A: Because the disc pathology as seen now wasn't present during the time of care for which I was treating him in regards to his work injury of 2013, I believe it was; so *that is a new pathology.* So I'm not sure how you can state that [it] is directly related to his work injury when it wasn't present based upon the records that I had for review and based upon the

> symptomology that I saw at the point where I placed him at maximum medical improvement.
>
> So if that indeed is new symptomology and new pathology, then I'm not sure how it would have a direct relationship to his work injury. (Dr. Tyler depo, pp. 65-66).

27. Claimant testified he experiences continuous pain in his left neck and the upper part of his shoulder. Claimant testified that since being placed at MMI, his neck condition has worsened. Specifically, Claimant experiences neck pain and headaches when he turns his head up or down and from side to side, and he has had to decrease or terminate physical activities such as golf and fishing due to his increased neck pain. Claimant has been unable to work since December, 2014 due to the effects of his industrial injuries. Claimant was awarded Social Security disability benefits.

28. Claimant further testified that he did not tell a medical care provider at Concentra in November 2014 that he was: "100% back to normal with no pain." Claimant also testified that he told Dr. Lesnak about pain in his neck and that Dr. Lesnak did not palpate his neck. Claimant contends that the discrepancy between his testimony and what is contained in the medical records over these matters is due to an error on the part of the medical providers or examiners in generating the records.

CONCLUSIONS OF LAW

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

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the

testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this instance, the ALJ finds Claimant to be sincere in his description of his symptoms to his medical providers at all times pertinent-including reporting, for example, to his Concentra provider in 2014 that he was "100% back to normal with no pain." His current recall of such events, including palpation of his neck by Dr. Lesnak, is simply not reliable-nor could one reasonably expect total reliability from a layperson who is now in pain. Claimant can only describe what he is feeling; someone in his position cannot render a medically reliable or convincing opinion on *causation.*

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

Overcoming the DIME Opinion, Generally

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The

> requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

DIME opinion of Dr. Tyler re: MMI (and by implication, Causation)

G. Dr. Jinkins credibly indicated that his focus was Claimant's shoulder, not his neck, according to his understanding of his assigned role by Concentra. Dr. Tyler, by contrast, made clear in his DIME report that he was addressing Claimant's neck issues as well as his shoulder. This is addressed in his 'Impression #5', as well as in his narrative. If any lingering doubt remained about the scope of his DIME exam, it was made clear in his deposition. As the DIME physician, Dr. Tyler opined that Claimant was at MMI as of July 14, 2016, *for all his injuries caused by this industrial accident.* While Dr. Tyler agrees that Claimant now suffers from serious issues with his cervical spine, he has made a persuasive case that Claimant's current cervical complaints were *not* ***caused by*** *this industrial accident.*

Ambiguity in the DIME's Conclusions

H. While Dr. Tyler appeared to equivocate (as Claimant now urges) at one point in his deposition on the MMI issue, this was based upon speculation under cross-examination of what Dr. Jinkins (who by all accounts was to treat the shoulder-not the neck) might or might not have said at his own deposition. Dr. Tyler again reaffirmed (after this alleged equivocation) that he did not believe the work injury *caused* Claimant's current complaints. To the extent his momentary 'equivocation' is construed as an ambiguity, the ALJ finds that, taken as whole, Dr. Tyler's body of work in the DIME report clearly shows a lack of causation for Claimant's current complaints due to the work injury.

Aggravation of Underlying Condition/Now Symptomatic

I. The ALJ further finds that Claimant's latent degenerative cervical conditions were not made symptomatic by his fall. At most, Claimant suffered a muscle strain,

from which he has long since recovered. The only evidence to the contrary was offered by Dr. Jinkins, who at one point opined in his deposition that it's *probably* a progression of a now-symptomatic aggravation of an underlying chronic condition. Assuming, arguendo, that the ALJ accepts this as being correct (which the ALJ does not in this case), it is insufficient to overcome the DIME opinion by clear and convincing evidence. At most, it represents a difference in medical opinion. In this case, Dr. Jinkin's 'charter' was not to treat the neck at all, except insofar is it related to his shoulder. The DIME opinion, therefore, has not been overcome.

Reopening/Worsening of Condition

J. As found above, Claimant has not shown, by a preponderance of the evidence, that his current cervical complaints, worsening though they are, are due to his work injury. His condition is chronic, and was not made symptomatic by the fall from the ladder. His request to reopen his claim is denied.

Medical Benefits/TTD Benefits

K. No one contests that Claimant needs surgical correction of his worsening cervical condition. This unfortunate gentleman has suffered lumbar and thoracic conditions already; now he suffers from a progressive, chronic degenerative cervical condition. However, since his work accident did not *cause* his chronic condition to now become symptomatic, he is not entitled to medical benefits. Nor can he claim TTD benefits, for the same reason.

ORDER

It is therefore ordered that:

1. Claimant's request for cervical spine surgery and TTD benefits is denied and dismissed.

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

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

DATED: February 2, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

The issues to be determined by this decision are:

- What is Claimant's average weekly wage?
- Whether Claimant is owed any back TPD?

FINDINGS OF FACT

1. Claimant is a 32 year-old male who was involved in an admitted incident which occurred on August 22, 2015. Claimant was employed with the Respondent as an automotive technician at the time of this incident.

2. On September 30, 2015, Respondents admitted to an average weekly wage of $507.07, as reflected on the initial General Admission of Liability.

3. The admitted average weekly wage was computed by totaling all of Claimant's wages from August 24, 2014 through August 15, 2015. As the work injury occurred on August 22, 2015, the time period used was a total of 51 weeks. The total wages were $25,860.35, which was then divided by 51 weeks. This resulted in an average weekly wage calculation of $507.07.

4. Claimant returned to work with lifting restrictions on September 12, 2015 and continued working with restrictions through September 18, 2017 when his ATP took him completely off work.

5. From September 19, 2017 through the date of hearing, Respondent had paid Claimant $338.04 per week based on the admitted average weekly wage of $507.07 as reflected in the GAL Respondents filed on October 19, 2017.

6. Claimant continues to receive wage loss benefits calculated using an average weekly wage of $507.07.

7. Claimant was not under any hourly work restrictions from the time he returned to work until April of 2016, when his ATP, Dr. William Miller, imposed a six hour per day work restriction. He remained on the restriction until he was taken off work on September 26, 2017.

8. On January 18, 2017, Claimant underwent a DIME performed by Dr. Douglas Scott. Dr. Scott opined Claimant had a 40 pound weight restriction with no hourly restrictions.

9. Claimant admitted there were times he missed work for personal issues during the time period he is asking for temporary partial disability benefits.

10. From his date of hire through November 14, 2014, Claimant was paid $11 an hour on an *hourly basis*.

11. Effective November 15, 2014, Claimant began receiving $13.75 “per hour.” However, he was no longer paid on an hourly basis. Rather, he was paid on a *task basis*. As an example, if Claimant completed a task assigned a value of 1.5 hours, he would be paid $20.63. It would not matter whether he completed the task in five minutes or five hours – he was paid the value of the *task*.

12. The total amount of wages Claimant earned while paid on a *task basis* from November 15, 2014 through August 15, 2015, a period of 39 weeks, is $19,824.13. $19,824.13 divided by 39 weeks results in an AWW of $508.31.

13. Bill Holinger, Claimant’s supervisor and the store manager where Claimant is employed, testified via deposition on November 10, 2017. He testified Claimant earns his wages based on the tasks he performs. The m Claimant completes tasks, the more he earns during a set period of time. Mr. Holinger also testified that Claimant’s wages are negatively impacted by the following factors:

- Claimant shows no sense of urgency when performing tasks,
- Claimant’s performance was sub-par,
- Claimant does not show up for many reasons not related to his work injury, such as “his car won’t start, that he needed a new battery, or new starter, or that he calls in sick because he did not get a good night’s rest because his daughter was keeping him up.”
- Claimant is late to work continually, providing different non-injury related excuses. Mr. Holinger testified that he knows this because he manually enters Claimant’s start time. Claimant’s tardy arrival at work decreases the amount of time he has to complete tasks and thus decreases his ultimate earnings,
- Claimant falls asleep on the job while sitting at his desk,
- Claimant takes 20 minute bathroom breaks, and when Mr. Holinger looks for Claimant, he finds Claimant asleep in the bathroom.

14. Mr. Holinger also testified that Claimant’s performance directly correlates to how much Claimant earns. Mr. Holinger reiterated that Claimant works as a flat rate technician. He earns money based not on the number of hours he works, but based on the number of tasks he completes and the hour-value assigned to the task.

15. Mr. Holinger explained that Claimant's doctor faxed in medical records indicating his work-restrictions. Mr. Holinger further testified that tasks which fit within Claimant's restrictions are and were available every day, and every hour. Such tasks include oil changes, alignments, brake work and vehicle inspections, and are performed on almost every vehicle brought to the workplace.

16. The ALJ finds Mr. Holinger's testimony credible and persuasive.

17. Claimant testified at hearing. Although he could not correctly recall his rates of pay, Claimant acknowledged that he was paid on a task basis; and that he observed his six-hour restrictions because he wanted to get better.

AWW Calculation

18. Claimant argues that Respondent's average weekly wage calculation is not correct. The ALJ agrees.

19. The total amount of wages Claimant earned from the time of his raise November 15, 2014 through August 15, 2015, a period of 39 weeks, is $19,824.13. $19,824.13 divided by 39 weeks is $508.31 per week on average. The ALJ finds this to be the best and most fair approximation of Claimant's wage loss.

CONCLUSIONS OF LAW

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

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

It is within the ALJ's purview as the finder of fact to determine the credibility of witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

Claimant argues that his AWW should be calculated as set forth in section 8-42-102(2)(d), C.R.S., which applies in situations where a claimant is paid an hourly wage. The ALJ concludes that after November 15, 2014, Claimant was no longer paid an hourly wage but rather a task based wage. This renders section 8-42-102(2)(d) inapplicable.

Claimant argues that the three weeks from April 26, 2015 through May 16, 2015, where Claimant earned little or nothing each week due to time off for a family emergency, should not be included in the averaging calculations as that period represents a one-of-a-kind loss of wages, which does not accurately reflect Claimant's earnings at the time of his injury. The ALJ is not persuaded. Claimant offers no authority to support this proposition and the ALJ likewise finds none. By Claimant's own admission, there were times he missed work for personal issues during the time period he is asking for temporary partial disability benefits.

Respondents argue that the six hour work restriction imposed by Claimant's ATP in April 2016 is inappropriate because the Division IME found no hourly restriction. Respondents offer no authority to support this proposition and the ALJ likewise finds none. That the DIME doctor did not suggest the six hour work restriction is of no consequence. No persuasive evidence supports a conclusion that the six hour restriction was ever lifted. Thus, the ALJ finds and concludes that Claimant was under an hourly restriction from April 2016 until he was taken off work.

The overall purpose of the statutory scheme is to calculate "a fair approximation of the claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). Additionally, the ALJ hearing a case is allowed to use a different method of calculation which "based on the facts presented, fairly determine such employee's average weekly wage." §§ 8-42-102(3) and 8-42-102(5)(b), C.R.S.

The ALJ finds the current average weekly wage is incorrect because it includes a time period when Claimant was not earning his time-of-injury rate of pay. A more fair and accurate representation of Claimant's earnings is based on the time period beginning when Claimant's hourly rate was increased to $13.75 through the date of his admitted injury. The AWW based on this calculation is $508.31. Not $507.07 as Respondents calculated.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $508.31.

2. Claimant is entitled to benefits based on his AWW of $508.31 for the period of time he was entitled to temporary partial disability benefits.

3. Claimant is entitled to interest at the rate of 8% per annum on all amounts not paid when due.

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

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

DATED: 01/25/2018

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, his injuries arose out of and in the course and scope of his employment.

II. Whether Claimant established, by a preponderance of the evidence, he is entitled to reasonable, necessary, and related medical treatment.

III. Whether Claimant established, by a preponderance of the evidence, the right to select a physician passed to Claimant and he is entitled to select a physician of his choice.

IV. Whether Claimant is entitled to temporary total disability benefits.

V. Claimant's average weekly wage.

FINDINGS OF FACT

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

1. Tice Electric – Employer - has been in business for 37 years. It is an LLC, and Chris Meister is the owner and manager of the company. He is responsible for hiring, scheduling, and payroll.

2. Nick Meister is the son of Chris Meister and also works for Employer.

3. As of May 25, 2017, Claimant had been employed by Employer for approximately one and a half years as an electrical apprentice and general handyman.

4. While working for the Employer, Claimant's work was not solely electrical in nature. Claimant would also participate in construction projects, go to car auctions, and work on a winery that was also on the Employer's premises. See Hearing Transcript pg. 10 lns. 2-18.

5. While working for Employer, Chris Meister, allowed Claimant to live at Employer's shop, which is located at 3535 A, South Irving Street, Englewood, CO 80110, for approximately 8 months. Employer/Chris Meister did not charge Claimant rent during this period. While working for Employer, Chris Meister also assisted Claimant in paying his first month's rent, and deposit, for a house. Employer/Chris Meister also assisted Claimant in paying some court fines and expenses in order for Claimant to get his driver's license back. The assistance provided to Claimant and the payments made on his behalf were favors.

Employer/Chris Meister never expected to be reimbursed. Hearing Transcript pgs. 59-62.

6. Prior to working for Employer, Claimant worked extensively in the concrete field for approximately 32 years. All of the employees with the Employer were aware of Claimant's extensive experience with and knowledge of concrete work. See Hearing Transcript pg. 10 lns. 23-25, pg. 11 lns. 1-14.

7. Chris Meister assigned duties and job tasks to employees when they arrived to work in the morning. See Hearing Transcript pg. 11 lns. 18-25, pg. 12 lns. 1-2.

8. On May 24, 2017, Claimant arrived to work at his normal time, approximately 7:00 a.m., and was told by Chris Meister they were going to do something different for work that day and they were going to go somewhere. See Hearing Transcript pg. 12 lns. 11-23.

9. Chris Meister informed Claimant that he would be working with Nick Meister for the day. Hearing Transcript pg. 13 lns. 8-12.

10. Nick Meister is Chris Meister's son and Claimant recognizes both men as his bosses or supervisors. Hearing Transcript pg. 13 lns. 16-25, pg. 14 lns. 1-2.

11. Nick Meister and Chris Meister are Claimant's bosses and supervisors.

12. On May 24, 2017, Nick Meister drove Claimant to Nick Meister's house to perform work. This is the first time Claimant had ever been to Nick Meister's house. Hearing Transcript pg. 14 lns. 6-13.

13. Claimant had no idea he would be working with concrete until he arrived at Nick Meister's house on May 24, 2017. See Hearing Transcript pg. 15 lns. 5-10.

14. Claimant had never known about a concrete patio project prior to May 24, 2017, when he arrived at Nick Meister's house and never conversed with Nick Meister about the patio previously—not even on the way to the house. See Hearing Transcript pg. 15 lns. 11-17.

15. Nick Meister, also a Tice Electric employee, was present and working on the patio project on May 24, 2017. See Hearing Transcript pg. 16 lns. 6-9.

16. After working for the day at Nick Meister's home, Nick Meister drove Claimant back to Tice Electric. See Hearing Transcript pg. 17 lns. 7-16.

17. Claimant began May 25, 2017, just the same by arriving at work in the morning at Tice Electric at his normal arrival time. See Hearing Transcript pg. 18 lns. 10-24.

18. Claimant and Nick Meister informed Chris Meister of the previous day's work and progress. Both Nick and Chris Meister informed Claimant that they were going to continue working on the concrete patio at Nick Meister's house. See Hearing Transcript pg. 19 lns. 1-19.

19. Again, Nick Meister drove Claimant to the work location, Nick Meister's house. See Hearing Transcript pg. 20 lns. 3-11.

20. When leaving the Tice Electric work yard, the vehicle was pulling a trailer owned by Tice Electric with wood pre-loaded in it. See Hearing Transcript pg. 20 lns. 17-25, pg. 21 ln. 1.

21. After arriving at Nick Meister's house on May 25, 2017, Claimant continued working on the concrete patio with Nick Meister. See Hearing Transcript pg. 21 lns. 7-25.

22. Chris Meister arrived late in the afternoon and ultimately ended up assisting in the work. See Hearing Transcript pg. 21 lns. 6-11.

23. The concrete was provided by a commercial truck rather than ready-mix bags at retail locations like Home Depot. See Hearing Transcript pg. 22 lns. 17-25, pg. 23 lns. 1-7.

24. Claimant was directing Nick and Chris Meister where to unload the wheelbarrows full of concrete each time they were refilled from the concrete truck. See Hearing Transcript pg. 23 lns. 8-25.

25. Chris Meister installed a sprinkler tube in the patio so low voltage lighting could be used. See Hearing Transcript pg. 26 lns. 20-25, pg. 27 lns. 1-4, pg. 76 lns. 10-17.

26. No one ever asked Claimant to perform a favor on May 24 or 25, 2017. No one ever informed Claimant that he would not be paid for his work on May 24 or 25, 2017. See Hearing Transcript pg. 32 lns. 1-9.

27. Claimant arrived at work at Tice Electric on May 25, 2017, as normal because that is the routine—he goes to work and is informed where he will be working and what he will be doing that day. See Hearing Transcript pg. 32 lns. 19-25, pg. 33 lns. 1-4

28. Neither Chris nor Nick Meister consulted Claimant about the patio or Claimant's opinions prior to being sent out to Nick Meister's house. See Hearing Transcript pg. 42 lns. 10-25.

29. Claimant does not always turn in time slips at the end of a work day. There were numerous times he did not submit a time slip after working. See Hearing Transcript pgs. 46-49, pg. 52 lns. 15-25, pg. 53.

30. Chris Meister never informed Claimant that his work on May 24 or May 25, 2017, was to pay back any debt for former assistance or that he was performing a favor. See Hearing Transcript pg. 52 lns. 5-10.

31. Claimant never told his employer that he quit Tice Electric. See Hearing Transcript pg. 54 lns. 10-13.

32. Claimant was only at Nick Meister's house on May 25, 2017, because he went to work in the morning, he was told go to Nick Meister's house that day by his boss, Chris Meister, and Nick Meister drove him to the location. See Hearing Transcript pg. 55 lns. 5-16.

33. Chris Meister bought supplies for the project—namely a tarp to cover the work area due to incoming rain. See Hearing Transcript pg. 68 lns. 24, pg. 69 lns. 2-7.

34. Chris Meister also assisted in the work and Chris and Nick Meister were taking direction from Claimant. See Hearing Transcript pg. 23 lns. 8-25.

35. Chris Meister remained at the job site until approximately 3:00 a.m. See Hearing Transcript pg. 75 lns. 3-7.

36. Claimant's legs were covered with wet concrete for an extended period of time and he ultimately felt a burning sensation in both legs. Claimant was forced to take a shower due to the burning and skin falling off from his legs. See Hearing Transcript pgs. 25-27. Claimant was informed by Nick Meister that an ambulance was called for Claimant and Claimant was transported to Swedish Medical Center's burn unit. See Hearing Transcript pg. 28 lns. 22-25, pg. 29 lns. 1-2.

37. Nick Meister knew of Claimant's chemical burns and need for treatment on May 25, 2017. Chris Meister learned of Claimant's chemical burns, second hand. See Hearing Transcript pg. 77 lns. 2-11. Although Chris Meister testified that he was not aware that an ambulance arrived and took Claimant to the hospital at the time it actually occurred, the ALJ finds that Chris Meister learned of the accident and Claimant's need for medical treatment that day through his son, Nick Meister. It does not seem plausible that Nick Meister would call an ambulance for Claimant and not tell his father, Chris Meister, that day since Chris Meister was at Nick's house until 3:00 a.m.

38. On May 25, 2017, Employer had notice of Claimant's work injury and need for medical treatment. Employer has never provided Claimant a list of designated physicians to treat his work injury.

39. On May 25, 2017, Claimant was treated at Swedish Medical Center's burn unit by Dr. Gregory Burcham. The medical report from that date indicates Claimant suffered his chemical burn "at work today." Claimant was treated and released the same day. Claimant was, however, directed to return to the outpatient Burn Clinic at Swedish for further treatment.

40. On May 31, 2017, Claimant returned to the outpatient Burn Clinic at Swedish Medical Center for additional treatment of his chemical burns. Claimant was initially evaluated Dr. Pulikkottil. Claimant was diagnosed as suffering from "7% total body surface area 2nd degree burns to his bilateral lower extremities due to chemicals from cement while at work." Claimant was admitted to the burn unit because it was a chemical burn that required operative management which included skin grafts.

41. On June 1, 2017, Claimant underwent surgery for his chemical burns. On June 2, 2017, Claimant was discharged. At the time of discharge, the degree of Claimant's burns was changed. Although Claimant was still diagnosed with burn injuries to 7% of his body, it was determined after surgery that 4% of his total body surface area suffered 3rd degree burns. Clmnt. Ex. 3.

42. After the first surgery was performed by Dr. Pulikkottil on June 1, 2017, Claimant returned to Dr. Pulikkottil for additional treatment. Clmnt. Ex. 3.

43. On June 21, 2017, Claimant underwent additional surgery, by Pulikkottil, for his chemical burns since some of the wounds were not healing. Clmnt. Ex. 3.

44. Claimant's chemical burns have required several skin grafts and laser treatments to treat his burns and extensive scarring. Claimant selected Dr. Pulikkottil to treat his burns and scarring. See Hearing Transcript pgs. 29-30; Clmnt. Ex. 3, Bates 10-149 and Ex. 6, Bates 161-69.

45. Claimant's chemical burns physically precluded him from performing his regular job duties for Employer as of May 26, 2017.

46. Claimant's injuries physically prevented him from returning to his usual job, and as a result, Claimant left his employment and has not returned to his employment.

47. As of December 20, 2017, the day of the hearing, Claimant has not returned to work, and has not be able to perform his regular job duties, due to his chemical burns and treatment.

48. Claimant experiences continuous itching and an absolute failure to perspire where he was burned, forcing Claimant to use lotions and other topical creams.

Claimant's injuries have also resulted in significant scarring. See Hearing Transcript pg. 30 lns. 2-10; Clmnt. Ex. 6, Bates 161-69.

49. Claimant has not been released back to work by his physicians to his knowledge and he has not performed any work since May 25, 2017, for income. See Hearing Transcript pg. 30 lns. 11-22.

50. Claimant has not been seeking work due to the need for ongoing treatment, including surgeries. See Hearing Transcript pg. 50 lns. 23-25, pg. 51 lns. 1-4.

51. Claimant never told Tice Electric he would not be returning to work. See Hearing Transcript pg. 50; lns. 7-16.

52. Since the accident, and Claimant was taken away by an ambulance, Employer and Claimant have not communicated with each other regarding the extent of Claimant's injuries, return to work matters, or other employment matters. The only matter Employer and Claimant communicated about after the accident was the return of a car Claimant was using which belonged to Employer.

53. Employer never terminated Claimant from his employment and Claimant never quit his employment with Employer.

54. Claimant never received a list of approved physicians from Employer following his injury on May 25, 2017. See Clmnt. and Rspndt. Exhibits generally.

55. Claimant was paid $20.00 per hour. The number of hours Claimant worked each week varied.

56. Claimant earned $13,515.96 from January 1, 2017, to May 24, 2017. Claimant's average daily wage was $94.52, translating to an average weekly wage of $661.64 after multiplying the average daily wage by 7. See Clmnt. Ex. 7, Bates 170-78.

57. Claimant's testimony is found to be credible.

58. Chris Meister testified that he would assign job tasks to the employees each morning. He also testified that if he did not have enough work for his employees, which might happen 2-3 days a month, he would either let them know a day ahead of time, or let them know when they got to work. He also testified that if there was not enough work for his employees, but they showed up, he would typically pay them for four hours.

59. Chris Meister testified that Claimant was not working for Employer on May 24th or May 25th, of 2017.

60. Chris Meister testified that on May 23, 2017, they finished up a job and there was no work for Claimant on May 24, 2017. Chris Meister testified that when Claimant came into work on May 24, 2017, he told Claimant that he did not have any work for Claimant, but that he was welcome to work around the shop if he wanted. Chris Meister also testified that on May 24, 2017, he told Claimant and his son Nick Meister, that he did not have any work for either of them, and then Nick Meister asked Claimant whether he wanted to go to his house and help him with a project. He also testified that he saw Nick and Claimant drawing little sketches regarding the project. Chris Meister also testified that on May 25, 2017, the day of the accident, he did not see Claimant at Tice Electric at the beginning of the day because he had a meeting that morning with the director from Arby's and he was running parts out to another job and picked up some checks.

61. The ALJ does not find Chris Meister's testimony regarding the events of May 24 and May 25, 2017, which resulted in Claimant working on a concrete project to be credible for a number of reasons. First, if Employer had work for Claimant around the shop on May 24th, 2017, for which he would get paid, it does not make sense that Claimant would forego payable work, when he was having financial problems, to do an unpaid favor for Nick Meister. Second, Chis Meister contends he did not see Claimant the morning of May 25, 2017, the day of the accident. If Chris Meister did not see Claimant that morning, how did Claimant know what work he was supposed to do that day? As testified to by Claimant, and not refuted by Respondents, job assignments were handed out each morning by Chris Meister. It does not make sense that Claimant would volunteer to work with Nick Meister at his house on May 25, 2017, and leave the shop if Chris Meister had yet to show up at Tice Electric to provide work assignments for that day. Third, if Claimant was asked to volunteer and help Nick Meister with his patio, it seems like they would have arranged to do the work over a weekend and not during a normal work week.

62. Employer did not pay Claimant for the work he performed on May 24th or May 25, 2017.

63. Claimant testified that he considered Chris Meister and Nick Meister to be his supervisors. Respondents did not dispute such testimony. The ALJ finds that both Nick Meister and Chris Meister had supervisory authority over Claimant.

64. Claimant was directed by his Employer, Chris Meister, to work on Nick Meister's patio, by performing concrete work, on May 24 and May 25, 2017.

65. Claimant was injured within the course and scope of his employment with Employer.

66. Claimant required medical treatment on May 25, 2017, due to his work injury.

67. Claimant's injuries have precluded him from performing his regular job duties since May 26, 2017.

68. Employer had notice of Claimant's work related injury and need for medical treatment on May 25, 2017, and Employer has never provided Claimant a list of designated medical providers to treat his chemical burns.

69. Claimant selected Dr. Pulikkottil to treat his chemical burns.

70. Claimant's average weekly wage is $661.64.

CONCLUSIONS OF LAW

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

GENERAL PROVISIONS

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

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

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

I. Whether Claimant established, by a preponderance of the evidence, his injuries arose out of and in the course and scope of his employment.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. Employer has the "power to enlarge the scope of employment." *See Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ has credited Claimant's testimony. As found, Claimant showed up at work each day to get his daily work assignment and was directed by Employer to perform concrete work at the house of Nick Meister on May 24 and May 25, 2017, as part of his employment. While performing the concrete work, Claimant suffered severe chemical burns to his legs.

Respondents contend that Claimant was performing the concrete work as a favor. However, the ALJ rejects such contention. As found, Claimant went to work on May 24 and May 25, 2017 and was directed by Employer – Chris Meister – on each day to work with Nick Meister. Claimant was then driven by Nick Meister to Nick's residence to perform concrete work. Claimant was never asked to perform the concrete work as a favor and Claimant never said he would perform the work as a favor.

Respondents also contend that the fact Employer did not pay Claimant for working on May 24 and May 25, 2017, supports their contention that Claimant was performing the concrete work as a favor and not as an Employee. However, the ALJ does not find this fact to be dispositive. Claimant credibly testified that he went to work on May 24 and May 25, 2017, with the intention of working for Employer and getting paid for his work. Claimant also credibly testified that upon arriving at work on each day he was directed by Employer – Chris Meister - to work with Nick Meister on those days and he did. Employer's failure to pay Claimant for work performed at the direction of Employer cannot be used to divest Employer's liability for a work related injury.

Respondents also contend that the fact that Claimant did not turn in a time-slip on May 24 and May 25, 2017 establishes that he was doing the work as a favor. Again, the ALJ does not find this fact to be persuasive or dispositive. As found, Claimant did not always turn in his time sheets. As testified to by Claimant, which the ALJ credits, he did not always turn in a time sheet for each day he worked because Chris Meister knew where he was and what he was working on. And, Claimant could not turn in his timesheet on May 25, 2017, because he was taken by ambulance to the hospital for his severe chemical burns.

Respondents also contend that because Claimant was hired as an apprentice electrician and handyman, that his performance of concrete work was beyond the course and scope of his employment. The ALJ also rejects this contention. The Employer has the "power to enlarge the scope of employment." *See Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998). In this case, Claimant was specifically directed by Employer to perform concrete work. In addition, Claimant's work was not limited to electrical work. During his Employment with Employer, Claimant did electrical work, general handyman work, and other tasks at the direction of Employer such as building out the bathroom at the shop and attending car auctions.

Therefore, the ALJ concludes that Claimant has established by a preponderance of the evidence that he suffered a compensable injury within the course and scope of his employment on May 25, 2017.

II. Whether Claimant established, by a preponderance of the evidence, he is entitled to reasonable, necessary, and related medical treatment.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant suffered severe chemical burns within the course and scope of his employment. As found, the chemical burns required medical treatment.
Claimant was taken by ambulance to Swedish Hospital and was treated in their burn unit. Claimant was also treated at the outpatient burn unit at Swedish hospital.

Therefore, the ALJ concludes Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment to cure and relieve the effects of his industrial chemical burns.

III. Whether Claimant established, by a preponderance of the evidence, the right to select a physician passed to Claimant and he is entitled to select a physician of his choice.

Section 8-43-404(5)(a)(I)(A), provides that:

> "In all cases of injury, the employer or insurer shall provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee."

The statute further provides that if "the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor."

This statute affords Employer the right to designate at least four physicians and/or corporate providers that are deemed authorized to provide medical treatment. Employer's right to designate the authorized providers may be lost and the right of selection passed to Claimant if medical services are not tendered "at the time of injury." *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987).

WCRP 8-2(A), provides a framework for providing the required list of physicians within 7 business days from when the Employer has notice of the injury and similarly states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written list .... " WCRP 8-2(D) further provides that if the employer fails to comply with this Rule 8-2, the injured worker may select an authorized treating physician of the workers' choosing.

However, once the ATP is "selected" Claimant may not change physicians or employ additional providers without obtaining permission from the Insurer or exercising a right granted by statute. This is true because § 8-43-404(5)(a)(I)(A) still gives Employer the initial right to designate the authorized provider, and Respondents still remain interested in the selection of the ATP since they are liable to pay for the medical treatment. *See Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999); *Yale v. Engineered Plastic Designs*, WC 4-643-303 (ICAO April 3, 2006).

As found, Employer had notice of the injury and Claimant's need for medical treatment on May 25, 2017, when Claimant suffered his chemical burns and was taken away by an ambulance – which was called by Nick Meister – who was also found to be a supervisor of Claimant. As found, Chris Meister also learned about Claimant's injury and need for treatment the same day since he was at Chris Meister's house until 3:00 a.m. the following morning. Employer never designated a physician to treat Claimant's work injury pursuant to §8-43-404(5)(a)(I)(A) or WCRP 8-2. Therefore, the ALJ concludes the right of selection passed to Claimant.

On the date of the accident, Claimant was taken to Swedish Hospital by ambulance. Claimant was released the same day and told to return to the outpatient burn clinic. On May 31, 2017, Claimant returned to the outpatient burn clinic and started treating with Dr. Pulikkottil. Since returning to the outpatient burn clinic on May 31, 2017, Claimant has continued to treat with Dr. Pulikkottil for his chemical burns. For example, Dr. Pulikkottil performed surgery on Claimant on June 1, 2017, as well as subsequent procedures. Therefore, the ALJ concludes that the right of selection passed to Claimant and Claimant selected Dr. Pulikkottil to treat his work injury.

IV. Whether Claimant is entitled to temporary total disability benefits.

Initial Entitlement to TTD

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As found, Claimant's chemical burns and need for treatment precluded Claimant from performing his regular job duties as an apprentice electrician and handyman. Although specific work restrictions were not issued by a treating physician, the ALJ concludes that Claimant's testimony, combined with the medical records and the exhibits showing the extent of his medical treatment and severity of his burns, establishes by a preponderance of the evidence that his injuries prevented Claimant from performing his regular job duties for more than three work shifts, starting May 26, 2017. Therefore, the ALJ concludes that Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits.

Is Claimant responsible for his termination

Respondents contend Claimant is not entitled to temporary disability benefits because he allegedly abandoned his job after the accident.

Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, Respondents shoulder the burden of proof by a preponderance of the evidence to establish each

element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (ICAO July 18, 2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.*

Violation of an employer's policy does not necessarily establish Claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). However, Claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. This is true even if Claimant is not specifically warned that failure to comply with Employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether Claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office, supra.*

If Claimant leaves work because of an inability to perform the duties of the job, Claimant is not responsible for the subsequent job separation. For example, in *Bonney v. Pueblo Youth Service Bureau*, W.C. No. 4-485-720 (ICAO April 24, 2002), an ALJ found an industrial injury physically prevented Claimant from returning to her usual job, and as a result Claimant left the employment. In that case, it was held that Claimant is not "responsible" for quitting employment which the injury prevents the claimant from performing. *See also Windom v. Lawrence Construction Co.*, W.C. No. 4-487-966 (ICAO November 1, 2002); *Holsonback v. Brand Scaffold Builders*, W.C. No. 4-724-509 (ICAO June 12, 2008). This is true because the very purpose of temporary disability benefits is to compensate for a temporary loss of wages which occurs when Claimant is physically unable to perform the pre-injury employment. *Schlage Lock v. Lahr*, 870 P.2d 615 (Colo. App. 1993).

In this case, Claimant left work after the May 25, 2017, accident because his chemical burns prevented him from performing his regular job duties. Since the accident, Claimant has not returned to work. There was no credible testimony presented by Employer that Claimant was terminated from employment. Therefore, there was no finding that Claimant was terminated from employment. There was testimony that neither Employer nor Claimant have spoken about work matters since the accident and Claimant has not returned to work. There was testimony that

communication between the parties since the accident involved Claimant returning a car that belonged to Employer. The fact that neither Employer nor Claimant have talked to each other since the accident regarding return to work issues and Claimant has not returned to work does not rise to the level of Claimant being responsible for the termination of his employment and a bar to disability benefits. Respondents did not put forth any credible testimony establishing Claimant violated a company rule or policy by not contacting Employer to discuss return to work matters, or other employment matters, and such conduct resulted in his termination from employment. As found, Claimant left work due to his injury and inability to perform his regular job duties. Therefore, the ALJ concludes that Respondents have failed to establish by a preponderance of the evidence that Claimant is responsible for the termination of his employment.

V. Claimant's average weekly wage.

Section 8-42-102(2), C.R.S., requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

Claimant was paid $20.00 per hour. However, the number of hours Claimant worked each week varied. Therefore, the ALJ concludes that in order to fairly determine Claimant's average weekly wage, Claimant's total earnings for 2017 will be divided by the number of weeks he worked that year.

Claimant earned $13,515.96 from January 1, 2017, to May 24, 2017. Claimant's average daily wage was $94.52, translating to an average weekly wage of $661.64 after multiplying the average daily wage by 7. See Clmnt. Ex. 7, Bates 170-78. Therefore, the ALJ concludes that Claimant's average weekly wage is $661.64.

ORDER

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

1. Claimant suffered a compensable injury on May 25, 2017, while working for Employer.

2. Respondents shall provide Claimant reasonable, necessary, and related medical treatment to treat his work injury.

3. The right to select a treating physician passed to Claimant and Claimant selected Dr. Pulikkottil. Therefore, Dr. Pulikkottil is an authorized treating physician.

4. Claimant's average weekly wage is $661.64.

5. Respondents shall pay Claimant temporary total disability benefits starting May 26, 2017, until terminated by law. Claimants' temporary total disability benefits shall be paid based upon an average weekly wage of $661.64.

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

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

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

DATED: January 23, 2018

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

ISSUES

1. Was Claimant an employee of either Respondent Carlos Hernandez or Respondent Matute on the date of injury; and

2. What is Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant is a 35 year old male who sustained admitted injuries on September 29, 2016, after falling from a ladder on the fourth day of a job scheduled for five days where he was sanding and painting a house in Golden, Colorado (the Golden residence).

2. Claimant has worked for different painting companies, including Davis Painting, which is owned by Freddie Hernandez who is Claimant's brother. Freddie Hernandez also works for Respondent Carlos Hernandez from time to time, and was doing so the week of September 26, 2016. Claimant also worked for Respondent Carlos Hernandez previously in 2013 and 2014. Respondent Carlos Hernandez is owned by another of Claimant's brothers, Carlos Hernandez. Carlos Hernandez has denied liability for this claim and contends that Claimant was not working for Respondent Carlos Hernandez on the date of the injury. It is undisputed that Respondent Carlos Hernandez was insured by Pinnacol Assurance on the date of Claimant's injury. The WC claim against Respondent Carlos Hernandez is designated as Pinnacol Assurance No. 3874469.

3. Wilder Hernandez is an employee of Respondent Carlos Hernandez and is the son of Carlos Hernandez, the owner of Respondent Carlos Hernandez. Wilder is Claimant's nephew. Wilder Hernandez was working as a painter at the Golden residence with Claimant on the date of the injury. Wilder does not own an interest in Respondent Carlos Hernandez. Wilder does not own a painting business or any business.

4. Jarvis Matute owns Respondent Matute and is also insured by Pinnacol Assurance. The WC claim against Respondent Matute is designated as Pinnacol No. 3864038. Respondent Matute is not now and has never been in the painting business. Respondent Matute has no employees and does not hire laborers.

5. The consolidated claims against Respondent Matute and Respondent Carlos Hernandez are designated as WC No. 5-027-793.

6. Jarvis Matute responded to a call from the pastor of a church (the Church) that he and the Hernandez family, including Carlos, Wilder and Eden Hernandez, also

attended. The Pastor called upon the congregation to help the Hernandez family by using Hernandez Painting for all of their painting needs.

7. On more than one occasion in 2016 at the Church, Jarvis Matute and Carlos Hernandez discussed the Golden residence sanding and painting job. Jarvis Matute also mentioned that he may have other work for Respondent Carlos Hernandez to paint some apartments. During a church picnic in June 2016, Jarvis Matute told the Pastor that he found work for the Hernandez family and Matute was focused mainly on Carlos Hernandez.

8. In May 2016, Carlos Hernandez, owner of Respondent Carlos Hernandez, entered into and signed a contract with Jarvis Matute, owner of Respondent Matute to perform sanding and painting services at the Golden residence. Carlos Hernandez also provided Jarvis Matute with a certificate of insurance listing Respondent Carlos Hernandez as the insured and Respondent Matute as the Certificate Holder and a W-9 taxpayer identification number for Respondent Carlos Hernandez. The ALJ accepts the testimony of Respondent Matute that he sub-contracted the work to Respondent Carlos Hernandez pursuant to a contract signed by Carlos Hernandez.

9. Wilder Hernandez and Claimant arrived at the Golden residence job site on September 26, 2016, in a Carlos Hernandez Painting company truck to begin the job. Wilder took Claimant to and from the Golden residence job site in the Carlos Hernandez Painting company truck on September 26, 27, and 28. Wilder also drove Claimant to the job site in the company truck on September 29th, the date of Claimant's injury.

10. Claimant and Wilder Hernandez used tools and equipment owned by Respondent Carlos Hernandez or Freddie Hernandez in the course and scope of their painting job at the Golden residence. Claimant and Wilder Hernandez used ladders, rollers, an extension cord and a machine that throws paper down used like a drop cloth, from Hernandez Painting, as well as a paint spray machine and a sanding machine owned by Freddie Hernandez who was working at the time with Carlos Hernandez on another paint job.

11. Based upon the totality of the evidence and the testimony of all witnesses, the Judge finds that Claimant was not an employee of Respondent Matute on the date of injury or any other time.

12. Based upon the totality of the evidence and the testimony of all witnesses, the Judge finds that Claimant was an employee of Respondent Carlos Hernandez on the date of injury.

13. On September 29, 2016, Claimant was injured in the course and scope of his employment for Respondent Carlos Hernandez.

14. Carlos Hernandez denies signing the May 31, 2016, contract between Respondent Carlos Hernandez and Respondent Matute. Charla Janney was accepted as a handwriting expert. Ms. Janney ruled out Jarvis Matute as forging Carlos

Hernandez' name on the contract but did not rule out Carlos Hernandez as the signer. Ms. Janney found it is probable that the signature on the contract is Carlos Hernandez'. The Judge accepts the opinion of Ms. Janney as credible and persuasive. The Judge rejects the testimony of Carlos Hernandez. No persuasive evidence was provided to support Carlos Hernandez' claim that the signature on the contract was not his.

15. On the date of injury and at all times that Claimant worked on the Golden residence job, the Judge finds that Claimant was an employee of Respondent Carlos Hernandez and Respondent Carlos Hernandez was Claimant's employer for all work on the Golden residence job the week of September 26, 2016, including the date of Claimant's injury. Respondent Carlos Hernandez was the insured subcontractor for all sanding and painting services for the Golden residence during the week of September 26, 2016, and including Claimant's date of injury. Wilder Hernandez and Claimant were the two employees of Respondent Carlos Hernandez that its owner, Carlos Hernandez, provided to perform the essential functions of the contract between Hernandez Painting and Jarvis Matute Construction signed by Carlos Hernandez and Jarvis Matute to perform services at the Golden residence.

16. The Judge rejects the testimony of Carlos Hernandez, Wilder Hernandez, and Edin Hernandez as not credible or persuasive.

17. The Judge accepts the testimony of Jarvis Matute, Pastor Bustamante, and Ms. Charla Janney as credible and persuasive.

18. The Judge finds and concludes that Claimant's AWW is based upon Claimant's 2016 earnings. Claimant's 2016 1099 federal tax form reflects earnings in 2016 of $41,400. Claimant worked through the end of September, approximately nine months in 2016; therefore the ALJ finds that Claimant's average weekly wage is $1,150.

CONCLUSIONS OF LAW

General Legal Principles

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

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence

or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

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

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

Who is Claimant's Employer

5. Contracts are formed once an offer is made, accepted, and a mutual exchange occurs or is promised. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957). Acceptance is a statement of agreement to the offer which may be exhibited by promising to perform the terms of the offer or actually beginning to perform the obligations of the offer. *Indus. Prod. Int'l, Inc. v. Emo Trans, Inc.*, 962 P.2d 983, 988 (Colo. App. 1997).

6. As found, Carlos Hernandez, owner of Respondent Carlos Hernandez entered into and signed a contract with Jarvis Matute, owner of Respondent Matute, to perform sanding/painting services at the Golden residence. As found, Respondent Matute sub-contracted all painting and sanding work for the Golden residence to Respondent Carlos Hernandez for the week of September 26, 2016, including Claimant's date of injury, September 29, 2016.

7. Section 8-40-202(1), C.R.S. of the Act defines an "employee" to include every person under any contract of hire, express or implied. Section 8-40-203(b) defines "employer" to include every person, association of persons, firm and private corporation, who has one or more persons engaged in the same business or employment. As found, Respondent Carlos Hernandez was subcontractor to perform all painting and sanding work at the Golden residence. As found, Claimant was an employee of Respondent Carlos Hernandez on September 29, 2016. As found, Claimant was in the course and scope of his employment for Respondent Carlos Hernandez when he was injured.

8. Because Respondent Carlos Hernandez was Claimant's employer, insured by Pinnacol Assurance on the date of Claimant's injury and Claimant was an employee of Respondent Carlos Hernandez on the date of injury, the concepts of statutory employer for an uninsured employers do not apply to this claim.

9. Pursuant to Section 8-42-102(2)(e), C.R.S. of the Act: "Where the employee is paid on a piecework, tonnage, commission, or basis other than a monthly, weekly, daily, or hourly wage AND where the employment is but casual and in the usual course of the trade, business, profession, or occupation of this employer, the total amount earned by the injured employee in the twelve months preceding the injury shall be computed and divided by the number of pay periods for which they were employed for the year preceding the injury. The Judge finds and concludes that Claimant's AWW is based upon Claimant's 2016 earnings. Claimant's 2016 1099 federal tax form reflects earnings in 2016 of $41,400. Claimant worked through the end of September. So $41,400 divided by nine months computes to an average weekly wage of $1,150.

ORDER

It is therefore ordered that:

1. The claim against Respondent Matute and Respondent Pinnacol Assurance is hereby DENIED AND DISMISSED.

2. Claimant was in the course and scope of his employment with Respondent Carlos Hernandez when he was injured.

3. Claimant's average weekly wage is $1,150.

4. Respondent Carlos Hernandez shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

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

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

DATED: 1-29-18

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

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant proved by a preponderance of the evidence that she sustained a work-related industrial injury and/or aggravation of a preexisting condition on February 25, 2017;

b. Whether Claimant's lower back and left hip injuries are compensable under this claim as a direct and natural consequence of the February 25, 2017, right knee injury;

c. Whether Claimant proved by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her right knee, low back and left hip injuries;

d. Whether Claimant established by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period of April 30, 2017, to October 16, 2017; and

e. What is Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant is 54 years old and has worked for Employer as a Customer Service Agent since December 1, 2014. Each day at work as a Customer Service Agent, Claimant is assigned a position at either the ticket counter, the gate or at the baggage service office, and she works that assignment for her entire shift.

2. As a part of her work-related duties at the ticket counter, Claimant normally weighs customers' bags, checks their identification and then lifts their bags onto a bag belt. Customer Service Agents for the Employer are taught proper bag lifting techniques, which requires squatting to complete each lifting motion. Each time Claimant moves a bag, she squats down, lifts the bag and then takes one to two steps before placing the bag on the bag belt. Claimant estimated that in a normal shift at the ticket counter she lifts at least 300 bags weighing 40 to 50 pounds each.

3. Claimant was assigned to work at the ticket counter from 7:00 a.m. to 3:30 p.m. on February 25, 2017. The morning of February 25, 2017, was not a typical morning at the ticket counter, because the bag belt malfunctioned and could not be used. The bag belt is a conveyor belt. Instead of simply lifting each bag once to put it onto the bag belt, she had to move each customer's bag twice, once to a staging area and then later onto the repaired bag belt.

4. At approximately 10:00 a.m. on the morning of February 25, 2017, Claimant's right knee became painful. Claimant was able to work through the pain, but by the end of her shift at 3:30 p.m., Claimant's knee was extremely painful and swollen. Claimant did not report her symptoms to a supervisor at that time. It is common for Claimant to have aches and pains after working a busy day at the ticket counter, so she went home with the hope that her knee pain and swelling would resolve on its own. Claimant spent the evening resting and icing her knee.

5. Claimant's knee did not improve with rest and ice. Therefore, when she reported to work for her next regularly scheduled shift on February 27, 2017, Claimant formally reported her injury to Customer Service Supervisor Brandy Barr. The Occupational Injury Report completed by Ms. Barr lists "carrying/lifting" as the cause of Claimant's injury, and goes on to state as follows:

> [Claimant] cannot remember a specific action that caused the injury however about half way into the shift she began to feel pain in her knee in which she states she felt like she must have twisted or strained it in some way. [Claimant] gave it the weekend to see if it was still feeling the same and as of now it is still painful and she is now reporting the injury …

6. Claimant injured her knee while squatting down to lift a heavy bag at work on February 25, 2017, but she cannot pinpoint an exact moment when the injury occurred. Claimant also reported the same mechanism of injury to each of the medical providers she has seen in this case. On February 25, 2017, Claimant had a busy day at the airport and that she had already serviced 60 to 70 customers by the time her knee became painful around 10:00 a.m.

7. Before February 25, 2017, Claimant had never experienced pain or swelling in her right knee, and she had never gone to a physician for treatment relating to her right knee. In fact, Claimant's insurance records reflect that December 1, 2014, to February 25, 2017, Claimant had only been to a physician on one occasion, and that was for a sinus infection.

8. After reporting her injury to Employer, Claimant established care with Martin Kalevik, D.O. of HealthONE Occupational Medicine and Rehabilitation. Dr. Kalevik sent Claimant for MRI imaging of the knee on March 10, 2017, and then ultimately referred Claimant to Rajesh Bazaz, M.D., an orthopedic surgeon with Western Orthopedics. Dr. Bazaz met with Claimant and evaluated Claimant's knee on six occasions, and also provided expert testimony in this case.

9. Dr. Bazaz diagnosed Claimant with arthritis of the right knee. Dr. Bazaz credibly opined that twisting the knee or squatting up and down to lift heavy items could suddenly aggravate previously asymptomatic arthritis.

10. Dr. Bazaz opined that it is impossible to tell what caused Claimant's arthritis or how long it has been present in Claimant's right knee. However, Dr. Bazaz further opined that Claimant sustained an aggravation of her preexisting arthritis on February 25, 2017, while squatting down and lifting baggage at work. Dr. Bazaz opined that the timing of the onset of Claimant's symptoms was relevant. Also relevant to Dr. Bazaz was the fact that prior to lifting bags all day at work on February 25, 2017, Claimant had never previously suffered from issues associated with her right knee.

11. Dr. Bazaz recommended non-operative treatment for Claimant's right knee condition, including a steroid injection, a lubricant injection, and physical therapy. Claimant underwent these treatments, and her knee is now approximately 50% improved. While she has not been able to return to doing all of her hobbies, Claimant reports that the treatment she has received for her knee has allowed her to return to work in a full-time capacity performing her normal job duties.

12. Claimant underwent a medical examination with Timothy O'Brien, M.D. on July 14, 2017, and Dr. O'Brien issued a report of the same date. Dr. O'Brien agreed with much of Dr. Bazaz's opinions. Dr. O'Brien opined that Claimant had arthritis in the knee that preexisted the February 25, 2017 incident and Dr. O'Brien agrees that arthritis in the knee can be completely asymptomatic and then suddenly become symptomatic due to an aggravation. Dr. O'Brien opined that spending an entire day lifting 30 to 40 pound pieces of luggage could aggravate preexisting arthritis. However, Dr. O'Brien would not agree that spending a day lifting luggage weighing 30 to 40 pounds did aggravate Claimant's preexisting arthritis in the right knee. However, Dr. O'Brien concluded that Claimant's sudden onset of symptoms in the right knee on February 25, 2017, was due to her "personal health."

13. In June of 2017, Claimant developed pain in the left hip and lower back and was referred to Samuel Chan, M.D. for evaluation. After completing an examination of Claimant, Dr. Chan opined that Claimant suffered from "compensatory symptoms" of the left lumbar spine and hip area. Dr. Chan recommended and performed an SI injection under fluoroscopic guidance for Claimant's lower back, and also recommended chiropractic treatment. With respect to the hip, Dr. Chan obtained MRI imaging and then determined that Claimant was suffering from an exacerbation/aggravation of preexisting arthritis.

14. Dr. O'Brien opined regarding Claimant's lower back and hip symptoms concluding Claimant's symptoms were a manifestation of Claimant's personal health and were not in any way related to Claimant's work on February 25, 2017 or right knee symptoms.

15. Claimant credibly testified at hearing that prior to June of 2017 she had never suffered from lower back or left hip symptoms. Claimant testified that since beginning treatment for her hip and lower back, those conditions have improved by approximately 60%.

16. Martin Kalevik, D.O. assigned work restrictions for Claimant beginning on March 2, 2017. Employer was not able to accommodate those restrictions between April 30, 2017, and October 16, 2017, and Claimant lost wages from Employer during that period.

17. Prior to her injury, Claimant worked for Employer approximately 40 hours per week and was paid at a rate of $14.58 per hour. Between February 16, 2016, and February 15, 2017, Claimant earned a total of $25,733.40. This equates to a daily rate of pay of $70.31 and an average weekly wage of $492.17 ($25,733.40/366 Days = $70.31; $70.31 x 7 = $492.17).

18. Claimant also works as a golf professional and owns her own company, Lana Ortega Golf, since 2006. Claimant has not sustained any wage loss with respect to Lana Ortega Golf. Claimant discussed her work for Lana Ortega Golf with her medical providers in this case, and they approved her continued work.

CONCLUSIONS OF LAW

General Legal Principles

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might

lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

Compensability – Claimant's Right Knee

4. A claimant bears the burden of proving by a preponderance of the evidence that an injury occurred within the course of, and arose out of, employment with the employer. Section 8-41- 301(1), C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury or condition is in the course of employment if it occurred within the time and place limits of employment and during an activity that has some connection with the employee's job-related functions. *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury or condition arises out of employment if "there is a causal connection between the duties of employment and the injuries suffered." *Deterts v.Times Pub. Co*., 38 Colo. App. 48, 552 P.2d 1033 (1976).

5. The mere existence of a pre-existing condition does not prevent an injury from "arising out of" an injured worker's employment. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

6. In this case, the credible and persuasive evidence presented at hearing established that Claimant had arthritis of the right knee that preexisted her February 25, 2017, injury. Claimant's arthritis constituted a preexisting condition. Further, the evidence established that Claimant's work for Employer on February 25, 2017, aggravated her preexisting condition of arthritis and caused the sudden need for medical attention. Prior to February 25, 2017, Claimant had never had a problem with her right knee. Then, suddenly, after an especially strenuous morning at work filled with squatting and lifting 40 to 50-pound pieces of luggage, Claimant's knee became swollen and painful. Dr. Bazaz's medical records and testimony offers the most probable explanation for Claimant's sudden onset of symptoms on February 25, 2017. Claimant's onset of symptoms was caused by her work. Dr. O'Brien's disagreement with this conclusion was not deemed credible. Accordingly it is concluded that Claimant's injury was precipitated by her work for Employer on February 25, 2017, when she was squatting down and lifting 300 or more bags weighing 40 to 50-pounds in an eight-hour shift.

Causation – Claimant's Lower Back & Left Hip

7. In Colorado, an employer is liable for the natural consequences of a work injury or the treatment obtained because of the work injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In this case, substantial evidence established that Claimant's altered gait caused by her right knee injury led to pain in her lower back and left hip. Dr. Chan, M.D. credibly opined that Claimant's symptoms are a "compensatory" injury related to her right knee. Also, Claimant credibly testified that prior to the onset of her right knee symptoms she had never experienced any pain or symptoms in her lower back or left hip. For these reasons, Claimant's lower back and left hip symptoms are deemed to be causally related to the compensable February 25, 2017, right knee injury.

Medical Benefits

8. A claimant is entitled to authorized medical treatment that is related and reasonably necessary to cure and relieve the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Yeck v. Industrial Claims Appeals Office*, 996 P.2d 228 (Colo.App. 1999). A claimant bears the burden to prove by a preponderance of the evidence the causal relationship between the work-related injury and the condition for which treatment is sought. *Snyder v. Industrial Claims Appeals Office,* 942 P.2d 1337 (Colo.App. 1997).

9. An employer is responsible for medical treatment when, in the normal progression of treatment, an authorized treating physician refers the claimant to other providers for additional treatment. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo.App. 1985). If a claimant seeks treatment outside the chain of authorized providers, respondents are not required to pay for it. Section 8-43-404(7), C.R.S.; *Yeck v. Industrial Claims Appeals Office, supra.*

10. As found, Claimant has proven by a preponderance of the evidence that she sustained a compensable right knee injury on February 25, 2017, that ultimately led to pain in her lower back and left hip. Claimant is therefore entitled to receive reasonable, necessary and casually related medical benefits for her right knee, lower back, and left hip injuries.

11. The medical treatment Claimant received through HealthONE Occupational Medicine and Rehabilitation, Health Images, Western Orthopedics, Colorado Occupational Medical Partners, Inc., Mile High Sports & Rehabilitation, and Injury Care Associates is found to be reasonable, necessary, and related to Claimant's compensable claim.

Temporary Disability Benefits

12. To prove entitlement to temporary total disability benefits, a claimant must prove the industrial injury caused a "disability." Section 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two

elements. The first is “medical incapacity,” which is evidenced by loss or impairment of bodily function. The second is temporary loss of earning capacity, which is evidenced by the claimant’s inability to perform his pre-injury full duty job. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Temporary disability benefits continue until the occurrence of one of the four terminating events specified in Section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg, supra*.

13. Claimant’s February 25, 2017 injury/aggravation caused functional limitation and restriction the prohibited her from completing her full, regular duty job for Employer. This is reflected by the restrictions assigned by Dr. Kalevik. Claimant’s functional limitations and restrictions interfered with her ability to work for Employer. As a result, Claimant testified that she lost wages between April 30, 2017, and October 16, 2017. Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits for that period.

Average Weekly Wage

14. The average weekly wage of an injured employee shall be taken as the basis upon which to compute compensation payments. Section 8-42-102(2), C.R.S. normally requires a judge to determine a claimant’s average weekly wage based on her earnings at the time of injury. A judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of the injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, Section 8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an average weekly wage in another manner if the prescribed methods will not fairly calculate the average weekly wage based on the particular circumstances of the case. *Campbell v. IBM Corp*., 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an average weekly wage is to arrive at a fair approximation of a claimant’s wage loss and diminished earning capacity*. Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240- 475 (ICAO May 7, 1997).

15. As found, a calculation based on the relevant period of September 16, 2016, through February 15, 2017, results in an AWW of $492.17. This constitutes a fair approximation of Claimant’s wage loss and diminished earning capacity.

ORDER

1. Claimant suffered a compensable work-related injury to her right knee on February 25, 2017.

2. Claimant’s lower back and left hip injuries are a natural consequence of her February 25, 2017, injury, and are therefore causally related to this compensable claim.

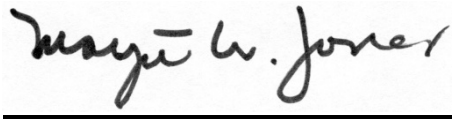
3. Respondents are financially responsible for all medical treatment that is reasonable, necessary and related to Claimant’s right knee, lower back, and left hip injuries. This includes treatment previously provided and treatment

recommended in the future to cure and relieve the effects of Claimant's compensable injuries.

4. Claimant shall receive TTD benefits for the period of April 30, 2017 to October 16, 2017.

5. Claimant's AWW is $492.17.

DATED: March 21, 2018



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

ISSUES

I. Whether Dr. Bennett Machanic is an authorized treating physician ("ATP").

II. Whether Dr. Machanic's referral to Dr. David Yamamoto exceeded the scope of referral by Dr. Lon Noel.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on February 6, 2017 while working for Employer as a physical therapist. The lid of Claimant's trunk unexpectedly came down while she was retrieving items from the trunk of her vehicle, striking Claimant's head and right shoulder.

2. Employer sent Claimant to Midtown Medical on February 7, 2017, where she presented to authorized treating physician ("ATP") Lon Noel, M.D. Dr. Noel diagnosed Claimant with a skull contusion/right shoulder contusion, cervical strain, and possible intermittent vertigo most likely secondary to vestibulitis. He recommended Claimant ice the area, take ibuprofen and/or Tylenol, and remain off of work until reevaluation.

3. Dr. Noel reevaluated Claimant on February 9, 2017 and diagnosed Claimant with a scalp contusion and acute neck injury superimposed on previously present neck pathology. Claimant was scheduled to undergo a cervical spine MRI.

4. On February 14, 2017, Claimant returned to Dr. Noel and complained of worsening symptoms. Dr. Noel noted Claimant brought in "some neurology notes from previous visits with Dr. Mechanic (*sic*)." Dr. Machanic had been treating Claimant since November 2016 for unrelated left arm and hand pain. Dr. Noel referred Claimant for a physiatry evaluation with Dr. Lesnak and a physical therapy assessment with South Valley Physical Therapy.

5. Dr. Noel reevaluated Claimant on February 20, 2017. Claimant reported tenderness and tightness in her right neck and on the right side of head. When working out feels pressure in her head. Dr. Noel noted, "She has been seen for her previous injuries by Physiotherapy Associates (Andy Free) and is also seeing Dr. Machanic (neurology) whose previous notes I have received and reviewed." In addition to the physiatry evaluation scheduled with Dr. Lesnak for February 27, 2017, Dr. Noel referred Claimant for a neurological evaluation with Dr. Machanic and "possible referral of therapy treatments to Physiotherapy Associates (Andy Free)."

6. Claimant presented to Dr. Machanic for evaluation on February 22, 2017. Among other things, Dr. Machanic recommended that Claimant undergo an ophthalmological consultation with her regular ophthalmologist, Dr. Stuart Lewis.

7. Claimant did not undergo the evaluation with Dr. Lesnak on February 27, 2017.

8. Dr. Noel reevaluated Claimant on February 27, 2017. Dr. Noel noted he reviewed in detail the notes from Dr. Machanic's neurological workup. He further noted Dr. Machanic sent Claimant for ophthalmological consultation with Dr. Lewis, and that Dr. Machanic would reevaluate Claimant in four weeks, on 4/12. Claimant was to continue physical therapy at Physiotherapy and vestibular stabilization treatments at South Valley Physical Therapy.

9. On March 6, 2017, Claimant followed up with Dr. Noel, reporting she had issues with her vision when looking at computer screens, sensitivity to light and noises, nausea, dizziness, off balance, shoulder pain and popping, and TMJ pain. Dr. Noel referred Claimant to her personal dentist, Dr. Pfeiffer.

10. Dr. Noel reevaluated Claimant on April 6, 2017. Dr. Noel stated additional x-rays taken were within normal limits. He noted that the x-rays were taken in odontoid view, which was suggested by Mr. Machanic. He again noted Claimant was scheduled for a follow-up evaluation with Dr. Machanic on April 12, 2017 and that a referral to Dr. Politzer was pending.

11. Claimant returned to Dr. Machanic for a follow-up evaluation on April 12, 2017. Dr. Machanic recommended Claimant continue physical therapy. In addition, he referred Claimant to Dr. Mary Ann Keatley for a cognitive evaluation, Dr. Politzer for vision issues, and Dr. Gentile for osteopathic treatment.

12. Dr. Noel reevaluated Claimant on April 18, 2017. Dr. Noel reported he reviewed the notes from Dr. Machanic's April 12, 2017 follow-up in detail. Dr. Noel outlined Dr. Machanic's findings, recommendations and referrals in detail, and noted Claimant was scheduled to see Dr. Machanic on June 6, 2017, but would possibly see him earlier pending a brain MRI recommended by Dr. Machanic.

13. Claimant returned to Dr. Noel for a follow-up evaluation on May 2, 2017. Dr. Noel noted Claimant had seen Dr. Keatley, Dr. Pfeiffer, Dr. Machanic, and South Valley physical therapy, and that she was scheduled to see Dr. Politzer on May 18, 2017. Dr. Noel further Claimant was scheduled for an evaluation with Dr. Politzer on May 18, 2017, and an evaluation with Dr. Machanic on June 8, 2017. He remarked that he had reviewed Claimant's case in detail with a Josie Niclinson and refused Dr. Machanic's referral to Dr. Gentile.

14. On May 23, 2017, Claimant followed up with Dr. Noel, reporting new right shoulder instability, new pressure in her head, sleep loss, new spinning sensations, and continued dizziness and light sensitivity. Dr. Noel reiterated his referral to Dr. Lesnak and noted Claimant again refused to see Dr. Lesnak. Dr. Noel indicated he was transferring Claimant's care, stating,

> She became quite upset when I suggested to her that her case needs to be consolidated and I think it is apparent that most of her consultants do

> not quite know what to do with her and keep referring her to other specialists. She has not subjectively improved and, in fact, overall seems to be worsen (*sic*) now than at the time of her 02/06/2017 injury…I voiced the fact that I was quite reluctant to continue treating this patient as she attempts to direct care and has been uncooperative in my attempts to treat her.

15. Dr. Noel recommended that Claimant finish therapy with South Valley Physical Therapy and Physiotherapy, and listed the following under Specialist Followups: "Followups with Dr. Mary Ann Keatley/Dr. Politzer/Mr. Machanic."

16. Dr. Noel signed referrals to Dr. Machanic on February 20, 2017, February 27, 2017, March 24, 2017, April 18, 2017, May 2, 2017 and May 23, 2017.

17. Claimant continued to treat with Dr. Machanic. Dr. Machanic referred Claimant to an endocrinologist, audiologist, and occupational physician Dr. David Yamamoto. The referral to Dr. Yamamoto was denied by Respondents.

18. Claimant ultimately underwent an evaluation with Dr. Lesnak on June 21, 2017. Dr. Lesnak evaluated Claimant and performed an extensive medical records review. He opined that Claimant was at maximum medical improvement ("MMI") with no impairment, and no need for maintenance medical benefits. Dr. Lesnak noted Claimant had no objective findings to support her multiples subjective complaints and opined, "Claimant has significant secondary gain issues and psychological factors influencing her symptoms and recovery."

19. On September 15, 2017, Claimant underwent an Independent Medical Examination with Dr. Carlos Cebrian. Dr. Cebrian opined that there is no objective evidence that provides support for persistence and expansion of subjective symptoms, and that Claimant is at MMI for her work related injury. He further opined, "the worsening of cognitive, emotional, and subjective symptoms are consistent with psychological issues rather than the work injury."

20. On November 28, 2017 Respondents filed a Final Admission of Liability consistent with the finding of Dr. Lesnak that claimant is at MMI with no impairment. The FAL denied maintenance medical benefits.

21. Dr. Noel testified by deposition as an expert in occupational medicine. He is board certified in internal medicine and Level II accredited by the Colorado Division of Workers' Compensation.

22. Dr. Noel testified he referred Claimant to Dr. Lesnak because of "red flags," stating Claimant "had a lot of subjective complaints that I could not find any objective evidence to confirm." Regarding his referral to Dr. Machanic, he testified, "I knew that Dr. Machanic had seen her previously, and I thought that she might be more comfortable seeing someone that she did know. Dr. Lesnak, as well as Dr. Machanic, has a neurological background, so Dr. Lesnak was my first choice." He testified that he

referred Claimant to Dr. Machanic for a neurological workup. Dr. Noel stated he does not know Dr. Machanic or work with him closely, and has not rendered referrals to Dr. Machanic as a routine part of his practice. He further stated he would not have referred Claimant to Dr. Machanic had Claimant not requested the referral.

23. When asked why he continued to render referrals to Dr. Machanic despite the "red flags" he observed as early as February 14, 2017, Dr. Noel testified,

> Well, I wanted to, as I mentioned, try to clarify some things, see if I could find objective evidence that she truly had a problem there. I generally will work with these difficult or red-flag cases, as it were, with Dr. Lesnak…And I wanted to work with him, but was unable to at that point in time. And so I kind of dragged it out a little bit, but I was trying to get more information.

24. He ended the doctor/patient relationship because Claimant was uncooperative in refusing to see Dr. Lesnak and he believed Claimant was attempting to direct her medical care.

25. Dr. Noel testified that at the time of the referral to Dr. Machanic, he had not yet reviewed Claimant's medical history. Dr. Noel testified that he subsequently has reviewed Claimant's medical records in their entirety and believes Claimant has hypochondriasis and Munchausen syndrome. Dr. Noel stated that, knowing what he knows now, he would not have rendered a referral to Dr. Machanic in February 2017.

26. Dr. Noel testified he did not intend for Dr. Machanic to render a "large number" of referrals, and he was dissatisfied with Dr. Machanic's failure to "get in touch with him" as the gatekeeper. However, in reference to Dr. Machanic's referrals, Dr. Noel further testified,

> Now, in retrospect, I did decide to go ahead and do a couple of them after she had already seen somebody, or on the recommendation of some of the other people, because I wanted to get some clarity on the case. And instead of clarifying things, it just made it worse.

27. Dr. Noel opined that Dr. Machanic's treatment was not reasonable, necessary or related for treatment of the February 6, 2017 industrial injuries.

28. Dr. Noel testified that he has 24 years of experience in the workers' compensation system and was aware that he controlled Claimant's case as the gatekeeper. He further testified that, if he deemed certain treatment inappropriate, he was aware he could address such issues in his reports.

29. Claimant testified that she did not initially see Dr. Lesnak because she did not believe it would be of any benefit. She testified she told Dr. Noel she wanted to see a neurologist because she believed she had post-concussive disorder, and informed Dr. Noel that she had seen Dr. Machanic in the past. She stated she did not tell Dr. Noel to

continue sending her to Dr. Machanic. Claimant testified that she was not attempting to direct her care.

30. Claimant's testimony is found credible and persuasive.

31. Dr. Noel's referral to Dr. Machanic was based on Dr. Noel's independent medical judgment and was within the normal progression of authorized treatment.

32. Dr. Machanic's referral to Dr. Yamamoto was in the chain of referrals and within the scope of Dr. Noel's referral.

CONCLUSIONS OF LAW

Generally

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

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

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

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination

regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Authorized Treating Physician

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777(Colo. App. 1990).

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the insurer will compensate the provider for the services rendered. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The questions of whether a referral was made as part of the normal progression of authorized treatment, and the scope of the referral, are questions of fact for determination by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App.2001).

A referral can be limited in scope. *See Gail v. U.S. West Service Link, Inc*., W.C. No. 3-957-994 (June 18, 1991), aff'd., *Gail v. U.S. West Service Link, Inc*., (Colo. App. No. 92CA1107, June 3, 1993) (not selected for publication). The scope of the referral is a question of fact for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). A limited referral for specified treatment does not render a physician an authorized treating physician for the purposes of making general referrals. *See Clark v. Hudick Excavating, Inc.*, W.C. No. 4-524-162 (November 5, 2004); *Gamboa v. ARA Group, Inc.*, W.C. No. 4-106-924 (November 20, 1996).

Here, Respondents contend Dr. Machanic is not an authorized physician because Dr. Noel's referral was not based on independent medical judgment and did not occur as part of the normal progression of authorized treatment. Respondents further contend Dr. Machanic exceeded the scope of his referral by referring Claimant to Dr. Yamamoto and other physicians.

The ALJ disagrees. Although Dr. Noel testified that he did not know Dr. Machanic, that he made the referral at the request of Claimant, and that he would not have made the referral without Claimant's request, the totality of the evidence establishes Dr. Noel's referral to Dr. Machanic was based on his independent medical judgment. Dr. Noel wanted Claimant to obtain a neurological workup and to obtain further clarification regarding Claimant's condition. While Dr. Lesnak was Dr. Noel's "first choice," Dr. Noel acknowledged that he thought Claimant may be more comfortable with Dr. Machanic. Thus, Dr. Noel had a medical reason to refer Claimant for further evaluation and doing so was within the normal progression of treatment. The fact that Claimant requested the referral to Dr. Machanic does not negate the validity of the referral. A claimant's request to be referred to a particular provider did not defeat the validity of such a referral in *Sackett*; *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997); or *Greager v. Indus. Comm'n*, 701 P.2d 168, 170 (Colo. App. 1985).

Beyond making the initial request to see Dr. Machanic, Claimant credibly testified that she did not tell Dr. Noel to continue sending her to Dr. Machanic. Dr. Noel continued to refer Claimant to Dr. Machanic, signing multiple referrals. While Dr. Noel testified Dr. Machanic was exceeding the scope of his referral and making referrals without his approval, the evidence clearly establishes Dr. Noel reviewed Dr. Machanic's evaluation notes in detail and was apprised of Dr. Machanic's findings, recommendations and referrals. No evidence was presented indicating Dr. Noel refused any of Dr. Machanic's referrals, with the exception of Dr. Gentile. Even when Dr. Noel elected to terminate the doctor/patient relationship with Claimant, he referred Claimant to Dr. Machanic for follow up. While Dr. Noel, in hindsight, would not refer Claimant to Dr. Machanic, his initial referral and continuing referrals were based his independent medical judgment at the time. Further, based on the totality of the evidence, Dr. Machanic's referral to Dr. Yamamoto and other physicians did not exceed the scope of Dr. Noel's referral.

ORDER

It is therefore ordered that:

I. Dr. Machanic is an authorized treating physician.

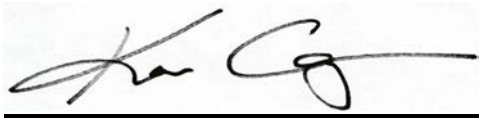
II. Dr. Machanic's referral to Dr. Yamamato was in the chain of referral and did not exceed the scope of referral.

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

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

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

DATED: January 31, 2018



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-995-488-04

ISSUE

The following issue was raised for consideration: Whether Claimant proved by a preponderance of the evidence that he is entitled to an Order awarding home assistance and yard services as a reasonable and necessary medical benefit.

FINDINGS OF FACT

1. Claimant sustained an admitted low back injury in a motor vehicle accident while in the course and scope of her employment on September 3, 2015. Claimant was authorized to treat with Dr. Alicia Feldman at the Colorado Clinic in Loveland, Colorado.

2. Claimant was paid temporary total disability benefits (TTD) benefits of $570.86 biweekly beginning September 29, 2015.

3. Dr. Feldman placed the Claimant at maximum medical improvement (MMI) on January 31, 2017. The Respondents filed a Notice and Proposal to Select an IME.

4. On June 13, 2017, Marc Steinmetz, M.D. authored a Division independent medical examination (DIME) report, stating Claimant reached maximum medical improvement (MMI) without impairment on October 3, 2016. On July 18, 2017, the DOWC provided notice of receipt of the Division IME report DIME process concluded. On July 26, 2017, Insurer filed a Final Admission of Liability consistent with Dr. Steinmetz' opinions Claimant reached MMI on October 3, 2016, without impairment. TTD benefits were paid to Claimant by Respondents, and never terminated by any other admission or order, until that Final Admission of Liability was filed.

5. Insurer contends that Claimant was overpaid TTD benefits from October 3, 2016, through July 14, 2017, in the amount of $11,621.08. Respondents seek repayment of the alleged overpaid amount.

CONCLUSIONS OF LAW

General Legal Principles

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

306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

Overpayment

4. Section 8-40-201(15.5), C.R.S., defines two categories of overpayment; when a claimant receives money that exceeds the amount that should have been paid or money received that a claimant was not entitled to receive.

5. Here, Claimant did not receive an overpayment within the meaning of Section 8-40-201(15.5), *supra*. The evidence established that Claimant received TTD benefits to which she was entitled during the period, October 16, 2016 through July 14, 2017. So, although Claimant received benefits exceeding the amount to which she became entitled after the DIME opinion and the Final Admission of Liability, at the time she received the TTD she was entitled to the TTD benefits.

6. Sections 8-42-103(3) and 8-42-105, C.R.S. provides that temporary total disability benefits shall continue until an employee reaches MMI, returns to regular or modified employment, the attending physician gives the employee a written release to return to regular employment or the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing and the employee fails to begin such employment.

7. At the time Claimant received TTD benefits, she was entitled to receive those benefits. Claimant did not meet any standard for termination of TTD as defined by Sections 8-42-103 and 105, *supra*. Claimant was placed at MMI by Dr. Feldman, the authorized treating physician, on January 31, 2017. On April 12, 2017, Respondents applied for a DIME challenging the impairment rating and MMI determination. TTD continue to be paid to Claimant during the pendency of the DIME. The DIME report was dated June 13, 2017, and DOWC determined the DIME process was concluded on July 18, 2017. On July 26, 2017, Respondents filed the Final Admission of Liability accepting

liability for TTD benefits from September 29, 2015, through October 2, 2016, based on the DIME physician's MMI determination of October 3, 2016.

8. Since Claimant was not overpaid TTD within the meaning of Section 8-40-201(15.5), C.R.S., Respondents shall not recoup an overpayment. *United Airlines v. Industrial Claim Appeals Office of the State of Colorado,* 312 P.3d 235, 239(Colo.App. 2013); *Rocky Mountain Cardiology v. Industrial Claim Appeals Office,* 94 P3d 1182, 1186 (Colo.App. 2004).

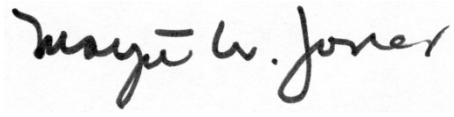
ORDER

1. Respondents claim to recoup an alleged overpayment of TTD is denied and dismissed.

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

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

DATED: February 26, 2018



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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that medical benefits of massage and acupuncture requested by Eric Tentori, D.O. are reasonable, necessary, and causally related to her October 5, 2016 work injury.

FINDINGS OF FACT

1. Claimant worked for employer as an office manager. As part of Claimant's duties she often was offsite seeking out more fleet business. In this capacity, she was picking up a client's car on October 5, 2016 when she was involved in a motor vehicle accident.

2. Claimant was rear ended while her vehicle was at a complete stop. At the time she was struck, Claimant was bent over attempting to turn a knob on the vehicle from four wheel to two wheel drive. Claimant alleges that when she was struck her head flew forward, she felt heat at the back of her neck, and her right hand flew into the dash near the knob she was reaching for.

3. The vehicle Claimant was in had slight damage to the rear bumper area. The vehicle that struck Claimant left the scene of the accident. Claimant was able to drive back to Employer's shop.

4. Claimant alleges that when she returned to the shop she was not making sense and couldn't even carry her purse. A co-worker advised Claimant to go to the emergency department. Claimant went to the emergency department where a CT of the neck and head were completed and negative. Chest x-rays were also completed and were negative. Claimant was discharged with a prescription for Norco.

5. On October 6, 2016 Claimant was evaluated at Concentra by Linda Thomas, M.D. Claimant reported that she was the restrained driver of a moderate velocity rear end collision the day prior. Claimant reported no loss of consciousness. Claimant reported right neck and upper back pain, feeling "flighty," pressure going up the right side of her neck and right side of her face, and episodes of light headedness increased by fast turning of the head. Dr. Thomas noted that the pain was located in the right lateral neck and right trapezius with associated symptoms of headache, neck muscle spasm, and neck tenderness. Dr. Thomas noted no upper extremity paresthesias, no upper extremity weakness, and no shoulder pain. Dr. Thomas found on the right hand/fingers a small ecchymosis at the right thenar eminence without tenderness, swelling, or erythema and with full range of motion and no discomfort. Dr. Thomas also found motor strength of the hand/fingers to be normal. Dr. Thomas found cervical muscle spasms and muscle tenderness and muscle tenderness and spasms in the thoracic spine. Dr. Thomas

assessed cervical strain, thoracic sprain, and concussion without loss of consciousness and recommended ibuprofen and physical therapy. *See* Exhibit D.

6. On October 18, 2016 Claimant was evaluated by Samuel Chan, M.D. Claimant reported that she was leaning forward in order to change the four-wheel drive back to two-wheel drive when she was rear ended. Claimant reported pain in the right side cervical spine especially at the base of the skull, radiating to the retro orbital region. Claimant also reported slurred speech, tearfulness on the right side, and a frequent choking sensation. Claimant also reported numbness and tingling going diffusely down the right upper extremity. Claimant was assessed as having sustained a whiplash type injury. *See* Exhibit G.

7. On October 21, 2016 Claimant was evaluated by Casey McKinney, PA-C. Claimant reported overall feeling much improved and that physical therapy was benefiting her neck symptoms. Claimant had some persistent neck pain, mild headache, and persistent dizziness with head movements. Claimant was assessed with cervical strain and headache and was refereed to physical therapy noting that Claimant would continue physical therapy for the cervical symptoms until resolved. *See* Exhibit 4.

8. On October 25, 2016 Claimant was evaluated by Theodore Villavicencio, M.D. Claimant reported overall being much improved with decreased dizziness. The next day, October 26, 2016 Claimant was evaluated and reported being worse, unable to complete a task properly, headache, and worse dizziness. On October 31, 2016 Dr. Villavicencio evaluated Claimant. Claimant reported being somewhat improved from the flare of cervical pressure and headache last week but that she was having sensation of abnormal swallowing, bubbling up her esophagus into her right ear, and persistent dizziness. *See* Exhibit 4.

9. On December 6, 2016 Claimant was evaluated by Dr. Villavicencio. Dr. Villavicencio noted that Claimant was overall improved with now infrequent headaches. He noted that her head CT from October 14, 2016 was normal and the MRI of her cervical spine showed some findings not causal of her pain. He noted that Claimant's neck pain was improving. He assessed cervical strain, thoracic sprain, concussion without loss of consciousness, and headache. He anticipated maximum medical improvement at the next visit in four weeks. *See* Exhibit D.

10. On December 16, 2016 Claimant was evaluated by Casey McKinney, PA-C. Claimant was noted to be in for a recheck on head and right elbow injury. Claimant reported trouble extending her arm. Claimant again indicated that her headaches were overall improved and she reported continued soreness in the right upper lateral neck. Claimant reported that on her initial visit and with her visit with Dr. Chan, she discussed right elbow pain after the motor vehicle accident that was initially minimal. Claimant reported that she was now having flares of pain in her right medial elbow after a temp job with writing that has caused her not to be able to extend the right elbow and that was causing radiating pain into her right hand/arm. Claimant also reported concern about her memory which she felt was failing her. At the right elbow, PA McKinney noted the medial

epicondyle and abnormal range of motion with pain at 70 degrees. Tenderness in cervical muscles was also found. PA McKinney noted Claimant's report that the right elbow was injured in the motor vehicle accident and had now flared and recommended a referral to a hand specialist if deemed compensable to evaluate and treat the working diagnosis of right medial epicondylitis. PA McKinney also recommended a referral to neurology for memory issues after concussion. *See* Exhibit D.

11. On December 23, 2016 Claimant was evaluated by Tracy Wolff, M.D. Claimant reported little glitches in the elbow when doing physical therapy and that the main focus had been concentrating on the neck and concussion. Claimant reported that since December 6 she was unable to straighten her arm and that she was having pain from the elbow up to the shoulder. Claimant also reported numbness down into the fingers. Dr. Wolf assessed right arm pain with a component of medial and lateral epicondylitis and diffuse neuritis and recommended therapy for the arm. Dr. Wolf performed a corticosteroid injection along the cubital tunnel on the right. *See* Exhibit G.

12. On January 6, 2017 Claimant was evaluated by Dr. Wolf and reported good overall relief following the prior injections. On examination, there was improved tenderness over the medial epicondyle but continued tenderness over the lateral epicondyle. A corticosteroid injection with lidocaine was performed at the right lateral epicondyle. *See* Exhibits 5, G.

13. On January 30, 2017 Claimant was evaluated by Dr. Villavicencio. He noted that Claimant was back for a recheck of multiple injuries stemming from a motor vehicle accident. Claimant reported that the medial and lateral injections for epicondylitis had benefit that was waning and that she felt weakness in the right upper extremity with attempts at lifting and that she was unable to fully extend the elbow. Dr. Villavicencio assessed cervical strain, headache, and medial epicondylitis, right and recommended a recheck with Dr. Wolf regarding the right epicondylitis. *See* Exhibit 4.

14. On February 3, 2017 Claimant was evaluated by Dr. Wolf. Dr. Wolf assessed right lateral greater than medial epicondylitis, possible cubital tunnel and discussed not using the right arm and activity modification or being stuck in a circle with it never healing. Dr. Wolf opined that other options included platelet rich plasma injections, acupuncture, dry needling, therapy, or in the long run surgery. Dr. Wolf opined, however, that none of the options were going to work if Claimant continued to use her right elbow as it needed the chance to calm down and heal. Dr. Wolf again discussed casting to completely stop use of that area. *See* Exhibit 5.

15. On February 20, 2017 after Claimant had continued right elbow pain, Dr. Villavicencio ordered a right elbow MRI. *See* Exhibit 4.

16. On February 27, 2017 Claimant underwent an MRI of her right elbow. The impression provided was low grade tear proximal fibers extensor carpi radialis muscle at the lateral epicondyle, mild osteoathrosis, and small elbow joint effusion with no acute bony injury. *See* Exhibit E.

17. Claimant was referred to the delayed recovery unit and began treating with Eric Tentori, D.O. Dr. Tentori noted the recommendation for the right epicondylitis of casting the right upper extremity for three weeks and Dr. Wolf's indication that it might be worth it to get a second opinion so Claimant could hear options from somebody else. Dr. Tentori referred Claimant for a second upper extremity orthopedic consultation. *See* Exhibit 6.

18. On March 21, 2017 Claimant was evaluated by orthopedic hand specialist Craig Davis, M.D. for a second opinion. Claimant reported that she had sustained a concussion, significant whiplash injury, and an injury to her right elbow. Claimant reported continued diffuse soreness throughout her elbow which was both medial and lateral. Dr. Davis provided the impression of right elbow mild degenerative arthritis that seemed to have been aggravated by her injury as well as an element of medial and lateral epicondylitis. Dr. Davis opined that Claimant had an appropriate/reasonable course of treatment. Dr. Davis indicated that if he were treating Claimant he would probably try an injection into the elbow joint itself given that Claimant seemed to have symptoms referable to the degenerative changes noted on MRI. He did not foresee that surgical treatment would likely be of benefit. *See* Exhibit 8.

19. On April 18, 2017 Claimant was evaluated by Dr. Davis. He noted she decided to pursue treatment with him and reported a new symptom of stocking distribution numbness from her forearm to her fingertips involving all five fingers. Claimant reported that it had been present since the accident. Dr. Davis provided the impression of persistent elbow synovitis and discussed an injection, but Claimant decided to wait on the injection. Dr. Davis noted that Claimant's numbness was in a stocking distribution and did not correspond with any single nerve. *See* Exhibit 8.

20. On April 25, 2017 Claimant was evaluated by John Aschberger, M.D. Dr. Aschberger found Claimant to have right elbow irritation with various findings including lateral epicondylitis and noted that Dr. Davis had suspected an intrinsic elbow abnormality. Dr. Aschberger doubted cervical radiculopathy and considered carpal tunnel syndrome given the symptom distribution in the hand. Dr. Aschberger recommended electro diagnostic testing for the right upper extremity given the persistent symptoms. Dr. Aschberger also noted symptoms of a potential median nerve issue at the wrist. He opined that there were findings of myofascial irritation and that a trial of massage therapy would be reasonable to address associated trigger points. *See* Exhibit 7.

21. On May 16, 2017 Claimant was evaluated by Dr. Tentori. He referred her back to Dr. Aschberger for the purpose of a right upper extremity electrodiagnostic assessment and asked that Dr. Aschberger continue his involvement in Claimant's somewhat complicated claim. *See* Exhibit 6.

22. On June 14, 2017 Claimant was evaluated by Dr. Aschberger. He found on examination that Claimant was tender at the right elbow medial and lateral epicondyle.

He noted findings of lateral epicondylitis were replicated. He noted that a follow up injection at the lateral epicondyle would be considered. *See* Exhibit 7.

23. On June 1, 2017 Claimant underwent an independent medical evaluation performed by George Schakaraschwili, M.D. Claimant reported headache, neck pain, right arm pain, and cognitive symptoms. Claimant reported that the motor vehicle accident was "quite the impact" and that it caused her to jam her right hand into the console. Claimant reported that after the accident she felt pain instantly in the back of her neck and that it felt warm. Claimant reported that she had a bruise in the right thenar area that resolved after one or two weeks and that she began noticing pain in the right elbow with decreased range of motion on elbow extension. Dr. Schakaraschwili reviewed medical records and performed a physical examination. On examination Claimant reported decreased sensation in a patchy non dermatomal distribution in the right elbow both medially and laterally and in the thumb and index finger. Dr. Schakaraschwili found tenderness to palpation at the right lateral epicondyle and radial tunnel. *See* Exhibits 9, G.

24. Dr. Schakaraschwili opined that following Claimant's initial evaluation, Claimant had an expanding list of symptoms that were inconsistent with the mechanism of injury including: severe headaches, severe neck pain, ear pain, right sided head pain, and progressive neurocognitive symptoms inconsistent with Claimant's behavior on the day of the accident and inconsistent with the known natural history of traumatic brain injury with the absence of any findings on two head CT scan studies. Dr. Schakaraschwili opined that the pain complaints appeared grossly out of proportion to the mechanism of injury including late appearing complaints of right elbow pain and temporomandibular joint complaints that had no apparent connection to the accident. Dr. Schakaraschwili opined that there were objective findings of a partial tear to the extensor tendon in the elbow along with a small joint effusion which indicated that some type of injury occurred to the right arm at some time but which could not have occurred during the subject accident. Dr. Schakaraschwili opined that the treatment for right elbow symptoms was due to injuries or conditions unrelated to the work injury. He opined that Claimant was at MMI with no impairment as a result of the accident and required no further treatment related to the accident. *See* Exhibits 9, G.

25. On June 20, 2017 Claimant was evaluated by Dr. Davis. Dr. Davis noted extreme tenderness on physical examination at the medial epicondyle. Dr. Davis provided the impression of right medial epicondylitis and performed an injection to that area. *See* Exhibit 8.

26. On July 3, 2017 J. Trevor McNutt, M.D. performed a medical record review. Dr. McNutt opined that Claimant likely sustained a cervical strain, thoracic strain, possible right elbow strain, and possible mild traumatic brain injury without loss of consciousness. Dr. McNutt opined that Claimant did not still suffer from the injuries, that her prognosis was good, and that she did not need any additional treatment. He opined that the treatment was appropriate for a mild soft tissue injury. Dr. McNutt noted that Claimant's initial symptoms improved within a few weeks after the accident which was expected but

that the symptoms began to recur and/or expand later throughout treatment without any new injury in and around the time Claimant retained legal counsel. Dr. McNutt also noted that results of neuropsychological testing indicated nonorganic factors playing a significant role in Claimant's symptoms and opined that her subjective complaints did not correlate with the objective findings. Dr. McNutt opined that no further treatment or intervention was indicated to improve Claimant's condition. *See* Exhibit H.

27. On August 22, 2017 Claimant was evaluated by Dr. Tentori. Claimant reported resolution of the pain in her neck and upper back, improvement with her right sided TMJ dysfunction and associated right ear pressure sensation, but no significant improvement regarding her diffuse right upper extremity pain and functional limitations. Dr. Tentori noted that Claimant had been evaluated by two upper extremity orthopedists, Dr. Wolf and Dr. Davis. He noted that Dr. Davis opined that Claimant's imaging studies had not shown much pathology and that Claimant was likely to gradually improve with time. Dr. Tentori also noted that Claimant was evaluated by physiatrist Dr. Aschberger who found Claimant had maximized treatment regarding the right upper extremity/right elbow and that Dr. Aschberger noted that Claimant's claim would be appropriate for case closure once Claimant had maximized treatment for TMJ. Claimant reported to Dr. Tentori that she had continued to receive treatment with Dr. Raabe including acupuncture and massage directed at her right TMJ issues. Claimant reported that the involved practitioners in her case had suggested a course of acupuncture and massage therapy directed at her right upper extremity. On examination Dr. Tentori found the right upper extremity to have ongoing tenderness with palpation of a diffuse nature that appeared to be emanating from the right elbow with symptoms radiating both proximally and distally. Dr. Tentori believed the upper extremity diffuse tenderness appeared to be related to myofascial pain/irritation and noted a neurologic examination had no focal findings. Dr. Tentori noted that the right TMJ/ear pressure sensation was resolving and that the one primary/ongoing issue was Claimants' report of pain affecting her right upper extremity. He opined that prior to consideration of case closure/MMI declaration, he supported/recommended a course of acupuncture and massage therapy directed at Claimant's right upper extremity with 1-2 sessions of each for 6 weeks. He explained to Claimant that the recommended 6 weeks of massage and acupuncture would likely be the final treatment recommendations directed at the right upper extremity. *See* Exhibits 6, D.

28. On September 6, 2017 Dr. Schakaraschwili issued a Rule 16 record review report. He noted his prior independent medical evaluation of Claimant and that he had received additional medical records. Dr. Schakaraschwili noted that his review of medical records showed that the right upper extremity pain complaints first appeared in the record on December 16, 2016 more than two months after the subject accident. He opined that the minor rear end collision on October 5, 2016 would not have caused injury to Claimant's right arm. He opined that the MRI findings were not related to the original work injury and that all treatment directed at the right upper extremity was not claim related. *See* Exhibit G.

29. On September 28, 2017 Claimant was evaluated by Dr. Aschberger. Claimant reported concern with the right arm, limited motion, and significant pain. Dr. Aschberger expected upcoming MMI. He agreed with Dr. Tentori's recommendation and plan for deep tissue work into the upper extremity. However, he opined that rather than acupuncture he recommended physical therapy combined with massage to go over a progressive strengthening and range of motion program. *See* Exhibit 7.

30. Both Claimant and Dr. Schakaraschwili testified at hearing.

31. Claimant disagreed that the motor vehicle accident was slight. She testified as to the damage to the car she was driving and to the other car, indicating the other car had major front end damage. Claimant testified that at the time of impact she was bent over trying to change the car from four-wheel drive to two-wheel drive. Claimant testified that when she was hit, her head flew forward and she felt heat at the back of her neck. Claimant further testified that her right hand flew into the dash near the knob she was reaching for. Claimant testified that she had a bruise on her right palm at the base of her thumb and that as she worked more after the accident, her elbow got worse. Claimant testified that after the recommendation for casting to avoid movement, she sought a second opinion and wished to undergo massage and acupuncture.

32. Dr. Schakaraschwili opined that Claimant had not sustained a head injury or traumatic brain injury in the accident and that when a person is rear ended they move backwards and it would be impossible for Claimant's hand to have been jammed into the dash when she was rear ended. He opined that epicondylitis is generally an overuse injury and noted that Claimant made no mention of elbow pain until December 16 when a flare up of pain was mentioned. He opined that Claimant probably had medial and lateral tendonitis and that the MRI showed a tear but opined that the conditions were not caused by the motor vehicle accident and that there was no mechanism of injury that could have caused those conditions. Dr. Schakaraschwili opined that a high force would be required to cause those type of injuries. Dr. Schakaraschwili also opined that massage and acupuncture would play no real role in treating the conditions and although it might make Claimant feel better it would not cure or shorten recovery time for the conditions. He noted that Claimant's elbow symptoms showed up after she worked a lot of data entry, reaching, and putting on stickers for a temporary organization job. Dr. Schakaraschwili agreed with physical therapy and strengthening as reasonable treatment options, but again opined that the treatment would not be work related. He opined that the mechanism of injury was not sufficient enough to cause Claimant's problems and that there was no mention of right arm pain until December 16 as the main bases for his opinion.

33. Claimant is found credible and persuasive in explaining the accident and the force on her right hand as it was pushed into the console near the button she was reaching for when she was rear ended. Although Dr. Schakaraschwili noted that a person would move backward when rear-ended, Claimant was diagnosed as having a whiplash type injury which necessarily involves both backward and forward movements. Claimant also had a bruise on her right hand supporting her testimony that her right hand was jammed into the console when she was rear ended. Additionally, Claimant is credible

and persuasive that she reported the right hand/elbow problems, but that the initial treatment focus was centered on other things. As found above, on October 18 Claimant reported to Dr. Chan that she had numbness and tingling going diffusely down her right upper extremity. This was approximately 13 days following the motor vehicle accident.

34. Dr. Schakaraschwili is not found persuasive. His opinion is based, largely, on the mechanism of injury and the believed time discrepancy. He is incorrect that Claimant had no reported symptoms until mid-December. Rather, the records indicate that Claimant told Dr. Chan on October 18 that she had numbness and tingling going diffusely down the right upper extremity. Additionally, Dr. Schakaraschwili is not found persuasive that the mechanism of injury could not have caused Claimant's right upper extremity condition.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Right upper extremity- massage and acupuncture

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). If Claimant establishes a causal nexus, Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met her burden to establish, more likely than not, that the recommended massage therapy and acupuncture is reasonable, necessary, and causally related to her October 5, 2016 work injury. Claimant is credible and persuasive that she had symptoms in her right upper extremity/elbow immediately but that the treatment was directed elsewhere. Claimant reported numbness and tingling diffusely down her right upper extremity to Dr. Chan on October 18, 2016, just 13 days after the motor vehicle accident. The treatment had been directed at the neck and the concerning concussion type symptoms. Claimant is credible that those areas were more of the focus and that although she had immediate right upper extremity and elbow symptoms, the pain and her elbow got worse as she worked more following the accident.

Dr. Schakaraschwili put great emphasis on expanding symptoms and believed that there were no upper extremity issues reported until December 16, 2016. In the December 16 visit with PA McKinney, Claimant told PA McKinney that she had reported to Dr. Chan her right elbow pain. Claimant testified consistently and on review, the record reviews of Dr. Chan's visit show that Claimant did report diffuse numbness and tingling in her right upper extremity and similar symptoms to what she continued to report during her later treatment. Dr. Schakaraschwili also put emphasis on the mechanism of injury where he believed Claimant could not have struck her right extremity with enough force to cause injury. Claimant, however, is credible and persuasive that her right hand was jammed into the console near the button she was reaching for. This is consistent with a rear end whiplash type accident, consistent with the bruising on her right hand shortly after the accident, and consistent with a rear end collision causing damage to both the vehicle she was driving and the vehicle that struck her. Claimant has established, more likely than not, that she struck her right upper extremity with enough force to cause injury on October 5, 2016.

The doctors who have reviewed this case have recommended different treatment modalities including acupuncture, massage, physical therapy, casting, strengthening, and

no treatment. The ALJ finds that massage and acupuncture are reasonable and necessary treatment methods to attempt to cure and relieve the effects of Claimant's motor vehicle accident. The recommendations by Dr. Tentori to are approved. Claimant has established, more likely than not, that her right upper extremity/elbow is related to the October 5, 2016 motor vehicle accident and that massage and acupuncture are reasonable and necessary treatment options.

ORDER

1. Claimant has established by a preponderance of the evidence that medical benefits of massage and acupuncture requested by Eric Tentori, D.O. are reasonable, necessary, and causally related to her October 5, 2016 work injury.

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

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

DATED: January 29, 2018 /s/ Michelle E. Jones

_____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-956-554-04

ISSUES

- Whether Respondents are entitled to reduce periodic permanent total disability (PTD) benefits following a lump sum payment of permanent partial disability (PPD) benefits?

STIPULATION

The parties stipulated at the time of hearing that Claimant is permanently and totally disabled from earning wages as a proximate result of his admitted workers' compensation injuries effective as of the date Claimant reached maximum medical improvement (MMI), or May 31, 2017.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on June 27, 2014. Claimant underwent treatment and on May 31, 2017, Dr. Caroline Gellrick placed at maximum medical improvement ("MMI"). Dr. Gellrick issued a 27% whole person impairment rating.

2. On June 7, 2017, Respondents filed a Final Admission of Liability ("FAL") admitting to the MMI date and impairment rating by Dr. Gellrick. The value of the 27% whole person impairment rating was $55,814.77. Respondents admitted to an average weekly wage ("AWW") of $760.00 with a correlating temporary total disability rate of $506.67.

3. On June 26, 2017, Claimant filed an objection to FAL and an application for hearing. Claimant's application for hearing endorsed the issues of average weekly wage, disfigurement, temporary total disability benefits, temporary partial disability benefits, medical bills, mileage, and permanent total disability benefits. Also on June 26, 2017, Claimant requested the PPD award in a lump sum.

4. On July 5, 2017, Respondents filed a lump sum calculation and proof of payment for permanent partial disability claims form. The form indicated that Respondents had previously paid $2,473.92 in permanent partial disability benefits prior to the request for a lump sum. The form also indicated that Respondents were taking a lump sum discount in the amount of $2,183.27. The form indicated that Respondents were paying Claimant $51,157.58 in a lump sum on July 6, 2017, after taking credit for the previously paid benefits and taking a discount on the lump sum.

5. Claimant was 59 years old when placed at MMI. Claimant's life expectancy pursuant to W.C.R.P. Rule 7-3 is 26.1 years.

6. While being treated for his work injury, Claimant was diagnosed with metastatic cancer. Claimant's treating doctors opined that Claimant would only survive for approximately 6 months to 2 years.

7. Since being diagnosed with cancer, Claimant has undergone surgical, chemotherapy, and radiation treatments. Claimant testified, consistently with his medical records, that some of the treatments have worked, while others have not.

8. By stipulating to PTD as of the date of MMI, the parties have *created* an "overpayment" because Respondents had already paid PPD for that time period.

9. The amount of overpayment is $39,299 based on the PPD lump sum paid being more than the amount of PTD that should have been paid from the date of MMI through the date of the hearing.

10. Respondents request a 75% reduction in Claimant's PTD benefits to recover the overpayment. Respondents seek to recover at such a high rate because they anticipate that Claimant will not survive long enough for them to recover the overpayment.

CONCLUSIONS OF LAW

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

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. (2017). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S.

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

It is within the ALJ's purview as the finder of fact to determine the credibility of witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

Respondents assert that Claimant's PPD award was not final, and that Claimant thus was not vested in the lump sum payment. After Respondents filed the FAL, Claimant filed an objection and requested a hearing on the issue of PTD benefits. Respondents argue that because Claimant had objected to Respondents' admission (that Claimant was entitled to PPD benefits rather than PTD benefits); the PPD award was not final.

Respondents rely on C.R.S. sections 8-43-203(2)(b)(II)(A) and (d)[1]; and *Franco v. Denver Public Schools*, W.C. No. 4-818-579 (ICAO Nov. 13, 2014), for the proposition that once a hearing is requested within 30 days of the filing of a final admission of liability, awards that are in dispute *will not close* until the dispute is resolved. Respondents argue that because the award of PPD benefits was not "final," Claimant was not entitled to the PPD benefits he received and they were, therefore, not due at the time he received them. Accordingly, Respondents argue they are entitled to recoup the payments they made for PPD benefits by taking a credit against future PTD benefits payments. *See Simpson v. Indus. Claim Appeals Off.*, 219 P.3d 354 (Colo. App. 2009).

The ALJ disagrees. Respondents' argument erroneously ties the requirement of disability benefit payments to the closure of an issue by failing to object to an admission or to an award entered by an ALJ. However, section 8-43-203(2)(b)(I) provides that if the employer or employer's carrier admit liability, payment must be immediate.

> Such notice shall specify the amount of compensation to be paid, the period for which compensation will be paid, to whom compensation will be paid, the period for which compensation will be paid and the disability for which compensation will be paid, and *payment thereon shall be made immediately*.

(emphasis supplied). The statute requires immediate payment regardless of whether or not an objection is filed.

Respondents provide no authority for the proposition that the purpose of section 8-43-203(2)(b)(II)(A) is to suspend respondents' immediate payment obligation set forth in 8-43-203(2)(b)(I). The ALJ likewise finds none. Rather, the purpose of subsection (2)(b)(II) appears to be procedural in nature. See section 8-43-203(2)(b)(II)(B) which provides, "The amendments made to sub sub-paragraph (A) of this subparagraph (II) by Senate Bill 09-168, enacted in 2009, are declared to be procedural . . .."

The ALJ finds and concludes that Respondents' argument is inconsistent with generally accepted rules of statutory construction. First, Respondents' argument would require us to read subsection (b)(II)(A) as nullifying subsection (b)(I). The ALJ declines to do so. We must read and consider the statutory scheme as a whole to give consistent, harmonious, and sensible effect to **all** its parts. *Charnes v. Boom*, 766 P.2d 665 (Colo. 1988); *Martinez v. Cont'l Enters.*, 730 P.2d 308 (Colo. 1986).

Second, when construing a statute, we must give effect to the General Assembly's purpose and intent as reflected in the plain language of the statute. *People v. Luther*, 58 P.3d 1013 (Colo.2002). Section 8-43-203(2)(b)(II)(A) is part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy. *Peregoy v. Industrial Claim Appeals*

[1] The ALJ does not find subsection (2)(d) to be applicable.

Office of the State of Colo., 87 P.3d 261, (2004); *Dyrkopp v. Indus. Claim Appeals Office*, 30 P.3d 821, 822 (Colo.App.2001)).

The ALJ finds and concludes that Claimant became entitled to immediate payment of his PPD benefits upon Respondents' filing of their FAL, June 7, 2017.

Claimants have a statutory right to request a lump sum payments for PPD pursuant to C.R.S. section 8-43-406 after six months have elapsed from the date of their injuries. At Claimant's request, Respondents paid out the lump sum PPD award subject to the 4% statutory discount and disability benefits already paid. Claimant's request and Respondents' payment were appropriate and created no overpayment.

However, the parties created an overpayment by stipulating at hearing to PTD as of the date of MMI. The stipulation created an overpayment because Respondents had already paid PPD benefits for the same time period the parties now stipulate Claimant was permanently totally disabled. See *Waymire v. Indus. Claim Appeals Off.*, 924 P.2d 1168 (Colo. App. 1996)(claimant may not receive permanent partial and permanent total disability benefits for the same periods of time).

Pointing to the terminal nature of Claimant's cancer, Respondents argue for an aggressive reimbursement rate, essentially arguing that Claimant will not live long enough for Respondents to otherwise recover the overpayment. However, Respondents again offer no authority to support that proposition, and the ALJ likewise finds none.

Lump sum calculations for PPD inherently rely on a certain amount of speculation to determine the lifetime present value of a claim. No one can say with any certainty how long any claimant will live. As a result, there is always a risk that payment of a lump sum will result in overcompensating or undercompensating a claimant. To minimize speculation, WCRP Rule 7-3 provides a life expectancy table to be utilized for this express purpose. To open up the workers' compensation system to additional speculation with regard to any injured workers' life expectancy is without authority and would effectively result in Respondents presenting evidence of claimants' individual health woes completely unrelated to work injuries in an attempt to lower disability payments. This result in contrary to the Act's purpose.

Respondents are entitled to recover their overpayment. See section 8-42-113.5 generally. Thus, pursuant to section 8-42-113.5(c), Respondents seek to reduce Claimant's weekly PTD benefits by 75%, arguing that even at that rate, they are unlikely to recover the entire overpayment because they anticipate Claimant will not survive long enough for them to do so. The ALJ finds and concludes that Claimant has no other source of income and testified to his monthly expenditures. Allowing Respondents to reduce Claimant's benefits by such and amount would result in financial hardship to Claimant, leaving him unable to meet his financial needs and obligations that arise as a result of his industrial injury.

Additionally, allowing for such a drastic reduction requires the ALJ to accept Respondents' position that Claimant's allegedly "accurate" life expectancy controls, rather

than WCRP Rule 7-3 provides a life expectancy table. The ALJ has specifically rejected this argument.

Neither statute nor rule mandates a specific method to recover workers' compensation benefits that have been overpaid. Claimant suggests the correct mechanism for recovery pursuant to C.R.S. section 8-43-406 is to essentially convert the PPD overpayment to a lump sum payment for PTD benefits. The ALJ finds and concludes that mechanism to be appropriate for the following reasons:

- At the time the parties stipulated that Claimant has been at PTD since his MMI date, he became able to request his PTD award in a lump sum.
- Respondents would have then been required to pay Claimant his PTD benefits in a lump sum subject to the statutory cap.
- The amount Respondents paid in PPD benefits does not exceed the amount of a lump sum PTD payment to which Claimant is entitled.
- This method does not reward respondents for a claimant's health status not related to the work injury.

ORDER

It is therefore ordered that:

1. Claimant's lump sum PPD payment is hereby converted to a partial lump sum PTD payment.

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

3. This decision of the Administrative Law Judge is final, unless a Petition to Review this decision is filed within twenty (20) days from the date of this decision is mailed. Section 8-43-301(2), C.R.S. The Petition to Review must be filed with the Office of Administrative Courts, 1525 Sherman Street 4th Floor, Denver, Colorado 80203. Detailed information regarding the Petition to Review process is contained in the attached advertisement "Appeals of Division of Administrative Hearings Orders in Workers' Compensation cases."

DATED: 01/29/2018

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

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ISSUES

1. Whether Claimant has established by a preponderance of the evidence that continued medical benefits are reasonable, necessary, and causally related to her January 3, 2016 work related injury.

FINDINGS OF FACT

1. Claimant sustained an admitted work related injury on January 3, 2016 when she was driving from her home to pick up work supplies.

2. While driving on January 3, 2016 at approximately 7:33 p.m., Claimant ran a stop sign and caused a motor vehicle accident. Her vehicle rolled over. The other vehicle involved in the accident had two unrestrained passengers who were both ejected. The accident resulted in the death of one of the unrestrained passengers, a 10 year old child.

3. When officers arrived on scene, Claimant's vehicle was on its roof and Claimant was outside the vehicle and was observed to be in a substantial amount of pain.

4. Paramedics on scene found Claimant laying outside her pickup truck. They noted no intrusion to the passenger compartment but that the vehicle was on its roof and sustained moderate to extensive front end damage. Claimant was alert, screaming, and in moderate distress. Clamant reported her vehicle had T-bone impacted the other vehicle in its passenger door/corner area and that she remembered everything but didn't know exactly what happened. Claimant reported she was dangling upside down by her seatbelt, self-extricated, and was assisted to lay on the ground by bystanders. Claimant denied any loss of consciousness, headache, dizziness, visual disturbance, midline spinal pain, abnormal extremity sensation, or nausea. Claimant was noted to be awake and oriented x4, following commands, answering questions appropriately, speaking clearly in full sentences. Claimant was transported by ambulance to North Colorado Medical Center (NCMC) on a non-emergent limited trauma activation transfer. *See* Exhibit G.

5. As a result of the motor vehicle accident, Claimant was criminally charged with careless involving death, careless driving involving injury, and a stop sign violation. The driver of the other vehicle was charged with two counts of seat belt violations.

6. At NCMC, Claimant was interviewed by police officers investigating the accident. Claimant reported that she hurt all down her left side including her ribs, hip, knee, shin, and center of her chest. Claimant moaned often and appeared to be in a bit of pain.

7. At NCMC Claimant was evaluated initially by Christopher Clark, D.O. Claimant reported severe pain and shortness of breath, left upper rig cage tenderness, left flank tenderness, and left leg tenderness. It was noted that she was driving a large pickup truck at 56 miles per hour when she was involved in a motor vehicle accident and her vehicle flipped. Claimant was noted to have a medical history involving diabetes type II. On physical examination, Claimant's head was found to be normocephalic and autraumatic and she was found to be alert and oriented to person, place, time, and situation with no focal neurological deficit observed. She was found to be cooperative with appropriate mood and affect. Dr. Clark listed the differential and possible diagnoses as: head injury, cervical spine injury, trunk injury, internal hemorrhage, solid organ injury, and hollow organ injury with the rationale that Claimant had abdominal tenderness, left chest wall tenderness, thoracic spine tenderness and further evaluation was ordered. Including a CT of the cervical spine, CT of the chest/abdomen/pelvis, and CT of the head/brain to determine what the problems actually were. *See* Exhibit C.

8. Claimant underwent diagnostic radiology at NCMC. The radiology showed no findings at the left femur and no acute fracture or dislocation of the left tibia or fibula. A well corticated calcification at the left medial knee joint was observed and opined that it may be soft tissue calcification and a well-corticated bone density was found at the tip of the fibula that could relate to an old fracture. Edema in the lower leg was also noted. The impression of the femur, tibia, and fibula was no acute osseous abnormality. (left leg) *See* Exhibit C.

9. A CT scan of the cervical spine was performed at NCMC. It was noted that images were obtained from the skull base through the upper thoracic spine. Degenerative disc disease was found at C6-C7 that was mild to moderate. The prevertebral soft tissues were found to be within normal limits. The impression provided was degenerative changes but no acute osseous abnormality of the cervical spine. *See* Exhibit C.

10. A CT scan of Claimant's chest, abdomen, and pelvis was also performed at NCMC. Mild narrowing and hardening of the aorta was found. Dependent atelectasis was found. The liver was diffusely decreased in attenuation, consistent with fatty liver disease (hepatic steatosis). A 1.6 cm parenchymal depth laceration of the left kidney upper pole cortex was found with perinephric hemorrhage, small in amount, adjacent to the laceration. Irregularity of the superior right pubic bone was appreciated and opined that it may reflect a nondisplaced fracture. Multilevel degenerative changes of the spine were found. Mild left osteoarthritis of the hip was found and moderate right osteoarthritis of the hip was found. Soft tissue calcification superior to the right femoral neck was found. *See* Exhibit C.

11. A CT scan of Claimant's lumbar spine was also performed. No acute osseous abnormality was found. Degenerative disc disease was found, most pronounced at L5-S1 where there was a vacuum cleft and endplate irregularity and anterior osteophytes. *See* Exhibit C.

12. A CT of Claimant's head/brain showed no acute intracranial abnormality. *See* Exhibit 3.

13. A CT scan of the thoracic spine was performed. No acute osseious abnormality was found. Mild multilevel degenerative changes of the thoracic spine were found. *See* Exhibit 3.

14. Michelle Anderson, M.D. reviewed the diagnostic testing and provided the impression of left kidney laceration and closed fracture of the right superior pubic ramus. Claimant was admitted. Claimant reported right hand pain and left foot pain and it was noted that an orthopedic consultation was pending and that x-rays would be ordered. *See* Exhibit C.

15. On January 5, 2016 Claimant was evaluated by Steven Sides, M.D. for an orthopedic consultation. He noted Claimant was involved in a motor vehicle collision with a questionable loss of consciousness and that Claimant complained of severe left flank chest wall pain as well as left leg pain. Dr. Sides noted that Claimant had undergone multiple CT scans and radiographs and was found to have a grade 3 left kidney laceration. Dr. Sides noted that there was a questionable superior pubic ramus fracture on CT scan. Dr. Sides noted that Claimant had multiple questions, multiple complaints, and wanted to make sure that he understood for some reason that she really needed to go to rehabilitation. He noted that he was not clear as to why Claimant and her sister were seemingly very interested and persistent about this. He noted that he later learned that there might be some legal issues involved with the crash. Dr. Sides noted that Claimant complained of multiple issues that seemed to be getting worse over the course of her hospitalization. He opined that Claimant's cervical, thoracic, and lumbar spine were cleared clinically and radiographically. When asked to localize pain, Claimant pointed to the midline anteriorly at the side of her symphysis pubis. Dr. Sides performed a physical examination. Dr. Sides assessed right superior pubic ramus fracture that was minimally displaced, left foot sprain, right hand contusion, and contusion with secondary ecchymosis to the left thigh and leg. Dr. Sides reassured Claimant that the left thigh and leg should resolve over time and with the hand and foot complaints, radiographs would be done and provided there were no fractures, claimant could mobilize with physical therapy. *See* Exhibit C.

16. Claimant was discharged from NCMC to an in-patient rehabilitation facility. On January 9, 2016 it was noted that Claimant was walking with a walker. By January 11, 2016 it was noted that Claimant had no complaints of pelvic pain and that the bruise on her left medial thigh was purple and resolving within normal limits. On January 13, 2016 it was noted that Claimant was independent with activities of daily living, denied pain, and was independent with ambulation in room and around the facility without the use of assistive devices. *See* Exhibit M.

17. On January 13, 2016 discharge planning was discussed with Claimant. Claimant reported increased anxiety and depression and feelings of weepiness with difficulty sleeping and repeated thoughts related to the motor vehicle accident. Claimant

reported that a friend showed her a picture of the crashed vehicle which resulted in an increased negative emotional response. Claimant agreed that seeing a therapist to address the emotional responses would be beneficial. The facility noted that discharge the next day would be good as Claimant had met all goals. The facility recommended no outpatient therapy but suggested mental health therapy. *See* Exhibit M.

18. An occupational therapy assessment showed that Claimant had benefitted from the inpatient therapy to increase safety and functional mobility to allow for safe discharge home at prior level of functioning. Claimant had a Barthel index score of 100/105 for all activities of daily living and functional mobility which was noted to be improved from her initial score of 57/105. The plan was to discharge Claimant home at her prior level of function with no further need for skilled occupational therapy. A physical therapy assessment showed that Claimant had demonstrated significant progress with strength, balance, and activity toleration and that she was now independent and safe with all bed mobility, transfers, gait, and stairs without use of assistive devices. Claimant was discharged from skilled physical therapy and noted to have met all goals. *See* Exhibit M.

19. After discharge from the inpatient rehabilitation program where she was doing well, Claimant was treated with multiple providers and had increasing and unexplained physical symptoms.

20. On January 21, 2016 Claimant was evaluated at Concentra by Robert Nystrom, D.O. Claimant reported that she had been involved in a motor vehicle accident and reported that she had been found at the emergency department to have a left lacerated kidney, fractured pelvis, and a concussion. Claimant reported that she may have had a loss of consciousness but was not sure as she had very large gaps in her memory of the event. Claimant reported headaches, poor memory, and pain in her left flank and left leg. Claimant reported difficulty performing mental calculations, impaired short term memory, long term memory, and recall. Claimant's mood and affect were noted to be bewildered, concerned, depressed, grieving, quiet, and tearful. Dr. Nystrom noted that she had slow speech and slow affect like she was stunned or in emotional shock. Claimant was assessed with pelvic fracture, kidney laceration (left), and concussion. This was the first time Claimant was assessed with concussion and was 18 days after the motor vehicle accident. Dr. Nystrom referred Claimant to neuro, psych, physiatry, and ortho. *See* Exhibit D.

21. On January 29, 2016 Claimant was evaluated by Robert Baer, M.D. Dr. Baer opined that Claimant had a very stable pelvic injury and he encouraged her to progress to her activities and felt that Claimant needed to get back to ambulating and strengthening to avoid deconditioning. *See* Exhibit I.

22. On January 29, 2016 Claimant was evaluated by Ophthalmologist Benjamin Markse. Claimant reported she broke her glasses in a car accident at work and that she had headaches since the accident, chronic pain, and eye pain when looking to the left. Dr. Markse also noted a diabetic check was due with 1 year since Claimant's last exam. He noted that Claimant did not check her blood sugars and has had diabetes for 14 years.

Dr. Markse reviewed her medications, and performed a complete examination. He assessed her with Diabetes Type II, unstable and discussed with her that her vision complaints were related to the lack of blood sugar control. Claimant also was assessed with: regular astigmatism, bilateral; hypermetropia, bilateral (farsightedness); presbyopia; and age related nuclear cataracts, bilateral. *See* Exhibit J.

23. On January 30, 2016 Claimant underwent a psychological consultation with Joel Cohen, Ph.D. Dr. Cohen noted that Claimant had been referred for concerns about neurocognitive disorder secondary to a blow to the head, likelihood that Claimant was either dazed and/or had loss of consciousness, and concerns about elements of PTSD. He noted that Claimant had a variety of symptoms suggestive of PTSD including recurrent intrusive thoughts about the motor vehicle accident, major substantially disrupted sleep, bad dreams, and significant depression. Claimant reported with the accident that she recalled headlights, flying in the air, landing upside down in the vehicle, and seeing her significant other undo the seatbelt and fall to the floor and crawl out the window. Claimant then recalled bracing herself, releasing her seatbelt, and coming down somewhat more gently than she had seen her significant other come down. Claimant recalls then significant pain, moaning, and yelling and that two gentleman came to the side of the vehicle and were able to pull her out. Claimant recalled being transported to the hospital by ambulance. Claimant expressed obvious anxiety about driving and a variety of symptoms clearly indicative of PTSD. Claimant had obvious emotional distress when describing that a 10 year old girl had died at the scene after being ejected from the other vehicle. Dr. Cohen opined that Claimant presented as significantly depressed. He opined that Claimant had an injury related diagnosis of acute onset of posttraumatic stress disorder and that she had indications of neurocognitive disorder but deferred that opinion to the neurologist and neuropsychologist. He recommended 10 sessions of psychotherapy to address emotional support to the incident. *See* Exhibit D.

24. On February 16, 2016 Claimant was evaluated by Shimon Blau, M.D. Claimant reported that she had been involved in a motor vehicle accident and that she suffered a left kidney laceration, multiple pelvic fractures, and a concussion. Claimant reported that she was admitted to the hospital for several days, and was then discharged to a rehabilitation facility where she spent about a week and that they had wanted her to stay longer but that she wanted to get home to her dog. Claimant reported ongoing severe pain, mostly in the right lateral thigh with numbness and a feeling of fire in the area and a similar feeling around the left knee joint and left lateral thigh. Claimant reported some left abdominal pain, left lower back pain, and left flank pain. Claimant reported pain in the region of bilateral throchanteric bursae. Claimant was noted to be 57 years old, a type 2 diabetic, and she reported smoking about 6 cigarettes per day and smoking medical marijuana at night to help her sleep. Dr. Blau reviewed the CT scans and x-rays that had been performed. He provided the impression of: kidney laceration, pain in bilateral lower extremities, concussion, opioid type dependence. He opined that Claimant's pain symptoms seemed to resemble myalgia paresthetica at least in the bilateral lower extremities and opined it may have been from her injuries and may take some time to improve. He recommended physical therapy. *See* Exhibit D.

25. On February 22, 2016 Claimant was evaluated by Dr. Nystrom. Claimant reported a lot of pain and numbness in the right leg with piercing pains and a feeling of lighting on fire. Claimant reported difficulty with balance and leg weakness and requested a script for a walker. Dr. Nystrom referred Claimant for an MRI of the lumbar spine to see if there was any nerve impingement that could be causing Claimant's leg symptoms. Dr. Nystrom also provided a prescription for a walk-n-chair to help Claimant ambulate. *See* Exhibit D.

26. On February 23, 2016 Claimant was evaluated by Eric Hammerberg, M.D. Claimant reported that she had been involved in a motor vehicle accident, was unconscious for an unknown period of time and awoke hanging upside down. Claimant reported she was diagnosed with concussion, posttraumatic amnesia, posttraumatic headaches, cervical strain, and post-concussion syndrome. Claimant reported right sided headaches with occasional nausea and vomiting which was becoming worse with a recent increase in her pain medication. Claimant reported her primary concern was severe burning pain over the anterior aspects of both thighs. Dr. Hammerberg noted medical problems of diabetes type 2 and high blood pressure and that Claimant had smoked cigarettes since 1972. Dr. Hammerberg noted on review of symptoms that Claimant had symptoms of malaise, fatigue, frequent urination, stuttering, occasional tremors, dizziness, weakness, impaired balance, impaired coordination, double and blurred vision, sleep problems, impaired concentration, impaired hearing in the left ear, appetite changes with nausea and vomiting, abdominal pain, dry skin, skin rashes, abnormal thirst, and cold intolerance. Dr. Hammerberg performed a neurological examination. Dr. Hammerberg provided the impression of: posttraumatic headache, cervical strain, post-concussion syndrome, and bilateral meralgia paresthetica (due to compression of both lateral femoral cutaneous nerves by the seat belt). He recommended increased gabapentin and a neuropsychological evaluation. *See* Exhibit H.

27. On February 26, 2016 Claimant was evaluated by Dr. Baer. He noted that Claimant was difficult to examine and could not tolerate even light touch to her right lateral thigh. Dr. Baer noted that when Claimant was distracted, he could rotate her hips reasonably well but if she realized he was moving the hips, her pain increased greatly. Dr. Baer noted an appearance of a sensory deficit in the right lateral femoral cutaneous nerve distribution. He noted that x-rays showed her fractures were healing and he opined that Claimant was going to have a very good outcome. Dr. Baer opined that Claimant again had pain that was way out of proportion to any obvious injury. *See* Exhibit I.

28. On March 10, 2016 Claimant was evaluated by psychologist Dr. Cohen. Dr. Cohen noted that Claimant's overall behavioral presentation was concerning. He noted that it was important to recall that when he saw Claimant originally, much closer to the actual date of injury, Claimant ambulated into his office and was more functional than she presented at this next appointment. Claimant indicated that she had been reporting escalating loss of sensation and weakness in her lower extremities bilaterally and that she was now in a combination of wheelchair/walker to prevent falling. Dr. Cohen noted that Claimant had elements of adjustment like reaction with depression and elements of

PTSD due to the loss of life and the fact that Claimant was also being held legally accountable and he noted a first court date in two weeks' time. Dr. Cohen opined that they could not minimize the potential for the level of emotional distress but also that it was adversely affecting the process of her physical recovery. *See* Exhibit D.

29. On March 21, 2016 Claimant was evaluated by Dr. Biggs. He noted that Clamant felt like she was progressively getting worse and that Claimant came into the evaluation in a wheelchair reporting that she was unable to ambulate because of the pain. Dr. Biggs noted that getting any sort of examination was difficult because Claimant was incredibly tender to just light touch. He opined that Claimant had no stenosis anywhere and could not explain her leg symptoms as coming from the spine. He opined that it sounded more like a meralgia paresthetica problem, but could not explain why Claimant could not walk. He opined there was nothing surgically to do and that injections into the spine would not help. *See* Exhibit I.

30. On April 5, 2016 Claimant underwent a cognitive assessment performed by Alissa Wicklund, Ph.D. Claimant reported the motor vehicle accident and that she had a brief loss of consciousness and brief posttraumatic amnesia. Claimant reported confusion and memory lapses during hospitalization and that she was experiencing headache, dizziness, and photophobia and phonophobia. Claimant reported constant headaches, dizziness with positional change and head movement, nausea, neck strain, photophobia and phonophobia, and mental fogginess. Claimant reported diminished concentration and memory. Claimant reported feelings of anxiety and depression as well as symptoms of PTSD. Claimant reported a medical history of febrile seizures, one seizure at age 16, diabetes, migraines, motion sickness, situational depression after her mother's death, and one previous concussion. Dr. Wicklund noted that Claimant's performance was invalid on measures of suboptimal effort and malingering with variable effort apparent across tests administered. Dr. Wicklund opined that due to Claimant's anxiety and Claimant's level of symptom exacerbation only a brief battery of neurocognitive tests were administered and that the tests were interpreted with caution as there was evidence of suboptimal engagement. Dr. Wicklund opined that the results from the evaluation were most notable for an individual in significant psychological distress. Dr. Wicklund noted that she discussed with Claimant the normal recovery curve form concussion. Dr. Wicklund opined that once Claimant had achieved more emotional stability, additional extended battery of neurocognitive testing could be administered. *See* Exhibit I.

31. On June 9, 2016 Claimant was evaluated by Alicia Feldman, M.D. Claimant reported pain in the right hip and right leg that was severe and burning in character with constant numbness, pins and needles, burning and tingling. Claimant underwent an EMG of her bilateral lower extremities. Dr. Feldman opined that the EMG results showed mild peripheral neuropathy likely from diabetes, and possible lateral femoral cutaneous neuropathy with absent bilateral lateral femoral cutaneous sensory nerve action potentials. Dr. Feldman could not exclude a right sided or bilateral meralgia paresthetica. Dr. Feldman found no evidence of any lumbar spine radiculopathy. Dr. Feldman opined

that they could consider lateral femoral cutaneous nerve injections once Claimant's blood sugars were under better control. *See* Exhibit E.

32. Claimant continued treatment through Concentra and their referrals. Her pain complaints continued, increased, and spread to other areas. Over the next several months she complained of neck pain, back pain, bilateral hip/thigh pain, bilateral knee pain, loss of hearing, loss of vision, bilateral leg pain, headaches, light sensitivity, depression, and trouble sleeping with flashbacks of the motor vehicle accident. Over the next several months and through September of 2016 the areas of concern Claimant reported subjectively and the assessments made by Dr. Nystrom continued to increase as her list of complaints grew.

33. On June 20, 2016 Claimant was evaluated at audiology for a hearing exam. Claimant reported that she had been in a motor vehicle accident on January 3 and had since experienced left ear hearing loss, left ear pain, and imbalance. Claimant underwent comprehensive audiometry threshold evaluation and speech recognition and was assessed with tinnitus bilateral, and mixed conductive and sensorineural hearing loss, unilateral, left ear, with unrestricted hearing on the right side. Claimant was found to have cerumen impactions, with earwax tightly packed blocking both of her ear canals, more on the left, that was removed. Claimant reported hearing better following the removal of these impactions.

34. On August 29, 2016 Claimant underwent an MRI of her cervical spine. The impression provided by Jay Kaiser, M.D. was C6-7 disc degeneration with disc osteophyte complex leading to mild thecal sac effacement. Dr. Kaiser also found uncovertebral spurring with moderate left and severe right foraminal stenosis at C6-7. *See* Exhibit L.

35. On September 21, 2016 Claimant underwent another cognitive assessment performed by Dr. Wicklund. Claimant reported an increase in overall symptoms compared to her first evaluation with Dr. Wicklund. Dr. Wicklund noted that neuropsychological testing was again attempted and that Claimant demonstrated a similar pattern and failed tests designed to examine suboptimal effort and malingering. Dr. Wicklund noted again that Claimant's results were notable for an individual with high levels of emotional distress. Dr. Wicklund noted that Claimant endorsed more current post concussion symptoms at this evaluation than at the April evaluation. Again, the neuropsychological tests were unable to be completed due to the suspected suboptimal effort on testing. Dr. Wicklund noted that she again discussed concussion mechanisms of injury, symptoms, and recovery trajectory with Claimant and that 9 months post injury the cellular dysregulation caused by concussion was likely resolved and opined that other factors were likely contributing to Claimant's perception of daily symptom experience. Dr. Wicklund recommended consultation with Claimant's current psychologist about inpatient psychiatric hospitalization as Claimant's' significant emotional distress and focus on physiologic symptoms was likely inhibiting progress in recovery. Dr. Wicklund noted again that Claimant could follow up with neuropsychology once she had achieved emotional stability. *See* Exhibit I.

36. On January 2, 2017 Claimant underwent an independent medical evaluation performed by psychiatrist Stephen Moe, M.D. Dr. Moe reviewed medical records, a clinical questionnaire filled out by Claimant, and performed a psychiatric interview of Claimant. Dr. Moe opined that Claimant's post injury physical and cognitive symptoms had been too numerous, too severe, too prolonged, and too unresponsive to treatment to reflect the effects of the acute injuries noted during her initial hospital stay after the motor vehicle accident. He opined that the physical and cognitive symptoms that Claimant attributed to the motor vehicle accident had been significantly influenced by non-injury factures captured by the psychiatric condition of somatic symptom disorder and/or intentional adoption of the illness role to gratify psychological needs and/or obtain external rewards. Dr. Moe opined that Claimant's post motor vehicle accident psychiatric complaints suggest she developed PTSD or major depressive disorder as a result of the accident, the findings related to her physical and cognitive symptoms made it probable that her psychiatric complaints were similarly influenced by non-injury factors. He opined that the available data in Claimant's case made the diagnosis of concussion highly uncertain and he noted evidence against a concussion from the medical records and Claimant's accounts. Dr. Moe opined, however, that if Claimant did incur a concussion, it would have been at the mild end of the spectrum of severity with a normative outcome of prompt recovery with cognitive deficits resolving in hours to days, to rarely weeks. Dr. Moe opined that when symptoms persist they winnow in number and severity reflecting a "worst-first" pattern. Dr. Moe noted Claimant's course of symptoms included escalation without identified cause and an absence of indications of symptoms of concussion initially followed by the later onset and escalation of symptoms suggesting enduring effects of a concussion. *See* Exhibit A.

37. Dr. Moe opined that both PTSD and major depressive disorder were plausible outcomes following a potentially life threatening accident that caused bodily injuries. He noted that objective findings and normative outcomes could assess the validity of a patient's physical complaints, no such tools were available for psychiatric symptoms. He also noted that the course f psychiatric symptoms was by and large unpredictable making it impossible to use the course of symptoms as a gauge for the legitimacy of complaints. Dr. Moe recommended that as a condition of further psychotherapy, Claimant display ever greater functioning. He recommended she take steps to return to work. *See* Exhibit A.

38. On January 24, 2017 Claimant underwent an independent medical evaluation performed by Allison Fall, M.D. Claimant reported the motor vehicle accident and that the other vehicle had hit the door on the driver's side of her car. Claimant reported thinking she had broken every bone on that side. Claimant reported that she woke up and was lying back with her hands on the wheel upside down. Claimant reported that her left flank and abdominal area was hurting and in extreme pain. Claimant reported undoing her seatbelt, falling, and landing on her arms. Claimant reported going to the hospital and to a rehabilitation center afterwards. Claimant reported when she got home, she just laid there, for the first part of the year of treatment no one could even touch her and she was in a walk and chair. Claimant reported current complaints of: nausea with

internal spinning; deep aches in her right greater than left hip, her neck, and her head; electrical bursts/shocks into both legs along the lateral thigh; stabbing pain in her back, neck, head, leg, and upper back; insomnia; and fear. Claimant reported not having as much pain in the rehabilitation center because everyone was focused on her kidney problem and that the other pain just started coming more and more. Claimant reported that she often fell over and did not know when she was going to fall or why she did not walk well. Dr. Fall reviewed medical records and performed a physical examination. *See* Exhibit B.

39. Dr. Fall provided the assessment of: status post work related motor vehicle accident; grade III kidney laceration, resolved without complication; superior pubic ramus fracture, healed without complication; and left thigh contusion, resolved. Dr. Fall opined that Claimant may also have suffered a mild self-limited concussion with no objection evidence of residuals that was resolved. Dr. Fall opined that the subjective complaints outweighed objective findings and that there was no indication for any additional treatment as a result of the motor vehicle accident. Dr. Fall opined that Claimant should be educated on discontinuing to the use of a cane and resuming normal activities and that Claimant should obtain a new primary care physician to take care of her underlying medical problems of diabetes and hypertension. Dr. Fall opined that fortunately, none of Claimant's injuries from the motor vehicle accident had led to any permanency. *See* Exhibit B.

40. On February 8, 2017 Claimant was evaluated by Dawn Jewell, Psy.D. Claimant expressed feeling discouraged by her persistent pain and the manner in which her limitations influenced her ability to sleep through the night or engage in typical daily activities. Claimant reported ongoing concerns about her cognitive abilities. Dr. Jewell noted that they had been working on what it means to accept what had happened and to realize that Claimant may not be able to achieve an adequate understanding of the accident and why it happened. Dr. Jewell noted that Claimant continued to perseverate on reviewing the accident with a focus on understanding why it happened. *See* Exhibit 2.

41. On February 21, 2017 Claimant underwent an MRI of her pelvis. The impression provided by Eric Smith, M.D. was normal pelvic bone barrow signal and morphology, with no stress reaction or fracture. Dr. Smith found mild degenerative changes bilaterally in the hips, a paralabral cyst along the lateral margin of the right illum, and mild proximal hamstring tendinosis. He found no tearing. *See* Exhibit L.

42. On February 21, 2017 Claimant also underwent an MRI of her lumbar spine. The impression provided by Jay Kaiser, M.D. at L5-S1 was: disc degeneration with a broad based central disc protrusion that did not cause neural compression, mild type 1 endplate change, and mild bilateral foraminal stenosis with facet joint tropism and moderate bilateral facet arthropathy. At L2-L3, the impression was: small caudal left foraminal protrusion extending to the exit zone of the foramen not causing neural compression. Dr. Kaiser also found mild degenerative changes at the other lumbar motion segments. *See* Exhibit L.

43. On February 27, 2017 Claimant was evaluated by Dr. Jewell. Claimant reported being sad lately and that she was always achy despite physical therapy exercises. Claimant remained frustrated about her reported inability to complete activities that were easy in the past and questioned if her distractibility was related to medications, sleep disturbance, stress, pain, or post-concussive symptoms. Claimant discussed an upcoming court date near the end of March and nervousness as well as an apology letter that she had to write about the accident. Dr. Jewell and Claimant talked about Claimant's post-accident identity and the manner in which the last year has changed her self-concept and confidence in her abilities. Dr. Jewell noted that the treatment continued to focus on managing pain, posttraumatic stress responses, and frustration related to functional limitation and changes post injury. *See* Exhibit 2.

44. On March 8, 2017 Claimant was evaluated by Dr. Jewell. Dr. Jewell noted that she was working on approaching maximum medical improvement and acceptance of current limitations. Claimant reported feeling super emotional lately and described increased back pain recently possibly from using walking sticks more. Dr. Jewell talked about what it meant to be approaching MMI and the need to develop a plan for post-MMI. Claimant reported wanting to focus on improving her organizational skills and getting a budget going to better manage personal finances. Dr. Jewell noted that they processed Claimant's reactions to accepting physical and cognitive limitations and that Claimant agreed to start reading and completing material out of a recommended work book for managing posttraumatic stress reactions. *See* Exhibit 2.

45. On April 3, 2017 Claimant was evaluated by Dr. Jewell. Claimant reported that she had court the week prior and that she felt somewhat relieved that have it behind her but was feeling scared about complying with the requirements. Dr. Jewell noted that Claimant was reading/working through a PTSD workbook but she reported poor recall of the content and could not tell Dr. Jewell what she had learned about the readings so far. Claimant reported persistent flashbacks and "hearing" the accident happen again but described having decreased intensity in her fear response and that she was impacted for a shorter amount of time. They discussed approaching MMI and Claimant returning to work but Claimant remained concerned about her ability to work in some capacity questioning her cognitive abilities, physical limitations, and impact of her mood/PTSD symptoms on work performance. Dr. Jewell noted that in light of recent events with Claimant's legal situation and Claimant's need to continue processing the impact on her personal and vocational future, continued psychological treatment may be beneficial. Dr. Jewell noted an understanding that Claimant may be approaching MMI from a physical standpoint but requested eight additional sessions of psychotherapy to be used before and/or after MMI, once per month, so that Claimant had support during the difficult transition. *See* Exhibit 2.

46. On April 12, 2017 Claimant was evaluated by Dr. Nystrom. Claimant reported that she was walking better but still had pain in the bilateral legs and right leg numbness. Dr. Nystrom opined that it was reasonable to do an MRI of the head to rule

out an intracranial pathology. Dr. Nystrom explained to Claimant that he thought she was approaching MMI. *See* Exhibit 3.

47. On April 24, 2017 Claimant was evaluated by Dr. Jewell. It was noted that Claimant appeared down affectively. Claimant stated that she had been sad and depressed in recent weeks with little interest in doing anything and described isolating herself in her room much of the time. Claimant expressed sadness about the way she had been treated since her court date and reported that she had been labeled as a murderer and killer and that she was none of those things. Claimant reported having increased sensation in her right leg and that she was trying to walk with one walking stick instead of two. Claimant remained discouraged about her ability to work. *See* Exhibit 2.

48. On May 10, 2017 Claimant was evaluated by Dr. Jewell. Claimant reported increased pain on her left side, that she had not been feeling well, and that she was easily exhausted. Dr. Jewell and Claimant continued talking about a letter that Claimant needed to write for court to the other driver involved in the motor vehicle accident. They also discussed what it would take to return to work and Claimant identified her perceived barriers as difficulty staying on task, getting easily confused, difficulty with multitasking, getting exhausted fast, lacking skills she had previously, making frequent mistakes, and experiencing headaches/increased pain when she pushed herself too hard. *See* Exhibit 2.

49. On May 10, 2017 Claimant was evaluated by Dr. Nystrom. Claimant reported she was in a lot of pain and had not been doing physical therapy as it ran out. Claimant reported feeling depressed and secluded. Claimant reported diffuse pain in her back and neck. *See* Exhibit 3.

50. On May 11, 2017 Claimant underwent an MRI of her head/brain. The impression provided by Jana Crain, M.D. was: no hemorrhage in the brain parenchyma and no extra axial fluid collection. Scattered few punctate foci of signal abnormality with the subcortical white matter nonspecific and bi-frontal. Differential included migraines, vaculitis, sequea of demylination, or chronic small vessel ischemic change. Dr. Crain found no acute intracranial abnormality. *See* Exhibit L.

51. On May 11, 2017 Claimant was evaluated by Dr. Feldman. Claimant reported pain in the right hip, right leg, left leg, back, groin, neck. Dr. Feldman noted that an MRI of the brain was pending and that the etiology for the gait disturbance remained unclear. Dr. Feldman noted that it appeared Claimant needed some cognitive rehab, but that she did not have Claimant's neuropsych testing. Dr. Feldman recommended that Claimant continue with Dr. Jewell for psychological treatment and discussed that Claimant may have some physical manifestations of the trauma. Dr. Feldman recommended Claimant continue with low dose medications for pain and function and explained the new marijuana policy and that Claimant needed to pick between opioids and marijuana. Dr. Feldman diagnosed Claimant with non-work related diabetes and obesity and with work related traumatic brain injury, numbness in right thigh, cervicalgia, lumbago, lumbar spondylosis, and non-displaced sacral fracture. *See* Exhibit 4.

52. On May 23, 2017 Claimant was evaluated by Dr. Feldman. Dr. Feldman noted that the goal was to work on gait, back pain, and neck pain. Dr. Feldman noted that Claimant's gait was improved and that the plan was to continue to provide reassurance. Dr. Feldman opined that Claimant may have some sort of conversion disorder as the imaging and workup was negative. Dr. Feldman recommended continued physical therapy and home exercise program. Dr. Feldman recommended at Claimant continue with Dr. Jewell for depression and delayed recovery. Dr. Feldman noted that Claimant reported that she needed cognitive rehab pursuant to neuropsych testing and Claimant complained of continued cognitive issues. Dr. Feldman noted that she did not have the neuropsych test report available. *See* Exhibit 4.

53. On June 6, 2017 Claimant was evaluated by Dr. Jewell. Claimant was not using her walking sticks and reported feeling optimistic about her progress. Claimant reported that she had discontinued pain medications and that she could handle the pain. Claimant reported that the PTSD workbook was helpful but that she continued to struggle with frequent and impactful PTSD symptoms on a regular basis, primarily flashbacks and re-experiencing symptoms. Claimant reported a new fear of being judged/labeled by strangers or having people call her a murderer. Claimant stated that she had been accused of not having enough empathy toward the other driver in the motor vehicle accident and the death. Claimant reported her belief that she thought people were looking at her and thinking she was a murderer. Dr. Jewell noted that Claimant continued to report cognitive deficits, slow processing speed, and poor retention despite the normal brain imaging and tests results so far. Dr. Jewell noted that Claimant had not yet undergone formal neuropsychological testing. *See* Exhibit 2.

54. On June 19, 2017 Claimant was evaluated by Dr. Jewell. Claimant reported that she had a telephone hearing where her driver's license was revoked for one year. Claimant reported that following her telephone hearing she had increased difficulty sleeping and felt a loss of freedom since she could no longer drive. Dr. Jewell noted that another provider had recently encouraged Claimant to participate in eye movement desensitization and reprocessing (EMDR) for her PTSD and noted that she did not provide that type of treatment. *See* Exhibit 2.

55. On June 21, 2017 Claimant was evaluated by Dr. Nystrom. Claimant reported she was doing better but that her head, neck, and knees were bothering her the most. Claimant reported having a lot of problems with depression and cognitive issues. Dr. Nystrom noted that Claimant was walking without assistive devices but with a noticeable limp. *See* Exhibit 3.

56. On June 30, 2017 Dr. Nystrom responded to a letter in which he deferred on answering questions about MMI until he had Dr. Feldman's input. Dr. Nystrom stated in response that Claimant was unfortunately suffering PTSD from her injury which was complicating her recovery. *See* Exhibit 3.

57. On July 12, 2017 Claimant was evaluated by Dr. Jewell. Claimant reported increased pain over the last three days. Claimant reported trouble processing with whether or not the incident was her fault and that if she knew definitely that she was the person solely at fault for the accident and death of the child, she could start to accept it and own it. Dr. Jewell noted that they discussed a lot the note Claimant was required to write for court as well as forgiveness and the process it takes to forgive someone. *See* Exhibit 2.

58. On July 20, 2017 Dr. Nystrom responded to questions sent to him by Claimant's attorney following the IME reports of Dr. Moe and Dr. Fall. Dr. Nystrom opined that there may be some secondary gain involved but that he felt Claimant's "real" PTSD and depression was much greater. Dr. Nystrom opined that Claimant was suffering from significant PTSD and depression. Dr. Nystrom opined that Claimant was possibly at MMI from a physical perspective, but noted he would defer to Dr. Feldman's opinion on physical MMI. Dr. Nystrom opined that if Claimant was at MMI she would need maintenance care of continued psychological counseling. He also opined that she would need further treatment recommended by Dr. Feldman. Dr. Nystrom opined that Claimant would have both physical and psychological permanent impairments. *See* Exhibit 3.

59. On July 28, 2017 Dr. Fall issued a supplemental report. She noted that she had received additional medical records following her independent medical evaluation of Claimant in January of 2017. Dr. Fall again opined that there was no indication for any additional treatment as a result of the motor vehicle collision. She noted that imaging studies still had not revealed any explanation for Claimant's various symptoms. *See* Exhibit B.

60. On July 28, 2017 Dr. Jewell wrote a letter after reviewing the IME documentation from Dr. Moe and Dr. Fall. Dr. Jewell expressed her surprise that Dr. Moe was asked to evaluate Claimant's psychiatric status and response to treatment when he did not have a complete treatment record. Dr. Jewell opined that she did not believe that Claimant's physical and cognitive symptoms were driven by secondary gain. Dr. Jewell noted that the motor vehicle accident had resulted in the death of a child and that Claimant was characterized by some as a murderer and had faced criminal charges. Dr. Jewell opined that any secondary gain Claimant may have received as a result of the accident seemed trivial compared to the profoundly negative social consequences from the accident. Dr. Jewell believed that the circumstances of the accident would be difficult for most individuals to cope with and that the profound consequences of the accident explained Claimant's depressive symptoms. Dr. Jewell noted that emotional distress can act to increase one's experience of pain and that Claimant's pain or physical symptoms may be related to stress reactions and that there was an objective basis for that. Dr. Jewell opined that Claimant clearly had PTSD and major depression from the motor vehicle accident. Dr. Jewell opined that a motor vehicle accident with a rollover and accidental death of a child is an extraordinary psychological stressor and clearly sufficient to precipitate a condition like PTSD. Given the severity of the psychological injury, Dr. Jewell indicated she would be more concerned if Claimant had not been emotionally impacted. Dr. Jewell indicated that a recognized diagnostic variation of PTSD is with

delayed expression and that it was plausible that Claimant's reactions were somewhat delayed. Dr. Jewell opined that Claimant had not yet reached MMI from a psychological perspective and that continued care was necessary. Dr. Jewell recommended continued psychological treatment focused on processing PTSD reactions and developing healthy coping skills/cognitive techniques with the goal of symptom reduction. She suggested at least eight additional sessions. *See* Exhibit 2.

61. On July 31, 2017 Dr. Moe performed a follow up independent medical examination of Claimant. He noted additional records he had received. Dr. Moe opined that Claimant's enduring physical, cognitive, and psychiatric symptoms were all rooted in unsuccessful coping with the effects of her work related motor vehicle accident, a maladaptive response which derived from a combination of pre-accident, accident-related, and post-accident factors. Dr. Moe opined that Claimant was at maximum medical improvement with respect to the psychiatric/psychological treatment for the work injury. Dr. Moe noted that at his evaluation, Claimant had a grossly abnormal gait pattern that appeared non-physiologic. Dr. Moe opined that the additional medical records he reviewed at this evaluation supported his conclusion that if Claimant suffered a concussion as a result of the motor vehicle accident (not diagnosed by hospital at discharge) then it would have been a mild concussion with prognosis of prompt and full recovery. Dr. Moe opined that Claimant's post injury physical and cognitive symptoms could not be explained with medical diagnoses. Dr. Moe noted that Claimant's breadth of physical symptoms characterized as severe and debilitating had changed greatly from his earlier interview and evaluation including: prior focus of pain in head, hips, right leg, and both knees and current focus of headaches and nausea with essentially no concern about hips or legs; increase in post-concussive syndrome noted by Dr. Wicklund on 9/21/16 that were greater than reported on 4/5/16. Dr. Moe noted that treatment over the past 1.5 years had resulted in minimal gains. *See* Exhibit A.

62. Dr. Moe opined that Claimant did not suffer from the effects of multiple slow to resolve physical traumas and that her emotional distress was not closely tied to the event of accident itself but was tied to the effects of the accident. Dr. Moe opined that Claimant's collective physical, cognitive, and psychiatric symptoms that persisted were primarily due to a failure to accept and cope with the various life-disrupting effects of the work injury that initially involved acute injuries and bewilderment as to how the accident happened and how she could have caused the accident by failing to notice the stop sign. Dr. Moe noted that Claimant then was confronted with dealing with the fact that her negligence caused the death of another person inflamed by the stress of criminal charges and a civil lawsuit. Dr. Moe noted that the degree of distress surrounding these issues that Claimant displayed in session with him and Claimant's associated adoption of the role of a victim spoke to the persistent impact that guild and shame continued to have on her. Dr. Moe opined that because Claimant had not achieved the necessary emotional growth that would be reflected in the successful process of accepting and coping with unwanted effects of the accident, Claimant's symptoms persisted in various forms (physical, cognitive, and psychiatric) which represented some combination of manifestations of distress and adoptions of the illness role as a maladaptive effort to cope with her situation. Dr. Moe noted that the treatment Claimant had received since

discharged from the hospital had not had a significant impact on her condition. The lack of recent improvement following the disposition of the criminal case, suggested that Claimant's illness role identification had become increasingly entrenched. Dr. Moe opined that Claimant stood to do no worse and to possibly enjoy significant improvement with the termination of psychotherapy and opined that Claimant was at MMI regarding treatment of post injury psychiatric symptoms. Dr. Moe opined that although Claimant had 17 sessions of psychotherapy which was far from excessive, by this time its effectiveness would be reflected in very apparent changes in Claimant's thinking and functioning which was unfortunately not the case. Dr. Moe opined that cognitive symptoms were not the product of concussion and that speech therapy was not reasonable, necessary, or related to the work injury. Dr. Moe recommended 10 sessions of maintenance psychotherapy with Dr. Jewell over the upcoming year to facilitate the positive termination of treatment. *See* Exhibit A.

63. Dr. Fall testified by deposition consistent with her reports. Dr. Fall opined that Claimant had some non-physiologic findings and movement patterns that were not normal or expected based on the injuries Claimant explained. Dr. Fall referenced early records where other doctors had found Claimant's behavior odd. She also referenced Claimant's worsening symptoms after getting out of the hospital and the neuropsychological testing which was invalid twice and noted that it was apparent that there were other issues all along through the medical records that were playing a role in Claimant's symptoms.

64. Dr. Fall opined that Claimant may or may not have meralgia paresthetica and noted that it was a hard diagnosis to objectively because it is mostly based on symptomatology. Dr. Fall opined that meralgia paresthetica could have been caused by the left thigh contusion and would have made sense on the left side, but that Claimant had it on both sides which didn't make sense and caused her hesitation to give meralgia paresthetica as a formal diagnosis. Dr. Fall opined that if Claimant did have meralgia paresthetica the expected symptoms were burning pain or pins/needles numbness and that it was a sensation type of injury. Dr. Fall opined that the treatment would include removing any source of compression and then time to heal and/or medications. Dr. Fall opined that there was not an exact time expectancy of when symptoms would go away. Dr. Fall opined that if Claimant really had meralgia paresthetica and if medications decreased the symptoms, then she would recommend medications. Dr. Fall opined that injections were an option, but rarely a treatment of meralgia paresthetica

65. Dr. Fall opined that Claimant had no lumbar spine injury, no lumbar radiculopathy, no cervical strain, no hearing loss, no speech abnormality, no traumatic brain injury or need for vision therapy as a result of the motor vehicle accident. Dr. Fall opined that Claimant's physical injuries of kidney laceration, superior pubic ramus fracture, and left thigh contusion all resolved without complication. Dr. Fall opined that if a mild concussion was sustained, it would be resolved by now. Dr. Fall opined that a mild concussion would include worst symptoms first with a gradual resolution to complete recovery. Dr. Fall agreed with Dr. Wicklund that any cellular dysregulation caused by concussion was likely resolved and opined that even if Claimant did have a concussion,

the possible severity of it was mild and would have resolved by the time of Dr. Wicklund's second evaluation. Dr. Fall also agreed that Claimant's physical and cognitive symptoms were being influenced by Claimant's psychiatric state. Dr. Fall opined that Claimant's current complaints were not typical complaints that would be heard 1.5 years after a mild concussion.

66. Dr. Fall opined that Claimant's physical symptoms at this point were a result of a somatic symptom disorder or other psychiatric diagnosis. Dr. Fall opined that Claimant did not require any further physical treatment and that treating physical abnormality doesn't make sense and that Claimant would not get any benefit from physical treatment because Claimant had no underlying tissue damage or pain generator from a physical perspective. Dr. Fall opined that with no physical pathology being treated, any further treatment would just perpetuate a disability mindset. Dr. Fall opined that 8 additional sessions of psychotherapy was reasonable.

67. Dr. Moe also testified by deposition in this matter. Dr. Moe testified that if a person remembered events following an accident, it argued against anything more than a relatively mild concussion at the worst based on what Claimant was able to recall about the accident, what paramedics reported, and the evaluation and diagnoses performed at the emergency department of the hospital on the day of accident. Dr. Moe opined that in Claimant's case there were excessive symptoms relative to the expected outcome both in terms of cognitive complaints and physical bodily complaints. Dr. Moe opined that Claimant may have an element of amplifying symptoms for expressions of care and concern as sort of an antidote to all the negativity she experienced as a result of the accident. He assessed somatic symptom disorder, and noted it would require treatment aimed at coping skills and that Claimant had partly received that with Dr. Jewell. Dr. Moe agreed that Claimant met the diagnostic criteria for PTSD but believed other issues were primarily driving Claimant's symptoms.

68. Dr. Moe opined that any continued treatment would be psychotherapy focused on coping for all of Claimant's issues, cognitive complaints or physical complaints. Dr. Moe noted that despite continued psychotherapy for some time, claimant reported no improvement and worsening. Dr. Moe noted that there had been no benefit from the psychotherapy and that there was no indications that the therapy was moving Claimant in the right direction. Dr. Moe recommended completing 8 more sessions of psychotherapy to complete it out under maintenance care and opined that Claimant was at maximum medical improvement. Dr. Moe believed Claimant was still struggling psychologically with multiple fueling factors

CONCLUSIONS OF LAW

Generally

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

§ 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Medical "treatment" encompasses both diagnostic and curative medical procedures. *Merriman v. Industrial Commission,* 210 P.2d 448 (Colo. 1949); *Public Service Co v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999) *Villela v. Excel Corp.,* W.C. No. 4-400-281 (ICAO February 1, 2001) (reasonable diagnostic procedures are a prerequisite to MMI if they have reasonable prospect for defining claimant's condition and suggesting further treatment). Conversely, MMI exists when any medically determinable physical or mental impairment caused by the injury has become stable and no further treatment is reasonably expected to improve the claimant's condition. Section 8-40-201(11.5), C.R.S.; *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002).

Claimant has established, by a preponderance of the evidence that continued medical treatment for both meralgia paresthetica and psychotherapy is reasonable, necessary, and causally related to her January 3, 2016 work related injury. As found above, several doctors diagnosed her as having likely meralgia paresthetica. On June 9, 2016 after performing EMG testing, Dr. Feldman opined that Claimant may have meralgia paresthetica and that injections could be considered for that nerve sensation deficit after Claimant had her blood sugars under control. Per the records submitted into evidence, this condition has not yet been adequately evaluated and/or treated. Although Dr. Fall opined that meralgia paresthetica could be consistent with the left thigh contusion from the motor vehicle accident, Dr. Fall found it inconsistent that Claimant would have symptoms of meralgia paresthetica on both the right and left side. This opinion is not as persuasive as the opinion of Dr. Hammerberg that the symptoms of bilateral meralgia paresthetica could be due to compression of both lateral femoral cutaneous nerves by the seatbelt. In addition to Dr. Hammerberg's opinion, in March of 2016 both Dr. Baer and Dr. Biggs endorsed Claimant's symptoms as being consistent with meralgia paresthetica. The June 9, 2016 EMG is also consistent with meralgia paresthetica. Dr. Fall explained potential treatment for this condition to involve medications and/or rarely injections and Dr. Feldman considered injections as a possibility in June of 2016 but not until Claimant had her blood sugar levels under control. From the records, Claimant has symptoms found by multiple providers to be consistent with meralgia paresthetica, yet has not had adequate curative or diagnostic treatment for this condition.

Claimant has also established, by a preponderance of the evidence that continued psychotherapy treatment is reasonable, necessary, and causally related to her January 3, 2016 work injury. As found above, Claimant experienced a significant psychological response to a devastating accident. Diagnoses of PTSD and depression and Claimant's obvious emotional distress describing the accident and that a 10 year old girl had died at the scene after being ejected from the other vehicle were noted in January of 2016 by Dr. Cohen. This obvious emotional distress has continued throughout the claim to the time of hearing. Claimant continues to experience trouble coping with the accident, has obvious psychological overlay affecting her reported physical symptoms, and still has indications of depression and PTSD as a result of the accident. The ALJ finds Dr. Jewell credible and persuasive that Claimant has not yet reached MMI from a psychological perspective and that continued care is necessary. Claimant has established that continued psychotherapy is reasonable, necessary, and related to the January 3, 2016 injury. The ALJ finds it credible that continued psychotherapy aimed at Claimant's underlying psychological conditions is reasonably be expected to improve her condition and is still necessary at this point given the extreme circumstances of the case and extreme emotional and psychological distress Claimant sustained.

Claimant has failed to establish that any further physical treatment (other than treatment aimed at meralgia paresthetica) is reasonable, necessary, or causally related to her January 3, 2016 work injury. As found above, Claimant's physical injuries resulting from the accident including her kidney laceration, pelvic fracture, and left thigh contusion have resolved without complication. Claimant has failed to establish that she sustained an injury to her cervical spine, thoracic spine, or lumbar spine necessitating treatment. As found above, the diagnostic testing of the spine showed no acute injury and/or nerve

impingement as a result of the motor vehicle accident. EMG testing showed no evidence of lumbar spine radiculopathy as a possible cause for Claimant's bilateral lower extremity symptoms.

Additionally, Claimant has failed to establish by a preponderance of the evidence that any treatment for concussion/mild traumatic brain injury is reasonable, necessary, or causally related to her January 3, 2016 work injury. Claimant has failed to establish that she sustained a concussion or mild traumatic brain injury as a result of the motor vehicle accident. From the paramedic records, hospital records, and Claimant's reported recollection of the injury, it appears she did not sustain a concussion or mild traumatic brain injury. As found above, at the scene of the accident, Claimant denied any loss of consciousness, headache, dizziness, visual disturbance, midline spinal pain, abnormal extremity sensation, or nausea. Claimant was noted to be awake and oriented x4, following commands, answering questions appropriately, speaking clearly in full sentences. After being transported by ambulance, and at the hospital Claimant's head was found to be normocephalic and autraumatic and she was found to be alert and oriented to person, place, time, and situation with no focal neurological deficit observed. She also was cooperative with appropriate mood and affect. Even assuming that Claimant did sustain a concussion and mild traumatic brain injury, Claimant has failed to establish that any further treatment aimed at concussion/MTBI symptoms is reasonable or necessary at this point, 1.5 years after the accident. Multiple providers opined that expected symptoms for this type of injury are "worst first" in nature. Here, Claimant's reported symptoms have not been worst first and have greatly expanded over the course of the claim. Further, as found above, several symptoms that Claimant subjectively believes are the result of a concussion/brain injury were opined to be caused by other problems. Claimant's vision problems were opined to be a result of her uncontrolled diabetes by her eye doctor. Her hearing problems greatly improved after removal of impacted ear wax. The symptoms that Claimant is reporting are medically inconsistent with concussion or mild traumatic brain injury. As such, Claimant has failed to establish that any further treatment aimed at concussion or mild traumatic brain injury is reasonable, necessary, or causally related to the January 3, 2016 work injury.

It is notable that Claimant was discharged from the rehabilitation center 11 days after the motor vehicle accident and was doing well at that time. She was found to have increased anxiety and depression with trouble sleeping and mental health therapy was suggested supporting her psychological trouble with the accident. However, physically she was doing fine and had met all goals. The rehabilitation center opined that she was at her pre-injury level of functioning at discharge. Claimant scored 100/105 for all activities of daily living and functional mobility improved from an initial score of 57/105. After discharge, Claimant's subjective complaints expanded greatly inconsistent with the natural course of concussion, mild traumatic brain injury, or physical injury where symptoms would be likely noted acutely and/or "worst first." The only remaining basis for treatment that Claimant has established as being reasonable, necessary, and causally related to the January 3, 2016 work injury is for the identified meralgia paresthetica and for continued psychotherapy. Claimant has failed to establish that any further treatment is reasonable, necessary or related.

ORDER

It is therefore ordered that:

1. Claimant has met her burden to establish that continued physical treatment aimed at meralgia paresthetica is reasonable, necessary, and causally related to her January 3, 2016 work injury.

2. Claimant has met her burden to establish that continued psychotherapy is reasonable, necessary, and causally related to her January 3, 2016 work injury.

3. Claimant has failed to establish that any further treatment (except as outlined in Order 1 and Order 2) is reasonable, necessary, or causally related to her January 3, 2016 work injury.

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

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

DATED: January 19, 2018

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered an occupational disease to her right upper extremity during the course and scope of her employment with Employer.

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

3. Whether Claimant has made a "proper showing" that she is entitled to a one-time change of her Authorized Treating Physician (ATP) pursuant to §8-43-404, C.R.S.

4. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Employer is a food service corporation with a location in a Comcast call center in Denver, Colorado. Employer provides food to employees of the call center as well as catering services. Claimant is a 36-year-old female who has worked for Employer since 2010. She was promoted to Cashier Supervisor in 2013.

2. Claimant engages in a variety of job duties throughout each day. Her responsibilities include loading ice into a soda machine and a salad bar, prepping and cutting vegetables and fruit, cashiering, cleaning, stocking product, managing employees and completing paperwork. Claimant testified that each time she supplies the soda machine or salad bar with ice, she first fills four large containers with ice using a scoop. She then lifts each of the containers and empties them into the soda machine or salad bar. Filling the soda machine requires Claimant to lift each of the four containers above her head and filling the salad bar requires her to lift the containers to shoulder height.

3. Claimant explained that she began experiencing pain in her right wrist and shoulder in April or May 2016. The pain in her shoulder was most pronounced when she was filling the soda machine and salad bar with ice. The pain in her wrist was most prevalent when chopping fruits and vegetables. Claimant remarked that her symptoms worsened between May and October 2016 because the Comcast call center lacked a manager and she was required to perform additional job duties.

4. Claimant commented that she reported her injuries to her supervisor Hugo Araujo shortly after he was hired in October 2016. She attributed her right upper extremity symptoms to her job duties. Although Mr. Araujo reduced Claimant's responsibilities by filling the soda machine and salad bar with ice, her symptoms persisted.

5. On March 15, 2017 Claimant visited primary care physician Devon Wall, FNP at the University of Colorado Health Center for an evaluation. FNP Wall diagnosed Claimant with radial styloid tenosynovitis of the right hand and right anterior shoulder pain. In response to Claimant's query about the cause of her symptoms FNP Wall attributed the condition to her repetitive job duties.

6. On March 16, 2017 Claimant again reported her injuries to Mr. Araujo and provided the medical records she had received from FNP Wall. Employer completed a First Report of Injury and provided a list of four medical providers. Claimant chose Concentra Medical Centers.

7. On March 22, 2017 Claimant visited Kara Marcinek, NP at Concentra. She reported that Claimant visited for a "possible repetitive motion injury" that had been causing her right upper extremity symptoms. NP Marcinek diagnosed Claimant with diffuse right arm pain. She assigned work restrictions prohibiting Claimant from lifting over two pounds with her right arm, scooping ice or chopping. NP Marcinek prescribed Claimant a wrist brace and pain medication. She also requested a work site evaluation.

8. On March 30, 2017 Sara Nowotny conducted a Physical Demands Analysis & Risk Factor Assessment (Job Demands Analysis) for the position of Kitchen Supervisor at Employer's Denver location. Because Claimant was under restrictions imposed by her medical providers at Concentra at the time of the assessment, Ms. Nowotny instructed Mr. Araujo to perform Claimant's job duties. Relying on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Ms. Nowotny did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's activities. Ms. Nowotny specifically noted that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. In specifically addressing awkward posture and repetition/duration Ms. Nowotny noted that Claimant engaged in right wrist ulnar deviation/flexion for 12 minutes and 51 seconds each hour or one hour and 43 minutes per day. To constitute a primary risk factor for the development of a cumulative trauma disorder, an individual must exhibit greater than four hours of wrist flexion in excess of 45 degrees, extension in excess of 30 degrees and ulnar deviation in excess of 20 degrees. Ms. Nowotny specifically commented that scooping ice did not fit within the Primary or Secondary Risk Factors regarding pronation and grip strength.

9. Claimant explained that in April 2017 she requested a switch to another one of Employer's authorized medical providers. She commented that Respondents informed her that changing her treating physician was not an option because she had already chosen a provider.

10. Claimant's treatment through Concentra included a referral to Rocky Mountain Medical Group for physical therapy. Claimant testified that her work restrictions and conservative treatment alleviated her right wrist pain but failed to diminish her shoulder symptoms.

11. At the request of Claimant's primary care provider FNP Wall Claimant underwent a right shoulder MRI. After reviewing the MRI Claimant's medical providers at Concentra referred her to Michael Hewitt, M.D. for an examination.

12. On July 24, 2017 Claimant visited Dr. Hewitt for an evaluation. After reviewing the right shoulder MRI Dr. Hewitt diagnosed Claimant with right shoulder impingement and recommended a cortisone injection. Dr. Hewitt administered the injection and Claimant obtained approximately two months of right shoulder pain relief.

13. On October 25, 2017 Claimant underwent an independent medical examination of her right wrist with Jonathan Sollender, M.D. Dr. Sollender conducted a physical examination, reviewed Claimant's medical records and considered Ms. Nowotny's Job Demands Analysis. Dr. Sollender summarized that Claimant engaged in a variety of tasks while working for Employer including cashiering, scooping ice and cutting vegetables and fruit. Claimant denied any specific injury, but attributed her symptoms to her daily, repetitive job duties.

14. Dr. Sollender explained that in order to perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated primary risk factors. Dr. Sollender determined that Claimant suffered from DeQuervain's tenosynovitis in her right wrist.

15. Dr. Sollender compared Claimant's job duties as reflected in the Job Demands Analysis with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. Additional risk factors are 6 hours of lifting 10 pounds greater than 60 times per hour or 6 hours of use of hand held tools weighing two pounds or greater.

16. Dr. Sollender noted that an additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires 4 hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees. The category also includes 6 hours of elbow flexion greater than 90 degrees, or 6 hours of supination/pronation with task cycles 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Dr. Sollender determined that Claimant's job duties did not meet any of the Primary or Secondary Risk Factors. enumerated in the *Guidelines.*

17. Dr. Sollender determined that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. He remarked that Claimant's activity of loading ice into the salad bar and soda machines took only 15-20 minutes to complete. Dr. Sollender detailed that Claimant made approximately 64 scoops of ice to fill the four buckets required for the salad bar and soda machines. Each scoop of ice weighs about 7.5 pounds and Claimant fills the soda machine and salad bar with ice four times each day. Dr. Sollender explained that

repetitive lifting is significant pursuant to the *Guidelines* only if it involves 10 pounds or greater more than once every 30 seconds over the course of four hours. He concluded that Claimant's various job duties did not involve the requisite force, repetition or awkward posture to constitute a repetitive trauma condition pursuant to the *Guidelines*.

18. Claimant has failed to demonstrate that it is more probably true than not that she suffered an occupational disease to her right upper extremity during the course and scope of her employment with Employer. Although Claimant attributed her right upper extremity symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. Claimant engaged in a variety of numerous tasks throughout each shift in her position as a Cashier Supervisor. The record reflects that Claimant's job duties specifically involved loading ice into a soda machine and salad bar, prepping and cutting vegetables and fruit, cashiering, cleaning, stocking product, managing employees and completing paperwork.

19. Relying on Rule 17, Exhibit 5 of the *Guidelines*, Ms. Nowotny did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. Ms. Nowotny specifically noted that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. In specifically addressing awkward posture and repetition/duration Ms. Nowotny noted that Claimant engaged in right wrist ulnar deviation/flexion for 12 minutes and 51 seconds each hour or one hour and 43 minutes in a day. To constitute a primary risk factor for the development of a cumulative trauma disorder, an individual must exhibit greater than four hours of wrist flexion in excess of 45 degrees, extension in excess of 30 degrees and ulnar deviation in excess of 20 degrees. Ms. Nowotny specifically commented that scooping ice did not fit within the Primary or Secondary Risk Factors regarding pronation and grip strength.

20. Dr. Sollender diagnosed Claimant with DeQuervain's tenosynovitis in her right wrist. Dr. Sollender compared Claimant's job duties as reflected in the Job Demands Analysis with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. Additional risk factors are 6 hours of lifting 10 pounds greater than 60 times per hour or 6 hours of use of hand held tools weighing two pounds or greater.

21. Dr. Sollender noted that an additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires 4 hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees. Dr. Sollender determined that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. He remarked that Claimant's activity of loading ice into the salad bar and soda machines took only 15-20 minutes to complete. Dr. Sollender detailed that Claimant made approximately 64 scoops of ice to fill the four buckets required for the salad bar and soda machines. Each scoop of ice weighs about 7.5 pounds and Claimant fills the soda machine and salad bar with ice four times each day. Dr. Sollender explained that repetitive lifting is significant pursuant to the *Guidelines* only if it involves 10 pounds or

greater more than once every 30 seconds over the course of four hours. He concluded that Claimant's various job duties did not involve the requisite force, repetition or awkward posture to constitute a repetitive trauma condition pursuant to the *Guidelines*.

22. Although Dr. Sollender did not address Claimant's shoulder condition, the record reflects that Claimant's variety of job duties did not involve the requisite force, repetition or awkward posture to constitute a repetitive trauma condition to her right upper extremity pursuant to the *Guidelines*. The record fails to demonstrate that Claimant engaged in right shoulder movement at the rate of 15-36 repetitions per minute and shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Furthermore, after conducting a detailed Job Demands Analysis Ms. Nowotny specifically noted that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Based on the persuasive opinions of Dr. Sollender and Ms. Nowotny that Claimant did not suffer cumulative trauma disorders to her right upper extremity while working for Employer, Claimant's claim for Workers' Compensation benefits is denied. Although Claimant manifested right upper extremity symptoms at work she has failed to establish a causal relationship to job duties.

CONCLUSIONS OF LAW

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

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

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

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

7. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45

degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees. The category also includes 6 hours of elbow flexion greater than 90 degrees, or six hours of supination/pronation with task cycles 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for six hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two pounds or greater.

8. The *Guidelines* specifically include factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Vibration can also be considered an additional risk factor pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology.

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease to her right upper extremity during the course and scope of her employment with Employer. Although Claimant attributed her right upper extremity symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. Claimant engaged in a variety of numerous tasks throughout each shift in her position as a Cashier Supervisor. The record reflects that Claimant's job duties specifically involved loading ice into a soda machine and salad bar, prepping and cutting vegetables and fruit, cashiering, cleaning, stocking product, managing employees and completing paperwork.

10. As found, relying on Rule 17, Exhibit 5 of the *Guidelines*, Ms. Nowotny did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. Ms. Nowotny specifically noted that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. In specifically addressing awkward posture and repetition/duration Ms. Nowotny noted that Claimant engaged in right wrist ulnar deviation/flexion for 12 minutes and 51 seconds each hour or one hour and 43 minutes in a day. To constitute a primary risk factor for the development of a cumulative trauma disorder, an individual must exhibit greater than four hours of wrist flexion in excess of 45 degrees, extension in excess of 30 degrees and ulnar deviation in excess of 20 degrees. Ms. Nowotny specifically commented that scooping ice did not fit within the Primary or Secondary Risk Factors regarding pronation and grip strength.

11. As found, Dr. Sollender diagnosed Claimant with DeQuervain's tenosynovitis in her right wrist. Dr. Sollender compared Claimant's job duties as reflected in the Job Demands Analysis with the delineated Primary Risk Factors in the *Guidelines*.

He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. Additional risk factors are 6 hours of lifting 10 pounds greater than 60 times per hour or 6 hours of use of hand held tools weighing two pounds or greater.

12. As found, Dr. Sollender noted that an additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires 4 hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees. Dr. Sollender determined that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. He remarked that Claimant's activity of loading ice into the salad bar and soda machines took only 15-20 minutes to complete. Dr. Sollender detailed that Claimant made approximately 64 scoops of ice to fill the four buckets required for the salad bar and soda machines. Each scoop of ice weighs about 7.5 pounds and Claimant fills the soda machine and salad bar with ice four times each day. Dr. Sollender explained that repetitive lifting is significant pursuant to the *Guidelines* only if it involves 10 pounds or greater more than once every 30 seconds over the course of four hours. He concluded that Claimant's various job duties did not involve the requisite force, repetition or awkward posture to constitute a repetitive trauma condition pursuant to the *Guidelines*.

13. As found, although Dr. Sollender did not address Claimant's shoulder condition, the record reflects that Claimant's variety of job duties did not involve the requisite force, repetition or awkward posture to constitute a repetitive trauma condition to her right upper extremity pursuant to the *Guidelines*. The record fails to demonstrate that Claimant engaged in right shoulder movement at the rate of 15-36 repetitions per minute and shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Furthermore, after conducting a detailed Job Demands Analysis Ms. Nowotny specifically noted that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Based on the persuasive opinions of Dr. Sollender and Ms. Nowotny that Claimant did not suffer cumulative trauma disorders to her right upper extremity while working for Employer, Claimant's claim for Workers' Compensation benefits is denied. Although Claimant manifested right upper extremity symptoms at work she has failed to establish a causal relationship to job duties.

ORDER

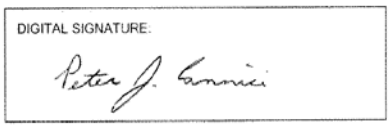
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

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

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

DATED: February 1, 2018.



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

ISSUES

- Did Respondents prove a basis to withdraw their admission for *Grover* medical benefits by a preponderance of the evidence?

- Did Claimant prove by a preponderance that that narcotic pain medications prescribed by Dr. Kedlaya are reasonable, necessary and related to his admitted industrial injury?

FINDINGS OF FACT

1. This claim involves an admitted industrial injury to Claimant's neck in July 2001.

2. Claimant had a significant preinjury history of neck pain and headaches. In September 1998, he started receiving chiropractic treatment from Dr. William Thomas for "pain in the neck and the back of the skull bilaterally." Objective findings included muscle spasms in the cervical spine and occiput. Dr. Thomas diagnosed "cervical sprain/strain/whiplash injury." Later records consistently documented cervical and occipital pain, muscle spasms, and reduced cervical range of motion. In August 2000, he reported muscle spasms in the cervical spine, dizziness, and headaches. The chiropractic records document ongoing neck pain through July 2001. On July 9, 2001 (one week before the injury), Claimant reported exacerbating his neck and upper back pain putting up drywall at his home.

3. Claimant worked for Employer as a "gas fitter/serviceman." He was injured on July 16, 2001 when an excavation trench partially collapsed on him. A third-party company was performing a horizontal boring operation beneath a roadway, and Claimant was hunched over working in a trench on the opposite side of the street. The bore broke through the embankment above Claimant, causing several hundred pounds of dirt and rock to fall on his head, neck, and back. Claimant extricated himself from the trench with the assistance of coworkers.

4. Employer referred Claimant to Dr. Kevin Boehle at Southern Colorado Clinic for authorized treatment.[1] At the initial visit, he reported neck and upper back pain and was diagnosed with a "cervicothoracic strain." X-rays showed moderate straightening of the cervical lordosis. He was prescribed medication, referred for physical therapy, and put on work restrictions. Claimant did not tell Dr. Boehle about his prior neck problems or treatment.

[1] The parties submitted no records from the first 11+ years of Claimant's injury-related treatment, so the history has been gleaned primarily from Respondents' IME reports, the FALs, and testimony.

5. A cervical MRI on September 17, 2001 showed disc bulging at C4-5, a small left-sided protrusion at C5-6 with lateral recess stenosis and possible encroachment of the left C6 nerve root, and a central disc bulge at C6-7.

6. Claimant had a surgical consultation with Dr. Illig in November 2001 but was not considered a surgical candidate. Regarding the potential nerve root encroachment noted by the radiologist, Dr. Illig opined "clinically there is no evidence of this and the degree of impingement as mentioned is quite mild."

7. Dr. Boehle put Claimant at MMI in July 19, 2002. At the time of MMI, Claimant reported "achiness" in his neck. He had pain 10% of the time, typically 1/10, and 2/10 at its "worst." Physical examination revealed "some chronic mild muscle tightness" in the cervical region. Dr. Boehle assigned a 9% whole person cervical impairment rating based on 4% for Specific Disorder and 5% for ROM loss. Regarding Claimant's functional capacity and maintenance care, Dr. Boehle opined:

> [T]he patient is capable of resuming regular work activities without restrictions particularly and will continue the home stretching and strengthening program to maintain spinal mobility and decreased pain. He will utilize over-the-counter anti-inflammatories as needed. At this point, I will not schedule him back for maintenance care, although if he has any changes, then follow-up one to two times in the next 6 to 12 months may be indicated. We will also approve of an independent exercise and strengthening program for the next 3 to 6 months . . . . Beyond that, I do not feel that any other intervention is indicated or necessary . . . . He will resume activities of daily living, social activities and occupational activities without limitation.

8. Respondents filed a Final Admission of Liability (FAL) on August 26, 2002 admitting for the rating and "6 months independent exercise and strengthening program" per Dr. Boehle's report.

9. Claimant returned to full-duty work in approximately July 2002. He testified that he "worked there for a couple of years, and I started having problems again. So I actually worked there for four years with the problem, and then finally, just could not do it anymore."

10. In June 2004, Claimant reported worsening symptoms. By that time, Dr. Daniel Olson at CCOM had taken over as Claimant's primary ATP. The record contains no discussion or analysis by any physician of a causal connection between the worsened condition and the original injury.

11. Claimant had another cervical MRI on September 22, 2004 which showed a small left paracentral disc complex and moderate bilateral foraminal stenosis at C5-6, a small annular tear at C6-7, and a moderate-sized disc protrusion at C7-T1.

12. Claimant returned to Dr. Illig for a second surgical consultation in October 2004, who concluded "the patient has no clinical evidence of any significant cervical

radiculopathy. He has no evidence of a cervical myelopathy." Dr. Illig saw no indication for surgical intervention.

13. In a report dated December 8, 2004, Dr. Olson indicated Claimant was at MMI with no additional impairment. Dr. Olson also assigned permanent work restrictions.

14. Respondents filed a stipulated FAL on March 30, 2006 admitting for a closed period of TTD from September 30, 2004 through December 14, 2004. The FAL also admitted to "reasonable, necessary, and solely related medical treatment after MMI to maintain MMI status."

15. Claimant's maintenance care subsequently expanded far beyond that contemplated in the original 2002 MMI report. He has had numerous modalities, including numerous medications, cervical facet injections and ESIs, and at least one rhizotomy. Claimant testified "none of that really seemed to help." Eventually, he was put on escalating doses of narcotics such as Opana and OxyContin.

16. Claimant started treating with Dr. Divakara Kedlaya, a pain management specialist, in December 2009. At the time, he was taking 40 mg of Opana ER twice a day, 5 mg of Opana IR four times per day, gabapentin, Celebrex, Flexeril, and Ambien.

17. Dr. Raschbacher performed two IMEs and two record reviews for Respondents between July 2012 and June 2017. At his initial IME on July 25, 2012, Dr. Raschbacher was impressed by Claimant's preinjury history of neck problems, for which he was actively receiving treatment one week before the industrial accident. Dr. Raschbacher noted there was no evidence the accident caused any structural damage or other objectively verifiable injury to Claimant's cervical spine. He also opined Claimant's failure to disclose the preinjury history to Dr. Boehle was "a major omission" that prevented Dr. Boehle from properly assessing causation and determining when Claimant had returned to baseline. Dr. Raschbacher ultimately concluded Claimant's ongoing neck symptoms were not work-related:

> [Claimant] was clearly under treatment for chronic neck and other pain prior to his injury claim date. In fact, the week before he reported his injury claim, he was already reporting spontaneous worsening of cervical symptomatology. It appears that after the injury . . . all treatment was then done on a work-related basis, for the neck. This appears to be an error, in my medical opinion.
>
> [M]ore likely than not [Claimant] would have returned to his prior baseline . . . as there were pre-existing structural or degenerative changes not caused by the accident. . . . [Claimant] has been treated well beyond any reasonable period of maintenance for his pre-existing cervical pain complaints. Clearly, progressive degeneration over time on a nonwork-related basis is more likely than not going to occur with the passage of time. The imaging tests done after the injury claim date did not delineate any finding that was clearly and solely a result of the injury claim of 07/16/01.

> My medical opinion is that any need for a temporary aggravation of his cervical pain complaints from his work-related injury claim would have ceased long ago. . . . He had chronic pain before the injury and certainly would be expected to have it after the injury, and would be expected to have it absent any injury. Given these facts, my recommendation is to not offer any more care or treatment for the cervical spine on a work-related basis.

18. In his January 2014 report, Dr. Raschbacher opined "it is not clear why all treatment for this preexisting symptomatic condition was assumed to be work-related after his injury claim date." He maintained that any further treatment should be provided outside of the workers' compensation system.

19. In his June 10, 2016 IME report, Dr. Raschbacher reiterated "there is no clear medical basis for continuing to treat his chronic cervical pain on the basis of his injury claim. This condition was under treatment before his injury and there did not appear to be any clear anatomic changes or objective findings that were not likely pre-existing and that were attributable to an injury of 07/16/01."

20. In May 2017, Respondents denied any further refills of Opana. As a result, Dr. Kedlaya changed Claimant's prescription to MS Contin 30mg three times per day and oxycodone 10 mg 4 times per day. He also continued Celebrex, Lidoderm patches, Voltaren gel, tizanidine, Ambien, and Movantic for opioid-induced constipation.

21. In his most recent report, dated June 27, 2017, Dr. Raschbacher opined "it is neither reasonable nor necessary to continue with any narcotic prescription on a chronic basis . . . either Opana or morphine sulfate or similar or related medicines."

22. Dr. Kedlaya testified in a post-hearing evidentiary deposition on December 2, 2017. He discussed the medical justification for Claimant's medication regimen at length, but provided minimal information as to any causal connection between Claimant's accident and his current treatment. Dr. Kedlaya opined in conclusory fashion that Claimant's ongoing neck pain is related to the 2001 injury, but did not explain the basis for that opinion. He admitted he was unaware of Claimant's preinjury neck and back problems, and had not reviewed any of the preinjury records.

23. Dr. Raschbacher's opinions regarding causation are credible and persuasive.

24. Respondents proved by a preponderance of the evidence that the admitted industrial accident did not proximately cause Claimant's current need for medical treatment.

CONCLUSIONS OF LAW

Respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the industrial injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond maximum medical

improvement (MMI) if the claimant requires periodic maintenance care to prevent further deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An injury need not be the sole cause of a claimant's need for treatment, as long as there is a "direct causal relationship" to the industrial accident. *Seifreid v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1996); *Munoz v. JBS Swift & Co. USA, LLC*, W.C. No. 4-780-871-03 (October 7, 2014).

Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability and reasonable necessity of specific treatment. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003). Ordinarily, the claimant must prove by a preponderance of the evidence that an injury directly and proximately caused the condition for which he seeks benefits, and that the requested treatment is reasonably necessary. *Walmart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). But § 8-43-201(1) was amended in 2009 to place the burden of proof on the party seeking to modify an issue determined by an admission or order. If the effect of the respondents' challenge to medical treatment is to terminate all previously admitted maintenance benefits, the respondents must prove no further treatment is reasonable, necessary or related to the injury. *Salisbury v. Prowers County School District RE2*, W.C. No. 7-702-144 (ICAO June 5, 2013); *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (ICAO October 1, 2013).

At hearing, Respondents' counsel acknowledged Respondents are seeking to terminate Claimants' ongoing maintenance benefits on the theory that no further treatment is causally related to the industrial injury. Respondents also argue ongoing treatment with narcotics is not reasonable or necessary, regardless of causation. Respondents have the burden of proof on withdrawing the admission for *Grover* medical benefits and terminating all of Claimant's ongoing treatment. If Respondents fail to carry that burden, Claimant must prove opioids are reasonably necessary treatment for the industrial injury.

As found, Respondents proved by a preponderance of the evidence that the July 2001 accident did not proximately cause Claimant's current need for medical treatment. Dr. Raschbacher laid out a cogent and convincing argument to support his opinion regarding causation, and the countervailing evidence is minimal. Although Dr. Kedlaya opined Claimant's current neck pain is injury-related, his opinion was conclusory with no accompanying persuasive rationale. He admitted he was not aware of Claimant's preinjury history of chronic neck pain and did not even begin treating Claimant until many years after the accident. Claimant's condition worsened significantly after being placed at MMI in 2002, and there is no persuasive evidence to establish the requisite causal connection to the original injury. It is most probable that Claimant's current symptoms reflect the natural progression of his pre-existing degenerative changes combined with natural aging, which would have happened regardless of the industrial accident. While the treatment Dr. Kedlaya provides may be reasonably necessary to manage Claimant's chronic pain, it is not reasonably attributed to the accident which occurred nearly 17 years ago.

ORDER

It is therefore ordered that:

1. Respondents' request to withdraw their admission for ongoing *Grover* medical benefits is granted.

2. Claimant's request for additional medical treatment in relation to his July 16, 2001 industrial injury is denied and dismissed.

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

DATED: February 2, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable lower back injury during the course and scope of her employment with Employer on December 11, 2016.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment for her December 11, 2016 industrial accident.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period March 7, 2017 until May 16, 2017.

4. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant worked for Employer as a City Delivery Dispatcher at its area distribution center. Her job duties involved retrieving orders from shelves and preparing items for delivery to Employer's retail locations.

2. On August 29, 2015 Claimant obtained treatment for lower back pain at a chiropractic facility known as "The Joint." Todd Taylor, D.C. reported that Claimant presented with lower back pain that had started approximately one week earlier when she moved from a seated position to standing. He noted that Claimant suffered sharp, constant pain in her entire lower back area. Claimant had difficulty walking. She used Ibuprofen and pain-relief gel to alleviate her symptoms.

3. On December 11, 2016 Claimant moved 18 car batteries from a core cart to a pallet while working for Employer. The batteries each weighed approximately 40 pounds. Claimant specifically bent forward, lifted each battery out of the core cart, carried the battery and bent down to place it on the pallet. She commented that she experienced soreness in her lower back but the pain became more intense when she entered her delivery truck.

4. On December 12, 2016 Claimant discussed her lower back pain with Store Manager Stanley Brutis. Claimant specifically advised Mr. Brutis that she was feeling more sore than usual and would be leaving work early to obtain chiropractic treatment. Although Mr. Brutis inquired whether Claimant's lower back pain was related to her work activities, she specifically denied that her symptoms were work-related.

5. Later on December 12, 2016 Claimant visited The Joint for chiropractic treatment. Zachary Roberts, D.C. did not record any history of a work-related injury. Instead, the record reveals that Claimant simply presented for lower back stiffness without radiation.

6. On December 12, 2016 Claimant purchased a membership to The Joint. The membership permitted her to visit three to four times over the course of one month.

7. Claimant did not work on December 13, 2016 because of lower back pain but did not report any work injury to Employer. On December 14, 2016 Claimant resumed her regular job duties.

8. On December 16, 2016 Claimant returned to The Joint for treatment. Nicholas Jason, D.C. noted that Claimant presented with sciatic pain. However, Claimant did not mention a work injury. Dr. Jason referred Claimant to Mountain View Pain Center for an examination.

9. Later on December 16, 2016 Claimant visited Anthony Trotter, D.C. at Mountain View Pain Center for an evaluation. Dr. Trotter recorded that Claimant suffered lower back pain that originally began as tightness. The symptoms progressively worsened to include shooting pains down the right leg into the calf. Dr. Trotter diagnosed a disc herniation that required additional treatment.

10. On December 17, 2016 Claimant reported her December 11, 2016 injury to Mr. Brutis. Employer filed a Workers' Compensation claim on Monday, December 19, 2016.

11. On December 20, 2016 Claimant visited Authorized Treating Physician (ATP) Tomm VanderHorst, M.D. for an initial evaluation. Dr. VanderHorst recorded that Claimant had developed symptoms on the evening of December 11, 2016. Claimant did not recall a specific trauma or onset of symptoms. She noted that she had loaded approximately 20 car batteries onto a pallet earlier in the day. Claimant remarked that she had "some slight low back soreness across to her outlining level." She commented that it was not unusual for her to experience some muscle soreness after work. Claimant left work early the following day because of increased back pain and visited her chiropractor. As the week progressed Claimant's pain radiated into her right buttock, upper thigh and right calf. After conducting a physical examination Dr. VanderHorst diagnosed Claimant with acute right-sided lower back pain with sciatica. He determined that Claimant's lower back condition was likely caused by her work activities for Employer.

12. On March 8, 2017 Claimant underwent a lower back MRI. The MRI revealed a large right paramedian disc extrusion at L4-L5 that resulted in obliteration of the right lateral recess and mass effect on the right L5 and S1 nerve roots in the thecal sac. After reviewing the MRI results, Dr. VanderHorst referred Claimant to Robert Kawasaki, M.D. for specialist treatment on March 10, 2017.

13. Claimant began treatment with Dr. Kawasaki on April 7, 2017. Claimant reported she began experiencing lower back pain while moving car batteries on

December 11, 2016 at work and developed radiating pain into her legs within the next few days. She informed Dr. Kawasaki that she first sought chiropractic treatment on her own and her chiropractor encouraged her to file a claim for Workers' Compensation. Dr. Kawasaki diagnosed Claimant with a L4-5 right sided disc-herniation resulting in the obliteration of the lateral recess causing L5 and S1 radicular symptoms. He determined that it was within reasonable medical probability that Claimant's work activities on December 11, 2016 caused her disc herniation and radicular symptoms. Dr. Kawasaki recommended injections.

14. On April 12, 2017 Claimant underwent a psychological evaluation with Ron Carbaugh, Psy.D. Claimant reported that she was injured at work on December 11, 2016 while moving car batteries. She mentioned that she sought chiropractic treatment on her own and then obtained medical treatment through the Workers' Compensation system with Dr. VanderHorst. Dr. Carbaugh diagnosed Claimant with adjustment disorder and depressed mood. He noted that she possessed psychological factors that affected her medical condition. Claimant subsequently began psychological treatment with Dr. Carbaugh.

15. On August 3, 2017 Claimant underwent an independent medical examination with Kathleen D'Angelo, M.D. Claimant reported that her lower back began aching on December 11, 2016 after loading car batteries from a cart onto a pallet. Over the ensuing days the pain radiated down into her right leg. Dr. D'Angelo reviewed Claimant's medical records and conducted a physical examination. She expressed concerns about the delayed reporting of Claimant's lower back injury, the atypical presentation of symptoms that worsened over time instead of occurring acutely and the absence of notes about a precipitating injury in the December 2016 records from The Joint and Mountain View Pain Center. Dr. D'Angelo ultimately did not render a causation opinion in the absence of electrodiagnostic testing.

16. On August 7, 2017 Claimant underwent an independent medical examination with John S. Hughes, M.D. Dr. Hughes concluded that Claimant suffered a lower back injury while moving car batteries for Employer on December 11, 2016. However, he cautioned that the medical documentation was "not clear" because "initial notes authored by Dr. Taylor and Dr. Roberts on December 12, 2016 did not mention work-related lifting." He recommended a right lower extremity EMG.

17. On September 27, 2017 Claimant underwent an EMG of her right leg. The EMG revealed an acute S1 right-sided radiculopathy.

18. After reviewing additional medical records Dr. D'Angelo issued a Supplemental Report on October 19, 2017. Dr. D'Angelo continued to express concerns about the causal relationship between Claimant's December 11, 2016 work activities and lower back symptoms. She emphasized that an acute disc herniation is usually accompanied by immediate symptoms. Claimant's development of worsening symptoms in the days following the December 11, 2016 incident was unusual.

19. On December 6, 2017 the parties conducted the post-hearing evidentiary deposition of Dr. D'Angelo. Dr. D'Angelo explained that Claimant did not likely suffer a compensable lower back injury while working for Employer on December 11, 2016. She reiterated that Claimant had a disc extrusion at L4-L5 that resulted in nerve compression at the L5-S1 level. Dr. D'Angelo explained that most extruded discs are degenerative in nature. Furthermore, 40%-60% of patients with disc findings have no pain or radiculopathy. She noted that Claimant's intermittent lower back pain followed by remission of pain is "very typical of degenerative spine disease." In contrast, Dr. D'Angelo explained that when patients present with lower back symptoms after an acute injury they can usually state exactly what they were doing at the time. She characterized an acute disc extrusion as "acutely symptomatic."

20. Dr. D'Angelo remarked that Claimant initially described her lower back pain as "soreness" or "an ache" after December 11, 2016. She reasoned that, if Claimant suffered a disc extrusion at work on December 11, 2016, she likely would not have completed her shift. Claimant would have immediately experienced nerve compression at L5-S1. Furthermore, Claimant did not note an acute trauma to The Joint, Mr. Brutis, Dr. Trotter or Dr. Vander horst in the days following December 11, 2016. Dr. D'Angelo reasoned that Claimant's failure to mention a traumatic incident was inconsistent with an acute disc extrusion. Finally, Dr. D'Angelo noted that Claimant experienced lower back pain while simply standing up in 2015 and subsequently suffered intermittent back pain. She concluded that Claimant's pattern of symptoms was not consistent with an acute spinal injury on December 11, 2016.

21. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable lower back injury during the course and scope of her employment with Employer on December 11, 2016. The medical records reflect that Claimant did not suffer an acute injury but likely experienced a recurrence of lower back stiffness and soreness. On December 11, 2016 Claimant moved approximately 20 car batteries from a core cart to a pallet while working for Employer. On the following day she advised Store Manager Mr. Brutis that she was feeling more sore than usual and would be leaving work early to obtain chiropractic treatment. Although Mr. Brutis inquired whether Claimant's lower back pain was related to her work activities, she specifically denied that her symptoms were work-related. Subsequent chiropractic records from The Joint and Dr. Trotter reveal that Claimant experienced tightness and stiffness in her lower back. However, she did not mention any work accident. In a visit with Dr. VanderHorst Claimant also did not report an acute work incident but instead mentioned that it was not unusual for her to experience some muscle soreness after work.

22. After undergoing a lower back MRI Claimant was diagnosed with a L4-5 right-sided disc herniation that resulted in nerve compression at L5-S1. Drs. VanderHorst and Kawasaki determined that Claimant's work activities on December 11, 2016 caused her disc herniation and radicular symptoms. However, they failed to adequately consider Claimant's chiropractic records that revealed prior lower back symptoms and treatment. Instead, Dr. D'Angelo persuasively explained that, if Claimant suffered a disc extrusion at work on December 11, 2016, she likely would have immediately experienced nerve compression at L5-S1. She also emphasized that Claimant did not note an acute trauma

to The Joint, Mr. Brutis, Dr. Trotter or Dr. VanderHorst in the days following December 11, 2016. Dr. D'Angelo reasoned that Claimant's failure to mention a traumatic incident was inconsistent with an acute disc extrusion.

23. Although Dr. Hughes concluded that Claimant suffered a lower back injury while moving car batteries for Employer on December 11, 2016 he cautioned that the medical documentation was "not clear" because "initial notes authored by Dr. Taylor and Dr. Roberts on December 12, 2016 did not mention work-related lifting." Dr. D'Angelo also noted that Claimant experienced lower back pain while simply standing in 2015 and subsequently suffered intermittent back pain. She concluded that Claimant's pattern of symptoms was not consistent with an acute spinal injury on December 11, 2016. Based on Claimant's initial reports excluding an acute injury as well as the persuasive opinion of Dr. D'Angelo, Claimant has failed to demonstrate that her work activities on December 11, 2016 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Claimant may have experienced soreness and stiffness after moving car batteries at work on December 11, 2016. However, in the absence of an acute event, her symptoms more likely constituted the logical and recurrent consequence of her pre-existing condition.

CONCLUSIONS OF LAW

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

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

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

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable lower back injury during the course and scope of her employment with Employer on December 11, 2016. The medical records reflect that Claimant did not suffer an acute injury but likely experienced a recurrence of lower back stiffness and soreness. On December 11, 2016 Claimant moved approximately 20 car batteries from a core cart to a pallet while working for Employer. On the following day she advised Store Manager Mr. Brutis that she was feeling more sore than usual and would be leaving work early to obtain chiropractic treatment. Although Mr. Brutis inquired whether Claimant's lower back pain was related to her work activities, she specifically denied that her symptoms were work-related. Subsequent chiropractic records from The Joint and Dr. Trotter reveal that Claimant experienced tightness and stiffness in her lower back. However, she did not mention any work accident. In a visit with Dr. VanderHorst Claimant also did not report an acute work incident but instead mentioned that it was not unusual for her to experience some muscle soreness after work.

8. As found, after undergoing a lower back MRI Claimant was diagnosed with a L4-5 right-sided disc herniation that resulted in nerve compression at L5-S1. Drs.

VanderHorst and Kawasaki determined that Claimant's work activities on December 11, 2016 caused her disc herniation and radicular symptoms. However, they failed to adequately consider Claimant's chiropractic records that revealed prior lower back symptoms and treatment. Instead, Dr. D'Angelo persuasively explained that, if Claimant suffered a disc extrusion at work on December 11, 2016, she likely would have immediately experienced nerve compression at L5-S1. She also emphasized that Claimant did not note an acute trauma to The Joint, Mr. Brutis, Dr. Trotter or Dr. Vanderhorst in the days following December 11, 2016. Dr. D'Angelo reasoned that Claimant's failure to mention a traumatic incident was inconsistent with an acute disc extrusion.

9. As found, although Dr. Hughes concluded that Claimant suffered a lower back injury while moving car batteries for Employer on December 11, 2016 he cautioned that the medical documentation was "not clear" because "initial notes authored by Dr. Taylor and Dr. Roberts on December 12, 2016 did not mention work-related lifting." Dr. D'Angelo also noted that Claimant experienced lower back pain while simply standing in 2015 and subsequently suffered intermittent back pain. She concluded that Claimant's pattern of symptoms was not consistent with an acute spinal injury on December 11, 2016. Based on Claimant's initial reports excluding an acute injury as well as the persuasive opinion of Dr. D'Angelo, Claimant has failed to demonstrate that her work activities on December 11, 2016 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Claimant may have experienced soreness and stiffness after moving car batteries at work on December 11, 2016. However, in the absence of an acute event, her symptoms more likely constituted the logical and recurrent consequence of her pre-existing condition.

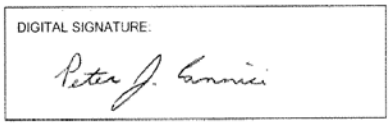
ORDER

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

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

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

DATED: January 30, 2018.



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

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that she suffered an injury to her back arising out of and in the course and scope of her employment with employer on July 13, 2017.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that medical treatment she received, including treatment at Glenwood Medical Associates, constitutes reasonable medical treatment necessary to cure and relive claimant from the effects of the work injury.

- At hearing, the parties agreed that if the claim is found compensable they will reach a stipulation on the issues of average weekly wage (AWW); temporary total disability (TTD) benefits; and temporary partial disability (TPD) benefits.

FINDINGS OF FACT

1. Claimant began working for employer on July 12, 2016 as a customer service clerk. Claimant testified that on July 13, 2017 she was working at the service counter with her coworker, RH. Claimant testified that she was injured on that date when she was "slugged" in the back by her coworker, RH. Claimant testified that the contact made by RH was forceful enough to cause claimant to strike her abdomen on the service counter. Claimant also testified that immediately following that contact she could not move for a period of time.

2. RH testified at hearing regarding the July 13, 2017 incident. RH agrees that she and claimant were working at the service counter. They had been discussing another employee. RH noticed that same employee was close to where she and claimant were speaking. As a result, RH wanted to get claimant's attention. RH admits that she touched claimant on the back. However, RH describes the contact as a "very very light touch" in the area of claimant's shoulder. RH testified that claimant seemed startled when she was touched. Prior to this incident RH was not aware that claimant had any back issues. Claimant notified RH that she had "a bad back".

3. Another coworker, NK also testified at hearing. NK was present when RH touched claimant at the service counter. NK testified that he believed that RH was attempting to get the attention of claimant. NK described the touch as "miniscule"; a "light little tap". NK testified that claimant appeared to be startled when RH touched her back and stated that she had a "bad" back.

4. At hearing video surveillance of the July 13, 2017 incident was offered as evidence. The ALJ has reviewed the video and finds that it corroborates the version of events described by RH and NK.

5. Claimant testified that she has arthritis in her back and "has to be careful with it". Claimant testified that immediately following the incident she took some Aleve to treat her back pain. Claimant continued to have back pain and after reporting the incident to a store manager claimant left her shift for the day.

6. Claimant testified that her back pain worsened overnight. On July 14, 2016, claimant notified employer that she intended to seek medical treatment. Employer provided claimant with a list of designated providers and claimant chose to seek treatment with Glenwood Medical Associates as her authorized treating provider (ATP). Claimant was seen on that date by Dr. Paul Salmen who diagnosed a mid-back contusion and "some muscle spasm with parathoracic movement". Dr. Salmen prescribed Meloxicam and cyclobenzaprine and instructed claimant to treat with ice and heat. Claimant was taken off of work until July 18, 2017. Dr. Salmen provided work restrictions including no lifting over 20 pounds, no overhead lifting, and no kneeling or crawling.

7. On July 18, 2017, claimant was seen by Dr. Jamie Faught (also with the ATP, Glenwood Medical Associates). Dr. Faught diagnosed mid thoracic back pain and recommended claimant take Celebrex and to begin taking the cyclobenzaprine previously prescribed by Dr. Salmen. At that time, Dr. Faught placed claimant on complete work restrictions for one week.

8. On August 28, 2017, Dr. Faught placed claimant at maximum medical improvement (MMI) with no permanent impairment. Claimant testified that she has no back symptoms from the July 13, 2017 incident.

9. The ALJ credits the testimony of RH and NK over the conflicting testimony of claimant and finds that the contact made by RH on July 13, 2017 was a light tap on claimant's shoulder. Therefore, the ALJ finds that claimant has failed to demonstrate that it is more likely than not that she suffered an injury to her back on July 13, 2017.

10. The ALJ also concludes that claimant has failed to demonstrate that it is more likely than not that the incident on July 13, 2017 aggravated, accelerated, or combined with any preexisting condition to necessitate medical treatment or disability.

CONCLUSIONS OF LAW

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

employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

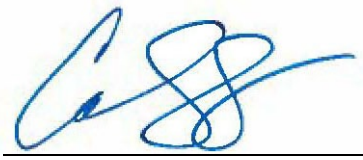
4. As found, claimant has failed to demonstrate by a preponderance of the evidence that she suffered an injury to her back on July 13, 2017. As found, the testimony of RH and NK is credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

Dated: February 6, 2018



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

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

ISSUES

I. Whether Claimant has proven by a preponderance of evidence that Dr. Eric Spier issued an order for ongoing 24-hour supervision.

II. If Dr. Spier ordered 24-hour supervision, whether the care/24-hour supervision provided by Vicky Ferry is reasonable, necessary and related to Claimant's admitted industrial injury.

III. To the extent actually raised by Claimant at hearing, whether Dr. Spier's request for 24-hour care/supervision should be "deemed authorized" for Respondents' failure to contest what Claimant contends was a request for prior authorization in compliance with WCRP 16-9, 16-10 and 16-11.

FINDINGS OF FACT

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

1. Claimant worked for Employer as a CDL truck driver delivering oversized loads of material to building construction sites. On April 15, 2017, Claimant went to a job site for a client. While on site, Claimant fell approximately 10 feet through an unmarked/unprotected basement opening to the concrete floor below.[1]

2. Claimant suffered serious life threatening injuries, including a severe closed head injury, multiple fractures, including closed fractures of ribs 2-8. He also sustained a right shoulder rotator cuff tear with AC separation and biceps tendinopathy, a cervical spine strain and a lumbar sprain with involvement of the right SI joint.

3. Claimant was air lifted by flight for life to Penrose Hospital where he underwent an emergent left-sided decompressive craniectomy, with bone flap for evacuation of a subdural hematoma. Post surgically, Claimant developed a hemopneumothorax and an entrapped right lung requiring limited thoracotomy with placement of chest tubes on April 25, 2017. Claimant subsequently developed acute respiratory failure requiring tracheostomy and mechanical ventilator support.

4. Claimant's acute condition stabilized and he was transferred to Kindred Hospital (herein after "Kindred") on May 5, 2017 for continued respiratory stabilization. While at Kindred, Claimant was "liberated" off the ventilator although his tracheostomy

[1] The medical records that contain reference to the fact that Claimant fell from a roof are in error.

remained cannulated at the time of his discharge and transfer to Craig Hospital (herein after "Craig") for additional rehabilitation on May 22, 2017.

5. Claimant was admitted to Craig on May 22, 2017 to participate in interdisciplinary brain injury recovery to include, brain injury physician management, pharmacology management, specialized rehabilitation nursing, speech therapy, physical therapy, occupational therapy, recreational therapy and neuropsychology evaluation and management.

6. Upon admission to Craig, Claimant underwent an optometry consultation during which it was discovered that Claimant suffered a "complete traumatic neuropathy of his right eye" probably caused by his facial fractures. Claimant had no light perception vision and it was felt that he would have no "useful visual recovery in the right eye." Claimant is essentially blind in the right eye.

7. Claimant was also found to have mixed hearing loss in the right ear after otology evaluation.

8. On May 25, 2017, Dr. Eric Spier, Claimant's attending physician at Craig, authored correspondence strongly recommending the appointment of a guardian and conservator given Claimant's inability to make personal, legal, medical or financial decisions secondary to severe cognitive impairment.

9. Claimant's wife is handicapped. She has cerebral palsy, is deaf, unable to speak and does not read. She communicates via special sign language with her left hand/arm since right-sided weakness prevents her from using her right arm/hand to sign. Claimant provided substantial assistance to his wife before his injury. Claimant's wife moved into her sister's (Vicky Ferry's) home following Claimant's injury. Ms. Ferry is currently delivering the assistance to Claimant's wife that he was providing before his fall. Given the depth of Claimant's cognitive impairment coupled with his wife's limitations, Dr. Spier appointed Ms. Ferry as Claimant's Medical Proxy Decision Maker on May 24, 2017. The Medical Proxy Order was to remain in effect for 6 months. The Order states that due to the Claimant's cognitive impairment, he "lacks decisional capacity to:

(a) comprehend information,
(b) deliberate regarding available choices, and/or
(c) communicate verbally or nonverbally his/her decisions regarding his/her health care."

10. During a medical team conference meeting on June 5, 2017, it was noted that Claimant required moderate assistance with time management and minimal assistance with activities of daily living (ADL). He was noted to have a severe word finding difficulties, moderately impaired verbal comprehension, and severely impaired reading, writing and signing skills.

11. On June 20, 2017, Claimant suffered a generalized tonic-clonic post-traumatic seizure requiring emergency room attention. Claimant was placed on Keppra in an effort to prevent further seizure activity.

12. A follow-up team conference meeting was held July 11, 2017. Present at the meeting were several medical team members, Claimant's wife, unidentified family members and Kathy Douglas, a nurse case manager (NCM) assigned to the case by Insurer. A report from this conference reveals that while Claimant's recovery was progressing, he required a shower chair and supervision with other ADL's. It was also noted that Claimant's severe conduction aphasia persisted, as did a severe naming impairment, a fluent output repetition impairment and an oral reading comprehension impairment. Claimant was noted to have other mild executive function deficits for which monitoring of his neurocognitive status was recommended. Family education and discharge to Ms. Ferry's home was discussed and a list of "Do's and Don'ts" was provided to Claimant and his family in preparation for his discharge. Upon discharge, Claimant was to be followed by home health care with eventual progress to outpatient therapy, including the Craig Hospital Aphasia Treatment (CHAT) Program later.

13. Careful review of the aforementioned "Do's and Don'ts" lists the first "Do" as Claimant needing to have 24 hour supervision, meaning that "someone [needed] to be home with [Claimant] at all times." The Do's and Don'ts list encourages Claimant to assist with the completion of certain daily activities, i.e. laundry, cleaning the dishes, cleaning his room and cooking with supervision (emphasis added). The list also instructs Claimant not to drive a vehicle, use power or hand tools capable of causing injury, engage in unsupervised cooking, build or tend to fires, use weapons, or walk outside unsupervised. Moreover, the list provides that Claimant was not to pay his bills without supervision nor was he to shower without letting a family member know he was doing so. As a "general rule of thumb", Claimant was to refrain from any activity that could cause harm to him or anyone else if it was not done perfectly.

14. Ms. Ferry was present during the discharge-planning meeting. She testified that she took the Do's and Don'ts list to mean that Claimant would need constant supervision upon his discharge. Leanne Endriss, Claimant's other sister-in-law, was also present at the discharge planning meeting. Ms. Endriss testified that she understood from the discharge instructions that "David would need 24-hour care for his safety, that he that he wasn't able to make decisions safely, and that instead of going to a home -- because they had talked about putting him in a home healthcare -- not in-home healthcare, but in a facility -- . . . Vicky said he can come to my house, I will take care of him. And so they knew that and they thought that was a good fit."

15. Ms. Ferry's interpretation of the "Do's and Don'ts" list as it relates to Claimant's need for 24 hour supervision is supported by the various discharge summaries from the interdisciplinary rehabilitation team members and the testimony of Ms. Endriss. Based upon the evidence presented the ALJ credits Ms. Ferry's interpretation of the Do's and Don'ts list to find that upon his discharge, Claimant required substantial structure and 24 hour supervision to abstain from certain inherently dangerous activities- for his safety and the safety of others given his cognitive deficits.

16. Claimant was discharged from Craig on July 12, 2017. Per the discharge plan, Claimant returned to Colorado Springs to live with his wife and Ms. Ferry in Ms. Ferry's home as he required more care and supervision than his wife could provide. Claimant has lived with Ms. Ferry continuously since his discharge from Craig. Since his discharge, Ms. Ferry has transported him to his various medical appointments, has assisted him in preforming activities of daily living, has managed his prescriptions, assisted with cognitive retaining through various activities/games, has assisted with Claimant's social reintegration and has taken over his finances. The evidence presented persuades the ALJ that per the discharge plan Ms. Ferry has assumed Claimant's care and has provided 24-hour supervision.

17. At the time of Claimant's discharge, Dr. Spier indicated that Claimant should continue with physical therapy, occupational therapy, speech and language therapy, and neuropsychology care; however, he did not write a script for home care services. Rather, Dr. Spier indicated that Claimant should follow up with his primary care physician and return to Craig to participate in the CHAT Program, and for follow up as needed.

18. As noted, Ms. Douglas, NCM was present as the discharge-planning meeting held July 11, 2017. Upon Claimant's discharge, NCM Douglas helped arrange and schedule the follow-up therapy appointments recommended by Dr. Spier. She did not, however, arrange for Claimant to be seen by an authorized treating provider as part of the workers' compensation claim. Ms. Ferry testified that after returning home from Craig, Claimant was running out of his medications, including Keppra. As NCM Douglas had yet to schedule an appointment for Claimant to see a physician under the workers' compensation claim, Ms. Ferry took him to his primary care physician, Dr. Strode to get his prescription(s) refilled.

19. Because Dr. Spier did not write a prescription for home supervision and no follow-up appointment had been made for Claimant to be evaluated by a physician under the workers' compensation claim, no specific recommendations, outside of the "Do's and Don'ts" list regarding the scope of continued home supervision existed after Claimant's discharge from Craig. According to NCM Douglas, Dr. Spier had little interest in getting involved in home care issues, noting further that he did not want to write any additional prescriptions for home care and that Claimant should follow-up with whomever he saw in Colorado Springs after his discharge for home care/supervision concerns.

20. Because no follow-up appointment had been scheduled for Claimant to see a physician under the workers' compensation claim following his discharge from Craig and because Ms. Ferry was scheduled to be on vacation from August 2 through August 8, 2017, arrangements were made though NCM Douglas to secure an alternate care giver to cover Ms. Ferry's supervision of Claimant while she was out of town. As part of this process, Dr. Spier issued a prescription for home care services providing for both certified nursing assistant care and home supervision on July 26, 2017. The prescription provides as follows: "CNA Care 2-4 hours per day 5-days per week (reevaluate in 4 weeks) 24 hr. supervision (8-2-17 to 8-8-17)."

21. As noted above, Leanne Endriss is Claimant's sister-in-law. She is also a professional caregiver. Ms. Endriss was chosen to fill in for Ms. Ferry while she was on vacation. Relying on the prescription written by Dr. Spier, Ms. Endriss provided supervision to Claimant. Insurer has paid Ms. Endriss for the services she rendered and payment for this period of supervision is no longer in controversy. Concerning the CNA care ordered by Dr. Spier, the evidence presented persuades the ALJ that this care was provided by an outside agency and Insurer has paid the costs for the same.

22. Claimant was evaluated by Dr. Miguel Castrejon on August 17, 2017 as part of the worker's compensation claim. While Dr. Castrejon made multiple recommendations, referrals and provided Claimant with prescriptions for language re-education, a right shoulder and lumbar MRI, he did not write a prescription for continued 24-hour supervision.

23. On August 31, 2017, Claimant met with his Occupational Therapist, Sarah Wrench for his 16th visit of occupational therapy. Ms. Wrench indicated that the Claimant had made good overall progress and opined the Claimant was ready to transfer to outpatient services. Ms. Wrench had previously indicated the Claimant was able to feed himself independently, as he was able to utilize all utensils, adaptive devices, pour liquids and open containers without risk.

24. Ms. Wrench indicated that Claimant could independently and safely perform daily living tasks such as washing his face, shaving (including blade insertion), bathing combing hair and brushing teeth independently, and without supervision. Ms. Wrench indicated that the Claimant was able to answer phones, dial numbers, transfer in and out of bed, administer the changing and dressing of his own clothing, and that he could walk independently (without need of human assistance, including on uneven surfaces). As for toileting, it was indicated that the Claimant was able to manage all aspects of toileting safely and without assistance.

25. Ms. Wrench specifically indicated that the Claimant was able to ambulate and walk independently of 165 feet or more, on all surfaces. It was also indicated that Claimant was able to ascend and descend a full flight of stairs without the need of any supervision. Claimant was noted to be able to open tight jars, perform chores such as washing walls, carry groceries or briefcase, climb stairs, and transfer from chair to chair without difficulty.

26. Claimant was evaluated by Dr. Timothy Sandell on November 15, 2017 in the presence of his wife and NCM Douglas. It is noted in the report generated from this date of visit that Dr. Castrejon had recently evaluated Claimant and that Claimant was referred to Dr. Sandell to become his "primary care provider." Similar to Dr. Castrejon, Dr. Sandell made recommendations for re-evaluation, primarily with regard to his shoulder, ENT services, and neuroopthalmology. However, the record presented from this date of service is devoid of any indication that Claimant required any period of home supervision nor does the record evidence presented support a finding that Dr. Sandell ordered such services.

27. On November 17, 2017, Ms. Ferry submitted an invoice to Insurer seeking reimbursement for the care/supervision services she has rendered to Claimant. The invoice specifically requests that she be compensated for providing 24-hour supervision of Claimant from July 12, 2017 to August 1, 2017 for a total of 496 hours at $16.00/hour. In her invoice, Ms. Ferry also requested to be compensated for eight hours a day at $12.00/hour for home health care services/supervision from August 8, 2017 through November 17, 2017, for an additional 452 hours.

28. The ALJ finds $16.00 a reasonable rate of compensation for the home health care/supervision services provided to Claimant by Ms. Ferry.

29. NCM Douglas testified that she is currently the nurse case manager assigned to the Claimant's case. Ms. Douglas testified that she was assigned to the case shortly after Claimant was admitted to the hospital in April of 2017. Ms. Douglas also testified that she had attended Claimant's discharge meeting at Craig Hospital on July 12, 2017. Ms. Douglas indicated that at the discharge meeting, it was agreed that Claimant would continue with physical therapy, occupational therapy, and speech and language therapy. Ms. Douglas indicated that she arranged for these treatments as she had received the prescriptive orders for the therapy services from Craig Hospital.

30. Despite her attendance at the discharge-planning meeting, NCM Douglas testified that Dr. Spier did not recommend 24-hour care, "except for the time frame that the family was not going to be in attendance." NCM Douglas also testified that she was did not see the list of Do's and Don'ts that was prepared for Claimant in advance of his discharge. Not only did NCM Douglas testify that she did not see the list, she maintained that it was not "necessarily conveyed in the conference." NCM Douglas' testimony is inconsistent with the more persuasive medical records and the testimony of Ms. Ferry and Ms. Endriss tending to establish that she knew or should have known that Claimant was to be supervised 24 hours per day upon discharge and that Dr. Spier, as the rehabilitation team leader assisted in developing this requirement and supported it. (See records of Discharge Report, Claimant's Exhibit 12, page 88 (cc'd Kathy Douglas); see also, Team Conference report, id., "the discharge plan was discussed. A list of do's and don'ts was provided to the patient. He is initially being followed by home health care and will progress to outpatient therapy…" , cc'd to Kathy Douglas. id., page 88).

31. Ms. Douglas also testified that Dr. Spier's prescription written on July 26, 2017, was the only prescription for home supervision that has been issued in this case. Careful review of the evidence presented, supports this testimony.

32. To the extent that Claimant actually raised the issue at hearing, the ALJ finds that he failed to prove that Dr. Spier requested prior authorization of 24-hour care/supervision. To complete a prior authorization request under WCRP 16-10, the provider shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting medical documentation. Supporting medical documentation is defined as documents used in the provider's decision-making process to substantiate the need for the requested service or procedure. In this case, there is a dearth of evidence to support a finding that Dr. Spier

sent any documentation to the adjuster containing the necessary information required by Rule 16-10(F(1)(b), W.C.R.P. to make it a completed request for prior authorization for 24-hour care/supervision.

33. Based upon the evidence presented, the ALJ is persuaded that the Do's and Don'ts list, along with the specific recommendations of Claimant's physical therapist, occupational therapist and psychologist, establish that Claimant did not have the capacity to manage his activities of daily living as a direct consequence of his industrial injury. Accordingly, the ALJ finds that the 24-hour supervision needed to assure Claimant's safety and wellbeing upon discharge through the last date of Ms. Ferry's vacation reasonable, necessary and related to his admitted work injury.

34. Moreover, the evidence presented persuades the ALJ that while Dr. Spier did not write a prescription for such supervision, he clearly intended for Claimant to be supervised as part of his discharge to Ms. Ferry's home. Because Dr. Spier did not alter the "Do's and Don'ts" list prior to August 2, 2017, and because he wrote a prescription for 24 hour supervision while Ms. Ferry was on vacation, it is reasonable to infer that Claimant required 24 hour care/supervision prior to Ms. Ferry's vacation, i.e. following his discharge on July 12, 2017, to the date of her vacation on August 2, 2017. In this case, the ALJ is persuaded that the "Do's and Don'ts" list is tantamount to an order/prescription for 24-hour care/supervision upon Claimant's discharge to Ms. Ferry's home. Accordingly, the ALJ is persuaded that Ms. Ferry is entitled to reimbursement for the care/supervision she provided from July 13, 2017 through August 2, 2017.

35. While Ms. Ferry may have provided some amount of care/supervision on July 12, 2017, the evidence presented fails to establish that the care/supervision she rendered was likely 24 hours in length. To the contrary, the evidence presented establishes that Claimant was discharged from Craig on this date, so he clearly spent some part his day in the hospital under the care and supervision of the hospital staff. Consequently, the ALJ finds the claim for 24-hour reimbursement for July 12, 2017 unpersuasive. The evidence presented also persuades the ALJ that Ms. Ferry likely cared for and supervised Claimant for some period of time on August 2, 2017 prior to departing for vacation. The ALJ finds Ms. Ferry's indication that she provided 7 hours of care/supervision to Claimant on August 2, 2017 credible and persuasive.

36. While the ALJ is convinced that Dr. Spier ordered Claimant to be supervised 24 hours a day upon his discharge through August 8, 2017, the ALJ agrees with Respondents that the issue of ongoing care/supervision beyond August 8, 2017, was not specifically endorsed for hearing. Consequently, the ALJ declines to address and reserves for future determination, Claimant's homecare/supervision needs after August 8, 2017.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

C. In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). Concerning the credibility of witnesses, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As found, the ALJ credits the testimony of Ms. Ferry and Ms. Endriss over the contrary testimony of NCM Douglas regarding Claimant's need for 24-hour supervision. While there is inconsistency regarding the specific period of time Ms. Ferry provided Claimant care/supervision on July 12 and August 2, 2017, the balance of the evidence establishes that Dr. Spier supported Claimant's discharge from Craig if Claimant could be provided with 24-hour supervision. Thus, while the invoice submitted by Ms. Ferry does not support that she provided 24-hour supervision of Claimant on July 12, 2017, the ALJ concludes that her testimony regarding Claimant's need for supervision is in keeping with Dr. Spier's intent and with the content of the discharge summaries of the interdisciplinary rehabilitation team at Craig. Ms. Douglas' contrary testimony is unpersuasive.

Medical Benefits- Essential Services/Supervision

D. Section 8-42-101(1)(a), C.R.S. provides that the respondent is liable for medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Colorado Compensation Insurance Authority v. Nofio, supra.* Home health care services fall within this provision. *See Suetrack USA v. Industrial Claim Appeals Office, supra.* Whether treatment or services provided under § 8-42-101, C.R.S. are reasonable and necessary is one of fact for resolution by the ALJ. *See City of Durango v. Dunagan,* 939 P.2d 496 (Colo.App. 1997). In this case, Respondents contend that the need for 24-hour supervision as contained in the "Do's and Don'ts" list is not reimbursable because Claimant's occupational therapist, Ms. Wrench reported on August 31, 2017, that Claimant does not need any assistance with personal hygiene, bathing, eating, or dressing. Consequently, Respondents assert that the essential services provided by Ms. Ferry are limited to purely supervising Claimant while he performs his daily activities and household chores. In short, Respondents argue that the essential services/supervision provided by Ms. Ferry are not incidental to the provision of medical treatment and thus, not compensable under the Act.

E. To be a compensable medical benefit, the service must be medical in nature or incidental to obtaining such medical or nursing treatment. *Country Squire Kennels v. Tarshis,* 899 P.2d 362 (Colo.App. 1995). A service is medical in nature if it is reasonably needed to cure and relieve the effects of the injury and related to the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo.App. 1997). Services which have been found to be "medical in nature" include home health care services in the nature of "attendant care" if reasonably needed to cure or relieve the effects of the industrial injury. *Atencio v. Quality Care, Inc.*, 791 P.2d 7 (Colo.App. 1990). Such services may encompass assisting the claimant with activities of daily living, including matters of personal hygiene. *Suetrack v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo.App. 1995). Further, it is well established that a claimant's spouse may be compensated for nursing type services. *Edward Kraemer and Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo.App. 1992). Here, the evidence presented persuades the ALJ that the services/supervision rendered during the period July 13, 2017 to August 2, 2017 were central to Claimant's personal care, health and wellbeing. Specifically, Claimant required transportation to/from all of his follow-up visits as he was precluded from driving. Moreover, Claimant required supervision and assistance to take a shower, cook, clean, do laundry and manage his prescriptions and finances. Finally, Claimant required assistance in brain stimulation and social reintegration to improve his condition. Based upon the evidence presented, the ALJ concludes that the services rendered to Claimant by Ms. Ferry were both medical in nature and incidental to obtaining medical care. Moreover, as found, the ALJ is convinced that such services were reasonable and necessary to assist in Claimant's medical recovery, i.e. to prevent deterioration of his condition and otherwise cure and relieve him of ongoing cognitive dysfunction by precluding his engagement in hazardous activities and otherwise expose him to additional brain and social stimulation. Hence, the ALJ concludes that the

services and supervision provided by Ms. Ferry from July 13, 2017 through August 2, 2017 were medical in nature and thus, compensable.

F. In addition to contending that the services/supervision provided by Ms. Ferry are not medical in nature, Respondents argue that they are not reimbursable because outside of Dr. Spier's, July 26, 2017 script, none of the treating providers in the case have issued a prescription for such services/supervision. As noted above, the ALJ finds that Claimant did not specifically endorse the issue of Claimant's entitlement to ongoing home care/supervision after August 8, 2017. Consequently, this order does not address that issue. Nonetheless, Respondents also contend that Ms. Ferry is not entitled to reimbursement for the care/supervision she rendered to Claimant from July 13, 2017 through August 2, 2017, because of the absence of a written a prescription. The ALJ is not persuaded. In rejecting Respondents' contention, the undersigned finds the claim of *Brenda Kern v. St. Mary's Hospital*, W.C. 4-391-482 (ICAO, January 17, 2001) instructive. In *Kern*, the Claimant suffered severe head and brain injuries, including a right temporal lobe hemorrhage, a subdural hematoma and a fractured skull. Ms. Kern's husband was spending a substantial amount of time with her performing essential services including "food planning and preparation, cognitive training, encouraging the claimant to eat (because the industrial injury resulted in the claimant's loss of smell and taste), developing daily schedules, assisting the claimant with daily work assignments from Dr. Bowen, preparing daily medications, dispensing daily medications, assisting the claimant with her hearing aide, transporting the claimant to the grocery store where she shops as part of her cognitive training, performing massages, calling in and picking up prescriptions, assisting the claimant in a prescribed exercise program, and other duties related to the claimant's personal hygiene and incontinence."

G. Citing *Atencio v. Quality Care, Inc*., 791 P.2d 7 (Colo.App. 1990), the *Kern* respondents challenged the provision of essential services on the grounds that such services were "not compensable in the absence of a medical prescription from the attending physician." Because, no treating physician had prescribed attendant services prior to June 3, 1999, the *Kern* respondents reasoned that the record was "legally insufficient to support an award of attendant services prior to that date." In the instant claim, Respondents likewise assert that because no prescription for essential services/supervision was written covering times before August 2, 2017, the services/supervision provided by Ms. Ferry up to her vacation were not reasonable or necessary.

H. Setting aside the fact that the undersigned is persuaded that the "Do's and Don'ts" list is the equivalent of a prescription for 24-hour care/supervision, the ALJ finds Respondents' argument concerning the need to have a prescription to award the provision and reimbursement of essential services contrary to the Panel's decision in *Kern*. Indeed, the Panel in *Kern* rejected this argument noting as follows:

> Contrary to the respondents' contention the courts have not interpreted § 8-42-101(1)(a) to limit compensable home health care to

> services which are medically prescribed. *Atencio v. Quality Care, Inc., supra*. In *Atencio*, the claimant suffered compensable injuries to her upper extremities. As a result of [her] injuries, the claimant was severely limited in the use of her hands. The treating physician prescribed housekeeping and attendant services which were awarded by an ALJ. However, the Industrial Claim Appeals Panel concluded such services were not compensable under the predecessor statute to § 8-42-101(1)(a) and, therefore, set aside the award. The Supreme Court disagreed and concluded that such services are compensable if medically necessary or incidental to obtaining such treatment. Further, the court held that the question of whether the services "qualify under this test" was one of fact for the ALJ. In concluding that the record contained "substantial and sufficient" evidence "both in quality and quantity to support" the ALJ's award, the court relied on the testimony of the claimant and the claimant's attendant that the claimant is unable to bathe, dress, perform home health care or sanitary functions or household chores without assistance. *Id*. at 8. The court also relied on "undisputed" evidence that the treating physician prescribed housekeeping and attendant services and that such services were necessary. *Id* at 9. However, nothing in *Atencio* suggests that the medical prescription for attendant care was a prerequisite to the award of attendant services. To the contrary, the court held that the facts "considered together, were sufficient to support" the finding the requested attendant care met the test of being "medical in nature." *Id* at 9. Therefore, we reject the respondents' contention that *Atencio* supports their assertion that as a matter of law, attendant services which are not prescribed by the treating physician are not compensable.
>
> Furthermore, a medical prescription for attendant care services is not determinative of whether such services are reasonably necessary. Rather, a medical prescription or a physician's supporting testimony is merely some evidence the ALJ may consider in determining whether the requested services are "medical in nature." *See Bellone v. Industrial Claim Appeals Office, supra.* Consequently, the ALJ was not precluded from awarding attendant services greater than the services subsequently prescribed by the treating physicians.

I. While the facts are not exactly aligned with the case at bar, the decision reached in *Kern* persuades the ALJ that an award of essential services is not predicated on the existence of a prescription. Moreover, as announced in *Kern,* the ALJ is not precluded from widening the scope of services awarded beyond that prescribed by the treating physician provided that the care/services are medical in nature or incidental to obtaining medical treatment and otherwise reasonable and necessary. What occurred in the matter at hand mirrors what occurred in *Kern*, namely that Claimant was receiving essential services without a formal prescription written by a treating physician. Because the ALJ concludes that a prescription is not necessary and because the

care/supervision Ms. Ferry provided between July 13, 2017 and August 2, 2017 was medical in nature, Claimant has proven by a preponderance of the evidence that he is entitled to reimbursement to Ms. Ferry, at a rate of $16.00 per hour for a total of 487 hours. (20 days (7/13/2017-8/1/2017) × 24 hours/day + 7 hours on 8/2/2017 = 487 hours).

ORDER

It is therefore ordered that:

1. Claimant has proven that Dr. Spier ordered home care/24-hour supervision upon Claimant's discharge from Craig Hospital on July 12, 2017. Even if Dr. Spier had not ordered such home care, the ALJ concludes that a prescription for such services is not necessary to order reimbursement to Ms. Ferry for services she rendered between July 13, 2017 and August 2, 2017.

2. Claimant has proven by a preponderance of the evidence that the care/24-hour supervision rendered by Ms. Ferry between July 13, 2017 and August 2, 2017 was reasonable, necessary and related to his admitted industrial injury.

3. Claimant's request for a determination of whether he is entitled to ongoing home care/24-hour supervision after August 8, 2017, along with all matters not determined herein are reserved for future determination.

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

DATED: February 6, 2018

/s/ Richard M. Lamphere

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

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he was injured in the course and scope of his employment, when he was injured in an automobile accident on his way home from work?

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant works as a maintenance technician for Sylvester's Maintenance. The company is headquartered in Englewood, Colorado, a suburb of Denver. The company performs building maintenance jobs, such as welding, plumbing, general building maintenance, and repairs for commercial businesses such as grocery stores and auto dealerships. The Claimant testified that it is a "fairly small" business with about 10-11 other maintenance techs that cover jobs, mainly in the Denver area. The Claimant worked there for about a year before his accident.

2. On June 23, 2017, a Friday, the Claimant finished his last job for the day. This was a Friday. After finishing this job, the Claimant went by the office and removed some trash from his truck at the company headquarters. He noted his hours on his handwritten timesheet when he finished the job at 4:30 pm. The Claimant then proceeded to drive to his home in Black Forest.

3. As Claimant neared his home, he was involved in a two-vehicle accident. The Claimant was approaching an intersection where he had the right of way, and the other driver failed to stop at a stop sign. The Claimant testified that he stepped hard on the brakes but could not avoid 't-boning' the other vehicle. After the impact, his truck veered off the left side of the road and ran up an embankment and into a brick wall.

4. Cell phone records indicate the last time Claimant used the phone for work purposes was at 2:55 p.m. The next entry was a call at 5:23 p.m., sometime after the accident occurred.

5. Claimant's truck was equipped with a safety system that automatically called 911 and reported the accident to authorities. The Claimant testified, and the phone records confirm, that after the accident he called his work supervisor, Robert Lashway. Soon he also received a call from the company owner James Sylvester. After the emergency response team arrived, both he and the other driver were medically examined at the scene.

6. The Claimant testified that the emergency responders recommended that he seek emergency treatment. The Claimant did not immediately seek medical care. He

stayed at the scene to gather contents of the truck which were loose and scattered at the scene. At the time of the accident the truck was loaded with tools and parts. There was also a welder mounted in the truck bed. Many of the hand tools on the truck were the property of Claimant.

7. The Claimant submitted as evidence photographs he took at the scene, showing very significant damage to the truck he was driving, a 2016 Ford F-350. The airbags had deployed. The truck was towed back to the company headquarters in Englewood and the Claimant went home with his wife, who had come to the accident scene. At home he showered, and then by about 9:00 pm he felt bad and decided to go to the ER. His wife drove him to the ER, where he was checked out and put under observation. He testified that the ER doctor recommended he take a couple weeks off.

8. The Claimant suffered injuries to his right knee, which rammed the dash, and his left shoulder, from the shoulder belt, and was later diagnosed with a mild traumatic brain injury.

9. The Claimant was not directed by his employer to seek treatment with a work comp provider. The Claimant had been referred to Dr. Bradley Vilims by his personal injury attorney. Dr. Vilims saw the Claimant on July 18 for treatment. Dr. Vilims diagnosed mild traumatic brain injury, neck pain and headaches, mid to upper lumbar pain, and left knee injury. He recommended continued chiropractic treatment and made a referral for treatment of anxiety and fear avoidance behavior. He took the Claimant off work for 3 weeks.

10. The Claimant lives in Black Forest, a suburb of Colorado Springs. He and one other maintenance tech live outside of Denver, but the other techs all live in the Denver area. Mr. Sebastian testified that, if he was driving to a job in Denver, he would typically clock in for the day about when he hit highway 470, or about 15 minutes away from the home office in Englewood. In this way, he could either report to the home office, or be diverted to an assigned job. If he was working on a job in Colorado Springs, he testified that "…as soon as I walk out the front door I'm on the clock." Maintenance techs such as Claimant are not required to first go to the home office in Englewood office prior to clocking in.

11. The exception to this is required safety briefings, which are held on Monday mornings at the home office in Englewood. Maintenance techs are not paid for their time for this weekly commute to Englewood, including Claimant, who lives about an hour away.

12. The maintenance techs are each provided with a company truck and a company owned cellphone. They are also provided with a company owned credit card to pay for gas. The techs are allowed to drive the company trucks home and keep them at their homes. The cell phones are provided for the techs by the company, who has the contract and pays the cell phone bills. The Claimant testified that this was his only cell phone, and he made personal calls on the cell phone as well as work calls. The cell phone had a calendar function, which Employer would populate with the job

assignments, so the maintenance techs could arrange their workday. Additionally, Claimant wore a company issued shirt and hat to work each day.

13. The Claimant testified that the new truck and cell phone were offered to him as part of the negotiations when he was hired. The Ford F-350 he drove was a new truck the Employer purchased specifically for him when he was hired. Claimant considered this truck and cell phone to be a personal benefit for him. The Claimant testified that he considered the free cell phone and use of the truck as "enticing factors" in the job offer. The photographs of the truck show that the vehicle bears signage on both sides advertising for the Employer Sylvester's Maintenance.

14. The Claimant testified that, at the time of his accident, the truck had about 60,000 miles on it and it was 8 months old. He estimated that he drove about 300 to 400 miles per day in the truck. The rear of the truck had compartments for tool storage. There is a rack on the back of the truck that held a ladder. After the accident there were tools and parts scattered around the scene. The record is unclear which of these particular items were Claimant's, and which belonged to Sylvester's Maintenance. Such distinction, however, is not important to make in this case.

15. Mr. Sylvester, the owner of Sylvester's Maintenance, testified for the Respondents. He confirmed that his maintenance techs all drove company trucks which he allows them to keep at their homes. He testified that, "…my agreement with the employees is you have the company vehicle at your disposal 24 hours a day 7 days a week, if you need it for personal, you are allowed to use it, my only rule is you put personal fuel into it. That's my only requirement."

16. When he was questioned, "So, the employee has use of the vehicle, but it's the fuel that's the issue?" Sylvester answered, "Sure". Mr. Sylvester was asked if there were company materials on the truck and stated, "We were never able to do an inventory because Mr. Sebastian is the one who drives that truck every day, so I don't know 100% what is on that truck, so the answer is no."

17. Mr. Sylvester confirmed that the maintenance techs are "on the clock" for the entire business day except for lunch, and they are normally paid to travel between jobs. The techs are not required to stop in the office on their way to or from work, with the exception of Monday mornings, when they attend a safety meeting at the office.

18. He further testified, however, that Maintenance Techs are not paid to commute, unless they are picking up parts from the home shop in order to perform a particular job. He confirmed that the issuance of company trucks and call phones are a fringe benefit for his workers. He confirmed that he considers Claimant to be an employee of Sylvester's Maintenance.

CONCLUSIONS OF LAW

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

Generally

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

B. It is the Claimant's burden of proof to establish compensability of her injury by a preponderance of the evidence. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina*, 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A*., 104 P. 3d 273 (Colo. App. 2004); *Hosier v. Weld County Bi-Products,Inc.*, W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, there are few material conflicts in the testimony to resolve. The ALJ finds Claimant to be credible, despite evidence of some post-concussion symptoms. The ALJ finds James Sylvester to be credible as well.

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

Compensability-"Going to Work"

E. In general, a Claimant who is injured while going to or coming from work does not qualify for workers' compensation benefits because such travel is not considered to be performance of services arising out of and in the course of employment. *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1999). This principle is known as the "going to and from work" rule. However, many exceptions to the general rule against compensability for travel to and from work have been recognized "to account for varying and unusual circumstances that create a causal connection between the employment and an injury that occurred while the employee was going to and from work." *Id.* at 863-64. The fact that an employer provides transportation for an employee does not, by itself, make an injury compensable under the Colorado Workers' Compensation Act. The Madden Court cited four possible variables in assessing if an exception to the general rule exists: "These variables include but are not limited to:

> (1) whether the travel occurred during working hours,
> (2) whether the travel occurred on or off the employer's premises,
> (3) whether the travel was contemplated by the employment contract, and
> (4) whether the obligations or condition of employment created a 'zone of special danger' out of which the injury arose."

F. The Colorado Court of Appeals applied the "going to and from work" rule in *Varsity Contractors & Home Ins. Co. v. Baca,* 709 P.2d 55 (Colo. App. 1985), to an "on-call" employee involved in a motor vehicle accident while he was heading home to shower and change clothes in preparation for another shift that night. The workers' compensation benefits were denied. The hearing officer (prior to designation of ALJ) found that the accident was not compensable because it occurred while the claimant was traveling between work and home, as he was doing nothing in furtherance of the employer's business. The Court of Appeals found that even if the Claimant was going home to shower and change clothes in preparation for working another shift that night, that was insufficient to constitute the requisite special circumstances needed to create a causal connection between the employment and the injury.

G. In *Baca,* the Claimant argued that other factors also established that he was working within the course of his employment, such as the fact that he sometimes did office work at home, the car and fuel were provided by his employer for his personal use, and he carried a beeper and therefore, was "on-call" while driving home. The Court found each of these factors to be insufficient under the totality of the circumstances. The *Baca* Court observed that there was no evidence that the Claimant intended to perform office work at home on the evening of the accident. Nor had he performed work at home with sufficient regularity that it could "genuinely and not fictitiously be that the home had become part of the employment premises." The *Baca* Court further noted that the car in which the Claimant was injured was provided for both personal and business use, and was neither operated by nor under the direct control of the employer at the time of the accident. Thus, an injury resulting from the Claimant's operation of the vehicle did not arise from the course and scope of employment.

Madden Variables (1) "Working Hours", and (4) "Zone of Danger"

H. Claimant concedes that he had had "clocked out" at 4:30 p.m., and was on his way home when the accident occurred at least 30 minutes later. He concurs that *Madden* Variable (1) does not apply here.

I. Claimant further concedes that *Madden* Variable (4) does not apply, as there was no "zone of danger" that gave rise to this injury. The accident occurred on public roads, miles from where Employer maintains a business.

Madden Variable (2) "Premises of Employer"

J. Claimant argues that since Employer owns the truck, the truck attains the status of 'mobile office'- thus making said truck the ***'premises'*** of Employer. Claimant reasons that this truck contains what is needed to complete the day's work (cell-phone, tools, and parts), and he spends his work day in this 'mobile office'. The ALJ does not concur. What is contemplated by the employment relationship herein is that Claimant will spend no more time than is necessary to get from one job to the next in his truck, after which he will spend the *majority* of his work day performing repairs on the **'premises'** *of Employer's client businesses.* Only in this way does Employer bill the client.

K. An argument might be advanced that it is too rigid to confine the term 'premises' to an Employers' *real property* instead of an appropriately equipped motor vehicle- a mobile food truck or bookmobile, for example. In such case, the employment relationship might indeed contemplate such equipped truck as being 'premises', since such a worker would spend the entire work day inside, mostly while stationary, and perhaps situated on land leased for this limited purpose. Such is not the case here. The ALJ finds that Employer's truck has not obtained the status of 'premises'.

Madden Variable (3) "Contemplated by Employment Contract"

L. Claimant contends that this accident occurred while he was engaged in 'activities benefitting the employer.' As examples, he cites that tools and parts were retrieved from the ground immediately afterwards, and that the truck had signage identifying the owner of the business. Regarding the latter, this truck's insignia falls short of being a 'moving billboard' for Employer. While arguably some benefit might derive, the ALJ finds such benefit to be *de minimis,* especially since Sylvester's Maintenance is not a retail business or product appealing to consumers *("Coca Cola", "ABC Plumbing", "Two Men and a Truck",* and the like). Instead, the only persons who would ever be influenced by the logo would be prospective owners or managers of commercial businesses, such as Employer's clients. The primary purpose of this signage is more likely simply to identify the truck to the clients while parked on their premises.

M. Nor would picking up the *post-accident* flotsam somehow mean that Claimant was *'rendering services as contemplated by the Employment Contract' during the accident.* A travelling salesman injured in a company car on his way to church on

Sunday morning does not 'render such services to his employer' merely by vacuuming the glass from the floorboard afterwards, or retrieving his sales brochures from the pavement, even though this constitutes mitigation of his employer's damages. Nor would calling a supervisor for guidance on arranging for a tow ***after the fact*** retroactively mean that the accident itself resulted from 'rendering services to the employer.'

N. Nor was Claimant on "travel status." Employer did not require Claimant to be at this intersection when the accident occurred. Claimant was not required to be on the way home at all. He could just as easily be on the way to his favorite restaurant, or his son's little league game across town. "Just gas up the truck. Enjoy your weekend." No further jobs for that workday were contemplated, once he removed the trash from the truck and 'clocked out' after his last assignment of the day. In this case, Employer paid the note and insurance on the truck for use by Claimant 24/7. In theory, at least, Claimant paid for his personal gasoline. There is no evidence in the record that Employer paid for meals or lodging under any circumstances. This accident did not occur 'reasonably incidental to the express or implied terms of his employment.' Once Claimant clocked out, he could do as he pleased, up until the Monday morning safety meeting.

O. There being no other "*Madden* variable" applicable to this case, the ALJ concludes that Claimant was simply driving home from work when this unfortunate accident occurred.

ORDER

It is therefore ordered that:

1. Claimant's claim for Workers Compensation benefits is denied and dismissed.

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

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

DATED: February 7, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that penalties should be assessed against respondent pursuant to Sections 8-43-304 and 8-43-305, C.R.S. for respondent's alleged violation of a court order dated June 28, 2016.

- Whether claimant has demonstrated by a preponderance of the evidence that penalties should be assessed against respondent pursuant to Sections 8-43-304 and 8-43-305, C.R.S. for respondent's alleged violation of a settlement order dated May 26, 2017.

FINDINGS OF FACT

1. The parties previously went to hearing on June 9, 2016 before ALJ Mottram on the issues of compensability, reasonable and necessary medical treatment, temporary total disability (TTD) benefits, and employer's failure to maintain workers' compensation insurance. Respondent participated in the June 9, 2016 hearing *pro se*.

2. On June 28, 2016, ALJ Mottram issued Findings of Fact, Conclusion of Law, and Order. In that order ALJ Mottram determined that claimant suffered a compensable injury while employed with respondent. Respondent was ordered to pay for medical treatment related to the work injury. Respondent was also ordered to pay TTD benefits, which ALJ Mottram increased by 50% due to respondent's failure to carry workers' compensation insurance. The June 28, 2016 order also instructed respondent to post a bond with the Division of Workers' Compensation (DOWC) in the amount of $3,400.00.

3. Following the June 28, 2016 order by ALJ Mottram, respondent obtained legal representation from Melissa Loman Evans, Esq. While represented by counsel, respondent entered into a settlement agreement with claimant. The parties agreed to a full and final settlement in which respondent would pay claimant $15,000.00. On May 26, 2017, the settlement agreement was approved by the DOWC Director.

4. Mr. Warnock testified at the hearing in this matter and stated that he has not paid any money to claimant pursuant to the June 9, 2016. Mr. Warnock also testified that he did not post a bond in the amount of $3,400.00 as ordered on June 9, 2016. Mr. Warnock testified that he has made no payments toward the settlement amount that was approved by the DOWC on May 26, 2017.

5. At hearing, respondent attempted to argue that claimant was not an employee of respondent at the time of the injury. Respondent further argued that because it is respondent's position that claimant was not their "employee" that the June 28, 2016 order directing "the employer" to act does not apply to them.

6. At hearing, the ALJ explained to respondent that the issue of whether claimant was an employee was not an issue properly before the ALJ. Likewise the issue of whether the claimant suffered a compensable injury, was previously adjudicated at the June 9, 2016 hearing.

7. The ALJ credits the testimony of Mr. Warnock and finds that claimant has demonstrated that it is more likely than not that respondent has taken no steps to comply with the June 28, 2016 order issue by ALJ Mottram.

8. The ALJ credits the testimony of Mr. Warnock and finds that claimant has demonstrated that it is more likely than not respondent has taken no steps to comply with the settlement order issued by the DOWC on May 26, 2017.

9. Respondent testified at hearing that because of fines assessed by the DOWC, the company is likely facing bankruptcy. While the ALJ can appreciate respondent's situation, the issue of fines assessed by the DOWC is not properly before the ALJ at this time.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that any employer or insurer:

> "who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey any lawful order…, shall be subject to … a fine of not more than one thousand dollars per day for each such offense."

This provision has been construed as applying to violation of an order issued by an ALJ. *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

4. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If respondent committed a violation of the statute, rule or order, penalties can be imposed only if respondents' actions were not reasonable under an objective standard. *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

5. An order is defined as including "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." *See* Section 8-40-201(15), C.R.S. The fine shall be apportioned in whole or part at the discretion of the director or administrative law judge between the aggrieved party and the workers' compensation cash fund created in Section 8-44-112, C.R.S. with the amount apportioned to the aggrieved party being a minimum of fifty percent of any penalty assessed. *See* Section 8-43-304, C.R.S. In addition, Section 8-43-305 C.R.S. provides that each day a party engages in the violation is construed as a separate offense.

6. Here respondent has failed to comply with two separate orders. The first order was issued on June 28, 2016 by ALJ Mottram. The second is the settlement order issued on May 26, 2017 by the DOWC.

7. In each instance respondent does not dispute that he has failed to comply with these orders. Respondent's only argument on the issue of penalties is Mr. Warnock's belief that claimant was not an employee of respondent. Again, the question of whether claimant was or was not respondent's employee was at issue at the initial proceeding in June 2016 and is not properly before the ALJ at this time.

8. The ALJ finds that respondent did not act reasonably in violating both the June 28, 2016 order and the May 26, 2017 settlement order.

9. The ALJ concludes that penalties shall be assessed in this matter for respondent's failure to comply with the June 28, 2016 order. However, once the settlement was reached by the parties, respondent was responsible for complying with the settlement order beginning on May 26, 2017.

10. Therefore the ALJ calculates that 332 days elapsed between the June 28, 2016 order and the May 26, 2017 settlement. This represents the dates in which respondent violated the initial June 28, 2016 order. The ALJ also calculates that 230 days elapsed between the May 26, 2017 settlement order and the January 11, 2018 hearing in this matter. This results in a total of 562 days in which of respondent violated an order.

11. As each day is a separate offense under the statute, respondent shall pay a penalty of $10.00 per day, totaling $5,620.00 in penalties. No amount of this total will be apportioned to the fund.

ORDER

It is therefore ordered that:

1. Respondent shall pay claimant $5,620.00 in penalties, no amount is apportioned to the fund.

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

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

4. In lieu of payment of the above compensation and benefits to the claimant, respondent shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $5,620.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee;

OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $5,620.00 with the Division of Workers' Compensation:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation;

OR

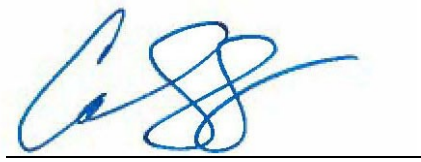
(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

5. It is further ordered that respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

6. It is further ordered that the filing of any appeal, including a petition to review, shall not relieve respondent of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

Dated: February 8, 2018



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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-051-811-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 16, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 1/16/18, Courtroom 1, beginning at 8:30 AM, and ending at 11:00 AM). Jorge Espinosa was the official Spanish/English Interpreter.

Claimant's Exhibits 1, 2 and 4 were admitted into evidence, without objection. Claimant's exhibit 3 was withdrawn. Respondents' Exhibits A through F were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on January 19, 2018. Respondents were given 2 working days within which to file objections. None were timely filed. After consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The issue to be determined by this decision concerns whether or not the Claimant sustained a compensable right shoulder injury on June 22, 2017.

The Claimant bears the burden of proof by a preponderance of the evidence.

Because the ALJ hereby determines that the Claimant sustained a compensable injury and no benefits are awarded, as outlined herein below, any appeal of this decision would be interlocutory.

FINDINGS OF FACT

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

Procedural Posture

1. The Respondents filed a Notice of Contest on July 19, 2017, denying coverage based upon the need for "Further Investigation for medical evidence."

2. The Claimant filed an Application for Expedited Hearing on August 8, 2017.

3. An expedited hearing took place on January 16, 2018, where testimony was presented before the undersigned ALJ.

The Injury

4. The Claimant was a potato unloader for the Employer.

5. On June 22, 2017, while in the course and scope of his employment, the Claimant stepped onto a potato, slipped, and struck his right shoulder against the side of a tractor, at approximately 10:00 AM.

6. The Claimant timely reported the injury to his immediate supervisor, Roy Kobza. Roy Kobza directed the Claimant to speak with the Employer's Human

Resources (HR) Representative, Juanita Adame, to whom the Claimant reported his injury. Adame speaks Spanish.

After the Injury

7. The Claimant completed his shift, which ended at 3:30 PM. He returned to work the following day, Friday, June 23, 2017, and performed his regular duties.

8. The Claimant volunteered to work an overtime-shift on Saturday, June 24, 2017. He proceeded to work a four-hour-shift spraying chemicals around the exterior property. According to the Claimant, this was a light task.

9. Kevin Kobza, the Employer's Maintenance Manager, testified that he observed the Claimant spraying the weeds and did not see the Claimant showing signs of pain. The ALJ finds that this testimony does not disprove the Claimant's injury of June 22, 2017.

10. Roy Korbza, the Claimant's supervisor on June 22, testified that Claimant told him that he had slipped on a potato chip, fell into a wall, and injured his right shoulder. Roy Korbza told the Claimant to report the incident to Juanita, which the Claimant did.

11. The Claimant did not work on Sunday, June 25, 2017.

12. The Claimant returned to work on Monday, June 26, 2017. He complained of pain, and an inability to use his right shoulder, to his supervisor, Roy Kobza. The Claimant had no such complaints or limitations before the incident of June 22, 2017. Roy Kobza corroborated what the Claimant told him about his right shoulder. Consequently, Roy Kobza assigned the Claimant to light duty.

11. The Claimant completed an Incident Report Form with the Employer's HR Representative, Juanita Adame. This report lists the date and time of incident as "6/22/2017 at 10:00 A.M." (Claimant's Exhibit 4).

12. The Claimant was referred to, and received treatment at Aviation & Occupational Medicine by Amelia Carmosino, Certified Physician's Assistant (P.A-C) and Gary Childers, M.D. In their assessment, they determined that there was a greater than 51% probability that this was a work-related injury. (Respondents' Exhibit C, p. 2).

13. The Claimant returned to work, and was placed in modified duty.

Ultimate Findings

14. The Claimant credibly testified that he injured his right shoulder, while in the course of his employment, and that this injury required medical treatment. The Claimant's testimony is corroborated by the medical records, which demonstrate a consistent pattern of complaint. The ALJ finds that the Claimant presented in a straight-forward and credible manner. The medical records of a right shoulder injury are undisputed. Although Kevin Kobza did not observe the Claimant manifesting pain, the ALJ finds that his testimony does not detract from the Claimant's credibility.

15. Further, the Claimant's testimony regarding the mechanism of injury is credible. The Claimant timely notified a supervisory individual with the Employer of his injury on June 22, 2017, and again, on June 26th, 2017 (Claimant's Exhibit 4). The medical records following the Claimant's date of injury corroborate the Claimant's testimony concerning the mechanism of injury. The Claimant's testimony was persuasive and credible.

16. Based on the totality of the evidence, the ALJ infers and finds that the event of June 22, 2017 constituted an aggravation and acceleration of a dormant preexisting fragility of the Claimant's right shoulder and the incident, which arose out of the course and scope of the Claimant's employment, required medical treatment and was disabling.

CONCLUSIONS OF LAW

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

Credibility

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

(1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant credibly testified that he injured his right shoulder, while in the course of his employment, and that this injury required medical treatment. The Claimant's testimony was corroborated by the medical records, which demonstrated a consistent pattern of complaint. The medical records of a right shoulder injury are undisputed. Although Kevin Kobza did not observe the Claimant manifesting pain in his opinion, the ALJ finds that his testimony does not detract from the Claimant's credibility.

Compensability

b. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, based on the totality of the

evidence, the event of June 22, 2017 constituted an aggravation and acceleration of a dormant preexisting fragility of the Claimant's right shoulder and the incident, which arose out of the course and scope of the Claimant's employment, required medical treatment and was disabling.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant sustained a compensable injury to his right shoulder on June 22, 2017.

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

DATED this_____day of February 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

ISSUES

At the time of the hearing the issues before the ALJ were:

- Whether claimant has demonstrated by a preponderance of the evidence that he sustained an injury to his low back arising out of and in the course of his employment with employer on December 5, 2016.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that medical treatment he has received was reasonable and necessary to cure and relieve claimant from the December 5, 2016 injury.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that medical treatment he has received was authorized.

On January 12, 2018, the ALJ granted a stipulation that provides that issues related to claimant's medical treatment are held in abeyance while claimant attends aggressive physical therapy. In addition, the parties stipulated that respondent will pay for out of pocket medical expenses that were included in claimant's hearing exhibit 12.

Thereafter, on February 6, 2018, the parties participated in a status conference regarding what issues, if any, remained to be determined. At that status conference it was clarified that the issue of compensability is still pending. Therefore, the ALJ issues this order regarding the issue of compensability.

FINDINGS OF FACT

1. Claimant was been employed with employer for approximately four years as a utility worker. Claimant's job duties include installing and maintain water and sewer lines. On December 5, 2016 claimant and a coworker were notified that an E-1 pump was not working. Claimant and his coworker determined that the pump would need to be removed and a new pump installed.

2. An E-1 pump is located approximately six feet underground. Claimant testified that normally these pumps are installed with two ropes that are then available to pull the pump out of the hole. However, on December 5, 2016, the E-1 pump claimant was to remove had a wire installed rather than a rope. When claimant and his coworker attempted to use this wire to pull the pump, claimant lost his grip and he felt a

sharp pain and stiffness in his low back. Claimant did not immediately report this incident to employer. Claimant finished his shift and self-treated with ice, heat, and ibuprofen.

3. Claimant reported the December 5, 2016 incident to employer on December 6, 2016. Employer provided claimant with a list of designated medical providers. From that list of providers claimant selected Dr. Patrick O'Meara as his authorized treating physician (ATP).

4. Claimant first treated with Dr. O'Meara on December 7, 2016 and reported stiffness and pain in his low back with electrical shocks into his left leg. Dr. O'Meara diagnosed claimant with lumbar, sacral, and thoracic strains. Claimant's treatment has included physical therapy, home exercise, and injections.

5. Dr. O'Meara ordered a magnetic resonance image (MRI) scan of claimant's lumbrosacral spine. That MRI was done on January 27, 2017 and showed degenerative changes at multiple levels, with a modest concentric bulge disc at the L2-L3 level, prominent edema seen near the mid-portion of the L2-L3 level interspace, and a significant finding of stenosis at the right L4 neural foramen.

6. On February 8, 2017, claimant received a left transforaminal lumbar epidural steroid injection (ESI) at the L2-L3 level. On February 15, 2017, claimant returned to Dr. O'Meara and reported that his pain had worsened since the injection.

7. Claimant underwent another transforaminal lumbar ESI at the L2-L3 level on March 10, 2017. On March 14, 2017, claimant was again seen by Dr. O'Meara. At that time claimant reported that the most recent injection did not improve the pain in this lower back.

8. On March 27, 2017, claimant underwent a bone scan that showed degenerative change in the paracentral lumbar spine at the L2-L3 level, but no evidence of metastatic disease.

9. On April 10, 2017, claimant underwent a left sacrolliac (SI) joint injection. On April 13, 2017, Dr. O'Meara noted that claimant had "significant improvement" following that injection.

10. Claimant testified that Dr. O'Meara referred him to Dr. Joseph Adragna for treatment because Dr. O'Meara was closing his practice and moving out of the country. The medical records entered into evidence indicate that on May 23, 2017 Dr. O'Meara instructed claimant to follow up with Dr. Adragna in two to three weeks.

11. Dr. O'Meara referred claimant to Dr. Robert Replogle for a neurosurgery consultation. Claimant was seen by Dr. Replogle on May 30, 2017. Dr. Roplogle noted that claimant had symptoms of pain referable to his L2-L3 level. Dr. Roplogle and recommended claimant undergo an anterior lumbar interbody fusion (ALIF).

12. Claimant was first seen by Dr. Adragna on June 12, 2017. Dr. Adragna diagnosed a flare of claimant's underlying degenerative condition and a thoracolumbar strain. Dr. Adragna referred claimant to Dr. William Faragher with Rocky Mountain Restorative Medicine. Claimant was see by Dr. Faragher on September 26, 2017. Dr. Faragher diagnosed claimant with left low back pain "possibly" secondary to left L4-S1 facet syndrome; possible left SI joint pain and dysfunction; left L5-S1 foraminal stenosis; and right L2L3 and right L4-L5 foraminal stenosis.

13. Dr. Faragher recommended a number of treatment modalities, including a home exercise program, use of a TENS unit, and lumbar traction. Dr. Faragher noted that more invasive treatment options could include L4-S1 medial branch blocks and possible consideration of radiofrequency ablation.

14. On September 6, 2016, respondents sent claimant to Dr. Brian Reiss for an independent medical examination (IME). Dr. Reiss reviewed claimant' medical records, obtained a history from claimant and conducted a physical exam. In his IME report Dr. Reiss opined that fusion surgery, as recommended by Dr. Replogle, would not be indicated for claimant. Instead, Dr. Reiss recommended that claimant undergo an intensive physical therapy program that would include core strengthening, aerobic conditioning, and a stretching program.

15. Dr. Reiss testified by deposition in this matter and confirmed his opinion that the recommended fusion surgery is not reasonable medical treatment at this time. Dr. Reiss also testified regarding his specific recommendation that claimant undergo intensive physical therapy.

16. Claimant testified that his current back symptoms include pain and stiffness and sharp "shock like" jolts of pain from the lower left side of his back down his left leg to his knee. Claimant's symptoms are worsened when he walks on uneven terrain, twists his torso, or bends side to side. Claimant's current work restrictions include no lifting over 50 pounds; no repetitive lifting over 40 pounds; with limits on walking, crawling, kneeling and climbing.

17. Claimant testified that he previously suffered an injury to his mid back, but has had no prior low back issues. In addition, claimant had no leg symptoms prior to the December 5, 2016 incident.

18. The ALJ credits claimant's testimony and the opinion of Dr. Adragna and finds that claimant has shown that it is more likely than not that on December 5, 2016 the lifting incident aggravated, accelerated, or combined with claimant's underlying degenerative condition to necessitate medical treatment.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, the lifting incident on December 5, 2016 aggravated, accelerated, or combined with claimant's underlying degenerative condition. As found, claimant has demonstrated by a preponderance of the evidence that he suffered a work injury to his low back on December 5, 2016. As found, claimant's testimony and the opinion of Dr. Adragna are credible and persuasive.

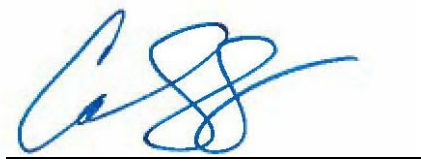
ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury to his low back on December 5, 2016.

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

Dated: February 8, 2018



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

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury on October 17, 2016.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to a general award of reasonable and necessary medical benefits to treat her October 17, 2016 injury.

STIPULATIONS

1. Claimant's average weekly wage is $520.00.

FINDINGS OF FACT

1. Claimant was employed by Employer as a housekeeper. Her duties included entering rooms after patients left, cleaning the rooms, changing the sheets, and preparing the rooms for new patients. Employer's job description notes a heavy physical workload with physical requirements including: pushing, pulling, and lifting up to 50 pounds; and standing, walking, bending, pushing, kneeling, and stooping. *See* Exhibit 15.

2. Claimant alleges that on October 17, 2016 she arrived to work and checked the board to know which patients would be checking out and which rooms would need to be cleaned that shift.

3. Claimant testified that she went to the closet and realized that she would need more sheets. Claimant testified that she went to the clean linen closet and took out a package of heavy sheets, put the package on her right shoulder, and went through the hallways to get to a cart where she typically put clean linens. Claimant testified that the cart was higher than her and that she needed to push her right shoulder upward to get the sheets onto the cart. Claimant alleges she felt a pulling in her shoulder and neck at that time with no pain and that she kept working.

4. Claimant testified that she first felt pain 2-3 days later and that the pain increased daily. Claimant reported that she sent a text message to her supervisor on October 23, 2016 reporting the incident since she could no longer bear the pain and that on October 24, 2016 while at work she made a report of the injury and was referred for treatment.

5. Approximately 10 months prior to this incident and approximately 2 weeks prior to this incident, Claimant had been evaluated by her primary care physician (evaluations on December 2, 2015 and October 5, 2016).

6. At the December 2, 2015 evaluation with primary care provider Luz Marcela Serrano, M.D. Claimant reported that she worked in housekeeping for Employer and that she had developed pain on her upper extremities that started on her shoulders and radiated to both arms. Claimant reported moderate pain and that it was waking her from sleep. Claimant reported no heavy lifting or trauma. Claimant reported pain on the biceps region bilaterally, that she was unable to sleep on her sides, and a noticed decreased in strength. Dr. Serrano noted review of systems positive for myalgias, back pain, and joint pain and that Claimant had pain on examination in the cervical spine, paraspinal muscles, and medial and lateral epicondylitis bilaterally. Dr. Serrano ordered x-rays of Claimant's cervical spine that were noted to be negative with no significant arthritis but mild degenerative joint disease. Dr. Serrano assessed: acquired hypothyroidism; myalgia and myositis; radicular pain; paresthesias; prediabetes; and morbid obesity. *See* Exhibit D.

7. At the October 5, 2016 evaluation with Dr. Serrano, Claimant reported bilateral upper extremity pain with an onset of three weeks prior in the biceps region radiating down to wrists with constant pain. Claimant reported working in housekeeping with heavy lifting. Claimant also complained of blurry vision. Dr. Serrano assessed: myalgia; pain in both upper extremities; visual disturbance; pre-diabetes; acquired hypothyroidism; bmi 39.0-39.9 adult; and generalized abdominal pain. Dr. Serrano opined that Claimant had an unclear etiology for her myalgias but suspected it was due to the line of work and heavy lifting. Dr. Serrano completed lab work. *See* Exhibit D.

8. On October 6, 2016 Dr. Serrano called Claimant to notify Claimant that the lab work showed normal kidney and liver functions, worsening pre-diabetes, and hypothyroidism. Dr. Serrano noted that there was no need to adjust Claimant's medications. Dr. Serrano noted that overall the labs were normal and that Dr. Serrano could not explain Claimant's body aches but that she suspected it may be associated with the type of work Claimant does. *See* Exhibit D.

9. Approximately two weeks after this visit with Dr. Serrano, Claimant alleges that an acute work related injury occurred. On October 24, 2016 Claimant reported that she had sustained a work injury on October 17, 2014 and she was referred for treatment.

10. Claimant was evaluated on October 24, 2016 at Rocky Mountain Urgent Care by Michelle Baker, PA-C. Claimant reported pain in her right arm and back from carrying a packet of 100 sheets on October 17, 2016. Claimant reported that two days after lifting the heavy package of sheets she developed pain. PA Baker recommended a sling, rest, voltaren, and diclofenac. PA Baker referred Claimant to see a workers' compensation physician for follow-up. Claimant did not report her prior right upper extremity pain or treatment with Dr. Serrano. *See* Exhibits C, 9.

11. On November 3, 2016 Claimant was evaluated by Devin Jacobs, PA-C. Claimant reported that on October 17, 2016 she was carrying a package of sheets that weighed approximately 30 pounds on top of her right shoulder. Claimant reported that she threw the sheets off her right shoulder with a mild twinge of discomfort which gradually got worse. PA Jacobs noted tenderness to palpation to the right rhomboids, and muscle tension with mild spasm. He found pain in abduction range of motion and in internal rotation right midline spine. Claimant's cervical spine was noted to have no tenderness and full range of motion. PA Jacobs assessed strain of right shoulder, provided work restrictions, and referred Claimant for physical therapy. *See* Exhibits B, 10.

12. On November 7, 2016 Claimant underwent physical therapy with Patrick Morrissey, PT. PT Morrissey noted that Claimant's right shoulder strain correlated with her impairments including active range of motion, pain, and muscle performance. *See* Exhibit 11.

13. On November 9, 2016 Claimant was evaluated by PA Jacobs. Claimant reported continued pain in the lateral and posterior shoulder with occasional radiation to the right mid upper arm. Claimant reported overall feeling better but that the pain that morning had been worse than yesterday. Claimant reported spasms at night and that her pain level was 6/10. PA Jacobs noted under review of systems: muscle pain; joint swelling, and joint stiffness. He continued to assess strain of right shoulder and continued work restrictions. *See* Exhibits B, 10.

14. On December 7, 2016 Claimant was evaluated by Dr. Serrano. Claimant reported being injured on October 17, 2016 at work after grabbing sheets from a supply office and lifting onto her right shoulder and that she developed pain four days after the heavy lifting in the mid back. Claimant reported pain in the mid back, limited range of motion with trouble twisting, and pain on the right trapezius and radiating to the forearm. Claimant reported no longer being covered by workman's comp for unclear reasons and that she wanted to have a personal evaluation because she still had pain. Dr. Serrano found Claimant positive for myalgias, back pain, joint pain, and neck pain. On examination Dr. Serrano found that the right shoulder exhibited decreased range of motion, tenderness, pain, spasm, and decreased strength. Dr. Serrano assessed right shoulder injury/muscle strain and recommended work restrictions and physical therapy. *See* Exhibits D, 12.

15. On January 16, 2017 Claimant was evaluated by Dr. Serrano. Claimant reported that her symptoms improved as long as she was doing physical therapy. Claimant reported that at work her restrictions were not being followed. Claimant reported that her work, pain, and shoulder symptoms were having an effect on her mood. Dr. Serrano continued to assess right shoulder injury/muscle strain, continued work restrictions, and noted her anticipation that Claimant would be able to return to work without restrictions once Claimant finished physical therapy in six more weeks. Dr. Serrano noted Claimant's low score on the depression assessment and strongly advised Claimant to start depression medications. Claimant indicated that she wanted to do natural methods first. *See* Exhibits D, 12.

16. On January 31, 2017 Claimant was evaluated by Timothy Lewan, M.D. Claimant reported being there for depression symptoms that had been constant and ongoing for several weeks. Claimant reported being angry at times and that her blood pressure was mildly elevated and significantly elevated at work that she attributed to being so mad. Dr. Lewan assessed: moderate episode of recurrent major depressive disorder, anxiety, and elevated blood pressure. Claimant reported wanting to restart Zoloft and that she had success with Zoloft in the past. Dr. Lewan noted that counseling could be helpful and that Claimant was to follow up with Dr. Serrano. *See* Exhibit 12.

17. On March 13, 2017 Claimant was evaluated by Dr. Serrano. Dr. Serrano noted that Claimant was present for headaches and blood pressure concerns and that Claimant was seen a few weeks ago after developing headaches and high blood pressure while at work and was found to have major depressive disorder and was prescribed Zoloft. Claimant reported that she did not take the Zoloft because she was concerned about side effects. Claimant reported being stressed about a workman's comp case and potential outcomes and lawyer fees. Dr. Serrano assessed headache, sleep disturbance, moderate episode of recurrent major depressive disorder, elevated blood pressure, pre-diabetes, and acquired hypothyroidism. *See* Exhibit 12.

18. On April 10, 2017 Claimant was evaluated by Dr. Serrano. Claimant reported that her headaches were better, that she had been laid off work, and that she felt that her health was better. Dr. Serrano recommended follow up for depression and headaches in about six weeks, that Claimant continue medications, and that it may be okay to discharge Claimant and suspected stress may have been cause of headaches. *See* Exhibit 12.

19. On June 13, 2017 Claimant underwent an independent medical evaluation performed by Lawrence Lesnak, M.D. Claimant reported that on October 17, 2016 while working she had obtained a package of clean sheets, lifted them and placed them onto the top of her right shoulder and walked through several hallways. Claimant reported that she was in the process of leaning forward to let the package of clean sheets slide off her shoulder onto a nearby cart when she felt a sudden pop in her right suprascapular region but that other than the pop she had no initial symptoms. Claimant reported that approximately three days later she began to notice some right sided lower thoracic/infrascapular pains, right suprascapular pains, and some diffuse right arm pains. Claimant indicated that she was referred to physical therapy which helped a little bit but that she soon found out her claim had been denied. *See* Exhibits A, 13.

20. Claimant reported that she went to her primary care provider in December because of her ongoing symptoms and that her primary provider recommended physical therapy and medications and again Claimant reported that the physical therapy seemed to help. Claimant also reported that during this time she noticed her depression becoming much worse. Claimant reported frequent muscle cramping in her right suprascapular region and right inferior scapular region typically occurring late in the afternoon or evening hours with intermittent popping sensations involving her right shoulder whenever she

moves in certain directions. Claimant reported frequent cramping sensations and some pain involving her right posterior upper arm that seemed to be associated with any type of overhead activities. Claimant reported no history of prior right upper back, capular/suprascapular, shoulder, or right upper extremity symptoms or injuries. *See* Exhibits A, 13.

21. Dr. Lesnak reviewed medical records and performed a physical examination. Dr. Lesnak opined that there did not appear to be any medical evidence to suggest that Claimant sustained any type of injurious event during work hours on October 17, 2016. Dr. Lesnak opined that ***the reported mechanism of injury would place no anatomic stresses on the Claimant's right shoulder and an injury could not have occurred based on the specific incident Claimant alleges occurred***. Dr. Lesnak also opined that ***if Claimant had sustained an acute soft tissue or bony injury, she would have had symptoms immediately and not three days later and that a three day period was not consistent with any type of injurious event***. Dr. Lesnak also noted that ***Claimant clearly had similar symptomatology documented by her primary care provider just 12 days prior to the alleged incident as well as similar symptoms documented in December of 2015 and that they were noted without trauma***. *See* Exhibits A, 13.

22. As part of the independent medical evaluation, Claimant also underwent a computerized outcome assessment. Dr. Lesnak noted that Claimant scored a 39 on the modified zung depression index and an 18 on the modified somatic pain questionnaire. Dr. Lesnak opined that scores placed Claimant in the distressed depressive category for psychosocial functioning. Dr. Lesnak also noted scores from the Dallas Pain Questionnaire. Dr. Lesnak opined that the test results suggested that there were significant psychosocial factors that were influencing Claimant's symptoms, recovery, and perceived function. Dr. Lesnak opined that the extremely high level of somatic pain complaints reported may suggest an underlying somatization/somataform disorder. Dr. Lesnak opined that patients with extremely high levels of somatic pain complaints are often times very unreliable and that the reproducible objective findings must be relied upon rather than the subjective complaints in these types of patients. Dr. Lesnak opined that Claimant also had a long history of chronic depression and had discontinued high dose antidepressant medications on her own in early 2016. Dr. Lesnak suspected that Claimant had progressive depressive symptoms resulting in worsening somatic pain complaints that were completely unrelated to any job activities. *See* Exhibits A, 13.

23. Dr. Lesnak testified at hearing consistent with his written report. Dr. Lesnak reported that Claimant demonstrated the actual mechanism of injury at the evaluation and that ***her testimony at hearing was completely different than what she had reported to him at the evaluation.*** Dr. Lesnak also noted that ***Claimant had denied to him that she had any prior symptoms involving her right shoulder or right upper extremity, despite diffuse neck, bilateral shoulder, and bilateral upper extremity symptoms noted in the medical records in December of 2015 and again 12 days prior to the alleged injury. Dr. Lesnak noted that Claimant had also denied prior problems at Rocky Mountain Urgent Care and at Concentra.***

24. Dr. Lesnak's opinions are found credible and persuasive.

25. Jonathan Guenther, Employer's director of plant operations testified at hearing. After the alleged injury was reported, Mr. Guenther attempted to find footage of the injury on the facility's video system. Mr. Guenther checked the location, date, and time reported by Claimant but did not find footage to match Claimant's report. Mr. Guenther also checked footage throughout the entire shift from different areas of the facility and also on days before and after the 17th. Mr. Guenther was able to view Claimant in the videos, but did not see any footage of Claimant carrying a package on her right shoulder in his review. After reviewing footage, Mr. Guenther went back to Claimant to verify he was looking at the right time and place.

26. The video in question was not produced to Claimant. A copy of the video showing the date and time frame in question was sent to Insurer and was lost. The original video was recorded over by Employer after a copy was sent to Insurer.

27. At hearing Claimant was asked whether she had given a recorded statement to Insurer. Claimant was confused by what Respondents meant,

A "about the first call when I made my report?"

Q "this would have been the second call. Well, let's talk about this. How many –how many times have you been asked about the claim?"

A "several times"

28. Claimant never confirmed or denied that she had given a recorded statement to Insurer. Respondents did not offer a recorded statement into evidence. Other than the questions to Claimant about a recorded statement, and Claimant's confused responses, there is no testimony confirming a recorded statement exists. The ALJ concludes that there is insufficient evidence of the existence of a recorded statement in this case and thus makes no findings as to a recorded statement.

29. An Employee Accident Report, offered as Exhibit E, and any questions surrounding the report are stricken from the record and not considered.

30. Claimant, overall, is not found credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence,

to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection

is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet her burden of proof to establish that she sustained a work related injury on October 17, 2016. Claimant is not found credible or persuasive by the ALJ for the following reasons:

1. Claimant's testimony about the mechanism of injury at hearing is inconsistent from her reports to medical providers about the mechanism of injury.
2. Claimant failed to report to Dr. Lesnak and to several treating providers that she had pre-existing bilateral upper extremity symptoms for which she had received treatment and treatment recommendations just 12 days prior to this new alleged injury. These pre-existing problems included her complaints of diffuse pain preventing her from sleeping and requiring diagnostic imaging. This type of pre-existing pain/treatment would be hard to forget, especially considering it was last evaluated 12 days before this alleged work injury.
3. The injury could not have occurred as described by Claimant due to the lack of anatomic stresses on the right shoulder as credibly opined by Dr. Lesnak.
4. If an acute injury had occurred, Claimant would have had immediate symptoms rather than a 2-3 day delay in onset of symptoms as credibly opined by Dr. Lesnak.
5. Claimant's psychosocial issues make her subjective complaints unreliable.

Recorded Statement

As pertinent to the remand order, Claimant was asked at hearing whether she had given a recorded statement to Insurer. The ALJ allowed the question about whether or not a statement had been given over Claimant's objection, objecting to any mention of the recorded statement or any use of it for impeachment due to late disclosure. Prior to this question about whether or not a recorded statement had been given, Claimant was asked about the weight of the sheets. Claimant indicated she didn't know how much they weighed. After the question about whether or not she had given a statement was allowed, Claimant's testimony was confused about what call or what statement Respondent counsel was talking about. Claimant never confirmed or denied having given a recorded statement to Insurer. Respondent never offered a recorded statement into evidence nor did they attempt to use any recorded statement to impeach Claimant's testimony. After the confusion about which statement they were referring to, Respondent went on to continue to question Claimant about the weight of the sheets.

Q "you do remember giving a statement, right?"
A "about the first call when I made my report?"
Q "this would have been the second call. Well, let's talk about this. How many –how many times have you been asked about the claim?"
A "several times"

Q Okay. And during the several times, you estimated that this weighed at least 50 pounds, this item you're lifting; isn't that true, ma'am?"

A "I don't remember."

At this point, after asking generally about what Claimant reported during the several times she had been asked about the claim (and not about what she reported during any recorded statement since she could not answer/remember), Respondents asked the next question about the recorded statement.

Q "Okay. I've got a transcript and I've got the recorded statement itself. Do you want me to play it where you said 50 pounds or do you want to admit that you said it weighed about 50 pounds?"

A "Yes that's okay"

Q "Okay. So you're admitting it weighed 50 pounds or you're not sure"

A "I'm not – I'm not sure"

Q "Okay. Did you tell anybody else that it was very heavy?"

A "Yes."

Again, other than Respondents' argumentative question, there was no testimony or evidence about the recorded statement. Claimant again did not confirm whether or not a recorded statement existed or what she may have said. The questioning again went on to what she told "anybody else" about the weight of the sheets and went on to reports she made outside any recorded statement. Claimant continued to answer that she didn't know how much the sheets weighed, felt that they were very heavy, and answered that very heavy to her meant 50-60 pounds. Claimant, when asked if she took sheets weighing at least 50 pounds, again answered she wasn't sure, didn't remember it, and indicated that when she placed the sheets on her shoulder, she was not thinking about exactly how much they weighed.

In the July 31, 2017 Findings of Fact, Conclusions of Law, and Order, the ALJ made no findings about the recorded statement. On appeal to ICAO, Claimant contended that the recorded statement was not in her possession, that she was surprised by it, and that the ALJ abused discretion in permitting the Respondents to cross-examine Claimant about it. Essentially, Claimant argued on appeal a discovery violation. Although a discovery violation may have existed as Respondents admittedly did not disclose to Claimant or provide Claimant with a copy of the recorded statement until the night prior to hearing, the question allowed asked Claimant whether or not she had given a recorded statement to Insurer. Claimant never provided a direct answer either confirming/denying that she had given a recorded statement. Claimant was confused by recorded statement versus report of injury and the examination moved on to additional questions about the weight of the sheets, what she had reported (generally) about the weight of the sheets, and what heavy meant to Claimant. Had Respondents referred directly to the recorded statement, offered it into evidence, or attempted to use it for impeachment, the ALJ would have addressed the alleged discovery violation and sanctions. Here, Claimant could not confirm or deny that she provided a recorded statement. Contents of a recorded statement were not considered in the July 31, 2017 findings of fact since there was no

evidence or testimony to support that a recorded statement with Insurer took place or what was said during the recorded statement. Further, even if a sanction was appropriate, the sanction would have included striking the recorded statement/evidence (it was never even offered into evidence), and would have included disallowing questions about the recorded statement (here, although a brief question was allowed, Claimant could not recall the recorded statement and did not confirm that there was a recorded statement).

Accident Report

Also as pertinent to the remand order, Claimant was asked questions at hearing about an Employee Accident Report that was later admitted into evidence as Exhibit E. Claimant objected to using Exhibit E as evidence due to surprise and argued that it was provided the night prior to hearing despite repeated requests for discovery. Claimant testified that it was her handwriting was on the report. The report itself indicated in response to the request to describe fully the events that resulted in injury: "I was carried one packet of blankets almost 50 fits." Claimant testified that she didn't write down a description about flipping the sheets with her shoulder and feeling a pop but that she filled out the form herself indicating she had guessed how many feet she had walked. After review of the transcript on remand, the ALJ finds that the Employee Accident Report should not have come into evidence and that questions about its contents should be stricken. Exhibit E is removed from evidence and questions surrounding the Employee Accident Report are stricken from the record.

The ALJ agrees that a discovery violation existed. Respondents failed to provide Claimant with a copy of the Employee Accident Report until the day prior to hearing. Respondents were required to exchange all relevant employer records at least 20 days prior to the hearing date. The evidence was in Respondents' possession and easily could have been transmitted to Claimant. Although the statement in question contained a fragmented sentence and had almost no potential to be outcome determinative, there was insufficient good cause to allow for its late submission. The evidence itself was insignificant, but could easily have been exchanged by the exercise of due diligence on the part of the Respondents. As the ALJ found the evidence insignificant, it was not referenced at in the Findings of Fact, Conclusions of Law, and Order issued July 31, 2017. However, on remand the ALJ agrees that the correct sanction is to exclude Exhibit E and any testimony surrounding it. The exclusion does not impact the ultimate determination in this case.

Video and Spoliation

The ALJ has broad discretion to impose sanctions when there is spoliation of evidence to remediate the harm to the injured party from the absence of that evidence. Claimant argued that the video in this case should have been preserved and wasn't and that Claimant had no way to verify what was or was not shown on the video. Claimant requested that Mr. Guenther's testimony about what was observed on the video be stricken due to spoliation.

The ALJ finds that taping over the video was neither intentional spoliation nor reckless or grossly negligent spoliation of the video. Rather, Employer had sent a copy to Insurer and had no reason to believe that the original should be preserved. Additionally, the ALJ finds that Insurer did not intentionally or recklessly lose the recorded video such to require the requested sanction of disallowing Mr. Guenther's testimony. Bad faith has not been shown sufficient to disallow testimony about what was viewed on the video.

Additionally, even if the ALJ imposed the sanction of disallowing Mr. Guenther's testimony and took an adverse inference that the video showed Claimant walking down the hallway of Employer with a package of sheets on her right shoulder, the adverse inference and sanction would not change the outcome of the proceeding. A video showing Claimant walking down the hallway with sheets on her shoulder and placing them onto a cart would not be sufficient to establish a work related injury. Although it may support Claimant's testimony that she carries packages of sheets on her shoulders, it would not support an acute injury occurring on the date in question. As found above, Claimant had symptoms and received treatment prior to this date. Claimant testified and reported that she had no pain for several days after this incident, so the video would not be able to show any immediate/acute actions consistent with acute pain. Further, even if showed Claimant carrying sheets and pushing them onto a cart, Dr. Lesnak is credible that the claimed mechanism would not have caused injury. Thus, even if the video contained what Claimant alleges it still would not be outcome determinative.

Here, as there was no intentional, reckless, or grossly negligent conduct destroying the video Claimant's request to strike Mr. Guenther's testimony due to spoliation is denied. Further, even if the testimony was stricken and an adverse inference were drawn, it would not be outcome determinative given Claimant's pre-existing symptoms/treatment, the lack of anatomic stress on the shoulder with the movement described, and the lack of immediate pain inconsistent with an acute injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury on October 17, 2016.

2. Claimant therefore is not entitled to an award of medical benefits and her claim is denied and dismissed.

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

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

DATED: February 8, 2018,

/s/ Michelle E. Jones

_____

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

ISSUES

I. Determination of Claimant's average weekly wage ("AWW").

II. Whether Claimant has established by a preponderance of the evidence entitlement to temporary total disability benefits ("TTD") from July 11, 2017 through July 31, 2017.

FINDINGS OF FACT

1. Claimant's date of birth is May 1, 1951. Claimant was 66 years old at the time of hearing.

2. Claimant has been a member of the International Theatrical Stagehand and Employees Union (IATSE) since 2005. Claimant obtains work from different employers through the IATSE. Claimant testified the length of jobs varied from one day up to five weeks. The rate of pay for each job also varied.

3. Claimant testified that in the year prior to his injury he earned an average of $1,186.18 per week from multiple employers, including Employer.

4. On June 27, 2017, Claimant suffered an admitted industrial injury in the course and scope of his employment as an audio/visual technician for Employer. Claimant sustained an injury to his right middle and ring fingers.

5. On the date of injury, Claimant was working a two-day job for Employer at $32.28 per hour. Per Employer's pay records and Claimant's testimony, Claimant worked a total of 16 regular hours and 5 overtime hours on two-day job, earning gross wages of $758.58.

6. Claimant did not have concurrent employment on June 27, 2017.

7. Prior to June 27, 2017, Claimant's gross wages earned from Employer totaled $3,383.62 for pay dates February 24, 2017 through June 2, 2017. Review of the pay records demonstrates Claimant actually worked seven (7) weeks for Employer between February 24 and June 2, 2017.

8. In a July 14, 2017 report, Claimant's authorized treating physician ("ATP"), Dr. Villavicencio, placed Claimant at maximum medical improvement ("MMI") on July 11, 2017 with no permanent physical impairment. Claimant testified he asked Dr. Villavicencio to place him at MMI because he wished to return to work.

9. On July 31, 2017, Respondents filed a Final Admission of Liability ("FAL") consistent with Dr. Villavicencio's report, admitting for an AWW of $491.02 and TTD benefits from July 1, 2017 through July 10, 2017.

10. Claimant testified that after asking to be placed at MMI, his hand did not continue to heal as he expected. Claimant believed he was unable to perform his job duties to his hand injury and subsequently scheduled a return visit to Dr. Villavicencio.

11. Dr. Villavicencio reevaluated Claimant on August 1, 2017, at which time he placed Claimant back on temporary work restrictions. Claimant was restricted to lifting up to 20 pounds for up to 3 hours per day and pushing/pulling up to 20 pounds for up to 3 hours per day.

12. Respondents reopened Claimant's claim by filing a new General Admission of Liability ("GAL") on August 15, 2017, admitting for an AWW of $491.02 and TTD benefits from June 28, 2017 through July 10, 2017 and August 1, 2017 ongoing. It was noted that Respondents re-opened TTD benefits on August 1, 2017 because Claimant returned to treatment and was placed back on restrictions which could not be accommodated.

13. On October 13, 2017, Dr. Villavicencio placed Claimant at MMI with a 10% hand impairment.

14. On November 2, 2017 Respondents filed a second FAL admitting for an AWW $491.02, TTD from June 28, 2017 through July 10, 2017 and August 1, 2017 through September 28, 2017, and permanent partial disability ("PPD") from October 13, 2017 through December 24, 2017.

15. Respondents have paid Claimant TTD in accordance with the November 2, 2017 FAL. Claimant returned to work after September 28, 2017.

16. Claimant requests TTD from July 11, 2017 through July 31, 2017.

17. Claimant testified he was unable to bid for jobs through the IATSE during the periods of previously paid TTD and for the time period of July 11, 2017 through July 31, 2017 because the IATSE does not permit members to bid for jobs while under temporary work restrictions. Claimant testified he did not work between July 11 and July 31, 2017.

18. Claimant's testimony regarding his average earnings is found credible and persuasive. The ALJ finds Claimant's AWW is $1,186.18, based on Claimant's average earnings per week during the year prior to the industrial injury.

19. Claimant failed to establish entitlement to TTD benefits from July 11, 2017 through July 31, 2017 by a preponderance of the evidence. Claimant's testimony, alone, does not persuade the ALJ Claimant is entitled to TTD benefits when Claimant's ATP, Dr. Villavicencio, placed Claimant at MMI as of July 11, 2017.

20. Evidence and inferences contrary to these findings were not credible and persuasive.

21. CONCLUSIONS OF LAW

Generally

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

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

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

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial

evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. However, Section 8-42-102(3) provides,

> Where the foregoing methods of computing the average weekly wage of the employee, by reason of the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable earnings to be computed thereunder or has been ill or has been self-employed or for any other reason, will not fairly compute the average weekly wage, the division, in each particular case, may compute the average weekly wage of said employee in such other manner and by such other methods as will, in the opinion of the director based on the facts presented, fairly determine such employee's average weekly wage.

The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

Claimant was paid an hourly rate for the two-day job on which he was injured and had no concurrent employment at the time. Nonetheless, Claimant worked for multiple employers for varied lengths of time and various rates of pay leading up to, and after, his date of injury. Due to the nature of Claimant's employment, solely considering Claimant's work for Employer at the time of injury, or his sporadic work for Employer during the weeks prior to the injury, does not provide a fair approximation of Claimant's wage loss and diminished earning capacity. Accordingly, the ALJ concludes Claimant's average weekly wage should be based on his average earnings over the course of the year prior. Claimant credibly testified that in the year prior to his injury he earned an average of $1,186.18 per week through multiple employers. An AWW of $1,186.18 accurately reflects Claimant's varied jobs and pay rates, and is the fairest approximation of the claimant's wage loss and diminished earning capacity.

TTD

To prove entitlement to TTD benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage

loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant notes his request for TTD for the period of time from July 11, 2017 through July 31, 2017 is based solely upon his testimony that he “improvidently” talked his physician into placing him at MMI and was unable to work due to the hand injury. There is insufficient persuasive evidence Dr. Villavicencio did not use his own independent medical judgment when placing Claimant at MMI on July 11, 2017. Based on the totality of the evidence, TTD benefits were properly terminated on July 10, 2017 as Claimant was placed at MMI, and Claimant is not entitled to TTD benefits for the period of July 11, 2017 through July 31, 2017.

ORDER

It is therefore ordered that:

I. Claimant’s AWW is $1,186.00.

II. Claimant has not established entitlement to TTD benefits from July 11, 2017 through July 31, 2017. Claimant’s claim for TTD benefits for such time period is denied and dismissed.

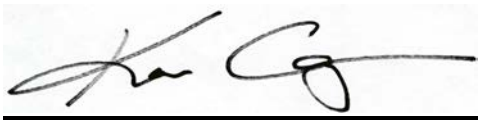
III. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

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

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

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

DATED: February 8, 2018



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

ISSUES

- Did Claimant prove by a preponderance of the evidence that a C3-C7 cervical fusion performed by Dr. James Bee on September 26, 2017 was causally related to his admitted July 21, 2016 industrial accident?

- If Claimant proved the requisite causal nexus, was the surgery reasonably necessary?

FINDINGS OF FACT

1. Claimant worked for Employer as a tractor-trailer driver. On July 21, 2016, he suffered admitted injuries in a motor vehicle accident on I-25 north of Monument. He Claimant was traveling northbound and traffic had come to a complete stop due to an obstruction up the road. A drunk driver traveling at a high rate of speed failed to stop and crashed into a minivan behind Claimant's vehicle. The force of the impact pushed the minivan into and under Claimant's semitrailer.

2. Although the trailer absorbed the brunt of the impact, enough energy was transmitted to the tractor to jostle Claimant around in the cab. As pertinent to the current disputed issues, Claimant likely experienced a "whiplash" motion of his head and neck.

3. Claimant required no medical attention at the scene and assisted the passengers in the minivan, including two young children. He remained at the crash site for several hours interacting with first responders. The semitrailer was inoperable but the tractor was undamaged, so Claimant drove it back to the truck depot.

4. During the return drive, Claimant began experiencing neck pain and stiffness, which he rated approximately 4-5/10. When he arrived at the office, he completed accident paperwork and discussed the accident with his managers. Claimant said his neck was hurting and he was anxious and upset about witnessing the trauma to the family in the minivan. Claimant's manager asked if he needed to go to the hospital, and Claimant replied "I don't know. Maybe I'm stressed-out over these kids." The manager replied "why don't you just go home," and Claimant did so.

5. Claimant stayed off work the next three days, returning to work on Monday, July 25. On Wednesday of that week, he awoke with severe pain in his low back. He worked Wednesday and Thursday and then told his direct supervisor about his back pain. Claimant was concerned about a health insurance co-payment if he went to the emergency room, so he elected to see a chiropractor instead.

6. Claimant saw David Lauritzen, D.C. on August 3, 2016, complaining primarily of low back pain. He had difficulty rising from a seated position, standing, and walking. Physical examination showed moderate to severe muscle spasms throughout

his neck and back, but there were no radicular signs or other objective neurological abnormalities. Deep tendon reflexes (DTRs) in the upper and lower extremities tested normal. Claimant subsequently received several additional chiropractic treatments, but at no time did Dr. Lauritzen document any objective neurological abnormalities.

7. Employer eventually referred Claimant to CCOM for authorized treatment. His initial visit was on August 22, 2016 with Dr. Kathryn Murray. His primary complaints related to his low back but he also reported some neck pain. Claimant denied any numbness, tingling or weakness in his arms. The most significant exam findings were trigger points and muscle spasms in the neck and lower back. All objective neurological tests were normal, including DTRs, strength, and sensation in the upper and lower extremities. Cervical x-rays showed multilevel degenerative changes, including ventral vertebral osteophytes at C3 through C6, but no acute pathology. Dr. Murray diagnosed cervical and lumbar strains, referred Claimant for physical therapy, and released him to full duty.

8. At his next visit on September 8, 2016, Claimant told Dr. Murray his neck pain had "resolved." He was still having low back pain but was improving with therapy. His most bothersome symptom was occasional numbness in the right foot. Dr. Murray did not examine Claimant's neck because "patient states all [neck] pain is gone." Physical examination relating to his low back showed normal lower extremity reflexes, strength, and sensation, with no gait abnormalities.

9. Claimant's leg symptoms progressively worsened over the next several weeks, so Dr. Murray requested a lumbar MRI. The MRI was performed on November 11, 2016, and showed multilevel pathology including two herniated lumbar disks abutting nerve roots, facet hypertrophy and foraminal stenosis.

10. After reviewing the MRI, Dr. Murray referred Claimant to Dr. William Lippert for an epidural steroid injection (ESI).

11. Claimant had his initial visit to Dr. Lippert's office on December 1, 2016. PA-C Mark Stafford examined his neck, low back, upper extremities, and lower extremities but the only significant findings related to potential lumbar radiculopathy.[1]There were no signs suggestive of cervical myelopathy. Claimant's reflexes and strength were normal in the upper and lower extremities, Babinski response was normal, and he demonstrated an "excellent heel and toe walk." PA-C Stafford diagnosed lumbar radiculopathy and scheduled a lumbar ESI.

12. Claimant returned to Dr. Murray on December 6, 2016 and reported Employer had taken him off work after learning of the herniated discs in his low back. Dr. Murray noted "patient states he has to be honest with me today and says his pain has truly been 4-5/10 scale for many months but he just did not want to be taken off work so he has been downplaying his pain the entire time. He has constant tingling in the right leg specifically the calf and foot. He will get an occasional left foot tingling but it is very

[1] Claimant had tenderness to palpation of the lumbar spine, some decreased sensation in the right leg and left foot, and positive straight leg raise testing.

minimal. He does complain of having back spasms." Claimant did not mention issues with his neck or upper extremities, nor did he describe any symptoms suggestive of cervical myelopathy. Examination of the lower extremities showed decreased sensation on the right calf and left foot but normal strength and reflexes. His gait was normal.

13. At his next appointment on January 3, 2017, Claimant's lower extremity strength was 5/5 and equal bilaterally including resisted dorsiflexion and plantar flexion, knee extension and flexion and hip flexion. Deep tendon reflexes were normal at the knees and left ankle, but ***reduced*** (1/4) in the right ankle. This was the first documented neurologic abnormality other than decreased lower extremity sensation, but interestingly, Claimant was actually hyporeflexive.[2]

14. Dr. Lippert performed a lumbar ESI on January 25, 2017, which provided approximately 75% pain relief, particularly with the leg pain. Based on Claimant's response to the injection, Dr. Lippert opined the residual back pain was likely related to facet arthropathy.

15. The improvement from the ESI was only temporary, and Claimant's severe symptoms returned after a few weeks. Because of his recurrent symptoms, Dr. Murray referred Claimant to Dr. James Bee for a surgical evaluation.

16. Dr. Kathleen D'Angelo performed an IME for Respondent on April 9, 2017. Her physical exam revealed no neurological abnormalities suggestive of myelopathy.

17. Dr. Bee evaluated Claimant on April 17, 2017. He did not think Claimant was a surgical candidate for his lumbar spine and instead recommended rhizotomy. Dr. Bee was more concerned with examination findings suggesting cervical myelopathy. Specifically, Dr. Bee appreciated subtle long tract signs including brisk upper and lower extremity reflexes, positive Hoffmann's sign bilaterally, bilateral clonus, and ataxia. Dr. Bee requested a cervical MRI to investigate possible cord compression.

18. Claimant saw Dr. Rook for an IME at his counsel's request on June 9, 2017. Dr. Rook focused primarily on Claimant's low back, but also addressed the neck briefly. On exam, Dr. Rook noted lower extremity hyperreflexia,[3] but normal upper extremity reflexes. Dr. Rook appreciated "trace" clonus at the right ankle, but none on the left. Babinski response was normal. Dr. Rook noted "there has been a concern that the patient might have a cervical or thoracic injury contributing to the hyperreflexia and clonus identified by Dr. Bee . . . . [Claimant] did have hyperreflexia but the remainder of his physical examination was soft for upper motor neuron lesion. Nevertheless, I've encouraged him to proceed with the diagnostic imaging."

19. Claimant saw Dr. Bee again on June 12, 2017, but the MRI had not been completed because Respondent denied it. Dr. Bee again noted long tract signs including

[2] As Dr. Rook and Dr. Bee explained, **hypo**reflexia is typically associated with nerve root compression (i.e., radiculopathy), whereas **hyper**reflexia is a common sign of cervical myelopathy.
[3] Reflexes were 4+ bilaterally at the knees and 3+ bilaterally at the ankles.

unsteady heel-to-toe walking, brisk reflexes (3+/4) in the lower and upper extremities, positive Hoffmann's, and clonus.[4]

20. Claimant had the cervical MRI on July 10, 2017. It showed stenosis with cord flattening from C3 through C7 due to bulging or herniated discs and vertebral spurring.

21. Claimant met with Dr. Bee to review the MRI on July 17, 2017. Dr. Bee noted "cord compression measuring less than 10 mm at C3-4, C4-5, C5-6 and C6-7, but no definitive cord signal change." Dr. Bee stated, "with [the] statistically increased risk of cord compression with space revealed for the cord less than 10 mm as well as his findings of long tract signs, I have talked to him about surgical intervention on his cervical spine. He is not interested at this time."

22. Claimant returned to Dr. Bee on July 31, 2017 and had changed his mind regarding surgery. He told Dr. Bee "he has discussed this with his family as well as Dr. Murray. Due to his four-level cord compression, his ongoing symptoms, and his worsening ataxia, he would like to proceed with surgical intervention."

23. Dr. Rook reevaluated Claimant on August 24, 2017. He reviewed the MRI report and spoke with Claimant, although it does not appear he performed any physical examination. Dr. Rook opined

> [H]is MRI now demonstrates three disc herniations with flattening of the spinal cord. These findings were likely not present prior to his motor vehicle accident/OTJI as the patient had no musculoskeletal ailments or neurological symptoms prior to the accident. The accident involved significant forces, and given the findings on the recent imaging studies, it is more than likely that his current cervical symptomatology is related to herniated discs that developed as a result of his motor vehicle accident. It is my recommendation that he proceed with surgery as soon as possible, utilizing his private insurance if necessary.

24. On September 26, 2017, Dr. Bee performed a C3-C7 anterior discectomy and fusion. Respondent had denied authorization for surgery, so Claimant elected to have surgery under his health insurance.

25. Dr. Bee testified via deposition on November 1, 2017. He offered a cogent justification for the surgery but provided no definitive conclusions regarding causation. For instance, when asked whether he agreed with Dr. Rook that the MVA likely caused the cervical disc herniations he replied, "I think it's incredibly difficult to try to predict what was occurring before. Unless you have an MRI before, it's just speculation." He also testified "it's difficult, if not impossible, to say what event caused this pathology." He testified "if you have cord compression from disk bulging, that tends to be more of a

[4] In his deposition, Dr. Bee discussed a number of inaccuracies in his medical records due to the EMR software used by his office. The ALJ relied on Dr. Bee's testimony in conjunction with his records to glean which portions likely reflect actual exam findings and which portions are likely cloned or "auto-populated."

degenerative case" but added, "sometimes degenerative changes can be accelerated with trauma." Finally, he testified:

> Q. [I]n terms of more likely than not . . . is it your opinion that his degenerative conditions simply worsened over time naturally to culminate in the surgery, or that his condition was accelerated or aggravated by the motor vehicle accident?
>
> A: I think it's impossible to say.
>
> Q. So you can't say whether it's more likely than not?
>
> A. No.

26. Dr. Brian Reiss performed an IME for Respondent in November 2017, and concluded the cervical stenosis and cord compression were not causally related to the July 2016 accident.

27. Dr. Resiss subsequently testified via deposition to elaborate on the opinions and conclusions expressed in his IME report. He emphasized there were no documented neurological abnormalities suggestive of myelopathy before Dr. Bee's initial evaluation in April 2017. He disagreed with Dr. Rook's opinion that the MVA caused the herniated cervical discs:

> [The MRI] revealed severe degenerative changes at multiple levels . . . . [H]e had spurs at the location of where he had apparent bulging, which when you put those together, really indicates a chronic condition because spurs take years to develop . . . . [I]t clearly is the picture of a degenerative process occurring over years. I didn't detect anything that would suggest to me that he had an acute herniated disc at all.

28. Dr. Reiss testified Claimant specifically denied any significant symptoms such a clumsiness or dropping things before seeing Dr. Bee.

29. Dr. Reiss also opined Claimant's pattern of symptom progression was inconsistent with a sudden increase in cord compression after the accident:

> [I]f you very, very, very slowly over years decrease the space available for the cord, the cord adapts, it does not react to that until it becomes critical. So a slow narrowing of the spinal canal is something that is quite well tolerated by the cord until it is overwhelming. And it occurs in a lot of people slowly over time without any signs or symptoms.
>
> If you have an acute herniated disc that all of a sudden takes the space available for the cord, usually the cord reacts very poorly that, and you get signs and symptoms very soon after. . . .
>
> So everything points away from any acute narrowing of the spinal canal, which would indicate to me, it is highly unlikely that he herniated a

> disc after the motor vehicle accident. He probably just had a cervical strain and myofascial pain. So the findings of his stenosis are almost certain to be chronic, pre-existing, and degenerative.

30. Based on his review of the MRI images, Dr. Reiss concluded Claimant had bulging discs but no "true" herniations. He thought the cord compression was primarily a function of "the spur formation taking up room and coming up against the spinal cord.

31. Dr. Reiss opined there was no urgent need for surgery and the multilevel fusion was essentially "prophylactic." Given Claimant's relatively subtle neurological findings, with mild cord compression but no evidence of any cord damage, Dr. Reiss would have instead recommended careful observation and monitoring for signs of progressive myelopathy. But he also acknowledged that reasonable surgeons disagree about whether surgery is the best approach in a situation such as this:

> [I]f you have cervical stenosis without symptoms of myelopathy, proceeding [with surgery] is a prophylactic procedure. And . . . there is some validity to that. I would be on the other side of that saying we should observe carefully. There are plenty of people on this side that say, no, we should go ahead with surgery.
>
> And this is what is available in the literature. This is what is discussed, and there are reasonably good surgeons on both sides, very intelligent people that do research that follow these things, and there are people on both sides, and they disagree.

32. Ultimately, Dr. Reiss concluded the surgery was reasonable but "not at all related to the effects of the motor vehicle accident."

33. Dr. Reiss' opinions regarding causation are more credible and persuasive than those of Dr. Bee or Dr. Rook.

34. Claimant failed to prove that the September 26, 2017 cervical fusion performed by Dr. Bee was causally related to the July 21, 2016 accident.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals*

Office, 989 P.2d 251 (Colo. App. 1999). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a).

The existence of a preexisting condition does not disqualify a claim for compensation if an industrial accident aggravates, accelerates, or combines with the preexisting condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

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

As found, Claimant failed to prove the multilevel cervical fusion performed by Dr. Bee was causally related to the July 21, 2016 accident. The ALJ credits Dr. Reiss' opinion that the underlying pathology in Claimant's neck was preexisting and degenerative rather than the result of acute trauma. The nine-month delay between the accident and the first documented manifestation of any signs of myelopathy undercuts Dr. Rook's opinion that the accident acutely caused bulging or herniated discs. As Dr. Reiss explained, the spinal cord will generally adapt to and tolerate progressive canal narrowing over a prolonged period. Eventually, it reaches a tipping point, leading to the insidious onset of signs and symptoms of myelopathy. By contrast, the cord typically "reacts very poorly" to an acute disk herniation and "you get signs and symptoms soon after that." Had claimant suffered structural damage in the accident, he most likely would have developed clinically observable signs of myelopathy sooner. Although Claimant argues no one was "looking for" issues related to his neck, multiple providers documented normal neurological findings throughout his course of treatment before he started treating with Dr. Bee. PA-C Stafford specifically documented normal reflexes in the upper and lower extremities and negative Babinski response in December 2016. Similarly, no providers documented any symptoms consistent with myelopathy such as clumsiness, balance problems, ataxia, dropping items, or difficulty with fine manipulation before April 2017.

The ALJ is also persuaded by Dr. Reiss' opinion that the accident did not aggravate, accelerate, or combine with Claimant's pre-existing condition to produce the need for surgery. Again, the substantial delay between the accident and the onset of any observable clinical signs of myelopathy is a critical factor. Dr. Reiss explained "there are no clinical signs or symptoms that were recorded after the motor vehicle accident that would indicate that there was any effect . . . on [Claimant's] spinal cord. Zero symptoms, zero signs recorded of any effect on his spinal cord." Although Dr. Bee opined trauma "can" aggravate degenerative changes "sometimes," he did not say it more likely than not did so in this case. Ultimately, Dr. Bee found it "impossible to say" whether the accident aggravated or accelerated Claimant's preexisting condition. Dr. Rook initially opined the accident caused the cord compression, but hedged at the hearing and offered an aggravation theory as a fallback position. He offered no persuasive explanation for the nine-month delay in developing clinically appreciable signs of myelopathy. Additionally, the fact that Dr. Rook did not personally review the MRI images reduces the probative

value of his opinions as compared to those of Dr. Reiss. While Dr. Rook's theory may be correct, the ALJ does not find it to be more likely than not.

After reviewing all the evidence presented, the ALJ concludes the surgery was most likely a culmination of the natural progression of Claimant's preexisting condition, without contribution from the industrial accident.

Having determined that Claimant did not prove the requisite causal nexus, the question of reasonable necessity is moot.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits for cervical myelopathy, including the fusion surgery performed by Dr. Bee, is denied and dismissed.

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

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

DATED: February 9, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-043-248-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 18, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 1/18/18. Courtroom 1, beginning at 8:30 AM, and ending at 10:15 AM).

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondents' Exhibits A through H were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on January 25, 2018. On January 29, 2018, counsel for Respondents indicated no objection to the proposed decision. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern: (1) average weekly wage (AWW); AND, (2) whether Claimant is entitled to temporary total disability (TTD) benefits from March 3, 2017, through September 5, 2017. If the Claimant meets his

burden on TTD, the next issue is whether the Claimant was responsible for his termination from employment and the resulting wage loss and, thus, not entitled to TTD benefits from March 3, 2017, through September 5, 2017.

The Claimant bears the burden of proof, by a preponderance of the evidence on the issues of AWW and TTD. Respondents bear the burden on the affirmative defense of "responsibility for termination, by preponderant evidence."

FINDINGS OF FACT

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

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated and the ALJ finds that Claimant's AWW is $1,008.42, which yields a TTD rate of $672.31. The parties stipulate that the time period at issue for the TTD benefits is from March 3, 2017, through September 5, 2017, both dates inclusive, a total of 187 days. As of September 6, 2017, Respondents admitted for TTD benefits.

2. On the February 16, 2017, Claimant injured his back while working for the Employer. The Claimant was assigned to work near Loveland, Colorado, on Highway 34. His job duties involved rock mitigation and this required him to walk down or repel down mountains and knock loose rock off the mountain. His job duties also involved drilling holes and installing rebar on mountainsides.

3. The Respondents filed a General Admission of Liability (GAL) dated November 20, 2017, admitting for medical benefits, a TTD weekly benefit rate of $672.31, and TTD benefits from September 6, 2017 "ongoing." The GAL remains in full force and effect. The controversy herein concerns TTD benefits from March 3, 2017 through September 5, 2017m, both dates inclusive, a total of v187 days.

The Injury

4. On February 16, 2017, the Claimant was repelling down a mountain and trying to set a 25-foot rebar, which was tied to rope and being lowered down the mountain by two other employees who were stationed above the Claimant. The two employees lost control of the rope, and the Claimant grabbed the 25-foot rebar to prevent it from falling down on his co-workers below him. While holding onto the rebar, Claimant's body twisted, and he injured his back.

5. Immediately following his injury, the Claimant experienced back pain and left-sided foot drop. According to the Claimant, his left leg felt like dead weight. One day soon after the injury, the Claimant was walking and his injured leg got caught on a rock, he fell and injured his shoulder. Despite his condition, the Claimant did not seek medical attention right away and he tried to continue working his regular duty job. He was struggling to do his job, so the Employer let him take a few days off to let him heal. The Claimant he did not get better. When he returned to work, the Employer provided some light duty tasks for him and also let him take a few more days off work to rest.

6. The Claimant has been restricted to light duty ever since his work-related injuries.

Alleged "Responsibility for Termination"

7. On Sunday, February 19, 2017, a few days after the injury, the Claimant and another employee, Corey Ballantine, were drinking whiskey and started wrestling at the hotel, which is paid for by the Employer. According to the Claimant, it was a fun wrestling match and that they were just joking around. The Claimant and Ballantine shook hands afterwards and then continued to hang out together and with the other employees. Although the Employer paid for the lodging, the Claimant and Ballantine were off duty at the time and no one was injured. The ALJ takes administrative notice of the fact that it is not illegal for an adult to drink whiskey when the adult is off duty (the Claimant was born on November 27, 1982 and was 34 years old at the time of the wrestling match). It is also not illegal to engage in a wrestling match, off duty, nor was any company policy prohibiting wresting presented in evidence.

8. At the end of February 2017, the Employer took the Claimant off the mountain and had him drive to Grand Junction to deliver a part. The Employer also had the Claimant fly from Denver to Seattle, Washington to deliver a hydraulic press to the owner of the company. When he returned to Colorado, the Employer told him that they no longer had any light duty for him and that he could return to work when he was ready to work full duty. Claimant continued to be restricted from full duty as of this time and he continues to be so restricted. The Employer never told the Claimant that he was terminated or that he was fired for any reason. The Employer did not give the Claimant a warning for the wrestling match and nobody ever told him he was fired for wrestling with Ballantine.

9. At the hearing, David Williams, a foreman or supervisor for the Employer, testified that he was the Claimant's temporary foreman at the time of the Claimant's injury and in the few weeks after Claimant's injury. Williams was aware of the incident in which Claimant and Ballantine wrestled at the hotel. Williams talked to the Claimant about the incident but he did not give the Claimant a warning, written or verbal, about the incident. Williams does not terminate employees.

10. Williams worked on the job site with the Claimant until early March 2017, when he was sent to a different job site. When Williams left the job site, the Claimant was still there. Williams did not know if Claimant was terminated or why Claimant stopped working for the Employer.

11. Although the Respondents raised the affirmative defense of "responsibility for termination," they did not inform the Claimant of the specific policy reasons, if any, for the Claimant's separation from employment, other than telling him there was no more light duty work for him. The ALJ infers that the Employer considered the horseplay wresting with Ballantine, on Sunday when the Claimant was off duty, as a violation of company policy (no policy was presented) under an inferred rationale that the Employer was paying for the accommodations, somehow the Claimant was on duty 24/7, and the wresting match was a safety danger. The ALJ finds that this rationale goes far beyond pushing the ends of the envelope. It amounts to a desperate grab at straws to avoid paying benefits to the insured's work-related temporarily disabled employee. The ALJ rejects this rationale.

Ultimate Findings

12. Despite his propensity to drink whiskey, off duty, the ALJ finds the Claimant's testimony credible, straight-forward, persuasive an un-rebutted. The facts are not in dispute. What is in dispute is some unknown reason underlying the Claimant's separation from employment. David Williams, who testified for the Respondents did not contradict the Claimant's testimony in any appreciable way.

13. The ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and to reject any evidence to the contrary.

14. The Claimant has proven, by a preponderance of the evidence that he was temporarily and totally disabled from March 3, 2017, through September 5, 2017, both dates inclusive, a total of 187 days (Respondents admitted for TTD benefits from September 6, 2017 and continuing). During this period of time, the Claimant was sustaining a 100% temporary wage loss.

15. The Respondents have failed to prove, by preponderant evidence that the Claimant was responsible for his termination by virtue of a volitional act that he reasonably knew, or should have known, would result in his termination from employment.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, THE Claimant's version of the events of his injury and temporary disability are undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the Claimant's testimony was credible, straight-forward, persuasive and un-rebutted. The facts were not in dispute. What was in dispute was some unknown reason underlying the Claimant's separation from employment. David Williams, the only witness who testified for the Respondents did not contradict the Claimant's testimony.

Substantial Evidence

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

Temporary Total Disability

c. The Claimant has the burden of proving entitlement to TTD benefits. § 8-42-103(1)(a), C.R.S. This provision requires a claimant to establish a causal connection between the work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo.1995). The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). As found, The Claimant was restricted from full duty from March 3 2017 through September 5, 2017; and, the Employer chose to no longer make modified duty available to the Claimant during this period of time. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, a claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant was temporarily and totally disabled from March 3, 2017, through September 5, 2017, both dates inclusive, a total of 187 days (Respondents admitted for TTD benefits from September 6, 2017 and continuing).

d. Once the prerequisites for TTD are met [*e.g.,* no release to return to full duty, MMI has not been reached (the GAL admitting for continuing TTD benefits establishes that MMI has not yet been reached), a temporary wage loss is occurring because modified employment is no longer made available, and there is no actual

return to work]. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, during the period from March 3, 2017 through September 5, 2017,, the Claimant was sustaining a 100% temporary wage loss.

e. The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions that impair Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). The existence of disability presents a question of fact for the ALJ. There is no requirement that the Claimant produce evidence of medical restrictions imposed by an authorized treating physician, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic, supra.* As found, Claimant established a disability directly related to his work-related injury.

"Responsibility for Termination"

f. Respondents contend that the Claimant is not entitled to TTD benefits from March 3, 2017, through September 5, 2017, because he is at fault for his separation of employment and resulting wage loss. Respondents argue that Claimant's employment was terminated in March 2017 because he was in a fight with another employee on Sunday, February 19, 2017 (an off day), at an employer-provided hotel in Loveland, Colorado. This defense is governed by the termination statues, as well as *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004). "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury". §§ 8-42-203(1)(g) and 8-42-105(4)(a), C.R.S. Thus, where the employee is responsible for the termination, TTD benefits may be denied. *Id.; See also Apex Trans., Inc. v. Indus. Claim Apps. Office*, 321 P.3d 630, 631 (Colo. App. 2014). Respondents did not present any persuasive evidence that the Employer actually terminated the Claimant's employment. Accordingly, Respondents failed to meet their burden to prove Claimant was at fault for his separation of employment and resulting wage loss.

g. Section 8-42-105 (4), C.R.S., provides that an employee responsible for his own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether the claimant is responsible for termination, the ALJ may be required to evaluate competing factual theories concerning the actual

reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788 [Indus. Claim Appeals Office (ICAO), June 25, 2003]. As found herein above, the Respondents failed to prove that the Claimant's separation from employment was because of a volitional act on his part that he knew, or reasonably should have known would lead to his termination from employment. Indeed, the Respondents failed to show that the Employer terminated the Claimant in the first place. As found, on March 3, 2017, the Employer stopped making modified work available to the Claimant.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to TTD benefits from March 3, 2017, through September 5, 2017, both dates inclusive, a total of 187 days. As further found, Respondents failed to sustain their burden on the affirmative defense of "responsibility for termination."

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. In addition to all admitted benefits, Respondents shall pay the Claimant temporary total disability benefits of $672.31 per week, or $96.04 per day, from March 3, 2017 through September 5, 2017, both dates inclusive, a total of 187 days, in the aggregate amount of $17, 960.28, which is payable retroactively and forthwith.

B. The General Admission of Liability, dated November 20, 2017, shall remain in full force and effect.

C. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

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

DATED this_____day of February 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2018, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable injury to her low back, pelvis and wrists as a consequence of a fall occurring March 12, 2017.

FINDINGS OF FACT

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

1. Employer provides commercial food service to a flight school operated by Doss Aviation. As part of their business, Employer maintains a large production bakery on site. Claimant worked as a baker making breads, rolls, cakes and various other desserts for service to the flight students.

2. On March 12, 2017, Claimant was engaged in her typical clean up duties at the end of her work shift. Claimant testified that she was pulling a large rubber mat across the floor in order to sweep and mop underneath of it when her heel caught on a mat behind her. According to Claimant, she lost her balance, and fell backward on to her buttocks and outstretched hands. Claimant testified that she remained on the ground for a couple of minutes until Michael Rivera; one of Employer's cooks assisted her to her feet.

3. Mr. Rivera testified that he had finished cleaning up the area around his workstation. He had moved his mat away from his workspace, placing it in a folded position on the floor close to the area where Claimant was working. According to Mr. Rivera, as Claimant was dragging her mat backward, she made contact with the folded edge of his mat. Mr. Rivera testified that Claimant stumbled and fell backward, landing on her buttocks and right hand on top of his folded mat. Per Mr. Rivera, Claimant never lost grip of the mat with her left hand during her fall. Mr. Rivera testified that Claimant appeared embarrassed and laughed before he assisted her to her feet. According to Mr. Rivera, Claimant complained of right wrist pain but returned to her duties. She did not appear hurt to him.

4. Claimant testified that she reported the incident to Robert Cruz, Employer's shift lead, as no manager was working that day. According to Claimant, Mr. Cruz told her she could seek emergent care if she wanted to and that someone would take her to Centura Center for Occupational Medicine (CCOM) the next day as there was no manager on duty to take her claim.

5. Mr. Cruz, testified that he did not see the incident but Claimant later reported it to him, indicating that she had fallen during cleanup and her right wrist was bothering her. According to Mr. Cruz, Claimant did not mention any other pains or complaints nor did she request medical treatment. Rather, Claimant indicated that she would go home, take some Ibuprofen, go to bed and see how she felt the next day.

6. Claimant completed her shift, returned home and went to bed. She testified that she woke up at 6:00 PM with intense pain focused in her low back. Claimant testified that she reported for her 3:30 AM shift on March 13, 2017, at which time she requested medical treatment. According to Claimant, after reporting her need to obtain treatment, she was instructed to commence with her regular duties. Claimant testified that she worked for approximately six hours before she was taken to CCOM around 9:30 AM.

7. Owen Brooks, Employer's Assistant Manager, testified that Mr. Cruz advised him of Claimant's alleged injury around 7:30-8:00 AM. Mr. Brooks then spoke with Claimant. Mr. Brooks testified that during his conversation with Claimant she advised him that she had fallen and injured her wrists. He testified further that Claimant never mentioned low back pain. According to Mr. Brooks he did not learn of Claimant's back pain until after her initial visit to CCOM.

8. Bill Hayes, Employer's site manager also testified that he spoke with Claimant prior to her leaving for CCOM on March 13, 2017. He testified that Claimant did not mention what body parts were hurting her prior to her departure to CCOM.

9. Mr. Brooks transported Claimant to CCOM where Nurse Practitioner (NP) Teresa Kuhn evaluated her for a chief complaint of back/low back and bilateral wrist pain. Claimant reported that she fell backwards onto her low back with both of her arms stretched behind her to brace her fall. She reported soreness in both wrists and her low back. She denied incontinence, numbness, or tingling. She described her pain as aching with occasional stabbing sensations. "She denie[d] previous problems with her low back or wrists." She reported that Advil helped alleviate symptoms. A pain diagram completed on this visit depicts numbness and aching in the wrists bilaterally. The pain diagram also depicts aching pain in the anterior pelvis and the midline of spine, extending from the top of the thoracic spine downward to the lumbar spine and laterally to the sacroiliac joints (SI) bilaterally.

10. While Claimant denied a prior history of hand/wrist symptoms, review of the medical records reveals that on December 11, 2015, she reported bilateral hand/finger numbness and tingling to Wendy Archuleta the nurse practitioner in her primary care physician's office. Claimant's hand symptoms were severe enough to warrant a referral to a hand surgeon for a surgical consultation. Claimant's medical records also indicate that she continued to have tingling in her hands and feet, as of April 2016, but that she had not followed through with the referral to the hand surgeon.

11. Claimant testified that prior to the date of injury she never mentioned any problems with her low back to coworkers, but may have mentioned problems with her hands to a coworker. This purportedly occurred when she borrowed some pain cream from a coworker (identified as Tracy) about a month or two prior to the date of injury.

12. Tonya Martinez, a co-employee of Claimant's testified that she regularly interacted with Claimant during the workweek and had done so the last five years. She testified that Claimant periodically complained of back, hip, and wrist problems prior to the March 12, 2017 injury. Additionally, Ms. Martinez testified that she had at least one conversation with Claimant concerning Claimant's interest in having carpal tunnel surgery. Ms. Martinez added that for a period of time Claimant had had both wrists wrapped at work, which had become somewhat of a joke around the workplace.

13. Claimant denied ever mentioning problems with her low back or wrists to Ms. Martinez. She also testified that she denied previous problems with her low back and wrists at her initial evaluation following her March 12th slip and fall because she had not had any prior low back problems and because her prior symptoms involved her hands and not her wrists, which she did not think, were significant enough to report. Nonetheless, after reviewing the December 11, 2015 report of NP Archuleta, Claimant acknowledged that her symptoms predated the injury.

14. Claimant's March 13, 2017 physical examination revealed normal sitting and standing posture. Claimant also demonstrated the capacity to transition from one position to another with ease. She could get on and off the exam table without difficulty. She demonstrated full lumbar flexion and extension range of motion with discomfort. Straight leg raising was negative bilaterally. Gait was normal. Palpatory examination revealed lumbar paraspinal tenderness with spasm. Range of motion in the bilateral wrists were normal with generalized pain. Grip strength was equal bilaterally.

15. X-rays of the lumbar spine were taken and revealed mild degenerative changes throughout without fracture or subluxation. There was no significant bony neural foraminal narrowing. X-rays of the wrists were compared to those obtained February 21, 2008 and demonstrated no bony abnormalities and no interval change.

16. Claimant was assessed with contusions of the low back, pelvis, and right and left wrists. She was released with work restrictions of no bending, kneeling, squatting, stooping, or twisting; push pull no more than 5 pounds; and lift no more than 1 pound.

17. Claimant testified that she returned to work on March 14, 2017, at which time she asked Mr. Hays if he had received a list of her work restrictions. Mr. Hays told her he had the restrictions. According to Claimant, she asked Mr. Hays if he had filing she could do. Claimant testified that he told her no. She alleged that she also asked if she could use her sick time, to which she testified Mr. Hays informed her that she had no sick time. Claimant also testified that she asked if she could take her pre-planned vacation early, which purportedly was rejected because there was only one other baker

who was already on vacation. Given the above, Claimant testified that she was essentially forced to work full unrestricted duty for the next three shifts which purportedly caused worsening symptoms, including weakness in her legs.

18. Mr. Rivera testified that he was aware that Claimant had lifting restrictions. He also testified that during the three shifts, which Claimant asserts she worked full duty, he did not observe her lifting anything heavy nor did he ever see Claimant move about kitchen with support from the counters as she would later claim was necessary. According to Mr. Rivera, Claimant was not asked to perform duties outside of her restrictions.

19. Mr. Cruz testified that he was aware of Claimant's restrictions and that she was limited in the amount of lifting she could perform. He testified that Claimant was never asked to work beyond her restrictions and he never saw Claimant use the counters in the kitchen for support while carrying out her duties. According to Mr. Cruz, co-workers performed the heaving lifting associated with Claimant's position and she was assigned light duty tasks, including cutting and plating desserts.

20. Mr. Brooks testified that Bill Hayes made everyone aware of Claimant's work restrictions following her March 13, 2017 CCOM appointment. He testified that because the other baker was on vacation at the time, he took over the majority of Claimant's job duties, so she could work within her restrictions. Claimant's primary job during the three shifts she claimed to have worked full duty was to cut, decorate and plate desserts. He testified that Claimant was never forced or even asked to work outside of her work restrictions. He too, testified that he never noticed Claimant holding onto countertops or crying in pain.

21. Bill Hayes, testified that he informed the staff of Claimant's work restrictions and that they needed to help her out while she worked modified duty. He indicated that there was modified duty available within Claimant's work restrictions but she wanted to be off work. He testified that he told her he was down to one baker and that her co-employees would help her with the duties of her job that she was restricted from performing.

22. Claimant returned to NP Kuhn on March 16, 2017. Claimant reported that her condition had worsened because she had not been allowed to work within her restrictions. She described her lumbar pain as achy, "crampy" muscle type pain. Physical examination revealed findings similar to those documented after her March 13, 2017 examination. Claimant was referred to physical therapy and returned to modified duty work. Her pushing, pulling and lifting restrictions were liberalized to 10 pounds pushing/pulling and 5 pounds lifting.

23. Claimant never returned to work following her vacation.

24. Claimant saw Physician Assistant (PA) Steven Byrne at CCOM on March 21, 2017. As part of this visit, Claimant completed a pain diagram that depicts achy

8/10 pain in her back and pelvis. She also reported continued numbness and pins and needles sensations in her hands and wrists. Physical examination of the wrists revealed mild swelling over the radial styloid bilaterally. Claimant again reported that Employer did not comply with her work limitations and made her work full duty with which PA Byrne documented her frustration. Based upon the evidence presented, this documentation is the last treatment note authored by a provider at CCOM.

25. On March 24, 2017, Claimant presented to Dr. Terrance Lakin at the Southern Colorado Clinic. Claimant reported that she tripped over a floor mat that was left in the walkway, and while she was moving it, she fell back on her tailbone and hands. She continued to have more pain and aching in the low back/pelvis, loss of sensation/tingling in thighs/pelvis and buttocks, and incontinence of urine. Physical examination revealed moderate to severe distress, slow transitioning, guarding, and assistance required to get on and off the exam table. She had poor lumbar range of motion. She reported paresthesia in nearly all digits, but intermittent and difficult to pin down. She maintained full bilateral wrist range of motion, although mild swelling of the wrists persisted. Straight leg raises were positive bilaterally at 70° with radiating symptoms. She was at that time referred to the emergency room (ER) for evaluation of possible cauda equina syndrome.

26. On March 29, 2017, Physician Assistant (PA), Terry Schwartz at Southern Colorado Clinic, evaluated Claimant in follow-up. Claimant appeared extremely upset and anxious. She expressed "strong emotions about her supervisor 'making her work' to the end of her shift despite her pain complaints. While there is no reference to the condition of Claimant's wrists, Claimant's low back, pelvic and lower extremity examination was essentially unchanged. PA Schwartz explained to Claimant that her "symptoms, exam, and testing [did] not correlate with identifying a specific cause." Nonetheless, Claimant removed from work because PA Schwartz did not think she could function.

27. As evidenced by the content of the medical records and pain diagrams completed thereafter, the ALJ finds the March 24, 2017 appointment to mark an inexplicable expansion of purported symptoms Claimant associates with her March 12, 2017 slip and fall. While Claimant has undergone substantial physical evaluation and extensive diagnostic testing, an objective explanation for her evolving symptoms has not been discovered leading some providers to recommended psychological evaluation/intervention and Respondents' retained expert, Dr. Henry Roth to suggest that she is suffering from somatic symptom disorder.

28. While questions regarding the reasonableness and necessity of Claimant's treatment along with concerns regarding the relatedness, i.e. the cause of Claimant's escalating symptoms and inability to function at work persist, these issues are not before the ALJ. Rather, the parties only requested a determination of whether Claimant suffered a compensable injury in the first instance.

29. While Dr. Lakin indicated that there is a lack objective evidence to support a conclusion that Claimant sustained an injury, the ALJ finds that he, NP Kuhn and PA Schwartz all documented, what the undersigned ALJ finds to be independent signs consistent with injury, namely back spasm and wrist swelling. Moreover, the April 7, 2017 MRI performed at St. Mary Corwin Hospital demonstrated "mild soft tissue edema overlying the sacrum/coccyx posteriorly." While Dr. Roth largely concurs with the opinions of Dr. Lakin, he admitted that the described mechanism of injury could result in a sacral contusion or lumbar strain.

30. The evidence presented persuades the ALJ that the documented back spasm and wrist swelling Claimant experienced following her slip and fall was, more probably than not caused by the March 12, 2017 incident. While Dr. Roth contends that the myriad of symptoms that developed over the ensuing months is unrelated to Claimant's slip and fall, the ALJ is not persuaded this negates a finding that she suffered a compensable injury. As noted, questions regarding the relatedness of Claimant's escalating symptoms and inability to function at work following her slip and fall are not before the ALJ. As presented, Claimant has proven, by a preponderance of the evidence, that she sustained compensable injuries to her back, pelvis and wrists.

CONCLUSIONS OF LAW

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

I. General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

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

unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). In this case, Claimant's testimony regarding the events leading up to her slip and fall are corroborated by the testimony of Mr. Rivera. Moreover, the medical documentation supports a conclusion that Claimant fell backward onto her outstretched hands and buttocks resulting in low back and wrist pain requiring medical attention. Claimant's subjective pain complaints are supported by objective findings including low back spasm, soft tissue edema over the sacrum/coccyx by MRI imaging and radial styloid swelling. Accordingly, the undersigned finds Claimant's testimony regarding the mechanism of injury, her initial pain and her decision to seek treatment credible and persuasive.

II. Compensability

D. A "compensable injury" is one, which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, *supra*; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to

the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of her employment relationship with Employer and during an activity, specifically moving a large rubber mat in preparation to clean under it as part of her duties as a baker for Employer. Moreover, the evidence presented leaves little doubt that Claimant's injuries "arose out of" her employment.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that Claimant sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). Here, the ALJ concludes that the testimony of Mr. Rivera corroborates that Claimant slipped and fell while moving her work mat in order to clean under it at the end of her shift. Moreover, the physical examinations of Claimant shortly after this slip and fall contain objective findings consistent with an injury to the low back, pelvis and wrists. Accordingly, the ALJ is convinced that Claimant's injury has its origins in her work related functions and is sufficiently related thereto so as to be considered part of her service to Employer. Based upon a totality of the evidence presented, Claimant's low back, pelvis and wrist injuries are compensable. Questions regarding the extent of Claimant's injuries and the relatedness of her evolving symptoms to her injuries along with her inability to work are reserved for future determination.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that she sustained compensable injuries to her low back, pelvis and wrists.

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

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

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

DATED: February 12, 2018

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-041-216-01

SUPPLEMENTAL ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

No further hearings have been held in the above-captioned matter. On December 27, 2017, counsel for the Respondents filed a Petition to Review the Full Findings of Fact, Conclusions of Law and Order of Administrative Law Judge (ALJ) Edwin L. Felter, Jr., mailed December 15, 2017, an interlocutory decision which granted the Claimant the right to proceed to a Division Independent Medical Examination (DIME) at her own expense, reserving all other issues. No hearing transcript was requested. On December 27, 2017, Respondents filed an "opposed Motion to Stay DIME," which the ALJ denied on January 8, 2018. On January 30, 2018, Respondents filed their Brief in Support of petition to Review, conceding: "It is well-established that a party dissatisfied with an order that requires it **to pay** (emphasis supplied) a penalty or benefit, or denies a **claimant** (emphasis supplied) a benefit or penalty, is reviewable." Respondents argue that they are required to pay costs, attendant to the Claimant's paid-for DIME by providing the DIME physician and all other parties, a complete copy of all medical records in their possession pertaining to the "subject injury," pursuant to § 8-42-107.2(3)(b), C.R.S. and W.C.R.P., Rule 11-3(J) and § 25-1-801, C.R.S. To further pursue to postal/cost argument, the ALJ is impressed that this argument stretches the outer ends of the envelope beyond reason and common sense. To save costs on documents that the Respondents are otherwise legally obliged to provide, Respondents' argument would deprive the Claimant of the statutory right to have and pay for a DIME. The Claimant is **not** seeking an Indigent Determination (which the Respondents could contest and appeal an adverse ruling).

On February 9, 2018, the Claimant filed a "Response to Respondents' Brief in Support of Petition to Review," essentially, arguing that Respondents' argument that the admissions of liability they filed were a nullity because the Respondents properly treated the Claimant's claim as a "no lost time" injury, whereby they could pay medical benefits without admitting or denying liability. This argument is bold-facedly made against a backdrop of an independent medical examination by Henry J. Roth, M.D., wherein he rated the Claimant's permanent disability at zero, and the Respondents filed a Final Admission of Liability (FAL), dated June 15, 2017, admitting for Dr. Roth's zero permanent impairment rating. The Respondents argument thereupon would have a "slam dunk" effect, thus ending the Claimant's case at zero permanent impairment without her having the due process right to challenge the FAL with a statutory DIME. Respondents' convoluted and circular argument is very interesting. It may even border on the frivolous. It is not well-taken by the ALJ.

The full background of the interlocutory decision is repeated herein below.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 5, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 12/5/17, Courtroom 1, beginning at 8:30 AM, and ending at 9:30 AM). No testimony was taken. Oral arguments were made.

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. Respondents' Exhibits A through C were admitted into evidence, without objection.

ISSUE

The sole issue to be determined at hearing and by the Full Findings, Conclusions of Law and Order, mailed December 15, 2017, was whether the Claimant is entitled to a Division Independent Medical Examination (DIME), after the Respondents filed an FAL for zero permanent impairment, based on Dr. Roth's IME rating of zero permanent impairment. Because the Claimant's counsel made a judicial admission that the Claimant was not indigent and the Claimant would be paying for the DIME, any determination of the issue would be interlocutory.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

1. The Claimant sustained an admitted compensable injury (within the definition of "sufficiency to be compensable") arising out of the course and scope of her employment on February 16, 2017.

2. The Claimant underwent significant medical treatment at the hands of Henry J. Roth, M.D. (Claimant's Exhibit 7), who was the Claimant's authorized treating physician (ATP). Dr. Roth diagnosed "a whiplash like response involving cervical, thoracic, and lumbar regions, primarily right-sided" (Claimant's Exhibit 7), occurring on February 16, 2017. He released the Claimant to full time work, effective February 21, 2017, with restrictions of "no patient turning, transfers, transport, or boosting." These restrictions continued until May 3, 2017. On May 24, 2017, Dr. Roth gave the Claimant a full release to work, and declared her to be at maximum medical improvement (MMI) with no residual impairment. Dr. Roth was of the opinion that the Claimant's condition was work-related.

3. First, the Respondents filed a General Admission of Liability (GAL) on May 1, 2017. Under the section "Liability is admitted for the following benefits, the box was checked, marking "medical benefits." No other box in that section was checked. In the "remarks" section, Respondents wrote "medical only claim with no lost time….Not at MMI/no PPD owed" (Claimant's Exhibit 1). The ALJ infers and finds that statement "Not at MMI/no PPD owed" a "rush to judgment before a Final Admission of Liability (FAL) was ripe.

4. Next, based on Dr. Roth's opinions, the Respondents ultimately filed an FAL, dated June 15, 2017 (Claimant's Exhibit 2), admitting for an MMI dated of May 24, 2017 and zero permanent partial disability (PPD). There have been no admissions for temporary disability benefits.

5. The Claimant filed a timely objection to the FAL and a Notice and Proposal to Select a DIME.

6. On July 12, 2017, Respondents requested a pre-hearing conference where both attorneys appeared by telephone.

7. A pre-hearing conference was held on July 31, 2017, before Pre-Hearing ALJ (PALJ) Thomas J. DeMarino. Based on the Industrial Claim Appeals Office Order in *Trujillo v. Elwood Staffing,* W.C. No. 4-957-118-02 [Indus. Claim Appeals Office(ICAO), June 22, 2017], PALJ DeMarino granted Respondents' motion to strike

the Claimant's Notice and Proposal, articulating the fact that ATP Henry J. Roth, M.D., found zero PPD. This determination will be further discussed in detail herein below under "Conclusions of Law."

8. Thereafter, the Claimant applied for a hearing before the Office of Administrative Courts (OAC) on the issue of whether the Claimant is entitled to a DIME, under the holding in *Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003).. The hearing was held on December 5, 2017, with no testimony taken –only oral arguments of counsel. Also, Respondents filed a written "Trial Brief Regarding Claimant's Lack of Entitlement to a DIME," which was considered herein.

RESPONDENTS' ARGUMENTS

In a nutshell, Respondents orally argued that its admissions of liability were, essentially, nullities because the case does not involve a compensable "indemnity" claim. This Respondents incorrectly analogize the circumstances in this case to the established law that an employer may pay an injured worker's medical benefits without admitting or denying liability. *See* § 8-43-101, C.R.S. Reading the statutory section *in pari materia,* it is clear that an employer/insurance carrier may pay for an injured worker's medical benefits without taking a position admitting or denying compensability. The underlying purpose of this provision is to encourage the payment of medical bills by an employer without the employer committing to a position on liability. The ALJ concludes that this analogy is misplaced because the Respondents filed **admissions** concerning medical benefits and an FAL for zero PPD. *Black's Law Dictionary,* 10th Ed., defines "admission" as "an acknowledgement that facts are true." In this case, an admission of **liability** is an admission that the fact of liability is true, *i.e.* that the Respondents accept liability for a compensable injury resulting in the need for authorized medical treatment. An **admission of liability** in workers' compensation law is legally binding unless set aside in an adjudicatory proceeding. The ALJ soundly rejects the Respondents analogy to paying medical benefits without admitting or denying liability.

Respondents mechanistically rely of Workers' Compensation Rules of Procedure (WCRP), Rule 5-5 (E) (1) (a) [Trial Brief, p. 2, par. 5], which states"…within 30 days after the date of mailing or delivery of a determination by an authorized treating physician providing primary care that there is **no** (emphasis supplied) impairment, the insurer shall either: (a) file an admission of liability consistent with the physician's opinion, or ()b) Request a Division Independent Medical Examination (IME) in accordance with…." The ALJ infers and concludes that Respondents must have been laboring under a scotoma (blind spot) with respect to the full import of this rule, which mandates a DIME request if no final admission is filed. Indeed, to accept the respondents' argument in this regard would be to interpret that only respondents, **and not claimants,** could obtain a DIME when there is zero PPD. Such an interpretation would do violence to the plain meaning of the rule.

Respondents, as did PALJ DeMarino in striking the Claimant's request for a DIME, rely heavily on ICAO's Order in *Trujillo v. Elwood Staffing,* W.C. 4-957-118-02 (ICAO, June 22, 2017). *Trujillo* is part of the progeny of *Harman-Bergstedt, Inc. v.* Lo*ofbourrow*, 320 P.3d 327 (Colo. 2014), which applied very narrow, fact specific principles, without establishing a sweeping precedent. *Trujillo* determined that MMI is a term of art, and has no legal significance in a case with no indemnity benefits payable. This makes implicit sense because MMI is the demarcation line between temporary and permanent disability indemnity benefits. Indeed, it is the demarcation line between temporary disability benefits and **zero** permanent disability. In *Loofbourrow* by extension, an FAL is not effective to close a case as to further medical benefits. The Court stated that a claimant could still seek further medical benefits, with the burden of proof as to reasonableness and causal relatedness on the claimant. The holding of the case is that a petition to reopen need not be filed under §8-43-303, if the claimant should seek further medical benefits. The case sets no precedent as to any broader meaning than in the context of reopening for medical benefits, and it does not specify what type of medical benefits it is meant to address (*i.e*. *Grover* or pre-MMI substantive treatment). To accept the Respondents argument that the FAL, admitting for zero PPD is a nullity, would overturn the reasonable expectations of the community of injured workers who received a perfunctory zero impairment rating. It would undermine the DIME process whereby the ATP's opinion of zero PPD would be the end of the line and not subject to challenge. This could be the situation in a parallel universe (where technical form triumphs over due process), but not in Colorado.

CONCLUSIONS OF LAW

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

COMPENSABILITY

a. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, **the consequences of a work-related incident must require medical treatment or be disabling** in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, by admissions of the Respondents and the medical evidence, the Claimant sustained compensable injuries on February 16, 2017, arising out of the course and scope of her employment.

CLAIMANT'S ENTITLEMENT TO A DIME

Rule 5-5 (E) (1) (a) of the WCRP

b. Rule 5-5 (E) (1) (a), WCRP, allows for a DIME when an ATP rates PPD at zero.

Trujillo v. Elwood Staffing, W.C. 4-957-118-02 (ICAO, June 22, 2017)

c. This case, which was relied upon by PALJ DeMarino in striking the Claimant's request for a DIME at the pre-hearing conference, is part of the progeny of *Loofbourrow*, *supra*. The Supreme Court held in *Loofbourrow* that MMI is a term of art, and has no legal significance a case with no indemnity payable. By extension, a FAL is not effective to close a case as to further medical benefits. This makes implicit sense because MMI is the demarcation line between temporary and permanent disability indemnity benefits. The Court stated that the claimant could still seek further medical benefits, with the burden of proof as to reasonableness and causal relatedness on the claimant. The holding in the case is that a petition to reopen need not be filed under §8-43-303, C.R.S., if the claimant should seek further medical benefits. The case sets no precedent as to any broader meaning than in the context of reopening for medical benefits, and it doesn't specify what type of medical benefits it is meant to address (i.e. Grover or pre-MMI substantive treatment).

d. Additionally, *Trujillo* continues down the path of *Kazazian v. Vail Resorts*, W.C. No. 4-915-969-03 (ICAO, April 24, 2017), in that there is no statutory consequence of MMI unless there is an injury for which disability is payable. ICAO reasoned, "In Loofbourrow, the Court held that a determination of MMI has no statutory significance with injuries that do not result in the loss of no more than three days or shifts of work time or permanent disability, as is the case in this action…." See, *Trujillo v. Elwood Staffing*, *supra.* As stated, extending the *Loofbourrow* case this far was not the Supreme Court's intent. The "unique" circumstances of *Loofbourrow* are distinguishable from both this *Trujillo* case, as well as the present case decided herein. Moreover, this *Trujillo* case involves the limited issues of medical **benefits after a DIME had already occurred.** It is clearly distinguishable on these grounds as well. The case does not stand for the fact that the DIME should never have occurred, or that §8-42-107.2(a)(1)(A) does not apply in these instances. Stretching the rationales of these cases to the present case is an interesting gymnastic devoid of merit as applied herein.

[T]he General Assembly created the DIME System within the Statutory Scheme because of the Potential for Treating Physicians to be Biased

e. The logical result of the Respondents' argument is that if an ATP is allowed to determine whether or not a DIME should occur (if a zero PPD is assessed, there is no right to a DIME), is that it runs afoul of the decision in *Whiteside v. Smith,* 67

P.3d 1240 (Colo. 2003). *Whiteside* stands for the notion that the worker is giving up a lot of common law rights within the Colorado workers' compensation system, and therefore access to the system—including the DIME process—is a substantive due process right. The *Whiteside* Court stated unequivocally that the "substantive right to workers' compensation is a constitutionally protected property interest." Generally, this is true concerning the right to challenge an ATP's zero PPD rating. If not challenged through the DIME process, the ATP's zero PPD rating is final and "supreme." To argue the a request for a DIME is not yet ripe creates a logical fallacy, whereby any challenge or rating other than the ATP's zero PPD rating will, most likely never be ripe unless there's a worsening of condition. There is a missing link in such a notion, *i.e.,* the present right to challenge an ATP's zero PPD rating.

Harman-Bergstedt, Inc. v. Loofbourrow, 320 P.3d 327 (Colo. 2014)

f. The *Loofbourrow* case is distinguishable from the present case. In *Loofbourrow* there *was no* FAL filed. It is clear error to extend this holding to the conclusion that there can be no DIME without a TTD payment. It is a stretched connection, beyond the bounds of reason, with such overwhelming, key distinguishing facts.

g. The Respondents argue that a DIME should not be granted in the absence of PPD or TTD award. The argument relies squarely on the holding in the *Loofbourrow* case and its ICAO progeny. The *Loofbourrow* case did not involve a FAL. The filing of an FAL triggers a claimant's duty to request a DIME. *See*, § 8-42-107.2(a)(1)(A), C.R.S. The only legal remedy for a claimant (or respondent) who disagrees with an ATP's MMI determination is to request a DIME. Thus, the *Loofbourrow* decision does not apply in this instance given the clear factual incongruence. There is also the issue of **due process**, which will be discussed *infra*. In fact, many cases would not be factually similar to *Loofbourrow*, as that case involved "unique circumstances." See, *Harman-Bergstedt, Inc. v. Loofbourrow*, *supra*. For the Respondents' arguments to prevail, *Loofbourrow* must be read in such a way that it tortures the facts and looks nothing like the decision itself. The *Loofborrouw* holding is very narrow and limited. Its progeny have gone far out of bounds. The *Loofbourrow* decision itself concedes how unique the factual situation was. It does not apply to a situation in which an FAL is part of the procedural history (there was no FAL in *Loofbourrow*, *supra*).

h. The *Loofbourrow* Court refers to the "unique circumstances of that case. *See, Harman-Bergstedt, Inc. v. Loofbourrow*, *supra*. Further, the Supreme Court stated: "The **sole** (emphasis supplied) issue before this court is whether Loofbourrow could be entitled to an award of temporary disability benefits without having challenged, by means of a division-sponsored independent medical examination, the initial treating physician's assessment that she had reached maximum medical improvement. The intermediate appellate court found that**, under the unique circumstances of this case,** including particularly her claim of a worsening condition and the **absence of a final admission of liability…**" [emphasis supplied], *Id*. If the Respondents use

Loofbourrow to skirt the due process import of *Whiteside v. Smith, supra,* they do so in a "circular" way. Specifically, they implicitly argue that the Claimant never had a right to the DIME in the first place. The ALJ concludes that this circuitous argument is a stretch beyond the bounds of reason and without merit.

Setting Aside Pre-Hearing Order Striking DIME

i. The orders of a PALJ are not final for purposes of an appeal. *See Indus. Claim Appeals Office v. Orth,* 965 P.2d 1246 (Colo. 1998). As found and concluded, PALJ DeMarino's pre-hearing conference order misplaced a reliance on ICAO's Order in *Trujillo, supra.* For the reasons articulated herein above, the pre-hearing conference order was in error and should be set aside.

Burden of Proof

j. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992), and it is by a "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden that she is entitled to a DIME to challenge ATP Dr. Roth's zero PPD rating.

SUPPLEMENTAL ORDER

IT IS, THEREFORE, ORDERED AND RE-ITERATED, THAT:

A. The Claimant is entitled to a Division Independent Medical Examination (DIME) at her own expense.

B. The DIME process shall proceed forthwith. PALJ DeMarino's Pre-Hearing Conference Order is hereby set aside.

C. This order is procedural and interlocutory because it does not award any benefits. Therefore, any and all issues not determined herein are reserved for future decision.

D. Further relief on interlocutory matters, if the ALJ has exceeded his jurisdiction, may be sought through a Rule 106 (a)(4), C.R.C.P. avenue.

DATED this_____day of February 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. Nos. 5-029-658-01, 5-029-659-01 and 5-029-6660-01

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING SUMMARY JUDGMENT

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

On February 13, 2018, the parties filed a "Joint Motion for Corrected order," alleging *inter alia,* that the Findings of Fact, made to illustrate contested issues of fact and set forth some background, "may be misread, misunderstood, misinterpreted, and misapplied." The Joint Motion is well taken, and the Order denying Summary Judgement in all three of the above-referenced cases is hereby corrected accordingly.

A hearing on the merits in the above-referenced matter has been re-scheduled. On December 27, 2017, Respondents filed three separate Opposed Motions for Summary Judgment, in the above-captioned, cases on the issue of statute of limitations allegedly barring the Claimant's claims. On January 11, 2018, the Claimant filed three separate Responses to Respondents' Motions for Summary Judgment. The matter was referred to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) for a ruling on January 15, 2018.

The ALJ hereby consolidates all of the three above-captioned cases for purposes of ruling in the Motions for Summary Judgment.

W.C. No. 5-029-658-01 concerns an alleged right shoulder injury of June 15, 2005 [attached to Respondents' Motion are Exhibits A through Y]. W.C. No. 5-029-659-01 concerns an alleged right elbow injury of July 15, 2006 [attached to the Respondents' Motion are Exhibits A through Y]. W.C. No. 5-029-660-01 concerns an

alleged left hip injury of October 17, 2013 [attached to Respondents' Motion are Exhibits A through F][1] The Claimant filed three separate "Responses to Respondents' Motions for Summary Judgment on January 11, 2018 [separate sets of Exhibits A through U were attached to the Claimant's Responses].

ISSUES FOR SUMMARY JUDGMENT

The issues to be determined by this controversy on all three claims concern the applicability of the affirmative defense of "statute of limitations." to all three claims. The Employer takes the position that the claims only needed to be filed with the insurance carrier and not with the Division of Workers' Compensation (DOWC) because they concerned alleged "no lost time" injuries and the Respondents were not required to file Employer First Reports of Injury, and they could pay medical bills without contesting or denying liability. The Claimant's position is that the Employer knew, in each case, that the Claimant was taken out of his regular duties of playing baseball for more than three days, yet the Employer did not file an Employer's First Report of Injury in any of the claims, thus, the statute of limitations was tolled.

The Respondents bear the burden of proof, by preponderant evidence on the "statute of limitations" affirmative defense as it pertains to each claim. The crux of the Respondents' position is that its wage continuation program, pursuant to § 8-42-105 (2)(a), C.R.S.,, essentially, renders the notion of the Employer's knowledge of "more than three days lost time" irrelevant, thus, allowing the Employer to treat the Claimant's cases as paying medical bills without have to file Employer's First Reports of Injury, or without being required to admit or deny liability.

FINDINGS OF FACT

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

General/All Three Cases

1. The ALJ finds that there are disputed issues of material fact concerning whether the statute of limitations was tolled, and these issues can only be resolved in an evidentiary hearing.

[1] The sets of lettered Exhibits attached to the three motions are different lettered sets.

W.C. No. 5-029-659-01 (July 15, 2006)

2. The ALJ finds that there are disputed issues of material fact concerning the 2006 right elbow injury, among other issues, whether the statute of limitations was tolled.

W.C. No. 5-029-660-01

3. The ALJ finds that there are disputed issues of material fact concerning whether the statute of limitations was tolled after the 2013 injury.

DISCUSSION OF STATUTE OF LIMITATIONS

Section 8-43-103(2), C.R.S., provides that the right to workers' compensation benefits is barred unless a formal claim is filed within two years of the injury. The statute of limitations does not begin to run until a claimant, as a reasonable person, knows, or should have known, the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne,* 426 P.2d 194 (Colo. 1967) at 197. In order to recognize the probable compensable character of the injury, "the injury must be of sufficient magnitude that it causes a disability which would lead a reasonable person to recognize that he may be entitled to compensation benefits." *Choi v. Colo. Architectural Mills Works Supply*, W.C. No. 4-794-282 [Indus. Claim Appeals Office (ICAO), October 14, 2010].

There are exceptions to the two-year statute of limitations under § 8-43-103(2), but they do not apply in this case. For instance, § 8-43-103(2), C.R.S. provides: "In all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division (DOWC) as required by the provisions of [the Workers' Compensation Act], this statute of limitations shall not begin to run against the claim of the injured employee … until the required report has been filed with the division. *Likens v. Dep't of Corrs*, W.C. No. 4-560-107 (ICAO Feb. 10, 2004). This applies to alleged "lost time" or "permanently disabling injuries of which an employer has notice.

CONCLUSIONS OF LAW

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

Statute of Limitations

a. The Statute of Limitations is an affirmative defense and unless raised, it is waived. *See Kersting v. Indus. Comm'n,* 30 Colo. App. 297, 567 P.2d 394 (1977). To

paraphrase the late U.S. Supreme Court Justice Oliver Wendell Holmes, Jr: "It has nothing to do with justice. It is a housekeeping device of the law to clean out old cases." When the time specified in a statute of limitations has passed, it could be conceptualized that there is a conclusive presumption that there will be prejudice to the side on the receiving end of the lawsuit. As found, herein above, the Respondents raised this affirmative defense herein.

b. Although if the Claimant establishes that he sustained three compensable injuries in 2005, 2006 and 2013, respectively, his claims would be barred by the statute of limitations, applicable to each claim unless the statutes were tolled. § 8-43-103(2), C.R.S., provides that the right to workers' compensation benefits is barred unless a formal claim is filed within two years of the injury. The statute of limitations does not begin to run until the claimant, as a reasonable person, knew or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v Payne,* 162 Colo. 345, 426 P.2d 194 (1967) at 197. The holding in *Payne* is not germane herein if the statute of limitations was tolled by virtue of the Employer failing to file Employer's First Reports of Injury when they were legally obligated to do so.

Tolling of the Statute of Limitations

c. There are exceptions to the two-year statute of limitations under § 8-43-103(2), and one of them applies in this case. For instance, § 8-43-103(2), C.R.S. provides that: "In all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division (DOWC) as required by the provisions of [the Workers' Compensation Act], this statute of limitations shall not begin to run against the claim of the injured employee … until the required report has been filed with the division." *Likens v. Dep't of Corrs.,* W.C. No. 4-560-107 (ICAO Feb. 10, 2004).

Burden of Proof

d. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). In the present case, it is the Respondents' burden to prove that the statutes of limitations apply to the Claimant's three claims; and, it is the Claimant's burden to prove that the statutes of limitations were tolled in the three claims. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, in the first instance, the

Respondents have established prima facie cases concerning the applicability of the statutes of limitations to all three claims; however, the .Claimant has proven that there are disputed issues of material fact surrounding the tolling of the statutes of limitations.

Summary Judgment

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

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

g. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there are genuine issues of disputed, material facts for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Respondents' three Motions for Summary Judgment, and the Claimant's Responses thereto fail to show specific facts probative of the respondents' right to summary judgment.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents' Motions for Summary Judgment in W.C. Nos. 5-029-658-01, 5-029-659-01 and 5-029-660 are hereby denied and dismissed.

B. A hearing on the merits, shall proceed as scheduled.

C. Any and all issues, including the tolling of the statutes of limitations in all three claims, are hereby reserved for future decision.

DATED this_____day of February 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-055-295-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 10, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 1/10/18, Courtroom 1, beginning at 8:30 AM, and ending at 11:30 AM).

Claimant's Exhibits 1 through 21 were admitted into evidence, without objection, with the exception of Claimant's Exhibit 21, pp. 227, 228 only, which two pages were rejected. Respondents' Exhibits A through G were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief was filed on January 17, 2018. Respondents' answer brief (erroneously labeled as "Proposed Full Findings of Fact, Conclusions of Law and Order) was filed on January 26, 2018 [PLEASE NOTE: the ALJ finds it inappropriate for a party to file a proposed decision before the ALJ has decided the case]. On January 30, 2018, Claimant advised that she would not be filing a reply brief. Consequently, the matter was deemed submitted for decision on January 31, 2018.

ISSUES

The issues designated for hearing concerned: (1) compensability of a pulmonary embolism and a right knee bruising; (2) medical benefits from August 11, 2017, attributable to a pulmonary embolism and a minor right knee bruising; (3) average weekly wage (AWW); and temporary total disability (TTD) benefits from August 12, 2017, through September 11, 2017, attributable to a pulmonary embolism or a right knee bruising.

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

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant works for the Employer as a supervisor at Denver International Airport. She coordinates the pick-up of arriving passengers at the airport by taxi cabs and limousines for transport to their ultimate destinations

2. On June 15, 2017, the Claimant underwent non-work related right total knee replacement surgery (arthroplasty), performed by Jared Michalson, M.D. She was not given anti-coagulation prophylactics (Respondents'. Exhibit C, pp. 39-41).

The Work-Related Incident, Allegedly Causing a Compensable Aggravation/Acceleration of the Claimant's Underlying Right Knee Condition

3. On August 11, 2017, at approximately 6:00 PM, the Claimant was walking with another employee to the Employer's office in order to clock-out for the day. She walked too close to the edge of the sidewalk, lost her balance, and fell to the ground. She struck her right knee on the ground (concrete) and could not get up.

4. An ambulance came and took the Claimant to University Hospital. She was admitted to the emergency room (ER) at 6:47 PM (Claimant's Exhibit 1, p. 5). An x-ray was taken of her right knee at University Hospital and it revealed no significant findings (Claimant's Exhibit 1, p.9). According to the Claimant, her right knee "looked good" following the fall.

After the Incident

5. On August 29, 2017, the Claimant presented to orthopedic surgeon, Dr. Michalson for evaluation and another x-ray to the right knee. Dr. Michalson noted the x-ray showed a well-appearing right total knee arthroplasty without complication. Dr. Michalson did not provide nor refer the Claimant for any treatment to her right knee (Respondents' Exhibit. B, p.33).

6. On August 30, 2017, the Claimant was evaluated by Lynne M. Yancey, M.D., at Concentra Medical Center. Based on her examination of the Claimant and the history provided, Dr. Yancey's assessment was "traumatic hematoma to the right knee." (Respondents' Exhibit D, p. 43). No medication or treatment was provided and the Claimant was released from care (Respondents' Exhibit D., pp. 43-44).

7. The Claimant admitted at hearing that as a result of the August 11, 2017 incident her right knee was bruised but had returned to its baseline condition.

Pulmonary Embolism

8. The Claimant had her knee fully checked out at the ER and was ready to leave the hospital several hours later when she first noticed shortness of breath. She ultimately was diagnosed with a pulmonary embolism (PE) and related medical conditions involving her heart and she had to be hospitalized.

9. The Claimant alleges that her pulmonary embolism and resulting medical conditions are work-related based on the fact that the medical conditions first presented several hours after the fall on August 11, 2017. She contends that the temporal relationship between the fall and the medical conditions confirms that the pulmonary embolism is work-related.

Medical:

10. On August 12, 2017, William Cameron McGuire, M.D., a resident physician in the cardiology department at UC Health, evaluated Claimant and concluded that she sustained an acute and chronic pulmonary embolism which was likely provoked with recent TKA [total knee arthroplasty (replacement)] and no prophylaxis (Claimant's Exhibit 1, p. 22). With respect to the NSTEMI (heart) issue, questions arose as to whether this was "type I" or "type II". Dr. McGuire noted on August 12, 2017; "Type I vs. Type II. Concerning features are type of pain/pressure, onset at rest, pain that was experienced despite IV morphine, progressive nature over 30m, and relief with sublingual nitro. Tnl initially 0.4 but uptrended overnight to 1.8 c/w NSTEMI. Also possible that this is Type II from an acute PE in the setting of a mechanical fall on a recently operated knee without thromboembolism prophylaxis. The characteristic of the

chest pain and the lack of tachycardia argue against that, but she does have increased risk in the post-operative LE phase w/CP occurring shortly after a mechanical fall" (Claimant's Exhibit 1, p. 22).

11. A second physician at University of Colorado Health Sciences Center (UCHSC), Peterson Sparks, M.D., provided the following option about the cause of the Claimant's condition on August 15, 2017: "Pulmonary emboli: acute and chronic. Likely provoked with recent TKA and no prophylaxis" (Respondents' Exhibit F, p. 89).

12. On September 29, 2017, a third physician, Stuart Lind, M.D., a hematologist at UCHSC evaluated the Claimant and provided the following causation assessment:

> Although the patient's acute PE was discovered within a month of knee replacement, which might lead to her PE as being classified as "provoked", the radiologist's findings of evidence of chronic PE suggests that she may be closer physiologically to someone with 'unprovoked' venous thromboembolism" (Respondents' Exhibit F, p. 135).

Dr. Lind concluded that the Claimant's PE was likely unprovoked and caused by her genetic abnormality that makes her blood more susceptible to clotting.

13. Jessica D. Badlam, M.D., a pulmonologist at UCHSC and instructor of pulmonary vascular disease, initially considered the possibility that the Claimant's PE may have been related to the fall on August 11, 2017 (Claimant's Exhibit 3, p. 90). After reviewing additional information, however, Dr. Badlam clarified her opinion on October 11, 2017 and concluded that the Claimant's PE was either provoked by the TKA and lack of prophylaxis or unprovoked by Claimant's genetic clotting disorder.

14. A review of the entire medical record in evidence discloses not a single medical opinion that the Claimant's fall of August 11, 2017, provoked her pulmonary embolism. On the contrary, the weight of medical opinion establishes that the Claimant's TKE of June 15, 2017, which preceded the fall of August 11, 2017, provoked the pulmonary embolism.

15. There is no dispute in the evidence concerning the fact that the Claimant's fall of August 11, 2017 was of sufficient seriousness that she could not get up, was taken to the ER and otherwise required medical care and attention of an immediate and emergent nature for her right knee. As found herein above, an X-Ray of the Claimant's right knee in the ER revealed no significant findings (Claimant's Exhibit 1, p. 9). As further found herein above, Surgeon Dr. Michalson, on August 29, 2017, noted that the X-Ray showed a well-appearing TKA without complication. The Claimant admitted at

hearing that as a result of the August 11, 2017, fall, her right knee was bruised but had returned to its baseline condition.

16. The Employer directed the Claimant to Concentra, where she was seen by Lynne Yancey, M.D., on August 30, 2017. Dr. Yancey reported that the Claimant's PE and heart condition were not work related (Respondents' Exhibit D, p. 44).

17. On August 30, 2017, Dr. Yancey placed the Claimant at maximum medical improvement (MMI) and released her to return to work full duty without restrictions (Respondents' Exhibit D. p. 45).

Independent Medical Examination (IME) by Jeffrey Schwartz, M.D.

18. Dr. Schwartz, a board certified pulmonologist, performed an IME of the Claimant on November 15, 2017; and, he reviewed all medical records which were admitted into evidence (Respondents' Exhibit A, pp. 1-5). Dr. Schwartz stated that there is no scientific evidence or medical literature to support the proposition that a fall or traumatic impact to the lower extremity could cause a blood clot in the leg to become a PE.

19. Dr. Schwartz is of the opinion that the Claimant had two major risk factors for developing a PE prior to and unrelated to the incident of August 11, 2017: (1) a familial blood clotting disorder; and, (2) a recent total right knee replacement surgery on June 15, 2017, which was completed without anticoagulation prophylaxis.

20. Dr. Schwartz is of the opinion, within a reasonable degree of medical probability, that the Claimant's PE was provoked by the total right knee replacement surgery which occurred before the August 11, 2017 incident and the lack of anticoagulation prophylaxis. Furthermore, Dr. Schwartz stated the opinion that the Claimant's fall on August 11, 2017 did not aggravate or accelerate in any way the provocation of the PE that was caused by the recent knee surgery.

Ultimate Findings

21. The Claimant's credibility is not in issue, however, her lay opinion on the cause of her PE is **not** sufficient, without medical support, to establish the cause of her PE. In contra-distinction, the weight of medical opinion establishes to a reasonable degree of medical probability that the TKA most likely provoked the PE. There is no persuasive evidence that the fall of August 11, 2017, contributed to the occurrence of the PE. The medical experts' opinions in evidence are persuasive, credible and undisputed. The medical opinion of IME Dr. Schwartz is highly persuasive and credible. In fact, it is corroborated by other physicians, as found herein above.

22. The Claimant has failed to prove, by a preponderance of the evidence that her PE is causally related to a compensable event. The totality of the evidence establishes, however, that the fall of August 11, 2017 was sufficient to cause a minor, compensable right knee injury, which required medical attention, but caused **no** temporary disability. Her disability from August 12, 2017 through September 121, 2017 is attributable to the non-work related PE.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's credibility is **not** in issue, however, her implied lay opinion that the fall of August 11, 2017, caused the pulmonary embolism would amount to an expert medical opinion and it is not sufficient to establish a causal link between the fall and the

pulmonary embolism. The weight of medical opinion in evidence makes it reasonably probable that the TKA provoked the pulmonary embolism and this is undisputed. There is no medical opinion in evidence linking the fall to the pulmonary embolism. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony .as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. The ALJ is not free to disregard the undisputed medical evidence and lack thereof. Further, as found, the medical opinions of IME Dr. Schwartz were highly persuasive and credible. In fact, they are corroborated by other medical opinions in evidence, as herein above found.

Compensability of the Pulmonary Embolism

b. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant failed to prove, at the threshold, that the PE was caused by the fall of August 11, 2017. Therefore the PE is not a compensable phenomenon.

The Right Knee Bruising

c. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, the fall of August 11, 2017 resulted in the Claimant being taken to the ER for treatment of her right knee, with minor bruising of the right knee, and she returned to baseline on the right knee, without any disability attributed to the right knee. Therefore, the Claimant has proven, by preponderant evidence that she sustained a minor compensable injury to the right knee, which required a medical examination and ER costs, but did not result in disability.

Temporary Disability

d. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1),

C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). As found, the Claimant has failed to prove that her right knee injury resulted in temporary disability.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the ambulance and emergency room costs of treatment of the Claimant's right knee bruising, subject to the Division of Workers' Compensation Medical fee Schedule.

B. Any and all claims related to the pulmonary embolism are hereby denied and dismissed.

C. Any and all claims for temporary disability benefits from August 12, 2017, through September 11, 2017, are hereby denied and dismissed,

DATED this_____day of February 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Whether Claimant overcame by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician as to maximum medical improvement.

- Whether Respondents overcame by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician as to Claimant's permanent impairment rating.

FINDINGS OF FACT

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

1. On January 20, 2015, Claimant injured his back when he and four coworkers tried to move a heavy magnet belt.

2. A few weeks prior to the work injury, Claimant treated for low back problems with a chiropractor, Dr. Clark, and with Physician Assistants Tyler Norton and Amy King at Dr. Lisa Zwerdlinger's office. On January 4, 2015, Tyler Norton, PAC, noted that Claimant injured his back three weeks prior when he picked something heavy off of the ground. Claimant treated several times with Dr. Clark. Claimant reported pain severity of 5/10, increasing to 8/10 with walking. Claimant's pain was constant and radiated down the back of his buttocks and right leg. On January 8, 2015, Amy King PA reported Claimant still had a lot of back pain despite medication and Ms. King prescribed Vicodin.

3. After the January 20, 2015, work injury, Claimant primarily treated with Dr. Lisa Zwerdlinger, Dr. Donald Corenman, and Dr. Thos Evans. Treatment included extensive chiropractic care, physical therapy, epidural steroid injections, and radiofrequency ablation.

4. On March 16, 2015, Dr. Robert Leibold performed a lumbar spine MRI which was read as finding central L3-4 disc herniation and L4-5 disc bulge with mild to moderate stenosis. A later MRI, performed on May 6, 2015, found a broad-based disc protrusion at L4-5 with moderate stenosis and displacement of the left L5 Nerve root; and spondylosis and facet joint osteoarthritis from L2-3 through L5-S1.

5. On December 21, 2015, Dr. Thomas Puschak, Panorama Orthopedics & Spine Center, performed a second opinion and noted that Claimant's EMG in May was unequivocal and that an MRI showed "very mild degenerative changes, mild congenital and acquired stenosis at L3-L4 and L4-L5. He has had some epidural injections, radiofrequency ablations without significant benefit . . . The amount of stenosis he has is so exquisitely mild that I would not recommend anything surgical to decompress this . . . He has failed meds, PT, injections, rhizotomies at this point. I doubt that there is going to [be] much for me to offer from surgical standpoint."

6. On January 15, 2016, Dr. Marc Treihaft, neurologist, performed a neuromuscular evaluation following referral from Dr. Corenman. Dr. Treihaft noted that the abnormalities identified on MRI studies did not present a clear-cut surgical lesion. Dr. Treihaft noted that Claimant's

intermittent symptoms may reflect compression of the sciatic nerves but did not explain saddle and truncal distribution numbness. Dr. Treihaft considered the sensorimotor polyneuropathy most likely related to diabetes. Dr. Treihaft recommended a thoracic MRI. On February 3, 2016, the thoracic MRI reflected only degenerative changes.

7. On February 3, 2016, Dr. Corenman noted that MRIs of the thoracic and lumbar spine reflected some degenerative changes but no evidence of root compression. Claimant's work-related back pain was not surgical and Claimant was close to maximum medical improvement. Claimant's bilateral lower extremity symptoms were probably diabetic related and not Workers' Compensation related.

8. On March 17, 2106, Dr. Evans intended to convey his injection treatment plan to Dr. Corenman who was scheduled to see Claimant later that day.

9. On March 17, 2016, Dr. Corenman reported that Claimant reached maximum medical improvement and he rated Claimant with a 17% whole person impairment (11% range of motion and 7% Table 53). Dr. Corenman did not consider Claimant a surgical candidate. Leg symptoms did not appear to be radiculopathic but probably were neuropathic. The first EMG indicated there was some evidence of radiculopathy at L5-S1 but there was no real evidence of that on exam or in Claimant's history. Dr. Treihaft performed another EMG that found peripheral neuropathy. He concluded Claimant's leg symptoms were generally unrelated to his current back symptoms. Dr. Corenman recommended medical maintenance of one year of pain medications for acute flares of Claimant's chronic pain.

10. On March 18, 2016, Dr. Kevin King, chiropractor, indicated Claimant rated his lower back pain as a 5 on a scale of 0 to 10.

11. On April 16, 2016, Dr. Reiss performed a Respondents sponsored independent medical evaluation. Dr. Reiss concluded that Claimant suffered a work related temporary exacerbation of a preexisting condition that resolved without impairment. Dr. Reiss opined that Claimant had reached MMI on May 6, 2015.

12. On April 8, 2016, Dr. Lisa Zwerdlinger noted Claimant reached maximum medical improvement March 17, 2016. "Patient's pain is in the low back with no improvement." She recommended continued medication and chiropractor as needed.

13. On August 25, 2016, Dr. Brian Shea performed the Division independent medical examination (DIME). Dr. Shea reviewed medical records and examined Claimant. Dr. Shea agreed with treating physician, Dr. Corenman, that Claimant reached maximum medical improvement on March 17, 2016. Dr. Shea rated Claimant with an 18% whole person impairment (12% range of motion impairment and 7% Table 53(2)(C)). Dr. Shea understood Dr. Reiss's reluctance to give Claimant an impairment rating based on evidence of a preexisting condition, however Dr. Shea decided to give an impairment rating based on Claimant's primary physician's opinion that Claimant suffered a work-related injury and Dr. Corenman's treatment. Dr. Shea recommended medical maintenance care over the next 12 months including prescription medication, injections by Dr. Evans, and consideration of electrical stimulation implant.

14. On September 28, 2016, Respondents filed a Final Admission based on Dr. Shea's report.

15. Claimant has undergone the following medical maintenance treatments:

- Injections:
    - On September 6, 2016 and November 16, 2016, Dr. Evans performed right L4-5 and right L5-S1 transforaminal epidural steroid injections with little to no lasting improvement.
    - On March 14, 2017, Dr. Evans performed a right L3-4 and right L4-5 transforaminal epidural steroid injection.
    - On December 19 and 27, 2016, Dr. Evans performed medial branch radiofrequency ablation. Initially, Claimant initially reported relief, however, subsequently, Claimant reported new symptoms that included foot drop, pain in the right foot, and spasms in the lower right leg.
- Chiropractic: Claimant regularly treated at King Chiropractic. Claimant generally rated his low back pain with 4, 5, or 6 on a scale of 1 - 10. On October 10, 2017, Kevin G. King reported Claimant "is showing no change in functional complaints and is showing no change in level of discomfort.
- Physical Therapy: Claimant treated at Parker Physical Therapy from March 26, 2015, prior to MMI, through April 24, 2017, after MMI. During that time, Claimant participated in 119 visits and missed 16 appointments. Claimant reported very little overall change from appointment to appointment.
- MRI: On April 26, 2017, an MRI of the lumbar spine reflected a "new" central to left posterolateral disc extrusion with mild caudal migration at L4-L5. The extrusion could be a source of left L5 radiculopathy.

16. On December 1, 2016, Dr. Barry Ogin performed an independent medical examination and report at Respondent's request. On May 31, 2017, Dr. Ogin performed a follow-up independent medical evaluation and report. Also, Dr. Ogin testified at the hearing as an expert in Physical Medicine and Rehabilitation, and in Pain Management.

- Dr. Ogin reported that Claimant appeared comfortable and not in any significant distress on casual observation, however, once formal testing started, Claimant demonstrated extensive grimacing and multiple pain behaviors.
- Formal range of motion testing appeared limited by poor effort and was non-physiologic and inconsistent with casual observation.
- Lumbar range of motion was invalid based on internal consistency measurements.

- Dr. Ogin concluded that Claimant's symptoms far outweighed any objective pathology. Dr. Ogin agreed with Dr. Corenman that Claimant's MRIs revealed mild degenerative changes without obvious stenosis; that Claimant may have some underlying congenital narrowing and disk degeneration, but there was no evidence of a specific injury that could be attributed to the work incident.

- Claimant's symptoms progressed dramatically over time which is inconsistent with a static low back injury without worsening pathology.

- Claimant presented with multiple non-physiologic pain behaviors and non-physiologic distribution of numbness and weakness in his legs.

- He had a negative response to all treatments rendered including multiple medications, extensive physical therapy, chiropractic care and multiple spinal injections. Multiple epidural steroid injections failed to alleviate his low back pain and leg pain for more than a few days at most. Typically, radiofrequency neurotomy should provide benefit for up to one year and, at a minimum, six months. Claimant had no objective improvements and at most had less than one month of subjective improvement according to the physical therapy records, Dr. Zwerdlinger's records, and Claimant's own history.

- Contrary to Dr. Zwerdlinger's assertions, there was no clear evidence of radiculopathy. Dr. Treihaft's electrodiagnostic testing in January 2016, revealed no evidence of radiculopathy.

- Dr. Corenman, Dr. Puschak, and Dr. Reis agreed Claimant did not present with compressive lesions and was not a surgical candidate.

- Dr. Ogin concluded Claimant has a nonorganic basis for his pain and presentation either due to conscious or unconscious variables. The medical records reflected preexisting anxiety and other stressors. There may be a psychological basis for Claimant's condition that would not be related to his work injury.

- Dr. Ogin agreed with Dr. Reiss that Claimant reached maximum medical improvement by May 2015, and that additional treatment was not warranted.

- Dr. Ogin pointed out that Claimant's number of physical therapy visits exceeded recommendations in the Medical Treatment Guidelines, and there was no functional progress documented in the physical therapy records.

- Dr. Ogin agreed with Dr. Reiss that no permanent impairment existed due to the work injury. Claimant's underlying degenerative disk disease was not caused, aggravated, or accelerated by the work injury. Claimant's failure to improve was not physiologically attributed to the back strain.

17. Dr. Ogin opined that much of Claimant's treated was not supported by the Medical

Treatment Guidelines (MTGs).

- The MTGs do not support radiofrequency denervation without a prior positive diagnostic response to controlled medial branch blocks. No documentation in Claimant's medical records supports that a functional assessment occurred or that Claimant experienced functional improvement. Results indicated some transient relief or no relief. The Medical Treatment Guidelines require six to 18 months of relief or longer. Therefore, repeat radiofrequency neurotomy procedure was not indicated or appropriate.

- The MTGs did not support Claimant's repeated epidural steroid injections because evidence of functional gain was not present and pain returned, or worsened, or there was no diagnostic response.

- The Medical Treatment Guidelines did not support ongoing physical therapy visits because 121 visits far exceed the amount and duration recommended and Claimant did not show functional gain.

- Dr. Ogin concluded that Claimant's current problems are not work related. In Dr. Ogin's opinion, the new L4-5 disk extrusion was due to progressive disk degeneration. Dr. Ogin noted that disk protrusions, spondylosis, and facet degeneration are all typical age-related findings in the lumbar spine and that the new disk herniation at L4-5 in April 2017, over two years after Claimant's occupational exposure, was not related, caused, or aggravated by the work injury.

- Dr. Ogin did not recommend further treatment under the workers' compensation claim because Claimant had not responded to extensive treatment including physical therapy, chiropractic care, massage therapy, modalities, epidural steroid injections, and facet blocks, and because Claimant's ongoing symptoms were not work related. Dr. Ogin recommended treatment outside the workers' compensation system that may include repeat epidural steroid injections, electrodiagnostic testing, therapies, and possible surgical intervention.

18. Dr. Ogin testified that Claimant's reported "pop" in his back was not an indication of a disc rupture based on Claimant's clinical course and nonspecific findings. He opined Dr. Shea erred when he concluded Claimant presented with radiculopathy. Claimant's clinical examination did not support radiculopathy. The first EMG study described some weak radiculopathy but that was not borne out in clinical examination or subsequent EMG results. Dr. Ogin agreed with medical specialists, Dr. Corenman, Dr. Reiss, Dr. Puschak, and Dr. Treihaft, that Claimant's leg symptoms were not related to the work injury but rather were more likely attributable to Claimant's diabetes and peripheral neuropathy. Dr. Ogin testified that the new disc fragment, identified over two years after Claimant's date of injury and over one year after maximum medical improvement, was not work related but rather more likely was due to the natural progression of his underlying degenerative disc disease.

19. On January 10, 2017, Dr. John Hughes prepared an independent medical

examination report at Claimant's request. Also, Dr. Hughes testified at the hearing as an expert in in occupational medicine. He is not a spine surgeon or a neurologist. Until shortly before the hearing, Dr. Hughes was not aware of pertinent medical records including records of Claimant's low back injury and treatment that predated Claimant's work injury, and Dr. Triehaft's recommendation for a thoracic spine MRI.

20. Dr. Hughes testified that when he examined Claimant on January 10, 2017, Claimant reported that he then was experiencing back pain of a 2 on a scale of 1 – 10; that Claimant reported diffuse weakness in both legs; and that pain radiated down Claimant's legs.

21. Dr. Hughes did not disagree with Dr. Shea's determination of MMI on March 17, 2016. Rather, Dr. Hughes concluded that Claimant's condition worsened post MMI and that Claimant is no longer at MMI as evidenced by the April 2017 new disc extrusion. Dr. Hughes testified that Claimant's work injury predisposed him to additional injury, however, Dr. Hughes also testified that degenerative changes occur naturally in the lumbar spine.

22. Claimant testified at the hearing that a few weeks prior to the work injury, he hurt his low back, primarily his hip, at work. Claimant admitted he did not report a work injury. Contrary to the medical records that Claimant treated with his chiropractor for a few weeks and then saw his doctor, Claimant testified that he saw his doctor first and that his doctor referred Claimant to treat with his chiropractor. Also, contrary to the medical records that reflected Claimant reported ongoing back pain on January 8, 2015, and that the PA prescribed Vicodin on that date, Claimant testified that his symptoms essentially resolved prior to the January 20, 2015, work injury. Claimant is a poor historian and his testimony was not persuasive.

23. Claimant admitted to a medical history that included diabetes. Claimant testified that his condition worsened in April of 2017 when he got out of bed in the morning, was brushing his teeth, and he experienced excruciating pain. Claimant treated with his chiropractor and the next day an MRI was performed. Claimant reported that current symptoms include pain on the right side of his low back and his legs go numb based on his position.

24. The ALJ finds, based on the totality of the evidence that Claimant has not overcome by clear and convincing evidence the opinion of the DIME physician as to MMI.

25. The ALJ finds, based on the totality of the evidence that Respondents have overcome by clear and convincing evidence the opinion of the DIME physician as to Claimant's permanent impairment rating.

CONCLUSIONS OF LAW

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

Generally

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

injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. § 8-43-201, C.R.S.

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

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

Overcoming DIME

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

Overcoming DIME on Maximum Medical Improvement

Section 8-40-201 (11.5) C.R.S. defines "maximum medical improvement" as a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.

The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

Claimant failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Shea that Claimant reached MMI on March 17, 2016. The medical evidence supports that Claimant was medically stable and had not improved despite extensive treatment before and after the date of MMI.

The persuasive medical records support Dr. Shea's conclusion of MMI. Multiple physicians, including Dr. Corenman, Dr. Reiss, Dr. Ogin, and Dr. Hughes, support Dr. Shea's conclusion of MMI. Dr. Reiss and Dr. Ogin supported an earlier MMI date. Dr. Hughes agreed that Claimant reached MMI on March 17, 2016, but questioned whether Claimant's condition had worsened and whether Claimant remained at MMI. Dr. Zwerdlinger's conclusion that Claimant was not at MMI was not persuasive.

The question of reopening, or questions of whether Claimant's condition changed for the worse, if the worsening is work-related, and if Claimant remains at maximum medical improvement, are not ripe for consideration by this ALJ at this hearing.

Claimant has not produced persuasive medical evidence contradicting Dr. Shea's opinion of maximum medical improvement. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Shea's Maximum medical improvement determination was incorrect.

Overcoming DIME on PPD Impairment Rating

A DIME physician's findings of causation or relatedness and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000). The question of whether the DIME physician rating was overcome by clear and convincing evidence presents questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002).

Respondents have met their burden and have established by clear and convincing evidence that it was "highly probable" that Dr. Shea, the DIME physician, incorrectly related Claimant's ongoing back problems to the work injury and, as a result, Dr. Shea incorrectly assigned an 18% whole person permanent impairment rating. The opinions and testimony of Dr. Ogin are found credible and persuasive. The opinion of Dr. Reiss is found credible and persuasive. Their overall opinions were detailed and supported by the medical records.

Dr. Shea erred when he concluded Claimant presented with radiculopathy. Dr. Treihaft's EMG results confirmed sensorimotor polyneuropathy related to diabetes. On February 3, 2016, Dr. Corenman noted that MRIs of the thoracic and lumbar spine reflected some degenerative changes but no evidence of root compression and that Claimant's bilateral lower extremity symptoms were probably related to his diabetes and not his work injury. On March 17, 2016, Dr. Corenman reported that the first EMG study described some weak radiculopathy but that was not borne out in clinical examination or subsequent EMG results. Dr. Ogin agreed with medical specialists, Dr. Corenman, Dr. Reiss, Dr. Puschak, and Dr. Treihaft, that Claimant's leg symptoms were not related to the work injury but rather were more likely related to Claimant's diabetes and peripheral neuropathy.

Dr. Shea erred because objective tests, clinical evaluations, and medical treatment did not objectively or persuasively support a ratable work injury/condition. The March 16, 2015, and May 6, 2015 lumbar spine MRIs reflected minimal degenerative changes common in an individual Claimant's age. On December 21, 2015, orthopedic specialist Dr. Puschak noted that an MRI showed "very mild degenerative changes, mild congenital and acquired stenosis at L4-L4 and L4-L5. He has had some epidural injections, radiofrequency ablations without significant benefit… The amount of stenosis he has is so exquisitely mild that I would not recommend anything surgical to decompress this... He has failed meds, PT, injections, rhizotomies at this point. I doubt that there is going to [be] much for me to offer from surgical standpoint." On January 15, 2016, Dr. Treihaft, neurologist, performed a neuromuscular evaluation and noted that the abnormalities identified on MRI studies did not present a clear-cut surgical lesion. Dr. Treihaft noted that intermittent symptoms may reflect compression of the sciatic nerves but did not explain saddle and truncal distribution numbness. Dr. Treihaft considered the sensorimotor polyneuropathy most likely related to diabetes. Dr. Ogin agreed with Dr. Corenman that MRIs revealed mild degenerative changes without obvious stenosis, and that Claimant may have some underlying congenital narrowing and disk degeneration, but there was no evidence of a specific injury that could be attributed to the work incident.

Dr. Shea's reliance on Dr. Zwerdlinger's opinion to support a rating constituted error because Dr. Zwerdlinger's conclusions were not supported by the persuasive medical records.

Specifically, Dr. Shea acknowledged Dr. Reiss's reluctance to give the patient an impairment rating based on evidence of a preexisting condition, however Dr. Shea decided to give an impairment rating based on Claimant's primary physician's opinion, Dr. Zwerdlinger's opinion, that Claimant suffered a work-related injury. Dr. Zwerdlinger failed to acknowledge Claimant's preexisting back problems even though Claimant treated with physician assistants in Dr. Zwerdlinger's office the weeks leading up to the work injury. On January 4, 2015, Tyler Norton, PAC, reported that Claimant injured his back three weeks prior when he picked something heavy off of the ground. Claimant treated several times with his chiropractor, Dr. Clark. Claimant reported the severity of pain was 5/10, increasing to 8/10 with walking. Pain radiated down the back of his buttocks and right leg. Pain was constant. On January 8, 2015, Amy King PA reported Claimant still had a lot of back pain despite medication and Ms. King prescribed Vicodin. Also, as noted above, contrary to Dr. Zwerdlinger's assertions, there was no clear evidence of radiculopathy. Dr. Zwerdlinger's conclusions were not supported by any neurologist or orthopedic specialist.

Dr. Shea's reliance on Dr. Corenman's treatment to support a rating constituted error because treatment, in and of itself, does not support a rating. Also, Dr. Corenman did not appear to be aware of Claimant's preexisting condition. In fact, the records indicate that Claimant failed to report, or downplayed, his preexisting back problems to all of the physicians including his own independent medical examiner, Dr. Hughes.

Dr. Ogin persuasively concluded that Claimant presented with multiple non-physiologic pain behaviors and non-physiologic distribution of numbness and weakness in his legs which was not ratable. Claimant's subjective symptoms far outweighed any objective pathology. He had a negative response to all treatments rendered including multiple medications, extensive physical therapy, chiropractic care, and multiple spinal injections. Multiple epidural steroid injections failed to alleviate his low back pain and leg pain long term. Claimant had no objective improvements according to the physical therapy records, Dr. Zwerdlinger's records, and the patient's own history. Dr. Ogin concluded Claimant has a nonorganic basis for his pain and presentation either due to conscious or unconscious variables. The medical records reflected preexisting anxiety and other stressors and support a finding that Claimant's condition has a psychological basis not related to his work injury.

The medical records support that Claimant suffered a temporary aggravation that did not result in a permanent change in his condition that predated the work injury. Two weeks prior to the work injury, Claimant reported the severity of his low back pain was 5/10, increasing to 8/10 with walking. He had constant pain which radiated down the back of his buttocks and right leg. On March 18, 2016, one day after Dr. Corenman and Dr. Shea placed Claimant at maximum medical improvement of his work-related injuries, Claimant's complaints essentially mirrored pre-work injury levels. On March 18, 2016, Dr. Kevin King, chiropractor, reported that Claimant rated his lower back pain at a 5 on a scale of 0 - 10. Shortly thereafter, on April 16, 2016, orthopedic specialist, Dr. Reiss, concluded that Claimant suffered a work related temporary exacerbation of a preexisting condition that resolved without impairment. Dr. Ogin agreed with Dr. Reiss that no permanent impairment existed due to the work injury. Dr. Ogin concluded that Claimant's current problems are not work related. Claimant's underlying degenerative disk disease was not caused, aggravated, or accelerated by the work injury.

Claimant's problems/symptoms at the time of the hearing appear to be due to non-work-related progressive disk degeneration and a new L4-5 disk extrusion. Dr. Ogin credibly testified that disk protrusions, such as the one reflected on Claimant's recent MRI, spondylosis, and facet degeneration, are all typical age-related findings in the lumbar spine and that Claimant's new disk herniation at L4-5, first identified over two years after Claimant's work injury and after multiple prior MRIs, was not related, caused, or aggravated by the work injury. Claimant supported that opinion when he testified that his condition worsened sometime in April 2017 when he got out of bed, was brushing his teeth, and experienced excruciating pain. Claimant treated with his chiropractor who referred Claimant for an MRI. The medical records reflect that the MRI to which Claimant referred occurred on April 26, 2017, over two years after the original work injury, and the MRI reflected a "new" central to left posterolateral disc extrusion.

In summary, Respondents met their burden of proof that it was highly probable that Dr. Shea, the DIME physician, incorrectly related Claimant's ongoing back problems to the work injury and incorrectly assigned Claimant an 18% whole person permanent impairment rating. The opinions of Dr. Reiss and Dr. Ogin are more credible that Claimant suffered a temporary aggravation of his preexisting conditions that resolved and that Claimant did not suffer any permanent impairment as a result of his work-related injury.

ORDER

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

1. Claimant failed to overcome Dr. Shea's determination of maximum medical improvement by clear and convincing evidence.

2. Respondents have overcome Dr. Shea's opinion of permanent impairment by clear and convincing evidence, thus Claimant is not entitled to a permanent impairment rating.

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

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

DATED: February 14, 2018

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Suite 400
Denver, CO 80203

ISSUES

- Whether Claimant overcame the opinion of the DOWC independent Medical Examiner (Dwight R. Leggett, II, M.D.) by clear and convincing evidence on the issues of maximum medical improvement, causation and permanent disability

- Was the left total knee replacement reasonable, necessary and related to the work injury of June 2, 2015?

- Whether Respondents are liable for ongoing medical care as a result of the June 2, 2105 injury.

- Is Claimant entitled to disfigurement benefits as a result of the June 2, 2016 work injury?

FINDINGS OF FACT

1. Claimant has worked for Employer for seventeen years. At the time of her injury, Claimant was a Customer Service Representative at the CSR Center. She assisted passengers who had problems with tickets, needed their flights re-scheduled and the like.

2. Claimant's medical history was significant in that she was previously diagnosed with osteoarthritis in both knees and received treatment for that condition. Medical records admitted at hearing documented treatment she received for both knees. In particular, Dr. Leggett's DIME report referenced the fact Claimant underwent a left knee arthroscopy in 2007 and was treated by Timothy Collander, M.D in 2009.[1]

3. On December 21, 2009, Claimant sustained an industrial injury to her right knee, which resulted in surgery. A report from J. Raschbacher, M.D., dated September 27, 2010 related to this injury was admitted into evidence. A history of left knee injury was noted and Claimant was continuing to experience pain in the right knee. Dr. Raschbacher determined Claimant reached MMI for this injury and concluded Claimant sustained a 26% lower extremity medical impairment, which converted to a 10% whole person impairment.

4. Claimant was evaluated on September 21, 2012 by Stephanie Evans, P.A. (supervised by Dr. Collander), whose diagnosis was osteoarthritis of the knee (bilateral). The symptoms were noted to have begun more than five years ago and the record documented a recommendation that both knees be replaced. At the evaluation, pain

[1] Exhibit 9, p. 341; Exhibit B, p. 36.

was noted on palpation of the medial and lateral joint line of both knees, as well as the medial and lateral patella. The assessment was acquired hypothyroidism; insomnia; and osteoarthritis of the knee. Celebrex was prescribed and given instructions for RICE therapy.

5. Claimant returned for a follow-up evaluation with PA Evans on December 13, 2013, with essentially the same symptoms. The assessment was osteoarthritis of the knees and it was noted she would need a knee replacement. In a follow-up examination on December 19, 2014, PA Evans reported Claimant had bilateral knee pain. The treatment note indicated Claimant needed bilateral knee replacement surgery, but did not have enough time off and would have to wait another year. [2] The ALJ inferred Claimant's osteoarthritis had reached the point that surgery was recommended.

6. On May 15, 2015, at the time of a comprehensive examination, Claimant's knee symptoms were described as stable, but progressive and worsening.

7. Claimant testified she did not have trouble with her knees after 2007. She had occasional tightness. Claimant testified she was able to work full-time and her activities were not restricted. Her job required her to stand.

8. On June 2, 2015, Claimant sustained an admitted industrial injury when she fell forward and landed on both knees. Claimant testified she landed on the marble floor and she was sent to Concentra.

9. Claimant was evaluated by Stephanie Missey, PA-C at Concentra, who noted tenderness in both knees. PA-C Missey's assessment was: fall and knee contusion. Tylenol was prescribed and x-rays were ordered. The x-rays taken on June 2, 2015 showed degenerative changes of the femorotibial joint space, with diffuse joint space narrowing and osteophyte formation in the right knee. No joint effusion was seen. On the left knee, no fracture or malalignment was seen. Degenerative changes of the femorotibial joint space and diffuse osteophyte formation, along with joint space narrowing were found. Radiologist Maximina Boutselis, M.D. read the films. The M-164 was signed by Candice Sobanski, M.D.

10. Claimant returned for a follow-up evaluation on June 8, 2015. She was evaluated by Rosalie Einspahr, NP, who noted her condition had not changed from last week. She had complaints of knee pain and lower leg pain. The assessment was identical to the June 2, 2015 appointment and physical therapy ("PT") was begun.

11. Claimant continued to treat at Concentra, including follow-up appointments with NP Einspahr while she received PT. Claimant continued to report pain in both knees, with the left more painful than the right. On June 22, 2015, Scott Richardson recommended continued PT and returned Claimant to regular work duties.

[2] Exhibit G, p. 56.

12. On August 3, 2015, Claimant was evaluated by Jeffrey Arthur, M.D., at which time she had ongoing bilateral knee pain. Dr. Arthur noted no erythema, no ecchymosis, but found tenderness to palpation over the patellofemoral joints bilaterally, positive medial joint line tenderness in both knees, crepitus in the left knee, as well as reduced range of motion. Dr. Arthur noted Claimant had been very active before her injury and was able to work without limitations. The ALJ noted Dr. Arthur did not include a causation analysis in this record. Dr. Arthur administered bilateral steroid injections and referred Claimant for bilateral knee MRIs. Dr. Arthur completed an M-164 detailing his findings and recommendations.

13. On August 22, 2015, Claimant underwent an MRI of the left knee. Films were read by Bao Nguyen, M.D. whose impression was large degenerative tear of the lateral meniscus associated with advance lateral femorotibial arthrosis; lateral patellofemoral and early medial compartment degenerative changes; additional thin oblique horizontal tear of the horn medial meniscus; mild chronic sprains of the cruciate and collateral ligaments; and no bone trauma, bone tumor or AVN.

14. In the MRI done on the right knee that same day, Dr. Nguyen's impression was: no bone trauma or bone tumor, but degenerative changes across the medial compartment of patellofemoral joint associated with tiny intra-articular loose bodies; complex degenerative, but mostly horizontal tear of the body of the medial meniscus; mild MCL sprain and accompanying mild posteromedial corner sprain/strains; complex tear of the lateral meniscus; intact cruciate and collateral ligaments; mild prepatellar subcutaneous edema, but no extensor mechanism tear or evidence of transient patellar dislocation.

15. Claimant returned to Dr. Arthur on October 8, 2015. At the time of the evaluation, Dr. Arthur noted Claimant was a candidate for a knee arthroscopy based upon the MRI findings. The arthroscopy was recommended for therapeutic purposes. Dr. Arthur noted both knees were candidates for surgical intervention, since Claimant had failed to an extensive course of conservative treatment, including anti-inflammatory medicine, injections, therapy, and activity modification.

16. On November 11, 2015, Claimant was evaluated by John Burris, M.D. He noted that the Claimant had attended 38 sessions of physical therapy. Dr. Burris stated the x-rays taken subsequent to falling on June 2, 2015 were negative with no acute abnormalities. The MRIs of both knees on showed significant degenerative changes with no obvious acute abnormalities. Dr. Burris diagnosed bilateral knee contusion and noted that a discussion of total joint replacement occurred three weeks before the injury, when Claimant reached end stage degenerative joint disease. Dr. Burris concluded that the Claimant was already at end stage degenerative joint disease when she was injured June 2, 2015. He found reasonable and appropriate conservative care was provided, as determined by the Division of Workers' Compensation Treatment Guidelines.

17. Dr. Burris placed the Claimant at MMI and concluded she sustained a 0% medical impairment as a result of the work injury. He issued no work restrictions and recommended no maintenance or follow-up treatment.

18. Claimant testified she continued to experience pain after MMI.

19. On May 10, 2016, Dr. Leggett performed a DOWC Independent Medical Examination ("DIME"). Claimant reported she had 0% improvement since the fall, with severe pain in the left greater than right knee. She reported swelling in the left knee greater than the right knee. On examination, considerable edema was noted in the left knee, primarily over the lateral aspect. 2+ pitting edema which was found from the mid tibia downward. Exquisite tenderness was found along the lateral joint line, as well as over the lateral greater than medial infrapatellar bursa. Crepitus was noted with active and passive range of motion.

20. Examination of the right knee revealed lateral greater than medial edema, but not as severe as the left. High levels of tenderness were also found over the lateral greater then medial joint line and collateral ligaments. This involved the infrapatellar bursa as well. Mild to moderate medial patellar drift was identified with observation of active flexion and extension of the knee. Crepitus and occasional popping was noted with active and passive range of motion.

21. Dr. Leggett noted that Claimant's medical records documented clear pre-existing pathology as well as symptoms immediately before the fall. The ALJ noted this was part of Dr. Leggett's causation analysis. Dr. Leggett cited the DOWC Medical Treatment Guidelines-Lower Extremity ("MTG-Lower Extremity") concerning the occupational relationship with aggravated osteoarthritis:

> "2. KNEE
>
> a. Aggravated Osteoarthritis (OA):
> …
>
> ii. Occupational Relationship: The provider must establish the occupational relationship by establishing a change in the patient's baseline condition and a relationship to work activities including but not limited to physical activities such as repetitive kneeling or crawling, squatting and climbing, or heavy lifting. There is also good evidence that intensive physical work more than doubles the risk of symptomatic knee OA with knee replacement, and that there is a dose-response relationship between work load and the development of knee OA with knee replacement. Intensive physical labor is defined as job categories such as forestry employee, dockworker, farm worker, or ditch digger.
> …
>
> iii. Non-occupational Risk Factors: Body mass index (BMI) of 25 or greater is a significant risk factor for eventual knee replacement. There is good evidence that

obesity increases the risk of symptomatic knee OA resulting in knee replacement six fold in men and eleven fold in women. There is strong evidence of increased BMI as a significant risk factor for the occurrence of onset of knee OA. Numerous studies document an increased odds ratio for developing knee osteoarthritis for BMIs greater than 30. Progression of symptomatic knee osteoarthritis is variable. In one study over a two year span, 70% of patients showed no significant joint space narrowing, 20% showed slow progression and only 9% had more significant changes. There is strong evidence for hand OA as a significant marker of risk for knee OA. Other causative factors to consider - Previous meniscus or ACL damage may predispose a joint to degenerative changes. There is strong evidence that an ACL injury increased the ten-year risk of developing Kellgren-Lawrence defined osteoarthritic changes compared to the uninjured knee. This risk is approximately fourfold both for minimal OA and for moderate to severe OA. There is good evidence that meniscal damage, even in the absence of knee surgery, is associated with a significantly increased risk of development of radiographic tibiofemoral OA within 30 months of its detection on MRI. There is strong evidence for previous knee injury as a significant risk factor for OA. A number of studies indicate that patients with ACL injuries and meniscus pathology are likely to develop degenerative osteoarthritis. Percentages range from approximately 25% to 50%. It is unclear whether the repair of ACLs significantly decreases the degenerative pathology. One study found more severe arthritis present in those with an ACL repair. In order to entertain previous trauma as a cause, the patient should have medical documentation of the following: menisectomy; hemarthrosis at the time of the original injury; or evidence of MRI or arthroscopic meniscus or ACL damage. The prior injury should have been at least 2 years from the presentation for the new complaints. In addition, there should be a significant increase of pathology on the affected side in comparison to the original imaging or operative reports and/or the opposite un-injured side or extremity." MTG Lower Extremity, pp. 67-68.

22. Dr. Leggett opined Claimant's ongoing pain and functional limitation was due to pre-existing bilateral knee osteoarthritis and degeneration. This conclusion was persuasive to the ALJ. Dr. Leggett stated no impairment or maintenance was indicated due to the June 2, 2015 fall. He assigned a 0% medical impairment rating. Dr. Leggett stated that additional conservative treatment would not give much benefit and concurred with Dr. Arthur and Dr. Colander that surgery was necessary.

23. On June 10, 2016, a Final Admission of Liability ("FAL") was filed on behalf of Respondents based upon Dr. Leggett's DIME. Respondents admitted for 0% impairment and no post-MMI medical benefits.

24. Claimant returned to Dr. Arthur on June 16, 2016. Dr. Arthur noted Claimant had meniscus tears and arthritis in both knees. Her knees were becoming more symptomatic and she wished to have the problems addressed and not worry about who would be covering it. On examination, increased valgus deformity, right greater than left was noted. Crepitus was found at the patellofemoral joint bilaterally,

with medial and lateral joint line tenderness was noted. Dr. Arthur performed a repeat cortisone injection in both knees. Claimant was to return once surgery was authorized.

25. On July 26, 2016, Claimant underwent a left total knee arthroplasty, which was performed by Dr. Arthur. The pre-and post-operative diagnosis was the same: severe left degenerative joint disease. Claimant was noted to have failed conservative treatment, including weight loss, physical therapy, anti-inflammatories, aquatic medicine, activity modification, cane, injections etc. There were no complications noted from the surgery.

26. On August 4, 2016, Claimant was seen post-surgery by Dr. Arthur. Dr. Arthur noted it could take from 4-6 weeks for the surgical pain to resolve.

27. On October 6, 2016, Claimant was evaluated by Jon Erickson, M.D., at the request of Respondents. Dr. Erickson opined Claimant's current significant bilaterally symptoms were due directly and solely to her pre-existing advanced osteoarthritis. This opinion was within a reasonable degree of medical probability. After reviewing the MRIs, Dr. Erickson noted there was no evidence of a significant worsening or aggravation of the osteoarthritis. The only site of acute trauma was bilateral subcutaneous edema in the area of both patellae, which one would expect from a blow to the front of the knees.

28. Dr. Erickson concluded subcutaneous edemas were not a basis for surgery. Dr. Erickson noted there was a reference to bilateral knee osteoarthritis, severe enough to justify a knee replacement made on May 17, 2015, which was evidence that Claimant was symptomatic immediately prior to the subject injury. Dr. Erickson concurred with the MMI determinations of Dr. Burris and Dr. Leggett.

29. Dr. Erickson testified at hearing as an expert in Orthopedic Surgery, the specialty in which he was board-certified. He is Level II accredited pursuant to the WCRP. Dr. Erickson review Claimant's treatment records from the June 2, 2015 injury, as well as the records which predated it. Dr. Erickson testified he disagreed with the request for an arthroscopy made during the claim, as he believed Claimant had a preexisting condition and not related to the work injury.[3] He diagnosed prepatellar subcutaneous edema in both knees.[4] Dr. Erickson opined Claimant had a temporary exacerbation of her pre-existing knee issues, but not a permanent aggravation. This was supported by the MRIs, which showed degenerative, not acute findings.[5] Dr. Erickson testified that he believed Dr. Burris and Dr. Leggett were correct in placing Claimant at MMI with no maintenance treatment recommended for the work injury.[6] Dr.

[3] Hearing Transcript ("Hrg. Tr.") p. 43: 1-18.

[4] Hrg. Tr. p. 51: 8-13.

[5] Hrg. Tr. p. 53: 4-14; 54:5-6.

[6] Hrg. Tr. 57:1-12.

Erickson testified a significant injury to a joint can cause an acceleration of a patient's preexisting arthritis. In this case Claimant's arthritis had progressed to the point that a joint replacement was required.[7] Dr. Erickson's testimony was persuasive to the ALJ.

30. Claimant testified that she now has difficulty with stairs and walking for long periods of time. She has trouble sleeping due to pain.

31. Before the June 2, 2015 injury, Claimant suffered from osteoarthritis in both her left and right knee. Total knee arthroplasties were recommended before the subject injury.

32. Claimant's need for the left total knee arthroplasty was a result of the osteoarthritis and not the June 2, 2015 industrial injury.

33. Claimant did not offer medical evidence which contradicted Dr. Leggett's conclusions, nor did it lead the ALJ to conclude these were erroneous.

34. Claimant failed to overcome Dr. Leggett's opinions concerning MMI and impairment by clear and convincing evidence.

35. Claimant failed to satisfy her burden of proof to show an entitlement to post-MMI medical benefits.

36. Claimant had a scar on her left knee that was open to public view.

37. Claimant's scar resulted from the total knee arthroplasty, which was not causally related to the industrial injury. Claimant was not entitled to disfigurement benefits.

38. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of

[7] Hrg. Tr. p. 59:10-14.

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the ALJ focused on the respective medical opinions on the issue of whether Dr. Leggett's opinions were overcome by clear and convincing evidence.

Legal Standard for Overcoming the DIME

In resolving the issues, the ALJ notes the question of whether Respondents overcame Dr. Leggett's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. (2016); *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence". § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007). Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician*. Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*. The elevated burden is evidence of the Colorado Legislature's intent to limit overcoming the DIME physician's opinion to those cases where it is more probable than not that the opinion was incorrect

As a starting point, Claimant suffered from pre-existing osteoarthritis in both knees. (Findings of Fact 2-6). This degenerative condition had advanced to the point

that total knee arthroplasties were recommended for both knees. (Findings of Fact 4-5). This occurred before the work injury on June 2, 2015.

Once Claimant suffered her industrial injury, she required treatment for symptoms in both knees. However, Claimant was placed at MMI by first, her ATP and then by the DIME physician, Dr. Leggett. In this regard, Dr. Leggett concluded Claimant's osteoarthritis was the cause for her symptoms, as well as her need for surgery. He determined this was not related to June, 2015 fall. As the Court of Appeal noted in *Leprino Foods Co. v. Indus. Claim Appeals Office*, *supra,* 134 P.3d at 482, absent evidence that the conclusion regarding causation was erroneous, Dr. Leggett's conclusions were binding.

Based upon the totality of the evidence, the ALJ concluded that Dr. Leggett's opinions were not overcome with regard to MMI and Claimant's impairment rating. The ALJ's rationale was two-fold; first, Dr. Leggett articulated the basis for his conclusion that Claimant reached MMI on November 11, 2015, along with the determination that pre-existing bilateral osteoarthritis was the cause of Claimant's pain and functional limitations. As determined in Findings of Fact 22-23, Dr. Leggett concluded Claimant sustained no medical impairment as a result of the June 2, 2015 injury based upon his review of Claimant's history, including treatment before the subject injury. The ALJ found Dr. Leggett applied the MTG-Lower extremity when analyzing Claimant's osteoarthritis condition. (Finding of Fact 22).

Dr. Leggett's conclusions were buttressed by the opinions offered by Dr. Burris, who was an ATP, who agreed that Claimant's preexisting condition was the cause of her ongoing complaints. (Finding of Fact 15). Dr. Erickson's opinions were also in accord. (Findings of Fact 25-27). The ALJ credited the opinions of Dr. Leggett, Dr. Burris and Dr. Erickson.

Second, Claimant did not introduce sufficient evidence to overcome Dr. Leggett's opinion regarding causation. Dr. Leggett analyzed the basis for Claimant's bilateral knee symptoms and concluded the symptoms were related to the underlying osteoarthritis condition. (Finding of Fact 22). Claimant did not adduce evidence which rebutted Dr. Leggett's conclusions.

The ALJ considered Claimant's argument that her symptoms were significantly aggravated by the work injury. Claimant also averred the records of Dr. Arthur supported the conclusion that the left knee arthroplasty was required by the June 2, 2015 injury. As determined in Findings of Fact 33-34, Claimant did not adduce sufficient evidence to meet the clear and convincing evidence standard.

Medical Benefits-Reasonable, Necessary and Related

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. (2016) The question of whether Claimant proved treatment is reasonable and

necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant put forward the argument that the surgery performed on the left knee was reasonable and necessary, relying upon the opinions of Dr. Arthur. Claimant also argued the fact that before her fall she was able to work with no restrictions supported this conclusion.

The ALJ determined that the question of relatedness was required to be answered first and the conclusions of the DIME physician were dispositive on this issue. As found, Dr. Leggett concluded the proposed surgery was not related to the industrial injury, but rather required because of Claimant's osteoarthritis. (Finding of Fact 21). This determination on relatedness controls the ALJ's decision on whether Respondents are liable to provide medical benefits, in this case, the left total knee arthroplasty.

Grover Medical Benefits

As found, Claimant did not overcome Dr. Leggett's conclusion that she was at MMI. However, the ALJ considered whether she was entitled to post-MMI medical benefits. The claim for medical treatment beyond the point of maximum medical improvement is governed by *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). In *Grover v. Industrial Commission*, the Colorado Supreme Court authorized maintenance care to maintain MMI or to prevent further deterioration of a Claimant's condition. *Milco Construction v. Cowan,* 860 P.2d 539, 541 (Colo. App. 1992). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended, nor a finding that Claimant is actually receiving medical treatment*. Holly Nursing Care Center v ICAO*, 992 P.2d 701 (Colo. App. 1999). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993).

Claimant failed to show she was entitled to post-MMI medical benefits for condition related to the subject injury. There was no evidence in the record that any of the Claimant's ATPs recommended maintenance treatment. (Finding of Fact 16). This determination was also supported by the conclusions of Dr. Erickson. (Finding of Fact 27-29) .

Further, Dr. Leggett concluded Claimant's need for further treatment was not related to her injury. The opinions regarding further treatment offered by Dr. Leggett (as the DIME physician) were not entitled to any special deference. However, his conclusion was consistent with those offered by Dr. Burris. In light of these conclusions that Claimant's need for treatment was not related to the industrial injury, the ALJ determined Claimant did not prove her need for medical treatment. (Finding of Fact 35). Accordingly, The ALJ determined Claimant failed to meet her burden of proof on this issue and was not entitled to *Grover* medical benefits.

Disfigurement

Claimant's request for disfigurement benefits is governed by 8-42-108, C.R.S. (2016), which provides in pertinent part:

> "If an employee is seriously, permanently disfigured about the head, face, or parts of the body normally exposed public view, in addition to all other compensation benefits provided in this article and except as provided in subsection (2) of this section, the director may allow compensation not to exceed four thousand dollars to the employee who suffers such disfigurement".

Claimant's entitlement to disfigurement benefits must be related to a compensable component of the industrial injury. The ALJ found that Claimant's bilateral knee condition was preexisting and the left knee arthroplasty was necessitated by the preexisting condition. Thus, the scar resulting from the surgery was not related to the work injury and Claimant is not entitled to recover disfigurement benefits.

ORDER

It is therefore ordered:

1. Claimant failed to overcome the opinions of Dr. Leggett by clear and convincing evidence. Claimant remains at maximum medical improvement, without impairment, as of November 11, 2015.

2. Respondents are not liable for the left total knee replacement, as the need for the treatment was unrelated to and pre-existed the June 2, 2015 injury.

3. Claimant's request for post-MMI medical benefits is denied and dismissed.

4. Claimant's request for disfigurement benefits is denied and dismissed.

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

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

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 14, 2018

Digital signature

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence she suffered a compensable industrial injury on February 13, 2017.

II. Whether Claimant established by a preponderance of the evidence she is entitled to reasonable and necessary medical treatment related to the February 13, 2017 injury, including medical care received thus far at HealthONE and Blue Sky Neurology.

III. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

In lieu of live testimony, the parties stipulated to the following findings of fact:

1. Claimant is employed with Employer as a teacher. On February 13, 2017, Claimant sustained a work injury while working with a student. The student struck Claimant on the head with a laptop computer.

2. Claimant required medical treatment. Since the date of injury, Respondent has paid for all related medical treatment. Respondent has not denied any medical treatment.

3. While Claimant lost time from work due to the work injury, she has not missed more than three days or shifts as a result of the injury.

4. On July 3, 2017, Claimant filed a Workers' Claim for Compensation.

5. On July 27, 2017, Respondent filed a Notice of Contest denying liability because Claimant had not missed over three work days.

6. Claimant requests an order establishing she sustained a compensable injury and that Respondent is liable for reasonable and necessary medical treatment.

The ALJ makes the additional findings of fact, based on exhibits admitted at hearing:

7. Claimant treated with Matthew Lugliani, M.D. at HealthOne. Dr. Lugliani diagnosed Claimant with mild postconcussive syndrome, cephalgia and cervicalgia. Dr. Lugliani recommended Claimant attend a neurology consultation, which occurred on on April 13, 2017 with Lisa Roeske-Anderson, M.D. at Blue Sky Neurology.

8. Dr. Lugliani noted Claimant's objective findings were consistent with a work-related mechanism of injury. Claimant continued to treat with Dr. Lugliani, who continued to opine Claimant's condition was work-related.

9. Payroll records reveal Claimant worked an average of five days per week between January 20, 2017 and March 1, 2017. Claimant was paid at two different hourly rates, $25.49 and $11.25. For each day worked from February 1, 2017 and February 28, 2017, Claimant was paid a total of $146.96 per day (4 hours at $25.49 plus 4 hours at $11.25). Multiplying the daily amount ($146.96) by the average number of days worked per week (5) results in an average weekly wage of $734.80. The ALJ finds that $734.80 represents a fair and accurate approximation of Claimant's average weekly earnings at the time of injury.

10. Claimant has established by a preponderance of the evidence that she sustained a compensable industrial injury arising out of and in the course of her employment with Employer on February 13, 2017.

11. Claimant has established by a preponderance of the evidence she is entitled to reasonable and necessary medical treatment related to the February 13, 2017 injury.

12. Claimant has established by a preponderance of the evidence the medical treatment provided by HealthONE and Blue Sky Neurology as a result of the February 13, 2017 injury was reasonable and necessary to cure and relieve the effects of the injury.

13. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary

to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

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

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Respondent argues Claimant's injury is not "compensable" because Claimant was not disabled for more than three working shifts or did not sustain any permanent impairment. Respondent relies, in part, on *Harman-Bergstedt, Inc. v. Loofbourrow,* 320

P.3d 327 (Colo. 2014). In *Loofbourrow*, the Court held that a determination of maximum medical improvement has no statutory significance with regard to injuries that do not result in the loss of no more than three days or shifts of work time or permanent disability. *Loofbourrow* addresses a narrow issue, specifically, whether the claimant could be entitled to temporary total disability benefits without having challenged the authorized treating physician's MMI determination through a Division Independent Medical Examination.

Section 8-41-301(1), C.R.S. states, in relevant part, that the right to the compensation "shall obtain in all cases" where the following conditions occur:

> (b) Where, at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment;
> (c) Where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment and is not intentionally self-inflicted.

The Industrial Claim Appeals Office ("ICAO") has acknowledged that defining a compensable injury solely as one where there has been sufficient lost time or permanent impairment mischaracterizes the intentions of the Act. In *Fincham v. Home Depot*, W.C. No. 5-020-103-01 (November 9, 2017), the ALJ determined the respondents were liable for the claimant's right shoulder injury. On appeal, the respondents argued the ALJ erred in "implicitly" concluding the claimant proved a compensable injury, contending the claimant's injury did not result in a sufficient disability. In a footnote, ICAO stated,

> The Respondents attribute consequences to the word 'compensable' which are not intended by the Workers' Compensation Act (Act) or by various judicial uses of the term. As the Loofbourrow opinion explains, the Court in that decision is using the word to refer a claim for which indemnity benefits are payable. However, in different contexts the Act applies the word 'compensable' to simply mean an injury that arises out of the and in the course of the employment, even if the injury requires no more than the payment of medical benefits. See § 8-42-101(6)(a) and (b) or § 8-43-404(9), C.R.S.

Here, while it is undisputed Claimant has not missed more than three days of work or suffered permanent impairment, "compensability" denotes whether the injury arose out of and in the course of employment. The industrial injury occurred at work while Claimant was performing work-related functions. Dr. Lugliani opined Claimant's condition is work-related. Based on the totality of the evidence, Claimant has established that it is more likely than not the February 13, 2017 injury arose out of and in the course of employment, and was proximately caused by the performance of services for Employer. Accordingly, Claimant has proven by a preponderance of the evidence she sustained a compensable injury on February 13, 2017.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As Claimant has established she sustained a compensable industrial injury, Claimant is entitled to reasonable and necessary medical treatment related to the February 13, 2017 injury. The medical treatment Claimant has received at HealthOne and Blue Sky Neurology for the work injury has been reasonable and necessary to cure and relieve Claimant of the effects of the injury.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

As found, Claimant's average weekly wage based on the earnings at the time of injury is $734.80.

ORDER

It is therefore ordered that:

I. Claimant has established by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course of her employment on February 13, 2017.

II. Respondents shall pay for reasonable and necessary medical treatment related to the February 13, 2017 industrial injury, including the medical treatment provided by HealthOne and Blue Sky Neurology.

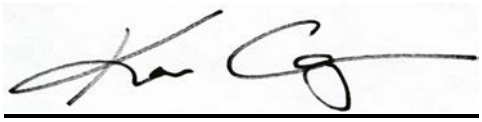
III. Claimant's average weekly wage is $734.80.

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

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

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

DATED: February 15, 2018



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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable right shoulder injury on June 23, 2017.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits, including reimbursement for the cost of surgical treatment to her right shoulder.

STIPULATIONS

1. The parties stipulated that Claimant's average weekly wage is $892.97.

FINDINGS OF FACT

1. Claimant was employed by Employer as a bus driver.

2. On March 3, 2017 Claimant slipped and fell on ice in her own driveway at home and sustained a non-work related injury to her right shoulder.

3. Due to the March 3, 2017 injury, Claimant underwent surgery on April 4, 2017 to repair a full thickness tear of the supraspinatus tendon in her right shoulder that was performed by Thomas Hackett, M.D. The surgery included arthroscopic limited debridement, arthroscopic rotator cuff repair of the supraspinatus tendon, acromial decompression with partial chondroplasty, and sub pectoral open biceps tenodesis of the long head of the biceps tendon. *See* Exhibits 8, I.

4. The following physical therapy notes document Claimant's progress after surgery. On April 27, 2017 Claimant was working on rotation more aggressively and was weaning from her sling while at home. On April 28, 2017 Claimant was doing well and pushing rotation motion better. On May 3, 2017 the plan was to add foam roll in gentle pectoral stretch position and the physical therapist encouraged more overpressure into flexion and abduction as they were limited greater than external rotation over the past 2-3 visits. On May 5, 2017 Claimant had increased pain at end ranges but was pushing the stretching. On May 8, 2017 Claimant had a long weekend with family to clear out her home and do yard work to help prep for the sale of her home. Claimant's tolerance assessment showed increased passive range of motion to 130 flexion, 95 abduction, and 45 external rotation but showed continued stiffness throughout all directions of shoulder motion. Claimant was to begin more aggressive overpressure stretching. On May 12, 2017 it was noted that Claimant had moderate restrictions into range of motion of flexion, external rotation, abduction, and internal rotation. *See* Exhibit J.

5. On May 19, 2017 Claimant underwent physical therapy. Claimant reported having a lot of fluid in her arm after the last session that subsided with massage. The physical therapist noted moderate shoulder hiking that was visible with slow improvement in passive range of motion and moderate levels of pain at end ranges. The plan was for Claimant to continue to focus on regaining full passive range of motion. On May 22, 2017 the physical therapist noted that Claimant remained fairly stiff in the shoulder. On May 24, 2017 the assessment was that Claimant continued to demonstrate decreased mobility at GH and ST joints. *See* Exhibits 9, J.

6. On May 24, 2017 Claimant was evaluated by Dr. Hackett. Claimant reported that she was doing well, continuing to progress with regard to her symptoms, but that she did not feel she had adequate strength yet to return to work. Dr. Hackett agreed Claimant was not ready to return to work without restrictions. *See* Exhibits 8, I.

7. On May 26, 2017 Claimant reported at physical therapy that she had difficulty getting her arm down with foam roller stretching and that her tightness was worse. On May 30, 2017 Claimant reported she was still having difficulty with external and internal rotation and Claimant had continued demonstrated limitations in range of motion. Claimant reported on June 2, 2017 that she had more difficulty in her posterior shoulder and shoulder blade region due to muscle spasms and that she had been using the arm a lot. The therapist noted that Claimant remained limited in her full passive range of motion and had increased tone throughout the parascapular region probably due to increased work load performed last week in cleaning house activities. *See* Exhibits 9, J.

8. Claimant continued to treat at physical therapy throughout June of 2017. On June 5, 2017 Claimant reported that she had increased lifting with her right arm and that she tolerated lawn work and sweeping/raking but had increased soreness. On June 7, 2017 Claimant reported increased soreness in her biceps region following a lifting motion with her right upper extremity and that she had wrapped and iced her right arm “a bunch” following. Her passive mobility was noted to be improved with moderate overpressure achieving 155 flexion, 160 abduction. It was noted at this visit that Claimant had continued difficulty with shoulder hiking during active range of motion due to scapular emchancis and weakness in the rotator cuff that remained. On June 12, 2017 it was noted that Claimant had continued tightness and stiffness throughout the shoulder joint limiting return to full and normal ranges. On June 15, 2017 Claimant reported that she was very stiff and the therapist found she continued to demonstrate compensation at scapulothoracic joint during active motion. On June 20, 2017 Claimant reported frustration with the continued stiffness/soreness due to lack of motion and that she wanted to return to work. *See* Exhibits 9, J.

9. On June 21, 2017 Claimant was evaluated by Dr. Hackett. He noted she was ten weeks post-op for her right shoulder surgery. Claimant reported she was continuing to work with her physical therapist on range of motion, felt like she was still a little tight, but overall felt well with minimal pain. Claimant wanted to discuss returning to work. Dr. Hackett noted that as a bus driver, Claimant needed significant use of both

arms. On examination, Dr. Hackett found that Claimant had approximately 160 degrees of forward flexion, internal rotation to the level of L5, and external rotation to about 30 degrees. Dr. Hackett found 4/5 supraspinatus testing. Dr. Hackett wanted Claimant to continue working on range of motion and strengthening in physical therapy. Dr. Hackett provided work restrictions of allowing Claimant to work part-time and 5 hours every other day for two weeks. He then indicated Claimant could go up to 10 hours every other day for an additional two weeks and opined that by the end of July Claimant should be able to return back to work full time. *See* Exhibits 8, I.

10. Prior to being able to return to work, Employer required Claimant to undergo an evaluation pursuant to the requirements of the Federal Transit Administration to determine whether or not Claimant met all of the Department of Transportation (DOT) physical requirements and to determine whether Claimant had "fitness for duty" following her injury. The fit for duty evaluation was scheduled for June 23, 2017.

11. Claimant underwent both physical therapy and her fitness for duty evaluation on the same date. In the morning of June 23, 2017 she went to physical therapy. At physical therapy she reported continued mobility issues and that she was unable to raise her arm fully overhead. *See* Exhibits 9, J.

12. On June 23, 2017 in the afternoon, Claimant underwent a fit for duty evaluation performed by Deborah Zimmerman, PA-C at CCOM. Claimant reported that she had been doing physical therapy but had not yet started much strengthening overhead. Claimant reported that Dr. Hackett had released her to full duty. On examination, PA Zimmerman found abduction to about 140 degrees, flexion to about 150 degrees, and very limited strength to resistance to both abduction and flexion. PA Zimmerman found that Claimant was able to reach across to her other shoulder but could not reach much past her lumbar spine behind her. PA Zimmerman found that Claimant was capable of lifting floor to waist but not capable of driving a commercial vehicle per federal guidelines and that Claimant would need to continue her strengthening prior to a return to driving commercial vehicles. PA Zimmerman opined that Claimant had very little stamina in the right shoulder and had a five pound restriction above the waist. PA Zimmerman recommended that Claimant return in one month after some increased strengthening and range of motion. *See* Exhibit C.

13. Claimant emailed Employer on June 25, 2017 noting that PA Zimmerman had made the decision not to clear Claimant without having Dr. Hackett's records. Claimant also noted that she had researched her job description and essential functions, DOT and motor carrier Safety regulations and couldn't find any requirement for overhead lifting of any weight. Claimant indicated that she would bug staff to forward Dr. Hackett's records but wasn't sure if it would change Zimmerman's mind. Claimant did not report any injury or new pain in her shoulder due to the June 23 examination in this email. *See* Exhibit D.

14. Claimant underwent physical therapy on June 28, 2017 and reported seeing a CCOM doctor. The physical therapist noted increased bruising throughout the anterior

arm and concern with a possible tear due to the bruising. However, the therapist noted Claimant's verbal reports of discomfort were less and that Claimant's passive range of motion was slightly improved. The therapist instructed Claimant to return to her doctor. *See* Exhibits 9, J.

15. After PA Zimmerman opined that Claimant could not drive a commercial vehicle, Employer scheduled an interactive discussion with Claimant about possible work accommodations.

16. Claimant met with Employer for this discussion on June 30, 2017. Claimant testified that during this meeting she reported to Employer that she had been injured at the June 23, 2017 evaluation with PA Zimmerman.

17. Employer's senior human resources specialist, Monica Zorens and Employer's director of human resources, Dana Lavardiere were present at the June 30, 2017 meeting. Both testified at hearing that Claimant did not report any injury from the June 23, 2017 evaluation during this meeting and that Claimant appeared excited and upbeat at the meeting regarding her progress.

18. On July 5, 2017 Claimant was evaluated by Dr. Hackett. Claimant reported that after her last visit where she was cleared to return to work on a 4 week progression, CCOM denied her request to return to work and did not clear her. Claimant reported that after the appointment at CCOM she noticed bruising and what she thought was some weakness and that her physical therapist recommended she follow up with Dr. Hackett. Claimant did not report that PA Zimmerman had caused an acute injury and did not report that PA Zimmerman had yanked down hard on her arm causing acute pain/weakness. On exam, Dr. Hackett found significant bruising along Claimant's right arm with no swelling or erythema. Dr. Hackett found 130 degrees of forward flexion, 4/5 supraspinatus testing, and 4+/5 external and internal rotation strength testing. Dr. Hackett was concerned with Claimant's increased weakness and planned to obtain imaging to see if there was a re-torn rotator cuff tendon. *See* Exhibit I.

19. On July 6, 2017 Claimant underwent an MRI of her right shoulder interpreted by Charles Ho, M.D. Dr. Ho provided the impression of: postoperative changes compatible with rotator cuff repair, sub acromial decompression, and long biceps tenodesis; moderate to severe supraspinatus tendinosis with high-grade partial thickness tearing and possible areas of full thickness tearing from the greater tuberosity and repair with medial retraction of torn portions of tendon with tear defect over about 1 cm wide area; prominent sub acromial sub deltoid scarring and debris and fluid signal distention which may be postoperative and/or bursitis; and small joint effusion with prominent capsular synovial irregular thickening and increased signal which may be postoperative change and sprain and scarring and synovitis and/or capsulitis. *See* Exhibit K.

20. On July 7, 2017 Dr. Hackett called Claimant to explain that the MRI showed a new tear of the supraspinatus tendon with medial retraction. Dr. Hackett recommended a revision rotator cuff repair surgery. *See* Exhibits 8, I.

21. On July 7, 2017 Claimant emailed Employer. She noted that Dr. Hackett had expressed some concerns about possible shoulder damage done by PA Zimmerman at her June 23, 2017 evaluation and that Dr. Hackett was extremely concerned about obvious acute damage. Claimant also reported that an MRI was completed and showed a fresh rotator cuff tear and that she was going to be scheduled for repair surgery and would keep them posted. *See* Exhibit D.

22. On July 12, 2017 Employer responded to Claimant's email and requested that Claimant completed an "employee's written notice of injury" and "designated medical provider" form. *See* Exhibit D.

23. On July 13, 2017 Claimant responded by email to Employer indicating she was very confused why workers comp paperwork was emailed. Claimant indicated she respectfully declined to sign the forms and noted that it remained to be determined precisely when or how her recent post-surgery rotator cuff tear happened and that the reason could remain idiopathic. *See* Exhibit D.

24. On July 18, 2017 Claimant underwent a right shoulder arthroscopy with extensive debridement and revision rotator cuff repair performed by Dr. Hackett. In the indication for procedure, Dr. Hackett noted that Claimant was doing well postoperatively when she sustained an incident resulting in popping with a pulling type sensation that was followed by weakness not present previously. *See* Exhibits 8, I.

25. On July 28, 2017 Claimant filled out "Employees Written Notice of Injury" indicating that she was injured when at the direction of PA Zimmerman, she raised her right arm both straight out in front of her and straight out to the right side. Claimant wrote that PA Zimmerman applied inappropriate sharp downward force on the right arm in both positions causing pain, tingling, and weakness form the shoulder all the way to the fingertips. *See* Exhibit E.

26. On November 17, 2017 Claimant underwent an independent medical evaluation performed by J. Raschbacher, M.D. Claimant reported that after her initial shoulder injury and surgery she was progressing well in physical therapy and was cleared 11 weeks post-surgery to return to work at 20 hours per week. Claimant reported that prior to her fitness for duty examination she had no symptoms except for some weakness. Claimant reported that on physical examination at her fitness for duty evaluation she was requested to hold her shoulder on the right at 90 degrees forward flexion with the elbow straight and that when she did so, the examiner yanked down on her arm and pushed it down 5 or 6 inches. Claimant reported that the examiner then requested Claimant do 90 degrees of abduction and did not put pressure on the arm, and that Claimant could only do about 45 to 50 degrees. Claimant reported to Dr. Raschbacher that she felt a pop in the shoulder and felt a definite drop of one-quarter to one-half inch and had pain shooting down the right arm to the elbow and pain to the neck as well as an electrical sensation to the outer two fingers. Claimant reported that at her next physical therapy date, she had a red/purple bruise at the right arm to the elbow and that after her fitness for duty

evaluation, she had pain almost back to her pre-surgery levels and could hardly lift her arm again. *See* Exhibit G.

27. Dr. Raschbacher reviewed medical records and performed a physical examination. Dr. Raschbacher opined that it was unlikely that Claimant suffered the injury claimed on June 23, 2017. Dr. Raschbacher opined that Claimant's description was not likely accurate of what occurred during physical examination with PA Zimmerman. Dr. Raschbacher noted that the general practice of examiners would not include yanking on or applying sharp downward force to a post-operative extremity. Additionally, Dr. Raschbacher opined that failure of a rotator cuff repair is not particularly unusual and that failure is an accepted risk of the procedure with no specific trauma or injury necessary to cause a failure of a repair or a re-tear of a partially healed tendon. Dr. Raschbacher also noted the discrepancy where Claimant reported to Dr. Hackett that the new incident resulted in popping and weakness but no significant discomfort and reported to Dr. Raschbacher that she had immediate symptomatology that included pain. Dr. Raschbacher opined that it was medically medically unlikely that resistance testing described by PA Zimmerman would result in a re-tear of the supraspinatus tendon. *See* Exhibit G.

28. On November 27, 2017 Jon Erickson, M.D. performed a medical records review. Dr. Erickson noted the wide variance between PA Zimmerman's account of the June 23 evaluation and Claimant's account of the same evaluation. Dr. Erickson noted that he had done innumerable shoulder girdle strength assessments and that the technique he uses is similar to that described by PA Zimmerman and that the technique described by Claimant would not allow an accurate strength assessment. Dr. Erickson opined that bruising or ecchymosis following a tear or re-tear of the rotator cuff would be decidedly unusual and opined that the bruising suggested that Claimant had sustained a separate injury unrelated to the June 23, 2017 alleged incident. Dr. Erickson noted that orthopedic literature documented many times that failure of rotator cuffs in individuals over the age of 50 was not unusual and was commonly associated with prolonged limitation in range of motion and decreased strength in the rotator cuff which was a theme running consistently throughout the physical therapy notes that followed Claimant's April 4, 2017 surgical repair. Dr. Erickson also noted the surgical record from the re-tear surgery where Dr. Hackett found the cuff tendon to be very degenerative and friable causing substantial difficulties in the re-repair which Dr. Erickson opined was not consistent with an acute re-injury but suggested the tear had been present for a significant period of time. Dr. Erickson opined that Claimant's initial rotator cuff repair unfortunately failed which caused Claimant difficulties in physical therapy including limitations in range of motion and weakness. *See* Exhibit H.

29. PA Zimmerman testified by deposition. PA Zimmerman testified that at the June 23, 2017 evaluation she had Claimant go through range of motion and that she also performed resistance testing. PA Zimmerman testified that the resistance testing involved abduction at 90 degrees and flexion at 90 degrees. PA Zimmerman indicated that she usually uses her index and long finger (two fingers) to apply pressure during resistance testing and that she applies her fingers to the arm and asks patients to resist her in upward

pressure. PA Zimmerman testified that if there is no force whatsoever upward, she might apply a little bit of downward pressure. PA Zimmerman recalled that the examination was uncomfortable for Claimant but did not recall Claimant being in pain. PA Zimmerman testified that Claimant had no strength in her arm and brought it down right away on resistance testing when she was asked to push up. PA Zimmerman testified that she did not grab Claimant's arm, did not apply a huge amount of pressure, and did not apply sharp downward pressure while performing testing. PA Zimmerman did not recall hearing a pop, seeing any shift or drop of Claimant's shoulder, or hearing Claimant report pain shooting up her neck and down into her arms and testified that she would have documented that if it had occurred.

30. PA Zimmerman's testimony is found credible, persuasive, and logically consistent with the normal course of examinations for return to duty evaluations.

31. Claimant testified at hearing. Claimant reported that by June 22, 2017 her shoulder was fine and that she had been released to work. This is inconsistent with the physical therapy records and reports showing Claimant's frustration and continued limitations with her right shoulder in June of 2017.

32. Claimant testified that at the June 23, 2017 evaluation with PA Zimmerman, sharp downward pressure was put on her right arm during strength testing and that she heard a popping noise, felt like her arm dropped, and felt pain shooting up the side of her neck and down her arm. This is inconsistent with her later reports.

33. Claimant testified that immediately following her evaluation with PA Zimmerman, she drove to Breckenridge and to Employer's office and spoke to supervisor Williamson about what had happened. She testified that she told Williamson around 5:10 p.m. that the PA had yanked on her arm and that "you should have seen it." Mr. Williamson testified that he did not see or talk to Claimant on June 23, 2017 after Claimant's evaluation and that he regularly leaves the office by 4:00 or 4:30 p.m. Mr. Williamson testified that he was first aware of an alleged injury from the June 23, 2017 evaluation on July 7, 2017.

34. Claimant also testified that at the meeting with Employer on June 30, 2017 she told them what had happened with PA Zimmerman at the June 23, 2017 evaluation and that she showed them her bruising.

35. Employer's senior human resources specialist, Monica Zorens testified about the June 30, 2017 meeting with Claimant. Ms. Zorens testified that Claimant did not report any incident with PA Zimmerman or the June 23, 2017 CCOM evaluation and that Claimant was excited at the meeting and upbeat. Ms. Zorens testified that Claimant reported that her range of motion had improved and held out her arms to show them the improvement/increase in range of motion. Ms. Zorens noticed a bruise on Claimant's arm and testified that Claimant indicated that the physical therapist had recommended an appointment with the doctor due to concern for internal bleeding. Ms. Zorens testified that the first time she was aware Claimant was reporting that an injury had happened

during the June 23, 2017 evaluation with PA Zimmerman at CCOM was when she received an email from Claimant on July 7, 2017.

36. Employer's director of human resources, Dana Lavardiere, also testified at hearing about the June 30, 2017 meeting with Claimant. Ms. Lavardiere also testified that Claimant was very positive at the meeting about her progress and that Claimant never alleged that the CCOM evaluation had led to any pain or discomfort. Ms. Lavardiere also testified that Claimant held out her arms to demonstrate her range of motion and progress and that Claimant appeared excited.

37. Ms. Zorens, Ms. Lavardiere, and Mr. Williamson are found more credible and persuasive than Claimant. Claimant did not report any alleged injury from her June 23, 2017 evaluation to them either on June 23, 2017 or during the meeting on June 30, 2017.

38. Dr. Raschbacher testified at hearing. He opined that the method of strength testing PA Zimmerman indicated was performed was the typical method for strength testing. Dr. Raschbacher testified that in 30-35 years of performing return to work physicals following rotator cuff surgeries, he has never seen a rotator cuff re-torn from strength testing. Dr. Raschbacher noted that although Claimant reported to him that after her June 23, 2017 evaluation with PA Zimmerman at CCOM her pain was back to higher levels and she couldn't lift her arm, the records showed that her range of motion after the June 23, 2017 evaluation improved actively. Dr. Raschbacher opined that if the June 23, 2017 CCOM evaluation caused a new tear, it was not at all likely that Claimant would have had improved range of motion on June 28, 2017. Dr. Raschbacher agreed with Dr. Erikson's opinion that the re-tear of Claimant's rotator cuff was not acute because of the appearance in the subsequent surgery and opined it was unlikely that a re-tear occurred on June 23, 2017.

39. The opinions of Dr. Raschbacher and Dr. Erikson are found credible and persuasive and consistent with the credible testimony of PA Zimmerman. Although Claimant either re-tore her rotator cuff or had a failed initial surgery, Claimant has failed to establish that an injury occurred on June 23, 2017 during her evaluation with PA Zimmerman.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find

that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection

is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable work related injury on June 23, 2017 during her evaluation at CCOM with PA Zimmerman. PA Zimmerman's testimony surrounding the strength testing is found more credible and persuasive than Claimant's testimony. PA Zimmerman's testimony is consistent with the testimony from other providers as to the usual course of strength testing. PA Zimmerman is further found credible that Claimant performed strength testing in both flexion and abduction despite Claimant's reports that she could not even raise her arm to perform abduction testing.

Claimant's testimony that she was doing fine prior to the CCOM evaluation is also discredited by the physical therapy records. As found above, five days after this alleged injury during her evaluation, Claimant had better range of motion. In addition to PA Zimmerman, Claimant's testimony was contradicted by three Employer witnesses. Overall, Claimant is not credible or persuasive as to what occurred during the CCOM evaluation. Claimant did not report that any acute, new, or alleged injury occurred during that testing until much later. Claimant admits that in a July 13, 2017 email she wrote that it remained to be determined precisely when or how her recent post-surgery rotator cuff tear had happened. If Claimant, as she alleges at hearing, knew that sharp downward pressure applied by PA Zimmerman at the evaluation had caused immediate pain and symptoms, it is logically incredible that she would have indicated in the July 13 email that it remained to be determined when or how the re-tear had occurred. Rather, she would have indicated the acute incident that she now alleges. Claimant also was contradicted in cross examination as to the amount of housework and movement she performed with her right arm during her recovery from the initial surgery. Clearly, as shown by MRI, Claimant had a re-tear. However, Claimant has failed to establish more likely than not that this re-tear has any causal connection to the June 23, 2017 evaluation with PA Zimmerman.

Claimant's argument that she sustained a permanent substantial aggravation of her condition during the evaluation is not credible or persuasive. Claimant was not, as she argues, doing very well until the evaluation and had not been cleared for normal full time work. Rather, she had been cleared to work 5 hours per day, every other day and had ongoing limitations and frustrations documented throughout physical therapy. Claimant has failed to establish that the evaluation on June 23, 2017 caused an acute re-tear of her rotator cuff or that she sustained a work related injury. Rather, it is just as likely that she had failed surgery and/or a separate incident causing her re-tear. Claimant is not credible as her testimony has been contradicted by multiple sources and witnesses and thus her testimony cannot be relied upon to any degree of certainty. The weight of the evidence does not support that a work related injury occurred on June 23, 2017.

Medical Benefits

As Claimant has failed to establish that she sustained a compensable work related injury, her request for medical benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable work related injury on June 23, 2017 during her evaluation at CCOM performed by PA Zimmerman.

2. Claimant's request for medical benefits and her claim is denied and dismissed.

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

DATED: February 16, 2018,

/s/ Michelle E. Jones

_____

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

ISSUES

I. Whether Respondents are entitled to recover the costs of medical and indemnity benefits paid under the claim following a determination that Claimant induced the award of said benefits through fraud.

FINDINGS OF FACT

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

1. While employed as a hair stylist for Employer, Claimant alleged that she suffered an injury to her neck on February 28, 2015, despite the fact she had significant preexisting problems with her neck. (Resp. Ex. B - Findings of Fact 1).

2. A hearing regarding the compensable nature of this injury took place on September 29, 2015 before ALJ Lamphere. The ALJ issued a Summary Order on November 4, 2015 finding that Claimant had proven that she suffered a compensable aggravation of a pre-existing, yet asymptomatic condition. The November 4, 2015 Summary Order held Respondents liable for all related medical treatment reasonably necessary to cure and relieve Claimant from the effects of this compensable aggravation. A critical determination concerning this finding and Order was that Claimant testified she had been pain free and not sought medical treatment for an extended period of time prior to the work injury. (Resp. Ex. B - Findings of Fact 2).

3. Following Claimant's September 29, 2015 hearing, Respondents located additional records and history referencing the condition of Claimant's cervical spine. Respondents then sought to set aside the November 4, 2015 Summary Order and reopen the claim based on fraud due to Claimant intentionally misleading the Court regarding the condition of her cervical spine at the time of her alleged February 28, 2015 injury. (Resp. Ex. B - Findings of Fact 4).

4. Hearing concerning reopening of the claim was held on January 18, 2017. The evidence presented at hearing persuaded ALJ Lamphere that Claimant suffers from chronic neck pain precipitated by preexisting injuries suffered as a consequence of falls and motor vehicle accidents. Despite Claimant's assertion to the contrary, the persuasive evidence demonstrated that she sought treatment regarding her neck multiple times from 2007 to 2015, including treatment for neck pain in 2013 after a fall and again in February 2015 just two day prior to the alleged work injury. (Resp. Ex. B - Findings of Fact 11).

5. Following that hearing, the ALJ entered an Order on March 3, 2017 finding that Claimant "consciously concealed the true nature of her cervical spine condition at the time of her September 29, 2015 hearing in an effort to mislead the ALJ into finding her asserted neck injury compensable." (Resp. Ex. B - Findings of Fact 19).

6. The ALJ then ordered that Respondents had established by a preponderance of evidence that the prior November 4, 2015 Order should be reopened due to fraud and/or mistake and Respondents had demonstrated by a preponderance of the evidence that Claimant did not sustain a compensable injury on February 28, 2015 as she claimed. (Resp. Ex. B – Order).

7. While the March 3, 2017 Order found that Claimant committed fraud, it did not address repayment of medical or indemnity benefits previously paid by Respondents as a consequence of the November 4, 2015 Summary Order. (Resp. Ex. B).

8. Respondents appealed the March 3, 2017 Order to the Industrial Claim Appeals Office (the "Panel"). The Panel issued an Order of Remand on August 18, 2017. The Panel affirmed the ALJ's determination that claimant engaged in fraud and that Claimant did not suffer a work injury in 2015. Nonetheless, as the order did not address repayment of both medical and indemnity benefits paid, the Panel remanded the case back to the ALJ to hold a hearing to address the issue of repayment of medical and temporary disability benefits and enter the necessary factual findings and order on this issue. (Resp. Ex. C).

9. Gwen Brightwell, claim's adjuster at Sedgwick, testified that Respondents' Exhibit A contained the medical and indemnity payments for Claimant's claim. Ms. Brightwell testified that pages 1 and 2 were the medical benefits paid on the claim after Claimant reported the alleged work injury. Ms. Brightwell testified that this was a true and correct copy of the medical payments made on this claim. (Tr. 11:2 – 13:11).

10. Ms. Brightwell testified that $13,158.37 was paid out in medical expenses under the claim. This included reimbursements paid directly to Claimant for mileage traveled to and from doctor's appointments for treatment. (Tr. 13:25 – 14:9 and Resp. Ex. A p. 1-2). According to Ms. Brightwell, the $13,158.37 included charges for a Respondent sponsored Independent Medical Exam ("RIME") and for a Division Independent Medical Examination ("DIME"). Page 2 of Respondents Exhibit A lists two bills labeled as "Medical Exam – Defense (Medical)" in the amounts of $575.00 and $5,050.00 respectively. Ms. Brightwell testified that this was for a Respondent requested independent medical examination (IME), and that the physician who completed this examination provided no treatment to Claimant. The same page of Exhibit A documents two bills labeled "Medical Exam – Independent/Agree" in the amounts of $675.00 and $117.72 respectively. Ms. Brightwell testified that these bills were for the Division Independent Medical Examination (DIME) sought and paid for by Respondents.

11. Ms. Brightwell testified that page 3 of Exhibit A was a payment log for the indemnity benefits paid to Claimant as part of the claim. According to MS. Brightwell and the documentation contained on page 3 of Exhibit A, Respondents paid Claimant a total of $1,995.33 in temporary disability benefits.

12. Based upon the evidence presented, Insurer has paid a total of $15,153.70 in connection with this claim. (Tr. 15:13 – 21 and Resp. Ex. A). Respondents seek reimbursement for the total amount paid, i.e. $15,153.70 at a minimum rate of $500.00.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The undersigned finds Ms. Brightwell's testimony regarding the amounts paid under this clam credible and supported by the

payment logs entered into evidence. Nonetheless, the ALJ agrees with Claimant that not all moneys paid in connection with the claim are recoverable as "benefits" induced by Claimant's fraudulent actions.

Respondent's Entitlement to Repayment of Disability and Medical Benefits

D. Pursuant to § 8–43–303(1) C.R.S., upon a prima facie showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In 1997, The General Assembly amended subsections (1) and (2)(a) of § 8-43-303 to permit reopening of an award on grounds of fraud and overpayment, in addition to the already statutory reopening methods of error, mistake, or change in condition. *Haney v. Shaw, Stone, & Webster*, W.C. No. 4-796-763 (ICAO July 28, 2011) at *1; citing *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds Benchmark/Elite, Inc., v. Simpson*, 232 P.3d 777 (Colo. 2010).

E. The 1997 amendments also provide that no such reopening shall effect the earlier award as to moneys already paid except in cases of fraud or *overpayment*. *Haney*, at *1. The 1997 amendments added § 8-40-201(15.5) defining "overpayment" to mean:

> [M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

F. The case of *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981) has been interpreted to hold that the remedy for respondents that retroactively withdraw an admission of liability based on fraud is entitlement to repayment from a claimant for "all fraudulently obtained benefits, including medical benefits paid to third parties." *Stroman v. Southway Services, Inc.,* W.C. No. 4-366-989 (ICAO August 31, 1999) at *3.

G. The term "medical benefit" is not found in the definitions contained in the Act at § 8-40-201, C.R.S.; however, the definition of "medical benefit" has been discussed by the courts. It has previously been held that a DIME examination is directed towards resolving disputes and is "not directed towards curing and relieving the effects of the claimant's injury." *Jones v. Circle Two Ranch,* W.C. No. 4-488-429 (ICAO September 11, 2008) at *2; *See Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995)(the DIME process is to reduce litigation on the issues of MMI and medical impairment by deferring the determinations of MMI and medical impairment to a neutral, medical expert). The *Jones* court further explained that the DIME physician generally cannot treat the claimant or make referrals for treatment; therefore, it was clear that the DIME was not designed to provide a "medical benefit" to the claim. *Id.* at *2.

H. As explained in the *Jones* claim cited *supra*, it has previously been held that a DIME is not considered a medical benefit because there was no treatment provided or referred, and the sole purpose of a DIME is to reduce litigation. The ALJ therefore concludes that the two payments made by Respondents for the DIME in the amounts of $675.00 and $117.20 do not constitute a "medical benefit" Claimant obtained fraudulently. Consequently, Respondents are not entitled repayment of the costs associated with for it. The same rationale applies to the expenses incurred by Respondents in requesting that a physician of their choice perform an independent medical examination of Claimant. It logically follows that if a DIME does not constitute a "medical benefit" because no treatment is being provided, then a RIME, which does not provide any service to cure and relieve the claimant of the effects of his/her alleged injury also does not constitute a medical benefit. Indeed, the principal purpose of requesting a RIME is investigative in nature and intended to secure an opinion from a retained expert in an effort to reduce the potential for further litigation rather than the delivery of any treatment. The ALJ therefore concludes that Respondents are not entitled to repayment of the two charges associated with their request for an independent medical examination in the amount of $575.00 and $5,050.00 respectively.

I. Respondents paid a total of $6,417.72 between their IME and the DIME that the undersigned concludes they are not entitled to recoup. Subtracting $6,417.72 from the total medical payments made by Respondents of $13,158.37, leaves $6,740.65 that Respondents are entitled to recover from Claimant, as payments associated with this treatment constitute moneys paid for benefits obtained through Claimant's fraud. Respondents also paid $1,995.33 in indemnity payments that they are entitled to recoup. Combining the total amount of "benefits" Respondents are entitled to recoup yields a total of $8,735.98.

J. The parties have been unable to agree on a schedule for repayment of the above referenced $8,735.98. When the parties are unable to agree upon such a schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. See *Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994).

K. As found, Respondents' request that the overpayment be repaid at a rate of $500.00 per month. Claimant presented no evidence regarding her ability to repay the benefits fraudulently obtained, other than to request that repayment be "affordable." As pointed out by Respondents, benefits in this case were pay out over a period of 28 months. Based upon the evidence presented, the ALJ concludes that a repayment schedule of $312.00/month will extinguish the overpayment in approximately the same time frame that the fraudulently obtained benefits were paid out. The ALJ concludes that the aforementioned repayment schedule balances the rights of Respondents to

timely recovery of the overpayment while lessening the potential of creating an undue hardship on Claimant.

ORDER

It is therefore ordered that:

1. Claimant shall repay Respondents a total of $8,735.98 at a rate $312.00/month. Claimant's first payment to Respondents is due the 1st of the month after this order becomes final and subsequent payments of $312.00 are due the first of every month thereafter until the overpayment is extinguished. Claimant's counsel shall contact Respondents' counsel to obtain the necessary details regarding where payments are to be sent.

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

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

DATED: February 16, 2018

/s/ Richard M. Lamphere

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

ISSUES

I. Was Employer insured by Pinnacol Assurance for Workers Compensation Insurance on the date of injury?

STIPULATIONS

As noted previously, both parties present stipulated that the date of injury was 9/6/2016, despite a date of injury of 9/21/2016 being referenced in earlier pleadings. Counsel for Claimant and Respondent/Insurer agreed that Employer was not insured by Pinnacol on said date of injury.

Both parties further agreed that the burden of proof in this instance is upon Insurer to show lack of coverage, by a preponderance of the evidence.

RECITATIONS

At the outset of this Hearing, the ALJ informed the parties that Diva Lauren had called the Colorado Springs Office of Administrative Courts shortly before the 9:00 a.m. start time for this hearing, and informed Court personnel that she could not attend today's hearing, but could be reached by telephone at a phone number she left with Court personnel. Neither party present expressed a desire for her participation in this hearing, by phone or otherwise.

Counsel for Respondent/Insurer made an extensive offer of proof of Insurer's repeated efforts to secure the participation and cooperation of Ms. Lauren in the discovery and hearing process, to no avail. Further, Insurer's counsel informed the ALJ that Ms. Lauren has verbally acknowledged to him her receipt of his efforts at communication. Claimant's counsel concurred that his own numerous efforts at communication with Ms. Lauren to investigate this case went unanswered.

The ALJ finds both counsel credible.

FINDINGS OF FACT

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

1. On July 20, 2016, Pinnacol Assurance notified Employer by letter that Employer's Workers Compensation Insurance policy would be cancelled for non-payment of premiums, effective August 10, 2016, unless said premiums were either paid, or alternative arrangements agreed to. (Exhibit A, p. 1)

2. On August 10, 2016, Pinnacol notified Employer by letter that Employer's Workers Compensation Insurance policy had been cancelled, effective 12:01 a.m. on August 10, 2016. In this letter, Pinnacol advised Employer of the possibility of reinstating said policy, but contact must be made immediately by Employer with Pinnacol to discuss terms of reinstatement. (Exhibit A, p. 2).

3. There is no evidence in the record that such policy of Workers Compensation Insurance was ever reinstated by Employer.

4. There is no evidence in the record that Employer, at any point, secured Workers Compensation Insurance under a different carrier.

5. Claimant suffered a work injury on September 6, 2016, while working for Patsy's Candies, Inc.

6. At the time of this work injury, the ALJ finds, by a preponderance of the evidence, that Employer was not insured by Pinnacol Assurance for Workers Compensation coverage.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, there are no credibility

determinations of witnesses to be made; however, the ALJ does find both counsel present to have been candid and credible in reciting to the ALJ their efforts to investigate, process, and litigate this case appropriately-specifically to secure the participation of Diva Lauren in the process.

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

Workers Compensation Insurance on Date of Injury

D. The ALJ concludes, by a preponderance of the evidence, that Employer was not covered by Pinnacol for a Workers Compensation Insurance policy on the date Claimant was injured.

ORDER

It is therefore Ordered that:

1. Employer was not insured by Pinnacol Assurance for Workers Compensation Insurance on the date of injury.

2. Respondent Pinnacol Assurance is dismissed as a party to this action, and has no further obligations to Employer or Claimant in connection therewith.

3. In the event a new Application for Hearing is filed in connection with this matter, Claimant’s Attorney is directed to request that Court personnel administratively assign such future case to ALJ Edie.

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

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

DATED: February 21, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that the thoracic outlet syndrome release surgery recommended by Dr. Stephen Annest is reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted May 23, 2014 work injury.

FINDINGS OF FACT

1. Claimant sustained an injury to her right shoulder on May 23, 2014. The injury occurred when claimant was lifting a bag of resident laundry and felt and heard a pop in her right shoulder. Respondents admitted liability for claimant's injury. Claimant subsequently underwent two right shoulder surgeries.

2. Subsequently, Dr. David Lorah placed claimant at maximum medical improvement (MMI) on May 8, 2015 with an impairment rating of 6% to her right upper extremity. On July 21, 2015, respondents filed a final admission of liability (FAL) based upon Dr. Lorah's determined date of MMI, impairment rating, and admitted for ongoing maintenance medical benefits. Claimant objected to the FAL and requested a Division-sponsored independent medical examination (DIME).

3. On November 17, 2015, Dr. William Timothy performed an electromyogram (EMG) test and a nerve conduction (NCS) study of claimant's upper extremities. Dr. Timothy found claimant's EMG results to be normal and showed no evidence of neurogenic injury. Dr. Timothy diagnosed cervical strain with axial back pain, upper extremity paresthesias, and right shoulder pain. In his report, Dr. Timothy questioned nonspecific thoracic outlet symptomology.

4. Dr. Ellen Price performed a DIME of claimant on November 18, 2015. Dr. Price determined that claimant reached MMI on June 9, 2015 and assessed an impairment rating of 24% to claimant's right upper extremity.

5. On November 30, 2015, claimant was seen by Dr. David Lorah. On that date, Dr. Lorah referred claimant to physical therapy for thoracic outlet syndrome (TOS). In his report, Dr. Lorah indicated that he would consider referral for a TOS consultation.

6. Based upon Dr. Price's DIME report respondents filed a FAL On December 4, 2015, admitting to the MMI date of June 9, 2015, and impairment rating of 24% for claimant's right upper extremity. Respondents also admitted for ongoing maintenance medical treatment. Claimant timely objected to the December 4, 2016 FAL and applied for hearing on the issues of conversion and disfigurement.

7. On January 4, 2016, Dr. Richard Sanders examined claimant and diagnosed right neurogenic TOS and right neurogenic pectoralis minor syndrome. In his report, Dr. Sanders recommended claimant complete physical therapy. Dr. Sanders opined that if claimant's symptoms did not improve she could be a candidate for surgery for thoracic outlet syndrome.

8. On January 20, 2016, Dr. Lorah concurred with Dr. Sanders' recommendation for physical therapy and opined that by pursuing physical therapy claimant could possibly avoid surgery for thoracic outlet syndrome.

9. On May 3, 2016, the parties proceeded to hearing before ALJ Mottram on the issues of whether claimant suffered a functional impairment to part of the body that was not contained on the impairment schedule and whether she was entitled to a disfigurement award. On June 7, 2016, Judge Mottram issued Findings of Fact, Conclusions of Law and Order and found that claimant had sustained a functional impairment and was entitled to a whole person impairment rating of 14%.

10. On January 4, 2016, claimant was seen by Dr. Richard Sanders for evaluation of possible TOS. On that date, Dr. Sanders administered a right pectoralis minor block. Dr. Sanders found claimant's response to that block as "fair". Dr. Sanders also administered a right scalene block, which led to a 60% decrease in pain and paresthesia, which Dr. Sanders deemed to be a "good" response to the block. Based upon claimant's responses to these blocks Dr. Sanders diagnosed claimant with right neurogenic TOS and right neurogenic pectoralis minor syndrome.

11. On February 19, 2016, claimant returned to Dr. Lorah. On that date, Dr. Lorah noted that Dr. Sanders no longer performed surgery and referred claimant to Dr. Stephen Annest for consultation.

12. On October 12, 2016, the parties proceeded to hearing before ALJ Sidanycz regarding whether the referral to Dr. Annest was reasonable, necessary and related to claimant's work injury. The ALJ issued Findings of Fact, Conclusions of Law and Order in which the surgical consultation was found to be reasonable, necessary and related to claimant's work injury.

13. Claimant returned to Dr. Lorah on December 9, 2016. Dr. Lorah noted claimant had been evaluated in the emergency room due to a severe flare of pain involving her right shoulder, upper arm, and forearm. Dr. Lorah noted that he believed claimant needed a surgical decompression and that delay of the surgery could lead to permanent damage to neurovascular structures.

14. At the request of respondents, on April 27, 2017, Dr. Kathy McCranie reviewed claimant's medical records. Dr. McCranie opined that claimant continued to remain at MMI and that a diagnosis of TOS would not be work related, given claimant's mechanism of injury. McCranie also noted in her report that the EMG study of claimant's right upper extremity was negative, thus ruling out a diagnosis of neurogenic TOS.

15. On May 11, 2017, the parties proceeded to hearing before ALJ Mottram regarding whether claimant's claim should be reopened due to a worsening condition. On June 8, 2017, ALJ Mottram issued Findings of Fact, Conclusions of Law, and Order in which he found that claimant's condition had worsened and her claim was reopened.

16. Claimant was seen by Dr. Annest on August 4, 2017 and August 24, 2017. Dr. Annest opined that claimant has right side brachial entrapment. He recommended claimant undergo right TOS decompression surgery. Specifically, Dr. Annest recommended pec minor tenotomy, transaxillary resection, dissection of artery, supraclavicular neurolysis peripheral nerve, brachial plexus neurolysis, and amniotic wrap.

17. On August 31, 2017, claimant was seen by Dr. Alexander Feldman for an EMG. Based upon the results of the EMG, Dr. Feldman opined that claimant has right TOS.

18. On November 28, 2017, claimant was sent for an independent medical examination (IME) with Dr. Henry Roth. In connection with the IME, Dr. Roth reviewed claimant's medical records, obtained a medical history from claimant, and performed a physical examination. In his IME report, Dr. Roth opined that the recommended thoracic outlet surgery is not reasonable or necessary medical treatment; is not related to claimant's work injury; and would not likely provide much benefit to claimant. In support of his opinion, Dr. Roth noted that the Colorado Medical Treatment Guidelines (the Guidelines) state that myofascial dysfunction with TOS symptoms does not qualify as an operative condition.

19. On January 2, 2018, Dr. Roth issued an addendum to his IME report in which he reviewed the EMG report prepared by Dr. Feldman. In the addendum, Dr. Roth opined that claimant does not have TOS and questioned whether the EMG result was correct. Dr. Roth recommended that claimant undergo another EMG with a board certified electromyographer with expertise in peripheral neuropathy and TOS electric diagnostics.

20. Dr. Roth testified at hearing and confirmed the opinions in his written reports. In his testimony, Dr. Roth was critical of the results of the EMG performed by Dr. Feldman because the test was only performed on claimant's right side and no left sided comparison was done.

21. On January 3, 2018, Dr. McCranie performed a supplemental medical records review. In her supplemental report Dr. McCranie again opined that claimant's mechanism of injury would not cause the development of TOS and that the very diagnosis of TOS would not be work related. In that same report, Dr. McCranie agreed with Dr. Roth's recommendation that claimant undergo another EMG with a board certified electromyographer.

22. Claimant testified that her current symptoms include headaches, pain her right shoulder, right arm, neck, chest wall, and shoulder blade, as well as swelling in her right arm and hand. Claimant testified that she drops objects and has difficulty writing. Claimant also testified that she wants to undergo the recommended surgery and that she understands the risks involved.

23. The ALJ credits the medical records, claimant's testimony, and the opinions of Drs. Annest, Sanders, Feldman, and Lorah over the contrary opinions of Drs. Roth and McCranie and finds that claimant has shown that it is more likely than not that the TOS surgery recommended by Dr. Annest is reasonable medical treatment necessary to cure and relieve claimant from the effects of the May 23, 2014 work injury.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, claimant has demonstrated by a preponderance of the evidence that the TOS surgery recommended by Dr. Annest is reasonable medical treatment necessary to cure and relieve claimant from the effects of the May 23, 2014 work injury. As found, the medical records, claimant's testimony, and the opinions of Drs. Annest, Sanders, Feldman, and Lorah are credible and persuasive.

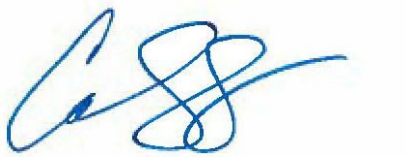
ORDER

It is therefore ordered that:

1. Respondents shall pay for the thoracic outlet syndrome release surgery recommended by Dr. Annest, pursuant to the Colorado Medical Fee Schedule.

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

Dated: February 22, 2018



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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-022-847-03; WC 4-977-514-01

ISSUES

- Whether Claimant has proved by a preponderance of the evidence that the L4-5 lumbar decompression recommended by Andrew Castro, M.D., Allison Fall, M.D. and John Burris, M.D. is reasonable and necessary to cure and relieve the effects of Claimant's industrial injuries.

- Whether the L4-5 lumbar decompression surgery is reasonable necessary and related to the October 13, 2014, or March 23, 2016, worker's compensation claims.

- Whether Claimant proved by a preponderance of the evidence that W.C. No. 4-977-514 should be reopened for a worsened condition.

FINDINGS OF FACT

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

1. Claimant has worked as a bus driver for Employer since 2008.

2. On October 13, 2014, Claimant sustained work-related injuries to his low back when he slipped and fell on the wet bathroom floor while working for Employer. Thereafter, Claimant experienced low back and left leg pain.

3. On October 16, 2014, Claimant was evaluated by Michelle Honsinger, PA-C at Concentra. Claimant advised Ms. Honsinger that he slipped and fell on the wet bathroom floor at work on October 13, 2014, and that he landed on his back. Claimant reported that he sought treatment because his pain was not improving and even worsening. Claimant reported low back pain that radiated into his left buttock and left thigh with a pain level of 7/10.

4. On October 23, 2014, Claimant returned to Concentra and reported that he continued to suffer from back pain that shot down his left leg.

5. On November 6, 2014, Claimant was evaluated by Glenn Petersen, PA-C, at Concentra. Claimant advised Mr. Petersen that he continued to experience low back pain that radiated into his left leg and that there was no change in symptoms despite therapy. Accordingly, Mr. Peterson recommended that Claimant undergo an MRI of his lumbar spine.

6. On November 12, 2014, Claimant underwent his first lumbar spine MRI which demonstrated:

   1) *Small broad-based disc protrusion at L4-5, resulting in mild central canal stenosis and moderate bilateral foraminal compromise but as yet,* ***no exiting nerve root deformity****.*
   2) ***Other disc levels remain normal from T11-12 to L5-S1****.*

3) *No osseous trauma or spondylolisthesis. No evidence of a spinal infection or bone tumor.*
4) *No abnormal distal thoracic cord signal or syrinx.*

7. Claimant returned to Concentra on November 13, 2014, at which time it was noted that Claimant did not suffer from muscle pain, neck pain, joint swelling, joint stiffness, muscle weakness or night pain.

8. On November 18, 2014, Claimant was examined by Lacie Esser, PA-C, at Concentra who noted Claimant's MRI findings which demonstrated a small broad-based disc protrusion at L4-L5 with moderate bilateral foraminal encroachment. Ms. Esser noted Claimant's complaints of back pain that radiated down to his left leg. Ms. Esser stated that she would like to send Claimant for a spine consultation to see if he would be a candidate for an epidural steroid injection ("ESI").

9. On December 4, 2014, Gary Ghiselli, M.D. at Denver Spine Surgeons evaluated Claimant and reported that he had been working non-operatively without pain relief with back pain that radiated into his left leg. Dr. Ghiselli found that Claimant had minimal leg symptoms and no weakness on exam. After his physical exam and review of the MRI, Dr. Ghiselli opined that, "**We do not feel that surgery is necessary at this time**. We have recommended that he see a Physiatrist to maximize all non-operative treatment including possible injections to help therapeutically and diagnostically. He can return to see us if surgical evaluation needs to be done again. However, currently we do not feel that surgery would benefit him."

10. On December 4, 2014, Claimant also saw Glenn Petersen, PA-C, at Concentra after his consultation with Dr. Ghiselli. Mr. Petersen noted that Claimant continued to experience back pain that radiated down his left leg and that Dr. Ghiselli only advised him to consult with a physiatrist for possible injections.

11. Claimant was evaluated by physiatrist, Rick Zimmerman, D.O. on January 7, 2015. Claimant reported ongoing low back. **Dr. Zimmerman's straight leg raise and neural tension were negative bilaterally**. Dr. Zimmerman also noted no specific tenderness in the SI joints, sciatic notches or greater trochanters bilaterally. After review and examination, Dr. Zimmerman performed Claimant's first bilateral L4-5 transforaminal ESI. After performing the ESI, Dr. Zimmerman noted that in the recovery room, Claimant stood, flexed and extended his lumbar spine and reported no low back pain. Claimant demonstrated improved range of motion reaching down to his lower shins and eventually touching his ankles, which was a functional improvement compared to his pre-injection ability to reach to his upper shins with his fingertips. **Dr. Zimmerman officially considered it a diagnostic response to the ESI**.

12. On February 9, 2015, thirty-four days after undergoing his first ESI, Claimant was evaluated by Allison Fall, M.D. at Concentra. Claimant reported that he was doing well, able to do his independent home exercise program and that he had no pain. Claimant also advised Dr. Fall that he was still under restrictions but stated that he did not really need them. Dr. Fall's examination revealed that forward flexion, extension

and right and left lateral bending were full and pain-free and that there were **no radicular signs**. Dr. Fall's final impression was that Claimant suffered from an **asymptomatic L4-5 disc protrusion** and she discharged him from care and released him to full duty. Dr. Fall opined that there was **no impairment or indication for work restrictions**.

13. On February 26, 2015, Claimant was involved in a non work-related motor vehicle collision.

14. On February 27, 2015, Claimant presented to Denver Health Medical Center Emergency Room and was evaluated by Cecilia Sorensen, M.D. Dr. Sorensen reported that Claimant was status post a motor vehicle collision from the day before as a restrained driver with no airbag deployment and that Claimant's car was drivable after the collision. Dr. Sorensen stated that after Ibuprofen and Tramadol was administered, his only complaints were of neck pain and headaches. Specifically, that Claimant was complaining of left lateral neck pain. Dr. Sorensen determined that Claimant did not warrant any imaging studies. Most notably, Dr. Sorensen noted that Claimant reported whiplash and **denied incontinence, weakness, tingling or any other pain**. Dr. Sorensen's official diagnosis was that Claimant suffered from upper back pain and discharged him after Motrin was administered. The Nursing Notes also state that Claimant was medicated with Motrin and observed to be ambulatory with a steady gait from the Emergency Department.

15. On March 4, 2015, six days after the motor vehicle collision, Claimant consulted with J. Stephen Gray, M.D. at Lakewood Injury Treatment Center. Claimant's chief complaints were headaches, neck pain and left low back pain with lower extremity symptoms. Dr. Gray noted Claimant's statement that upon impact, he was slammed, thrown forward and caught by the seatbelt which slammed him backwards and to the left where he hit the left side of his head on the post of the jeep. Claimant advised Dr. Gray that he did not lose consciousness but that he did experience immediate left-sided head pain. Dr. Gray noted that Claimant had some improvement in neck pain and minimal improvement in his low back pain. Most notably, Claimant graded his neck pain and 3-4/10 and his back pain at 7/10. Claimant informed Dr. Gray that he had been treated in the past several months for a prior work-related low back injury and that he had an MRI showing a disc protrusion. Claimant reported some aching pain down into his left posterolateral thigh area but specified that, "This does not go down to his knee and has not since the accident." Dr. Gray noted that in Claimant's prior work-related care, he had the same left-sided posterolateral leg pain, and for that reason, underwent one ESI. Dr. Gray reviewed Claimant's MRI and agreed that prior to the motor vehicle collision, his MRI demonstrated a, "small broad-based disc protrusion at L4-5." Dr. Gray's primary assessment was that Claimant suffered from a scalp contusion, mild concussion, cervical strain and exacerbation of pre-existing low back pain with recurrence of left lower extremity symptoms, probably referred. Dr. Gray ordered X-rays of Claimant's cervical and lumbar spine and a repeat MRI of his low back to rule out a worsening of his preexisting broad-based disc protrusion at L4-5.

16. Claimant returned Concentra on March 11, 2015, where he was evaluated by Rosalie Einspahr, N.P. Claimant informed Ms. Einspahr that he suffered from neck, low back and left leg pain. Due to the exacerbation of Claimant's preexisting low back and left leg pain, Claimant was referred back to Dr. Fall.

17. On March 13, 2015, Claimant underwent a second lumbar spine MRI which now demonstrated:

> *L1-L2: No disc herniation, foraminal narrowing, or spinal stenosis.*
>
> *L2-L3: No disc herniation, foraminal narrowing, or spinal stenosis.*
>
> *L3-4: There is mild bilateral facet hypertrophy. There is no focal disc herniation or central canal stenosis. A component of relatively mild bilateral neural foraminal narrowing is noted but there is no significant nerve impingement.*
>
> *L4-5: There is relatively mild bilateral facet hypertrophy. There is mild disc desiccation. There is a shallow broad-based posterior disc protrusion and annular fissure, slightly asymmetric to the left. This contacts and abuts the descending bilateral L5 nerve roots, slightly greater on the left than right. There is no significant central canal stenosis. There is mild to moderate left and relatively mild right sided foraminal narrowing.*
>
> *L5-S1: There is relatively mild bilateral facet hypertrophy. There is no significant disc herniation. No central canal stenosis. No significant foraminal narrowing.*
>
> *IMPRESSION:*
>
> *Mild degenerative disc disease and facet hypertrophy of the lumbar spine, greatest at L4-L5. A shallow broad-based posterior disc protrusion and annular fissure at L4-L5 abuts the descending L5 nerve root, slightly greater on the left than right. There is relatively mild left greater than right L4-5 neural foraminal narrowing.*

This imaging report was subsequently amended with ADDENDUM #1 which stated:

> *Request for addendum has been made to compare with a previous spine MRI from 11/12/2014, which is now available for comparison. The broad-based posterior* ***disc protrusion at L4-L5 is slightly improved and decreased in size in the interval****. No other significant interval changes have occurred.*

18. Claimant returned to Dr. Gray at Lakewood Injury Treatment Center on March 25, 2015, and advised Dr. Gray that he continued to have moderately severe neck pain and moderate low back pain that ran down to the posterolateral aspect of his left leg to his knee. Upon review of Claimant's most recent MRI, Dr. Gray stated, "It

should be noted that in comparing this with the previous MRI there did not appear to be any significant changes. We will ask Dr. Fall to look at these two MRIs and help us differentiate whether there are any new findings. Again, **to this examiner's eye, there is no significant difference in these films**." On examination of Claimant's lumbar spine, Dr. Gray stated that there was no evidence of spasm, erythema, edema or step-off. Dr. Gray also found that Claimant's legs were neurovascularly intact. Dr. Gray referred Claimant for chiropractic care and advised him to follow-up with Dr. Fall to discuss the possibility of a repeat epidural steroid injection.

19. On April 22, 2015, Claimant was re-evaluated by Dr. Gray who reported that Claimant continued to complain of low back pain with left lower extremity symptoms that remained unchanged since their last visit. Claimant reported that his neck pain was improving and denied any new symptomatology. Claimant did not report new symptomatology in his legs and denied any bowel or bladder incontinence, dysfunction, or urinary retention. Dr. Gray's examination of Claimant's lumbar spine revealed no evidence of spasm, erythema, edema, step-off or significant abnormal curvature. Dr. Gray also noted that there was no localized tenderness to palpation of Claimant's lumbar spine. Dr. Gray recommended that Claimant continue with chiropractic care, physical therapy and massage twice a week.

20. Claimant returned to Dr. Gray on May 13, 2015, where he continued to complain of left-sided low back pain and left leg pain. Claimant advised Dr. Gray that his pain improved somewhat since their last visit. Dr. Gray noted that Claimant would not be allowed to see Dr. Fall under his prior work-related claim and other than relatively mild neck discomfort, Claimant denied any new symptomatology. Dr. Gray continued to recommend that Claimant see a physiatrist to determine whether an epidural steroid injection or some sort of injection therapy would be appropriate and that he was to follow-up with his work comp doctor regarding his injuries as well.

21. Claimant was evaluated by Kirk Holmboe, D.O. at Concentra on May 13, 2015. On this date, Dr. Holmboe released Claimant from care and found that he reached maximum medical improvement for his 2014 work-related injuries. Dr. Holmboe stated, "At this point I will release him from care for his work related injury as he was doing quite well when last seen by Dr. Fall and she imposed no restrictions and did not assign any impairment. Further care will have to come through his or other drivers auto insurance."

22. On May 19, 2015, Claimant was evaluated Yusuke Wakeshima, M.D. Claimant advised Dr. Wakeshima that his current symptoms were posterior neck pain and upper back region pain, which Dr. Wakeshima determined to be 100% related to the 2015 MVA. Claimant also reported low back pain with left posterior thigh and leg pain with no lower extremity weakness, bowel or bladder dysfunction. Dr. Wakeshima acknowledged Claimant's history of a preexisting low back injury with corresponding left leg symptoms and stated that he would request notes from Dr. Fall as well as Dr. Holmboe to review and determine what percentage of his symptoms were related to the 2015 MVA and what percentage were related to the 2014 work injury. Dr. Wakeshima

planned to see Claimant back to discuss apportionment of his lumbar spine region and future treatment plans based on his review of the MRI studies.

23. Claimant returned to Dr. Wakeshima on June 2, 2015, and reported pain in his low back, left leg, neck and upper back. Dr. Wakeshima reviewed Claimant's prior lumbar MRI studies and noted that his review of the MRI on November 12, 2014, before the MVA and after his first work-related injury reported only a small broad-based disc protrusion with mild central canal stenosis and moderate bilateral foraminal compromise with no exiting nerve root deformity. Dr. Wakeshima opined that on his over-read of the 2014 MRI, there was facet arthrosis appreciated at multiple levels as well as an annular tear. Accordingly, Dr. Wakeshima opined that Claimant's MRI findings before and after the non work-related MVA **probably did not significantly change despite contrasting reports**. Dr. Wakeshima planned to have Claimant take his 2015 MRI films back to Advanced Medical Imaging so they could compare it to their 2014 MRI to determine if there were any real significant interval changes from his lumbar spine MRI before and after the 2015 MVA. However, it was Dr. Wakeshima's opinion that he did not observe a significant interval changes between Claimant's 2014 and 2015 MRIs. Most notably, Dr. Wakeshima stated, **"Upon my over-read of the MRI films from November 12, 2014, I am not really seeing that much difference that the MRI of March 13, 2015 and I would like to confirm whether there has been no significant interval change."**

24. Dr. Wakeshima re-evaluated Claimant on June 16, 2015, and stated that since his last evaluation, Claimant did not report any change in his neck and low back pain symptoms, specifically that his neck was now as equally as painful as his low back. On this date, Dr. Wakeshima was still without Claimant's 2014 work injury records. In the absence of medical records and based purely on Claimant's subjective responses and answers, Dr. Wakeshima opined that 60% of his ongoing low back pain was related to the MVA of February 26, 2015, and that 40% was preexisting and related to the work injury on October 13, 2014. Dr. Wakeshima recognized that he would need to re-address this apportionment after Claimant's 2014 and 2015 MRIs were properly compared and contrasted by Advanced Medical Imaging. Dr. Wakeshima stated, "**I would like to see him one more time to obtain the radiologist's inputs regarding comparison MRI studies as well as review Dr. Fall's notes, and determine what was accomplished in the past and how severe his pain was prior to his motor vehicle accident.**"

25. On June 30, 2015, Claimant returned to Dr. Wakeshima and reported no significant change in his pain symptoms. Specifically that he still experienced pain in his lower neck, low back and left leg. Dr. Wakeshima noted that Claimant was able to have his lumbar MRI imaging studies over-read to compare and contrast any significant interval changes between the 2014 and 2015 MRIs. Dr. Wakeshima stated, "**They did compare the MRI from March 13, 2015 with an MRI on November 12, 2014 and it did report that there was a broad-based posterior disc protrusion at L4-5 that has slightly improved and decreased in size in the interval. No significant interval change has occurred.**" Dr. Wakeshima also had notes from Dr. Holmboe available to him for review. Dr. Wakeshima noted that Dr. Holmboe's last note indicated he was at

MMI. Dr. Wakeshima opined that Claimant would benefit from undergoing electrodiagnostic studies to make sure there was no radiculopathy. In terms of Claimant's neck and low back pain, Dr. Wakeshima wanted him to undergo a course of chiropractic treatment with acupuncture times six sessions each to see if it improved his pain symptoms. With regard to treatment of Claimant's low back, Dr. Wakeshima stated, "**His MRI studies of the lumbar spine and cervical spine did not demonstrate any major pathology that would lead one to suspect that spine surgical intervention currently is indicated.**"

26. On July 14, 2015, Claimant presented to Wayne Hoffman, D.C. per Dr. Wakeshima's referral. Dr. Hoffman reported Claimant's chief complaints of neck pain, mid back pain, low back pain and that his progress had stagnated. On physical exam, Dr. Hoffman performed orthopedic testing which most notably included a Lasègue's test which was negative bilaterally. Dr. Hoffman also performed a **straight leg test to diagnose lumbosacral radiculopathy which was also negative bilaterally,** demonstrating that Claimant did not reproduce a pain pattern in his bilateral lower extremities when tested for lumbar radiculopathy.

27. On July 21, 2015, Claimant returned to Dr. Hoffman and advised him that he was still experiencing cervical pain at a 3/10 level, no mid back pain at all and improved low back pain at 3/10. Dr. Hoffman assessed that Claimant's cervical spine improved, that his thoracic pain resolved and that his lumbar spine was improved as well.

28. On July 21, 2015, Claimant was also evaluated by Bethany Wallace, M.D. at Lakewood Injury Treatment Center. Claimant advised Dr. Wallace that he was getting better, that his left leg pain was receding and not as intense or consistent and that he still had stiffness in his neck and low back. Claimant reported that if he sat for a long time, it aggravated his left leg. Most notably, Dr. Wallace noted that Claimant was getting much better after the slip and fall at the time Dr. Fall evaluated him on February 9, 2015, just prior to his 2015 MVA. Dr. Wallace also noted Claimant's reports that he no longer needed assistance to stand up and that **he was not interested in injections or surgery**. Claimant reported that, "He is pleased that the chiropractic and the acupuncture, have helped a lot." **Dr. Wallace also performed another straight leg test which was negative** for a reproduced pain pattern in his lower extremities. Dr. Wallace merely recommended that Claimant continue physical therapy, massage therapy, chiropractic and acupuncture and that he could consider spinal surgery for the lumbar disc problem and sciatica. Dr. Wallace did not request authorization for a second epidural steroid injection nor did she request authorization for spinal surgery. Claimant's low back and left leg symptoms had much improved and he was not interested in pursuing further treatment on his low back. Dr. Wallace's one-time evaluation was done under the auspices of a consultation, not a surgical recommendation.

29. On December 8, 2015, Claimant underwent a Division Independent Medical Examination with Jade Dillon, M.D. for evaluation of his October 13, 2014, work injury. Dr. Dillon noted that Claimant's MRI on November 12, 2014, only demonstrated a small broad-based disc protrusion at L4/5 with mild central canal stenosis and moderate

bilateral foraminal compromise with no focal nerve root deformity. She also noted Claimant's neurosurgical evaluation by Dr. Ghiselli on December 14, 2014, wherein Dr. Ghiselli found that Claimant was not a surgical candidate as it related to his 2014 work injuries. Dr. Dillon relied on Dr. Fall's report dated February 9, 2015, which reflected a good response to the first epidural steroid injection on January 7, 2015. Dr. Dillon also agreed with Dr. Holmboe's assertion that Claimant reached MMI for the 2014 work injuries to his low back and left leg. Absent the second subsequent intervening event on March 23, 2016, Dr. Dillon could only conclude that Claimant's increased low back pain and left leg symptoms were due to the non work-related MVA on February 26, 2015. Thus, Dr. Dillon concurred with Dr. Holmboe that Claimant reached MMI on May 13, 2015, for his 2014 work injuries and that his low back pain and left leg symptoms were not ratable conditions; therefore assigning a 0% impairment rating.

30. Aside from DIME Dr. Dillon's finding that Claimant reached MMI on his 2014 low back and left leg conditions, and that Claimant's low back and left leg symptoms were not ratable conditions, Dr. Dillon recorded that as of December 8, 2015, Claimant's symptoms remained isolated to his low back and left leg. Additionally, Dr. Dillon recorded that Claimant moved well with normal gait, stance and balance and, most notably, that her straight leg raising test was negative bilaterally. Dr. Dillon concluded that Claimant merely suffered from a lumbar strain as a result of the occupational injury on October 13, 2014, which she found to go on to good recovery with conservative treatment.

31. On March 23, 2016, Claimant was involved in a second motor vehicle accident while driving a bus for Employer.

32. As the DIME provided no medical treatment, Claimant received no medical treatment for his low back from July 21, 2015, until after his March 23, 2016 accident. This is a period of over 9 months of no treatment.

33. On March 31, 2016, Claimant returned to Concentra and was evaluated by Catherine Hunt, P.A. Ms. Hunt noted Claimant's description of the work-related motor vehicle accident on March 23, 2016, stating that, "Patient reports he was driving a bus and another car was hit, which then lost control and hit the front of the bus with the front of their car. Patient states he was driving about 20 mph at time of impact and was restrained." Ms. Hunt recorded Claimant's chief complaint to be low back pain. Claimant's pain diagram dated March 31, 2016, reveals that, in contrast to all of his prior complaints of low back and left leg pain, Claimant now documented increased low back pain with stabbing pain that radiated into *both* legs.

34. On April 20, 2016, Claimant returned to Concentra and was evaluated by Valerie Skvarca, PA-C. Ms. Skvarca noted that Claimant was still complaining of left-sided low back pain at 6/10. Claimant was forthright in advising Ms. Skvarca that he had a previous history of back injuries and therefore asked for a repeat lumbar spine MRI.

35. On April 29, 2016, Claimant underwent a third lumbar spine MRI read by Bao Nguyen, M.D. which revealed:

1. *Moderate bilateral L4-5 neuroforaminal stenosis and mid central spinal canal stenosis at this level owing to a broad-based protrusion.*
2. *Minor central disc bulge at L5-S1.*

36. Dr. Nguyen filed an addendum to the April 29, 2016, MRI report which stated:

COMPARISON: MRI 11/12/2014

No interval change is appreciated in comparison to the prior MRI exam of 2014.

37. Claimant returned to Concentra on May 5, 2016, and was evaluated by Nickolas Curcija, PA-C. Claimant advised Mr. Curcija that his pain was unimproved despite therapy or medications and that he had been experiencing cramps in *both* legs at night. Mr. Curcija performed a positive straight leg test. Claimant's corresponding pain diagram also documents his ongoing reports of low back pain and bilateral leg pain.

38. On May 19, 2016, Claimant returned to Concentra and was re-examined by Mr. Curcija who specifically noted that, "The patient presents today with recheck back pain radiating down to legs." Another positive straight leg test was performed and again, Claimant's pain diagram continued to document low back pain and bilateral leg pain.

39. Claimant returned to Dr. Fall on May 20, 2016. Although Dr. Fall acknowledged that Dr. Nguyen noted no interval change between the 2014 MRI and 2016 MRI, Dr. Fall found that, in contrast to the 2014 MRI, the 2016 MRI demonstrated moderate bilateral L4-5 neuroforaminal stenosis and mid central spinal canal stenosis due to a broad-based disc protrusion. Dr. Fall stated that Claimant continued to report low back and bilateral leg symptoms and that he was now experiencing parasthesias down *both* legs. Another positive straight leg test was performed and Dr. Fall opined that Claimant had radicular findings consistent with his 2016 MRI. Dr. Fall therefore recommended that Claimant undergo *bilateral* L4-5 transforaminal steroid injections.

40. On June 9, 2016, Claimant returned to Concentra and was re-examined by Mr. Curcija who noted that Claimant was still waiting for his bilateral L4-5 transforaminal steroid injections and that therapy was increasing his pain symptoms. Mr. Curcija reported that Claimant's pain level was 6/10 and that it was located in the low back bilaterally with pain radiating to his bilateral calves. Mr. Curcija also noted that Claimant was experiencing weakness in his both legs.

41. Claimant returned to Dr. Fall on June 10, 2016, and reported that he had a return of symptoms with pain radiating down both legs. Dr. Fall noted that Claimant's bilateral L4-5 transforaminal steroid injections were still pending and, in contrast to her diagnosis of an asymptomatic L4-5 disc protrusion for the 2014 injury, Dr. Fall now found that Claimant suffered from left greater than right L4 radiculitis. Dr. Fall stated that she would await the results of the bilateral L4-5 transforaminal steroid injections.

42. On June 17, 2016, Claimant was evaluated by Robert Kawasaki, M.D. Dr. Kawasaki stated that Claimant was still experiencing low back pain, bilateral thigh region pain, calf cramps and numbness and tingling in his left leg. Dr. Kawasaki then performed right L4-5 transforaminal steroid injections with L4 spinal nerve root block and left L4-5 transforaminal steroid injections with L4 spinal nerve root block.

43. On June 23, 2016, Claimant returned to Concentra and was re-evaluated by Mr. Curcija. Six days had passed since Claimant underwent bilateral L4-5 transforaminal steroid injections and L4 spinal nerve root blocks; however, Claimant continued to report back pain that radiated into *both* legs and that he did not feel any symptom relief following the injections as he continued to have pain at 6/10 in his low back that radiated down to both legs and into his calves. Mr. Curcija performed another positive straight leg test which caused a pulling sensation in Claimant's lower extremity. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

44. Claimant returned to Dr. Fall on June 24, 2016, one week after his bilateral L4-5 transforaminal steroid injections and L4 spinal nerve root blocks, and continued to report no change in symptoms. Dr. Fall noted that the injection he received as a result of his 2014 worker's compensation claim was the only thing that helped that the second set of injections did not change anything. Claimant continued to report pain down both legs and that he was even experiencing numbness in his posterior calf. Accordingly, Dr. Fall recommended an electrodiagnostic evaluation of Claimant's left leg to rule out radiculopathy.

45. On August 25, 2016, Insurer admitted liability for medical benefits on the 2016 work-related injuries.

46. Dr. Fall performed Claimant's electrodiagnostic evaluation on August 26, 2016. Dr. Fall noted that electrodiagnostic evaluation of Claimant's left leg revealed increased insertional activity in the lower lumbar paraspinals and in the left gastrocnemius. Dr. Fall also stated that she saw a visible involuntary contraction of the left gastrocnemius when Claimant was lying flat. Dr. Fall assessed that Claimant suffered from left L5 radiculitis without significant denervation. After reviewing his treatment, Dr. Fall recommended that Claimant undergo a left L5-S1 transforaminal injection which would address the left L5 nerve root. Due to his ongoing low back and bilateral leg symptoms, Claimant asked Dr. Fall if he could discuss his symptoms with a spine surgeon. Dr. Fall felt this request was appropriate and wrote a referral for a surgical evaluation to be done after the L5-S1 transforaminal injection its response could be discussed. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

47. On September 2, 2016, Claimant returned to Concentra where he was evaluated by Dr. Cava. Claimant continued to report low back pain that radiated into both legs and also, that he was having difficulty with sexual function and erections due to his severe back pain and severe cramping in his buttocks and legs. Dr. Cava's straight leg test was positive bilaterally but worse on the left.

48. On September 7, 2016, Claimant was evaluated by spine surgeon, Bryan Castro, M.D. Dr. Castro's report states, "The patient has lower back pain with pains going down his legs, left side greater than right. Sometimes he gets cramping in the legs as well. He has some numbness in the medial calf with some pain and cramping in the posterior aspect of the leg, left greater than right. His low back pains are greater than the leg pains. He has pain with any activities." Most notably, Dr. Castro's report states, "The patient states that now since his automobile accident in March [2016], the pains have been significantly increased." Dr. Castro reviewed Claimant's treatment history and acknowledged that the L5-S1 transforaminal injection as recommended by Dr. Fall was still pending. Dr. Castro's review of systems were, "Positive difficulty and pain with walking, some difficulty with sexual relations secondary to pain." Dr. Castro reviewed Claimant's lumbar spine MRI of April 29, 2016, and compared it to the lumbar MRI of November 12, 2014, which he found to highlight some disc desiccation at L4-L5 with mild disc protrusion and annular tear. Ultimately, Dr. Castro's report states that he was in agreement with proceeding with bilateral L5-S1 transforaminal epidural steroid injections and found them to be reasonable. Once again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

49. Dr. Zimmerman performed Claimant's left L5-S1 transforaminal epidural steroid injection on September 14, 2016. Dr. Zimmerman reported that Claimant's pre-procedure pain score at rest was 6/10 and his straight leg raise and neural tension were positive. After the injection, Claimant's pain score at rest was 0/10. Dr. Zimmerman stated, "Lumbar range of motion improved with forward bending and reaching down to his mid shins with his fingertips, and extension improved to approximately 10" or 15". He had no significant pain with these maneuvers, and straight leg raise pain was reduced from 8/10 before the procedure to 2/10 after the procedure, being a diagnostic response. The patient stood and ambulated without difficulty. Motor and sensation were intact in both lower limbs."

50. Claimant returned to Dr. Fall on September 23, 2016, nine days after his left L5-S1 transforaminal epidural steroid injection, and reported that he was worse. Claimant explained that initially, he was numb so he did not experience pain in Dr. Zimmerman's clinic; however, once he left, the numbing medicine wore off and his pain returned and increased to the point where he was even having difficulty doing things around the house. Dr. Fall's straight leg test was again positive and she referred Claimant for pool therapy two times a week for three weeks for core stabilization and low back pain. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

51. Claimant was re-evaluated by Dr. Cava at Concentra on September 29, 2016. Dr. Cava stated that if Claimant experienced worsening radicular symptoms, that a follow-up with Dr. Castro should be considered to re-evaluate Claimant's need for surgery. Dr. Cava also noted that the most recent injection did not help and that Claimant continued to experience difficulty with sexual function and erections due to severe back pain and severe cramping in his buttocks and legs. Dr. Cava reported that Claimant's pain radiated into his buttocks, thighs, bilateral calves and was worse on the left with associated symptoms of lower extremity numbness, lower extremity tingling and

lower extremity weakness. Dr. Cava's repeat straight leg test was once again positive and Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

52. Claimant was re-examined by Dr. Fall on October 7, 2016. Claimant reported a pain level of 6/10 and Dr. Fall's physical exam revealed decreased flexion with pain radiating down both legs and a positive straight leg raise bilaterally in the seated position. Dr. Fall's impression was that Claimant suffered a lumbosacral strain with a small broad-based disc protrusion at L4-5 with surgery not yet recommended by Dr. Castro. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

53. Between October 13, 2016, and October 27, 2016, Claimant was seen at Concentra at least three more times, and continued to complain of low back pain that radiated into both legs at each appointment.

54. Claimant returned to Dr. Fall on November 14, 2016, where she recorded that Claimant did not benefit from pool therapy. Specifically that, "He states he is 0% better. He still has pain going down the leg and the back. He states they are both together, so one is not worse than the other." Dr. Fall did not have further treatment recommendations, only that she would recommend a follow-up with Dr. Castro prior to MMI to re-address the reasonable necessity of surgery.

55. Claimant was re-evaluated by Dr. Castro on November 15, 2016. Dr. Castro noted Claimant's report of worsened symptoms and stated, "Just prior to closing the case, I will get him a new MRI to make sure there is [sic] no new findings and indeed if this still remains with no significant herniation, then surgical intervention would not be offered. At that point, he will be placed at MMI from a surgical standpoint. We will see him back after the MRI." Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

56. On November 23, 2016, Claimant underwent his fourth lumbar spine MRI, which demonstrated:

IMPRESSION

1. *Canal stenosis L4-L5 level with protrusion and annular tearing. Mild inferior foraminal narrowing is noted.*
2. *L5-S1 with canal narrowing. Foraminal narrowing right greater than left.*

57. Claimant followed up with Dr. Fall on December 5, 2016, who reviewed the results of his fourth lumbar MRI scan. After reviewing the MRI, Dr. Fall assessed that Claimant suffered from **L4-5 and L5-S1 disc protrusions with bilateral lower extremity radiculitis with possible progression on a more recent study**. Dr. Fall stated that she would await the recommendations of Dr. Castro in light of these new MRI findings. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

58. Claimant returned to Dr. Castro on December 7, 2016, to re-address the reasonable necessity of surgery. Dr. Castro stated that Claimant's MRI scans appeared to be significantly changed when compared to the last MRI. Dr. Castro stated that there were no new herniations or instability patterns; however, Claimant demonstrated moderate stenosis of the lateral recesses bilaterally at L4-5. Dr. Castro informed Claimant that low back pain was not an indication for surgical intervention in his case where there was no instability or worsening findings in his low back but that *his buttock and leg pain could be treated with a lumbar decompression*. In lieu of recommending ineffective conservative management, Dr. Castro recommended a one-level microdiscectomy decompression for decompression of lateral recesses to hopefully improve Claimant's claudicatory-type symptoms, which in a setting of moderate stenosis and failure to respond to conservative management, was a reasonable consideration. Dr. Castro stated that there was no indication for a fusion or any other structural type of surgery but that due to Claimant's ongoing pain and worsening of symptoms, he would begin surgical planning for a one-level decompression. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

59. On December 12, 2016, Claimant returned to Dr. Fall who agreed with Dr. Castro's surgical recommendation of a one-level decompression. Claimant's corresponding pain diagram continued to indicate low back pain and bilateral leg pain.

60. On December 14, 2016, Dr. Castro's office requested authorization of an L4-5 lumbar decompression, which was scheduled to take place on December 29, 2016, at Lutheran Medical Center.

61. On January 9, 2017, Claimant returned to Dr. Fall and advised her that the L4-5 lumbar decompression was denied. Claimant stated that he was quite miserable, in a lot of pain and actually felt sick that the surgery had been denied. Dr. Fall noted that Claimant was still working and having pain in his low back and both legs. Dr. Fall assessed that Claimant suffered from L4-5 and L5-S1 disc protrusions with bilateral lower extremity radiculitis. Dr. Fall stated, "I agree with the surgical recommendation by Dr. Castro, the orthopedic spine specialist." Dr. Fall wanted Claimant to follow up with her in one month so if he was to pursue surgery, he would not be at MMI. If however Dr. Fall saw that Claimant would not pursue surgery, she planned to proceed with an impairment rating. Claimant's corresponding pain diagram continued to indicate low back pain and bilateral leg pain.

62. Claimant returned to Dr. Fall on February 6, 2017, and reported ongoing symptoms in both legs and that his pain was quite bad. Claimant advised Dr. Fall that a hearing was set regarding denial of the L4-5 lumbar decompression and that he was to attend two Respondent-sponsored IMEs with Brian Reiss, M.D. and John Burris, M.D. Dr. Fall prescribed additional medication for his radicular symptomatology and advised Claimant that it was only a temporary solution. Claimant's corresponding pain diagram continued to indicate low back pain and bilateral leg pain.

63. On February 27, 2017, Dr. Burris performed a Respondent-sponsored IME. Dr. Burris was to respond to a letter from Respondents dated February 2, 2017. In that letter, Respondents asked Dr. Burris to address the following question:

> *If Mr. Camara has not reached MMI from any work-related injuries, please describe what further treatment is reasonable and necessary to bring him to MMI. Please specifically address whether Dr. Castro's request for authorization to perform an L4-5 lumbar decompression is reasonable, necessary and related to Mr. Camara's injury of March 23, 2016.*

After Dr. Burris conducted his physical exam and reviewed the records, Dr. Burris concurred with Drs. Fall and Castro that Claimant suffered from low back pain with bilateral lower extremity radiculitis. In response to Respondents' inquiry on whether Dr. Castro's request for authorization to perform an L4-5 lumbar decompression was reasonable, necessary and related to the March 23, 2016, injury, Dr. Burris stated:

> *Although he has a history of prior back injuries**, the records support the 3/23/2016 event as the proximate cause of his current symptoms**. Because he has continued symptoms and his treating specialists recommend additional treatment, **I do not believe he has reached maximum medical improvement**. **I believe the L4-5 lumbar decompression recommended by Dr. Castro is reasonable, necessary and related to the 3/23/2016 event**.*

64. On March 1, 2017, Claimant underwent a second Respondent-sponsored IME with Dr. Reiss. By contrast, Dr. Reiss opined that the 2016 work MVA did not change Claimant's preexisting condition. It is Dr. Reiss' opinion that treatment should be considered related to Claimant's only preexisting incident not related to his work injuries. In contrast to the overwhelming evidence, Dr. Reiss' report states that he does not believe the 2015 MVA produced even a temporary aggravation of Claimant's preexisting condition. Dr. Reiss testified consistent with his report that he did not contest the L4-5 lumbar decompression itself, only that it could only be related to the 2015 MVA. On cross-examination, Dr. Reiss admitted that he did not have or review any medical records showing that Claimant suffered from any back pain prior to February 26, 2015. Dr. Reiss also admitted that he did not recall any medical records documenting that Claimant's pain complaints after the 2014 work claim were isolated to his left leg and low back, which would allow him to properly compare and contrast Claimant's complaints of low back and left leg pain prior to March 23, 2016, to Claimant's complaints of low back pain and bilateral leg symptoms after March 23, 2016.

65. Dr. Reiss testified at hearing that the surgery could only be related to the 2016 work MVA if his worsening of condition was simply a lumbar strain superimposed upon Claimant's preexisting condition, which included spinal stenosis and lower extremity symptomatology. Dr. Reiss testified that if Claimant received any injury in the 2016 work MVA, it was possible he had a lumbar strain and that treatment of a lumbar strain was not surgical intervention but physical therapy and time. Dr. Reiss' testimony is inconsistent with every other provider's opinion, the overwhelming medical records

and the objective findings on Claimant's four separate MRI scans documenting that Claimant's initial lumbar strain was objectively worsened after the March 23, 2016, work MVA.

66. Claimant returned to Dr. Fall on March 13, 2017, and advised her that he still had ongoing low back and bilateral leg pain. Dr. Fall addressed Dr. Burris' IME opinion and acknowledged that he found the surgery to be medically reasonable, necessary and related to the March 23, 2016, work injuries. Dr. Fall stated, "Hopefully, this means that the insurance will now approve the surgery and he can proceed." Dr. Fall also wrote Claimant a prescription for a three-month gym membership while he awaited surgery in order to keep him active, mobile and to help him with symptom relief.

67. On April 13, 2017, Claimant returned to Concentra and was re-evaluated by Nickolas Curcija, PA-C. Mr. Curcija noted that Claimant's symptoms remained the same, if not worse, with pain radiating down to the backs of both legs to his calves. Claimant also reported occasional numbness in his left shin and intense pain in the back of his legs which limited his ability to be intimate with his wife. Claimant's corresponding pain diagram continued to indicate low back pain and bilateral leg pain.

68. On May 1, 2017, Claimant followed up with Dr. Fall who acknowledged receipt of Dr. Reiss' IME opinion stating that the L4-5 lumbar decompression was not related to the work injury of March 23, 2016, but rather to Claimant's preexisting condition he solely attributed to the MVA on February 26, 2015. Claimant advised Dr. Fall that although he received treatment from Dr. Wakeshima, he did not pursue surgery after the February 26, 2015, motor vehicle accident and that he was in fact doing well after the 2015 MVA, up until the work-related MVA on March 23, 2016.

69. On May 2, 2017, and May 11, 2017, Claimant was seen at Concentra and continued to complain of ongoing low back pain that radiated into both legs. Claimant's corresponding pain diagrams on these two dates also continued to indicate low back pain and bilateral leg pain.

70. Claimant was evaluated by Albert Hattem, M.D. on May 22, 2017, and reported persistent low back pain with bilateral leg numbness. Claimant rated his pain at 6/10 and advised Dr. Hattem that this injury has really impacted his life and that he continued to have problems with his wife. Claimant stated that prior to March 2016, he was not having these problems. On physical exam, Dr. Hattem's straight leg test was positive in the seated position bilaterally.

71. Dr. Fall re-examined Claimant on June 12, 2017, and noted that Claimant's pain was worsening and that he was experiencing a lot of leg pain and cramping. Claimant rated his pain at 7/10. Since the hearing was scheduled so far out, and there was no treatment to undergo apart from the denied L4-5 lumbar decompression, Dr. Fall recommended proceeding forward with an impairment assessment at their next scheduled visit.

72. Claimant underwent a third IME with John Hughes, M.D. on June 26, 2017. Similar to Drs. Castro, Fall and Burris, Dr. Hughes agreed that the surgical treatment as proposed by Dr. Castro was reasonable and necessary; however, in contrast to every other treating provider, Dr. Hughes found that original 2014 work injury was the proximate cause of his current symptoms. Dr. Hughes stated that:

> *I do believe that surgical treatment as proposed by Dr. Castro is reasonable, necessary, and related to a natural progression of Mr. Camara's initial work-related lumbar spine injuries of October 13, 2014. In my opinion, Mr. Camara is not at MMI pending this surgical treatment.*
>
> *RECOMMENDATION*
>
> *It is my opinion that Mr. Camara sustained work-related lumbar spine injuries on October 13, 2014, that did not resolve, as noted by Dr. Dillon in her report of December 8, 2015. He has now developed left L5 radiculopathy, and I believe that the surgical treatment recommended by Dr. Castro is reasonable, necessary, and related to Mr. Camara's initial work-related lumbar spine injury of October 13, 2014.*

73. Claimant was finally re-evaluated by Dr. Hattem on July 6, 2017, and reported no change in his symptoms within the last 1 ½ months. Claimant continued to report persistent low back pain at 7/10 with ongoing bilateral leg pain. Claimant reported that his low back pain equaled his leg pain and that his right leg was now worse than the left.

CONCLUSIONS OF LAW

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

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder

should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

In the present case, Claimant began suffering from low back pain and left leg symptoms on October 13, 2014. On February 9, 2015, Dr. Fall evaluated Claimant and found that he merely suffered from an asymptomatic L4-5 disc protrusion as a result of his 2014 work claim. On February 26, 2015, Claimant was involved in a non work-related motor vehicle accident which temporarily aggravated his underlying low back pain and left leg symptoms. On June 30, 2015, Dr. Wakeshima, became the first provider to expressly opine that Claimant's MRI studies on March 13, 2015, did not demonstrate any major pathology that would lead one to suspect that spine surgical intervention was indicated at that time. In this case, the undersigned ALJ agrees with Claimant that the IME report of Dr. Reiss reflects enhanced effects of the claim he was hired to review (the February 26, 2015, MVA claim) to provide an opinion that would mitigate Respondents' obligation to deliver medical benefits per sections 8-40-101, *et seq.*, C.R.S. The medical records substantiate that prior to March 23, 2016, Claimant's medical treatment was isolated to his low back and left leg.

Reasonable and Necessary Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. See § 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714 (Colo. 1994). The claimant has the burden of proof to establish the right to specific medical benefits by a preponderance of the evidence. § 8-43-201, C.R.S.; *Valley Tree Service v. Jimenez*, 787 P.2d 658 (Colo. App. 1990). The question of whether a claimant has proved that specific medical treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Once the claimant establishes the probability of need for future treatment, as is found in this case, the claimant is entitled to a general award of future medical benefits, subject to the respondents' right to contest the compensability of any particular treatment on grounds that the treatment is not authorized or not reasonably necessary. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Here, Claimant has proven by a preponderance of the evidence Claimant was finished treating for his 2015 MVA by the time he was involved in the motor vehicle accident on March 23, 2016, while in the course and scope of his employment with Employer. Claimant received no medical treatment whatsoever in the more than nine months preceding his March 23, 2016 work related accident. The medical records persuasively document that Claimant's treatment after the 2016 MVA included injections, medications and therapy for his low back and bilateral lower extremities. Moreover, the medical records persuasively and overwhelmingly document that Claimant's complaints of bilateral leg symptomatology did not begin until after the motor vehicle accident on March 23, 2016.

Similarly, the ALJ is not persuaded by Respondents' assertion that Claimant is attempting to get the L4-5 lumbar decompression "bootstrapped" onto the 2016 work claim. On July 21, 2015, Dr. Wallace recorded Claimant's express statement that he was not interested in any injections or surgery at that time. In fact, Dr. Wallace specifically stated that, "He is pleased that chiropractic and acupuncture, have helped a lot." The ALJ finds that Claimant credibly and persuasively testified that he was not sent for any surgery as a result of his evaluation with Dr. Wallace in relation to his 2015 MVA claim. Additionally, the ALJ finds that Dr. Wallace's report is indicative of a mere consultation, not an actual request to conduct surgery, as Respondents contended multiple times at hearing. As is found, Claimant was not a surgical candidate as a result of the 2015 MVA.

Dr. Burris, a Level II accredited physician appointed by Respondents to conduct an IME, provided a causation opinion which the ALJ finds credible and persuasive. Dr. Burris concurred with Dr. Castro and Dr. Fall in opining that although Claimant had a history of back injuries, the records support the 3/23/2016 event as the proximate cause of Claimant's current symptoms. Dr. Burris does not believe Claimant has reached MMI. More importantly, Dr. Burris credibly opined that the L4-5 lumbar decompression recommended by Dr. Castro is reasonable, necessary and related to the 3/23/2016 event. As is found, the L4-5 lumbar decompression is reasonable, necessary and related to the March 23, 2016, work-related MVA claim.

Based on the totality of the evidence presented, the ALJ is not persuaded by Respondents' argument that Claimant's low back and bilateral leg symptoms are primarily attributable to the February 26, 2015, non work-related motor vehicle accident. Although Claimant sustained an aggravation of his preexisting low back pain and left leg symptoms on February 26, 2015, he did not seek any injections or surgery as a result of that MVA and he was finished treatment by the time he was involved in the MVA on March 23, 2016. Respondents did not introduce any persuasive evidence to refute the records of Drs. Castro, Fall or Burris confirming that Claimant sustained additional

injuries to his low back with new symptomatology in both legs as a result of the work-related motor vehicle accident on March 23, 2016.

By contrast, Claimant has been continuously and increasingly limited since the March 23, 2016, industrial injury. Moreover, Claimant provided ample evidence to document additional symptoms in his both legs after the March 23, 2016, motor vehicle accident. Also persuasive was Claimant's testimony and medical records demonstrating that the March 23, 2016, work MVA was the only precipitating event that compelled Claimant to report that he was having difficulty with sexual function and erections due to his severe back pain and severe cramping in his buttocks and legs.

The ALJ concludes that Dr. Burris' opinion that Claimant's low back and bilateral leg symptoms are related to the March 23, 2016, work MVA is credible, persuasive and more persuasive than the contrary causational opinion of Dr. Reiss. The medical records substantiate, and Dr. Burris credibly explained that Claimant's increased low back symptoms with new bilateral leg symptoms are related to the March 23, 2016, work MVA. After the March 23, 2016, work MVA, new findings were observed on Claimant's MRI at the L5-S1 level with new symptoms manifesting in both legs. Moreover, when Claimant's 2014 and 2015 MRIs were compared, every treating provider opined that the 2015 MRI did not demonstrate significant interval changes. By contrast, upon official comparison of Claimant's 2014 and 2015 MRIs, it was found that the broad-based posterior disc protrusion present as a result of the 2014 work claim had actually slightly improved and decreased in size in the interval by March 13, 2015.

Accordingly, Dr. Reiss was not persuasive as to his opinion that the 2015 could be the only cause for Claimant's current symptoms. Dr. Reiss' opinions are not consistent with Claimant's medical records nor do they negate any physician's opinion that an L4-5 lumbar decompression is actually necessary. Dr. Reiss' opinion that the 2015 MVA did not even aggravate Claimant's 2014 low back symptoms is biased, unpersuasive and inconsistent with the overwhelming medical records. That Dr. Reiss issued an opinion in favor or Respondents should not come as a surprise. At hearing, Dr. Reiss admitted that he "testif[ies] for the respondents. That's who hires [him]. That's who pays [him]. And that's who [he] testif[ies] for." Incredibly, and despite all evidence to the contrary, Dr. Reiss issued the opinion that Claimant suffered no injury *at all* as a result of his March 23, 2016 car crash. After weighing the medical opinions and potential biases as a whole, the ALJ finds Drs. Castro, Fall and Burris more persuasive.

Claimant has proved by a preponderance of the evidence that the exacerbation of his low back pain accompanied by new symptomatology in both legs was caused by his involvement in the motor vehicle collision that occurred at work on March 23, 2016. Therefore, Claimant is entitled to such medical benefits under the 2016 worker's compensation claim. The one-level, one-sided decompression surgery is therefore authorized, reasonable, necessary and related to the March 23, 2016, worker's compensation claim. The ALJ is persuaded that the March 23, 2016, incident is the most likely cause of Claimant's current low back and bilateral leg symptomatology, which ultimately requires an L4-5 lumbar decompression as recommended by Drs. Castro, Fall and Burris.

Reopening W.C. No. 4-977-514-2014 CLAIM

To warrant reopening, it is not necessary that a worker's industrial disability, i.e. the degree of permanent partial disability, has increased. Rather, reopening is also appropriate where additional medical and temporary disability benefits are warranted. *See Osborne v. Industrial Commission*, 725 P.2d 63 (Colo .App. 1986); *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). Claimant has failed to prove by a preponderance of the evidence that W.C. No. 4-977-514 should be reopened for a worsened condition.

Dr. Burris, a Level II accredited physician appointed by Respondents to conduct an IME, provided a causation opinion the ALJ finds credible and persuasive. Dr. Burris concurred with Dr. Castro and Dr. Fall in opining that although Claimant had a history of back injuries, the records support the 3/23/2016 event as the proximate cause of Claimant's current symptoms. Dr. Burris credibly opined that the L4-5 lumbar decompression recommended by Dr. Castro is reasonable, necessary and related to the 3/23/2016 event. As is found, the L4-5 lumbar decompression is reasonable, necessary and related to the March 23, 2016, work-related MVA claim.

The ALJ has found the March 23, 2016 work injury to be the proximate cause of Claimant's need for surgery. Therefore, there is no basis for reopening W.C. No. 4-977-514-2014.

ORDER

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

1. The L4-5 lumbar decompression as recommended by Drs. Castro, Fall and Burris is reasonable, necessary and related to Claimant's March 23, 2016, work-related MVA.

2. Claimant requires the medical treatment recommended by Drs. Castro, Fall, and Burris to cure and relieve him of the effects of his March 23, 2016, industrial injuries and their sequelae and is entitled to a general award of medical benefits. Respondents shall pay for the Claimant's L4-5 lumbar decompression, and all other medical care deemed reasonable and necessary.

3. Claimant failed to prove by a preponderance of the evidence that W.C. No. 4-977-514 should be reopened for a worsened condition. Therefore that claim shall not be reopened.

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

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

DATED: February 20, 2018

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive additional medical treatment, including medications and physical therapy, that is causally related, reasonable and necessary to his November 18, 2015 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 43-year-old male who worked for Employer as a Concrete Finisher and Laborer. On November 18, 2015 Claimant slipped on ice while working for Employer. He injured his lower back and neck. Claimant continued his regular work schedule for Employer and did not miss any shifts as a result of the incident.

2. On November 25, 2015 Claimant visited Brian Beatty, D.O. at Rocky Mountain Medical Group for an examination. Claimant reported lower back pain but denied any leg symptoms.

3. During the winter of 2015-16 Claimant reported a gradual improvement in his symptoms. By February 5, 2016 he noted that he only had back pain when he bent at the waist for extended periods of time. Claimant continued to deny any leg pain, numbness, weakness or tingling.

4. On April 4, 2016 Claimant underwent a lumbar spine MRI. The MRI reflected only mild degenerative disc changes at L5-S1 and mild, bilateral, proximal S1 root sleeve deformity.

5. On April 22, 2016 Claimant visited Barry Ogin, M.D. for an evaluation of his lower back discomfort. After performing a physical examination Dr. Ogin determined that Claimant's lumbar spine was "fairly unremarkable." He noted that Claimant's mild L5-S1 disc protrusion was likely incidental. Dr. Ogin also concluded that Claimant was not a good candidate for interventional treatments because he suffered diffuse axial back pain that was aggravated by minimal palpation and movement. He suspected that there were psychological barriers potentially impacting Claimant's recovery.

6. Claimant also visited Dr. Beatty for an examination on April 22, 2016. Dr. Beatty commented that there were no major structural changes to Claimant's lower back and with physical therapy and core stabilization Claimant would return to full activities. Claimant continued to deny any leg pain, numbness, weakness or tingling.

7. On June 22, 2016 Claimant returned to Dr. Beatty for an evaluation. Claimant reported that he had been released by Dr. Ogin and completed physical therapy. He noted that he was doing well with only minimal, intermittent pain. Claimant explained

that he was ready to work his regular job. Dr. Beatty noted that Claimant suffered only occasional back pain and was not experiencing any leg pain, numbness, weakness or tingling. Dr. Beatty confirmed that Claimant had not suffered any radicular symptoms. He concluded that Claimant had reached Maximum Medical Improvement (MMI) with no permanent impairment.

8. On July 5, 2016 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Beatty's MMI and impairment determinations. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME) to address his neck, back and right arm symptoms.

9. On June 30, 2016 Claimant was incarcerated at the Sterling Correctional Facility. Claimant testified that his condition began to deteriorate and he suffered more sciatic pain that traveled down his left leg.

10. On August 2, 2016 Claimant visited the infirmary at the Sterling Correctional Facility. He reported lower back symptoms and pain that radiated down his left leg. He received pain medication, muscle relaxers and a lidocaine injection. Physicians also provided Claimant with a cane so he would not suffer any additional lower back injuries.

11. After Claimant was released from prison he visited the Salud Family Health Center on May 4, 2017. He reported significant lower back pain while sitting and standing. Claimant also noted left posterior thigh numbness and two instances of urinary incontinence. Claimant attributed his symptoms to his slip and fall at work on November 18, 2015.

12. On May 11, 2017 Claimant underwent an MRI of his lumbar spine. The MRI revealed a diffuse disc bulge at L3-L4 that had increased since the prior MRI.

13. On May 19, 2017 Claimant visited R. Shay Bess, M.D. for an examination. Dr. Bess recorded that Claimant had suffered a work injury when he fell on ice and injured his back. He noted lower back swelling and sciatica. Claimant reported pain in his buttocks, thigh and calf. His symptoms consisted of 75% back pain and 25% leg pain. Dr. Bess diagnosed Claimant with a lumbar disc herniation, lumbar stenosis and lumbar spondylosis. He did not have Claimant's lumbar MRI scan, Workers' Compensation medical records and Department of Corrections medical records to determine whether Claimant's symptoms were related to his November 18, 2015 work incident.

14. On May 30, 2017 Claimant underwent a DIME with Lloyd Thurston, D.O. Claimant reported that he slipped and fell at a job site on November 18, 2015. Dr. Thurston noted that Claimant was initially diagnosed with cervical, lumbar and thoracic strains. He reviewed Claimant's medical records, considered diagnostic studies and conducted a physical examination. Dr. Thurston explained that Claimant's original lumbar MRI on April 4, 2016 showed mild degenerative disc changes at L5-S1 "with some mild, bilateral, proximal S1 root sleeve deformity." He agreed with Dr. Beatty that Claimant reached MMI on June 22, 2016 with no permanent impairment or restrictions.

15. Dr. Thurston commented that Claimant's symptoms initially improved but then worsened "without explanation when he was incarcerated." He concluded that the lumbar MRI changes from April 4, 2016 to May 11, 2017 were unrelated to the November 19, 2015 slip and fall. Although Claimant reported that his back pain was greater than his left leg pain, there were no objective findings consistent with a radiculopathy. Dr. Thurston determined that Claimant's current symptoms should be addressed through his primary care physician. He concluded that Claimant's cervical, thoracic and lumbar strains had resolved. Dr. Thurston emphasized that Claimant's disc bulge at L3-L4 and spinal canal stenosis occurred after he reached MMI on June 22, 2016 and was thus not work-related.

16. On July 13, 2017 Respondents filed a FAL consistent with Dr. Thurston's MMI and impairment determinations. The FAL specified that Claimant reached MMI on June 22, 2016 with no permanent impairment.

17. Claimant testified at the hearing in this matter. He explained that Dr. Beatty placed him at MMI on June 22, 2016 because he was likely to be incarcerated. Nevertheless, Claimant acknowledged that he was suffering minimal symptoms while treating with Dr. Beatty and his condition worsened without an intervening event while incarcerated. Claimant specifically began to suffer tingling down his left leg and urinary incontinence.

18. Claimant has failed to demonstrate that it is more probably true than not that he is entitled to receive additional medical treatment, including medications and physical therapy, that is reasonable, necessary and causally related to his November 18, 2015 admitted industrial injury. Initially, Claimant suffered admitted industrial injuries to his lower back and neck area on November 18, 2015 and did not miss any of his scheduled work shifts. Claimant subsequently received conservative treatment including physical therapy and core stabilization exercises. A lumbar spine MRI reflected only mild degenerative disc changes at L5-S1 and mild, bilateral, proximal S1 root sleeve deformity. By June 22, 2016 Dr. Beatty noted that Claimant suffered only occasional back pain and was not experiencing any leg pain, numbness, weakness or tingling. He concluded that Claimant had reached MMI with no permanent impairment.

19. On June 30, 2016 Claimant was incarcerated. He subsequently developed increasing lower back symptoms and pain that radiated down his left leg. A May 11, 2017 lumbar MRI revealed a diffuse disc bulge at L3-L4 that had increased since the prior MRI. DIME Dr. Thurston commented that Claimant's symptoms initially improved but then worsened "without explanation when he was incarcerated." He concluded that the lumbar MRI changes from April 4, 2016 to May 11, 2017 were unrelated to the November 19, 2015 slip and fall. Although Claimant reported that his back pain was greater than his left leg pain, there were no objective findings consistent with a radiculopathy. He summarized that Claimant reached MMI on June 22, 2016 with no impairment or restrictions and his current symptoms should be addressed through his primary care physician. Dr. Thurston concluded that Claimant's cervical, thoracic and lumbar strains had resolved.

20. In contrast, Claimant explained that Dr. Beatty placed him at MMI on June 22, 2016 because he was likely to be incarcerated. Nevertheless, Claimant acknowledged that he was suffering minimal symptoms while treating with Dr. Beatty and his condition worsened without an intervening event while incarcerated. Based on Claimant's November 18, 2015 work injury Dr. Bess diagnosed him with a lumbar disc herniation, lumbar stenosis and lumbar spondylosis. However, Dr. Bess did not have Claimant's lumbar MRI scan, Workers' Compensation medical records and Department of Corrections medical records to determine whether Claimant's symptoms were related to his November 18, 2015 work incident. Based on the persuasive medical records and opinions of Drs. Beatty and Thurston, Claimant's symptoms from his work injury resolved by June 22, 2016. Although Claimant suffered additional back pain and radicular symptoms when he was incarcerated, it is speculative to attribute his condition to the November 18, 2015 slip and fall at work. As Dr. Thurston specifically noted, the lumbar MRI changes from April 4, 2016 to May 11, 2017 were unrelated to the November 19, 2015 slip and fall. Accordingly, Claimant's request for causally related, reasonable and necessary medical benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

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

5. However, a determination of MMI has no statutory significance when injuries do not cause a claimant to lose more than three work shifts or suffer a permanent disability. *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P. 3d 327, 331 (Colo. 2014). Specifically, MMI is a statutory term of art that has no applicability in claims that do not entail payment of disability benefits. *Id.* Because MMI has no applicability in medical only claims, it cannot serve as a basis for filing or contesting a FAL. *Trujillo v. Elwood Staffing*, W.C. No. 4-957-118 (ICAP, June 22, 2017). Accordingly, MMI is a term that only applies to injuries in which disability indemnity benefits are payable. *Id.*

6. Claimant's claim in the present matter is thus not closed. Respondents' FAL based on Dr. Thurston's DIME determination is premature and does not preclude Claimant from pursuing additional medical benefits. Claimant does not need to prove that his condition has changed or that there was a mistake pursuant to §8-43-303, C.R.S. *See Trujillo v. Elwood Staffing*, W.C. No. 4-957-118 (ICAP, June 22, 2017).

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to receive additional medical treatment, including medications and physical therapy, that is reasonable, necessary and causally related to his November 18, 2015 admitted industrial injury. Initially, Claimant suffered admitted industrial injuries to his lower back and neck area on November 18, 2015 and did not miss any of his scheduled work shifts. Claimant subsequently received conservative treatment including physical therapy and core stabilization exercises. A lumbar spine MRI reflected only mild

degenerative disc changes at L5-S1 and mild, bilateral, proximal S1 root sleeve deformity. By June 22, 2016 Dr. Beatty noted that Claimant suffered only occasional back pain and was not experiencing any leg pain, numbness, weakness or tingling. He concluded that Claimant had reached MMI with no permanent impairment.

9. As found, on June 30, 2016 Claimant was incarcerated. He subsequently developed increasing lower back symptoms and pain that radiated down his left leg. A May 11, 2017 lumbar MRI revealed a diffuse disc bulge at L3-L4 that had increased since the prior MRI. DIME Dr. Thurston commented that Claimant's symptoms initially improved but then worsened "without explanation when he was incarcerated." He concluded that the lumbar MRI changes from April 4, 2016 to May 11, 2017 were unrelated to the November 19, 2015 slip and fall. Although Claimant reported that his back pain was greater than his left leg pain, there were no objective findings consistent with a radiculopathy. He summarized that Claimant reached MMI on June 22, 2016 with no impairment or restrictions and his current symptoms should be addressed through his primary care physician. Dr. Thurston concluded that Claimant's cervical, thoracic and lumbar strains had resolved.

10. As found, in contrast, Claimant explained that Dr. Beatty placed him at MMI on June 22, 2016 because he was likely to be incarcerated. Nevertheless, Claimant acknowledged that he was suffering minimal symptoms while treating with Dr. Beatty and his condition worsened without an intervening event while incarcerated. Based on Claimant's November 18, 2015 work injury Dr. Bess diagnosed him with a lumbar disc herniation, lumbar stenosis and lumbar spondylosis. However, Dr. Bess did not have Claimant's lumbar MRI scan, Workers' Compensation medical records and Department of Corrections medical records to determine whether Claimant's symptoms were related to his November 18, 2015 work incident. Based on the persuasive medical records and opinions of Drs. Beatty and Thurston, Claimant's symptoms from his work injury resolved by June 22, 2016. Although Claimant suffered additional back pain and radicular symptoms when he was incarcerated, it is speculative to attribute his condition to the November 18, 2015 slip and fall at work. As Dr. Thurston specifically noted, the lumbar MRI changes from April 4, 2016 to May 11, 2017 were unrelated to the November 19, 2015 slip and fall. Accordingly, Claimant's request for causally related, reasonable and necessary medical benefits is denied and dismissed.

ORDER

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

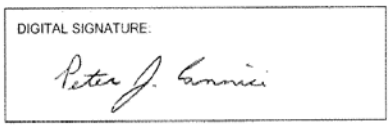
1. Claimant's request for additional medical benefits is denied and dismissed.

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

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

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

DATED: February 20, 2018.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-997-496-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 23, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 1/23/18, Courtroom 1, beginning at 1:30 PM, and ending at 4:30 PM).

Claimant's Exhibits 1 through 16, with the exception of Exhibi6 which was withdrawn, were admitted into evidence, without objection. Respondents' Exhibits A through U were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a briefing schedule and a deadline to file a written transcript of the post-hearing evidentiary deposition of Bennett I. Machanic, M.D. the Claimant's authorized treating physician (ATP). The Claimant's opening brief was filed, electronically, on January 30, 2018. Respondents' answer brief was filed, electronically, on February 6, 2018. Claimant's reply brief was filed on February 8, 2018. A written transcript of Dr. Machanic's evidentiary deposition was due on March 19, 2018, however, Claimant's counsel advised on February 16, 2018 that Claimant would **not** be taking Dr. Machanic's deposition and the parties were ready for a decision. Therefore, the ALJ deems the matter submitted for decision as of February 16, 2018.

ISSUES

The issue to be determined by this decision concerns whether the Claimant is permanently and totally (PTD) disabled because of a compensable back injury of October 23, 2015. During the hearing, the parties stipulated that the Claimant was entitled to post maximum medical improvement (MMI) medical benefits that are reasonably necessary and causally related to the compensable back injury.

The Claimant bears the burden of proof, by a preponderance of the evidence on the issue of PTD.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant, age 39, suffered an on-the-job back injury which was found compensable by ALJ Margo W. Jones in a decision issued on September 21, 2016. In that decision ALJ Jones found that the Claimant suffered a compensable back injury while installing solar panels (Claimant's. Exhibit 16).

2. The claim was initially denied by Respondents and proceeded to hearing on April 21, 2016 and June 17, 2016 before ALJ Margot Jones on the issue of compensability.

3. After ALJ Jones issued her decision, the Respondents filed a General Admission of Liability (GAL) on March 1, 2017, which admitted to medical benefits and ongoing temporary total disability (TTD) benefits since the date of injury at a rate of $610.71 per week (Respondents' Exhibit B).

4. Andrew Castro, M.D., a surgeon, diagnosed the Claimant as having an extremely large disc herniation at L5-S1 centrally and right sided causing several lateral recess encroachment, severe spinal canal compression, and encroachment of the transversing S1 nerve root bilaterally (Claimant's. Exhibit. 11).

5. Until the injury event of October 23, 2015, the Claimant was able to work full time installing solar panels, a heavy duty job.

6. Ultimately, Respondents filed a Final Admission of Liability (FAL), admitting for the 25% whole person medical impairment rating, assigned by ATP Dr.

Machanic, with an MMI date of July 25, 2017, which is not disputed. Respondents originally denied liability for post-MMI maintenance medical benefits, but stipulated to the same during the hearing.

Medical

7. Prior to the first hearing before ALJ Jones, the Claimant had treated with a few medical providers. On February 15, 2017, he first met with his chosen ATP, Dr. Machanic. He informed Dr. Machanic that he had a prior injury to his low back injury which occurred twenty years ago. Then, he had a ruptured disc and underwent a lumbar laminectomy with a possible fusion (Respondents' Exhibit Q). Dr. Machanic reviewed the Claimant's prior imaging and ordered an EMG (Exhibit Q).

8. The Claimant underwent an EMG with Dr. Machanic on March 29, 2017 (Exhibit Q, bates stamp, 339)

9. In May 2017, the Claimant treated at Colorado Brain and Spine Institute. (Respondents' Exhibit O). J. Paul Elliott, M.D., performed an initial exam on May 7, 2017. Dr. Elliott noted, "his diffuse bilateral extremity pain and weakness is not explained by these examinations and we are recommending a thoracic MRI (magnetic resonance imaging) without contrast and a lumbar MRI for further evaluation." (Respondents' Exhibit O, bates stamp 323). On May 9, 2017, Margarety Gasienica, PA-C (Certified Physician's Assistant) reviewed the Claimant's lumbar MRI and believed it was "largely normal except for left S1 nerve root abutted by scar tissue. Nothing to explain his exam" (Exhibit O, bates stamp 326). On May 22, 2017, PA-C Gasienica reviewed the Claimant's MRI findings with Dr. Elliott and stated, "reviewed the imaging which reveals only left lateral recess/subarticular recess scar tissue [at the] L5-S1. These findings do not explain his symptoms. Will refer back to Dr. Machanic for further evaluation of a neurological issue" (Exhibit. O, bates stamp 570). The ALJ finds that ATP Dr. Machanic's assessments are entitled to greater weight than Dr. Elliott's assessments.

10. On July 11, 2017, the Claimant returned to Dr. Machanic who noted the Claimant had gone to see Dr. Elliott. Dr. Machanic was of the opinion that the Claimant was at MMI as of July 25, 2017 (Respondents' Exhibit Q, bates stamp 343) Dr. Machanic assigned the Claimant a 25% whole person impairment rating. Respondents filed an FAL, based on ATP Dr. Machanic's opinions. This fact adds greater weight to Dr. Machanic's opinions.

11. In his November 17, 2017 report, Dr. Machanic stated that based on testing, the Claimant has nerve abnormalities at L5 and S1 and scarring. Dr. Machanic stated that the nerves were not dead but they were not vigorous. The Claimant's nerve problems trigger spasms which result in pain that radiates into his legs and groin. Dr. Machanic was of the opinion that there are no treatment options to restore the nerves to

their normal function and that Claimant's problems are likely permanent. Dr. Machanic also stated that if surgery had been performed earlier, the Claimant would have gotten better, and that the Claimant is unable to work now and will endure ongoing and permanent chronic pain. Because of this, the Claimant will need help with the activities of daily living (ADLs) for the remainder of his life (Claimant's. Ex. 2). The ALJ finds ATP Dr. Machanic highly persuasive and credible in this regard. Indeed, during the course of the hearing, the ALJ observed the Claimant exhibiting severe physical limitations, requiring the use a wheelchair, on and off, and these manifestations appeared to be genuine.

12. Jeffery Kleiner, M.D., performed an independent medical examination (IME) and issued a report dated October 25, 2017. Dr. Kleiner concurred with the opinion of Dr. Machanic that the delay in surgery on the massive L5-S1 disc herniation led to irreparable nerve injury, pain and dysfunction. While Dr. Kleiner is not a vocational expert, he agreed with Dr. Machanic that the Claimant is permanently and totally disabled-- from a medical standpoint (Claimant's. Exhibit 4).

Functional Capacities Evaluation (FCE)

13. Terry Young, an occupational therapist (OTR) at Starting Point performed a FCE on the Claimant. In her report of October 3, 2017, she documented that the Claimant suffered from pain and muscle spasms in his legs during the testing which were palpable and so severe that Young had to massage his legs and at one time, Young had to use both knees on the Claimant's hamstrings to get the spasms to stop (Claimant's Exhibit 1).

14. According to Young, despite multiple attempts on the part of the Claimant to perform any type of productive task during the FCE, he was simply unable. According to Young, the Claimant has no ability to engage in home making chores, family activities, and social functions in any consistent or reliable way. She said that reaching, leaning forward, standing or any type of activity, no matter how sedentary, would prompt spasms within minutes. Even simple reaching caused the Claimant to go into painful muscle spasms. In this regard, the ALJ has the unmitigated temerity to conclude that OTR Young's observations of the Claimant and more reliable and credible than Dr. Lesnak's so called observations, which border on moral, not medical bases, *i.e.,* "exaggerating."

15. Young's expert OTR opinion was that the Claimant was putting forth full and consistent effort during the evaluation. She based this opinion upon widely accepted protocols within the field of functional capacity evaluations, with 16 out of 16 markers used to determine level of effort showing that high effort was put forth. Young stated that observations and other evidence support the fact that the Claimant's report of abilities and limitations can be considered valid and authentic. She concluded that the Claimant was unable to demonstrate any productive abilities that would equate to competitive employment in any position at any time during the FCE.

16. Regarding physical limitations, Young stated in her report that the Claimant can sit for 5 to 45 minutes, but at times he can't sit at all due to unrelenting muscle spasms, and that his sitting tolerance is not predictable in any way. He can stand for to 5 minutes but this quickly brings on high levels of pain and that standing is very difficult and painful. He was barely able to tolerate walking for even short distances and was in a wheelchair most of the time during the evaluation. He cannot bend, crouch, squat, kneel, crawl, or climb stairs. He cannot reach above shoulder level and cannot drive. Any reaching forward to perform functional tasks for more than a few seconds to a few minutes is extremely limited due to the onset of muscle spasms.

17. Young stated that the Claimant applied a massage tool to his legs during the FCE to try to control the muscle spasms. The ALJ also observed the Claimant's significant other doing this during the course of the hearing. Dr. Lesnak's observations of this bordered on ridicule.

Dr. Machanic's Review of FCE

18. Dr. Machanic reviewed the FCE report and stated that it mirrors what he saw, clinically. Dr. Machanic said that the FCE study was a very well done study and the results of the testing are reliable. Dr. Lesnak attempted, unsuccessfully, to diminish the FCE. Dr. Machanic also concluded, from a medical standpoint, that the Claimant is completely and totally disabled from employment.

Respondents' Independent Medical Examination by Lawrence Lesnak, D.O.

19. The ALJ finds that Dr. Lesnak's demeanor and manner of testifying was less than straight-forward in answering questions, especially on cross-examination. He insisted on attempting to seize control of the questioning, especially during cross examination, by delivering a mini lecture without giving answers which were directly responsive to the questions being asked. The ALJ infers and finds that Dr. Lesnak's approach resulted more in obfuscating the true facts rather than aiding the tribunal in a search for the truth. Although hired by the Respondents as their IME, his role is not to assist in the advocacy of Respondents' position. His proper role is to assist the tribunal in a search for the truth, according to his best lights. Dr. Lesnak did **not** fulfill the later role. This is only one factor diminishing his overall credibility.

20. Dr. Lesnak stated the opinion that the Claimant was exaggerating his symptoms and was **probably** capable of working. This opinion lacks any means of visible support in Dr. Lesnak's underlying analysis. Dr Lesnak had previously testified at the compensability hearing in 2016. At that hearing, as cited in Finding of Fact No. 22 of ALJ Jones' decision (Claimant's Exhibit 16), Dr. Lesnak stated that the Claimant was unable to work due to his injury, although he also opined that the Claimant's disc injury was not caused by his employment. Obviously, ALJ Jones did not believe him on work-

relatedness. During a voir dire exam at the present hearing, Dr. Lesnak admitted that the Claimant's condition had worsened since the prior hearing. Based on the totality of the evidence, Dr. Lesnak's opinion that the Claimant's condition had worsened since 2016 is credible because it is corroborated by other medical, OTR and vocational opinions. The ALJ infers and finds that the inconsistency between Dr. Lesnak's 2016 opinion that the Claimant could **not** work, and his 2018 opinion that the Claimant's condition had worsened yet the Claimant could **not** work seriously undermines the overall credibility of Dr. Lesnak's opinions. How can Dr. Lesnak explain that the Claimant can now work .when his condition has worsened, but could **not** work before his condition worsened? He gives no answer to this question. The ALJ infers that the answer, if any, would appear to be in the realm of the paranormal, further undermining the overall credibility of Dr. Lesnak's opinions.

21. Dr. Lesnak admitted on cross examination that he had only examined the Claimant once and that was on March 5, 2016. He was contacted about two weeks before the present hearing to give an opinion on the Claimant's capacity to work. Dr. Lesnak also disagreed with the FCE findings of Terry Young, and with every treating doctor, none of whom found the Claimant to be exaggerating or magnifying his symptoms. Indeed, the foundation of Dr. Lesnak's ultimate opinion that the Claimant can now work is made of nebulous matter, thus, his ultimate opinions fall in the face of well-founded medical opinions to the contrary. Ultimately, the ALJ finds Dr. Lesnak's opinions in this matter lacking in credibility.

Opinion of Vocational Expert Katie Montoya

22. Katie Montoya, a vocational rehabilitation expert, was retained by Claimant's counsel to render an opinion on the employability of the Claimant. She based her opinions on the FCE findings and the adoption of those findings by the Claimant's treating physician, Dr. Machanic. The ALJ infers and finds that Montoya's opinions are based on a solid set of assumptions as herein above found.

23. Montoya is of the opinion that the Claimant is unemployable due to his restrictions; also, because of his frequent, severe and debilitating muscle spasms which occur with almost any activity including simple reaching. She is of the opinion that the Claimant cannot be productive in his present condition and that no employer would be interested in hiring the Claimant, nor would an employer be able to accommodate the Claimant's restrictions and limitations. The ALJ infers and finds that the totality of Montoya's opinions add up to a firm factual conclusion that the Claimant cannot earn a wage in the open, competitive job market and is, thus, permanently and totally disabled.

Vocational Opinion of Sara Nowotny

24. Sara Nowotny testified as a vocational expert for the Respondents. She had looked into several jobs that she believed the Claimant could do at car dealerships

in the Denver area. Several of the employers she contacted said that they hire people who are confined to wheelchairs. This does not take into account Claimant's other physical limitations and spasms. Most of the examples she gave were for receptionist jobs. On cross examination, Nowotny conceded that the Claimant's employability issues were not limited to the Claimant having to frequently use a wheelchair. She admitted that the restrictions from the FCE, as verified by Dr. Machanic, would make the Claimant permanently and totally disabled, but if she relied only upon the opinion of Dr. Lesnak, the Claimant could be employable. Indeed, .the ALJ infers and finds that Nowotny's tentative, alternative opinions would support either employability (if her assumptions are based on Dr. Lesnak's opinions) or un-employability (if her assumptions are based on the FCE and ATP Dr. Machanic's opinions). Indeed, the ALJ infers and finds that one of Nowotny's alternative opinions supports Montoya's opinions. Based on the proposition that Dr. Lesnak's opinions have been discredited as herein above found, the ALJ finds Nowotny's alternative opinion, based on the assumptions that the FCE is valid, as well as the opinions of ATP Dr. Machanic, more credible than the other alternative opinion, founded on IME Dr. Lesnak's discredited opinions.

Factual Analysis of the Evidence

25. The totality of the evidence supports the inescapable factual conclusion that the Claimant's is incapable of earning any wages with the Employer herein, or with any other employer. The FCE findings show that the Claimant is unable to perform the simplest tasks, like reaching or even sitting, without suffering from debilitating spasms and pain. This was borne out by the occupational therapist, Terry Young, who was able to palpate the spasms during the FCE. She had to massage the affected area so the spasm would release and she could continue with the FCE. These spasms occurred after a few minutes of reaching or sitting. It is implausible that any employer would be willing to accommodate these symptoms in an employee. It is also implausible that the Claimant could be even marginally productive in an employment setting. The fact that the Claimant cannot even take care of his personal needs without assistance speaks to the probability that he cannot be productive in any type of employment.

26. Respondents argue that there is **insufficient** objective evidence of permanent total disability. This argument is misplaced because, during the FCE, the Claimant suffered from pain and muscle spasms to the extent that OTR Terry Young eventually had to place both her knees on the Claimant's hamstrings to stop the spasms. Quite incredibly, Dr. Lesnak opined that the spasms were voluntarily induced (a euphemism for "faking it"). He offered no underlying explanation for this seemingly clairvoyant conclusion. Indeed, the ALJ rejects this conclusion in the face of an objective FCE and the weight of other medical opinions. The ALJ finds the Respondents argument in this regard to be without merit.

27. The testimony of Dr. Lesnak that the Claimant is exaggerating or otherwise magnifying his symptoms is not shared by any of the Claimant's treating physicians. As found herein above, Dr. Lesnak is not credible.

28. Katie Montoya's opinion that the Claimant is permanently totally disabled is persuasive and credible, considering the extreme difficulty the Claimant had in even completing the FCE. Sara Nowotny admitted that if the opinions of OTR Terry Young and Dr. Machanic are relied upon, the Claimant is incapable of employment. While the Claimant has some college education and because there are employers who hire individuals in wheelchairs, this does not make the Claimant employable. The Claimant's almost constant state of severe pain and spasm is one of the most critical factors (in the opinions of Terry Young, Katie Montoya and Dr. Machanic) that make the Claimant unemployable.

29. The Claimant's treating physicians are unanimous in their opinions that the Claimant is severely injured. No doctor other than the Respondents' IME physician, Dr. Lesnak, has stated any doubts about the Claimant's veracity. In fact, the FCE showed that the Claimant tried his best to complete the assigned tasks but was simply unable because of his injuries.

Ultimate Findings

30. To a considerable degree, resolution of the PTD issue rests heavily on credibility determinations. As found herein above, the opinions of ATP Dr. Machanic, Vocational Expert Katie Montoya, and OTR Terry Young are highly persuasive, credible and dispositive of the issue of PTD. Indeed, the alternative opinion of Respondents' vocational expert, Sara Nowotny, wherein she postulates that Claimant would be PTD if Nowotny accepted the FCE findings and ATP Dr. Machanic's opinions, further supports the fact that Claimant is permanently and totally disabled.

31. The ALJ makes a rational choice, based on substantial evidence, to accept the opinions of ATP Dr. Machanic, Vocational Expert Katie Montoya, and OTR Terry Young, and to reject all opinions to the contrary, especially the opinions of Dr. Lesnak.

32. The Claimant's established 25% whole person permanent medical impairment is one significant factor, coupled with the fact that he is unemployable because of his spasms and physical limitations, are significant human factors contra-indicating the Claimant's ability to work. The Claimant has proven, by a preponderance of the evidence that he is incapable of earning a wage in the competitive labor market. He has proven that the injury of October 23, 2015 is a significant causative factor of his inability to earn a wage in the competitive job market. Therefore, the Claimant has proven that he is permanently and totally disabled.

33. The Claimant's back injury of 20 years ago is a non-factor. 20 years later, he was able to work full time at heavy work until the injury of October 23, 2015. If anything, the injury of October 23, 2015, aggravated and accelerated a dormant back condition.

34. During the hearing, the parties stipulated that Respondents would pay the costs of all authorized, causally related and reasonably necessary post-MMI medical maintenance benefits, which would be incurred after the MMI date of July 25, 2017.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be ad evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of ATP Dr. Machanic, Vocational Expert Katie Montoya, and OTR Terry Young are highly persuasive, credible, consistent with the totality of the evidence and dispositive of the issue of PTD. Indeed, the alternative opinion of Respondents' vocational expert, Sara Nowotny, wherein she postulates that Claimant would be PTD if Nowotny accepted the FCE findings and ATP Dr. Machanic's opinions, further supports the fact that Claimant is permanently and totally disabled. As further found, the opinions of Dr. Lesnak are **not** credible (with the exception of his opinion that the Claimant's condition had worsened since 2016) because, among other

findings herein above, the critical inconsistency between his 2016 opinion that the Claimant could **not** work, and his 2018 opinion that the Claimant's condition has worsened, but the Claimant can now work negates his ultimate opinions on employability.

Substantial Evidence

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

Permanent Total Disability

c. An employee is permanently and totally disabled if he is unable to earn any wages in the same or other employment. § 8-40-201(16.5) (a) C.R.S. The "full responsibility rule," applicable to claims for permanent total disability benefits, provides that the industrial injury need not be the sole cause of a claimant's permanent total disability. Under the rule, when an "employer hires an employee who, by reason of a pre-existing condition or by reason of a prior injury, is to some extent disabled, he takes the man (person) with such handicap," and the employer is liable for a "full award of benefits" if a subsequent industrial injury combines with the pre-existing disability to produce permanent total disability. See *United Airlines, Inc. v. Indus. Claim Appeals Office,* 993 P.2d 1152, 1154-1155 (Colo. 2000). The only exception to the established rule is where the industrial injury is not a significant causative factor in the claimant's disability. See *Seifried v. Indus. Comm'n,* 736 P.2d 1262 (Colo. App. 1986) [the claimant suffered from several pre-existing ailments, and the treating physician opined

that the claimant had reached maximum medical improvement, and concluded that the claimant remained disabled because of non-occupational factors].; *Lindner Chevrolet v. Indus. Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995). *See also Holly Nursing Care Center v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999).As found, the Claimant meets the statutory and case law criteria for PTD. He has established that his admitted, compensable injury of October 23, 2015, is a significant causative factor of his PTD

d. In determining whether a claimant is permanently and totally disabled, an ALJ may consider the claimant's "human factors," including the claimant's age, work history, general physical condition, education, mental ability, prior training and experience, and the availability of work that the claimant could perform. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998*); Joslin's Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The critical test is whether employment exists that is reasonably available to a claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. *See Joslins Dry Goods Company v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). As found, the Claimant has proven that he is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to him. Permanent total disability does not need to be proven by medical evidence. *See Baldwin Construction, Inc. v. Indus. Claim Appeals Office,* 937 P.2d 895 (Colo. App. 1997). *Calvert v. Roadway Express, Inc.,* W.C. No. 4-355-715 [Indus. Claim Appeals Office (ICAO), November 27, 2002]; *In re Claim of Randy Blocker v. Express Personnel,* W.C. No. 4-622-069-04 (ICAO, July 1, 2013). As further found, the admitted injury of October 23, 2015 is a significant causative factor of the Claimant's PTD.

Post-MMI Medical Maintenance Benefits

e. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured

worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, during the hearing, the parties stipulated that the Respondents will pay the costs of all authorized, causally related and reasonably necessary post-MMI medical maintenance benefits.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of all authorized, causally related and reasonably necessary post-maximum medical improvement medical maintenance care and treatment, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant permanent total disability benefits at the rate of $610.71 per week from July 25, 2017 and continuing for the rest of the Claimant's natural life.

C. Respondents are entitled to a credit for all permanent partial disability benefits paid pursuant to the Final Admission of Liability, dated August 24, 2017.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

DATED this_____day of February 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2018, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

- Did Claimant prove by a preponderance of the evidence she sustained a compensable injury on January 9, 2017?

- If the claim is compensable, is Claimant entitled to reasonably necessary and related medical benefits, including three office visits to Southern Colorado Clinic in January 2017 and associated mileage reimbursement?

STIPULATIONS

If the claim is compensable, Southern Colorado Clinic is an authorized provider.

The parties reserved the issues of temporary disability benefits, whether the right of selection passed to Claimant, and whether other providers are authorized.

Claimant's average weekly wage is $457.72.

FINDINGS OF FACT

1. Claimant worked for Employer for several years as an overnight merchandise stocker. Her duties include pulling boxes and items from shelving units in the back of the store and stocking items for retail sale. The job requires a significant amount of lifting, bending, climbing ladders, standing, and walking.

2. At approximately 9:30 PM on January 9, 2017, Claimant was in the back of the store pulling boxes of inventory. She was standing beside a steel shelving unit and bent over to retrieve a box from the bottom shelf. A coworker was on the other side of the shelving unit moving boxes on the top shelf. The top shelf is 7 feet 4 inches from the floor, and several boxes on the top shelf were stacked on top of other boxes. The coworker inadvertently knocked a box off the top shelf, which fell and struck Claimant in the low back.

3. There is conflicting evidence regarding the size and weight of the box. Claimant estimated the box was 24 inches by 24 inches and weighed approximately ten pounds. Ms. Gonzales, the assistant manager, estimated by box was 12 inches by 12 inches and weighed "between four and five pounds." Ms. Madrill testified the box weighed 4.5 pounds. The ALJ does not consider the exact dimensions of the box to be dispositive and finds it likely weighed approximately 5 pounds.

4. Immediately after being struck by the falling box, Claimant felt a sharp pain in her low back. After she stood up, she had difficulty standing and walking. Claimant reported the incident to her manager and completed an incident report. Claimant told her manager she wanted to go to the emergency room, but he could not take her because he

could not get another manager to cover the store for several hours.[1] So Claimant clocked out and went home.

5. Claimant's pain was "a little bit better" the next day, so she returned to the store for her regular shift. She was allowed to "do something light" at her request. Claimant's back pain increased during the shift, making it increasingly difficult to perform her duties. She finished her shift at 6:00 AM but asked her manager to make arrangements for her to see a doctor.

6. Before going to urgent care later that morning, Claimant was summoned to a meeting with several managers. One of the managers indicated Employer would likely deny the claim because Claimant had several prior work-related injuries. The managers questioned Claimant about what she could have done differently to avoid the accident. Claimant was upset by this encounter because she had done nothing to trigger the incident.

7. Employer referred Claimant to Southern Colorado Clinic, where she saw PA-C Terry Schwartz. At her initial visit on January 11, 2017, she described the incident as "box fell off shelf above her and struck her in the lower back sacrum as she was bent over trying to pick up a box, knocked her to her knees, after sitting a little while was able to get back up. . . . Progressively more lower back pain when she tried to return to work." Claimant maintained a "guarded" posture, and was also visibly upset by her perception that Employer blamed her for the accident. Physical examination revealed marked tenderness over the sacrum on the left side and the paraspinal muscles at approximately L4-5. There was no obvious ecchymosis or abrasion. PA-C Schwartz remarked "it appears the blow to the lower back now has set off lower lumbar spasms, probably trying to splint low back from the initial injury. Though I cannot identify a contusion, [the] area is quite tender in addition now into [the] surrounding region." He diagnosed "acute low back pain – struck in lower sacrum by falling box." PA-C Schwartz prescribed 800 mg of ibuprofen three times per day for pain and cyclobenzaprine to relieve muscle spasms. He also imposed work restrictions of no lifting from the floor, 3 pounds from waist to shoulders, and recommended she be allowed to change positions frequently for pain relief. Finally, he referred Claimant to a psychologist, Dr. Herman Staudenmayer, to address anxiety and other emotional issues that he believed "sets her up for delayed recovery."

8. Employer provided modified duties consistent with the restrictions and Claimant has remained at work in a modified capacity since the accident.

9. Claimant had a psychological evaluation with Dr. Staudenmayer on January 17, 2017. His impressions included "emotional dysfunction from the injury, including depression, anxiety, and anger." Psychological testing suggested a tendency to somaticize and overreport symptoms. Dr. Staudenmayer diagnosed "adjustment disorder

[1] Per Employer's policy, a manager generally accompanies the injured worker to their first injury-related medical appointment.

with mixed anxiety and depressed mood" and "somatic symptom disorder." He recommended cognitive behavioral therapy and biofeedback.

10. Claimant returned to PA-C Schwartz on January 18, 2017. She had left work early the night before because of increased pain. She also noticed "pins and needles on her thigh and R knee." She was having difficulty standing to fold clothes at work and had to sit down frequently. On exam, she was tender throughout the L4-5, S1 and SI joint regions. She was scheduled to start physical therapy on January 20. PA-C Schwartz ordered lumbar x-rays, which showed no abnormalities. He indicated "I am having difficulty connecting the MOI with her progression of symptoms/complaints. I discussed restrictions and explained that with this injury cannot justify putting her completely off work. She indicated she would like to be, but the notes she 'can't afford' to be off. Finally negotiated a reduced 4 hr shift for a while." He prescribed Lidoderm patches, continued the ibuprofen and cyclobenzaprine, and recommended Claimant continue home exercises.

11. Claimant started physical therapy on January 20 as expected. The therapist noted, "symptoms are consistent with the diagnosis and stated history of lumbar contusion and strain injury."

12. Claimant followed up with PA-C Schwartz again on January 25, 2017. She was still having back pain, but it had improved to 4/10. She described several injury-related and personal factors causing stress and anxiety. She had seen Dr. Staudenmayer twice and had another appointment with him in two weeks. PA-C Schwartz noted they "spent a few minutes talking about emotions/psychological issues affecting physical conditions. She notes 'a lot of nausea, anxiety, worry' and notes direct relationship to her levels of back pain and inability to function. I believe biofeedback could really help her; she is to begin tomorrow." PA-C Schwartz concluded, "the patient has so much psychological issues, that it will be difficult to get her physically back to baseline." He recommended reducing physical therapy and adding massage once per week. Her next appointment was scheduled for February 15, 2017.

13. Respondents filed a Notice of Contest on January 27, 2017.

14. After Respondents formally denied the claim, all further treatment was denied and Claimant's scheduled appointments were cancelled.

15. Claimant had a history of intermittent low back problems predating the January 9, 2017 work accident. In October 2012 she told her primary care providers she had been experiencing back pain for approximately two years. She also reported that her left leg would give out occasionally due to low back pain. She was having left-sided low back pain with radiating pain down the left leg to the toes. Lumbar x-rays were unremarkable. Claimant received some chiropractic treatment but discontinued care because it was "not helping."

16. She pursued treatment again in April 2014 for low back pain and left leg radicular-type symptoms. She reported "intermittent" back pain since her last evaluation

for back pain in 2012, but her symptoms had worsened over the past several weeks. She had a lumbar MRI on April 30, 2014 which showed an L5-S1 lateral disc protrusion abutting and possibly compressing the left L5 nerve. Claimant attended physical therapy for approximately three weeks, with the last documented session on June 13, 2014. The PT records reflect a general pattern of improvement although the ALJ could not find a formal discharge summary in the record.

17. Claimant received no further treatment for her low back from June 2014 until the work accident in January 2017. The only documentation of any potentially related issues during that interval is a July 14, 2015 physical therapy note (for an unrelated condition) which notes: "she has felt shooting pain down her legs at times, but not often."

18. Claimant resigned her position with Employer on May 26, 2014, citing ongoing low back pain. She was re-hired at full duties in September 2014 and continued working until the present.

19. Claimant underwent two IMEs in connection with the January 2017 injury claim. Dr. Eric Ridings performed an IME for Respondents, and Dr. Miguel Castrejon performed an IME for Claimant.

20. Claimant saw Dr. Ridings on March 20, 2017. She estimated top shelf was 7 feet off the floor[2] and was confident the box that struck her was stacked on at least one, and possibly two, other boxes. She demonstrated her bent-over position at the time of the accident, and Dr. Ridings measured her back was 3.5 feet from the floor. He determined the box must have fallen at least 4.5 feet before it struck Claimant's back. Based on this information, Dr. Ridings opined:

> [Claimant] sustained a contusion to the lumbosacral region. This mechanism [as described by Claimant] could cause a lumbosacral strain, or less likely a low lumbar disc injury. The likelihood of either injury being severe enough to require medical treatment is directly related to the kinetic energy imparted to the patient's back by the falling box, and therefore to the weight of the box and the distance that it fell. If the box was more or less as described by [Claimant] today, it may have caused a lumbar strain, and therefore evaluation and treatment as was initiated under this claim prior to its denial would be reasonable, necessary, and accident related.

21. Dr. Ridings also noted he had received conflicting information from Respondents' counsel before the IME. According to Respondents' counsel, Employer stated the box weighed only 4.5 pounds, and fell only 1.7 feet before impacting Claimant. Dr. Ridings stated, "if this information from the employer is accurate, then in my opinion such an incident could not cause any injury to the patient's back that would require any medical evaluation or treatment."

[2] Employer's personnel manager, Yvonne Madrill, credibly testified she measured the shelving unit with a tape measure, and the top shelf is 7' 4" from the floor.

22. Dr. Castrejon evaluated Claimant on September 20, 2017. Dr. Castrejon noted Claimant's description of the incident to PA-C Schwartz, Dr. Ridings, and himself were "nearly identical." He thought it inappropriate to rely on unsubstantiated information from Employer transmitted through counsel regarding the mechanism of injury. Dr. Castrejon noted Claimant presented as a "straightforward" and sincere individual, who "has experienced a distinct injury that has been complicated by the development of chronic pain syndrome." Dr. Castrejon opined Claimant suffered "a straining injury to the lumbar spine," and "an aggravation of the underlying degenerative condition that is resulting in radiculitis involving the left lower limb." He recommended additional treatment including a lower extremity EMG, a surgical consultation, and psychological treatment aimed at addressing Claimant's chronic pain syndrome.

23. Dr. Ridings testified at hearing for Respondents. Based on the testimony at hearing, Dr. Ridings realized the true mechanism of injury was an "intermediate" scenario between those discussed in his report, *i.e*., the box fell at least 4.5 feet but weighed only 4.5 pounds. He opined "I would expect that you would have a visible bruise the day afterward if the force was enough to have actually caused an injury."

24. Dr. Castrejon testified in a post-hearing deposition dated January 10, 2018 to elaborate on the opinions expressed in his IME report. Although Dr. Castrejon had known of Claimant's preinjury back problems at the time of his IME, he did not have medical records documenting the prior history and treatment. He reviewed those records before the deposition and opined they did not change his opinions.

25. Dr. Castrejon's opinions regarding causation are credible and persuasive.

26. Claimant proved by a preponderance of the evidence she suffered a compensable industrial injury on January 9, 2017.

27. Claimant proved by a preponderance of the evidence that the treatment she received from Southern Colorado Clinic's between January 11, 2017 and January 25, 2017, the treatment with Dr. Staudenmayer, and ancillary mileage reimbursement, was reasonably necessary and related to the January 9, 2017 injury.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to

find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

If an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-91-616-03 (ICAO, September 9, 2016

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1), C.R.S. In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO Aug. 17, 2016). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the nature or extent of the industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2000).

Even a minor "strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused her to seek medical treatment. The ICAO's decision in *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2004) is instructive regarding the minimal extent of an injury that can satisfy the basic threshold requirement of compensability. In *Garcia*, the claimant felt pain in her abdomen and hip while lifting a piece of glass at work. The employer referred the claimant to Dr. Caughfield, who diagnosed a lumbar strain, but opined she had already reached MMI. The ALJ found that the claimant suffered a "minor back sprain," but also found the sprain had "resolved" within five days of the incident. The ALJ denied the claim on the theory that the claimant suffered no "injury." The ICAO reversed and held that the claimant had established a compensable injury as a matter of law:

> Where pain triggers the claimant's need for medical treatment, the claimant has established a compensable injury if the industrial injury is the cause of the pain. The term medical treatment includes diagnostic procedures required to ascertain the extent of the industrial injury.
>
> Here, the ALJ found there was an industrial accident which caused a minor lumbar strain. Further, the ALJ determined that when the injury was reported to the employer, the employer offered the claimant medical services from Dr. Caughfield, which the claimant accepted. Although Dr.

> Caughfield placed the claimant at MMI based upon his [ ] examination, the ALJ found with record support that Dr. Caughfield diagnosed a lumbar strain. Thus, the ALJ's findings compel the conclusion the claimant established a compensable injury which entitled her to an award of medical benefits. (Citations omitted).

Similarly, *Conry v. City of Aurora*, W.C. No. 4-195-130 (ICAO, April 17, 1996) involved a minor episode that was found to establish a compensable claim as a matter of law. In *Conry*, the claimant suffered from pre-existing asthma. One day she walked into work and encountered a "strong smell of ammonia." As a result, she "began wheezing and became short of breath." The claimant's supervisor advised that she go to the doctor. There is no indication in the decision that the claimant required any treatment other than that single physician visit. The ALJ denied the claim because the ammonia exposure merely caused a "temporary exacerbation" of the claimant's pre-existing asthma. She had no ongoing sequela nor required any additional treatment. Therefore, the ALJ determined the claimant failed to prove that she suffered a compensable "injury."

The ICAO reversed and found the claimant had proven compensability as a matter of law. The Panel stated "the claimant's industrial exposure to ammonia caused her to experience respiratory symptoms for which she needed and received medical treatment. . . . [T]hese findings compel a conclusion that the claimant suffered a compensable aggravation of her pre-existing condition [asthma]. Therefore, we reverse the ALJ's determination that the claimant did not suffer a compensable injury."

As found, Claimant proved she suffered a compensable injury on January 9, 2017. The persuasive evidence demonstrates a box of product fell from a shelf directly onto Claimant's back while she was stooped over. The shelf was 7' 4" high, and the box that fell was most likely stacked on top of at least one other box. Even if the forces involved were relatively minor, they were sufficient to evoke symptoms in Claimant's low back. When the pain persisted, Claimant reasonably requested medical treatment and Employer obliged. Her clinical presentation at the initial visit was consistent with an acute episode of low back pain. Although PA-C Schwartz saw no obvious contusion, he noted she was "quite tender" where the box struck her and concluded the incident likely "set off" back spasms. PA-C Schwartz diagnosed "acute" low back pain and reasonably prescribed conservative measures including diagnostic imaging, medications and physical therapy.

Although Claimant had a history of low back problems with episodes of similar symptoms in 2012 and 2014, there is no persuasive evidence that she was pursuing or needed any treatment for those issues immediately before the incident in January 2017. The last documented treatment for the preexisting condition was in June 2014, nearly two and one-half years before the work accident. The ALJ finds it unlikely that Claimant was having significant symptoms during that interval, particularly since she has not otherwise been reticent to pursue treatment when she feels it warranted. Furthermore, Claimant would not likely have been able to maintain her relatively physically demanding job had her back been symptomatic. The most likely scenario is Claimant suffered a recurrence of back pain as a direct and proximate result of the incident on January 9, 2017. Moreover,

mere fact that emotional issues may have played a role in amplifying and perpetuating Claimant's perception of her pain does not negate the fact that the incident at work was the catalyst for her symptoms and the proximate cause of her need for treatment in January 2017.

Respondents have raised legitimate questions regarding the full extent of Claimant's injury and whether her ongoing need for treatment is related to the compensable injury. This order does not address those issues, for two reasons. First, the parties only asked the ALJ to address whether Claimant suffered a compensable injury in the first instance, and if so, whether Respondents are liable for the treatment she received from Southern Colorado Clinic. Second, Respondents' argument essentially invites a determination that Claimant is at MMI, which exceeds the ALJ's jurisdiction. *See McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (January 27, 2006) (once there has been an initial determination of a compensable injury, an ALJ's finding that the claimant requires no further treatment constitutes an impermissible constructive determination of MMI).

B. Medical benefits

Respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As found, Claimant proved by a preponderance of the evidence that the treatment she received through Southern Colorado Clinic in January 2017 is reasonable, necessary and related to her January 9, 2017 injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for a January 9, 2017 industrial injury is compensable.

2. Respondents shall pay for reasonably necessary medical treatment to cure and relieve the effects of the January 9, 2017 injury, including, but not limited to, the January 2017 charges from Southern Colorado Clinic, the treatment with Dr. Staudenmayer, and ancillary mileage expense.

3. Claimant's AWW is $457.72.

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

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

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

DATED: February 22, 2018

s/Patrick C.H. Spencer II

Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Dr., Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that treatment of his cervical symptoms (including epidural steroid injections recommended by Dr. John Prall) constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 2, 2016 work injury.

- Whether claimant has proven by a preponderance of the evidence that the umbilical hernia repair recommended by Dr. Andrew Morse constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 2, 2016 work injury.

FINDINGS OF FACT

1. Claimant began working for employer in June 2016 as a mechanic. On August 2, 2016, claimant was driving his vehicle on I-70 to pick up parts for employer. Another vehicle struck claimant's vehicle causing claimant to lose control, resulting in the vehicle rolling four or five times. This is an admitted claim. Claimant testified that at the time of the injury he knew that he had injured his back and ribs. In addition, claimant felt pain in his neck and left knee.

2. Immediately following the August 2, 2016 motor vehicle accident (MVA), claimant was transported by ambulance to St. Mary's Hospital for treatment. Claimant testified that he was informed that his left lung was punctured and that he had broken ribs. Claimant was initially hospitalized for five days.

3. On August 2, 2016, claimant underwent various computed tomography (CT) scans, including a CT scan of his cervical spine. That CT scan showed no acute injury. The findings did show spondylosis with osteophyte formation at the C5-C6 and C6-C7 levels with facet arthritis throughout the mid and lower cervical spine.

4. On August 4, 2016, a magnetic resonance image (MRI) of claimant's cervical spine showed moderate acquired central canal stenosis at the C4-C5 level. That same MRI showed a broad based annual bulging and bilateral uncovertebral joint osteophyic spurring causing ventral cord flattening and mild acquired central canal stenosis at the C6-C7 level.

5. The medical records entered into evidence indicate that claimant reported parasthesia in his bilateral lower extremities and his right upper extremity. These same records identify claimant's injuries as left rib fractures on ribs 5-10; a left pulmonary contusion; left L2-L4 transverse process fractures; and abrasions. Claimant's abdomen was examined and identified as "soft without significant tenderness, masses,

organomegaly or guarding". Elsewhere in the initial medical records, Dr. David Pettit identified "a tiny pneumothorax which does not need a chest tube at this time". Claimant was discharged from St. Mary's Hospital on August 7, 2016.

6. Thereafter, claimant began treating with his authorized treating physician (ATP), Dr. Michael Hughes. Claimant was first seen by James Haraway, NP with Dr. Hughes' practice on August 15, 2016. Mr. Haraway recorded that claimant was experiencing chest pain, shortness of breath, abdominal pain, low back pain with tingling and numbness in his lower extremities, neck pain, and bilateral shoulder pain.

7. Claimant testified that after being seen by Mr. Haraway he continued to have difficulty breathing. When his breathing issues did not improve, claimant sought treatment at Community Hospital on August 25, 2016. On that date, a CT scan of claimant's chest was taken and showed a large pleural effusion in claimant's left lung. As a result, claimant was hospitalized at Community Hospital from August 25, 2016 to August 27, 2016.

8. A second MRI of claimant's cervical spine was taken on August 25, 2016 that showed degenerative disc disease with minor disc bulging at the C6-C7 level.

9. Respondents admitted for the August 2, 2016 injury and filed a General Admission of Liability (GAL) on November 21, 2016.

10. Claimant was successful in requesting a change of physician and on November 22, 2016, claimant was first seen by his new ATP, Dr. Craig Stagg. At that time claimant reported pain in his neck, mid back, and low back. In addition, claimant reported numbness into his chest area and down into his arms. On that same date, Dr. Stagg examined claimant's abdomen and recorded that it was soft, non-tender with no guarding or rebound and no tenderness to palpation.

11. Dr. Stagg referred claimant to Dr. Ellen Price for chronic pain management. Claimant was first seen by Dr. Price on January 5, 2017. Dr. Price noted that claimant was experiencing pain in his back, left leg, and left knee. Dr. Price recommended and administered acupuncture and recommended that claimant continue with physical therapy.

12. On May 10, 2017, claimant underwent surgery on his lumbar spine. Dr. John Prall performed partial laminectomy, medial facetectomy and foraminotomy at L3 and L4; a revision partial laminectomy, medial facetectomy and foraminotomy at L4-L5, removal of hardware; and posterior lateral fusion at L4-L5. Claimant testified that following the May 10 2017 surgery he felt an 80% improvement in his back pain. However, claimant noted an increase in his left knee pain.

13. Following the May 10, 2017 surgery claimant was instructed to wear a back brace. On May 12, 2017, an x-ray was taken of claimant's abdomen. That x-ray did not show any indication of a hernia.

14. On May 26, 2017, respondents sent claimant for an independent medical examination (IME) with Dr. Carlos Cebrian. In connection with the IME, Dr. Cebrian reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant. Following the IME, Dr. Cebrian issued a report in which he opined that claimant's cervical spine symptoms are not related to the August 2, 2016 work injury.

15. On June 8, 2017, claimant returned to Dr. Stagg complaining of sharp pain and tenderness on his left side and pain in his mid-back when taking deep breaths. After consultation with Dr. Prall, Dr. Stagg instructed claimant to seek treatment at the emergency department at Community Hospital to rule out a pulmonary embolus. On that same date a CT scan of claimant's abdomen showed no abnormalities. The report makes no mention of a hernia.

16. Due to claimant's continued complaints of right rib pain and low back pain, Dr. Stagg referred claimant to Dr. Andrew Morse for consultation. Claimant was seen by Dr. Morse on June 19, 2017. Dr. Morse examined claimant and noted a small umbilical hernia.

17. Claimant testified that he has had no symptoms related to the hernia, but he believes he did not have a hernia prior to the work injury. Claimant further testified that he believes that the hernia was caused by the August 2, 2016 work injury

18. On July 11, 2017, claimant returned to Dr. Prall and indicated that he "would like to revisit the issue of his neck". On that date, claimant reported to Dr. Prall that he had issues with imbalance, discoordination with his hands including changes to his handwriting, dropping things, with intermittent numbness and tingling in his upper extremities. Dr. Prall opined that claimant's symptoms were indicative of myelopathy and ordered an MRI of claimant's cervical spine.

19. On July 18, 2017, the cervical spine MRI showed mild canal narrowing at the C4-C5, C5-C6, and C6-C7 levels secondary to posterior disc complexes; multilevel neural foraminal narrowing most noticeable at the C5-C6 level; and multilevel degenerative disc disease with unconvertebral and facet arthropathy. It was noted in the MRI report that these findings were not significantly changed from the prior cervical MRI.

20. On July 20, 2017, claimant returned to Dr. Stagg. In the medical record of that date, Dr. Stagg noted that Dr. Prall had ordered a cervical MRI to rule out compression and myelopathy. Dr. Stagg opined that those diagnoses, if found, would be related to claimant's work injury.

21. Based upon the MRI results, Dr. Prall recommended claimant undergo bilateral transforaminal ESIs at the C5-C6 and C6-C7 levels.

22. On August 17, 2017, Dr. Brian Mathwich reviewed the request for C5-C6 and C6-C7 ESIs. Dr. Mathwich deferred to the opinions of Dr. Cebrian as indicated in the IME report and agreed that claimant's cervical spine symptoms are not related to

the work injury. Based upon Dr. Mathwich's report respondents denied the requested ESIs.

23. On August 22, 2017, Dr. Stagg opined that given the findings on the cervical CT scans and MRIs that the proposed cervical ESIs are appropriate treatment for claimant. Dr. Stagg specifically opined that claimant's cervical injury is work related.

24. On September 19, 2017, claimant returned to Dr. Stagg. On that date, Dr. Stagg referred claimant to Dr. Joel Dean for electrodiagnotic studies of claimant's upper extremities related to claimant's possible cervical spine myelopathy.

25. On September 27, 2017, claimant returned to Dr. Morse. On that date, Dr. Morse identified a palpable periumbilical hernia. Dr. Morse recommended claimant undergo repair of the hernia.

26. On September 29, 2017, Dr. Jeffrey Raschbacher reviewed the request for hernia repair. Dr. Raschbacher noted that there were no prior reports of a hernia in claimant's medical records. Dr. Raschbacher noted that there is "no latency of many, many months for developing an umbilical hernia". Therefore, Dr. Raschbacher opined that the hernia was not caused by or related to the work injury. Based upon Dr. Raschbacher's report respondents denied the recommended hernia repair.

27. Dr. Cebrian prepared a supplemental IME report on November 15, 2017 in which he opined that claimant's cervical spine complaints are not causally related to the August 2, 2016 work injury. In support of this opinion Dr. Cebrian noted that initial findings related to claimant's cervical spine were muscular in nature and claimant did not complain of cervical spine pain for several months. Dr. Cebrian also opined that claimant likely sustained a cervical strain/contusion at the time of the work injury, but claimant does not need treatment for that condition at this time.

28. In that same supplemental report, Dr. Cebrian opined that claimant's umbilical hernia is not causally related to the August 2, 2016 work injury. In support of this opinion Dr. Cebrian noted that there is no report of a hernia until June 19, 2017 and in Dr. Cebrian's opinion it is unlikely for there to be a 10 month delay in the development of a hernia. Dr. Cebrian opined that it is more likely that claimant's umbilical hernia is related to claimant's weight.

29. Dr. Cebrian's testimony by deposition was consistent with his written reports. Dr. Cebrian testified that the two most likely causes of an umbilical hernia are: 1) increased intra-abdominal pressure secondary to obesity and 2) a traumatic evident. Dr. Cebrian explained that hernias caused by increased intra-abdominal pressure occur over a long period of time, while those caused by trauma are symptomatic within days of the trauma. Dr. Cebrian further testified that he believes that claimant's umbilical hernia was caused by increased intra-abdominal pressure secondary to obesity because it took approximately 10 months for the hernia to appear. Dr. Cebrian also testified that claimant's hernia is not causally related to the August 2, 2016 MVA.

30. With regard to claimant's cervical symptoms, the ALJ credits the opinions of Drs. Prall and Stagg over the contrary opinion of Dr. Cebrian and finds that claimant has demonstrated that it is more likely than not that his cervical symptoms are related to the August 2, 2016 MVA. Therefore, the ALJ also finds that claimant has demonstrated that it is more likely than not that treatment of his cervical symptoms (including the recommended ESIs at the C5-C6 and C6-C7 levels) is reasonable medical treatment necessary to cure and relieve him from the effects of the work injury.

31. With regard to the umbilical hernia, the ALJ credits the medical records and the opinions of Drs. Raschbacher and Cebrian and finds that claimant has failed to demonstrate that his hernia was caused by the August 2, 2016 MVA. The ALJ credits Dr. Cebrian's opinion and finds that the more likely cause of claimant's umbilical hernia is increased intra-abdominal pressure secondary to obesity.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting

disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has demonstrated by a preponderance of the evidence that treatment of his cervical spine symptoms (including the recommended ESIs) constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 2, 2016 injury. As found, the opinions of Drs. Prall and Stagg are credible and persuasive on this issue

6. As found, claimant has failed to demonstrate by a preponderance of the evidence that the recommended umbilical hernia repair is reasonable medical treatment necessary to cure claimant from the effects of the August 2, 2016 injury. As found, the medical records and the opinions of Drs. Raschbacher and Cebrian are credible and persuasive on this issue.

ORDER

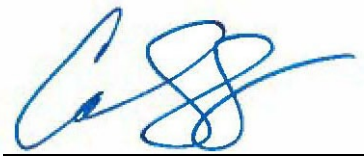
It is therefore ordered that:

1. Respondents shall pay for treatment of claimant's cervical spine symptoms, including the recommended ESIs at the C5-C6 and C6-C7 levels, pursuant to the Colorado Medical Fee Schedule.

2. Claimant's request for umbilical hernia repair is denied and dismissed.

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

Dated: February 23, 2018



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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

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

ISSUES

The issue presented involves Claimant's entitlement to additional medical benefits. The specific question is:

I. Whether Claimant established, by a preponderance of the evidence, that a trial of spinal cord stimulation is reasonable, necessary and casually related to his March 4, 2015 work injury.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury to his low back on March 4, 2015, while employed as an Engineer with the City of Colorado Springs Fire Department. He slipped on ice and fell to the ground while chasing after a parked firetruck that was also sliding on the ice.

2. Claimant began treating with Dr. Miguel Castrejon on March 13, 2015. Dr. Castrejon described Claimant's low back complaints as a "constant dull to sharp and stabbing pain that extends into the left leg with a tingling sensation…" Electrodiagnostic (EMG) testing revealed "abnormal" results, which were interpreted by Dr. Castrejon as supportive of the "presence of a chronic left L5 radiculopathy…" Dr. Castrejon referred Claimant to Dr. Michael Rauzzino for a neurosurgical opinion.

3. Dr. Rauzzino saw Claimant on March 24, 2015. At the time of this evaluation, Claimant reported low back greater than left leg pain. He also complained of left greater than right leg weakness. Finally, he reported left leg numbness and tingling. Dr. Rauzzino discussed treatment options including physical therapy, injections, and surgery.

4. Conservative care failed prompting Dr. Rauzzino to perform a lumbar decompression and fusion surgery at L5-S1 on May 13, 2015.

5. On June 23, 2015, Claimant returned to Dr. Rauzzino with complaints of "worsening" in his low back with radiation "down his legs." Dr. Rauzzino recommended a longer course of steroids.

6. Claimant saw Dr. Rauzzino on July 14, 2015, during which appointment, Claimant reported persistent "numbness and tingling in his feet and up into the calves and ankles…" Dr. Rauzzino recommended gabapentin for the ongoing numbness and

tingling, as well as physical therapy. Dr. Rauzzino expressed no concerns about plantar fasciitis.

7. Claimant followed-up with Dr. Castrejon on July 23, 2015. During this encounter Claimant reported that the "bottom of [his] right foot [was] painful midfoot to heel and is causing him to limp and not walk as much as he would like" Claimant was encouraged to "roll [his] right foot over a frozen water bottle to see if that will help. He may have a mild plantar fasciitis…" Dr. Castrejon did not refer Claimant to a podiatrist in order to confirm or rule out plantar fasciitis.

8. A lumbar spine x-ray was taken on September 11, 2015 and compared to Claimant's prior study. The interpreting radiologist noted the following: "Compared to the prior study, there is now separation of the plate from the anterior margin of the fusion cage on the extension and neutral views compared to the flexion view. This would be consistent with residual motion at the L5-S1 level and therefore pseudoarthrosis."

9. On September 15, 2015, Dr. Rauzzino reported, "…[Claimant] has some low back aching that is fairly well controlled. His main complaint continues to be numbness and tingling in his legs and feet. He had some of this pain prior to surgery, but this is a bit different and has increased some after surgery…" Dr. Rauzzino recommended an epidural steroid injection "to try to calm down the nerves at L5-S1 given that this is where his pain symptoms are." Dr. Rauzzino added that, "…given the significant amount of collapse and slip he has after correction, this could be something of a stretch injury on the nerves, though this should settle down in a few months…"

10. Dr. Castrejon reviewed new imaging on October 2, 2015 and reported, "…The lumbar MRI did not reveal a significant change. The x-rays, though, document plate separation with motion on flexion and extension that support a nonunion. This is likely the source of his pain. As he is having an increase in left leg pain and paresthesias with some involvement on the right, and in light of the nonunion, I am requesting authorization for proceed with repeat EMG/NCV to evaluate for worsening radiculopathy. I am requesting authorization for lumbar ESI with Dr. Bert Willman…"

11. Claimant returned to Dr. Rauzzino on October 5, 2015 reporting an "increase in low back pain as well as leg radiculopathy, mostly with burning and sharp pain in his feet" six weeks previously. Dr. Rauzzino indicated, "…It is likely that his symptoms are due to an increase in activity, especially the abrupt increase in physical therapy around that time certainly can cause an increase inflammatory response and could lead to some of his symptoms, on top of him abruptly coming off the narcotics was likely not helpful for the patient as well either…He is also set up for an EMG today, which could certainly give us some more information regarding his foot pain…"

12. Dr. Castrejon performed the aforementioned repeat EMG/NCV testing on October 5, 2015. Again, the results were interpreted as abnormal and consistent with the "presence of a chronic bilateral L5 radiculopathy with small fibrillation potentials that

may support post surgical acute irritation." According to Dr. Castrejon the EMG study, "although not definite, suggest[ed] acute to subacute changes at L5 and minimal at S1…" Dr. Castrejon noted Claimant requested a second opinion, and he referred him to Dr. Paul Stanton.

13. Dr. Bert Willman saw Claimant on October 7, 2015 in conjunction with the referral from Dr. Castrejon. Dr. Willman noted that after his surgery in May 2015, Claimant enjoyed some improvement; however, he subsequently experienced a "flare up" described as "increased low back pain with increased burning pain in bilateral lower extremities in a symmetric manner…" Dr. Willman expressed no concern about plantar fasciitis. He administered a L4-L5 epidural steroid injection.

14. Claimant completed a pain questionnaire for Dr. Willman on October 12, 2015. He indicated his current symptoms were "nerve pain in both feet, worse on the left. Dull pain in lower back." Claimant also completed a pain diagram, confirming "numbness" and "burning" in both feet."

15. Dr. Stanton evaluated Claimant on November 5, 2015 as part of his request for a second opinion. Dr. Stanton reported that since the surgery in May, 2015, "…[Claimant] has had ongoing back pain, which he had prior to surgery and new onset of bilateral lower extremity symptoms, left more significant than right with numbness and tingling bilateral feet and toes and burning pain into the calf, which he did not have prior to surgery…" Dr. Stanton's opined that Claimant likely experienced a "nerve root stretch with neuropractic [sic] symptomatology." He elaborated; "…At this point, Michael likely has nerve root stretch from his interbody cage size…" Dr. Stanton noted that revision surgery with bone grafting could be contemplated, but, he concluded that he "would certainly not recommend this until he has had adequate time for his nerve roots to recover…" Dr. Stanton expressed no concern about plantar fasciitis.

16. Claimant saw Dr. Rauzzino on November 10, 2015, after which he noted, "…Michael is requesting referral to a neurologist to see if there is anything else that can be done to help manage his nerve pain and I think it is not unreasonable to have a neurologist assess the paresthesias in his feet; we will defer to Dr. Castrejon to arrange this if he feels this is indicated…" Dr. Rauzzino expressed no concern about plantar fasciitis.

17. Neurologist, Dr. Gregory Ales met with Claimant on December 2, 2015. Upon review of Claimant's medical history, he reported, "…[Claimant] was noted to have atrophy of his left calf and surgery was recommended. He had a fusion in May of this year of the L5-S1 level. He had significantly worsened pain after surgery. The pain was now radiating into his legs whereas it was only localized back pain previously…He did get a second opinion from another orthopedic surgeon [Dr. Stanton] who concluded that there was some stretch injury to the nerve because of the hardware…He describes pain bilaterally in his feet. It often radiates from his back. He has continued low back pain. The pain in his feet is burning. It is generally worse on the left in the lateral portion of the foot and on the right on the medial portion of the foot…"

18. On physical examination, Dr. Ales noted Claimant's left calf measured 1 centimeter smaller than his right calf. Claimant was assessed with "pain and paresthesias in primarily an L5 and S1 distribution bilaterally along with sensory deficits and continued atrophy of his left calf which was identified prior to his surgery…" Dr. Ales reviewed treatment options, noting as follows: "…We briefly discussed a spinal stimulator which would only be considered if his symptoms persisted beyond a year postop…" Dr. Ales did not suspect plantar fasciitis, but rather concluded Claimant was experiencing "…Lower extremity paresthesias likely related to lumbar spondylosis and lumbar fusion. I do not see evidence of polyneuropathy by his examination of another compressive neuropathy."

19. The L4, L5, and S1 dermatomes emanate from the low back and descend down the leg to the feet. (Claimant's Exb. 19).

20. Dr. Castrejon placed Claimant at MMI on January 7, 2016. At the time, he made no mention of plantar fasciitis. He did however; provide impairment ratings for lumbar spine impairment including ratings for sensory loss and motor weakness at the L5 level.

21. Claimant began treating with Dr. Stephen Scheper on February 24, 2016. Dr. Scheper noted Claimant complained of aching midline lumbosacral pain "…with numbness, tingling, burning, and sharp pain in the bilateral feet and ankles in stocking glove distribution." On neurologic exam, Dr. Scheper found diminished sensation to "light touch in the bilateral L4-S1 dermatomes and to pinprick in the bilateral S1, greater than L5 dermatomes – although not following clear dermatomal distribution, his pattern of sensory disturbance is not fully 'stocking glove' in nature…"

22. Dr. Scheper assessed: "Persistent chronic L4-S1 neuropathic pain and L5-S1 weakness status post L5-S1 fusion." He also opined that Claimant's "questionable hardware loosening at the anterior vertebral body of L5 is unrelated to his current symptoms, considering there is no instability of the L5 on S1 vertebral bodies." He agreed with Dr. Stanton that Claimant "likely suffered a nerve traction injury which should be treated conservatively…" Regarding continued treatment, Dr. Scheper recommended repeat epidural steroid injections, and use of prescription medications.

23. Dr. Scheper performed repeat EMG testing on April 7, 2016 and interpreted the results as follows: "Abnormal EMG consistent with bilateral L5-S1 denervation mild on the left and mild bordering on moderate on the right of subacute and chronic nature…Bilateral sural sensory nerves reveal evidence of axonal loss. This is unrelated to pre-DRG radicular pathology and more likely a sensory axonal peripheral neuropathy in nature."

24. On April 27, 2016, Dr. Scheper saw Claimant in follow-up for "…chronic low back pain and bilateral foot pain and sensory disturbance persistent after L5-S1 fusion on May 2015." During this examination, Claimant reported increased numbness in his right heel but denied symptoms through the calf or distally through the foot. Dr.

Scheper assessed Claimant with "[c]hronic lumbosacral neuritis after L5-S1 fusion, versus peripheral neuropathy nerve pain in the bilateral plantar feet. He noted the EMG as being consistent with "mild, latent, subacute-chronic radiculopathy with evidence of reinnervation AND rather severe sensory axonal peripheral neuropathy." Finally, he noted Claimant's "[l]ow back pain is better" and the [i]ntensity of leg symptoms is mildly improved with high-dose Lyrica and Cymbalta." Dr. Scheper expressed no concern about plantar fasciitis.

25. Respondents retained physician, Dr. Nicolas Olsen to perform an independent medical examination (IME). Dr. Olson evaluated Claimant on May 5, 2016. Dr. Olson completed a records review, performed an examination and issued a report concerning his findings. In his report, Dr. Olson documents what he believed to be findings consistent with a diagnosis of plantar fasciitis namely the presence of "point tenderness . . . centered around the anterior aspect of both calcaneus, right greater than left" along with numbness "overlying the calcaneus in the right foot." According to Dr. Olson, Claimant's physical examination was "strongly suggestive of bilateral plantar fasciitis accounting for his burning foot pain." Dr. Olson opined that Claimant was not a candidate for "any kind of stimulator" as he had "no clear signs of radiculopathy and his foot pain was not associated with his lumbar complaints so as to warrant such a device.

26. On June 6, 2016 Dr. Scheper reported; "…It is reasonable for [Claimant] to undergo another surgical opinion now one year after his surgery. More importantly, I think evaluation for spinal cord stimulator trial is appropriate."

27. Dr. Jeffrey Jenks performed a Division Independent Medical Examination (DIME) on June 14, 2016. In his DIME report, Dr. Jenks notes: "…Presently, [Claimant] describes bilateral lumbosacral pain with radiation into the postural lateral aspects of both legs to his feet. He describes weakness in both legs." (Id. at 88). Dr. Jenks diagnosed Claimant with "[s]tatus post L5-S1 fusion with ongoing severe low back and bilateral leg pain." He agreed with Dr. Castrejon's date of MMI; however, added, "I would recommend that he be evaluated for placement of a spinal cord stimulator. If this would occur that [sic] his claim should be reopened." Dr. Jenks expressed no concern about plantar fasciitis.

28. Dr. Kevin Schmidt examined Claimant on July 20, 2016 and noted, "…Michael currently reports 'aching' low back pain and 'burning, pins and needles' foot pain beginning at mid foot through all toes…" Dr. Schmidt reported, "…Michael and I discussed the possibility of spinal cord stimulation. I feel he is a reasonable candidate for a trial of this and feel it would likely improve his foot symptoms and also has a chance to improve his low back symptoms…" Dr. Schmidt expressed no concern about plantar fasciitis.

29. Dr. George Frey examined Claimant on August 25, 2016. In his report from this encounter, Dr. Frey noted: "…He had surgery with Dr. Rauzzino. Sx were all LBP pre op. 'From day one I had severe leg pains in BLE equally.' He was placed on steroids. The sx have now settled into the sole of the feet, and medially and heel.

Severe LBP. There is swelling in the feet and stiffness in the thighs and knees…" Dr. Frey concluded; "…In summary, Michael has an unclear pain generator at this point. He (sic) sx may represent a CRPS or perhaps a persistent L5 radiculopathy. EMG offers some support for this. A Dx SNRB [diagnostic selective nerve root block] would be helpful to better define this. If this is more the latter, we could consider (remotely) the option of a revision decompression. If this is CRPS then an SCS [spinal cord stimulation] may be of benefit. Dr. Frey expressed no concern about plantar fasciitis.

30. Dr. Schmidt performed a diagnostic bilateral L5-S1 transforaminal epidural steroid injection on September 27, 2016. (In his testimony, Claimant erroneously recalled this injection as having happened in "maybe June" of 2016).

31. Dr. Frey met with Claimant on October 13, 2016 and reported a favorable outcome from the recent injection as follows: "…He saw excellent diagnostic relief of the LE pains in the calf and the feet. The R=L in relief, the LLE in general has more pain than the right…" Dr. Frey described problems with Claimant's surgical hardware, and his treatment plan noting: "…In summary, Mike has persistent L5 nerve compression and L5 radiculopathy due to foraminal compression. There is bony material built up in the L5 foramen – pushed back from the TIBFD [threaded lumbar interbody spinal fusion device]. Note that the S1 screw tip on the left side penetrates the anterior cortex of the sacral ala exactly adjacent to the L5 root on the left side; this may also explain a significant amount of the L5 radiculopathy. Given the well correlated Dx result of the injection, I recommend we proceed to surgery for L5 root decompression and posterior pedicle screw instrumentation removal…"

32. Dr. Frey performed surgery on November 15, 2016. Surgery included removal of the previously placed surgical hardware. Claimant saw Dr. Frey's physician assistant (PA) in follow-up on November 29, 2016. At this appointment, Claimant reported persistent foot pain described as pins and needles, constantly. Claimant's foot pain was reportedly "worse with walking, placing feet in cold water and he states his feet feel 'cold to the touch' and "when sheets are over his feet and when he wears socks and shoes…"

33. Dr. Scheper saw Claimant on December 12, 2016. Dr. Scheper noted that after his recent surgery Claimant was reporting 6/10 "soreness and dull pressure in the low back" and no improvement with his "bilateral foot burning pain and paresthesias…"

34. On January 12, 2017, Dr. Scheper noted continued burning and tingling in Claimant's feet opining that he was suffering from "chronic bilateral lower extremity neuropathic pain secondary to lumbosacral neuritis…"

35. On February 21, 2017, Dr. Frey reported Claimant was three months' post surgery and "…His LBP and his true radicular sx are resolved since surgery. He still has the neuropathy pains and remains on Lyrica and Nucynta. His neuropathic pains continue to SLOWLY improve." (Id. at 13; emphasis in original). Dr. Frey concluded that Claimant was "[d]oing well with partial resolution of pre op sx. Neuropathic pains

unchanged; he may need an SCS if time, rehab, and med management are not adequate…"

36. On May 19, 2017, Dr. Scheper reported: "…The patient presents to followup on persistent bilateral foot burning pain and sensory disturbance which he rates at 7/10. Those are still most prominent in the afternoon-evening, and he is overall unchanged since his last encounter in January. He continues taking Nucynta…Cymbalta…and Lyrica…" Dr. Scheper's impression was:

> -Chronic bilateral foot neuropathic pain secondary to lumbosacral neuritis status post L5-S1 fusion 2015, with revision November 2016. On an appropriate medication regimen but unfortunately with inadequate relief…
>
> -Mild idiopathic sensory axonal peripheral neuropathy on EMG, less likely causing his foot symptoms as I would expect a mild peripheral neuropathy to respond better to his high dose anti-neuritic medications.

Dr. Scheper concluded: "…He has been recommended to undergo a stimulator trial but was reluctant in the past. He is now considering this more readily because of his severe daily symptoms which have been unresponsive to extensive conservative efforts. I feel this is reasonable to restore his capacity for any gainful employment…" Dr. Scheper recommended a psychologic profile evaluation, "…prior to pursuing the trial with Dr. Schmidt back in the office of Dr. Frey…"

37. Neuropsychologist Lisa Townsend, Psy.D. evaluated Claimant on July 6 and 13, 2017 to determine whether he was an appropriate candidate for a spinal stimulator trial. She concluded, "…There are no other clinically significant psychological indicators that would preclude this patient from undergoing the stimulator trial."

38. On August 25, 2017, Dr. Scheper again diagnosed "Chronic bilateral lower extremity neuropathic pain secondary to lumbosacral neuritis status post L5-S1 fusion. Symptoms remain moderate-severe and cause severe functional impairment as described above, despite extensive conservative treatment…Mild idiopathic sensory axonal peripheral neuropathy on EMG, unlikely the cause of his moderate-severe neuropathic pain…As I have previously recommended, I still feel he is not at MMI and should be referred back to Dr. Schmidt for a neurostimulator trial."

39. A request for authorization of a trial spinal cord stimulator with Dr. Schmidt was submitted on September 13, 2017. Respondent denied the request.

40. Claimant testified that the surgery on May 13, 2015, helped relieve his low back pain, but that very shortly after the surgery he began experiencing burning pain in both legs, ankles, and feet. This is corroborated by Dr. Rauzzino's reports. Claimant explained that his low back pain now accounts for 20% of his total pain, while his bilateral feet and ankles account for 80% of his pain.

41. Claimant had plantar fasciitis in his left heel approximately 10 years ago. According to Claimant, the pain was localized to the area of a bone spur on the heel. Claimant's primary care physician gave him arches and the condition resolved after about 1 year. Claimant testified he had no other problems with his feet or ankles until after the surgery on May 13, 2015.

42. Dr. Olson testified at hearing. He testified that plantar fasciitis is a condition when the plantar fascia (the ligament that connects the heel bone to the toe) becomes inflamed causing pain in the soles of the feet, especially when standing and/or walking. He reiterated his opinion that Claimant's medical record complaints and his physical examination support a conclusion that he is suffering from either non-work related plantar fasciitis, or a potential idiopathic peripheral axonal sensory neuropathy. He testified the former is more likely than the latter.

43. Dr. Olsen testified that the goal of a spinal cord stimulator to treat lumbar radiculopathy would be to disrupt the signals in the lumbar nerve roots that are causing the symptoms. Dr. Olsen further testified that in using neural stimulation to address radicular pain, it is essential that there is a clearly defined pain generator. Specifically, in order for neural stimulation to be able to appropriately treat symptoms resulting from a lumbar radiculopathy, there needs to be clear evidence that the patient does have a true lumbar radiculopathy caused by a compression of a nerve root. In this case, Dr. Olson testified that Claimant had close to a 0% chance of the symptoms he has at the bottom of his feet being relieved as a result of neural stimulation because he does not demonstrate any clear evidence of a lumbar radiculopathy. In other words, because none of the lumbar nerve roots are the pain generator for Claimant's symptoms, neural stimulation of the lumbar nerve roots will not address Claimant's plantar symptoms. Accordingly, Dr. Olson opined that the recommended spinal cord stimulator trial is not reasonable, necessary or related to Claimant's admitted work injury.

44. The Medical Treatment Guidelines (MTG) for Chronic Pain Disorders specifically reference the appropriateness of spinal cord stimulation in certain cases. Specifically, the MTG for Chronic Pain Disorders state the following:

> Traditional or other SCS may be indicated in a subset of patients who have clear neuropathic radicular pain (radiculitis).

While Respondents acknowledge that Dr. Scheper, has diagnosed Claimant with chronic bilateral lower extremity neuropathic pain secondary to lumbosacral neuritis, they cite to the potential complications associated with spinal stimulation and Dr. Olson's concerns that Dr. Scheper did not always complete a detailed examination of Claimant as proof that a trial of SCS in not reasonable or necessary. The ALJ is not persuaded.

45. The ALJ notes that with the exception of the one-time reference that Claimant "may" have mild plantar fasciitis in the right foot by Dr. Castrejon on July 23,

2015, none of Claimant's treating or examining physicians and surgeons have entertained plantar fasciitis as a possible cause of Claimant's foot and ankle pain. To the contrary, careful inspection of the medical record reveals the following opinions concerning the likely cause of Claimant's foot and ankle pain include the following:

- Dr. Rauzzino on September 15, 2015; "…this could be something of a stretch injury on the nerves, though this should settle down in a few months…"

- Dr. Stanton on November 5, 2015; "…likely nerve root stretch with neuropractic [sic] symptomatology…At this point, Michael likely has nerve root stretch from his interbody cage size…"

- Dr. Ales on December 2, 2015; "…Lower extremity paresthesias likely related to lumbar spondylosis and lumbar fusion.."

- Dr. Scheper on February 24, 2016; "…I do agree with Dr. Stanton he likely suffered a nerve traction injury which should be treated conservatively…"

- Dr. Frey on October 13, 2016; "…In summary, Mike has persistent L5 nerve compression and L5 radiculopathy due to foraminal compression…"

- Dr. Scheper on January 12, 2017; "Chronic bilateral lower extremity neuropathic pain secondary to lumbosacral neuritis…"

- Dr. Frey on February 21, 2017; "…His LBP and his true radicular sx are resolved since surgery. He still has the neuropathy pains and remains on Lyrica and Nucynta…Neuropathic pains unchanged; he may need an SCS if time, rehab, and med management are not adequate…"

- Dr. Scheper on May 19, 2017; "…Chronic bilateral foot neuropathic pain secondary to lumbosacral neuritis status post L5-S1 fusion 2015, with revision November 2016. On an appropriate medication regimen but unfortunately with inadequate relief…"

- Dr. Scheper on August 25, 2017, "Chronic bilateral lower extremity neuropathic pain secondary to lumbosacral neuritis status post L5-S1 fusion…"

46. The ALJ credits the opinions of Claimant's treating physicians to find that Claimant likely suffers from neuropathic pain in his bilateral feet and ankles caused by lumbosacral neuritis resulting from a combination of his fusion surgery performed May 13, 2015 and the subsequent stretching of the nerves secondary to movement of the

interbody cage prior to achieving fusion. Dr. Olson's contrary opinions are unconvincing.

47. Based upon the evidence presented, the ALJ is persuaded that Claimant is an appropriate candidate for a trial of spinal cord stimulation and that the need for this trial is related to his admitted work related injury and is otherwise reasonable and necessary to cure and relieve him of his ongoing symptoms.

48. The ALJ further finds Claimant's condition satisfies the requirements of the Medical Treatment Guidelines ("MTG's") necessary to warrant a trial of neurostimulation. W.C.R.P. 17, Exb. 7, Section H (1)(c) discusses surgical indications for neurostimulation, and subsections (i) and (ii) set forth criteria that "patients must meet" in order to be considered for neurostimulation. The criteria include: clear neuropathic radicular pain; not a candidate for further surgical intervention of the spine; have burning pain in a distribution amendable to stimulation coverage and have pain at night not relieved by position; and the extremity pain should account for at least 50% or greater of the overall leg and back pain. Additionally, prior to the trial of neurostimulation, a comprehensive psychiatric or psychologic evaluation must take place as has been performed here. As noted, the ALJ finds that Claimant's current condition satisfies the requirements of the MTG's regarding a trial spinal cord stimulator. However, the ALJ is not compelled to award or deny medical benefits based on the MTG's alone. See *Thomas v. Four Corners Health Care,* W.C. No. 4-484-220 (April 27, 2009); *Jones v. T.T.C. Illinois, Inc*., W.C. No. 4-503-150 (May 5, 2006), *aff'd Jones v. Industrial Claim Appeals Office,* No. 06CA1053 (Colo. App. March 1, 2007)(not selected for publication)(it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive).

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought, including medical treatment *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact,

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

B. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). In this case, the evidence presented, including the results of Claimant's EMG testing persuade the ALJ that Claimant's persistent plantar symptoms are likely the result of lumbosacral neuritis caused by a combination of his May 13, 2015 fusion surgery and the subsequent stretching of the nerves secondary to movement of the interbody cage prior to achieving boney consolidation (union). As found, Dr. Olson's contrary opinion that the symptoms in Claimant's feet are causally related to non-work related plantar fasciitis is unconvincing.

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

Medical Benefits

D. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

F. The MTG's are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. The ALJ may also appropriately consider the Medical Treatment Guidelines as an

evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011).

G. As provided for under § 8-43-201(3), the ALJ has "[considered] the medical treatment guidelines adopted under § 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease." In keeping with the MTGs and as found above, the ALJ concludes that Claimant's current condition satisfies the requirements set forth in the Medical Treatment Guidelines ("MTG's") necessary to warrant a trial of neurostimulation. See, W.C.R.P. 17, Exb. 7, Section H (1)(c) subsections (i) and (ii). Here, Claimant most probably has neuropathic pain (radiculitis), is not currently a candidate for additional surgical intervention on the spine, and has burning pain in a L5-S1 distribution greater than his degree of axial back pain. Moreover, Claimant has undergone a psychological evaluation, which has determined that no clinically significant psychological indicators exist that would preclude Claimant from undergoing a trial of neurostimulation. Claimant has established by a preponderance of the evidence that he is entitled to a trial of spinal cord stimulation as a reasonable, necessary and related treatment modality to cure and relieve him of the effects of his admitted work related injury.

ORDER

It is therefore ordered that:

1. Respondent shall authorize and pay for the spinal cord stimulator trial.

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

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

DATED: February 26, 2018

/s/ Richard M. Lamphere

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the right wrist surgery recommended by Dr. Randall Viola is reasonable medical treatment necessary to cure and relieve claimant from the effects of the March 19, 2015 work injury.

- Whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits for the dates September 10, 2016 through September 12, 2016; September 26, 2016; October 4, 2016; December 13, 2016; February 21, 2017; and April 3, 2017.

- Whether claimant has proven by a preponderance of the evidence that her average weekly wage (AWW) should be increased.

- Whether claimant has demonstrated by a preponderance of the evidence that the surgery recommended by Dr. Viola was automatically authorized due to respondent's alleged failure to comply with WCRP 16.

- Whether claimant has demonstrated by a preponderance of the evidence that penalties should be imposed pursuant to Section 8-43-304, C.R.S. for respondent's alleged violation of WRCP 16.

FINDINGS OF FACT

1. Claimant was employed with employer as a paraprofessional working with severe needs students at employer's preschool. On March 19, 2015, claimant suffered an injury to her right wrist. Claimant testified that the injury occurred when she was attempting to interact with a severe needs student. During that interaction the student grabbed the ring and small fingers on claimant's right hand and hyperextended them. Respondents have admitted for the March 19, 2015 injury.

2. Claimant testified that initially her medical treatment included physical therapy, light therapy, and home exercises.

3. In the summer of 2015, claimant moved to Steamboat Springs, Colorado because her spouse obtained employment in that area. Claimant testified that upon moving to Steamboat Springs she obtained employment with the Hayden School District.

4. After claimant's move to Steamboat Springs, her medical treatment related to this claim was transferred to Dr. Laura Morti. Claimant was first seen by Dr. Morti on July 21, 2015. Dr. Morti diagnosed claimant with sprains to her right hand and wrist.

5. Dr. Morti referred claimant to Dr. Alexander Meininger with Steamboat Orthopaedic Associates. Thereafter, Dr. Morti also referred claimant to hand specialist, Dr. Randall Viola. Claimant was first seen by Dr. Viola on April 19, 2016. At that time, Dr. Viola diagnosed scarring secondary to a volar plate injury in the right ring finger and small finger. Dr. Viola ordered a magnetic resonance image (MRI) of claimant's right wrist.

6. On May 24, 2016, an MRI of claimant's right wrist showed a full thickness tear through the central disc of the triangular fibrocartilage complex (TFCC), and a small longitudinal split tear of the extensor carpi ulnaris tendon.

7. Based upon the results of the MRI, Dr. Viola recommended surgery including debridement of the TFCC, a possible ganglion cyst excision, repair of the extensor carpi ulnaris tendon tear, and trigger finger release for both the ring and small fingers.

8. The recommended surgery was reviewed by Dr. Jonathan Sollender on July 6, 2016. Dr. Sollender opined that the recommended surgery was reasonable, necessary, and related to claimant's work injury. Respondents authorized that recommended surgery which was performed by Dr. Viola on July 14, 2016.

9. Following the July 14, 2016 surgery, claimant was prescribed the antibiotic clindamycin. This antibiotic resulted in claimant contracting clostridium difficile colitis (c. diff). Claimant was diagnosed with c. diff in early August 2016. Claimant testified that she treated with Dr. Lambert Orton for her c. diff symptoms. Initially, the c. diff seemed to resolve with treatment and on September 1, 2016, Dr. Mordi cleared claimant to return to full duty.

10. Claimant testified that her c. diff symptoms returned and she again tested positive for c. diff on September 13, 2016. Claimant testified that for the dates of September 10, 2016 through September 12, 2016 she was unable to work because of the return of her c. diff symptoms.

11. Subsequently, claimant was seen by Dr. Orton on September 26, 2017. At that time Dr. Orton determined that the c. diff was resolved. Dr. Orton cleared claimant to return to work with no restrictions on September 27, 2016. Claimant was also seen by Dr. Morti on September 26, 2016. Dr. Morti released claimant to return to work with no restrictions on September 26, 2016. Claimant testified that because she was seen by both physicians on September 26, 2016, she missed the entire day of work.

12. Claimant testified that following the surgery and prior to the c.diff diagnosis she was attending physical therapy and doing well. C. diff is highly contagious and claimant was unable to be around people. As a result, claimant was unable to attend physical therapy following the c. diff diagnosis.

13. On September 21, 2016, respondents filed a General Admission of Liability (GAL) admitting for an average weekly wage (AWW) on this claim of $860.59.

14. On October 18, 2016 claimant returned to Dr. Mordi and reported that she had some pain from injections administered by Dr. Viola, but her range of motion had improved. Dr. Mordi did not assign any work restrictions at that time.

15. On October 24, 2016, claimant began physical therapy with Winters Handworks. On October 26, 2016, claimant reported to the physical therapist that she was "getting more rotation at [her] forearm". At a subsequent physical therapy appointment on November 4, 2016, claimant reported that her wrist was "finally feeling a little better" and that she could rotate her arm without pain and had better range of motion.

16. Claimant returned to Dr. Mordi on November 29, 2016. On that date claimant reported that she was improving and Dr. Mordi noted that claimant's right wrist extension was almost the same as her left wrist. Again, Dr. Mordi did not assign work restrictions.

17. On December 13, 2016, claimant returned to Dr. Viola and reported that she was "doing very well following this surgery until several nights ago when at a work party someone shook her hand extremely sternly and caused immediate pain". In the medical record of that date, Dr. Viola noted that "[t]echnically we would likely consider this a new injury as the patient was doing well following her procedure". Dr. Viola recommended claimant utilize a wrist splint. For ease of reference, this December 2016 incident will be referred to as "the handshake incident".[1]

18. On January 10, 2017, claimant was seen by Dr. Mordi. Claimant reported "a worsening of symptoms after an aggressive handshake at a holiday party". Dr. Mordi noted that the use of a splint, as directed by Dr. Viola, "resolved the symptoms of that aggravation". Claimant had no work restrictions following the January 10, 2017 appointment with Dr. Mordi.

19. On February 21, 2017, claimant returned to Dr. Viola. On that date, Dr. Viola determined that claimant's lack of wrist motion was due to excessive adhesions. Dr. Viola recommended claimant undergo a second surgery to remove adhesions and scar tissue through tenolysis.

[1] It is undisputed that the handshake incident occurred at a work event related to claimant's employment with Hayden School District and not the employer at issue in this claim.

20. Claimant was seen by Dr. Mordi for a follow up on February 28, 2017. On that date, Dr. Mordi noted decreased range of motion and referenced Dr. Viola's recommendation for surgery.

21. In late February 2017, insurer determined almost two years had elapsed since the date of claimant's admitted injury. As a result, insurer commenced the process for scheduling a 24 month Division-sponsored independent medical examination (DIME) and took steps to schedule an independent medical examination (IME) for claimant with Dr. Sollender. On February 23, 2017, claimant was provided with notification that the IME with Dr. Sollender was scheduled for April 3, 2017.

22. On March 13, 2017, Dr. Viola's staff sent insurer a request for authorization of the recommended right wrist tenolysis surgery.

23. Pursuant to a request from respondents, on March 14, 2017, Dr. Jason Rovak reviewed the reasonableness of the recommended surgery. Dr. Rovak opined that the recommended surgery was unrelated to claimant's injury in March 2015. Dr. Rovak specifically questioned the mechanism of injury and reasonableness of the first surgery. Dr. Rovak specifically noted that central TFCC tears are idiopathic "in the patient population surrounding the 50-year range".

24. Dr. Rovak also noted his disagreement with authorization of the first surgery, but acquiesced that it had in fact been authorized. Dr. Rovak recommend denial of the surgery until claimant was seen by the IME. Based upon Dr. Rovak's opinion, respondents denied the recommended surgery.

25. On April 3, 2017, claimant attended the scheduled IME with Dr. Sollender. Dr. Sollender reviewed claimant's medical records, obtained a medical history from claimant, and performed a physical examination in connection with the IME. In his IME report, Dr. Sollender opined that claimant reached maximum medical improvement (MMI) on October 18, 2016. Dr. Sollender also opined that the surgery recommended by Dr. Viola was not reasonable or necessary. In support of this opinion Dr. Sollender noted that further surgery on claimant's right TFCC would not be useful. Dr. Sollender also opined that the December 2016 handshake incident constituted a new injury to claimant's right wrist. Therefore, in Dr. Sollender's opinion any further treatment of claimant's right wrist would be related to the handshake incident.

26. On October 19, 2017, Dr. Viola responded in writing to a number of questions posed to him by claimant's counsel. In that letter, Dr. Viola was asked if the recommended surgery was authorized by the Colorado Medical Treatment Guidelines. Dr. Viola indicated that he was unable to answer that question.

27. Claimant testified that at the time of the March 19, 2015 work injury she had concurrent employment with Yampa Valley Medical Center in a preschool named "Grandkids". As indicated by W-2s entered into evidence, claimant's earnings from Yampa Valley Medical Center totaled $14,050.43 in 2014; and $12,083.97 in 2015.

28. Claimant testified that she has also worked as an independent consultant for Thirty One since March 2014 and was doing so the time of her March 19, 2015 work injury. Records entered into evidence indicate that claimant's earnings with Thirty One were $959.00 in 2015; $1,111.00 in 2016; and $651.00 in 2017. Claimant asserts that her AWW should be increased to reflect her concurrent employment with Yampa Valley Medical Center and Thirty One.

29. Claimant testified that on September 26, 2016; October 4, 2016; December 13, 2016; and February 21, 2017; she attended medical appointments related to this claim. On each date, claimant took a "sick day" and was initially paid for that time by her employer, the Hayden School District. However in May 2017, the Hayden School District recouped those wages from claimant's pay. Claimant asserts that because she was attending authorized medical appointments and missed entire days of work, respondents are responsible for payment of TTD benefits for these dates.

30. Claimant also testified that she took a sick day to attend the IME with Dr. Sollender on April 3, 2017. As with the dates listed above, claimant was initially paid wages for that sick day by her current employer, the Hayden School District, but the wages were also later recouped.

31. With regard to the recommended surgery, the ALJ notes that claimant's medical providers agree that the diagnosis of c. diff is causally related to claimant's original injury as it arose directly from medications she was prescribed following the July 14, 2016 surgery.

32. The ALJ credits the opinion of Dr. Viola over the contrary opinion of Dr. Sollender and finds that claimant's current need for wrist surgery is related to the development of adhesions and scar tissue. The ALJ further finds that the adhesions and scar tissue in claimant's right wrist are causally related to claimant's inability to attend physical therapy for a period for time while she underwent treatment for c. diff. The ALJ is not persuaded that the December 2016 handshake incident caused the adhesions and scar tissue. Therefore, the ALJ finds that claimant had demonstrated that it is more likely than not that the need for right wrist surgery is reasonable medical treatment necessary to cure and relieve her from the effects of the admitted work injury.

33. Claimant argues that because she missed work to attend various authorized medical appointments and her current employer failed to pay her for those dates that she is entitled to temporary total disability (TTD) benefits for those dates. The ALJ is not persuaded by this assertion. In each instance the claimant was working without restrictions when she attended medical appointments with her providers. Therefore, "loss of wages" asserted by claimant on those dates was not caused by a disability. The ALJ finds that claimant has failed to demonstrate that it is more likely than not that she is entitled to TTD benefits on the dates of September 10, 2016 through September 12, 2016; September 26, 2016; October 4, 2016; December 13, 2016; February 21, 2017; and April 3, 2017.

34. The ALJ credits the documents entered into evidence and claimant's testimony regarding her employment with Yampa Valley Medical Center and Thirty One. The ALJ finds that claimant has demonstrated that it is more likely than not that at the time of her work injury she had concurrent employment with Yampa Valley Medical Center and Thirty One.

35. The ALJ calculates that at the time of the injury claimant's AWW with Yampa Valley Medical Center was $251.29. This calculation is based upon an average of claimant's 2014 and 2015 wages.[2] The ALJ calculates that claimant's AWW with Thirty One[3] at the time of the injury was $18.44. Therefore, claimant has demonstrated that it is more likely than not that her AWW should be increased by $269.73.

36. Claimant argues that respondents failed to comply with Rule 16 when Dr. Rovak deferred to the IME physician regarding the recommended surgery. The ALJ is not persuaded by this assertion. It is clear from Dr. Rovak's report that he considered the relatedness and necessity of the recommended surgery. Dr. Rovak specifically opined that claimant should not have undergone the first surgery as he questioned the mechanism of injury. The ALJ finds that this constitutes an opinion regarding whether the recommended surgery was reasonable, necessary, and related. Thus the ALJ finds that respondents complied with Rule 16 in issuing a denial within the prescribed timeline and the surgery was not automatically authorized.

37. Claimant also asserts that penalties should be assessed for respondents' alleged "unreasonable delay and denial" of the requested surgery. The ALJ credits the medical records entered into evidence and finds that claimant has failed to demonstrate that it is more likely than not that there was unreasonable delay or denial of the requested surgery.

CONCLUSIONS OF LAW

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

[2] Wages of $14,050.43 and $12,083.97 divided by 104 weeks = $251.29.
[3] 2015 wages of $959.00 divided by 52 weeks = $18.44.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, claimant has demonstrated by a preponderance of the evidence that the right wrist surgery recommended by Dr. Viola is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. As found, the opinion of Dr. Viola is credible and persuasive.

5. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

6. As found, claimant has failed to demonstrate by a preponderance of the evidence that on the dates of September 10, 2016 through September 12, 2016; September 26, 2016; October 4, 2016; December 13, 2016; February 21, 2017; and April 3, 2017; that she suffered a wage loss due to a medical incapacity or disability. On the contrary, on each of the dates listed claimant was released to full duty work without restrictions.

7. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

8. As found, claimant has demonstrated by a preponderance of the evidence that at the time of her work injury she had concurrent employment with Yampa Valley Medical Center and Thirty One. As found, the ALJ calculates that claimant's AWW should be increased by $269.73 to reflect concurrent employment.

9. Rule 16-11 WCRP allows respondents seven days to contest a recommended medical treatment. If respondents fail to comply with the requirements of Rule 16-11, the requested treatment is deemed authorized. Rule 16-11(B) provides, in part:

> [i]f the payer is contesting a request for prior authorization for medical reasons, the payer shall, within seven (7) business days of the completed request: (1) Have all submitted documentation . . . reviewed by a physician or other health care professional, as defined in section 16-5(A)(1)(a), . . .
>
> (3) Furnish the provider and the parties with a written contest that sets forth the following information: (a) An explanation of the specific medical reasons for the contest, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion; (b) The specific cite from the Medical Treatment Guidelines exhibits to Rule 17, when applicable; (c) Identification of the information deemed most likely to influence the reconsideration of the contest when applicable; and (d) A certificate of mailing to the provider and parties.

10. WCRP 16-11(E) provides, in pertinent part: "[f]ailure of the payer to timely comply in full with the requirements of section 16-11(A) or (B), shall be deemed authorization for payment of the requested treatment".

11. The purpose of Rule 16 is to protect the medical provider from providing treatment to a claimant which the insurer later challenges as unrelated, unnecessary or unreasonable. *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 20, 2007). Although the rule refers to "authorization," its purpose is to establish the reasonableness and necessity of treatment provided by an authorized provider. *Bray v. Hayden School District RE-1,* W.C. No. 4-418-310 (April 11, 2000).

12. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If respondent

committed a violation of the statute, rule or order, penalties can be imposed only if respondents' actions were not reasonable under an objective standard. *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

13. Rule 16-9 applies only to requests for authorization of medical treatment that is consistent with the Medical Treatment Guidelines and has an established value under the Medical Fee Schedule. When asked by claimant's counsel to identify whether the proposed surgery was within the Medical Treatment Guidelines, Dr. Viola was unable to do so. The ALJ concludes that there was no violation of Rule 16-9 in the current case as it does not apply to Dr. Viola's request for authorization.

14. The ALJ also concludes that respondents complied with Rule 16-11(B) when they asked Dr. Rovak to review the request for the procedure. The ALJ notes that Dr. Rovak's report is dated one day after Dr. Viola's office submitted the request for authorization to respondents. In that report, Dr. Rovak made specific medical findings regarding why he recommended that respondents deny the surgery. Dr. Rovak specifically indicated in his report that he did not think that claimant's condition was related to the March 19, 2015 work injury. The ALJ concludes that respondents acted in an objectively reasonable manner in relying upon Dr. Rovak's report. Similarly, the ALJ finds that respondents did not unreasonably delay claimant's surgery. The denial was issued the day after respondents received the request for authorization.

15. As found, claimant has failed to demonstrate that by a preponderance of the evidence that respondents violated Rule 16. Therefore, the surgery recommended by Dr. Viola did not become authorized by operation of the rule.

16. As found, claimant has failed to demonstrate by a preponderance of the evidence that respondent violated a rule. Therefore, claimant has failed to demonstrate by a preponderance of the evidence that penalties are appropriate in this matter.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the right wrist surgery recommended by Dr. Viola.

2. Claimant's request for TTD benefits for the dates of September 10, 2016 through September 12, 2016; September 26, 2016; October 4, 2016; December 13, 2016; February 21, 2017; and April 3, 2017, is denied and dismissed.

3. Claimant's average weekly wage (AWW) for this claim shall be increased by $269.76 to reflect concurrent employment.

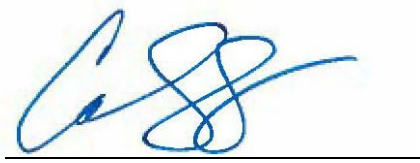
4. Claimant's request for automatic authorization of the surgery for an alleged violation of Rule 16 is denied and dismissed.

5. Claimant's request for penalties for an alleged violation of Rule 16 is denied and dismissed.

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

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

Dated: February 7, 2018



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

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the right wrist surgery recommended by Dr. Randall Viola is reasonable medical treatment necessary to cure and relieve claimant from the effects of the March 19, 2015 work injury.

- Whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits for the dates September 10, 2016 through September 12, 2016; September 26, 2016; October 4, 2016; December 13, 2016; February 21, 2017; and April 3, 2017.

- Whether claimant has proven by a preponderance of the evidence that her average weekly wage (AWW) should be increased.

- Whether claimant has demonstrated by a preponderance of the evidence that the surgery recommended by Dr. Viola was automatically authorized due to respondent's alleged failure to comply with WCRP 16.

- Whether claimant has demonstrated by a preponderance of the evidence that penalties should be imposed pursuant to Section 8-43-304, C.R.S. for respondent's alleged violation of WRCP 16.

FINDINGS OF FACT

1. Claimant was employed with employer as a paraprofessional working with severe needs students at employer's preschool. On March 19, 2015, claimant suffered an injury to her right wrist. Claimant testified that the injury occurred when she was attempting to interact with a severe needs student. During that interaction the student grabbed the ring and small fingers on claimant's right hand and hyperextended them. Respondents have admitted for the March 19, 2015 injury.

2. Claimant testified that initially her medical treatment included physical therapy, light therapy, and home exercises.

3. In the summer of 2015, claimant moved to Steamboat Springs, Colorado because her spouse obtained employment in that area. Claimant testified that upon moving to Steamboat Springs she obtained employment with the Hayden School District.

4. After claimant's move to Steamboat Springs, her medical treatment related to this claim was transferred to Dr. Laura Morti. Claimant was first seen by Dr. Morti on July 21, 2015. Dr. Morti diagnosed claimant with sprains to her right hand and wrist.

5. Dr. Morti referred claimant to Dr. Alexander Meininger with Steamboat Orthopaedic Associates. Thereafter, Dr. Morti also referred claimant to hand specialist, Dr. Randall Viola. Claimant was first seen by Dr. Viola on April 19, 2016. At that time, Dr. Viola diagnosed scarring secondary to a volar plate injury in the right ring finger and small finger. Dr. Viola ordered a magnetic resonance image (MRI) of claimant's right wrist.

6. On May 24, 2016, an MRI of claimant's right wrist showed a full thickness tear through the central disc of the triangular fibrocartilage complex (TFCC), and a small longitudinal split tear of the extensor carpi ulnaris tendon.

7. Based upon the results of the MRI, Dr. Viola recommended surgery including debridement of the TFCC, a possible ganglion cyst excision, repair of the extensor carpi ulnaris tendon tear, and trigger finger release for both the ring and small fingers.

8. The recommended surgery was reviewed by Dr. Jonathan Sollender on July 6, 2016. Dr. Sollender opined that the recommended surgery was reasonable, necessary, and related to claimant's work injury. Respondents authorized that recommended surgery which was performed by Dr. Viola on July 14, 2016.

9. Following the July 14, 2016 surgery, claimant was prescribed the antibiotic clindamycin. This antibiotic resulted in claimant contracting clostridium difficile colitis (c. diff). Claimant was diagnosed with c. diff in early August 2016. Claimant testified that she treated with Dr. Lambert Orton for her c. diff symptoms. Initially, the c. diff seemed to resolve with treatment and on September 1, 2016, Dr. Mordi cleared claimant to return to full duty.

10. Claimant testified that her c. diff symptoms returned and she again tested positive for c. diff on September 13, 2016. Claimant testified that for the dates of September 10, 2016 through September 12, 2016 she was unable to work because of the return of her c. diff symptoms.

11. Subsequently, claimant was seen by Dr. Orton on September 26, 2017. At that time Dr. Orton determined that the c. diff was resolved. Dr. Orton cleared claimant to return to work with no restrictions on September 27, 2016. Claimant was also seen by Dr. Morti on September 26, 2016. Dr. Morti released claimant to return to work with no restrictions on September 26, 2016. Claimant testified that because she was seen by both physicians on September 26, 2016, she missed the entire day of work.

12. Claimant testified that following the surgery and prior to the c.diff diagnosis she was attending physical therapy and doing well. C. diff is highly contagious and claimant was unable to be around people. As a result, claimant was unable to attend physical therapy following the c. diff diagnosis.

13. On September 21, 2016, respondents filed a General Admission of Liability (GAL) admitting for an average weekly wage (AWW) on this claim of $860.59.

14. On October 18, 2016 claimant returned to Dr. Mordi and reported that she had some pain from injections administered by Dr. Viola, but her range of motion had improved. Dr. Mordi did not assign any work restrictions at that time.

15. On October 24, 2016, claimant began physical therapy with Winters Handworks. On October 26, 2016, claimant reported to the physical therapist that she was "getting more rotation at [her] forearm". At a subsequent physical therapy appointment on November 4, 2016, claimant reported that her wrist was "finally feeling a little better" and that she could rotate her arm without pain and had better range of motion.

16. Claimant returned to Dr. Mordi on November 29, 2016. On that date claimant reported that she was improving and Dr. Mordi noted that claimant's right wrist extension was almost the same as her left wrist. Again, Dr. Mordi did not assign work restrictions.

17. On December 13, 2016, claimant returned to Dr. Viola and reported that she was "doing very well following this surgery until several nights ago when at a work party someone shook her hand extremely sternly and caused immediate pain". In the medical record of that date, Dr. Viola noted that "[t]echnically we would likely consider this a new injury as the patient was doing well following her procedure". Dr. Viola recommended claimant utilize a wrist splint. For ease of reference, this December 2016 incident will be referred to as "the handshake incident".[1]

18. On January 10, 2017, claimant was seen by Dr. Mordi. Claimant reported "a worsening of symptoms after an aggressive handshake at a holiday party". Dr. Mordi noted that the use of a splint, as directed by Dr. Viola, "resolved the symptoms of that aggravation". Claimant had no work restrictions following the January 10, 2017 appointment with Dr. Mordi.

19. On February 21, 2017, claimant returned to Dr. Viola. On that date, Dr. Viola determined that claimant's lack of wrist motion was due to excessive adhesions. Dr. Viola recommended claimant undergo a second surgery to remove adhesions and scar tissue through tenolysis.

[1] It is undisputed that the handshake incident occurred at a work event related to claimant's employment with Hayden School District and not the employer at issue in this claim.

20. Claimant was seen by Dr. Mordi for a follow up on February 28, 2017. On that date, Dr. Mordi noted decreased range of motion and referenced Dr. Viola's recommendation for surgery.

21. In late February 2017, insurer determined almost two years had elapsed since the date of claimant's admitted injury. As a result, insurer commenced the process for scheduling a 24 month Division-sponsored independent medical examination (DIME) and took steps to schedule an independent medical examination (IME) for claimant with Dr. Sollender. On February 23, 2017, claimant was provided with notification that the IME with Dr. Sollender was scheduled for April 3, 2017.

22. On March 13, 2017, Dr. Viola's staff sent insurer a request for authorization of the recommended right wrist tenolysis surgery.

23. Pursuant to a request from respondents, on March 14, 2017, Dr. Jason Rovak reviewed the reasonableness of the recommended surgery. Dr. Rovak opined that the recommended surgery was unrelated to claimant's injury in March 2015. Dr. Rovak specifically questioned the mechanism of injury and reasonableness of the first surgery. Dr. Rovak specifically noted that central TFCC tears are idiopathic "in the patient population surrounding the 50-year range".

24. Dr. Rovak also noted his disagreement with authorization of the first surgery, but acquiesced that it had in fact been authorized. Dr. Rovak recommend denial of the surgery until claimant was seen by the IME. Based upon Dr. Rovak's opinion, respondents denied the recommended surgery.

25. On April 3, 2017, claimant attended the scheduled IME with Dr. Sollender. Dr. Sollender reviewed claimant's medical records, obtained a medical history from claimant, and performed a physical examination in connection with the IME. In his IME report, Dr. Sollender opined that claimant reached maximum medical improvement (MMI) on October 18, 2016. Dr. Sollender also opined that the surgery recommended by Dr. Viola was not reasonable or necessary. In support of this opinion Dr. Sollender noted that further surgery on claimant's right TFCC would not be useful. Dr. Sollender also opined that the December 2016 handshake incident constituted a new injury to claimant's right wrist. Therefore, in Dr. Sollender's opinion any further treatment of claimant's right wrist would be related to the handshake incident.

26. On October 19, 2017, Dr. Viola responded in writing to a number of questions posed to him by claimant's counsel. In that letter, Dr. Viola was asked if the recommended surgery was authorized by the Colorado Medical Treatment Guidelines. Dr. Viola indicated that he was unable to answer that question.

27. Claimant testified that at the time of the March 19, 2015 work injury she had concurrent employment with Yampa Valley Medical Center in a preschool named "Grandkids". As indicated by W-2s entered into evidence, claimant's earnings from Yampa Valley Medical Center totaled $14,050.43 in 2014; and $12,083.97 in 2015.

28. Claimant testified that she has also worked as an independent consultant for Thirty One since March 2014 and was doing so the time of her March 19, 2015 work injury. Records entered into evidence indicate that claimant's earnings with Thirty One were $959.00 in 2015; $1,111.00 in 2016; and $651.00 in 2017. Claimant asserts that her AWW should be increased to reflect her concurrent employment with Yampa Valley Medical Center and Thirty One.

29. Claimant testified that on September 26, 2016; October 4, 2016; December 13, 2016; and February 21, 2017; she attended medical appointments related to this claim. On each date, claimant took a "sick day" and was initially paid for that time by her employer, the Hayden School District. However in May 2017, the Hayden School District recouped those wages from claimant's pay. Claimant asserts that because she was attending authorized medical appointments and missed entire days of work, respondents are responsible for payment of TTD benefits for these dates.

30. Claimant also testified that she took a sick day to attend the IME with Dr. Sollender on April 3, 2017. As with the dates listed above, claimant was initially paid wages for that sick day by her current employer, the Hayden School District, but the wages were also later recouped.

31. With regard to the recommended surgery, the ALJ notes that claimant's medical providers agree that the diagnosis of c. diff is causally related to claimant's original injury as it arose directly from medications she was prescribed following the July 14, 2016 surgery.

32. The ALJ credits the opinion of Dr. Viola over the contrary opinion of Dr. Sollender and finds that claimant's current need for wrist surgery is related to the development of adhesions and scar tissue. The ALJ further finds that the adhesions and scar tissue in claimant's right wrist are causally related to claimant's inability to attend physical therapy for a period for time while she underwent treatment for c. diff. The ALJ is not persuaded that the December 2016 handshake incident caused the adhesions and scar tissue. Therefore, the ALJ finds that claimant had demonstrated that it is more likely than not that the need for right wrist surgery is reasonable medical treatment necessary to cure and relieve her from the effects of the admitted work injury.

33. Claimant argues that because she missed work to attend various authorized medical appointments and her current employer failed to pay her for those dates that she is entitled to temporary total disability (TTD) benefits for those dates. The ALJ is not persuaded by this assertion. In each instance the claimant was working without restrictions when she attended medical appointments with her providers. Therefore, "loss of wages" asserted by claimant on those dates was not caused by a disability. The ALJ finds that claimant has failed to demonstrate that it is more likely than not that she is entitled to TTD benefits on the dates of September 10, 2016 through September 12, 2016; September 26, 2016; October 4, 2016; December 13, 2016; February 21, 2017; and April 3, 2017.

34. The ALJ credits the documents entered into evidence and claimant's testimony regarding her employment with Yampa Valley Medical Center and Thirty One. The ALJ finds that claimant has demonstrated that it is more likely than not that at the time of her work injury she had concurrent employment with Yampa Valley Medical Center and Thirty One.

35. The ALJ calculates that at the time of the injury claimant's AWW with Yampa Valley Medical Center was $251.29. This calculation is based upon an average of claimant's 2014 and 2015 wages.[2] The ALJ calculates that claimant's AWW with Thirty One[3] at the time of the injury was $18.44. **Therefore, claimant has demonstrated that it is more likely than not that her AWW with her concurrent employers is $269.73.**

36. Claimant argues that respondents failed to comply with Rule 16 when Dr. Rovak deferred to the IME physician regarding the recommended surgery. The ALJ is not persuaded by this assertion. It is clear from Dr. Rovak's report that he considered the relatedness and necessity of the recommended surgery. Dr. Rovak specifically opined that claimant should not have undergone the first surgery as he questioned the mechanism of injury. The ALJ finds that this constitutes an opinion regarding whether the recommended surgery was reasonable, necessary, and related. Thus the ALJ finds that respondents complied with Rule 16 in issuing a denial within the prescribed timeline and the surgery was not automatically authorized.

37. Claimant also asserts that penalties should be assessed for respondents' alleged "unreasonable delay and denial" of the requested surgery. The ALJ credits the medical records entered into evidence and finds that claimant has failed to demonstrate that it is more likely than not that there was unreasonable delay or denial of the requested surgery.

CONCLUSIONS OF LAW

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

[2] Wages of $14,050.43 and $12,083.97 divided by 104 weeks = $251.29.
[3] 2015 wages of $959.00 divided by 52 weeks = $18.44.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, claimant has demonstrated by a preponderance of the evidence that the right wrist surgery recommended by Dr. Viola is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. As found, the opinion of Dr. Viola is credible and persuasive.

5. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

6. As found, claimant has failed to demonstrate by a preponderance of the evidence that on the dates of September 10, 2016 through September 12, 2016; September 26, 2016; October 4, 2016; December 13, 2016; February 21, 2017; and April 3, 2017; that she suffered a wage loss due to a medical incapacity or disability. On the contrary, on each of the dates listed claimant was released to full duty work without restrictions.

7. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

8. As found, claimant has demonstrated by a preponderance of the evidence that at the time of her work injury she had concurrent employment with Yampa Valley Medical Center and Thirty One. **As found, the ALJ calculates that claimant's AWW for her concurrent employers is $269.73.**

9. Rule 16-11 WCRP allows respondents seven days to contest a recommended medical treatment. If respondents fail to comply with the requirements of Rule 16-11, the requested treatment is deemed authorized. Rule 16-11(B) provides, in part:

> [i]f the payer is contesting a request for prior authorization for medical reasons, the payer shall, within seven (7) business days of the completed request: (1) Have all submitted documentation . . . reviewed by a physician or other health care professional, as defined in section 16-5(A)(1)(a), . . .
>
> (3) Furnish the provider and the parties with a written contest that sets forth the following information: (a) An explanation of the specific medical reasons for the contest, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion; (b) The specific cite from the Medical Treatment Guidelines exhibits to Rule 17, when applicable; (c) Identification of the information deemed most likely to influence the reconsideration of the contest when applicable; and (d) A certificate of mailing to the provider and parties.

10. WCRP 16-11(E) provides, in pertinent part: "[f]ailure of the payer to timely comply in full with the requirements of section 16-11(A) or (B), shall be deemed authorization for payment of the requested treatment".

11. The purpose of Rule 16 is to protect the medical provider from providing treatment to a claimant which the insurer later challenges as unrelated, unnecessary or unreasonable. *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 20, 2007). Although the rule refers to "authorization," its purpose is to establish the reasonableness and necessity of treatment provided by an authorized provider. *Bray v. Hayden School District RE-1,* W.C. No. 4-418-310 (April 11, 2000).

12. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If respondent

committed a violation of the statute, rule or order, penalties can be imposed only if respondents' actions were not reasonable under an objective standard. *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

13. Rule 16-9 applies only to requests for authorization of medical treatment that is consistent with the Medical Treatment Guidelines and has an established value under the Medical Fee Schedule. When asked by claimant's counsel to identify whether the proposed surgery was within the Medical Treatment Guidelines, Dr. Viola was unable to do so. The ALJ concludes that there was no violation of Rule 16-9 in the current case as it does not apply to Dr. Viola's request for authorization.

14. The ALJ also concludes that respondents complied with Rule 16-11(B) when they asked Dr. Rovak to review the request for the procedure. The ALJ notes that Dr. Rovak's report is dated one day after Dr. Viola's office submitted the request for authorization to respondents. In that report, Dr. Rovak made specific medical findings regarding why he recommended that respondents deny the surgery. Dr. Rovak specifically indicated in his report that he did not think that claimant's condition was related to the March 19, 2015 work injury. The ALJ concludes that respondents acted in an objectively reasonable manner in relying upon Dr. Rovak's report. Similarly, the ALJ finds that respondents did not unreasonably delay claimant's surgery. The denial was issued the day after respondents received the request for authorization.

15. As found, claimant has failed to demonstrate that by a preponderance of the evidence that respondents violated Rule 16. Therefore, the surgery recommended by Dr. Viola did not become authorized by operation of the rule.

16. As found, claimant has failed to demonstrate by a preponderance of the evidence that respondent violated a rule. Therefore, claimant has failed to demonstrate by a preponderance of the evidence that penalties are appropriate in this matter.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the right wrist surgery recommended by Dr. Viola.

2. Claimant's request for TTD benefits for the dates of September 10, 2016 through September 12, 2016; September 26, 2016; October 4, 2016; December 13, 2016; February 21, 2017; and April 3, 2017, is denied and dismissed.

3. Claimant's average weekly wage (AWW) for concurrent employment with Yampa Valley Medical Center and Thirty One is $269.73.

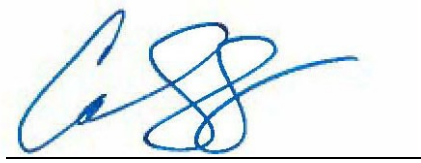
4. Claimant's request for automatic authorization of the surgery for an alleged violation of Rule 16 is denied and dismissed.

5. Claimant's request for penalties for an alleged violation of Rule 16 is denied and dismissed.

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

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

Dated: February 27, 2018



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

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that continuing medical treatment for her left upper extremity ulnar neuropathy, lumbar spine and cervical spine is reasonable, necessary and causally related to her March 10, 2017 admitted industrial injuries.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period May 5, 2017 through May 19, 2017.

3. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $635.00.

FINDINGS OF FACT

1. Claimant worked for Employer as the Manager of a convenience store. On March 10, 2017 Claimant suffered admitted industrial injuries during the course and scope of her employment. While assisting customers Claimant tripped on a shock absorbent mat and fell backwards against a cigarette case. She struck her left shoulder and head and twisted her left ankle. Claimant did not fall to the ground during the incident.

2. Claimant initially sought medical treatment at the Lutheran Medical Center on March 10, 2017. She exhibited guarding of her neck, diffuse tenderness at the midline of her cervical spine and bilateral paraspinal muscle tenderness. Claimant's medical records documented bursitis and chronic lower back pain. CT scans of Claimant's lumbar and cervical spines revealed multiple degenerative findings.

3. Employer directed Claimant to Concentra Medical Centers for treatment. On March 13, 2017 Claimant visited Concentra for an evaluation. Claimant reported back, neck, left shoulder and hip pain. Kristin Haber, M.D. diagnosed Claimant with an acute sprain of the ligaments of the neck, a lumbar sprain, a closed head injury and tingling of the left upper extremity. Dr. Haber assigned the following work restrictions: change positions periodically to relieve discomfort; work no more than 40 hours per week; sit 80% of the time; no squatting/kneeling; no walking on uneven terrain; no climbing ladders and; limit work shifts to eight hours.

4. On April 3, 2017 Claimant returned to Dr. Haber and stated that her back was "back to baseline." Dr. Haber noted that Claimant exhibited a normal lordosis to the lumbosacral spine, no tenderness, full range of motion and a negative straight leg raise.

5. Employer's District Manager and Claimant's supervisor Larry Altipeter explained that he accommodated Claimant's work restrictions. He specifically provided Claimant with a high stool on which to sit behind the counter.

6. Employer also adhered to Claimant's assigned work restrictions by limiting her to working no more than 40 hours per week. Claimant's co-worker Jennifer Beckett testified that she and Amanda Kama Lile worked overtime to cover for Claimant's limited hours. In fact, time cards reflect that Ms. Beckett worked 56-70 hours per week while Claimant was on restricted duty.

7. Claimant testified that in early May 2017 she requested permission from Concentra to return to full duty employment without the 40 hours per week limitation. However, she explained that the additional work hours caused an increase in her pain symptoms. Claimant was thus taken off work until May 5, 2017.

8. On May 8, 2017 Claimant was released to work 40 hours per week. Claimant also submitted a conditional resignation letter to Employer. The letter specified that "my last day will be May 19 of 2017." The letter provided that the stress of work was weighing on her injury and health.

9. Claimant testified that she tendered her resignation because of Mr. Altipeter's expectations when she returned to work. She specifically commented that Mr. Altipeter required her to have Employer's convenience store staffed and restocked by May 9, 2017. In contrast, Mr. Altipeter remarked that he only wanted to begin the process of restocking and staffing on May 9, 2017.

10. On May 9, 2017 Claimant reported for work at Employer's convenience store. She provided her resignation and two weeks' notice to Mr. Altipeter. He accepted Claimant's resignation letter and terminated her effective immediately. Mr. Altipeter noted that Industry standards dictate an Employer can either accept a conditional resignation and permit the employee to work an additional two weeks or accept the resignation effective immediately. Claimant's last day of work was May 5, 2017.

11. Claimant subsequently continued to receive medical treatment through Concentra providers. She has not yet reached Maximum Medical Improvement (MMI).

12. On July 14, 2017 Respondents filed a General Admission of Liability (GAL). The GAL specified that Respondents acknowledged liability for medical benefits only. The GAL noted that there was "no lost time exceeding 3 days. MMI and impairment yet to be determined."

13. On August 25, 2017 Claimant visited Kathy McCranie, M.D. at Concentra. Dr. McCranie referred Claimant for an EMG/NCV of the left upper extremity. She noted that the test "would help determine whether [Claimant] has a cervical radiculopathy versus an ulnar neuropathy. While the cervical radiculopathy would be considered work related, the ulnar neuropathy would not as there is no correlated injury to the left upper extremity."

14. Claimant subsequently underwent a left upper extremity EMG/NCV. The test revealed a distal ulnar neuropathy with sparing of the nerve across the elbow and no evidence of a cervical radiculopathy.

15. On October 3, 2017 Claimant underwent a psychological evaluation with Joel Cohen, Ph.D. Dr. Cohen noted that "[t]here is certainly going to be a somatoform element to [Claimant's] presentation apart from whatever true pain generator she may have from a pathophysiological perspective." He summarized that "we are dealing with a diagnosis of adjustment reaction with mixed emotional features, but the rule out diagnosis would be somatic symptom disorder."

16. On December 14, 2017 Claimant underwent an independent medical examination with Wallace K. Larson, M.D. Claimant reported that she was bagging a purchase for a customer while at work on March 10, 2017. As she stepped backwards she tripped over a shock absorbing pad on the floor. Claimant struck her head, neck and left shoulder area on a cigarette case but did not fall to the floor. After conducting a thorough review of Claimant's medical records, Dr. Larson determined that Claimant sustained a very minor contusion of the posterior aspect of her left shoulder and trapezius. He noted that the injury should have resolved within two weeks even without any medical treatment. Dr. Larson explained that, although Claimant exhibited a great deal of pain behavior, her symptoms were not related to the March 10, 2017 accident. He commented that Claimant has a history of lower back pain and degenerative disc disease of the lumbar spine. Noting that Claimant's treatment has been excessive and nonproductive, Dr. Larson concluded that her care was not related to the March 10, 2017 event. Moreover, Claimant "does not require any ongoing medical treatment, evaluation, maintenance care or restrictions."

17. Dr. Larson testified at the hearing in this matter. He explained that Claimant's neck symptoms, ulnar neuropathy and lower back pain were not related to her March 10, 2017 work accident. In addressing Claimant's neck pain, he mentioned that the cervical MRI on the date of injury revealed pre-existing degenerative findings. He attributed Claimant's neck symptoms to her somatoform disorder and specified that her pain did not have an anatomical basis. Finally, Claimant's mechanism of injury only caused a minor contusion to the back of her left shoulder and did not involve her neck.

18. In addressing Claimant's ulnar neuropathy, Dr. Larson noted that Dr. McCranie had referred Claimant for an EMG/NCV of the left upper extremity. Dr. McCranie determined that the EMG/NCV revealed a non-work related distal ulnar neuropathy and sparing of the nerve across the elbow with no evidence of a cervical neuropathy. Dr. Larson emphasized that he agreed with Dr. McCranie that Claimant's left upper extremity symptoms were not related to her March 10, 2017 accident.

19. Dr. Larson also testified that Claimant's lower back problems were not related to her March 10, 2017 accident at work. Initially, by April 3, 2017 Claimant reported to Dr. Haber that her back had "returned to baseline." Dr. Larson also mentioned that Claimant's lumbar MRI revealed pre-existing, degenerative findings. He summarized that Claimant experienced a minor mechanism of injury and suffers from a somatoform disorder.

20. Claimant has established that it is more probably true than not that continuing medical treatment for her left upper extremity ulnar neuropathy, lumbar spine and cervical spine is reasonable, necessary and causally related to her March 10, 2017 admitted industrial injuries. On July 14, 2017 Respondents filed a GAL acknowledging liability for Claimant's industrial injuries. The GAL noted that there was "no lost time exceeding 3 days. MMI and impairment yet to be determined." Respondents have not sought to withdraw the GAL.

21. The record reflects that Claimant is seeking medical benefits for her left upper extremity ulnar neuropathy, lumbar spine and cervical spine. Respondents assert that Claimant's current condition is not related to the admitted injuries and seek a denial of additional medical treatment. Relying on the opinion of Dr. Larson and the medical records, Respondents specifically contend that Claimant suffers degenerative conditions and a somatoform disorder. However, Respondents argument requires a *de facto* finding of MMI regarding the March 10, 2017 injuries. Because Claimant is entitled to medical benefits until reaching MMI, a denial of all further medical treatment necessarily reflects an implicit determination that Claimant reached MMI for the effects of her industrial injuries. However, there has been no medical determination of MMI by an ATP or Division Independent Medical Examination (DIME) physician. Accordingly, the issue of MMI is not properly before the ALJ. Therefore, Claimant is entitled to receive continued medical treatment for her March 10, 2017 industrial injuries.

22. Claimant has proven that it is more probably true than not that she is entitled to receive TTD benefits for the period May 5, 2017 through May 19, 2017. Claimant was unable to earn wages during the period because she was experiencing the effects of her March 10, 2017 industrial injuries. In early May 2017 Claimant requested permission from Concentra to return to full duty employment without a 40 hours per week limitation. However, she explained that the additional work hours caused an increase in her pain symptoms. Claimant was taken off work until May 5, 2017. On May 9, 2017 Claimant reported for work at Employer's convenience store. She provided her resignation and two weeks' notice to Mr. Altipeter. Mr. Altipeter accepted Claimant's resignation letter and terminated her effective immediately. Claimant's last day of work was thus May 5, 2017. The record reflects that Claimant's industrial injuries caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. Notably, Claimant has not reached MMI for her March 10, 2017 industrial injuries.

23. Respondents have failed to prove that it is more probably true than not that Claimant was responsible for her termination from employment and is thus precluded from receiving indemnity benefits. Mr. Altipeter accepted Claimant's resignation letter on

May 9, 2017 and explained that industry standards dictate that an Employer can either accept a conditional resignation and permit the employee to work an additional two weeks or accept the resignation effective immediately. However, when Claimant tendered her resignation letter on May 9, 2017 she anticipated that she would cease employment with Employer on May 19, 2017. In fact, the letter specified that "my last day will be May 19 of 2017." Although Claimant voluntarily resigned her position, the resignation was not effective until May 19, 2017. The resignation was conditioned upon the completion of two more weeks of work. Instead, Mr. Altipeter chose to terminate Claimant on May 9, 2017 despite her intention. The record thus reveals that Claimant did not precipitate her employment termination by a volitional act that she would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over her termination from employment. She is thus not precluded from receiving TTD benefits. Claimant shall receive TTD benefits for the period May 5, 2017 through May 19, 2017.

CONCLUSIONS OF LAW

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

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

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

Medical Benefits

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A

preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The employer's obligation continues until the claimant reaches MMI. MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. However, the claimant may receive medical benefits after MMI to maintain his status or prevent a deterioration of his condition. *See Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Furthermore, §8-42-107(8)(b)(I) & (II), C.R.S. provide that the initial determination of MMI is to be made by an ATP. If either party disputes the ATP's MMI determination, the claimant must undergo a DIME. The statute also provides that the ALJ lacks authority to determine MMI until there has been a medical determination of MMI by an ATP or a DIME. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, W.C. Nos. 4-947-316-01, 4-935-813-03 (ICAP, July 31, 2015).

6. As found, Claimant has established by a preponderance of the evidence that continuing medical treatment for her left upper extremity ulnar neuropathy, lumbar spine and cervical spine is reasonable, necessary and causally related to her March 10, 2017 admitted industrial injuries. On July 14, 2017 Respondents filed a GAL acknowledging liability for Claimant's industrial injuries. The GAL noted that there was "no lost time exceeding 3 days. MMI and impairment yet to be determined." Respondents have not sought to withdraw the GAL.

7. As found, the record reflects that Claimant is seeking medical benefits for her left upper extremity ulnar neuropathy, lumbar spine and cervical spine. Respondents assert that Claimant's current condition is not related to the admitted injuries and seek a denial of additional medical treatment. Relying on the opinion of Dr. Larson and the medical records, Respondents specifically contend that Claimant suffers degenerative conditions and a somatoform disorder. However, Respondents argument requires a *de facto* finding of MMI regarding the March 10, 2017 injuries. Because Claimant is entitled to medical benefits until reaching MMI, a denial of all further medical treatment necessarily reflects an implicit determination that Claimant reached MMI for the effects of her industrial injuries. However, there has been no medical determination of MMI by an ATP or Division Independent Medical Examination (DIME) physician. Accordingly, the issue of MMI is not properly before the ALJ. Therefore, Claimant is entitled to receive continued

medical treatment for her March 10, 2017 industrial injuries. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, W.C. Nos. 4-947-316-01, 4-935-813-03 (ICAP, July 31, 2015) (where the claimant had not reached MMI, ALJ's finding terminating all future medical treatment reflected an implicit determination that the claimant had reached MMI and was thus erroneous); *Davis v. Little Pub,* W.C. No. 4-947-977 (June 17, 2015).

TTD Benefits

9. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

10. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period May 5, 2017 through May 19, 2017. Claimant was unable to earn wages during the period because she was experiencing the effects of her March 10, 2017 industrial injuries. In early May 2017 Claimant requested permission from Concentra to return to full duty employment without a 40 hours per week limitation. However, she explained that the additional work hours caused an increase in her pain symptoms. Claimant was taken off work until May 5, 2017. On May 9, 2017 Claimant reported for work at Employer's convenience store. She provided her resignation and two weeks' notice to Mr. Altipeter. Mr. Altipeter accepted Claimant's resignation letter and terminated her effective immediately. Claimant's last day of work was thus May 5, 2017. The record reflects that Claimant's industrial injuries caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. Notably, Claimant has not reached MMI for her March 10, 2017 industrial injuries.

Termination For Cause

11. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that

reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

12. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant was responsible for her termination from employment and is thus precluded from receiving indemnity benefits. Mr. Altipeter accepted Claimant's resignation letter on May 9, 2017 and explained that industry standards dictate that an Employer can either accept a conditional resignation and permit the employee to work an additional two weeks or accept the resignation effective immediately. However, when Claimant tendered her resignation letter on May 9, 2017 she anticipated that she would cease employment with Employer on May 19, 2017. In fact, the letter specified that "my last day will be May 19 of 2017." Although Claimant voluntarily resigned her position, the resignation was not effective until May 19, 2017. The resignation was conditioned upon the completion of two more weeks of work. Instead, Mr. Altipeter chose to terminate Claimant on May 9, 2017 despite her intention. The record thus reveals that Claimant did not precipitate her employment termination by a volitional act that she would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over her termination from employment. She is thus not precluded from receiving TTD benefits. Claimant shall receive TTD benefits for the period May 5, 2017 through May 19, 2017.

ORDER

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

1. Claimant is entitled to receive continued medical treatment for her March 10, 2017 industrial injuries.

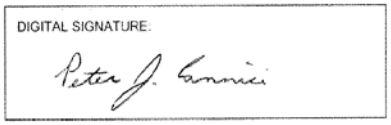
2. Claimant shall receive TTD benefits for the period May 5, 2017 through May 19, 2017.

3. Claimant earned an AWW of $635.00.

4. Any issues not resolved in this Order are reserved for future determination.

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

DATED: February 28, 2018.



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

ISSUES

I Whether Respondents presented clear and convincing evidence establishing that Dr. Henke erred in opining that Claimant had not attained maximum medical improvement (MMI) at the time of a follow-up Division Independent Medical Examination (DIME) on October 5, 2016.

FINDINGS OF FACT

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

Claimant's Injury and Prior Hearing Regarding MMI

1. Claimant sustained an admitted work-related injury on September 10, 2013, while stepping from a mowing machine. According to Claimant, he slipped on wet grass and fell striking his right lower back on the mower deck resulting in immediate pain. He reported his injury and began treating through workers' compensation with Dr. Craig Anderson.

2. Claimant treated through workers' compensation and was placed at maximum medical improvement with 0% disability and no restrictions by Dr. Anderson on March 7, 2014.

3. Claimant returned to work after being placed at MMI. He testified that upon his return to work, he was assigned to operate a skid loader to clean up debris after a flood in the Boulder area. According to Claimant, he ran the skid loader for approximately two weeks during which time he experienced a return of his back pain with associated leg symptoms pain due to being bounced about inside the cab.

4. Claimant sought care through the emergency room and his primary care physician Dr. Robert Springs.

5. On July 9, 2014, Claimant was seen by Dr. Clarence Henke for a Division Independent Medical Exam (DIME). Dr. Henke obtained a history from Claimant, reviewed medical records and performed a physical examination. After completing his evaluation, Dr. Henke concluded that Claimant was not at maximum medical improvement (MMI). Before endorsing MMI, Dr. Henke requested the completion of a lower extremity EMG and a neurosurgical evaluation. He also recommended that Claimant continue with his established medications and return to restricted work.

6. Respondents requested an independent medical examination (RIME) with Dr. Franklin Shih. Dr. Shih completed the requested RIME on August 27, 2014. In his RIME report, Dr. Shih disagreed with Dr. Henke's opinion that Claimant had not reached MMI. Dr. Shih opined that Dr. Henke erred in concluding that Claimant had not reached MMI based upon perceived inconsistencies between what Claimant reported to him during the RIME and what was contained in the medical records of Dr. Anderson. Moreover, Dr. Shih noted that Dr. Henke did not perform three sets of range of motion measurements nor did he assign a preliminary impairment rating in accordance with the *AMA Guides* and the DOWC rating tips.

7. Respondents filed an Application for Hearing to challenge the "not at MMI" determination of Dr. Henke. Respondents requested hearing was held on December 3, 2014. ALJ Margot Jones presided. ALJ Jones determined that Respondents had failed produce clear and convincing evidence to overcome Dr. Henke's opinion that Claimant had not reached MMI.

8. In her February 19, 2015 Findings of Fact, Conclusions of Law and Order, ALJ Jones concluded that Dr. Anderson's reports concerning Claimant's symptoms were internally inconsistent and inconsistent with his subsequent deposition testimony. Consequently, she found Claimant's testimony more persuasive than Dr. Anderson's. She also concluded that while Dr. Henke may have technically deviated from the AMA Guidelines, such deviations do not automatically mandate a conclusion that his DIME opinions are erroneous. Rather, the party challenging the DIME must still demonstrate that the deviation casts a substantial doubt on the validity of the DIME. Finally, in upholding Dr. Henke's "not at MMI" determination, ALJ Jones concluded that a mere difference of opinion between physicians does not amount to clear and convincing evidence to support a finding that the DIME had been overcome. For these reasons, ALJ Jones determined that Respondents failed to overcome Dr. Henke's opinion concerning MMI.

Post Hearing Events, Claimant's Follow-Up DIME and Claimant's Subsequent Treatment

9. After that ALJ Jones determined that Respondents had failed to overcome Dr. Henke's MMI determination, Respondents filed a General Admission of Liability (GAL) on March 3, 2015. Respondents contend that despite the filing of a GAL, Claimant failed to follow-up with treatment. Claimant contends that Respondents failed to schedule the necessary appointments recommended by Dr. Henke to bring him to MMI. Instead of scheduling the EMG and neurosurgical evaluation, Claimant contends that Respondents scheduled additional IME's.

10. Claimant was evaluated by Dr. Sharon Walker at the request of Respondents on September 3, 2015. As part of her RIME, Dr. Walker completed a records review, obtained a history and completed a physical examination. Dr. Walker's RIME report reflects that details of the case were "difficult" to discern because of discrepancies in the records. Ultimately, Dr. Walker concurred with Dr. Shih's opinions,

noting that the "medical record documentation is probably a more accurate depiction of what took place between September 30, 2013 and March 7, 2014." She raised concern for symptom magnification and concluded that Claimant indeed had reached MMI by March 7, 2014 as opined by Dr. Anderson. She also specifically noted that Claimant did not require additional treatment and/or surgical intervention.

11. Following Dr. Walker's RIME, Claimant sought to return to Dr. Henke for a follow-up DIME. Claimant completed his request for a follow-up DIME on October 7, 2015 and Dr. Henke performed the follow-up DIME on November 11, 2015.

12. On December 11, 2015, Dr. Henke issued his follow-up DIME report. In his report, Dr. Henke noted that as part of the original DIME completed on July 9, 2014, he recommended "bilateral lower extremity electromyogram examination" and "neurosurgical consultation." Dr. Henke reviewed the RIME report of Dr. Walker. He concluded that her opinions regarding MMI, permanent impairment and the need for additional treatment were "directly contrary to her [documented] review of the medical records and her physical examination." After completing a physical examination and reviewing Claimant's MRI, Dr. Henke reiterated his original opinion that Claimant was not at MMI. He also renewed his original recommendations for bilateral lower extremity electromyogram examination and a neurosurgical evaluation. After the second time Mr. Potter visited with Dr. Clarence Henke, he finally was able to start seeing a physician through workers' compensation.

13. Respondents filed a GAL on January 4, 2016 and Claimant was referred to Dr. Levi Miller for additional treatment.

14. Dr. Miller examined Claimant on February 4, 2016. During this initial examination, Dr. Miller documented findings consistent with the content of previous medical records specifically that Claimant was suffering from chronic low back and right leg pain most consistent with an L4-5 radiculopathy. However, it was unclear to Dr. Miller whether Claimant's "neurologic deficit [was] due to nondermatonal abnormalities and pain." Dr. Miller noted that it did not appear that Claimant had undergone an electrodiagnostic study or a "consultation" with a surgeon. Despite the recommendation of Dr. Henke for completion of an EMG study, Dr. Miller simply noted he would "[c]onsider nerve conduction study/electromyography to evaluate for acute/or chronic denervation related to right lower extremity lumbosacral radiculopathy symptoms. Rather than completing the recommended EMG or referring Claimant to another doctor for the same, Dr. Miller instructed Claimant to "[r]eturn to the clinic in one month for medication management and to discuss further diagnostic and therapeutic measures."

15. On April 14, 2016, Dr. Miller saw Mr. Potter again. Instead of referring Mr. Potter for an EMG and neurosurgical consultation, Dr. Miller changed medications due to an allergic reaction he had to Percocet.

16. Claimant returned to Dr. Miler on June 23, 2016. In his report from this date of visit, Dr. Miller documents that Claimant asked to be placed at MMI because he

"[believed] there [was] nothing that we can do to improve his condition." Claimant disputes that he made this statement. Nonetheless, Dr. Miller noted that Claimant would return to Dr. Henke for an impairment rating. Based upon the evidence presented, the ALJ finds that the EMG and neurosurgical evaluation recommended by Dr. Henke were not completed during Claimant's care with Dr. Miller.

Claimant's Third DIME with Dr. Henke

17. Claimant returned to Dr. Henke for a third DIME. Dr. Henke reviewed Dr. Miller's treatment records and after review reiterated that Claimant had not had the benefit of the EMG and neurosurgical evaluation he recommended twice previously. Claimant's physical examination was felt to be consistent with right leg radiculopathy with compression of the L4 and L5 spinal roots. Dr. Henke recommended a bilateral lower extremity electromyogram and a neurosurgical consultation as soon as possible given Claimant's MRI findings and his worsening radiculopathy symptoms. Accordingly, Dr. Henke repeated his conclusion that Claimant was not at MMI.

18. Respondents applied for Hearing to overcome the DIME.

Claimant's Hearing Testimony

19. Claimant testified that Dr. Miller never referred him to get the nerve study recommended by Dr. Henke, even though he asked for it. Claimant also testified that Dr. Miller asked specifically if he desired to have surgery to which Claimant responded, "Yes," yet he was not referred to one.

20. Claimant testified that he has shooting pain in his back. Movement makes his pain worse as does sitting. Claimant reported high anxiety as a result of his continued pain. He testified that he "just wants to be fixed." Consequently, he testified that he wants to get an opinion from a neurosurgeon to determine if surgery would be successful or if it would make his condition worse.

Dr. Henke's Deposition Testimony

21. In support of his DIME opinions concerning MMI, Dr. Henke testified via deposition. Dr. Henke testified that when he met with Claimant at the second and third DIME's, Claimant endorsed symptoms in both legs in a pain diagram and described them as pins and needles, stabbing pain in the lower lumbar area midline, and on both sides. Dr. Henke opined that these were consistent with subjective complaints of radiculopathy. He also testified that the MRI and physical examination supported clinical findings of radiculopathy. Consequently, he testified that completion of a nerve study was important because it could assist in determining whether Claimant's leg pain was "occurring from a disc compression on the nerve or a narrowing of the foramen, which level, one or more, that was causing this."

22. Dr. Henke reviewed the report from Dr. Sharon Walker. He testified that her conclusion that Claimant was at MMI contradicted her own physical findings on examination. Specifically, Dr. Henke pointed to the fact that Dr. Walker noted that Claimant could hardly walk due to increased pain and weakness in the right leg, which caused listing to the right side. He also noted that she was unable to elicit deep tendon reflexes at the bilateral knee or ankle, that Claimant was unable to toe walk on the right secondary to his leg giving out and that he had a positive straight leg raise test all of which were inconsistent with Claimant being at MMI.

23. Dr. Henke also reviewed the medical records from Dr. Miller. Dr. Henke testified that had Dr. Miller referred Mr. Potter to get the EMG as he'd requested, it would have identified the accuracy of the kinds of symptoms he was complaining of as to which nerves could be causing his symptoms, which would assist a provider in determining whether a surgical remedy was available to Claimant.

Dr. Walker's Testimony

24. Dr. Walker testified that she disagreed with Dr. Henke's conclusion that Claimant was not at MMI. In support of her disagreement with Dr. Henke's MMI determination, Dr. Walker testified: "Dr. Hinkey (sic) continues to basically take the patient's word over the documented medical records, even though there was discrepancies between Mr. Potter – what Mr. Potter says and the documented medical records." Despite this testimony, Dr. Walker concurred with Claimant's counsel that the need for additional diagnostic testing could preclude a finding of MMI. Outside of her criticism of Dr. Henke's faith in the credibility of Claimant's subjective reports, Dr. Walker failed to point out any errors in the procedures or methodology utilized by Dr. Henke in the completion of his DIME.

25. The ALJ finds a paucity of evidence to suggest that Dr. Henke erred in the completion of his DIME, or that his opinion concerning MMI is highly probably incorrect. To the contrary, the evidence presented persuades the undersigned ALJ, as much as it did ALJ Jones, that there is a mere difference of opinion between the Dr. Henke as the division independent medical examiner and Respondents' retained medical expert, Dr. Walker concerning causation and MMI. Concerning, Respondents suggestion that the DIME should be set aside because the record demonstrates that Dr. Shih credibly opined that there were multiple errors in the report, specifically that Dr. Henke did not assign a preliminary impairment rating as required, that he did not perform three sets of range of motion and lastly that Dr. Henke did not rely upon the evidence contained in the record, the ALJ is, as was ALJ Jones, not persuaded that these technical deviations cast substantial doubt on the validity of Dr. Henke's MMI determination.

26. Based upon the evidence presented, the ALJ finds the opinions expressed by Dr. Henke regarding MMI supported by the content of the medical records presented to him for review. Even Dr. Walker, Respondents' retained expert, agrees that a finding of MMI may be precluded based upon the need for additional diagnostic testing. Dr. Henke believes that Claimant could benefit from further diagnostics and consultation to

determine the cause of his ongoing pain in an effort to cure and relief it. While Dr. Walker disagrees, the ALJ finds her report and testimony unpersuasive.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). In this case, the ALJ concludes that Dr. Henke's opinion concerning MMI is supported by the content of the medical records he reviewed. The ALJ is not persuaded that Dr. Henke's MMI opinion is in error based upon the fact that he relied on Claimant's verbal history and the records sent to him for review. While Dr. Walker disagrees, the ALJ rejects the suggestion that her contrary opinions constitute clear and convincing evidence that Dr. Henke's MMI determination is highly probably

incorrect. Furthermore, there is a lack of persuasive evidence to support a conclusion that Dr. Henke's technical deviations regarding the assignment of a preliminary impairment rating, completion of range of motion testing and attaching range of motion worksheets to the report casts a substantial doubt regarding the validity of his MMI determination. Accordingly, the ALJ finds Dr. Henke's MMI opinions credible and persuasive.

Overcoming Dr. Henke's MMI Determination

D. A DIME physician's findings concerning causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

F. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Here, the weight of the persuasive evidence demonstrates that Claimant's need for additional diagnostic testing/evaluation is directly related to his admitted industrial injury. Because this treatment has not been afforded and it presents a reasonable prospect for curing and relieving Claimant of the ongoing effects caused by his work related low back injury, Claimant is not at MMI. See *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001), *aff'd. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA0401, February 14, 2002)(*not selected for publication)* (citing *PDM Molding v. Stanberg,* 898 P.2d 542 (Colo. App. 1995*)* and *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995)]; *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000).

G. After considering the totality of the evidence presented, including the DIME report of Dr. Henke and the conflicting reports of Drs. Anderson, and Shih, as well as the report and stated opinions of Dr. Walker, the undersigned concludes, as did ALJ Jones that Respondents have failed to produce clear and convincing evidence to establish that Dr. Henke's determination regarding MMI is highly probably incorrect. Rather, the ALJ concludes that the evidence presented persuades the ALJ that the errors asserted by Dr. Shih as having occurred in this case constitute deviations from the *AMA Guides*, which do not call into question the legitimacy of Dr. Henke's MMI determination. Moreover, to the extent that Dr. Henke's opinions concerning MMI diverge from those expressed by Dr. Shih, Dr. Anderson and Dr. Walker, the ALJ concludes that those divergences constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Respondent has failed to prove that Dr. Henke's opinion regarding MMI is highly probably incorrect.

ORDER

It is therefore ordered that:

1. Respondents request to set aside the DIME opinion of Dr. Henke regarding MMI is denied and dismissed. Because the ALJ determines that Respondents have failed to overcome the MMI determination of Dr. Henke, assignment of permanent impairment associated with Claimant's back injury is premature.

2. Respondents shall authorize and pay for all expenses associated with the completion of the EMG and neurosurgical consultation as recommended by Dr. Henke. Payment shall be in accordance with the Colorado workers' compensation medical benefits fee schedule.

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

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

DATED: February 28, 2018

/s/ Richard M. Lamphere

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

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury on or about August 18, 2017?

II. Has Claimant shown, by a preponderance of the evidence that the right of selection of his Authorized Treatment Provider ("ATP") passed to him, due to Employer's failure to timely provide a list of ATP's as required by law?

III. If the right to select his ATP passed to Claimant, did he properly exercise that right in selecting Dr. Malinky as his ATP?

IV. If the right of selection of ATP was not properly exercised by Claimant, was he nonetheless entitled to a change of ATP to Dr. Malinky?

V. Has Employer shown, by a preponderance of the evidence, that Claimant was responsible for his own termination, thus relieving Employer of providing Temporary Total Disability payments?

STIPULATIONS

The parties stipulated that Claimant's Average Weekly Wage is $1,558.00. This stipulation was accepted by the ALJ.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed as a service technician whose job was to service and repair heating and air conditioning equipment. This type of work can be physically demanding. Claimant has approximately 30 years of experience in the field, and began work with Employer in July, 2016.

2. On Friday, August 18, 2017 Claimant was working on job at a restaurant/brewery that involved relocating an ice machine from a small upstairs closet to a room downstairs. Claimant had been involved in planning how the work would be performed. Claimant testified that he had expressed to Employer that this was a "major job" and that three men were needed in order to complete the work.

3. The men and materials were gathered and work began at 8:00 a.m. After the work began, one of the technicians ("Ben") was called away. He left with a work truck that contained materials Claimant felt were necessary for the job. The major part of the job involved running copper lines down into and through the building. The

workers needed to push and pull the copper lines from a condenser on the roof of the building into a crawlspace, across a ceiling, through an office, then into another room.

4. At some point, Ben returned and everyone worked on the task. The copper lines were placed and some of the connections were made. Running the lines involved physical overhead work, pushing and pulling the copper lines through holes which the workers had drilled into floors, walls and ceilings.

5. Claimant testified that by approximately 7:00 p.m., his arms felt numb. His shoulders and back hurt from twisting and torqueing his arms and upper body while running the copper lines all day. Claimant testified that he told his co-workers (Ben, and Mike Buffington) that his arms were numb and that he had hurt himself.

6. Claimant did not report the injury to his supervisor, Vernon Zimmerman, on August 18, 2017. Claimant testified that in this industry, aches and pains are common. Claimant testified that he is not in the habit of reporting an injury or seeking medical attention every time he experiences pain at work.

7. Claimant testified that his symptoms increased over the weekend. On the morning of Monday, August 21, 2017, Claimant testified that his right arm and shoulder were very painful. He went to work, and arrived to find 4-5 co-workers outside. He told "Mike" and several other co-workers that he had hurt himself. Claimant went inside and asked Mr. Zimmerman to come outside when he finished a phone call. Claimant went back outside. Mr. Zimmerman came outside and asked Claimant how the job had gone. Claimant told Mr. Zimmerman he was injured while performing the job. Claimant became upset, raised his voice, and asked Mr. Zimmerman "what is wrong with you and why are you doing this to me?" He further told Mr. Zimmerman that "You hurt me!" Claimant further characterized his own demeanor as "I lost it."

8. Claimant testified that believed Mr. Zimmerman had not been providing sufficient men and materials that would allow Claimant to perform his jobs effectively. He believed the job on August 18 was one such job. In fact, Claimant testified that he sincerely believed that Mr. Zimmerman was "after me" and *intentionally* trying to hurt him in this fashion. Mr. Zimmerman invited Claimant to "go home and cool off."

9. Claimant and Mr. Zimmerman talked on the phone later that morning. Mr. Zimmerman asked Claimant to return to the office so they could meet and decide what to do next. Claimant returned and met with Mr. Zimmerman and office manager Sean Gayle. Claimant reported being injured on the job the previous Friday. During this meeting, Mr. Gayle stated, "Geary, we cannot have you go forward like this, hollering at people after you get hurt." Claimant stated he understood.

10. Mr. Zimmerman proposed a possible new job position for Claimant; in either sales or supervision. Claimant told Mr. Zimmerman he was grateful for the opportunity. Claimant stated he was hurt, and he asked to take a week of vacation so he could "heal" and consider the new job offer. Mr. Zimmerman agreed. During this

conversation, Employer did not provide Claimant with a list of physicians from which to choose to treat his injuries.

11. Claimant testified that he then took a nap. Then, since he knew the location of an Emergicare facility, and knew it was a 'Workers Comp facility', he went there the afternoon of August 21. He was told he needed a "first report of injury" from his employer before he could be seen. Claimant called Shelby Baker at Employer's office; she told him he would have to come to the office the next morning to get it.

12. Claimant went to Employer's office the morning of Tuesday, August 22, 2017. He met with Shelby Baker and Sean Gayle. Ms. Baker gave Claimant the paperwork he needed, but told him the situation looked "suspicious." Ms. Baker completed an "Employer's First Report of Injury" on the same date. (Ex. 5). She described how the injury happened; "[employee] was pulling line set for installation in the basement thru ceiling; noticed shoulder pain. Continued to work thru the shoulder pain." *Id.*

13. Claimant was then seen at Emergicare on August 22, 2017. Dr. Autumn Dean reported, "Pt was reaching overhead for 6-8 hours at work and started having burning pain in his R shoulder." She diagnosed "R shoulder strain" and noted that her objective findings were consistent with a work-related mechanism of injury. Dr. Dean imposed work restrictions that included no lifting or carrying more than 5 pounds, and no reaching. Her notes further indicate "May use R arm up to waist level only and next to body-no reaching. No driving if taking sedating medications." A return visit was scheduled for 8/29/2017 at 10:20 a.m. (Ex. 1, p. 4).

14. Claimant (while still officially on paid vacation) went to Employer's office the morning of Friday, August 25, 2017. He thanked Employer for considering him for one of the two positions they discussed previously, on August 21. Mr. Zimmerman then told Claimant it had been decided not to offer him a position. Employer gave Claimant a document entitled "Wright Total Indoor Comfort Disciplinary Procedure" dated August 21, 2017. (Ex. E).

15. That form indicates Claimant received a warning about his behavior on August 21, 2017. Specifically, that Claimant had "walked off scheduled job" and "continuing instances of loseing [sic] composure with fellow employees & supervisors." The form does not indicate Claimant's employment was being terminated, rather, the section entitled "Action Plan Taken by Supervisor to Help Employee" contains the following entry; "Termination at current position. Offered new position to accomidate [sic]." The form is dated August 21, 2017 and lists a "Follow Up Date" of August 25, 2017.

16. Mr. Zimmerman testified that no new job was formally offered to Claimant at the meeting on August 21. He explained his intent was to consider offering Claimant a job as a sales representative when he met with Claimant on August 25. However, at a separate meeting prior to Claimant's arrival, Employer had decided to terminate

Claimant's employment after all. Mr. Zimmerman terminated Claimant's employment when Claimant came to the office on August 25.

17. Claimant acknowledged at hearing that in April, 2017, and again in May of 2017, he had raised his voice working at two different jobs at 7-11 stores. Mr. Zimmerman had discussed these incidents with Claimant, but Claimant had not been subject to any sort of formal discipline.

18. Dr. Dean's *Physician's Report of Workers Compensation Injury* indicates that Claimant was examined again on 8/29/2017. The restrictions originally imposed on 8/22/2017 remained in effect, with a recommendation for physical therapy to occur twice a week for 4 to 6 weeks. MMI was estimated to be in 4-6 weeks. A follow-up exam was then set for 9/19/2017 at 9:00 a.m. (Ex 1, p. 3).

19. Dr. Dean's next *Physician's Report of Workers Compensation Injury* shows that Claimant did appear on 9/19/2017 for his follow-up appointment. The same work restrictions were still recommended, but no referral for physical therapy was made at this visit. MMI was still estimated at "4-6 weeks", despite this visit being three weeks after MMI had already been estimated at "4-6 weeks". Claimant was still diagnosed with a right shoulder strain, and the next appointment was set for 10/10/2017 at 9:00. (Ex 1, p. 2). The record is silent whether Claimant attended this follow-up visit, or any thereafter.

20. Claimant testified that on September 1, 2017, he delivered a letter to Employer in which he requested authorization to be seen by "Interventional Pain Management" for his work related injury. (Ex. 8). Claimant testified that Dr. Malinky is with that clinic, that Dr. Malinky had treated Claimant for prior medical issues, and Claimant wanted a change of physician from Dr. Dean to Dr. Malinky. Employer did not respond to the letter. The ALJ notes that the document itself merely mentions that Claimant would like "another opinion of injuries", does not request a change of physicians, and is not on a Change of Treating Physician form as prescribed by the Director of the Division of Workers Compensation.

21. Claimant supplied medical records which appear to indicate that he consulted on at least one occasion with the Mountain View Medical Group through private insurance, in the fall of 2017. Nothing in the record indicates that at any point Claimant attempted to designate this group as his ATP, nor does Claimant argue that now.

22. Claimant testified that he has applied for work but has been unable to locate work which is within Dr. Dean's work restrictions. At hearing, however, Claimant testified that his injuries from this event are now "completely better". Claimant has, however, been receiving unemployment benefits.

23. Vernon Zimmerman testified that he was unaware of Claimant's pain complaints until they were raised at the meeting on August 21. He testified that

Claimant was ultimately terminated from his position due to his unprofessional behavior, and due to some prior absenteeism due to aches and pains. He had verbally warned Claimant previously about his unprofessional behavior, but not in writing.

24. Shelby Baker, Office Manager for Employer, testified by telephone. She testified that Claimant's termination was not related to any Workers Compensation claim he might have filed; rather, it was due to his behavioral issues. Instead, she had opined that it seemed suspicious that Claimant would file a Workers Compensation claim so close on the heels of this meeting where his behavior had become an issue. She further testified that she verbally gave Claimant a list of ATPs while filling out the First Report of Injury with Claimant, since she did not have a written ATP list at this time. There is no further evidence suggesting that anyone on Employer's behalf subsequently tendered Claimant a written list of providers within seven days-or any time thereafter.

CONCLUSIONS OF LAW

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

Generally

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

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

C. Assessing weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it

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

Compensability

D. For an injury to be compensable under the Act, it must arise out of and occur within the course and scope of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); see also, *Industrial Commission v. London & Lancashire Indemnity Co*., 135 Colo. 372, 311 P.2d 705 (1957) (mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. §8-43-201, C.R.S. 2006; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989).

E. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

Retaliatory Claim for Workers Compensation Benefits

F. Respondents argue that Claimant's claim for Workers Compensation was filed in retaliation for his meeting with his supervisor on August 21, 2017, wherein he had been warned about his behavioral issues. The timeline of events suggests otherwise. Claimant left this meeting chastened, but hopeful of receiving a new position within the company. The two positions mentioned as possibilities were both less physically demanding. It was not until that Friday, August 25, that Claimant was informed that his services would no longer be needed. In the interim, Claimant had already reported his injuries; first during the meeting of August 21, then formally with the office manager on August 22 while seeking medical treatment. The ALJ is unpersuaded that Claimant filed his Workers Compensation claim for a termination which did not even occur for several more days.

G. Instead the evidence shows that Claimant was performing assigned job duties for Employer when he injured his right shoulder. The injury happened on Friday, August 18, 2017. Claimant did not report the injury that day. Claimant reasonably thought he might feel better over the weekend, but unfortunately did not. He then reported the injury to his Employer the morning of Monday, August 21, 2017. Claimant presented to Emergicare on August 22, 2017 where Dr. Dean indicated "[Patient] was reaching overhead for 6-8 hours at work and started having burning pain in his R shoulder." This description of the mechanism of injury is entirely consistent with Claimant's testimony. Dr. Dean diagnosed "[Right] shoulder strain," recommended medication, and imposed work restrictions. Dr. Dean saw Claimant again on August 29 and September 19. On the August 29, 2017 visit, she recommended Claimant begin physical therapy. Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his right shoulder on August 18, 2017.

Medical Benefits

H. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, the respondents are only liable for authorized treatment or emergency medical treatment, which may be obtained without prior authorization. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). In this case, while Claimant could rightfully have obtained emergency medical treatment over the weekend due to the pain he was experiencing, he did not. Claimant reasonably believed that this was one of those aches and pains that resolve on their own. Instead, he waited to express his dissatisfaction and report his injury until business hours resumed that following Monday.

Initial Right of Selection of Physician

I. Authorization refers to a physician's legal status to treat the industrial injury at the Respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Once an ATP has been designated, the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. However, if an employer fails to designate an ATP the right of selection of the ATP passes to the claimant. Section 8-43-404(5)(a)(I)(A), C.R.S. ("…If the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor.") *See also* W.C.R.P. 8-2(E)(" If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing.") While the evidence does not show any bad faith by Employer in providing a written list of ATPs, such failure to provide a written list of authorized treating physicians within seven days passed the right of selection to Claimant, and the ALJ so finds.

J. The inquiry does not end there, however. In this case, Claimant initially chose Emergicare, and was treated by Dr. Dean, beginning August 22, 2017. Although the record is not clear what other ATP options were conveyed to him verbally by Shelby Baker, Claimant chose Emergicare. Claimant then continued to treat with Dr. Dean, with at least two more visits, on August 29, and again on September 19. (The records provided by Claimant indicated he then treated with Mountain View Medical Group on 10-2-17, through private insurance, but no effort was made to change his ATP, and no follow-up is noted). When Claimant tendered his letter, dated 9/1/2017, he did not manifest an intent to choose Dr. Malinky as his ATP. He never mentions Dr. Malinky by name. The letter merely asks that he "be seen by" Interventional Pain Management for "another opinion of injuries." There is no evidence that he ever actually was seen or at this facility. Where a Claimant has signified "by words or conduct that he has chosen a physician to treat the industrial injury", he has made 'a selection'. *Pavelko v. Southwest Heating and Cooling,* W.C. 4-897-489 (Sept. 4, 2015). Also see, *Williams v. Halliburton Energy Services,* W.C. 4-005-888-01 (Oct. 28, 2016). The ALJ finds, that notwithstanding his letter of 9/1/17, that Claimant actually *selected* Dr. Dean of Emergicare as his Authorized Treating Physician. As such, he then became subject to C.R.S. 8-43-304(5)(a)(III), for any *changes* he might wish to make to his ATP.

Change of Authorized Treating Physician and Claimant's Letter dated 9/1/2017

K. The ALJ finds that such letter, assuming it were timely delivered and received by Employer, does not comply with the requirements of C.R.S 8-43-304(5)(a)(III). The request is not on a written and submitted on a *form designated by the director* (of the Division of Workers Compensation), as required by C.R.S. 8-43-304(5)(a)(III)(B). The letter was not sent to Employers Insurance Carrier, nor to the initially authorized treating physician. C.R.S. 8-43-304(5)(a)(III)(C). There is no evidence that Interventional Pain Management was on the Employer's designated list, or provides medical services for a designated corporate medical provider on such list, as required by C.R.S. 8-43-304(5)(a)(III)(D). As already found, this letter does not manifest an intention to designate Interventional Pain Management as Claimant's ATP. The ALJ further finds that, statutory noncompliance notwithstanding, the letter does not even request a *change of physician;* merely "another opinion of injuries'. For the foregoing reasons, Claimant has failed to show he is entitled to this change of physician. His ATP remains Dr. Dean with Emergicare.

TTD Benefits and Responsibility for Termination of Employment

L. To prove entitlement to temporary total disability (TTD) benefits, Claimant must establish that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The impairment of the earning

capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). In this case, the preponderance of the evidence establishes that beginning August 21, 2017 Claimant was otherwise unable to perform his usual job, due to the effects of the industrial injury. The evidence further shows that Claimant was on paid vacation, at his own request, from August 21, 2017, until his termination became formalized on August 25, 2017.

M. The employer bears the burden of establishing by a preponderance of the evidence that a Claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008); Section 8-42-105(4). Claimant must perform some volitional act or exercise a degree of control over the circumstances resulting in his termination. See *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995).

N. The ALJ concludes that the Claimant had at least four documented instances of angry outbursts in front of customers and co-workers prior to his termination. Vernon Zimmerman credibly identified two instances in April and May of 2017, at two different 7-Eleven convenience store sites, where the Claimant and Mr. Zimmerman had discussions about the Claimant's loud outbursts that were unacceptable in front of customers and co-employees. Claimant himself largely corroborated this. According to Mr. Zimmerman, the Claimant apologized for his inappropriate behavior that day. Another July 2017 verbal warning regarding inappropriate behavior was documented in Exhibit E, the termination letter. The final reprimand and ultimatum took place on August 21, 2017, in a meeting with Mr. Zimmerman and other management personnel, when the Claimant was told his unprofessional angry outbursts could not be tolerated by the company.

O. The record is unclear if profanity was actually used in this meeting. Nonetheless, the ALJ finds that Claimant's belief, however sincerely held, that Employer was *intentionally trying to hurt him,* is simply not rational. It is not uncommon for employees to feel that insufficient resources are provided to them to complete their jobs. While most employers might welcome some employee input to promote efficiency, they need not tolerate repeat verbal outbursts from their subordinates, in the form of "losing it". Claimant was already on notice that such conduct was unacceptable. Between August 21, 2017 and August 25, 2017, when the Claimant came to pick up his paycheck, the Respondent/Employer decided that it was not going to accommodate the Claimant with another position in the company and communicated the final decision to terminate the Claimant. The ALJ finds and concludes that Employer was within its discretion to terminate Claimant forthwith, notwithstanding "optional" steps mentioned in its Disciplinary Procedure. Employer was free to proceed straight to termination at its discretion.

P. The ALJ further finds, by a preponderance of the evidence, that Employer did not terminate Claimant as retaliation for his earlier filing of a Workers Compensation

Claim. The Claimant was responsible for his own termination, which precludes Claimant from receiving temporary total or temporary partial disability for his compensable injury. Claimant was on voluntary, paid vacation when he was terminated; therefore he is not entitled to TTD payments for any missed work at any point.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable work injury on August 18, 2017; thus he is entitled to all medical benefits to relieve him of such injury.

2. Claimant's ATP at all times pertinent is Dr. Dean with Emergicare.

3. Claimant's claim for Temporary Total Disability benefits is denied and dismissed.

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

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

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

DATED: March 5, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2964 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant prove that her condition has worsened and a left ulnar nerve transposition is reasonably necessary to cure and relieve the effects of her industrial injury?

- Did Claimant prove entitlement to TTD benefits commencing August 17, 2017?

- Did Respondents prove that Claimant's admitted left ulnar nerve pathology was not caused by the November 7, 2011 accident?

FINDINGS OF FACT

1. Claimant suffered admitted injuries on November 7, 2011 due to a trip and fall accident. Claimant's foot got caught while she was stepping up onto a curb, causing her to fall forward onto her hands and knees.

2. Employer did not refer Claimant to an authorized provider, so she treated with her personal providers through the military healthcare system. She initially went to the Evans Army Hospital emergency room on November 7, 2011. The records are largely illegible, but the problematic areas appear confined to the bilateral wrists and left knee. There were no documented elbow complaints.

3. Claimant underwent upper extremity electrodiagnostic testing on November 30, 2011 with Dr. William Seybold. The impetus for the testing was "recurrent, primarily nocturnal bilateral hand pain and numbness . . . over the past few months." There was no mention of the November 7 fall at work. Dr. Seybold found bilateral carpal tunnel syndrome. He did not test the left ulnar nerve and there was no indication of any ulnar nerve symptoms or problems.

4. Claimant saw Dr. Daniel White, an orthopedic surgeon, on January 30, 2012. Her chief complaint was bilateral hand pain and numbness of "insidious onset" starting "6-7 months ago." She reported "pins and needles" in all fingers but "most specifically in the right ring finger." Elbow flexion ulnar compression test was "equivocal," and Tinel's was negative at the cubital tunnels. Dr. White diagnosed "bilateral wrist pain" and referred Claimant for occupational therapy. He did not mention any left ulnar nerve pathology.

5. Claimant's initial occupational therapy evaluation took place on April 16, 2012. The therapist examined both arms, but provocative tests for ulnar nerve issues were "negative."

6. Claimant underwent a second EMG/NCV test on December 11, 2012 with Dr. Mark Blackley. This time the testing included the left ulnar nerve at the elbow. The

testing showed mild to moderate bilateral carpal tunnel syndrome but "no evidence of an ulnar neuropathy."

7. Claimant had a surgical evaluation with Dr. Chance Henderson on January 22, 2013. There were significant clinical findings consistent with bilateral carpal tunnel syndrome, including thenar atrophy and positive Tinel's and Phalen's tests bilaterally at the wrists. Cubital tunnel testing was "negative x3 bilateral elbow." Dr. Chance diagnosed bilateral carpal tunnel syndrome, administered bilateral wrist injections and scheduled Claimant for surgery.

8. Dr. Henderson performed bilateral carpal tunnel surgery on February 8, 2013. Claimant initially did well, but her symptoms gradually returned. She followed up with Dr. Henderson on April 9, 2013 and reported "numbness in the bilateral ring and small fingers that seems to be bothering her more than anything." On examination, Tinel's and elbow ulnar nerve compression tests were negative, and there were no subjective changes in sensation in the ulnar nerve distribution. Dr. Henderson remarked Claimant was "doing well since surgery but today [presents] with new complaints of hand pain mostly in the distribution of the ulnar nerve . . . ."

9. Although Employer had filed a First Report of Injury shortly after the accident, Insurer did not contact Claimant for more than a year. A second "First Report of Injury" was filed on January 14, 2013, which prompted Insurer's claims adjuster, Beatriz Diaz, to contact Claimant in late January or early February 2013. As a result of those communications, Ms. Diaz filed a General Admission of Liability and referred Claimant to Dr. Gregg Martyak for ongoing care.

10. Claimant's initial visit with Dr. Martyak took place on July 11, 2013. He noted positive Tinel's over the bilateral cubital tunnels and made the first documented diagnosis of cubital tunnel syndrome.

11. On November 19, 2013, Claimant had a third EMG/NCV test, performed by Dr. Katherine Leppard. By that time, her clinical presentation was more clearly consistent with bilateral cubital tunnel syndrome. She had tenderness over both ulnar nerves at the elbow with positive Tinel's bilaterally. Pinprick sensation was decreased in the median and ulnar distributions. The electrodiagnostic testing showed continued bilateral carpal tunnel syndrome and, for the first time, evidence of bilateral ulnar neuropathy at the elbow. Dr. Leppard graded the left ulnar neuropathy as "moderate" and the right as "mild." She also commented that "both were reportedly normal on the prior EMG of 12/11/12."

12. On January 27, 2014, Dr. Martyak performed a left carpal tunnel revision and a left ulnar neuroplasty at the elbow. Intraoperatively, he found a "large amount of scar tissue on the median nerve at the wrist." He also noted a "large amount of tissue placing pressure on the [ulnar] nerve in the cubital tunnel," but did not specify whether it was scar tissue.

13. At her April 22, 2014 follow-up appointment, Claimant told Dr. Martyak her left elbow and wrist were "doing well," with no residual numbness in the ulnar nerve

distribution. But by August 7, 2014, numbness and tingling were "returning" in the ulnar distribution of the left hand.

14. Dr. Martyak released Claimant at MMI on October 8, 2014. He opined, "I am not sure any additional surgery would be of benefit to her. The only procedure left would be to revise her ulnar nerve neuroplasties to transpositions."

15. Claimant saw Dr. Shimon Blau on March 23, 2015 for an impairment rating. Dr. Blau assigned a 15% left upper extremity rating, including 3% for the residual left ulnar nerve impairment. Dr. Blau's report contains no causation analysis regarding the left cubital tunnel syndrome.

16. Claimant attended a DIME with Dr. Frank Polanco on August 24, 2014. Dr. Polanco calculated a 26% scheduled rating for the left upper extremity, including 3% for residual left ulnar nerve impairment. Dr. Polanco's report contains no discussion or analysis of causation regarding the left cubital tunnel syndrome.

17. Respondents filed a Final Admission of Liability based on Dr. Polanco's DIME report on October 14, 2015. Claimant timely objected to the FAL and requested a hearing, but subsequently withdrew her objection in a stipulation dated March 7, 2016, and allowed the claim to close.

18. Claimant's residual left cubital tunnel symptoms progressively intensified after MMI. On February 14, 2017, she returned to Dr. Martyak and reported the numbness in the fourth and fifth fingers had "returned to the level of pre surgery on the left." Dr. Martyak recalled that "at our last visit in 2014 we declared her at MMI with the caveat that if numbness returned we may need to consider a revision ulnar nerve neuroplasty with transposition as a final definitive procedure." He sent Claimant back to Dr. Leppard for repeat EMG/NCV testing.

19. Dr. Leppard performed the testing on July 20, 2017, which showed bilateral ulnar mononeuropathy at the elbow. She opined "the left ulnar mononeuropathy at the elbow is severe . . . . [and] has worsened since the prior EMG of 11/19/13."

20. After reviewing the electrodiagnostic test results, Dr. Martyak recommended a revision ulnar neuroplasty with an intramuscular transposition.

21. Respondents asked Dr. Eric Ridings to perform a Rule 16 peer review of the request for surgery. Dr. Ridings opined "there is no occupational relationship between her current left cubital tunnel syndrome and her injury falling down in 2011. Based on the record, an ulnar nerve transposition is reasonable but is not related to the 2011 claim or to her work in any other way."

22. Dr. Ridings performed a detailed record review for Respondents in November 2017 regarding the left cubital tunnel. He opined that the original mechanism of injury would not have caused cubital tunnel syndrome. He thought Dr. Leppard had over-interpreted the November 2013 electrodiagnostic testing, and stated, "at most I

would call this borderline cubital tunnel syndrome." He agreed that the July 2017 testing showed definitive ulnar neuropathy, but opined:

> [T]he patient's current left cubital tunnel syndrome can in no way be related to falling onto her outstretched hands in 2011. As noted, the EMG of December 2012 showed no abnormalities across the left elbow, and subsequent development of borderline findings in 2013 cannot be attributed to the 2011 work injury. Even less can one attribute findings in 2017 to the 2011 claim. Hence, any treatment for that condition is not work-related under this claim.

23. Claimant saw Dr. Timothy Hall for an IME at her counsel's request on November 15, 2017. Dr. Hall disagreed with Dr. Ridings and opined,

> [T]his is the direct consequence of her original injury to the left elbow. . . . This is a very specific event at the left elbow. The only thing that has happened at that left elbow is the fall, which resulted in this entrapment. I do not see any reasonable argument that has been put forward that would explain these symptoms other than the worsening over time of this diagnosis related to the fall. It is probably the consequence of local scarring following surgery, which is not an uncommon even under these circumstances.

24. Dr. Hall testified at hearing to elaborate on the opinions expressed in his report. When asked how Claimant's condition could naturally worsen after the 2014 surgery with no intervening cause, Dr. Hall explained:

> Continued scarring. You know, that's what the neurolysis went in to get rid of. And unfortunately, often the consequence of removing scar tissue is the production of further scar tissue. We don't have a way of retarding that consequence. Some people lay down different amounts of scar tissue in different places. And it appears she has laid down significant scar tissue postoperatively.

25. Regarding the significant delay between the accident and the first documented complaints of cubital tunnel syndrome, Dr. Hall opined he "wouldn't expect" acute symptoms because "there was not that much trauma." Rather, he opined that the entrapment "evolved slowly over time."

26. Dr. Ridings testified for Respondents in a posthearing deposition dated February 12, 2018. He expressed his "strong opinion that [Claimant's] left ulnar nerve issues are not, in any way, related to the 2011 claim." Dr. Ridings cited several factors which led him to that conclusion: there was no documented injury to Claimant's left elbow in 2011; the records document no complaints or findings consistent with ulnar compression until April 2013; EMG/NCV studies in November 2011 and December 2012 showed no evidence of cubital tunnel syndrome; and the EMG/NCV testing in November 2013 was at most "borderline" positive for cubital tunnel syndrome.

27. Dr. Hall's opinion that Claimant's current need for a left ulnar nerve transposition is the direct and natural consequence of the January 27, 2014 surgery is credible and persuasive. Claimant proved by a preponderance of the evidence that her condition has worsened since MMI and the proposed left ulnar nerve transposition is reasonably necessary.

28. Dr. Ridings' opinion that Claimant's initial diagnosis of cubital tunnel syndrome was not related to the November 2011 accident is credible and persuasive. Respondents proved that the initial diagnosis of left cubital tunnel syndrome was not caused by the November 2011 accident. The January 27, 2014 left cubital tunnel surgery was reasonably necessary, but not causally related to the November 2011 accident.

29. After reviewing the evidence presented, the ALJ is persuaded that Claimant's left cubital tunnel syndrome has worsened since MMI, and the left ulnar nerve transposition proposed by Dr. Martyak is reasonably necessary. The ALJ further credits Dr. Hall's opinion that the proposed transposition is the direct and natural consequence of the January 27, 2014 surgery. But the ALJ is also persuaded by Dr. Ridings' opinion that the initial diagnosis of left cubital tunnel syndrome, which led to the January 2014 surgery, was not caused by the November 2011 accident. Although Respondents admitted liability for the diagnosis, covered the 2014 surgery, and paid medical impairment benefits related to ulnar neuropathy, they are legally entitled to revisit the initial causation determination in the context of Claimant's petition to reopen. Since the January 2014 surgery was performed for a condition that, in retrospect, was not caused by the industrial accident, Respondents are not liable for the current consequences of that surgery. Therefore, Claimant's petition to reopen must be denied.

CONCLUSIONS OF LAW

A. Claimant proved her condition worsened after MMI. The proposed ulnar nerve transposition is reasonably necessary and causally related to the January 27, 2014 surgery

Section 8-43-303(1) allows a party to request that a claim be reopened on the grounds of "an error, a mistake, or a change in condition." A change in condition refers either to a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985).

Claimant's left ulnar neuropathy has clearly worsened since MMI and all experts agree the surgery proposed by Dr. Martyak is reasonably necessary. The also ALJ credits Dr. Hall's opinion that the ulnar nerve transposition surgery is the direct and natural consequence of the January 27, 2014 surgery. Specifically, Dr. Hall explained that the current left ulnar nerve entrapment "is probably the consequence of local scarring following surgery, which is not an uncommon event under these circumstances." This opinion is supported by the "large amount of scar tissue" Dr. Martyak found around the

median nerve during Claimant's left carpal tunnel revision surgery, which indicates she has a predisposition to developing excessive scar tissue after surgery.

B. Respondents must prove that the initial diagnosis of cubital tunnel syndrome, which led to the January 27, 2014 left ulnar neuroplasty, was not related to the November 2011 accident.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). As a general rule, where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Even after an admission of liability is filed, the respondents retain the right to dispute the relatedness of any particular treatment, because the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010).

But application of those general principles in this case is complicated by § 8-43-201(1), which provides that "a party seeking to modify an issue determined by a general or final admission . . . shall bear the burden of proof for any such modification." Respondents are not merely disputing whether the proposed surgery is related to the original accident, but are asserting that left cubital tunnel syndrome should not have been considered a compensable component of the injury in the first place. That position directly conflicts with their previous admissions of liability for left cubital tunnel syndrome, pursuant to which they paid medical and indemnity benefits. By defending the petition to reopen on the basis that that the left cubital tunnel syndrome was not causally related to the accident in the first instance, Respondents are seeking to modify an "issue" that was previously determined by an admission of liability. As a result, Respondents must prove that Claimant's initial diagnosis of left cubital tunnel syndrome was not causally related to the November 2011 accident.

C. Is the standard of proof a preponderance or clear and convincing?

Although § 8-43-201(1) assigns the burden of proof it does not specify the applicable standard of proof. Most issues in this system are decided using the preponderance of the evidence standard, which requires a showing that a disputed proposition is more likely true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). But Claimant previously underwent a DIME with Dr. Polanco, who assigned an impairment rating for left ulnar neuropathy. Although determining causation is an "inherent" part of the DIME process, Dr. Polanco's determinations are not entitled to any special weight because Claimant had purely scheduled impairments. The presumptive weight attributed to the DIME's determinations of MMI and whole person impairment is not applicable to scheduled ratings. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App.

2000). Thus, Respondents must carry their burden on initial causation by a preponderance of the evidence.

D. Respondents carried their burden

As found, Respondents proved that Claimant's original diagnosis of left cubital tunnel syndrome was not caused by the industrial accident. The ALJ credits Dr. Ridings' opinions as the most reasonable interpretation of the post-accident medical evidence. The ALJ sees no persuasive explanation for the seventeen-month delay before the first definitive manifestations of ulnar entrapment. Although Claimant's early complaints of numbness and tingling in "all" of her fingers (which includes the fourth and fifth fingers) *could* have been consistent with cubital tunnel syndrome, no examining provider even suggested that diagnosis until Dr. Henderson in April 2013. Dr. Ridings further noted that those early reported symptoms were "diagnostically [ ] meaningless," and Dr. Hall agreed that Claimant's symptoms have been "very diffuse" and "non-specific," and her clinical presentation has been "inconsistent . . . from provider to provider." More importantly, specific provocative tests such as Tinel's and cubital tunnel compression test were repeatedly negative during that seventeen-month interval, and EMG/NCV testing of the left ulnar nerve in December 2012 (13 months post-injury) was objectively normal. Had Claimant been experiencing chronic inflammation and progressive scarring around the left ulnar nerve since the accident as opined by Dr. Hall, the ALJ would have expected ulnar nerve entrapment to have become apparent much sooner than it did.

The ALJ acknowledges that Dr. Blau and Dr. Polanco implicitly found a causal connection between left cubital tunnel syndrome and the accident, as evidenced by their impairment ratings. But their reports contain no specific discussion or analysis of causation and they appear to have simply presumed causation, most likely because Respondents had paid for the surgeries and were not disputing causation. The ALJ has given minimal weight to Dr. Blau's and Dr. Polanco's reports.

E. The proposed ulnar nerve transposition is not a compensable consequence of the original injury as a matter of law.

The finding that the accident did not cause the initial ulnar nerve entrapment does not end the analysis, because the ALJ has also determined that the proposed surgery is a direct and natural consequence of the surgery performed in January 2014. Therefore, the next question is: are Respondents liable for medical treatment to remedy a problem caused by a surgery they authorized under an admission of liability, even though, in retrospect, the original surgery was not causally related to Claimant's industrial accident?

The ICAO addressed this issue in *Gordon v. Ross Stores, Inc*., W.C. No. 4-878-759-05 (February 5, 2015). In *Gordon*, the respondents had admitted liability for carpal tunnel syndrome (CTS) and authorized a carpal tunnel decompression surgery. Because of the surgery, Claimant developed CRPS. A DIME determined that the CRPS was "iatrogenically caused" by the carpal tunnel surgery and provided a whole person CRPS rating. An ALJ subsequently found that the respondents proved the claimant did not develop CTS as a result of her employment and allowed them to withdraw the GAL. But

the ALJ also awarded the DIME's CRPS rating because the CRPS was caused by surgery that was authorized and admitted at the time. Specifically,

> The ALJ rejected the respondents' argument that since the claimant's underlying CTS was not caused by her work activities, then her subsequent surgery for CTS and her resulting CRPS also cannot be work-related. The ALJ based his determination on the quasi-course of employment doctrine. The ALJ explained that the claimant developed CRPS while undergoing authorized medical treatment for an industrial injury, that surgical treatment was provided to relieve the effects of the admitted industrial injury, and that it became an implied part of her employment contract.

The ICAO reversed and held the claimant's CRPS was not a compensable component of her injury as a matter of law. Citing *Travelers Insurance Company v. Savio*, 706 P.2d 1258 (Colo. 1985), the ICAO held the quasi-course doctrine only applies if the subsequent injury "is the direct and natural consequence of an original injury which itself was compensable." Since the claimant's CTS was not a compensable injury in the first instance, a secondary condition that developed due to treatment for CTS was also not compensable.

Based on the analysis in *Gordon*, even though Claimant's current need for surgery is a direct and natural consequence of the January 2014 surgery, Respondents are not liable for futher treatment because the original ulnar neuropathy was not caused by the November 2011 accident.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen her claim for a left ulnar nerve transposition and additional TTD benefits is denied and dismissed.

2. Any matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

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

DATED: March 16, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-048-446-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 28, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 2/28/18, Courtroom1m beginning at 1:30 PM, and ending at 4:00 PM).

Claimant's Exhibits 1 through 15 were admitted into evidence, without objection, After a foundation was laid, Claimant's Exhibit 16 was admitted into evidence Respondents' Exhibits A through J were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on March 7, 2018. Respondent had been given 2 working days within which to file objections. No timely objections were filed. A written transcript of the February 28, 2018 hearing, was filed on March 21, 2018. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable low back injury arising out of and in the course and scope of her employment with the Employer on May 7, 2017. Additionally, the ALJ determined whether Jed A. Bell, D.O., Buckeye Spine and Rehab, is an authorized treating physician and whether the October 18, 2017, and November 15, 2017, low back injections that the Claimant underwent with Dr. Bell were reasonably necessary, and causally related to the May 7, 2017 work-related injury. The paramount issue of **compensability** turns on an assessment of the Claimant's credibility.

The Claimant bears the burden of proof by a preponderance of the evidence on all issues that are the subject of this decision.

FINDINGS OF FACT

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

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds, that if the claim is compensable: (a) Claimant's average weekly wage (AWW) is $656, with a corresponding temporary total disability (TTD) benefit rate of $437.33; (b) the time period for TTD benefits is June 5, 2017, through July 21, 2017, both dates inclusive, a period of 47 days; and, (c) Robert Herbert, D.O., is the Claimant's authorized treating physician (ATP).

2. On May 7, 2017, Claimant, a flight attendant for the Employer, sustained a lower back injury arising out of and in the course and scope of her employment with the Employer. Claimant testified that while on a flight from San Jose, California to Las Vegas, Nevada, she injured her back during unexpected turbulence. Claimant testified she was trying to return to her jump seat when the turbulence hit and she twisted, feeling a sudden pinch in her lower back. Claimant testified she flew the rest of her trip from Las Vegas, Nevada, to Buffalo, New York, and then home to Cleveland, Ohio. Claimant testified that on May 9, 2017, she went to her primary care physician (PCP), Mount Carmel Medical Group, but could not be seen due to the fact her injury was work related (Claimant's Exhibit 8, p. 52).

3. On May 12, 2017, the Claimant went to the adult triage (ED) at Mount Carmel St. Ann's in Westerville, Ohio. The ED report reflects Claimant "is a flight attendant and has had right leg pain …x1 week. No known moi (mechanism of injury)" (Claimant's Exhibit 6, p, 13). The report also states Claimant said, "she developed mild right leg pain four weeks ago after flying back from Ireland. She works as a flight attendant. She did not think much of it but pain has gradually worsened especially over the last 2 days. She does not have a PCP…" The ED physician was concerned with a DVT (deep vein thrombosis) [Claimant's Exhibit 6, p. 15]. On physical examination, the ED physician noted that Claimant had back pain with palpation. The ED physician noted Claimant was concerned with a herniated disc and wanted a lumbar MRI (magnetic resonance imaging) [Claimant's Exhibit 6, p. 17]. At Hearing, the Claimant testified that she never told the ED providers that she injured her back on the way home from Ireland. She testified that she was in Ireland at the end of March 2017 and did not injure her back on her trip home from Ireland. She further testified that she was at the Mount Carmel ED for approximately 35 minutes, that it was chaotic, and that nobody was really helping her. She stated that she reported that she injured her low back during turbulence.

4. There is a discrepancy between the history of mechanism of injury (MOI) that Claimant gave to the ED treaters in Ohio and the history of the MOI which the Claimant subsequently gave to her treating physicians and to which she testified at hearing. The Respondents substantially rely on this discrepancy in their challenge to **compensability.** As found herein below, the Claimant presented straight-forwardly and credibly at hearing. The ALJ infers and finds that the ED treaters, in conversation with the Claimant, heard mention of "flying back from Ireland" and placed importance on this detail to the exclusion of the Claimant giving a history of the injury occurring after experiencing turbulence. In making a credibility determination, the ALJ finds the Claimant's version of the MOI, as related to her subsequent authorized treating physicians (ATPs) and testified to at hearing, under oath, more credible than the Ohio ED notes on MOI. Even the Respondents' retained Independent Medical Examiner (IME), Allison Fall, M.D., is of the opinion that if turbulence was the MOI, then, the Claimant's back injury is **work-related.** In the final analysis, the mention of 'flying back from Ireland," although it may have been the beginning of the Claimant's low back problems, has turned out to be somewhat of a "red herring."

5. On May 14, 2017, the Claimant treated at Riverside Methodist Hospital ED. She reported that she hurt her lower back approximately one week prior. The report reflects that Claimant stated she had been physically active and developed pain in her right hip and down her right lower extremity (Claimant's Exhibit 7, pp. 31-32). The report also reflects that Claimant reported that she works as a flight attendant and is "often having to bend low and lift objects." The report reflects that the Claimant reported she has thrown her back out in the past but this incident was worst (Claimant's Exhibit 7, p. 34). On physical examination, the ED physician noted a positive straight leg raise on the right side. Claimant underwent a lumbar CT, which revealed "slight effacement of the

ventral thecal sac and bilateral neural foraminal stenosis at L4-5 and L5-S1 due to disc space narrowing and mild discogenic disease" and disc protrusions (Claimant's Exhibit 7, p. 37). The ED physician prescribed medications and referred the Claimant to a neurosurgeon. *Id*. Claimant testified, under oath, that despite what the report states, she did report how she injured her back during turbulence. Claimant testified this ED report does not accurately reflect what she told the ED providers on May 14, 2017.

6. The Claimant stated that as a result of her injury she took time off work. She stated that she was off work following her injury until May 16, 2017. She testified that she was on the board on May 16-18. According to the Claimant, she did not work on May 16, 2017. She stated that she flew one or two roundtrip flights on May 17 and 18. Then, on May 19, 2017, she went back to work for one day of training. She was off work from May 20 through May 29. She took this time off work in hopes her back would start feeling better. On May 29, 2017, she reported her injury to her supervisor, who advised her to complete an irregularity report, which she did that day. In the irregularity report, the Claimant described how her injury occurred (Claimant's Exhibit 16, p. 180).

7. At the hearing, Claimant was adamant that on May 12 and May 14, 2017, she reported her mechanism of injury to both ED providers. She testified the May 12 and May 14, 2017 ED reports do not accurately reflect what she reported to these providers regarding how her injury occurred. The ALJ finds the Claimant's testimony regarding how her injury occurred credible and persuasive. The ALJ finds that the Claimant has proven that on May 7, 2017, she sustained a low back injury arising out of and in the course and scope of her employment with the Employer. Additionally, the ALJ finds that the Claimant has proven that the October 18, 2017, and November 15, 2017, lumbar spine injections she underwent with Jed Bell, D.O., Buckeye Spine and Rehab, were reasonably necessary, and causally related to her May 7, 2017 work-related injury.

Work Health Grove City—Robert Herbert, D.O.

8. On June 6, 2017, the Claimant treated at Work Health Grove City with Robert Herbert, D.O., the authorized treating physician (ATP). The Claimant reported that she injured her lower back during turbulence on a May 7, 2017 flight. Dr. Herbert provided the Claimant with work restrictions and referred her for physical therapy (PT). (Claimant's Exhibit 10, pp. 107-115). From June 13, 2017, through July 10, 2017, The Claimant underwent ten PT sessions at Eastside Health Center *Claimant's* (Exhibit 9, pp. 53-106).

9. On June 20, 2017, the Claimant treated with Dr. Herbert, who noted that Claimant had started PT and was off work. The Claimant reported ongoing lower back pain with radiating pain down her right leg. Dr. Herbert prescribed medications, maintained the Claimant's treatment plan and work restrictions, and referred her to a pain management specialist (Claimant's Exhibit 10, pp. 116-124). On July 5, 2017, the Claimant treated with Dr. Herbert and continued to report ongoing low back pain with

radiating pain down her right leg (Claimant's Exhibit 10, pp. 125-131). On July 21, 2017, Claimant again treated with Dr. Herbert and reported ongoing lower back pain with radiating pain down her leg. Dr. Herbert released her to full duty on July 21, 2017 (Claimant's Exhibit 10, pp. 138-145). On August 10, 2017, the Claimant again treated with Dr. Herbert, who the maintained Claimant's treatment plan (Claimant's Exhibit 10, pp. 146-151).

Physical Medicine Associates –Robert Perkins, M.D.

10. On August 4, 2017, the Claimant treated at Physical Medicine Associates with Robert Perkins, M.D., and reported how her injury occurred and her symptoms since the injury. Dr. Perkins noted that on August 3, 2017, the Claimant underwent a lumbar MRI, which revealed a right paracentral disc protrusion at L5-S1 that is compressing the right S1 nerve root. Dr. Perkins rendered an opinion, to a reasonable degree of medical probability, that the disc protrusion is related to her work injury. Dr. Perkins recommended two rounds of epidural steroid injections (Claimant's Exhibit 11, pp. 152-153). At hearing, the Claimant stated that the Respondents denied these injections.

Buckeye Spine and Rehabilitation –Jed Bell, D.O.

11. At hearing, the Claimant testified that after Respondents denied the injections recommended by Dr. Perkins, she went to Buckeye Spine and Rehab, where she treated with Dr. Bell. On October 4, 2017, the Claimant treated with Dr. Bell, who recommended that the Claimant undergo the lumbar injections (Claimant's Exhibit 15, pp. 172-173). On October 18, 2017, the Claimant underwent her first right S1 TFESI (Claimant's Exhibit 15, p. 174). On November 2, 1017, the Claimant again treated with Dr. Bell, who noted that Claimant had a 60% decrease in pain following the first injection (Claimant's Exhibit 15, pp. 176-177). On November 15, 2017, the Claimant underwent her second right S1 TFESI (Claimant's Exhibit 15, p. 178).

Allison Fall, M.D. Respondents' Independent Medical Examiner (IME)

12. On January 18, 2018, the Claimant underwent an IME with Dr. Fall, Respondents' retained expert witness. Dr. Fall examined the Claimant and reviewed Claimant's medical records, including the May 12 and May 14, 2017 ED records (Claimant's Exhibit 5, pp. 9-12). Claimant described her mechanism of injury to Dr. Fall. Dr. Fall stated the following opinion:

> Assuming [Claimant's] history is accurate, then she did note the onset of the low back pain during turbulence, then she does have a work-related lumbar spine injury, which is a disc protrusion with right lower extremity radiculopathy, which fortunately has responded quite well to epidural injections. She is not yet at MMI.

Claimant's Exhibit 5, p.12). Dr. Fall recommend a course of PT and consideration of one final epidural steroid injection.

13. On February 20, 2018, Dr. Fall testified by deposition. She testified consistently with her report. Dr. Fall stated that if Claimant's reported mechanism of injury is correct, then she did sustain a work-related injury. Dr. Fall testified that if Claimant's reported mechanism of injury is not accurate*, i.e.,* if there was no turbulence, then she did not sustain a work-related injury.

Ultimate Findings

14. The ALJ finds the Claimant's testimony and Dr. Fall's opinion credible and persuasive. Specifically, the ALJ finds that Claimant's testimony that she injured her back during turbulence on the May 7, 2017 flight and that she reported this mechanism of injury at her May 12, and May 14, 2017 ED appointments. The Claimant's testimony was straight-forward, credible and persuasive. As found herein above, the reference to "flying back from Ireland" is a "red herring."

15. Between conflicting medical reports, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and Dr. Fall's opinion, and to reject any evidence to the contrary.

16. The ALJ finds that the Claimant has proven by a preponderance of the evidence that she sustained a compensable lower back injury on May 7, 2017, during the turbulence incident, arising out of and in the course and scope of her employment with the Employer.

17. The ALJ finds that all of the Claimant's medical care and treatment for her May 7, 2017, work-related lower back injury, including the injections by Dr. Bell, are causally related and reasonably necessary to cure and relieve the effects thereof. Additionally, the ALJ finds Dr. Bell is an authorized treating physician. Claimant testified Respondents denied the injections recommended by Dr. Perkins for non-medical reasons. Claimant then went and had the injections with Dr. Bell.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony and Dr. Fall's opinion on work-relatedness were credible and persuasive. Specifically, the ALJ found that Claimant's testimony that she injured her back during turbulence on the May 7, 2017 flight and that she reported this mechanism of injury at her May 12, and May 14, 2017 ED appointments credible. . The Claimant's testimony was straight-forward, credible and persuasive. As found herein above, the reference to "flying back from Ireland" is a "red herring."

Substantial Evidence

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

Compensability

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. §** 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health* 21 *Laboratories v. Indus. Claim Appeals* Office, 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals* Office, 942 P.2d 1337 (Colo. App. 1997). *Also see §* 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225334 (ICAO, April 7, 1998). As found, on May 7, 2017, the Claimant sustained a low back injury arising out of and in the course and scope of her employment with the Employer. Therefore, she sustained a compensable injury on May 7, 2017.

Medical Benefits/Refusal to Treat for Non-Medical Reasons

d. Because this matter is compensable, Respondents are liable for medical treatment that is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(a), C.R.S.; *Snyder v. Indus. Claim. Apps. Office*, 942 P.2d 1337 (Colo. App. 1997). To be a compensable benefit, medical care and treatment must be causally related to an industrial injury. *Dependable Cleaners v. Vasquez*, 883 P.2d 583 (Colo. App. 1994). Pursuant to § 8-43-404(5)(a), C.R.S., an employer or insurer is afforded the right in the first instance to designate the authorized treating physician. If the physician selected by the respondents refuses to treat for non-medical reasons, and the respondents fails to appoint a new physician, the right of selection passes to the claimant, and the physician selected by the claimant is authorized. *See Ruybal v. Univ. Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). Whether the ATP refused to treat the claimant for non-medical reasons is a question of fact for the ALJ. *See Lutz v. Indus. Claim Apps. Office*, 24 P.3d 29 (Colo. App. 2000). In this case, Dr. Herbert referred the Claimant to Dr. Perkins, who recommend that the Claimant undergo lumbar injections. At hearing, Claimant credibly testified that the Respondents denied the injections recommended by Dr. Perkins, so she went to Buckeye Spine and Rehab to undergo the injections. As found, Dr. Bell at Buckeye Spine and Rehab, is an authorized treating physician.

e. As found, Claimant's need for the lower back treatment, including the October 18, 2017, and November 15, 2017, lumbar spine injections performed by Dr. Bell, are causally related to the Claimant's May 7, 2017 work-related injury. Additionally, medical treatment must be reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a), C.R.S.; *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P.2d 864 (1935); *Sims v. Indus. Claim Apps. Office*, 797 P.2d 777 (Colo. App. 1990). As found, the Claimant sustained her burden concerning the authorization, reasonable necessity, and causal relatedness of the October 18, 2017, and November 15, 2017, low back injections that the Claimant underwent with Dr. Bell at Buckeye Spine and Rehabilitation.

f. As stipulated and found, Robert Hebert, D.O., is the Claimant's ATP. Therefore, as found, any referrals for treatment of the Claimant's work-related back injury were and are within the chain of authorized referrals.

Average Weekly Wage (AWW)

f. As stipulated and found, the Claimant's AWW is $656, which yields a TTD rate of $437.33 per week, or $62.48 per day

Temporary Total Disability (TTD)

g. As stipulated and found, the Claimant was temporarily and totally disabled from June 5, 2017 through July 21, 2017, a total of 47 days, which entitles the Claimant to aggregate TTD benefits of $2,936.56.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all of the causally related, reasonably necessary costs of medical care, including the costs of referrals from Robert Herbert, D.O., subject to the Division of Workers Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary total disability benefits at the rate of $437.33 per week, or $62.48 per day, from June 5, 2017, through July 21, 2017, both dates inclusive, a total of 47 days, in the aggregate amount of $2,936.56, which is payable retroactively and forthwith.

C. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

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

DATED this_____day of March 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable injury on August 2, 2017.

II. Whether Claimant established, by a preponderance of the evidence, that she is entitled to reasonable and necessary medical treatment.

FINDINGS OF FACT

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

1. Claimant was born on April 23, 1964 and was 53 years of age at the time of the hearing.

2. Claimant worked for Pro Drivers, a "subsidiary" of Employbridge Holding Company.

3. Claimant was employed as a driver. Claimant's job duties included delivering equipment to clients. Equipment included delivering Comcast boxes, medical supplies and metal on flatbed trucks.

4. In May of 2017, Claimant allegedly injured her low back while transporting milk to "Scoop" ice cream. Claimant was allegedly moving a dolly containing five crates of milk, when the dolly tipped and claimant jerked to grab the milk, allegedly pulling her back. This alleged injury was not part of this hearing. (*Hearing* p. 10, ll:3-8)

5. Claimant reported this injury but refused workers' compensation.

6. Claimant was seen by a chiropractor Justin Dukes, D.O. as a result of this alleged injury. (*Hearing*, p. 10, l:21)

7. Claimant was originally examined by Dr. Dukes on May 5, 2017. Claimant was complaining of acute low back dysfunction. Claimant rated her pain as a 6 out of 10 which was deep and burning. (*Respondents' Exhibit* A, p. 1)

8. Claimant continued to suffer from low back dysfunction and treated with Dr. Dukes in May, June and July. Claimant last treated with Dr. Dukes on July 29,

2017. Claimant continued to complain of acute low back dysfunction with her pain at a 6 out of 10. (*Respondents' Exhibit* A)

9. Claimant also testified that her symptoms were consistent during her treatment with Dr. Dukes and that her pain level was roughly a 9 out of 10. (*Hearing*, p. 11, ll: 1-8.) Claimant also testified that despite having 9/10 pain, she was able to work. (*Hearing*, p. 11, ll: 9-10.)

10. Claimant testified as a result of this injury her symptoms continued after July 29, 2017.

11. Claimant testified she was injured on August 2, 2017, working at CTDI pulling a lift gate up when she felt pain in her low back. Claimant originally testified on direct the incident occurred at 10:00 a.m. with her shift starting at 4:00 a.m. On cross-examination, Claimant testified the incident occurred at 3:00 p.m. (*Hearing*, p. 12, ll:1-6)

12. Jennifer Warren, the area operations manager for Respondent-Employer, testified. Ms. Warren testified her job duties include meeting and getting to know the drivers, the clients, job assignments as well as what happens on the job. Ms. Warren testified if there is an on the job injury it comes to her attention. Ms. Warren testified employees are taught to notify both the client and the employer of an injury right away. Ms. Warren testified the reason for this is to investigate the claim. Ms. Warren's testimony is found to be credible. (*Hearing*, p. 20, ll:21-25, p. 21, ll:1-5)

13. Ms. Warren testified she knew the Claimant as a driver for Pro Drivers.

14. Ms. Warren testified review of the CTDI computer records documents the job Claimant was doing at CTDI ended on August 1, 2017. Ms. Warren testified when discussing the alleged incident with Andrea at CTDI they were unaware of any injury. (*Hearing*, p. 21, ll:19-24)

15. Ms. Warren also testified that Claimant first reported that the accident occurred at the dock at CTDI. CTDI pulled all of the camera footage from their dock and they could not find footage of the alleged accident. After footage of the alleged accident could not be found, Claimant indicated the accident occurred at a client's delivery site. (*Hearing*, p. 23, ll:19-23.)

16. Claimant was seen by Dr. Childers on the day of the alleged accident. On Dr. Childers' physical examination he found no gross abnormalities, strength and sensation were normal, Claimant's gait was normal, her straight leg raised test was normal and her reflexes were normal. Other than tenderness of the lumbar spine there was nothing abnormal about Claimant's presentation on August 2, 2017. (*Respondents' Exhibit* C, p. 19)

17. Claimant testified that just prior to the alleged incident of August 2, 2017, her pain level was 7/10 and that after the incident it was 10/10. (Hearing, p. 13, ll: 12-17) Despite indicating her pain level was 10/10 after the alleged incident, Claimant was evaluated by Dr. Childer's the same day, August 2, 2017, and he indicated in his report that Claimant was in "no apparent distress." (*Respondents' Exhibit* C, p. 19)

18. Dr. Childers referred Claimant to Dr. Parker. Dr. Parker first saw Claimant on August 10, 2017. Claimant told Dr. Parker, and she conceded on cross-examination, that her discomfort would fluctuate depending upon the activity. The Claimant admitted this fluctuation occurred prior to August 2, 2017. (*Respondents' Exhibit* D, p. 21)

19. Claimant also told Dr. Parker on August 10, 2017, that although additional treatment was recommended due to her alleged injury that occurred in May of 2017, such treatment was not approved. (*Respondents' Exhibit* D, p. 21)

20. In addition to seeing Dr. Parker, Claimant also had physical therapy. In the August 29, 2017 chart note, the physical therapist educated Claimant on her "normal" age related changes found on her MRI. (*Respondents' Exhibit* E)

21. The evidentiary deposition of Gary B. Childers, M.D. was taken on January 19, 2018 and submitted as evidence. Dr. Childers is a physician who has been licensed to practice for approximately 30 years in family medicine. He is neither board certified nor board eligible. (*Depo. Tr*. p.4 ll:11-23) When Dr. Childers examined Claimant on August 2, he found no muscle spasm. (*Id*. p. 8 ll:13-16) Other than Claimant's complaint of tenderness there were no other findings on physical examination. (*Id*. ll:17-25)

22. Dr. Childers admitted his opinion on causation was predicated upon Claimant's self-reported history to him. (*Id*. p.10 ll:15-17)

23. Dr. Childers conceded the problem as a provider is they don't know whether the patient is being honest with them with regard to where their symptoms are or what caused the symptoms. (*Id*. p.20 ll:13-17)

24. Review of the MRI, according to Dr. Childers, although abnormal were not unusual for someone of Claimant's age in fact found in 60% of individuals over the age of 40 were arthritis and were not necessarily causing symptoms. (*Id*. p.27 ll:1-25 and p.28 ll:1-2)(*See also* p.30 ll:1-8)

25. Claimant was evaluated in an Independent Medical Examination by Kathleen D'Angelo, M.D. on December 24, 2017. Dr. D'Angelo's evidentiary deposition was taken on January 26, 2018. Dr. D'Angelo is a Board Certified Internal Medicine Specialist who moved to Colorado in 2001, Level II Accredited since that time with education training experience to examine, diagnose and treat

patients with low back complaints. (*Depo* 2, p.4 ll:7-19) Dr. D'Angelo was offered as a medical expert in occupational medicine with no objection from Claimant. (*Id*. p.5 ll:1-2)

26. At the time of Dr. D'Angelo's Independent Medical Examination, she did not have access to Dr. Dukes' records. These were provided to her on January 25, 2018, and reviewed prior to her deposition. Claimant reported to Dr. D'Angelo her symptoms existed prior to the alleged August 2, 2017 incident. (*Id*. p. 9 ll:1-4) Dr. D'Angelo asked merely because on August 2, 2017 between 11:37 a.m. and 1:41 p.m., Claimant complained to Dr. Childers of some tenderness, which did not mean it was due to what allegedly occurred at 9:15 a.m. that morning. "No. no. I mean, certainly not when you look at her MRI. She certainly had a lot of degenerative changes." (*Id*. ll:17-25; p.10 ll:1-7)

27. Dr. D'Angelo testified merely because Claimant had palpable tenderness at the lumbar spine on August 2, did not mean Claimant actually injured her lumbar spine. (*Id*. ll:9-12)

28. With regard to the MRI findings, Dr. D'Angelo testified they were not due to the alleged injury. (*Id*. ll:8-16)

29. Dr. D'Angelo volunteered, "clearly, August 2nd, the same day as her "injury" she had a normal exam. Certainly nothing that would lead me to believe that there was anything significant brewing. "I - - I can't explain excruciating back pain based upon what she looked like immediately after her injury, unless there was an intervening event." (*Id*. p.23 ll:12-18)

30. Dr. D'Angelo further offered, "she stated that from the very beginning of her May injury until the time I saw her, she had lower back pain with radiation into her right leg up to the level of the knee. (Id. p.24 ll:3-5) Claimant did not claim to Dr. D'Angelo the alleged August 2, 2017 incident aggravated, accelerated or exacerbated the pain in her right leg, rather, she related it to the May injury. "She stated that from the time of the May injury until she saw me, her symptoms had really not changed at all." (*Id*. ll:8-14)

31. Dr. D'Angelo further testified, "there is no way to state within a reasonable degree of medical probability the care claimant received beginning August 2 was reasonably needed because of what occurred on August 2." Dr. D'Angelo explained, "no. And that is very significant, not only did she complain about 6 out of 10 pain on that particular date 5 days prior to her August injury, but that level of pain seemed to be fairly consistent from beginning to end of the chiropractic notes, which suggests to me that pain wasn't going anywhere anytime soon." (*Id*. p.30 ll:10-21)

32. With regard to restrictions subsequent from August 2, Dr. D'Angelo testified based upon a complete review of the medical evidence, meeting Claimant and

evaluating Claimant. Dr. D'Angelo testified the restrictions Dr. Childers gave were not reasonably needed because of what she alleged occurred on August 2:

> No. I mean, clearly on that particular date what she had was subjective complaints of pain that did not appear to correspond to objective abnormalities on physical exam. They also did not seem to be all that different from her complaints of pain five days earlier when she was seen by the chiropractor at which time she was performing regular duty. So I don't really see any physiological reason for restrictions. There was no tissue at risk of worsening damage with her regular duties.

(*Id*. p. 31 ll:7-15)

33. It is specifically found Claimant failed to meet her burden of proof. It is specifically found the testimony of Jennifer Warren to be credible and persuasive. It is specifically found the testimony of Kathleen D'Angelo, M.D. to be credible and persuasive. It is specifically found that the testimony of Claimant is not credible. It is specifically found Claimant did not injure her back on August 2, 2017 in the course and scope of her employment that required healthcare and/or disabled the Claimant from performing her regular job duties.

CONCLUSIONS OF LAW

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

General Provisions

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

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

rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 134 P.254 (Colo. 1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insuranace Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2007). A worker's compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable injury on August 2, 2017.

For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires Claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id*. An activity arises out of and in the course of employment when the activity is sufficiently related to the conditions and circumstances under which the employee generally performs her job functions such that the activity may reasonably be characterized as an incident of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

The right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000).

Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp*., 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.*, WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

It is specifically concluded that Claimant's testimony is not credible for a number of reasons. First, Claimant alleges she injured herself on August 2, 2017, while driving for CTDI. According to Ms. Warren, the driving assignment for CTDI ended on August 1, 2017. Second, Claimant initially indicated the accident occurred at CTDI. Once CTDI reviewed their surveillance footage and could not find any evidence of the alleged accident, the location of the alleged accident was changed to a client of CTDI's. Third, Claimant obtained medical treatment the same day of the alleged accident. Although Claimant testified the accident caused back pain of 10/10, Dr. Childer's evaluated Claimant the day of the alleged accident and noted Claimant was in no apparent distress. Fourth, Claimant alleges she initially injured her back in May of 2017 while delivering milk to Scoop Ice Cream. Claimant's medical records after May of 2017, but before August 2, 2017, indicate Claimant had persistent back pain of 6/10. Then, at hearing, Claimant testified that she had persistent back pain of 9/10 between the same period of time and that she was able to work during this period of time. Claimant's pain complaints are inconsistent and it does not make sense to the ALJ that Claimant could have pain of 9/10 but continue to work – even modified duty. Therefore, this ALJ does not find Claimant's pain complaints, which are the underpinnings of her claim, to be credible.

It is specifically concluded Claimant failed to meet her burden of proof. It is specifically concluded the testimony of Jennifer Warren to be credible and persuasive. It is specifically concluded the testimony of Kathleen D'Angelo, M.D. to be credible and persuasive. It is specifically concluded Claimant failed to establish by a preponderance of the evidence that she injured her back on August 2, 2017 in the course and scope of her employment and that such injury required healthcare and/or disabled Claimant from performing her regular job duties.

II. **Whether Claimant established, by a preponderance of the evidence, that she is entitled to reasonable and necessary medical treatment.**

Because the ALJ concluded Claimant failed to establish by a preponderance of the evidence that she suffered a compensable injury on August 2, 2017, this issue is moot.

ORDER

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

1. Claimant's claim is denied and dismissed.

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

DATED: February 21, 2018

Glen Goldman

_____

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment.

FINDINGS OF FACT

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

1. Claimant began working for United Subcontractors, Inc. in February of 2017. His job was to spray polyurethane foam insulation inside of buildings. Claimant was trained to wear protective clothing while spraying, including a respiratory mask with cartridges to protect him from chemical vapors. [Resp. Exhibit G, p. 63]

2. Claimant consistently wore his protective clothing while spraying, including a respiratory mask with cartridges to protect him from chemical vapors. [Hearing Transcript, p. 47.]

3. On the alleged date of injury, Claimant entered the room where his partner, Bryan Stoddard, was working. Claimant was not wearing his protective clothing since Mr. Stoddard was not actively spraying. Claimant told Mr. Stoddard that he missed a spot. Claimant was approximately 15 feet away when Mr. Stoddard resumed spraying. [Hearing Transcript p. 18] The overspray hit the back of Claimant's head and neck.

4. Claimant testified that Mr. Stoddard did not tell him to put his protective gear on prior to spraying. [Hearing Transcript, p. 33-34] Mr. Stoddard testified that he told Claimant to put his protective gear back on. Mr. Stoddard testified that he was not aware if Claimant was in the room when he resumed spraying. [Hearing Transcript, p. 55]

5. Per the history provided to Claimant's medical providers, the alleged exposure occurred on March 3, 2017 (Friday) and Claimant developed a mild cough on March 4, 2017 (Saturday). By March 7, 2017 (Tuesday), Claimant alleged a shortness of breath even at rest. He assumed that he had a respiratory infection and self-treated with Mucinex, Dayquil, and Nyquil. Claimant alleges that his symptoms worsened over the next few days until he went to an urgent care clinic on March 10, 2017 (Friday). At the urgent care clinic, it was discovered that Claimant had low blood oxygen and he was transferred to the emergency department for further treatment and evaluation. According to Claimant, he was

diagnosed with chemical induced pneumonia and asthma and remained hospitalized for three days. [Resp. Ex. G, p. 62]

6. Claimant testified the alleged exposure occurred on Saturday, March 4, 2017. This testimony is contrary to the Workers' Claim for Compensation which Claimant completed and signed on March 20, 2017, that identified the date of injury as March 3, 2017. [Resp. Ex. A] Mr. Stoddard testified that he believed that the alleged exposure occurred on Friday, March 3, 2017.

7. During Claimant's testimony, he admitted he was coughing prior to work on the alleged date of injury. Claimant testified that he did not believe he had a cold and that the cough was due to smoking. [Hearing Transcript, p. 16 at 8-13] Claimant admitted he smoked a half pack to a full pack for 10 years prior to the alleged incident. [Hearing Transcript p. 30-31] Claimant admitted that he had "new onset" of a cough in the mornings prior to March 3, 2017. He described this as being over the prior "day or two." [Hearing Transcript p. 30]

8. Mr. Stoddard testified that he picked Claimant up for work on the morning of the alleged exposure. He testified that the morning of the alleged incident Claimant had a cough and "wasn't…his healthy self." [Hearing Transcript p. 64] Mr. Stoddard testified that Claimant had been sick for approximately one week. He suggested that Claimant see a doctor prior to the alleged exposure due to his coughing. [Hearing Transcript, p. 63-64] Mr. Stoddard testified that he noticed an increasing cough due to Claimant's physical exertion throughout the day, again, prior to the alleged overspray incident. [Hearing Transcript p. 64-64, Claimant's Exhibit 9]. The ALJ credits this portion of Mr. Stoddard's testimony and finds it highly persuasive.

9. Claimant testified that on the day of the alleged incident, but prior to the alleged overspray incident, he tried to smoke a cigarette, but could not because he was coughing so much. [Hearing Transcript, p. 32] The ALJ credits this portion of Claimant's testimony and finds it highly persuasive.

10. Claimant testified that he was not feeling well immediately following the alleged exposure and that he spoke with Mr. Stoddard about his condition. Mr. Stoddard testified that he was not aware of the alleged incident until the two returned to the truck at the end of the job. At that time, Claimant purportedly told Mr. Stoddard that he had been sprayed. [Hearing Transcript, p. 56 at 2-10]

11. Claimant testified that Mr. Stoddard offered Claimant his inhaler following the alleged exposure. [Hearing Transcript, p. 42] Claimant testified he did not recall whether he told his physicians about his prior cough or his use of an inhaler on the day of the incident.

12. On March 16, 2017, Mr. Stoddard authored a witness statement. [Claimant's Exhibit 9] In this statement, he stated Claimant was having light to moderate

coughing spells and that he noticed the cough to be “worsening” throughout the workday prior to the alleged spraying incident. Mr. Stoddard’s statement says that he “did not notice a severe shortness of breath.” There is no mention of the use of any inhaler in Mr. Stoddard’s written statement.

13. Notably, Claimant’s cough prior to the alleged exposure and alleged use of Mr. Stoddard’s inhaler on the date of the incident are not documented in his medical records. The first mention of the alleged use of the inhaler came during Claimant and Mr. Stoddard’s hearing testimony.

14. Mr. Stoddard testified that he and Claimant are friends and see each other socially. [Hearing Transcript – p. 72 at 2-18]

15. Claimant testified that he told his physicians that his coworker had inadvertently sprayed the back of his suit and his hair with insulation. [Hearing Transcript, p. 45 at 19-23] Notably, Claimant told Dr. Neagle that “he did not feel like any got onto his skin and he did not have irritation on the back of his neck.” [Resp. Ex. C, p. 30]

16. Claimant testified that he did not report any injury when he returned to the shop on his alleged date of exposure. [Hearing Transcript p. 42]

17. When Claimant presented to the hospital with respiratory symptoms on March 10, 2017, he provided very specific details concerning the alleged incident. Specifically, Claimant reported that he was “not experiencing significant symptoms” on March 3, 2017. He stated that he “seemed to do okay through the weekend; however by Monday morning, he noticed onset of cough, wheezing, and shortness of breath.” He stated that “over the last 5 days this has gotten progressively worse.” [Resp. Ex. C, p. 38] There is no mention of having used a co-worker’s inhaler contained in the hospital records nor is there any mention of a cough prior to the incident that was so bad he could not smoke a cigarette. This record, dated March 10, 2017 is the most contemporaneous account of the alleged incident.

18. This provided history, which Claimant repeated to other medical providers that evaluated him, starkly contradicts Claimant’s testimony concerning onset of his symptoms provided at hearing. [See e.g., Resp. Ex. D, G]

19. Claimant testified he does not have health insurance as of March 2017, that significant medical bills were incurred as a result of his hospitalization, and if workers’ compensation does not cover it, he is “pretty much” stuck with the bill. [Hearing Transcript p. 50-51]

20. Claimant treated with Dr. Neagle on March 10, 2017. Per Dr. Neagle’s assessment, the two possible causes of Caimant’s respiratory illness were either isocyanate-induced asthma or a respiratory infection. On March 11, 2017, Dr.

Neagle opined that Claimant's exposure to isocyanates on March 3, 2017 was the most likely cause of Claimant's respiratory illness. [Resp. Ex. C, p. 43]

21. Dr. Neagle testified that claimant's CT scan revealed "some subtle patchy, hazy opacities in the upper lung field, which can represent infection, but it can be due to a virus, bacteria, So you can't say for certain what it is without knowing." [Deposition of Dr. Neagle, p. 28-29] There is no indication in Dr. Neagle's reports or testimony that he was aware of Claimant's pre-existing cough.

22. Respondents obtained an IME with Dr. Schwartz. Dr. Schwartz disagreed with Dr. Neagle's assessment of the cause of Claimant's symptoms. "Mr. Malan's clinical trial was, in fact, inconsistent with all known respiratory conditions associated with isocyanate exposure, but very consistent with community acquired pneumonia (CAP)." [Exhibit G, p. 66]

23. Dr. Schwartz testified that community acquired pneumonia is an infection of the lungs acquired in a nonhospital setting. [Deposition of Dr. Schwartz, p. 10 at 11-19] He testified this is a relatively common condition as opposed to isocynate induced injury which is rare.

24. Dr. Schwartz noted that isocyanate-induced asthma typically occurs in individuals who are chronically exposed to isocyanates over many months or many years. Claimant gave no history of repeated exposure to isocyanate as he indicated that he was careful to wear the prescribed respiratory mask designed to prevent inhalation of vapors and fumes. Dr. Schwartz further opined, "had Mr. Malan somehow become sensitized to isocyanates prior to the described exposure on Friday, 03/03/17, his exposure would have caused…*acute* asthma, that is, a severe attack within minutes of exposure. Had the claimant developed acute asthma secondary to his isocyanate exposure, these symptoms would have gradually improved when he was away from work on the weekend of 03/04/17-03/05/17. The careful history obtained by Dr. Neagle regarding Claimant's exposure and his onset of symptoms in the AM of 03/06 is not consistent with any known reaction to the exposure to isocyanate Mr. Malan reports, asthma or otherwise." [Resp Ex. G, p. 66-67]

25. Per Dr. Schwartz, "Dr. Neagle opined that claimant likely had isocyanate-induced asthma on 03/11/17 but he did so without accounting for Mr. Malan's focal right upper lobe pulmonary infiltrate and right hilar lymphadenopathy evident on his chest CT scan on 03/10/17. Asthma is an airway disease and would not cause a focal pulmonary infiltrate to occur, regardless of the etiology of the asthma, hence Mr. Malan's right upper lobe infiltrate cannot be explained by a diagnosis of isocyanate-induced asthma."

26. Dr. Schwartz further opined, "it was additionally preposterous for Mr. Malan's physicians to diagnose the claimant with chemical pneumonitis, as the inhalation of an irritant fume would not cause injury to just the right upper lobe, as the upper

lobes of the lungs get significantly less ventilation and, therefore, less exposure to an inhaled toxin than the lower portions of the lung. An inhaled irritant that moved down the airways of the lungs and reached the alveoli would cause a more diffuse lung injury and not result in an injury to only one small area of the right lymphadenopathy, a finding that does *not* occur in asthma attacks from chemical exposure but is a *typical* inflammatory reaction in patients with pneumonia." [Resp. Ex. G, p. 67]

27. Dr. Schwartz concluded that "CAP, rather than chemical pneumonitis or isocyanate-induced asthma, is a much more likely diagnosis to account for Mr. Malan's acute respiratory illness in March. CAP is a very common illness as it occurs in 4-5 million Americans each year. While no risk factor is required to have CAP, cigarette smoking is a well-known risk factor for CAP and the claimant has been a smoker prior to his acute respiratory illness in March 2017." [Resp. Ex. G, p. 67]

28. Dr. Schwartz noted that "in deciding that claimant did not suffer from CAP, Dr. Neagle attributed diagnostic importance that no causative organism was found to be responsible for Mr. Malan's pneumonia. However, there is no diagnostic importance of this finding. It has long been known that the majority of hospitalized patients with CAP who undergo an exhaustive evaluation to identify the organism causing their pneumonia do not have an organism identified. A recent study of the etiologies of CAP in adults in the U.S. demonstrated that we can only identify the cause of CAP in approximately 38% of cases that are severe enough to require hospitalization. The most common etiologies of CAP were shown not to be bacteria, but respiratory viruses, organisms which are known to be difficult to identify and have long been known to cause airway inflammation and bronchial hyperreactivity as seen in Mr. Malan when he was acutely ill." [Resp. Ex. G, p. 68]

29. Dr. Neagle admitted that there is no way to quantify isocyanate exposure. There are no diagnostic tests which would show isocyanate levels in Claimant's blood or lungs. There are no objective tests of any kind which could show that an individual was or was not exposed to an isocyanate. [Deposition of Dr. Neagle, p. 17-18]

30. Dr. Schwartz acknowledge Claimant probably had some inhalation of isocyanate, but he testified that this inhalation did not cause, aggravate, or accelerate any condition for Claimant. [Deposition of Dr. Schwartz, p. 16-17]

31. Dr. Schwartz testified that Claimant underwent spirometry testing on multiple occasions. Per Dr. Schwartz, spirometry testing is a common way to look at lung capacity and airflow. Dr. Schwartz noted Claimant's spirometry testing was normal. [Hearing Transcript, p. 79] Dr. Schwartz testified Claimant has no evidence of asthma. He testified Claimant has had no testing done to determine airflow obstruction which would be necessary for an affirmative diagnosis.

[Hearing Transcript, p. 81] Of the testing that was completed, Dr. Schwartz testified it was not consistent with a diagnosis of asthma.

32. Dr. Schwartz testified Claimant did not tell him that he was coughing prior to the alleged exposure. Dr. Schwartz noted that this supported his conclusion Claimant had a respiratory infection. Dr. Schwartz testified, "I believe he had a respiratory infection, likely viral related, that caused an asthmatic reaction and he had clear evidence on his CT scan of focal area of infiltrate, an enlarged lymph gland on that side, quite consistent with infection. So, he had pneumonia, so we call it community-acquired pneumonia to distinguish it from something that was developed in the healthcare environment." [Hearing Transcript, p. 85-86]

33. Dr. Neagle testified that in his opinion Claimant's CT scan was not consistent with community-acquired pneumonia, but that he could not rule out an infection. [Deposition of Dr. Neagle, p. 30 at 6-12]

34. Dr. Schwartz testified that Dr. Neagle did not think Claimant had community-acquired pneumonia because his area of infiltrate was small and his oxygen requirement was large. Dr. Schwartz disagreed and testified that the infection caused bronchospasms which would account for low oxygen levels. [Hearing Transcript, p. 87 at 6-18]

35. Per Dr. Schwartz, "the evidence on the CT is quite clear-cut…he had a focal which means a localized infiltrate in the upper portion of his right lung near towards his spine, so he's got a small area of infiltrate congestion that's evident on the CAT scan and the other finding that the radiologist described which I reviewed and confirmed was that a lymph node on the right side was enlarged and lymph nodes become enlarged typically from infection." [Hearing Transcript, p. 86-87] Dr. Schwartz explained in his report that lymph nodes do not enlarge due to isocyanate exposure. [Resp Ex. G]

36. Dr. Schwartz testified that Dr. Neagle was "quite wrong about a very basic point of physiology and that is as we inhale, most of our air goes to the lower part of our lung…so when somebody has an inhalation exposure, the substance will go everywhere in the lungs…so if somebody was going to have some damage as a result of an inhaled chemical, they will demonstrate congestion in the mid or lower portion of the lung, not the upper portion and Dr. Neagle was confused and wrong about that point of physiology." [Hearing Transcript, p. 87-88]

37. Per Dr. Schwartz' testimony, "single exposures from isocyanates causing lung issues just sort of doesn't occur." Dr. Schwartz testified there is no evidence Claimant had become sensitized to isocynates in his prior work in the spray foam industry. Even if he were sensitized, only a small percentage may develop an asthmatic reaction. Dr. Schwartz noted, "you don't have to have any predisposing conditions in order to get pneumonia but Mr. Malan's smoking was a well-known risk factor to develop pneumonia." [Hearing Transcript, p. 88-89]

38. Dr. Schwartz opined to a reasonable degree of medical probability no injury-producing incident occurred on March 3, 2017 and Claimant's lung issues were not caused, aggravated, or accelerated by any overspray which claimant may have encountered on that date.

39. The ALJ credits Dr. Schwartz' opinions, as set forth in his testimony and report, that Claimant most likely suffered from community acquired pneumonia (CAP) and finds it highly persuasive for a number of reasons. First, Claimant had a significant cough before the alleged exposure. Claimant, and Mr. Stoddard, both testified that Claimant had a cough before the alleged exposure. The cough, as described by Mr. Stoddard, had been present for about a week before the alleged incident. The severity and persistence of the cough, and the fact that Claimant did not appear to be "his healthy self" caused Mr. Stoddard to tell Claimant to go see a doctor. Moreover, the severity of the cough prevented Claimant from being able to smoke a cigarette on the day of, but before, the alleged incident. Second, Claimant underwent a CT scan when he was hospitalized on March 10, 2017. The radiologist opined that the CT scan showed "patchy infiltrates in the medial aspect of the right upper lobe suspicious for an infectious process." The opinion of the radiologist is consistent with Dr. Schwartz' opinion that the presence of patchy infiltrates is inconsistent with exposure to isocyanates and consistent with an infection. The CT scan also showed an enlarged lymph node, which Dr. Schwartz also indicated is indicative of an infection and inconsistent with exposure to isocyanates. Moreover, the CT findings were isolated to the right upper quadrant of Claimant's lungs. As explained by Dr. Schwartz, which the ALJ found credible, if Claimant's lung condition was caused by the inhalation of isocyanates, you would expect to see findings bilaterally, and lower in the lungs. Third, as testified to by Dr. Schwartz, Claimant's asthma diagnosis – which was provided by Dr. Neagle - has not been confirmed through appropriate testing, such as a methacholine challenge test.

40. The ALJ is mindful that there is evidence contained in the record which could lead one to find that Claimant did not have an infection or CAP. However, the ALJ finds that Dr. Schwartz credibly and persuasively addressed those matters in his testimony and report.

41. The ALJ does not credit the opinions of Dr. Neagle for a number of reasons. First and foremost, Dr. Neagle has not credibly explained the timing of Claimant's symptoms compared to the alleged exposure. Dr. Neagle was not aware of Claimant's persistent and worsening cough that predated Claimant's alleged exposure by almost a week. As found, and previously stated above, the cough prevented Claimant, who was smoking a pack of cigarettes a day, from being able to smoke a cigarette on the day of, but before, the alleged exposure. Second, based upon Dr. Neagle's testimony, it appears that at the time of his original diagnosis, he was not familiar with the latency period between the exposure to isocyanates and the development of symptoms. [Deposition

Transcript, p.22-24.] Dr. Neagle testified that since he has been involved in Claimant's care, he has read additional literature regarding the matter. He indicated that based on his understanding of the literature, and his understanding that Claimant's symptoms allegedly arose approximately 48 hours after the alleged exposure, the onset of Claimant's symptoms is consistent with the literature. [Deposition Transcript, p.22-24.] Such testimony appears to be directed at the opinion set forth in Dr. Schwartz' report which indicates one would expect a much faster onset of symptoms if Claimant had been exposed and was sensitized to isocyanates. [Resp. Exhibits, p. 66-67]. However, regardless of the latency period between the exposure and the onset of symptoms, Dr. Neagle did not provide a credible or persuasive opinion to explain the onset of Claimant's symptoms approximately one week before the alleged exposure. Second, Dr. Neagle did not have a credible and persuasive explanation for Claimant's right swollen lymph node and patchy infiltrates in the medial aspect of the right upper lobe of Claimant's lungs. Third, Claimant was evaluated by Dr. Neagle on April 11, 2017 and advised by Claimant that his claim was being contested. [Claimant's Hearing Exhibits, p. 3-4.] Upon being advised that his claim was being denied, Dr. Neagle indicated in his April 11, 2017, report that Claimant suffered "a significant exposure to spray foam insulation, which contains isocyanates." However, during his deposition, Dr. Neagle agreed that there was no way to quantify the amount of isocyanate to which Claimant was exposed. [Deposition Transcript, p. 17-20] Dr. Neagle also indicated in his report that prior to the exposure, Claimant did not have any prior lung asthma or disease. However, as previously found, Claimant had a cough that was getting progressively worse during the week leading up to the alleged exposure.

CONCLUSIONS OF LAW

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

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

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

evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. Section 8-43-201.

4. With regard to compensability, C.R.S. Section 8-43-201 states, "A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence." The claimant always carries the initial burden of proof in a workers' compensation case." *DiCamillo v. Gosney & Sons, Inc.* W.C. No. 4-328-945 (May 21, 1998).

5. The preponderance standard is met when "the existence of a contested fact is more probable than its nonexistence." *Industrial Com. of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *People v. Taylor*, 618 P.2d 1127 (Colo. 1980). The question of whether Claimant met his burden of proof to establish a compensable injury is one of fact for determination by the judge. *See Faulkner v. I.C.A.O.*, 12 P. 3d 844 (Colo. App. 2000).

6. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. C.R.S. Section 8-41-301(1)(b)*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). If a party has the burden of proof by a preponderance of the evidence, and the evidence presented weighs evenly on both sides, the finder of fact must resolve the question against the party having the burden of proof. *Town of Castle Rock v*. *I.C.A.O.*, 2013 COA 109 (Colo. App. 2013); *Schocke v. State*, 719 P.2d 361 (Colo. App. 1986).

7. Claimant has stipulated that this is not an occupational disease claim. The sole issue before the court is whether a chemical exposure on March 3, 2017 caused, aggravated, or accelerated any condition in claimant's lungs. Claimant has failed to meet his burden of proving that it is more probably true than not that he suffered an

injury to his lungs in the course and scope of his employment on or around March 3, 2017. The persuasive and credible evidence shows that claimant's symptoms are related to community acquired pneumonia.

8. The ALJ notes significant inconsistencies between Claimant's testimony and Claimant's medical history which is well-documented in his medical reports. The ALJ further notes inconsistencies between Claimant's testimony and the testimony of Mr. Stoddard.

9. The ALJ finds the testimony of Dr. Schwartz as to the issue of causation credible and persuasive. The ALJ accepts the opinions of Dr. Schwartz as more credible and persuasive than those of Dr. Neagle. The ALJ accepts Dr. Schwartz' opinion that claimant's work activities on March 3, 2017 did not cause, aggravate, or accelerate Claimant's condition and that Claimant did not develop an occupationally induced respiratory condition. [Exhibit G, p. 68]

10. The ALJ concludes that that Claimant has failed to sustain his burden of proof to establish a compensable injury to his lungs on March 3, 2017.

ORDER

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

1. Claimant's claim for workers' compensation benefits arising out of the alleged March 3, 2017 incident is hereby denied and dismissed.

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

DATED: February 2, 2018

Glen B. Goldman

_____

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable injury on August 2, 2017.

II. Whether Claimant established, by a preponderance of the evidence, that she is entitled to reasonable and necessary medical treatment.

FINDINGS OF FACT

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

1. Claimant was born on April 23, 1964 and was 53 years of age at the time of the hearing.

2. Claimant worked for Pro Drivers, a "subsidiary" of Employbridge Holding Company.

3. Claimant was employed as a driver. Claimant's job duties included delivering equipment to clients. Equipment included delivering Comcast boxes, medical supplies and metal on flatbed trucks.

4. In May of 2017, Claimant allegedly injured her low back while transporting milk to "Scoop" ice cream. Claimant was allegedly moving a dolly containing five crates of milk, when the dolly tipped and claimant jerked to grab the milk, allegedly pulling her back. This alleged injury was not part of this hearing. (*Hearing* p. 10, ll:3-8)

5. Claimant reported this injury but refused workers' compensation.

6. Claimant was seen by a chiropractor Justin Dukes, D.O. as a result of this alleged injury. (*Hearing*, p. 10, l:21)

7. Claimant was originally examined by Dr. Dukes on May 5, 2017. Claimant was complaining of acute low back dysfunction. Claimant rated her pain as a 6 out of 10 which was deep and burning. (*Respondents' Exhibit* A, p. 1)

8. Claimant continued to suffer from low back dysfunction and treated with Dr. Dukes in May, June and July. Claimant last treated with Dr. Dukes on July 29,

2017. Claimant continued to complain of acute low back dysfunction with her pain at a 6 out of 10. (*Respondents' Exhibit* A)

9. Claimant also testified that her symptoms were consistent during her treatment with Dr. Dukes and that her pain level was roughly a 9 out of 10. (*Hearing*, p. 11, ll: 1-8.) Claimant also testified that despite having 9/10 pain, she was able to work. (*Hearing*, p. 11, ll: 9-10.)

10. Claimant testified as a result of this injury her symptoms continued after July 29, 2017.

11. Claimant testified she was injured on August 2, 2017, working at CTDI pulling a lift gate up when she felt pain in her low back. Claimant originally testified on direct the incident occurred at 10:00 a.m. with her shift starting at 4:00 a.m. On cross-examination, Claimant testified the incident occurred at 3:00 p.m. (*Hearing*, p. 12, ll:1-6)

12. Jennifer Warren, the area operations manager for Respondent-Employer, testified. Ms. Warren testified her job duties include meeting and getting to know the drivers, the clients, job assignments as well as what happens on the job. Ms. Warren testified if there is an on the job injury it comes to her attention. Ms. Warren testified employees are taught to notify both the client and the employer of an injury right away. Ms. Warren testified the reason for this is to investigate the claim. Ms. Warren's testimony is found to be credible. (*Hearing*, p. 20, ll:21-25, p. 21, ll:1-5)

13. Ms. Warren testified she knew the Claimant as a driver for Pro Drivers.

14. Ms. Warren testified review of the CTDI computer records documents the job Claimant was doing at CTDI ended on August 1, 2017. Ms. Warren testified when discussing the alleged incident with Andrea at CTDI they were unaware of any injury. (*Hearing*, p. 21, ll:19-24)

15. Ms. Warren also testified that Claimant first reported that the accident occurred at the dock at CTDI. CTDI pulled all of the camera footage from their dock and they could not find footage of the alleged accident. After footage of the alleged accident could not be found, Claimant indicated the accident occurred at a client's delivery site. (*Hearing*, p. 23, ll:19-23.)

16. Claimant was seen by Dr. Childers on the day of the alleged accident. On Dr. Childers' physical examination he found no gross abnormalities, strength and sensation were normal, Claimant's gait was normal, her straight leg raised test was normal and her reflexes were normal. Other than tenderness of the lumbar spine there was nothing abnormal about Claimant's presentation on August 2, 2017. (*Respondents' Exhibit* C, p. 19)

17. Claimant testified that just prior to the alleged incident of August 2, 2017, her pain level was 7/10 and that after the incident it was 10/10. (Hearing, p. 13, ll: 12-17) Despite indicating her pain level was 10/10 after the alleged incident, Claimant was evaluated by Dr. Childer's the same day, August 2, 2017, and he indicated in his report that Claimant was in "no apparent distress." (*Respondents' Exhibit* C, p. 19)

18. Dr. Childers referred Claimant to Dr. Parker. Dr. Parker first saw Claimant on August 10, 2017. Claimant told Dr. Parker, and she conceded on cross-examination, that her discomfort would fluctuate depending upon the activity. The Claimant admitted this fluctuation occurred prior to August 2, 2017. (*Respondents' Exhibit* D, p. 21)

19. Claimant also told Dr. Parker on August 10, 2017, that although additional treatment was recommended due to her alleged injury that occurred in May of 2017, such treatment was not approved. (*Respondents' Exhibit* D, p. 21)

20. In addition to seeing Dr. Parker, Claimant also had physical therapy. In the August 29, 2017 chart note, the physical therapist educated Claimant on her "normal" age related changes found on her MRI. (*Respondents' Exhibit* E)

21. The evidentiary deposition of Gary B. Childers, M.D. was taken on January 19, 2018 and submitted as evidence. Dr. Childers is a physician who has been licensed to practice for approximately 30 years in family medicine. He is neither board certified nor board eligible. (*Depo. Tr*. p.4 ll:11-23) When Dr. Childers examined Claimant on August 2, he found no muscle spasm. (*Id*. p. 8 ll:13-16) Other than Claimant's complaint of tenderness there were no other findings on physical examination. (*Id*. ll:17-25)

22. Dr. Childers admitted his opinion on causation was predicated upon Claimant's self-reported history to him. (*Id*. p.10 ll:15-17)

23. Dr. Childers conceded the problem as a provider is they don't know whether the patient is being honest with them with regard to where their symptoms are or what caused the symptoms. (*Id*. p.20 ll:13-17)

24. Review of the MRI, according to Dr. Childers, although abnormal were not unusual for someone of Claimant's age in fact found in 60% of individuals over the age of 40 were arthritis and were not necessarily causing symptoms. (*Id*. p.27 ll:1-25 and p.28 ll:1-2)(*See also* p.30 ll:1-8)

25. Claimant was evaluated in an Independent Medical Examination by Kathleen D'Angelo, M.D. on December 24, 2017. Dr. D'Angelo's evidentiary deposition was taken on January 26, 2018. Dr. D'Angelo is a Board Certified Internal Medicine Specialist who moved to Colorado in 2001, Level II Accredited since that time with education training experience to examine, diagnose and treat

patients with low back complaints. (*Depo* 2, p.4 ll:7-19) Dr. D'Angelo was offered as a medical expert in occupational medicine with no objection from Claimant. (*Id*. p.5 ll:1-2)

26. At the time of Dr. D'Angelo's Independent Medical Examination, she did not have access to Dr. Dukes' records. These were provided to her on January 25, 2018, and reviewed prior to her deposition. Claimant reported to Dr. D'Angelo her symptoms existed prior to the alleged August 2, 2017 incident. (*Id*. p. 9 ll:1-4) Dr. D'Angelo asked merely because on August 2, 2017 between 11:37 a.m. and 1:41 p.m., Claimant complained to Dr. Childers of some tenderness, which did not mean it was due to what allegedly occurred at 9:15 a.m. that morning. "No. no. I mean, certainly not when you look at her MRI. She certainly had a lot of degenerative changes." (*Id*. ll:17-25; p.10 ll:1-7)

27. Dr. D'Angelo testified merely because Claimant had palpable tenderness at the lumbar spine on August 2, did not mean Claimant actually injured her lumbar spine. (*Id*. ll:9-12)

28. With regard to the MRI findings, Dr. D'Angelo testified they were not due to the alleged injury. (*Id*. ll:8-16)

29. Dr. D'Angelo volunteered, "clearly, August 2nd, the same day as her "injury" she had a normal exam. Certainly nothing that would lead me to believe that there was anything significant brewing. "I - - I can't explain excruciating back pain based upon what she looked like immediately after her injury, unless there was an intervening event." (*Id*. p.23 ll:12-18)

30. Dr. D'Angelo further offered, "she stated that from the very beginning of her May injury until the time I saw her, she had lower back pain with radiation into her right leg up to the level of the knee. (Id. p.24 ll:3-5) Claimant did not claim to Dr. D'Angelo the alleged August 2, 2017 incident aggravated, accelerated or exacerbated the pain in her right leg, rather, she related it to the May injury. "She stated that from the time of the May injury until she saw me, her symptoms had really not changed at all." (*Id*. ll:8-14)

31. Dr. D'Angelo further testified, "there is no way to state within a reasonable degree of medical probability the care claimant received beginning August 2 was reasonably needed because of what occurred on August 2." Dr. D'Angelo explained, "no. And that is very significant, not only did she complain about 6 out of 10 pain on that particular date 5 days prior to her August injury, but that level of pain seemed to be fairly consistent from beginning to end of the chiropractic notes, which suggests to me that pain wasn't going anywhere anytime soon." (*Id*. p.30 ll:10-21)

32. With regard to restrictions subsequent from August 2, Dr. D'Angelo testified based upon a complete review of the medical evidence, meeting Claimant and

evaluating Claimant. Dr. D'Angelo testified the restrictions Dr. Childers gave were not reasonably needed because of what she alleged occurred on August 2:

> No. I mean, clearly on that particular date what she had was subjective complaints of pain that did not appear to correspond to objective abnormalities on physical exam. They also did not seem to be all that different from her complaints of pain five days earlier when she was seen by the chiropractor at which time she was performing regular duty. So I don't really see any physiological reason for restrictions. There was no tissue at risk of worsening damage with her regular duties.

(*Id*. p. 31 ll:7-15)

33. It is specifically found Claimant failed to meet her burden of proof. It is specifically found the testimony of Jennifer Warren to be credible and persuasive. It is specifically found the testimony of Kathleen D'Angelo, M.D. to be credible and persuasive. It is specifically found that the testimony of Claimant is not credible. It is specifically found Claimant did not injure her back on August 2, 2017 in the course and scope of her employment that required healthcare and/or disabled the Claimant from performing her regular job duties.

CONCLUSIONS OF LAW

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

General Provisions

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

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

rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 134 P.254 (Colo. 1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insuranace Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2007). A worker's compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable injury on August 2, 2017.

For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires Claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id*. An activity arises out of and in the course of employment when the activity is sufficiently related to the conditions and circumstances under which the employee generally performs her job functions such that the activity may reasonably be characterized as an incident of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

The right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000).

Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp*., 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.*, WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

It is specifically concluded that Claimant's testimony is not credible for a number of reasons. First, Claimant alleges she injured herself on August 2, 2017, while driving for CTDI. According to Ms. Warren, the driving assignment for CTDI ended on August 1, 2017. Second, Claimant initially indicated the accident occurred at CTDI. Once CTDI reviewed their surveillance footage and could not find any evidence of the alleged accident, the location of the alleged accident was changed to a client of CTDI's. Third, Claimant obtained medical treatment the same day of the alleged accident. Although Claimant testified the accident caused back pain of 10/10, Dr. Childer's evaluated Claimant the day of the alleged accident and noted Claimant was in no apparent distress. Fourth, Claimant alleges she initially injured her back in May of 2017 while delivering milk to Scoop Ice Cream. Claimant's medical records after May of 2017, but before August 2, 2017, indicate Claimant had persistent back pain of 6/10. Then, at hearing, Claimant testified that she had persistent back pain of 9/10 between the same period of time and that she was able to work during this period of time. Claimant's pain complaints are inconsistent and it does not make sense to the ALJ that Claimant could have pain of 9/10 but continue to work – even modified duty. Therefore, this ALJ does not find Claimant's pain complaints, which are the underpinnings of her claim, to be credible.

It is specifically concluded Claimant failed to meet her burden of proof. It is specifically concluded the testimony of Jennifer Warren to be credible and persuasive. It is specifically concluded the testimony of Kathleen D'Angelo, M.D. to be credible and persuasive. It is specifically concluded Claimant failed to establish by a preponderance of the evidence that she injured her back on August 2, 2017 in the course and scope of her employment and that such injury required healthcare and/or disabled Claimant from performing her regular job duties.

II. **Whether Claimant established, by a preponderance of the evidence, that she is entitled to reasonable and necessary medical treatment.**

Because the ALJ concluded Claimant failed to establish by a preponderance of the evidence that she suffered a compensable injury on August 2, 2017, this issue is moot.

ORDER

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

1. Claimant's claim is denied and dismissed.

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

DATED: February 21, 2018

Glen Goldman

_____

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

ISSUES

I. Whether Respondents have produced clear and convincing evidence to overcome the opinion of DIME physician's opinion that Claimant is not at MMI.

II. If Respondents have overcome the DIME physician's opinion on MMI, whether Respondents have overcome the DIME physician's provisional impairment rating.

III. Whether the medical benefits recommended by the DIME physician are reasonable and necessary.

FINDINGS OF FACT

1. On April 10, 2015, Claimant was involved in a non-work-related rear-end motor vehicle accident ("MVA"). Claimant was the restrained driver of a stationary small vehicle that was rear-ended by a mid-size automobile traveling less than 20 miles per hour. Claimant went to the emergency department that day, and then subsequently sought medical treatment at OnPoint Urgent Care on April 21, 2017 for neck and back pain. On physical examination, Claimant had normal neck range of motion, lumbar paraspinous tenderness, and right side cervical paraspinal muscular spasm. Claimant was diagnosed with a cervical strain/sprain and lumbar strain/sprain. Claimant underwent chiropractic treatment and physical therapy after the April 10, 2015 accident.

2. On October 11, 2016, Claimant was involved in a second MVA in the course and scope of her employment with Respondents. Claimant's vehicle was side-swiped by another car attempting to avoid a rear-end collision.

3. Claimant selected Concentra Medical Center as her designated provider and presented to Carrie J. Burns, M.D. on October 11, 2016 with complaints of neck, mid back and low back pain. Claimant reported being involved in a MVA in April 2015. On physical examination, Dr. Burns noted tenderness in the C1-3 right paraspinal and right trapezius muscle, T8-12 right paraspinal and right rhomboid muscle, and L2-T12 tenderness right paraspinal. Dr. Burns further noted cervical, thoracic and lumbosacral muscle spasms on the right side, and full range of motion in the cervical, thoracic and lumbar spine. She diagnosed Claimant with a cervical and lumbar strain and released Claimant to work without restrictions. Claimant was not prescribed medication.

4. Claimant returned to Dr. Burns for a follow-up evaluation on October 17, 2016 with complaints of a burning sensation, bilateral lumbar pain and stiffness, and right neck and upper back pain. Claimant rated the pain 8/10, reporting that the right side was worse than the left. Dr. Burns provided an assessment of a cervical and lumbar

strain and thoracic myofascial strain. She referred Claimant to massage therapy and physical therapy.

5. On October 24, 2016, Claimant presented to Sharon O'Connor, M.D. at Concentra with continued complaints of back and neck pain. Claimant reported 25% improvement in her back pain.

6. During a follow-up evaluation with Dr. Burns on November 8, 2016, Claimant reported improvement in her neck symptoms, but a persistent ache in her lower back. Claimant reported that the pain was worse on the right side.

7. On November 29, 2016, Gary Scofield, PA-C evaluated Claimant at Concentra. Claimant reported improvement but still experienced mild to moderate right neck and right lower back pain, which she rated a 2/10.

8. Massage Therapist, Cynthia Guy, treated Claimant on November 30, 2016. Claimant stated her cervical and thoracic pain was improved, but her lumbar pain had increased. Claimant reported most of her pain and tension being in the right lower quadrant.

9. Cynthia Guy again treated Claimant on December 13, 2016. Claimant reported overall improvement in her cervical and thoracic spine, and some pain in the lumbar spine, with general all-around improvement in that area as well.

10. Claimant subsequently transferred care to Caroline Gellrick, M.D. Dr. Gellrick performed a medical record review on December 15, 2016 in which she documented Claimant's April 2015 MVA..

11. Dr. Gellrick first evaluated Claimant on December 22, 2016. Claimant reported she had approximately one month of treatment for the 2015 MVA and "everything resolved" with no lingering residual symptoms. In connection with the October 2016 MVA, Claimant reported 7/10 pain in her cervical, lumbar and lower thoracic spine, with random shooting pains in the low back into the right leg. Claimant reported the right side of the cervical trapezius area felt worse than the left. On physical examination, Dr. Gellrick noted paraspinous muscle spasms in right side of neck worse than left, cervical range of motion 85% normal with positive Spurling's test, and "huge" trigger points in the right trapezius and left trapezius, with the right side being particularly bothersome. Dr. Gellrick diagnosed Claimant with a cervical strain with right greater than left trapezius spasm, myofascial thoracic strain resolving, myofascial lumbar spine strain resolving, with no focal neurological deficits, and reactive adjustment disorder. She administered one trigger point injection to the left trapezius and two injections to the right trapezius and recommended Claimant undergo an x-ray of the cervical spine.

12. Claimant returned to Dr. Gellrick for a follow-up evaluation on December 30, 2016. Cervical x-rays demonstrated cervical kyphosis but were otherwise remarkable. Dr. Gellrick noted Claimant's symptoms were worse in the cervical spine than the low

back and thoracic spine. On physical exam, Dr. Gellrick noted very tight trigger points in the trapezius region, worse on the right than the left. She administered repeat trigger injections and recommended physical therapy, massage therapy, chiropractic treatment, Lidopro cream, and a psychological evaluation with Dr. Torres.

13. Dr. Gellrick reevaluated Claimant on January 12, 2017. Claimant reported continued pain, which she rated a 7.5/10. Dr. Gellrick noted very tight trigger points on the right and left sides and administered repeat trigger point injections.

14. Claimant was involved in a third MVA on January 17, 2017. Claimant was the restrained driver and was struck by another vehicle. Claimant presented to OnPoint Urgent Care with neck pain, back pain and a headache. Claimant was diagnosed with a neck strain and prescribed Norco and Medrol, Soma. Cervical x-rays revealed curvature reversal but were otherwise normal.

15. Claimant began receiving treatment from Donald D. Aspegren, D.C. on January 19, 2017. She reported being involved in the January 17, 2017 MVA. Claimant rated her pain 7-10/10. In subsequent visits on January 23, January 25 and January 30, 2017, Claimant rated her 7-10/10, 6.5/10, and 7/10, respectively.

16. Physiotherapy Associates physical therapy notes dated January 19, January 23 and March 24, 2017, document Claimant's cervical pain as 9/10, thoracic 8/10, and lumbar 6/10.

17. Claimant saw Dr. Gellrick on January 26, 2017 and informed her of the January 17, 2017 MVA. Claimant reported being rear-ended by a car driving 10-15 miles per hour. She reported being in a turned position looking over her left shoulder at the time of impact. Claimant was wearing her seatbelt and did not strike her head. Claimant reported feeling an onset of increased pain in the entire spine with spasm. She rated the pain 7/10. Dr. Gellrick noted the following on physical examination: tight trigger points in both the left and right trapezius, 85% normal cervical range of motion, pain with cervical extension, and tenderness of the paraspinous muscles the cervical spine. Claimant indicated she was experiencing pain in her left low back.

18. Dr. Gellrick noted Claimant experienced a "[w]orsening of condition with new MVA January 17, 2017 with left-sided symptoms present now responding to chiropractic treatment." She placed Claimant at MMI as of January 17, 2017, stating,

> We have a new injury which by history is not work comp compensable. If this changes this examiner would certainly be happy to see the patient back under work comp since she was driving the company vehicle but otherwise must go to MMI today with notification with this examiner of a new injury dated January 17, 2017 aggravating the entire spine in the latest car accident and the patient was turned to the left with jolted the neck even more.

Dr. Gellrick suggested Claimant's treatment should proceed under a new claim for the January 17, 2017 MVA.

19. On June 15, 2017, Claimant underwent a DIME with Kristin D. Mason, M.D. Dr. Mason physically examined Claimant and reviewed medical records from October 11, 2016 through February 22, 2017, including the Physiotherapy Associates record from January 19, 2017, and Dr. Aspegren's January 19 and January 25, 2017 records.

20. Claimant reported to Dr. Mason receiving physical therapy through her private health insurance since being placed and MMI and her condition had improved. Claimant reported neck pain predominantly on the right side radiating into the scapular area and low back pain. Claimant felt the neck generally bothered her more, rating the pain at a 4-5/10.

21. Dr. Mason noted Claimant was involved in an April 2015 MVA and her symptoms had resolved. Regarding the January 17, 2017 MVA, Dr. Mason noted, "She feels immediately following the second motor vehicle accident she was about 30% worse, mainly marked by more prominent headaches and increased bad days. She definitely feels the first motor vehicle accident was the worse one and caused her the most symptoms."

22. On physical examination, Dr. Mason noted trigger points in the right trapezius and levator scapula. She further noted the following dual inclinometer range of motion measurements: forward flexion 45 degrees, extension 50 degrees, right side bending 45 degrees, left side bending 30 degrees, right rotation 82 degrees and left rotation 82 degrees. Dr. Mason diagnosed Claimant with a cervical sprain/strain with myofascial findings, and possible underlying facet disorder status post MVA times two.

23. Dr. Mason opined Claimant was not at MMI, stating,

> She did have a subsequent injury but it does not appear that her pain levels increased substantially or that she had any brand new complaints so as I sit here today, based on the information I have, it looks like at most she had a temporary exacerbation from the other accident in January and the ongoing difficulties she is having likely dates back to the October accident.

24. Dr. Mason recommended Claimant complete physical therapy and undergo a reevaluation with Dr. Torres. She suggested Claimant might also benefit from manipulation and acupuncture. Dr. Mason assessed a provisional 9% total whole person impairment, consisting of a 4% impairment under Table II(B) of the AMA Guides, and 5% for range of motion deficits.

25. On October 11, 2017, Brian Reiss, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Reiss reviewed Claimant's medical records and physically examined Claimant. Dr. Reiss noted that he did not have

any of Claimant's medical records prior to the 2016 MVA and, as such, he could not confirm whether or not Claimant truly had symptoms prior to the October 2016 MVA. Dr. Reiss remarked that it would be unusual for an individual to only have continued symptoms from a side-wipe accident and not from two separate rear-end accidents. Regarding the October 2016 MVA, he found Claimant's reports of 2/10 pain in physical therapy notes to contradict the 7/10 pain reported to Dr. Gellrick in December 2016. He noted it was unclear if Dr. Gellrick believed Claimant's symptoms from the October 2016 MVA had resolved and Claimant's current symptoms were new and related to the January 2017 MVA. Dr. Reiss opined Claimant had reached MMI without restrictions and without any need for further care.

26. Dr. Reiss testified at hearing on behalf of Respondents as an expert in orthopedic surgery with a subspecialty in spine disorders. Dr. Reiss is board certified and Level II accredited by Division of Workers' Compensation. Dr. Reiss opined Claimant reached MMI as of November 29, 2016, based on her low pain levels at the time. He stated it is unclear why Claimant's pain level subsequently changed so dramatically. Dr. Reiss opined that it is more probable a rear-end collision, rather than the side-swipe accident, caused Claimant's issues.

27. Dr. Reiss disagreed with Dr. Mason that the January 2017 MVA was a temporary exacerbation, stating such determination was medically improbable and could not be based solely on Claimant's pain level. He testified the January 2017 MVA was at least equally responsible for Claimant's symptoms. Dr. Reiss opined Dr. Mason's determination that Claimant did not report a substantial increase in pain or any "brand new" complaints following the January 17, 2017 MVA is incorrect. Dr. Reiss referred to Claimant's pain levels increasing from 7/10 to 9/10 after the January 2017 MVA, opining that such increase in pain complaints is substantial. He also referred to Claimant's report of a 30 percent worsening of her symptom with increasing bad days, newly reported headaches, and "new" left-sided complaints.

28. Dr. Reiss opined additional physical therapy, chiropractic treatment, and acupuncture are not reasonable or necessary. He testified Claimant has exceeded physical therapy maximums as recommended by the Guidelines, and he sees no compelling reason to deviate from the Guidelines. Dr. Reiss further testified that any additional physical therapy deemed reasonable and necessary could be performed as maintenance care.

29. Claimant testified at hearing that the symptoms from the April 2015 MVA resolved after a few sessions of physical therapy. She stated she had no back or neck complaints in the weeks prior to the October 2016 MVA. Claimant testified the 2016 MVA resulted in neck and back pain, right worse than left. In the days leading up to the January 2017 MVA Claimant continued to experience pain in the cervical spine and mild pain in her mid and low back. Claimant testified subsequent to the January 2017 MVA her neck and back pain worsened, but she returned to her pre-January 2017 MVA baseline in April 2017. Claimant testified that she continued to experience neck and back pain after April 2017 but continued to receive physical therapy and massage until

November 2017 through her private insurance. Claimant testified that her neck pain at the time of hearing had been reduced to a 3/10 and her low back pain had essentially resolved. Claimant testified that she had not been symptom free from her work-related injuries since the October 2016 MVA. Claimant stated she desires additional physical therapy, chiropractic treatment and acupuncture.

30. Claimant's testimony is found credible and persuasive.

31. The ALJ credits the opinion of DIME physician Dr. Mason over the conflicting opinions of Drs. Reiss and Gellrick.

32. Respondents failed to overcome the DIME physician's opinion on MMI by clear and convincing evidence.

33. Claimant has proven by a preponderance of the evidence the medical treatment recommended by Dr. Mason is reasonable, necessary and related to the October 2016 work injury.

34. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals*

Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Overcoming the DIME Physician's Opinion

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI.

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the

province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Respondents contend Dr. Mason was clearly wrong in determining the January 2017 was a temporary exacerbation, as Claimant's pain substantially increased after the January 2017 MVA and Claimant developed worsening and new symptoms. The ALJ disagrees. As of January 12, 2017, Claimant's pain was 7.5/10. Subsequent to the January 2017 MVA, the medical records document 6.5-9/10 pain. Dr. Mason clearly took this into consideration and determined the change was not substantial, as she reviewed the January 19, 2017 Physiotherapy Associates note and Dr. Aspegren's January 19 and January 26, 2017 medical notes which reflect Claimant's 6.5-9/10 pain. Moreover, although Claimant reported to Dr. Mason she felt 30 percent worse after the January 17, 2017, Dr. Mason specifically notes this was "immediately following" the January 2017 MVA.

Regarding new and worsening symptoms, Claimant's left-sided symptoms were present to some extent prior to the January 2017 MVA. The medical records prior to the January 2017 MVA document bilateral and left-sided complaints and objective findings. The ALJ acknowledges there is no mention of headaches in the pre-2017 MVA medical records; however, such fact alone does not persuade the ALJ Dr. Mason clearly erred in concluding the January 2017 MVA was a temporary exacerbation and Claimant is not at MMI. Claimant credibly testified her symptoms worsened after the January 2017 MVA and returned to baseline by April 2017. Dr. Mason's opinion that Claimant is not at MMI is supported by the medical records and Claimant's credible testimony. The evidence presented presents a mere difference of opinion in that of Dr. Mason, Dr. Reiss and Dr. Gellrick. Based on the totality of the evidence, there is insufficient credible and persuasive evidence establishing Dr. Mason's opinion on MMI was highly probably incorrect.

Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury or disease and the condition for which benefits or compensation is sought. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo.App. 1997).

As found, Claimant has proved it is more likely than not that the medical treatment recommended by Dr. Mason is reasonable, necessary and related to the

October 2016 work injury. The ALJ credited Dr. Mason's opinion over that of Dr. Reiss with respect to the reasonableness and necessity of the recommended medical treatment.

ORDER

It is therefore ordered that:

I. Respondents failed to overcome the DIME physician's opinion on MMI and provisional impairment by clear and convincing evidence. Claimant is not at MMI.

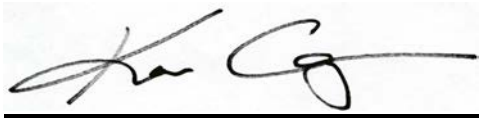
II. Claimant established by a preponderance of the evidence entitlement to the medical treatment recommended by the DIME physician.

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

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

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

DATED: February 21, 2018



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

ISSUES

1. Did Claimant sustain her burden of proof to establish that she suffered a compensable injury within the course and scope of her employment at Respondent?

2. Did Claimant sustained her burden of proof to establish that she is entitled to medical benefits as a result of the alleged work incident?

FINDINGS OF FACT

1. Claimant is a 54-year-old woman who worked for Safeway since 1999 as a truck driver. Claimant's job duties as a truck driver included checking the truck, checking the equipment, hooking up the trailer, making deliveries, driving to various stores, delivering product to various stores, lifting some product that could have fallen off the pallet and driving back to the distribution center.

2. On October 10, 2014, Claimant was driving back to Respondent's Distribution Center when she had to take her mandatory Department of Transportation break. Claimant pulled off on I-25 at Buckeye Road because there was a pull off for trucks. Claimant took a walk on the frontage road next to I-25. While taking her walk, she was struck by a vehicle.

3. The October 11, 2014, medical record from the emergency department of the University of Colorado noted that Claimant did not complain of head and neck pain. Claimant's only complaint of pain was buttock pain and coccyx/pelvis pain. Claimant did not have an altered mental status. On the review of symptoms, Claimant was negative for back pain, joint swelling, neck pain, and neck stiffness. On lumbar examination, there was no swelling, edema, deformity, or laceration. On psych examination, Claimant had a normal mood and affect with normal behavior. Claimant underwent a CT scan of her abdomen and pelvis, which was unremarkable. This was the first examination after the incident with the vehicle. This examination was benign, and there were no complaints of neck and head pain. There were minimal complaints of low back pain.

4. On October 14, 2014, Claimant was evaluated at Midtown Occupational Medicine (Midtown Occupational). Claimant stated that her pain was primarily in her coccyx region and in her left buttocks. Claimant denied any other symptoms, and she was ready to return to work. On her review of symptoms, Claimant was negative for weakness and paralysis of the lower extremities. On examination, Claimant had full range of motion of her back, both anterior and posterolaterally and rotation. Claimant also had full range of motion of her hips, knees, and ankles, bilaterally. Claimant also had no pain to palpation of her spine. Claimant's diagnosis was a low back strain secondary to trauma. Claimant was given a full duty release, placed at maximum medical improvement (MMI) and given a 0% impairment rating. No further examinations were scheduled. This examination occurred four days after the incident. This examination was benign and fairly normal.

5. During her testimony, Claimant indicated that she had lied to the providers at Midtown Occupational. Claimant unpersuasively and incredibly testified that she was in so much pain at that time of her examination at Midtown Occupational that she could barely stand there, and that her ankle was so swollen that it barely fit in her shoe. It is inconsistent for Claimant to say that she was in so much pain that she could barely stand, but the examination showed that Claimant had 5/5 strength in all four extremities, a normal gait and that her sensation was intact in all four extremities. The medical record also indicates that Claimant had a pleasant mood and affect. Claimant's testimony is not credible.

6. Claimant further testified that she had at least two prior workers' compensation claims, and that she knew how to file a claim with Respondent. Claimant testified that she did not want to file a worker's compensation claim for the October 10, 2014, date of injury because she did not want to sit in Respondent's Wellness Room. Claimant unpersuasively and incredibly testified that the Wellness Room was torture because she had to sit there for 8 hours not doing anything.

7. Claimant testified, that instead of wanting to sit in the Wellness Room, she preferred to work her regular, full time job as a truck driver performing her regular duties. Claimant performed her regular, full time job for almost two years until she was taken off work for a subsequent work-related left knee injury. At the April 28, 2016 evaluation for her left knee pain, Claimant indicated that she was working her full duty work without too much difficulty. Claimant's testimony is illogical and incredible to believe that she could not sit in the Wellness Room because of unbearable pain, but that she could perform her regular, full time duties as a truck driver.

8. Claimant further testified that she went to Israel and went on camping trips. Claimant testified that the Israel trip was miserable because she had to sit on an airplane for 15 hours and sit on tour buses. Nonetheless, Claimant was working full duty, driving a truck, and sitting during her shifts without any pain. None of Claimant's work duties increased her pain. Claimant's testimony is inconsistent with a person who sustained a compensable injury on October 10, 2014.

9. Claimant filed a Workers' Claim for Compensation in September of 2016 for the October 10, 2014, accident because she was running out of money for her treatment. Claimant testified that she wanted to remain outside of the workers' compensation system as long as possible. Claimant admitted during her testimony that one of the reasons that she wanted to file a worker's compensation claim was that she was running out of money. Claimant's actions are inconsistent with her claim of work injury.

10. On October 23, 2014, Jack England, D.O. evaluated Claimant. Claimant complained of left ankle pain going up the leg; swollen and bruised. On examination, Claimant had a normal gait, and her neck examination was within normal limits. There was no complaint of neck pain. Dr. England's assessment was acute left ankle sprain, abrasions to the left ankle, and back pain. This examination occurred approximately 10 days after the incident, and there was swelling of the ankle. However, at the initial

examination at the emergency department and at Midtown Occupational, Claimant presented without any indication of left ankle abrasions or left leg swelling. Claimant also had a normal gait during those examinations. Claimant's left ankle was swollen because of her underlying degenerative condition as determined by the x-ray.

11. Dr. England reexamined Claimant on January 28, 2015. Claimant complained of pain in the left ankle and multiple areas. Dr. England noted that he was double board certified in emergency medicine and familiar with automobile accidents. Dr. England asked Claimant why she was not complaining of pain in these other areas during her initial presentation to the emergency department. Dr. England noted that this was a late injury, but he was going to reevaluate Claimant. Dr. England also opined that it was not uncommon to have injuries that bothered injured persons a few days or a week or so later after the injury. Dr. England ordered diagnostic studies, which were also performed on January 28, 2015.

12. Claimant had multiple pain complaints three months after the incident. The only pain complaint reported to the emergency room was for buttock and pelvis pain. Claimant had reported some mild low back pain to Midtown Occupational. The impressions of the x-rays were mainly negative, except for the coccyx, and even that did not show any defined acute fracture. Even three months after the incident, Claimant's pain complaints did not match any objective findings on diagnostic testing.

13. Claimant underwent a MRI of the left ankle on February 5, 2015. The MRI's results were consistent with a degenerative change of the ankle but not acute traumatic injury. Claimant's alleged pain complaints to her ankle were the result of her underlying arthritis and degenerative changes, which were not caused by the October 10, 2014, incident.

14. On April 30, 2015, Claimant was evaluated by Bharat Desai, M.D. at Panorama Orthopedics Spine Center. Claimant complained of pain on the midsection of her body, especially the tailbone on the left buttock cheek. On examination, Claimant was alert and oriented times 3, and she had appropriate mood and affect. Claimant was tender over her left buttock cheek and over her sacrococcygeal junction. Claimant underwent straight leg raising tests, which were not suggestive of a lumbar issue or low back issue. Dr. Desai noted that the x-rays showed a slightly distracted sacrococcygeal junction but otherwise stable. The lateral issues on her sacrum and pelvis were stable. Dr. Desai recommended a coccyx MRI. At this examination, Claimant did not report any low back pain.

15. Claimant underwent an MRI of the pelvis on May 14, 2015. The MRI showed degenerative tears, which were tendinosis, and not uncommon with age. Most patients with such findings have no history of acute trauma before developing pain symptoms to the area.

16. Claimant was reevaluated by Dr. England on May 14, 2015. Claimant's neck examination was within normal limits. Claimant had a normal gait, and her sensation was within normal limits. Claimant had a normal mood and affect. Dr.

England drafted an addendum to his chart on May 15, 2015. Dr. England noted that the biggest complaint was persistent pain in the coccyx. Dr. England also noted that Claimant complained of cervical spine pain, lumbosacral spine pain, and right knee pain. Claimant's left ankle seemed improved. Dr. England opined that Claimant's conditions were chronic with acute exacerbations at times. This was the first mention of any neck pain in the medical records. This is seven months removed from the October 10, 2014 incident. Claimant did not sustain a neck injury in the alleged trauma. Claimant's alleged neck pain seven months after the incident is due to her underlying degenerative condition.

17. On May 28, 2015, Claimant underwent a lumbar MRI. The MRI's impression was: overall mild lower lumbar spine degenerative change and no acute disc herniation. The radiographic evidence does not show an acute injury. The lumbar MRI shows degenerative changes, which were not caused by the incident. Claimant's degenerative changes are caused by the aging process and living.

18. Michael Horner, D.O., evaluated Claimant on July 16, 2015. Claimant complained of lower back pain that radiated into the buttock and posterior thigh on the right side. Claimant also complained of pain to the thoracic spine. Claimant introduced a new complaint of pain to the mid back. This is the first mention of mid back pain, and this occurred nine months after the October 10, 201, incident.

19. On October 28, 2015, Claimant was evaluated by Patrick Sawyer, PA-C of South Denver Spine. Claimant complained of tailbone pain, low back pain, and pain at the T10 region of the low back. Claimant related all of her pain complaints to the October 10, 2014, incident. Claimant also complained of right lateral thigh pain, and she denied symptoms in her left leg. Claimant brought a new complaint of right lateral thigh pain, which is a year removed from the October 10, 2014, incident. Claimant also noted that she did not have any left leg symptoms, which is different than her previous examinations. Claimant's pain complaints outweighed her objective findings.

20. On December 30, 2015, Claimant was evaluated by Louis Kasunic, D.O. In the review of symptoms, Claimant reported "that the job is the enemy. I work too much to have a life. It is [Respondent's] fault, but I am not willing to give up the pay and benefits I would have to lose if I left the job." Additionally, under review of symptoms, Claimant denied muscle pain and weakness of muscles or joints. Dr. Kasunic opined that Claimant has serious victim issues and that none of her health issues are of her own doing and everything is the fault of her job, but she is unwilling to leave that job.

21. Subsequently, Claimant underwent an MRI of the cervical, thoracic, and lumbar spine on January 7, 2016. The impressions were: ** C5-C6 moderate spinal stenosis, moderate right foraminal narrowing, and abutment and possible compression of the right C6 nerve; ** C6-C7 mild to moderate spinal stenosis, moderate right foraminal narrowing, and abutment and possible compression of the right C7 nerve; ** C3-C4 mild spinal stenosis and moderate left foraminal narrowing; ** T10-T11 moderate spinal stenosis secondary to a right paracentral disc extrusion; ** T11-T12 mild spinal

stenosis; ** Mild congenital cervical spinal stenosis; and ** Chronic left uretero pelvic junction obstruction versus peripelvic cyst.

22. The findings on the January 7, 2016, cervical, thoracic, and lumbar spine MRI were degenerative changes. Claimant had arthritis of the joints and the spaces on the lateral portion of the spine, which was not caused by the work incident.

23. On March 4, 2016, Claimant was evaluated by Zaki Ibrahim, M.D. Claimant complained of back pain that radiated into her legs with right leg pain worse than left. Claimant also complained of numbness and tingling. Claimant noted that her back symptoms have been severe since the October 10, 2014, incident. Dr. Ibrahim stated that Claimant's symptoms have been unabated despite extensive physical therapy and chiropractic treatment. Claimant stated that she underwent a lumbar injection, which only helped her low back symptoms for a short period of time. Dr. Ibrahim reviewed the January 7, 2016, MRI of the cervical, lumbar, and thoracic spine. Dr. Ibrahim opined that each of her MRI studies revealed mild to moderate degenerative changes with no evidence of instability or significant canal occulusion. Dr. Ibrahim opined that he was unable to identify a concrete lesion, which could be responsible for Claimant's symptom constellation. Dr. Ibrahim opined that he "strongly recommended that this patient continue conservative care. I do not believe she would benefit from any type of surgical intervention given her history of not having any persistent improvement with conservative care up to this point and the appearance that her symptom distribution is somewhat nonphysiologic... Indeed, I must question the possibility of symptom magnification or malingering which may be related to her current lawsuit…." The changes seen on MRI were chronic and degenerative. They were not acute. Dr. Ibrahim could not find a pain generator for Claimant's symptoms. Claimant's pain symptoms did not match any objective findings.

24. Jeremy Smith, PA, from the Steadman Clinic evaluated the Claimant on April 11, 2016. Claimant complained of right hip and left hip pain due to the October 10, 201, incident. Mr. Smith noted that the MRI of the lumbar spine showed multiple distances without significant nerve compression, and that the bilateral hip MRI showed mild chondral degeneration along with mild CAM bump. Mr. Smith reported that the hip MRI findings were consistent with a glut medius and minimus tendinitis involving the right hip. On examination, Claimant had pain with palpation over the lumbar spine diffusely along with pain on back extension and rotation. On ambulation, Claimant had a mild antalgic gait. Mr. Smith opined that Claimant's MRIs showed degenerative and not acute changes. There was a new finding of a mild antalgic gait, instead of a normal gait. This new finding occurred approximately one and half years after the October 10, 2014 incident. Based on Claimant's presentation, her pain complaints were not caused by acute trauma, but they are instead due the degenerative condition or a somatic symptom disorder.

25. Patricia Little, M.D. evaluated Claimant on April 25, 2016. Claimant noted that she only received short term benefit from her L4-S1 facet injection. Dr. Little also noted that Claimant's coccyx MRI does not reveal any abnormality. On examination,

Claimant's gait was wide-based. Dr. Little's impressions were lumbar spondylosis, lumbosacral radiculopathy and sacroiliac joint, inflamed.

26. On May 17, 2016, Claimant was evaluated by Eric Jamrich, M.D. Claimant complained of low back pain that radiated down the back of her legs. Claimant stated her pain started from the October 10, 2014, incident. Dr. Jamrich noted that Claimant had conservative care, which did not relieve her symptoms. Dr. Jamrich recommended a discogram. Claimant underwent the discogram on June 20, 2016, which found 7/10 concordant low back pain reproduced at L4-L5 and L5-S1.

27. Claimant was referred for a bilateral lower extremity EMG due to complaints of numbness. This EMG occurred on June 28, 2016. The EMG's assessment was normal study without evidence for any significant neuropathy or lumbar radiculopathy. Claimant's complaints of radiating pain down both of her legs do not match any objective clinical test.

28. Dr. Little continued to examine Claimant. Dr. Little recommended another lumbar spine MRI, which occurred on March 16, 2017. The March 16, 2017, MRI reflected: ** Mild central canal stenosis at T11-T12 due to a shallow right central disc protrusion. This is unchanged from the prior study. ** Mild to moderate left and mild right neural foraminal narrowing and slight narrowing of the left lateral recess at L3-L4, unchanged. ** Minimal right neural foraminal narrowing at L4-L5. There is a tiny shallow central disc protrusion and annular fissure at this level, unchanged. ** Mild disc bulge and shallow central disc protrusion at L5-S1 in addition to the 2.5 mm retrolisthesis of L5-S1. There is no central or neural foraminal narrowing at this level. Three is no change from the prior study. ** Mild edema within the soft tissues adjacent to the right L3 facet. This is of uncertain etiology, but could represent a mild muscle strain or ligamentous sprain. ** Left renal peripelvic cyst, unchanged.

29. The March 16, 2017, MRI was compared to the previous January 7, 2016, MRI. There were no changes, except that there was some mild edema on the soft tissues adjacent to the right L3 facet. These degenerative changes and Claimant's pain complaints did not correlate with the objective findings.

30. Kathy D'Angelo, M.D. performed an IME and issued a report on March 30, 2017. Dr. D'Angelo opined that Claimant's only medical diagnoses related to the October 10, 2014, incident were contusions of the coccyx and myofascial pain to the lumbar and sacral region. Dr. D'Angelo noted those conditions were at MMI and no impairment rating should be given. Dr. D'Angelo performed an examination of Claimant's cervical spine, thoracic spine, lumbar spine, right hip, and left hip. The examinations were normal. Dr. D'Angelo opined that Claimant had a delayed onset of symptoms, which is difficult to explain from a physiological and neurological perspective. Dr. D'Angelo noted that she could not explain Claimant's waxing and waning pain complaints from a medical standpoint. Dr. D'Angelo noted that if Claimant would have developed lumbar disc herniation due to the alleged incident, Claimant's symptoms would have been evident immediately, but it was not within medical

probability to have intermittent pain symptoms from an acute spinal trauma. Dr. D'Angelo opined that it was not medically probable to have the development of symptoms, which were not problematic consistently following an original spine trauma several days, weeks, months, or years following an acute traumatic injury. Dr. D'Angelo testified that some pain symptoms can manifest at a later date. Dr. D'Angelo testified that there are no late onset of symptoms with acute spinal trauma or acute joint trauma.

31. Dr. D'Angelo further opined that Claimant's expanding and changing complaints were subjective and inconsistent with objective physical or radiological findings. Dr. D'Angelo noted that Claimant's diffuse pain complaints have migrated and worsened, and that new symptoms have developed following a significant lapse of time after her injury. Dr. D'Angelo opined that Claimant's complaints are not causally related to the October 10, 2014, incident. Dr. D'Angelo also opined that Claimant's abnormal and non-physiological symptom presentation is related to degenerative changes, anger, and financial incentive.

32. Claimant underwent a three-level fusion at L3-S1 on May 15, 2017.

33. At the August 21, 2017, hearing, Dr. Little testified on behalf of Claimant. Dr. Little noted that she was not level II accredited, and that she is not familiar with the causation analysis under the Division of Workers' Compensation Medical Treatment Guidelines. Dr. Little testified that Claimant's neck complaints did not arise initially. Dr. Little also testified that Claimant's three level lumbar spine surgery was not unreasonable, but it may have not been necessary. Dr. Little testified that she would not have chosen surgery without weakness or intractable pain.

34. Dr. D'Angelo credibly testified via post-hearing deposition on August 31, 2017. Dr. D'Angelo credibly testified that there is no late onset of symptoms with acute spinal trauma or acute joint trauma. Dr. D'Angelo also credibly testified that Claimant did not suffer an acute injury to her lumbar spine because Claimant's physical examinations showed a normal motor examination and normal sensory examination. Dr. D'Angelo testified that an acute trauma does not accelerate that the underlying degenerative disease process. Dr. D'Angelo further credibly testified that Claimant's subjective complaints do not match the objective findings because Claimant had normal examinations and normal straight leg raising tests. Dr. D'Angelo testified that straight leg raising tests are indicative of disc herniations, and if the leg is elevated, it increases pressure on the nerve and causes radiculopathy pain, which Claimant did not have. Dr. D'Angelo testified that she could not link Claimant's complaint of neck pain to the October 10, 2014, incident because the incident happened seven months prior to the first complaint of neck pain and Claimant initially denied head and neck pain. Dr. D'Angelo testified that there are very specific indications for a fusion surgery, one of which is instability of the spine. Dr. D'Angelo testified that there was nothing on the MRIs that indicated that Claimant needed a fusion. Dr. D'Angelo credibly testified that the surgery was not reasonable, necessary, and not related to the October 10, 2014, incident.

35. Dr. D'Angelo testified that Claimant behaved like a person with somatic symptom disorder because Claimant was attached to her symptoms and was looking for validation of her symptoms. Dr. D'Angelo testified that Claimant said she was in pain, but Claimant did not demonstrate any pain behaviors. Dr. D'Angelo credibly testified that Claimant's alleged cause of lumbar spine pain, cervical spine pain, and bilateral hip pain were due to underlying degenerative changes and not causally related to her work injury.

36. The ALJ finds and determines that the medical evidence and the testimony by Dr. D'Angelo indicate that Claimant did not sustain a compensable injury on October 10, 2014.

37. The ALJ finds that Dr. D'Angelo's testimony is more credible than Claimant and Dr. Little. The ALJ finds that testimony by Claimant is not credible and not persuasive. The ALJ finds that from review of the medical records, Claimant's pain complaints did not match any objective findings or her subjective pain complaints outweighed any objective findings. This is especially true on the EMG, which was normal, even though Claimant complained of radicular symptoms into her legs.

38. The ALJ finds the medical records of Midtown Occupational, Dr. England, Dr. Ibrahim, and Dr. Kasunic more persuasive than the testimony of Dr. Little or the Claimant.

39. The ALJ finds that Claimant's conduct and actions contradicts her hearing testimony. Despite being in so much pain, following the October 10, 2014, incident, she worked her regular duties, full time as a truck driver, but she could not sit in the Respondent's Wellness Center. Despite Claimant's testimony about the October 14, 2014, medical appointment when she was in so much pain, the medical record contradicts Claimant's pain complaints reflecting that Claimant had a pleasant mood and affect. This ALJ concludes that it is not credible that someone in such severe pain would state that she was ready to return to work full duty.

CONCLUSIONS OF LAW

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

lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

2. A claimant is required to prove that an injury arose out of and in the course of the Claimant's employment. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Moreover, to recover workers' compensation benefits, there must be a causal relationship between the industrial accident and the injury for which benefits are sought. *Snyder v. Indus. Claims Appeal Office*, 942 P.2d 1337 (Colo. App. 1997).

3. In the context of a workers' compensation claim, the terms "accident" and "injury" are not synonymous. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). An industrial accident is an unforeseen event. Section 8-40- 201(1), C.R.S. An injury is a result of the industrial accident. However, not every industrial accident results in a compensable injury. *See Hershberger v. Baldwin Constr*., W.C. No. 4-331- 727 (February 19, 1998). A compensable industrial injury is an accident which results in an injury requiring medical treatment or causing a disability. *Wherry v. City and County of Denver,* W.C. 4-475- 818 (March 7, 2002).

4. The mere occurrence of a compensable injury does not require the Administrative Law Judge to find that all subsequent medical treatment and physical disability was caused by the industrial injury. *Boone v. Winslow Constr*., W.C. No. 4-321- 251 (August 21, 1998).

5. In determining whether the claimant suffered a compensable injury in this case, the credibility of the witnesses and the probative value of the evidence must be assessed in order to determine whether the claimant has met her burden of proof. *Dover Elevator Co. v. Indus. Claim Appeals Office,* 961 P.2d 1141 (Colo. App. 1998).

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

7. The credible and persuasive evidence presented at hearing established that Claimant did not sustain a compensable work injury on October 10, 2014. Claimant being struck by a vehicle did not cause her disability. Claimant was given a full duty release, placed at MMI, and given a 0% impairment rating on October 14, 2014, by the treating physician at Midtown Occupational. Claimant's examination was benign and normal. During Claimant's multiple examinations with multiple providers her subjective complaints did not match any objective findings. Claimant's lumbar, thoracic, and neck MRI show degenerative changes, which are not related to the October 10, 2014 incident. Dr. Ibrahim credibly

opined that he was unable to identify a concrete lesion, which could be responsible for Claimant's symptom constellation. Dr. Ibrahim persuasively opined that Claimant would not benefit from surgical intervention given her nonphysiologic symptom distribution.

8. Dr. D'Angelo's IME and testimony were credible and persuasive. Dr. D'Angelo noted that Claimant's expanding and changing nature of her complaints were subjective and inconsistent with objective physical or radiological findings. Dr. D'Angelo noted that Claimant's diffuse pain complaints have migrated and worsened, and that new symptoms have developed following a significant lapse of time after her incident. Dr. D'Angelo credibly opined and testified that Claimant's complaints are not causally related to the October 10, 2014 incident. Dr. D'Angelo also opined that Claimant's abnormal and non-physiological symptom presentations are related to degenerative changes, anger, and financial incentive.

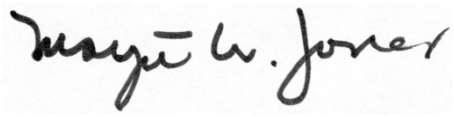
9. Given the forgoing, the ALJ finds and concludes Claimant's October 10, 2014, incident did not require medical treatment or caused a disability. Accordingly, the ALJ determines and concludes that the Claimant did not meet her burden of proof in establishing that she suffered a compensable injury on October 10, 2014. The ALJ also concludes that Claimant's extensive medical treatment is not reasonable, necessary, or causally related to the October 10, 2014, incident. Lastly, the three-level fusion performed on May 15, 2017, was not reasonable, necessary, or related to the October 10, 2014, incident

ORDER

1. The Claimant's request for workers' compensation benefits is denied and dismissed with prejudice.

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

DATED: February 28, 2018



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

ISSUES

1. Whether the Claimant sustained a compensable injury as an employee of Employer?

2. Whether the medical benefits from Yampa Medical Center, Classic Air Care, Inc. and Denver Health were reasonable, necessary and related to Claimant's industrial injury?

3. Whether Claimant is entitled to temporary total disability (TTD) benefits?

4. Whether Employer is liable for penalties for failure to maintain workers' compensation insurance pursuant to Section 8-43- 408, C.R.S.?

FINDINGS OF FACT

1. Claimant credibly testified that in January 2017 he began working for Employer. Prior to this time, Claimant had worked as a painter. Claimant's friend, Daniel Benegas, asked Claimant if he wanted to work for Employer. Claimant identified Matthew Gantick as Employer. Claimant was not working at the time and agreed. Claimant began performing snow removal services for Employer on January 5, 2017. Claimant was paid $20 per hour by Employer. Claimant denied having prior experience performing snow removal services. Claimant denied operating any company of any kind in January 2017.

2. Claimant credibly testified at hearing. Claimant testified that Mr. Gantick told him what jobs to perform. Mr. Gantick would call or text Claimant, through Mr. Benegas, as to when there was work and the time and place to show up. Typically, they would meet at Mr. Gantick's business in Clark, Colorado and then drive to the work location. Sometimes, Mr. Gantick would drive Claimant to the work location. Claimant denied working for any other company or at any other job in January 2017. Claimant denied any prior training or experience before working for Employer. Mr. Gantick instructed Claimant on snow removal skills on the first day of work.

3. Employer provided Claimant with tools to perform the snow removal services including shovels, picks and ladders. Claimant did not provide any tools for the snow removal service.

4. On February 6, 2017, Claimant met Employer in Clark, Colorado. Claimant was a passenger in a vehicle driven by Daniel Benegas. They followed Employer to a house where they were to remove snow from the roof. Employer left and said he would return later. Claimant was required to work on the house that day. Claimant testified that some jobs would take more than one day to complete. However, Claimant felt he was required to work the job

within the time frame given by Employer, who would pressure Claimant to finish.

5. Claimant and Mr. Benegas began removing snow from the roof. While on the roof, Claimant slipped and fell off the roof. The ice from the roof fell on top of Claimant. Claimant testified that he sustained injuries to his ribs, chest and nose as a result of the fall. Claimant testified that he did not have a good memory of the accident or his injuries immediately thereafter as he lost consciousness. Mr. Benegas took Claimant into the residence and called Employer.

6. Mr. Gantick arrived at the job site after Claimant was injured. Claimant was taken to Yampa Valley Medical Center. He awoke and saw his wife and brother.

7. Claimant was taken to Denver Health by helicopter. Claimant underwent surgery to his stomach at Denver Health. Claimant displayed a surgical scar in the middle of his torso approximately five inches in length. Claimant also displayed a protruding rib higher on his chest, to the left side. Claimant remained hospitalized at Denver Health approximately one week. Claimant received follow up medical treatment at Yampa Valley Medical Center approximately one month after his injury where x-rays were taken. Claimant followed up at Denver Health on March 15, 2017.
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8. Claimant received medical bills from Yampa Valley Medical Center for treatment on February 6, 2017, and a follow up visit. These medical bills were the result of treatment Claimant received for injuries caused by the fall from the roof on February 6, 2017.

9. Claimant received medical bills from Classic Air Care, Inc. for helicopter transportation on February 6, 2017. The medical bill for the helicopter flight were the result of treatment he received for injuries caused by the fall from the roof on February 6, 2017.

10. Claimant received medical bills from Denver Health for treatment on February 6, 2017, including, but not limited to, surgery and a follow up visit.

11. These medical bills were the result of treatment he received for injuries caused by the fall from the roof on February 6, 2017.

12. Claimant was paid in cash from Employer for his snow removal services. Claimant was paid $20 per hour for the hours he worked. Claimant would submit his hours to Employer and would receive payment. Claimant was not paid on a fixed schedule. Claimant filled out a card upon which Claimant would submit his daily hours. Claimant contemporaneously kept track of his hours on his cell phone. Claimant worked 108 hours for Employer from

January 5, 2017 to February 6, 2017. It is found that Claimant's AWW is $458.18.

13. Employer never consulted with Claimant for purposes of deciding how to bid or determine an estimate for a snow removal job.

14. Claimant did not return to work for Employer after his injury. Claimant was unable to perform his regular job duties for Employer after he was discharged. Claimant tried to return to work painting in mid-April, 2017 and worked for approximately 3-4 weeks. Claimant earned $16 per hour and worked 10 hours per day, 6 days per week during this period. Claimant was unable to continue painting due to his work injuries. Claimant returned to work washing dishes and preparing food for an event company on June 11, 2017, earning $14 per hour working 40 hours per week. Claimant could not return to his work at Employer at this time.

15. Mr. Gantick is the sole owner of Employer. The business purpose of Employer is concrete construction. Mr. Gantick testified that he did not have any employees in February 2017. Mr. Gantick testified he last had employees two and one-half years prior when he issued payroll for concrete construction services. Mr. Gantick testified he sub-contracted out his work for the past two and one-half years. Mr. Gantick's testimony is found to be less credible and persuasive than Claimant's testimony.

16. Mr. Gantick identified Claimant as "Tommy". Mr. Gantick became familiar with Claimant through Mr. Benegas, identified by Mr. Gantick as an independent subcontractor who contracted with Employer. Mr. Gantick testified Mr. Benegas approached Employer indicating Claimant was an experienced shoveler and brought him to work on a particular day. Mr. Gantick testified that Claimant rode in his truck one time. Mr. Gantick testified that Claimant's services worked out to $20 per hour. Mr. Gantick testified he would receive a phone call from a home owner for snow removal service and Mr. Gantick would contact a list of independent subcontractors. Mr. Gantick testified that whoever could do the job would perform snow removal services. The Employer would get paid and Employer would pay the independent subcontractors. Mr. Gantick testified that he did pay Claimant money by handing him cash directly. Mr. Gantick testified that to keep the independent contractors organized by providing index cards for them to write their time down for snow removal services which he would then record. To the extent that Mr. Gantick's testimony contradicts Claimant's testimony, Claimant's testimony is found to be more credible and persuasive than Mr. Gantick's testimony.

17. Mr. Gantick testified that he requested Claimant's Social Security number to issue a 1099 tax form but was unable as Claimant never provided the requested information. Mr. Gantick testified he paid Claimant a total of

$1620.00 for 81 hours of snow removal services from January 5, 2017, to February 6, 2017. The hours recorded by Employer were read into the record. Mr. Gantick denied requiring Claimant to work exclusively for him and denied providing Claimant any training. Mr. Gantick testified he had tools, identified as ladder and scoops, but so did Claimant, as he witnessed them being removed from the vehicles. Mr. Gantick testified he had been providing snow removal for several years.

18. Mr. Gantick testified on February 6, 2017, Mr. Benegas and Claimant followed him to the job site. Mr. Gantick testified that he would take the labor that he contacted to a job site and expect that they Mr. Benegas called Mr. Gantick approximately 1 hour later. Mr. Gantick arrived back at the job site and found Claimant in Mr. Benegas's car. Mr. Gantick observed a cut on Claimant's nose and placed some snow on the wound. Claimant was complaining of pain in his side and Mr. Gantick instructed that they needed to get Claimant to Yampa Valley Medical Center. Mr. Gantick testified he went with Claimant to Yampa Valley Medical Center and witnessed him being airlifted.

19. Mr. Gantick testified he did not have workers' compensation insurance on February 6, 2017. Mr. Gantick testified he would decide, together with his independent contractors, how many hours a snow removal job would take and charge the customer $30 per hour per individual on the job to make up the estimate or bid. Mr. Gantick testified Claimant did not provide snow removal services for Employer after February 6, 2017.

20. Claimant submitted documentation from Yampa Valley Medical Center that on February 6, 2017, medical services identified as Pharmacy IV Solutions, General Supplies, Laboratory, Laboratory Chemistry, Laboratory Immunology, Laboratory Hematology, Chest XRay, CAT Scan Head, CAT Scan Body Portion, Ultrasound, Emergency Room Services, Echocardiology, Drug with detailed coding, Trauma Activ Respon IV, Preventative Care Vaccine, Physician Fees Radiology, Physician Fees Emergency were performed and charged to Claimant.

21. Claimant submitted documentation from Classic Air Care, Inc. indicating the Claimant was transported on February 6, 2017, from Yampa Valley Medical Center to Denver Health Medical Center.

22. Claimant submitted documentation from Denver Health that Claimant received hospital services from February 6, 2017, to February 12, 2017, identified as Room and Board, Intensive Care, Pharmacy, Medical/Surgical Supplies and Devices, Laboratory, Radiology, Operating Room Services, Anesthesia, Respiratory Services, Emergency Room, Pulmonary Function, Pharmacy-Extension of 025X-Single, Source Drug Not Used, Recovery Room, Radiology Diagnostic, Physician services by Dr. Michael Breyer

(Critical Care E/M 30-74 Minutes), Physician services by Dr. Donald Townsend (Insert Cath,art, Percut, Shorterm, Emergency Anesthesia, Anesth, Open Heart; W/O Pump Oxygenator), Physician Services by Dr. David Symonds (Chest X-Ray), Physician Services by Dr. Linda Fielding (Chest X-Ray), Physician Services by Dr. Michael Mestek (Chest X-Rays) and Physician Services by Dr. Ronald Townsend (Chest X-Ray).

23. The medical report from Denver Health dated March 15, 2017, indicated Claimant was seen for post-operative follow up after a pericardial window by Dr. Cohen on February 6, 2017. Claimant was seen this date by Nupur Sehdev PA-C. Claimant reported feeling great and denied chest pain. Claimant's wound looked good. Mr. Sehdev offered Claimant a letter returning him to work light duties but Claimant was seeking a letter returning him to stay at home until he obtain surgery for a his nasal fracture which Mr. Sehdev declined to provide.

24. It is found that Claimant proved by preponderance of the evidence that he was an employee of Respondent on the date of the work injury, February 6, 2017, and that he received the medical treatment, described above, that was reasonably necessary and related to cure and relieve Claimant of the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43- 201, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385,389 (Colo. App. 2000).

2. The ALJ is empowered to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *See Bodensieck v. ICAO*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. ICAO*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). When determining credibility, the fact finder should consider, among other things,

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

COMPENSABILITY (EMPLOYEE VS. INDEPENDENT CONTRACTOR)

3. Pursuant to Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person is "free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." The putative employer may establish that the claimant was free from direction and control and engaged in an independent business or trade by proving the presence of some or all of the nine criteria set forth in Section 8-40- 202(2)(b)(II), C.R.S.; *Baker v. BV Properties, LLC*, W.C. No. 4-618-214 (August 26, 2005) (*See also Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1998)).

4. The factors set forth in Section 8-40- 202(2)(b)(II) indicating that an individual is not an independent contractor include the individual being paid a salary or hourly rate instead of a fixed contract rate, and being paid individually rather than under a trade or business name. Conversely, independence may be shown if the person for whom the services are performed provides no more than minimal training to the claimant, does not dictate the time of performance, does not establish a quality standard for the claimant's work, does not combine its business with the business of the claimant, does not require the claimant to work exclusively for a single person or company, and is not able to terminate the claimant's employment without liability. *Baker v. BV Properties, LLC, supra.* This statute creates a "balancing test" to overcome the presumption of employment contained in Section 8-40- 202(2)(a), C.R.S. and establish independent contractor status. *Nelson v. Industrial Claim Appeals Office, supra*. The question of whether the employer has presented sufficient proof to overcome the presumption is one of fact for the ALJ. *Baker v. BV Properties, LLC, supra*.

5. As found, there was no dispute that Claimant received compensation for snow removal services. Claimant was paid in cash, by Employer, based on an hourly rate of $20 per hour. It was undisputed that Claimant would submit his hours to Employer and was then compensated at his hourly rate. As a result, Claimant established a prima facie case that he was an employee of Employer.

6. As found, Employer has failed to establish by a preponderance of the evidence of Claimant's independence from Employer. In addition to the payment at an hourly rate, Claimant testified that he never performed snow removal services prior to working for Employer. As a result, Claimant was not customarily engaged in the snow removal business but worked only for Employer. Claimant credibly testified that Employer provided the tools for the snow removal services, including shovels, ladders and picks. Claimant credibly testified that Employer instructed him on snow removal on his first day of work. Claimant credibly testified that Employer took Claimant to the job sites on a daily basis and provided instruction on the job. Claimant credibly testified, as did Employer, that he was compelled to work on a given job by Employer and was not given freedom to complete the project based on Claimant's own schedule. Claimant credibly testified that Employer pressured him to complete projects.

7. It is concluded that Claimant was an employee of Respondent on February 6, 2017, and injured himself in the course and scope of his employment with Respondent.

AVERAGE WEEKLY WAGE

8. "Wages" is defined as the "money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Section 8-40- 201 (19(a)), C.R.S. The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. Section 8-42- 102(3); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo.App.1993); *See Williams Brother, Incorporated v. Grimm*, 88 Colo. 416, 197 P.1003 (1931); Vigil v. Industrial Claim Appeals Office, 841 P.2d 335 (Colo. App. 1992).

9. Claimant credibly testified that he worked 108 hours for the 33 day period from January 5, 2017, to February 6, 2017. As a result, Claimant's AWW is calculated at $458.18 (108 hours x $20.00 / 33 days x 7 = $458.18).

MEDICAL BENEFITS

10. Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of a work-related injury. Section 8-42- 101(1) (a), C.R.S. (2008). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work related

injury and the condition for which benefits are sought. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Whether a claimant sustained her burden of proof is generally a factual question for resolution by the ALJ. *See City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

11. Claimant credibly testified that he was taken to Yampa Valley Medical Center then airlifted to Denver where he underwent surgery at Denver Health. The medical records, including bills, support and confirm that Claimant underwent emergency treatment at Yampa Valley Medical Center and Denver Health on February 6, 2017. The medical records, including bills, support that Claimant was airlifted from Yampa Valley Medical Center to Denver Health on February 6, 2017. The medical records, including bills, support and confirm that Claimant was seen in follow up at Yampa Valley Medical Center for x-rays and physician evaluation on February 22, 2017. The medical records, including medical bills, support and confirm that Claimant was admitted to Denver Health from February 6 to February 12, 2017, and seen in follow up at Denver Health on March 15, 2017. Claimant credibly testified that all the medical treatment was related to his industrial fall. The evidence provided by Claimant was not contested by Respondent. In fact, Employer confirmed that Claimant was treated at Yampa Valley Medical Center and airlifted to Denver.

12. As a result, because the evidence provided by Claimant was uncontested with regard to the medical treatment, Claimant has sustained his burden of proof establishing the medical treatment obtained from Yampa Valley Medical Center on February 6, 2017, and February 22, 2017, was reasonable, necessary and related to his work-related fall. As found, Claimant has sustained his burden of proof establishing the airlift on February 6, 2017, was reasonable and necessary medical treatment arising out of his work-related fall.

13. As found, Claimant has sustained his burden of proof establishing that the medical treatment received at Yampa Valley Medical Center and Denver Health from February 6, 2017, to February 12, 2017, and March 15, 2017, was reasonable, necessary and related to his industrial fall.

TEMPORARY DISABILITY BENEFITS

14. To establish entitlement to temporary disability benefits, an employee must prove that the industrial injury, or occupational disease, has caused a "disability," and that he/she suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42- 103(1), C.R.S.; *PDM Molding, Inc. v. Stanburg*, 898 P.2d 542, 546 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or reduction of bodily function. "Disability" connotes both medical incapacity and restrictions to bodily function.

15. The second element of temporary disability is loss of wage earning capacity. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning

capacity element of "disability" may be evidenced by a complete or partial inability to work, or physical restrictions that preclude a claimant from securing employment. *See Culver v. Ace Electric, supra; Hendricks v. Keebler Company*, W.C. No. 4-373- 392 Industrial Claim Appeals Office (ICAO), June 11, 1999.

16. It is concluded that Claimant was disabled from his usual employment and is therefore entitled to an award of indemnity benefits. Claimant and Employer testified Claimant did not return to work after his injury. Claimant was physically unable to return to work until April 15, 2017. This testimony was uncontested. The only medical documentation with regard to work restrictions was from the Physician's Assistant Sehdev which suggests Claimant could return to light duty on March 15, 2017. As a result, Claimant has sustained his burden of proof establishing entitlement to TTD from February 7, 2017, to April 14, 2017, when Claimant started painting.

17. Based on Claimant's testimony, he did not sustain wage loss for approximately 4 weeks starting April 15, 2017. Claimant credible testified he was unable to continue painting due to his work injuries on or about May 12, 2017. Claimant is entitled to TTD from May 13, 2017 until June 10, 2017. Based on Claimant's testimony, he returned to work on June 11, 2017, and did not sustain work-related wage loss thereafter.

PENALTIES

18. Mr. Gantick testified he was uninsured on February 6, 2017. Pursuant to Section 8-43-408(1), C.R.S. Claimant's indemnity benefits in the present claim shall be increased by 50%.

19. Section 8-43-408(2), C.R.S., requires that an uninsured employer post a bond or certificate of deposit for the present value of all of the unpaid compensation and benefits. WCRP 9-5 provides that the trustee is to be the Subsequent Injury Fund in the Division of Workers' Compensation. Pursuant to WCRP 9-5, the ALJ has calculated a total of $5,958.03 for past-due TTD benefits through the date of hearing in addition to $112.234.43 for known authorized medical expenses. There is no present value discount for these past-due amounts. A bond or certificate of deposit in the amount of $118,192.46 is appropriate.

ORDER

IT IS, THEREFORE ORDERED THAT:

1. Claimant sustained a compensable injury as an employee of Respondent on February 6, 2017, when he fell off a roof.

2. Claimant's average weekly wage is $458.18 with a corresponding TTD rate of $305.54. With the additional 50% liability, Claimant is entitled to TTD benefits at the rate of $458.31 per week.

3. Respondent are liable and shall pay all medical benefits received by Claimant from Yampa Valley Medical Center for dates of service on February 6, 2017, and February 22, 2017.

4. Respondent are liable and shall pay for the airlift services provided to Claimant by Classic Air Care, Inc. on February 6, 2017.

5. Respondents are liable and shall pay all medical benefits received by Claimant from Denver Health from February 6, 2017 to February 12, 2017 and for March 15, 2017.

6. Respondent are liable and shall pay Claimant for TTD benefits from February 7, 2017 to April 14, 2017 and May 13, 2017 to June 10, 2017.

7. Respondent are liable and shall pay Claimant an additional 50% on all indemnity benefits pursuant to Section 8-43- 408 (1), C.R.S. for failure to maintain workers' compensation insurance.

8. Pursuant to WCRP 9-5, the ALJ has calculated a total of $5,958.03 for past-due TTD benefits through the date of hearing in addition to $112.234.43 for known authorized medical expenses. There is no present value discount for these past-due amounts. A bond or certificate of deposit in the amount of $118,192.46 is appropriate.

9. Within ten (10) days of the date of service of this order, deposit the sum of $118.192.46 with the trustee, Subsequent Injury Fund Unit of the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik, to secure the payment of all unpaid compensation and benefits awarded, or in lieu thereof,

10. Within ten (10) days of the date of service of this order, Claimant shall file a bond in the sum of $118,192.46 with the Division of Workers' Compensation within ten (10) days of the date of this order:

    (1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

    (2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

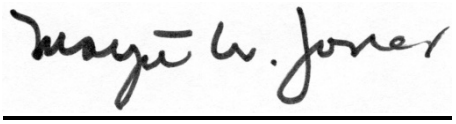
11. IT IS FURTHER ORDERED: Pursuant to Section 8-43-408(5) C.R.S., the uninsured employer shall pay an amount equal to 25% of the compensation to which Claimant is entitled to the Colorado uninsured employer fund created in Section 8-67-105 C.R.S.

12. IT IS FURTHER ORDERED: That the employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

13. IT IS FURTHER ORDERED: That the filing of any appeal, including a petition for review, shall not relieve the employer of the obligation to pay the designated sum to a trustee or to file the bond. Section 8-43-408(2) C.R.S.

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

DATED: March 5, 2018



MARGOT W. JONES
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

The undersigned, hereby certify that on 3-5-18, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** was emailed to all parties at the addresses shown below:

Sean Knight, Esq.
sknight@sawayalaw.com

Gregory Cairns, Esq.
gcairns@cairnslegal.com

Sue Sobolik
Division of Worker's Compensation
sue.sobolik@state.co.usDivision of Workers' Compensation
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/s/ Fabiola Mendez

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury on September 13, 2016.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment for a September 13, 2016 injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits and/or temporary partial disability (TPD) benefits.

STIPULATIONS

1. Claimant's average weekly wage (AWW) at the time of injury was $376.00.

FINDINGS OF FACT

1. Claimant is a 47 year old woman who was employed by Employer as a banquet worker. Claimant was so employed for approximately 1.5 years.

2. Claimant's duties included washing dishes, prep work, polishing spoons and glasses, setting up for events, and serving and clearing food. Employer sends their workers to different large hotels or places that need banquet workers for events. The Omni Hotel is a regular client of Employer.

3. On September 13, 2016 Claimant was assigned to work a banquet event at the Omni Hotel. This was Claimant's first time working at this particular hotel. Claimant arrived at the Omni and clocked in at 3:50 p.m. Claimant clocked out at 5:00 p.m.

4. What happened during the hour and ten minutes Claimant was at the Omni is in dispute and there are many inconsistencies of what occurred during this time.

5. Claimant alleges that she was wearing the proper all black uniform that day as required. Claimant alleges that she met the other employees who worked for Employer in the cafeteria of the Omni. Claimant alleges that she then walked to the event hall and past an ice machine on her way to go into the event hall when she slipped on water near the machine that she did not see. Claimant alleges that she fell with her knee twisted and landed sitting down. Claimant testified that when she landed one knee was bent and the other knee was forward.

6. Claimant alleges that after falling she couldn't walk and was told to stay there and sit for a little bit and after ten minutes, she continued working to set up the event because the event was about to start and they needed to have all the tables set and ready.

7. Claimant alleges that at around 4:40 or 5:00 she was told to go home and that when she left she called a supervisor, Augustin Ramirez, to report that she had fallen. Claimant alleges that she was not told why she was being sent home and that she reported to Mr. Ramirez that she thought she was being sent home because she had fallen. Claimant testified that she would have worked the whole event if she had not been sent home. Claimant denied that she was told she was being sent home because of a uniform problem.

8. Claimant alleges that after calling Mr. Ramirez, she went to Employer's office and was wearing the same clothes she had on while at work (her all black uniform) and that she arrived at Employer's office shortly before 6:00 p.m. Claimant alleges that at the meeting she met only with Mr. Ramirez. Claimant alleges that she filled out a report and met with the district manager Beatrice Rodriguez the next day.

9. Claimant alleges that at her first doctor's appointment she told the doctor she had fallen with her right knee bent backward and twisted and that she fell into a sitting position.

10. Mr. Ramirez, an area manager for Employer testified at hearing. He was Claimant's manager on the date in question. Mr. Ramirez testified that on September 13, 2016 he received a call from the Omni reporting that Claimant was not wearing the proper uniform and that the call was about 15-20 minutes after the scheduled shift start time of 4:00 p.m. Mr. Ramirez alleges that he called Claimant to tell her she needed to go home because she was not in the proper uniform and that Claimant was really upset. Mr. Ramirez alleges that he then told Claimant to wait a few minutes and they would see if they could use her in the back of the house or bring her a uniform.

11. Mr. Ramirez alleges that Claimant called him a few minutes later to report that she had fallen and that Claimant was advised to call Ms. Rodriguez, the district manager, to report the injury. Mr. Ramirez alleges that a couple hours later, around 7:00 p.m., Claimant came to the office to write down a statement and that he, Claimant, Ms. Rodriguez, and Claimant's daughter were in the room. Mr. Ramirez alleges that at the meeting, Claimant was not in the proper all black uniform and that Claimant said she had gone home to change before coming to the office.

12. Ms. Rodriguez, Employer's district manager, also testified at hearing. Ms. Rodriguez indicated that on the date in question, Mr. Ramirez told her Claimant had been sent home due to her uniform and that she then received a call from Claimant who said she needed to seek medical attention. Ms. Rodriguez alleges that Claimant could not explain clearly what had happened and that it didn't make sense so she asked Claimant

to come to the office to meet in person. At the office, Ms. Rodriguez alleges that Claimant had on regular clothing and was not in the proper all black uniform.

13. Ms. Rodriguez is familiar with the Omni since the Omni is a regular client and Ms. Rodriguez has worked at the Omni for events. Ms. Rodriguez testified that the usual practice is for all employees to meet in the cafeteria to get assignments and partner with the Omni staff. Ms. Rodriguez testified that if an employee is not in the correct uniform when meeting in the cafeteria, they are sent home and don't get to work or go into the ballroom.

14. Ms. Rodriguez testified that Claimant was at Employer's office at approximately 6:45 p.m. and that she filled out Exhibit 1 with information given to her from Claimant. Ms. Rodriguez testified that Claimant stated that she had stopped at home to change before coming to the office.

15. Exhibit 1 is a report of injury that indicates Claimant was walking into the ballroom to start her shift with all employees when she slipped on ice and water on the floor at approximately 4:15 p.m. It is listed a slip and fall accident with problems including Claimant's back and right knee. The date and time of notification of injury is listed as September 13, 2016 at 5:15 p.m. and the date and time of preparation of the report is listed as September 13, 2016 at 6:45 p.m. *See* Exhibit 1.

16. On September 14, 2016 Claimant was evaluated at Concentra by Ron Rasis, PA-C. Claimant reported that she slipped on water and ice when she was walking into a banquet hall with a group of co-workers. Claimant reported that her right leg slipped out into extension in front of her and that she fell back and landed on her buttock. Claimant reported mild soreness in her buttock at the impact sight and diffuse lower back pain as well as right knee soreness and stiffness. On examination there was no erythema, ecchymosis, effusion or swelling noted. The lumbar spine had tenderness and tenderness in the left and right paraspinals. X-rays showed no right knee fracture, dislocation, or osseous lesion and the adjacent soft tissues appeared unremarkable with no evidence of joint effusion. Claimant was assessed with contusion of the buttock, back pain, and right knee pain and sprain. A knee support was provided and physical therapy, ibuprofen, and hold/cold compress was planned. Claimant was allowed to return to modified work activity that day working her entire shift with a 15 pound lift/push/pull limit and an occasional squat/kneel restriction allowing 3 hours of those activities per day. *See* Exhibits 3, A, C.

17. On September 16, 2016 Claimant was evaluated by PA Rasis. Claimant reported that she was working light duty and felt overall slightly improved but with slight ongoing soreness over her patella. PA Rasis noted no joint swelling. *See* Exhibits 3, A.

18. On September 16, 2016 Claimant underwent physical therapy. Claimant reported that her right leg bent back and she landed in a sitting position after slipping on water and ice on the floor. Claimant reported no prior functional restrictions. Claimant reported pain of 5/10. *See* Exhibits 2, B.

19. Claimant continued to undergo physical therapy with 8 total visits between September 16 and November 22. Although Claimant reported that physical therapy slightly helped and that she was slightly better following, her pain levels remained fairly similar throughout therapy. *See* Exhibits 2, B.

20. On September 19, 2016 Employer sent a letter to Concentra noting that Claimant was currently unable to perform the physical tasks required of her regular job and listing temporary positions which required different abilities for specific tasks that were outlined in the letter. Concentra was asked to check all activities that Claimant would currently be able to perform. An M.D. from Concentra (signature illegible) checked off 55 boxes for different tasks, indicating that Claimant could currently perform all tasks identified by Employer. This letter was signed on September 29, 2016. *See* Exhibit J.

21. On September 28, 2016 Claimant was evaluated by PA Rasis. Claimant reported that she was not working due to her restrictions and again reported overall improvement. Claimant reported no pain when active and walking, but increased stiffness after sitting. PA Rasis discussed advancing restrictions and ongoing physical therapy. PA Rasis assessed back pain and right knee sprain. PA Rasis increased work restrictions to allow lifting, pushing, and pulling up to 20 pounds and he removed the restriction on squatting and kneeling. *See* Exhibits 3, A.

22. On October 7, 2016 Employer sent a letter to Claimant indicating they had identified a temporary position for her that her physician stated she could perform. The position was listed as dishwasher/prep cook and was set to begin at 7:00 a.m. on Thursday October 13, 2016. Claimant was asked to please report to work at that date and time and that she would be scheduled for 38 hours per week at the Convention Center and at the Hyatt Tech Center. *See* Exhibit J.

23. On October 31, 2016 Claimant was evaluated by PA Rasis. Claimant reported ongoing relief from her prior knee pain but ongoing diffuse aching lower back pain and soreness with bending, prolonged standing, and activity. Work restrictions were removed and Claimant was returned to regular duty on this date. *See* Exhibits 3, A.

24. On November 14, 2016 Claimant was evaluated by PA Rasis. Claimant reported that she was not working as Employer had not offered her work recently. Claimant reported ongoing aching pain and soreness in her lower back and that she had not received any additional physical therapy as she had not been contacted to schedule it. PA Rasis found tenderness in the left and right paraspinal in the lumbar spine but no muscle spasms or warmth. PA Rasis recommended physical therapy two times per week for two weeks. *See* Exhibits 3, A.

25. On December 20, 2016 Claimant was evaluated by PA Rasis. He noted that Claimant had no restrictions. Claimant reported overall that she was much improved with no ongoing midline lower back pain. Claimant reported a slight pulling sensation in her left buttock with bending over. On exam, Claimant had no tenderness in the lumbar

spine and no muscle spasm. PA Rasis noted that Claimant had been compliant with physical therapy and that she was comfortable with her home exercise program. Claimant agreed that she was able to perform all her regular work activity and activities of daily living without difficulty and that she had full function and required no additional medical intervention or ongoing monitoring. PA Rasis found that Claimant was at maximum medical improvement (MMI) and noted that Claimant agreed to MMI. PA Rasis found that Claimant had no permanent impairment. *See* Exhibits 3, A.

26. Wage records show that prior to the injury, Claimant worked varied hours per week for Employer. In the twelve weeks prior to her injury, the lowest week included 23.17 hours worked and the highest week included 61.82 hours worked. The week of the alleged injury and the week ending September 18, 2016, claimant worked 14.67 hours.

27. Wage records show Claimant was not paid and did not work at all in the three weeks following her alleged injury including the weeks ending September 25, 2016, October 2, 2016, and October 9, 2016. *See* Exhibits J, K.

28. By the week ending October 16, 2016 Claimant was working her normal varied hours per week for Employer. Claimant continued to work hours similar to those prior to her alleged injury from October 10, 2016 through November 6, 2016. Claimant's last paycheck covering the week ending November 6, 2016 was issued on November 14, 2016. *See* Exhibits J, K.

29. Claimant testified that she missed days and time from work due to her injury but that she was sent to work within her restrictions at the same pay. Claimant testified that she believes she was terminated from Employer because she sent messages to Mr. Ramirez about work and that he stopped responding to her. Claimant testified that she was never told she was no longer an employee. Mr. Ramirez testified that he tried to find duties within Claimant's restrictions after the injury and that Claimant was able to work within the restrictions. Mr. Ramirez testified that he was unsure why Claimant stopped coming to work and that Claimant did not reach out to him.

30. Victor Juarez, Employer's workers' compensation claims manager, testified at hearing. Mr. Juarez indicated that Claimant was able to work after her injury and that he received restrictions and updates on restrictions. He testified that after Claimant was released to full duty she continued to work but then later stopped working for unknown reasons. Mr. Juarez testified that after her full duty release, Claimant became a regular employee and indicated that employees typically call them for work or are called by Employer if needed for a job.

CONCLUSIONS OF LAW

Generally

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

§ 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment was proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10,

2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As noted above, there are numerous inconsistencies in what occurred at the Omni and afterward in the meeting at Employer's office to discuss the alleged injury. The Respondents essentially argue that Claimant is not credible, was sent home due to her uniform, and did not even work let alone fall or sustain an injury. Claimant essentially argues that she fell, had no uniform issues, and was sent home because she had fallen. The ALJ finds inconsistencies and flaws in both arguments.

If Claimant was sent home immediately due to her uniform problem she would not have been clocked in for 1 hour and 10 minutes. She would have been sent home fairly quickly. As Ms. Rodriguez noted, employees who don't have the correct uniform don't even get job assignments or leave the cafeteria meeting place. Credible and persuasive evidence was presented that at this time, both the Omni and Employer were trying to find a way to use Claimant despite her wrong uniform. Credible and persuasive evidence also shows that there was an event that needed to be set up quickly that evening. It is logically consistent with the credible and persuasive evidence that Claimant did in fact perform duties that evening during the time period in question and that they found work for her despite her uniform problem. This is consistent with Claimant's testimony that she worked for a while before being sent home. The credible and persuasive evidence is that Claimant was eventually sent home due to the uniform problem after 1 hour and 10 minutes and after performing the duties they found for her that didn't require a uniform.

The ALJ finds the logically persuasive and credible evidence establishes that Claimant arrived to work without the proper uniform, was given duties anyways that didn't require a uniform, and was sent home 1 hour and 10 minutes later due to the uniform issue and after Employer could no longer use her for duties not requiring a uniform. The question then becomes whether or not Claimant sustained a work related injury while she was working and performing duties during this 1 hour and 10 minute period of time.

The ALJ finds that Claimant has established by a preponderance of the evidence that she slipped and fell on water near the ice machine on September 13, 2016 while working. Although filling up glasses with ice is the last step of banquet setup, water from an ice machine can be present at other times and Claimant is credible that there was water on the floor on September 13, 2016 that caused her to slip and fall and sustain minor injuries to her lower back and knee. The ice machine would have been located in a hallway used to access the banquet room and Claimant is credible that she was in the hallway to work banquet set up and that there was water on the floor that caused her to slip and fall. Claimant's testimony that she rested a little while and then worked on banquet set up is credible and persuasive. Claimant reported the injury to Employer that day and Claimant has established, more likely than not, that she sustained a compensable work related injury on September 13, 2016 while in the course and scope of employment.

Reasonable and Necessary Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Claimant has established by a preponderance of the evidence that her medical treatment related to the September 13, 2016 injury through December 20, 2016 was reasonable, necessary, and related to her injury. As found above, on December 20, 2016 Claimant was placed at maximum medical improvement with no permanent impairment and Claimant reported that she was much improved, had full function, and agreed that she required no additional medical intervention or ongoing monitoring. Claimant has received reasonable and necessary medical treatment for her injury and has established that the treatment through December 20, 2016 was related to her injury.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As found above, Claimant worked varied hours per week. The wage records show that following her injury Claimant did not work until October 10, 2016. Based on the weight of the evidence and testimony, the ALJ finds that Claimant had met her burden to show that from September 13, 2016 through October 9, 2016, Claimant was temporarily and totally disabled due to her injury. As found above, the wage records also show that

beginning October 10, 2017, Claimant worked her normal varied hours similar to those she worked prior to her September 13, 2016 injury and that she continued working normal varied hours for approximately one month and through November 6, 2016.

Claimant has failed to show that she was temporarily partially or totally disabled at any point after October 9, 2016. Claimant did not sustain an impairment of wage earning capacity, Claimant was placed at full duty in October, and Claimant continued to work until November 6, 2016. The weight of the credible and persuasive evidence establishes that Claimant stopped calling in for jobs after November 6, 2016. It is not persuasive that Respondent started ignoring Claimant's calls or failed to provide her work. Claimant testified that around this time period she began caring for her grandchildren. Any wage loss subsequent to November 6, 2016 was not due to Claimant's injury or any impairment. Claimant was, in fact, working full duty with no restrictions on November 6, 2016. She had no medical incapacity or disability and any wage loss after November 6, 2016 was due to Claimant's choice not to call in or take jobs and due to her choice to stop coming in to work.

Temporary Partial Disability

An employee is entitled to receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability. As found above, Claimant was out of work completely following her injury until October 10, 2016 and is entitled to temporary total disability for the time between her injury and through October 9, 2016. On October 10, 2016 she began earning her normal pre-injury wages and had no appreciable difference between her average wages prior to injury. Thus, Claimant has failed to establish any entitlement to temporary partial disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that she sustained a compensable injury on September 13, 2016.

2. Claimant has established, by a preponderance of the evidence, that the medical treatment from September 13, 2016 through December 20, 2016 was reasonable, necessary, and causally related to her September 13, 2016 work injury.

3. Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits from September 13, 2016 through October 9, 2016.

4. Claimant has failed to establish, by a preponderance of the evidence, an entitlement to any temporary partial disability benefits.

5. All issues not determined herein are reserved for future determination.

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

DATED: February 28, 2018

/s/ Michelle E. Jones

_____

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

ISSUES

1. Whether Respondents have successfully rebutted the presumption of compensability under §8-41-209 by showing, by a preponderance of the medical evidence, that Claimant's prostate cancer did not occur on the job.

2. Whether Respondents have made the necessary showing so as to be able to withdraw the medical only General Admission of Liability filed on April 24, 2013.

3. In the event this claim is deemed compensable, whether medical treatment provided by Anova Cancer Center is reasonably necessary and related to the work injury, such that Respondents should be held liable for payment of this treatment.

FINDINGS OF FACT

1. Claimant worked for Employer for a period of 36 years as a firefighter. Claimant was hired as a full time firefighter on February 1, 1979 and worked until he retired on February 20, 2015 for reasons unrelated to his prostate cancer. See Exhibit A.

2. Throughout his career, Claimant performed shift work. From 1979 through 2006 he worked 24 hours on, 24 hours off, 24 hours on, followed by 4 days off. In 2006 Claimant began working 48 hours on followed by 96 hours off.

3. During the course of his career, Claimant responded to the typical range of fires for career firefighters, including grass fires, dumpster fires, car fires, weed fires, wildland fires, some commercial fires, and house fires. Claimant testified that the fires to which he responded were fairly typical with the other firefighters in his department who were employed around the same time and for approximately the same duration. Other than the typical general hazards of the firefighting profession, Claimant reported to Dr. Allems that there were no unusual specific fires or particular exposures that stood out in his mind. Claimant sustained the known and typical exposures associated with the firefighting profession during his career.

4. As with most career firefighters, Claimant used protective equipment and bunker gear that was eventually improved and replaced over time. In his earlier career the issued self-contained breathing apparatus (SCBA) was used only during the suppression phase of fighting fires and not during the overhaul or cleanup phases. Additionally, in the early part of his career, the SCBA masks were shared and not fitted properly. In his early career, Claimant washed his bunker gear himself. Claimant also would take showers after a fire call and soot from the fire would roll off his body and down the drain.

5. Bunker gear, the SCBA masks, and the cleaning processes improved throughout the years of Claimant's employment. Extractors were eventually purchased by Employer to clean the bunker gear and an extra set of bunker gear was eventually purchased so Claimant did not have to use "dirty" gear.

6. With the improvement in bunker gear and processes, Claimant's exposures at the end of his career were less than in his early career. However, from 1979 through 2015 Claimant had many years of exposure to the known and typical exposures associated with the firefighting profession and many years where his gear did not adequately protect him from exposure.

7. Claimant began undergoing testing for prostate specific antigen (PSA) at age 50 through Employer and continued to undergo the PSA testing annually. *See* Exhibit 8.

8. On May 29, 2012, Claimant was evaluated at Urology Associates by Susan Eichorst, PA. Claimant reported dysuria, a history of prostatitis on two to three previous occasions, and a family history of prostate cancer. PA Eichorst performed a physical exam and noted an asymmetric prostate with bulbous right lobe and firmness of the left base. PA Eichorst noted a PSA was performed on May 24, 2012 with a result of 1.3. PA Eichorst assessed penile pain and abnormal prostate exam. PA Eichorst opined that Claimant had an asymmetric prostate and a PSA of 1.3, and that although it may be a normal variant, with Claimant's family history and symptoms, a prostate biopsy would be recommended. *See* Exhibit J.

9. On June 7, 2012, Claimant underwent a biopsy of his prostate at Urology Associates. Twelve cores were removed and tested. Eleven tested normal as benign prostatic tissue. However, the right lateral base core tested positive for adenocarcinoma with a Gleason score of: 3+3=6 involving 5% of the biopsy. The diagnostic summary was prostatic adenocarcinoma. *See* Exhibit J.

10. On June 19, 2012, Claimant was evaluated at Urology Associates by Barrett Cowan, M.D. Dr. Cowan assessed prostate cancer and discussed treatment options with Claimant including active surveillance, hormone deprivation therapy, davinci robotic prostatectomy, open radical prostatectomy, brachytherapy, IMRT, combination radiation therapy, cyberknife radiation therapy, proton therapy, and cryotherapy as well as the risks and benefits of all treatment options. Claimant was interested in learning more about cyberknife therapy and was referred to Gregg Dickerson, M.D. to learn more about the cyberknife option. *See* Exhibit J.

11. On July 3, 2012, Claimant was evaluated by Dr. Dickerson. Dr. Dickerson noted that Claimant had been referred to learn more about the option of cyberknife stereotactic body radiation therapy (SBRT) for prostate cancer. Claimant reported a family history of prostate cancer (father). On exam, Dr. Dickerson found Claimant's prostate asymmetrically enlarged with a bulbous and firm right superior lobe. Dr.

Dickerson discussed treatment options and he recommended SRBT to treat Claimant's prostate cancer. Dr. Dickerson noted that Claimant wanted to proceed with cyberknife SBRT treatment. *See* Exhibits 5, I.

12. On July 18, 2012, Claimant filed a Workers' Claim for Compensation with regard to his prostate cancer and listed it as an occupational disease under § 8-41-209, C.R.S. On August 8, 2012, Respondents filed a Notice of Contest. The matter was scheduled for hearing on May 28, 2013. After filing a claim and received the notice of contest, Claimant continued to seek treatment. *See* Exhibits B, C, E.

13. On August 14, 2012 Claimant was evaluated by Dr. Cowan. Dr. Cowan noted that Claimant came in to discuss treatment options. Dr. Cowan noted that they discussed Claimant's situation for over an hour and the advantages and disadvantages of each mode of therapy. Dr. Cowan advised Claimant that despite his age, he was a good candidate for observation. Dr. Cowan also advised Claimant that if he wanted to be treated, cyberknife had an equivalent cure rate to other treatments with fewer side effects. Claimant opted to proceed with observation and a follow up in one month for a repeat PSA was planned. *See* Exhibit J.

14. On October 10, 2012, Claimant underwent an independent medical evaluation performed by Annyce Mayer, M.D. Dr. Mayer noted a history of prostatitis x2 in the past as well as a family history with Claimant's father having had prostate cancer at age 70. Claimant reported that his father worked at Rocky Flats as a guard and a technical writer and that to his knowledge, his father did not work in any production areas and did not have any excess radiation exposure or exposure related illness. Dr. Mayer noted that Claimant began having PSA testing with Employer at work at age 50 and had been tested annually, with results always 1.0 or less until his recent diagnosis. Dr. Mayer opined that the prostate cancer had been detected at a very early stage and that it was not yet clear that treatment would be required. Dr. Mayer noted a plan of watch and wait with repeated PSA and biopsy in December. *See* Exhibit 8.

15. Dr. Mayer opined, to a reasonable degree of medical probability that the cause of Claimant's prostate cancer was unknown. She opined that Claimant was exposed to a number of carcinogens commonly found in fire soot and smoke over the course of his 34 years as a firefighter. Dr. Mayer opined that Claimant met the presumption under 8-41-209, C.R.S. that his prostate cancer was work related. She noted thus, that she had to consider whether or not the non-occupational risk factors constituted a preponderance of the medical evidence that the condition or impairment did not occur on the job and the question of without the work-related exposure, was it medically probable that Claimant would have the current diagnosis and treatment requirements in the absence of his firefighting exposure. *See* Exhibit 8.

16. Dr. Mayer referenced the International Agency for Research on Cancer (IARC), part of the World Health Organization, and noted that IARC has recognized a number of carcinogens that are commonly found in fire soot and smoke. Dr. Mayer listed some of the carcinogens in each of the IARC categories, including Group I agents (known

human carcinogens), Group 2A agents (probable human carcinogens), and Group 2B agents (possible human carcinogens). Dr. Mayer also discussed various risk factors for prostate cancer and noted the following: prostate cancer was the most common non-skin cancer in men, particularly in older men; there is a strong familial component to prostate cancer, with an estimated 10-15% of all prostate cancer attributable to inherited factors, and the remainder considered "sporadic cases"; for development of prostate cancer before age 55, up to 40-50% are considered due to inherited factors; and the greatest familial risk of prostate cancer is afforded by first degree relatives. Regarding Claimant's case, Dr. Mayer opined that Claimant had an increased relative risk of prostate cancer of 1.5-2.0 due to his family history. Dr. Mayer discussed the meta-analysis by LeMasters et al. which she noted reported a 28% increase in relative risk of prostate cancer in firefighters. Dr. Mayer also noted that most firefighters do not get prostate cancer. *See* Exhibit 8.

17. On December 6, 2012 Claimant underwent a repeat PSA test that showed a level of 1.5. On December 12, 2012 Claimant underwent a repeat biopsy of his prostate. Twelve cores were again removed and tested. Ten of then tested normal as benign prostatic tissue. This time, two cores tested positive for adenocarcinoma: the right lateral base core and right lateral mid core. *See* Exhibit J.

18. On January 4, 2013 Claimant again met with Dr. Cowan to discuss treatment options. Dr. Cowan opined that Claimant's long-term prognosis was excellent regardless of which mode of therapy Claimant chose.

19. In March and April of 2013, Claimant underwent cyberknife SBRT treatment for his prostate cancer with Dr. Dickerson. *See* Exhibit I.

20. On April 15, 2013 William Milliken, M.D. issued a case summary letter. Dr. Milliken opined that based on prior experience with prostate cancer claims in firefighters with significant risk factors for a non-occupational exposure etiology, it appeared the case would be accepted for a firefighter exposure etiology despite the predominance of scientific evidence that suggested otherwise. Dr. Milliken noted the constraints of the legislative issues. *See* Exhibit H.

21. On April 24, 2013 Respondents filed a medical only general admission of liability (GAL) noting that there had been no compensable wage loss. After this was filed, the May 28, 2013 hearing was cancelled noting that the issues had been resolved. At the time the GAL was filed Claimant had already completed his cyberknife SBRT treatment for prostate cancer. *See* Exhibits 1,D, E.

22. Claimant continued to follow up with Dr. Dickerson and with Dr. Cowan at Urology Associates. By January of 2015, his PSA level was at .5. By April of 2015, his PSA level was at .49 and he was noted to be doing well two years post cyberknife treatment. In April of 2015, Dr. Dickerson noted that Claimant was demonstrating an excellent clinical and biochemical response to treatment with no significant late side effects and relief of problems of erectile dysfunction with Cialis. By October of 2015,

Claimant's PSA level was at .4 and in April of 2016 it was noted to be at .2. On October 26, 2016 Urology Associates noted that Claimant was demonstrating excellent clinical and biochemical response to treatment. It was noted that Claimant had worsening of erectile dysfunction at about 50% of pre-treatment level, but that there were no other late side effects from Claimant's course of cyberknife SBRT for his prostate cancer. *See* Exhibits 6, 13, I, J.

23. On July 27, 2016 Claimant was evaluated by Sharon Walker, M.D. at On the Mend Occupational Medicine. Dr. Walker noted that Claimant was sent to their clinic for an evaluation of work-related prostate cancer and to determine if Claimant had reached MMI and whether he had sustained any permanent impairment as a result of his work injury. Dr. Walker noted that Claimant's dad had prostate cancer at the age of 70. Dr. Walker opined that Claimant's prostate cancer was a result of his work as a firefighter and she agreed with the treatment Claimant had undergone. Dr. Walker placed claimant at maximum medical improvement and opined that further treatment could be done as maintenance including lifetime erectile dysfunction medications and lifetime follow up evaluations for prostate cancer. DR. Walker opined that Claimant sustained a 5% whole person impairment rating. *See* Exhibits 2, G.

24. On December 27, 2016 Dr. Mayer issued an updated report. Dr. Mayer noted Claimant's prostate cancer diagnosis and treatment history. She listed his social history to include that he was a former smoker, smoking ¾ of a pack per day on average for 17 years overall. She noted his family history with Claimant's father diagnosed with prostate cancer at age 70. Dr. Mayer supplemented Claimant's occupational history to include additional information regarding Claimant's work shifts and the shift changes that had occurred over the years, noting that Claimant initially worked most of his career at 24 hours on, 24 hours on, 24 hours off, 24 hours off, 24 hours on, followed by 4 days off and that 8 years or so before he retired he changed to 48 hours on, followed by 96 hours off. Claimant reported feeling much more refreshed on the 48/96 schedule. Dr. Mayer also noted that Claimant had retired from employment on February 20, 2015. Dr. Mayer opined that Claimant was at MMI and that he had a 23% whole person impairment rating based on impairment of prostate and seminal vesicles (5%), impairment for sexual function (10%) and impairment of the urethra for mild urinary incontinence (10%). *See* Exhibit 7.

25. Dr. Mayer again opined that Claimant met the requirements under the firefighter cancer presumption statute listed at 8-41-209. She discussed his exposures typical to fighting fires as well as other exposures including diesel exhaust, solar radiation, and shift work. Dr. Mayer opined that rotating shift work has been identified as a risk factor for prostate cancer. She noted that Claimant did not sleep well on the job and that he had difficulty with sleep after leaving the job. Dr. Mayer opined that six epidemiological studies showed an increased risk of prostate cancer in firefighters including: LeMasters et al. (2006); Bates (2007); Daniels (2013); Pukkala (2014); Tsai (2015); and Glass (2016). Dr. Mayer noted that smoking cigarettes did not appear to increase the risk of prostate cancer in Caucasians (other than in heavy smokers). As before, Dr. Mayer opined that Claimant has an increased relative risk of 1.5-2.0 of developing prostate

cancer due to his family history. Dr. Mayer noted that the relative risk of prostate cancer in firefighters as a group was known, but that the relative risk of prostate cancer in firefighters with a familial history of prostate cancer versus those without a family history were not known because none of the studies had examined family history. As such, she opined that it was possible that the summary risk statistics consistently showing a statistically significant increased risk of prostate cancer of 4-28% in firefighters actually means that all firefighters have this same amount of increased risk. She opined that it was also possible that there was a subset of firefighters who were at substantially increased risk, with a synergistically increased risk strong enough to drive up the summary risk estimate for the whole population. She noted that some people possess a low risk for developing a disease through an environmental insult while others are much more vulnerable due to subtle differences in genetic factors. Dr. Mayer noted that as Claimant and his father shared some genetic factors, a gene by environment interaction was suggested with the early onset of prostate cancer. *See* Exhibit 7.

26. Dr. Mayer opined that there was no medical evidence that it is more probable that the cause of Claimant's prostate cancer was not related to his exposure to carcinogens during his work as a firefighter. Dr. Mayer opined that over the course of his 33 to 34 years of work as a firefighter, Claimant had repeated opportunity for typical firefighter exposures that have been linked to prostate cancer including PAHs and circadian rhythm disruption as well as cadmium, pesticides, arsenic, PCBs, and other endocrine disruptors. She noted he had inadequate respiratory and skin protection for much of his career and that his repeated exposure to carcinogens including PAHS were at virtually every fire scene and well absorbed through the skin---and were well established risk factors for prostate cancer. *See* Exhibit 7.

27. On February 6, 2017 Claimant underwent an independent medical evaluation performed by Sander Orent, M.D. Dr. Orent opined that from the perspective of risk factors, Claimant's many years of firefighting exposed him to multiple carcinogens and noted the problems with bunker gear in the early days as well as a lack of adequate respiratory protection during that time. Dr. Orent noted that Claimant smoked cigarettes at ¾ of a pack per day for a period of 17 years. Dr. Orent noted a family history of prostate cancer from Claimant's father. However, Dr. Orent opined that it was extremely important to know that Claimant's father was a guard at Rocky Flats and had two major exposures to plutonium fires in that job. Dr. Orent opined that it was quite clear in his view that Claimant's prostate cancer was a result of his multiple and prolonged exposures to carcinogens in the course and scope of his job as a firefighter. Dr. Orent opined that Claimant's family history does not explain his malignancy and noted the genetic predisposition as a potential enhancer to the carcinogen exposure. However, Dr. Orent noted that Claimant's father had substantial carcinogen exposures even probably exceeding that of Claimant in at least 2 episodes at Rocky Flats from a highly carcinogenic agent, plutonium. Dr. Orent opined that Claimant did not have a significant smoking history and had no other confounders. Therefore, Dr. Orent opined that Claimant's prostate cancer was a direct result of his many years of carcinogenic exposure as a firefighter. *See* Exhibit 9.

28. On January 23, 2017 Claimant was interviewed by phone for an internal medicine/occupational medicine and toxicology evaluation performed by Thomas Allems, M.D. Dr. Allems reviewed Claimant's medical and occupational history and issued a report on May 1, 2017. Dr. Allems opined that Claimant's diagnosis of adenocarcinoma of the prostate was unrelated to his occupation as a firefighter. Dr. Allems opined that it was not possible to state, with any degree of medical probability, that Mr. Minor's prostate cancer was caused or contributed to by any factors of his employment. Dr. Allems noted his understanding of Colorado's firefighter cancer presumption statute, and noted that the application of this statute and the determination of whether the scientific evidence rebuts it from a legal standpoint is deferred to the trier of fact. However, from a medical standpoint, Dr. Allems opined, "the presumption is reasonably rebutted on the strength of the medical evidence of a lack of association between firefighting and prostate cancer." *See* Exhibits 10, F.

29. Dr. Allems opined that prostate cancer is the most common cancer diagnosis in American males and that the incidence of prostate cancer skyrocketed in the 1990s contemporaneous with wide usage of PSA screening. "The advent of mass annual screening for prostate cancer (now abandoned) that resulted in a big uptick in disease incidence disproportionately affected precisely the cohort that firefighters fall into – healthy middle aged men." Like Dr. Mayer, Dr. Allems also noted that a family history of prostate cancer is a recognized risk factor for prostate cancer, while cigarette smoking is generally not considered a risk factor for prostate cancer. *See* Exhibits 10, F.

30. Dr. Allems opined that there are no established human carcinogens that are recognized to be a cause of prostate cancer. In addition to IARC, Dr. Allems cited the 2006 edition of Cancer Epidemiology and Prevention by Schottenfeld, which Dr. Allems described as an authoritative text on the epidemiology of cancers. Dr. Allems noted that this text, similar to the summary tabulations published by IARC, does not include prostate cancer in the list of known target organs for any carcinogens. Dr. Allems further noted that there had been specific interest in the occupational epidemiological studies in the role of cadmium because cadmium is concentrated in the prostate. Dr. Allems noted that this was a concern in cadmium workers who had actual known and significant exposure to cadmium, such as workers in the battery manufacturing industry, and that this group was not felt to include firefighters. In addition, even studies of such cadmium-exposed workers did not find a clear association between occupational cadmium exposure and prostate cancer. Dr. Allems went on to review of a number of epidemiological studies that looked at various occupational associations with prostate cancer. Dr. Allems noted that, while not focusing on firefighters, many of the studies included exposures of relevance to firefighters such as vehicular exhausts, solvents and polycyclic aromatic hydrocarbons (PAHs). As part of his review, Dr. Allems included a summary of his analysis regarding the interpretation of the results of the studies and their significance to the causation analysis. The results of these studies, Dr. Allems noted, often contained inconsistencies in the data and/or failed to show any meaningful association between any of these substances and prostate cancer. *See* Exhibits 10, F.

31. Dr. Allems acknowledged that firefighters, in the usual course of their firefighting duties, were inevitably exposed to numerous toxins and recognized human carcinogens, both through inhalational exposure as well as dermal exposures. Dr. Allems specifically identified several recognized and suspected human carcinogens that can be present in products of combustion, including asbestos, polyaromatic hydrocarbons (PAHs), benzo(a)pyrene, benzene, formaldehyde, dioxins, polychlorinated biphenyls and vinyl chloride. Dr. Allems further noted that the carcinogens that were most prevalent in fire smoke were asbestos, benzene, formaldehyde and PAHs. However, Dr. Allems noted that PAHs were not associated with prostate cancer. Dr. Allems further recognized that firefighters can also be exposed to vehicular exhausts as part of their work duties. However, Dr. Allems noted that IARC has published an extensive and authoritative monograph on the carcinogenic potential of vehicular exhaust, and that epidemiological studies regarding vehicular exhaust have focused on occupations that involve incontrovertible potential for overexposure on a chronic and daily basis (as opposed to firefighters). Dr. Allems noted that, while the human epidemiologic data have suggested an association between heavy exhaust exposure and cancer of the lung and bladder (thus resulting in diesel exhaust being ranked as a Group I carcinogen), no association was found with regard to prostate cancer. Gasoline engine exhaust, on the other hand, is ranked by IARC as a Group 2B carcinogen, indicating a substance that is possibly carcinogenic in humans based on "inadequate" evidence of cancer causation in humans. *See* Exhibits 10, F.

32. Dr. Allems explained that, although the general epidemiological data did not suggest that the types of exposures sustained by firefighters on the job posed a risk of prostate cancer, a numbers of epidemiological studies have been done specifically with regard to firefighters and cancer. Dr. Allems identified and reviewed numerous firefighter studies and noted the findings in his report. In addition to all 6 of the studies cited by Dr. Mayer, Dr. Allems' review included many other studies that looked specifically at firefighters and prostate cancer. According to Dr. Allems' review, several of the studies found no increased association or actually found negative associations between firefighters and prostate cancer as compared to the general population. While some of the studies found a marginally increased risk, the increase was noted in many cases to not be statistically significant. In many instances, studies that initially found an increased rate of prostate cancer were noted to have incongruous results when the data was analyzed for markers of increasing exposure and/or age (in other words, the data showed decreasing rates of prostate cancer with increasing amounts of firefighting exposures and/or age). A few studies found a marginally increased rate of prostate cancer but did not provide any data to allow for an analysis of dose response trend. In addition to the epidemiological studies, Dr. Allems noted that in 2009 the National League of Cities provided a report reviewing state firefighter presumption laws and the pertinent epidemiological literature. Dr. Allems wrote that the report noted zero studies that found strong or moderate associations between firefighting and prostate cancer, three studies that reported a weak association, and nine studies that found no association. Further, Dr. Allems noted that IARC monograph on cancer risk in firefighters placed the occupation of firefighting in the Group 2B category (possibly carcinogenic to humans). *See* Exhibits 10, F.

33. Dr. Allems opined that Claimant (and firefighters) are not exposed to any known prostate carcinogens and opined that the strength of the medical evidence made it more probable that Claimant's condition was not work related. Dr. Allems opined that Claimant's prostate cancer was due to the natural risk factors of Claimant being a middle age man, and/or Claimant's family history of prostate cancer.

34. Dr. Orent, Dr. Mayer, and Dr. Allems testified at hearing consistent with their reports and opinions.

35. At hearing, several pages of the International Agency for Research on Cancer (IARC) Monographs on the Evaluation of Carcinogenic Risk to Humans, Volume 98 were admitted into evidence. These included pages 401-403, 760-764, and 556-569. A summary of those pages is listed below.

Pages 401-403 --- shows table 1.1 and cancer sites in humans of chemicals measured at fires. Of the large list of chemicals measured at fires, none is listed as having human or animal evidence of prostate as a cancer site. *See* Exhibit M.

Pages 556-569 --- Lists exposure data and acknowledges the enormous number of toxic combustion products including known and possible carcinogens generated by all fires. It noted that a meta-analysis of multiple studies showed the incidence of prostate cancer for firefighters was approximately 30% in excess. IARC noted, however, that of the 20 studies of prostate cancer, only two reached statistical significance and only one study showed a trend with duration of employment. It noted of 20 total studies of prostate cancer, 17 reported elevated risk estimates ranging from 1.1 to 3.3. IARC noted that the human epidemiological studies, at best, used poor measurements of exposure. IARC noted increased risks for some cancers was found for firefighters in the meta-analysis but IARC noted the limitations in the studies. IARC concluded that there was limited evidence in humans for the carcinogenicity of occupational exposure as a firefighter and that occupational exposure as a firefighter was possibly carcinogenic to humans. *See* Exhibit 16

Pages 760-764 Discussion of relationship between cancer and shift work and circadian disruption. IARC notes that increased risk of cancer of the prostate had been reported and that the earliest studies of airplane pilots showed a markedly elevated incidence of prostate cancer compared with national reference levels, but IARC noted the limitations of the studies involved the potential for detection bias due to a higher prevalence of screening for

> prostate cancer in this occupational group. IARC concluded that there was limited evidence in humans for the carcinogenicity of shiftwork that involves night work and that shiftwork that involves circadian disruption is probably carcinogenic to humans. *See* Exhibit 21.

36. Dr. Mayer testified that the LeMasters study reviewed many smaller studies and summarized them in the meta-analysis. Dr. Mayer testified that after the LeMasters study, the Bates study showed a 1.22statistically significant increased risk of prostate cancer in firefighters; the Pukkala study showed an increased risk of 1.13, and the Glass study showed an increased risk of 1.23 for full time firefighters and 1.51 for part time firefighters. Dr. Mayer also testified that hormonal dysregulation is a risk factor for prostate cancer and that in animals there was good evidence that this type of disruption alters the hormonal cycle such that it leads to a conclusion that shift work that involves circadian rhythm disruption is probably carcinogenic to humans. DR. Mayer opined that the cause of Claimant's cancer was unknown and that she couldn't say it was specifically due to firefighting. Dr. Mayer also testified that family history can confer risk but that it was also known that there is a synergistic risk with a combination of genetic factors and carcinogen exposures that could cause cancer. Dr. Mayer opined that prostate cancer had been linked to firefighting by both the LeMasters meta-analysis that showed an increased risk of 1.28 and by IARC itself that showed an increased risk of 1.3.

37. Dr. Orent testified at hearing. Dr. Orent opined that there was no question that Claimant had exposures during his career to multiple carcinogenic agents. Dr. Orent reviewed Claimant's occupational history and known exposures with the lack of proper bunker gear cleaning, lack of good personal protective equipment, and lack of use of some during phases of the fire overhaul. Dr. Orent also opined that Claimant worked shift work and that shift work has an effect on hormonally sensitive target organs and that sleep disturbance is a profound part of being a firefighter. Dr. Orent also opined that plasticizers had endocrine components. Dr. Orent opined that prostate cancer was an endocrine sensitive malignancy. Dr. Orent opined that the concurrence of exposures that Claimant had over the course of many years is what led to his prostate cancer.

38. Dr. Allems testified that many studies have not shown an association between firefighting and prostate cancer and that some studies showed a negative association between firefighting and prostate cancer, meaning that firefighters had a lower risk than the general population. Dr. Allems also acknowledged that some studies showed an increased risk but opined that even though some studies might show a statistically significant increased risk, the existence of a negative dose-response pattern, meaning the risk is not increasing with increased exposure- length of employment, duration of employment, number of runs- outweighed the fact that there was a statistically significant increased risk listed at all. Dr. Allems also noted the concerns with the few studies that did show an association between firefighting and prostate cancer including a general lack of dose response relationship, lack of racial divisions, and lack of family history. Dr. Allems also noted concern with the PSA screening since firefighters were more likely than the general public to have annual and regular PSA tests. Dr. Allems

opined that the inconsistencies were still too great to make a connection between firefighting and prostate cancer. Dr. Allems opined that the statistically increased risk of prostate cancer for Claimant due to his family history was 1.5 to 2.0 and opined that it was probably higher than any of the other statistics that were cited by Dr. Mayer. Dr. Allems opined that the family history was higher than the risk associated at 1.28 for firefighters by the LeMasters study. Dr. Allems opined that family history is one of the strongest risk factors. Dr. Allems testified that despite the wealth of information and studies, firefighting does not reach the level of causation for prostate cancer. Dr. Allems explained that, if you have a study that purports to show an increased risk of prostate cancer, but then the data is segregated out along exposure lines and the rates do not increase with increasing markers of exposure, then the study falls flat for purposes of trying to make an occupational causation connection. Dr. Allems testified that the firefighter studies that have looked at markers of exposure have been pretty uniform in not showing an increased trend in prostate cancer.

39. The ALJ finds, based on the evidence as a whole, that Claimant's cancer was not caused or contributed to by his firefighting exposures. The epidemiological studies specifically regarding firefighters are particularly relevant to this case given that it is undisputed that Claimant sustained the gamut of known and typical firefighting exposures, and given the lack of evidence of any usual exposures outside of this range of known and typical firefighting exposures. Dr. Allems credibly testified that, although there are some studies that show a connection between firefighting and prostate cancer, the strength of the scientific and medical evidence as a whole strongly supports the conclusion that firefighting is not associated with an increased risk for prostate cancer. In contrast to Dr. Mayer, who did not reference or discuss any of the studies that did not show an association between firefighting and prostate cancer, Dr. Allems conducted an extensive, thorough and objective review of the pertinent literature, including the six studies upon which Dr. Mayer primarily relied. While Dr. Allems acknowledged those studies that found an association, he also credibly testified regarding the deficiencies in the data and the inconsistencies and conflicts that emerge when the data in these studies are reviewed and analyzed more closely. Dr. Mayer agreed that markers or surrogates of exposure and the concept of dose-response is "absolutely" relevant to the causation analysis in this case. Nevertheless, Dr. Mayer did not provide any explanation or response regarding the specific discrepancies and inconsistencies that Dr. Allems pointed out with regard to the data in the studies upon which she relied, including the absence of a correlation between markers of increased exposure and increased risk of prostate cancer. Dr. Mayer also did not offer any response to Dr. Allems' testimony regarding the phenomenon of increased PSA testing among firefighters beginning in the 1990s as compared to the non-firefighter population, and the skewing of the increased incidence rates and the epidemiological data overall that occurred as a result. Dr. Mayer also did not dispute Dr. Allems' testimony regarding the existence of a larger number of studies that did not show any association between firefighting and prostate cancer, nor did she specifically address IARC's listing of firefighting as only a Group 2B possible human carcinogen.

40. Regarding the basis for her opinion, Dr. Mayer referred to the "multiple studies out there" that have found a statistically significant increased risk. Dr. Mayer also testified regarding IARC's review of the LeMasters meta-analysis and a subsequent meta-analysis conducted by the IARC working group which she stated found a statistically significant 30% excess risk for cancer in firefighters. However, the IARC monograph reflects that the 30% increase is referring to the incidence rate, which is the precise measure that Dr. Allems testified was particularly sensitive to the phenomenon of increased PSA testing among firefighters. Moreover, in this same monograph, IARC concluded that there is "limited evidence" in humans for the carcinogenicity of occupational exposure as a firefighter, and that occupational exposure as a firefighter is "possibly carcinogenic" to humans (Group 2B). That IARC concluded that firefighting exposures were only possibly carcinogenic to humans, despite the finding of a 30% increase in prostate cancer incidence rates, reflects IARC's recognition of the need to look beyond a single data point and consider additional factors when interpreting the data, such as the impact of the frequency of PSA testing among firefighters as compared to the general population, any correlation in the data with markers of exposure, and the strength of the body of scientific evidence as a whole. This recognition is consistent with the opinions and testimony provided by Dr. Allems. Moreover, IARC's conclusion that firefighting is only "possibly" carcinogenic to humans supports the conclusion that it is probable (i.e. more likely than not) that Claimant's prostate cancer is not causally related to his firefighting exposures.

41. The ALJ finds Dr. Allems' opinions and testimony regarding the lack of a causal association between firefighting exposures and prostate cancer to be well thought out and supported by his thorough review and analysis of the pertinent epidemiological literature regarding occupations in general, firefighters specifically, and prostate cancer. The ALJ finds the opinions of Dr. Allems to be more credible and persuasive that those provided by Dr. Mayer and Dr. Orent in this regard.

42. The ALJ further finds, based on the credible evidence as a whole, that Claimant's strongest risk factor for his prostate cancer is his family history. Both Dr. Mayer and Dr. Allems testified that family history is a strong risk factor for prostate cancer. Dr. Mayer also opined that Claimant's increased risk for prostate cancer due to his family history is 1.5-2.0. Dr. Allems agreed that this assessment is reasonable. Dr. Allems also credibly testified that the increased risk due to family history, as assessed by Dr. Mayer, is actually greater than the 1.28 increased risk that was stated in the LeMasters study, as well as in most of the firefighter data that he reviewed. Dr. Mayer's own testimony and the studies submitted into the evidence by Claimant also establish that the 1.5-2.0 increase in risk due to family history is greater than the increased risk associated with firefighting found in the studies relied upon by Dr. Mayer in support of her opinion in this case. Specifically, Dr. Mayer testified that the Bates study found an increased risk of 1.22; that the Pukkala study found an increased risk of 1.3; that the Daniels (2013) study found an increased risk of 1.44 in the population aged 45 to 59; and that the Glass study found an increased risk of 23% (1.23) for full-time firefighters and 51% (1.51) for part-time firefighters. Thus, according to Dr. Mayer's own testimony, the increased risk of prostate cancer associated with firefighting as found in these studies is actually less than

Claimant's increased risk of prostate cancer due to his family history. Dr. Allems testified that Claimant's strongest risk factor was his family history. Dr. Mayer also agreed that Claimant's age at diagnosis was only one year off of the age range at which 40-50% of all cases are considered due to inherited factors.

43. Dr. Orent discounted the importance of Claimant's family history as a risk factor in this case because of the purportedly significant exposure to plutonium that Claimant's father sustained while working at Rocky Flats. However, there was no evidence or testimony as to what exposures Claimant's father specifically had and Dr. Orent testified at hearing that he had no details about Claimant's father's potential exposures. In light of the vague and scant amount of uncorroborated information upon which Dr. Orent based his opinion, that Claimant's father's prostate cancer was due to his plutonium exposures such that Claimant's family history is not a significant risk factor in this case, the ALJ finds this opinion to be incredible and unpersuasive.

44. Further, the ALJ finds that the preponderance of the medical evidence establishes the lack of a causal association between plutonium and prostate cancer. Even if Claimant's father had been exposed to plutonium while working at Rocky Flats, plutonium is listed by IARC as a carcinogenic agent for cancers of the lung, liver and bone and is not listed in association with the prostate as a target organ. Dr. Allems testified that to his knowledge, plutonium has not been identified as a prostate carcinogen and if it were, he would expect it to be listed on the IARC table for prostate cancer. No studies were presented to support the conclusion that plutonium is a carcinogen for prostate cancer or that any (speculative) plutonium exposure Claimant's father had was the cause of his prostate cancer.

45. Based on a review of the evidence as a whole, and particularly the epidemiological evidence, the ALJ finds that the preponderance of the medical and scientific evidence establishes that Claimant's known and typical firefighting exposures were not capable of causing his prostate cancer, such that the presumption of compensability is rebutted with regard to general causation.

46. In addition, based on a review of the evidence as a whole, the ALJ finds that the Respondents have established by a preponderance of the medical and scientific evidence that it is more probable that Claimant's prostate cancer was due to his family history, and not to his occupational exposures as a firefighter, such that the presumption of compensability is rebutted with regard to specific causation.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Firefighter Presumption Under §8-41-209, C.R.S.

For an injury to be compensable under the Act, it must “arise out of” and “occur within the course and scope” of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Ordinarily, the claimant has the burden of establishing his or her entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). The question of causation is generally one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Section 8-41-209, C.R.S., enacted by Colorado’s legislature in 2007, reverses the burden of proof for firefighters who have developed certain types of cancers and who have satisfied the threshold criteria set forth in the statute. The statute provides:

(1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a

firefighter, caused by cancer of the brain, skin, digestive system hematological system or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.

(2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and

(b) Shall **not** be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows **by a preponderance of the medical evidence** that **such condition or impairment did not occur on the job**.

. . .

§8-41-209, C.R.S. (emphasis added).

In *City of Littleton v. Industrial Claim Appeals Office*, 370 P.3d 157, 165 (Colo. 2016), the Colorado Supreme Court determined that the statutory presumption embodied in §8-41-209(2), C.R.S. "is substantive in that it remains in the case as a substitute for evidence." *Id.* at 165. However, the court emphasized that the statutory presumption "is not conclusive, or irrebuttable." *Id*. at 168. The employer can overcome the presumption by producing a preponderance of the medical evidence that the firefighter's cancer "did not occur on the job." *Id*. at 165, 169. While the court stated that the employer faces a "formidable" burden "because the employer is tasked with proving a negative," *Id*. at 172, the court also noted that the employer's burden does not require an especially high degree of proof. Rather, in order to meet its burden under §8-41-209(2)(b), the employer or insurer must show that it is "more probable than not" that the firefighter's condition or impairment "did not occur on job." *Id.* at 169. The *City of Littleton* court clarified the types of evidence that employers can use to rebut the statutory presumption and prove that a firefighter's cancer is not work-related. The employer may rebut the presumption with evidence establishing the absence of either general or specific causation. *Id.* at 172. Specifically an employer may prove by a preponderance of the medical evidence either: "(1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue; or (2) that the firefighter's employment did not cause the firefighter's particular cancer, where, for example, the claimant firefighter was not exposed to the cancer-causing agent, or where the medical evidence renders it more probable that the cause of the claimant's cancer was not job-related." *Id*. Notably, §8-41-209(2), C.R.S. does not require the employer "to disprove causation from every conceivable substance." *Id.* at 171. In fact, if a firefighter's exposure is "speculative, remote or illogical, then it is not typical of the occupation." *Id.*

With regard to general causation, the *City of Littleton* court noted that epidemiological evidence is "'highly probative because it considers human physiology and

the likelihood that a potential environmental factor is capable of entering the body, traveling to a particular organ, and interacting with that organ in a way that can cause a particular cancer.'" *Id.* at 170. The court cited a 10th Circuit opinion for the proposition that, "[w]hile the presence of epidemiology does not necessarily end the inquiry, where epidemiology is available, it cannot be ignored. As the best evidence of general causation, it must be addressed." *Id.* (citing *Norris v. Baxter Healthcare Corp.,* 397 F.3d 878, 882 (10th Cir. 2005)). The *City of Littleton* court expressly concluded that employers may rely on epidemiological evidence to show the lack of an association or general causal relationship between known or typical substances to which the firefighter is likely to be exposed on the job and the firefighter's particular condition or impairment. The ALJ may then determine whether that medical evidence shows, by a preponderance, that the claimant firefighter's cancer "did not occur on the job." *Id.* at 171.

In the companion case of *Industrial Claim Appeals Office v. Town of Castle Rock*, 370 P.3d 151, 157 (Colo. 2016), the Supreme Court further determined that to meet its burden of proof under §8-41-209(2)(a), the employer is not required to establish a specific alternate cause of the firefighter's cancer. The court addressed the employer's ability to rebut the presumption of compensability by showing a lack of specific causation and noted that the employer may meet its burden to show that the firefighter's condition did not occur on the job by presenting risk-factor evidence demonstrating that it is more probable than not that a particular firefighter's cancer was caused by something other than the firefighter's employment. *Id.* at 156-157.

Here, Respondents have established by a preponderance of the evidence that the known and typical occupational exposures sustained by Claimant as a result of his work as a firefighter are not capable of causing his prostate cancer. Although it is undisputed that Claimant was exposed to carcinogenic agents during his long 36 year career, the epidemiological evidence considered as a whole shows a lack of association or general causal relationship between the known and typical substances to which Claimant was likely exposed on the job and his prostate cancer. The carcinogenic agents he was exposed to have been shown to be linked to other types of cancers, but none are linked or show a relationship with prostate cancer or as targeting the prostate.

As found above, although some studies show a slightly increased risk of prostate cancer among firefighters, the studies have limitations and conflicts (dose trend, lack of sorting by racial makeup, lack of sorting by family history) as well as potential for higher prevalence based on higher levels of PSA testing in the firefighter population. Although it is possible that firefighting may cause prostate cancer, it is not probable and Respondents have met their burden to show, more probably than not, that based on current scientific and medical evidence, prostate cancer is not causally related to the exposures experienced in firefighting occupations. Therefore, Respondents have successfully rebutted the presumption of compensability pursuant to §8-41-209(2)(b) based on a lack of general causation.

In addition, even if general causation were accepted based on the LeMasters meta-analysis showing an increased risk of 1.28 and the IARC listing of 1.3 increased

risk, Respondents have still successfully rebutted the presumption of compensability pursuant to §8-41-209(2)(b) based on a lack of specific causation. As found above, Claimant's greatest risk factor for developing prostate cancer is his family history and the fact that his father had prostate cancer. This risk factor was opined by both Dr. Mayer and Dr. Allems to be 1.5-2.0, and is greater than the risk listed by the studies relied upon. Even assuming that general causation exists between firefighting and prostate cancer, here, Claimant's family risk is much higher than the risk associated with firefighting and Respondents have presented this risk factor evidence, demonstrating it is more probable that Claimant's prostate cancer was caused by his family risk than his firefighting risk. Although Dr. Orent disregarded the family risk due to his belief that Claimant's father was exposed to significant plutonium due to work at Rocky Flats, we have no information on what types (if any) of exposure Claimant's father had. Further, plutonium is not linked causally to prostate cancer.

Withdrawing an Admission of Liability

The Court of Appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of the evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1), C.R.S.

Because Respondents filed a medical only General Admission of Liability on April 24, 2013, they bear the burden of proof to establish by a preponderance of the evidence that Claimant did not sustain a compensable injury. As found, Respondents have successfully rebutted the presumption of compensability under §8-41-209(2)(b). Consequently, Respondents have satisfied their burden under §8-43-201(1) and are permitted to withdraw their admission of liability in this claim.

ORDER

IT IS HEREBY ORDERED that:

1. Respondents have successfully rebutted the presumption of compensability under §8-41-209 and have shown, by a preponderance of evidence, that Claimant's prostate cancer did not occur on the job.

2. Respondents have made the necessary showing to withdraw the medical only General Admission of Liability filed on April 24, 2013.

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

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

DATED: March 22, 2018

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Brian Beatty, D.O. that he reached Maximum Medical Improvement (MMI) on September 29, 2016 for his March 19, 2014 industrial injuries.

2. Whether Claimant has produced clear and convincing evidence to overcome the DIME opinion of Dr. Beatty that his Deep Vein Thrombosis (DVT) was not related to his March 19, 2014 industrial injuries.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits that are designed to relieve the effects of his March 19, 2014 industrial injuries or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

4. Whether Claimant is entitled to a disfigurement award pursuant to §8-42-108, C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a Roofer. On March 19, 2014 Claimant was climbing a ladder while carrying a roll of black paper to a roof. As Claimant stepped onto the roof with his right leg, his left foot slipped and the ladder moved from its base. Claimant fell approximately 20 feet to the ground. He suffered pain to his right upper extremity, back and left lower extremity. Claimant was transported to the Denver Health Emergency Room and diagnosed with a fracture of the right wrist, a fracture of the coccyx and a lower back strain.

2. On March 31, 2014 Claimant began receiving medical treatment from Arbor Occupational Medicine. He was diagnosed with a right radius fracture, a cervical myofascial strain, a coccyx fracture, a contusion and hematoma to the right shin area, a contusion of the right ankle and a contusion of the left heel.

3. On April 4, 2014 Claimant visited Andrew Castro, M.D. for an evaluation. Dr. Castro agreed that Claimant had a fracture of the coccyx. He determined that the fracture was stable and Claimant was not a surgical candidate. Dr. Castro recommended an MRI of the lumbar spine if Claimant's symptoms persisted.

4. On April 16, 2014 Respondents acknowledged that Claimant had suffered industrial injuries on March 19, 2014 and filed a General Admission of Liability (GAL).

5. On August 14, 2014 Claimant underwent an MRI of his lumbar spine. Claimant subsequently visited PA-C Richard Shouse for an evaluation. PA-C Shouse noted that the MRI revealed soft tissue edema surrounding the S5 fracture that suggested a lack of healing.

6. Claimant subsequently received a lengthy course of medical treatment. Although he underwent right wrist surgery and his wrist healed, he continued to suffer lower back pain. Moreover, physicians noted urological symptoms and a possible pudental nerve injury.

7. On June 1, 2015 Claimant underwent a urological examination with Richard Heppe, M.D. Claimant reported urinary intermittency, decrease in force of his urine stream, significant urinary urgency, decreased libido and erectile dysfunction. Dr. Heppe commented that the urinary obstructive symptoms could be related to underlying urethral stricture disease secondary to Claimant's work injury, neurogenic bladder dysfunction secondary to his sacral injury or dysfunctional voiding related to inadequate relaxation of the pelvic floor secondary to his ongoing pain. Dr. Heppe determined that Claimant's erectile dysfunction was likely related to hypogonadism caused by long-term narcotic treatment.

8. Dr. Heppe recommended a number of tests to diagnose Claimant's condition. The tests included a blood draw, a cystoscopy to rule out urinary tract anatomic pathology and complex urodynamics to better evaluate bladder function and determine whether there was neurogenic dysfunction. Claimant did not undertake the proposed testing or attend any follow-up appointment with Dr. Heppe.

9. On August 13, 2015 Claimant returned to Authorized Treating Physician (ATP) Sander Orent, M.D. for an examination. Dr. Orent noted that an MRI reflected scarring around the pudental nerve that may have constituted the source of Claimant's urinary symptoms. He remarked that the diagnostic testing still needed to be completed but Claimant was unable to tolerate the evaluations. On September 2, 2015 Dr. Orent again remarked that Claimant's urodynamics had been delayed because of his increased back pain and leg symptoms after attempted injections. By October 15, 2015 Dr. Orent reiterated that Claimant required a urologic evaluation but the workup had not been completed because of severe back pain. He noted that he would not reschedule the diagnostic testing.

10. On March 17, 2016 Claimant visited Dr. Orent for an examination. Claimant reported "marked swelling in his left calf." Dr. Orent noted that Claimant had a history of "venous insufficiency in both lower extremities and therefore that puts him at risk for the possibility of a DVT." He remarked that the "proximate cause of any DVT would be a back injury and the inability to do anything other than primarily lie in bed on his back." An ultrasound at the Avista Adventist Hospital Emergency Room revealed a nonocclusive clot extending from the femoral deep vein distal to the popliteal. Claimant received Xarelto for his DVT.

11. On April 12, 2016 Claimant returned to Dr. Orent for an evaluation. Although Claimant had received 21 days of Xarelto for his DVT, Dr. Orent noted that the amount was insufficient and referred Claimant to a hematologist for further evaluation. In addressing Claimant's lower back condition Dr. Orent remarked that there was no other treatment available and Claimant would likely reach Maximum Medical Improvement (MMI) after evaluation for ongoing anticoagulation treatment.

12. On May 4, 2016 Claimant visited Praveena Solipuram, M.D. at the Rocky Mountain Cancer Centers regarding his DVT. Dr. Solipuram ordered a hypercoagulable panel and a repeat ultrasound. She stated that Claimant should continue the medications for at least four to six months pending the results of testing. In a follow-up visit with Dr. Solipuram she commented that Claimant might benefit from long-term anticoagulation medications. Claimant subsequently informed Dr. Solipuram that he had stopped taking Xarelto because he had awakened on multiple occasions with blood in his mouth.

13. On July 8, 2016 Claimant underwent an independent medical examination with Edwin M. Healey, M.D. Claimant continued to report severe chronic pain and significant depression. Dr. Healey diagnosed Claimant with post-traumatic mechanical low back pain, continued fracture of the fifth sacral segment of the coccyx with 6mm displacement associated with small bony fragments, adjustment disorder with depression and anxiety, chronic pain disorder, DVT and urinary frequency. He offered Claimant the opportunity to speak with a psychologist, but Claimant declined because the psychologist did not speak Spanish. Dr. Healey thus recommended that Claimant visit a Spanish speaking psychologist in conjunction with pain management treatment.

14. On August 16, 2016 Claimant underwent a final evaluation with Dr. Orent. Dr. Orent remarked that Claimant had undergone injections, physical therapy and chiropractic treatment without improvement. Claimant exhibited significant non-physiologic tenderness in his lumbar spine. Dr. Orent specifically commented that it had been very difficult to identify a pain generator. He diagnosed Claimant with "chronic intractable low back pain." Dr. Orent recommended a Functional Capacity Evaluation (FCE) to ascertain Claimant's true limitations.

15. On September 29, 2016 Claimant visited David Orgel, M.D. for an impairment evaluation. Dr. Orgel noted that Claimant had undergone three surgeries for his right wrist and suffered from lower back pain "of an unclear etiology." He assigned Claimant a 13% right upper extremity impairment for wrist range of motion deficits. Although Dr. Orgel attempted to measure Claimant's lumbar flexion range of motion, the measurements were invalid. He asked Claimant to return on the following day for repeat lumbar flexion range of motion measurements.

16. Claimant returned to Dr. Orgel on September 30, 2016. Dr. Orgel noted that Claimant had been unable to complete an FCE because of his pain behaviors. Although Claimant's lumbar flexion range of motion measurements were again invalid, Dr. Orgel assigned him an 11% range of motion impairment for his lower back. He also assigned Claimant a 7% impairment for a specific disorder of his coccyx and sacral fracture pursuant to Table 53 of the *AMA Guides for the Evaluation of Permanent*

Impairment Third Edition (Revised) (AMA Guides). Claimant thus suffered a total 18% whole person impairment rating for his back. Combining his right wrist and back ratings yielded a 25% whole person impairment as a result of his March 19, 2014 industrial injuries.

17. Dr. Orgel diagnosed Claimant with lower back pain and a DVT. He determined that Claimant should receive maintenance treatment through the Hematology Clinic and visit Dr. Sorenson for one year. Dr. Orgel did not assign Claimant work restrictions because "there was no valid way of determining his work abilities." He thus discharged Claimant at MMI.

18. Claimant challenged the MMI determination through a Division Independent Medical Examination (DIME). On January 19, 2017 Brian Beatty, D.O. performed the DIME. Claimant reported neck pain, lower back pain and right wrist pain. Dr. Beatty conducted a thorough review of Claimant's medical records and performed a physical examination. He diagnosed Claimant with a lumbar spine strain, a right wrist fracture, a sacral fracture and a coccyx fracture. Dr. Beatty agreed that Claimant had reached MMI on September 29, 2016. He assigned Claimant a 5% impairment for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides* and a 7% rating for range of motion deficits. Dr. Beatty also assigned Claimant an 8% whole person impairment rating for range of motion loss of the right wrist. The impairments combined for a 19% whole person rating. He noted that Claimant's range of motion measurements for lumbar flexion were invalid. Dr. Beatty recommended lumbar spine maintenance treatment for six months. He did not suggest any additional treatment for Claimant's DVT because it was not causally related to the March 19, 2014 industrial injuries. Dr. Beatty specifically explained that he did not "believe that treatment for the deep venous thrombosis is appropriate [because] the patient is at high risk for DVT due to varicose veins and there was never any surgical procedure performed on his lower extremities that would account for a work-related DVT."

19. On June 19, 2017 Claimant underwent an independent medical examination with Miguel Castrejon, M.D. Claimant reported ongoing lower back pain as well as depression and anxiety. He mentioned continued urological symptoms of interrupted urine flow, erectile dysfunction and urination difficulties. After reviewing Claimant's medical records and conducting a physical examination, Dr. Castrejon diagnosed Claimant with post-fracture scarring involving the pudental nerve that possibly caused pudental nerve entrapment. The condition resulted in neurogenic bladder and erectile dysfunction, DVT, chronic pain, and reactive depression and anxiety.

20. Dr. Castrejon determined that Claimant had not reached MMI for his pudental pain syndrome or reactive depression and anxiety due to incomplete evaluations and lack of treatment. He agreed that Claimant had reached MMI for his other symptoms. Dr. Castrejon also commented that Claimant's DVT was related to his March 19, 2014 industrial injuries because the accident caused severe deconditioning.

21. Dr. Castrejon explained that imaging studies supported his conclusion that Claimant had pudental nerve scarring that caused pudental entrapment syndrome. He

remarked that many medical providers had mentioned possible pudental nerve entrapment but Claimant never completed urodynamic studies or received treatment. Dr. Castrejon commented that the symptoms of pudendal nerve entrapment syndrome arise from changes in nerve function and structural changes in the nerve from compression. The changes cause "neuropathic" pain in the perineum, genital and rectal areas.

22. Dr. Castrejon stated that Claimant required additional treatment to reach MMI. He recommended urodynamic studies to assess Claimant's possible pudental nerve entrapment. Dr. Castrejon also suggested psychological treatment involving biofeedback and psychotropic medications to address Claimant's anxiety. In terms of medical maintenance care Dr. Castrejon reasoned that Claimant should have access to additional spinal injections and participate in a supervised water therapy program to assist with conditioning and development of an independent core strengthening program. Claimant should also be permitted to return to a pain management specialist for medication management, possible nerve blocks, stimulators or surgical nerve decompression.

23. On August 3, 2017 Claimant underwent an independent medical examination with F. Mark Paz, M.D. Claimant recounted his March 19, 2014 fall at work and his course of medical treatment. Dr. Paz conducted a thorough physical examination and reviewed Claimant's medical records. He determined that Claimant's lower back, coccyx and right wrist conditions were work-related but his left lower extremity DVT and adjustment disorder were not caused by his work accident. Dr. Paz emphasized that Claimant's physical examination findings reflected symptom magnification. Claimant provided a poor effort and his pain behaviors were documented by his treating physicians. Dr. Paz also mentioned that Claimant's "overt pain behaviors and inconsistencies" were documented in the FCE reports. He concluded that Claimant did not require any medical maintenance treatment.

24. On October 18, 2017 Dr. Paz issued a Supplemental Report to address Dr. Castrejon's conclusions and consider surveillance video of Claimant. He noted that the surveillance video reinforced his opinion that Claimant "has been an unreliable historian for an indeterminate period." Dr. Paz specified that Claimant's lack of pain behaviors or posturing in the video "were inconsistent with an individual with a greater than two-year history of subjectively reported, debilitating low back pain." He concluded that Claimant reached MMI on September 29, 2016 for his March 19, 2014 industrial injuries. Dr. Paz detailed that Claimant's sacral and right wrist fractures were "clinically stable" and would not improve with additional treatment.

25. Dr. Paz also addressed Dr. Castrejon's comments regarding Claimant's pudental nerve involvement. Dr. Paz reasoned that, because Claimant already had a caudal epidural steroid injection on June 3, 2015 with a non-diagnostic/therapeutic response, there was no need for sacral nerve root blocks. He remarked that the caudal epidural steroid injections would have "flooded" the sacral nerve root area and the blocks would be redundant. Dr. Paz emphasized that Claimant presented with only subjective symptoms and had no "pain" pattern in the pudental nerve distribution. He summarized that "[t]here is no clinical basis for further evaluation of the pudental nerve in this claim."

26. Dr. Paz also noted the disparity between Claimant's pain complaints and functional abilities. He commented that Claimant's exaggerated pain behaviors upon physical examination and observed functional activities on the surveillance video could not be ignored. Dr. Paz explained that the disparity in Claimant's behaviors should be incorporated into the clinical assessment and decision-making. He concluded that the DIME opinion of Dr. Beatty was consistent with the Workers' Compensation Level II Physician Accreditation Curriculum for determining MMI.

27. On November 13, 2017 Claimant underwent a psychological evaluation with Stephen Moe, M.D. Dr. Moe concluded that Claimant suffers from adjustment disorder, anxiety and depression as a result of his March 19, 2014 accident. However, he concluded that additional treatment for Claimant's psychological conditions could be completed as maintenance care and was not required for Claimant to attain MMI. He reasoned that Claimant's psychological symptoms might resolve with resolution of his physical ailments. Dr. Moe commented that psychiatric treatment might not help Claimant until he accepts that his physical condition may never be "fixed." He recommended 8-10 sessions of psychotherapy and possibly medications for depression and anxiety.

28. Claimant testified at the hearing in this matter. He explained that he continues to suffer lower back pain and urological symptoms. Claimant remarked that he has difficulties urinating and problems with erectile dysfunction. He noted that he has experienced significant depression since his work injuries and would like to visit a Spanish-speaking psychologist.

29. Claimant also underwent a disfigurement evaluation at the hearing. As a result of his March 19, 2014 industrial injuries, he sustained permanent disfigurement to his right upper extremity area. The disfigurement consists of three scars on his right wrist. Two of the scars are about three inches long and one is two inches long. Claimant also cannot completely straighten his right hand. The disfigurement is serious, permanent and normally exposed to public view. Claimant is thus entitled to a disfigurement award in the amount of $1,900.00.

30. Dr. Castrejon testified at the hearing in this matter. He explained that, although Claimant's coccyx fracture has healed, the break scarred the pudendal nerve. Objective imaging could account for all of Claimant's urological symptoms. Dr. Castrejon remarked that entrapment of the pudendal nerve can occur anywhere along the nerve. He stated that Claimant's fall from 10-20 feet onto a concrete surface caused displacements and fractures resulting in bone fragments. Dr. Castrejon reasoned that blood from the fracture caused scarring of the area and entrapped the nerve. After reviewing the DIME report he commented that Dr. Beatty failed to address Claimant's pudendal nerve and thus erred. Moreover, because there is treatment likely to improve Claimant's condition, Dr. Beatty erred in finding Claimant had reached MMI. Dr. Castrejon remarked that Claimant must undergo the previously recommended urological workup prior to reaching MMI. He also disagreed with Dr. Paz that the caudal epidural steroid injection was sufficient to test the pudental nerve because it did not likely cause fluid to extend outside of the spinal structure.

31. Dr. Castrejon explained that Claimant suffers from depression and anxiety as a result of his March 19, 2014 industrial injuries. He remarked that Dr. Beatty failed to address Claimant's mental health condition. Dr. Castrejon agreed with Dr. Moe that Claimant's psychological treatment could occur after MMI as maintenance care.

32. Dr. Castrejon also maintained that Claimant's DVT was related to his March 19, 2014 work accident. Claimant's immobility for a significant period of time after his work accident rendered him susceptible to developing a DVT. He determined that Dr. Beatty simply failed to address the possibility that Claimant developed a DVT as a result of his immobility.

33. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Beatty that he reached MMI on September 29, 2016 for his March 19, 2014 admitted industrial injuries. Claimant has also failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Beatty that his DVT was not related to his March 19, 2014 industrial injuries. Initially, Claimant suffered industrial injuries to his right wrist, coccyx and lower back when he fell from a ladder on March 19, 2014. Claimant subsequently received a lengthy course of medical treatment. Although his right wrist healed after surgeries, he continued to suffer lower back pain. Moreover, physicians noted urological symptoms and a possible pudental nerve injury. By October 15, 2015 ATP Dr. Orent reiterated that Claimant required a urologic evaluation but the workup had not been completed because of severe back pain. Claimant also received treatment for a left calf DVT as well as anxiety and depression.

34. On August 16, 2016 Claimant underwent a final evaluation with Dr. Orent. Dr. Orent remarked that Claimant had undergone injections, physical therapy and chiropractic treatment without improvement. He diagnosed Claimant with "chronic intractable low back pain." Claimant underwent impairment evaluations with Dr. Orgel on September 29-30, 2016. Dr. Orgel assigned Claimant an 11% range of motion impairment for his lower back and a 7% impairment for a specific disorder of the coccyx and sacral fracture pursuant to Table 53 of the *AMA Guides*. He also assigned Claimant a 13% right upper extremity impairment for wrist range of motion deficits. Combining Claimant's ratings yielded a 25% whole person impairment as a result of his March 19, 2014 industrial injuries.

35. Claimant subsequently underwent a DIME with Dr. Beatty. Dr. Beatty diagnosed Claimant with a lumbar spine strain, a right wrist fracture, a sacral fracture and a coccyx fracture. Dr. Beatty agreed that Claimant had reached MMI on September 29, 2016. He assigned Claimant a 5% impairment for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides* and a 7% rating for range of motion deficits. Dr. Beatty also assigned Claimant an 8% whole person impairment rating for range of motion loss of the right wrist. The impairments combined for a 19% whole person rating. Dr. Beatty recommended lumbar spine maintenance treatment for six months. He did not recommend any additional treatment for Claimant's DVT because it was not causally related to the March 19, 2014 industrial injuries. Dr. Beatty specifically explained that he did not "believe that treatment for the deep venous thrombosis is appropriate [because] the patient is at high risk for DVT due to varicose veins and there was never any surgical

procedure performed on his lower extremities that would account for a work-related DVT." Dr. Paz agreed that Claimant's lower back, coccyx and right wrist conditions were work-related but his left lower extremity DVT and adjustment disorder were not caused by his work accident. He also agreed that Claimant reached MMI on September 29, 2016. Dr. Paz specified that the DIME opinion of Dr. Beatty was consistent with the Workers' Compensation Level II Physician Accreditation Curriculum for determining MMI.

36. In contrast, Dr. Castrejon determined that Claimant has not reached MMI for his pudental pain syndrome or reactive depression and anxiety due to lack of treatment. He agreed that Claimant has reached MMI for his other symptoms. Dr. Castrejon remarked that many medical providers had mentioned possible pudental nerve entrapment but Claimant never completed urodynamic studies or received treatment. He also suggested psychological treatment involving biofeedback and psychotropic medications to address Claimant's anxiety. Finally, Dr. Castrejon commented that Claimant's DVT was related to his March 19, 2014 industrial injuries because the accident caused severe deconditioning. Although Dr. Castrejon disagreed with Dr. Beatty's MMI determination and the relatedness of Claimant's DVT, he did not outline any specific errors in Dr. Beatty's application of the *AMA Guides*.

37. Despite Dr. Castrejon's opinions, the bulk of the record reflects that Dr. Beatty properly applied the *AMA Guides* in concluding that Claimant reached MMI on September 29, 2016 and his DVT was not causally related to his March 19, 2014 industrial injuries. The persuasive medical records and opinions support Dr. Beatty's determinations. Initially, Dr. Beatty simply affirmed the MMI determination of ATP's Drs. Orent and Orgel. Moreover, Dr. Paz persuasively explained that Claimant's work injury did not cause any pudental nerve involvement. He reasoned that, because Claimant already had a caudal epidural steroid injection on June 3, 2015 with a non-diagnostic/therapeutic response, there was no need for sacral nerve root blocks. Dr. Paz emphasized that Claimant presented with only subjective symptoms and had no "pain" pattern in the pudental nerve distribution. Finally, Dr. Moe concluded that Claimant suffers from adjustment disorder, anxiety and depression as a result of his March 19, 2014 accident. However, he concluded that additional treatment for Claimant's psychological conditions could be completed as maintenance care and was not required for Claimant to attain MMI. The record thus demonstrates that the contrary opinions of Drs. Castrejon and Healey constitute mere differences of medical opinion regarding Claimant's treatment. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Beatty's MMI and causation determinations were incorrect.

38. Claimant has demonstrated that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical maintenance benefits that are designed to relieve the effects of his March 19, 2014 industrial injuries or prevent further deterioration of his condition. Dr. Beatty recommended lumbar spine maintenance treatment for six months. Furthermore, Dr. Moe concluded that Claimant suffers from adjustment disorder, anxiety and depression as a result of his March 19, 2014 accident. Treatment for the conditions would constitute maintenance care. He recommended 8-10 sessions of psychotherapy and possibly medications for depression and anxiety. Dr.

Castrejon agreed with Dr. Moe that Claimant's psychological treatment could occur after MMI as maintenance care. Finally, Claimant noted that he has experienced significant depression since his work injury and would like to visit a Spanish-speaking psychologist. In contrast, Dr. Paz concluded that Claimant did not require any medical maintenance treatment. However, the bulk of the persuasive evidence and medical records reflect that Claimant is entitled to receive medical maintenance treatment in the form of lumbar spine care for six months, 8-10 sessions of psychotherapy with a Spanish-speaking provider and medications for depression and anxiety.

CONCLUSIONS OF LAW

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

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

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

Overcoming the DIME

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

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,*

81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

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

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Beatty that he reached MMI on September 29, 2016 for his March 19, 2014 admitted industrial injuries. Claimant has also failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Beatty that his DVT was not related to his March 19, 2014 industrial injuries. Initially, Claimant suffered industrial injuries to his right wrist, coccyx and lower back when he fell from a ladder on March 19, 2014. Claimant subsequently received a lengthy course of medical treatment. Although his right wrist healed after surgeries, he continued to suffer lower back pain. Moreover, physicians noted urological symptoms and a possible pudental nerve injury. By October 15, 2015 ATP Dr. Orent reiterated that Claimant required a urologic evaluation but the workup had not been completed because of severe back pain. Claimant also received treatment for a left calf DVT as well as anxiety and depression.

8. As found, on August 16, 2016 Claimant underwent a final evaluation with Dr. Orent. Dr. Orent remarked that Claimant had undergone injections, physical therapy and chiropractic treatment without improvement. He diagnosed Claimant with "chronic intractable low back pain." Claimant underwent impairment evaluations with Dr. Orgel on September 29-30, 2016. Dr. Orgel assigned Claimant an 11% range of motion impairment for his lower back and a 7% impairment for a specific disorder of the coccyx and sacral fracture pursuant to Table 53 of the *AMA Guides*. He also assigned Claimant a 13% right upper extremity impairment for wrist range of motion deficits. Combining Claimant's ratings yielded a 25% whole person impairment as a result of his March 19, 2014 industrial injuries.

9. As found, Claimant subsequently underwent a DIME with Dr. Beatty. Dr. Beatty diagnosed Claimant with a lumbar spine strain, a right wrist fracture, a sacral fracture and a coccyx fracture. Dr. Beatty agreed that Claimant had reached MMI on September 29, 2016. He assigned Claimant a 5% impairment for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides* and a 7% rating for range of motion deficits. Dr. Beatty also assigned Claimant an 8% whole person impairment rating for range of motion loss of the right wrist. The impairments combined for a 19% whole person rating. Dr. Beatty recommended lumbar spine maintenance treatment for six months. He did not recommend any additional treatment for Claimant's DVT because it was not causally related to the March 19, 2014 industrial injuries. Dr. Beatty specifically explained that he did not "believe that treatment for the deep venous thrombosis is appropriate [because] the patient is at high risk for DVT due to varicose veins and there was never any surgical procedure performed on his lower extremities that would account for a work-related DVT." Dr. Paz agreed that Claimant's lower back, coccyx and right wrist conditions were work-related but his left lower extremity DVT and adjustment disorder were not caused by his work accident. He also agreed that Claimant reached MMI on September 29, 2016. Dr. Paz specified that the DIME opinion of Dr. Beatty was consistent with the Workers' Compensation Level II Physician Accreditation Curriculum for determining MMI.

10. As found, in contrast, Dr. Castrejon determined that Claimant has not reached MMI for his pudental pain syndrome or reactive depression and anxiety due to lack of treatment. He agreed that Claimant has reached MMI for his other symptoms. Dr. Castrejon remarked that many medical providers had mentioned possible pudental nerve entrapment but Claimant never completed urodynamic studies or received treatment. He also suggested psychological treatment involving biofeedback and psychotropic medications to address Claimant's anxiety. Finally, Dr. Castrejon commented that Claimant's DVT was related to his March 19, 2014 industrial injuries because the accident caused severe deconditioning. Although Dr. Castrejon disagreed with Dr. Beatty's MMI determination and the relatedness of Claimant's DVT, he did not outline any specific errors in Dr. Beatty's application of the *AMA Guides*.

11. As found, despite Dr. Castrejon's opinions, the bulk of the record reflects that Dr. Beatty properly applied the *AMA Guides* in concluding that Claimant reached MMI on September 29, 2016 and his DVT was not causally related to his March 19, 2014 industrial injuries. The persuasive medical records and opinions support Dr. Beatty's determinations. Initially, Dr. Beatty simply affirmed the MMI determination of ATP's Drs. Orent and Orgel. Moreover, Dr. Paz persuasively explained that Claimant's work injury did not cause any pudental nerve involvement. He reasoned that, because Claimant already had a caudal epidural steroid injection on June 3, 2015 with a non-diagnostic/therapeutic response, there was no need for sacral nerve root blocks. Dr. Paz emphasized that Claimant presented with only subjective symptoms and had no "pain" pattern in the pudental nerve distribution. Finally, Dr. Moe concluded that Claimant suffers from adjustment disorder, anxiety and depression as a result of his March 19, 2014 accident. However, he concluded that additional treatment for Claimant's psychological conditions could be completed as maintenance care and was not required for Claimant to attain MMI. The record thus demonstrates that the contrary opinions of

Drs. Castrejon and Healey constitute mere differences of medical opinion regarding Claimant's treatment. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Beatty's MMI and causation determinations were incorrect.

Medical Maintenance Benefits

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

13. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits that are designed to relieve the effects of his March 19, 2014 industrial injuries or prevent further deterioration of his condition. Dr. Beatty recommended lumbar spine maintenance treatment for six months. Furthermore, Dr. Moe concluded that Claimant suffers from adjustment disorder, anxiety and depression as a result of his March 19, 2014 accident. Treatment for the conditions would constitute maintenance care. He recommended 8-10 sessions of psychotherapy and possibly medications for depression and anxiety. Dr. Castrejon agreed with Dr. Moe that Claimant's psychological treatment could occur after MMI as maintenance care. Finally, Claimant noted that he has experienced significant depression since his work injury and would like to visit a Spanish-speaking psychologist. In contrast, Dr. Paz concluded that Claimant did not require any medical maintenance treatment. However, the bulk of the persuasive evidence and medical records reflect that Claimant is entitled to receive medical maintenance treatment in the form of lumbar spine care for six months, 8-10 sessions of psychotherapy with a Spanish-speaking provider and medications for depression and anxiety.

Disfigurement

14. Section 8-42-108, C.R.S. provides that a claimant may obtain additional compensation if he is seriously disfigured as the result of an industrial injury. As found, as a result of Claimant's March 19, 2014 industrial injuries, he sustained permanent disfigurement to his right upper extremity area. The disfigurement consists of three scars on his right wrist. Two of the scars are about three inches long and one is two inches long. Claimant also cannot completely straighten his right hand. The disfigurement is

serious, permanent and normally exposed to public view. Claimant is thus entitled to a disfigurement award in the amount of $1,900.00.

ORDER

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

1. .Claimant reached MMI on September 29, 2016 as a result of his March 19, 2014 industrial injuries.

2. Claimant's DVT was not related to his March 19, 2014 industrial injuries.

3. Claimant shall receive medical maintenance benefits.

4. Claimant shall receive a disfigurement award in the amount of $1,900.00.

5. Any issues not resolved in this Order are reserved for future determination.

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

DATED: February 15, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-995-488-04

ISSUE

The following issue was raised for consideration: Whether Claimant proved by a preponderance of the evidence that he is entitled to an Order awarding home assistance and yard services as a reasonable and necessary medical benefit.

FINDINGS OF FACT

1. Claimant sustained an admitted low back injury in a motor vehicle accident while in the course and scope of her employment on September 3, 2015. Claimant was authorized to treat with Dr. Alicia Feldman at the Colorado Clinic in Loveland, Colorado.

2. Claimant was paid temporary total disability benefits (TTD) benefits of $570.86 biweekly beginning September 29, 2015.

3. Dr. Feldman placed the Claimant at maximum medical improvement (MMI) on January 31, 2017. The Respondents filed a Notice and Proposal to Select an IME.

4. On June 13, 2017, Marc Steinmetz, M.D. authored a Division independent medical examination (DIME) report, stating Claimant reached maximum medical improvement (MMI) without impairment on October 3, 2016. On July 18, 2017, the DOWC provided notice of receipt of the Division IME report DIME process concluded. On July 26, 2017, Insurer filed a Final Admission of Liability consistent with Dr. Steinmetz' opinions Claimant reached MMI on October 3, 2016, without impairment. TTD benefits were paid to Claimant by Respondents, and never terminated by any other admission or order, until that Final Admission of Liability was filed.

5. Insurer contends that Claimant was overpaid TTD benefits from October 3, 2016, through July 14, 2017, in the amount of $11,621.08. Respondents seek repayment of the alleged overpaid amount.

CONCLUSIONS OF LAW

General Legal Principles

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

306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

Overpayment

4. Section 8-40-201(15.5), C.R.S., defines two categories of overpayment; when a claimant receives money that exceeds the amount that should have been paid or money received that a claimant was not entitled to receive.

5. Here, Claimant did not receive an overpayment within the meaning of Section 8-40-201(15.5), *supra*. The evidence established that Claimant received TTD benefits to which she was entitled during the period, October 16, 2016 through July 14, 2017. So, although Claimant received benefits exceeding the amount to which she became entitled after the DIME opinion and the Final Admission of Liability, at the time she received the TTD she was entitled to the TTD benefits.

6. Sections 8-42-103(3) and 8-42-105, C.R.S. provides that temporary total disability benefits shall continue until an employee reaches MMI, returns to regular or modified employment, the attending physician gives the employee a written release to return to regular employment or the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing and the employee fails to begin such employment.

7. At the time Claimant received TTD benefits, she was entitled to receive those benefits. Claimant did not meet any standard for termination of TTD as defined by Sections 8-42-103 and 105, *supra*. Claimant was placed at MMI by Dr. Feldman, the authorized treating physician, on January 31, 2017. On April 12, 2017, Respondents applied for a DIME challenging the impairment rating and MMI determination. TTD continue to be paid to Claimant during the pendency of the DIME. The DIME report was dated June 13, 2017, and DOWC determined the DIME process was concluded on July 18, 2017. On July 26, 2017, Respondents filed the Final Admission of Liability accepting

liability for TTD benefits from September 29, 2015, through October 2, 2016, based on the DIME physician's MMI determination of October 3, 2016.

8. Since Claimant was not overpaid TTD within the meaning of Section 8-40-201(15.5), C.R.S., Respondents shall not recoup an overpayment. *United Airlines v. Industrial Claim Appeals Office of the State of Colorado,* 312 P.3d 235, 239(Colo.App. 2013); *Rocky Mountain Cardiology v. Industrial Claim Appeals Office,* 94 P3d 1182, 1186 (Colo.App. 2004).

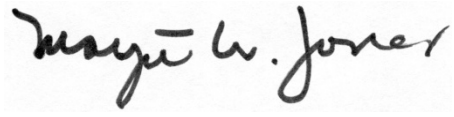
ORDER

1. Respondents claim to recoup an alleged overpayment of TTD is denied and dismissed.

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

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

DATED: February 26, 2018



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

PROCEDURAL BACKGROUND

On January 13, 2017, the Director of the Division of Workers Compensation issued a fine against Respondent, T-Rex Roofing & Construction, for failing to carry workers' compensation insurance since August 2013. The Director of the DOWC referred the matter to the Court for an evidentiary hearing and findings of fact. An evidentiary hearing was held pursuant to *Dami Hospitality, LLC v. Industrial Claim Appeals Office,* 2017COA21 (February 23, 2017).[1]

An Application for Hearing filed on behalf of the Colorado Division of Workers' Compensation on August 24, 2017. No Response to the Application for Hearing was filed on behalf of T-Rex Roofing & Construction, LLC.

PRELIMINARY FINDINGS OF FACT

1. T-Rex was a roofing company doing business in Pueblo, Colorado.

2. T-Rex was a two member LLC which Jason Trexel started with David Gallo in 2011. Mr. Trexel testified as a representative of Respondent at hearing.

3. Mr. Trexel testified T-Rex did not perform any of the roofing work; all the work was done through subcontractors. The subcontractors included Luis Martinez and BT Roofing.

4. T-Rex was previously covered by a workers' compensation insurance policy issued by Pinnacol Assurance.

5. On or about July 10, 2013 an individual employed by Luis Martinez (Liborio Rodriguez Reyes) was injured. A workers' compensation claim was asserted against T-Rex as the statutory employer. This claim was covered by Pinnacol Assurance. According to DOWC records, this Claimant fell off a roof and injured his head, neck and back.

6. There was no evidence in the record that other workers' compensation claims were filed against T-Rex after 2013.

7. Mr. Trexel testified the company's insurance premiums went up to $1,100.00 per month after the 2013 workers' compensation claim.

[1] The ALJ noted a petition for writ of certiorari was granted by the Colorado Supreme Court in *Dami Hospitality, LLC v. Industrial Claim Appeals Office, supra.*

8. T-Rex' workers' compensation coverage was cancelled on November 5, 2013 for non-payment of premiums.

9. Julie Yakes, a Manager of the Self-Insurance and Coverage Enforcement unit at the DOWC, testified at hearing. In this capacity, she was part of the compliance section of DOWC, which ensures employers carry worker's compensation coverage. Ms. Yakes was familiar with Respondent, as a case involving Respondent came through the unit.

10. Ms. Yakes confirmed T-Rex's last workers' compensation policy was effective on May 1, 2013 and coverage was cancelled for nonpayment of premiums on November 5, 2013. T-Rex continued to operate without worker's compensation insurance through November 2017.

11. Mr. Trexel did not dispute that T-Rex did not have worker's compensation coverage during the aforementioned period of time. The ALJ concluded Mr. Trexel knew Respondent did not have workers' compensation insurance coverage and continued to do business. This was a volitional decision.

12. After its insurance lapsed, T-Rex hired subcontractors to perform roofing work, including BT Roofing. Some of the subcontractors did not have workers' compensation insurance. Mr. Trexel testified T-Rex stopped using BT Roofing as a subcontractor in November 2016. Mr. Trexel admitted he did not verify whether BT Roofing had workers' compensation insurance, although at one point he thought he saw the company had coverage.

13. Ms. Yakes testified Respondent had a competitive advantage by not carrying workers' compensation insurance in that its costs were lower than other roofing companies. She estimated Respondents saved in excess of $63,000.00 by not paying workers' compensation insurance premiums. The ALJ concluded this constituted actual harm suffered by T-Rex' competitors.

14. On June 12, 2014, a rejection of coverage for T-Rex (for both members of the LLC) was filed with DOWC. The ALJ found this evinced a belief by Mr. Trexel that workers' compensation insurance coverage was not required, if T-Rex worked through subcontractors.

15. T-Rex continued to contract for roofing construction jobs after 2013. From November 15, 2016 through August 23, 2017, T-Rex filed for 31 permits for roof construction in the City of Pueblo.[2] T-Rex was listed as the contractor.

16. Evidence was admitted at hearing regarding the risk of occupational injuries and illnesses in 2015-16. For the year 2015, the construction industry had the highest number of fatal work injuries. A higher proportion of these injuries were

[2] Exhibit 2.

sustained by contractors. Ms. Yakes testified these statistics led her to surmise that roofing contractors had a high risk of injury. Mr. Trexel agreed workers performing roofing work were at risk to suffer injuries. The ALJ concluded from this evidence that there was a risk for workers within the construction field (in general) and the roofing industry (specifically) to sustain both fatal and nonfatal work-related injuries.

17. Ms. Yakes testified the Director of DOWC assessed a fine against T-Rex for $63,990.00 in January 2017, which was an ongoing fine.[3] Ms. Yakes explained that the fine was calculated by multiplying the number of days T-Rex was not in compliance, by the daily fine amount set forth under WCRP 3-6, which governs the imposition of fines. Ms. Yakes further explained that the daily amount of the fine increases as more time elapses during which the employer is without coverage. Ms. Yakes stated this methodology for assessing fines was used against other similarly situated employers.

18. Mr. Trexel testified he wrote a letter after receiving notification of the fine, which stated he couldn't pay the fine. Mr. Trexel also testified there was a lien placed on his house and he was sued by subcontractors. T-Rex ceased business operations in November 2017. Mr. Trexel testified that the LLC has no income. He also stated the closure of the business caused him financial hardship. Mr. Trexel testified that he filed for personal bankruptcy.[4] There was no evidence that T-Rex filed for bankruptcy.

19. On cross-examination, Mr. Trexel agreed that he and Mr. Gallo took the following payments from T-Rex:

2012 - $36,316.11 to Gallo and $48,352.88 to Trexel
2013 - $50,013.93 to Gallo and $81,335.02 to Trexel
2014 - $56,351.83 to Gallo and $109,041.23 to Trexel
2015 - $56,351.83 to Gallo and $118,006.37 to Trexel
2016 - $59,711.68 to Gallo and $144,986.89 to Trexel

20. The ALJ finds there was no documentary support or explanation of these figures. More particularly, it was unclear whether these figures represented member payments from the LLC in total for these years. The ALJ concluded Respondent had the wherewithal to make payments to the members of the LLC from 2012-2016. The ALJ further inferred Respondent had the financial ability to pay the fine imposed by DOWC.

21. In his post-hearing submission, Mr. Trexel averred that the payments made to members of the LLC were actually lower. He stated the figures were cumulative and did not represent payments on a year-to-date basis. Mr. Trexel alleged the following distributions were paid in succeeding years:

[3] The Order imposing the fine was not offered by either party and was not part of the record.

[4] No documents were admitted into evidence confirming this bankruptcy filing.

2012 - $25,250 to Gallo and $33,913.50 to Trexel
2013 - $13,697.82 to Gallo and $33,007.14 to Trexel
2014 - $6,337.90 to Gallo and $27,706.21 to Trexel
2015 - $0.0 to Gallo and $26,980.52 to Trexel
2016 - $5,229.70 to Gallo and $18,237.21 to Trexel

22. The ALJ found Respondent's explanation was unclear. In the post-hearing submission, Claimant referred to hearsay evidence, which was not considered. No explanation was provided as to the methodology used for arriving at the figures Respondent claimed he was paid, nor did he delineate what the payments were. The ALJ is unable to determine whether these represented LLC member payments on a yearly basis. The ALJ found that Respondent did not establish that it could not pay the fine as imposed by the Director.

23. Mr. Trexel testified that the company was the victim of a theft of materials from the yard. He also testified that an individual (Jose Guerrero) he employed represented himself as an owner of T-Rex and received direct payments for roofing work. This cause financial harm to the company. He also stated two suppliers had filed liens.

24. Amelia Torrealva testified as a rebuttal witness on behalf of Respondent. Ms. Torrealva stated that she owned BT Roofing and confirmed that it was a subcontractor for T-Rex. Ms. Torrealva testified that no one from T-Rex ever talked to her about workers' compensation insurance or asked her for proof of such insurance. She testified that BT Roofing did not have workers' compensation insurance during the time it did work for T-Rex.

25. Ms. Torrealva testified she did not sign the Workers' Compensation Independent Questionnaire.[5] Mr. Trexel testified he showed her the document, which Ms. Torerealva denied. The ALJ found this document did not have Ms. Torrealva's signature on it.

26. Financial records from T-Rex were not admitted at hearing. Respondent's representative was asked at the outset of the hearing whether there were attachments to Exhibit A to be submitted and these were not offered.

27. Mr. Trexel's personal financial records were not admitted at hearing.

28. T-Rex did not maintain workers' compensation insurance coverage from November 5, 2013 through November 2017.

29. T-Rex's failure to maintain worker's compensation insurance caused actual harm to its competitors, whose costs were higher.

[5] Exhibit 3.

30. T-Rex's failure to maintain workers' compensation insurance coverage caused no actual harm to an injured worker who sustained a work-related injury that was either employed directly by Respondent or by a subcontractor.

31. T-Rex's failure to maintain workers' compensation insurance coverage represented a risk of potential harm to workers who worked for uninsured subcontractors that the company engaged to perform roofing work.

Legal Standard

In *Dami Hospitality, LLC v. Industrial Claim Appeals Office,* 2017COA21 *(Colo. App. 2017),* the Colorado Court of Appeals enunciated the standard for evaluating conduct when imposing a fine for the failure to carry workers' compensation insurance. In that case, Dami Hospitality, LLC operated a motel in Denver and was initially fined for failing to carry workers' compensation insurance in 2006. Respondent paid the fine and then was once again without insurance in 2006-2007 and in 2010. DOWC sent a notice in 2014 imposing a penalty for the failure to carry insurance in the amount of $821,000.00, pursuant to 8-43-409(1)(b)(II) and WCRP 3-6. Respondent then requested DOWC to reconsider the fine, asserting among other things that the fine eas excessive because it exceeded the businesses' receipts in a year. Respondent also claimed that she relied on her insurance agent to obtain the necessary insurance and believe that the business insurance policy provided a workers' compensation coverage.

The Court of Appeals found the factors in *Associated Business Products v. Industrial Claims Appeal Office*, 126 P.3d 323 (Colo. App. 2005) established the standard for evaluating what was a constitutionally permissive fine under the Eighth Amendment. The Court concluded that Respondent was afforded procedural due process and found no facial flaw in the penalty statute, but found the penalty violated constitutional protections against excessive fines. More particularly, the Court found the fine in *Dami* was unconstitutionally excessive as applied.

Noting that an abuse of discretion occurred when an order was entered that was unsupported by the evidence, misapplied or was contrary to the law, the Court adopted the following criteria to be evaluated when a fine of this nature was imposed: the degree of Respondent's reprehensibility or culpability [6]; the relationship between the penalty and harm to the victim caused by the Respondent's actions; and the sanctions imposed in other cases for comparable misconduct. The Court also concluded that Respondent's ability to pay must be considered. (*Dami Hospitality, LLC v. Industrial Claim Appeals Office, supra,* slip opinion page 43-46).

Ultimate Findings of Fact-Application of *Dami* Factors

[6] The *Dami* Court noted that the Colorado Supreme Court adopted the U.S. Supreme Court's criteria for assessing reprehensibility in the punitive damages context in *Qwest Servs. Corp. v. Blood*, 252 P.3d 1094-1095 (Colo. 2011)-slip opinion pages 38-39.

As to the reprehensibility of Respondent's conduct, there was no evidence Respondent's conduct was done with indifference to or reckless disregard for the safety of others. While the ALJ found that the decision not to carry workers' compensation insurance was volitional, the ALJ also determined that Mr. Trexel believed he could work through independent contractors. Also, there was no evidence of intentional malice, trickery or deceit. The evidence in the record led the ALJ to conclude that, similar to *Dami*, Respondent's conduct was on the low end of reprehensibility.

As found, there was no actual harm caused by Respondent's conduct to an injured worker, either directly employed by the company or by one of its subcontractors, who did not maintain workers' compensation insurance coverage.

There was actual harm sustained by Respondent's competitors in that its lack of compliance with the requirement that it carry workers' compensation insurance gave it a competitive advantage by virtue of its lower costs.

There was also potential harm to workers who performed roofing for the subcontractors engaged by Respondent. The undisputed evidence was that the construction field in general was a dangerous one, both for fatal and nonfatal accidents. The statistical evidence supporting this conclusion, as well as the dangerous nature of the roofing industry was undisputed. Respondent's representative acknowledged that the roofing industry was a dangerous one. Accordingly, the ALJ concluded Respondent's failure to maintain worker's insurance coverage represented a potential harm both workers and the public. The risk exceeded that identified in *Dami*, as the roofing industry represented a higher risk of accidents than that of the leisure industry. There was also a higher potential risk Respondent could be found liable as a statutory employer, as it had in the 2013 claim.

The fine in this case was comparable to that imposed on other uninsured employers. Respondent did not dispute Ms. Yakes' testimony on the subject.

Last, based upon the totality of evidence, the ALJ determined that T-Rex did not prove it was unable pay the fine imposed by DOWC. There was evidence T-Rex obtained permits for roofing jobs in Pueblo through 2017. There was also evidence in the record that T-Rex's roofing jobs were to be completed by another company, but it was unclear whether T-Rex would receive any money for completion of those jobs.[7]

The ALJ credited the testimony that T-Rex and Mr. Trexel suffered financially, but this fell short of establishing Respondent was unable to pay. Mr. Trexel's testimony was primarily focused on his personal financial difficulties, including the fact that he filed for bankruptcy protection. There was no evidence in the record T-Rex filed for bankruptcy. On balance, T-Rex did not introduce sufficient evidence that it could not pay the fine.

[7] Exhibit A.

DATED: February 28, 2018

Digital signature

_____

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he suffered a compensable work injury on December 31, 2016.

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits.

IV. Whether Respondent has proven by a preponderance of the evidence that Claimant violated a safety rule and that his indemnity benefits should be reduced by fifty-percent.

STIPULATIONS

If found compensable, the parties stipulated to the following:

A. Claimant earned an average weekly wage (AWW) of $338.57.

B. Claimant is entitled to temporary total disability benefits from January 1, 2017 through February 28, 2017.

C. Respondent is liable for reasonable and necessary medical treatment.

FINDINGS OF FACT

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

1. Claimant starting working for Employer at the Beaver Creek Resort during December of 2016.

2. Claimant worked as a member of the Epic Mix race crew. The Epic Mix race crew conducted public and private ski races at the Beaver Creek Resort. His job duties included set-up and break-down of the course, and working at the either the starter or finish shack. **Hearing Tr. 48: 2-10**.

3. Employer is a drug-free workplace and Claimant was aware of such when he was hired.

4. Claimant agreed that Employer's drug-free workplace rule was a safety rule. **Hearing Tr. 67: 10-19**.

5. Although the exact definition of a drug-free workplace was not established during the hearing, Claimant agreed that Employer's drug-free workplace policy prohibited employees from working on the mountain while high or drunk. **Hearing Tr. 67: 10-19**.

6. Claimant was not required to pass pre-employment drug test.

7. There was no evidence submitted by either party that employees, such as Claimant, were subject to, and underwent, random drug tests during their employment to test for drug use during and after working hours.

8. During the brief period of his employment with Employer, it did not appear to Claimant that Employer enforced their drug-free workplace policy, unless there was a work accident.

9. As an employee, Claimant was provided access to employee housing. On December 12, 2016, Claimant signed numerous documents regarding his employee housing. The agreements indicate employees cannot use or possess illegal drugs, including marijuana, in employee housing. **Hearing Ex. I**. Claimant possessed marijuana in the employee housing. **Hearing Tr. 68-69**.

10. One of the documents Claimant signed indicated his employee housing would be inspected throughout the ski season by Management. The document indicated that Management would be looking for violations of the employee housing agreement, which included the possession of illegal drugs such as marijuana. However, the same document indicates the date and time of the inspections. **See Hearing Ex. I: pg. 107.**

11. Claimant was aware that any employee involved in an accident during work would be tested for drugs, including marijuana. Claimant was also aware that testing positive for marijuana after a work accident would result in his termination.

12. Claimant's first day of work was December 13, 2016.

13. On December 30, 2016, Claimant smoked marijuana around 8:30 PM before going to bed.

14. On December 31, 2016, Claimant did not smoke or ingest marijuana.

15. On December 31, 2016 Claimant clocked in at work around 7:50 AM. **Claimant's Ex. 3**. At approximately 8:20 AM Claimant boarded the Centennial Lift to make his way up the mountain and get to the EMR2 start shack so he could begin scanning in participants at the start of the race track. Claimant arrived at the EMR2 start shack and began working at the EMR2 start shack scanning participants in at the start of the race. **Hearing Tr. 48: 18-20**. At approximately 12:30 PM he called his supervisor, Joe Santalla, to request a break to use the restroom. **Hearing Tr. 49: 5-11**. Mr. Santalla approved and sent Mr. August Smirl to cover Claimant's post. **Hearing Tr. 49:12-16**. Thereafter, Claimant snowboarded down to the office, used the employee restroom next to the office, and ran into the office and grabbed a granola bar. **Hearing Tr. 50: 1-5**.

16. At 12:58 PM Claimant boarded the Centennial Lift gondola to return to his post at the EMR2 start shack. **Cl. Ex. 3: 4; Hearing Tr. 50: 5**. The gondola ride from the base of the mountain to Claimant's exit is approximately 10 minutes. **Hearing Tr. 50: 18-19**. He exited the gondola, strapped his feet into his snowboard and began descending the mountain to the EMR2 start shack location. **Hearing Tr. 50: 19-23**. The ride from the gondola drop off to the EMR2 start shack is less than five minutes. **Hearing Tr. 50: 22-33**.

17. Claimant arrived at the EMR2 start shack between 1:15 PM and 1:20 PM. As he approached the building his snowboard edge hit some ice and slid out from under him. He fell to his butt and slid directly into the EMR2 start shack. **Hearing Tr. 51: 7-11**.

18. August Smirl is an employee of Respondent Employer. **Hearing Tr. 31: 2-3**. On December 31, 2016 he worked with Claimant as a member of the Epic Mix Race crew at Beaver Creek. **Hearing Tr. 31: 4-8**. Around 12:30 PM he temporarily relieved Claimant from working the EMR2 start shack so Claimant could take a break and use the restroom. **Hearing Tr. 31: 21-25**. As Claimant was returning to work Mr. Smirl witnessed him crash into the EMR2 start shack. He testified Claimant, "lost his edge on his snowboard and slid into the start shack[]"(**Hearing Tr. 32: 5-14**) at a not slow speed. **Hearing Tr. 32: 20-22**.

19. After Claimant hit the building Mr. Smirl went to check on him (**Hearing Tr. 32-33: 24-1**) because he appeared to be in pain and favoring his leg. **Hearing Tr. 33: 15-18**. Claimant then removed his left boot in the presence of Mr. Smirl to examine his left ankle. **Hearing Tr. 33-34: 23-15; 52: 1-4**. Neither saw a compound fracture or what appeared to be a broken bone. **Hearing Tr. 34: 5-11; 52: 1-4**. Claimant felt severe pain in his left ankle but believed he only suffered a severe sprain. **Hearing Tr. 52: 4-11**.

20. Next, Claimant put his foot back in his boot and entered the EMR2 start shack to call his supervisor, Joe Santalla, about the accident. **Hearing Tr. 52: 16-19**.

21. Claimant called Mr. Santalla and reported he injured his left ankle by sliding into the EMR2 start shack. Mr. Santalla inquired into the severity of the injury. Claimant indicated he believed it was a sprain. **Hearing Tr. 52: 20-25**. Mr. Santalla informed Claimant he would be drug tested if he reported the injury as a work incident, and if he failed, he would lose his job. Claimant responded he did not want to lose his job if he only suffered a sprain that would sideline him for a short period of time. **Hearing Tr. 53: 18-23**.

22. Mr. Santalla agreed to help Claimant try to preserve his job and avoid taking a drug test by allowing him to leave early and report he injured himself somewhere else. **Hearing Tr. 53-54: 24-1**. The two believed this would allow Claimant to get medical treatment for his ankle injury and preserve Claimant's job with Respondent Employer.

23. The conversation between Claimant and Mr. Santalla lasted only 2-3 minutes, at most. **Hearing Tr. 54: 1-4.**

24. Mr. Smirl did not hear the conversation between Claimant and Mr. Santalla. **Hearing Tr. 34: 14-20**.

25. Once the conversation with Mr. Santalla was over Claimant informed Mr. Smirl he was leaving work for the day. He also mentioned to Mr. Smirl that he did not want to lose his job over an accident. **Hearing Tr. 54: 7-14; Tr. 42: 20-25**, and **Tr. 43: 1-3**. Claimant then buckled into his snowboard and headed down the mountain towards the Village. **Hearing Tr. 36: 7-13; 54: 7-14**.

26. Claimant started heading down the mountain towards the Village to clock out at approximately 1:25 PM. The office where Claimant clocks out is directly at the base of the run for the EMR course. **Hearing Tr. 57: 1-3.** Since it usually takes about 5 minutes to get from the EMR course to the base of the run and clock out, Claimant should have clocked out at approximately 1:30 PM - if he was not injured. **Hearing Tr. 36: 2-6**.

27. To accommodate the pain in his left leg Claimant rode "goofy foot" down the mountain which is not his typical riding position. **Hearing Tr. 54: 17-20**. "Goofy foot" means riding with the right leg forward. **Hearing Tr. 56: 15-18**. Mr. Smirl testified Claimant appeared to be snowboarding slower than his usual pace while traveling down the mountain. **Hearing Tr. 45: 8-11**. Typically the ride form the EMR2 start shack to the Race City Office is under five minutes. **Hearing Tr. 36: 2-6**. On December 31, 2016 it took Claimant approximately 30 minutes to travel this distance. **Hearing Tr. 56: 19-22**.

28. Claimant reached the Race City Office near the Village and clocked out at 1:53 PM. **Cl. Ex. 3: 4-5**.

29. Normally, Claimant would remove his snowboarding gear, clothes and boots, after clocking out and place them in his work locker. **Hearing Tr. 57: 10-15**. On December 31, 2016 Claimant clocked out and did not remove his gear, including his boots. **Hearing Tr. 57: 5-6**. Claimant's left boot was essentially acting as a cast allowing him to ambulate.

30. The distance between the Race City Office where Claimant clocked out and the bus stop is approximately 150-175 feet and is at most, a two minute walk. **Hearing Tr. 58: 3-7.**

31. Claimant limped from the Race City Office to the bus area where Vail-run busses pick up employees and customers and take them to various destinations, which includes employee housing and customer parking lots. **Hearing Tr. 57-58: 14-2**.

32. Within eight minutes of clocking out Claimant sent a text message to Mr. Santalla at 2:01 PM that read "Joe I'm off clock now. If I get hurt it's not testable right[?]" **Cl. Ex. 4: 15**. Phone records from AT&T confirm Claimant texted Mr. Santalla at this time. The records further confirm only one text message was sent between Claimant and Mr. Santalla. **Cl. Ex. 5: 22 (Items 95-97)**. Claimant testified he texted this to Mr. Santalla to inform him he was off the clock, and figure out how much time he needed to wait before going to seek medical treatment, "to make [their] story fit." **Hearing Tr. 59: 14-18**.

33. Claimant boarded the Vail-run bus and began making phone calls to find a ride to get medical attention. A random customer of Vail was on the bus and overheard Claimant making the calls and offered to take him to the nearest urgent care. **Hearing Tr. 60: 13-19**.

34. Mr. Santalla testified that he received a text message from Claimant, before the end of the day, indicating that he had fallen down some steps in the Village and had hurt his leg. **Hearing Tr. 120: 18-20**. However, the phone records confirm Claimant did not send Mr. Santalla a second text message before the end of the day, about falling down some stairs. The phone records establish Claimant called Mr. Santalla at 2:44 PM that day. **Cl. Ex. 5: 18 (Items 24-25).** Therefore, the ALJ finds that Claimant called Mr. Santalla at 2:44 PM and told him that he was going to get medical treatment for his ankle injury that occurred on the mountain when he slid into the start shack and indicate to the medical providers that the injury occurred when he fell down some steps in the Village after work.

35. Claimant arrived at Avon Urgent Care at 3:09 PM. He reported an injury to his left ankle sustained after falling down steps. **Cl. Ex. 6: 47**.

36. Imaging of the left ankle indicated multiple fractures and severed arteries. **Cl. Ex. 6: 52-53**.

37. Due to the extent of Claimant's injuries, Claimant was transferred for emergency treatment by LifeFlight to St. Anthony's ER in Denver. **Id. at 49**.

38. At St. Anthony's Claimant first reported a left ankle injury after falling down stairs. **Cl. Ex. 7: 65**. He underwent emergency surgery to reset the bones in his left ankle and get blood flow back to his left foot. **Cl. Ex. 9: 81-82**.

39. On December, 31, 2016, towards the end of the day, or early evening, Mr. Santalla contacted his supervisor, Mr. Ron Rupert, who is the manager of Beaver Creek's [**Vail Resort's**] Race Department. **Hearing Tr. 91**. Mr. Santalla advised Mr. Ruppert that Claimant was injured walking down some steps leaving work that day and was seeking medical treatment. **Hearing Tr. 91-92.**

40. Later in the evening, Mr. Rupert heard the injury was more serious than previously thought, so he tried reaching out to Claimant, but was unsuccessful. **Hearing Tr. 92-93**.

41. The following day, January 1, 2017, Mr. Rupert drafted an email to Jennifer Law and Claude Goldberg – Human Resources Manager for Beaver Creek. **Claimant's Ex. 10**.

The email contains the following message:

> One of my staff members apparently broke his ankle yesterday after work. Below is the ***story*** that I was told by other staff members. (Emphasis added.) Bryan Schoff was working on EMR yesterday. He was alone at the EMR 2 Start. He called Joe Santalla (EpicMixRacing Supervisor), on the phone and said he was not feeling well and thinking that it was something that he ate. He asked to if he could go home. Joe sent another staff member (August) up to relieve him so he could go home. When August arrived to relieve Bryan he noticed he was limping. Bryan got on his snowboard and went down the hill and clocked out. Shortly after Bryan clocked out he gave Joe a call on his cell phone and told him that he slipped in the village and hurt his ankle. Bryan was going to have it looked at.
>
> Later Joe received a call from Bryan's mother that Bryan had broken his ankle in 6 places and needed surgery. Bryan is currently in a hospital in Denver. (His mother lives in Denver).
>
> ***He did not report that he injured himself at work. It is my speculation that he was afraid to take a drug test.*** (Emphasis added.)

> I am wondering how I should proceed? If you would like to talk in person I should be available tomorrow afternoon. I could be available today as well.
>
> Please let me know what you all think.
>
> Thank you,
>
> Ronald R. Rupert.

42. Just one day after the incident, Mr. Rupert thought Claimant might have injured himself at work, but said he injured himself after work while walking in the Village of Beaver Creek to avoid taking a drug test.

43. On January 3, 2017, while at St. Anthony's ER, Claimant called Respondent Employer about finding a sit-down job within the company. **Cl. Ex. 3: 5**.

44. On January 4, 2017, Claimant was told by Respondents Employer that because he had not been an employee for more than 60 days, he was not eligible to take a leave of absence and would have to be terminated. **Hearing Tr. p, 64**; **Cl. Ex. 3: 6**.

45. After learning that he would be terminated, Claimant decided to tell the truth about how he got injured.

46. On January 5, 2017, Claimant informed Dr. Nimesh Patel he was injured in a high-impact snowboarding accident while at work and not by falling down stairs. Claimant informed Dr. Patel he feared he would lose his job if he failed a drug test, so after the injury he snowboarded down the mountain and clocked out before seeking medical care. **Cl. Ex. 8: 79**.

47. Blood flow was never restored to Claimant's left foot and had his lower left leg amputated on January 6, 2017. **Cl. Ex. 9: 89**.

48. Claimant did not undergo a forensic drug test after his accident. Therefore, there is no evidence based on a forensic drug test which indicates Claimant had the presence of marijuana in his system at the time of the accident.

49. Claimant did not use marijuana on the day of the accident.

50. Claimant's snowboarding accident and left ankle injury was caused solely by Claimant losing his edge while snowboarding on an icy slope and falling and then sliding into the start shack at approximately 1:15 PM.

51. The accident occurred while Claimant was on the clock and within the course and scope of his employment.

52. Claimant's work accident and injury did not result from Claimant violating Employer's drug-free workplace policy.

53. Claimant's work accident and injury did not result from the presence of a controlled substance – marijuana - in his system.

54. Claimant's hearing testimony is found to be credible.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

Compensability

I. **Whether Claimant has proven by a preponderance of the evidence that he suffered a compensable work injury on December 31, 2016.**

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An injury that results from a risk of employment that is directly tied to the work itself is compensable. *See City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014).

Moreover, actions such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water and keeping warm have been held to be incidental to employment under the "personal comfort" doctrine. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 22-23 (Colo. 1988); *Industrial Commission v. Golden Cycle Corp*., 246 P.2d 902 (1952). Colorado appellate courts consistently have held that under the personal comfort doctrine, a resulting injury arises out of and in the course of the employment while the employee is on the employer's premises ministering to personal necessities. *Industrial Commission v. Golden Cycle Corp., supra; Stribling v. Home Depot USA, Inc.*, W.C. No. 4-597-408 (October 13, 2004). Underlying the personal comfort doctrine is the assumption that "personal comfort" is necessary to maintain an employee's health, and is indirectly conducive to the employer's purposes. *See Ocean Accident & Guaranty Corp. v. Pallaro*, 66 Colo. 190, 180 P. 95 (1919). Further, it is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of employment. *Cf. Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). This includes discretionary activities on the part of the employee which do not have any duty component, and are unrelated to any specific benefit to the employer. *Cf. City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

As found, Claimant clocked in and began working on December 31, 2016, at approximately 7:50 AM, at the Beaver Creek Resort. Claimant's job required him to take the Centennial Lift up the mountain and snowboard down to the Epic Mix race course and help run the course. At the beginning of the course is the start shack. Claimant's job required him to scan participates in at the start shack. Claimant helped run the start shack the day of the accident.

As found, around 12:30 PM, Claimant had to take a break to use the restroom. In order to use the restroom, Claimant snowboarded down to the base of the mountain and used the restroom. After using the restroom, Claimant boarded the Centennial Lift back up the mountain. Claimant got off the lift and snowboarded down the mountain to the start shack. While approaching the start shack on his snowboard, Claimant ran over some ice and lost his edge and fell on his butt and slid into the start shack and broke his

ankle. The ALJ concludes that snowboarding to the start shack and encountering ice on the mountain is a risk of employment that is directly tied to Claimant's job of helping operate the Epic Mix race course.

The ALJ found Claimant's hearing testimony to be credible and persuasive for a number of reasons. First, Claimant alleges he injured his left ankle when he lost his edge while snowboarding back to the start shack after taking a bathroom break. Claimant's testimony was corroborated by co-employee, Mr. Smirl. Mr. Smirl credibly testified that while working at the start shack on December 31, 2016, he saw Claimant lose his edge and crash into the start shack. Mr. Smirl stated that after the accident, Claimant appeared to be in pain and favoring his leg. Mr. Smirl also testified that after the accident, he saw Claimant remove his snowboarding boot and look at his ankle. He further testified that after the accident, he saw Claimant go into the start shack and call Mr. Santalla – and then come out of the shack and indicate that he did not want to lose his job due to an accident - and then get back on his snowboard and start snowboarding, slower than his normal pace, down the mountain.

Second, Claimant's testimony that he did not want to formally report his work accident when it occurred because he was afraid he would have to undergo a drug test – and thought he would fail it because he smoked marijuana the night before and would be terminated – is plausible. Employer made it clear to its employees that if they were involved in a work related accident, they would have to undergo a drug test, and if it was positive, they would be terminated.

Third, Claimant testified that shortly after he slid into the start shack and injured his ankle, he went into the start shack and used the telephone to call Mr. Santalla, who was in the shack at the end of the race course, and told him about the accident. Claimant testified that they had a brief discussion about the accident and at that time he did not think his injury was that bad. Claimant testified that after he told Mr. Santalla that he slid into the start shack and hurt his ankle, Mr. Santalla told him that he would have to undergo a drug test if the ski patrol took him down the mountain for a work injury, but that he would not have to undergo a drug test if he left work early because he was not feeling well and injured himself after work. Therefore, they both agreed that Claimant would leave early under the pretext of not feeling well and Claimant would seek treatment for his ankle after work and indicate he got injured after work. Although Mr. Santalla denied this conversation took place, the fact that Claimant sent Mr. Santalla (Joe) a text message at 2:01 PM indicating: "Joe I'm off clock now. If I get hurt it's not testable right[?]," corroborates Claimant's testimony. Claimant also testified that he called Mr. Santalla around 2:45 PM on the day of the accident and told him that he was getting medical treatment for his ankle and would indicate he hurt himself after work while going down some stairs in the Village. Claimant's text message, combined with his testimony about the phone call he made to Mr. Santalla, is consistent with the fact that Mr. Santalla did not respond to Claimant's 2:01 PM text message and then told Mr. Rupert on the day of the accident that Claimant injured his ankle going down some stairs in the Village.

Fourth, Employer contends Claimant snowboarded to the bottom of the mountain to use the restroom and then took the Centennial Lift back up the mountain and snowboarded to the start shack in order to call Mr. Santalla – who was working at the finish line shack on the same run – to let him know that he was not feeling well and to ask if he could go home. Such scenario does not make sense to the ALJ. If Claimant was not feeling well and wanted to go home, it seems more likely that Claimant would have texted or called Mr. Santalla on his cell phone after he used the restroom at the base of the mountain and asked to go home at that time instead of riding the lift back up the mountain, snowboard down the mountain to the start shack, take off his snowboard, walk into the start shack, and then call Mr. Santalla using the phone in the start shack and ask to go home.

Fifth, Claimant testified that it usually takes about five minutes to snowboard from the start shack to the base of the mountain and clock out. On the date of the accident, it took Claimant approximately 30 minutes to snowboard from the start shack to the bottom and clock out. Such testimony was corroborated by Employer's records which indicate the time Claimant got on the chairlift after using the restroom and the time he clocked out after the accident. The additional time it took Claimant to get to the bottom of the run and clock out is consistent with Claimant breaking his ankle when he slid into the start shack and needing additional time to get to the bottom and clock out.

Sixth, Mr. Rupert, the manager of the race department, learned about the incident on December 31, 2016, and January 1, 2017. His initial investigation into the matter indicated Claimant was seen limping before he left work early on December 31, 2016. His initial investigation into the matter also indicated that after he clocked out, Claimant called his manager, Mr. Santalla, and told him he slipped in the Village and hurt his ankle. Even Mr. Rupert speculated that Claimant injured himself at work and did not report his injury because he did not want to take a drug test.

Seventh, Claimant never mentioned to any medical provider that he was not feeling well. Although Claimant was treating for a severely fractured ankle, not once did he indicate that in addition to breaking his ankle, he was sick.

It should also be noted that the ALJ found Mr. Smirl's, (August's), testimony to be credible and persuasive for a number of reasons. Mr. Smirl works as a pharmacist during the week and works only one day a week, Saturday, for Employer during the ski season. In addition, there was no credible evidence submitted that Mr. Smirl and Claimant were friends outside of work. Therefore, the ALJ found Mr. Smirl to be an impartial witness because he is not beholden to Employer for ongoing employment and was not a friend of Claimant.

Therefore, the ALJ concludes Claimant established by a preponderance of the evidence that he injured his left ankle during the course and scope of his employment on December 31, 2016, when he slid into the start shack.

II. **Whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment.**

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant suffered a compensable injury when he slid into the start shack and broke his left ankle in numerous places. As found, the injury also resulted in decreased blood flow to his left ankle. In order to treat his serious ankle injuries, Claimant requirement emergency medical treatment. Due to the extent of his injuries, Claimant was flown to Denver where he underwent surgery to set his broken ankle and restore blood flow to his ankle. Because blood flow could not be restored to his ankle, Claimant ultimately underwent surgery to amputate his left ankle.

The parties stipulated that if the December 31, 2016, injury to Claimant's left ankle was found compensable, Respondent would be responsible for reasonable and necessary medical treatment.

The ALJ concluded Claimant established by a preponderance of the evidence that he suffered a compensable injury to his left ankle. Therefore, the ALJ concludes that Respondent is liable for reasonable and necessary medical treatment to treat Claimant's left ankle injury.

III. **Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits.**

The parties stipulated that if the December 31, 2016, injury to Claimant's left ankle was found to be compensable, Claimant was entitled to temporary total disability benefits from January 1, 2017, through February 28, 2017.

The ALJ concluded Claimant established by a preponderance of the evidence that he suffered a compensable injury to his left ankle on December 31, 2016. Therefore, Respondent is liable for temporary total disability benefits from January 1, 2017 through February 28, 2017.

IV. Whether Respondent has proven by a preponderance of the evidence that Claimant violated a safety rule and that his indemnity benefits should be reduced by fifty-percent.

a. Safety Rule Violation Pursuant to Section 8-42-112(1)(b), C.R.S.

C.R.S. § 8-42-112(1)(b) provides for a 50% reduction in compensation to Claimant when Respondent proves Claimant's injury was caused by the willful failure to obey any reasonable rule adopted by the employer for the safety of the employee. The Respondent carries the burden of establishing all five elements of a safety rule violation, which are:

1. There must be a specific, unambiguous and definite safety rule adopted by the employer.

2. The safety rule must be reasonable.

3. The safety rule must be "brought home" to the employee and diligently enforced.

4. Violation of the safety rule must be willful.

5. The violation of the safety rule must be the cause of Claimant's injury.

Respondent must establish that the proximate cause of Claimant's injury is the violation of the safety rule at issue. *See Stearns-Roger Mfg. Co. v. Casteel*, 261 P.2d 228, (Colo. 1953) In this case, the safety rule at issue is Employer's drug-free workplace safety rule, which Employer contends prohibits employees from using marijuana at any time, whether working or not, and prohibits employees from possessing marijuana in employee housing.

As found, Claimant possessed marijuana while living in the employee housing. It was also found that Claimant used marijuana after work on December 30, 2016, before going to bed. Respondent, however, failed to present credible and persuasive evidence establishing Claimant's use of marijuana after work on the evening of December 30, 2016, before going to bed and possessing marijuana in employee housing, - i.e., violating the safety rule of a drug free workplace - caused the accident the following day.

As found, Claimant did not use marijuana on the day of the accident and was not under the influence of marijuana on the day of the accident. As found, the sole cause of the accident was Claimant losing his edge while snowboarding down an icy mountain and falling and then sliding into the start shack. Claimant's use of marijuana the night before did not play any part in Claimant's accident and resulting injuries.

The resolution of the proximate cause element precludes the need to analyze the other elements required to establish a safety rule violation and reduction of indemnity benefits.

Therefore, the ALJ concludes that Respondent has failed to establish by a preponderance of the evidence a safety rule violation which warrants the reduction of Claimant's indemnity benefits by 50% pursuant to Section 8-42-112(1)(b), C.R.S.

b. Limitation on Payments based upon the use of a controlled substance. (Safety Rule Violation) Pursuant to Section 8-42-112.5, C.R.S.

Respondent also asserted at the beginning of the hearing that they were asserting a safety rule violation because they expected Claimant to testify that he was "on cannabis" on the day of the accident.

Pursuant to Section 8-42-112.5, C.R.S., non-medical benefits otherwise payable to an injured worker are reduced by fifty percent where the injury results from the presence in the worker's system, during working hours, of controlled substances, as defined in section 18-18-102(5), C.R.S., that are not medically prescribed, as evidenced by a forensic drug test conducted by a medical facility or laboratory licensed or certified to conduct such tests. A duplicate sample from any test conducted must be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense. If the test indicates the presence of such substances it is presumed that the employee was intoxicated and that the injury was due to the intoxication. This presumption may be overcome by clear and convincing evidence. C.R.S § 8-42-112.5, *supra*.

To the extent that Section 8-42-112.5 allows the imposition of a fifty percent reduction in disability benefits where the injury results from the use of a controlled substance, without a forensic drug test, the ALJ concludes that Claimant's accident and resulting injuries were not caused by the use of a controlled substance.

Claimant did not testify that he was on cannabis on the day of the accident and the ALJ did not find that Claimant used cannabis on the day of the accident or was under the influence of cannabis at the time of the accident.

As found, and set forth above, the sole cause of the accident was Claimant losing his edge while snowboarding down an icy mountain and falling and then sliding into the start shack. Claimant's use of marijuana the night before did not play any part in Claimant's accident and resulting injuries.

Moreover, the presence of a controlled substance, marijuana, in Claimant's system during working hours was not established through a forensic drug test as required by 8-42-112.5. Thus, Respondent is not entitled to the presumption that Claimant's accident resulted from the use of marijuana.

Therefore, the ALJ concludes that Respondent has failed to establish by a preponderance of the evidence Claimant's disability benefits should be reduced by 50% pursuant to Section 8-42-112.5.

ORDER

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

1. Claimant suffered a compensable injury on December 31, 2016.

2. Respondent shall be responsible for payment of Claimant's reasonable and necessary medical treatment. Respondent shall pay for this medical treatment in accordance with the Colorado Medical Fee Schedule of the Division of Workers' Compensation.

3. Respondent shall pay Claimant temporary total disability benefits based on an average weekly wage of $338.57 for the period of January 1, 2017 through February 28, 2017.

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

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

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

DATED: February 9, 2018

Glen B. Goldman

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

ISSUES

- Whether respondents have overcome the opinion of the Division-sponsored Independent Medical Exam ("DIME") physician on the issue of maximum medical improvement ("MMI") by clear and convincing evidence?

- If respondents have overcome the DIME physician's opinion, what is claimant's permanent impairment rating?

- Whether respondents have established by a preponderance of the evidence that the claimant sustained an intervening injury that serves to sever respondents' liability for benefits in this case?

FINDINGS OF FACT

1. Claimant sustained a compensable injury while employed with employer on June 21, 2016. According to the medical records, claimant was injured when she was helping a customer put an entertainment set on to a dolly when the entertainment set started to fall and claimant struggled to keep the entertainment set from falling.

2. Claimant sought medical treatment beginning July 11, 2017 with Concentra Medical Center. Claimant reported she had pain in her left lateral neck and lower back that occurred when she was holding up a heavy entertainment center. Claimant was diagnosed with a cervical train, a strain of the thoracic region and a lumbar strain and was prescribed physical therapy.

3. Claimant had a prior injury to her low back in 2009 that resulted in a left L5-S1 hemilaminectomy and discectomy. Claimant reported that following her surgery, she required minimal pain medication and did not have any work restrictions or permanent impairment.

4. Claimant reported in the medical records that during the course of her physical therapy, she sustained an injury when the therapist lad claimant on her stomach, then got up on her back and pushed forcefully in a downward motion overlying the area of the right shoulder blade.

5. Claimant returned to Concentra on July 18, 2016 with complaints of a stiff neck that was causing headaches. Claimant was eventually referred to Dr. Chan on August 23, 2016. Dr. Chan noted claimant's accident history and performed a physical examination. Dr. Chan reported that while claimant reported having no pain, she was still complaining of numbness and tingling over the right lower extremity, which were noted to be similar to her symptoms in 2009 prior to her surgery. Dr. Chan recommended a magnetic resonance image ("MRI") of the lumbar spine.

6. Claimant was examined by physician's assistant, Casey McKinney on August 25, 2016. PA McKinney noted that claimant's neck remained sore and stiff, but had improved with therapy.

7. Claimant underwent the lumbar spine MRI on September 2, 2016. The MRI demonstrated post-operative changes at L5-S1 with advanced L5-S1 degenerative disc disease and moderate left greater than right L5-S1 foraminal stenosis. An abutment of the descending left S1 nerve root at the L5-S1 level was also noted. Mild L4_l5 foraminal narrowing, slightly greater on the right than left and secondary to moderate bilateral L4-L5 facet hypertrophy was also noted.

8. Claimant returned to Dr. Chan on September 13, 2016. Dr. Chan reviewed claimant's MRI and noted the findings which he opined may correlate well with claimant's current symptomatology. Dr. Chan recommended an evaluation with an orthopedic spine surgeon.

9. Claimant was examined by Dr. Castro on September 21, 2016 noted claimant's history and reviewed her MRI scan. Dr. Castro opined that claimant had no significant nerve compression or severe disc herniations. Dr. Castro recommended an aggressive physical therapy and rehab program. Dr. Castro further noted that claimant may consider a cervical MRI down the road if her symptoms involving her neck and right arm did not improve or worsened.

10. Claimant was evaluated at the St. Luke's Emergency Room ("ER") on October 25, 2016 with complaints of 10/10 non-radiating upper back pain and non-radiating right anterior chest pain for the past four days. Claimant was provided with medications and released. This apparently was related to the incident at physical therapy with the therapist attempting a thoracic manipulation.

11. Claimant was evaluated by Dr. Villavicencio on October 26, 2016 at Concentra. Dr. Villavicencio noted claimant's report of problems following the physical therapy on October 21. Dr. Villavicencio referred claimant for an urgent physiatry evaluation with Dr. Sacha.

12. Claimant subsequently underwent the MRI of her cervical spin on October 26, 2016. The MRI showed mild facet hypertrophic changes on the left side at the C2-3 level contributing to mild left foraminal narrowing. At the C3-4 level, there was a small posterior disc/osteophyte complex asymmetric to the left which indents the ventral thecal sac. Additionally, mild-to-moderate facet hypertrophic changes and uncovertebral osteophytes contributing to moderate foraminal narrowing was also noted. A very mild disc bulge that indented the ventral thecal sac was noted that the C5-6 and C6-7 levels. Claimant also underwent an MRI of the thoracic spine on October 27, 2016. The MRI showed small disc protrusions at the T7-T8 and T8-T9 levels with minimal spinal narrowing and a normal appearance of the thoracic spinal cord. An MRI of claimant's right shoulder showed some elevated signal along the posterior inferior labrum, but it was not felt to represent a labral tear.

13. Dr. Sacha evaluated claimant on October 28, 2016. Dr. Sacha reviewed the MRI reports and noted that the MRI of the shoulder showed some inflammation around the right breast implant. Dr. Sacha noted that there was no evidence of rupture, but there was a strong possibility that the manipulation may have cause some inflammation around the breast implant. Dr. Sacha noted that the prognosis for a complete recovery would be excellent.

14. Claimant returned to Dr. Sacha on December 7, 2016. Dr. Sacha noted that claimant was progressing well with acupuncture and chiropractic treatment. Dr. Sacha diagnosed claimant with lumbosacral radiculopathy with thoracic strain, myofascial pain and right breast implant contusion. Dr. Sacha noted claimant was approaching maximum medical improvement.

15. Dr. Sacha placed claimant at MMI on December 28, 2016. Dr. Sacha provided claimant with an impairment rating of 5% whole person for the lumbar spine based on Table 53(II)(B). Dr. Sacha did not provide claimant with any impairment for range of motion. Dr. Sacha recommended maintenance care to include chiropractic care and acupuncture.

16. Post-MMI, claimant underwent an MRI of the thoracic spine on March 17, 2017. The MRI showed a probable bilateral intracapsular breast implant rupture. MRI of the right shoulder performed on the same day showed supraspinatus and infraspinatus tendinosis with degenerative changes in the acromioclavicular joint with acromial morphology predisposing claimant to impingement.

17. Claimant was seen in the ER on May 20, 2017 after an MVA. Claimant was evaluated for neck and back injuries after she was rear ended from behind. Claimant underwent a chest x-ray and a computed tomography ("CT") scan of the cervical spine. No acute changes were noted on the scans. Claimant was provided with medications and instructed to follow up with her primary care physician.

18. Claimant returned to the ER on June 6, 2017 for complaints of back pain, neck pain and hip pain after an MVA on May 20, 2017. The ER physician noted that claimant has a follow up exam in one month. Claimant was provided with medications including valium and oxycodone and released.

19. Claimant was again seen in the ER on July 6, 2017 with complaints of hip pain since her MVA. Claimant was instructed to return in a week.

20. Claimant underwent an independent medical evaluation ("IME") with Dr. Hughes on July 12, 2017 at the request of her attorney. Dr. Hughes reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Hughes noted claimant's accident history and her complaints of left hip pain stemming from the MVA on May 20, 2017. Dr. Hughes noted the ER records from May 20, 2017 and June 6, 2017.

21. Dr. Hughes noted that claimant also complained of right sided posterior low back pain at a level of 4/10 along with left sided neck pain and stiffness with neck

pain ranging from 5-6/10 to 8/10 depending on what she does. Dr. Hughes noted claimant's prior back surgery along with prior neck therapy with full recovery.

22. Dr. Hughes noted that claimant presented with an interesting and complex medical history. Dr. Hughes agreed with Dr. Sacha's date of MMI. Dr. Hughes also noted that his range of motion measurements involving claimant's lumbar spine would result in a range of motion measurements of 16% whole person for the lumbar spine. Dr. Hughes combined this with the 5% Table 53(II)(b) rating to get a lumbar range of motion measurement of 20% whole person.

23. Dr. Hughes also provided claimant with permanent impairment involving her cervical spine of 4% whole person under Table 53(II)(B) along with range of motion measurements of 13% whole person. This related to a cervical spine impairment rating of 16% whole person for the cervical spine. Dr. Sacha combined the cervical and lumbar impairment ratings and opined that claimant had a total impairment rating of 33% for the lumbar and cervical spine.

24. Claimant underwent the DIME on July 27, 2017 with Dr. Castrejon. Dr. Castrejon reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with the DIME. Dr. Castrejon opined that based on his examination, claimant's mechanism of injury was consistent with a stratining injury of the cervical and lumbar spine. Dr. Castrejon noted that claimant remained symptomatic with regard to the cervical and thoracic spine. Dr. Castrejon noted that claimant's lumbar spine had reached a level of stability. Dr. Castrejon further opined that claimant sustained a new injury to the chest, thoracic spine and right scapular region as a result of the manipulation by the physical therapist. Dr. Castrejon opined that claimant was not at MMI with regard to the new injury to claimant's chest, thoracic spine resulting from the manipulation. Dr. Castrejon noted that claimant had developed right shoulder girdle myofascial pain and scapular dyskinesis.

25. Dr. Castrejon recommended additional medical treatment including a psychological evaluation, physical and massage therapy directed to the scapular dyskinesis and myofascial pain component of her condition. Dr. Castrejon noted that if claimant's condition did not improve, then consideration could be given to a therapeutic/diagnostic epidural steroid injection. With regard to the lumbar spine, the DIME physician found that no additional active treatment was indicated at this time.

26. Dr. Castrejon provided claimant with a provisional impairment rating of 28% whole person.

27. Respondents obtained a records review IME from Dr. Bernton on November 3, 2017. Dr. Bernton opined in his report that he did not believe the DIME report was performed consistent with the standards set forth for assessment of impairment in the *AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*. Dr. Bernton opined that the May 20, 2017 MVA resulted in worsening of complaints while the initial occupational injury had occurred more than a year previous. Dr. Bernton opined that it could not be determined that claimant's current

complaints were related to her work injury without a complete set of the medical records from claimant's treatment following the MVA.

28. As noted above, May 2017, claimant was involved in a motor vehicle accident ("MVA"). Claimant reported the MVA to the DIME physician. Claimant reported to the DIME physician that she was evaluated in the emergency room after the MVA, but did not need additional medical treatment.

29. Respondents note in their position statement that claimant's medical history as provided to Dr. Castrejon was incorrect in that Dr. Castrejon recorded that claimant had only treated once with the ER following the MVA.

30. Medical records document that after the DIME, claimant continued to treat with Denver Health for issues involving her sacroiliac ("SI") joint and left hip. The medical treatment claimant has sought does not address, however, the recommended medical treatment that Dr. Castrejon associated with claimant's work injury. Specifically, Dr. Castrejon recommended physical and massage therapy directed to the scapular dyskinesis and myofascial pain component of her condition. Claimant's complaints post-MVA as mentioned in the medical records are not related to these complaints. Moreover, with regard to claimant's low back condition, Dr. Castrjon specifically found that claimant was at MMI. Therefore, the ALJ finds that respondents have failed to overcome the opinion of the DIME physician that claimant is at MMI.

31. Based on these same factual findings, the ALJ finds that respondents have failed to establish that it is more probable than not that claimant sustained an intervening injury that would sever respondents' liability in this case. The ALJ specifically notes that the DIME physician in this case placed claimant at MMI for the parts of the body that are being treated as a result of the MVA. Specifically, the DIME physician found that no additional active treatment was recommended for claimant's lumbar spine.

32. The ALJ notes, however, that claimant's range of motion of the lumbar spine as measured by Dr. Hughes and Dr. Castrejon appear to be different from the range of motion measurements obtained by Dr. Sacha. The ALJ also notes that Dr. Sacha's range of motion measurements were obtained before the MVA. The ALJ recognizes that there may be an argument as to the *cause* of the range of motion measurements, but that is within the confines of the DIME when the issue of PPD is addressed. The ALJ notes, however, that respondents are not precluded from arguing that a component of the PPD rating could be causally related to the MVA as opposed to the work injury, but that issue is not before this court due to the finding that the claimant is not at MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-

102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2012. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra*. A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. Respondents argue that the opinion of Dr. Castrejon regarding the issue of MMI has been overcome by clear and convincing evidence. The ALJ disagrees.

6. While claimant was involved in an MVA on May 20, 2017, shortly before the DIME, the treatment claimant has received after the MVA has focused on her left hip and SI joint. The treatment recommended by Dr. Castrejon that justifies his opinion that claimant is not at MMI is to the scapular dyskinesis and myofascial pain complaints. As such, the ALJ finds that respondents have failed to overcome the DIME physician's opinion regarding MMI by clear and convincing evidence.

7. The doctrine of intervening injury concerns the effect of a separate injury, which occurs while the claimant is receiving medical and disability benefits for a compensable injury effectively holds that respondents are not liable for injuries which occur subsequent to a compensable injury, and are not a "natural result" of the compensable injury. *Post Printing and Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Respondents are only liable for subsequent injuries which "flow proximately and naturally" from the compensable injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

8. At the present time, because there is no recommendation for ongoing treatment to claimant's lumbar spine, the ALJ finds that respondents have failed to establish an intervening injury that would sever their liability for ongoing benefits in this case.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the opinion of the DIME physician that claimant is not at MMI by clear and convincing evidence.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

3. Respondents have failed to establish that claimant sustained an intervening injury sufficient to sever their liability for ongoing benefits.

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

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

DATED: March 12, 2018

Keith E. Mottram

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a worsening of condition attributable to his April 12, 2012, right shoulder injury, warranting reopening of the claim.

2. In the event that the claim is reopened for a worsening of condition, whether Dr. David Schneider is an authorized provider.

3. In the event that the claim is reopened for a worsening of condition, whether surgery recommended by Dr. Schneider is reasonable, necessary and related to the April 12, 2012, right shoulder injury.

FINDINGS OF FACT

1. Claimant is a 52 year-old freight driver who has had preexisting right and left shoulder pain and symptoms since at least 2007. Claimant had been treating with Dr. Christopher Isaacs, orthopedic surgeon, for his bilateral shoulders since this time. Claimant also treated for his bilateral shoulders with Dr. Eric Smith, his family physician since the time that he was a child.

2. On January 1, 2012, Claimant suffered an admitted injury to his right shoulder as the result of work-related exposure. There was no specific mechanism of injury. Claimant was diagnosed with a full-thickness rotator cuff tear of the right shoulder and underwent surgical repair of the torn rotator cuff with Dr. Isaacs in June of 2013. Claimant specifically requested that Dr. Isaacs perform the surgery for the right shoulder, as he had previously performed a surgery for the left shoulder and was familiar with Claimant's shoulder problems.

3. Dr. Isaacs placed Claimant at MMI on October 31, 2013. Dr. Isaacs gave Claimant a 10% scheduled rating of the right upper extremity, which was later converted to a 6% whole person impairment rating at a previous hearing. Dr. Isaacs released Claimant to full duty and recommended maintenance care for the shoulder, limited to Lidoderm patches for one year after MMI. Claimant was otherwise discharged from care.

4. Respondents filed a Final Admission of Liability (FAL) on December 3, 2014. Respondents admitted for a 6% whole person impairment rating and reasonable, necessary, and related maintenance medical treatment.

5. Following his placement at MMI, Claimant continued treatment with his family physician, Dr. Smith, for regular yearly injection treatments. Claimant did not receive this treatment through workers' compensation.

6. Claimant presented to Dr. Isaacs on January 24, 2017, with complaints of ongoing bilateral shoulder pain. Dr. Isaacs noted that his was a problem that had been present for years. Dr. Isaacs indicated that Claimant had not had an injection for approximately one year for his right shoulder. Dr. Isaacs noted that Dr. Smith was retiring and that Claimant was "in the market for a new family physician." Dr. Isaacs reviewed x-ray imaging of both shoulders and noted some mild acromioclavicular degeneration, but otherwise no significant abnormalities. Dr. Isaacs stated the diagnosis was "Bilateral shoulder rotator cuff tendinitis and impingement." Dr. Isaacs recommended and performed a repeat subacromial injection. There were no recommendations for surgery or further treatment or evaluation.

7. Claimant subsequently independently sought further evaluation for his right shoulder through Dr. David Schneider, an orthopedic surgeon at Panorama Orthopedics recommended by his wife. Claimant presented to Panorama on March 27, 2017 and was referred for diagnostic MRI studies for his bilateral shoulders, pursuant to complaints of pain in the shoulder joints of both his left and right shoulders.

8. MRI studies of the left and right shoulders were performed on March 30, 2017. The radiologist, Dr. Andrew Sonin, indicated the MRI of the right shoulder reflected a prior rotator cuff repair with no full-thickness defect or retear, no retraction or atrophy of the cuff musculature, with a normal subscapularis. The biceps tendon and anchor are intact. There was no evidence of instability lesion. Dr. Sonin noted a cyst formation around the repair site in the lateral humeral head.

9. Claimant saw Dr. Schneider on April 26, 2017. It is noted that Claimant has chronic bilateral shoulder problems. It is noted that Claimant had difficulty sleeping due to bilateral shoulder pain. Dr. Schneider indicated that "both" of Claimant's MRIs showed a thinning and tearing of the supraspinatus. Dr. Schneider also noted "pretty large impending insufficiency fractures of both greater tuberosities with large cystic area right near the supraspinatus insertion site." The diagnosis was listed as complete tears of the right and left rotator cuffs. Dr. Schneider recommended that Claimant have a right shoulder surgery first (implying a pending left shoulder surgery). Dr. Schneider recommended shoulder "arthroscopy with rotator cuff repair, because of the edema and impending fracture, nature of the greater tuberosity." Dr. Schneider also recommended a calcium phosphate injection into the area at the time of surgery. Dr. Schneider requested that Claimant consult with his workers' compensation physician so he could have the procedure covered under the work-related claim.

10. Claimant returned to Dr. Isaacs on May 2, 2017, for a recheck in accordance with the findings of Dr. Schneider. It is reported that Claimant was having ongoing shoulder pain and was beginning to take time off work for his pain. Dr. Isaacs noted that Claimant was informed by Dr. Schneider that he had a cyst in the humeral

head and that there was a recommended arthroscopy with injection of the cyst area. Dr. Isaacs reviewed the MRI findings from March 30, 2017, and stated that he did not see the findings indicated by Dr. Schneider, including a full-thickness re-tear of the cuff or an impending fracture of the greater tuberosity. Dr. Isaacs indicated that he was not familiar with a calcium phosphate injection. Dr. Isaacs stated that Claimant was, without question, having pain related to his work injury but that he could not say whether the MRI findings were related to the injury. Dr. Isaacs did not schedule a follow-up appointment. .

11. Dr. Isaacs issued correspondence addressed specifically to Claimant's attorney, dated July 6, 2017. Dr. Isaacs noted that, since the initial right shoulder rotator cuff repair, Claimant had intermittent pain in his shoulders. Dr. Isaacs stated that Claimant had sought a "second opinion" from Dr. Schneider and had come away from this appointment with the impression that he had a cyst in his humerus that was quite large and required an injection. Dr. Isaacs also noted that Dr. Schneider was requesting a repeat rotator cuff repair and calcium phosphate injection into the greater tuberosity. Dr. Isaacs stated that the MRI did not show any rotator cuff tear but did show cystic changes that were likely related to the anchor placements at the time of the initial surgery. Dr. Isaacs opined that the cystic changes were likely a natural progression from surgery but that he was unfamiliar with the calcium phosphate injection procedure and would not have classified the MRI findings as an "impending fracture." Dr. Isaacs opined that there were no findings on the MRI to indicate the need for a repeat rotator cuff repair.

12. Dr. Isaacs signed a facsimile transmittal sheet, not addressed to any person or entity, dated both November 20 and November 22, 2017. Dr. Isaacs referred Claimant back to Dr. David Schneider for right shoulder surgery. There is no further comment concerning the referral or the procedure to be performed. This document was sent by Claimant to his attorney on November 27, 2017.

13. Dr. Mark Paz performed an IME on November 10, 2017, and issued his report on November 22, 2017. Claimant denied any new injury or trauma to the right shoulder since his rotator cuff repair. Claimant told Dr. Paz that he was scheduled for surgery on December 21, 2017, with Dr. Schneider for a "resection of the cyst." Dr. Paz agreed with Dr. Isaacs that there was no rotator cuff tear seen on the most recent March 30, 2017 MRI and that this also did not document impending fractures. Dr. Paz further opined that there was no mechanism of injury which would explain fractures. Dr. Paz opined that the proposed treatment of the calcium phosphate injection was not indicated to treat the work-related diagnoses of rotator cuff tendinitis and impingement, as set forth by authorized treating physician, Dr. Isaacs. Dr. Paz recommended conservative care as outlined by Dr. Isaacs, which could be completed under maintenance.

14. Dr. Paz issued an addendum report on December 5, 2017, after reviewing the November 22, 2017, referral note from Dr. Isaacs to Dr. Schneider. Dr. Paz noted that documentation supporting the basis for the referral was not presented. Id. Dr. Paz

stated that the primary issue was not a difference of opinion regarding treatment options for the right shoulder, but rather the absence of objective findings on the MRI study supporting any of the treatments proposed by Dr. Schneider. Dr. Paz noted that Dr. Isaacs specifically disagreed with Dr. Schneider's assessment of the MRI results.

15. Claimant testified that he was not referred by Dr. Isaacs to see Dr. Schneider until he solicited this request in November 2017. Claimant testified at hearing that he had specifically requested Dr. Isaacs to do surgeries for his right shoulder and unrelated knee injury because Dr. Isaacs was familiar with his claim and was a good surgeon. Claimant testified that Dr. Isaacs would not perform surgery and was unfamiliar with the proposed procedure requested by Dr. Schneider. Claimant testified that he received regular treatment for his right shoulder after surgery with his personal care provider, Dr. Eric Smith. Claimant testified that he had previously been out on FMLA leave for the shoulder. Claimant testified that he had been working full duty up until the point that he again went on FMLA leave on November 4, 2017. Claimant testified that his right shoulder had always been hurting, prior to his 2012 injury and after his 2013 surgery. Claimant testified that he had always had intermittent pains after surgery.

16. Dr. Paz testified at hearing as Respondents' medical expert in occupational medicine. Dr. Paz testified that there were no medical restrictions imposed by any provider in the records reviewed, to date. Dr. Paz testified that Claimant's present, ongoing diagnosis was impingement syndrome of the right shoulder and "post-operative" right shoulder rotator cuff repair status. Dr. Paz testified that Dr. Isaacs had not indicated any surgical recommendations to address the cyst formation and indicated no surgical recommendations after review of the MRI. Dr. Paz testified that there were no objective findings to support the opinion and recommendation for surgery by Dr. Schneider. Dr. Paz testified that the purpose of calcium phosphate injections is to heal fractures, and that cysts are resected out, not treated with calcium phosphate. Dr. Paz testified that there was no request for any specific type of surgical procedure in the record by Dr. Isaacs. Dr. Paz testified that the calcium phosphate injections recommended by Dr. Schneider were secondary to the recommendation for rotator cuff repair surgery and surgery for what Dr. Schneider classified as impending insufficiency fractures. Dr. Paz opined that any further reasonable, necessary, and related treatment could be performed as maintenance care.

CONCLUSIONS OF LAW

Reopening of the Claim

1. A claimant may file a Petition to Reopen his claim on the basis of a change in condition within six years of the date of injury, or otherwise after the date the last temporary or permanent disability benefits, or medical benefits, become due and payable. Section 8-43-303(1)-(2)(a)-(b), C.R.S. The claimant has the burden of proof, by a preponderance of the evidence, in seeking to reopen a claim for a worsened condition. *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). A "change in condition" refers either to a change in condition of the original principal injury or a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury. *Chavez v. Industrial Comm'n of State of Colo*., 714 P.2d 1328 (Colo. App. 1985). Reopening of a claim is appropriate when the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v Industrial Claim Appeals Office of State of Colo*., 996 P.2d 756 (Colo. App. 2000). The ALJ has broad discretionary authority to determine whether a claimant has met his burden of proof to reopen. *Kilpatrick v. Industrial Claim Appeals Office of State*, 356 P.3d 1008 (Colo. App. 2015).

2. In determining whether a claimant has met her burden of proof, the ALJ may resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *Bodensleck v. Indus.* Claim Appeals Office, 183 P.3d 684 (Colo. App. 2008). When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness, probability or improbability, of the testimony and actions, the motives of the witness; whether the testimony has been contradicted; and bias, prejudice and interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936). The ALJ should consider an expert witness' special knowledge, training, experience or research, and has broad discretion to determine the weight of evidence on this basis. *See Young v. Burke*, 338 P.2d 284 (Colo. 1959).

3. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Substantial evidence is that "quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. *See Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001). It is not necessary that the ALJ address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

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

4. Claimant had preexisting right shoulder pain before his April 12, 2012, work injury and had treated with his family doctor, Dr. Smith, for both shoulders since the time he was a child. There was no acute injury in this matter and Claimant's pain continued intermittently after his 2013 surgical repair with Dr. Isaacs and his October 31, 2013, placement at MMI. Dr. Isaacs recommended Lidoderm patches as maintenance and otherwise discharged Claimant from care after MMI. Claimant continued to treat with his family doctor, Dr. Smith, after placement at MMI for the injury and only saw Dr. Isaacs for his injection treatments when Dr. Smith retired. Claimant sought treatment for his bilateral shoulders and it is noted that he was seeking a new family physician to continue treatment for the shoulders.

5. Dr. Isaacs did not recommend surgery, further diagnostics or care when Claimant presented to him on January 24, 2017. Dr. Isaacs likewise did not recommend surgery or further care at his May 2, 2017, follow-up visit. Dr. Isaacs never indicated a change in Claimant's MMI status or his work restrictions. Dr. Isaacs only referred Claimant back to Dr. Schneider when he was asked to do so by Claimant.

6. Claimant voluntarily removed himself from work in November to go on FMLA. Claimant has previously removed himself from work to go on FMLA for his bilateral shoulder condition.

7. Based upon the above, there is no work-related change in condition that warrants a reopening of the claim for additional medical or temporary disability benefits. There is no indication by the ATP that the cystic changes require removal from MMI or temporary disability. Likewise, there is no indication by the ATP that the referral solicited by Claimant to Dr. Schneider is for treatment related to the claim. Dr. Isaacs did not independently recommend surgery or further medical care after his review of the MRI study. Claimant has not met his burden to show that he suffered a work-related change in condition.

8. Since Claimant's petition reopen is denied and dismissed, it is found and concluded that Claimant's claim for medical benefits is also denied.

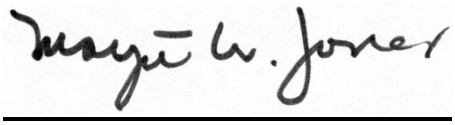
ORDER

1. Claimant has failed to establish that he suffered a work-related change in condition warranting reopening of his claim. Claimant's Petition to Reopen is therefore denied and dismissed.

2. Since Claimant failed to sustain his burden of proof to establish a worsening of his condition, Claimant's claims regarding medical benefits are also denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43- 301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.Hearing in this matter was held on

DATED: March 1, 2018



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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-044-870-01

ISSUE

The following issue was raised for consideration: Whether Claimant proved by a preponderance of the evidence that he is entitled to an Order awarding home assistance and yard services as a reasonable and necessary medical benefit.

FINDINGS OF FACT

1. Claimant sustained a compensable injury to his right upper extremity on April 23, 2017. Claimant has been a volunteer firefighter for the Employer since 2011 and was participating in training when he sustained an admitted injury to his right hand, primarily to the third and fourth digits. The injury required surgery on Claimant's right ring finger PIP joint and ligaments throughout the right hand. Claimant's surgery was performed on April 26, 2017.

2. Claimant's primary profession is as an attorney. Claimant's brother is an orthopedic surgeon.

3. The day after his April 23, 2017, work injury, Claimant treated with Dr. Tomm VanderHorst who reported that Claimant spoke to his brother, the orthopedic surgeon, and Claimant wanted to be referred to Dr. Craig Davis. On April 24, 2017, Dr. VanderHorst's medical record restricted Claimant to light desk work and maximal grip and pinch of one pound with the right hand. Dr. VanderHorst referred Claimant to Dr. Davis who Claimant saw that day, April 24, 2017. Dr. Davis performed Claimant's surgery on Claimant's right hand on April 26, 2017.

4. By June 2017, Dr. Davis suspected Claimant's CRPS diagnosis. Claimant developed complications related to the work injury. He developed right upper extremity pain. There were also trophic changes, which included increased hair growth, swelling, mottling changes of the skin and discoloration to Claimant's right upper extremity.

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5. Following the April 26, 2017, surgery, Claimant was seen again by Dr. VanderHorst on June 5 and July 19, 2017. On July 19, 2017, Dr. VanderHorst reported that Claimant was accompanied by his new wife and reported good pain control through the pain management efforts of Dr. Ogin and Dr. Ghazi. Dr. VanderHorst reported that Claimant's wedding and road trip to Yellowstone and Glacier went well from the pain management perspective. At this appointment, Claimant sought an appetite stimulant for

weight gain which the doctor declined to prescribe and instead encouraged Claimant to eat regular meals.

6. Claimant reported to Dr. VanderHorst at the July 2017 appointment increased irritability and uncharacteristic lack of control, but adamantly rejected a recommendation for psychological counselling and expressed a need for assistance with home responsibilities such as house work and yard work. Dr. VanderHorst assessed Claimant with a diagnosis of CRPS, Type 2 of the right upper extremity, weight loss of more than 10 lbs. in 90 day, avulsion fracture of the proximal phalanx of finger, dislocation of the right ring finger and anxiety disorder due to general medical condition.

7. At the July 2017 appointment with Dr. VanderHorst a second surgery was discussed with Claimant, however a second opinion regarding the surgery was sought by Claimant and Dr. Davis. Dr. VanderHorst made recommendations to Claimant for doctors from whom he could get a second opinion, but Claimant declined the recommendations preferring instead to do some "internet searching" before making a decision regarding whom he wanted to see. Dr. VanderHorst concluded his July 17, 2017, medical report reporting, "Once he [Claimant] has decided whom he would like to see an (sic) 2nd opinion, he will let me know and we will make appropriate referrals."

8. During the month to six weeks after the April 26, 2017, surgery, Dr. Davis performed four to five cortisone injections in the joints of Claimant's right hand for Claimant's pain and range of motion limitations. When these injections did not help Claimant, Dr. Davis referred Claimant to Dr. Ogin for pain management.

9. Subsequent to the appearance of Claimant's CRPS symptoms, Claimant was diagnosed by multiple treating physicians with CRPS. Claimant received extensive medical treatment, including stellate ganglion blocks, peripheral nerve blocks, interregional bier blocks, cervical sympathetic blocks, occupational and physical therapy, and daily medications.

10. In June and July 2017, Dr. Davis wrote Claimant prescriptions for "home assistance" and "in home assistance." In a script, dated June 5, 2017, Dr. Davis recommended that Claimant receive home assistance three days per week, for a four-week time period. Dr. Davis then wrote another script dated July 19, 2017. Again, Dr. Davis recommended in-home assistance for five hours per day, four days per week, for the next six to eight weeks, as needed.

11. On August 15, 2017, Dr. Davis noted that Dr. Ogin had administered to Claimant a dozen stellate ganglion blocks. On this date, Dr. Davis spoke to Claimant at night at Claimant's request for 45 minutes by telephone. Dr. Davis reported that Claimant is complaining the he lives on a large property and requires help with outdoor work. Dr. Davis does not mention a need for "in home" assistance. In this note, the doctor reports that Claimant is crying and expressing frustration. Dr. Davis recommended that Claimant see a psychiatrist, but Claimant rejected this recommendation because he did not have time because of his treatments and his job. Claimant reported he had obtained a second

opinion regarding the recommendation for a second surgery. Dr. Davis asked Claimant to obtain the notes from the doctor offering the second opinion and foreword them to him.

12. On August 17, 2017, Dr. Davis wrote a letter to Respondent's counsel advising the attorney that Claimant required "assistance with general home services and activities, including yard services." Dr. Davis further explained that Claimant required this assistance to receive relief from his symptoms. The doctor explained that the performance of the tasks for which he seeks assistance (yard services) could cause reinjury of the right hand. Dr. Davis stated that Claimant needed this in-home assistance five hours per day for five days per week for an additional six to eight weeks, as needed.

13. Claimant reported to his doctors constant pain with paresthesia into the fingers and intermittent sharp shooting pains at 8-9/10. Claimant testified that he is in excruciating pain all the time. Claimant explained that his pain is burning, aching and a dull sensation. The pain at night is worse. Claimant claimed that the CRPS has also created mirror pain in the left upper extremity and, although not as bad, some pain in the bottom of Claimant's feet and hypersensitivity in Claimant's shoulders.

14. Dionne Lebeau, the claims administrator in this claim, testified that the cost for the one time that in-home assistance provided Claimant was $253.00. Ms. Lebeau also testified that the overall cost of medical treatment as of the date of the hearing was $41,589.48. On one occasion on June 13, 2017, Respondent provided Claimant with in home assistance. However, Claimant found the assistance offered unsatisfactory and advised Respondent he did not want the assistance provided and wanted to select the company from whom the assistance was obtained. Respondent declined to permit Claimant to select the service provider.

15. In an e-mail from Claimant to Erica Hernandez, an employee of OneCall Care Management, dated August 31, 2017, Claimant made it clear that the in-home assistance services that he needed would be limited to housekeeping/domestic services only.

16. Claimant attended an independent medical evaluation with Dr. Nicholas Olsen on October 25, 2017. In that evaluation, Claimant discussed with Dr. Olsen the extent and reason that he needs in-home assistance. Dr. Olsen reported that Claimant was able to bathe, dress and perform his activities of daily living (ADLs). Dr. Olsen reports that Claimant does not require assistance with his ADLs, including dressing, bathing, and toileting. Claimant told Dr. Olsen that he only needed help in his yard, as well as performing house cleaning services. Claimant told Dr. Olsen he needed help with bigger projects around his home and taking care of his property and lawn.

17. Dr. Olsen also testified that, based on his review of the medical records, Claimant has attended numerous medical appointments from the date of his injury through the present time. Dr. Olsen testified that his medical record review does not reflect that Claimant was having any difficult attending those medical appointments. Dr. Olsen further noted that Claimant has been prescribed the following medications: Lyrica, Cymbalta, Baclofen, Prednisone, Dilaudid, Ambien, Tramadol, Trazodone, Ibuprofen,

Gabapentin, and Hydrocodone. Claimant has discontinued the use of Hydrocodone, Gabapentin, Tramadol and Dilaudid.

18. Claimant failed to establish that his need for home services and yard assistance is medical in nature because these services would not cure and relieve the symptoms and effects of Claimant's work injury. It is further found that these services are not incidental to medical treatment because they are not part of a home healthcare program designed to treat Claimant's condition.

CONCLUSIONS OF LAW

General Legal Principles

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

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

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

In-home assistance and yard care services

4. Section 8-42-101(1)(a), C.R.S. imposes upon every employer the duty to furnish such medical treatment "as may reasonably be needed at the time of the injury ... and thereafter during the disability to cure and relieve the employee from the effects of the injury." That duty includes furnishing treatment for conditions representing a natural development of the industrial injury. *Employers Mutual Insurance Co. v. Jacoe,* 102 Colo. 515, 81 P.2d 389 (1938). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

5. Home health care services in the nature of "attendant care," if reasonably needed to cure or relieve the effects of the industrial injury may encompass assisting the claimant with activities of daily living, including matters of personal hygiene. *Suetrack v. Industrial Claim Appeals Office, supra.* In *Kuziel v. Pet Fair, Inc.,* 931 P.2d 521 (Colo. App. 1996), however, the court cited *Industrial Commission v. Pacific Employers Insurance Co.,* 120 Colo. 373, 209 P.2d 908 (1949) and refused to extend benefits to cover the payment of expenses incurred for household care or maintenance, child, spousal, or pet care, or other routine living expenses that are paid or incurred during a claimant's hospitalization or other medical treatment.

6. To be a compensable medical benefit, the service must be medical in nature or incidental to obtaining such medical or nursing treatment. *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). A service is medical in nature if it is reasonably needed to cure and relieve the effects of the injury and related to the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); Kuziel v. Pet Fair, Inc., supra.

7. Services which have been found to be "medical in nature" include home health care services in the nature of "attendant care" if reasonably needed to cure or relieve the effects of the industrial injury. *Atencio v. Quality Care, Inc*., 791 P.2d 7 (Colo. App. 1990). Such services may encompass assisting the claimant with activities of daily living, including matters of personal hygiene. *Suetrack v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Further, it is well established that a claimant's family may be compensated for these services. *See Edward Kraemer and Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. App. 1992).

8. The leading and most recent case on the issue of when home services may be considered “medical” in nature is *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo.App. 1997). In *Bellone, supra*, the court held that child care services prescribed by a physician were “medical in nature” because they allowed the claimant, who suffered a brain injury, to obtain rest and reduce the likelihood of injury-related fatigue and seizures. The court stated the following:

> The child care services here were “medical” in nature because they relieved the symptoms and effects of the injury and were directly associated with claimant’s physical needs. Further, they were “incidental” to medical treatment because the services were provided as part of an overall home health care program designed to treat the claimant’s condition. *Id*. at 1118.

9. The determination of whether the attendant care requested by the claimant is "medical in nature" is one of fact for determination by the ALJ, which must be upheld if supported by substantial evidence in the record. *Bellone*, supra. In assessing the evidence, the ALJ may consider whether the services were medically prescribed, and whether they are directly associated with the claimant's physical needs. *Bellone, supra*. However, the term "medical in nature" is not limited to services prescribed by the treating

physician. Neither is there any rule or statute which requires the claimant to present evidence of a medical prescription from the attending physician before attendant care may be found to be medical in nature.

10. Here, the Judge concludes that Claimant's request for in home services and yard services is not reasonably necessary to cure and relieve Claimant of the effects of the April 23, 2017, injury nor is it incidental to obtaining medical treatment. Claimant's testimony at hearing, and the medical records reflect, that Claimant aggressively acquired workers' compensation benefits. Dr. Davis's evolving prescription for in home services and yard services leaves question about the credibility and persuasiveness of Dr. Davis's opinion. Particularly, in light of the credible testimony and independent medical examination report of Dr. Olson who opined that Claimant's request for in home services and yard services was not a reasonably necessary medical benefit. Dr. Olson further credibly opined that Claimant did not require in home services to aide him with his activities of daily living. Dr. Olson credibly reports that he reviewed a request for services from June 2017 from a professional caregiver from whom Claimant sought assistance. From that agency, Claimant sought services to clean bathrooms, vacuum floors, throw out trash and put away clothing. Dr. Olson reports that Claimant advised him he needed assistance with larger projects around his house.

11. It is concluded that the request for yard services and in home services would relieve Claimant of the rigors of yard work and larger projects in the home but these services are not prescribed to cure and relieve Claimant of the effect of the work injury nor are these services incidental to obtaining such medical treatment.

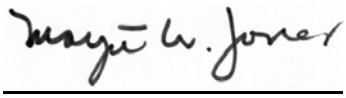
ORDER

1. Claimant's claim for in home services and yard services is denied and dismissed.

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

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

DATED: February 22, 2018



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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her left knee on March 25, 2017.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment for her left knee, including left knee surgery performed on May 1, 2017.

3. Determination of Claimant's average weekly wage.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits.

5. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability (TPD) benefits.

FINDINGS OF FACT

1. Claimant is a 33 year old woman employed by Employer at a Qdoba restaurant, a subsidiary of Employer. Claimant has worked at Qdoba for approximately 13 years and is an assistant manager.

3. From December 19, 2016 through March 12, 2017, the twelve weeks prior to her alleged work related injury, wage records show that Claimant worked on average 43.41 hours per week, consistent with her testimony at hearing that she typically worked 45 hours per week. The wage records also list her as "Nexempt" supporting her testimony at hearing that she is paid time and a half for the hours she works over 40 hours per week. Finally, the wage records show that from September of 2016 through December 18, 2016, her hourly wage rate was $12.47. The records also show that starting December 19, 2016, her regular hourly pay rate was $14.50. Claimant testified that her hourly rate was $12.70 per hour which is inconsistent with any hourly rate listed in wage records. *See* Exhibit J.

4. With an hourly rate of $14.50/hour for 40 hours per week ($580) and with time and a half of $21.75/hour for the average 3.41 hours per week that Claimant worked over 40 hours ($74.17), the ALJ determines based on the persuasive testimony and evidence that Claimant's average weekly wage prior to her injury was $654.17. This average weekly wage determination times 52 weeks per year ($34,016.84) is also consistent with the amount listed on Employer's records as Claimant's annual salary ($33,930.00). *See* Exhibit J.

5. Claimant's duties as assistant manager include opening the restaurant, turning on fryers, preparing food, operating the restaurant, and cleaning.

6. Claimant is required to wear a uniform including jeans/pants, a Qdoba shirt, and non-slip work shoes.

7. On March 25, 2017 Claimant was so employed. Claimant was assigned to the morning shift and opened the restaurant. At approximately 7:30 a.m. Claimant was preparing tortilla chips facing the fryer. As the chips were frying, hot grease splashed outside the fryer and Claimant turned/twisted to her left to grab a towel that was behind her to clean the mess. When she turned her feet were planted on the ground.

8. When she completed this motion her left knee popped, gave out, and she felt immediate pain. She immediately was unable to place weight on her left leg to walk or move.

9. Jeffrey Gerler is a cook at Qdoba and was working the morning shift with Claimant on March 25, 2017. He testified that Claimant was walking normally that morning before the incident, was not limping, and did not appear to be in any pain. He testified that he saw Claimant working at the fryer and saw the incident with her left knee and saw that she was in severe pain, could not walk, and that she left work shortly after. He testified that Claimant was wearing her non-slip shoes and that she didn't slip or fall but twisted when the incident happened.

10. Claimant has had issues with her left knee prior to March 25, 2017. In 2010, Claimant jumped up to touch a sign while out drinking and hyperextended her left knee when she landed.

11. On April 26, 2015 Claimant was evaluated at the Poudre Valley Health emergency department. Claimant reported pain to her left knee, mostly the anterior tibial plateau area in joint line. Claimant reported that she was in a fight with her brother the night prior and that her knee was hyperextended. Claimant reported she was still able to ambulate. Claimant was noted to have decreased range of motion, tenderness on the medial joint line and lateral joint line. It was recommended that Claimant follow up if she did not improve and return to the ER, a primary care provider, or to an orthopedic referral. *See* Exhibit B.

12. On April 21, 2016 Claimant was evaluated at the Poudre Valley Health emergency department. Claimant reported injuring her left knee while wrestling with a friend that day. Claimant reported that she felt a pop. Claimant's exam showed medial and lateral joint line tenderness, laxity with valgus stress, and no endpoint appreciated with Lachman's maneuver. There was suspicion for an MCL and ACL tear and large effusion was noted on the x-ray. Claimant was placed in a knee immobilizer and crutches were provided. Claimant was noted to have been limping. *See* Exhibit B.

13. Claimant's left knee was also evaluated on February 7, 2017 by Erin Schrunk, M.D. Dr. Schrunk noted that Claimant was there for evaluation of intermittent left knee pain and right arm paresthesia. Regarding the knee, Claimant reported that about five years prior she was drinking and jumped landing in a hyperextended position. Claimant reported having pain laterally with no swelling or erythema but that now she had intermittent pain laterally that was alleviated by over the counter medication. Claimant reported that she was applying for a job and wanted to make sure nothing further was going on with her knee. Dr. Schrunk performed a focused exam on the left knee and found no obvious deformity/swelling, no PTP of joint spaces, negative lochman/mcmurray/ant and post drawer tests, and intact distal sensation. *See* Exhibits 10, G.

14. On the morning of March 25, 2017, shortly after the incident, Claimant left Qdoba and went to Poudre Valley Health emergency room and was admitted at approximately 9:08 a.m. Claimant reported that just prior to arrival she hyperextended her left knee. Claimant reported originally injuring her knee about two years ago and that it improved but that she had periodic episodes of knee pain. X-rays performed were negative for fracture. A complete assessment of the knee was not performed due to Claimant's intolerance and guarding. Based on the history, suspicion of meniscal injury was noted as well as differential diagnoses of dislocation and ligamentous injury. Claimant was placed in a knee immobilizer splint and was referred to orthopedics for follow up. *See* Exhibits 7, B.

15. On March 27, 2017 Claimant was evaluated at Orthopedic & Spine Center of the Rockies by Kurt Dallow, M.D. Claimant reported that she had hyperextended her left knee a few years ago and never followed up and had hyperextended it a few times since then. Claimant reported that on March 25, 2017 she twisted her knee while her foot was planted and felt a pop and was unable to bear weight. Dr. Dallow discussed with Claimant that the injury happened at work and that she needed to notify her supervisor and talk with them about whether it should be handled through work comp. *See* Exhibits 8, C.

16. On March 28, 2017 Claimant was evaluated at Concentra by Amber Payne, PA-C. Claimant reported that she twisted her knee on March 25, 2017 while working in the kitchen. Claimant reported that her left knee popped and she was immediately unable to bear weight. Claimant reported pain under the patella and on the medial side. Claimant reported that she didn't know if her knee caught, locked, or gave way because it was too painful to even try to walk on it. PA Payne found effusion at a grade 2-3 and tenderness over the medial joint line and diffusely over the medial knee. PA Payne assessed left knee sprain and swelling of left knee joint. She ordered an MRI of the left knee. *See* Exhibits 9, E.

17. On March 30, 2017 Claimant underwent an MRI of her left knee interpreted by Jamie Colonnello, M.D. In the medial compartment, a complete bucket-handle type tear of the medial meniscus was found involving the body and both horns with a flipped bucket handle fragment into the intercondylar notch and disruption of the

meniscocapsular junction posteriorly and superiorly. A complete rupture of the anterior cruciate ligament was found with no intact fibers. Edema was found surrounding the medical collateral ligament along its proximal one half. Deep fibers to the medial meniscus were thickened and Dr. Colonnello opined that they may be partly torn compatible with a low to intermediate grade sprain. Dr. Colonnello found a large joint effusion and extension into a small popliteal cyst with subcutaneous edema along the anterior aspect of the joint. Dr. Colonnello's impression was: complete rupture of the left knee anterior cruciate ligament; complex bucket handle tear of the left knee medial meniscus with a flipped bucket handle fragment into the intercondylar notch; apparent disruption of the posterior and superior medial meniscal capsular junction; minimal trochlear chondrosis; and large joint effusion with soft tissue swelling surrounding the knee. *See* Exhibits 3, F.

18. On April 4, 2017 Claimant was evaluated by PA Payne. PA Payne discussed the MRI results with Claimant and reported to Claimant that the results were not supported by the mechanism of injury. PA Payne noted that Claimant's swelling had decreased but that she was still wearing a brace and requiring crutches. PA Payne did not perform an examination. PA Payne opined that there was less than 50% medical probability that this was a work related injury. PA Payne told Claimant that she would likely need surgery and was to continue on non-weight bearing status with the use of crutches and a knee brace. Claimant was released from care with instructions to follow up with orthopedics or her primary care provider under her primary insurance. *See* Exhibit E.

19. On April 10, 2017 Claimant was evaluated by David Beard, M.D. Claimant reported that prior the injury at work she was not having problems with pain, swelling, instability, or loss of motion and would regularly participate in physical exercise such as weightlifting. Dr. Beard noted that there was still approximately 2+ knee effusion, some guarding on attempts at Lachman examination making it difficult to assess any type of endpoint, and moderate medial joint line tenderness. Dr. Beard reviewed the MRI from March 30, 2017 that showed a prominent joint effusion present and findings consistent with an ACL complete tear. Dr. Beard noted that he was able to see some of the fibers of the ACL still attached to the tibia and opined that it did not appear to be a chronic tear. He also noted evidence of a displaced bucket handle tear of the medial meniscus displaced into the intercondylar notch and did not see any bone marrow edema on the proximal tibia but did see a very small area of bone marrow edema on the anterior aspect of the medial femoral condyle. Dr. Beard assessed: left knee acute ACL tear, left knee displaced bucket handle medial meniscus tear, and left knee large effusion. Dr. Beard disagreed with PA Payne. Dr. Beard opined that Claimant had a specific documented injury and was completely asymptomatic with the left knee prior to the injury and had persisted to be symptomatic since the time of injury. He recommended proceeding with a left knee ACL reconstruction and attempt at medial meniscus repair. He recommended Claimant continue on crutches in the meantime to avoid further damage. *See* Exhibits 8, C.

20. On May 1, 2017 Claimant underwent left knee surgery performed by Dr. Beard. Dr. Beard performed a left knee arthroscopically assisted anterior cruciate ligament reconstruction and a left knee arthroscopic medial meniscus repair. Dr. Beard noted Claimant's immediate onset of pain following by swelling and instability after a twisting injury on March 25, 2017. In the surgical note, Dr. Beard noted that the ACL was torn and that fibers of the ACL were still visible but it represented a complete tear. *See* Exhibits 6, A.

21. On May 25, 2017 Claimant was evaluated by Dr. Beard. He noted that Claimant could wean out of the left knee brace and crutch over the next several days and that she would be allowed to return to light duty status at work the next week with 25 hours per week gradually increased as tolerated. He recommended she continue to use the brace while at work. *See* Exhibits 8, C.

22. On June 22, 2017 Claimant was evaluated by Dr. Beard. He noted she had been undergoing physical therapy and was no longer using crutches. He noted full knee extension and 130 degrees of flexion on the left compared to 135 degrees on the right. Dr. Beard noted that Claimant would finish formal physical therapy over the next two weeks and then would move to an independent exercise program. *See* Exhibits 8, C.

23. On July 20, 2017 Claimant was evaluated by Dr. Beard. Claimant was noted to be back to full activities at work with a plan to continue working on rehab exercise and progress more to independent stretching. *See* Exhibits 8, C.

24. On September 6, 2017 Dr. Beard provided written medical opinions in response to questions asked of him. Dr. Beard noted that Claimant had been seen first by a non-operative physician at his clinic, Orthopedic & Spine Center of the Rockies, and then was referred to him for further evaluation. Dr. Beard opined to a reasonable degree of medical probability that Claimant suffered a compensable workers compensation injury to her left knee on March 25, 2017. He opined that the mechanism of a twisting-type injury with her foot planted supported the objective findings on MRI of complete anterior cruciate ligament tear, displaced bucket handle meniscus tear, and large joint effusion. Dr. Beard noted Claimant's pre-existing history of knee injuries but found that her most recent examination by Dr. Schrunk on February 7, 2017 showed normal range of motion, no swelling, no deformity, no tenderness to palpation, and no issues with instability. Dr. Beard opined that the twisting is a specific mechanism of damage to the structures involved and that the large joint effusion shown on MRI specifically indicated a more recent injury as opposed to a chronic injury. Dr. Beard opined that PA Heard's opinion that the mechanism of injury could not have caused the objective findings on MRI was incorrect. *See* Exhibits 4, C.

25. Dr. Beard opined that at the time of the May 1, 2017 surgery, he saw the anterior cruciate ligament tear and saw that there were still remaining fibers of the torn anterior cruciate ligament present, typically indicating a more recent injury. Dr. Beard opined that if it were an injury from years ago, the body would tend to reabsorb the fibers of the anterior cruciate ligament, even torn portions, and they would typically see absence

of the ACL. He opined that because they did still see torn fibers of Claimant's ACL, it indicated a more recent injury. Dr. Beard opined that the surgery he performed on May 1, 2017 was reasonable, necessary, and related to Claimant's March 25, 2017 work injury. *See* Exhibit 4.

26. On September 25, 2017 Claimant underwent an independent medical evaluation performed by J. Stephen Gray, M.D. Claimant reported being in the kitchen in her non slip shoes when she turned around to reach for a towel and twisted her knee with a popping sensation and severe pain. Claimant reported that after she had to hop on her right leg. Dr. Gray reviewed medical records and performed a physical exam. Dr. Gray opined that Claimant sustained a compensable injury to her left knee and that Claimant was injured in the course of performing work duties. Dr. Gray noted Claimant's pre-existing injuries and opined they may have left Claimant vulnerable to future injury making Claimant somewhat of an "eggshell" patient. Dr. Gray opined that Claimant had some residual incompletely resolved internal injury to the left knee and clearly some previous ACL injury that was medically probably permanently aggravated by the work related injury on March 25, 2017 which was the straw that broke the camel's back. Dr. Gray opined that a twisting motion with the foot held in place by non-slip footwear could explain a meniscus injury and he cited the medical treatment guidelines. Dr. Gray further opined that with a pre-existing ACL tear, the twisting could have been sufficient to tear some of the remaining ACL fibers, especially with some pre-existing mild instability. Dr. Gray opined that acute damage to the ACL was supported by the presence of an effusion. Dr. Gray opined that the surgical finding of a few remaining ACL fibers supported the notion that there was not a pre-existing complete rupture of the ACL and opined that it was medically probable that a portion of the ACL was acutely injured at the time of the incident in question. Dr. Gray opined that he agreed with Dr. Beard. *See* Exhibits 5, It.

27. Dr. Gray opined that the surgery on May 1, 2017 was reasonable, necessary, and related to the March 25, 2017 work injury. Dr. Gray opined that the work injury worsened an already existing condition and that the abrupt twisting motion caused both permanent worsening of the pre-existing partial ACL tear and caused or permanently worsened a pre-existing partial meniscus tear. Dr. Gray opined that Claimant's condition was aggravated by the work incident and noted that Claimant was working full time without restrictions until March 25, 2017 with no signs of impairment supporting Claimant's contention that she was doing fine until the work incident. *See* Exhibit 5.

28. On August 14, 2017 Claimant underwent an independent medical evaluation performed by Timothy O'Brien, M.D. Claimant reported that she was at the fryer when she turned to the left to reach behind her with her left arm to get a towel and that she felt a pop and had immediate pain in her left lower extremity emanating from the left knee and could not put weight on her left knee. Dr. O'Brien noted three prior right knee injuries. Claimant had an injury in 2010 jumping up to hit a sign and coming down hyperextending the her left knee, that got better in a couple of days. In 2015 Claimant was horsing around with her brother and her left knee gave out on her. Claimant again reported it got better in a couple of days. In February of 2016 Claimant again had her left knee give out on her and was, like the time prior, told to see an orthopedist if it did not get

better. Claimant reported again, that it got better. Claimant reported that the March 25, 2017 injury was different because it had not gotten better. Dr. O'Brien reviewed medical records and performed a physical examination. *See* Exhibit H.

29. Dr. O'Brien opined that Claimant experienced left knee instability on March 25, 2017 as a manifestation of her longstanding and pre-existing ACL insufficiency. Dr. O'Brien opined that the symptoms on that date were not the result of any new tissue breakage or yielding and were not the result of any new injury. Dr. O'Brien opined that the mechanism of injury described was not traumatic enough to result in any ACL tear and/or any bucket handle tear of the medial meniscus and noted that Claimant was merely turning when she felt symptoms in her knee. He opined that Claimant did not slip, fall, was not running, not accelerating or decelerating, and thus that no substantial inertial forces were present. Dr. O'Brien opined that turning to reach a towel was not a traumatic event but a daily activity and that the musculoskeletal system is durable enough to remain healthy with common daily activities such as slightly turning through the knee joints. Dr. O'Brien opined that Claimant's past history of a traumatic injury from jumping and hyperextending her knee was the type of injury mechanism that predates an ACL tear and opined that is where Claimant sustained her ACL injury. Dr. O'Brien noted that once the ACL was torn, Claimant had an unstable knee and opined that Claimant had altered biomechanical forces for a decade which would be expected to result in swelling, giving way, and instability. Dr. O'Brien disagreed with Dr. Beard's statement that Claimant had no prior symptomatology. *See* Exhibit H.

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30. Dr. O'Brien opined that the ACL was a very durable and resilient ligament that would take significant force to rupture or tear and that turning back to reach for a towel was not sufficient enough force to cause rupture/tearing. Dr. O'Brien opined that the MRI scan findings were consistent with a chronic ACL rupture, not an acute tear and significantly differed in opinion from Dr. Beard. Dr. O'Brien opined that the residual fibers viewed were 100 percent consistent with a chronic injury and opined that in the thousands of MRI scans of the knee he has seen, including those demonstrating acute tears and chronic tears, Claimant's MRI scan findings were 100 percent consistent with a chronic tear. Dr. O'Brien opined that on March 25, 2017 Claimant's unstable and insufficient ACL gave way which is what ACL deficient knees do and opined that no new injury occurred. *See* Exhibit H.

31. On January 3, 2018 Dr. O'Brien provided an updated report. He stood by the opinion he previously had provided and again disagreed with Dr. Beard's opinion. He noted that he had been able to review the MRI scan and opined that the MRI demonstrated a chronically torn and completely absent ACL, a degenerative and long standing bucket-handle tear, and opined that based on the MRI scan, Claimant's ACL had been absent for quite some time. Dr. O'Brien disagreed with Dr. Beard's opinion that there was a tibial attachment of the ACL and found no tibial attachment. *See* Exhibit L.

32. Claimant submitted a portion of the medical treatment guidelines as evidence. Referring to the rupture or partial rupture of the ACL, the guidelines indicate it may be caused by virtually any traumatic force of the knee but is most often caused by a

twisting or a hyperextension force, with a valgus stress. They go on to indicate that the foot is usually planted and the patient frequently experiences a popping feeling and giving way sensation. *See* Exhibit11.

33. Dr. O'Brien testified at hearing consistent with his reports. He indicated that when an ACL tears it is painful and there is bleeding and a quite swollen knee. He opined that once torn, the ACL will not repair itself and the person will have instability at unpredictable times. Dr. O'Brien opined that if a torn ACL is not repaired a person can live with it and play sports, but that it would be unpredictably symptomatic. Dr. O'Brien opined that the 2010 incident where Claimant jumped and came down wrong on her left knee was consistent with how you can injure an ACL with the hyperextension on foot landing. Dr. O'Brien referred to the records after the 2016 injury where the reports indicated no endpoint in ACL testing, laxity at the knee, and opined that this showed that Claimant's ACL was insufficient in 2016. Dr. O'Brien opined that Claimant had an ACL tear in 2016 and that it would be likely for Claimant to have intermittent pain, swelling, and knee giving way even without provocation or stress due to her underlying condition. Dr. O'Brien opined that there was no tear of the ACL, no tear of the meniscus, and no acute injury on March 25, 2017.

34. Dr. O'Brien opined that the February, 2017 exam was inaccurate since Claimant had a positive Lachman test in 2016 and the ACL cannot repair itself. Dr. O'Brien opined that given the April 2016 injury and findings, it would be very unlikely for Claimant to have had no symptoms until March of 2017 and that the February, 2017 exam and reports indicated ongoing issues with the left knee. Dr. O'Brien opined that a lot of force is required to tear an ACL and that here the mechanism of injury here was insufficient to cause an ACL tear. He opined that Claimant's ACL was completely apart with no fibers intact. He opined that the meniscular capsular junction showed a complete tear and that there was chondral fissuring which tells us there is arthritis and that it got softer, frayed, fractured with chronic tears. Dr. O'Brien opined that the arthritis shown on the MRI just a few days after the alleged injury takes years to develop and is related to Claimant's chronic ACL insufficiency. Dr. O'Brien opined that someone can have a partial tear that would cause instability but he opined that in Claimant's case, the March 25, 2017 manifestation was the natural progression of Claimant's underlying condition. Dr. O'Brien opined that Claimant was a candidate for surgery in 2010 and that there was no aggravation at work on March 25, 2017.

35. Claimant testified at hearing. She indicated that immediately after the incident on March 25, 2017 she could not put any pressure on her left leg at all. Claimant testified that she told providers of her prior issues with her left knee, but testified that her knee had always gotten better within a week so she had never seen an orthopedist before. Claimant testified that prior to March 25, 2017 she was able to play with her kid, walk her dogs, work 45 hours per week, and was doing fine. She indicated that after the three prior instances of left knee pain and problems in 2010, 2015, and 2016, her knee and symptoms always got better so she never sought further evaluation. Claimant testified that prior to March 25, 2017 she could walk, run, work out (including squats and lunges), work full duty, and had excellent strength. Claimant testified that in 2017 she had applied

for a different job requiring a physical exam and that her left knee was tested and no treatment was recommended for her. Claimant testified that after March 25, 2017 she had sharp pain, burning, stabbing, no strength, and limited movement.

36. Claimant told providers in March of 2017 about prior problems with her left knee. Claimant testified that in interrogatories she didn't list the prior problems/injuries because she didn't know the exact prior injury dates until this case happened.

37. Claimant, overall, is found credible and persuasive. Her testimony surrounding her level of function prior to March 25, 2017 is consistent with the February, 2017 medical report and consistent with the testimony of a co-worker.

38. The weight of the evidence supports the credible opinions of Dr. Gray and Dr. Beard.

39. As a result of her injury, Clamant missed some work between March 25, 2017 and April 16, 2017. As a result of her injury, Claimant was completely off work from April 17, 2017 to May 21, 2017. Claimant then returned to work, but between May 22, 2017 and June 18, 2017 she worked fewer than her average weekly hours prior to her injury. Claimant was back to full time work, and back to her average working hours on June 19, 2017.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo.

275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment was proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established, by a preponderance of the evidence that she sustained a compensable work related injury on March 25, 2017. The symptoms she experienced were not just the natural progression of a pre-existing condition. Although Claimant had prior injuries to her left knee in 2010, 2015, and 2016, prior to March 25, 2017 Claimant was doing well and able to remain active with exercise and with her full time work schedule. Although Claimant likely had partial tears and insufficiencies in her left knee prior to March 25, 2017, the ALJ finds the opinion of Dr. Gray to be credible and persuasive that the prior ACL injury was medically probably permanently aggravated on March 25, 2017. Dr. Gray credibly opined that the twisting incident at work was sufficient to tear some remaining ACL fibers, especially with some pre-existing mild instability in the left knee. Here, Claimant had instability and prior issues with her left knee. However,

more likely than not, the injury on March 25, 2017 tore remaining fibers and caused an acute injury. The opinion of Dr. Gray is supported by the presence of effusion on MRI. The opinion is also consistent with opinions provided by Dr. Beard. Dr. Beard performed the surgery on May 1, 2017 and saw remaining fibers of the torn ACL during surgery. Dr. Beard opined that if the injury had been chronic, even the remaining fibers would have been reabsorbed by the body and thus opined that a more recent tear and injury had occurred. Dr. Beard's opinion that Claimant sustained a compensable twisting type injury with a planted foot is credible and persuasive and consistent with the large joint effusion on MRI.

Claimant had an acute inability to bear weight on her left leg on March 25, 2017 after twisting with her feet planted at work. Prior to this date, Claimant was active and working full duty with no restrictions which is supported by her testimony, her co-worker's testimony, and her wage records. Although Claimant did not initially disclose her prior injuries in some reports and in her recorded statement, Claimant's consistently reported pre-existing left knee issues to her medical providers including to Poudre Valley Health, Dr. Dallow, Dr. Beard, Dr. O'Brien, and Dr. Gray. Claimant's testimony surrounding the condition of her knee prior to March 25, 2017 is credible and consistent with the weight of the evidence. Claimant had previously hyperextended her left knee and recovered each time within a week. Here, Claimant did not recover like she had in the past. The ALJ finds, more likely than not, that Claimant sustained an acute injury and additional tearing on March 25, 2017 when she turned with her feet planted, felt a popping sensation in her left knee, and had immediate pain. This injury aggravated her underlying condition and caused disability and the immediate need for medical treatment. The opinions of Dr. Gray and Dr. Beard are found persuasive and consistent with the overall weight of the evidence. Therefore, Claimant has met her burden to establish a compensable injury.

Reasonable and Necessary Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment for her left knee. Claimant's underlying left knee condition was aggravated by work producing disability and the need for medical treatment including surgery. Claimant has established that the medical treatment received to date, including surgery performed by Dr. Beard, was reasonable and necessary to cure and relieve her of the effects of the industrial injury.

Average Weekly Wage

Section 8-42-102(2) C.R.S. requires the ALJ to base claimant's AWW on her earnings at the time of injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon her AWW on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), *supra*, grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

As found above, in the twelve week period prior to the injury, Claimant worked on average 43.41 hours per week. This is consistent with her testimony that she typically worked 45 hours per week. The wage records also list her as a non-exempt employee, requiring pay at time and a half for hours over 40 per week. The wage records show an hourly wage of $14.50. The ALJ concludes that the persuasive evidence establishes an average weekly wage of 40 hours x $14.50 plus 3.41 hours x $21.75 for a total average weekly wage rate of $654.17. As found above, this average weekly wage determination is consistent with Employer's wage records documenting an annual salary of $33,930 (although Claimant is not paid salary, the average weekly wage calculated by the ALJ multiplied by 52 weeks comes out very close to the annual salary number listed by Employer in wage records).

The parties appear to base their average weekly wage calculations on the amount listed on Employer wage records as "total earning amount." However, the ALJ is unable to figure out how the "total earning amount" was calculated as it does not match the listed hourly rate times the number of hours worked. The persuasive evidence is that Claimant worked 43.41 hours per week at $14.50 per hour plus time and a half for 3.41 hours and that her average weekly wage is thus $654.17.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. The existence of disability

presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Here, Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits from April 17, 2017 through May 21, 2017, and for a period of five weeks. At this time, Claimant was under the care of an orthopedic surgeon who recommended continued use of crutches, performed surgery, and monitored her surgical recovery. Wage records and testimony shows that Claimant had impairment of wage earning capacity due to her inability to resume her work during this time related to her medical incapacity. Claimant has established an entitlement to TTD benefits during this five week period. As of May 22, 2017, the evidence established that Claimant returned to modified employment and her entitlement to TTD ended.

Temporary Partial Disability

An employee is entitled to receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability. As found above, on June 19, 2017 Claimant was able to resume her regular schedule and normal job duties and her temporary partial disability was no longer continuing. However, prior to June 19, 2017 Claimant had two periods of time where she was temporarily partially disabled and unable to earn her normal average weekly wage. These periods include: March 25, 2017 through April 16, 2017 and May 22, 2017 through June 18, 2017.

From the wage records submitted, it is unclear to the ALJ what wages Claimant was paid during these time periods as the records reflect a "total earning amount" that does not match the hourly wage rate times the number of hours worked. Claimant has established, by a preponderance of the evidence, that she was temporarily and partially disabled during these time periods and that she is entitled to TPD benefits. However, the ALJ has insufficient evidence to calculate the exact amount owing based on the evidence and records submitted.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her left knee on March 25, 2017.

2. Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment for her left knee, including the May 1, 2017 left knee surgery performed by Dr. Beard.

3. Claimant's average weekly wage is $654.17.

4. Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from April 17, 2017 through May 21, 2017.

5. Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability (TPD) benefits from March 25, 2017 through April 16, 2017 and from May 22, 2017 through June 18, 2017.

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

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

DATED: February 22, 2018

/s/ Michelle E. Jones

_____

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable back injuries during the course and scope of his employment with Employer on February 22, 2017.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive causally related, reasonable and necessary medical treatment for his February 22, 2017 injuries.

FINDINGS OF FACT

1. Claimant worked for Employer at a company called ProDrivers. His job duties involved driving a truck and delivering materials.

2. Claimant testified that on February 22, 2017 he was asked to deliver steel electrical piping to a job site. When he arrived at the location he unloaded the pipes and developed pain in his lower back area. Claimant assumed that his symptoms would resolve without treatment.

3. Transportation Supervisor Mitchell Smith testified that Claimant did not report any industrial injury to him on Wednesday, February 22, 2017. Instead, Claimant completed his shift and performed his regular job duties on February 23-24, 2017. Claimant called in sick with the flu on February 27-28, 2017.

4. On Saturday, March 4, 2017 Claimant and his wife were cleaning the office of his chiropractor Chris Pellow, D.C. Claimant had been receiving chiropractic treatment from Dr. Pellow for both his cervical and lumbar spine since 2009. Claimant climbed on a traction machine and laid on his stomach. When the machine lowered Claimant suffered a sharp pain in his lower back area.

5. A review of Claimant's personnel records reflects that his employment status with Employer changed on March 1, 2017 to "available." Thereafter, Claimant's job status was changed to "reason ended. Quit without notice end day: 03/01/2017 AE/ss [Operations Dispatcher] Jennifer Warren." On March 6, 2017 "this employee's status was changed to do not use – discharged for cause." Ms. Warren testified that Claimant did not report the February 22, 2017 incident at any time from February 22, 2017 through March 6, 2017.

6. Compliance Manager Amanda Rice testified that she is responsible for handling Workers' Compensation claims for Employer. She explained that Claimant reported his February 22, 2017 injury over the phone and then in person the following day

on March 13, 2017. Claimant specified in an injury report that he injured his back while unloading pipes on February 22, 2017.

7. On March 14, 2017 Claimant visited Authorized Treating Physician (ATP) Aviation & Occupational Medicine (Aviation) for an evaluation. Claimant reported that he was lifting electrical pipe off of a flatbed truck for about one to one and one-half hours. He developed pain in his lower back, mid-back and neck areas. After spinal x-rays did not reveal any acute injuries, Claimant was diagnosed with cervical, thoracic and lumbar strains. Amelia Carmosino, P.A-C determined that there was a greater than 51% probability that Claimant's injuries were caused by his work activities. She referred Claimant for 12 physical therapy sessions.

8. On April 7, 2017 Claimant began work as a Meat Cutter with Sam's Wholesale Club. In performing his job duties Claimant regularly lifted between 30 and 90 pounds.

9. On April 26, 2017 Claimant visited Rehabilitation Associates of Colorado (RAC) and was examined by Franklin Shih, M.D. Claimant reported "initial discomfort in the lower back area after unloading pipe off of a truck in February of this year. The back pain progressed and about a week later he was seen by his chiropractor and with traction had an acute increase in pain with extension into the mid and upper back area." Dr. Shih noted that Claimant's condition had improved by about 75% before reaching a plateau. He commented that Claimant's prior symptoms predominantly involved lower back discomfort and his pain diagram showed diffuse posterior axial complaints. Dr. Shih did not recommend injections or surgical intervention but suggested acupuncture.

10. Claimant subsequently continued regular treatment with Aviation. His condition improved significantly during the period.

11. On May 23, 2017 Claimant visited Jennifer Voag, P.A-C at Aviation for an examination. He reported that he was 95% better with minimal to no pain. He was also "doing well" with full duty employment. P.A-C Hoag concluded that Claimant had reached Maximum Medical Improvement (MMI) and released him to full duty employment with no impairment or work restrictions. She specified that Claimant did not require medical maintenance treatment.

12. On June 21, 2017 Claimant returned to Aviation for an evaluation. He reported lower back symptoms as well as pain and weakness radiating down his right leg. Gary Childers, M.D. diagnosed Claimant with cervical, thoracic and lumbar strains. He recommended a lower back MRI. Dr. Childers noted that Claimant remained at Maximum Medical Improvement (MMI) pending the MRI findings.

13. Claimant subsequently continued to receive medical treatment from Aviation. Treatment notes reflect that Claimant's February 22, 2017 case was reopened and he received work restrictions involving lifting, carrying, pushing and pulling.

14. On August 2, 2017 Claimant returned to RAC and visited Nicholas Olsen, M.D. Dr. Olsen noted that Claimant's July 31, 2017 lumbar MRI revealed moderate facet

arthrosis at his L4-L5 and L5-S1 nerve roots. He also remarked that Claimant had a right foraminal disc protrusion at L5-S1. Dr. Olsen recommended a right L5-S1 transforaminal epidural steroid injection (ESI). The September 12, 2017 ESI yielded pain relief for approximately two days.

15. On November 13, 2017 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Claimant reported that on February 22, 2017 he unloaded steel electrical piping at a job site. While completing the task he developed weakness and pain in his lower back area. Claimant completed his shift and performed his regular job duties on February 23-24, 2017. Claimant called in sick with the flu on February 27-28, 2017. Employer called Claimant on Wednesday March 1, 2017 because he had been sick. Claimant responded that, because the job was very physical and he was 54 years old, he might look for another job. Claimant explained to Dr. Fall that on Saturday, March 4, 2017 he and his wife were cleaning the office of Dr. Pellow. Claimant climbed on a traction machine and laid on his stomach. When the machine lowered he suffered a sharp pain in his lower back area. Claimant exclaimed to his wife "Mary, I think I hurt myself really bad." Claimant subsequently obtained conservative medical treatment including pain medications and physical therapy. He left his job with Employer and obtained a position as a Meat Cutter with Sam's Club. Claimant later developed worsening symptoms including severe right leg pain.

16. After reviewing Claimant's medical records and conducting a physical examination Dr. Fall diagnosed Claimant with an exacerbation of preexisting lower back pain as a result of repetitive lifting at work on February 22, 2017. Dr. Fall explained that Claimant's initial back complaints "were appropriately treated successfully and he was released at MMI with no impairment." She characterized Claimant's February 22, 2017 symptoms as a temporary aggravation that resolved by the time he reached MMI on May 23, 2017. Any treatment after MMI was not related to the February 22, 2017 incident. Dr. Fall explained that Claimant also suffered a "new right lower extremity radiculopathy" that was unrelated to the February 22, 2017 incident. She detailed that after Claimant began working as a Meat Cutter he developed worsening symptoms and the acute onset of right leg pain at the end of June 2017. Dr. Fall emphasized that Claimant's right leg symptoms were not caused by the February 22, 2017 incident.

17. On December 7, 2017 the parties conducted the pre-hearing evidentiary deposition of Dr. Fall. Dr. Fall maintained that Claimant suffered a temporary exacerbation of his preexisting lower back condition as a result of repetitive lifting while working for Employer on February 22, 2017. However, he reached MMI by May 23, 2017 with no permanent impairment. Dr. Fall explained that Claimant suffered from chronic lower back pain as reflected in his long-term visits to a chiropractor. She detailed that after Claimant began working as a Meat Cutter he developed the acute onset of right leg pain at the end of June 2017. Dr. Fall concluded that Claimant's right leg symptoms were not caused by the February 22, 2017 incident.

18. On December 29, 2017 the parties conducted the pre-hearing evidentiary deposition of Dr. Childers. Dr. Childers explained that he first examined Claimant on March 24, 2017. He remarked that Claimant's cervical, thoracic and lumbar spines were

normal except for complaints of tenderness in the lumbar spine. There were no objective abnormalities and Claimant exhibited full range of motion. Dr. Childers released Claimant to regular duty employment on March 31, 2017 based on Claimant's request because he was beginning a new job as a Meat Cutter. Dr. Childers noted that Claimant's condition improved through May 23, 2017 when P.A-C Voag, placed Claimant at MMI. He commented that Claimant's condition was markedly worse by June 21, 2017 but did not comment on any source of the worsening.

19. Claimant has demonstrated that it is more probably true than that he suffered compensable back injuries during the course and scope of his employment with Employer on February 22, 2017. Initially, Claimant had been receiving chiropractic treatment from Dr. Pellow for both his cervical and lumbar spines since 2009. Claimant explained that on February 22, 2017 he was unloading electrical pipes at a job site and developed pain in his lower back area. Claimant completed his work shift and did not report an injury. He subsequently suffered a sharp pain to his lower back while on a chiropractic table on February 4, 2017 and ceased working for Employer on March 6, 2017. Claimant finally reported his February 22, 2017 injury to Employer over the phone on March 12, 2017 and in-person on the following day. On March 14 Claimant visited ATP Aviation for medical treatment. P.A-C Carmosino determined that there was a greater than 51% probability that Claimant's back injuries were caused by his work activities. After Claimant was referred to Dr. Shih he continued to receive treatment from Aviation and his condition improved. By May 23, 2017 P.A-C Hoag concluded that Claimant had reached MMI and released him to full duty employment with no impairment or work restrictions. She specified that Claimant did not require medical maintenance treatment.

20. Dr. Fall explained that Claimant suffered from chronic lower back pain as reflected in his long-term visits to a chiropractor. She persuasively maintained that Claimant suffered a temporary exacerbation of his preexisting lower back condition as a result of repetitive lifting while working for Employer on February 22, 2017. However, he reached MMI by May 23, 2017 with no permanent impairment. Dr. Fall characterized Claimant's February 22, 2017 symptoms as a temporary aggravation that resolved by the time he reached MMI on May 23, 2017. Based on Claimant's testimony, the medical records from Aviation and the persuasive opinion of Dr. Fall, Claimant suffered an exacerbation of his preexisting lower back condition while working for Employer on February 22, 2017. Claimant's work activities on February 22, 2017 aggravated, accelerated or combined with his preexisting back condition to produce a need for medical treatment.

21. Claimant has proven that it is more probably true than not that he was entitled to receive causally related, reasonable and necessary medical treatment for his February 22, 2017 back injuries until he reached MMI on May 23, 2017. However, the medical treatment that Claimant received after he reached MMI was not causally related to his work activities. Claimant initially obtained authorized medical treatment through Aviation and referrals. The treatment significantly improved his condition and he reached MMI on May 23, 2017. Claimant subsequently returned to Aviation, his claim was reopened and he received additional treatment.

22. Dr. Childers noted that Claimant's condition improved through May 23, 2017 when he reached MMI. He commented that Claimant's condition was markedly worse by June 21, 2017 but did not mention the source of the worsening. Dr. Fall persuasively detailed that after Claimant began working as a Meat Cutter he developed the acute onset of right leg pain at the end of June 2017. She concluded that Claimant's right leg symptoms were not caused by the February 22, 2017 incident. The medical records and persuasive opinion of Dr. Fall demonstrate that Claimant's medical treatment subsequent to May 23, 2017 was not related to his February 22, 2017 work activities. Accordingly, Claimant's request for medical benefits after May 23, 2017 is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

Compensability

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered compensable back injuries during the course and scope of his employment with Employer on February 22, 2017. Initially, Claimant had been receiving chiropractic treatment from Dr. Pellow for both his cervical and lumbar spines since 2009. Claimant explained that on February 22, 2017 he was unloading electrical pipes at a job site and developed pain in his lower back area. Claimant completed his work shift and did not report an injury. He subsequently suffered a sharp pain to his lower back while on a chiropractic table on February 4, 2017 and ceased working for Employer on March 6, 2017. Claimant finally reported his February 22, 2017 injury to Employer over the phone on March 12, 2017 and in-person on the following day. On March 14 Claimant visited ATP Aviation for medical treatment. P.A-C Carmosino determined that there was a greater than 51% probability that Claimant's back injuries were caused by his work activities. After Claimant was referred to Dr. Shih he continued to receive treatment from Aviation and his condition improved. By May 23, 2017 P.A-C Hoag concluded that Claimant had reached MMI and released him to full duty employment with no impairment or work restrictions. She specified that Claimant did not require medical maintenance treatment.

8. As found, Dr. Fall explained that Claimant suffered from chronic lower back pain as reflected in his long-term visits to a chiropractor. She persuasively maintained that Claimant suffered a temporary exacerbation of his preexisting lower back condition as a result of repetitive lifting while working for Employer on February 22, 2017. However, he reached MMI by May 23, 2017 with no permanent impairment. Dr. Fall characterized Claimant's February 22, 2017 symptoms as a temporary aggravation that resolved by the time he reached MMI on May 23, 2017. Based on Claimant's testimony, the medical

records from Aviation and the persuasive opinion of Dr. Fall, Claimant suffered an exacerbation of his preexisting lower back condition while working for Employer on February 22, 2017. Claimant's work activities on February 22, 2017 aggravated, accelerated or combined with his preexisting back condition to produce a need for medical treatment.

Medical Benefits

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

10. As found, Claimant has proven by a preponderance of the evidence that he was entitled to receive causally related, reasonable and necessary medical treatment for his February 22, 2017 back injuries until he reached MMI on May 23, 2017. However, the medical treatment that Claimant received after he reached MMI was not causally related to his work activities. Claimant initially obtained authorized medical treatment through Aviation and referrals. The treatment significantly improved his condition and he reached MMI on May 23, 2017. Claimant subsequently returned to Aviation, his claim was reopened and he received additional treatment.

11. As found, Dr. Childers noted that Claimant's condition improved through May 23, 2017 when he reached MMI. He commented that Claimant's condition was markedly worse by June 21, 2017 but did not mention the source of the worsening. Dr. Fall persuasively detailed that after Claimant began working as a Meat Cutter he developed the acute onset of right leg pain at the end of June 2017. She concluded that Claimant's right leg symptoms were not caused by the February 22, 2017 incident. The medical records and persuasive opinion of Dr. Fall demonstrate that Claimant's medical treatment subsequent to May 23, 2017 was not related to his February 22, 2017 work activities. Accordingly, Claimant's request for medical benefits after May 23, 2017 is denied and dismissed.

ORDER

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

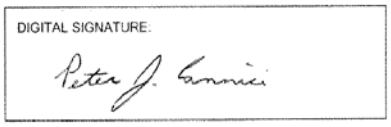
1. Claimant suffered work-related injuries to his back on February 22, 2017.

2. Claimant was entitled to receive medical treatment for his February 22, 2017 back injuries until he reached MMI on May 23, 2017. However, the medical treatment he received after he reached MMI was not causally related to his work activities.

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

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

DATED: February 7, 2018.



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

ISSUES

I. Has Claimant shown, by clear and convincing evidence, that the DIME opinion of Dr. Tyler has been overcome, on the issue of MMI, and therefore, causation?

II. If the DIME has not been overcome, has Claimant's condition worsened after MMI, such that his claim should be reopened?

III. Has Claimant shown, by a preponderance of the evidence, that he is entitled to medical benefits, in the form of cervical spine surgery?

IV. Has Claimant shown, by a preponderance of the evidence, that he is entitled to TTD benefits, effective December 8, 2017, as a result of his worsening condition?

STIPULATIONS

I. The parties agreed that the issues of Permanent Partial Disability and Permanent Total Disability were bifurcated from this hearing, and held in abeyance, pursuant to a Prehearing Conference Order dated October 24, 2017. Further, Claimant has admitted to the Average Weekly Wage as admitted by Respondents, and wishes to hold the issue of disfigurement in abeyance. These agreements were all adopted by the ALJ.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant worked for Employer as a Maintenance Technician at Tierra Vista Communities. On November 22, 2013 Claimant was repairing a section of the sliding garage door when he fell approximately 3 feet from a platform ladder, striking primarily his left side of his body.

2. Claimant was initially treated by the Peterson Air Force base fire department and by personnel from American Medical Response. Claimant's entire spine was immobilized as he was placed on the back board with straps. He was also placed in a cervical collar as "Fire stated that pt was having c-spine neck pain, left shoulder pain, right knee pain, and head pain." (Ex. 1, pp. 2-3).

3. Claimant underwent initial diagnostic testing including a CT scan of the cervical spine which showed an absence of any acute fracture or subluxation. It was noted by his emergency providers that he had a mild T9 compression fracture of indeterminate age. (Ex. 2, p. 31). Claimant's initial diagnosis was a left shoulder strain and a right pinky finger abrasion. After physical therapy Dr. Randall Jones (with Concentra) placed Claimant at MMI with no impairment effective December 13, 2013. (Ex. K, p. 88-89).

Dr. Jones noted in his report that "patient is "100%" back to normal. Patient has been working their (sic) full duty. Patient has not been taking their meds because his condition improved. Patient has had physical therapy and feels better…' (Ex. 3, p. 71). (It is duly noted that Claimant testified that he never told Dr. Jones these things).

4. Claimant went without treatment for almost one year, but followed-up with Dr. Jones on November 10, 2014. According to Claimant, during this timeframe he went to his personal physician, Dr. Robert Swanson, who advised him to follow with Dr. Jones. During this visit, Claimant complained of shoulder pain, but *denied* neck problems, except some left neck pain with shoulder motion. (Ex. 3, p. 69). This produced a recommendation for an MRI scan of the left shoulder by Dr. Wiley Jinkins. Claimant was then diagnosed with subacromial impingement syndrome with a partial thickness rotator cuff tear. (Ex. K, pp. 89-90).

5. An MRI of the cervical spine was performed on December 18, 2014. The pertinent findings for that exam were:

1. Mid and lower cervical *degenerative* change, greatest at C6-C7……

4. *Possible mild subacute* soft disc at C6-C7, *more likely chronic.* (Ex. F, p. 4)(emphasis added).

6. Upon questioning, Dr. Jones responded by stating that it was a greater than 50% likelihood claimant's left shoulder pain was related to the work injury, but nothing in his record review would indicate claimant's back, head or neck related to the work injury. (Ex. K, p. 90).

7. Dr. Wiley Jinkins, MD, initially treated Claimant's left shoulder with injections, but Claimant also underwent a second MRI indicating the shoulder pathology had progressed. Dr. Jinkins performed the arthroscopic repair of claimant's left shoulder on October 23, 2015. If Claimant had made cervical spine pain complaints while treating with Dr. Jinkins, Dr. Jinkins testified that would have referenced this in his reports. No such references exist in his reports.

8. Claimant was placed at MMI by Dr. Jones, effective May 20, 2016 and provided with a 20% scheduled impairment. Respondents filed an Amended Final Admission of Liability dated June 12, 2016 in accordance with the MMI opinion and impairment rating. (Ex. A).

9. Claimant initiated the DIME process which was conducted by Dr. John Tyler, MD. Dr. Tyler found the claimant was at MMI, effective July 14, 2016. Dr. Tyler provided Claimant with an 18% left upper extremity impairment. Respondents filed a Final Admission of Liability on February 1, 2017 accordance with Dr. Tyler's opinions. (Ex. D).

10. In assessing whether Claimant received any impairment to the cervical spine due to the injury Dr. Tyler found that:

> I do not find clear and convincing evidence that the patient had an *injury* to the cervical spine. I base this not only on the medical record review of the physician's notes but also on the forms completed by the patient and each of these forms show that his pain symptomatology is well-localized to the left shoulder and the patient himself does not even mark the cervical spine is an area of pain complaint or concern. (emphasis added).

During the examination of Claimant's cervical spine, Dr. Tyler found normal alignment with no segmental dysfunctions, no evidence of localized spasm or trigger points, with only a few localized trigger points within the left infraspinatus, rhomboid minor and superior trapezius. (Ex. 8, p. 193).

11. Claimant underwent an independent medical examination on June 30, 2016 with Dr. Lawrence Lesnak. In Dr. Lesnak's report Claimant denies posterior neck symptoms. On physical examination, Claimant had full range of motion in the cervical spine in all planes, without reproduction of any symptoms. Provocative testing of Claimant's cervical spine was negative, and palliative testing of claimant cervical spine produced no symptoms. (Ex. H, p.59, 69). Dr. Lesnak performed a Distress and Risk Assessment Method (DRAM) evaluation of Claimant. This showed that Claimant had a significant degree of psychological factors influencing his symptoms. In Dr. Lesnak's estimation, Claimant has a very disabled viewpoint. Id at 57.

12. Claimant returned to Dr. Jinkins on January 18, 2017. The hand-written notes accompanying Dr. Jinkins' narrative report indicate; "(L) shoulder, headache & neck pain. Increased neck pain." (Ex.4, p. 96). Dr. Jinkins injected the shoulder and recommended a repeat MRI.

13. An MRI of the cervical spine was performed on March 23, 2017. Dr. Jinkins reviewed the results on April 4, 2017; "…There was a large disc herniation at C6-C7, which is causing moderate to severe bilateral foraminal stenosis, being more symptomatic on the left than the right, with the disc herniation effacing the thecal sac in close proximity to the cervical spinal cord. He indicated that overall, there has not been a great deal of change as far as symptoms are concerned. He rates his pain level in the neck and trapezius area as a '6' on a scale of 1-10 and his shoulder as well. The pain radiates all the way down his left arm into the hand." (Ex. 4, p. 89).

14. Dr. Jinkins continued; "Physical examination revealed provocative testing for impingement still to be positive, however, more significantly, there does appear to be some slight triceps weakness on the left as compared to the right, which would be a corresponding spinal nerve being impinged. Rotation of the cervical spine elicited discomfort as well." Id.

15. Dr. Jinkins recommended a neurosurgical consultation, "…insomuch that he does have a significant disc herniation, as noted above. He indicated that prior to his fall at work, he had no problems with his cervical spine. Since that time, his symptoms have not abated, but in actuality have progressed…" (Id at p. 90).

16. Claimant saw neurosurgeon Dr. Manon on July 24, 2017. He reported; "…The patient presents for a clinic visit today regarding the cervical spine. He had surgery performed of the left shoulder by Dr. Jenkins [sic] in 2015 for 'bone spurs.' Despite successful surgery he continued to have radiating pain originating in the shoulder and radiating to the neck. Additionally, he reported radiculopathy extending from the base of the neck [on] the left down the shoulder, biceps, forearm, and third, fourth and fifth digits…He reports some limited range of motion of the neck with precipitating neck pain upon flexion and rotation towards [the] left. Also, rotation towards [the] left precipitates his left arm pain…" (Ex. 5, p. 142).

17. On physical examination of the cervical spine, Dr. Manon found "diffuse pain elicited along the cervical paraspinal musculature bilaterally, trapezius, and shoulder. ROM [range of motion] limited with flexion and extension, rotation…" (Id.) Dr. Manon reviewed the MRI findings and concluded, "…This is a 60 year old gentleman with a chronic history of left upper extremity radiculopathy secondary to a prominent C6-C7 disc bulge or herniation with associated significant neural foraminal stenosis. There is advanced cervical spondylosis associated with this. The patient will be best treated with surgical discectomy and artificial disc replacement versus a cervical fusion…" (Ex. 5 at 144).

18. Dr. Jinkins again saw Claimant on July 26, 2017. He reported, "…He did see Dr. Manon, who felt that he is a candidate for decompression at level C6-C7. He is actually scheduled for the surgery on his cervical spine on Tuesday, 08/01/17. He indicated that overall, *there has not been any notable change as far as his neck* and left arm are concerned…Physical examination revealed there to be tenderness in the paraspinous musculature, left and right...I would recommend proceeding with this surgical procedure, as recommended by Dr. Manon…" (Ex. 4, p. 87)(emphasis added).

19. Dr. Manon submitted a request for authorization of cervical spine surgery to Insurer on July 27, 2017. (Ex. 5, p.141). Insurer denied the request on August 2, 2017. (Id. at 140).

20. Dr. Jinkins testified by deposition as an expert in orthopedic surgery on December 4, 2017. Dr. Jinkins explained that Concentra referred Claimant to him only for evaluation and treatment of the shoulder injury, and that the shoulder was the only injury he was authorized to treat. Dr. Jinkins explained that the lack of reference to cervical spine complaints in some of his reports was due to Concentra's policy of allowing him to treat only the shoulder. (Dr. Jinkins depo pp. 17-18)

21. Dr. Jinkins explained that when he placed Claimant at MMI, it was for the shoulder injury, not the neck injury:

> *Q* The maximum medical improvement status for Mr. Romero, if the – is this just maximum medical improvement in your opinion relative to the

left shoulder that you were treating or is this maximum medical improvement for the injury?

A No, this is just the shoulder.

Q Is that ordinarily how you would evaluate a worker for a work injury, is to offer maximum medical improvement for just the component of injury that you're evaluating?

A Yes, that's – that's the way it was recommended that it be done from Concentra.

Q From Concentra?

A Yes.

Q Okay.

A Once again, I was not treating him for the cervical problem at that time. (Dr. Jinkins depo p. 36).

22. Dr. Jinkins testified that the work injury served to aggravate Claimant's cervical spine degenerative condition:

Q The diagnostic testing for Mr. Romero, at least as far as the Penrad Imaging study shows, has degenerative changes identified in the MRI. Would you agree with that?

A It did, yes.

Q Including bony formations that are working in concert with a potential disc to create impingement, correct?

A Correct.

Q If this is identified in the report as chronic in nature, which we've read, do you disagree with that radiologist's interpretation of this condition as chronic?

A No, I do not. In other words, the injury which he – which was incurred did not cause the degenerative condition. It was – it was there previously. It preexisted, but it did serve to aggravate it.

Q Okay. So, in your opinion, the degenerative condition predates injury, but injury happens and creates symptomatology in the neck, working together with that degenerative condition?

A Yes, sir. The neck is inherently close to the shoulder or the muscles that operate the shoulder do originate in the cervical region, the scapular region. And so they can be interrelated. (Dr. Jinkins depo. pp. 57-58)

Q You talked about the degenerative condition not being caused by Mr. Romero's work injury, but it being aggravated. Could you tell us how that happened?

A Yes. This is not uncommon, that we see people -- older people in the older people workforce where -- who will have pre-existing degenerative arthritis, most commonly seen probably in the knees, who are completely asymptomatic barring an injury. The injury can aggravate this underlying, silent arthritis and cause it to become symptomatic. Also an injury can accelerate the progression of the arthritic condition if it's a significant trauma.

Q And do you feel that's what happened in Mr. Romero's case?

A He's significantly symptomatic now with regard to the cervical region, probably more so than he was early on, so it is *probably a progression.* (emphasis added). (Dr. Jinkins depo p. 67).

23. Dr. Jinkins testified that Claimant's cervical spine condition has worsened:

Q Since the report in which it appears you first documented cervical spine problems, that being December 23, 2014, from then until the time you most recently saw Mr. Romero, has his cervical spine condition worsened?

A It seems to be a preponderance of his symptoms at the present time. It does appear that it has progressed, because this is his main complaint at the present. (Dr. Jinkins depo p. 71).

24. Dr. Tyler was deposed on December 8, 2017. Dr. Tyler further explained at his deposition what he meant by a cervical *injury* during his deposition the following:

Q. And basically you found - - or it's your opinion that there was no cervical spine injury or perhaps just ratable impairment, or is that a distinction without a difference?

A. You are hundred percent correct. There was nothing that was ratable. Did he suffer an *injury* to the cervical spine? Yes. That was reported in the very beginning of his notes when he fell off the ladder and his consciousness, but, I mean, it was reported by think even the paramedics. But there wasn't anything *ratable* based on my examination. (Dr. Tyler depo, pp.31- 32,).

A. ….based on what we have just reviewed, i.e., the CT scans, the X-rays, and putting on the [cervical] collar, *it doesn't state that there's an injury.*

Now, there's mention made by the ambulance service, the paramedics, that the patient was tender. That's the symptom; that's not a diagnosis. So it's – do you have any question that he was most likely suffering an *injury* to the cervical spine? The question is, no, I don't question that he suffered an *injury* to the cervical spine. You don't fall off a 3-foot ladder striking your shoulder, your hips, and not *strain the muscles* of your neck. Why? Because your head weighs between 10 and 16 pounds, depending on the size.

….you're most likely going to *strain the muscles* and surrounding tissues that are helping to hold or support the head, and that would be the cervical spine.

Q: But just to clarify, is it your testimony that *he did sustain in injury to his cervical spine, but* ***he simply does not have ratable impairment?***

A: That would be correct. (Dr. Tyler depo, pp. 53-55)(emphasis added).

25. Dr. Tyler testified regarding the way he conducts DIMEs. While dictating the review of the medical records component of his DIME report the patient is present, so as to allow for any input. In this instance, Claimant participated in generating part of Dr. Tyler's report through parenthetical offerings, as allowed by Dr. Tyler. (Dr. Tyler depo, pp. 7, 8, 10-12). When showed Dr. Lesnak's report describing no cervical symptoms upon provocative testing, Dr. Tyler agreed that this was consistent with his examination of Claimant's cervical spine. (Dr. Tyler depo, p. 44).

26. Dr. Tyler also addressed the issue of worsening of Claimant's condition, since the DIME report was issued:

Q: …..Based on all of that, do you have an opinion as to whether or not Mr. Romero is still at MMI?

A: I don't think I can answer that question.

Q: Why not?

A: Because the disc pathology as seen now wasn't present during the time of care for which I was treating him in regards to his work injury of 2013, I believe it was; so *that is a new pathology.* So I'm not sure how you can state that [it] is directly related to his work injury when it wasn't present based upon the records that I had for review and based upon the

> symptomology that I saw at the point where I placed him at maximum medical improvement.
>
> So if that indeed is new symptomology and new pathology, then I'm not sure how it would have a direct relationship to his work injury. (Dr. Tyler depo, pp. 65-66).

27. Claimant testified he experiences continuous pain in his left neck and the upper part of his shoulder. Claimant testified that since being placed at MMI, his neck condition has worsened. Specifically, Claimant experiences neck pain and headaches when he turns his head up or down and from side to side, and he has had to decrease or terminate physical activities such as golf and fishing due to his increased neck pain. Claimant has been unable to work since December, 2014 due to the effects of his industrial injuries. Claimant was awarded Social Security disability benefits.

28. Claimant further testified that he did not tell a medical care provider at Concentra in November 2014 that he was: "100% back to normal with no pain." Claimant also testified that he told Dr. Lesnak about pain in his neck and that Dr. Lesnak did not palpate his neck. Claimant contends that the discrepancy between his testimony and what is contained in the medical records over these matters is due to an error on the part of the medical providers or examiners in generating the records.

CONCLUSIONS OF LAW

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

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the

testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this instance, the ALJ finds Claimant to be sincere in his description of his symptoms to his medical providers at all times pertinent-including reporting, for example, to his Concentra provider in 2014 that he was "100% back to normal with no pain." His current recall of such events, including palpation of his neck by Dr. Lesnak, is simply not reliable-nor could one reasonably expect total reliability from a layperson who is now in pain. Claimant can only describe what he is feeling; someone in his position cannot render a medically reliable or convincing opinion on *causation.*

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

Overcoming the DIME Opinion, Generally

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The

> requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

DIME opinion of Dr. Tyler re: MMI (and by implication, Causation)

G. Dr. Jinkins credibly indicated that his focus was Claimant's shoulder, not his neck, according to his understanding of his assigned role by Concentra. Dr. Tyler, by contrast, made clear in his DIME report that he was addressing Claimant's neck issues as well as his shoulder. This is addressed in his 'Impression #5', as well as in his narrative. If any lingering doubt remained about the scope of his DIME exam, it was made clear in his deposition. As the DIME physician, Dr. Tyler opined that Claimant was at MMI as of July 14, 2016, *for all his injuries caused by this industrial accident.* While Dr. Tyler agrees that Claimant now suffers from serious issues with his cervical spine, he has made a persuasive case that Claimant's current cervical complaints were *not* ***caused by*** *this industrial accident.*

Ambiguity in the DIME's Conclusions

H. While Dr. Tyler appeared to equivocate (as Claimant now urges) at one point in his deposition on the MMI issue, this was based upon speculation under cross-examination of what Dr. Jinkins (who by all accounts was to treat the shoulder-not the neck) might or might not have said at his own deposition. Dr. Tyler again reaffirmed (after this alleged equivocation) that he did not believe the work injury *caused* Claimant's current complaints. To the extent his momentary 'equivocation' is construed as an ambiguity, the ALJ finds that, taken as whole, Dr. Tyler's body of work in the DIME report clearly shows a lack of causation for Claimant's current complaints due to the work injury.

Aggravation of Underlying Condition/Now Symptomatic

I. The ALJ further finds that Claimant's latent degenerative cervical conditions were not made symptomatic by his fall. At most, Claimant suffered a muscle strain,

from which he has long since recovered. The only evidence to the contrary was offered by Dr. Jinkins, who at one point opined in his deposition that it's *probably* a progression of a now-symptomatic aggravation of an underlying chronic condition. Assuming, arguendo, that the ALJ accepts this as being correct (which the ALJ does not in this case), it is insufficient to overcome the DIME opinion by clear and convincing evidence. At most, it represents a difference in medical opinion. In this case, Dr. Jinkin's 'charter' was not to treat the neck at all, except insofar is it related to his shoulder. The DIME opinion, therefore, has not been overcome.

Reopening/Worsening of Condition

J. As found above, Claimant has not shown, by a preponderance of the evidence, that his current cervical complaints, worsening though they are, are due to his work injury. His condition is chronic, and was not made symptomatic by the fall from the ladder. His request to reopen his claim is denied.

Medical Benefits/TTD Benefits

K. No one contests that Claimant needs surgical correction of his worsening cervical condition. This unfortunate gentleman has suffered lumbar and thoracic conditions already; now he suffers from a progressive, chronic degenerative cervical condition. However, since his work accident did not *cause* his chronic condition to now become symptomatic, he is not entitled to medical benefits. Nor can he claim TTD benefits, for the same reason.

ORDER

It is therefore ordered that:

1. Claimant's request for cervical spine surgery and TTD benefits is denied and dismissed.

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

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

DATED: February 2, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Respondents' are entitled to dismissal on the issues of medical benefits, authorized treating physicians, reasonable and necessary treatment, disfigurement, TTD, PPD, and PTD, because petition to reopen is the only ripe issue.

II. Whether Claimant established, by a preponderance of the evidence, that his claim should be reopened.

FINDINGS OF FACT

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

A. Procedural History

1. Claimant sustained an industrial injury to his right knee on March 7, 2006.

2. On November 19, 2013, Respondents filed an Amended Final Admission of Liability (FAL) admitting for MMI on August 8, 2013, and 38% scheduled impairment. No PPD was paid under the Amended FAL because $140,845.36 in TTD was paid, exceeding the indemnity cap of $75,000. The Amended FAL denied future medical benefits and specifically listed Disfigurement and PTD as "NONE." *(OMD Exhibit* A*)*

3. Subsequently, the FAL was not properly served. Hearing was held on the issue of service, and whether Claimant's objection to the FAL was timely. As set forth in his July 13, 2017, Specific Findings of Fact, Conclusions of Law, and Order, ALJ Cannici found that Claimant received the FAL on April 28, 2014. *(OMD Exhibit M)* ALJ Cannici also found Claimant's May 22, 2014, Objection to the Final Admission was timely. (*OMD Exhibit* M)

4. ALJ Cannici found that because Claimant timely objected to the FAL, his claim had not closed and remained viable. Judge Cannici also indicated that Claimant's Workers' Compensation claim for his March 7, 2006 right knee injury remained open and therefore it was unnecessary to address whether Claimant should be permitted to reopen the claim based on a worsening of condition pursuant to Section 8-43-303(1), C.R.S. Moreover, ALJ Cannici indicated that any issues not resolved in his Order, were reserved for future determination. *(OMD Exhibit* M)

5. The issue of whether Claimant timely filed an Application for Hearing or a Notice and Proposal to Select an IME within 30 days of receiving the FAL on April 28, 2014, was not addressed or resolved by ALJ Cannici. (*OMD Exhibit* M)

6. Claimant did not file an Application for Hearing or a Notice and Proposal to Select an IME within 30 days of the November 19, 2013, FAL which was received on April 28, 2014, as required by Section 8-43-203(2)(b)(II)(A), C.R.S. Rather, On May 22, 2014, Claimant merely filed an Objection to Final Admission. *(Claimant's Proposed FFCL, p.2; Claimant's Exhibit 7, p.2; OMD Exhibit B)*

7. On June 23, 2014, more than 30 days after Claimant's receipt of the FAL, Claimant filed an Application for Hearing on the sole issue of "Whether Respondent's Final Admission of Liability was properly served, and if so, when, and based upon such, whether Claimant's Objection to Final Admission of Liability was timely." (*OMD Exhibit* C). The issue was set to be heard on October 16, 2014. On October 14, 2014, Claimant filed an unopposed motion to withdraw his application for hearing, preserving all ripe issues, claims, defenses, and time requirements. (*OMD Exhibit* D). An Order was issued on October 15, 2014, allowing Claimant to withdraw his application for hearing and preserving all ripe issues, claims, defenses, and time requirements. (*OMD Exhibit* E). The Order neither granted Claimant the right to resurrect an issue that was previously ripe and not timely endorsed via a timely application for hearing and thereby closed, nor extend the time to file a Notice and Proposal for a DIME which was not timely filed.

8. On August 4, 2015, Claimant filed a Petition to Reopen alleging a change in medical condition, error, and mistake. (*Claimant's Exhibit* 1)

9. Claimant filed another Application for Hearing on February 2, 2017, and again endorsed the issue of "Whether Respondent's Final Admission of Liability was properly served, and if so, when, and based upon such, whether Claimant's Objection to Final Admission of Liability was timely" and petition to reopen. (*OMD Exhibit* L)

10. As set forth above, the issue as to when Claimant received the FAL and whether his objection was timely was heard by ALJ Cannici and resolved pursuant to Judge Cannici's July 13, 2017, Order. (OMD Exhibit M).

11. On August 22, 2017, over three years after Respondents' Amended FAL was filed, Claimant filed an Application for Hearing on the issues of compensability, medical benefits, authorized provider, reasonably necessary, petition to reopen claim, disfigurement, TTD from August 7, 2013 to ongoing, PPD, PTD, and "all issues ripe for determination arising from the ALJ's July 13, 2014 [sic] order." *(Claimant's Exhibit 7, p. 5). (The correct date of the ALJ's order is July 13, 2017.)*

12. On September 21, 2017, Respondents filed a Response to Application for Hearing and endorsed numerous issues, including "Claimant's failure to timely endorse any issues related to benefits," and "8-43-203(2)(b)(II), C.R.S." (*Claimant's Exhibit* 4).

B. Factual History

13. After Claimant's industrial injury on March 7, 2006, Claimant was temporarily totally disabled with right knee pain, underwent numerous knee surgeries, and walked with an antalgic gait. *(Hearing, p. 92)*

14. Claimant contends he has had back pain since the accident in 2006. (*Claimant's Exhibit* 1-004 and 1-013; *Hearing*, p.110)

15. On October 27, 2009, Claimant underwent a DIME with Dr. Shea, who did not assess any impairment related to low back pain. *(Respondents' Exhibit A, p. 5)*

16. On November 2, 2010, Claimant underwent a subsequent DIME with Dr. Shea, after having two additional knee surgeries. Dr. Shea agreed with Dr. Primack, opining Claimant reached MMI on September 23, 2010, with a 16% whole person impairment rating, and recommended a Percocet prescription for two years, as well as periodic maintenance for medication reevaluation. Dr. Shea did not find any impairment related to low back pain. *(Respondents' Exhibit A, pp. 8-9)*

17. On April 5, 2011, Claimant underwent a psychological evaluation with Dr. Kenneally. Claimant described to Dr. Kenneally "back pain that kills me all the time." (*Respondents' Exhibit* B, p. 12) Dr. Kenneally opined Claimant's "pain report is being exacerbated by both conscious and unconscious psychological factors." Claimant had marked elevation on the fake bad scale, indicating exaggerated symptom reporting. Further, Claimant "is not a good candidate for surgery or other invasive medical procedures at this time given the significance of his depression and sleep disorder; and his translation of psychological factors into physical symptomatology." *(Respondents' Exhibit B, p. 14)*

18. On September 13, 2011, Claimant underwent a lumbar MRI, which revealed degenerative changes at L4-L5 and L5-S1. (Dr. McPherson's Depo., p. 83) The reason for the lumbar MRI was based on the contention that Claimant injured his back in 2006 when he fell and injured his knee. (*Claimant's Exhibit* 1-004.)

19. On October 14, 2011, Claimant was seen again by Dr. Primack, and complained of chronic back pain. Dr. Primack concluded Claimant's "back problem is not work-related." (*Respondents' Exhibit D*, p. 22)

20. The claim was voluntarily reopened due to a worsening condition. (*Hearing Transcript*, p.33) On December 13, 2012, Claimant underwent a revision right knee arthroplasty to remove the knee prosthesis which contained materials

Claimant was allergic to. Claimant was prescribed OxyContin 20 mg and Percocet 10/325mg, up to six a day. (*Respondents' Exhibit* D, p. 23)

21. Before the November 19, 2013, Final Admission of Liability was filed, Claimant had asserted that his back condition was caused by his March 7, 2006, work accident, and sought treatment for his back condition.

22. On September 20, 2012, Claimant underwent a psychological evaluation with Dr. Carbaugh. Dr. Carbaugh noted "a summary of his treatment includes physical therapy with no benefit, medications with some benefit, injections with no benefit and at least five surgical procedures on his right knee with no benefit to a worsening of his condition." Dr. Carbaugh also noted in his report that Claimant complained of back pain and indicated that Dr. Loucks also told Claimant he needs back surgery as well. Dr. Carbaugh noted in his report Claimant's evaluation with Dr. Kenneally and that she "suspected a role of more conscious symptom magnification." Dr. Carbaugh opined Claimant "is an extremely poor candidate for surgery strictly from a psychological standpoint. His ongoing depression and personality characteristics make it very unlikely that he will respond positively to any invasive procedure." (*Respondents' Exhibit*, C.)

23. On June 15, 2012, Claimant finally underwent a urine drug test recommended by Dr. Primack, after previously refusing. Dr. Primack reported there was no evidence of oxycodone and no evidence of any opioids in Claimant's urine, yet Claimant received 530 opioid tablets between March 29, 2012 and May 15, 2012. Dr. Primack reported Claimant "is doctor shopping, yet non-compliant given the lack of opioid in his urine" and would not prescribe any more opioids at that time. *(Respondents' Exhibit D, p. 23)*

24. On December 13, 2012, Claimant underwent a revision right knee arthroplasty. (*Respondents' Exhibit* D, p. 23).

25. On February 27, 2013, based on a referral from Dr. Hugate, Claimant was evaluated by Dr. Chris Huser of Metro Denver Pain Management. Claimant reported the combination of Oxycontin and Percocet in the hospital made him pain free and since the surgery has been on Percocet. Claimant stated he had been out of pain medication for three weeks and rated his pain at 10/10. (*Respondents' Exhibit* D, p. 23). It does not appear Dr. Huser was aware of Dr. Kenneally's or Dr. Carbaugh's reports which indicated symptom magnification and that Claimant's pain complaints were being exacerbated by both conscious and unconscious psychological factors. It also does not appear Dr. Huser was aware of Dr. Primack's findings on June 15, 2012, when he indicated that on drug testing, there was no evidence of oxycodone and no evidence of any opioids in Claimant's urine, yet Claimant received 530 opioid tablets between March 29, 2012 and May 15, 2012 and that Dr. Primack reported Claimant "is doctor shopping, yet non-compliant given the lack of opioid in his urine" and

would not prescribe any more opioids at that time. (*Respondents' Exhibit* D, p. 23).

26. Based on Claimant's pain complaints, Dr. Huser prescribed Claimant OxyContin and Percocet and required Claimant to sign an opiate agreement and undergo a urine drug test. The urine drug test of February 27, 2013, came back positive for cocaine. Therefore, Dr. Huser discharged Claimant from their pain clinic. (*Respondents' Exhibit* D, p. 23).

27. On August 8, 2013, Claimant returned to his authorized knee surgeon, Dr. Hugate and was placed at MMI. Because Dr. Hugate was not Level II accredited, Claimant went to Dr. Fall, a Level II provider, for an impairment rating. Dr. Fall reported Claimant had a 15% whole person impairment. Neither physician assessed or rated back pain. *(Respondents' Exhibit D, p. 24)*

28. On November 19, 2013, as found above, Respondents filed an Amended Final Admission of Liability and denied future medical benefits.

29. After MMI, Claimant reported continued knee pain and low back pain, as well as pain throughout his entire body. *(Respondents' Exhibit E, p. 38)*

30. On September 17, 2014, Claimant underwent another lumbar MRI, revealing "some" spondylosis at L4-L5 and L5-S1 with moderate bilateral foraminal stenosis. There was no evidence of neural element impingement. These findings were no different from the first MRI. *(Respondents' Exhibit D, p. 24; Exhibit F, p.43)*

31. On December 17, 2014, Claimant had a surgical follow up with Dr. Hugate. Dr. Hugate noted that he had performed the revision knee replacement about two years earlier. He documented that "Interestingly in the clinic, I could only get [Claimant] to bend [his knee] a few degrees, but as soon as he went to sleep, his motion went down to about 110 degrees of flexion. A similar phenomenon occurred when Dr. Loucks was treating him, I believe." (*Respondents' Exhibit* D, p. 25) This is consistent with Dr. Kenneally finding exaggerated symptom reporting.

32. On July 30, 2015, Dr. Gesquire, responded to a letter written by Claimant's attorney asking whether Claimant's underlying back condition was caused or aggravated by his altered gait. Dr. Gesquire was specifically asked whether Claimant's "low back pain, lumbar spondylosis, and lumbar radiculopathy versus radiculitis bilaterally have either been caused or aggravated by changes in Claimant's gait or walking pattern?" Dr. Gesquire indicated that "It is my opinion that [Claimant] has a chronic antalgic gait caused by his right knee injury which is causing his BP to worsen." Although Dr. Gesquire indicated he thought Claimant's altered gait was causing his back pain to worsen, he did not say that Claimant's altered gait caused or aggravated Claimant's lumbar spondylosis,

lumbar radiculopathy, or radiculitis. Dr. Gesquire was also asked whether the medical treatment provided to Claimant for his "low back pain, lumbar spondylosis, and lumbar radiculopathy versus radiculitis" was due to Claimant's altered gait. Dr. Gesquire merely stated that Claimant's right knee injury aggravates his low back. He did not indicate the Claimant's altered gate caused the need for medical treatment. (*Claimant's Exhibit* 2, pg. 003-004) The ALJ does not find Dr. Gesquire's opinion to be persuasive because his opinion is vague, conclusory, and non-specific. His response on July 30, 2015, does not take into consideration the findings of Dr. Kenneally and Carbaugh which document symptom magnification. His response also fails to take into consideration and discuss the findings of Dr. Hugate and Dr. Loucks which tend to indicate Claimant's range of motion and function of his knee might be much better than Claimant contends and that the extent of Claimant's limp is in question.

33. Claimant subsequently underwent multiple bilateral L4-L5 and L5-S1 facet blocks, medial branch nerve blocks, bilateral L4-L5 transforaminal epidural steroid injections and selective nerve blocks. Claimant reported none of these procedures provided him pain relief. *(Respondents' Exhibit D, pp.24-26)*

34. Moreover, Claimant's self-reported response to the injections was non-physiologic. For example, reporting two days relief from an injection when the anesthetic contained in the injection lasts only six hours. (*Ridings 1*, p. 26: ll 2-10)

35. On April 26, 2016, Claimant underwent a L4-L5 fusion performed by Dr. McPherson, which did not relieve Claimant's symptoms. *(Respondents' Exhibit D, p. 26,30)*

36. On September 26, 2016, Claimant underwent an IME with Dr. Ridings. Claimant reported his low back pain began the date of his industrial injury. *(Respondents' Exhibit D, p. 27)* Dr. Ridings reviewed the entirety of Claimant's medical history.

37. In reviewing Claimant's medical history, Dr. Ridings noted in his report:

> At this point there are records indicating widespread complaints of pain in the neck, back, upper and lower extremities without clear etiology, which may or may not be related to an inflammatory arthritis, lack of any opiates in his system when he was thought to be on high dose Percocet, and a finding of cocaine in his system on a different drug screen, psychological testing indicating symptom magnification and a strong component of psychological factors (versus malingering) to the patient's complaints, and now the documentation of near normal range of motion of the right knee under anesthesia at a time that the patient

> was demonstrating only minimal right knee range of motion preoperatively in the clinic. Clearly it is difficult to support a clear-cut cause and effect relationship between the patient's antalgic gait and his complaints of low back pain.

(*Respondents' Exhibit* D, p. 25)

38. Dr. Ridings opined Claimant's increased pain symptoms and imaging did not warrant the lumbar fusion, but rather could be due to Claimant's inflammatory arthritis or lack of opiates in his system. *(Respondents' Exhibit D, p. 25)* Dr. Ridings further reported Claimant was not a surgical candidate given there were no surgical indications from Claimant's MRI's or x-rays, because there was no instability documented anywhere. Dr. Ridings reported in addition to the two psychological evaluations indicating Claimant's exaggeration of symptoms, Dr. Hugate reported when Claimant came in for a surgical follow up "interestingly in the clinic, [Claimant] could only bend a few degrees, but as soon as he went to sleep, his motion went down to about 110 degrees of flexion." *(Respondents' Exhibit D, p. 25)* Dr. Ridings opined Claimant's low back pain has been complicated by a degree of psychological overlay to the severity of his complaints:

> Based on my analysis of the records, the [Claimant's] lumbar fusion was performed primarily because his subjective complaints had not improved despite a course of conservative care. The structural findings on his lumbar imaging would not typically suggest the need for a fusion surgery. As it turns out, he reports no improvement in his symptoms from the fusion, supporting that opinion.

(Respondents' Exhibit D, p. 30)

39. Dr. Ridings also indicated that the spinal fusion was unreasonable and unrelated to Claimant's work injury, based on the lack of structural findings coupled with Claimant's psychological symptomology. *(Respondents' Exhibit D, p.30)* Dr. Ridings further opined Claimant does not require any treatment for his low back and Claimant remains at MMI since he was placed there in 2010. (*Respondents' Exhibit D, p.30*)

40. Dr. Ridings also indicated Claimant continued to seem depressed during his evaluation. Dr. Ridings suggested further treatment for Claimant's depression, which if brought under control may well lead to a significant diminution of Claimant's perceived pain and disability. However, Dr. Ridings indicated he did not fully evaluate and investigate Claimant's depression and he did not opine that Claimant's psychological condition, regardless of its cause, had worsened since being placed at MMI. (*Respondents' Exhibit* D, p.30). Moreover, during his deposition, Dr. Ridings indicated that any psychological treatment should be

undertaken outside the workers' compensation system. (*Ridings 1*, p. 53) Then, during a subsequent, deposition, Claimant's attorney asked Dr. Ridings if he agreed that Claimant was affected by a psychological overlay in December of 2016 which was causally related to the fact that Claimant was depressed due to his disability. Dr. Ridings indicated he did not make a causal connection between Claimant's depression and his work injury in either his report or his prior testimony. Dr. Ridings indicated that there might be multiple reasons as to why Claimant is depressed or might have been depressed before the injury. Dr. Ridings went on to state that Claimant has some kind of widespread inflammatory arthritis, that he has pain in essentially every joint in his body, and that there are multiple other psychological issues, including drug abuse, which could be the cause of any depression. (*Ridings 3*, pp. 23-25)

41. On May 10, 2017, Dr. McPherson testified by deposition and was admitted as an expert in orthopedic surgery. Dr. McPherson testified that he did not review Claimant's entire medical history, nor the reports regarding Claimant's psychological conditions from Dr. Ridings, Dr. Carbaugh or Dr. Kenneally. *(Dr. McPherson Depo., pp.67, 71, 75)* Dr. McPherson testified he diagnosed Claimant with degenerative spondylolisthesis. Dr. McPherson testified spondylolistheses is the slippage of vertebra, but he did not keep any records measuring slippage. *(Depo., p. 88)* Despite not having the objective neurogenic claudication findings, Dr. McPherson testified his indication for surgery was based on Claimant's pain symptoms and lumbar x-ray. *(Depo., pp. 57-58)*

42. On December 4, 2017 and January 10, 2018, Dr. Ridings testified by deposition and was admitted as an expert in physical medicine and rehabilitation, Level II accredited. *(Respondents' Exhibit F, p. 42)* Dr. Ridings testified that it is highly unlikely an antalgic gait would cause structural spinal damage, but would more likely cause muscular pain or a lumbar strain. *(Respondents' Exhibit H, pp.88-89)* Dr. Ridings testified "reporting low back pain as a symptom, however, does not imply or require that there be an actual pathologic or pathoanatomic change to the back itself." *(Respondents' Exhibit F, p.42)* Dr. Ridings testified Claimant underwent a series of lumbar injections, in part for diagnostic purposes because there was no clear etiology for the Claimant's low back complaints, however none of these injections relieved pain suggesting psychological overlay to the Claimant's complaints. *(Respondents' Exhibit F, p. 44)*

43. Claimant testified at hearing he was totally disabled since the date of injury. *(Hearing, p.118, llL21-23)* Claimant testified he had low back pain beginning at the time of his work injury and walked with a limp and antalgic gait. *(Hearing, p. 92 ll: 2-7)* Claimant testified he told all of his doctors dating back to 2006 that he was having low back pain. *(Hearing, p. 110, ll: 22-25)* Claimant testified none of the health care has helped his back pain. *(Hearing, p. 118, ll:13-17)*

44. On December 4, 2017, Dr. McPherson noted in a report that he has been unable to provide an impairment rating for Claimant's low back because he could not get

valid range of motion measurements and did not think Claimant would be able to participate in range of motion testing. (*Claimant's Exhibit* 16.) This is another example of Claimant attempting to establish the extent of his disability to a medical provider in an inconsistent manner.

45. Claimant is found to not be credible.

46. Claimant's pain complaints, physical presentation, and verbalized symptoms, are found to not be reliable.

47. Claimant did not injure his back on March 7, 2006, when he fell at work.

48. Claimant's altered gait did not cause or aggravate his back condition.

49. Claimant's altered gait did not cause or aggravate Claimant's back condition and necessitate the need for medical treatment or cause additional disability.

50. Claimant has failed to establish that his work related medical conditions have worsened since being placed at MMI.

51. Claimant has failed to establish that there was a mistake or error which warrants reopening.

52. The ALJ hereby finds the claim was closed on all issues but petition to reopen. The ALJ finds Claimant failed to meet his burden of proof and establish by a preponderance of the evidence found credible his industrial injury worsened as a natural progression there of, or that there was a mistake or error which warrants reopening, thus the Claimant is not entitled to additional benefits.

CONCLUSIONS OF LAW

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

General

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 134 P. 254 (Colo. 1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondents' are entitled to dismissal on the issues of medical benefits, authorized treating physicians, reasonable and necessary treatment, disfigurement, TTD, PPD, and PTD, because petition to reopen is the only ripe issue.

Section 8-43-203(2)(b)(II)(A), C.R.S., provides that a case will be "automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing, including the selection of an independent medical examiner. . . ." *(emphasis added)* Applying time limits to Claimant's right to contest closure is rational and advances the statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker. *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006).

On November 19, 2013, Respondents filed an Amended Final Admission of Liability (FAL) admitting for MMI on August 8, 2013, and 38% scheduled impairment. No PPD was paid under the Amended FAL because $140,845.36 in TTD was paid, exceeding the indemnity cap of $75,000. The Amended FAL denied future medical benefits and specifically listed Disfigurement and PTD as "NONE."

There was a dispute regarding service of the FAL. A Hearing was held by ALJ Cannici on the issue of service and whether Claimant's objection to the FAL was timely as well as whether Claimant's claim should be reopened based upon a worsening of

condition. As set forth in his July 13, 2017, Specific Findings of Fact, Conclusions of Law, and Order, ALJ Cannici found that Claimant received the FAL on April 28, 2014. ALJ Cannici also found Claimant's May 22, 2014, Objection to the Final Admission was timely.

ALJ Cannici determined Claimant's case did not close due to a failure to timely file an objection to the FAL. Therefore, he did not address Claimant's petition to reopen based upon a worsening of condition. ALJ Cannici did indicate that any issues not resolved in his Order, were reserved for future determination. ALJ Cannici's Order did not address and resolve the issue of whether Claimant's case is closed due to his failure to timely file an application for hearing or file a Notice and Proposal to select an independent medical examiner.

In light of ALJ Cannici's Order, Claimant filed a new Application for Hearing on August 22, 2017, and endorsed the issue of compensability, medical benefits, authorized treating physician, reasonable and necessary treatment, disfigurement, TTD, PPD, and PTD. On September 21, 2017, Respondents filed a Response to Application for Hearing and endorsed numerous issues, including "Claimant's failure to timely endorse any issues related to benefits," and "8-43-203(2)(b)(II), C.R.S."

Claimant did not file an Application for Hearing or a Notice and Proposal to Select an IME within 30 days of receiving the November 19, 2013, FAL on April 28, 2014, as required by Section 8-43-203(2)(b)(II)(A), C.R.S. Rather, on May 22, 2014, Claimant merely filed an objection to the FAL.

In this case, the issue of medical benefits, future medical benefits, disfigurement, temporary total disability benefits from August 7, 2013 to ongoing, permanent partial disability benefits, and permanent total disability benefits closed pursuant to the November 19, 2013, FAL.

Claimant contends that the only issue that was ripe when he filed his June 23, 2014, Application for Hearing was whether his "claim should be reopened based upon a defectively served FAL." (*Claimant's Proposed FFCL*, p. 3) Claimant, however, misstates the issues raised and the finding of ALJ Cannici. The issue raised by Claimant in his June 23, 2014, Application for Hearing was "Whether Respondent's Final Admission of Liability was properly served, and if so, when, and based upon such, whether Claimant's Objection to Final Admission of Liability was timely." (*OMD* C) Although the June 23, 2014, Application for Hearing was withdrawn and refiled, the issue asserted by Claimant remained the same and was decided by ALJ Cannici. As set forth above, ALJ Cannici determined Claimant received the FAL on April 28, 2014, and timely filed an objection. ALJ Cannici did not determine the FAL was defective, but merely determined the date Claimant received the FAL which triggered Claimant's obligation to properly contest the FAL within 30 days. Therefore, by the time Claimant filed his June 23, 2014, Application, the case had closed due to his failure to properly contest the FAL within 30 days of receipt of the FAL.

The ALJ concludes Claimant's case closed pursuant to the November 19, 2013, FAL, which was received by Claimant on April 28, 2014.

II. Whether Claimant established, by a preponderance of the evidence, that his claim should be reopened.

Change in condition since being placed at MMI on August 8, 2013.

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. Claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 474 P.2d 622 (Colo. 1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

The question of whether Claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.*

As found, Claimant's altered gait did not cause or aggravate his underlying back condition and necessitate the need for medical treatment or cause any additional disability. Such conclusion, is based on a number of findings.

First, Claimant asserts that his back pain and back condition has worsened since being placed at MMI on August 8, 2013. However, Claimant complained to Dr. Kenneally in 2011 that his back pain kills him all the time. In addition, in September of 2012, Claimant told Dr. Carbaugh that he was advised by Dr. Loucks that he needed back surgery. Therefore, Claimant's contention that his back pain worsened and that such worsening necessitated the need for medical treatment, in the form of back surgery, is inconsistent with his medical records.

Second, the ALJ was persuaded by the opinions of Dr. Kenneally that Claimant's pain complaints are not a true representation of his actual pain due to any underlying physical pathology. In 2011, Dr. Kenneally opined Claimant's "pain report is being exacerbated by both conscious and unconscious psychological factors." She indicated that Claimant had marked elevation on the fake bad scale, indicating exaggerated symptom reporting. Dr. Kenneally also stated that Claimant "is not a good candidate for surgery or other invasive medical procedures at this time given the significance of his depression and sleep disorder; and his translation of psychological factors into physical symptomatology."

Third, the ALJ was also persuaded by the opinions of Dr. Carbaugh. In 2012, Dr. Carbaugh indicated that "a summary of his treatment includes physical therapy with no benefit, medications with some benefit, injections with no benefit, and at least five surgical procedures on his right knee with no benefit to a worsening of his condition." Dr. Carbaugh noted in his report Claimant's evaluation with Dr. Kenneally and that she "suspected a role of more conscious symptom magnification." Therefore, Claimant's pain complaints are not found to be reliable.

Fourth, the ALJ was also persuaded by the fact that the only treatment Claimant told Dr. Carbaugh provided him some benefit was medication, which Claimant was misusing. As stated by Dr. Primack, Claimant was misusing his opiod mediation. For example, on June 15, 2012, Claimant finally underwent a urine drug test recommended by Dr. Primack, after previously refusing. Dr. Primack reported there was no evidence of oxycodone and no evidence of any opioids in Claimant's urine, yet Claimant received 530 opioid tablets between March 29, 2012 and May 15, 2012. Dr. Primack reported Claimant was "doctor shopping, yet non-compliant given the lack of opioid in his urine" and would not prescribe any more opioids at that time. It should also be noted that after Dr. Primack refused to prescribe additional opiates, Claimant came under the care of Dr. Huser in February of 2013 and indicated that the only type of medication that controlled his pain was opiates. In light of Claimant's pain complaints, Dr. Huser prescribed OxyContin and Percocet and required Claimant to sign an opiate agreement and undergo a urine drug test. The urine drug test of February 27, 2013, came back positive for cocaine. Therefore, Dr. Huser discharged Claimant from their pain clinic.

Fifth, the ALJ was also persuaded by the opinions of Dr. Ridings. In reviewing Claimant's medical history, Dr. Ridings noted in his report:

> At this point there are records indicating widespread complaints of pain in the neck, back, upper and lower extremities without clear etiology, which may or may not be related to an inflammatory arthritis, lack of any opiates in his system when he was thought to be on high dose Percocet, and a finding of cocaine in his system on a different drug screen, psychological testing indicating symptom magnification and a strong component of psychological factors (versus malingering) to the patient's complaints, and now the documentation of near normal range of motion of the right knee under anesthesia at a time that the patient was demonstrating only minimal right knee range of motion preoperatively in

> the clinic. Clearly it is difficult to support a clear-cut cause and effect relationship between the patient's antalgic gait and his complaints of low back pain.

In addition, Dr. Ridings opined Claimant's increased pain symptoms and imaging did not warrant the lumbar fusion, but rather could be due to Claimant's inflammatory arthritis or lack of opiates in his system. Dr. Ridings further reported Claimant was not a surgical candidate given there were no surgical indications from Claimant's MRI's or x-rays, because there was no instability documented anywhere. Dr. Ridings reported in addition to the two psychological evaluations indicating Claimant's exaggeration of symptoms, Dr. Hugate reported when Claimant came in for a surgical follow up "interestingly in the clinic, [Claimant] could only bend a few degrees, but as soon as he went to sleep, his motion went down to about 110 degrees of flexion." Therefore, even the extent of Claimant's antalgic gait is questioned by the ALJ.

Moreover, Dr. Ridings opined based on his analysis of the records, the Claimant's lumbar fusion was performed primarily because his subjective complaints had not improved despite a course of conservative care. He also stated that the structural findings on his lumbar imaging would not typically suggest the need for a fusion surgery. Dr. Ridings indicated that as it turns out, Claimant reported no improvement in his symptoms from the fusion, which further supported Dr. Ridings' opinions.

Dr. Ridings also indicated that the spinal fusion was unreasonable and unrelated to Claimant's work injury, based on the lack of structural findings coupled with Claimant's psychological symptomology. Dr. Ridings further opined Claimant does not require any treatment for his low back and Claimant remains at MMI.

Sixth, Claimant's complaints of pain, and other symptoms, are not found to be credible or reliable. In essence, the basis for Claimant's petition to reopen is that his pain has worsened. However, as found, Claimant's pain complaints are not a reliable indicator regarding any underlying pathology, or the worsening of such, necessitating the need for medical treatment or causing any additional disability.

To the extent Claimant asserts that his psychological condition has worsened since being placed at MMI, Claimant has also failed to present credible and persuasive evidence supporting that contention.

The ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that his condition has worsened since being placed at MMI.

Error or Mistake

When a party alleges that a prior award is based on an error or mistake, the ALJ must determine whether an error or mistake was made, and if so, whether it is the type of error or mistake which justifies reopening the case. *Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399 (Colo. App. 1981). "Mistake" refers to any mistake of law or fact which demonstrates that a prior award or denial of benefits was incorrect. *See Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). A mistake in diagnosis, for example, previously has been held sufficient to justify reopening. *See Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *see also Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989)(petition to reopen based on a mistake of fact may properly be granted where there is a mistake in diagnosis due to limited medical technology available to treating physician).

Claimant, in his Petition to Reopen, checked the box for error and mistake. However, Claimant's post hearing position statement – proposed order - does not contain a cogent argument regarding this issue. Claimant's post hearing filing contains some statements regarding the timing as to when Claimant learned that his back pain and need for medical treatment might have been caused or aggravated by his altered gait. As asserted by Claimant, he did not find out that he back pain might have been caused by his altered gait until he received the comments from Dr. Gesquire which were written on the July 30, 2015, letter to Dr. Gesquire. As found by the ALJ, Claimant did not injure his back on March 7, 2006, and Claimant's altered gait did not cause or aggravate his back condition. Therefore, there was no error or mistake in Claimant's diagnosis.

Claimant also states in his post hearing position statement – proposed order – that the failure to properly contest the FAL is a "technical flaw" and should not result in the closure of his claim pursuant Section 8-43-203(2)(b)(II)(A), C.R.S. Therefore, Claimant might also be arguing that his failure to properly contest the FAL should provide the basis reopening his claim.

When determining whether an error or mistake warrants reopening, the ALJ may consider whether it could have been avoided by the timely exercise of appropriate procedural or appellate rights. *Industrial Commission v. Cutshall*, 433 P.2d 765 (Colo. 1967); *Klosterman v. Industrial Commission*, 694 P.2d 873 (Colo. App. 1984). In this case, Claimant's "technical flaw" or mistake could have been avoided by timely exercising his procedural rights pursuant to Section 8-43-203(2)(b)(II)(A), C.R.S., and properly contesting the FAL. Therefore, the ALJ concludes that Claimant's failure to comply with Section 8-43-203(2)(b)(II)(A), C.R.S., and properly contest the FAL does not warrant reopening.

ORDER

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

1. Respondents' Motion for Dismissal is granted. This issue of medical benefits, future medical benefits, authorized treating physicians, reasonable and necessary treatment, disfigurement, TTD, PPD, and PTD were closed pursuant to Respondents FAL which is dated November 19, 2013, and was received by Claimant on April 24, 2014.

2. Claimant's Petition to Reopen is denied. Claimant's request for additional benefits is denied and dismissed.

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

DATED: March 5, 2018

Glen Goldman

_____

Glen B. Goldman
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that he suffered an injury to his left foot arising out of and in the course and scope of his employment with employer.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that medical treatment he received constitutes reasonable medical treatment necessary to cure and relive claimant from the effects of the work injury.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary partial disability (TPD) benefits.

- If claimant proves a compensable injury, what is claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. Claimant testified that he began working for employer in May 2017. Employer is a landscaping company. Claimant was hired to work as a laborer in planting and renovation. Claimant was scheduled to work ten hours per day, four days per week and was paid $14.50 per hour.

2. Claimant testified that on Wednesday, May 31, 2017[1] he injured his left foot while working for employer. Claimant provided the following testimony regarding the incident. Claimant and his foreman, Mr. Garcia-Gonzales, were loading a wheeled cart full of plants onto a box truck. The truck has a hydraulic lift on the rear tailgate for this purpose. Claimant was standing on the lift with the cart while Mr. Garcia-Gonzales operated the mechanism for moving the lift. As the lift was raised the cart began to shift. It is claimant's testimony that his left foot became caught between the lift and the tailgate. The force of the lift pushed claimant's foot out.

[1] Employer's First Report of Injury and the medical records indicate that the incident at issue occurred on June 6, 2017. However, claimant was quite adamant in his testimony that the incident occurred on May 31, 2017.

3. Claimant testified that because he was wearing steel toe boots, his toes were protected from the force of the lift. Claimant removed his boot and looked at his toes and foot. Claimant testified that the skin on the top of his left foot was scraped off.

4. Claimant also testified that at the time of the May 31, 2017 incident he felt pain throughout his entire body. Claimant testified that he currently has pain from his neck down through his whole body, including pain in his shoulders and arms. Claimant's testimony regarding the nature and development of his symptoms was unclear and unpersuasive.

5. Mr. Garcia-Gonzales testified at hearing regarding the May 31, 2017 incident involving the lift gate and claimant's foot. Mr. Garcia-Gonzales agrees that he and claimant were in the process of loading a cart of plants onto the box truck. However, Mr. Garcia-Gonzales testified that claimant's foot was not caught by the movement of the lift, but was "pushed out". Mr. Garcia-Gonzales also testified that he looked at claimant's left foot immediately following the incident. Mr. Garcia-Gonzales testified that there was no redness, swelling, or abrasions on claimant's left foot at that time.

6. Claimant completed his shift on May 31, 2017, working approximately three more hours after the incident. Claimant testified that he reported for work and worked his entire shift the following day, which was a Thursday. Claimant also reported to work and completed his scheduled shifts the following week. Claimant testified that during this time he was in pain, but believed that Mr. Garcia-Gonzales would report the issue to employer.

7. Claimant testified that on Friday, June 9, 2017, he reported the incident to employer by notifying Mr. Heredia. At that time, claimant reported that the alleged injury to his foot occurred on June 6, 2018.

8. Ms. Heredia testified that claimant did report the incident to her, but not until June 16, 2017. On that date, claimant told Ms. Heredia that he was injured on June 6, 2017. When Ms. Heredia learned of the incident she provided claimant with a list of designated medical providers that same day. Ms. Heredia also testified that she informed claimant that Doctors on Call have Spanish speaking staff. Claimant indicated that he would seek medical treatment at Doctors on Call. Ms. Heredia also testified that claimant continued to report to work and complete all of his assigned duties. Employer's records indicate that claimant continued to work up to and including June 22, 2017. On that date claimant worked a 13 hour day.

9. On June 16, 2017, claimant first treated at Doctors on Call and was seen by Dr. Guy Kovacevich. At that time, claimant reported that his left foot was caught in a power lift gate "over a week ago". Dr. Kovacevich noted that claimant reported hyperextending his foot. Dr. Kovacevich diagnosed strains of unspecified muscles and tendons in the left lower leg and prescribed naproxen and Norco. At that time, claimant was placed on work restrictions of lifting, carrying, pushing and pulling of no more than 10 pounds.

10. The medical records indicate that claimant has reported ever increasing pain symptoms over time. These pain reports have expanded from leg and foot pain to include issues with his back, neck, arms, and shoulders.

11. On November 17, 2017, respondents sent claimant to Dr. Albert Hattem for an independent medical examination (IME). Dr. Hattem reviewed claimant's medical records, obtained a history from claimant, and performed a physical examination. In his IME report, Dr. Hattem opined that claimant suffered a minor sprain of his left foot that had resolved and claimant had reached maximum medical improvement (MMI). Dr. Hattem also opined that claimant's complaints of total body pain is not related to the May 31, 2017 left foot incident.

12. Dr. Hattem's testimony by deposition was consistent with his IME report. In his testimony, Dr. Hattem noted that Dr. Kovacevich did not order an x-ray of claimant's left foot. Dr. Hattem testified that this indicates to him that Dr. Kovacevich did not believe that claimant suffered any trauma to his left foot.

13. The ALJ credits Mr. Garcia-Gonzales' testimony regarding the incident involving claimant's foot and the hydraulic lift. The ALJ does not find claimant's testimony regarding that incident to be credible or persuasive. The ALJ also finds that the May 31, 2017 incident did not result in an injury to claimant's left foot. Nor did that incident cause the ongoing full body pain now alleged by claimant.

14. The ALJ credits the medical records and the opinion of Dr. Hattem and finds that on May 31, 2017 claimant suffered a minor left foot sprain that resolved and did not require medical treatment. The ALJ finds that claimant has failed to demonstrate that it is more likely than not that he suffered an injury arising out of and in the course and scope of his employment with employer.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d

385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

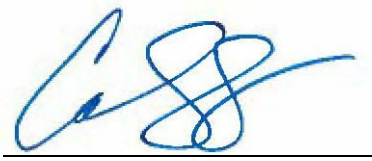
4. As found, claimant has failed to demonstrate by a preponderance of the evidence that he suffered an injury arising out of and in the course and scope of his employment with employer. As found, Dr. Hattem's opinion, the medical records, and the testimony of Mr. Garcia-Gonzales are found to be credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

Dated: March 6, 2018



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

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

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ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that injuries he sustained on August 23, 2017 are compensable under the quasi course and scope doctrine.

- If claimant proves that his August 23, 2017 injuries are compensable, whether respondents have demonstrated by a preponderance of the evidence that claimant engaged in a substantial deviation that severed the relationship necessary for the application of the quasi course and scope doctrine.

- The parties have stipulated that if claimant's August 23, 2017 injuries are found compensable, the medical treatment claimant received at Vail Valley Medical Center is reasonable, necessary, and related to claimant's work injury. On December 22, 2017, Prehearing Administrative Law Judge Michael Harr entered an order approving the stipulation of the parties.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his back on February 10, 2011. Claimant has undergone a number of surgeries related to the February 10, 2011 injury. Claimant's most recent surgery was performed by Dr. John Adair Prall on April 12, 2017 and included partial laminectomy and medial facetectomy and foraminotomy at the T10-T11 and T11-T12 levels. The surgery was performed in Lakewood, Colorado.

2. Claimant resides in Grand Junction, Colorado. During this claim claimant has traveled to the Denver, Colorado area for medical treatment. Claimant traveled to Denver for his April 2017 surgery and related follow up appointments. These medical treatments and related travel were authorized and paid for by respondents.

3. Claimant was scheduled to undergo treatment at Craig Hospital on August 22, 2017. Craig Hospital is located in Englewood, Colorado. The medical treatment was to include a urodynamic study and a magnetic resonance image (MRI) of claimant's brain. It is undisputed that the treatment claimant received at Craig Hospital on August 22, 2017 was related to this claim and claimant's February 10, 2011 work injury.

4. Initially, claimant requested two nights of hotel accommodations from respondents for the August 22, 2017 related travel. However, it was discussed that the treatment would be completed early enough on August 22, 2017 to allow claimant time to travel home on that same date.

5. Claimant testified that because of his work injury he no longer drives. As a result, claimant's spouse typically drives him to and from medical appointments,

including those occurring outside of Grand Junction. Claimant also testified that his spouse does not drive at night because of issues with her vision.

6. When traveling claimant must stop periodically to stretch and walk to alleviate pain he has in his back and legs. Claimant testified that on a typical trip from Grand Junction to Denver he will need to stop four to five times. Claimant and his spouse will make this trip by traveling on 1-70.

7. Once the arrangements were made for the August 22, 2017 medical appointments, claimant and his spouse communicated with their daughter who resides in Fort Collins, Colorado. Claimant's daughter requested that when claimant and his spouse traveled to the Denver area for claimant's medical appointments that they bring items of furniture they had been storing for her in Grand Junction. Claimant and his spouse agreed.

8. Claimant and his spouse own a Lincoln Navigator and a 16 foot trailer. Prior to traveling in late August 2017, the trailer was attached to the Navigator for purposes of transporting the furniture items for claimant's daughter. Claimant testified that he did not participate in the attaching or loading of the trailer.

9. Claimant testified that due to the decision to deliver the furniture to their daughter in Fort Collins, he and his spouse traveled "a day or two early". The ALJ estimates that this would have been either August 19, 2017 or August 20, 2017. During that time claimant and his spouse stayed at their daughter's residence in Fort Collins, and steps were taken to disconnect the trailer from the Navigator.

10. On August 21, 2017, claimant and his spouse traveled from Fort Collins to Craig Hospital in Englewood where overnight accommodations had been arranged. They did not tow the trailer at that time.

11. On August 22, 2017, claimant underwent the scheduled urodynamic study and brain MRI at Craig Hospital. At the conclusion these treatments, claimant and his spouse drove from Englewood back to Fort Collins. Claimant testified that because the MRI was not completed until approximately 4:00 p.m. they decided not to travel home on that date. Instead they stayed an additional night at their daughter's residence on August 22, 2017.

12. On the morning of August 23, 2017, the now empty trailer was reattached to the Navigator. Claimant testified that he and his spouse left Fort Collins at approximately 9:30 a.m. They traveled down I-25 to 1-76 and then to I-70. Claimant testified that after leaving Fort Collins, they first stopped in Frisco/Dillon, Colorado to allow claimant a chance to walk and stretch. They also had a meal while in Frisco.

13. After the stop in Frisco/Dillon they returned to westbound I-70 to travel home to Grand Junction and were involved in a motor vehicle accident (MVA). Claimant testified that just prior to the MVA he and his spouse were traveling on the west side of Vail Pass, which was under construction. As a result, there was an area where the two westbound lanes were reduced to one lane. Another driver made space

to allow claimant and his spouse to merge left into the single lane. Claimant testified that approximately two or three minutes after moving to the single lane of traffic they were struck from behind by the same driver that had allowed them to merge. Claimant also testified that he and his spouse did not stop or slow down once they were in the single lane. Rather, they were moving slowly with the flow of traffic when they were struck.

14. Claimant's spouse also testified at hearing. Her testimony was consistent with claimant's testimony.

15. Claimant testified that following the MVA he instantly felt pain in his back. Claimant also testified that his head and whole body felt like they were "on fire". In his testimony, claimant described this burning pain as the same sensation he experienced at the time of the February 10, 2011 admitted work injury. After the MVA, claimant was transported to Vail Valley Medical Center by ambulance. Due to the nature of claimant's complaints, he was admitted to the hospital overnight.

16. The driver that struck claimant's vehicle was Mr. Phillips. Mr. Phillips testified that he resides in Vail, Colorado and travels over Vail Pass approximately twice a week. On August 23, 2017, Mr. Phillips was traveling on westbound I-70. Mr. Phillips testified that traffic was merging from two lanes to one because of construction and a number of vehicles were attempting to merge. Mr. Phillips noticed a vehicle pulling a trailer and tried to make room to allow that vehicle to merge. It is undisputed that this was claimant's vehicle. Mr. Phillips testified that after merging into the single lane claimant's vehicle slowed abruptly and he tried to brake to keep from striking them. However, Mr. Phillips' vehicle made contact with claimant's trailer and the trailer in turn struck claimant's vehicle.

17. Trooper Juenke testified at hearing and stated that he was the officer who responded to the MVA involving claimant. Based upon his investigation of the accident, Trooper Juenke opined that both vehicles were moving at the time of impact. In his written report, Trooper Juenke identified damage to claimant's trailer and vehicle as "moderate".

18. Respondents argue that claimant's travel to Fort Collins prior to traveling to Englewood for his medical appointments constitutes a substantial deviation that severed the quasi course of employment relationship. Respondents also argue that claimant's travel to and from Denver with a trailer attached to his vehicle constitutes a substantial deviation that severed the quasi course of employment relationship.

19. The ALJ credits claimant's testimony and finds that the primary purpose of claimant's trip to the Denver area in late August 2017 was for authorized medical treatment. However, the ALJ also finds that claimant engaged in two deviations while traveling to and from his medical appointments at Craig Hospital. The ALJ further concludes that in each instance the deviation ended prior to the August 23, 2017 MVA.

20. Claimant's first deviation occurred when he and his spouse left I-70 to travel north to Fort Collins rather than south to Englewood. That deviation ended once claimant and his spouse were traveling to Englewood on August 21, 2017 to stay at the hotel paid for by respondents and attend the medical appointments on August 22, 2017.

21. Claimant engaged in a second deviation on August 22, 2017 when he and his spouse traveled north of I-70 to return to their daughter's residence to stay an additional night and retrieve their trailer. Again, the ALJ finds that the deviation ended on August 23, 2017 once claimant and his spouse returned to I-70 and began their westbound travel home to Grand Junction. It was not until after the conclusion of this second deviation that the MVA occurred on Vail Pass. Therefore, the ALJ finds that claimant has shown that it is more likely than not that at the time of the MVA on August 23, 2017 he was in the quasi course and scope of employment.

22. The ALJ is not persuaded by respondents' assertion that the use of the trailer itself created a substantial deviation that continued throughout claimant's trip. On the contrary, the ALJ concludes that the use of the trailer was not the primary purpose of claimant's trip. The decision to transport the furniture was made after the medical appointments were made. Additionally, the ALJ concludes that the existence of an empty trailer did not cause the MVA.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

3. Under the quasi course of employment doctrine injuries sustained while undergoing or traveling to and from authorized medical treatment are compensable, even though they occur outside the ordinary time and place limitations of normal employment. *See Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1998); *Schreiber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo. App. 1993).

4. The principles regarding traditional deviation situations where the employee is on a personal errand during a business trip, can be used to resolve the factual question of whether there is a deviation from the route of travel in the application of quasi course and scope of employment for authorized medical treatment. *Kelly v. ICAO*, 214 P.3d 516 (Colo. App. 2009). The primary consideration is whether the deviation is substantial. *Id. See also Pacesetter Corp v. Collett* 33 P.3d 1230 (Colo. App. 2010); *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995).

5. As found, claimant has demonstrated by a preponderance of the evidence that at the time of the August 23, 2017 MVA he was in the quasi course and scope of employment. As found, claimant's testimony is credible and persuasive.

6. As found, respondents have failed to demonstrate by a preponderance of the evidence that at the time of the MVA claimant was engaged in a substantial deviation that severed the employment relationship required by the quasi course and scope doctrine. As found, the deviations engaged in by claimant had ended prior to the August 23, 2017 MVA. As found, claimant's testimony is credible and persuasive.

ORDER

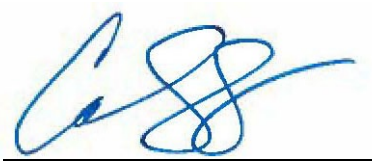
It is therefore ordered that:

1. The injuries claimant sustained from a motor vehicle accident (MVA) on August 23, 2017 are compensable under the quasi course and scope doctrine.

2. Pursuant to the stipulation of the parties, respondents shall pay for the medical treatment claimant received at Vail Valley Medical Center as a result of the August 23, 2017 MVA, pursuant to the Colorado Medical Fee Schedule.

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

Dated: March 6, 2018



Cassandra M. Sidanycz
Administrative Law Judge
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Grand Junction, Colorado 81501

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. Nos. 3-958-743-05

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PARTIAL SUMMARY JUDGMENT

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

A hearing on the merits in the above-referenced matter is scheduled for March 14, 2018, in Denver, Colorado. On February 6, 2018, Respondents filed a "Motion for Partial Summary Judgment Concerning Entitlement to Offset under C.R.S. 8-42-113.5." On February 20, 2018, Claimant filed a "Response to Respondents' Motion for Summary Judgment." The matter was referred to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) for a ruling on February 23, 2018.

ISSUE FOR SUMMARY JUDGMENT

The sole issue for partial summary judgment concerns whether there is a disputed issue of material fact regarding whether the Respondents (over a period of fifteen years) have waived their right to claim a Federal Social Security (SSA) Retirement benefit offset in the amount of **$40,937.00**, against the elderly Claimant's permanent total disability (PTD) benefits of **$153.28** per week, which is the Claimant's only means of subsistence. Claimant is 80 years old and was employed by the Employer in 1989, at the time of her admitted, work-related injury.

Although appellate courts erroneously interpreted § 8-42-103 (1) (c) (I), C.R.S., by applying the offset provisions to Social Security **Retirement** benefits in an officially published opinion (*See Zerba v. Dillon Companies,* 292 P.3d 1051, **2012 COA 78**), the ALJ is bound by the doctrine of *stare decisis.* Therefore, applicability of the offset provisions to Social Security Retirement benefits cannot be an issue herein.

In the first instance, the Respondents bear the burden of proof, by a preponderance of the evidence, to establish that there is no genuine issue of dispute material fact regarding the applicability of the offset provisions. If there is no genuine disputed issue of material fact concerning the applicability of the offset provisions to retirement benefits, The Respondents bear the burden of establishing that there **is no genuine disputed issue of material fact** concerning **waiver** of the right to claim an offset. As pertains to a waiver of offset of SSA Retirement benefits, this is a case of first impression.

FINDINGS OF UNDISPUTED FACT

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

1. Claimant sustained an admitted industrial injury on September 20, 1989, while employed by the Employer (Respondents' Exhibit A).

2. Subsequently, the Claimant first applied for federal social security disability (SSDA) benefits in 1991 but the Social Security Administration (SSA) denied her claim (Respondents' Exhibit C).

3. The Claimant reached maximum medical improvement (MMI) on October 20, 1992 for the 1989 industrial injury. Respondents filed a Final Admission of Liability (FAL) on July 21, 1994, admitting for permanent total disability (PTD) [Respondents' Exhibit A). She began to receive PTD benefits at the weekly rate of $153.28 (Respondents Motion for Summary Judgment, ¶ 22).

4. The Claimant began receiving **SS Retirement** benefits in August of 2002 (Respondents' Exhibit D).

5. In October of 2017, the Claimant filed an Application for Hearing. The issues designated were whether Respondents are entitled to an offset due to Claimant receiving social security retirement benefits; medical benefits; authorized providers; and, reasonably necessary medical treatment (Claimant's Exhibit 1).

6. During discovery, Respondents claim that they first found out that the Claimant had been receiving SS Retirement benefits since 2002 (Respondents' Exhibit D). In September of 2017, Respondents filed an FAL asserting an offset of $40, 937.00 against the Claimant's weekly PTD benefits of $153.28 (Claimant's Exhibit 2). Based

on the SS Retirement Award of $364.00 per month (Respondents' Exhibit F), the Claimant receives $84 per week in SS Retirement benefits. Coupled with her PTD benefit of $153.28 per week, the Claimant's gross income from all sources is $237.28 per week, or $1,028.21 per month, which is below the poverty line.

7. The Claimant is now eighty (80) years old and lives alone. She has dealt with numerous medical issues since her industrial injury including: chronic back pain; a torn left calf (Claimant's Exhibit 3); congestive heart failure (Claimant's Exhibit 4); spinal stenosis (Claimant's Exhibit 5); respiratory failure (Claimant's Exhibit 6); numerous episodes of confusion and altered mental status (Claimant's Exhibit 7, 8 and 9); a volvulus reduction, laminectomy, rotator cuff repair, and an appendectomy (Claimant's Exhibit 10).

8. Claimant currently understands that she receives social security **retirement** benefits but does not recall ever applying for them (Claimant's Exhibit 11). The ALJ infers and finds that there is a disputed issue of material fact concerning whether the Claimant or her counsel understood, or were confused, because of the difference between SSDI and straight SS Retirement benefits, in light of the wording of the offset provisions contained in § 8-42-103 (1) (c) (I), C.R.S.

9. At the time of the admitted injury, the Claimant was reportedly not eligible for social security benefits. Respondents received notice from the SSA, dated September 30, 1991, stating that Claimant was not entitled to SSDI benefits (Respondents' Exhibit B).

10. On July 21, 1994, Respondents sent a letter to both Claimant's counsel and the Claimant which referenced the September 30, 1991 letter from the SS denying benefits. The letter, which was sent in conjunction with the FAL, dated July 21, 1994, requested that Claimant or counsel "submit any social security information you may already have or receive in the future" (Respondents' Exhibit C). Apparently, this is the Respondents' last request for social security information, until 2017. Again, the ALJ infers and finds that there is a disputed issue of material fact concerning whether the Claimant or her counsel understood, or were confused, because of the difference between SSDI and straight SS Retirement benefits, in light of the wording of the offset provisions contained in § 8-42-103 (1) (c) (I), C.R.S.

11. On August 1, 2002, the Claimant began receiving SS Retirement benefits. Neither the Claimant nor her counse**l explicitly notified the Respondents of the Claimant's receipt of SS Retirement** benefits. Again, the ALJ infers and finds that there is a disputed issue of material fact concerning whether the Claimant or her counsel understood, or were confused, because of the difference between SSDI and straight SS Retirement benefits, in light of the wording of the offset provisions contained in § 8-42-103 (1) (c) (I), C.R.S.

12. Respondents claimed that they first learned (officially) that the Claimant was receiving SS Retirement benefits when they inquired with the SSA, as part of new

litigation of this workers' compensation claim. The inquiry was made because of a Social Security release executed by the Claimant on March 14, 2017 (Respondents' Exhibit D] A letter requesting Social Security records was submitted by Respondents on March 17, 2017 (Respondents' Exhibit E). The ALJ infers and finds that there is a disputed issue of genuine material fact concerning the Respondents' inaction in requesting releases from the Claimant from 1994 through 2017, a period of approximately 23 years. As a corollary, there is a genuine issue of disputed material fact concerning whether or not the Respondents **waived** their right to claim an offset against the Claimant's $153.28 weekly PTD benefits by 23 years of inaction on their part and suddenly (in 2017) claiming a $40, 937.00 offset against the Claimant's $153.28 weekly benefits. Indeed, **the doctrine of waiver is invested with the qualities of equitable considerations,** *e.g.,* "equity does not aid those who sleep on their rights." Pursuant to the Claimant's release of 2017, Respondents received written verification from the SSA that Claimant was receiving SS Retirement benefits of $364.00 per month, which equates to $84.00 per week (Respondents' Exhibit F).

13. On September 13, 2017, Respondents filed a new FAL, asserting an offset for an alleged overpayment of $40,937.00 against the Claimant's $153.28 weekly PTD benefit. Without the benefit of a hearing, Respondents suspended payment of the Claimant's PTD benefits to recover the overpayment, thus, temporarily granting their own motion for partial summary judgment.

14. On October 5, 2017, the Claimant filed an Application for Hearing to address the offset as well as PTD, medical benefits, authorized providers, and reasonably necessary treatment. A second hearing application was filed on November 17, 2017, endorsing the same issues.

15. Hearing is presently scheduled for March 14, 2018.

16. The Claimant's interrogatory responses, dated December 12, 2017, state, with respect to the asserted offset and claimed overpayment that "Respondents had sufficient notice that I was receiving Social Security benefits." She states that this notice was because she was "far beyond the age where it becomes mandatory" (Respondents' Exhibit G).

Ultimate Findings

17. There are genuine issues of disputed material fact surrounding the alleged and disputed **waiver** by the Respondents of the right to claim an offset of 40, 937.00 against the Claimant's PTD benefit of $153.28 per week. There may also be a collateral issue concerning the Respondents' unilateral suspension of the Claimant's $153.28 PTD benefits before a hearing.

18. There are genuine issues of disputed material fact concerning whether Respondents knew **or should have known** of the Claimant's eligibility for social security retirement benefits and Respondents' due diligence obligation to enquire and

prevent a "snow-balling effect of the alleged overpayment. After the Claimant turned 65 years of age, the Respondents continued paying the Claimant PTD benefits for 15 years, without enquiring or claiming an SS offset. As such, there are genuine issues of disputed material fact concerning the Respondents' inaction for almost 15 years and what the Respondents should have known. There are also genuine issues of disputed material fact surrounding equitable and fairness considerations as they relate to an alleged waiver of the right to pursue a snow-balled $40, 937.00 overpayment claim.

CONCLUSIONS OF LAW

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

Summary Judgment

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

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

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there are genuine issues of disputed, material facts for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Respondents' Motion for Summary Judgment, and the Claimant's Response thereto, fail to show specific facts

probative of the Respondents' right to summary judgment. Indeed, as inferred and found, there are genuine issues of disputed material fact surrounding **waiver** of the Respondents' right to claim an offset against SS Retirement benefits.

Waiver

d. The doctrine of waiver is based upon the principles of equity and fairness. The doctrine prevents "a rigid and inflexible application of the law [that] would otherwise result in an injustice." *Johnson v. Indus. Com. of State*, 761, P. 2d 1140, 1447 (Colo. 1988). A waiver occurs if a party manifests intent to relinquish a right. A party can waive a right through explicit or implicit conduct. An implicit waiver occurs when a party acts inconsistently with the assertion of the right. The ALJ, at an evidentiary hearing on the merits must consider whether Respondents knew **or should have known** of the Claimant's eligibility for social security benefits.

e. The *Johnson* court disagrees with Respondents' assertion, in their Motion for Partial Summary Judgment, that the Claimant has the sole responsibility to give notice of social security benefits. Apparently, the *Johnson* court wanted to prevent situations where vulnerable individuals, such as Claimant, were subject to a substantial offset (*e.g.,* $40,937.00) after a significant amount of time has passed, thus bringing detrimental harm to a claimant, which would warrant equity and fairness considerations coming into play. A determination involving such considerations would necessitate an evidentiary hearing on the merits to resolve genuine issues of disputed material fact.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). In the present case, it is the Respondents' burden to prove that there are no genuine issues of disputed material fact and that they are, thus, entitled to a partial summary judgment. Their burden is by a "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not (in this case that there is no genuine issue of disputed material fact). *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, there are genuine issues of disputed fact which can only be resolved at an evidentiary hearing, thus, Respondents have failed to prove that there are none.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents' Motion for Partial Summary Judgment is hereby denied and dismissed.

B. The hearing of March 14, 2018, shall proceed as scheduled.

C. Any and all issues, including "waiver of the offset" are reserved for decision after the hearing on the merits.

DATED this_____day of March 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that her permanent partial disability (PPD) impairment rating and functional impairment as a result of her work injury is on the schedule of injuries set forth by § 8-42-107(2), C.R.S.

FINDINGS OF FACT

1. Claimant was employed by Employer as a courtesy clerk with duties including bagging groceries and loading bags of heating pellets.

2. Respondents filed an admission of liability, admitting that on December 15, 2013 Claimant sustained a compensable injury involving her bilateral shoulders.

3. Following her injury in December of 2013, Claimant underwent treatment.

4. On July 20, 2015, Claimant underwent a Division Independent Medical Examination (DIME) performed by Bennett Machanic, M.D. Claimant reported working as a courtesy clerk with several days of repetitive cart pushing and lifting 40 pound bags of heating pellets and that by December 15, 2013 she had such severe pain in both shoulders that she was incapable of doing much work and within a couple of weeks she was totally unable to do her job. Dr. Machanic found on examination a straightened neck with exquisite tenderness over the scalene areas, right greater than left and reduced range of motion far worse on the right. He also found reduced range of motion in the bilateral shoulders, right greater than left. He found tenderness over the bicipital tendon area, decreased sensation over the hands bilaterally especially on the ulnar side, and distinct weakness in the hands. He opined that the Claimant's underlying problem may indeed be present over the brachial plexus and that she could have suffered a brachial plexus stretch injury or even thoracic outlet syndrome. Dr. Machanic opined that Claimant was not at maximum medical improvement (MMI), and recommended an EMG study of the brachial plexus; checking ulnar nerve dysfunction from the neck down the arm to the fingertips; MRI imaging; evaluation by a thoracic outlet syndrome therapist; and interventions based on the studies performed. He opined that since Claimant was not at MMI she did not qualify for a PPD impairment rating. *See* Exhibit C.

5. Based on the DIME report from Dr. Machanic, Claimant underwent additional treatment.

6. Claimant was evaluated by Alexander Feldman on June 30, 2016 and November 16, 2016. Dr. Feldman noted that Claimant had sustained a work related injury due to repetitive lifting of 40 pound heating pellet bags in 2013 and that Claimant had developed neck pain, shoulder pain, arm pain down the elbows. Dr. Feldman noted that

Claimant had been referred for thoracic outlet syndrome work up. He ordered a thoracic outlet protocol EMG study of both upper extremities and referred Claimant for thoracic outlet syndrome physical therapy stretching and Feldenkrise exercise. He noted that if it didn't help he would consider diagnostic scalene and pectoralis minor injections. *See* Exhibit F.

7. On October 12, 2016 Claimant underwent an Independent Medical Examination performed by Wallace Larson, M.D. Dr. Larson opined that Claimant did not sustain an injury at King Soopers with no specific history of trauma, no objective findings of trauma, and opined that the medical evidence showed pre-existing degenerative joint disease of the shoulders. Dr. Larsen opined that the condition was not caused or aggravated by occupational exposure. He opined that Claimant's examination was very inconsistent during his both his examination and other examinations and that her symptoms and responses could not be explained by any known physical disorder. He opined that Claimant did not have thoracic outlet syndrome. *See* Exhibit G.

8. On January 11, 2017 Claimant was again evaluated by Dr. Feldman. Dr. Feldman noted that Claimant's physical therapy had significantly helped with range of motion and shoulder and neck pain. Claimant reported stiff neck, neck muscle spasm, joint pain in shoulders with radiation to the elbows, weakness and mild weakness in the hands, and that she could not move her shoulders and hands fast enough. Claimant also reported tingling and numbness in her hands at night or when working on the computer. On examination, Dr. Feldman found stiffness and tenderness in the neck at cervical vertebrae 2, 3, 4, 5, and 6 as well as at the stemocleidomastoid region and the trapezius region on both sides. Dr. Feldman found tenderness in the sub occipital muscles of the cervical spine on both sides, increased cervical lordosis, and restricted range of motion in the cervical spine with flexion, extension, left side bending, right side bending, left rotation, and right rotation. He diagnosed brachial plexus disorder, traumatic arthropathy in the left and right shoulder, and cervicalgia. Dr. Feldman noted that Claimant had obviously benefited from physical therapy and recommended it be continued. Dr. Feldman noted significant pain over the right scalene complex and opined that if the therapy did not help, he would consider diagnostic blocks in the scalene muscles. *See* Exhibit F.

9. On May 23, 2017 Claimant was evaluated by Christina Pinsinski, M.D. Claimant reported that she was working in mail sorting and that she avoided the three actions out of her range that triggered her shoulder pain. Claimant reported doing yoga and tai chi and doing well. Claimant reported that once a week rehab helped significantly to release her deep upper back and shoulder muscles. On examination, Claimant's was found to have full range of motion of her shoulders and was able to rotate, extend, and flex completely. Claimant reported no pain with shoulder motions including with overhead movement. Dr. Pinsinski found full range of motion of shoulders, neck, and upper back without difficulty or pain. Claimant reported she only got symptoms when she overused three directions of movement including reaching anterior, reaching laterally, and lifting upward. Dr. Pinsinski assessed primary osteoarthritis of the right shoulder, primary

osteoarthritis of the left shoulder, and thoracic outlet syndrome. Dr. Pinsinski recommended continued therapy and home exercise and stretching. *See* Exhibit D.

10. On June 14, 2017 Claimant underwent physical therapy. She reported constantly feeling better and moderately confident in performing her activities of daily living with her upper extremities. Claimant reported increased symptoms in her left shoulder with constant overhead lifting and repetition but improved with exercise and physical therapy. *See* Exhibit 1.

11. On July 10, 2017 Claimant returned to Dr. Machanic for an updated DIME. Dr. Machanic noted that after his prior examination, Claimant had undergone additional treatment. He noted that Dr. Feldman believed Claimant to have chronic brachial plexus disorder. Dr. Machanic noted that Dr. Gottlob diagnosed primary osteoarthritis of both shoulders and bilateral shoulder glenohumeral degenerative joint disease. Dr. Machanic reviewed MRIs of both shoulders that were completed in March of 2016 as well as an EMG nerve conduction study done by Dr. Feldman in May of 2016. He noted that Dr. Feldman believed Claimant had evidence of thoracic outlet syndrome bilaterally as well as problems with the right median nerve and the left median nerve. Dr. Machanic noted diagnoses in July of 2016 by Dr. Dua of muscle contracture over the shoulders, sprain of the ligaments over the neck, sprain over the ligaments of the thoracic spine, brachial plexus disorders, and pain in both shoulders. Dr. Machanic finally noted that Claimant had been seen on May 23, 2017 by Dr. Pinsinski and placed at MMI with primary osteoarthritis, both right and left shoulders and thoracic outlet syndrome noted as problems. Dr. Machanic found on clinical examination that Claimant had stiffness of neck movement and upper back movement. Dr. Machanic noted that for the purpose of impairment rating which involved the shoulders only, Claimant's arms were examined with an inclinometer for range of motion over both right and left shoulders. *See* Exhibit C.

12. Dr. Machanic opined that Claimant had reached MMI on May 23, 2017. Dr. Machanic opined that Claimant had a work related cumulative trauma disorder as of December 15, 2013. He opined that Claimant had loss of range of motion over both shoulders with an 11% right upper extremity rating and a 5% left upper extremity rating. He also found that Claimant had sensory loss and findings in the ulnar nerves bilaterally with 5% upper extremity sensory motor loss on the right and 5% sensory motor loss on the left. Combing the ulnar nerve findings with loss of range of motion, he opined that Claimant had a 15% right upper extremity impairment and a 10% left upper extremity impairment, for a combined upper extremity impairment rating of 24%. He noted that the rating can be converted to a 9% whole person rating on the right, 6% whole person rating on the left, and to a total 15% whole person combined impairment rating. Dr. Machanic recommended closing Claimant's case, declaring MMI on May 23, 2017 and stating that Claimant had a permanent partial impairment of 24% upper extremity equating to 15% whole person. *See* Exhibit C

13. On August 9, 2017 Respondents filed a final admission of liability (FAL) admitting to a permanent partial disability (PPD) rating of 15% whole person, amounting

to a PPD payment of $11,400.60. Respondents indicated in the FAL that the basis for the permanent disability award was DIME physician Dr. Machanic's report. *See* Exhibit B.

14. On September 6, 2017 Claimant underwent physical therapy. Claimant reported feeling better with her upper back, neck, and shoulders with occasional pain and weakness in her shoulders. *See* Exhibit 1.

15. Claimant testified at hearing that due to her bilateral shoulder injuries her hands are not as efficient and that she moves slower now. Claimant testified that if she does not do physical therapy, her hands will get numb during work, especially her right hand. Claimant testified that her limitations from her injury essentially involve three actions that she avoids doing. She testified that these include repeated front reaching, repeated reaching to the side, and overhead reaching and that she tries to avoid lifting from the top of her thigh to the bottom of her ribs. Claimant testified that if she does these moves she had feelings of right shoulder spasm, bicep wanting to jump out of the groove, and irritation and pain. Claimant also testified that reaching overhead is not as acute of a problem, but that she avoids it.

16. Claimant's testimony is found credible. Claimant continues to experience spasm in her right shoulder, feelings of numbness in her hands, and feelings of bicep irritation like the bicep is jumping out of its groove. The pain, irritation, and limitations do not extend beyond the arm at the shoulder. The functional limitations resulting from Claimant's injury are limited to her shoulder, bicep, and hands and the functional limitations do not extend beyond the shoulder joint.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the

testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Scheduled Injury vs. Whole Person Impairment

Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The question of whether the Claimant sustained a scheduled impairment rating under § 8-42-107(2), C.R.S., or a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Claimant bears the burden of establishing functional impairment and the consequent right to permanent partial disability benefits under § 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4-662-369 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005).

In this case, Claimant's testimony, substantiated by the medical records, establish that Claimant is entitled to a scheduled impairment rating under § 8-42-107(2), C.R.S. because her functional impairment is listed on the schedule of impairment. Claimant has met her burden by a preponderance of the evidence to show that her functional impairment does not extend beyond the "arm at the shoulder." As found above, at the time Claimant was placed at MMI by Dr. Pinsinski, Claimant reported that she only had symptoms with overuse in three directions of motion which is consistent with Claimant's hearing testimony. The symptoms and permanent impairment are related to the shoulder, bicep, and hands and do not extend beyond the shoulder. Claimant reported consistently at physical therapy in June of 2017 that she had increased symptoms in her shoulder with constant overhead lifting and repetition. Dr. Machanic found limitations in shoulder range of motion and sensory loss in her ulnar nerves bilaterally. Although Dr. Machanic found

stiffness of neck and upper back movement, Claimant is credible that her only permanent functional limitations as a result of the injury are with movements in her arms and at or below her shoulders. Claimant has established by a preponderance of the evidence that her functional limitations as a result of her work related injury are not beyond the arm at the shoulder and that she is entitled to a rating on the schedule of impairment.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she has sustained a permanent partial disability impairment that is on the schedule of injuries listed at § 8-42-107(2), C.R.S. Claimant is therefore entitled to permanent partial disability benefits based upon a scheduled rating of 24% upper extremity.

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

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

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

DATED: March 7, 2018

/s/ Michelle E. Jones

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

ISSUES

I. Whether the ALJ has subject matter jurisdiction over this matter.

II. Whether Claimant established by a preponderance of the evidence that he suffered a compensable right upper extremity injury arising out of and in the course of his employment on December 24, 2015.

III. Whether Claimant established by a preponderance of the evidence he is entitled to reasonable, necessary and related medical benefits, including an elbow injection as recommended by Dr. Scott Primack.

FINDINGS OF FACT

Jurisdiction

1. A First Report of Injury was filed in this claim on February 22, 2016.

2. Respondents filed a Notice of Contest on March 8, 2016.

3. On December 15, 2016, Respondents filed a Motion to Close the Claim for Failure to Prosecute.

4. On December 20, 2016, Claimant filed a Response to Respondents' Motion to Close Claim for Failure to Prosecute. Claimant also filed an Application for Hearing.

5. On December 30, 2016, the Director issued an Extension of Time to Show Cause ("Show Cause Order"), which provided Claimant's claim would automatically close unless, within 100 days of the date of the order, (1) the parties set a hearing before an OAC ALJ on any outstanding issues and attend the hearing, (2) the parties file a stipulation agreeing the claim be kept open, or (3) Claimant files a written motion for an additional extension of time with the Division.

6. A hearing was set for May 16, 2017. On January 19, 2017, Respondents filed their Response to Application for Hearing.

7. On April 14, 2017, the Division issued a second Show Cause Order providing the claim would automatically close within 100 days of the order unless the parties attend the May 16, 2017, file a stipulation agreeing the claim be kept open, or Claimant files a written motion for an additional extension of time with the Division.

8. On May 3, 2017, Claimant filed an Unopposed Motion for Extension of Time to Commence Hearing and to vacate the May 16, 2017 hearing. The motion was granted on May 4, 2017.

9. On May 8, 2017, Claimant filed a Motion for Additional Time to Show Cause, requesting additional time "incase parties are unable to get a new hearing date within the timeframe set forth in the April 14, 2017, Order." In that motion, Claimant stated, "Parties have been attempting to set a new date. However, counsel for Respondents has no availability for dates falling within the sixty (60) days, or the one hundred (100) day headline provided by Director Tauriello."

10. Based on the availability of counsel, parties agreed to set the hearing for November 2, 2017 at 1:30pm. On July 10, 2017, confirmation for the November 2, 2017 hearing was filed.

11. On July 19, 2017, the Director issued a third Show Cause Order, providing that Claimant's claim would automatically close unless, within 100 days of the date of the order, (1) the parties set a hearing before an OAC ALJ on any outstanding issues and attend the hearing, (2) the parties file a stipulation agreeing the claim be kept open, or (3) Claimant files a written motion for an additional extension of time with the Division.

12. The ALJ notes the July 19, 2017 Show Cause Order was issued after hearing confirmation of the November 2, 2017 hearing. Additionally, unlike the April 14, 2017 Show Cause Order, which noted the pending May 16, 2017 hearing date, the July 19, 2017 Show Cause Order did not reference or acknowledge the pending November 2, 2017 hearing date.

13. The hearing was held before ALJ Cayce on November 2, 2017.

14. On November 21, 2017, the Director issued a fourth Show Cause Order which stated the claim "will be held open so that the Final Order can be issued for the hearing held on November 2, 2017, within thirty (30) days of the date of this order."

15. On December 21, 2017, the parties attended a pre-hearing conference on Claimant's Motion for an Extension of Time to Comply with the Director's Show Cause Order. PALJ Steninger granted Claimant's motion, and ordered that the Director's Show Cause Order be "held in abeyance until 30 calendar days following the entry of an Order by the Office of Administrative Courts emanating from the hearing on 11/2/17."

16. The ALJ finds she has subject matter jurisdiction over this matter, per the Director's November 21, 2017 Show Cause Order and PALJ Steninger's December 21, 2017 Order.

<u>December 24, 2015 Alleged Injury</u>

17. Claimant is a 56-year-old man who works for Employer as a Business Manager.

18. Claimant alleges he suffered an injury to his right extremity on December 24, 2015. Claimant testified he was having a retirement party for two co-workers during a daily pre-work communication meeting in the customer area. He stated that supervisor Monica Vail appeared angry and approached him and told him it was not a good idea to have the meeting in that location. Claimant testified that, following the meeting, Ms. Vail grabbed his right arm with her right hand and yanked and pulled his elbow in an attempt to remove Claimant from the area and go see his immediate supervisor. He testified he told Ms. Vail "You need to turn me loose" and Ms. Vail released his arm. Claimant stated he felt immediate pressure from the pull, then pain over the following days and weeks. Claimant stated he did not have any bruising. Claimant reported the interaction to the Division Manager and Human Resources Manager that day, threatening to file assault charges against Ms. Vail. He did not report a work injury at the time. Claimant acknowledged he is aware of how to report work injuries. Claimant continued to work that day and has worked throughout the entirety of his claim.

19. Claimant testified he had no prior injuries to or issues with his right extremity. He stated he has experienced pain in his right arm and elbow since the date of the incident, as well as some pain in his hand and fingers.

20. Ms. Vail, Director of Sales, testified at hearing regarding the December 24, 2015 incident. She stated that she was frustrated Claimant chose to hold the meeting in a busy customer area and informed Claimant it was not a good idea to have the meeting in the customer area at that time. She testified she approached Claimant from his right side and put her left hand on Claimant's right upper arm because Claimant raised his voice. She stated Claimant told her to "never touch him again." She testified that she did not grab or pull Claimant. Ms. Vail testified that she is approximately five feet, six inches or five feet, seven inches tall.

21. Claimant is approximately six feet tall and weighs approximately 259 pounds.

22. Claimant testified he did not require medical treatment during the six weeks after the work incident. He later testified he waited to have the alleged injury addressed because he thought his symptoms would improve. He stated he did not do anything in the six weeks following the work incident that would have caused the injury.

23. On January 27, 2016, Claimant sought medical care with his personal physician, Seth A. Gursky, M.D., for a separate, non-related issue. During the visit, Claimant complained of right arm pain, reporting to Dr. Gursky that his supervisor grabbed his right arm. Claimant complained of soreness and tenderness, radiating arm pain, and decreased strength in his fingers. On physical examination, Dr. Gursky noted point tenderness in the right lateral antecubital fossa, pain with supination, pain and decreased strength in right hand, and no neurological deficits, boney tenderness, ecchymosis or deformity. Dr. Gursky assessed Claimant with obstructive sleep apnea, right elbow pain and right arm weakness. He recommended Claimant undergo an MRI of the right elbow.

24. Claimant attributed his condition to the December 24, 2015 work incident and subsequently reported the injury to Employer as a work-related injury on February 22, 2016. The First Report of Injury indicates the injury occurred when Ms. Vail grabbed Claimant's right arm at the bend of the elbow.

25. Claimant subsequently presented to Kirk Nelson, D.O. at U.S. HealthWorks Medical Group on March 1, 2016. Claimant reported that Ms. Vail grabbed his right arm at the elbow with her right hand in an attempt to escort him to another area. Claimant denied having constant pain, but reported having some pain at the elbow when rotating his forearm, and with flexion of his biceps. Physical examination revealed full active range of motion with resisted flexion producing pain in the radial collateral ligaments, mild crepitus at the head of the radius, normal grip strength, and decreased bicipital strength with subtle giveway weakness. Dr. Nelson remarked that Claimant was "insistent that the interaction between him and his co-worker be listed as an assault." Dr. Nelson diagnosed Claimant with a right elbow strain with possible small distal bicipital tendon tear and/or radial collateral ligament tear and assault. He recommended Claimant ice the area, take ibuprofen, and undergo an MRI. Dr. Nelson noted Claimant's history and physical exam were consistent with a work-related injury.

26. Claimant underwent an MRI of the right elbow on March 16, 2016. The MRI revealed a subacute mild strain to the distal biceps insertion on the radial tuberosity, with no tear or retraction. The ligaments were intact. There was no evidence of active epicondylitis. Modest subcutaneous edema adjacent to the medial supracondylar right without medial epicondylitis or ulnar neuritis was noted.

27. On March 18, 2016, Claimant presented to John Sanidas, M.D. Dr. Sanidas noted the following mechanism of injury: "pulling incident when [Claimant] wrenched the distal biceps tendon." He noted the MRI did not show a tear, but did reveal irritation/sprain. On physical examination, Dr. Sanidas noted tenderness to palpation on the distal tendon on the radius. He assessed Claimant with a right biceps distal tendon sprain and referred Claimant to an upper extremity specialist.

28. Dr. Sanidas opined that Claimant's December 24, 2015 injury was work-related.

29. On April 11, 2016, Claimant presented to Eric N. Britton, M.D. with complaints of right elbow pain. Physical examination revealed full range of motion of the elbow, tenderness to palpation of the proximal mobile wad and distal biceps tendon, and pain with stressed elbow flexion. The supination stress test was negative. Dr. Britton noted the MRI showed evidence of distal biceps tendon strain and medial subcutaneous edema. He diagnosed Claimant with a right elbow sprain and distal biceps tendon and brachloradialis strain. Dr. Britton referred Claimant to physical therapy.

30. Claimant reported no significant improvement after undergoing several sessions of physical therapy.

31. Dr. Sanidas reevaluated Claimant on May 13, 2016. Dr. Sanidas noted Claimant had no other discomfort or problems in the right shoulder or forearm except for

a “very isolated area of palpation.” He referred Claimant to Scott J. Primack, D.O. for an ultrasound.

32. Dr. Primack conducted a comprehensive diagnostic ultrasound consultation on June 24, 2016. The ultrasound revealed a small, deep muscle tear at the level of the supinator muscle just lateral to the insertion point of the biceps tendon. Dr. Primack discussed treatment options with Claimant, including injections or an elbow sleeve.

33. On October 9, 2016, Kathleen D’Angelo, M.D. performed an Independent Medical Evaluation (“IME)” at the request of Respondents. Dr. D’Angelo performed a comprehensive medical records review and physically examined Claimant. Claimant reported sustaining an injury when Ms. Vail grabbed his right arm with her right hand and pulled him. He reported that Ms. Vail was standing off to his left and facing him when the incident occurred. Claimant alleged experiencing worsening pain since the incident. On physical examination of the right elbow, Dr. D’Angelo noted negative Tinel’s, full range of motion with no complaints of pain with supination or pronation, no tenderness to the epidoncdyles or olecranon, no erythema or effusion, and isolate antecubital tenderness over the lateral region. Regarding the right shoulder she noted minor pain with palpation over the posterior musculature diffusely at the upper trapezius, and normal range of motion. Examination of the right hand was normal with the exception of isolated tenderness over the ulnar-lateral aspects of the long finger and ring finger MCP joints.

34. Based on a lack of MRI findings, negative physical examination findings, the late onset of pain complaints, and the absence of response to any appropriate treatment, Dr. D’Angelo opined Claimant’s injury was not related to the December 24, 2015 work incident. She explained that the supinator muscle is a deep muscle in the anteriolateral compartment of the forearm, and opined that Claimant’s supinator muscle tear cannot be explained by the mechanism of injury described by Claimant. She noted Claimant did not actively seek medical attention for his symptoms, and only mentioned the right arm pain to his personal physician during a visit for an unrelated issues. Dr. D’Angelo further noted that there was no trauma to the superficial tissue in the area, bruising, swelling and pain, which would have been expected. She also determined Claimant’s other symptoms, including the radiating pain, finger pain, trapezius spams and increased headaches, were not related to the injury.

35. Dr. D’Angelo opined Claimant was at MMI with no need for further medical evaluation or treatment, restrictions or permanent impairment. She suggested any further treatment should proceed under Claimant’s private health insurance.

36. Dr. D’Angelo testified by deposition as an expert in internal medicine. Dr. D’Angelo is board certified in internal medicine and Level II accredited by the Division of Workers’ Compensation. Dr. D’Angelo testified that supinator tears generally require a significant amount of force, are generally associated with a distal biceps tear and other associated traumas. She stated that one would anticipate bruising, immediate bleeding into the muscle, swelling, pain, ecchymosis and difficulty immediately with supination and pronation, none of which Claimant indicated occurred at the time the injury, or was

noted in the first exam. She testified that even if Ms. Vail grabbed Claimant's elbow, such contact would not have resulted in Claimant's injury. Dr. D'Angelo continued to opine within a reasonable degree of medical probability that Claimant's supinator tear and other symptoms were not related to the December 24, 2015 work incident. Dr. D'Angelo acknowledged that Drs. Sanidas and Nelson found Claimant's injury work-related, but stated neither doctor performed a thorough causation analysis.

37. Claimant returned to Dr. Sanidas for a follow-up visit on October 28, 2016. Dr. Sanidas placed Claimant at MMI with an 8% upper extremity rating. Claimant indicated to Dr. Sanidas he wished to continue conservative management on his own. Dr. Sanidas released Claimant to full duty with six to eight months of maintenance care as needed.

38. Ms. Vail's testimony is found more credible and persuasive than Claimant's testimony.

39. The ALJ credits the opinion of Dr. D'Angelo over the conflicting opinions of Drs. Sanidas and Nelson and finds Claimant's supinator muscle tear and other symptoms are not related to the December 24, 2015 work incident.

40. Claimant failed to establish by a preponderance of the evidence he sustained a compensable injury arising out of and in the course of his employment for Employer on December 24, 2015.

41. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Jurisdiction

Respondents contend the ALJ lacks subject matter jurisdiction over this matter, arguing Claimant's claim administratively closed on October 27, 2017 pursuant to the Director's July 19, 2017 Show Cause Order. Respondents argue that a hearing did not take place within 100 days of the date of the July 19, 2017 Show Cause Order, nor did Claimant file another written motion for an additional extension of time.

WCRP 7-1 provides, in relevant part, that a claim may be closed by order, final admission, or pursuant to the subsection (C) of the rule regarding failure to prosecute. Subject matter jurisdiction "relates to the power or authority of the court to deal with a particular case." Sanchez v. Straight Creek Constructors, 41 Colo. App. 19, 580 P.2d 827 (1978). The ALJ has subject matter jurisdiction to resolve disputes arising under the Workers' Compensation Act. § 8-43-201, C.R.S.

The Director's July 19, 2017 Show Cause Order was issued after confirmation of the November 2, 2017 hearing and made no reference to the pending November 2, 2017 hearing. The Director subsequently issued a November 21, 2017 order specifically stating the claim would be held open for issuance of a final order from the November 2, 2017 hearing. PALJ Steninger's December 21, 2017 order further noted the Director's order would be held in abeyance following the entry of an order of the OAC emanating from the November 2, 2017 hearing. Accordingly, despite the Director's July 19, 2017 Show Cause Order, subsequent orders clearly establish the claim was held open for the issuance of an order on the merits in this case. Accordingly, the ALJ has subject matter jurisdiction to decide whether Claimant sustained a compensable injury and is entitled to reasonable, necessary and related medical care.

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Ms. Vail credibly testified that she did not grab or pull Claimant's elbow. More importantly, Dr. D'Angelo credibly opined that even if Ms. Vail did grab Claimant as purported by Claimant, such mechanism of injury would not produce a supinator muscle tear or Claimant's other symptoms. The ALJ credited the opinion of Dr. Angelo, who performed a comprehensive examination, medical records review, and causation analysis. Claimant did not report a work injury nor seek medical treatment until approximately six weeks after the incident. Neither Claimant's testimony nor the medical records establish Claimant had any bruising, swelling, internal bleeding or injury to the more superficial muscles in the same area, which Dr. D'Angelo credibly opined would be present in the event Claimant sustained an injury as purported. Based on the objective medical evidence, Dr. D'Angelo's credible opinion, and the credible testimony of Ms. Vail, the ALJ concludes Claimant failed to demonstrate that it is more likely than not he sustained a compensable industrial injury on December 24, 2015.

As Claimant failed to meet his burden to prove a compensable injury, the issue of reasonable, necessary and related medical treatment is moot.

ORDER

It is therefore ordered that:

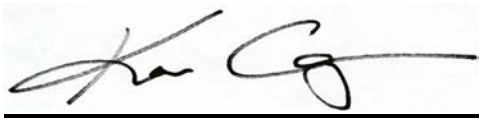
1. Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury resulting from his work activities on December 24, 2015. Claimant's claim for benefits is denied and dismissed.

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

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

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

DATED: March 7, 2018



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

ISSUES

- Is Claimant's entitled to higher average weekly wage for purpose of calculating Claimant's PPD benefits?

STIPULATIONS

The parties stipulated as to the following facts.

1. Claimant was injured on February 6, 2016. At the time of his injury, Claimant was paid $14.50 per hour (approximately 40 hours per week). Claimant's AWW was $648.48 – which equated to a comp. rate (TTD) of $432.32.

2. On or about July 16, 2016, Claimant received a wage increase to $15.00 per hour.

3. On or about September 21, 2016, Claimant received a wage increase to $17.00 per hour.

4. Claimant is still employed with Employer.

The Stipulations were accepted by the Court and made part of this Order.

FINDINGS OF FACT

1. On February 6, 2016, Claimant was injured while working for Employer when he fell off a balcony.

2. Claimant's rate of pay at the time of his injury was $14.50 per hour.

3. The ALJ found Stipulation 1 specified Claimant worked "approximately" 40 hours per week. However, the stipulated average weekly wage of $648.48 leads the ALJ to conclude Claimant worked slightly more than 40 hours per week. To reach this this AWW, Claimant would have been working approximately 44.72 hours per week (without any overtime).

4. There was no evidence in the record as to the amount of overtime (if any) Claimant was working at the time of injury.

5. An Employer's First Report of Injury was completed on or about February 8, 2016.[1] That document did not provide a figure for Claimant's AWW.

6. On February 22, 2016, a General Admission of Liability ("GAL") was filed on behalf of Respondents, admitting for medical benefits and wage benefits (TTD), beginning February 7, 2016.

7. On April 13, 2016, Claimant was released to work with restrictions.[2] Claimant was working six hours per day.

8. An amended GAL was filed on April 26, 2016, which reflected Claimant's return to work with restrictions.

9. On or about July 16, 2016, Claimant received a wage increase to $15.00 per hour. (*Stipulation #2*)

10. On September 9, 2016, Claimant was released to full duty (no commercial driving until a driving test could be taken).[3]

11. A General Admission of Liability was filed on or about dated September 16, 2016 after Claimant was returned to work full duty.

12. On or about September 21, 2016, Claimant received a wage increase to $17.00 per hour. (*See Stipulation #3*).

13. On February 15, 2017, Claimant was placed at Maximum Medical Improvement (MMI) and his ATP determined he had a 10% whole person impairment. Additionally, Claimant was awarded 3 years of medical maintenance to address issues with TMJ. Claimant did not receive any permanent restrictions.

14. On April 17, 2017, Respondents filed a Final Admission of Liability. Claimant's PPD Award was calculated to be $29,051.90 based on an AWW of $648.48 and a TTD comp. rate of $432.32.[4]

15. The AWW admitted to by Respondents was based on working more than 40 hours per week.

16. The admitted AWW did not fairly compensate Claimant for his wage loss.

17. Claimant is entitled to a higher average weekly wage.

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[1] Respondents' Exhibit A.

[2] Respondents' Exhibit C.

[3] Respondents' Exhibit D.

[4] Respondents' Exhibit E.

18. The ALJ determined it was more fair to include Claimant's raise received in July 2016. At the time of this raise, Claimant was working modified duty. A higher AWW using this methodology would more fairly approximate Claimant's wage loss and diminished earning capacity.

19. The ALJ concluded the Claimant was working the equivalent of 44.72 hours per week at the time of his injury. Claimant was therefore entitled to a higher AWW of $670.80 per week ($15.00 x 44.72=$670.80). Claimant's TTD rate was $447.20 per week.

20. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

AWW

§ 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW.

However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-

102(3), C.R.S. establishes the so-called “discretionary exception”. *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82. The rationale for the Court’s decision was one of fairness and Justice Plank stated:

> “The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage”. *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the ALJ had discretion to calculate Claimant’s wages to based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a fairer calculation of Claimant’s AWW.

In the case at bar, Respondents argued the default method for calculating Claimant’s AWW was the appropriate methodology for this determination; specifically, the fact he received raised did not automatically entitle him to a higher AWW. Respondents also averred Claimant provided no evidence that he was entitled to a higher AWW.

Claimant argued the default method did not fairly establish Claimant’s AWW. Claimant asserted he was entitled to receive the benefit of the raises he received while working for Employer and therefore was entitled to a higher AWW of 17.24%.

As determined in Findings of Fact 15-19, the ALJ found the default method for calculating Claimant’s AWW was not the fairest calculation and did not adequately compensate Claimant for his wage loss. Respondents correctly pointed out Claimant was not automatically entitled to a higher AWW because he received raises subsequent to his industrial injury. However, the ALJ concluded Claimant’s actual wages were

higher than the admitted rate. (Finding of Fact 3). In addition, the ALJ determined it was a fair approximation of Claimant's actual wage loss to include one raise before Claimant was returned to full duty. (Finding of Fact 18).

Therefore, the ALJ found Claimant was entitled to a higher AWW and utilized the discretionary exception found in § 8-42-102(3), C.R.S. The ALJ's reasoning was twofold; first, based upon the evidence before the Court, Claimant was working slightly more than forty (40) hours per week at the time was injured. The admitted average weekly wage reflected this fact. In this regard, without payroll/timecard records, the ALJ deduced Claimant worked the equivalent of 44.72 hours per week. The ALJ concluded a fairer approximation of Claimant weekly wage took into account the average or equivalent number of hours per week and the July 2016 raise. This gives an AWW of $670.80.

Second, based upon the rationale articulated in *Campbell* and *Pizza Hut*, the ALJ determined Claimant should receive the benefit of the July 2016 raise, which he received before he was returned to work without restrictions. Using the formula, the ALJ determined this compensated Claimant for his cognizable wage loss which occurred while he was still temporarily disabled. Accordingly, Claimant is entitled to a higher average weekly wage.

ORDER

It is therefore ordered that:

1. Claimant's AWW is increased to $670.80 per week.

2. Respondents shall pay indemnity benefits (TTD) based upon Claimant's higher AWW.

3. Respondents shall pay medical impairment benefits (PPD) based upon Claimant's higher AWW.

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

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

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

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 7, 2018

Digital signature

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

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that on April 28, 2017 she suffered an injury that arose from and in the course and scope of her employment with employer (WC 5-046-046-02).

- If claimant does not prove a new compensable injury, whether claimant has demonstrated by a preponderance of the evidence that her claim related to an admitted injury that occurred on December 26, 2015 (WC 5-002-511-01) should be reopened pursuant to Section 8-43-303, C.R.S. based on a change of condition.

- If claimant proves a compensable injury for claim WC 5-046-046-02 **OR** proves reopening of claim WC 5-002-511-01, whether claimant has demonstrated by a preponderance of the evidence that medical treatment she received after April 28, 2017 (including incurred medical mileage) was reasonable and necessary to cure and relieve her from the effects of either work injury.

STIPULATIONS

- The parties stipulated that if the April 28, 2017 incident is found compensable, claimant's average weekly wage (AWW) for that claim (WC 5-046-046-02) will be $626.62.

- The parties stipulated that respondents are entitled to an offset related to claimant's receipt of Social Security Disability Insurance (SSDI) benefits beginning October 1, 2017.

- In their position statements the parties indicated that they have also stipulated that if claim WC 5-002-511-01 is reopened **OR** if claim WC 5-046-046-02 is found compensable, claimant is owed temporary total disability (TTD) benefits for the period of April 29, 2017 through February 6, 2018 in the amount of $14,971.15 (which reflects the offset for SSDI benefits).

FINDINGS OF FACT

1. Claimant testified that she began employment with employer in September 2003 and worked primarily in the meat department. On December 26, 2015 claimant suffered an admitted work injury. Claimant testified that the injury occurred when she slipped on ice in employer's parking lot and fell. The medical records identify the injured body parts as claimant's low back, hip, and neck.

2. Following the December 26, 2015 injury, claimant's authorized treating provider (ATP) was St. Mary's Occupational Medicine. Claimant was seen at St. Mary's Occupational Medicine by James Harkreader, NP, Dr. Robert McLaughlin, and Dr. Craig Stagg.

3. On February 29, 2016, a magnetic resonance image (MRI) was taken of claimant's lumbar spine. The MRI showed mild facet arthritis with degenerative listhesis primarily at the L4-L5 level and some associated mild stenosis primarily from the L3 to S1 levels.

4. Claimant's medical treatment for the December 26, 2015 work injury has included physical therapy, injections, acupuncture, and chiropractic treatment. Claimant testified that she did not receive sustained pain relief from any of these treatment modalities.

5. On December 28, 2016, Dr. Stagg determined that claimant had reached maximum medical improvement (MMI) and assessed a permanent impairment rating of 11% whole person. Dr. Stagg recommended post MMI medical treatment including three to four follow up visits over the next year, with the possibility of additional injections. At that time, claimant had no work restrictions and continued working for employer in the meat department.

6. Claimant testified that when she was placed at MMI she continued to have symptoms that included pain in her low back, both hips, and her left leg from her hip to her foot.

7. On January 13, 2017, respondents filed a Final Admission of Liability (FAL) admitting for a whole person permanent impairment of 11%, the MMI date of December 28, 2016, and reasonable, necessary, and related maintenance medical treatment. Claimant did not contest the FAL. As a result, the claim was closed.

8. On January 16, 2017, claimant returned to Dr. Stagg and reported that she was having significant pain in her low back and pain in her cervical spine. Dr. Stagg assigned claimant work restrictions of no lifting, pushing, or pulling over 20 pounds. Based upon those work restrictions, employer moved claimant from the meat department to the position of fitting room attendant in mid to late January 2017. The position in the fitting room complied with claimant's work restrictions.

9. On March 28, 2017, Dr. Kenneth Lewis administered right sided L4 through S3 radiofrequency ablation. Immediately following the radiofrequency ablation treatment, Dr. Lewis recorded that claimant was able to ambulate with no motor or sensory deficits.

10. On April 10, 2017, claimant returned to Dr. Lewis' office and reported to Chelsea Olsen, FNPC that the radiofrequency ablation relieved her pain by 70%. At hearing, claimant testified that following the radiofrequency ablation treatment she developed a headache and pain in her back. Claimant also testified that felt that by March 2017 her condition was worsening.

11. Claimant testified that on April 28, 2017 she suffered an injury at work when she was working in the fitting room area and lifted a tub of merchandise. Claimant testified that she believed that the tub was only full of clothing items. However, the tub also contained shoes and boots, so it was heavier than claimant anticipated. As claimant lifted the tub she felt pain in her shoulder blade area, right arm, right shoulder, and back. Claimant testified that following that incident she finished her scheduled shift. Claimant testified that the next day the pain in her shoulder blade area had worsened and she called off from her shift. The next two days were claimant's scheduled days off.

12. Claimant testified that her next scheduled shift was the following Tuesday. On that date, claimant reported the April 28, 2017 incident to employer. Claimant testified that she was instructed by a member of personnel to see her workers' compensation doctor, so claimant scheduled an appointment with Dr. Stagg.

13. Claimant was seen by Dr. Stagg on May 2, 2017. Claimant reported that while lifting tubs at work she felt an increase in her low back pain with radiating pain into her left lower extremity. Dr. Stagg noted claimant's history of chronic back pain and determined that the April 28, 2017 tub incident was a "temporary aggravation" of that preexisting condition. Dr. Stagg ordered an x-ray of claimant's lumbar spine placed claimant on a work restriction of "no work". Claimant testified that she has not returned to work for employer or any other employer since that time.

14. Claimant returned to Dr. Stagg on May 5, 2017 and reported that although her back pain had decreased, it was still present. On that date, Dr. Stagg diagnosed an acute lumbar strain. Dr. Stagg recommended claimant begin physical therapy and continued claimant on a restriction of "no work".

15. On May 8, 2017, claimant returned to Dr. Lewis and reported that she had 60% relief from her right sided radiofrequency ablation. Claimant also reported that she had recently injured her right side and wanted to postpone further treatment on that side. On that date, Dr. Lewis performed left L4 through S3 radiofrequency ablation.

16. On May 10, 2017, claimant began physical therapy related to the April 28, 2017 incident. Claimant testified that at physical therapy her neck, shoulders, and mid-back were addressed. Claimant testified that pain in her mid-back is a new symptom that began after the April 28, 2016 incident.

17. On May 17, 2017, claimant returned to Dr. Stagg and reported that the most recent radiofrequency ablation procedure provided no relief. At that time, Dr. Stagg opined that claimant had experienced an "[e]xacerbation of [her] underlying chronic low back pain with radicular symptomology" and ordered a lumbar spine MRI.

18. On May 22, 2017, an MRI of claimant's lumbar spine showed degenerative disc and degenerative facet disease which was noted as "similar to previous study". The MRI also showed mild retrolisthesis of the L1 on L2 and

anterolisthesis of L4 on L5 secondary to degenerative facet disease, which was also unchanged from the prior MRI.

19. On May 30, 2017, claimant returned to Dr. Stagg and reported that she was still having pain in her back that was radiating into her left anterior thigh and down into her left lower extremity. On that date, Dr. Stagg recommended that claimant return to Dr. Clifford for consultation because of her "worsening symptomatology". Dr. Stagg also referred claimant to Dr. Joel Cohen for pain psychology treatment.

20. On June 14, 2017, claimant was seen by Todd Ousley, PA-C at Dr. Clifford's office. At that time, claimant described the April 28, 2017 incident involving lifting the tub at work. Claimant also reported pain in her lumbar spine that was radiating into the mid thoracic spine and down into her left leg.

21. Dr. Stagg also ordered a functional capacity evaluation (FCE) and claimant attended the FCE on August 7, 2017 with Marty Haraway, OTR. At the conclusion of the FCE, Ms. Haraway opined that claimant should seek work within or below the Sedentary Physical Demand Category that would allow for frequent position changes and not require squatting or kneeling.

22. Claimant attended an independent medical examination with Dr. Tashof Bernton on September 13, 2017. Dr. Bernton reviewed claimant's medical records, obtained a history from claimant and performed a physical examination as part of the IME. In his IME report, Dr. Bernton opined that claimant remains at MMI for the December 26, 2015 injury and did not suffer a new injury on April 28, 2017. Dr. Bernton also noted in his IME report that claimant has exhibited significant somatoform symptoms.

23. Dr. Bernton's testimony at hearing was consistent with his written report. During his testimony Dr. Bernton reiterated his opinion that claimant has not experienced a worsened condition related to the December 2015 work injury and did not suffer an injury on April 28, 2017. Dr. Bernton testified that following the December 2015 work injury, claimant's condition was "fluctuating but stable".

24. Dr. Bernton also provided testimony regarding his opinion that claimant's symptoms are the result of a somatoform disorder. In support of this opinion, Dr. Bernton noted that during the IME claimant exhibited four out of five Waddell's signs. Dr. Bernton explained that Waddell's signs are indicative of nonorganic or psychological causes of a patient's pain symptoms. Dr. Bernton testified that he does not doubt that claimant is experiencing pain, but there is no objective evidence pointing to a pain generator.

25. The ALJ credits claimant's testimony, the medical records, and the opinion of Dr. Stagg over the contrary opinion of Dr. Bernton and finds claimant has demonstrated that it is more likely than not that on April 28, 2017 she suffered an injury at work that aggravated, accelerated, or combined with her preexisting chronic low back pain, necessitating medical treatment.

26. The ALJ credits claimant's testimony and the medical records and finds that claimant has demonstrated that it is more likely than not that the medical treatment she has received following the April 28, 2017 work injury, including incurred medical mileage, is reasonable and necessary to cure and relieve her from the effects of the work injury.

27. The ALJ credits claimant's testimony and the medical records and finds that claimant has demonstrated that she has not worked since the April 28, 2017 injury and as a result has experienced loss of wages.

28. The ALJ does not address reopening WC 5-002-511-01 because claimant has proven that she suffered a compensable injury on April 28, 2017.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

5. As found, claimant has demonstrated by a preponderance of the evidence that she sustained an injury to her back that arose out of and in the course an scope of her employment with employer. As found, the April 28, 2017 incident aggravated, accelerated, or combined with claimant's preexisting chronic back condition resulting in the need for medical treatment. As found, claimant's testimony, the medical records, and the opinion of Dr. Stagg are credible and persuasive.

6. As claimant has proven that she suffered a compensable injury on April 28, 2017, the ALJ does not address reopening the WC 5-002-511-01 claim.

7. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

8. As found, claimant has demonstrated by a preponderance of the evidence that medical treatment she has received following the April 28, 2017 work injury, including incurred medical mileage, is reasonable and necessary to cure and relieve claimant from the effects of the work injury. As found, claimant's testimony and the medical records are credible and persuasive.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively

and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

10. As found, claimant has demonstrated by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits because her April 28, 2017 work injury resulted in wage loss. As found, claimant's testimony and the medical records are credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury on April 28, 2017 that arose out of and in the course and scope of her employment with employer.

2. As claimant has proven that she suffered a compensable injury on April 28, 2017, the ALJ does not address reopening the WC 5-002-511-01 claim.

3. Respondents are liable for medical treatment claimant received after April 28, 2017, including incurred medical mileage.

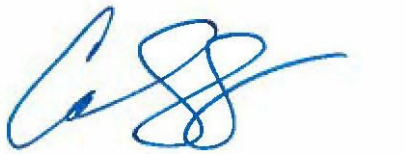
4. Pursuant to the stipulation of the parties, claimant's average weekly wage (AWW) is $626.62

5. Pursuant to the stipulation of the parties, claimant is owed temporary total disability (TTD) benefits for the period of April 29, 2017 through February 6, 2018 in the amount of $14,971.15.

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

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

Dated: March 13, 2018



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

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

ISSUES

I. Have Respondents shown, by a preponderance of the evidence, that Claimant is no longer entitled to Temporary Total Disability ("TTD") payments, effective September 11, 2017, due to his failure to begin a valid offer of modified employment?

II. Have Respondents shown, by a preponderance of the evidence, that Claimant is no longer entitled to TTD benefits, effective September 11, 2017, because he was responsible for his own termination?

STIPULATION

Dr. Douglas Bradley, M.D. is Claimant's Authorized Treating Physician. The ALJ accepted this stipulation.

ADMISSIBILITY OF CLAIMANT'S EXHIBIT 5

Respondents object to the admission of Claimant's Exhibit 5 because the document lacks foundation and is inadmissible hearsay. The ALJ now finds that Exhibit 5 is a record generated by Pinnacol, Maggie's Farm's workers' compensation *insurer.* Insurer's records do not constitute *'employer records'* for the purposes of admission under § 8-43-201. Claimant wishes to characterize this document as a statement by a party opponent (thus non-hearsay). Such characterization is misplaced. While the *document* was generated by a *party in interest* (as opposed to a party-opponent), what Claimant seeks to introduce is actually *Claimant's statement* regarding his medical condition. Further, an insurer's records, such as here, contain discussions of the advisability of *settlement*, which is not before the fact-finder. Exhibit 5 is inadmissible based on a lack of foundation and hearsay, regardless of any relevance it might arguably possess.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was hired as a cultivation technician by Maggie's Farm on July 24, 2017. As a cultivation technician, Claimant performed outdoor manual labor for a marijuana farm.

2. On the day he was hired, Claimant signed a document acknowledging he received Maggie's Farm's employee handbook ("Handbook"). The document declares Claimant reviewed the Handbook, understood the Handbook, and understood that it was his responsibility to comply with the policies in the Handbook. (Ex. D, p. 16).

3. The Handbook contains several policies related to attendance. In the section labeled "PUNCTUALITY AND ATTENDANCE," the Handbook states an "employee who is absent for three or more consecutive days without notifying the Company . . . will be considered to have abandoned their job and will be considered to have voluntarily resigned." (Ex. C, p. 11). In the section labeled "Unscheduled Time Off," the Handbook states that "[e]xcessive unscheduled time off may result in counseling and, if the problem continues, may be grounds for disciplinary action, up to and including termination of employment." (Ex. C, p. 15). Both policies refer to Maggie's Farm's Attendance Policy ("Attendance Policy") for additional details.

4. When he was hired, Claimant also signed a document acknowledging he received the Attendance Policy and he understood that it was his responsibility to read the Attendance Policy and to comply with its terms. (Ex. F, p. 23).

5. The Attendance Policy states that the third occurrence of absence without notification would result in separation from employment. (Ex. E, p. 19). An "absence without notification" is defined by the Attendance Policy as an "[u]nscheduled absence without notice prior to the start of the scheduled shift (not reporting or calling)." (Ex. C, p. 18). The Attendance Policy also states an employee "who is absent from work for three consecutive shifts without notifying his or her Supervisor or Manager may generally be deemed to have voluntarily resigned his or her position." (Ex. C*,* p. 20). Discipline under the Attendance Policy "may not necessarily be progressive" and Maggie's Farm may terminate employees without prior warnings. (Ex. C*,* p. 17).

6. The ALJ finds that Claimant received, and acknowledged by his signature dated 7/24/17, the Handbook and the Attendance Policy, including the rule stating an employee would be terminated for the third occurrence of an absence without notification.

7. Sharon Northern, the Human Resources Director at Maggie's Farm, drafted the Handbook and the Attendance Policy. She testified the Handbook expressed the overarching rules of employment with Maggie's Farm, while the Attendance Policy provided specific details regarding the expectations of employee attendance. The purpose of the attendance rules was to avoid severe disruption in the operation of Maggie's Farm's business. As Ms. Northern explained, when an employee unexpectedly misses time from work, the production level at Maggie's Farm drops, which reduces the supplies Maggie's Farm can provide to its recreational dispensaries.

8. Claimant reported to Emergicare that he injured his right knee on July 31, 2017, when his right knee just "gave out." He was unable to put any weight or pressure on his knee without experiencing considerable pain. Dr. Bradley noted swelling, tenderness, and limited range of motion when Claimant was examined. (Ex. 8, pp. 36-43). Claimant later reported that he did not fall, twist the knee, or hyperextend it. (Ex. L, p. 62). He was injured one week after he began working at Maggie's Farm.

9. Dr. Bradley prescribed work restrictions on the date of injury of no lifting, carrying, pushing or pulling more than 5 lb, walking or standing no more than 1 hour

total per day (5 to 10 minutes at one time), and 7 hours sitting per day (55 minutes per hour). Claimant was to wear a brace, and be up on crutches. MRI and X-rays were ordered. A follow-up visit was set for 8/4/17. (Ex K, p. 50).

10. Similar work restrictions remained in place at this follow-up visit of 8/4/17, with 7 hours of sitting noted to be 50 minutes per hour. It was noted that Claimant was not currently working. Next follow-up visit was set for 8/14/17 (Ex. K, p. 51).

11. On the follow-up visit of 8/21/17 (the record is unclear why it did not occur on 8/14/17 as previously scheduled), the same work restrictions remained in place. Physical therapy was prescribed, and a referral was made to Orthopedist Michael Simpson, MD. Dr. Simpson diagnosed Claimant with a patellar subluxation with bone contusion and mild strain of the medial collateral ligament, with the conclusion that this injury can be managed nonoperatively (Ex. 3, pp. 21-23). There is a handwritten notation that at this visit with Dr. Bradley that "Pt left without signing." Return appointment was set for "2 weeks." (Ex. K, p. 52).

12. On August 25, 2017, Respondents sent Dr. Bradley a modified position letter based on a position Ms. Northern had identified in the trim station. (Ex. G, p. 25). The modified position involved the following tasks: "Sitting in a room trimming the leaves off of plaints using scissors. Involves sitting, reaching, handling and no lifting/carrying/push/pulling over 5lbs." (Ex. G, p. 25). Ms. Northern selected this position because it was within Claimant's work restrictions.

13. Ms. Northern testified about the physical requirements of the trim station. This job requires employees to trim buds from marijuana plants with tiny scissors. The scissors are shorter than the length of a pen, and are equivalent to a cuticle scissor. (Ex. M, p. 67-68). The buds are the size of a quarter and weigh a few ounces. (Ex. M, p. 65). An employee called "the pass" brings the buds in a Tupperware container to employees at the trim station. The job can be performed while sitting or standing. The ALJ finds Ms. Northern accurately described the physical requirements of the trim station.

14. Claimant never worked in, and never saw, the trim station.

15. On August 29, 2017, Claimant had the next follow-up appointment with Dr. Bradley. (Ex. J, p. 35). Once again, Dr. Bradley provided Claimant with work restrictions of lifting, carrying, pushing/pulling five pounds; walking for one hour per day; standing for one hour per day; and sitting for seven hours per day. Dr. Bradley noted that Claimant should sit for 50 minutes per hour and walk or stand for 10 minutes per hour. (Ex. K, p. 53). Claimant signed instructions on August 29 listing these work restrictions. The next follow-up appointment was set for 9/11/17 at 11:30 a.m.

16. Claimant testified, and the ALJ finds, that he was aware of the work restrictions on the August 29 discharge instructions, because Dr. Bradley explained these restrictions to him and provided Claimant with a copy of the discharge instructions.

17. Dr. Bradley approved the modified position for Claimant at the trim station on August 29, but added Claimant could not lift or carry more than five pounds and needed to sit for 50 minutes per hour and stand or walk 10 minutes per hour. (Ex. G, p. 25).

18. The ALJ finds that Claimant's *work restrictions* as of September 11, 2017 were no lifting, carrying, pushing/pulling more than five pounds; walking for one hour a day at a rate of 10 minutes per hour; or standing for one hour a day at a rate of 10 minutes per hour; and sitting for seven hours a day or 50 minutes per hour.

19. The ALJ further finds that the trim station position easily satisfied the work restrictions imposed by Dr. Bradley, and Claimant would have been able to perform this position well within said work restrictions.

20. The modified position was scheduled to start at 7:30 a.m. on September 11, 2017. The ALJ finds Claimant received a copy of the modified job offer before the position was scheduled to start based on Ms. Northern's testimony that she mailed the modified job offer to Claimant, and Claimant's testimony that he received a copy of the offer. (Ex. I, p. 28). The ALJ also finds Claimant knew the modified position was scheduled to start at 7:30 a.m. because he received the letter.

21. Claimant admitted at hearing he did not come to work at Maggie's Farm on September 11 and has not worked there since then. Claimant testified that he did not "show up because [he] went to the doctor with the restrictions [he] had and the restrictions had changed and [he] was unable to perform the work physically that they had [him] put out to do." Claimant's personal opinion that the offered job did not comply with Dr. Bradley's restrictions is not persuasive. Claimant never saw or worked in the trim station prior to his injury. Without ever seeing or working in the trim station, Claimant could not have known whether the trim station position complied with Dr. Bradley's restrictions. The trim station position was well within the work restrictions Dr. Bradley noted in his August 29, 2017 letter.

22. Claimant testified that he believed he had restrictions beyond the restrictions Dr. Bradley listed in the modified job offer. Claimant testified his work restrictions included applying a warm moist compress to his knee, stretching hourly, and resting, icing, and elevating his knee. (Ex. J, p. 37). This testimony is not persuasive. These recommendations were *treatment recommendations,* not *work restrictions*, and have no relation to his ability to work at the trim station.

23. On September 11, 2017, at 11:30 a.m. (4 hours after he was to report for his modified duty with Employer), Claimant attended his next appointment with Dr. Bradley. Dr. Bradley again assigned work restrictions of lifting, carrying, pushing/pulling no more than five pounds; walking or standing for one hour per day cumulative; and sitting for seven hours per day, cumulative. (Ex. K, p. 54).

24. Claimant testified that he had restrictions beyond the restrictions Dr. Bradley assigned in his September 11 note. Claimant testified that his work restrictions

included applying a warm moist compress to his knee, stretching hourly, and resting, icing, and elevating his knee. Claimant also testified that Dr. Bradley gave him work restrictions for his back, which included icing or heating his back, resting on a firm surface, and applying warm compresses to his back. (Ex. J, p. 40).

25. The ALJ finds that Claimant's work restrictions immediately after his September 11, 2017 appointment with Dr. Bradley were no lifting, carrying, pushing/pulling more than five pounds; walking or standing for one hour cumulative per day; and sitting for seven hours per day. The ALJ finds that Claimant could have performed his modified job within these restrictions. The ALJ finds that Claimant's testimony regarding additional *treatment recommendations* is not persuasive, insofar as he characterizes them as *work restrictions.*

26. The ALJ finds Claimant's alleged back pain is not related to his work injury according to Dr. Bradley. (Ex. J, p. 48). Therefore, any restrictions or treatment recommendations related to Claimant's back are not work restrictions, and are not related to the Workers Compensation system.

27. Ms. Northern testified that the modified position offered to Claimant was within the restrictions assigned by Dr. Bradley and within the additional restrictions Claimant thought he had. Ms. Northern explained that Claimant could have applied warm compresses and an ice pack or heating pad while sitting, could have rested on a firm surface, and could have stood up while at the trim station. The ALJ finds her testimony to be credible and persuasive.

28. The ALJ further finds that Claimant could have performed the trim station position even if Dr. Bradley had included applying a warm moist compress to Claimant's knee, stretching hourly, and resting, icing, and elevating Claimant's knee and icing or heating his back, resting on a firm surface, and applying warm compresses to his back as work restrictions. The trim station position, as credibly described by Ms. Northern, involves very little physical effort and Maggie's Farm could have, and would have, accommodated Dr. Bradley's treatment recommendations, although not required to do so.

29. On September 14, 2017, Ms. Northern determined that Claimant had abandoned his job because he had not returned to work, nor had he contacted Maggie's Farm since he was released to work. (Ex. H, p. 26). The letter terminated Claimant, effective September 11. Ms. Northern relied on the Handbook and the Attendance Policy to terminate Claimant for not contacting Maggie's Farm for three consecutive days after he was scheduled to return to work.

30. Claimant testified he left a voicemail for Ms. Northern on September 11. Ms. Northern testified that Claimant did not leave her a voicemail. The ALJ credits Ms. Northern's testimony. Ms. Northern testified that if she had received a voicemail from Claimant she would not have terminated him because she would have known that he had intended to return to work. If Claimant had told Ms. Northern that he could not

return to work due to his restrictions, Ms. Northern would have worked with him to accommodate his new restrictions.

31. The ALJ finds that Maggie's Farm terminated Claimant on September 11 because Claimant failed to communicate with Maggie's Farm for three consecutive days after he was scheduled to return to work. Ms. Northern's decision to terminate Claimant was consistent with the employment policies clearly stated in the Handbook and the Attendance Policy. Claimant's decision to not call Ms. Northern was a volitional act because Claimant signed documents acknowledging that he had read and understood the Handbook and the Attendance Policy and understood that it was his responsibility to abide by their terms.

32. On September 18, 2017, Dr. Bradley revised Claimant's restrictions to allow him to stand and walk for seven hours a day and sit for only one hour a day. (Ex. K, p. 55). Those same work restrictions remained in effect on successive visits on 9/27/17 and 10/18/17 (Ex. K, pp. 55-57).

33. On 11/17/17, Dr. Bradley kept the same walking, standing, and sitting work restrictions, but revised the lifting, carrying, pushing, and pulling restrictions upwards to 15 lbs. Those same restrictions remained in place at successive visits on 12/1/17, 12/15/17, and 1/18/18. (Ex. K, pp. 58-61).

34. On November 14, 2017, Claimant also treated with Scott Primack, D.O. at Colorado Rehabilitation & Occupational Medicine. (Ex. L). Claimant filled out a patient questionnaire which asked him to identify his work restrictions. (Ex. A to Motion to Submit Post-Hearing Evidence, at 4). Claimant stated that his only work restrictions were "lifting, pushing, pulling only 5 pounds." Claimant makes no mention in this questionnaire of any of the treatment recommendations which he now contends were work restrictions. (*Id.*).

35. The ALJ finds that Claimant's statement to Dr. Primack undermines the credibility of his testimony that he had additional work restrictions. Instead, the statement to Dr. Primack shows that Claimant knew his work restrictions were limited to no lifting, carrying, pushing/pulling more than five pounds, walking or standing for one hour a day or 10 minutes per hour; and sitting for seven hours a day or 50 minutes per hour.

36. On November 17, 2017, Dr. Bradley improved Claimant's work restrictions again by allowing him to lift, carry, push, and pull up to 15 pounds. (Ex. K, p. 058). Claimant also testified these restrictions allowed him to do more than he had been able to do prior to September 11. Claimant testified that his restrictions had improved since September 11.

37. The ALJ finds that Claimant's condition has improved-certainly not worsened-since the date of his termination based on the liberalized revisions to his work restrictions.

CONCLUSIONS OF LAW

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

Generally

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

B. It is the sole province of the fact finder to weigh the evidence and resolve conflicts in the evidence. *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936). The ALJ "is at liberty to find part, but not all, of a witness' testimony to be credible." *El Paso Cnty. Dep't of Soc. Servs. v. Donn*, 865 P.2d 877, 881 (Colo. App. 1993).

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

Claimant's Failure to Begin Modified Employment

D. Section 8-42-105(3)(d)(I), C.R.S., provides a three-part test for the termination of TTD benefits: "[1.] The attending physician gives the employee a written release to return to modified employment, [2.] such employment is offered to the employee in writing, and [3.] the employee fails to begin such employment." The term "fails to begin" is defined as "a failure to start the modified employment in the first instance." *Liberty Heights v. Indus. Claim Appeals Office*, 30 P.3d 872, 874 (Colo. App. 2001). Termination of TTD benefits is "mandatory" once the requirements of section 8-42-105(3)(d)(I) are satisfied. *Laurel Manor Care Cntr. v. Indus. Claims Appeals Office*, 964 P.2d 589, 590 (Colo. App. 1998).

E. Under section 8-42-105(3)(d)(I), the term "modified employment" means employment within the restrictions established by the attending physician. *See Flores-Arteaga v. Apple Hills Orchard Juice Co.*, W.C. No. 3-101-024 (ICAO Feb. 15, 1996). If there is a conflict in the record regarding a claimant's release to return to work, the ALJ has discretion to resolve the conflict. *Imperial Headware Inc. v. Indus. Claim Appeals Office*, 15 P.3d 295, 296 (Colo. App. 2000).

F. The modified employment must be reasonably available to the injured worker under an "objective standard." *Ragan v. Temp Force*, W.C. No. 4-216-579 (ICAO June 7, 1996). An injured worker's subjective beliefs about his ability to perform a modified job are legally irrelevant, and do not provide a basis to refuse to begin modified employment. *Burns v. Robinson Dairy*, 911 P.2d 661, 663 (Colo. App. 1995) ("[A]ny evidence concerning claimant's self-evaluation of his ability to perform his job was irrelevant.").

G. By a preponderance of the evidence, Respondents have the burden to prove that Claimant failed to begin modified employment while Claimant has the burden to show that the modified employment exceeded his physical restrictions or was unreasonable. *Bull v. Dynalectric*, W.C. No. 4-654-356 (ICAO Nov. 18, 2006).

H. Respondents have established by a preponderance of the evidence each of the three factors in section 8-42-105(3)(d)(I). Dr. Bradley, Claimant's attending physician, provided him with a written release to return to modified employment on August 29. Ms. Northern sent Claimant the letter offering him a modified position in the trim station to begin on September 11. Claimant received this letter. Finally, Claimant did not begin his modified employment with Maggie's Farm on September 11. Because Respondents have satisfied section 8-42-105(3)(d)(I), termination of TTD benefits is mandatory once these factors have been satisfied. Claimant is not entitled to TTD benefits effective September 11, 2017 and ongoing.

I Claimant argues that the modified job in the trim station was not within the Dr. Bradley's restrictions. Claimant contends that his restrictions prior to September 11 included applying warm moist compresses to his right knee, stretching hourly, and resting, icing, and elevating his right knee, which could not have been accommodated in the trim station.

J Claimant's *work restrictions* as of September 11 were lifting, carrying, pushing, and pulling up to five pounds, sitting for 50 minutes per hour, and walking or standing for 10 minutes per hour. These were the only work restrictions Dr. Bradley listed when he signed Claimant's modified task letter on August 29. (Ex. G, pp. 25). These were also the only work restrictions listed on the discharge instructions he provided to Claimant on August 29. (Ex. G, pp. 25, 53). Similarly, Claimant acknowledged in a patient questionnaire to Dr. Primack that his restrictions were lifting, pushing, and pulling five pounds, further indicating that Claimant himself believed these were his only work restrictions. The modified position Maggie's Farm offered to Claimant was well within these restrictions and Claimant's opinion that the offered job did not comply with Dr. Bradley's restrictions is neither relevant nor credible.

K. Claimant's testimony that his work restrictions changed on September 11 because Dr. Bradley recommended icing or heating his back, resting on a firm surface, and applying warm compresses to his back is likewise irrelevant. These 'restrictions' are irrelevant because Claimant's appointment with Dr. Bradley occurred four hours after Claimant was already supposed to have started his modified employment four hours prior. By the time Claimant had his appointment with Dr. Bradley, he had already failed to begin his modified employment. Further, Dr. Bradley concluded Claimant's *back pain* is not a work-related condition. In any event, Dr. Bradley's September 11 recommendations for Claimant's back on are treatment options, not work restrictions.

L Even if Claimant's testimony regarding the additional restrictions to his knee and back were credited, the trim station position still accommodated these restrictions. The trim station requires an employee to stand or sit and use cuticle-sized scissors to trim buds smaller than a quarter. Maggie's Farm was willing and able to allow Claimant to ice or heat his back, rest on a firm surface, take prescribed medications, apply warm compresses, and accommodate Claimant's medical appointments. (Ex. J, p. 40). Based on the nearly effortless physical requirements of the trim station and Ms. Northern's testimony, even the additional treatment recommendations Claimant believes he had could have been accommodated. It was patently unreasonable for Claimant to refuse to accept this position. Such offer of modified employment needs only to reasonably meet prescribed work restrictions; it need not offer total comfort, stimulation, or personal fulfillment to an injured worker.

Claimant's Responsibility for Termination

M. If an injured worker is responsible for his termination from employment, the injured worker is not entitled to receive benefits compensating him for the wage loss after the date of termination. § 8-42-103(1)(g), C.R.S.; § 8-42-105(4), C.R.S. For an employee to be responsible for termination, the employee must perform a volitional act which leads to the termination. *Gutierrez v. Exempla Healthcare*, W.C. No. 4-495-227 (ICAO June 24, 2002). An employee commits a volitional act when he exercises some degree of control over the circumstances leading to the termination. *Colorado Springs Disposal v. Indus. Claim Appeals Office*, 58 P.3d 1061, 1062 (Colo. App. 2002). An employee is responsible for termination if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colo. Dept. of Public Safety,* W.C. No. 4-432-301 (ICAO, Sept. 27, 2001). Negligent or inadvertent acts qualify as volitional acts for the purposes of determining whether a claimant is responsible for termination. *Gleason v. Southland Corp*., W.C. No. 4-149-631 (ICAO June 13, 1994).

N. Failing to return to or call in to work after an injury for a position that is within a Claimant's work restrictions are volitional acts which support a finding that a Claimant is responsible for termination. *Villa v. Wal-Mart Stores, Inc.*, W. C. No. 4-631-217 (ICAO Sept. 30, 2005); *Hoefner v. Russell Stover Candies*, W.C. No. 4-541-518 (ICAO Dec. 13, 2002).

O. Respondents have the burden to prove by a preponderance of the evidence that claimant was responsible for termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008). Respondents have met their burden.

P. Claimant knew he was expected to return to work at 7:30am on September 11, 2017 based on the modified job offer he received. Claimant also knew that Maggie's Farm's Handbook and Attendance Policies required him to contact Maggie's Farm if he was unable to come to work. Yet, Claimant did not contact Maggie's Farm for three consecutive days after September 11. Maggie's Farm terminated Claimant, effective September 11, because he violated the attendance rules in the Handbook and Attendance Policy. As found, Claimant's failure to contact Maggie's Farm was volitional, and his volitional act led to his termination. Such termination was unrelated to his claim for Workers Compensation.

Q. To the extent Claimant wishes to contend that his condition has worsened since his termination, Claimant's condition has actually improved since his termination, based on his work restrictions, as well as Claimant's admission that he is physically able to do more now than he was able to do as of September 11, 2017.

ORDER

It is therefore ordered that:

1. Claimant's claim for TTD benefits from September 11, 2017 and ongoing is denied and dismissed.

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

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

DATED: March 14, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-019-945-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 27, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 2/27/18, Courtroom 1, beginning at 2:00 PM, and ending at 3:30 PM).

The Claimant was present via telephone and represented by Scot Eley, Esq. Respondents were represented by Jacqui D. Condon, Esq.

Hereinafter Sergio Martinez shall be referred to as the “Claimant." Security Industry Specialists, Inc. shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 7 were admitted into evidence, without objection. Respondents’ Exhibits A through F were admitted into evidence, without objection. Security

At the conclusion of the hearing, the ALJ decided that no briefs were necessary, after the parties closing arguments. Therefore, the ALJ deemed the matter submitted for decision as of February 27, 2018.

ISSUES

The issues to be determined by this decision concern the Claimant's request for conversion of a scheduled extremity rating, admitted in the Final Admission of Liability (FAL), which was based on the Division Independent Medical Examiner's (DIME's) ratings, to a whole person rating; and, the Respondents' claim of overpayment of benefits.

The Claimant bears the burden of proof, by a preponderance of the evidence on the issue of conversion because the Claimant accepts the four corners of the DIME's opinion letter. The Respondents bear the burden of proving their entitlement to an overpayment.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant, age 35, suffered an on-the-job right shoulder injury on June 23, 2016. The Claimant was struck in the anterior right shoulder while trying to apprehend a suspect as a Loss Prevention Specialist for the Employer.

2. The latest amended Final Admission of liability (FAL), dated October 6, 2017, admitted for a 6% right upper extremity (RUE) impairment, pursuant to the rating of Division Independent Medical Examiner (DIME) X.J. Ethan Moses, M.D.

3. The Claimant was evaluated at the Denver Health ER on June 23, 2016 by Derrick A. Foge, M.D., a resident, and the attending physician, Eric Hammerberg, M.D. The Claimant presented with "severe right shoulder pain" (*See* Claimant's Exhibit 3, BS 116) and was diagnosed with a comminuted mildly displaced extra-articular fracture of the right scapula after physical examination, x-rays, and a CT scan (*See* Claimant's Exhibit 3, BS118).

4. The Claimant was referred to the Denver Health Orthopedic Clinic for repeat imaging and ongoing operative management of his injury by the treating physicians at the Denver Health ER (*See* Claimant's Exhibit 3, BS 119). The Claimant made multiple visits to the clinic from July 1, 2016 to January 24, 2017 (*See* Claimant's Exhibit 2, BS 11-12). On January 24, 2017, Ashley P. Green, PA-C (Certified Physician's Assistant), discharged the Claimant from the clinic and released him to full duty with no restrictions. (*See* Claimant's Exhibit 3, BS 29, 33).

Division Independent Medical Examination (DIME) by X.J. Ethan Moses, M.D.

5. On September 6, 2017, Dr. Moses conducted a DIME of the Claimant at the request of the Respondents (*See* Claimant's Exhibit 2, BS 9-27). The Claimant reported to Dr. Moses "pain that is 6/10 in severity, burning in character, throbbing when exacerbated, located at the anterior right shoulder, constant, and radiates intermittently to his posterior right shoulder and right posterior neck" (*See* Claimant's Exhibit 2, BS 10). The Claimant also reported weakness, instability, atrophy of the right bicep, "numbness and tingling radiating from the shoulder to the right forearm." *See id.* Dr. Moses noted difficulty in determining the exact cause of the Claimant's subjective complaints because they were not entirely consistent with medical reports and pathology of his injury. *See id.* According to the DIME, the Claimant did not report having any headaches in the "Patient Reported History" and the Claimant's neck had a full range of motion with no tenderness during the "Physical Exam" (*See* Claimant's Exhibit 2, BS 9, 13).

6. Dr. Moses concluded that the Claimant reached maximum medical improvement (MMI) on January 24, 2017 "in conjunction with his release to full activities and discharge from care from Denver Health Orthopedics (Claimant's Exhibit 2, BS 10).

7. During a functional assessment, Dr. Moses found that the Claimant

> has difficulty opening a tight or new jar, doing heavy household chores, carrying a shopping bag or briefcase, washing his back, using a knife to cut food, performing recreational activities that require force or impact through the arm, performing normal social activities, performing regular daily activities or work, with pain, with tingling in the arm, and sleeping due to pain.

(Claimant's Exhibit 2, BS 14).

The ALJ infers and finds that DIME Dr. Moses observations are consistent with a situs of functional impairment bin the RUE and not beyond it.

8. Dr. Moses conducted an impairment evaluation and assigned a 6% RUE rating for Claimant's right shoulder (*See* Claimant's Exhibit 2, BS 16). As required by the American Medical Association *Guides to the Evaluation of Permanent Impairment*, 3rd. Ed., Rev., Dr. Moses mechanically converted that extremity rating into a 4% whole person rating. *See id.* Dr. Moses expressed his medical opinion that the Claimant "does not demonstrate a loss of function extending proximally from the injured shoulder," concluding it was not a whole person impairment without further explanation. (*See* Claimant's Exhibit 2, BS 16-17).

Respondents' Independent Medical Examination (IME) by Timothy S. O'Brien, M.D.

9. At Respondents' request, Dr. O'Brien completed an IME on November 11, 2016. His report notes that the Claimant complained of pain in the front and back of his shoulder, pain around the scapula, and numbness and tingling radiating down his arm and in his fingers (*See* Respondent's Exhibit B, BS 13). Dr. O'Brien notes associated symptoms as "achiness, weakness, jolting, tingling, sharpness, giving out, clicking, soreness, throbbing, numbness, and stiffness." *Id.* During his physical examination, Dr. O'Brien reported that the Claimant had a full range of motion in his neck (*See* Respondent's Exhibit B, BS 15).

Claimant's IME by Gregory D. Smith, D.O.

10. At the request of the Claimant, Dr. Smith completed an IME on January 19, 2018. In his subjective findings, Dr. Smith noted that the Claimant reported that "lying on his left side causes extreme pain, and in the morning, he may throw his arm across the bed and gets a popping sensation that becomes very painful in the glenohumeral region" (Claimant's Exhibit 1, BS 4). According to Dr. Smith, the Claimant also reported that his pain varies, he gets headaches, and he has "significant cervical pain at times." *Id.* During his physical examination, Dr. Smith noted "fairly significant tenderness on movement of the right shoulder" and lessened grip and muscular strength on the right. *Id.* Dr. Smith also concluded that the Claimant would receive a 6% RUE rating and 4% whole person rating. He stated that the Claimant's cervical range of motion was "abnormal on the right side in comparison to the left" but did not rate it because it was "not part of what I was asked to do at this time." (Claimant's Exhibit 1, BS 5).

11. Dr. Smith concluded that, in his opinion, a whole person rating should be used for the Claimant but then limits his reasoning to limitations in the right shoulder and arm (*See* Claimant's Exhibit 1, BS 5). He states:

> my through processes is if one reads the AMA Guides to Evaluation of Permanent Impairment, third edition, under 3.1G, it talks about the shoulder saying that the functional unit represents 60% of the upper extremity function. The shoulder has three units of motion, each contributing a relative value to the shoulder functioning as following: flexion, extension, abduction, adduction, and internal and external rotation. With this in mind, with the shoulder having 60% of all movements in the upper extremity and in Mr. Martinez' case he also has difficulties in his elbow down to the forearm with some weakness and some paraesthesia in his right upper extremity, I do feel this

> should be rated as a whole person and not as a upper extremity evaluation.
>
> *Id.*

The ALJ infers and finds that Dr. Smith's opinions do not demonstrate that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Moses' opinion, limiting permanent impairment to the RUE, is clearly wrong.

The Claimant's Testimony

11. The Claimant testified at hearing that he currently experiences pain in his shoulder and headaches. He reports that the symptoms affect his daily living because he can no longer work in loss prevention; he cannot work as an Uber driver for more than a few hours at a time, and cannot sleep for more than a few hours at a time because of pain. The Claimant testified that he had difficulty turning to see when changing lanes as an Uber driver because he would have to turn his whole torso to avoid pain. He reported that he had to add a side view blind spot camera to his vehicle to drive without having to turn his head. The Claimant visited multiple providers for his injury between the day of injury, June 23, 2016, to the DIME on September 6, 2017. There is no persuasive evidence that the Claimant ever complained of headaches or trouble turning his head in any of these visits including during the DIME.

Ultimate Findings

12. The Claimant's testimony concerning headaches, neck pain, and limited range of motion in the neck is inconsistent with the aggregate medical records. There is no convincing support for these symptoms prior to the Claimant's requesting a conversion and the subsequent IME by Dr. Smith. Consequently, the ALJ does not find the Claimant's testimony in this regard credible. Indeed, the ALJ infers that, under the totality of the evidence, the Claimant's description of neck symptoms and headaches appears to be an after-thought in anticipation of furthering his claim for a conversion. The DIME opinion of Dr. Moses, which is credible, persuasive, and has a presumptive effect does not include any complaints of headaches or limited neck movement. Furthermore, DIME Dr. Moses' opinions explicitly do not support a situs of functional impairment beyond the right upper extremity.

13. Between the conflicting opinions of Dr. Moses and Dr. Smith, the ALJ makes a rational choice, based on substantial evidence, to accept the opinion of Dr. Moses and reject any opinions to the contrary.

14. Accepting the four corners of Dr. Moses' opinions in the DIME Report, especially his opinion that a whole person rating is **not more appropriate** than an extremity rating, plus the finding herein above that Dr. Moses's opinion does not support a plausible inference that the situs of the functional impairment transcends the RUE, the ALJ finds that it is more likely than not that the situs of the Claimant's functional

impairment is in his right upper extremity. Therefore, the Claimant has failed to prove, by a preponderance of the evidence that a conversion to a whole person rating is warranted.

15. The Respondents failed to provide any evidence beyond the conclusory calculations in the FAL to support their overpayment claim.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony concerning problems of headaches and limited neck motion is inconsistent with the aggregate medical records. There is no convincing support for pain and problems going into the Claimant's neck or persistent headaches until much later when the pendency of his adjudication became imminent. Consequently, the ALJ does

not find the Claimant's testimony in this regard credible. Further, the ALJ infers and finds, the DIME opinion of Dr. Moses, which is credible and persuasive, does not support a situs of functional impairment beyond the RUE. As found, the opinions of DIME Dr. Moses are more thorough, based on more of an in-depth analysis, and more convincing and credible than the opinions of Claimant's IME Dr. Smith..

Substantial Evidence

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

Conversion from Extremity to Whole Person Rating

c. It is well-established law that the question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107 (2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107 (8) (c), C.R.S. is one of fact for determination by the ALJ. *Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000). In resolving this question, the ALJ must determine the site of a claimant's "functional impairment." *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). For a conversion, with a "preponderance" standard of proof, the party seeking it must accept the four corners of the DIME'S opinion letter, whereby it is clear that the seeker of the conversion is not challenging the DIME's opinions with respect to related medical conditions. As found, accepting the four corners of DIME Dr. Moses's opinions, especially because he does **not** render an opinion that a whole person rating is more appropriate than his extremity rating, plus the finding herein above that Dr. Moses's opinions do not support a plausible inference that the situs of functional impairment transcends the upper extremity, the ALJ finds that it is more likely than not that the situs of the Claimant's functional impairment is in the right upper

extremity. Therefore, the Claimant has failed to prove, by a preponderance of the evidence that a conversion to a whole person rating is warranted.

Overpayment

d. Recovery of overpayments, based on mistake and on a retroactive basis, was prohibited by *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). In 1997, the General Assembly amended the re-opening statute to include overpayments as a ground for re-opening as to overpayments only. § 8-43-303 (1) and (2) (a), C.R.S. Now, employers have a statutory right to review and recalculate payments if an insurance carrier made a mistake in previous payments. *Simpson v. Indus. Claim Appeals Office,* 2009 Colo. App. LEXIS 576 (No. 07CA1581, April 16, 2009) (NSOP). Previously, an admission of liability could only be withdrawn retroactively on the basis of fraud. *Vargo v. Indus. Comm'n,* 626 P.2d 1164 (Colo. App. 1981). To the extent that a case may be re-opened, based on mistake and not fraud, if there were overpayments, the *Vargo* grounds for retroactively modifying a previously admitted award have been altered to include employer mistakes in **calculations**. As found, the Respondents failed to provide any persuasive evidence to support the overpayment claim beyond the conclusory FAL calculations. Therefore, the Respondents failed to prove their overpayment claim.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain his burden with respect to a conversion of the DIMJE's extremity rating to a whole person rating. Also, as found, the Respondents have failed to sustain their burden with respect to an overpayment.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for a conversion from the right upper extremity scheduled rating to a whole person rating are hereby denied and dismissed.

B. The latest, amended Final Admission of Liability, dated October 6, 2017, is hereby approved and adopted as if fully restated herein.

C. Any and all claims for overpayment of benefits are hereby denied and dismissed.

DATED this_____day of March 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2018, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he is entitled to ongoing medical care for gout and the proposed surgery by Dr. Young?

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical mileage concerning treatment received for the disputed care?

3. Whether Claimant was disabled from his usual employment by his work injury and therefore entitled to temporary total disability benefits (TTD)?

4. Whether Claimant established entitlement to penalties under Section 8-43-304, C.R.S.?

PROCEDURAL MATTERS

1. On September 28, 2017, at the parties' request, the Court left the record open to allow the parties to verify mileage and other dates of service paid by Respondents. See Respondents' exhibit I, attached ledger for dates of services paid to physicians, pharmacies and medical mileage for the dates at issue. Claimant has no objection to Exhibit I being made part of the record.

FINDINGS OF FACT

1. On May 8, 2002, Claimant was injured in the course and scope of his employment for Employer. He was shoveling an entrenchment and struck a rock injuring his right hand. Claimant noticed symptoms and was sent for medical treatment. Claimant was diagnosed with Carpal Tunnel Syndrome (CTS). Claimant was taken off work. Claimant continued to seek care. Claimant had several non-claim related health issues which began complicating matters. Claimant contracted an infection. This delayed recovery also led to additional procedures. Claimant had several surgeries to his wrist and finger, as well as surgeries to remove the infections.

2. In 2004, Claimant saw Dr. Henry Roth for a maximum medical improvement (MMI) determination. Dr. Roth diagnosed Claimant with CTS and trigger finger. Dr. Roth also addressed the infections and a gout issue. It was Dr. Roth's opinion that Claimant was at MMI. He noted that Claimant had ongoing issues, and assigned an impairment rating of 4% whole person. Dr. Roth opined that Claimant did not require work restrictions even though he would have ongoing issues with the injury, particularly with his finger. Dr. Roth also opined that the infections were not related to the industrial injury.

3. On June 14, 2004, Claimant underwent a DIME with Dr. Jonathon Woodcock. Dr. Woodcock agreed with the date of MMI, February 23, 2004, and

diagnoses. He noted that Claimant was having issues with the right ring finger. Dr. Woodcock assigned an impairment rating of 21% upper extremity. Dr. Woodcock noted that the right ring finger still presented issues, but agreed that there were no work restrictions. After several months of continuing care, Respondents re-opened the claim. Claimant received TTD during a surgery in January 2005. Claimant was given a release to full duty by his authorized treating physician (ATP), Dr. Hanson, on March 10, 2005. Dr. Hanson noted that Claimant was approaching MMI.

4. Claimant's case was also reviewed by Dr. Carlton Clinkscales a hand specialist. Dr. Clinkscales noted that it appeared Claimant's infection issues had resolved. Dr. Clinkscales opined that Claimant appeared to have undergone a successful biopsy. He also opined that Claimant was approaching MMI. Thereafter, Claimant worked for Gart Sports for approximately one year.

5. Claimant relocated to Nevada and has worked for various family businesses over the last several years performing a variety of duties. Claimant was seen by two different hand specialists in Nevada. Claimant did not follow-up further. Neither physician restricted Claimant from working. They noted that this was a complex case, but there was little to do in the way of treatment options.

6. Claimant was seen by Dr. Sean Griggs, a hand specialist, for an MMI determination. Dr. Griggs concurred in the diagnosis of CTS and right trigger finger from the industrial injury. He assigned a rating of 27% upper extremity. On December 28, 2011, the final admission of liability was filed. Claimant did not object to the final admission of liability.

7. Claimant continued to receive periodic care in Las Vegas, NV. Claimant worked for his family's business in a variety of positions. Claimant eventually came under the care of Dr. Colby Young in Nevada and total fusion surgery of the right wrist was performed in November of 2014. In 2015, it was noted that Claimant was doing well. On February 2, 2016, Claimant returned to Dr. Young because Claimant's pain persisted and the fusion of the right finger was discussed. Authorization for ring finger tenolyisis and capsulotomy was requested. Insurer had the request reviewed by Dr. Jonathon Sollender. Dr. Sollender reviewed Claimant's medical records. He opined that the surgery was not reasonable, necessary and related to the industrial injury. He further opined that anything after the 2014 fusion was not related to the original industrial injury because of the length of time that had passed since the original injury and past failed operations. He opined that additional surgery would was not appropriate.

8. There was additional care rendered in 2017, and also care was requested for Claimant's gout. Dr. Sollender again reviewed the records and noted that the initial gout treatment in 2005 was due to a reaction from prescribed medications. He noted that after 2006 there was not much concern about

gout in the medical records and that Claimant stopped taking anti-gout medications at that time. Dr. Sollender opined that Claimant's gout at this point was no longer related to the industrial injury but any regression was due to Claimant's metabolic state. He opined that Claimant's current request for repeat surgery was not reasonable and necessary. Insurer timely issued WCRP rule 16 letters in association with these requests.

CONCLUSIONS OF LAW

General Legal Principles

The purpose of the "Workers' Compensation Act of Colorado" (Act), Sections 8-40-101, *et seq*, (2017), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

Claimant's claim for medical benefits

The right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection between the work injury and the need for medical treatment. *Ringsby Truck Lines, Inc. v. Industrial Commission,* 30 Colo. App. 224, 491 P.2d 106

(Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 124 Colo. 210, 236 P.2d 2993(1951).

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

In this claim, it is concluded that Claimant failed to prove that the requested surgery, gout treatment and related medical mileage is reasonable, necessary and related to the industrial injury. This is a May 8, 2002, date of injury and multiple procedures have been performed. Claimant stopped taking the anti-gout medications in 2006 when that issue resolved. His current provider wishes to do a repeat procedure after having fused Claimant's wrist in 2014. Dr. Sollender credibly opined that the requested treatment is not reasonable, necessary and related to the 2002 injury.

Claimant is requesting additional surgery and treatment for gout in his wrist. Dr. Sollender opined in 2016 that the currently requested procedures and the gout treatment are no longer related to the 2002 date of injury. He explained in his deposition the difficulties with the anatomical components of healing in the affected areas as well as the failures of previous procedures. As to the gout, he opined in his report, while the 2005/2006 treatment was related to the medications prescribed post-surgically, the current need for treatment is related to Claimant's personal metabolic issues and not the medications.

Regarding the surgery requests from Dr. Young, Dr. Sollender noted there has been a lengthy passage of time, subsequent employment and previously unsuccessful procedures. Claimant has extensive scar tissue in his right hand. However, as Dr. Sollender explained the possibility of a successful repeat procedure is very slim. As he noted, the prior TAPS, IMEs, and DIME opined that there was no need for repeat surgeries to Claimant's hand. Dr. Sollender explained that the immature and mature scar tissue in Claimant's hand presented difficulties for surgeons and that the repeat procedure at this point is no longer, reasonable, necessary, and related to cure and relieve the effects of the industrial injury.

It is for these reasons, and the evidence submitted, that it is concluded that Claimant's claim for medical benefits for Claimant's wrist, gout condition, and associated travel reimbursement are not reasonable, necessary and related the original injury.

Claimant's claim for TTD, temporary partial disability benefits (TPD) and permanent partial disability benefits (PPD).

Claimant has requested additional TPD, TTD, and PPD. These issues are closed by the operation of law based on the December 28, 2011, FAL. A claimant is entitled to TTD benefits if the injury caused a disability, the disability caused the claimant to leave work, and the claimant missed more than three regular working days. TTD benefits continue until the occurrence of one of the four terminating events specified in Section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

It is undisputed that Claimant was placed at MMI on September 29, 2011. No objection was filed and the issues were closed by operation of law. The claim is presently admitted for *Grover* medical benefits. Since the FAL was filed, a Petition to re-open has not been filed and there has not been an additional impairment rating. Thus, the Claimant's request for additional indemnity benefits is denied.

Claimant's claim for penalties

Claimant endorsed penalties as an issue for hearing on the Application for Hearing. However, the requested penalties were not specific as to the provision of the statute relied upon and the date or nature of the violation alleged. It is Respondents' position that they were not properly pled.

Section 8-43-304(1), C.R.S. allows a Judge to penalize a person who violates a rule, statute, or order in the amount of up to $1,000 per day. The imposition of penalties under 8-43-304(1) requires a two-step analysis. The ALJ must first determine whether the disputed conduct constituted a violation of a rule or order. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If the ALJ finds a violation, the ALJ must determine whether the employer's actions which resulted in the violation were objectively reasonable. See *City Market, Inc. v. Industrial Claim Appeals Office*, 68, P.3d 601 (Colo. App. 2003). The reasonableness of the employer's action depends on whether it is predicated in a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003).

Section 8-43-304(4), C.R.S. provides that if the alleged violator cures the alleged violation within twenty days of the date of mailing of an application for hearing for penalty, the party seeking a penalty must prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation.

In this case, Claimant did not specifically pled a penalty. Claimant's application for hearing and all subsequently filed pleading failed to specify a statute, rule or order allegedly violated. Since the Claimant's claim for penalties was not specifically pled, the claim must be denied.

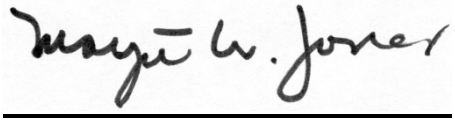
ORDER

1. Claimant's request for additional surgery, treatment for gout and associated mileage is denied.

2. Claimant's request for indemnity benefits is denied.

3. Claimant's request for penalties is denied.

Dated: March 14, 2018



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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-054-169-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 8, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 2/8/18, Courtroom 1, beginning at 1:30 PM and ending at 4:30 PM).

Claimant's Exhibits 1 through 12 were admitted into evidence, without objection. Respondent's Exhibits A through N, with the exception of Exhibit M (a recorded statement which was withdrawn) were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: The Claimant's opening brief was filed on February 16, 2018. Respondent's answer brief was filed on February 20, 2018. On February 22, 2018, Claimant advised that no reply brief would be filed. Therefore, the matter was deemed submitted for decision on February 22, 2018.

ISSUES

The issues to be determined by this decision concern compensability of a right knee injury of August 3, 2017; if compensable, medical benefits, average weekly wage

(AWW); and, temporary total disability (TTD) benefits from August 20, 2018 and continuing.

FINDINGS OF FACT

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

Stipulations and Findings

1. At the commencement of the hearing, the parties stipulated and the ALJ finds, in the event that the injury was compensable, the Claimant's AWW is $1,031.87.

2. Based on the stipulation, the ALJ finds that the Claimant is entitled to TTD benefits of $687.91 per week from August 24, 2017 through November 13, 2017.

3. Based on the stipulation, the ALJ further finds that the Respondent refused to tender medical care after August 22, 2017 and the right to select a medical provider passed to the Claimant who selected New West Physicians, also known as Denver West Family Practice and their subsequent referrals including, but not limited to, Panorama Orthopedics & Sports Center.

Preliminary Findings

4. The Claimant is 52 years old, having a date of birth of December 24, 1965.

5. Prior to August 3, 2017, the Claimant had no ongoing symptoms or functional limitation in her right knee. With the exception of two medical visits in 2009 (*See* Claimant's Exhibit 12), the Claimant had never been provided medical treatment for her right knee and had been an employee of the Employer since 2007, serving in the capacity of a Healthcare Services Technician I.

6. The Employer is a residential state agency caring for mentally disabled and functionally disabled individuals.

The injury Incident

7. On Thursday, August 3, 2017, the Claimant was loading disabled individuals onto a bus to take them to a pool for pool therapy in the course and scope of her as a Healthcare Services Technician I. After loading the disabled individuals, all of who were in wheelchairs and required having their wheelchairs locked down in the bus, the Claimant had the option of jumping over the three individuals in the back of the bus

to return to the driver's seat or stepping off the back of the bus to access the front where she would then drive the individuals to their pool therapy. Respondent disputes this version of events because the Claimant first reported that her right knee injury was caused by locking down patients wheelchairs in the bus. Later, the Claimant consistently reported that her injury occurred while jumping out of the back of the bus. Respondent argues that the Claimant did not mention jumping out of the back at first and, based on this, Respondent contends that the Claimant's is not credible concerning the mechanism of injury. The medical record reveals that the Claimant had a right knee injury as of the time she first sought medical treatment. Although it is the Claimant's burden of proof to establish a work-related right knee injury, Respondent offers no plausible, alternative theory of injury (this merely goes to the credibility of Respondent's defense).

8. The Claimant testified that after loading the bus to take the individuals to the pool, she felt that it was easier to exit the back of the bus rather than climb over the locked down wheelchairs. After the Claimant landed from jumping out of the back of the bus, she felt a pop in her right knee, but she was able to complete her work that day. She informed her supervisor, Brooke Renker, that she had experienced a twinge in her knee on August 3, 2017. Renker indicated that she did not receive notice of the Claimant's injury until two days later on August 5, 2017. Based on the totality of the evidence, the ALJ finds the Claimant's version of events credible.

9. On Friday, August 4, 2017, the Claimant called staffing coordinator, Melissa Yoder, and indicated that she had "hurt her right knee the day prior. Friday was the Claimant's day off and when she woke up her right knee was "swollen." The Claimant reported to work and filled out the Employee portion of the "Colorado Department of Human Services Injury/Exposure On The Job" form for Yoder (*See* Respondent's Exhibit I, Bate Stamp (BS) 59).

10. When the Claimant filled out the Employer's form, she described her injury as:

> While doing tie down my r[t] knee started to hurt and felt tight when I stood up it popped. Was a little uncomfortable rest of the day, but when I woke up this morning it was swollen.

Id.

The ALJ infers and finds that the Claimant did not mention 'jumping off the back of the bus" because she was afraid that she may have violated a safety procedure, however, unknown to the Claimant this is irrelevant to "compensability." Respondent did not designate "safety violation" as an issue for hearing.

11. Staffing coordinator Yoder indicated that the report was accepted at 3:18 PM and the parties agreed that the Claimant could go to Lutheran Medical Center,

which was a designated medical provider for medical issues on the weekends for injuries arising from an on-the-job injury when medical treatment was required.

12. On August 5, 2017, Supervisor Renker agreed that the Claimant provided her with notification of the August 3, 2017 injury at approximately 12:38 PM, but disagreed that the Claimant has previously told her that her right knee was tight on Thursday, August 3, 2017. Supervisor Renker played the message Claimant left for her on her cell phone at hearing.

Medical

13. On Saturday, August 5, 2017, at approximately 10:22 AM, the Claimant reported to Lutheran Medical Center Emergency Room (ER) with a chief complaint of a right knee injury and gave a history as follows:

> [Claimant] is a 51yr female who presents complaining of right knee pain. She is a bus driver and is in and out of the bus multiple times during the day. **She states she has to jump down.** Pain began on Thursday when she was in out of the bus several times. Her knee swelled up. She made an incident report on Friday and presents here today because of persistent pain in her knee. The swelling has gone down somewhat. She's had no fall. She is ambulating with difficulty. **She's had no trauma other than jumping out of the driver side of the bus.** She denied other complaint (emphasis supplied).

(*See* Claimant's Exhibit 5, BS 13)

The ALJ finds the almost contemporaneous history the Claimant gave to the Lutheran Medical Center ER more reliable and credible than the testimony of Yoder and Renker, who denied that the Claimant told them that the Claimant was injured jumping out of the back of a bus. The Claimant's history, given to the ER, is more consistent with the actual right knee injury observed by the ER.

14. At the evaluation at Lutheran Medical Center ER, the Claimant presented with "pain and tenderness in her right knee" (*See* Claimant's Exhibit 5, BS 14) and Michael John Stackpool, M.D., instructed the her as follows: "I don't think it is reasonable to have her drive while she is wearing a splint for the next couple of days" (*See* Claimant's Exhibit 5, BS 14) and Claimant was assigned work restrictions of "no work until August 12, 2017" (*See* Claimant's Exhibit 5, BS 18).

15. Following her ER visit, the Claimant contacted residential coordinator Brooke Renker and left a voicemail message consistent with Renker's written report which set forth as follows:

> [Claimant] called and left a message on 8/5/17 and stated she will be off for the next week per Dr.'s order. She then stated on 8/3/201 that she **jumped out the back of the bus** the next day she said her knee felt tight. She went to the Dr. and she said that the Dr. said she sprained the back of her knee.

See Respondent's Exhibit I, BS 60 (emphasis added).

16. In fact, at hearing, Residential Coordinator Renker played the voice message, and indicated that it had been received on her cell phone on August 5, 2017 at 12:38 PM.

17. On Monday, August 7, 2017, the Claimant was directed to the Employer's designated medical provider, Front Range Occupational Medicine, where she filled out a new patient information sheet, indicating that she had injured her right knee jumping/climbing out of bus (*See* Claimant's Exhibit 6, BS 19).

18. At the first evaluation, the Claimant was evaluated by authorized treating physician (ATP) Matt Miller, M.D., who took a history as follows:

> Says she has to climb up about **3 feet into the bus then jumps back down**. Kept working. Was off the next few days, but noticed swelling the next day. Saturday morning couldn't walk so she went to the ER. Had xrays and was given knee immobilizer and meloxicam. Then sent here for eval.
>
> * * *
>
> Assessment
>
> Initial Pain in Joint, Lower Keg, **acute**. No additional work-up required.
>
> **Given the information available today, from a causality standpoint, I feel this incident is work related. (>50%)** (emphasis supplied).

(*See* Claimant's Exhibit 6, BS 21-22)

19. The Claimant was assigned temporary work restrictions of 15 pounds, assigned a hinged knee brace and was instructed to take a break every one to two hours, which restrictions the Respondent accommodated.(*See* Claimant's Exhibit 6, BS 24.

20. On August 14, 2017, the Claimant was again evaluated by ATP Miller who noted that the initial chief complaint was:

> Patient was climbing in and out of the bus, felt increased tightness and a 'ping' in her right knee.
>
> * * *
>
> Work Status/Assessment
>
> Patient is to continue restriction(s): No kneeling or squatting, Weight lifting, pushing, pulling up to 15 pounds. Limit time on feet to 4 hours/day, no more than one hour at a time.

(*See* Claimant's Exhibit 6, BS 25)

21. The Claimant remained on temporary work restrictions, which the Employer accommodated (*See* Claimant's Exhibit 6, BS 27).

22. On August 18, 2017, the Respondent advised the Claimant that her claim was denied as follows:

> This is to inform you we have completed the investigation of your workers' compensation claim with a date of loss 8/3/2017. After a thorough investigation, we have determined we will be denying compensability for this claim. **Please be advised we are willing to pay for conservative treatment with your employer's authorized medical provider until 8/21/17. Any treatment after that date will be considered your responsibility** (emphasis supplied)**.**
>
> If you have any questions regarding this position on compensability, please feel free to contact me.

(*See* Claimant's Exhibit 6 6, BS 28).

Refusal to Treat for Non-Medical Reasons

23. On August 25, 2017, the Claimant reported to her private physician's office, New West Physicians, also known as Denver West Family Practice where the clinical indication was made of "medial right knee pain after jumping out of a box on 8/3/2017," and where she was evaluated by physician's assistant (PA) Rebecca Opaluch, who diagnosed a "right knee injury" and put in a request for an MRI (magnetic resonance imaging) of the right knee without contrast. (*See* Claimant's Exhibit 9 BS 36-37).

24. On August 30, 2017, the Claimant underwent an MRI of the right knee with a clinical indication that it was necessary because of "medial right knee pain after jumping out of a box [sic bus] on 8/3/2017" (*See* Claimant's Exhibit 7, BS 29) with the MRI results reflecting:

> Horizontal central and peripheral zone tear of the posterior horn of the medial meniscus.
>
> Small-volume joint effusion.

(*See* Claimant's Exhibit 7, BS 30).

25. On August 30, 2017, after receiving the MRI results at New West Physicians, PA Opaluch referred the Claimant to Panorama Orthopedics & Sports Center.

Authorized Treating Physicians by Default

26. On August 31, 2017, the Claimant notified the Respondent that care had been denied, that there had been a refusal to tender care, and that the Claimant was exercising her right to select a physician indicating:

> Claimant has selected Denver West Family Practice as her authorized treating provider. She is currently treating with a physician's assistant (PA) Rebecca Opaluch, and has been referred out to Panorama Orthopedics for a surgical evaluation. [Claimant's] MRI has come back reflecting a torn meniscus, which she did not have prior to the events of August 3, 2017. She will be requesting reimbursement of all co-pays in her case.

> A copy of the report from her first visit with Denver West Family is attached for your records. If [Claimant] is successful at hearing, this is the designated doctor.

(*See* Claimant's Exhibit 8, BS 32).

27. On September 7, 2017, the Claimant reported to Panorama Orthopedics & Sports Center for an evaluation with Charles Gottlob, M.D., of her right knee where a history of present illness was taken as follows:

> [Claimant] is a pleasant 51 year old female who presents to clinic today for evaluation of her right knee. She states that this injury happened at work but workers' comp denied the claim because they believe the injury happened at home. She has had no prior injury or surgery to this knee. **Her injury happened on 8/3/17 at work when she was jumping out of the back of a school bus.** She works as an aide for the mentally disabled. Her symptoms are dull and achy which is aggravated by walking, standing, driving, lifting, pushing, and pulling. She does notice swelling after too much activity. She is currently not working since she cannot return to work with light duty. She has been using sick leave for the time being.
>
> Assessment Plan
>
> Pain in right knee (M25.561)
>
> Tear of medial meniscus of right knee, current,
>
> Unspecific tear type, initial encounter
>
> (S83.241A)
>
> Right knee acute complex medial meniscus tear.

[Claimant] was injured at work 08/03/2017, for some reason they have denied her work comp claim, so she is running this through her commercial insurance. In any event, she presents with an MRI report from NewWest that shows a medical meniscus tear, no other significant surgical pathology. Her exam is consistent with

a medical meniscus tear as are her signs and symptoms clinically. Her mechanism of injury is also consistent with that pathology. At this point, I would recommend a right knee arthroscopic partial medial meniscectomy. Before we make that final decision **I do need to see the actual study and make sure that the radiology read is accurate in my opinion** (emphasis supplied)**.** She is going to collect her disc, drop it off, I will look at it, and then call her with the final decision.

(*See* Claimant's Exhibit 10, BS 50).

28. On September 20, 2017, the Claimant underwent surgery on her right knee with Dr. Gottlob, M.D., from Panorama Orthopedics & Sports Center (*See* Claimant's Exhibit 10, BS 56-58).

29. Following surgery, the Claimant underwent eight physical therapy visits as directed by PA Michael J. Trimble at Panorama Orthopedics & Sports Center (*See* Claimant's Exhibit 10, BS 59).

Independent Medical Examination by Timothy S. O'Brien, M.D.

30. Prior to hearing, the Respondent retained the services of Dr. O'Brien, who performed a Respondent-requested independent medical evaluation (RIME) on December 29, 2017 (*See* Claimant's Exhibit 11, BS 63-72). Dr. O'Brien testified at hearing consistent with his report and gave the opinion that it was more likely than not that the Claimant did not suffer an on-the job injury in light of her 1) inconsistent history; 2) physical examination and MRI findings; and, 3) her behavior following this injury, as opposed to the behavior following the two medical visits for the knee injury in 2009. The ALJ finds that Dr. O'Brien's opinions are inconsistent with the weight of medical opinion. The ALJ infers and finds that Dr. O'Brien's sketchy opinions selectively rely on a potpourri of factors, some not medical, *e.g.,* "behavior." Ultimately, the ALJ finds the opinions of Dr. Miller, Dr. Gottlob, the previous physicians' assistants, and the ER physicians more credible and persuasive than the opinions of Dr. O'Brien.

31. The Respondent's expert, Dr. O'Brien, testified that it was probable to tear a meniscus by jumping out of the back of a bus, but not probable to tear a meniscus arising from a squatting position after tying down a patient's wheelchair. Dr. O'Brien also testified that the surgery performed by ATP Gottlob was not reasonably necessary or causally related because the Claimant's injury would, more likely than not, have improved with the passage of time. The ALJ finds this opinion of Dr. O'Brien lacking in credibility because it is at odds with the totality of the medical evidence and it amounts to speculation.

32. In spite of Dr. O'Brien's testimony, in opposition to the medical records authored by Dr. Gottlob, Dr. O'Brien was of the opinion that ATP Miller was correct when he evaluated the Claimant at the first visit of August 7, 2017, as having suffered from an "acute" lower leg injury and that the restrictions assigned to the

Claimant, with the exception of a hinged knee brace, were appropriate. Dr. O'Brien agreed that the record was devoid of the Claimant receiving any medical care on her right knee except for the two visits in 2009 (*See* Claimant's Exhibit 12, BS 73-76). Dr. O'Brien also agreed that the Claimant was under no work restrictions prior to August 3, 2017, that jumping out of a bus could cause a meniscus tear, and that although he did not believe the surgery performed by ATP Dr. Gottlob was reasonably necessary or causally related, that "many orthopedic surgeons" are still performing the surgery which was performed by ATP Gottlob. Dr. O'Brien did not review the actual MRI film whereas ATP Gottlob did review the film. Based on the hypothetical, Dr. O"Brien conceded that mechanism of the Claimant's injury could have caused the Claimant's right knee condition.

33. Dr. O'Brien stated the opinion that it was too early to give an opinion on whether the surgery performed by Dr. Gottlob relieved the Claimant of the effects of her industrial injury, even though the Claimant reported pain complaints less than those she reported prior to injury. The ALJ infers and finds that this testimony is add odds with Dr. O'Brien's opinion that the surgery was not reasonably necessary. The ALJ further finds that this significantly detracts from Dr. O'Brien's overall credibility.

34. Prior to the hearing, ATP Gottlob was provided with the Respondent's expert, Dr. O'Brien's report and Dr. Gottlob drafted a succinct and concise response which set forth in pertinent part:

> [Claimant] is a patient who presented to me in the office on September 07, 2017 with a history of an injury at work while stepping off of the back of a school bus on August 03, 2017. She developed a new onset and medial knee pain. She had no prior history of knee issues. She presented with an MRI that showed a medial tear that correlated perfectly with her ongoing symptoms. Ultimately, I operated on her knee on September 20, 2017. I performed an arthroscopic partial medial meniscectomy, chondroplasty and synovectomy. She did well postoperatively. Our last visit was on October 19, 2017.
>
> It has come to my attention that my treatment has been called into question. Specifically, Dr. Timothy S. O'Brien, has suggested that surgery was unnecessary, her meniscal tear was chronic and related among other things to her weight. Of note, the patient's BMI is 26. **I strongly object to Dr. O'Brien's opinion. I think it is completely ill found and frankly offensive** (emphasis supplied)**.** [Claimant] was found to have an **unstable complex oblique tear of the posterior third of her medial meniscus, unstable to**

> **probing at the time of surgery. It was not a macerated horizontal cleavage type tear that is degenerative** (emphasis supplied)**.** I am actually not sure how he (Dr. O'Brien) even came to that conclusion. The rest of her knee looked excellent except for a very small area of degenerative arthritis along the far lateral aspect of the medial femoral condyle and some inflammation of her plica.
>
> Again, I resent and strongly disagree with Dr. O'Brien's opinion. I have the opportunity to see many degenerative meniscal tears in my practice and done so for the last twenty-two years. There was nothing degenerative about this tear.

(*See* Claimant's Exhibit 10, BS 61-62).

Ultimate Findings

35. The ALJ finds that the opinions of ATPs Dr. Miller, Dr.Gottlob and PA Opaluch, are more persuasive and credible than the opinion of the Respondent's expert, Dr. O'Brien because the former's opinions are based on a more thorough analysis of the Claimant's medical situation and because the Respondent's expert Dr. O'Brien gives the opinion that the temporary work restrictions assigned by ATP Miller are appropriate even though the Claimant had no work restrictions prior to August 7, 2017. ATPs Dr. Miller and Dr. Gottlob connect the mechanics of the Claimant's injury to the objective medical evidence of a meniscus tear and, thus, their opinions outweigh the opinion of Respondent's expert, Dr. O'Brien. Additionally, the Respondent's expert, Dr. O'Brien did not have the MRI film to read, which ATP Gottlob had and read. The mechanics of injury and the appropriateness thereof is a critical ingredient of the above injury. ATPs Dr. Miller and Dr. Gottlob were of the opinion that the Claimant's mechanism of injury was consistent with the actual medical condition of the injury.

36. The Respondent's IME, Dr. O'Brien, admits the probability that jumping off the back of a bus could cause a meniscus tear. In the final analysis, however, Dr. O'Brien's opinion is that because the Claimant is an "unreliable historian and that an onset of pain was the manifestation of her personal health," (*See* Claimant's Exhibit11, BS 69) her condition was not work related. The ALJ infers and finds, under the circumstances, that Dr. O"Brien has "pushed the envelope" too far to opine on non-work-relatedness. In light of the ER records, in addition to the causality findings of ATPs Dr. Miller and Dr. Gottlob, when viewed on the basis of the request for the MRI, the ALJ does not find Dr. O'Brien's opinion credible or persuasive.

37. The AJL makes a rational choice between two conflicting sets of opinions, based on substantial evidence, and accepts the opinions of ATPs Dr. Miller and Dr. Gottlob and rejects the opinion of Dr. O'Brien, in so far as it is inconsistent with the opinions of the ATPs. The ALJ finds that the Claimant's testimony is consistent with the medical records and is credible.

38. The Claimant has proven that it is more likely than not that she suffered an on-the-job occupational injury, which aggravated, accelerated or, combined with a preexisting disease or infirmity, to produce the need for treatment on her right knee and the treatment is a compensable consequence of the industrial injury. The ALJ further finds that it is reasonably probable and more likely than not that the testimony of the Claimant, ATP records authored by ATPs Dr. Miller and Dr. Gottlob show that the Claimant suffered a compensable occupation injury to her right knee jumping out the back of the bus after loading it with disabled individuals in the course and scope of her employment as a Healthcare Technician I.

39. All medical care rendered by the Claimant's ATP Matt Miller, M.D., at Front Range Occupational Medicine, from August 7, 2017 until care was denied for non-medical reasons on August 21, 2017, was reasonably necessary and causally related to the Claimant's right knee injury of August 3, 2017, and the medical care and treatment was and is authorized and within the chain of authorized referrals..

40. Because the Respondent refused to tender medical care after August 21, 2017 for non-medical reasons after August 21, 2017, the right to select a physician passed to the Claimant who selected PA Rebecca Opaluch, who referred the Claimant for an MRI at Denver West Family Practice and, thereafter, who referred the Claimant to Charles Gottlob, M.D., at Panorama Orthopedic & Sports Clinic. Therefore, all physcians and physician's assistants, after August 21, 2017 became the Claimant's authorized medical providers; and. the referrals within the chain of necessary medical treatment, after August 25, 2017 for the right knee are reasonably necessary, causally related and authorized.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the opinions of ATPs Dr. Miller, Dr.Gottlob and PA Opaluch, are more persuasive and credible than the opinion of the Respondent's expert, Dr. O'Brien because the former's opinions are based on a more thorough analysis of the Claimant's medical situation and because the Respondent's expert Dr. O'Brien gives the opinion that the temporary work restrictions assigned by ATP Miller are appropriate even though the Claimant had no work restrictions prior to August 7, 2017. ATPs Dr. Miller and Dr. Gottlob connect the mechanics of the Claimant's injury to the objective medical evidence of a meniscus tear and, thus, their

opinions outweigh the opinion of Respondent's expert, Dr. O'Brien. Additionally, the Respondent's expert, Dr. O'Brien, did not have the MRI film to read, which ATP Gottlob had and read. The mechanics of injury and the appropriateness thereof is a critical ingredient of the above injury. ATPs Dr. Miller and Dr. Gottlob were of the opinion that the Claimant's mechanism of injury was consistent with the actual medical condition of the injury.

b. Seriously undercutting Dr. O'Brien's ultimate opinion of non-work relatedness, as found, is that Dr. O'Brien admitted the probability that jumping off the back of a bus could cause a meniscus tear. In the final analysis, however, Dr. O'Brien's opinion is that because the Claimant is an "unreliable historian and that an onset of pain was the manifestation of her personal health," (*See* Claimant's Exhibit11, BS 69) her condition was not work related. Aw found, Dr. O"Brien "pushed the envelope" too far to opine on non-work-relatedness. In light of the ER records, in addition to the causality findings of ATPs Dr. Miller and Dr. Gottlob, when viewed on the basis of the request for the MRI, the ALJ found that Dr. O'Brien's opinion was not credible or persuasive.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the AJL made a rational choice between two conflicting sets of opinions, based on substantial evidence, and accepted the opinions of ATPs Dr. Miller and Dr. Gottlob and rejected the opinion of Dr. O'Brien, in so far as it was inconsistent with the opinions of the ATPs. The ALJ found that the Claimant's testimony was consistent with the medical records and is credible.

d. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a

claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals* Office, 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals* Office, 942 P.2d 1337 (Colo. App. 1997). *Also see §* 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225334 (ICAO, April 7, 1998). As found, the incident of August 3, 2017, aggravated and accelerated the Claimant's underlying asymptomatic right knee condition. Therefore, she sustained a compensable injury on August 3, 2017.

Medical Care and Treatment

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational injury. *Dependable Cleaners v. Vasquez,* 883 P.2d 583 (Colo. App. 1994). The Claimant's medical treatment is causally related to the right shoulder injury. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational injury. § 8-42-101(1) (a), C.R.S; *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P.2d 864 (1935); *Sims v. Indus. Claim Appeals* Office, 797 P.2d 777 (Colo. App. 1990). As found, all of the Claimant's treatment at Front Range Occupational Medicine and the Claimant's subsequent treatment at New West Physicians, also known as Denver West Family Practice, and their referral to Panorama Orthopedic & Sports Center, including the surgery performed by ATP Dr. Gottlob was reasonably necessary to cure and relieve the effects of the August 3, 2017 compensable injury and causally related thereto.

Respondent's Refusal to Treat for Non-Medical Reasons and Claimant's Right of Selection

f. Respondent is liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S.; *Snyder v. Indus. Claim Appeals* Office, 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-405 (a), C.R.S., respondents in the "first instance" have the authority to select the treating provider for a claimant. When the employer fails to provide a physician "in the first instance" the right of selection passes to the claimant. See *Rogers v. Indus. Claim Appeals* Office, 746 P.2d 565 (Colo. App. 1987) (employer must tender medical treatment "forthwith" on notice of an injury or the right of first selection passes to the claimant). Once the right of selection has passed to the claimant it cannot be recaptured by a respondent. *Id.*

g. Where a treating physician refuses to render care to a claimant the right of selection passes to the claimant. *See Rogers v. Indus. Claim Appeals Office, supra.* Here, the evidence establishes that the ATPs refused medical care for non-medical reasons. This triggered the Claimant's right to select his physician. See *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1249 (Colo. App. 1988). In the present case, the refusal to treat was not based on a company doctor's "medical judgment" concerning the Claimant's need for treatment, but rather on the Respondents' selected medical evaluator's opinion concerning legal issues of causality and compensability. Under the circumstances, it was a refusal to provide medical care when the Respondent related the Claimant's right knee problems to a pre-existing disease for legal, not medical, reasons. As a result of the foregoing, the right to select a physician passed to the Claimant who selected New West Physicians. Therefore, new West and all of its referrals were authorized.

h. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all referrals after the Claimant's first selection upon the former ATP's refusal to treat for non-medical reasons were within the chain of authorized referrals.

Burden of Proof

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

ORDER

A. The Claimant sustained a compensable injury to her right shoulder on August 3, 2017.

B. Respondent shall pay all of the Claimant's authorized, reasonably necessary and causally related medical costs, including those after the Claimant's self-selection of providers upon refusal of providers to treat for non-medical reasons, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Pursuant to the stipulations and findings thereon, Claimant's average weekly wage is $1,031.87, which yields a temporary total disability benefit rate of $687.90 per week, or $98.27 per day;; and, she was temporarily and totally disabled (TTD) from August 24, 2017 through November 13, 2017, both dates inclusive, a total of 82 days. Therefore, Respondent shall pay the Claimant temporary total disability benefits of $687.90 per week from August 24, 2017, through November 13, 2017, both dates inclusive, a total of 82 days, in the aggregate amount of $8,058.14, which is payable retroactively sand forthwith.

D. Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

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

DATED this_____day of March 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2018, electronically in PDF format, addressed to:

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

_____
Court Clerk

WC.ord

ISSUES

I. What is the true opinion of Division Independent Medical Examination (DIME) physician, Dr. Robert Kawasaki regarding maximum medical improvement (MMI) and Claimant's permanent impairment?

II. If Dr. Kawasaki's true opinion is that Claimant is at MMI as of July 14, 2015, did Claimant overcome the DIME opinion by clear and convincing evidence?

III. If Dr. Kawasaki's true opinion is that Claimant is not at MMI, did Respondents overcome the DIME opinion by clear and convincing evidence?

IV. Whether Respondents overcame the opinion of the authorized treating physician, Dr. Hughes, on the matter of a permanent impairment rating by a preponderance of the evidence.

PRELIMINARY MATTERS

I. Respondents filed a Motion for Sanctions Violation of Discovery Orders pursuant to C.R.S. §8-43-207(1)(e), C.R.C.P. Rule 37(b)(2)(A)-(E) and Rule 9-1 of the Workers' Compensation Rules of Procedure. Respondents requested reimbursement of expenses for Claimant's failure to comply with an order compelling the Claimant's appearance and cooperation at a medical examination with Dr. Cebrian, reasonable attorney fees in the preparation of the Motion for Sanctions, and that the Claimant be precluded from presenting fact and expert witnesses and exhibits to support her claims or defenses in this matter. The ALJ denied the request for reimbursement and attorney fees but ordered that the Claimant could not present fact or expert witnesses except for the Claimant's own testimony and with respect to the tendered exhibits, ruled as follows:

(a) The Claimant's "Voluntary Abandonment" form with 10-page statement was not admitted per the Motion for Sanctions and also on the grounds that much of the document contained inadmissible hearsay;

(b) Documents from Dr. Sanders, including an impairment rating, an evaluation from the day prior to the hearing and all other documents prepared and/or organized by Dr. Sanders were not admitted per the Motion for Sanctions;

(c) The medical record of Dr. Hughes dated September 14, 2016 was admitted as part of the Respondents' Exhibit packet at exhibit LL;

(d) The recordings of Dr. Hughes were not admitted per the Motion for Sanctions, because the evidence exchange was not timely and a lack of relevance;

(e) The July 14, 2015 medical record of Dr. Hughes was admitted as part of the Respondents' Exhibit packet at exhibit EE.

II. The ALJ also admitted Respondents' Prehearing Brief RE: Issues and Burden of Proof for consideration in this case.

III. On May 31, 2017, Claimant submitted a post-hearing position statement in which Claimant registered numerous objections to questions and responses contained in deposition testimony of Dr. Robert Kawasaki taken on March 28, 2017. The transcript of the deposition was admitted into evidence at hearing over the general objection of Claimant. Claimant's position statement further contained references and discussion of matters not in evidence. Claimant also submitted additional documents with the position for the consideration of the ALJ. On June 8, 2017, Respondents submitted a Motion to Strike Portions of Claimant's Position Statement and the Submission of Additional Evidence after the Hearing. At hearing, the ALJ explained to Claimant that, by electing to proceed pro se, she would be bound by the same rules of procedure and evidence as attorneys. The ALJ ruled on the documentary evidence Claimant offered at hearing as detailed above, and Claimant elected to not testify at hearing. At hearing, the ALJ explained that no new evidence would be permitted in the position statements from either party. Claimant's offer of new evidence and testimony in her position statement is in contravention of the ALJ's rulings and instructions at hearing and allowing such evidence would cause unfair prejudice to Respondents. Further, while Claimant did not attend the deposition of Dr. Kawasaki, her attorney at the time attended on her behalf and voiced objections during the course of the deposition and no other objections were registered as to the questioning or responses of Dr. Kawasaki.

Accordingly, Respondents' Motion to Strike is GRANTED. The ALJ strikes and disregards Claimant's untimely objections to questions and responses in the deposition testimony of Dr. Kawasaki on March 28, 2017, as well as any and all post-hearing submissions and references to matters not in evidence.

FINDINGS OF FACT

1. Claimant sustained an admitted work injury to her left upper extremity on December 28, 2014.

2. Prior to the work injury, Claimant sustained non-work related injuries to her cervical spine, left upper extremity and other body parts.

3. Claimant experienced a non-work related motor vehicle accident (MVA) on March 27, 2009. Claimant treated with Dr. Paul Leo and Dr. Joseph Ramos through 2010 for injuries related to the March 27, 2009 MVA. Claimant was diagnosed with cervical facet arthropathy, cervical segmental dysfunction, cervical myospasm,

deconditioning, and cervicogenic headache. As of an October 7, 2010 office visit with Dr. Ramos, Claimant was reporting neck pain of 7-8/10 intensity and shoulder pain of 7/10 intensity.

4. Claimant was involved in a second non-work related MVA on July 15, 2014. Claimant saw PA-C Renae Tabin at OnPoint Urgent Care - Aurora on July 30, 2014, reporting hand pain, neck pain and headache. PA-C Tabin noted that Claimant was "struggling with upper back (left sided) and left upper arm 'hot pain,' creaking and crackling in the neck with ROM, headaches occasionally left sided."

5. On August 20, 2014, Claimant began treating with Dr. Gin-Ming Hsu for injuries related to the July 15, 2014 MVA. Dr. Hsu noted Claimant "has a pertinent history of diabetes with diabetic neuropathy." Claimant reported pain localized to the left side of her neck, with radiation to the left shoulder/arm. Claimant rated the pain at a 7/10 at its worst. Dr. Hsu noted Claimant "characterizes it as stabbing, tingling and aching." Dr. Hsu noted Claimant had full functional range of motion in the left upper extremity and that her strength was 5/5 in all major muscle groups. A Neer's test was positive for impingement. Dr. Hsu initially assessed Claimant as having injuries from the 7/15/14 MVA "consistent with whiplash injury. There is evidence of myofascial pain as well as occipital neuralgia. She is also complaining of shoulder pain, that upon exam, is consistent with bursitis." Dr. Hsu recommended conservative therapy to include physical therapy and injections and he also referred Claimant for an MRI of the cervical spine.

6. Dr. Hsu reevaluated Claimant on November 6, 2014. Claimant complained of left-sided neck pain with radiation to the left shoulder/arm. Claimant also complained of pain in her hand "that she describes as a locking sensation on the left side." On examination, palpation of the left upper extremity revealed subacromial tenderness but full functional range of motion. Hawkin's test was negative for impingement and Neer's test was positive for impingement. Strength was noted as 5/5 in all major muscle groups. Dr. Hsu performed trigger point injections in the greater occipital nerve under ultrasonic guidance. Dr. Hsu recommended a course of physical therapy following the injections. He noted that on later follow up, additional procedures are considered including left shoulder injections, left medial branch blocks and an MRI.

7. On November 7, 2014, Claimant saw neurologist Dr. Patricia Soffer. Claimant reported that she received facet blocks and cortisone injections for her neck pain, which Claimant reported were ineffective.

8. Dr. Hsu reevaluated Claimant on December 2, 2014. Claimant continued to report left-sided neck pain with radiation to the left shoulder/arm. Regarding the injection, Dr. Hsu noted, "She reports feeling relief after a week from injection, she reports since then she has had only two episodes of shooting pain into the head. She reports that these are overall successful, request to continue treatment with ONB." Claimant reported experiencing pain in her left had she described as a "locking sensation." Dr. Hsu noted full functional range of motion in the left upper extremity with 5/5 strength in all major muscle groups. Hawkin's test was negative for impingement

and Neer's test was positive for impingement. Dr. Hsu remarked, "Left AC Joint sprain noted on exam."

9. Claimant returned to Dr. Hsu on December 9, 2014 for a shoulder injection. Claimant continued to complain of pain in the hand described as a locking sensation on the left side. Dr. Hsu's findings for the left extremity were the same as his prior examination. Dr. Hsu noted that a course of physical therapy would follow the injection and that he was considering left medial branch blocks and an MRI for injuries related to the July 15, 2014 MVA.

10. On December 28, 2014, Claimant was treated by Dr. Duard (Pat) Spruce at OnPoint Urgent Care Aurora. Claimant reported she was experiencing left shoulder pain and left hand pain that started that day at work. She reported tingling and tenderness. On examination, Dr. Spruce noted Claimant "reacts to light touch but inconsistent." Dr. Spruce also documented, "ROM and motor strength exam also inconsistent with observed ROM and use of strength such as removing overcoat." Dr. Spruce further noted that there was no deformity, edema or ecchymosis on examination. Dr. Spruce assessed a strain/sprain to Claimant's shoulder/arm.

11. On December 29, 2014, Claimant went to NextCare Urgent Care and was treated by Dr. Mark Collins. Claimant complained of pain and tingling in her left hand and left shoulder pain with a severity level of 7. Claimant reported that the onset was one day ago at work. Claimant reported that "she was required to lift up to 40-5-pound masses of dough and reach into a machine requiring extreme hunching of her shoulders." On examination, Dr. Collins noted tenderness on palpation of her left shoulder and "severe pain with motion." Specifically regarding the left shoulder, Dr. Collins noted active and passive painful range of motion. Dr. Collins assessed a shoulder sprain and prescribed Skelaxin.

12. On January 7, 2015, Claimant returned to Dr. Hsu for a follow-up on the prior left AC injection. Claimant reported that the injection helped, but that her back pain started to return one week prior. Claimant reported that she was injured at work lifting 25 pounds of dough. Dr. Hsu noted, "[Claimant] reports new pain is different than pain before is tingling and sharp shooting pain (intermittent)." Claimant continued to complain of pain in her left hand. Claimant reported to Dr. Hsu that the pain was tingling and sharp and intermittent, with intermittent swelling in the left hand. On examination, Dr. Hsu noted Claimant's cervical range of motion was decreased secondary to pain. He also noted tenderness along the AC joint line, full functional range of motion of the left upper extremity, and 5/5 strength in all major muscle groups. Dr. Hsu recommended a repeat left AC joint injection, an MRI of the cervical spine, and physical therapy.

13. Dr. Hsu reevaluated Claimant on January 22, 2015. Claimant reported left-sided pain radiating to the left arm. Claimant reported experiencing temporary relief from the injection and that the arm pain returned. Claimant reported tingling and numbness in her hand and severe neck pain. Dr. Hsu noted that Claimant had been undergoing physical therapy with Julie Wallace. Dr. Hsu recommended another

cortisone injection in the left shoulder bursa, continued physical therapy and consideration of left medial branch blocks. Dr. Hsu noted, “Aware of PTs concern she may have thoracic outlet syndrome. I prefer to review MRI results before coming to that conclusion.”

14. On January 26, 2015, the Claimant returned to Dr. Hsu for the ultrasound guided left shoulder injection for the diagnosed left subacromial bursitis. Dr. Hsu reviewed a September 5, 2014 MRI and noted mild multilevel spondylosis at C3-C4, mild post disc bulging at C3-4, C4-5, and C6-7, mild facet arthropathy at C4-5, C5-6, C6-7, and moderate foraminal stenosis at C5-6.

15. Dr. John Hughes evaluated Claimant on February 3, 2015. Claimant complained of left arm pain at a 6/10 in severity. On examination, Dr. Hughes found Claimant’s strength was normal with active flexion measuring 90 degrees and active abduction measuring 70 degrees. Dr. Hughes diagnosed a left shoulder sprain, left TOS and disc displacement in the cervical spine. Dr. Hughes recommended an MRI of the left shoulder and left upper extremity neurodiagnostics. Dr. Hughes opined that “the cause of this problem appears to be, in part, related to work activities.”

16. Claimant returned to Dr. Hsu for a follow-up evaluation on February 24, 2015. Claimant reported experiencing intermittent neck pain, and that her left shoulder pain was about 80% better. On examination, Dr. Hsu noted tenderness along the AC joint line, full functional range of motion with no laxity or subluxation of any joints, and 5/5 strength in all muscle joints and normal overall tone. Hawkin’s test was negative for impingement and Neer’s test was positive for impingement. Dr. Hsu again noted Claimant’s concern regarding having TOS, and again stated that he preferred to review the MRI before coming to such conclusion. Dr. Hsu recommended that Claimant return to the physical therapist to obtain a home exercise program (HEP) for use at her gym.

17. Claimant underwent an MRI of the left shoulder without contrast on March 19, 2015. The radiologist, Dr. William Rhey Dunfee, compared the MRI images to December 17, 2008 X-ray images. Dr. Dunfee noted findings indicating an infraspinatus muscle strain and focal tendinosis versus partial rim-rent like tear (less than 50% thickness) of the supraspinatus tendon at the anterior distal insertion. Dr. Dunfee noted a more than slightly irregular signal within the superior labrum at the biceps anchor attachment which may represent of SLAP 1 type lesion. He further noted mild subacromial-subdeltoid bursitis and acromioclavicular joint arthritis.

18. On March 27, 2015, Claimant underwent a left upper extremity EMG. Dr. Erasmus Morfe assessed arm pain and radicular pain but opined that it was a “normal study.” Dr. Morfe remarked, “There is NO convincing electrophysiologic evidence for cervical radiculopathies or other compressive mononeuropathies. Overall no identifiable neurogenic changes.”

19. Dr. Hsu reevaluated Claimant on April 14, 2015. Claimant reported that, since her last visit, her neck pain was the same and her left shoulder pain had

worsened. Dr. Hsu noted that Claimant was discharged from physical therapy the previous week. Dr. Hsu noted the same examination findings from his previous examinations. Dr. Hsu administered a trigger point injection with ultrasound guidance. Dr. Hsu again noted Claimant's concern regarding having TOS, and again stated that he preferred to review the MRI before coming to such conclusion. Dr. Hsu recommend Claimant continue with physical therapy and receive additional trigger point injections.

20. Claimant returned to Dr. Hughes for a follow-up evaluation on May 7, 2015. Claimant reported that her symptoms had not changed over the past month and that she was experiencing left arm numbness. Claimant also reported that she had completed physical therapy with Ms. Wallace who told Claimant there was not much more she could do for her. On examination, Dr. Hughes noted,

> Left shoulder motion is guarded but smooth with active flexion and extension measured at 103 and 49 degrees, abduction and adduction 80 and 0 degrees, external and internal rotation 76 and 14 degrees. Sensation is intact to light touch. Strength testing is diffusely 'give-way' but hand intrinsic strength seems to be 5/5 and symmetrical.

Dr. Hughes assessed a work-related left shoulder sprain/strain with development of tendinosis versus a partial rim-rent-like tear of the supraspinatus tendon. Dr. Hughes noted that he received and reviewed additional medical records related to Claimant's 2009 and 2014 MVAs, including an MRI of her cervical spine from August 21, 2010 and records of Claimant's treatment with Dr. Hsu. Having reviewed those records, Dr. Hughes opined that Claimant's ongoing cervical spine problems do not stem from the work injury. He also noted that Claimant was assessed with left shoulder pathology prior to her work injury and had undergone ultrasound guided subacromial corticosteroid injections for this. Dr. Hughes opined that Claimant sustained a left shoulder injury superimposed on diabetic tendinopathy of her rotator cuff complex. He referred Claimant to Dr. John Reister for an orthopedic evaluation.

21. Claimant returned to Dr. Hsu for a follow-up evaluation on May 14, 2015. Claimant reported being very pleased after completing 12 weeks of physical therapy and that her left shoulder was about 80% better. Claimant reported that the trigger point injections she last received were very helpful. Dr. Hsu noted the same exam findings from his prior examinations. Dr. Hsu noted Claimant had "excellent results" with the trigger point injections and there was no need to repeat at that time. Dr. Hsu approved Claimant to be discharged, and documented that Claimant would be seeing an orthopedic physician to address her persistent left shoulder pain.

22. On July 14, 2015, Dr. Hughes reevaluated Claimant and placed Claimant at MMI. On examination, Dr. Hughes noted the following range of motion measurements of the left upper extremity: flexion at 120 degrees, extension at 49 degrees, abduction at 93 degrees, adduction at 22 degrees, external rotation at 88 degrees and internal rotation at 33 degrees. Dr. Hughes noted that other joint and sensorimotor examinations in her upper extremities were normal. Dr. Hughes assessed work-related left shoulder

sprain/strain with development of tendinosis versus a partial rim-rent-like tear of the supraspinatus tendon. Dr. Hughes also made the following non-work related assessments: past medical history of cervical spine injuries with MRI findings of multilevel degenerative changes with mild central canal stenosis, poorly controlled type 2 diabetes, hypertension, and probable left shoulder joint tendinopathy secondary to Claimant's type 2 diabetes. Dr. Hughes noted Claimant had related symptoms consistent with poorly controlled diabetes. Dr. Hughes remarked, "I feel her diabetes poses a relative contraindication to proceed with surgical treatment of her shoulder. For this reason, it is my opinion that she has reached maximum medical improvement." Dr. Hughes noted that Claimant had seen Dr. Reister and that Dr. Reister recommended a series of 12 physical therapy sessions which Dr. Hughes agreed Claimant could finish out under medical maintenance. Per the AMA Guides, Dr. Hughes assigned a 13% upper extremity impairment rating (8% whole person) based on his range of motion measurements.

23. On September 11, 2015, Respondents filed a Final Admission of Liability admitting a July 14, 2015 MMI date and a 13% impairment rating in accordance with Dr. Hughes' July 14, 2015 medical report.

24. On December 21, 2015, Dr. Tashof Bernton conducted an Independent Medical Examination (IME) of Claimant at the request of Respondents. Dr. Bernton performed a medical records review and physically examined Claimant. Claimant reported that she injured herself while lifting a piece of dough out of the extruder. Claimant reported that, subsequent to her July 14, 2015 evaluation with Dr. Hughes, she saw Dr. Sanders, who told Claimant she had two forms of TOS and recommended physical therapy and exercises. Claimant complained of neck pain, left-sided headaches, and pain in the left shoulder through her elbow and forearm. On examination, Claimant did not have pain on palpation of the left AC joint but had some tenderness in the left supraclavicular fossa. Range of motion measurements for the left shoulder were flexion at 129 degrees, extension at 51 degrees, external rotation at 87 degrees, internal rotation at 71 degrees, abduction at 136 degrees and adduction at 25 degrees. Dr. Bernton noted "no dermatomal numbness in the left arm, but some diffuse decreased sensation is noted and give-way weakness was present diffusely in the left shoulder."

25. Dr. Bernton noted that Claimant had chronic left neck and left shoulder complaints prior to the work injury, including stabbing, tingling, numbness and aching sensations. Dr. Bernton opined that Claimant sustained a work-related muscular strain which aggravated Claimant's shoulder tendinopathy.

26. Dr. Bernton remarked that Claimant's presentation was consistent with a "fairly pronounced functional overlay." Dr. Bernton further remarked, "In addition to the notation of inconsistent range of motion seen initially after the injury, the patient's complaints of pain and symptoms throughout the entire arm and the history of chronic pain also indicate a probable nonphysically-based contribution to the patient's symptomatology." Dr. Bernton agreed with Dr. Hughes assessment that Claimant was

at MMI for her work-related complaints, stating, "She does have left shoulder tendinopathy with a partial tear. As a diabetic with probable symptom magnification, surgical treatment of a partial tear of the shoulder, I would agree, is unlikely to produce functional improvement." Dr. Bernton opined that Claimant "may have" TOS as well, noting, "She does have some tenderness in the supraclavicular fossa and exacerbation of pain with abduction, external rotation, and opening and closing the fist." Dr. Bernton did not opine that the TOS was work-related. Dr. Bernton opined that the "work-related component of the patient's symptoms were, at most, a muscular strain which aggravated the patient's shoulder tendinopathy."

27. Dr. Bernton further opined that Claimant's impairment rating should be based upon range of motion deficits. Dr. Bernton found a 7% impairment of the upper extremity based on range of motion deficits. Dr. Bernton again noted that Claimant had shoulder pathology prior to the occupational injury, and apportioned 50% of the impairment to preexisting conditions. Dr. Bernton assigned a total impairment rating of the upper extremity of 3.5%, which he rounded to 4%.

28. Dr. Richard Sanders provided a record review report dated March 3, 2016. Dr. Sanders opined that Claimant's December 28, 2014 work injury aggravated Claimant's preexisting conditions from her July 15, 2014 MVA. Dr. Sanders noted that, based on a suggestion from the physical therapist, he also considered a diagnosis of TOS. Dr. Sanders noted that Dr. Bernton, in his IME, also suggested this diagnosis. Dr. Sanders noted that Dr. Hsu mentioned the TOS concerns of the physical therapist but did not make the diagnosis. Dr. Sanders then opined that, in reviewing records prior to December 28, 2014, no one mentions the appropriate symptoms for which to suspect TOS. As a result, he determined that based on the Claimant's reported mechanism of injury and what he finds to be the development of new symptoms of numbness and tingling in the hand and arm, he attributes the TOS to the work injury and noted Claimant was not at MMI for that work injury. He opined that if Claimant does not exhibit a pattern of improvement after three months of treatment for NTOS and NPMS, she may be a candidate for pectoralis minor tenotomy surgery.

29. On March 16, 2016, Dr. Hughes provided a case review at the request of Claimant. Dr. Hughes reviewed his previous medical notes and Dr. Sanders' March 3, 2016 report. Dr. Hughes disagreed with Dr. Sanders' conclusions, stating,

> [i]t is clear from medical record documentation from prior to December 28, 2014, that [the Claimant] had ongoing left-sided neck and shoulder problems leading to shoulder injections done prior to December 28, 2014. During the time I attended [Claimant]'s rehabilitative care, I pondered if she, indeed, sustained anything new as a result of her work-related injuries of December 28, 2014. However, in the absence of documentation by MRI scan of pathology involving the left shoulder, I ultimately attributed the left shoulder pathology to her work-related injury of December 28, 2014. The same is not true, in my opinion, regarding her ongoing and well-documented cervicothoracic and left upper extremity problems as

> discussed by Dr. Hsu in his follow up report of January 7, 2015. I do not feel that further evaluation and treatment proposed by Dr. Sanders in his report of March 3, 2016, is in any way related to the injuries she sustained at work on December 28, 2014.

30. On April 5, 2016, Dr. Bernton provided an updated medical record review and specifically addressed Dr. Sanders March 3, 2016 report. Dr. Bernton noted that Claimant's statements that pain, tingling and swelling in the left shoulder were not present after her July 15, 2014 MVA but were there after her December 28, 2014 work injury are inconsistent with the medical records. Dr. Bernton opined that Dr. Sanders' assessment that Claimant has TOS and that the work injury is the primary cause of Claimant's current disability was based on Claimant's subjective report to him on March 3, 2016. Dr. Bernton noted that "medical notes at the time reflect the most accurate documentation we have," and stated that it was unlikely Dr. Hsu simply made up complaints of stabbing, tingling, aching and radiation noted in his December 9, 2014 evaluation notes. Dr. Bernton also took issue with Dr. Sanders' failure to provide a placebo injection with his administration of a diagnostic pectoralis minor block, which caused him to question Dr. Sanders' conclusions regarding Claimant's response to that block. Dr. Bernton reiterated that the work-related component of Claimant's symptoms "were at most muscular strain which aggravated the patient's shoulder tendinopathy." Dr. Bernton stated, "To the extent the patient has thoracic outlet syndrome, the record does clearly reflect the presence of symptoms consistent with this prior to the occupational injury." Dr. Bernton again opined Claimant had reached MMI with a 7% upper extremity rating, apportioning 50% to preexisting conditions.

31. Dr. Robert Kawasaki performed a DIME examination of Claimant on April 15, 2016 and issued a report of the same date. Dr. Kawasaki performed a medical records review and physical examination. Claimant reported that she was "completely healed 'back to normal'" by the end of treatment following the 2009 MVA. Claimant reported she was feeling "fantastic" by early November 2014 and was only experiencing occasional pain in her neck and shoulder girdle after the July 2014 MVA. Claimant reported no numbness and tingling in her upper extremities as of her first day of work for Employer. Claimant reported that her injuries from the motor vehicle accident had mostly resolved by the start of her employment with Employer. Regarding the mechanism of injury, Claimant reported that she was injured at work while pulling dough out of an extruder machine. Claimant reported current symptoms of constant pain in her neck, left shoulder and pain shooting down her arm, with numbness and tingling in her left hand. Dr. Kawasaki noted that, while taking her history, Claimant complained of a hostile work environment and alleged sexual harassment.

32. On examination, Dr. Kawasaki noted "diffuse tenderness to palpation posterior cervical musculature." Dr. Kawasaki noted the Claimant was "diffusely tender" and she had the following left shoulder ROM measurements: flexion was 120 degrees, extension was 52 degrees, adduction was 35 degrees, abduction was 120 degrees, internal rotation was 70 degrees and external rotation was 90 degrees. Dr. Kawasaki further noted "giveway pattern weakness diffusely through the proximal upper extremity

and shoulder and shoulder girdle area."

33. Dr. Kawasaki noted that Claimant had a well-documented, long history of preexisting and non-work related chronic pain in the cervical spine and left shoulder, with reported stabbing, tingling, aching and radiation into the left shoulder/arm. Dr. Kawasaki referred to the MTG for TOS and noted, "Within medical probability, although the patient was not diagnosed prior to the work injury with thoracic outlet syndrome, retrospective review of the prior medical records show chronic signs and symptomatology consistent with long-standing thoracic outlet syndrome." Dr. Kawasaki opined that "The mechanism of injury reported on 12/28/14, within medical probability, was a shoulder strain with exacerbation of the pre-existing shoulder pathology and underlying thoracic outlet syndrome." Dr. Kawasaki noted that Claimant's symptoms were perpetuated by psychological, emotion and functional overlay.

34. Dr. Kawasaki further opined that Claimant had not reached MMI. Dr. Kawasaki recommended a psychologic evaluation, 6-12 biofeedback therapy sessions, and chiropractic treatment. Dr. Kawasaki opined that surgery was not indicated and that a repeat EMG test to confirm TOS could be considered reasonable, but was not necessary. Although Dr. Kawasaki did not place Claimant at MMI, he provided a provisional upper extremity impairment rating of 11% (7% whole person), which consisted of a 5% rating for range of motion deficits for the left shoulder and a 6% rating for TOS. Dr. Kawasaki remarked, "Although retrospectively, medical record review shows evidence of undiagnosed pre-existing thoracic outlet syndrome, there are no specific clinical findings documented by Dr. Hsu or other providers to provide basis for apportionment."

35. Claimant was involved in a third MVA on June 23, 2016. Claimant treated with Injury Solutions on July 7, 2016, August 4, 2016 and September 1, 2016 for injuries resulting from the June 23, 2016 MVA. On July 7, 2016, Dr. Kenneth Allan assessed possible closed head injury, anxiety/PTSD, cervicalgia, post-traumatic headache, cervical sprain/strain/myofascial spasm with pain, lumbosacral pain/strain/sprain, and thoracic pain.

36. After Dr. Kawasaki opined that Claimant was not at MMI, Claimant was returned to treatment with Dr. Hughes on September 14, 2016. Dr. Hughes noted that Claimant and her husband arrived for the appointment appearing "visibly angry." Dr. Hughes noted that he "did not proceed with any additional physical examination in light of this markedly hostile environment." Dr. Hughes noted that he had reviewed Dr. Kawasaki's DIME report and although he agreed with the recommendation for a pain psychology evaluation and other recommendations, Dr. Hughes continued to opine that the Claimant was at MMI and this treatment should be considered medical maintenance. Dr. Hughes noted that he discharged Claimant from his care into another authorized treating physician (ATP) as he "will not reevaluate [Claimant] without a court order to do so in the setting of mutual distrust."

37. Dr. Gary Gutterman conducted an outpatient psychiatric consultation of

Claimant on September 7, 2016 and issued a report dated September 26, 2016. Dr. Gutterman noted that he conducted a medical records review and met with Claimant for three hours. Dr. Gutterman opined that Claimant was at MMI from a psychiatric perspective relating to the work injury, stating:

> In summary, I do not believe the patient currently is experiencing any psychiatric or psychological disorder as it relates to her employment injury...The credibility of the patient's various complaints related to others needs to be carefully evaluated...There certainly was no indication of any need for psychopharmacologic or psychotherapeutic intervention as it would relate to her employment injury. In reference to six to 12 biofeedback sessions, if it is determined that the patient's TOS was exacerbated by the employment injury or if it is determined that the TOS arose as a result of the employment injury, six to 12 biofeedback sessions would be reasonable.

38. On September 19, 2016, Respondents designated Dr. Carlos Cebrian as Claimant's new ATP and scheduled an initial appointment for January 9, 2017, providing notice of the appointment to Claimant. On January 3, 2017, Claimant advised that she was unable to attend the appointment. Respondents rescheduled the initial evaluation appointment for Claimant on February 2, 2017 and then requested an order compelling Claimant to attend the appointment. PALJ Steninger noted that Claimant expressed "a willingness and intent to attend the 2/2/2017 appointment" and granted the motion to compel attendance at the appointment in his Prehearing Conference Order dated February 1, 2017.

39. Claimant saw Dr. Cebrian on February 2, 2017. Dr. Cebrian noted he explained to Claimant that he was to take over as Claimant's treating physician for her Workers' Compensation claim as Dr. Hughes previously declined to continue to treat her. Dr. Cebrian noted that he attempted to evaluate Claimant and to obtain a medical history from her and Claimant told him, "[w]e don't even know each other. You're not my doctor. You're not going to be my doctor." Dr. Cebrian noted that Claimant then stated that Dr. Cebrian seeing her was an "illegal IME" and what he was doing was "illegal." Dr. Cebrian noted that, based on Claimant's actions, he felt it would not be possible to establish a therapeutic doctor-patient relationship and ended the evaluation. Dr. Cebrian noted that he will no longer see Claimant.

40. Respondents subsequently sought another Prehearing Conference in this matter to compel Claimant to provide overdue responses to Interrogatories and Requests for Production and to permit the parties to conduct a deposition of the DIME physician Dr. Robert Kawasaki. PALJ Sandberg entered an order to compel discovery responses and he entered an order permitting the Respondents to take the deposition of Dr. Kawasaki.

41. The deposition of the DIME physician Dr. Kawasaki took place on March 28, 2017. Claimant's legal counsel at the time appeared at the deposition along with

Respondents' counsel.

42. Dr. Kawasaki testified that he agreed with Dr. Hughes' assessment that Claimant had a preexisting left shoulder condition prior to the December 28, 2014 injury and that Claimant's ongoing cervical spine problems are not related to the work injury. Dr. Kawasaki testified that it is medically probable that the pathology noted on the March 19, 2015 MRI was pre-existing. Dr. Kawasaki a opined that it is likely Claimant's shoulder tendinitis would have progressed whether or not she suffered a sprain or strain of her shoulder on December 28, 2014. Dr. Kawasaki testified that there was no problem with Dr. Hughes' methodology in converting range of motion measurements to an impairment rating.

43. Dr. Kawasaki testified that he changed his opinion and he stated his revised opinion as to both Claimant's MMI status and impairment rating. He referred to measurement of range of motion as an "objective measurement of subjective motion," that is, in part, based on a claimant's effort. After review of many of the medical records in this case, Dr. Kawasaki testified that, on multiple occasions, there were inconsistencies in Claimant's presentation and history, which eroded trust in Claimant. He opined that Claimant was not giving full effort during his DIME examination, and that her inconsistencies caused him to question even his own range of motion measurements. He testified both Dr. Hughes and Dr. Bernton used the correct methodology of converting the range of motion measurements to an impairment rating. He was unaware of how Dr. Bernton determined a 50% apportionment.

44. When questioned as to why he assigned a 6% rating for peripheral nervous system impairment, Dr. Kawasaki testified that at the point of the DIME report, he agreed with the diagnosis of TOS. Regarding Dr. Hughes February 3, 2015 medical record, Dr. Kawasaki acknowledged that, "there's nothing to indicate thoracic outlet syndrome in the note." Dr. Kawasaki testified that he revised his opinion and that, to the extent Claimant has TOS, it is preexisting and not related to the work injury. Dr. Kawasaki specifically testified:

Q: So if you were writing the DIME report today, would you find the symptomatology for the thoracic outlet syndrome related to the December 28, 2014 work injury?
A: No.
Q: Would you include that as a part of her impairment rating for the December 28, 2014 work injury?
A: No.
Q: All right. So what you have on Page 18 [of the DIME report], this 6 percent, you would no longer include that.
A: Correct.
Q: That would be zero percent?
A: Correct.

Dr. Kawasaki further testified about the TOS symptoms, treatment and the impairment rating as follows:

A: Right. So, again during my DIME, I did recommend some additional treatment for the thoracic outlet syndrome which I revised today. So with my understanding -- further understanding of the case today and reviewing the records as we have, I agree with Dr. Bernton at this point that the patient does not require further treatment.

Q: And in addition to not requiring further treatment for TOS, the rating for that condition should not be included in the overall impairment rating for [Claimant's] work related injury, correct?

A: That's correct.

45. Dr. Kawasaki testified that in his DIME report he recommended that the psychologic portion be addressed because of an overriding concern regarding potential delayed recovery and psychologic issues around the injury and alleged sexual harassment. When asked if he disputed Dr. Gutterman's conclusions regarding the lack of relatedness of any psychological or psychiatric issues to Claimant's work injury, Dr. Kawasaki testified:

A: …I know Dr. Gutterman, and he is somebody who has a good reputation. And I refer to Dr. Gutterman, as well, for my patients. And so I think that his summary can stand on its own. So I have no basis to agree or disagree. But these are -- but I did recommend in my IME that she have a psychologic evaluation. And Dr. Gutterman has evaluated the patient, and in his professional opinion, she does not need pharmacologic or psychotherapeutic interventions, he does not feel that the patient has a psychologic disorder relating to the employment, and indicates that the issues with regard to the sexual harassment do not need to be treated. I mean, I -- typically, if I'm looking at Dr. Gutterman's, that's what I do. I go to the summary because I always let Dr. Gutterman's assessment stand on its own.

Q: So do you accept Dr. Gutterman's conclusions on these issues?

A: I do.

Dr. Kawasaki further testified as follows:

Q: And the existence of outstanding psychological or psychiatric issues that you had expressed at the time of the DIME report, those are fully -- I guess those are covered with respect to your reliance on Dr. Gutterman's opinion in his September 26, 2016 report?

A: That's correct.

Q: All right. So does that change your opinion with respect to [the Claimant's] MMI status? At the time of the DIME report, you indicated she was not at MMI.

A: Yes, She is at maximum medical improvement at this point.

Q: All right. So if she is at MMI, do you agree that she was at MMI at the time that Dr. Hughes placed her there on July 14, 2015?

A: From a physical standpoint, I believe so. This is difficult. I mean, when I saw the patient for the DIME, the psychologic issue had not been addressed or looked at, as far as I know. And I think that was an important piece of the puzzle. So I believe that once the psychologic has been addressed, that's the point the patient reaches maximum medical improvement.

Q: Now, the psych was addressed on September 26, 2016, but in his report, he indicated that none of this was related to the employment injury. So if none of it was related -- I understand you wanted the need for this evaluation. But in the evaluation, Dr. Gutterman states none of it was related. So if none of it was related, doesn't that back date to when she was physically at MMI, if none of the psychological was ever found to be related to her employment injury, or for that matter, for her prior complaints of sexual harassment? He actually included that.

A: I'm going to think out loud for a second. Okay? So if -- say I had -- I did a DIME and had concern the patient had a knee pathology that might need to be treated, and I said the patient is not at maximum medical improvement and we need to work up the knee. And the knee MRI came back normal, and there's no indication for treatment for the knee. The MMI would be when the patient was at maximum medical improvement previously, not when the MRI is done proving that the patient did not need further treatment. So if the MRI had shown that the patient needed treatment for the knee, then the patient would not be at MMI and continue on. So using that logic, talking out loud, then I recommended a psychologic/psychiatric evaluation to see if there is treatment necessary. So even though it's done after I saw her, based on Dr. Gutterman saying that there's no need for treatment, there's no work related psychologic, then I would go back to the MMI date that she was placed by Dr. Hughes.

Q: So because that was longer, I just really want to clarify. And let's get this really short because it's easier to have it short. What you are now saying is that you have changed your opinion from your April 15, 2016 DIME evaluation based on some new information that we went through at this hearing, that [the Claimant] was at MMI on July 14, 2015, the date that Dr. Hughes placed her at MMI.

A: That's correct.

46. Dr. Bernton testified at hearing as an expert in internal medicine and occupational medicine. Dr. Bernton is board certified in internal medicine and

occupational medicine and is Level II accredited by the Division of Workers' Compensation. Dr. Bernton generally testified in accordance with his December 21, 2015 report of his IME examination of Claimant and updated his opinion regarding medical records subsequent to his original and updated written reports, including the DIME report, Dr. Gutterman's report and the deposition transcript of Dr. Kawasaki. Specifically regarding Dr. Hughes' February 3, 2015 medical record, Dr. Bernton agreed that there was nothing in the medical record to indicate that any testing for TOS had been performed at that point. Dr. Bernton also testified that the shoulder injections and treatment associated with Claimant's February 24, 2015 evaluation with Dr. Hsu were not related to Claimant's work injury.

47. Dr. Bernton testified that he agreed with Dr. Kawasaki's March 28, 2017 opinion that Claimant reached maximum medical improvement as of July 14, 2015, the date that Dr. Hughes originally placed Claimant at MMI. Dr. Bernton testified that the total upper extremity rating provided by Dr. Kawasaki related to Claimant's work-related impairments is a 5% upper extremity rating. Dr. Bernton agreed that Claimant's TOS condition is not work-related, and that Claimant should not receive a 6% rating for the TOS condition. Dr. Bernton agreed with Dr. Kawasaki's opinion that Claimant is entitled to a 5% upper extremity impairment rating for range of motion deficits. Dr. Bernton testified that Dr. Kawasaki's DIME opinion, as changed by Dr. Kawasaki's March 28, 2017 deposition testimony, is reasonable and appropriate. Dr. Bernton testified that the opinion of the DIME regarding the Claimant's impairment as expressed in his March 28, 2017 deposition testimony is provided in accordance with the AMA Guides.

48. Claimant was offered the opportunity to testify at the hearing and declined to testify.

49. The ALJ finds that Dr. Kawasaki changed his DIME opinion originally expressed in his April 15, 2016 DIME report. Per his testimony under oath at his deposition taken on March 28, 2017, Dr. Kawasaki changed his opinion as to Claimant's MMI status and impairment rating. Dr. Kawasaki's revised opinions as expressed in his deposition testimony are unambiguous and represent Dr. Kawasaki's true DIME opinion regarding MMI and permanent impairment.

50. Dr. Kawasaki's true opinion is that Claimant reached MMI as of July 14, 2015, the date that Claimant's ATP Dr. Hughes originally placed her at MMI.

51. Dr. Kawasaki's true opinion is that Claimant is total impairment rating is a 5% upper extremity impairment based on range of motion deficits, as Dr. Kawasaki revised his opinion to find that the TOS is not work-related and should not be rated. No other body parts were rated.

52. The ALJ credits the opinion of Drs. Kawasaki, Bernton, Hsu and Gutterman over the contradictory opinion of Dr. Hughes.

53. Claimant failed to overcome the DIME physician's opinion that she

reached MMI on July 14, 2015 by clear and convincing evidence.

54. Respondents established, by a preponderance of the evidence, that Dr. Hughes' 13% impairment rating admitted to in the September 11, 2015 FAL should be set aside, and the FAL should be modified to reflect the 5% impairment rating assigned by Dr. Kawasaki.

55. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Determining the True Opinion of the DIME Physician

The DIME physician's findings include his or her subsequent opinions, as well as his or her initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). If a DIME physician issues conflicting or ambiguous opinions concerning MMI or impairment, it is the ALJ's province to determine the Division IME's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Rainwater v. Sutphin*, WC 4-815 042-04 (ICAO September 9, 2014).

In his initial DIME report dated April 15, 2016, Dr. Kawasaki opined that Claimant had not reached MMI and assigned a provisional 11% impairment rating based on range of motion deficits and TOS. Upon reconsidering already reviewed medical records and reviewing additional medical records, Dr. Kawasaki subsequently revised his DIME opinion regarding MMI and permanent impairment in deposition testimony given under oath on March 28, 2017. In his deposition testimony, Dr. Kawasaki relied on Dr. Gutterman's opinion that Claimant's psychological issues are not work-related, and opined that Claimant had reached MMI as of the date her ATP, Dr. Hughes, placed her at MMI. Regarding permanent impairment, Dr. Kawasaki testified that Claimant's TOS condition was pre-existing and not work-related. Dr. Kawasaki testified that he would no longer include an impairment rating for Claimant's TOS condition. No other body parts were rated. As found, Dr. Kawasaki's revised opinions as expressed in his deposition testimony are unambiguous and represent Dr. Kawasaki's true DIME opinion regarding MMI and permanent impairment. As found, Dr. Kawasaki's true DIME opinion is that Claimant reached MMI as of July 14, 2015 and that Claimant's total impairment rating is a 5% upper extremity impairment rating based on range of motion deficits.

MMI

Once the ALJ determines the true opinion of the DIME physician, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. A DIME's findings of MMI, causation, and non-scheduled impairment are binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the DIME's findings are incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). To overcome a DIME's opinion, "there must be evidence that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monforte Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Quall-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998).

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

As found, the DIME physician's true opinion is that Claimant reached MMI as of July 14, 2015. Accordingly, Claimant has the burden of proof to overcome Dr. Kawasaki's opinion on MMI by clear and convincing evidence.

Claimant declined to testify at hearing and did not present any admissible evidence establishing that it is unmistakable and free from serious or substantial doubt that it is highly probable Dr. Kawasaki's opinions on MMI is incorrect. Dr. Kawasaki's opinion that Claimant reached MMI is supported by the opinions of Dr. Hughes and Dr. Bernton, who both determined Claimant reached MMI as of July 14, 2015. Dr. Kawasaki testified at his deposition that Claimant's psychological issues and TOS condition were not work-related, which is supported by Dr. Gutterman's and Dr. Bernton's opinions, respectively. To the extent there are inconsistent physician opinions, such opinions merely represent a difference of opinion which, in this case, do not rise to the level of clear and convincing evidence. As found, Claimant has failed to overcome Dr. Kawaski's true DIME opinion on MMI and permanent impairment by clear and convincing evidence.

Scheduled Impairment Rating

While a DIME physician's opinion on non-scheduled impairment must be overcome by clear and convincing evidence, no statutory or presumptive weight is given to a DIME physician's opinion on a scheduled impairment rating. A party disputing the impairment rating of a scheduled injury bears the burden of proof by a preponderance of the evidence. *Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007); *Ortiz v. Ingersoll-Rand Co*., W.C. No. 4-981-218-04 (January 25, 2018). A party seeking to modify an issue already determined by a general or final admission shall bear the burden of proof for any such modification. 8-43-201(1), C.R.S.; *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014).

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

Dr. Kawasaki opined that Claimant sustained a 5% scheduled upper extremity impairment. Respondents filed a September 11, 2015 FAL admitting for a 13% scheduled impairment in accordance with Dr. Hughes' July 14, 2015 medical report. Thus, Respondents bear the burden of proof, by a preponderance of the evidence, to establish Dr. Hughes' impairment rating should be set aside.

Respondents overcame Dr. Hughes' 13% impairment rating by a preponderance of the evidence and proved it is more likely than not Dr. Kawasaki's impairment rating is correct and appropriate. Dr. Kawasaki credibly opined that Claimant's TOS is not work-related and should not be rated. His opinion is supported by Dr. Bernton. The medical records evidence multiple inconsistencies in Claimant's strength testing and range of motion measurements, as well as repeated references to give-way strength. Dr. Kawasaki credibly testified that such inconsistencies led him to believe Claimant was not putting forth full effort. Dr. Hsu repeatedly found full range of motion and 5/5 strength in his examinations and the range of motion measurements of Drs. Hsu, Kawasaki, and Bernton's measurements were all higher than Dr. Hughes' measurements. Dr. Bernton agreed with Dr. Kawasaki's 5% upper extremity rating, and credibly testified the rating was provided in accordance with the AMA Guides and was reasonable and appropriate. Based on the totality of the evidence, Respondents have established that it is more probable than not that Dr. Hughes' 13% impairment rating should be set aside and the impairment rating previously admitted to in the September 11, 2015 FAL should be modified to Dr. Kawasaki's 5% scheduled impairment rating.

ORDER

It is therefore ordered that:

1. The true opinion of the DIME physician, Dr. Kawasaki, is that Claimant reached MMI as of July 14, 2015 and is entitled to a total impairment rating of 5% for the upper extremity.

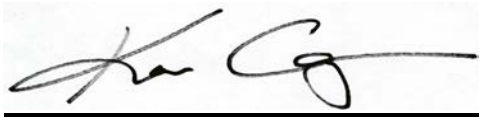
2. Claimant failed to overcome the DIME physician's true opinion on MMI by clear and convincing evidence.

3. Respondents established by a preponderance of the evidence that Dr. Hughes' 13% scheduled impairment rating should be set aside and the FAL should be modified to reflect a 5% scheduled impairment rating as provided by Dr. Kawasaki.

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

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

DATED: March 14, 2018



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

STIPULATION

At the outset of hearing, the parties stipulated that if Claimant established compensability, his average weekly wage (AWW), including wages from his concurrent employment is $1,103.48. The ALJ approves the stipulation.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his right finger on September 5, 2017.

II. If Claimant established that he suffered a compensable injury, whether he also established that he is entitled to a general award of all reasonable, necessary and related medical benefits.

III. If Claimant proved that he suffered a compensable injury, whether he also established, by a preponderance of the evidence, that he is entitled to temporary total disability benefits.

FINDINGS OF FACT

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

1. The facts regarding the mechanism of injury in this case are not in dispute. Claimant is employed by Respondent-Employer as a corrections officer. Claimant's job duties include, but are not limited to, making rounds, performing inmate counts and supervising/observing offenders.

2. On September 5, 2017, Claimant was sitting at an observation desk actively monitoring inmates when he developed an itch around his right ankle/calf area. While keeping an eye on the inmates as their turned in their laundry, Claimant reached down with his right hand, pulled up his right pant leg, reached into his sock, and scratched the itch. As Claimant was pulling his hand from his sock, his finger caught. Claimant felt a "pop" and experienced immediate pain. Upon freeing his hand/finger, Claimant noticed that the distal joint of the middle finger was bent forward and he could not actively move it.

3. Claimant suffers from venous stasis or slow blood flow in the legs. Claimant testified that his work occasionally requires him to sit for long stretches of time while he monitors offenders. According to Claimant, the slow blood flow in his legs combined with sitting results in the pooling of fluid and swelling in his lower legs creating a risk for blood clots. Claimant has a prior history of blood clot development in his right leg. His medical

records reveal that he had a deep vein thrombosis (DVT), i.e. a blood clot in the right leg, confirmed by ultrasound, after presenting to the emergency room on November 24, 2014 for pain and swelling in the right leg. Claimant was treated with anticoagulants and advised to wear a compression sock on the right for the "long haul." Claimant testified that since his DVT, he wears compression stockings daily, both at work and home to help prevent the reoccurrence of blood clots.

4. Claimant was wearing his compression stockings at the time of his finger injury. Claimant testified that no one at work knew about his compression socks because he had not told anyone he was using them, they were not part of his official uniform and they were concealed under his pants.

5. Claimant reported the injury to his employer. He was referred to Emergicare for treatment where he was evaluated by Dr. Michael Dallenbach.

6. During the initial evaluation, the following history of injury was recorded: "Pt states that he is wearing special sock when he had a itch, moved sock down, right middle finger got caught in sock cause (sic) it to stay bent." Dr. Dallenbach diagnosed Claimant with a "mallet finger" and imposed physical restrictions of "[n]o computer work, keep in splint at all times, no physical contact with inmates." He also referred Claimant to Dr. Phillip Marin for a hand surgery consultation. Of note, Dr. Marin's partner is Dr. Charles Kessler. Claimant was scheduled to return to Emergicare on September 19, 2017.

7. Respondent-Employer was unable to accommodate Claimant's temporary physical restrictions. Consequently, he did not work as a corrections officer following the September 5, 2017, injury until he was released from care on November 21, 2017. Claimant has concurrent employment with Loaf-n-Jug as a convenience store clerk. Because of his injury, and a subsequent surgery, Claimant was also did not work his concurrent store clerk position from September 5, 2017 until his release from care on November 21, 2017.

8. Respondent-Employer filed a Notice of Contest denying the claim on September 13, 2017.

9. Prior to his scheduled September 19, 2017, follow-up appointment with Emergicare, Claimant was notified that his claim had been denied and that Respondent-Employer would no longer authorize any care through workers' compensation. Nonetheless, Claimant followed through with the referral to Dr. Phillip Marin. Although Claimant was referred to Dr. Marin, physician availability mandated that he see Dr. Kessler who, as noted above, is Dr. Marin's partner.

10. Dr. Kessler evaluated Claimant on September 11, 2017. He recommended surgery to repair Claimant's mallet deformity. The recommended surgery was performed on September 22, 2017. Claimant subsequently participated in post-surgical occupational therapy at Hands Plus Rehabilitation Center from September 26, 2017 to November 8, 2017.

11. Based upon the evidence presented, the ALJ finds that Claimant's injury was precipitated by the act of having to reach down into his sock to relief the discomfort caused by an itch rather than his preexisting venous stasis, his prior blood clot or his sock per se.

12. This ALJ finds that Claimant suffered a compensable right finger injury on September 5, 2017.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found, the facts concerning the mechanism of injury in this case are not in dispute. Moreover, the medical records admitted into evidence support Claimant's testimony regarding nature, extent and cause of his finger injury. Consequently, the ALJ finds Claimant's testimony credible.

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

arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. Under the Workers' Compensation Act, an injured employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Based upon the evidence presented, the ALJ finds ample evidence to conclude that Claimant's finger injury occurred in the course of his employment. Indeed, Respondent does not challenge that Claimant's injury occurred in the scope of employment. Rather, Respondent argues that Claimant's injury did not "arise out" of his employment.

E. Relying on the principals announced by the Colorado Supreme Court in the *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014), Respondent asserts that Claimant's mallet finger injury did not arise out of employment because it was caused by a risk which was entirely personal or private to him. In *City of Brighton*, the Court identified three categories of risk that cause injuries to employees: (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment related nor personal. 318 P.3d 496 (Colo. 2014).

F. In this case, Respondent contends that Claimant's need to wear a compression sock constitutes a personal risk, because it is an "accessory" unique to him rather than a risk tied directly to the work environment. As noted, category 2 above addresses risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to his/her employment. Injuries precipitated by pre-existing conditions brought to the workplace are generally not compensable unless an exception applies. *City of Brighton, supra* at 503. One such exception is when a pre-existing or idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. Respondent emphasizes that since Claimant's compression sock caused his injury as a prescribed "medical instrument", namely an "accessory" to treat his pre-existing blood clots, the ALJ should view the sock as the expression and presence of a pre-existing condition brought by Claimant to the workplace. Accordingly, Respondent argues that the "special hazard rule" announced in *Gates Rubber Co. v.*

Industrial Comm'n., 705 P.2d 6, 7 (Colo. App. 1985), applies in this case. Consequently, Respondent maintains that Claimant must establish that his sock not only precipitated the accident but also combined with a hazardous condition of employment to cause an injury before the injury can be found to be compensable. *See also, Ramsdell v. Horn, 781 P.2d 150 (Colo. App. 1989).*

G. The rationale for the "special hazard rule" is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission, supra; Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See Ramsdell v. Horn, supra.*

H. In order to be considered a special hazard, the employment condition cannot be a ubiquitous one; it must be a special hazard not generally encountered outside the work environment. *Id.* Chairs and stools have previously been determined to be ubiquitous conditions that a claimant could encounter equally off the job as well as on. *Crass v. Cobe Laboratories*, W.C. No. 3-960-662 (October 10, 1991); *Horne v. St. Mary-Corwin Hospital*, W.C. No. 4-205-014 (April 14, 1995). Relying on the above-cited cases, Respondent maintains that there is nothing special or hazardous about the chair that Claimant was sitting in at the time of his injury. To the contrary, Respondent contends that Claimant's chair is a ubiquitous feature commonly found both in and outside the work environment. Moreover, Respondent points out that the chair did not contribute to Claimant's injury, and there is no evidence any work duty combined with the compression sock to cause injury. Consequently, Respondent reasons that Claimant has failed to meet the requirements of special hazard rule to prove that his injury is compensable.

I. On the other hand, Claimant urges the ALJ to find that the act of pulling his hand from his sock and injuring his finger, while monitoring inmates as they turned in their laundry, was tied directly to his work and as such, his injury is compensable.

J. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra*. An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of the injury. *City of Boulder v. Streeb, supra*.

K. The determination of whether there is a sufficient "nexus" or causal

relationship between Claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. An incident that merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991).

L. The totality of the evidence presented in this case persuades the ALJ that Claimant has established the requisite causal connection between his work duties and his right finger injury. In concluding as much, the ALJ finds Respondent's compensability defense rests principally on the suggestion that Claimant's pre-existing blood-clotting disorder precipitated his injury because it caused his need to wear compression socks. As found above, the ALJ is not persuaded. Here, the evidence presented convinces the ALJ that Claimant's injury was caused, i.e. precipitated by an itch that he sought to relieve by reaching into his pant leg and down his sock while he was actively engaged in his work duties rather than his pre-existing blood clotting disorder or his sock per se. Indeed, the evidence presented fails to establish that the compression stocking caused the finger injury to be worse than it would have been if Claimant had been wearing normal stockings, or that the injury would not have happened "but for" the compression stockings. Consequently, the ALJ is not persuaded that Claimant's injury arose out of a risk inherently personal to himself.

M. In determining that Claimant has proven that he sustained a compensable injury to his right finger, the ALJ is mindful that Colorado recognizes the "personal comfort doctrine" which holds that actions such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water and keeping warm have been held to be incidental to employment. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 22-23 (Colo. 1988). Although the doctrine primarily addresses questions concerning whether a particular injury occurred in the scope of employment, the underlying principal of the doctrine holds that actions taken to satisfy the employees "personal comfort" are necessary to maintain the employee health, and are indirectly conducive to the employers' purposes. *See Ocean Accident & Guaranty Corp. v. Pallaro*, 66 Colo. 190, 180 P. 95 (1919).

N. As noted, there must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* A causal connection exists if it is demonstrated that the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Marie Eslinger v. Kit Carson County Memorial Hospital*, W.C. No. 4-638-306 (ICAO, January 10, 2006)(citing *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). This includes discretionary activities on the part of the employee which are devoid of any duty component, and are unrelated to any specific

benefit to the employer. *Id., citing Boulder v. Streeb, supra*; *L.E.L. Construction v. Goode,* 849 P.2d 876 (Colo. App. 1992), rev'd on other grounds 867 P.2d 875 (Colo. 1994). Here, the ALJ finds/concludes that Claimant took action to relieve himself of the discomfort associated with an itch on his lower leg. Moreover, the evidence presented fails to support a conclusion that Claimant's decision to scratch his leg constituted a substantial departure (deviation) from his work duties that would warrant a finding that he left the scope of his employment. Thus, while Claimant's decision to scratch his leg did not involve a duty associated with his employment, the ALJ finds that Claimant's actions fall within the personal comfort doctrine. As noted, actions taken to minister to a worker's personal comfort have been held to be incidental to employment. Based upon the evidence presented in this case, the ALJ concludes that Claimant's need to scratch his leg without carefully monitoring the placement/location of his hand/fingers was not only necessary to relief his discomfort but also to maintain his attention/concentration on his job duties, specifically his need to remain vigilant regarding inmate movement and interaction. The ALJ concludes Claimant's injury arose out of an action that was reasonably incidental to the conditions and circumstances of his specific work duties at the time. Consequently, the injury is compensable.

Medical Benefits

O. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

P. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Under §8-43-404(5)(a)(I)(A), C.R.S. 2014 the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S. 2005; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); Pickett v. Colorado State Hospital, 32 Colo. App. 282, 513 P.2d 228 (1973).

Q. The employer's duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo. App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (Industrial Claim Appeals Office, September 6, 2011). In this case, Claimant reported his injury to Employer who subsequently referred him to Emergicare

for treatment. Accordingly, the ALJ concludes that Emergicare is Claimant's designated provider. Claimant was treated at Emergicare one time on September 5, 2017, during which time he was referred to Dr. Marin for treatment of the work-related injury. As stated, Claimant was actually treated by Dr. Kessler who is in the same office as Dr. Marin and who is Dr. Marin's partner. Dr. Kessler performed surgery, oversaw follow up care, and referred Claimant to the Hands Plus Rehabilitation Center for physical therapy. Consistent therewith, Respondents are liable for the costs of treatment provided by Emergicare, Dr. Kessler, and the Hands Plus Rehabilitation Center as these providers are within the chain of authorized referrals. In this case, the evidence demonstrates that Claimant's medical care as provided at Emergicare and their referrals, including the evaluation and subsequent surgery performed by Dr. Kessler was reasonable, necessary and related to Claimant's traumatic mallet finger injury. The aforementioned care was necessary to assess and treat, i.e. relieve Claimant from the acute effects of his injury. The specialist referrals were reasonable and necessary to determine the extent of injury in light of Claimant's inability to extend the distal joint of his right long finger. Moreover, the evidence presented persuades the ALJ that the recommendation to proceed with surgery was reasonable and necessary given Claimant's continued pain and functional disability. Consequently, Respondents are liable for the aforementioned medical treatment.

Temporary Total Disability

R. To receive temporary disability benefits, a Claimant must prove the injury caused a disability, that he/she leaves work as a consequence of the injury, and the disability is total and lasts more than three regular working days. *C.R.S. § 8-42-103(1); PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d).

S. C.R.S. § 8-42-105(3) provides in pertinent part: Temporary total disability benefits shall continue until the first occurrence of any one of the following:

> (a) The employee reaches maximum medical improvement;
>
> (b) The employee returns to regular or modified employment;
>
> (c) The attending physician gives the employee a written release to return to regular employment; or
>
> (d)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to

the employee in writing, and the employee fails to begin such employment.

T. From the evidence presented, the ALJ concludes that Claimant was provided with physical restrictions and released to return to work in a modified capacity following his September 5, 2017 Emergicare visit. The ALJ is also persuaded that Respondent was unable to accommodate Claimant's restrictions. Consequently, Claimant was unable to work as a corrections officer until he was released from care on November 21, 2017. Moreover, the evidence presented convinces the ALJ that Claimant was unable to perform the work duties associated with his concurrent employment as a store clerk for Loaf-n-Jug as a direct consequence of his compensable injury from September 5, 2017 until his release from care on November 21, 2017. Thus, the ALJ concludes that Claimant experienced a wage loss lasting more than three regular work shifts due to his inability to perform regular work duty and his employer's inability to accommodate his work restrictions. Here, Claimant has established that he is "disabled" within the meaning of section 8-42-105 and has experienced a wage loss. Thus, he is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Because the period of disability lasted longer than two weeks from the day Claimant left work as a consequence of his injury, Claimant is entitled to recover disability benefits from the day he left work in this case. Section 8-42-103(1)(b), C.R.S. Based upon the evidence presented, the ALJ concludes that Claimant is entitled to TTD benefits from September 6, 2017 through November 20, 2017.

ORDER

It is therefore ordered that:

1. Claimant has established by preponderance of the evidence that she suffered a compensable injury to the distal joint of his right long finger on September 5, 2017.

2. Respondent shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his compensable injury, including, but not limited to the treatment afforded Claimant at Emergicare, the mallet finger repair procedure performed by Dr. Kessler and the post-surgical rehabilitation at Hands Plus Rehabilitation Center.

3. Respondents shall pay temporary disability benefits in accordance with section 8-42-103(1)(b), C.R.S. at a rate of sixty-six and two-thirds percent of Claimant's stipulated AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. As Claimant's disability lasted longer than two weeks from the day that he left work as a result of his injury, TTD benefits shall be paid from September 6, 2017 through November 20, 2017, in accordance with Section 8-42-103(1)(b), C.R.S.

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

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

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

DATED: March 16, 2018

/s/ Richard M. Lamphere

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

ISSUES

- Did Claimant prove that her condition has worsened and a left ulnar nerve transposition is reasonably necessary to cure and relieve the effects of her industrial injury?

- Did Claimant prove entitlement to TTD benefits commencing August 17, 2017?

- Did Respondents prove that Claimant's admitted left ulnar nerve pathology was not caused by the November 7, 2011 accident?

FINDINGS OF FACT

1. Claimant suffered admitted injuries on November 7, 2011 due to a trip and fall accident. Claimant's foot got caught while she was stepping up onto a curb, causing her to fall forward onto her hands and knees.

2. Employer did not refer Claimant to an authorized provider, so she treated with her personal providers through the military healthcare system. She initially went to the Evans Army Hospital emergency room on November 7, 2011. The records are largely illegible, but the problematic areas appear confined to the bilateral wrists and left knee. There were no documented elbow complaints.

3. Claimant underwent upper extremity electrodiagnostic testing on November 30, 2011 with Dr. William Seybold. The impetus for the testing was "recurrent, primarily nocturnal bilateral hand pain and numbness . . . over the past few months." There was no mention of the November 7 fall at work. Dr. Seybold found bilateral carpal tunnel syndrome. He did not test the left ulnar nerve and there was no indication of any ulnar nerve symptoms or problems.

4. Claimant saw Dr. Daniel White, an orthopedic surgeon, on January 30, 2012. Her chief complaint was bilateral hand pain and numbness of "insidious onset" starting "6-7 months ago." She reported "pins and needles" in all fingers but "most specifically in the right ring finger." Elbow flexion ulnar compression test was "equivocal," and Tinel's was negative at the cubital tunnels. Dr. White diagnosed "bilateral wrist pain" and referred Claimant for occupational therapy. He did not mention any left ulnar nerve pathology.

5. Claimant's initial occupational therapy evaluation took place on April 16, 2012. The therapist examined both arms, but provocative tests for ulnar nerve issues were "negative."

6. Claimant underwent a second EMG/NCV test on December 11, 2012 with Dr. Mark Blackley. This time the testing included the left ulnar nerve at the elbow. The

testing showed mild to moderate bilateral carpal tunnel syndrome but "no evidence of an ulnar neuropathy."

7. Claimant had a surgical evaluation with Dr. Chance Henderson on January 22, 2013. There were significant clinical findings consistent with bilateral carpal tunnel syndrome, including thenar atrophy and positive Tinel's and Phalen's tests bilaterally at the wrists. Cubital tunnel testing was "negative x3 bilateral elbow." Dr. Chance diagnosed bilateral carpal tunnel syndrome, administered bilateral wrist injections and scheduled Claimant for surgery.

8. Dr. Henderson performed bilateral carpal tunnel surgery on February 8, 2013. Claimant initially did well, but her symptoms gradually returned. She followed up with Dr. Henderson on April 9, 2013 and reported "numbness in the bilateral ring and small fingers that seems to be bothering her more than anything." On examination, Tinel's and elbow ulnar nerve compression tests were negative, and there were no subjective changes in sensation in the ulnar nerve distribution. Dr. Henderson remarked Claimant was "doing well since surgery but today [presents] with new complaints of hand pain mostly in the distribution of the ulnar nerve . . . ."

9. Although Employer had filed a First Report of Injury shortly after the accident, Insurer did not contact Claimant for more than a year. A second "First Report of Injury" was filed on January 14, 2013, which prompted Insurer's claims adjuster, Beatriz Diaz, to contact Claimant in late January or early February 2013. As a result of those communications, Ms. Diaz filed a General Admission of Liability and referred Claimant to Dr. Gregg Martyak for ongoing care.

10. Claimant's initial visit with Dr. Martyak took place on July 11, 2013. He noted positive Tinel's over the bilateral cubital tunnels and made the first documented diagnosis of cubital tunnel syndrome.

11. On November 19, 2013, Claimant had a third EMG/NCV test, performed by Dr. Katherine Leppard. By that time, her clinical presentation was more clearly consistent with bilateral cubital tunnel syndrome. She had tenderness over both ulnar nerves at the elbow with positive Tinel's bilaterally. Pinprick sensation was decreased in the median and ulnar distributions. The electrodiagnostic testing showed continued bilateral carpal tunnel syndrome and, for the first time, evidence of bilateral ulnar neuropathy at the elbow. Dr. Leppard graded the left ulnar neuropathy as "moderate" and the right as "mild." She also commented that "both were reportedly normal on the prior EMG of 12/11/12."

12. On January 27, 2014, Dr. Martyak performed a left carpal tunnel revision and a left ulnar neuroplasty at the elbow. Intraoperatively, he found a "large amount of scar tissue on the median nerve at the wrist." He also noted a "large amount of tissue placing pressure on the [ulnar] nerve in the cubital tunnel," but did not specify whether it was scar tissue.

13. At her April 22, 2014 follow-up appointment, Claimant told Dr. Martyak her left elbow and wrist were "doing well," with no residual numbness in the ulnar nerve

distribution. But by August 7, 2014, numbness and tingling were "returning" in the ulnar distribution of the left hand.

14. Dr. Martyak released Claimant at MMI on October 8, 2014. He opined, "I am not sure any additional surgery would be of benefit to her. The only procedure left would be to revise her ulnar nerve neuroplasties to transpositions."

15. Claimant saw Dr. Shimon Blau on March 23, 2015 for an impairment rating. Dr. Blau assigned a 15% left upper extremity rating, including 3% for the residual left ulnar nerve impairment. Dr. Blau's report contains no causation analysis regarding the left cubital tunnel syndrome.

16. Claimant attended a DIME with Dr. Frank Polanco on August 24, 2014. Dr. Polanco calculated a 26% scheduled rating for the left upper extremity, including 3% for residual left ulnar nerve impairment. Dr. Polanco's report contains no discussion or analysis of causation regarding the left cubital tunnel syndrome.

17. Respondents filed a Final Admission of Liability based on Dr. Polanco's DIME report on October 14, 2015. Claimant timely objected to the FAL and requested a hearing, but subsequently withdrew her objection in a stipulation dated March 7, 2016, and allowed the claim to close.

18. Claimant's residual left cubital tunnel symptoms progressively intensified after MMI. On February 14, 2017, she returned to Dr. Martyak and reported the numbness in the fourth and fifth fingers had "returned to the level of pre surgery on the left." Dr. Martyak recalled that "at our last visit in 2014 we declared her at MMI with the caveat that if numbness returned we may need to consider a revision ulnar nerve neuroplasty with transposition as a final definitive procedure." He sent Claimant back to Dr. Leppard for repeat EMG/NCV testing.

19. Dr. Leppard performed the testing on July 20, 2017, which showed bilateral ulnar mononeuropathy at the elbow. She opined "the left ulnar mononeuropathy at the elbow is severe . . . . [and] has worsened since the prior EMG of 11/19/13."

20. After reviewing the electrodiagnostic test results, Dr. Martyak recommended a revision ulnar neuroplasty with an intramuscular transposition.

21. Respondents asked Dr. Eric Ridings to perform a Rule 16 peer review of the request for surgery. Dr. Ridings opined "there is no occupational relationship between her current left cubital tunnel syndrome and her injury falling down in 2011. Based on the record, an ulnar nerve transposition is reasonable but is not related to the 2011 claim or to her work in any other way."

22. Dr. Ridings performed a detailed record review for Respondents in November 2017 regarding the left cubital tunnel. He opined that the original mechanism of injury would not have caused cubital tunnel syndrome. He thought Dr. Leppard had over-interpreted the November 2013 electrodiagnostic testing, and stated, "at most I

would call this borderline cubital tunnel syndrome." He agreed that the July 2017 testing showed definitive ulnar neuropathy, but opined:

> [T]he patient's current left cubital tunnel syndrome can in no way be related to falling onto her outstretched hands in 2011. As noted, the EMG of December 2012 showed no abnormalities across the left elbow, and subsequent development of borderline findings in 2013 cannot be attributed to the 2011 work injury. Even less can one attribute findings in 2017 to the 2011 claim. Hence, any treatment for that condition is not work-related under this claim.

23. Claimant saw Dr. Timothy Hall for an IME at her counsel's request on November 15, 2017. Dr. Hall disagreed with Dr. Ridings and opined,

> [T]his is the direct consequence of her original injury to the left elbow. . . . This is a very specific event at the left elbow. The only thing that has happened at that left elbow is the fall, which resulted in this entrapment. I do not see any reasonable argument that has been put forward that would explain these symptoms other than the worsening over time of this diagnosis related to the fall. It is probably the consequence of local scarring following surgery, which is not an uncommon even under these circumstances.

24. Dr. Hall testified at hearing to elaborate on the opinions expressed in his report. When asked how Claimant's condition could naturally worsen after the 2014 surgery with no intervening cause, Dr. Hall explained:

> Continued scarring. You know, that's what the neurolysis went in to get rid of. And unfortunately, often the consequence of removing scar tissue is the production of further scar tissue. We don't have a way of retarding that consequence. Some people lay down different amounts of scar tissue in different places. And it appears she has laid down significant scar tissue postoperatively.

25. Regarding the significant delay between the accident and the first documented complaints of cubital tunnel syndrome, Dr. Hall opined he "wouldn't expect" acute symptoms because "there was not that much trauma." Rather, he opined that the entrapment "evolved slowly over time."

26. Dr. Ridings testified for Respondents in a posthearing deposition dated February 12, 2018. He expressed his "strong opinion that [Claimant's] left ulnar nerve issues are not, in any way, related to the 2011 claim." Dr. Ridings cited several factors which led him to that conclusion: there was no documented injury to Claimant's left elbow in 2011; the records document no complaints or findings consistent with ulnar compression until April 2013; EMG/NCV studies in November 2011 and December 2012 showed no evidence of cubital tunnel syndrome; and the EMG/NCV testing in November 2013 was at most "borderline" positive for cubital tunnel syndrome.

27. Dr. Hall's opinion that Claimant's current need for a left ulnar nerve transposition is the direct and natural consequence of the January 27, 2014 surgery is credible and persuasive. Claimant proved by a preponderance of the evidence that her condition has worsened since MMI and the proposed left ulnar nerve transposition is reasonably necessary.

28. Dr. Ridings' opinion that Claimant's initial diagnosis of cubital tunnel syndrome was not related to the November 2011 accident is credible and persuasive. Respondents proved that the initial diagnosis of left cubital tunnel syndrome was not caused by the November 2011 accident. The January 27, 2014 left cubital tunnel surgery was reasonably necessary, but not causally related to the November 2011 accident.

29. After reviewing the evidence presented, the ALJ is persuaded that Claimant's left cubital tunnel syndrome has worsened since MMI, and the left ulnar nerve transposition proposed by Dr. Martyak is reasonably necessary. The ALJ further credits Dr. Hall's opinion that the proposed transposition is the direct and natural consequence of the January 27, 2014 surgery. But the ALJ is also persuaded by Dr. Ridings' opinion that the initial diagnosis of left cubital tunnel syndrome, which led to the January 2014 surgery, was not caused by the November 2011 accident. Although Respondents admitted liability for the diagnosis, covered the 2014 surgery, and paid medical impairment benefits related to ulnar neuropathy, they are legally entitled to revisit the initial causation determination in the context of Claimant's petition to reopen. Since the January 2014 surgery was performed for a condition that, in retrospect, was not caused by the industrial accident, Respondents are not liable for the current consequences of that surgery. Therefore, Claimant's petition to reopen must be denied.

CONCLUSIONS OF LAW

A. Claimant proved her condition worsened after MMI. The proposed ulnar nerve transposition is reasonably necessary and causally related to the January 27, 2014 surgery

Section 8-43-303(1) allows a party to request that a claim be reopened on the grounds of "an error, a mistake, or a change in condition." A change in condition refers either to a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985).

Claimant's left ulnar neuropathy has clearly worsened since MMI and all experts agree the surgery proposed by Dr. Martyak is reasonably necessary. The also ALJ credits Dr. Hall's opinion that the ulnar nerve transposition surgery is the direct and natural consequence of the January 27, 2014 surgery. Specifically, Dr. Hall explained that the current left ulnar nerve entrapment "is probably the consequence of local scarring following surgery, which is not an uncommon event under these circumstances." This opinion is supported by the "large amount of scar tissue" Dr. Martyak found around the

median nerve during Claimant's left carpal tunnel revision surgery, which indicates she has a predisposition to developing excessive scar tissue after surgery.

B. Respondents must prove that the initial diagnosis of cubital tunnel syndrome, which led to the January 27, 2014 left ulnar neuroplasty, was not related to the November 2011 accident.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). As a general rule, where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Even after an admission of liability is filed, the respondents retain the right to dispute the relatedness of any particular treatment, because the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010).

But application of those general principles in this case is complicated by § 8-43-201(1), which provides that "a party seeking to modify an issue determined by a general or final admission . . . shall bear the burden of proof for any such modification." Respondents are not merely disputing whether the proposed surgery is related to the original accident, but are asserting that left cubital tunnel syndrome should not have been considered a compensable component of the injury in the first place. That position directly conflicts with their previous admissions of liability for left cubital tunnel syndrome, pursuant to which they paid medical and indemnity benefits. By defending the petition to reopen on the basis that that the left cubital tunnel syndrome was not causally related to the accident in the first instance, Respondents are seeking to modify an "issue" that was previously determined by an admission of liability. As a result, Respondents must prove that Claimant's initial diagnosis of left cubital tunnel syndrome was not causally related to the November 2011 accident.

C. Is the standard of proof a preponderance or clear and convincing?

Although § 8-43-201(1) assigns the burden of proof it does not specify the applicable standard of proof. Most issues in this system are decided using the preponderance of the evidence standard, which requires a showing that a disputed proposition is more likely true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). But Claimant previously underwent a DIME with Dr. Polanco, who assigned an impairment rating for left ulnar neuropathy. Although determining causation is an "inherent" part of the DIME process, Dr. Polanco's determinations are not entitled to any special weight because Claimant had purely scheduled impairments. The presumptive weight attributed to the DIME's determinations of MMI and whole person impairment is not applicable to scheduled ratings. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App.

2000). Thus, Respondents must carry their burden on initial causation by a preponderance of the evidence.

D. Respondents carried their burden

As found, Respondents proved that Claimant's original diagnosis of left cubital tunnel syndrome was not caused by the industrial accident. The ALJ credits Dr. Ridings' opinions as the most reasonable interpretation of the post-accident medical evidence. The ALJ sees no persuasive explanation for the seventeen-month delay before the first definitive manifestations of ulnar entrapment. Although Claimant's early complaints of numbness and tingling in "all" of her fingers (which includes the fourth and fifth fingers) *could* have been consistent with cubital tunnel syndrome, no examining provider even suggested that diagnosis until Dr. Henderson in April 2013. Dr. Ridings further noted that those early reported symptoms were "diagnostically [ ] meaningless," and Dr. Hall agreed that Claimant's symptoms have been "very diffuse" and "non-specific," and her clinical presentation has been "inconsistent . . . from provider to provider." More importantly, specific provocative tests such as Tinel's and cubital tunnel compression test were repeatedly negative during that seventeen-month interval, and EMG/NCV testing of the left ulnar nerve in December 2012 (13 months post-injury) was objectively normal. Had Claimant been experiencing chronic inflammation and progressive scarring around the left ulnar nerve since the accident as opined by Dr. Hall, the ALJ would have expected ulnar nerve entrapment to have become apparent much sooner than it did.

The ALJ acknowledges that Dr. Blau and Dr. Polanco implicitly found a causal connection between left cubital tunnel syndrome and the accident, as evidenced by their impairment ratings. But their reports contain no specific discussion or analysis of causation and they appear to have simply presumed causation, most likely because Respondents had paid for the surgeries and were not disputing causation. The ALJ has given minimal weight to Dr. Blau's and Dr. Polanco's reports.

E. The proposed ulnar nerve transposition is not a compensable consequence of the original injury as a matter of law.

The finding that the accident did not cause the initial ulnar nerve entrapment does not end the analysis, because the ALJ has also determined that the proposed surgery is a direct and natural consequence of the surgery performed in January 2014. Therefore, the next question is: are Respondents liable for medical treatment to remedy a problem caused by a surgery they authorized under an admission of liability, even though, in retrospect, the original surgery was not causally related to Claimant's industrial accident?

The ICAO addressed this issue in *Gordon v. Ross Stores, Inc*., W.C. No. 4-878-759-05 (February 5, 2015). In *Gordon*, the respondents had admitted liability for carpal tunnel syndrome (CTS) and authorized a carpal tunnel decompression surgery. Because of the surgery, Claimant developed CRPS. A DIME determined that the CRPS was "iatrogenically caused" by the carpal tunnel surgery and provided a whole person CRPS rating. An ALJ subsequently found that the respondents proved the claimant did not develop CTS as a result of her employment and allowed them to withdraw the GAL. But

the ALJ also awarded the DIME's CRPS rating because the CRPS was caused by surgery that was authorized and admitted at the time. Specifically,

> The ALJ rejected the respondents' argument that since the claimant's underlying CTS was not caused by her work activities, then her subsequent surgery for CTS and her resulting CRPS also cannot be work-related. The ALJ based his determination on the quasi-course of employment doctrine. The ALJ explained that the claimant developed CRPS while undergoing authorized medical treatment for an industrial injury, that surgical treatment was provided to relieve the effects of the admitted industrial injury, and that it became an implied part of her employment contract.

The ICAO reversed and held the claimant's CRPS was not a compensable component of her injury as a matter of law. Citing *Travelers Insurance Company v. Savio*, 706 P.2d 1258 (Colo. 1985), the ICAO held the quasi-course doctrine only applies if the subsequent injury "is the direct and natural consequence of an original injury which itself was compensable." Since the claimant's CTS was not a compensable injury in the first instance, a secondary condition that developed due to treatment for CTS was also not compensable.

Based on the analysis in *Gordon*, even though Claimant's current need for surgery is a direct and natural consequence of the January 2014 surgery, Respondents are not liable for futher treatment because the original ulnar neuropathy was not caused by the November 2011 accident.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen her claim for a left ulnar nerve transposition and additional TTD benefits is denied and dismissed.

2. Any matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

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

DATED: March 16, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that his claim should be reopened pursuant to Section 8-43-303, C.R.S. based on a change of condition.

- If claimant's claim is reopened, whether claimant has demonstrated by a preponderance of the evidence that recommended medical treatment, including neuropsychological testing and treatment with Dr. Christopher Young, is reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted March 21, 2013 work injury.

- If claimant's claim is reopened, whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits beginning July 1, 2017 and ongoing until terminated by law.

- At the hearing respondents clarified that they have authorized treatment of claimant's anxiety and depression as it has been determined that those issues are related to the admitted work injury.

FINDINGS OF FACT

1. Employer operates in the oil and gas industry. Claimant sustained an admitted work injury on March 21, 2013. The injury occurred when claimant and his coworkers were unloading a trailer full of pipe and the mechanism that held the pipe in place opened and an aluminum "cheater pipe" hit claimant across the face. Claimant testified that the pipe that struck him was six feet long and three inches in diameter. Claimant also testified that virtually every bone in his face from his chin to his forehead was broken by the pipe striking him.

2. Immediately following the injury claimant received medical treatment at a medical clinic in Collbran, Colorado. However, due to the severe nature of claimant's injuries, he was transported to St. Mary's Hospital in Grand Junction, Colorado. At St. Mary's Hospital claimant was treated by Dr. Holly Buschhorn. The emergency room records indicate that claimant was complaining of significant facial pain, a diffuse headache, issues with hearing, as well as vomiting and nausea. Dr. Buschhorn also noted that claimant had three facial lacerations that required sutures.

3. A computed tomography (CT) scan of claimant's brain showed no acute traumatic intracranial injuries. A CT scan of claimant's facial bones showed multiple fractures including bilateral nasal bone fractures, a septal fracture, fracture of the left orbital, and multiple maxillary bone fractures. On May 31, 2013, Dr. James Merrell surgically repaired claimant's facial fractures.

4. Claimant's authorized treating provider (ATP) for this claim has been Work Partners. Claimant was initially seen at Work Partners by Erica Herrera, PA and Dr. Craig Gustafson. On June 25, 2013, claimant was seen by Ms. Herrera and reported pressure in his nose and an occasional sharp pain over the bridge of his nose. Claimant also reported that he felt that his pain was improving and noted his pain as 2 of 10. On that date, Ms. Herrera determined that claimant could return to work with modified duty. Claimant's work restrictions included sedentary desk work with no strenuous lifting or work, and no safety sensitive work.

5. On August 5, 2013, claimant was again seen by Ms. Herrera. On that date, claimant reported that he experienced an intermittent aching pain that seemed to be worsened by sneezing or blowing his nose. Even with that pain, claimant identified his pain level at a 0 of 10. Ms. Herrera released claimant to full duty, with an instruction to avoid respirator use.

6. Claimant testified that when he returned to full duty with employer he continued to experience headaches and nosebleeds, but was able to perform his normal duties. Claimant also testified that after returning to work in August 2013 he experienced difficulty sleeping, short term memory loss, and concentration issues.

7. On April 25, 2014, claimant returned to Work Partners and reported to Ms. Herrera that he was experiencing headaches and nosebleeds that were worsened with exposure to dust. Claimant also reported that he was having issues with his short-term memory, focus, and concentration. Based upon claimant's report of these symptoms, Ms. Herrera referred claimant for a neurological consultation.

8. April 25, 2014 was the first time claimant reported cognitive issues to a medical provider. Claimant testified that although he had been experiencing these issues since returning to work in August 2013, he did not want to admit that he was suffering emotional or cognitive impairment.

9. On June 9, 2014, Dr. Merrell performed a septoplasty with bilateral inferior turbinate reduction to address claimant's deviated septum. Two days later on June 11, 2014, claimant sought treatment at the emergency department at St. Mary's Hospital and was seen by Dr. Paul Padyk. Claimant reported "a jittery sensation", a "spacey feeling", heart palpitations, and narrowed vision. Dr. Padyk noted that the cause of these symptoms was unclear. Claimant testified that at the time of that emergency room visit he believed he was having a stroke. However, claimant now believes that he was experiencing a panic attack.

10. From that time, claimant continued to treat with Work Partners and reported headaches and ongoing issues with short-term memory loss, concentration, and a lack of focus.

11. On January 7, 2015, claimant was placed at maximum medical improvement (MMI) by Dr. Gustafson. At that time, Dr. Gustafson assessed a permanent impairment rating of 7% whole person. This rating included an impairment of 3% for claimant's loss of olfactory sense and impairment of 4% for claimant's "closed head injury". Dr. Gustafson opined that claimant would likely need maintenance medical treatment including follow up treatment with Work Partners and Dr. Merrell, repeat surgeries, and medication management.

12. On January 16, 2015, respondents filed a Final Admission of Liability (FAL) admitting for the January 7, 2015 date of MMI, the 7% whole person impairment rating, and reasonable, necessary, and related maintenance medical treatment.

13. After being placed at MMI, claimant continued to work for employer until he was laid off due to a work slowdown in April 2015. Claimant testified that during that time he experienced panic attacks more frequently and the attacks were more severe.

14. After he was laid off by employer, claimant began working for Intermountain Wood Products (IWP) as a truck driver in July or August 2015. Claimant testified that although he was able to perform all of his job duties while employed with IWP he experienced "anger fits" and felt very nervous at times. Claimant's employment with IWP ended when he was discharged for refusing to drive to Steamboat Springs during a snow storm.

15. Thereafter, claimant worked for Elite Cleaning (EC) for two or three months. During that employment claimant's job duties included completing construction clean up. Claimant stopped working for EC when he was hired by Gonzo to drive a water truck in the oil and gas industry. Claimant testified that his employment with Gonzo began in April or May 2017.

16. During his testimony claimant described an incident that occurred on June 30, 2017 while he was working for Gonzo. On that date, claimant was operating a water truck that did not have a working air conditioner so he was driving with the windows down. With the windows down, the cab of the truck filled with dust and claimant experienced what he later learned was a panic attack. At the time, claimant believed he was having a stroke or heart attack.

17. Immediately following the June 30, 2017, incident claimant received medical treatment at Grand River Hospital. It was there that claimant learned that he had experienced a panic attack.

18. On July 17, 2017, claimant returned to Work Partners and was seen by Dr. Lori Fay. Claimant reported to Dr. Fay that he was still experiencing nosebleeds and headaches. Claimant also reported his continuing panic attacks that seemed to be related to breathing. Dr. Fay recommended claimant avoid dust exposure and specifically included that recommendation as a work restriction. Dr. Fay also recommended claimant return to Dr. Merrell for an evaluation and referred claimant to Dr. Joel Cohen, a psychologist.

19. On August 8, 2017, claimant returned to Dr. Merrell's office and was seen by Dr. Mark Griffin. Dr. Griffin noted that claimant's septum was straight and there did not appear to be any anatomical issues.

20. Claimant was first seen by Dr. Cohen on August 17, 2017. At that time, claimant reported that he was having panic attacks two to three times per week, at a minimum. Claimant also reported that he felt that he had lost 30% of his memory function since the work injury. Dr. Cohen recommended that claimant see psychiatrist, Dr. David Good, for consultation regarding appropriate medication.

21. Claimant returned to Work Partners on August 29, 2017 and was seen by Ms. Herrera. At that time Ms. Herrera noted that claimant's panic attacks were getting worse and he was continuing to report memory and cognitive deficits. Based upon claimant's symptoms, Ms. Herrera opined that claimant was no longer at MMI. In that same medical record, Ms. Herrera stated that due to the mechanism of claimant's injury "he certainly sustained a traumatic brain injury and concussion". She agreed with Dr. Cohen's recommendation that claimant see Dr. Good for pharmacologic management of his anxiety and depression. Ms. Herrera also made a referral to Dr. Christopher Young for neuropsychological evaluation and testing.

22. On September 27, 2017, claimant was seen by Dr. Good. Dr. Good diagnosed claimant with major depression, panic disorder, attention deficit disorder (ADD), concussion, and panic disorder. Dr. Good recommended supportive therapy and prescribed Prozac.

23. Claimant testified that since he has been taking the medication prescribed by Dr. Good he has experienced a reduction in his cognitive issues. Specifically, claimant feels that his memory has improved, he is more articulate, more confident, and his panic attacks occur with less frequency.

24. On November 6, 2017, claimant's counsel asked Dr. Good to respond to a number of questions related to claimant's medical condition. In his response to counsel dated November 9 2017, Dr. Good noted that claimant was now having panic attacks less often, but opined that overall claimant's psychiatric condition has worsened since he was placed at MMI.

25. On November 27, 2017, claimant was seen by Dr. Stephen Moe for a psychiatric independent medical examination (IME). Dr. Moe reviewed claimant's medical records and obtained a medical history from claimant. In his IME report Dr. Moe diagnosed claimant with anxiety disorder and Moe opined that claimant's psychiatric symptoms are related to the March 21, 2013 work injury. Dr. Moe also opined that as of June 30, 2017 claimant was no longer at MMI. Dr. Moe recommended that claimant undergo psychiatric and psychological treatment to return to MMI.

26. With regard to cognitive difficulties, Dr. Moe opined that claimant's complaints of cognitive deficits are a result of claimant's diagnosed anxiety. Dr. Moe further opined that as the anxiety related symptoms are resolved, claimant's perceived cognitive issues will likely diminish. Dr. Moe further explained in his report that neuropsychological testing and/or a magnetic resonance image (MRI) of claimant's brain would likely be ambiguous or misinterpreted to claimant's detriment.

27. On December 14, 2017, claimant was seen by Dr. Eric Hammerberg for an IME. Dr. Hammerberg reviewed claimant's medical records, obtained a medical history from claimant, and performed a physical examination. In his IME report Dr. Hammerberg agreed with Dr. Moe's assessment that claimant is no longer at MMI and claimant's anxiety and depression symptoms are related to the work injury. Dr. Hammberberg also opined in his report that claimant did not sustain a concussion at the time of the work injury and that claimant's cognitive deficits are secondary to his psychological issues. Based upon the opinions of Drs. Moe and Hammerberg respondents have denied authorization for the recommended neuropsychological testing and treatment with Dr. Young.

28. Dr. Hammerberg's testimony by deposition was consistent with his report. Dr. Hammerberg testified that he does not believe claimant suffered a concussion because claimant did not report a loss of consciousness at the time of the work injury and no cognitive issues were reported for some time. Dr. Hammerberg also testified that any cognitive problems claimant may be having are related to his psychological issues and not a neurological cause.

29. Since the June 30, 2017 panic attack, claimant has not returned to work for Gonzo. Claimant testified that Gonzo will not allow him to return to his job duties until he has a release from a physician. Claimant understands that he is still employed by Gonzo, but is unable to report to work because of his "no dust" work restriction. Claimant testified that even if he were able to drive a truck for Gonzo with the windows rolled up, he would still be exposed to dust throughout his work day in the oil fields. Claimant also testified that he has not sought employment elsewhere because he would like to return to work for Gonzo.

30. The ALJ credits the medical records, claimant's testimony and the opinions of Ms. Herrera, Drs. Fay, Moe, and Hammerberg and finds that claimant has demonstrated that it is more likely than not that due to his anxiety, depression, and cognitive issues, claimant is no longer at MMI and has suffered a worsening of his condition.

31. The ALJ credits the medical records claimant's testimony, and the opinions of Ms. Herrera, Dr. Gustafson, and Dr. Good over the contrary opinions of Drs. Moe and Hammerberg and finds that claimant has demonstrated that it is more likely than not that claimant's current cognitive symptoms are related to the injury he sustained on March 21, 2013. The claimant has also demonstrated that it is more likely than not that the recommended neuropsychological testing and treatment with Dr. Young is reasonable and necessary to cure and relieve claimant form the effects of the work injury.

32. The ALJ credits the medical records and claimant's testimony and finds that claimant has failed to demonstrate that it is more likely than not that he has suffered a loss of wages because of the work injury. Claimant has not worked since his panic attack that occurred on June 30, 2017. Currently claimant's only work restriction is "no dust". Claimant has failed to demonstrate that he is unable to work. On the contrary, claimant testified that he has not sought employment elsewhere because he would like to return to work for Gonzo. The ALJ finds that claimant's wage loss is due to claimant's personal preference to not seek work elsewhere, and not due to a physical disability or medical condition.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

4. As found, claimant has demonstrated by a preponderance of the evidence that he is no longer at MMI and has suffered a worsening of his condition. Therefore, claimant's claim for workers' compensation benefits shall be reopened pursuant to Section 8-43-303, C.R.S. As found, the medical records, claimant's testimony, and the opinions of Ms. Herrera, Drs. Fay, Moe, and Hammerberg are credible and persuasive on this issue.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, claimant has demonstrated by a preponderance of the evidence that the recommended neuropsychological testing and treatment with Dr. Young is reasonable and necessary to cure and relieve claimant form the effects of the work injury. As found, the medical records, claimant's testimony, and the opinions of Ms. Herrera, Dr. Gustafson, and Dr. Good are credible and persuasive on this issue.

7. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

8. As found, claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to TTD benefits. As found, the medical records and claimant's testimony are credible and persuasive on this issue.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits shall be reopened pursuant to Section 8-43-303, C.R.S.

2. Respondents shall pay for the recommended neuropsychological testing and treatment with Dr. Young, pursuant to the Colorado Medical Fee Schedule.

3. Claimant's claim for temporary total disability (TTD) benefits from July 30, 2017 and ongoing is denied and dismissed.

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

Dated: March 20, 2018

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

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

ISSUES

I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Finn regarding the application of the Table 40(5) to Claimant's Impairment Rating, resulting in an additional 5% for arthritis?

ISSUES NOT IN DISPUTE

The parties do not dispute the MMI date of 3/17/17, as found by the DIME physician and ATP, nor do Respondents dispute the 8% Range of Motion Impairment rating as found by the DIME physician.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was driving for employer on July 17, 2015 when he suffered a left patellar tendon rupture when he lost his balance exiting his truck, and fell backwards, landing awkwardly on his left leg.

2. An MRI scan was taken on this date, and the reading radiologist indicated the findings as:

> 1) High-grade distal quadriceps tendon, favored to be chronic given prior radiographs and the imaging characteristics, although it is conceivable that the tear has acutely worsened.
> 2) No detected meniscal tear or ligamentous injury.
> *3) Mild superior patellar chondromalacia.*
> 4) Small joint effusion with some extra-articular extension through the quadriceps defect.
>
> Addendum: Upon further review, although the report for the prior exam in 2014 describes findings of the left knee, those radiographs were actually of the right knee. As such, the high-grade tear of the distal quadriceps on this exam may all be acute. (Ex. D)(emphasis added).

3. On July 22, 2015, Claimant underwent repair of the left quadriceps tendon, which surgery was performed by Dr. Kimberly Furry. In Dr. Furry's post-surgical report, there is no mention of chondromalacia-or lack thereof-in Claimant's intra-articular interface between the kneecap and femur. (Ex. E).

4. Dr. Furry saw Claimant again on December 3, 2015. Under *HISTORY,* in addition to pain in his quadriceps tendon, it is noted that "he will have popping there as well." (Ex. 6).

5. Under *IMAGING,* on this date, she also notes "small bony ossicle at the superior medial aspect of his patella and *soft tissue ossification* a little more proximal to that is seen on the lateral" *Id.* (emphasis added).

6. His next noted visit is May 20, 2016, at which time under *HISTORY,* Claimant reports pain on stairs, worse when ascending, and catching in his knee, resulting in pain of 5/10. (Ex. 6). Under *PLAN,* Dr. Furry notes that upon review of the radiographs, "he does *not* seem to have any *substantial arthritis* in [his left] knee". (emphasis added).

7. Claimant returned to Dr. Furry on August 26, 2016, with bilateral knee discomfort. On this date, the doctor noted under *PLAN* that Claimant should be at MMI from his quadriceps tendon rupture and repair and should be able to resume full activity. Dr. Furry went on to note that, "We talked about the possibility of SYNVISC, although, I don't think that's going to help him and I don't think it's related to his Workman's Compensation injury either." (Ex E1).

8. At this same visit, under *HISTORY*, Dr. Furry noted that Claimant had seen her three months prior "for pain and catching", but that there was "less *catching* and clicking in that left knee but *it still catches with stairs,…" Id.* (emphasis added).

9. Also on this visit, *PHYSICAL EXAMINATION* on August 26, 2016 shows that under palpation, "He has minimal *patellofemoral crepitus on the left* and none on the right." *IMAGING* notes "He has some *mild patellofemoral* ***arthritis*** *on the left." Id.* (emphasis added).

10. Claimant's care had been coordinated by Dr. Kevin Rice. Claimant underwent physical therapy and was subsequently released to return to work full duty on October 28, 2016, and underwent a subsequent FCE, which confirmed this status. (Ex. F).

11. Before this, Dr. Rice noted on 4/18/16 that Claimant's knee would pop while ascending stairs, and upon *PHYSICAL EXAMINATION*, "There is *minimal patellofemoral crepitus*". At a visit on 7/22/16, Dr. Rice noted that Claimant "has *some patellofemoral crepitus*." Id. (emphasis added).

12. Claimant also treated with Rio Grande Hospital in Del Norte for physical therapy. Claimant reported pain while walking up stairs on the following dates: 5/27/16, 6/3/16, 6/10/16, 6/15/16, 6/23/16, 6/29/16, 8/5/16, 8/8/16, 8/15/16, 8/22/16, and 8/29/16. (Ex 6).

13. On March 17, 2017, Dr. Kevin Rice, placed claimant at MMI. On this date, Dr. Rice's diagnosis was: Status post left patellar tendon rupture 7/17/15. Dr. Rice

rated claimant's impairment, using the AMA Guidelines, 3rd Edition, at 4% of the lower extremity. He arrived at this rating by loss of range of motion calculations only. Dr. Rice did not note the existence of trauma related arthritis, nor did he provide a rating for it. (Ex F).

14. Respondent's filed a Final Admission of Liability consistent with Dr. Rice's rating on May 23, 2017. (Ex A).

15. Thereafter, on September 1, 2017, Claimant underwent a Division IME with Dr. Kenneth Finn. Dr. Finn noted in his *RECORDS REVIEW* section that he reviewed the July 17, 2015 MRI scan report, of the left knee, which revealed a "high-degree distal quadriceps tendon tear. A few fibers extend deep into the patella. There was evidence of *mild chondromalacia* of the superior patella."

16. After reviewing the medical records, Dr. Finn noted in his *PHYSICAL EXAM* section, that Clamant was "tender along the patellar tendon and had no medial or lateral joint line tenderness. There was no crepitation with active or passive ROM." (Ex. G, p. 3). Under *DIAGNOSIS,* Dr. Finn noted two items:

A. S/p left quadriceps tendon rupture repair July 22, 2015.

B. *Mild patella-femoral arthritis*. *Id.* (emphasis added).

17. In rating Claimant's permanent medical impairment, Dr. Finn also referenced the AMA Guidelines, 3rd Edition, (*Revised*), and awarded 8% for lost range of motion. He also opined that, "he does have a table 40 diagnosis of patella-femoral arthritis and is rendered a 5% lower extremity impairment." These two ratings combined for a total lower extremity rating of 13%. (Ex. G).

18. Claimant was referred for an independent medical examination ("IME") with Dr. John McBride on November 28, 2017. Dr. McBride reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. McBride was also provided with the actual MRI scan of July 17, 2015 on CD ROM to review. In the *DISPOSITION* section of his report, he opined that a quadriceps tendon rupture is an eccentric loading injury that pulls the tendon off the superior pole of the patella. This is a non-articular injuring process. Dr. McBride explained that from his review of the Operative Report, he found no evidence of any articular cartilage damage at the time of the injury, and that the quadriceps tendon was ruptured off the superior pole of the patella. Therefore, based on the AMA Guidelines, Third Edition (*Revised*), there is no Table 40 diagnosis for osteoarthritis with regards to this specific injury. Hence, Dr. McBride concludes that Dr. Finn was in error to award the additional rating pursuant to Table 40.

19. Dr. McBride, Board Certified Orthopedic surgeon, and Level II Accredited physician, was accepted as an expert in the areas of orthopedic surgery and sports medicine. Dr. McBride testified consistent with his IME report at hearing. At hearing, Dr. McBride explained in more detail why his opinion concerning the extent of

permanent medical impairment suffered by this claimant constituted more than just a difference of opinion, from that of the DIME doctor's opinions.

20. Dr. McBride testified that his review of the actual CD ROM of the July 17, 2015 MRI scan, was of significant assistance in helping him formulate his opinions with respect to the existence of any ratable arthritis as a component of this injury. The MRI review evidenced no intraarticular injury – no damage to the ACL, PCL menisci, or the articular surface of the tibia or femur. No evidence of edema in the patella or the femur or tibia. No evidence of inflammation or degeneration of the cartilage in the knee joint. No evidence of any arthritis going on inside the knee. Dr. McBride pointed to the MRI report itself, and directed attention to the bottom of page 1, where it references "osseous and chondral surfaces" explaining that where the report indicates "normal marrow signal characteristics", that if Clamant had arthritis, the marrow should not be normal.

21. Dr. McBride explained that the type of injury claimant sustained involved his quadriceps tendon pulling away from the bone on the front half of his patella, and did not involve injury to the inside of the knee joint.

22. Dr. McBride opined that the Operative Report prepared by Dr. Furry did not describe any evidence of any intraarticular pathology, or damage, at the time of her repair in the Operative Report. Dr. Furry makes no reference to any articular injury.

23. Dr. McBride further noted that the ATP, Dr. Rice, provided a permanent medical impairment for lost range of motion only, as this is the number one complication for a ruptured tendon repair, and Dr. Rice did not provide a rating for arthritis.

24. In reviewing Dr. Finn's report, Dr. McBride opined that Dr. Finn provided Claimant a rating for arthritis based on Claimant's complaint of pain. However, in reviewing his report, and physical examination, Dr. McBride stated that there is no objective evidence to support this rating, as there is no evidence of intraarticular injury in this claim. Dr. McBride opines that this additional rating under Table 40 is clear error, as Table 40 does not apply as there is no evidence of symptomatic chondromalacia or intraarticular injury/damage. According to his Level II training, an injury must cause intraarticular damage in order for Table 40 to apply.

25. Dr. McBride opined that with no intraarticular injury, you cannot relate any alleged arthritis, to the work-related injury. This injury was not inside the knee joint, it was to the muscle that runs the knee joint. Dr. McBride analogized this injury in the following manner: (The quadriceps muscle is the motor that runs the knee, or the drive shaft that runs the knee. The knee is like the tire or wheel of a car, and the tire can wear out over time. So, as in this case, even if the tire is brand new, and your drive shaft breaks, then the car still won't run. However, as evidenced by the MRI, claimant's tire is not worn out, so his knee could not have gotten arthritis just because the drive shaft broke. The end of the story is that the knee isn't working because the drive shaft broke, and in this case claimant's quadriceps tendon tore, but the knee still has its full tread on it. It didn't get arthritis because the drive shaft broke.)

26. As a result of all of the above, Dr. McBride opined that providing an impairment rating for arthritis in the intraarticular surface of the knee in this claim is "clear error".

27. On cross-examination, Dr. McBride acknowledged that he had not seen any of the X-rays of Claimant. He further acknowledged that crepitus is among the first indicators of patella-femoral arthritis, but it is not the sole or exclusive means of establishing it. He did not see the report of Dr. Rice, wherein Dr. Rice noted that Claimant had patellofemoral crepitus. He did further acknowledge that patella-femoral crepitus was noted in Dr. Furry's report of August 26, 2016.

28. Claimant testified that he had not sustained any prior injuries to his left knee, nor has he previously had the type of pain he is now experiencing.

CONCLUSIONS OF LAW

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

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the ALJ finds the Claimant's testimony to be sincere and credible. While not medically trained, the ALJ finds that Claimant has been consistent overall in reporting his symptoms to his medical providers

(including the IME by Dr. McBride) in an effort to secure the best medical care he can. Further, the ALJ finds that Claimant testified credibly in the hearing.

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

Overcoming the DIME Opinion of Dr. Finn-Impairment Rating

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

F. In this case, Respondents, and Dr. McBride, have taken the position that in order receive an impairment rating under Table 40(5), there must be an *objective* manifestation of arthritis; not merely a Claimant's *subjective* complaints of pain. The ALJ sees no such requirement in the plain wording of Table 40(5), in contrast, for example, with a Table 53(II)(B) or (C) rating. In this case, the DIME physician assigned a 5%

impairment rating for his diagnosis of patellofemoral arthritis, combined with 8% for range of motion (range of motion not being in dispute).

G. Nonetheless, there is ample evidence in the medical records to support such a finding of patellofemoral arthritis, based upon *objective* evidence.

●*"Catching" or "popping*" in his knee (accompanied by pain when it occurs, especially on stairs) was noted by Dr. Furry, as well as being a recurrent issue in physical therapy.

●*Crepitus* was noted by Dr. Furry ("minimal"), as well as Dr. Rice ("minimal", and "some").

●Dr. Furry noted in imaging studies that there was soft tissue *ossification* of his superior patella. Further, she noted in *IMAGING* that there was mild patellofemoral *arthritis.* She also noted on a different date that "he *does not seem* to have any *substantial* arthritis [in his left knee]. Such observation hardly eliminates a diagnosis of arthritis entirely; the wording is suggestive that some amount could exist.

●Mild *chondromalacia* was noted in the MRI narrative.

H. Dr. McBride notes that Dr. Furry, after seeing the intra-articular surfaces of Claimant's patella and femur during surgery, fails to document any observations in her post-operative notes of symptoms of arthritis. He infers that if such observation had occurred, it would have certainly appeared in her notes. While such medical inference is certainly reasonable, it falls short of compelling the conclusion that arthritis was nonexistent *during the DIME.* Claimant suffered a severe injury, and one that required urgent surgical intervention. The ALJ notes that Dr. Furry's surgical consent advisement included "failure of repair". Any repair, no matter how skillfully performed, could lead to some small misalignment of the kneecap, especially for an active, older person climbing stairs regularly. Over time, this can lead to the symptoms such as Claimant experienced. The medical reports suggest this may well have occurred over time.

I. While the ALJ finds Dr. McBride to be a sincere and eminently qualified orthopedist, he was also not in possession of all pertinent medical records in this case when he rendered his opinion. In the end, Dr. McBride's professional and sincerely held medical opinion simply differs from that of the DIME physician. After considering the totality of the evidence presented, including the DIME reports and testimony of Dr. McBride, the ALJ concludes that Respondent has failed to produce unmistakable evidence establishing that the Dr. Finn's impairment rating is highly probably incorrect. Rather, the ALJ concludes that the evidence presented establishes a mere difference of opinion of the application of Table 40(5) between the DIME physician and the medical expert retained by Respondent. A professional difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome the opinion of the DIME physician.

ORDER

It is therefore ordered that:

1. The DIME physician's Impairment rating is upheld in its entirety. Claimant's combined lower left extremity Impairment Rating is 13%.

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

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

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

DATED: March 21, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Are Respondents bound by the DIME's opinion that Claimant requires medical treatment after MMI because they filed a Final Admission of Liability rather than an Application for Hearing in response to the DIME report?

2. Did Claimant prove entitlement to a general award of medical benefits after MMI by a preponderance of the evidence?

3. The parties stipulated to an average weekly wage of $591.20.

4. At the commencement of the hearing, Claimant argued he suffered a whole person impairment, and Respondents were bound by the DIME rating because they filed a Final Admission of Liability rather than requesting a hearing after receiving the DIME report. The ALJ concluded Claimant properly preserved that issue by endorsing "PPD" on his Application for Hearing, but did not give Respondents sufficient notice of his intent to try that issue through discovery. Respondents elected to reserve that issue for future determination.

FINDINGS OF FACT

1. Claimant suffered admitted injuries to his left leg on April 8, 2015 while working for Employer as a plumber. He was stepping up onto a scaffold and his left foot slipped into a gap between the ground and the front step of the scaffold, causing him to fall backward onto the ground. In the process of falling, he twisted his left leg and ankle.

2. Claimant's boss took him to Concentra, where he saw Dr. Walter Larimore. Claimant reported pain in the left ankle and left calf, and had difficulty bearing weight on the left leg. His left ankle was swollen and tender with limited range of motion. Dr. Larimore diagnosed a moderate left ankle sprain, splinted the ankle and gave Claimant crutches. He advised Claimant to remain nonweightbearing and released him to sedentary duties only.

3. Claimant returned to Concentra on April 13, 2015 and reported minimal improvement. He was not using crutches but was limping due to lateral ankle and calf pain. His left ankle remained swollen and painful. Examination of the left calf showed tenderness at the gastrocnemius and Achilles junction. Dr. Larimore added the diagnosis of gastrocnemius tendon strain. Ibuprofen was not helping, so Dr. Larimore prescribed naproxen instead. He also referred Claimant for physical therapy.

4. Claimant's ankle steadily improved over the next several weeks, but his calf remained painful with minimal relief from medication and therapy. Dr. Larimore referred Claimant for a lower leg MRI and an orthopedic consultation with Dr. Michael Simpson.

5. Claimant saw Dr. Simpson on May 18, 2015. Dr. Simpson reviewed the MRI and described it as "completely normal" with no evidence of a muscle tear. He saw no surgical pathology and expected Claimant's pain to resolve with time. He also stated, "If he continues to have pain, it may be prudent to have him evaluated by a pain management specialist to determine whether or not he has any neuropathic pain."

6. Claimant did not improve, and on June 8 he told Dr. Peterson at Concentra he was "becoming worse." Dr. Peterson ordered a "STAT" ultrasound which ruled out DVT and referred Claimant to Dr. Jeffrey Jenks for electrodiagnostic testing.

7. Claimant had a repeat MRI on June 30 due to imaging artifact in the first MRI. The second MRI showed "minimal Achilles tendinosis."

8. Dr. Jenks performed a left leg EMG on July 8, 2015, which showed peroneal neuropathy at the left fibular head. Testing of the lumbar paraspinals was normal with no evidence of denervation or motor changes. Dr. Jenks started Claimant on Neurontin and prescribed a topical compound analgesic cream.

9. Claimant began treating with Dr. Shimon Blau, a physiatrist, on July 20, 2015. He described ongoing left leg pain and weakness, aggravated by walking. The Neurontin was not helping, so Dr. Blau switched him to Lyrica.

10. In late October 2015, Claimant reported the pain had "started working its way up into his posterior thigh and buttocks."

11. Dr. Blau administered an ultrasound-guided injection of steroid and lidocaine on November 3, 2015. On follow up in December, Claimant told Dr. Blau the injection "did not help at all."

12. Claimant started experiencing low back pain in approximately November 2015. Claimant never noted low back pain on the pain diagrams he completed at Concentra. Claimant has admitted he first developed back pain "eight or nine months" after the injury.

13. In January 2016, Dr. Blau discontinued Lyrica and started Claimant on Cymbalta. He also refilled trazodone and referred Claimant back to Dr. Jenks for a repeat lower extremity EMG.

14. Dr. Albert Hattem took over as Claimant's primary ATP on January 14, 2016 due to "delayed recovery." Claimant told Dr. Hattem "overall since his injuries . . . he is unchanged despite considerable time and treatment." The physical examination was largely normal, except slight tenderness on the lateral aspect of the ankle and lower leg. Dr. Hattem advised Claimant if the repeat EMG was unchanged or improved, he would be at MMI.

15. Claimant saw Dr. Jenks for the repeat EMG on February 16, 2016. Although Dr. Jenks' report is not in evidence, Dr. Blau described it in his March 7, 2016 report.

According to Dr. Blau, the EMG showed "findings and symptoms potentially consistent with a left L5 radiculopathy. This was based on _____ peroneus longus muscle."

16. Dr. Blau's March 7, 2016 report also contains what appears to be the first mention of low back pain in the Concentra records. He described the back pain as "constant, aching and throbbing." Claimant also described ongoing leg pain which was "more sharp in nature." He rated his pain at 7.5-9/10, but it is unclear whether he was referring to his back pain, leg pain, or both. Dr. Blau noted "he has tried Lyrica, Cymbalta, and trazodone in the past . . . and states these were not helping very much." Dr. Blau ordered a lumbar MRI.

17. Claimant followed up with Dr. Hattem on March 24. Dr. Hattem noted the repeat EMG "demonstrated no evidence of left peroneal neuropathy. This condition is now resolved and is at maximum medical improvement." He also opined the potential L5 radiculopathy was a "new finding" not causally related to the industrial accident. Dr. Hattem placed Claimant at MMI with no impairment, no restrictions, and no maintenance care. He advised Claimant to "consult with his personal physician outside of workers' compensation for non-claim-related lumbosacral radiculopathy."

18. Claimant has been treating with his primary care providers for leg pain since March 2016. The working diagnosis throughout the PCP records is "left L5 radiculopathy."

19. Claimant saw Dr. Stephen Gray for a Division Independent Medical Examination ("DIME") on April 11, 2017. Claimant complained of intermittent "severe" sharp, shooting, and stabbing pain across his entire lumbosacral region. Dr. Gray noted none of the Concentra pain diagrams identified low back pain. Claimant stated the back pain did not develop until "8 or 9 months after the original injury." He described stabbing pains and tingling in the posterior aspect of the left leg from the buttock into the heel. He complained of numbness laterally over the left thigh and calf area, and weakness "in the entire left leg." On exam, he was tender over the left iliac crest and iliolumbar ligament, and the left SI joint. Straight leg raise and tension signs were "equivocally positive" on the left. He had decreased sensation over the left L5 dermatome "consistent with L5 radiculopathy." Strength testing was "difficult to evaluate as there was a rather extreme breakaway weakness in testing dorsiflexion and left knee extension. Left leg range of motion testing showed difficulty with eversion "consistent with his previous peroneal nerve palsy." He had significant difficulty with dorsiflexion, and his EHL was weak.

20. Dr. Gray agreed Claimant was at MMI on March 24, 2016. Dr. Gray's diagnoses included "left peroneal neuropathy, probably secondary to 4/8/15 work-related incident," and "lumbosacral radiculopathy, unclear relationship to [the industrial accident]." Dr. Gray struggled to sort out which symptoms were injury-related:

> This case proved to be quite difficult in regards to causation of the late complaint of low back pain and the late findings of the L5 radiculopathy. It seems reasonably clear that the left lower extremity peroneal neuropathy is related to the strain/sprain injury of the left lower extremity that occurred on 4/8/15. The late finding of an L5 radiculopathy throws a wrench or red

> herring into the thought process. To this examiner's knowledge an MRI scan was not obtained. Even if an MRI scan of the lumbar spine showed a corresponding disc lesion at the left L5 area, it would not answer whether there was ever a low back injury. [Claimant] was quite frank about the fact that his complaints of low back pain did not manifest until long after the initial injury. The first mention of back injury in the medical records occurred almost ½ a year after the injury . . . . Nevertheless, we have the electrodiagnostic studies that show a left leg peroneal neuropathy and then a later electrodiagnostic study that shows an L5 radiculopathy. This examiner did not have the benefit of reviewing a complete set of notes on the electrodiagnostic studies that were performed. . . . Even if this examiner did have complete raw data on the electrodiagnostic studies, it would require the input of Dr. Jenks to help answer the following question. Is it possible that the early study showing a peroneal neuropathy was limited by how far of the exam was done? Is it possible that what we are seeing is the result of a "double crush" phenomena? Is it possible that, if the earlier study had been performed all the way up into the proximal right lower extremity and pelvis, would this have shown an L5 radiculopathy?

21. Dr. Gray opined "there ***may*** have been a relationship between the peroneal nerve injury and electrodiagnostic changes proximal to that, in the L5 spinal nerve root, which is partially where the peroneal nerve comes from." (Emphasis added). Ultimately, Dr. Gray assigned a 14% lower extremity impairment rating based on range of motion deficits and impairment of the common peroneal nerve. He indicated the neurological rating addressed "***both*** the L5 radiculopathy and peroneal nerve changes." (Emphasis added). He did not assign a lumbar spine rating.

22. Dr. Gray recommended maintenance care in the form of quarterly visits with Dr. Hattem for pain management and medication refills. He also opined Dr. Hattem should have the option to refer Claimant for brief courses of physical therapy for flare-ups, and ESIs "if Dr. Hattem thinks that injections might help him control his pain." Dr. Gray did not specify what "pain" the recommended treatment was intended to address; i.e., the peroneal nerve pain or the unrelated back pain and L5 radiculopathy? He recommended a follow-up visit with Dr. Jenks for "an opinion on the relationship of the L5 and peroneal nerve changes." Finally, he recommended a follow-up visit with Dr. Simpson, despite opining Claimant "does not appear to be a surgical candidate for his current work-related condition."

23. Claimant underwent a lumbar MRI on April 21, 2017, which was essentially normal.

24. Insurer filed a Final Admission of Liability on May 17, 2017 based on Dr. Gray's DIME report. The FAL admitted for a 14% scheduled impairment. The FAL also stated "we deny liability for medical treatment and/or medications after MMI."

25. Claimant's PCP referred him to Dr. Christopher Malinky, an interventional pain management specialist, in May 2017. Claimant's primary complaint was left-sided

low back pain radiating down his left leg. Dr. Malinky administered an L4-5 transforaminal ESI, which gave Claimant "0 relief." Dr. Malinky recommended a spinal cord stimulator trial since no previous treatment had helped Claimant's leg pain.

26. Claimant saw Dr. Mark Paz for an IME at Respondents' request in October 2017. Dr. Paz opined the left peroneal neuropathy had resolved per the EMG, and the L5 radiculopathy was not injury-related. Dr. Paz pointed out that Claimant did not complain of low back pain until several months after the original injury, and opined the mechanism of injury does not correlate to an L5 radiculopathy. Dr. Paz agreed Claimant was at MMI as of March 24, 2016, and requires no additional treatment for any injury-related condition. He disagreed with Dr. Gray's rating because it was based on conditions that are not related to the April 2015 accident.

27. Dr. Hattem testified in a deposition for Respondents on September 15, 2017. He does not believe Claimant's low back pain is work-related, as it did not manifest until well after the original injury. He also noted Claimant's pain from the work injury originated in the lower leg and radiated at times *upward*, which is not consistent with the later onset of L5 radiculopathy radiating from the back *downward*.

28. Dr. Paz testified at hearing on behalf of Respondents. He reiterated and expanded on the opinions expressed in his IME report. He explained that symptoms of peroneal neuropathy are similar to those of L5 radiculopathy, but they are distinct entities and peroneal neuropathy would not evolve into an L5 radiculopathy. He maintained the peroneal neuropathy has resolved and the L5 radiculopathy is not related to Claimant's industrial injury. Dr. Paz agreed with Dr. Hattem that Claimant requires no additional treatment for any injury-related condition.

29. The opinions of Dr. Hattem and Dr. Paz are more persuasive than opinions in the record to the contrary.

30. Claimant failed to prove by a preponderance of the evidence that his low back pain and L5 radiculopathy is causally related to the April 8, 2015 industrial accident.

31. Claimant failed to prove by a preponderance of the evidence that the industrial accident proximately caused the need for ongoing medical treatment.

CONCLUSIONS OF LAW

A. Respondents are not bound by the DIME's opinion regarding medical benefits after MMI.

Respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if the claimant requires maintenance care to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI,

subject to the respondents' right to dispute compensability, reasonableness, or necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003).

As found, the Respondents did not request a hearing to challenge the DIME's report within 20 days, and filed an FAL instead. Since the DIME recommended maintenance treatment, Claimant reasons the DIME's opinion is binding under § 8-42-107.2(4)(c), which provides:

> Within 20 days after the date of mailing of the division's notice that it has received the IMEs report, the insurer or self-insured employer shall either file its admission of liability pursuant to section 8-43-203 or request a hearing before the division contesting one or more of the IMEs findings or determinations contained in such report.

In *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005), the court of appeals held that the requirements of § 8-42-107.2(4)(c)[1] are "jurisdictional." Thus, if the respondents do not request a hearing to contest the DIME's findings, those findings are binding on the parties and the ALJ.

The ALJ disagrees with Claimant's argument that the "findings or determinations" referenced in § 8-42-107.2(4)(c) include opinions regarding medical treatment after MMI. Rather, the preclusive effect is limited to determinations regarding MMI or whole person medical impairment.

The general assembly used various permutations of the term "findings" or "determinations" throughout §§ 8-42-107 and 8-42-107.2.[2] The terms are always linked to the issues of MMI or whole permanent impairment, and it is well-established that the DIME's findings are only given presumptive weight on those two issues. *E.g., Meza v. Industrial Claim Appeals Office*, 303 P.3d 158 (Colo. App. 2013); *Leprino Foods v. Industrial Claim Appeals Office, supra*; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Yeutter v. CBW Automation, Inc.*, W.C. No. 4-895-940-03 (February 26, 2018). A DIME is not a prerequisite to a dispute over *Grover* medical benefits, and the DIME's opinion on the matter is afforded no special weight. *E.g.*, *Lassiter v. Trojan Labor*, W.C. No. 4-741-836 (June 23, 2010). "Regardless of whether . . . the DIME physician recommended future medical treatment, the respondents were free to

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[1] *Leprino* construed a prior version of the statute, which was codified at § 8-42-107.2(4). The statute was subsequently amended by SB 13-249 to clarify the triggering event and reduce the time limit, but the substantive language was unchanged. *Leprino* thus remains good law with respect to this issue.

[2] See, e.g., § 8-42-107(8)(b)(I) (an ATP "shall make a *determination* as to when the injured employee reaches maximum medical improvement"); § 107(8)(b)(II) ("if either party disputes a *determination* by an [ATP] . . . whether the injured worker has . . . reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2"); § 107(8)(b)(III) ("if the [DIME] . . . *finds* that the injured worker has reached [MMI], the [DIME] shall also *determine* the injured worker's permanent medical impairment rating."); § 107(8)(c) ("If either party disputes the [ATP's] *finding* of medical impairment . . . the parties may select [a DIME]. The *finding* of the [DIME] may be overcome only by clear and convincing evidence"); § 107.2(2)(b) ("if any party disputes a *finding or determination* of the [ATP], such party shall request the selection of an IME."). (Italics supplied)

deny liability and place the burden on the claimant to prove by a preponderance of the evidence that she needed future medical treatment." *Wilkinson v. Wal-Mart Stores, Inc*., W.C. No. 4-657-582 (October 26, 2007).

B. Claimant failed to prove that the industrial accident proximately caused the need for ongoing medical treatment

A claimant must prove entitlement to medical benefits after MMI by a preponderance of the evidence, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). The DIME's opinion regarding medical treatment after MMI is not entitled to any special weight but is simply another medical opinion for the ALJ to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

As found, Claimant failed to prove by a preponderance of the evidence that the industrial accident proximately caused the need for ongoing medical treatment. Claimant simply did not present sufficient evidence for the ALJ to tease out the degree to which the industrial accident "more likely that not" caused a need for treatment. Dr. Hattem and Dr. Paz provided well-reasoned arguments and Claimant has no persuasive countervailing opinion evidence. No treating providers have recommended further treatment on a work-related basis, and Claimant is primarily relying on Dr. Gray's opinions. But Dr. Gray did not differentiate treatment intended to address injury-related peroneal nerve pain versus nonindustrial back pain and L5 radiculopathy. As Dr. Gray pointed out, the assessment of causation is "difficult" due to the conflicting EMG findings and evolving symptomatology. Claimant has some symptoms consistent with peroneal neuropathy, but no corresponding current EMG findings. He also has symptoms consistent with L5 radiculopathy and positive EMG findings, but no apparent spinal pathology per the lumbar MRI. Dr. Gray raised several valid questions in his report but failed to answer them. Ultimately, Dr. Gray "punted" on the causation question, conflated the conditions and calculated a rating which covers both the peroneal neuropathy and the nonindustrial L5 radiculopathy. It is reasonable to assume he applied similar reasoning to his recommendations for maintenance care. Therefore, the ALJ concludes there is insufficient persuasive evidence for Claimant to carry his burden.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits after MMI is denied and dismissed.

2. Any issues not decided herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with this Supplemental Findings of Fact, Conclusions of Law, and Order, you may file a Petition to Review the order with the Denver Office of Administrative

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

DATED: March 22, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

STIPULATION

At the commencement of hearing, the parties stipulated that Claimant's average weekly wage (AWW) with Employer equals $911.48 in the event that the injury is determined to be compensable. The parties' stipulation is approved.

REMAINING ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he suffered a compensable work-related injury to his low back and knee, and is therefore, entitled to reasonable, necessary and related medical benefits to cure and relieve him of the effects of said injuries.

II. If Claimant established that he suffered compensable work-related injuries, whether he demonstrated, by a preponderance of the evidence, that he is entitled to select a physician of his choice to attend to his injuries because the right of selection passed to him.

III. Whether Claimant has proven, by a preponderance of the evidence, his entitlement to temporary disability benefits.

IV. Whether Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment thereby precluding his entitlement to TTD benefits subsequent to December 19, 2016, injury.

Because the undersigned concludes that Claimant failed to prove that he sustained a compensable injury on January 23, 2017, this order does not address questions II-IV as set forth above.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing deposition testimony of Dr. McCranie, the ALJ enters the following findings of fact:

1. Claimant worked for Employer as a truck driver. His job duties included hauling heavy excavating equipment from one job site to another and occasionally running an end dump truck. A large Peterbilt semi tractor-trailer rig was used to haul the heavy machinery from one location to another.

2. Claimant testified that his habit and routine was to arrive at work around 4:30 a.m. where he would clock in through his cell phone while pulling up to Employer's locked gate. Claimant testified that on December 19, 2016, he clocked in his usual

fashion[1] and drove to where the Peterbilt was parked in order to get it started and ready to move equipment for the day. Claimant exited his Jeep and climbed into the cab of the Peterbilt. When he tried to start it, the truck would not fire. Rather, the ignition made a clicking sound as if the battery was dead. Assuming there was a problem with the battery, Claimant testified that climbed out of the truck and drove to the shop on facility grounds to find a set of jumper cables. After failing to find the cables in the shop, Claimant testified that he got in his Jeep and drove to the WalMart located at Platte and Chelton to purchase a set of cables. According to Claimant, he purchased a cheap set of cables out of his pocket and drove back to the yard where he tried to jump the Peterbilt. Claimant explained that he drove up to the Peterbilt, exited his vehicle, removed the Peterbilt's battery cover,[2] hooked up the jumper cables from his Jeep's battery to the Peterbilt's battery, waited 10-15 minutes for a charge to build up, climbed back into the truck and tried to start it. Per Claimant the truck still would not start. Consequently, he testified that he exited the truck to check his connections. As he was climbing down, Claimant testified that his foot landed on and slipped off the batteries causing him to fall backwards to the ground onto his buttocks. According to Claimant's Worker's Claim for Compensation the entire aforementioned activity took approximately 15 minutes from his arrival at work as the injury allegedly occurred at 4:45 a.m. (Respondents' Exhibits, hereinafter *RE, Exhibit B*).

3. Claimant testified that there was only one set of jumper cables in the shop. He further testified that there was only one service truck on site and that he did not check the service truck because it would have been locked and he did not have a key.

4. Claimant's personal vehicle operates on a 12 volt charging system; the Peterbilt operates on a 24 volt charging system. Claimant testified to his knowledge of this, noting that was probably the reason why he could not get the truck to start. He also testified that when he left the truck step, i.e. the battery cover was still off and the hood was not buckled down.

5. At 5:04 a.m. on December 19, 2016, Claimant sent a text message to Seth Chiddix, owner and operator of Employer stating, "Truck wouldn't start, went to Walmart to get cables, fell and hurt knee and back. no moves done, truck don't start." (*RE J, Bates 283 (Text entry #51).* While Claimant testified that his text message included an indication that he was going home, the actual message fails to indicate the same. Additionally, Claimant conceded that his message is vague and does not specifically indicate that he fell in the yard and consequently sustained an injury while at work.

[1] When asked if he was sure he clocked in, Claimant testified that he was "quite sure [he] did" and that he could think of no reason he would not have.

[2] The battery cover also functions as a step up into and down from the cab of the Peterbilt and must be physically removed to expose the batteries.

6. Mr. Chiddix returned a text message to Claimant at 7:32 a.m. on December 19, 2016, attempting to clarify whether Claimant was coming in to work. Claimant did not respond.

7. The next day, December 20, 2016, Claimant texted Mr. Chiddix informing him he would not be in to work as his back was "hurt." Later at 5:57 p.m., Claimant texted Mr. Chiddix asking whether there were "moves", i.e. work for the morning of the 21st as he needed to work. *RE J, Bates 284 (Text entry #57)* Mr. Chiddix informed Claimant that he would need to provide a doctor's note releasing him to work. *RE J, Bates 284 (Text entry #58)*

8. Because Claimant needed a doctor's note clearing him for work, he sought medical treatment at a UCHealth facility near his home on December 21, 2016. He was examined by Physician's Assistant (PA) Alicia Libby. PA Libby obtained a history noting Claimant's chief complaint as back pain since he "jumped onto the side of his truck and slipped on the ice and fell on his back." Consistent with Mr. Chiddix's request, PA Libby also noted that Claimant "needs a work note." Finally, PA Libby noted that Claimant had an "extensive history of prior compression fractures at L1." At 10:28 a.m., PA Libby ordered x-rays of the lumbar spine to "r/o (rule out) new fx (fracture). The x-rays were completed by 11:02 a.m. revealing L1 and L3 compression fractures of indeterminate age.

9. PA Libby authored a letter indicating that Claimant was able to return to work without restrictions on December 22, 2016. PA Libby electronically signed the letter at 11:13 a.m. Based upon the medical record from this date of service, the letter was "sent." *RE C, Bates 15.* Claimant suggested that he did not get the letter and claimed that he was unaware that he had been cleared to return to work. The ALJ finds Claimant's suggestion that he did not get the letter from PA Libby dubious. The claim that he was unaware that he had been released to work is equally unconvincing. Here the evidence presented establishes that per Employer's instruction, Claimant presented to UCHealth for the sole purpose of getting a work release so he could return to work as he was requesting to do. Without a release, Claimant was aware that he could not return to work. Given that Claimant was expressing a desire to return to work and knowing he could not return without one, the ALJ finds his suggestion that he left without a release or an indication that he was cleared to return to work preposterous.

10. At 5:31 p.m. on December 21, 2016, Claimant sent a text message to Mr. Chiddix noting that he had been to the doctor and his condition was "worse then (sic) [he] realized from that fall [he] had Monday morning on the yard." Claimant indicated that he was instructed to "go to the spinal center . . . and to rest and be off my feet and back." Claimant did not provide any detail regarding his condition nor did he mention the letter (work note) authored by PA Libby releasing him to work in his text message. Rather, the ALJ finds that the content of Claimant's text message ostensibly implies that PA Libby excused him from work. *See RE J, Bates 284 (Text entry #60-#61).*

11. Claimant admitted on cross-examination that he has never provided Employer with a note or any medical record that indicates that he has been taken off work.

12. On January 10, 2017, Claimant presented to the neurosciences center of UC Health for a neurosurgical evaluation. Physician Assistant (PA) Justin Kidd and Dr. Todd Thompson, M.D. evaluated claimant. An MRI of the lumbar spine for a diagnosis of "compression fracture of lumbar spine, non-traumatic, initial encounter" was ordered and Claimant was scheduled for a follow-up appointment.

13. Claimant returned to the UC Health Neuroscience Out Patient Clinic on February 2, 2017 to review the results of his MRI. Dr. Stacy Greenspan reached the following impressions based upon Claimant's MRI findings:

1. No evidence of acute osseous abnormality.

2. Chronic mild to moderate compression fractures of T12 and L1 and multiple chronic endplate irregularities throughout the lumbar spine consistent with mild chronic compression fractures and Schmorl's node phenomenon.

3. Slight flattening along the ventral surface of the dural sac at T12-L1 without significant canal stenosis.

4. No significant canal stenosis or neural foraminal stenosis throughout the remainder of the lumbar spine.

14. Dr. Greenspan specifically referenced that Claimant's MRI findings were compared to the "plain radiographs", i.e. x-rays taken of his lumbar spine on 12/21/2016. In comparing the images, Dr. Greenspan noted that the moderate loss of vertebral body height at L1 and the mild to moderate loss of height at T12 were present on the 12/21/2016 x-rays "consistent with at least subacute to chronic compression fractures and multiple Schmorl's nodes."

15. Follow-up x-rays of Claimant's lumbar spine were obtained on April 18, 2017. The x-rays were interpreted as demonstrating "stable wedge-shaped fracture at L1 and compression fracture of T12. PA Kidd referred Claimant to Dr. Alexandra Coffey for additional non-surgical treatment recommendations and to physical therapy for rehabilitation.

16. Claimant was evaluated by Dr. Coffey on July 25, 2017. Dr. Coffey renewed Claimant's prescriptions and helped "facilitate" his physical therapy closer to his home for better access to treatment. Claimant was referred to Strive Physical Therapy and he participated in treatment from August 2, 2017 through August 30, 2017.

17. Claimant subsequently sought and obtained employment as a driver with Falcon Transportation (hereinafter "Falcon"). *RE K* Claimant failed to provide information of this employment in his answers to interrogatories when asked specifically to identify all employment he has held since leaving his employment with the employer. Nonetheless, employment records from Falcon were subsequently received by Respondents and were admitted into evidence at hearing. Claimant's wage records from Falcon indicate that he began his employment on August 31, 2017. *RE K, Bates 298.* Claimant testified that his employment with Falcon lasted "maybe a month" because he could not stay in the trucks as they were too stiff and he could not bend over to pull chains. Contrary to Claimant's testimony that his employment with Falcon lasted "maybe" a month, his wage records indicate that he was employed with Falcon through October 20, 2017. *RE K, Bates 302.* From August 31, 2017 through October 20, 2017, Claimant earned gross wages in the amount of $6,547.50. *RE K, Bates 298-302.* This yields an AWW of $916.63, which is $5.15 greater than the AWW claimant earned while working for Employer.

18. Claimant testified that he left his employment at Falcon on his own accord. He was adamant that he was not fired.

19. Patricia Farrenkopf is the co-owner of Falcon Transportation. She was allowed to testify as a rebuttal witness taken out of order. As part of her business duties, Ms. Farrenkopf is involved in the Human Resource functions for the business and testified that she would have been made aware if any employee, including claimant, was having difficulty with physically performing their job. Ms. Farrenkopf testified that she received no reports that Claimant had problems or difficulties with the physical performance of his job. Ms. Farrenkopf further testified that Claimant did not voluntarily resign his employment with Falcon Transportation. Rather, Ms. Farrenkopf testified that Claimant was terminated for cause for violation of safety regulations, namely his failure to chain down machinery that he was transporting as required by the Department of Transportation. Ms. Farrenkopf also testified that following Claimant's termination for cause, he contacted Falcon requesting that they give him another opportunity for employment, which request Falcon refused.

20. Claimant next sought and obtained employment with All American Disposal (hereinafter "All American"). Claimant testified that he did not start working for All American until December 3, 2017. Claimant's employment records from All American indicate that Claimant started his employment there on November 13, 2017. *RE L, Bates 303.* Additionally, when Claimant saw Dr. Timothy Hall for an IME on November 21, 2017, he told Dr. Hall that he had been working for All American. Consequently, Claimant's hearing testimony is inconsistent with his prior statements to Dr. Hall and the record evidence presented.

21. Claimant has earned gross wages in the amount of $8,057.29 from November 13, 2017 through February 20, 2018 while working for All American Disposal. *RE L, Bates 303-315.* This yields an AWW of $633.73, which is a difference of $277.75 from the AWW claimant earned with employer.

22. At hearing, Claimant testified that he has difficulty with walking, sitting, or standing for long periods. However, his physical therapy records indicate that he demonstrated the capacity to hike about 2 ½ hours for two consecutive days in August 2017. At hearing, Claimant testified that he never reported that he went hiking in Garden of the Gods as his physical therapy records indicate. Rather, Claimant explained that he would walk around Palmer Park with his fiancé for an hour during lunch and much of that time was spent sitting on rocks.

23. Tobias Glaser testified as Employer's computer network and timecard administrator. Mr. Glaser testified that Employer uses a computer-based timecard program that was implemented in the summer of 2016. The program allows employees to clock into work using their cell phones. Each employee has an application on their phone for this purpose that the employee installs on their respective phones. According to Mr. Glaser, the program contains a GPS function to track the position of Employer's drivers, to "make sure our employees are getting to where they're supposed to be when they're supposed to be." Once clocked in the GPS function tracks the employee's movements.

24. Mr. Glaser testified that if someone were attempting to clock into the system without having their location settings on, they would get an almost immediate notification that they cannot be clocked in due to the settings being turned off. Mr. Glaser refuted Claimant's testimony that it would take up to two hours to receive such notification. Mr. Glaser also testified that he is familiar with Claimant's habit and routine with regard to clocking in and out of the timecard system. He testified that Claimant was very consistent about clocking in. According to Mr. Glaser, there was never a day that Claimant worked that he failed to clock in. Finally, Mr. Glaser testified that if an employee was unable to clock in for some reason another employee (Lisa) could manually clock him or her in and adjust their time record to reflect an accurate clock in date and time. Lisa would attend to such adjustments the same day per Mr. Glaser.

25. Claimant's timesheet records reflect his habit and routine of clocking in for work. *RE I, Bates 220-225.* Mr. Glaser testified that if Claimant had clocked in on December 19, 2016 at 4:30 a.m. as he testified he did, or later through Lisa, there would be a record entry for this date. Mr. Glaser confirmed that Claimant's timesheet records reflect that he did not clock in on December 19, 2016, and did not appear for work on this date. *RE I, Bates 225.*

26. Seth Chiddix testified as the owner of Employer for 22 years. He testified that it was his usual practice and custom to communicate with Claimant via text message due to the unreliability of cell phone signal for the area where Claimant lived. Mr. Chiddix recalled the text message Claimant sent at 5:04 on December 19, 2016. He testified that the text message was vague and did not clearly indicate that Claimant had sustained a work related injury. Mr. Chiddix further testified that upon receipt of this text message, he immediately pulled up Claimant's "Tsheets" to see if he had reported to work that morning. Review of Claimant's electronic clock in data revealed that

Claimant had not clocked in; leading Mr. Chiddix to believe that Claimant had not reported to work that morning. Consequently, Mr. Chiddix did not feel Claimant's text message required a response at the time.

27. Upon his arrival at work on December 19, 2016, Mr. Chiddix saw the Peterbilt sitting in the yard, prompting him to respond to Claimant's earlier email with: "And you're not coming in, right?"

28. Mr. Chiddix testified that on December 19, 2016, there would have been at least two and possibly three sets of jumper cables in the shop, thus, even if one pair had been used and not returned to the shop, Claimant still would have had access to one or two other pair. Moreover, Mr. Chiddix testified that on December 19, 2016, there were two service trucks parked just outside the shop, both of which carried jumper cables and neither of which were locked. Thus, Claimant had access to at least two additional pairs of jumper cables according to Mr. Chiddix. According to Mr. Chiddix, there would have been no reason that Claimant would have needed to travel to WalMart to get jumper cables. Mr. Chiddix testified that the trucks remain unlocked because the facility is contained within a locked and fenced in area that is secured, and because the locks on the service trucks do not work.

29. Mr. Chiddix testified that he has traveled from the yard to the WalMart at Platte and Chelton and that depending on traffic and stop lights, it generally takes between 15-20 minutes one way. He agreed that traffic is generally lighter at 4:30-5:00 in the morning, but that Claimant's assertion that he traveled to the WalMart in five minutes is not realistic.

30. Mr. Chiddix testified that he has extensive knowledge of jump-starting 24 volt charging systems on heavy equipment based on his long history and experience in the excavation business. He also testified that he has extensive experience and knowledge regarding jump-starting 12 volt charging systems. Mr. Chiddix testified that if Claimant had hooked the 12 volt charging system of his personal vehicle to the 24 volt charging system of the Peterbilt, he would have "fried" the electronics in his Jeep because you cannot run a 24 volt to 12 volt system.

31. Mr. Chiddix testified that when he arrived at the yard on December 19, 2016, he spoke with his lead mechanic and learned that there was no problem with the Peterbilt and that it "fired right up" when the mechanic turned it over.

32. Mr. Chiddix confirmed that he requested Claimant to provide him with a work release from a doctor before he could return to work and that Claimant never provided him with the same. Instead, Mr. Chiddix testified that Claimant texted him that his injury was worse than he thought and that he was told to rest and be off his feet and back. Mr. Chiddix later learned that PA Libby had authored a letter returning Claimant to work without restriction, which was contrary to Claimant's text message to him. Mr. Chiddix testified that he would have put claimant back to work immediately if Claimant

had provided the note from PA Libby. As found above, Claimant did not provide the note and did not return to work for Employer despite being released to do so.

33. Mr. Chiddix attempted to reach Claimant via text message on December 27, 2017, January 2, 2018 and again on January 8, 2018 to inquire whether he would be returning to work. *RE J, Bates 285 (Text entries #64, #64, and #65).* Claimant never responded to any of Mr. Chiddix's text messages nor did he return to work. Accordingly, after more than a couple of weeks of Claimant's failure to appear for work, Mr. Chiddix testified that he was of the reasonable belief that Claimant had abandoned his job.

34. Mr. Chiddix testified that the first he learned that Claimant purportedly sustained a work injury was when he, as Employer received notification from Insurer in January 2017 that Claimant had filed a Workers' Claim for Compensation.

35. Colleen Chiddix testified as Employer's Office Manager and Human Resource Director. She testified that she is the person to whom employees are instructed to report all work injuries. Ms. Chiddix testified that she never received any notification from Claimant that he had sustained any type of work injury. She testified that she only became aware of the alleged work injury in this case when the Insurer notified Employer in January 2017 that Claimant had filed a Workers' Claim for Compensation.

36. After notification by Insurer of the claim, Ms. Chiddix testified that she attempted to contact Claimant but had been unable to reach him. She further testified that she sent him COBRA paperwork after it was determined that he had abandoned his employment.

37. When asked on direct examination why she did not initiate an injury report on or about December 19, 2016, Ms. Chiddix testified that though she had seen the text message from Claimant to Mr. Chiddix on that date, there was no clear indication where Claimant fell and what claimant was doing when he fell. Further, Ms. Chiddix testified that Claimant had not clocked in and was apparently not at work. Consequently, she did not believe that Claimant had suffered a work related injury.

38. On November 21, 2017, Claimant presented to Dr. Hall, a board certified physiatrist, for an independent medical examination (IME) at the request of his attorney. Dr. Hall testified that Claimant complained of low back pain, but that claimant denied any radiating pain or paresthesia. Dr. Hall testified that he reviewed medical records in advance of the IME, but on cross-examination, admitted that he did not view the MRI images. Instead, he read the reports commenting on the MRI made by Claimant's providers. Dr. Hall confirmed Claimant's diagnosis of compression fractures at T12-L1 and L3, but noted that care must be exercised when addressing the discussion about whether Claimant's compression fractures were "old or new." According to Dr. Hall, it is difficult to differentiate between old and new compression fractures. He testified that one assumes that with acute injury (fracture), there will be some bone marrow edema or

local swelling of the soft tissue, but that is not always the case. Regardless, he testified that Claimant's imaging is not consistent with an acute fracture.

39. While Dr. Hall testified that Claimant's symptomatology is consistent with the mechanism of injury—falling from a height of about four feet onto his buttock, he conceded that he is not sure what injury Claimant actually sustained. Dr. Hall surmised that, "something else got injured when [Claimant] fell." He suggested that Claimant's ongoing pain could be emanating from facet joints and/or SI joint dysfunction. Nonetheless, he agreed on cross-examination that Dr. Thompson, after multiple examinations and an MRI scan, has made no alternative diagnoses to account for Claimant's ongoing pain.

40. Respondents requested a medical records review from Dr. Kathy McCranie. Respondents also obtained Dr. McCranie's testimony via post hearing deposition. Dr. McCranie testified as a board certified physiatrist. She testified that she reviewed Claimant's available medical records including the MRI report. She testified that the MRI imaging revealed chronic, i.e. "old" mild to moderate compression fractures at T12 and L1. According to Dr. McCranie, Claimant's medical records and radiographic findings fail to support an objective basis for him having suffered acute compression fractures. *RE H.*

41. Dr. McCranie also addressed Dr. Hall's supposition that Claimant's ongoing pain complaints could be caused by the facet and/or SI joints and opined that this is not the case. Dr. McCranie testified that if the facet joints were Claimant's pain generator, there would be objective medical evidence of the same on the MRI scan. However, in reviewing the MRI scan there was no evidence of any kind of facet abnormality.

42. The ALJ credits the opinions Dr. McCranie and Dr. Greenspan to find that the compression fractures visualized on Claimant's x-rays and MRI likely predated his alleged slip and fall. While the suggestion that they are subacute has been attributed to Dr. Thompson, the ALJ finds that reference was actually raised in the MRI report authored by Dr. Greenspan. Specifically, Dr. Greenspan noted that the findings on MRI at the T12 and L1 spinal levels were also seen on the x-rays taken 12/21/16, which, at the time, demonstrated the compression fractures to be "at least subacute." Given that the x-rays of 12/21/16 failed to demonstrate evidence of acute injury only 2 days after the alleged slip and fall, per Dr. Greenspan, the ALJ finds Dr. McCranie's opinion regarding the chronicity of the compression fractures persuasive. Even Dr. Hall agreed that Claimant's imaging studies are not consistent with an acute fracture.

43. Based upon the evidence presented, the ALJ also credits the opinion of Dr. McCranie over the less persuasive opinion of Dr. Hall regarding the cause of Claimant's current low back pain. Specifically, the ALJ credits the opinion of Dr. McCranie that Claimant's low back pain as reported during the pendency of this case is related to his chronic compression fractures.

44. Claimant has failed to establish that he sustained a work related injury to his low back on December 19, 2016.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

Claimant's Credibility

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). In this case, the ALJ finds Claimant's testimony regarding the events leading up to his alleged injury unreliable and unpersuasive. The overwhelming evidence presented at hearing and through the post

hearing evidentiary deposition of Dr. McCranie belies Claimant's assertion that he sustained a work related injury.

D. Here, Claimant's self-admitted practice and routine is to clock in as he is approaching the gate to Employer's yard. Claimant testified, both on direct and cross examination, that he acted in accordance with his usual habit on the morning of December 19, 2016, and that he clocked in as he was approaching the gate at or near 4:30 a.m. Indeed, Claimant was "quite sure" he clocked in. Yet, review of his timesheets, as testified to by Mr. Glaser and Mr. Chiddix support that he did not clock in on December 19, 2016 as he claims. Claimant explained that in order to clock in the locations settings, i.e. the GPS function on the phone had to be turned on. Claimant testified that he would turn the GPS function on his phone off as it used data on his phone, suggesting that he may not have successfully clocked in on December 19, 2016. As found, Mr. Glaser testified that if Claimant had failed to turn on "Location Services," before attempting to clock in, he would have received an almost immediate notification on his cell phone that his attempt was unsuccessful and that he needed to turn on "Location Services." Claimant tried to elicit testimony from Mr. Glaser that such notification could take a couple of hours as testified to by Claimant. In response, Mr. Glaser testified that since the program was implemented in the summer of 2016, he had never experienced such a delay in notifications. The ALJ is convinced that had Claimant attempted to clock in on December 19, 2016 without his location services being turn on, he would have received an almost immediate notification that his attempt failed. Claimant's testimony that it would take up to two hours to receive such notification is not persuasive. Moreover, Mr. Glaser testified that since the implementation of the timekeeping system, Claimant has never failed to clock in on the days that he worked. The evidence presented persuades the ALJ that Claimant's assertion that he was at work but either forgot to clock in or was unsuccessful in doing so on December 19, 2016 is simply not credible. Based upon the evidence presented, the ALJ finds/concludes that Claimant probably did not appear for work on the morning of December 19, 2016 as he testified.

E. In support of the contention that Claimant did not report for work as he professed, Respondents cite the timeline surrounding the events leading up to his alleged injury. As found, Claimant testified and his Workers' Claim for Compensation notes that he arrived at work at 4:30 a.m. He reported that the injury occurred a mere 15 minutes later, at 4:45 a.m. Claimant testified that upon arrival at work he opened the gate, drove up to the Peterbilt, cracked the hood and checked the oil before attempting to start it. He then said that he tried to start the Peterbilt without success. Thereafter, he testified that he drove 100 yards to the shop, searched the shop for a set of jumper cables, and finding none, returned to his personal vehicle to drive to WalMart to purchase a pair. According to Claimant, he then drove to the WalMart at Platte and Chelton, which he claimed, took 5 minutes. He parked, entered the store, walked to far corner of the store, located jumper cables, walked to front of the store, paid for the jumper cables, returned to his car in the parking lot and then drove back to the employer's facility, which he claimed took 3-4 minutes. Once back at the yard, Claimant testified that he removed the battery cover and worked to get the jumper cables

attached (he testified that the cables he was using were shorter and harder to work with) to the truck. He then allowed the Peterbilt to charge for 10-15 minutes before attempting to start the Peterbilt's engine again. Based upon Claimant's testimony regarding the activities he took in an effort to start the Peterbilt, Respondents point out that the injury could not have taken place at 4:45 a.m. as claimed. Indeed, given that the minimum times described by the Claimant, excluding his efforts to locate jumper cables and get the truck started, exceed 15 minutes, the injury could not have taken place at 4:45 a.m. as claimed. At best, the injury could have occurred within 34 minutes from Claimant's arrival at work, assuming that he arrived at 4:30 as claimed, given his text message to Mr. Chiddix sent at 5:04 a.m. Weighing all that Claimant described he undertook in his alleged efforts to jump-start the Peterbilt against the more persuasive competing evidence, leads the ALJ to conclude that a claim of injury occurring within 34 minutes of Claimant's arrival at work is also improbable.

F. Claimant's testimony was contradicted a number of times throughout the hearing. Moreover, while Claimant testified that he was provided a receipt for the jumper cables he purchased at WalMart, he did not provide it to Employer or the court as some evidence that he traveled to WalMart as he claimed. Claimant called his own credibility into question when he failed to disclose that he had obtained employment with Falcon in his answers to interrogatories, and also that he had left his employment at Falcon voluntarily, when the evidence unequivocally demonstrates that Claimant was terminated for cause due to his failure to abide by DOT regulated safety precautions. Such inconsistences and lack of candor cannot be reconciled with the balance of the competing evidence nor ignored by the court. Accordingly, the ALJ concludes that Claimant's testimony regarding the events he asserts caused a low back injury is unreliable and unpersuasive. Given the totality of the evidence presented, the ALJ agrees with Respondents to find/conclude that Claimant probably did not attempt to clock in for work on December 19, 2016 as he likely did not appear for work that morning.

Compensability

G. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo.App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

H. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions.

In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, the objective medical evidence supports Respondents' contention that Claimant did not sustain a work related injury even if Claimant had established that he was indeed at work on the morning of December 19, 2016 and that he fell while exiting the Peterbilt. Indeed, there is a dearth of objective medical evidence to support that he sustained any acute injury assuming that he did fall as claimed. The only medically based diagnosis supported by imaging is that of subacute to chronic compression fractures that the ALJ concludes likely pre-existed any alleged fall. While Dr. Hall speculated that Claimant's pain could be generated from the facet joints, this suggestion was persuasively discredited by Dr. McCranie, who testified that if the facet joints were the pain generator, there would be objective medical evidence of this on the MRI scan. She testified that upon her review of the MRI scan report, she found no objective evidence to support a finding that the facet joints are the source of Claimant's pain. As presented, the evidence supports a conclusion that Claimant's pain is, more probably than not, related to the delayed healing of his pre-existing chronic compression fractures.

I. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). Assuming that Claimant had established that he was at work and had fallen from the Peterbilt as claimed, the medical evidence does not support a conclusion that he sustained an injury, including a compensable aggravation of an underlying pre-existing condition to his low back. Rather, when Claimant's pre-injury medical history, concerning his low back, as explained by Dr. McCranie, is combined with his imaging studies, a reasonable inference can be drawn that his symptoms are, more probably than not, due to pain associated with the delayed healing of his chronic compression fractures rather than the December 19, 2016 incident. Consequently, the ALJ concludes that had Claimant proven that he was at work and fell from the Peterbilt on December 19, 2016, he failed to prove, by a preponderance of the evidence, that there is a causal connection between his employment and the resulting condition for which medical treatment benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish he suffered a compensable injury, his claim must be denied and dismissed. Accordingly, his remaining claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant’s claim for workers’ compensation benefits is hereby denied and dismissed.

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

DATED: March 23, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-004-079-05

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 1, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 3/1/18, Courtroom 1, beginning at 1:30 PM, and ending at 5:00 PM).

Claimant's Exhibits 1 through 12 were admitted into evidence, without objection, Respondents' Exhibits A through G were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on March 8, 2018. Respondents were given two working days within which to file objections to the proposed decision. None were timely filed and the matter was deemed submitted for decision. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issue to be determined by this decision concerns whether the Respondents have overcome the opinion of the Division Independent Medical Examiner's (DIME), Clarence Henke, M.D., that the Claimant is not at maximum medical improvement (MMI).

The Respondents bear the burden of proof, by clear and convincing evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. Claimant Firefighter, a Paramedic Captain, suffered an admitted injury on November 4, 2015, while he was in the course and scope of employment. He received treatment from multiple sources for his right shoulder injury (RUE), as well as for his left elbow (LUE). He underwent right shoulder surgery on January 12, 2016, with Michael Hewitt, M.D.

2. Ultimately, Respondents filed a Final Admission of Liability (FAL), dated July 6, 2017, admitting for a scheduled impairment of the right shoulder (RUE) of 1% for a total of $596.77, with a maximum medical improvement (MMI) date of May 17, 2017; and, admitting for causally related and reasonably necessary post-MMI medical maintenance treatment (*Grover* medicals).

The Left Elbow

3. The Claimant sought treatment for his left elbow due to overuse in May 2016. He testified that his left elbow pain began when he was on light duty and due to the right shoulder surgery he was unable to use his RUE to perform the essential functions of his job. His light duty included sixteen to twenty safety/fire inspections per day using various tools.

4. The Claimant was treated by Doctors at On the Mend (a group of physicians). He received medical treatment for his left elbow during the summer of 2016. The Claimant's condition improved by September after he had been on vacation and not been performing work activity using his LUE. He was provided home exercise and an elbow strap for his left elbow. On September 15, 2016, Authorized Treating Physician (ATP) Sharon R. Walker, M.D., diagnosed the Claimant with lateral epicondylitis on September 15, 2016 (Respondents' Exhibit A, BS 8).

5. The Claimant returned to full duty on September 15, 2016, and subsequently began performing his regular job which requires physical work in the heavy category (Claimant's Exhibit 12, BS 4). After being released to full duty, the Claimant began lifting patients, trams, and extraction equipment, as well as engaging in fire suppression, training and overhaul. This activity caused his left elbow to worsen.

6. ATP Dr. Walker referred the Claimant to orthopedic surgeon Kulvinder Sachar, M.D., who is within the chain of authorized referrals. Dr. Sachar saw the Claimant on November 18, 2016. Dr. Sachar stated that the Claimant was using his left arm more significantly and had developed left medical epicondyle pain and that he had tried rest and anti-inflammatories without success. Dr. Sachar gave the Claimant an injection in the left medical epicondyle on that date.

7. The Claimant underwent an MRI (magnetic resonance imaging) on January 20, 3017, which established findings consistent with chronic medial epicondylitis with a partial thickness tear of the central fibers of the common flexor tendon (Claimant's Exhibit 1, BS 54).

8. The Claimant saw Dr. Sachar again on February 15, 2017. Dr. Sachar documented the fact that the November 2016 injection had given Claimant some relief but its effect had recently worn off. The Claimant underwent a second injection.

9. The Claimant has not received treatment for his left elbow since he last saw authorized referral physician, Dr. Sachar, because additional treatment for his left elbow has been denied by the Respondents.

10. Although ATP Dr. Walker had treated the Claimant for left elbow pain on numerous occasions, she did not render a specific opinion on causation until after she had reviewed an independent examination (IME) performed at the request of the Respondents by Carlos Cebrian, M.D., dated April 18, 2017 (Claimant's Exhibit 10, BS 17). After reviewing Dr. Cebrian's report, Dr. Walker stated the "opinion" that Claimant's left elbow epicondylitis was not related to his November 4, 2015, left elbow injury, despite Dr. Walker having treated Claimant's left elbow lateral tendon (Respondents' Exhibit A, BS 16). Consequently, when Dr. Walker released the Claimant at MMI on May 17, 2017, she did not provide him with a left elbow impairment rating (Respondents' Exhibit A, BS 18 – 21). Having reviewed the four corners of ATP Dr.

Walker's release of the Claimant at MMI, the ALJ infers and finds that Dr. Walker abdicated her independent medical judgment to IME Dr. Cebrian. On the left elbow issue, ATP Dr. Walker's ultimate opinion can be no better than Dr. Cebrian's opinion in this regard.

11. After the Claimant was placed at MMI the Respondents issued an FAL on July 6, 2017, as referenced in Finding No. 2 herein above, no impairment was given for the Claimant's left elbow. Thereafter, the Claimant timely sought a DIME, which Dr. Henke was assigned to perform.

The Division Independent Medical Examination (DIME) of Clarence Henke, M.D.

12. DIME Dr. Henke was of the opinion that the Claimant was **not** at MMI, and that the Claimant was suffering from the causally related condition of work-related left medial epicondylitis. Dr. Henke stated the opinion that as of the date of his evaluation on October 11, 2017, MMI had not been achieved for either the Claimant's right shoulder or his left elbow (Claimant's Exhibit 2, BS 19). DIME Dr. Henke did not provide permanent ratings for either the right shoulder or his left elbow because the Claimant was not at MMI. Dr. Henke also recommended that the Claimant undergo follow-up treatment for his left elbow. *Id.*

13. DIME Dr. Henke stated that the Claimant's "[l]eft elbow pain that developed from **overuse** (emphasis supplied) when he was rehabilitating from right shoulder surgery," and that he had some occupational therapy (OT) visits with some improvement, but pronation and flexion still causes discomfort (Claimant's Exhibit 2, BS 17).

Respondents' Independent Medical Examiner (IME), Carlos Cebrian, M.D.

14. Respondents' retained Dr. Cebrian, testified as an expert in the field of occupational medicine and a Level 11 accredited physician --to challenge DIME Dr. Henke's opinions. Dr. Cebrian agreed that the Claimant was suffering left medial epicondylitis but asserted that DIME Dr. Henke had inadequately addressed causation to support his opinion in finding that Claimant had suffered a work related left medical epicondylitis. Although there was no evidence of pre-existing left elbow problems, Dr. Cebrian stated the opinion that there was insufficient evidence establishing a causal relationship between the Claimant's epicondylitis and his November 2015 injury. Dr. Cebrian's ultimate opinion was that it was not medically probable that Claimant's left medial epicondylitis, with a partial tear, is causally related to his November 4, 2015, injury. The ALJ infers and finds that the underlying basis of Dr. Cebrian's opinion with respect to the Claimant's left elbow is inadequately explained and does not establish that it is highly probable, unmistakable and free from serious and substantial doubt that any of DIME Dr. Henke's opinions are wrong.

15. The ALJ draws a plausible inference and finds that Dr. Cebrian has a mere difference of opinion with DIME Dr. Henke's opinions, which does not rise to the level of "clear and convincing" evidence that Dr. Henke's opinions are wrong.

Claimant's IME, Ronald Swarsen, M.D.

16. The Claimant retained Dr. Swarsen, to testify in support of Dr. Henke's DIME. Dr. Swarsen testified as an expert in the field of occupational medicine and as a Level II an accredited physician.

17. Dr. Swarsen was of the opinion that DIME Dr. Henke had adequately provided a causation analysis under both the AMA *Guides to the Evaluation of Permanent Impairment*, 3rd Ed., Rev. AMA *Guides*) and the Division of Workers' Compensation (DOWC) Medical Treatment Guidelines (MTG*)*. After hearing the testimony of both Dr. Cebrian and the Claimant, Dr. Swarsen was of the opinion that there was more than adequate evidence to support DIME Dr. Henke's left elbow causation determination. Thus, the fact that Claimant was performing heavy work when he returned to full duty, had been evaluated by an orthopedic surgeon diagnosing left medial epicondylitis, had undergone MRIs which showed left elbow symptomatology, and the proximity of the development of left medial epicondylitis to the November 2015 injury, established that Claimant's left elbow injury was occupationally related.

Ultimate Findings

18. The ALJ finds the opinions of Dr. Swarsen, the testimony of the Claimant, and the medical records to be highly persuasive and credible. Together, these opinions and records support the opinion of DIME Dr. Henke that Claimant suffered a causally work related left elbow injury and is not at MMI, and the ALJ rejects the contrary opinion of Dr. Cebrian as lacking in overall credibility. Dr. Cebrian has a mere difference of opinion with DIME Dr. Henke's opinions, which does not rise to the level of "clear and convincing" evidence that Dr. Henke's opinions are wrong.

19. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of DIME Dr. Henke and Claimant's IME Dr. Swarsen, plus the testimony of the Claimant, and to reject all opinions to the contrary.

20. Respondents have failed to demonstrate that it is highly probable, unmistakable, and free from serious and substantial doubt that DIME Dr. Henke's opinions that the Claimant's LUE injury is causally related to the November 4, 2015, admitted RUE injury and that the Claimant is **not** at MMI.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Swarsen, the testimony of the Claimant, and the medical records were highly persuasive and credible. Together, these opinions and records supported the opinion of DIME Dr. Henke that Claimant suffered a causally work related left elbow injury and is not at MMI. Also, as found, the ALJ rejected the contrary opinion of Dr. Cebrian as lacking in overall credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App.

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

Burden of Proof

c. As found, the party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office, supra*; *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable

and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, Respondents, as challenger to DIME Dr. Henke's opinions failed to sustain their burden as to MMI and to the alleged lack of causal relatedness of the Claimant's overuse LUE condition.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents' Request to overcome the opinions of Division Independent Medical Examiner Clarence Henke, M.D., that the Claimant's left upper extremity condition is causally related to the admitted right shoulder injury of November 4, 2015; and, that the Claimant is not at maximum medical improvement, is hereby denied and dismissed.

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

DATED this_____day of March 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that her ambulance transportation and treatment at the St. Anthony's Hospital Emergency Room on June 8, 2017 constituted an emergency that was reasonable, necessary and causally related to her February 2, 2017 admitted lower back injury.

FINDINGS OF FACT

1. Claimant worked for Employer as an Assistant Store Manager. On February 2, 2017 Claimant suffered admitted industrial injuries during the course and scope of her employment with Employer. While Claimant was taking out trash she slipped on ice and fell down four cement stairs. Claimant suffered lower back pain, right hip pain, headaches and bruises as a result of the incident.

2. Claimant selected NextCare Urgent Care for medical treatment. She visited Authorized Treating Physician (ATP) Erick Gomer, M.D. and received conservative treatment for her symptoms. Claimant noted that she suffered extreme pain during the period.

3. Dr. Gomer referred Claimant to Usama Ghazi, D. O. for an examination. On April 3, 2017 Claimant visited Dr. Ghazi. Claimant reported that she was experiencing severe neck pain that caused headaches. She also noted stabbing lower back pain. Dr. Ghazi commented that Claimant specifically identified the "L4, L5 and S1 paraspinals and the SI joints." After reviewing Claimant's medical records and conducting a physical examination, Dr. Ghazi diagnosed Claimant with lumbar facet pain and paraspinal tightness as a result of her February 2, 2017 slip and fall. He recommended physical therapy, chiropractic treatment and facet joint injections.

4. On May 4, 2017 Claimant again visited Dr. Ghazi. He administered bilateral C2-3 and C3-4 cervical facet joint injections. He noted that Claimant suffered from "severe spondylosis with osteophytosis of the left C2-3 and C3-4 facet joints with moderate findings on the right side." Dr. Ghazi determined that Claimant sustained significant pain relief from the injections. He specifically remarked that Claimant "had 100% anesthetic relief with reproduction of her neck pain and headaches during the contrast injections, followed by 100% relief of the neck pain and 100% relief of the upper cervical facet pain at C2-3 and C3-4 as well as 100% relief of her headaches bilaterally."

5. Claimant testified that on June 8, 2017 she bent over to pick up a laundry basket at home. However, Claimant was unable to straighten and remained locked in the bent position for approximately one and one-half hours. Claimant remarked that she was not receiving treatment from a Workers' Compensation physician at the time because she

had been discharged from care by Dr. Gomer. Despite her pain and discomfort Claimant was thus unable to contact a physician.

6. Concerned about her symptoms, Claimant called an ambulance. She was transported to the St. Anthony Hospital Emergency Room. Providers noted that she had suffered an initial Workers' Compensation injury to her lower back approximately three months earlier. An MRI revealed a small disc bulge contacting the L5 nerve roots. The MRI did not reflect any acute surgical pathology. After undergoing a physical examination, Claimant was diagnosed with intervertebral disc disorders with radiculopathy in her lumbar region, headaches and hypertension. Claimant was discharged from care with medications.

7. On June 9, 2017 Claimant returned to Dr. Ghazi for an examination. The appointment had been previously scheduled as a follow-up for the cervical injections she received on May 4, 2017. She recounted that on June 8, 2017 she bent over and became stuck in a 90-degree flexion position. Claimant was unable to extend her back and was transported to the St. Anthony Hospital Emergency Room. Dr. Ghazi reported that Claimant had been experiencing treatment authorization issues, had been unable to visit a provider for three weeks and suffered a severe flare-up of her pain. He noted that the June 8, 2017 lumbar MRI reflected multilevel facet arthrosis as well as an annular tear with a small central disc protrusion at L5-S1. Dr. Ghazi commented that Claimant's physical examination was consistent with L4-L5 and L5-S1 facet joint pain that was confirmed by the MRI. He summarized that Claimant suffered cervical facet syndrome and headaches that had significantly improved after facet injections. Dr. Ghazi recommended additional injections, physical therapy, massage therapy and medications.

8. On June 29, 2017 Claimant underwent an initial evaluation with Matt Miller, M.D. at Front Range Occupational Medicine. Dr. Miller diagnosed Claimant with a work-related sprain of the ligaments of the cervical spine. He assigned work restrictions that limited Claimant to lifting and pushing/pulling not to exceed 15 pounds. Dr. Miller also noted that Claimant should change positions frequently and not engage in prolonged standing. He released her to modified duty employment.

9. Claimant subsequently underwent additional conservative treatment in the form of facet joint injections and visits with Drs. Ghazi and Miller. She still has not reached Maximum Medical Improvement (MMI) for her February 2, 2017 industrial injuries.

10. On January 24, 2018 Claimant underwent an independent medical examination with Timothy O. Hall, M.D. Dr. Hall considered whether Claimant's emergency room treatment on June 8, 2017 was reasonable, necessary and causally related to her February 2, 2017 industrial injuries. Dr. Hall reviewed Claimant's medical records including the report from the St. Anthony Hospital Emergency Room. He concluded that Claimant's June 8, 2017 emergency room visit was reasonable, necessary and causally related to her February 2, 2017 industrial injuries. Dr. Hall explained that Claimant had received extensive lower back treatment and undergone substantial invasive procedures to treat her lower back pain. Although Claimant's symptoms on June 8, 2017 did not constitute an "emergency situation" according to Dr. Hall, it was

reasonable for her to visit the emergency room because of the acute onset of symptoms that required a thorough evaluation. Dr. Hall summarized that "considering [Claimant's] pain levels and history of trauma to the area, it is understandable that a dramatic increase in pain would be concerning enough to make an emergent visit to the hospital appropriate."

11. Dr. Hall also testified at the hearing in this matter. He maintained that Claimant's June 8, 2017 emergency room visit was reasonable, necessary and causally related to her February 2, 2017 industrial injuries. Dr. Hall specifically explained that, although Claimant had not suffered a medical emergency, it was reasonable and appropriate for her to seek emergency room treatment. He remarked that Claimant's significant back pain on June 8, 2017 caused her to become fearful and concerned about her condition. Dr. Hall noted that Claimant lacked access to a treating physician at the time and no plan existed to obtain medical treatment if she experienced a flare-up of her back symptoms. Accordingly, to alleviate her concerns, Claimant's visit to the St. Anthony Hospital Emergency Room was reasonable and necessary under the circumstances.

12. Claimant has established that it is more probably true than not that her ambulance transportation and treatment at the St. Anthony's Hospital Emergency Room on June 8, 2017 constituted an emergency that was reasonable, necessary and causally related to her February 2, 2017 lower back injury. Initially, Claimant suffered admitted industrial injuries to her lower back and other body parts on February 2, 2017 when she slipped and fell at work. Claimant received conservative medical care including physical therapy, chiropractic treatment and facet joint injections. Claimant explained that on June 8, 2017 she bent over to pick up a laundry basket at home but was unable to straighten and remained locked in the bent position for approximately one and one-half hours. She remarked that she was not receiving treatment from a Workers' Compensation physician at the time because she had been discharged from care by Dr. Gomer. Despite her pain and discomfort Claimant was unable to contact a physician. She thus called an ambulance and was transported to the St. Anthony's Hospital Emergency Room. An MRI revealed a small disc bulge contacting the L5 nerve roots but no acute surgical pathology. After undergoing a physical examination, Claimant was diagnosed with intervertebral disc disorders with radiculopathy in her lumbar region, headaches and hypertension.

13. After conducting an independent medical examination Dr. Hall concluded that Claimant's June 8, 2017 emergency room treatment was reasonable, necessary and causally related to her February 2, 2017 industrial injuries. He explained that Claimant had received extensive lower back treatment and undergone substantial invasive procedures to treat her condition. Although Claimant's symptoms on June 8, 2017 did not constitute an "emergency situation" according to Dr. Hall, it was reasonable for her to visit the emergency room because of the acute onset of symptoms that required a thorough evaluation. Dr. Hall specifically explained that, although Claimant was not suffering a "medical emergency," it was reasonable and appropriate for her to seek emergency room treatment. He remarked that Claimant's significant back pain on June 8, 2017 caused her to become fearful and concerned about her condition. Dr. Hall noted that Claimant lacked access to a treating physician at the time and no plan existed to obtain medical treatment if she experienced a flare-up of her back symptoms. Based on

the medical records and persuasive opinion of Dr. Hall, Claimant's treatment at the St. Anthony Hospital Emergency Room to alleviate her concerns constituted an emergency that was reasonable and necessary under the circumstances. Claimant was thus permitted to obtain immediate medical treatment without the delay of notifying Employer to obtain a referral or approval.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the Authorized Treating Physician (ATP). However, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, W.C. No. 4-586-030 (ICAP, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* W.C. No. 3-969-031 (ICAP, June 29, 2005).

6. As found, Claimant has established by a preponderance of the evidence that her ambulance transportation and treatment at the St. Anthony's Hospital Emergency Room on June 8, 2017 constituted an emergency that was reasonable, necessary and causally related to her February 2, 2017 lower back injury. Initially, Claimant suffered admitted industrial injuries to her lower back and other body parts on February 2, 2017 when she slipped and fell at work. Claimant received conservative medical care including physical therapy, chiropractic treatment and facet joint injections. Claimant explained that on June 8, 2017 she bent over to pick up a laundry basket at home but was unable to straighten and remained locked in the bent position for approximately one and one-half hours. She remarked that she was not receiving treatment from a Workers' Compensation physician at the time because she had been discharged from care by Dr. Gomer. Despite her pain and discomfort Claimant was unable to contact a physician. She thus called an ambulance and was transported to the St. Anthony's Hospital Emergency Room. An MRI revealed a small disc bulge contacting the L5 nerve roots but no acute surgical pathology. After undergoing a physical examination, Claimant was diagnosed with intervertebral disc disorders with radiculopathy in her lumbar region, headaches and hypertension.

7. As found, after conducting an independent medical examination Dr. Hall concluded that Claimant's June 8, 2017 emergency room treatment was reasonable, necessary and causally related to her February 2, 2017 industrial injuries. He explained that Claimant had received extensive lower back treatment and undergone substantial invasive procedures to treat her condition. Although Claimant's symptoms on June 8, 2017 did not constitute an "emergency situation" according to Dr. Hall, it was reasonable for her to visit the emergency room because of the acute onset of symptoms that required a thorough evaluation. Dr. Hall specifically explained that, although Claimant was not suffering a "medical emergency," it was reasonable and appropriate for her to seek emergency room treatment. He remarked that Claimant's significant back pain on June 8, 2017 caused her to become fearful and concerned about her condition. Dr. Hall noted that Claimant lacked access to a treating physician at the time and no plan existed to obtain medical treatment if she experienced a flare-up of her back symptoms. Based on the medical records and persuasive opinion of Dr. Hall, Claimant's treatment at the St. Anthony Hospital Emergency Room to alleviate her concerns constituted an emergency that was reasonable and necessary under the circumstances. Claimant was thus

permitted to obtain immediate medical treatment without the delay of notifying Employer to obtain a referral or approval.

ORDER

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

1. Respondents are financially responsible for Claimant's ambulance transportation and treatment at the St. Anthony's Hospital Emergency Room on June 8, 2017

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

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

DATED: March 27, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable left shoulder and lower back injuries during the course and scope of her employment with Employer on May 30, 2017.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment, including left shoulder arthroscopic surgery, for her May 30, 2017 industrial injuries.

FINDINGS OF FACT

1. Claimant is a 31-year-old female who worked for Employer as a Flight Attendant. On May 30, 2017 Claimant was staffing an airline flight traveling from Atlanta, GA to Fort Lauderdale, FL. As the aircraft was reaching the Florida airport the pilot noted there was significant turbulence from a storm and asked Claimant to clean-up early to prepare for the descent.

2. Claimant walked toward a two person jump seat to sit down and apply her safety restraint. Because the other occupant of the jump seat was a large man she had to squeeze between him and a wall. As Claimant was walking past the man's knees the plane hit a patch of turbulence and she fell forward. Claimant struck her left shoulder on the hinge on top of the jump seat and twisted her lower back. She suffered immediate pain.

3. Claimant believed her symptoms would improve. However, when she awoke during the night she was experiencing excruciating burning pain. Claimant thus reported her injuries to Employer on May 31, 2017 and obtained a flight back to her home in Atlanta.

4. Claimant selected Concentra Medical Centers for treatment. On June 1, 2017 Claimant visited Concentra for an examination. Claimant reported that she slammed into a jump seat during a turbulent airline flight while working as a Flight Attendant for Employer on May 30, 2017. She was diagnosed with a cervical strain and contusions of her left upper extremity. Medical providers recommended diagnostic testing, medications, physical therapy and work restrictions.

5. On June 1, 2017 Claimant underwent x-rays of her left shoulder and cervical spine. The shoulder imaging did not reveal any evidence of an "acute fracture, dislocation or osseous lesion." The cervical spine x-ray reflected "straightening of the normal cervical lordosis, possibly secondary to muscle spasm." The imaging was otherwise negative.

6. On June 19, 2017 Claimant underwent an MRI of her left shoulder. The MRI revealed a "small questionable" superior labral or SLAP tear. The imaging also reflected mild supraspinatus and infraspinatus tendinosis.

7. On June 22, 2017 Claimant underwent an evaluation with Ezequiel H. Cassinelli, M.D. Dr. Cassinelli noted that Claimant had been receiving treatment through Concentra for complaints of neck pain, lower back pain and left shoulder pain. He concluded that Claimant was suffering from either soft tissue or discogenic pain in her back and recommended physical therapy with restrictions.

8. Claimant obtained additional medical care through Concentra. On July 21, 2017 Claimant visited Eric Furie, M.D. She reported that she continued to experience left shoulder pain and clicking. Dr. Furie diagnosed a possible labral tear or loose body in Claimant's left shoulder. Because of her "severe crepitus and daily pain" Dr. Furie remarked that either a labral tear or loose body would require surgical intervention. He recommended scheduling arthroscopic left shoulder surgery and discontinuing physical therapy. Dr. Furie continued Claimant's work restriction of no reaching above shoulder level.

9. On September 11, 2017 Claimant visited private physician Orthopedic Surgeon Thomas P. Branch, M.D. for her left shoulder symptoms. Claimant reported that she has suffered left shoulder popping, cracking and locking since she was injured on May 30, 2017. She noted that her claim had been denied because of a misunderstanding that she had recently been involved in a motor vehicle accident that injured her shoulder. However, Claimant explained that her husband had been in a motor vehicle accident and she had not suffered any left shoulder or back symptoms prior to her May 30, 2017 industrial accident.

10. After conducting a physical examination and reviewing diagnostic testing Dr. Branch diagnosed Claimant with left shoulder impingement syndrome, a superior glenoid labrum lesion and an incomplete rotator cuff tear. He concluded that Claimant suffered a work-related injury on May 30, 2017. Dr. Branch remarked that Claimant's left shoulder MRI revealed a "small questionable superior labral tear" or SLAP tear. He thus recommended surgical repair. Dr. Branch specified that Claimant could not return to her position as a Flight Attendant because she was unable to perform her job duties.

11. On November 11, 2016 Claimant underwent an independent medical examination with Timothy S. O'Brien, M.D. Claimant recounted that she injured her back and left shoulder when she struck a wall because of turbulence during an airline flight in her capacity as a Flight Attendant for Employer. Despite medical treatment and physical therapy through Concentra, Claimant was unable to obtain relief of her symptoms. She specifically explained that activities of daily living including sitting, standing, bending lifting, pushing, pulling, sleeping and driving aggravated her left shoulder pain. Dr. O'Brien reviewed Claimant's medical treatment records and diagnostic testing. He also conducted a physical examination.

12. Dr. O'Brien concluded that Claimant suffered the following as a result of her May 30, 2017 work accident: (1) minor cervical, thoracic and lumbosacral strains/sprains; (2) a minor left shoulder strain/sprain/contusion; and (3) a minor left elbow contusion. Dr. O'Brien noted that Claimant described an appropriate mechanism of injury with no significant delay in reporting and thus acknowledged that she had suffered an injury on May 30, 2017. However, he commented that Claimant did not suffer any bleeding after the incident and there was no objective evidence of tissue breakage. Dr. O'Brien explained that a direct blow to the shoulder would not cause a labral tear or spinal injuries. He specifically remarked that, because there was no evidence of injury to the skin on the directly impacted left shoulder joint, there was "even less dissipation of energy into the axial skeleton or spinal elements."

13. Dr. O'Brien remarked that Claimant's minor injuries healed "uneventfully and expeditiously" by June 2017. He noted that Claimant's elbow pain was transient and she did not have any complaints of elbow symptoms by June 30, 2017. In addressing Claimant's spine, Dr. O'Brien commented that Claimant's cervical and thoracic regions healed by June 22, 2017 based on the resolution of her pain. He detailed that Claimant's lumbosacral spine healed by June 12, 2017 because she exhibited nonorganic findings. Finally, Dr. O'Brien explained that Claimant's left shoulder healed by June 19, 2017 because she had a normal MRI scan. Claimant did not exhibit labral or rotator cuff tears.

14. Dr. O'Brien remarked that, regardless of causation, Claimant had not exhausted her non-operative treatment modalities. He specifically remarked that surgery should not have been recommended without attempting a diagnostic or therapeutic injection to the left shoulder. Dr. O'Brien also commented that, because Claimant has been experiencing inorganic pain symptoms, surgery is not warranted. He summarized that Claimant has reached Maximum Medical Improvement (MMI) and does not require medical maintenance treatment.

15. On December 14, 2017 Claimant returned to Dr. Branch for an examination. After conducting a physical examination Dr. Branch recommended physical therapy for Claimant's pelvic and lower back pain as well as an MRI of the lumbosacral spine. He continued to recommend surgery for her work-related left shoulder injury. Dr. Branch also maintained that Claimant was still unable to perform her job duties as a Flight Attendant for Employer. He specified that Claimant was limited in her ability to stand and walk for long periods of time because of her back and SI joint symptoms. Dr. Branch commented that Claimant would be unable to work for three months pending "follow-up, treatment and recommended study results."

16. Claimant testified at the hearing in this matter. She explained that, prior to May 30, 2017, she was working full duty as a Flight Attendant and had never been assigned work restrictions. Claimant remarked that she had never undergone a shoulder MRI or received a recommendation for shoulder surgery. She noted that her current left shoulder symptoms include popping, locking and the inability to lift her arm. In addressing her back symptoms Claimant specified that she cannot "sit or stand for any length of time really without experiencing massive pressure that builds."

17. On February 2, 2018 the parties conducted the post-hearing evidentiary deposition of Dr. O' Brien. Dr. O'Brien maintained that Claimant did not suffer a labral tear to her left shoulder or any back injuries while performing her job duties on May 30, 2017. He explained that labral tears only occur when an acute injury results in a massive trauma. Moreover, labral tears are usually associated with shoulder dislocations. Dr. O'Brien thus noted that it was "virtually impossible" for Claimant to suffer a labral tear from a direct blow to the front of her left shoulder. He also detailed that only the axial plane of Claimant's left shoulder MRI revealed a "questionable labral tear" while the coronal and sagittal views did not reflect a tear. Dr. O'Brien then detailed that the questionable finding on the MRI did not corroborate with his physical examination of Claimant. Finally, Claimant did not likely suffer a back injury while performing her job duties for Employer. Because back injuries are typically caused by bending, stooping or twisting, a direct blow to the shoulder was inconsistent with Claimant's back symptoms.

18. Dr. O'Brien detailed that Claimant suffered minor injuries on May 30, 2017. He remarked that it was appropriate for Claimant to obtain medical care to determine the severity of her injuries, but her symptoms would have healed rapidly without treatment. Furthermore, the requested surgery for Claimant's left shoulder is not reasonable and necessary because there were no anatomical findings on Claimant's MRI that could be considered surgical indicators. Dr. O'Brien reasoned that Claimant's subjective symptoms could not be correlated with objective findings and thus did not warrant any ongoing medical care or surgical intervention.

19. Claimant has demonstrated that it is more probably true than not that she suffered compensable left shoulder and lower back injuries during the course and scope of her employment with Employer on May 30, 2017. Initially, Claimant explained that she was walking toward a jump seat to apply her safety restraint while working as a Flight Attendant for Employer. When the airplane encountered turbulence she struck her left shoulder on the hinge on top of the jump seat and twisted her lower back. A left shoulder MRI revealed a "small questionable" labral tear. Dr. Furie diagnosed a possible labral tear or loose body in Claimant's left shoulder and recommended surgical intervention. Dr. Branch diagnosed Claimant with left shoulder impingement syndrome, a superior glenoid labrum lesion and an incomplete rotator cuff tear. He concluded that Claimant suffered an industrial injury while working for Employer on May 30, 2017. Finally, Dr. O'Brien concluded that Claimant suffered the following as a result of her May 30, 2017 work accident: (1) minor cervical, thoracic and lumbosacral strains/sprains; (2) a minor left shoulder strain/sprain/contusion; and (3) a minor left elbow contusion. Dr. O'Brien noted that Claimant described an appropriate mechanism of injury with no significant delay in reporting and thus acknowledged that she had suffered a work injury on May 30, 2017. Accordingly, the persuasive medical evidence reflects that Claimant suffered left shoulder and lower back injuries while performing her job duties on May 30, 2017.

20. Claimant has established that it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical treatment for her May 30, 2017 industrial injuries. The record reflects that Claimant is seeking medical benefits for her left shoulder and lower back. Respondents are not challenging a specific medical benefit but instead assert that Claimant's current symptoms are not related to the

admitted injuries and seek a denial of additional medical treatment. Relying on the opinion of Dr. O'Brien, Respondents assert that Claimant is not entitled to receive any additional medical treatment. Dr. O'Brien specifically remarked that Claimant's minor injuries healed "uneventfully and expeditiously" by June 2017. He noted that Claimant's elbow pain was transient and she did not have any complaints of elbow symptoms by June 30, 2017. In addressing Claimant's spine, Dr. O'Brien commented that Claimant's cervical and thoracic regions healed by June 22, 2017 based on the resolution of her pain. He detailed that Claimant's lumbosacral spine healed by June 12, 2017 because she exhibited nonorganic findings. Finally, Dr. O'Brien explained that Claimant's left shoulder healed by June 19, 2017 because she had a normal MRI scan.

21. Relying on Dr. O'Brien's analysis requires a *de facto* finding that Claimant has reached Maximum Medical Improvement (MMI) regarding the May 30, 2017 injuries. Because Claimant is entitled to medical benefits until reaching MMI, a denial of all further medical treatment necessarily reflects an implicit determination that Claimant reached MMI for the effects of her industrial injuries. However, there has been no medical determination of MMI by an Authorized Treating Physician (ATP) or Division Independent Medical Examination (DIME) physician. Furthermore, the persuasive opinions of Claimant's treating doctors reflect that she requires continuing medical treatment for her lower back and left shoulder symptoms. Drs. Furie and Branch independently determined that a left shoulder arthroscopy was reasonable, necessary and causally related to her May 30, 2017 industrial accident. Finally, Claimant credibly remarked that she had never undergone a shoulder MRI or received a recommendation for shoulder surgery. She noted that her current left shoulder symptoms include popping, locking and the inability to lift her arm. In addressing her back symptoms Claimant specified that she cannot sit or stand for any length of time without suffering back pressure. The bulk of the persuasive evidence thus reveals that Claimant is entitled to continuing medical treatment, including left shoulder arthroscopic surgery, for her May 30, 2017 work injuries.

CONCLUSIONS OF LAW

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

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

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

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

Compensability

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered compensable left shoulder and lower back injuries during the course and scope of her employment with Employer on May 30, 2017. Initially, Claimant explained that she was walking toward a jump seat to apply her safety restraint while working as a Flight Attendant for Employer. When the airplane encountered turbulence

she struck her left shoulder on the hinge on top of the jump seat and twisted her lower back. A left shoulder MRI revealed a "small questionable" labral tear. Dr. Furie diagnosed a possible labral tear or loose body in Claimant's left shoulder and recommended surgical intervention. Dr. Branch diagnosed Claimant with left shoulder impingement syndrome, a superior glenoid labrum lesion and an incomplete rotator cuff tear. He concluded that Claimant suffered an industrial injury while working for Employer on May 30, 2017. Finally, Dr. O'Brien concluded that Claimant suffered the following as a result of her May 30, 2017 work accident: (1) minor cervical, thoracic and lumbosacral strains/sprains; (2) a minor left shoulder strain/sprain/contusion; and (3) a minor left elbow contusion. Dr. O'Brien noted that Claimant described an appropriate mechanism of injury with no significant delay in reporting and thus acknowledged that she had suffered a work injury on May 30, 2017. Accordingly, the persuasive medical evidence reflects that Claimant suffered left shoulder and lower back injuries while performing her job duties on May 30, 2017.

Medical Benefits

8. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

9. Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The employer's obligation continues until the claimant reaches MMI. MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S.

10. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment for her May 30, 2017 industrial injuries. The record reflects that Claimant is seeking medical benefits for her left shoulder and lower back. Respondents are not challenging a specific medical benefit but instead assert that Claimant's current symptoms are not related to the admitted injuries and seek a denial of additional medical treatment. Relying on the opinion of Dr. O'Brien, Respondents assert that Claimant is not entitled to receive any additional medical treatment. Dr. O'Brien specifically remarked that

Claimant's minor injuries healed "uneventfully and expeditiously" by June 2017. He noted that Claimant's elbow pain was transient and she did not have any complaints of elbow symptoms by June 30, 2017. In addressing Claimant's spine, Dr. O'Brien commented that Claimant's cervical and thoracic regions healed by June 22, 2017 based on the resolution of her pain. He detailed that Claimant's lumbosacral spine healed by June 12, 2017 because she exhibited nonorganic findings. Finally, Dr. O'Brien explained that Claimant's left shoulder healed by June 19, 2017 because she had a normal MRI scan.

11. As found, relying on Dr. O'Brien's analysis requires a *de facto* finding that Claimant has reached Maximum Medical Improvement (MMI) regarding the May 30, 2017 injuries. Because Claimant is entitled to medical benefits until reaching MMI, a denial of all further medical treatment necessarily reflects an implicit determination that Claimant reached MMI for the effects of her industrial injuries. However, there has been no medical determination of MMI by an Authorized Treating Physician (ATP) or Division Independent Medical Examination (DIME) physician. Furthermore, the persuasive opinions of Claimant's treating doctors reflect that she requires continuing medical treatment for her lower back and left shoulder symptoms. Drs. Furie and Branch independently determined that a left shoulder arthroscopy was reasonable, necessary and causally related to her May 30, 2017 industrial accident. Finally, Claimant credibly remarked that she had never undergone a shoulder MRI or received a recommendation for shoulder surgery. She noted that her current left shoulder symptoms include popping, locking and the inability to lift her arm. In addressing her back symptoms Claimant specified that she cannot sit or stand for any length of time without suffering back pressure. The bulk of the persuasive evidence thus reveals that Claimant is entitled to continuing medical treatment, including left shoulder arthroscopic surgery, for her May 30, 2017 work injuries.

ORDER

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

1. Claimant suffered compensable industrial injuries to her left shoulder and lower back on May 30, 2017.

2. Claimant is entitled to receive continued medical treatment, including left shoulder arthroscopic surgery, for her May 30, 2017 industrial injuries.

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

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

reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 28, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-057-876-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 22, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 2/22/18, Courtroom 1, beginning at 1:30 PM, and ending at 5:00 PM).

Claimant's Exhibits 1 through 11 were admitted into evidence, without objection. Respondents' Exhibits A through G were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ordered post-hearing briefs. Claimant's opening brief was filed on March 6, 2018. Respondents' answer brief was filed on March 8, 2018. No timely reply brief was filed and the matter was deemed submitted for decision on March 13, 2018. After a consideration of the evidence and briefs, the ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable occupational injury, specifically, the mental impairment of Post-traumatic Stress Disorder (PTSD) under § 8-41-301, C.R.S.; if compensable,

whether the Claimant is entitled to ongoing temporary total disability (TTD) benefits from September 19, 2017, ongoing; whether Claimant was at fault for termination effective January 25, 2018, for a volitional act which he reasonably could have known would lead to his termination; and; whether Janet Ruby, Employee's Assistance Program (EAP), Denver Family Therapy, is an authorized provider.

FINDINGS OF FACT

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

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated if the claim is compensable that the Claimant's average weekly wage (AWW) is $1,871.48. The ALJ so finds.

2. The parties also stipulated if the claim is compensable, Hiep Ritzer, M.D., and Gary Gutterman, M.D., are authorized treating physicians (ATPs). The ALJ so finds.

3. The parties further stipulated if compensable, the Claimant is entitled to TTD benefits from September 19, 2017, and ongoing. The ALJ so finds.

4. The Claimant filed an initial claim for compensation due to a mental impairment, post-traumatic stress disorder (PTSD), on September 18, 2017 (Claimant's Exhibit 1. Respondents filed its First Report of Injury on September 25, 2017 (Claimant's Exhibit 2). Respondents also filed a Notice of Contest on February 28, 2017 (Claimant's Exhibit 3). The Claimant filed an Application for Hearing on October 27, 2017 (Claimant's Exhibit 4).

5. The Claimant filed his claim for mental impairment because he was suffering the signs and symptoms of PTSD for approximately one year. He continued working full duty during that period of time. When he filed his claim he was performing services as a Paramedic Lieutenant and had been a firefighter for approximately sixteen years (Claimant's Exhibit 1).

Circumstances Leading to PTSD

6. Prior to filing his claim, the Claimant had been experiencing increasingly significant psychological problems impacting his ability to function as a firefighter Paramedic Lieutenant. These symptoms caused anxiety and affected the Claimant's leadership, his ability to train younger firefighters and his concentration. As a Paramedic Lieutenant, his essential duties and responsibilities are extensive and

require him to supervise station personal and require him to be capable of "planning, directing, and supervising the work activities of subordinates, evaluating and reviewing the work products of subordinates; and making recommendations on disciplinary actions; plus, assisting in the training and professional development of subordinate employees" (Claimant's Exhibit 8, BS 40). The Claimant is also responsible for proctoring and providing training for EMS students assigned to his station. *Id.*

7. After the Claimant submitted his mental impairment claim, the Respondents referred him to Dr. Ritzer for evaluation and treatment. He first saw Dr. Ritzer on September 27, 2017. The Claimant reported to her that about a month prior to September 27, 2017, he had responded to an incident where a twenty year old female was found hanging in the woods. Additionally, in December 2016, and January 2017, he had responded to two graphic suicides of middle-aged men, one of which was a gunshot to the face. Dr. Ritzer also referenced the Claimant's exposure to a pilot being burned alive following a small plane crash as a traumatic experience (Claimant's Exhibit 5, BS 8). The ALJ infers and finds that Dr. Ritzer catalogues cumulative traumatic events leading to the Claimant's condition.

8. The Claimant's symptomatology included nightmares, wakening up terrified, panic attacks, and numbness and tingling in both extremities.

Causality

9. ATP Dr. Ritzer performed a causality analysis and stated that it was her opinion, to a reasonable degree of medical probability, that the Claimant's symptoms were consistent with a work place mental impairment of PTSD and anxiety. *Id.*, BS 11. She referred the Claimant to ATP Dr. Gutterman, a Level 11 accredited and board certified psychiatrist. Dr. Ritzer took the Claimant off work.

10. The Claimant first saw ATP Dr. Gutterman on October 4, 2017 (Claimant's Exhibit 6, BS 26). ATP Dr. Gutterman documented the Claimant's symptoms of anxiety, racing heart, nightmares, and hypervigilance. He noted that these had increased over the past three years following numerous traumatic incidents the Claimant had witnessed at work. ATP Dr. Gutterman noted that the Claimant was unable to sleep and that the Claimant was a zombie although he tried to sleep as best as possible (Claimant's Exhibit 7, BS 27). According to the Claimant, he has been suffering a disintegration of his personality and not functioning well at work, and he understood his need for psychological intervention when he filed his workers' compensation claim on September 17, 2017.

11. During his evaluation of the Claimant, ATP Dr. Gutterman stated that Claimant demonstrated anxiety when speaking about traumatic incidents to which he responded as a firefighter in the recent past. ATP Dr. Gutterman's concluded that the Claimant was experiencing symptoms consistent with PTSD, and was continuing to

suffer anxiety, panic attacks, hypervigilance, nightmares, and intrusive memories of the traumatic incidents and scenes he had responded to as a firefighter. Dr. Gutterman noted that although the Claimant had been prescribed anti-depressants by his family doctor these did not help (Respondents' Exhibit L, BS 29). ATP Dr. Gutterman prescribed Clonazepam and Trintellix.

12. At a follow-up examination with ATP Dr. Gutterman on October 17, 2017, ATP Dr. Gutterman again diagnosed the Claimant with PTSD and noted that the Claimant had some relief from his nightmares resulting from his use of Prazosin (Claimant's Exhibit 7, BS 31).

13. By November 14, 2017, ATP Dr. Gutterman reported that the Claimant had been more stable with less anxiety having been away from work and his sleep had improved, although his nightmares continued. At that point, ATP Dr. Gutterman suggested that the Claimant undergo Eye Movement Disintegration Resource (EMDR). (Claimant's Exhibit 7, BS 36). ATP Dr. Ritzer concurred in this recommendation and agreed that the Claimant see Janet Ruby, EMDR, for this treatment (Claimant's Exhibit 5, BS 21). The ALJ infers and finds that the referral to Ms. Ruby was within the chain of authorized referrals and within the natural progression of treatment. Therefore, treatment by Ms. Ruby was authorized.

14. When he saw ATP Dr. Ritzer on January 3, 2018, the Claimant was continuing to experience nightmares and waking up terrified. This was accompanied by panic attacks, palpations, as well as numbness and tingling in both extremities. *Id*. ATP Dr. Ritzer stated that Claimant had suffered a "syncopal episode" when he struck his head leaning forward in the middle of the night some weeks before the visit of January 3, 2018. *Id.*, BS 22.

Compensability of Claimant's PTSD-- Mental Impairment

15. Respondents' paramount argument against the compensability of Claimant's PTSD (mental impairment) is that the traumatic causes of the Claimant's mental impairment are **not** outside of his usual experience and would **not** evoke significant symptoms of distress in a worker similarly situated. § 8-41-301 (2) (a), C.R.S., goes on the enumerate disciplinary actions taken in good faith as not arising out of and in the course of employment. Boiled down to its bare essentials, Respondents argue that watching a plane crash victim burn alive, encountering suicides where the deceased is hanging in a barn are just another "day in the life" of a paramedic and within the usual experience of paramedics and would not evoke significant symptoms of distress in a paramedic similarly situated. In support of Respondents' argument, Melissa Saghy, the HR individual, testified that she knew of no other paramedics who made workers' compensation claims based on PTSD. The ALJ infers and finds that her testimony does not preclude other paramedics experiencing significant symptoms of

distress. Respondents' argument, stated simply, is that watching a human being burning alive and witnessing dead bodies of young women, after suicide, poised in grotesque positions is another normal work day for paramedics. Respondents' offered no expert testimony to support this argument, and Saghy's testimony (from memory) was based on a previous review of personnel records never furnished to the Claimant. The ALJ rejects this argument. As found herein below, the Claimant's work-related PTSD is supported by a qualified psychiatrist and by his ATP. The ALJ explicitly finds that Claimant's trauma is not common to his filed of employment and Respondents failed to demonstrate that Claimant's experiences that caused his PTSD would **not** evoke significant symptoms of distress in similarly situated paramedics. The ALJ finds that the Claimant's evidence demonstrates that his traumatic experiences that caused his PTSD are **not** within the usual experiences of paramedics. The ALJ draws a plausible inference and further finds that the Claimant's traumatic experiences would evoke significant symptoms of distress among similarly situated paramedics.

Authorization of EMDR by Janet Ruby

16. The Claimant was referred for EMDR by both ATP Drs. Ritzer and Gutterman for work-related PTSD, and he saw Janet Ruby for this purpose, consistently with ATP Dr. Gutterman's November 14, 2017, recommendation (Exhibit 5, BS 21). Although the Claimant may have seen Janet Ruby for marital counseling, there is no persuasive evidence that this prior relationship interfered with his need for PTSD treatment. Although there is evidence that Claimant had sought mental health counseling as a result of his divorce, there is no persuasive evidence that this treatment was causally related to a prior diagnosis of PTSD. Therefore, the ALJ finds that Ms. Ruby was within the authorized chain of referrals and within the natural progression of treatment for the work related PTSD.

The Claimant's Hearing Testimony

17. At hearing the Claimant testified consistently with his histories given to ATP Dr. Ritzer and ATP Dr. Gutterman.

18. The Claimant testified that over his years as a firefighter/Paramedic Lieutenant he had been exposed to multiple traumatic events despite which he was able to continue functioning in the work place. Thus, following the plane crash of 2014 he returned to work despite witnessing the body of the pilot burning and did not seek EAP (Employee Assistance Program) help. This situation changed after the events of 2016 and 2017, when he was dispatched for suicides. The Claimant has not argued that the events of 2014, involving the plane crash are the sole reason for his disintegrated mental status. Rather, he relied on that event, as well as the suicides which he was engaged in investigating in 2016 and 2017 as the cause of his PTSD.

Average Weekly Wage (AWW)

19. As stipulated and found herein above, the Claimant's AWW is $1,871.48, which establishes the maximum TTD rate of $948.15 per week, or $135.45 per day for Fiscal Year (FY) 2017/2018. The period from September 19, 2017, through the date of hearing, February 22, 2018, both dates inclusive, is a total of 157 days.

Temporary Total Disability

20. As stipulated and found herein above, the Claimant has been temporarily and totally disabled from September 19, 2017, and ongoing. He has not returned to work since September 18, 2017, nor has he been medically released to his pre-injury job. He has earned no wages since that time and he has not been declared to be at maximum medical improvement (MMI) by an ATP. Therefore, he has been temporarily and totally disabled since September 18, 2017.

Responsibility for Termination Affirmative Defense

21. Respondents argue that Claimant was at fault for his termination on January 25, 2018. Respondents rely on their letter of termination to support this (Claimant's Exhibit 11). First, respondents assert that Claimant inappropriately cancelled a Fit for Duty appointment on September 19, 2017. Claimant's Exhibit 11, however, acknowledges that Claimant rescheduled his Fit for Duty appointment for September 21, 2017. Although he did not complete the testing at Nicoletti-Flatter Associates on September 21, 2017, the Claimant credibly testified that his inability to complete the testing related directly to his mental impairment, specifically caused by the evaluation questions and his inability to concentrate and anxiety. The ALJ finds that Claimant's inability to complete testing was not volitional. Indeed, as a mentally impaired individual, he could not reasonably believe that his incapacitated ability to complete the testing would lead to his termination.

22. An additional basis for termination was the Claimant's failing to complete Family and Medical Leave Act (FMLA) and other leave paperwork. Melissa Saghy, Human Resources (HR) coordinator for the Employer testified that despite the Claimant's "unwillingness" [or inability] to complete this paperwork, the Employer nevertheless placed the Claimant on FMLA and on other leaves, even though, according to the Claimant, he did not request FMLA and did not want it.

23. Pursuant to CFR § 825-100 (Code of Federal Regulations), the purpose of the FMLA is to allow employees to balance their work and family life. There is no statutory basis that an employee has a legal obligation to apply for FMLA if requested by an employer. Saghy agreed that FMLA arises under Federal Law and is not governed by the workers' compensation system. Additionally, she agreed that the Employer makes its own determination of what should be provided to its injured

employees. The Employer's policy did not give rise to a requirement that employees request FMLA or any of the other benefit available through the Employer.

24. The ALJ finds that the Claimant did **not** commit a **volitiona**l act, or **exercised control over his termination**, in light of the totality of the circumstances. He could not **reasonably expect** that his actions or inactions due to his impairment could result in a loss of employment.

25. The fact that the Employer discharged the Claimant, **even in accordance with its policy**, does not establish that Claimant acted volitionally, or exercised control over the circumstances of termination.

26. To the extent that the Employer's decision to terminate Claimant on January 25, 2018, was based on either his failure to complete his Fit for Duty evaluation of not applying for FMLA or other leaves does not support a finding that Claimant committed a volitional act which he knew could have resulted in his termination from employment.

27. Additionally, the termination letter of January 25, 2018, acknowledges that regardless of the Claimant's cooperation or lack thereof, the Employer imposed the FMLA and other leave policies when Claimant did not return documents as requested. Thus, its decision to terminate the Claimant was based on its own internal policies, not due to Claimant's volitional act. An employer's policies regarding sufficient grounds for termination differ from the narrow workers' compensation provision concerning "responsibility for termination," based in volitional acts, which allows a discontinuance of TTD benefits, if affirmatively proven by an employer. The concept is an fair exception to the overriding purpose of the Workers Compensation Act (the "Act") to provide a source of income to injured individuals who are unable to work because of their work-related injuries.

Ultimate Findings

28. The medical opinions of ATP Dr. Ritzer and Dr. Gutterman, concerning the work-related cause of the Claimant's PTSD/Mental Impairment, are credible, persuasive and essentially undisputed. Respondents offered no expert medical opinions to contradict their opinions. The Claimant's testimony was straight-forward, persuasive, credible and corroborated by the histories he gave to ATP Dr. Ritzer and ATP Psychiatrist Dr. Gutterman.

29. Between conflicting evidence, Melissa Saghy's testimony in particular, and the opinions of Dr. Ritzer and Dr. Gutterman, the ALJ makes a rational choice, based on substantial evidence, the accept the opinions of Dr. Ritzer and Dr. Gutterman, plus the Claimant's testimony, and to reject any evidence to the contrary.

30. As found herein above, the Claimant sustained the compensable occupational disease of PTSD, a purely mental impairment, arising out of the course and scope of his employment. As found, his psychological traumas were **generally** outside the usual experience of paramedics and would evoke significant symptoms of distress in paramedics similarly situated. Death as the final frontier is significantly different than a paramedic's usual mission of trying to save lives.

31. As stipulated and found, all of the Claimant's medical care and treatment was authorized, causally related and reasonably necessary to cure and relieve the Claimant's PTSD. As found herein above, the EMDR treatment by Janet Ruby was within the authorized chain of referrals during the natural course of treatment for the Claimant's PTSD within the scope of the medical referrals, causally related to the occupational disease of PTSD, and reasonably necessary to cure and relieve the effects thereof. Marital treatment and counseling by Ruby was **not** authorized or causally related to the PTSD nor reasonably necessary to cure and relieve the effects of the PTSD.

32. The Claimant's AWW is $1,871.48, which establishes the maximum TTD rate of $948.15 per week, or $135.45 per day for Fiscal Year (FY) 2017/2018. The period from September 19, 2017, through the date of hearing, February 22, 2018, both dates inclusive, is a total of 157 days.

33. The evidence establishes that the Claimant has been temporarily and totally disabled since September 19, 2017. The period from September 19, 2017, through the date of hearing, February 22, 2018, both dates inclusive, is a total of 157 days, which establishes aggregate past due TTD benefits of $21,265.65. The Claimant continues to be temporarily and totally disabled since February 23, 2018.

34. As found herein above, the Claimant has proven a compensable mental occupational disease, PTSD, by a preponderance of the evidence. Respondents have failed to prove their affirmative defense of "responsibility for termination" by preponderant evidence. The Claimant has further prove, by preponderant evidence that all his medical care and treatment for his PTSD, including the EMDR treatment for PTSD by Janet Ruby was authorized, causally related to the PTSD, and reasonably necessary to cure and relieve the Claimant's PTSD. Ruby's marital counseling is not causally related to the compensable PTSD.

35. Respondents have failed to prove their affirmative defense of "responsibility for termination" by preponderant evidence.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the medical opinions of ATP Dr. Ritzer and Dr. Gutterman, concerning the work-related cause of the Claimant's PTSD/Mental Impairment, are credible, persuasive and essentially undisputed. Respondents offered no expert medical opinions to contradict their opinions. The Claimant's testimony was straight-forward, persuasive, credible and corroborated by the histories he gave to ATP Dr. Ritzer and ATP Psychiatrist Dr. Gutterman.

Substantial Evidence

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

Compensability of Claimant's PTSD

c. Section 8-41-301 (2) (a), C.R.S., provides added elements of proof for mental impairments such as PTSD: (1) the claim must be supported, which it is, as found herein above; (2) "mental impairment" applies to a recognized, **permanent disability**…consisting of a psychological traumatic event "that is outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances [**permanent** impairment is **not** an issue herein. Nonetheless, as inferred and found, the Claimant's exposures were outside the Claimant's usual experience as a paramedic and the exposures would evoke significant symptoms of distress in similarly situated paramedics]. Even if the "mental impairment" test applied to issues other than **permanent** impairment, the evidence established that Claimant met the tests for mental impairment without a physical component. The resolution of what is a "common work condition depends upon the particular facts and circumstances of each case. *See Holme, Roberts & Owen v. Indus. Claim Appeals Office*, 800 P.2d 1332 (Colo. App. 1999); *Pub. Serv. Of Colo. V. Indus. Claim Appeals Office,* 68 P.3d 583 (Colo. App. 2003).

d. An "occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure

occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). Occupational diseases typically involve long latency periods, sometimes produce symptoms at times remote from the last exposure, and yet may lead to disability or death. An occupational disease might be said to "occur" when the disease becomes **disabling.** *See Union Carbide Corporation v. Indus. Claim Appeals Office,* 128 P.3d 319 (Colo. App. 2005). As found, the evidence meets all of the tests for compensability of an occupational disease, in this case PTSD with increasing debilitating effects on the Claimant. .As found, Claimant has proven an occupational disease with an onset date that cannot be precisely pinpointed, and a last injurious exposure of September 18, 2017.

Medical

e. As found the parties stipulated, and the ALJ found that all of the medical care and treatment, with the exception of the EMDR by Janet Ruby was authorized, causally related and reasonably necessary. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, the EMDR treatment by Janet Ruby was within the authorized chain of referrals during the natural course of treatment for the Claimant's PTSD within the scope of the medical referrals, causally related to the occupational disease of PTSD, and reasonably necessary to cure and relieve the effects thereof. Marital treatment and counseling by Ruby was **not** authorized or causally related to the PTSD nor reasonably necessary to cure and relieve the effects of the PTSD.

Average Weekly Wage (AWW)

f. As stipulated and found, the Claimant's AWW is $1,871.48, which establishes the maximum TTD rate of $948.15 per week, or $135.45 per day for Fiscal Year (FY) 2017/2018. The period from September 19, 2017, through the date of hearing, February 22, 2018, both dates inclusive, is a total of 157 days.

Temporary Total Disability

g. As stipulated and found, the Claimant has been temporarily and totally disabled since September 19, 2017. The period from September 19, 2017, through the date of hearing, February 22, 2018, both dates inclusive, is a total of 157 days, which

establishes aggregate past due TTD benefits of $21,265.65. The Claimant continues to be temporarily and totally disabled since February 23, 2018.

h. Section 8-41-301 92) (b), C.R.S., limits awards for **permanent** mental impairment, with no physical impairment, to 12 weeks. The 12-week limitation on **permanent** disability benefits for mental impairments, contained in § 8-41-301 (2) (b), C.R.S., applies to **permanent** impairment benefits only, not to temporary disability benefits. *See City of Thornton v. Replogle*, 873 P.2d 30 (Colo. App. 1993). Therefore, the 12-week limitation does not apply to TTD benefits.

"Responsibility for Termination" Affirmative Defense

i. Section 8-42-105 (4), C.R.S., provides that an employee responsible for his/her own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether a claimant is responsible for termination, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788 [Indus. Claim Appeals Office (ICAO), June 25, 2003]. The Supreme Court has determined that the "responsibility for termination" defense is not absolute and is vitiated when a worsening of condition occurs. *Anderson v. Longmont Toyota,* 102 P. 3d 323 (Colo. 2004). As found, Respondents failed to satisfy their burden of proof on the affirmative defense that Claimant was responsible for his termination through a volitional act on his part and/or that Claimant exercised ad degree of control over the circumstances leading to termination.

Burden of Proof

j. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979).

People v. M.A., 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has satisfied his burden with respect to compensability, all medical benefits for his work-related PTSD, AWW, and TTD. Respondents have failed to satisfy their burden with respect to their affirmative defense of "responsibility for termination."

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all of the costs of Claimant's medical care and treatment for his compensable mental injury of post-traumatic stress disorder, including but not limited to the costs of medical care by Hiep Ritzer, M.D., Gary Gutterman, M.D., and Janet Ruby for the EMDR, subject to the Division of Workers Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary total disability benefits from September 19, 2017, through the date of hearing, February 22, 2018, both dates inclusive, a total of 157 days, at the rate of $948.15 per week, or $135.45 per day, in the aggregate past due amount of $21,265.65, which is payable retroactively and forthwith.

C. From February 23, 2018, and continuing until cessation or modification of temporary disability benefits is warranted by law, Respondents shall continue to pay the Claimant temporary total disability benefits of $948.15 per week.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due on indemnity benefits and not paid when due.

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

DATED this_____day of March 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Whether Claimant overcame, by clear and convincing evidence, the opinion of the DIME that Claimant's conditions, at the time of maximum medical improvement, were not causally related to the work injury.

- Whether Claimant overcame, by clear and convincing evidence, the opinion of the Division Independent Medical Examination (DIME) physician as to maximum medical improvement.

- Whether Respondents established, by a preponderance of the evidence, that they are entitled to correct/modify the Final Admission of Liability admitting to a 2% upper extremity schedule rating, to properly reflect the DIME examiner's findings that Claimant did not suffer work-related permanent impairment.

- Whether Claimant established by a preponderance of the evidence that she is entitled to reasonable and necessary medical benefits, including surgery, to cure and relieve the effects of a work-related injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, including the deposition testimony of Dr. Castrejon, the ALJ enters the following findings of fact:

1. This claim has been the subject of a prior hearing held before ALJ Patrick Spencer on January 26, 2017. The undersigned ALJ adopts and incorporates the findings of fact from ALJ Spencer's March 1, 2017 order to find as follows:

    - Claimant is a long time employee of "Respondent-Employer" having worked for the county for approximately 31 years. For the past 9-10 years, Claimant has worked as an Income Maintenance Technician Supervisor. Her job duties vary daily and include among others things, supervision and training of five case workers; processing claims for Medicaid and Food Stamps; issuing EBT cards, interviewing potential social services clients, completing documentation and preparing written reports. Based upon the evidence presented, the ALJ finds that Claimant performs significant amounts of data entry on a computer.

    - On March 6, 2015, Claimant developed pain in her bilateral hands secondary to "continuous" mousing and keyboarding. She reported the injury prompting Respondent-Employer to file an Employer's Frist Report of Injury on March 9, 2015.

- Claimant was referred to Dr. Kevin Rice who evaluated her on March 13, 2015. During her initial evaluation, Claimant reported a two-year history of progressive wrist pain and a recent inability to use small writing utensils secondary to pain in the thumb and lateral wrist. Claimant was tender over the first extensor compartment of the wrists bilaterally, right greater than left. Finkelstein test was equivocal on the right and negative on the left. X-rays of the hand were obtained. The x-rays demonstrated mild-to-moderate degenerative changes, particularly involving the first DIP joints.

- Claimant undertook conservative care, including occupational therapy (OT). Recommendations were made to assist Claimant in keeping her wrists in a neutral position while typing and mousing.

- On July 23, 2015, Claimant was evaluated by Sadie Thomas, an orthopedic physician assistant (PA) who noted that Claimant reported "[working] at a computer most of the day and does a lot of typing which aggravates her pain." PA Thomas diagnosed tenosynovitis of the thumb, wrist pain, and hand osteoarthritis. Claimant declined aggressive treatment, including cortisone injections. Consequently, PA Thomas prescribed Voltaren gel and encouraged additional OT.

- On January 27, 2016, an MRI showed a ganglion cyst, but no other significant pathology. Claimant was referred to Dr. Karl Larsen for a surgical consultation.

- Claimant saw Dr. Larsen on February 29, 2016. Dr. Larsen opined that arthritis and associated MP instability accounted for Claimant's thumb symptoms. He felt the ganglion cyst shown on MRI was asymptomatic and not an issue. He opined the ulnar-sided wrist discomfort seemed most associated with pisotriquetral arthritis with some associated FCU tendinitis. He administered an injection in an effort to delineate Claimant's pain generator. He also recommended a splint to protect Claimant from resting on her pisiform when using her mouse.

- During a follow-up appointment on April 29, 2016, Claimant reported that the injection proved helpful. Dr. Larsen opined that Claimant seemed to be doing well with conservative care and was unlikely to improve further with nonsurgical treatment. He indicated that should Claimant's symptoms persist or worsen, a wrist arthroscopy should be considered. He also noted that should an arthroscopy fail, an ulnar shortening procedure would be "the final solution."

- On June 17, 2016, Claimant reported ongoing symptoms during a follow-up visit with Dr. Larsen. Because of Claimant's ongoing symptoms, Dr. Larsen recommended a wrist arthroscopy to evaluate and potentially

debride Claimant's TFC. He did not think surgery was indicated for her thumb but recommended a CMC joint cortisone injection, which he indicated he would administer intraoperatively.

- Claimant saw Dr. Thomas Mordick on August 5, 2016 for an Independent Medical Examination (IME) at Respondent's request. Dr. Mordick prepared a report dated August 5, 2016, and a supplemental letter dated September 1, 2016. He pointed out that the fact that a patient's symptoms bother them at work does not make it a work-related condition. Dr. Mordick requested a job analysis. Dr. Mordick opined that Claimant had "diffuse multifocal areas of wrist tenderness that "are not consistent with a specific anatomic diagnosis." Dr. Mordick opined Claimant was not a surgical candidate because there were no objective findings of surgical pathology. Dr. Mordick recommended the discontinuation of treatment, as he believed Claimant was at maximum medical improvement without a specific work-related diagnosis. He diagnosed CMC arthritis of the thumb.

- Sara Nowotny performed a Physical Demands Analysis & Risk Factor Assessment on September 12, 2016. Ms. Nowotny interviewed Clamant and observed Claimant perform the position of Income Maintenance Technician Supervisor and concluded Claimant's job did not expose her to any primary or secondary risk factors for a cumulative trauma injury.

- On September 15, 2016, Dr. Mordick reported that he reviewed the Job Demands Analysis report and there were no primary or secondary criteria for work causation of a repetitive motion disorder. "Hence, there is no evidence that Ms. Romero's complaints would be caused by her job."

- Dr. Rice placed Claimant at maximum medical improvement on October 10, 2016 without permanent impairment or work restrictions. His final diagnosis was "persistent right wrist pain secondary to arthritis and tendinitis." Dr. Rice recommended "maintenance care" including follow-up appointments and the wrist arthroscopy proposed by Dr. Larsen.

- While Respondents filed a Final Admission of Liability (FAL) consistent with the opinions expressed by Dr. Rice due to their statutory obligations, they reiterated an intent to proceed to hearing on compensability and withdraw a previously filed General Admission of Liability (GAL).

- Claimant objected to the FAL and requested a Division Independent Medical Examination (DIME), which was subsequently held in abeyance per order of prehearing Administrative Law Judge (PALJ), John Sandberg pending adjudication of the issues of compensability and withdrawal of the GAL.

2. ALJ Spencer denied Respondents request to withdraw their GAL

concluding that the evidence presented established that Claimant had sustained a compensable injury as result of her work duties, which injury required "evaluation, diagnostic workup and treatment with conservative measures." Consequently, the DIME process that was being held in abeyance commenced once again.

3. On June 12, 2017, Dr. Rosemary Greenslade performed the requested DIME and prepared a report. Dr. Greenslade noted the scope of the exam was based on a request for "determination of MMI, Partial Impairment, and Work-Relatedness, for Work Comp Claim for Bilateral Wrist and Thumb Pain." Dr. Greenslade took a history from Claimant that included information from her about her job duties. Dr. Greenslade reviewed the medical records and performed a physical examination. She diagnosed bilateral thumb arthritis, involving the MP Joint, with MP joint instability, as well as the carpal-metacarpal joints bilaterally, and the IP joints of the thumbs bilaterally. She opined that Claimant's diagnoses were "non-work related, and pre-existing." Dr. Greenslade noted in the discussion section of her report that "[t]here is no work-related causality." She reported that Claimant reached MMI on 10/10/2016 and that Claimant remained at MMI reiterating that Claimant's injuries were "pre-existing, and non-work-related." Dr. Greenslade did not recommend any maintenance care; however, rated Claimant's permanent impairment as 2% upper extremity impairment to the right wrist and thumb and 2% upper extremity impairment to the left wrist and thumb.

4. On August 23, 2017, Respondents prepared a FAL admitting to the impairment rating assigned by Dr. Greenslade.

5. Dr. Castrejon performed an independent medical evaluation (IME), at Claimant's request on November 14, 2017. He diagnosed CMC arthritis, bilateral thumbs. While he concluded that Claimant's arthritis was pre-existing, her work activities aggravated this underlying arthritis. He also specifically disagreed with Dr. Rice, Dr. Mordick, and Dr. Greenslade that Claimant's condition was non-work related and that she did not suffer work-related permanent impairment. In concluding as much, Dr. Castrejon opined that Dr. Greenslade misapplied the Colorado Medical Treatment Guidelines in determining that Claimant's condition was non-work related, stating as follows: "To begin, although the claimant has clinical findings of bilateral carpal tunnel syndrome, her presenting complaints are not consistent with carpal tunnel syndrome as being the etiology of her current symptomatology. Therefore a discussion regarding causation that attempts to incorporate Rule 17, Exhibit 5 of the Colorado Division of Workers Compensation Medical Treatment Guidelines, for [Claimant's] diagnosis, into the causation analysis is not appropriate. We are not dealing with carpal tunnel nor cubital tunnel syndrome in this case."

6. Dr. Castrejon professed his confusion as to how the DIME concluded that the Claimant's condition was non-work related, yet, calculated permanent impairment for the bilateral thumbs and wrists. Dr. Castrejon reported that he reviewed Dr. Mordick's September 1, 2016, report in which Dr. Mordick requested a job demands analysis (JDA) to help determine if Claimant suffered a work-related condition. Nonetheless, Dr. Castrejon did not report that he reviewed Dr. Mordick's September 15,

2016 note in which he (Dr. Mordick) indicated that he reviewed the job demands analysis report and it did not support a work injury. Instead, Dr. Castrejon mistakenly concluded that Dr. Mordick did not have the information, including the JDA, necessary to render an opinion as to causation and that "similarly, the DIME physician misconstrued or misinterpreted Dr. Mordick's letter by concluding that Dr. Mordick had, in fact, determined lack of causation based upon his review of the JDA– which he had not." Dr. Castrejon essentially admitted that causation was a matter of opinion and opinions differed noting that "the opinions of Dr. Mordick and Dr. Greenslade are just that, opinions."

7. Dr. Castrejon testified by deposition. He agreed that Claimant clearly has pre-existing osteoarthritis of the hands. He testified that the Medical Treatment Guidelines are "just guidelines for physicians, and physicians should then think and use their mind and use their medical judgement to make the right decision based on the specific condition of the patient." Dr. Castrejon agreed that Dr. Greenslade, Dr. Mordick, and Dr. Mitchell all reviewed information and arrived at their opinion that Claimant's condition was not work-related based on their knowledge, training, and experience. In so concluding, Dr. Castrejon noted: "We all have medical opinions. We try to use a skeleton model, which is what the Colorado treatment guidelines are, to direct us toward a well-thought-out and hopefully good decision or analysis."

8. Dr. Castrejon testified that other physicians opined that Claimant's symptoms were carpal tunnel syndrome related. He testified that Dr. Greenslade offered a "discussion where she alluded to Rule 17, Section 5, and she pretty much paraphrased what one looks for in carpal tunnel syndrome – which is not [Claimant's] problem." He continued to state that the diagnosis-based risk factor table for the diagnosis of aggravation of osteoarthritis of thumb at the CMC joint and wrist states there is no quality evidence available so the physician has to determine causation based on the medical findings, the history, and diagnostic studies. According to Dr. Castrejon, the various examiners who reached a conclusion that Claimant's condition was non-work related had not obtained a sufficiently detailed evaluation of Claimant's work history in order to determine causation. Dr. Castrejon reviewed Dr. Mordick's September 15, 2016 report and testified that Dr. Mordick indicated the job analysis did not contain adequate information for him to make a decision. Dr. Castrejon explained that he chose to rely on information Claimant provided about her work duties rather than rely on the job analysis. While Dr. Castrejon did not dispute the accuracy of the JDA including the duties completed for the day it was done, he stressed that the JDA was not "representative of [Claimant's] 30 years of employment" by her description of her work duties to him.

9. While he concluded that the JDA was not representative of Claimant's work duties for the past 30 years, Dr. Castrejon admitted that Dr. Greenslade's report indicated that she spoke to Claimant about her history of work activities even if the information documented from that discussion only comprised two lines of her report. He also agreed that both he and Dr. Greenslade relied on Claimant's verbal work history report, at least in part, to form conclusions regarding the causal relatedness of

Claimant's hand/thumb condition to her work duties. Finally, Dr. Castrejon agreed it is up to each physician to determine how much weight to place on the history given by Claimant and the information obtained and contained in a physical demands analysis, noting that it is a matter of opinion as to how much weight to give each item. In this regard, the following question and answer was posed and provided during Dr. Castrejon's deposition: "Q. It doesn't' mean one doctor is right and another is wrong, does it? A. No, it does not."

10. Dr. Linda Mitchell performed an IME at the request of Respondents. In a report dated January 17, 2018, Dr. Mitchell agreed with Dr. Greenslade and Dr. Mordick that Claimant's hand/thumb condition/symptoms are not related to her work duties based on the Medical Treatment Guidelines. According to Dr. Mitchell, Claimant has degenerative findings in the fingers, wrists, and shoulders. According to Dr. Mitchell, it is not unusual for a person of Claimant's age to develop degenerative osteoarthritis and while she may have discomfort at work, there is no evidence that her work activities are objectively aggravating her osteoarthritis at a cellular or tissue level.

11. Claimant testified at the hearing. She testified that she experiences pain primarily at the base of her thumbs and that the pain increases throughout the week as she works. In addition, she testified that her pain decreases during the weekends when she is not working. She also testified that she would like to do the surgery recommended by Dr. Larson.

12. The ALJ finds the opinions of Dr. Greenslade, Dr. Mordick, Dr. Rice, and Dr. Mitchell more persuasive than the contrary opinions of Dr. Castrejon.

13. Based upon the evidence presented as a whole, the ALJ finds that Claimant has not overcome, by clear and convincing evidence, the opinion of the DIME physician regarding the relatedness of Claimant's hand/thumb conditions to her work duties.

14. The ALJ finds, based on the totality of the evidence, that Claimant has not overcome by clear and convincing evidence the opinion of the DME physician as to MMI.

15. The ALJ finds, based on the totality of the evidence, that Respondents may correct the Final Admission, which admitted to a 2% upper extremity schedule rating, to properly reflect the DIME findings that Claimant did not suffer a work-related permanent impairment.

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the medical record evidence coupled with JDA supports the opinions of Dr. Mordick, Dr. Greenslade and Dr. Mitchell that Claimant's hand/thumb symptoms are not causally related to her work duties. Rather, the evidence presented persuades the ALJ that Claimant's hand/thumb symptoms are likely related to the natural progression of Claimant's pre-existing osteoarthritis. The contrary opinions expressed by Dr. Castrejon are not convincing for the reasons set forth below.

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

Overcoming the DIME Opinion of Dr. Greenslade Regarding Causation and MMI

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and*

Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. As found here, the persuasive medical records as well as the JDA support Dr. Greenslade's conclusion regarding causation, i.e. relatedness of Claimant's hand/thumb condition to her work duties at the time of maximum medical improvement. Multiple physicians, including Dr. Rice, Dr. Mordick, and Dr. Mitchell support Dr. Greenslade's conclusion that Claimant's upper extremity condition was not work related at the time of maximum medical improvement. Dr. Castrejon's conclusion to the contrary is not persuasive. Here, Dr. Castrejon testified that it is up to each physician to determine how much weight to place on the history given by Claimant and the information obtained and contained in a JDA. He admitted that both he and Dr. Greenslade relied on Claimant's work history, at least in part, to form conclusions regarding relatedness of Claimant's condition. As a result, their disagreement regarding the weight to place on the history given by Claimant and the information obtained and contained in a physical demands analysis simply constitutes a matter of opinion. To the extent that Dr. Castrejon's opinions concerning the relatedness of Claimant's hand/thumb pain her work duties, including keyboarding and mousing vary from those expressed by Drs. Greenslade, Mordick and Mitchell, the ALJ concludes that those divergences constitute a professional difference of opinion. A professional difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Greenslade's opinion concerning causation. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000).*

F. Furthermore, the ALJ is not persuaded that Dr. Greenslade erred in her causation analysis, as suggested by Dr. Castrejon, because she decided to use Rule 17, Exhibit 5 of the Medical Treatment Guidelines (MTG) as support in analyzing whether Claimant's hand/thumb conditions were related to her work duties. The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, specifically Rule 17-2(A), provide that: "All health care providers shall use the Medical Treatment Guidelines adopted by the Division." In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. While Rule 17, Exhibit 5 has been accepted in the assessment of the cause of carpal tunnel syndrome specifically, the Rule also addresses many other

cumulative trauma conditions that "comprise a heterogeneous group of diagnoses which include numerous specific clinical entities, including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures" such as: de Quervain's disease, cubital tunnel syndrome, epicondylagia, and osteoarthritis. (Emphasis added.) The MTG includes a section titled "General Principles of Medical Causation Assessment." That section encourages doctors to address causation based on the totality of medical and non-medical evidence. Dr. Castrejon correctly pointed out that the Diagnosis-Based Risk Factors Table indicated that "No Quality Evidence is Available for osteoarthritis of the Thumb, Carpometacarpal (CMC) and Wrist;" however, he failed to note that the MTG specifically provide in section F 1, "Aggravated Osteoarthritis of the Digits, Hand, Or Wrist" that the provider should "Refer to Section D 3 for Medical Causation Assessment for Cumulative Trauma Conditions" and that section D 3 includes the Diagnosis-Based Risk Factors Table. Here, Dr. Mordick, Dr. Greenslade and Dr. Mitchell reviewed Claimant's job duties in conjunction with the Rules and did not find that they presented any risk factors for her condition, an opinion the ALJ concludes is supported by the JDA. Thus, while Rule 17, Exhibit 5 specifically addresses factors to consider when addressing the cause of carpal tunnel, the ALJ determines that Dr. Greenslade's decision to analyze the cause of Claimant's hand/thumb conditions under Rule 17 in this case does not, contrary to Dr. Castrejon's urging, constitute an error that would support a conclusion that her causation opinion is highly probably incorrect.

G. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

H. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The instant case involves complex medico-legal questions regarding the cause of Claimant's hand/thumb conditions. As found here, the persuasive evidence supports Dr. Greenslade's use of Rule 17, Exhibit 5 in determining that Claimant's hand/thumb conditions are unrelated to her work. While the Claimant clearly has ongoing medical treatment needs, the ALJ agrees with Dr. Mitchell that she "should see her primary healthcare provider for

management of her osteoarthritis" because those needs fall outside the worker's compensation system. Because Claimant has failed to produce unmistakable evidence that Dr. Greenslade's causation opinion is highly probably incorrect, it follows that her opinion regarding MMI has also not been overcome. Considering all the evidence presented, the ALJ concludes that Claimant has failed to establish that Dr. Greenslade's causation/MMI opinion is highly probably incorrect. Accordingly, the request to set the DIME aside must be denied and dismissed.

Claimant's Request for Medical Benefits

I. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury or prevent further deterioration of the claimant's condition. § 8-42-101, C.R.S.; *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609, 611 (Colo.App.1995). However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

J. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). As found here, Claimant has failed to establish a causal relationship between her hand/thumb condition and her work duties, i.e. she failed to overcome the causality opinion of Dr. Greenslade. Here the evidence presented persuades the ALJ that Claimant's symptoms are likely emanating from the natural progression of her pre-existing degenerative osteoarthritis. While a pre-existing condition does not disqualify a claimant from receiving workers compensation benefits[1], a claimant must establish that his or her employment "aggravates, accelerates, or "combines with" the pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

K. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not compel the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent

[1] *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004).

the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). In this case, the totality of the evidence presented persuades the ALJ that Claimant's ongoing hand/thumb pain is likely related to the natural progression of her pre-existing osteoarthritis. Any suggestion that the only logical conclusion that can be reached from the evidence presented is that Claimant's underlying pre-existing condition was aggravated by her keyboarding and mousing is unpersuasive when Claimant's explanation of her duties and the JDA is taken into account. The ALJ credits the opinions of Drs. Greenslade, Mordick and Mitchell in this case to conclude that the variety of job duties described and demonstrated by Claimant during the JDA are probably not exposing her to risk factors for the development of her hand/thumb condition. As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship between a claimant's alleged injury and his/her work based on temporal proximity. To the contrary, as noted by the panel in *Scully* "correlation is not causation." Because Claimant has failed to establish that her need for medical treatment was proximately caused by an injury arising out of and in the course of the employment, her claim for additional medical benefits must be denied and dismissed.

Final Admission Permanent Partial Disability Rating

L. Workers' Compensation Rules of Procedure (WCRP) 5 – 5.G provides that an insurer may modify an existing admission regarding medical impairment, whenever the medical impairment rating is changed pursuant to a division independent medical exam, a division independent medical examiner selected in accordance with Rule 5-5(E); or an order. However, any such modifications shall not affect an earlier award or admission as to monies previously paid.

M. Dr. Greenslade, as the division independent medical examiner, noted the scope of the exam was based on a request for "determination of MMI, Partial Impairment, and Work-Relatedness, for Work Comp Claim for Bilateral Wrist and Thumb Pain." Dr. Greenslade responded to all of these issues. As found, she determined that Claimant's hand/thumb conditions were not causally related to her work duties. Consequently, she placed the Claimant at MMI without maintenance treatment needs. Nonetheless, Dr. Greenslade assigned 2% upper extremity impairment to the right wrist and thumb and 2% upper extremity impairment to the left wrist and thumb. On August 23, 2017, Respondents mistakenly prepared a FAL that admitted for 2% right upper extremity and 2% left upper extremity impairment. Based upon the evidence presented, the ALJ is persuaded that Respondents' admission was filed in error because the Division IME determined Claimant's permanent impairment was not work related. Accordingly, the ALJ agrees with Respondents that the correct work-related impairment rating is 0% for each upper extremity. Respondents have carried their burden to establish that a modification of the FAL is necessary to prevent an unjust result in this case. Respondents may modify the existing admission to reflect the proper work-related medical impairment based on this order but such modification shall not affect an earlier award or admission as to monies previously paid.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside Dr. Greenslade's causation determination is denied and dismissed.

2. Claimant's request to set aside Dr. Greenslade's MMI determination is denied and dismissed.

3. Claimant's request for medical treatment, including surgery, is denied and dismissed.

4. Respondents are permitted to file a new Final Admission to correct the erroneous indication that Claimant is entitled to medical impairment benefits for a non-work related condition as determined by Dr. Greenslade.

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

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

DATED: March 30, 2018

/s/ Richard M. Lamphere

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

ISSUES

- Did Respondent prove by a preponderance of the evidence that Claimant's TTD benefits should be suspended or terminated based on an intervening event?

- Did Respondent prove by a preponderance of the evidence that Claimant's TTD benefits should be suspended under § 8-43-404(3) for refusing have surgery on his left elbow?

FINDINGS OF FACT

1. Claimant worked for Employer as an Automotive and Diesel Vehicle Technician for over 21 years. His job duties included repair and maintenance of over-the-road and local delivery trucks. Claimant sustained admitted injuries to his bilateral upper extremities on April 30, 2010, while performing maintenance work on a vehicle.

2. Claimant's injuries lead to a lengthy course of treatment, including conservative measures and multiple surgeries. In the course of this claim, Claimant has undergone the following surgical procedures:

- 12/9/10: right shoulder subacromial decompression/distal clavicle resection
- 7/7/11: left shoulder subacromial decompression/distal clavicle resection
- 7/7/11: left elbow ulnar neurolysis/elbow debridement
- 3/6/12: right elbow ulnar neurolysis
- 3/6/12: right carpal tunnel release
- 2/7/14: right elbow epicondylar debridement/ulnar nerve revision

3. At present, Claimant is awaiting a revision left ulnar neurolysis and submuscular transposition surgery, initially recommended by Dr. Karl Larsen in April 2015. The surgery has been the subject of considerable prior litigation. Respondent initially requested a hearing after receiving Dr. Larsen's request for surgical preauthorization, and ALJ Lamphere heard the matter on December 2, 2015. In an order dated February 3, 2016, ALJ Lamphere determined that the left ulnar nerve revision and transposition surgery was not reasonably necessary. Accordingly, ALJ Lamphere denied and dismissed the request for surgery.

4. Claimant subsequently saw Dr. Thomas Higginbotham for a DIME in April 2016. Dr. Higginbotham opined that "beyond a reason[able] degree of medical probability, the recommendation [made by Dr. Larsen] for the left ulnar nerve transposition is necessary and reasonable." He concluded Claimant "is not at MMI until after the proposed left ulnar nerve transposition."

5. Respondent requested a hearing to challenge the DIME's determination regarding MMI, which was heard by the undersigned ALJ on October 16, 2016. I found that ALJ Lamphere's order did not preclude the DIME from revisiting the issue of surgery in the context of determining MMI. I further found that Respondent failed to overcome the DIME by clear and convincing evidence, and ordered Respondent to pay for the surgery. Respondent appealed that decision to the ICAO, which affirmed on March 24, 2017.

6. Respondent notified Claimant on April 26, 2017 that the left ulnar nerve neurolysis and submuscular transposition surgery was authorized. As of the February 15, 2018 hearing, Claimant had not undergone surgery. The ostensible reason for the delay is residual complications from a gallbladder surgery on March 3, 2017.

7. Claimant saw Dr. Larsen on June 7, 2017 to discuss the proposed elbow surgery. Claimant still wanted surgery but was not ready to proceed at that time. Dr. Larsen noted "[h]e is recovering from a cholecystectomy, so he wants to wait until he has recovered a little bit more from that surgery before he actually undergoes a procedure." Dr. Larsen noted that his surgical recommendation was unchanged and stated, "we had him meet with scheduling today to sort out when he wants to do this." Dr. Larsen offered no opinion regarding whether it was medically necessary to delay surgery.

8. Claimant saw Dr. Frank Polanco on July 25, 2017 for a consultation regarding a potential change of ATP. The review of systems noted "the gastrointestinal system is negative," and there was no discussion of any ongoing gastrointestinal issues. Dr. Polanco ultimately declined to take over as Claimant's ATP.

9. Claimant had a follow-up appointment with Dr. Larsen on October 25, 2017. Dr. Larsen noted Claimant "has been undergoing other medical treatments for gastrointestinal issues and has concerns about his medical state associated with that by his report. He has requested to just go ahead and contact me when he has his medical issues situated." In response to questions posed by Respondent's counsel as to whether there was any reason to delay surgery, Dr. Larsen said:

> He remains a candidate for the procedure. He is delaying for what he reports are medical reasons that are outside the realm of my care. I do not have a lot of insight into the specifics of the medical issues but by his description, they sound to be fairly serious and would trump any surgery that I would need to perform for him. He can undergo the surgery at any point when he is ready but it is certainly not an emergency.

10. Respondent continued to pay TTD pending the surgery. On November 3, 2017, Respondents filed a petition to modify, terminate or suspend Claimant's TTD benefits because Claimant was delaying surgery "for reasons unrelated to the workers' compensation claim." Respondent requested termination of TTD "until . . . Claimant proceeds with surgery."

11. Claimant timely objected to Respondent's petition, stating "there are legitimate medical reasons why I cannot temporarily undergo the recommended elbow

surgery." Based on Claimant's timely objection, the Division denied the petition and advised Respondent "if you wish to pursue this issue you will need to apply for a hearing."

12. On November 16, 2017, Claimant's primary care physician, Dr. Opeyemi Banjoko, wrote a letter addressing the recommended surgery in the context of the non-work related GI condition. He wrote, "Given the stress of the diarrhea and tests he needs to get done, the patient wants to be done with his current evaluation with the gastroenterologist doctor before pursuing any surgical intervention on his left elbow." Dr. Banjoko did not opine that elbow surgery was medically contraindicated.

13. At the February 15, 2018 hearing, Claimant testified that he underwent gallbladder surgery on March 3, 2017 and developed GI complications. He described issues including chronic diarrhea, rectal bleeding, hemorrhoids, and digestive issues.

14. The ALJ received no records from the gastroenterologist managing Claimant's condition. The records submitted into evidence contain no objective clinical, laboratory, or other diagnostic or examination findings to document the frequency and severity of the GI issues. Nor are there any details of a specific treatment plan or the anticipated duration of treatment. No provider has predicted or discussed when Claimant could be expected to undergo elbow surgery.

15. Respondent failed to prove that Claimant's unrelated GI issues are an "intervening cause" because his wage loss remains attributable to the industrial injury "to some degree."

16. Respondent proved that Claimant's TTD benefits should be suspended under § 8-43-404(3). The persuasive evidence demonstrates the left elbow surgery is reasonably essential to promote recovery and bring Claimant to MMI. The ALJ further finds that Claimant's refusal to proceed with surgery is not objectively reasonable.

CONCLUSIONS OF LAW

A. Claimant's non-injury related GI issues are not an "intervening cause" sufficient to sever the causal connection between the injury and Claimant's temporary disability.

To receive TTD benefits, a claimant must establish a causal connection between a work-related injury and the subsequent wage loss. Section 8-42-103(1)(a). A claimant need not prove that the work-related injury was the *sole cause* of the wage loss to establish entitlement to TTD benefits. Rather, eligibility for TTD benefits requires only that the work-related injury contributes *"to some degree"* to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

Once commenced, TTD benefits generally continue until one of the four events enumerated in § 8-42-105(3). But the respondents can also terminate TTD by proving that an efficient intervening event has severed the causal connection between the injury and the wage loss. *Roe v. Industrial Commission*, 734 P.2d 138 (Colo. App. 1986). The existence of an intervening event is an affirmative defense which the respondents must

prove by a preponderance of the evidence. *Atlantic and Pacific Ins. Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983).

Given the relatively low threshold showing of causation needed to establish entitlement to TTD, the respondents face a considerable challenge in proving an intervening event to terminate TTD. Since TTD is payable if the injury contributes "to some degree" to a wage loss, the respondents must show that the injury no longer contributes *in any degree* to the claimant's wage loss. *E.g*., *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

Horton v. Industrial Claim Appeals Office, *supra*, is dispositive of Respondent's intervening event defense here. In *Horton*, the claimant was receiving TTD benefits and awaiting surgery when she suffered a non-injury related fall. The fall aggravated a pre-existing condition and necessitated postponement of the surgery. An ALJ concluded that the fall was an intervening event and suspended TTD benefits. The ICAO reversed the ALJ, and the Court of Appeals affirmed the ICAO. The following language is particularly pertinent to Claimant's case:

> [P]etitioners admitted liability for temporary total disability benefits and they did not contend that the claimant's disability abated prior to the fall . . . . Since the claimant was already totally disabled by the injury at the time of the alleged "intervening event," the subsequent wage loss was necessarily caused to some degree by the injury. Thus, the ALJ's findings establish that claimant's injury contributed in part to the subsequent wage loss. Therefore, under *PDM Molding* [ ], claimant was entitled to temporary disability benefits for the disputed period. *Id*. at 1211.

In *Parks v. Ft. Collins Ready Mix, Inc*., W.C. No. 4-251-955 (March 31, 1999), the ICAO applied *Horton* to a situation similar to Claimant's case. In *Parks*, the claimant's physicians had recommended a talonavicular fusion. The claimant had refused to undergo surgery, and the respondents requested termination of TTD benefits based on an "intervening event." The ICAO held that the claimant's refusal to proceed with surgery was not an "efficient intervening event" because "benefits are only precluded when the industrial disability plays 'no part' in the wage loss." The ICAO stated:

> [I]t is undisputed that the claimant was temporarily disabled at the time Dr. Thomas recommended additional surgery. Thus, the industrial injury contributed "to some degree" to the claimant's wage loss . . . . Under *PDM*, it was incumbent upon the respondents to show that some particular point, the injury no longer contributed in any degree to the claimant's wage loss. . . . Absent evidence that the claimant's temporary disability would have resolved by a specific time but for his delay in undergoing surgery, we perceive no error in the ALJ's determination that the delay is not an efficient intervening event.

The ALJ perceives no meaningful distinction between *Horton*, *Parks,* and Claimant's case. Claimant was clearly disabled by the industrial injury before he

developed the GI problems, and there is no persuasive evidence to suggest his disability would have otherwise resolved by now with the elbow surgery. Indeed, it is nearly certain that Claimant will have some residual disability regardless of the outcome of surgery. Accordingly, Respondent did not prove an intervening event sufficient to terminate Claimant's TTD benefits.

B. Respondent proved that Claimant's TTD benefits should be suspended under § 8-43-404(3).

The Workers' Compensation Act requires employers to provide reasonably necessary medical treatment to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). The Act also creates a corresponding obligation on the claimant's part to participate in treatment as a precondition for receiving indemnity benefits. Specifically, § 8-43-404(3) provides:

> If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment . . . as is reasonably essential to promote recovery, the director shall have the discretion to reduce or suspend the compensation of such injured employee.

Application of § 8-43-404(3) is an affirmative defense, requiring the respondents to prove that the treatment "is calculated to effect a cure" or "is reasonably essential to promote recovery." *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002).

The purpose of the statute is "to prevent the situation where a claimant by refusal of reasonable medical treatment aggravates the compensable consequences of the industrial injury and thereby imposes additional liability on the respondent" *Aranda v. Evraz, Inc*., W.C. No. 4-628-418 (February 17, 2010).

In deciding whether to reduce a claimant's compensation, the ALJ should evaluate the refusal of treatment under an objective standard, and ask "what a reasonable person would do given the circumstances facing the claimant." *Romero v. Alstom, Inc*., W.C. No. 4-767-157-06 (April 9, 2015). The ALJ should consider factors such as "the history of treatment, contrary medical opinions, the importance of the proposed recommendation to the medical outcome and other circumstances bearing on the ability of a patient to comply with the medical directions." *Id*.

As found, Respondent proved that Claimant has refused treatment that is reasonably essential to his recovery, and that his refusal is not objectively reasonable. There is no serious question that the left elbow surgery is reasonably necessary to promote recovery, and all physicians agree it is the only thing standing between Claimant and MMI. No treating or examining provider has recommended Claimant postpone the surgery. Dr. Larsen admitted he had no personal knowledge of Claimant's GI issues and simply relied on Claimant's description of ongoing symptoms. The ALJ does not interpret Dr. Larsen's reports as opining that surgery is contraindicated. Similarly, Dr. Banjoko

stated that "*the patient* wants to be done with his current evaluation with the gastroenterologist before pursuing any surgical intervention on his left elbow." The persuasive evidence shows no injury-related impediment to moving forward with the left elbow surgery, and surgery is being delayed solely due to a non-work related condition. While this condition was no doubt stressful and painful, Claimant presented no persuasive evidence that it was of sufficient magnitude to delay the recommended surgery for medical reasons. Rather, the decision to proceed with elbow surgery rested solely with Claimant.

The unreasonableness of Claimant's refusal to proceed with surgery is further underscored by the lengthy and open-ended nature of the delay. It has been more than a year since the gallbladder surgery and 11 months since Respondent authorized the elbow surgery, with no end in sight. No provider has outlined a specific treatment plan or an anticipated timeframe for the GI problems to improve or resolve. Based on the evidence presented, the ALJ has no principled basis to determine when, or if, Claimant will deem himself ready for surgery. Although Claimant can choose to postpone surgery while he attends to unrelated medical issues, it is not objectively reasonable for him to do so indefinitely at Respondent's ongoing expense.

ORDER

It is therefore ordered that:

1. Respondent's request to suspend Claimant's TTD benefits under § 8-43-404(3) is granted. Respondent may suspend TTD benefits effective November 3, 2017, and continuing until Claimant undergoes left elbow surgery.

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

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

DATED: March 30, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on July 20, 2017.

2. If compensable, whether Respondents have proven by a preponderance of the evidence that they are entitled to recover a penalty of 17 days of Temporary Total Disability (TTD) benefits for Claimant's failure to timely notify Employer of his injury pursuant to §8-43-102(1)(a), C.R.S.

STIPULATIONS

The parties agreed to the following:

1. If Claimant suffered a compensable industrial injury on July 20, 2017 Michael A. Dallenbach, M.D. and Derek Purcell, M.D. are Authorized Treating Physicians (ATP's).

2. If Claimant suffered a compensable industrial injury on July 20, 2017 he is entitled to receive TTD benefits for the period August 19, 2017 until terminated by statute.

3. Claimant earned an Average Weekly Wage (AWW) of $1,064.21.

FINDINGS OF FACT

1. Claimant worked for Employer as a Route Salesman. His job duties involved loading and delivering bread products to various locations across the state.

2. On July 20, 2017 Claimant was unloading trays of bread from a stack that was 15 trays high. Claimant estimated that each tray weighed approximately 30 pounds. As he was lowering two of the trays, he experienced a tearing or ripping sensation in his right shoulder. Claimant was unable to lift his arm but completed his work shift.

3. Claimant subsequently took two weeks off from work for a scheduled vacation. He expected his right shoulder condition to improve with rest. However, when his symptoms continued after approximately one week off of work, he contacted Market Sales Leader William White to report his July 20, 2017 injury.

4. After Claimant completed his two weeks of vacation he visited Employer's facility to complete Workers' Compensation paperwork. On August 11, 2017 he filled-out an Employee Statement of Injury. He stated that he injured his right shoulder on July 20,

2017 while lowering trays of bread from a stack. Employer also completed a First Report of Injury on August 11, 2017.

5. Mr. White testified that Claimant contacted him while on vacation on August 4, 2017. Claimant specified that he had injured his shoulder, but was uncertain about where the injury occurred. Mr. White confirmed that Claimant subsequently completed the Workers' Compensation paperwork on August 11, 2017.

6. On August 11, 2017 Claimant visited Authorized Treating Physician (ATP) Michael A. Dallenbach, M.D. for an examination. Dr. Dallenbach recounted that Claimant had been lowering two baskets weighing a total of approximately 60 pounds to load his delivery truck when he "felt a rip in his right shoulder." After performing a right shoulder x-ray Dr. Dallenbach diagnosed Claimant with a right rotator cuff tear and biceps tendon tear. Dr. Dallenbach assigned work restrictions of no lifting, carrying, pushing/pulling or repetitive lifting in excess of five pounds.

7. The record reflects that Claimant has a prior history of right shoulder problems. On May 9, 2017 Claimant visited Sean Oquist, D.C. for chiropractic treatment. Claimant reported that he had been lifting a couch at home and experienced pain in his right shoulder and lower neck area on May 8, 2017. He explained that he suffered constant pain and almost any movement aggravated his symptoms. Dr. Oquist determined that Claimant had "localized tenderness in the anterior shoulder congruent with a rotator cuff strain."

8. On June 6, 2017 Claimant returned to Dr. Oquist for chiropractic treatment. Claimant remarked that his right shoulder had been popping more than normal. Nevertheless, Dr. Oquist noted that Claimant's symptoms were improving.

9. On July 7, 2017 Claimant visited Ann Daggett, M.D. at Arkansas Valley Family Medicine for an examination. He reported that about two months earlier he was lifting furniture while helping his daughter move when he felt a pop in his right shoulder. Dr. Daggett noted that Claimant's right shoulder was "constantly popping in and out of place with any overhead movement." She diagnosed Claimant with right shoulder pain and ordered an x-ray.

10. On July 11, 2017 Claimant returned to Dr. Daggett for an evaluation. Dr. Daggett continued to diagnose Claimant with right shoulder pain and administered a steroid injection.

11. On November 29, 2017 Claimant underwent an independent medical examination with Timothy O'Brien, M.D. Claimant reported that on July 20, 2017 he was removing two trays of bread from a stack that was 15 trays high. He immediately experienced a "profound ripping in his right arm" and could no longer lift trays. Although Claimant hoped his condition would improve while he was on vacation for the following two weeks, his symptoms continued and he reported his injury to Employer. Dr. O'Brien noted that Claimant had suffered a right arm injury in April 2017 while helping his daughter move a couch. He reviewed Claimant's medical records and conducted a physical

examination. Dr. O'Brien concluded that Claimant did not suffer a new right shoulder injury on July 20, 2017 because his symptoms were a manifestation of his personal health.

12. Dr. O'Brien explained that an MRI arthrogram of Claimant's right shoulder revealed longstanding rotator cuff degenerative changes, tearing, retraction and atrophy. He noted that the conditions take years to develop. Dr. O'Brien commented that Claimant's torn rotator cuff "looked degenerative" and there was no objective evidence that he suffered an acute injury on July 20, 2017. Furthermore, Claimant has suffered daily pain, range of motion limitations and weakness in his right shoulder since he helped his daughter move in April 2017. Dr. O'Brien summarized that Claimant's "massive rotator cuff tear" constituted "an incurable and relentlessly progressive condition that is expected to result in episodic pain and those episodes of pain are typically not the result of identifiable trauma, but rather a manifestation of the underlying disease process." Claimant did not suffer any "new tissue breakage or yielding of his rotator cuff" while working for Employer on July 20, 2017.

13. Dr. O'Brien testified at the hearing in this matter. He maintained that Claimant's work activities on July 20, 2017 did not cause a new injury in the form of a rotator cuff tear. Instead, Claimant suffered a gradual, degenerative rotator cuff tear that developed over years. Claimant's right shoulder popping and intense inflammation documented in the medical records were consistent with the degenerative process of osteoarthritis. The April 2017 incident in which Claimant helped his daughter move a couch constituted an acute flare of an arthritic joint. The July 20, 2017 incident at work was not an acute incident because Claimant did not tear any new tissue. Claimant already had a massive rotator cuff tear. Accordingly, the work incident did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

14. Claimant testified at the hearing in this matter. He acknowledged that he injured his right shoulder in late April 2017 while assisting his daughter move from one apartment to another. He specifically remarked that he moved several pieces of furniture including a couch, chairs, tables, a bed frame and mattresses. The medical records from May through July 2017 document ongoing symptoms in Claimant's right shoulder including significant pain, popping, catching and limited range of motion. Claimant confirmed that he sought active medical care following the April/May 2017 right shoulder injury, including chiropractic treatment, medications, palliative care and an injection.

15. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on July 20, 2017. Initially, Claimant asserts that he injured his right shoulder while lowering two trays from a large stack. However, the record is replete with evidence that Claimant suffered an acute right shoulder injury in late April or early May 2017 while helping his daughter move. The medical records from May through July 2017 document ongoing symptoms in Claimant's right shoulder including significant pain, popping, catching and limited range of motion. Claimant sought medical care

following the April/May 2017 right shoulder injury, including chiropractic treatment, medications, palliative care and an injection.

16. Dr. O'Brien explained that an MRI arthrogram of Claimant's right shoulder revealed longstanding rotator cuff degenerative changes, tearing, retraction and atrophy. He remarked that Claimant suffered a gradual, degenerative rotator cuff tear that developed over years. Claimant's right shoulder popping and intense inflammation documented in the medical records were consistent with osteoarthritis. The April/May 2017 incident in which Claimant helped his daughter move furniture constituted an acute flare of an arthritic joint. The July 20, 2017 incident at work was not an acute incident because Claimant did not tear any new tissue. Claimant already had a massive rotator cuff tear. Accordingly, the July 20, 2017 work incident did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals*

*Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on July 20, 2017. Initially, Claimant asserts that he injured his right shoulder while lowering two trays from a large stack. However, the record is replete with evidence that Claimant suffered an acute right shoulder injury in late April or early May 2017 while helping his daughter move. The medical records from May through July 2017 document ongoing symptoms in Claimant's right shoulder including significant pain, popping, catching and limited range of motion. Claimant sought medical care following the April/May 2017 right shoulder injury, including chiropractic treatment, medications, palliative care and an injection.

8. As found, Dr. O'Brien explained that an MRI arthrogram of Claimant's right shoulder revealed longstanding rotator cuff degenerative changes, tearing, retraction and atrophy. He remarked that Claimant suffered a gradual, degenerative rotator cuff tear that developed over years. Claimant's right shoulder popping and intense inflammation documented in the medical records were consistent with osteoarthritis. The April/May 2017 incident in which Claimant helped his daughter move furniture constituted an acute flare of an arthritic joint. The July 20, 2017 incident at work was not an acute incident because Claimant did not tear any new tissue. Claimant already had a massive rotator cuff tear. Accordingly, the July 20, 2017 work incident did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

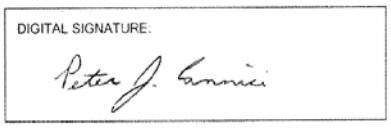
ORDER

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

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

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

DATED: March 29, 2018.



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

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that medical treatment including: a computed tomography (CT) scan taken at St. Mary's Hospital on July 6, 2017, temporomandibular joint (TMJ) treatment, treatment of concussive symptoms, and psychiatric treatment, constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the June 20, 2017 work injury.

- At hearing, the parties stipulated that respondents would file a General Admission of Liability (GAL) on this claim and issue payment of temporary total disability (TTD) benefits for the period of August 31, 2017 through September 12, 2017, based upon a stipulated average weekly wage (AWW) of $783.04.

FINDINGS OF FACT

1. Claimant has worked for employer since 2016 as manager of the Seafood Department. On June 30, 2017, claimant was walking into her department when she slipped on a wet floor and fell. Claimant testified that while falling she struck the right side of her jaw on a pole and then fell to the ground and struck the back of her head on the floor. Store security video taken on June 30, 2017 supports claimant's description of the incident.

2. Claimant testified that following the incident she had pain in her right jaw. Claimant immediately reported the slip and fall incident to a supervisor. Claimant's supervisor instructed her to seek medical treatment with Work Partners because claimant was already receiving treatment with Work Partners related to a prior work injury. [1]

3. On June 30, 2017, claimant received medical treatment at Work Partners and was seen by Dr. Lori Fay. On that date, claimant reported pain in her right jaw, right hip, left hand, left knee, and lumbar region. Dr. Fay determined that claimant was able to return to work with no restrictions.

4. On July 5, 2017, claimant returned to Dr. Fay and reported headaches, and vision issues. Claimant also reported that when she fell on June 30, 2017 that she "lost time" and was concerned that she suffered a concussion. Claimant denied any dizziness, weakness, confusion, nausea, or vomiting. At that time, Dr. Fay opined that claimant did not need a computed tomography (CT) scan of her head. Dr. Fay

[1] On April 18, 2017, claimant suffered injuries to her left knee, right hip, and right groin while working for employer. Claimant receives treatment for that April 2017 injury with Work Partners as her authorized treating provider (ATP).

recommended brain rest and instructed claimant to avoid computers, telephones, and televisions.

5. On July 6, 2017, claimant sought treatment at the emergency department (ED) at St. Mary's Hospital (SMH). Claimant testified that she went to the ED because she had concerns about her ongoing headaches. Claimant also testified that she felt that she could not think quickly and could not speak correctly. Work Partners did not refer claimant to SMH for treatment.

6. While at SMH on July 6, 2017, claimant was seen by Dr. Wendy Filener. Dr. Filener diagnosed claimant with a head contusion and a concussion with loss of consciousness. Claimant testified that she understood that she was diagnosed with a Grade 2 concussion. Dr. Filener also diagnosed a jaw strain.

7. Also on July 6, 2017 at SMH, claimant underwent CT scans of her cervical spine, head, and maxillofacial area. The CT of claimant's cervical spine showed no evidence of an acute injury. The head CT showed no acute inter cranial abnormality. The CT of claimant's face was negative for any bony injury.

8. On July 21, 2017, claimant sought treatment with Dr. Karen Frye as her primary care provider. During that visit claimant described her fall at work and complained of headaches, neck pain, visual disturbances, and dizziness. With regard to these symptoms, Dr. Frye diagnosed claimant with concussion syndrome.

9. On August 9, 2017, respondents sent claimant to Dr. Lawrence Lesnak for an independent medical examination (IME). Dr. Lesnak reviewed claimant's medical records, obtained a history from claimant, and performed a physical examination. The focus of the IME was claimant's April 18, 2017 work injury. However, in his IME report Dr. Lesnak opined that, as a result of the June 30, 2017 slip and fall, claimant likely had right lateral buttock, pelvic, and right thigh myalgia. Dr. Lesnak also opined that claimant was nearing maximum medical improvement (MMI) related to the June 30, 2017 injury.

10. On August 18, 2017, claimant returned to Work Partners and was seen by Erica Herrera, PA. At that time claimant reported aching and dull pain in her head and neck, a constant headache, and ringing in her ears. In addition, claimant reported problems with her memory. Ms. Herrera recommended that claimant undergo psychologic rehabilitation. Ms. Herrera also recommended that claimant see a dentist because of claimant's complaints that since the June 30, 2017 fall at work she had difficulty with her teeth not "lining up" correctly and not "closing right". At that August 18, 2017 visit, Ms. Herrera placed claimant on restricted duty including no lifting overhead, and a 15 pound limit for lifting, pushing and pulling. Ms. Herrera also instructed claimant to limit screen time and caffeine.

11. On August 31, 2017, claimant returned to Dr. Fay and reported symptoms that included constant headache, neck pain, and ringing in her ears. Dr. Fay noted that claimant's concussive symptoms had worsened and she recommended neuropsychiatric testing. In addition, Dr. Fay made a referral regarding claimant's continuing jaw complaints. At that time, Dr. Fay restricted claimant from all work.

12. On September 12, 2017, claimant was seen by Dr. Fay and reported that she continued to have headaches with neck pain, but that it was improved. Dr. Fay released claimant to return to work with restrictions, including no lifting, carrying, pushing or pulling over 15 pounds and no reaching overhead.

13. On September 20, 2017, Dr. Lesnak issued an addendum to his IME report because he had reviewed additional medical records and was asked to opine on the reasonableness and necessity of various recommended medical treatments. In the addendum Dr. Lesnak noted that claimant did not report any cognitive symptoms during the August 9, 2017 IME. Dr. Lesnak also noted that there was "absolutely no evidence" of any type of brain injury or cerebral concussion that may have occurred on June 30, 2017. As a result, Dr. Lesnak noted that it is his opinion that the recommended medical treatment would not be reasonable or necessary because it is not related to the June 30, 2017 incident.

14. Dr. Lesnak's testimony by deposition was consistent with his written reports. Dr. Lesnak reiterated his opinions that claimant did not suffer a concussion on June 30, 2017 and the recommended medical treatment is not reasonable or necessary to treat claimant. In support of his opinions Dr. Lesnak noted that there were no radiologic abnormalities. In his testimony Dr. Lesnak also pointed to the August 31, 2017 note by Dr. Fay that indicated that claimant's cognitive symptoms had not improved, but had worsened. Dr. Lesnak testified that worsening of symptoms is a non-physiologic response to a concussion. Dr. Lesnak also testified that claimant did not report any cognitive difficulties at the IME.

15. The ALJ is persuaded by claimant's post-hearing affidavit in which she notes that because she understood that the focus of the IME was her April 18, 2017 work injury, she completed the pain diagram regarding only the April incident.

16. Claimant returned to Dr. Frye on November 10, 2017 and reported that she continued to have difficulty with memory and recall. At that time, Dr. Frye recommended claimant undergo treatment with a speech therapist.

17. Claimant testified that she chose to seek treatment with Dr. Christopher Young on her own because Dr. Fay had previously recommend him[2]. Claimant was seen by Dr. Young on January 3, 2018. At that time, Dr. Young recorded that claimant's complaints as including tinnitus, mental fogginess, cognitive problems, lethargy, anxiety,

[2] The ALJ infers that claimant is referencing Dr. Fay's August 31, 2017 recommendation for neuropsychiatric testing.

emotional lability, problems with balance and coordination, auditory discrimination problems, dizziness, nausea, photosensitivity, phonosensitivity, and blurred vision. Dr. Young diagnosed sequela of traumatic injury to the brain and adjustment disorder. His treatment recommendations included neuropsychological evaluation, physical therapy, audiology, and biofeedback.

18. The ALJ credits[3] the medical records, claimant's testimony, and the opinions of Ms. Herrera, Dr. Fay, Dr. Filener, Dr. Frye, and Dr. Young over the contrary opinion of Dr. Lesnak and finds that claimant has demonstrated that it is more likely than not that she suffered a concussion and injury to her jaw on June 30, 2017.

19. The ALJ credits the medical records and the opinions of Ms. Herrera, Dr. Fay and Dr. Young over the contrary opinion of Dr. Lesnak and finds that claimant has demonstrated that it is more likely than not that the recommended medical treatment (including TMJ treatment, treatment of concussive symptoms, and psychiatric treatment) is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

20. The ALJ credits the medical records and Dr. Fay's July 5, 2017 opinion that claimant did not need to undergo a head CT. In that same medical report Dr. Fay recognized claimant's concussive symptoms and continued to recommend brain rest. The ALJ finds that claimant has failed to demonstrate that it is more likely than not that on July 6, 2017 she experienced a bona fide emergency that necessitated medical treatment.

CONCLUSIONS OF LAW

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

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

[3] In claimant's position statement the ALJ is asked to take judicial notice of credibility determinations made by another ALJ regarding respondents' expert. In issuing this order, the ALJ does not consider the credibility determinations of another fact finder. The ALJ finds that to do so would be wholly inappropriate.

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, claimant has demonstrated by a preponderance of the evidence that she suffered a concussion and injury to her jaw on June 30, 2017. As found, claimant has demonstrated by a preponderance of the evidence that recommended medical treatment (including TMJ treatment, treatment of concussive symptoms, and psychiatric treatment) is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. As found, the medical records, claimant's testimony, and the opinions of Ms. Herrera, Dr. Fay, Dr. Filener, Dr. Frye, and Dr. Young are credible and persuasive.

5. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a), C.R.S. specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee.

6. In an emergency situation, a claimant need not seek authorization from the employer before seeking medical attention. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a question may be raised as to whether a bona fide emergency exists that would justify treatment at an emergency room. *Timko v. Cub Foods*, W.C. No. 3-969-031 (June 29, 2005).

7. As found, claimant has failed to demonstrate by a preponderance of the evidence that on July 6, 2017 she suffered a bona fide emergency that necessitated medical treatment. Therefore, the head CT claimant obtained on July 6, 2017 is not authorized medical treatment. As found, the ALJ finds the medical records and the July 5, 2017 report by Dr. Fay to be credible and persuasive.

ORDER

It is therefore ordered that:

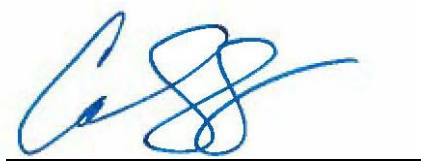
1. Respondents shall pay for reasonable and necessary medical treatment related to claimant's June 30, 2017 work injury, including TMJ treatment, treatment of

concussive symptoms, and psychiatric treatment, pursuant to the Colorado Medical Fee Schedule.

2. Claimant's claim for the July 6, 2017 head CT is denied and dismissed.

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

Dated: March 27, 2018



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

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury to his right shoulder while working for Employer.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical treatment.

III. Whether Claimant established by a preponderance of the evidence that the medical treatment he has received is authorized.

IV. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits.

V. Claimant's average weekly wage.

VI. Whether Claimant's compensation should be increased by 50% pursuant to §8-43-408(1), C.R.S., for Employer's failure to carry Workers' Compensation insurance.

VII. Whether Claimant is an independent contractor.

FINDINGS OF FACT

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

1. Employer, Ross Landscape and Irrigation, is owned by Mr. Chris Ross. Mr. Ross is married to Ms. Shannon Ross. Claimant is Ms. Ross' brother. Therefore, Mr. Ross is Claimant's brother-in-law.

2. Employer provides landscaping and irrigation services to its customers.

3. Claimant alleges he injured his right shoulder on June 17, 2016, while moving a wheelbarrow full of rock (cobble) while working on a rock garden for Employer. (Claimant's Exhibit 6; Respondent's Exhibit F)

4. Claimant was born on April 13, 1964. On the date of the alleged injury, Claimant was 51.

5. Claimant has a broad range of experience working in the construction industry. Claimant has done this type of work his entire career. Claimant's experience and skill-set includes, but is not limited to, remodeling kitchens and bathrooms, tile work, installation and repair of drywall, installation and repair of fences,

landscaping, painting, general carpentry, and performing finish work. Claimant also described himself as a "handy-man." (Hearing Transcript., pg. 104, ln. 5-12)[1]

6. Mr. Ross has known Claimant for twenty years. Since Mr. Ross has known Claimant, Claimant has complained of shoulder pain. (Tr., pg. 160). Claimant's shoulder problems began when he was in his 20's and injured his shoulder at Fuddruckers when he picked up a side of beef that was too heavy. (T., p. 160, ln. 7-16.)

7. Claimant has been taking opiates for pain on a regular basis since 2002. (Respondent's Exhibit C, pg. 126)

8. Prior to the date of the alleged injury, Claimant had chronic shoulder pain.

9. Claimant also fell off of a roof in 2007 and injured his right shoulder. (T., pg. 120, ln. 1-6.)

10. Claimant underwent an MRI scan of his right shoulder in 2007 due to pain and limited range of motion caused by an injury. (Id., Respondent's Exhibit D, pp. 129.)

11. Claimant began treating with Dr. Euser for a workers' compensation injury in 2010. (T., p. 46, ln. 22-25; p. 47, ln. 1-6.) The extent or type of treatment Dr. Euser provided Claimant due to the 2010 work injury is not clear from the medical records submitted at hearing.

12. On January 29, 2014, Dr. Euser evaluated Claimant. The report from this visit indicates Claimant was a "new patient." The medical report from this visit indicates Claimant was complaining of back and shoulder joint pain which was chronic and was due to an injury. It was also noted that Claimant had recently filled a prescription for hydrocodone.

13. Between 2014 and 2017, Dr. Euser's medical records regarding Claimant document that he treated Claimant for chronic shoulder and back pain and prescribed Claimant hydrocodone on a regular basis. (Respondent's Exhibit B)

14. Claimant was incarcerated in the Weld County jail in 2014 and was released on December 13, 2014. While incarcerated, Claimant was treated for withdrawal symptoms due to not taking opiates. After his release, he continued to treat with Weld County physicians for pain management through March, 2015, and received prescriptions for chronic pain. (T., p. 122, ln. 7-25; p. 123, ln. 1-8; Respondent's Exhibit C, pp. 125-127.)

15. After his release from jail, Claimant lived with his mother until she passed away in November, 2015. (T., p. 104, ln. 22.) After she passed away, he continued to

[1] All future references to the Hearing Transcript will be identified by T., followed by a page and line number.

live in her home, which was inherited by his sister, Ms. Shannon Ross. (Id., ln. 23-25.) Once Ms. Ross owned the home, Claimant entered into a rental agreement with Ms. Ross wherein his rent to live in the home was $750 per month. (T., p. 105, ln. 13-14.)

16. Towards the end of 2015, Claimant's construction jobs were starting to dry up. As noted in his December 20, 2015, text message to Ms. Ross, Claimant was just finishing up the tile work on a bathroom he was remodeling and wanted to know if she or Mr. Ross had any leads for work. (Respondent's Exhibit H).

17. Based on a January 4, 2016, text message from Claimant to Ms. Ross, Claimant was late paying his January rent. But, Claimant indicated he had additional work lined up. (Respondent's Exhibit, H., p.2)

18. On January 31, 2016, Claimant sent a text message to Ms. Ross indicating he was working on a project up North that required him to install a dishwasher and go through some drywall and change out a faucet he had recently installed in a shower. (Respondent's Exhibit, H., p.6)

19. On February 9, 2016, Claimant sent a text to Ms. Ross and indicated he started a new bathroom job that day. (Respondent's Exhibit, H., p.8)

20. Mr. Ross testified at the December 5, 2017, hearing. He testified that he brought Claimant on as an independent contractor to give him something to do and to try and help him out. (T., p. 153, ln. 6-19.)

21. Mr. Ross further testified that he has never had any employees, but from time to time he hires independent contractors to help with his company. (T., p. 151, ln. 17-23.) He testified that he agreed to pay Claimant $15.00 per hour for any project Claimant accepted, but that he had no control over Claimant's schedule, did not pay any taxes or social security for the Claimant, Claimant did not complete an application for employment, and that Claimant was free to, and did, work for other clients at his own discretion. (T., p. 155, ln. 8-25; p. 156, ln. 1-3; p. 163, ln. 25; p. 164, ln. 1-22.)

22. Claimant performed general landscaping labor for Employer from April 5, 2016, through July 22, 2016. (Respondent's Exhibit G) During this period of time, Claimant also performed work for others. (Claimant's Exhibit 4).

23. Claimant testified that he injured his right shoulder while moving large river rock with a wheelbarrow. (Tr., pg. 32-33.) Claimant contends the accident occurred on June 17, 2016. (Respondent's Exhibit F)

24. Claimant kept a log of his work assignments in 2016 regardless of where he was working for purposes of his probation officer, as he needed to show his probation officer that he was gainfully employed. (T., p. 102, ln. 10-25; p. 103, ln. 1-2)

Claimant documented his jobs starting in May, 2016. (Claimant's Exhibit 4, pp. 1-3.) However, Claimant testified that he also worked jobs prior to May, 2016, which were not associated with Employer, including a finishing job in Thornton in January, 2016, and a partial bathroom remodel job in February, 2016. (T., p. 123, ln. 23-25 - p. 125, ln. 1-9.) He further testified that he also accepted jobs into October, 2016, but began refusing work at that point for many reasons including clients not being able to pay and not being able to purchase materials. (T., p. 128, ln. 12-25.)

25. Claimant's documentation regarding his jobs indicates that he was working on the rock garden on June 16th and June 17th of 2016. (Claimant's Exhibit 4)

26. Tommy Southcott testified at the December 5, 2017 hearing. Mr. Southcott also worked with Employer. Mr. Southcott testified that Claimant told him in passing prior to June 17, 2016, that he had previously injured his shoulder and referred to his shoulder as being a problem and that his pain complaints were pretty routine. (T., pp. 138, ln. 6-16; p. 141, ln. 10-16.) Mr. Southcott also testified that Claimant would take pain pills at work for his shoulder. Id. Claimant would call his pain pills his "candy" and indicate it was "candy time" when taking his pain pills. (T., p. 146, ln. 1-9.) He further testified he personally hired Claimant to complete projects at his home in the spring of 2016, including rebuilding a bathroom and woodworking on 10 foot high pillars. (T., p. 138, ln. 24-25 – p. 140, ln. 1-22.)

27. Mr. Southcott also testified that he worked at the jobsite where Claimant contends he injured his right shoulder moving large rocks with a wheelbarrow on June 17, 2016. He testified that the day before the alleged accident, June 16, 2016, only he and Mr. Ross were using the heavy wheelbarrows to truck and dump the rocks ("cobble") to the back of the house where Claimant was working. (T., p. 137, ln. 1-19) Each rock was about the size of a football. (T., p. 136, ln. 24) Then, once Mr. Southcott and Mr. Ross would dump the rock by Claimant, Claimant would set each rock in place by hand. (T., p. 137, ln. 1-19). Mr. Southcott also testified that on the following day, June 17, 2016, the day of the alleged accident, he and Mr. Ross got in an argument that morning and he – Mr. Southcott - left the jobsite. T., p. 33, ln. 19-24.) The ALJ finds Mr. Southcott's testimony to be credible.

28. Mr. Ross testified that he was present the entire time Claimant was on the job site with Ross Landscaping on June 17, 2016, and that Claimant was not using a wheelbarrow at any time as he was clearing dirt to install new drain pipes in the front yard. (T., p. 158, ln. 3-9.) Mr. Ross also testified he got into an argument with Mr. Southcott as to how he wanted the rock – cobble – moved and he ended up moving the remaining rocks himself which consisted of three wheelbarrows. (T., 158, ln. 3-19) He further testified that he did not see Claimant injure his shoulder on June 17, 2016, nor did the Claimant or anyone else advise him that Claimant injured his shoulder on June 17, 2016. (T., p. 159, ln. 23-25; p. 160, ln. 1-5.) He testified that Claimant had previously advised him of a prior injury to his

shoulder while working at Fuddruckers when the Claimant was in his 20's and that the Claimant had complained of shoulder problems since they first became acquainted. (T., p. 160, ln. 7-16.) The ALJ finds Mr. Ross' testimony to be credible.

29. Claimant's work logs specifically indicate the projects at which he was working on June 16th and June 17th of 2016 involved the rock "garden" or rocks. (Claimant's Exhibit 4, p.2). The only other project listed on Claimant's work logs that indicate he was working with rocks was on June 10, 2016. (Claimant's Exhibit 4, p.1-3.) Claimant's work logs from May, June, and July of 2016, indicate Claimant performed other tasks, and worked at other locations, but there are no other time entries which indicate Claimant was working with cobble or rock. (Claimant's Exhibit 4, p.1-3).

30. Mr. Ross was out of town and not working from July 2, 2016 through July 12, 2016. (T., p. 168, ln. 15-16.) During this period of time, Claimant did not work with Employer. (Id.; Respondent's Exhibit G). It is not known who Claimant worked for during this period. Claimant also did not work with Employer after July 22, 2016, because Claimant was working on other personal jobs. (Respondent's Exhibit G).

31. On August 4, 2016, Claimant was working on a personal job painting a house. This job required Claimant to use a ladder to reach the second story, such as above the garage. (Respondent's Exhibits, pg. 251.) Claimant and Mr. Ross began texting each other. Claimant advised Mr. Ross that he was not available to work that day since he was working on another job which involved painting the exterior of a house. During their discussion, via text, a rift developed between Claimant and Mr. Ross regarding the amount of hours Claimant worked during July of 2016. According to Mr. Ross, Claimant worked on a personal project at "Dee's" house during the first two weeks of July and had been working on another personal job which involved painting the exterior of a house for the last two weeks. Employer's payment history regarding Claimant established Claimant worked with Employer approximately 5 ½ days, or 44.5 hours, between July 1, 2016, and July 22, 2016. The payment history also shows Claimant did not work with Employer after July 22, 2016. By the end of the conversation, Mr. Ross advised Claimant that he was done working with him. (Respondent's Exhibit I, pg. 248-257.) After this conversation, Claimant did not work with Employer again.

32. While renting the house from his sister, Ms. Ross, Claimant got behind in his rent payments. Claimant also failed to pay various utility bills. (T., p. 161, ln. 8-11.)

33. Towards the end of September, 2016, the relationship between Claimant and Ms. Ross deteriorated due to Claimant's failure to pay his rent and utility bills. (T., p. 161, ln. 8-11., Respondent's Exhibits, pg. 209-212)

34. On October 1, 2016, Claimant texted Ms. Ross about wanting to give her a check that day, but he could not. Claimant also indicated that he was picking up more supplies and wood for another project and that he would be "sitting real pretty" after finishing up various projects. He also indicated that he got a contract on Jim and Dee's fence plus both of their neighbors' fences. Furthermore, he also said he got another job to remodel a kitchen. None of these text messages indicate he hurt his shoulder working with Employer, that he was having shoulder problems which impacted his ability to work, or that his long standing shoulder condition had gotten worse. (Respondent's Exhibit H, pg. 219-220)

35. Up until October 5, 2016, Claimant had not reported to Employer, or his sister, that he injured his shoulder working with Employer.

36. It is undisputed that Claimant did not perform any work for Employer on June 25, 2016, or at any time after July 22, 2016. (T, p. 106, ln. 5-25; p. 110, ln. 8-10; Claimant's Exhibit 4, pp. 3-4; Respondent's Exhibit G, pp. 174.)

37. Claimant was hired by other individuals to perform various types of work on July 24, 2016, July 26-30, 2016, and in August, 2016, for almost the entire month. (Claimant's Exhibit 4, pp. 3) This work consisted of sprinkler work and fixing a garage door, trim work, demo work, sanding and finishing work, painting the exterior of a house, and building a large deck. (Id.)

38. Ms. Ross testified at the February 12, 2017, hearing. She testified that during the time Claimant lived in her house, he was unable to pay his rent timely. Thus, Ms. Ross decided to sell the home and on October 5, 2016, gave Claimant notice via a text message that the house was being sold and that he would have 90 days to relocate. (T., p. 129, ln. 1-8; Respondent's Exhibit H, pp. 45.)

39. On October 5, 2016, Claimant sent a text message in response to his sister's advisement that he would need to relocate, stating "[t]he bad news doesn't quit my doctor's appointment yesterday I ripped my rotator cuff in the major muscle above that when I was working with Chris. Anyway, no hard feelings you gotta do what you gotta do and I have to do what I have to do." (Respondent's Exhibit H, pp. 46.)

40. On October 6, 2016, after Claimant was given notice that he had to move, Mr. Ross and Mr. Southcott went to Claimant's house to turn off the water to the sprinkler system in anticipation of a freeze. (T., pg. 141-142). When Mr. Ross arrived at the house, he could hear someone working in the garage and sanding something. Mr. Ross rang the doorbell and Claimant's son answered the door. Claimant's son then went to get Claimant from the garage. While waiting for Claimant to come to the front door, the sanding stopped. Shortly thereafter, Clamant came to the door wearing a bathrobe and he had sawdust on his hands, face, and hair - but not on his bathrobe. Claimant was trying to hide the fact that he was working in the garage based on the fact that he told his sister the day

before that he injured his shoulder working with Mr. Ross. Claimant was verbally upset with Mr. Ross, and threated to sue Mr. and Ms. Ross in probate court and threatened to file a workers' compensation claim, stating "I'm going to get my money one way or the other." (T., p. 141, ln. 20-25; p. 142, ln. 1-15; p. 163, ln. 7-19.)

41. Claimant was also demanding money from Ms. Ross, or the estate, for allegedly taking care of his mother, while he was living with her and before she passed away.

42. The parties ended up in an eviction proceeding to remove Claimant from the premises owned by Ms. Ross. At a mediation conference during that proceeding on October 22, 2016, Claimant handed Chris and Shannon Ross a statement indicating that he injured his shoulder while moving rock working for Ross Landscaping on June 17, 2016. (Claimant's Exhibit 6.)

43. Claimant testified that he had previously filed numerous workers' compensation claims wherein he received TTD benefits, PPD benefits and settlements, and that he knew how to report work related injuries and file workers' compensation claims. (T., p. 112, ln. 3-24.)

44. Despite knowing how to properly file a workers' compensation claim, Claimant testified that he "kind of" reported his workers' compensation injury to Chris Ross verbally on June 17, 2016, by stating he tweaked his shoulder, or words to that effect. (T., p. 35, ln. 9-18; p. 114, ln., 11-25 – p. 116, ln. 1-17.) He admitted, however, that he did not submit any written report of his injury until his eviction proceedings on October 25, 2016, and did not file his workers' compensation claim with the Division until October 31, 2016, more than four (4) months after his alleged date of injury. (T., p. 130, ln. 4-11, Respondent's Exhibit F, pp. 169.)

45. Claimant was also asked when he decided that he needed to file a workers' claim for compensation. Claimant testified that he had talked to Mr. Ross about it, when they were starting to go their separate ways due to a conflict over hours worked. According to Claimant, his shoulder was "killing" him at that time. (Tr., pg. 36, ln. 9-24.) However, the conversation between the Claimant and Mr. Ross that resulted in them going their separate ways occurred on August 4, 2016, via text message. The text messages were submitted into evidence by Respondent. (See Respondent's Exhibit I, pg. 250-260.) At no time did Claimant advise Mr. Ross that he injured his shoulder. Moreover, at no time during this conversation did Claimant indicate his shoulder was "killing" him. Instead, Claimant complained about the wasps he was encountering behind the shutters that were above the garage of the house he was painting. (Id.)

46. Mr. Ross testified that the first time he was made aware the Claimant was asserting an injury to his shoulder caused by working for Ross Landscaping was on October 5, 2016, when Claimant sent his October 5, 2016 text message to

Ms. Ross in response to a text message she sent Claimant indicating she had decided to sell the house Claimant was living in and he would have to move out. (T., p. 161, p. 13-25; p. 163, ln. 7-24.)

47. As found above, when Claimant was behind in his rent, he texted his sister, Ms. Ross, on October 1, 2016, and said he was picking up some wood and supplies for another project. He also specifically stated that he "got the contract on Jim and Dees fence." At hearing, however, Claimant testified that he really didn't get the contract on their fence but that they were merely talking about it and they knew Claimant couldn't handle the weight and physically perform the work. (T., pg 127, ln. 16-23.) Claimant also indicated in his text message that was redoing Karen and Randy's Kitchen. At hearing, however, Claimant testified that he did not do that job either because he never got the job to redo Karen and Randy's kitchen, they just "possibly" wanted him to redo their kitchen. (T., pg. 127, ln. 24; pg. 128, ln. 1-6) Therefore, Claimant was either leading his sister along with misrepresentations about jobs he had which would allow him to pay the rent or was making misrepresentations to the court if he actually did the jobs.

48. Dr. Euser was Claimant's primary care physician. Dr. Euser testified that every time Claimant would see him for an office visit, Claimant was required to update his social history on an electronic tablet that was incorporated into his medical reports. (T., p. 70, ln. 23-25; p. 71, ln 1-19.)

49. Claimant confirmed that at each evaluation with the Dr. Euser, he was given an electronic tablet to update his social history section and that he was honest in what he reported. (T., p. 120, ln. 14-25.)

50. The social history section of Dr. Euser's reports references whether or not an injury occurs in the workplace or is work related. (T., p. 71, ln. 20-25; p. 72, ln. 1-19.)

51. It is undisputed that in every medical report authored by Dr. Euser at the relevant times, the social history for each visit reports the shoulder injury as non-work related. (Respondent Exhibit B, pp. 11-123.)

52. Claimant stated very clearly in his Workers' Claim for Compensation that he injured his shoulder on June 17, 2016, pushing a wheelbarrow full of cobblestone. (Respondent's Exhibit F). However, On June 7, 2016, during an evaluation by Dr. Euser, Claimant reported complaints of bilateral shoulder pain. The report also indicates Claimant planned to have his shoulder fixed at some point in the future. (Respondent Exhibit B, pp. 87.) And, the report specifically indicates the injury is not work related.

53. Dr. Euser also testified that his report of June 7, 2016, indicates that he and Claimant discussed his bilateral shoulder problems and that they would discuss it further when and if Claimant wanted to fix it. (T., p. 80, ln. 1-17.)

54. The ALJ infers from Dr. Eueser's June 7, 2016, medical report, Dr. Euser's testimony, as well as his other medical records, that Claimant's shoulder problems have been a chronic long standing problem which supported Dr. Euser's ongoing prescriptions for hydrocodone and most likely resulted in them discussing on such date that Claimant would have to undergo shoulder surgery to fix his chronic shoulder problem and reduce his shoulder pain.

55. Due to the fact that Claimant alleged he injured his shoulder on June 17, 2016, and the fact that Dr. Euser's June 7, 2016, report indicates Claimant has was evaluated for bilateral shoulder problems, and would discuss it further when and if Claimant wanted to fix it, Claimant's attorney asked Claimant if he might have injured his shoulder on June 7, 2016. In response to such question, and in light of the stark discrepancy, Claimant testified that he was not exactly sure what date he injured his shoulder. (T., p. 99, ln. 17-25; p. 100, ln. 1-2; p. 101, ln. 11-20.)

56. On July 8, 2016, Claimant returned to Dr. Euser. Again, Claimant used the electronic tablet to indicate the reason for his visit. Again, he specifically indicated his appointment was not due to a work-related injury. The medical report from this visit indicates Claimant was treating for chronic right shoulder pain. Dr. Euser evaluated Claimant and continued prescribing opiates for Claimant's chronic pain. There is no indication that Claimant's shoulder condition worsened since the prior visit of June 7, 2016.

57. On August 15, 2016, Claimant returned to Dr. Euser with continued complaints of ongoing shoulder pain. Again, Claimant indicated he was not seeking treatment for a work-related injury. Moreover, Claimant had not worked with Employer since July 22, 2016, approximately 3 weeks. Based on Claimant's pain complaints, Dr. Euser ordered an MRI.

58. The first report from Dr. Euser wherein range of motion testing was documented and revealed decreased range of motion to Claimant's shoulder was September 6, 2016, which is after Claimant stopped working with Employer on July 22, 2016. (T., p. 72, ln. 20-24; p. 73, ln. 4 – p. 75, ln. 1-5; Respondent Exhibit B, pp. 99.)

59. On October 4, 2016, Dr. Euser went over the MRI results with Claimant. (Respondent's Exhibit B, pg. 100-103.) In the assessment section of his report, Dr. Euser noted Claimant had an incomplete rotator cuff tear or rupture of the right shoulder, and that it was not specified as traumatic. (Id. at 103.) Consistent with his prior reports, Dr. Euser continued to note that the onset and timing of Claimant's shoulder pain was chronic and that the injury was not work-related. (Id. at 102)

60. Despite indicating in his October 4, 2016, report - after reviewing the MRI results - the rotator cuff tear or rupture was not specified as traumatic, Dr. Euser testified

that the findings/impressions on the MRI, except impression number 5, indicated acute trauma. (T., pg. 60-61.)

61. On April 7, 2017, Claimant was evaluated by Dr. Euser. The report from this visit indicates Claimant has had chronic right sided shoulder pain for greater than 5 years.

62. On July 31, 2017, Claimant underwent right shoulder surgery. (Respondent's Exhibit A, pg. 7).

63. Dr. Euser testified that at no time did he ever issue any work restrictions for the Claimant during the course of his treatment. (T., p. 77, ln. 6-22.)

64. Dr. Euser was not able to state within a reasonable degree of medical probability that Claimant's shoulder injury arose out of a work related incident. (T., p. 64, ln. 23-25; p. 65, ln. 1-14.)

65. Claimant testified that he wrote down the date he injured his shoulder in his notes that he prepared while at the Division of Worker's Compensation, and that his notes reflect an injury date of June 25, 2016. (T., p. 107, ln. 16-25). Claimant further testified that the June 25 date was originally listed as July 25, 2016, and that his injury could have occurred on that date as well. (T.,p. 108, ln. 25; p. 109, ln. 1-11.) However, Claimant did not perform any work with Employer on June 25, 2016, and Claimant ceased working with Employer on July 22, 2016. (Respondent's Exhibit, G).

66. Dr. Beatty evaluated the Claimant on October 10, 2017. (Respondent Exhibit A.) Dr. Beatty states in his report that Claimant denied any history of shoulder injuries. (Respondent Exhibit A, pp. 9.) Claimant's denial of prior shoulder injuries or problems is not true.

67. Dr. Beatty further opined that based on the prior medical history and medical evidence he reviewed in the file, he could not opine within a reasonable degree of medical probability that Claimant's right shoulder injury occurred on June 17, 2016. (Id.)

68. Claimant also treated with Dr. Euser for chronic back pain. Dr. Euser testified that although Claimant's medical records document chronic shoulder pain, he primarily treated Claimant for chronic back pain. Dr. Euser testified that even though Claimant's medical records document chronic shoulder pain at each visit, such reference merely means that Claimant had previously complained of chronic shoulder pain at some point in the past while being treated by Dr. Euser. Therefore, according to Dr. Euser, he was not actively treating Claimant for shoulder pain at each visit between 2014 and 2017.

69. Claimant listed three different dates of injury. On handwritten notes, Claimant first wrote July 25, 2016 – and payroll records indicate he did not work that day - then he scratched it out and wrote June 21, 2016, then he wrote a statement indicating he hurt his shoulder on June 17, 2016. Claimant also testified at hearing that he wrote June 25, 2016, in his notes as the possible date of his injury. Then, at hearing, when presented evidence that he treated for shoulder pain with Dr. Euser on June 7, 2016, and discussed getting it fixed with Dr. Euser, Claimant indicated he did not know when he hurt it.

70. The ALJ finds the testimony of Mr. Ross, Ms. Ross, and Mr. Southcott to be credible and persuasive. The testimony of these witnesses, combined with the documentary evidence submitted at hearing, is consistent and cohesive.

71. On June 16th and June 17th of 2016, Claimant was working on the jobsite that involved the rock garden described by Mr. Southcott, Mr. Ross, and Claimant. Claimant did not, however, use a wheelbarrow to move any of the rock.

72. The ALJ finds that Claimant did not report his alleged shoulder injury to Employer, either in writing or verbally, at any time while Claimant was working with Employer. The ALJ finds that the first time Claimant alleged he hurt his shoulder while working with Employer was in his responsive text message to his sister, Ms. Ross, on October 5, 2016. As found, Claimant was responding to Ms. Ross' text advising him that he would have to move out of the home he was renting from her.

73. The ALJ does not find Claimant to be credible.

74. The ALJ finds the testimony of Mr. Southcott, Mr. Ross, and Ms. Ross to be credible.

75. The ALJ finds the opinion of Dr. Beatty to be credible and persuasive.

76. Claimant failed to establish by a preponderance of the evidence that his work with Employer caused his right shoulder condition and produced a disability or need for medical treatment.

77. Claimant failed to establish by a preponderance of the evidence that his work with Employer aggravated, accelerated, or combined with his pre-existing right shoulder condition to produce a disability or need for medical treatment.

78. Claimant has failed to establish by a preponderance of the evidence that he injured his right shoulder while working with Employer.

CONCLUSIONS OF LAW

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

GENERAL PROVISIONS

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

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

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

Where the medical evidence is subject to conflicting inferences, it is the ALJ's sole prerogative to resolve the conflict. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

I. **Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury to his right shoulder while working with Employer.**

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

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

The ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that he injured his right shoulder performing work with Employer. As found, the ALJ did not find Claimant credible. The ALJ did not find Claimant credible for a number of reasons.

First, Claimant underwent an IME with Dr. Beatty. Claimant told Dr. Beatty that he did not have any prior shoulder injuries. The testimony and medical records established Claimant had prior shoulder injuries and suffered from chronic shoulder pain long before the alleged accident of June 17, 2016. Mr. Ross credibly testified that Claimant told him he originally injured his shoulder when he was in his twenties working at Fuddruckers when he picked up a side of beef that was too heavy. Mr. Ross also credibly testified that Claimant has had shoulder problems since he has known Claimant and he has known Claimant for 20 years. Claimant's medical records from Weld County indicate Claimant has been on opiates for chronic pain since 2002. In addition, Claimant underwent an MRI in 2007 due to an injury to his right shoulder. Moreover, Dr. Euser's medical records document Claimant has had chronic shoulder pain due to an injury for years and such pain predated the alleged accident of June 17, 2016.

Second, Claimant was very specific in his October 31, 2016, Workers' Claim for Compensation regarding the date he allegedly injured his shoulder, the project on which he was working, and task he was performing. The testimony of Mr. Ross, Mr. Southcott, and Claimant, corroborated that they were working on the rock garden on June 16th and June 17th of 2016. However, both Mr. Ross and Mr. Southcott credibly testified that Claimant was not moving rock or cobblestone with a wheelbarrow on the

date of the alleged accident or even the day before the date of the alleged accident. The ALJ is mindful that mistakes can be made when a Claimant tries to determine the exact date of an accident that is not timely reported. However, in this case the project at issue defined the date of the alleged accident.

Third, as set forth above, Claimant was very specific about the project on which he was working when he allegedly injured his shoulder. Claimant indicated that he injured his shoulder while working on a rock garden. Based upon the evidence, the work regarding the rock garden was performed on June 16, 2016 and June 17, 2016. Claimant, however, presented to Dr. Euser on June 7, 2016, with complaints of bilateral shoulder pain. The report from the visit that day indicates Dr. Euser and Claimant indicated they would discuss it further, if and when, Claimant wanted to fix his shoulder problems. As found above, the ALJ inferred from the evidence that they discussed surgery was the only option left to fix his shoulder problems and reduce his shoulder pain.

Fourth, following Dr. Euser's testimony, the Claimant changed his testimony and stated that he was not sure his injury happened on June 17, 2016, and could have occurred on June 7, 2016. Thereafter, Claimant admitted that when he filed his paperwork with the Division to commence his claim, his notes listed a date of injury of June 25, 2016, and thereafter admitted that the date had initially been written as July 25, 2016 but had been changed in his notes to June 25, 2016, however he could have injured his shoulder on July 25, 2016. Thus, Claimant testified to a possible four different dates over the course of a two month period on which he claims he could have injured his right shoulder.

Fifth, it is undisputed that each time the Claimant treated with Dr. Euser, he was required to update his social history on an electronic tablet, which included advising the doctor if any of his complaints were work related. At no time did the Claimant ever report any of his symptoms or injuries to Dr. Euser as work related, thus in every medical report authored by Dr. Euser at the relevant times, each report specifically denies any work related injury. The ALJ finds this evidence credible and persuasive.

Sixth, it is undisputed that the Claimant did no work or projects for Ross Landscaping on either June 25, 2016 or July 25, 2016, but did perform other handyman services and contract work for other clients that had no connection to Ross Landscaping both prior to June 17, 2016 and after July 22, 2017.

Seventh, the reporting of Claimant's alleged injury is problematic. Claimant testified that he "kind of" reported his injury to Chris Ross on June 17, 2016, however was not clear on what he actually said to Mr. Ross to confirm he reported an injury on that date. Mr. Ross denies Claimant reported any injury on that date. There is no dispute, however, that the Claimant provided his first written reporting of any injury with Ross Landscaping to Chris and Shannon Ross during an eviction mediation on October 22, 2016. Prior to that, the only possible reporting of any injury from Claimant was made when he sent a text message to Shannon Ross on October 5, 2016, claiming to

have injured his shoulder while "working with Chris" without providing any specific details. Even assuming the October 5, 2016 report of injury is appropriate notice, there is no question that Claimant waited four months to report his injury with Ross Landscaping and almost 5 months before he filed his claim form with the Division. Claimant had filed numerous prior workers' compensation claims in the past and testified that he was well aware how to report injuries in the workplace and file claims with the Division. The ALJ finds the testimony of Chris Ross credible and persuasive that the Claimant did not report any injury to his right shoulder to Mr. Ross on June 17, 2016.

Eighth, Claimant texted his sister, Ms. Ross, on October 1, 2016, about work he was currently performing and new jobs he got which included Jim and Dee's fence and remodeling Randy and Karen's kitchen. At hearing, however, Claimant denied getting those jobs and denied performing those jobs. Such contradictions further diminished Claimant's credibility.

Dr. Beatty was retained by Respondent to provide an opinion as to the causation of Claimant's right shoulder injury. Dr. Beatty reviewed all of the medical records in this case and conducted an evaluation of the Claimant. He opined that the Claimant denied any prior injury to his shoulder, which is not supported by the medical records or Claimant's own testimony at the hearing. He concluded that he could not state, within a reasonable degree of medical probability, that the Claimant's injury was causally related to any work related event on June 17, 2016. The ALJ is persuaded by the opinion of Dr. Beatty.

The ALJ concludes that the Claimant is not able to meet his burden of proof that his right shoulder injury arose out of, or occurred in the course and scope of employment with Ross Landscaping. As such, Claimant's claim for benefits is hereby denied and dismissed.

Because Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury, the remaining issues raised by Claimant are moot and will not be addressed.

ORDER

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

1. Claimant's claim for benefits is denied and dismissed.

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

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 15, 2018

Glen Goldman

_____

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

ISSUES

I. Whether Respondents have presented clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Stephen Gray, M.D. that Claimant suffered a 20% whole person impairment.

FINDINGS OF FACT

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

1. On May 17, 2016, Claimant was injured while helping unload a truck. At the time of the accident, Claimant was facing away from the truck when a heavy wooden door swung and hit him in the back of the head. He was knocked to the ground and lost consciousness for a brief period of time.

2. Respondents admitted liability for the claim.

3. Lynn Walker, M.D., saw Claimant on May 18, 2016. At this appointment, Claimant described the accident and indicated that he was knocked unconscious, but that he did not really know for how long. He indicated that it might have been just a few seconds or it could have been as long as a minute. Dr. Walker diagnosed him with a head injury, likely concussion, and neck pain/strain. Dr. Walker took Claimant off work and ordered cervical x-rays.

4. Claimant underwent cervical x-rays on May 18, 2016. The x-rays showed moderate degenerative changes at C5-C6 with mild to moderate bilateral foraminal stenosis and no acute findings.

5. On May 20, 2016, Claimant was seen at Care Plus Medical Center by Darlene Hughes, N.P. Claimant was placed on restrictions for lifting, carrying, bending, squatting, crawling, climbing, and changing positions quickly. He reported that as he was getting up from the dinner table he became dizzy and had to be helped to the couch by his wife.

6. On May 23, 2016, Claimant was seen by Dr. Walker. Claimant complained of headaches, neck pain, occasional nausea, and sometimes seeing double. Dr. Walker noted reduced range of motion of his neck. She recommended an MRI of his brain. She also returned Claimant to modified duty.

7. On June 1, 2016, Dr. Walker referred Claimant to Dr. Eric Hammerberg, a neurologist, due to ongoing neurological complaints.

8. On June 7, 2016, Dr. Hammerberg evaluated Claimant. Dr. Hammerberg noted Claimant was experiencing continuous pain in his neck and daily headaches. Dr. Hammerberg indicated Claimant was unable to return to work due to profound vertigo and nausea with movement. Dr. Hammerberg also found Claimant's cognition was mildly impaired, with Claimant scoring 23/28 on the MMSE. Dr. Hammerberg concluded Claimant had post-traumatic headache with cervical strain, post-traumatic vertigo, post-concussion syndrome, situational adjustment reaction, depression, and anxiety. Dr. Hammerberg referred Claimant to an ENT for evaluation and treatment recommendations.

9. On June 8, 2016, Claimant was seen by Nurse Hughes. Claimant complained of head and neck pain. He reported dizziness when making sudden movements. Claimant was prescribed Cymbalta.

10. On June 13, 2016, Abby Emdur, M.D., examined Claimant. Dr. Emdur diagnosed Claimant with vertigo, neck pain, tinnitus, and mild asymmetric sensorineural hearing loss, the latter unlikely related to the accident.

11. On June 23, 2016, Claimant attended physical therapy. This is the first time that Claimant's cervical range of motion measurements were taken after his work related accident. His range of motion was limited.

12. On August 3, 2016, Claimant returned to Dr. Walker. He complained of ongoing headaches which were the same, or worsening. He did, however, state that his neck pain was getting slightly better and that he had less dizziness. Dr. Walker noted in the objective findings section of her report that Claimant had limited range of motion of his neck and some tenderness to palpation on the posterior aspect of his neck and in the occipital region.

13. On August 5, 2016, Dr. Tashoff Bernton performed a records review. Dr. Bernton indicated Claimant's symptomatology with high pain levels appeared to be inconsistent with what would be anticipated on a physiologic basis given the reported injury and normal MRI scan of the brain. He cited a study regarding postconcussive syndrome and that its symptomatology is more common in individuals with depression, anxiety, and somatization than it is with individuals with a history of concussion. Dr. Bernton then indicated that based on his review of Claimant's records, it would not be particularly helpful or accurate diagnostically to attribute "significant" symptomatology to a postconcussive syndrome at that point in time. Dr. Bernton did not say Claimant was not having any symptoms from his head injury. Therefore, it is found that Dr. Bernton still concluded Claimant was having symptoms as a result of his head injury.

14. On August 17, 2016, Claimant returned to Dr. Walker. Claimant complained of ongoing headaches, neck pain, and depression. He did, however, indicate that his dizziness had improved significantly. Dr. Walker noted objective findings of decreased range of motion regarding his neck and some continued neck tenderness in response to palpation. She also noted that Claimant was unable to

get any additional physical therapy appointments approved. Therefore, she recommended Claimant use moist heat and perform range of motion exercises at home.

15. On August 31, 2016, Claimant was evaluated by Dr. Walker and she noted he seemed to be quite a bit better.

16. On September 14, 2016, Claimant returned to Dr. Walker. Claimant stated he has good and bad days. At this visit, he did indicate that the last two days were particularly bad because he had fairly persistent headaches and a slight recurrence of dizziness. Dr. Walker noted that Claimant was continuing to take his medications, which consisted of Gabapentin, Citalopram, and Mobic. Regarding objective findings, Dr. Walker noted improved range of motion regarding his neck, but not full range of motion.

17. On September 20, 2016, Dr. Hammerberg examined Claimant again. Claimant reported ongoing headaches, but that they had improved. Claimant indicated that his dizziness essentially resolved and that he was experiencing only a momentary sensation of imbalance upon lying down, which happened no more than once per week. He was taking Gabapentin, Meloxicam, Celexa, and Tylenol. Dr. Hammerberg did not recommended further vestibular testing or therapy. Dr. Hammerberg noted that Claimant was confused about how often he was to take the Gabapentin. After clarifying the dosage of the Gabapentin, he recommended that Claimant continue on the current medication regimen which also included Mobic and Citalopram.

18. On October 10, 2016, Claimant returned to Dr. Walker with continued complaints of neck pain and headaches. Claimant indicated that when he has bad days, he will have continuous headaches and at other times it will be intermittent, but that it still bothers him most of the time. Dr. Walker noted “essentially normal” range of motion regarding his neck. She continued Claimant’s medication regimen, but did increase Claimant’s Citalopram, which was being prescribed for Claimant’s depression and poor sleep.

19. On October 31, 2016, Claimant was evaluated by Dr. Walker. He advised Dr. Walker that he had a headache that was bad enough to keep him from going to work and performing his modified job. He also indicated that he had 2-3 headaches per week and that his headaches sometimes kept him from performing his usual activities.

20. On November 28, 2016, Claimant complained to Dr. Walker of having a pretty bad headache at work and that it did not respond to the Mobic, but that overall, his headaches had improved over the last month since increasing his Gabapentin.

21. Claimant was ultimately let go from his employment around November 30, 2016. Claimant did, however, obtain new employment driving a truck and performed

that work starting around May of 2017 and continued that work for about 4 months. Claimant, however, ultimately had to quite that job because of his headaches.

22. On December 19, 2016, Dr. Walker examined Claimant. Claimant complained of intermittent headaches and neck pain. He continued to take Gabapentin and Meloxicam. Dr. Walker again noted "essentially normal" range of motion of the neck. Dr. Walker placed Claimant at MMI with no impairment and no work restrictions.

23. On March 1, 2017, Claimant was seen by Dr. Walker. He reported ongoing headaches, neck pain, stress, and depression. Claimant continued to be prescribed, and take, Gabapentin, Mobic, and Citalopram.

24. Claimant underwent a DIME examination with Dr. Gray on April 27, 2017. Dr. Gray summarized the medical records and emphasized portions of those records. Claimant reported intermittent dull aching head pain and upper neck pain. He reported that the pain increased when lifting and reaching. He also reported intermittent dizziness, especially when standing up too fast. Claimant reported that the head and neck pain affects everything as he is unable to concentrate or focus. Dr. Gray noted that Claimant was a poor historian.

25. Dr. Gray also listed his objective findings. Under objective findings, Dr. Gray described his findings upon his physical examination of Claimant's neck. Dr. Gray noted tenderness over the left trapezius musculature with palpation which increased with right side bending and rotation. He also noted, and measured, Claimant's decreased range of motion regarding his cervical spine.

26. Dr. Gray diagnosed Claimant with work related scalp contusion with loss of consciousness with post-concussion syndrome with persistent post-traumatic headache, mostly resolved post-traumatic vertigo, tinnitus, cervical strain with imaging evidence of pre-existing moderate degenerative disc disease at C5-C6 with mild to moderate bilateral foraminal stenosis, and situational adjustment reaction with depression and anxiety.

27. Dr. Gray opined after examining the medical records and Claimant that Claimant was entitled to an impairment rating due to his work injury. Dr. Gray emphasized sections of the medical records to support his opinion.

28. Dr. Gray opined that Claimant was entitled to an impairment rating per the AMA Guides. Dr. Gray assigned a 6% impairment under Table 53(II)(C) due to the cervical strain and "specific disorders."

29. Table 53(II)(C) of the AMA Guides provides that a 6% impairment rating is appropriate for an intervertebral disc or other soft-tissue lesion, unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity, without or without muscle spasm, associated with moderate to severe degenerative changes on structural tests.

30. In this case, Claimant had a medically documented soft tissue injury to his cervical spine as set forth in the medical records. Claimant also had a minimum of six months of medically documented pain and limited range of motion, i.e., rigidity, as demonstrated by Dr. Walker's medical records and testimony. Dr. Gray also noted claimant's cervical pain complaints – and measured Claimant's limited cervical range of motion. In addition, Claimant underwent x-rays which showed moderate degenerative changes of his cervical spine.

31. Dr. Gray noted that Claimant displayed minimal, if any pain, behaviors. He indicated that during the examination Claimant showed some mild pain behaviors with regard to his cervical spine range of motion. But, Dr. Gray went on to state that Claimant actually gave a reasonably good effort and Dr. Gray had no difficulty validating his examination.

32. Dr. Gray measured Claimant's cervical range of motion with double inclinometers as dictated by the AMA Guides. The measurements obtained by Dr. Gray met the strict validity requirements of the AMA Guides. Dr. Gray found a cervical spine range of motion impairment of 11%. Neither Dr. Fall nor Dr. Walker indicated that the range of motion measurements documented and used by Dr. Gray to calculate Claimant's 11% rating for his decreased range of motion – rigidity - were invalid pursuant to the AMA Guides.

33. Dr. Gray also assigned Claimant a 5% impairment rating under Table I for brain impairment. Dr. Gray opined that Claimant's persistent headaches were an episodic neurological disorder that caused slight interference with daily living. Pursuant to the AMA Guides, the criteria for evaluating such impairments are based on the frequency, severity, and duration of attacks as they affect the Claimant's performance of activities of daily living.[1] The AMA Guides go on to provide that an episodic neurological disorder is of slight severity and under such control that most of the activities of daily living can be performed.[2] The AMA Guides provide that when most activities of daily living can be performed, a rating of 5-15% can be provided for slight impairment.[3] Dr. Gray indicated in his report that Claimant stated his headaches negatively impacted his ability to concentrate and focus on his religious activities, which include reading, discussions, and holding services. Dr. Gray also noted that Dr. Hammerberg, the neurologist, indicated Claimant's cognition was mildly impaired. Therefore, Dr. Gray provided Claimant a 5% rating under Table 1, which is the lowest rating available for an episodic neurological disorder – such as headaches – which is impairing.

34. It appears the DIME occurred while Claimant was unemployed, therefore, Claimant did not indicate his headaches were impacting his current employment since he did not have current employment. However, as stated by Dr. Gray, Claimant's headaches were impacting his ability to concentrate and perform

[1] AMA Guides, pg. 106.
[2] Id.
[3] Id.

certain religious activities and his headaches had previously impacted his work activities.

35. Overall, Dr. Gray assigned Claimant a 20% whole person impairment from his work related injury of May 17, 2016.

36. Claimant was last seen by Dr. Walker on September 18, 2017. At that time Claimant was still taking the medications Gabapentin and Mobic for headaches and neck pain. He was also taking Citalopram for stress and depression.

37. Dr. Walker testified that Claimant had objective findings, via x-rays, showing moderate degenerative changes at C5-C6 with mild to moderate bilateral foraminal stenosis. She also testified that Claimant had objective findings regarding his neck injury based upon her palpation of Claimant's cervical spine and his report of pain.

38. Dr. Walker testified that Claimant had "essentially normal" cervical range of motion at the appointment on October 10, 2017, and on December 19, 2016, when she placed Claimant at MMI. However, Dr. Walker testified that she did not perform formal range of motion measurements with inclinometers. Dr. Walker also testified that "essentially normal" cervical range of motion meant normal based on Claimant's age and prior examinations. Therefore, Dr. Walker's medical records and deposition testimony which indicates Claimant had "essentially normal" cervical range of motion at times does not mean Claimant had normal range of motion pursuant to the AMA Guides.

39. Dr. Walker testified that Claimant's condition had resolved in approximately five months, on October 31, 2016. However, when presented with her report dated November 14, 2016, Dr. Walker testified that Claimant presented with objective findings that his condition was not resolved. In addition, Claimant was evaluated by Dr. Walker on January 16, 2017. Although his condition had improved, Claimant still had continued complaints of headaches and neck pain. Based on her evaluation of Claimant, Dr. Walker renewed Claimant's prescription medications for pain, headaches, and depression. Therefore, Dr. Walker's testimony that Claimant's condition had resolved prior to six months is not persuasive.

40. Dr. Walker testified that Claimant's range of motion, based upon the formal measurements taken by the physical therapist in July of 2016 was better than the range of motion measured by Dr. Gray. However, during July of 2016, Claimant had been undergoing active physical therapy to help decrease his pain and improve his range of motion. However, based upon the medical records presented at hearing, Respondents would not authorize additional physical therapy and physical therapy ceased around August 3, 2016. Therefore, Claimant had not undergone physical therapy for quite some time by the time he was placed at MMI and when he underwent the DIME. Thus, any gains made regarding his range of motion might have been lost due to the failure to continue

his physical therapy, or the mere passage of time, by the time Claimant underwent the DIME.

41. Dr. Fall testified and indicated in her report that Dr. Gray erred in providing Claimant a Table 53 rating of 6% for his cervical strain. Dr. Fall indicated that Dr. Gray should have provided Claimant a 4% rating for his cervical strain. However, a review of Table 53 of the AMA Guides indicates that a 4% rating is appropriate when there are "none-to-minimal" degenerative changes on structural tests and that a 6% rating is appropriate when there are "moderate-to-severe" degenerative changes on structural tests. In this case, Claimant's cervical spine x-rays demonstrated moderate degenerative changes. Thus, the 6% rating provided by Dr. Gray is consistent with Table 53. Therefore, Dr. Fall's opinion that Dr. Gray erred in providing a Table 53 rating of 6% instead of 4% is not persuasive.

42. Dr. Fall also indicated that Dr. Gray reported a normal spine exam at the DIME appointment. However, this is not persuasive as Dr. Fall was not at the DIME appointment. Dr. Gray reported Claimant had cervical tenderness with palpation upon exam as well as decreased cervical range of motion. Dr. Gray also determined that Claimant's injury to his cervical spine resulted in a specific disorder that is ratable pursuant to the AMA Guides.

43. Dr. Fall also indicated in her testimony that there were no objective findings of pathology to support a rating. In her report she also indicates that there were no "significant objective findings." However, she goes on to note that there were "minimal" objective findings. Therefore, even Dr. Fall found objective findings regarding Claimant's injury to his cervical spine.

44. Dr. Fall testified that Claimant's limited range of motion was due to his not putting forth full effort. However, Dr. Gray opined in his DIME report that Claimant's range of motion measurements were valid under the "strict" AMA Guidelines, Claimant put forth reasonably good effort, and Claimant had "no difficulty at all validating his examination." Dr. Fall's opinion regarding Claimant's effort is not found to be persuasive since she was not present for the evaluation and range of motion measurements and Claimant's measurements met the validity requirements of the AMA Guides.

45. Dr. Fall testified that Dr. Gray erred in assigning the headache/brain impairment because the medical record did not show any documentation that the headaches caused problems with his daily activities. However, the medical records document times where Claimant needed assistance to sit down and also where he was unable to work due to his headaches. Claimant also indicated that his headaches negatively impacted his ability to concentrate and focus on his religious activities, which include reading, discussions, and holding services. Therefore, Dr. Fall's opinion is not persuasive in establishing Dr. Gray erred.

46. Dr. Fall testified that Dr. Gray failed to explain any inconsistencies in his medical evaluation. However, there are no inconsistencies with Dr. Gray's medical evaluation. Claimant presented with the same symptoms, taking the same medications, and with limited cervical range of motion as he always had.

47. Dr. Fall testified that Claimant sustained an injury of cervical strain which is a soft tissue lesion. She testified that Claimant had six months of documented pain. She testified that there is no good definition of rigidity but that limited range of motion could be rigidity. Dr. Fall testified that Claimant's cervical x-rays showed moderate degenerative changes. Dr. Fall testified that muscle spasms are not a requirement for an impairment rating under the AMA Guides, Table 53IIC.

48. Limited range of motion is the equivalent of rigidity under the AMA Guides.

49. Dr. Fall testified that headaches that cause disruption in daily activities could be classified as episodic neurological disorders as described in AMA Guides Table 1.

50. Dr. Fall testified that Claimant was not provided any work restrictions and that a 20% impairment rating could be inconsistent with such a high impairment rating. However, The AMA Guides define medical impairment as the "alteration of an individual's health status that is assessed by medical means."[4] The AMA Guides go on to provide that medical impairment is distinguished from "disability," which represents "an alteration of an individual's capacity to meet personal, social, or occupational demands," and is assessed by nonmedical means.[5] The AMA Guides also indicate that an individual who is "impaired" is not necessarily "disabled."[6] Therefore, the fact that Claimant has not been assigned work restrictions does not negate the fact that Claimant has a ratable medical impairment pursuant to the AMA Guides.

51. Dr. Fall also testified that Dr. Gray did not follow the "Impairment Rating Tips" (Tips) authored by the Division of Workers' Compensation.[7] The Tips indicate that a spinal rating shall only be provided when a specific diagnosis and objective pathology is identified. In this case, Dr. Gray diagnosed Claimant as suffering from a cervical strain. He also identified objective pathology which consisted of pain with palpation of the cervical spine, a particular pattern of pain with right sided bending and rotation, limited range of motion of the cervical spine, and x-ray findings. Moreover, his objective findings were consistent with the type of findings identified by Dr. Walker.

[4] AMA Guides, pg.1.
[5] Id.
[6] Id., pg. 2.
[7] The Department of Labor and Employment, Division of Workers' Compensation Impairment Rating Tips, Desk Aid #11, Spinal Ratings, 1-2.

The Tips also indicate that:

> Whenever 6 months of treatment of the spine has occurred and a Table 53 zero percent rating is assigned, the physician must provide justification for the zero percent rating, based on the lack of physiologic findings. The rating physician shall be aware that a zero percent rating in this circumstance implies that treatment was performed in the absence of medically documented pain and rigidity.[8]

Neither Dr. Walker nor Dr. Fall has indicated that the treatment provided to Claimant was provided in the absence of medically documented pain and rigidity.

The Tips also provide direction when rating headaches due to a closed head injury. They provide:

> Headaches that qualify for a separate work-related impairment rating should be rated using the Episodic Neurological Disorders section in Table 1- Section B (Chapter 4, p. 109). It is important to remember that if the individual has a closed head injury the highest applicable rating from this table is the only rating used. If the headache rating is to be combined with another body part, the rater must be very careful not to rate the activities of daily living deficits in both impairment areas. [9]

There is no indication that Dr. Gray rated Claimant's deficits regarding his slight impairment in performing some activities of daily living due to his headaches in any other impairment provided to Claimant in a manner that is inconsistent with the Tips.

52. Claimant testified at hearing regarding his employment after he was let go by Employer. He testified that he was not working construction. He was driving. He did not lift heavy things. Neither Dr. Walker nor Dr. Fall investigated what Claimant's job duties entailed. Dr. Walker and Dr. Fall both erroneously opined that Claimant had returned to full duty heavy work.

53. Claimant's headaches and neck pain make it difficult for him to work full duty and full time.

54. Due to his work related accident, Claimant suffered a cervical strain and injury to his head. Claimant's head injury caused Claimant's post-concussion syndrome with persistent post-traumatic headaches.

[8] Id.
[9] Id, General Principals, Section 10.

55. Claimant's post-concussion syndrome with persistent post-traumatic headaches slightly impairs Claimant's ability to perform certain activities of daily living such as working. It also slightly impairs his ability to concentrate and focus on his religious activities, which include reading, discussions, and holding services.

56. Claimant was prescribed numerous medications for his post-concussion syndrome with persistent post-traumatic headaches. The medications, as expected, provided Claimant some relief from his symptoms.

57. Claimant's continued use of the prescribed medications – with some benefit - supports the finding that Claimant was experiencing the symptoms he described. These medications would not have been prescribed and continued if he was receiving no benefit in the form of reduced symptoms.

58. Claimant's representations to his physicians regarding his accident, symptoms, response to medications, response to treatment, and impairment, are found to be credible.

59. Claimant's representations to his physicians regarding his accident, symptoms, response to medications, response to treatment, and impairment, are found to be consistent with the diagnosis of cervical strain and post-concussion syndrome with post-traumatic headaches.

60. Claimant has a specific disorder of the cervical spine which is ratable under Table 53 of the AMA Guides.

61. There is no indication by Dr. Hammerberg, a neurologist, or Dr. Walker, or Dr. Gray, that Claimant's post-concussion syndrome symptoms and persistent post-traumatic headaches are non-physiologic. Therefore, the ALJ finds there is a physiologic basis for Claimant's post-concussion syndrome and persistent post-traumatic headaches and the resulting slight interference with Claimant's ability to perform activities of daily living.

62. The AMA Guides Table IB allows for a brain impairment for episodic neurological disorders which cause slight interference with activities of daily living. Episodic neurological disorders are defined as, but not limited to syncope, epilepsy, and convulsive disorders. Episodic neurological disorders can include headaches.

63. Claimant has an episodic neurological disorder in the form of chronic headaches.

64. Dr. Gray did not provide Claimant an impairment rating for chronic pain.

65. Dr. Gray's impairment rating is supported by objective findings with an anatomic correlation.

66. Dr. Gray's impairment rating is also supported by evidence of a physiologic correlation.

67. Dr. Gray was correct in assigning an impairment rating under the AMA Guides Table 53 IIC and Table IB. Claimant met all the criteria for the impairment rating provided by Dr. Gray. Dr. Gray's opinion is supported by Claimant's testimony, the medical record, and his DIME examination of Claimant.

68. Respondents have failed to present clear and convincing evidence that Dr. Gray erred in his DIME report assigning a 20% whole person impairment to Claimant. Dr. Walker and Dr. Fall's opinions amount to a mere difference of opinion and not clear and convincing evidence.

69. Claimant sustained a 20% whole person impairment as opined by Dr. Gray in the DIME report.

CONCLUSIONS OF LAW

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

GENERAL PROVISIONS

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

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

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

Where the medical evidence is subject to conflicting inferences, it is the ALJ's sole prerogative to resolve the conflict. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

I. Whether Respondents have presented clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Stephen Gray, M.D., that Claimant suffered a 20% whole person impairment.

A DIME physician must apply the AMA Guides when determining Claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning Claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

As found, the ALJ determined that Dr. Gray properly applied the AMA Guides in this case. Dr. Gray provided Claimant a 20% whole person impairment rating for Claimant's cervical strain and his post-concussion syndrome with post-concussive headaches.

Respondents contend Dr. Gray misapplied the AMA Guides. As found, Dr. Gray properly applied the AMA Guides when providing a rating for Claimant's cervical spine. Dr. Gray properly determined Claimant had a specific disorder of his cervical spine

which is ratable under Table 53. As found, Dr. Gray also properly provided Claimant a 6% rating pursuant to Table 53 based upon Claimant's soft tissue injury, and associated moderate degenerative changes, shown on Claimant's x-rays. Dr. Gray also properly measured Claimant's range of motion deficits pursuant to the AMA Guides and assigned the proper rating, which was 11%.

It was also found that Dr. Gray properly applied the AMA Guides when rating Claimant's headaches. Dr. Gray determined that Claimant's headaches slightly impacted his ability to perform activities of daily living. Dr. Gray determined Claimant's headaches slightly impacted Claimant's ability to concentrate and focus on his religious activities, which includes reading, discussions, and holding services. The record also demonstrates that Claimant's headaches impacted his ability to work. Therefore, pursuant to Table I, Dr. Gray provided Claimant a 5% rating for his episodic neurological disorder - headaches.

Respondents also contend Dr. Gray did not follow the Department of Labor and Employment, Division of Workers' Compensation Impairment Rating Tips, Desk Aid #11. As found, Dr. Gray properly followed the rating tips. Dr. Gray properly rated Claimant's cervical strain and headaches based on Claimant having a specific disorder – diagnosis – and objective pathology – or physiologic correlation - consistent with C.R.S. §8-42-107(8)(c). Moreover, Dr. Gray's rating for Claimant's headaches is consistent with the Tips because it did not provide a rating for any impairment that was provided for in Claimant's cervical spine rating.

Respondents also contend Dr. Gray erred by providing Claimant a rating for chronic pain, without anatomic correlation based on objective findings, or physiologic correlation, as set forth by C.R.S. §8-42-107(8)(c). In this case, Dr. Gray did not rate Claimant for chronic pain. Dr. Gray rated Claimant for a specific disorder resulting from an injury to his cervical spine, i.e., cervical sprain, and a specific disorder resulting from an injury to his head, i.e., post-concussion syndrome with post-traumatic headaches, which slightly impacted Claimant's ability to perform some activities of daily living. Both of these disorders where identified and treated by Claimant's primary treating physician, Dr. Walker, as well as Dr. Hammerberg, a neurologist. The Industrial Claim Appeals Office has held that C.R.S. §8-42-107(8)(c) is not applicable when Claimant is rated for a specific disorder. See *Murphy v. Legend's Casino*, W.C. No. 4-297-222 (May 24, 2001); *Herrera v. Sturgeon Electric Co*., W.C. No. 4-320-602 (January 8, 1999) (anatomic correlation requirement not applicable where claimant is rated for a specific disorder of lumbar spine under AMA Guides).

To the extent C.R.S. §8-42-107(8)(c) is applicable, the ALJ also concludes that Claimant's impairment rating, as determined by Dr. Gray, is consistent and in accord with the statute. First, Dr. Gray relied upon Claimant's medical records which document Claimant's injuries, loss of consciousness, underlying moderate degenerative changes in his cervical spine, pain complaints, headaches, neurological complaints, reported symptoms, response to medical treatment, and impairment. Second, Dr. Gray relied upon the physical examinations of other physicians, and his own physical examination of Claimant. Third, Dr. Gray relied upon the information provided by Claimant. Based

on these findings, Dr. Gray determined Claimant's work accident caused a cervical strain and post-concussion syndrome with post-traumatic headaches and the injuries caused impairment that is ratable under the AMA Guides. The ALJ concludes there are sufficient findings to support an anatomical and physiological correlation between Claimant's injuries, symptoms, and the medical impairment rating provided by Dr. Gray.

The ALJ concludes Respondents have failed to overcome Dr. Gray's opinion by clear and convincing evidence.

ORDER

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

1. Respondents have failed to overcome the DIME physician's opinions by clear and convincing evidence.

2. Respondents shall pay permanent partial disability benefits to Claimant based upon a whole person impairment rating of 20%.

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

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

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

DATED: March 8, 2018

Glen Goldman

_____

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable injury to her right shoulder arising out of and in the course of her employment on June 27, 2017.

II. If compensable, whether the requested treatment by authorized treating physician ("ATP") Sean G. Grey, M.D. is related to the June 27, 2017 industrial injury and reasonably necessary to cure and relieve Claimant the effects of the injury.

III. If compensable, whether Claimant demonstrated by a preponderance of the evidence an average weekly wage ("AWW") of $700.95, based upon her year-to-date earnings through August 5, 2017.

FINDINGS OF FACT

1. Claimant is a 51-year-old woman who works for Employer as a medical assistant. Her job duties include among other things, checking patients in and out, answering telephones, performing drug screens, ordering and stocking supplies, and referring patients for authorization.

2. Claimant has a longstanding history of right upper extremity complaints, including right arm, elbow, wrist and hand pain. Claimant was seen on April 29, 2014 complaining of right wrist, arm and shoulder pain after falling over a vacuum. Claimant was diagnosed with a wrist sprain, forearm contusion, shoulder strain, and paresthesia in the right hand. Claimant was seen on January 8, 2015 with complaints of right arm, wrist, neck, shoulder, elbow and hand pain, which she attributed to her keyboard and mouse use at work. Claimant continued to treat for her symptoms and was last seen by Robert Dupper, M.D. on October 21, 2016. Dr. Dupper diagnosed Claimant with right shoulder impingement, bicipital tendinitis, myalgia, and right shoulder, arm, hand and forearm pain. Claimant underwent physical therapy through November 9, 2016, and continued to report that her symptoms remained the same. Medical records indicate Claimant was scheduled to treat for an additional four weeks, however, no evidence was introduced at hearing indicating she sought any treatment for her condition after that time.

3. Claimant alleges she suffered an acute right shoulder injury on June 27, 2017 while unstocking boxes filled with reams of paper. Claimant does not contend she suffered a cumulative trauma injury. Claimant testified that approximately four or five boxes of paper were stacked on the floor. She estimated the boxes each weighed 20-25 pounds. Claimant testified that she reached up to retrieve the second box from the stack

of boxes and felt a pop and a burning sensation when grabbing the box and setting the box on the ground. The medical records reflect Claimant is 5'2".

4. Dawn Kramer, Claimant's supervisor, testified it is unlikely there would have been four or five boxes of paper to stock at the time, as the last order of paper prior to June 27, 2017 was delivered on May 30, 2017, and consisted of four boxes. She testified that stocking generally occurs one day to one week after the delivery.

5. Claimant testified that after the alleged incident she stopped unloading the boxes and went to the front desk area to inform two co-workers of the incident. She testified that she did not inform Ms. Kramer at the time because Ms. Kramer was not at work. Claimant testified she then performed her other duties, including unloading boxes of medical supplies.

6. The First Report of Injury, Incident Injury Report Form, and Claimant's initial visit to a physician were delayed because both Claimant and Ms. Kramer took vacation time for the Fourth of July holiday.

7. Claimant completed an Incident Injury Report Form on July 11, 2017, indicating she was working at the front desk at the time of the incident. She reported right arm, hand, neck, shoulder and arm pain. In response to the question "What caused your injury/illness/symptoms?" Claimant responded, "The desk area, has caused same injury for years, never solved or address (*sic*) at last injury (same)."

8. Ms. Kramer completed a First Report of Injury indicating she was notified of the incident on June 27, 2017. The report notes that the injury occurred while Claimant was working at the front desk performing general work and experienced pain in her hand, arm, wrist. Ms. Kramer listed "Pain when using at other duties" in response to the question "type of injury sustained." In response to "What equipment was being used" Ms. Kramer noted, "Front desk- east end." Ms. Kramer testified that Claimant did not report a specific incident or event occurring.

9. On July 18, 2017, Claimant presented to Neal Tah, M.D. complaining of right arm, hand, and shoulder pain, back pain, and numbness. Regarding the mechanism of injury Dr. Tah wrote,

> Patient reports right arm pain from constantly being at the front desk at work. Had a similar situation about 2 years ago. She didn't really get therapy or massage because they were so short staffed at work. She thinks it really got worse about 2 months ago, and now it's much worse."

10. Dr. Tah's clinical notes contain no mention of Claimant experiencing a pop or specific event. On physical examination of the right shoulder, Dr. Tah noted weakness with abduction, tenderness at the anterior deltoid, trapezius and middle deltoid, 100 degrees active abduction, pain to palpation over the right upper arm, forearm and hand, with normal strength and range of motion of the forearm. Dr. Tah provided the following diagnosis: impingement syndrome of the right shoulder, right rotator cuff sprain, radiculopathy, and pain in the right shoulder, arm, hand and forearm. Dr. Tah noted that

the objective findings were consistent with the history of a work-related etiology. He released Claimant to restricted duty, prescribed a muscle relaxer, and ordered an EMG, MRI of the right shoulder, chiropractic treatment, physical therapy, and massage therapy.

11. Claimant began physical therapy on July 20, 2017. Matthew McLaughlin, MSPT, noted, "[Claimant's] primary problem is R shoulder, neck strain. The onset was gradual. The problem began on June 27, 2017." He further documented, "Patient reports right arm pain from constantly being at the front desk at work. Had a similar situation about 2 yrs ago." The physical therapy notes do not contain any reference to Claimant feeling a pop.

12. Claimant underwent a right shoulder MRI on July 25, 2017 which revealed a focal full-thickness tear of the distal anterior supraspinatus fibers, significant tendinopathy in the intra-articular portion biceps tendon, and mild subacromial/subacute bursitis.

13. Claimant attended a follow-up evaluation with Dr. Tah on August 7, 2017, reporting continued right shoulder pain, neck pain, numbness and tingling. Dr. Tah updated his diagnoses to include a complete rotator cuff tear or rupture of right shoulder, not specified as traumatic. He again noted that the objective findings were consistent with history of a work-related etiology and released Claimant to restricted duty.

14. On August 9, 2017, Claimant presented to Eric M. Shoemaker, D.O. and underwent an EMG. Dr. Shoemaker noted Claimant reported having gradual symptoms that became "significantly worse late June or early July with increased demands at work of lifting and moving boxes of paper which he (*sic*) estimates weighed over 100 pounds. She was doing this repetitively and symptoms became significantly worse." Dr. Shoemaker's clinical notes contain no mention of Claimant experiencing a pop. The EMG results were normal. Dr. Shoemaker diagnosed Claimant with a supraspinatus tendon tear, cervicalgia, and myalgia. He opined that Claimant had supraspinatus tendinopathy and some existing scapular dyskinesis that progressed to a full thickness tear while performing a lifting maneuver at work. He concluded the injury was work-related and recommended surgical repair or deferred ultrasound guided subacromial injections.

15. Claimant presented to orthopedic surgeon Sean G. Grey, M.D. on August 15, 2017. Claimant reported having prior intermittent right shoulder pain for which she treated with physical therapy and improved. Claimant reported experiencing an abrupt increase in pain while unloading boxes on June 27, 2017. There is no mention in Dr. Grey's clinical note of a pop. Dr. Grey noted, "Reviewed and otherwise noncontributory" in the category "Past medical history." Dr. Grey reviewed the shoulder MRI and diagnosed Claimant with a full-thickness supraspinatus tear and potential split in proximal biceps tendon of the right shoulder. He recommended proceeding with a right shoulder arthroscopy, subacromial decompression, evaluation of the biceps tendon with potential biceps release, and arthroscopic rotator cuff repair. Dr. Grey noted that the

objective findings were consistent with the history and/or work-related mechanism of injury/illness.

16. On August 22, 2017, David Orgel, M.D. performed a records review at the request of Respondents. Dr. Orgel diagnosed Claimant with stage two and possibly stage three impingement. He noted that impingement first involves irritation and swelling of the rotator cuff tendons, then progresses to a full-thickness tear. Dr. Orgel explained that impingement is not a cumulative trauma disorder, and usually results from significant overhead activity and/or an acute event. He found that the medical records did not reveal either an acute injury or significant overhead activity, and opined that Claimant's shoulder impingement was not work-related. He noted there was not a significant mechanism of injury to cause the abnormalities noted on the MRI, and reiterated that Claimant's condition is usually a degenerative progressive process.

17. Joseph B. Blythe, MA, CRC, performed a Jobs Demands Analysis on December 12, 2017 and issued a reported dated December 17, 2017. Mr. Blythe observed another employee performing Claimant's job duties. He determined Claimant's duties fell in the light work category, with frequent lifting of 1-5 pounds, rare lifting of 6-40 pounds, and frequent reaching but rarely above the shoulders.

18. Claimant testified that Mr. Blythe's report was accurate, with the exception of his omission of other duties including training, referral coordinating, and ordering and unpacking supplies. She also contended that she reached above her shoulder on a "frequent" basis rather than the "rare" basis, stating she spent approximately fifty to sixty percent of her day reaching over her head. Claimant later testified she had no idea how many times during a typical day she reached above her head. She testified that she does not perform any extended work over her head. Ms. Kramer testified Claimant's job did not require reaching overhead for fifty percent of her day.

19. On December 13, 2017, X.J. Ethan Moses, M.D., performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Moses physically examined Claimant and reviewed medical records from 2014 through 2017, as well as Mr. Blythe's job analysis findings from December 12, 2017. Dr. Moses issued an IME report dated December 19, 2017. Claimant reported to Dr. Moses that she injured herself lifting multiple reams of paper and stacking them on a shelf. She reported that she initially thought she just "overdid it" and that her pain was due to her previous injury "because it never really went away." Claimant then reported that she "felt kind of like a pop." Claimant subsequently reported that she thought the issue was part of her longstanding right arm issues, but later said the location of the pain was specifically in the right shoulder and that she "immediately could tell it was different" and "couldn't lift the arm like I used to." Claimant reported two previous work-related right arm repetitive motion injuries, and denied any other previous right arm or shoulder injuries.

20. Dr. Moses diagnosed Claimant with chronic, diffuse right upper extremity pain of uncertain etiology, Stage 3 chronic right shoulder impingement syndrome with full thickness supraspinatus tear, and chronic right bicipital tendonitis with split tear of the right long head of the biceps. He opined that Claimant's condition was not work-related.

21. He noted that the history provided to him by Claimant significantly diverged from the history contained in the medical records. He noted Claimant reported to him having two prior workers' compensation claims and no prior right shoulder injuries, while the medical records reflected four other work-related claims over the past three years and evidence of an April 2014 injury. Dr. Moses remarked,

> … [W]hen viewed as a whole, the divergence between the medical evidence presented in regards to the mechanism of injury for her 6/27/17 injury leads me to believe that her current reports are less than reliable. The pattern is revealing for significant familiarity with the workers' compensation system, and it raises the concern for the use of that knowledge to obfuscate the fact that there was no specific injury, but rather a resurgence of her previous diffuse and widespread right upper extremity pain that was previously determined not to be work-related.

22. He referenced the Shoulder Injury Medical Treatment Guidelines, Rule 17, Exhibit 4, Section E "Rotator Cuff Tear," subsection 10, which states that rotator cuff tears "May be caused by 1) sudden trauma to the shoulder such as breaking a fall using an overhead railing or an out-stretched arm; or 2) chronic use." Dr. Moses opined that there is insufficient evidence to support an acute right shoulder injury, and no medically probably risk factors for cumulative trauma disorder.

23. Dr. Moses explained that Stage 3 impingement is common in patients 40 years and older, and that the condition progresses and eventually results in a full-thickness tear of the supraspinatus. He opined that Claimant's supraspinatus tear is likely due to the natural progression of chronic degenerative changes secondary to impingement syndrome, and not work-related. He further opined that Claimant's bicep pathology is also not work-related. Dr. Moses determined Claimant is at maximum medical improvement with no further treatment warranted under the workers' compensation system. He noted that, if Claimant's condition was found to be work-related, surgical intervention would be unlikely to resolve her pain complaints, and recommended diagnostic injections.

24. Dr. Moses testified at hearing on behalf of Respondents as an expert in occupational medicine. Dr. Moses testified consistent with his IME report. Dr. Moses reiterated his opinion that Claimant's condition is not work-related, based on the medical records and discrepancies in Claimant's reporting of the incident. Dr. Moses stated Claimant's reported history was inconsistent, varying between an acute injury and cumulative trauma. He testified that Dr. Tah documented complaints consistent with a repetitive motion issue, but did not include a thorough causation analysis or request a job analysis. He acknowledged that Dr. Grey performed a sufficient causation analysis if Claimant's reported mechanism of injury is, indeed, correct. Dr. Moses testified it is difficult to determinate the age of Claimant's supraspinatus tear but opined, within a medical degree of probability, that the supraspinatus tear and biceps pathology, were likely the result of the natural progression of a longstanding degenerative process, and were not caused or aggravated by Claimant's work activities.

25. Claimant testified she was not working any under restrictions prior to the alleged injury. She also testified that she had not been told she had impingement syndrome prior to June 27, 2017. Regarding the inconsistencies in the reported mechanism of injury, Claimant testified she did not initially report that she felt a pop because she always had pain in her right arm and did not think the incident was significant. She later testified that the pain she experienced on June 27, 2017 was different than her prior pain, and resulted in limited range of motion, lifting limitations, a constant burning sensation and pain in her neck and down her shoulder. Claimant further testified that she did not report feeling a pop to Dr. Tah because he did not ask about her specific activities that day, but subsequently reported feeling a pop to Dr. Grey because he further inquired about her activities. Claimant also stated she was unaware of the results of her right shoulder MRI until she saw Dr. Grey.

26. Claimant's testimony is not found credible or persuasive.

27. The ALJ credits the opinions of Drs. Mason and Orgel over the conflicting opinions of Drs. Tah, Grey and Shoemaker and finds Claimant's work activities did not cause Claimant's right shoulder and arm condition or otherwise aggravate, accelerate or combine with a preexisting condition to produce the need for medical treatment.

28. Claimant failed to prove by a preponderance of the evidence that she sustained a compensable industrial injury arising out of and in the course of her employment on June 27, 2017.

29. Evidence and inferences contrary to or inconsistent with these findings of fact are not credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

A claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to meet her burden to prove she sustained a compensable acute industrial injury on June 27, 2017. Ms. Kramer credibly testified that Claimant did not report a specific event that caused her symptoms. This testimony is

corroborated by the First Report of Injury and Incident Injury Report Form which are devoid of any mention of a specific event or incident, and contain repeated references to longstanding pain associated with working at the front desk. Upon receiving medical treatment, Claimant continued to report longstanding unresolved pain associated with desk work, reporting to Dr. Tah the pain had worsened two months prior. Claimant did not allege a specific event occurred until she was diagnosed with a rotator cuff tear. Claimant's testimony that she was unaware of the rotator cuff tear diagnosis until her visit with Dr. Grey is incredible. The ALJ also notes that, while Claimant contends she mentioned to Dr. Grey that she felt a pop, the ALJ notes there is no mention of a pop in Dr. Grey's notes or anywhere else in the records provided except Dr. Moses' IME report. Both in her testimony and her reported history to Dr. Moses, Claimant vacillates between purporting that the pain was due to her longstanding right upper extremity issues, and claiming she immediately noticed the pain was different and more severe than her prior issues. Claimant's explanation regarding the discrepancies and the reported mechanism of injury is not credible or persuasive.

Beyond the aforementioned discrepancies, Claimant has a longstanding, documented history of pre-existing right shoulder and arm issues, including impingement. The medical records establish Claimant's pain never fully resolved and worsened by the time of the June 27, 2017 alleged injury. Dr. Moses credibly explained that Stage 3 impingement is common in patients over 40 years old, and both Dr. Moses and Dr. Orgel credibly explained that impingement naturally progresses to a full-thickness tear of the supraspinatus. Drs. Moses and Orgel credibly opined there was not a significant mechanism of injury to cause or aggravate Claimant's condition. Drs. Moses and Orgel opinion that Claimant's condition is due to the natural progression of a chronic degenerative condition is credible and persuasive.

While Dr. Tah opined that Claimant's condition is work-related, Dr. Tah's clinical notes contain no mention of an acute event and only reflect a reported repetitive motion injury. Dr. Tah did not request a job demands analysis or conduct a thorough causation analysis. Furthermore, when Dr. Tah diagnosed Claimant with a rotator cuff tear, he noted the tear was not specified as traumatic. Dr. Shoemaker determined Claimant's condition is work-related based on Claimant's erroneous reported mechanism of injury of repetitively moving boxes of paper weighing over 100 pounds. With respect to Dr. Grey, although he indicated he reviewed Claimant's past medical history, there is no indication he reviewed Claimant's prior medical records or was aware of the prior diagnosis of impingement. Moreover, Dr. Grey's opinion on work-relatedness, like those of Drs. Tah and Shoemaker, was based on Claimant's unreliable and incredible reported history.

While Claimant may have experienced increased symptoms at work on June 27, 2017, based on Claimant's inconsistent reporting, the credible opinions of Drs. Moses and Orgel, and the objective medical evidence, there is insufficient credible and persuasive evidence establishing that it is more likely than not that work activities caused an injury, or otherwise aggravated, accelerated or combined with a pre-existing condition causing the need for treatment.

As Claimant failed to meet her burden to prove that she sustained a compensable injury, the remaining issues of requested medical treatment and AWW are moot.

ORDER

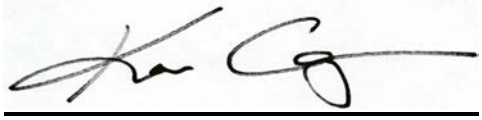
It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence that she suffered a compensable injury on June 27, 2017. Claimant's claim is denied and dismissed.

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

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

DATED: March 9, 2018



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

within the time frame given by Employer, who would pressure Claimant to finish.

5. Claimant and Mr. Benegas began removing snow from the roof. While on the roof, Claimant slipped and fell off the roof. The ice from the roof fell on top of Claimant. Claimant testified that he sustained injuries to his ribs, chest and nose as a result of the fall. Claimant testified that he did not have a good memory of the accident or his injuries immediately thereafter as he lost consciousness. Mr. Benegas took Claimant into the residence and called Employer.

6. Mr. Gantick arrived at the job site after Claimant was injured. Claimant was taken to Yampa Valley Medical Center. He awoke and saw his wife and brother.

7. Claimant was taken to Denver Health by helicopter. Claimant underwent surgery to his stomach at Denver Health. Claimant displayed a surgical scar in the middle of his torso approximately five inches in length. Claimant also displayed a protruding rib higher on his chest, to the left side. Claimant remained hospitalized at Denver Health approximately one week. Claimant received follow up medical treatment at Yampa Valley Medical Center approximately one month after his injury where x-rays were taken. Claimant followed up at Denver Health on March 15, 2017.
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8. Claimant received medical bills from Yampa Valley Medical Center for treatment on February 6, 2017, and a follow up visit. These medical bills were the result of treatment Claimant received for injuries caused by the fall from the roof on February 6, 2017.

9. Claimant received medical bills from Classic Air Care, Inc. for helicopter transportation on February 6, 2017. The medical bill for the helicopter flight were the result of treatment he received for injuries caused by the fall from the roof on February 6, 2017.

10. Claimant received medical bills from Denver Health for treatment on February 6, 2017, including, but not limited to, surgery and a follow up visit.

11. These medical bills were the result of treatment he received for injuries caused by the fall from the roof on February 6, 2017.

12. Claimant was paid in cash from Employer for his snow removal services. Claimant was paid $20 per hour for the hours he worked. Claimant would submit his hours to Employer and would receive payment. Claimant was not paid on a fixed schedule. Claimant filled out a card upon which Claimant would submit his daily hours. Claimant contemporaneously kept track of his hours on his cell phone. Claimant worked 108 hours for Employer from

January 5, 2017 to February 6, 2017. It is found that Claimant's AWW is $458.18.

13. Employer never consulted with Claimant for purposes of deciding how to bid or determine an estimate for a snow removal job.

14. Claimant did not return to work for Employer after his injury. Claimant was unable to perform his regular job duties for Employer after he was discharged. Claimant tried to return to work painting in mid-April, 2017 and worked for approximately 3-4 weeks. Claimant earned $16 per hour and worked 10 hours per day, 6 days per week during this period. Claimant was unable to continue painting due to his work injuries. Claimant returned to work washing dishes and preparing food for an event company on June 11, 2017, earning $14 per hour working 40 hours per week. Claimant could not return to his work at Employer at this time.

15. Mr. Gantick is the sole owner of Employer. The business purpose of Employer is concrete construction. Mr. Gantick testified that he did not have any employees in February 2017. Mr. Gantick testified he last had employees two and one-half years prior when he issued payroll for concrete construction services. Mr. Gantick testified he sub-contracted out his work for the past two and one-half years. Mr. Gantick's testimony is found to be less credible and persuasive than Claimant's testimony.

16. Mr. Gantick identified Claimant as "Tommy". Mr. Gantick became familiar with Claimant through Mr. Benegas, identified by Mr. Gantick as an independent subcontractor who contracted with Employer. Mr. Gantick testified Mr. Benegas approached Employer indicating Claimant was an experienced shoveler and brought him to work on a particular day. Mr. Gantick testified that Claimant rode in his truck one time. Mr. Gantick testified that Claimant's services worked out to $20 per hour. Mr. Gantick testified he would receive a phone call from a home owner for snow removal service and Mr. Gantick would contact a list of independent subcontractors. Mr. Gantick testified that whoever could do the job would perform snow removal services. The Employer would get paid and Employer would pay the independent subcontractors. Mr. Gantick testified that he did pay Claimant money by handing him cash directly. Mr. Gantick testified that to keep the independent contractors organized by providing index cards for them to write their time down for snow removal services which he would then record. To the extent that Mr. Gantick's testimony contradicts Claimant's testimony, Claimant's testimony is found to be more credible and persuasive than Mr. Gantick's testimony.

17. Mr. Gantick testified that he requested Claimant's Social Security number to issue a 1099 tax form but was unable as Claimant never provided the requested information. Mr. Gantick testified he paid Claimant a total of

$1620.00 for 81 hours of snow removal services from January 5, 2017, to February 6, 2017. The hours recorded by Employer were read into the record. Mr. Gantick denied requiring Claimant to work exclusively for him and denied providing Claimant any training. Mr. Gantick testified he had tools, identified as ladder and scoops, but so did Claimant, as he witnessed them being removed from the vehicles. Mr. Gantick testified he had been providing snow removal for several years.

18. Mr. Gantick testified on February 6, 2017, Mr. Benegas and Claimant followed him to the job site. Mr. Gantick testified that he would take the labor that he contacted to a job site and expect that they Mr. Benegas called Mr. Gantick approximately 1 hour later. Mr. Gantick arrived back at the job site and found Claimant in Mr. Benegas's car. Mr. Gantick observed a cut on Claimant's nose and placed some snow on the wound. Claimant was complaining of pain in his side and Mr. Gantick instructed that they needed to get Claimant to Yampa Valley Medical Center. Mr. Gantick testified he went with Claimant to Yampa Valley Medical Center and witnessed him being airlifted.

19. Mr. Gantick testified he did not have workers' compensation insurance on February 6, 2017. Mr. Gantick testified he would decide, together with his independent contractors, how many hours a snow removal job would take and charge the customer $30 per hour per individual on the job to make up the estimate or bid. Mr. Gantick testified Claimant did not provide snow removal services for Employer after February 6, 2017.

20. Claimant submitted documentation from Yampa Valley Medical Center that on February 6, 2017, medical services identified as Pharmacy IV Solutions, General Supplies, Laboratory, Laboratory Chemistry, Laboratory Immunology, Laboratory Hematology, Chest XRay, CAT Scan Head, CAT Scan Body Portion, Ultrasound, Emergency Room Services, Echocardiology, Drug with detailed coding, Trauma Activ Respon IV, Preventative Care Vaccine, Physician Fees Radiology, Physician Fees Emergency were performed and charged to Claimant.

21. Claimant submitted documentation from Classic Air Care, Inc. indicating the Claimant was transported on February 6, 2017, from Yampa Valley Medical Center to Denver Health Medical Center.

22. Claimant submitted documentation from Denver Health that Claimant received hospital services from February 6, 2017, to February 12, 2017, identified as Room and Board, Intensive Care, Pharmacy, Medical/Surgical Supplies and Devices, Laboratory, Radiology, Operating Room Services, Anesthesia, Respiratory Services, Emergency Room, Pulmonary Function, Pharmacy-Extension of 025X-Single, Source Drug Not Used, Recovery Room, Radiology Diagnostic, Physician services by Dr. Michael Breyer

(Critical Care E/M 30-74 Minutes), Physician services by Dr. Donald Townsend (Insert Cath,art, Percut, Shorterm, Emergency Anesthesia, Anesth, Open Heart; W/O Pump Oxygenator), Physician Services by Dr. David Symonds (Chest X-Ray), Physician Services by Dr. Linda Fielding (Chest X-Ray), Physician Services by Dr. Michael Mestek (Chest X-Rays) and Physician Services by Dr. Ronald Townsend (Chest X-Ray).

23. The medical report from Denver Health dated March 15, 2017, indicated Claimant was seen for post-operative follow up after a pericardial window by Dr. Cohen on February 6, 2017. Claimant was seen this date by Nupur Sehdev PA-C. Claimant reported feeling great and denied chest pain. Claimant's wound looked good. Mr. Sehdev offered Claimant a letter returning him to work light duties but Claimant was seeking a letter returning him to stay at home until he obtain surgery for a his nasal fracture which Mr. Sehdev declined to provide.

24. It is found that Claimant proved by preponderance of the evidence that he was an employee of Respondent on the date of the work injury, February 6, 2017, and that he received the medical treatment, described above, that was reasonably necessary and related to cure and relieve Claimant of the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43- 201, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385,389 (Colo. App. 2000).

2. The ALJ is empowered to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *See Bodensieck v. ICAO*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. ICAO*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). When determining credibility, the fact finder should consider, among other things,

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

COMPENSABILITY (EMPLOYEE VS. INDEPENDENT CONTRACTOR)

3. Pursuant to Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person is "free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." The putative employer may establish that the claimant was free from direction and control and engaged in an independent business or trade by proving the presence of some or all of the nine criteria set forth in Section 8-40- 202(2)(b)(II), C.R.S.; *Baker v. BV Properties, LLC*, W.C. No. 4-618-214 (August 26, 2005) (*See also Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1998)).

4. The factors set forth in Section 8-40- 202(2)(b)(II) indicating that an individual is not an independent contractor include the individual being paid a salary or hourly rate instead of a fixed contract rate, and being paid individually rather than under a trade or business name. Conversely, independence may be shown if the person for whom the services are performed provides no more than minimal training to the claimant, does not dictate the time of performance, does not establish a quality standard for the claimant's work, does not combine its business with the business of the claimant, does not require the claimant to work exclusively for a single person or company, and is not able to terminate the claimant's employment without liability. *Baker v. BV Properties, LLC, supra.* This statute creates a "balancing test" to overcome the presumption of employment contained in Section 8-40- 202(2)(a), C.R.S. and establish independent contractor status. *Nelson v. Industrial Claim Appeals Office, supra*. The question of whether the employer has presented sufficient proof to overcome the presumption is one of fact for the ALJ. *Baker v. BV Properties, LLC, supra*.

5. As found, there was no dispute that Claimant received compensation for snow removal services. Claimant was paid in cash, by Employer, based on an hourly rate of $20 per hour. It was undisputed that Claimant would submit his hours to Employer and was then compensated at his hourly rate. As a result, Claimant established a prima facie case that he was an employee of Employer.

6. As found, Employer has failed to establish by a preponderance of the evidence of Claimant's independence from Employer. In addition to the payment at an hourly rate, Claimant testified that he never performed snow removal services prior to working for Employer. As a result, Claimant was not customarily engaged in the snow removal business but worked only for Employer. Claimant credibly testified that Employer provided the tools for the snow removal services, including shovels, ladders and picks. Claimant credibly testified that Employer instructed him on snow removal on his first day of work. Claimant credibly testified that Employer took Claimant to the job sites on a daily basis and provided instruction on the job. Claimant credibly testified, as did Employer, that he was compelled to work on a given job by Employer and was not given freedom to complete the project based on Claimant's own schedule. Claimant credibly testified that Employer pressured him to complete projects.

7. It is concluded that Claimant was an employee of Respondent on February 6, 2017, and injured himself in the course and scope of his employment with Respondent.

AVERAGE WEEKLY WAGE

8. "Wages" is defined as the "money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Section 8-40- 201 (19(a)), C.R.S. The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. Section 8-42- 102(3); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo.App.1993); *See Williams Brother, Incorporated v. Grimm*, 88 Colo. 416, 197 P.1003 (1931); Vigil v. Industrial Claim Appeals Office, 841 P.2d 335 (Colo. App. 1992).

9. Claimant credibly testified that he worked 108 hours for the 33 day period from January 5, 2017, to February 6, 2017. As a result, Claimant's AWW is calculated at $458.18 (108 hours x $20.00 / 33 days x 7 = $458.18).

MEDICAL BENEFITS

10. Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of a work-related injury. Section 8-42- 101(1) (a), C.R.S. (2008). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work related

injury and the condition for which benefits are sought. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Whether a claimant sustained her burden of proof is generally a factual question for resolution by the ALJ. *See City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

11. Claimant credibly testified that he was taken to Yampa Valley Medical Center then airlifted to Denver where he underwent surgery at Denver Health. The medical records, including bills, support and confirm that Claimant underwent emergency treatment at Yampa Valley Medical Center and Denver Health on February 6, 2017. The medical records, including bills, support that Claimant was airlifted from Yampa Valley Medical Center to Denver Health on February 6, 2017. The medical records, including bills, support and confirm that Claimant was seen in follow up at Yampa Valley Medical Center for x-rays and physician evaluation on February 22, 2017. The medical records, including medical bills, support and confirm that Claimant was admitted to Denver Health from February 6 to February 12, 2017, and seen in follow up at Denver Health on March 15, 2017. Claimant credibly testified that all the medical treatment was related to his industrial fall. The evidence provided by Claimant was not contested by Respondent. In fact, Employer confirmed that Claimant was treated at Yampa Valley Medical Center and airlifted to Denver.

12. As a result, because the evidence provided by Claimant was uncontested with regard to the medical treatment, Claimant has sustained his burden of proof establishing the medical treatment obtained from Yampa Valley Medical Center on February 6, 2017, and February 22, 2017, was reasonable, necessary and related to his work-related fall. As found, Claimant has sustained his burden of proof establishing the airlift on February 6, 2017, was reasonable and necessary medical treatment arising out of his work-related fall.

13. As found, Claimant has sustained his burden of proof establishing that the medical treatment received at Yampa Valley Medical Center and Denver Health from February 6, 2017, to February 12, 2017, and March 15, 2017, was reasonable, necessary and related to his industrial fall.

TEMPORARY DISABILITY BENEFITS

14. To establish entitlement to temporary disability benefits, an employee must prove that the industrial injury, or occupational disease, has caused a "disability," and that he/she suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42- 103(1), C.R.S.; *PDM Molding, Inc. v. Stanburg*, 898 P.2d 542, 546 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or reduction of bodily function. "Disability" connotes both medical incapacity and restrictions to bodily function.

15. The second element of temporary disability is loss of wage earning capacity. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning

capacity element of "disability" may be evidenced by a complete or partial inability to work, or physical restrictions that preclude a claimant from securing employment. *See Culver v. Ace Electric, supra; Hendricks v. Keebler Company*, W.C. No. 4-373- 392 Industrial Claim Appeals Office (ICAO), June 11, 1999.

16. It is concluded that Claimant was disabled from his usual employment and is therefore entitled to an award of indemnity benefits. Claimant and Employer testified Claimant did not return to work after his injury. Claimant was physically unable to return to work until April 15, 2017. This testimony was uncontested. The only medical documentation with regard to work restrictions was from the Physician's Assistant Sehdev which suggests Claimant could return to light duty on March 15, 2017. As a result, Claimant has sustained his burden of proof establishing entitlement to TTD from February 7, 2017, to April 14, 2017, when Claimant started painting.

17. Based on Claimant's testimony, he did not sustain wage loss for approximately 4 weeks starting April 15, 2017. Claimant credible testified he was unable to continue painting due to his work injuries on or about May 12, 2017. Claimant is entitled to TTD from May 13, 2017 until June 10, 2017. Based on Claimant's testimony, he returned to work on June 11, 2017, and did not sustain work-related wage loss thereafter.

PENALTIES

18. Mr. Gantick testified he was uninsured on February 6, 2017. Pursuant to Section 8-43-408(1), C.R.S. Claimant's indemnity benefits in the present claim shall be increased by 50%.

19. Section 8-43-408(2), C.R.S., requires that an uninsured employer post a bond or certificate of deposit for the present value of all of the unpaid compensation and benefits. WCRP 9-5 provides that the trustee is to be the Subsequent Injury Fund in the Division of Workers' Compensation. Pursuant to WCRP 9-5, the ALJ has calculated a total of $5,958.03 for past-due TTD benefits through the date of hearing in addition to $112.234.43 for known authorized medical expenses. There is no present value discount for these past-due amounts. A bond or certificate of deposit in the amount of $118,192.46 is appropriate.

ORDER

IT IS, THEREFORE ORDERED THAT:

1. Claimant sustained a compensable injury as an employee of Respondent on February 6, 2017, when he fell off a roof.

2. Claimant's average weekly wage is $458.18 with a corresponding TTD rate of $305.54. With the additional 50% liability, Claimant is entitled to TTD benefits at the rate of $458.31 per week.

3. Respondent are liable and shall pay all medical benefits received by Claimant from Yampa Valley Medical Center for dates of service on February 6, 2017, and February 22, 2017.

4. Respondent are liable and shall pay for the airlift services provided to Claimant by Classic Air Care, Inc. on February 6, 2017.

5. Respondents are liable and shall pay all medical benefits received by Claimant from Denver Health from February 6, 2017 to February 12, 2017 and for March 15, 2017.

6. Respondent are liable and shall pay Claimant for TTD benefits from February 7, 2017 to April 14, 2017 and May 13, 2017 to June 10, 2017.

7. Respondent are liable and shall pay Claimant an additional 50% on all indemnity benefits pursuant to Section 8-43- 408 (1), C.R.S. for failure to maintain workers' compensation insurance.

8. Pursuant to WCRP 9-5, the ALJ has calculated a total of $5,958.03 for past-due TTD benefits through the date of hearing in addition to $112.234.43 for known authorized medical expenses. There is no present value discount for these past-due amounts. A bond or certificate of deposit in the amount of $118,192.46 is appropriate.

9. Within ten (10) days of the date of service of this order, deposit the sum of $118.192.46 with the trustee, Subsequent Injury Fund Unit of the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik, to secure the payment of all unpaid compensation and benefits awarded, or in lieu thereof,

10. Within ten (10) days of the date of service of this order, Claimant shall file a bond in the sum of $118,192.46 with the Division of Workers' Compensation within ten (10) days of the date of this order:

    (1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

    (2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

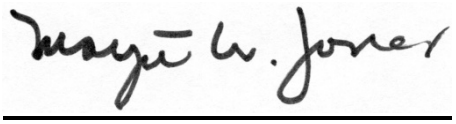
11. IT IS FURTHER ORDERED: Pursuant to Section 8-43-408(5) C.R.S., the uninsured employer shall pay an amount equal to 25% of the compensation to which Claimant is entitled to the Colorado uninsured employer fund created in Section 8-67-105 C.R.S.

12. IT IS FURTHER ORDERED: That the employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

13. IT IS FURTHER ORDERED: That the filing of any appeal, including a petition for review, shall not relieve the employer of the obligation to pay the designated sum to a trustee or to file the bond. Section 8-43-408(2) C.R.S.

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

DATED: March 5, 2018



MARGOT W. JONES
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

a. Whether Claimant established by a preponderance of the evidence that his alleged work injury arose out of and in the course and scope of his employment on February 21, 2017;

b. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable, necessary and related medical treatment;

c. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning on February 23, 2017, and continuing until terminated by law ;

d. Whether Claimant was responsible for his termination under Sections 8-42-103(1)(g) and 8-42-105(4)(a); and

e. Whether Claimant's compensation shall be reduced by fifty percent for his willful failure to follow safety rules pursuant to Section 8-42-112(1)(b), C.R.S.

STIPUATION OF FACT

The parties stipulate and agree that Claimant's average weekly wage is $959.93.

FINDINGS OF FACT

1. Claimant began working for Employer on February 13, 2017. Claimant's duties were to drive Employer's truck which carried all the equipment necessary for the crew to work on the job site each day and to work as a general laborer pouring and finishing concrete.

2. Prior to beginning work for Employer, on February 12, 2017, Claimant completed paperwork for the Employer and signed an acknowledgement that he received and understood the Employer's Written Safety Plan. Claimant's acknowledgement reflected that Claimant read and understood Employer's written safety plan and agreed to follow all safety policies and rules.

3. Employer's safety rules included a prohibition regarding horseplay on the job. The rule warned that injury or termination could result from horseplay on the job. Charles Franklin, the General Manager for Employer, credibly testified that Claimant was given the safety policies and rules and instructed to read the written safety plan.

4. Mr. Franklin explained in his deposition testimony that, in January 2017, he and his parents purchased the concrete business, in which they employed all employees previously employed by the company.

5. On February 21, 2017, Claimant was on break with other employees waiting for concrete to be delivered. Two other employees were present with Claimant, Fermin Galindo and Joel Ernesto Escarecega-Olivas. While the group was waiting for the concrete to arrive, Claimant and Escarecega-Olivas decided to arm wrestle. Claimant initiated the arm wrestling.

6. Claimant, Galindo and Escarecega-Olivas were aware that arm wrestling was not part of their job duties. Galindo and Escarecega-Olivas knew that arm wrestling was not permitted and no such horseplay had been observed by them at work. During Claimant's brief employment with Employer, he had not observed anyone arm wrestling.

7. Claimant and Escarecega-Olivas started arm wrestling, facing each other and grasping each other's right hands. The arm wrestling match lasted about 30 seconds. Escarecega-Olivas declared that he had won the wrestling match, Claimant declared an end to the match and Claimant let go of Escarecega-Olivas's hand. Claimant step back from Escarecega-Olivas, tripped and fell to the ground landing on his back. Claimant fell almost immediately after ending the arm wrestling match. Escarecega-Olivas did not cause Claimant's fall.

8. Claimant provided contradictory testimony regarding the arm wrestling incident. Claimant's testimony was found to be less credible and persuasive than the testimony of Escarecega-Olivas and Galindo.

9. Claimant treated for his alleged injury with Dr. David Yamamoto, M.D. On February 22, 2017, Dr. Yamamoto recorded that Claimant suffered an injury while walking backwards when he tripped over rebar. Claimant is reported to have told the physician that he injured his right shoulder. On February 24, 2017, Dr. Yamamoto referred Claimant for a right shoulder MRI, which revealed a full thickness rotator cuff tear, as well as a partial tear of the infraspinatus tendon, strain of the deltoid and infraspinatus muscles, and moderate joint effusion.

10. On March 2, 2017, Claimant treated with Dr. Eric C. McCarty, an orthopedic surgeon. The doctor recommended and requested a right arthroscopic rotator cuff repair, subacromial decompression, distal clavicle excision and biceps tendenosis. The doctor opined that Claimant's right shoulder condition was acute.

11. On July 25, 2017, Claimant saw Dr. Peter Weingarten for an IME and the doctor reported that Claimant was pushed and fell backwards. Claimant reported to this doctor that he could not recall exactly how he fell, whether he fell on his shoulder or fell on his outstretched arm. Dr. Weingarten opined that

Claimant sustained a full thickness tear of the supraspinatus tendon in the February 21, 2017, fall incident.

12. Following the February 21, 2017, incident, Claimant continued to work the remainder of the day. On February 23, 2017, Claimant met with Mr. Franklin, the General Manager, about the safety rule violation and Claimant's tardiness for work. Claimant was issued a written warning regarding his violation of Employer's safety rules prohibiting horseplay. Employer also warned Claimant about his late arrival for work on three occasions. Employer sought Claimant's signature on the written warning regarding his horseplay and tardiness. Claimant refused to sign the warning and walked off the job addressing Mr. Franklin using expletives.

13. Mr. Franklin deemed Claimant's refusal to sign the written warning and his departure from the work site to be a resignation from his position. Later, on February 23, 2017, Claimant returned to the job site and surrendered his keys to the Employer's vehicle when he was advised his employment was deemed terminated.

CONCLUSIONS OF LAW

General Legal Principles

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

2. The claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with the employer. Section 8-41-301(1)(b) & (c), C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires the claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

Compensability

3. If the acts of an employee at the time of the injury are for the employee's sole benefit, then the injury does not arise out of and in the course of employment. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006), *Kater v. Industrial Claim Appeals Office,* 728 P.2d 746 (Colo.App. 1986); *Brogger v. Kezer,* 626 P.2d 700 (Colo.App.1980). If the claimant's activity at the time of the injury constitutes such a substantial deviation from the circumstances and conditions of the claimant's employment that the activity is for the claimant's sole benefit, the injury does not arise out of and in the course of employment. *Kater v. Industrial Commission, supra.* Where, the alleged deviation from employment involves "horseplay," our courts apply a four-part test to determine whether the resulting injury is compensable. In *Lori's Family Dining v. Industrial Claim Appeals Office,* 907 P.2d 715, 718 (Colo. App. 1995), the Court of Appeals held that the relevant factors are:

> (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, *i.e.,* whether it was commingled with the performance of a duty or involved an abandonment of duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay.

4. In any event, the critical concern is "whether the claimant's conduct constituted such a deviation from the circumstances and conditions of employment that the claimant stepped aside from his job and was performing the activity for his sole benefit." *Panera Bread, LLC v. Industrial Claim Appeals Office, supra. Ultimately, resolution of the issue is one of fact for determination by the ALJ. Panera Bread, LLC v. Industrial Claim Appeals Office*, *supra.*

5. In this matter, Claimant failed to prove by a preponderance of the evidence that he injured himself in the course and scope of his employment for Employer. Claimant's testimony regarding the mechanism of his injury was less credible and persuasive than that of his co-workers. Claimant's explanation to medical providers was evolving, changing and not credible. Claimant's assertions that he was pushed by a co-worker and fell, that he did not instigate the horseplay activity or that his injury did not occur in the midst of the horseplay was not deemed credible. Claimant's horseplay was a deviation from his duties and provided no service to Employer. Claimant's deviation was not co-mingled with Claimant's duties for Employer. Claimant's injury arises from a brief deviation from providing service to Employer. However, though the deviation was brief in the amount of time Claimant and his co-worker were involved with arm wrestling, the brevity of their deviation was dictated by the time it took for Claimant to injure himself bringing the deviation to an end.

6. The evidence established that Employer maintained a written safety policy which included a prohibition against horseplay at work. Claimant was provided with this written safety policy and was aware of the prohibition. Claimant's co-workers credibly testified that they observed no horseplay in the workplace. The evidence further established that despite Claimant's knowledge of Employer's safety policy, Claimant initiated an arm wrestling match. Upon concluding the horseplay which involved Claimant's right arm being wrapped around his co-worker's right arm, Claimant stepped backward and fell. It is concluded that Claimant's deviation from his employment for Employer was substantial to the extent that Claimant's activities leading up to his fall and at the time of his fall, provided no service to Employer, was outside the scope of Claimant's employment and did not arise from his employment for Employer.

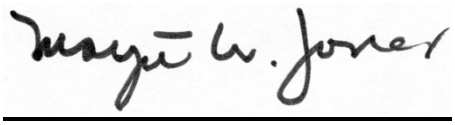
7. Claimant failed to sustain his burden of proof to establish that the injury occurred in the course and scope of his employment, therefore his claim is not found to be compensable.

ORDER

Claimant's claim is denied and dismissed.

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

DATED: May 14, 2018



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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on May 20, 2017.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits to treat his May 20, 2017 work injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from May 21, 2017 through August 25, 2017.

4. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant was employed by Employer as a laborer with duties including demolition and remediation at Colorado Mills Mall which had been damaged by a hail storm. Claimant's duties included pulling and bagging ceiling tiles that had sustained water and hail damage and removing screws from drywall.

2. Claimant began employment on May 16, 2017 and worked 4 total days for Employer. Claimant worked 9.5 hours on the 16th, 9.5 hours on the 18th, 4 hours on the 19th, and 9.5 hours on the 20th and was paid $12.50 per hour.

3. Claimant testified that during his 4 days of work for Employer he carried and hauled heavy bags full of wet and demolished drywall to the trash. Claimant reported that he had carried hundreds of these bags out to the trash. Claimant testified that a few days prior to May 20 he had back pain, but that on May 20 it became "insane" and was the worst pain he has had in his life.

4. On May 20, 2017, his fourth day of work, Claimant alleges he sustained an injury to his lumbar spine. Claimant testified that he was on a ladder near the end of the day removing drywall screws and felt his shoulder pop which it does sometimes but that he also felt pain in his back at that time and went down the ladder. Claimant reported that after a couple of steps off the ladder he hit the ground.

5. Claimant reported having one problem previously with his low back when he was cutting a tree and twisting and that he went to the emergency room for low back pain but that it was not a big problem, so he didn't report it to Dr. Roth. Claimant reported that his low back pain at this time lasted only one week and then was gone and that he has had no low back problems whatsoever since (incident was in 2011).

6. On May 21, 2017 Claimant was evaluated at Denver Health Medical Center (DHMC). Claimant reported that he thought he hurt his back at work a few days ago but denied any specific injury or trauma. Claimant reported left sided shooting pain to his left lower extremity that started in the past 7 days with pain in the sacro-iliac radiating to the left foot, left knee, and left thigh. Claimant reported that he started having pain on Tuesday (May 16) and that he had been working a lot and a lot of long hours. Claimant reported that sometimes his entire leg goes numb and he gets a Charlie horse along the side of the left lower leg. Claimant reported that he was able to keep working through it, but that it definitely was getting worse. Claimant was assessed with radiculopathy of the lumbar region and was advised to follow up with his primary care provider. *See* Exhibits 1, I.

7. On May 28, 2017 Claimant was evaluated at DHMC. Claimant reported a lifting/twisting injury at work last week and that he had no improvement of his symptoms. Claimant reported continued pain in his lower back and left sciatic pain. X-rays of Claimant's lumbar spine were performed and showed mild anterior wedging of the T12 vertebral body which was age-indeterminate. Scattered small endplate osteophytes were noted. Otherwise, the x-rays showed no acute findings. *See* Exhibits 1, I.

8. On May 30, 2017 Claimant was evaluated at DHMC. Claimant reported back pain after starting a new job which involved lifting and that he injured his back approximately 10 days prior. Claimant reported sharp shooting pain from his left lumbar spine to his hip, and all the way down the lower lateral part of his left lower extremity. At this visit, Claimant had a tooth extracted. *See* Exhibits 1, I.

9. On June 6, 2017 Claimant was evaluated at DHMC. Claimant reported that at work he was going up and own ladders carrying heavy objects and that toward the end of the day his back started hurting. Claimant reported that the first day of pain it started to be uncomfortable in his low back, that he kept working, and that the pain then got severe in his low back above the left hip running down to the knee and into the calf. Claimant's exam and history were consistent with sciatic pain and SI joint pain and an injection was recommended. *See* Exhibits 1, I.

10. On June 15, 2017 Claimant underwent an MRI of his lumbar spine. The impression provided was: L4-L5 moderate diffuse disc bulge lateralizing to the left with left foraminal disc protrusion and a large superimposed superior disc extrusion extending from the left paracentral region of the left intervertebral foramen with mild central stenosis, compression, and displacement of the traversing left L4 nerve root as well as compression of the existing left L4 root in the foramen by the large disc extrusion. *See* Exhibits1, I.

11. Claimant was previously evaluated at the emergency department of St. Anthony's Hospital for lower back pain. On October 24, 2011 he reported lower back pain for one week after picking up a heavy tree with pain at a 7/10 in his bilateral lower back. Claimant was treated with pain medications and was referred to outpatient primary care for follow up. *See* Exhibit H.

12. On November 4, 2011 Claimant was evaluated at Denver Health Medical Center. Claimant reported low back pain, bilateral hip pain, and groin pain for the past two weeks. Claimant reported that he had been given pain medications from St. Anthony's but had run out and that now he also had pain and intermittent leg numbness. Claimant was found to have tenderness across the L5 area and bilateral iliac crests. *See* Exhibit I.

13. On December 18, 2017 Claimant underwent an independent medical examination performed by Henry Roth, M.D. Claimant reported low back and left leg pain. Claimant reported that on May 20, 2017 while working in construction demolition, he was removing drywall screws with a power screwdriver and going up and down a 10 foot ladder. Claimant reported that near the end of his shift, he was at the top of the ladder removing screws when he thought he heard a noise near his shoulder but felt back pain that traveled down his left leg. Claimant reported that he came down the ladder, took two steps, and then had to sit on the ground due to pain. *See* Exhibit G.

14. Dr. Roth reviewed medical records that noted back pain starting on May 16, 2017 and Claimant indicated the medical record was wrong. Dr. Roth reviewed the lumbar MRI. Claimant reported pain at a 5-6 but with activity that it could be to a 9/10. Claimant reported his primary pain is in the posterior lateral aspect of his left leg. After his review of medical records and physical examination of Claimant, Dr. Roth opined that he was unable to identify with medical probability, a work related cause of injury. Dr. Roth pointed out that Claimant did not report a specific time, activity, and sudden pain onset until September 28, 2017 and that he had indicated previously discomfort with no specific incident. Dr. Roth also opined that Claimant's lumbar spine MRI showed degenerative changes without any edema or suggestion of an acute disorder and that Claimant's findings were ordinary. Dr. Roth opined that Claimant's work related activities in removing drywall screws and going up and down a ladder were not mechanisms of injury for an alteration of lumbar anatomy or even lumbar strain and were not of sufficient force to produce an alteration to the sacroiliac anatomy. *See* Exhibit G.

15. Dr. Roth opined that Claimant's left sided lumbopelvic pain syndrome and left sided sciatic were a pre-existing personal illness and that any symptoms Claimant may have experienced at work between May 16 and May 20 were incidental and not the direct result of work activities. Dr. Roth opined that Claimant definitely had an L4/5 degenerative disc herniation causing an L4/5 left leg radiculopathy but that there was no acute anatomic disruption. *See* Exhibit G.

16. Dr. Roth testified at hearing. Dr. Roth opined that Claimant needed lumbar discectomy and decompression surgery and that Claimant was long overdue for surgery. Dr. Roth noted that Claimant did not tell him about lifting heavy bags of wet drywall tiles. Dr. Roth opined that Claimant's condition was a personal illness and that it was not medically probable that repetitive materials handling would produce a condition requiring surgery or sustained back pain. Dr. Roth opined that just having pain at work does not make work responsible. Dr. Roth opined that Claimant's employment did not cause his anatomy and that if Claimant had pain on Tuesday the 16th (as reported to DHMC), then Claimant had pain on his first day of work that would just be a reflection of Claimant's existing anatomy at the time he was hired. Dr. Roth opined there was no aggravation of a pre-existing condition.

CONCLUSIONS OF LAW

Generally

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

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

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet his burden to establish that he sustained a compensable work related injury on May 20, 2017. Initially, Claimant's testimony that his prior back pain from 2011 lasted only a week and then he had no further problems or symptoms whatsoever is not consistent with earlier treatment records. In 2011, Claimant was initially evaluated on October 24 stating he had been having lower back pain for a week. On November 4, he returned and he was reporting continued low back pain as well as intermittent leg numbness and tenderness in the L5 and bilateral iliac crests. From the records, Claimant was continuing to have severe enough pain to return for more treatment approximately 3 weeks after his incident cutting a tree. Although the records show no further follow up, it is clear that on November 4 he was still having significant symptoms from the tree incident three weeks earlier.

The symptoms Claimant reported in 2011 are in the same area he currently reports symptoms. Dr. Roth is credible and persuasive that Clamant is long overdue for lumbar spine surgery. The MRI demonstrates pathology consistent with Dr. Roth's opinion. However, the MRI and the lumbar x-rays fail to show an acute incident or injury causally related to Claimant's employment on May 20, 2017. Claimant's work activities and duties did not cause or alter his pre-existing lumbar spine condition or anatomy. Further, Claimant's reports to providers on the date of his pain symptoms and mechanism of injury have not been consistent throughout treatment for this alleged work related injury. The opinion of Dr. Roth that Claimant has a pre-existing condition is credible and persuasive. This condition was not aggravated or accelerated by his employment. Although Claimant may have felt pain at work due to his pre-existing and underlying condition, Dr. Roth is credible and persuasive that there is no causal relationship and that work did not aggravate or accelerate the condition. Claimant's symptoms at work are more likely to represent the natural progression of Claimant's pre-existing condition that is unrelated to his employment with Employer.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a work related injury on May 20, 2017 during his course and scope of employment with Employer.

2. As Claimant failed to meet his burden to establish a compensable injury, the remaining issues are not addressed. The claim is denied and dismissed.

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

DATED: March 28, 2018

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease or work injury on or about April 1, 2016.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to medical benefits to treat his occupational disease or work injury, including the bills of Dr. Beatty and his referrals.

STIPULATIONS

1. Claimant's average weekly wage (AWW) is $821.95.

FINDINGS OF FACT

1. Claimant is a 38 year old male who is employed by Employer as an operational coordinator at Employer's fitness gym and facility, the PEAK Center.

2. The facility has adaptive equipment for clients with special accommodation needs which makes it easier for clients to work out.

3. Claimant initially began working as a volunteer for Employer, was moved to a per diem position, and became a full time employee in May of 2015.

4. Claimant has been employed full time as the operational coordinator since May 9, 2015. Claimant performs a lot of administrative work and schedules and receives applications for new clients on a daily basis. The facility sees approximately 120 clients per day. Claimant is sometimes on the floor of the gym facility to discuss with clients scheduling or billing issues, but is primarily in his office at a desk performing administrative work.

5. Between May of 2015 and April of 2016, Claimant's workload was of a fairly constant intensity. Claimant's work required regular mousing, typing, and computer work. The scheduling program used by Employer's facility is heavily mouse dependent. Since May of 2015, the time Claimant has spent on the computer during a work day has varied from heavier times of computer use at 50% of each hour to lighter times of computer use at 30% of each hour.

6. In the spring of 2016, Claimant began experiencing pain in his right elbow. Claimant tried to ignore the little pains until it became a larger problem for him and he eventually sought treatment in April of 2016.

7. Claimant was ultimately diagnosed with right cubital tunnel syndrome and medial epicondylitis.

8. Claimant contends that his right elbow condition is an occupational disease caused by computer work (keyboarding and mousing) performed at Employer's facility.

9. In 2003 Claimant was injured in a diving accident. As a result, Claimant experienced a spinal cord injury and is a C7 tetraplegic. Claimant has disability in all four limbs due to his accident. The spinal cord injury affects Claimant's upper extremity function and he has limited finger function and flexion function. Due to this, the mechanics involved when Claimant uses the mouse at work are different. Claimant turns the mouse in a clockwise direction and rolls his hand out to be able to right click the mouse. The motion necessitates Claimant's elbow and shoulder. Claimant does not have enough finger flexion to put pressure on the mouse clicker and to depress the mouse clicker he has to use pressure from his shoulder and elbow.

10. Claimant uses tenodesis griping for everything and with all techniques involving his right hand.

11. Claimant also lacks core strength due to his 2003 injury. Claimant thus has to stabilize himself when seated at his work desk with his upper extremities and forearms. If he does not place pressure on his hands and forearms to stabilize himself, he falls forward into the desk. When Claimant is on the computer at work and using the mouse or keyboard, he is simultaneously holding himself erect and placing pressure and his weight on his upper extremities to stabilize himself.

12. In April of 2016, approximately 11 months after beginning full time employment with Employer, Claimant sought medical treatment. Claimant testified that he wanted a quick fix and didn't want to draw attention and sought treatment on his own without reporting it as a work injury.

13. On April 25, 2016 Claimant was evaluated by Maureen Preston, NP. Claimant reported that he had been experiencing right elbow pain which he believed may be related to his computer use at work and that he had developed a new right elbow ulcer due to ice he had been applying to the area. NP Preston referred Claimant to hand therapy associates to evaluate his right elbow pain. NP Preston also referred Claimant for a job site evaluation. *See* Exhibit 1.

14. On April 29, 2016 Claimant was evaluated at hand therapy associates by Phillip Heyman, M.D. Claimant reported pain on the medial side of the right elbow and that he had been using a mouse lately in a somewhat different way than usual and that it seemed to have contributed to his symptoms. Dr. Heyman found that Claimant was

unusually well developed from the elbows on proximal and that Claimant was tender just at the posterior edge of the medial epicondyle and not particularly tender over the ulnar nerve. Dr. Heyman provided an impression of medial epicondylitis and provided an injection into the medial epicondyle. *See* Exhibits 2, G.

15. On May 18, 2016 Claimant was evaluated by Dr. Heyman. Claimant reported modest relief from the prior injection and reported pain in the medial aspect of the right elbow when he used his touch pad or mouse. Dr. Heyman again noted point tenderness in the same location just beyond the medial epicondyle on examination. Dr. Heyman performed a second injection into the medial epicondyle. *See* Exhibits 2, G.

16. On August 10, 2016 Claimant was evaluated by Dr. Heyman. Claimant had persisting right medial elbow pain. Dr. Heyman noted that Claimant was essentially insensate in the small and ring finger due to spinal injury. Dr. Heyman recommended therapy modalities and stretching. *See* Exhibits 2, G.

17. Claimant began physical therapy with massage, strengthening, and stretching exercises performed. On August 25, 2016 Claimant reported at physical therapy that he wanted to return to the gym and to outdoor activities and that his elbow discomfort had limited his participation in both activities. Claimant reported no mechanism of injury but that his pain had been going on for multiple months. Claimant reported that massage/stretches helped alleviate the constant pain. Claimant reported that on the weekends his pain significantly reduces. *See* Exhibits 2, G.

18. At physical therapy on September 8, 2016 Claimant reported little to no pain. Claimant reported that he had gone on vacation for 5 days during which he did no keyboarding and that his pain disappeared during this trip and appeared to be coming back when he keyboarded. The occupational therapist noted a plan to find an ergonomic solution or fabricate adaptive equipment to take strain off Claimant's forearm flexors. *See* Exhibits 2, G.

19. Claimant testified that the 5 day vacation was a weeklong work conference in New Orleans. Claimant testified that he had no computer and that his symptoms got better that week with rest and time away from the computer but that they did not completely go away.

20. By October of 2016, Claimant's symptoms had not subsided and he reported a work injury. Claimant testified that he decided to report the injury because his symptoms had not gone away, he needed his employer to be aware, and he knew he needed to make changes to his workstation and equipment.

21. On October 18, 2016 Claimant was evaluated by Brian Beatty, D.O. Claimant reported that he did a lot of scheduling on a computer all day long and started to develop right elbow pain in the spring. Claimant reported a diagnosis of medial epicondylitis and that he had two injections with some improvement as well as physical therapy without much improvement. Dr. Beatty noted that Claimant wore a tennis elbow

brace. Dr. Beatty found tenderness to palpation over the medial aspect of the right elbow. Dr. Beatty diagnosed right medial epicodylitis and recommended hand therapy, medication, and ergonomic evaluation of Claimant's workstation with appropriate changes. Dr. Beatty opined that based on Claimant's description of the injury and the clinical findings, he believed that the objective findings were consistent with a work related mechanism of injury. Dr. Beatty listed the work related medical diagnosis as medial epicondylitis. *See* Exhibits 3, I.

22. An ergonomic evaluation of Claimant's work station was performed and changes were made to Claimant's work station. The changes along with taking recommended breaks and stretching throughout the course of the day made Claimant's work easier, but his pain did not subside.

23. As part of the overall ergonomic recommendations, Claimant initially moved the computer mouse to the left side, then moved to a trackball mouse, and later moved to using dragon speak software.

24. Claimant underwent an initial occupational therapy evaluation on October 20, 2016. Claimant reported symptoms increased when pushing on wheelchair rails, typing, using the mouse, and using a phone screen. Claimant reported pain at the elbow and that he mostly used tenodesis for object manipulation. The therapist opined that the prognosis for functional recovery was good but that Claimant would need optimal ergonomics and an optimal long range distal upper quadrant maintenance program to sustain resolution of symptoms. *See* Exhibits 6, H.

25. On October 31, 2016 Claimant underwent therapy. Claimant reported that he noticed the pain when he types. The therapist noted that Claimant's triceps and extrinsic flexors were intensely tight perpetuated by his use of the upper limbs for wheelchair mobility. The symptoms were noted to be most bothersome when using computer but the therapist noted the use of upper limbs for wheeled mobility very likely was a significant factor in overall cumulative stress to tissue. The therapist opined that the occurrence of symptoms appeared to be consistent with workstation ergonomics as causal issues and opined that the changes recommended by the ergonomic evaluator should help. *See* Exhibits 6, H.

26. On November 3, 2016 Claimant was evaluated by Dr. Beatty. Claimant reported gradual improvement in his symptoms with less pain and tightness in the forearm and elbow and improved numbness and tingling in his fingers. Dr. Beatty diagnosed right medial epicondylitis and cubital tunnel syndrome. Dr. Beatty recommended continued hand therapy, medications, and performed a trigger point injection to the flexor muscles of the forearm. Dr. Beatty continued to opine that it was a work related mechanism of injury. *See* Exhibit 3.

27. On November 30, 2016 at therapy, it was noted that Claimant still developed immediate regression of symptoms on initiation of computer keyboard use. The therapist

opined that there was clearly a significant ergonomic contribution to Claimant's symptoms. *See* Exhibits 6, H.

28. On December 5, 2016 at therapy, it was noted that Claimant had an ergonomic evaluation, but that Claimant still developed increased pain fairly quickly on initiation of computer use. *See* Exhibits 6, H

29. On December 7, 2016 Claimant was evaluated by Dr. Beatty. Claimant reported that he tended to have more symptoms of tingling into his fingers when his elbow was bent. At an evaluation with Dr. Beatty on December 21, 2016 it was noted that Claimant's symptoms were about the same and had overall greatly improved but seemed to now be plateaued. *See* Exhibits 3, I.

30. On December 14, 2016 a job demands analysis was performed. It was noted that Claimant's job involved constant sitting, frequent reaching below shoulders when using computer mouse, keyboard, transferring documents/items, and using telephone headset, and frequent fingering when using computer mouse, keyboard, telephone, writing and processing documents. It was noted that gripping was rare and while using telephone handset and stapler. Under the risk factor assessment it was found that Claimant did not have risk factors present. Specifically, under the risk factor of 4 hours of mouse usage, it was noted that Claimant used the mouse approximately 3.7 hours per day and that he used the keyboard approximately 52.5 minutes per day. *See* Exhibit M.

31. On December 21, 2016 Jonathan Sollender, M.D. issued a letter recommending denial of Claimant's claim. Dr. Sollender noted diagnoses of cubital tunnel syndrome and right medial epicondylitis and Dr. Sollender reviewed the job demands analysis. Dr. Sollender opined that it was certainly possible that Claimant may have generated mouse use with the injured right hand for upwards of 4 hours per workday (not directly quantified by the job demands analysis) but that the underlying reason for considering mouse use as a risk factor over 4 hours was not for the flexor tendons but for the extensor tendons that raise the hand for clicking purposes. Dr. Sollender opined that typically someone with high amounts of mousing will have extensor tendon symptoms including forearm extensor tendinitis up to and including lateral epicondylitis. Dr. Sollender opined that the use of the mouse was inconsistent with the development of medial epicondylar symptoms. Dr. Sollender also opined that cubital tunnel syndrome would tend to arise in someone with elbow flexion greater than 90 degrees for over 4 hours per day which was not the case. Dr. Sollender opined, therefore, that although Claimant might be using the mouse near the threshold valued for a repetitive motion injury, mousing was physiologically inconsistent with the development of medial epicondylitis or cubital tunnel syndrome and he recommended denial. *See* Exhibit A.

32. On January 11, 2017 Claimant was evaluated by Craig Davis, M.D. of Colorado Orthopedic Consultants. Dr. Davis noted that Claimant was sent for a second opinion and consultation regarding right elbow problems. Dr. Davis noted that in April of 2016 Claimant developed gradually increasing pain around the right medial elbow. Dr.

Davis noted that Claimant does a lot of typing for work and would rest his arm on the desk and because of his quadriplegia had to rest a little weight on his arm. Dr. Davis reviewed the treatment history and performed a physical examination. Dr. Davis provided the impression of right medial epicondylitis and ulnar neuropathy at the right elbow. Dr. Davis noted with 8 months of conservative treatment it would be reasonable now to get an MRI of the elbow and to consider electrodiagnostic testing to evaluate the ulnar nerve conduction and that depending on the findings it might be worth considering surgical treatment, although surgical treatment should be a last resort. *See* Exhibits 5, 8, J.

33. On January 24, 2017 Claimant underwent an MRI of his right elbow. The impression provided was: mild medial epicondylitis change but fatty denervation type change of the common flexor muscular origin, flexor carpal ularis, flesor digitorum superficialis and the flexor carpi radialis muscle bellies; small physiologic elbow joint effusion with minimal synovitis change and no chondral or osseous abnormality; and probable artifact medial aspect olecranon. *See* Exhibit L.

34. On February 9, 2017 Claimant was evaluated by Barry Ogin, M.D. Dr. Ogin noted that Claimant performed a lot of repetitive use with the mouse at work and that due to Claimant's tetraplegia, Claimant had an awkward position holding the mouse. Dr. Ogin noted that Claimant had good strength with elbow flexion and extension as well as wrist extension but had no hand intrinsic or finger flexion strength in either hand. Dr. Ogin noted that in the spring of 2016 Claimant began developing some achiness along the medial aspect of the right arm and that while Claimant admitted it could be in part related to chronic wheelchair use, it seemed that it was predominantly the mouse work that was throwing him over the edge. Dr. Ogin noted that symptoms were only on the right side where Claimant utilized the mouse. Dr. Ogin noted that Claimant had a very muscular upper body but significant atrophy of hand intrinsic muscles and no active finger flexion or hand intrinsic activation. Dr. Ogin attempted electrodiagnostic testing but noted it was quite limited given Claimant's tetraplegia. Dr. Ogin noted that a diagnostic ultrasound could be considered to identify if the ulnar nerve appeared swollen, entrapped, or sublexed in regards to the cubital tunnel. Dr. Ogin assessed probable ulnar neuropathy, right and right medial epicondylitis. *See* Exhibits 7, F.

35. On March 14, 2017 Claimant underwent an independent medical examination performed by Jonathan Sollender, M.D. Dr. Sollender noted that he had reviewed medical records and the job demands analysis report. Dr. Sollender opined that mouse use was not associated medial epicondylitis or cubital tunnel syndrome but that mouse usage can cause wrist extensor tendinitis or lateral epicondylitis. Dr. Sollender opined that based on the lack of physiologic relatedness of the risk factor of mousing to Claimant's condition, he recommended claim denial. *See* Exhibit A.

36. Dr. Sollender noted that after his March 14 evaluation he came to understand that Claimant does not really have any active flexion of any finger joint on the right hand and that Claimant's manner of mousing and keyboarding was really biceps and shoulder controlled to strike keys and mouse and that the evaluation was done with Claimant's left hand. Dr. Sollender recommended a repeated job site evaluation to

ensure that the right wrist, fingers, and elbows were more carefully evaluated while Claimant mouses with his right hand. *See* Exhibit A.

37. Dr. Sollender noted that updated photographs and video of Claimant mousing and keyboarding noted minimal flexion of the right elbow while typing or mousing and Dr. Sollender noted that he did not see Claimant anchoring forearms on the desk or resting forearms on any edge of the desk/work station and that there was no awkward posture of flexion or extension at the wrist or any elbow flexion while typing or mousing confirming his earlier suspicion that Claimant's right hand was not at an awkward posture while typing or mousing. Dr. Sollender continued to opine that Claimant's work activities did not accelerate or aggravate Claimant's chronic condition that worsened in Spring of 2016. Dr. Sollender agreed that Claimant's condition could be in part related to chronic wheel chair use based on significant calluses Claimant had on the hypothenar aspect of both hands. Dr. Sollender opined that he did not see anything from Claimant's hand motions at work that would give him any suspicion that Claimant's hand use from typing or mousing would naturally lead to the development of cubital tunnel syndrome or medial epicondylitis. *See* Exhibit A.

38. On July 25, 2017 Claimant underwent an independent medical evaluation performed by Hugh Macaulay, M.D. Claimant reported that using his office and desk space at work he noticed right elbow discomfort at first and that once it started it slowly progressed to being pretty painful. Claimant reported that the pain was worse while mousing and using his keyboard to type. Claimant reported that due to his spinal cord injury, he is very body conscious and body aware and analyzed what he was doing when the pain occurred and realized it was a lot worse when he was at his desk and particularly when he used his mouse. Claimant reported that he does not have enough flexion with his finger to be able to put pressure on the mouse clicker and that in order to depress the clicker, he has to rotate the mouse clockwise and use his shoulder and elbow to depress the clicker on the mouse. Claimant reported using the mouse about 4 hours per day. Dr. Macaulay noted that Claimant did not have any core strength or back extension and that while at a desk, Claimant stabilizes himself with his hands and forearms and that without doing so, he falls forward. Claimant reported that when he held himself to stabilize his thorax and to pronate his hand he had sharp and stabbing pain in the medial epicondylar area. Claimant reported continued pain in his right elbow that was static and not improving. Claimant reported that leaning on his desk to support himself increased his discomfort. *See* Exhibits 4, B.

39. Dr. Macaulay reviewed medical records and performed a physical examination. DR. Macaulay found tenderness along the right medial epicondyle with the lateral epicondyle unremarkable. Dr. Macaulay found tinel's at the cubital tunnel showed tenderness neuritic irritation. Dr. Macaulay found significant calluses on the left and right hands at the palms base and wrist and that Claimant propelled his wheelchair using the base of the hand with external shoulder rotation to keep his fingers from being caught in the spokes. Dr. Macaulay opined with reasonable medical probability that Claimant had ulnar neuritis and medial epicondylitis as a result of his work activities. Dr. Macaulay noted that when sitting at his desk, Claimant has to use his forearms to help support his

trunk and that to right click the mouse Claimant had to keep his elbow bent and pronate his hand to enable sufficient force to depress the key. Dr. Macaulay noted also that when Claimant types, he once again has to flex the elbow and pronate the hand to use his thumb to depress the key on the keyboard. *See* Exhibits 4, B.

40. Dr. Macaulay opined that using the algorithm set up by the medical treatment guidelines would have limited if any utility because the studies are based on normal ergonomic apposition of the body to the keyboard and mouse which Claimant does not do. Thus, Dr. Macaulay opined that the time intervals, degree of force, and frequency were not applicable to Claimant and opined that Claimant's approach was profoundly different. Dr. Macaulay opined that flexing the elbow and pronating the forearm were provocative motions for the development of medial epicondylitis and ulnar nerve dysfunction and that Claimant did those things. Thus, Dr. Macaulay opined that the mechanism by which Claimant interfaced with his workstation and performed his tasks was provocative and causal for medial epicondylitis and ulnar nerve dysfunction and he opined that the conditions were work related. *See* Exhibits 4, B.

41. At hearing, Claimant testified. Claimant's testimony is found credible and persuasive and consistent with the overall weight of the evidence.

42. Claimant is very physically fit, active, and muscularly developed as noted by the medical records, his appearance at hearing, and his testimony. Claimant plays quad rugby and works out regularly. Prior to full time employment with Employer, Claimant worked out approximately 4 times per week. After beginning full time employment, his workouts went down to 2-3 times per week.

43. Claimant also uses a manual wheelchair that requires him to push it. Claimant has exercised before with a crank bicycle, pedaling the bicycle with his upper extremities. Claimant has done weight training and created a YouTube channel to help show other quadriplegics how they can still exercise in the gym. During exercise and weight training, Claimant hooked in to weights with a d-ring strapped around his wrist since he cannot grip the apparatus.

44. Dr. Sollender testified at hearing. He opined that Claimant's medial epicondylitis and cubital tunnel syndrome were not work related due to outside factors and non-occupational causes. Dr. Sollender disagreed with Dr. Macaulay's opinion to not use the medical treatment guidelines. Dr. Sollender opined that although Claimant has special circumstances because of his spinal cord injury, you have to use a muscle group and have sufficient exposure to cause the conditions. He opined Claimant did not have sufficient exposure. He opined that the MRI showed chronic wasting of the nerve signal to the muscle in the right elbow and chronic changes to the muscle that would take more than one year to develop. Dr. Sollender opined that mousing does not cause cubital tunnel or medial epicondylitis. Dr. Sollender opined that Claimant had no primary or secondary risk factors and that there were no studies to support that quadriplegic patients developed differently than anyone else for the conditions at issue. Dr. Sollender opined that the removal of exposure when the mouse was moved from the right side to the left

side, Claimant should have had relief. Dr. Sollender opined that there was no pressure on Claimant's right elbow at work.

45. Dr. Sollender opined that there can be an increase in nerve entrapment and changes as a spinal cord injury patient ages. Dr. Sollender opined that Claimant was athletic, worked out vigorously, was well developed, and was physically active and that the overuse injuries of a wheelchair athlete is high. Dr. Sollender opined that Claimant's workouts, sports, and other activities were more likely to be a direct cause of Claimant's diagnosis along with the natural aging process than Claimant's work exposure. Dr. Sollender opined that Claimant was more exposed to development of his conditions due to his outside of work activities.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by his employment or working conditions. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). The definition of occupational disease is: a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. See 8-40-201(14), C.R.S. The question of whether the claimant met the burden of proof to establish that he sustained a compensable occupational disease is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established, by a preponderance of the evidence, that his right medial epicondylitis and right cubital tunnel syndrome are work related occupational diseases. Although keyboarding and mousing in a person with a normal body habitus are not physiologically related to the diagnoses at issue, Claimant does not keyboard or mouse in the same physiologic manner due to his spinal cord injury. Rather, Claimant's testimony is credible and persuasive that he puts pressure on his arms and upper extremities and has to use them to support himself regularly while at his desk due to his lack of trunk muscles and so he does not fall into the desk. While putting pressure on his arms, he also uses tenodesis gripping methods, and puts force on and through his elbow to strike the mouse and keyboards. As found above, Claimant's reports and testimony were consistent with the job demands analysis as the amount of time per workday he spends mousing and performing heavy mouse activity. Claimant is not just mousing for almost 4 hours per day. He is leaning on his arms, using tenodesis to grip the mouse, and placing pressure through his right upper extremity to click and strike the mouse buttons during his work day. As found above, the job demands analysis found grip use to be "rare" at work. However, Claimant is credible and persuasive that he uses tenodesis grip techniques mostly to grip all objects and thus the job demands analysis does not accurately reflect the grip technique required for Claimant to grip and hold the mouse.

Further, although Claimant has out of work exposures, it is notable that the pain and symptoms developed less than one year after his full time employment began. Claimant had been physically active with out of work exposures for many years prior to the development of his right upper extremity conditions. Claimant's testimony that the pain is worse when at his desk and performing tasks and that it gets better with rest and

time away from the computer is credible, persuasive, and consistent with the overall medical reports and evidence. The pressure Claimant places on his right upper extremity at work to keep himself upright and the way in which he has to use his upper extremity to be able to grip, click, and type are different than a person with a normal body habitus.

The opinions of Dr. Beatty and Dr. Macaulay are found credible and persuasive. Additionally, the physical therapist noted improvement over the weekends when away from the computer and opined there was clearly a significant ergonomic contribution to the symptoms. Claimant has established, more likely than not, that his occupational disease resulted directly from his employment and that the work exposure was the proximate cause of the development of his medial epicondylitis and cubital tunnel syndrome. Although Claimant has some outside exposures, the hazards outside of work are not equal or greater to his full time work schedule with significant pressure on his right upper extremity, gripping tenodesis to use the computer, and pressure to click and type.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As Claimant has established a compensable occupational disease, Respondents are liable to provide reasonable and necessary medical treatment. Claimant has established an entitlement to such medical benefits including the treatment and referrals of Dr. Beatty.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease or work injury on or about April 1, 2016.

2. Claimant has established by a preponderance of the evidence an entitlement to medical benefits to treat his occupational disease or work injury, including the bills of Dr. Beatty and his referrals.

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

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

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

DATED: March 14, 2018

/s/ Michelle E. Jones

_____

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

ISSUE

1. Whether Claimant is entitled to request and undergo a Division Independent Medical Examination (DIME) when her claim involves no lost time.

2. Whether Pre-hearing ALJ (PALJ) Steninger's October 3, 2017 Order allowing Claimant to proceed with a DIME was in error.

FINDINGS OF FACT

1. Claimant was employed by Employer and sustained an admitted work related injury to her left knee, right shoulder, and right hip on June 8, 2017.

2. Claimant was referred by Employer for medical treatment and received medical treatment for her admitted injury which was paid for and admitted to by Respondents. Respondents paid medical benefits in the amount of $1,854.64. *See* Exhibit 1.

3. Claimant was evaluated on multiple occasions by medical providers and had evaluations on June 12, 2017, June 22, 2017, June 28, 2017, July 6, 2017, July 12, 2017, and July 26, 2017.

4. On July 26, 2017 Claimant was evaluated by Henry Roth, M.D. Dr. Roth noted that Claimant continued to have discomfort. However, Dr. Roth opined that Claimant was at maximum medical improvement (MMI) with no medical impairment and opined that she did not have any future medical specifically planned or anticipated. *See* Exhibit 1.

5. On August 15, 2017 Respondents filed a Final Admission of Liability (FAL). Respondents noted that Claimant had been placed at MMI with no impairment on July 26, 2017 and noted the claim was medical only with no lost time. Respondents attached Dr. Roth's July 26, 2017 report to the FAL. *See* Exhibits 1, B.

6. On August 31, 2017 Claimant filed an objection to the FAL. Claimant noted that she disagreed with the determination made by Dr. Roth and requested a Division Independent Medical Examination (DIME). Claimant indicated her understanding that the DIME would consider the issues of MMI and permanent impairment. *See* Exhibit 2.

7. Respondents' requested a pre-hearing conference and filed a Motion to Strike Claimant's Notice and Proposal to Select an IME.

8. On October 3, 2017, PALJ Steninger issued an Order denying Respondents' motion. *See* Exhibit C.

9. On October 26, 2017 Respondents filed an Application for Hearing with the Office of Administrative Courts. The sole issues listed to be heard was the appeal of the 10/3/2017 order of PALJ Steninger which allowed Claimant's application for DIME to proceed. Respondents argued in the Application that Claimant had no entitlement to a DIME under the Loufbourrow, Kazazian, and Trujillo case law as Claimant had a non-lost time claim without permanent impairment assigned by the ATP.

10. At hearing, no witnesses were called and the parties made brief legal arguments.

11. The October 3, 2017 Order of PALJ Steninger is persuasive and well-reasoned. The Order is upheld and the Order is incorporated herein as findings and conclusions of the undersigned ALJ. *See* Exhibit C.

12. Prior to this matter reaching the Office of Administrative Courts, Claimant underwent a DIME performed by Timothy Hall, M.D. Dr. Hall opined that Claimant was not at MMI and recommended further medical treatment. *See* Exhibit 4.

CONCLUSIONS OF LAW

Generally

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

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discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Claimant is entitled to a DIME

Respondents' arguments are not persuasive. Although no indemnity benefits were admitted in this case, Claimant is entitled to a DIME to dispute the determination and findings of the authorized treating provider regarding MMI and permanent impairment. As pointed out by PALJ Steninger, if a Claimant had no ability to contest the determinations of an authorized treating provider (designated by Employer), providers could regularly place injured workers at MMI with no permanent impairment and their opinions would be binding. This is clearly not the intent of the Act. The plain language of the Act indicates and provides parties with a mechanism to dispute a determination of an authorized treating physician on whether or not an injured worker has reached MMI. The mechanism to dispute the determination is to request a DIME. *See* § 8-42-107(8)(b)(II), C.R.S. The plain language of the Act also provides that only if a party fails to timely request a DIME will the authorized treating provider's findings and determinations be binding. *See* § 8-42-107.2(2)(b), C.R.S. Respondents essentially argue that the authorized treating provider's opinions in this case cannot be challenged or disputed. Respondents suggest that merely because Claimant did not miss time from work due to her admitted injury, the authorized treating provider's opinions on MMI and permanent impairment are binding and Claimant does not have a "compensable" claim. This is not persuasive.

As pointed out by PALJ Steninger, in his October 3, 2017 Order incorporated herein by reference, the Supreme Court in *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003) held that Respondents must either admit liability or issue a notice of contest and that if they admit liability ***they must compensate the injured employee in two ways***. First, by providing employees with temporary total disability benefits. ***Second, by providing employees with medical treatment to cure and relieve the employee from the effects of the injury***. As found above, Claimant was compensated in this claim by having $1,854.64 worth of medical treatment provided by Respondents. Here, Respondents admitted in the general admission of liability that Claimant had sustained a compensable injury. As required by the Act, Respondents admitted liability and paid medical benefits. As noted in the October 3, 2017 PALJ Order, MMI has a dramatic statutory significance in being the point of time where medical care and admitted medical benefits are terminated and there is a fundamental right for an injured worker to challenge the termination of medical benefits through the DIME process. MMI has significant meaning and acts to terminate curative medical treatment in admitted injury cases. To take away

the ability of an injured worker to challenge the determination of an authorized treating provider is inconsistent with the Whiteside analysis. For the reasons above and the reasons analyzed in the well written and persuasive October 3, 2017 PALJ Order incorporated by reference herein, Claimant is entitled to challenge the determination of MMI and the termination of her curative medical treatment by initiating the DIME process.

ORDER

It is therefore ordered that:

1. Claimant is entitled to dispute the determination of an authorized treating provider as to MMI and permanent impairment. Claimant is entitled to request and undergo a Division Independent Medical Examination (DIME).

2. Pre-hearing ALJ (PALJ) Steninger's October 3, 2017 Order is found persuasive and is incorporated herein.

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

DATED: March 12, 2018

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

ISSUES

1. Whether Respondents have established by a preponderance of the evidence that the general admission of liability filed July 20, 2017 may be withdrawn.

2. Determination of Claimant's average weekly wage (AWW).

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

4. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability (TPD) benefits.

5. Whether Claimant was responsible for the termination of her employment in September of 2017.

FINDINGS OF FACT

1. Claimant is a 21 year old who began working for Employer on January 23, 2017 as a nurse's aide. Claimant became a certified nursing assistant (CNA) for Employer on April 1, 2017 after receiving her CNA certification. Claimant continued to work for Employer as a CNA until and through September 3, 2017.

2. Prior to starting employment, and on January 17, 2017, Claimant underwent a job function test performed by Employer. Claimant passed the test indicating her ability to push/pull 45 pounds at hip level, lifting 15 pounds from hip level and holding 5 seconds, and that she could perform all 10/10 job functions. The musculoskeletal assessment showed her upper extremities to be within normal limits and not limited in motion or weakness. *See* Exhibit 1.

3. In addition to her employment with Employer, Claimant is a full time student at Colorado State University. Claimant attends classes during the fall and spring semesters and generally takes the summers off from school and works during the summer.

4. Claimant initially began working a schedule that included every Friday and every other Saturday and Sunday. Claimant realized the hours were too much with her school schedule and dropped the Friday shift, and began working every other Saturday and Sunday. Claimant testified that she was working approximately an average of 8 hours per week prior to her injury. Claimant was hired at $10.85/hour for weekday work and at $12.10/hour for weekend work. Claimant's rate of pay was scheduled to increase to

$11.60/hour for weekday work as of April 1, 2017 to reflect her CNA certification. Wage records show that her weekend rate of pay increased after April 1, 2017 to $12.85/hour, then to $13.08/hour on April 16, 2017, then to $13.30/hour on July 16, 2017. *See* Exhibits 13, V, W, X.

5. Wage records show that Claimant worked the following hours for Employer before her March 25, 2017 work injury:

Jan.	23-31	13 hours
Feb.	1-15	43.5 hours
Feb.	16-28	33 hours
March	1-15	17.5 hours

See Exhibits 13, X.

6. On Saturday March 25, 2017 Claimant was working a normal scheduled shift. Claimant was in a resident's room at Employer's facility when she lifted a mattress to pull up a fitted sheet over the corner of the resident's bed.

7. Claimant had initially mechanically raised the bed to about the level of her waist. Claimant testified that the sheets are tight and that she was on the last corner of the bed trying to stretch the fitted sheet around the last mattress corner. Claimant lifted the mattress up from the waist level (where it had been mechanically raised to) to about her shoulder or head level with her left hand while she had the fitted sheet in her right hand. When she lifted the mattress with her left hand, she felt a pop in her shoulder and felt a large amount of immediate sudden pain.

8. Claimant reported the injury to Employer and filled out an Employee Incident Report. Claimant described that she was changing sheets, lifting a mattress to hook the corner when she was injured. Nursing Supervisor Jennifer Thompson noted that Claimant was changing sheets to a patient bed and felt her left shoulder pop and had immediate pain. Ms. Thompson noted no external injury apparent and no redness/swelling/bruising but that Claimant reported pain, had limited range of motion, and was unable to elevate her left upper extremity above the shoulder level without pain. Ms. Thompson advised Claimant to seek a provider for follow-up. Claimant went to the emergency room of UC Health. *See* Exhibit U.

9. On March 25, 2017 Claimant was evaluated at UC Health. Claimant reported that she had been at work lifting a mattress when she felt a pop and pain in her left shoulder. On examination, Claimant had decreased range of motion, tenderness, and bony tenderness in her left shoulder. X-rays were performed and showed borderline wide AC joint which may be indicative of a type 1 AC joint injury. A recommendation was to correlate clinically. The records show that the x-rays were negative for fracture but showed a mild separation of the shoulder and the clavicle. Claimant was advised to take ibuprofen, use a sling, apply ice, and to follow up on Monday with workers' compensation. Claimant was provided a handout with information on acromioclavicular separation. At

UC Health, they filled out a physician's report of workers' compensation form indicating a work related medical diagnosis of AC separation. *See* Exhibits 2, Q, R.

10. On Monday March 27, 2017 Claimant was evaluated at Workwell Occupational Medicine by Kevin Keefe, D.O. Claimant reported that while performing work duties on March 25, she was reaching out with both hands to lift up a mattress and then shifted the weight of the mattress to her left arm while using the other arm for other purposes and had the sudden onset of pain in her left shoulder that got worse over the next hour. Claimant reported that the pain had not improved. Claimant reported no prior similar problems. On examination, Dr. Keefe found pain localized and centered at the left AC joint which was very tender to palpate. Dr. Keefe provided a diagnosis of unspecified dislocation of the left acromioclavicular joint and opined that the cause of the problem was related to work activities. He placed Claimant on restricted duty work status with restrictions of: no use of left arm. *See* Exhibits 3, P.

11. On April 4, 2017 Claimant underwent physical therapy. Claimant reported that she was adjusting sheets on a resident's bed holding the mattress up with her left hand when she felt a sudden onset of pain in her left shoulder. Claimant was assessed with pain and limited upper extremity movement due to diagnosed AC dislocation. *See* Exhibit N.

12. On April 4, 2017 Claimant underwent an MRI of her left shoulder that was interpreted by Samuel Fuller, M.D. The impression provided was: mild degree of abnormal intrasubstance signal within the biceps/labral complex, with an unlikely evolving SLAP lesion but difficult to rule out; mildly laterally downsloping acromion which could predispose to subacromial impingement; mild subacromial/subdeltoid bursitis. *See* Exhibit 4, O.

13. On April 18, 2017 Claimant was evaluated at Workwell by Ralph Holsworth, D.O. Claimant reported feeling as though her left shoulder was not improving. Dr. Holsworth noted that an MRI performed showed some degenerative changes about the AC joint but no other findings and that the radiologist raised the possibility of a SLAP tear but that the findings were equivocal. Dr. Holsworth recommended an orthopedic surgeon referral for further evaluation and treatment. Dr. Holsworth diagnosed unspecified dislocation of left acromioclavicular joint and opined that that cause of the problem was related to work activities. Dr. Holsworth provided work restrictions of lifting no more than 5 pounds with the left arm and no use of the left arm outstretched or above shoulder level. Dr. Neal noted that Claimant had separation of the left AC joint as well as subluxation of the left SC joint. *See* Exhibit 3.

14. On May 8, 2017 Claimant was evaluated at Orthopaedic & Spine Center of the Rockies by Mark Durbin, M.D. Claimant reported that on March 25 she was lifting a mattress when she felt something pop in her left shoulder and had a lot of pain. Claimant reported concern about the deformity in her SC joint and the pain in the anterolateral aspect of her shoulder as well as the weakness in her arm. Claimant reported no other trauma to her left shoulder. On examination, Dr. Durbin found tenderness over the AC

and SC joints and an obvious little prominence of her SC joint. Dr. Durbin noted that the x-rays and MRI showed maybe a little bit of AC joint swelling and some impingement with a little bit of bursitis but that you could not see the SC joint on the MRI. Dr. Durbin recommended a CT scan of the left SC joint. Dr. Durbin provided work restrictions of no use of left arm and opined that the work related medical diagnosis was left shoulder. *See* Exhibits 5, M.

15. On May 17, 2017 Claimant was evaluated by Dr. Durbin. Dr. Durbin noted that the CT scan showed subluxation and possibly even an anterior dislocation of the SC joint. Dr. Durbin explained that he does not perform surgery on SC joints and he referred Claimant for a second opinion with a shoulder surgeon who treats SC joints. *See* Exhibits 5, K.

16. On June 2, 2017 Claimant was evaluated by orthopedic surgeon Armadios Hatzidakis, M.D. Claimant reported an injury at work on March 25 when she lifted a mattress with her arm extended overhead and immediately felt as though the shoulder was not right. Claimant reported the injury had gotten progressively worse ad that she had trouble with many activities. Claimant reported no prior problems in her left shoulder. Claimant reported the pain was mostly to the anterior shoulder and across the clavicle with some radiation to the neck. Claimant reported she enjoyed working out, was in body building competitions, and hiking in her spare time. Dr. Hatzidakis noted on examination that Claimant's left arm is shortened compared to the right arm, that Claimant had tenderness at the AC and SC joint, and that she had reduced range of motion on the left. Dr. Hatzidakis reviewed the imaging. Dr. Hatzidakis assessed left shoulder strain with possible left SC joint subluxation and dislocation. Dr. Hatzidakis recommended an extensive list of tests. *See* Exhibits 7, J.

17. On June 21, 2017 Claimant underwent an MRI of her SC joints. The impression provided was apparent superior subluxation of the medial left clavicle at the SC joint, no joint effusion, and no bone marrow edema or fracture. Claimant also underwent a CT of her chest with an impression of some superior subluxation medial left clavicle at the SC joint with no fracture and abnormal bony articulation between the anterior left 1st and 2nd ribs. *See* Exhibits 8, I.

18. On June 26, 2017 Claimant was evaluated at Workwell by Tah Neal, M.D. Dr. Neal found deformity of Claimant's left shoulder and clavicle and noted the left scapula was prominent compared to the right, the left sternoclavicular joint was prominent and exquisitely tender, and the left acromioclavicular joint was also quite tender and enlarged. Dr. Neal noted that Claimant's entire left shoulder was held at a much higher angle than the right shoulder. Dr. Neal diagnosed unspecified dislocation of the left AC joint and unspecified subluxation of the left SC joint. Dr. Neal opined that the cause of the problem was related to work activities and he continued Claimant's work restrictions of no lifting more than 5 pounds with the left arm and no use of the left arm outstretched or above shoulder level. Dr. Neal noted that Claimant had separation of the left AC joint as well as subluxation of the left SC joint. *See* Exhibit 3.

19. On July 13, 2017 Claimant underwent an EMG performed by Kristin Mason, M.D. Claimant reported never having any shoulder issues in the past and that she was pushing up a mattress when she felt extreme pain in her left shoulder. Claimant reported her usual recreational activities included bodybuilding, lifting upper body, some lower body movements (lifts), and running. Dr. Mason provided the impression of: no evidence of long thoracic or spinal accessory nerve disruption. Pattern of continuous involuntary firing may represent dystonia. *See* Exhibits 9, H.

20. On August 16, 2017 Claimant was evaluated by neurologist Bennett Machanic, M.D. Claimant reported that on March 25 she was working as a CNA and was pushing up underneath a mattress with her left arm when she noted immediate, severe, sharp left shoulder pain. Dr. Machanic noted that the films showed a superior subluxation of the medial left clavicle at the SC joint with distinct asymmetry as compared to the right side. He noted that standard films of the SC joints done with MRI imaging showed also significant subluxation of the medial left clavicle at the SC joint, yet no joint effusion. Dr. Machanic noted that the left shoulder was carried way above the right and that although it appeared prominent and almost winged, when he tested radius anterior function there was no true scapular winging per se and opined it was a postural situation. Dr. Machanic noted that the trunk was tilted to the right with an apparent convex scoliosis to the left. Dr. Machanic noted that the clinical exam showed a left shoulder adhesive capsulitis but also that Claimant had weakness over the distribution of the suprascapular nerve. *See* Exhibits 10, G.

21. After the MRI of her SC joints, the EMG testing, and neurologist evaluation, Claimant returned to orthopedic surgeon Dr. Hatzidakis. On August 24, 2016 Dr. Hatzidakis reviewed the imaging and evaluations that had taken place since Claimant's prior appointment with him. Dr. Hatzidakis assessed: left shoulder strain, work related injury with persistent SC joint pain, superior displacement of the clavicle on the manubrium, and persistently elevated scapulothoracic joint, possible dystonia. Dr. Hatzidakis opined that Claimant did not have a severe enough injury, in his opinion, to cause anterior or posterior instability of the SC joint. He noted that the position of Claimant's clavicle was abnormal and that he was uncertain whether this was due to the persistent scapular elevation that was occurring versus Claimant's work related injury, or both. He did not have a surgical solution to offer Claimant and recommended Claimant have a second opinion with another shoulder specialist, such as Peter Millett or Tom Hackett in Vail, since Claimant's condition was quite uncommon. Dr. Hatzidakis opined that it would benefit Claimant to have multiple opinions. *See* Exhibit E.

22. Following her injury and during this period of time that Claimant was undergoing treatment, she continued to work for Employer on restricted duty. Wage records show that following her injury she worked the following hours:

Dates:		Hours:
Mar.	16-31	17.25
April	1-15	12.5
April	16-30	8.25

May	1-15	12.25
May	16-31	12.75
June	1-15	0
June	16-30	12.75
July	1-15	12.5
July	16-31	12.5
Aug.	1-15	12
Aug	16-31	12.25
Sept.	1-15	12.25

See Exhibits 13, X.

23. On September 1, 2017 Claimant submitted a resignation letter to Employer indicating the letter was her 2 weeks' notice. Claimant stated that due to her injury on March 25, 2017, the time she had allotted in her schedule for work was being taken up by her doctor's and physical therapy appointments. *See* Exhibit S.

24. On September 26, 2017 Claimant was evaluated by Peter Millett, M.D. at the Steadman Clinic in Vail. On her intake form Claimant indicated the sport or instrument that was most important to her was bodybuilding and that she had been unable to partake due to her injury. Claimant reported that she had sustained an injury while working part-time as a CNA in March. Claimant reported she had been lifting a mattress with her left upper extremity when she had immediate pain in the area of her left shoulder girdle. Claimant reported that she enjoyed working out, was into body building competitions, and liked to hike. On examination, Dr. Millett found notable swelling and prominence about the left SC joint which was particularly tender to palpation. He found muscle spasm over the anterior cervical muscles extending into the upper trapezius and deltoid region. Dr. Millett found Claimant's shoulder girdle to be considerably elevated as well as rotated anteriorly. He also found from examination posteriorly an elevated left scapula and considerable spasm of the upper trapezius muscles extending into the deltoid. Dr. Millett reviewed multiple outside images. AN MRI and X-rays of the cervical spine were performed at the clinic and shoed a reversal of the cervical lordosis with mild kyphosis with scoliosis of the cervical spine and cervicothoracic juncture and upper thoracic spine. *See* Exhibits 11, C, D.

25. Dr. Millett opined that Claimant had a complex problem with the left shoulder after an injury sustained while working as a CNA. Dr. Millett opined that Claimant's examination and imaging were consistent with a left SC joint injury. He opined that her left SC joint was clinically unstable and that reconstruction may be needed in the future but with the shoulder girdle as elevated as it was, a reconstruction of the left SC joint would be at risk for re-injury. They discussed at length options to assist with reduction of the left shoulder girdle spasms and elevation including an interscalene block for a period of 3 days so Claimant could participate in physical therapy to reduce spasm and work on range of motion. *See* Exhibits 11, C.

26. The interscalene block was performed that same day. After the catheter was placed, Claimant reported 70% reduction in her symptoms and had notable lowering of her shoulder girdle and reduction in palpable spasm. Dr. Millett planned to have claimant continue with physical therapy and to reevaluate and update the plan based on Claimant's progress. *See* Exhibits 11, C.

27. Claimant testified at hearing. Claimant is found credible and persuasive. Claimant has never had problems with her left shoulder or upper extremities before the incident on March 25, 2017. Claimant was able to always lift or maneuver as needed and passed her pre-employment physical for Employer. Claimant is very into health and fitness and prior to the injury she lifted weights and did cardiovascular exercises regularly and several times per week at a gym. Claimant rotated lifting with her upper body, legs, and back and went to the gym 2-3 times per week once she started college. Prior to college Claimant was more consistently in the gym lifting and performing cardio workouts. Claimant entered a physique and fitness competition in her junior year of high school, approximately three years prior to the work injury. Claimant has never had any problems working out or lifting weights.

28. Claimant testified that she intended to work full time in the summer and that she had mentioned her desire to work more hours during the summer to her supervisor and had provided him with a schedule of her available days for the summer. Claimant testified that she hoped to work 35-40 hours the weeks that she was available in the summer, but that she had some weeks marked as unavailable.

29. Claimant provided her supervisor a calendar indicating her availability once school ended in May. The calendar shows Claimant was available for work while school was out of session (between May 12, 2017 and August 21, 2017) for 9 days in May, 12 days in June, 15 days in July, and 10 days in August. Out of the 100 days Claimant was off from school, she indicated she was available for work on 46 of the days. The 100 day period covers 14.29 weeks, and averages out to an available work schedule of 3.23 maximum days of work per week if she worked every day she listed as available. At 8 hours per day this would amount to 25.84 hours per week maximum during this period of time if she worked every day she listed as available. As Claimant testified that she typically worked 8 hour shifts, the likely maximum amount of work and shifts possible per week would be 24 hours per week and three shifts per week of work. *See* Exhibit T.

30. Claimant testified that she resigned in September because she was seeing doctors, doing physical therapy, and was having to drive to Vail for appointments. Claimant testified that she did not have enough time to work with her full time school schedule and all the time her injury was taking up for treatment. When she resigned, Claimant had not yet been evaluated in Vail, but had been referred to physicians in Vail.

31. Scott Bolton, Claimant's supervisor, testified at hearing. He indicated that Claimant initially was hired in January at more hours, but that she had dropped to working just every other weekend by mid-March due to her full time school. After dropping down to working every other weekend in mid-March, he testified that Claimant never requested

more shifts or hours during her modified duty. Mr. Bolton indicated that after she was placed on modified duty and at the time of her resignation, Claimant's restrictions were being accommodated and Claimant was working 6 hour shifts instead of 8 hour shifts. Mr. Bolton testified that Employer was able to accommodate Claimant's restrictions and that following her injury and near the beginning of the summer Claimant provided him with a calendar of her availability during the summer. He agreed that Claimant had hoped to work 24 hours per week over the summer. Mr. Bolton indicated his plan to call Claimant to fill a slot if someone was sick on the days Claimant marked as available and that he always had open shifts and gaps to fill year round.

32. Frederick Scherr, M.D. testified at hearing. Dr. Scherr performed an independent medical evaluation on November 20, 2017. He examined Claimant and reviewed medical records. Dr. Scherr diagnosed dislocated SC joint, AC separation, and left shoulder strain. Dr. Scherr opined that the SC joint takes a very high energy force to dislocate and provided examples of car accidents or football hits. Dr. Scherr also opined that the Claimant's AC separation would require a high force and a downward force and opined that pushing up on a mattress was not sufficient to cause a separation. Dr. Scherr opined the injury was not work related mainly due to the amount of force required to sustain the types of injuries Claimant has but also due to the positioning and forces required that were not consistent with pushing up a mattress. Dr. Scherr testified that Claimant's injury was very rare and that he did research and that her injury and mechanism didn't make sense with the clinical research. Dr. Scherr opined that weightlifting as an adolescent and before the age of 20 can damage growth plates. Dr. Scherr opined that Claimant's history of repetitive weightlifting pre-disposed her to injury but that even with a pre-disposition, lifting the mattress was still not enough force. Dr. Scherr opined that studies as well as the medical treatment guidelines refer to AC separation as requiring a downward force and that an SC dislocation or fracture are described as requiring sudden trauma.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ

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

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

Withdrawal of General Admission of Liability

Respondents have failed to meet their burden of proof to establish that they may withdraw the general admission of liability filed July 20, 2017. The credible and persuasive evidence establishes that Claimant sustained an acute work related injury to her AC joint, SC joint, and left shoulder on March 25, 2017. The credible and persuasive evidence establishes that at the time of the injury Claimant was performing services in the course and scope of her employment and that the injury was caused by lifting a mattress. The persuasive and credible evidence and testimony establishes that Claimant had no prior injuries or restrictions and that she sustained an acute injury while lifting the mattress to put on a fitted sheet. Claimant is found credible and persuasive in her testimony of the acute incident that caused injury. The opinions of the medical providers who found the injury to be work related injury are persuasive. Additionally, it is found that this is an unusual injury and that Claimant may have been predisposed to this type of an injury due to her prior history of lifting weights while a teenager. However unusual, Claimant sustained an acute injury and suffered pain and limitations that did not exist prior to lifting the mattress on March 25, 2017. Although Respondents point to other possible causes of the injury and to what they believe is Claimant’s pre-disposition to injury, they have failed to meet their burden by a preponderance of the evidence to withdraw the general admission of liability. Rather, the credible evidence and testimony establish that Claimant sustained an acute work related injury while changing sheets and lifting a mattress on a bed on March 25, 2017.

Although the medical treatment guidelines and the opinions of Dr. Scherr have been considered, they are not found to be controlling or persuasive in this case. Claimant’s injury, as noted above, is unusual. Claimant also may have been pre-disposed

to this type of injury based on a history of lifting weights prior to complete body development. However, although the force and position has been opined by Dr. Scherr to not have been sufficient enough to cause these types of injuries even with a predisposition, the Claimant is credible and persuasive that she felt a pop and immediate pain when lifting the mattress. Claimant had no prior symptoms, restrictions, or treatment and the acute event of the lifting the mattress is found to have caused injury despite the opinions of Dr. Scherr and the medical treatment guidelines.

Average Weekly Wage

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

As found above, at the time of her injury Claimant was working approximately 8 hours per week at a pay rate of $12.10/hour. This amounts to an average weekly wage at the time of her injury of $96.80. However, in this case the ALJ finds it appropriate to use discretionary authority in order to fairly determine Claimant's diminished earning capacity due to her work related injury. Claimant is credible and persuasive that she intended to work more hours during the summer months when she was off school. This is typical for a college student and is found to be logical and persuasive testimony. Claimant also had the capacity prior to her injury to work more hours while in school, working initially 24 hours/week, then 16h hours/week before dropping down to 8 hours/week based on her own perception of priority with her school work. However, Claimant's testimony that she anticipated 35+ hours per week of work during the summer months is not plausible given her availability calendar. As found above, even if Claimant worked every single day she listed as available on the calendar, Claimant would work a maximum of approximately 24 hours per week, or 3 shifts per week. It is not found likely that Claimant would be tasked to work every single day she listed as available, or that she would have been called in every day listed as available. Rather, it is more likely that Claimant would have worked during the summer months in a capacity of somewhere between the 8 hours per week she was working at the time of injury and the maximum 24 hours she was available during the summer months. In addition, once school started in the fall, her earning capacity again would be in between 8 hours per week that she requested to be reduced to in the spring of 2017 and the initial 24 hours of work per week that she was hired at. The ALJ finds that a fair approximation of Claimant's wage loss

and diminished earning capacity due to her injury is fairly calculated at 16 hours per week. Further, the pay rate that fairly demonstrates Claimant's diminished earning capacity is found to be $13.30/hour which is the rate Claimant was earning at the time of her resignation. Claimant's average weekly wage and a fair approximation of her lost earning capacity due to her injury is thus found to be $212.80 (16 hours x $13.30/hour).

Temporary Total Disability

Claimant has failed to establish an entitlement to TTD benefits. TTD benefits are owed in cases where an employee is temporarily and totally disabled and unable to work due to the injury sustained. Here, Claimant returned to work in a modified duty position immediately following her injury. Although Claimant had new medical incapacity due to her injury, she was still able to earn wages and to perform work within her medical restrictions. Respondents were able to provide Claimant with modified duty work within her restrictions and provided work within Claimant's restrictions until her resignation in September of 2017. The testimony of Mr. Bolton is credible and persuasive that they would have continued to accommodate Claimant in modified duty work had she not resigned. Claimant has not established that she was totally disabled and unable to work or unable to be accommodated such that TTD was ever owing in this case. Her request for TTD benefits is denied and dismissed.

Temporary Partial Disability

In cases of temporary partial disability, an employee is entitled to receive sixty-six and two-thirds percent of the difference between their AWW at the time of the injury and in the AWW during the continuance of the temporary partial disability. *See* § 8-42-106(1), C.R.S. Following Claimant's injury on March 25, 2017 she was released to modified work duty and was accommodated by Respondents. As testified to by Claimant's supervisor, Claimant went from working 8 hour shifts to working 6 hour shifts. This is consistent with the wage records that show an overall decreased number of work hours subsequent to the injury. Claimant has established, more likely than not, that due to her injury she had a difference in her average weekly wage prior to and after the injury. As found above, a fair approximation of Claimant's AWW and diminished earning capacity is $212.80. Following her injury, and due to work restrictions and her medical incapacity and disability resulting from the injury, Claimant earned approximately $72.97/week. Claimant has established that she is entitled to sixty-six and two-thirds of the difference of $139.83, and TPD in the amount of $93.22/week during the continuance of her temporary partial disability and has established that her partial wage loss is attributed to her medical incapacity due to her March 25, 2017 work injury.

Responsible for Termination

Respondents have established by a preponderance of the evidence that Claimant was responsible for the termination of her employment. Although Claimant indicated in her resignation that she essentially did not have enough time to work due to school, her injury, and medical appointments, the ALJ finds this not to be entirely persuasive. Claimant's average weekly wage establishes an average work week of 16 hours per

week. Claimant, during her disability, was working even fewer hours than the AWW base hours. Although the ALJ realizes demands of full time school and doctors' appointments, Claimant's decision is found to be based on where Claimant volitionally chose to focus her attention and priority (namely, school). During her disability and while working within her work restrictions, Claimant was working only approximately 6 hours per week. Working 6 hours per week is found to be possible in addition to full time school and doctors' appointments. Although the injury certainly took up time in her schedule, Claimant was accommodated and worked minimum hours during her disability and made the volition decision to focus her time and energy elsewhere. Respondents accommodated Claimant's restrictions and offered her modified duty work within the restrictions and at reduced hours. Despite this, Claimant volitionally chose to resign based on her own priority determination. As such, she was responsible for termination of employment and the resulting wage loss ($72.97/week) from Claimant's resignation and the termination of Claimant's employment is not attributable to the on-the job injury.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish that the general admission of liability in this case may be withdrawn.

2. Claimant's average weekly wage is $212.80.

3. Claimant has failed to establish by a preponderance of the evidence an entitlement to TTD benefits. Her request for TTD is denied and dismissed.

4. Claimant has established by a preponderance of the evidence an entitlement to TPD benefits from the date of her injury and ongoing at a rate of $93.22 per week until terminated pursuant to law.

5. Respondents have established by a preponderance of the evidence that Claimant was responsible for the termination of her employment and that the wage loss from her employment termination is not attributable to the March 25, 2017 injury.

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

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

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

DATED: March 19, 2018

/s/ Michelle E. Jones

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

ISSUES

I. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable mental impairment during the course and scope of his employment with Employer.

II. Whether Claimant has proven by a preponderance of the evidence that the medical treatment he has received was authorized, reasonable and necessary to cure or relieve the effects of a work-related injury.

III. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive temporary total or temporary partial disability benefits.

FINDINGS OF FACT

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

1. Claimant was born on February 25, 1967.

2. After high school, Claimant joined the National Guard in Ohio. It is not known for how long Claimant was in the National Guard. After the National Guard, Claimant attended one semester of college at the University of Cincinnati and then dropped out. After dropping out of college, Claimant went into sales and has been in sales his entire career.

3. Claimant has a long history of suffering from bipolar disorder. Claimant believes that he has suffered from bipolar symptoms his entire adult life.

4. Claimant typically experienced a mania cycle in which he felt like he was "king of the world" from January through March. Claimant's manic symptoms included reckless spending of money, doing stupid and impulsive acts, and feeling elated in terms of mood. (Respondents' Exhibits, p. 271.)

5. Claimant typically experienced a depressive cycle from August through December. Claimant's depressive symptoms caused him to become argumentative and also caused him to push people away and become isolated.

6. Claimant has also suffered from bouts of anger and anxiety. (Transcript, p. 78).

7. Claimant became addicted to alcohol at the age of 16 or 17. Claimant has drank excessively on many occasions.

8. Claimant's bouts of anger, anxiety, and depression have caused him to go from job to job over the years – with most jobs lasting no longer than 1 ½ years or 2 years at the most. (Transcript, p. 78-79.)

9. Claimant struggles with relationships. Claimant was married at age 21 for two years and had two children, who are currently 26 and 28. His wife left him because he worked excessively and drank alcohol excessively. Claimant has had almost no contact with his children for the last 10 years. Claimant blamed his ex-wife's parents, and their influence with the court, for losing custody of his first two children. Claimant had a third child with another woman. His third child is 20. Claimant said the court also kept him from seeing this child as well and he has had no contact with this child for many years. Claimant indicated that losing his children and not having contact with them because of court rulings has been the most difficult thing he has had to deal with as an adult. (Respondent's Exhibit VV, p. 275.). Claimant married again and had a daughter. She is currently 12. Claimant divorced from his second wife in 2012. According to Claimant, that divorce was a "heartbreaker" and he became severely depressed and suicidal. Claimant was prescribed psychotropic medications, including an antidepressant, Wellbutrin, and Lithium, an anti-manic drug.

10. Claimant met his third wife in 2016, while he was living in Texas, and she was living in Louisiana. They got married on June 21, 2016, which was about three to four months after they met.

11. Later in 2016, Claimant, his third wife, and his youngest child moved to Colorado.

12. Towards the end of 2016, after he and his family moved to Colorado, Claimant gradually became depressed and was not paying attention to either his wife or his daughter. He became isolated, started drinking alcohol heavily, and ultimately became severely depressed.

13. Claimant started a new sales job at Best Buy in September or October of 2016. However, consistent with his pattern of not keeping a job for very long, Claimant left this job in December due to excessive fatigue and memory problems. (Respondents' Exhibits, p. 50.)

14. On January 20, 2017, Claimant emailed his physician, Dr. Hebert, and stated:

> After taking the assessment on the Kaiser website, it appears that I may be severely depressed. I have battled with depression for years, but this is the worst it has ever been. I can't sleep, can't seem to motivate myself to do anything, have become antisocial and am constantly feeling irritated.

(Respondents' Exhibits, p. 36.)

15. On January 23, 2017, Dr. Hebert diagnosed Claimant with a major depressive disorder, recurrent episode, and severe anxiety. It was also noted that although Claimant stopped drinking alcohol a week earlier, he was drinking 3-5 glasses of wine every night. (Respondents' Exhibits, p. 37-38.) Claimant also indicated he was having relationship issues with his new wife.

16. On January 25, 2017, progress notes from Dr. Lee-Lopez indicate Claimant has previously been on lots of different medications for depression, including lithium, has been treated by three different psychiatrists, and has participated in therapy.

17. On or about February 2, 2017, Claimant was started on various medications to treat his major depressive disorder and severe anxiety. (Respondents' Exhibits, p. 68.)

18. On February 4, 2017, Claimant wrote an email to Dr. Hebert. Claimant indicated that his mood had improved dramatically and that he has been looking for work and felt that he had performed well in his interviews. Claimant also indicated that he felt like his anxiousness had gone away and that he felt much more comfortable talking to people and being social. (Respondents' Exhibits, pg. 76.)

19. On February 6, 2017, Claimant was evaluated by Ms. Jeanne Sullivan, R.N. According to her notes from that day, Claimant indicated he was "feeling a lot better", but "still feeling pretty anxious." Claimant was advised that it might take 4-6 weeks for the medication to start making a difference. (Respondents' Exhibits, pg. 69-70.)

20. On February 20, 2017, Claimant was evaluated by Ms. Sullivan, R.N. Claimant indicated he was feeling very good, "a complete 180." Claimant indicated that he was feeling so much better that he was "going after jobs he normally wouldn't have tried for. But is optimistic and hopeful w/job search."

21. On March 29, 2017, Employer offered Claimant a sales position. It is not clear from the record when Claimant actually started working for Employer.

22. On April 27, 2017, Claimant sent a communication to Dr. Hebert. He indicated that although things were going well on the Zoloft, the sexual side effects were just too much to handle and he wanted to know about trying a different medication. Therefore, Claimant was started on Wellbutrin and his Zoloft was discontinued. (Respondents' Exhibits, pg. 94-95, and 98.)

23. On April 27, 2017, the Employer's Director of Human Resources, Mr. Brian Hartman, spoke with Claimant about verifying the information contained in his resume. Mr. Hartman advised Claimant that his resume indicated he was consulting under the name JLP Ventures from 2009 to the present. Mr. Hartman also indicated that the licensing information Claimant provided regarding JLP Ventures showed a license was issued on June 23, 2009, but went delinquent on May 1, 2014, and therefore it was inconsistent with Claimant working as a consultant up through his application for employment with Employer. Claimant

advised Mr. Hartman that he did not renew his license in May of 2014 because he was accepting payment directly as an individual. Therefore, Mr. Hartman requested Claimant to provide invoices, 1099s or similar proof, to show that he was working as Ron Pitcock and/or JLP Ventures from May 1, 2014 to the present. (Respondents' Exhibits, pg. 322-323.)

24. Claimant also told Mr. Hartman that he was working for his father from February of 2015 to April of 2016 which overlapped the dates above. Therefore, Mr. Hartman also requested W2's, 1099s, or some other proof of payment. (Respondents' Exhibits, pg. 323.)

25. Mr. Hartman also asked Claimant to explain why the information he provided to Sterling, the third party background checking company, indicated Claimant was working for JLP Ventures as of April of 2016, even though he told Mr. Hartman that he started operating JLP Ventures in 2008 and then applied for a business license in 2009. (Respondents' Exhibits, pg. 323.)

26. On April 27, 2017, Claimant responded to Mr. Hartman via email and explained to him that when he provided the information to Sterling, the on-line form prepopulated with a start date of April 2016 for JLP Ventures and he could not correct the date. (Respondents' Exhibits, pg. 322.)

27. On April 28, 2017, Mr. Hartman responded to claimant via email and told him that he would follow up with Sterling regarding Claimant's contention that he could not fix the date and told Claimant to focus on obtaining the other information requested to verify his employment. (Respondents' Exhibits, pg. 321-322.)

28. On May 2, 2017, Mr. Hartman followed up with Claimant to see if he had been able to obtain the documents necessary to verify his employment as set forth on his resume. Claimant indicated that he had "looped in" his manager, Ms. Camron Carhart, and was waiting for direction from her, but that she was on vacation that week. Mr. Hartman advised Claimant that Ms. Carhart really has no involvement in the matter. He advised Claimant that if he needed assistance or had a clarifying question, Claimant should connect with him. Mr. Hartman then specifically asked whether Claimant was unable to provide documentation verifying his employment from May 2014 to the present. (Respondents' Exhibits, pg. 320-322.)

29. On May 15, 2017, Claimant sent an email to Dr. Hebert. Claimant indicated that the switch to Wellbutrin did not work as planned. Claimant indicated that:

> Actually, it made me regress into the fogginess I was having prior to getting on the Zoloft, so I stopped taking it. It also decreased sexual desire. . .
>
> Also, I have been getting the shakes and feeling more anxious than normal for the last 3-4 weeks. Not sure what that is about since nothing else really changed. This is a

> real problem for me because I have to talk to people for work and sometimes I feel panicky (is that a word?) when meeting people or trying to make phone calls.

(Respondents' Exhibits, pg. 97.)

30. On May 16, 2017, Claimant was restarted on Zoloft, i.e., sertraline. (Respondents' Exhibits, pg. 98.)

31. On May 16, 2017, Claimant responded to Mr. Hartman and Ms. Reinhard via email and provided some additional information regarding his work history as well as some additional documentation.

32. On May 18, 2017, Ms. Elaine Reinhard, who also works in Human Resources, wrote an email to Mr. Ferng and copied Mr. Hartman. She succinctly stated that they were trying to verify the following:

    - Consulting as Ron Pitcock Jr. from 5/1/2014 – current, and

    - Worked for father from 2/2015 to 4/2016.

    In another email that same day, Ms. Reinhard indicated Claimant had provided some information, but not enough information to cover the entire time periods at issue. She indicated that Claimant had failed to provide the following:

    - Nothing to show the worked as a Consultant or his father from 5/1/2014 – 11/30/2015

    - Nothing to show he worked as a Consultant or his father from 5/1/2016 – current.

    She also indicated that the information Claimant provided included a paycheck from a company called Clare Controls for the time period of 7/1/2013 to 7/12/2013.

(Respondents' Exhibits, pg. 312-313.)

33. On May 22, 2017, Ms. Reinhard followed up with Clare Controls and was advised Claimant worked for them from June 24, 2013, through July 11, 2014. However, Claimant did not list this employer on his resume. In addition, Claimant's work for Clare Controls overlapped the time period he said he was working as a consultant for his company, JLP Ventures. (Respondents' Exhibits, pg. 310-311.)

34. On May 23, 2017, Ms. Ferng wrote an email and indicated that Mr. Grey Wyman would talk with Claimant to see what Claimant had to say about the gaps and inconsistencies in his resume. The two key issues Ms. Ferng wanted to have explained were: i) Claimant's failure to verify that he worked as an independent

contractor from 5/1/2014 through 11/30/2015 and 5/1/2016 – current, and ii) Claimant's failure to include Clare Controls as an employer on his resume. (Respondents' Exhibits, pg., 310.)

35. On May 24, 2017, Mr. Hartman indicated in an email to Ms. Ferng, Ms. Reinhard, and Mr. Wyman that he did not think having Mr. Wyman meet with Claimant to discuss the missing information would hurt. Mr. Hartman indicated that:

> [O]ver the last two months Claimant has had no less than half a dozen opportunities to provide the documents requested or "come clean." He went on to say that Claimant will either continue to take us further down this rabbit hole or he will confess that he was not 100% truthful with his employment history. I think we are at a decision point to either fish or cut bait. Integrity is part of POISE, and I do not think [Claimant] has demonstrated any integrity through this entire process. With his lack of integrity, we have to ask ourselves is he someone we want representing TriNet in selling products to prospects or servicing existing clients? My answer is no because integrity is everything.

(Respondents' Exhibits, pg. 309.)

36. On May 24, 2017, Mr. Wyman spoke with Claimant about the unresolved matters regarding his resume. Claimant stated that he has provided everything that Employer should need and that he wanted to get past the matter. Mr. Wyman indicated that he did not believe they had everything – i.e., and that was the reason for the phone call. He asked Claimant whether he stretched or overstated anything on his resume. Claimant said he did not. Claimant was also asked about the inconsistency regarding Clare Controls and not listing that employer on his resume. Claimant indicated he was consulting for them and they needed funding and had to have a certain number of people on the books and that's why they added him. He also mentioned that during some of the open times when he was consulting – he did not have clients. At the end of the conversation, Mr. Wyman thought that he had not gotten any further "on this mystery" and advised the other people working on this matter, including Ms. Feng, about his phone call with Claimant. (Respondents' Exhibits, pg. 308.)

37. On May 24, 2017, via email, Ms. Feng thanked Mr. Wyman for the update, and asked Ms. Reinhard and Mr. Hartman if Claimant's explanations satisfied their issues. She indicated that she did not think his answers were satisfactory, but was open to the thoughts of the others. She also indicated that his answer regarding Clare Controls employment did not sound very plausible. (Respondents' Exhibits, pg. 308.)

38. Employer decided to terminate Claimant.

39. On May 25, 2017, Mr. Hartman and Ms. Carhart terminated Claimant due to the inconsistencies in Claimant's resume and the manner in which Claimant handled himself with Employer during the process of trying to resolve the inconsistencies contained in his resume.

40. The ALJ finds that Employer's conduct in investigating the discrepancies and gaps in Claimant's resume and ultimate decision to terminate his employment was done in good faith. Claimant set forth certain dates of employment, and in the end, he could not verify certain dates of employment and refused to acknowledge that he stretched, overstated, or misrepresented the length of some of his employment. In addition, Claimant failed to list all of his employers on his resume such as Clare Controls.

41. On June 15, 2017, Claimant emailed Dr. Hebert. Claimant contacted Dr. Hebert for a new prescription for Sildenafil, which was for another medical condition. Claimant indicated that he was having a problem filling his prescription and thought it was because of his insurance being terminated at the end of May after losing his job. (Respondents' Exhibits, pg. 110.)

42. On August 10, 2017, Claimant contacted Dr. Hebert and asked for his medications to be refilled. Claimant indicated that his depression and anxiety have become much worse since he lost his job. Claimant indicated that he was in bad shape and did not know where to turn.

43. On August 14, 2017, Claimant was seen by Ms. Lee-Lopez, Phd. Claimant complained of worsening symptoms of depression and anxiety since losing his job. Claimant indicated that he was let go abruptly because of "something in his background check." Claimant indicated he tried to work with his brother performing construction, but could not do the work since he was having a hard time being around people and was afraid that he might cause someone to get hurt. Dr. Lee-Lopez did not opine as to whether the conduct of Claimant's employer, as alleged by Claimant, was a psychologically traumatic event. (Respondents' Exhibits, pg. 120.)

44. On August 15, 2017, Claimant saw Dr. Hebert. Dr. Hebert noted that Claimant was prescribed lithium due to a concern of bipolar disorder. Claimant complained of ups and downs with elevated moods in the spring and crashes in June and December. Claimant also indicated that things started going downhill in June of 2016 and that he was making crazy financial moves and incurred $20,000 of debt. Dr. Hebert noted that she did not know whether Claimant's alcohol abuse was causing his roller coaster of moods. (Respondents' Exhibits, pg. 126.)

45. On September 5, 2017, Claimant presented to Dr. Hebert. Claimant was shaking and feeling really panicked. Claimant indicated he tried going out Sunday on a "date night" and went bowling. Claimant indicated that he started shaking after being out for about 35 minutes. Claimant was assessed as suffering from a

panic attack. An ambulance was called to transport Claimant to the emergency department, but he declined. Dr. Hebert also indicated in her report that Claimant was drinking 2-3+ glasses of wine per night and that she could not rule out that Claimant's symptoms were due to alcohol withdrawal. Her note indicates that Claimant was going to see a psychiatrist the following week. (Respondents' Exhibits, pg. 152.)

46. There is also a call documentation note dated September 5, 2017, which was made by Dr. Christopher Frazier. The note indicates Claimant was in the clinic having a panic attack and that the physician was calling EMS for transport. It was also noted that Claimant had been drinking lots of alcohol lately. (Respondents' Exhibits, pg. 155.)

47. On September 13, 2017, Claimant underwent a psychiatric evaluation at AllHealth Network, which was performed by Dr. Sohini Parikh. Claimant's chief complaint was "I need meds for my anxiety, depression, mood swings." Claimant reported a long history of emotional problems, including one psychiatric hospitalization. Claimant also reported a strong family history of mood disorders. Claimant also reported that he could not hold a job for more than 1½ years due to anxiety and irritability and that he recently lost his job in May of 2017 for "no reason." Claimant also reported mood swings, including impulsivity spending money unwisely, hyper-sexual, hyper-verbal, less need for sleep, and anxiety. Dr. Parikh diagnosed Claimant with a general anxiety disorder, social major depressive disorder vs bipolar disorder, and alcohol use. Dr. Parikh also changed Claimant's medication regimen by reducing and increasing certain medications as well as starting other medications. Dr. Parikh did not opine as to whether Employer's conduct, as alleged by Claimant, was a psychologically traumatic event. (Respondents' Exhibits, pg. 155-158.)

48. On September 25, 2017, Claimant wrote an email to Dr. Hebert. Claimant complained of increased confusion, problems sleeping, and horrible dreams. Claimant also complained of problems with balance, dizziness, and feeling like he is going to pass out. He also complained of increasing rage and that he is getting more and more agitated as time passes. Claimant also complained of increasing anxiety and shaking that even occurs at home.

49. On November 1, 2017, Claimant met with a counselor, Julie Handley, LPC CACIII, of AllHealth network. (Ms. Handley is a Licensed Professional Counselor and a Certified Addiction Counselor, III; *See* Respondent's Exhibits, pg. 217.) This is one of the few records where Claimant discusses the alleged conduct of his employer that Claimant alleges made things so difficult. Claimant indicated that when he was talking to his manager [about the inconsistencies in his resume] he thought things were okay and when he talked to human resources [about the inconsistencies in his resume] he did not think things were okay. (Respondent's Exhibits, pg. 212 and 217.) This is consistent with Claimant's testimony at hearing.

50. The notes from Ms. Handley, also indicate that Claimant losing his job, and the way that it transpired, has been devastating for him. (Respondents' Exhibits, pg. 214.) Claimant's goals, as set forth in her notes, indicates that "I want to get back to how things were before I started feeling troubled. Before I was fired I was able to be productive." (Respondents' Exhibits, pg. 215.)

51. Although Ms. Handley's notes indicate that Claimant stated that "Before I was fired I was able to be productive," such statement is inconsistent with the medical records. As noted in his medical records, towards the end of 2016, Claimant obtained a job at Best Buy and had to quit after 2-3 months due to memory and fatigue problems. Then, in January of 2017, Claimant continued to decompensate and ended up being diagnosed with major depression and severe anxiety.

52. Ms. Handley did not opine that the events described by Claimant qualified as a psychologically traumatic event. Moreover, Ms. Handley is not a licensed physician or psychologist.

53. Claimant testified at hearing. Claimant testified that Employer's conduct regarding the inquiry into the inconsistencies contained in his resume and his termination caused his psychological condition, need for medical treatment, and disability. Claimant testified that on the one hand, while they were investigating the discrepancies contained in his resume, his communications with his supervisor, Ms. Carhart, led him to believe that everything was okay and that his job was not in jeopardy. Claimant testified that on the other hand, his communications with human resources led him to believe that everything was not okay and his job was in jeopardy. Claimant described the emails and telephone calls from human resources as badgering and indicated that the tone maintained during the phone calls was very accusatory and cruel. (Hearing Transcript, pg. 34-36.) Claimant indicated that this back and forth was traumatic. Claimant testified that Employer's conduct caused him to think on one day he had this fabulous job and on the next day he was going to lose this fabulous job. (Hearing Transcript, pg. 36.) According to Claimant, he thought Employer's conduct towards him regarding the inconsistencies contained in his resume was cruel and unusual. (Id.)

54. The ALJ finds that there were discrepancies in Claimant's resume and that Employer did not act in a cruel and unusual manner in requesting Claimant to verify his employment history as set forth in his resume. The communications – emails - provided by Respondents demonstrate they acted appropriately throughout the process and even gave Claimant the opportunity to "come clean" regarding the discrepancies and Claimant refused to do so.

55. On January 10, 2018, Gary Gutterman, M.D., (a psychiatrist) performed an Independent Medical Examination on behalf of Respondents, and issued a report dated January 29, 2018. As part of his examination, Dr. Gutterman obtained detailed history regarding Claimant's development and psychiatric history. Dr.

Gutterman also obtained from Claimant his version of events regarding the investigation into the discrepancies contained in his resume and his termination.

56. Claimant told Dr. Gutterman that when he interviewed for the job with Employer he was upfront about his background and employment. Claimant said that he explained that there were many positions not on his resume because he, in many instances, worked with startup companies in which he did not receive a W-2 and he was paid on the side or in some other manner and therefore his employment resume was incomplete. (Respondent's Exhibits, pg. 272.)

57. The ALJ does find Claimant's statement to Dr. Gutterman that he told Employer during his interview that his resume was incomplete to be credible. Had Claimant made this statement to Employer during his interview, it would seem logical that Claimant would have reiterated that statement to human resources when he was repeatedly asked for documentation to support his resume and again when asked if he stretched or overstated his resume. Instead of telling Employer that his resume was incomplete, he stated that his resume was complete and was offended that he was being questioned about it.

58. Claimant went on to tell Dr. Gutterman that at some point, Employer had a "beef" with his resume and that they started asking him for information about his background in an accusatory manner. Claimant said that he thought his job was being threatened and they were being mean and brutal. Claimant said that he asked his manager whether he was going to lose his job and she told him that everything was fine. He said that one day he thought he was going to be terminated and the next day he thought he was in good graces. Claimant said the telephone call from human resources made him feel like a "bad person." He told himself, "here we go again" (meaning that he was going to lose something that he had invested in as he had done so often in his life). Claimant stated that it was stressful while things went back and forth between himself and human resources. (Respondent's Exhibits, pg. 273.)

59. Dr. Gutterman testified at the hearing. Claimant cross examined Dr. Gutterman about Claimant's perceived treatment by Employer and asked Dr. Gutterman whether he had ever evaluated a similar situation in which someone was led to believe by one person that their job was safe and then led to believe by another person that their job was not safe. Dr. Gutterman testified that although he had not evaluated the exact situation described by Claimant, the situation was very similar to the typical relationship problems he has evaluated numerous times in which one person is ambivalent about their love towards another person. As stated by Dr. Gutterman:

> I certainly have had many patients who have been in relationships, who've been told I love you, and then I don't love, you and I love you, but no, I don't love you. Or had some nuance that suggested yes, your part of -- we're part of a relationship, but no, we're not. So that kind of back and

> forth, that kind of ambivalence that you're talking about, that kind of disappointment, many, many times.

(Hearing Transcript, pg. 100-101.)

60. Claimant also cross examined Dr. Gutterman about Dr. Gutterman's statement that Employer told Dr. Gutterman that they do not want to fire employees. Claimant asked Dr. Gutterman:

> In your expertise does a company that does not want to fire individuals go hunting for reasons to fire them?

Dr. Gutterman responded as follows:

> See, that's again -- that's an interesting way of phrasing it. You're saying they were hunting to look for reasons, rather than they're trying to fill in the gaps that you didn't provide them, again, as if somehow they're devious.

(Hearing Transcript, pg. 101.)

61. Claimant stated that he was ultimately asked by a vice president whether he had embellished his resume. Claimant stated that he said "I don't know how you could ask me that." Claimant stated that his supervisor asked him how the phone call went and he started crying. After Claimant started crying, he left the office for lunch, and then returned to the office and spoke to his supervisor again. Claimant indicated that his supervisor could tell he was distraught. Claimant stated that he was unable to hold his thoughts easily and he was experiencing sadness, frustration and rage. He stated that he knew he was probably going to be fired. Therefore, he told his supervisor that he was going to seek legal counsel because he thought he was being retaliated against for making comments about the company's discrimination policy. (Respondents' Exhibits, pg. 273.)

62. Claimant told Dr. Gutterman that he was terminated the following day. Claimant also told Dr. Gutterman that after he was terminated, he was out of it for the next three months. Claimant indicated that he could not leave his home, could not talk to his wife, and would have to be reminded to take his medications. Claimant further indicated that he could not find pleasure in anything and he had no motivation to do anything. He wanted to curl up in a ball and hide under his covers. He then gradually spent a few days out of his house each month. (Respondent's Exhibits, pg. 273-274.)

63. Claimant also told Dr. Gutterman that he has also filed an EEOC claim based on age and disability discrimination. Claimant stated that "he thought he was being retaliated against for making comments about Employer's discrimination policy which constituted whistleblowing" and "thought he was working in a hostile work environment." (Respondent's Exhibits, pg. 276.)

64. Dr. Gutterman concluded in his report that if Claimant's reported symptoms are accurate, since he did not have Claimant's medical records at the time he performed his IME, Claimant experienced a significant psychological reaction of withdrawal, isolation, and depression after being terminated from Employer which represented a depressive episode. Dr. Gutterman also stated that Claimant's condition started to improve in September of 2017 and that he has improved gradually and steadily since that time with the psychological treatment provided by Julie Handley, and additional psychopharmacologic medication prescribed by Dr. Parikh. He also opined that he did not anticipate Claimant would have any permanent disability due to his termination. (Respondents' Exhibits, pg. 278.)

65. Dr. Gutterman opined that Claimant's treatment by Human Resources in which they requested Claimant to explain the inconsistencies in his resume and provide supporting documentation regarding his employment history as well as his termination was not a psychologically traumatic event. Dr. Gutterman indicated that Human Resources' attempts to have Claimant verify the information contained in his resume left him feeling "persecuted and victimized." Dr. Gutterman stated:

> The patient seems to have a recurrent theme of feeling "persecuted and victimized" in various instances, including his not having custody or contact with three of his children due to divorce court determinations. The patient seems to have experienced the HR investigation as being done in a mean, brutal, accusatory and nonprofessional manner. I would seriously question the patient's reality testing regarding this perception on his part given his propensity to recurrently experience encounters and events in a persecutory fashion. Bipolar patients can often experience life events as persecutory due to altered reality testing influenced by suspiciousness and agitation.

(Respondents' Exhibits, pg. 277.)

66. Dr. Gutterman also stated in his report that Claimant's reaction to being questioned about his resume and then being terminated would not evoke significant symptoms of distress in a worker in similar circumstances. Dr. Gutterman indicated that:

> [Claimant's] response was extreme and not one that would be noted in an employee in a similar environment. The patient's significant depressive episode was due to his history or Bipolar Disorder. It was also due to multiple stressors having accumulated in his psychological and emotional life. . . [T]he patient's response was idiosyncratic and unique to his particular intrapsychic life and preexisting psychiatric disorder; namely, Bipolar Disorder. Hence, even

> if the patient's claim that he was terminated on the basis of age and disability factors as well as a retaliation for his whistleblowing (which I question due to reality testing factors), I do not believe that other individuals in a similar work situation would have reacted as the patient did. I believe that his reaction was idiosyncratic and extreme based on his Bipolar Disorder and his having experienced multiple preexisting and co-existing stressors. The patient experienced a significant depressive episode in late 2016 and various psychotropics had been added to his regimen as a result of that depressive episode. Hence, the patient's long standing Bipolar Disorder, various psychological stressors that he encountered during his adulthood over the years, and his recurrence of a depressive episode in late 2016 all left him vulnerable to his idiosyncratic and extreme response to his being terminated from [Employer].

(Respondents' Exhibits, pg. 277.)

67. Dr. Gutterman also testified consistent with his report. Dr. Gutterman testified that Employer's treatment of Claimant and his termination was not a psychologically traumatic event. He also testified that such treatment and the termination would not evoke significant symptoms of distress in a worker in similar circumstances. Dr. Gutterman also testified that Claimant would not suffer any permanent disability due to his termination.

68. The ALJ finds the opinions offered by Dr. Gutterman in his report and testimony to be persuasive and credible.

69. The ALJ does not find Claimant's testimony, statements to various medical providers, and statements to Dr. Gutterman, regarding the way he was treated by Employer to be reliable. As credibly testified to by Dr. Gutterman, he seriously questioned Claimant's reality testing regarding the events based on Claimant's propensity to recurrently experience encounters and events in a persecutory fashion due to Claimant's bipolar disorder which can cause him to experience life events as persecutory due to altered reality testing influenced by suspiciousness and agitation.

70. The ALJ also finds that although Claimant worked for Best Buy towards the end of 2016, it appears he also failed to include Best Buy on his resume. Such failure further erodes Claimant's credibility.

71. The ALJ finds that Employer questioning Claimant about the inconsistencies in his resume, requesting supporting documentation, and then terminating Claimant based on the inconsistencies contained in his resume and the manner in which Claimant handled the matter is not a psychologically traumatic event or events.

72. The ALJ finds that Claimant did have psychological symptoms due to his termination. However, the ALJ finds that Employer acted in good faith when terminating Claimant.

73. Claimant has failed to establish by a preponderance of the evidence that he suffered a permanent mental disability due to the way he was treated by his employer based on the inconsistencies in his resume and his termination.

74. Claimant has also failed to establish that he suffered a "psychologically traumatic event" during his employment.

75. Claimant also failed to establish by a preponderance of the evidence that his termination was outside his usual experience. At the time Claimant was terminated from his employment with Employer, he was 50 years old. As found, Claimant has not been able to keep a job for more than 1 ½ years, or 2 years at most, due to his underlying psychological problems. After high school Claimant went into the National Guard and then went to college for one semester. Assuming Claimant started working at 20, he has lost approximately 15-20 jobs. Therefore, Claimant's termination and loss of his job is not outside his usual experience.

76. The ALJ finds that a similarly situated worker who misrepresented their work history, was asked to verify their work history, and was subsequently terminated based on their inability to verify their work history would not end up suffering from significant symptoms of distress i.e., a major depressive disorder, significant anxiety, and end up homebound for almost three months.

77. Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable psychiatric impairment, disability, or injury.

CONCLUSIONS OF LAW

General Provisions

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

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

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

I. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable mental impairment during the course and scope of his employment with Employer.

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

The Workers' Compensation Act has authorized recovery for a broad range of physical injuries, but has "sharply limited" a claimant's potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAP, Mar. 9, 2011). Enhanced proof requirements for mental impairment claims exist because "evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury." *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAP, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAP, Feb. 19, 2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), affd 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4-728-064 (ICAP, Jan. 6, 2009).

Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment." *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury - mental impairment - during the course and scope of his employment with Employer.

Claimant's claim fails for a number of reasons. First, Claimant has failed to establish by a preponderance of the evidence that he suffered a permanent mental disability due to the way Employer handled the inquiry into the inconsistencies in his resume and his termination. As found, Dr. Gutterman opined that Claimant's reaction to the inquiry into the inconsistencies in his resume and his termination would not result in permanent disability, and the ALJ credits Dr. Gutterman's testimony regarding this issue.

Second, Claimant failed to establish that the manner in which Employer handled the inquiry regarding the inconsistencies in his resume and his termination was a psychologically traumatic event or events. Dr. Gutterman credibly opined that the manner in which Claimant was treated due to the inconsistencies contained in his resume and his termination would not qualify as a psychologically traumatic event or events and the ALJ credits his opinion.

Claimant also failed to establish by the testimony of a licensed physician or psychologist (via oral testimony, reports, or other documentary evidence) that he suffered a "psychologically traumatic event" during his employment. As found, Claimant

described to Ms. Handley how he felt based upon how he perceived the way his employer handled the inconsistencies in his resume and ultimate termination. However, Ms. Handley did not opine that Employer's conduct, if true, constituted a psychologically traumatic event. In addition, Ms. Handley is not a licensed physician or psychologist. Claimant told Dr. Parikh that he was terminated for unexplained reasons. Dr. Parikh, however, did not render an opinion as to whether Claimant's termination was considered a psychologically traumatic event. Claimant also told Dr. Lee-Lopez, a psychologist, that he was terminated from employment due to something in his background check. Dr. Lee-Lopez did not opine whether the manner in which Claimant alleges he was treated and his termination constituted a psychologically traumatic event.

In addition, Claimant's testimony and statements that he was treated in a cruel and unusual manner during the investigation into the inconsistencies in his resume and that this treatment was psychologically traumatic was not found to be credible or reliable. As found, the emails between Claimant and the various people in human resources were not cruel and unusual. The emails were professional and cordial and merely requested Claimant to provide supporting documentation for the employment history listed on his resume. In addition, the fact that Claimant perceived he was getting mixed messages from his supervisor and those in human resources as to whether his job was in jeopardy was not found to be a psychologically traumatic event.

Moreover, Dr. Gutterman opined that Claimant's reality testing regarding his perception of events is flawed given his propensity to recurrently experience encounters and events in a persecutory fashion and to experience life events as persecutory due to altered reality testing influenced by suspiciousness and agitation. In other words, Claimant's misperceives reality. The ALJ found Dr. Gutterman's opinion to be credible and persuasive and his opinion provides additional support for the finding that Employer's conduct was reasonable and that they acted in good faith – despite Claimant's contentions and characterizations.

Third, Claimant failed to establish that losing a job and being terminated was "generally outside of a worker's usual experience." Being terminated might be generally outside of some workers' usual experience. However, as found in this case, Claimant has been unable to keep a job for more than 1 ½ years, or 2 years at most, due to the manifestations of his underlying psychological conditions. Therefore, Claimant has probably lost 15-20 jobs since he was 20. Thus, Claimant's loss of his job was not generally outside Claimant's usual experience.

Fourth, Claimant's psychological reaction was due to his termination. And, Employer acted in good faith when investigating the discrepancies in Claimant's resume and terminating Claimant. As found, Claimant misstated his employment history on his resume and was unable to provide sufficient documentation to support the work history stated on his resume. This included the failure to list a prior employer. Employer gave Claimant the opportunity to explain why he failed to list a prior employer and to admit that he overstated or stretched some of the dates on his resume. Employer determined

Claimant's excuse for not listing a prior employer was not plausible. Claimant also refused to admit that he overstated or stretched some of his employment dates. Therefore, Employer terminated Claimant and the ALJ found that the decision to terminate Claimant was made in good faith.

Claimant told Dr. Gutterman that when he interviewed for the job with Employer he was upfront about his background and employment. Claimant said that he explained that there were many positions not on his resume because he, in many instances, worked with startup companies in which he did not receive a W-2 and he was paid on the side or in some other manner and therefore his employment resume was incomplete. The ALJ did not find Claimant's statement to Dr. Gutterman that he told Employer during his interview that his resume was incomplete to be credible. Had Claimant made such a statement to Employer during his interview, Claimant would have reiterated that statement to human resources when they repeatedly asked him for documentation to support his resume and asked him whether he stretched or overstated his resume. Instead of telling Employer that his resume was incomplete, he stated that his resume was complete and was offended that he was being questioned about it. Therefore, Claimant's contention that Employer knew his resume was incomplete from the beginning and asked for supporting documentation for an ulterior motive is not found to be credible or persuasive.

Fifth, the ALJ found Employer's actions would not evoke significant symptoms of distress in a similarly situated worker. Dr. Gutterman opined Claimant's reaction to Employer requesting Claimant to verify his employment history as set forth on his resume and then terminating him was idiosyncratic and extreme based on his bipolar disorder and Claimant having experienced multiple preexisting and co-existing stressors. Dr. Gutterman indicated that Claimant experienced a significant depressive episode in late 2016 and various psychotropics had been added to his medication regimen as a result of that depressive episode. Dr. Gutterman opined that Claimant's long standing bipolar disorder, various psychological stressors that he encountered during his adulthood over the years, and his recurrence of a depressive episode in late 2016 all left him vulnerable to his idiosyncratic and extreme response to his being terminated. The ALJ found Dr. Gutterman's opinions to be credible and persuasive.

In addition, Claimant had only worked for Employer for two months. His reaction to losing a job that he only had for two months also supports a finding that his reaction was out of proportion to how a similarly situated worker would respond.

Based on the evidence submitted at hearing, and the persuasive opinions of Dr. Gutterman, the ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable mental impairment injury.

ORDER

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

1. Claimant's claim is denied and dismissed.

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

DATED: March 22, 2018

Glen Goldman

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

ISSUES

- Claimant applied for hearing endorsing the issues of compensability, medical benefits, authorized provider, average weekly wage, petition to reopen claim, and disfigurement. His date of alleged injury was December 23, 2015.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on January 23, 2015, while working as a carpenter for Employer. Respondents admitted for medical benefits only as Claimant missed no work time.

2. On September 16, 2016, Respondents filed a Final Admission of Liability ("FAL") admitting to September 2, 2016 as the date of MMI date and an upper extremity impairment rating of 17%. The value of the scheduled impairment rating was $10,145.14.

3. On November 28, 2016, Claimant filed an untimely objection to the FAL. In the objection, he explained that his objection was late because he began serving a sixty-day jail sentence the day after he received a copy of the FAL.

4. On November 6, 2017, Claimant filed an application for hearing identifying the issues stated above, including a petition to reopen claiming a change in his medical condition. Claimant alleged that his back had been injured on December 23, 2015, as well, but that he had not received treatment for that injury. He attached a copy of a medical form of Julie Parsons, MD, which lists as a work related medical diagnosis, "LSS." The ALJ finds that in this particular context those abbreviations stand for lumbar spinal stenosis. However, that medical record is not associated with this claim. Rather, it relates to a November 5, 2017, injury which lists Flatirons Construction Corp. as the employer and Zurich Insurance as the insurer.

5. On December 7, 2017, Respondents responded to Claimant's application for hearing. Respondents alleged that the claim had closed as a matter of law because Claimant had failed to timely obtain a DIME.

6. Claimant testified at hearing. The substance of his testimony was that he had been injured at work on December 23, 2015. And although he had received treatment for his right wrist, he had not received medical treatment for his back or right shoulder.

CONCLUSIONS OF LAW

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

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. (2017). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S.

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

It is within the ALJ's purview as the finder of fact to determine the credibility of witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

The Administrative Law Judge finds and concludes that, considering the totality of the evidence, Claimant failed to prove it more likely than not that his worsened condition and need for treatment were caused by the industrial injury. Thus, the additional issues need not be addressed.

ORDER

It is therefore ordered that:

Claimant's claim to reopen his claim is denied and dismissed with prejudice.

DATED: March 26, 2018

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

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

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant proved by a preponderance of the evidence that she sustained a work-related industrial injury and/or aggravation of a preexisting condition on February 25, 2017;

b. Whether Claimant's lower back and left hip injuries are compensable under this claim as a direct and natural consequence of the February 25, 2017, right knee injury;

c. Whether Claimant proved by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her right knee, low back and left hip injuries;

d. Whether Claimant established by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period of April 30, 2017, to October 16, 2017; and

e. What is Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant is 54 years old and has worked for Employer as a Customer Service Agent since December 1, 2014. Each day at work as a Customer Service Agent, Claimant is assigned a position at either the ticket counter, the gate or at the baggage service office, and she works that assignment for her entire shift.

2. As a part of her work-related duties at the ticket counter, Claimant normally weighs customers' bags, checks their identification and then lifts their bags onto a bag belt. Customer Service Agents for the Employer are taught proper bag lifting techniques, which requires squatting to complete each lifting motion. Each time Claimant moves a bag, she squats down, lifts the bag and then takes one to two steps before placing the bag on the bag belt. Claimant estimated that in a normal shift at the ticket counter she lifts at least 300 bags weighing 40 to 50 pounds each.

3. Claimant was assigned to work at the ticket counter from 7:00 a.m. to 3:30 p.m. on February 25, 2017. The morning of February 25, 2017, was not a typical morning at the ticket counter, because the bag belt malfunctioned and could not be used. The bag belt is a conveyor belt. Instead of simply lifting each bag once to put it onto the bag belt, she had to move each customer's bag twice, once to a staging area and then later onto the repaired bag belt.

4. At approximately 10:00 a.m. on the morning of February 25, 2017, Claimant's right knee became painful. Claimant was able to work through the pain, but by the end of her shift at 3:30 p.m., Claimant's knee was extremely painful and swollen. Claimant did not report her symptoms to a supervisor at that time. It is common for Claimant to have aches and pains after working a busy day at the ticket counter, so she went home with the hope that her knee pain and swelling would resolve on its own. Claimant spent the evening resting and icing her knee.

5. Claimant's knee did not improve with rest and ice. Therefore, when she reported to work for her next regularly scheduled shift on February 27, 2017, Claimant formally reported her injury to Customer Service Supervisor Brandy Barr. The Occupational Injury Report completed by Ms. Barr lists "carrying/lifting" as the cause of Claimant's injury, and goes on to state as follows:

> [Claimant] cannot remember a specific action that caused the injury however about half way into the shift she began to feel pain in her knee in which she states she felt like she must have twisted or strained it in some way. [Claimant] gave it the weekend to see if it was still feeling the same and as of now it is still painful and she is now reporting the injury …

6. Claimant injured her knee while squatting down to lift a heavy bag at work on February 25, 2017, but she cannot pinpoint an exact moment when the injury occurred. Claimant also reported the same mechanism of injury to each of the medical providers she has seen in this case. On February 25, 2017, Claimant had a busy day at the airport and that she had already serviced 60 to 70 customers by the time her knee became painful around 10:00 a.m.

7. Before February 25, 2017, Claimant had never experienced pain or swelling in her right knee, and she had never gone to a physician for treatment relating to her right knee. In fact, Claimant's insurance records reflect that December 1, 2014, to February 25, 2017, Claimant had only been to a physician on one occasion, and that was for a sinus infection.

8. After reporting her injury to Employer, Claimant established care with Martin Kalevik, D.O. of HealthONE Occupational Medicine and Rehabilitation. Dr. Kalevik sent Claimant for MRI imaging of the knee on March 10, 2017, and then ultimately referred Claimant to Rajesh Bazaz, M.D., an orthopedic surgeon with Western Orthopedics. Dr. Bazaz met with Claimant and evaluated Claimant's knee on six occasions, and also provided expert testimony in this case.

9. Dr. Bazaz diagnosed Claimant with arthritis of the right knee. Dr. Bazaz credibly opined that twisting the knee or squatting up and down to lift heavy items could suddenly aggravate previously asymptomatic arthritis.

10. Dr. Bazaz opined that it is impossible to tell what caused Claimant's arthritis or how long it has been present in Claimant's right knee. However, Dr. Bazaz further opined that Claimant sustained an aggravation of her preexisting arthritis on February 25, 2017, while squatting down and lifting baggage at work. Dr. Bazaz opined that the timing of the onset of Claimant's symptoms was relevant. Also relevant to Dr. Bazaz was the fact that prior to lifting bags all day at work on February 25, 2017, Claimant had never previously suffered from issues associated with her right knee.

11. Dr. Bazaz recommended non-operative treatment for Claimant's right knee condition, including a steroid injection, a lubricant injection, and physical therapy. Claimant underwent these treatments, and her knee is now approximately 50% improved. While she has not been able to return to doing all of her hobbies, Claimant reports that the treatment she has received for her knee has allowed her to return to work in a full-time capacity performing her normal job duties.

12. Claimant underwent a medical examination with Timothy O'Brien, M.D. on July 14, 2017, and Dr. O'Brien issued a report of the same date. Dr. O'Brien agreed with much of Dr. Bazaz's opinions. Dr. O'Brien opined that Claimant had arthritis in the knee that preexisted the February 25, 2017 incident and Dr. O'Brien agrees that arthritis in the knee can be completely asymptomatic and then suddenly become symptomatic due to an aggravation. Dr. O'Brien opined that spending an entire day lifting 30 to 40 pound pieces of luggage could aggravate preexisting arthritis. However, Dr. O'Brien would not agree that spending a day lifting luggage weighing 30 to 40 pounds did aggravate Claimant's preexisting arthritis in the right knee. However, Dr. O'Brien concluded that Claimant's sudden onset of symptoms in the right knee on February 25, 2017, was due to her "personal health."

13. In June of 2017, Claimant developed pain in the left hip and lower back and was referred to Samuel Chan, M.D. for evaluation. After completing an examination of Claimant, Dr. Chan opined that Claimant suffered from "compensatory symptoms" of the left lumbar spine and hip area. Dr. Chan recommended and performed an SI injection under fluoroscopic guidance for Claimant's lower back, and also recommended chiropractic treatment. With respect to the hip, Dr. Chan obtained MRI imaging and then determined that Claimant was suffering from an exacerbation/aggravation of preexisting arthritis.

14. Dr. O'Brien opined regarding Claimant's lower back and hip symptoms concluding Claimant's symptoms were a manifestation of Claimant's personal health and were not in any way related to Claimant's work on February 25, 2017 or right knee symptoms.

15. Claimant credibly testified at hearing that prior to June of 2017 she had never suffered from lower back or left hip symptoms. Claimant testified that since beginning treatment for her hip and lower back, those conditions have improved by approximately 60%.

16. Martin Kalevik, D.O. assigned work restrictions for Claimant beginning on March 2, 2017. Employer was not able to accommodate those restrictions between April 30, 2017, and October 16, 2017, and Claimant lost wages from Employer during that period.

17. Prior to her injury, Claimant worked for Employer approximately 40 hours per week and was paid at a rate of $14.58 per hour. Between February 16, 2016, and February 15, 2017, Claimant earned a total of $25,733.40. This equates to a daily rate of pay of $70.31 and an average weekly wage of $492.17 ($25,733.40/366 Days = $70.31; $70.31 x 7 = $492.17).

18. Claimant also works as a golf professional and owns her own company, Lana Ortega Golf, since 2006. Claimant has not sustained any wage loss with respect to Lana Ortega Golf. Claimant discussed her work for Lana Ortega Golf with her medical providers in this case, and they approved her continued work.

CONCLUSIONS OF LAW

General Legal Principles

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might

lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

Compensability – Claimant's Right Knee

4. A claimant bears the burden of proving by a preponderance of the evidence that an injury occurred within the course of, and arose out of, employment with the employer. Section 8-41- 301(1), C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury or condition is in the course of employment if it occurred within the time and place limits of employment and during an activity that has some connection with the employee's job-related functions. *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury or condition arises out of employment if "there is a causal connection between the duties of employment and the injuries suffered." *Deterts v.Times Pub. Co*., 38 Colo. App. 48, 552 P.2d 1033 (1976).

5. The mere existence of a pre-existing condition does not prevent an injury from "arising out of" an injured worker's employment. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

6. In this case, the credible and persuasive evidence presented at hearing established that Claimant had arthritis of the right knee that preexisted her February 25, 2017, injury. Claimant's arthritis constituted a preexisting condition. Further, the evidence established that Claimant's work for Employer on February 25, 2017, aggravated her preexisting condition of arthritis and caused the sudden need for medical attention. Prior to February 25, 2017, Claimant had never had a problem with her right knee. Then, suddenly, after an especially strenuous morning at work filled with squatting and lifting 40 to 50-pound pieces of luggage, Claimant's knee became swollen and painful. Dr. Bazaz's medical records and testimony offers the most probable explanation for Claimant's sudden onset of symptoms on February 25, 2017. Claimant's onset of symptoms was caused by her work. Dr. O'Brien's disagreement with this conclusion was not deemed credible. Accordingly it is concluded that Claimant's injury was precipitated by her work for Employer on February 25, 2017, when she was squatting down and lifting 300 or more bags weighing 40 to 50-pounds in an eight-hour shift.

Causation – Claimant's Lower Back & Left Hip

7. In Colorado, an employer is liable for the natural consequences of a work injury or the treatment obtained because of the work injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In this case, substantial evidence established that Claimant's altered gait caused by her right knee injury led to pain in her lower back and left hip. Dr. Chan, M.D. credibly opined that Claimant's symptoms are a "compensatory" injury related to her right knee. Also, Claimant credibly testified that prior to the onset of her right knee symptoms she had never experienced any pain or symptoms in her lower back or left hip. For these reasons, Claimant's lower back and left hip symptoms are deemed to be causally related to the compensable February 25, 2017, right knee injury.

Medical Benefits

8. A claimant is entitled to authorized medical treatment that is related and reasonably necessary to cure and relieve the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Yeck v. Industrial Claims Appeals Office*, 996 P.2d 228 (Colo.App. 1999). A claimant bears the burden to prove by a preponderance of the evidence the causal relationship between the work-related injury and the condition for which treatment is sought. *Snyder v. Industrial Claims Appeals Office,* 942 P.2d 1337 (Colo.App. 1997).

9. An employer is responsible for medical treatment when, in the normal progression of treatment, an authorized treating physician refers the claimant to other providers for additional treatment. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo.App. 1985). If a claimant seeks treatment outside the chain of authorized providers, respondents are not required to pay for it. Section 8-43-404(7), C.R.S.; *Yeck v. Industrial Claims Appeals Office, supra.*

10. As found, Claimant has proven by a preponderance of the evidence that she sustained a compensable right knee injury on February 25, 2017, that ultimately led to pain in her lower back and left hip. Claimant is therefore entitled to receive reasonable, necessary and casually related medical benefits for her right knee, lower back, and left hip injuries.

11. The medical treatment Claimant received through HealthONE Occupational Medicine and Rehabilitation, Health Images, Western Orthopedics, Colorado Occupational Medical Partners, Inc., Mile High Sports & Rehabilitation, and Injury Care Associates is found to be reasonable, necessary, and related to Claimant's compensable claim.

Temporary Disability Benefits

12. To prove entitlement to temporary total disability benefits, a claimant must prove the industrial injury caused a "disability." Section 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two

elements. The first is “medical incapacity,” which is evidenced by loss or impairment of bodily function. The second is temporary loss of earning capacity, which is evidenced by the claimant’s inability to perform his pre-injury full duty job. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Temporary disability benefits continue until the occurrence of one of the four terminating events specified in Section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg, supra*.

13. Claimant’s February 25, 2017 injury/aggravation caused functional limitation and restriction the prohibited her from completing her full, regular duty job for Employer. This is reflected by the restrictions assigned by Dr. Kalevik. Claimant’s functional limitations and restrictions interfered with her ability to work for Employer. As a result, Claimant testified that she lost wages between April 30, 2017, and October 16, 2017. Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits for that period.

Average Weekly Wage

14. The average weekly wage of an injured employee shall be taken as the basis upon which to compute compensation payments. Section 8-42-102(2), C.R.S. normally requires a judge to determine a claimant’s average weekly wage based on her earnings at the time of injury. A judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of the injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, Section 8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an average weekly wage in another manner if the prescribed methods will not fairly calculate the average weekly wage based on the particular circumstances of the case. *Campbell v. IBM Corp*., 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an average weekly wage is to arrive at a fair approximation of a claimant’s wage loss and diminished earning capacity*. Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240- 475 (ICAO May 7, 1997).

15. As found, a calculation based on the relevant period of September 16, 2016, through February 15, 2017, results in an AWW of $492.17. This constitutes a fair approximation of Claimant’s wage loss and diminished earning capacity.

ORDER

1. Claimant suffered a compensable work-related injury to her right knee on February 25, 2017.

2. Claimant’s lower back and left hip injuries are a natural consequence of her February 25, 2017, injury, and are therefore causally related to this compensable claim.

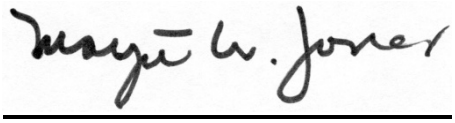
3. Respondents are financially responsible for all medical treatment that is reasonable, necessary and related to Claimant’s right knee, lower back, and left hip injuries. This includes treatment previously provided and treatment

recommended in the future to cure and relieve the effects of Claimant's compensable injuries.

4. Claimant shall receive TTD benefits for the period of April 30, 2017 to October 16, 2017.

5. Claimant's AWW is $492.17.

DATED: March 21, 2018



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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence the medical treatment recommended by Dr. Sacha is reasonable, necessary and related to Claimant's January 10, 2017 admitted industrial injury.

II. Whether Respondents have proven by a preponderance of the evidence no further medical treatment is reasonable, necessary and related to Claimant's January 10, 2017 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 49 year old woman.

2. Claimant was not present at hearing and did not testify.

Prior History

3. Claimant has a history of anxiety, panic attacks, and depression.

4. Claimant injured her neck and back in a non-work-related 2011 motor vehicle accident, which was treated in part with opioids and facet joint injections. A September 2012 cervical spine MRI revealed a C4-5 disc bulge.

5. Claimant filed for social security disability benefits in 2013. Claimant reported "sharp pain in neck, very severe, pain down right arm, numbness in hands, sharp pain in lower back, numbness and tingling in feet." Claimant also reported she had been unable to work since October 21, 2012 due to a bulging disc in her back and neck and anxiety. Claimant did not qualify for social security disability benefits.

6. On December 8, 2014, Claimant sustained an injury while working for a different employer. Claimant reported that a five pound metal beam fell and struck her on the left side of her forehead. Claimant underwent treatment at Concentra and was diagnosed with a cervical strain with radicular symptoms, post-concussion syndrome, headaches, and adjustment reaction with anxious mood. Claimant's Concentra physicians referred her for a variety of care, including an MRI, EMG, neurology consultation, psychotherapy with Joel Cohen, Ph.D., care with a concussion specialist Susan Ladley, M.D., vestibular rehabilitation, physical therapy, and delayed recovery specialist care with Dr. Eric Tentori, D.O.

7. At a January 14, 2015 neurological evaluation with Eric K. Hammerberg, M.D., Claimant reported neck pain, headaches, nausea, vomiting, and dizziness. Claimant's

EMG was negative. Her November 24, 2015 cervical MRI noted the same C4-5 disc bulge from her 2012 MRI.

8. On February 2, 2015, Claimant began psychotherapy care with Dr. Cohen. Dr. Cohen opined that it is "imperative that we distinguish between injury-related issues…and noninjury-related longstanding…physical issues…which led to her decision to…apply for SSDI coupled with her very obvious propensity for anxiety." On March 9, 2015, Dr. Cohen noted Claimant should be showing significant signs of improvement in her mild postconcussive syndrome, and that "a substantial degree of her psychological issues [are] preexisting and longstanding in nature and need to be addressed and treated outside of the workers' compensation system." On December 16, 2015, Dr. Cohen opined Claimant's symptoms are not characteristic of postconcussive issues, but are related to non-injury psychosocial stressors. Dr. Cohen noted Claimant's vertigo may be related to her anxiety.

9. Claimant did not give a history of neck trauma, pain, or cervical disc bulge from her 2011 accident to any of the eight providers she treated with for her 2014 injury. Claimant. In Respondents' written interrogatories, Claimant was asked about treatment in the five years predating her January 2017 work injury. Claimant did not disclose her neck condition/treatment in 2012 or 2013, nor did she list those providers. Claimant again did not provide this information in her supplemental answers.

10. Claimant filed a workers' compensation claim for the 2014 injury, which was closed due to her failure to follow up her with medical care at a January 19, 2017 demand appointment. Her treating physicians never released her and more care was recommended.

Current Injury

11. On January 10, 2017, Claimant sustained an admitted industrial injury while working for Employer. Claimant reported to her supervisor, Jose Botello, that a mop bucket fell from a hook and struck her on the head.

12. Mr. Botello offered credible testimony at hearing on behalf of Respondents. Mr. Botello testified he was sitting approximately five feet away from where the incident occurred. He did not see the incident, but did hear the sound of an empty mop bucket hit what he believed to be the sink then the floor. Mr. Botello stated the mop buckets are plastic and hang on hooks approximately seven feet above the ground. He estimated the mop buckets weigh no more than five pounds. Mr. Botello testified he observed Claimant standing after the incident. She was not bleeding or slurring her speech, and had no apparent swelling or bumps on her head. He stated Claimant continued to work a portion of her shift and complained of symptoms. He subsequently released Claimant from the remainder of her shift to seek medical attention. No medical records were provided indicating Claimant sought medical attention January 10, 2017 through January 15, 2017.

13. On January 16, 2017, Claimant presented to the emergency department at the Medical Center of Aurora with complaints of nausea, vomiting, intermittent headaches and vertigo. Claimant reported a mop bucket fell and hit her on the back of the head while she was bent over. It was noted Claimant did not lose consciousness. CT scans were normal. Claimant was treated for a concussion and discharged.

14. Claimant began treating at Concentra on January 19, 2017. Claimant presented with complaints of headache, nausea, dizziness, ringing in her ears, bilateral neck pain, and tingling in her hands and fingers. Claimant did not give a history of her 2011 neck injury. On physical examination, Natasha Deonarain, M.D. noted tenderness in the cervical spine and "possible overexaggerated response to very light palpation over the posterior cervical and upper shoulder girdle." Dr. Deonarain further noted full range of motion and no spasms, facial lesions or swelling. She gave an assessment of a closed head injury and concussion. She released Claimant to modified duty, prescribed Tramadol, and referred Claimant to a neurologist.

15. Respondents filed a General Admission of Liability ("GAL") on January 31, 2017, admitting for medical benefits and temporary total disability ("TTD") from January 13, 2017 and ongoing.

16. A February 13, 2017 MRI of Claimant's head/brain was normal.

17. Respondents filed a second GAL on February 14, 2017 admitting for medical benefits, TTD from January 13, 2017 through January 22, 2017, and temporary partial disability from January 23, 2017 and ongoing. Respondents contend they were not aware of Claimant's pre-existing condition when they filed the GALS, and did not receive medical records documenting Claimant's prior condition until October 18, 2017

18. On March 1, 2017, Claimant attended a neurological consultation with Alexander H. Zimmer, M.D. Claimant reported sustaining a concussion in December 2014 and experiencing headaches and numbness in her fingertips that never resolved. Claimant estimated having headaches five days a week after the 2014 accident. Dr. Zimmer noted Claimant had a history of depression since 2010 and panic attacks for several years with high frequency. Dr. Zimmer's examination revealed a normal comprehensive cranial nerve exam and sensory exam over the lower extremities, as well as a negative Romberg test with swaying at the waist. He opined Claimant sustained a concussion and recommended Claimant continue current treatment. He noted he would attempt to obtain medical records to review Claimant's baseline condition prior to the January 10, 2017 injury.

19. Despite undergoing conservative treatment, including physical therapy and medication, Claimant continued to report worsening symptoms. Claimant was eventually referred to delayed recovery specialist John Burris, M.D.

20. Dr. Burris first evaluated Claimant on June 7, 2017. Claimant reported 7/10 pain, headaches, and ongoing problems with memory and cognition. Dr. Burris' notes do not contain any reference to Claimant's 2011 injury. On physical examination, Dr.

Burris noted full neck range of motion with negative Spurling's sign bilaterally, and a normal neurologic examination. He diagnosed Claimant with a head contusion, noting he suspected "a fair amount of psychosomatic overlay" in Claimant's presentation. He recommended Claimant discuss possible other medication trials with Dr. Zimmer and undergo a neuropsychological evaluation.

21. Claimant returned to Dr. Burris for a follow-up evaluation on June 21, 2017 complaining of worsening pain headache and neck pain. She denied persistent numbness or weakness in her extremities. Dr. Burris noted functional self-limited range of motion, diffuse tenderness with no localized muscle spasm or trigger points, and a normal neurologic exam. He again remarked Claimant presented with "clear psychosomatic overlay," noting Claimant continued to report worsening symptoms and "very elevated subjective" pain complaints after a "minor workplace event." He referred Claimant to a rehabilitation specialist, John Sacha, M.D. He remarked, "Based on the overall clinical picture, including her request for her to be taken off of work, it indicates that likely secondary gain issues are contributing to her symptom maintenance."

22. Claimant presented to Dr. Sacha on July 17, 2017. He noted Claimant has long history of preexisting neck pain and closed head injury, including a motor vehicle accident "15 years ago" and a mild closed head injury with whiplash three years ago. He documented an incorrect mechanism of injury, noting Claimant fell nine feet and hit her head. Claimant reported constant pain to her neck bilaterally with radiation in the occipital and periorbital area bilaterally, some dizziness, nausea, vomiting, insomnia, and bilateral ear ringing, and some difficulties with concentration, memory and speech. Dr. Sacha opined that there was no evidence of a closed head injury and gave the following impression: cervical facet syndrome posttraumatic in nature, occipital neuralgia secondary to cervical facet syndrome, dizziness and blurry vision secondary to cervical facet syndrome, and adjustment disorder. He recommended a change in medications, cervical MRI, chiropractic treatment, acupuncture, and a psychological evaluation with Dr. Cohen.

23. Claimant continued to have persistent and expanding pain complaints in subsequent visits with Dr. Burris on August 9, 2017 and August 16, 2017. Dr. Burris noted he agreed with Dr. Sacha's recommendations. At both visits, Claimant demanded to be taken off of work, purporting she could not perform light duty work. Dr. Burris took Claimant off of work on August 16, 2017, stating, "It is clear that there is psychosomatic overlay likely contributing to symptom maintenance as well as potential secondary gain. Given all that is going on at this point, I recommend taking her off of work until we can try to get some of these issues resolved."

24. On August 22, 2017, Lloyd J. Thurston, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. He issued an IME report on August 24, 2017. Dr. Thurston reviewed Claimant's medical records from January 16, 2017 through July 26, 2017 and performed a physical examination. Claimant reported feeling 80% recovered from the 2014 injury at the time of the January 10, 2017 incident. She reported that after the January 10, 2017 incident she felt 30% recovered to her pre-injury state, which she defined as her ailments from her 2014 injury. Claimant

rated her pain 8/10 on average. She did not disclose her 2011 injury to Dr. Thurston. On physical examination, Dr. Thurston noted normal cervical range of motion with the exception of cervical extension, left side flexion and left rotation, mild tenderness to palpation over the greater occipital nerves with no localized discomfort with facet loading or firm palpation over the facets, mild upper cervical paraspinous muscle tenderness without trigger points or localized spasm, and negative Spurling's maneuver. Dr. Thurston agreed Claimant did not suffer a head injury, concussion or traumatic brain injury as a result of her January 10, 2017 injury. He opined Claimant suffered a minor exacerbation of her December 2014 injuries. He noted that without the medical records from Claimant's 2014 injury, he was unable to determine what, if any, of Claimant's current symptoms are related to the January 10, 2017 work injury.

25. On September 27, 2017, Dr. Sacha noted he previously documented an incorrect mechanism of injury due to a typographical error. He revised the history of accident to reflect that a bucket fell eight feet and hit Claimant's head. Dr. Sacha did not change his assessment of cervical facet syndrome, occipital neuralgia secondary to cervical facet syndrome, and adjustment disorder.

26. On October 4, 2017 Dr. Burris noted Claimant "continues to have diffuse pain complaints which do not follow anatomical pattern…"

27. Dr. Sacha reviewed surveillance video of Claimant and issued reports dated October 16, 2017 and November 20, 2017. He noted Claimant had "significantly more pain behaviors" when she presented at his office, and more functional ability than she reports and when observed in his office. He noted function is usually not compromised with cervical facet syndrome. Dr. Sacha stated that nothing on the surveillance video changed his opinion with respect to diagnosis, causality or recommendations for treatment. He opined Claimant is not at maximum medical improvement ("MMI"), and continued to recommend a cervical spine MRI and a trial of cervical facet injections and occipital nerve blocks for diagnostic, treatment and causality purposes.

28. The ALJ reviewed surveillance video taken July 17, 2017, July 19, 2017 and September 1, 2017. Claimant is observed walking, standing, bending, squatting, climbing stairs, tossing large garbage bags, and carrying a large purse, all with no apparent discomfort. Claimant appeared to be dizzy and swayed on approximately one occasion.

29. On November 9, 2017, Dr. Thurston issued an addendum to his August 24, 2017 IME report after reviewing records from Claimant's 2014 injury. Dr. Thurston opined Claimant's symptoms were residual from her 2014 injury and are consistent with the diagnosis of malingering. He outlined the American Psychiatric Association's multi-factor test for malingering, and opined Claimant satisfied at least three of the four criteria. Dr. Thurston opined Claimant does not need any further medical evaluation or treatment. Dr. Thurston opined Claimant required further care for her psychological issues outside of the worker's compensation system.

30. On November 16, 2017, Dr. Thurston testified by deposition as an expert in occupational medicine. Dr. Thurston testified consistent with his IME report and addendums. Dr. Thurston testified Claimant sustained a minor injury with nonspecific symptoms that are out of proportion to her exam findings, and diagnostic studies have not confirmed the source of Claimant's pain. Dr. Thurston disagreed with Dr. Sacha's diagnosis of posttraumatic cervical facet syndrome, as there were no indications of cervical facet syndrome on his examination of Claimant. He opined Claimant's symptoms are not related to the January 10, 2017 work injury and no further medical treatment, including a cervical MRI, chiropractic care, acupuncture or injections, is reasonable, necessary or related to the January 10, 2017 work injury. Dr. Thurston agreed with Dr. Burris that there is a fair amount of psychosomatic overlay with Claimant, along with indications of secondary gain and malingering. Dr. Thurston stated he would recommend Claimant undergo psychological treatment outside of the workers' compensation system.

31. Dr. Burris reevaluated Claimant on December 6, 2017. He supported Dr. Sacha's recommendations for diagnostic injections. He remarked that Claimant "has no objective findings with extreme pain behaviors." He noted Claimant refused to go back to work and stated, "I do not believe that there is any objective basis to have the patient off of work. However, given her extreme reaction in the past I am not ready to release her back to light activities."

32. Dr. Thurston reviewed additional medical records from Dr. Sacha and Dr. Burris and issued a second addendum report on January 8, 2018. Dr. Thurston opined Claimant does not have cervical facet syndrome, pain arising from cervical facets or adjustment disorder. He stated Claimant's neck pain was not the result of the January 10, 2017 industrial injury. Dr. Thurston reiterated his opinion that Claimant sustained minor trauma with no objective evidence of a traumatic brain injury or neck injury beyond a mild cervical myofascial strain. He noted Claimant's headaches, dizziness and neck pain never completely resolved from her 2014 injury. Dr. Thurston again noted there was no significant objective pathology on exam consistent with Claimant's symptoms and mechanism of injury, and no imaging studies identified objective pathology explaining her symptoms. He noted Claimant's lack of response to "appropriate treatments" was not physiologic. Dr. Thurston opined Claimant suffered a head contusion and cervical myofascial strain as a result of the January 10, 2017 incident. He continued to opine further medical treatment was not reasonable, necessary or related to Claimant's January 10, 2017 injury. He explained that, even if the facet injections produced a positive diagnostic response, such response does not establish Claimant's symptoms are caused by the January 10, 2017 injury. Dr. Thurston opined Claimant at MMI with 0% impairment with no restrictions and no need for medical maintenance care.

33. The ALJ credits the opinion of Dr. Thurston over the conflicting opinions of Drs. Sacha and Burris.

34. Claimant failed to prove by a preponderance of the evidence that the medical treatment recommended by Dr. Sacha, including a cervical MRI, chiropractic treatment,

acupuncture, psychological evaluation, occipital injections and facet injections, is reasonable, necessary and related to Claimant's January 10, 2017 industrial injury.

35. Respondents established by a preponderance of the evidence that no further medical treatment is reasonable, necessary or related to Claimant's January 10, 2017 industrial injury.

36. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo.

1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Medical Care

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002). Causation is also a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rint*, 717 P.2d 965 (Colo. App. 1985).

Respondents are permitted to challenge causation and relatedness of the need for any treatment, despite having admitted liability for a claim. *Hanna v. Print Expediters, Inc*. 77 P.3d 863 (Colo. App. 2003). In a dispute over medical benefits that arises after filing an admission of liability, respondents may assert, based upon subsequent medical reports, that a workers' compensation claimant did not establish a threshold requirement of direct causal relationship between the on-the-job injury and need for medical treatment. *Snyder v. Industrial Claim Appeals Office of the State of Colo.,* 942 P.2d 1337 (Colo. App. 1997). Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury, and that the treatment is reasonable and necessary. *Id*.; *see also Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988).

Where, however, respondents attempt to modify an issue that previously has been determined by an admission of liability, they bear the burden of proof for such modification. *Section 8-43-201(1), C.R.S*.; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). When respondents seek a ruling at hearing that would serve as "terminating the claimant's right to receive medical benefits," they are seen as seeking to reopen that admission and the burden is theirs. In *Salisbury v. Prowers County School District*, *supra,* the Industrial Claims Panel held that where the effect of the respondents' argument is to terminate previously admitted maintenance

medical treatment, the respondents have the burden, pursuant §8-43-201(1), C.R.S., to prove that such treatment is not reasonable, necessary or related to the claimant's industrial injury.

Here, Respondents seek a determination that both the specific treatment recommended by Dr. Sacha and any further medical treatment is not reasonable, necessary and related to Claimant's January 10, 2017 industrial injury. Claimant bears the burden of proof with respect to the specific treatment recommended by Dr. Sacha. As Respondents' challenge to any further medical treatment is effectively a request to modify their previously filed GALs and terminate Claimant's right to receive medical benefits, Respondents have the burden of proof regarding further medical treatment.

The preponderance of the evidence establishes that both the specific medical treatment recommended by Dr. Sacha, and any further medical treatment is not reasonable, necessary and related to Claimant's January 10, 2017 industrial injury. Both Dr. Thurston and Dr. Burris note Claimant sustained a very minor injury, with overexaggerated responses, non-objective findings, psychosomatic overlay and indications of secondary gain. Dr. Burris complied with Claimant's repeated demands to be taken off of work, despite his own acknowledgment that there is no objective basis to do so.

The medical records clearly establish Claimant has a longstanding history of pre-existing cervical pain, hand numbness, headaches, dizziness, nausea, depression and anxiety, much of which had not resolved prior to the January 10, 2017 injury. Claimant's 2011 injury caused significant enough neck pain that she underwent medical treatment and applied for social security disability. Claimant failed to disclose this information to providers, with the exception of Dr. Sacha, to whom she incorrectly informed that the accident was 15 years prior. There is no indication Drs. Sacha and Burris reviewed medical records from Claimant's 2011 and 2014 injuries, which resulted in many of the same symptoms as the January 10, 2017 injury, and for which Claimant had already received some of the same treatment recommended by Dr. Sacha, including facet injections and cervical MRIs.

Dr. Thurston conducted a thorough medical records review and physical examination, and was aware of the extent of Claimant's pre-existing condition and treatment. Accordingly, Dr. Thurston's opinion is more credible and persuasive than the opinions of Drs. Sacha and Burris, which are based on an incomplete view of Claimant's medical condition. Dr. Thurston credibly and persuasively opined that Claimant does not have cervical facet syndrome or related symptoms, Claimant's current symptoms and need for treatment are not related to the January 10, 2017 work injury, and Dr. Sacha's recommendations and any further medical treatment is not reasonable, necessary and related to the January 10, 2017 work injury. Based on the totality of the evidence, it is more likely than not that Dr. Sacha's recommended treatment, as well as any further medical treatment, is not reasonable, necessary or related to the January 10, 2017 industrial injury.

ORDER

It is therefore ordered that:

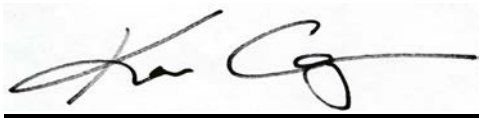
1. Claimant's request for chiropractic care, acupuncture, psychological treatment, occipital injections, facet injections and a cervical MRI as recommended by Dr. Sacha is denied and dismissed.

2. No further medical care is reasonable, necessary or related to Claimant's January 10, 2017 injury. Respondents are not liable for additional medical treatment related to Claimant's January 10, 2017 injury.

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

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

DATED: March 2, 2018



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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that the explantation of an existing spinal cord stimulator and re-implantation of a DRG spinal cord stimulator or IPG reprogramming is reasonable and necessary post-MMI medical treatment.

II. Whether Claimant established, by a preponderance of the evidence, that the ongoing prescriptions of Celebrex and Cymbalta are reasonable and necessary post-MMI medical treatment.

III. Whether Claimant established, by a preponderance of the evidence, that the ongoing prescription of physical therapy is reasonable and necessary post-MMI medical treatment.

FINDINGS OF FACT

1. On May 25, 2009, Claimant suffered an admitted industrial injury to his right hip and groin during the course and scope of his employment with Employer. Claimant stepped off a pallet and felt a pop in his hip and groin area.

2. Claimant treated with Michael J. Gesquiere, M.D. He was initially diagnosed with lumbar and groin strains. Claimant underwent a femoral hernia repair and hip surgery in 2009. He subsequently had various forms of conservative treatment and diagnostic procedures.

3. Brian Beatty, D.O. placed Claimant at MMI on July 12, 2011 with a 2% whole person impairment rating for injuries to Claimant's ilioinguinal nerve.

4. Claimant returned to Dr. Gesquiere for an evaluation on January 3, 2012. Dr. Gesquiere noted that Claimant suffered from chronic pain syndrome and opioid dependence. Claimant sought to decrease his reliance on narcotic pain medications. Dr. Gesquiere recommended neuromodulation therapy or a spinal cord stimulator in an attempt to decrease pain, improve function and reduce reliance on narcotic pain medications.

5. On January 4, 2012, Claimant underwent a Division Independent Medical Examination ("DIME") with John Aschberger, M.D. Dr. Aschberger opined Claimant reached MMI as of July 12, 2011, with a combined 16% whole person impairment, consisting of impairments for loss of range of hip motion, neurological condition, and iliohypogastric nerve and ilioinguinal nerve impairments. Dr. Aschberger recommended

maintenance medication and physician follow-ups with drug monitoring. Regarding the recommended spinal cord stimulator, Dr. Aschberger stated,

> [Claimant] should understand that there are issues that may occur with spinal cord implantation and associated complications. It certainly will be an unusual case where it completely eliminates use of medication for symptomatic control. That being said, given his response to the nerve blocks at the high lumbar levels, he is a candidate for a nerve stimulator trial.

6. On January 27, 2012, Glenn M. Kaplan, Ph.D. examined Claimant and opined Claimant was a candidate for a neurostimulator procedure for chronic pain management.

7. Dr. Gesquiere renewed his recommendation for a spinal cord stimulator on February 3, 2012, March 2, 2012, March 22, 2012, and June 7, 2012. On June 7, 2012, Dr. Gesquiere stated that he hoped a spinal cord stimulator would relieve nerve pain, decrease Claimant's dependence on medications, improve his overall function, and allow Claimant to return to work.

8. On February 27, 2012, Respondents filed a Final Admission of Liability admitting for reasonably necessary and related post-MMI medical benefits.

9. On May 4, 2012, Brent Van Dorsten, Ph.D., performed an independent psychological evaluation at the request of Respondents. Dr. Van Dorsten issued a report dated May 14, 2012. He opined Dr. Kaplan's examination did not meet the Medical Treatment Guidelines requirement for a comprehensive psychiatric or psychological evaluation. Dr. Van Dorsten discussed multiple risk factors, including involvement in litigation, heavy job demands, Claimant's belief that he has chronic nerve damage, and pre-injury psychological treatment for depression and anxiety. He stated that Claimant's belief he has nerve damage requiring stimulation treatment should be address prior to proceeding to spinal stimulation. He concluded that "a pre-surgical psychological assessment of risk factors for surgical treatment outcome does not easily allow for a yes or no dichotomous decision."

10. On May 18, 2012, J. Tashof Bernton, M.D. conducted an independent medical examination ("IME") at the request of Respondents. Dr. Bernton reviewed medical records and physically examined Claimant. Dr. Bernton opined spinal cord stimulation was not reasonable, necessary, or consistent with the Medical Treatment Guidelines, referring to spinal cord stimulation as a "grossly inappropriate medical intervention" for Claimant. In support of his position, Dr. Bernton discussed Claimant's variable response to different procedures, psychologic factors, and a "dramatic disconnect between the patient's reported pain levels and functional impairment and his physical examination which is remarkably benign." Dr. Bernton also opined that Claimant should withdraw from narcotic medications.

11. On August 8, 2012, Claimant went to hearing before ALJ Bruce C. Friend. ALJ Friend issued an order dated August 23, 2012 denying Dr. Gesquiere's request for prior authorization for a spinal cord stimulator. ALJ Friend relied on Dr. Bernton's report and testimony in determining that the spinal cord stimulator trial was not reasonably needed to cure and relieve Claimant from the effects of his industrial injury.

12. On October 9, 2012, Claimant underwent a spinal cord stimulator trial through his private insurance. Because he reported pain relief of approximately 80% to 90% with the trial, Dr. Gesquiere permanently implanted a spinal cord stimulator on December 17, 2012. However, by January 15, 2013, Claimant's pain had returned to an 8/10 level.

13. Dr. Bernton reevaluated Claimant on June 4, 2013. Claimant reported right hip and groin pain, lower back pain, and neck pain. Claimant could not identify any functional improvement since the implantation of the spinal cord stimulator. Claimant was asked to rate his pain levels on a 0 to 10 scale, where 0 was no pain and 10 was pain so severe you would faint or die. Claimant noted pain levels as high as a 7 in his right leg and hip, with his least pain being a 3 to 4; pain as high as an 8 to 9 in his low back, with his least pain being a 6 to 7; and with respect to his neck, Claimant noted pain levels as high as an 8 to 9, with his least pain being a 6 to 7. Dr. Bernton remarked that Claimant's pain levels had not substantially changed and there was no improvement in Claimant's level of function. He opined that maintenance of the spinal cord stimulator was non work-related. Dr. Bernton continued to recommend withdrawal from narcotic medications.

14. On August 14, 2013, Claimant went to hearing before ALJ Barbara S. Henk on the issue of Claimant's medications. ALJ Henk issued a Summary Order dated November 5, 2013. Relying on Dr. Bernton's reports and testimony, ALJ Henk ruled that Claimant failed to prove that the Morphine ER, Klonopin, Norco and Nucynta were reasonable and necessary medications related to the May 25, 2009 accident. She found that Claimant met his burden in proving that Cymbalta, Tramadol and Celebrex were reasonable and necessary.

15. Claimant continues to take the narcotic pain medications of Hysingla ER, Roxicodone, Klonopin, together with the non-narcotic prescription medications of Cymbalta and Celebrex.

16. On August 25, 2014, Dr. Gesquiere performed right L3-L4 facet joint blocks, a L3 medial branch nerve block, a right L4-L5 facet joint block and a L5 medial branch block. Claimant reported 50% relief from the blocks.

17. On September 29, 2014, Dr. Gesquiere requested prior authorization for right L3-4, L4-5 and L5-S1 radiofrequency nerve ablations, opining that Claimant's facet joints were his identified pain generators. Insurer denied Dr. Gesquiere's prior authorization request.

18. On November 11, 2014, Dr. Bernton conducted a third IME, reviewing additional medical records and physically examining Claimant. Relying on the Medical Treatment

Guidelines, Dr. Bernton concluded that L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation was not reasonable, necessary and causally related to Claimant's May 25, 2009 industrial injury. Dr. Bernton explained that a medial branch block is a procedure used to determine whether the facet is the pain generator. The Medical Treatment Guidelines require an 80% response from medial branch blocks to proceed with a radiofrequency ablation. Dr. Bernton opined that, because Claimant received only 50% relief, the medial branch blocks were non-diagnostic.

19. On March 4, 2015, Claimant went to hearing before ALJ Peter J. Cannici on the issue of authorization of the requested radiofrequency facet blocks. ALJ Cannici issued an order dated May 21, 2015. Relying on Dr. Bernton's reports and April 10, 2015 deposition testimony, ALJ Cannici held that Claimant failed demonstrate it is more probably true than not that the request for prior authorization of L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation by Dr. Gesquiere was reasonable, necessary and causally related to his May 25, 2009 industrial injury.

20. Claimant continued to treat with Dr. Gesquiere through his private insurance. Claimant resumed physical therapy in approximately March 2016.

21. On May 23, 2016, Claimant saw Eric Anderson PA-C at Dr. Gesquiere's office. Claimant reported a pain score of 6-7/10, with 50-60% relief from his medications. PA-C Anderson noted, "Medications improve his quality of life. However, even with his medications his quality of life has decreased secondary to pain symptoms in his back and groin area. He is unable to do things such as walk distances or standing for long periods of time." Claimant reported being unsure if he was actually improving from the physical therapy.

22. On July 9, 2016. Claimant saw Dr. Gesquiere's assistant, Amber Aguilera. He reported worsening of symptoms over the last six to nine months. Ms. Aguilera noted, "[Claimant] has had a spinal cord stimulator analysis and reprogramming, it does seem to cover the appropriate area although its effectiveness has significantly declined to the point where he has reached pain levels not seen him in about 3 or 4 years. It is currently affecting his day-to-day activities." She further noted, "He has been increasing his medications secondary to lack of efficacy from long-term use of medications." Ms. Aguilera administered an ilioinguinal nerve block. She recommended Claimant undergo a spinal cord stimulator revision with updated technology including DRG therapy, noting estimates of 80-90% improvement of ilioinguinal pain.

23. Dr. Gesquiere referred Claimant to Dr. Kaplan for a psychological evaluation. Dr. Kaplan evaluated Claimant on November 17, 2016 and opined Claimant is an appropriate candidate for the DRG stimulator procedure, with no signs of secondary gain issues or need for psychological treatment.

24. On November 17, 2016, Dr. Gesquiere requested prior authorization for a DRG trial and, if successful, permanent placement.

25. On November 28, 2016, Respondents authorized the DRG trial and permanent implantation for a one year period.

26. On December 19, 2016, Eric Anderson, PA-C noted, "There seems to be confusion on the patients (*sic*) part as to what procedure is going to be done. He is cancelling his DRG for 12/28/16 and will follow up with Dr. Gesquiere to further discuss what is going to be done."

27. Dr. Gesquiere evaluated Claimant on January 17, 2017. He remarked,

> There has been some confusion on whether we were going to undergo DRG therapy or an IPG replacement…We discuss again our current plan of action for patient's SCS. His Worker's Comp approved DRG therapy but patient was under the impression we were proceeding with an IPG replacement. Given patient's success with current system in the past and present pain symptoms, I have agreed that an IPG replacement would be the best course of action to undertake. Patient needs time however to discuss with his attorney if worker's comp will change their authorization to cover his IPG replacement.

28. Claimant continued to treat at Dr. Gesquiere's office and continued to attend physical therapy. Medical reports note the physical therapy "helps tremendously for maintaining."

29. Dr. Bernton performed a fourth IME on November 7, 2017. Dr. Bernton reviewed additional medical records and physically examined Claimant. Dr. Bernton continued to opine Claimant does not meet the criteria for placement or replacement of a spinal cord stimulator, noting that there are no clearly defined pain generators and very strong psychologic factors. Dr. Bernton further noted that Claimant "failed to get significant relief from the initial spinal cord stimulator, as defined by lack of significant change in subjective pain reports, lack of functional change, and lack of significant reduction in pain medication." Dr. Bernton addressed an August 8, 2016 medical report that stated the stimulator's effectiveness significantly declined resulting in pain levels not seen by Claimant in the last three or four years and worsening of symptoms in last six to nine month. He emphasized that the medical records do not support such assessment, as the Visual Analog Pain scale "stayed remarkably consistent over a period of more than a year prior to that report." He further noted that Claimant's functional status was significantly better than most patients with spinal cord stimulators. Dr. Bernton continued to opine Claimant's narcotic medications should be tapered and discontinued. Regarding Claimant's other medications, Dr. Bernton stated,

> I believe at this point, on a work-related basis, an antiinflammatory medication may be reasonable. This could be Celebrex or another nonsteroidal. Patient has a preexisting history of depression, and it is my assessment that the use of Cymbalta at this period of time eight and one-half years following the occupational injury can reasonably be regarded as necessary care on a work-related basis….Some continuation of the anti-

> inflammatory at this point in time is the only treatment that I would regard as reasonable and necessary on a work-related basis.

30. Dr. Bernton testified at hearing as an expert in occupational and internal medicine. Dr. Bernton is Level II accredited by the Division of Workers' Compensation and board certified in occupational medicine and internal medicine. Dr. Bernton testified consistent with his reports. He testified that, almost nine years post-accident, Claimant's pain generators have never been adequately identified. He stated there is a very strong psychological component to Claimant's pain syndrome, as documented by psychological evaluations and is consistent with Claimant's pattern of very good or even "100%" relief of pain initially with procedures on multiple different pain generators, but the lack of any significant, long-lasting relief. Claimant's pain level and function has not materially changed. Dr. Bernton testified that Claimant does not meet the Medical Treatment Guidelines, Rule 17, Exhibit 9, criteria for placement or replacement of the spinal cord stimulator, as Claimant does not have a clearly defined pain generator. He noted that the medical records evidence very significant psychological factors complicating Claimant's pain presentation, which is another contraindication for spinal cord stimulator placement or replacement. Additionally, the record does not indicate Claimant got effective relief of pain when the original stimulator was placed. Dr. Bernton testified that replacing the stimulator placed on a non-work-related basis under the workers' compensation system would not be medically reasonable.

31. Dr. Bernton explained that a spinal cord stimulator consists of an impulse generating unit ("IPG") and leads. "DRG" refers to the dorsal root ganglion, the specific area where the stimulator is placed. Dr. Bernton testified that there have not been any dramatic technological advancements in spinal cord stimulators that would make placement or replacement of a stimulator reasonable in Claimant's case.

32. Dr. Bernton reiterated his opinion that Claimant's continued use of narcotic medications and Klonopin is not medically reasonable or necessary. Dr. Bernton opined that, if tapered from narcotics, Claimant's continued use of Celebrex and Cymbalta would be reasonable. He testified that, in light of Claimant's continued use of narcotic medications, Celebrex, an anti-inflammatory medication, is not reasonable or necessary. He stated Claimant's continued use of Cymbalta is reasonable and necessary.

33. Dr. Bernton further testified that the ongoing prescription of physical therapy almost nine years post-accident is not reasonable and necessary and is not consistent with the Medical Treatment Guidelines. Dr. Bernton stated that Claimant can continue Pilates exercises in a home exercise program.

34. Claimant testified that he continued working two jobs after the industrial injury. In October 2017, Claimant began working a different job managing call centers.

35. Claimant testified that he experienced 80% relief of pain with the trial stimulator and 30-40% relief after the permanent placement. He stated that, at the most, he has experienced 40% relief, even with multiple attempts to cover different areas. Claimant testified that he would like an effective electronic stimulator to allow him to wean off of

opioid medications, which he sees as dangerous to his health. His belief is that new technology and better lead placement holds prospects for better results than what he has currently.

36. Claimant testified that he takes Cymbalta, Celebrex, and Hysingla in the morning, oxycodone for spikes in pain, and Klonopin in the evening to assist with sleep. He testified that on medications his pain is 6-7/10. Claimant testified that he experienced increased swelling and pain when he was without Celebrex.

37. Claimant stated that he has been participating in physical therapy for almost two years, and has benefitted from the core strengthening. He testified that at home he does not have access to Pilates devices, exercise balls and plastic bands used in physical therapy. Claimant wants to continue physical therapy.

38. At hearing, Respondents challenged the reasonableness and necessity of Claimant's Celebrex, Tramadol and Cymbalta prescriptions. Respondents' position statement identifies Cymbalta prescription medication at issue.

39. Claimant has not used Tramadol for a few years.

40. The ALJ credits the opinion of Dr. Bernton over the conflicting opinion of Dr. Gesquiere on the issues of the spinal cord stimulator, physical therapy and ongoing prescriptions of Celebrex and Cymbalta.

41. Claimant failed to prove, by a preponderance of the evidence, that the spinal cord stimulator, physical therapy, and ongoing prescription of Celebrex are reasonable and necessary to cure and relieve Claimant of the effects of the May 25, 2009 industrial injury.

42. Claimant established, by a preponderance of the evidence, that the ongoing prescription of Cymbalta is reasonable and necessary to cure and relieve the effects of the May 25, 2009 industrial injury.

43. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the

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

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

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

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Medical Benefits

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

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for

specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the Medical Treatment Guidelines is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the Medical Treatment Guidelines such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

As found, Claimant failed to prove it is more likely than not that the DRG spinal cord stimulator/IPG reprogramming is reasonable and necessary to cure and relieve the effects of the May 25, 2009 industrial injury. Subsequent to ALJ Friend's denial of Dr. Gesquiere's request for prior authorization for a spinal cord stimulator, Claimant underwent the procedure through his private insurance. The medical record establishes that, despite Claimant's initial reports of improvement in pain, there has been no material improvement in Claimant's pain or function. Dr. Bernton credibly opined that Claimant does not meet the Medical Treatment Guidelines criteria for neurostimulation, as Claimant's pain generator is unclear and there are strong psychological factors. Although Dr. Gesquiere has repeatedly recommended neurostimulation throughout Claimant's claim, he has not provided any analysis of the criteria for implantation under the Medical Treatment Guidelines, or any reason to deviate from the Medical Treatment Guidelines. While compliance with the criteria of the Medical Treatment Guidelines is not dispositive for purposes of the ALJ's determination, considering the totality of the evidence, the spinal cord stimulation procedure recommended by Dr. Gesquiere is not reasonable or necessary.

As found, Claimant failed to prove that it is more likely than not that the ongoing prescription physical therapy is reasonable and necessary. Dr. Bernton credibly opined that continued physical therapy in Claimant's circumstance is not indicated under the Medical Treatment Guidelines, and that Claimant can achieve the benefits of physical therapy through a home exercise program.

As found, Claimant also failed to prove that it is more likely than not the ongoing prescription of Celebrex is reasonable and necessary. Dr. Bernton credibly testified that, while Claimant continues to use narcotic medications, Claimant's use of Celebrex is not medically reasonable or necessary.

As found, Claimant established by a preponderance of the evidence that the ongoing prescription of Cymbalta is reasonable and necessary. Dr. Bernton credibly opined that the continued use of Cymbalta is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant failed to establish, by a preponderance of the evidence, that the spinal cord stimulator procedure is reasonable and necessary. Claimant's request for prior authorization of a DRG spinal cord stimulator or IPG revision is denied and dismissed.

2. Claimant failed to establish by a preponderance of the evidence that the ongoing prescription for physical therapy is reasonable and necessary. Respondents are not liable for the cost of physical therapy.

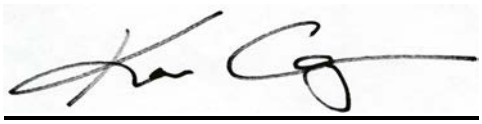
3. Claimant failed to establish, by a preponderance of the evidence, that the ongoing prescription for Celebrex is reasonable and necessary. Respondents are not liable for the cost of Celebrex.

4. Claimant established, by a preponderance of the evidence, that the ongoing prescription for Cymbalta is reasonable and necessary. Respondents are liable for the cost of Cymbalta.

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

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

DATED: March 30, 2018



Kara R. Cayce.
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-969-585-03

ISSUES

The issues to be determined by this decision are the following issues:

- Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable work injury on August 12, 2014?

- If so, whether Claimant has proven by a preponderance of the evidence that she is entitled to medical treatment.

FINDINGS OF FACT

1. Claimant complains of right hand and wrist pain which she has experienced for several years. Claimant first sought treatment for her complaints in 2007, treated at Concentra, and was eventually released.

2. Claimant again sought treatment at Concentra on July 27, 2012, with similar complaints. She reported experiencing pain in her right hand and wrist on and off for several years that was intermittent and would resolve on its own. She complained that recently her pain was worsening. Her treatment providers noted limited physical findings including some shaking in Claimant's hand and arm which her provider attributed to possible fatigue in her right upper extremity.

3. This is Claimant's third workers' compensation claim for the same cluster of symptoms.

4. Claimant works as an operations manager for Employer. She has been in that position for four years, and employed by Employer for fourteen years. Claimant testified that her position requires her to perform multiple job duties. These include renting cars to customers from a counter desk, checking in cars upon return, working at the security gate where she scans information related to the car to the customers' contracts, entering data, and preparing reports.

5. Claimant testified that on a normal day, she spends most of her shift at the rental counter. She did not quantify the period of time, though. There, she pulls up information on a computer, types in information provided by customers, and swipes credit cards. She testified that on a busy day she can help 12 to 15 people an hour. However, some days were slow and some parts of busy days were slow.

6. Claimant testified that she "constantly" uses a mouse because as she enters information into the computer or scanner, she clicks on different data fields. For example, when a customer picks up a rental car, she uses a tablet to scan in the car and

contract, and types in information. Claimant described the tablet as weighing between five and eight pounds.

7. When Claimant works at the security gate, she scans cars before they leave the lot to attach them to customers' contracts in Employer's database, and uses the mouse to switch between fields to enter information.

8. Claimant testified she completes daily reports that take approximately one hour to prepare. She stated the reports require researching contracts and returns, and data entry.

9. Claimant testified that she experienced pain, numbness, tingling and weakness first in her right wrist and then her left wrist.

10. On November 18, 2014, Genex performed a Job Site Analysis and concluded Claimant's job duties had no risk factors for repetitive use injuries. Claimant was observed performing her job duties for the analysis. The job site analysis took longer than usual as Claimant has multiple work stations and job functions. Her job duties included working outside of the office assisting staff with checking in customers for car rentals, doing reports in her office, and assisting with car returns and with security. The analyst found Claimant used a keyboard approximately two to three hours a day and her mouse use varied depending upon the task.

11. Claimant's keyboard use varied depending on the job duty, but ranged from 16 to 25 seconds per minute, which extrapolated into 16 to 25 minutes per hour and 2.1 to 3.3 hours per day. Claimant's mouse use averaged 19.11 minutes per hour while performing administrative work in her office, and 13.47 minutes per hour while working at the customer service desk. Claimant's total mouse use based on an eight hour work day was 1 hour and 48 minutes.

12. The job site analyst evaluated risk factors including force and repetition/duration, awkward posture and repetition/duration, computer work, use of vibratory power tools and duration, and cold working environment. The analysis found that force and repetition risk factors were not present in Claimant's job duties.

13. Claimant agreed the job site analysis was performed by observing her perform her job duties. She stated it was a slow day, but agreed that if her job duties were observed on a busier day, how she performed the task would not change – just how often she performed it. She agreed her job duties varied throughout the day and that she does not work behind a computer or with a tablet all day.

14. Claimant had been treating at Concentra for her bilateral upper extremity pain complaints. On December 4, 2014, Concentra released Claimant from care at MMI because the work site evaluation concluded that work related criteria were not met.

15. After Concentra released Claimant, she treated outside of the workers' compensation system with Dr. Von Linderman. Claimant reported that she began

developing left sided symptoms because she had overused her left upper extremity while her right side was more symptomatic.

16. On January 23, 2015, Claimant sought a second opinion with Dr. Davis. Claimant. Despite the job site analysis which concluded otherwise, she reported that her job duties involved "constant" typing and mousing for the prior ten years. Claimant also reported to Dr. Oh that she spent most of her work day typing.

17. On February 27, 2015, Claimant underwent an EMG/nerve conduction study with Dr. Oh. The testing results were within normal limits. Dr. Oh found no convincing evidence of compression neuropathy in the left wrist, or focal neuropathy, brachial plexopathy, or cervical radiculopathy in the right upper extremity.

18. On March 13, 2015, Claimant followed up with Dr. Davis. He noted that Claimant had myofascial pain in both hands and wrists, and that her symptoms did not clinically fit with carpal tunnel syndrome and the EMG testing was "completely normal." He pointed out that Claimant's thumb pain was diffuse and not localized to any one joint.

19. During a later visit on July 1, 2016, Dr. Davis continued to comment on how Claimant's presentation was atypical.

20. Claimant's symptoms did not abate, so she underwent a second EMG/nerve conduction study on May 11, 2015. Claimant's bilateral upper extremities test results again were read as normal.

21. On August 3, 2015, Dr. Raschbacher performed an independent medical evaluation of Claimant. Claimant reported that her right upper extremity issues began about 3-1/2 years prior but he noted she appeared to have symptoms for five to six years. Her symptoms began as pain at the forearm, fingers and palm of her right hand. Her hand also felt weak. In the past year she began to experience numbness and tingling in her right palm and middle three digits. Claimant also reported pain and paresthesia in her left hand and thumb from "compensating."

22. Dr. Raschbacher reviewed the Department of Labor's definition of repetitive work – which is performing a specific task every 30 seconds – and testified that he would not qualify Claimant's job duties as repetitive.

23. Dr. Raschbacher testified that normal EMG test results do not provide objective evidence to support a diagnosis of carpal tunnel syndrome.

24. Dr. Raschbacher noted that Claimant took a week-long vacation in June 2015 during which her symptoms remained unchanged. Claimant also testified that she would take vacations for maybe one week, and that her symptoms did not change while being away from work. Dr. Raschbacher clarified that the lack of change of symptoms whether Claimant was at work or not would suggest that the causative factor was not likely work-related. He would anticipate that if the offending activity stopped for a time, even as short as one week, one would expect to see improvement in symptoms.

25. Dr. Raschbacher indicated that Claimant may have both carpal tunnel syndrome and radial tunnel syndrome in her right hand. Claimant had a positive compression test but negative EMG/nerve conduction studies. Overall, he opined that Claimant's complaints and her need for further treatment were not related to her job duties. Dr. Raschbacher pointed to the Medical Treatment Guidelines for cumulative trauma disorders and lack of support in medical literature to support that Claimant's job duties likely caused radial or carpal tunnel syndrome.

26. Dr. Raschbacher testified that carpal tunnel syndrome does not have a clear causative factor in most people and is idiopathic. He added that the medical literature does not support that Claimant's work activities would cause carpal tunnel syndrome.

27. Dr. Raschbacher opined that Claimant's bilateral issues were more suggestive that her complaints were not work related, and could also indicate she had a predisposition for that type of pathology. He opined that Claimant's symptoms were idiopathic.

28. Dr. Raschbacher testified that none of Claimant's treating physicians provided a causation analysis as required by the Medical Treatment Guidelines. Dr. Raschbacher stated that he went through the causation analysis to reach his conclusions. He first diagnosed Claimant with carpal and cubital tunnel syndrome, and questioned her tenderness in the area of radial tunnel syndrome. He then determined that the disorder was not known or plausibly associated with work. Dr. Raschbacher interviewed Claimant to determine whether there were risk factors to support that work aggravated or caused her condition. Finally, Dr. Raschbacher matched the risk factors with the established diagnosis, and opined Claimant's work activities were not causative of her various bilateral symptoms.

29. On August 22, 2016, Dr. Davis performed surgery on Claimant diagnosing left elbow ulnar neuropathy and left carpal tunnel syndrome. The procedures performed were subcutaneous transposition of the left ulnar nerve and endoscopic carpal tunnel release.

30. On May 12, 2017, Claimant had right wrist and elbow surgery with Dr. Davis for diagnosed right carpal tunnel syndrome and right elbow ulnar neuropathy. Dr. Davis performed an endoscopic carpal tunnel release of the right wrist and decompression of the ulnar nerve at the right elbow.

31. Claimant testified that she experienced slight relief in both wrists following her surgeries. However, she did not experience relief in her elbows and continued to experience nerve pain. Dr. Raschbacher testified that it was surprising that Claimant had persistent symptoms after surgery.

32. Claimant testified that she returned to full duty work in June or July 2017. She stated that when she returned to full duty, her pain has resumed. Claimant stated that she believes typing and mousing caused her arms to hurt.

CONCLUSIONS OF LAW

General Legal Standards

The purpose of the "Workers' Compensation Act of Colorado" (Act), Title 8, Articles 40 to 47 C.R.S., is to ensure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to the employers without the necessity of any litigation. §8-40-102(1), C.R.S. Claimant, in a workers' compensation claim, has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-40-101, C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959).

A claimant is required to prove that an injury arose out of and in the course of the claimant's employment. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). See also, §8-41-301(1)(b) & (c) C.R.S. A claimant must also prove by a preponderance of the evidence that there is a proximate causal relationship between an incident/injury and the need for medical treatment, plus the entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2017). See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000).

The fact that a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the logical and recurrent consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether any subsequent need for treatment was caused by an industrial aggravation of a pre-

existing condition or by the natural progression of the pre-existing condition. The mere experience of symptoms at work does not necessarily require a finding the employment aggravated or accelerated the pre-existing condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Ringa*, 717 P.2d 965 (Colo. App. 1985).

Moreover, section 8-40-201(14), C.R.S., defines occupational disease as:

> A disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id*. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTS diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

"Good" but not "strong" evidence that occupational risk factors cause carpal tunnel syndrome, as set forth in the *Guidelines*, include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. "Some" evidence of occupational risk factors for the development of carpal tunnel syndrome include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. W.C.R.P. Rule 17, Exhibit 5, pp. 23-24.

Claimant Failed to Prove She Sustained a Compensable Injury to the Bilateral Upper Extremities on August 12, 2014

The Medical Treatment Guidelines provide guidance for clinicians regarding the diagnosis and treatment of cumulative trauma disorders, such as carpal tunnel syndrome, de Quervains syndrome and lateral epicondylitis.

Per Rule 17, the Guidelines should be used to evaluate and treat categories of occupational disease. Per the Guidelines, employees' self-report of keyboard use appeared to be approximately double the actual time spent using the keyboard. Further, studies have provided evidence that "keyboarding in a reasonable ergonomic … posture up to 7 hours per day under usual conditions is very unlikely to cause carpal tunnel syndrome or other upper extremity disorders."

The MGT provide the steps in completing a medical causation assessment for cumulative trauma conditions. The steps are to:

(1) Make a specific and supportable diagnosis.

(2) Determine whether the disorder is known to be or is plausible associated with work.

(3) Interview the patient to find out whether risk factors are present in sufficient degree and duration to cause or aggravate the condition.

(4) Complete the required match between the risk factors in Section D.3.d Risk Factors Definitions Table and the established diagnosis using the system described in Section D.3.d.

(5) Determine whether a temporal association exists between the workplace risk factors and the onset or aggravation of symptoms.

(6) Identify non-occupational diagnoses … as well as avocational activities.

Claimant did not prove by a preponderance of the evidence that she suffered a work related injury on August 12, 2014, and failed to meet the causation requirements outlined by the Guidelines. This conclusion is based in part upon the following evidence:

- Claimant testified that her job duties varied throughout the day. She did not sit behind a computer and consistently type or use a mouse constantly during the day. Her job duties involved a variety of activities.

- A Job Site Evaluation and Physical Demands Analysis were completed. Claimant was physically present and observed to complete the analysis. After reviewing Claimant's job duties, the analyst determined Claimant spent approximately two to three hours per day using a keyboard and less than two hours per day using a mouse. The analyst found no risk factors present in Claimant's job duties.

- While Claimant advised her treating doctors that she "constantly" used the keyboard and mouse, per the Guidelines, studies are clear that patients' self-reports do not match objective measures and are usually double the time actually spent.

- Claimant underwent two EMG tests, with "completely normal" results, and no objective evidence of bilateral carpal tunnel syndrome.

- Dr. Raschbacher evaluated Claimant and assessed medical causation per the Guidelines. He opined that Claimant's job duties did not qualify as repetitive per the Department of Labor's definition. Dr. Raschbacher opined that Claimant's complaints were not caused by her job duties and were not work related.

- Claimant testified that she would take approximately one week vacations. However her pain complaints did not change or lessen while on vacation. Dr. Raschbacher testified he would expect an improvement in symptoms if the offending activity was stopped, even for one week.

- Claimant's complained of bilateral pain. Dr. Raschbacher testified that bilateral symptoms suggest the cause was not work related and opined Claimant's symptoms were idiopathic.

Physicians from Concentra and Dr. Raschbacher opined that Claimant's complaints were not work related. Claimant failed to present persuasive medical evidence to the contrary.

Accordingly, Claimant has not demonstrated that the hazards of her employment caused, intensified, or, to a reasonable degree, aggravated her bilateral carpal tunnel syndrome. Claimant has failed to prove by a preponderance of evidence that her bilateral symptoms were directly or proximately caused by her employment.

The ALJ finds, based on the totality of the evidence, that Claimant failed to prove a compensable work injury to her bilateral upper extremities.

An injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2013). See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals*

Office, 24 P.3d 29 (Colo. App. 2000). Even if an incident occurs it must be significant enough to result in an injury requiring medical treatment or resulting in impairment. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (Ind. Cl. App. Office, March 7, 2002). Pursuant to *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (Ind. Cl. App. Off. March 7, 2002), if an incident is not a significant event resulting in an injury, claimant is not entitled to benefits.

Even if Claimant were to have sustained an injury to her bilateral upper extremities on August 12, 2014, she is not entitled to medical benefits based on the following:

- Claimant's treating physician, Dr. Davis, and Dr. Raschbacher, opined that Claimant had an unusual presentation of pain complaints that did not fit with carpal tunnel syndrome.

- Claimant underwent bilateral carpal tunnel release and left transposition of the ulnar nerve and right decompression of the ulnar nerve surgeries. However, Claimant testified that she experienced only slight relief in her bilateral wrists and no relief in her elbows. Dr. Raschbacher testified it was surprising Claimant continued to experience pain following the surgical intervention.

Claimant did not present persuasive medical evidence that her job duties resulted in her bilateral upper extremity complaints and thus the need for medical treatment. The treating physicians at Concentra and Dr. Raschbacher both offered opinions that her complaints were not the result of her job duties.

Claimant has failed to prove by a preponderance of the evidence that she required medical treatment to her bilateral upper extremities as a result of her job duties.

The ALJ finds and concludes based on the totality of the evidence that Claimant failed to prove by a preponderance of the evidence that she sustained a compensable work in injury on August 12, 2014.

ORDER

It is, therefore, ordered that:

1. Claimant failed to prove by a preponderance of the evidence that she sustained a work injury on August 12, 2014.

2. Claimant's claim for benefits is denied and dismissed with prejudice.

DATED: 03/20/2018

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

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the cervical fusion at C4-C6 recommended by William Biggs, M.D. is reasonable, necessary, and related to his November 21, 2016 work injury.

2. Whether Respondents have established that sanctions are appropriate pursuant to 8-43-207(1)(p) for Claimant's failure to comply with Orders compelling him to respond to discovery and to provide supplemental discovery responses. Whether the appropriate sanction is termination of temporary total disability (TTD) benefit payments from December 26, 2017 through February 8, 2018.

FINDINGS OF FACT

1. Claimant is employed by Employer as a full service vending worker with duties that include stocking and re-stocking vending machines with Pepsi products. Claimant also removes excess change from the machines. Claimant drives a delivery truck that is already stocked when Claimant arrives to work. Claimant is tasked with driving the truck to different locations, lifting cases of product/soda off the truck and onto a hand cart, and pushing the hand cart with product to the vending machine locations to restock.

2. On November 21, 2016 Claimant was reaching above his head to remove a case of Mountain Dew soda from the top shelf of his work truck when he felt right shoulder and neck pain with tingling into his right arm and hand. Claimant reported that he slid the case of soda off the top of another case, but pulled too hard and it slipped. Claimant reported he caught the case with his left hand as it was about to fall and that he felt a twinge in his right shoulder just above the right scapular region. Claimant reported that he had immediate pain at a 7-8/10. *See* Exhibit C.

3. Claimant immediately called his supervisor to report the incident. Claimant reported that his supervisor sent a relief driver and that he was sent to NextCare for evaluation.

4. A summary of Claimant's medical treatment was prepared by Dr. Paz as part of an independent medical evaluation. *See* Exhibit C.

5. On November 21, 2016 At NextCare, Claimant reported pain and numbness in his right neck and shoulder after pulling a case of soda off the top shelf of his work truck. The pain was noted to be in the right lateral neck, right posterior neck, right shoulder, and right upper back with radiation into the right hand. It was noted that the events described involved lifting and twisting and did not involve axial loading or cervical

compression. Claimant was found to have no cervical spine tenderness, normal mobility, and normal curvature in his cervical spine. Claimant had positive testing in his right shoulder with positive O'Brien's, Speeds, and Yergason's. Claimant was advised to rest and reduce use and it was noted that he would be referred for a right shoulder MRI if he had no improvement. *See* Exhibit C.

6. On December 12, 2016 Claimant underwent an MRI of his right shoulder. The findings included: mild supraspinatus, infraspinatus, and subscapularis tendinosis. Articular surface fraying of the infraspinatus tendon was found with an intramuscular ganglion cyst. Low signal intensity thickening of the inferior glenohumeral ligament was identified with a recommendation to clinically correlate for adhesive capsulitis. Blunting and degeneration of the superior and posterior superior glenoid labrum were identified as was severe acromioclavicular joint arthritis. *See* Exhibit C.

7. On March 1, 2017 Claimant underwent an MRI of his cervical spine. The impression included multilevel spondylitic change with the most significant findings at C5-6 with severe bilateral neural foraminal narrowing as well as severe canal stenosis. In addition, findings of severe canal stenosis and moderate bilateral neural foraminal narrowing were identified at C4-5. *See* Exhibit C.

8. Claimant continued to be evaluated with complaints of neck pain and right shoulder pain. Neck stiffness was noted as well as difficulty with rotation. Claimant also reported some numbness and tingling in both his hands and forearms. *See* Exhibit C.

9. On April 12, 2017 Claimant underwent bilateral C4-5 and C5-6 transforaminal epidural steroid injections. Claimant reported that the injections did not help his pain much but that he felt better after physical therapy. *See* Exhibit C.

10. Claimant continued to report arm symptoms and it was noted that Claimant would be set up for bilateral upper extremity EMG tests as well as a CT scan of the neck. *See* Exhibit C.

11. On June 30, 2017 Claimant underwent a CT of his cervical spine. The impression provided was: multilevel disc protrusion and posterior longitudinal ligament ossification; moderate spinal and severe foraminal stenosis at C3-4, C4-5, and C5-6; and moderate spinal and foraminal stenosis at C-7. *See* Exhibit C.

12. On July 26, 2017 Claimant underwent an EMG of his bilateral upper extremities performed by Raymond van den Hoven, M.D. Dr. van den Hoven noted a physical exam that included significantly decreased cervical range of motion with increased neck discomfort on motion, as well as slight positive tinel's and carpal tunnel compression test on the bilateral wrists. Dr. van den Hoven's impression following EMG testing was: moderate bilateral carpal tunnel syndrome, relatively symmetrical in degree without denervation with much of the numbness and tingling coming from carpel tunnel syndrome although he suspected some contribution from cervical stenosis; no acute or chronic cervical radiculopathy in the C5-T1 myotomes or brachial plexopathy; no ulnar

neuropathy at the elbow/wrist; no peripheral neuropathy; and on a clinical bases, some suspected impairment of the C5 nerve roots and/or impingement on cord C4-5 serving C5 roots (decreased biceps reflexes, increased pronator teres and triceps reflexes). *See* Exhibits 2, C.

13. On August 3, 2017 Claimant was evaluated by Dr. Briggs who recommended a four level cervical fusion. *See* Exhibit C.

14. On August 8, 2017 F. Mark Paz, M.D. performed an independent medical record review. He noted that he had been asked to provide a medical opinion as to whether or not the request for a three level cervical fusion was reasonable, necessary, and causally related to the November 21, 2016 incident. Dr. Paz reviewed the medical records. Dr. Paz opined that Claimant had a diagnosis of cervical myelopathy with severe canal stenosis at the C4-5 and C5-6 levels, without cord signal abnormality and in addition had foraminal stenosis bilaterally at the C4-5 and C5-6 levels. Dr. Paz opined that Claimant did not have diagnostic therapeutic response to the bilateral transforaminal epidural steroid injections. Dr. Paz opined that the diagnosis of cervical spondylosis is a degenerative condition of the cervical spine found more often in older adults. Dr. Paz pointed out the anatomical changes identified included disc protrusion at C3-4, C4-5, and C5-6 levels and ossification of the longitudinal ligaments. *See* Exhibit C.

15. Based on the records that he reviewed and the documented mechanism of injury, Dr. Paz opined that it was not established that Claimant sustained a neck injury. Dr. Paz opined that it was not medically probable that the requested fusion was reasonable, necessary, and causally related to the November 21, 2016 incident. Dr. Paz opined that the mechanism of injury documented by the records was not consistent with a cervical spondylytic myelopathy diagnosis and that the multilevel cervical spondylosis was a pre-existing degenerative cervical spine condition. Dr. Paz also opined that it was not medically probable that the pre-existing cervical spine spondylosis was aggravated or accelerated as a result of the November 21, 2016 incident. *See* Exhibit C.

16. On August 9, 2017 Respondents issued a letter to Dr. Briggs indicating that the surgical request made by Dr. Briggs had been reviewed by Dr. Paz who opined that the requested surgery was not reasonable, necessary, or related to the November 21, 2016 work injury. Respondents indicated that Dr. Briggs' request could be reconsidered upon submission of further documentation supporting the reasonableness, necessity and relatedness of the procedure. *See* Exhibit B.

17. On August 11, 2017 Dr. Briggs issued a letter to Insurer. Dr. Briggs noted that Claimant had been under his care for a work related injury involving the neck. Dr. Briggs noted Claimant had reported that prior to the November 21, 2016 incident he had no difficulty with his arms and no significant pain in his neck. Dr. Briggs opined that there was no question that Claimant has cervical myelopathy. Dr. Briggs opined that the recommended surgery was reasonable and necessary and that once a patient presents with myelopathic findings, surgery is definitely indicated. Dr. Briggs opined that the causality was definitely due to Claimant's cervical degeneration and pressure on the

spinal cord that was clearly a pre-existing condition present before Claimant's work injury. However, Dr. Briggs opined that the injury at work seemed to aggravate it. Dr. Briggs noted that it was impossible to tell on MRI whether or not this was a disc herniation or just straight disc degeneration and noted there was no prior MRI for comparison. Dr. Briggs acknowledged that it was possible Claimant had a small disc herniation that hit his cord and gave him myelopathy findings at the time of injury, but that there was no way of knowing for sure. Dr. Briggs opined that either way, Claimant had a pre-existing injury aggravated or exacerbated by a work related injury since Claimant had no significant symptoms prior to the work related injury. Dr. Briggs urged Insurer to reconsider approval of the three level anterior cervical decompression fusion. *See* Exhibits 1, C.

18. On August 17, 2017 Respondents issued a letter to Dr. Briggs noting that they had received his response and would forward it to Dr. Paz who was scheduled to complete an independent medical evaluation. Respondents indicated until further notice, Dr. Paz should accept the correspondence as denial of the request for authorization. *See* Exhibit B.

19. Also on August 17, 2017, Respondents applied for hearing on the issue of whether the surgery requested by Dr. Briggs was reasonable, necessary, and causally related to the November 21, 2016 incident. *See* Exhibit A.

20. On October 2, 2017 Claimant underwent an independent medical evaluation performed by Dr. Paz. Dr. Paz issued his report on November 17, 2017. Claimant reported that on November 21, 2016 he was unloading from the top shelf of his trailer a case of mountain dew and that he slid the case off the top of another case, pulled too hard, and the case of soda slid off the top of the overhead shelf. Claimant reported catching the case with his left hand as it was about to fall and that he felt a twinge in his right shoulder just above the right scapular region. Claimant reported symptoms of the upper back and neck over the trapezial region, extending to the right and left scapular region as well as symptoms on the dorsal aspects of the right and left hand. Claimant also reported cervical spine symptoms aggravated with holding his head, rotating his head, and sleeping. On examination, Claimant had severely restricted active range of motion on gross inspection in three planes. Dr. Paz noted grimacing and pain behaviors with active range of motion testing which were not present prior to direct examination of the cervical spine. Dr. Paz found hypertonicity over the right levator muscle and tenderness to palpation with partial leaning on the right in the neutral position when compared with the left scapula. Dr. Paz found that Claimant was non tender to palpation of the superior and medial segments of the trapezius muscles on the right and left. Dr. Paz found the paraspinous muscles of the cervical spine to be without spasm but tenderness to palpation at the base of the cervical spine on both the left and right. Dr. Paz reviewed medical records and imaging reports. *See* Exhibit C.

21. Dr. Paz opined that it was not medically probable that the cervical spondylosis with myelopathy was causally related to the November 21, 2016 incident. He opined that based on reasonable medical probability, the cervical spondylosis predated the November 21, 2016 incident and opined that the cervical spondylosis with advanced

degenerative changes at multiple levels was not aggravated or accelerated as a result of the November 21, 2016 incident. Dr. Paz opined that the mechanism of injury involved no force across the neck/cervical spine. He again opined that cervical spondylosis is a degenerative condition of the cervical spine. *See* Exhibit C.

22. On December 6, 2017 the parties attended a status conference in anticipation of hearing set for December 8, 2017. At the status conference, ALJ Goldman granted Claimant an extension of hearing date until January 26, 2018 to allow Claimant additional time to seek counsel.

23. On December 13, 2017 Pre-hearing ALJ Goldstein issued an Order after a pre-hearing conference addressing Respondents' motion to compel supplemental responses to discovery and to propound three additional interrogatories less than 60 days prior to hearing. Respondents requested that Claimant supplement responses to interrogatories 3 and 6 which sought information concerning any prior illness, injury, or disability to the same body parts subject to the current claim… Claimant responded to interrogatories 3 and 6 by stating "N/A" and indicated at the prehearing conference that he intended by his responses to indicate that he had never suffered any prior illnesses, injuries, or disabilities nor has he suffered any conditions, symptoms, or pain concerning his cervical spine prior to the date of injury. ALJ Goldstein ordered that within seven days, Respondents had to provide Claimant with a copy of the initial discovery requests and Claimant's answers and that Claimant had to supplement his responses to interrogatories 3 and 6. ALJ Goldstein also ordered that Respondents could propound three additional interrogatories on Claimant to address any residency or work outside of Colorado within the last 10 years. *See* Exhibit A.

24. 25. On January 5, 2018 Respondents filed a Motion for Termination or Suspension of Temporary Disability Benefits Pursuant to Violation of Order. Respondents indicated that they provided Claimant copies of the original interrogatories and additional interrogatory questions on December 18, 2017 and that Claimant's supplemental responses were due by December 25, 2017 but that to date they had not received responses. Respondents argued that they were not able to complete their investigation into the prior medical history due to Claimant's noncompliance and they requested and argued that the Claimant's failure to comply with the December 13, 2017 Order was willful and that they were prejudiced in their inability to fully research Claimant's medical history and had to continue paying temporary total disability benefits while the hearing was pending. They requested to terminate or suspend temporary total disability benefits as a sanction and to add sanctions as an issue for hearing. *See* Exhibit A.

25. On January 22, 2018 Pre-hearing ALJ DeMarino issued an Order noting that Respondents had moved for sanctions against Claimant for failing to answer or respond to the additional discovery allowed by the December 13, 2017 pre-hearing Order. ALJ DeMarino noted that the issue of sanctions would be added as an issue for the January 26, 2018 hearing. *See* Exhibit A.

26. At hearing on January 26, 2016 Respondents requested as a sanction that they be allowed to terminate TTD benefits from December 26, 2017 (the day after Claimant's responses were due) through February 8, 2018 (the date of Dr. Paz's deposition). At hearing, Claimant indicated his belief that he had responded as required by the December pre-hearing Order. Respondents indicated that they had received responses to their additional interrogatories from Claimant in early January but that the responses were illegible. The parties were given the opportunity to submit any email exchanges regarding the additional discovery responses within 20 days of hearing. The ALJ did not receive any email exchanges or records concerning the additional discovery beyond the arguments and statements made at the January 26, 2018 hearing.

25. After hearing, and on February 8, 2018 Dr. Paz testified by deposition. Dr. Paz opined that Claimant's diagnosis was not disputed and was cervical sponydlolisthetic myelopathy which is a degenerative compression and congenital condition compressing the spinal cord. He opined that the condition affects the ligaments connecting the bones within the spinal cord causing them to thicken and ossify, that it can also affect the vertebral bodies themselves causing them to gain bony material compromising the diameter of the spinal cord, and affects disc degeneration and can cause disc herniation. Dr. Paz opined that the spinal canal space can be narrowed by conditions and if narrowed then the cord can be compressed. Dr. Paz opined that they are age related degenerative changes with a component of underlying genetics. Here, Dr. Paz opined that Claimant had degenerative conditions from C4 down to C6 where his spinal cord was compressed.

26. Dr. Paz noted that at the initial evaluation at NextCare there was no documented trauma to Claimant's spinal cord and that the events were listed as not including axial loading or cervical compression. Dr. Paz opined that based on the history given by Claimant, there was no trauma to the cervical cord. Dr. Paz opined that the surgery requested by Dr. Biggs was not reasonable, necessary, and causally related to the November 21, 2016 incident primarily because there was no mechanism of injury to support the cervical spondylitic myelopathy.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University*

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

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

Medical benefits

Respondents are required to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that the three level cervical fusion requested by Dr. Biggs is reasonable, necessary, or casually related to his November 21, 2016 work injury. Claimant has failed to establish that he sustained an acute injury to his cervical spine or that he aggravated a pre-existing cervical spine condition on November 21, 2016 requiring a three level fusion. Rather, the testimony and

reports of Dr. Paz are found more credible and persuasive that there was no trauma to the cervical spine sufficient to have caused or aggravated/accelerated Claimant's condition. Claimant has failed to establish that the requested surgery is work related. Claimant's pre-existing degenerative condition was not aggravated or accelerated by the November 21, 2016 incident and Claimant's request for surgery is denied and dismissed.

Sanctions

The ALJ has wide discretion to enter sanctions deemed appropriate for violation of an Order. Here, Respondents argue that Claimant violated a December 13, 2017 pre-hearing Order by failing to respond to additional interrogatory questions and by failing to supplement responses to interrogatories 3 and 6. Respondents request to be allowed to terminate TTD benefits from the day after the responses were due (December 26, 2017) through the date of Dr. Paz's deposition (February 8, 2018) and they specifically argue that they were unable to adequately prepare for hearing due to an inability to fully research Claimant's medical history. Initially, it was found at the December 13, 2017 Order that Claimant had answered "n/a" to questions 3 and 6 and Claimant indicated he had answered in such a way because he had no prior issues with his cervical spine, including any treatment. At hearing on January 26, 2018 Claimant indicated he had answered the additional questions and that he had tried to comply with the pre-hearing Order. Respondents indicated and admitted that they actually had received responses in early January to the interrogatories addressed by the December 13, 2017 Order but that the responses were illegible. The parties were allowed to submit any email exchanges/records on this issue following hearing. No records were received.

The ALJ declines to impose sanctions and specifically declines to impose the sanction of termination of TTD benefits from December 26, 2017 through February 8, 2018. It appears initially that Claimant answered interrogatories 3 and 6 indicating there were no records, etc. to disclose. With nothing to disclose, it is unclear how Claimant's responses or lack of any additional responses would have prejudiced Respondents in preparing for hearing. Claimant answered "n/a," explained at pre-hearing that "n/a" meant he had nothing to disclose and no prior problems/issues with his cervical spine, and had nothing to add to his answer. Although Claimant was ordered to supplement the answers, there really was nothing to supplement or add since Claimant maintained at the December 13, 2017 pre-hearing that there was nothing to add to his "n/a" response as no records, treatment, etc. existed. Further, the parties indicated at the January 26, 2018 hearing that Claimant had actually responded to the December 13, 2017 Order in early January. Although this response would have been slightly late, it appears Claimant did respond. If his answers were illegible as Respondents indicated, Respondents could have contacted Claimant to ask for typed responses and/or could have filed a motion to compel legible answers instead of requesting sanctions. Based on the statements of the parties, it appears Claimant attempted to comply with the December 13, 2017 Order by providing responses. Further, the statements at the December 13, 2017 pre-hearing also indicate there was no additional information Claimant would have or could have provided to questions 3 and 6 even if he had timely responded with legible answers. Respondents have failed to show that even if Claimant failed to comply, they were prejudiced to a

degree that termination of TTD would be an appropriate sanction. The request for sanctions is denied.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that the cervical spine surgery recommended by Dr. Biggs is reasonable, necessary, or casually related to his November 21, 2016 work injury. His request for surgery is denied and dismissed.

2. Respondents request for sanctions is denied and dismissed.

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

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

DATED: March 26, 2018,

/s/ Michelle E. Jones

_____

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

ISSUES

- Whether claimant has proven that he is entitled to an award of permanent partial disability ("PPD") based on the impairment rating provided by Dr. Machanic, the Division-sponsored Independent Medical Examination ("DIME") physician?

- If claimant has proven that he is entitled to an award of PPD benefits based on the impairment rating of the DIME, whether respondents have overcome the opinion of the DIME regarding PPD impairment by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant sustained an admitted work injury on November 22, 2014. Claimant testified at hearing that he was getting carpet rolls down off of a pyramid of carpets when he fell off the carpets to the ground. Claimant was referred for medical treatment by employer with Ms. Kylie Wead, a physician's assistant, and Dr. Burris with Concentra Medical Center.

2. Prior to his work injury, claimant had received medical treatment for his lumbar spine dating back to at least 2006. This treatment included a spinal cord stimulator implant in 2010, replacement of the stimulator in 2012 and reprogramming of the stimulator at a subsequent date.

3. Following claimant's injury, claimant was evaluated at Concentra Medical Center. It was noted on November 22, 2014 that claimant had fallen about 10 feet striking his head and having a loss of consciousness. Claimant complained of pain in the lower back of 6 out of 10.

4. According to the medical records from Ms. Wead, claimant was provided with work restrictions that included "no work" when he was evaluated on November 24, 2014 and November 26, 2014. Claimant was released to return to modified activity as of December 2, 2014 according to the December 1, 2014 note from Ms. Wead that kept claimant off of work for the rest of the shift with modified activity tomorrow.

5. Claimant returned to Ms. Wead on December 5, 2014. Ms. Wead released claimant to return to modified duty that limited claimant to a 4 hour work shift as of that day. Claimant's work shift was increased to six hours on December 16, 2014, with a 10 pound lifting restriction. These restrictions were kept in place through May 14, 2015 when claimant's lifting restriction was increased to 20 pounds and he was allowed to work an 8 hour shift.

6. Claimant underwent a computed tomography ("CT") scan of the head that was read as normal. Claimant also underwent a CT scan of the thoracic spin that

showed some atelectasis over his lungs, along with mild multilevel degenerative disc change. Claimant underwent a CT scan of the lumbar spine that showed his prior L5-S1 posterior fusion intact without evidence of loosening or failure.

7. Claimant was referred for physical therapy before being referred to Dr. Ghiselli for surgical consultation. Dr. Ghiselli noted that claimant had segment degeneration at T12-L1 and L1-L2 and recommended physical therapy. Dr. Ghiselli did not recommend surgery at the time of his evaluation.

8. Claimant was referred to a physiatrist, Dr. Blau. Dr. Blau noted claimant had chronic sacroilitis, chronic pain syndrome, opioid dependence and recommended ultrasound guided bilateral sacroiliac joint/ligament steroid injection with lidocaine. Claimant underwent the recommended injection on February 20, 2015.

9. Claimant was subsequently referred to Dr. Duhon on May 13, 2015. Dr. Duhon diagnosed claimant with facetogenic pain/spondylosis and felt the fall on November 22, 2014 had exacerbated this condition. Dr. Duhon felt claimant was not getting good coverage from his spinal cord stimulator and suggested adjusting the stimulator settings. Dr. Duhon also recommended medial branch blocks at the T11, T12, L1 and L2 levels along with rhizotomies.

10. Claimant was referred to Dr. Ghazi on July 8, 2015 for the medial branch blocks at T11, T12, L1 and L2 levels. Dr. Ghazi performed medial branch rhizotomies on August 11, 2015 at the T11, T12, L1 and L2 levels on the right side. A second set of rhizotomies was performed on August 25, 2015, again by Dr. Ghazi, this time on the left side at the T11, T12, L1 and L2 levels.

11. Issues arose with regard to whether the ongoing medical care being recommended by the various physicians treating claimant was related to his work injury. Respondents obtained a peer review report from Dr. Ayyar on November 11, 2015 that indicated that Dr. Barolat's request for a lumbar peripheral nerve stimulator should be denied as the information provided did not establish the medical necessity of the request. Dr. Burris noted on January 15, 2016 that there were significant pre-existing issues with regard to claimant's prior surgery. Dr. Burris recommended a one-time evaluation with a pain specialist to determine causality.

12. Claimant was evaluated by Dr. Sacha on February 9, 2016. Dr. Sacha opined that claimant had issues with opioid dependence and was at his baseline level of pain. Dr. Sacha opined that claimant was at maximum medical improvement with regard to his work injury and recommended case closure.

13. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Burris on April 8, 2016. Dr. Burris noted that claimant continued to have back pain 1 ½ years after his work injury, but diagnostic testing had failed to reveal any new issues. Dr. Burris agreed with Dr. Sacha that claimant's current back complaints were related to his pre-existing issues and placed claimant at MMI. Dr. Burris opined that claimant had no permanent impairment as a result of the work injury.

14. Claimant filed a workers' claim for compensation on July 5, 2016. Respondents filed a final admission of liability ("FAL") admitting for $26,035.49 in medical expenses, but no temporary or permanent disability. Claimant filed a timely objection to the FAL and requested a Division-sponsored Independent Medical Examination ("DIME").

15. Claimant underwent a DIME with Dr. Machanic on August 9, 2017. Dr. Machanic reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Machanic noted claimant's long history of pre-existing issues involving his low back and his medical treatment after his November 22, 2014 fall at work.

16. Dr. Machanic opined that claimant was at MMI as of April 18, 2016. Dr. Machanic acknowledged the significant complex issue with regard to claimant's long history of prior low back pain. Dr. Machanic provided claimant with a 19% whole person impairment rating after apportionment. Dr. Machanic based this impairment rating off of claimant's medical treatment, including the two rhizotomies. Dr. Machanic noted that claimant had documented pre-existing numbness and provided no additional impairment for this condition.

17. Respondents obtained an independent medical examination ("IME") with Dr. Lesnak on December 15, 2017. Dr. Lesnak evaluated claimant and reviewed his medical records and issued a report documenting his findings. Dr. Lesnak opined that there was no medical evidence to support Dr. Machanic's opinion that claimant would qualify for a 19% whole person impairment rating.

18. Claimant testified at hearing that following his injury, when he was on restrictions, he was mostly doing work behind the desk. Claimant testified that he did not lose any wages after his injury as he was a salaried employee and continued to receive his full salary after his injury.

19. Claimant testified that he eventually got a new job in 2016 with a new employer. Claimant testified he did not leave Employer due to his injury or any disability. Claimant testified he did miss time from work to attend medical appointments, but continued to receive his salary.

20. Respondents argue that the DIME report from Dr. Machanic is invalid in this case due to the fact that claimant did not suffer a loss of earning capacity following his industrial injury. The ALJ is not persuaded that claimant is precluded from obtaining a DIME in this case.

21. Notably, while claimant did not suffer a wage loss, claimant did suffer a disability in this case. Claimant was taken off of work completely by the treating physician for over a week following the initial injury. Claimant was then precluded from working his regular eight hour shift for another 5 months. The mere fact that the employer elected to continue claimant on his salary while his ability to perform the work for employer was limited by his physician does not compel a finding that claimant failed

to establish a "disability" following the injury. The ALJ finds that where claimant is incapable of performing his prior job due to the injury, the mere fact that employer elects to continue to pay claimant does not mean claimant is not disabled.

22. Moreover, respondents filed an FAL in this case which triggered claimant's time period for applying for a DIME to address the issues of MMI and permanent impairment. Respondents moved to strike claimant's DIME report only after the report was received. Respondents made no effort to limit the DIME prior to Dr. Machanic performing the DIME to address only the issue of MMI.

23. Claimant bore the cost of the DIME pursuant to the statute. If respondents felt claimant was not entitled to a DIME on the issue of PPD benefits, they could have moved to limit the DIME prior to the DIME occurring. Instead, respondents waited until after the DIME occurred, and after claimant bore the cost of the DIME, and then sought to limit the impact of the DIME.

24. With regard to the impairment rating of Dr. Machanic, Dr. Machanic noted that claimant did have prior numbness and did not provide claimant with an impairment rating for that condition, implicitly finding that the numbness was not related to claimant's work injury. Dr. Machanic did provide claimant with a permanent impairment rating for the surgery and rhizotomies related to his work injury, but apportioned the impairment for his prior surgeries. This left claimant with an impairment rating of 2% associated with the most recent injury. Dr. Machanic noted that he did not have prior range of motion measurements in which to provide an opinion with regard to apportionment, and therefore, provided claimant with 17% whole person impairment for loss of range of motion. Dr. Machanic combined the 2% specific disorder impairment rating with the 17% range of motion rating to come to a final rating of 19% whole person.

25. Notably, Dr. Machanic's impairment rating before apportionment was 30% whole person, but Dr. Machanic found that only 19% of the impairment could be related to the industrial injury, the vast majority of which was attributable to claimant's range of motion measurements.

26. Dr. Lesnak in his IME report notes that it was his opinion that claimant's condition was entirely related to his pre-existing condition, finding that there was no radiographic, MRI or CT abnormalities that could be associated with claimant's work injury. Dr. Lesnak further noted that claimant's range of motion measurements would be invalidated using the straight leg raising criteria.

27. The ALJ credits the DIME report from Dr. Machanic and finds that respondents have failed to overcome the findings of Dr. Machanic by clear and convincing evidence with regard to the issue of permanent partial disability. The ALJ notes that while Dr. Lesnak invalidated claimant's range of motion measurements, Dr. Machanic did not find it necessary to do so based on his examination. The ALJ finds that at best, this represents a difference of medical opinion regarding whether the range of motion measurements are valid.

28. The ALJ further notes that Dr. Machanic appears to have taken into consideration the amount of impairment that could be attributable to the admitted work injury in this case and properly applied the concept of apportionment and causation to the best of his ability in his report. The ALJ therefore finds that the opinion expressed by Dr. Machanic regarding the extent of permanent impairment that can be attributable to the admitted work injury in this case is credible and persuasive.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. Likewise, Respondents have the burden of proving any affirmative defenses raised at hearing by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P2d 1205 (1936); CJI, Civil 3:16 (2008).

3. Respondents argue that pursuant to *Harman-Bergstedt v. Loofbourrow,* 320 P.3d 327 (Colo. 2014), bars the claimant from pursuing a DIME in a case in which claimant is put at MMI and no temporary disability benefits have been paid. The ALJ finds that Respondents' interpretation of *Loofbourrow* is misguided.

4. In *Loufbourrow*, the Colorado Supreme Court held that an injured worker was not precluded from pursuing temporary total disability benefits where the worker was placed at MMI prior to the injured worker suffering a wage loss. However, even if *Loufbourrow* were to hold that injured workers are not entitled to a DIME where the injury resulted in no lost time from work and no disability benefits paid to claimant, the ALJ finds that in this case, claimant did have a disability, and therefore, is entitled to a DIME.

5. As argued by respondents, to prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.*

6. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

7. In this case, claimant established a disability as he was taken off of work completely by his physician for a period of a week. Claimant was then restricted from working his normal shift for another 5 months. Employer continued claimant's salary during this time, but that does not mean that claimant was not "disabled". Only that claimant did not lose any earnings as a result of his disability.[1]

8. Respondents argument in this case illustrates some of the issues with regard to the interpretation of *Loufbourrow* as a defense to the claimant's right to a DIME. Section 8-42-107(8)(b)(II), C.R.S. allows either party to request a DIME on the issue of whether or not the injured worker has reached maximum medical improvement. There is no limitation in Section 8-42-107(8)(b)(II) that would limit the request for a DIME on the issue of maximum medical improvement to only cases in which the injured worker is paid temporary disability benefits.

[1] The ALJ would note that the Colorado Workers' Compensation Act makes a specific provision for what occurred in this case under Section 8-42-124(2)(a), C.R.S. but requires that the employer be reimbursed by the insurance carrier. No evidence was presented at hearing that the agreement in this case was done pursuant to a wage continuation plan as allowed by the statute, nor that the plan was approved by the Director as required under Section 8-42-124(5), C.R.S. However, the mere fact that the wages continued does not necessarily mean that the injured worker was not disabled. The ALJ makes no finding that this was or was not a wage continuation plan as allowed by statute, only that the evidence establishes that claimant was "disabled" as contemplated by the Colorado Workers' Compensation Act.

9. Moreover, Section 8-42-107(8)(c), C.R.S. provides in pertinent part:

> When the injured employee's date of maximum medical improvement has been determined pursuant to subparagraph (I) of paragraph (b) of this subsection (8), and there is a determination that permanent medical impairment has resulted from the injury, the authorized treating physician shall determine a medical impairment rating as a percentage of the whole person based on the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment", in effect as of July 1, 1991. Except for a determination by the authorized treating physician providing primary car that no permanent medical impairment has resulted from the injury, any physician who determines medical impairment rating shall have received accreditation under the level II accreditation program.... If either party disputes the authorized treating physician's finding of medical impairment, *including a finding that there is no permanent medical impairment,* the parties may select an independent medical examiner in accordance with section 8-42-107.2. The finding of the independent medical examiner may be overcome only by clear and convincing evidence. (emphasis added)

10. Again, nothing in Section 8-42-107(8)(b) or (c) provides that the DIME process is only for cases in which temporary disability benefits have been paid. In fact, the statute allows for physicians who have failed to go through the Level II accreditation program to issue an opinion that the injured worker has no permanent impairment.

11. To accept respondents argument with regard to the interpretation of *Loufbourrow*, would leave injured workers who have obvious permanent impairment without a remedy when they are placed at MMI with a zero percent impairment rating that could be provided by a physician who has not received required training for providing an opinion on permanent impairment under Colorado Law without any recourse to challenge that rating, merely because they did suffer a wage loss as a result of the injury, for whatever reason. The ALJ finds that this is contrary to the intended result of the Colorado Supreme Court in *Loufbourrow*.

12. Regardless, however, the ALJ has found that claimant has established that he suffered a disability as a result of the work injury and is therefore entitled to a DIME on the issue of PPD benefits.

13. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion

between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

14. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

15. As found, respondents have failed to overcome the opinion of Dr. Machanic by clear and convincing evidence with regard to the amount of permanent impairment that can be attributable to claimant's work injury. As found, Dr. Machanic's opinion regarding permanent impairment is found to be credible and persuasive.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant PPD benefits based on Dr. Machanic's 19% whole person impairment rating.

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

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

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

DATED: October 10, 2018

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-588-918-21

ISSUE

- Whether Claimant established by a preponderance of the evidence that the hearing aids prescribed to address his tinnitus condition are reasonable, necessary, and related to cure and relieve the effects of Claimant's admitted industrial injury.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury to his left ankle in the course and scope of his employment with Employer on January 22, 2003.

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

3. Christopher J. Huser, M.D., Claimant's ATP has prescribed and Claimant has taken multiple medications during the course of his treatment. Since approximately January of 2015, he has been taking Cymbalta and using a Butrans Patch to control his pain at a level of 6/10, and other injury related symptoms.

4. Although Respondents challenged the referral, the ALJ's order authorizing the referral was ultimately affirmed by the Industrial Claims Appeal Office.

5. On November 9, 2016, Dr. Huser sent Claimant to "The Hearing Clinic" for evaluation of his history of increasing bilateral tinnitus.

6. On November 17, 2016, Ira Dector, an audio engineer and hearing instrument specialist at The Hearing Clinic evaluated Claimant. The evaluation included hearing tests among other things. The Hearing Clinic issued a report which reads in pertinent part:

> Joseph Robbins came to our clinic on November 17, 2016 with complaints about tinnitus (ringing in the ears). His tinnitus is causing him severe anxiety, stress and sleep deprivation. Joe was injured on the job on July 2nd 2003 and prescribed several medications, including Cymbalta and a Butrans pain patch, both of which are listed by the American Tinnitus Association as causing tinnitus. During his tinnitus evaluation, Joe was also diagnosed with a severe high frequency hearing loss in both ears.
>
> Unfortunately, there is no cure for tinnitus, only treatment. The most effective treatment is sound therapy, and given

> Joe's hearing loss, the sound therapy must be amplified and presented through hearing aids. After just a few minutes of wearing hearing aids in our office Joe's adverse reaction to his tinnitus lessened substantially. The Hearing aids with the sound therapy that will most effectively help Joe are Resound linx2 9's which cost $7,000.

7. The Hearing Clinic permitted Claimant to try the prescribed hearing aids which he testified eliminated the symptoms of his tinnitus by 90%.

8. At the conclusion of his appointment, The Hearing Clinic provided Claimant a bill and purchase agreement for the hearing aids.

9. Mr. Dector referenced the American Tinnitus Association website as identifying several medications that have been known to cause tinnitus including Cymbalta and Butrans.

10. Respondents retained Dr. Alan Lipkin, a board-certified otolaryngologist to evaluate Claimant. As part of his evaluation, Dr. Lipkin reviewed The American Tinnitus Association website, including the medications that The American Tinnitus Association notes as potential causes of tinnitus. Dr. Lipkin testified that The American Tinnitus Association website has identified no less than 1,000 medications that potentially cause tinnitus, including common medications such as Tylenol and Pepto Bismol. Dr. Lipkin noted that The American Tinnitus Association identifies medications that are commonly used to treat tinnitus, including Xanax, as potential causes of tinnitus. As such, Dr. Lipkin, opined that The American Tinnitus Association was unreliable.

11. Dr. Lipkin evaluated Claimant on October 10, 2017. Dr. Lipkin conducted audio testing and diagnosed Claimant with bilateral, high frequency, sensory neural hearing loss. Individuals with this condition have hearing losses in the upper frequencies.

12. Dr. Lipkin testified that tinnitus is a sensation of noise in your ears or head that is not present in the environment. Claimant has the common type, subjective tinnitus, which is typically associated with sensory neural hearing loss.

13. Dr. Lipkin testified that, in the course of his practice, he has treated thousands of people with tinnitus.

14. Dr. Lipkin opined in his report that it is highly likely that Claimant's tinnitus is caused by Claimant's severe bilateral sloping sensory neural hearing loss. At hearing, Dr. Lipkin clarified that the likelihood that Claimant's tinnitus was caused by his severe bilateral sloping sensory neural hearing loss was greater than a 90%.

15. Dr. Lipkin opined that Claimant's consumption of Cymbalta and Butrans patches had not caused Claimant's tinnitus because, "Although tinnitus has apparently been associated with Cymbalta and Butrans patches, this must be a very uncommon association as I have not seen this in the past in any of the thousands of tinnitus patients that I have seen." At hearing, Dr. Lipkin further clarified that there would be less than a

5% chance that Claimant's consumption of Cymbalta and use of Butrans patches would somehow be the cause of his tinnitus.

16. Respondents denied authorization of the hearing aids asserting that Claimant's tinnitus is not related to his work injury or treatment for the injury.

17. On October 30, 2017, Claimant returned to Dr. Huser and provided him with a copy of Mr. Dector's report. At that visit, Dr. Huser – who previously sought to refer Claimant to an otolaryngologist to determine the cause of Claimant's tinnitus – appears to have adopted Mr. Dector's opinion that Claimant's medications had caused his tinnitus. Dr. Lipkin, the board-certified otolaryngologist, testified that he would not defer his opinions to those of Dr. Huser.

CONCLUSIONS OF LAW

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

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. CRS Section 8-42-101. The right to workers' compensation benefits, including medical benefits, however, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment is proximately caused by an injury arising out of an in the course of employment. C.R.S. section 8-41-301(1)(c); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3rd 844 (Colo. App. 2000). In addition, Respondents are free to challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care on a case. *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3rd 192 (Colo. App. 2002). The question of whether a particular medical treatment is reasonable and necessary and/or related to the claim is one of fact for determination from the ALJ. *Id.; Walmart Stores Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant continues to bear the burden to prove her right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990).

The ALJ credits the opinions of Dr. Lipkin as being more credible and persuasive than those of Dr. Huser and Mr. Dector. Dr. Lipkin based his opinions on years of experience, having treated thousands of patients with tinnitus, and his specialized training.

The ALJ gives little credence to the fact that The American Tinnitus Association associates certain of Claimant's medications. As found, that association has identified no less than 1,000 medications that potentially cause tinnitus, including common medications such as Tylenol and Pepto Bismol; and identifies medications that are commonly used to treat tinnitus, including Xanax, as potential causes of tinnitus.

The ALJ finds and concludes that more likely than not Claimant developed tinnitus secondary to his severe bilateral sloping sensory neural hearing loss.

The ALJ finds and concludes that Claimant has not proven by a preponderance of the evidence that his tinnitus is causally related to medications that he is taking.

ORDER

It is therefore ordered that:

1. Claimant's request that Respondents pay for his hearing aids is denied and dismissed with prejudice.

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

DATED: March 22, 2018

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-057-574-01

ISSUE

- Whether Claimant has proven by a preponderance of the evidence that he suffered a compensable injury on September 8, 2017 arising out of and in the course and scope of his employment, and if so, whether Claimant requires medical care.

FINDINGS OF FACT

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

1. Claimant was employed by Employer as a driver who made deliveries for Office Depot. Claimant's duties included transporting loads from the store's warehouse to area stores.

2. Office Depot employees would stack supplies onto pallets, shrink-wrap the pallets in plastic, and load the wrapped pallets onto the truck. Pallets weighed between 1,200 and 1,500 pounds. Occasionally, pallets were improperly stacked, resulting in uneven, unbalanced, or top-heavy loads. When pallets were properly loaded onto the truck, the plastic they were wrapped in did not touch. However, pallets were occasionally improperly loaded resulting in the plastic wrap of two pallets touching and sticking together.

3. Upon arrival at the stores, Claimant was responsible for removing the pallets from the truck, most often using a pallet jack.

4. On September 8, 2017, Claimant began unloading his truck and noticed the plastic wrap on two of the pallets was stuck together. As he attempted to separate the plastic with his hands, one of the pallets tipped over, the plastic broke, and the majority of supplies fell onto him pinning him against another pallet which was behind him. Claimant ultimately was able to exit the cargo portion of the truck, but was unable to complete his delivery. Claimant testified that the Office Depot manager on duty came onto the truck to assist him and take photographs for her report.

5. Claimant returned to the warehouse, reported the accident and his injuries to his manager, and was unable to make his second delivery for the same day. Claimant testified that he asked to see a doctor at that time.

6. Claimant testified that his manager told him to take the weekend off, and then more time off, to see if his injuries resolved. They did not, and Claimant began experiencing difficulty with his activities of daily living.

7. Claimant testified that he told Employer again that he needed to see a doctor. Employer did not provide Claimant with a list of medical providers. Rather, Employer told Claimant on Friday, September 15, 2017, that they would schedule an appointment for him the following Monday. At that time, Claimant called his regional safety manager seeking medical care.

8. On Monday, September 18, Employer sent Claimant to a conference room at a Best Western Hotel where he was seen for "EFA" testing by a technician. No persuasive evidence established what, if any, qualifications the technician had.

9. As part of his on-boarding with Employer, Claimant underwent a pre-employment medical examination that included an "electrodiagnostic functional assessment" (EFA) also performed by a technician associated with Emerge Diagnostics. The EFA purportedly measures the baseline status of certain body parts. Claimant testified that the pre-employment EFA was performed in a five foot by five foot room; that electrodes were attached to his neck, shoulders, and chest; and that he performed stretches, ranges of motion, and static resistance bar testing. The EFA took approximately thirty minutes, during which time the technician commented that she was having problems with the equipment. The technician did not explain what she was doing and did not provide Claimant with the EFA results. Employer assigned no restrictions and Claimant was issued a CDL.

10. The parties described the September 18, 2017, post-injury EFA as a "telemedicine" visit with Frank Tomecek, M.D. Claimant testified that the doctor was only on screen for a portion of the examination where Claimant was asked to perform certain movements with his left shoulder while both shoulders were connected to electrodes. Claimant testified he inquired about his right shoulder and low back which he also identified as being injured. Apparently, the technician made a phone call and then told Claimant that only his left shoulder had been reported. Claimant testified further that he was unable to perform several of the tasks Dr. Tomecek asked of him, and that he had more pain after the exam. According to Claimant, Dr. Tomecek interrupted the testing by saying, "I've seen enough." Claimant asked what treatment or further evaluation he would have, and the doctor responded, "They'll get back to you."

11. After the September 18, 2017, EFA exam, Claimant contacted the Labor Board to determine how to proceed. Employer ultimately provided Claimant with a list of designated medical providers on September 20, twelve days post-injury.

12. Claimant scheduled an appointment with Dr. Brian Williams, one of the designated providers, in part because he was able to see Claimant the soonest.

13. On September 20, 2017, Claimant presented to Dr. Williams for examination of his work related injuries. At the initial examination, Dr. Williams diagnosed Claimant with left and right shoulder strain, lumbar strain, and back pain with left-sided radiculopathy. Dr. Williams prescribed medications, physical therapy for Claimant's right shoulder and low back, and a left shoulder MRI for a suspected tear. Dr. Williams assessed that "based on the patient history provided, the injuries described more likely

did occur within the scope and duties of the [Claimant's} employment for the following injuries: left shoulder strain, right shoulder strain, lumbar strain, back pain with left-sided radiculopathy, and acute stress reaction."

14. On September 27, 2017 Claimant presented to Dr. Williams with continued bilateral shoulder pain and lower back pain. Claimant complained of difficulty with sitting, standing, lifting, traveling, personal care, and intense pain. Dr. Williams' progress report noted that his objective findings were consistent with Claimant's history and the work-related mechanism of injury.

15. On September 28, 2017, Insurer notified Dr. Williams that it had denied compensability on the claim. Insurer denied Claimant's claim based largely on Dr. Tomecek's report.

16. On October 11, 2017, Claimant returned to Dr. Williams after deciding to continue treatment using his private insurance, outside of the Workers' Compensation system. Dr. Williams reiterated his concern for the left shoulder injury and his opinion that an MRI was necessary. Dr. Williams assigned lifting restrictions including maximum lifting not to exceed 10 pounds, repetitive motion not to exceed 5 pounds, and pushing and pulling not to exceed 10 pounds. Employer could not accommodate Claimant's restrictions, and ultimately Employer terminated Claimant's employment. Claimant received an email at approximately the same time notifying him that Insurer had denied his claim.

17. On November 11, 2017, Claimant underwent a left shoulder MRI examination which he paid for. According to the interpreting radiologist, Charles Wells, M.D., it revealed linear hyper-intense signal in the posterior labrum, extending from approximately 11:00 to 8:00. The impressions portion of the MRI report provided: "suspected nondetached tear of the posterosuperior labrum extending from 11:00-8:00."

18. Claimant did not attend physical therapy because he lost his personal health insurance when Employer terminated him, and he could not afford it.

19. The ALJ finds Claimant credible. His testimony was straight forward, reasonable, and supported by and consistent with his medical records. Photographs admitted as Claimant's exhibit 4 document Claimant's testimony regarding pallets being improperly stacked, resulting in uneven, unbalanced, or top-heavy loads. Further, the exhibit shows the stack of supplies that fell onto Claimant in a manner consistent with Claimant's testimony.

20. Maryrose Reaston, Ph.D., testified on Respondents' behalf at the hearing. Ms. Reaston introduced herself as the "chief scientific officer" of Emerge Diagnostics, and the inventor of EFA. Although Respondent offered Ms. Reaston as an expert in electrodiagnostics, following Claimant's voir dire, the ALJ found that Ms. Reaston was not qualified as an expert.

- Ms. Reaston's education was limited to a bachelor's degree in psychology from UCLA and a Ph.D. in psychology from Sierra University in Costa Mesa, California. The seal Ms. Reaston uses, however, is that of Sierra College, a community college.

- Sierra University no longer exists and was only accredited for a short period of time if at all. It was described as a "university without walls," and has been sued for fraud.

- Ms. Reaston never practiced in her degreed field of psychology.

- Ms. Reaston testified that she attended a "roughly" three-month program at "Harvard," and earned a "certificate." However, she had not performed EMGs or any other work in electrodiagnostics even at the level of a technician, at the time she attended the program. Ms. Reaston's testimony implied that she was a student at Harvard. However she was never admitted to Harvard University as a student.

- Ms. Reaston initially testified that Emerge Diagnostics had fifteen employees. When pressed, she clarified that she included remote consultants and salespeople as employees.

- Ms. Reaston testified that her title is Chief Science Officer, but later acknowledged that no scientists work under her supervision. Rather, she "collaborates" with other scientists. She asserted that she was collaborating on research with consultants from Harvard and MIT but when asked why she did not publicize that association, she replied, "Because we are still working on the research, and the publications are coming out in the near future."

- Ms. Reaston appears in Emerge Diagnostics marketing videos which claim that EFAs help curb workers' compensation claim costs.

- Ms. Reaston testified that Emerge Diagnostics has a research and development department, later clarifying that it was composed of "consulting" physicians and a software engineer, and that "Emerge Diagnostics consults with MIT and Harvard different research projects."

- Although Ms. Easton mentioned Harvard and MIT frequently in her testimony, she did not identify with whom she was working or even what department of the universities she was engaged with.

- Ms. Reaston testified that the EFA has independent validation for reliability. She later clarified that really *EMGs* have independent validation. She testified that EFAs are "more reliable than EMGs and better than an MRI." On cross examination, she conceded that EFA is really a surface EMG that

she markets as a "revolutionary technology for the diagnosis and treatment of soft tissue injuries."

21. Ms. Reaston testified that the EFA is similar to other diagnostic surface EMGs, and the EFA technology is classified as a class two diagnostic physical medicine and rehab and neurology device by the FDA. Its labeled usage says that it can age an injury. The EFA is also FDA approved to perform baseline testing. However, her testimony was not supported by any documentary evidence and was conclusory and defensive rather than descriptive.

22. Ms. Reaston testified that EFA data is collected by certified EMTs, physician assistants, and nurses. That testimony was contradicted by Dr. Tomecek who testified that the person collecting the EFA data only needed to be able bodied and able to understand English. Claimant's testimony also contradicted that of Ms. Reaston.

23. No Colorado doctor uses EFAs and the Medical Treatment Guidelines do not support or provide for their use.

24. The ALJ finds Ms. Reaston to be incredible. Her testimony was largely unsupported and was contradicted by her own doctor/consultant. She exaggerated her credentials. She lacks training. And she is clearly biased.

25. Dr. Tomecek testified for Respondents by phone at the hearing. He is a board certified neurosurgeon and 95% of his work involves spine surgery operating out of Tulsa, Oklahoma. While he has evaluated some workers for workers' compensation claims, he follows the CDC Guidelines, not the Medical Treatment Guidelines required by Colorado law. He is not Level II certified. Dr. Tomecek thought he had been doing EFA testing for about five years. He acknowledged that his practice uses MRIs – not EFAs -- to diagnose joint problems, and that MRIs are the "gold standard" for diagnosing rotator cuff injuries.

26. The doctor's training with respect to shoulders was provided over twenty years prior to the hearing. It consisted of differentiating between neck and shoulder problems and was provided as part of his spine surgery training. Although his training and practice have always specialized in spinal surgeries, Dr. Tomecek testified that he was "fully capable of making *any* type diagnosis regarding neck and joint problems."

27. Dr. Tomecek testified that the procedure for a telemedicine visit was as follows: "What happens is Mr. Smith, or another patient, would come to the clinic where we have a medical assistant or nurse, and that medical assistant or nurse would hook Mr. Smith up to the electrodiagnostic functional assessment equipment, and after they're hooked up to the equipment, they contact me. I then visit with the patient where we have – it is basically like a Face Time visit." He continued that the camera is focused on the patient and a medical assistant or nurse conducts the examination, including range of motion testing, under his supervision. Dr. Tomecek indicated that the patient wears the EFA testing equipment for the duration of the examination and that he "can see what their muscles and nerves are doing when we are moving their arms, when they're moving their

arms and neck, when they're lifting, when they're bending." Dr. Tomecek appeared unaware Claimant's exam took place in a Best Western hotel, not a clinic. And no persuasive evidence supports a finding that the technician was a nurse or medical assistant. As Dr. Tomecek later testified, the technician only had to be able bodied and able to understand English.

28. The ALJ finds Dr. Tomecek's report to be seriously flawed for the following reasons:

- Although Claimant complained of bilateral shoulder and low back injuries, reporting pain in those areas of five and six over ten, Dr. Tomecek only evaluated Claimant's left shoulder.

- The doctor did not join the exam until after the technician had attached electrodes to Claimant's left shoulder, and told Claimant he had "seen enough," and that the technician would finish the examination. However, Dr. Tomecek testified that he supervised "the entire exam from start to finish."

- Dr. Tomecek's report is dismissive of Claimant's pain complaints. And, without even examining Claimant's right shoulder or low back, he attributed Claimant as having unspecified Waddell's signs rather than legitimate pain complaints.

- The doctor also opined that Claimant displayed distraction signs "where he had less pain when he moved his arms when he thought we weren't observing." It is unreasonable to assume that Claimant ever thought he was not being observed as he was in front of a camera and the technician and connected to electrodes for the entire time Dr. Tomecek participated in the exam.

- Dr. Brian Williams, Claimant's current medical provider, noted that Dr. Tomecek's report omitted portions of the MRI report which did not support his opinion. The section Dr. Tomecek omitted provides, "There is linear hyper intense signal in the posterior labrum, extending from approximately 11:00 to 8:00. There is mild rounding of the underlying posterior glenoid, with minimal edema like signal." Dr. Tomecek also omitted the radiologist's impression which stated, "Suspected nondetached tear of the posterosuperior labrum extending from approximately 11-8 o'clock."

29. Dr. Tomecek has only testified on behalf of respondents.

30. Dr. Tomecek testified that he was unable to provide any opinion with respect to Claimant's lower back injury because he "could not recall" whether he evaluated Claimant's low back. He also testified that Claimant was not injured in the course and scope of his employment, based on the EFA results.

31. When Dr. Tomecek evaluated Claimant on September 18, 2017, he noted that Claimant, "displayed several of Waddell's signs of exaggerated pain response to motion of his arms, supination of the arms, pronation of the arms, and again during different parts of the examination checking his motor strength. Again, he displayed several of Waddell's signs with groaning, grimacing, and also displayed some distraction signs where he had less pain when he moved his arms when he thought we weren't observing." Dr. Tomecek concluded after his single telemedicine examination that he was "highly concerned about secondary gain" and that "Claimant would have a bad outcome with treatment." None of Claimant's Colorado treatment providers have voiced any similar concerns.

32. Dr. Tomecek compared Claimant's September 18, 2017 left shoulder EFA results with Claimant's pre-employment EFA left shoulder data. Per Dr. Tomecek, both demonstrated chronic changes, and the latter actually demonstrated an improvement over the baseline.

33. No persuasive evidence was offered to support a finding that the EFA data was reliable and not the result of faulty equipment or misplaced electrodes.

34. He noted no evidence of acute pathology and no evidence of an acute injury. He concluded, "[t]here is no need for treatment on an industrial basis."

35. At hearing, Dr. Tomecek testified that he reviewed surveillance footage of Claimant and noted no evidence of back pain or back problems. However, the surveillance footage was not offered as evidence and no persuasive evidence supports a finding that Claimant was the person surveilled.

36. On November 20, 2017, Claimant underwent an MRI of his left shoulder. Charles Wells, M.D., the radiologist who read the report suspected a nondetached tear of the posterosuperior labrum and distal clavicular osteolysis.

37. Dr. Tomecek reviewed the MRI prior to the hearing and disagreed with Dr. Well's opinions, and testified that the MRI did not show any evidence of an acute injury.

38. Dr. Tomecek testified, "Unlike an MRI, an EFA can actually tell us when an injury occurred. It can time soft tissue injury, and it is FDA approved to do so." However, the doctor did not explain how an EFA would be more accurate at determining the time of an injury than any other diagnostic technology that was performed pre- and post- injury.

39. Dr. Tomecek testified that with a soft tissue injury, telemedicine combined with the EFA is just as effective as a face to face visit. "With the EFA on the patient while I'm examining them, I get a lot of additional information of the muscles and nerves that I could not get even in a face-to-face visit. I can really assess their soft tissues at rest and with activity, and I can't do that just seeing a person face to face."

40. The ALJ finds Dr. Tomecek's opinions and testimony not credible or persuasive. He was unaware of the context of Claimant's exam, he did not know the qualifications of the person who assisted in the exam, and his examination of Claimant

was incomplete. He uses the CDC guidelines which are not approved in Colorado. He relied on the EFA data when no persuasive evidence supports its validity. He omitted unfavorable MRI findings from his report.

41. Based on the totality of the evidence, the ALJ finds that Claimant has proven by a preponderance of the evidence that he suffered a compensable injury on September 8, 2017 arising out of and in the course and scope of his employment.

CONCLUSIONS OF LAW

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

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

With regards to compensability, C.R.S. §8-43-201 states, "A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence." The claimant always carries the initial burden of proof in a workers' compensation case." *DiCamillo v. Gosney & Sons, Inc.*, W.C. No. 4-328-945 (ICAO May 21, 1998). The preponderance standard is met when "the existence of a contested fact is more probable than its nonexistence." *Industrial Com. of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *People v. Taylor*, 618 P.2d 1127 (Colo. 1980).

The question of whether claimant met his burden of proof to establish a compensable injury is one of fact for determination by the judge. *See Faulkner v. I.C.A.O.*, 12 P. 3d 844 (Colo. App. 2000).

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

Claimant met his burden of proving that it is more probably true than not that he suffered an injury in the course and scope of employment on September 8, 2017. The persuasive and credible evidence shows evidence of any injury or acute pathology.

The ALJ finds that Claimant was injured while unloading pallets during the course of his employment with Respondents. Claimant's testimony regarding the mechanism of his injury was credible and supported by photographic evidence. Rather than provide Claimant a list of qualified Colorado Workers' Compensation physicians, Respondents sent Claimant to a Best Western Hotel, where he was treated by a technician associated with Emerge Diagnostics, and was "examined" by a Tulsa, Oklahoma based physician via a video chat. Feeling that this procedure was not appropriate, Claimant contacted the Colorado Labor Board, and was made aware of proper Workers' Compensation procedures. Thereafter, Claimant was examined by Dr. Brian Williams who opined that Claimants bilateral shoulder strain, lumbar strain, and back pain with left side radiculopathy were related to his at work injury on September 8, 2017. Dr. Williams further opined that an MRI would be appropriate as a diagnostic tool to further determine the extent of Claimants left shoulder injury, and that physical therapy was necessary. Respondents denied compensability for the injuries and Claimant was not provided that care.

Claimant continued to treat with Dr. Williams outside of Workers' Compensation. Claimant then paid out-of-pocket for an MRI as suggested by Dr. Williams. The MRI revealed a suspected nondetached tear of the posterosuperior labrum extending from 11:00 to 8:00.

During hearing, Respondents attempted to establish validity to the EFA technology promoted by Ms. Maryrose Reaston and Emerge Diagnostics. Ms Reaston was not

qualified as an expert on this technology. Ms. Reaston earned her psychology graduate degree from a university that may or may not have been accredited, and existed for only a period of years. She has never worked in any capacity as a psychologist or as a scientist in the field of electrodiagnostics. As a founding partner in Emerge Diagnostics, Ms. Reaston's testimony regarding the effectiveness of the technology was biased and unsupported by any scientific evidence, and lacks credibility.

Respondents provided the testimony of Dr. Frank Tomecek. Dr. Tomecek was not qualified as an expert in shoulder surgery. Dr. Tomecek never physically examined Claimant. His video examination was incomplete. He was selective in his report, omitting information about MRI findings that were inconsistent with his opinion. Dr. Tomecek never examined Claimant's lower back. Rather than treating Claimant's pain complaints as sincere, Dr. Tomecek opined after a single, short video chat, that Claimant sought secondary gains and would not respond well to treatment. Dr. Tomecek uses CDC Guidelines rather than the Medical Treatment Guidelines. Also, Dr. Tomecek is a consultant to Emerge Diagnostics and has a financial interest in the success of the company and of the EFA technology.

Dr. Tomecek did not place his hands on Claimant, did not diagnose him with any injury related to his at work incident, and did not see Claimant with the intention of providing medical care. The ALJ rejects Dr. Tomecek's opinion that Claimant was not injured in the course and scope of employment.

Dr. Williams examined Claimant in person, diagnosed his injuries, provided prescription medications, recommended follow up appointments and further diagnostic imaging studies. Dr. Williams opined that Claimant was injured as a result of his at work incident. Further, the MRI Dr. Williams recommended revealed a suspected rotator cuff tear. The ALJ credits Dr. Williams' opinion that Claimant injured both his left and right shoulder and his lower back. The ALJ also finds that Claimant needs additional medical care for his shoulders and back.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the ALJ enters the following order:

1. Claimant has proven by a preponderance of the evidence that his September 8, 2017 work injury suffered on is compensable.

2. Claimant has proven by a preponderance of the evidence that associated medical benefits related to his work injury are reasonably necessary.

3. Respondents shall pay for reasonable and necessary treatment of Claimant's left and right shoulder and lower back.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 7, 2018

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-012-594-01

ISSUE

1. Whether Respondents overcame the opinion of Dr. Caroline Gellrick, Division independent medical examiner (DIME), by clear and convincing evidence regarding Claimant's impairment rating.

FINDINGS OF FACT

1. Claimant sustained a compensable injury to her back on March 24, 2016, when she slipped and fell in a parking lot at work. A lumbar MRI was performed on July 28, 2016. The MRI demonstrated an L5-S1 disk desiccation and annular tear. On January 18, 2017, Claimant's authorized treating physician (ATP), Dr. Samuel Y. Chan, opined that Claimant was at maximum medical improvement (MMI) and had not suffered permanent impairment because he identified no significant permanent pathology.

2. Claimant reported that she still had pain of two on a scale of ten, but her pain was no longer functionally limiting, and she moved around a room without any difficulties.

3. Respondents filed a Final Admission of Liability (FAL) on March 13, 2017, based on Dr. Chan's report. The FAL admitted to reasonable and necessary post-MMI medical benefits for the lumbar spine/SI joint, but did not admit to a permanent impairment rating. Claimant objected to the FAL and underwent a DIME with Dr. Caroline Gellrick on May 30, 2017.

4. In the DIME report, Dr. Gellrick agreed with the date of MMI assigned by Dr. Chan, January 18, 2017, but she assigned Claimant a 14% whole person impairment rating. Specifically, Dr. Gellrick assigned Claimant a 7% whole person impairment for Claimant's L5-S1 disk desiccation with annular tear and 4% whole person impairment for range of motion, for a total 11% whole person lumbar spine impairment. Additionally, Dr. Gellrick assigned Claimant a 2% whole person impairment for her thoracic spine, with a 1/2% range of motion impairment, for a total of 2 ½, which she rounded to 3% thoracic spine whole person impairment. The 11% and 4% whole person equate to a 14% whole person impairment rating. Dr. Gellrick opined, "Using page 80 IIC of the spine table, the patient would be seen to fit under 7% whole person for the L5-S1 disk desiccation with annular tear."

5. Respondents filed an Application for Hearing on July 7, 2017, endorsing the issues of reasonably necessary, causation, relatedness, offsets, overpayments, credits, and to contest the findings of the DIME. Claimant filed a Response to Application for Hearing on July 21, 2017, which endorsed the additional issue of PPD benefits.

6. On August 21, 2017, Claimant underwent an independent medical examination (IME) requested by Respondents with Dr. Carlos Cebrian. Dr. Cebrian's report is dated September 26, 2017. When Claimant presented to Dr. Cebrian, she complained of low back pain, mid back pain, buttock pain and burning, and right subscapular region pain. Claimant denied any previous thoracic or lumbar spine complaints or past surgical history.

7. Dr. Cebrian opined Claimant suffered a lumbar strain with SI joint dysfunction and a thoracic strain/contusion. He noted that Dr. Chan and Dr. Gellrick also made the same diagnoses. Dr. Cebrian opined Dr. Chan appropriately placed Claimant at MMI on January 18, 2017. Dr. Cebrian concluded that the findings on MRI did not correlate with Claimant's subjective complaints nor her examination findings, which were consistent with SI joint dysfunction. Dr. Cebrian opined the MRI findings were merely incidental degenerative findings that are a normal part of aging and unassociated with Claimant's pain.

8. Dr. Cebrian credibly testified regarding this conclusion, explaining that there is no correlation between any of the symptoms that Claimant was having throughout her claim and the findings in the lumbar MRI. None of Claimant's medical providers noted disk pathology that was causing symptoms. Claimant was treated for SI joint pathology that did not show any findings on the MRI.

9. Dr. Cebrian opined no further treatment was necessary. He acknowledged that Claimant still has right SI joint pain, but opined that her examination findings do not warrant SI joint injections. Dr. Cebrian recommended Claimant engage in an aerobic exercise program with core strengthening, as this would improve both her SI joint complaints and her thoracic spine complaints. He also suggested weight loss to take pressure off the SI joint and thoracic spine. Dr. Cebrian utilized the *AMA Guides* in his analysis, and he utilized the Colorado Department of Workers' Compensation Impairment Rating Tips in reaching his conclusion that Claimant has a 5% whole person impairment rating (WPI) for her SI joint dysfunction. He concluded that Claimant does not have a range of motion impairment. Therefore, the overall rating for her lumbar spine impairment is 5% WPI.

10. Dr. Cebrian assigned Claimant an impairment rating for her SI joint dysfunction based on objective evidence he observed in his examination of Claimant and Claimant's reported symptoms. He testified that Claimant "had some rotation of her right SI joint that was present in the pelvis. And that was something that was previously identified by her physical therapy providers." However, Dr. Cebrian declined to assign Claimant an impairment rating for her thoracic spine because he found that there is no specific diagnosis nor objective pathology on which he could base an impairment rating.

11. Dr. Cebrian opined Dr. Gellrick erred in her assignment of Claimant's permanent impairment rating in two ways. First, Dr. Cebrian concluded that Dr. Gellrick erred because she assessed impairment based on Claimant's lumbar MRI findings which are incidental and do not correlate to her symptoms. Dr. Cebrian credibly explained that because the findings on the MRI reflect a pre-existing condition and are not causing any symptoms, Dr. Gellrick should not have assigned a rating for the lumbar spine or thoracic spine based on these findings.

12. Dr. Cebrian further explained that the Impairment Rating Tips address this issue in directing physicians not to rate findings by diagnostic imaging if they have not been clearly defined as contributing significantly to the patient's condition. Dr. Cebrian opined that Dr. Gellrick erred by rating Claimant's MRI findings when those findings did not clinically correlate with Claimant's examination findings.

13. In regard to Claimant's thoracic spine injury, Dr. Cebrian declined to assign Claimant an impairment rating and credibly opined Dr. Gellrick's assignment of a rating was erroneous. Dr. Cebrian acknowledged Claimant's pain complaints, but explained that there was no objective evidence suggesting a permanent impairment. Because Claimant did not suffer a permanent injury to her thoracic spine, Dr. Cebrian declined to assign a rating for it.

14. Dr. Cebrian credibly opined that Claimant's myofascial pain complaints do not result in permanent impairment. Dr. Cebrian opined that assignment of impairment needs the rating physician to identify a specific diagnosis that correlates with objective pathology.

15. Additionally, Dr. Cebrian found no structural abnormality of Claimant's thoracic spine, and, therefore, opined that she did not have a thoracic spine impairment. Dr. Cebrian performed spine range of motion measurements using the dual inclinometer method consistent with *the AMA Guides*.

16. On October 18, 2017, Claimant met with Dr. Ethan Moses for an IME at Claimant's request. Dr. Moses opined that Claimant's injury is work related, based on Claimant's report that she slipped on ice after exiting her car in her Employer's parking lot. Dr. Moses concluded that Claimant has progressed in an appropriate manner with treatment including massage therapy, chiropractic therapy, physical therapy and therapeutic injections. Dr. Moses explained that the next level of treatment would be SI neurotomy. He opined there is no indication for additional SI joint steroid injections, as the functional benefits Claimant gained from them do not satisfy the guidelines.

17. Dr. Moses reviewed Dr. Cebrian's report and discussed Dr. Cebrian's conclusion that Dr. Gellrick erred in her calculation of Claimant's impairment rating. Dr. Moses opined that the impairment rating performed by Dr. Gellrick was done appropriately and without error.

18. Dr. Moses concluded that Dr. Gellrick's DIME opinion was time-limited in her report writing as DIME examiner. Dr. Moses offered assurance regarding the propriety of Dr. Gellrick's rating, stating that Dr. Gellrick's rating is correct because she identified that same level of permanent impairment as did Dr. Moses. Dr. Moses opined that reproducibility is the only known criterion for validating optimum effort. Yet, Dr. Moses did not reproduce Dr. Gellrick's results. Both doctors assigned a 14% WPI.

19. It is found that Dr. Gellrick erred in assigning Claimant an impairment rating for her thoracic spine with no objective pathology. Dr. Gellrick assigned Claimant a 2% whole person impairment for her thoracic spine, with a 1/2% range of motion impairment, for a total of 2 ½, which she rounded to 3% thoracic spine whole person impairment. Dr. Cebrian credibly explained, "Application of medical impairment requires that the disorder being rated is identified (specific diagnosis), there is objective pathology, is accurately treated, is reproducible, measurable and permanent. There is no such thing as a permanent strain or contusion. Myofascial pain complaints do not result in permanent impairment. Level II Accreditation indicates that there needs to be a specific diagnosis that correlates with objective pathology to assign an impairment."

20. This ALJ finds the testimony and medical report of Dr. Cebrian to be credible and finds that he points to clear and convincing evidence why Dr. Gellrick's impairment rating was most probably incorrect. It is found that Dr. Cebrian's rating of 5% WPI is the correct impairment rating.

CONCLUSIONS OF LAW

General Legal Principles

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

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

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

Overcoming the DIME Physician's Opinion

4. Sections 8-42-107(8)(b)(III) and (c), C.R.S., provides that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by clear and convincing evidence. Section 8-42- 107(8)(b)(III); *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

5. "Clear and convincing evidence" is evidence that shows that it is "highly probable" that the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 12 P.2d 590, 592 (Colo. App. 1998). The evidence presented must be "unmistakable and free from serious or substantial doubt." *In the Matter of Adams*, W. C. No. 4-476- 254, 2001 WL 1502158 (Colo. Ind. Cl. App. Off. Oct. 4, 2001). Where the evidence is subject to conflicting inferences a mere difference of opinion

between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

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

7. It is found and concluded that Dr. Gellrick erred in assigning Claimant an impairment rating for MRI findings unrelated to Claimant's symptoms. The evidence established that on May 30, 2017, Claimant underwent a DIME with Dr. Gellrick. Dr. Gellrick agreed with the date of MMI assigned by Dr. Chan of January 18, 2017, but she disagreed with his opinion that Claimant suffered no permanent impairment.

8. Upon review of Claimant's July 28, 2016, MRI, Dr. Gellrick found that, using the *AMA Guides,* page 80, Table 53 IIC of the spine table, Claimant fit under 7% whole person for the L5-S1 disk desiccation with annular tear. However, nowhere in Dr. Gellrick's report did she find that the disk desiccation or annular tear contributed to Claimant's symptoms. No provider concluded that Claimant's MRI findings were correlated with her symptoms. Nonetheless, Dr. Gellrick erroneously assigned Claimant a 7% whole person impairment for Claimant's L5-S1 disk desiccation with annular tear and 4% whole person impairment for range of motion, for a total 11% whole person lumbar spine impairment.

9. The evidence established that Dr. Gellrick, Dr. Chan, and Dr. Cebrian made the same diagnoses of lumbar strain with SI joint dysfunction. While Dr. Gellrick's diagnosis was appropriate, her assignment of impairment based on the lumbar MRI findings was not.

10. It is undisputed that that Dr. Gellrick assigned a 7% whole person impairment under Table 53 IIC of the *AMA Guides* for the L5-SI disc desiccation with annular tear. This was erroneous because the MRI findings are incidental and do not correlate with Claimant's symptoms. Dr. Cebrian credibly opined that impairments are only assigned for claim-related objective pathology which correlates with a specific diagnosis.

11. Dr. Gellrick provided no justification for her deviation from the impairment rating tips aside from Claimant's unrelated, degenerative MRI findings. Dr. Moses did find this placement to be appropriate based on the moderate degenerative changes observed on MRI. However, he does not conclude that the MRI findings are correlated with Claimant's symptoms, nor does he explain why it was appropriate to place

Claimant in Category II(C) instead of II(B) in light of the lack of correlation. Instead, he makes a conclusory remark, "Any reasonable reader would recognize this, and Dr. Gellrick's opinion should not be dismissed simply because she was time-limited in her report writing as DIME examiner."

12. Respondents assert Dr. Gellrick's opinion should be dismissed not because she was time-limited in writing her report, but because she erred in assigning Claimant an impairment rating based on degenerative MRI findings unrelated to her symptoms.

13. Dr. Gellrick erred in assigning Claimant an impairment rating for her thoracic spine with no objective pathology. Dr. Gellrick assigned Claimant a 2% whole person impairment for her thoracic spine, with a 1/2% range of motion impairment, for a total of 2 ½, which she rounded to 3% thoracic spine whole person impairment. Dr. Cebrian explained, "Application of medical impairment requires that the disorder being rated is identified (specific diagnosis), there is objective pathology, is accurately treated, is reproduceable, measurable and permanent. There is no such thing as a permanent strain or contusion. Myofascial pain complaints do not result in permanent impairment. Level II Accreditation indicates that there needs to be a specific diagnosis that correlates with objective pathology to assign an impairment."

14. Respondents established by clear and convincing evidence through the expert testimony of Dr. Carlos Cebrian, and through the medical records, that Dr. Gellrick's thoracic spine impairment rating was erroneous because there was no specific diagnosis for the thoracic spine, there were no objective findings related to the thoracic spine area, and Claimant's thoracic spine complaints are described as myofascial pain complaints and are not expected to be permanent.

15. Although she identified tenderness and pain in the region, Dr. Gellrick did not identify any underlying pathology or make a specific permanent diagnosis other than a strain/sprain, nor did any other physician. Because Claimant does not have a structural abnormality of her thoracic spine, she does not have a spinal mediated disorder of the thoracic spine. Therefore, she does not have a Table 53 diagnosis upon which to base a permanent impairment rating.

16. It is concluded that Dr. Gellrick erred in her assignment of a 14% whole person impairment rating because she assigned Claimant an impairment rating for incidental MRI findings unrelated to Claimant's symptoms and assigned Claimant an impairment rating for her thoracic spine with no objective pathology.

17. It is further concluded that Dr. Cebrian's opinion is more credible and persuasive than the opinion rendered by Claimant's independent medical examiner, Dr. Ethan Moses. It is further found and concluded that the 5% whole person impairment rating assessed by Dr. Cebrian is correct and supported by the evidence.

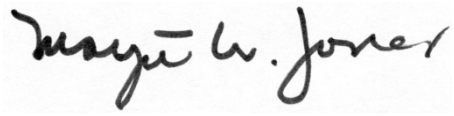
ORDER

1. Respondents shall be liable to Claimant for worker's compensation benefits based on a 5% whole person impairment.

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

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

DATED: March 15, 2018



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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a worsening of condition attributable to his April 12, 2012, right shoulder injury, warranting reopening of the claim.

2. In the event that the claim is reopened for a worsening of condition, whether Dr. David Schneider is an authorized provider.

3. In the event that the claim is reopened for a worsening of condition, whether surgery recommended by Dr. Schneider is reasonable, necessary and related to the April 12, 2012, right shoulder injury.

FINDINGS OF FACT

1. Claimant is a 52 year-old freight driver who has had preexisting right and left shoulder pain and symptoms since at least 2007. Claimant had been treating with Dr. Christopher Isaacs, orthopedic surgeon, for his bilateral shoulders since this time. Claimant also treated for his bilateral shoulders with Dr. Eric Smith, his family physician since the time that he was a child.

2. On January 1, 2012, Claimant suffered an admitted injury to his right shoulder as the result of work-related exposure. There was no specific mechanism of injury. Claimant was diagnosed with a full-thickness rotator cuff tear of the right shoulder and underwent surgical repair of the torn rotator cuff with Dr. Isaacs in June of 2013. Claimant specifically requested that Dr. Isaacs perform the surgery for the right shoulder, as he had previously performed a surgery for the left shoulder and was familiar with Claimant's shoulder problems.

3. Dr. Isaacs placed Claimant at MMI on October 31, 2013. Dr. Isaacs gave Claimant a 10% scheduled rating of the right upper extremity, which was later converted to a 6% whole person impairment rating at a previous hearing. Dr. Isaacs released Claimant to full duty and recommended maintenance care for the shoulder, limited to Lidoderm patches for one year after MMI. Claimant was otherwise discharged from care.

4. Respondents filed a Final Admission of Liability (FAL) on December 3, 2014. Respondents admitted for a 6% whole person impairment rating and reasonable, necessary, and related maintenance medical treatment.

5. Following his placement at MMI, Claimant continued treatment with his family physician, Dr. Smith, for regular yearly injection treatments. Claimant did not receive this treatment through workers' compensation.

6. Claimant presented to Dr. Isaacs on January 24, 2017, with complaints of ongoing bilateral shoulder pain. Dr. Isaacs noted that his was a problem that had been present for years. Dr. Isaacs indicated that Claimant had not had an injection for approximately one year for his right shoulder. Dr. Isaacs noted that Dr. Smith was retiring and that Claimant was "in the market for a new family physician." Dr. Isaacs reviewed x-ray imaging of both shoulders and noted some mild acromioclavicular degeneration, but otherwise no significant abnormalities. Dr. Isaacs stated the diagnosis was "Bilateral shoulder rotator cuff tendinitis and impingement." Dr. Isaacs recommended and performed a repeat subacromial injection. There were no recommendations for surgery or further treatment or evaluation.

7. Claimant subsequently independently sought further evaluation for his right shoulder through Dr. David Schneider, an orthopedic surgeon at Panorama Orthopedics recommended by his wife. Claimant presented to Panorama on March 27, 2017 and was referred for diagnostic MRI studies for his bilateral shoulders, pursuant to complaints of pain in the shoulder joints of both his left and right shoulders.

8. MRI studies of the left and right shoulders were performed on March 30, 2017. The radiologist, Dr. Andrew Sonin, indicated the MRI of the right shoulder reflected a prior rotator cuff repair with no full-thickness defect or retear, no retraction or atrophy of the cuff musculature, with a normal subscapularis. The biceps tendon and anchor are intact. There was no evidence of instability lesion. Dr. Sonin noted a cyst formation around the repair site in the lateral humeral head.

9. Claimant saw Dr. Schneider on April 26, 2017. It is noted that Claimant has chronic bilateral shoulder problems. It is noted that Claimant had difficulty sleeping due to bilateral shoulder pain. Dr. Schneider indicated that "both" of Claimant's MRIs showed a thinning and tearing of the supraspinatus. Dr. Schneider also noted "pretty large impending insufficiency fractures of both greater tuberosities with large cystic area right near the supraspinatus insertion site." The diagnosis was listed as complete tears of the right and left rotator cuffs. Dr. Schneider recommended that Claimant have a right shoulder surgery first (implying a pending left shoulder surgery). Dr. Schneider recommended shoulder "arthroscopy with rotator cuff repair, because of the edema and impending fracture, nature of the greater tuberosity." Dr. Schneider also recommended a calcium phosphate injection into the area at the time of surgery. Dr. Schneider requested that Claimant consult with his workers' compensation physician so he could have the procedure covered under the work-related claim.

10. Claimant returned to Dr. Isaacs on May 2, 2017, for a recheck in accordance with the findings of Dr. Schneider. It is reported that Claimant was having ongoing shoulder pain and was beginning to take time off work for his pain. Dr. Isaacs noted that Claimant was informed by Dr. Schneider that he had a cyst in the humeral

head and that there was a recommended arthroscopy with injection of the cyst area. Dr. Isaacs reviewed the MRI findings from March 30, 2017, and stated that he did not see the findings indicated by Dr. Schneider, including a full-thickness re-tear of the cuff or an impending fracture of the greater tuberosity. Dr. Isaacs indicated that he was not familiar with a calcium phosphate injection. Dr. Isaacs stated that Claimant was, without question, having pain related to his work injury but that he could not say whether the MRI findings were related to the injury. Dr. Isaacs did not schedule a follow-up appointment. .

11. Dr. Isaacs issued correspondence addressed specifically to Claimant's attorney, dated July 6, 2017. Dr. Isaacs noted that, since the initial right shoulder rotator cuff repair, Claimant had intermittent pain in his shoulders. Dr. Isaacs stated that Claimant had sought a "second opinion" from Dr. Schneider and had come away from this appointment with the impression that he had a cyst in his humerus that was quite large and required an injection. Dr. Isaacs also noted that Dr. Schneider was requesting a repeat rotator cuff repair and calcium phosphate injection into the greater tuberosity. Dr. Isaacs stated that the MRI did not show any rotator cuff tear but did show cystic changes that were likely related to the anchor placements at the time of the initial surgery. Dr. Isaacs opined that the cystic changes were likely a natural progression from surgery but that he was unfamiliar with the calcium phosphate injection procedure and would not have classified the MRI findings as an "impending fracture." Dr. Isaacs opined that there were no findings on the MRI to indicate the need for a repeat rotator cuff repair.

12. Dr. Isaacs signed a facsimile transmittal sheet, not addressed to any person or entity, dated both November 20 and November 22, 2017. Dr. Isaacs referred Claimant back to Dr. David Schneider for right shoulder surgery. There is no further comment concerning the referral or the procedure to be performed. This document was sent by Claimant to his attorney on November 27, 2017.

13. Dr. Mark Paz performed an IME on November 10, 2017, and issued his report on November 22, 2017. Claimant denied any new injury or trauma to the right shoulder since his rotator cuff repair. Claimant told Dr. Paz that he was scheduled for surgery on December 21, 2017, with Dr. Schneider for a "resection of the cyst." Dr. Paz agreed with Dr. Isaacs that there was no rotator cuff tear seen on the most recent March 30, 2017 MRI and that this also did not document impending fractures. Dr. Paz further opined that there was no mechanism of injury which would explain fractures. Dr. Paz opined that the proposed treatment of the calcium phosphate injection was not indicated to treat the work-related diagnoses of rotator cuff tendinitis and impingement, as set forth by authorized treating physician, Dr. Isaacs. Dr. Paz recommended conservative care as outlined by Dr. Isaacs, which could be completed under maintenance.

14. Dr. Paz issued an addendum report on December 5, 2017, after reviewing the November 22, 2017, referral note from Dr. Isaacs to Dr. Schneider. Dr. Paz noted that documentation supporting the basis for the referral was not presented. Id. Dr. Paz

stated that the primary issue was not a difference of opinion regarding treatment options for the right shoulder, but rather the absence of objective findings on the MRI study supporting any of the treatments proposed by Dr. Schneider. Dr. Paz noted that Dr. Isaacs specifically disagreed with Dr. Schneider's assessment of the MRI results.

15. Claimant testified that he was not referred by Dr. Isaacs to see Dr. Schneider until he solicited this request in November 2017. Claimant testified at hearing that he had specifically requested Dr. Isaacs to do surgeries for his right shoulder and unrelated knee injury because Dr. Isaacs was familiar with his claim and was a good surgeon. Claimant testified that Dr. Isaacs would not perform surgery and was unfamiliar with the proposed procedure requested by Dr. Schneider. Claimant testified that he received regular treatment for his right shoulder after surgery with his personal care provider, Dr. Eric Smith. Claimant testified that he had previously been out on FMLA leave for the shoulder. Claimant testified that he had been working full duty up until the point that he again went on FMLA leave on November 4, 2017. Claimant testified that his right shoulder had always been hurting, prior to his 2012 injury and after his 2013 surgery. Claimant testified that he had always had intermittent pains after surgery.

16. Dr. Paz testified at hearing as Respondents' medical expert in occupational medicine. Dr. Paz testified that there were no medical restrictions imposed by any provider in the records reviewed, to date. Dr. Paz testified that Claimant's present, ongoing diagnosis was impingement syndrome of the right shoulder and "post-operative" right shoulder rotator cuff repair status. Dr. Paz testified that Dr. Isaacs had not indicated any surgical recommendations to address the cyst formation and indicated no surgical recommendations after review of the MRI. Dr. Paz testified that there were no objective findings to support the opinion and recommendation for surgery by Dr. Schneider. Dr. Paz testified that the purpose of calcium phosphate injections is to heal fractures, and that cysts are resected out, not treated with calcium phosphate. Dr. Paz testified that there was no request for any specific type of surgical procedure in the record by Dr. Isaacs. Dr. Paz testified that the calcium phosphate injections recommended by Dr. Schneider were secondary to the recommendation for rotator cuff repair surgery and surgery for what Dr. Schneider classified as impending insufficiency fractures. Dr. Paz opined that any further reasonable, necessary, and related treatment could be performed as maintenance care.

CONCLUSIONS OF LAW

Reopening of the Claim

1. A claimant may file a Petition to Reopen his claim on the basis of a change in condition within six years of the date of injury, or otherwise after the date the last temporary or permanent disability benefits, or medical benefits, become due and payable. Section 8-43-303(1)-(2)(a)-(b), C.R.S. The claimant has the burden of proof, by a preponderance of the evidence, in seeking to reopen a claim for a worsened condition. *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). A "change in condition" refers either to a change in condition of the original principal injury or a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury. *Chavez v. Industrial Comm'n of State of Colo*., 714 P.2d 1328 (Colo. App. 1985). Reopening of a claim is appropriate when the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v Industrial Claim Appeals Office of State of Colo*., 996 P.2d 756 (Colo. App. 2000). The ALJ has broad discretionary authority to determine whether a claimant has met his burden of proof to reopen. *Kilpatrick v. Industrial Claim Appeals Office of State*, 356 P.3d 1008 (Colo. App. 2015).

2. In determining whether a claimant has met her burden of proof, the ALJ may resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *Bodensleck v. Indus.* Claim Appeals Office, 183 P.3d 684 (Colo. App. 2008). When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness, probability or improbability, of the testimony and actions, the motives of the witness; whether the testimony has been contradicted; and bias, prejudice and interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936). The ALJ should consider an expert witness' special knowledge, training, experience or research, and has broad discretion to determine the weight of evidence on this basis. *See Young v. Burke*, 338 P.2d 284 (Colo. 1959).

3. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Substantial evidence is that "quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. *See Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001). It is not necessary that the ALJ address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

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

4. Claimant had preexisting right shoulder pain before his April 12, 2012, work injury and had treated with his family doctor, Dr. Smith, for both shoulders since the time he was a child. There was no acute injury in this matter and Claimant's pain continued intermittently after his 2013 surgical repair with Dr. Isaacs and his October 31, 2013, placement at MMI. Dr. Isaacs recommended Lidoderm patches as maintenance and otherwise discharged Claimant from care after MMI. Claimant continued to treat with his family doctor, Dr. Smith, after placement at MMI for the injury and only saw Dr. Isaacs for his injection treatments when Dr. Smith retired. Claimant sought treatment for his bilateral shoulders and it is noted that he was seeking a new family physician to continue treatment for the shoulders.

5. Dr. Isaacs did not recommend surgery, further diagnostics or care when Claimant presented to him on January 24, 2017. Dr. Isaacs likewise did not recommend surgery or further care at his May 2, 2017, follow-up visit. Dr. Isaacs never indicated a change in Claimant's MMI status or his work restrictions. Dr. Isaacs only referred Claimant back to Dr. Schneider when he was asked to do so by Claimant.

6. Claimant voluntarily removed himself from work in November to go on FMLA. Claimant has previously removed himself from work to go on FMLA for his bilateral shoulder condition.

7. Based upon the above, there is no work-related change in condition that warrants a reopening of the claim for additional medical or temporary disability benefits. There is no indication by the ATP that the cystic changes require removal from MMI or temporary disability. Likewise, there is no indication by the ATP that the referral solicited by Claimant to Dr. Schneider is for treatment related to the claim. Dr. Isaacs did not independently recommend surgery or further medical care after his review of the MRI study. Claimant has not met his burden to show that he suffered a work-related change in condition.

8. Since Claimant's petition reopen is denied and dismissed, it is found and concluded that Claimant's claim for medical benefits is also denied.

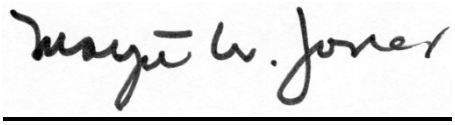
ORDER

1. Claimant has failed to establish that he suffered a work-related change in condition warranting reopening of his claim. Claimant's Petition to Reopen is therefore denied and dismissed.

2. Since Claimant failed to sustain his burden of proof to establish a worsening of his condition, Claimant's claims regarding medical benefits are also denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43- 301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.Hearing in this matter was held on

DATED: March 1, 2018



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Denver, CO 80203

ISSUES

- Is Claimant entitled to permanent total disability benefits?

STIPULATIONS

1. Respondents admitted that the atrial fibrillation condition ("a-fib") is related to the admitted injury.

2. Medical benefits were not an issue to be determined at hearing, as there were no specific medical treatments currently in dispute.

3. Respondents reserve their right to contest liability for any other heart conditions which may arise in the future beyond the atrial fibrillation.

4. In light of the above Stipulations, Claimant does not intend to pursue the issue of overcoming the DIME regarding his medical impairment rating.

5. If Claimant is awarded PTD benefits, Respondents are entitled to the statutory offset for Claimant's receipt of Social Security retirement benefits.

6. Claimant was permitted to present evidence on the issue of disfigurement at the hearing on May 8, 2017 and the disfigurement hearing set for July 17, 2017 at 9:00 a.m. was cancelled.

The Stipulations were accepted by the Court and are made part of this Order.

FINDINGS OF FACT

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

1. Claimant was 67 years old at the time of the hearing (D.O.B. March 20, 1950).

2. Claimant reported he completed the equivalent of one year of school in Honduras. Claimant had limited ability to write Spanish.

3. From approximately 1999 to 2005, Claimant worked as a laborer for a metal company which made gutters. From 2005 two 2008, Claimant worked for B&D

Roofing. From 2008 to 2010, Claimant worked for several companies, removing asbestos. The ALJ found Claimant's jobs were ones that involve physical labor.[1]

4. Claimant testified he took classes to obtain his asbestos certification from the State of Colorado.[2] He was licensed in 2008 and renewed the license every year after that.

5. Claimant underwent physical evaluations for the job of the asbestos removal on August 3, 2012 and August 14, 2013. In these forms, physicians certified Claimant was found to be able to use a respiratory device and there was no medical condition that would place him at an increased risk of material health impairment from exposure to asbestos.

6. Claimant began working for Employer as an asbestos remediation specialist in 2011. He worked there until he was injured.

7. There was no evidence in the record Claimant had physical restrictions before April 23, 2014. The ALJ noted Claimant told Dr. Gellrick he had not treated with a doctor in the twenty years before his industrial injury.

8. On April 23, 2014, Claimant sustained an admitted industrial injury when he fell from scaffolding while working for Employer. There were differing accounts as to how far he fell, which was anywhere from 15-25 feet. Claimant suffered a loss of consciousness and sustained multiple injuries as a result of the fall. He was transported to the emergency room at Vail Valley Medical Center.

9. Claimant was treated at Vail Valley Medical Center his lacerations were repaired. A CT scan revealed multiple left rib fractures and small pulmonary contusions, with a small left pneumothorax. An April 26, 2014 note from Jamie Craig, M.D. discussed the diagnosis of atrial fibrillation, which was likely from the stress of an acute pulmonary emboli. Claimant was treated with therapeutic Lovenox for bilateral pulmonary emboli, with bilateral deep vein thrombosis. On April 26, 2014, Claimant was discharged from Vail Valley Medical Center and transferred to Denver Health.[3]

10. At Denver Health, Claimant underwent a flexible bronchoscopy, left posterior lateral thoracotamy and open reduction internal fixation of left ribs (numbers 2,3,4,5 and 6). Claimant was discharged from Denver Health on May 28, 2014.

11. Claimant was hospitalized at Kindred Hospital with acute hypercarbic respiratory failure, pulmonary embolism/deep vein thrombosis, for which he was prescribed Coumadin. The treatment received during this hospitalization also included

[1] Exhibits 27 and 28.

[2] Exhibit 1.

[3] Claimant's early course of treatment was summarized in Dr. Hattem's IME report-Exhibit 16, pp. 165-167, along with Dr. Gellrick's DIME report. Also, both vocational experts prepared extensive medical summaries.

treatment for an infection and an acute kidney injury. Claimant was then discharged to home care.

12. On July 7, 2014, Claimant was evaluated by Greg Smith, D.O. at Occmed Colorado. Dr. Smith noted he did not have all of Claimant's medical records he anticipated significant permanent impairment as a result of the traumatic brain injury and pneumothorax, noting Claimant could not work. Dr. Smith received Claimant's hospital file, which noted diminished cognition, TMJ frozen left shoulder, along with changes. Dr. Smith referred Claimant to Barry Ogin, M.D. for treatment.

13. Claimant was hospitalized again on July 17, 2014 at University Hospital for a pulmonary embolism, acute hypoxic respiratory failure, a fib, post-traumatic brain injury, recent CVA, decreased visual acuity, pulmonary hypertension, thyroid hypertonicity, medical delirium, chest pain/rib fractures. Claimant was discharged on July 25, 2014.

14. On August 15, 2014, Claimant was hospitalized at Swedish Hospital with chest pain. Diagnostic tests were run and he was discharged.

15. On August 22, 2014, Claimant was evaluated by William Boyd Ph.D., who conducted a psychological evaluation. Dr. Boyd's impression was: rule out emotional disorder, pain disorder and personality factors. Claimant received cognitive-behavioral therapy (eight sessions). The last section with Dr. Boyd was December 18, 2014. Dr. Boyd concluded Claimant's somatic symptom disorder was resolved and the adjustment disorder with anxiety, was partially resolved.

16. On October 22, 2014, Claimant was evaluated by Suzanne Kenneally, Psy.D. Dr. Kenneally conducted a clinical interview, as well as administering tests, including a neuropsychological test, nonverbal intelligence, memory malingering and the Beck depression inventory. Dr. Kenneally diagnostic impressions were: major depressive episode: single episode; psychological factors affecting a general medical condition; and status six months post-work site injury. Dr. Kenneally opined Claimant did not have persistent cognitive deficits associated with the injury and the test results were markedly variable.

17. Claimant returned Dr. Smith on February 18, 2015. With regard to the atrial fibrillation, Dr. Smith noted this condition was found before Claimant underwent to surgery a few weeks ago. Dr. Smith initially opined it was not work related and referred Claimant to his personal physician, who believed he did not have a-fib before the injury. Claimant had an embolus and his primary care physician believed this was a work-related injury. Dr. Smith agreed with this physician that the embolus lodged in the atrium caused the a-fib, which needed to be corrected before he underwent surgery.

18. On examination, Claimant had a positive straight leg raising on the right and negative on the left. Claimant reported tenderness in his left eye. There was a positive Phalen's test in the left wrist. Dr. Smith's assessment was: closed head injury-improved and returned to baseline; chest injuries resolved; partial rotator cuff tear with

adhesive capsulitis-good response to injection; pulmonary embolism and DVT secondary to stasis from closed head injury; multiple rib fractures status post-open reduction and internal fixation; Coumadin therapy; hypertension; and atrial fibrillation.

19. Claimant was treated by Alan Lipkin, M.D. for vertigo and sensorineural hearing loss after he was injured. Dr. Lipkin's impression was bilateral post-tramautic hearing loss; tinnitus; and vertigo. In the evaluation on April 28, 2015, Dr. Lipkin noted all three conditions had improved.

20. On September 25, 2015, Claimant underwent a functional capacity evaluation ("FCE") by Kristine Couch, OTR. Claimant reported being unable to sit more than twenty minutes or stand more than thirty minutes, but was observed sitting for fifty minutes and standing for forty minutes. Claimant reported being able to walk for 30 to 45 minutes. He demonstrated the ability to lift up to 10 pounds from the ground to overhead. A hand function test confirmed the ability to perform such tasks in the sedentary and light work categories, even though a validity check indicated possible poor effort during left hand grip tests. Ms. Couch noted that Claimant's lift capacity testing "was terminated based upon his determination" that he reached his safe and reliable capacities. Ms. Couch placed the FCE results in the sedentary work category.

21. On October 14, 2015, Claimant was evaluated by Dr. Bloch. At that time, Claimant was complaining of ringing in his ears, as well as pain in the ribs, where he underwent an open reduction and internal fixation of multiple rib fractures. On examination, Dr. Bloch noted significant limitation of range of motion of the thoracic spine and shoulder, along with swelling in the rib area. The ALJ found these were objective findings made on examination.

22. Dr. Bloch's assessment was: closed head injury-improved and returned to baseline; chest injuries-resolved; partial rotator cuff tear-with significant adhesive capsulitis with a good response to injection by Dr. Fuller; pulmonary embolism and DVT; multiple rib fractures-status post open reduction and internal fixation; Coumadin therapy; encounter for therapeutic drug monitoring; hypertension; and atrial fibrillation; awaiting echocardiogram studies by Dr. Cohen; physiatry injections on hold due to anticoagulation; and chest wall pain, contusion to chest and rib, costochondritis, closed head injury with loss of consciousness, blunt facial trauma, and left shoulder rotator cuff repair.

23. Dr. Bloch concluded Claimant was at MMI and sustained a permanent medical impairment. Dr. Bloch assigned a 37% whole person impairment to the thoracic spine, as well as a shoulder impairment of 29% (extremity), which converted to a 17% whole person impairment rating. Dr. Bloch also assigned a 5% whole person impairment for tendinitis. Claimant's total medical impairment was 48%. Citing the FCE, Dr. Bloch noted Claimant was placed in a moderate duty category[4], with lifting

[4] The ALJ notes this does not correspond all aspects of the medium work category as identified by Mr. White and Ms. Bartmann.

limited to 10 pounds from the floor to chest; pushing and pulling to 50 pounds, as well as limitations in ability to work overhead. He was also limited from bending, kneeling, crawling, squatting and climbing; should not drive company vehicles or work with power equipment.

24. Claimant was treated for the right eye retinal tear by Frank Siringo, M.D. and was evaluated by Ronald Wise, M.D. for visual impairment on January 5, 2016. Dr. Wise assigned a 5% rating for each eye. Claimant had no restrictions provided that he used appropriate spectacle correction. He also required lifelong monitoring for signs and symptoms of a retinal tear or detachment.

25. On March 25, 2016, Claimant underwent an independent medical examination which was performed by Edward Healy, M.D. at the request of Claimant. At that time, he complained of headaches, intermittent vertigo, along with cognitive dysfunction, including mild problems with memory, attention and concentration. He also had pain in his cervical, left upper trapezius, medial periscapular and levator scapular muscle, with tingling and numbness radiating into his third, fourth and fifth digits of his left hand. On examination, Claimant had an irregular heart beat and was not able to do serial three subtractions, which was deemed secondary to his minimal education. The Dix-Hallpike maneuver (left and right) caused dizziness and vertigo. Claimant had limitations in the range of motion ("ROM") left shoulder. Tenderness was found in the cervical spine, lumbar mild hypertonicity over the left cervical paraspinals and left upper trapezius muscles. Decreased cervical ROM was found, but full ROM was present in the lumbar spine.

26. Dr. Healey's diagnoses included: traumatic brain injury/concussion, with post-concussion syndrome including central vertigo, disequilibrium, post-traumatic headaches and cognitive dysfunction; left first through seventh rib fractures-status post ORIF with the thoracotomy of the second, third, fourth, fifth and sixth ribs; chronic respiratory pain in the distribution of rib fractures noted in diagnosis number two; left pneumothorax and pulmonary contusion; history of pulmonary emboli related to chest trauma and rib fractures and subsequent recurrence of pulmonary emboli-rule out pulmonary insufficiency; history bilateral lower extremity deep venous thrombosis, trauma-related; chronic atrial fibrillation, secondary to pulmonary emboli; status post left facial laceration repair; status post hand laceration repair; history of acute failure requiring mechanical ventilation; history work injury related injury; history of pneumonia; history of acute kidney injury work related; bilateral neurosensory hearing loss, left greater than right, with associated tinnitus, pre-existing, but hearing loss increased; left visual blurring and history of right retinal detachment requiring photocoagulation; post-traumatic headaches with occipital neuralgia; left shoulder contusion with a partial supraspinatus tear and tendinopathy requiring left shoulder arthroscopy with SLAP tear repair and distal clavicle section; chronic cervicalgia, with cervical MRI revealing C3-C4 disc extrusion, C6-C7 disc extrusion and C7-T1 facet arthropathy with disc bulge; left cervical brachial myofascial pain and secondary headaches; adjustment disorder with mixed anxiety and depressed mood; chronic chest wall pain secondary to blunt trauma, and fractured ribs with costochondritis. Dr. Healey opined Claimant was permanently and totally disabled and required additional

treatment including psychological counseling, long-term medical care with an internal medicine doctor or cardiologist and re-evaluation by orthopedic surgeon.

27. A DOWC IME was performed by Caroline Gellrick, M.D. on May 24, 2016. At that time, Claimant described persistent headaches, neck pain, mid- and low back pain, left shoulder pain and right leg pain. Dr. Gellrick's diagnoses were: TBI, PCS, with central vertical disc equilibrium-symptoms mostly resolved; cervical strain; rib fractures with resultant hemothorax, pulmonary embolism, pneumonia, persistent intercostal neuritis; history of DVT bilateral lower extremities; cranial contusion resulting in left facial laceration, left eye contusion and retinal tears-repaired; left partial supraspinatus tear, left shoulder arthroscopy with SLAP tear repair, DCR with biceps tendinotomy.

28. Dr. Gellrick opined that Claimant reached MMI on October 14, 2015, with a 37% combined impairment rating, consisting of a 21% left upper extremity rating (which converted to 13% whole person rating), an 11% spine rating (cervical and thoracic), a 10% rib rating, and a 5% vision rating. Dr. Gellrick did not assign permanent impairment ratings for a-fib, headaches, hearing loss, or cognitive impairment.

29. Dr. Gellrick confirmed Claimant was at MMI but needed extensive maintenance treatment. This included injections for the shoulder, as well as anti-coagulants. Dr. Gellrick agreed Claimant was in the sedentary work classification, as opined by Dr. Bloch. He should not use ladders or do overhead work with his left shoulder and the condition of the cervical spine. Dr. Gellrick opined Claimant also should not be operating heavy equipment with the condition of his chest wall and pain. Dr. Gellrick concluded Claimant should not drive with his cardiac condition of a-fib, including personal vehicles.

30. On June 21, 2016, a Final Admission of Liability ("FAL") was filed on behalf of Respondents, admitting for a 37% whole person medical impairment. Claimant's TTD benefits ended on October 143 2015. Respondents admitted for reasonable and necessary and related medical treatment and/or medications after MMI.

31. Claimant underwent an FCE on August 8, 2016 at XRTS. The testing was performed by Alexander Guido, PT/DPT. PT Garrido concluded Claimant's effort was inconsistent, which led to inconclusive findings. Claimant was also reported to have overt pain behaviors and positive Waddell's signs. His lowest-lift was a right unilateral lift of 24.75 pounds from 10 inches to waist. His heaviest lift was right unilateral lift of 32.25 pounds to waist. The grip strength testing for the right and left hand was valid.

32. On September 26, 2016, Claimant underwent an IME performed by Respondents' expert Albert Hattem, M.D., who observed non-physiologic signs on examination. The only medications Claimant reported taking were Tramadol, Ibuprofen, and Eliquis; he did not report taking Metoprolol. Claimant did not describe left wrist or hand pain to Dr. Hattem, who documented normal strength in the hands and wrists

without any neurological deficits, and no left hand condition was diagnosed. Claimant reported he was very healthy before the accident, his contemporaneous pain level was 2/10, and his pain is normally mild. Dr. Hattem concluded that Claimant could work in the sedentary-to-light work category.

33. On December 15, 2016, Claimant underwent a vocational assessment by Cynthia Bartmann, C.C.M, C.D.M.S. He denied having any medical conditions before the accident which limited the type or amount of work he could perform and reported that his job with Respondent-Employer required substantial use of the upper extremities. Claimant reported numbness in the left upper extremity, but did not describe any functional limitations of the left hand. Ms. Bartmann concluded Claimant could work in the sedentary-to-light category. There was no evidence Ms. Bartman performed academic testing at the time of her assessment of Claimant.

34. Ms. Bartmann identified several open positions within Claimant's commutable labor market and the restrictions issued by Drs. Bloch and Hattem: (1) American Made Apparel Manufacturing: apparel maker with seamstress positions (for which prior experience was preferred but not required) and seasonal clothes folding positions (for which no prior experience was needed, though no such positions were open then); (2) Hemp Temp: temporary employment company servicing marijuana growers with trimmer jobs; (3) Casa Bonita: Mexican restaurant with several open positions, including food assemblers and sopapilla runners; (4) Hammond's Candies: candy maker with production jobs which did not require lifting; and (5) Casa Vallarta: Mexican restaurant with salsa runner positions who can choose how many plates they carry at a time. Ms. Bartmann also listed Simmons Company as a possibility, a mattress manufacturer willing to train workers for frequently available and sedentary seamstress positions, although they did not have openings at the time of her report. Ms. Bartmann noted that these were examples of jobs Claimant can pursue, rather than a complete list of those he can perform. The ALJ inferred all of these positions required some use of both upper extremities.

35. On January 17, 2017, Claimant underwent a disability evaluation with Lee White. Mr. White prepared a lengthy summary of Claimant's medical treatment.[5] He concluded the combination of Claimant's ratable impairments (cervical, thoracic, rib - related, visual, shoulder, heart, and circulatory) resulted in a constellation of restrictions. This limited Claimant to sedentary duty. Mr. White also noted that it was reasonable to consider tinnitus, hearing loss, headaches and a complex integrated cerebral function as part of the disability. Admittedly, Claimant was a difficult individual to psychologically evaluate given his limited education, language barrier and negligible Spanish literacy. Mr. White concluded Claimant had ongoing cognitive limitations. Mr. White noted Claimant was employable in several capacities before the injury, including as a farm worker, service worker, and as a construction laborer. He was now limited to working at the sedentary level and his physical/vocational abilities no longer matched. He agreed with Dr. Healey that Claimant was permanently and totally disabled.

[5] Exhibit 21, pp. 244-351. Exhibit 22, pp. 354-430.

36. Mr. White reviewed Ms. Bartmann's report and agreed Claimant did not have marketable transferable skills. He opined Claimant was limited to the sedentary job classification. Mr. White opined Ms. Bartmann did not adequately address the role that the combination of Claimant's head, neck, shoulder and rib problems would play in his ability to work in the suggested assignments. Mr. White reviewed all of the employers listed by Ms. Bartmann and concluded Claimant could not work in those positions, as the physical requirements exceeded his post-injury physical limitations. He concluded Claimant's back, shoulder, and rib conditions precluded his employment as Claimant did not have the ability to perform in these positions.

37. On March 7, 2017, Claimant underwent a rest and pharmacologic stress myocardial perfusion imaging. Claimant experienced chest pain, dizziness, headache, and shortness of breath during the test. Sundeep Viswantan, M.D. determined this was an abnormal rest and pharmacologic rest and pharmacologic stress myocardial perfusion imaging scan. There was a 6% reversible defect present in the apex and in 408 pickle area concerning for ischemia. Claimant had normal left ventricular systolic function and equivocal EKG response to Regadenoson. The results were sent to Dr. Cohen.

38. Mr. White prepared a supplemental report, dated April 28, 2017. He offered further opinions regarding Claimant's limitations, noting that Claimant was limited from sustained use of the left upper extremity. He also believed Claimant's general endurance was affected by his cardiac situation. Mr. White also reviewed Ms. Bartmann's report regarding other potential employers, which she found were either hiring or taking applications. Mr. White found as follows:

> Denver Bookbinding Company: contacted in person-4/20/17-not hiring.
> Broncorp Manufacturing: contacted in person-4/20/17-not hiring.
> Pro-Tel, Inc.: called to inquire about applying-not hiring.
> Davis Manufacturing: contacted in person-4/21/17 not hiring.
> Your Bindery: contacted in person-4/21/17-not hiring.
> Color Productive Printing: Google lists as permanently closed-address now occupied by fast food establishment.
> Peak Fulfillment-contacted a person-4/26/17-not hiring.
> Styro-Tech-not at that location for year.

39. Mr. White concluded that it was unlikely that Claimant was employable in food service/production, industrial printing, apparel manufacturing, or light manufacturing packaging. He opined Claimant was unable to use his upper extremities in a sustained and bilateral manner.

40. The evidentiary deposition of Dr. Hattem was taken on May 12, 2017. Dr. Hattem testified as an expert in the fields of Occupational Medicine and Preventive Health. He is Level II accredited pursuant to the WCRP. Dr. Hattem discussed his evaluation of Claimant, including the conclusion that Claimant was at MMI. He opined Claimant had no functional limitation in his right upper extremity, but limitations in his left upper extremity. Dr. Hattem testified that both he and Dr. Gellrick found close to full

ROM in Claimant's shoulder, which differed from Dr. Smith and Dr. Healey. He thought the explanation was Claimant was self-limiting or had behavioral issues, which caused inconsistent measurements. Dr. Hattem believed Claimant could perform repetitive work activities with the left hand, but should limit use of the left shoulder overhead or at chest height.[6]

41. Dr. Hattem testified Claimant had no limitations with regard to his hearing and sight.[7] Dr. Hattem agreed to Claimant could have pain with regard to the rib injury, if he were required to perform repetitive activities.[8] Dr. Hattem stated Claimant could perform the potential jobs identified by Ms. Bartmann from a medical standpoint because these were in the sedentary-to-light category.

42. With regard to the a-fib, Dr. Hattem testified this condition was related to the work injury and Claimant had an ongoing need to take anti-coagulation medications. He stated if that condition was well-controlled, the blood clotting was within a therapeutic range and assuming one had a normal heart rate, this would not preclude employment. Dr. Hattem stated he would send Claimant to work in occupations that did not require extreme exertion. On cross-examination, Dr. Hattem agreed that symptoms of shortness of breath, fatigue, dizziness, chest pain were consistent with the diagnosis of atrial fibrillation (as opined by Dr. Cohen), if the a-fib was not under control. Dr. Hattem testified he did not focus on Claimant's subjective complaints, but rather on objective findings.

43. Santos Ortiz, a longtime friend and now landlord of the Claimant, testified that the Claimant rents his basement. He and the Claimant interact on a daily basis. Mr. Ortiz testified that the Claimant requires his help with basic living needs, such as cleaning and cooking two or three times per day, and that the niece of the Claimant also frequently helps with the same. Mr. Ortiz credibly testified that he has been witness to the fact Claimant required naps during the day due to fatigue, and testified that the Claimant often awakes him at night when he is unable to sleep confirming the Claimant's testimony that he has difficulty sleeping. Mr. Ortiz testified that he has been witness to the fact that the Claimant has difficulty using his left arm and avoids using his left arm.

44. Dr. Healey testified as an expert in the neurology and occupational medicine. He is Level II accredited pursuant to the WCRP. He examined Claimant on two occasions. Dr. Healey testified Claimant's symptoms from the injuries caused permanent physical and mental impairment. He noted Dr. Keneally assessed Claimant's IQ at 74, which was in the 4th percentile. This could be a combination of cognitive problems from the injury, as well as innate abilities. Dr. Healey also found Claimant's diagnoses with respect to the cervical spine and shoulder caused limitations. These were noted in his second evaluation. Claimant also had decreased

[6] Hattem deposition, pp. 51:25-52:2.

[7] Hattem deposition, pp. 10:20-11:8.

[8] Hattem deposition, pp. 26:7-27:6.

grip strength left hand. Dr. Healey opined this limited his activities. Claimant's impairment necessitated work restrictions in addition to those assigned by Dr. Hattem and Dr. Bloch. Dr. Healey concluded Claimant was permanently and totally disabled.

45. Dr. Healey testified Claimant's a-fib required him to take Metropolol, which caused various symptoms, including tiredness, low energy, decreased ability to respond to exercise, slow heartbeat, mental sluggishness. This affected his ability to maintain a steady work throughout the day, especially if the job was physically demanding. The ALJ credited this testimony and concluded the symptoms would affect Claimant's ability to earn wages.

46. The ALJ considered the various opinions and concluded Claimant had permanent physical restrictions related to the industrial injury. These included no bending, kneeling, crawling, squatting and climbing. Claimant was restricted from lifting overhead with his left arm and at chest-level, as stated by Dr. Hattem. The ALJ inferred Claimant was precluded from doing jobs which required repetitive use of both upper extremities. Per Dr. Bloch (an ATP), Claimant was limited in the company vehicles he could drive.[9]

47. Claimant did not return to work after his industrial injury.

48. There was no evidence Claimant could return to his pre-injury employment.

49. Ms. Bartmann testified as a vocational expert on behalf of Respondents. Ms. Bartmann testified consistently with her vocational report. She concluded the Denver labor market was one that was growing and in which there were jobs available. More particularly, there were entry-level jobs available within Claimant's restrictions. These were the type of jobs that had a great deal of turnover and were open frequently. Ms. Bartmann stated Claimant did not evince any cognitive difficulties during her evaluation. He stated Claimant did not demonstrate physical discomfort during her meeting. The ALJ found Ms. Bartmann discounted Claimant's restrictions, including those he reported, as well as those related to the a-fib. Ms. Bartmann testified there were jobs where Claimant would not be required to use his left upper extremity or it would only be used to assist the other hand. Ms. Bartmann conceded there were other positions were Claimant was required to use both upper extremities, however, her reading of the medical restrictions indicated he could do that.[10] Ms. Bartmann opined Claimant was able to earn wages.

50. Mr. White testified as a vocational expert on behalf of Claimant. He testified consistently with his vocational report and supplemental reports he prepared. He concluded Claimant was unable to earn wages as a result of the injury sustained on April 23, 2014. Mr. White testified Claimant's limited education and work experience limited his access to the Denver labor market. Although there were jobs available

[9] Exhibit 26, p. 508.

[10] Bartmann deposition page 54:19-55:17.

within the Denver labor market, Mr. White opined Claimant would not be able to obtain and keep those positions. Mr. White testified that he believed Claimant could not work in positions where he had to use his upper extremities on a continuous basis. Mr. White's testimony regarding positions which required use of both upper extremities was persuasive to the ALJ. Based on all the medical records, Mr. white believed Claimant was limited to the sedentary work classification. Mr. White also concluded that Claimant's need for frequent breaks was a barrier to obtaining and keeping employment. The ALJ credited Mr. White's opinions and found him to be more credible than Respondents' expert, Ms. Bartmann.

51. Claimant testified that he still experiences pain in his head, left shoulder, chest and left eye. He has a buzzing in his ear, which sounds like a fly. Claimant also stated he has hand/arm symptoms. Claimant said his pain ranges from 2/10 to 7/10. Claimant stated the pain he experiences increases when he does more activity. Claimant state he is able to walk short distances, including to McDonalds. The pain also interrupts his sleep and he gets tired quickly. Claimant testified he rests during the day, sometimes taking naps. Claimant did not believe he would be able to do a job that required using both hands. The ALJ credited Claimant's testimony that he continued to have pain in the parts of his body injured in the accident and this can be variable. The ALJ also concluded this pain limited Claimant's physical abilities.

52. Claimant testified he has applied for jobs, with friends taking him to fill out the applications. The ALJ inferred Claimant's experience and background limited to him in the job search and led him to enlist help in the search.

53. There was no evidence in the record Claimant performed any production or assembly jobs before his injury. There was no evidence Claimant performed any job involving sewing before his injury. The ALJ concluded Claimant's left upper extremity condition, including restrictions precluded him from performing these jobs. To the extent those jobs were available, Claimant could not perform the functions required for those positions.

54. Claimant receives $514.00 in Social Security retirement benefits every month.

55. Claimant's a-fib was related to the work injury.

56. Claimant takes Atorvastatin, Metoprolol Tartrate, Eliquis, which were prescribed by Dr. Cohen. He is also taking Tramadol for pain.[11]

57. Claimant proved he is no longer able to earn wages as a result of restrictions from his industrial injury and the pain he experiences on a regular basis.

58. Evidence inconsistent with the above findings is either not credible and/or not persuasive.

[11] Exhibit 25, pp.441-442.

CONCLUSIONS OF LAW

General

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The question of whether Claimant proved he was permanently and totally disabled rested on a relation of the credibility of witnesses, including the vocational experts.

Permanent Total Disability

To prove his claim that he is permanently and totally disabled, Claimant shouldered the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. §§ 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001).

The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether Claimant is able to earn any wages, the ALJ may consider various human factors, including Claimant's physical condition, mental ability, age, employment history, education, and availability of work that Claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). As Justice Martinez articulated:

"We hold that, in determining eligibility for PTD benefits, it is appropriate to consider various, well-settled human factors related to the claimant's ability to earn wages. These factors may include consideration of the claimant's commutable labor market or other analogous concept which depends upon the existence of employment that is reasonably available to the claimant under his or her particular circumstances". *Weld County School Dist. Re-12 v. Bymer*, *supra,* 955 P.2d at 558.

The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether Claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

In the case at bench, Claimant asserted that the combination of his educational and work background, along with his physical injuries rendered him permanently and totally disabled. Claimant pointed to his continuing ongoing physical complaints and limitations as support for this claim. Claimant argued he could not maintain employment and earn wages. Respondents averred there were multiple jobs within Claimant's commutable labor market in which he was employable. Therefore, he could earn wages and was not permanently and totally disabled as a result of his industrial injury. Based upon the evidence, the ALJ determined Claimant met his burden of proof and was entitled to permanent total disability benefits. The ALJ reached this conclusion based upon Claimant's background, as well as the sequelae of the April 23, 2014 injury.

As a starting point, the ALJ first considered Claimant's age, education and work experience to determine whether he satisfied his burden of proving he was entitled to PTD benefits. As determined in Findings of Fact 1-2, Claimant was sixty-seven years old and had limited education. There was no evidence in the record Claimant had the ability to read and write in English. Although Claimant's writing ability in Spanish was disputed, there was no evidence in the record Claimant held any job before the injury in which he used his writing abilities. The evidence in the record led the ALJ to conclude he had limited ability to write in Spanish. (Finding of Fact 2).

As found, Respondents' expert did not conduct any academic testing on Claimant at the time of her evaluation and the evidence supported the conclusion that Claimant had very limited academic experience or proficiency. (Finding of Fact 33). The ALJ credited the testimony of Claimant's vocational expert that his academic background and experience represented a barrier to re-employment. (Findings of Fact 39, 50).

Claimant's employment since 1999 included jobs which were physical in nature, many of which involved lifting, as well as use of both upper extremities. As reflected in his work history, most of Claimant's work experience was doing jobs which required physical labor. (Finding of Fact 3). Claimant most recent employment of asbestos removal was a labor-intensive job, which required climbing ladders/scaffolding. As

found, Claimant could not return to jobs he had previously done after his work-related injury. (Findings of Fact 47-48, 50).

Second, the inquiry then turned to Claimant's physical condition, including consideration of his physical limitations which resulted from his industrial injury. There was no dispute that Claimant suffered substantial physical injuries as a result of his fall on April 23, 2014. The course of his treatment included four hospitalizations in the first six months after the injury, as well as extensive treatment for injuries to his head, neck, shoulder, as well as internal injuries.

However, there was a divergence of opinions with regard to Claimant's permanent physical restrictions. As determined in Finding of Fact 23, ATP Dr. Bloch found these injuries led to permanent medical impairment ratings, as well as physical restrictions. All of the physicians who performed independent medical examinations also concluded Claimant had permanent restrictions as a result of the injury. (Finding of Fact 29-Dr. Gellrick; 39-Dr. Hattem; 43-Dr. Healey). The first FCE placed Claimant in the sedentary work classification. The second FCE did not place Claimant in a classification. The ALJ considered the multiple opinions regarding Claimant's restrictions and determined Claimant was in the sedentary to light work classification, along with restrictions to his left upper extremity, as well as those related to standing, squatting, climbing ladders and driving. Specifically, with regard to the left upper extremity, the ALJ found Claimant was not precluded from using his arm entirely. However, the restrictions for reaching overhead and at chest height impacted his ability to perform jobs in which repetitive upper extremity use was required. The ALJ found Claimant's permanent restrictions limited his access to the labor market and ability to earn wages.

Third, the ALJ was persuaded the sequelae from Claimant's industrial injury precluded him from earning wages. The ALJ credited the Claimant's testimony that he experienced frequent physical pain related to the accident. (Finding of Fact 51). There was no evidence Claimant had physical conditions which caused pain or any restrictions prior to his industrial injury. He experienced ongoing pain, specifically in his chest, neck and back. This impacted his ability to secure employment and earn wages.

The ALJ also found the a-fib condition impacted Claimant's employability. In this regard, the medication Claimant took for this condition caused symptoms, including fatigue, which he verified. Dr. Hattem who testified it was possible that a-fib in the medication could cause the symptoms, but qualified the answer by saying symptoms would not occur if the a-fib was well-controls. Dr. Healey testified the a-fib and the medication claimant was taking for this problem affected him. Claimant's testimony, as well as the cardiac workup in March 2017 led the ALJ to conclude that Claimant's a-fib condition impacted him. The ALJ found this supported claim for permanent total disability benefits.

When considering all of these facts, the ALJ credited the opinions of Mr. White over those offered by Ms. Bartmann. The ALJ concluded Mr. White integrated Claimant's residual symptoms, along with his restrictions when analyzing whether he

could obtain employment and earn wages. The ALJ found it was the combination of Claimant's background, as well as his physical conditions which rendered him permanently and totally disabled. (Finding of Fact 57). The ALJ concluded, even though the commutable labor market had open positions, these were not jobs Claimant could perform.

In coming to this conclusion, the ALJ considered Respondents' argument that were open positions in the Denver labor market within Claimant's restrictions. Respondents also contended Claimant did not commence his job search until recently. The assertion that Claimant delayed in seeking a job was undercut, at least in part, by the fact that Claimant had four hospitalizations in the aftermath of the injury, as well as extensive treatment through his ATPs. That said, Claimant did not immediately seek employment. Indeed, the evidence showed his applications for work were completed more recently. As found, Claimant was limited in his job search by his physical condition, along with his work experience and background. (Finding of Fact 52). The ALJ concluded this restricted Claimant's access to the job market.

Respondents also argued Claimant did not include all of his prior experience in some applications and appeared to sabotage some of the potential employment opportunities, in that he talked about his restrictions and took his shirt off during one interview. Although the ALJ could find no rational explanation for Claimant removing shirt during an interview, disclosing restrictions on an application or during an interview did not necessarily lead the ALJ to conclude Claimant was sabotaging these employment opportunities. Indeed, some employers inquire as to physical limitations when a candidate is interviewed. The overriding question was whether Claimant could secure employment and earn wages, which the ALJ concluded he could not.

Respondents also focused on the tests in the FCEs, in which the individuals administering the tests felt Claimant was self-limiting and where the results did not meet validity criteria. Respondents correctly pointed out at least some of Claimant's self-described restrictions were greater than those imposed by his physicians. Respondents also relied upon Dr. Hattem's testimony to support the assertion that Claimant could perform jobs identified by Ms. Bartmann. The ALJ was not convinced Claimant could obtain employment at any of these companies. In addition, the ALJ was not persuaded that the unskilled jobs identified by Respondents' expert constituted employment opportunities in which Claimant could earn wages. On balance, the ALJ was persuaded Claimant would not be able to obtain a position and earn wages.

Based upon the totality of the evidence adduced at hearing, the ALJ determined Claimant proved he was permanently and totally disabled as a result of his industrial injury.

ORDER

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

1. Respondents shall pay Claimant permanent total disability benefits, commencing on October 14, 2015.

2. Respondents are entitled to a credit for PPD benefits paid.

3. Respondents shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Pursuant to the parties' Stipulation, Respondents shall provide medical benefits to treat Claimant's a-fib, including medications.

5. Respondents are entitled to take the statutory offset for Claimant's social security retirement benefits.

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

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

DATED: March 20, 2018

Digital signature

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

ISSUES

The issues set for determination included:

- Whether Claimant proved by a preponderance of the evidence that he suffered a worsening of condition (right foot) related to the admitted September 17, 2015 injury, entitling him to reopen his claim.

- Whether Claimant has proven by a preponderance of the evidence that his bilateral knee complaints are a compensable component of the admitted September 17, 2015 work injury.

- If Claimant proved that his bilateral knee condition is a compensable component of the admitted injury, did he establish by a preponderance of the evidence that he is no longer at MMI?

- Did Claimant prove that treatment for his right foot and both knees was reasonable, necessary, and related to his industrial injury?

FINDINGS OF FACT

1. Claimant was employed as a driver for Employer. This job involved delivering packages to various locations.

2. There was no evidence in the record that Claimant sustained an injury to his right foot before September 2015. There was no evidence Claimant injured or received treatment for his right knee before September 2015.

3. In 1998, Claimant injured his left knee for which he required ACL surgery. There was no evidence admitted at hearing which documented any permanent work restrictions related to Claimant's left knee. Claimant testified he was able to perform his job duties for Employer without any knee problems.[1]

4. On September 17, 2015, Claimant sustained an admitted industrial injury while he was checking his truck. He was hurt when he walked between two pallets and caught his right foot on the corner of a pallet. Claimant testified this caused his foot to twist and it was really sore. Claimant reported the injury two hours later to his dispatcher.

[1] Hearing Transcript ("Hrg Tr.") pp. 37:24-38:3.

5. Claimant initially treated at North Suburban Medical Center on September 17, 2015. X-rays were taken and read by Matthew Schmitz, M.D. Dr. Schmitz' impression was: proximal fifth metatarsal minimally displaced fracture, approximately 2 cm. from the base. A splint was applied and Claimant was given crutches, as well as oxycodone and tramadol.

6. On September 21, 2015, Claimant was evaluated by Carlos Guerrero, M.D. at Concentra. Dr. Guerrero's impressions were: fracture of right foot and fracture of fifth metatarsal bone of right foot. An Achilles tendon sprain was also noted. X-rays showed a non-displaced fifth metatarsal fracture, along with a plantar and Achilles tendon spur. Claimant was given restrictions, including no driving a company vehicle, no climbing ladders, stairs or walk, and may not walk on uneven terrain. Claimant was referred for an orthopedic evaluation.

7. Claimant was evaluated by Michael Zyzda, M.D. on September 30, 2015. Pain was noted of the base of the fifth metatarsal, with slight pain of the cuboid. Dr. Zyzda recommended Claimant stay non-weightbearing for an additional week. In the follow-up evaluation which occurred on October 21, 2015, Dr. Zyzda recommended Claimant put full weight on the foot with the cast boot on and to discontinue crutches in two weeks.

8. Claimant was followed by Candace Sobanski, M.D. who continued the work restrictions in the evaluation on November 9, 2015, at which time he was going to be weaned from the walking boot. Claimant received physical therapy ("PT") in the form of electrical stimulation, iontophoresis, ultrasound, and heat/cold. The November 9, 2015 note from Dr. Sobanski indicated Claimant was being weaned from the walking boot. The ALJ inferred Claimant's use of a walking boot and the process of being weaned from it could cause bilateral knee symptoms, as Claimant reported symptoms once he was out of the walking boot.

9. On November 18, 2015, Dr. Zyzda noted Claimant was still experiencing soreness and had been out of the boot over the last few days. Claimant was to begin PT. An x-ray taken that day was read by Abbas Chamsuddin, M.D., who identified callus formation at the level of the fracture of the base of the fifth metatarsal bone, along with a decrease in edema and swelling. No MRI scan was done of the right foot before Claimant reached MMI.

10. The medical records before November 24, 2015 did not contain references to complaints of knee pain made by Claimant. In a PT note dated November 24, 2015, Kristin Johnson, P.T. noted Claimant reported bilateral knee pain. Additional notes from Bethany Lubacz, P.T. for the period of December 1, 2015 through December 7, 2015 were admitted onto evidence. These records documented bilateral knee pain, which PT Lubacz initially described as unrelated.

11. On December 9, 2015 Claimant was evaluated by Stephanie Missey, PA-C, at which time he was reporting right knee pain and weakness. PA-C Missey

recommended additional PT for strengthening. Claimant received additional PT provided by Catherine Kent, P.T.

12. On December 22, 2015, Claimant was placed at MMI. A narrative report was prepared by PA-C Missey and Claimant was released by Dr. Zyzda. There was a report of bilateral knee pain noted by PA-C Missey. X-rays taken that day showed no osseous abnormality in his right foot, as found by radiologist Carol Stephenson, M.D. An old fracture proximal to the fifth metatarsal was noted, along with small dorsal osteophytes and plantar heel spurs.

13. On December 29, 2015, a Final Admission of Liability ("FAL") was filed on behalf of Respondents based upon Dr. Guerrero's December 22, 2015 evaluation.[2] Respondents denied liability for post-MMI medical treatment on the grounds that it was not reasonable, necessary or related to the compensable injury.

14. Claimant testified since he was placed at MMI, his foot condition has gotten worse.[3]

15. Claimant continued to receive PT, which also included the right knee. After the evaluation on January 8, 2016, Dr. Sobanski diagnosed right knee injury and sprain of the right knee. Dr. Sobanski noted causation of the bilateral knee complaints would be determined after imaging was obtained. In the M-164 signed by Daniel Peterson, M.D. on January 14, 2016, Dr. Peterson indicated his objective findings were consistent with the history and/or work related mechanism of injury/illness. Claimant received PT for the knee through January 27, 2016. The notes reflected pain reported by Claimant as well as catching/locking found by the therapist (PT Lubacz).

16. Claimant was evaluated on January 19, 2016 by Scott Richardson, M.D. at Concentra. At that time, he complained of pain in the right lateral foot, as well as both knees. Claimant indicated the latter symptoms started two days after his injury. Dr. Richardson's assessment was fracture of the fifth metatarsal bone of the right foot; right knee injury; and left knee injury. Claimant's work restrictions were continued. A prescription for ibuprofen was issued, along with knee sleeves and PT was ordered. The February 9, 2016 treatment note from PT Lubacz recorded that Claimant was discharged from care, as he was not making progress and would not benefit from further therapy.

17. On February 9, 2016, Claimant was evaluated by Mark Foster, D.O., at which time he was reporting bilateral knee pain and right foot pain. This pain had worsened since MMI. Dr. Foster noted bilateral knee crepitus and tenderness on examination. Tenderness was noted over the proximal right 5th metatarsal. Claimant's list of active problems included: Achilles tendon sprain; fracture of the fifth metatarsal bone of the right foot; fracture right foot; left knee injury; right knee injury; and sprained

[2] Dr. Guerrero's M-164 was admitted into evidence and referenced in the FAL.

[3] Hrg Tr. p. 27:5-10.

of right knee. Dr. Foster recommended an MRI and podiatry evaluation. He also prescribed ibuprofen. Dr. Foster noted the compensability of both knees had been contested by the insurance company, but did not provide a definitive opinion regarding causation.

18. X-rays of Claimant's left knee were taken on February 10, 2016, which showed evidence of a prior ACL repair in the distal femur, as well as surgical screws in the proximal tibia. The films were read by Steven Abrams, M.D., who identified moderate narrowing of the medial joint compartment and marginal osteophytes, along with patellar spurring. Dr. Abrams' impression was: no bony abnormality; degenerative changes and the evidence of prior postsurgical changes as described above. The x-rays of the right knee showed mild to moderate narrowing of the medial joint compartment, marginal osteophytes involving the femoral condyles and tibial plateau, along with patellar spurring which were also noted by Dr. Abrams.

19. On March 4, 2016, Claimant underwent an MRI of the right foot. The films were read by Joseph Ugorji, D.O., who concluded there was a nondisplaced, ununited sub-acute fracture at fifth metatarsal base; early microtrabecular stress fracture at fourth metatarsal base; non-displaced acute/sub-acute fracture of the lateral sesamoid; low-grade contusion at insertional peroneus brevis. The ALJ found this was the first MRI of the right foot in the record.

20. Claimant also underwent an MRI of the left knee on March 4, 2016. These were read by Dr. Ugorji. His conclusion was medial and lateral tibial femoral compartment failure, as evidence by grade 4 of 4 bone on bone chondromalacia, with synovial hypertrophy, bulk marginal osteophytosis, areas of subchondral osteonecrosis, with extensive subchondral edema. There was also evidence of prior ACL reconstruction, with occlusion of the intercondylar notch, which contributed to high-grade fraying without tear of the posterior ligament; grade three chondromalacia patella; advanced proximal tibiofibular osteoarthropathy; and bulky posterolateral interarticular loose body. No lateral meniscus tear was found.

21. On March 10, 2016, Amanda Cava, M.D. performed a one-time evaluation Claimant and recommended reopening of the case and a referral to podiatry in light of continued symptoms and the MRI. Dr. Cava noted there was an ununited fracture on the MRI. Dr. Cava completed an M-164 (dated March 20, 2016) which repeated this recommendation. The ALJ credited this opinion.

22. Matt Lewis, M.D. authored a letter, dated March 21, 2016 which referenced the March 4th MRI. Dr. Lewis noted the MRI showed three separate fractures with in the affected foot, one with nonunion. Because of Claimant's continued symptoms due to the original injury and his worsening clinical status, Dr. Lewis recommended the case be reopened. This opinion was persuasive to the ALJ.

23. Claimant filed a Petition to Reopen on April 29, 2016. On May 20, 2016, Respondents filed an objection to Claimant's Petition to Reopen.

24. On June 3, 2016, Claimant was evaluated by Philip Stull, M.D. Claimant reported persistent symptoms in his foot, as well as the onset of bilateral knee pain at the time of the injury in September 2015. Dorsal edema was seen in the foot, along with a small effusion in the right knee. X-rays taken at the office showed mild lucency around the medial border of the base of the fifth metatarsal. Dr. Stull recommended bilateral knee cortisone injections and braces. The injections were administered in the office. He referred Claimant to a foot consultant. The ALJ inferred Dr. Stull was of the opinion that the condition of Claimant's knees was related to the work injury, although the report did not contain a specific opinion on causation.

25. There was no recommendation for further treatment of the right or left knee in the record.

26. On August 10, 2016, Claimant was evaluated by Stuart Myers, M.D. Mild swelling over the lateral TMT joints and fifth metatarsal base was noted, as well as tenderness at those locations. The ALJ noted the swelling was an objective finding. A CT scan of the right foot was done. Dr. Myers' impression was: healed fifth metatarsal fracture; post-traumatic arthritis, fourth and fifth TMT joints. Topical diclofenac was prescribed and an injection was discussed. Dr. Myers was asked about the relationship between the original injury and his post-traumatic arthritis and noted degenerative changes at the location of fracture could certainly be related to the injury. Dr. Myers stated it was difficult to tell.

27. On January 11, 2017, Claimant was evaluated by Kathleen D'Angelo, M.D. at the request of Respondents. At that time, he was complaining of pain in his right knee, left knee, lower back and right foot. On examination, Dr. D'Angelo noted swelling to the right foot, along with tenderness in the right knee over the patella. Dr. D'Angelo stated the only diagnosis related to the claim was a fractured fifth right metatarsal bone, which she found to be healed and Claimant remained at MMI. The diagnoses not related to the claim included: hypertension, query Diabetes Mellitus type two; osteoarthritis; bilateral knee degenerative joint disease; Charcot's joints and fractures. Dr. D'Angelo opined Claimant's right proximal fifth metacarpal fracture was at MMI. She concluded the other right foot fractures, degenerative changes and other radiological findings were incidental and causally unrelated to the work injury.[4] Dr. D'Angelo concluded Claimant developed neuropathic arthropathy as a result of diabetes, which had not been confirmed as a diagnosis.

28. Dr. D'Angelo testified as an expert in internal medicine at hearing. She is Level II accredited pursuant to the WCRP. Dr. D'Angelo testified consistently with her IME report. Dr. D'Angelo opined Claimant's bilateral knee pain was not related to the September 17, 2015 injury. She based this conclusion on the delay in reporting knee symptoms, as well as the presence of degenerative changes in both knees. Dr. D'Angelo also opined Claimant's foot condition was not related to the original injury, but

[4] Dr. D'Angelo's diagnoses, including Diabetes Mellitus type two and Charcot's joints were not made by Claimant's ATPs.

felt there were amyotrophic damage to the foot. This was potentially related to diabetes. Claimant had a family history of diabetes (grandmother) and needed to be re-tested. The ALJ noted no other physician attributed Claimant's foot condition to diabetes. Dr. D'Angelo also stated that Claimant had a fracture to a different part of his foot. The ALJ found Dr. D'Angelo's opinions were not as persuasive as Dr. Cava.

29. Claimant proved the condition of his right foot worsened.

30. Claimant proved he required treatment for his right foot.

31. Claimant proved his bilateral knee pain resulted from the industrial injury and caused the need for medical treatment.

32. Claimant failed to prove additional treatment was required for his right and left knee.

CONCLUSIONS OF LAW

Generally

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the ALJ focused on the credibility of Claimant and the various medical experts to determine the issues.

Reopening

Section 8-43-303(1), C.R.S. (2016) authorizes an ALJ to reopen any award within six years after the date of injury on a number of grounds, including error, mistake, or a change in condition. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220

(Colo. App. 2008); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). A change in condition refers either "to a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury". *Chavez v. Industrial Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985).

The reopening authority granted ALJs by § 8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ". *Cordova v. Industrial Claim Appeals Office*, *supra,* 55 P.3d at 189. The party seeking reopening bears "the burden of proof as to any issue sought to be reopened". § 8-43-303(4), C.R.S. (2016). As the *Heinicke* Court noted, reopening is proper where a showing can be made that "Claimant's physical or mental condition that is causally connected to the original compensable injury". *Heinicke v. Industrial Claim Appeals Office*, supra, 197 P.3d at 223.

The medical evidence before the Court led to the conclusion that Claimant's foot condition worsened after MMI and was tied to the original compensable injury. As a starting point, the evidence established Claimant continued to have symptoms (including swelling) in his right foot after MMI. (Finding of Fact 16-17, 26). Claimant testified his right foot symptoms were worse. (Finding of Fact 14).

Claimant also did not have an MRI before being placed at MMI. The March 4, 2016 MRI showed an ununited fracture of the fourth metatarsal. (Finding of Fact 20). In addition, the opinions of Dr. Lewis and Dr. Cava supported the ALJ's conclusion that Claimant's symptoms worsened. As treating physicians, Dr. Lewis and Dr. Cava were in a better position to evaluate Claimant as to whether his condition had worsened.

Dr. Richardson also made objective findings concerning Claimant's right foot in his evaluation on January 19, 2016. He made referrals based upon Claimant's symptoms. (Finding of Fact 16). The ALJ was not persuaded that Claimant sustained an injury to a different part of his foot after MMI, as testified to by Dr. D'Angelo. It was more probable than not that the MRI revealed the extent of Claimant's injury and that condition worsened after MMI. There was also evident (albeit not conclusive) that Claimant developed post traumatic arthritis as a result of the industrial injury. (Finding of Fact 26). Accordingly, Claimant adduced sufficient evidence to meet his burden of proof on reopening.

Claimant had the burden of proving his entitlement to medical benefits for his foot. As found, Dr. Cava recommended additional treatment for the right foot. The ALJ credited this opinion over the opinion offered by Dr. D'Angelo. Claimant therefore proved he was entitled to receive additional benefits to cure and relieve the effects of his injury and Respondents are liable to provide said benefits.

Compensability of Bilateral Knee Condition

Turning to the question of whether Claimant's knee symptoms were a compensable part of the claim, the ALJ found Claimant's injury caused both his right

knee and left knee to become symptomatic. (Finding of Fact 31). There was no evidence Claimant had previously injured his right knee before September 17, 2015. Specifically, there was no medical evidence that Claimant had prior symptoms in his right knee or required treatment for his right knee. (Finding of Fact 2). The evidence led the ALJ to conclude Claimant began experiencing symptoms in his right knee after the industrial injury when he was first required to use crutches, then a walking boot. Based upon the evidence before the Court, the ALJ was persuaded the industrial injury aggravated the condition of Claimant's right knee.

Although Claimant underwent a left knee ACL repair in approximately 1998, Claimant had no work restrictions and was not limited prior to the September 2015 injury. (Finding of Fact 3). There was evidence of degenerative changes in the left knee, as documented by the MRI. (Finding of Fact 20). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004).

Where there was no evidence in the record that Claimant's prior left knee condition limited him in any way prior to the September 17, 2015 work injury, the ALJ concluded that the industrial injury caused the need for medical treatment. (Finding of Fact 31). The record was clear that Claimant became symptomatic after the subject work injury and required treatment. Under these circumstances, the ALJ determined that the September 17, 2015 work injury caused him to experience symptoms in his bilateral knees and therefore this was a compensable facet of the subject claim.

The ALJ considered Respondents' argument that the delay in the report of knee pain and equivocation on the part of some of the providers impels the conclusion that the bilateral knee pain was not related. The ALJ was persuaded that the industrial injury aggravated both of Claimant's knees. As determined in Findings of Fact 15-16, the records admitted at hearing documented the fact that Claimant received treatment (including PT) under the auspices of his ATPs for bilateral knee complaints and this lent support for this conclusion. Claimant was credible when describing his knee complaints which was accepted by his ATPs.

Based upon the evidence admitted at hearing, the ALJ was persuaded Claimant developed bilateral knee symptoms as a result of the work-related injury. This required medical treatment. Accordingly, Respondents are liable for the aggravation of the underlying condition in both of Claimant's knees.

Medical Benefits-Knees

The ALJ concluded that Claimant failed to prove he was entitled to medical treatment for either knee. As found, the MRI of the left knee showed the presence of degenerative changes in the knee. (Finding of Fact 20). Claimant received physical therapy for both knees. (Findings of Fact 15-16). No ATP recommended a course of

further treatment for either knee after this course of PT was concluded. (Finding of Fact 25). In fact, there were no recommendations made by any physician for further treatment of either knee in the record. *Id.*

Claimant was required to establish the need for such treatment by a preponderance of the evidence, but failed to do so. (Finding of Fact 32). In the absence of such evidence, Claimant's request for medical benefits for his knees is denied.

ORDER

It is therefore ordered:

1. Claimant met his burden of proof and established a worsening of his right foot condition. Respondents shall provide medical benefits to Claimant for his right foot to cure and relieve the effects of the work injury.

2. Claimant established his right and left knee symptoms were related to the industrial injury. Claimant bilateral knee conditions were worsened by the September 17, 2015 injury.

3. Claimant failed to establish his right and left knees required medical treatment. Claimant's request for medical benefits for the left knee is denied and dismissed. Claimant's request for medical benefits for the right knee is denied and dismissed.

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

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

DATED: March 1, 2018

Digital signature

_____

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

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he suffered a compensable right knee injury on November 23, 2016.

2. Did Claimant prove by a preponderance of the evidence that the right knee meniscus repair recommended by Dr. Beard is reasonable, necessary and related to the work injury.

3. Whether the authorized treating provider is Rosalinda Pineiro, M.D. at Concentra Medical Centers.

STIPULATIONS

The parties reached the following stipulations:

1. If the claim is found compensable, Claimant's average weekly wage is $1,050.00 per week.

2. If the claim is found compensable, Claimant is entitled to temporary partial disability benefits as of November 28, 2016 and continuing.

These stipulations were accepted by the ALJ and are made part of this Order.

FINDINGS OF FACT

1. Claimant's medical history was significant in that he suffered a right knee fracture when he was in his teens and underwent arthroscopic surgery in the 1980s.

2. Claimant also testified that he fractured his left knee. He underwent three arthroscopic surgeries, ultimately requiring a left knee replacement.

3. In 2012, Claimant fell on a carpet step on a stage at church. Claimant testified he had swelling in his knee and was back to work after a month. At that time, he was performing a physical job and had no problems with his right knee after the injury.

4. On May 25, 2012, Claimant underwent an MRI of the right knee and the films were read by David Stoller, M.D. The medial meniscus was intact and the lateral meniscus showed mild fraying of the apex. Chondromalacia patella with grade 3 chondral erosions of the lateral patellar facet and a hypoplastic medial facet were

shown. Dr. Stoller's impression was: large hemorrhagic fluid collection anterior and medial to the tibia 6.6 cm. x 1.5 cm. in cross-section of the axial plane and 4.5 cm. x 1.7 cm. in the sagittal plane.

5. There was no evidence in the record Claimant suffered a subsequent injury to the right knee from 2012-2016. Claimant testified he was able to perform his job duties during this period of time. There was no evidence in the record that he had permanent restrictions related to his right knee as a result of the 20112 injury.[1]

6. Claimant was employed as a repair technician for Employer, beginning work on February 2, 2016. In this capacity, he responded to maintenance calls for appliances sold by Employer. Claimant testified this job involved bending, stooping, as well as carrying tools. Sometimes he was required to work in awkward positions, with a limited area in which to work.

7. Claimant worked on November 23, 2016, which was the Wednesday before Thanksgiving. He testified he started work at 8:00 in the morning and did jobs throughout the day. Claimant thought he had done a job in in Broomfield and then at approximately 3:30 p.m. went to the last job of the day in Commerce City.

8. Claimant stated he was working in a confined space on a refrigerator that had a leak in the cooling system. He estimated the space was probably 2.5' x 4'. He left the job location at approximately 7:30 p.m. The ALJ inferred Claimant's job duties that day required him to bend, stoop and carry tools. He was working a small space. Claimant testified he worked long hours and he didn't notice the pain until he was driving home. His knee had stabbing pain and stiffness. When he got home, Claimant applied ice and took ibuprofen. Claimant was a credible witness when describing the activities of that day.

9. Claimant testified he reported the injury on Friday morning by sending a text to his manager. She was off for a four-day weekend due to the Thanksgiving holiday. Over the weekend, Claimant said his knee was very painful and he treated it by elevation, icing and occasional heat.

10. Claimant returned to work on Monday, November 28, 2016. At that time, he was sent to the designated ATP for Employer, Concentra. Claimant was evaluated by Cynthia Goacher, M.D. on November 28, 2016. No acute injury or accident was noted, but swelling/pain was present in the right knee after working on his knees 3-4 hours. On examination, an effusion grade 1 and swelling was noted on the anteromedial aspect and medial fossa of the right knee. Restrictions in the range of motion ("ROM") were noted on flexion and extension. Dr. Goacher was concerned about DVT and ordered an ultrasound.

11. On December 12, 2016, Claimant returned Concentra and was evaluated by Dr. Pineiro. He noted no improvement of the knee over the past weeks and was working with restrictions. Dr. Pineiro noted tenderness of the underside of the patella

[1] Hearing transcript, p. 35:16-19.

and popliteal fossa, along with crepitus on examination. There was a positive Lachman's test, but no laxity on valgus stress or varus stress. Dr. Pineiro's assessment was acute pain of right knee and she ordered an MRI.

12. On December 29, 2016, Claimant underwent an MRI of the right knee. The films were read by Eric Smith, M.D., whose impression was: longitudinal horizontal tear in the posterior horn segment medial meniscus. Dr. Smith noted this was a new finding when compared with 2012. There was also free edge fraying versus small free edge body segment lateral meniscus present. Progressive arthrosis was present in the lateral patella and lateral trochlea, along with deep cartilage fissuring in the lateral tibial plateau, with mild interval progression noted.

13. Claimant returned to Dr. Pineiro on January 9, 2017, at which time he noted increased pain in the right knee. On examination, tenderness and swelling were noted over the medial joint line and lateral joint line. Swelling was also found in the infrapatellar region, with tenderness found in the patella and popliteal fossa, along with crepitus. Dr. Pineiro restricted Claimant to a lifting maximum of 40 pounds, no kneeling, squatting and climbing ladders. He was to use kneepads while working. Claimant was to return after the orthopedic evaluation.

14. Claimant was evaluated by Thomas Sachtleben, M.D. on January 16, 2017. He was having quite a bit of pain in his anterior knee that was worse with kneeling. On examination, trace effusion was noted, along with mild medial joint line tenderness. Claimant had a negative McMurray test and negative Lachman's test. Claimant had mild pain with patellar compression testing and one plus retro patellar crepitus was noted. Dr. Sachtleben's diagnosis was right patellofemoral joint osteoarthritis and right medial meniscus tear. Dr. Sachtleben did not think the medial meniscus tear noted on the MRI was a significant contributor to his pain, but rather the patellofemoral joint was the source of Claimant's pain. Dr. Sachtleben administered a corticosteroid injection and referred Claimant to physical therapy ("PT"). Claimant's restrictions were continued.

15. The ALJ found that there was insufficient documentation in the record to determine whether Dr. Pineiro referred Claimant to Dr. Sachtleben. Dr. Pineiro received a copy of Dr. Sachtleben's report.

16. On February 20, 2017, Claimant was reevaluated by Dr. Pineiro. Claimant reported pain relief after the injection for a short time, but the pain returned. Claimant's right knee had tenderness on the under surface of the patella, along with crepitus on palpation. Limited ROM was noted in all planes. Dr. Pineiro noted Claimant was to begin PT for the right knee as soon as possible.

17. On March 6, 2107, Claimant returned to Dr. Sachtleben. Claimant noted relief for about a week after the injection, but was still getting catching and popping in the right knee. On examination, Claimant's ROM for the right knee was 10° to 130° of flexion, with negative McMurray's testing and no appreciable effusion. Medial joint line tenderness was present, but the Lachman's test was negative. Dr. Sachtleben's

assessment was the same as the previous evaluation and he recommended a surgical consultation. He opined Claimant may ultimately benefit from a trial of viscosupplementation, but would need to consider a patellofemoral arthroplasty or total knee arthroplasty at some point.

18. On March 10, 2017, Claimant was evaluated by David Beard, M.D., who is an orthopedic surgeon. Dr. Beard noted trace knee effusion, with moderate medial joint line tenderness and pain with the McMurray test. There was a negative Lachman test and negative anterior posterior drawer, with some patellofemoral crepitus upon active knee extension. Claimant's ROM for the right knee was 0° extension to 135° of flexion. Dr. Beard's diagnoses were: right knee primary osteoarthritis affecting the patellofemoral articulation, not work-related; right knee medial meniscus tear, work related. Dr. Beard recommended a knee arthroscopy to address the meniscal pathology. Dr. Beard noted there were no osteoarthritic findings in the medial compartment and opined the surgery should significantly alleviate Claimant's symptoms. He also advised Claimant that he would be unable to change the fact that there was pre-existing patellofemoral osteoarthritis. The ALJ found Dr. Beard's opinion regarding the relatedness of the meniscus tear to be persuasive.

19. On March 13, 2017, Claimant was re-evaluated by Dr. Pineiro. Dr. Pineiro stated she agreed with the surgical procedure based on MRI findings and Dr. Beard's assessment. Dr. Pineiro's assessment was: acute pain of right knee; patellofemoral syndrome.

20. On July 13, 2017, Claimant underwent an independent medical examination which was performed by Timothy O'Brien, M.D., at Respondents' request. On examination, Dr. O' Brien noted 0° to 110° of the right knee on flexion. Patellofemoral crepitus was present and there was a positive compression test to the right patellofemoral joint. The McMurray test was negative and there was no obvious medial or lateral instability. Claimant did not have an antalgic gait that Dr. O'Brien observed.

21. Dr. O'Brien concluded the November 24, 2016 [2] onset of right knee pain was a manifestation of Claimant's personal health and not causally related to his brief occupational exposure. He disagreed with Dr. Beard's opinion that the meniscal tear occurred while Claimant was kneeling. Dr. O' Brien said medial meniscal tears were created by energy that was dissipated to the knee when the foot was planted and rotational forces were directed to the knee. He noted Claimant had pre-existing patellofemoral arthrosis and it was possible that he noted knee pain while kneeling, which was just a manifestation of his arthritis. Dr. O'Brien stated Claimant's delay in seeking treatment was the behavior of a person who was accustomed to arthritic knee pain. Dr. O' Brien noted Claimant had age-related to generation of his patellofemoral joint based on plane radiographs, which was a long-standing, pre-existing condition. Dr. O'Brien opined the surgical intervention recommended by Dr. Beard was contraindicated, unreasonable and not within the standard of care.

[2] This appears to be a typographical error.

22. Claimant returned to Dr. Pineiro on November 21, 2017. On examination, swelling was noted in the right knee, along with tenderness over the medial joint line and in the undersurface of the patella. Crepitus was found on palpation. Dr. Pineiro noted limited ROM in all planes, with pain. Dr. Pineiro's assessment was: acute pain of right knee; derangement, knee. Dr. Pineiro continued Claimant's work restrictions of: may lift up to 20 pounds frequently, push/pull up to 20 pounds frequently, no climbing ladders, no kneeling for more than five minutes at a time and must wear knee pads.

23. On December 6, 2017, Dr. Pineiro responded to questions posed by Respondents' counsel on the issues of causation and the reasonableness of the proposed surgery.[3] Dr. Pineiro opined Claimant's meniscus tear was work-related, but the osteoarthritis was not. Dr. Pineiro also recommended the meniscus be repaired. She specifically disagreed with Dr. O'Brien's opinion that the right knee pain was a manifestation of Claimant's personal health and not causally related to his employment. She also disagreed with Dr. O'Brien's opinion that the proposed right knee surgery was contraindicated. The ALJ credited Dr. Pineiro's opinions on causation and the reasonableness of the proposed surgery.

24. Dr. O'Brien testified as an expert in orthopedic surgery. He is Level II accredited pursuant to the WCRP. He testified consistently with his IME report. Dr. O'Brien testified there was not an injury to the Claimant's right knee. The act of kneeling would not cause an injury of this type because there was insufficient energy in this activity to cause a tear. The ALJ found this was a somewhat limited view of Claimant's activities, as he was doing more than kneeling on November 23, 2016. Dr. O'Brien opined Claimant's symptoms were a manifestation of his arthritis.[4] Dr. O'Brien stated Claimant had pain behind the kneecap or in the patellofemoral joint. He believed the 2012 injury was traumatic and the MRI showed evidence of a chronic meniscus tear at that time. He said the MRI was misread and a cyst was present. The ALJ noted that to the extent Dr. O'Brien found a pre-existing meniscus tear in 2012, there was no evidence to show Claimant suffered from symptoms and/or limitations following the 2012 injury. Therefore, the ALJ inferred that the work activities aggravated the underlying condition of the right knee.

25. Dr. O'Brien testified Claimant's surgeries on his left knee were indicators of what could be expected with regard to the right. There were three prior arthroscopies on the left knee; all of which failed. Dr. O'Brien stated the medical literature indicated arthroscopic surgery was not successful in relieving pain related to arthritis. He opined Claimant would not benefit from this surgery. Dr. O'Brien also testified that where a knee that has had a prior surgical intervention such as an arthroscopy, it makes the knee replacement much more difficult.[5] Dr. O'Brien stated the surgery recommended by Dr. Beard should not be approved.

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[3] Respondents' Exhibit B, p. 23.

[4] O'Brien deposition, p. 6:18-7:22.

[5] O'Brien deposition, p. 23:14-24:4.

26. Claimant testified that he wishes to have the surgery. He has been working on modified duty, which includes maintenance of the vans, along with helping supply technicians with tools and equipment. This has reduced his pay almost in half.

27. The ALJ found Claimant's work on November 23, 2016 caused his right knee to become symptomatic.

28. The surgery proposed by Dr. Beard is reasonable and necessary

29. Evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

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

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

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

Compensability-Right Knee

Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Sections 8-41-301(1)(b) & (c), C.R.S. (2016). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995). Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). The particular focus in the case at bench is whether the Claimant's work on November 23, 2016 aggravated and/or accelerated the underlying condition of Claimant's right knee.

Claimant argued his right knee became symptomatic as a result of his work duties on November 23, 2016. More particularly, the work performed that day caused the meniscus to become symptomatic. Claimant asserted the activities on November 23, 2016 either created the condition or caused the underlying condition to become symptomatic. Claimant contended that although he did not know the exact moment he injured himself, this did not bar his claim. Claimant relied upon the opinions of Dr. Pineiro and Dr. Beard to support the conclusion that the proposed treatment was reasonable, necessary and related to the injury.

Respondents argued Claimant's job activities on November 23, 2016 were insufficient to cause a torn medial meniscus. Respondents contended Claimant's medial meniscus was a result of ongoing degenerative changes in the right knee, which were similar to those in the left knee. They argued there was a delay in the onset of Claimant's symptoms, which came as the result of his arthritis. Respondents relied upon Dr. O'Brien's testimony to support these contentions.

On balance, the ALJ was persuaded Claimant's job duties caused the onset of symptoms in the right knee, thereby making Respondents liable for benefits. As a starting point, the ALJ found Claimant to be credible when describing the work performed on November 23, 2016. He was working in a small space and when doing a job of this type, this required not only kneeling, but bending stooping and twisting. (Finding of Fact 8). The ALJ also relied upon the findings of ATP, Dr. Pineiro, who concluded Claimant's job duties were the cause of his right knee symptoms. (Findings of Fact 19, 23). Dr. Pineiro was a treating physician over the course of the claim and responded in the affirmative to the specific question of whether the right knee condition was related to the incident of November 26, 2016. (Finding of Fact 23). Dr. Pineiro also confirmed that the proposed surgery by Dr. Beard was reasonable, necessary and related to the injury. *Id.* Based upon the evidence admitted at hearing, the Judge concluded Claimant established a sufficient nexus between his job duties and the symptoms in of his right knee.

The ALJ considered Respondents' assertions on the issue of compensability. As found, the ALJ concluded Dr. O'Brien's view was somewhat circumscribed regarding Claimant's job duties. He did not take into account that the work performed on November 23, 2016 was not just kneeling, but involved crouching, squatting, lifting, and twisting while working in a confined space. (Finding of Fact 24). In addition, to the extent that Claimant had a meniscal tear in the right knee which was chronic, the ALJ determined it was made symptomatic by Claimant's work activities. The ALJ credited the opinions of Dr. Pineiro, as well as Dr. Beard over those offered by Dr. O'Brien.

The ALJ also reviewed the case cited by Respondents, who argued that the instant case was similar to *Sanchez v. Industrial Claim Appeals Office*, 15CA1481 (Colo. App. March 17, 2016) [Unpublished]. In *Sanchez*, Claimant's knee was asymptomatic before he knelt under and arose from working under a crane. When he stood up, he felt a pop, which is what he advised the various medical providers. There was no evidence in the record that Claimant had symptoms prior to the date of injury. The ALJ initially denied benefits based upon the IME physician's conclusion that Claimant's knee injury would not have occurred when he stood up. This expert opined that the type of tear that occurred was generally a chronic condition and the ALJ credited that opinion. The Industrial Claim Appeals Office affirmed the decision.

The Colorado Court of Appeals, in an unreported decision, reversed and remanded the case, concluding the ALJ applied the incorrect legal standard. The Court of Appeals determined that Claimant was in the neutral risk category, pursuant to the *City of Brighton v. Rodriguez*, 318 P.3d 496, 505 (Colo. 2014). The ALJ implicitly found that Claimant's knee condition was chronic and pre-existing. This amounted to a finding that Claimant's injury was in the purely idiopathic personal risk category and generally not compensable under the Colorado Workers' Compensation Act, absent an exception. However, the Court concluded that Claimant's knee injury would not have occurred but for his actions at work. Therefore, Claimant's activities should have been analyzed under the positional risk test and the Court of Appeals concluded the injury was compensable.

Both the rationale and result in *Sanchez v. Industrial Claim Appeals Office* support the ALJ's conclusions in the case at bench. The ALJ concluded that it was Claimant's work activities on November 23, 2016 that led to Claimant's symptoms. Therefore, he was entitled to receive benefits under the Colorado Workers' Compensation Act.

Medical Benefits

In light of the ruling on compensability, Respondents are required to provide medical benefits to Claimant to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved the proposed treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). As found, ALJ concluded the arthroscopic surgery proposed by Dr. Beard was reasonable, necessary and related.

(Finding of Fact 28). Dr. Pineiro's opinion, as well as Dr. Peter's opinion persuaded the ALJ on this question. In addition, the ALJ credited Dr. Beard's opinion that this would relieve Claimant's pain. (Finding of Fact 18).

The ALJ notes that the record was unclear whether Dr. Pineiro directly referred Claimant to Dr. Sachtleben, who in turn referred Claimant for a surgical evaluation by Dr. Beard. (Finding of Fact 15). Without sufficient evidence in the record, additional evidence is required on this issue. Accordingly, the parties will be ordered to confer on the authorization issue to try to resolve it.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable injury on November 23, 2016, injuring his right knee while working as a service technician.

2. Respondents shall provide medical benefits to cure and relieve the effects of Claimant's injury. Dr. Pineiro remains an ATP.

3. Because the ALJ could not determine whether Dr. Sachtleben and Dr. Beard were ATPs, counsel for the parties shall confer within thirty (30) days of this Order becoming final regarding the authorization issue to try to reach an agreement. If no agreement is reached, either Claimant or Respondents may file an Application for Hearing on this issue.

4. Pursuant to the parties' Stipulations, Respondents shall pay Claimant TPD benefits from November 28, 2016 until terminated by law.

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

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

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

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 2, 2018

Digital signature

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on July 10, 2017.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $433.55.

2. If compensable, Claimant is entitled to receive Temporary Total Disability (TTD) benefits for the period July 7, 2017 through October 2, 2017.

3. If compensable, Annu Ramaswamy, M.D. is Claimant's Authorized Treating Physician (ATP).

4. If compensable, all medical treatment that Claimant has received for his lower back injury is reasonable, necessary and related to the July 10, 2017 accident.

FINDINGS OF FACT

1. Claimant worked for Employer as a Landscaper. He began his employment on May 9, 2017. Claimant's job duties involved mowing lawns, raking leaves, cleaning gutters, using blowers and basic sprinkler repair.

2. On July 10, 2017 Claimant was assigned to perform work at the Early Learning Child Center in Lakewood, Colorado. Employer's Manager Joshua Pedersen was at the job site in the morning but left for another job location. Claimant's co-workers Mike and Matt were also at the jobsite to clear the grounds and create a play area. The process involved cutting trees, removing shrubs and disposing of debris. After lunch Mike and Matt left the location. By early afternoon only Claimant and Foreman Patrick Moreno remained on the Child Center job site.

3. While Mr. Moreno was in the back of a truck, Claimant was using a wheelbarrow to transport groundcover materials from the truck to the property. Claimant was pushing a loaded wheelbarrow that weighed approximately 50-60 pounds. When the wheelbarrow struck the ground and began to wobble, Claimant attempted to keep the device upright. Nevertheless, the wheelbarrow fell on its side and Claimant landed awkwardly on the ground. Claimant specified that his left leg bent behind him and he heard a "pop" in his back. Although Claimant immediately experienced back pain and symptoms radiating down his left leg, he completed his wheelbarrow trips. Claimant

remarked that he told Mr. Moreno that he had fallen and instructed him to contact Manager Mr. Pedersen about the accident.

4. Claimant explained that on July 10, 2017 he called Mr. Pedersen and left a voicemail message about his injury. He stated that he was going to see how badly he felt before going to a doctor and determining whether he would attend work on the following day.

5. Claimant returned to work on the next day and performed his job duties. He advised Mr. Pedersen about his back injury and commented that he would try to make it through the week. However, Claimant noted that he might need to visit a doctor.

6. On July 12, 2017 Claimant was assigned to work with Mr. Pedersen to remove and install a fountain. Claimant explained that while he was lifting a section of the fountain he suffered increased back pain and symptoms radiating down his left leg. Claimant noted that he informed co-worker Matthew Katzenmaier and Mr. Pedersen that he had re-injured his back. Claimant completed his job duties and worked the following two days without incident.

7. On July 17, 2017 Claimant did not report to work but mentioned his back injury to Mr. Pedersen. He visited the Medical Center of Aurora Emergency Department for an evaluation. Claimant reported that he injured his back five days earlier while lifting a heavy planter at work. A lumbar MRI revealed a left lateral and inferior disc extrusion that impinged on the left S1 nerve root in the lateral recess and a broad-based right lateral disc protrusion that impinged on the descending L5 nerve root in the lateral recess. Claimant was diagnosed with left-sided lower back pain.

8. Claimant ceased working for Employer on July 21, 2017.

9. Mr. Moreno testified that he was working with Claimant on July 10, 2017 at the Early Learning Child Center. He explained that Claimant was using a wheelbarrow to transport material from a work truck onto the job site. Mr. Moreno commented that he never saw Claimant fall while pushing the wheelbarrow and Claimant did not report any accident.

10. Mr. Pedersen testified that he worked with Claimant at various job sites after July 10, 2017. Claimant did not inform him of any injuries until July 17, 2017. Mr. Pedersen also did not notice any pain behaviors or discomfort.

11. On July 27, 2017 Claimant visited Colorado Orthopedic Consultants and received treatment from Stephen F. Pehler, M.D. Claimant reported that he had injured his back at work approximately two weeks earlier. Dr. Pehler noted that Claimant's lumbar MRI reflected a left paracentral disc herniation at L5-S1 with a disc bulge at L4-L5. He recommended medications, physical therapy and left-sided L5-S1 epidural steroid injections.

12. On August 3, 2017 Claimant completed a Workers' Claim for Compensation. Claimant specified that he injured his lower back and left leg on July 10,

2017 while pushing a wheelbarrow. He explained that he fell over with the wheelbarrow after it struck a pothole.

13. On August 9, 2017 Claimant underwent physical therapy at Altitude Physical Therapy & Sports Medicine. Claimant reported that on July 10, 2017 he injured his back while pushing a wheelbarrow. He commented that he re-injured his back later in the week at work while moving a stone waterfall. Claimant noted back pain that radiated down his left leg.

14. On October 18, 2017 Claimant visited Annu Ramaswamy, M.D. for an evaluation. On a Physician's Report of Workers' Compensation Injury Dr. Ramaswamy noted that his objective findings were consistent with a work-related mechanism of injury. He assigned work restrictions and noted that Claimant would reach Maximum Medical Improvement (MMI) in about three to four months.

15. On November 21, 2017 Claimant presented to Dr. Pehler for an examination. Claimant reported that he injured his back in July 2017 during a lifting and twisting incident at work. He remarked that he has continued to suffer lower back and left lower extremity symptoms. Claimant commented that, despite conservative treatment, his symptoms have worsened. Dr. Pehler recommended a repeat MRI, a bilateral EMG, continued physical therapy and a second injection.

16. On November 22, 2017 Claimant underwent a second MRI that revealed similar findings to the July 17, 2017 MRI. Claimant subsequently underwent a third lumber MRI that again yielded similar results.

17. On January 8, 2018 Claimant returned to Dr. Ramaswamy for an evaluation. Dr. Ramaswamy again noted that his objective findings were consistent with a work-related mechanism of injury. He continued to assign work restrictions and commented that Claimant would likely reach MMI in two to three months.

18. Claimant continued to periodically visit Dr. Ramaswamy. By February 14, 2018 Dr. Ramaswamy remarked that his objective findings were consistent with a work-related mechanism of injury. He assigned work restrictions and estimated that Claimant would reach MMI in about three to four months.

19. Claimant has demonstrated that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on July 10, 2017. Claimant credibly explained that on July 10, 2017 he was using a wheelbarrow at work weighing about 50-60 pounds to transport groundcover materials. When the wheelbarrow struck the ground and began to wobble, Claimant attempted to keep the device upright. Nevertheless, the wheelbarrow fell on its side and Claimant landed awkwardly on the ground. Claimant specified that his left leg bent behind him and he heard a "pop" in his back. He immediately experienced back pain and radiating left leg symptoms. Claimant's Workers' Claim for Compensation also specified that he injured his lower back and left leg on July 10, 2017 while pushing a wheelbarrow. He explained that he fell over with the wheelbarrow after it struck a pothole. Claimant

added that on July 12, 2017 he aggravated his lower back and left leg symptoms while lifting a section of fountain when working at a private residence for Employer.

20. The medical records support Claimant's testimony that he suffered a lower back injury while at work on July 10, 2017. On July 27, 2017 Claimant received medical treatment from Dr. Pehler. Claimant reported that he had injured his back at work approximately two weeks earlier. Dr. Pehler noted that Claimant's lumbar MRI reflected a left paracentral disc herniation at L5-S1 with a disc bulge at L4-L5. He recommended medications, physical therapy and left-sided L5-S1 epidural steroid injections. Two subsequent lumbar MRI's revealed similar findings. Furthermore, Dr. Ramaswamy repeatedly noted that his objective findings were consistent with a work-related mechanism of injury. He assigned work restrictions and noted that Claimant has not yet reached MMI.

21. In contrast, Mr. Moreno testified that, although he was working with Claimant on July 10, 2017, he never saw Claimant fall while pushing the wheelbarrow and there was no accident report. Moreover, Mr. Pedersen testified that Claimant did not inform him of any injuries until July 17, 2017 and he did not notice any pain behaviors. Finally, the medical records reflect some inconsistencies on the precise mechanism of Claimant's lower back injury. Nevertheless, the bulk of the evidence demonstrates that Claimant suffered a lower back injury while working for Employer on July 10, 2017. The diagnostic testing and other medical records demonstrate a causal connection between Claimant's work activities and his lower back symptoms. Accordingly, Claimant's work activities aggravated, accelerated or combined with his condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on July 10, 2017. Claimant credibly explained that on July 10, 2017 he was using a wheelbarrow at work weighing about 50-60 pounds to transport groundcover materials. When the wheelbarrow struck the ground and began to wobble, Claimant attempted to keep the device upright. Nevertheless, the wheelbarrow fell on its side and Claimant landed awkwardly on the ground. Claimant specified that his left leg bent behind him and he heard a "pop" in his back. He immediately experienced back pain and radiating left leg symptoms. Claimant's Workers' Claim for Compensation also specified that he injured his lower back and left leg on July 10, 2017 while pushing a

wheelbarrow. He explained that he fell over with the wheelbarrow after it struck a pothole. Claimant added that on July 12, 2017 he aggravated his lower back and left leg symptoms while lifting a section of fountain when working at a private residence for Employer.

8. As found, the medical records support Claimant's testimony that he suffered a lower back injury while at work on July 10, 2017. On July 27, 2017 Claimant received medical treatment from Dr. Pehler. Claimant reported that he had injured his back at work approximately two weeks earlier. Dr. Pehler noted that Claimant's lumbar MRI reflected a left paracentral disc herniation at L5-S1 with a disc bulge at L4-L5. He recommended medications, physical therapy and left-sided L5-S1 epidural steroid injections. Two subsequent lumbar MRI's revealed similar findings. Furthermore, Dr. Ramaswamy repeatedly noted that his objective findings were consistent with a work-related mechanism of injury. He assigned work restrictions and noted that Claimant has not yet reached MMI.

9. As found, in contrast, Mr. Moreno testified that, although he was working with Claimant on July 10, 2017, he never saw Claimant fall while pushing the wheelbarrow and there was no accident report. Moreover, Mr. Pedersen testified that Claimant did not inform him of any injuries until July 17, 2017 and he did not notice any pain behaviors. Finally, the medical records reflect some inconsistencies on the precise mechanism of Claimant's lower back injury. Nevertheless, the bulk of the evidence demonstrates that Claimant suffered a lower back injury while working for Employer on July 10, 2017. The diagnostic testing and other medical records demonstrate a causal connection between Claimant's work activities and his lower back symptoms. Accordingly, Claimant's work activities aggravated, accelerated or combined with his condition to produce a need for medical treatment.

ORDER

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

1. Claimant suffered a compensable lower back injury while working for Employer on July 10, 2017.

2. Claimant earned an AWW of $433.55.

3. Claimant shall receive TTD benefits for the period July 7, 2017 through October 2, 2017

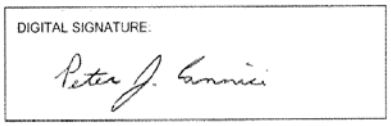
4. Annu Ramaswamy, M.D. is Claimant's ATP.

5. All medical treatment that Claimant has received for his lower back injury is reasonable, necessary and related to the July 10, 2017 accident.

6. Any issues not resolved in this Order are reserved for future determination.

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

DATED: April 5, 2018.



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

ISSUES

- Did Claimant prove that an L5-S1 lumbar fusion recommended by Dr. Ronald Hammers is reasonably necessary and related to the admitted injury?

- Did Claimant prove entitlement to TTD from April 18, 2017 through May 22, 2017?

- Claimant seeks an increase in his average weekly wage to $1,411.89, effective August 1, 2017, due to the cancellation of his Employer-sponsored health insurance coverage. Respondents conceded the issue in their position statement, so AWW has been resolved by agreement.

FINDINGS OF FACT

1. Claimant worked for Employer as a warehouse associate, commercial driver and delivery person. He worked in that physically demanding job for seven years before his industrial injury. Before that, he worked other medium to heavy jobs including highway maintenance and fuel delivery.

2. On October 14, 2016, Claimant suffered admitted injuries on as a result of a slip and fall accident. He was walking down a grass-covered hill and slipped and fell onto his back. Claimant injured his low back and left shoulder as a result of the accident.[1]

3. Claimant had a pre-injury history of low back problems dating to at least 1994. He underwent a laminotomy in October 1994 for a large, left-sided L5-S1 disc herniation displacing the left S1 nerve root. He initially did well after the surgery but developed recurrent symptoms approximately six months later. A lumbar MRI on May 3, 1995 showed a recurrent herniation surrounded by scar tissue displacing the left S1 nerve root. His symptoms were not severe enough to warrant surgery and Claimant underwent three lumbar ESIs, which provided excellent relief. The last ESI was performed on October 13, 1995.

4. The next documented mention of low back pain is in records from Claimant's PCP, Dr. Leyva, in April 2011. At the time, Claimant was awaiting surgery on his right elbow, and Dr. Leyva prescribed Vicodin and Mobic for elbow pain. Dr. Leyva's report included a diagnosis of "Lumbago. Stable at this time. No heavy lifting. Instructed on proper lifting technique. Strengthen abdominal core and back." Later records contain nearly identical language regarding the "lumbago" diagnosis, so these are likely "cloned" entries prepopulated in Dr. Leyva's electronic medical records.

[1] The ALJ is mindful of the parties' disagreement whether other parts of Claimant's body were injured in accident, and this order takes no position those issues.

5. Claimant started seeing a new PCP, Dr. Uusinarkaus, in February 2015. His active problems at that time included his left shoulder, right elbow, and low back. Dr. Uusinarkaus referenced Claimant's remote history of lumbar surgery and noted "he works in a warehouse and his back hurts at the end of the day. He uses hydrocodone for this." Thereafter, Dr. Uusinarkaus refilled Claimant's Vicodin approximately every six months. It appears his standing prescription was for 60 tablets "PRN," which equates to approximately 10 Vicodin per month. That is consistent with Claimant's testimony that he used the Vicodin "two or three times a week" before the October 2016 accident.

6. The pre-injury medical records establish that Claimant had mild chronic low back pain before the October 2016 accident, which waxed and waned with activity, including his work. He worked physically demanding jobs with no significant limitations. There is no persuasive evidence of any pre-existing right lower extremity radicular symptoms.

7. After the October 2016 work accident, Employer referred Claimant to Dr. Robi Baptist at Colorado Springs Health Partners. At his initial visit on October 17, 2016, Claimant described low back pain and radiating right leg pain "like before he had a discectomy several years ago."[2] Sensory and motor examinations were normal, but based on the reported symptoms Dr. Baptist diagnosed lumbar radiculopathy and requested a lumbar MRI. She also imposed sub-sedentary work restrictions with a maximum lifting of 5 pounds.

8. Claimant had a lumbar MRI on October 25, 2016, which showed significant right foraminal stenosis at L5-S1 with probable impingement of the right L5 nerve root. The MRI also showed a "residual or recurrent" left-sided disc bulge possibly impinging the left S1 nerve, severe chronic degenerative disc disease at L4-5, and lesser degenerative changes at L3-4.

9. Claimant saw a neurologist, Dr. Kimberly Wagner, on November 10, 2016. He described back pain with pain and paresthesias in his buttocks, worse on the right than the left. Dr. Wagner noted decreased right lower extremity sensation "in a nondermatomal distribution." Dr. Wagner ordered electrodiagnostic testing "to rule out radiculopathy," and referred Claimant to Dr. Scott Ross for pain management.

10. On November 17, 2016, Dr. Baptist noted Claimant's right leg symptoms had improved, with only intermittent discomfort to the knee without weakness.

11. Claimant underwent a lower extremity on December 1, 2016 with Dr. Ales, which showed evidence of chronic right L5 radiculopathy with no acute denervation.

12. Claimant had a surgical consultation with Dr. Joseph Illig on December 7, 2016. Dr. Illig noted Claimant "currently has no radiating right L5 radicular symptoms but occasionally some buttocks soreness bilaterally." He reported the low back pain was improving with physical therapy. Examination of the lower extremities showed no motor

[2] Since there is no evidence of any preinjury right leg symptoms, the ALJ interprets this to mean Claimant's right leg pain was equivalent to the left leg radiculopathy he had before his 1994 back surgery.

or sensory abnormalities. Dr. Illig opined there was "no indication for surgical intervention in the lumbar spine without evidence of root compression with no recurrent disc herniation."

13. On December 8, 2016, Dr. Baptist noted no surgery was planned because "most radicular leg sx resolved." She also noted a second surgical opinion was pending. At his next visit, on December 30, Dr. Baptist noted the numbness and weakness in Claimant's right leg "is gone but pain continues."

14. Claimant attended numerous physical therapy sessions between November 8, 2016 and January 27, 2017. The PT records reflect steady and significant improvement in his low back pain and radicular symptoms. At the initial visit, Claimant reported pain down the back of his right greater than left leg with occasional numbness and tingling. His back pain was 10/10 at its worst. His sleep was poor, and he could only maintain a posture for approximately 30 minutes before needing to change positions. By December 20 Claimant reported "he hardly notices the numbness/tingling in his butt – it is hardly there anymore." He completed a 5+ hour drive over Christmas with minimal symptoms. On January 20 his "lumbar ROM was pain free, and LE nerve tension has almost all resolved." The PT stopped in the end of January 2017.

15. By the time he returned to therapy on April 4, 2017, Claimant had lost all the previous gains. The therapist noted,

> L shoulder pain . . . has gotten worse since stopping PT at the end of Jan 2017 and this has led to adhesive capsulitis. L shoulder ROM is extremely limited and follows a capsular pattern. He is unable to do most ADLs with his L arm. His low back pain has also gotten worse since stopping PT, and he now experiences shooting pains down his R>L LE. He has decreased lumbar ROM, (+) neural tension test, and impaired dermatomes of L5-S1 in R LE.
>
> * * *
>
> Since stopping PT . . . the back and leg pain is more severe and more frequent. . . . [H]is back is terrible. It hurts to bend a little to make the bed and causes pain to shoot down his R leg to the calf and the L buttcheek. Getting out of a low chair hurts the back. Last week he had to take breaks every hour during his road trip. Sneezing completely debilitates him. . . Sitting is worse than standing.

16. Claimant saw Dr. Ronald Hammers, a neurosurgeon, the next day. He reported "low back pain and right greater than left lower extremity pain. The right lower extremity pain is present in the buttocks, posterior thigh and posterior leg. The left leg pain is present in the buttocks. He believes his lower extremity symptoms are worse than any back pain." The physical examination was relatively benign, with no significant motor or sensory deficits. Dr. Hammers recommended a lumbar ESI and "hoped" conservative care would resolve Claimant's symptoms.

17. Claimant had the ESI on April 10, 2017 but received no significant benefit.

18. Claimant started a modified duty assignment on April 18, 2017. Since Employer had no suitable light duty work available at its facility, it assigned Claimant to work at the ARC Thrift Store. The work aggravated claimant's condition, even though the ARC was careful to abide by his restrictions. When the store manager realized the work was aggravating Claimant's pain, she notified Employer the ARC was no longer willing to have Claimant work there. She sent Claimant home on April 21, 2017 after he had worked one hour.

19. On May 23, 2017, Claimant had surgery with Dr. Weinstein for his admitted left shoulder condition.

20. Respondents admitted TTD benefits from October 15, 2016 through April 17, 2017. Respondents terminated TTD benefits and started TPD benefits on April 18, 2017 based on the modified duty at the ARC. Respondents reinstated TTD on May 23, 2017 when Claimant had shoulder surgery.

21. Claimant saw Dr. Hammers again on June 28, 2017. His primary complaint was right greater than left lower extremity pain radiating to the thigh and down the leg, "most closely resembling an L5 dermatome." Dr. Hammers noted the recent lumbar ESI was ineffective, and opined:

> As for his back and lower extremities, he does have spondylosis in the setting of prior lumbar discectomy. I suspect the majority of his symptoms, resembling L5, reflect right sided L5-S1 foraminal stenosis with compression of the exiting L5 nerve root. He has failed to improve with conservative management and I think further evaluation and consideration of surgery is appropriate.

22. Dr. L. Barton Goldman has performed two IMEs and at least one record review for Respondents addressing various medical treatment issues in this claim. Dr. Goldman also testified at the hearing to elaborate on his opinions regarding the proposed L5-S1 fusion. Dr. Goldman opined Claimant does not meet the criteria for lumbar fusion set forth in the Low Back Pain MTGs. He disagreed with Dr. Ales' interpretation that the EMG shows a right L5 radiculopathy. Dr. Goldman raised concerns about somatization, and noted Claimant has not undergone a psychological evaluation as required by the MTGs as a prerequisite to surgery. Dr. Goldman explained that the proposed surgery is a major undertaking with a difficult recovery, because it involves both a posterior and anterior approach. Dr. Goldman noted no progressive neurological deficits or spinal instability which require surgery on an urgent basis. He also noted Claimant's positive response to physical therapy before it was terminated in January 2017. Ultimately, Dr. Goldman opined an intensive physical medicine and rehabilitation program, with psychological support to address somatization issues, has a better chance of success than surgery.

23. Dr. Hammers testified in a deposition on January 30, 2018 to justify his surgical recommendation. Dr. Hammers explained the primary goal of surgery is to address Claimant's right leg symptoms, which he believed correlate with the L5 nerve root compression seen on MRI. Dr. Hammers opined conservative treatment had failed because Claimant did not respond to the lumbar ESI and received no lasting benefit from physical therapy. He opined that Claimant's low back symptoms and need for surgery are related to the October 14, 2016 accident. Although Claimant had significant pre-existing low back issues, he was functioning fairly well before the accident. Dr. Hammers noted Claimant now has a very different presentation, including radicular symptoms.

24. Dr. Hammers testified he reviewed Dr. Goldman's reports in preparation for the deposition, and modified his recommendations somewhat:

> As I prepared for this deposition, I had all of the reports from Dr. Goldman; and although I don't know if I agree with every one of his assertions, I appreciate that he recognizes concerns about somatization.
>
> And so the way that I would deal with that is, number one, I would require pain psychology; number two, I would require a pain management plan, both pre- . . . during, and post-operative.
>
> And number three, I'm very appreciative that Dr. Goldman has raised these concerns in this case. Where I ever to see [Claimant] again, not only would I have a thorough conversation with him, letting him know that there are reasonable doctors bringing up concerns, but I would do one more confirmatory injection to see if we could get a better understanding of his ability to respond to surgery.
>
> * * *
>
> [P]rior to considering surgery, I would do a right L5-S1 selective nerve root injection.

25. As agreed by the parties, Claimant's average weekly wage is $1,411.89, effective August 1, 2017.

26. Claimant proved by a preponderance of the evidence he is entitled to TTD benefits from April 22, 2017 through May 22, 2017. The ALJ credits Ms. Hovenic's testimony that she terminated Claimant's modified duty at the ARC thrift store because the work was aggravating his injury-related symptoms.

27. Claimant proved the injury aggravated, accelerated or combined with his pre-existing condition to cause his current low back pain and radicular symptoms. Before the October 2016 accident, Claimant had only mild chronic low back pain and no right leg radicular symptoms. He worked full time in physically demanding jobs with no significant limitations. Even Dr. Goldman agreed that the October 2016 accident "exacerbated" or "aggravated" Claimant's pre-existing condition.

28. Claimant proved by a preponderance of the evidence that the L5-S1 fusion recommended by Dr. Hammers is reasonably necessary to cure and relieve the effects of his admitted work injury, **if** Dr. Hammers still recommends the surgery **and** Claimant obtains psychological pre-clearance as contemplated by the MTGs. The ALJ credits Dr. Hammers' opinions regarding surgical indications over those of Dr. Goldman. Claimant has severe and disabling symptoms which have not responded to conservative measures. Since Claimant lost all the gains he made in therapy within two months of its termination, it is unlikely he will achieve lasting benefit from more therapy. The MRI shows objective pathology at L5-S1 that reasonably correlates with his most significant symptoms, and the proposed surgery is reasonably calculated to address that pathology. The finding regarding reasonable necessity comes with the caveat that Dr. Hammers still recommends surgery after reevaluating Claimant as discussed in his deposition. The ALJ further notes that Claimant has not undergone a psychological evaluation for this non-emergency surgery as required by the MTGs. Given the legitimate concerns raised regarding potential somatization and other possible psychological factors, the ALJ finds no basis to deviate from the requirement that Claimant obtain psychological pre-clearance as a precondition to surgery.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents, and the claimant must prove entitlement to benefits by a preponderance of the evidence. Section 8-43-201. The insurer takes the claimant as it finds him. If an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment, the insurer is liable for that treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. As the arbiter of disputes regarding treatment, the ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining whether requested medical treatment is reasonably necessary or injury-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). As found, Claimant has proven by a preponderance of the evidence that the lumbar surgery requested by Dr. Hammers is reasonably necessary to cure or relieve the effects of the admitted work injury, assuming that Dr. Hammers still recommends the surgery and Claimant obtains psychological pre-clearance as required by the MTGs.

To receive temporary disability benefits, a claimant must prove that must prove that the injury caused medical incapacity or a wage loss. *Montoya v. Industrial Claim Appeals Office*, ___ P.3d ___ (Colo. App. 2018). The persuasive evidence shows Claimant suffered a total wage loss commencing April 22, 2017 as a direct and proximate consequence of his industrial injury. The ALJ credits Ms. Hovenic's testimony that she

terminated Claimant's modified duty at the ARC because it was aggravating his injury-related symptoms. It is immaterial that the work was otherwise within the restrictions outlined by the ATP. Once the third-party chosen by Employer declined to provide further work, for whatever reason, it was incumbent on Respondents to offer alternative work or reinstate Claimant's TTD benefits.

ORDER

It is therefore ordered that:

1. Insurer shall pay for the L5-S1 fusion requested by Dr. Hammers if Dr. Hammers still recommends the surgery and Claimant receives psychological clearance.

2. Insurer shall pay Claimant TTD benefits from April 22, 2017 through May 22, 2017, based on the admitted AWW of $1,028.78.

3. Claimant's AWW shall be increased to $1,411.89 effective August 1, 2017.

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

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

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

DATED: April 6, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury on July 31, 2017.

II. Whether Claimant has established by a preponderance of the evidence that she is entitled to all reasonable, necessary, and related medical treatment stemming from the July 31, 2017 incident.

III. Whether Claimant has established by a preponderance of the evidence that her stress fracture, and need for medical treatment, is related to her July 31, 2017, work injury.

FINDINGS OF FACT

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

1. Claimant began working for Employer in July 2017. She was employed as a day laborer whose tasks would vary based upon the jobs assigned to her crew on any given assignment. Those tasks generally involved various types of physical labor. Claimant testified that she would wear steel-toed boots while working, and estimated that the boots she wore during this period were in good condition, and possibly up to a year old.

2. Prior to her employment with Respondents, Claimant was diagnosed with renal disease. (Clmt. Ex. 5, pp. 59-95). She required kidney dialysis from 2007 through 2010 to address her end-stage renal disease, eventually receiving a kidney transplant in 2010. Since that time, Claimant has required numerous medications, as well as regular bone density tests. Due to this medical history, Claimant was placed at increased risk for stress fractures and infections from even minor injuries. *Id*. at 74.

3. Claimant testified at hearing that on July 31, 2017, she arrived at work around 6:00 A.M. She and her crew went to their job site, a school in the midst of construction. As the roof of the school gymnasium was not completed at that time, the gym had filled with water due to rains that had occurred a few days before. Claimant and her crew were tasked with removing the water, which they endeavored to accomplish by means of pushing water with push brooms and squeegees toward other workers who were operating vacuums. Claimant estimated that the standing water in the gymnasium was about three inches deep.

4. Claimant testified that as she was pushing water in this manner, she and a coworker had to quickly move to avoid a piece of heavy machinery that was operating near them. As Claimant stepped back with her right foot, she stepped on a nail jutting from a board that was obscured by the standing water. The nail went through the sole of Claimant's boot and punctured the bottom of the arch of her right foot. Claimant testified that she felt immediate pain as a result. Claimant testified that she informed her site supervisor, used the worksite's first aid to bandage the wound, and returned to Employer to report her injury.

5. Upon returning to Employer, Claimant completed an Employee's Report of Injury Form. (Resp. Ex. B, pp. 7-8). Consistent with her testimony at hearing, Claimant indicated that she stepped backward with her right foot, stepping on a nail that punctured the arch of her right foot. Claimant was provided with a Rule 8 medical provider list, from which she chose Concentra Medical Center ("Concentra"). *Id*. at 9.

6. Claimant reported to Concentra that same day. (Resp. Ex. C, pp. 13-34). She was examined by physician's assistant Jordan Maas, who diagnosed her with a puncture wound to the right foot without the presence of a foreign body. Claimant was not given any work restrictions during this initial visit. Claimant returned to Concentra on August 2, 2017, with Maas noting that the puncture wound appeared to be healing normally.

7. In the days following her injury, Claimant testified that she shifted her weight onto the outside of her right foot while walking and standing in order to avoid pressure directly on the puncture wound. As she kept doing so, she testified that she began having additional pain in the lateral side of her right foot, as well as swelling that had not previously been present.

8. Claimant returned to Concentra on August 8, 2017, complaining of lateral right foot pain over the preceding days, worsened by direct pressure and walking. She was given an ankle brace. Claimant returned on August 29, 2017, when Maas noted that Claimant was having continued right lateral foot pain, "likely from compensatory gait changes due to puncture wound." (Resp. Ex. C at 29). Maas noted Claimant was referred to physical therapy for gait training and for possible orthotics. Claimant was also referred for x-rays, which were performed that day. *Id*.

9. Claimant returned to Concentra on September 6, 2017. On that date, Maas diagnosed a stress fracture of the right distal fifth metatarsal from the x-rays that were performed on Claimant's prior visit. Maas further noted that Claimant suffered from lateral forefoot swelling, as well as tenderness in the fourth and fifth metatarsal and the lateral midfoot. Maas examined Claimant's x-rays on that date and diagnosed her with work-related stress fracture of the distal right fifth metatarsal, also noting that the initial puncture wound had healed. (Resp. Ex. C at 32-34).

10. Claimant returned to Concentra and Dr. Zyzda on October 4. 2017. Dr. Zyzda recommended that Claimant receive a specialized orthotic to correct the antalgic

gait that had led to her stress fracture. X-rays continued to show incomplete healing of the stress fracture in Claimant's right foot.

11. On November 1, 2017, Claimant returned for a follow-up appointment with Dr. Zyzda. She noted continued pain along her stress fracture, although her symptoms had improved since her last visit. Approval for the orthotic recommended by Dr. Zyzda was not forthcoming at that time.

12. Claimant presented to Kathleen D'Angelo, M.D. for an IME at Respondents' request on January 28, 2018. (Clmt. Ex. 5, pp. 59-95). As part of her IME, Dr. D'Angelo performed a physical exam, took a patient history, and reviewed the medical record. She ultimately concluded that Claimant's fifth metatarsal stress fracture was a logical consequence of the puncture wound she sustained on July 31, 2017; due to Claimant's pre-existing renal disease and resultant mineral bone disease, Claimant was more susceptible to these types of fractures. As such, when Claimant shifted her weight to the lateral aspect of her foot, i.e., the fifth metatarsal, to avoid pressure on the puncture wound while walking or standing, she had high risk potential for the exact type of fracture that ultimately occurred. Dr. D'Angelo recommended that Claimant receive treatment for her fifth metatarsal stress fracture, specifically recommending a customized orthotic as recommended by Dr. Zyzda.

13. Dr. D'Angelo was subsequently deposed on February 23, 2018. In her testimony, Dr. D'Angelo emphasized that Claimant's stress fracture to the fifth metatarsal could not have occurred due to an acute injury, but rather would have been only caused by a shift in Claimant's weight to the lateral portion of her right foot to avoid placing pressure directly upon the puncture wound while walking. Dr. D'Angelo reiterated the major conclusions of her report, namely that Claimant's preexisting renal disease and mineral bone disease made Claimant more susceptible to a stress fracture due to Claimant putting additional weight on the lateral aspect of her foot while walking due to her work injury. Dr. D'Angelo testified that:

> I absolutely believe that the puncture wound to the medial aspect of her foot caused her to distribute weight on the lateral aspect, therefore causing the stress reaction to the fifth metatarsal and stress fracture.

(Dep. Tr., pg. 27).

14. Dr. D'Angelo concluded that Claimant's fifth metatarsal stress fracture would not have occurred but for the July 31, 2017 work injury, which caused Claimant to put more weight on the lateral portion of her right foot while walking and caused the stress fracture.

15. The ALJ finds Dr. D'Angelo's opinions as set forth in her report and deposition testimony to be credible and highly persuasive.

16. Claimant testified live at hearing. She testified as to how her injury occurred, as well as the steps she took to report and seek treatment for the injury, and how the puncture injury caused her to walk and put more weight on the lateral aspect of her right foot. Claimant also testified as to the treatment she received for the initial puncture wound and the subsequent stress fracture.

17. The ALJ finds Claimant to be credible. Claimant testified credibly as to how her injury occurred, and her subsequent reporting of the injury is consistent with her testimony as to how it occurred. Claimant also testified credibly regarding how the puncture wound to her foot caused her to walk in a manner that put additional weight on the lateral aspect of her right foot. Additionally, Respondents' medical expert was emphatic that, but for the initial injury at work and Claimant's prior medical history, the subsequent stress fracture would not have occurred. Respondents did not introduce credible and persuasive evidence to rebut Claimant's testimony. Dr. D'Angelo's opinions and conclusions as set forth in her medical report and testimony were also unrebutted by credible and persuasive testimonial or documentary evidence.

CONCLUSIONS OF LAW

Generally

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

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

3. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or

none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

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

Compensability

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

6. The ALJ concludes that Claimant has established by a preponderance of the evidence that she sustained a compensable injury while working for the Employer on July 31, 2017. Claimant testified credibly as to how she stepped backward onto a nail on that date and suffered a puncture wound to bottom of her right foot which necessitated the need for medical treatment. Claimant's testimony as to this point is unrebutted, and Respondents have not attempted to dispute that this incident occurred consistently with Claimant's testimony. Claimant's description of the July 31, 2017 work incident is consistent with the description completed by Claimant for her employer, as well as the synopses completed by Claimant's treating physicians throughout her course of treatment. For these reasons, the ALJ finds Claimant's claim to be compensable.

Medical Benefits

7. Claimant has the burden to prove her entitlement to medical benefits by a preponderance of the evidence. C.R.S. §8-43-201. The respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. C.R.S. §8-42-101(1)(a).

8. Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial*

Claim Appeals Office, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

9. The ALJ concludes that Claimant is entitled to all reasonable, necessary, and related medical treatment as it relates to the July 31, 2017 work incident. There is no doubt that the treatment Claimant received immediately following this incident was reasonable and necessary; Claimant sustained a puncture wound that needed treatment to avoid infection or irritation. Moreover, the causal connection between this initial injury and Claimant's subsequent stress fracture is also clear. The causation analysis provided by Dr. D'Angelo is particularly lucid, providing a clear explanation for why Claimant would be at particular risk for the type of fracture that, in fact, occurred subsequent to the initial puncture wound. The ALJ finds that, per Claimant's testimony, and the report and testimony of Dr. D'Angelo, Claimant's renal disease and mineral bone disease were pre-existing yet stable conditions that, in confluence with the July 31, 2017 puncture wound, caused the eventual stress fracture in Claimant's right foot. That fact that Respondents' own expert, Dr. D'Angelo, conceded the relatedness of the stress fracture to the work injury lends particular credibility to the opinions of Dr. D'Angelo as to causation.

10. The ALJ concludes that Claimant's medical treatment received to date has been reasonable, necessary, and related. Respondents shall provide ongoing medical treatment for Claimant's right foot injury including treatment for Claimant's stress fracture.

ORDER

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

1. Claimant's claim of a July 31, 2017 industrial injury to her right foot is found to be compensable.

2. Respondents are liable for all healthcare that is reasonable and necessary to cure Claimant from the effects of her puncture wound and stress fracture to her right foot.

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

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

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

DATED: April 9, 2018

Glen Goldman

_____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-050-014-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 7, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 3/7/18, Courtroom 1, beginning at 1:30 PM, and ending at 4:30 PM).

Claimant's Exhibits 1 through 11 were admitted into evidence, without objection, Respondents' Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. On March 14, 2018, Claimant filed his opening brief, electronically. On March 20, 2018, Respondents filed their answer brief, electronically. On the same date, Claimant indicated that no reply brief would be filed, thus, the matter was deemed submitted for decision at that time. Consequently, the ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the compensability of a left shoulder injury of January 14, 2017; if compensable, medical benefits and average weekly wage (AWW) are also issues. At the commencement of the hearing, the Claimant withdrew the issue of temporary disability and Respondents withdrew the affirmative defense of "responsibility for termination," which must be predicated on temporary disability.

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

FINDINGS OF FACT

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

1. The Claimant suffered an injury to his left shoulder on January 14, 2017 (a Saturday). At the time, he was working with co-employee Vince Martinez (Martinez) on the loading dock. The Claimant injured his left shoulder trying to raise the door of a trailer which became stuck. He loudly yelled "ouch" when he felt pain in his left shoulder. This was heard by Martinez. Both the Claimant and Martinez testified that Martinez helped the Claimant using a crowbar to get the trailer door open. After it was opened Martinez helped the Claimant loading the trailer. The ALJ finds the Claimant's testimony in the regard credible and corroborated by Martinez.

2. After the incident, Martinez advised the Claimant to report his injury to his supervisor, Nicholas Mathurs (Mathurs). The Claimant spoke with Mathurs about his left shoulder injury on January 14, 2017. He received a dismissive response from Mathurs and he was not referred for medical treatment (Claimant's Exhibit 1, BS 2).

3 When the Claimant reported his injury to Mathurs, the Claimant said that Scott Petrie (Petrie), a co-employee was present. Petrie was called to testify by the Respondents and he denied being present during the Claimant's meeting with Mathurs. Petrie testified that he did not "recall" the Claimant reporting an injury to Mathurs on January 14, 2017, however, he did not positively deny that the reporting as recounted by the Claimant occurred. He also did not "recall" the Claimant's signature on the Employer's First-Aid Report of January 14, 2017. The ALJ finds Petrie's testimony to be

of a neutral character because Petrie simply didn't remember, but he didn't contradict the Claimant.

4. The Claimant filed a written notice of his injury on January 14, 2017, by making a notation on the company's Denver Plant Daily First-Aid Report (Respondents' Exhibit D, BS 129). In the column titled "Nature of Injury," the Claimant notes that he pulled his left arm back. He also stated he was taking Aleve. *Id.* The ALJ infers and finds that this near-simultaneous written document complies, in substance, with the written reporting requirement

5. Several lay witnesses testified on behalf of the Respondents. Martinez testified that he assisted the Claimant with opening the door to the trailer on January 14, 2017. Both Martinez and Petrie testified that the Claimant complained of left shoulder pain between January 14, 2017 and May 24, 2017. Mathurs testified that the Claimant never reported the injury to him and that he never had a meeting with the Claimant that he could "recall." Although Matthurs was Claimant's supervisor, the First Report of Injury by the Employer's safety Manager, dated June 22, 2017, acknowledges a reporting on January 14, 2017, the date of injury ((Respondents' Exhibit B). The ALJ finds the testimony of the Claimant concerning reporting to be credible. The Employer witnesses simply could not remember, as opposed to clearly contradicting the Claimant.

6. In late May of 2017, the Claimant completed an Incident Data Report showing that he was working as a "weekend warrior" (12 hours a day for 3 days) over the weekend on January 14, 2017 (a Saturday). The Claimant stated that his injury was witnessed by Martinez. The Claimant sent a written report to HR (Human Resources) detailing the incident including the reaction of Mathurs. The Claimant also gave Mathurs the name and trailer number (Claimant's Exhibit 1, BS 2).

7. The Claimant filed a Workers' Claim for Compensation on June 14, 2017 (Claimant's Exhibit 8). Consistently, with his testimony, the Claimant reported that he was trying to open the door of a trailer which he thought was frozen. It started to open and then stuck. He received assistance from co-employee Vince Martinez. He also stated that his last day worked was May 29, 2017. *Id.* This is consistent with the overall evidence at hearing.

8. There is no persuasive evidence that the Employer made a referral of the Claimant to a medical treatment provider, after the Employer knew or reasonably should have known that the Claimant was claiming a work-related injury. The only referral that respondents made was to Kathleen D'Angelo, M.D., for a respondents' Independent Medical Examination (IME).

Medical

9. The Claimant sought medical advice following his right shoulder injury with Kaiser on January 24, 2017. The Kaiser report recounts that the Claimant stated that he had injured his left arm on January 14, 2017, while trying to load a trailer and felt something tear in his "deltoid or tricep" but continued working thereafter (Respondents' Exhibit C, BS 34). The Claimant was complaining of pain and weakness when raising his left arm above his head, although he was able to bend and straighten his arm at the elbow. He was advised by Kaiser to contact HR or his supervisor for direction on where to get evaluated for workers' compensation and call back if there were worsening symptoms. *Id*.

10. The Kaiser records show that the Claimant sought additional treatment on May 23, 2017, when he was evaluated by orthopedist James F. MacDougall, M.D. Dr. MacDougall reported that the Claimant's arm had bothered him from January 14th and that he had reported his injury to the Employer. The Claimant described the injury as occurring when he was pulling open a trailer door that was stuck when he felt a burn and pain in his shoulder and upper arm. When the Claimant saw Dr. MacDougall, he was continuing to have tingling in his forearm and rated his pain at 7/10 (Claimant's Exhibit 3, BS 5 and 6). Dr. MacDougall recommended that the Claimant undergo an MRI (magnetic resonance imaging) since Dr. MacDougall was concerned that there was a likelihood that the Claimant had an irreparable shoulder tear.

11. An MRI (magnetic resonance imaging) was performed on May 24, 2017 (Claimant's Exhibit 2, BS 3). The MRI documented chronic full thickness, full width supraspinatus and full thickness partial width infraspinatus tendon tears, and a medial retraction of the torn tendon fibers to the glenohumeral joint line. There was also a diffusely abnormal signal intra-articular longhead bicep suggesting tendinosis. The MRI also found a postero-superior degenerative labral tear. *Id*.

12. According to Mathurs, Dr. MacDougall gave the Claimant a 5 lb. lifting restriction which the Claimant brought to his Employer in late May. The Employer did not accommodate this restriction.

13. Contemporaneously, the Claimant was suffering multiple disabling physical problems (not work-related), including degenerative arthritis to his left knee. This would eventually require a left knee replacement. He also testified he recently underwent carpal tunnel surgery (Claimant's Exhibit C, BS 54). Because of his multiple problems, the Claimant withdrew his request for temporary total disability (TTD) benefits as he would not have been able to work due to these additional problems.

14. The Claimant underwent left shoulder surgery on June 27, 2017. He was placed in a sling with restrictions of no lifting with his left upper extremity (LUE) [Claimant's Exhibit 3, BS 14). The Claimant has not returned to work since May 29,

2017, nor has he been released to return to work by an authorized treating physician (ATP). And, he has not been declared to be at MMI for the left shoulder, by an ATP.

Independent Medical Examination (IME) by Kathleen D'Angelo, M.D.D

15. At the Respondent's request, Dr. D'Angelo, M.D., a board certified physician in family medicine, performed an IME of the Claimant. She is Level II accredited by the Division of Workers Compensation (DOWC), and she practices in the field of occupational medicine. In her report and at the hearing, Dr. D'Angelo stated she had no way of knowing what happened in the Claimant's work place on January 14, 2017. She commented on the Claimant's reporting the injury to Mathurs because of an off-color joke made by Mathurs concerning the Claimant's manhood when the Claimant reported it.

16. Dr. D'Angelo noted that the Claimant had not presented to his primary care provider for prior disabling left shoulder complaints (Claimant's Exhibit 4, BS 36). Thus, Dr. D'Angelo could not point either to evidence that the Claimant's left shoulder was industrially problematic before the January 14, 2017, injury, or to his left shoulder restrictions, imposed as a result of the January 14, 2017, injury.

17. At hearing, Dr. D'Angelo testified that the medical records do not establish whether, when, or if, an injury had occurred. She agrees that the Claimant may have had some pre-existing degenerative left shoulder problems prior to his injury; and she was surprised that the Claimant continued working after the January 14, 2017, event, given the heavy nature of his work and the MRI findings.

18. In her report, dated December 14, 2017, Dr. D'Angelo concluded that the Claimant suffered a work related left shoulder injury on January 14, 2017, and that the treatment he had received to date was reasonable and necessary. *Id*. The ALJ finds this written report by Dr. D'Angelo is more credible and reliable than her testimony at hearing, wherein she **changed** her opinion.

19. Dr. D'Angelo "**modified" [changed]** her opinion at the hearing based on the testimony by the Claimant's supervisor's that the Claimant had not reported his injury on January 14, 2017 (Claimant's Exhibit 4, BS 000020). Dr. D'Angelo commented that the supervisor's testimony caused her to question whether the Claimant had reported his injury. The ALJ infers and finds that the basis of Dr. D'Angelo's changed opinion is based, in part on misinformation. Indeed, the Employer's First Report of Injury, dated June 22, 2017, completed by Joshua Lane, Safety Manager, acknowledged a reporting on January 14, 2017. Apparently, this Report was not made available to Dr. D'Angelo prior to her hearing testimony and changed opinion. The First report of injury undermines the paramount basis of Dr. D'Angelo's **changed** opinion. The ALJ further infers and finds that the basis for Dr. D'Angelo's changed opinion, based upon a lack of complete information regarding the reporting of the

Claimant's injury is not credible. As found herein above, the first opinion (expressed in Dr. D'Angelo's letter report) is more credible that her "about-face" on the issue of causality.

Employer's Knowledge of the Injury

20. Respondents argue that the Claimant did not comply with the reporting requirements of the company requiring an employee to make a written report of injury within four days of the happening of the January 14, 2017, incident. The evidence is that the Claimant reported his injury, in writing, when he completed the Daily First-Aid Report on January 14, 2017. This is an issue where fair notice to the Employer takes precedence over a formalistic, written document, labeled "Report," prevails as far as credibility is concerned. Further, "late reporting" was not designated as an issue, however, the fact that Dr. D'Angelo places importance on the alleged "late reporting," which was based on a lack of complete information (Employer's First Report, Claimant's Exhibit B), not only undermines Dr. D'Angelo's **changed** opinion, but it undermines the thrust of Respondents' contention that the injury was not reported to Supervisor Mathurs, based on his testimony. Employer's Safety Manager Lane, however, acknowledged that the Employer was notified on January 14, 2017 (Respondents' Exhibit B).

Average Weekly Wage (AWW)

21. At the time of his injury the Claimant testified that his AWW was $1,076.76. This is supported by the Employer's records (Claimant's Exhibit 7). The Employer's First Report of Injury, completed by Joshua Lane, Safety Manager, on June 22, 2017, recites an hourly wage of $29.91, which computes to $1,196.40 per seek, based on an assumption of a 40-hour week (Respondents' Exhibit B). The ALJ finds that the Claimant's AWW is $1,076.76. This finding, however, is academic at this point because the Claimant withdrew the issue of TTD at the commencement of the hearing.

Ultimate Findings

22. Respondents argue that the Claimant did not comply with the reporting requirements of the company requiring an employee to make a written report of injury within four days of the happening of the January 14, 2017, incident. The evidence is that the Claimant reported his injury when he completed the Daily First-Aid Report on January 14, 2017. This is an issue where fair notice to the Employer taking precedence over a formalistic, written document prevails as far as credibility is concerned. Further, "late reporting" was not designated as an issue, however, the fact that Dr. D'Angelo places importance on the alleged "late reporting," which was based on a lack of complete information (Employer's First Report, Claimant's Exhibit B), not only undermines Dr. D'Angelo's **changed** opinion, but it undermines the thrust of

Respondents' contention, based on Supervisor Mathurs' testimony, that the injury was not reported to the Employer. Safety Manager Lane, however, acknowledged that the Employer was notified on January 14, 2017 (Respondents' Exhibit B). Therefore, as an ultimate proposition, the ALJ finds the Claimant's testimony straight-forward and credible, Dr. D'Angelo's **changed** causality opinion entirely lacking in credibility; and, the testimony of Mathurs, Petrie and Martinez, insofar as their testimonies are inconsistent with the Claimant's testimony, are lacking in credibility.

23. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept Dr. D'Angelo's first written opinion on causality as more reliable, and to reject her testimony wherein she changed her opinion, based in part upon misinformation concerning when the Claimant reported his injury to his Employer. Also, the ALJ accepts the Claimant's testimony as credible and rejects any evidence to the contrary.

24. The Claimant has shown that it is more probably true than not that his job activities caused, intensified, aggravated and accelerated any pre-existing, dormant left shoulder condition on January 14, 2017.

25. After the Employer reasonably should have known, as of January 14, 2107, that the Claimant was claiming a work-related injury, the Employer offered the Claimant **no** medical treatment nor did it make any referral to a medical provider. Therefore, beyond 10-days after the Employer's knowledge of a claimed work-related injury, the Claimant self-selected a medical provider. Therefore, any medical providers who provided treatment for the Claimant's work-related left shoulder injury, after January 26, 2018, were authorized; and, any referrals within the authorized chain of referrals were authorized.

26. All of the Claimant's medical care and treatment for his compensable left shoulder injury of January 14, 2017 was and is causally related to that injury, and reasonably necessary to cure and relieve the effects thereof.

27. The Claimant's AWW is $1,076.76. This is academic, however, since the issues concerning temporary disability were withdrawn at the commencement of the hearing.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant reported his injury, in writing, when he completed the Daily First-Aid Report on January 14, 2017. As found, Dr. D'Angelo placed importance on the alleged "late reporting," which was based on a lack of complete information (Employer's First Report, Claimant's Exhibit B). This not only undermined her **changed** opinion, but it undermined the thrust of Respondents' contention, based on Supervisor Mathurs' testimony, that the injury was not reported to the Employer. As found, Safety Manager Lane, however, acknowledged that the Employer was notified on January 14, 2017 (Respondents' Exhibit B). Therefore, as an ultimate proposition, the Claimant's testimony was straight-forward and credible, Dr.

D'Angelo's **changed** causality opinion was entirely lacking in credibility; and, the testimony of Mathurs, Petrie and Martinez, insofar as their testimonies were inconsistent with the Claimant's testimony, were lacking in credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept Dr. D'Angelo's first written opinion on causality as more reliable, and to reject her testimony wherein she changed her opinion, based in part upon misinformation concerning when the Claimant reported his injury to his Employer. Also, the ALJ accepted the Claimant's testimony as credible and rejected any evidence to the contrary.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** [presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment whereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for

determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. The Claimant must show a connection between the employment and the injury such that the injury has its origin of the employee's work- related functions which is sufficiently related to those functions to be considered part of the employment contract. See *Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999). As found, it is more probably true than not that the Claimant's job activities caused, intensified, or, to a reasonable degree, aggravated and accelerated any u7nderlying conditions of his left shoulder in the incident of January 14, 2017.

Authorization of Medical Treatment

d. Pursuant to § 8-43-404(5), C.R.S. Respondents in the "first instance" had the authority to select the treating provider for the Claimant. When an employer fails to provide a physician "in the first instance," the right of selection passes to the Claimant. See *Rogers v. Indus. Claim Appeals Office*, 746 P .2d 565 (Colo. App. 1987) (employer must tender medical treatment **"forthwith"** on notice of an injury or the right of first selection passes to the Claimant). This was not done here, thus, triggering the Claimant's right to select a physician and he selected the treaters at Kaiser, who are authorized.

Chain of Authorized Referrals

e. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, medical providers who provided treatment for the Claimant's work-related left shoulder injury, after January 26, 2018, were authorized; and, any referrals within the authorized chain of referrals were authorized.

Medical Treatment

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment was and is causally related his left shoulder injury of January 14, 2017. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment for his left shoulder

injury of January 14, 2017 was and is reasonably necessary to cure and relieve the effects thereof.

Average Weekly Wage (AWW)

g. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. An ALJ has the discretion to determine a claimant's AWW. *See Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, the Claimant's AWW is $1,076.76, which is academic at this point since issues concerning temporary disability benefits were withdrawn at the commencement of the hearing.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all of the costs of medical care and treatment for the Claimant's compensable left shoulder injury of January 14, 2017, subject to the Division of Workers Compensation Medical Fee Schedule.

B. Any and all issues not determined herein, including entitlement to temporary and permanent disability benefits, are reserved for future decision.

DATED this_____day of April 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of April 2018, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

I. Whether Respondents produced clear and convincing evidence to overcome Dr. Clarence Henke's Division Independent Medical Examination ("DIME") opinion on maximum medical improvement ("MMI").

II. If Respondents have overcome the DIME opinion on MMI, what is Claimant's impairment rating?

III. Whether Claimant is entitled to an award for disfigurement pursuant to C.R.S. §8-42-108.

FINDINGS OF FACT

1. Claimant is 63-year-old right-hand-dominant woman. Her date of birth is November 8, 1954. Claimant worked for Employer as a cook.

2. Claimant suffered an admitted industrial injury to her right wrist and hand on October 23, 2014. Claimant felt a pop in her right wrist while lifting and emptying a trash can into a dumpster.

3. Braden Reiter, D.O., evaluated Claimant on October 24, 2014 and diagnosed Claimant with a right wrist strain. She was placed in a splint, prescribed ibuprofen and referred to occupational therapy. Dr. Reiter issued the following work restrictions: no lifting, grasping, or twisting with the right hand.

4. Claimant underwent an MRI of her right wrist on November 22, 2014. Bao Nguyen, M.D. gave the following impression: 1) No occult distal radius or distal ulnar fracture, but equivocal fracture of the distal pole of the scaphoid vs. degenerative changes across the STT joint simulating a fracture, for which CT correlation is suggested for further evaluation; 2) also suspected old fracture deformity of the inner aspect of the first metacarpal base (old Bennett's fracture) plus an adjoining nonunited fracture of the ulnar rim of the opposing trapezium, all further associated with severe osteoarthritis of the first CMC joint; 3) some degenerative changes also across the capitolunate joint and to some extent, the capitoharnate joint, but no carpal AVN or bone tumor, no evidence of DISI or VISI; 4) small irregular tear of the central disc of the TFCC; 5) accompanying mild diffuse extensor and flexor tenosynovitis but no flexor/extensor tendon rupture or retracted tendon stump; 6) mass effect upon the median nerve at the level of the carpal tunnel could be an issue due to flexor tenosynovitis.

5. Dr. Reiter reevaluated Claimant on December 2, 2014. He reviewed the wrist MRI and noted severe osteoarthritis of the first CMC joint, old fracture deformities, a

questionable fracture of the distal pole of the scaphoid versus degenerative changes, and an irregular tear of the TFCC diffuse tenosynovitis. Dr. Reiter again diagnosed Claimant with a right wrist strain. He continued Claimant's restrictions and occupational therapy, and referred Claimant to a hand specialist.

6. On December 16, 2014, Claimant presented to orthopedic hand surgeon In Sok Yi, M.D. Dr. Yi gave the following impression after physically examining Claimant and reviewing the MRI: right wrist flexor tenosynovitis with CMC and STT arthritis. Dr. Yi opined that Claimant had a "very difficult problem" because he felt "a lot of the problems such as the CMC arthritis and the STT arthritis are underlying problems which could have been exacerbated by her twisting type activity." Dr. Yi administered an injection of into the mid-carpal joint and opined that Claimant may need to undergo serial injections, including injections of the CMC joint and possibly the carpal tunnel. He recommended Claimant wear a splint and hold off on therapy.

7. Claimant returned to Dr. Yi for a follow-up evaluation on February 10, 2015 and reported that the injection was not helpful and aggravated her symptoms. On physical examination, Claimant remained tender over the CMC joint with swelling and tender over the area of the TFC. Dr. Yi opined Claimant's condition may be a permanent exacerbation of an underlying condition and recommended CMC and STT arthroplasty with ligament reconstruction and tendon reposition, De Quervain's release and a wrist arthroscopy with debridement.

8. Dr. Yi performed the recommended surgery on March 20, 2015. Claimant initially responded well to the surgery, but subsequently continued to complain of pain in her right wrist and arm. As of June 2, 2015, Claimant was reporting to Dr. Yi improved thumb pain with constant wrist pain. Dr. Yi opined Claimant's wrist abnormality was either overshadowed by the CMC arthritis pain prior to surgery, or the CMC arthroplasty aggravated Claimant's underlying arthritis within the scaphoid fossa. He noted Claimant's pain had worsened and recommended a proximal row carpectomy.

9. Dr. Yi performed a right wrist proximal carpectomy with radial styloidectomy and posterior interosseous nerve neurectomy on July 10, 2015.

10. Claimant continued to report symptoms, including pain in the right hand, wrist and forearm, a burning sensation, limited range of motion, and difficulty gripping. On August 28, 2015, Dr. Reiter referred Claimant for a pain psychological evaluation.

11. Claimant continued to treat with Dr. Yi and Dr. Reiter. On October 6, 2015. Claimant reported pain and stiffness. Dr. Yi noted limited range of motion and some swelling about the dorsal capsule. He felt Claimant may be overworking her hand and wrist in therapy and suggested Claimant cease therapy and wear a splint.

12. Claimant presented to Matthew Lugliani, M.D. on November 19, 2015. Claimant reported persistent 8/10 pain, excruciating pain to any light touch, no movement of her finger, and persistent swelling. Physical examination revealed right hand proximal distal carpal row deformity, swelling over the dorsal surface of the palm, limited range of

motion in all fingers as well as the thumb, hyperesthesia and allodynia. Dr. Lugliani assessed status post right wrist proximal row carpectomy with chronic pain, allodynia, and hyperesthesia. He referred Claimant for pain management and rehabilitation, noting he wanted to rule out the possibility of complex regional pain syndrome ("CRPS").

13. Claimant underwent a follow-up MRI of the right wrist on December 15, 2015. Bao Nguyen, M.D. gave the following impression: 1) mild extensor tenosynovitis across the mid dorsum of the wrist, primarily affecting the extensor digitorum communis, with possible focal partial tear of the most medial EDC tendon where the tendon tracks over the 3rd CMC joint; 3) other extensor tendons remain intact; 4) also TFCC different in size and shape than before, suggesting a larger re-tear; 5) no occult wrist fracture, carpal AVN or bone tumor; 6) no flexor tendon tear or tenosynovitis.

14. Claimant presented to David L. Reinhard, M.D. on December 22, 2015. Claimant reported experiencing constant 6-9/10 pain in her right wrist, hand and fingers, along with numbness in her ring finger and shooting pain into her shoulder and neck. On examination, Dr. Reinhard noted decreased sensation in certain areas of the right hand and allodynia in others, swelling through the right hand and wrist, reddish discoloration of the hand, little to no active motion of the right wrist and very minimal flexion of the fingers, and "extremely shiny" skin over the fingers. No abnormal sweating or trophic nail changes were noted. Dr. Reinhard diagnosed Claimant with probable CRPS, type 1, of the right upper limb. He recommended Claimant undergo an EMG and nerve conduction studies of the right upper extremity to evaluate the function of the right median nerve, and a three-phase bone scan to evaluate for CRPS.

15. Dr. Reiter reevaluated Claimant on December 29, 2015. Claimant reported persistent 8/10 pain, numbness, tingling, swelling, and skin discoloration. Physical examination revealed right hand and wrist swelling, decreased range of motion, hypersensitivity over the dorsum of the wrist and hand, weakness with grip strength, and hypersensitivity along the forearm and extensor musculature.

16. On December 31, 2015, Claimant returned to Dr. Reinhard for a follow-up evaluation, reporting 8/10 right hand and wrist pain and severe right-sided neck pain. EMG and nerve conduction studies were conducted and revealed mild slowing of the right median and radial distal sensory latencies, as well as the right median distal motor latency. Findings on the right ulnar sensory conduction study and right ulnar and radial motor conduction studies were normal, as was the needle EMG examination of the right upper limb. Dr. Reinhard gave the following diagnostic impression: 1) moderate primarily demyelinating right median sensorimotor neuropathy at the level of the right wrist consistent with moderate right carpal tunnel syndrome 2) mild primarily demyelinating right radial sensory neuropathy at the wrist.

17. Claimant underwent a three-phase bone-scan on January 12, 2016. Orlin W. Hopper, M.D. gave the following impression: 1) no scintingraphic findings to suggest a diagnosis of CRPS, and 2) asymmetric delayed phase uptake along the radial aspect of the left carpus suggesting degenerative uptake.

18. On January 21, 2016, Claimant returned to Dr. Reinhard for a follow-up evaluation. On physical examination, Dr. Reinhard noted severe restricted range of motion in the right wrist and fingers, allodynia, and reddish discoloration. He noted that the bone scan results ruled out CRPS and that peripheral nerve damage explained some of Claimant's pain.

19. Dr. Yi reevaluated Claimant on January 26, 2016 and noted that the bone scan was essentially negative. He administered an injection of the right carpal tunnel and around the right fourth dorsal compartment for the fourth dorsal compartment tendonitis.

20. Claimant returned to Dr. Lugliani on February 9, 2016 reporting continued pain with numbness and tingling into her forearm. On physical examination, Dr. Lugliani noted fullness and mottling of the skin, extreme hypersensitivity and allodynia with light touch, and an inability to make a fist.

21. On February 18, 2016, Claimant again saw Dr. Reinhard, who noted bluish discoloration in Claimant's right distal forearm and hand, allodynia, restricted range of motion and some tremor. He recommended that Claimant undergo a test more sensitive than the bone scan to further evaluate for CRPS, "particularly since her exam findings, which include temperature changes, extreme allodynia and prominent bluish discoloration, all speak to a diagnosis of CRPS type 2." Dr. Reinhard referred Claimant to Tashof Bernton, M.D. for further consultation and testing.

22. Claimant presented to Dr. Bernton on March 1, 2016. Physical examination revealed marked hyperalgesia in the distal right extremity, marked decreased range of motion in the wrist and fingers, swelling in the wrist, and discoloration. Dr. Bernton performed a stress thermography, obtaining three series of 12 thermographic images. Dr. Bernton opined that the findings were consistent with CRPS and met diagnostic criteria for CRPS with "marked and evident asymmetry increasing with cold stress in a nondermatomal distribution. The degree of temperature asymmetry of up to 3 degrees, in the absence of evident vascular compromise, is strongly suggestive of CRPS."

23. Dr. Bernton also performed an autonomic testing battery (QSART). Claimant's total laboratory score was five out of nine possible points, which Dr. Bernton noted represented a high probability of dysautonomia. He opined that the results were a positive diagnostic assessment for CRPS, stating that Claimant's laboratory scale of five and clinical scale of five represented a high probability of CRPS.

24. Dr. Bernton opined that the diagnosis of CRPS was clearly established, as Claimant's clinical findings were strongly consistent with CRPS, and Claimant met the criteria for CRPS under the Guidelines with two positive objective diagnostic tests. He noted, "The stress thermography, particularly, demonstrates marked changes which are close to pathognomonic for complex regional pain syndrome as long as vascular compromise is ruled out, and there is no indication of any vascular compromise present on a clinical basis." Dr. Bernton further noted that Claimant's carpal tunnel syndrome and mild right radial sensory neuropathy were consistent with CRPS Type 2. He concluded topical analgesics and stellate ganglion or epidural steroid blocks would be

appropriate but cautioned against any further invasive or operative procedures, stating that such procedures can result in delayed healing and often increased symptoms.

25. Claimant attended a follow-up evaluation with Dr. Lugliani on March 8, 2016. Dr. Lugliani noted confirmatory tests were positive for CRPS. Claimant reported two episodes where her forearm went numb, excruciating pain, and an inability to move her hand or arm. Dr. Lugliani referred Claimant to Usama Ghazi, D.O. for evaluation and treatment of her CRPS.

26. Claimant also saw Dr. Yi on March 8, 2016, and reported that the injections only helped for one to two days. Dr. Yi recommended proceeding with a right endoscopic carpal tunnel release and right EDC tendonitis release.

27. On March 17, 2016, Dr. Reinhard noted that the stress thermography and autonomic test battery were positive for CRPS. Claimant reported experiencing episodes of severe pain. Physical examination revealed right upper extremity allodynia, distal bluish discoloration, and severely restricted wrist and hand and finger range of motion.

28. Claimant presented to Dr. Ghazi on March 30, 2016. Dr. Ghazi noted Claimant had a positive QSART and thermography test. On physical examination, strength testing was limited in the right upper extremity due to diffuse allodynia and pain radiating all the way into the trapezius. There was hyperesthesia from the trapezius all the way down to the distal hand, whereas in the superficial radial nerve and median nerve distributions allodynia was actually noted along the posterior aspect/dorsum of the hand. This also extended into the ulnar distribution where there was hyperesthesia and allodynia, but the degree of allodynia was far less significant than in the superficial radial distribution. There was some distal coolness with vasoconstriction in the tips of the fingers. Claimant was unable to make a full fist or fully extend the fingers. He noted Claimant held her hand in slight wrist extension and the fingers are held in slightly flexed position. There was a tremor in the hand but no fasciculations noted. Dr. Ghazi diagnosed Claimant with CRPS, opining that the CRPS "began in the superficial radial nerve and now has spread into the median and ulnar nerves diffusely, traversing proximally up the arm into the trapezius." He recommended beginning with sympathetic and radial nerve blocks combined. Dr. Ghazi administered a right superficial radial nerve block.

29. On April 14, 2016, Dr. Reinhard noted that Claimant had "[c]lassic findings of CRPS in the right wrist and hand with marked allodynia, reddish discoloration, decreased temperature, moderate swelling, and severe restricted range of motion at the hand and wrist."

30. On April 21, 2016, Dr. Ghazi performed a right stellate ganglion block and right radial nerve block at the spiral groove for diagnoses of CRPS, neuritis of the right upper extremity, and postoperative neuralgia with sympathetic mediate pain of the right arm and hand. Pre-injection temperature of the right upper extremity was 93.2 degrees,

compared to 94.5 degrees of the left hand. Post-injection temperature of the right upper extremity was 95.9 degrees versus 90.3 degrees on left, with 50% reduction of pain.

31. Claimant saw Dr. Reinhard on May 19, 2016 and he noted Claimant had complete resolution of her pain at rest and 50% pain reduction with palpation after the right stellate ganglion block and right radial nerve block. Dr. Reinhard noted Claimant continued to have significant decrease in allodynia in the right hand and improved range of motion in her fingers. There was still minimal range of motion at the wrist. On examination, Dr. Reinhard noted less reddish discoloration in the wrist and hand and a decrease in the swelling in the right hand and better ability to tolerate light touch to the hand and arm.

32. Claimant returned to Dr. Lugliani for a follow-up evaluation on May 26, 2016, Claimant reported color changes, extreme sensitivity with any type of touch involving her right hand/wrist, and persistent range of motion deficits in her fingers. Physical examination revealed fullness and mottling of the skin, allodynia to touch over the dorsum of the hand, limited grip strength and finger movement, and limited range of motion in the wrist.

33. On June 14, 2016, Dr. Ghazi performed a repeat right stellate ganglion block, repeat right radial nerve block and right median nerve block. Dr. Ghazi noted a temperature change of 82.2 degrees in the right upper extremity versus 84.5 in the left. He further noted vasoconstriction and pallor notes on right hand compared to the left. Dr. Ghazi noted that post-injection, Claimant reported 0/10 pain at rest or with palpation and light touch. He determined there was a 100% anesthetic relieve of median neuralgia and allodynia.

34. Dr. Reinhard reevaluated Claimant on June 20, 2016 and noted that, while Claimant had a positive response to the first blocks, the most recent blocks seemed to cause a flare-up of symptoms. He further noted that the right carpal tunnel release was denied and that he not proceed with the surgery at that time due to Claimant's severely symptomatic CRPS. Physical exam revealed a bluish discoloration of the right hand and wrist, severe allodynia, and very little if any active motion in the fingers or wrist.

35. Claimant returned to Dr. Lugliani on June 30, 2016 and reported worsening symptoms. Exam revealed fullness and mottling of the skin, exquisite tenderness to palpation with allodynia and hyperesthesia, limited wrist range of motion, and an inability to move her right fifth digit.

36. On July 20, 2016, Dr. Reinhard reexamined Claimant and noted no active range of motion of the right fifth digit with some deformity and very minimal movement in the other fingers and wrist. Dr. Reinhard noted Claimant's "daily activities are carried out almost entirely with the left upper extremity, that includes meal prep, hygiene, bathing, and dressing. There is really no function at all in the right arm in the absence of function at the right wrist and hand." He referred Claimant to Dr. Ghazi for another right stellate ganglion block and radial and median peripheral nerve blocks.

37. On August 11, 2016, Claimant saw Dr. Lugliani and reported persistent pain and swelling. Exam revealed full and mild mottling of the skin, exquisite tenderness to palpation with allodynia and hyperesthesia, and an inability to move her right pinkie finger and grip. Dr. Lugliani noted that the request for carpal tunnel release was denied and that a repeat sympathetic block was scheduled. Dr. Lugliani opined that Claimant plateaued and had reached MMI. He referred Claimant to Dr. Reinhard for an impairment rating.

38. On August 25, 2016, Dr. Ghazi performed a repeat right stellate ganglion block, ultrasound guided radial nerve block, and ultrasound guided median nerve block. Post-injection, Claimant's pain decreased from 10/10 to 6/10, with 100% relief of allodynia to light touch.

39. Dr. Reinhard reevaluated Claimant on September 6, 2016 and noted Claimant did not experience any significant benefit from the third stellate ganglion block. Claimant continued to report 8/10 pain and restricted motion in her right hand and wrist. Physical examination revealed reddish discoloration, decreased temperature, severe allodynia, limited active range of motion, and development of some deformity in the fingers. Dr. Reinhard noted Claimant had severe contracture of the right wrist and hand with little, if any, function in the right hand stating, "She needs assistance brushing her hair or tying her hair up in a hair band. She needs assistance with household activities that require two arms such as making a bed. She has a lot of problems cutting food and doing meal prep. She is not able to open jars or bottles." Dr. Reinhard placed Claimant at MMI, restricting all use of Claimant's right upper extremity. He opined Claimant required maintenance care in the form of Gabapentin, Ambien, topical ketamine cream and Percocet for severe pain. He assessed a 30% whole person permanent impairment rating for CRPS noting, "Her impaired use of her right upper extremity is a product of the CRPS, which resulted in both neuropathic pain and allodynia as well as contractures." Using Table 1A of the AMA Guides, he placed Claimant in the section "Use of upper extremities" under the subsection of "Has difficulty with self-care," which lists 30-35% whole person impairment for the preferred extremity.

40. Claimant returned to Dr. Lugliani for a follow-up visit on September 15, 2016. She continued to report persistent 7-8/10 pain in her right hand and wrist. On examination, Dr. Lugliani noted fullness and mottling of the skin, tenderness to palpation with allodynia and hyperesthesia, no movement of the right pinkie finger, and an inability to grip. Dr. Lugliani noted Claimant is at MMI and discharged her from care.

41. Dr. Yi reevaluated Claimant on September 26, 2016. He noted the stellate ganglion blocks did not provide any relief. On physical examination, Dr. Yi noted adherence of skin to the underlying extensor tendons, increased sensitivity to touch, and no skin coloration changes or any changes in hair pattern. He opined some of Claimant's pain stemmed from the median nerve and the adherence of extensor tendons to the underlying skin. Dr. Yi recommended a tenolysis.

42. Respondents obtained surveillance video of Claimant taken in October 2016. The ALJ reviewed the surveillance video and observed Claimant performing the

following actions with her right hand: opening and closing a mailbox, retrieving and sorting through mail, picking up a newspaper, lighting, holding and putting out a cigarette, adjusting her pants and shirt, opening and shutting car doors, pushing a shopping cart, opening and closing the back hatch of an SUV, grabbing and lifting multiple grocery bags and placing the grocery bags into the SUV, running her hand over her hair, attempting to swat an insect, picking in her ear, cleaning underneath a fingernail on her left hand using the right hand, picking up and carrying a large purse, removing a ponytail holder from her hair and putting her hair back into a ponytail, retrieving sunglasses from a purse, and scratching her face. No apparent pain behaviors, guarding, or pinkie deformity was observed.

43. On October 26, 2016, Gary Gutterman performed an independent psychiatric consultation of Claimant. Dr. Gutterman issued a report dated October 31, 2016. He opined that, if the diagnosis of CRPS is accurate, there is no indication embellishing her symptoms or experiencing a Somatoform Symptom Disorder or malingering. Dr. Gutterman concluded that Claimant is capable of returning to some type of employment and is not in need of any psychiatric or psychological treatment.

44. On December 22, 2016 Carlos Cebrian, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Cebrian performed a medical records review and physically examined Claimant. Regarding Claimant's activity, Dr. Cebrian noted, "…she states she is able to do most things, but primarily uses her left arm. She states she tries to do as much as she can and is able to shower and get dressed. She is able to prepare simple food, but states she cannot cut with her right hand…She states she is able to clean up including vacuum." Claimant reported enjoying ziplining and kayaking, which she had not done in over a year. Claimant reported using her left arm while ziplining and placing the oar under her right arm while kayaking.

45. Dr. Cebrian noted the following on physical examination: tenderness to extremely light touch throughout the entire right hand, wrist and forearm, pain to palpation on the upper arm, a six degree difference in temperature between the right and left hands, no swelling, no sensory abnormalities or sweating changes, no color changes, and symmetrical nails. Dr. Cebrian provided the following work-related diagnoses: related right wrist sprain and CRPS Type 2. He agreed with Dr. Reinhard that Claimant reached MMI on September 6, 2016.

46. Dr. Cebrian opined Claimant's pain complaints were out of proportion to her objective findings and in contrast to her presentation. He noted, "Her activities have also not been in keeping with someone with extremely elevated levels of pain as she reported that she continue to zipline, camp and kayak even after her injury." Dr. Cebrian noted Claimant fulfilled the diagnostic criteria for CRPS based on the positive thermogram and QSART tests; however, he further noted that the results could have been false positives due to certain medications and vascular disease.

47. Dr. Cebrian assigned a 15% whole person impairment for CRPS under Table 1A of the AMA Guides "Use of Upper extremities" section in the subsection "Has no

digital dexterity." He explained that he assigned a 15% impairment because Claimant continued to be active after the injury, including kayaking, camping and ziplining, and reported being able to take care of self-care needs. Dr. Cebrian disagreed Claimant should be restricted from using her right hand, and instead assigned permanent work restrictions of no lifting over one pound with the right hand. He opined that additional stellate ganglion blocks or injections were not indicated, nor was additional surgery, as it could have the potential of worsening Claimant's symptoms. Dr. Cebrian recommended Gabapentin, Ambien and a topical cream and quarterly visits with Dr. Reinhard as maintenance treatment.

48. On January 23, 2017, John Hughes, M.D. performed an IME at the request of Claimant. Dr. Hughes performed a medical records review and physically examined Claimant. Claimant reported being unable to tolerate touch and having no use of her right arm or hand. On physical examination, Dr. Hughes noted Claimant held her arm and hand in a "claw" position and did not tolerate any touch. He further noted that Claimant's hand appeared red and mildly swollen, with some nail changes compared to the left hand. Dr. Hughes provided the following diagnoses: right wrist sprain/strain with development of hand and wrist pain, right carpal tunnel syndrome, and right CRPS Type 1. He remarked, "Diagnosis of CRPS-1 does not appear to be in doubt. All evaluators to date agree with this particular diagnosis and that its etiology stems from [Claimant's] work-related injuries of October 23, 2014." Dr. Hughes opined Claimant suffered permanent impairment rated under Table 1A of the AMA Guides, concluding Claimant has difficulty with self-care activities in her dominant right arm/hand as a result of CRPS, and agreed with Dr. Reinhard of a whole person permanent impairment in the range of 30-35%.

49. On February 16, 2017, Claimant underwent a DIME with Clarence E. Henke, M.D. Dr. Henke issued a DIME report on February 28, 2017. Dr. Henke reviewed medical records from the period October 24, 2014 to January 23, 2017 and physically examined Claimant. Claimant reported 8-9/10 pain. On physical examination of the right upper extremity, Dr. Henke noted Claimant held her right upper extremity in a marked guarded position, moderate swelling and discoloration of the entire right hand, "very brittle nail changes," and tenderness to palpation of surgical scars. Pinwheel sensation testing could not be performed due to Claimant's marked pain level. Dr. Henke gave the following impressions: right wrist carpal bone fracture, nonunited, with developed right carpal tunnel syndrome symptoms, and right upper extremity CRPS Type 1, secondary to the right wrist and thumb injuries. Dr. Henke opined Claimant is not at MMI and recommended Claimant follow-up Dr. Reinhard for continued pain medications, delay surgical procedures until symptoms improve, and consider a stellate ganglion rhizotomy procedure for diagnosis of her current symptoms and possible pain relief. In his discussion of the medical records, Dr. Henke noted Dr. Reinhard considered a 30-35% whole person impairment rating; however, Dr. Henke did not indicate whether he agreed or disagreed with such rating, or otherwise assess any provisional impairment rating.

50. Respondents filed a General Admission of Liability on April 11, 2017, admitting for medical benefits and TTD from October 24, 2014 and ongoing.

51. Dr. Reinhard reevaluated Claimant on April 11, 2017. He noted no change in Claimant's condition. Dr. Reinhard discussed with Claimant Dr. Henke's recommended radiofrequency ablation of the stellate ganglion procedure and a possible alternative, a spinal cord stimulator. Dr. Reinhard noted that neither he, nor Claimant, were in favor of proceeding with radiofrequency ablation or spinal cord stimulator. He wrote,

> The current management is fairly conservative in that she is on three tramadol a day as opposed to large amounts of opioid analgesics. Also, she has had three stellate ganglion blocks. Only one of three was helpful. I tried to explain to her that there is a lot of territory between where we are now in her management as opposed to going to the mostly invasive aggressive procedures. She explained that she actually feels pretty good, although she is not able to use the hand very much and if she does she does have increased pain symptoms. However, she is fairly comfortable with where she is at and still not in favor of doing anything real aggressive. We talked about maybe seeing if we can get a topical ketamine compound authorized as a more prudent alternative to a spinal cord stimulator or radiofrequency ablation of the stellate ganglion.

Dr. Reinhard opined Claimant remained at MMI with no change in the impairment rating he previously assigned.

52. Dr. Henke performed a DIME reexamination on May 12, 2017 and issued a written report dated May 18, 2017. Dr. Henke reviewed Dr. Reinhard's April 11, 2017 clinical summary report and noted that both Claimant and Dr. Reinhard were not in favor of proceeding with the radiofrequency ablation of the stellate ganglion. On physical examination he noted Claimant held her right upper extremity in a marked guarded position during the entire examination, and refused to move it in any direction, requesting that Dr. Henke make no physical contact. Physical examination of the right upper extremity revealed generalized moderate swelling and discoloration of the right upper extremity and hand, and brittle fingernail changes. Dr. Henke gave the following impressions: right wrist carpal bone fracture, non-united, with developed right carpal tunnel syndrome, and right upper extremity stage 2 CRPS, secondary to right wrist and thumb injuries. He again opined Claimant was not at MMI. Dr. Henke did not provide a provisional impairment rating. He recommended that Claimant follow-up with Dr. Ghazi for a stellate ganglion rhizotomy. He remarked,

> A long discussion with [Claimant] was made to inform her that the right upper extremity symptoms would continue to progress with muscle contracture and weakness and continued ongoing symptoms of constant pain. She was informed that the potential side effects of a stellate ganglion rhizotomy procedure far outweigh the expected future right upper extremity future complications of muscular contracture and atrophy.

53. On August 25, 2017, Respondents filed an Application for Hearing endorsing the issue of overcoming the DIME on MMI and impairment rating.

54. On September 8, 2017, Claimant filed a Response to Application for Hearing endorsing medical benefits (reasonably necessary), average weekly wage, disfigurement, temporary total disability, temporary partial disability, permanent partial disability ("PPD") and permanent total disability.

55. On August 18, 2017, L. Barton Goldman, M.D. performed an IME at the request of Respondents. Dr. Goldman reviewed medical records dated October 24, 2014 through May 18, 2017 and physically examined Claimant. Claimant reported 6-9.9/10 pain and no digital dexterity. She reported difficulty with self-care, stating that the pain and dysesthesia prevented all activity. Claimant advised Dr. Goldman that she is not sure whether there is anything left to do to help her condition and she was not enthusiastic at all about having her "nerves burned." Dr. Goldman reviewed September and October 2016 surveillance video with Claimant. He noted, "She states that she was doing better than (*sic)* but has worsened since January 2017 but she is 'not sure.'"

56. On physical examination, Dr. Goldman noted Claimant kept her right arm in a dependent, guarded, adducted and internally rotated position with fear-avoidant movement patterns. He also noted she would keep her right pinky finger abducted most of the time and periodically would abduct her second and fourth fingers in a rather unusual "papal sign" variant, although this posturing was not noted most of the time on indirect examination or with distraction. Dr. Goldman noted minimal movement of the right hand, fingers and wrist that would improve periodically when he was observing her indirectly. In particular, Dr. Goldman noted more normal movement of the right upper arm, wrist and fingers, including the fifth (pinky) digit when distracted. Dr. Goldman noted some post-surgical disuse atrophy but no other trophic asymmetries. In particular he noted Claimant's nails appeared to be symmetrical and "quite normal." Dr. Goldman noted a slight "rubor" or redness of the skin that resolved with any type of movement or elevation. He noticed no sudomotor asymmetries and no difference in temperature from the right to left hand with the exception of the right pinky which was slightly cooler on the right. Dr. Goldman noted borderline trace edema in the right dorsal wrist that improved rapidly with elevation. With respect to cervical range of motion, Dr. Goldman opined that Claimant's motion was guarded, self-limited and nonphysiologic. Right shoulder active range of motion was diminished compared to the left. Dr. Goldman noted he was unable to obtain reliable active range of motion measurements of the right wrist. With respect to the right upper extremity, Dr. Goldman found "diffuse inconsistent nondermatomal hypersensitivity throughout the entire limb with an atypical pseudo-allodynia presentation associated with fear avoidant components to the degree that Claimant reacted with dramatic withdrawal before the skin was eve touched, but this reaction was somewhat variable and inconsistent." Dr. Goldman opined that Claimant's altered sensation was "glove like" in distribution, nondermatomal and overall considered inconsistent and nonphysiologic.

57. Dr. Goldman found Claimant's presentation represented "gross symptom magnification" and concluded that Claimant's physical presentation and subjective pain complaints cannot be relied upon. Dr. Goldman expressed "serious concern regarding the accuracy of the neuropathic and CRPS diagnoses being rendered in this matter that

are based on unreliable subjective presentations by this patient and presumed on the basis of relatively weak to non-diagnostic studies."

58. Dr. Goldman remarked that, even if Claimant presented in a more physiologic fashion and met the CRPS criteria, he disagreed with the recommendation for stellate ganglion radiofrequency ablation. Dr. Goldman noted he was perplexed as to why Dr. Henke did not place Claimant at MMI, as Claimant does not want to undergo the procedure. Dr. Goldman opined Claimant should be placed at MMI as of October 13, 2016, the last date of the video surveillance he reviewed with an impairment rating based on normalized range of motion discrepancy between Claimant's right and left wrist. In considering this, Dr. Goldman determined that it is appropriate to rely on Chapter 3, tables 10 and 14 of the AMA Guides for a mild categorization of median and radial sensory neuropathy with an equally mild table 11 gradation applied for median motor neuropathy of a mild category. Dr. Goldman further noted that the resulting impairment should be considered a scheduled right upper extremity impairment at the wrist. Based on this, Dr. Goldman calculated Claimant's impairment rating as follows:

> I have graded the patient's right median sensory neuropathy from Chapter 3, table 10 of the AMA Guides, third edition revised at 30% multiplied by a maximum sensory impairment of 40% from table 14. I have graded the motor component at 5% from table 11, Chapter 31 multiplied by a maximum 35%, table 14 motor impairment. This results in 12% median nerve sensory upper extremity impairment and 2% upper extremity motor impairment that combines to a 14% right upper extremity impairment at the wrist for the median nerve. For the right radial sensory neuropathy, I have graded table 10 at 26% multiplied by maximum 5% sensory impairment from table 14, resulting in a 1% radical peripheral sensory nerve impairment at the right wrist. Using the combined values chart, overall peripheral neurologic impairment in this case is equal to 15% right upper extremity at the wrist, which converts via table 3 to a 9% whole person impairment, although in this case, a scheduled upper extremity impairment rating of the wrist would be the most applicable interpretation of this rating.

59. As for maintenance medical care, Dr. Goldman recommended weaning and discontinuing most of Claimant's medications with the exception of the gabapentin. Again, Dr. Goldman opined that he "obviously strongly disagree[s] with Dr. Henke's conclusions and recommendations with respect to diagnosis, MMI status and treatment of [Claimant]." He noted application of Rule 17 of the Guidelines argues against Dr. Henke's treatment recommendations as does Dr. Goldman's experience and medical literature on the subject. Regarding work restrictions, he noted Claimant "has much more function and dexterity than she often presents to her providers," and opined that restrictions should be considered relative, and not absolute, limitations. Dr. Goldman recommended limitations on lifting with both of her upper limbs at 25 pounds occasionally and 10 pounds repetitively.

60. Respondents obtained additional surveillance video of Claimant in August and

September 2017, which the ALJ reviewed. Surveillance footage taken at 4:47 p.m. on August 18, 2017 shows Claimant holding her right hand in a guarded position, with a perceived deformity of the right pinkie finger. She uses her left hand to open and shut a car door and put on a seatbelt.

61. Claimant testified at hearing that she continues to experience swelling and pain in her right hand and wrist, which she describes as a burning, stabbing and shooting sensation into her arm and neck. She testified the symptoms wax and wane, and that she attempts to utilize the right extremity as much she can. Claimant stated that, at times, she is entirely unable to use her right extremity. She testified that it is very difficult to brush her hair or put it in a ponytail. She stated she uses her left hand to cook, and can use her right hand to hold very light grocery bags. Claimant stated she went kayaking in 2015 but was unable to hold the oar. She further testified that she went ziplining after the industrial injury but only used her left hand. She stated she spoke to Dr. Reinhard and then definitely decided she did not want to undergo the procedure. Claimant testified that she does not want to undergo the stellate ganglion rhizotomy and had informed Dr. Henke of this fact.

62. Dr. Goldman testified at hearing as an expert in physical medicine and rehabilitation and specifically within the area involving CRPS patients. Dr. Goldman is Level II accredited and board certified. Dr. Goldman testified generally in accordance with his August 18, 2017 IME report. He initially testified that Claimant could be considered to be at MMI on October 13, 2016, the date of the video surveillance, but also felt Dr. Reinhard's initial September 6, 2016 MMI date was appropriate and agreed that was the point where it became unlikely that more aggressive interventions or medication management were going to improve Claimant's function and her condition was stabilized.

63. He further testified that it was clear Claimant is at MMI because she does not want to undergo the stellate ganglion rhizotomy procedure. With respect to the DIME physician's finding that Claimant is not at MMI due to the treatment recommendation for the stellate ganglion rhizotomy procedure, Dr. Goldman testified that he strongly disagreed. He stated that this is an extraordinary recommendation and is indicated for patients who clearly have ischemic vascular changes in the arm. He opined that the procedure recommended by Dr. Henke is not at all in line with any version of the Guidelines and it is only recommended in the most unique and extraordinary cases. Dr. Goldman further testified that the procedure has a 30% chance of making Claimant worse. He opined that the procedure recommended by Dr. Henke is not indicated for Claimant. Dr. Goldman stated he is not simply expressing a mere difference of opinion with Dr. Henke, but rather, Dr. Henke is "profoundly incorrect" in providing an erroneous recommendation that not only contradicts the Guidelines but also contradicts good judgment. Dr. Goldman further stated that Dr. Henke's insistence on Claimant undergoing the stellate ganglion rhizotomy and failure to place Claimant at MMI knowing Claimant does not want the procedure is illogical and erroneous.

64. Regarding the diagnosis of CRPS, Dr. Goldman testified he disagreed with Dr. Bernton's endorsement of CRPS. Dr. Goldman testified that, while the thermogram

technique used by Dr. Bernton was not contradictory to the Guidelines, he believes the cold water stress test is the superior test. He conceded that the QSART results were positive, but emphasized what he deemed to be Claimant's inconsistent and subjective clinical findings and lack of true response to the sympathetic blocks.

65. Dr. Goldman testified that the impairment ratings assigned by Drs. Reinhard, Cebrian and Hughes are incorrect because the ratings are based on a CRPS diagnosis. Dr. Goldman explained that, even if Claimant has CRPS, it is very mild and should be rated under Chapter 3 of the AMA Guides for a peripheral nerve injury and not as a centralized CRPS injury. Dr. Goldman emphasized that, although Dr. Reinhard and Dr. Lugliani noted Claimant has no use of her right upper extremity and Dr. Reinhard rated Claimant in the subsection that requires Claimant to have difficulty with self-care, the video surveillance from October of 2016 and Claimant's testimony at the hearing on October 31, 2017 demonstrate that Claimant is able to perform activities of daily living and is not as limited in self-care as reported.

66. Dr. Goldman reiterated his opinion that Claimant sustained a 15% upper extremity (9% whole person impairment) as rated under Chapter 3, Tables 10, 11 and 14 of the AMA Guides. He testified that he rated Claimant conservatively based, in part, on discrepancies in Claimant's function noted in the surveillance video compared to Claimant's objective presentation. He noted he was unable to obtain a normalized range of motion impairment.

67. Dr. Bernton testified by post-hearing deposition on November 28, 2017. Dr. Bernton is Level II accredited and board certified in internal medicine, occupational medicine, and thermology. Dr. Bernton explained the different stress thermogram methods, including immersion in cold water and whole body cold stress tests. He testified Claimant underwent a whole body cold stress test, which is approved by the American Academy of Thermology and consistent with the requirements of the Guidelines. Dr. Bernton strongly disagreed with Dr. Goldman's assertion that the Guidelines historically required a true cold water stress evaluation test. Dr. Bernton testified that Claimant's test produced "very clear documentation of the presence of CRPS," and met the diagnostic criteria for CRPS. He testified that his opinion is not only based on testing, but also his consultation with Claimant and his physical exam, where the findings were also consistent with CRPS. Dr. Bernton testified that both the QSART test and thermography were was positive and provided clear and strong evidence for CRPS. Dr. Bernton disagreed with Dr. Goldman's premise, stating the thermogram findings were not limited to the peripheral nerve. Claimant has a mild right radial sensory neuropathy and carpal tunnel syndrome, which indicate Claimant has Type 2 CRPS. Dr. Bernton explained that the CRPS categories of Type 1 and Type 2 refer to the level of nerve involvement, not severity.

68. The ALJ examined Claimant's right upper extremity at hearing. Claimant has a visible disfigurement to the body consisting of the following: (1) a faint, well-healed scar on the Claimant's right thumb down to her wrist approximately 1 ½ inches in length and less than ¼ inch in width; (2) a second scar on the top of the hand and wrist approximately 2 inches in length and less than ¼ inch wide with some discoloration of

the skin surrounding the scar; (3) a third well-healed scar on the Claimant's right forearm approximately ½ inch in length that was not very perceptible to the ALJ; (4) swelling/enlargement in the area over the knuckles of the index and middle fingers of the right hand; (5) a pinky finger extended out from the right hand which the Claimant could not say for certain was like that all the time. The ALJ finds that Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation.

69. The ALJ credits the opinions of Drs. Reinhard, Cebrian, and Goldman over the opinion of Dr. Henke on MMI.

70. Respondents have established that it is highly probable Dr. Henke's opinion on MMI is incorrect. The ALJ finds that Claimant reached MMI on September 6, 2016, the date Claimant's ATP, Dr. Reinhard, placed Claimant at MMI.

71. The preponderance of the evidence establishes Claimant suffered a 15% whole person impairment based on her CRPS diagnosis, as rated under Table 1A of the AMA Guides, "Use of upper extremity – Has no digital dexterity." The ALJ credits the opinion of Dr. Cebrian over the opinions of Drs. Reinhard, Hughes and Goldman with respect to permanent impairment.

72. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the

testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000).

Claimant concedes she is at MMI because she does not wish to proceed with the stellate ganglion rhizotomy recommended by Dr. Henke. However, Claimant argues she should be placed at MMI as of the date she definitively determined she did not want to proceed with the procedure.[1] Respondents argue Claimant reached MMI on September 6, 2016.

Respondents have produced clear and convincing evidence that Dr. Henke's DIME opinion on MMI is in error. The medical records and the credible and persuasive opinions of Drs. Reinhard, Cebrian and Goldman regarding MMI establish that Claimant reached MMI on September 6, 2016. Claimant underwent conservative therapy, two surgeries and multiple injections. Dr. Henke opined Claimant is not at MMI based on his recommendation for Claimant to undergo a stellate ganglion rhizotomy. Dr. Goldman credibly and persuasively opined that such procedure is only recommended in unique and extraordinary cases, is not indicated for Claimant, and is not consistent with the Guidelines. Furthermore, the procedure has a 30% chance of worsening Claimant's condition. Dr. Goldman's opinion regarding the recommended procedure is supported by Dr. Reinhard, who opined Claimant should not undergo such an aggressive procedure. While Dr. Cebrian's evaluation took place prior to Dr. Henke's recommendation, Dr. Cebrian also opined, in general terms, that Claimant additional surgery is not recommended for Claimant, as it could worsen Claimant's symptoms.

The evidence establishes that the procedure recommended by Dr. Henke does not offer a reasonable prospect for defining Claimant's condition, improving Claimant's condition, or improving her function. It is undisputed Claimant does not wish to undergo the recommended procedure. Despite knowing this, Dr. Henke declined to place Claimant at MMI and continued to insist Claimant proceed with the recommended procedure. All physicians who have treated or evaluated Claimant, with the notable exception of the DIME physician, agree Claimant's condition has plateaued and there does not currently appear to be any further medical treatment that is likely to improve her condition or prevent further deterioration. Based on the totality of the evidence, it is highly probable Dr. Henke's DIME opinion on MMI is incorrect and that Claimant reached MMI on September 6, 2016.

Medical Impairment

DIME Panel Physician Note #4 of the Impairment Rating Tips provides, in relevant part, "If the party requesting the DIME has asked that impairment be addressed, and if you find the patient not at MMI for that work-related injury, you should nevertheless provide a rating for that injury." Dr. Henke did not provide a provisional impairment rating nor indicate whether \ he agreed or disagreed with Dr. Reinhard's rating. Claimant argues the issue of impairment is not ripe and Claimant should return to Dr. Henke for a follow-up DIME to allow Dr. Henke to assign an impairment rating.

[1] Claimant's position statement argues different MMI dates. Claimant argues an MMI date of April 11, 2017, the date she was reevaluated by Dr. Reinhard, as well as an MMI date of August 18, 2017, the date Claimant was evaluated by Dr. Goldman.

Claimant identifies no statute, rule or case law requiring yet another follow-up DIME evaluation under the specific circumstances.

Generally, the term "ripeness" refers to whether an issue is "real, immediate, and fit for adjudication." *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006); *also see Silviera v. Colorado Springs Health Partners,* W.C. 4-502-555 (I.C.A.O. November 8, 2011). In general, under the doctrine of ripeness courts will not consider uncertain or contingent future matters because the injury is speculative, may never occur and might resolve prior to the court's determination. *See Stell v. Boulder County Dep't of Social Svcs*., 92 P.3d 910 (Colo. 2004).

As discussed, Claimant is found to be at MMI. Respondents endorsed the issue of impairment on their Application for Hearing and Claimant endorsed the issue of PPD in her Response to Application for Hearing. The issue of impairment is ripe.

As Dr. Henke did not provide an impairment rating, there is no impairment rating to overcome by clear and convincing evidence. Moreover, once the ALJ determines that the DIME's opinion has been overcome, the claimant's correct medical impairment then becomes a question of fact and the ALJ is free to calculate Claimant's impairment rating based upon the preponderance of the evidence. *See Garlets v. Memorial Hosp.*, W.C. No. 4-336-566 (I.C.A.O. Sept. 5, 2001). "The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols." *Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-477 (I.C.A.O. Nov. 16, 2006).

Claimant has a confirmed diagnosis of CRPS per the criteria set forth in Rule 17 of the Guidelines. Rule 17 requires both a clinical diagnosis and at least two positive tests from the following categories of diagnostic tests: (1) trophic tests, which include comparative x-rays and triple bone scans; (2) vasomotor/temperature tests (infrared stress thermography); (3) sudomotor test (autonomic test battery with an emphasis on QSART); and (d) sensory/sympathetic nerve test (sympathetic blocks). Rule 17 identifies a whole body thermal stress test as an acceptable thermographic test.

The medical records evidence continuing pain, allodynia, temperature asymmetry, skin color changes, restricted motion, edema, tremor, and trophic changes, which support the clinical diagnosis of CRPS. Claimant has two positive objective diagnostic tests, a positive QSART and a positive whole body thermal stress test. Drs. Bernton, Reinhard, Ghazi, Hughes and Cebrian all opined that Claimant has CRPS. Dr. Bernton opined that the diagnosis is clearly established. Dr. Hughes noted the CRPS diagnosis was not in doubt. Dr. Reinhard referred to Claimant as having "classic findings" of CRPS. While Dr. Cebrian mentioned the possibility of false positives on the diagnostic tests, he nevertheless diagnosed Claimant with CRPS and assessed a rating based on such diagnosis. Dr. Goldman acknowledged that the QSART test was positive, and that, although he believed a cold water stress test is superior to a whole body thermal stress test, the thermogram method used by Dr. Bernton was within the criteria of the Guidelines. Accordingly, the overwhelming majority of the evidence establishes that Claimant suffers from CRPS. Drs. Reinhard, Hughes and Cebrian

assigned impairment ratings based on the CRPS diagnosis, all using Table 1A of the AMA Guides. Dr. Goldman's opinion that Claimant does not suffer from CRPS and should not be rated under Table 1A of the AMA Guides is not credible or persuasive.

The ALJ finds Dr. Cebrian's opinion on permanent impairment most credible and persuasive in light of the supporting medical records and surveillance footage. Dr. Reinhard's assessment of a 30% impairment was based on Claimant's reports of having little to no function of the right hand. Dr. Reinhard noted Claimant needed assistance doing her hair, preparing meals, and performing household activities. Dr. Hughes agreed with a 30-35% impairment rating based on Claimant's reports of difficulty with self-care. In contrast, Dr. Cebrian noted that Claimant continued ziplining and kayaking for some period of time after the injury, and was able to shower, get dressed and clean. Dr. Goldman noted improved movement when he observed Claimant indirectly on examination. The surveillance video reviewed by the ALJ clearly shows Claimant with more function than she reported. Claimant is observed performing various functions with her right hand with no pinkie deformity, guarding or apparent pain behaviors. Claimant is only observed holding her hand and arm in a guarded position exhibiting a pinkie deformity in surveillance video taken August 18, 2017 at 4:47 p.m., the same day of Dr. Goldman's evaluation, where she was confronted about previous surveillance footage. While CRPS symptoms may wax and wane, Claimant continuously reported elevated pain levels and minimal function throughout the medical records, which is inconsistent with her presentation in the surveillance footage. Based on the totality of the evidence, it is more likely than not Claimant sustained a 15% whole person impairment under Table 1A of the AMA Guides "Use of upper extremities- Has no digital dexterity."

Disfigurement

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view."

As found, Claimant has surgical scars as a result of his compensable injury. The ALJ concludes Claimant should be awarded $1,500.00 for this disfigurement.

ORDER

It is therefore ordered that:

1. Respondents have overcome the DIME opinion of Dr. Clarence Henke regarding MMI by clear and convincing evidence. Claimant is at MMI as of September 6, 2016.

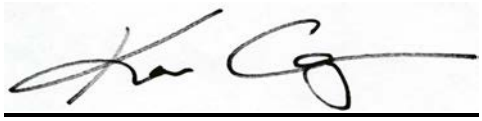
2. Respondents established by a preponderance of the evidence that the correct impairment rating is that calculated by Dr. Cebrian. Claimant's impairment rating is a 15% whole person impairment rating.

3. Respondents shall pay Claimant $1,500.00 for disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 10, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that left knee surgery recommended by Christopher Isaacs, M.D. is reasonable, necessary, and causally related to his June 7, 2016 work injury.

2. Whether Respondents have established by a preponderance of the evidence that temporary total disability (TTD) benefits should be terminated, effective August 24, 2017, based on the petition to terminate compensation filed pursuant to §§ 8-42-103 and 8-42-105, C.R.S.

FINDINGS OF FACT

1. Claimant was employed by Employer and sustained an admitted work related left knee injury on June 7, 2016.

2. On August 5, 2016 Claimant underwent an MRI of his left knee. The conclusion was a radial tear in the posterior horn of the medial meniscus with partial extrusion of medial meniscal body segment and scuffing at the posterior root of the lateral meniscus. The findings noted fraying at the posterior root lateral meniscus without discrete lateral meniscal tear. *See* Exhibit 6.

3. On August 31, 2016 Claimant underwent a left knee arthroscopy partial medial and lateral meniscectomies performed by Dr. Isaacs. The post-operative diagnosis noted a left knee torn medial meniscus plus a torn lateral meniscus. The operative report noted a complex tear in the medial meniscus required 40% resection and that the lateral meniscus required 25% resection. *See* Exhibits 5, C.

4. Following his first left knee surgery, Claimant returned to work for Employer. On September 23, 2016 Claimant stepped off a curb awkwardly and twisted his left knee while working, re-injuring it.

5. On September 30, 2016 Claimant underwent an updated MRI of his left knee. The impression was: new posterior horn medial meniscus tear superimposed on previous partial meniscectomy at the body segment; and acute lateral meniscus tear in the posterior horn extending to the root ligament with displaced debris posteriorly in the notch. The impression included acute lateral meniscus tear in the posterior horn extending to the root ligament with displaced debris posteriorly in the notch. *See* Exhibits 6, C.

6. On December 14, 2016 Claimant underwent a second left knee arthroscopy and further medial meniscectomy performed by Dr. Isaacs. Dr. Isaacs noted that Claimant had undergone a prior arthroscopy and debridement of the meniscus but had a subsequent injury and re-tearing. In the operative report, Dr. Isaacs noted that the further tearing of the medial meniscus required near total meniscectomy. *See* Exhibits 5, C.

7. On December 22, 2016 Claimant was evaluated by Dr. Isaac's PA, Charles Jennings. Claimant reported he was doing well with significantly decreased pain. PA Jennings noted that Claimant had a medial and lateral meniscal tears of the left knee and that Claimant was status post meniscectomy and debridement. PA Jennings noted that Claimant still needed to be taking it easy. *See* Exhibits 5, C.

8. At a follow up with Dr. Isaacs on January 19, 2017 Claimant reported doing better but still having mild discomfort in his left knee. Dr. Isaacs noted mild tenderness medially. At a follow up on February 16, 2017 Claimant still reported discomfort in the medial aspect of his knee and a slight instability feeling. Dr. Isaacs found a benign examination and deferred to Dr. Mason whether or not further physical therapy was needed. *See* Exhibits 5, C.

9. On April 7, 2017 Claimant was evaluated by Dr. Mason. Claimant reported a pain level of 3/10 and that he was taking occasional ibuprofen. Dr. Mason found no effusion and that Claimant's vmo strength continued to progress. Dr. Mason noted that Claimant had finished his work conditioning physical therapy but that Claimant had been laid off from work. Claimant reported the possibility of work out of state but that he would need to be taken off restrictions. Claimant reported feeling ready and that he wanted to test out the knee. Dr. Mason opined that was probably a good idea. Dr. Mason cleared Claimant for a trial of full duty work and noted that if Claimant was doing well she would consider MMI. *See* Exhibits 4, B.

10. On May 16, 2017 Claimant was evaluated by Dr. Mason. Claimant reported his pain level at a 3-4/10 and that lifting and carrying 80 pounds seemed to increase his left knee symptoms. Claimant reported that he was able to tolerate up to five miles of hiking, but that he needed ice and ibuprofen afterwards. On examination, Dr. Mason found some tenderness along the medial joint line and pes anserine areas. Dr. Mason noted that Claimant was going to be starting a job in Utah on May 31 and that they were hoping it would go fine, but that Claimant actually had not done a trial of full duty, so she was not certain that Claimant wouldn't require some permanent restrictions. Dr. Mason noted that Claimant would call her once he had the opportunity to trial full duty work to let her know how it was going. Dr. Mason opined that it the work trial was going well, she would file an impairment report but that if it was not going well, she would need to follow up with Claimant and possibly get a functional capacity evaluation for permanent restrictions. Dr. Mason noted that if he was doing well, she would place Claimant at MMI and that otherwise Claimant might need further attention, a functional capacity evaluation, and permanent restrictions. *See* Exhibits 4, B.

11. On June 2, 2017 Dr. Mason noted she had spoken with Claimant. She noted that Claimant had been working a trial of full duty work in Utah for the last 5-6 days and that his knee had been swelling at the end of the day and he reported it more intolerable today and that he thought he could not continue and was planning on returning to Denver. *See* Exhibits 4, B.

12. On June 14, 2017 Dr. Mason responded to a letter from Respondents. Dr. Mason opined that Claimant was not at maximum medical improvement for his June, 2016 injury. *See* Exhibits 4, B.

13. On June 20, 2017 Claimant was evaluated by Dr. Mason. She noted that Claimant had contacted her when he was working a job in Utah earlier in the month reporting that he had been more symptomatic since he was on a trial of full duty. Claimant reported his knee had been swelling again, that he couldn't straighten it all the way, and that he had cramping in the calves. Claimant reported that the job in Utah was not very heavy but that he did have to crawl on his hands and knees. Dr. Mason noted his recurrent symptoms and placed him back on restrictions. Dr. Mason also recommended a new MRI and a referral back to Dr. Isaacs. *See* Exhibits 4, B.

14. On July 11, 2017 Claimant underwent an updated MRI of his left knee. The conclusions were: sequel of significant remote proximal MCL spraining without appreciable resultant laxity accompanying the sequel of a significant partial medial meniscectomy involving its body and posterior horn without evidence of significant degenerative changes or re-tearing. The conclusion also recommended correlation with previous MRIs of the left knee due to the appearance of the medial third of the posterior horn of the lateral meniscus which was highly suspicious for a partially attached anteromedially displaced 1 cm tear fragment. *See* Exhibits 6, D.

15. On July 14, 2017 Claimant was evaluated by Dr. Mason. Dr. Mason noted that the new MRI showed the medial meniscus repair looked okay but showed a question of a fragment on a loose body from the lateral meniscus. Dr. Mason noted that they did not have Claimant's prior MRIs to compare, but felt that the lateral meniscus looked suspicious for a partially attached anteromedially displaced 1 cm tear fragment. Dr. Mason reviewed Claimant's prior MRI and noted the prior MRI also questioned the same lesion. Dr. Mason reviewed Dr. Isaacs's operative report which showed that Dr. Isaacs did not see the lesion in question at the time of surgery. Dr. Mason recommended follow up with Dr. Isaacs. *See* Exhibits 4, B.

16. On August 7, 2017 Claimant was evaluated by Dr. Isaacs. Claimant reported recurrent symptoms in his left knee with no recent injury. Claimant reported after starting a job in Utah he began having pain and swelling in his knee. Dr. Isaacs reviewed the July 11, 2017 MRI and noted that in the lateral compartment there appeared to be a fragment displaced away from the lateral meniscus about 1 cm in size. Dr. Isaacs provided the impression of lateral meniscus tear, possible loose body, in the left knee. Dr. Isaacs recommend a repeat arthroscopy. *See* Exhibits 5, C.

17. On August 8, 2017 Claimant was evaluated by Dr. Mason. She noted that Dr. Isaacs had recommended scoping for a loose body in Claimant's knee and that she agreed since Claimant had fairly clear cut mechanical symptoms. Dr. Mason noted a possible lateral meniscus tear vs. loose body shown on MRI. *See* Exhibits 4, B

18. On August 10, 2017 Claimant underwent an independent medical examination performed by Allison Fall, M.D. Claimant reported that while working on June 7, 2016 he was shoveling a pile of dirt, put his foot down landing on something, and slipped. Claimant reported feeling a twinge of pain in his left knee and that within 2-3 minutes it was swollen a little bit. Claimant reported after a few weeks his knee was locking up on him and that after another man fell and he rushed over to help, the knee swelled significantly. Claimant reported undergoing surgery on August 31, 2016 and that he was doing well after surgery. Claimant reported however, that one day while walking on the sidewalk he twisted and rolled off and his knee swelled up again. Claimant reported having a second surgery followed by physical therapy and that he underwent a trial of full duty work in Utah but that each day with work his pain became worse. Claimant reported that his job duties included bending, squatting, crawling, and climbing a ladder. Claimant reported he underwent a new MRI that showed an abnormality in the lateral compartment and that Dr. Isaacs was recommended surgery. Claimant reported it could have been anything that caused his recurrent symptoms and reported no specific incident. *See* Exhibit A.

19. Dr. Fall reviewed medical records and performed a physical examination. Dr. Fall assessed status post left medial and lateral meniscectomies with recurrent medial meniscus tear and status post a near complete medial meniscectomy with increased pain now and a new onset of lateral knee pain after returning to work in Utah with recurrent swelling and lateral meniscus abnormality on a recent MRI. Dr. Fall opined that it appeared as if there were a new abnormality of the lateral meniscus. Dr. Fall opined that previously, most of Claimant's symptoms were on the medial side and explained by having a near complete resection of the medial meniscus but that after working in Utah, Claimant developed more pain on the lateral side. Dr. Fall noted that Claimant had done well on conditioning before working in Utah to the point that Claimant had been released to full duty by Dr. Mason. Dr. Fall opined therefore, with Claimant doing so well before working in Utah, it indicated that something had occurred after Claimant had been released to full duty and may be related to the work Claimant performed in Utah. Dr. Fall opined that there was a new incident that occurred in Utah leading to Claimant's symptoms and that therefore Claimant was at MMI for his prior work related knee injury. Dr. Fall opined that the third recommended surgery would not be related to the June 7, 2016 work injury. *See* Exhibit A.

20. Dr. Fall noted that there had been an abnormality noted in the lateral meniscus on the second MRI prior to Claimant's second surgery. However, she noted that Dr. Isaacs did not find any abnormalities in the lateral meniscus when performing the second surgery. She noted that Dr. Isaacs did not see any fragments during surgery in the intercondylar notch. *See* Exhibit A.

21. On August 24, 2017 Respondents filed a petition to terminate compensation noting their position that they were entitled to terminate temporary total disability (TTD) benefits based on the medical opinions of Dr. Fall, Dr. Mason, and Dr. Isaacs and argued the medical opinions all indicated Claimant presented with complaints of left knee pain after working at a new employer.

22. On September 5, 2017 Claimant was evaluated by Dr. Mason. Claimant was clear that he didn't have any event in Utah but that his knee just gradually got worse over the days that he was there and came on gradually with increased normal activity. *See* Exhibits 4, B.

23. On November 10, 2017 Claimant was evaluated by Dr. Mason. Dr. Mason noted that she had reviewed Dr. Fall's IME report where Dr. Fall opined that something must have happened when Claimant was in Utah. Dr. Mason again discussed it with Claimant and noted there was no significant incident and that in Utah Claimant had been doing fairly light things and could not identify any specific time when he might have sustained an injury. *See* Exhibits 4, B.

24. On November 21, 2017 Dr. Mason responded to Claimant's letter. Dr. Mason opined that the 3rd left knee arthroscopy recommended by Dr. Isaacs was reasonable, necessary, and related to cure Claimant from the effects of his June 7, 2016 industrial fall. *See* Exhibit 4.

25. On December 1, 2017 Claimant was evaluated by Dr. Mason. Dr. Mason noted that Claimant was status post left medial meniscectomy x2 after a tear and recurrent tear, and now with a possible lateral meniscus tear versus loose body and noted that Claimant was awaiting arthroscopic surgery. *See* Exhibits 4, B.

26. Claimant testified credibly at hearing. Claimant testified that after his second left knee surgery, his rehabilitation was going well and he was getting back into shape, but that he always had swelling. Claimant testified that he was told at physical therapy that the pain and swelling would always be there. Claimant testified that at physical therapy twice per week, his left knee was always iced. Claimant testified that Dr. Mason wanted him to trial full duty work.

27. Claimant testified that he went to Utah and started working in Salt Lake City at the Utah Jazz stadium. Claimant testified he did light duty pipe work on the water system. Claimant testified that it was the easiest job he had and that he lifted lighter things, but that he was working 10 hours per day and 7 days per week. Claimant reported noticing problems with his knee and with swelling after his first 10 hour day of work which involved 5 hours of orientation and 5 hours of learning the job. Claimant testified that after his first day of work in Utah, his knee swelling was a little worse. After the end of the second day of work, Claimant testified that his knee was swollen and that he iced it and took ibuprofen. Claimant testified credibly that he did not sustain any new acute injury and that he had no acute pain or incident and that he didn't want to get reinjured.

28. Claimant testified credibly that he worked three days, then had Memorial Day weekend off and that he rested over the weekend and his swelling went down. Claimant testified that the next week on Tuesday he started working again and that the swelling started again and came back right away and that he knew the physical therapist had said there would be swelling and he would have to deal with it. Claimant testified that by Thursday he was worse and called Dr. Mason. Claimant testified that his symptoms at the Utah job were in the same place as the symptoms he had following the second left knee surgery.

29. Dr. Fall testified at hearing. Dr. Fall testified that based on the MRIs, there was a new finding in July of 2017 in the lateral part and that based on the new finding a new surgery was recommended. Dr. Fall opined that there was a new injury and/or an aggravation of Claimant's pre-existing condition that occurred at his new place of employment. Dr. Fall opined that Claimant's current wage loss was due to a new re-injury and due to the original June 7, 2016 injury. Dr. Fall believed that Claimant had a loose body present in his left knee and that the swelling was consistent with that but opined that before his work in Utah, Claimant had problems in the medial compartment and that when he got back from Utah, his problems were noted in the lateral compartment. Dr. Fall noted that Claimant did have swelling at physical therapy that gradually decreased and that with work in Utah, Claimant had increased activity and more swelling. Dr. Fall testified that Claimant already had activity related swelling that then seemed to increase in Utah and that the additional swelling beyond the swelling Claimant previously had with activity was due to a new tear.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the

testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Reasonable and Necessary Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Claimant has met his burden of proof to establish by a preponderance of the evidence that the left knee arthroscopy recommended by Dr. Isaacs is reasonable, necessary, and related to his June 7, 2016 work injury. Claimant did not have a pre-existing condition that was aggravated by his work in Utah. Rather, he had an ongoing left knee condition at the time he started a “trial” of full duty work in Utah and the ongoing condition was due to his June 7, 2016 work injury that had never fully healed. The recommended third left knee arthroscopy is related to and was caused by Claimant’s work injuries that occurred prior to his trial of work in Utah.

As found above, Claimant was only doing a “trial” of full duty work when he went to Utah. The trial was due to Dr. Mason’s concern over whether or not Claimant’s left knee was in the condition to allow full duty work with no restrictions. She allowed a trial of full duty work to help figure this out. Before starting his full duty work trial and before

going to Utah, Claimant had ongoing pain in his left knee, ongoing swelling in his left knee with activity, and had problems in his lateral meniscus that had previously been identified by MRI. The ALJ concludes that Claimant's original injuries and Claimant's left knee condition never fully healed and was not at 100% before he went to Utah. Respondents suggest that Claimant was doing well and then re-injured or aggravated his knee in Utah. This is not persuasive. Rather, the weight of the evidence establishes that Claimant had ongoing pain, swelling, and problems with his left knee prior to going to Utah. His left knee problems due to his work injuries were ongoing at the time he began his return to work "trial" in Utah. Clearly, the return to work trial of full duty work with no restrictions did not go well. This is found to be due to Claimant's continued and ongoing left knee condition that never fully healed or resolved subsequent to his second left knee surgery.

The opinion of Dr. Mason is credible and persuasive that the third left knee arthroscopy recommended by Dr. Isaacs is reasonable, necessary, and causally related to Claimant's June 7, 2016 work injury. This is supported by the weight of the evidence showing MRI findings prior to the second left knee surgery consistent with current MRI findings. Dr. Fall's opinion that Claimant sustained a new injury or an aggravation of his underlying condition is not credible or persuasive. Dr. Fall's opinion that there were new findings in the lateral meniscus and that Claimant sustained a new incident in Utah since he had been doing so well before going to Utah is not credible or persuasive. Rather, Claimant's testimony is credible and persuasive. Claimant had swelling with activity following his second surgery. After returning to a trial of work in Utah, his swelling increased without any acute incident or injury. The records show that after his original June 7, 2016 work injury and during his first left knee surgery, he was found to have a torn lateral meniscus. In that first surgery, Dr. Isaacs resected 25% of the lateral meniscus. After he re-injured his knee the September 2016 MRI showed acute lateral meniscus tear in the posterior horn extending to the root ligament with displaced debris posteriorly in the notch. Although Dr. Isaacs didn't see any loose fragments or debris during the second left knee surgery, the third left knee surgery is being recommended due to what Dr. Isaacs opined in August of 2017 was a lateral meniscus tear or possible loose body. This third recommendation for surgery addresses findings that were present before the second surgery took place and are not new findings as suggested by Dr. Fall. Claimant overall is credible and persuasive. His left knee never healed following the second surgery. He continued to have swelling and pain. He tried to return to work during a trial that did not go well with his swelling and pain increased.

Claimant has established, by a preponderance of the evidence, that the third left knee arthroscopy requested by Dr. Isaacs is reasonable, necessary, and related to his June 7, 2016 work injury.

Temporary Total Disability

Respondents may not terminate TTD benefits in this case and their petition is denied. As found above, Claimant did not sustain a new intervening injury with a new employer. Rather, at the time of his trial back to work, Claimant had an ongoing injury and ongoing problems due to his June 7, 2016 work related injury. Claimant did not have

an underlying condition that was aggravated by his employment in Utah nor did he sustain a new acute injury in Utah. Rather, Claimant had an ONGOING condition that had been aggravated with activity since his second surgery. Claimant has established that his condition is related to his June 7, 2016 work injury and thus terminating any entitlement to TTD benefits due to an alleged new injury with a new employer is not supported. Respondents' petition to terminate TTD benefits is denied.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence that the left knee arthroscopy recommended by Dr. Isaacs is reasonable, necessary, and related to his June 7, 2016 work injury.

2. Respondents' Petition to Terminate Temporary Disability Benefits is denied.

3. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 11, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment on August 11, 2017.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her industrial injuries.

III. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Elisa Leake owns and operates a personal care business known as Kind Heart Home Care, LLC (Employer). Employer provides home care services, including assistance with activities of daily living (ADL), light housekeeping, cooking and grocery shopping based upon individual need to various clients, including Medicaid recipients.

2. As a personal care attendant, Claimant assists Employer's clients with the aforementioned activities. On August 11, 2017, Claimant was assisting Vernelda Bonet, a Medicaid client assigned to her, through security at the courthouse so Ms. Bonet could attend a probation appointment. While clearing security, Ms. Bonet suffered a seizure, tensed up and grabbed Claimant by the left arm as she fell to the floor. Claimant felt a pop in her left shoulder. After physical therapy and an MRI, Claimant has been diagnosed with a rotator cuff tear requiring surgery. Claimant reported her injury to Employer on August 14, 2017 and a first report of injury was filed by Ms. Leake on August 24, 2017.

3. Respondents have denied liability for Claimant's injury. Respondents assert that Claimant was outside the course and scope of her employment because she had driven Ms. Bonet to her probation appointment in contravention of prior instructions not to drive and or accompany her to probation appointments.

4. Claimant testified that on the date of injury, she was working 34 hours per week at $9.75 per hour. She was assigned to work with Ms. Bonet for four hours per day in the mornings, for a total of 24 hours per week. She also assisted another client named Barbara for two hours a day in the afternoon for a total of 10 hours per week.

5. Claimant testified she started working for Employer in October 2016. According to Claimant, Employer informed her that in addition to a list of duties such as dusting and feeding and bathing the clients, she was required to run errands and take the clients to their appointments.

6. Claimant testified she began taking care of Ms. Bonet in January 2017 after Ms. Bonet was temporarily assigned to her when her regular caretaker, Milagros Estrello went on vacation. The assignment became permanent. The first month following the assignment becoming permanent, Claimant testified that Ms. Bonet requested to be transported to a meeting with her probation officer at the courthouse. Claimant testified that she was present when Ms. Bonet called Employer requesting that she (Claimant) be given permission to take her (Ms. Bonet) to said probation appointments. Claimant testified that Employer authorized the transportation. Employer disputes that Claimant was given permission to transport or accompany Ms. Bonet to her probation appointments.

7. Ms. Bonet testified that she was placed on probation in October 2016. She testified that her prior caregiver, Milagros Estrello had transported her to her probation appointments on three occasions. Ms. Bonet was subsequently placed in jail and upon her release was not permitted to drive. After her release from jail, Ms. Bonet testified that she called Employer, in the presence of Claimant, to ask if her caretaker could take her to her monthly probation appointments. Ms. Bonet testified that Employer gave permission for Claimant to drive and accompany her to probation.

8. Ms. Estrello confirmed she had driven Ms. Bonet to the probation office while caring for her. She believed it only happened once and did not seek permission from Employer to do so as she understood taking clients to their appointments was part of her job and providing transportation was otherwise permitted. She testified that she was never specifically told that she could not transport Ms. Bonet or other clients to appointments until after Claimant's August 11, 2017 accident.

9. Claimant testified that she was required to call in to the office every morning upon her arrival at Ms. Bonet's home. The purpose of the call in was to report the plan of care for that day and discuss any transportation requests. In addition to the owner, there are two other office employees to whom Claimant would report before beginning her care with Ms. Bonet. If no one was available, Claimant would leave the information on the answering machine. Claimant testified that if there was an unusual request for transportation from Ms. Bonet, she would call Ms. Leake on her personal phone and request permission for the trip. Sometimes Ms. Leake would authorize the transportation, other times she would not. According to Claimant, Employer authorized trips to the courthouse on two occasions when Ms. Bonet was scheduled to attend a probation appointment, informing her that said appointments were going to last up to two years.

10. Claimant testified that Ms. Bonet was a very persistent client with excessive and at times inappropriate transportation requests. She testified that Ms.

Bonet frequently demanded to be driven to multiple destinations the same day. Consequently, Claimant asked Employer if she could be reimbursed for her gas expense, including the expense for the trips she was making to the probation office. According to Claimant, Employer did not respond except to tell her that Ms. Bonet was scheduled for probation appointments for the next one to two years. During cross-examination, Claimant reiterated her understanding that it was her obligation to take Ms. Bonet and other clients "where ever they had to go."

11. Claimant testified that the first time she learned she could not drive Ms. Bonet to her probation appointments was the Friday after the incident occurring in the courthouse wherein she injured her shoulder. Claimant testified that she received a copy of an August 18, 2017, letter drafted by Ms. Leak and sent to all employees stating that they were not allowed to drive clients. By this time, Claimant, who had been calling in to report her anticipated treatment plan and clarify transportation requests, had driven Ms. Bonet to the probation office every month since January 2017 except once when Claimant was ill, and another co-worker had taken her.

12. Ms. Leake testified that Colorado Medicaid rules do not allow her employees to transport clients in the employees' vehicles or in the clients' vehicles. Rather, she testified that caregivers are allowed to meet clients at their appointments or for example, at the grocery store where they can assist the client as necessary. According to Ms. Leake, she limited the personal care providers to accompanying a client to one doctor's appointment and one grocery store trip per week. She testified that since her business opened in 2009, she had established a strict rule that her employees cannot drive the clients anywhere in the employees' vehicles except in cases of emergency. She testified that if client was injured in her employees' cars, she would be liable. Medicaid could shut down her business if she did not follow the rules.

13. Ms. Leake testified that when she initially assigned Claimant to take care of Vernalda Bonet, she was asked by Claimant if she could transport Ms. Bonet to her probation department appointments. Ms. Leake testified that she specifically told Claimant that she could not drive Ms. Bonet anywhere, purportedly telling her that without exception she was only allowed to complete her job duties of picking-up medications, attending patients doctors' appointments, and assisting with grocery shopping once per week.

14. Ms. Leake also testified that she was asked by Ms. Bonet if she could receive transportation to the probation appointments. Ms. Leake testified that contrary to Ms. Bonet's report, she did not authorize Claimant to transport or assist her with personal appointments.

15. Ms. Leake testified that on August 9, 2017, two days before her injury, Claimant was reminded not drive Ms. Bonet anywhere. Claimant testified that, as she had previously done, she called into the office because Ms. Bonet had insisted that she be driven to different places and Claimant called the office to inform them. According to Claimant, she was given permission to take Claimant to probation during this call but

nowhere else. Moreover, she was given suggestions on how to curb Ms. Bonet's demands and told simply to say "no" when Ms. Bonet began demanding that she drive her here and there. Asked why she then drove Ms. Bonet to the probation appointment on August 11, 2017, Claimant testified that she believed that it was her duty to drive Ms. Bonet to her probation appointments. She had reported it as part of her daily plan reports and had complained to Ms. Leake of the cost to drive Ms. Bonet to the probation office and did not receive a response other than being informed that Ms. Bonet's probation appointments would continue for two years. When asked whether she had called the office on the morning of August 11, 2017 to tell them that she was taking Ms. Bonet to her probation appointment, she said she had not because when she got to Ms. Bonet's house, Ms. Bonet was waiting outside ready and demanding to be taken to her appointment forthwith.

16. Pertinent documentary evidence establishes that an employee meeting was held on May 12, 2017. Among the topics discussed at the meeting was transportation of clients. The agenda list suggests that care givers were permitted to drive clients to grocery shop one time per week, drive clients for medication pick-up and to one doctor's appointment although it does not specify a time frame for these two activities. Importantly, the agenda indicates, "any alternatives must be discussed with office staff", suggesting that driving clients for other reasons was open to discussion. Separate documentation reveals that Claimant was in attendance for this meeting.

17. An April 4, 2017 communication note indicates that Ms. Bonet went to jail and would return on May 29, 2017. A June 3, 2017 communication note indicates that Ms. Bonet called in requesting services again and asking that Claimant be assigned to her.

18. Despite Ms. Leake's emphatic testimony that her employees are prohibited from driving clients anywhere, the evidence presented persuades the undersigned ALJ that this prohibition was honored more in the breach than in the observance. In a letter signed by Ms. Leake, dated July 14, 2017, less than a month before Claimant's accident, Ms. Leake complained to her clients that in "many cases our Caregivers are doing more driving then [sic] providing the services that you all need."

19. The ALJ credits the testimony of Claimant and the documentary evidence to find that there were probable frequent discussions between Claimant and Employer regarding Ms. Bonet's transportation demands and that Employer occasionally acquiesced to those demands permitting Claimant to drive Ms. Bonet to outside appointments, including her probation meetings. At a minimum, both Ms. Estrello and Claimant were under the impression that such transportation and assistance were permitted. The ALJ finds the pre-injury documents relied upon by Employer, as proof that Claimant was outside the scope of her employment, to be vague and unlikely to dissuade Claimant of her belief that such transportation and assistance was sanctioned. Concerning the August 9, 2017 communication note, the ALJ is not convinced Claimant understood that she was not permitted to take Ms. Bonet to her August 11, 2017 probation appointment. The ALJ infers from the evidence presented that Claimant was

likely given permission to take Ms. Bonet to her probation appointment by a manager (Maria) and later counseled by Ms. Leake about "transfering (sic) client in her car" without further discussion regarding the upcoming August 11, 2017 probation appointment. Only after Claimant's injury did Employer clarify to all employees the directive concerning transporting clients in either the Employee's or the client's personal vehicle.

20. Even if one were to deem Claimant's transportation of Ms. Bonet to her probation appointments as an activity outside the course and scope of her employment, the ALJ finds that the injury did not happen while she was driving. Rather, the injury occurred while Claimant was assisting Ms. Bonet in attending an appointment outside of the client's home. The job description for a personal care provider includes, as a duty and responsibility, the need to *"[assist] in completing activities such as shopping and appointments outside the home."* (emphasis added). Consequently, the ALJ is persuaded that Claimant not only had a reasonable belief that her job required her to take clients where they needed to go to but also to assist them in completing the activities associated with their appointments. Assisting a client prone to seizures in clearing security clearly falls within the job description duty/responsibility statement in furtherance of Employer's mission to provide personal care to her clients.

21. Claimant has proven by a preponderance of the evidence that she was in the course and scope of her employment when she sustained an injury to her left shoulder while assisting Ms. Bonet on August 11, 2017. The evidence presented also persuades the ALJ that contrary to her assertion, Employer did not issue a clear unambiguous directive that employees were never permitted to transport clients to and assist them during appointments outside their homes. Indeed, the May 12, 2017 meeting agenda sheet as well as the job description of a personal care provider contradicts such assertion.

22. Based upon the evidence presented, the ALJ finds Claimant's treatment through Emergicare, including the referral to Colorado Springs Imaging and Centura Orthopedics were reasonably necessary to cure and relieve her from the effects of her compensable injury.

23. Wage records admitted into evidence reflect that Claimant's earnings vary from pay period to pay period. They also establish that Claimant earned $5,406.42 for the 30 weeks from January 13, 2017 and August 11, 2017. The ALJ relies upon the records submitted from this time period to calculate Claimant's average weekly wage (AWW) as it provides a reflection of Claimant's hours after assuming Ms. Bonet's care up to the day of injury. These records provide approximately seven months of earnings from which an average wage up to the date of Claimant's injuries can be calculated. Based upon the evidence presented, the ALJ calculates Claimant's AWW to equal $180.21 per week ($5,406.42 ÷ 30 weeks = $180.21).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Compensability

C. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

D. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of

employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). In this case there is little question that Claimant's alleged injury arose out of what can be considered a work related function, specifically assisting a client during an appointment outside of her home. Rather, the question here is whether Claimant was acting outside the sphere of her employment when she was injured because she violated an asserted employer directive not to transport Ms. Bonet to her probation appointment or otherwise assist her once there.

E. An employer may limit an employee's sphere of employment such that the employee is not acting within the "course of" his employment if he violates the express limitations imposed by the employer. *Bill Lawley Ford v Miller,* 672 P.2d 1031 (Colo. App. 1983). Generally, an employer has a right to issue directives concerning what an employee may do, and when the employee may do it. *Id*. For purposes of determining the compensability of an injury, an employer's direction to an employee falls into one of two categories. *Id.* It may limit the sphere of the employment relationship, or it may simply regulate the employee's conduct while he is engaged in such employment. *Id.* A violation of a directive of the first type means that the employee is no longer within the sphere of employment, so that any injury occurring to the employee does not arise out of or in the course of his employment. *Id.* A violation of an order of the second type, while it may result in a reduced benefit under § 8–52–104, C.R.S. (1986 Repl. Vol. 3B), does not affect the compensability of an injury. *See Industrial Commission v. Funk,* 68 Colo. 467, 191 P. 125 (1920).

F. In order for an employer directive to remove conduct from the sphere of employment, it is necessary that the directive be clear and evidence an intent to remove conduct from the scope of employment. *Butland v. Industrial Claim Appeals Office*, 754 P.2d 422 (Colo. App. 1988). In this case, Respondents contend that Claimant took herself outside the sphere of employment because she violated her employer's directive and was injured as a result. As found, the ALJ is not persuaded. Contrary to Respondents' assertion, the evidence presented does not support a conclusion that Claimant was issued a clear directive limiting the her sphere of employment multiple times. While Ms. Leake may have attempted to communicate the policy regarding transporting and assisting clients to and during appointments outside the home on numerous occasions, that message was sufficiently confusing and so ambiguous that both Claimant and Ms. Estrello unequivocally testified that they understood that they were "supposed" to take clients to their appointments. Moreover, even assuming that Claimant was precluded from taking Ms. Bonet to her probation appointments as a limitation concerning the sphere of her work activity, the injury in this case occurred while Claimant was assisting Ms. Bonet as part of an outside the home appointment. As noted, such assistance is a stated part of the duties and responsibilities of a

personal care provider according to Employer provided job description. Furthermore, the evidence presented persuades the ALJ that Claimant was never given an explicit directive that she could only discharge this job duty/responsibility while at doctor's appointments, at the grocery store or during prescription pick-up. Consequently, the ALJ concludes that Claimant's injury occurred during the course and scope of her employment on August 11, 2017 and that a logical causal connection exists between Claimant's work duties and her left shoulder symptoms and the need for treatment. Accordingly, the injury is compensable.

Medical Benefits

G. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her left shoulder. The evidence presented persuades the ALJ that this compensable "injury" is the proximate cause of Claimant's need for medical treatment, including her need for physical therapy and imaging. Taken in its entirety, the ALJ finds the evidentiary record to contain substantial evidence to support a conclusion that Claimant's work duties and not a pre-existing condition or a prior injury, as suggested by Respondent's inclusion of Claimant prior work related injury record, caused her current symptoms and need for treatment. Consequently, the ALJ concludes that Claimant has established that her need for treatment with Emergicare and Centura Orthopedics is causally related to her August 11, 2017 work injury. Moreover, the totality of the evidence presented establishes that the care, including physical therapy and specialist referral were reasonable and necessary given Claimant's continued pain and functional decline. Consequently, the ALJ concludes that Respondents are liable for Claimant's care at Emergicare, Colorado Springs Imaging and Centura Orthopedics.

Average Weekly Wage

H. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

I. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity at the time of his industrial injury comes from the wage records submitted into evidence. As found, the wage records admitted into evidence establish that Claimant earned $5,406.42 for the 30 weeks from January 13, 2017 and August 11, 2017 for an AWW of $180.21 per week ($5,406.42 ÷ 30 weeks = $180.21). The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of her August 11, 2017 compensable work related injury. Accordingly, for purposes of this claim, Claimant's AWW is $180.21.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury to her left shoulder on August 11, 2017.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her left shoulder injury, including, but not limited to the care provided at Emergicare, Colorado Springs Imaging and Centura Orthopedics and that care provided as a consequence of any referrals from Emericare, i.e. physical therapy.

3. Claimant's AWW for purposes of paying TTD associated with this claim is $180.21.

4. All matters not determined herein are reserved for future determination.

DATED: April 12, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, Co 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did Claimant prove by a preponderance of the evidence she suffered a whole person impairment?

- At the commencement of the hearing, the ALJ granted Claimant's motion to bifurcate and preserve the issues of PTD, average weekly wage and medical benefits. Respondent stipulated that the FAL admits for a general award *Grover* medical benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a forensic case manager. On September 8, 2014 she injured her left knee getting into her car at work. Respondent admitted liability for the injury.

2. Employer referred Claimant to CCOM on September 10, 2014, where she saw Dr. Richard Nanes. Dr. Nanes ordered an MRI, which showed a bucket-handle medial meniscus tear, a chronic-appearing ACL tear, and advanced arthritis. Respondent denied the claim, so Claimant pursued treatment under her health insurance.

3. Claimant had a left knee arthroscopy with partial medial meniscectomy on November 7, 2014 with Dr. Romero. He did not repair the torn ACL because of the arthritis, which was even more severe on intraoperative inspection than previously shown by the imaging studies. Claimant continued to have problems with the left knee, and Dr. Romero recommended a left total knee arthroplasty (TKA).

4. The matter went to hearing before ALJ Lamphere in February 2016 on the issues of compensability and medical benefits. ALJ Lamphere found Claimant suffered a compensable aggravation of a pre-existing condition and that the recommended TKA was causally related to the accident.

5. Claimant resumed treatment at CCOM in March 2016. She saw Dr. Nanes twice before being transferred to Dr. Daniel Olson, who has been her primary ATP since May 2016.

6. Claimant had the left TKA with Dr. Nakamura on June 21, 2016. She had extensive physical therapy for approximately ten months after surgery. Records from the post-operative period documented no low back or hip issues.

7. Claimant completed numerous pain diagrams during her treatment at CCOM. Her reported symptoms were typically limited to the left knee and leg. There is only one pain diagram, dated March 20, 2017, on which Claimant documented aching in her low back. But Dr. Olson did not mention the low back in his corresponding treatment

note. On April 17, 2017, Dr. Olson documented Claimant's back was "**not** hurting," which matches the pain diagram she completed at that visit.

8. Dr. Olson placed Claimant at MMI on April 17, 2017, and assigned a 26% lower extremity impairment rating, which corresponds to 10% of the whole person. His report contains no reference to low back or hip problems.

9. Claimant saw Dr. Stephen Gray for a DIME on August 1, 2017. Claimant's gait was "minimally antalgic," and she showed "essentially no pain behaviors." When describing her ongoing symptoms, Claimant did not mention any low back or hip problems. She described difficulties with a variety of ambulatory activities, all of which are attributable to her lower extremity impairment. Dr. Gray assigned a 26% lower extremity rating, which converts to 10% whole person.

10. Claimant underwent a vocational evaluation with Patricia Anctil at Respondent's request on February 23, 2018. Claimant described ongoing leg symptoms and associated limitations, including difficulty with prolonged standing and walking, climbing stairs, kneeling and squatting. She told Ms. Anctil she could not pass a mandatory "take-down and hold" test required for her job. Claimant did not mention any low back or hip problems.

11. Dr. Olson testified in a deposition on March 7, 2018. When asked whether Claimant's impairment affected her whole person, he opined, "I think it would be appropriate, because it does affect her – it's obviously affected her job, and . . . a total knee is still not the same as your regular knee, so I think it does kind of affect the whole person." He did not testify as to any injury-related low back pain or other problems.

12. Claimant failed to prove she suffers functional impairment not listed on the schedule of disabilities.

CONCLUSIONS OF LAW

The term "injury" as used in the context of permanent partial disability "refers to the manifestation in a part or parts of the body which have been impaired or disabled as a result of the industrial accident." *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has sustained a scheduled injury or a whole person impairment is a question of fact for determination by the ALJ. *Id.* In resolving this question, the ALJ must determine "the situs of the functional impairment," which refers to "the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co*., 942 P.2d 1390, 1391 (Colo. App. 1997). The schedule of disabilities refers to the loss of "a leg." Section 8-42-107(2)(a). To establish entitlement to a whole person rating, the claimant must show functional impairment to part(s) of her body other than the "leg." It is the claimant's burden to prove a non-scheduled impairment by a preponderance of the evidence. *Cassius v. Entegris*, W.C. No. 4-732-489 (March 26, 2010).

Functional impairment need not take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may show functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although medical opinions may be relevant to this determination, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

As found, there is no persuasive evidence that Claimant suffers functional impairment in parts of her body not listed on the schedule. Dr. Olson's opinion regarding conversion is not persuasive because it suggests a knee replacement which interferes with a person's ability to perform their preinjury job always constitutes a whole person impairment. It is well settled that functional impairment cannot be determined strictly by reference to a claimant's diagnosis, or the presence or absence of permanent work restrictions. *E.g*., *Ellison v. People's National Bank*, 4-449-392 (January 7, 2002); *Copp v. City of Colorado Springs*, W.C. No. 4-271-758; 4-337-778 (January 24, 2001); *Villoch v. Opus Northwest, LLC*, W.C. No. 4-514-339 (June 17, 2005); *Colacion v. Excel Corporation*, W.C. No. 4-546-219 (March 26, 2004). Rather, this determination must be made on a case-by-case basis, based on all the evidence regarding a particular claimant's situation. *Martinez v. Pueblo County Sheriff's Office*, W.C. No. 4-806-129 (August 9, 2011); *Ellison v. People's National Bank, supra*.

The persuasive evidence demonstrates Claimant's functional impairment is limited to her left leg. One of her primary arguments to support whole person impairment is that she allegedly developed low back and hip pain because of altered gait mechanics. But there is no persuasive corroborating evidence in Claimant's medical records to support that argument. Claimant noted back pain only once on the numerous pain diagrams she completed at CCOM, and reported no back or hip symptoms to the DIME or Ms. Anctil. Although Claimant may experience transient low back pain, the ALJ is not persuaded that any such symptoms represent a functional impairment that would justify a finding of whole person impairment. The ALJ does not doubt that Claimant has ongoing difficulties with ambulation that affect her ability to perform routine activities. But those limitations are a function of her lower extremity impairment and not caused by any injury-related functional impairment extending beyond the leg.

ORDER

It is therefore ordered that:

1. Claimant's request for whole person PPD benefits is denied and dismissed.

2. All issues not determined herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 18, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Should Claimant's average weekly wage (AWW) be increased to $764.49, effective March 2, 2017, because of concurrent employment?

FINDINGS OF FACT

1. Claimant suffered an admitted low back injury on September 1, 2015 while working for Employer as a custodian. Claimant's typical job duties included cleaning, gardening, and babysitting children during services. The job likely falls within the medium physical demand category as customarily defined. The parties stipulated that Claimant's AWW with Employer is $314.39.

2. At the time of the admitted injury, Claimant was concurrently employed by Colorado Springs School District 11 (D-11) as a custodian at Coronado High School. D-11 initially hired Claimant on a part-time basis in November 2012. In March 2015, she became a full-time employee. The parties stipulated that Claimant's AWW from D-11 is $450.10.

3. The formal job description for the custodian position at Coronado states, "This work is regularly active with periods of heavy exertion. Typical positions require workers to walk or stand for long periods; lift and carry up to 100 pounds; climb stairs, ladders and scaffolding; bend, kneel, crouch and crawl . . . ." D-11 required Claimant to complete a pre-employment physical before she could be hired. Claimant demonstrated the ability to lift 50 pounds to shoulder height. She could not lift 70 pounds and did not attempt to lift 100 pounds.

4. D-11 deemed Claimant's inability to lift more than 50 pounds a "permanent medical restriction." But the building manager at Coronado was able to accommodate a 50-pound restriction because "no one at Coronado lifts more than 50lbs, we use caster floor dollies for heavy items with two wheel assist."

5. Claimant began receiving primary care from Dr. Sheldon Ravin on July 20, 2015. She complained of progressive stomach pain for at least a week. Dr. Ravin's nurse ordered lumbar x-rays to evaluate "abdo[minal] pain radiating to lower back." The x-rays showed "moderate-to-advanced" facet osteoarthritis at L4-L5 and L5-S1, and "advanced" degenerative disc disease at L5-S1 with grade 1 spondylolisthesis. Dr. Ravin ordered a lumbar MRI after receiving the x-ray report but there is no indication it was ever completed. There was no further mention of any back pain until after the September 2015 work accident. The abdominal pain resolved after treatment for H. pylori infection.

6. In September 2015, Claimant developed acute low back pain after lifting a heavy stone at work. She did not report the injury immediately, but waited several months

before seeking treatment. Eventually, she reported the injury, and Respondents admitted liability. She has received conservative care including physical therapy and injections.

7. Claimant has been continuously disabled from her regular job with Employer since at least June 2016. During that period, Claimant's ATP assigned various work restrictions because of the industrial injury. At times she was restricted from all work due to pain flares. Otherwise, she has had restrictions such as no lifting over 15-20 pounds, no twisting with lifting, frequent breaks, "work as tolerated," and "light duty." The restrictions have been appropriate given the severity of her symptoms and the physically demanding nature of her work. Respondents admitted TTD benefits from June 1, 2016 through September 11, 2017.

8. Claimant's husband and son also worked as custodians at Coronado High School. From time to time before September 2015, they helped Claimant complete some of the more strenuous tasks required of her job. After the work injury, Claimant's husband and son provided much more assistance; she performed lighter tasks such as dusting and sweeping, while her husband and son took out the trash, mopped, cleaned restrooms, and performed other heavier duties. The ALJ infers that any help Claimant received from her husband and son before the accident was significantly less than she required afterward.

9. In approximately February 2017, the custodial assignments at Coronado were changed, and Claimant's husband and son could no longer assist with her duties. Claimant resigned from D-11 on March 2, 2017 because she could not perform the job by herself. Claimant's injury-related limitations and restrictions would have forced her to stop working at Coronado sooner had her husband and son not been available to help with the physically demanding tasks.

10. Claimant's injury disabled her from her concurrent job and proximately caused a wage loss commencing March 2, 2017.

11. Claimant proved by a preponderance that her AWW should be increased to $764.49, effective March 2, 2017.

CONCLUSIONS OF LAW

Under § 8-42-103(3) the ALJ has discretion to determine AWW by any method that will "fairly" calculate the claimant's earnings. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity as a result of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). If a claimant was concurrently employed at the time of the accident, "the ALJ may, in order to achieve fairness, include all such wages in the computation of average weekly wage." *Broadmoor Hotel v. Industrial Claim Appeals Office*, 939 P.2d 460, 461 (Colo. App. 1996); *see also St. Mary's Church & Mission v. Industrial Commission*, 735 P.2d 902 (Colo. App. 1986). There is no *ipso facto* rule that the AWW must invariably include wages from concurrent employment, and the ALJ should consider

the specific factors in each case. *Jefferson County Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

As found, Claimant proved that concurrent earnings from D-11 should be included in the AWW to achieve a fair approximation of her injury-related wage loss and diminished earning capacity. The job at D-11 exceeded Claimant's post-injury physical limitations and restrictions, and she was only able to keep working there after the accident because she received assistance from her husband and son. Once they were no longer available to help, she was forced to resign.

The ALJ is not persuaded by Respondents' argument that Claimant was already "disabled" from the job at D-11 because she received accommodations and some help from her family members before September 2015. There is no persuasive evidence that Claimant was substantially limited by low back pain before the industrial accident. Although she had significant pre-existing degenerative changes in her lumbar spine, there is no indication she was symptomatic or required treatment. The July 2015 lumbar x-rays were ordered to investigate abdominal pain rather than back pain. Her abdominal pain subsequently resolved with treatment for H. pylori, and there was no further mention of any back problems until after the industrial accident. There is no persuasive evidence that her inability to lift more than 50 pounds in 2012 was related to any low back problems as opposed to Claimant's body habitus and the natural physical abilities of a 54-year-old woman.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is increased to $764.49, effective March 2, 2017.

2. Insurer shall recalculate and pay all admitted benefits on and after March 2, 2017 based on the increased AWW.

3. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

4. All issues not determined herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 20, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues set for determination were:

- Did Claimant file a timely Petition to Reopen his Claim?
- What was the effect of the Stipulation signed on December 22, 2011 and approved January 5, 2012 (hereinafter referred to as the "2012 Stipulation")?
- Did the 2012 Stipulation withdraw, waive, or resolve Claimant's Petition to Reopen?
- What was the effect of the Order issued by ALJ Broniak on December 7, 2012?
- What was the effect of the Prehearing Orders issued by PALJ Purdie on June 25 and July 10, 2013, respectively?
- What was the effect of the Order issued by ALJ Cain on December 12, 2013?
- What was the effect of the Order issued by ALJ Broniak on February 5, 2015?
- Was Claimant precluded from obtaining a DIME?
- Is Claimant entitled to additional PPD benefits?
- If none of the prior Orders resolved Claimant's Petition to Reopen – did Claimant prove by a preponderance of the evidence that his condition worsened?
- If Claimant proved a worsening of condition, did Respondents overcome the DIME opinion by clear and convincing evidence?

PROCEDURAL HISTORY AND PRELIMINARY FACTS

The following is a summary of the extensive procedural history of the case, along with preliminary factual findings:

1. Claimant sustained an admitted back injury on April 8, 2005. Respondents provided medical benefits to Claimant and he was treated by Hector Brignoni, M.D.,

Scott Hompland, D.O. and Robert Anderson-Oeser, M.D. Claimant received conservative treatment, including physical therapy ("PT"), along with facet injections.

2. There was no evidence in the record that Claimant sustained an injury to his low back before April 8, 2005.

3. Claimant underwent a lumbar MRI on July 18, 2005 at Fort Collins MRI. The films were read by John Roth, M.D., whose impression was: early changes, disk degeneration-lumbar and low thoracic spine; slight posterior annular bulging L4-5; and mild relative narrowing of the proximal portions of the L4-5 neural foramina. No nerve root impingement was noted.

4. On July 7, 2006, Respondents filed a Final Admission of Liability ("FAL") admitting for PPD benefits based upon the 5% whole person impairment rating issued by the DIME physician, John Aschberger, M.D. The FAL denied liability for post-maximum medical improvement (MMI) medical benefits.

5. As of May 21, 2007, Claimant's restrictions were: max 20 pounds lifting; limited bending- occasional; no repetitive pushing/pulling; sit five minutes/every hour. Dr. Brignoni confirmed Claimant was at MMI as of that date.

6. On December 7, 2007, the parties entered into a written Stipulation Regarding Reopening and a follow-up DIME. The Stipulation specified Claimant filed a Petition to Reopen in August 2007. The stipulation stated as follows: "the parties have agreed this claim was reopened on March 26, 2007", and that the Claimant was back at MMI with no additional impairment as of May 21, 2007. The Stipulation also provided Claimant would undergo another DIME with Dr. Aschberger within 30 days of the date the stipulation was approved. ALJ Harr approved the Stipulation by Order dated December 7, 2007.

7. Dr. Aschberger conducted a second DIME on January 30, 2008. In a report issued on February 11, 2008, Dr. Aschberger opined that Claimant was at MMI on February 28, 2006 with no additional impairment.

8. On March 27, 2008, Respondents filed an amended FAL pursuant to Dr. Aschberger's February 11, 2008 report. The FAL did not admit for additional PPD benefits. The FAL also denied liability for post-MMI medical benefits. There was no record that Claimant filed an objection to the FAL. There was no evidence in the record that Claimant received indemnity or permanency benefits after 2006.

9. On March 28, 2011, Claimant's counsel filed a Petition to Reopen the claim. This Petition alleged a "change in medical condition" and was accompanied by the emergency room report dated July 27, 2010.

10. On July 25, 2011, Claimant's counsel filed an Application for Hearing and Notice to Set, which listed as the issue for determination: Petition to Reopen the claim.

11. On December 22, 2011, Claimant's counsel and Respondents' counsel entered into a signed Stipulation on behalf of their respective clients. Paragraph 1 of the Stipulation stated that Claimant filed a Petition to Reopen the claim for the April 8, 2005 injury, as well as a new claim that listed the date of injury as July 27, 2010. The Stipulation stated these claims had been consolidated for purposes of a hearing and the issues involved "compensability, causality, and relatedness".

Paragraph 2 of the Stipulation stated that Claimant filed a timely Petition to Reopen the 2005 claim and that the parties "stipulate and agree that Claimant will continue to receive reasonable, necessary and related medical care to maintain maximum medical improvement for the 2005 claim by way of authorized treating physician, Dr. Cathy Smith". The ALJ noted the language of the Stipulation did not state Claimant was withdrawing the Petition to Reopen.

Paragraph 3 of the Stipulation specified the parties stipulated and agreed the evidence did not support a "new injury to the lumbar spine on July 27, 2010" and Claimant agreed to withdraw the claim for that alleged injury. The Stipulation provided that the claim for a July 2010 injury shall only be reopened for fraud or mutual mistake of material fact. Finally, paragraph 3 stated: "All other issues are hereby reserved".

12. On January 5, 2012, PALJ Purdie signed an "Order Granting Stipulation". That Order incorporated the language concerning *Grover* medical benefits, which would be provided by Dr. Smith and the withdrawal of the July 2010 claim.

13. On July 23, 2012, Claimant filed an Application for Hearing and Notice to Set for the April 8, 2005 injury. The only issue listed was permanent partial disability benefits. Respondents filed a Response listing issues of jurisdiction, ripeness, whether "PPD is closed and whether Claimant has to establish a right to reopen before the court can address PPD".

14. On December 7, 2012, ALJ Broniak conducted a hearing concerning the Claimant's July 2012 Application for Hearing. On February 8, 2013 ALJ Broniak entered Findings of Fact, Conclusions of Law, and Order ("FFCL"). The FFCL stated the issue for determination is "whether the Claimant is entitled to an increased permanent impairment rating". However, ALJ Broniak concluded she lacked "authority" to resolve this issue because Claimant had not obtained a DIME to challenge the ATP's rating as required by § 8-42-107(8)(c), C.R.S. and § 8-42-107.2, C.R.S.

15. The February 8, 2013 FFCL was interlocutory as it did not deny or award a benefit.

16. On April 16, 2013, the Claimant's counsel filed an Application for a Division Independent Medical Examination. The body parts listed for examination were low back and any other area deemed related by the examiner. A DIME was scheduled for July 2, 2013.

17. On June 6, 2013, Respondents' filed a Motion to Strike Claimant's Application for a Division IME. In this Motion, Respondents took the position that the claim was closed pursuant to the March 27, 2008 FAL and had never been reopened.

18. Claimant filed an objection to the Respondents' Motion to Strike the DIME application. Citing ALJ Broniak's FFCL, Claimant argued that the claim had been reopened.

19. PALJ Purdie granted Respondents' Motion to Strike on June 25, 2013, stating there had been no Response to the Motion. Claimant filed a Motion to Reconsider this ruling since he had, in fact, filed a Response.

20. Dr. Shea performed the DIME on July 2, 2013. On examination, Dr. Shea noted Claimant had mild Waddell's signs denoting symptom exaggeration, particularly when sitting down or standing up. Limitations in his lumbar ROM were noted, as well as mild restrictions in cervical ROM on right rotation and side bending. Moderate restrictions in right shoulder ROM was found on abduction and internal rotation, with mild restrictions noted on extension, adduction and flexion. Tender points were noted in the right lumbar sacral paraspinal musculature.

Dr. Shea's assessment was: chronic low back pain; degenerative disc disease with moderately severe right to neural foraminal narrowing, especially at the L4-5 levels; her MRI, mild cervical degenerative disc disease; myofascial pain in the lumbar spine, thoracic, and lower cervical regions, right side greater than left; right shoulder impingement; right sacralization of the right L5 vertebrae; moderately restricted range of motion of the lumbar spine. Dr. Shea opined the Claimant reached MMI on February 28, 2006 and that he sustained a 19% whole person impairment rating. The rating included 7% from the specific disorders table 53, with 13% ROM impairment of the lumbar spine. The ALJ found Dr. Shea's ROM measurements met validity criteria, including the straight leg raise measurements. Dr. Shea noted he rated only the body parts involved in the initial lumbar injury of April 8, 2005.

The ALJ found Dr. Shea concluded Claimant's permanent medical impairment was the result of the April 8, 2005 injury and he reviewed both Dr. Smith and Dr. Wunder's records when coming to this conclusion. Dr. Shea had the opportunity to adopt Dr. Smith and Dr. Wunder's opinions that Claimant's pain complaints were related to the degenerative condition of his spine and not the industrial injury, but chose not to reach that conclusion. The ALJ credited Dr. Shea's opinion on causation.[1]

21. On July 10, 2013, PALJ Purdie denied Claimant's Motion to Reconsider her June 25, 2012 Order. PALJ Purdie wrote the following: "Paragraph 2 of the parties' December 22, 2011 Stipulation affirms that Claimant was at MMI as of that date (or earlier) and was receiving maintenance benefits. Claimant abandoned the petition to

[1] Dr. Shea's report was not part of Respondents' Motion for Summary Judgment or Claimant's Objection filed in response. It was not considered by the ALJ when the Motion for Summary Judgment was granted. Claimant moved for admission of the report at the time of Dr. Shea's evidentiary deposition and Respondents did not object. (Shea deposition, page 16:13-20).

reopen by canceling the hearing. The claim remains closed except for maintenance medical benefits".

22. On August 7, 2013, Respondents filed an Application for Hearing and Notice to Set endorsing the issues of "PPD, penalties for failure to comply with ALJ Purdie's June 25, 2012 and July 10, 2012 orders, petition to reopen if necessary, and if necessary the Respondents' motion to overcome the opinion of the Division evaluator". Claimant filed a Response to the Application for Hearing endorsing the issues of PPD, issue preclusion and appeal of PALJ Purdie's Order of July 10, 2013.

23. After a prehearing conference, Judge Goldstein issued an Order on October 24, 2013 concluding that the issues of PPD and penalties "should be bifurcated from issues set to be determined at the hearing scheduled to commence on November 8, 2013". Judge Goldstein concluded that it would be a waste of judicial and party resources to address these issues while there are "genuine issues of law and fact" concerning (1) whether the December 22, 2011 stipulation of the parties included an agreement to reopen the claim; (2) whether ALJ Brondiak's [sic] order confirmed that the matter was reopened, as opposed to only ruling that a DIME would be jurisdictionally required 'if' the matter had been reopened; (3) whether, if the claim was reopened, Respondents had a duty to file a final admission of liability or notice and proposal within thirty (30) days of Dr. Smith's November 12, 2012 report; whether, if they had that duty, they should now be compelled to file a final admission of liability; and whether, in the absence of the FAL, Claimant is jurisdictionally barred from pursuing the DIME".

24. The case was submitted to ALJ Cain on stipulated facts and position statements. On December 12, 2013, ALJ Cain entered Findings of Fact, Conclusions of Law, and Order (FFCL)[2] and concluded that the December 22, 2011 Stipulation was ambiguous as to whether the parties agreed to reopen the claim and did not unequivocally establish that they intended to do so. Part of ALJ Cain's reasoning was that the December 22, 2011 Stipulation did not explicitly state it was reopening the claim.[3] ALJ Cain found it was plausible to construe the December 22, 2011 Stipulation as a form of partial settlement of issues related to the Petition to Reopen, without any agreement or admission that the claim was reopened. Therefore, ALJ Cain concluded the Stipulation was ambiguous with respect to the parties' intent concerning the reopening of the claim. ALJ Cain also found ALJ Broniak's FFCL, dated February 8, 2013, did not determine that the claim was reopened. Further, ALJ Cain determined ALJ Broniak's Order had no preclusive or determinative effect.

In his Order, ALJ Cain stated the claim for benefits in WC 4-679-322-03 was not reopened by the Stipulation of the parties, dated December 22, 2011. ALJ Cain held

[2] The Findings of Fact, Conclusions of Law and Order issued by ALJ Cain were admitted into evidence (as Exhibit D), as were the PHC Orders issued by PALJ Purdie and PALJ Goldstein. The Findings of Fact, Conclusions of Law and Order issued by ALJ Broniak was also admitted as Exhibit C.

[3] Exhibit D, p. 23.

that the Order of ALJ Broniak dated February 8, 2013 did not determine that the claim was reopened and the claim for the April 2005 injury remained closed pursuant to the Final Admission of Liability filed on March 27, 2008.

25. A hearing was held on May 16, 2014 before ALJ Broniak. The issues set for determination were whether this workers' compensation claim has remained open, closed, or whether it was reopened. Also listed as an issue for adjudication was whether Claimant was entitled to additional permanent partial disability benefits and whether penalties should be imposed against the Claimant for his failure to comply with PALJ Purdie's orders.

On February 5, 2015, ALJ Broniak determined the claim was not open and has "never been reopened". (Finding of Fact 29). The FFCL found that no Petition to Reopen had been filed with DOWC since March 2011. (Finding of Fact 27). The Order specified Claimant had not properly filed a Petition to Reopen and did not address whether his condition worsened. The Order provided in pertinent part:

"Claimant's workers' compensation claim is closed, and has been pursuant to the March 28, 2008 final admission of liability. Thus, as a matter of law, the issue of whether Claimant should receive an increase in his PPD award cannot be determined at this time".[4]

ALJ Broniak also found Claimant did not violate PALJ Purdie's Orders of June 25 and July 10, 2013 and denied the request for penalties.

26. Claimant and Respondents were represented by counsel at the May 16, 2014 hearing. There was no appeal of ALJ Broniak's February 5, 2015 Order.

27. Claimant filed an Application for Hearing and Notice to Set on April 23, 2015, listing as the issues to be determined: "medical benefits, petition to reopen claim, permanent partial benefits and *Grover* medicals". Respondents filed a Response to Application for Hearing, listing statute of limitations, waiver, estoppel and *res judicata* as the issues to be determined. The Response also specified: "Case is closed; Petition to reopen is necessary and whether the issues endorsed by Claimant are ripe for adjudication".

28. On or about August 10, 2015, Respondents filed a Motion for Summary Judgment, arguing the Petition to Reopen and claim for PPD benefits were barred by the statute of limitations. Claimant filed a timely Objection to the Motion for Summary Judgment on August 25, 2015.

29. On October 19, 2015, an amended Order was issued granting the Motion for Summary Judgment. Claimant filed a timely appeal of the Order.

[4] Exhibit C, p.16.

30. On February 11, 2016, the Industrial Claim Appeals Office ("ICAO") issued an Order of Remand, determining that summary judgment was not proper and an evidentiary hearing needed to be held regarding factual issues. The factual issues included the effect of the January 2012 Stipulation and whether Claimant withdrew of the July 23, 2012 Application for Hearing. Whether Claimant properly filed a Petition to Reopen and the effect of ALJ Broniak's February 5, 2015 Order were also deemed factual disputes. Following a Status Conference on May 12, 2016, the hearing was held on August 22, 2016.

FURTHER FINDINGS OF FACT

31. On July 27, 2010, Claimant was evaluated at the North Colorado Medical Center Emergency Room and was examined by John Hurst, M.D. He complained of increased low back pain related to his 2005 work injury. X-rays showed no fractures, subluxation, bony lesions, spondylosis or spondylolisthesis in the lumbar spine. The diagnosis was: exacerbation of lumbar pain. Dr. Hurst stated he was unsure if this was related to the original injury and referred Claimant back to Employer.

32. Records from Employer's in-house clinic were admitted, starting with an evaluation that took place on January 20, 2011. Sharp pain was noted in Claimant's neck, shoulder blade, and right arm. The case of the pain was listed as pushing/pulling. Full ROM was noted, although the name of the examiner was not listed. On January 28, 2011, Claimant returned to the clinic and full ROM, with mild tenderness and pain of 4/10 were noted. Claimant missed work on January 29, 30, 31 and February 1, 2011.

33. Claimant was evaluated by Dr. Dhupar on March 1, 2011. He was noted to have a five-year history of right neck and right arm pain radiating to long finger. His symptoms were described as chronic, but progressively worse over the last five months. On examination, Claimant ambulated with a slightly antalgic gait. He was unable to toe walk, heel walk or perform tandem gait. The ALJ noted that these were objective signs of a worsening of condition. Dr. Dhupar's impression was: Claimant was a 45-year-old male with mechanical low back pain, right leg pain, neck pain and right arm pain. He was to follow-up after the MRI was completed.

34. On March 9, 2011, Claimant underwent a lumbar MRI. The films were read by Michael Bennett, M.D., whose impression was: severe right foraminal narrowing at L4-L5, with nerve compression; lateral recess narrowing at L4-L5, could affect the traversing right L5 nerve root; left L5 spondylolisthesis, without listhesis.

35. The ALJ finds that Claimant's March 28, 2011 Petition to Reopen was filed five years, eleven months and twenty days after the April 8, 2005 date of injury. The Petition to Reopen was timely filed within the limitation period specified by § 8-43-303(1), C.R.S.[5]

[5] The ALJ noted the language of paragraph 2 in the 2012 Stipulation stated the parties stipulated the Petition to Reopen was filed in a timely fashion. Respondents did not contradict this, either by way of their hearing submissions or post-hearing Position Statement.

36. Claimant was examined by Cathy Smith M.D. on June 16, 2011. The history of Claimant's April 5, 2005 injury and his treatment were reviewed by Dr. Smith. Claimant said he felt better for approximately 6-12 months, but began having increased low back pain, as well as mid-back and neck pain. On examination, Dr. Smith noted decreased lumbar lordosis, along with pain with direct palpation over the right lower cervical area and right periscapular area, as well as right thoracic ribs. Claimant had pain with direct palpation over the right L5-S1 area.

Dr. Smith's impression was: lumbar strain, with alternating right and left leg pain, intermittent, with possible facet dysfunction status post work-related slip and twist injury 4/8/05; chronic low back pain with intermittent complaints of increased low back pain 2007, as well as 2010-11; mid back pain reported in 2007 without new injury, not related to the 4/8/05 incident; cervical pain with right arm pain in 2011, with MRI showing mild left foraminal narrowing, C3-4 without central stenosis. Dr. Smith recommended a follow-up PT evaluation for Claimant, with six visits of manipulative therapy and review of home exercise program. Claimant also wished to proceed with facet injections and he was referred to Dr. Hompland. His permanent work restrictions were continued and Dr. Smith recommended a job site evaluation.

37. On June 20, 2011, Claimant was examined by John Hughes, M.D., at the request of his attorney. On examination, he was complaining of right shoulder and elbow pain, as well as right-sided spine pain and tenderness extending from his right eye through his mid-and low back. He also had right knee and ankle pain, which was described as having a stabbing quality. On examination, Claimant's cervical spine had superficial touch tenderness of the right superomedial scapular border. Cervical spine R0M was limited. Claimant's upper extremity had limited ROM, on flexion and extension, which Dr. Hughes described as inconsistent. Claimant's lumbar spine ROM was quite guarded, as well as variable.

Dr. Hughes' assessment included: general asymmetry of L5, with sacralization on the right and lumbarization on the left, along with hypoplastic posterior elements, as described by Dr. van den Hoven. Claimant was also diagnosed with lumbar sprain/strain, with development of symptomatic degenerative disc disease and L5 radiculitis, as described by Dr. Viola; progressive degenerative spondylolisthesis, with development of severe right foraminal narrowing at L4-L5, as described in the MRI report of March 9, 2011. With regard to the right upper extremity, right shoulder pain and mobility restriction an unclear etiology was noted, along with right lateral epicondylitis. Claimant was diagnosed with cervical spondylosis; mild uncovertebral spurring and facet arthrosis, most notably present on the left at C3-C4; mild hand osteoarthritis and somatization behaviors.

Dr. Hughes opined Claimant sustained a natural progression of injury-related degenerative changes in his lumbar spine, present at the L4-L5 level, which were related to his initial work injury of April 8, 2005. The ALJ found Dr. Hughes' opinion on causation to be persuasive.

38. Claimant returned to Dr. Hompland on November 15, 2011, complaining of low back and leg pain. At that time, Dr. Hompland reviewed his MRIs in detail. Dr. Hompland's impression was: probable right L5 and possibly L4 radiculitis, secondary to foraminal encroachment at L4-L5 and lateral recess stenosis, as identified on the MRI. Claimant did not wish to proceed with additional injections and was referred to Dr. Dhupar/Dr. Smith for a surgical evaluation. The ALJ noted Dr. Hompland's opinion regarding Claimant's diagnosis was based on the MRI and differed from Dr. Smith's diagnosis.

39. Claimant returned to Dr. Smith on October 3, 2012 and November 12, 2012. Dr. Smith reviewed a video of Claimant's job duties and said Claimant was not working in an awkward position and was working well within his permanent restrictions. On review of the video, Dr. Smith also noted that Claimant's use of the knife and throwing product onto the conveyor would not explain his low back pain. The ALJ noted Dr. there was no indication Dr. Smith had information concerning the frequency of Claimant's breaks in that position with Employer.

Dr. Smith reviewed the repeat MRI of March 9, 2011 which was positive for severe right foraminal narrowing, L4-5, with nerve root compression at the right L4 and L5 nerve roots, left L5 spondylolysis without listhesis. Dr. Smith opined the changes would be expected as a natural progression of the underlying degenerative and congenital condition found in the lumbar spine. Based on the MRI results and her examination of Claimant, Dr. Smith found that Claimant remained at MMI with no change in his permanent impairment. Dr. Smith recommended no change in Claimant's work restrictions.

40. On October 25, 2012, Claimant was evaluated by Jeffrey Wunder, M.D., at the request of Respondents. Claimant was complaining of pain on his right side of his back up to his neck. He also reported numbness in his right index finger. On examination, hyperkyphosis was noted in the thoracic spine, but no tenderness was noted in that area. Claimant reported diffuse muscular tenderness right of midline and in the parascapular region. He complained of tenderness right of midline in the lumbar spine, but no palpable vertebral muscle spasm was noted. Dr. Wunder's impression was: nonspecific low back pain; lumbar degenerative disc disease; right sacralization, right L5.

Dr. Wunder opined Claimant was still at MMI and agreed with Dr. Ashberger's impairment. He noted the physical examination was inconsistent with what he observed in terms of lumbar ROM. Dr. Wunder did not believe the incident of April 8, 2005 caused a worsening of his lumbar MRI and disagreed Claimant's condition had worsened. Dr. Wunder was in agreement with Dr. Smith concerning the congenital findings documented in 2005 and 2008, along with the natural progression of same. The ALJ noted Dr. Wunder did not specifically consider the question of whether Claimant's job duties had increased, but adopted Dr. Smith's conclusion that Claimant was working within his restrictions. Dr. Wunder did not do a formal impairment rating at the time of the IME. Dr. Wunder's opinions were less persuasive than those offered by Dr. Hughes.

41. Video surveillance of the Claimant was admitted into evidence.[6] It included surveillance taken on the following days:

- November 18, 2012 at 3:05 PM. Claimant was seen walking into a house and opened the door with his left hand. He was not walking quickly or slowly.

- November 21, 2012 at 2:11 PM. Claimant was seen walking to the parking lot, holding a plastic bag in one hand and what could be a lunch box. He was also drinking water. He walked relatively slowly and got into a minivan.

- November 21, 2012 at 2:11 PM. Claimant walked into a store, got back into a minivan and drove away.

- November 28, 2012 at 9:50 AM. Claimant was seen walking into a store, holding hands with a young girl. Slowly jogged as he approached the entrance to the store. Claimant exited the store and put plastic bags in the back of a minivan, using primarily his right hand.

- November 28, 2012 at 10:13AM. Claimant entered/exited another store. He picked up a young child at the minivan.

- November 28, 2012 at 10:50 AM. Claimant returned home and held the door while various young people unloaded the minivan. Claimant carried one load of plastic bags into the house, holding two or three in each hand, respectively.

The ALJ found Claimant performed the above activities, as depicted in the videos. Claimant did not appear to be in physical distress at the various dates/times shown. The ALJ was not able to conclude Claimant exceeded his restrictions while doing the activities at the various time shown. In addition, the ALJ did not derive any conclusions regarding whether Claimant's condition worsened from this video.

42. Claimant testified at the December 7, 2012 hearing that his symptoms had increased since 2008. He had a lot of pain in his back, as well as on one side.[7] Claimant stated he was working harder than before in his job, which included specifically putting meat on a conveyor above him.[8] Claimant stated his pain was stronger and his headaches were worse. He took more Advil. Claimant testified he was given a break at 9:00 a.m. and 12:00 p.m. He was not given a break to sit down five minutes of every hour, as required by his permanent restrictions.

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[6] Exhibit Z.

[7] December 7, 2012 Hearing Transcript ("Hearing Tr.") p. 25:7-14.

[8] Hearing Tr. p. 30:4-7.

43. At the December 2012 hearing, Dr. Wunder was qualified as an expert in Physical Medicine and Rehabilitation, along with pain medicine. He is Level II accredited pursuant to the WCRP. Dr. Wunder testified regarding his findings at the time of the October 26, 2012 IME. He also reviewed the surveillance video of Claimant. Dr. Wunder noted there were no pain behaviors by Claimant in the video.

Dr. Wunder testified Claimant's diagnoses were: non-specific low back pain, lumbar degenerative disc disease and sacralization to the right side of the L5 root. This last diagnosis was related to congenital abnormalities in his spine. The changes were as a result of aging, as opposed to an injury and this caused the discs to change.

Dr. Wunder testified Claimant had limited ROM on examination, which was not consistent with observations he made before the examination. Claimant was able to walk around, get up from a sitting position, but then had trouble doing so on examination. Dr. Wunder also opined that Claimant's job duties would not worsen the condition of his lumbar spine. He cited the study attached to his report. Dr. Wunder opined there was no increased impairment to Claimant's lumbar spine.

44. The ALJ found Dr. Shea reviewed the IME reports issued by Dr. Wunder and Dr. Hughes, along with Dr. Aschberger's DIME reports when he evaluated Claimant on July 2, 2013.

45. On November 1, 2013, Dr. Wunder issued a supplemental report, after reviewing the DOWC IME report from Brian Shea, D.O. Dr. Wunder noted Claimant reported low back pain, which was essentially unchanged over seven years. He also said at the time of the DIME, Dr. Aschberger gave a rating of 5% of the basis of Table 53, as the MRI showed only mild degenerative disease. The primary area of Dr. Wunder's disagreement was Dr. Shea, as the DIME examiner relied on the 2011 MRI scan, which showed progressive degenerative disease and Dr. Wunder stated this was an age-related progression. He did not believe the 7% Table 53 impairment could be justified.

Dr. Wunder also opined Dr. Shea neglected to compare his ROM measurements with those done in the past. Dr. Wunder did not indicate whether this was required for evaluation of Claimant's medical impairment under the AMA Guides to the Evaluation of Permanent Impairment (Third Edition revised). The ALJ noted Dr. Wunder did not find that the ROM measurements done by Dr. Shea were invalid. The ALJ concluded Dr. Wunder expressed a different opinion regarding Claimant's medical impairment than the opinion offered by Dr. Shea.

46. The Prehearing Orders issued by PALJ Purdie on June 25 and July 10, 2013 were superseded by the FFCLs issued by ALJ Cain on December 12, 2013 and ALJ Broniak on February 5, 2015, respectively.

47. The ALJ concludes that the December 12, 2013 FFCL issued by ALJ Cain determined the 2012 Stipulation did not reopen the case, which remained closed pursuant to the FAL issued on March 27, 2008. The ALJ also determined that when ALJ Cain made this determination both Claimant and Respondents were represented at the hearing and had the opportunity to present evidence on the March 28, 2011 Petition to Reopen and the 2012 Stipulation.

48. Dr. Wunder performed a follow-up IME at the request of Respondents on May 26, 2016. Since Dr. Wunder's initial IME, Claimant underwent the DIME with Dr. Shea, as well as evaluations by Dr. Smith including one on October 9, 2014 for a hand injury. Dr. Smith also saw Claimant on January 12, 2015 and her report referenced electrodiagnostic studies were related to peripheral neuropathy suggestive of hereditary sensory for polyneuropathy and diabetic neuropathy.[9]

Claimant indicated he had not received treatment for his low back since 2012 and reported pain on the right side of his back, extending from the right scapular area down to the right foot. He also reported pain radiating down the lateral right lower extremity to the heel. On examination, Claimant's thoracic spine revealed increased kyphosis, but no midline or periscapular tenderness. Claimant's lumbar spine had normal spinal contours, with tenderness noted in the central to right sacrum. Sacroiliac joint tests were noted to be negative. Claimant had 2/5 Waddell findings. Dr. Wunder's impression was: mechanical low back pain; progressive lumbar degenerative disease.

Dr. Wunder noted limitations in Claimant's ROM in the lumbar spine. He commented there was a reduction in the lumbar ROM, which corresponded to the mobility measurements taken by Dr. Shea. He opined this was related to the progressive degenerative cascade, which correlated to increased symptoms with increased use. Dr. Wunder discussed Dr. Hughes' opinion that the natural progression of degenerative disease of Claimant's lumbar spine was attributed the injury. He noted Dr. Smith disagreed with that opinion and he agreed with her assessment. Dr. Wunder opined there had not been a worsening of Claimant's condition over time and did not believe any ongoing maintenance treatment would be related to the April 8, 2005 injury.

49. Claimant testified in the August 22, 2016 hearing he continues to experience low back pain. The pain went down his leg and limited his activities.

50. In his evidentiary deposition on September 20, 2016, Dr. Wunder continued his expert testimony. Dr. Wunder noted that in a study of identical twins, one half of the group sustained significant back injury or trauma and the other did not.[10] The conclusion was that significant back injury or trauma did not have a role in the progression of degenerative disc disease.

[9] Exhibit M, p. 94.

[10] This study was "The Role of Back Injury or Trauma in Lumbar Disc Degeneration: An Exposure-discordant Twin Study, Spine (May 12, 2016).

Dr. Wunder noted Claimant had mild symptom magnification (Waddell's signs) at the time the DIME was performed by Dr. Shea. Dr. Shea measured 15° straight leg raising at a normal gait, which he thought was "probably" not valid.

On cross-examination, Dr. Wunder agreed that there was always a possibility that studies could be disputed. He agreed the city of twins did not indicate the type of injury or degree of impairment. Dr. Wunder stated if Claimant's restrictions were not followed, this could cause increased symptoms. He also testified Claimant's presentation in 2016 as no longer having constant pain was at variance with the diagnosis of progressive degenerative disc disease.[11]

Dr. Wunder agreed that Claimant's Table 53 impairment had increased from 5% to 7%. However, Dr. Wunder believed this was a result of the degenerative changes, as opposed to the natural progression of the injury. Dr. Wunder did not do formal ROM testing of Claimant at the time of his second evaluation, other than the straight leg raise testing. The ALJ found Dr. Wunder's conclusions regarding impairment were less persuasive than those offered by Dr. Shea.

51. The 2012 Stipulation did not constitute a waiver of Claimant's right to seek an adjudication of the Petition to Reopen.

52. None of the prior FFCLs issued by ALJ Broniak and ALJ Cain in the case made a factual determination on the issue of whether Claimant met his burden of proof for the Petition to Reopen.

53. Claimant proved by a preponderance of the evidence that his condition worsened.

54. Respondents failed to overcome the opinion of Dr. Shea by clear and convincing evidence.

55. There was no evidence in the record that Claimant required treatment after Dr. Shea's July 2, 2013 evaluation.

56. Evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S. (2016), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

[11] Shea deposition pages 26:19-27:2.

litigation. § 8-40-102(1), C.R.S. (2016). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. (2016).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Legal Effect of Prior Orders Issued in the Case

As noted *supra,* this case was the subject of multiple hearings and Orders. The threshold question considered by the ALJ was the impact of the December 12, 2013 FFCL issued by ALJ Cain, as well as the February 8, 2013 and February 5, 2015 Broniak FFCLs. The ALJ determined Judge Cain's prior Order concluded the claim was not reopened by virtue of the January 2012 Stipulation and there was no basis to disturb this finding. Accordingly, the ALJ rejected Claimant's argument was reopened at that time. ALJ Cain's reasoned this Stipulation was ambiguous and this was credited by the undersigned. (Finding of Fact 11). In addition, the Stipulation did not, by its terms, specifically provide for reopening of the claim. Therefore, the case remained closed as of the December 12, 2013 findings of Fact, Conclusions of Law and Order.

Likewise, the ALJ determined ALJ Broniak's Orders did not constitute an adjudication on the merits of reopening. By their very terms, both of ALJ Broniak's Orders did not make factual findings on the merits of the reopening the claim. (Findings of Fact 14 and 25). More particularly, in the February 8, 2013 FFCL, ALJ Broniak concluded she lacked the authority to resolve the medical impairment issue, since claimant had not obtained a DIME. (Finding of Fact 14). In the February 5, 2015 Order, ALJ Broniak determined the claim was not opened and had never been reopened. (Finding of Fact 25).

The ALJ found the previous orders issued in the case can be harmonized and the discretionary doctrine of law of the case applies in this instance. Under this doctrine, a court will generally adhere to a prior ruling on a question of law that it made at an earlier stage of the same litigation. *Giampapa v. Am. Family Mut. Ins. Co.,* 64 P.3d 230, 243 (Colo. 2003). There is discretion to deviate from the law of the case principle, if the court determines that the prior ruling at issue was no longer sound because of changed conditions, factual errors, intervening changes in the law or

resulting manifest injustice. *Id; People of the City of Aurora, ex rel. State v. Allen, 885 P.2d 207, 212 (Colo. 1994).* The FFCL issued by ALJ Cain constitutes the law of the case concerning the effect of the 2012 Stipulation. In the case at bench, the ALJ determined that the findings with regard to the 2012 Stipulation, namely that it did not reopen the claim, should be adhered to and no reason was presented to vitiate that ruling. (Finding of Fact 47). Likewise, ALJ Broniak determined that the case had never been reopened and there had never been an adjudication on the merits of reopening issue. Under the law of the case doctrine, the under signed ALJ has abided by these previous rulings.

Respondents argued that by virtue of the 2012 Stipulation, Claimant waived his right to file a Petition to Reopen. Respondents pointed to the cancellation of hearing made after the Stipulation was entered into and approved by PALJ Purdie in support this argument. The ALJ concluded there was nothing in the record that indicated an knowing, voluntary, unequivocal waiver on the part of Claimant to have his right to proceed to hearing on the Petition to Reopen the claim. (Finding of Fact 51). Indeed, Respondents did not contest the fact that Claimant's Petition to Reopen was filed in a timely fashion and that no formal adjudication was made on the Petition to Reopen. Nothing in the Order issued by ALJ Cain contravened this conclusion. The ALJ therefore concluded Claimant did not waive his right to proceed on the Petition to Reopen.

Reopening

§ 8-43-303(1), C.R.S. (2016), provides that an award may be reopened on the ground of, *inter alia*, change in condition. Claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. § 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the Claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1086 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for

treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

The question of whether Claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

Claimant argued his condition worsened, as evidenced by his return to the doctor in July 2010-March 2011. Claimant also asserted there was objective evidence of a worsening in the form of the MRI findings in March 2011. Respondents argued, relying on the opinions of Dr. Smith and Dr. Wunder, that Claimant's condition had not worsened as a result of the work-related injury, but rather the progression of his degenerative condition. Respondents also asserted Claimant's evaluations were characterized by symptom magnification, which called into question whether his condition had in fact worsened.

As found, the ALJ determined Claimant filed a timely Petition to Reopen. (Finding of Fact 52). There were prior hearings held in the case, however, none of the prior orders determined whether Claimant satisfied his burden of proof on reopening. As determined in Finding of Fact 53, the ALJ concluded Claimant met his burden of proof and established a worsening of condition. This conclusion was based, first on the medical evidence in the case. There was evidence of increased symptoms and treatment for those symptoms through Claimant's ATPs. As found, Claimant was evaluated in the Emergency Department of North Suburban Medical Center, complaining of increased low back symptoms. (Finding of Fact 31). The increased symptoms were documented in Employer's clinic notes, as well as by Dr. Smith. (Finding of Fact 32, 36). Dr. Dhupar also noted increasing pain over the past five (5) months and recommended treatment. (Finding of Fact 33). These increased symptoms led to evaluations and treatment provided by ATPs, as found in Findings of Fact 33-36 and 38-39.

In this regard, Dr. Hughes's opinion was persuasive to the Judge that there was a causal link between the increased symptoms and the Claimant's April 2005 work-related injury. Dr. Hughes stated his belief that Claimant's symptoms were the result of the work-related injury. (Finding of Fact 37). Accordingly, the ALJ was satisfied Claimant met his burden to establish a causal link between the industrial injury and the consequences, including further degeneration of his lumbar spine. *Jarosinski v. Industrial Claim Appeals Office, supra,* 62 P.3d at 1086.

Second, Claimant's testimony established a link between a worsening of Claimant's symptoms and his job duties. There was direct evidence that Claimant was not provided the breaks specified by his permanent restrictions. As found, there was no evidence in the record that Claimant had a prior injury to his low back and the ALJ

determined that the consequences of the injury, including an aggravation and worsening of the underlying condition was attributable to the original injury. Thus, the testimony of Claimant helped to establish that his increased symptoms were attributable to his low back injury in April 2005.

Third, the ALJ determined the issue of Claimant's worsening of condition as referenced by the Petition to Reopen was properly evaluated as of the time the Petition to Reopen was filed in March 2011. Respondents did not argue this point, either at hearing or in post-hearing submissions.[12] Based upon the evidence admitted at hearing, the ALJ determined Claimant's increased symptoms were the result of his injury, increased job duties and the treatment required to address the symptoms, as documented in the evaluations by his ATPs. This evidence persuaded the ALJ that Claimant proved that his condition was worse than when Dr. Aschberger performed a second DIME in 2008.

Statute of Limitations

The ALJ then considered Respondents' argument that more than six years had passed since the date of injury and more than two years had passed since the last indemnity payment. Respondents averred Claimant was barred, as a matter of law, from reopening his claim to seek any additional indemnity benefits. The first part of Respondents' argument was resolved by the Judge's finding that the Petition to Reopen was filed in a timely fashion, pursuant to § 8-43-303(1), C.R.S. (2016). Respondents did not contest that the Petition to Reopen was timely filed and the ALJ considered Claimant's treatment in the 2010-2013 timeframe when concluding his condition had worsened. In addition, Respondents conceded if the claim was reopened under this section, additional indemnity benefits may be paid.

The Court did not reach the question of whether the claim for additional PPD benefits was barred by § 8-43-303(2)(a), C.R.S., which allows a claim to be reopened within two (2) years from the date of the last disability payment where there is a change in condition. Respondents agreed if a claim was reopened under either subsection (1) or (2)(a), additional indemnity benefits could be paid.

Therefore, the ALJ determined Claimant adduced sufficient evident to show by a preponderance of the evidence that his condition was worsened. The claim of reopening was not barred by the applicable statute of limitations and Claimant had the right to a further DIME, as this was within the ambit of ALJ Broniak's February 8, 2013 Order. Claimant also established that he was entitled to the increased medical impairment rating, as found by Dr. Shea. The inquiry then turned into Respondents attempt to overcome Dr. Shea's opinion.

[12] Respondents' counsel agreed the issue of worsening of condition went back to 2011 in Dr. Shea's deposition, page 14:7-10.

Legal Standard for Overcoming the DIME

In resolving the issues, the ALJ notes the question of whether Respondents overcame Dr. Shea's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. (2016); *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence". § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*. The elevated burden is evidence of the Colorado Legislature's intent to limit overcoming the DIME physician's opinion to those cases where it is more probable than not that the opinion was incorrect. In the case at bar, the ALJ determined Respondents failed to meet this burden of proof and establish that Dr. Shea's opinion was more probably incorrect.

As found, Dr. Shea's opinion was supported by the medical evidence. In this regard, Dr. Shea examined Claimant and confirmed he remained at MMI, but assessed a higher medical impairment rating, based upon ROM testing. (Finding of Fact 20). Dr. Shea specifically noted he rated only Claimant's body parts which were injured in the April 8, 2005 injury. Implicit in Dr. Shea's opinion was a finding that the permanent medical impairment was caused by this injury.

As found, Dr. Shea's evaluation occurred after Claimant experienced and increased symptoms and required additional treatment. (Finding of Fact 20). Dr. Shea also had the opportunity to consider whether Claimant exaggerated his symptoms and made findings based upon positive Waddell's signs. *Id*. Nonetheless, despite mildly positive Waddell's findings, Dr. Shea determined Claimant was entitled to an increased medical impairment rating. There was no evidence presented that Dr. Shea's range of

motion testing was invalid and indeed it met the validity criteria as documented in the worksheets. (Finding of Fact 20).

In addition, Dr. Shea's diagnoses and opinions were supported by Dr. Hughes and objective findings in the MRI. Dr. Shea had the benefit of reviewing Dr. Hughes report and the 2011 MRI. In addition, Dr. Shea also reviewed Dr. Wunder's initial IME, as well as Dr. Smith's evaluations in 2011-12. Dr. Shea concluded Claimant was entitled to a higher impairment rating. (Finding of Fact 44).

In coming to this conclusion, the ALJ considered Respondents' argument that Dr. Smith should not have relied upon the latter MRI films and gone back to the original date of MMI. Respondents also pointed to the opinions of Drs. Smith and Dr. Wunder that Claimant experienced symptoms as a result of degeneration in his lumbar spine and not the industrial injury. Based on this evidence, Respondents asserted Claimant was not entitled to additional permanency. The ALJ determined these represented different medical opinions, but did not lead to the conclusion that Dr. Shea was more probably incorrect in his findings and opinions. As such, Claimant is entitled to the permanent medical impairment rating assigned by Dr. Shea and PPD benefits based upon that rating.

ORDER

It is therefore ordered:

1. Claimant's claim is reopened.

2. Claimant remains at MMI.

3. Respondents shall pay PPD benefits based upon the medical impairment rating of 19% issued by the DIME physician, Dr. Shea.

4. Respondents are entitled to a credit for PPD benefits previously paid.

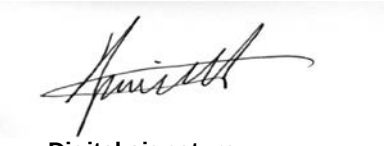
5. Respondents shall pay statutory interest of eight percent on all sums ordered, pursuant to § 8-43-410(2) C.R.S. (2016).

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to

follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 23, 2018



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she sustained a compensable injury on July 12, 2017?

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to all reasonable, necessary, and related treatment arising out of the July 12, 2017 incident?

STIPULATIONS

The parties stipulated that if the injury is found compensable, Respondents would pay $26.50 in mileage reimbursement. This stipulation was accepted by the ALJ.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant is employed as a member service supervisor with one of the Employer's Sam's Club warehouse locations in Colorado Springs, Colorado. Claimant's job duties include supervising personnel and assisting customers throughout the Employer's warehouse. She began working there in 2013.

2. Claimant alleges she sustained an injury to her thoracic spine on July 12, 2017. Claimant testified she was moving a soda "BIB," (beverage-in-box), from a shelving unit, which was positioned above her head. She stood on a step stool, making the BIB around eye level. She was pulling it towards her when she felt pain in her right scapula and thoracic spine. Claimant reported the alleged injury and presented to Concentra for treatment. At hearing, she estimated the BIB to weigh around 53 pounds.

3. Claimant has a pre-existing history of pain and treatment for her spine dating back several years. Claimant has treated for her spine with her primary care physicians and has received conservative treatment modalities for a number of years. Claimant has also been prescribed numerous narcotic medications through her primary care physicians for ongoing pain to her spine.

4. On January 5, 2013, Claimant presented to her primary care physicians for chiropractic care. (Ex. A) Claimant completed a patient questionnaire at registration detailing her spine complaints. Claimant noted pain from her neck down through her lumbar spine. Claimant's treating chiropractor specifically noted the location of her pain as C5-C6, T6-T7, and L5-S1. *(Id* at p. 4). A pain diagram depicts pain down the entire cervical region, lower lumbar, and *broadly between both scapulae.* Claimant detailed a

history of pain stemming from car accidents in 2001 and 2004, a fall from 2006, and a prior fibromyalgia diagnosis. (*Id* at p.2). Claimant noted that her pain occurred "every day."

5. Throughout the course of treatment with her chiropractor, Claimant was noted to have pain throughout her spine, including the thoracic spine. On her initial visit, Claimant noted that she was having thoracic spine pain that was an "8" out of 10. (*Id* at p. 6) On a follow-up visit on February 25, 2013, Claimant noted that she was having thoracic spine pain that was a "6" out of 10. (*Id* at p. 11)

6. On March 6, 2013, Claimant went to her primary care physicians at Colorado Pain Relief Center. (Ex. B) Claimant's physicians documented a history of chronic thoracic and lumbar spine back pain with occasional neck pain. (*Id* at p.13) Claimant indicated she takes Vicodin regularly and that chiropractic and acupuncture treatment was not helpful. Claimant's physicians opined that her back pain appears to be muscular and that Claimant had been taking multiple pain medications, (some addictive) for an extended period of time without relief. (*Id* at p.15)

7. On March 17, 2015, Claimant presented to Lynn Huffman, M.D. at Interventional Pain Management for her ongoing pain. (Ex. C, p. 17). Dr. Huffman noted that Claimant was having thoracic spine pain in "upper (thoracic) back upper back above the level of the shoulder blades bilaterally; upper back overlying both shoulder blades; and upper back below the level of the shoulder blades bilaterally…." Claimant noted that her pain was constant from her low back all the way up to her neck. Claimant complained of pain that was an "8" out of 10 despite taking Norco and Soma. (*Id* at p. 20)

8. On May 29, 2015, Claimant presented to Rachael Degurse, M.D. for her ongoing pain complaints. (*Id* at p.34) Dr. Degurse noted that Claimant was having pain in her thoracic area after bending her head forward. Claimant described her pain level in the thoracic spine as "9.5" out of 10. Dr. Degurse refilled Claimant's prescriptions for Soma and Percocet, and recommended that Claimant undergo repeat radiofrequency ablations. (*Id* at p. 36)

9. From 2015 through the date of the alleged incident, Claimant continued to treat with her primary care physicians at Interventional Pain Management. (Ex. C) Claimant's treating physicians have consistently noted chronic pain throughout her spine, including her thoracic spine and shoulder blades. Despite her reported pain, Claimant's primary care physicians noted that she continued to work full time for Employer.

10. Claimant presented for a follow-up visit to Dr. Degurse on December 1, 2016. (*Id* at p. 83) Claimant indicated she was having neck pain that had gotten worse over the past month. Claimant noted that her pain began in the right trapezius area and radiated towards the base of her skull. Dr. Degurse noted that Claimant was taking Opana, Meloxicam, Soma, and Zanaflex for pain. Dr. Degurse noted that Claimant's

cervical spine MRI results were relatively benign. (*Id* at p. 85). Dr. Degurse recommended that Claimant undergo bilateral occipital nerve blocks.

11. On May 11, 2017, Claimant again presented to Dr. Degurse. (*Id* at p. 92) Claimant noted continued pain throughout her spine. Claimant noted that she was not able to obtain Butrans due to not being able to afford the medication. Dr. Degurse noted that Claimant was having flare-ups in her chronic spine pain, which included the thoracic spine and shoulder blade regions. Dr. Degurse further noted that Claimant had not undergone thoracic spine injections to help alleviate her pain.

12. On July 6, 2017, Claimant was seen by Dr. Degurse for her ongoing chronic pain. (Ex. C at p. 95). Dr. Degurse increased Claimant's Opana prescription and continued claimant on Zanflex. Dr. Degurse also recommended that the claimant undergo translaminar steroid injections to the T12-L1 portion of the spine. Dr. Degurse noted under "Assessment" that Claimant was currently suffering from "..intervertebral disc degeneration, thoracic region". *Id*

13. Claimant first presented to Concentra following her alleged 7/12/17 injury on July 17, 2017. (Ex. D, p. 101) Claimant noted that that she was having right sided mid-back pain following lifting a "pallet of soda." Claimant reported a history of nerve burning in her low back and upper cervical but denied any surgeries. Claimant was referred for therapy to alleviate her pain.

14. On July 21, 2017, Claimant had a follow-up visit with Daniel Peterson, M.D. (Ex. D at p.104). Dr. Peterson noted that Claimant had previously indicated no prior history of thoracic spine pain or mid-back pain prior to her alleged July 12, 2017 injury. Dr. Peterson was concerned about Claimant's use of multiple narcotic medications without progress in alleviating her pain symptoms. Dr. Peterson indicated he was "worried that the Claimant's thoracic spine will become a chronic issue just like the low back and neck." Dr. Peterson further noted that Claimant had been working regular duty and was doing "fine."

15. On July 27, 2017, Dr. Peterson evaluated Claimant for a follow-up visit. (Ex. D, pp.116-118). Dr. Peterson again noted that Claimant presented with ongoing pain in her thoracic spine and that she had denied prior thoracic spine complaints. Dr. Peterson opined that Claimant was at MMI, without impairment or restrictions. Dr. Peterson further indicated that he believed that the minor strain could not be the cause of the Claimant's ongoing pain complaints. Dr. Peterson opined that Claimant's ongoing fibromyalgia and pre-existing condition was the cause of her continued pain complaints.

16. Claimant was examined by Carlos Cebrian, M.D. on November 13, 2017 for an Independent Medical Examination ("IME") at the request of Respondents. (Ex. E). Dr. Cebrian performed a physical examination of Claimant and was able to review her complete medical records. Dr. Cebrian noted that Claimant described a mechanism of injury involving pulling down a soda "bib" that weighed between "20-25 pounds." (*Id* at p. 121). Dr. Cebrian noted that Claimant denied any prior treatment to the thoracic

spine with her primary care physicians. He noted the inconsistencies in claimant's alleged mechanism of injury to what was described to Dr. Peterson.

17. Dr. Cebrian noted that, contrary to Claimant's statements, she had a significant prior history of thoracic spine pain dating back several years. He further noted that Claimant had undergone multiple forms of treatment to the thoracic spine, and that she had been on multiple forms of narcotics and pain medications to control pain throughout her spine. Dr. Cebrian ultimately concluded that Claimant did not sustain an injury, or an aggravation of her prior spine complaints. He further found that Claimant's subjective complaints were out of proportion to the objective findings. Dr. Cebrian further opined that Claimant's complaints were due to the natural progression of her underlying degenerative spine condition and not due to the alleged incident at work.

18. On February 5, 2018, Claimant presented to Timothy Hall, M.D., for an IME at her request. (Ex. 4). Dr. Hall indicated he reviewed numerous medical records and also noted a prior history of thoracic spine issues. Claimant also described to him moving a box that weighed between 20-25 pounds. Dr. Hall reviewed noted from Claimant's chiropractor and indicated that Claimant had prior lumbar and cervicothoracic pain. Dr. Hall disagreed with Dr. Cebrian that an injury did not occur. He reasoned that there was enough force to create an injury and focused more on Claimant's subjective complaints noting that Claimant appeared to him to be "a reasonable historian to me". *Id.* Dr. Hall opined that Claimant sustained an injury to her thoracic spine and parascapular region. Dr. Hall also noted that before her reported injury "She was not missing work. She was not leaving work early due to 'unbearable' pain as she has on occasion since this event."(Ex. 4, p. 9). Dr. Hall indicated that sometimes one must sometimes rely heavily upon subjective symptoms in diagnosing soft tissue injuries:

> The fact that we cannot see it or feel it or image it does not mean it does not exist, meaning the injury. There are many soft tissue injuries that do not have "objective" findings. (Ex. 4, p. 10).

19. Claimant testified at hearing regarding her alleged injury and pre-existing condition. Claimant indicated she injured her thoracic spine when she moved a soda "bib" from a shelf that was above her. Claimant testified that the alleged injury happened on a Friday and that she waited until Monday to report the injury, hoping it would get better. Claimant testified that she stood up on a ladder to move the box. Claimant described the box as being an 8-inch x 8-inch x 11-inch box that weighed approximately "53 pounds" by her estimate. Claimant testified that the box was at eye-level and directly in front of her when she moved it towards her to get it down from the shelf. Claimant alleges that she felt a pop when moving the box towards her.

20. Claimant testified at hearing that she did not experience pain in her thoracic spine prior to July 12, 2017. Claimant testified that the pain in her spine was to the cervical and lumbar regions only. When asked to describe where her thoracic spine

was relative to her body, Claimant (essentially correctly) testified "cervical is mainly for your upper neck, lumbar is down in the lower region, and thoracic is mainly in your shoulder blade area." Claimant also testified that the pain in her thoracic spine would be as high as "13 out of 10" at times.

21. Dr. Cebrian testified at hearing on behalf of the Respondents. Dr. Cebrian noted the inconsistencies in the Claimant's testimony and what she had described to the other physicians and himself. Dr. Cebrian noted that Claimant had described to him and Dr. Hall a box that weighed "20-25" pounds, whereas Claimant testified in court that the box weighed 53 pounds. Dr. Cebrian noted that Claimant had denied prior thoracic spine pain complaints, although her medical records had numerous instances in which the she was treated for chronic thoracic spine complaints and was on several narcotic medications for her ongoing pain.

22. Dr. Cebrian disagreed with Dr. Hall that Claimant was a reliable historian. He noted the inconsistencies in her pain complaints and her own testimony about having pain that was a 13 out of 10 in her thoracic spine. Dr. Cebrian re-iterated his prior opinions that Claimant did not sustain an injury, and that her subjective complaints have consistently been out of proportion to the objective findings. Dr. Cebrian further opined that Claimant's description of injury at hearing would not involve the muscles in the thoracic region. Dr. Cebrian specifically testified that if Claimant were pulling the box directly out from in front of her as described, it would involve more of the upper extremities than the thoracic spine. Dr. Cebrian indicated that Claimant was having ongoing chronic pain in the thoracic spine and had presented for treatment with her primary care physician six days prior to the date of the alleged incident.

23. Following the hearing, Respondents took the post-hearing evidentiary deposition of Dr. Peterson, Claimant's ATP. Dr. Peterson was shown Claimant's medical records and Dr. Cebrian's IME report. Dr. Peterson noted that Claimant had also denied prior thoracic spine complaints to him. Dr. Peterson confirmed that Claimant had a long-standing pre-existing back condition and had treated on multiple occasions for her thoracic spine. Dr. Peterson agreed with Dr. Cebrian that it was more probable than not that Claimant did not sustain a strain to her thoracic spine. Dr. Peterson opined that his prior suspicions were confirmed that the cause of Claimant's complaints were due to her fibromyalgia, and a natural progression of her underlying degenerative condition. Dr. Peterson agreed with Dr. Cebrian that Claimant did not sustain an injury or aggravation to her thoracic spine or shoulder region.

24. In support of this, Dr. Peterson testified:

> She [Claimant] presents with a mechanism that describes an onset of pain at this particular time of day and a particular day and a particular event. When I examined her, she did on my exam have tenderness at the thoracic spine T4, 5, 6, 7, 8, and 9, but not at the left paraspinal, not at the right paraspinal. No tenderness at the right rhomboid muscle and no tenderness in the left rhomboid

muscle. It was odd that having complained of pain, she didn't have any muscular pain on either side. (Peterson Depo, pp. 18-19).

CONCLUSIONS OF LAW

Based upon the forgoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §*8-40-102(1)*, C.R.S. (2017) A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §*8-42-101*, C.R.S. (2017) A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979)

2. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968). The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

Compensability

3. Whether the Claimant has proven that the conditions of employment caused, or contributed to, a disease is a question of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).

Moreover, if an industrial injury aggravates or accelerates a preexisting condition which causes a need for treatment, the treatment is compensable. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Under §*8-40-201(14)*, C.R.S., the Claimant is not required to prove the conditions of the employment were the sole cause of the disease. Rather, it is sufficient if the Claimant proves the hazards of employment caused, intensified, or aggravated - to some reasonable degree - the disability for which compensation is sought. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993).

4. Claimant's testimony at hearing is at odds with her prior statements given to Dr. Peterson and Dr. Cebrian regarding her prior thoracic spine complaints and treatment. Claimant detailed on numerous office visits to her primary care physicians, chronic thoracic spine pain that extends on occasion into her cervical spine and shoulder blade regions. Claimant correctly confirmed at hearing her understanding of where the thoracic spine was located. This was not simply a misarticulation by an unsophisticated patient. Despite this, Claimant reiterated at hearing that she had never had treatment to this area of her back. While Claimant may have been simply adding drama to emphasize her point, her characterization at hearing of having pain at "13 out of 10" was not helpful. It renders her prior reports of pain levels rather meaningless. Similarly, while Claimant's estimation of the BIB weight could be overlooked, more than doubling its weight at hearing calls her reliability into question. The ALJ finds it highly improbable that boxes designed to routinely replenish soda dispensers would weigh anywhere near 53 pounds.

5. In the final analysis, Dr. Hall correctly articulated that sometimes physicians must rely heavily on the subjective reporting of symptoms by their patients. In his professional judgment, Claimant was a reliable historian. The ALJ does not concur in this instance. Claimant's subjective complaints were indeed out of proportion to her objective symptoms (or lack thereof). The ALJ notes that the Claimant presented to Dr. Degurse six days prior to the alleged incident for treatment of her pre-existing back condition. Claimant's medications were re-filled and Dr. Degurse recommended that the Claimant consider translaminar steroid injections to the T12-L1 portion of the spine. In May 2017, Claimant was noting pain in the same thoracic region that she described at hearing to her primary care physicians. This caused her physicians to increase her narcotic medications to alleviate the flare-up in her pain.

6 The ALJ further finds no evidence that Claimant has missed time from work as a result of her continued pain complaints, despite Dr. Hall's notations to the contrary. Claimant testified at hearing that she has continued to work in a full-duty capacity despite the alleged incident.

7. Claimant has failed to prove that she has sustained a compensable injury as a result of the described incident on July 12, 2017. The ALJ further finds that the claimant did not aggravate her long-standing pre-existing degenerative spine condition as a result of the July 12, 2017 incident. Rather, the ALJ finds the opinions of Dr.

Cebrian and Dr. Peterson credible and persuasive that the Claimant's pain complaints represent a natural progression of her underlying degenerative spine condition.

Medical Benefits and Mileage Reimbursement

8. Claimant has failed to prove compensability. There is no further need to address medical benefits or mileage reimbursement.

ORDER

It is therefore Ordered that:

1. Claimant's request for Workers Compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 27, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that a stellate ganglion block and an evaluation with Dr. Barolat are reasonably necessary treatment after MMI?

FINDINGS OF FACT

1. Claimant suffered admitted injuries to her right upper extremity on June 24, 2016 while delivering pizzas for Employer. She stepped in a pothole and fell on her outstretched right arm. She developed immediate pain and swelling in her right wrist and hand.

2. Claimant went to the Parkview Hospital emergency room the next day. X-rays were negative for fracture of other acute injury, and she was diagnosed with a wrist sprain. Employer referred Claimant to CCOM for authorized treatment, where she primarily saw Dr. Daniel Olson and PA-C Steven Byrne.

3. After a month of splinting and occupational therapy, Claimant still had significant pain, so she was sent for an MRI of the right wrist and hand. The MRI showed a non-displaced fracture at the base of the fourth metacarpal bone, moderate arthritis at the base of the first metacarpal bone, inflammation around the fourth and fifth digits, and an ulnar collateral ligament strain.

4. Claimant started treating with Dr. Karl Larsen, a hand surgeon, on August 1, 2016. Dr. Larsen opined, "[she] has the sequelae of middle, ring and small finger CMC joint sprains and intrinsic sprains. She has a non-displaced ring finger metacarpal base fracture, severe pain and dysfunction associated with this, and may be developing complex regional pain syndrome. I think certainly nothing surgical is noted here. I have recommended that she be evaluated by pain management to see if she would benefit from a stellate block."

5. She saw Dr. Bertram Willman, an interventional pain specialist, on September 2, 2016. Dr. Willman diagnosed complex regional pain syndrome and concurred with Dr. Larsen's recommendation for a stellate ganglion block.

6. Claimant followed up with Dr. Larsen on September 7, 2016 and reported persistent pain. He noted hypersensitivity to palpation of the hand and wrist, and difficultly moving her fingers. Dr. Larsen opined:

> She has pain symptoms that are out of proportion to anything that I would expect off of her MRI. She has some elements that seem consistent with complex regional pain syndrome. Unfortunately, really the treatments that

> we recommended last time have not been fully implemented, so it is hard to judge her response at this point.

7. Dr. Willman performed a right side stellate ganglion block on September 30, 2016. Three days later, PA-C Byrne at CCOM documented "her pain is about 50% better than her last visit." Similarly, on October 5, 2016, Dr. Willman noted Claimant enjoyed approximately 30% pain reduction for a few days until manipulation caused an increase in pain.

8. On October 19, 2016, Dr. Larsen noted:

> She had a stellate ganglion block at the end of August with Dr. Willman that actually cut her pain down significantly but was not long lasting. . . . The best diagnosis I can give her is complex regional pain syndrome. I do not have any interventions that can help her. . . . I think continued pain management with drug treatment dedicated to managing her neuropathic symptoms and consideration of repeat stellate ganglion blockade would be reasonable.

9. Claimant saw Dr. Olson at CCOM on November 10, 2016. He saw no skin mottling, discoloration, or shininess on examination of her right hand. Claimant reacted strongly to light manipulation of her hand and abruptly left the examination room. Dr. Olson though her behavior was "odd" and suspected psychological overlay exacerbating her perception of pain. He released Claimant from his care.

10. Dr. Willman performed a second stellate ganglion block on November 19, 2016.

11. Dr. Olson formally placed Claimant at MMI on December 14, 2016. He opined she had permanent impairment but should be referred to a different Level II physician because he was not comfortable performing the rating.

12. Claimant saw Dr. William Watson for an impairment evaluation on April 11, 2017. She described severe, unremitting pain in the right hand and fingers. She stated her right hand felt cooler than the left hand, and her fingernails on the right hand were "thinner." She told Dr. Watson she did not like anything touching the hand and felt more comfortable holding the hand against her side with her elbow flexed. When Dr. Watson entered the exam room, he noted "she held her hand close to her side" and was wearing a compression glove. On examination, she had "evidence of marked allodynia, hyperalgesia with hyperpathia." Sensation was normal. Dr. Watson saw no atrophy or edema, and "temperature seemed symmetric between the left and right hands." He diagnosed "symptoms of complex regional pain syndrome without verified diagnosis." After reviewing the CRPS MTGs, Dr. Watson credibly and persuasively opined:

> I believe she qualifies for the initial diagnosis of complex regional pain syndrome. Unfortunately she has not had any diagnostic components which have confirmed the complex regional pain syndrome. She has not had comparative x-rays of both extremities, triple phase bone scan, vasomotor

> temperature test to include infrared stress thermography, sudomotor test, autonomic test battery with emphasis on QSART. She has had sensory sympathetic nerve test, sympathetic blocks which have been equivocal. . . . [S]he does not want to do any further testing. Therefore, my provisional diagnosis would be complex regional pain syndrome. Unfortunately we cannot make a final definitive diagnosis because the patient would prefer not to do any further testing.

13. Dr. Watson assigned a 35% whole person impairment utilizing the Spinal Cord and Brain Impairment Values methodology the DOWC recommends for CRPS.

14. Respondents filed a Final Admission of Liability (FAL) based on Dr. Watson's rating on June 19, 2017. The FAL also admitted for reasonably necessary medical treatment after MMI.

15. At present, Claimant sees Dr. Miguel Castrejon for maintenance care. The ALJ was given only one report from Dr. Castrejon, dated November 13, 2017, but it appears he began treating Claimant in approximately June 2017. Dr. Castrejon's diagnoses include CRPS "by history," and "chronic pain." His examination of the right hand showed slight swelling but no temperature abnormalities. Dr. Castrejon appreciated slight skin mottling and decreased wrist range of motion in all planes. He also noted, "extensive hypersensitivity with allodynia making any further examination of the hand and wrist not possible." Dr. Castrejon recommended a stellate ganglion block with Dr. Stephen Ford and referred Claimant to Dr. Giancarlo Barolat "regarding the option of a peripheral stimulator."

16. Claimant proved by a preponderance of the evidence that the stellate ganglion block and the consultation with Dr. Barolat are reasonably necessary *"Grover"* treatment for her industrial injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment after MMI that is reasonably necessary to relieve the effects of the injury or prevent deterioration of the claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Compensable medical treatment includes diagnostic testing to investigate the injury-related diagnosis or suggest a further course of treatment. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents, and the claimant must prove entitlement to benefits by a preponderance of the evidence. Section 8-43-201. As the arbiter of disputes regarding treatment, the ALJ may consider the MTGs as an evidentiary tool but is not bound by them when determining whether requested medical treatment is reasonably necessary or injury-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). As

found, Claimant proved by a preponderance of the evidence that Dr. Castrejon's referrals for a stellate ganglion block and consideration of peripheral nerve stimulation are reasonably necessary *"Grover"* treatment for the industrial injury.

Respondents dispute Dr. Castrejon's recommendations on the theory that Claimant has "not actually been diagnosed with CRPS." Respondents also argue stellate blocks are not reasonable because the previous blocks were "ineffective."

The CRPS MTGs differentiate between "clinical CRPS" and "confirmed CRPS" depending on the strength of evidence to support the diagnosis. A claimant satisfies the criteria for "clinical CRPS" with characteristic pain and other symptoms, combined with various clinical signs. A diagnosis of "confirmed CRPS" requires at least two positive tests, such as a triple-phase bone scan, sympathetic blocks, thermography, or QSART. The MTGs also put forth an alternative diagnosis of sympathetic maintained pain (SMP) for patients with CRPS-like pain and a positive response to sympathetic blocks, but no clinically detectable vasomotor or sudomotor signs.

Although Claimant has not undergone the testing to establish "confirmed" CRPS per the MTGs, the clinical data supports a finding of "clinical" CRPS.[1] Multiple treating and examining providers have accepted CRPS as a working diagnosis. The fact that Claimant received some relief from the prior sympathetic blocks suggests that at least some of her pain is sympathetically driven. At the very least she may have SMP, which also warrants treatment with stellate blocks under the MTGs. The ALJ acknowledges Claimant's "equivocal" response to the previous blocks but finds it difficult to draw definitive conclusions since the blocks were spaced two months apart, rather than "3-14 days" as directed by the MTGs for diagnostic purposes.[2]

Dr. Castrejon's recommendation for a repeat stellate ganglion block is reasonable, given Claimant's ongoing severe pain only partially relieved with medication. Stellate blocks are a well-accepted treatment modality for CRPS/SMP, and they gave Claimant some relief in the past. The ALJ has no reason to presume Dr. Castrejon will continue to recommend additional blocks if they are not helpful in managing Claimant's pain.

The referral to Dr. Barolat for consultation is also reasonably necessary. Both the CRPS MTGs and the Chronic Pain MTGs allow peripheral stimulation for neuropathic pain in appropriate circumstances, and the only request at this time is for an *evaluation* to determine Claimant's candidacy for the procedure. The Chronic Pain MTGs state this modality can be used for any "nerve" pain, so the presence or absence of CRPS is not determinative. The ALJ sees no persuasive basis to deny Claimant a consultation with Dr. Barolat to receive his treatment recommendations.

[1] The current version of DOWC Rule 17, Exhibit 7 became effective November 30, 2017. Although Dr. Watson was applying an earlier version of the CRPS MTGs, the ALJ does not consider the interval changes sufficiently substantive to undercut his conclusion.
[2] Rule 17, Exhibit 7 § (G)(7)(a).

ORDER

It is therefore ordered that:

1. Respondents shall pay for a stellate ganglion block with Dr. Ford and a consultation with Dr. Barolat, as recommended by Dr. Castrejon.

2. All issues not determined herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 18, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. The issues to be determined by this decision are:

   a. Whether Claimant sustained his burden of proof to establish that he suffered a work injury in the course and scope of his employment for Employer on August 21, 2017;

   b. Whether Claimant is entitled to reasonably necessary and related medical benefits for his work related injury of August 21, 2017, including the November 2, 2017, surgery with Dr. Snyder; and

   c. Whether Claimant was disabled from his usual employment and therefore entitled to an order awarding temporary disability benefits from August 22, 2017, to December 13, 2017.

STIPULATION OF FACT

The parties stipulate that Claimant's average weekly wage (AWW) is $2141.00.

FINDINGS OF FACT

1. Claimant is a 56 year old man who has worked for Employer for seven years and, most recently, in a supervisory capacity in the bulk plant. Claimant's duties as a supervisor in the bulk plant is to oversee the cementing of wells upon completion of drilling.

2. On August 20, 2017, Claimant started work at the bulk plant at 9:00 a.m. Claimant received a 2:00 p.m. call to perform work outside of the bulk plant. This work consisted of taking company trucks containing cement and material to a well site. At the bulk plant, Claimant blended the cement that would be used at the well site and started toward the well site in Kersey, CO at 4:00 p.m. The well site is approximately 50 miles from the bulk plant. At the well site, he performed a safety clearance and unloaded materials. Claimant walked up and down twenty steps going up two stories on the rig multiple times. In addition, he entered and alighted from his truck multiple times.

3. Claimant was able to perform the essential functions of his job and continued to do so at the well site until approximately 2:00 or 2:30 a.m. on August 21, 2017. Then, he slept in his truck and awoke around dawn, at approximately 5:00 or 5:30 a.m., and proceeded to a truck stop where his truck experienced mechanical difficulties. Claimant stopped the truck and found anti-freeze spewing out.

4. As Claimant was walking around his truck, he felt pain in his right knee. He checked his right knee and found that it was swollen and bruised. He testified credibly that he was unsure why the swelling and bruising occurred yet he was conscious of the arduous activities at the well site, the drive in the middle of the night in his truck, his

attempt to sleep in the cab of his truck and his surveillance of his truck's mechanical difficulties.

5. Claimant reported his injury to Employer and Supervisor Kitsmiller drove the Claimant to be evaluated by Dr. Julie Parsons at UC Health. On the way to Dr. Parsons' office, Mr. Kitsmiller suggested to Claimant that he may have a blood clot in his right knee.

6. During Claimant's examination by Dr. Parsons, Claimant was not asked to explain the mechanism of his injury. Claimant did not report his arduous activities at the well site in Kersey. At Dr. Parsons' office, Claimant waited while Mr. Kitsmiller conversed with Dr. Parsons outside of Claimant's presence, and without Claimant's authorization. Claimant told Dr. Parsons he was upset with her communication with Mr. Kitsmiller outside his presence. Dr. Parsons explained in her August 21, 2017, report that it was routine protocol to talk with the Employer's representative to "ascertain the circumstances surrounding the injury."

7. Dr. Parsons reported that Claimant had sudden right knee swelling and bruising and the doctor issued a report concluding that Claimant's injury was not work related. Dr. Parsons stated that Claimant did not hit his knee, step in a hole, or experience a twisting injury. Claimant credibly testified that the doctor did not question him concerning the mechanism of his injury. Additionally, Dr. Parsons referenced potential clotting. Dr. Parsons referred Claimant to his primary care physician for further treatment.

8. On August 23, 2017, Claimant returned to UC Health and was examined by Dr. Brent Grauerholz for a second opinion. During this second evaluation, Dr. Grauerholz noted Claimant described his mechanism of injury as follows:

> On the night of Sunday night, he was out East of Kersey in a semi truck. The truck broke down. He has been getting up and down ladders etc. all day, which is not atypical for his job description. He then went to sleep in the cab while he awaited assistance from a wrecker. When he woke up and stepped off the truck, he had sharp pain and swelling in the right knee. He has some ecchymosis over the medial aspect of the knee that has gotten perhaps a bit better. He told his employer, we then evaluated at a clinic in Brighton. He said, "they looked at me, palpated my knee and told me I had a blood clot." They told him it was not work related. He wanted a second opinion and is brought in by an employee of Halliburton's HR department. . .

9. Claimant was released to full duty work. Dr. Grauerholz noted that Claimant's condition was probably work-related. Claimant was referred for x-rays. Dr. Grauerholz opined he would let the process sort itself out regarding if Claimant's condition is from a work injury.

10. On August 31, 2017, Claimant was evaluated at UC Health by Michael, Deitz, Physician's Assistant, Certified (PAC). During Claimant's third evaluation, Claimant described his mechanism of injury as occurring ten (10) days prior. Claimant described that:

> . . . he had been doing a lot of climbing about his truck. He states that he did several ascends and descends about his truck. He states he had a truck breakdown. In the process of waiting he then rested in his cab. He got out of his truck and felt something pull in his right knee. He states that he then started to develop swelling and marked pain to the medial aspect of his knee in the posterior aspect of the knee. He had a little bit referral pain to his calf but that was not his main concern.

11. Claimant was diagnosed with a knee strain including the quad and hamstrings and first degree medial collateral ligament sprain. Mr. Deitz noted that a differential diagnosis may include a medial meniscus tear, partial quad defect muscular tear and a remote possibility of a DVT in the calf. Mr. Deitz referred Claimant for an MRI. Mr. Deitz noted that Claimant was scheduled to go on a two-week vacation starting in four days. Mr. Deitz assigned temporary work restrictions of "no clutch driving, max lift 25 pounds. No crawling, climbing, kneeling, or squatting. Patient must work on dry and even surfaces."

12. Claimant was referred for an MRI which established that he had suffered an oblique tear of the medial meniscus body along with a partial thickness articular heterogenity along the weight bearing surfaces of the meniscus. The MRI showed that Claimant's medial collateral ligament was normal. Claimant has underlying pre-existing osteoarthritis and degenerative medial meniscus tear.

13. Claimant also saw Dr. Rafferty at UC Health who described the history of the Claimant's injury as 10 days earlier Claimant was doing a lot of climbing about his truck, doing his "usual duties" and his knee started swelling. Dr. Rafferty credibly opined in his December 1, 2017, letter that Claimant's right knee pain results from a combination of medial meniscus tear and degenerative changes that have been identified within the knee. Dr. Rafferty further credibly opined that it is probable that Claimant's pre-existing, degenerative medial meniscus tear was made symptomatically worse by his usual duties at work.

14. Claimant was given temporary restrictions and was allowed to return to modified duty on August 23, 2017. He was not permitted to perform overtime.

15. On referral from UC Health, Claimant saw orthopedist Dr. Snyder on September 22, 2017. Claimant underwent surgery on November 2, 2017, for his right knee medial meniscus tear and a right knee chondromalacia of the patella, i.e., medial meniscectomy and a chondroplasty for the medial femoral condyle and patella.

16. Claimant credibly testified that he was allowed to return to work, working forty to fifty hours per week, depending on the "hitch", but was not permitted overtime. Working forty hours a week the Claimant was paid a hourly rate of $25.39 or $1,015.60 per week for a forty hour week, less than his stipulated AWW of $2,141.00.

17. Claimant testified that he continued working after surgery on modified duty until he was returned to full duty in December 2017.

18. A medical record review was performed by Dr. Failinger at the request of Respondents on September 30, 2017. He testified at hearing as an expert in the field of orthopedics. When he prepared his report, Dr. Failinger did not have a complete set of records.

19. Dr. Failinger's opinion concerning work relatedness relied on the initial report of Dr. Parsons. However, he was present in court when Claimant testified concerning the various activities that he was required to perform just before his onset of knee problems on August 21, 2017. He testified that the activities performed by the Claimant had the potential of giving rise to the type of disease processes found in the Claimant's diagnostic MRI of September 2, 2017. Dr. Failinger opined that meniscus tears can be either acute or degenerative in nature.

20. Dr. Failinger opined that there is no evidence in the records that Claimant had meniscal problems prior to the events of August 21, 2017. And, it is found that no credible or persuasive evidence was presented to establish that Claimant had no prior medical history of right knee symptoms or treatment.

21. On December 12, 2017, Dr. John Charbonneau, an authorized treating physician (ATP), credibly opined that Claimant suffered an occupational injury arising from the Claimant's arduous work on August 21, 2017. In the December 12, 2017, progress note, Dr. Charbonneau noted the same mechanism of injury regarding Claimant's strenuous work, sleep in a truck cab and awakening to right knee swelling, bruising and pain.

22. The ALJ finds the report of ATP Dr. Charbonneau and the testimony of the Claimant credible and concludes that this evidence supports that the Claimant suffered a work related right knee injury.

CONCLUSIONS OF LAW

General Legal Principles

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all

of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence dispositive of the issues involved. The ALJ has not addressed every piece of evidence leading to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). As found, this Claimant has proven by a preponderance of the evidence that he suffered a work related injury to his right knee arising out of and in the course of his employment on August 21, 2017.

Here, it is found and concluded that Claimant's underlying asymptomatic degenerative condition was made symptomatic by the right knee injury resulting from the arduous nature of the work he was required to perform for the Employer at the work site, including walking, climbing stairs, and carrying materials on August 21-22, 2017. It is found and concluded that Claimant's work injury arose from his work activities in combination with Claimant's degenerative condition as reflect in the MRI. The evidence established that Claimant's injury arose out of and in the course and scope of his employment.

Both parties argue that the cause of Claimant's purportedly unexplained injury is analyzed based on *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. App. 2014). However, to the contrary, the Judge concludes that *City of Brighton, supra,* is inapplicable in this case because the cause of Claimant's injury is explained by the combined impact of Claimant's pre-existing degenerative condition and the arduous labor on August 21-22, 2017, performed by Claimant in the course and scope of his employment. *H & H Warehouse v. Vicory*, *supra*, controls the analysis of this case since the evidence established that Claimant's industrial injury aggravated, accelerated,

or combined with Claimant's degenerative condition to produce disability and a need for treatment and is therefore compensable.

Medical Benefits

If there is a compensable injury, the employer and its insurance carrier must provide all medical benefits, which are reasonably necessary to cure and relieve the work-related injury. Section 8-42-101 C.R.S.; *Owens v. Indus. Claim Appeals Office of State of Colo.,* 49 P.3d 1187, 1188 (Colo. Ct. App. 2002). The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-42-101, C.R.S.; See *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Where liability for a particular medical benefit is contested, the claimant must prove that it is reasonably necessary to treat and is causally related to the industrial injury. *Id*.; See *Grover v. Industrial Commission,* 759 P2d 705 (Colo. 1988). The record must distinctly reflect that the medical treatment was necessary and designed to cure or relieve the effects of the work injury. *Pub. Serv. Co. of Colorado v. Indus. Claim Appeals Office of State of Colo.,* 979 P.2d 584, 585 (Colo. Ct. App. 1999). Whether services are medically necessary for treatment of a claimant's injuries or incidental to obtaining such treatment is a question of fact to be determined by the ALJ. *Bellone v. Indus. Claim Appeals Office of the State,* 940 P.2d 1116 (Colo. Ct. App. 1997).

The respondents are only liable for authorized or emergency medical treatment. See section 8-42-101(1), C.R.S. (2002); *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973). Section 8-43-404(5)(a) directs that respondents will provide Claimant with a list of at least four physicians who are willing to provide treatment without regard to non-medical issues such as the prospects for payment in the event the claim is ultimately denied. *Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988). Whether the ATP has refused to provide treatment for non-medical reasons is a question of fact for the ALJ. *Ruybal v. University of Colorado Health Sciences Center, supra.*

Here, the record establishes that Dr. Parsons refused to provide to Claimant further medical care on his right knee for non-medical reasons and referred the Claimant to his PCP. This triggered the Claimant's right to select his physician. *See Roybal v. University of Colorado Health Sciences Center*, *supra*. Claimant selected UC Health as his ATP where he received treatment, including surgery.

Claimant's providers are deemed authorized. The treatment rendered by ATPs is reasonable, necessary and related and therefore compensable.

TPD

To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury, or occupational disease, has caused a "disability," and that the claimant suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42- 103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 546 (Colo. 1995). The claimant's medical incapacity is evidenced by his loss or reduction of bodily function. There is no statutory requirement that the Claimant present medical opinion evidence from an attending physician establishing his physical disability. *See Lymbum v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary disability. *Id.*

Claimant established by a preponderance that he suffered an adverse impact on his ability to perform his job. It is found and concluded that Claimant suffered a loss of wage earning capacity due to his injury. His impairment of earning capacity is evidenced by his partial inability to work. The testimony of Claimant and Claimant's medical records establish this. Here the Claimant has shown that he lost overtime for which he is entitled to TPD from August 23, 2017, to December 12, 2017.

ORDER

It is, therefore, ordered that:

a. Claimant sustained his burden of proof to establish by a preponderance of the evidence that his work injury of August 21, 2017, arose in the course and scope of his employment for Employer.

b. Since Claimant suffered a work related injury, Respondents shall be liable for reasonably necessary and related medical benefits with UC Health, Dr. Snyder.

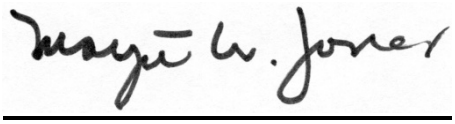
c. Claimant established by a preponderance of the evidence that he was disabled from his usual employment and therefore entitled to an award of indemnity. Claimant is entitled to benefits from August 23, 2017, to December 12, 2017.

d. Based on Employer's wage records, Respondents shall be liable to Claimant for temporary partial disability benefits during any week during this period when Claimant's AWW fell below Claimant's admitted AWW of $2141.00.

e. Respondents shall pay interest at the rate of 8% per annun for all amounts not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 27, 2018



Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-975-232

ISSUE

- Has Claimant proven by a preponderance of the evidence that Respondent is responsible for medical treatment received from Dr. Gottlob and Axis PT after MMI through December 31, 2016?

FINDINGS OF FACT

1. Claimant sustained an industrial injury on February 4, 2015.

2. In 2015, the authorized treating physician, Dr. Scherr, referred Claimant to orthopedic surgeon Dr. Janes, who performed two right knee surgeries. Claimant returned to Dr. Janes with continued right knee pain.

3. Because of Claimant's frustration, Dr. Janes referred Claimant to two additional orthopedic surgeons for evaluation, Dr. Sterett and Dr. LaPrade. All three orthopedic surgeons agreed Claimant would benefit from additional surgical intervention.

4. On April 24, 2016, Claimant returned to Dr. Scherr. Dr. Scherr reported Claimant refused to undergo the surgical procedures recommended by the authorized providers and requested a fourth surgical opinion. Dr. Scherr placed Claimant at MMI, as she no longer wanted the treatment recommend by her authorized providers.

5. On October 7, 2016, Claimant underwent a DIME with Dr. Lindenbaum, who opined that Claimant could benefit from hardware as maintenance, and would not require additional physical therapy. He placed Claimant at MMI.

6. After MMI, Claimant sought treatment with physical therapist Ami Doyle and orthopedic surgeon Dr. Gottlob. Between April 24, 2016 and December 30, 2016, Claimant treated with these providers, without authorization, paid by her personal health insurance or out of pocket. She now requests Respondent pay for this treatment.

7. On May 2, 2016, Ami Doyle (physical therapist) recommended Claimant be evaluated by Dr. Gottlob. No physician in the chain of referral, including Dr. Scherr, Dr. Janes, Dr. Sterett, or Dr. LaPrade made a referral to Dr. Gottlob. Claimant underwent knee surgery with Dr. Gottlob, who referred her for additional physical therapy.

8. In a previous hearing to overcome the DIME and request a change of physician, Claimant testified she treated with Dr. Gottlob on her own, without any

referral and outside the workers' compensation system. As a result, ALJ Michelle Jones determined that Claimant went to Dr. Gottlob on her own, and failed to establish that he is an authorized physician.

9. Here Claimant conceded at hearing that her physical therapy after April 24, 2016, was unauthorized. Claimant conceded she treated with Dr. Gottlob outside the workers' compensation system. Claimant presented no credible evidence that she sought authorization prior to undergoing the treatment.

10. Ami Doyle conceded at hearing that she never requested authorization from Claimant's workers' compensation adjuster.

11. Additionally, Claimant underwent vein treatment, which Dr. Scherr opined was not related to the industrial injury.

CONCLUSIONS OF LAW

1. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. Section 8-43-404(5)(a) prohibits a claimant from retaining additional physicians, outside the chain of referral, without following the statutory procedure.

Martinez v. The Central States Roofing & Insulating Company, W.C. No. 4-228-090 (August 23, 1996) *see Pickett v. Colorado State Hospital*, 513 P.2d 228 (1973).

5. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Authorized treating providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995).

6. Even if the treatment is reasonable, necessary and related, if the treatment is unauthorized, the respondents are not required to pay for it. Section 8-43-404(7); *Johnston v. Hunter Douglas, Inc.*, W.C. No. 4-879-066-01 (April 29, 2014); *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

7. A limited referral for specific treatment does not render the referred physician an ATP for purposes of making general referrals. *Clark v. Hudick Excavating, Inc.*, W.C. No. 4-524-162 (November 5, 2004) (chiropractor could not make referrals as he was only authorized to perform chiropractic treatment.)

8. Here, the record contains no credible evidence that Respondent authorized the physical therapy provided by Ami Doyle post-MMI. Claimant and Ami Doyle conceded the physical therapy was provided without requesting authorization. Regardless of medical reasonableness or necessity, Respondent is not required to pay for unauthorized treatment. Further, even if there existed a referral to Ami Doyle, such referral is limited to performing physical therapy and does not provide authority to make referrals to physicians.

9. Similarly, Claimant treated with Dr. Gottlob outside the chain of referral. The credible evidence presented at hearing does not establish that an authorized provider referred Claimant to Dr. Gottlob. At hearing, Claimant testified she proceeded to Dr. Gottlob outside the workers' compensation system. While she allegedly did so out of necessity because her claim was closed, this testimony is not credited. Claimant had access to three authorized orthopedic surgeons. She declined to continue treatment with any of them. Instead, Claimant chose to direct her own care. The Act does not compel Respondent to pay for this choice.

10. Finally, Claimant requests reimbursement for vein treatment. However, in his final report, Dr. Scherr opined that Claimant's need for vein treatment did not relate to the industrial injury. As there is no credible medical evidence to the contrary, Claimant's request for reimbursement is denied.

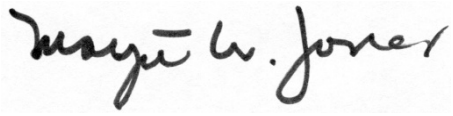
ORDER

1. Claimant's claim for medical benefits for the medical treatment Claimant obtained after MMI from (1) Axis Physical Therapy and (2) Dr. Gottlob is denied and dismissed.

2. Claimant claim for vein treatment is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

DATED: April 27 2018



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

- Whether Respondents overcame by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician as to Claimant's permanent impairment rating and relatedness of Claimant's left knee.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. On June 13, 2016, Claimant, a firefighter, suffered multiple work-related injuries in the course and scope of his employment. Claimant was transported to Boulder Community Hospital where medical providers initially diagnosed Claimant with a scalp laceration, vertebral artery injury, neck injury, and right knee pain. Hospital records indicate that Claimant did not report left knee symptoms or suffer a left knee injury. Claimant subsequently experienced acute bilateral pulmonary emboli.

PROCEDURAL POSTURE

2. On June 20, 2016, Dr. Matt Miller performed his initial examination of Claimant who reported injury to his head, neck, vertebral artery, right knee, left hand, and tailbone contusion. Dr. Miller's record reflects that Claimant did not report left knee symptoms or suffer a left knee injury.

3. On June 21, 2017, Respondents filed a Final Admission admitting to a whole person impairment of 17% for his spine and 30% for his right lower extremity.

4. Claimant requested a DIME evaluation which Dr. Jade Dillon performed. By report dated October 6, 2017, Dr. Dillon opined that Claimant suffered a 26% whole person impairment for his spine, a 33% impairment right lower extremity impairment. Dr. Dillon also assigned a 7% left lower extremity impairment.

5. Respondents applied for a hearing to overcome Dr. Dillon's DIME opinion with respect to her opinion that Claimant sustained a left knee injury as the result of his June 13, 2016 work injury.

FIRST ELEVEN MONTHS OF TREATMENT

6. During the eleven months following Claimant's injury, Claimant's medical providers – including Drs. Boublik, Carbaugh, Hewitt, Miner, and Miller – noted no left knee symptoms and diagnosed no left knee injuries.

7. On July 11, 2016, Dr. Martin Boublik evaluated Claimant. Dr. Boublik previously treated Claimant in 2000 for right knee ACL reconstruction, patellar tendon bone autograft, and extensive partial medial and lateral meniscectomies.

- Dr. Boublik examined Claimant's injured right knee and noted mild effusion, gentile motion 0-80, and tenderness.

- Dr. Boublik examined Claimant's left knee and noted no effusion, good mobility and range of motion 1-140 without pain, ligamentously stable, and mild patellofemoral crepitance without pain.

- Dr. Boublik diagnosed right knee pain, acute ACL graft tear, and degenerative medial and lateral meniscus tears.

- Dr. Boublik's record reflects that Claimant did not report left knee symptoms and did not suffer a left knee injury.

8. Clamant returned to Dr. Boublik on July 27, 2016, August 24, 2016, September 21, 2016, and November 2, 2016. At each visit, Dr. Boublik, or his PA Jameson Parker, noted that Claimant returned for reevaluation of Claimant's *right* knee following the work accident at which he also injured his head, and cervical spine. Dr. Boublik's records for these visits also do not reflect that Claimant reported left knee symptoms or suffered a left knee injury.

9. On October 25, 2016, Dr. Ron Carbaugh performed a psychological assessment of Claimant and prepared a report. Dr. Carbaugh presented a "relevant history" taken from Claimant's self-report and from the medical records. Dr. Carbaugh noted Claimant's injuries included a C2 vertebral fracture, vertebral artery injury, right knee fracture and ACL tear, and thoracic vertebral fractures. Dr. Carbaugh's record and report reflect that Claimant did not report left knee symptoms or suffer a left knee injury.

10. On December 21, 2016, Dr. Michael Hewitt provided a second opinion regarding Claimant's right knee. Dr. Hewitt referenced that body parts injured during the Claimant's June 13, 2016 work injury included cervical fracture, vertebral artery dissection, scalp laceration, and right knee fracture. Dr. Hewitt's record reflects that Clamant did not report left knee symptoms or suffer a left knee injury.

11. On January 6, 2017, Dr. Todd Miner, an orthopedist, consulted regarding Claimant's chronic and worsening right knee pain. Dr. Miner referenced that body parts injured during the Claimant's June 13, 2016 work injury included the right knee, scalp, thoracic spine and right tibial plateau. Dr. Miner examined Claimant's right and left knees and reviewed radiographs that revealed osteoarthritic changes in both knees. Dr. Miner did not reference a left knee injury.

12. On January 25, 2017, Dr. Miller noted Claimant was "much improved" and "was able to go up and down 9 flights of stairs with 50 lbs on his back. Was pushing and pulling 170 lbs 40 ft x 8. Is carrying 65 lb box without issues." Dr. Miller noted that "PT notes indicate that [Claimant] should likely be able to pass his fitness exam in 3-4 weeks." Dr. Miller's record does not reflect that Clamant reported left knee symptoms or suffered a left knee injury.

13. On March 29, 2017, Dr. Boublik reexamined Claimant's right knee and noted that during the previous nine months, Claimant had participated in rehab treatment for his right knee. Dr. Boublik did not reference left knee symptoms or a left knee injury. Dr. Boublik noted that Claimant presented with significant degenerative changes in both knees and that Claimant was at some risk for struggling with both of his knees in the future. He suggested that if Claimant felt like he required Visco supplementation for either his right knee or both knees, he should call.

14. On April 14, 2017, Claimant returned to work at full duty.

CLAIMANT"S FIRST MENTION OF LEFT KNEE PROBLEMS

15. On May 10, 2017, eleven months after Claimant's occupational injury, Claimant complained to a treatment provider about left knee problems. Dr. Boublik's assistant, Jameson Lee Parker, PA, noted, for the first time, that Claimant presented for examination of his *bilateral* knees. X-rays revealed degenerative changes of the patellofemoral joint of the left knee but no other acute bony masses, lesions, or abnormalities were noted. Mr. Parker itemized Claimant's occupational "polytrauma" to include head injury, C-spine injury, thoracic spine fractures, and right knee injury. Mr. Parker did not associate Claimant's left knee degenerative changes to the occupational "polytrauma." Rather, he characterized them as "persistent degenerative type symptoms."

16. On May 22, 2017, Amber Seno, a medical assistant at the Steadman Hawkins clinic drafted a letter "to whom it may concern," commenting that Claimant was treating for a work related right knee injury. She explained that because the office was involved in treating the work related right knee, they were also addressing Claimant's left knee complaints. Ms. Seno noted: "Given the mechanism of injury, it is conceivable that the left knee degenerative changes were flared up and may have ben made worse due to the injury as well as the amount of work the left leg had to do to support [Claimant] during his recovery." The ALJ finds that the following factors greatly reduce the persuasive value of Ms. Seno's letter:

- Ms. Seno is a medical assistant, not a physician or physician assistant.
- No persuasive evidence supports that the letter was sent, to whom it was sent, or for what purpose it was created.
- The language used by Ms. Seno – "conceivable," and "may have" – do not rise to the level required to establish causation.
- The letter was not carefully prepared and contains at least five errors which decrease its clarity.

MAXIMUM MEDICAL IMPROVEMENT

17. On May 23, 2017, Dr. Miller reported that Claimant had reached maximum medical improvement for his work-related injuries. Dr. Miller noted that Claimant presented with left knee arthritis, but specifically noted that Claimant's left knee was not injured in the occupational accident. He explained that Claimant did not have a primary injury to the left knee, x-rays revealed the presence of arthritis, and, as Claimant resumed his normal activity levels, he might experience some pain in the left knee but that it was *not* due to the occupational trauma. Dr. Miller rated Claimant with a 17% whole person impairment for neck and back injuries and a 30% lower extremity impairment for the right knee injury.

18. Respondents filed a final admission based on Dr. Miller's report. Claimant objected and requested a DIME.

19. On October 3, 2017, Dr. Jade Dillon performed the Division IME and prepared a report dated October 6, 2017. Dr. Dillon's pertinent history section noted that Claimant "is not sure if his memory is faulty with a short period of amnesia from the head injury, or if his recollections blurred simply because everything happened so quickly." Nevertheless, Claimant was able to recall that "at the time . . . both knees hurt, worse on the right." With regard to the left knee, Dr. Dillon concluded that Claimant "did sustain an injury at the time of the occupational injury in question and [Claimant had] residual stiffness. This is a ratable condition." Dr. Dillon did not include a diagnosis. Dr. Dillon agreed with Dr. Miller that Claimant reached maximum medical improvement on May 23, 2017. Dr. Dillon rated Claimant with a 26% whole person for the neck and back and 33% extremity for the right lower extremity and 7% for the left knee.

20. On November 17, 2017, Dr. Barry Ogin performed a Claimant sponsored independent medical examination. Dr. Ogin agreed with Dr. Miller that Claimant's left knee symptoms were not related to the work injury. Therefore, Dr. Ogin did not rate an impairment for the left knee. Dr. Ogin noted that Claimant's medical records did not support a conclusion that Claimant injured his left knee in the accident. Emergency Room notes on several occasions, imaging studies, primary care notes, and orthopedic records all focused just on the right knee without any mention of an injury to his left knee in the months after his initial trauma. Claimant's left knee symptoms progressively worsened over time which is consistent with an arthritic condition.

21. On January 10, 2018, Dr. Boublik reexamined both of Claimant's knees, but continued to identify the right knee, not the left knee, as part of the June 13, 2016, occupational "polytrauma." He noted that both knees showed end-stage degenerative changes and that Claimant's left knee was more painful than his right. Dr. Boublik recommended right knee treatment, pursuant to the Workers' Compensation Guidelines. Separately, Dr. Boublik recommended left knee treatment and that Claimant's personal insurance had denied hyaluronic acid injections because Claimant had not responded well to a cortisone injection.

22. Dr. Dillon testified at hearing. Dr. Dillon admitted she did not include a left knee diagnosis in her written report. Dr. Dillon did not specifically provide a work-related left knee diagnosis when she testified. Nevertheless, Dr. Dillon maintained that Claimant's left knee condition was work-related. Dr. Dillon primarily based her conclusion on three factors: 1) Claimant provided Dr. Dillon a verbal history on October 6, 2017, 17 months after the work injury, that his recollections blurred but he was able to recall that both knees hurt at the time of the accident. Dr. Dillon admitted, however, that Claimant saw multiple medical providers and none of them referenced left knee symptoms for several months following the work accident, including the Emergency Room records. 2) Dr. Dillon relied on the possibility that Claimant's left knee symptoms were minor compared to Claimant's other injuries and that Claimant's left knee symptoms could easily have been masked while the medical providers treated the other injuries. Dr. Dillon admitted that she expected Claimant to report left knee symptoms within a few weeks of good recovery and return to function. Dr. Dillon noted that probably occurred around the time that Amber Seno prepared a note that reflected Claimant reported left knee symptoms on May 22, 2017. Subsequently, Dr. Dillon agreed that she was a little troubled by the fact that four months earlier, on January 25, 2017, Dr. Miller noted good recovery and return to function and that Claimant was able to go up and down 9 flights with 50 lbs. on his back, and pushing and pulling 170 lbs. 40 ft x 8, and carried a 65 lb. box without issues but that medical records did not reflect left knee complaints for another 4 months. 3) Dr. Dillon relied on the fact that Claimant was asymptomatic prior to the occupational injury but, at the time Dr. Dillon saw Claimant, his left knee was symptomatic. Dr. Dillon's testimony was not persuasive.

23. Dr. Ogin testified at the hearing as an expert in Physical Medicine and Rehabilitation, and in Pain Management. Dr. Ogin concluded that Claimant's left knee symptoms are due to (1) underlying, pre-existing arthritis, (2) the normal progression of arthritis, and (3) Claimant's left knee condition/symptoms are not related to a work injury. Dr. Ogin testified that Dr. Dillon erred in reaching a different conclusion, and that the difference was more than simply one of opinion.

24. Specifically, Dr. Ogin testified:

- Work relatedness was not supported by the Medical Treatment Guidelines which require swelling and/or pain in a joint due to an aggravating activity. In this case, none of the medical records support that claimant reported any left knee symptoms or hurt his left knee at the time of the injury or for several months thereafter. Clamant agreed that he was not aware of any left knee pain or physical symptoms for several months after the accident.

- Dr. Boublik, an orthopedic specialist, evaluated Claimant's left knee, in conjunction with his evaluation of Claimant's injured right knee, and Dr. Boublik did not identify any pain or swelling and noted good range of motion in Claimant's left knee. Dr. Boublik identified underlying arthritis and expected risk with both knees in the future but Dr. Boublik did not recommend any left knee treatment at that time.

- There was no indication of a left knee trauma that aggravated/worsened the underlying left knee arthritis. Claimant's diagnosis of pre-existing osteoarthritis, in and of itself, is not an occupational condition.

- Every medical provider agreed that the left knee arthritis predated the work injury but was asymptomatic.

- According to the Guidelines, osteoarthritis commonly leads to functional loss over time; with or without a work-related aggravation. In this case, Claimant was asymptomatic prior to the work injury and for several months after the work injury. After left knee symptoms began, Claimant's left knee symptoms progressively worsened over time which was consistent with an underlying arthritic condition.

- Claimant presented with the non-occupational risk factor of a body mass index of 25 or greater.

25. Dr. Ogin summarized that if Claimant's work injury caused significant enough trauma to Claimant's left knee to aggravate his underlying arthritic condition, the aggravation would have been evidenced by pain and swelling most prominently immediately after the injury. Claimant would have reported symptoms at or around the time of the accident, which he did not. The medical records reflect that Claimant did not report any left knee symptoms for several months.

26. Dr. Ogin summarized that had Claimant injured his left knee, the normal progression of his condition would have been improvement and then worsening over time. That did not occur.

27. Finally, Dr. Ogin summarized that Claimant treated with multiple medical providers who identified Claimant's underlying arthritic condition, but none – other than Dr. Dillon -- considered the left knee symptoms work related.

28. Dr. Ogin concluded that Dr. Dillon erred in the following ways:

- when she relied on Claimant's history of left knee pain 17 months after the work injury rather than relying on the medical records prepared contemporaneously with each visit;

- when she postulated that Claimant's other injuries masked his left knee pain;

- and that she erred when she related left knee problems to a work injury simply because his left knee was asymptomatic at the time of the injury but symptomatic approximately one year later .

The ALJ credits Dr. Ogin's testimony and opinions as credible, persuasive, and well supported by the medical records and other medical opinions.

29. Claimant testified at the hearing that he struck both knees during his fall, but that nothing was wrong with his left knee for several months, and he did not experience any pain in his left knee until November or December 2016. Claimant testified that in November or December, 2016, he mentioned left knee symptoms to Dr. Miller who referred Clamant to Drs. Hewitt and Minor. However, Claimant admitted on cross examination that Dr. Miller's referrals were only for his right knee. Claimant testified that he did not return to normal function until May, 2017, contrary to Dr. Miller's January 25, 2017, medical note that Claimant was much improved and able to go up and down 9 flights with 50 lbs. on his back, push and pull 170 lbs. 40 ft x 8, and carry a 65 lb. box without issues. The ALJ finds Claimant to be a poor historian which limited the persuasive value of his testimony.

30. The ALJ finds, based on the totality of the evidence, that Respondents have overcome by clear and convincing evidence the opinion of the DIME physician as to the relatedness of Claimant's left knee injury and permanent impairment rating.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

The purpose of the Workers' Compensation Act of Colorado, sections 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by

crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME on PPD Impairment Rating and Relatedness

A DIME physician's findings of causation or relatedness and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician.

The question of whether the DIME physician's rating was overcome by clear and convincing evidence presents questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle*, 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

Respondents have met their burden and have established by clear and convincing evidence that it was "highly probable" that Dr. Dillon, the DIME physician, incorrectly related Claimant's left knee problems to the work injury. As a result, Dr.

Dillon incorrectly assigned a 7% lower extremity permanent impairment rating for Claimant's left knee. The opinions and testimony of Dr. Ogin are found credible and persuasive. The opinion of Dr. Miller is found credible and persuasive. Their overall opinions were detailed and supported by the medical records.

Dr. Dillon erred when she concluded Claimant's left knee was injured during the accident and that Claimant's current left knee symptoms are related to the work injury. Dr. Dillon's causation assessment was flawed and did not comply with the Medical Treatment Guidelines. Specifically, the Medical Treatment Guidelines require swelling and/or pain in a joint due to an aggravating activity. In this case, no persuasive medical records support the conclusion that Claimant reported any left knee symptoms or hurt his left knee at the time of the injury or for several months thereafter. Multiple medical providers evaluated Claimant and diagnosed multiple medical conditions, however, none of the medical providers referenced left knee symptoms until almost one year after the work injury. These include the Boulder Community Hospital Emergency Room, Dr. Matt Miller, Dr. Martin Boublik, Dr. Ron Carbaugh, Dr. Michael S. Hewitt, Dr. Todd Miner, and Dr. Barry Ogin. Dr. Boublik specifically examined Claimant's left knee less than one month after the work injury and Dr. Boublik noted no effusion, good mobility and range of motion without pain, ligamentously stable, and mild patellofemoral crepitance without pain.

Multiple doctors, including orthopedic specialists, identified underlying left knee osteoarthritis, but did not relate the arthritis to the work injury. Dr. Boublik and Dr. Miner noted that radiographs revealed tricompartmental osteoarthritic changes in both knees. None of the doctors treated Claimant's left knee in the workers' compensation claim, even after Claimant's left knee became symptomatic almost one year after the work injury. Most recently, on January 10, 2018, Dr. Boublik referenced Claimant's right knee as part of the June 13, 2016, occupational "polytrauma" but not the left knee. Dr. Boublik noted that both knees reflected end-stage degenerative changes and he recommended treatment of the right knee as part of the worker's compensation claim but noted treatment of the left knee was handled by Claimant's commercial insurance.

Dr. Dillon's conclusion was not persuasive and her opinion was overcome because Dr. Dillon ignored the overwhelming evidence provided in the medical records. Instead, Dr. Dillon relied on Claimant's verbal history given to her 17 months after the work injury that, even though his recollection was blurred, he recalled that he injured his left knee during his fall. Dr. Dillon's conclusion is at odds with Claimant's testimony that there was nothing wrong with his left knee for several months, and that he did not experience any pain in his left knee until November or December 2016.

Dr. Dillon's conclusion was not persuasive and her opinion was overcome because Dr. Dillon based her conclusion, in part, on the possibility that Claimant's left knee symptoms were minor and masked by Claimant's other injuries. Dr. Dillon admitted that if the other injuries masked the left knee injury, she would expect Claimant to have reported left knee symptoms within a few weeks of good recovery and return to function which she estimated occurred around May 2017. The medical records, however, reflect

that Claimant recovered well and returned to function in January 2017. Even Dr. Dillon admitted that she was "a little troubled" by the fact that four months earlier, on January 25, 2017, Dr. Miller noted good recovery and return to function and that Claimant was able to go up and down 9 flights with 50 lbs. on his back, and pushing and pulling 170 lbs. 40 ft x 8, and carried a 65 lb. box without issues but that medical records did not reflect left knee complaints for another 4 months.

Dr. Dillon's conclusion was not persuasive and her opinion was overcome because she ignored the natural progression of arthritic conditions. Dr. Dillon relied on the fact that Claimant was asymptomatic prior to the occupational injury but, at the time Dr. Dillon saw Claimant, almost one and a half years later, his left knee was symptomatic. Dr. Ogin persuasively pointed out that Claimant was asymptomatic for several months after the work injury. Also, Claimant's diagnosis of pre-existing osteoarthritis, in and of itself, is not an occupational condition. There was no indication of a left knee trauma that aggravated/worsened the underlying left knee arthritis. Osteoarthritis commonly leads to functional loss over time; with or without a work-related aggravation. In this case, several months after the work injury, Claimant's underlying arthritis became symptomatic and Claimant's left knee symptoms progressively worsened over time; consistent with an underlying arthritic condition. Dr. Ogin persuasively testified that if Claimant's work injury caused significant enough trauma to Claimant's left knee to aggravate his underlying anthric condition, the aggravation would have been evidenced by pain and swelling most prominently after the injury, and Claimant would have reported symptoms at or around the time of the accident, which he did not.

Colorado Division of Workers' Compensation Impairment Rating Tips provide that permanent impairment ratings are only warranted when a specific diagnosis and objective pathology can be identified. See Desk Aid #11, General Principles 1. Dr. Dillon erred when she failed to identify a work-related diagnosis of his left knee symptoms.

In summary, Respondents met their burden of proof that it was highly probable that Dr. Dillon, the DIME physician, incorrectly related Claimant's left knee problems to the work injury and incorrectly assigned Claimant a 7% lower extremity permanent impairment rating. The opinions of Dr. Miller and Dr. Ogin are more credible that Claimant suffered from underlying non-work-related arthritis and that Claimant did not suffer any permanent impairment as a result of his work-related injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have overcome Dr. Dillon's opinion that Claimant suffered a left knee injury as part of his compensable workers' compensation injury.

2. Respondents have overcome Dr. Dillon's opinion of permanent impairment by clear and convincing evidence. Thus, Claimant is not entitled to a left knee permanent impairment rating.

3. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: April 30, 2018

/s/ Kimberly Turnbow

Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Suite 400
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

STIPULATIONS

If the claimed injury is found compensable, the parties reached the following stipulations:

1. Claimant is subject to the maximum temporary total disability rate for 2016 as her average weekly wage is $1,407.75.

2. Claimant returned to work full duty as of November 1, 2017 resulting in a period of temporary total disability exposure extending from June 21 through October 31, 2017.

The stipulations are approved.

REMAINING ISSUES

I. Is Claimant's claimed psychological injury based in part on circumstances common to all fields of employment and thus should be denied and dismissed?

II. Did Claimant prove by a preponderance of the evidence that she endured psychologically traumatic event(s) generally outside of a worker's usual experience that would have evoked significant symptoms of distress in a similarly situated worker?

III. Did Claimant prove by a preponderance of the evidence that she was temporary and totally disabled as a consequence of her alleged work injury?

Because the ALJ concludes that Claimant failed to prove the elements required to establish a claim of mental impairment as required by § 8-41-301(2)(a), this order does not address her entitlement to temporary total disability benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was hired as the Facility Education Director, i.e. the school principal at Grand Mesa Youth Services Center (GMYSC) in the summer of 2015.

2. Grand Mesa is a multipurpose detention facility and school for juveniles involved with the criminal justice system.

3. As school principal, Claimant was to manage the educational services that are provided to committed youth, supervise ten staff members, oversee curriculum, schedules, and ensure educational compliance components for Division of Youth Services.

4. Claimant testified that upon taking the position, she understood there were many issues for the incoming education director to address, including student scheduling concerns, difficult staff members and problems with lesson plans not meeting standards.

5. Cris Matoush testified as the director of GMYSC. He functioned in that position for three and one half years, and for the duration of claimant's employment at the facility. Mr. Matoush has a total of ten years of experience as a supervisor for the State of Colorado.

6. As facility director, Mr. Matoush was involved in Claimant's hiring process. He sat on her interview panel and testified that the facility had just been audited and was found to be out of compliance in certain areas. Accordingly, he testified that he communicated his expectations about getting the educational components of the facility, including special education back into compliance. He also addressed the need for strong personnel management and the supervisory components of the job.

7. Mr. Matoush met with Claimant to discuss each person she was to supervise. During this meeting, the two discussed each person's relative strengths and their weaknesses.

8. While Claimant was not hired as a turnaround principal, she felt she was acting in that capacity, testifying that she was set up to be a "hatchet man." Based upon the evidence presented, the ALJ finds that Claimant was apprised of the specific challenges associated with her job, including the supervisory changes necessary to bring the educational component of GMYSC into compliance. Moreover, the evidence presented persuades the ALJ that Claimant knew that making would be difficult and the subject of significant pushback by the staff. Indeed, Claimant testified as much indicating, in both her testimony and interrogatory responses, that "[i]n school turnaround where major functions, procedures, and schedules are changed, it is always difficult for staff to accept . . ."

9. Claimant testified that Mr. Matoush refused to support her decisions concerning staff and would directly contradict and undermine her instructions/directives to staff members leaving her with little authority over the staff she was charged with supervising. Consequently, she testified that the staff become increasingly insubordinate and hostile. Claimant testified that Mr. Matoush would yell and point his finger at her in front of staff members creating a hostile work environment and unnecessary stress. According to Claimant, Mr. Matoush would ask her out to dinner and drinks and to his kids' soccer games. Claimant submitted that these invites were sexual advances and beyond the normal supervisor/subordinate employment relationship. On one occasion, Mr. Matoush went to Claimant's home while she was

sick. Claimant found this unusual, testifying that Mr. Matoush apologized for the chaos at work but that no changes were made, testifying "the next day it would be back to the same thing."

10. Mr. Matoush testified that he never asked Claimant out to dinner or drinks. Moreover, he testified that he just threw out that if Claimant was bored and had nothing to do, she could come watch his kids soccer games. The ALJ interprets the evidence surrounding Mr. Matoush's offer to watch a soccer game as a social invite made to Claimant and others he worked with and not a sexual advance as suggested by Claimant. Mr. Matoush testified that he is not a yeller and that he never yelled at Claimant or anyone else he supervises.

11. Mr. Matoush admitted that he went to Claimant's home on a single occasion around the middle of December 2016 after she failed to appear for her scheduled shift. According to Mr. Matoush, Claimant failed to show up for her 7:30 AM shift and not notified anyone of her unscheduled absence.

12. Pursuant to GMYSC protocol, an employee taking unexpected leave was to call the control unit and notify Mr. Matoush for supervisory approval. Claimant was familiar with the protocol and had previously followed it when calling in sick.

13. Having received no contact from Claimant regarding her unanticipated absence, Mr. Matoush testified that he checked with control and they had not heard from Claimant. Mr. Matoush then asked several other facility members if they had contact with Claimant, and no one had heard from her.

14. Mr. Matoush called and texted Claimant several times to ask if she was okay. Claimant did not respond. Consequently, at about 11:00 a.m. he discussed the need to make a welfare check on Claimant with colleagues Justin Roberts and Patty Maurer. Neither Mr. Roberts nor Ms. Maurer voiced an opposition to Mr. Matoush checking on Claimant. Accordingly, Mr. Matoush drove to Claimant's house and knocked on her door. Claimant did not answer immediately and when she did, Mr. Matoush testified that she did not look well and appeared as if she had been crying.

15. Mr. Matoush testified that he was invited in and sat down on the couch while Claimant sat in a recliner. They discussed why she was not at work. According to Mr. Matoush, he and Claimant discussed several personal life stressors including a custody battle involving her grandchildren and her doing all the legwork for that legal dispute. They also discussed the fact that Claimant's husband was not working and that they were struggling financially, were "house poor," and had been unable to afford a turkey dinner for Thanksgiving. They discussed that Claimant and her husband were not doing well and had discussed divorce. Per Mr. Matoush, he and Claimant discussed how these personal outside struggles were affecting her work performance. He reminded Claimant of the policies and protocol to follow if she was to be unexpectedly absent. Mr. Matoush testified that the visit ended cordially and at no time did Claimant express any discomfort or ask him to leave.

16. On June 6, 2017, Claimant had a meeting with Mr. Matoush and Dave Livingston, a life coach hired by GMYSC to work with Claimant, to address what was happening with her team. Claimant became upset during the meeting and abruptly left Mr. Matoush's office and the GMYSC facility, abandoning the remainder of her shift. She did not return to the facility and did not seek permission to take the balance of the day off.

17. On June 21, 2017, Mr. Matoush hand-delivered a Corrective Action to Claimant for her actions during the June 6, 2017 meeting. The Corrective Action expressed that Claimant's abrupt departure from the meeting and the facility on June 6 violated three separate rules/policies, specifically State Personnel Board Rule 5-4, Board Rule 6-1, and Division of Youth Services (DYS) Policy 3.6, Article III, Subsection D.1. Claimant has alleged a date of injury that corresponds with service of the corrective action.

18. State Personnel Board Rule 5-1 states, "Employees are required to work their established work schedule unless on approved leave…Unauthorized use of any leave may result in the denial of paid leave and/or corrective or disciplinary action."

19. State Personnel Board Rule 6-1 states, "Employees represent the state so they are required at all times to use their best efforts to perform assigned tasks promptly and efficiently and to be courteous and impartial in dealing with those served."

20. DYS Policy 3.6, Article III, Subsection D.1 states, "Whenever an employee has a need to request time off, the employee shall make a request to their appointing authority or designee. All requests shall be made in writing prior to the date(s) needed and in accordance with the facility/office implementing procedure. In situation of emergency or unexpected circumstances, notification shall be made to the appointing authority or designee, as soon as the information becomes available."

21. Mr. Matoush testified that Claimant's shift abandonment warranted a corrective action because he had already addressed the leave policy with Claimant during his welfare check in December 2016. He specifically testified, "The second time that had happened is more of a this is a formal document now, this is the second time that it's happened. So we are going to address it." Based upon the evidence presented, the ALJ finds that the corrective action issued by Mr. Matoush was taken in good faith to address Claimant's failure to follow established leave policy.

22. Claimant testified that at least one employee filed a grievance against her, and two others filed a type of formal complaint. Claimant admitted that negative peer reviews did not psychologically traumatize her. According to Claimant, she knew she was going to get negative reviews, testifying that "the negative reviews were not the issue...did that destroy my world? No. That's just part of the principal."

23. Claimant was not disciplined or demoted in any way while the aforementioned grievances/complaints were being investigated or because of receiving a corrective action.

24. Mr. Matoush testified that being the subject of a grievance/complaint is not generally outside of the expected experience encountered by someone in the position of facility education director at GMYSC. According to Mr. Matoush, simply being in a supervisory capacity as part of an administrative position "only increase (sic) your chances to get a form of grievance at some point in your career."

25. Mr. Matoush was grieved by the same employee who grieved Claimant and over the same events that formed the grievance against her. Mr. Matoush did not consider this to be outside his experience as facility Director nor as an employee with supervisory capacity in general. He was not psychologically traumatized by the grievance.

26. Claimant outlined a number of events involving her subordinates that she characterized as involving unethical behavior. These included: a teacher leaving doors open after Claimant instructed her not to; a teacher keeping a calendar after Claimant told her there was to be one master calendar for student registration; a teacher sending inappropriate emails, including a satirical prescription ad; an administrative assistant who was setting her own hours and using a former employee's computer credentials to access the computer; a P.E. teacher having a high number of time outs and a computer teacher not getting out of his chair to teach during lessons. Claimant testified that these events were not traumatizing per se. Rather, Claimant suggested that dealing with these events became traumatizing after she felt undermined and marginalized by what she perceived was a lack of support on the part of Mr. Matoush.

27. Much of Claimant's direct testimony regarding her experiences at GMYSC was directly contradicted by Mr. Matoush, including her allegations that GMYSC did not hire a life coach for her; that she did not discard old folders and binders in her administrative assistant's office; that Mr. Matoush was always texting her for dinner and drinks; that Mr. Matoush appointed a science teacher to a (non-existent) position of dean of students and that Claimant called off sick to Tracy Schwartz the day of Mr. Matoush's wellness check.

28. Claimant has a history of Wellbutrin and Celexa use predating her employment with GMYSC by several years. Claimant testified that she uses these medications for treatment of ADHD.

29. Claimant sought treatment for her alleged psychological injuries from her primary physician, Dr. Klemmetson with Primary Care Partners in Grand Junction.

30. On September 7, 2017, Dr. Klemmetson's office and Claimant exchanged emails regarding Claimant's claim for disability. Dr. Klemmetson's triage assistant, "Wendi" told Claimant to let her know what she needed, and "Hopefully you can get at least what they owe you out of them!!"

31. On September 15, Claimant visited the Community Hospital Emergency Department in Grand Junction. Claimant testified that she was directed to the ER to get

"some medical documentation" for her condition and to "check off the requirements for workmen's comp." According to Claimant, she did not go to the ER for treatment.

32. While in the ER, Claimant told Dr. Roper that "she used to enjoy going out with friends and now has no interest…symptoms are severe enough that she has been unable to work and has experienced significant disruption to her normal everyday life."

33. On September 19, 2017, Claimant wrote Dr. Klemmetson an email stating, "Don't be alarmed by my ER visit on Friday after I left your office. This was what Workman's Comp asked me to do. Ridiculous!"

34. On September 21, 2017, Dr. Klemmetson wrote Claimant an email regarding her claim for benefits and her work restrictions stating: "We faxed a letter stating you have been on continuous leave since the beginning and also you are off work until 10/5 f/u. You must f/u with us on that date or before to continue your leave. If you miss that it will give the ins another reason to deny your claim for not following up as you were requested to do so. We want to make sure we all do our part and not give them any more ammunition to deny you payment and this is one area I have run into them picking apart claims as well and we know that you are very much knowing they have not been playing very nicely with us."

35. On October 2, 2017, Claimant sent an email to Dr. Klemmetson requesting that a fitness to return to work document be faxed to her. Dr. Klemmetson responded, "What date for return to work did you want on it and any restrictions or reduced scheduled hours?"

36. Concurrently with her workers' compensation claim, Claimant filed a Colorado Department of Human Services (CDHS) Employee Discrimination Compliant, alleging "a hostile work environment, bullying, harassment by some of the Grand Mesa Education Staff. She also filed a specific complaint against Cris Matoush for creating a hostile work environment, for discrimination based on sex, for inappropriate comments and boundaries for supervisor, retaliation for seeking other employment, retaliation for requesting a new supervisor, retaliation for contacting Vern Jackson, all of which she complained caused her to have a mental breakdown.

37. Claimant's complaints were investigated. Both she and Mr. Matoush were interviewed. During her interview, Claimant stated that Cris Matoush asked to take her for dinner and drinks and came to her house once when she was sick. According to Claimant's statement, "it felt like an inappropriate relationship, continuing to be hostile towards me and then engage in a 'honeymoon cycle' similar to domestic violence." Claimant also stated to the Civil Rights Board that her performance evaluations were "inappropriate" and the corrective action was "vindictive."

38. In response to Claimant's assertion that he did not support her in a "consistent manner as Principal", Mr. Matoush replied that he "supported her when he believed it was warranted, but, as the Facility Director, he felt it was sometimes his responsibility to support the efforts and/or ideas of others as well." Mr. Matoush reported

that from the start of Claimant's employment there "seemed to have been many family issues . . . that took her away from the facility" resulting in "frequent absences from the first." Nonetheless, Mr. Matoush reported that multiple opportunities were presented to Claimant to improve her performance and behavior. He reported that he hired a team coach and scheduled mediation sessions but that these efforts were not as "successful as hoped." According to Mr. Matoush, staff members, both old and new were complaining of Claimant's professionalism and trustworthiness prompting a "full revolt of teachers."

39. Mr. Matoush adamantly denied asking Claimant to dinner or drinks. He admitted that she was invited to group lunches. He further admitted he went to Claimant's house to "check" on her, as he knew her self-esteem was not high, that she was not coming to work and that she was not in a "good space."

40. Following their investigation, the Civil Rights Board found it significant that Claimant's "initial complaint focused solely on her difficult work environment due to the hostility directed towards her by subordinates" and only after speaking to investigators during which she was informed that complaints about insubordinate and challenging staff were not matters that are investigated by the Civil Rights Unit, did the tone and wording of the written complaint change to include retaliation, harassment, discrimination and hostile work environment. The Board noted that Claimant's complaints centered on what "she defined as hostility and harassment from subordinates and co-workers, combined with the lack of support from her supervisor, [Mr. Matoush]." According to the Board's report, Claimant appeared "angry and defensive."

41. The Civil Rights Board found, "[Matoush's] alleged invitations for dinner and drinks unsubstantiated. The Board also concluded that, "[Matoush's] visit to [Claimant's] home on one occasion did not appear to be sexually motivated, but instead appeared to be for reasons of a wellness check."

42. The Civil Rights Board found, "There is no evidence that the employer issued the corrective action in bad faith and that Claimant admitted she left a scheduled meeting with her supervisor and coach (David Livingston) on June 6, 2017, and left the facility for the rest of the day without permission."

43. Finally, the Board noted that there was "sufficient evidence that [Claimant] had room for improvement in her performance and management of subordinates."

44. Based upon the totality of the evidence presented, the Civil Rights Board concluded, "[Claimant's] allegations of gender discrimination, sexual harassment, and hostile work environment are unsubstantiated and do not support a claim for damages.

45. While the evidence presented confirms that several outside personal stressors were affecting her work performance and causing her substantial mental stress, the ALJ is convinced that Claimant's alleged mental impairment was emanating primarily from her occupation and place of employment. Nonetheless, the ALJ credits

the testimony of Mr. Matoush and the documentary evidence to find that Claimant failed to establish other statutory elements necessary to prove that she suffered a compensable mental impairment arising out of and in the course of her employment with GMYSC. Specifically Claimant failed to establish that she was subjected to psychologically traumatic events generally outside her employment that would evoke significantly distress in a worker in similar circumstances and/or that the corrective action issued June 21, 2017, was taken in bad faith, i.e. "vindictively."

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. To receive compensation or medical benefits, a claimant must prove that he/she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *see also, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

B. "Mental-mental" injuries are injuries in which mental impairment follows a solely emotional stimulus. *Oberle v. Indus. Claim Appeals Office,* 919 P.2d 918, 920 (Colo. App. 1996). "An injury that is 'the product of purely an emotional stimulus that results in mental impairment' requires a 'heightened standard of proof' to 'help prevent frivolous or improper claims.'" *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205–06 (Colo. App. 2012) (internal citations omitted). This is true because "[c]ases in which a claimed disability is based on emotional or psychological cause and in which physical injury is absent are less subject to direct proof and more susceptible to being frivolous in nature." *Dushane v. Beneficial Colorado, Inc.,* W.C. No. 4-218-217 (ICAO July 17, 1996).

C. Section 8-41-301(2)(a), C.R.S., addresses this heightened burden of proof and provides the conditions of recovery for claims of mental impairment. According to § 8-41-301(2)(a), the claim "must be proven by evidence supported by the testimony of a licensed physician or psychologist." Moreover, the mental injury must "consist of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances." *Id.* "This interpretation of the statute serves the legislative purpose of weeding out frivolous claims predicated on alleged idiosyncratic responses to non-stressful, or mildly

stressful, occurrences which would not have produced significant distress in a reasonable worker." *Gaudett v. Stationers Distributing Company,* W.C. No. 4-135-027 (ICAO April 5, 1993). Finally, "a mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement or similar action taken in good faith by the employer." Section 8-41-301(2)(a), C.R.S. Good faith personnel actions are those which are reasonable under an objective standard. The question of whether employer discipline is objectively reasonable is a question of fact to be determined by examining the surrounding facts and circumstances. *Spencer v. Synthes USA,* W.C. No. 4-370-762 (ICAO, Dec. 28, 2000).

D. Section 8-41-301(2), C.R.S. applies to claims of multiple, allegedly traumatic events, as well as claims alleging a single traumatic event. "When multiple stressors are alleged, that determination must include a separate analysis of each event to ascertain whether the claim is based in whole or in part upon facts or circumstances common to all fields of employment." *Pub. Serv. of Colorado v. ICAO,* 68 P.3d 583, 585 (Colo. App. 2003). If a claim is based on one or more incidents that are common to all fields of employment, it should be denied. *Trujillo v. ICAO,* 957 P.2d 1052, 1054 (Colo. App. 1998).

E. In this case, the ALJ agrees with Respondents that Claimant's stress claim is based at least in part on incidents common to all fields of employment, specifically routine conflict and stress related to managing and being managed by others at work. Conflict between employees and supervisors over unpopular directives, job performance, schedules, personality differences and perceived lack of support is not isolated to correctional facilities or schools, but rather widespread and shared with all fields of employment. Here, the testimony of Mr. Matoush coupled with the balance of the persuasive documentary evidence convinces the ALJ that Claimant's allegation that she was working in a hostile, retaliatory and vindictive work environment (created by Mr. Matoush) which generated conflict/stress that exceeds the level common to all fields of employment is most probably overstated. Indeed, the Civil Rights Board concluded as much in finding that Claimant's assertions of a hostile work environment were unsubstantiated after investigation of the same.

F. As discussed above, Claimant's conflict with Mr. Matoush and her subordinate staff is common to all fields of employment. Moreover, Claimant's issues with Mr. Matoush and her staff were to be expected within her position. Claimant testified that she took the position understanding there were significant problems with schedules, standards, and difficult staff members. Claimant admitted that it is always difficult for staff to accept major changes, that such changes are often met with hostility. She also admitted that the conflict she experienced with subordinates was not unexpected, noting that her negative reviews and peer treatment were simply part of being the principal. In this regard, Claimant's testimony mirrors that of Mr. Matoush who testified that complaints and grievances were part of Claimant's job as education director, part of being a supervisor, and part of working for a State agency. Based upon a totality of the evidence presented, the ALJ concludes that none of the conflict that

Claimant alleges she had with her colleagues constitutes a psychologically traumatic event that would be considered outside of a principal's usual working experience.

G. In concluding that Claimant's claim involves incidents common to all fields of employment and that Claimant was not subjected to conflict which was so unusually intense that it was outside the normal conditions of her employment as a principal, the ALJ finds the case of *Spencer v. Synthes USA,* W.C. No. 4-370-762 (ICAO, Dec. 28, 2000) instructive. In *Spencer*, the claimant's relationship with her supervisor became "quite strained" when the supervisor disciplined her for failure to keep her radio and keys in her possession. Analogous to the instant case, the claimant in *Spencer* alleged that her supervisor "set out on a course of behavior with the sole intent of harassing and belittling her" and that his conduct caused her anxiety and depression. The ALJ ruled that "claimant presented insufficient evidence to demonstrate that her conflict with her supervisor, and the results which flowed from that conflict, were so unusually intense that they were outside of the normal conditions of employment." *Id.* The ICAO upheld the ALJ's dismissal of the claim stating: "We agree with the ALJ's conclusion that some level of conflict between employees and supervisors is 'objectively common' to all fields of employment." *Id.* Because the ALJ finds/concludes that Claimant's conflict with Mr. Matoush is based in part upon facts and circumstances common to all fields of employment, it must be denied under the principals announced in *Trujillo, supra.*

H. Even if Claimant had established that the incidents she asserts exposure to were so unusually intense that they would be considered to be outside of the normal conditions of her employment, she failed to establish that those events would evoke significant symptoms of distress in a worker whose experience, training, and duties are similar to hers, i.e. an experienced school principal. Here, the persuasive evidence persuades the ALJ that none of Claimant's allegations meets this standard. Claimant's allegedly traumatic events include: a lack of perceived support from Mr. Matoush, teachers propping doors open; emails with cartoons and fake prescription ads; dual competing spreadsheets and calendars, and being told to write up teachers for various insubordinations. The ALJ finds/concludes that Claimants perceived lack of supervisor support and the aforementioned events are not likely to cause significant emotional distress in a similarly situated worker possessing the same training and work experience as Claimant. In this case, the ALJ finds Claimant's allegations similar to those where certain behavior/events were not found to be outside a worker's usual experience or so abusive as to cause significant distress in a similarly situation worker. Those events/circumstances include, enforcing polices regarding overtime and the length of lunch breaks (*Davis v. Minnequa Bank of Pueblo,* W.C. No. 4-506-911 (ICAO Jan. 17, 2002); not taking claimant's ideas seriously at meetings (*Trujillo,* 957. P.2d at 1053); minor harassment by coworkers including kicking and shoving (*Gaudett, supra)*; departure of subordinate due to problems with claimant; and a telephone conversation regarding claimant's job performance. (*McCallum v. Dana's Housekeeping,* W.C. No. 4-211-605 (ICAO Feb. 22, 1996). By contrast, the following work place events have been found to be objectively, reasonably traumatizing to a similarly situated worker resulting in a claim for psychological trauma, sabotage of equipment for which claimant was responsible, puncturing claimant's car tire with a knife, rumors that claimant traded his

testimony for money and sexual favors, and threats that claimant's wife would be informed he was allegedly engaged in extramarital affairs. *Pub. Serv. of Colorado v. ICAO,* 68 P.3d 583 (Colo. App. 2003). As noted above, the evidence presented persuades the ALJ that Claimant's reaction to the perceived lack of supervisor support and "unethical" staff behavior constitutes an idiosyncratic response to non-stressful or mildly stressful events which are unlikely to evoke significant symptoms of distress in a similarly situated worker called upon to address said behavior. *See generally*, *Brown v. Family Inn of Colorado Springs*, W.C. No. 4-271-351 (November 12, 1996); *Gaudett, supra.*

I. Finally as required by § 8-41-301(2)(a), claims for mental impairment "shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer." In this case, it is clear that that Claimant filed her claim for mental impairment following service of a corrective action. Indeed, the date of injury as alleged is the same date of service of her corrective action and the decision of the Civil Rights Board also references that Claimant was severed a corrective action on June 21, 2017. To the extent that Claimant asserts that she suffered mental impairment as a consequence of the corrective action served on her on June 21, 2017, the ALJ agrees with Respondents that she failed to prove her corrective action was taken in bad faith. Here, corrective action was taken after Claimant abandoned her shift after becoming upset and leaving GMYSC during a meeting with her supervisor and team coach. She did not seek or obtain prior permission to leave the facility and did not return for the balance of her shift. In the assessment of Claimant's supervisor, her conduct violated three written policies in effect at GMYSC. Moreover, this was not the first time that Claimant violated Employer's leave policy. Based upon the evidence presented, the ALJ concludes that the disciplinary action against Claimant was taken in good faith.

J. When determining good faith, the ALJ may consider whether a claimant was instructed to follow policy prior to the disciplinary action. *Spencer, supra* (supervisor instructed claimant to keep her keys and radio on her person before ultimately confiscating them when she failed to do so). In this case, Mr. Matoush testified that he had previously discussed leave protocol with Claimant during his welfare check when she had no-called, no-showed. He stated that he practiced progressive discipline, and waited until Claimant violated leave protocol a second time to issue the corrective action. The Civil Rights Board also expressly found there was no evidence that the corrective action was issued in bad faith. Accordingly, the ALJ is persuaded that Claimant's corrective action was issued in good faith to address her failure to adhere to established leave policies and dissuade further similar conduct.

ORDER

It is therefore ordered that:

1. Because the ALJ concludes that Claimant's claim for mental impairment is based, in part on incidents common to all fields of employment, and because she failed

to establish she was subjected to psychologically traumatic events generally outside her employment that would evoke significantly distress in a worker in similar circumstances and/or that the corrective action issued June 21, 2017, was taken in bad the claim must be denied and dismissed. Accordingly, Claimant's remaining claims need not be addressed further.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 30, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Has Claimant shown, by the preponderance of the evidence, that he is entitled to post-MMI medical treatment to relieve the effects of his work injury and prevent deterioration of his condition?

2. Has Claimant suffered serious permanent disfigurement about the head, face, or parts of the body normally exposed to public view, which would entitle him to additional compensation?

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ enters the following Findings of Fact:

1. Claimant injured his left knee in an admitted work injury on 7/7/16, while stepping into a pothole. Prior to this injury, Claimant's knee had not been symptomatic, despite his having been previously diagnosed with rheumatoid arthritis.

2. He was referred to an orthopedist, Dr. Wiley Jinkins, M.D. Conservative treatment was not entirely successful. Dr. Jinkins eventually performed an arthroscopic surgery on 6/19/17, which Claimant tolerated well. Claimant had medical and lateral meniscus tears repaired, among other procedures.

3. Claimant continued to follow-up with Dr. Jinkins, who sought authorization for three injections of hyaluronate (Supartz) into the knee to relieve ongoing post-surgical pain. Those were performed, with some relief noted by Claimant, in the fall of 2017.

4. Dr. Jinkins placed Claimant at MMI on 11/14/17 following these injections. At this visit, Claimant noted that he was "75% better" as a result of the surgery and injections. Slight swelling in the knee was noted. In this final visit, Dr. Jinkins noted the following:

> The only medication he is taking at the present time is Relafin and I did give him a *new prescription on this date*. David will return to see me on an as needed basis. I do think it *reasonable for him to have a period of "maintenance care"* for a period of time into the future, should he need an injection, prescription, etc. (Ex. 1, p. 3) (emphasis added).

5. It was noted by Dr. Jinkins, and other physicians, that Claimant would likely need a knee replacement in the future, but no timeline for this has been established.

6. In a previous visit on 3/21/17, Dr. Jinkins had written to Claimant's ATP at Concentra that Claimant had reported that he had placed Claimant on Pennsaid as a

topical nonsteroidal anti-inflammatory medication which had helped to some degree. This Pennsaid prescription was refilled on this date.

7. Claimant had been going to Concentra in a series of visits since shortly after the injury, and had been seeing Randall Jones until March of 2017, after which he was seen by Dr. Daniel Peterson. In a visit dated 4/3/17 Dr. Peterson notes that Claimant had reported that the Pennsaid lotion was helping 'considerably' with the swelling. (Ex. E, p. 54).

8. Dr. Peterson's final visit with Claimant was 11/17/17. He concurred with the MMI assessment, but noted that "David Strine is at functional goal, not at end of healing." (Ex. 1, p.71). He noted at this visit that "Dr. Jinkins did his IR [Impairment Record] already. Specialist is not supposed to do this, but Dr. Jinkins does anyway! Will not waste time repeating it today". (Ex. 1, p. 69). In this visit, Dr. Peterson merely notes that Claimant "needs no medical maintenance care," without further explanation. (Ex. 1, p. 72).

9. Claimant testified at hearing. He reported that he benefitted from the surgery and treatment to date, but still experiences some pain and swelling. He described some benefit from the Relafin as an anti-inflammatory, and the Pennsaid lotion helped with his pain. He still sleeps with a pillow between his legs, and will occasionally awake at night from the pain.

10. Claimant acknowledges that he has not gone to the emergency room or urgent care in recent months, nor has he seen a primary care physician. Claimant explained that he is not currently working, and has no health insurance.

11. Claimant also presented for his disfigurement hearing. Claimant showed some slight swelling on the inner portion of his left kneecap, and two small arthroscopic scars around the kneecap. Each scar is slightly indented, and perhaps 5 mm in length. Additionally, Claimant does have a barely discernable gait disturbance, favoring his left knee when walking.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is

that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, no expert testimony was offered, but the medical reports have been reviewed, and the opinions of Claimant's treating physicians have been weighed.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

General Award of Medical Benefits after MMI

D. The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond MMI if the Claimant requires further treatment to relieve the effects of the injury or prevent deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

E. To establish entitlement to *Grover* medical benefits, a Claimant must prove that future medical treatment is or will be reasonably necessary to relieve the effects of the injury or to prevent deterioration of their condition. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI to obtain a general award of future medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1989). If the Claimant establishes the probability of a need for future treatment, the claimant is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity. *Hanna, supra*.

F. Claimant has established, with substantial evidence, the probability of a need for future medical treatment, which entitles him to a general award of future medical benefits. The ALJ finds Claimant's testimony to be credible. The ALJ further finds that Claimant accurately reported his symptoms to his medical providers. He continues to suffer pain and swelling related to his work injury. He reports some benefit from the Pennsaid and Relafin, which are not affordable through private insurance-nor is it reasonable to require him to resort to that. Additionally, the ALJ is more persuaded by the notes of Dr. Jinkins than those of Dr. Peterson-who does not explain his reasoning why Claimant could not benefit from post-MMI treatment.

Disfigurement

G. Section 8-42-108(1) provides that a Claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." Claimant's disfigurement, as found, is all exposed to public view. The ALJ concludes that Claimant should be awarded $1,800.00 for this disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore Ordered that:

1. Respondent shall cover all reasonable and necessary medical treatment from Authorized Treatment Providers to relieved the effects of Claimant's injury and prevent deterioration of his injury.

2. Respondent shall pay Claimant $1,800.00 for his disfigurement. Respondent may take credit for any disfigurement benefits previously paid to Claimant in this matter.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 3, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that recommended medical treatment, including physical therapy for the claimant's right shoulder and consultation with Dr. Tom Hackett, is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement (MMI).

- Whether the claimant has demonstrated by a preponderance of the evidence that his claim should be reopened pursuant to Section 8-43-303, C.R.S. based on a change of condition.

- If the claimant's claim is reopened, whether the claimant has demonstrated by a preponderance of the evidence that recommended medical treatment, including physical therapy for the claimant's right shoulder and consultation with Dr. Tom Hackett, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted occupational disease.

FINDINGS OF FACT

1. While working for the employer as a grocery clerk, the claimant sustained an admitted occupational disease to his right shoulder with a date of onset of October 20, 2014. The claimant initially treated with his primary care provider, Dr. Gina Martin. Subsequently, the claimant reported his right shoulder pain to the employer as a work related injury.

2. On August 10, 2015, the parties went to hearing before ALJ Keith Mottram on issues that included, *inter alia*, compensability for an occupational disease. On September 23, 2015, ALJ Mottram issued a Corrected Order in which it was determined that the claimant suffered a compensable occupational disease while working for the employer. Thereafter the claimant's authorized treating physician (ATP) for this claim became Dr. Craig Stagg.

3. On October 9, 2015, a magnetic resonance image (MRI) was taken of the claimant's right shoulder and showed advanced humeral degenerative joint disease and mild supraspinatus tendiopathy.

4. Dr. Stagg referred the claimant to Dr. Douglas Huene. The claimant was first seen by Dr. Huene on November 25, 2015. Dr. Huene opined that the claimant's right shoulder pain was due to glenohumeral bone on bone arthritis with biceps tendonitis. Dr. Huene administered a right glenohumeral injection. On that same date, Dr. Huene discussed with the claimant the possibility of undergoing arthroscopic surgery. The claimant expressed to Dr. Huene that he did not wish to pursue surgery.

5. On December 29, 2015, the claimant returned to Dr. Stagg and reiterated that he did not wish to pursue total shoulder arthroplasty. On that date, Dr. Stagg determined that the claimant had reached maximum medical improvement (MMI) and assessed a permanent impairment rating of 22% for the claimant's right upper extremity. Dr. Stagg noted that the claimant would need maintenance medical treatment including three to four follow up visits per year, repeat injections (up to three per year) and medications. Dr. Stagg also noted that the claimant "will need a total shoulder arthroplasty in the future".

6. On May 23, 2016, the parties went to hearing before ALJ Mottram on the issue of permanent partial disability (PPD) benefits and, more specifically, converting the claimant's scheduled impairment to a whole person impairment. On June 22, 2016, ALJ Mottram issued Findings of Fact, Conclusion of Law and Order in which the claimant's scheduled impairment of 22% for his right upper extremity was converted to a whole person impairment of 13%.

7. On June 29, 2016, the respondent filed a Final Admission of Liability (FAL) admitting for the MMI date of December 29, 2015, the 13% whole person impairment rating, and reasonable and necessary post-MMI medical treatment.

8. On September 18, 2017, the claimant returned to Dr. Stagg and reported that he was having significant pain in his right shoulder, with pain in his neck and bilateral numbness in his hands. The claimant also requested a referral to Dr. Tom Hackett, for a "second opinion" regarding his right shoulder. At that time, Dr. Stagg referred the claimant to Dr. Hackett for an orthopedic consultation. In addition, Dr. Stagg referred the claimant to Dr. Ellen Price for pain management.

9. The claimant was first seen by Dr. Price on September 21, 2017. At that time, Dr. Price noted that the claimant had been unable to return to work since reaching MMI, had retired, and was "on long-term disability." Dr. Price also noted that the claimant had significant degenerative arthritis and supraspinatus tendinopathy on MRI, and was "still being considered for a total shoulder replacement and plans to see Dr. Hackett at Steadman Hawkins." Dr. Price provided acupuncture treatment, referred the claimant for pool-based physical therapy, and prescribed Lyrica.

10. On October 16, 2017, Dr. Frank Polanco reviewed the claimant's medical records regarding Dr. Price's recommendation for pool physical therapy. In his report, Dr. Polanco opined that pool physical therapy was not medically necessary because there was no indication that the claimant was unable to perform land based rehabilitation activities or an independent exercise program. Dr. Polanco also noted that the claimant was three years post injury with no significant change, flare up or new injury. As a result, Dr. Polanco recommended that the respondent deny pool physical therapy for the claimant's right shoulder.

11. In addition, on October 16, 2017, Dr. John Burris completed a review of the claimant's medical records and opined that the claimant's current treatment was driven by the claimant's underlying arthritic condition and no further care would be

warranted for his occupational disease. Dr. Burris also noted that the claimant suffered from chronic pain related to numerous musculoskeletal issues that are unrelated to the current workers' compensation claim.

12. The respondent has denied authorization for additional physical therapy and the referral to Dr. Hackett.

13. On December 7, 2017, the claimant returned to Dr. Price who noted that the claimant failed to progress with five sessions of acupuncture. At that time, Dr. Price opined that the claimant needed to see Dr. Hackett at Steadman Hawkins for consideration of shoulder replacement. Dr. Price also stated that "there is likely no other option".

14. On January 8, 2018, claimant was again seen by Dr. Price. In the medical record of that date, Dr. Price noted that the respondent had denied authorization for consultation with Dr. Hackett, massage therapy, and other modalities of treatment. Dr. Price provided trigger point injections to the claimant's shoulders and reiterated her opinion that the claimant should see Dr. Hackett.

15. On January 18, 2018, the claimant attended an independent medical examination (IME) with Dr. Wallace Larson. As part of the IME, Dr. Larson reviewed the claimant's medical records, obtained a medical history from the claimant, and performed a physical examination. In his report, Dr. Larson opined that the claimant does need a total right shoulder arthroplasty. With regard to causation, Dr. Larson opined that the claimant's need for right shoulder surgery is due to the preexisting osteoarthritis and not because of any work related injury.

16. Dr. Larson's testimony by deposition was consistent with his IME report. Dr. Larson testified that it is his opinion that the claimant's current right shoulder condition is not related to an occupational disease. Instead, Dr. Larson opined that it is the degenerative arthritis in the claimant's shoulder that is causing his symptoms. Dr. Larson also testified that while repetitive activity can cause tendonitis, repetitive activity with the shoulders does not cause arthritis.

17. The ALJ credits the testimony of the claimant along with the medical records entered into evidence, and finds that the claimant has established that it is more likely than not that due to a worsening of his condition, the claimant is no longer at MMI. The ALJ notes that although the claimant's physicians suggested shoulder surgery as a possibility at the time he reached MMI, beginning in September 2017 Dr. Stagg and Dr. Price have opined that total shoulder arthroplasty should be considered, and have opined that a referral to Dr. Hackett is reasonable.

18. The ALJ credits the opinions of Dr. Stagg and Dr. Price, along with the testimony of the claimant, over the conflicting opinions of Dr. Larson and finds that the claimant has proven that it is more likely than not that the consultation with Dr. Hackett at the Steadman Clinic is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted occupational disease.

19. The ALJ credits the opinions of Dr. Price, along with the testimony of the claimant, over the conflicting opinions of Dr. Larson and finds that the claimant has proven that it is more likely than not that the pool-based physical therapy is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted occupational disease.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

4. As found, the claimant has proven by a preponderance of the evidence that he suffered a worsening of his condition and is no longer at MMI. Therefore, the claimant's claim for workers' compensation benefits shall be reopened pursuant to Section 8-43-303, C.R.S. As found, the claimant's testimony, the medical records, and the opinions of Dr. Stagg and Dr. Price are credible and persuasive on this issue.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where the claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

6. As found, the claimant has demonstrated by a preponderance of the evidence that the recommended consultation with Dr. Hackett is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted occupational disease. As found, medical notes indicating the progression and worsening of the claimant's shoulder symptoms, the claimant's testimony, and the opinions of Dr. Stagg and Dr. Price are credible and persuasive.

7. As found, the claimant has demonstrated by a preponderance of the evidence that pool-based physical therapy recommended by Dr. Price is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted occupational disease**.** As found, claimant's testimony, the medical records, and the opinion of Dr. Price are credible and persuasive.

ORDER

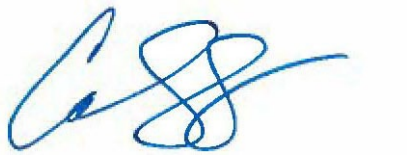
It is therefore ordered that:

1. The claimant's claim shall be reopened.

2. The respondent shall pay for the reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted occupational disease, including physical therapy recommended by Dr. Price and surgical consultation with Dr. Tom Hackett, pursuant to the Colorado Medical Fee Schedule.

3. All matters not determined herein are reserved for future determination.

Dated: April 16, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that he sustained an injury that arose out of and it course and scope of his employment with employer on January 5, 2016.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that the total right knee arthroplasty is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the January 5, 2016 work injury.

STIPULATED FACTS

The parties submitted the following stipulated facts:

1. The claimant is now a 49 year old police office for the Town of Carbondale. He alleges that he sustained an injury to his right knee on January 5, 2016 when he felt his knee buckle and pop while lifting a box. The respondents issued a Notice of Contest on January 28, 2016.

2. The claimant has significant preexisting injuries and conditions relating to both of his knees due to injuries and his weight.

3. With regard to his left knee, the claimant has received numerous surgical interventions for conditions including degenerative joint disease. On April 18, 2008, Dr. Robert Adams, an orthopedic surgeon, noted that the claimant's biggest concern was his weight, and that he had a 70 year old knee on a 39 year old body. The claimant's weight was such that Dr. Adams could not recommend that the claimant exercise because he would wear out his knee before he could lose enough weight. On July 21, 2008, Dr. John Findley told the claimant that his weight, which at that time was 374 pounds, would likely expedite his need for total knee replacement.

4. At a visit with bariatric surgeon Dr. Michal Snyder on April 15, 2009, the claimant noted that his obesity was causing him problems with his knees, feet, and hips.

5. With regard to the claimant's right knee, the claimant most recently sustained a work related injury on March 1, 2013, when he was kicked in the right knee. Claimant sustained a medial meniscus tear, and underwent a right knee arthroscopy and partial medial meniscectomy on May 22, 2013. The claimant was found to have had grade III and IV tricompartmental arthritic changes in the right knee at that time. When he was placed at maximum medical improvement (MMI) for that injury on September 27, 2013, Dr. David Lorah noted that the claimant still had pain over the medial aspect of the knee. He further noted that the claimant had "occasional locking

and an associated sensation of giving way." At the time of the 2013 injury, the claimant was morbidly obese with a weight in excess of 400 pounds.

6. On September 27, 2013, Dr. Lorah assigned the claimant a permanent impairment rating of 26% for the claimant's right lower extremity. A functional capacity evaluation showed that claimant's right knee flexion was limited to 103 degrees, with extension limited to 5 degrees.

7. The claimant returned to Dr. Snyder on May 8, 2014, who noted that the claimant's past medical history included "arthritis of the weight bearing joints."

8. The claimant had a visit at Glenwood Medical Associates on January 6, 2016. The claimant stated that he felt a pop in his knee, and that it felt unstable and was giving way. An x-ray taken on that date showed extensive degenerative changes in all three knee compartments.

9. The claimant was referred to Glenwood Orthopedic Center, where he treated with Dr. Adams on January 13, 2016. Dr. Adams noted a "long-term history of right knee pain and problems", which included multiple surgeries. He remarked that the claimant had multiple previous right knee injuries which resulted in severe osteoarthritis. Dr. Adams remarked that "most of the pain was located medially." The claimant had a range of motion of 110 degrees of flexion, and 5 degrees of flexion contracture (extension).

10. Dr. Adams' reading of the claimant's x-rays was that that the claimant had "severe bone on bone changes to the medial aspect of his knee, large osteophytic changes, large osteophytes of the patella with bone on bone changes of the patellofemoral compartments as well."

11. Dr. Adams diagnosed the claimant with right knee osteoarthritis, and recommended a total knee arthroplasty. At a visit with Dr. Kelli Konst-Skwiot on January 21, 2016, she noted that Dr. Adams said that the claimant "had severe degeneration and that it was time for a knee replacement."

12. Dr. Andrew Parker issued a staffing opinion on February 12, 2016. He noted that the claimant already had severe right knee arthritis years prior to his workplace incident. Dr. Parker remarked that the proposed surgery addressed a non-work related problem. The insurer denied any liability for total knee replacement.

13. On July 14, 2016, the claimant told Dr. Konst-Skwiot that his right knee was still "popping and cracking and often gives out."

14. The claimant underwent the right knee arthroplasty on October 18, 2016. Preoperative and postoperative diagnoses were right knee degenerative joint disease. Indications were "a longstanding history of knee pain and problems."

15. The claimant returned to Dr. Adams on November 21, 2016. Dr. Adams remarked that claimant's right knee "looks great". The claimant has not received treatment for his right knee since that time. Dr. Adams remarked that the claimant now wanted to have his left knee replaced due to severe tricompartmental arthritis. Dr. Adams felt that was reasonable and performed a total left knee arthroplasty on December 20, 2016.

16. All of the claimant's medical care, including the right knee arthroplasty, was paid for by his personal health insurer. The claimant did not miss any uncompensated time from work.

17. In his answers to the respondents' interrogatories, the claimant acknowledged that he had pain in his right knee due to arthritis prior to the January 5, 2016 incident.

FINDINGS OF FACT

1. The ALJ credits the opinion of Dr. Parker and finds that prior to the January 5, 2016 incident at work, the claimant had severe right knee arthritis. The ALJ also credits the claimant's answers to interrogatories in which he acknowledged that he had pain in his right knee due to arthritis prior to the January 5, 2016 incident.

2. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that his right knee injury arose out of and in the course and scope of his employment with employer. The ALJ finds that the claimant's right knee injury was the result of a preexisting condition.

3. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the act of picking up a box on January 5, 2016 aggravated, accelerated, or combined with his preexisting right knee condition. The ALJ finds that the act of picking up a box is ubiquitous and does not constitute a "special hazard" of the claimant's employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

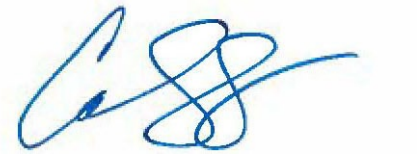
4. An otherwise compensable injury does not cease to arise out of employment because it is partially attributable to a preexisting physical infirmity of the employee. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992). Rather, an injury which results from the concurrence of a preexisting condition and a special hazard of employment is compensable. *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Thus, even if the direct cause of the accident is a preexisting idiopathic disease or condition, the resulting disability is compensable if the conditions or circumstances of employment have contributed to the accident or to the injuries sustained by the employment. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). To be an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *See Ramsdell supra*, (high scaffold constituted special employment hazard to worker who suffered epileptic seizure and fell).

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that he suffered an injury arising out of and in the course and scope of his employment with employer on January 5, 2016. As found, the direct cause of the claimant's right knee injury was the preexisting condition of his right knee as documented by the claimant's various medical providers.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits related to the January 5, 2016 incident is denied and dismissed.

Dated: April 17, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that he suffered an injury arising out of and in the course and scope of his employment with employer.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary partial disability (TPD) benefits.

STIPULATIONS

- The parties have stipulated that if claimant's claim is found compensable, his average weekly wage (AWW) is $990.00.

- The parties agree that all medical treatment related to the August 2017 incident has been authorized and paid for by respondents.

FINDINGS OF FACT

1. Claimant began working for employer's predecessor, Proline Supply, in December 2012. In January 2016, employer purchased Proline Supply and claimant's employment began with employer. Employer is a plumbing and heating distributor. Claimant works for employer in inside sales.

2. Claimant works primarily in the electrical portion of the store handling wiring. Claimant's job duties include checking out customers, ordering, receiving and stocking. When assisting a customer with an order for wire, claimant will load a large spool of wire onto a spooling machine. This machine will measure and re-spool the wire for the customer. To place the larger spool on the machine, it is necessary to place the spool on the round edges and roll the spool to the machine using both a pushing and pulling motion.

3. Claimant testified that on August 21, 2017 he was engaging in the task of moving one of these large spools of wire when he felt a "twinge" in his low back near his belt line. Claimant continued working and completed his scheduled shift. At home that night claimant's back was sore and he treated it with ice, ibuprofen, and stretches.

4. Claimant testified that the following day, August 22, 2017, his back was still sore, but he reported for his scheduled work shift. While claimant was at work the pain in his back continued to worsen. Claimant notified his supervisor, Ms. Jardine, that he had hurt his back moving large spools of wire the day before and that that his back was hurting. Claimant also informed Ms. Jardine that he felt that he should go home. Ms. Jardine agreed that claimant could leave at that time. Once home, claimant treated his back pain with ibuprofen. However, claimant continued to have pain and he contacted Ms. Jardine to ask where he should seek treatment for a work injury. Ms. Jardine instructed claimant to go to Pagosa Springs Medical Clinic.

5. Claimant testified that there were no appointments available at the clinic on August 23, 2017. As a result, claimant received treatment in the emergency department at Pagosa Springs Medical Center and was seen by Dr. Mark Turpen. At that time, claimant reported that he felt pain in his back while bending and lifting heavy bales of wire. Dr. Turpen recorded that claimant's pain was located in his bilateral lumbar spine with pain radiating into both legs. Dr. Turpen diagnosed claimant with acute bilateral low back pain and degenerative disc disease in his lumbar spine. Dr. Turpen prescribed pain medication including Norco, cyclobenzaprine, and meloxicam. Dr. Turpen also recommended claimant undergo physical therapy.

6. Claimant testified that his back pain did not improve and on August 25, 2017, he sought additional treatment at the emergency department and was seen by Dr. Robert Halterman who prescribed a different pain medication, Robaxin.

7. Claimant continued to have back pain and returned to Dr. Halterman on August 29, 2017. In addition to his back pain, claimant reported that he was having difficulty emptying his bladder. Dr. Halterman prescribed Floxmax for claimant's urinary symptoms and ordered a magnetic resonance image (MRI) of claimant's lumbar spine.

8. An MRI of claimant's lumbar spine was taken on August 29, 2017 and showed multilevel neural foraminal stenosis or spinal canal stenosis, and multilevel degenerative spondylosis.

9. Dr. Halterman instructed claimant to seek additional treatment from his primary care provider (PCP) Tabitha Zappone, FNP. Claimant was seen by Ms. Zappone on September 5, 2017. At that time, claimant reported back pain radiating into his bilateral groin. Ms. Zappone referred claimant to Spine Colorado for consultation.

10. On September 11, 2017, claimant was seen at Spine Colorado by Dr. Amir Abtahi. At that time, Dr. Abtahi opined that claimant's symptoms were most consistent with hip pathology and referred claimant to orthopedics for evaluation of his hips.

11. Subsequently, it was determined that claimant could not continue treating with Ms. Zappone for his workers' compensation claim. As a result, claimant began to treat with Dr. Julie Buchner at Pagosa Springs Medical Center.

12. Claimant was first seen by Dr. Buchner on September 14, 2017. Claimant reported extreme low back pain, radiating around the bilateral groin creases and, at times, radiating down the posterior of the left leg. Dr. Buchner diagnosed lumbosacral radiculitis and ordered x-rays of claimant's lumbar spine.

13. On September 15, 2017, x-rays of claimant's lumbar spine showed degenerative changes in the lumbosacral spine without other acute radiologic findings.

14. On September 18, 2017, claimant returned to Dr. Buchner and reported that his low back pain was improving, but he was still experiencing pain that radiated into his groin. Claimant also reported that he was having difficulty urinating. A post void residual ultrasound of claimant's bladder was performed and showed potential urinary retention. Dr. Buchner opined that the cause was claimant's discontinuation of Flomax. In addition, Dr. Buchner referred claimant to Dr. William Webb for an orthopedic consultation. On September 25, 2017, claimant was seen by Dr. Webb who diagnosed low back pain and made a referral for physical therapy.

15. On October 13, 2017, claimant returned to Dr. Abtahi and reported that the orthopedist in Pagosa Springs did not believe that claimant had a hip issue. At that time, Dr. Abtahi recommended that claimant undergo sacroiliac (SI) joint injections. The recommended bilateral SI joint injections were performed by Dr. James Santos on October 27, 2017.

16. Claimant returned to Dr. Abtahi on November 17, 2017 and reported that since the SI joint injections he had improvement in his bilateral hip and low back pain. Dr. Abtahi recommended that claimant continue with conservative treatment including physical therapy and injections.

17. Claimant testified that he felt that the injections to his SI joint "really helped" to reduce his pain symptoms.

18. Also on November 17, 2017, claimant began treating with providers with Centura Centers for Occupational Medicine (CCOM) including Dr. Emily Burns and Dr. Randall Jernigan. The parties agree that CCOM is an ATP.

19. On December 8, 2017, claimant was seen by Dr. Burns who recorded that claimant was showing slow, but continuous improvement and no longer had radicular symptoms into his legs. On that date, Dr. Burns released claimant to return to work, four hours per day with a lifting restriction of no more than five pounds. Claimant testified that he returned to work on this part-time basis the following Monday, January 11, 2017.

20. On December 13, 2017, Dr. Michael Janssen reviewed claimant's medical records and opined that treatment of claimant's lumbar spine is not related to the August 21, 2017 lifting incident. In support of his opinion, Dr. Janssen noted that the August 29, 2017 MRI showed no acute pathology.

21. Dr. Janssen's testimony by deposition was consistent with his written report. Dr. Janssen testified that it is his opinion that claimant did not suffer an injury at work. Dr. Janssen also testified that his opinion is based upon the medical records he was provided and he was unaware that claimant had received SI joint injections.

22. On December 29, 2017, claimant returned to CCOM and was seen by Dr. Jernigan. On that date, Dr. Jernigan released claimant to work six hours per day, with a lifting restriction of no more than 20 pounds.

23. Claimant continued to improve and on February 1, 2018, Dr. Jernigan released claimant to full duty, working eight hours per day, with work restrictions for lifting, pushing, and pulling of no more than 30 pounds.

24. Based upon the payroll records entered into evidence at hearing, employer paid claimant partial wages during the period of August 23, 2017 through September 16, 2017. Beginning September 17, 2017 and through December 10, 2017, claimant was off of work with no workers' compensation benefits. Upon returning to work on a part-time basis on December 11, 2017 claimant again was paid partial wages until returning to full duty on February 1, 2018.

25. At hearing, the parties agreed that respondents have paid for all of claimant's medical care related to the August 21, 2017 incident.

26. Claimant testified that during 2017 he worked on a part-time basis of Pagosa Electric Services, LLC (PES). Claimant was paid $26.00 per hour with PES. Records entered into evidence indicate that claimant earned a total of $3,003.00 while working for PES in 2017. Claimant's final day of work with PES was August 15, 2017. Employer was aware of claimant's additional employment with PES.

27. Mr. Iverson, owner of PES, also testified at hearing. Mr. Iverson's testimony was consistent with claimant's testimony regarding claimant's employment with PES.

28. The ALJ credits claimant's testimony and the medical records over the contrary opinion of Dr. Janssen and finds that claimant has demonstrated that it is more likely than not that he injured his low back at work on August 21, 2017.

29. The ALJ credits the medical records and finds that claimant has demonstrated that it is more likely than not that from August 22, 2017 until December 8, 2017 claimant was unable to work because of his low back injury. As a result, claimant has demonstrated that it is more likely than not that he suffered a loss of wages during that time.

30. The ALJ credits the medical records and finds that claimant has demonstrated that although he returned to work on December 11, 2017, he did so on a part-time basis because of his work restrictions. Therefore, claimant has demonstrated that it is more likely than not that he continued to suffer a wage loss from December 11, 2017 until returning to full duty on February 1, 2018.

31. The parties have stipulated that claimant's average weekly wage (AWW) for this claim is $990.00. The ALJ adopts this stipulation of the parties.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has demonstrated by a preponderance of the evidence that he suffered an injury to his low back that arose out of an in the course and scope of his employment. Claimant's preexisting degenerative condition was aggravated, accelerated, or combined with the incident on August 21, 2017, resulting in the need for medical treatment. As found, claimant's testimony and the medical records are credible and persuasive on this issue.

5. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

6. As found, claimant has demonstrated by a preponderance of the evidence that he suffered a wage loss during the period of September 17, 2017 through December 10, 2017. Therefore, he is entitled to TTD benefits during that time. As found, the payroll records and claimant's testimony are credible and persuasive.

7. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Temporary partial disability payments ordinarily continue until either claimant reaches maximum medical improvement or an attending physician gives claimant a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. *See* 8-42-106, C.R.S.

8. As found, claimant has demonstrated by a preponderance of the evidence that he suffered a wage loss during the period of August 23, 2017 through September 16, 2017, and for the period beginning December 11, 2017 until claimant returned to full duty on February 1, 2018. Therefore, the claimant is entitled to TPD benefits during that time. As found, the payroll records and claimant's testimony are credible and persuasive.

9. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include the reasonable value of any advantage or fringe benefit provided to the claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

10. As found, the parties have stipulated that claimant's AWW for this claim is $990.00 and the ALJ adopts the stipulation of the parties.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury arising out of and in the course and scope of his employment with employer on August 21, 2017.

2. Claimant is entitled to temporary total disability (TTD) benefits for the period of September 17, 2017 through December 10, 2017.

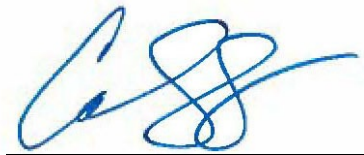
3. Claimant is entitled to temporary partial disability (TPD) benefits for the period of August 23, 2017 through September 16, 2017 and for the period of December 11, 2017 through January 31, 2018.

4. The ALJ adopts the stipulation of the parties and orders that claimant's average weekly wage (AWW) for this claim is $990.00.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

Dated: April 23, 2018



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ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that he sustained an injury that arose out of and in the course and scope of his employment with the employer on September 2, 2016.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that recommended medical treatment, including an electromyography (EMG) study as recommended by Erica Herrera, PA, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

- Prior to hearing, the claimant endorsed the issue of average weekly wage (AWW). However, at hearing the ALJ granted the claimant's motion to reserve that issue, without prejudice.

FINDINGS OF FACT

1. The employer performs investigations for clients, primarily in the workers' compensation system. The claimant is the owner of the employer's company and conducts surveillance for the employer's clients.

2. The claimant testified that he volunteers as the "assistant get back coach" for a local high school football team. In that position, the claimant ensures that players do not enter the field during a game. The claimant also testified that as a volunteer assistant coach he does not coach a position group, lead or demonstrate drills, or perform any physical duties.

3. The claimant testified that on September 2, 2016 he was conducting surveillance that involved filming an individual from his vehicle. While sitting in the driver's seat of his vehicle, the claimant turned to the right to film over his shoulder through the back driver's side window. The claimant testified that during this process of twisting his body, he felt a "pop" in his right low back or right hip and felt a "jolt" down his right leg. At that time, the claimant had to lay down on the ground until the pain subsided. The claimant testified that following that incident he had difficulty raising his right foot to walk. The claimant describes the feeling "like a pinched nerve".

4. The medical records entered into evidence demonstrate extensive prior treatment of the claimant's left hip and low back. A pelvic x-ray taken on March 20, 2013 showed mild bilateral hip osteoarthritis. The claimant testified that he has had issues with his left hip and left knee for many years and considered his right leg to be his "good" leg.

5. The claimant first communicated the September 2, 2016 incident to a medical provider when he contacted his primary care physician Dr. Andrew Mohler on September 13, 2016 via a "patient portal". In that communication the claimant indicated that he twisted his body "weird" and was unable to lift his right foot. Dr. Mohler instructed the claimant to schedule an appointment to been seen.

6. On September 19, 2016, the claimant sought treatment at Dr. Mohler's office and was seen by Courtney Kasun, NP. At that time, the claimant reported "burning pain" in his right hip and the inability to lift his right leg to step. Ms. Kasun instructed the claimant to treat the area with heat and referred him to physical therapy.

7. Thereafter, the claimant was seen by Dr. Mohler on September 30, 2016 and reported right hip pain with an occasional "zinger" down his right leg. Dr. Mohler referred the claimant to Dr. Fletcher Colwell for consultation. Claimant was seen by Dr. Colwell on October 7, 2016 who administered a right intra-articular hip injection. The claimant testified that the injection seemed to help his right hip symptoms.

8. On November 29, 2016, the claimant was seen by Dr. Richard Price regarding pain he was experiencing in his left knee. The claimant reported to Dr. Price that several weeks prior he had fallen on his left knee while hunting. The claimant testified that he tripped on a root and fell on his left knee. The claimant also testified that this pain was different from the pain he has in his low back and right hip.

9. The claimant did not receive further treatment for right hip pain until he returned to Dr. Mohler for treatment on March 29, 2017. At that time, the claimant reported a numb, tingling pain on the lateral aspect of his thigh, with a different kind of pain on the medial aspect of his thigh. The claimant linked those symptoms to the September 2, 2016 twisting incident. Dr. Mohler referred the claimant back to Dr. Colwell for consultation.

10. The claimant reported the September 2, 2016 incident to the insurer on April 18, 2017 by filing a First Report of Injury with the insurer. The claimant testified that he did not report the September 2, 2016 incident to his workers' compensation carrier sooner because he believed that the issue would resolve. When his hip pain continued and he sought additional medical treatment, the claimant decided he would report the incident to the insurer.

11. The claimant was instructed to obtain treatment with Work Partners as his authorized treating provider (ATP). The claimant first treated at Work Partners on May 1, 2017 and was seen by Dr. Lori Fay. At that time, the claimant reported pain in his right hip that was "tight" with burning on the inside of his leg and numbness on the outside of his leg. Dr. Fay opined that the claimant's symptoms indicated lumbar radiculopathy and ordered a magnetic resonance image (MRI) of the claimant's lumbar spine.

12. On May 3, 2017, an MRI was taken of the claimant's lumbar spine that showed degenerative facet changes throughout the lumbar spine with minor degenerative disc changes, most marked at the L4-5 level.

13. The claimant returned to Dr. Fay on May 10, 2017. Based upon the MRI results, Dr. Fay opined that the claimant's pain and numbness was likely originating from the facet arthritis and disc bulge at L4-5. She further opined that the incident on September 2, 2016 likely exacerbated the claimant's underlying degenerative condition. Dr. Fay referred the claimant to Dr. Kirk Clifford for consultation.

14. On May 31, 2017, the claimant was seen by Dr. Clifford and Todd Ousley, PA-C with Rocky Mountain Orthopaedic Associates. The claimant reported back pain that radiated into his right thigh as well as numbness in his thigh. Based upon the claimant's complaints and the results of the lumbar spine MRI, the claimant was instructed to continue to pursue non-operative treatment including exercise, weight loss, and smoking cessation. Dr. Clifford opined that the claimant would not benefit from injection therapy.

15. On June 1, 2017, x-rays of the claimant's bilateral hips showed moderate degenerative changes in each hip joint.

16. Subsequently, Dr. Fay referred the claimant for physical therapy and to Dr. Frazho for an orthopedic consultation. On June 9, 2017, the claimant was seem by Bryan Whitesides, MPT with Rocky Mountain Orthopaedic Associates. Mr. Whitesides opined that the claimant's chronic back pain could be caused by a gluteus medius tendon injury or tear.

17. On June 15, 2017, the claimant returned to Work Partners and was seen by Erica Herrera, PA. The claimant indicated to Ms. Herrera that he did not intend to return to Mr. Whitesides for treatment because the claimant disagreed with the assessment of a possible torn muscle. At that time, Ms. Herrera opted to wait on the referral to Dr. Frahzo and instead ordered an MR arthrogram of the claimant's right hip.

18. On July 11, 2017 an MR arthrogram of the claimant's right hip showed degenerative joint disease, small marginal osteophytes along the femoral head, minimal labral degeneration, with mild bursitis, and no labral tear.

19. On July 13, 2017, the claimant returned to Work Partners and was seen by Ms. Herrera. At that time, Ms. Herrera noted that the claimant's pain was a "shooting pain that radiates down the anterior thigh crossing over at the knee and in the medial aspect of the lower leg to the ankle". The claimant also reported that his symptoms seemed to worsen when he "shuffles down the field" when coaching football. At that time, Ms. Herrera opined that the claimant did not suffer a significant injury because the mechanism was "benign" and this was a slight exacerbation of claimant's preexisting condition. Despite this opinion, Ms. Herrera recommended an electromyography (EMG) study of the claimant's right leg.

20. On July 21, 2017, Dr. Kathryn Bird reviewed the request for an EMG study of the claimant's right leg. Dr. Bird opined that the need for an EMG would not be related to the claimant's workplace injury, and therefore would not be reasonable or necessary medical treatment. In support of this opinion, Dr. Bird noted that the claimant's mechanism of injury would not have be forceful enough to cause the changes seen on MRI. Dr. Bird opined that it was more likely that the degeneration seen on the imaging was due to the aging process and not a specific injury. Based upon Dr. Bird's opinion, respondents have denied authorization for the requested EMG.

21. On October 3, 2017, the claimant attended an independent medical examination (IME) with Dr. Albert Hattem. In connection with the IME, Dr. Hattem reviewed the claimant's medical records, obtained a medical history from the claimant, and performed a physical examination. In his written report, Dr. Hattem opined that the September 2, 2016 incident was a "very minor mechanism of injury" that resulted in a strain of the claimant's right hip. Dr. Hattem also opined that the claimant's chronic right hip pain was likely caused by his time as a football coach, or the fall he suffered while hunting in October 2016. In his report, Dr. Hattem stated that the claimant had reached maximum medical improvement (MMI), did not need further medical treatment, and did not have any permanent impairment. Dr. Hattem's testimony at hearing was consistent with his written report.

22. On October 30, 2017, Dr. Fay and Ms. Herrera authored a letter in which they agreed with Dr. Hattem's assessment that claimant's hip pain is not likely related to the September 2, 2016, but instead related to his underlying and preexisting arthritis.

23. The ALJ credits the opinions of Dr. Fay, Ms. Herrera, Dr. Bird, and Dr. Hattem and finds that the incident on September 2, 2016 was a minor and "benign" event. The ALJ also credits the opinions of Dr. Fay, Ms. Herrera, and Dr. Hattem that if anything, the claimant suffered a brief exacerbation of pain as the result of the September 2016 twisting incident, but his need for medical treatment is causally related to the claimant's preexisting arthritis.

24. The ALJ credits the medical records and finds that although the claimant sought medical treatment with Dr. Mohler in the weeks following the September 2, 2016 incident, the complaints that caused him to return to Dr. Mohler in March 2017 were related to his preexisting right hip, left hip, and low back conditions.

25. For the foregoing reasons, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an injury at work on September 2, 2016 that required medical treatment. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that the event on September 2, 2016 did not aggravate, accelerate, or combine with claimant's preexisting condition to warrant the need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

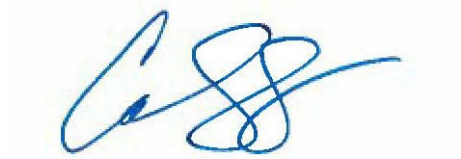
3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, the claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable work injury on September 2, 2016. As found, the September 2, 2016 incident may have caused a brief exacerbation of pain symptoms, but did not aggravate, accelerate, or combine with claimant's preexisting condition to necessitate medical treatment. As found, the medical records and the opinions of Dr. Fay, Ms. Herrera, Dr. Bird, and Dr. Hattem are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed.

Dated: April 25, 2018



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ISSUES

I. Whether Claimant overcome the Division IME opinions of Dr. McCranie regarding MMI and Impairment.

II. Whether Claimant is entitled to curative medical benefits in the form of left shoulder surgery.

III. Whether Claimant is entitled to maintenance medical benefits to maintain his MMI status.

IV. Whether Claimant proved by a preponderance of the evidence that his admitted left upper extremity impairment rating should be converted to a whole-person impairment rating.

V. Whether the medical treatment Claimant received through Colorado Rehabilitation and Occupational Medicine ("CROM") and Spine One was reasonable, necessary, related, and authorized.

PROCEDURAL MATTERS

At the close of Claimant's case-in-chief, Respondents made motions and requests for directed verdicts dismissing Claimant's request for additional curative and maintenance medical benefits provided by, and through referrals from, Colorado Rehabilitation and Occupational Medicine ("CROM") and Spine One as unauthorized. Claimant confessed those motions. The ALJ thus entered an Order granting Respondents' motion for directed verdict denying and dismissing Claimant's requests for maintenance and curative medical benefits provided by, and through referrals from, Colorado Rehabilitation and Occupational Medicine ("CROM") and Spine One as unauthorized.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant, currently 60 years-old (date of birth May 26, 1956),was hired by Ryko Solutions, Inc. ("Ryko") on March 1, 2010, as a full time chemical and parts delivery driver. He was injured on July 18, 2016, when, while making a delivery with his chemical delivery truck (a Ford F640), he stepped down while exiting the truck. He was holding a hand rail. His foot missed a step, and he struck his left heel on the curb by the truck. He did not fall to the ground or hit the truck. He reported this incident to Ryko, and selected Concentra as his medical provider.

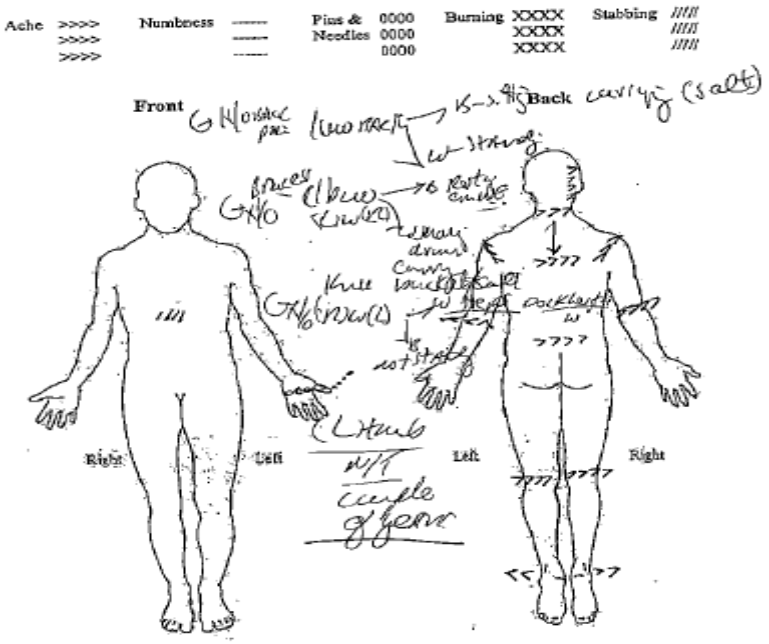
2. Claimant's first visit at Concentra was on July 19, 2016. Claimant said he had pain from his left heel up into his lower back, "[A]nd up into [his] left shoulder." Claimant reported, "No initial pop in shoulder foot or back." Claimant said most of his pain was in his left heel area. Ms. Hanna Bodkin, P.A. wrote in her report from this visit that claimant admitted to chronic, symptomatic low back and neck pain. Claimant stated he took Norco every day for his low back and neck pain, up to four a day. Ms. Bodkin did not take a further history from claimant about his pre-existing back symptoms, treatment, or diagnoses. Ms. Bodkin found no tingling or numbness on her examination. Claimant was tender in the anterior aspect of his left shoulder without crepitus, and with normal strength and tone on the left side. Claimant had tenderness in his left paraspinal muscles. Left foot x-rays taken at that visit were interpreted to be normal. Ms. Bodkin diagnosed claimant with a left shoulder strain, a lumbar strain, and a left foot injury. She put claimant in a left foot walking boot and gave him restrictions (Resp. Ex. C, pgs. 41-44).

3. Claimant testified Employer accommodated his restrictions consistently. Claimant missed no time from work at Employer due to this claim's injury and he continues to work as a full time chemical and parts delivery driver for Employer.

4. Claimant's previous left elbow and low back symptoms, medical treatment, and injuries are chronicled in the medical records from his personal medical providers at Hilltop Family Physicians. On August 5, 2013, Claimant discussed his lower back and left elbow pain. He was diagnosed with back pain, and prescribed 7.5 mg of Lortab for that pain, taking one tablet every four to six hours. (Resp. Ex. H, pgs. 213-215). On December 10, 2014, he reported chronic pain in his elbow, knee, and back. His back pain medication was being managed by Dr. Scott Primack at CROM (Resp. Ex. H, pg. 217).

5. Dr. Primack first saw claimant on November 20, 2013 (Resp. Ex. G, pgs. 115-116). Claimant complained of bilateral elbow pain and low back discomfort. "This has been ongoing over the last three years." Claimant wrote that his pain had developed over time (Id, pg. 117). His back pain was worse with motion, better when he was doing nothing. Claimant's goal was to have less pain. Claimant's, "[L]umbar flexion was 40^{o}. Lumbar extension was 15^{o}.[1] Rotation from right to left gave him as much discomfort as rotation from left to right." Claimant had central back pain, and was taking Lortab as prescribed, Claimant testified, by Hilltop Family Physicians. Claimant was diagnosed with lumbar degenerative disc disease, and was told to begin physical therapy for his lumbar spine. He was prescribed Ultram, 200 mg, in addition to the Lortab that would be for breakthrough pain. Claimant would need to use, Dr. Primack wrote, "[A] long-term medication for a 'long-term problem.'" Claimant completed a pain diagram showing pains in his left ankle, low back bilaterally, and behind both shoulders, at this appointment:

1 These are more restricted than claimant's lumbar range of motion found by the DIME Dr. McCranie on July 19, 2017 (Resp. Ex. A, pg. 18)



(Resp. Ex. G, pg. 118). This is significant as this diagram is very similar to Claimant's pain diagrams endorsing symptoms in the same areas after this claim's injury occurred. This is found to be clear and persuasive evidence Claimant had pre-existing conditions and symptoms in his left shoulder and back.

6. Claimant saw Dr. Primack for a worker's compensation injury that included an, "[E]xacerbation of his underlying multilevel degenerative disc disease . . ." on January 8, 2014 (Resp. Ex. G, pg. 122). On February 11, 2014, Claimant was taking Tramadol, and 7.5 mg of Norco 2-3 times daily, for his pain. He had low back pain with reduced range of motion in all plains (Resp. Ex. G, pg. 123). Claimant was prescribed Lortab 7.5 mg every eight hours (Resp. Ex. G, pg. 124). Claimant was using a back brace for axial low back pain on June 10, 2014 (Resp. Ex. G, pg. 130). Dr. Primack, on June 18, 2014, stated Claimant's low back symptoms were from, "[A] problem with facet syndrome and multilevel degenerative disc disease." (Resp. Ex. G, pg. 131) When Dr. Primack saw Claimant on October 24, 2014, he opined Claimant had facet syndrome with possible annular tears (Resp. Ex. G, pg. 132). Claimant had a lumbar spine MRI on October 28, 2014 (Resp. Ex. I, pg. 241) that demonstrated a disk protraction at L4-L5. Dr. Primack ordered an epidural steroid injection that was done January 23, 2015. (Resp. Ex. G, pg. 135-137). Claimant received relief from that injection and was found to have degenerative disk disease and facet oriented low back pain (Resp. Ex. G, pgs. 138-139). Dr. Primack discussed with Claimant undergoing medial branch blocks or facet injections on May 25, 2016, but Claimant declined to have those procedures (Resp;. Ex. G, pg. 150). Claimant's lumbar pain was determined to be facet-oriented on August 23, 2016 (Resp. Ex. G, pg. 154). While Claimant's attorney argued at hearing Claimant did not have these lumbar facet or disc diagnoses until after his July 18, 2016, injury, the record contains clear evidence that he did, and the ALJ finds Claimant had pre-existing lumbar facet dysfunction and degenerative disc disease that caused symptoms, including chronic pain, and required long-term medical treatment before his injury on July 18, 2016.

7. On April 17, 2015, Dr. Primack found Claimant had been fully treated for his work-related low back strain, and was back to his baseline of chronic lumbar back pain requiring medication management. Dr. Primack found, "He [Claimant] does have multilevel non-work-related lumbar spondylosis." Claimant had continued symptoms, requiring treatment, but, "Any further care would not be specific to his job, but would be more specific to non-work-related lumbar spondylosis." He took range of motion measurements, and wrote:

Today, when utilizing a two inclinometer method with validity testing, there was 43 degrees of flexion. There was 29 degrees of extension. Right lateral sidebending was 20 degrees and left lateral sidebending was 30 degrees.

Rotation did give him some discomfort. In the sitting position, internal/external rotation of the hips were within normal limits. Straight leg raising sign was 54 degrees on the left and 51 degrees on the right. Pelvic compression test was negative.

Dr. Primack indicated that Claimant was to continue taking Norco and Mobic for his non-work-related chronic low back symptoms. However, Dr. Primack did provide Claimant a 10% whole person impairment rating for his work related low back strain. (Resp. Ex. G, pgs. 141-144).

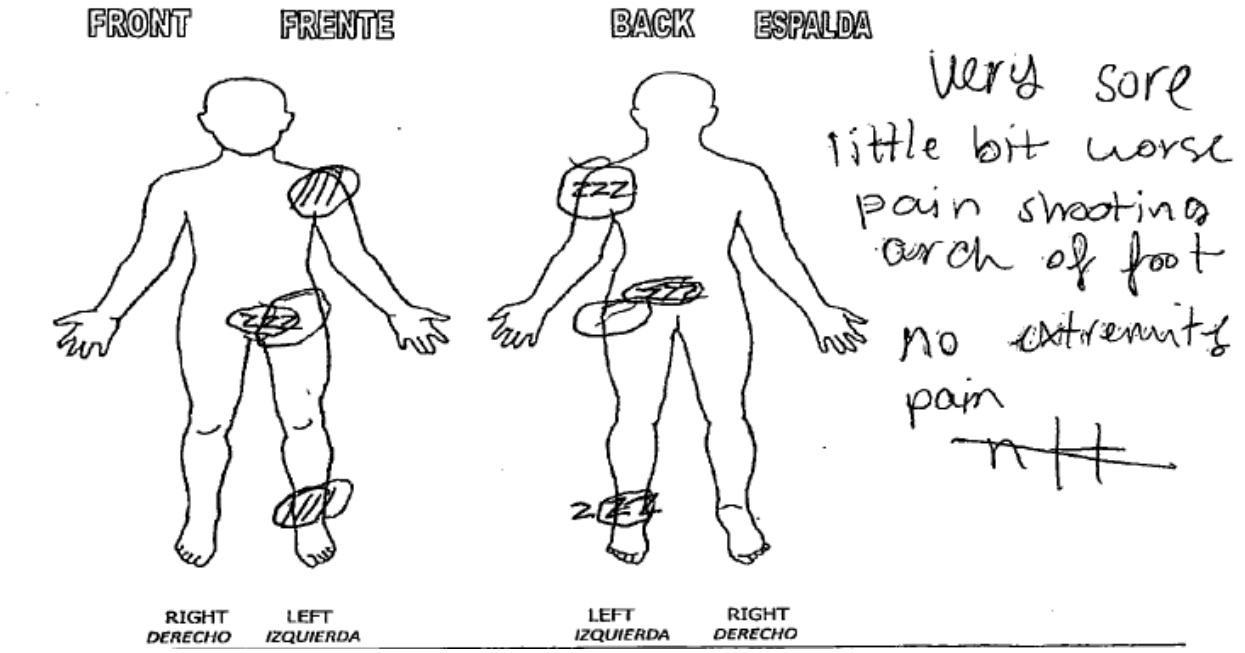
8. Claimant continued to receive treatment and prescription medication pain management with Dr. Primack after April 17, 2015. On December 15, 2015, Claimant was taking 10 mg of Norco "p.o.q.i.d.p.r.n," for, "[H]is usual back pain due to lumbar spondylosis." (Resp. Ex. G, pg. 147) He was taking the same pain medication on February 9, 2016 (Resp. Ex. G, pg. 150). Dr. Basse testified at hearing that this notation is Latin meaning claimant would take the prescribed Norco by mouth four times a day.

9. On December 15, 2015, Claimant returned to Dr. Primack due to his ongoing back pain. Dr. Primack noted Claimant had functional limitations with prolonged sitting and standing. Dr. Primack also noted Claimant's back pain was disabling and that Claimant required ongoing pain control for functionality. (Resp. Ex. G, pg. 147-148.) Claimant continued treating with Dr. Primack for chronic low back pain which required medication to increase Claimant's functioning and decrease his disability. (Resp. .Ex. G, pg. 150-151.) Therefore, before Claimant's July 18, 2016, his prior back condition was disabling.

10. Claimant testified at hearing during direct examination that his July 18, 2016, injury increased his back pain and necessitated the need for his pain medication use and dosage to be increased. As Dr. Basse credibly testified from her review of the records, and as shown in the medical records presented by Respondents at hearing, this is not true. Claimant was taking 10 mg of Norco four times daily on and before February 9, 2016 (Resp. Ex. G, pgs. 147, 150, 181-187), and continued taking the same 10 mg of Norco four times daily on and after August 23, 2016 for his stable usual low back pain (Resp. Ex. G, pgs. 154-155; 157 [November 22, 2016]; 160 [February 21, 2017]; 163 [May 18, 2017]; 166 [August 17, 2017]; 169 [November 14, 2017]). Claimant's Norco dosage increased from 7.5 mg to 10 mg on April 17, 2015 (Id. pg.

187) and remained stable at that dosage and frequency ever after. Claimant ultimately admitted during cross-examination at hearing that he did not have a clear or reliable recollection of what medication he took, the dose of the medication he took, or the frequency he took his medication, for his back pain. He admitted that because of his unreliable memory on these issues one should refer to and rely on the medical records to see what medication he took, when he took the medication, and his dosage and frequency of taking the medicine. Dr. Basse credibly testified that Claimant's medication use did not change or increase after this claim's July 18, 2016, injury.

11. Claimant returned to Concentra and Ms. Bodkin on July 27, 2016. He said he still had left heel pain that was slightly better, and pain in his left shoulder when moving it to 90 degrees. Claimant alleged that his back pain was worse than before this claim's injury. His pain diagram showed:



Claimant was, however, just taking his previously prescribed Norco for his pain. Ms. Bodkin referred Claimant to physical therapy, and continued his work restrictions. (Resp. Ex. C, pg. 52) Claimant's first physical therapy appointment was on August 2, 2016, at Concentra. By September 9, 2016, Claimant had achieved his goals in physical therapy, and was discharged to do home exercises (Resp. Ex. C, pg. 61).

12. On August 30, 2016, Claimant was evaluated by Dr. Cary Motz, an orthopedic surgeon. Dr. Motz evaluated Claimant's left shoulder. Claimant denied any prior shoulder injuries. Due to approximately 6 weeks of left shoulder discomfort with slight weakness, Dr. Motz ordered an MRI of Claimant's left shoulder. (Resp. Ex. E, pg. 105).

13. On September 20, 2016, Claimant returned to Dr. Motz. Dr. Motz reviewed Claimant's MRI of his left shoulder. Dr. Motz concluded that the MRI demonstrated degenerative changes with rotator cuff tendinitis. He did not document

an acute or traumatic rotator cuff tear. Dr. Motz felt the left shoulder required a steroid injection, and provided one at that appointment. Claimant reported a significant reduction in his left shoulder symptoms after the injection. Dr. Motz was hopeful that with some additional physical therapy, he would be able to release Claimant from his care. (Resp. Ex. E, pg. 107).

14. On October 11, 2016, Claimant returned to Concentra and was evaluated by Carrie Burns, M.D. Claimant reported his symptoms had improved, with his back now his most painful body area. Dr. Burns did not document any symptoms above Claimant's left arm at the shoulder at this appointment (Resp. Ex. C, pg. 71).

15. On October 25, 2016, Claimant returned to Dr. Motz. It was noted that although physical therapy had been authorized several weeks ago, Claimant had not attended any physical therapy appointments since they had been authorized. Dr. Motz examined Claimant's shoulder. His impression was i) impingement syndrome, and ii) degenerative labral fraying. Dr. Motz indicated that he would like to see how Claimant responds to physical therapy. Dr. Motz also opined that:

> I am not terribly optimistic that he will get better. **I certainly have some concerns regarding secondary gain issues with this patient** and concerns that surgical intervention would not have the desire [*sic*] improvement. (Emphasis added.)

(Resp. Ex. E., pg. 110).

16. At Claimant's next visit at Concentra on October 28, 2016, Dr. Aschberger reviewed Claimant's history of lumbar spine symptoms and medical treatment. He noted Claimant had findings of facet irritation before this claim's injury. He wrote that he did not see, "[S]ignificant deterioration in his overall condition." Dr. Aschberger stated, "He has a preexisting lumbar abnormality requiring opioid pain management and has been followed by Dr. Primack. I am not expecting any additional impairment given the current findings. He is not a candidate for additional opioid management." (Resp Ex. C, pg. 77).

17. On November 2, 2016, Claimant told Ms. Bodkin he was frustrated, stating, "[N]o one is addressing his pain and injuries." Ms. Bodkin listed all the referrals and treatments Claimant had received to rebut that assertion. Claimant said he was 10% improved as compared to his symptoms when his injury occurred. Claimant's left shoulder was no longer constantly painful, but he still complained of pain with range of motion measurements. There was no note made of any symptoms above his left arm at the shoulder. His heel pain had decreased, Claimant said, to 3-4/10. His physical therapy was to begin November 3, 2016. Ms. Bodkin examined Claimant, and recorded:

Left Shoulder: (forward flexion and abduction to about 90 degrees with pain, pain with lift off. TTP anterior shoulder, AC and posterior shoulder. strength 4/5. no edema. no deformity.)
Shoulder: Appearance is normal. No crepitus on palpation with no warmth. Motor tone is normal. Neurovascular function intact. Positive impingement testing.

Left Ankle: Appearance normal. No deformity. No tenderness. FROM. Strength normal.

Left Foot/Toes: (TTP calcaneus. no edema)
Foot and Toes: Appearance is normal. Palpates normal. Full range of motion. Normal tone. Neurovascular function intact.
Lumbosacral Spine:
(limited ROM all planes with pain most significant with forward flexion and left lateral bend.) Appearance with Normal. level entire tenderness in the left paraspinal and level entire tenderness in the right paraspinal, but no tenderness in the lumbar spine Palpation: no bilateral muscle spasms. Neuro/Vascular: neurovascular function intact. normal sensation.

(Resp. Ex. C, pgs. 80-83).

18. On November 29, 2016, Claimant returned to Dr. Motz after undergoing eleven physical therapy visits for his left shoulder. Claimant told Dr. Motz that the physical therapy improved his pain and function a little bit. Dr. Motz physically evaluated Claimant's left shoulder and noted mild limitation of range of motion and a positive impingement Hawkin's test. He also noted that his rotator cuff strength was 5/5 and there was no instability. Despite these findings, but due to Claimant's ongoing pain complaints, Dr. Motz recommended shoulder surgery. However, Dr. Motz opined that the surgery may not resolve Claimant's pain complaints. Dr. Motz stated in his report:

> The patient has now undergone four months of conservative treatment including physical therapy and a steroid injection without significant functional improvement. At this point, our options are to consider surgical intervention or I believe he is approaching MMI for his shoulder. He does not feel he can live with his shoulder symptoms the way they are. Therefore, I believe that we need to proceed with an arthroscopy with subacromial decompression and extensive debridement. I went over the risks and complications associated with the procedure as well as the postoperative rehabilitation and expectations. He understands these and desires to proceed. ***I certainly have some concerns given the multitude of issues that he has that he may not have resolution of his shoulder pain***, . . . (Emphasis added.)

(Resp. Ex. E, pg. 111).

19. On December 8, 2016, Dr. Peter Garcia performed a "Peer Review" evaluation. Dr. Garcia was asked to address whether the surgery recommended by Dr. Motz was reasonable and necessary and due to the July 18, 2016 work injury. Although Dr. Garcia did not appear to have any records outlining the alleged mechanism of injury, Dr. Garcia opined that the requested shoulder surgery was not reasonable, necessary, and related. Dr. Garcia noted that the procedure recommended by Dr. Motz would address the diagnosis of impingement syndrome which is an age

related disease process. He went on to indicate that conditions that predispose individuals to impingement syndrome include those that alter the normal gliding function of the shoulder such as bone spurs, osteoarthritis, shoulder injuries and degenerative diseases. In support of such opinion, Dr. Garcia noted the MRI findings which indicated Claimant had a small to moderate caliber mildly impinging subacromial spur.

(Ex. F, pg. 112).

20. Dr. Aschberger saw claimant on December 9, 2016. He reported Claimant's foot was better, but still had irritation in his lumbar spine and low back. Dr. Aschberger wrote:

> I reviewed his past history with back issues. He has had previous indications of lumbar facet irritation. He was seen at CROM on 08/23/2016. Mr. Hogan reports he has not had significant issues with back and has been able to drive. However, he has been taking opiates as prescribed for "chronic pain issues." Mr. Hogan reports medication helped control the back pain and did not have the aggravation that he is currently reporting.

(Resp. Ex. C, pgs. 94-95).

21. On December 14, 2016, Claimant saw John Burris, M.D. at Concentra. Dr. Burris stated Claimant had no complaints of left heel or foot pain at this appointment. He discussed Claimant's left shoulder's symptoms and method of injury. Dr. Burris opined, after reviewing the claim's injury mechanism, "I suspect that the left foot injury is likely the only injury that can be correlated with this mechanism. There was no specific trauma to the back and he has a significant preexisting history of low back issues requiring 40 mg of Norco daily. Likewise, this mechanism does not appear to be consistent with a left shoulder injury and subsequent workup has only revealed impingement syndrome which is a common condition and typically occurs absent trauma." He felt Claimant was at MMI without impairment. (Resp. Ex. C, pgs. 96-98) The ALJ finds Dr. Burris' opinion that Claimant reached MMI on December 14, 2016, and that Claimant's shoulder impingement problem is a common problem and typically occurs without trauma to be credible and persuasive.

22. Respondents filed a Final Admission of Liability consistent with Dr. Burris' opinions stating claimant reached MMI on December 14, 2016, that his left heel injury was the only injury covered by this claim, and that Claimant had no impairment or need for maintenance medical treatment (Resp. Ex. O). Claimant, through his attorney, objected to that admission and requested a Division IME.

23. On March 19, 2017, Claimant fell from a roof at his home, landing on a fence, and then a patio. He had abrasions and symptoms on his entire left side including his left arm, and left ribs. He was taken off of all work. By April 5, 2016, his symptoms had improved so that he was requesting a note allowing him to return to work with restrictions. Employer accommodated those restrictions beginning April 17, 2017. (Resp. Ex. H, pgs. 229-239)

24. Rachel L. Basse, M.D. saw Claimant on May 9, 2017, at Respondents' request, for an independent medical evaluation (Resp. Ex. B). Consistent with his

testimony at hearing, Claimant indicated that although he was using pain medication for his preexisting back injury before this claim, he had to use more pain medication after his work accident on July 18, 2016. In other words, Claimant alleged that his July 18, 2016, accident aggravated his preexisting back condition and caused additional pain which required additional medication to treat the increase in pain. Claimant, however, did not accurately report his medication usage history to Dr. Basse (Resp. Ex. B, pg. 30), and Dr. Basse reviewed Claimant's medical records accurately documenting his chronic opioid use for his long-standing lumbar spine diagnoses and symptoms after this appointment. When she did so, as she credibly testified at hearing, she found Claimant has used the same amount of Norco before and after his July 18, 2016 accident. (Resp. Ex. B, pgs. 36-40). Therefore, Claimant is not found to be reliable regarding the extent of his symptoms, disability, and pain that existed before and after his July 18, 2016, work accident.

25. Dr. Basse indicated in her reports, and testified at hearing, that at most, Claimant sustained a sprain/strain of his low back on July 18, 2016, and that he has returned to baseline without any additional impairment. The ALJ finds Dr. Basse's opinions to be credible and persuasive.

26. Dr. Basse wrote in her initial and addendum reports, and testified at hearing, that Claimant sustained no impairment and needs no additional medical treatment for his lumbar spine due to his July 18, 2016, sprain. (Resp. Ex. B, pgs. 35; 39-40.) Dr. Basse's testimony is founded on a review of all of Claimant's medical records, a thorough examination of Claimant, and listening to Claimant's hearing testimony. She possesses a complete understanding of Claimant's overall medical condition, making her opinions expressed in her reports and at hearing credible and persuasive.

27. The DIME examination was performed by Kathy McCranie, M.D. on July 19, 2017. Dr. McCranie's opinions and impressions are as follows:

a. Low back pain status post lumbar strain.
b. History of mild degenerative disease in the lumbar spine not aggravated or accelerated by the July 18, 2016, work accident.
c. Longstanding history of chronic back pain pre-dating the work injury.
d. History of prior work-related lumbar injury in approximately 2014 at MMI on April 17, 2015, with ten percent whole person impairment rating.
e. Left shoulder pain, status post strain.
f. Left heel pain secondary to plantar fasciitis of the left heel with calcaneal spur.

Dr. McCranie concluded Claimant reached MMI on December 14, 2016, which is the date Dr. Burris placed Claimant at MMI. She also concluded Claimant is not in need of maintenance medical treatment for his work related injuries.

Back Injury

Regarding Claimant's low back, she concluded Claimant suffered a lumbar strain as a result of the July 18, 2016, work accident. She also concluded that Claimant has a history of longstanding chronic lumbar pain and spondylosis. She further concluded that after reviewing his MRI, and performing an impairment rating, his back condition has returned to baseline. Dr. McCranie performed an impairment rating of his low back pursuant to the AMA Guides. She determined Claimant would receive five percent impairment from the Spinal Disorders Chart from Table 53 and an additional five percent impairment for loss of range of motion equaling ten percent impairment whole person. She indicated that his impairment was identical to the impairment rating given in 2015 for his previous work related back injury. Therefore, she concluded that after apportionment, his lumbar rating for his July 18, 2016, injury was zero percent.

Left Shoulder Injury

Regarding Claimant's left shoulder, injury, she determined Claimant suffered a shoulder strain and that Claimant has reached MMI. In her report, she noted that Dr. Motz recommended shoulder surgery. She also noted that Dr. Garcia performed a Peer Review and did not think the surgery was reasonable for Claimant's left shoulder strain. She noted that Dr. Garcia determined the requested shoulder procedure was addressing an age-related disease process. In the end, Dr. McCranie agreed and concluded that Claimant has non-work related underlying degenerative changes in his left shoulder that are age related and that Claimant does not require any additional medical treatment for his work related shoulder strain.

Regarding impairment, she determined that Claimant would receive seven percent impairment for loss of range of motion of the left shoulder. She then determined that two percent should be deducted from the seven percent after normalization to yield five percent impairment of the left upper extremity. She went on to conclude that the five percent impairment of the left upper extremity equals three percent whole person impairment. She did not state or provide any persuasive findings that would establish this impairment is above Claimant's arm at the shoulder.

Dr. McCranie also concluded Claimant does not require any maintenance medical treatment for his left shoulder.

Left Heel Injury

Regarding Claimant's left heel, she determined Claimant developed plantar fasciitis due to his July 18, 2016, work injury. Due to tightness in dorsiflexion of his left foot, she provided Claimant a two percent impairment of the left lower extremity which equals a one percent whole person rating. She also indicated

that no maintenance medical treatment is needed, other than the use of orthotics.

(See Resp. Ex. A)

28. Dr. McCranie found Claimant had no cervical or scapular muscle tenderness (Resp. Ex. A, pg. 11). Her report documents no left upper extremity symptoms above Claimant's arm at the shoulder.

29. She stated Claimant requires no maintenance medical treatment, "His opioid management is not work-related and he can return to Dr. Primack's office outside of Workers Compensation for continued opioid management as he was doing prior to this work injury." (Id.)

30. The ALJ finds Dr. McCranie's findings and opinions as set forth in her report to be credible and persuasive.

31. The Division of Workers' Compensation Division IME Unit issued a Notice of Completion on August 11, 2017 (Resp. Ex. P). Respondents admitted to Dr. McCranie's impairment rating, date of MMI of December 14, 2016, and denied maintenance medical treatment consistent with her opinion in Final Admissions of Liability filed August 18 and October 24, 2017 (Resp. Ex. Q and R).

32. Claimant testified that, with regard to his low back, he was suffering very bad pain prior to seeking treatment at Spine One. He contacted Spine One in response to their TV advertising. At Spine One, Claimant received a series of nerve blocks culminating in a rhizotomy (Resp. Ex. M). Claimant reported 80% improvement of his low back symptoms, and Dr. Vu assessed "excellent relief of the facet-mediated pain from the radiofrequency ablation." (Resp. Ex. M, pg. 287) Claimant testified that, since receiving treatment at Spine One, he has been able to perform his job duties without back impairment, and has reduced his use of medications. Claimant contends that the treatment he received from Spine One is responsible for the relief he is experiencing in his low back.

33. Claimant had pre-existing lumbar facet dysfunction and degenerative disc disease that caused chronic pain and required long-term medical treatment before his injury on July 18, 2016. Claimant's pre-existing lumbar facet dysfunction, degenerative disc disease, and chronic back pain was not aggravated or accelerated by his July 18, 2016, work injury which resulted in a lumbar sprain/strain. Therefore, the ALJ finds that the treatment Claimant received from CROM and Spine One, which includes the injections and radiofrequency neurotomy - ablation - was not reasonable and necessary to treat Claimant from the effects of his July 18, 2016, work accident because such condition(s) were not related to the July 18, 2016, work accident. The treatment Claimant received from CROM and Spine One was to treat Claimant's preexisting spinal problems and chronic back pain which were not caused, aggravated, or accelerated by his July 18, 2016, work injury.

34. Claimant, through his attorney, agreed that CROM and Spine One are not authorized providers. Therefore, CROM and Spine One are not authorized providers and the treatment Claimant received from CROM and Spine One was not authorized.

35. Claimant suffered a lumbar sprain/strain on July 18, 2016. Claimant's work accident did not aggravate or accelerate his preexisting degenerative disease of his lumbar spine, including his facet related back pain. Claimant's lumbar sprain/strain resolved and Claimant's back condition returned to his baseline condition as it existed before the work accident. Any need for ongoing medical treatment for his low back is not related to his July 18, 2016, work injury.

36. Claimant's medical impairment rating for his July 18, 2016, lumbar sprain/strain is zero.

37. Claimant suffered a left shoulder strain on July 18, 2016. Claimant's left shoulder strain did not aggravate or accelerate Claimant's underlying degenerative age related disease process in his left shoulder. The need for shoulder surgery is not reasonable and necessary to treat Claimant's work related shoulder strain/sprain because i) the surgery was proposed to treat his underlying degenerative age related disease process which was not caused, aggravated, or accelerated by his work injury; ii) the surgery was proposed to treat his ongoing pain complaints which have been found to not be reliable; and iii) even Dr. Motz has reservations as to whether the surgery will help Claimant's pain complaints. Therefore, the need for additional medical treatment for his left shoulder is not reasonable, necessary, or related to his work injury. There is no need for maintenance medical treatment for his work related shoulder sprain. Claimant did suffer a five percent impairment of his left upper extremity.

38. Claimant testified regarding his shoulder and that he has trouble with putting his coat on due to an inability to lift his arm above his head or out to the side without pain. He also indicated that he is restricted from working overhead and is unable to perform this task at work. He further testified that he experiences a tightness and pulling in his shoulder when over using his arm. (Audio recording from hearing, 1:33 -1:36:27). The ALJ does not find all of Claimant's pain complaints and all of his alleged restrictions regarding his left shoulder to be reliable or related to his shoulder sprain. Therefore, the ALJ does not find Claimant's symptoms and restrictions to equate to a functional impairment extending beyond his left upper extremity. Thus, Claimant's functional impairment is limited to his left upper extremity and does not extend beyond the arm at the shoulder

39. Claimant suffered an injury to his left heel and developed plantar fasciitis due to his July 18, 2016, work injury. This caused tightness in dorsiflexion of his left foot and resulted in a two percent impairment of the left lower extremity which equals a one percent whole person rating. There is no need for maintenance medical treatment for his heel injury – plantar fasciitis.

40. Claimant did not challenge the extremity rating provided by Dr. McCranie for his left shoulder and his left lower extremity.

41. Claimant did not assert that apportionment of the 10% impairment rating provided by Dr. Primack for Claimant's prior work related back injury was inappropriate. Instead, Claimant asserted that DOWC Impairment Rating Tips (Claimant's Exhibit 3) provide that a rhizotomy should be rated using part II(C) of Table 53 in the *AMA Guides*. (p.13) Specific Disorders Table 53, II.C (Exh.4), provides a 7 percent rating for the lumbar spine. Claimant further asserted that after apportionment of the prior 5% Table 53 rating, Claimant would be entitled to the net difference of 2%. As found, the treatment Claimant received through Spine One, including the neurotomy/rhizotomy, is not related to the July 18, 2016, work injury. Therefore, the ALJ does not find Claimant's argument persuasive.

42. Claimant failed to present credible and persuasive evidence that would clearly and convincingly show Dr. McCranie's impairment ratings, MMI determination, and opinions on causation and relatedness inherent in her determinations of MMI and impairment are erroneous and should be set aside. No medical provider or expert issued a report, or offered testimony, which would amount to clear and convincing evidence that Dr. McCranie erred in these determinations. Dr. Basse testified credibly and convincingly that Dr. McCranie's impairment ratings were correctly done and complied with the DOWC's impairment rating tips and Level II guidelines, as well as the AMA Guides. The ALJ finds Dr. McCranie's determinations that Claimant reached MMI on December 14, 2016, consistent with Dr. Burris' report and findings, and Dr. Basse's reports and opinions, is correct. The ALJ finds Dr. McCranie's impairment rating of 5% of Claimant's left upper extremity of the left arm at the shoulder, and 2% of his left lower extremity at the ankle, are correct and are the only impairment ratings causally related to Claimant's injury of July 18, 2016, covered by this claim.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Principles

a. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*.

b. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

c. When determining credibility, the fact finder should consider, among other

things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). Where a party presents expert opinions, the weight, and credibility, of the opinions are matters exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

d. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the Division IME

I. Whether Claimant overcome the Division IME opinions of Dr. McCranie regarding MMI and Impairment.

Maximum Medical Improvement

e. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe,* W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines,* W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). This determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to

assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008).

f. The mere difference of medical opinion does not necessarily constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.,* W.C. No. 4-380-560 (ICAP, Nov. 17, 2000). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

g. MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. Importantly, Claimant bears the burden of proof of showing that medical benefits he requests to show he was not properly placed at MMI by the DIME provider Dr. McCranie must be causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (May 4, 2007). Claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that curative treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

h. In this case the Division Examiner Dr. McCranie found Claimant reached MMI on December 14, 2016, as did the primary treating provider John Burris, M.D. Dr. McCranie, in her DIME report, determined Claimant suffered a shoulder strain. In her report, she noted that Dr. Motz recommended shoulder surgery. She also noted that Dr. Garcia performed a Peer Review and did not think the surgery was reasonable for Claimant's left shoulder strain. She noted that Dr. Garcia determined the requested shoulder procedure was addressing an age-related disease process. In the end, Dr. McCranie agreed and concluded that Claimant has non-work related underlying degenerative changes in his left shoulder which are age related and were not aggravated or accelerated by the work injury and that Claimant does not require any additional medical treatment to cure him from the effects of his work related shoulder strain/sprain.

i. Dr. McCranie also determined Claimant reached MMI for his lumbar strain and that Claimant returned to his baseline condition which existed before his July 18, 2016, work injury. She concluded Claimant did not need any additional medical treatment to cure him from the effects of his July 18, 2016, lumbar strain.

j. Dr. McCranie also determined Claimant reached MMI for his heel injury and that he does not need any additional medical treatment to cure him from the effects of that injury.

k. Claimant did not present clear and convincing evidence to show that he did not reach MMI on December 14, 2016. Dr. Rachel Basse's report and hearing testimony that this date is Claimant's date of MMI is also persuasive and credible. The ALJ finds and concludes Claimant attained MMI on December 14, 2016. Accordingly, as curative medical benefits end when Claimant attains MMI, Claimant's request for additional curative medical benefits, including shoulder surgery, is denied and dismissed.

Impairment Rating

l. A DIME physician must apply the AMA Guides when determining the Claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8) (c), C.R.S. The finding of a DIME physician concerning the Claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

m. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). Medical impairment rating is not the equivalent of disability. *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996).

n. The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). A mere difference of

opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

o. A DIME physician is required to rate Claimant's impairment in accordance with the AMA Guides. § 8-42-107 (8) (c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). Even if the ALJ finds the DIME physician deviated from the rating protocols of the AMA Guides, the party challenging the rating must still demonstrate that the deviation casts substantial doubt on the overall validity of the rating. *Schrameck v. USA Waste Management*, W.C. No. 4-407-221 (ICAO May 18, 2001), *Rivale v. Beta Metals, Inc.*, W.C. No. 4-2655-360 (April 16, 1998), *aff'd. Rivale v. Industrial Claim Appeals Office,* (Colo. App. No. 98CA0858, January 28, 1999) (not selected for publication). For example, the mere absence of the DIME's notes on a subject does not rise to the level of clear and convincing evidence that the DIME was wrong. *Wilson v. Falcon Street School District No. 49*, W.C. No. 4-494-116 (October 7, 2002). As noted by the ICAO in *Wilson*, supra, "Implicit in the appellate rulings is the recognition that not every deviation from the rating protocols of the AMA Guides warrants the conclusion that the rating itself has been overcome by clear and convincing evidence. Rather, proof of a deviation from the AMA Guides is some evidence which must be considered in the context of all other evidence in determining whether the rating has been overcome." *Rivale v. Beta Metals, Inc.,* supra; *Sutton v. Alpen Construction,* W.C. No. 4-225-415 (April 1, 1997); *aff'd., Sutton v. Industrial Claim Appeals Office,* (Colo. App. No. 97CA0711, November 13, 1997) (not selected for publication).

p. In this case, Dr. McCranie provided Claimant a 0% lumbar spine impairment rating for this claim. Claimant failed to present clear and convincing evidence establishing this rating was incorrect. No other medical provider provided an impairment rating for Claimant's spine, which the credible evidence presented at hearing showed was symptomatic, and independently disabling and impairing, prior to Claimant's July 18, 2016, injury covered by this claim. As found, the ALJ concludes Dr. McCranie correctly and fully rated claimant's impairments causally related to this claim's July 18, 2016, injury.

q. Claimant asserted that DOWC Impairment Rating Tips (Claimant's Exhibit 3) provide that a rhizotomy should be rated using part II(C) of Table 53 in the *AMA Guides*. (p.13) Specific Disorders Table 53, II.C (Exh.4), provides a 7 percent rating for the lumbar spine. Claimant further asserted that after apportionment of the prior 5% Table 53 rating, Claimant would be entitled to the net difference of 2%. As found, the treatment Claimant received through Spine One, including the neurotomy/rhizotomy, is not related to the July 18, 2016, work injury. Therefore, Claimant's assertion does not rise to the level of clear and convincing evidence.

r. Neither party challenged the scheduled impairment ratings provided by Dr. McCranie and which were admitted to by Respondents in their FAL. Therefore, they were not addressed under any burden of proof.

s. The ALJ concludes that Claimant has failed to overcome the opinion of Dr. McCranie regarding his impairment rating. Claimant's impairment rating for his low back under this claim is zero. The ALJ also concludes that Dr. McCranie's impairment rating of 5% of claimant's left upper extremity of the left arm at the shoulder, and 2% of his left lower extremity at the ankle, are correct and are the only impairment ratings causally related to claimant's injury of July 18, 2016, covered by this claim.

Conversion of Impairment Rating

t. The party seeking to convert the impairment rating has the burden of proof of doing so by the preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

u. Claimant contends that he is entitled to a whole person impairment rating. Respondents contend that Claimant is entitled to a scheduled impairment rating. Section 8-42-107 sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and Subsection (8) provides a Division independent medical examination (DIME) process for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The application of the schedule depends upon the situs of the functional impairment rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996).

v. Section 8-42-107(8)(a), C.R.S. states: "When an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." And, the IME provisions of Section 8-42-107(8) (c) only apply "in cases of whole body impairment." *See Mountain City Meat Co. v. Industrial Claim Appeals Office*, 904 P.2d 1333 (Colo. App. 1995). The percentage rating for scheduled benefits is determined based upon the preponderance of the evidence. Section 8-42-107(2), C.R.S. describes scheduled impairments as "loss" at or below the shoulder.

w. When reading these two statutes in concert, any "loss" that is not on the schedule found at C.R.S. 8-42-107 (2) shall be paid as a whole person impairment pursuant to C.R.S. 8-42-107 (8).

x. The evidence presented at hearing established that Claimant's functional impairment in his left shoulder is at and below Claimant's left arm at the shoulder. Claimant failed to produce credible or persuasive evidence that would show Claimant's left arm impairment should not be rated on the schedule of impairments. No medical provider credibly stated in any report, or in testimony, that Claimant's left arm functional impairment is above his arm at the shoulder. Dr. Basse testified the situs of Claimant's functional impairment is at the arm at the shoulder. Claimant has unrelated, pre-

existing degenerative shoulder joint arthritic changes that also cause shoulder symptoms. Dr. Burris found Claimant's left shoulder had no impairment when he placed claimant at MMI. Moreover, the ALJ did not find Claimant's pain complaints and stated limitations regarding his shoulder to be reliable or that they are related to his shoulder sprain. The ALJ finds and concludes Claimant has no functional impairment above his left arm at the shoulder. Claimant is entitled to the 5% left upper extremity impairment provided by Dr. McCranie on the schedule found at C.R.S. 8-42-107 (2). As Respondents have admitted to and paid that scheduled rating's PPD benefits Claimant is not entitled to additional PPD benefits.

Maintenance Medical Benefits

y. While the denial of Claimant's request for maintenance medical benefits as the requested specific medical benefits provided by and through Claimant's medical providers at CROM and Spine One alleviates Respondents from any duty to provide those benefits, Claimant continues, as the ALJ understands, to request an order finding respondents responsible for general maintenance medical benefits to maintain his MMI status. Respondents contend the need for continued medical benefits is entirely related to Claimant's pre-existing, symptomatic, impairing lumbar spine and back condition documented in Claimant's medical records submitted at hearing, specifically the medical records from CROM. C.R.S. § 8-42-101 (1) (a) provides that respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (May 4, 2007). Therefore, Claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

z. Respondents' obligation to provide medical benefits to cure the industrial injury terminates at MMI. Thereafter, Respondents are only responsible for medical benefits to maintain or prevent a deterioration of Claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Id.* An award for *Grover* medical benefits, also referred to as maintenance medical benefits, is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo.

App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

aa. The ALJ credits the opinions of Dr. McCranie and Dr. Basse that Claimant does not require maintenance medical treatment due to his work related injuries. Claimant's need for medical treatment directed towards his back relates to his preexisting back problems which were not aggravated or accelerated by his work injury. Moreover, any need for treatment directed towards Claimant's left shoulder is also due to Claimant's preexisting age related shoulder condition which was not aggravated or accelerated by his work injury. Claimant also does not need any maintenance treatment for his left heel. The ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that he is in need of maintenance medical treatment to prevent further deterioration of his work injuries or relieve him from the effects of his work injuries.

Whether the medical treatment Claimant received through Colorado Rehabilitation and Occupational Medicine ("CROM") and Spine One was reasonable, necessary, related, and authorized.

bb. A preexisting disease or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the preexisting disease or infirmity to produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and Claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

cc. As found, Claimant had pre-existing lumbar facet dysfunction and degenerative disc disease that caused chronic pain and required long-term medical treatment before his injury on July 18, 2016. Claimant's pre-existing lumbar facet dysfunction, degenerative disc disease, and chronic back pain was not aggravated or accelerated by his July 18, 2016, work injury which resulted in a lumbar sprain/strain and returned to baseline. As found, the treatment Claimant received from CROM and Spine One, which includes injections and the radiofrequency neurotomy was not reasonable and necessary to treat Claimant from the effects of his July 18, 2016, work accident because such condition(s) were not related to the July 18, 2016, work accident. The treatment Claimant received from CROM and Spine One was to treat Claimant's preexisting spinal problems and chronic back pain which were not caused, aggravated, or accelerated by his July 18, 2016, work injury. Therefore, the treatment provided by CROM and Spine One was not reasonable and necessary to treat Claimant's July 18, 2016, work injury. Moreover, Claimant, through his attorney, agreed at hearing that the treatment provided by CROM and Spine One was not authorized.

dd. Therefore, Claimant has failed to establish by a preponderance of the evidence that the treatment he received from CROM and Spine One was reasonable, necessary, related, and authorized. Therefore, the ALJ concludes Respondents are not responsible for the treatment provided to Claimant by CROM and Spine One.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following Order:

1. Claimant has failed to overcome the Division IME opinions of Dr. McCranie regarding MMI and Impairment.

2. Claimant reached MMI on December 14, 2016.

3. Claimant's request for left shoulder surgery is denied and dismissed.

4. Claimant request for maintenance medical benefits is denied and dismissed.

5. The treatment provided by CROM and Spine One, as well as their referrals, was not reasonable and necessary to treat Claimant for his work related back sprain because the conditions treated were not related to Claimant's work injury. Moreover, the treatment provided by CROM and Spine One, as well as their referrals, was not authorized. Therefore, Respondents are not responsible for the treatment provided by CROM, Spine One, or any of their referrals.

6. Claimant sustained a 5% impairment of his left arm at the shoulder found on the schedule of impairments. Claimant failed to establish that the extremity rating for his shoulder should be converted to a whole person impairment rating. Claimant also sustained a 2% impairment of his left foot at the ankle found on the schedule of impairments. These are the only impairment ratings causally related to Claimant's July 18, 2016, injury.

7. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 11, 2018

Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

I. Reopening or withdrawal of general admission of liability dated July 21, 2017, and any other general admission of liability, which admitted and paid temporary total disability benefits from December 14, 2015 through June 11, 2017.

II. Whether Claimant was entitled to temporary total disability from December 14, 2015 through June 11, 2017.

III. Calculation of temporary partial disability owed from December 14, 2015 through June 11, 2017, and calculation of overpayment.

IV. Whether respondents may take credit for overpayment against permanent partial disability benefits.

V. Overpayment reimbursement.

VI. Whether Claimant willfully made a false statement or representation material to the claim for the purpose of obtaining benefits per CRS § 8-43-402.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. This is an admitted claim. Claimant, a Licensed Practical Nurse, was injured when she slipped and injured her left knee on December 13, 2015. *Ex. O, Bates 217.* Claimant fractured her left patella. Ex. *A*. The employer was Integrated Healthcare Staffing, who carried workers' compensation insurance with Pinnacol Assurance. Claimant worked for Integrated Healthcare Staffing part time, and had just begun that work in October 2015. Claimant worked approximately 8 hours per week for Employer.

2. Claimant's average weekly wage ("AWW") from her work with Integrated Healthcare Staffing, Inc. was $166.74. *Ex. K, attachments to GA.* [Pay from 10-18-2015 to 11-21-2015, 34 days, $810 total. $810/34 = $23.82 per day, x 7 days = $166.74.] Temporary total disability rate based upon that AWW is $111.14.

3. The claims representative handling the claim for Insurer is Ryan Saladin. Mr. Saladin was present and testified at hearing. At the time of the injury, continuing, Claimant's concurrent and full time job was with Children's Medical Center, P.C.

("Children's) Mr. Saladin was contacted by Claimant, who provided him her wage records for her full time job at Children's for inclusion in her average weekly wage. *Ex. N, Bates 240-248.* In reliance upon the representation that she was not working at either job, and based upon the wage records from Claimant, Mr. Saladin calculated AWW based upon both employments, filed a general admission of liability ("GAL"), and proceeded to pay temporary total disability benefits. *Saladin testimony HT, P. 25, L. 13-25. , Ex. K.* On January 6, 2016, Mr. Saladin emailed claimant notifying her of his AWW calculation, and letting her know that her first temporary total disability check for the period of 12-14-15 to 1-7-16 would go in the mail that night. This email asked, "Please let me know when you return to work to either employer so we can avoid overpayment." *Ex. O, Bates 254.*

4. Consistent with his email to Claimant, Mr. Saladin filed a GAL on January 7, 2016, which admitted for temporary total disability benefits at a weekly rate of $771.07 which was based on an AWW of both employments of $1,156.60. Moreover, the GAL specifically stated the AWW was based on wages from two employers and included wage statements from both employers as an attachment.

5. The AWW was revised based upon inquiry from the Division of Workers' Compensation, and a new GAL was filed on January 26, 2016. *Ex. K.* That GAL admitted for a slightly higher AWW of $1,183.86. Temporary total disability benefits were paid out at a rate of $789.24 per week beginning December 14, 2015 until June 11, 2017. *Ex. K and J.*

6. The following is a timeline of the events following the filing of the GAL of January 26, 2016:

    a. February 22, 2016: Claimant emailed Mr. Saladin on February 22, 2016, asking for mileage reimbursement for January 2016. Mr. Saladin responded, "I will submit for processing. How is everything going with your treatment? Have you returned to work for Children's?" Claimant responded, "Ryan, therapy is going okay. Have had hard time bending my knee and now it is popping. I have an e-mail out to my surgeon. No, to your second question. Thank you." The second question was, "Have you returned to work for Children's?" *Ex. N, Bates 237 – 238, Ex. O, Bates 257.*

    b. Claimant was working full time and receiving pay from Children's on February 22, 2016, and had been. Pay period beginning December 28, 2015 to January 10, 2016 from Children's shows claimant working regular and overtime hours for a total gross pay of $2,224.24. January 11, 2016 to January 24, 2016 pay records from Children's show regular and overtime with gross pay of $2,036.30. For pay period January 25, 2016 through February 7, 2016, her gross pay was $ 2,071.50. For pay period February 8, 2016 to February 21, 2016, her gross pay was $2,256.38. For

pay period February 22, 2016 to March 6, 2016, her gross pay was $2,177.70. *Ex. C, Bates 82 – 86.* Claimant's February 22, 2016 email responding "no" to the question, "Have you returned to work at Children's?" was not true.

c. March 1, 2016: Mr. Saladin received a request for mileage from Claimant. She sent this with an email. That email made no mention of returning to work for Children's. *Ex. O, Bates 257.* Wage and hour records show claimant was working at Children's during this time. *Ex. C, Bates 85, 86.*

d. March 10, 2016: Claimant emailed Mr. Saladin regarding her medical treatment. That email made no mention of returning to work for Children's. Wage and hour records show Claimant was working at Children's during this time. *Ex. C, Bates 87.*

e. As set forth below, Mr. Saladin sent Claimant a number of return to work questionnaires. Each one provides:

> Pinnacol Assurance is paying temporary total disability (TTD) benefits for your work-related injury. When you sign your TTD check, you declare you did not work for anyone during the period of time referenced on the check. If you return to work and begin earning any wage, you must notify Pinnacol.

The questionnaire also indicates the following just above the signature line:

> By my signature, I attest that I am aware that it is unlawful to receive TTD while earning any wage.

f. September 2, 2016: Claimant was sent a return to work questionnaire from Mr. Saladin. Claimant signed and returned this on September 17, 2016. This questionnaire includes the following questions: "Have you returned to work for any employer or earned any income at any time since your injury? Yes___No____" Claimant responded, "No"; and "Have you been self-employed or performed any activity for which you earned any income since your injury? Yes___No___" Claimant responded "No." She also wrote, in response to the question, "If the answer is "No." please give us your reason for not returning to work:" "Unable to work due to not able to walk for any length of time." *Ex. N, Bates 236.* Wage and hour records show Claimant was working at Children's steadily during this period. *Ex. C, Bates 87-100.* Claimant's response of "no" to questions about return to work on this form were not true.

g. October 13, 2016: Claimant was sent a return to work questionnaire from Mr. Saladin. She did not respond. *Ex. N, Bates 235, HT P. 38, l. 1-10.*

h. November 14, 2016: Claimant was sent a return to work questionnaire from Mr. Saladin. Claimant signed and returned this on November 30, 2016. This questionnaire includes the following questions: "Have you returned to work for any employer or earned any income at any time since your injury? Yes___No____" Claimant responded, "No"; and "Have you been self-employed or performed any activity for which you earned any income since your injury? Yes___No___" Claimant responded "No." She also wrote, in response to the question, "If the answer is "No." please give us your reason for not returning to work:" "Unable to walk for any amount of time, to perform my job." *Ex. N, Bate 234.* Wage and hour records show Claimant was working at Children's steadily, earning over $2,100 every pay period. *Ex. C, Bates 101-104.* She also continued to cash her checks from the Insurer for temporary total disability benefits of $ 1,578.48. *Ex. Q.* Claimant's response of "no" to questions about return to work on this form were not true.

i. December 16, 2016: Claimant was sent a return to work questionnaire from Mr. Saladin. She did not respond. *Ex. N, Bates 233, HT P. 39, l. 19 P. 40 l. 1.*

j. January 25, 2017: Claimant emailed Mr. Saladin asking for mileage reimbursement. Mr. Saladin replied, "I will re-submit to the payments team. Are you still not working for Integrated Healthcare [or] any other employer?" Claimant did not respond to this question. *HT, P. 40, l. 2-18; Ex. O, Bates 259-260.*

k. January 27, 2017: Claimant was sent a return to work questionnaire from Mr. Saladin. She did not respond. *Ex. N, Bates 232, HT P. 39, l. 9-1*

l. February 17, 2017: Claimant was sent a return to work questionnaire from Mr. Saladin. Claimant signed and returned this on February 27, 2017. This questionnaire includes the following questions: "Have you returned to work for any employer or earned any income at any time since your injury? Yes___No____" Claimant responded, "No"; and "Have you been self-employed or performed any activity for which you earned any income since your injury? Yes___No___" Claimant responded "No." She also wrote, in response to the question, "If the answer is "No." please give us your reason for not returning to work:" "Unable to stay on my feet/knee for long period of time.." *Ex. N, Bate 234.* Wage and hour records show Claimant was working at Children's and cashing her TTD checks. *Ex. C, Bates 101-112, Ex. Q.* Claimant's response of "no" to questions about return to work on this form were not true.

m. March 8, 2017: Mr. Saladin called Claimant at her phone number and left a message asking her to call him back to discuss the claim and her work status. *Ex. O, Bates 261.* Claimant did not call back. *HT, P. 41, l. 13-17.*

n. March 10, 2017: Mr. Saladin sent a letter and surveillance video of Claimant to her authorized treating physician, asking several questions, including, "Is Ms. Jaramillo working?" Claimant was copied with this letter. *Ex. O, Bates 262.* Mr. Saladin testified that the surveillance video showed Claimant going to Children's Medical Center over a several day period early in the morning, and then leaving in the evening. *HT, P. 42, l. 4-14.* Claimant did not contact Mr. Saladin about this letter, and his phone calls to her were left unanswered. *Id. L. 23-25.*

o. March 28, 2017: Claimant was sent a return to work questionnaire from Mr. Saladin. She did not respond. *Ex. N, Bates 230, HT P. 44, l. 10-15.*

p. May 5, 2017: Claimant wrote an email to Mr. Saladin, attaching her mileage from January to April of 2017, requesting reimbursement. Mr. Saladin replied "I will submit for processing. I do need to talk to you about ongoing lost wage benefits and you working. This is very important. Do you have time today we can discuss this?" Saladin also phoned Claimant at her phone number and left a message asking her to call him back to discuss the claim and her work status. *Ex. O, Bates 263.* She did not call him back. *HT, P. 45, l. 20-24.*

q. May 7, 2017: Claimant emailed Mr. Saladin back and said "My dad recently passed away and I am in Kansas helping out my mom." She made no comment in response to his questions about working. Mr. Saladin provided condolences and asked that she call him back. *Ex. O, Bates 264.* Pay records from Children's from the period of April 3, 2017 through May 14, 2017 show her working her usual full time hours. *Ex. C, Bates 116-118, see also Ex. D, Bates 136-137. Ex. C, Bates 115.* She continued to cash her TTD checks.

r. May 9, 2017: Claimant was sent a return to work questionnaire from Mr. Saladin. In his cover letter, he stated, "Pinnacol has been paying lost wages for both Integrated Healthcare Staffing and your second employer Children's Medical Center since December 14, 2015. It is very important that you send this as soon as possible." *Ex. N, Bates 229, Ex. O, Bates 265; Exhibit N, Bates 227.*

s. June 9, 2017: Mr. Saladin again called Claimant at her phone number and left a message asking for a call back to discuss the claim and work status. On that same day, he sent another return to work questionnaire to Claimant. He again included in his cover letter, "Pinnacol has been paying lost wages for both Integrated Healthcare Staffing and your second employer Children's Medical Center since December 14, 2015. It is very important that you send this as soon as possible." *Ex. O, Bates 266-267; Ex. N, Bates 228.*

t. June 12, 2017: Claimant signed and returned the May 9, 2017 return to work questionnaire on June 12, 2017. This questionnaire includes the following questions: "Have you returned to work for any employer or earned any income at any time since your injury? Yes___No____" This time, Claimant responded, "Yes"; and "Have you been self-employed or performed any activity for which you earned any income since your injury? Yes___No___" Claimant responded "No." She filed in the blanks and stated she had returned to work at full wages, in the amount of $554.05 per week for Children's Medical Center. The form asked the date Claimant returned to work, and she did not supply that information. Mr. Saladin testified that the date Claimant returned to work was important to him because "We need to know when an injured worker returns to work to properly calculate whether or not TTD is still owed, TPD is owned, or if no wages are due at all." *HT P. 50, 18-25.*

u. June 16, 2017: Mr. Saladin sent Claimant a return to work questionnaire. This questionnaire includes the following questions: "Have you returned to work for any employer or earned any income at any time since your injury? Yes___No____" Claimant again responded, "Yes"; and "Have you been self-employed or performed any activity for which you earned any income since your injury? Yes___No___" Claimant responded "No." The form asked the date Claimant returned to work, and she again did not supply that information. She stated she had returned to work at full wages, in the amount of $554.05 per week for Children's Medical Center. This is signed July 1, 2017.

v. July 11, 2017: Claimant was sent a return to work questionnaire from Mr. Saladin. In his cover letter, he stated, "Please complete and sign the attached return to work questionnaire and employment release. Please include the date you returned to work. It is very important that you send this as soon as possible." This was sent certified mail. Notice was provided to Claimant on July 15, July 20, and July 31 of the certified mail. The certified mail was unclaimed and returned to Pinnacol. *Ex. N, Bates 221-225, Ex. O, Bates 270*

w. July 14, 2017: Mr. Saladin contacted Matt Heiderich, in the investigations unit at Pinnacol. He noted that Claimant has not returned phone calls, and not responded to request for information about the date of return to work. *Ex. O, Bates 268.*

x. July 26, 2017: Claimant emailed Mr. Saladin, asking for mileage reimbursement for May, June and July, 2017. This was her first communication to Mr. Saladin since her May 7, 2017 email. She did not make any comment about her return to work and did not provide any of the information previously requested. Mr. Saladin wrote in response to Claimant with another return to work questionnaire and a request for a release for information from Children's Medical Center. *Ex. O, Bates 269.*

y. August 10, 2017: Matt Heiderich met Claimant at her medical appointment at Concentra medical facility in Denver. He took with him a copy of the return to work questionnaire and employment release for Children's Medical Center. He introduced himself to her and provided her the Pinnacol paperwork. Mr. Heiderich testified that he stood with Claimant while she completed the form in front of him. On this form, Claimant stated that she had returned to work with Children's Medical Center, at a wage of $26.52 per hour, 40 hours per week, wrote that she returned to work on January 3, 2017, and then signed and dated the form. *Ex. N, Bates 219.* After reading this, Mr. Heiderich asked Claimant directly if she had returned to work for Children's Medical Center from December 13th, 2015, to the date of January 3rd, 2017, which she had just provided on the form. *HT, P. 69, l. 2-P. 70, l. 21.* At that time, Claimant told Mr. Heiderich that she had actually returned to work for Children's Medical Center in May of 2016. When he asked her more questions about the date of return to work, she said that she did not recall the date in May of 2016, but that she had returned part time. Claimant provided Mr. Heiderich a release for records from Children's. When he obtained these records, submitted by respondents as Exhibit C, he saw Claimant had returned to work prior to May of 2016, and worked primarily on a full time basis from the date of injury until the date of their discussion. *Ex. C, HT, P. 70, l. 22 – P. 72, l. 2.* Mr. Heiderich testified that, based upon the records he received from Children's, statements written on the form for him and made to him by Ms. Jaramillo were false statements. *HT, P. 72, l. 3-8.*

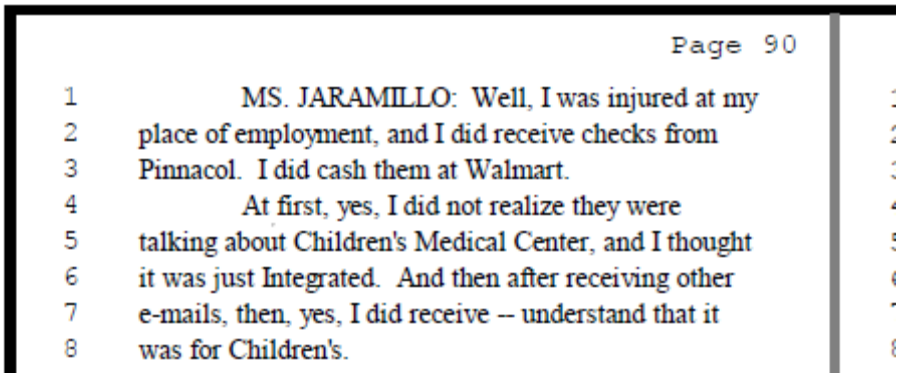
7. Mr. Saladin testified that he relied upon Claimant's representations over this time period to continue to pay temporary total disability benefits under the GAL. He testified that he made TTD payments under the GAL for wage loss from Children's Medical Center.

8. Claimant testified and confirmed her email and home address, which matched the addresses used by Pinnacol during the course of the claim. She confirmed that she earned $200 or less per week from Integrated Healthcare Staffing. She testified that she understood that the average weekly wage that was used in this claim included her wages from Children's Medical Center. She received the general admissions of liability. She admitted she was working at Children's Medical Center following December 13, 2015, and knew that she was working, at a rate of $25 per hour, with increases over time. As an example, Claimant admitted that her paystub for period beginning April 4, 2016 showed that Claimant worked 80 hours, plus 6.5 hours overtime. The temporary total disability check for this period of time was in the amount of $1,578.48. That check and all other checks to Claimant was accompanied with a check stub which provided details of the check and what the check was payment for. The check overlapping this Children's pay period included the detail, "TTD regular 4/1/16 through 4/14/16 at $789.24 per week. 14 days equals $1,578.48." *Exhibit T.* Based upon this, the ALJ concludes Claimant knew what the checks she was cashing represented. Claimant testified that all signatures endorsing the checks

sent her were her signatures. She testified that she understood she was being paid almost $800 per week, and that her loss of income at Integrated Healthcare Staffing was less than $200 per week. Claimant testified that she earned $60,193.16 at Children's in 2017.

9. For the period of December 14, 2015 through June 11, 2017, Respondents paid Claimant a total of $61,560.72 in temporary total disability benefits. *Ex. P, Ex. J, Ex. Q.* Claimant received, signed and cashed checks in the amount of $1,578.48 every two weeks, $3,156.96 per month. *Ex. Q.* Every check Claimant endorsed required her to sign on a line directly above the following statement "Read before chasing this check. If you are currently earning wages and this check is payment for temporary or permanent total disability benefits, you may not be legally entitled to this benefit. If you cash this check and are ineligible for the benefit it represents, you may be required to repay Pinnacol Assurance for the amount received." *Ex. Q, Bates 299-365. Ex. R.* Because this statement was directly below Claimant's signature on all checks cashed, the ALJ concludes that she read and understood the statement. Claimant testified that she did not deposit this money into her bank account, but instead cashed all of the checks at Walmart. There is therefore no record of what Claimant has done with that $61,560.72, and no information regarding how much of that money is still in Claimant's possession. Claimant testified that she does have a bank account with Wells Fargo Bank.

10. Claimant stated during her defense (*HT, P. 90, l. 1-8)*:



Page 90

MS. JARAMILLO: Well, I was injured at my place of employment, and I did receive checks from Pinnacol. I did cash them at Walmart.

At first, yes, I did not realize they were talking about Children's Medical Center, and I thought it was just Integrated. And then after receiving other e-mails, then, yes, I did receive -- understand that it was for Children's.

11. Mr. Saladin testified that he had calculated overpayment in this matter to be $44,570.98. *Ex. S.* This was calculated by determining if temporary partial disability was owed during each two week time frame. Claimant's hours at Children's were similar, but not always the same, for each period. Claimant did not return to her job with Employer - Integrated Healthcare Staffing - and was therefore due wage replacement, but facts show she was not due temporary total disability benefits. In some periods, no temporary partial disability benefits were due, because of the amount paid from Children's exceeded the average weekly wage. Based upon calculations provided by Respondents, total amount of

temporary partial disability owed for time lost in the relevant time period is $16,989.74. *Ex. S.*

12. Claimant was determined to have reached MMI by her authorized treating physician Dr. John Burris, on September 14, 2017. He provided Claimant an impairment rating of 4% lower extremity for her left knee injury. The value of this rating is $2,387.09 [4% of 100% lower extremity value for date of injury of $59,677.28] *Ex. A.*

13. Following receipt of MMI and rating from Dr. Burris, Respondents filed an application for hearing, per Division Rule 5-5(E)(1)(c). They seek an order providing them repayment of the overpayment. First, they seek to reopen, or retroactively withdraw, the general admissions of liability admitting for and paying temporary total disability benefits from December 14, 2015 through June 11, 2017. They seek a recalculation of the temporary benefits owed under the admissions, based upon temporary partial disability. They seek a credit for overpayment against permanent impairment benefits owed. They seek an order for repayment of the reminder of the overpayment, with a specific amount of obligation per month. They seek a finding from the ALJ per CRS § 8-43-402.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. After an admission of liability has been filed, an insurer may not unilaterally withdraw its admission, but rather must continue to make payments consistent with admitted liability until the ALJ enters an order allowing revocation in full or in part. Section 8-43-203(2)(d), C.R.S.; *H.L.J. Management v. Kim*, 804 P.2d 250 (Colo. App. 1990). In accordance with *HLJ Management Group, Inc*., insurers are permitted to "obtain relief from improvident or erroneous admissions." Id. at 252.

4. C.R.S. § 8-43-303(1) states that "at any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition…" § 8-43-303. The party seeking to reopen bears the burden of proof to establish grounds for reopening. See *Garcia v. Qualtek Manufacturing*, W.C. No. 4-391-294 (ICAO August 13, 2004).

5. "Overpayment" means money received by a claimant that exceed the amount that should have been paid, of which the claimant was not entitled to receive. C.R.S. § 8-40-201 (15.5). There is no intent requirement under this statute. The ALJ finds Respondents have established by a preponderance of the evidence that there is an overpayment in this matter. The ALJ finds Claimant was not entitled to receive TTD wage replacement benefits for wage loss including Children's Medical Center during the period of December 14, 2015 to June 11, 2017, because Claimant was working at Children's during that time. Based upon the testimony and records, the ALJ finds and concludes Respondents overpaid $44,570.98 in temporary disability benefits.

6. Upon a prima facie showing Claimant received overpayments, an award may be reopened solely as to overpayments and repayment "shall" be ordered. C.R.S. § 8-43-303 (1). In addition, an ALJ in a workers' compensation claim has authority to order repayment of overpayment. *Simpson v. ICAO, 219 P.3d 354 (Colo. App. 2010) rev'd on other grounds, Benchmark/Elite, Inc. v. Simpson, 232 P.3d, 777 (Colo. 2010).* In the recent case of *Turner v. Chipolte Mexican Grill,* the ICAO affirmed an ALJ's ability to order recovery of overpayment. *Turner v. Chipolte Mexican Grill* W.C.# 4-893-631-07 (ICAO, February 8, 2018). The Court of Appeals in *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981) noted that there were no provisions in the Act authorizing "retroactive withdrawals of an admission of liability." Nevertheless, the Court stated that the "beneficial intent" of the Act was predicated on claimant's providing accurate information. In *Stroman v. Southway Services, Inc*., W.C. No. 4-366-989 (August 31, 1999), ICAO interpreted *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981) and subsequent statutory amendments to permit retroactive withdrawal of admissions, and ICAO construed those authorities as permitting the ALJ to order repayment of compensation and benefits, including medical benefits. Specifically, in *Stroman*, ICAO stated that "[a]lthough the *Vargo* decision does not expressly state that a claimant may be ordered to repay the insurer for benefits obtained prior to withdrawal of the fraudulently induced admission, the court's reference to "retroactive withdrawal" of the admission indicates that repayment is the intended remedy. *Cf. HLJ Management Group, Inc. v. Kim, 804 P.2d 250* (Colo. App. 1990) (holding that admission may not be withdrawn retroactively unless procured by fraud, but permitting prospective withdrawal of an erroneous admission). Similarly, in *West v. Lab Corp*., W.C. No. 4-684-982 (ICAO February 27, 2009), ICAO reiterated that in a circumstance of fraud, the ALJ did not err in ordering the withdrawal of the respondents' admissions and repayment of compensation and medical benefits. In *West*, ICAO further indicated that "[w]e perceive nothing in the language of [section] 8-43-304(2) indicating that the legislature intended the respondents' only recourse to be an offset against future payments in cases where the claim was fraudulently filed and there will therefore be no future payments." *Id*.

7. The elements of fraud are set forth by the Colorado Supreme Court in *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (1937). In that case, the Court stated: "The constituents of fraud, though manifesting themselves in a multitude of forms, are so well recognized that they may be said to be elementary. They consist of the following:

> (1) A false representation of a material existing fact, or representation as to a material existing fact made with a reckless disregard of its truth or falsity; or concealment of a material existing fact, that in equity and good conscience should be disclosed.
>
> (2) Knowledge on the part of the one making the representation that it is false; or utter indifference to its truth or falsity; or knowledge that he is concealing a material fact that in equity and good conscience he should disclose.
>
> (3) Ignorance on the part of the one to whom representations are made or from whom such fact is concealed, of the falsity of the representation or the existence of the fact concealed.
>
> (4) The representation or concealment made or practiced with the intention that it shall be acted upon.
>
> (5) Action on the representation or concealment resulting in damages."

8. As noted by ICAO in *Essien v. Metro Cab*, W.C. Number 3-853-693 (ICAO August 22, 1991), "[t]he existence of the elements is generally a question of fact for the determination of the ALJ", and because proof of fraud is a factual issue, the ALJ may base his decision on inferences drawn from circumstantial or direct evidence. See *Essien*, supra, citing *Electric Mutual Liability Insurance Co. v. Industrial Commission*, 154 Colo. 491, 391 P.2d 677 (1964). As discussed below, the elements of fraud have been proven by Respondents in this matter.

9. The first element of fraud has been proven: false representation by Claimant as to a material existing fact. Claimant was repeatedly directly asked, in many forms over a long period of time, if she had returned to work at Children's. She responded in writing on more than one occasion that she had not returned to work at Children's, when she had. Ryan Saladin made it clear to her in his first email regarding the AWW calculation that she needed to keep him informed if she returned to work at Children's to avoid overpayment. Every check she signed included a warning about cashing it if she had returned to work. She knew that the fact that she was being paid for work at Children's was a material existing fact. Her statements that she was not working were false representations. Her avoidance of Mr. Saladin's questions and lack of response to his inquires was concealment of a material existing fact. In equity and good conscience, Claimant should have informed Respondents that she was being paid

temporary total disability benefits for wage loss at Children's when she had no wage loss at Children's.

10. The second element of fraud has been proven. Claimant was aware that she was working and being paid by Children's. When she repeatedly informed respondents that she had not returned to work, she knew that this was false. Claimant was cashing checks for TTD of nearly $800 per week. She knew her work with Integrated Healthcare Staffing never exceeded $200 per week. She knew that payment of TTD was continuing for wage loss that did not exist. She admitted this at hearing. Any assertion that she was confused at any time and thought that she was only being paid for her wage loss at Integrated Healthcare Staffing is not credible. She was cashing checks in the amount of $1,578.48 every two weeks, far in excess of any wage loss from her $166 per week job at Integrated Healthcare Staffing. She knew, in equity and good conscience, that she should inform Respondents that she had returned to work at Children's.

11. The third element of fraud has been proven. Respondents were ignorant of the fact Claimant was working while collecting temporary total disability benefits. It is found that Respondents had no means of obtaining the information needed to properly calculate temporary benefits actually due Claimant. They relied upon Claimant to notify them that she returned to work at her concurrent employment, the wages earned, and the dates of work. As testified by Mr. Saladin, Respondents were entirely dependent upon Claimant for this information.

12. The fourth element of fraud has been proven. Claimant's representations and concealments regarding her wage earnings at Children's are found to have been made with the intention that they be acted upon in the form of continuing payment of temporary total disability benefits at a rate of $1,578.48 every two weeks. Claimant took each check and cashed it without hesitation, instead of depositing it into her account, for a total of $3,156.96 per month, from December 14, 2015 through June 11, 2017. This is a total of $61,560.72 in (untraceable) cash. Claimant never indicated to Respondents that payment for wage loss at Children's should be stopped. Claimant is an intelligent and educated person, a licensed practical nurse, and at hearing she displayed no deficits in understanding or communicating. Claimant knew or should have known that she was not due $ 789.24 wage loss benefits per week for her $166 per week job. Claimant knew or should have known that her payments were based upon Respondents' reliance that she was not working at Children's, and that if she revealed that she was, those payments would no longer be made. She knew that when she informed Respondents that she had returned to work almost immediately after the injury, she would be responsible for a large overpayment, and therefore, concealed and then provided false information about her return to work date. It is concluded that Claimant had the intention required for this element of fraud.

13. The fifth element of fraud has been proven. Claimant's actions resulted in damage to Respondents. Claimant was paid temporary total benefits from December 14, 2015 through June 11, 2017 when she was not owed these benefits. This resulted in

an overpayment that Respondents must now seek an order to recover. Respondents have lost the benefit of their money over a long period of time.

14. It is found that Claimant, for self-gain, willfully made false statements material to the claim for the purpose of obtaining compensation under the Colorado Workers' Compensation Act. Claimant knew that her temporary benefits were based upon wage loss at Children's, and she knew that Mr. Saladin needed to know when she returned to work at Children's to avoid overpayment. She knew that she was being overpaid. As noted in chronology of finding number 6, above, there were several occasions when Claimant responded to Mr. Saladin's inquiries about her return to work saying that she had not. She wrote this several times. At all times when she represented to Respondents that she was not working, the Children's records show that she was. She knew that Respondents had found out that she was working when the surveillance tapes were sent to her doctor, and refused to respond to inquiries for months after that. When confronted face to face by Mr. Heiderich, she again made false statements: first stating that she had only returned to work on January 3, 2017, then when confronted, stating that she had not returned to work until May of 2016. Records show that both of these statements are false. It is undisputed that Claimant made several false statements to Respondents, denying and concealing her work at Children's and the fact that she lost almost no time from that job after the date of injury.

15. To the extent the GALs are an "award," the ALJ concludes that Respondents have established by a preponderance of the evidence that the GALs filed in this case shall be reopened based on fraud and overpayment. *See Meza v. BMC West Corp*. W.C. No. 4-651-065 (January 3, 2007) *citing Burke v. Industrial Claim Appeals Office*, 905 P.2d 1, 2 (Colo. App. 1994).

16. The ALJ also concludes that Respondents have established by a preponderance of the evidence that they can retroactively withdraw that portion of each General Admission of Liability which admitted for temporary total disability benefits to which Claimant was not entitled to receive and recover the overpayment.

17. Respondents have requested the reopening and withdrawal of the general admissions of liability in order to recover the overpayment of temporary total disability benefits. Although a request to reopen and withdraw an admission of liability may be duplicative, since each remedy allows the same relief, the ALJ concludes that Respondents are entitled to both remedies in order to effectuate their ultimate request which is to obtain an order determining the amount of the overpayment that has occurred in this case and an order to recover the overpayment.

18. Regarding the recovery of the overpayment, it is noted that Claimant cashed each of the temporary benefits checks sent to her for a total amount of $61,560.72. In 2017, she also earned over $60,193.16 at her job at Children's. It is reasonable to infer that she made an amount very close to this in 2016. From the check stubs in evidence, this appears to be the case. This overpayment is not for a short period of time, but a span of a year and a half, during which she continued working at Children's. Claimant provided no evidence of her financial obligations, and in fact did

not respond to a discovery order asking her to do so. Claimant simply represented that she recently separated and is a single mother and could afford repayment at a rate of $150 a month, with no supporting evidence. She had a bank account, and is certainly reasonable to infer that she cashed instead of depositing her TTD check to prevent the money from being traced and in anticipation of this very determination by the ALJ. Claimant received an overpayment of more than $2,700 per month for a year and a half based upon her repeated false statements. [$3,156.96 in TTD - $444.56 owed for wage loss at Integrated Healthcare Staffing]. She received the benefit of that money over a long period of time, with full understanding that she was not entitled to it. As noted by Respondents, an overpayment payback schedule of $150 per month would take approximately 24 years to recoup, interest free. In many cases, overpayment is not because of any intentional action by Claimant (e.g. when MMI is pushed back by a DIME). That is not the situation here. In fashioning a remedy with regard to overpayments, the ALJ must be fair to all parties.

19. At hearing, Respondents requested Claimant be ordered to repay the overpayment at a rate of $1,200 per month. However, in their proposed order, Respondents proposed a more reasonable figure based on the circumstances of this case and argued Claimant should be ordered to repay the overpayment at a rate of $600 per month. Respondents supported their request for such an order with the following argument:

> Overpayment is $44,570.80 – the amount of a car purchase. Similar to a car loan, claimant has voluntarily and intentionally created this debt for herself. Claimant could never finance a car for 24 years, interest free. Claimant received approximately $2,700 extra dollars a month for a year and a half. December 14, 2015 to June 11, 2017 is 545 days. An overpayment of $44,570.80 represents overpayment of $81.78 per day. The length of time and amount of this overpayment can only be attributable to claimant's misrepresentations and concealment. It is not for lack of effort to obtain the correct information by respondents. Given claimant's behavior, it would certainly be "fair" to provide an order for a monthly amount equal to what claimant wrongfully and intentionally took from respondents. Even half of the amount per month accumulated by claimant could be "fair." Respondents do recognize that this is not realistic. Still, setting the payback amount based upon what claimant says she wants to pay is patently unfair to respondents, given the length of time payback would take, and the reasons that this overpayment occurred. $150 per month is less than 5% of the overpayment claimant accumulated per month, while concealing that she was working. $150 per month may be what is comfortable for her, what she wants to pay, but not necessarily what she can pay. She did not provide documentation of her financial obligations, in violation of a discovery order. She provided only her bank account statements, and only did that the eve of the hearing. She now wants this lack of information to be read in her favor. She has not proven any limits on

> what she can afford per month. The bank account records she did provide do not show any of the $61,560.72 in cash she received in TTD. Respondents assert that there was no reason to cash each of those checks other than to avoid tracing of that money when respondents finally caught on and sought overpayment – who needs over $3,000 in cash every month? With an income of over $60,000 per year, and no reason to believe that a $61,560.72 cash cushion has disappeared. She has not proven that it has. Just as before, we are entirely reliant upon this person to provide us information, and she has not done it. It is reasonable to require Claimant to be at least as responsible as she would be, should she have made a purchase for an item of $44,570.80 in value. According to simple internet calculators, $44,570 car loan with NO interest over 36 months is $1,238; 48 months is $929; 60 months (5 years) is $743. Respondents propose an order with a payback schedule of $600 per month. This is a fraction of the overpayment per month taken by claimant, but represents a realistic amount over a reasonable timeline for the voluntary obligation claimant chose to create for herself.

20. The ALJ finds the arguments raised by Respondents to be persuasive. In addition to the arguments raised by Respondents, the ALJ is taking into consideration the fact that Claimant's primary job was with Children's and she was working for Respondent/Employer as a second job which she had started shortly before her work injury. At the time of her injury, Claimant was earning $166.74 per week with Employer at her second job, which equates to $722.54 per month. It is not unreasonable for Claimant to use earnings from a second job to repay the overpayment. Therefore, the ALJ concludes that Claimant shall repay the overpayment at a rate of $500 per month.

21. Respondents also requested the ALJ to determine whether Claimant willfully made a false statement or representation material to the claim for the purpose of obtaining benefits pursuant to CRS § 8-43-402.

Section 8-43-402 C.R.S. states:

> If, for the purpose of obtaining any order, benefit, award, compensation, or payment under the provisions of [Workers' Compensation Act], either for self-gain or for the benefit of any other person, anyone willfully makes a false statement or representation material to the claim, such person commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S., and shall forfeit all right to compensation under said articles upon conviction of such offense.

While the credible evidence demonstrates Claimant acted willfully by failing to disclose her return to employment with Children's, despite numerous opportunities to do

so, §8-43-402, C.R.S., requires forfeiture of all of right to workers' compensation upon a "conviction" of a class 5 felony. The Respondents have presented no evidence of a conviction. As such, § 8-43-402, C.R.S., is inapplicable to the facts of this case.

22. Respondents are also requesting to take a credit for the permanent partial disability benefits of $2,387.09 against the $44,570.80 overpayment. The ALJ concludes that Respondents may take a credit for Claimant's permanent partial disability benefits in the amount of $2,387.09 against the overpayment. Therefore, an overpayment of $42,183.89 remains after this credit is applied.

ORDER

It is therefore ordered that:

1. The General Admissions of Liability dated January 7, 2016, January 26, 2016, and January 26, 2017 and July 21, 2017, are reopened based upon fraud and an overpayment.

2. The General Admissions of Liability dated January 7, 2016, January 26, 2016, and July 21, 2017 are withdrawn, retroactively, as to the admission for temporary total disability benefits based upon fraud.

3. Claimant was not entitled to temporary total disability benefits from December 14, 2015 through June 11, 2017.

4. For the period of December 14, 2015 through June 11, 2017, Claimant was due $16,989.74 in temporary partial disability benefits.

5. Claimant was overpaid $44,570.98 in temporary benefits for the period of December 14, 2015 through June 11, 2017

6. Respondents may take credit against the overpayment for the permanent partial disability benefit award of $2,387.09. Therefore, an overpayment of $42,183.89 remains after this credit is applied.

7. Pursuant to § 8-43-207(1)(q), C.R.S., Claimant shall repay $42,183.89 to Respondents in accordance with this Order.

8. Claimant shall pay $500 per month for 84 months commencing the month after this Order becomes final. Claimant shall make a final payment of $183.89 in the 85th month.

9. Payments shall be sent to Respondent Pinnacol Assurance in care of the adjuster.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 19, 2018

Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Dr. Genuario's recommendation of a new IV contrast MRI of the right hip is reasonable, necessary and related to Claimant's October 17, 2016 industrial injury.

FINDINGS OF FACT

1. Claimant is a 58-year-old male who works for Employer as a part-time freight employee.

2. On October 17, 2016, Claimant sustained an admitted industrial injury when he fell off of a step stool and landed on his right back and side.

3. On October 27, 2016, Claimant presented to Carrie Burns, M.D. Dr. Burns noted Claimant struck his right buttock and strained his left groin. Claimant complained of "nerve pain" from his right low back and buttocks radiating down to his right thigh. Dr. Burns diagnosed Claimant with a hip contusion and acute lumbar radiculopathy.

4. Claimant underwent a lumbar spine MRI which revealed an L4-L5 disc protrusion with facet spondylosis.

5. On November 16, 2016, Claimant saw John Sacha, M.D. and complained of low back and right anterior thigh pain, right anterior leg numbness and tingling, and occasional right groin pain. Dr. Sacha diagnosed Claimant with lumbosacral radiculopathy and lumbosacral displaced disc. He recommended Claimant proceed with the right L4-L5 transforaminal S1 nerve block.

6. On November 23, 2016, Claimant presented to Chad J. Prusmack, M.D. Claimant reported worsening weakness. On physical exam, Dr. Prusmack noted diminished strength of the right lower extremity. He recommended Claimant undergo an L4-5 microdiscectomy, which was performed on November 29, 2016.

7. On December 12, 2016, Claimant attended a post-operative appointment with Dr. Prusmack's assistant, David Whatmore MMS, PAC, and reported feeling much better, despite some remaining radiculopathy and mild leg weakness.

8. Claimant subsequently began physical therapy. On January 4, 2017, Ryan Winters, DPT noted that Claimant "now feels a tension that wraps around the R side of his LB to his R hip and groin region; sometimes down the thigh but not below the knee." He further noted "moderate R hip mobility restrictions." On January 9, 2017, PAC Whatmore noted, "The patient had some persistence of pain radiating into the groin

which he said was an end stage development of his radiculopathy when he had this acute disc herniation."

9. By March 6, 2017, Claimant was reporting worsening pain in his right groin and buttock. On physical exam, Dr. Prusmack noted positive impingement sign on external rotation of the right hip, weakness in flexion and extension of the thigh, and positive femoral stretch. Dr. Prusmack recommended an MRI of the right hip.

10. A March 17, 2017 right hip MRI revealed a tear of Claimant's right anterior superior and posterior superior acetabular labrum.

11. On March 23, 2017, Claimant returned to PAC Whatmore for a follow-up evaluation. PA-C Whatmore opined that the right hip labral tear was the most likely source of Claimant's hip pain. He remarked that Claimant's radicular symptoms had basically resolved but noted, "Throughout the process though and amongst these other pains, he has also had difficulties with a pain on the right side of the hip radiating into the right groin and posteriorly into the right buttock. The microdiskectomy surgery has not changed these symptoms." Claimant was referred to orthopedic surgeon James Genuario, M.D. for further evaluation of the labral tear.

12. Dr. Genuario first evaluated Claimant on April 17, 2017 and diagnosed Claimant with a right hip FAI with a labral tear. He remarked, "I discussed with [Claimant] that this may have not directly occurred from the fall but may have predated the fall but has become symptomatic secondary to this change in his functional gait pattern and weakness associated with recovery." He recommended that Claimant begin a formalized physical therapy program. Dr. Genuario stated that if Claimant did not see any improvement, he would then consider an intra-articular injection and, ultimately, a hip arthroscopy with a labral repair femoroplasty. Claimant received an intra-articular cortisone hip injection on May 24, 2017.

13. On June 26, 2017, PAC Whatmore noted that the right hip injection had improved Claimant's right hip pain and radiating pain. Claimant continued to report some right-sided back pain and intermittent radiculopathy into the right leg. PAC Whatmore referred Claimant for a right L4-5 transforaminal epidural steroid injection.

14. On July 27, 2017, Allison Fall, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Fall reviewed Claimant's medical records and performed a physical examination. Claimant reported to Dr. Fall that he began to notice right groin pain after the microdiscectomy. Regarding the labral tear Dr. Fall noted, "He was told he probably had it before." She noted that Claimant's right hip pain resolved for a few weeks after the injection and Claimant now had milder symptoms in the groin. Dr. Fall opined that Claimant sustained a work-related L4-5 disc extrusion. She opined that the right hip labral tear was not work-related and was likely preexisting but asymptomatic. She noted that the hip injection helped Claimant's symptoms and concluded that, other than one additional right hip intraarticular injection, further treatment for the right hip would be outside of the scope of the workers' compensation system.

15. On August 28, 2017, Dr. Genuario's assistant, Jeremy B. Smith, PAC, evaluated Claimant and noted that the intraarticular injection helped Claimant's symptoms for a few months and then wore off. Possible treatment options were with Claimant, including a possible right hip arthroscopic surgery and labrum repair. It was recommended that Claimant undergo a new MRI with IV gadolinium to evaluate cartilage and ensure Claimant is a good candidate for arthroscopic labral repair surgery.

16. Dr. Fall testified by post-hearing deposition as an expert in physical medicine and rehabilitation. Dr. Fall testified consistent with her IME report and continued to opine that Claimant's right hip labral tear is more likely a pre-existing, degenerative condition. Regarding the development of hip symptoms, Dr. Fall stated, "I guess that most accurate response is that we don't really know why he felt pain in his hip at that point in time. I don't know. I don't think anybody can say exactly why he started to feel pain in his hip." Dr. Fall noted that Claimant began to notice hip pain during his rehabilitation and stated, "Now, that might have been because he was walking differently or had weakness in his leg, but somehow he felt hip pain and they sent him for an injection and that helped that pain symptom." Dr. Fall acknowledged that Claimant was performing his recreational activities without impairment from a labrum tear prior to the work injury. She testified that the intraarticular injection provided 100 percent immediate diagnostic response, Claimant is not symptomatic from the right hip, and does not need treatment for the right hip as a result of the work-related injury. She opined that the recommended right hip MRI is not reasonable, necessary or related to the work injury.

17. Claimant testified that prior to the work injury he actively engaged in athletic activities, including skiing and ultra-distance running. He testified that prior to the work injury he did not have any right hip injuries or right hip complaints. Claimant stated that subsequent to the work injury he experienced pain radiating from his lower back to his right buttocks around to the right thigh and knee, along with pain in his right groin across the leg to his right hip. Claimant testified that he felt the right groin pain more intensely after the microdiscectomy, which relieved his "all-consuming" low back radicular pain. Claimant further testified that the references in the medical records to left groin symptoms are incorrect, and that his groin pain has always been on the right.

18. The ALJ credits Claimant's testimony at hearing, Dr. Genuario's opinion, and the medical records, and finds that it is more likely than not that the new right hip MRI is reasonable, necessary and related to Claimant's work injury. The ALJ notes the conflicting medical opinions expressed in this case; however, the ALJ finds the opinions expressed by Dr. Genuario more credible and persuasive than the contrary opinion expressed by Dr. Fall.

19. Claimant proved it is more likely than not that the October 17, 2016 industrial injury aggravated, accelerated or combined with Claimant's pre-existing hip condition to produce the need for medical treatment.

20. Claimant proved it is more likely than not that the recommended right hip MRI is reasonable and necessary to cure and relieve the employee of the effects of October 17, 2016 work injury.

21. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Reasonable, Necessary and Related Medical Treatment

A claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A respondent is liable to provide such medical treatment “as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.” Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Claimant credibly testified that he did not have any right hip complaints prior to the October 17, 2016 work injury and that his right hip did not become symptomatic until after the work injury. No credible and persuasive evidence was presented at hearing to the contrary. Claimant reported right groin complaints to Dr. Sacha in mid-November 2016, and continued to report such complaints after undergoing surgery and rehabilitation. Claimant credibly testified that the right groin complaints were present after the work injury, but felt more intensely once his “all-consuming” low back pain

subsided. The medical records document reported weakness as well as decreased strength on physical examination. Dr. Genuario credibly opined that, while the labrum tear may have been pre-existing, it became symptomatic due to the change in Claimant's gait pattern and weakness associated with recovery from the back injury. Dr. Fall even acknowledged in her deposition testimony that Claimant's right hip symptoms may have resulted from a change in gait or weakness in the leg during rehabilitation from the back injury. Based on the totality of the evidence, the ALJ is persuaded that the October 17, 2016 industrial injury aggravated, accelerated or combined with Claimant's pre-existing right hip condition to produce the need for medical treatment.

While Dr. Fall opined that, as of the date of her evaluation of Claimant in July 2017, Claimant's right hip was no longer symptomatic, as of late August 2017, the medical records reflect that Claimant was no longer experiencing relief from the intraarticular injection. Dr. Genuario recommended Claimant undergo a new right hip MRI for the purpose of further evaluating Claimant's right hip condition and possible treatment options, which is reasonable and necessary under the circumstances. Claimant has proven by a preponderance of the evidence that the new IV contrast MRI of the right hip recommended by Dr. Genuario is related to the October 17, 2016 work injury and is reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

ORDER

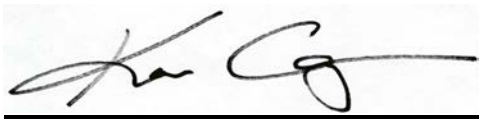
It is therefore ordered that:

1. Dr. Genuario's recommendation for a new IV contrast MRI of the right hip is reasonable, necessary and causally related to Claimant's October 17, 2016 work injury. Insurer shall authorize the proposed MRI of the right hip.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 24, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable work related injury on or about September 8, 2016.

2. Whether Claimant has established an entitlement to reasonable and necessary medical benefits to treat her September 2016 work related injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a full time accountant and has been so employed since June of 2015.

2. On November 30, 2016 Claimant was evaluated at Kaiser by Y Jane Cramer, PA. Claimant reported that she had insect bites that had been occurring since August that were starting to bother her. Claimant reported seeing bugs at work and that she was developing black dots on her skin. Claimant reported thinking that there was something under her skin. Claimant insisted that she had bugs and brought a magnifying glass to the appointment along with pictures on her cell phone. PA Cramer performed an examination and opined that the areas looked like moles. PA Cramer opined that Claimant had scattered dark moles around the neck. PA Cramer noted that she took a #15 blade and scraped off one area and saw no insect or foreign body in Claimant's skin. PA Cramer opined that the areas that Claimant was pointing to looked like pigmented lesions, and she noted that Claimant insisted that she was wrong. PA Cramer opined that she saw no sign of bugs or foreign bodies under Claimant's skin. Despite seeing no signs of bugs or foreign bodies under Claimant's skin, PA Cramer referred Claimant to dermatology. *See* Exhibit C.

3. On December 7, 2016 Claimant was evaluated by dermatologist Megan Weber, M.D. Claimant reported that she had bug bites that began to appear in September and that she had been seeing bugs at both her home and work. Claimant reported that exterminators at her home had found beetles and that she had her home sprayed with pesticides several times in the past few months but that when the vents went on bugs come out and she can feel herself being bitten. Claimant also reported seeing bugs at work. Claimant reported that she looks at her skin with a magnifying mirror and sees little black bugs coming out of certain sites. Claimant had the magnifying mirror with her at the appointment. Dr. Weber performed a full skin check of Claimant's face, eyelids, lips, ears, neck, left arm, right arm, chest, abdomen, back, right leg, left leg, digits, and nails. Dr. Weber found brown verrucous stuck on appearing papules on Claimant's face, under her breasts, and on her back that were too numerous to count. Dr. Weber found follicular

based hyperkeratotic papules on the bilateral upper arms, two dilated open comeodones on the right abdomen, and a firm indurated subcutaneous nodule with peripheral rim of pigmentation x1 on the right back. Dr. Weber found no lesions consistent with arthropod bites and no burrows on finger webs. Dr. Weber noted that Claimant pointed to numerous lesions on the examination which were banal appearing 2-3 mm brown macules with regular pigment network consistent with benign melanocytic nevi. *See* Exhibit C.

4. Dr. Weber assessed Claimant with seborrheic keratosis, melanocytic nevus, dermatofibroma on the right back, and acquired keratosis pilaris. Dr. Weber noted that she reassured Claimant at length and assured Claimant that the numerous banal appearing melanocyutic nevi Claimant was pointing to were normal moles and were not bites. Dr. Weber assessed Claimant as having probable delusions of parasitosis and noted no lesions on exam consistent with bug bites or infestation. Dr. Weber recommended Claimant have an evaluation with psychiatry and after Claimant angered, Dr. Weber gently but clearly advised Claimant that she did not have a skin problem and again recommended Claimant see psychiatry. Dr. Weber noted that Claimant refused the psychiatry referral. *See* Exhibit C.

5. In December of 2016 a first report of injury was filed. The report indicates that Claimant reported that she had sustained a work related injury on September 8, 2016 when she was sitting at her desk working and was bitten by insects all over her body. Claimant reported that she began to experience insect bites, initially on her legs and then over time on her arms and face. Claimant reported that some bites were sharp prickly bites and others just felt like being bitten, and itched. *See* Exhibit A.

6. On January 4, 2018 Claimant was evaluated by Neil Silverman, M.D. Claimant reported that she wanted a skin check to check for evidence of bug infestation and that she was convinced that a dark spot on the mid upper lip and another dark lesion on her right clavicle were bugs imbedded in her skin. Claimant reported feeling that bugs were coming from her job. On examination, Dr. Silverman found 11 brown stuck on plaques with horn cysts in the breast area and that Claimant had numerous brown stuck on papules scattered over the cheeks, back, and more sparsely over the extremities. Dr. Silverman found a mid-upper lip black 2 mm diameter macule and a pore with imbedded dark material within the lesion on the right clavicular area. Dr. Silverman treated the 11 areas under the breast with cryo and he removed the mid upper lip and right clavicle lesions. Dr. Silverman recommended follow up if any moles changed or if any new dark lesions occurred. *See* Exhibit C.

7. On January 9, 2018 Dr. Silverman advised Claimant that the biopsy from the right clavicle lesion showed just an enlarged pore and that the biopsy from the upper lip lesion showed just a lentigo (large freckle). Dr. Silverman opined that there was no sign of bug bites or bug body parts in either of the biopsies. *See* Exhibit C.

8. On January 16, 2017 Respondent filed a notice of contest denying the claim and indicating that the injury was not work related. *See* Exhibit B.

9. A friend of Claimant's, Telmahury Robledo indicated that in December of 2016 while at Claimant's house, she noticed that the light fixture above Claimant's dining room table had insects in it. *See* Exhibit 1.

10. A commercial pest control technician, Stephen Ceas testified by deposition. Mr. Ceas has worked in pest control for 23 years and has taken over 150 courses in pest control including a certification course. Mr. Ceas completed continuing education courses throughout his career to maintain his licensure. Mr. Ceas testified that he had made service calls to 1313 Sherman Street. Mr. Ceas testified that Claimant had called him around September 28th and that he scheduled an appointment for September 30th. Mr. Ceas testified that he went out to Claimant's work building, did an inspection, and didn't find any activity but that he set out monitor traps. He testified that he inspected the baseboards, the desk area underneath, and the chair but didn't see bugs. He set out monitor traps and went back to check them on October 28th. Mr. Ceas testified that there was nothing on the traps and that he left the traps in place. Mr. Ceas testified that he returned on November 10th and found three insects that he identified as sawtooth grain beetles in the traps in Claimant's office. Mr. Ceas testified that those types of insects are generally found where somebody has brought food into the office and the insects were in the food.

11. Mr. Ceas testified that a sawtooth grain beetle is a little beetle that will lay eggs in grains and that they are found in rice, wheat, oatmeal, and things like that. Mr. Ceas testified that sawtooth grain beetles are not known or listed as pests that would be a biting insect pest. Mr. Ceas testified that he treated Claimant's office and did the entire inside of the office all the way around all the walls, under the desk, the edges of the desk, under the chair, and under the bottom of the chair with an aerosol spray.

12. Mr. Ceas testified that he returned to Claimant's office building on December 2nd and that Claimant had moved offices and that he had treated the new office with the aerosol spray before she had moved in. Mr. Ceas testified that the treatment killed insects and that he would expect to find carcasses after a treatment and that the treatment lasts for 30 days minimum and keeps killing insects for a while. Mr. Ceas testified that he also put traps into Claimant's new office on that date. He testified that he also checked the traps in Claimant's old office on this date and didn't find anything. Mr. Ceas returned on December 9th and found minute debris on 3 of the traps that he identified under 10x magnification to be plant debris and not insect or insect body parts.

13. Mr. Ceas testified that Claimant always had insisted she was getting bit and that he used all the techniques he knew of but couldn't find anything that would indicate bites. Mr. Ceas testified that he never found any biting insects while inspecting or treating Claimant's offices. Mr. Ceas testified that he never saw fleas. Mr. Ceas testified that he was trained to consider that a person could have delusionary periostosis when someone is insistent that they are being bitten and he has set traps for months without catching any kind of biting insect.

14. Claimant testified at hearing that she has been bitten by insects at work since September of 2016 and that the bites are ongoing. Claimant testified that it was a harassing condition and that she wanted to know what was biting her and wanted treatment. Claimant testified that she brings Off and Raid insect sprays to her office on a daily basis and sprays her legs and her entire office but that the bites persist. Claimant testified that she gets two different types of bites, one that is sharp and prickly and one that is not, and that she is concerned that there are two types of biting insects in her office. Claimant testified that she believes the insect infestation is intentional and is racially motivated as an attempt to get her to quit her job.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish, more likely than not, that she sustained a compensable injury of insect bites at work. Although Claimant believes she is being bitten by some type of insect or insects at work, she has failed to show this by preponderant evidence.

The medical evaluations have not demonstrated any evidence that Claimant has any insect bites or body parts imbedded in her skin. Rather, it shows she has a large number of normal lesions on her body that are ***not suspicious*** and are consistent with moles, papules, freckles, pores, etc. In November of 2016, PA Cramer opined that there was no signs of bugs or foreign bodies on Claimant's skin and went as far as to scrape off a portion of Claimant's skin to come to this determination. Despite this, PA Cramer referred Claimant to dermatology due to Claimant's insistence that she was being bitten by insects. In December of 2016 dermatologist Dr. Weber noted that Claimant had no lesions consistent with arthropod bites and that the areas Claimant pointed to and insisted that little black bugs were coming out of her skin appeared to be nothing more than normal moles. In January of 2018 Claimant again was evaluated and was convinced that dark spots on her lip and right clavicle were bugs imbedded in her skin. This time Dr. Silverman went to the length of removing and sending the two areas to biopsy. The biopsy showed that the areas were not bugs imbedded in Claimant's skin but that they were an enlarged pore and a large freckle. The examinations by three medical professionals all show no evidence of any bug bites or bugs imbedded in the skin.

Further, as found above, Mr. Ceas went to Claimant's office on several occasions to inspect for insects. Despite the traps he set out and his visits, he was unable to find evidence of insects known to bite humans. He found only sawtooth grain beetles which are not known to be biting insects.

Claimant has not presented sufficient evidence to support her claim that she has been bitten by insects or that she has been bitten by insects at work and sustained a work related injury. Therefore, her request for a finding of compensability and an award of medical benefits to treat her insect bites is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable work related injury of insect bites on or about September 8, 2016.

2. As Claimant has failed to establish that she sustained a compensable injury, her request for medical benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 4, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant is an employee of Kinney Moving Services (Kinney). Kinney executed a shipping contract with Golden Van Lines on September 20, 2014. Golden Van Lines is an agent of Employer. Employer is thus Claimant's statutory employer.

2. Kinney issued Claimant a W-2 Form for the year 2014. The W-2 Form reflected that Claimant earned a total of $25,000 from Kinney for the year.

3. While working for Kinney in 2014 Claimant also fulfilled a contract for Endo Enterprises. Services pursuant to the contract occurred between May 20, 2014 and July 7, 2014. Payment for the work included Claimant's gross wages from Kinney.

4. On January 27, 2015 Claimant suffered an admitted industrial injury during the course and scope of his employment. On February 26, 2015 Respondents filed a General Admission of Liability (GAL) acknowledging an Average Weekly Wage (AWW) of $300.00 pending receipt of pay records.

5. On April 5, 2017 Respondents filed a second GAL recognizing an AWW of $773.19 with a corresponding Temporary Total Disability (TTD) rate of $515.46. Respondents attached their calculation of the AWW to the GAL. There were 103 days between the date of the shipping contract on September 20, 2014 and December 31, 2014. Claimant earned a net income of $11,377.58 during the period. Dividing $11,377.58 by 103 days and multiplying by seven yields an AWW of $773.19.

6. Claimant testified that he began working pursuant to the Golden Van lines contract on September 26, 2014. He worked through January 27, 2015. Claimant emphasized that he worked for 40 days during the period. He requested an increase in his AWW based on only the 40 days that he actually worked rather than the total number of days in the contract period.

7. Claimant explained that he worked from May 20, 2014 through July 7, 2014 to fulfill the contract with Endo Enterprises. Although Claimant did not testify about the specific number of days he worked during the period, he agreed that his work days were included in the total compensation he received from Kinney.

8. Claimant asserts that his AWW should be $4,375.00. He introduced Exhibit 14 to detail his calculation. The Exhibit specifies that Claimant worked a total of 40 days between September 26, 2014 and January 27, 2015 and earned $25,000. Dividing

$25,000 by 40 days yields a daily pay rate of $625.00. Multiplying $625.00 by seven yields an AWW of $4,375 or $227,500 per year.

9. Claimant's tax records from 2013 through 2015 were admitted into evidence and do not support gross earnings of $227,500. Claimant's Adjusted Gross income (AGI) for 2013 was $18,818. His AGI for 2014 was $7,000 and his AGI for 2015 was $2,925.

10. Claimant worked from May 20, 2014 through July 7, 2014 to complete the contract with Endo Enterprises. There are 49 days in the period. Claimant also worked from September 26, 2014 through January 27, 2015 to fulfill the Golden Van Lines contract. There are 124 days in the period. There are thus a total of 226 days for the period May 20, 2014 through December 31, 2014.

11. Claimant obtained medical treatment for his injuries but did not reach Maximum Medical Improvement (MMI). Respondents thus requested a 24-month Division Independent Medical Examination (DIME) pursuant to statute. On July 25, 2017 Franklin Shih, M.D. performed the DIME. He assigned Claimant a 16% lower extremity impairment rating. On September 17, 2017 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Shih's impairment determination.

12. On September 21, 2017 Respondents filed a second FAL. The second FAL reflected that Respondents had paid Claimant total indemnity benefits of $107,373.75. The indemnity benefits included an overpayment that Respondents noted would "be offset against future benefits owed." The second FAL specified that Claimant was entitled to an AWW of $773.19. At the time the September FAL's were filed Claimant had an Application for Hearing pending on the issue of AWW.

13. Claimant timely filed an objection to the second FAL. He subsequently re-filed his Application for Hearing regarding AWW but did not endorse any other issues for hearing. All issues including TTD benefits, disfigurement, Permanent Partial Disability (PPD) benefits and Permanent Total Disability (PTD) benefits closed by operation of law.

14. Because Claimant's date of injury was January 27, 2015 the effective statutory cap for whole person impairments of 25% or less was $81,435.67. Claimant was assigned a 16% lower extremity impairment rating. The FAL reflects that Claimant received a total of $107,373.75 in indemnity benefits. Respondents have thus paid Claimant indemnity benefits in excess of the statutory cap.

15. An AWW of $773.19 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity. Initially, Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer on January 27, 2015. Respondents acknowledged that Claimant was entitled to receive an AAW of $773.19 by including the 103 days between the date of the shipping contract on September 20, 2014 and December 31, 2014. Claimant earned a net income of $11,377.58 during the period. Dividing $11,377.58 by 103 days and multiplying by seven yields an AWW of $773.19.

16. In contrast, Claimant asserts that his AWW should be $4,375.00. He introduced Exhibit 14 to detail his calculation. The Exhibit specifies that Claimant worked

a total of 40 days between September 26, 2014 and January 27, 2015 and earned $25,000. Dividing $25,000 by 40 days yields a daily pay rate of $625.00. Multiplying $625.00 by seven yields an AWW of $4,375 or $227,500 per year. Claimant's requested AWW is not reflective of his actual earnings during the relevant time period prior to his industrial injury. By selecting only dates on which he actually worked, Claimant's calculation misrepresents and distorts his actual earnings over the relevant time period. In fact, Claimant's tax records from 2013 through 2015 were admitted into evidence and do not support gross earnings of $227,500. Claimant's AGI for 2013 was $18,818. His AGI for 2014 was $7,000 and his AGI for 2015 was $2,925. Because Claimant's requested AWW is inconsistent with his actual earnings during the relevant time period preceding his industrial injury, the proper calculation of his AWW is $773.19. An AWW of $773.19 represents a fair approximation of his actual wage loss.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App.

1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

5. As found, an AWW of $773.19 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity. Initially, Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer on January 27, 2015. Respondents acknowledged that Claimant was entitled to receive an AAW of $773.19 by including the 103 days between the date of the shipping contract on September 20, 2014 and December 31, 2014. Claimant earned a net income of $11,377.58 during the period. Dividing $11,377.58 by 103 days and multiplying by seven yields an AWW of $773.19.

6. As found, in contrast, Claimant asserts that his AWW should be $4,375.00. He introduced Exhibit 14 to detail his calculation. The Exhibit specifies that Claimant worked a total of 40 days between September 26, 2014 and January 27, 2015 and earned $25,000. Dividing $25,000 by 40 days yields a daily pay rate of $625.00. Multiplying $625.00 by seven yields an AWW of $4,375 or $227,500 per year. Claimant's requested AWW is not reflective of his actual earnings during the relevant time period prior to his industrial injury. By selecting only dates on which he actually worked, Claimant's calculation misrepresents and distorts his actual earnings over the relevant time period. In fact, Claimant's tax records from 2013 through 2015 were admitted into evidence and do not support gross earnings of $227,500. Claimant's AGI for 2013 was $18,818. His AGI for 2014 was $7,000 and his AGI for 2015 was $2,925. Because Claimant's requested AWW is inconsistent with his actual earnings during the relevant time period preceding his industrial injury, the proper calculation of his AWW is $773.19. An AWW of $773.19 represents a fair approximation of his actual wage loss.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

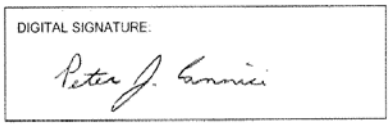
1. Claimant earned an AWW of $773.19.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it

within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 11, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable injury to her right shoulder on August 13, 2017.

II. If Claimant proved she sustained a compensable work injury, whether Claimant is entitled to reasonably necessary and related medical benefits.

FINDINGS OF FACT

1. Claimant is a 51-year-old woman who works for Employer as a pharmacist. Claimant primarily worked in a mail order pharmacy processing bulk pharmaceuticals. Her duties required pushing a metal car and lifting totes filled with pharmaceuticals.

2. On August 30, 2017, Claimant sustained an injury to her right shoulder while performing her duties for Employer. Claimant was scheduled to work from 12:30 p.m. to 9:00 p.m. on August 30, 2017. Claimant testified that, at approximately 6:30 p.m., she experienced a sharp pain in her right shoulder while lifting a tote from the lower rack of a metal cart. At hearing, Claimant demonstrated the movement involved, which required Claimant to bend at the waist, lift the tote to chest level, and place the tote on a desk. Claimant testified the tote was filled with pharmaceuticals and weighed approximately 10-15 pounds. Claimant subsequently completed her shift and went home for the evening. She testified that the pain increased throughout the evening and became so severe she was unable to sleep. Claimant testified she contacted her primary care physician, Mark Nathanson, D.O. early morning on August 31, 2017.

3. Claimant presented to Dr. Nathanson at Aurora Family Practice Group at 10:24 a.m. on August 31, 2017. In the History of Present Illness section, Dr. Nathanson noted, "R shoulder pain for 2 weeks no acute trauma or strain. Worsened slowly and now unable to sleep." On physical examination, Dr. Nathanson noted decreased active range of motion in the right shoulder, positive impingement sign and full empty can testing. He diagnosed Claimant with a non-traumatic rotator cuff tear, prescribed Celebrex, and recommended Claimant rest, ice, stretch and take NSAIDS.

4. Claimant testified that she worked approximately one to two hours of her scheduled shift on August 31, 2017, then left work early due to pain.

5. Claimant returned to Dr. Nathanson on September 1, 2017 complaining of worsening shoulder pain. Dr. Nathanson again diagnosed Claimant with a non-traumatic rotator cuff tear, noting Claimant "thinks it may be work related from carrying totes." He administered a steroid injection and prescribed Percocet.

6. Claimant also underwent a right shoulder MRI on September 1, 2017. The indication states, “Shoulder pain since injury 2 days ago.” Eduardo Seda, M.D. gave the following impression: “Prominent edema and thickening in the supraspinatus and infraspinatus tendons, suspected tendinosis. Tendinitis is an alternate possibility. Shallow bursal surface tear is seen at the infraspinatus insertion.”

7. Claimant testified that Dr. Nathanson excused her from work September 1 - 6, 2017. As a result, Claimant missed scheduled shifts on September 1, September 5, and September 6, 2017. She was not scheduled to work September 2 or September 3, 2017. Claimant returned to work on modified duty on September 7, 2017 and has continued working since such time.

8. On September 7, 2017, Claimant presented to Sarah M. Perman, M.D. at UC Health. Dr. Perman noted that Claimant has a “known labral tear” in her right shoulder and was requesting a change in her prescription because she did not like how Percocet made her feel. Dr. Perman noted, “No evidence of repeat injury, fall or fracture.” She further stated, “This is a new problem. The current episode started more than 2 days ago. The problem occurs constantly. The problem has not changed since onset.” Dr. Perman diagnosed Claimant with a right shoulder injury and prescribed Flexeril.

9. Claimant reported the work injury to Employer on September 7, 2017. Employer subsequently sent Claimant to Henry J. Roth, M.D.

10. Claimant presented to Dr. Roth on September 14, 2017. Dr. Roth quoted Claimant saying, “I started feeling the pain in my shoulder at the completion of my shift on 8/31/17 and did not think too much into it, until bedtime. The pain woke me up through the night that I had to call my physician to get checked.” Dr. Roth remarked that the “exact mechanism of injury is hard to define.” Dr. Roth noted Claimant lifted heavy totes of pharmaceuticals with a hand on each side of the tote, and placed the tote on a table. He noted the movement involved flexion of arms at the elbow. Dr. Roth noted, “She cannot pinpoint a specific moment.” He further noted that the September 1, 2017 MRI revealed supraspinatus thickening, infraspinatus thickening with shallow bursal tear, no impingement anatomy, normal biceps, and a chondral labral junction tear without detachment at the biceps insertion. Dr. Roth opined that the injury was a work-related event, stating, “This is an acute and specific injury that occurred sometime during her shift. I believe it is related to biceps contraction lifting a (sic) heavy totes.” There is no reference to a biceps strain in the report. He placed Claimant on work restrictions and referred Claimant for an orthopedic evaluation with John Paul Spittler, M.D.

11. On September 26, 2017, Claimant presented to Dr. Spittler with right shoulder and neck pain “x1 month.” Dr. Spittler noted Claimant had an “overhead lifting injury” on August 30, 2017, and further noted, Claimant “[w]as lifting boxes at work on 08/30/17 and at end of shift noticed R ant shoulder pain…” He diagnosed Claimant with acute right shoulder pain and a right glenoid labrum tear and referred Claimant for physical therapy.

12. On October 4, 2017, Claimant returned to Dr. Nathanson, who noted Claimant's condition remained the same. He continued Claimant on restricted duty.

13. Claimant attended a physical therapy session on October 12, 2017. Ryan McFadden, PT, noted that Claimant injured her right shoulder on August 30, 2017 when lifting a heavy box overhead. Claimant testified that there was no overhead lifting involved.

14. On October 19, 2017, Dr. Roth issued a progress report after reviewing Dr. Nathanson's August 31 and September 1, 2017 medical records. Dr. Roth noted that Claimant's history of new acute onset pain on August 30, 2017 was inconsistent with Dr. Nathanson's August 31, 2017 medical record that reflected right shoulder pain for two weeks without trauma or strain. Dr. Roth remarked that it did not appear Claimant's reporting was accurate, or that the onset of her shoulder condition occurred on August 30, 2017. He opined, "[w]ork relatedness does not now appear to be medically probable. This is not currently appear (*sic*) to be either a cumulative trauma or acute injury claim."

15. On November 13, 2017, Claimant presented to Andrew Sarka, M.D. at Aurora Family Practice Group. He noted that Claimant's shoulder pain began on August 30, 2017 while working. He further noted, "She has no history of trauma but she does significant repetitive movements at work and this is very likely the source of shoulder injury particularly in light of the fact that she does not do activities at home out of normal activities that would likely aggravate the shoulder." He wrote that Dr. Nathanson's August 31, 2017 report was incorrect in stating that Claimant's pain began two weeks prior to that visit. Dr. Sarka opined that Claimant suffered from a work-related overuse injury and recommended Claimant see an orthopedist.

16. Claimant testified at hearing that she did not tell Dr. Nathanson her pain was present for two weeks and slowly worsened. Claimant contends Dr. Nathanson made a typographical error.

Claimant testified that she did not experience similar shoulder pain prior to the work injury, nor did she seek or receive treatment for shoulder pain prior to the work injury. Claimant alleges she sustained an acute injury. Claimant testified that she continues to attend physical therapy and treat with Dr. Spittler.

17. Dr. Roth testified at hearing that his initial assessment was incorrect. He testified that Claimant did not describe a specific event or mechanism of injury during his initial evaluation. He explained that when he initially opined Claimant sustained a work-related injury, his impression was that Claimant sustained an "acute overuse injury" and strained her bicep. He testified that he later determined Claimant's condition was "an inherent process with gradual development" based on Dr. Nathanson's August 31, 2017 medical report. Dr. Roth initially testified that, at the time of his initial evaluation, he did not have the September 1, 2017 MRI or Dr. Nathanson's reports. He later testified that he did, in fact, have Claimant's MRI results at the time of his initial evaluation. Dr. Roth testified that Claimant's MRI findings revealed a tear, which he

stated is degenerative in most cases, but also can be the result of a traumatic event. Dr. Roth testified that there was no evidence of acute trauma or cumulative trauma, and that Claimant does not meet the criteria for cumulative trauma under the Guidelines.

18. Claimant's testimony, which is supported by the medical records, is found more credible and persuasive than the opinion and testimony of Dr. Roth.

19. Claimant established that it is more likely than not that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment on August 30, 2017.

20. Claimant established by a preponderance of the evidence she is entitled to reasonable and necessary medical treatment related to the August 30, 2017 industrial injury.

21. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S. (the "Act"), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant met her burden of proof to establish she sustained a compensable industrial injury on August 30, 2017. Dr. Roth testified that there is no evidence of acute or cumulative trauma. This is inconsistent with his initial opinion, which changed based solely on Claimant's alleged report that she had longstanding shoulder pain with no acute event. While Dr. Roth stated in his initial report that the exact mechanism of injury was hard to define, he nonetheless opined that Claimant sustained an acute and specific work-related injury, "…related to biceps contraction lifting heavy totes." His initial opinion was made with knowledge of the objective MRI findings and Claimant's reported mechanism of injury, which is the same mechanism of injury Claimant set forth in her testimony at hearing and in other medical records. Dr.

Roth subsequently changed his opinion as to work-relatedness because Dr. Nathanson referenced Claimant having shoulder pain prior to the work injury.

Claimant credibly testified that she did not tell Dr. Nathanson that she had been experiencing shoulder pain for two weeks prior to the August 31, 2017 evaluation. Claimant is credible in her testimony that she did not have similar right shoulder pain or treatment prior to the work injury. No evidence was presented at hearing indicating Claimant sought prior medical treatment for a shoulder issue. Claimant credibly testified she began experiencing pain while lifting a tote during her work shift on August 30, 2017 and that the pain worsened. The medical records subsequent to Dr. Nathanson's August 31, 2017 report corroborate Claimant's credible testimony that her shoulder pain began at work while performing work duties on August 30, 2017. The ALJ acknowledges there are references to overhead lifting in two medical records. Claimant clarified in her testimony that overhead lifting was not involved in the work incident, and there is no reference of overhead lifting in Dr. Roth's initial report where he considered Claimant's mechanism of injury and still opined that her condition was work-related. Thus, based on the totality of the evidence, the ALJ is persuaded Claimant's symptoms and need for medical treatment were more likely caused by Claimant's work duties than the natural progression of a non-work-related preexisting condition. Claimant's credible and persuasive testimony, as supported by the medical records, establish by a preponderance of the evidence that Claimant sustained a work-related injury that produced the need for medical treatment.

Reasonable, Necessary and Related Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As found, Claimant sustained a compensable industrial injury on August 30, 2017. Claimant is entitled to reasonable and necessary medical treatment related to the August 30, 2017 industrial injury. Claimant received and continues to undergo medical treatment for the effects of the injury.

ORDER

It is therefore ordered that:

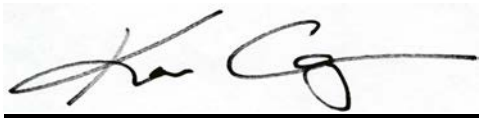
1. Claimant has established by a preponderance of the evidence that she sustained a compensable industrial injury to her right shoulder on August 30, 2017.

2. Respondents shall pay for reasonable and necessary medical treatment related to the August 30, 2017 industrial injury, including reimbursement to Claimant for any out-of-pocket expenses.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-997-018

ISSUES

- Whether Respondents have overcome by clear and convincing evidence the Division IME's opinions regarding permanent impairment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant sustained an admitted injury while working for Employer as a cement mason on a bridge on Colfax Avenue on May 28, 2015. He began work at 2:00 p.m. and worked until 5:00 a.m. the following morning. Claimant was smoothing wet cement in 2' X 2' rebar cages, which involved reaching down between the squares of rebar and smoothing out the surface. Conventional tools did not fit into the space, and Claimant had to extend his arm past his elbow into the rebar cage to smooth the cement. He primarily used his right hand, but switched between his upper extremities to perform this task while kneeling on a board and bending forward.

2. After approximately seven hours, Claimant began experiencing pain in his right shoulder and arm. At the end of his shift, Claimant reported that his entire arm was swollen up to the shoulder. He went home, could not sleep, and returned to the office to report his injury. Employer referred Claimant to an occupational clinic in Greeley for treatment of his right shoulder and the lateral aspect of his elbow.

3. Claimant changed physicians so he could treat closer to home, and began seeing Dr. Raschbacher at Midtown. Claimant reported that he developed wrist pain about one month after the date of injury.

4. Ultimately, Claimant underwent rotator cuff repair and a second surgery for adhesive capsulitis.

5. Following the surgeries, Claimant began physical therapy and reported the onset of neck pain in approximately January, 2016.

6. As Claimant progressed through physical therapy, he continued to complain of right shoulder pain with all movements, as well as right elbow pain, pain in the proximal aspect of his right wrist and finger extensor muscles from the lateral epicondyle down to the wrist and fingers, and pain on the ulnar side of the wrist.

7. On September 21, 2016, Dr. Raschbacher placed Claimant at MMI with an 11% upper extremity rating for injuries to his right shoulder.

8. Claimant requested a Division Independent Medical Examination which Dr. Higginbotham performed. Dr. Higginbotham assigned a 3% rating for loss of range of motion in the thoracic spine, a 10% rating for loss of range of motion in the cervical spine, a 10% scheduled rating for subacromial arthroplasty, a 14% rating for loss of range of motion in the shoulder, a 7% rating for loss of range of motion in the elbow, and a 9% rating for loss of range of motion in the wrist.

9. When the DIME Unit received Dr. Higginbotham's report, Courtney Holmes, a Quality Assurance Specialist with the DIME Unit, wrote to Dr. Higginbotham regarding multiple concerns with his report.

- Dr. Higginbotham assigned ROM in the absence of a Table 53 diagnosis. The Division Impairment Rating Tips state, 'In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero.'

- Dr. Higginbotham assigned ROM for isolated thoracic range motion, when none is allowed.

- The DIME Unit asked Dr. Higginbotham to review and clarify his report.

- With regards to functional status, Ms. Holmes wrote, "[t]here appears to be a paucity of information regarding the patient's functional status as it relates to the assigned impairment rating for cervical range of motion and the additional 10% for shoulder surgery. While the Division Impairment Rating Tips allow for this, a more thorough discussion regarding functional deficit would assist all concerned parties in understanding the assigned rating."

- Ms. Holmes concluded, "keep in mind, Article 42, section 3.7 of the Colorado Workers' Compensation Act states 'for purposes of determining levels of medical impairment pursuant to articles 40 to 47 of this title a physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation.' Anatomic correlation must be based on objective findings."

10. In response, Dr. Higginbotham indicated that "there is guidance in the DOWC Impairment Rating Tips that a shoulder condition can result in cervical range of motion loss . . .I extrapolate this guidance to include thoracic range of motion loss as well." Further, Dr. Higginbotham reported, "[t]he operative report of Dr. Motz on 11/16/2015 noted an arthroscopic subacromial decompression. The additional upper extremity rating of 10% is in accordance with the DOWC Impairment Rating Tips."

11. Per the Division of Workers' Compensation Impairment Rating Tips, "[i]n order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under

Table 53." However, "[i]n unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature, an isolated cervical range of motion impairment may be allowed if well-justified by the clinician. Otherwise there are no exceptions to the requirement for a corresponding Table 53 rating."

12. The Impairment Rating Tips allow for a 10% scheduled impairment rating for a subacromial arthroplasty. Here, Claimant did *not* undergo an arthroplasty. Dr. Higginbotham acknowledged in his deposition testimony that Claimant in fact underwent an acromioplasty, not an arthroplasty.

13. Dr. Ridings performed an independent medical examination at Respondents' request and testified at hearing. Dr. Ridings testified that Dr. Higginbotham's rating of Claimant's thoracic spine was impermissible. "It is specifically disallowed to utilize range of motion to assign impairment for the thoracic or the lumbar spines in the absence of a Table 53 rating greater than zero."

14. The Division of Workers' Compensation Rating Tips allow for an isolated cervical range of motion rating in rare circumstances. Dr. Ridings testified, "[t]he actual wording here on page 4 of the Tips says, quote, in unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature, an isolated cervical range of motion impairment may be allowed if well justified by the clinician." Dr. Ridings noted the following problems with Dr. Higginbotham's rating.

- There is nothing at all unusual about this case.
- There is not severe shoulder pathology. Claimant had a rotator cuff tear and a routine rotator cuff repair surgery.
- The rating is not well-justified in Dr. Higginbotham's notes.

15. With regards to the cervical spine, Dr. Ridings further testified, "there is no indication that [Claimant] sustained an acute injury on the date of injury, which is, you know, a point source trauma to the cervical spine, and even the day after had no complaints, which you would think if it was a muscle thing that happened right away, because he was in an awkward position for a long time, certainly you would think by the next day, he would be having muscle pain and so on in the neck. And he, in capital letters, did not [have muscle pain in his neck], according to his evaluating physician."

16. Dr. Ridings testified that notations in the records regarding discomfort in the cervical spine and interscapular region were to be expected given his physical therapy treatment. "The muscles that move the shoulder, certainly include muscles like the rhomboids, which are in between the spine and the shoulder blade, so that is not surprising. In order to treat a shoulder in physical therapy, you are going to have mention in the physical therapy records about the neck. For instance, if you are going to stretch the upper trapezius . . . you are going to have to stretch the neck and shoulder apart in order to treat shoulder."

17. Dr. Ridings testified that there was no evidence of a right wrist injury which would warrant a rating for a loss of range of motion. Per Dr. Ridings, Claimant had lateral epicondylitis, which is an irritation of the connection between the muscles that extend the wrist and extend the fingers at their origin at the lateral condyle elbow. "It is irritation at the elbow, and you rate the elbow joint for lateral epicondylitis or tennis elbow." Dr. Ridings testified that he had never seen a provider rate the wrist range of motion for lateral epicondylitis because doing so is wrong according to the Division's instruction.

18. Dr. Ridings was critical of Dr. Higginbotham reasoning in rating Claimant's shoulder. In his deposition testimony Dr. Higginbotham emphatically states that if one has any sort of "arthroplasty" at the shoulder, one receives a 10% rating. Dr. Ridings testified that he could not remember any provider assigning a 10% impairment solely for a subacromial arthroplasty. And that is emphatically what Dr. Higginbotham testified he did. This explanation is consistent with his wording in the original IME report.

19. Per the Rating Tips, "[t]he AMA Guides 4th and 5th additions continue to suggest that subacromial arthroplasty should be rated using ROM, and when appropriate, 'joint crepitation with motion' from the 'Other Disorders' section. In general, any additional rating for subacromial arthroplasty is deemed inappropriate because other factors have adequately rated the extent of the impairment.

20. Dr. Ridings testified that Dr. Higginbotham did *not* opine that Claimant had an unusually severe condition which required an additional rating beyond range of motion, nor did he say that he was rating crepitus, "which is what you are supposed to do if you are going to use the Tips sheet." He further testified that Claimant was adequately rated for his shoulder. "This person has already got a shoulder rating, so it is not like you are not getting a shoulder rating even though you had a part of your acromion removed. It is just part of the procedure, which is rated typically, and universally, unless you talk about crepitus simply by shoulder range of motion alone."

21. Dr. Ridings testified that in his opinion, to a reasonable degree of medical probability, Dr. Higginbotham used incorrect rating methods when assigning impairment for the cervical spine, thoracic spine, right wrist, and right shoulder.

22. Dr. Ridings evaluated Claimant for permanent impairment and assigned a 9% rating for loss of range of motion for the shoulder, and a 2% rating for loss of range of motion for the elbow, for a combined 11% upper extremity rating.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads

the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002).

The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The findings of a DIME physician concerning the claimant's unscheduled medical impairment rating shall be overcome only by clear and convincing evidence. Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005). As a matter of diagnosis, the assessment of impairment requires a rating physician to identify and evaluate all losses and restrictions which result from the industrial injury. *Egan v. Indus. Claim Appeals Office,* 971 P.2d 664 (Colo. App. 1998); *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995).

Where permanent impairment is limited to a portion of the body included on the list of scheduled ratings in C.R.S. § 8-43-107(2)(a), the burden of proof to establish the impairment rating is a preponderance of the evidence. *Delaney v. Industrial Claims Appeals Office,* 30 P.3d 691, 693 (Colo. App. 2000).

The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately used the Medical Treatment Guidelines and the AMA Guides.

A DIME physician *must* apply the AMA Guides when determining the claimant's medical impairment rating. C.R.S. §8-42-101(3.7); C.R.S. §8-42-107(8)(c). The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

The ALJ finds and concludes Dr. Higginbotham used incorrect rating methods when assigning impairment for the cervical spine, thoracic spine, right wrist, and right shoulder.

Per the Division of Workers' Compensation Impairment Rating Tips, "[i]n order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment of greater than zero under Table 53. The Impairment Rating Tips allow for an isolated range of motion impairment rating for the cervical spine in unusual cases. The Impairment Rating Tips do not allow a similar exception for the thoracic spine. Dr. Higginbotham clearly erred when he assigned an isolated 3% range of motion rating for the thoracic spine.

Similarly, the ALJ finds and concludes Dr. Higginbotham erred when he assigned an isolated 10% range of motion rating for the cervical spine. While the Impairment Rating Tips do allow for this when it is well justified under unusual circumstances, such justification and circumstances are not present in this case. The ALJ agrees with the letter from Ms. Holmes that "[t]here appears to be a paucity of information regarding the patient's functional status as it relates to the assigned impairment rating for cervical range of motion." The ALJ credits the testimony of Dr. Ridings that "there is not severe shoulder pathology. He had a rotator cuff tear. He had a routine rotator cuff repair surgery...there is just nothing unusual about this case, and the shoulder pathology is not severe." Further, the ALJ accepts the testimony of Dr. Ridings that "there is no indication that [Claimant] sustained an acute injury on the date of injury, which is, you know, a point source trauma to the cervical spine, and even the day after had no complaints, which you would think if it was a muscle thing that happened right away, because he was in an awkward position for a long time, certainly you would think by the next day, he would be having muscle pain and so on in the neck. And he, in capital letters, did not, according to his evaluating physician." Additionally, the ALJ credits Dr. Ridings' explanation for the

notations in the records regarding the neck. "The movers of the shoulder, the muscles that move the shoulder, certainly include muscles like the rhomboids, which are in between the spine and the shoulder blade, so that is not surprising. In order to treat a shoulder in physical therapy, you are going to have mention in the physical therapy records about the neck. For instance, if you are going to stretch the upper trapezius…you are going to have to stretch the neck and shoulder apart in order to treat shoulder."

The ALJ finds and concludes that Dr. Higginbotham erred when he assigned a 9% rating of the wrist. As Dr. Ridings testified, there is no evidence of a wrist injury which would warrant a rating for a loss of range of motion. The ALJ accepts the testimony of Dr. Ridings that Claimant had from lateral epicondylitis, which is properly rated as an elbow injury and not as a wrist injury.

The ALJ finds and concludes that Dr. Higginbotham erred when he assigned a 10% rating for a subacromial arthroplasty. Claimant underwent an acromioplasty, not an arthroplasty. Further, the ALJ notes that Dr. Higginbotham did not opine that claimant had an unusually severe condition which required an additional rating beyond range of motion, nor did he say that he was rating crepitus. There is simply no basis for the 10% rating for a subacromial arthroplasty.

The ALJ credits the opinions of Dr. Ridings as more credible and persuasive than the opinions of Dr. Higginbotham on permanent impairment.

Respondents met their burden of overcoming Dr. Higginbotham's opinions regarding permanent impairment of the cervical and thoracic spine by clear and convincing evidence.

Respondents met their burden of overcoming Dr. Higginbotham's opinions regarding permanent impairment of the wrist and shoulder by a preponderance of the evidence.

The ALJ accepts the opinions of Dr. Ridings as most likely correct regarding permanent impairment. Thus, Claimant's upper extremity rating is 11%.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents overcame the opinions of Dr. Higginbotham regarding permanent impairment.

2. Claimant's permanent impairment rating is 11% upper extremity.

3. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

DATED: April 16, 2018

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant's May 10, 2017 Application for Hearing is barred by the statute of limitations and whether there is compliance with the requirements of § 8-43-103(2), C.R.S. which requires the filing of a notice claiming compensation with the division within two years after an injury.

STIPULATIONS

1. If the statute of limitations argument is not found persuasive, Respondents agree to file a general admission of liability admitting compensability.

2. If the statute of limitations argument is not found persuasive, Respondents will pay for reasonable and necessary medical benefits including the July 3, 2013 surgery and the co-pay of $100.00.

FINDINGS OF FACT

1. Claimant is employed by Employer as a firefighter.

2. On June 13, 2013 Claimant attended an evaluation with Neil Silverman, M.D. after noticing a new mole on his back. The shave biopsy revealed that the lesion was melanoma.

3. Claimant's melanoma was successfully excised by Edward Vaughn, M.D. on July 3, 2013. *See* Exhibit 6.

4. On July 24, 2013 Claimant reported to Employer that he had been diagnosed with melanoma and that he believed it was work related and reported it as a claim to Employer. *See* Exhibit A.

5. On August 5, 2013 Employer/Respondent filed with the Division an Employer's First Report of Injury form. The Division assigned a case number to the claim. *See* Exhibits 1, B.

6. On August 6, 2013 Employer/Respondent filed a Notice of Contest with the Division. *See* Exhibits 2, C.

7. On August 7, 2013 the Division sent a letter to Claimant indicating that a notice of contest had been filed denying liability for Claimant's workers' compensation

claim. The letter provided instructions on requesting a hearing or an expedited hearing. *See* Exhibit 3.

8. On July 18, 2014 Annyce Mayer, M.D. authored an extensive causation report, opining the melanoma was work related. Dr. Mayer opined that Claimant was at maximum medical improvement and that he had an 11% whole person impairment rating. *See* Exhibit D.

9. On May 10, 2017 Claimant followed up with Dr. Mayer who opined that Claimant was still in remission and remained at maximum medical improvement. *See* Exhibit D.

10. On September 1, 2017 Claimant filed an Application for Hearing with the Office of Administrative Courts. *See* Exhibits 5, E.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Statute of Limitations

Section 8-43-103(1), C.R.S. requires an employer to provide notice of an injury for which compensation and benefits are payable to the Division within ten days after the injury. If the employer does not give such notice, then notice may be given by any person. Any notice required to be filed by an injured employee may be made and filed by anyone on behalf of such claimant and shall be considered as done by such claimant if not specifically disclaimed or objected to by such claimant in writing. *See* § 8-43-103(1), C.R.S.

Section 8-43-103(2), C.R.S. bars the right to compensation and benefits provided by the Act unless, within two years after the date of injury, a notice claiming compensation is filed with the Division. The Division has a form titled "Workers' Claim for Compensation." In this case, Claimant did not fill out or submit this form. Claimant argues that the "Employer's First Report of Injury" and the "Notice of Contest" forms filed with the Division by Respondent suffice and count as what is required by statute, namely "a notice claiming compensation filed with the Division." Conversely, Respondent argues that since Claimant did not submit a "Workers' Claim for Compensation" and/or an "Application for Hearing," within two years of his date of injury, Claimant has not met the statutory requirement of filing a notice with the Division claiming compensation within two years of the date of injury.

The parties essentially dispute whether the forms filed with the Division by Respondent suffice as a notice claiming compensation filed with the Division as required by § 8-43-103(2), C.R.S. The forms filed by Respondent were filed within two years of Claimant's date of injury. Claimant's application for hearing was not filed within two years of the date of injury nor did he file a Workers' Claim for Compensation form. Claimant is found persuasive that there is no time requirement (currently) on when an Application for Hearing must be filed if there has been a notice claiming compensation filed with the Division. Here, the issue is whether or not Respondents' filings with the division constitute a notice claiming compensation or whether Claimant is required additionally to file a workers' claim for compensation form within two years of his date of injury to preserve his right to compensation and benefits under the Act.

As found above, after Respondent filed "Employer's First Report of Injury," a workers' compensation claim number was assigned. Employer in this case had notice that Claimant was claiming compensation and claiming that he had sustained a compensable injury. They responded by denying liability and filing a notice of contest. As noted by the general information section on the Workers' Claim for Compensation form, the purpose of the form is to provide notice to Respondent and to allow them to either admit liability or file a notice of contest. Claimant argues since a notice of a claim

and contest of a claim was completed and submitted by Respondent in this case, Respondent and the Division had notice of the claim and he had no further requirement to submit filings with the Division to preserve his right to benefits or compensation under the Act.

The ALJ finds Claimant's arguments persuasive. Filing a Workers' Claim for Compensation form in this case would not have served to provide any additional notice to Respondent and would not have triggered any further filings on behalf of Respondent. Here, Respondent had notice and acted appropriately in filing an Employer's First Report of Injury and a Notice of Contest. A filing with the Division by Claimant would not have produced any different response from Respondent and would have been somewhat duplicative. Here, Respondent had notice that Claimant believed he had sustained a compensable injury and acted appropriately in filing an Employer's First Report of Injury and a Notice of Contest. There is no current time requirement after the notice of contest is filed in which Claimant must request a hearing. Here, The ALJ concludes that a notice of claim was filed with the division within the statutory time limitations and that Claimant's claim is not barred by the statute of limitations.

ORDER

It is therefore ordered that:

1. Claimant's May 10, 2017 Application for Hearing is not barred by the statute of limitations and compliance with the requirements of § 8-43-103(2), C.R.S. was met when both the Employer's First Report of Injury and the Notice of Contest were filed. A "claim" for compensation was filed within two years of the injury.

2. Pursuant to stipulation, Respondents shall file a general admission of liability admitting compensability.

3. Pursuant to stipulation, Respondents shall pay for reasonable and necessary medical benefits including the July 3, 2013 surgery and the co-pay of $100.00.

4. Any issues not determined herein, remain for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 3, 2018

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered an occupational disease to her left upper extremity and neck area during the course and scope of her employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment rendered by Rene Shenoi, M.D. at Kaiser Permanente was authorized, reasonable and necessary to cure or relieve the effects of her work-related injuries.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $680.00.

FINDINGS OF FACT

1. Claimant has been employed as an Assembler for Employer for almost 20 years. She worked approximately 40 hours each week. Claimant noted that her primary job duties involved bonding or connecting two pieces of plastic tubing. She remarked that she bonded about 650-900 packets each day.

2. Employer's Production Supervisor Tim Zeller explained that Claimant engages in a variety of bonding activities and other job duties throughout each day. He detailed that there were seven work stations in Employer's facility. Claimant rotated stations approximately every one to one and one-half hours during each eight-hour work day. Five of the work stations involved bonding or connecting pieces of plastic tubing. The number of bonds and required force or pressure to connect the tubes varied at each station. The other two stations involved sealing or packing materials.

3. On April 1, 2017 Claimant reported the onset of left shoulder symptoms. She attributed her pain to increased bonding activities at work. Claimant selected Front Range Occupational Medicine Center for treatment.

4. On June 22, 2017 Claimant visited Authorized Treating Physician (ATP) Matt Miller, M.D. for an evaluation. She reported the slow onset of left arm pain to the back of the shoulder as well as left-sided neck pain. Claimant noted that her work activities had involved changing roles with more bonding. Dr. Miller diagnosed Claimant with acute tenosynovitis of the left hand and wrist with shoulder pain. However, he was unable to determine whether Claimant's condition was related to her work activities for Employer. He recommended conservative treatment including physical therapy and medications. Dr. Miller released Claimant to modified duty employment with no bonding.

5. Claimant continued to receive medical treatment through ATP Dr. Miller during June and July 2017. Claimant reported diffuse tenderness with even light palpation and minimal movement.

6. On July 10, 2017 Claimant reported that she had visited primary care physicians at Kaiser Permanente. Claimant had also undergone an MRI of her neck.

7. On July 27, 2017 Claimant visited Dr. Miller for an examination. She reported increased left arm, shoulder and neck pain. After reviewing Claimant's MRI, Dr. Miller noted that Claimant had possible nerve root impingement at C5-C6. He determined that Claimant's neck symptoms constituted the predominant problem. However, Dr. Miller concluded that Claimant's neck condition was not related to her job duties. Accordingly, he concluded that Claimant reached Maximum Medical Improvement (MMI) without impairment. Dr. Miller did not assign work restrictions and noted that Claimant did not require medical maintenance treatment.

8. On August 1, 2017 Claimant visited Neurosurgeon Rene Shenoi, M.D. at Kaiser. Claimant reported that she began suffering left extremity pain on April 1, 2017 without any specific trauma. She attributed her symptoms to her job duty of connecting or bonding tubing while working for Employer. Claimant noted that she had filed a Workers' Compensation claim but her treating physician had determined her symptoms were not work-related. Dr. Shenoi diagnosed Claimant with cumulative trauma disorder, left C5-C6 radiculopathy due to left lateral recess stenosis, cervical spondylosis and left shoulder pain. She referred Claimant for left upper extremity diagnostic testing in the form of an EMG/nerve conduction study to rule out Carpal Tunnel Syndrome (CTS) ulnar neuropathy and brachial plexopathy.

9. On September 12, 2017 Claimant underwent an EMG/nerve conduction study with Joshua M. Scheidler, M.D. Dr. Scheidler determined that the results were normal and there was no diagnostic evidence of left median neuropathy at the wrist, left ulnar neuropathy or left cervical motor radiculopathy.

10. On October 11, 2017 Dr. Shenoi remarked that the left shoulder MRI revealed mild bursitis and tendinosis but no rotator cuff tear. She stated that "I think the pain is coming from [Claimant's] neck." Dr. Shenoi referred Claimant for an injection.

11. On November 16, 2017 Claimant underwent a cervical facet injection with Jeromy Cole, M.D. to treat cervical facet joint arthritis. However, the injection did not improve her symptoms.

12. On December 13, 2017 Claimant underwent an independent medical examination with Barry A. Ogin, M.D. Claimant remarked that she has worked as an Assembler for Employer for about 20 years. She reported that she had not suffered any left upper extremity symptoms prior to approximately March 2017. Claimant described that she rotates positions or job stations once every hour during her work shift. For at least one and one-half years one of the positions involved hanging bags on a line with her left arm while applying a connector with her right hand. Claimant noted that the line

was at head height and she lifted the bags from her waist to her shoulder at the rate of about 200 cycles per hour. She occupied the station for two to three hours each day. Claimant's other job duties included bonding or connecting tubes. She inserted about eight tubes per unit and completed 120-160 units each hour. Claimant performed the bonding from a seated position and completed two to three shifts each day. Finally, Claimant's other stations involved packing and sealing bags.

13. Claimant detailed that in approximately March 2017 she developed aching in her left shoulder. After she requested to refrain from any bag-hanging activities because of shoulder pain, Claimant was assigned to more bonding shifts. Claimant stated that she completed up to six bonding shifts per day in addition to packing and sealing bags. She explained that the force required by her bonding duties increased her left upper extremity symptoms. Claimant specifically described symptoms on the left side of her neck and shoulder blade.

14. Dr. Ogin reviewed Claimant's medical records and conducted a physical examination. He noted that Claimant presented with chronic pain along her shoulder, arm and left side of her neck. Dr. Ogin explained that Claimant's diagnosis remained unclear. Claimant possibly had a cervical radiculopathy with radiating symptoms into her left neck and arm. Alternatively, Claimant exhibited symptoms of left rotator cuff impingement. In reviewing the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Dr. Ogin stated that repetitive overhead activity can be associated with rotator cuff pathology. He concluded that, if Claimant has rotator cuff pathology and her job description about repetitively lifting her left arm in an overhead capacity at up to 200 cycles per hour for a couple of hours each day was accurate, then her rotator cuff symptoms were caused by her work activities. However, if Claimant's pain was primarily due to a radiculopathy, then her symptoms are not work-related. Finally, if Claimant's pain was caused by intrinsic shoulder pathology or diffuse myofascial pain, Dr. Ogin reasoned that "her work activities could have caused an aggravation of her pain" but he would have expected improvement with job modifications, therapy treatments and time. He ultimately concurred with Dr. Miller that Claimant's left upper extremity symptoms were not likely work-related.

15. On February 18, 2018 Dr. Ogin issued a supplemental report after reviewing additional medical records. He remarked that MRI films reflected a significant C5-C6 stenosis that was likely the primary cause of Claimant's neck, shoulder and left arm radicular pain complaints. Dr. Ogin also commented that electrodiagnostic testing was negative for a brachial plexus injury or peripheral nerve entrapment. He determined that the cervical spine was thus Claimant's most likely pain generator. Although Dr. Ogin acknowledged that Claimant's work activities could "lead to a cumulative trauma disorder," there was no evidence that Claimant suffered a left upper extremity cumulative trauma disorder. He noted that Claimant did not have evidence of a rotator cuff tear and failed to respond to conservative care. Dr. Ogin thus concluded that Claimant's persistent pain suggested a cervicogenic cause and did not warrant additional treatment through her Workers' Compensation claim.

16. Dr. Ogin also testified at the hearing in this matter. He maintained that Claimant's left upper extremity symptoms were caused by a cervical radiculopathy at C5-C6. He noted that Drs. Miller and Shenoi had determined that Claimant's symptoms originated in her neck area. Dr. Ogin detailed that Claimant performed her bonding activities while in a seated position with her work in front of her. The position would not cause a rotator cuff tendinopathy or myofascial pain. Furthermore, EMG testing did not reveal a significant cumulative trauma disorder affecting the left upper extremity. Finally, applying the *Guidelines* reflects that Claimant's work activities did not cause a cumulative trauma disorder to her left upper extremity.

17. Claimant has failed to demonstrate that it is more probably true than not that she suffered an occupational disease to her left upper extremity and neck area during the course and scope of her employment with Employer. Although Dr. Shenoi diagnosed Claimant with a cumulative trauma disorder, the record is devoid of evidence that she performed a causation analysis. To perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated primary risk factors. Initially, the record reveals that Claimant's primary pain generator is in her cervical spine and thus is not a cumulative trauma condition of the left upper extremity. Furthermore, Claimant's work activities did not meet the Primary or Secondary Risk Factors under Rule 17, Exhibit 5 of the *Guidelines.*

18. The medical records reveal that Claimant suffers from a cervical spine condition. Claimant reported to ATP Dr. Miller that she experienced left arm, shoulder and neck pain. After reviewing Claimant's MRI, Dr. Miller noted that Claimant had possible nerve root impingement at C5-C6. He determined that Claimant's neck symptoms constituted the predominant problem. Dr. Miller concluded that Claimant's neck condition was not related to her job duties. Accordingly, he reasoned that Claimant reached MMI without impairment. Dr. Shenoi agreed that Claimant's primary pain generator was in her neck area. In fact, she remarked that "I think the pain is coming from [Claimant's] neck."

19. Although Dr. Ogin acknowledged that Claimant's work activities could "lead to a cumulative trauma disorder," there was no evidence that Claimant suffered a left upper extremity cumulative trauma condition. Dr. Ogin detailed that Claimant performed her bonding activities while in a seated position with her work in front of her. The position would not cause a rotator cuff tendinopathy or myofascial pain. Furthermore, EMG testing did not reveal a significant cumulative trauma disorder affecting the left upper extremity. Finally, Dr. Ogin remarked that applying the *Guidelines* reflects that Claimant's work activities did not cause a cumulative trauma disorder to her left upper extremity. The medical records thus demonstrate that Claimant did not suffer a cumulative trauma condition to her left upper extremity but instead suffers from a non-work related cervical spine condition.

20. The record reveals that Claimant's work activities did not meet the Primary or Secondary Risk Factors for a cumulative trauma condition in Rule 17, Exhibit 5 of the

Guidelines. Claimant simply did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Although Claimant attributed her left upper extremity symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. Claimant engaged in a variety of numerous tasks throughout each shift in her position as an Assembler. Her job duties typically involved working at seven different stations in Employer's facility. Claimant rotated stations approximately every one to one and one-half hours during each eight-hour work day. Five of the work stations involved bonding or connecting pieces of plastic tubing. The number of bonds and required force or pressure to connect the tubes varied at each station. The other two stations involved sealing or packing materials. Because Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in Rule 17, Exhibit 5 of the *Guidelines*, her request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

7. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees. The category also includes 6 hours of elbow flexion greater than 90 degrees, or six hours of supination/pronation with task cycles 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous

mouse use of greater than four hours or use of a handheld vibratory power tool for six hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two pounds or greater.

8. The *Guidelines* specifically include factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Vibration can also be considered an additional risk factor pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology.

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease to her left upper extremity and neck area during the course and scope of her employment with Employer. Although Dr. Shenoi diagnosed Claimant with a cumulative trauma disorder, the record is devoid of evidence that she performed a causation analysis. To perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated primary risk factors. Initially, the record reveals that Claimant's primary pain generator is in her cervical spine and thus is not a cumulative trauma condition of the left upper extremity. Furthermore, Claimant's work activities did not meet the Primary or Secondary Risk Factors under Rule 17, Exhibit 5 of the *Guidelines.*

10. As found, he medical records reveal that Claimant suffers from a cervical spine condition. Claimant reported to ATP Dr. Miller that she experienced left arm, shoulder and neck pain. After reviewing Claimant's MRI, Dr. Miller noted that Claimant had possible nerve root impingement at C5-C6. He determined that Claimant's neck symptoms constituted the predominant problem. Dr. Miller concluded that Claimant's neck condition was not related to her job duties. Accordingly, he reasoned that Claimant reached MMI without impairment. Dr. Shenoi agreed that Claimant's primary pain generator was in her neck area. In fact, she remarked that "I think the pain is coming from [Claimant's] neck."

11. As found, although Dr. Ogin acknowledged that Claimant's work activities could "lead to a cumulative trauma disorder," there was no evidence that Claimant suffered a left upper extremity cumulative trauma condition. Dr. Ogin detailed that Claimant performed her bonding activities while in a seated position with her work in front of her. The position would not cause a rotator cuff tendinopathy or myofascial pain. Furthermore, EMG testing did not reveal a significant cumulative trauma disorder affecting the left upper extremity. Finally, Dr. Ogin remarked that applying the *Guidelines* reflects that Claimant's work activities did not cause a cumulative trauma disorder to her

left upper extremity. The medical records thus demonstrate that Claimant did not suffer a cumulative trauma condition to her left upper extremity but instead suffers from a non-work related cervical spine condition.

12. As found, the record reveals that Claimant's work activities did not meet the Primary or Secondary Risk Factors for a cumulative trauma condition in Rule 17, Exhibit 5 of the *Guidelines.* Claimant simply did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Although Claimant attributed her left upper extremity symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. Claimant engaged in a variety of numerous tasks throughout each shift in her position as an Assembler. Her job duties typically involved working at seven different stations in Employer's facility. Claimant rotated stations approximately every one to one and one-half hours during each eight-hour work day. Five of the work stations involved bonding or connecting pieces of plastic tubing. The number of bonds and required force or pressure to connect the tubes varied at each station. The other two stations involved sealing or packing materials. Because Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in Rule 17, Exhibit 5 of the *Guidelines*, her request for Workers' Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 3, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Jade Dillon, M.D. that he reached Maximum Medical Improvement (MMI) on October 14, 2015 with a 0% whole person impairment to his right upper extremity as a result of his May 9, 2015 admitted industrial injury.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits in the form of right shoulder surgery that are designed to relieve the effects of his May 9, 2015 industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.*, 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. On January 30, 2013 Claimant injured his right shoulder while working for Mountain Foods, LLC as a Delivery Driver. Claimant was unloading his truck by pushing a dolly loaded with cans of food and bags of rice. The dolly weighed approximately 500 pounds. While descending a ramp, the dolly tipped towards the side and Claimant attempted to stabilize the device. However, Claimant fell backward and the dolly struck him in the chest. Claimant reported injuries to his right shoulder, left elbow, sternum and left lower back.

2. After reaching Maximum Medical Improvement (MMI) Claimant underwent a Division Independent Medical Examination (DIME) with L. Barton Goldman, M.D. on January 20, 2014. Claimant reported symptoms in his left arm, chest wall, neck, left lower back and left abdominal areas. Dr. Goldman noted that Claimant exhibited objective findings of a right shoulder labral tear. He assigned Claimant a provisional 16% right upper extremity impairment rating for crepitus and range of motion limitations. Dr. Goldman concluded that Claimant had not reached MMI and recommended additional treatment that included an MRI arthrogram of the right shoulder. Claimant subsequently settled his Workers' Compensation claim without completing the treatment recommended by Dr. Goldman.

3. In October of 2014 Claimant began working for Employer as a Delivery Driver. On May 9, 2015 Claimant was again pushing a dolly weighing approximately 500 pounds down a ramp. He lost control of the dolly and attempted to prevent it from falling. However, Claimant fell and the dolly struck him in the chest.

4. Claimant initially received treatment with Concentra Urgent Care. However, Claimant's care was subsequently transferred to Authorized Treating Physician (ATP)

Michael Ladwig, M.D. with Aviation Occupational Medicine. Dr. Ladwig referred Claimant to Franklin Shih, M.D. for a physical medicine evaluation and Mark Failinger, M.D. for a surgical consultation.

5. On June 2, 2015 Claimant underwent an MRI arthrogram of his right shoulder. The MRI revealed moderate subacromial/subdeltoid bursitis and marrow edema of the greater tuberosity of the humeral head.

6. Claimant subsequently received conservative medical treatment from Drs. Shih and Failinger. Dr. Failinger discussed surgical options with Claimant. However, in a September 1, 2015 visit with Dr. Shih Claimant stated that he was considering whether to proceed with surgery. In a subsequent examination Claimant remarked that he wanted to proceed with surgery but "not for three months."

7. On October 29, 2015 Dr. Ladwig determined that Claimant had reached Maximum Medical Improvement (MMI) on October 14, 2015 with a 0% permanent impairment rating. Dr. Ladwig remarked that Claimant had discussed surgical options with Dr. Failinger but declined to proceed with surgery at the time. He determined that Claimant was entitled to receive medical maintenance benefits in the form of right shoulder surgery with Dr. Failinger within the following 12 months.

8. On March 8, 2016 Claimant underwent a DIME with Jade Dillon, M.D. Claimant reported burning pain in his right shoulder area. Dr. Dillon noted invalid range of motion measurements with multiple pain behaviors. She agreed that Claimant had reached MMI on October 14, 2015 and assigned a 0% whole person impairment rating. Dr. Dillon determined that it was reasonable to retain the option of surgery over the ensuing 12 months. However, she commented that a pain psychology assessment should precede any surgical intervention.

9. On September 5, 2017 Linda A. Mitchell, M.D. performed a record review of Claimant's case. She considered the medical records from both the 2013 and 2015 right shoulder claims. Dr. Mitchell noted that Dr. Goldman had assigned Claimant a 16% right upper extremity impairment rating for his January 30, 2013 right shoulder injury. She explained that Drs. Ladwig and Dillon had obtained invalid range of motion measurements and neither was aware of Claimant's January 30, 2013 right shoulder injury. Dr. Mitchell agreed that Claimant reached MMI on October 14, 2015 with a 0% whole person impairment rating. She concluded that surgical intervention for Claimant's May 9, 2015 right shoulder injury was not reasonable and necessary. Dr. Mitchell detailed that Claimant was a poor surgical candidate because of pain behaviors, inconsistencies between subjective complaints and objective findings, and failure to respond to conservative treatment.

10. On November 13, 2017 Dr. Failinger issued a supplemental report. After reviewing the DIME reports from Drs. Goldman and Dillon as well as the record review of Dr. Mitchell he addressed the reasonableness and necessity of surgical intervention for Claimant's right shoulder. Dr. Mitchell summarized descriptions of Claimant's 2013 and 2015 accidents and remarked that multiple medical providers had noted inconsistencies

and pain behaviors in Claimant's presentation. He questioned whether Claimant was an appropriate surgical candidate.

11. In addressing causation, Dr. Failinger noted that Claimant's right shoulder MRI revealed a "rim-rent" tear of the supraspinatus that was "in most all situations a degenerative phenomenon that occurs with a rotator cuff and is not with medical probability an acute tear that may have occurred" on May 9, 2015. Although Claimant exhibited some symptoms after the May 9, 2015 accident, there were significant inconsistencies between subjective complaints and physical findings. Dr. Failinger determined that Claimant did not suffer any significant and new injuries on May 9, 2015. However, Claimant's right shoulder MRI reflected a "progressive, high-grade supraspinatus tear." Dr. Failinger characterized the progression of the tear as "a degenerative and ongoing phenomenon." He remarked that progression of rotator cuff tears occurs as individuals age and use their arms at shoulder level or above. Dr. Failinger thus summarized that "there would be great concern proceeding with surgical intervention in a patient with this type of symptomatology unless evaluated by a psychologist" to determine whether non-organic issues contributed to Claimant's heightened symptoms.

12. Claimant testified at the hearing in this matter. He explained that his right shoulder still pops and wishes to pursue the right shoulder surgery originally recommended by Dr. Failinger. Claimant also remarked that Dr. Dillon's DIME evaluation was not very thorough. However, he did not present any evidence that he is no longer at MMI or suffered permanent impairment as a result of his May 9, 2015 work accident.

13. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Dillon that he reached MMI on October 14, 2015.and suffered a 0% whole person impairment to his right upper extremity as a result of his May 9, 2015 admitted industrial injury. Initially, Claimant received conservative treatment for his right shoulder condition and Dr. Failinger discussed surgical options. However, Claimant considered whether he wanted to proceed with surgery and delayed his decision. Dr. Ladwig determined that Claimant had reached MMI on October 14, 2015 with a 0% permanent impairment rating. He remarked that Claimant had discussed surgical options with Dr. Failinger but declined to proceed with surgery at the time. On March 8, 2016 Claimant underwent a DIME with Dr. Dillon. Claimant reported burning pain in his right shoulder area. Dr. Dillon noted invalid range of motion measurements with multiple pain behaviors. She agreed that Claimant had reached MMI on October 14, 2015 and assigned a 0% whole person impairment rating.

14. Claimant testified that Dr. Dillon's DIME evaluation was not very thorough. However, he did not present any evidence that he is no longer at MMI or suffered permanent impairment as a result of his May 9, 2015 work accident. Furthermore, Claimant has not provided any medical evidence that Dr. Dillon's impairment determinations contravened the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*) or was otherwise incorrect. Finally, Drs. Ladwig and Mitchell also concluded that Claimant reached MMI on October 14, 2015.

Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Dillon's MMI or impairment determination was incorrect.

15. Claimant has failed to demonstrate that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical maintenance benefits in the form of right shoulder surgery that are designed to relieve the effects of his May 9, 2015 industrial injury or prevent further deterioration of his condition. Claimant explained that he would like to pursue further medical treatment to alleviate his continuing right shoulder pain. However, the overwhelming medical evidence demonstrates that Claimant does not warrant medical maintenance benefits for his May 9, 2015 right shoulder injury.

16. ATP Ladwig and DIME physician Dr. Dillon determined that it was reasonable to retain the option of surgery over the ensuing 12 months. However, Dr. Mitchell persuasively explained that Drs. Ladwig and Dillon had obtained invalid range of motion measurements and neither was aware of Claimant's January 30, 2013 right shoulder injury. Dr. Mitchell agreed that Claimant reached MMI on October 14, 2015 with a 0% whole person impairment rating. She concluded that surgical intervention for Claimant's May 9, 2015 right shoulder injury was not reasonable and necessary. Dr. Mitchell detailed that Claimant was a poor surgical candidate because of pain behaviors, inconsistencies between subjective complaints and objective findings, and failure to respond to conservative treatment. Furthermore, in a supplemental report Dr. Failinger persuasively noted that Claimant's right shoulder MRI revealed a "rim-rent" tear of the supraspinatus that was "in most all situations a degenerative phenomenon that occurs with a rotator cuff and is not with medical probability an acute tear that may have occurred" on May 9, 2015. Although Claimant exhibited some symptoms after the May 9, 2015 accident, there were significant inconsistencies between subjective complaints and physical findings. Dr. Failinger thus determined that Claimant did not suffer any significant, new injuries on May 9, 2015. He characterized the progression of the tear as "a degenerative and ongoing phenomenon." Dr. Failinger remarked that progression of rotator cuff tears occurs as individuals age and use their arms at shoulder level or above. He thus summarized that "there would be great concern proceeding with surgical intervention in a patient with this type of symptomatology" prior to a psychological evaluation. Accordingly, based on the persuasive medical records, Claimant's request for medical maintenance benefits in the form of right shoulder surgery is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The

facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides.* §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,*

W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Dillon that he reached MMI on October 14, 2015.and suffered a 0% whole person impairment to his right upper extremity as a result of his May 9, 2015 admitted industrial injury. Initially, Claimant received conservative treatment for his right shoulder condition and Dr. Failinger discussed surgical options. However, Claimant considered whether he wanted to proceed with surgery and delayed his decision. Dr. Ladwig determined that Claimant had reached MMI on October 14, 2015 with a 0% permanent impairment rating. He remarked that Claimant had discussed surgical options with Dr. Failinger but declined to proceed with surgery at the time. On March 8, 2016 Claimant underwent a DIME with Dr. Dillon. Claimant reported burning pain in his right shoulder area. Dr. Dillon noted invalid range of motion measurements with multiple pain behaviors. She agreed that Claimant had reached MMI on October 14, 2015 and assigned a 0% whole person impairment rating.

8. As found, Claimant testified that Dr. Dillon's DIME evaluation was not very thorough. However, he did not present any evidence that he is no longer at MMI or suffered permanent impairment as a result of his May 9, 2015 work accident. Furthermore, Claimant has not provided any medical evidence that Dr. Dillon's impairment determinations contravened the *AMA Guides* or was otherwise incorrect. Finally, Drs. Ladwig and Mitchell also concluded that Claimant reached MMI on October 14, 2015. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Dillon's MMI or impairment determination was incorrect.

Medical Benefits

9. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.*, 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

10. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits in the form of right shoulder surgery that are designed to relieve the effects of his May 9, 2015 industrial injury or prevent further deterioration of his condition.

Claimant explained that he would like to pursue further medical treatment to alleviate his continuing right shoulder pain. However, the overwhelming medical evidence demonstrates that Claimant does not warrant medical maintenance benefits for his May 9, 2015 right shoulder injury.

11. As found, ATP Ladwig and DIME physician Dr. Dillon determined that it was reasonable to retain the option of surgery over the ensuing 12 months. However, Dr. Mitchell persuasively explained that Drs. Ladwig and Dillon had obtained invalid range of motion measurements and neither was aware of Claimant's January 30, 2013 right shoulder injury. Dr. Mitchell agreed that Claimant reached MMI on October 14, 2015 with a 0% whole person impairment rating. She concluded that surgical intervention for Claimant's May 9, 2015 right shoulder injury was not reasonable and necessary. Dr. Mitchell detailed that Claimant was a poor surgical candidate because of pain behaviors, inconsistencies between subjective complaints and objective findings, and failure to respond to conservative treatment. Furthermore, in a supplemental report Dr. Failinger persuasively noted that Claimant's right shoulder MRI revealed a "rim-rent" tear of the supraspinatus that was "in most all situations a degenerative phenomenon that occurs with a rotator cuff and is not with medical probability an acute tear that may have occurred" on May 9, 2015. Although Claimant exhibited some symptoms after the May 9, 2015 accident, there were significant inconsistencies between subjective complaints and physical findings. Dr. Failinger thus determined that Claimant did not suffer any significant, new injuries on May 9, 2015. He characterized the progression of the tear as "a degenerative and ongoing phenomenon." Dr. Failinger remarked that progression of rotator cuff tears occurs as individuals age and use their arms at shoulder level or above. He thus summarized that "there would be great concern proceeding with surgical intervention in a patient with this type of symptomatology" prior to a psychological evaluation. Accordingly, based on the persuasive medical records, Claimant's request for medical maintenance benefits in the form of right shoulder surgery is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to overcome the DIME opinion of Dr. Dillon. He reached MMI on October 14, 2015 with a 0% whole person impairment rating.

2. Claimant's request for medical maintenance benefits in the form of right shoulder surgery is denied and dismissed.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 17, 2018.

DIGITAL SIGNATURE

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved, by a preponderance of the evidence, that she suffered a compensable industrial injury arising out of and in the course of her employment with Employer on April 29, 2017.

II. If Claimant proved she sustained a compensable injury, whether Claimant is entitled to reasonable, necessary and related medical treatment

III. If Claimant proved she sustained a compensable injury, whether the medical treatment provided by UC Health and Dr. Jeffrey Kesten was authorized, reasonable, necessary and related to the compensable injury.

IV. If Claimant proved she sustained a compensable injury, whether Claimant proved, by a preponderance of the evidence, that she is entitled to temporary disability benefits.

PROCEDURAL MATTER

Pursuant to this Court's Order, the case was kept open for the deposition of Dr. Kathy McCranie and rebuttal from Claimant. Claimant filed a rebuttal report of Dr. Jeffrey Kesten dated March 18, 2018. On March 26, 2019, Respondents filed a Motion to Strike Dr. Kesten's Rebuttal Report. On March 29, 2018, Claimant filed an Objection to Respondents' Motion to Strike Dr. Kesten's Rebuttal Report. The ALJ denied Respondent's Motion to Strike. Dr. Kesten's rebuttal report. The opinions expressed in Dr. Kesten's rebuttal report were considered by the ALJ.

STIPULATION

The parties stipulated that Claimant's average weekly wage ("AWW"), taking into account wages from Employer and her concurrent employer, is $825.66. This amount is comprised of $165.66 from Employer and $660.00 from her concurrent employer ISI.

FINDINGS OF FACT

1. Claimant has a history of pre-existing medical conditions dating back to at least 2013, including migraines, memory loss, bilateral hand paresthesias and pain, vertigo and dizziness, syncopal episodes, vision difficulties and changes, and shoulder and neck pain. Claimant sought treatment for these conditions, including physical therapy and medication.

2. On September 20, 2015, Claimant sustained a concussion after being hit with a cane and punched in the head repeatedly. Claimant sought medical treatment subsequent to the incident and reported experiencing a "whoosh" sensation, a "wave of weirdness," tinnitus, and being off balance. Claimant testified at hearing that she does not recall which side of her head was struck. She testified that after the concussion she was "foggy" for approximately one month, but returned to work full duty and did not have cognitive difficulties lead up to the April 29, 2017 work injury.

3. On April 24, 2017, Jessica Erin Scharein, NP with the UC Health Neurology Department provided Claimant a note which stated,

> [Claimant] has been under my care for a medical condition in which she requires an anti-glare screen filter for any prolonged computer usage. As an alternative to this anti-glare computer glasses that filter both LED and LCD lights can be purchased for her condition.

4. Claimant underwent a brain MRI on April 28, 2017 for worsening headache, visual changes/disturbances, and new onset extremity numbness. The MRI was unremarkable.

5. On Saturday, April 29, 2017, Claimant sustained a contusion and abrasion to her face while performing her work duties for Employer. Claimant was reaching for an empty ice bucket that was located within arm's length at or just above Claimant's head on the shelf/top of the ice maker. The plastic bucket, weighing approximately 1 ¾ pounds, was placed upside-down on a black mat, which had slipped out of place. Claimant went to fix the mat under the bucket and the bucket fell towards her. Claimant testified that the bucket hit her in between the bridge of her nose and her right eye but she does not entirely recall how the bucket came at her. She testified that she did not lose consciousness nor did she fall after the bucket came towards her. After the bucket fell, a two co-workers came to check on Claimant and she told them she was in pain because the ice bucket hit her in the face. Claimant testified she initially had blurry vision immediately following the bucket falling on her face but by the time the manager came over to her she was able to see again without any blurry vision. Claimant then went to the bathroom to look at her face and noticed an abrasion in between her nose and eye that was bleeding and she testified she felt swelling where her cheek and jaw meet. She testified that she put a band-aid on the abrasion. She did not leave work and was not sent for follow-up medical attention. At the end of her shift, Claimant testified that she told her manager that she was still in pain and had taken ibuprofen and was going to get a beer.

6. Claimant was not scheduled to work either job the following day, Sunday, April 30, 2017. Claimant initially testified that she "probably rested" the whole day on Sunday and did not remember leaving her house. Claimant later testified that she did not stay home resting all day, but rather, went out with her friend for a beer and lunch, and also stopped at King Soopers to run an errand.

7. On Monday, May 1, 2017, Claimant went to work at her ISI job as scheduled. She testified that when she arrived at work, the computers were down for about the first 3 ½ - 4 hours of her shift. Claimant testified that when the computers were finally working, she had difficulty typing and she told her supervisor at ISI that she wanted to leave work because she was in pain. Claimant testified that her supervisor let her use her sick time so she could go home and rest and go to the emergency room.

8. Claimant sought medical treatment later that day at the UC Health emergency department. The medical record notes Claimant was seen at 5:41 p.m. Claimant complained of right eye pain. Jean McFall Wheeler Hoffman, M.D. noted,

> 37 y.o. female with closed head injury that does not meet criteria for head or neck imaging, very small punctate nasal bridge abrasion, no indication for T-DAT, no facial instability, no septal hematoma, no indications for fact imaging at this time. Will do with PCP f/u. Has Hx of chronic migraines with recent nml MRI. I do not think this is an acute ICH. She is ambulating through the ED without difficulty. Overall appears well.

Dr. Hoffman discharged Claimant from care and recommended Claimant follow up with her primary care physician. Dr. Hoffman authored a letter dated May 1, 2017 stating Claimant was seen at the emergency department and unable to work. The letter further states, "Once her concussive symptoms resolve or cleared by neurology she may return to work with no restrictions." The letter was electronically signed by Dr. Hoffman at 5:46 p.m.

9. On May 4, 2017, Claimant presented to Jeffrey Kesten, M.D. with complaints of severe and persistent headache and an ice bucket swung and hit her in the face, specifically, on the right forehead and right anterolateral facial region. Claimant reported a history of dizziness, which had markedly worsened since the April 29, 2017 work incident. Claimant also reported a history of migraines, dizziness, and intermittent bilateral hand paresthesias. On physical examination, Dr. Kesten noted a small eschar, tenderness to moderate palpation to the right lateral aspects of her nasal bridge, and dizziness with upward gaze. Dr. Kesten diagnosed Claimant with work-related mild cognitive impairment, mild traumatic brain injury, posttraumatic headache, postconcussive syndrome, contusion of the nose, right orbit, and head, and worsening of premorbid dizziness. Dr. Kesten ordered an x-ray of Claimant's orbits, which was taken the same day. The radiologist found no displaced fracture and noted the visualized paranasal sinuses were clear.

10. Claimant returned to Dr. Kesten for a follow-up evaluation on May 9, 2017, and reported getting "a little foggy about stupid things," exhaustion, compromised dexterity, painful pressure in her forehead, and stiffness in her neck. Dr. Kesten added three new diagnoses: cervicothoracic pain, cervicothoracic sprain/strain, and cervicothoracic myofascial pain syndrome. Dr. Kesten prescribed a trial of tramadol 50mg and continued Claimant on Celebrex, LidoPro cream, Lidopro patch and noted that another medical provider was simultaneously prescribing Lyrica, Imitrex and meclizine. Dr. Kesten kept Claimant off work for Employer and off work half-time for her concurrent

employer ISI. Dr. Kesten also noted he was considering physical therapy, cognitive therapy and cervicothoracic trigger point injections.

11. On May 12, 2017, Claimant was physically examined at UC Health. Claimant reported feeling constant pressure headache, an intermittent squeezing/pulling sensation in the right eye, ringing sensation in the ear, and increased sensitivity to light. The examination showed "full range of motion in the cervical, thoracic and lumbosacral spines. Not tenderness to palpation." With respect to psychiatric, her "mood and affect normal. Judgement normal." As for neurologic, "patient is alert and oriented to person, place, time and situation. Recent and remote memory are intact. Attention and concentration are normal. Fund of knowledge is appropriate to level of education." With respect to Claimant's speech, language including naming, repetition, comprehension and spontaneous speech are normal. No dysarthria or dysphasia." Claimant's pupils were equal, round and reactive to light and her extraocular eye movements were full and conjugate and without nystagmus. Claimant was diagnosed with post-concussion headache, post-concussion syndrome, and neck pain, and referred for massage therapy.

12. On June 1, 2017, Claimant continued reporting cognitive defects to Dr. Kesten. Physical examination revealed that Claimant's small right paranasal eschar had resolved. Claimant also denied "appreciable tenderness to moderate palpation over her posterolateral cervicothoracic region." Dr. Kesten kept Claimant off work as a part-time server for Employer and limited Claimant to working a maximum of four hours per day as an order processing coordinator at ISI.

13. On June 28, 2017. Dr. Kesten noted that Claimant interventions thus far included limited pharmacologic trials, activity restrictions, cervicothoracic trigger point injections, craniosacral therapy, and speech language pathology/cognitive rehabilitation. Dr. Kesten continued to keep Claimant off all part-time work Employer and to restrict her hours at ISI to 4 hours per day or 20 hours per week.

14. Claimant continued to treat with Dr. Kesten. From July 12, 2017 through September 29, 2017, Dr. Kesten continued Claimant on medications, craniosacral massage therapy, and cervicothoracic trigger point injections. He continued to recommend speech language pathology/cognitive rehabilitation and continued Claimant's work restrictions to allow for 30 hours of work a week at ISI and potential modified duty with Employer.

15. On October 3, 2017, Kathie McCranie, M.D. performed an independent medical evaluation ("IME") at the request of Respondents. Dr. McCranie reviewed medical records dated February 15, 2011 through September 11, 2017 and performed a physical examination. On physical examination, Claimant denied tenderness in the cervical or scapular musculature with some tautness in the left trapezius but no tenderness. Claimant denied any facial tenderness. Cervical facet compression tests were negative and Claimant demonstrated good/full cervical and bilateral shoulder range of motion. Dr. McCranie noted preexisting diagnoses of migraines, worsening of headaches and memory loss, vertigo/dizziness/syncopal episodes, neck pain, left

shoulder pain, bilateral upper extremity paresthesias, anxiety, depression, post-concussion, right elbow pain, and GI symptomatology. Based on her review of the medical records, history from Claimant and physical examination, Dr. McCranie opined that the April 29, 2017 work injury solely resulted in a contusion to the nasal bridge and facial area. She opined that the remainder of Claimant's diffuse symptomatology "correspond with her diffuse pre-existing symptom complex and cannot be objectively linked to this minor mechanism of action." Dr. McCranie noted that the mechanism of injury could cause a contusion, but would not be expected to cause persistent headaches, or cognitive or musculoskeletal sequelae. Dr. McCranie further opined that Claimant's past significant medical history of headaches, vertigo, dizziness, visual difficulties, neck and left shoulder pain, memory loss and prior concussion is more likely to be causing current symptoms that the reported minor mechanism of injury Dr. McCranie noted that Dr. Kesten did not apply the Level II criteria in addressing causality assessment.

16. On October 16, 2017, Claimant returned to Dr. Kesten for a follow-up evaluation and continued to report cognitive issues, headaches and tinnitus. In his medical note, Dr. Kesten references an April 6, 2017 note of Jessica Scharein, NP at UC Health. Dr. Kesten's reference (and abridgment) of the documentation states as follows, in relevant part:

> Encounter Diagnosis…Contusion of Ala Nasi, sequelae...Bruised jaw, sequelae….Past history of Concussion; Gastritis; Hiatal hernia (03/2016); and Migraine…Impression: 1. Migraine with aura and without status migrainosus, not intractable…Possible contributing factors include a prolonged use of computer, stress, hx of concussion…2. Papilledema…Possible, will do OCT…3. Visual disturbance…Migraine aura…4. Spells…MRI brain…5. Paresthesia of both hands…Could be part of hemiplegic migraine…Follow up of migraine with aura. Pain is described as mostly being in the right temple and right eye and feels like a 'screwdriver going into my head' and is associated with a pressure feeling in her entire head. Her headaches and her head feels 'foggy' afterwards and neck is sore. More frequent when she looks at a computer screen. Is requesting a work note for migraine screen cover and to see an ophthalmologist to check pressure in her eyes…ACTIVE PROBLEM LIST…Corneal ulcer…Recurrent erosion of cornea…Tear film insufficiency… Syphilis contact… Cognitive complaints… Migraine… Paresthesia…Carpal tunnel syndrome…Syncope…

17. On November 29, 2017, Dr. McCranie issued an addendum to her IME report after reviewing photographs of the ice bucket and additional medical records. Dr. McCranie concluded that the additional medical records further confirmed Claimant's pre-existing history of migraine headaches, vertigo/dizziness, neck and left shoulder pain, and memory loss. She again opined that the mechanism of injury would not cause Claimant's continued symptoms.

18. Dr. McCranie testified by post-hearing deposition as an expert in physical medicine, rehabilitation and pain medicine. Dr. McCranie testified consistent with her IME report and addendum and continued to opine that Claimant's April 29, 2017 work injury solely resulted in a contusion and abrasion to the nose and face area. Dr. McCranie testified that the May 1, 2017 UC Health emergency department records do not indicate any concussive symptoms. She testified that a diagnosis of a closed head injury means the patient was struck in the head, and is different from a traumatic brain injury or concussion diagnosis. She noted that Claimant did not meet the criteria for head or neck imaging, which indicated the lack of severity.

19. Dr. McCranie testified that Claimant was reporting some identical symptoms prior to the work injury, including memory loss and frequent headaches. She testified that the medical records leading up to April 29, 2017 indicate Claimant's symptoms was progressing. She compared symptoms of cognitive deficits Claimant described to Dr. Kesten at this June 1, 2017 visit to the types of symptoms in the medical records from August 23, 2013 and found that the level of cognitive symptoms remained constant with no aggravation or acceleration of the symptoms. Dr. McCranie testified that "I'm not seeing any change in her complaint. She had concerns with memory loss before. She would forget to perform certain important tasks that she brought to the attention of her medical providers, and she's doing the same thing again."

20. Dr. McCranie reiterated her disagreement with all of Dr. Kesten's work-related diagnoses with the exception of the contusion. She stated that Dr. Kesten did not perform a causation analysis, and indicated that his medical records did not include reference to Claimant's 2015 concussion. She testified that Claimant's contusion was expected to resolve without medical care, but also testified that the initial emergency room evaluation on May 1, 2017 was reasonable under the circumstances. Dr. McCranie explained that the other treatment Claimant received, including the craniosacral therapy, cognitive rehabilitation, physical therapy, trigger point injections, was not reasonable, necessary or related to Claimant's April 29, 2017 work injury. She stated that there is no mechanism of injury to explain Claimant's cervicothoracic pain, strain and myofascial pain. The treatment authorized by Dr. Kesten was to treat Claimant's pre-existing conditions. Dr. McCranie opined that Claimant's work-related conditions did not result in any disability and did not necessitate missing any work from Employer or ISI.

21. When questioned by Claimant's counsel as to her opinion as to whether Claimant being in a weakened condition due to her preexisting conditions might result in her reacting in a more exaggerated way to stimuli, Dr. McCranie pointed out that Claimant was in a weakened state prior to her concussion in 2015 where she had a severe trauma to her head, and yet, Claimant reported minimal symptoms related to that. Therefore, Dr. McCranie opined that, in Claimant's case, she does not have a different or increased reaction to stimuli in spite of her preexisting conditions.

22. Claimant filed rebuttal evidence in the form of a March 18, 2018 report authored by Dr. Kesten. Dr. Kesten indicated he reviewed medical records and noted that Claimant experienced migraines, unspecified cognitive complaints and syncope prior to

April 29, 2017. Despite Claimant's history of pre-existing conditions, Dr. Kesten opined that Claimant experienced an "exacerbation and change in quality of symptoms" after the April 29, 2017 work injury. He noted,

> Despite having been provided with photographs of the ice bucket's position prior to having fallen onto [Claimant], I do not feel qualified to render a comprehensive and accurate forensic analysis of the mechanism of injury considered. Nevertheless, as cited by Mayo Clinic, 'the risk of post-concussion syndrome doesn't appear to be associated with the severity of the initial blow.'

23. Claimant testified at hearing that her current symptoms, including her headaches, neck and shoulder pain, and cognitive issues, differ from those she experienced prior to the April 29, 2017 work injury. She stated that she is now more sensitive to light, and the headaches are now a twisting feeling at the base of her skull through the right side of her head, with a pulling sensation behind the eye. Claimant stated that her cognitive issues have improved since the date of the work injury.

24. Claimant testified that she chose to treat with Dr. Kesten because her primary care physician, Dr. Zimmel, would not treat her for a work-related condition. Claimant stated that she has continued to treat with Dr. Kesten and last saw him in December 2017. Respondents denied further treatment with Dr. Kesten based on a Notice of Contest filed May 23, 2017.

25. The ALJ finds Dr. McCranie's testimony and opinion, as supported by the medical records, more credible and persuasive than Claimant's testimony and the opinion of Dr. Kesten.

26. Claimant proved by a preponderance of the evidence she sustained a compensable injury arising out of and in the course of her employment for Employer on April 29, 2017.

27. The compensable injury sustained by Claimant is limited to a facial contusion and abrasion.

28. Claimant is entitled to medical treatment to cure and relieve her from the effects of the facial contusion and abrasion. Claimant is not entitled to medical treatment for her other alleged conditions and alleged symptoms including, but not limited to, headaches, visual changes/disturbances, cognitive issues, and neck and shoulder pain.

29. UC Health and Dr. Kesten are authorized treating physicians.

30. Claimant failed to prove entitlement to temporary disability benefits by a preponderance of the evidence. The compensable injury, a facial contusion and abrasion, did not result in any disability or wage loss.

31. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service.

Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant proved it is more likely than not she sustained a compensable industrial injury arising out of and in the course of her employment with Employer on April 29, 2017. An ice bucket fell and struck Claimant in the face while she was performing her job duties during a scheduled shift. Respondents argue Claimant's injury is not compensable because Claimant did not suffer any disability or require any medical treatment. While the ALJ agrees Claimant did not suffer any disability, the injury did require some, albeit minimal, medical treatment. Dr. McCranie credibly testified that, while a contusion can be expected to heal on its own, the initial treatment sought at UC Health emergency department on May 1, 2017 was reasonable.

While the ALJ concludes Claimant suffered a compensable injury, the totality of the evidence establishes that the work-related injury is limited to a facial contusion and abrasion. An empty plastic ice bucket weighing no more than two pounds fell from a relatively short distance and struck Claimant in the face. Dr. McCranie credibly opined that the mechanism of injury would not cause Claimant's diffuse symptomatology, including persistent headaches, cognitive sequelae, or musculoskeletal sequelae. Despite the general diagnosis of a closed head injury, the May 1, 2017 emergency department records do not list concussive symptoms. The May 1, 2017 medical records do, however, document Claimant's reports of right eye complaints, which were noted a few weeks before the work injury, on April 6, 2017. The same April 6, 2017 medical record documents pain in Claimant's right temple and eye, pressure, fogginess, and neck soreness. A mere day before the industrial injury, Claimant underwent an MRI for worsening headaches and visual disturbances. The medical records clearly reflect Claimant has a longstanding pre-existing history of many of the same symptoms she contends were caused or aggravated by the April 29, 2017 work incident, and that many of those symptoms continued up to the date of the industrial injury.

While Dr. Kesten opined that Claimant experienced an exacerbation and change in quality of symptoms as a result of the April 29, 2017 industrial injury, he acknowledged that he was not qualified to render an analysis of the mechanism of injury. Dr. Kesten's opinion appears to be based on Claimant's subjective reports of her condition, which the ALJ does not find credible and persuasive in light of the mechanism of injury, the medical records and Dr. McCranie's credible opinion. There is insufficient credible and persuasive evidence that Claimant's diffuse symptomatology is the result of the April 29, 2017 work injury and not the natural progression of Claimant's pre-existing condition. Based on the totality of the evidence, it is more likely than not the April 29, 2017 work injury solely resulted in a facial contusion and abrasion, and did not

otherwise cause, aggravate, accelerate or combine with Claimant's pre-existing condition to create the need for medical treatment for any other conditions.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As found, Claimant's work-related injury is limited to a facial contusion and abrasion. As discussed, Dr. McCranie credibly opined that Claimant's initial visit to the emergency room on May 1, 2017 was reasonable in light of her facial contusion and abrasion. Claimant subsequently received a variety of other medical treatment, including craniosacral therapy, cognitive rehabilitation, physical therapy and trigger point injections. Dr. McCranie credibly testified that this subsequent medical care was intended to treat Claimant's non-work-related conditions and was not reasonable or necessary. Based on the totality of the evidence, it is more likely than not that the initial UC Health emergency room visit on May 1, 2017 was reasonable, necessary and related to the minor injury Claimant sustained on April 29, 2017. Claimant failed to prove by a preponderance of the evidence that any subsequent medical treatment, including craniosacral therapy, cognitive rehabilitation, physical therapy and trigger point injections, was reasonable, necessary and related to the April 29, 2017 work injury.

Authorized Treating Physicians

Section 8-43-404(5)(a), C.R.S. gives the respondents the right in the first instance to select the authorized treating physician ("ATP"). Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). If upon notice of the injury the employer fails forthwith to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office, supra*.

Employer received notification of Claimant's work injury at the time of the injury, on April 29, 2017. The ALJ is persuaded Employer had sufficient knowledge of a potential claim for compensation at such time. Claimant was not sent for medical attention. Thus, the right of selection passed to Claimant, who selected UC Health and Dr. Kesten for medical treatment. However, as discussed above, the only treatment deemed reasonable, necessary and related is the initial emergency room visit at UC Health on May 1, 2017.

Temporary Disability Benefits

To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury, or occupational disease, has caused a "disability," and that he suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2009); *PDM Molding, Inc. v. Stanburg*, 898 P.2d 542, 546 (Colo. 1995). The term "disability" connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Claimant failed to prove entitlement to temporary disability benefits by a preponderance of the evidence. As found, the extent of Claimant's compensable injury is a facial contusion and abrasion, for which Claimant only required an initial emergency room visit. Dr. McCranie credibly testified that the work-related injury did not result in any disability or necessitate missing work from Employer or ISI. Thus, although Claimant has not returned to work for Employer, there is insufficient credible and persuasive evidence that the facial contusion and abrasion sustained on April 29, 2017 resulted in loss or reduction of bodily function or restrictions that impaired Claimant's earning capacity.

ORDER

It is therefore ordered that:

1. Claimant established by a preponderance of the evidence that she suffered a compensable injury on April 29, 2017, limited to a facial contusion and abrasion.

2. Respondents shall pay for reasonable and necessary medical treatment to cure and relieve Claimant's from the effects of the facial contusion and abrasion. Claimant is not entitled to medical treatment for her other conditions and symptoms including, but

not limited to, headaches, visual changes/disturbances, cognitive issues, and neck and shoulder pain.

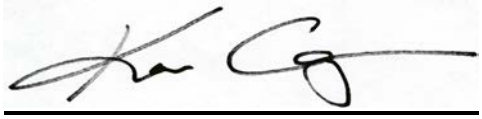
3. UC Health and Dr. Kersten are authorized treating physicians.

4. Claimant's claim for temporary disability benefits is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a functional impairment that is not contained on the schedule of impairments set forth at Section 8-42-107(2), C.R.S. and would therefore entitle claimant to a whole person award for permanent partial disability ("PPD")?

FINDINGS OF FACT

1. Claimant is employed with employer as a package car driver. Claimant testified he was injured on April 27, 2016 when he lifted a carpet roll off the top of the packages and injured his right shoulder. Claimant was referred by employer to Dr. Ogrodnick for medical treatment.

2. Claimant was initially evaluated by Dr. Ogrodnick on May 2, 2016. Claimant reported a consistent accident history of reaching up to unload a carpet roll causing a painful pop over the scapular region. Claimant was diagnosed with a shoulder strain.

3. Claimant returned to Dr. Ogrodnick on May 12, 2016. Dr. Ogrodnick noted claimant was doing about the same and complained of pain if he held the steering wheel too long or held a box next to his body. Dr. Ogrodnick recommended claimant undergo a magnetic resonance image ("MRI") of his right shoulder.

4. The MRI took place on May 25, 2016 and demonstrated moderate supraspinatus, infraspinatus and subscapularis tendinosis. Proximal long head bideps tendinosis with degenerative fraying at the biceps labral anchor was also noted. No rotator cuff tear was detected.

5. Claimant returned to Dr. Ogrodnick on May 26, 2016. Dr. Ogrodnick reviewed the MRI and discussed potential treatment options with claimant. Dr. Ogrodnick referred claimant to Dr. Hatzidakis to evaluate the right shoulder and possibly provide claimant with an injection.

6. Claimant was examined by Dr. Hatzidakis on July 14, 2016. Claimant reported to Dr. Hatzidakis that he was having difficulty with his right shoulder in the overhead and behind-the-back activities and with sleeping. Claimant reported pain occurring across the whole shoulder that was described as a constant dull ache with intermittent dull/occasional sharp pain. Claimant reported chronic ongoing neck pain and constant numbness and tingling to the long, index and thumb since his injury. Dr. Hatzidakis diagnosed claimant with a right shoulder traumatic work-related injury with subacromial impingement, tendinitis and bicipital fraying/irritation, with possible partial

thickness rotator cuff tear and possible low grade infection. Dr. Hatzidakis recommended a diagnostic injection that was performed on July 14, 2016. Claimant was instructed to follow up in three to four weeks to review the diagnostic tests.

7. Claimant returned to Dr. Hatzidakis on August 4, 2016. Dr. Hatzidakis noted that claimant complained of pain across the whole shoulder that can radiate up into the neck, with increased pain with neck rotation. Dr. Hatzidakis recommended therapy and a neck magnetic resonance image ("MRI").

8. Claimant again returned to Dr. Hatzidakis on September 1, 2016. Dr. Hatzidakis noted that claimant's symptoms were more likely than not due to his recent work related right shoulder injury. Dr. Hatzidakis recommended claimant undergo a right shoulder arthroscopic debridement with evaluation of the previous repair and removal of sutures that were causing irritation.

9. Claimant underwent surgery under the auspices of Dr. Hatzidakis on October 4, 2016. The surgery consisted of a right shoulder arthroscopy with extensive debridement, arthroscopic removal of multiple sutures, arthroscopic subacromial decompression, arthroscopic rotator cuff pain and arthroscopic long head of biceps tenodesis.

10. Claimant continued to follow up with Dr. Ogrodnick after his surgery. Claimant complained of issues involving his right elbow and complained that his neck would "lock up" if he's been stationary for too long when watching television, reading a book or sleeping.

11. Claimant returned to Dr. Vanderhorst on February 1, 2017. Dr. Vanderhorst noted claimant was complaining of more discomfort related to his bilateral upper posterior neck and trapezius area irritation. Dr. Vanderhorst noted that his physical therapy had tried to address some of his cervical and muscular complaints which had provided him with some relief. Physical examination revealed complaints of tenderness to palpation in the mid to upper trapezius distribution bilaterally. Dr. Vanderhost noted that claimant had mildly increased muscle tone but no spasm or trigger points.

12. Claimant returned to Dr. Ogrodnick on February 21, 2017. Dr. Ogrodnick noted that claimant's physical therapist had been routinely addressing his neck issues. Physical examination revealed claimant to e tender along the trapezii, but not over scalenes or suboccipital notches.

13. Claimant again returned to Dr. Ogrodnick on April 18, 2017. Claimant reported he had pain of only 3 out of 10 and said his shoulder was feeling "good". Physical examination revealed claimant to be tender over his right trapezius. Dr. Ogrodnick released claimant to return to work over claimant's objections.

14. Claimant returned to Dr. Hatzadakis on May 23, 2017. Dr. Hatzadakis noted that claimant was concerned about returning to work as tolerated as he felt he may re-injury his shoulder. Dr. Hatzadakis provided claimant with work restrictions that

allowed him to return to work in the medium level work lifting 25 to 50 pounds with bilateral upper extremities.

15. Claimant was placed at maximum medical improvement ("MMI") by Dr. Ogrodnick on June 23, 2017. Dr. Ogrodnick noted that claimant felt his strength was at 90% pre-injury and complained of pain of 1 out of 10 from what claimant thought was his biceps. Claimant also reported feeling tight in the upper trap. Claimant was provided with a permanent impairment rating of 8% of the upper extremity by Dr. Ogrodnick. The 8% upper extremity converts to a 5% whole person impairment rating.

16. Claimant underwent a Division-sponsored Independent Medical Examination ("DIME") with Dr. Green on October 16, 2017. Dr. Green reviewed claimant's medical records, obtained a medical history from claimant and performed a physical examination in connection with the DIME.

17. Dr. Green noted claimant reported that after his original right shoulder work injury, he had an injury to this left shoulder on August 29 with development of pain in the left shoulder and neck. This left shoulder injury was covered under a different claim. Claimant reported his right shoulder "feels 90%" and complained the shoulder would get weak with lifting or carrying. Claimant reported he would experience an occasional popping sensation in his right shoulder. Claimant reported he develops a tightness over the pectoralis, parascapular and right upper trapezius region, particularly with overhead lifting. Claimant also reported increased left greater than right paracervical pain following the interim work related injury.

18. Dr. Green noted that on examination claimant had no acromioclavicular tenderness on his right shoulder and no scapular winging. Claimant presented with decreased range of motion of the upper extremity that amounted to a permanent impairment rating of 8% of the upper extremity. Claimant reported that cervical range of motion provoked ipsilateral neck pain, left greater than right, with lateral bending. Examination also revealed mildly positive impingement sign with Hawkins testing and negative apprehension testing on the right.

19. Dr. Green noted that with regard to claimant's cervical spine, claimant did report paracervical symptoms following his injury and based upon his exam, he has good compliance of his upper trapezius muscles. Dr. Green noted that claimant had left greater than right sided cervical symptoms without evidence for clinical radiculopathy and the mechanism of injury and immediate reports do not, in Dr. Green's mind, support a more likely than not, separately identifiable cervical spine injury on April 27, 2016.

20. Dr. Green provided claimant with a permanent impairment rating of 8% of the upper extremity based on claimant's range of motion. Dr. Green noted that claimant does not receive a crepitation impairment. The 8% upper extremity impairment rating converts to a 5% whole person impairment rating according to the AMA Guides, Third Edition, Revised.

21. Respondents filed a Final Admission of Liability ("FAL") based on the scheduled impairment rating. Claimant objected to the FAL and applied for hearing on the issue of conversion. The FAL denied future medical treatment based on the report from Dr. Ogrodnick.

22. Claimant underwent an independent medical examination ("IME") with Dr. D'Angelo on January 10, 2018. Dr. D'Angelo reviewed claimant's medical records, obtained a medical history and performed a physical examination as part of her IME. Dr. D'Angelo confirmed that claimant had two separate injuries to his left and right shoulder, with his left shoulder injury occurring August 19, 2017 and being a separate claim.

23. Dr. D'Angelo noted that claimant described his right shoulder as feeling 90% of his pre-injury status. Claimant reported that occasionally with heavy lifting or carrying, his right arm would feel week. Claimant also complained of right arm numbness if he lies on his right side. Claimant reported no pain in the shoulder at rest, but did admit to occasional popping in the right shoulder.

24. Dr. D'Angelo noted several concerns with regard to claimant's current complaints involving the left sided complaints and noted that many of these symptoms were present after claimant's 2016 injury and before the August 2017 injury.

25. Dr. D'Angelo opined that claimant's right shoulder impairment should remain a scheduled injury.

26. With regard to the April 27, 2016 right shoulder injury, Dr. D'Angelo opined that claimant's right shoulder impairment should remain at 8% upper extremity as it is not appropriate to convert this to a whole person impairment.

27. Claimant presented the testimony of Dr. Swarsen at hearing. Dr. Swarsen had reviewed claimant's medical records and testified that claimant had undergone a right shoulder arthroscopy with extensive debridement, removal of mulitiple sututres,subacromial decompression, arthroscopic rotator cuff repair and arthroscopic long head of biceps tenodesis. Dr. Swarsen identified the areas of the surgery on claimant's exhibit 8, which consisted of a diagram of the shoulder. Dr. Swarsen testified that in his opinion, claimant's ongoing complaints of pain were consistent with the surgical procedures performed on claimant's right shoulder. Dr. Swarsen testified that 90% of the surgical repairs conducted by Dr. Hatzidakis to claimant's rotator cuff were performed on an areas of claimant's shoulder that were proximal to the glenohumeral joint.

28. Respondents' presented the testimony of Dr. D'Angelo at hearing. Dr. D'Angelo testified consistent with her IME report regarding her opinion involving the permanent impairment related to claimant's injury. Dr. D'Angelo testified that it was her opinion that claimant's functional impairment was properly rated as a scheduled impairment rating for the upper extremity and that claimant's impairment rating should not be converted to a whole person award. Dr. D'Angelo testified that physicians do not

award impairment for pain, nor do they award impairment for myofascial irritation. Dr. D'Angelo testified that Dr. Green's DIME report does not note any loss of function beyond the arm. Dr. D'Angelo testified that in order for a physician to provide an impairment rating for the cervical spine, the injured worker would need to be entitled to a table 53 diagnosis. In this case, Dr. D'Angelo opined that she saw no evidence of cervical spine abnormality to warrant a diagnosis.

29. Claimant testified at hearing that he has limitation in movement of his right upper extremity and that it goes numb when overhead or while sleeping. Claimant testified that he still has pain in his upper trapezius and up into his neck. Claimant reported that the pain was on a scale of 2 out of 10 on the day of the hearing.

30. The ALJ credits the testimony of claimant at hearing along with the medical records entered into evidence in this case and finds that claimant has established that it is more likely than not that he has sustained a functional impairment to a part of the body that is not contained on the schedule of impairments set forth at Section 8-42-107(2), C.R.S.

31. The ALJ notes that claimant's testimony regarding the area of his symptoms is claimant's report of symptoms to Dr. Ogrodnick on the date of his initial examination in which claimant reported developing a cramp in his scapular region while performing internal rotation. Claimant also reported being tender over the deltoid region on May 12, 2016. Claimant reported to Ms. Fenton, the physicians' assistant for Dr. Hatzadakis, on August 4, 2016 that he had a lot of increasing neck pain along with pain that increased with neck rotation.

32. Following claimant's surgery, claimant again reported to Ms. Fenton on January 11, 2017 that he had ongoing complaints involving the cervical spine. This is consistent with his complaints to Dr. Ogrodnick, including his report of neck issues on March 21, 2017 that was noted along with tenderness along the cervical spine and paraspinal muscles.

33. As Dr. D'Angelo noted in her report and testimony, there was no evidence of a cervical spine abnormality that would warrant a diagnosis that would result in a Table 53 rating. However, the question of whether claimant has sustained a functional impairment that is not contained on a part of the body set forth on the schedule of impairments under Section 8-42-107(2), C.R.S. requires a determination as to the situs of the impairment.

34. In this case, the ALJ determines that the claimant has established that the situs of impairment is off the schedule of impairments set forth at Section 8-42-107(2), C.R.S. Therefore, claimant is entitled to a conversion of the scheduled impairment rating to a whole person award.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2012. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(1) states in pertinent part:

> (a) When an injury results in permanent medical impairment and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section.
>
> (b) When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section.

4. It is claimant's burden of proof by a preponderance of the evidence to establish both that he suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is Claimant's burden to prove by a preponderance of the evidence the extent of the permanent impairment.

5. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489,

(ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

6. As found, claimant has suffered a "functional impairment" to a part of the body that is not contained on the schedule. Therefore, claimant is entitled to a whole person impairment award pursuant to Section 8-42-107(8), C.R.S. As found, claimant's testimony with regard to the situs of the impairment and the corresponding medical records that are consistent with claimant's testimony are credible and persuasive on this issue. As found, claimant is entitled to an award of 5% whole person as a result of his industrial injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant PPD benefits based on an impairment rating of 5% whole person.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 12, 2018

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414

ISSUES

- Whether Claimant demonstrated by a preponderance of the evidence that his need for total knee replacement is related to his work-related injury.

- Whether Claimant demonstrated by a preponderance of the evidence that his work-related condition worsened so as to support a reopening of his claim.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On July 20, 2015, Claimant sustained a compensable injury to his right knee while stepping off a fire engine. On October 5, 2015, Claimant first sought medical care with Martin Boublik, M.D. who recorded that Claimant "felt a slight pop in the knee and significant *medial* sided knee pain." Dr. Boublik's physical examination also indicated a medial knee injury based on Claimant's positive *medial* McMurray's test, and negative Lachman test. Dr. Boublik also noted instability with both varus and valgus stress testing. Dr. Boublik determined that Claimant's presentation was consistent with *medial* meniscus pathology. He ordered an MRI.

2. On October 15, 2015, Claimant underwent a right knee MRI which revealed medial and lateral meniscus tears, extrusion of the lateral meniscus, diminution of the lateral meniscus, and underlying osteoarthritis. Although the MRI revealed lateral findings, Claimant's symptomology was medial.

3. On May 26, 2016, Dr. Boublik performed an arthroscopic procedure to address Claimant's medial symptoms. Photographs taken during the procedure revealed the medial joint surfaces were intact.

4. However, the photographs displayed significant osteoarthritis on the *lateral* side of Claimant's right knee. The photographs showed degenerative fraying of the *lateral* meniscus without an acute tear and a small, chronic flap tear. Dr. Boublik removed the degenerative fraying and a small piece of cartilage associated with the flap tear. Photographs taken before the procedure was finished revealed exposed bone in Claimant's tibia and femur, grade IV *lateral* changes, and reflected a large defect of articular cartilage in the *lateral* compartment.

5. On August 24, 2016, Dr. Boublik noted that Claimant did very well and had complete resolution of his pain post procedure.

6. However, during his recovery, Claimant experienced a pain flare after performing activity and reported a new onset of snapping or shifting sensation *laterally*.

Dr. Boublik opined "we have again reviewed the inter-operative findings consistent with his grade IV changes laterally… again this is due to his likely underlying degenerative changes . . . We did discuss possible need for total knee arthroplasty in the future and that he may not be able to return back to full duty as a firefighter given his underlying changes are not only from acute but degenerative type injuries."

7. Dr. Boublik placed Claimant at maximum medical improvement (MMI) as of October 26, 2016, reiterating arthroscopic findings in the *lateral* aspect of Claimant's knee. At the time of MMI, Claimant reported the following symptoms related to the *lateral* aspect of his right knee: diffuse pain, episodic instability, activity related night pain, and difficulty with activities such as trying to climb ladders or going up and down stairs. Dr. Boublik noted Claimant's status as post-partial meniscectomies and debridement for significant lateral compartment changes. With respect to maintenance medical benefits, Dr. Boublik opined "given the fairly significant degenerative changes in the patient's right knee, I think he will benefit from ongoing, primarily home based, physical therapy with occasional formal physical therapy visits. I think he may also benefit from possibly repeat injections into the right knee. Ultimately, he may require further surgery including possible total knee replacement."

8. On November 10, 2016, Claimant returned to Dr. Boublik's office and saw PA Parker. Upon the physical examination, PA Parker noted Claimant "continues to be tender over the *lateral* joint line. No medial joint line pain noted." PA Parker noted that at the October 26, 2016 MMI appointment, "we put him at MMI at that time and we had discussed that given his degenerative changes status post work-injury with subsequent meniscal pathology and again now, bone on bone arthritis in the lateral compartment, he will be unlikely to return to work as a firefighter." Claimant acknowledged at hearing that he and PA Parker discussed Claimant's persistent pain and dysfunction which were due to his underlying arthritis. In November, 2016, Claimant applied for retirement disability due to the fact that he could no longer work as a firefighter due to his ongoing knee problems.

9. On January 10, 2017, Respondent filed a Final Admission of Liability based on Dr. Boublik's report. Claimant did not object, and this claim closed by operation of law.

10. On July 6, 2017, Claimant saw Dr. Yang whose history of present illness states:

> David comes in today for a follow up of his right knee. He is a former patient of Dr. Ray Kim's. The patient had a right knee ACL reconstruction in 2002. He now wears a brace on his right knee. He has bone on bone articulation of the right knee. He has a valgus deformity.

Dr. Yang assessed "post-traumatic osteoarthritis of the right knee." The ALJ finds that the trauma referenced in the preceding sentence refers to the ACL reconstruction surgery performed in 2002. Dr. Yang recommended a total right knee arthroplasty

based upon a diagnosis of "osteoarthritis of the right knee." Dr. Yang makes no mention of the July 20, 2015 work injury to the medial meniscus.

11. Claimant seeks to reopen his July 2015 worker's compensation claim based upon this report of Dr. Yang.

12. On November 6, 2017 Claimant underwent a IME with Dr. Lindberg to address whether the work-related injury to the medial portion of Claimants knee aggravated or accelerated the need for a total knee replacement. Dr. Lindberg opined that Claimant's need for a total arthroplasty was due to his underlying degenerative arthritis and not due to the July 2015 work injury.

- Dr. Lindberg explained that Claimant underwent a major lateral meniscectomy as well as an anterior cruciate reconstruction in 2000 and that "it is well documented in orthopedic literature that the ultimate outcome of the person with an anterior cruciate injury and a major lateral meniscectomy is not good and that one can expect early development of osteoarthritis".

- Dr. Lindberg relied upon the intraoperative photographs that were available from Dr. Boublik's 2016 scope which "showed chronic changes in the lateral meniscus … as well as significant osteoarthritis in the lateral joint affecting both the lateral femoral condyle and the lateral tibial plateau".

13. Dr. Lindberg also relied on the October15, 2015 MRI which revealed significant osteoarthritis prior to the May 2016 work-related scope for the medial sided knee pain. Dr. Lindberg opined that "the MRI confirms significant osteoarthritis prior to the May 2016 scope and that this did not occur or progress to a reasonable degree between his injury and the scope." Dr. Lindberg opined that the injury, as explained to him by Claimant was not responsible for the current situation.

14. Finally, Dr. Lindberg concluded that the need for total knee replacement is caused by Claimant's underlying degenerative arthritis and that Claimant has typical findings in which he would expect to see 15 years after an ACL reconstruction with a 70% removal of his lateral meniscus. He opined that Claimant remained at MMI and any further treatment should be rendered outside of his worker's compensation claim.

15. Claimant testified that subsequent to MMI for his work-related condition, he has experienced increased pain, increased instability "and when I say it locks up, - it catches and then snaps off since it's bone on bone". Claimant testified that he wears a brace designed to open up the outside of the knee so that the "bone on bone" is not as intense. It is undisputed that Claimant's "bone on bone" changes are limited to the *lateral* aspect of Claimant's knee.

16. Claimant testified that subsequent to his 2002 ACL reconstruction, he eventually returned to full duty work and did not have any type of restrictions to his right knee prior to the July 2015 work-related injury.

17. At hearing, Claimant conceded that at the October 26, 2016 MMI appointment, and at his November 10, 2016 appointment with Dr. Boublik, he discussed ongoing persistent pain and dysfunction. Further, his need of a total knee replacement was addressed at both of these visits as well as a prior July 2016 visit. Claimant testified that he wished to undergo a total knee replacement because his knee was not improving.

18. At hearing Dr. Lindberg was admitted as an expert in orthopedics of the knee. Dr. Lindberg testified that he had an opportunity to review medical records as well as to physically evaluate Claimant. Dr. Lindberg testified that he addressed the causality of the need of the total knee replacement and concluded that Claimant's need for the surgery was inevitable and due to the natural progression of Claimant's underlying severe osteoarthritis which resulted from the 2002 removal of 70% of his lateral meniscus.

19. Dr. Lindberg testified that Claimant sustained a work-related injury on July 20, 2015 to the *medial* side of his knee, where he reported symptoms. He explained that Claimant's symptoms and findings are all on the *lateral* side of the knee. He based his opinion on Claimant's MRI and the intraoperative photos from the May 2016 scope. Dr. Lindberg testified the work-related injury to the *medial* side of Claimant's knee had nothing to do with his need for a total knee replacement. Dr. Lindberg opined no evidence of the work-injury aggravating, accelerating, or exacerbating of Claimant's underlying osteoarthritic problems.

20. Dr. Lindberg explained that in 2002, Claimant had a "devastating" injury to his knee wherein he tore his ACL, tore his medial meniscus, and tore his lateral meniscus. Dr. Lindberg testified that while Dr. Yamamoto was able to repair the medial meniscus and did not have to remove it, he unfortunately was unable to fix the lateral meniscus.

- He pointed out that the lateral meniscus was "multiply injured" and explained that Dr. Yamamoto had to remove 70% of the lateral meniscus which is "the worst possible thing that can happen to somebody who tears their anterior cruciate."

- He explained that "the expected outcome is that of a severe degenerative osteoarthritis because of the removal of the lateral meniscus, it is a guaranteed outcome".

- He testified that "as time goes on, Claimant's knee deteriorated, and he started losing joint surface in the outside [lateral] part of his knee."

- Dr. Lindberg testified that at the time of the July 2015 work related injury to the medial meniscus, “the lateral knee was already shot with bone on bone arthritis.”

- Dr. Lindberg testified that he has “performed 10,000 knee scopes and probably 1,000 ACL reconstructions and it’s heartbreaking when you find out that you did a great operation but 15 years later, the knee is shot.”

- He noted that “the outcome is comparable to ‘the Ten Commandments,’ it’s engrained in stone, you know it’s going to happen”.

21. Dr. Lindberg opined that the October 15, 2015 MRI supported his opinion because it revealed significant degenerative arthritis with lateral space narrowing “which is what we would expect to see 12 or 13 years post-injury.”

- Dr. Lindberg testified that the MRI report did not accurately portray the actual MRI films and provided a careful explanation at hearing regarding the MRI films which he also interpreted.

- Dr. Lindberg identified the lateral side and the medial side of the MRI film, and pointed out the white spots which show degenerative arthritis underneath the loss of cartilage on the lateral side.

- Dr. Lindberg pointed out to the Court the area of exposed femur and tibia bone with osteoformation and extrusion of the lateral meniscus.

- Dr. Lindberg showed the Court the bones on the lateral side where the meniscus had “squirted out” or what was left of it because Dr. Yamamoto had taken 70% of it out.

22. Dr. Lindberg noted that as of October 2015 the MRI revealed significant underlying osteoarthritis which is “only going to get worse over time, it’s the natural progression of the disease and it has already progressed significantly at this point in time, in October 2015.” Dr. Lindberg pointed out the top of the tibia and the remnant of the lateral meniscus and explained that this area “looked like someone had gone in there with a church key and scraped that meniscus.” He explained that this represented degenerative fraying of the lateral meniscus and not an acute tear. Based upon the appearance of the frayed lateral meniscus, he opined that it had been there for a long time and was only going to be “a problem.”

23. Dr. Lindberg also relied upon the May 2016 arthroscopic photographs which revealed degenerative fraying of the lateral meniscus. He noted there was “a little flap tear that was frayed and was chronic and had been there for a long time. He opined it was a remnant of his previous surgery.” Dr. Lindberg noted if the work injury caused any acute damage, it was to the *medial* side of Claimant’s knee where he was symptomatic. However, Claimant’s ongoing problems and the symptoms for which he requires a total knee replacement are all on the *lateral* side of the knee. He noted “the

lateral knee was already shot with bone on bone arthritis at the time of this "small injury" that could have possibly torn his medial meniscus." Finally, he testified that at the time of the May 2016 scope, "[Claimant's] lateral side was toast. It was already significantly damaged and that was not secondary to any injury other than the one in 2002 that resulted in 70% excision of his meniscus."

24. Dr. Lindberg testified that Claimant's initial evaluation with Dr. Boublik supported his opinion regarding causation. Specifically, Dr. Lindberg noted that under the physical examination, Claimant reported *medial* sided pain and Dr. Boublik noted that Claimant had a positive *medial* McMurray's test which is the test for a meniscal tear. He explained that Claimant had a negative Lachman test which indicated that his ACL was intact and that he had instability both with varus and valgus stress testing. He explained Claimant's instability was because of his osteoarthritis in his lateral joint with articular cartilage loss and that was why Claimant had instability, especially on exam. He further explained that Claimant had instability due to the removal of his lateral meniscus: "when you take out the cushion, you develop arthritis, point loading on the articular cartilage and the cartilage begins to deteriorate. Once you lose the articular cartilage, you lose the spacer between the bones. So, when you wiggle the knee, it's going to collapse on that side, it's going to be unstable." Dr. Lindberg explained that "at the time of [Claimant's] initial visit, he already had instability consistent with what we saw on his MRI with joint space loss when the two bones come together and they're not supposed to be together, they're supposed to be far apart."

25. Dr. Lindberg testified with 98% guaranteed certainty that Claimant would require a total knee replacement wholly independent of the July 2015 work injury. Dr. Lindberg testified that he has been doing orthopedic surgery and IME's for a long time and "never have I had as much evidence, both MRI and readable photographs of his surgery itself, and an accurate history that backs up everything I've said. There is no evidence of an acute injury on the lateral side of the knee." While Dr. Lindberg acknowledged the possible flap tear of the medial meniscus as it related to the work-injury to the medial side, he opined Claimant's need for surgery is to the lateral side and the fact that the need for surgery to the lateral side happened while Claimant was being treated for his medial meniscus injury has no relationship to the progression of the lateral disease.

26. Dr. Lindberg testified that he was unaware of any medical provider who related Claimant's need for a total knee replacement to the July 2015 work-injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of

whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

The Administrative Law Judge finds and concludes that, considering the totality of the evidence, Claimant failed to prove it more likely than not that his worsened condition and need for treatment were caused by the industrial injury. Rather, the credible and persuasive testimony of Dr. Lindberg and the supporting medical evidence make it more likely than not that Claimant's need for knee replacement surgery is caused by factors unrelated to this work injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to demonstrate by a preponderance of the evidence that his work-related condition worsened so as to support a reopening of his claim. Claimant's request to reopen his claim is denied and dismissed with prejudice.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 11, 2018

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that right hip surgery and any necessary diagnostic workup prior to a right hip surgical procedure to treat his right hip labral tear is reasonable, necessary, and causally related to his January 7, 2017 work injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a technician performing mechanic type work on cars. Claimant's duties involve placing cars on lifts, raising them up, taking off tires, performing oil changes and doing jobs including brake repairs, new brakes, shocks, struts, transmissions, radiators.

2. On January 7, 2017 Claimant was so employed. Claimant was performing an oil change on a Chevy S10 pickup truck. Claimant's right hand was pinned by the hood of the pickup truck after the hood dropped. The pickup truck started moving forward with Claimant's right hand stuck inside the hood. Claimant turned and attempted to move as far away from the pickup truck as possible but couldn't get completely away from the pickup truck because his hand was inside the hood. The pickup truck pinned Claimant against a toolbox that was against the wall of the shop. Claimant's right hip area and right side of his body was due to his hand being stuck. The bumper of the pickup truck was against Claimant's right hip area and right side of his body when he was pinned. A co-worker got into the pickup truck and reversed it to get Claimant free and then Claimant was able to remove his right hand from the hood of the pickup truck.

3. Claimant's entire right sided hurt following the incident. Claimant had pain from his back going down the front and down his leg. Claimant had trouble standing on his injured right side.

4. Prior to this incident, Claimant had no problems in his right hip, no pain in his pelvis, and had received no prior medical treatment to his hip.

5. On January 9, 2017 Claimant was evaluated at St. Anthony Hospital. Claimant reported that two days prior he was working as a mechanic and standing in front of a vehicle he was working on when a coworker accidentally caused the vehicle to roll forward. Claimant reported that the hood of the vehicle slammed on his right hand and that he was pinned momentarily between the front of the pickup truck and a toolbox against the wall. Claimant reported severe lower back pain since the incident and intermittent numbness and tingling to his bilateral lower legs. Claimant also reported intermittent abdominal discomfort since the incident. *See* Exhibit 5.

6. On January 15, 2017 Claimant was evaluated at by Bethany Wallace, D.O. Claimant reported worsening low back pain and pain into his groin. Claimant reported that he went to the emergency room and was sent home after imaging but that his pain was worse with much worse swelling and pain into his right groin. Due to Claimant's reported pain, Dr. Wallace sent him back to the emergency room. *See* Exhibit 7.

7. On January 15, 2017 at the emergency room of Lutheran Medical Center, Clamant reported increasing low back pain that radiated to his right hip, groin, and thigh after an injury on January 7, 2017. Claimant reported no new injuries since January 7. Claimant had tenderness to palpation diffusely throughout the thoracic and lumbar region bilaterally. A CT scan of the abdomen and pelvis were performed and found to be within limitations of a non-contrast CT examination showing no acute traumatic findings. *See* Exhibit 8.

8. On February 1, 2017 Claimant was evaluated by David Yamamoto, M.D. Claimant reported low back pain, right flank pain, right lower abdominal pain, and right hip pain. Dr. Yamamoto found Claimant to be tender laterally at the right hip. *See* Exhibit 9.

9. On February 2, 2017 Claimant went to the emergency room of Lutheran Medical Center for chest pain. Claimant also reported right hip pain from a recent traumatic accident where he was pinned. *See* Exhibit 10.

10. Claimant continued to be evaluated by Dr. Yamamoto.

11. On March 25, 2017, Claimant underwent an independent medical evaluation performed by Douglas Scott, M.D. Claimant reported a burning and stabbing feeling over the right iliac crest that wrapped around into the right lower abdominal quadrant and then down into the right inner aspect of his thigh. Claimant reported that he had been pinned between a pickup truck and a tool box against the wall. Claimant reported that his right hand was also pinned under a partially closed hood because he was shutting the truck hood when the truck moved forward and that because his hand was trapped under the hood he was pulled before being able to release his right hand. Claimant reported that he had a bruise over the right side of his trunk into his right lower quadrant abdomen. Dr. Scott found on examination a maximum point of tenderness over the right groin and found reduced active range of motion in the right hip. Dr. Scott opined that Claimant's presumptive diagnoses included: right sided trunk contusion, possible right lumbar strain, possible right groin strain, and right hand abrasions. Dr. Scott opined that a cane for walking was reasonable and necessary and that a referral to physical therapy was reasonable and necessary. *See* Exhibits 13, B.

12. On April 5, 2017 Claimant began physical therapy. Claimant reported being pinned between a truck and a toolbox and that he had not worked since. Claimant reported pain in his right anterior hip to his buttocks, back, and mid spine. Claimant reported pain in his inner right thigh and that he had difficulty walking and could not bend. *See* Exhibit X.

13. Claimant continued to treat with Dr. Yamamoto who eventually referred Claimant to David Zarou, D.O. after physical therapy failed to provide Claimant with improvement.

14. On June 14, 2017 Claimant was evaluated by Dr. Zarou. Dr. Zarou opined that Claimant was not an excellent candidate for osteopathic manipulative treatment and opined that he believed Claimant had a torn labrum in the right hip and needed an MRI/arthrogram to identify the lesion that would not be visible by a plain MRI or CT scan. Dr. Zarou recommended Claimant be evaluated by an orthopedic hip specialist. *See* Exhibit 19.

15. On July 13, 2017 Claimant underwent a right hip MRI arthrogram interpreted by Cameron Bahr, M.D. The findings included suspicion for cam type femoracetabular impingement of the right hip, slight irregularity of the right hip labrum anteriorly suspicious for small tear, mild chondral thinning over the femoral head posteriorly, and mild tendinosis of the right hamstring tendon origin. *See* Exhibit 23.

16. On September 6, 2017 Claimant was evaluated by Brian White, M.D. at Western Orthopaedics. Claimant reported being pinned at work between a truck and toolbox and that since then he had pain deep in the groin that radiates into his thigh and that it had gotten to the point where he was now significantly limited with his function. Dr. White opined that Claimant's findings were consistent with right hip femoracetabular impingement, labral tear, and some hypersensitivity possible CRPS scenario. Dr. White opined that Claimant would be a candidate for right hip arthroscopy surgery to address the impingement and labral tear and opined that it may be helpful to do a diagnostic injection to definitively confirm the labral tear. Dr. White opined that he wanted to do a diagnostic injection first to see how much pain goes away and that if Claimant had a nice benefit from injection, then hip arthroscopy with labral reconstruction would be the best fit for him. Dr. White also opined that he was not sure if Claimant had an element of CRPS but that Claimant's level of pain was a little bit more than he would like to see with just a labral tear and that Claimant should get an evaluation to see if CRPS is a component of it so that they would know and could treat the right hip differently with regard to the anesthesia for the hip procedure and different modalities of pain control prior to and after but opined that moving forward with hip arthroscopy would be reasonable as well. *See* Exhibit 25.

17. On September 6, 2017 Dr. White wrote a letter to Dr. Yamamoto. Dr. Yamamoto noted that Claimant's pain response was significant and that he was worried about an element of CRPS. Dr. White thought that a diagnosis of CRPS could be helpful preoperatively, intra-operatively, and postoperatively as well. Dr. White indicated he did not know if a CRPS diagnosis would deter him from doing anything surgically for Claimant but thought that it might be a component of pain that he could make worse with hip arthroscopy if it was not reasonably treated. He indicated he thought they should see if CRPS was a component of all of this. *See* Exhibit 25.

18. On September 18, 2017 Claimant was evaluated by Dr. Yamamoto who referred Claimant for CRPS testing. *See* Exhibit 26.

19. On September 27, 2017 Claimant underwent an independent medical evaluation performed by Dr. Scott. Dr. Scott issued a report on October 14, 2017. Dr. Scott noted that Claimant had a cam type abnormality in the shape of the femoral head and had femoracetabular impingement that can be associated with labral tears. He noted that degenerative labral tears occurred after years of repetitive minor injuries and were usually associated with impingement. He opined that femoracetabular impingement predisposed patients to tearing of the labrum. He also opined that labral tears can be the result of trauma. Dr. Scott noted Claimant's apparent distress due to the right hip pain. Dr. Scott noted that the medical treatment guidelines indicated labral tears could result from high energy trauma, but questioned the cause of Claimant's right hip labral tear after noting the January 9, 2017 urgent care records and records from St. Anthony's emergency room referencing lumbar contusions and right hand contusions. Dr. Scott noted that Dr. White had diagnosed cam type femoracetabular impingement and labral tear but did not clarify if the labral tear was due to the January 7 injury or was the result of repeated small trauma to the labrum from the cam type FAI and opined that Dr. White needed to clarify the cause of Claimant's labral tear. *See* Exhibits 27, B.

20. On October 24, 2017 Jorge Klajnbart, D.O. performed a medical records review. Dr. Klajnbart noted that Claimant had not yet been evaluated for CRPS and that Claimant should have a workup due to his allodynia, decreased range of motion, hyperalgesia, and lower extremity pain out of proportion. Dr. Klajnbart opined that the CRPS was directly related to Claimant's injury. However, Dr. Klajnbart opined that Claimant's labral tear was probably pre-existing in nature and not directly related to Claimant's workers' compensation injury. Dr. Klajnbart noted Claimant's cam type femoroacetabular impingement and defect led primarily to Claimant's labral tear. Dr. Klajnbart opined that although a labral tear can be caused by trauma, it can also be caused by femoroacetabular impingement and hyperlaxity of the hip joint. Dr. Klajnbart noted that Claimant did not have right hip pain until approximately one month after the injury and that traumatic labral tears typically occur from a twisting or pivoting movement at the hip that involves external rotation and hyperextension and that he did not see that type of mechanism of injury documented in Claimant's case. He therefore opined that the traumatic event at work was not the causative event of Claimant's labral tear. *See* Exhibits 30, C.

21. On November 2, 2017 Claimant was evaluated by David Reinhard, M.D. Dr. Reinhard reviewed the mechanism of injury with Claimant and reviewed the past medical treatment. Dr. Reinhard performed a physical examination. Dr. Reinhard provided the impression of: work related crush injury to the right hip and low back; right hip labral tear due to crush injury; lumbar strain and sprain and contusion due to crush injury with possible right sacroilitis; right thigh pain of unclear etiology. Dr. Reinhard recommended a repeat Doppler ultrasound of the right lower extremity, a non-contrast MRI of the lumbar spine, a three phase bone scan to evaluate for possible CRPS, and s-rays of the right femur. *See* Exhibit 31.

22. On November 30, 2017 Claimant was evaluated by Dr. Reinhard. Dr. Reinhard noted that the lumbar spine MRI showed multilevel degenerative changes and no findings explaining Claimant's right lower extremity symptoms. He also found that the repeat diagnostic Doppler ultrasound of the right lower extremity was negative and that x-rays of the right femur were normal. Dr. Reinhard noted that the triple phase bone scan had not been authorized or performed and recommended it be done. Dr. Reinhard also recommended referral for a right lumbar sympathetic block. *See* Exhibit 34.

23. On February 14, 2018 Dr. White issued a letter clarifying his assessment of Claimant. Dr. White opined that Claimant had a significant twisting injury to his hip and lower extremity at work on January 7, 2017. Dr. White opined that his injury resulted in CRPS on that side and a labral tear and bad hip. Dr. White opined that Claimant had underlying impingement but that Claimant was asymptomatic before and was doing heavy work without any problems. Dr. White opined that the work injury is clearly what changed everything and rendered Claimant in severe pain and rendered him severely dysfunctional. Dr. White opined that CRPS was an issue and could be a significant portion of Claimant's overall pain. Dr. White noted that he would like to do a diagnostic injection into Claimant's hip joint to see how much better Claimant's hip moved and how much better Claimant felt. Dr. White noted he had great respect for operating on patients with CRPS and noted things he could do to try to minimize the risk of making it worse intra-operatively and postoperatively typically using IV ketamine and he recommended that for Claimant provided that Claimant received good relief with the diagnostic injection and had improvement in function with that. *See* Exhibit 38.

24. Dr. White recommended moving forward with arthroscopic surgery of the hip with reshaping of the ball and the cup and a labral reconstruction and he recommended getting a physician involved now that treats CRPS to help Claimant and to be a helpful partner in moving forward with Claimant's surgery. *See* Exhibit 38.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even

if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Reasonable and Necessary Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Claimant has established by a preponderance of the evidence that he is entitled to right hip arthroscopy recommended by Dr. White to treat his work related right hip labral tear sustained on January 7, 2017. The surgery is reasonable, necessary, and causally related to Claimant's work injury. Claimant is credible and persuasive in his testimony surrounding the mechanism of injury where his body twisted to try to get away from the pickup truck that pinned him against the toolbox against the wall. The opinions of Dr. White and Dr. Reinhard are persuasive that the crush injury and Claimant's labral tear are related to the work injury. The surgery proposed is found to be reasonable, necessary, and causally related to the injury. As found above, there is concern that Claimant may have CRPS and Dr. White noted a slightly different approach in surgery if that is confirmed. Dr. White also indicated a desire to perform a right hip injection prior to surgery. The ALJ finds that any necessary diagnostic workup recommended by Dr. White prior to arthroscopic surgery is also reasonable, necessary, and causally related to the work injury and shall be authorized. The opinion of Dr. Klajnbart is not found credible

or persuasive. Although Claimant has pre-existing cam type femoracetabular impingement in his right hip that is congenital, Claimant was asymptomatic and his labral tear is much more likely due to the trauma while twisting and getting pinned against the toolbox against the wall by a pickup truck than due to his congenital condition. Dr. Klajnbart is incorrect in believing Claimant had no reported symptoms in his right hip for a month following the injury. Records show otherwise and show pain reported by Claimant into the right groin on January 15, pain into the right hip on January 15, and again pain into the right hip reported on February 1.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence that the right hip arthroscopy recommended by Dr. White and any and all necessary diagnostic workup as recommended by Dr. White prior to the surgical procedure is reasonable, necessary, and causally related to his January 7, 2017 work related right hip labral tear.

2. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 10, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Determination of Claimant's appropriate permanent partial disability (PPD) impairment rating.

FINDINGS OF FACT

1. Claimant was 22 years old at the time of hearing. In July of 2016 Claimant was employed by Employer as an order selector.

2. On July 14, 2016 Claimant was working in that capacity. Claimant was training on working in the freezer and was wearing gloves provided by Employer while working. Despite the gloves, Claimant developed frostbite on digits 2-5 of his right hand.

3. Claimant was referred to Concentra and underwent treatment.

4. On August 1, 2016 Claimant was evaluated by hand specialist Kulvinder Sachar, M.D. Dr. Sachar noted that Claimant had sustained superficial frostbite to the right index, middle, ring, and small fingers on July 14, 2016 when he was in the freezer for about 40 minutes. Dr. Sachar also noted a similar but less severe episode about two weeks prior. Dr. Sachar found no deformity on examination of Claimant, found full range of motion, and found no skin or subcutaneous tissue changes. Dr. Sachar found normal capillary refill in the fingertips with normal turgor. Dr. Sachar opined that Claimant had superficial frostbite to the right hand and that it would be reasonable for Claimant to seek out treatment through his primary care physician to make sure he did not have anything that would predispose him to decreased circulation in the hands like sickle cell trait. Dr. Sachar opined that if a workup turned out normal, he did not believe there would be a problem with Claimant continuing to work in a cold environment and that it may be just circumstances on the two episodes that Claimant had cold sensitivity. Dr. Sachar opined that there were really no signs of vascular disorder and that it would be safe for Claimant to resume cold exposure if the blood work including sickle cell trait was negative. Dr. Sachar opined that blood work testing should be done through a hematologist or primary care physician and that he was not certain it would be done through workmen's comp, but that he would defer back to Concentra. Dr. Sachar noted he could see Claimant back as needed. *See* Exhibit F.

5. On August 16, 2016 Claimant was evaluated by Deepa Ramadurai, M.D. Claimant reported that in mid-July while working at a food processing company he sustained a cold injury to his right hand after being in the freezer for an hour wearing appropriate protective gear. Claimant reported pain and tingling in the four digits of his right hands from the tips of the fingers to the DIP joints, that he had white discoloration of the fingertips, and that over the course of a few weeks the affected skin peeled and he regained full sensation and coloring. Claimant reported no prior history of vascular

disease and no prior sudden color changes of fingertips. Dr. Ramadurai found on examination no discoloration of the right hand digits, normal capillary refill, and no signs of digital ulceration. Dr. Ramadurai assessed cold injury with resolved symptoms and exam not concerning for a recurrent vasculitic process. Claimant's complete blood count results were flagged as abnormal for low white blood cell count, high corpuscular hemoglobin concentration, and low neutrophils. Claimant was noted to have leukopenia/neutropenia without anemia or thrombocytopenia and the plan was to re-evaluate his complete blood count in 1-2 weeks. *See* Exhibit 5.

6. On August 22, 2016 Claimant was evaluated by Bryan Counts, M.D. Claimant reported that on July 14, 2016 he had been working in the freezer for almost an hour with freezer gloves and liners at -4 degrees. Claimant reported that 15 minutes into work his hands hurt from the cold. Claimant reported that his fingertips were white colored and that just the right hand, fingers 2 through 5 were affected and still felt numb and tingly. Claimant reported that he was doing better but that he still had some mild tingling in the tip of his ring finger. Dr. Counts noted that Claimant had not been working in the freezer and that Dr. Sachar had recommended blood work through a non-workers' compensation provider and that a sickle cell trait was negative. Dr. Counts assessed superficial frostbite of finger of right hand and opined that Claimant was at maximum medical improvement with no impairment. Dr. Counts provided restrictions of no more than 10 minutes in the freezer at a time with full hand warming in between. *See* Exhibit E.

7. On October 14, 2016 Claimant was evaluated by Dr. Counts Claimant reported that he was doing better but that he still had some mild tingling in the tip of his ring finger. Claimant reported that he had undergone a trial of 30 minutes in the freezer with a glove liner but that he had pain and numbness with dusky discoloration of his fingers. Dr. Counts assessed: local injury due to exposure to cold; and superficial frostbite of finger of right hand. Dr. Counts provided permanent work restrictions of no freezer work and opined that Claimant was at maximum medical improvement. *See* Exhibit E.

8. On November 29, 2016 Claimant was evaluated by Dr. Counts. Claimant reported that his right hand was feeling painful and cold when he was outside in the cooler weather. Dr. Counts recommended keeping Claimant's case closed and that Claimant follow up with his primary care provider for further work up. Dr. Counts noted Claimant's unilateral Raynaud's type symptoms, but opined they were not work related. *See* Exhibit 7.

9. On January 3, 2017 Claimant was evaluated by Dr. Ramadurai. Dr. Ramadurai noted Claimant's current medications included amlodipine (Norvasc) for secondary Raynaud's. Dr. Ramadurai increased the amlodipine (Norvasc) from 2.5 mg per day to 5 mg per day and requested Claimant return in 5-6 weeks to see how the increased dose was going. *See* Exhibit 5.

10. On February 6, 2017 Respondents filed a final admission of liability noting a maximum medical improvement date of November 29, 2016 and no permanent

impairment. Claimant objected and requested a division independent medical examination. *See* Exhibit 7.

11. On February 14, 2017 Bradley Steffen, M.D. issued a letter indicating that both he and Dr. Ramadurai had been treating Claimant for the past six months. Dr. Steffen opined that Claimant's evaluations and work ups had revealed objective deficits in strength and sensation to the distal right upper extremity and included evaluation by a specialist in rheumatologic disease. Dr. Steffen opined that Claimant was suffering from chronic cold sensitivity following a frostbite injury and opined that Claimant would likely continue to suffer from this cold sensitivity. Dr. Steffen recommended Claimant not be allowed to work at temperatures below freezing as Claimant was at risk for worsening his injury. *See* Exhibit 5.

12. On February 24, 2017 Claimant was evaluated by neurologist Dianna Quan, M.D. Claimant reported right hand weakness, numbness, and tingling that became noticeable around the time of his two frostbite injuries between July and September of 2016 while he was working in a freezer. Dr. Quan performed nerve conduction studies and electromyography and opined that the studies were normal. Dr. Quan opined that there was no electrophysiologic evidence of a generalized polyneuropathy, focal entrapment neuropathy, or cervical radiculopathy affecting the symptomatic right arm or hand. *See* Exhibits 5, D.

13. On May 11, 2017 Claimant underwent a Division Independent Medical Examination (DIME) performed by J.E. Dillon, M.D. Claimant reported sustaining frostbite to his right hand when working in a freezer and that he had been working in the freezer at -4 degrees Fahrenheit for about an hour when his hands felt cold. Claimant reported he was found to have discoloration and slowed capillary refill at the onsite doctor. Claimant reported continued discomfort in the right hand with exposure to cold and that below certain temperatures his hand, excluding his thumb, felt uncomfortably cold and stiff. Claimant reported that when his hand was cold he had difficulty with fine manipulation with the fingers and weakened grip. Claimant reported a dusky discoloration of digits two through five when his hand was cold. Dr. Dillon reviewed medical records and performed a physical examination. *See* Exhibits 2, C.

14. Dr. Dillon found no discoloration but found capillary refill at the index and middle fingers to be slow compared to the contralateral side. Dr. Dillon also noted the strength of opposition slightly less on the right when opposing the thumb to the small finger as compared to the left side. Dr. Dillon opined that Claimant was at maximum medical improvement and agreed with a date of 10/14/16 as the date of maximum medical improvement. Dr. Dillon opined that Claimant had a cold exposure injury with residual cold intolerance and opined that it was a ratable condition. Dr. Dillon opined that for rating, Claimant fell under Class 1 of impairment due to vascular disorders of the upper extremity with a Raynaud's phenomenon and assigned him 5% upper extremity impairment for the condition. Dr. Dillon opined that there was no other impairment related to the injury in question. *See* Exhibits 2, C.

15. On June 7, 2017 Respondents filed a final admission of liability. They admitted for permanent partial disability consistent with Dr. Dillon's opinion at a scheduled impairment rating of 5% of body code 01, for an award of $3,067.27. Claimant objected and filed an application for hearing. *See* Exhibits 1, A.

16. On August 16, 2017 Claimant underwent an independent medical examination performed by Ronald Swarsen, M.D. Claimant reported that on July 14, 2016 he was training in the freezer as an order selector and had on his freezer gloves but that about 15-20 minutes into the training his hands were getting very cold. Claimant reported that his trainer advised him that he had to finish the batch and that he spent about another 45-60 minutes in the freezer at 0 degrees or less and that he could not feel his right hand. Claimant reported his fingers were pale and that he was sent to the onsite physician and that it took about a half hour to re-warm and that he had pain, aching, throbbing, and stabbing and that the next day they didn't feel normal and that his fingertips on his right hand started peeling a couple of days later. Claimant reported being out of the freezer for several weeks but that each time he was put back into the freezer his symptoms returned. Claimant reported that on his right hand all four fingers were very sensitive to exposure to temperatures below 60 degrees Fahrenheit. Claimant reported weakened grip strength in his right hand. *See* Exhibit 3.

17. Dr. Swarsen performed a physical examination. Dr. Swarsen found Claimant's hand/fingers to be distinctly colder to touch on the right hand than on the left. Dr. Swarsen noted a grip of 4/5 on the right compared to the left. Dr. Swarsen found capillary refill of digits 2 through 5 to be 3-4 seconds on the right compared to a 1 second on the digits on the left. Dr. Swarsen found light tough decreased compared to the left from the PIP distal to the fingertip at digits 2 through 5. Pinkprick yielded a report of moderate dysthesias over the same discrimination. Dr. Swarsen assessed: frostbite, repetitive cold injury, Raynaud's phenomena, and possible CRPS, right upper extremity and a workup for CRPS was advised. Dr. Swarsen respectfully disagreed that Raynaud's phenomena would not be work related and opined that it was well known that Raynaud's could be triggered by an acute episode or by repeated episodes of cold exposure. Dr. Swarsen opined that Claimant's case fit the criteria and was directly related in time to Claimant's exposures and onset of symptoms and noted Claimant's lack of pre-existing conditions or symptoms of Raynaud's. Dr. Swarsen thus opined that the appearance of Raynaud's was directly related in time and causally related to Claimant's occupational exposure. *See* Exhibit 3.

18. Dr. Swarsen agreed that Claimant was at maximum medical improvement. Dr. Swarsen opined that Claimant fell into the class 3 section of Table 6 of the AMA Guides for having symptoms onset below 50 degrees Fahrenheit. Dr. Swarsen also noted that Claimant was on a medication trial but reported little change from the medications. Dr. Swarsen opined that given Claimant's symptoms, presentation, and severity, a 50% right upper extremity impairment was appropriate under Class 3. *See* Exhibit 3.

19. On September 21, 2017 Claimant underwent an independent medical examination performed by Allison Fall, M.D. Claimant reported that his regular job with

Employer involved working as an order selector in the cooler but that he was training to work in the freezer. Claimant reported that on his first day training in the freezer he was puling food and that after 15-20 minutes he felt his right hand was numb. Claimant reported being told that he had to finish the batch and that he worked another 45 minutes to an hour. Claimant reported afterwards that he could not feel his fingers and that his right hand was pale and discolored. Claimant reported going to Concentra and being placed on restriction that did not allow him to work in the freezer. *See* Exhibits 6, B.

20. Claimant reported that he was sent back to the freezer with new liners and gloves and that it was approved by the Concentra doctor. However, despite the new liners it didn't help and Claimant again had symptoms. Claimant reported horrible symptoms in the winter and that any time it is cold, his hand is freezing and feels numb and gets discolored every now and then. Claimant reported no grip strength and that his hand ached when it was cold. Claimant reported pain at a 9/10 level. Dr. Fall reviewed medical records and performed a physical examination. Dr. Fall found no hair, nail, skin, or color changes in examination of Claimant's bilateral hands. She found that both of Claimant's hands were slightly cold with the right more so than the left but opined that after Claimant moved his right upper extremity and opened and closed his right hand, the temperature returned to normal. Dr. Fall assessed status post superficial frostbite without permanent impairment. *See* Exhibits 6, B.

21. Dr. Fall opined that Claimant's complaints had seemed to escalate somewhat with now greater areas of numbness and weakness which is not consistent with the injury Claimant sustained, described as superficial frostbite. Dr. Fall found it notable that Dr. Sachar noted a normal examination and that Claimant could return to working in the freezer unless he had an underlying condition or reason for cold sensitivity. Dr. Fall opined that indicated no permanent impairment due to Claimant's minor episodes. Dr. Fall opined that Claimant's subjective complaints had seemed to have escalated and that it was likely there were some underlying psychological issues. She opined that Claimant's reported symptoms with temperatures as warm as 60 degrees Fahrenheit were non physiologic. Dr. Fall opined that there was not sufficient objective evidence to diagnose Claimant with a vascular disorder that would indicate permanent impairment of his right hand due to vascular issues and that Dr. Dillon was in error. Dr. Fall also opined that Claimant did not have work related Raynaud's phenomenon. She opined that Claimant had no impairment. *See* Exhibits 6, B.

22. Claimant testified at hearing that he initially was injured in July of 2016 when he couldn't feel his right hand after working in the freezer. Claimant testified that he was out of the freezer for 2-3 weeks but then had another batch to do in the freezer and that he had issues in the freezer 3-4 more times before he was taken off freezer work completely. Claimant testified that his right hand continues to be numb or frozen and that it is different in color from his left hand. Claimant testified that he had trouble gripping with his right hand now.

23. At hearing the undersigned ALJ, Dr. Fall, and Dr. Swarsen felt both of Claimant's hands. Claimant's right hand was noticeably colder than his left hand.

24. Dr. Swarsen testified at hearing. Dr. Swarsen disagreed with DIME physician Dr. Dillon's impairment rating and believed it was too low. Dr. Swarsen opined that Claimant was initially diagnosed with frostbite but then had repeated exposures with reactions to the cold and that Claimant had sustained a micro vascular injury. Dr. Swarsen opined that Claimant now is continually sensitive to cold exposure and that Claimant has a decrease in blood flow to the digits in his right hand and a difference in color between the two hands. Dr. Swarsen opined that visually, Claimant's right hand has dusky cyanosis coloring, consistent with Claimant's exposures. Dr. Swarsen also noted a temperature difference with Claimant's right hand being cooler than the left hand which he opined was consistent with the reports and Raynaud's phenomena. Dr. Swarsen opined that Claimant had the micro vascular disease of Raynaud's phenomena as well as the frostbite condition. Dr. Swarsen opined that because Claimant had symptoms below 60 degrees and because his symptoms were poorly controlled by medication, Claimant was at a class 3 rating level. Dr. Swarsen noted that the DIME physician had rated Claimant at a class 1 rating level, but that he believed a class 3 rating level was more appropriate. Dr. Swarsen opined that the EMG results in this case are irrelevant to the impairment rating as the EMG is a neurologic test and the rating is a vascular rating.

25. Dr. Fall testified at hearing. Dr. Fall opined that Claimant did not have Raynaud's phenomenon and that the color change noted with Raynaud's are noticeable and drastic. She opined that Claimant did not have bilateral symptoms and did not present as someone with Raynaud's. She further opined that there was no support that Raynaud's was developed due to exposure with Employer and that primary Raynaud's has no known cause and happens on its own without cold exposure. Dr. Fall opined that Claimant had initial symptoms of superficial frostbite and not deeper nerve type frostbite and had some peeling of the skin consistent with frostbite, but opined that his symptoms resolved. Dr. Fall noted a normal EMG study and opined that there was no reason for Claimant's subjective symptoms of decreased hand strength per the EMG. Dr. Fall opined that the EMG showed no permanent nerve damage. Dr. Fall acknowledged that Claimant's right hand was slightly lighter and a little bit paler than his left hand and that it was colder than his left hand, but opined that if you don't use your hand it can look lighter and feel colder. Dr. Fall opined that the proper scheduled impairment rating for Claimant was 0% because he did not have a permanent condition or permanent impairment. She noted that Dr. Sachar, a hand surgeon, had provided no restrictions and found no vascular damage. Dr. Fall opined that even if Claimant had Raynaud's, Dr. Swarsen was wrong with providing a class 3 rating because Claimant did not have severe swelling or vascular degeneration and that Claimant doesn't fit the class 3 rating. Although Dr. Fall agreed cold sensitivity for Claimant was possible, she opined that there was no permanent nerve damage.

26. Section 3.1i of Table 16 of the AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition Revised provides a class 3 rating (36-50% impairment) is appropriate if Raynaud's phenomenon occurs on exposure to temperatures lower than 50 degrees Fahrenheit and is only partially controlled by medication. A class 2 rating (10-

35% impairment) is appropriate if Raynaud's phenomenon occurs on exposure to temperatures lower than 39 degrees Fahrenheit but is controlled by medication. A class 1 rating (0-9% impairment) is appropriate when Raynaud's phenomenon that occurs with exposure to temperatures lower than 32 degrees Fahrenheit but is readily controlled by medication.

27. The opinions of Dr. Swarsen are found credible and persuasive. The opinions of Dr. Fall are not found as persuasive and are rejected.

28. The Claimant's testimony and reports of symptoms and onset are credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Permanent Partial Disability (PPD) impairment rating

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in § 8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has stated in this respect that: scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of § 8-42-107(8)(c), which states that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

Claimant has the burden of showing the extent of his scheduled impairment by a preponderance of the evidence. *Maestas v. American Furniture Warehouse and G.E. Young and Company*, W.C. No. 4-662-369 (2007); *Burciaga v. AMB Janitorial Services, Inc. and Indemnity Care ESIS Inc*., W.C. No. 4-777-882 (2010). Respondents are not required to overcome the scheduled impairment rating assigned by the DIME and the usual preponderance of the evidence burden of proof applies for Claimant to prove entitlement to benefits. *Id.*

Here, the weight of the medical evidence establishes that Claimant's injury is a scheduled injury. Claimant has not sustained functional impairment to a part of the body off the schedule of impairment. After weighing the evidence and assessing the probative value to determine the appropriate scheduled impairment rating, the ALJ concludes that Claimant has sustained a 50% right upper extremity impairment rating.

Dr. Swarsen's opinion that Claimant suffers from Raynaud's phenomena is credible and persuasive and more credible than Dr. Fall's opinion that Claimant does not suffer from Raynaud's. Specifically, Dr. Swarsen's opinion that Claimant has Raynaud's is supported by opinions from DIME physician Dr. Dillon who rated Claimant for Raynaud's, Dr. Ramadurai who prescribed and increased medications for secondary Raynaud's, and by Dr. Counts who noted Claimant's unilateral Raynaud's type symptoms but believed they were not work related. Four doctors have opined or noted that Claimant has Raynaud's and these opinions are more persuasive than the opinion of Dr. Fall. Although Dr. Counts believed Claimant's Raynaud's was not work related, the ALJ finds more persuasive the opinion of Dr. Swarsen and Dr. Dillon that Raynaud's is work related. Specifically, Dr. Swarsen's opinion that Raynaud's can be triggered by an acute episode or by repeated episodes of cold exposure is persuasive. Dr. Dillon rated Claimant for Raynaud's, indicating her belief it was work-related. The ALJ finds that the symptoms

onset after repeated freezer work, the temporal relationship, and the credible testimony of Dr. Swarsen make it more likely than not that Claimant's Raynaud's is work related.

Dr. Fall rejected Claimant's reported symptoms due, in part, to her belief that his subjective complaints had escalated and that he reported symptoms at temperatures under 60 degrees. Dr. Fall opined that Claimant's subjective complaints had seemed to escalate in this case after only a superficial frostbite injury and that the report of symptoms with temperatures as warm as 60 degrees was non-physiologic. However, Dr. Fall failed to address Claimant's repeat exposures after his initial frostbite injury and that his increase of symptoms occurred after these repeated exposures and upon the seasons changing from July/August to the fall and to colder outside temperatures. In October and November, Claimant reported to Dr. Counts that he had increased symptoms after being put back into freezer work and with the colder weather. During this time, Dr. Counts increased Claimant's work restrictions to include no freezer work, but recommended Claimant's case stay closed. The increased symptoms during this time with new exposures (attempting freezer work again, and colder temperatures outside) are expected and are consistent with Raynaud's phenomena. Dr. Swarsen is credible and persuasive that Claimant was initially diagnosed with frostbite but then had repeated exposures with reactions to the cold and that Claimant had sustained a micro vascular injury. Dr. Sachar only evaluated Claimant in August after the initial frostbite and Dr. Fall relied, in part, on his opinion that Claimant had only a frostbite injury. However, Claimant was not re-evaluated by Dr. Sachar after continuing to have symptoms with repeated exposures. Thus, the opinion of Dr. Sachar cannot be given great weight as he did not evaluate Claimant after the repeated exposure and continued symptomatology months after the initial frostbite exposure. Further, Dr. Fall believed that Claimant's reported symptoms with temperatures as warm as 60 degrees were non-physiologic. However, the AMA Guides specifically provide for ratings when Raynaud's phenomenon occurs on exposure to temperatures lower than 68 degrees, so Claimant's reports at lower than 60 degrees can certainly be physiologic.

Dr. Fall also opined that even if Claimant had Raynaud's phenomena, the Class 3 rating was incorrect because Claimant did not have severe swelling or vascular degeneration. However, the Class 3 rating in the AMA Guides does not require swelling or vascular degeneration if someone has Raynaud's phenomena. It only requires that Raynaud's phenomenon occurs on exposure to temperatures lower than 50 degrees and is only partially controlled by medication. Dr. Fall has misinterpreted the AMA Guides.

The ALJ concludes that the weight of the credible and persuasive evidence establishes that Claimant not only sustained a frostbite injury in July of 2016, but that as a result of his injury, Claimant has work related Raynaud's phenomena. The rating provided by the DIME physician Dr. Dillon rated Claimant for Raynaud's phenomena at a 5% right upper extremity impairment. However, the rating by Dr. Dillon in Class 1 would require that the phenomenon occur at exposures to temperatures lower than 32 degrees Fahrenheit and be readily controlled by medication. As found above, Dr. Ramadurai provided medication to Claimant that helped somewhat, but did not control Claimant's symptoms or responses to cold exposure. Dr. Ramadurai increased the dosage of

medications prescribed for secondary Raynaud's, but Claimant's testimony at hearing is credible and persuasive that cold exposures still trigger symptoms. Claimant's right hand and digits 2-5 are different in color from his left hand, they are colder than his left hand, and they ache and are painful and stiff and Claimant has these symptoms and Raynaud's phenomena on exposure to temperatures below 60 degrees Fahrenheit. The ALJ finds that Class 1 of the rating under 3.1i does not adequately represent Claimant's permanent impairment nor does Class 2. The ALJ finds Dr. Swarsen to be credible and persuasive that Class 3 is the appropriate impairment rating category for Claimant's Raynaud's phenomenon. After weighing the evidence, the ALJ finds that a rating of 50% is appropriate and has been established by a preponderance of the evidence to be the correct rating for Claimant's right upper extremity permanent impairment.

ORDER

1. Claimant has established by a preponderance of the evidence an entitlement to a 50% right upper extremity impairment rating. Respondents shall admit for and pay for this rating.

2. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 1, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

a. Whether Claimant proved by a preponderance of the evidence that on September 22, 2017, he sustained an injury arising out of and in the course and scope of his employment with the Employer; and

b. Whether Claimant proved by a preponderance of the evidence that the medical treatment he received through the Orthopaedic & Spine Center of the Rockies, including the right shoulder MRI and physical therapy, is reasonable, necessary and related to his September 22, 2017, industrial injury.

STIPULATIONS

a. The parties stipulate that if the claim is found compensable: 1) Claimant's average weekly wage (AWW) is $898.63, with a corresponding temporary total disability (TTD) rate of $599.09; 2) Claimant is entitled to TTD benefits from October 15, 2017, through November 11, 2017; and 3) Claimant is entitled to temporary partial disability (TPD) benefits for pay periods ending September 30, 2017, October 14, 2017 and November 25, 2017, in the amount of $1,842.91.

b. The parties stipulate that, if the claim is found compensable, Respondents are entitled to all applicable offsets.

FINDINGS OF FACT

1. Claimant is 31 years old and worked for Employer as a delivery driver. On September 22, 2017, Claimant injured his right shoulder in the course and scope of his employment when he was pinned against a wall/stud by sheet rock. The sheet rock Claimant delivered was 4'x 12' in dimension with each sheet weighed 100 lbs. Claimant delivered carts containing ten to twelve sheets of sheet rock to the work site.

2. On September 25, 2017, Claimant treated at Concentra with Robert Nystrom, M.D., and reported "a large cart full of drywall hit his [right] shoulder and [pinned] it against a stud three days ago." Claimant reported "he did have significant pain at the time but continued to work." Claimant reported the shoulder hurt more later that night and through the weekend. On physical examination of the right shoulder, Dr. Nystrom noted anterior shoulder pain with palpation and with resisted abduction and internal rotation. Dr. Nystrom provided Claimant with work restrictions, including maximum right arm lifting of five pounds. Dr. Nystrom referred Claimant to an orthopedic specialist.

3. On September 27, 2017, Respondents filed a First Report of Injury which detailed that on September 22, 2017, Claimant injured his right shoulder when it

was pinned between drywall and wood stud. The first report of injury indicated Claimant reported his injury to Employer on September 25, 2017. On October 10, 2017, Respondents filed a Notice of Contest. On November 10, 2017, Claimant filed an Application for Hearing and endorsed compensability, medical benefits, authorized provider and wage loss benefits. On November 22, 2017, Respondents filed a Response to Claimant's Application for Hearing and endorsed the same issues, as well as a number of defenses.

4. From October 13, 2017, through November 27, 2017, Kevin Piper, M.D., Claimant's primary care physician (PCP), placed Claimant on work restrictions of no lifting with his right upper extremity above waist level due to the September 22, 2017, right shoulder injury.

5. On October 18, 2017, Claimant treated with Thomas Anderson, D.O, at the Orthopaedic and Spine Center of the Rockies, and reported he injured his right shoulder when sheet rock was pushed into his shoulder. Claimant reported he now has pain in the anterior aspect of his right shoulder and frequent popping and increased pain with lifting his arm and with overhead lifting. Claimant also reported weakness, numbness and tingling in his right upper extremity. On physical examination, Dr. Anderson noted pain with range of motion and positive Neer and Hawkins tests. Dr. Anderson recommended a right shoulder MRI.

6. On October 26, 2017, Claimant underwent a right shoulder MRI, which revealed minimal supraspinatus/infraspinatus tendinosis, mild fraying of the superior labrum, including physiologic joint fluid, mild acromioclavicular joint osteoarthritis with mild capsular edema, and mild to moderate fatty atrophy of the lateral deltoid muscle.

7. On November 6, 2017, Claimant treated with Dr. Anderson, who noted he reviewed the right shoulder MRI. Dr. Anderson gave Claimant a right shoulder injection.

8. Claimant worked for Employer for approximately two years as a delivery driver. Prior to September 22, 2017, Claimant never had a shoulder injury or treatment and was never under any work restrictions due to a right shoulder injury/condition. Claimant credibly testified that prior to September 22, 2017, he never had any physical limitations doing his job.

9. On September 22, 2017, Claimant was delivering 4' x 12' sheet rock to a six-plex in Windsor, CO. The apartments were already framed-in. Claimant and his coworkers completed the front side of building, which included two apartments on the top and two apartments on the bottom, and were then starting work on the back two apartments. In order to get into the back two apartments, Claimant and his coworker had to push the carts of sheet rock over a 2'x4' stud on the floor. Claimant and his co-worker had to knock out a floor stud and setup a ramp, which was a steel plate, in order to push the carts of sheet rock into one

of the two back apartments. At first, only one ramp was setup, and they did not have a ramp into the second, back apartment. Because there was no ramp setup at the second apartment, Claimant had to lift the front of the cart up over a floor stud.

10. Claimant and his co-worker were getting a cart of sheet rock into the second, back apartment, the one without the ramp. Claimant was in front, closest to the floor stud and Claimant's co-worker was at the far end. Claimant's co-worker was working quickly and Claimant did not have time to look where he was going. Claimant bent down to lift the cart over the 2'x4' floor stud and, when he stood up, the sheet rock on the cart continued to roll toward his right shoulder, pinning Claimant's right shoulder against the wall stud.

11. Claimant shouted at his co-worker, "Why are you going so fast," and shouted in anger and discomfort. Claimant pushed the sheet rock off his shoulder and leaned it against the wall. Claimant continued unloading sheet rock and then went outside and told his brother, also an employee of Employer, and another worker about the incident. Claimant did not discuss the incident with either of his co-workers who Claimant believed observed the incident because those individuals were known to Claimant as Spanish speakers, and Claimant does not speak Spanish.

12. Claimant worked the rest of the day and delivered another five carts of sheet rock to the Windsor apartment complex. Claimant avoided using his right shoulder/arm and working overhead the rest of his shift. Claimant's coworkers, who knew about his injury, helped him avoid using his arm.

13. Claimant did not report his injury to Dustyn Parker, his supervisor that day. Claimant hoped his shoulder would get better. When Claimant got home from work, he felt sharp shooting pain in his shoulder when he reached up above shoulder level. On September 22, 2017, at 7:55 p.m., Claimant sent a text message to Mr. Parker to advise him of his shoulder injury.

14. On Monday, September 25, 2017, Claimant reported to work and discussed his injury with Mr. Parker and Dan, another supervisor. Claimant tried to do a little work on Monday, but he continued to have the throbbing and shooting pain in his right shoulder. Claimant was referred to Concentra by his Employer and then referred to an orthopedic surgeon.

15. Respondents denied his claim and Claimant paid out of pocket for the orthopedic surgeon, right shoulder MRI, and physical therapy. Claimant continues to have problems with his shoulder.

16. William Conrow, Claimant's brother, and Eliseo Soto and Jay Huizar employees of the Employer, testified at hearing. The ALJ finds that Claimant and

Mr. Parker's testimony was more credible and persuasive than Mr. Soto and Mr. Huizar's testimony.

16. The ALJ finds Claimant proved by a preponderance of the evidence that on September 22, 2017, he sustained a right shoulder injury arising out of and in the course and scope of his employment with the Employer. The ALJ finds Claimant proved by a preponderance of the evidence that the medical treatment he received through the Orthopaedic & Spine Center of the Rockies, including the right shoulder MRI and physical therapy, are reasonable, necessary, and related to Claimant's industrial injury.

CONCLUSIONS OF LAW

General Legal Principles

The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the right of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1), C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc., v. Indus. Claim. Apps. Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness; testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline,* 57 P.2d 1205, 1209 (Colo. 1936); CJI, Civ. 3:17 (2013).

Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Section 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office,* 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship

between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant has proven by a preponderance of the evidence that on September 22, 2017, he sustained an injury arising out of and in the course and scope of his employment with the employer.

Medical benefits

Respondents are not liable for medical treatment unless it is rendered for an injury "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Section 8-41-301(1)(c), C.R.S. Similarly, the statute provides respondents are liable for reasonable and necessary medical treatment to cure or relieve the employee "from the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

Claimant proved by a preponderance of the evidence that the medical treatment he received through the Orthopaedic & Spine Center of the Rockies, including the right shoulder MRI and physical therapy, is reasonable, necessary and related to his compensable industrial injury.

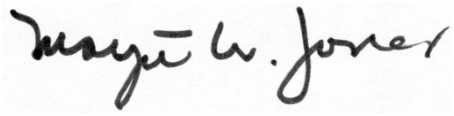
ORDER

A. Claimant sustained an industrial injury arising out of and in the course and scope of his employment with the Employer.

B. The medical treatment Claimant has received through the Orthopaedic & Spine Center of the Rockies, including the right shoulder MRI and physical therapy, is reasonable, necessary, and related to his September 22, 2017 industrial injury. Respondents shall pay for this treatment pursuant to the Colorado Medical Fee Schedule.

C. All matters not determined herein are reserved for future determination.

DATED: May 1, 2018.



MARGOT W. JONES
ADMINISTRATIVE LAW JUDGE

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4 th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did Respondents overcome the DIME on the issue of MMI by clear and convincing evidence?

- If Respondents overcame the DIME on MMI, did Respondents overcome the DIME's whole person impairment rating?

- Did Claimant prove by a preponderance of the evidence that the treatment recommended by the DIME is reasonably necessary and related to her injuries?

FINDINGS OF FACT

1. Claimant suffered admitted injuries on August 24, 2016 when she hit her head on a wall-mounted computer while performing housekeeping duties for Employer at Memorial Hospital. She had bent over to empty a trash can that was directly under a wall-mounted medical computer used by the nursing staff. When she stood up, she struck the right side of her head on the metal frame that holds the keyboard. She experienced immediate pain, which she described as an electrical type sensation on the right side of her head, jaw and into her neck.

2. Claimant sought treatment in Memorial Hospital's emergency department shortly after the accident. She reported head pain, neck pain, and dizziness. She denied loss of consciousness, severe headache, or blurry vision. A head CT showed no evidence of skull fracture, intracranial bleeding, midline shift, or other brain trauma. A cervical CT showed mild degenerative changes but no acute injury. The ER physician diagnosed a mild closed head injury and neck strain, prescribed ibuprofen, and released Claimant with instructions to return if her symptoms worsened.

3. Employer referred Claimant to the Memorial Occupational Health Clinic on August 26, 2016, where she saw Dr. Rosemary Greenslade. Claimant reported mild concussion symptoms including headaches, dizziness, and difficulty with concentration. She denied blurry vision, nausea, or vomiting. Dr. Greenslade diagnosed "cervicalgia" and concussion. She prescribed ibuprofen and took Claimant off work until August 30.

4. Claimant followed up with Dr. Greenslade on August 30, 2016, reporting ongoing concussive symptoms and worsening headache. She told Dr. Greenslade she had a history of migraines but had not had one in several years. Dr. Greenslade directed Claimant to the ER "due to worsening HA and persistence of symptoms."

5. At the ER, Claimant stated that when she hit her head "the pain radiated from her forehead to her jaw." She further stated "since that time she has had intermittent sharp/severe pain and difficulty focusing. She also has associated nausea, dizziness, and photophobia." A repeat head CT showed no acute abnormalities or significant change

from the previous CT scan. She was given IV medications and acetaminophen, which helped her symptoms. The ER doctor concluded, "the most likely etiology of her symptoms is a concussion related to her head injury."

6. Claimant followed up with Dr. Greenslade the next day and seemed to be improving. Dr. Greenslade opined Claimant's symptoms were consistent with "migraines" and prescribed sumatriptan (Imitrex). Claimant subsequently tried the sumatriptan, but it did not help.

7. At her next appointment on September 7, 2016, Dr. Greenslade released Claimant at MMI with no impairment and no restrictions. Dr. Greenslade stated Claimant's neck pain and concussion symptoms had "resolved," with the only ongoing symptoms being "right-sided [headaches] with hot flashes and other menopausal symptoms." Dr. Greenslade advised Claimant to follow up with her primary care provider.

8. Claimant returned to the ER on September 22, 2016 due to ongoing symptoms. She explained that since the accident "she has been having headache and neck pain. Headache is described as a throbbing. Over the last few days, patient has been feeling a sensation like there is water running down the right side of her head. Endorses dizziness and trouble focusing." Claimant stated the right-side headache "has been essentially persistent, every day [since the accident]. . . . She is taking Motrin at home without relief." She underwent a brain MRI which showed chronic changes but no acute abnormality. The ER physician opined "her symptoms are most likely related to an ongoing posttraumatic cephalgia." The ER records support Claimant's testimony that her symptoms had not resolved by September 7.

9. Claimant had a "one-time evaluation" with Dr. Greenslade on September 28, 2016. Dr. Greenslade again stated that Claimant's neck pain and concussion-related symptoms had "resolved," except for "intermittent" nausea associated with right-sided headaches. She affirmed Claimant was at MMI with no impairment and no restrictions. Dr. Greenslade opined "she has now had 3 imaging studies, 2 CT scans/1 MRI since the injury occurred. All normal. Her HA's are intermittent and resolved on their own and likely migraines/tension variety. Her original injury was a minor blow to her head one month ago. Recommend f/u pcp for further eval and tx migraines and possible htn."

10. Claimant saw Dr. Jack Rook for a Division IME on February 2, 2017. She described ongoing right-sided head and facial pain, right jaw pain, and right-sided neck pain. Dr. Rook noted a history of migraine headaches "about 20 years ago" which resolved, and no prior history of neck pain. Examination of Claimant's neck showed severe tenderness to palpation of the scalene muscles on the right, increased muscle tone with severe tenderness of the right-sided suboccipital and paracervical musculature, and moderate tenderness of the right upper trapezius. Neck symptomatology was localized to the right side, with no pain on the left. Examination of her head and face showed severe tenderness of the right temporalis, masseter, and pterygoid muscles, and moderate tenderness of the right TMJ.

11. Dr. Rook diagnosed posttraumatic headaches, possibly tension headaches and/or right greater and lesser occipital neuralgia; right-sided temporomandibular joint dysfunction with surrounding myofascial pain; and right-sided cervical myofascial pain syndrome. Dr. Rook opined Claimant's visual complaints were most likely due to greater occipital neuralgia, and the ear pain was due to irritation of the lesser occipital nerve. He found Dr. Greenslade's assertion that Claimant's condition had resolved in September 2016 unconvincing. He noted Claimant "had essentially no treatment for this condition" and she was not at MMI. He recommended additional treatment including gentle physical therapy, massage therapy, trigger point injections and occipital nerve blocks. Respondents filed a GAL based on Dr. Rook's report.

12. Claimant returned to Dr. Greenslade on March 8, 2017 for treatment as recommended by Dr. Rook. Dr. Greenslade reiterated that Claimant was at MMI and none of her ongoing symptoms were related to the August 2016 accident. She declined to treat Claimant and advised her to seek treatment under Medicaid. Claimant had another "one-time evaluation" with Dr. Greenslade on September 27, 2017, with the same outcome.

13. Claimant returned to Dr. Rook for a follow-up DIME on November 28, 2017. He noted Claimant presented with the same complaints she had at the first DIME ten months prior. The physical exam findings were very similar to those at his initial examination. Dr. Rook provided the same diagnoses and maintained Claimant was not at MMI. He recommended she be allowed to proceed with the treatment recommendations from his initial DIME "and that her care be transferred to a pain management specialist." He also provided an advisory rating. If Claimant were at MMI she would have a 20% whole person cervical impairment rating, based on a 4% Specific Disorder rating combined with a 17% for cervical range of motion deficits.

14. After receiving Dr. Rook's follow-up DIME report, Respondents requested a hearing to challenge the DIME.

15. Claimant saw Dr. Frank Polanco for an IME at Respondents' request on March 1, 2018. Dr. Polanco noted Claimant appeared "very anxious." His exam findings differed significantly from Dr. Rook's examinations. Dr. Polanco noted normal cervical muscle tone with no trigger points or spasm, and normal cervical range of motion. After he examined her TMJ, Claimant complained of tenderness and pain in the right side of her neck and right trapezius. Dr. Polanco thought it was "obvious" Claimant sustained a work-related injury in the form of a "contusion," but opined "there are not findings to support that she sustained a concussion." He also opined the mechanism of injury would not cause a TMJ disorder. He disagreed with Dr. Rook's conclusions regarding MMI. He also disagreed with the provisional cervical impairment rating because "there are no clinical or diagnostic findings to support that she has sustained a structural injury to her cervical spine. She has a normal examination and normal range of motion. She does not qualify for a table 53 diagnosis and has no range of motion deficits."

16. Claimant attended an IME with Dr. Timothy Hall at her counsel's request on March 7, 2018. In contrast to Dr. Polanco's exam six days earlier, Dr. Hall found significant abnormalities relating to Claimant's neck and head. He noted hypertonicity, active trigger

points, and diffuse tenderness in the right sited cervicothoracic and parascapular areas. Her nuchal ridge was tender on the right side but not on the left. She had "significant" pain in the right TMJ and difficulty opening her mouth. Dr. Hall also noted visual deficits which he attributed to the concussion. He diagnosed mild traumatic brain injury with postconcussive syndrome, postconcussive headaches, occipital neuralgia, TMJ dysfunction and a sleep disorder related to pain and concussion. He agreed with Dr. Rook that Claimant was not at MMI. He agreed that a cervical rating would be appropriate, but he would also include a rating specifically related to the concussion.

17. Shortly before the hearing, Respondents obtained preinjury medical records documenting symptoms in August 2014 similar to those Claimant has experienced since the industrial accident. She was hospitalized on August 23, 2014 for neurological symptoms and functional deficits suggestive of a stroke. Approximately ten days before the hospitalization, she had developed a right-sided headache around the parietal aspect of her head. The pain was constant and extended into her neck. She also had associated tearing, blurriness, and brief blacking out of the right eye. Her gait was unsteady and she had fallen at least two times. She reported difficulty with word finding. She described a history of migraines "many years" ago, but said her current headache was "very different." She was admitted to the hospital to evaluate multiple potential diagnoses including \ CVA, sudomotor cerebri, sinus thrombosis, trigeminal neuralgia, and benign positional vertigo. She underwent extensive diagnostic evaluation, but no specific pathology was identified. Within four days, Claimant's symptoms resolved and she was discharged. She followed up with her PCP a week later, who documented that "all symptoms resolved," including her "headache."

18. The only other mention of headaches between September 2014 and the industrial accident as a March 9, 2015 records from her gastroenterologist noting "some leg pain/cramps as well as some headaches."

19. Dr. Polanco testified at hearing for Respondents. He had reviewed the preinjury medical records before his testimony. Dr. Polanco opined that a complete medical history is "critical" for an accurate DIME, and Dr. Rook's determination was flawed because he did not have access to the preinjury records. Dr. Polanco opined Claimant sustained no significant head injury and her ongoing symptoms were most likely due to anxiety. He thought her similar presentation in August 2014 was also probably attributable to anxiety. He reiterated that Claimant suffered only a minor head contusion in August 2016 with no ongoing injury-related sequelae.

20. Dr. Polanco's opinions represent mere differences of professional opinion with Dr. Rook.

21. Respondents failed to overcome the DIME's MMI determination by clear and convincing evidence.

22. Claimant proved the treatment recommended by the DIME is reasonably necessary and related to the industrial injury.

CONCLUSIONS OF LAW

A. Respondents did not overcome the DIME regarding MMI

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5). The DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). In determining whether a claimant is at MMI, the DIME "inherently" must decide whether further treatment is causally related to the industrial injury, and the DIME's determination that a particular condition is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI finding is incorrect. *Qual-Med*, 961 P.2d at 592; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A "mere difference of medical opinion" does not constitute clear and convincing evidence that the DIME is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As found, Respondents have failed to overcome the DIME by clear and convincing evidence. Claimant has consistently complained of right-sided head and neck pain since the initial accident. She has no documented preinjury history of neck pain, and there is no indication she suffered any significant head pain immediately before the accident. Dr. Greenslade's assertion that Claimant's condition had "resolved" by September 7 is not persuasive in light of the ER records shortly before and after that date. Admittedly, the history Dr. Rook received from Claimant regarding her prior headaches was incomplete, but the most significant pre-injury records relate to the hospitalization in August 2014, and by September 2014 Claimant's PCP confirmed "all symptoms" including headaches had "resolved." There is no further mention of any significant headache issues until after the August 2016 accident at work. The ALJ is not persuaded that lack of the pre-injury records substantially undermines Dr. Rook's opinions.

The ALJ has little doubt Claimant's emotional state plays a role in amplifying and perpetuating her perception of pain, and whoever assumes the role of ATP would be well advised to consider psychological counseling as part of her treatment regimen. But the mere fact that an underlying anxiety condition may contribute to the overall severity of her symptoms does not negate the accident's causal role in the development of her symptoms in the first instance. On balance, it appears that the August 2016 accident triggered Claimant's current symptoms, which have not resolved to date. Although reasonable physicians can disagree regarding causation, the persuasive evidence does not show Dr. Rook was "highly probably incorrect" in attributing Claimant's ongoing symptoms to the accident and recommending further treatment.

B. The treatment recommended by Dr. Rook is reasonably necessary

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Where the respondents dispute a claimant's entitlement to medical benefits, the claimant must prove that the requested treatment is reasonably necessary and causally related to the injury. Section 8-42-101(1)(a); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A DIME's recommendation regarding specific treatment is not entitled to presumptive weight but is simply another medical opinion to consider when evaluating all the evidence under the preponderance standard. *Goff v. Schwan's Home Services*, W.C. No. 4-947-921-03 (August 9, 2017); *Holcombe v. FedEx Corp*., W.C. No. 4-824-259-05 (March 24, 2017); *Duplissis v. Shepard's*, W.C. No. 4-508-725 (December 3, 2002). As found, Claimant proved by a preponderance of the evidence that the treatment recommended by Dr. Rook is reasonably necessary. As Dr. Rook pointed out, Claimant has essentially had no treatment for the symptoms, and his opinions regarding the specific treatment needed to bring Claimant to MMI are credible and persuasive.

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME is denied and dismissed.

2. Respondent shall provide treatment reasonably needed to cure and relieve the effects of Claimant's injury as recommended by the DIME.

3. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 4, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Has Claimant shown, by a preponderance of the evidence, that he sustained a compensable injury to his left knee on or about September 21, 2017?

2. Has Claimant shown, by a preponderance of the evidence, that Respondent Employer failed to comply with C.R.S. 8-43-404(5)(a)(I)(A) and WCRP 8-2, thus entitling him to select his Authorized Treating Physician?

3. Has Claimant shown, by a preponderance of the evidence, that his medical treatment, including but not limited to that provided by St. Francis Medical Center and Centura Orthopedics, was reasonable, necessary, and related to his work injury?

STIPULATIONS

The parties stipulated that, if compensable, Claimant's Average Weekly Wage is $1202.95. The corresponding Temporary Total Disability ("TTD") rate is $801.97. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant is truck driver for the Employer. On September 21, 2017, he was in Omaha, Nebraska after delivering a load. While attempting to enter the trailer from the rear, he placed his left foot onto a step, and was attempting to swing his right leg onto the trailer bed. While swinging his right leg, he felt a "pop", and pain in his left knee.

2. Claimant called and reported his injury to the Employer. (Ex L, p. 48). On September 26, 2017, Respondents filed a First Report of Injury ("FROI"), documenting that on September 21, 2017, Claimant reported he injured his left knee climbing into the trailer of his truck. The FROI reflects Claimant reported his injury to the Employer the same day. (Ex. 1, p. 1). On October 12, 2017, Respondents filed a Notice of Contest. (Ex. 2, p. 2).

3. Then, on Sunday, October 8, 2017, Claimant treated at St. Francis Medical Center Emergency Room ("ER") and reported left knee pain. Claimant reported he was walking in the parking lot, and heard a pop in his left knee, accompanied by severe pain. Claimant reported his left knee pain had started approximately two weeks prior when he was trying to get on his tractor-trailer. Claimant reported his knee had started to feel better, but then the knee popped on October 8.

4. Claimant was referred to an orthopedic surgeon. That same day, Claimant sent a text message to Mark Jordan, confirming he went to the ER. (Ex .N, p. 51). Also on October 8, 2017, Mr. Jordan left Claimant a voicemail, stating that he was going to call Carrie or Debra Houston and let them know that Claimant is seeking medical treatment related to his injury. (Ex. N, p. 50).

5. On October 9, 2017, Claimant treated with Robert Schuck, M.D. at Centura Orthopedics. Claimant reported he first injured his knee at work approximately three weeks prior while climbing into the back of his trailer. Claimant reported he stepped up into the trailer and felt a painful pop deep in his left knee; Claimant had immediate sharp pain. Claimant reported to Dr. Schuck that his knee started to feel better, but then yesterday (October 8, 2017), he experienced sharp pain while walking. Claimant reported the pain was a lot more severe than when he hurt it entering the truck. It almost made him pass out. Claimant reported he went to the ER and was placed in a knee immobilizer, provided crutches, and prescribed pain medication.

6. Claimant reported he was unable to bear full weight on his left leg. On physical examination of Claimant's left knee, Dr. Schuck noted a large joint effusion, significant muscular guarding, and that the varus stress test caused intense medial joint line discomfort. Dr. Schuck recommended a left knee MRI. Dr. Schuck gave Claimant a left knee intra-articular corticosteroid injection. (Ex. 6, pp. 18-23). On October 12, 2017, Dr. Schuck released claimant to return to work without restriction. (Ex. I, p. 27).

7. On November 29, 2017, Claimant filed an Application for Hearing and endorsed compensability, medical benefits, authorized provider, average weekly wage, and temporary disability benefits.

8. On December 29, 2017, Respondents filed a response to Claimant's Application for Hearing and endorsed a number of defenses, including causation, relatedness, and pre-existing condition, among others.

9. On January 30, 2018, Claimant underwent an independent medical examination with James P. Lindberg, M.D. Claimant reported that on his date of injury he injured his left knee while climbing into his trailer. Claimant reported he had his right hand on the bed and his left leg on the bumper. Claimant reported he pulled and pivoted on his left leg to get his right foot over the bumper and felt a snap in his left knee. Claimant reported his knee swelled up, and he had burning pain. Claimant reported the injury immediately to Mark Jordan. Claimant returned to Colorado. Claimant reported he was still hurting two weeks later, when he was walking into a restaurant and his knee gave out. Dr. Lindberg opined:

> It appears that what happened on the initial injury on September 21, 2017, was a meniscal tear. The mechanism of injury is consistent with tearing of the meniscus. He pivoted on his knee with significant stress. He felt immediate pain and reported it contemporaneously. He got better on Advil, with a little bit of time and then he had an unprovoked giving way of his knee in a restaurant two weeks later. My guess at this point is he had a

> meniscal displacement. The other possibility is that he had an onset of psoriatic arthritis in his knee and that was the problem. However, one cannot tell one from the other without an MRI. Therefore, I think it is appropriate to approve an MRI at this time, and if he has a meniscal tear, then I think it was an acute Workmen's Compensation injury and it should be treated as such. If the MRI is normal, then this is more than likely a manifestation of his psoriatic arthritis and should be treated by his P.M.D. The MRI will make the decision-making obvious. (Ex. K, pp. 43-45).

10. On February 6, 2018, Claimant treated with Autumn Dean, M.D., who noted Claimant's reported mechanism of injury, provided work restrictions of no lifting, repetitive lifting, carrying, pushing, or pulling more than 10 pounds, and referred Claimant for a left knee MRI. (Ex.7, p. 24).

11. On February 13, 2018, Claimant underwent a left knee MRI, which revealed: a) Medial meniscus demonstrates tri-zonal radial root tear with partial extrusion of medial meniscal body segment (finding may have a subacute component);

b) Focus of subchondral edema at the posterior nonweightbearing medial femoral condyle (subacute subchondral contusion);

c) 1.7 x 1.2 cm greater than 50% partial-thickness chondral ulcer (chronic component) at posterior weight-bearing medial femoral condyle 5mm deep chondral flap tear extending anteriorly from the ulcer;

d) Proximal grade 1 of 3 MCL sprain (subacute component);

e) 7 mm oblique, deep chondral flap tear at patellar crest;

f) Greater than 50% partial-thickness tiny chondral fissure at posterocentral aspect of lateral tibial plateau;

g) Lateral collateral ligament demonstrates scarring of the fibular collateral ligament origin with mild periligamentous edema; and

h) 1.9 cm chondroid lesion at proximal fibula 8 x 8 mm segment of scalloping in the nearby anterior fibular cortex. (Ex. 8, pp.25-26).

12. On February 21, 2018, Dr. Lindberg reviewed the MRI narrative and noted that the MRI report is inconclusive, as it shows both meniscal tearing and degenerative changes. Dr. Lindberg requested to review the original MRI images. (Ex. K, p. 42).

13. On February 27, 2018, Dr. Lindberg issued a third report after reviewing the MRI images and opined the MRI revealed:

> [a]ll chronic changes [that] are secondary to his age and psoriatic arthritis. There is no evidence of an acute injury. Any further

> treatment should be under his personal health insurance. Neither physical therapy nor arthroscopy are indicated. This is clearly pre-existing and his symptoms were a manifestation of his underlying osteoarthritis. There is no evidence of an acute aggravation, acceleration, or exacerbation of the underlying disease. (Ex. K, p. 41).

14. At Hearing, Claimant testified he started working for the Employer as a truck driver in 2014. Claimant testified he was diagnosed with psoriatic arthritis in his feet and hands back in 2003. He testified that previously he had been prescribed numerous medications to treat this condition, something like 27 different pills a day. However, he did not feel that this medication was helping, so he stopped taking all medications, and he does not believe he has gotten any worse. In 2005, he would take Embrel and Remicade infusions. He did this for about one year. He was also sent to San Francisco for additional experimental medicines. Claimant testified that since 2005, he has neither taken any medications nor had any treatment for this condition.

15. Claimant testified this condition has not worsened since he stopped taking the medications. Claimant testified he has no prior treatment to his knees or his hips and that he has never had any injuries to his knee. To his knowledge, the psoriatic arthritis has never bothered his hips or knees. Claimant testified the psoriatic arthritis has never prevented him from working, nor affected how he functions on a daily basis.

16. Claimant testified he advised the Employer that he was looking for a non-physical job. Claimant testified his job duties with the Employer do not generally require heavy lifting. Claimant testified that when he was hired he gave the employer, specifically Mr. Lundquist, the terminal manager, his final doctor's paperwork from the prior work-related injury. Claimant testified he eventually passed his DOT physical and started working for the Employer.

17. At hearing, Claimant testified that he was required to take a physical FirstFleet. Claimant signed a physical form on August 2, 2016. Where the form asked if Claimant had any chronic (long-term) infection or other chronic diseases, claimant checked the box "no". When asked more specifically about "Other health condition(s); not described above: Claimant noted that he was pre-diabetic, and also mentioned a hernia repair, but did not mention his psoriatic arthritis. (Ex. S).

18. Claimant was involved in a prior workers compensation claim involving his back, and prior to returning to work for FirstFleet, he was told that he would have to be off all narcotics for thirty days for the medications to work their way out of his system. Claimant indicated that his job at FirstFleet does not involve heavy lifting, as he uses a pallet jack to unload pallets. However, sometimes he would have to down stack off the back of the trailer. Physically, he does have to get up and down into the trailer and sweep the trailers.

19. Claimant testified that on September 21, 2017, he was at a store outside Omaha, Nebraska. Claimant testified he was going to sweep out his trailer prior to driving back to Colorado Springs. He testified that in order to get into his trailer he has to put his left foot on the bumper and swing his right leg into the truck. Claimant testified the Employer's trailer did not have any hand rails or other device to help him get into the truck. He testified he put his left foot on the bumper, put one hand on the bed of the trailer, shifted his weight to his left leg, and used both hands to push up off the trailer to swing his right foot onto trailer bed.

20. Claimant testified that while doing this his left leg twisted and that he felt a pop in his left knee. Claimant testified he immediately had burning pain in his left knee, and that his knee swelled up in less than two hours. He immediately called and reported his injury to Mark Jordan, his supervisor. Claimant testified Mr. Jordan advised him to call the Employer's injury hot-line, and he did this within minutes of his injury. Claimant testified he then drove back to Colorado Springs, using the truck's clutch minimally, arriving between 6:00-7:00 A.M. on September 22, 2017.

21. Claimant testified he let Mr. Jordan know he was back in town, and then drove straight to Concentra. Claimant testified Mr. Jordan advised him to hold off on going into Concentra until he spoke with Carrie Pritchard, who worked in HR for Employer. Claimant testified he was sitting in his car in Concentra's parking waiting to hear from Ms. Pritchard. Claimant testified he called her three times before she called back. Claimant testified Ms. Pritchard already had the incident report but wanted Claimant to explain everything again.

22. Claimant testified that after explaining the nature of the injury, Ms. Pritchard told him that he did not sustain a work injury and that his injury was not compensable because his knee could have popped anywhere. Claimant testified Ms. Pritchard told him the Employer would not authorize him to see Concentra, but that he did not have to take a drug screen, since he was not injured on the job. Claimant also testified that all phone conversations with FirstFleet are recorded and saved.

23. Claimant testified the Employer refused to allow him to see a doctor, and never provided him a designated provider list. Claimant testified he never refused to see a doctor. Had the Employer authorized him to see a doctor, he would have gone. Claimant testified he then returned to work despite his ongoing knee pain. Claimant testified that over the next two weeks he still had left knee pain and was limping around at work and that he told Mr. Jordan that he was still having knee pain. Claimant testified he was having a hard time doing his job. He asked Mr. Jordan for an automatic transmission truck but nothing was available for him. Claimant testified that prior to September 21, 2017, he never had any similar symptoms or issues with his knee.

24. Claimant testified that on Sunday, October 8, 2017, he took the day off work for his son's baptism. He testified he was walking into a restaurant after the baptism when his knee gave out. He was in excruciating pain and could not put any weight on his left knee. Claimant testified he went to the ER that day. Claimant testified

he sent a text message to Mr. Jordan at 3:38 P.M., letting him know he had to go to the ER.

25. Claimant testified he advised the ER physician how injury occurred, underwent an x-ray, was referred to an orthopedic surgeon, and was provided an immobilizing knee brace and crutches. Claimant testified that on October 9, 2017, he brought the ER paperwork to Mr. Jordan. Claimant testified he also spoke to Ms. Pritchard, who advised him that the Employer would not authorize any medical care related to the injury. Claimant testified he also spoke to Debra Houston, who is Ms. Pritchard's boss, and she too told him his injury is not compensable, and that the Employer would not allow him to see a doctor. Claimant testified he continues to work. Claimant testified he continues to have left knee pain.

26. At hearing, Dr. Lindberg testified as an expert in the field of orthopedic surgery. Dr. Lindberg testified he stopped performing surgery and seeing patients in 2012. Dr. Lindberg testified Claimant admitted he has psoriatic arthritis. Claimant told him the psoriatic arthritis affects only his feet, hands, and chest. Claimant told him the psoriatic arthritis does not affect his knees.

27. Dr. Lindberg testified he reviewed the left knee MRI. At Hearing, Dr. Lindberg compared Claimant's left knee MRI to a knee MRI which Dr. Lindberg described as showing a normal meniscus. Dr. Lindberg testified Claimant's left knee MRI showed arthritis and also revealed chronicity, or degenerative changes in the knee. Dr. Lindberg testified the MRI did not reveal any evidence of an acute injury. Dr. Lindberg opined there is no evidence of an acute injury and that all the findings on the left knee MRI are chronic.

28. Dr. Lindberg opined it is more likely than not Claimant has a chronic injury. Dr. Lindberg testified he is not a rheumatologist, but he does know Claimant has a history of psoriatic arthritis and that Claimant needs to be seen and treated by a rheumatologist. Dr. Lindberg testified this is not an orthopedic problem and that Claimant would not benefit from surgery. Dr. Lindberg testified Claimant's left knee problems are more likely related to a chronic condition than an acute injury.

29. Dr. Lindberg testified the September 21, 2017 incident did not cause a left knee injury and not aggravate his left knee condition. That Claimant has subjective complaints of left knee pain does not mean he has an injury because there is no objective evidence of an acute injury. Dr. Lindberg testified he does not give significant weight to the fact Claimant heard a pop or snap in his knee at the time of his injury. Regarding the October 8, 2017 incident, Dr. Lindberg stated Claimant's popliteal cyst may have ruptured at that time; Dr. Lindberg acknowledged that this is purely a guess.

30. On cross-examination, Dr. Lindberg testified that prior to September 21, 2017, Claimant's left knee was apparently asymptomatic and that there are no records that indicate Claimant ever had any prior left knee injuries, conditions, symptoms, or treatment. Dr. Lindberg testified that Claimant's September 21, 2017 mechanism of injury could have caused an injury, including a meniscus tear. Dr. Lindberg testified he

is not denying Claimant had an injury, twisted his knee, and felt pain on September 21, 2017. Dr. Lindberg acknowledged that knee swelling is objective evidence of an acute injury. Dr. Lindberg testified that there is just no evidence of an acute injury on the MRI. Dr. Lindberg testified the radiologist who reviewed the left knee MRI noted multiple subacute findings and that subacute means 'kind of' acute.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). While Claimant may not have been entirely accurate or forthcoming in outlining his entire medical history when applying for employment, the ALJ finds that overall, Claimant has provided accurate medical history to his medical providers, and has provided credible testimony at hearing. Of particular note is Claimant's unrebutted testimony about being rebuffed by HR when reporting this incident and seeking treatment, when such calls are apparently recorded.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive

arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

E. An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Indus. Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Indus. Comm'n*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*.

F. Claimant herein has proven by a preponderance of the evidence that on September 21, 2017, he sustained a left knee injury or aggravation of his preexisting left knee condition arising out of and in the course and scope of his employment with the employer. The ALJ concurs with Dr. Lindberg's general proposition that correlation does not equal causation. In this case, however, Claimant's sudden onset of symptoms, at the very instant he was twisting at an awkward angle to enter the truck is simply too much to attribute to coincidence. Claimant had never experienced knee pain previously. The ALJ further finds that Claimant not only felt pain, but observed swelling within a short time of this incident. Swelling is a significant indicator of acute trauma. Respondents are not to be rewarded, in essence, by denying Claimant the ability to not only treat promptly, but also have independent medical corroboration of the swelling that he experienced. Similarly, a MRI taken shortly after the incident would have been of far greater value to all concerned. Those subacute findings from 2/13/18 might well have been acute if taken promptly. This will remain unknown, but HR made the wrong call in summarily denying compensability. Claimant was plainly at work when this happened. Determining the medical component of compensability is the job of medical professionals, not HR personnel.

Authorized Treatment Provider

G. C.R.S. section 8-43-404(5)(a)(I)(A) requires the insurer or employer to provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers or a combination thereof where available from which an injured worker may select the physician who attends the injured employee. C.R.S. section 8-43-404(5)(a)(I)(A) goes on to state that if the services of a physician are not tendered at the time of injury, the injured worker has the right to select a physician. WCRP 8-2 outlines the rules regarding designating an authorized treating physician. WCRP 8-2(E) states, "If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing." Respondents failed to designate a medical provider or provide Claimant with a list of physicians as required by C.R.S. section 8-43-404(5)(a)(I)(A) and WCRP 8-2. Accordingly, Claimant proved by a preponderance of the evidence that he has the right to select his authorized treating physician. While the ALJ finds Dr. Lindbergh to be eminently qualified and sincere in his medical opinions, Respondents may not use him after the fact to deny Claimant his own ATP.

Medical Benefits

H. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

I. Claimant has proved by a preponderance of the evidence that the medical treatment he received through St. Francis Medical Center and Centura Orthopedics, including the October 9, 2017 left knee injection, is reasonable, necessary, and related to his compensable industrial injury. While Claimant was not at work when this sudden onset of pain occurred in the parking lot, a sufficient nexus has been shown between this incident and the original work injury from September 21, 2017. Respondents shall pay for this medical treatment and all other medical care that is reasonable, necessary, and related to Claimant's September 21, 2017 industrial injury. Time will tell if Claimant's ATPs will recommend surgery, but Claimant has the right to find that out

through the Workers Compensation process, and the opinions of physicians assigned to treat him.

ORDER

It is therefore ordered that:

1. The injury to Claimant's left knee occurring 9/21/17 is compensable, as is the episode which occurred October 8, 2017.

2. The right to select his Authorized Treating Physician has fallen to Claimant.

3. Respondents shall pay all reasonable and necessary medical treatment related to Claimant's compensable injury, including, but not limited to, treatment rendered to date from St. Francis Medical Center and Centura Orthopedics.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 9, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that treatment of his cervical myelopathy (including the cervical surgery performed by Dr. Douglas Orndorff on December 20, 2016) constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted January 16, 2015 work injury.

- Whether claimant has demonstrated by a preponderance of the evidence that treatment of his urological symptoms constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted January 16, 2015 work injury.

- At hearing, the parties stipulated that claimant's average weekly wage (AWW) is $1,106.10 for the period of January 16, 2015 through and including July 31, 2015.

- The parties further stipulated that claimant's AWW is $1,347.24 beginning August 1, 2015 and ongoing until terminated by law.

FINDINGS OF FACT

1. Claimant was employed by employer as a milk delivery driver. Claimant's job duties included loading and unloading pallets of milk to make deliveries to commercial clients. Claimant testified that he began performing these job duties with employer's predecessor company more than 20 years ago.

2. On January 16, 2015, claimant was making an early morning delivery to a customer in Breckenridge, Colorado. Claimant unloaded the delivery onto a wheeled dolly and pushed the dolly on the sidewalk. Claimant testified that the left wheel of the dolly hit some ice, causing claimant to slip and fall. Claimant testified that he landed on his right hip and struck the right side of his head and immediately experienced numbness in his left hand.

3. Claimant first received medical treatment for his injury on January 20, 2015 and was seen by Dr. Jason Stuerman at Middle Park Medical Center. At that time, in addition to issues related to his right hip, claimant reported that since the slip and fall he had a difficult time picking things up because he had numbness from his elbows to his hands. Claimant also reported that he had more frequent urination since the fall. Claimant testified that at that time he was urinating every thirty minutes. Dr. Stuerman recommended that claimant undergo a head CT (computed tomography) scan.

4. On January 20, 2015, claimant returned to Middle Park Medical Center and was seen by Dr. Frank Tong. Claimant again reported numbness in both arms, with tingling in his fingers. Claimant also reported that his arm symptoms were improving. At that time, Dr. Tong opined that claimant had not suffered a concussion. Due to claimant's report that he was improving, Dr. Tong determined that a head CT was not necessary.

5. On February 4, 2015, respondents filed a General Admission of Liability (GAL) for the January 16, 2015 incident.

6. On June 18, 2015, claimant attended an independent medical examination (IME) with Dr. Thomas Moore. In connection with the IME, Dr. Moore reviewed claimant's medical records, obtained a medical history from claimant, and performed a physical examination. In his report, Dr. Moore opined that claimant's right hip condition was related to the January 16, 2015 work injury. Dr. Moore also noted in his report that during the IME claimant reported that he felt he had only "5% feeling" in the fingers of both hands. Claimant testified that at the IME Dr. Moore focused on the injury to claimant's right hip.

7. On September 2, 2015, claimant was seen by Dr. Richard Lawton for a surgical consultation related to his right hip. Dr. Lawton opined that claimant's right hip pain was coming from a torn labrum and recommended that claimant undergo surgery to repair the labrum.

8. At the time of the injury, claimant was living in Silverthorne, Colorado. Prior to undergoing the hip surgery recommended by Dr. Lawton, claimant moved to Bayfield, Colorado where his son lives. Claimant testified that he moved so that he could have support from his son following the surgery.

9. On September 17, 2015, Dr. Lawton performed a right hip arthroscopic labral debridement and partial labrectomy.

10. Following the surgery, began physical therapy with Bayfield Physical Therapy. On October 20, 2015, claimant was seen by Andre Sarnow, PT. Claimant reported to PT Sarnow that since the surgery in September 2015, he had fallen at least four times when his right hip "blows out" and he has no control of the right hip. Claimant also reported that he continued to have numbness and tingling in both hands, and was concerned that those symptoms "had not been addressed".

11. Subsequently, Dr. Lawton referred claimant to Spine Colorado. On March 9, 2016 claimant was seen at Spine Colorado by Clayton LaBaume, PA-C. At that time, claimant reported right sided hip pain with standing or walking. He also reported numbness and tingling in both hands, and some loss of coordination in his hands. PA LaBaume opined that claimant had cervical myelopathy and referred claimant for an MRI of his cervical spine. PA LaBaume also ordered an MRI of claimant's lumbar spine. Claimant testified that the MRI of his cervical spine did not occur.

12. Due to claimant's ongoing hip symptoms, on July 5, 2016, Dr. Lawton performed a right total hip arthroplasty. On July 25, 2016, claimant was seen at Mercy Orthopedic Associates by Ann Theine, PA for a follow up appointment. Claimant reported to PA Theine that he had begun to have urinary incontinence since the surgery. Claimant testified that prior to the July 5, 2016 surgery he had never had urinary issues.

13. On October 10, 2016, claimant returned to Dr. Lawton and reported that he was getting better, but slowly. Claimant also reported that he could walk up to two miles, but that he felt clumsy, as if he might stumble and fall. In the medical record of that date, Dr. Lawton noted that claimant's gait "was a bit odd" and was "definitely abnormal". Dr. Lawton noted that claimant's gait reminded him "of a gait typical for someone with a neurologic disorder of some type."

14. On December 15, 2016, claimant sought treatment with Dr. Jessica Hannah, a neurologist. Claimant testified that he chose to seek a neurologist because he felt that he was getting progressively worse. Claimant testified that at that time he could not pick up items with his hands, he could not get out of bed, and his son had to assist him in going to the bathroom.

15. On December 15, 2016, claimant reported to Dr. Hannah that he had numbness in his left hand immediately after his slip and fall in January 2015, but that in the last month it has also moved into his right hand and his legs. Claimant also reported that he was unable to complete his activities of daily living (ADLs). At that time, Dr. Hannah diagnosed progressive myelopathy with unclear etiology and ordered a magnetic resonance image (MRI) of claimant's cervical spine.

16. On December 15, 2016, an MRI was taken of claimant's cervical spine. The MRI showed critical central canal stenosis at C3-C4 secondary to severe degenerative disc disease with large posterior disc osteophyte complex and ligamentum flavum hypertrophy. The radiologist noted in the MRI notes that the findings correlated with claimant's symptoms. Based upon these MRI results Dr. Hannah requested a surgical consultation with Colorado Spine.

17. Claimant was seen for surgical consultation with Dr. Douglas Orndorff on December 20, 2016. Based upon the results of the cervical MRI, claimant underwent surgery on an emergent basis to his cervical spine. Specifically, Dr. Orndorff performed a posterior cervical decompression and fusion of the cervical spine from C3 to C5 and a C3 and C4 laminectomy.

18. While he was in the hospital recovering from the cervical surgery, claimant continued to experience dislocation of his right hip. On December 28, 2016, Dr. Paige Mallette performed a closed reduction of the dislocated right hip.

19. During claimant's hospitalization in December 2016, a Foley catheter was utilized. Following the cervical surgery that he was admitted to Four Corners Rehabilitation for six weeks. Claimant continued to have a Foley catheter during those six weeks.

20. On January 13, 2017, claimant sought treatment at the urology department at Mercy Medical Center. As indicated by the medical records, claimant had an "indwelling catheter" since his cervical surgery. The catheter was removed on January 13, 2017, but claimant was unable to void. Ultimately claimant was admitted to the hospital for a urinary tract infection (UTI) and sepsis.

21. On January 27, 2017, Dr. Mallette performed a revision of the right total hip arthroplasty acetabular and femoral head to a constrained liner. Claimant testified that the additional hip surgery seems to have addressed the hip dislocation problem.

22. On February 2, 2017, Dr. Carlos Cebrian completed a medical records review to assess whether the December 20, 2016 surgery performed by Dr. Orndorff was reasonable, necessary, and related to claimant's January 16, 2015 work injury. In his written report, Dr. Cebrian opined that claimant's need for surgery in December 2016 was related to claimant's preexisting cervical spine degenerative disc disease and spinal stenosis. Dr. Cebrian further opined that the fall on January 16, 2015 did not cause claimant's cervical spine symptoms. In support of his opinions, Dr. Cebrian noted that claimant's complaints of numbness in his bilateral upper extremities improved after several visits and then returned later in claimant's treatment.

23. On May 26, 2017, Dr. Cebrian completed a second review of claimant's medical records to address whether claimant's urological symptoms are causally related to the January 16, 2015 work injury. Dr. Cebrian opined in his report that claimant's urological symptoms are not related to the work injury. Dr. Cebrian noted that claimant's urological issues did not arise until after the cervical spine surgery. As Dr. Cebrian does not believe claimant's cervical spine symptoms are related to the work injury, he reasons that the urological symptoms are likewise not related.

24. Dr. Cebrian's testimony by deposition was consistent with his written reports. Dr. Cebrian testified that it is his opinion that claimant's cervical spine symptoms and urological symptoms are not related to claimant's work injury. In support of his opinion, Dr. Cebrian noted that early in claimant's medical treatment, Dr. Tong determined that because of claimant's normal neurological exam and lack of neck pain cervical spine imaging was not recommended. In support of his opinion regarding claimant's urological symptoms, Dr. Cebrian noted that the March 10, 2015 MRI of claimant's right hip showed evidence of an enlarged prostate, which would explain claimant's urinary symptoms at that time.

25. Dr. Cebrian also testified that the symptoms claimant was experiencing in 2016 and the need for cervical surgery are unrelated to the fall on January 16, 2015. The need for cervical surgery was needed to correct degenerative changes in claimant's cervical spine. Dr. Cebrian also opined that the January 16, 2015 fall at work did not aggravate claimant's underlying degenerative condition in his cervical spine. With regard to numbness and tingling that claimant has reporting having from his elbows to his hands, Dr. Cebrian testified that the level of claimant's cervical stenosis would not correlate to those types of complaints.

26. On June 12, 2017, claimant underwent urodynamic testing. However, claimant was unable to void before or after the testing, so a catheter was utilized. Thereafter, claimant treated with urologist Dr. Francis Carpio. On June 23, 2017, Dr. Carpio diagnosed claimant with neurogenic bladder and noted that claimant was self-catheterizing every four to five hours.

27. Dr. Orndorff testified by deposition in this matter. Dr. Orndorff explained that prior to the December 20, 2016 surgery claimant had very severe cervical spondylitic myelopathy. Dr. Orndorff also testified that symptoms of cervical myelopathy can include diffuse hand numbness and tingling, loss of hand dexterity, loss of fine motor skills, and balance instability. In addition an individual with cervical myelopathy can have either urinary retention or urinary incontinence.

28. Dr. Orndorff testified that it is his opinion that there is a "very strong correlation" between the January 16, 2015 slip and fall and claimant's cervical condition. In support of this opinion Dr. Orndorff noted in his testimony that claimant's injury was a loading type of injury that can cause compression of the spinal cord combined with claimant's progressive symptoms (including hand numbness and tingling, hand dysfunction, and balance issues) indicate a correlation.

29. During his testimony, Dr. Orndorff indicated that he agrees that claimant had pre-existing degenerative changes in his spinal cord. However, Dr. Orndorff noted in his testimony that the pre-existing condition was asymptomatic prior to claimant's January 16, 2015 work injury.

30. Claimant testified that throughout his extensive medical treatment related to the January 16, 2015 slip and fall, he has reported ongoing numbness in his arms and hands to all of his providers.

31. Claimant testified that his current urological symptoms include urinary retention. Claimant explained that he has to insert a catheter up to six times per day to relieve his bladder. This involves the use of various medical supplies.

32. The ALJ credits claimant's testimony, the medical records, and the opinion of Dr. Orndorff over the contrary opinion of Dr. Cebrian and finds that claimant has demonstrated that it is more likely than not that claimant's cervical myelopathy is causally related to the January 16, 2015 fall at work.

33. The ALJ credits claimant's testimony, the medical records, and the opinion of Dr. Orndorff over the contrary opinion of Dr. Cebrian and finds that claimant has demonstrated that it is more likely than not that claimant's urological condition was caused by the cervical surgery performed on December 20, 2016. As claimant's cervical condition was caused by the work injury on January 16, 2015, the claimant has also successfully demonstrated by a preponderance of the evidence that his urological condition is causally related to the work injury.

34. The ALJ credits the medical records and the opinion of Dr. Orndorff and finds that treatment for claimant's cervical myelopathy, including the cervical surgery performed on December 20, 2016, is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

35. The ALJ credits the medical records and the opinion of Dr. Orndorff and finds that treatment for claimant's urological condition, including catheter supplies, is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2014).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, claimant has demonstrated by a preponderance of the evidence that treatment of his cervical myelopathy (including the cervical surgery performed by Dr. Orndorff on December 20, 2016) constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the January 16, 2015 work injury. As found, claimant's testimony, the medical records, and the opinion of Dr. Orndorff are credible and persuasive.

5. As found, claimant has demonstrated by a preponderance of the evidence that treatment of his urological symptoms, including catheter supplies, constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the January 16, 2015 work injury. As found, claimant's testimony, the medical records, and the opinion of Dr. Orndorff are credible and persuasive.

ORDER

It is therefore ordered that:

1. Respondents shall pay for medical treatment related to claimant's cervical myelopathy, including the cervical surgery performed on December 20, 2016.

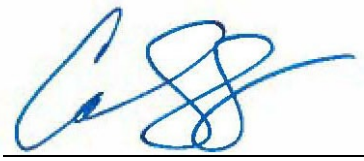
2. Respondents shall pay for medical treatment related to claimant's urological symptoms, including catheter supplies.

3. The ALJ adopts the stipulation of the parties regarding claimant's AWW. Therefore, Claimant's AWW is $1,106.10 for the period of January 16, 2015 through and including July 31, 2015; and is $1,347.24 beginning August 1, 2015 and ongoing until terminated by law.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

Dated: May 1, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that physical therapy treatment she received from Fyzical Therapy and Balance Centers between April 25, 2017 and October 31, 2017, is reasonable and authorized medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 6, 2016 work injury.

- Whether the claimant has demonstrated by a preponderance of the evidence that dental treatment she received from Laurie Stein, DDS is reasonable and authorized medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 6, 2016 work injury.

- Whether the claimant has demonstrated by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits for the period of August 1, 2016 through November 1, 2017.

FINDINGS OF FACT

1. The claimant was employed with the employer on a part-time basis as an in-house accountant. The claimant testified that her job duties were primarily sedentary in nature. At times the claimant also assisted with pouring wine in the employer's tasting room and at special events.

2. On June 6, 2016, the claimant was involved in a motor vehicle accident (MVA) while returning from the bank for the employer. The respondents have admitted for the June 6, 2016 work injury. The claimant testified that at the time of the MVA she believed that her neck and low back were injured.

3. Immediately following the MVA, the claimant received treatment at Community Hospital. While she was at Community Hospital on June 6, 2016, computed tomography (CT) scans were taken of the claimant's cervical and lumbar spines. The CT scan of the claimant's cervical spine showed no acute change and no fracture. The CT scan of claimant's lumbar spine showed no fractures. However, there was evidence of arthritic changes and some circumferential narrowing of the neural canal at the lower four lumbar levels.

4. During this claim, the claimant's authorized treating provider (ATP) has been Work Partners. The claimant was primarily seen at Work Partners by Erica Herrera, PA, and on one occasion the claimant was seen by Dr. Laurie Marbas.

5. The claimant testified that Ms. Herrera referred her to medical treatment that has included exercise treatment and massage therapy at Work Partners and physical therapy with Sean Richardson, PT with Fyzical Therapy and Balance Centers. The claimant began physical therapy with Mr. Richardson on August 18, 2016.

6. The claimant testified that following the MVA she continued to work for the employer in her regular position. The claimant also testified that due to the pain she had in her low back, it was necessary for her to get up and walk or stretch every 30 minutes while at work. The employer was willing to accommodate the claimant in this way.

7. The claimant was placed at maximum medical improvement (MMI) on November 8, 2016 by Ms. Herrera (with the agreement of Dr. Marbas). Ms. Herrera also determined that the claimant had suffered no impairment rating and required no permanent work restrictions. Ms. Herrera recommended maintenance medical treatment that included six addition physical therapy visits with Mr. Richardson over the next six months.

8. The claimant testified that close in time to being placed at MMI a piece of one of her teeth "came off". The claimant also testified that she was scheduled to see her dentist, Dr. Laurie Stein on November 15, 2016 for her normal dental check-up. As she was already scheduled to see Dr. Stein, the claimant addressed the broken tooth at that appointment.

9. When the claimant was seen by Dr. Stein on November 15, 2016, x-rays showed that the claimant had fractured her #5 tooth and her #20 tooth. Dr. Stein opined that the MVA on June 6, 2016 caused these fractures. In support of this opinion Dr. Stein noted that shortly before the MVA the claimant was seen at her office and the two teeth in question were not fractured. In addition, for these fractures to occur the teeth would have to sustain a "sharp trauma".

10. At the recommendation of Dr. Stein the claimant has undergone dental treatment that has included a crown restoration and dental implants for the teeth damaged in the MVA. The claimant has paid out of pocket for this dental treatment and is requesting reimbursement.

11. On May 1, 2017, the respondents filed a Final Admission of Liability (FAL) admitting for the MMI date of November 8, 2016, no impairment rating, and reasonable and necessary post-MMI medical treatment and/or medication. The claimant timely contested the FAL and requested a Division-sponsored independent medical examination (DIME).

12. On July 25, 2017, the claimant attended a DIME with Dr. James McLaughlin. In connection with the DIME, Dr. McLaughlin reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his DIME report, Dr. McLaughlin opined that the June 6, 2016 MVA aggravated the claimant's preexisting back condition and that the claimant was not at

MMI. Dr. McLaughlin also opined that the fractures to the claimant's teeth were likely caused by the June 6, 2016 MVA.

13. Although he found that the claimant was not at MMI, Dr. McLaughlin assessed a provisional permanent impairment. For the claimant's cervical spine, he assessed a whole person impairment rating of 12%. For the claimant's lumbar spine, he assessed a whole person impairment rating of 10%. This combined for a total impairment rating of 21% whole person. Dr. McLaughlin also recommended permanent work restrictions to sit and stand as needed, limited bending, and no lifting over 30 pounds. In addition, Dr. McLaughlin recommended claimant continue physical therapy to achieve MMI. He opined that six to twelve visits would be sufficient. Finally, Dr. McLaughlin recommended claimant undergo a magnetic resonance image (MRI) of her lumbar spine.

14. Based upon Dr. McLaughlin's DIME report, the respondents filed a General Admission of Liability (GAL) on September 15, 2017 recognizing that the claimant was not at MMI and admitting for additional medical benefits.

15. On November 2, 2017, the claimant returned to Work Partners and was seen by Dr. Lori Fay. Dr. Fay agreed with the opinions of Dr. McLaughlin that the claimant was not at MMI and that her dental issues were related to the work injury. At that time, Dr. Fay assigned the claimant work restrictions that included working no more than four hours per day, sitting and standing as tolerated, and no lifting, carrying, pushing, or pulling over 15 pounds. In addition, Dr. Fay ordered an MRI of the claimant's lumbar spine and referred the claimant back to Mr. Richardson for physical therapy. Dr. Fay also referred the claimant to Dr. Stein for treatment of her fractured teeth.

16. Based upon the November 2, 2017 medical report from Dr. Fay, the respondents filed an amended GAL on November 14, 2017. In the amended GAL, the respondents admitted for temporary total disability (TTD) benefits beginning on November 2, 2017.

17. On November 21, 2017, an MRI of the claimant's lumbar spine showed degenerative disc and facet disease at various levels. In addition, it was noted that there was grade 1 anterior listless of L4 on L5 and L5 on S1, which was similar to claimant's prior CT scan.

18. On November 27, 2017, the claimant returned to Dr. Fay and reported aching, sharp and, and stabbing pain in her low back that was made worse by sitting, standing, and riding in a car. The claimant also reported that she felt that her pain was getting worse. At that time, Dr. Fay referred the claimant to Dr. Kirk Clifford for an orthopedic consultation.

19. The claimant was first seen by Dr. Clifford on December 27, 2017. Dr. Clifford noted that despite physical therapy, the claimant has significant debilitating symptoms with pain radiating down the right thigh into the lateral calf and foot. At that

time, Dr. Clifford diagnosed grade 1 spondylolisthesis at L4-5 and grade 2 spondylolisthesis at L4-S1 as well as stenosis at the L4-5 level. Dr. Clifford recommended that the claimant undergo right sided L4-5, L5-S1 transforaminal epidural steroid Injections. The recommended injections were administered by Dr. Clifford on January 11, 2018.

20. Between the claimant's original MMI date of November 8, 2016 and returning to Work Partners on November 2, 2017, the claimant was unable to schedule an appointment with Work Partners. The claimant testified that Work Partners refused to schedule an appointment because her case was "closed". As a result, the claimant was unable to obtain a referral for additional physical therapy. The claimant continued physical therapy treatment with Mr. Richardson during that time. The claimant testified that she chose to continue physical therapy treatment with Mr. Richardson because her back pain was increasing.

21. In addition to the recommended maintenance medical treatment of six sessions, the claimant was seen at Fyzical Therapy and Balance Centers between April 25, 2017 and October 31, 2017. The claimant paid out of pocket for these physical therapy visits. The claimant is requesting reimbursement for these visits.

22. At the request of the respondents, the claimant attended an independent medical examination (IME) with Dr. Albert Hattem on February 21, 2018. Dr. Hattem reviewed the claimant's medical records, obtained a medical history, and conducted a physical examination. In his IME report, Dr. Hattem opined that the claimant had reached MMI as of the date of the IME on February 21, 2018. He also opined that injury to the claimant's cervical spine was a sprain that had resolved by August 4, 2016. As a result, when assessing a permanent impairment rating, Dr. Hattem only assessed claimant's lumbar spine.

23. Dr. Hattem assessed a 15% whole person permanent impairment rating for claimant's lumbar spine. He also recommended permanent work restrictions of "light level of work" with the ability to sit, stand, and stretch for five minutes every hour, and avoid repetitive bending or twisting at the waist. In his IME report, Dr. Hattem does not address any opinion regarding the causation of the claimant's dental issues.

24. The respondents have denied the requested dental treatment with Dr. Stein. The respondents have also denied the claimant's physical therapy treatment from April 25, 2017 through October 31, 2017.

25. The claimant testified that in August 2016 the employer sold the business and the claimant's employment ended. The claimant has not returned to work since that time. The claimant also testified that because of the June 6, 2016 MVA she is unable to work. Specifically, she is unable to sit for more than 20 or 30 minutes and is unable to stand for more than 20 to 30 minutes. The claimant also testified that the injuries she sustained in the MVA have negatively impacted her daily living. For example, the claimant testified that she enjoys cooking, but because she is unable to stand for long periods she is unable to cook like she did previously. Similarly, the

claimant is unable to complete housekeeping tasks. The claimant testified that her hobbies have also been impacted because she is unable to sit for long periods in a kayak and cannot use a 4-wheeler on bumpy roads.

26. The claimant's spouse provided testimony at hearing that was consistent with the claimant's testimony. In addition, the claimant's spouse testified that because of her injuries the claimant is unable travel great distances because she cannot sit for long periods of time.

27. The ALJ credits the claimant's testimony, the medical records, and the opinion of Dr. Fay and finds that claimant has demonstrated that it is more likely than not that the physical therapy that the claimant continued to receive between April 25, 2017 and October 31, 2017 was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

28. The ALJ credits the claimant's testimony and the medical records and finds that physical therapy treatment with Mr. Richardson was within the chain of referrals even after claimant was placed and MMI and during the DIME process. The ALJ finds that claimant has demonstrated that it is more likely than not that the continued physical therapy treatment claimant received between April 25, 2017 and October 31, 2017 was authorized medical treatment.

29. The ALJ credits the claimant's testimony, the dental records, and the opinions for Drs. Stein, McLaughlin, and Fay and finds that the claimant has demonstrated that it is more likely than not that at the time of the June 6, 2016 MVA claimant's #5 tooth and #20 tooth were fractured. The ALJ further credits the dental records and finds that the claimant has demonstrated that it is more likely than not that the dental treatment recommended and performed by Dr. Stein is reasonable medical treatment necessary to cure and relive the claimant from the effects of the work injury.

30. The ALJ credits the claimant's testimony and the medical records and finds that claimant has demonstrated that it is more likely than not that claimant's dental treatment with Dr. Stein is authorized medical treatment.

31. The ALJ credits the claimant's testimony and the medical records and finds that claimant has demonstrated that she suffered a wage loss during the period of August 1, 2016 through November 1, 2017. The claimant's employment with the employer ended on August 1, 2016 when the business was sold. The claimant's injuries from the MVA and the related work restrictions prevent her from obtaining new employment. Although claimant was released to "full duty" by Ms. Herrera, it is undisputed that the claimant's work for the employer was sedentary in nature and claimant had to make accommodations to continue in her employment with employer following the MVA.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008).

5. When the authorized treating physician refers the claimant to another health care provider, the treatment rendered by the referred provider is compensable as part of the legal chain of authorization. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026, 1029 (Colo. App. 1993) (*citing Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985)).

6. Section 8-42-101(6)(b), C.R.S. states in pertinent part:

> If a claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer or, if insured, the employer's insurance carrier, shall reimburse the claimant for the full

amount paid. The employer or carrier is entitled to reimbursement from the medical providers for the amount in excess of the amount specified in the worker's compensation fee schedule.

7. As found, the claimant has demonstrated by a preponderance of the evidence that the physical therapy treatment she continued to receive between April 25, 2017 and October 31, 2017 was reasonable medical treatment necessary to cure and relieve claimant form the effects of the work injury. As found, the claimant's testimony, the medical records and the opinion of Dr. Fay are credible and persuasive.

8. As found, the claimant has demonstrated by a preponderance of the evidence that the physical therapy treatment she continued to receive between April 25, 2017 and October 31, 2017 was authorized medical treatment. As found, the claimant's testimony and the medical records are credible and persuasive.

9. As found, the claimant has demonstrated by a preponderance of the evidence that her #5 tooth and #20 tooth were injured in the MVA. As found, he claimant has demonstrated by a preponderance of the evidence that the dental treatment recommended and performed by Dr. Stein is reasonable and authorized medical treatment necessary to cure and relive the claimant from the effects of the work injury. As found, the claimant's testimony, the dental records, and the opinions for Drs. Stein, McLaughlin, and Fay are credible and persuasive.

10. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

11. As found, the claimant has demonstrated by a preponderance of the evidence that she suffered a loss of wages during the period of August 1, 2016 through November 1, 2017. Therefore, she is entitled to TTD benefits during that time. As found, the claimant's testimony and the medical records are credible and persuasive.

ORDER

It is therefore ordered that:

1. The respondents shall reimburse the claimant for her out of pocket payment for physical therapy treatment between April 25, 2017 and October 31, 2017.

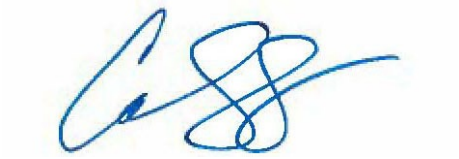
2. The respondents shall reimburse the claimant for her out of pocket payment for dental treatment with Dr. Stein related to the work injury.

3. The respondents shall pay claimant temporary total disability (TTD) benefits for the period of August 1, 2016 through November 1, 2017.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

Dated: May 1, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that maintenance medical treatment recommended by Dr. Lori Fay is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement (MMI).

FINDINGS OF FACT

1. The claimant was employed with the employer on the project team. The claimant's job duties included setting up displays in the employer's retail locations. The claimant testified that these job duties would often involve moving and lifting heavy items.

2. On October 2, 2015, the claimant suffered an admitted injury while he was installing a display. Claimant testified that a large piece of shelving fell and struck him in the forehead resulting in a laceration. The claimant immediately obtained medical treatment at the emergency department (ED) at St. Mary's Hospital.

3. While treating at St. Mary's Hospital on October 2, 2015, the claimant reported that he did not lose consciousness, but had symptoms that included severe headache, lightheadedness, and nausea.

4. On October 2, 2015, computed tomography (CT) scans were taken of the claimant's head cervical spine. Both CT scans were read as normal. On that date, Dr. Holly Buschhorn diagnosed claimant with a cervical strain and a concussion.

5. During this claim the claimant's authorized treating provider (ATP) has been Work Partners. The claimant was first seen at Work Partners by Erica Herrera, PA on October 5, 2015. At that time, the claimant described the injury and reported that he did not lose consciousness. The claimant also reported that he was experiencing a pressure headache and issues with short term memory. Ms. Herrera diagnosed the claimant with a mild traumatic brain injury/concussion. Ms. Herrera advised the claimant that his symptoms were "very common for this type of injury" and recommended that the claimant rest and avoid nicotine and caffeine.

6. The claimant returned to the ED on October 10, 2015 and reported that his headache had gotten worse since the injury. Dr. Brent Fowler diagnosed post concussive syndrome and advised the claimant that his symptoms were appropriate for his injury. On that date, a second head CT was performed that showed no acute intracranial pathology.

7. On October 12, 2015, the claimant was again seen by Ms. Herrera. The claimant reported to Ms. Herrera that he continued to experience headaches, dizziness, and memory issues. Ms. Herrera noted that the claimant's post concussive symptoms did not seem to be improving. At that time, Ms. Herrera referred the claimant for evaluation by a neurologist. Subsequently, Ms. Herrera referred the claimant specifically to neurologist, Dr. Joel Dean.

8. Other treatment modalities recommended for the claimant throughout this claim have included pain medications, physical therapy, acupuncture, and injections.

9. The claimant was first seen by Dr. Dean on November 11, 2015. The claimant reported to Dr. Dean that he had headaches that were "throbbing" as well as dizziness and issues with memory and concentration. Dr. Dean diagnosed the claimant with post concussive syndrome and post traumatic headache with migraine features and recommended that the claimant undergo neuropsychological screening. In addition, Dr. Dean opined that a magnetic resonance image (MRI) scan of the claimant's brain was not necessary.

10. Based upon Dr. Dean's recommendation, on January 6, 2016, the claimant was seen by Dr. Dale Bowen for neuropsychological testing. Dr. Bowen diagnosed the claimant with mild neurocognitive disorder due to the traumatic brain injury without behavioral disturbance. Dr. Bowen recommended that the claimant undergo speech therapy and cognitive retraining therapy.

11. On April 26, 2016, the claimant was seen at Work Partners by Dr. Craig Gustafson. The claimant reported that he continued to have headaches and acupuncture made his symptoms worse. Dr. Gustafson noted that the claimant's pain was "going in the right direction" but that the claimant continued to have memory problems. Dr. Gustafson also opined that although he expected the claimant's symptoms to improve, sometimes these symptoms can be "chronic".

12. Thereafter, the claimant continued to treat with providers at Work Partners and with Dr. Dean. On February 3, 2017, Ms. Herrera opined that the claimant was nearing maximum medical improvement (MMI) and referred the claimant to Dr. Lori Fay.

13. On February 17, 2017, the claimant was seen by Dr. Fay. At that time, the claimant reported that he continued to have "stabbing" headaches. He also reported that he felt that physical therapy was making his symptoms worse. Dr. Fay noted that despite this report by the claimant, she was hopeful that physical therapy would ultimately improve the claimant's pain. She also recommended claimant undergo injections and made a referral to Colorado Injury and Pain Specialists.

14. On March 10, 2017, the claimant was seen by Dr. Ashish Chavda with Colorado Injury and Pain Specialists. Dr. Chavda opined that the claimant's headaches could be multifactorial including neuralgia of the supraorbital and greater auricular nerves as well as some cervicogenic component. Dr. Chavda recommended that the claimant continue his physical therapy. In addition, Dr. Chavda recommended that the

claimant undergo bilateral nerve blocks of the supraorbital and auriculars. The claimant declined these injections.

15. On April 14, 2017, claimant attended physical therapy with Kelly Winkel, DPT and reported that he had not had any reduction in his headaches and that they "still occur just as frequently and intensely".

16. On April 21, 2017, the claimant returned to Dr. Fay. The claimant reported that he continued to have stabbing and sharp headaches. The claimant again reported to Dr. Fay that he felt that physical therapy treatment was causing his symptoms to worsen. On that date, Dr. Fay administered suboccipital trigger point injections in an attempt to relieve the claimant's headaches.

17. On June 2, 2017, the claimant returned to Dr. Bowen and underwent a second round of neuropsychological testing. Following that testing, Dr. Bowen noted that the claimant's test findings fell within normal limits and are consistent with the claimant's baseline ability level for cognitive and psychological functioning.

18. On June 9, 2017, the claimant was seen by Dr. Fay and reported that his symptoms of headache, dizziness, light sensitivity, and memory loss were unchanged. He also reported that he felt that speech therapy and cognitive therapy were not helpful with his memory issues. The claimant also reported that he was "not sure if [physical therapy] was helping". Dr. Fay noted in the medical record of June 9, 2017, that the claimant had tried various medications, but they either did not help, or caused side effects. Dr. Fay also noted that the subocciptal trigger point injections worsened the claimant's headaches. Despite his continuing symptoms, the claimant reported to Dr. Fay that he was able to attend school and was doing well in that program.

19. On that same date, Dr. Fay placed the claimant at MMI and assessed permanent impairment rating of 15% whole person based on the claimant's "episodic headaches from his head injury". Dr. Fay did not assign any permanent restrictions. At the time of MMI time, Dr. Fay recommended that the claimant receive up to three years of maintenance medical treatment including follow up with Work Partners, neuropsychiatric testing, neurology follow up, up to six physical therapy visits per year, and possible injections.

20. On September 21, 2017, the claimant attended a Division-sponsored independent medical examination (DIME) with Dr. Gareth Shemesh. In connection with the DIME, Dr. Shemesh reviewed the claimant's medical records, obtained a history, and completed a physical examination of the claimant. In his report, Dr. Shemesh agreed that the claimant had reached MMI on June 9, 2017. In addition, Dr. Shemesh agreed that the claimant suffered a permanent impairment, and assessed a whole person impairment of 15% due to the claimant's consistent headaches and cognitive difficulties. However, Dr. Shemesh did not agree with Dr. Fay's recommendations for maintenance medical treatment. In his DIME report, Dr. Shemesh noted that the claimant's condition had stabilized and opined that further medical treatment would not likely improve the claimant's condition.

21. Dr. Shemesh's testimony at hearing was consistent with his written report. Dr. Shemesh testified that a mild traumatic brain injury like the one sustained by the claimant will typically stabilize within six to twelve months. Dr. Shemesh noted that Dr. Bowen's testing of the claimant indicated that the claimant was within normal limits in June 2017.

22. On December 6, 2017, the respondents filed a Final Admission of Liability (FAL) admitting for the MMI date of June 9, 2017 and the impairment rating of 15% whole person. Based upon Dr. Shemesh's report, the respondents did not admit for maintenance medical treatment.

23. The claimant testified that he continues to have "ice pick" headaches and issues with short term memory. The claimant also testified that he is currently working full time as an apprentice plumber, despite these ongoing symptoms.

24. The claimant testified that physical therapy treatment would "trigger" his headaches. As the ALJ understands the claimant's testimony, by triggering headaches, the physical therapy had the effect of lessening the occurrence of the claimant's headaches. However, the medical records indicate that the claimant told his medical providers that he felt that physical therapy was making his symptoms worse.

25. The claimant's spouse provided testimony at hearing that was consistent with the claimant's testimony.

26. The ALJ credits the medical records and the opinion of Dr. Shemesh over the contrary opinion of Dr. Fay and finds that the claimant has failed to demonstrate that it is more likely than not that the recommended post-MMI medical treatment will prevent further deterioration of the claimant's physical condition. On the contrary, the ALJ finds that it is more likely that the recommended medical treatment, particularly injections and physical therapy, will have the effect of worsening the claimant's condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

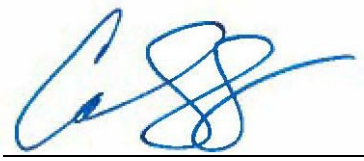
3. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

4. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the recommended post-MMI medical treatment will prevent further deterioration of the claimant's physical condition. As found, it is more likely that the recommended treatment will worsen the claimant's condition. As found, the medical records and the opinion of Dr. Shemesh are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for maintenance medical treatment is denied and dismissed.

Dated: May 10, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she is now entitled to additional medical benefits to cure and relieve the effects of her January 21, 2015 work injury?

II. Has Claimant shown, by a preponderance of the evidence, that she is now entitled to maintenance medical benefits (*Grover* medical benefits), to maintain her MMI status, which had been reached on February 4, 2015?

STIPULATIONS

The parties stipulated that if such medical benefits are awarded, they would be paid according to the established Workers Compensation Fee Schedule. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant was working for Employer as a front end supervisor, operating a checkout cash register on January 21, 2015, when she was struck in the lower back by an empty shopping cart being moved behind her by a co-worker. Claimant reported this claim to Employer on January 23, 2015 (Ex. F).

2. Claimant testified that she initially tried to take care of her symptoms of pain by resting, and taking Tylenol, while she had two days scheduled time off of work. Claimant then presented to the emergency room at Parkview Medical Center ("Parkview") on January 23, 2015, at 3:04 p.m. (Ex. B, pp. 29-30). She reported pain on the right side of her low back. X-ray films ruled out fracture or subluxation, and revealed no acute injury. The X-rays did show "*Chronic severe* L5-S1 intervertebral disc degeneration." (Ex. B, p. 34) (emphasis added).

3. The emergency room's assessment was, "Symptoms are likely due to localized inflammation where the patient was struck." Claimant had also been unknowingly exacerbating her symptoms by using heat packs to her low back area (*Id* at p. 31). She was given one dose of morphine, and a single oral dose of oxycodone-acetaminophen. Claimant was discharged in good condition, with the diagnosis of, "[A] low back contusion." (*Id* at. 31) Claimant continued to work for Employer at her regular job and missed no time from work due to this claim's injury.

4. Claimant's first appointment at CCOM was on January 26, 2015. She said

her symptoms were improving. Mr. Steven Byrne, P.A.-C., said Parkview's examination of Claimant on January 23, 2015, "[W]as essentially negative and the diagnosis was a contusion to the low back." Claimant could move without difficulty, and her exam was, "[M]ildly positive for discomfort." She walked and moved without difficulty. P.A. Byrne thought claimant would reach MMI by her next appointment on February 4, 2015, and gave her no restrictions. He told her to take Motrin as needed (Ex. A, pp. 1-9).

5. Claimant returned to CCOM on February 4, 2015. She said her pain was better, and was now a 2 on a 10-point pain scale. She could work her normal duties without difficulty, and, "[S]he says she has a slight twinge of discomfort occasionally but overall is improved and back to normal." Claimant said she could twist, walk, and bend without difficulty. She moved normally in the exam, and provocative tests were all negative. Claimant reported she was, "[F]eeling considerably better and able to do her normal work without any difficulty." (Ex. A, p. 10).

6. Claimant said, "[She is feeling remarkably improved and has minimal if any discomfort. She'll do her normal work without any difficulty. She can twist and walk without any pain. She feels that she is read[y] to be release to return to normal work." (*Id* at 12). Claimant's diagnosis was a low back contusion, and she was discharged at MMI, without impairment, without restrictions, and with no need for maintenance medical treatment. Dr. Daniel Olson at CCOM agreed with P.A. Byrne's assessments and conclusions (Ex. A, p. 15).

7. Douglas Scott, M.D. evaluated Claimant to assess her low back condition on January 5, 2016, for a similar incident which reportedly occurred on July 16, 2015. He concluded Claimant had a, "[M]inor soft tissue" contusion from the January 21, 2015, incident that, "[R]esolved very quickly." (Ex. C, p. 61) Dr. Scott said Claimant did not require any further medical treatment for her January 21, 2015, injury, and that there was no need for any maintenance medical treatment for this claim's injury (Ex. C, p. 62).

8. At hearing, Claimant admitted that she began taking Mobic in 2012, and that she had experience chronic low back pain for five years before she saw Dr. Michelle Duran on December 6, 2009. She would take Tylenol, Aleve, and Ibuprofen for her back pain since 2004. She testified that she did limit her activities and was careful to avoid activities and tasks that would make her back pain worse since 2004. She testified that she carried heavy items while working at Walgreens' store, and cited this job when explaining her prior low back pain. Claimant in her direct examination testified that her pain in her low back had been ongoing, never being pin-free since January 21, 2015, with low back pain rated as "2" to "8" on a 10-point pain scale daily leading up to her second injury of 7/16/15.

9. However, while pursuing a claim for the alleged similar subsequent incident which reportedly occurred on 7/16/15 (which was subsequently denied after a hearing), Claimant provided answers to interrogatories (Ex. O). Interrogatory #9 yielded the following question and answer:

Q: Please disclose and describe in detail all the symptoms you experienced in or about the body parts allegedly injured in this claim at any time before your injury alleged in this claim occurred for any reason. In your answer, state the symptoms you had, why and how the symptoms arose, how you addressed and treated the symptoms, how the symptoms affected your activities and work, and medical treatment you received for the symptoms, how long the symptoms lasted, and the full name and address of any medical providers you saw for treatment for evaluation of the symptoms disclosed in your answer to this interrogatory.

A: I had *mild* back pain and stiffness due to a similar incident that occurred on *January 21, 2015*, when I was struck with a shopping cart by another co-worker. I was having a *slight twinge* of discomfort *occasionally.* (emphasis added).

10. On December 6, 2009, Claimant saw Michelle Duran, M.D. at Touchstone Health West. Claimant complained at this time of pain in her hips, knees, ankles, and toes, and said, "She is having back pain." She was referred for lab tests including Rheumatoid factor. (Ex. E, pp. 76-77). Claimant had an x-ray of her lumbosacral spine on December 29, 2009. That exam revealed degenerative disc disease at L5-S1 (Ex. E, p. 78).

11. On December 21, 2012, Claimant returned to Touchstone Health West, saying she had pain in her legs every day, and arthritis in her spine. Her pain was getting worse, and had been a problem for the past five years. She was taking 7.5 mg of Mobic, and Dr. Debra Jean McCormack told her to try Celebrex instead for her arthritis pain. Dr. McCormack's diagnoses included chronic osteoarthritis. (Ex. E, pp. 79-82).

12. On July 8, 2013, Claimant told her provider, Mr. Terry Schwartz, P.A.-C. at Southern Colorado Clinic, P.C., "'[m]y spine hurts.'" She reported tenderness in upper lumbar region. (Ex. D, pp. 64-66). On January 29, 2014, Claimant told Ms. Deborah Lynn Chase, F.N.-P. at Touchstone Health West that she was having "Ache, Constant" in many areas of her body including specifically her back, hand, hip, neck and knees. The duration of these pains had been, "Chronic. Years." (Ex. E, p. 84). When Ms. Chase examined her spine, ribs, and pelvis she noted decreased range of motion and decreased muscle strength/tone. Claimant claimed Celebrex she had been taking for her pain symptoms was causing swelling. She changed to an increased dose of Celexa (Ex. E, pp. 83-87).

13. Claimant surgical history showed a "Nerve block in back 2010," when she saw her personal medical provider Mr. Jack Hall, P.A.-C. at Parkview Family Medicine on May 27, 2015. She was back to taking Celebrex (Ex B, p. 35). The medical report authored by Mr. Hall from this visit does not mention this claim's injury, and Mr. Hall's report states Claimant had, "back pain radiating down legs, *no history of trauma*." (Resp. Ex. B, pg. 35). (emphasis added).

14. As noted, Claimant alleged she sustained another similar workplace injury on July 16, 2017. Medical records documenting that claim's medical treatment show Claimant's objective findings were inconsistent with the claimed injury, and that the mechanism of injury in that claim was unlikely to be responsible for her current symptomatology (Ex. A, pp. 22, 25). Dr. Scott opined in his report, and during his hearing testimony summarized in Exhibit N, that Claimant sustained a minor contusion that quickly resolved. Claimant's symptoms were instead due to, and explained by, her chronic, long-standing severe lumbar spine degenerative disease.

15. Claimant also underwent an MRI on June 13, 2015. This MRI confirmed Claimant had degenerative changes in her lumbar spine, including the L5-S1 disc and endplate changes (Ex. B, pg. 37). Claimant was referred by Dr. Hall to Jan G. Davis, M.D. Dr. Davis saw Claimant on June 13, 2016. Dr. Davis took an x-ray of claimant's lumbar spine, that was interpreted to show:

> ….Patient does have some degenerative changes at the lower 2 motion segments. There is flattening of the L5-S1 disc space and some disc osteophyte complex at that level. At L4-5, she is beginning to demonstrate a very slight degenerative spondylolisthesis. (Ex. B, p. 42).

16. Dr. Davis also viewed Claimant's lumbar spine MRI of June 13, 2015 and diagnosed Claimant with "Spondylosis of lumbar region without myelopathy or radiculopathy." Claimant did report that her low back symptoms were due to this claim, and also Claimant's subsequent injury of July 16, 2015. Dr. Davis, however, concluded Claimant's symptoms were due to her long-standing degenerative lumbar spine condition. He said Claimant's degenerative spondylolistheses was not due to this claim's injury. He wrote, "I did show her low-grade degenerative spondylolisthesis and made it very clear that I have never seen this entity occur as a result of recent trauma. This is well described as a purely degenerative condition." (Ex. B, p. 43). "We also went over her MRI scan. I showed her the small disc protrusion at L5-S1 and pointed out that this is on the left side of her spine which does not correlate well with the primary lower extremity symptoms going into her right leg." (*Id* at p. 43). Despite this discussion, at hearing on cross-examination, Claimant acknowledged that in her interrogatory answer #3 for this case, she stated that she had never sought treatment for her lower back prior to this injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The

facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

D. C.R.S. § 8-42-101 (1) (a) provides that Respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (May 4, 2007). Therefore, Claimant is not entitled to medical care that is not causally related to her work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

E. To satisfy her burden of proof, Claimant must prove that the industrial accident is the proximate cause of claimant's need for medical treatment or disability. § 8-41-301 (1) (c), C.R.S. An industrial accident is the proximate cause of a Claimant's

need for medical treatment if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988) The question of whether Claimant had proven a causal relationship between employment and the alleged injury or disease is one of fact for determination of the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a Claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

F. The ALJ finds Claimant to be less than persuasive. When Claimant provided her interrogatory answers in her second Workers Comp claim, she stated quite clearly that the first incident (at issue herein) only caused mild back pain with a "slight twinge of discomfort occasionally." At hearing, Claimant stated that her pain levels between her first and second injury varied between a "2" and "8" out of 10, and that she was never pain free. In her interrogatory answers #3 for this claim, she stated that she had never before sought treatment for her back, despite being counseled by her physician about her degenerative lower back condition. When pressed for details, Claimant could only state that she could not recall. At one point in testimony, Claimant stated that her pain was worse after her second alleged injury, but that the pain from that second injury had now resolved.

G. The opinions of Claimant's medical providers at CCOM are found credible and persuasive. The ALJ finds Claimant had returned to her baseline for her contusion caused by the January 21, 2015, work incident covered by this claim on February 4, 2015, and all symptoms causally related to Claimant's January 21, 2015, injury had fully resolved by her MMI date of February 4, 2015. Claimant's injury causally related to the January 22, 2015, work incident covered by this claim was a lower back contusion only. This contusion had fully resolved without residual symptoms or need for medical treatment on February 4, 2015. Any need for continued medical treatment results from her low back symptoms, present since 2004, and her degenerative lumbar spine changes.

Maintenance Medical Benefits

H. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits, also referred to as maintenance medical benefits, is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992

P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995).

I. A Claimant may receive maintenance medical benefits that are reasonable, necessary and related to relieve the effects of a claimant's industrial injury or prevent further deterioration of the claimant's condition. See §8-42-101(1) (a), C.R.S.; *Grover v. Industrial Commission*, *supra.* However, the burden of proof to establish entitlement to these benefits is on the Claimant. In order to receive such benefits, the Claimant must present substantial evidence that future medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. See *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003); *Stollmeyer v. Industrial Claim Appeals Office, supra*. Section 8-42-101, C.R.S., authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra* The question of whether the Claimant met the burden of proof to establish entitlement to maintenance medical benefits is one of fact for determination by the ALJ. Holly Nursing Care Center v. Industrial Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999).

J. The ALJ finds that, as concluded above, Claimant requires no medical treatment to maintain her MMI status. She reached MMI on February 4, 2015, without need for any maintenance treatment. She was able to work without restrictions from the minor contusion causally related to this claim, and needs no further treatment for this January 21, 2015, work injury.

ORDER

It is therefore ordered that:

1. Claimant’s claim for any additional curative or maintenance medical benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 10, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits that are designed to relieve the effects of her May~~arch~~ 13~~19~~, 2016~~4~~ industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

2. Whether Claimant has made a "proper showing" for a change of physician to Katarzyna Kocol, M.D. pursuant to §8-43-404(5)(a), C.R.S.

FINDINGS OF FACT

1. Claimant worked as a Dental Technician for Employer. On May 13, 2016 Claimant was injured in a motor vehicle accident while returning to work after delivering dental supplies. Although Respondents initially contested the claim, Respondents filed a General Admission of Liability (GAL) on December 28, 2016.

2. Claimant initially received medical treatment from chiropractor Clinton Dickason, D.C. She reported neck and back symptoms as a result of the May 13, 2016 motor vehicle accident. Claimant had been receiving treatment from Dr. Dickason since 2013 for areas including the cervical and lumbar spines.

3. Claimant subsequently sought to designate J. Scott Bainbridge as her Authorized Treating Physician (ATP). Respondents approved the request and Claimant visited Dr. Bainbridge on September 19, 2016. Claimant reported injuries to her knees and left shoulder as well as "cervical and thoracolumbar pain." She specifically noted that her bilateral knee cap pain was aggravated by walking, standing and having her knees bent for a long time. A knee examination revealed left patellofemoral pain with compression that involved crepitus. The right knee produced less pain without crepitus. Dr. Bainbridge diagnosed patellofemoral disorder and prescribed medications.

4. On December 12, 2016 Claimant underwent MRI's of both knees. The left knee MRI revealed "Grade 2-3 patellar chondral softening and high-grade fissuring, likely extending to bone, along the median ridge and medial facet, with mild subchondral cystic change. Grade 2-3 inferior central and medial trochlear chondral thinning and probable fissuring to bone…" The right knee MRI reflected "Grade 2-3 patellar chondral softening with high-grade fissuring, possibly to bone, along the median ridge and medial facet. Grade 2-3 central trochlear chondral fissuring, possibly to bone…"

5. Claimant subsequently changed physicians to ATP John Hughes, M.D. On January 25, 2017 Claimant visited Dr. Hughes for an evaluation. Claimant reported

bilateral knee pain in the patellofemoral region that increased with walking. Dr. Hughes diagnosed right and left knee chondromalacia "probably stemming from" Claimant's May 13, 2016 motor vehicle accident. He did not provide treatment for Claimant's knees but referred her to Phillip Stull, M.D. for a surgical evaluation.

6. On March 7, 2017 Claimant visited Dr. Stull for an examination. Claimant recounted that she struck both of her knees on the dashboard during a work-related motor vehicle accident approximately one year earlier. She reported persistent bilateral knee pain behind her kneecaps. On physical examination Dr. Stull noted bilateral mild to moderate retropatella compression tenderness. After reviewing Claimant's MRI's and performing x-rays, Dr. Stull diagnosed patellofemoral arthritis and chondromalacia of both knees. He recommended conservative treatment in the form of injections and physical therapy.

7. On April 7, 2017 Dr. Hughes determined that Claimant reached Maximum Medical Improvement (MMI). Dr. Hughes remarked that Claimant had received no benefit from the physical therapy recommended by Dr. Stull and he did not have any other treatment recommendations. He noted that Claimant continued to suffer bilateral knee pain. Dr. Hughes diagnosed right and left chondromalacias patella. In addition to cervical and lumbar spine impairment ratings, Dr. Hughes assigned a 7% extremity rating for Claimant's right knee and a 10% rating for her left knee. The knee ratings were based on "traumatic chondromalacia patella" combined with loss of range of motion. Dr. Hughes released Claimant to full duty work and did not recommend medical maintenance treatment. He commented that Claimant did not wish to proceed with cervical spine injections and "there really is not that strong an indication to proceed with cervical spine injection-based treatment."

8. On May 17, 2017 Claimant underwent an independent medical examination with Marc Steinmetz, M.D. Dr. Steinmetz concluded that Claimant did not suffer any permanent impairment as a result of her May 13, 2016 motor vehicle accident. He noted that Claimant had provided inconsistent histories to multiple medical providers concerning pre-existing spinal issues and medication usage. Although Claimant exhibited loss of range of motion in both knees, the measurements conflicted with his observations. Thus, Dr. Steinmetz concluded that range of motion testing was invalid.

9. Respondents challenged Dr. Hughes' impairment determinations and sought a Division Independent Medical Examination (DIME). On September 5, 2017 Claimant underwent a DIME with Richard Stieg, M.D. Dr. Stieg agreed with Dr. Hughes that Claimant had reached MMI on April 7, 2017. He determined that Claimant's cervical and lumbar spine complaints constituted mild degenerative changes and were not related to her May 13, 2016 industrial injury. However, he diagnosed "bilateral osteoarthritis of the knees with bilateral patellofemoral chondromalacia." He specified that "the latter is related to [Claimant's] motor vehicle accident" of May 13, 2016. Dr. Stieg assigned a 26% extremity impairment rating for Claimant's right knee and a 29% extremity rating for her left knee. He did not recommend medical maintenance

treatment because Claimant "failed conservative therapy for her chondromalacia of the knees."

10. On October 31, 2017 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Stieg's MMI and impairment determinations. The FAL specified that Claimant reached MMI on April 7, 2017 with a 26% scheduled impairment of the right knee and a 29% scheduled rating of the left knee. Respondents denied liability for medical maintenance benefits.

11. Claimant subsequently sought medical treatment outside of the Workers' Compensation system with her primary care physician. Her primary care physician referred her to Katarzyna Kocol, M.D. On July 17, 2017 Claimant visited Dr. Kocol for an examination. Claimant reported persistent neck, mid-back, lower back and bilateral knee pain that she attributed to her May 13, 2016 motor vehicle accident. Dr. Kocol remarked that Claimant had received corticosteroid injections into her knees "which did not provide any relief." After reviewing imaging studies, Dr. Kocol recommended medications, lumbar spine injections and physical therapy.

12. On August 21, 2017 Claimant returned to Dr. Kocol for an evaluation. Dr. Kocol noted that Claimant might require maintenance physical therapy, injections and pain management for the following two to three years.

13. Claimant continued to visit Dr. Kocol over the ensuing months. Dr. Kocol administered a series of three left and right knee injections. However, the knee injections did not provide any benefit. Claimant also received physical therapy during the period.

14. On December 8, 2017 Dr. Kocol responded to written questions from Claimant's attorney. Dr. Kocol confirmed that she was treating both of Claimant's knees for the effects of the May 13, 2016 work-related motor vehicle accident. She remarked "injections [with] conservative treatment are performed to treat pain associated with injuries."

15. Dr. Kocol referred Claimant to orthopedic surgeon Anthony Sanchez, M.D. for her knee injuries. On January 25, 2018 Claimant visited Dr. Sanchez for an evaluation. Dr. Sanchez noted that Claimant had been suffering bilateral knee pain since she struck her knees on a dashboard during a May 13, 2016 motor vehicle accident. After reviewing radiographic imaging Dr. Sanchez recommended bilateral "knee scopes with LR and medial plica excision since she has failed months of conservative treatments."

16. On February 9, 2018 Dr. Sanchez performed arthroscopic surgery on Claimant's knees. He removed medial plicas from both knees and noted grade 2 chondromalacia under Claimant's patellas. Dr. Sanchez also released the lateral retinaculum in both knees to improve patella tracking.

17. On March 6, 2018 Dr. Steinmetz issued an addendum report after reviewing supplemental medical records. He maintained that Claimant did not suffer

any permanent impairment as a result of her May 13, 2016 motor vehicle accident. Dr. Steinmetz agreed that Claimant reached MMI on April 7, 2017 and did not require any medical maintenance treatment.

18. Claimant testified at the hearing in this matter. She explained that her surgeries have helped her knees. Specifically, Claimant no longer suffers sharp, shooting pain when walking. She summarized that her knees are approximately 80% better than before her February 9, 2018 surgery.

19. Dr. Steinmetz also testified at the hearing in this matter. He reiterated that Claimant reached MMI on April 7, 2017 and did not require medical maintenance treatment. Dr. Steinmetz noted that the Plica conditions found by Dr. Sanchez were not present on Claimant's December 1, 2016 MRI and multiple providers had not made the diagnosis. Moreover, the chronic, degenerative changes of the chondromalacia were not caused by the May 13, 2016 motor vehicle accident. Dr. Steinmetz summarized that Claimant's current care for her knees is not reasonable, necessary or causally related to her work-related motor accident.

20. Claimant has failed to demonstrate that it is more probably true than not that she is entitled to receive reasonable, necessary and related medical maintenance benefits that are designed to relieve the effects of her May~~arch~~ 13~~19~~, 2016~~4~~ industrial injury or prevent further deterioration of her condition. The bulk of the persuasive medical records reflect that medical maintenance treatment is not warranted. Initially, in addition to cervical and lumbar spine impairment ratings, Dr. Hughes assigned a 7% extremity rating for Claimant's right knee and a 10% rating for her left knee. The knee ratings were based on "traumatic chondromalacia patella" combined with loss of range of motion. However, Dr. Hughes released Claimant to full duty work and did not recommend medical maintenance treatment. Furthermore, DIME Dr. Stieg agreed with Dr. Hughes that Claimant had reached MMI on April 7, 2017. He determined that Claimant's cervical and lumbar spine complaints constituted mild degenerative changes and were not related to her May 13, 2016 industrial injury. However, he diagnosed "bilateral osteoarthritis of the knees with bilateral patellofemoral chondromalacia." He specified that "the latter is related to [Claimant's] motor vehicle accident" of May 13, 2016. Although Dr. Stieg assigned extremity impairment ratings for Claimant's knees, he did not recommend medical maintenance treatment because Claimant "failed conservative therapy for her chondromalacia of the knees." Finally, Dr. Steinmetz also agreed that Claimant reached MMI on April 7, 2017 and did not require medical maintenance treatment. Dr. Steinmetz noted that the Plica conditions found by Dr. Sanchez were not present on Claimant's December 1, 2016 MRI and multiple providers had not made the diagnosis. Moreover, the chronic, degenerative changes of the chondromalacia were not caused by the May 13, 2016 motor vehicle accident. Dr. Steinmetz summarized that Claimant's current care for her knees is not reasonable, necessary or causally related to her work-related motor accident.

21. In contrast, Dr. Kocol noted that Claimant might require maintenance physical therapy, injections and pain management for the following two to three years. Moreover, Dr. Sanchez performed surgery on both of Claimant's knees and removed

medial plicas. Claimant explained that the surgeries have helped her knees. Specifically, she no longer suffers sharp, shooting pain when walking. However, the persuasive medical evidence from Drs. Hughes, Stieg and Steinmetz demonstrates that medical maintenance treatment is not reasonable or related to Claimant's work-related motor vehicle accident. Accordingly, Claimant's request for medical maintenance benefits is denied and dismissed.

22. Claimant has failed to make a proper showing for a change of physician to Dr. Kocol. The record reflects that Claimant is requesting her third change of physician. She previously requested changes to Dr. Bainbridge and later to Dr. Hughes. Respondents authorized both requests. Claimant has failed to produce persuasive evidence that she reasonably developed a mistrust of Dr. Hughes. She has also failed to produce sufficient evidence that Dr. Hughes provided inadequate care or otherwise rendered unreasonable care. Disagreement and dissatisfaction with Dr. Hughes' diagnosis are insufficient to constitute a proper showing warranting a change of physician. Accordingly, considering Claimant's need for reasonable and necessary medical treatment while protecting Respondents' interest in being apprised of the course of treatment for which it may ultimately be liable, Claimant's request for a change of physician to Dr. Kocol is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical Maintenance Benefits

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits that are designed to relieve the effects of her May~~arch~~ 13~~19~~, 2016~~4~~ industrial injury or prevent further deterioration of her condition. The bulk of the persuasive medical records reflect that medical maintenance treatment is not warranted. Initially, in addition to cervical and lumbar spine impairment ratings, Dr. Hughes assigned a 7% extremity rating for Claimant's right knee and a 10% rating for her left knee. The knee ratings were based on "traumatic chondromalacia patella" combined with loss of range of motion. However, Dr. Hughes released Claimant to full duty work and did not recommend medical maintenance treatment. Furthermore, DIME Dr. Stieg agreed with Dr. Hughes that Claimant had reached MMI on April 7, 2017. He determined that Claimant's cervical and lumbar spine complaints constituted mild degenerative changes and were not related to her May 13, 2016 industrial injury. However, he diagnosed "bilateral osteoarthritis of the knees with bilateral patellofemoral chondromalacia." He specified that "the latter is related to [Claimant's] motor vehicle accident" of May 13, 2016. Although Dr. Stieg assigned extremity impairment ratings for Claimant's knees, he did not recommend medical maintenance treatment because Claimant "failed conservative therapy for her chondromalacia of the knees." Finally, Dr. Steinmetz also agreed that Claimant reached MMI on April 7, 2017 and did not require medical maintenance treatment. Dr. Steinmetz noted that the Plica conditions found by Dr. Sanchez were not present on Claimant's December 1, 2016 MRI and multiple providers had not made the diagnosis. Moreover, the chronic, degenerative changes of the chondromalacia were not caused by the May 13, 2016 motor vehicle accident. Dr. Steinmetz summarized that Claimant's current care for her knees is not reasonable, necessary or causally related to her work-related motor accident.

6. As found, in contrast, Dr. Kocol noted that Claimant might require maintenance physical therapy, injections and pain management for the following two to three years. Moreover, Dr. Sanchez performed surgery on both of Claimant's knees and removed medial plicas. Claimant explained that the surgeries have helped her knees. Specifically, she no longer suffers sharp, shooting pain when walking.

However, the persuasive medical evidence from Drs. Hughes, Stieg and Steinmetz demonstrates that medical maintenance treatment is not reasonable or related to Claimant's work-related motor vehicle accident. Accordingly, Claimant's request for medical maintenance benefits is denied and dismissed.

Change of Physician

7. A claimant is not entitled to medical treatment by a particular physician. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Vigil v. City Cab Co.,* W.C. No. 3-985-493 (ICAP, May 23, 1995). Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAP, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAP, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, W.C. No. 4-570-904 (ICAP, June 19, 2006).

8. As found, Claimant has failed to make a proper showing for a change of physician to Dr. Kocol. The record reflects that Claimant is requesting her third change of physician. She previously requested changes to Dr. Bainbridge and later to Dr. Hughes. Respondents authorized both requests. Claimant has failed to produce persuasive evidence that she reasonably developed a mistrust of Dr. Hughes. She has also failed to produce sufficient evidence that Dr. Hughes provided inadequate care or otherwise rendered unreasonable care. Disagreement and dissatisfaction with Dr. Hughes' diagnosis are insufficient to constitute a proper showing warranting a change of physician. Accordingly, considering Claimant's need for reasonable and necessary medical treatment while protecting Respondents' interest in being apprised of the course of treatment for which it may ultimately be liable, Claimant's request for a change of physician to Dr. Kocol is denied and dismissed. *See In Re Loza*, W.C. No. 4-712-246 (ICAP, Jan. 7, 2009) (affirming ALJ's denial of request for a change of physician because the claimant failed to present persuasive evidence that he developed a mistrust of the treating physician because the physician only treated him for his neck instead of for his head).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

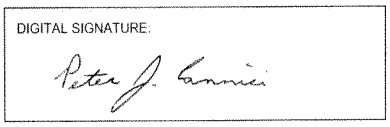
1. Claimant's request for medical maintenance benefits for her May 13, 2016 industrial accident is denied and dismissed.

2. Claimant's request for a change of physician is denied and dismissed.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 9, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that a spinal cord stimulator ("SCS") implanted by Dr. Giancarlo Barolat on August 15, 2017 was reasonably necessary and causally related to her admitted October 2009 injuries?

- Was Dr. Barolat's request for authorization of the SCS "deemed authorized" under WCRP 16-11(E) because Respondents did not comply with WCRP 16-11(B)(3)(a)-(d)?

- Should Respondents be penalized under WCRP 16-11(F) for unreasonably refusing to authorize the SCS?

- Are Respondents entitled to change Claimant's ATP?

FINDINGS OF FACT

1. Claimant suffered admitted injuries on October 26, 2009, while working as an emergency medicine physician for Employer. She slipped on icy concrete stairs and fell onto her back.

2. At the time of her injury, Claimant was concurrently employed as a traveling physician with Concord Medical Group. In that job, she traveled out-of-state to work at rural emergency rooms in Texas.

3. After the October 26 accident, Claimant was evaluated at Employer's nearby family practice clinic. There is minimal documentation of her treatment, presumably because Claimant was an employee rather than a standard patient. Dr. Lori Moll ordered lumbar and pelvic x-rays for "low back pain." X-rays of Claimant's lumbar spine showed scoliosis and degenerative disc disease, with no evidence of acute compression fracture or other bony injury. The pelvic x-rays were normal. Claimant was also given a "work comp drug screen," which the ALJ infers was negative since there is no evidence to the contrary.

4. Claimant did not immediately ask Employer to provide treatment because she hoped the injury would resolve with time. She saw a massage therapist and tried acupuncture on her own which helped some but did not resolve the symptoms. She continued working her regular job for Employer and the second job with Concord.

5. In February 2010, Claimant requested treatment and Employer referred her to Dr. Daniel Olson at CCOM in Pueblo. At her initial visit on February 9, 2010, Dr. Olson documented:

> She comes in today for a follow-up an injury that occurred back on October 26, 2009. . . . . She was hoping it would get better with time. She did have some radicular type symptoms initially, but those have resolved. She has been seeing a massage therapist, as well as an acupuncturist with some mild response, but no complete resolution.

6. Examination of her lumbar area showed pain and soft tissue "tightness," particularly in the left lower lumbosacral area and the upper gluteal muscles. Dr. Olson noted "these are tender and she had noticeable pain after the exam." Straight leg raising caused discomfort on the left at 40° and on the right at near full extension. Dr. Olson diagnosed thoracic and lumbar contusions "with continued pain," and opined that her "findings on exam are consistent with her mechanism of injury." He referred Claimant for physical therapy, and recommended a lumbar MRI "since it has been 4 months of pain." He prescribed tramadol and recommended that Claimant apply ice, heat, and Biofreeze.

7. Claimant had a lumbar MRI on February 18, 2010 which showed: possible left L5 and L4 nerve root compression at L4-L5 due to disc protrusion and degenerative facet hypertrophy; mild central stenosis at L3-L4 with possible bilateral L4 nerve root compression; minimal degenerative changes with no definitive nerve root compression from T-9 to L-3; and level rotatory scoliosis.

8. After reviewing the MRI, Dr. Olson recommended additional physical therapy and referred Claimant to Dr. Scott Ross for injections.

9. Claimant saw Dr. Ross on April 16, 2010. She reported "since [the accident] her pain has become prominent." She said the thoracic spine pain was improving with therapy but her low back pain was "constant." Dr. Ross diagnosed low back pain "most likely secondary to lumbosacral spondylosis." He recommended bilateral medial branch blocks at L4-5 and L5-S1 "with an eye toward rhizotomy." Claimant underwent the medial branch blocks on July 7, 2010, but they were not helpful.

10. In July 2010, Claimant transferred to the CCOM clinic in northern Colorado Springs, which was closer to her home in Monument. She saw Dr. Mary Dickson on July 21, 2010. She reported "functionally she feels very limited," and was on a leave of absence from work. Dr. Dickson noted claimant was tearful throughout much of the office visit and "frustrated secondary to her continued pain with lack of improvement." She referred Claimant to Dr. Mock for chiropractic treatment, and to Dr. Mann for "biofeedback and relaxation training and assistance with her chronic pain and frustration."

11. In August 2010, Dr. Dickson referred Claimant to Dr. Jeffrey Jenks because she was unhappy with Dr. Ross' office.

12. Dr. Jenks saw Claimant on August 19, 2010 and noted "these symptoms began following a slip and fall which occurred at work. . . . She attempted to wait it out to see if it would improve. It did not. She therefore saw Dan Olson, MD in February. Since then she has had acupuncture and physical therapy. It has not helped." She described bilateral lumbosacral pain without radiation to the lower extremities, aggravated by "most

activities." Dr. Jenks diagnosed "probable symptomatic L-3-4 and L4-5 spinal stenosis and discogenic pain." He recommended a lumbar epidural steroid injection ("ESI") and medication.

13. Over the next several months, Dr. Jenks administered ESI and facet joint injections, which provided varying levels of temporary relief.[1]

14. On November 2, 2010, Dr. Dickson referred Claimant to Dr. James Bee for a surgical evaluation "a she has now had pain for a year." Claimant preferred to see Dr. Sung instead but, for unclear reasons, the appointment never occurred. On December 9, 2010, Dr. Dickson authored a report where she confusingly stated both that Claimant "has elected to proceed with a surgical consultation" and "the patient did not want to proceed with a surgical evaluation."

15. Claimant saw orthopedic surgeon Dr. Michael Janssen on April 7, 2011 on her own referral. She told Dr. Janssen "she has been having severe low back pain ever since she had a work-related injury where she fell outside on some ice in October 2009. She has been having pain and a tingling and numbness sensation in her back and her legs ever since then." Dr. Janssen offered Claimant three treatment options: live with her symptoms, pursue further injections, or surgery. Dr. Janssen opined that surgery

> would either be a minimally invasive approach to strictly treat the stenosis at L3-4 and L4-5 or one could consider doing a fusion because I think the natural history of the L3-4 degenerative disease, collapse, and instability is going to do nothing but progress. This is a major undertaking and may impair her for some time. I did outline all the options. She has clear-cut anatomical structural abnormalities where her symptoms started secondary to the fall.

16. Dr. Janssen recommended a repeat lumbar MRI to help with decisionmaking regarding potential surgery.

17. Claimant followed up with Dr. Dickson the next day, on April 8. Dr. Dickson seemed perturbed that Claimant had seen Dr. Janssen on her own, because she had previously declined a surgical consultation arranged through CCOM. Claimant reported being "very frustrated with the quality of her life at this time. She is having difficulty with bending and running including with her work activities." Dr. Dickson saw no reason for any problems because she opined that working as an ER physician is not physically demanding. Specifically, Dr. Dickson stated "I reviewed with the patient that I had been in the emergency room physician for 13 years and my bending was extremely limited at work, as well as running, especially since she is in a lower volume emergency room. I also noted that historically while I was in the emergency room I never did any lifting at all."

[1] For example, in February 2011 she was "very pleased" with "80%" pain relief from a series of facet injections. But injections in April 2011 only provided pain relief for a day.

18. Dr. Dickson released Claimant to full duties throughout her course of care, which fits her opinion that working as an emergency room physician entails minimal physical demands.

19. Claimant had a repeat lumbar MRI on June 3, 2011, and followed up with Dr. Janssen on June 14, 2011. After reviewing her MRI films, he opined

> She has focal and severe spinal stenosis secondary to thickened ligamentum flavum and a disc herniation at the L3-4 and L4-5 levels. I think that she could probably be treated by a simple approach to make more anatomical/physiological room for her cauda equina and her nerve roots at the L3-4 and L4-5 levels with a central and sub-articular decompressive procedure. Because she has a coronal plane deformity, one could contemplate doing a fusion to stabilize this, but she does not want to have this at this time. She wants the most minimally invasive approach and realizes in the future she may need a fusion. . . . She would like to consider surgical intervention, which I think is a reasonable alternative for this underlying structural abnormality.

20. Claimant saw Dr. Bee on June 29, 2011. He did not recommend surgery because her lower extremity symptoms were not in a radicular pattern and he saw no "defined pain generator."

21. Dr. Jenks performed EMG testing in August 2011, which showed left L4 radiculopathy. He recommended another ESI, which only helped "somewhat." He referred Claimant to Dr. Gary Ghiselli for a surgical evaluation.

22. Claimant saw Dr. Ghiselli on October 25, 2011. He opined any surgery would be a multilevel fusion and recommended "that she try to avoid a large fusion if possible." Dr. Ghiselli recommended Claimant "revisit the options of facet injections, with possible medial branch blocks and rhizotomies."

23. Respondents referred Claimant for an IME with Dr. Nicholas Olson on March 22, 2012. Dr. Olson was "unable to make any sense out of the series of either the facet injections or the medial branch blockades." He opined that Claimant's symptoms resulted from "a combination of potential facet arthropathy which would be related to the 10/26/09 fall and signs of left L4 radiculopathy that are unrelated to the fall and began in June 2011." He opined Claimant was not at MMI pending "carefully performed medial branch blockades to determine if she is a candidate for radiofrequency neurotomies."

24. Dr. Jenks repeated medial branch blocks on July 23, 2012. He performed medial branch rhizotomies on July 27, 2012.

25. Dr. Jenks put Claimant at MMI on August 21, 2012 with a 9% lumbar rating. He noted "[Claimant] states her low back pain is at least 50% better following the medial branch rhizotomies. She is very happy with this. Her leg pain is gone following an epidural injection. She has been attempting to reduce her use of Dilaudid."

26. Claimant suffered a severe flare after being placed at MMI, so Dr. Jenks referred her to Dr. Stephen Shogun for another surgical evaluation. Dr. Shogun recommended that she continue conservative treatment "and leave surgery as only a very last resort."

27. Claimant saw Dr. Thomas Higginbotham for a Division IME on March 7, 2013, who opined she was not at MMI. He recommended a repeat EMG and further investigation of surgical options. Respondents filed a General Admission authorizing additional treatment based on the DIME.

28. On December 12, 2013, Dr. Jenks noted "[Claimant] does not want to increase her pain medication, but is wondering if there are other options for controlling her pain." He referred Claimant to Dr. Mark Meyer for evaluation of spinal cord stimulation.

29. Claimant saw Dr. Meyer on January 22, 2014, who documented "she really has a poor quality of life. She relates being bedridden about 80% of the time. When she gets up, she has a severe increase of pain with walking or standing any period of time, and really any activity is poorly tolerated." Dr. Meyer concluded "she has exhausted all of her reasonable options. She is not at a point where she wants to consider anything surgically in the immediate future. . . . I agreed that spinal cord stimulation would be a very reasonable treatment modality for her. I did explain to her that there is a higher predictive likelihood with radicular pain, and she has predominately low back pain. . . . She does seem by my impression psychologically well fit to proceed."

30. Dr. Jenks referred Claimant for another surgical consultation in February 2015, this time with Dr. Roger Sung. Dr. Sung reported "she has had ongoing low back pain with radiating pain down her leg. It is about 80% back pain and 20% pain down her leg." He documented "she is now taking a Fentanyl patch and this does control her pain somewhat. She does not take anti-inflammatories secondary to a GI bleed." Dr. Sung requested a new MRI before deciding whether to recommend surgery.

31. Respondents sent Claimant to an IME with Dr. Hugh Macaulay on April 7, 2015. Claimant told Dr. Macaulay her pain was bad enough to require the use of a cane or walker, and she was using a wheelchair at the IME. Dr. Macaulay opined Claimant's ongoing symptoms were due to degenerative pathology and were unrelated to her industrial accident.

32. Claimant returned to Dr. Sung in March 2016 and reported "90% low back pain, and 10% bilateral buttock and leg pain." He did not think a fusion surgery was a good option since she primarily had back pain rather than leg symptoms. He was also concerned that Claimant's high level of perceived disability was not poor prognostic indicator. He stated, "I have referred her for a spinal cord stimulator trial. I explained to her that I don't think this is a perfect option. But in terms of a simple option to give her some pain relief, it could be more reliable than a multilevel fusion."

33. A few weeks later, on March 28, 2016, Dr. Jenks noted, "[Claimant] continues with the low back pain and bilateral leg pain, which is unchanged. She has

seen Dr. Sung who did not recommend surgery, but did recommend referral for a spinal cord stimulator. . . . I agree that [Claimant] should be evaluated for a spinal cord stimulator. I have referred her back to Dr. Meyer for this."

34. On May 9, 2016, Dr. Meyer requested preauthorization of a spinal cord stimulator trial. Respondents had the preauthorization request reviewed by Dr. Anant Kumar, a spine surgeon, who recommended the stimulator trial be denied as inconsistent with the medical treatment guidelines.

35. Claimant saw Glenn Kaplan, Ph.D. on September 7, 2016 for a psychological evaluation in connection with the stimulator trial. Dr. Kaplan opined "she appears to be capable of handling the psychological and physical discomfort that may accompany any medical procedure. There is little likelihood that she will use prescribed medication in an inappropriate or dangerous manner. . . . Based on the results from this test there are no signs of psychological problems that would interfere with this patient pursuing the stimulator procedure. [Claimant] is an appropriate candidate for the neurostimulator procedure for chronic pain management."

36. Dr. Floyd Ring performed an IME on May 17, 2016 at Respondents' request. His report focused primarily on his significant concerns regarding potential addictive behavior, escalating narcotic use and potential medication abuse. He recommended that Claimant "undergo a comprehensive independent psychiatric examination with appropriate psychometric testing to address possible addictive behavior, secondary gain issues, or symptom magnification."

37. On September 23, 2016, Dr. Jon Erickson he issued a Physician Advisor opinion for Respondents regarding the SCS trial. He opined

> We are now fielding the third request for the use of a trial of a spinal cord stimulator. . . . As per the Medical Treatment Guidelines, she clearly does not satisfy the criteria for the use of the device based on the location of her discomfort and its nature. It therefore would be well within reason to recommend a denial of this request. . From the standpoint of trying to assist this woman with her pain in whatever way possible, I do believe that we can swing a deal, so to speak. I would give [Claimant] three months with the assistance of her managing pain physician . . . to enable a significant reduction in her opioid usage. If that can be documented within a three-month period of time, then I would vigorously recommend an approval of a trial of a spinal cord stimulator.

38. Respondents authorized the trial SCS, and Dr. Meyer implanted it on November 1, 2016. He removed the trial SCS on November 7, 2016. His report documents:

> She is 6 days status post SCS bilateral 1/8 Boston Scientific lead placement and has had excellent improvement in her pain over the last 5 days including her low back up to the L4 which was initially difficult to capture

during the trial. She . . . has had such great relief that she does not want to allow the leads to be removed today. Tolerated the stim well with improved function. Will send her to Dr. Barolat for permanent implantation.

39. Dr. Barolat evaluated Claimant on January 11, 2017. He noted,

> We recently performed a trial of spinal cord stimulation. The patient experienced excellent relief from her pain. She was able to stand better, walk better, and be more functional. The trial was therefore very successful. . . . I should mention that prior to the spinal cord stimulation trial the patient has undergone very extensive treatment, including acupuncture, physical therapy, chiropractic manipulation, stem cell injections,[2] rhizotomies, and cortisone injections. Out of all those procedures, the one that has helped the most has been the spinal cord stimulation trial.
>
> I reviewed a recent MRI of the lumbar spine. . . . I can see how the extent of her degenerative disease, which affects the whole lumbar spine, would be difficult to correct and would most likely require a substantial surgical procedure.
>
> IMPRESSION: This very nice lady is suffering from a chronic, severe, intractable, and incapacitating low back pain. She has been through innumerable treatments. The only modality that has really helped her substantially has been the spinal cord stimulation trial. I think she would be an ideal candidate for the implantation of the permanent system.

40. Dr. Barolat's office faxed a request for preauthorization of the permanent SCS to Insurer at 5:01 PM on January 17, 2017. Insurer had the request reviewed by Dr. Janssen acting as a Physician Advisor. There is no indication Dr. Janssen recalled his prior evaluations of Claimant, and the tenor of his opinions was substantially different than when he evaluated her as his patient. Dr. Janssen opined:

> Due to the complexity of this patient having this trivial injury of a fall dating back now to almost seven years ago, this 60-year-old female appears to have chronic low back conditions with chronic facet arthropathy and multilevel degenerative changes in addition. There is no indication of a true neuropathic pain pattern or a neuropathic abnormality that clearly correlates with any underlying anatomical condition. . . . [I]t does not appear that this patient meets any reasonable criteria for further intervention, specifically that of an implantable spinal cord stimulator.

41. On January 23, 2017, Insurer's Medical Case Manager, Harry White, sent a letter to Dr. Barolat's office denying authorization and attaching a copy of Dr. Janssen's Physician Advisor note. Mr. White copied all parties on the notice, and no party has denied

[2] Claimant saw Dr. Centeno at her own expense for stem cell treatment.

receiving it. Mr. White also called Dr. Barolat's office on January 23 and verbally informed Dr. Barolat's assistant the request was denied.

42. Claimant started treating at Colorado Clinic in early 2017 after Dr. Jenks ceased practicing medicine. Initially, she was unhappy because she saw several different providers and felt she was not receiving good continuity of care. At some point, she agreed to a change of physician to Dr. Pia Schalin, but later rescinded that agreement. At hearing, she testified she has seen Dr. Dameceo Howard at Colorado Clinic for several months and is satisfied with his care. Consequently, she no longer wants a change of physician. Dr. Howard is not Level II accredited by the Division of Workers' Compensation and Respondents have asked the ALJ to grant a change of ATP to a Level II provider.

43. Dr. Eric Ridings performed an IME for Respondents on March 22, 2017. Dr. Ridings opined Claimant was not a good candidate for a permanent SCS and raised numerous concerns regarding the reliability of Claimant's subjective reports regarding the trial SCS. He opined Claimant's described response to the SCS trial was "not medically believable." Dr. Ridings also denied any causal connection between Claimant's symptoms and the 2009 accident, opining "she would be in exactly the same place anatomically today whether she had fallen on the stairs or not."

44. Claimant saw Dr. Miguel Castrejon on April 25, 2017 for an IME at her counsel's request. Dr. Castrejon concluded that the October 2009 accident "resulted in a permanent aggravation to the claimant's pre-existing underlying degenerative lumbar spine condition." Dr. Castrejon noted the trial SCS "nearly resolved her pain for the period of the trial. Following discontinuation of the trial, the claimant states that her symptoms returned." Dr. Castrejon concluded she had failed conservative care and recommended that "she be allowed to proceed with spinal cord implantation with the caveat that a medication weaning program be developed, clearly delineated and monitored by her treating physician."

45. Dr. Robert Kleinman performed a psychiatric IME for Respondents on April 12, 2017. He opined Claimant was a poor candidate for a permanent SCS from a psychiatric prospective. He thought she was not forthcoming regarding a history of addiction and "misrepresented herself" during the interview. Dr. Kleinman issued a supplemental report on May 15, 2017, wherein he disagreed with Dr. Castrejon's assessment, Dr. Kaplan's conclusions, and the opinions of Dr. Wahl, a psychiatrist who evaluated Claimant in relation to professional discipline issues several years before the industrial accident.

46. Claimant underwent a psychological evaluation with Anthony Ricci, Ph.D. at her counsel's request on May 30, 2017. Regarding the SCS trial, Claimant told Dr. Ricci

> Following the [trial] implantation she felt "fantastic." She was more mobile. She could walk without assistance, and even went to dinner. She could walk unimpeded again, and could stand to cook. The trial continued for about 7 days, and on the last day she was experiencing some soreness. During the course of the trial she stopped utilizing the Dilaudid, and did not replace the

> Fentanyl patch, and went through a moderate opiate withdrawal process, which she tolerated due to the positive experience of having the back and radicular pain symptoms significantly ameliorated. After the spinal cord stimulator was removed the pain returned with full intensity, and she started the opiates several days after its removal.

47. Dr. Ricci opined:

> [T]he MMPI testing performed at Dr. Kleinman's office was not congruent with standard administration procedures, and he does not integrate the findings with her medical condition, and therefore draws erroneous conclusions. . . . He develops a strong theme that [Claimant's] morality is flawed, and therefore should not proceed with permanent spinal cord stimulation implantation.
>
> The issue of spinal cord stimulation candidacy should be based on psychological factors and medical status. Prior psychological evaluation and treatment information, including reports from Dr. Kaplan, Dr. Wahl, Dr. Pollack, and our evaluation present a very different clinical picture and status . . . . [In my opinion] there are no psychological contraindications to [Claimant's] spinal cord candidacy.

48. Claimant scheduled a hearing on July 20, 2017 in Colorado Springs regarding authorization of the SCS. She subsequently vacated that hearing and had the SCS implanted under her health insurance.

49. Dr. Barolat implanted the SCS on August 15, 2017 at Presbyterian/St. Luke's Hospital.

50. Claimant immediately reported significant benefit from the SCS. On August 23, 2017 Dr. Barolat documented, "The patient is doing exceedingly well. She has noticed about 75% reduction in the pain in her lower extremities and about 50% reduction in the low back pain. . . . She is not using the walker any longer. . . . The patient is extremely pleased with the results, and so am I."

51. During a follow-up appointment on September 20, 2017, Dr. Barolat documented:

> She has been compliant with her activity restrictions; however, she has been noticing she is able to easily overdo things due to the substantially decreased pain from the stimulator. She states she is getting well over 75% reduction overall in her pain. She is extremely pleased with this result. The patient's husband states she seems more frustrated by the fact that physically she cannot push herself further at this point in time. [Preoperatively], the patient had been extremely limited in her mobility due to the pain and had to use a walker for assisted ambulation. She is not utilizing the walker at this time. She feels she is also sleeping better. She

> has completely weaned off her Dilaudid.[3] She continues to use the fentanyl patches, as well as intermittently the Robaxin for muscle spasms.
>
> She is also getting nearly 75% relief in both her low back, as well as lower extremity pain. This is a substantial pain relief, and we are quite pleased with the results. She has also increased her activity level. We did ask the patient that she try to limit her frustration and her normal mobility given that she had spent such a long time being severely nearly disabled from the pain. Now that she has decreased pain, she will need to gradually increase her activity levels.

52. On November 8, 2017, Dr. Barolat noted "she is extremely pleased with her stimulator. Her pain is, at maximum, a 1 or a 2 out of 10. She has been able to increase her activities. . . . She has decreased her narcotic analgesics substantially. She continues to utilize the Robaxin for spasms. . . . She is extremely pleased, thus far, with the result." Finally, on February 7, 2018, Dr. Barolat stated, "she has been much more active. She has gotten rid of the wheelchair, the cane, and the walker." He concluded, "This modality has truly changed her life."

53. The Colorado Clinic records also reflect significant improvement due to the SCS. On September 5, 2017, Claimant stated "the pain has decreased from 8-10/10 now down to 2-3/10. . . . [S]he will have a one-month follow-up with the surgeon and then she will taper down on opiates." At her next visit, on October 2, she asked to decrease the Dilaudid. The November treatment note states "patient requesting decrease [in medication]. . . . SCS helps with pain decrease." On December 4, she told Dr. Howard the stimulator "is helping alleviate her pain. She states that her pain level has gone down drastically since the neurostimulator was put in. She would like to lower her dose on Dilaudid." And on January 5, 2018, Dr. Howard noted "patient would like to see if she could receive 30 tabs of hydromorphone [Dilaudid] at 4 mgs PRN. She states she's gotten to the point where she does not need medication every day."

54. On February 2, 2018 Dr. Howard cut the dose of fentanyl in half, and increased the Dilaudid "for breakthrough." When she returned on March 3, she reported her pain had gotten worse with the lower dose of fentanyl, and requested that it be increased.[4] Dr. Howard's nurse declined the request "since she has already been on the lower dose for 1 month." The nurse did not refill the Dilaudid because Claimant was not using it.

55. Claimant's pharmacy prescription log shows a steady decrease in Dilaudid and fentanyl starting in October 2017. Before the SCS, she was consistently using 480mg of Dilaudid and 10-15 fentanyl patches each month. After the SCS, she decreased the

[3] This information was incorrect, because Claimant continued to refill Dilaudid through February 2018. Claimant testified Dr. Barolat must have misunderstood her and did not tell him she was completely off Dilaudid. Rather, she told Dr. Barolat that she eventually wanted to be entirely off Dilaudid.

[4] Although Dr. Ridings questioned Claimant's motivation for seeking to asking fentanyl rather than taking more Dilaudid, the ALJ does not find it unusual that Claimant would prefer a higher dose of sustained release fentanyl rather than continually chasing her pain with Dilaudid multiple times per day.

Dilaudid each month from October 2017 through January 2018. The Dilaudid was temporarily increased in February 2018 when Dr. Howard cut the fentanyl in half.

56. The opinions of Dr. Meyers, Dr. Barolat, Dr. Castrejon and Dr. Ricci are credible and more persuasive than medical opinions in the record to the contrary.

57. Claimant proved by the preponderance of the evidence that the permanent SCS was reasonably necessary and causally related to her admitted October 2009 injury. Claimant's accident permanently aggravated a previously asymptomatic underlying degenerative condition and caused her to develop chronic pain. The SCS has significantly reduced Claimant's pain, leading to lower opioid use and increased functional abilities.

58. Claimant failed to prove that Dr. Barolat's preauthorization request was "deemed authorized." Respondents timely obtained a medical review by a spine surgeon and notified all parties within seven business days that the request was denied.

59. Claimant failed to prove that Respondents should be penalized for "unreasonably" denying authorization of the SCS. The decision to deny the permanent SCS was not "objectively unreasonable" given the numerous medical opinions and other evidence in Respondents' possession questioning her candidacy for the procedure. Even Claimant's IME acknowledged she did not precisely fit the criteria under the MTGs. The ALJ finds reasonable minds could, and did, disagree regarding whether the permanent SCS was reasonably necessary and related to the 2009 admitted injury. Although the ALJ has ultimately credited the opinions of Claimant's treating providers, Respondents were entitled to rely on the opinions of their examiners to deny the procedure and require Claimant to prove her entitlement to medical benefits at an evidentiary hearing.

60. Respondents failed to prove entitlement to a change of physician.

CONCLUSIONS OF LAW

A. The SCS is causally related to the October 2009 admitted accident

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). The mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury, and even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The existence of a preexisting condition does not disqualify a claim for compensation if an industrial accident aggravates, accelerates, or combines with the preexisting condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The claimant must prove

entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

As found, Claimant proved that the SCS was causally related to her October 2009 accident. She unquestionably had degenerative changes in her lumbar spine before the accident, but there is no persuasive evidence she was symptomatic or required any treatment. The persuasive evidence shows Claimant suffered a permanent aggravation of her pre-existing condition as a result of the October 2009 accident.

B. The permanent SCS is reasonably necessary

As found, the permanent SCS was reasonably necessary. According to the records from her treating providers, the SCS was very successful, leading to decreased pain and increased function. Dr. Barolat used superlatives such as "excellent" and "life-changing." Dr. Howard used more muted terminology but clearly documented a good outcome from the SCS. Claimant appears to be on an opioid weaning regimen, as evidenced by Dr. Howard's records. Claimant's prescription log shows a steady decrease in her opioid medication since she received the SCS. The temporary increase of Dilaudid in February 2018 coincided with a 50% reduction in the fentanyl, and Dr. Howard's office did not refill Dilaudid in March 2018.

Admittedly, the ALJ has concerns regarding the reliability of some of Claimant's testimony. In particular, her memory appears to become less reliable as events recede further into the past. Some of her testimony at hearing was contradicted by medical records or other documentation. Accordingly, the ALJ has given comparatively greater weight to her contemporaneous reports documented in the medical records, which likely provide a more accurate description her condition at any given time. Although Claimant has likely embellished her positive response somewhat, on balance, the evidence persuades the ALJ she received enough benefit from the SCS to justify finding it was reasonably necessary.

C. Dr. Barolat's request for preauthorization was not "deemed authorized."

WCRP 16-11(E) provides that if a payer does not comply with the preauthorization requirements, the request shall be "deemed" authorized. Claimant has predicated her argument on two provisions of WCRP 16-11.[5] Specifically, Claimant argues Respondents failed to include Dr. Janssen's "professional credentials" and did not include a certificate of mailing with the denial notice.

The ALJ disagrees with Claimant's arguments. The notation of Dr. Janssen's credentials as "spine surgery" is sufficient to satisfy Rule 16-11(B)(3)(a). The ALJ is

[5] Although Claimant specifically cited WCRP 16-10, the ALJ notes the rules were amended in January 2017, and the provisions on which Claimant relies are now codified in Rule 16-11.

unaware of any authority that would require Respondents to provide more detailed information such as the physician's education, training, and employment experience.

Regarding WCRP 16-11(B)(3)(d), the ALJ concludes the Rule does not require a formal certificate of service akin to a legal pleading. The intent of the rule is satisfied if the notice indicates when and to whom it was sent, which was the case here. At a minimum, Respondents' January 23, 2017 notice substantially complied with the Rule and preserved Respondents' right to dispute the procedure.

D. Claimant failed to prove Respondents should be penalized for violating WCRP 16-11.

Section 8-43-304(1) provides that an insurer "who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director," shall be punished by penalties of up to $1,000 per day.

The assessment of penalties is governed by an objective standard of negligence and involves a two-step analysis. The ALJ must first determine whether the insurer or employer violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

Whether the insurer's conduct was objectively reasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). A party establishes a *prima facie* showing of unreasonable conduct by proving that an insurer violated the statue or a rule of procedure. If the claimant makes a *prima facie* showing, the burden shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*; *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

Claimant argues Respondents should be penalized under WCRP 16-11(F), which provides, "Unreasonable delay or denial of prior authorization, as determined by the Director or an administrative law judge, may subject the payor to penalties under the Workers' Compensation Act."

The mere act of procuring a medical opinion under WCRP 16 does not excuse the carrier from its duty to act reasonably regarding the request. Rather, the insurer must act as a reasonable insurer would act regarding the information obtained from the medical reviewer. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007); *Miller v. Industrial Claim Appeals Office*, 49 P.3d 334 (Colo. App. 2001). The carrier is not limited to considering the Rule 16 opinion, but may also consider other information in its file when evaluating a preauthorization request.

Claimant's request for penalties fails because Respondents' decision to deny preauthorization was not objectively unreasonable. The medical opinions and other evidence in Respondents' possession were sufficient to raise a reasonable question of whether Claimant was an appropriate candidate for a permanent SCS. Even Claimant's IME acknowledged she did not precisely fit the criteria under the MTGs for SCS. Dr. Erickson made a similar point when he approved the SCS trial. The ALJ concludes that reasonable minds could disagree regarding whether the permanent SCS was reasonably necessary and related to the 2009 admitted injury. Although the ALJ has ultimately credited the opinions of Claimant's treating providers in approving the procedure, Respondents were entitled to rely on the opinions of their examiners to deny the procedure and require Claimant to prove her entitlement to medical benefits at hearing.

E. Respondents did not prove a basis for a change of physician.

Section 8-43-404(5)(a)(VI) permits a claimant to obtain a change of physician "upon the proper showing to the Division." The ALJ knows of no similar statutory provision or other authority permitting the respondents to obtain a change of physician from an ALJ, and Respondents have pointed to none. To the ALJ's knowledge, absent agreement with a claimant, the only mechanism for the respondents to change an ATP is through the medical utilization review ("MUR") process.

ORDER

It is therefore ordered that:

1. The SCS implanted by Dr. Barolat on August 15, 2017 was reasonably necessary and related to Claimant's October 2009 accident. Insurer shall cover the cost of the SCS, including reimbursement of Claimant's out of pocket expenses.

2. Claimant's request that the SCS be "deemed authorized" is denied and dismissed.

3. Claimant's request for penalties is denied and dismissed.

4. Respondents' request for a change of physician is denied and dismissed.

5. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 14, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issue addressed by this decision involves Claimant's entitlement to medical benefits. The specific question presented is:

I. Whether Claimant has proven, by a preponderance of the evidence, that medial branch blocks to treat Claimant's lumbar spine condition, as requested by Dr. Bernardini, are reasonable, necessary and related to his July 24, 2013, admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant began working for Black Hills Energy in October of 2000 as a meter reader. He progressed to a premise lineman; did a four-year apprenticeship, and became a board-certified journeyman lineman in early 2005.

2. On July 24, 2013, Claimant responded to a power outage in the Flower, Colorado service area of Pueblo County. Heavy storms passing through the area caused a high voltage transmission pole to break and fall into an adjacent pole triggering a cross-wire fire. Claimant and a co-worker were dispatched to extinguish the fire and repair the downed transmission lines. While working in a bucket lift approximately 40 feet off the ground, Claimant inadvertently came in contact with a live wire and was electrocuted.[1] According to Claimant's testimony, he felt an arc, saw a blue flame and was snapped backwards.

3. Emergency medical personnel were contacted and it was determined that Claimant would require Flight for Life transport to University of Colorado Hospital in Denver.

4. Upon arrival, the Flight for Life team obtained a medical history and assessed Claimant's condition. The team ascertained that Claimant had touched a "high voltage (16,000 volts) wire, causing him to go to his knees. He did not fall. There was no LOC (loss of consciousness) per [Claimant]." Claimant was contacted and noted to be alert and oriented times three (AOX3). He complained of "pain in [the] left elbow, hand and shoulder." Moreover, he was observed to have a burn wound to the "outer aspect of [his] left elbow and to [the] index and middle finger of [the] left hand." A field diagnosis

[1] Given the nature of his injuries, questions remain as to whether Claimant was actually shocked by a transmission wire or struck by lightning occurring some distance away.

of deep necrosis of underlying tissue due to burn (deep third degree) of thumb (nail), without mention of loss of thumb" was documented and Claimant was air lifted to Denver.

5. Claimant was admitted to the University of Colorado (UC) Hospital at 9:34 p.m. under the care of the "burn surgery team . . ." Upon admission, Claimant reported that he was "thrown back into [the] bucket."[2] He verbally reported "myalgias and back pain" during the reviews of systems assessment. Although he reported back pain, careful review of this section of the inpatient report fails to localize this "back pain" to a specific region of the spine.[3] Claimant testified that his low back was badly bruised, yet upon admission he "[exhibited] no tenderness and no boney tenderness" over the lumbar spine. Claimant did report TTP (tenderness to palpation) "over the left scapula and pain with provocative arm extension and supination against resistance. It was determined that Claimant had "injured his left shoulder in the workplace accident." He was instructed to follow-up with his primary care physician (PCP) for additional care.

6. At hearing, Claimant testified that the hospital team wanted him to stay in the hospital because he was having difficulty laying down due to a "black and purple" bruise across his back. As noted, the medical records are devoid of any reference to a bruise or any signs of trauma to the back and Claimant failed to complain of any tenderness or boney tenderness to the lumbar spine upon examination. Despite the professed condition of his low back, Claimant testified that he asked to be discharged from the hospital.

7. Respondents filed a General Admission of Liability (GAL) admitting liability for Claimant's injuries on August 7, 2013.

8. Claimant was discharged from the hospital on July 25, 2013 at approximately 1:57 p.m. in stable condition. The discharge summary notes the following:

> Pt was working on power lines when he arced between his elbow and his hand. The electricity did not pass through his chest. *He was not thrown back from the shock.* He was placed on tele and along with two EKGs there with (sic) no evidence of cardiac damage. His sensation in his hand and arm improved during his treatment and his arm never became tense, hot or had increasing pain. *No other signs of trauma, besides the shoulder.* (emphasis added)

9. Upon his discharged from the hospital, Claimant was referred to Dr. Dwight Caughfield for follow-up care. Dr. Caughfield evaluated Claimant on August 8, 2013. Dr. Caughfield obtained the following history: "[Claimant] is a 42 year old left-handed

[2] Claimant testified that he did not report being thrown backward into the bucket after contact with an electrical wire. Tr. 19:19-25, Tr. 20:1-2.

[3] Elsewhere in the medical records from UC Hospital, Claimant reported that he was thrown back in the bucket but sustained no trauma and no LOC. In this section of the record, Claimant reported "some lower back pain from hitting the bucket."

gentleman who sustained an injury to his left arm at work on the date of 7/24/13. . . . He states he had electrical contact with entry wound around the left lateral epicondyle, exit wound into the index and long fingers. He also had intense spasm with the high voltage and ended up with a rotator cuff tear." The record from this date of visit is devoid of any complaints of Claimant having sustained a back injury, back bruising or back pain despite his suggestion that he was essentially on bed rest following his discharge from the hospital secondary to back pain. Indeed the initial evaluation report of Dr. Caughfield notes that Claimant appeared "surprisingly jovial." Nonetheless, he complained of left subacromial shoulder pain. Given his confirmed rotator cuff tear and persistent left shoulder pain, Dr. Caughfield referred Claimant to an orthopedist for a surgical opinion.

10. Claimant's shoulder pain continued. He also developed headaches and proximal symptoms in his neck.

11. On October 18, 2013, Claimant underwent left shoulder surgery, consisting of a subacromial decompression, arthroscopic rotator cuff repair, biceps tenodesis, and distal clavicle resection, with David Weinstein, M.D. Claimant undertook post-surgical treatment (rehabilitation) for his left shoulder. While the condition of Claimant's shoulder improved, he continued to suffer from neck pain and debilitating headaches. Careful review of the records up to the date of Claimant's shoulder surgery fail to reflect that he complained of low back pain or that he obtained in treatment for his lower back.

12. A record dated July 14, 2014, includes a pain diagram wherein Claimant noted having pain in the mid portion (thoracic) of his back. Claimant's pain was characterized by Dr. Caughfield as periscapular in nature. No complaints of low back pain were noted in the record from this date of visit, nor was there any treatment directed to the thoracic or lumbar spine.

13. Dr. Caughfield instructed Claimant to pursue a home strengthening program to improve strength and range or motion in the left shoulder. This exercise program became unnecessary as of March 13, 2014, when Dr. Weinstein noted Claimant had reached maximum medical improvement for his left rotator cuff tear.

14. Claimant completed a pain diagram on May 18, 2015 depicting pain in his neck, upper left shoulder and left wrist. He characterized the pain as aching, sharp, numbing and tingling. No marks intended to represent pain in any portion of the thoracic or lumbar spine are included on Claimant's May 18, 2015 pain diagram.

15. On February 20, 2017, Claimant returned to Dr. Caughfield for a follow-up appointment. During this visit, he complained of "back pain and stiffness." The records from this encounter fail to indicate what part of the back was painful and stiff and no pain diagram accompanied the report admitted into evidence. Moreover, the record fails to indicate that treatment was directed to any portion of Claimant's back. Similarly, the record is devoid of any recommendation for a home exercise program geared towards strengthening any part of the back.

16. Claimant's headaches and neck pain persisted. Discography and MRI revealed disc pathology at the C5-6 level. Conservative treatment directed to the neck, including injections and ablation treatment failed. Consequently, Claimant underwent an anterior cervical discectomy with artificial disc replacement at C5-6 with Dr. Chad Prusmack on May 4, 2017.

17. Claimant was referred to post surgical physical therapy (PT) to "restore functional movement, [decrease] neck pain and improve strength and function" for the following diagnoses: "Cervical disc disorder at C5-C6 level with radiculopathy" and "Spinal stenosis, cervical region." Claimant testified he discussed returning to work and preparing for a functional capacity evaluation with his medical providers. Claimant testified that due to the fact he was inactive for over three years after his work injury, Dr. Prusmack and PT Brown recommend he supplement his physical therapy with a workout routine at a gym. Claimant testified Dr. Prusmack and PT Brown wrote out a list of strength and conditioning exercises for him to do at the gym and at home (outside of formal physical therapy) in order to get stronger and ready to go back to work.

18. Claimant testified that he joined Planet Fitness on May 15 or 16, 2017. He testified that that from either May 15 or 16 through July 18, 2017, he would work out at Planet Fitness three days per week for 3-4 hours at a time.

19. Claimant's initial PT evaluation occurred June 7, 2017. Based upon the PT records admitted at hearing, the ALJ finds that Claimant's PT was focused on ameliorating the effects of injuries to Claimant's neck and left upper extremity. The section of the report designated "Core Exercise Program" contains no information, suggesting that Claimant was not instructed in or asked to perform any core exercises at his June 7, 2013 initial PT evaluation.

20. On June 14, 2017, Physical Therapy Assistant (PTA), Melinda Velasquez documented that Claimant was lacking an appropriate home exercise program. Based upon the types of exercise recommended and performed in therapy up to this date, the ALJ finds that Claimant's PT treatment remained focused on his meeting treatment goals in connection with his neck and left /shoulder arm conditions/impairments. While the PT record from this date persuades the ALJ that the majority of the exercises performed in PT focused on his neck and upper extremities rather than his low back, it is noted that Claimant was performing seated rowing and upper body ergometer as part of an in clinic core exercise program. Moreover, the record indicates that Claimant was instructed in and performed exercise for stabilization including marching in place, pelvic tilts and hands on knees-push/hold.[4] Based upon the evidence presented, the ALJ is persuaded that core-strengthening exercises were added to Claimant's formal rehabilitation as of June 14, 2017.

[4] As noted by Dr. Fall these exercises are typically part of a home exercise program to improve core strength.

21. While the list of exercises recommended by Dr. Prusmack and/or PT Brown was not presented at hearing, the ALJ finds it reasonable to conclude that such a list was given to Claimant. Moreover, the ALJ finds it reasonable to infer that the list probably included recommendations for improving Claimant's overall endurance and core strength to address the general deconditioning associated with Claimant's neck surgery since his formal PT included a core exercise component.

22. On July 6, 2017, approximately 7 weeks after he testified he began working out at Planet Fitness, Claimant was instructed in the independent performance of an exercise program that was designed to address the problems and achieve the goals outlined in the plan of care." Based upon the July 6, 2017 PT note, the ALJ finds the plan of care to focus on improving cervical range of motion, decreasing cervical trigger points, improve grip and pinch strength, improve upper extremity strength, and increase independence with activities of daily living along with core strengthening given that the list of exercises included hands on knees-push/hold, marching in place and pelvic tilts-knees flexed in addition to seating rowing. (Claimant's Hearing Exhibits, Tab 14, Bates Stamp pg. 236).

23. Claimant testified that on July 18, 2017, he was at Planet Fitness following the written protocol recommended by Dr. Prusmack and PT Brown. Claimant testified that while completing a sidesaddle exercise, which involved sitting with his legs to left and his arms to right and pulling 40-60 pounds to his left, as recommended by Dr. Prusmack and PT Brown, he felt a pop in his back. Claimant testified he had extreme back pain and reported this to Nick, the manager at Planet Fitness, who helped him retrieve his belongings from a locker and get to his vehicle. Claimant testified he drove directly to PT Brown's office and reported to PT Brown what happened at the gym. Claimant testified he could make his back pop and that he demonstrated this for PT Brown, who stopped all physical therapy. Claimant testified PT Brown called Dr. Prusmack's assistant and told him what was going on.

24. Claimant underwent a non-contrast CT-scan of the lumbar spine on August 14, 2017. Among other findings, the scan revealed "chronic bilateral well-corticated pars defects (fracture) at the L2-3 level" along with bilateral foraminal protrusions and osteophytes with moderate right and mild left foraminal stenosis." A careful read of the CT scan report persuades the ALJ that substantial degenerative changes exist in Claimant's lumbar spine. While Claimant testified that the lumbar CT scan revealed a re-fracture of his pars at L2, the ALJ is unable to find any reference to Claimant's characterization that the pars defect visualized constituted a "re-fracture."

25. Claimant testified he followed-up with Dr. Prusmack, who referred him to Dr. Bernardini. Claimant was re-evaluated by Dr. Bernardini on September 7, 2017. In his report of this date, Dr. Bernardini noted that imaging revealed, "L2-3 anterolisthesis L2 pars fracture bilaterally. Contrary to Claimant's testimony, there is no indication by Dr. Bernardini that Claimant suffered a re-fracture of his pars interarticularis. Dr. Bernardini recommended that Claimant undergo a series of lumbar injections. The request for injections has been denied.

26. Claimant reiterated the following history to Dr. Bernardini during the September 7, 2017 appointment: "Per [Claimant] on 7/24/13 [he] was struck by lightning while working on a powerline, was sent to burn unit, bruising seen across back, was to evaluate but [Claimant] mentioned headaches, had skin graft issues along with torn left bicep and tricep (sic), and overtime the lower back got better. The [Claimant] feels that overtime his injury got worse and drew back, finally snapping while doing PE exercises."

27. Based upon the evidence presented, the ALJ finds the above history, especially the report that bruising was "seen across the back" along with the suggestion that but for headaches, the back was to be "evaluated", misleading and contrary to the balance of the more persuasive evidence tending to establish that Claimant did not suffer any significant injury to his low back during the incident in question. Indeed the record contains no persuasive evidence that bruising was ever observed on Claimant's low back and there are conflicting reports as to whether Claimant was actually thrown back onto the bucket upon being shocked. Moreover, Claimant treated with Dr. Caughfield very early in the course of his recovery, yet Dr. Caughfield's records are devoid of specific references to bruising and or pain in the lumbar spine.

28. On November 7, 2017, PT Brown authored a noted surrounding the denial of further treatment for Claimant's low back condition. PT Brown noted that he was advised that Claimant was unable to obtain treatment for his low back because he "didn't report in my notes how it was aggravated." While PT Brown recalled that, he felt popping in Claimant's low back, he could not recall the "particulars of the exacerbation." He simply recollected that Claimant "hurt it while trying to exercise at the health club." PT Brown noted that because Claimant was being treated for his "neck and not his back" he did not make a thorough report. Without explanation beyond referencing that, Claimant reported having bruising on his low back, PT Brown relates Claimant's spinal condition to his original condition. Based upon the totality of the evidence presented, the assumption is not persuasive.

29. On January 3, 2018, Physician Assistant (PA), David Whatmore opined that Claimant's need for low back treatment was a "direct consequence" of Claimant's original documented injury based upon the fact that a "flight medic" commented on Claimant having neck and low back symptoms." As noted above, the ALJ finds no reference to low back pain in the Flight for Life records or any of Dr. Caughfield's records until 2017. Moreover, while Claimant subjectively reported having pain in his "back" upon admission to the hospital, there was no evidence of trauma, let alone the presence of a "black and purple" bruise and he did not complain of pain with palpation to the lumbar spine during physical examination. Consequently, the ALJ finds PA Whatmore's causality opinion unconvincing.

30. Dr. Allison Fall, an expert in physical medicine and rehabilitation, performed Independent Medical Examinations (IME's) of Claimant at Respondents request on May 18, 2016 and January 25, 2017. In addition, Dr. Fall authored a Rule 16 Medical Records Review on October 19, 2017 and an addendum report on November 16, 2017.

31. Dr. Fall testified that she saw no reports in Claimant's medical record referencing low back pain prior to July 18, 2017. Moreover, Dr. Fall testified that Claimant did not refer to low back pain at either IME she performed despite an instruction to describe all symptoms and complaints.

32. Dr. Fall testified that a pars fracture can present at birth, could be traumatic, or degenerative in nature.

33. Dr. Fall testified that Claimant's pars defect fracture was not caused by the initial work injury. Dr. Fall opined that Claimant would have experienced some sort of significant back complaints from July 2013 through July 2017 had he suffered a pars fracture in the incident of July 24, 2014. Claimant's lack of diagnosis consistent with an injury to the lumbar spine, coupled with the lack of any low back complaints to medical providers following the July 24, 2013 incident until 2017, and a history of prior, severe low back complaints were noted as the basis for her opinion.

34. Dr. Fall opined that although Claimant had a 2008 MRI which did not reveal a pars defect, this imaging was not the gold standard for detection of this type of injury. A CT scan would better detect a pars defect.

35. Dr. Fall opined that while Dr. Bernardini's request for medial branch blocks for the lumbar spine is reasonable and necessary, the need for said injections is not causally related to the work injury from 2013.

36. The ALJ credits the opinions of Dr. Fall to find that Claimant likely did not suffer pars fractures at the time of his July 24, 2013 industrial injury. The evidence presented, persuades the ALJ that Claimant suffered electrical burns to his left arm/hand, a left shoulder injury and probably an aggravation of a pre-existing neck condition, which ultimately required surgery. The record presented supports a causal connection between these injuries and Claimant's July 24, 2013 work accident. In contrast, the record does not support a persuasive indication that Claimant experienced a mechanism of injury, i.e. being thrust backward onto the edge of the bucket that would cause injury to his low back. Here, the evidence presented fails to convince the ALJ that Claimant had any objective indication of injury (trauma/bruising) to his back upon admission to the hospital, which would support a conclusion that he was thrown back onto the edge of the bucket when he was shocked. Moreover, there is scant evidence that he complained of symptoms consistent with a severe injury to the vertebrae in the days, weeks, months and years following the July 24, 2013 incident. Accordingly, the ALJ finds that Claimant has failed to establish that he suffered pars fractures at the time of his July 24, 2013 work accident.

35. While the evidence fails to persuade the ALJ that Claimant's pars fractures were caused by the July 24, 2013 incident, the evidence presented persuades the ALJ that the pars defects are nonetheless related to his July 24, 2013 injury. In this case, the ALJ finds that Claimant was performing physical conditioning, including core-

strengthening exercises at the gym at the direction of his authorized treating providers, Dr. Prusmack and PT Brown. Although Claimant was involved in rehabilitation directed towards his cervical spine, the ALJ finds that core-strengthening exercises were part of his formal PT protocol and where likely made part of his independent exercise program by his PT no later than July 6, 2017 and probably by recommendation of Dr. Prusmack much earlier. Consequently, the ALJ finds that Claimant was participating in medical treatment related to his work injury when he injured his lower back. But for Claimant's July 24, 2013 industrial injury, he probably would not have been in the gym on July 18, 2017, and would not have injured his lower back. Accordingly, the ALJ finds Claimant's low back injury related to his July 24, 2013 industrial injury as part of the quasi course of employment doctrine. Finally, the evidence presented convinces the ALJ that the lumbar medial branch block injections recommended by Dr. Bernardini are reasonable and necessary to cure Claimant of the ongoing effects of his persistent low back symptoms. Indeed, Dr. Fall agrees as much.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, *supra*. The weight and credibility to be assigned expert medical opinion is a matter within the fact-finding authority of the ALJ. *Cordova v. Indus. Claim Appeals Office, supra.* The ALJ should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's

knowledge, skill, experience, training and education. *See § 8-43-210, C.R.S.; One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo.App. 1995). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). As found here, Claimant's testimony/reported history, especially his account that bruising was "seen across the back" along with the suggestion that but for headaches, his back would have been "evaluated", is unsubstantiated by the evidence presented. Indeed, the record contains conflicting reports regarding Claimant's testimony that he was thrown backwards onto the onto the edge of the bucket causing injury and bruising to the low back. Moreover, Claimant treated with Dr. Caughfield very early in the course of his recovery and long before he developed persistent headaches, yet Dr. Caughfield's records are devoid of specific references to bruising and or pain in the lumbar spine. Accordingly, the ALJ finds Claimant's suggestion that he fractured his pars on July 24, 2013 unpersuasive. Moreover, PT Brown, PA Whatmore and Dr. Bernardini have relied heavily on Claimant's unsubstantiated verbal history to conclude that his pars defects occurred during the July 24, 2013 incident. Because the record does not support Claimant's subjective report of low back pain, bruising or a mechanism for injury likely to cause a pars fracture, the ALJ finds their opinions that the pars fractures occurred on July 24, 2013, equally unconvincing. Nonetheless, the evidence presented persuades the ALJ that Claimant's pars defects are related to his July 24, 2013 work injury under the quasi course of employment doctrine.

C. The "quasi-course of employment" doctrine provides that injuries which would not have occurred but for a compensable work related injury are also compensable. This includes injuries that occur in the course of obtaining medical treatment for a compensable industrial injury. *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo.App. 1993). The rationale for the doctrine is that the employer is legally required to provide medical treatment to the injured employee, and the employee is legally required to submit to the treatment. The quasi-course of employment doctrine was first applied to injuries that occurred en route to authorized treatment for the original compensable injury. *See Price Mine Service v. Industrial Claim Appeals Office*, 64 P.3d 936, 938 (Colo. App. 2003)(traveling home from authorized medical treatment); *Excel Corp. v. Industrial Claim Appeals Office*, *supra* (slip and fall leaving authorized physical therapy). The doctrine was extended to include injuries involving an evaluation of the underlying workers' compensation claim, even though the claimant receives no treatment. *See Turner v. Industrial Claim Appeals Office* 111 P.3d 534 (Colo.App. 2004).However,the quasi-course of employment doctrine does not extend to injuries involving unauthorized medical treatment, *see Schrieber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo.App. 1993). In workers' compensation proceedings, "authorization" means "a physician's status as the health care provider legally authorized to treat an injured worker." *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026, 1029 (Colo. App. 1993). The question of whether a particular injury falls within the "quasi-course of employment" doctrine is essentially one of fact for determination by the ALJ. *See City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

G. As found here, Claimant was probably given a list of exercises to perform at a gym by Dr. Prusmack, and/or PT Brown to improve his core strength weeks prior to his July 18, 2017 injury. Even if Claimant was not given such a list, as suggested by Respondents, the evidence presented persuades the ALJ that Claimant was, more probably than not, instructed to continue with his core strengthening exercises outside of formal PT as demonstrated by the July 6, 2017 therapy note. While the note does not indicate the specifics of the program, the ALJ is persuaded that Claimant was engaged in an exercise program to improve his core strength in formal PT and sought to advance his progress by working out on the sidesaddle machine as he testified. While Dr. Fall testified that she would never recommend a side saddle machine to a patient, the ALJ concludes it is reasonable to infer that Claimant was performing a movement he believed was going to improve his core strength after consulting with the gym manager based on the list of exercises he was likely given by PT Brown and/or Dr. Prusmack. Consequently, the ALJ is convinced that Claimant's low back injury occurred as part of the quasi course doctrine because it occurred while he engaged in medical treatment for his compensable July 24, 2013 industrial injury. Because the need for medial branch blocks are related to Claimant's July 24, 2013 injury and are otherwise reasonable and necessary, Respondents are obligated to provide and pay for them.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical treatment, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the ongoing effects of his compensable low back injury, including but not limited to medial branch blocks recommended by Dr. Bernardini.

2. All matters not determined herein are reserved for future determination.

DATED: May 14, 2018

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he is entitled to Temporary Total Disability ("TTD") benefits effective October 12, 2017 and ongoing, due to a worsening of his compensable condition?

PROCEDURAL BACKGROUND

This matter has previously been before the OAC in WC No. 5-033-012-01 on the Respondents' Petition to Terminate or Suspend TTD benefits filed on February 13, 2017. The Respondents' position was that the Claimant was responsible for the termination of his employment, which notice was given to the Claimant on December 20, 2016. By Order of ALJ Lamphere on June 27, 2017, the ALJ found that pursuant to the provisions of sections 8-42-105(4) and 8-42-103(1)(g), at that time the Claimant's wage loss was as a result of a volitional act of the Claimant and suspended the Claimant's TTD benefits. In doing so, ALJ Lamphere found, pertinent to this proceeding, that:

1) Employer had a zero tolerance drug policy;

2) The evidence presented showed that the Claimant was aware of the policy;

3) Despite the legalization of marijuana in the State of Colorado, an employer in Colorado may terminate an employee for drug usage, *Coats v. Dish Network, LLC,* 340 P. 3d 849 (Colo. 2015);

4) Claimant sustained severe electrical injuries to his head, brain and shoulder, intracranial bleed and a subsequent MERSA infection as a complication of the skin grafting necessary to treat the severe burns when he was exposed to 12,000 volts of electoral current while working on a high voltage switch at Evans Army Hospital;

5) Upon being airlifted to the University of Colorado Health Center a urinalysis was completed which revealed the presence of cannabinoids in Claimant's urine; and

6) Employer terminated the Claimant's employment on December 20, 2016 for a violation of the Employer's substance abuse policy.

Contemporaneously to the termination of employment on December 20, 2016 the Respondent Insurer filed a General Admission of Liability. The Order of ALJ Lamphere of June 27, 2017 was not appealed and the Claimant's TTD benefits were terminated, effective the date of the Respondent's Filing of the Petition to Terminate or Suspend TTD benefits of February 13, 2017. Thereafter the Respondents filed a new General Admission of Liability on June 28, 2017. (Respondents' Ex. B).

The Claimant has now filed this Application for Hearing requesting reinstatement of TTD benefits as a result of additional surgical procedures which he had to undergo for his ongoing MERSA infection in his brain, and has requested reinstatement of TTD benefits effective October 12, 2017, and continuing, as a result of a worsening of condition.

The Respondents filed a Motion for Summary Judgment regarding the Claimant's Application for Hearing. By Order of ALJ Spencer of March 5, 2018, that Motion was denied and this matter proceeded to hearing on April 3, 2018. (Ex. 18).

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

At Time of his Termination, Claimant was Bedridden and Required 27/7 Care

1. At the time of his termination on December 20, 2016, the Claimant had recently been discharged from a nearly three week stay in the Burn Unit ICU at University of Colorado Hospital. The Claimant was discharged on December 14, 2016 with work-related diagnoses of an electrical injury, third degree burns to the scalp and left shoulder, and an epidural hematoma. At the time of his discharge, there were plans of readmission for surgical debridement, autografting, and possible flap placement. (Ex. F, p. 61).

2. The Claimant's discharge note indicated the Claimant would be discharged into the care of his wife, who the Claimant testified was a nurse, and he would also require home healthcare physical therapy and occupational therapy. The Claimant's immediate care included wound vac changes at least once per week by a RN. (Ex. F, pp. 61-62)

3. The Claimant testified around December 20, 2016, he required supervision twenty-four hours per day, seven days per week. He indicated the vast majority of that care was rendered by his wife, but he also was under the care of a home health nurse who came to his home to help with his wound vac system and activities of daily living, like showering.

4. The Claimant testified that, at the time of his termination from employment, he required assistance to dress himself, to shower, and to prepare meals. He also indicated he was unable to perform house chores, like laundry. On December 20, 2016, the claimant testified that he "didn't move from the couch unless it was to go to bed."

5. The Claimant also reported that he had difficulty walking, was a fall risk, could not drive, and was unable to leave his home by himself at the time of his termination from employment. The Claimant conceded that in the time period around

his termination from employment, the only time he left his house was to attend doctor's appointments about once per week.

6. At hearing, Claimant conceded that, around December 20, 2016, he was essentially bedridden.

At Time of his Termination by Employer, Claimant Was Completely Unable to Work

7. After his discharge from University of Colorado Hospital, the Claimant's first appointment with a Workers' Compensation doctor was on December 26, 2016, at Colorado Springs Health Partners. Dr. Rudderow documented pain levels up to 8-10/10 and that the Claimant complained of balance issues, memory issues, joint pain and muscle pain. In addition to concurrent care with a home nurse, the Claimant was seeing specialists for ophthalmology, plastics, burn, and neurology. Based on the Claimant's condition and status, the Claimant was found to be unable to work and given total "no work" restrictions. (Ex. D, pp.17-20).

8. The Claimant conceded in testimony that on December 20, 2016, he was completely unable to work in any employment. He conceded his ability to work in an employment capacity was "zero."

Claimant' Condition Improved at one Point, and was Better than at Time of Termination

9. Unlike the time around December 20, 2016 where the claimant could not drive, perform house chores, or perform activities of daily living by himself, the Claimant testified that he 'currently' [at the time of this hearing] could do laundry and other house chores and he could drive. The Claimant testified that he drove to the hearing venue for this hearing. He also testified that in July, 2017, he was able to leave the house more freely and able to attend family functions, such as his brother's wedding held in New York, in addition to his medical appointments.

Claimant Concedes Condition Post-Termination is Identical to Condition in October 2017

10. The claimant conceded in testimony that his overall physical ability and condition was identical at the time of his termination and at the time of his alleged worsening in October 2017:

> Q: Mr. Frisch, is it fair to say that on December 20th you were on your couch, you needed 24/7 care, and you had a home health care nurse, physical therapist, and occupational therapist?
>
> A: Yes.

Q: Okay. Is it fair to say that, after the October 2017 surgery, you were on your couch, needing care, had a home health care nurse, physical therapist, and occupational therapist?

A: Yes.

Q: So you understand your condition was identical after each time?

A: Pretty much so. Different – different aspect of life, but yeah.

11. Claimant worked as an electrician's apprentice when he was accidentally electrocuted after his head came into contact with high voltage equipment on November 28, 2016. He was hospitalized at the University of Colorado Health Center in the burn unit from November 28, 2016 thru December 14, 2016. Upon discharge he was ambulatory with steady gait, hemodynamically stable, pain well controlled on oral medications, with no issues of voiding and having regular bowel movements. He was discharged home to the care of his wife with plans to start Home Health Care ("HHC") for vacuum changes with HHC, Physical Therapy ("PT"), and Occupational Therapy ("OT") as soon as possible. (Ex. F, p.62)

12. A Burn Clinic Note from December 19, 2016 noted that the Claimant continued with headaches, difficulty with balance (no falls) and short-term memory loss, and ongoing numbness/tingling of his dorsal left hand with associated weakness. Claimant thought his balance was improving. His wound vac was changed and the wound cultures were positive for MERSA with a new area of eschar. Pain was well controlled with medication. (Ex. F. pp. 56-57).

13. The Claimant required additional surgery for scalp debridement and tangential excision to his left shoulder on December 23, 2016, as a result of multiple areas of non-viable tissues along the circumference of the scalp wound. The goal was to create a healthy, beefy, viable wound down to the subcutaneous layer of the left shoulder. (Ex. F, p. 53). An additional wound vac was applied.

14. The Claimant was readmitted to the hospital on January 7, 2017. Claimant showed no evidence of cellulitis or infection. He was hospitalized for reconstruction of his scalp defect, debridement of the outer calvarium, saphenous vein harvest for a latissimus free flap of the vertex of the scalp and repair of his left external jugular vein with the vein graft tunneled to his face. (Ex. 5, pp. 15-16).

15. The Claimant testified that he thought he did not have the ability to work on December 20, 2016 since he had just gotten home from the hospital. He was relegated to his couch, and he was unable to do much of anything. He was unable to shower, needed assistance in dressing, needed assistance with preparing meals and was in pain all of the time. He further agreed that he was essentially bedridden as of the time of termination on December 20, 2016.

16. After the surgery of January 7, 2017, Claimant's condition began to slowly improve. On May 18, 2017 Dr. Lund reported: "Patient needs temporary

restrictions, patient can lift a maximum of 10 lbs., can repetitively lift 10 lbs., can carry a maximum of 10 lbs., may walk 2 hours per day, patient may stand 2 hours per day and patient may sit 4 hours per day, Light duty, must work indoors, seated duty, part-time 4-6 hours/day. Dr. Lund indicated that *"Patient is able to return to modified duty from 05-18-2017.* (Ex. 7, p. 25) (emphasis added). It appears that Dr. Lund was not aware that Claimant had been terminated by Employer for cause months before.

17. In June of 2017, Dr. Rudderow assumed the ongoing care and treatment of the Claimant. Dr. Rudderow was evidently sent some surveillance of the Claimant to review. By note of June 25, 2017, the Dr. Rudderow was of the opinion that the Claimant could lift greater than 15 pounds, but should ease back into work due to issues with balance, memory and processing issues. She noted: "Thus, we will continue a stepwise approach to return to work. *Please encourage your client to accommodate the restrictions*. (Ex. 8, p.30) (emphasis added). Likewise, it appears that Dr. Rudderow was unaware of Claimant's prior termination, but felt he was fit for some light duty.

18. Instead, Claimant started getting worse, both physically and mentally. By note of August 15, 2017, the ATP noted in "PT [Claimant] has no balance, no strength or stamina, can't ride bike or do sit ups, can't walk fast, middle of shoulder blades has extreme pain with certain movements. sees psychologist monthly, he is going to refer pt to shink (sic) (the ALJ infers this to be 'shrink', i.e., psychiatrist). (Ex. 10, p.32).

19. The Claimant progressively got worse. A note of September 26, 2017 from Dr. Rudderow was requesting an immediate CT scan. The Claimant also testified at hearing that he had open sores on his head and nobody knew why. After the CT scan they found an infection in his skull. According to the Claimant they cut out a portion of his skull about the size of a softball and Claimant, at the time of the hearing, had only skin covering to the top of his head. This would remain until the surgery could be performed to put a plate over the top of his head.

20. The Claimant testified that the surgery in October, 2017 where they removed the portion of his skull was not anticipated at the time of his surgeries in December of 2016 and January of 2017 but was as a result of the holes in his head not healing and becoming infected.

21. As a result of the additional surgery in October of 2017, and because of the nature of the infection the Claimant was put on a PICC line for about six weeks. At the time of this hearing, the Claimant still was in need for additional surgery to install a skull-replacement plate to cover his brain. Prior to doing so he had to undergo implant surgery to expand his skull.

22. When asked if his head pain was not worse in December of 2016 than it was after the surgery in October of 2017, the Claimant replied on cross-examination that he would have to say that when they cut open his head and cut out his scalp, that surgery was even more painful, as he went home with 44 staples in his head. The Claimant testified that his physical condition was worse after this most recent surgery than before it.

23. The Claimant further testified that his mental issues with anxiety and dealing with the pain the longer the effects of the injury have gone on have significantly worsened. Claimant is of the opinion that he needs some assistance mentally with dealing with his situation, and that need has progressively worsened.

24. From the foregoing facts, the ALJ infers that there is no independent intervening cause which worsened Claimant's condition. Secondly, not only is Claimant not at MMI, there is not a realistic date upon which to even estimate his return to MMI.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a witness. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the ALJ finds Claimant to be credible, despite his acknowledged issues with memory. The conclusions to draw are based largely on legal principles, not on significant conflicts in the evidence.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive

arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

D. The Workers Compensation Act is designed to be humanitarian in its enforcement and the mandate set forth in CRS Section 8-43-201 that the facts shall not be liberally interpreted in favor of either party does not conflict with the rule of liberal statutory interpretation of the Act in favor of the beneficent purpose of the Act. As stated by the Colorado Supreme Court in *Mountain City Meat Co. v. Oqueda,* 919 P. 2d 246 (Colo. 1996) and as recently reiterated by the Colorado Supreme Court in *England v. Amerigas Propane,* 2017 CO 55, 395 P.3d 766, 770 (2017)*(citing, Padilla v. Indus. Claim Appeals Office,* 942 P.2d 1358, 1360 (Colo. App. 1997)*,* "the overall purpose of the Act is the 'beneficent' purpose of compensating injured workers; consequently, the 'Act's provisions are to be interpreted liberally in favor of the right of injured workers.'"

Martinez v. Denver Health Medical Center does not apply here

E. Respondents cite the plain wording of the dicta in *Martinez v. Denver Health Medical Center,* WC No. 4-527-415 (ICAO, August 8, 2005) for the proposition that since Claimant's condition will not (and essentially could never) worsen from his termination date, that TTD can never be reinstated. Assuming Respondent's legal position is correct, the ALJ has essentially found every fact proposed by Respondents to allow them to prevail on appeal. As the ALJ believes that the facts herein are distinguishable from Martinez, and *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004) the ALJ declines to mechanistically apply the dicta of those cases to deny Claimant's TTD benefits in this case.

Conclusions to Draw from WC No. 5-033-012-01

F. The ALJ makes two observations at the outset: First, that while Judge Lamphere's ruling intimates in Conclusion # "I" that TTD is 'permanently barred', the Order #"1" makes no such reference to permanence. The ALJ herein finds that ALJ Lamphere did not intend that Claimant could never seek reinstatement of TTD benefits if a *worsening of his condition* were shown. The issue of worsening does not appear to have been litigated or addressed in that case at all.

G. Secondly, *Longmont Toyota* at p. 325 states "This provision [§8-42-105(4)] applies to employee TTD claims made ***after*** *an injured worker returns to modified employment* and *subsequently quits* the employment or *is fired* for cause" (emphasis added). Claimant herein never returned to modified employment, nor did he subsequently quit or get fired for cause. That issue, however, was not appealed, nor is the potential total inapplicability of §8-42-105(4) to Claimant now before this ALJ. That ship has already sailed, and those issues determined by Judge Lamphere will not be disturbed.

Longmont Toyota

H. However, this opinion will address the policy considerations behind § 8-42-105(4), as outlined in *Longmont Toyota*, as applied to this claim. There is no need to wade into the realm of constitutional or property rights issues to decide the matter. What is inherently different here is that *Claimant's misconduct predated his injury and subsequent termination.* The legislative rationale, as discussed at length in *Longmont Toyota*, is that a claimant, once placed onto modified duty, becomes the architect of his own fate with this amendment. Before, claimants were essentially abusing their TTD status, and committing acts which got them fired from employment, but with impunity vis-à-vis their TTD benefits. What is also clear is that this was the limit of the intended purpose of the statute; to wit: to prevent such abuses.

> We acknowledge that the 1999 legislative debate surrounding enactment of section 8-42-105(4) was concerned with the point that PDM Molding had opened the door to rewarding employees for causing workplace disruptions, or walking off the job, and then being compensated for wage loss in doing so. Nevertheless, contrary to the court of appeals conclusion that the General Assembly clearly intended an absolute bar to all subsequent TTD benefits involving that employer, the debate actually demonstrates the General Assembly's intent not to bar the employee's subsequent worsening condition claim. Id at p. 328.
>
> This assurance that worsening condition compensation would not be jeopardized by passage of the bill occurred in the context of questions by legislators about the ramifications of passing the bill, and is particularly significant when paired with Representative Berry's statement, as sponsor, that the bill's purpose was "to clarify that temporary total disability is for when you're off work and injured, and it's not for any other purpose." Transcript of Hearings at 2. Id at p. 330.
>
> In summary, we conclude that the General Assembly intended section 8-42-105(4) to weed out wage loss claims subsequent to voluntary or for-cause termination of modified employment that do not involve a worsened condition. Id at p. 330.

I. The incongruous result of this Claimant's predicament, were *Martinez* to apply, can be outlined in the following *hypothetical* involving three (nearly) identical claimants, A, B, and C:

January 1: Claimant suffers a compensable injury to his lower back; goes onto TTD.

February 1: Claimant undergoes a 1-level fusion on lower back; MMI is preliminarily estimated to be August 1.

March 1: Claimant is deemed fit to return to modified, light duty and does so, with steady, predictable progress along the way.

July 1: Claimant's condition suddenly and unexpectedly worsens; he can no longer perform modified duty.

August 1: It is revealed that the fusion hardware has failed, requiring a more extensive revision surgery.

September 1: A 2-level fusion revision surgery is performed; Claimant is now placed onto an even more slow recovery track. MMI indeterminate, but a long ways off.

● Claimant A: An investigation now reveals an ongoing pattern of embezzlement which occurred the previous year; Claimant is terminated, for cause, on July 1.

● Claimant B: An investigation now reveals an ongoing pattern of embezzlement which occurred the previous year: Claimant is terminated, for cause, on September 1.

● Claimant C: An investigation now reveals an ongoing pattern of embezzlement which occurred the previous year; Claimant is terminated, for cause, on February 1. Because he was terminated, Claimant is never placed onto modified duty, despite the medical clearance to do so, effective March 1.

J. There is little doubt that hypothetical Claimants A and Claimant B would be eligible for reinstatement of TTD payments. Despite identical medical trajectories, and identical conduct predating the injury, Claimant C would not receive TTD, presumably ever. The difference? The date the pre-injury misconduct was *discovered* by Employer-or at least when *Employer* chose to act upon it-in good faith or otherwise. Claimant C never went onto modified duty. Instead, on the date Claimant C is terminated, he is under anesthesia, essentially helpless. His condition cannot get worse from that state; ergo no "worsening" of his current condition is ever possible. Checkmate.

K. Claimant herein finds himself essentially in the position of hypothetical Claimant C. Claimant was rightfully terminated for cause, shortly after his pre-injury misconduct was revealed. However, once he was injured and hospitalized, Clamant was no longer the architect of his own fate. Nothing in the record suggests that Employer acted in anything other than good faith in firing him. Nonetheless, it was *Employer's* timing, and not *Claimant's,* that led not only to his *termination of employment*, but also the *termination of his TTD benefits.* This is not the result contemplated by the enactment of §8-42-105(4). This issue was discussed at length in *Longmont Toyota*, and the ALJ declines to apply the dicta of *Martinez* to Claimant herein. Claimant's case is distinguishable.

L. There is ample evidence in the record to find that Claimant had improved sufficiently from his injury such that he was then capable of performing modified duty in May and June, 2017. He did not actually perform such modified duty, since he was (for valid reason) no longer employed by Employer. Shortly thereafter, his compensable

condition, both physical and mental, worsened considerably, culminating in his inability to work in any capacity on October 12, 2017. Hypothetically, had Claimant never sufficiently recovered to be able to perform modified duty (as occurred in this case in May and June of 2017), perhaps this analysis might have yielded a different result. Such analysis must wait for another day, if indeed §8-42-105(4) even applies to pre-injury misconduct.

M. By a preponderance of the evidence, the ALJ finds that Claimant's compensable condition worsened that by October 12, 2017, and ongoing, he was incapable of working in any capacity. He therefore has suffered a wage loss. As contemplated by the purpose of §8-42-105(4), and *Longmont Toyota,* his TTD benefits are to be reinstated as of that date.

ORDER

It is therefore ordered that:

1. Claimant's TTD benefits are to be paid by Respondents, effective October 12, 2017.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 15, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has produced substantial evidence that the right knee Synvisc One injection requested by Cary Motz, M.D. on December 1, 2017 in Workers' Compensation claim number 4-876-092 is a reasonable, necessary and causally related maintenance medical benefit that is designed to relieve the effects of his January 10, 2012 industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

2. Whether Respondent has established by a preponderance of the evidence that all future medical maintenance benefits in Workers' Compensation claim numbers 4-876-092. 4-942-549 and 4-977-997 should be terminated.

FINDINGS OF FACT

1. Claimant is a 63 year old male who works for Employer as a Transportation Maintenance 1. Claimant's job duties include patching asphalt, fixing guard rails, plowing snow, driving a tandem plow and other activities required to maintain Colorado highways.

2. On January 10, 2012 Claimant was a pedestrian in Employer's parking lot when he was struck by a vehicle driven by a coworker at a low speed [case no. 4-876-092]. He fell to the ground but did not lose consciousness and remained able to walk. Claimant suffered admitted industrial injuries to his lower back, right hip and right knee.

3. Claimant received medical care in the form of physical therapy, chiropractic treatment, acupuncture and medications. On October 25, 2012 Authorized Treating Physician (ATP) John Burris, M.D. concluded that Claimant had reached Maximum Medical Improvement (MMI).

4. Claimant challenged Dr. Burris' determination and sought a Division Independent Medical Examination (DIME). On March 11, 2013 David Orgel, M.D. performed the DIME. He agreed with Dr. Burris that Claimant had reached MMI on October 25, 2012. Dr. Orgel assigned Claimant a 29% whole person impairment for his lumbar spine and a 27% lower extremity or 11% whole person rating for his right hip. Notably, Dr. Orgel did not assign any impairment for Claimant's right knee but instead remarked that "there are chronic changes of arthritis noted." He recommended medical maintenance treatment in the form of medications, "occasional" chiropractic visits and possible right hip injections.

5. Claimant subsequently received maintenance medications in the form of Flexeril, Vicodin, Lidocaine patches and 800 mg Ibuprofen prescribed by ATP Samuel

Y. Chan, M.D. He continued to receive the preceding medications at the time of hearing. Claimant has also received chiropractic treatment from ATP Richard Mobus, D.C. and right knee injections from ATP Cary Motz, M.D.

6. On February 10, 2014 [case no. 4-942-549] Claimant suffered admitted industrial injuries to his right shoulder, right elbow and cervical area when he slipped and fell on ice in Employer's parking lot. Claimant continued to receive treatment from the same medical providers who had provided care for his January 10, 2012 claim.

7. As a result of his February 10, 2014 claim Claimant underwent right shoulder surgery with ATP Motz on June 2, 2014. The surgery consisted of a "right shoulder arthroscopy with subscapularis tendon repair, arthroscopic biceps tenodesis, and subacromial decompression."

8. On January 12 2015 ATP Ted Villavicencio, M.D. concluded that Claimant had reached MMI for his February 10, 2014 industrial injuries. Claimant was released to full duty employment.

9. Shortly after reaching MMI Claimant suffered a third admitted industrial injury on February 27, 2015 [case no. 4-977-997] when he again fell and slipped on ice. Claimant reinjured his right shoulder and right hip. A right shoulder MRI revealed a recurrent tear that was eventually related to the February 10, 2014 industrial accident. Claimant underwent repeat right shoulder surgery.

10. On January 22, 2016 Eric Tentori, M.D. concluded that Claimant had reached MMI with no additional impairment. He recommended medical maintenance benefits of one to two as needed visits with either Dr. Chan or Dr. Motz "for any significant clinical deterioration." Respondent subsequently filed a FAL that acknowledged Claimant was entitled to receive reasonable, necessary and related medical maintenance benefits.

11. Claimant challenged Dr. Tentori's MMI determination and sought a DIME. On April 29, 2016 Claimant underwent a DIME with Stephen D. Lindenbaum, M.D. Dr. Lindenbaum considered all three of Claimant's Workers' Compensation claims. He determined that Claimant had reached MMI for his February 10, 2014 industrial injury on November 6, 2015. Dr. Lindenbaum attributed Claimant's right knee pain to chronic degeneration as a result of tricompartment advanced disease. He remarked that numerous other complaints related to Claimant's feet, right arm falling asleep, hearing loss, right finger numbness and compensatory left shoulder symptoms were not related to any work incident. Dr. Lindenbaum concluded that additional medical maintenance treatment was not warranted because of Claimant's poor response to prior treatment. He specifically remarked that "I do not feel [Claimant] requires continued maintenance care because basically he has had several months of continued maintenance care with acupuncture and chiropractic which has been of minimal value."

12. The parties subsequently stipulated to a 7% whole person impairment rating for the February 10, 2014 claim. They also agreed to reasonable, necessary and

related medical maintenance treatment. Respondent filed a FAL consistent with the stipulations on September 7, 2016.

13. On October 6, 2017 Dr. Chan issued a statement providing that he was "in total agreement" with the independent medical examination opinion of Tashof Bernton, M.D. that Claimant's continuing symptoms were degenerative in nature and not related to a specific injury from February of 2015. Although Dr. Chan acknowledged that Claimant's pain symptoms required ongoing medical attention, his condition was not related to the February of 2015 work accident.

14. On December 7. 2017 Respondent filed an Application for Hearing regarding Claimant's February 27, 2015 injury [case no. 4-977-997]. Respondent requested the termination of medical care. Claimant filed a Response on December 11, 2017.

15. On December 15, 2017 Claimant filed an Application for Hearing based on his January 10, 2012 industrial injury in case number 4-876-092. He requested a Synvisc One injection into his right knee that had been recommended by Dr. Motz on December 1, 2017. The procedure had been denied by Respondent based on the opinion of Dr. Bernton. He had determined that Claimant's need for care was caused by degenerative changes unrelated to any of his industrial injuries. Respondent timely filed a Response to Claimant's Application for Hearing and requested the termination of all medical maintenance care.

16. Respondent also filed an Application for Hearing regarding Claimant's February 10, 2014 injury [case no. 4-942-549] requesting the termination of medical maintenance care. Claimant filed a timely Response on March 26, 2018.

17. All claims were consolidated for purposes of the April 24, 2018 hearing.

18. Claimant testified at the hearing in this matter. He explained that the medications and maintenance medical care he was receiving from ATP Chan were reasonable, necessary and related to his admitted industrial injury of January 10, 2012 [case no. 4-876-092]. Claimant remarked that the chiropractic care he has received from ATP Mobus has permitted him to continue to function in his job. He noted that he desires a Synvisc One injection from ATP Motz because the injections have worked previously.

19. Dr. Bernton testified at the hearing in this matter. He generally maintained that Claimant's need for treatment is caused by degenerative changes that are unrelated to any of the industrial injuries. In specifically addressing Claimant's right knee, Dr. Bernton explained that Claimant suffers from a degenerative process and his ACL was removed in 2004. Although Claimant's right knee was injured when he was struck by a slow-moving truck on January 10, 2012, there was no structural damage. Dr. Bernton emphasized that structural changes are necessary to change the degenerative slope of a condition. Absent structural changes, Claimant's right knee symptoms are unrelated to the January 10, 2012 incident but are instead related to

progressive degenerative osteoarthritis. Moreover, the February 10, 2014 and February 27, 2015 accidents did not cause any worsening of Claimant's right knee symptoms. Finally, the Synvisc One injections prescribed by Dr. Motz are designed to treat Claimant's underlying degenerative osteoarthritis and not his work injuries. Accordingly, the requested injections are not related to Claimant's industrial injuries.

20. In addressing Claimant's lower back symptoms, Dr. Bernton reasoned that Claimant also suffers from a pre-existing degenerative condition. The records document a significant history of lower back pain dating back prior to the January 10, 2012 work injury. Claimant was diagnosed with Modic and facet joint changes prior to the work injury and received significant evaluation and treatment including injections. Dr. Bernton explained that Claimant's degenerative lower back condition would continue to progress even in the absence of any of the work injuries based on the nature of the changes and Claimant's age, weight and genetics.

21. In addressing Claimant's right hip, Dr. Bernton had detailed in his report that the need for care was caused by degenerative changes unrelated to Claimant's industrial injuries. However, he testified that one to two right hip injections each year over the course of the following two years would be reasonable. Dr. Bernton apportioned 50% of the cost of the injections to the January 10, 2012 claim and 50% to the February 10, 2014 incident.

22. Claimant has failed to produce substantial evidence that the right knee Synvisc One injection requested by Dr. Motz is a reasonable, necessary and causally related maintenance medical benefit that is designed to relieve the effects of his January 10, 2012 industrial injury or prevent further deterioration of his condition. Initially, on January 10, 2012 Claimant was a pedestrian in Employer's parking lot when he was struck by a vehicle driven by a coworker at a low speed. Claimant suffered admitted industrial injuries to his lower back, right hip and right knee. Claimant noted that he desires a Synvisc One injection from ATP Motz because the injections have worked previously. However, the bulk of the medical records reflect that Claimant's right knee symptoms are not related to the January 10, 2012 incident but are instead attributable to chronic, degenerative changes.

23. DIME Dr. Orgel agreed with Dr. Burris that Claimant had reached MMI on October 25, 2012 for the January 10, 2012 Accident. Dr. Orgel assigned Claimant a 29% whole person impairment for his lumbar spine and a 27% lower extremity or 11% whole person rating for his right hip. Notably, Dr. Orgel did not assign any impairment for Claimant's right knee but instead remarked that "there are chronic changes of arthritis noted." Moreover, in a second DIME, Dr. Lindenbaum attributed Claimant's right knee pain to chronic degeneration as a result of tricompartment advanced disease. He determined that additional medical maintenance treatment was not warranted because of Claimant's poor response to prior treatment. Dr. Bernton also explained that Claimant suffers from a degenerative process and his ACL was removed in 2004. Although Claimant's right knee was injured when he was struck by a slow-moving truck on January 10, 2012, there was no structural damage. Dr. Bernton emphasized that structural changes are necessary to change the degenerative slope of a condition.

Absent structural changes, Claimant's right knee symptoms are unrelated to the January 10, 2012 incident but are instead related to progressive degenerative osteoarthritis. Dr. Bernton also noted that the February 10, 2014 and February 27, 2015 accidents did not cause any worsening of Claimant's right knee symptoms. He reasoned that, because the Synvisc One injections prescribed by Dr. Motz are designed to treat Claimant's underlying degenerative osteoarthritis and not his work injuries, the injections are not related to Claimant's industrial injuries. Based on the persuasive opinions of Drs. Orgel, Lindenbaum and Bernton, as well as the underlying medical records, Claimant's request for a Synvisc One injection into his right knee is denied and dismissed.

24. Respondent has failed to establish that it is more probably true than not that all future medical maintenance benefits regarding the January 10, 2012 [4-876-092] and February 10, 2014 [4-942-549] work accidents should be terminated. However, Respondent has demonstrated that Claimant is no longer entitled to receive medical maintenance benefits regarding the February 27, 2015 claim [4-977-997]. Initially, Respondent seeks to terminate medical maintenance benefits for Claimant's chiropractic care from Dr. Mobus, medications from Dr. Chan for lower back pain and right hip injections. The bulk of the persuasive medical records reflect that Claimant's lower back symptoms are attributable to a chronic degenerative condition. However, Claimant's continuing need for right hip injections is related to his January 10, 2012 and February 10, 2014 industrial accidents.

25. After considering all three of Claimant's Workers' Compensation claims Dr. Lindenbaum determined that additional medical maintenance treatment was not warranted because of Claimant's poor response to prior treatment. In addressing Claimant's lower back symptoms Dr. Bernton reasoned that Claimant suffers from a pre-existing degenerative condition. Dr. Bernton explained that Claimant's degenerative lower back condition would continue to progress even in the absence of any of the work injuries based on the nature of the changes and Claimant's age, weight and genetics. However, in addressing Claimant's right hip, Dr. Bernton testified that one to two right hip injections each year over the course of the following two years would be reasonable. Dr. Bernton apportioned 50% of the cost of the injections to the January 10, 2012 claim and 50% to the February 10, 2014 incident. Accordingly, Respondent's request to withdraw its admission for future maintenance medical benefits in claim numbers 4-876-092 or claim number 4-942-549 is denied.

26. Respondent is permitted to withdraw its admission for future maintenance medical benefits for the February 27, 2015 claim [4-977-997]. The persuasive medical evidence demonstrates that Claimant's need for medical maintenance care is no longer related to the February 27, 2015 accident. Dr. Lindenbaum remarked that Claimant is no longer entitled to medical maintenance treatment because of Claimant's lack of improvement and Dr. Bernton explained that Claimant suffers from pre-existing degenerative conditions unrelated to his industrial accidents. Finally, Dr. Chan issued a statement providing that he was "in total agreement" with Dr. Bernton that Claimant's continuing symptoms were degenerative in nature and not related to a specific injury

from February of 2015. Accordingly, Claimant's request to withdraw its admission for future maintenance medical benefits in claim number 4-977-997 is granted.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. Although Respondent filed a FAL admitting for medical maintenance benefits, it is not precluded from contesting liability for future treatment. *See Azar v. Mervyn's*, W.C. No. 4-354-936 (ICAP, June 9, 2005). An admission for medical

maintenance benefits is general in nature and is subject to a respondents' subsequent right to challenge particular treatment. *Id*. When respondents seek to terminate medical maintenance benefits they have the burden to prove that medical maintenance benefits are no longer reasonable, necessary or related to the industrial injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *see* section 8-43-201(1), C.R.S. (specifying that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification").

Synvisc One Injection

6. As found, Claimant has failed to produce substantial evidence that the right knee Synvisc One injection requested by Dr. Motz is a reasonable, necessary and causally related maintenance medical benefit that is designed to relieve the effects of his January 10, 2012 industrial injury or prevent further deterioration of his condition. Initially, on January 10, 2012 Claimant was a pedestrian in Employer's parking lot when he was struck by a vehicle driven by a coworker at a low speed. Claimant suffered admitted industrial injuries to his lower back, right hip and right knee. Claimant noted that he desires a Synvisc One injection from ATP Motz because the injections have worked previously. However, the bulk of the medical records reflect that Claimant's right knee symptoms are not related to the January 10, 2012 incident but are instead attributable to chronic, degenerative changes.

7. As found, DIME Dr. Orgel agreed with Dr. Burris that Claimant had reached MMI on October 25, 2012 for the January 10, 2012 Accident. Dr. Orgel assigned Claimant a 29% whole person impairment for his lumbar spine and a 27% lower extremity or 11% whole person rating for his right hip. Notably, Dr. Orgel did not assign any impairment for Claimant's right knee but instead remarked that "there are chronic changes of arthritis noted." Moreover, in a second DIME, Dr. Lindenbaum attributed Claimant's right knee pain to chronic degeneration as a result of tricompartment advanced disease. He determined that additional medical maintenance treatment was not warranted because of Claimant's poor response to prior treatment. Dr. Bernton also explained that Claimant suffers from a degenerative process and his ACL was removed in 2004. Although Claimant's right knee was injured when he was struck by a slow-moving truck on January 10, 2012, there was no structural damage. Dr. Bernton emphasized that structural changes are necessary to change the degenerative slope of a condition. Absent structural changes, Claimant's right knee symptoms are unrelated to the January 10, 2012 incident but are instead related to progressive degenerative osteoarthritis. Dr. Bernton also noted that the February 10, 2014 and February 27, 2015 accidents did not cause any worsening of Claimant's right knee symptoms. He reasoned that, because the Synvisc One injections prescribed by Dr. Motz are designed to treat Claimant's underlying degenerative osteoarthritis and not his work injuries, the injections are not related to Claimant's industrial injuries. Based on the persuasive opinions of Drs. Orgel, Lindenbaum and Bernton, as well as the underlying medical records, Claimant's request for a Synvisc One injection into his right knee is denied and dismissed.

Future Medical Maintenance Benefits

8. As found, Respondent has failed to establish by a preponderance of the evidence that all future medical maintenance benefits regarding the January 10, 2012 [4-876-092] and February 10, 2014 [4-942-549] work accidents should be terminated. However, Respondent has demonstrated that Claimant is no longer entitled to receive medical maintenance benefits regarding the February 27, 2015 claim [4-977-997]. Initially, Respondent seeks to terminate medical maintenance benefits for Claimant's chiropractic care from Dr. Mobus, medications from Dr. Chan for lower back pain and right hip injections. The bulk of the persuasive medical records reflect that Claimant's lower back symptoms are attributable to a chronic degenerative condition. However, Claimant's continuing need for right hip injections is related to his January 10, 2012 and February 10, 2014 industrial accidents.

9. As found, after considering all three of Claimant's Workers' Compensation claims Dr. Lindenbaum determined that additional medical maintenance treatment was not warranted because of Claimant's poor response to prior treatment. In addressing Claimant's lower back symptoms Dr. Bernton reasoned that Claimant suffers from a pre-existing degenerative condition. Dr. Bernton explained that Claimant's degenerative lower back condition would continue to progress even in the absence of any of the work injuries based on the nature of the changes and Claimant's age, weight and genetics. However, in addressing Claimant's right hip, Dr. Bernton testified that one to two right hip injections each year over the course of the following two years would be reasonable. Dr. Bernton apportioned 50% of the cost of the injections to the January 10, 2012 claim and 50% to the February 10, 2014 incident. Accordingly, Respondent's request to withdraw its admission for future maintenance medical benefits in claim numbers 4-876-092 or claim number 4-942-549 is denied.

10. As found, Respondent is permitted to withdraw its admission for future maintenance medical benefits for the February 27, 2015 claim [4-977-997]. The persuasive medical evidence demonstrates that Claimant's need for medical maintenance care is no longer related to the February 27, 2015 accident. Dr. Lindenbaum remarked that Claimant is no longer entitled to medical maintenance treatment because of Claimant's lack of improvement and Dr. Bernton explained that Claimant suffers from pre-existing degenerative conditions unrelated to his industrial accidents. Finally, Dr. Chan issued a statement providing that he was "in total agreement" with Dr. Bernton that Claimant's continuing symptoms were degenerative in nature and not related to a specific injury from February of 2015. Accordingly, Claimant's request to withdraw its admission for future maintenance medical benefits in claim number 4-977-997 is granted.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

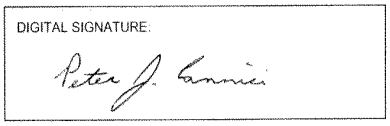
1. Claimant's request for the right knee Synvisc One injection requested by Cary Motz, M.D. on December 1, 2017 in Workers' Compensation claim number 4-876-092 is denied and dismissed.

2. Respondent's request to terminate all future medical maintenance treatment in case numbers 4-876-092 and 4-942-549 is denied and dismissed. Respondent's request to terminate all future medical maintenance treatment in case number 4-977-997 is granted.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 15, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

PROCEDURAL STATUS

A Prehearing Conference Order was issued by PALJ Harr on January 12, 2017. PALJ Harr granted Respondent's Motion to Add the Issue of Overcoming/Striking the Determination of DIME physician, Dr. Lindenbaum, based upon the allegations that Claimant violated WCRP 11. Claimant's Objection to adding the issue of overcoming the DIME physician as unripe, as closed, and as it outside the jurisdiction of an administrative law judge was added as an issue. Claimant's request that his objection be treated as an attempt to have the issue struck as unripe pursuant to 8-43-211(3) was granted and preserved for future adjudication.

The ALJ determined based upon the procedural posture of the case, as well as a need for testimony regarding the procedural and substantive issues, an Order bifurcating the issues set for determination was in the interests of justice.

Accordingly, the Court issued an Order Bifurcating the issues set for determination. The following issues were heard initially: Respondents' Motion to Add Issues at hearing; whether Respondents' requested remedy of striking the Division of Worker's Compensation IME is an available remedy under the OACRP and WCRP; whether the issue of the DIME rating was closed; whether the foregoing issues were ripe for determination. The remaining issues were reserved, to be determined after this Order.

PRELIMINARY FINDINGS OF FACT

1. Claimant worked as an Assistant Principal for Employer.

2. Claimant's medical history was significant in that he previously injured his low back in 2012 in a motor vehicle accident. An MRI done in May 2012 revealed Claimant had grade 1 spondylolisthesis at the L5-S1 level, with bilateral pars defect. Moderate foraminal stenosis was also noted at this level.

3. On August 14, 2012, Claimant underwent surgery for his low back, which was performed by Hooman Melamed, M.D. The procedure performed included: partial L5 and S1 semicorporectomy (anterior retroperitoneal approach); anterior lumbar interbody arthrodesis at the L5-S1 level; anterior lumbar segmental instrumentation and L5-S1, using RSB interbody plate; insertion of the biomechanical RSB cage with 12-decree lordosis; use of local harvested autograph and allograft bone; iliac crest bone grafting on the left side, separate procedure, separate incision and modifying up to 59; use of intraoperative fluoroscopy in multiplane; use of intraoperative somatosensory evoked potential and electromyographic monitoring. The pre-and post diagnoses were:

grade 1 isthmic spondylolisthesis at L5-S1 level; bilateral L5-S1 pars defects; bilateral foraminal stenosis; left leg pain, radiculitis, and sciatica; significant left L5 radiculitis; neurologic deficits in the L5 distribution on the left side; failed conservative management; and progressive worsening of the patient's symptoms of low back pain.

4. Claimant was involved in an altercation in 2014 while working. He underwent an MRI on September 17, 2014, which was ordered because of trauma and weakness in the lumbar spine. The MRI, which was read by Jaime Contreras, M.D., showed no acute findings and the anterior fusion at L5-S1, with grade one anterolisthesis of L5 on S1. Bilateral foraminal stenosis was noted at this level. The other lumbar levels were unremarkable.

5. Claimant sustained an admitted industrial injury on August 20, 2015 while working for Employer. Claimant was injured after he was struck in the parking lot by a parent in a pick-up truck.[1]

6. Claimant received treatment for his injuries, including at the North Colorado Medical Center, where he was treated in the Emergency Department.

7. On August 24, 2015, Claimant was evaluated by Jason Haas, D.C.[2] X-rays were taken and Claimant's posture and body composition was analyzed. Claimant returned to Dr. Haas' office on August 31, 2015 and received chiropractic treatments from Alisha Jacobs, D.C. Claimant's cervical, thoracic and lumbar spine were adjusted. Claimant also received chiropractic adjustments and a physical therapy evaluation on September 2, 2015.

8. A General Admission of Liability ("GAL") was filed on September 16, 2015 Respondents admitted for medical and temporary total disability ("TTD") benefits.

9. On September 10, 2015, Dr. Melamed issued a report following a telephone conference with Claimant. The report noted Claimant was doing well until recently when he was involved in a car accident. Dr. Melamed had reviewed Claimant's MRI and the CT scan, which showed psuedoarthrosis at the L5-S1 level. The PEEK cage and plate had completely subsided into the S1 vertebral body, causing bilateral L5-S1 significant foraminal stenosis. Dr. Melamed concluded there was pseudoarthrosis and also a loss of lumbosacral lordosis. Dr. Melamed recommended a posterior pedicle screw fixation at the L5-S1, with bilateral L5-S1 foraminal decompression, requiring an osteotomy and removing the entire facet complex and the pars to open up room for the nerve. Claimant indicated he wanted to go forward with surgical intervention.

[1] Exhibit PP, page 477.

[2] Records of treatment with Dr. Haas before Claimant's work injury were admitted at hearing. These records included treatments on March 19, 26, May 26, August 3, 6, 13, 2015; all of which occurred before the subject injury. Claimant treated for lumbar, cervical and right foot pain, receiving chiropractic adjustments.

10. Claimant received treatment at the Workwell Occupational Health, the designated ATP for Employer, beginning on September 22, 2015. Claimant was evaluated by Kevin Keefe, D.O., who diagnosed sprain/strains-lumbosacral; disturbance of skin sensation. Dr. Keefe opined Claimant's problem was related to work activities and issued an M164, as well as placing Claimant on restricted duty.

11. On September 30, 2015, Claimant was evaluated by Gregory Reichhardt, M.D. On examination, Claimant demonstrated diffuse give-way weakness in the left lower extremity. His reflexes were 2/4 and symmetrical in the patellae and Achilles. Claimant had god cervical and thoracic range of motion ("ROM"). Marked limitations were found in his lumbar ROM. Dr. Reichhardt's impression was: low back pain and bilateral lower extremity pain-history of previous L5-S1 fusion for spondylytic spondylolisthesis; mechanism of injury/pedestrian-motor vehicle accident in which he was directing traffic and was hit intentionally by a truck on 8/20/15; lumbosacral spine x-rays- post-op findings at L5-S1, grade II anterolisthesis, which may be chronic; thoracic spine x-ray 8/20/15-no acute findings; pelvic x-ray 8/20/15-no acute findings; CT of the thoracic spine 9/4/15-negative for acute bony pathology; lumbar MRI 9/4/15-bilateral pars defect, L5, grade I anterolisthesis, previous interbody fusion, moderate bilateral neural foraminal narrowing, L5-S1-mild ligamentum flavum and facet overgrowth, other levels normal; CT of the lumbar spine 9/4/15: L5-S1, interior screw fixation device was well-positioned in the line, no loosening fractures, bilateral L5 spondylolisthesis, slight L5-S1 listhesis, no acute pathology; 9/29/15 thoracic MRI demonstrating a small disc extrusion T5 to T7; concern by patient's prior surgeon re: pseudoarthrosis, with osteolysis; bilateral upper extremity numbness: C-spine x-ray 8/20/15-no acute findings; C3-4 minimal disc bulge, mild bilateral foraminal narrowing, C5-6 mild disc bulge, mild left foraminal stenosis, etiology unclear; opioid use, ORT, high risk; history of Hodgkin's lymphoma; history of stomach ulcers, psoriasis of hypothyroidism; borderline renal insufficiency. Dr. Reichhardt recommended Claimant keep his evaluation by a spine surgeon and offered various referral options.

12. On December 4, 2015, Claimant was evaluated by Anant Kumar, M.D.[3] Dr. Kumar noted Claimant had an antalgic gait and used a cane. Claimant's lumbar spine had localized tenderness at L4-S1. There were no obvious motor deficits, but a subjective decrease in sensation was noted. Dr. Kumar stated Claimant had undergone and L5-S1 anterior lumbar fusion, with anterior fixation using a stand-alone plate/cage. It appeared there had been subsidence of the cage and sacrum, but Dr. Kumar did not have the immediate postoperative x-rays or imaging to compare. In 2014, an MRI showed Claimant had left-sided foraminal stenosis at the L5-S1 level and an in situ fusion at L5-S1, with associated cage subsidence. Dr. Kumar disagreed a posterior only fusion would be successful in a reduction of the spondylolisthesis. He opined a posterior decompression would not decompress Claimant's up-and-down stenosis. Dr. Kumar recommended a revision anterior followed by a posterior spinal fusion.

[3] Dr. Kumar stated Claimant was referred by Insurer for an independent medical opinion. Claimant described Dr. Kumar as an ATP in his Position Statement and the referral from Dr. Pouliot was admitted as Exhibit J, p.177.

13. Dr. Kumar is an ATP.

14. Claimant was evaluated by Matthew Pouliot, D.O. on December 21, 2015. Dr. Pouliot documented Claimant was referred by Dr. Keefe. Dr. Pouliot reviewed the MRI which showed a neural compression at L5. On examination, Claimant's sensation and proprioception were intact on the upper and lower limbs, other than slight decreased sensation on the left in the L5 distribution. Dr. Pouliot's assessment was: 44-year-old male with a work injury on August 20, 2015, reportedly struck by a vehicle speed-now with back and radicular pain bilaterally worse on left, neural compression seen at L5's MRI bilaterally. Claimant was noted to have a history of anterior lumbar interbody fusion at L4-5, with reported pseudoarthrosis and reported negative EMG. Dr. Pouliot offered bilateral L5 transforaminal injections, but felt he would need a spinal operation. Dr. Pouliot noted he would assist Claimant with medication management.

15. Claimant returned to Dr. Keefe on February 9, 2016. Dr. Keefe noted back surgery had been denied by Insurer and Claimant was deciding whether to proceed with procedure using private insurance. Dr. Keefe recommended Claimant see Dr. Mathwich regarding case closure and a potential impairment rating. Dr. Keefe opined the cause of Claimant's problem was related to work activities.

16. On February 24, 2016, Claimant underwent a posterior lumbar spine fusion at L5-S1, which was performed by Dr. Kumar. A posterior instrumented fusion using pedicle screws, local bone graft, a medium in use was performed. Dr. Kumar also did a bilateral decompression of the L5 and S1 nerve roots in the canal and sub-particular zone. Claimant's pre-and post-operative proceedings were the same and included: pseudoarthrosis at L5-S1, status post L5-S1 anterior lumbar fusion; grade 1 spondylolisthesis, with severe foraminal stenosis, bilateral lower limb radiculopathy, left worse than right; present in both upper limbs, left worse than right; inability to stand upright; severe back pain; and failure of conservative treatment.

17. Dr. Kumar opined Claimant's prior L5-S1 anterior lumbar fusion had not healed appropriately and this was a revision surgery performed with no complications. Intraoperatively, Dr. Kumar found that the L5 nerve root was severely compromised and there was significant spinal stenosis in the canal, in the sub-pedicular and sub-articular zone.

18. On March 2, 2016, Claimant was evaluated by Brian Mathwich, M.D. Dr. Mathwich noted he was asked to evaluate Claimant regarding recent complications and the denial of surgery. He noted Insurer had not admitted liability for the lumbar spine and had denied the request for surgery. He spoke to Ms. Harrington, who confirmed the lumbar spine was not related. The lumbar CT and MRI showed significant issues in the lumbar spine, which was determined to be pre-existing and non-work-related. Dr. Mathwich stated Claimant underwent a conservative course of treatment.

19. At the time of Dr. Mathwich's evaluation, Claimant had complaints of bilateral arm numbness and tingling. Dr. Mathwich noted this was a difficult case due to

significant pre-existing issues. Dr. Mathwich found a normal cervical spine, reviewed the neurologic and upper extremity exam from Dr. Kumar, with no further complaints from the patient regarding bilateral arm numbness. Dr. Mathwich's diagnosis was: sprain/strains-lumbosacral; disturbance of skin sensation. If there continued to be no significant issues, Dr. Mathwich would consider Claimant to be without impairment rating and would issue permanent restrictions.

20. Dr. Keefe confirmed Insurer had denied liability after speaking to Ms. Harrington and also spoke to Dr. Mathwich. Dr. Keefe determined Claimant was at MMI on March 17, 2016 and completed a M-164.

21. On April 15, 2016, an amended GAL was filed. TTD benefits were terminated based upon Claimant's return to full duty.

22. Claimant returned to Dr. Mathwich, M.D. on April 21, 2016. Dr. Mathwich said Claimant initially had discomfort in the upper extremities, with bilateral arm numbness and had a negative MRI, as well as bilateral negative EMGs. Claimant underwent surgery on February 24, 2016, which was covered by private insurance. At the time of evaluation, Dr. Mathwich found tightness in the paraspinal muscles bilaterally, with some point tenderness of the left L4-5 paraspinal muscles. Tenderness was noted, along with trigger points in the gluteus medius bilaterally, just over the iliac crest. Dr. Mathwich's diagnosis was the same as on March 2, 2016.

23. Dr. Mathwich stated the cause of this problem did not appear to be related to work activities and noted he received documentation from Insurer which said the back injury, surgery and all associated treatment were not compensable. Dr. Mathwich stated there was no choice but to keep Claimant at MMI as of March 17, 2016. He indicated he would agree to be Claimant's primary care provider, if Insurer accepted liability.

24. Claimant requested a DOWC IME and Stephen Lindenbaum, M.D. was selected as the examining physician.

25. Claimant was evaluated by Dr. Lindenbaum on July 23, 2016. At the time of the evaluation the, Claimant walked without an antalgic gait and was able to walk heel to toe without discomfort. Dr. Lindenbaum agreed with Dr. Mathwich that Claimant reached MMI on March 17, 2016. Dr. Lindenbaum noted he received records from Dr. Haas. More particularly, he stated:

> "Today, the patient brought in some records from Dr. Haas, who he had been followed prior to the injury for just basic medical and physiological well-being. The notes that were brought to me show that the patient on exams prior to the injury had range of motion of the lumbar spine of flexion over 50° and extension over 26°. The exam after the accident dating 12/28/15, which is roughly 5 months later, shows the patient only has 90° flexion and 12° of extension".

26. On examination, Claimant had no long tract signs, clonus, or atrophy in the lower extremities. He had a prior injury fusion by Dr. Melamed and advised Dr. Lindenbaum he had no problems with his back since that time, until some mild back pain related to an altercation in 2014.

27. Dr. Lindenbaum obtained valid ROM measurements during his examination. Based on the *AMA* Guides, Table 53, IIB, Claimant had a 10% impairment of the body for his specific spine disorder and a 9% range of motion deficit. Combining the range of motion deficit with the specific disorder, Claimant had an 18% whole person impairment. Dr. Lindenbaum agreed with Dr. Kumar that this injury was not pre-existing and was a new injury, since he was previously asymptomatic. Dr. Lindenbaum opined that any postoperative care should have been covered under the compensation claim.

28. On August 4, 2016, the DOWC issued a Notice of Receipt of Division IME (DIME) Report DIME Process Concluded. Insurer received a copy of the Notice, as it was date stamped by its mail operations on August 5, 2016.

29. There was no dispute Respondents received a copy of the DIME report on August 17, 2016.

30. Pursuant to 8-42-107.2 (4) (c),C.R.S., Respondents were required to either file an admission of liability or request a hearing on or before August 24, 2016.

31. On September 12, 2016, a Final Admission of Liability ("FAL") was filed on behalf of Respondents. This was 18 days after the deadline set forth in § 8-42-107.2 (4)(c), C.R.S. Respondents admitted for PPD benefits based upon the medical impairment rating issued by Dr. Lindenbaum. Medical benefits after MMI were denied.

32. Claimant filed a timely objection to the FAL on September 15, 2016.

33. On January 12, 2017, counsel for the parties participated in a Prehearing Conference before Prehearing Administrative Law Judge Michael Harr. PALJ Harr's order is referenced, *supra*.

34. An Application for Hearing ("AFH") was filed on behalf of Claimant on February 28, 2017. The AFH listed the issues of medical benefits, disfigurement, as well as Grover medical benefits, mileage, and interest due on PPD.

35. A Response to the AFH ("RAH") was filed on behalf of Respondents on March 2, 2017. Respondents marked the following issues to be considered at hearing: medical benefits, disfigurement, permanent partial disability benefits. Other issues to be heard included reasonableness, necessity and relatedness of any and all medical care sought and/or received; authorization/authorized medical care; fee schedule; *Grover v. ICAO*; overcoming/striking the DIME; violation of Rule 11.

36. A Prehearing Conference was held on April 11, 2017 and an Order issued that same day. The Order vacated the hearing set for May 12, 2017. In addition, the Order allowed Respondents, at their discretion, to suspend payment of PPD benefits, pending a hearing. The Order also provided that if benefits remained owing after the hearing, Respondents were required to pay statutory interest on any amounts not paid during the duration of the suspension.

37. On April 14, 2017, Respondents filed a FAL. Respondents suspended payment of PPD benefits pending the resolution of issues at hearing.

38. On April 18, 2017, Claimant filed an Objection to the FAL.

39. On May 10, 2017, Claimant filed an AFH. He requested a hearing on the following issues medical benefits, disfigurement, along with *Grover* medicals, mileage, interest due on PPD, waiver, ripeness and closure.

40. On June 1, 2017, an RAH was filed on behalf of Respondents. The issues set for determination included medical benefits, disfigurement, and PPD benefits. Other issues include those referenced on Claimant's AFH. Respondents also sought an adjudication on reasonableness, necessity and relatedness of any and all medical care sought and/or received; authorization/authorized medical care; fee schedule; *Grover v. ICAO*; overcoming/striking the DIME; Claimant's violation of Rule 11.

FURTHER FINDINGS OF FACT

41. Dr. Haas testified JTECH is company that prepares a digital ROM assessment. The system on which this is prepared was separate from the medical record system which housed the records related to evaluations of patients.[4] The individual in his office who gathered the information for the report was Dr. Allison, the physical therapist or the PTA (Justin). Dr. Haas testified he had not reviewed Dr. Lindenbaum's report prior to the deposition. He did not have information as to what records Claimant took to the DIME.

42. Claimant brought notes documenting his ROM findings by Dr. Haas' offfice to the DIME, which was performed by Dr. Lindenbaum.

43. Claimant violated WCRP Rule 11 by bringing the records from Dr. Haas to the DIME.

44. Respondents were not aware Claimant brought the ROM findings from Dr. Haas' office to the DIME.

[4] Haas deposition page 16:18-25.

45. Dr. Lindenbaum testified he received notes from Dr. Haas at the time of his evaluation of Claimant.[5] Dr. Lindenbaum confirmed Claimant brought these records to the evaluation.[6]

46. Dr. Lindenbaum testified in his evidentiary deposition that he did not put much weight in the documents from Dr. Haas, stating at page 9:17-10:3:

> "Well, let me preface it by saying, I didn't put very much credence in it, but I thought it was something that should be placed in my report. It just basically says--Dr. Haas is commenting that he had seen the patient before this injury, [Claimant], and his range of motion was one level. And that several months after the injury, he saw him again, and his range of motion dropped significantly.
>
> Now, let me--let me state here that this is a very-this does not mean a lot to me. Only that I think it is important to put that in here because it is a document that suggests there had been a change".

47. Dr. Lindenbaum also stated his major concerns were the findings made by orthopedic surgeons. The ALJ noted Dr. Lindenbaum concluded Claimant's medical impairment was caused by his industrial injury.

48. Dr. Lindenbaum's testimony that his opinions were not affected by review of Dr. Haas' records was persuasive to the ALJ.

49. Laura Harrington testified as a representative for Respondent-Insurer. She has been employed by Insurer as a claims adjuster for 18 years and received notice of the claim on August 25, 2015. She has been responsible for adjusting the instant claim since that time. Ms. Harrington testified she did not prepare the DIME packet which was submitted to Dr. Lindenbaum. She did not have a copy of Dr. Haas' JTECH records prior to the DIME. Ms. Harrington was a credible witness.

50. Ms. Harrington testified she received Dr. Lindenbaum's DIME report on August 17, 2016, which was faxed to her at 3:56 p.m.[7] Ms. Harrington testified she skimmed the report and believed she had 20 days from receipt of the DIME report to take a position. Ms. Harrington testified Respondents disagreed with the DIME and wished to challenge the DIME opinion.

51. An AFH was filed on August 30, 2016[8], but was withdrawn after Ms. Harrington discussed the case with Insurer's staff attorneys and Claimant's counsel.

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[5] Lindenbaum deposition page 8:14-21.

[6] Lindenbaum deposition page 8:25-9-10.

[7] Exhibit A, p.1.

[8] Exhibit KK, pp. 463-465.

A Notice of Cancellation of hearing was filed, although the hearing had not been set.[9]

52. The ALJ found Ms. Harrington could have determined there was a reference to Dr. Haas' ROM records in Dr. Lindenbaum's report within the time frame to take a position on the DIME. Ms. Harrington incorrectly thought the 20-day time ran upon receipt of the DIME report. An AFH could have been filed on behalf of Respondents within the 20-day period to dispute the conclusions made by the DIME physician.

53. The issues concerning the DIME were ripe for determination.

54. The Court does not have jurisdiction to adjudicate Respondents' Objection to the DIME, as the AFH was filed beyond the 20-day time limit provided by statute.

55. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S. (2016), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2016). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. (2016).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

[9] Exhibit JJ.

RIPENESS

In the case at bench, Claimant disputed whether the issue of striking the determination of a DIME physician was ripe. The term "ripeness" refers to whether an issue is "real, immediate, and fit for adjudication". Colorado courts have held that under this doctrine "adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur". *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006).

That is not present in the instant case. The ALJ determined that all of the issues concerning the DIME, including Respondents' response to the Notice of Receipt of Division IME (DIME) Report DIME Process Concluded and receipt of the report of Dr. Lindenbaum were ripe for determination.

MOTION TO STRIKE DIME

Claimant argued that the failure to request a hearing within 20 days barred Respondents' attempt to contest the DIME opinion and this Court has no jurisdiction to decide the issue. Respondents argued that issues admitted to in a filed FAL are closed, unless Claimant filed a timely objection, pursuant to § 8-43-203(2)(b)(II)(A). Respondents cited *Balfour v Boulder County*, W.C. No 4-020-145 (ICAO March 22, 1993) for the proposition that Respondents could then controvert their own admission of liability once the Claimant objected. Respondent further argued that it did not waive its right to contest the DIME opinion since it was not aware Claimant had provided the Dr. Haas' records to Dr. Lindenbaum.

As determined in Findings of Fact 28-30, no contrary evidence was introduced to refute the fact that Respondents received the Notice of Receipt of Division IME (DIME) Report DIME Process Concluded. Respondents were required to take a position on or before August 24, 2016 upon issuance of the Notice of Receipt of Dr. Lindenbaum's report. Even though the adjuster for Insurer (Ms. Harrington) did not have JTECH report which contained the ROM readings before the evaluation, the ALJ determined she could have found the reference to those records in Dr. Lindenbaum's DIME report. (Finding of Fact 51).

The deadline set forth in § 8-42-107.2 (4) (c), C.R.S. has been held to be jurisdictional. *Leprino v. Industrial Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005). In *Leprino*, Claimant suffered an admitted industrial injury and reached MMI. Claimant requested a lump sum after an FAL was filed and then requested a DIME. The DIME physician concluded Claimant was not at MMI, but Respondents took no position with regard to that opinion. The case went to hearing, the ALJ found Claimant had not reached MMI and was entitled to PPD benefits. The ALJ also determined that Respondents failed to either admit or contest liability within 30 days [the 2005 version of § 8-42-107.2 (4)] and therefore Respondents were precluded from challenging the DIME physicians' opinion.

The Colorado Court of Appeals found Respondents were bound by the DIME physician's report because they failed to contest the findings. Justice Casebolt observed:

"Both sections [§ 8-42-107.2 (4) and § 8-43-203(2)(b)(II)] are part of an overall statutory scheme designed to ensure the prompt payment of benefits without the necessity of litigation in cases that do not present a legitimate controversy. [citation omitted]. The provisions of this statute are clear and require the insurer either to contest the DIME report within thirty days or to admit in accordance with the report. *City Mkt., Inc. v. Indus. Claim Appeals Office,* 68 P.3d 601 (Colo.App.2003) [upholding the imposition of penalties for employer's failure to either contest or admit to the DIME report]. Just as an ALJ lacks jurisdiction, without a DIME, to resolve a dispute concerning an ATP's finding of MMI, *Town of Ignacio v. Indus. Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002), the ALJ also lacks jurisdiction, absent an objection to the DIME physician's findings, to resolve a dispute as to those findings". *Id* at 482.

Leprino has not been overruled and remains good law, which governs the case at bench. No contrary authority was provided to the Court. The time limit prescribed by § 8-42-107.2(4) is jurisdictional. Accordingly, Respondents' August 30, 2016 Application for Hearing was outside the jurisdictional time limit for responding to the DIME report. The ALJ determined there was no jurisdiction once the time provided for in § 8-42-107.2(4) had elapsed.

In coming to this decision, the ALJ considered the application of *Rigoberto Almanza v. Terry Johnson and R. Edeltraud Johnson*, W.C. 4-713-132-02 (ICAO December 7, 2012) to the case at bar. Citing *Leprino v. Industrial Claim Appeals Office,* 134 P.3d 475, *supra*, the Industrial Claim Appeals Panel concluded the provisions of § 8-42-107.2 (4) were jurisdictional. The Panel reversed the ALJ Order which determined Respondents had not waived their right to respond to the DIME report based on a PALJ Order which extended the time to respond. (The basis for challenging the original DIME was because there was an improper communication with the examining physician.) The Order awarding PPD benefits based upon a subsequent DIME was also set aside. The ALJ determined this case does not provide the authority to strike the DIME in its entirety, as suggested by Respondents.

Respondents also averred they did not waive the right to contest the findings of the DIME physician. Respondents correctly point out the requirements for waiver were not met here, as there was not a knowing, intentional and voluntary relinquishment of a known right since they were not aware Claimant brought the JTECH report to the DIME. Respondents argued they could not have waived the right to raise the issue of a Rule 11 violation because they were not aware it had occurred. The ALJ found Respondents did not have a copy of Dr. Haas' records prior to the evaluation. (Finding of Fact 44). This was supported by the testimony of Ms. Harrington. (Finding of Fact 49). However, having determined there was no jurisdiction upon the expiration of the statutory timeframe, this argument is unavailing.

The ALJ has determined that Respondents are entitled to present evidence in support of their Petition to Reopen and/or withdrawal of the FAL. Under the particular factual circumstances of this case, the ALJ finds Respondents should be given the opportunity to present evidence on these issues at a subsequent hearing.

Finally, the ALJ has determined that a sanction is appropriate for Claimant's violation of Rule 11. As found, Claimant violated Rule 11 by tendering Dr. Haas' records to Dr. Lindenbaum at the time of the DIME. (Finding of Fact 43). As found, Claimant did not provide a copy of these records to Respondents before or after the DIME. Respondents were not aware these had been provided.

It is well-established that the Colorado Rules of Civil Procedure apply to workers' compensation hearings, except to the extent these are inconsistent with the statute or WCRP/OACRP. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). Moreover, the Colorado Legislature has articulated the important policy underpinning the DIME process, including its independence. The rules governing such evaluations provide a mechanism for submitting medical records and prohibit the submission of records outside the proscribed process. Claimant's submission of records violated this prohibition. (Finding of Fact 43).

Accordingly, the ALJ has determined that an appropriate sanction is to preclude Claimant from recovering statutory interest on PPD benefits during the time in which Respondents have suspended payment of said benefits. Said sanction is in the interests of justice and tailored to remedy the violation which occurred in this instance.

ORDER

It is therefore ordered:

1. Respondents' Motion to Strike the DIME is denied.

2. Claimant's Objection to Respondents adding the issue of Petition to Reopen is overruled. This issue is deemed ripe and will be set for determination at the hearing following this Order.

3. PALJ Gallivan's April 11, 2017 Order is affirmed, in part and overruled in part. Respondents shall not be obligated to pay statutory interest on PPD benefits which were suspended, as a sanction for Claimant's violation of WCRP Rule 11. The balance of PALJ Gallivan's order remains in full force and effect.

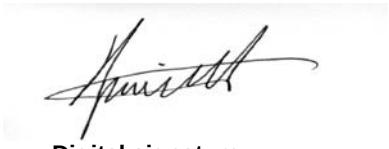
4. Counsel for Claimant and Respondents shall confer and schedule a second day of hearing on the remaining issues before the undersigned ALJ.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 15, 2018



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable injury on August 10, 2017?

2. Has Claimant shown, by a preponderance of the evidence, that he is entitled to all reasonable, necessary, and related medical treatment resulting from this work injury?

3. Has Claimant shown, by a preponderance of the evidence, that he is entitled to Temporary Total Disability payments as a result of this work injury?

STIPULATIONS

The parties stipulated that, if compensable, Claimant's Average Weekly Wage is $729.90. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant began working for Employer in 2016. Claimant worked in traffic maintenance, generally performing maintenance on state highways. This typically entailed duties such as clearing brush, guardrail repair, clearing trash, and plowing snow.

2. Claimant testified at hearing that on August 10, 2017, he arrived to work at 7:45 am. He and a team of two other employees, Victor Salone and Julius Orlando, were to clear brush on I-25 northbound near the Fontanero exit. Claimant testified that this job was to take the entirety of the work day.

3. Claimant testified that at 1:30 pm, he was engaged in cutting trees with a chainsaw which weighed about 30 pounds. Claimant was to cut the trees, Mr. Salone was to collect the fallen brush, and Mr. Orlando was to take the fallen brush and feed it into a tree shredder. Claimant testified that he had to look left, where the cut trees were falling, in order to ensure that his team would not be struck by falling debris. While cutting the trees, Claimant was holding his chainsaw extended away from his body at roughly chest height, leaning out over a retaining wall the interstate. At that time, he looked sharply left to ensure a safe falling path. At that time, he felt an instant pain in the center of his neck. He described a "bright flash of light", and "every intense" pain.

4. Claimant testified that he did not immediately inform anyone of his injury because the job was almost done and he felt that the work needed to be completed, as

he did not want to "leave his crew hanging." As it was also a Friday, he testified that he thought that rest and aspirin over the weekend would solve the problem. He did not mention his injury to either Orlando or Salone in the aftermath of the incident.

5. Claimant testified that he first reported his injury to Jacob Aguilar with Employer by phone on Saturday, August 12. He further testified that he also texted his road supervisor Steve Jurich that same day, indicating that he'd hurt himself that Thursday. Respondent's Exhibit J depicts a text message from Claimant to "Jake" (which the ALJ infers to be Mr. Aguilar) on Sunday, August 13 at 10:25 a.m., wherein Claimant states "I think I pinched a nerve in my neck Thursday [August 10] while cutting trees." Claimant testified that Aguilar directed him to wait until Monday, August 14 to present to Centura Centers for Occupational Medicine ("CCOM").

6. As Mr. Aguilar advised, Claimant did seek medical treatment with CCOM on August 14, 2017. (Ex. 4). He was first examined by Jay Neubauer, M.D. Dr. Neubauer noted primary problems located in Claimant's neck, left arm, and both shoulders. Claimant indicated to Dr. Neubauer that he had been operating a 30 pound chainsaw when he turned his head sharply to the left, causing instant pain. Dr. Neubauer placed Claimant under temporary restrictions, limiting him to no more than 5 pounds with his upper body and restricting him from any commercial driving. *Id*. at p. 14. Claimant was referred for physical therapy, and told to follow up in one week.

7. Claimant continued treating with CCOM through November 9, 2017, when his care was discontinued due to denial of his claim by Respondents. *Id*. at 31. Claimant's workers' compensation claim had been previously denied on August 28, 2017 when Respondents filed a Notice of Contest endorsing need for further investigation for prior medical records. (Ex. 3, p. 7).

8. Respondents conducted surveillance of Claimant during this period, most notably on November 19, 2017. (Ex. I). Surveillance footage of Claimant shows him repeatedly bending at the waist, as well as riding an ATV. Dr. Neubauer read a surveillance narrative report- but was unable to view the surveillance video itself-and noted that: "I do find it interesting that he is riding ATV *but surmise that this would be tolerable given his current level of pain*." (Ex. 4 at 37) (emphasis added).

9. Conservative care on Claimant's denied claim resumed with a demand appointment at CCOM on December 5, 2017. (Ex. 4, p. 32). Claimant resumed treatment until February 15, 2018, when he was placed at MMI by Dr. Neubauer. *Id*. at p. 55. Claimant's treatment during this period consisted largely of physical therapy and work hardening exercises, as well as some chiropractic treatment.

10. Throughout his course of treatment at CCOM, Claimant was placed under work restrictions by Dr. Neubauer. (Ex. 4). Those restrictions began on August 14, 2017, initially restricting Claimant with no lifting/carrying/pushing/pulling more than 5 pounds, and restricting commercial driving. *Id*. at 14. Claimant was released from restrictions on January 10, 2018, then returned to restrictions limiting him to no

lifting/carrying/pushing/pulling greater than 20 pounds on January 18. *Id*. at 45, 47. Claimant was released again at full duty, with no restrictions, on February 15, 2018, when Dr. Neubauer placed him at MMI. (Ex. 4 pp. 52-53).

11. Claimant attended an Independent Medical Exam with Jack Rook, M.D. on December 11, 2017. (Ex. 7, pp. 130-136). Dr. Rook reviewed the medical record, performed a physical exam, and took a patient history from Claimant. Dr. Rook diagnosed Claimant with chronic neck pain, including myofascial pain, probable facet malalignment, and diminished sensation in a left C7 distribution, as well as low back pain including a probable facet malalignment. *Id*. at 134.

12. Dr. Rook concluded that Claimant's neck pain was caused by the August 10, 2017 work incident. *Id*. at 135. Dr. Rook noted the awkward and physically demanding work Claimant was engaged in at the time of his injury. He also noted Claimant's utter lack of symptoms prior to the date of injury, and opined that this would have been sufficient to cause Claimant's injury upon turning his head sharply to the left as reported. Dr. Rook additionally concluded that Claimant's low back pain was causally related to the neck pain stemming from the August 10, 2017 work incident. This was caused by Claimant altering his gait in order to reduce pain stemming from his neck. *Id*. at 134-35.

13. Claimant also attended an Independent Medical Exam at Respondents' request with Carlos Cebrian, M.D. on February 12, 2018 (Ex. 16). Dr. Cebrian reviewed the medical record, performed a physical exam and took an oral history from Claimant, and reviewed Dr. Rook's IME report.

14. Victor Salone testified at hearing on behalf of Respondents. Mr. Salone worked for Employer with Claimant, and was present on the job site on August 10, 2017. Mr. Salone was unable to recall much about that day, although he estimated that they began work around 8 or 9 am and finished between 4 and 5 pm. Mr. Salone did not recall noticing Claimant engaging in any pain behaviors, nor did he recall Claimant mentioning anything to him about an injury. Claimant drove Mr. Salone to a bike event he was working that afternoon. He testified that Claimant spoke about being unsatisfied at work, but conceded that this wasn't uncommon, due to employees feeling that they were treated unfairly. He further clarified that Claimant seemed generally happy in his work with Employer.

15. Eric Myers also testified at hearing. Myers testified that as of August 2017 he was a first-level supervisor for Employer. He testified that Claimant reported his injury on August 14 and completed paperwork for a workers' compensation claim at that time, although he did note that Claimant marked the root case as "unknown." Claimant also, in response to the question "How could this type of incident been prevented:" (sic) marked "Unknown" (Ex. H, p.002). He did note that Claimant indicated in the report that the equipment involved in the injury was a chainsaw.

16. Bradley Bauer also testified at hearing on behalf of Respondents. He testified that his position with Employer was a LTC Ops I, part of which entailed supervising Claimant. He testified that it was common knowledge that Claimant intended to move on to another position from performing maintenance with Employer. He testified that Claimant immediately inquired about the promotional process upon being hired and attempted to enter a cross-training program to work in areas more engineering focused. Claimant was denied the cross-training opportunity. Bauer conceded that Claimant evidently intended to remain with Employer in some capacity, and that it was not suspicious for such employees to seek promotion. Finally, Bauer testified that Claimant left a note indicating his resignation on February 8, 2018.

17. Claimant's employee review noted that he had some accountability issues (which Claimant disputed), and some with communication. (Ex. G).

18. Dr. Cebrian testified at hearing. He was qualified as a Level II expert in Occupational Medicine. He testified, consistently with his report, that Claimant's injury could not have occurred as reported. He further noted that Dr. Rook's IME report should be given little weight, as Dr. Rook was only able to review medical records through September 28, 2017 as part of his IME. He concluded that this lack of records past that date rendered Dr. Rook's opinion as to causation less credible than his own, as he was able to review the surveillance footage, and the remainder of the medical records. He finally concluded that there was no objective evidence of an injury to Claimant's cervical spine on August 10, 2017.

19. Dr. Cebrian noted that because his opinion took into account more information than any other physicians', which allowed him to see "a larger view picture of what goes on relative to the mechanism" and thus a more accurate causation analysis. He noted Claimant's medical history showed it was common for Claimant to demonstrate diffuse musculoskeletal complaints without inciting events. (Ex. A p. 20). He opined there was no objective evidence of an injury whatsoever in this claim, and that this included the MRI and all other physicians' opinions. (Ex. A p. 21).

20. Regarding Claimant's report of a flash of light, Dr. Cebrian noted that (a) it had not appeared anywhere else in the record; and (b) the reported mechanism of injury could not have caused a flash of light because that would require force to the brain or eyes. The force of the mechanism described by the Claimant would be to the shoulders and upper back, instead of the neck. He opined the amount of force from this mechanism would be "significantly less" than pushups.

21. Dr. Cebrian addressed each of the potential injuries from the Incident: facet injury, muscle spasm, cervical strain, and low back strain. He stated each possible injury from the mechanism of injury was not medically probable:

- **Facet Injury**: This injury would be to small joints that go together from one vertebral body to another, and typically these are injured by significant forces of flexion and extension, such as whiplash. Therefore, the proposed mechanism of

injury of turning his head rapidly, even holding the chainsaw, did not have sufficient force to have injured the spine.

- **Muscle Spasm:** This injury would have appeared as a "large, knotted muscle," especially for an individual with Claimant's significant musculature. If it had occurred, it would have been found on palpation during examination within the initial evaluations, and those evaluations did not find any evidence of a muscle spasm. Finally, a muscle spasm would not be expected to cause 10 out of 10 pain.

- **Neck Strain:** the diagnosis suggested by Dr. Neubauer is a "stretching of the muscle fibers that results in some sort of local trauma." Onset is typically immediate, or by the next morning. Neck strains usually are at their worst initially, and resolve within 4-6 weeks at the longest. The problems with this diagnosis are: (a) there were no objective signs of a neck strain; and (b) Claimant's six month recovery did not fit the diagnosis because "when you're looking at the entire picture, it doesn't make sense that minimal mechanism would lead to those kinds of complaints that would last for that length of time without any objective findings of significance…"

- **Low Back:** For the first alleged cause, traction, it could not have injured Claimant's low back because it put no force on his low back, and Dr. Cebrian had never heard of neck traction injuring the low back. On the second cause, Claimant's posture could not have affected his low back, as it instead would only cause discomfort to claimant's shoulders and upper back. Further, Dr. Cebrian knew of no scientific studies connecting low back pain to neck posture. Finally, Claimant had full range of motion of his neck, so it would not have affected his posture significantly. Overall, the theory of a posture change was not medically probable.

22. Dr. Cebrian also noted the surveillance showed Claimant lifting a bench without difficulty, which you would not expect from someone with back complaints.

23. Dr. Cebrian opined that Claimant's tingling and numbness of his extremities, if they had been related to the Incident, should have occurred within the first few days, but had not. Regarding the surveillance, Dr. Cebrian testified that the most significant thing about that was that Claimant had no hesitation or pain behavior whatsoever.

24. Dr. Cebrian's ultimate opinion was that Claimant's neck issues were not work related, and that there were no potential neck or low back injuries resulting from the Incident. He also opined that Claimant should not have been placed on restrictions due to the incident.

25. Claimant testified at the hearing. He testified how his injury occurred, as well as the steps he took to report it. He did testify that he hadn't told anyone working with him on August 10, 2017 that he'd sustained an injury; instead deciding that he

needed to work through the pain in order to get the job completed. He further testified that the pain in his neck caused him to hold his head very stiffly to avoid aggravating the area and causing further pain. He testified that in so doing, he began noticing pain in his lower back as a result of the way he was holding himself.

26. He testified that he was able to return to work for 4 or 5 days in January of 2018, but otherwise his restrictions kept him off work, since Employer was unable to accommodate said restrictions. After returning to work for that period, he had a session of chiropractic care that caused his pain to increase, which again took him out of work. Claimant testified that he worked about another 4 or 5 days in February before he resigned.

27. Claimant also testified that while he had a minor injury years prior to August 10, 2017 which had caused stiffness in his neck, that he received treatment and the condition improved. He also indicated that he was not having any pain in his neck or low back immediately before the August 10, 2017 work incident, nor had he received treatment for those areas for some time before the incident.

28. During his testimony, Claimant addressed the surveillance footage showing him riding an ATV. Claimant testified that after his treatment had been ongoing, he was able to ride his ATV without much pain and would be able to do so without much pain. He indicated that the vehicle he uses does not require much effort to operate, as it has power steering. He testified that, to his knowledge, the restrictions from his doctor did not preclude him from riding the ATV.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive

arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Credibility

D. While Claimant may not have been entirely accurate or forthcoming in outlining his entire medical history depending upon the context of the conversation, overall the ALJ finds that Claimant testified credibly, and provided accurate information to his ATP, who placed him on diminishing work restrictions before ultimately placing him at MMI. Claimant was initially given a restriction of no commercial driving, based upon limited range of motion, but that would not have prevented him from the driving the ATV as he did for the few minutes as observed in November-and to no apparent surprise to Dr. Neubauer. After viewing the surveillance video, the ALJ (like Dr. Cebrian) notes no noticeable guarding or pain behaviors, but Claimant might well have simply been bored.

E. The ALJ finds the testimony of Victor Salone, Eric Meyer, and Bradley Bauer to be credible. However, such testimony merely established that Claimant delayed in reporting his injury, while not displaying pain behavior shortly after the fact. Claimant's credible explanation is that he thought he would work through it. When he realized he could not, he reported it two or three days later. Since the mechanism of injury seemed so benign on its face, and the onset of pain so sudden, it would be logical to describe its origin, and future prevention as "unknown". While Claimant was no doubt disappointed at his promotional prospects, the evidence is insufficient to conclude he has now resorted to fraudulent intentions. While Claimant's abrupt departure from his employment was anything but laudable, he more likely decided not to return, once medically cleared, to a job he saw as a dead end. Had Claimant wished to abuse the system, he likely would not have reported rapid improvements to Dr. Neubauer.

Compensability

F. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and

circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

G. An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Indus. Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Indus. Comm'n*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*.

H. The medical testimony is plainly in conflict on the conclusions to be drawn. While Dr. Cebrian did have greater access to information at the time of his report than did Dr. Rook, he did not have the benefit of regular treatment of Claimant, as did Dr. Neubauer. While the ALJ concludes that Dr. Cebrian is sincere and professional in his opinions, the testimony of Claimant, combined with the report from Dr. Rook, and the medical evidence from CCOM, is more persuasive in this instance. While Claimant did not fully disclose his prior issues with this neck and back, the record is sufficiently clear that he had worked this physically demanding position for some time without being symptomatic. The ALJ concludes, by a preponderance of the evidence, that Claimant either injured his back as described, or alternatively, aggravated a previously asymptomatic injury.

Medical Benefits

I. The Claimant has the burden to prove her entitlement to medical benefits by a preponderance of the evidence. C.R.S. §8-43-201. The respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. C.R.S. §8-42-101(1)(a).

J. The claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

K. "[I]f a disability were 95% attributable to a pre-existing, but stable condition, and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling." *Seifried v. Industrial Com'n of State of Colo.*, 736 P.2d 1262, 1263 (Colo. App. 1986). The ALJ finds that any preexisting injury in Claimant's neck or back was a preexisting, but otherwise stable condition. This condition did not become disabling until August 10, 2017 as a result of the compensable work event.

L The ALJ concludes that Claimant is entitled to all reasonable, necessary, and related medical treatment as it relates to the August 10, 2017 work incident. The treatment Claimant received in the months following were a direct result of the injury he sustained when the incident occurred. That a Claimant has sustained an injury in the past does not, in and of itself, make a subsequent injury a mere repetition of the former. Indeed, Claimant testified that his work as a law enforcement officer ended years before he began working for Employer, and does not appear to have had any trouble performing his work duties leading up to August 10, 2017. The ALJ therefore concludes that Claimant's treatment to his release date at MMI has been reasonable, necessary, and related to the August 10, 2017 work injury.

Temporary Total Disability Benefits

M. To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998)

N. The ALJ concludes that the August 10, 2017 work incident caused a disability resulting in more than three days of wage loss to Claimant. Claimant testified that Employer was unable or unwilling to accommodate the work restrictions assigned by Dr. Neubauer, and thus he was unable to return to work except for a few days in January and February 2018. Claimant testified, and the medical records document, that he had neck pain preventing him from physical work during such period, and his restrictions prevented a full range of motion in Claimant's neck necessary for him to drive a commercial vehicle safely during the same period. Claimant was impaired from performing his job duties from August 10, 2017 through February 8, 2018, the date Claimant tendered his resignation with Employer. The ALJ therefore concludes that Claimant is entitled to temporary total disability during said period.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury on August 10, 2017. Respondents will pay for all reasonable, necessary, and related medical treatment provided by an ATP.

2. Respondents will pay Claimant TTD benefits from August 10, 2017, through his last date of employment, February 8, 2018. Respondents will be given a reduction in TTD payments for any days during that period that Claimant did report to work and receive wages.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 17, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

The issues presented involve the relatedness of two medical conditions to Claimant's work duties, as well as medical benefits. The questions to be answered are:

I. Whether Claimant established, by a preponderance of the evidence, that her bilateral carpal and cubital tunnel syndromes are causally related to an occupational exposure, which also admittedly caused right lateral epicondylitis, and if so;

II. Whether Claimant also established by a preponderance of the evidence that she is entitled to reasonable and necessary medical benefits, including the treatment provided by Karl Larsen, M.D.

At hearing, the parties stipulated that Dr. Karl Larsen is an authorized treating physician. They also agreed to hold the issue of AWW in abeyance.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant has been employed with the City of Colorado Springs' police department for approximately 19 years. She began as a patrol officer and is now a detective. In her current position, Claimant works on narcotics cases with a team of other detectives. She also works on homicide and robbery cases, performs surveillance, and assists patrol officers with processing narcotics evidence.

2. Claimant and other detectives use the "Law Enforcement Records Management System" (LERMS) to submit case discovery/reports to the District Attorney's Office. In early 2017, Claimant's team was advised it had not been submitting discovery in the proper manner, and that it would need to reprocess and resubmit approximately 3,000 criminal cases. In order to do so, the detectives had to "rebuild the cases by reentering (typing) case information into the database and then resubmit those cases to the District Attorney's Office. During this time, Claimant was also "acting sergeant" for her team and was working her own criminal cases. As acting sergeant, Claimant was required to track computer statistics for her team, review and assign new investigations, and prepare arrest and search warrants. She was also working on a large prescription fraud case. She typed her own case reports, arrest warrants and search warrants, in addition to completing the case rebuilding duties noted above. All of the aforementioned tasks involve considerable amounts of typing and

computer mousing. Beginning January 2017, Claimant testified she was typing up to 10 hours per day.[1] She was also using a computer mouse 50% of the time.

3. In March 2017, Claimant began to feel an aching pain on the top of her left wrist when typing. She had experienced similar pain in January 2016 while typing at work, but that pain gradually went away. She believed that the pain she developed in March 2017 would go away too, but it did not. Claimant gradually began experiencing pain in the base of her left thumb, then on the bottom of her left wrist, and into her hand. Claimant testified that the pain was aggravated by all of the typing she was doing. Due to her job requirements, Claimant was not able to reduce or eliminate the amount of typing she was performing. Over time, she began to experience pain in the inside of her left elbow.

4. Claimant's job also requires her to drive, and she noticed that gripping the steering wheel in her vehicle caused pain and numbness in her left arm. In approximately March 2017, she began to experience considerable pain in her left elbow at night. She was contacted by Respondent-Employer regarding treatment but elected to simply give it more time to see if the pain would resolve.

5. Claimant's pain did not abate. Consequently, she decided to report her condition. She met with her supervisor, Sergeant John Sarkisian, and completed a "Preliminary Report of Injury/Illness" form. (Claimant's Exhibit 5, pgs. 68-69). Claimant did not report right upper extremity pain during this meeting. In this form, the "Date Injury Occurred" and the "Date Injury Reported to Supervisor" are both listed as May 2, 2017. Claimant testified this was simply the date she decided to complete the injury form, but that she was still unsure whether she wanted to actually file a claim and see a doctor. Claimant did not want to be put onto light duty work status, so from May to July 2017 Claimant continued to wait and see whether her pain would subside. She did not seek treatment during this time.

6. The "Preliminary Report of Injury/Illness" indicates Claimant's injury occurred as a result of "Typing," and "Because she must type for work," and "She must type to complete reports." (Claimant's Exhibit 5, pg. 69).

7. Claimant's left upper extremity pain persisted, worsened and started to affect her job performance. She also developed right thumb and wrist symptoms. Consequently, she decided to pursue a workers' compensation claim and seek medical treatment.

8. Claimant testified that she met with an unidentified female representative of Respondent-Employer on or about August 1, 2017 regarding the pain in her bilateral upper extremities. The representative reviewed the "Preliminary Report of Injury/Illness" Claimant completed on May 2, 2017. She hand-wrote a correction to indicate

[1] The extra typing associated with rebuilding/processing prior cases slowed down after June. According to Claimant, she was to typing 2-3 hours per shift after June 2017.

Claimant's left upper extremity pain extended from the wrist to the elbow (not shoulder), and hand-wrote the addition of "right thumb & wrist."

8. Claimant testified that she began having right thumb/wrist problems sometime in June 2017. The ALJ infers from the evidence presented, that Claimant told the unidentified risk management representative of her right thumb/wrist symptoms during the August 1, 2017 meeting and that the same was added to the Preliminary Report of Injury/Illness form at that time.

9. Respondent contends that Claimant's testimony concerning the development of right thumb/wrist symptoms in June 2017 is inconsistent with her prior answers to interrogatories wherein she noted that her right upper extremity pain "began" (as characterized by Respondent) in August 2017. Based upon the date of Claimant's report to risk management (August 1, 2017) coupled with her response that she was "experiencing" right thumb/wrist symptoms as of August 1, 2017, the ALJ finds it reasonable to infer that Claimant had been experiencing symptoms in her right thumb/wrist prior to August 1, 2017, including sometime in June as she testified. The ALJ credits Claimant's testimony to find that her right thumb/wrist symptoms probably began in June, prompting her to report this pain at her August 1, 2017 meeting with risk management. Respondent's additional arguments suggesting that Claimant's right thumb/wrist symptoms likely began in August are unpersuasive.

10. In 2009, Claimant injured her left wrist during a work-related altercation while trying to arrest a suspect. A surgeon removed a cyst and "cleaned up" some cartilage in the wrist. This injury and the pain associated with this "clean-up" procedure resolved completely, as did Claimant's 2016 left wrist pain noted above. Other than this, Claimant has had no prior injuries to her left wrist. She has never had prior problems/pain in her right thumb, wrist or arm.

11. Claimant met with Paula Homberger, PA-C, of Respondent's "Risk Management and Occupational Health" department on August 2, 2017. Ms. Homberger reported, "…Ms. Genta began getting pain in her L wrist after typing on a big case. She has sharp, shooting pains as well. She had trouble sleeping when it first occurred while working on a big case, this is better now. She has occasional mild numbness. She has some pain on the R, worse on the L. She also notices the pain with push-ups & turning the steering wheel while driving." Ms. Homberger diagnosed "B forearm strain, from overuse of excessive typing." ("B" meaning bilateral)(Claimant's Exhibit 3, pg. 49). Ms. Homberger's recommendations included physical therapy. Claimant participated in physical therapy, but it made her pain worse.

12. Ms. Homberger also recommended an ergonomic evaluation of Claimant's workstation. This was performed on August 14, 2017. (Claimant's Exhibit 4). The evaluator reported the following issues with the workstation: "1) Chair too high. 2) Lumbar support too low. 3) Keyboard tray too low. 4) Monitors too high. 5) Kristin sits too far forwards in her chair. 6) Forward head posture. 7) Reaching for the mouse. 8) Increased wrist extension outside of the norms." (Id. at 55). Claimant's left wrist

extension was measured at 50°, and for the mouse use, it was measured at 40°. (Id. at 56). Adjustments were made to Claimant's workstation. While these helped, they did not resolve Claimant's upper extremity pain, and in fact, it worsened with additional typing.

13. On August 24, 2017, Ms. Homberger reported, "…Ms. Genta reports feeling worse. She is having more pain. She is trying to rest it some. She still has the sharp, shooting pains with increased use. She is getting some numbness in the L hand…She had her ergonomic evaluation done & they found a few problems with her workstation. Her chair has been adjusted, she is trying an ergonomic keyboard…She is concerned because some of her symptoms are worsening." Ms. Homberger's recommendations included a referral to Dr. Larsen "…for consultation since her L arm symptoms are worsening." (Claimant's Exhibit 3, pg. 38).

14. Respondent scheduled an independent medical evaluation (IME) for Claimant with Dr. Eric Ridings on September 20, 2017 for the express purpose of obtaining an opinion as to whether Claimant's upper extremity complaints were causally related to her work duties. Upon taking a history and completing a physical examination, Dr. Ridings concluded that Claimant met the work-relatedness criteria under the Cumulative Trauma Medical Treatment Guidelines matrix for a diagnosis of right lateral epicondylitis only. He specifically opined that Claimant's bilateral wrist and thumb pain was not work related, noting further that Claimant's "described position keyboarding and mousing would not be expected to cause medial epicondylitis and as such, this condition was not work related.

15. In support of his opinions, Dr. Ridings testified that in order to perform a causality analysis, the first thing to do is to establish a diagnosis. Once you have established a diagnosis, the next step is to analyze the job duties of the worker to determine whether those duties meet sufficient risk factors for the development of the diagnosis to determine, within a reasonable degree of medical probability, whether the duties were causative of the diagnosis.[2]

16. Dr. Ridings testified that if Claimant did not develop symptoms in her right upper extremity until August 2017, during which time she was only keyboarding 2 to 3 hours per day, then her right upper extremity complaints would not be causally related to any of her work activities. According to Dr. Ridings, if Claimant began having symptoms in her right upper extremity in August 2017, then, pursuant to the MTG, she would not have been doing a sufficient amount of keyboarding and/or mousing to create a causal connection between her work activities and any of her upper extremity conditions. According to Dr. Ridings, to the extent that Claimant may have been performing a sufficient amount of abnormal motion in her right upper extremity from January 2017, through June 2017, if her symptoms did not begin until August 2017,

[2] Respondents acknowledge that Paula Homberger, the PA at the Occupational Clinic, made an initial assessment that Claimant's work activities were the cause of Claimant's upper extremity complaints reported to Ms. Homberger. Dr. Ridings, however, testified that it does not appear that Ms. Homberger used the algorithm established in the MTG for cumulative trauma conditions.

then there would be no temporal relationship between the amount of typing she was doing from January 2017 through June 2017, and the onset of her right upper extremity complaints.

17. Based on Dr. Ridings' report, Respondent filed a General Admission of Liability (GAL), admitting to Claimant's right lateral epicondylitis. Consequently, the ALJ finds, the questions presented in the instant case to be whether Claimant's bilateral carpal and cubital tunnel syndromes are causally related to her admitted occupational exposure and if so, whether she is entitled to medical treatment for these conditions.

18. Claimant saw Dr. Karl Larsen's physician assistant, Stephanie Noble, PA-C, on October 16, 2017. PA-C Noble noted, "…At this point, workman's comp is only treating her right lateral epicondyle. She now presents today to try to have the rest of her symptoms addressed…She has numbness and tingling in a clockwise distribution involving all digits on both hands, left worse than right. She states her pain started while typing at the computer…She does state that her workstation was adjusted to be more ergonomically appropriate. She had this occur approximately 1 month [ago] and she did note some improvement of her symptoms." On examination, Claimant had a positive carpal compression test. She also had a positive Tinels test over the left ulnar nerve at the elbow. Right ulnar nerve testing (Tinels) at the elbow was negative. Claimant was also noted to be tender over the left lateral epicondyle and bilateral radial tunnels." Claimant was diagnosed with "[b]ilateral hand numbness and tingling with possible carpal and cubital tunnel syndrome." EMG testing was recommended along with use of thumb braces, Voltaren gel and Lyrica for pain. The possibility of injections was also raised.

19. Dr. Katharine Leppard performed the recommended EMG testing on November 9, 2017. Dr. Leppard noted Claimant "…reports pain in both thumbs, there is numbness and tingling in all of the fingers, worse on the left hand than the right. She denies weakness. She rates her pain a 2/10 at its best and an 8/10 at its worst." Dr. Leppard reported the EMG testing was abnormal, with electrodiagnostic evidence of "Bilateral median mononeuropathies at the wrist, mild in severity, the left is slightly worse than the right. There [was] no electrodiagnostic evidence of an ulnar mononeuropathy at either elbow."

20. Dr. Larsen examined Claimant on November 15, 2017. He noted a positive carpal tunnel compression test that "…produces a lot of forearm and wrist pain…She is not tender over the medial epicondyle but is tender over the ulnar nerve…" Dr. Larsen reviewed the EMG testing and noted, "…Her electrodiagnostic tests were reviewed and consistent with mild carpal tunnel syndrome only with no evidence of ulnar or radial neuropathy." Dr. Larsen's impression was, "…Ms. Genta has bilateral arm pain. A lot of this seems to be associated with carpal tunnel syndrome and ulnar neuritis. She also has a some (sic) thumb base instability, probably developing thumb base arthritis. I discussed options. I do not know that we can make a global solution for her but I think her neuropathic symptoms are dominant here. Today, we performed corticosteroid injections into her carpal tunnels as a treatment & test."

21. Dr. Ridings testified that 40% of diagnosed carpal tunnel syndrome cases are idiopathic in nature, i.e. without a known cause.

22. On December 18, 2017, Dr. Larsen reported the injections provided significant temporary relief of the wrist symptoms, but the symptoms returned. On examination he noted, "…She continues to complain of right worse than left medial elbow pain as well as bilateral wrist pain palmarly and dorsally to some degree with intermittent numbness in the fingers…She is tender over both carpal tunnels and both ulnar nerves as well as the right medial epicondyle. The left medial condyle is not particularly tender today. She has a positive Tinels sign over both ulnar nerves and both carpal tunnels. She also has abnormal tenderness over both thumb bases with laxity and pain with crank testing."

23. Dr. Larsen confirmed Claimant had symptoms due to bilateral arm pain, and "…this may be related to poor ergonomics in her work activities…" He noted, "…I think here in the near term carpal tunnel surgery and cubital tunnel decompression with possible transposition of (sic) her nerve demonstrates instability intraoperatively would be the best way to start…"

24. On January 15, 2018, Dr. Larsen examined Claimant and reported,"…she is tender over the ulnar nerve at the elbow with a positive Tinels sign and positive elbow flexion compression test. She has a positive Tinels sign over the median nerve at the wrist. She is also continuing to be tender, right worse than left over her radial tunnels…We again had a discussion of options, and I think she very clearly has median and ulnar neuritis and electrodiagnostically has verified carpal tunnel syndrome…So, we are going to plan for right carpal and cubital tunnel decompression…"

25. Claimant testified that prior to surgery, the pain in her thumbs and wrists bilaterally was worse than the pain in her elbows, and the pain in her left wrist was worse than the right. She described the wrist pain as intense and radiating. She explained that she experienced numbness and tingling in her hands and fingers often while sleeping at night.

26. Dr. Larsen performed right carpal tunnel release and cubital tunnel release surgery on February 13, 2018. During a follow-up appointment on February 23, PA-C Noble reported Claimant was "…no longer getting any numbness or tingling." Dr. Larsen performed left carpal tunnel release and cubital tunnel release surgery on March 13, 2018.

27. At hearing, Claimant testified her bilateral upper extremities feel "better" since the surgeries though she has continued to experience some normal post-surgical pain. She testified the numbness and tingling in her fingers and thumbs has improved as well.

28. At the time she was performing extensive typing in 2017 Claimant was not pregnant, not a smoker, was not overweight, was not a diabetic and did not have a

rheumatologic disease or autoimmune disorder. Moreover, the evidence presented persuades the ALJ that Claimant did not participate in any non-work activities that would have exposed her to the likely development of a symptomatic cumulative trauma disorder in an equal or greater degree than that presented by her typing/mousing work.

29. Dr. Karl Larsen testified via deposition as a board-certified orthopedic surgeon specializing in hand surgery. He testified regarding his opinion of the causation of Claimant's upper extremity problems as follows:

> ***Q Sure. Do you have an opinion as to what was the cause of Detective Genta's bilateral carpal tunnel and cubital tunnel syndromes?***
>
> *A Yeah, it's a little hard to know. I mean, she -- you kind of speak in terms of risk factors, because it's a common disease. And the only real risk factor she has is age and female gender, right? She doesn't have any of the other associated issues, diabetes, heavy alcohol use, tobacco use, any of those things that go with it.*
>
> *So that's pretty nebulous. She felt that these symptoms were related to the prolonged typing and kind of described very extended periods of typing, like more than eight hours a day. And I know she had an ergonomic evaluation where they made a certain number of ergonomic corrections. So I interpreted that as she was not in an ergonomically appropriate position when these symptoms started. And so I felt that was contributory to her symptoms.*
>
> *And, you know, also take into consideration that as a law enforcement officer, they have a fairly high level of physical fitness, and she seemed to have been functioning well to this point. So I didn't have any other explanation other than what she described.*

(Dr. Larsen depo. tr. pg. 16, l. 6 – pg. 17, l. 5).

> ***Q Did you review the medical treatment guidelines at all with respect to trying to come to a causation opinion about the carpal and cubital tunnel?***
>
> *A Not before today's discussion. I'm aware -- you know, I just went through my Level II recertification; so I've looked through those before, that, you know, while the State doesn't ordinarily recognize keyboarding less than eight hours a day as causative for these cumulative trauma conditions, there's the little statement in there "in an ergonomically appropriate position."*

So if we're going to look at ergonomics as a potential contributory factor, she had demonstrated poor ergonomic setup for her work station because they made a certain number of corrections to it. And so I think that that was probably contributory to her symptoms.

(Dr. Larsen depo. tr. pg. 17, l. 17 – pg. 18, l. 8).

Q Okay. I guess the bottom line really, Doctor, is: Do you have enough information to give an opinion as to whether you think it's more likely than not that her carpal tunnel and cubital tunnel problems resulted from her work activities?

A I feel like based on the ergonomic assessments and the history where she had no antecedent symptoms, that it's more likely that her work activities either caused or aggravated this to the point where it needed treatment.

(Dr. Larsen depo. tr. pg. 19, l. 23 – pg. 20, l. 7).

30. Despite the above testimony, Dr. Larsen agreed that if Claimant was not doing extensive typing and mousing at the time that she developed her right upper extremity problems, then he would not link her work activities and the development of her carpal tunnel syndrome. That is, her work activities would not be the cause of her carpal tunnel. Rather, he would consider her right-sided carpal tunnel syndrome to be idiopathic. As noted, the ALJ is persuaded that Claimant's right hand, wrist and arm symptoms developed progressively around June rather than August as suggested by Respondent.

31. Based upon the evidence presented as a whole, the ALJ finds Dr. Larsen's testimony and opinions regarding the cause of Claimant's upper extremity conditions credible and persuasive. The ALJ has considered, and rejects as unpersuasive, the contrary opinions of Dr. Ridings.

32. Claimant has proven by a preponderance of the evidence presented that she is entitled to reasonable and necessary medical treatment to cure and relieve the effects of her bilateral carpal and cubital tunnel syndrome, including the treatment provided by Karl Larsen, M.D.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1),*

C.R.S. In this case, Claimant must prove her entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found in this case, the ALJ credits Claimant's testimony to conclude that her right upper extremity symptoms, probably began sometime in June rather than August as suggested by Respondent. Claimant's testimony is generally consistent with the content of the medical records and the testimony of Dr. Larsen. Given the consistency between Claimant's testimony and balance of the remaining evidence, the ALJ finds Claimant's testimony credible.

C. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Larsen are credible and supported by Claimant's testimony and the medical record. When the evidentiary record is considered in its totality, the opinions of Dr. Larsen are more persuasive than contrary opinions of Dr. Ridings.

D. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

The Relatedness of Claimant's Carpal and Cubital Tunnel Syndrome to her Work Duties and her Entitlement to Medical Benefits

E. The Claimant bears the burden of establishing entitlement to medical

treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo.App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo.App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused, i.e. related to an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury.

F. The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo.App. 1999). Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

G. In this case, the totality of the evidence presented persuades the ALJ that in addition to her right lateral epicondylitis, Claimant likely suffers from bilateral carpal and cubital tunnel syndrome. Nonetheless, the question remains as to whether those conditions are related to Claimant's work duties. In concluding that Claimant has proven that her carpal and cubital tunnel conditions are related to an admitted occupational exposure, significant enough to cause right lateral epicondylitis, the ALJ has considered the Medical Treatment Guidelines, specifically Rule 17, Exhibit 5. The Medical Treatment Guidelines (MTG's) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo.App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight and have been accepted in the assessment of the cause of carpal tunnel syndrome. *See, Flores v. Safeway Store, Inc.*, W.C. No. 4-799-270 (ICAO November 2, 2011).

H. As noted, Rule 17 Exhibit 5 of the MTGs specifically addresses causation of carpal tunnel syndrome. In determining whether treatment for carpal tunnel syndrome is due to a work related exposure or injury, the MTGs require that a provider identify "non-occupational" diagnosis/exposures as well as avocational activities in order to establish their contribution to symptoms and the need for treatment. According to the Guidelines the pertinent question to be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place? If the answer is "yes," then the condition is not work-related. If the answer is "no," then the condition is most likely work-related. The following non-occupational factors are to be considered when determining the occupational relationship regarding the need for treatment in cases involving carpal tunnel: age, sex, high BMI (obesity), the presence of other upper extremity musculoskeletal diagnosis, diabetes, rheumatologic diseases, hypothyroidism, smoking history and whether the patient is pregnant. *See Rule 17 Exhibit 5, D.1(c)(v)(A-G).* Based upon the evidence presented, the ALJ is not persuaded that Claimant's age, weight or any other non-occupational factors played a role in the development of her carpal or cubital tunnel syndrome.

I. The MTG's also contain an "Ergonomic Considerations Table." The Guidelines indicate that, "…This table is a generally accepted guide for identifying job duties which may pose ergonomic hazards…"[3] The Table itself indicates that "repetitive motion" activities with wrist extension greater than 30° for more than 2 hours per day is are ergonomic hazard. The Table indicates that "intensive keying" activities with wrist extension greater than 30° for more than 4 hours per day are an ergonomic hazard. [4] Here, Claimant's wrist extension was noted to be 50° in the ergonomic evaluation. (Claimant's Exhibit 4, pg. 56). Based upon the evidence presented, the ALJ is convinced that Claimant performed intensive keying activities with wrist extension greater than 30° for more than 4 hours per day for several weeks. Accordingly, the ALJ concludes that Claimant proved her job duties featured ergonomic hazards for the development of cumulative trauma conditions associated with the wrists and arms.

J. Furthermore, the Medical Treatment Guidelines provide that "…Clinicians may determine in a particular case that there is a relationship based on the ergonomic conditions or on excessive typing, such as more than 7 hours per day of essentially uninterrupted keyboard use or full-day court reporting." (W.C.R.P. 17, Exhibit 5(D)(3)(a) or Respondent's Exhibit E, pgs. 64, 65). The same section next provides that, "…There is some evidence that mouse use appears to be associated with carpal tunnel syndrome and related symptoms with 4 hours or greater of continuous use per day. Studies of pressure within the carpal tunnel indicated that pressures may rise to levels which could affect the median nerve when the mouse is being dragged or clicked. Again, the actual ergonomics of the work place should be considered for each individual patient before making a final causation decision." (Respondent's Exhibit E, pg. 65).

[3] The Table is described in the "Job Hazard Checklist" on page 141 of W.C.R.P. 17, Exhibit 5(H)(6)(c).
[4] The referenced portions of The Table are found on page 144 of W.C.R.P. 17, Exhibit 5(H)(6)(e).

K. The Guidelines provide that "…When the employee meets the definition for a sole Primary Risk Factor and the risk factor is physiologically related to the diagnosis, it is likely that the worker will meet causation for the cumulative trauma condition." (Respondent's Exhibit E, pg. 67). They then provide that a "primary risk factor" under "awkward posture and repetition/duration" is "4 hrs. of wrist flexion [greater than] 45 degrees, extension [greater than] 30 degrees, or ulnar deviation [greater than 20 degrees." (Respondent's Exhibit E, pg. 71). Here, the ergonomic evaluation determined Claimant's left wrist extension was 50 degrees, obviously greater than 30 degrees.

L. The Guidelines also identify "wrist bending or awkward posture for 4 hrs." as a "diagnosis based risk factor" for carpal tunnel syndrome. They identify the combination of force, repetition, and awkward posture as an additional risk factor for carpal tunnel syndrome. (Id. at 74).

M. The Guidelines require "at least one" of several findings to support a diagnosis of carpal tunnel syndrome. (Respondent's Exhibit E, pg. 58). The list of findings includes a positive compression test, which Dr. Larsen documented on physical examination. (Claimant's Exhibit 1, pgs. 11, 14).

N. Similarly, the Guidelines require "at least one" of several findings to support a diagnosis of cubital tunnel syndrome. (Respondent's Exhibit E, pg. 59). The list includes "diminished sensation of the fifth and ulnar half of the ring fingers…" Ms. Noble documented this on October 16, 2017 ("…She has numbness and tingling in a clockwise distribution involving all digits on both hands, left worse than right…"). Claimant's Exhibit 1, pg. 13).

O. The ALJ has considered the Medical Treatment Guidelines, Claimant's testimony and the testimony of Drs. Larsen and Ridings. The ALJ has also considered the parties' hearing exhibits. Based upon the totality of the evidence presented, the ALJ concludes Claimant has proven that her bilateral carpal and cubital tunnel syndromes are related to the work duties associated with her position during the period of time she was tasked with rebuilding cases for resubmission to the District Attorney's (D/A's) Office. The ALJ is persuaded that these disorders resulted directly from the conditions under which Claimant's work was performed and can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of her employment. Moreover, they can be fairly traced to Claimant employment as a proximate cause. Finally, the conditions do not come from a hazard to which the Claimant would have been equally exposed outside of her employment. Consequently, the ALJ is convinced that these conditions are related to Claimant's work duties and she likely would not have needed the treatment recommended by Dr. Larsen if her work place exposure had not taken place.

P. Even if Claimant's job does not fall precisely within the primary or secondary risk factors outlined in the causation matrix of the MTGs as suggested by Dr. Ridings, the ALJ finds and concludes that the particular facts in her case still make it more likely

than not that her bilateral carpal and cubital tunnel syndrome was caused by her work. The Court is not bound by the MTGs in deciding individual cases. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

Here, the ALJ concludes that Dr. Ridings causation argument is founded upon a rigid application of the MTGs' resting necessarily upon the assumption that the causation matrix is absolute, and provides the only source of information to which we should turn to determine causation in this case. The ALJ is not convinced. The evidence presented in this case persuades the ALJ that Claimant had no history of right upper extremity problems before she began reprocessing criminal cases for resubmission to the D/A's Office. Moreover, the evidence presented is not persuasive of Claimant having left upper extremity symptoms associated with cumulative trauma disorders, i.e. carpal/cubital tunnel syndrome for several months until she experienced a new onset of symptoms while performing work activities associated with the repossessing of these cases. Finally, there is no alternate cause, which explains her symptoms more persuasively, i.e. equally or more likely than her work exposure. Accordingly, the ALJ concludes that Claimant's carpal and cubital tunnel syndrome is, more probably than not, related to her work duties during the LERMS project wherein she was called upon to perform excessive typing and mousing in a poorly defined ergonomic position.

Q. The medical reports outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Larsen to perform bilateral carpal and cubital tunnel releases. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that these procedures were reasonable and necessary to cure and relieve Claimant from the ongoing effects of her compensable cumulative trauma conditions. The contrary opinions of Dr. Ridings are unpersuasive.

ORDER

It is therefore ordered that:

1. Claimant has proven that her bilateral carpal and cubital tunnel syndromes are causally related to an occupational exposure, which also admittedly caused right lateral epicondylitis. As such, these disorders are compensable conditions under the claim.

2. Respondents shall pay for all medical expenses, pursuant to the Workers'

Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her bilateral carpal and cubital tunnel syndrome including, but not limited to the bilateral carpal and cubital tunnel release procedures performed by Dr. Larsen.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 18, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, Co 80906

ISSUES

1. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury to her back on August 31, 2017?

2. If such injury is compensable, has Claimant shown, by a preponderance of the evidence, that she is entitled to all reasonable, necessary, and related treatment for her injured back?

3. Has Claimant shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability benefits from November 29, 2017 and ongoing?

4. Have Respondents shown, by a preponderance of the evidence, that Claimant willfully violated a safety rule, resulting in a 50% reduction in Claimant's Indemnity benefits?

STIPULATIONS

The parties stipulated that, if a compensable injury is shown, that Claimant's Average Weekly Wage is $519.40. The parties further agreed that if compensability is shown, the Claimant is entitled to TTD benefits from November 29 and ongoing until terminated by operation of law. The issue of any wage loss between August 31, 2017 and November 29, 2017 is held in abeyance. The ALJ accepted these stipulations.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant has been employed by Employer since June of 2017. She performed the very same duties with a predecessor company, beginning in 2015. As of the time of hearing, Claimant remains employed by Employer.

2. Claimant's formal job title is that of an Environmental Service Attendant (hereinafter "ESA"). She testified at hearing that her job duties include cleaning rooms, changing sheets, dusting, mopping, and other similar duties for the Penrose St. Francis Hospital system. As an ESA, per the position profile provided by the Employer, Claimant's *General Responsibilities* include:

- *Moves furniture* and sets-up tables and chairs

- Complies with all company safety and risk management *policies and procedures*.

●Performs all work in accordance with *established* safety *procedures*.

Under Skills/Aptitude is listed:

●Ability to work well *under pressure.*

●Ability to work well *alone* and *in a team*.

Under Physical Requirements is listed:

●Ability to reach, bend, stoop, push and /or pull, and *frequently lift up to 35 pounds* and occasionally lift/move 40 pounds. (Ex. E) (emphasis added).

3. Claimant testified that she began work around 7:00 am on August 31, 2017. She sustained an injury around noon that day, as she recalled it being right after she ate lunch, which was usually from 11:30am until noon. Claimant testified that she received a call from her supervisor, Ms. Pauline Sylvester, while she was eating lunch that day. She was instructed to perform a "stat terminal" clean. A "stat" clean is one that needs to be accomplished quickly and a "terminal clean" is one that requires a very thorough cleaning of everything in the room, even the walls.

4. According to Claimant, a terminal clean typically takes one hour to one-and-a-half hours, but she recalls being instructed by her supervisor to complete it in 30 minutes. Claimant immediately began cleaning the room, starting with the walls, dusting, and picking up trash. The only furniture actually in the room was the bed. When Claimant went to the bathroom to clean it, she noticed that all of the other furniture had been moved into the bathroom. Specifically, the sofa bed had been placed in the shower standing up vertically, on its side. Claimant called her supervisor for assistance to move the sofa bed out of the shower. Claimant testified that she waited for approximately 15-20 minutes before help eventually arrived. While she was waiting, Claimant felt pressured by the floor nurses, asking when the room would be ready, as they needed it right away.

5. Claimant, feeling pressured to clean the room timely, then attempted to move the sofa bed on her own. Claimant clarified that her intention was to only move the couch to one side, using essentially a 'hugging' motion, so that she could clean the walls around it until assistance arrived. While attempting to move the sofa bed, she felt it was beginning to fall towards her, so she pushed it back in its original position. It was during this act that Claimant felt pain in her back.

6. Claimant reported the injury to Ms. Sylvester the same day. (Ex. A). It is documented in the first report of injury that Claimant was pulling a couch out of the restroom when she felt pain in her lower back.

7. Upon cross examination, Claimant conceded certain points:

● Sodexo does not require a quota of rooms to be cleaned in a shift.

● She does not report to the nursing staff, but only to Sodexo and its supervisors.

● Sodexo conducts safety meetings at least once a month.

● She is able to converse in and understand English in court and at work.

● In the past she has called other supervisors on multiple occasions to move heavy couches.

● If there was a heavy object to be moved that she was supposed to call someone to get help.

● On the day of the alleged incident the actual time it took for her to clean the room with the vertical couch was in line with the normal average time to clean similarly situated rooms.

● Claimant had already spent 45 minutes cleaning the room, and it would take her an additional 30 minutes to clean the bathroom – which is right in line with the average to clean a similarly situated room.

● She was at lunch when she was assigned to clean the "stat" room, but was not asked to hurry up and finish her lunch.

●She was in a hurry to move the couch, "I knew I couldn't take it out of the bathroom by myself. But I wanted to put it to one side so I could start the—the wall, cleaning the walls."

● She was never chastised or disciplined by her supervisor for not having the room cleaned, as she alleges, within 30 minutes.

8. Claimant presented to CCOM the next day for evaluation. (Ex. 4, p. 11). Physician's Assistant, Steven Byrne, documented Claimant's complaints of pain in the thoracic and lumbar region of her spine as a result of her moving a couch at work. Physical examination documented tenderness along the bilateral paraspinals in the lower thoracic region through the lumbosacral spine with straight leg raises being positive bilaterally. *Id.* at 12. Mr. Byrne indicated that the objective findings were consistent with the history of a work related injury. Claimant was given various restrictions, including no lifting more than 10 pounds. She was also prescribed medications and instructed to follow up.

9. Claimant denied any previous back injury. (Ex. 4, p. 11). There are no records in evidence to suggest that Claimant had any degree of a lower to mid-back condition prior to August 31, 2017.

10. Claimant's next visit at CCOM was on September 11, 2017, with Dr. Kathryn Murray. (Ex. 4, p. 17). Claimant reported feeling worse than she did ten days prior and was experiencing some radiating pain into her buttock. Dr. Murray documented multiple muscle spasms and trigger points in the lumbar and thoracic region. She instructed Claimant to continue the medications and referred her for physical therapy for her lumbar and thoracic spine. (Ex. 4, p. 18). She kept Claimant restricted from performing full duty.

11. On November 28, 2017 at Colorado Springs Imaging a non-contrast MRI of Claimant's lumbar spine was conducted. Findings: lumbar lordosis normal. Overall volume of lumbar spinal canal is well within normal limits. No scoliosis. Distal thoracic spinal cord, conus medullaris, and cauda equine are normal. Vertebrae are normal. No spondylolysis or spondylolisthesis. Normal signal in the intervertebral discs at all levels. No disc protrusion, tearing of the disc margin, or significant disc bulging. No encroachment on nerve roots. Facet joints and pedicles are unremarkable. Spinous processes appear normal. Paraspinal soft tissues including the abdominal aorta are normal. Visualized parts of kidneys normal. Opinion: Normal degenerative limits for age. Negative for disc protrusion or nerve impingement. (Ex. F p. 20, G p. 27, 9, p. 127).

12. On February 15, 2018 Dr. Primack, with CCOM, concluded that objective findings indicate normal exam, negative MRI, subjective findings not consistent with objective findings and are nonphysiologic. Claimant was at maximum medical improvement, no permanent impairment, no restrictions at full time and full duty. (Ex. F, pp. 20, 22).

13. Respondents retained Dr. Jorge Klajnbart to perform an IME of Claimant. This took place on February 18, 2018. (Ex. G). Claimant reported ongoing mid-axial to low back pain, and she reported to him being approximately 50% better at that point in time due to the treatment received to date. *Id.* at 25. Claimant denied any previous injury to her back. *Id.* at 32. Claimant reported to Dr. Klajnbart that she felt the pain in her back after attempting to move the sofa bed out of the shower. Regarding causation, Dr. Klajnbart stated the "[M]echanism of injury is congruent with a lumbar sprain-strain…," though he did feel that Claimant's symptoms should have resolved within the first 90 days. *Id.* at 28. Dr. Klajnbart agreed that all treatment to date had been "*reasonable and related to this injury pattern to include radiographs and MRI."* Dr. Klajnbart did not dispute that there was a compensable injury, but noted: "Her current complaints are completely inconsistent with the isolated soft tissue, self-limiting injury pattern." *Id* at p. 28. (emphasis added).

14. Dr. Timothy Hall performed an IME at the request of Claimant on March 8, 2018. (Ex. 11). Dr. Hall reviewed medical records, took a history from Claimant, and performed a physical examination. Dr. Hall's examination revealed tenderness with palpation through the thoracolumbar paraspinals into the quadratus lumborum bilaterally. (Ex. 11, p 134). She was also very tender in the psoas bilaterally and that she had limited hip extension with pain.

15. Dr. Hall diagnosed Claimant as having a lifting injury at work, likely soft tissue, as well as pelvic obliquity with significant psoas spasm likely involved in Claimant's pain presentation. Dr. Hall felt the treatment Claimant had been receiving was appropriate, but also recommended more neuromuscular and stretch work involving the psoas, quadratus lumborum, and thoracolumbar paraspinals.

16. Dr. Hall testified at hearing that it was his understanding that Claimant was essentially "hugging" the couch during her attempt to move it. Claimant was essentially performing a "torqueing" maneuver, i.e., attempting to lift and turn the sofa bed. It is this kind of torqueing maneuver that creates forces through the thoracolumbar spine, which can exceed the tolerance of the muscles, ligaments, and tendons in that area of the spine. Dr. Hall felt the attempt to move the couch resulted in a soft tissue sprain/strain type injury to the thoracolumbar area. He acknowledged that, basically, what Claimant reported to him were subjective complaints, and that it was a 'benign' exam.

17. Dr. Hall agreed with Respondents' expert, Dr. Klajnbart, that Claimant's mechanism of injury is congruent with a lumbar sprain/strain injury.

18. Respondents called Ms. Pauline Sylvester to testify. Sylvester testified that she eventually arrived at the room after Claimant had called her for assistance with the sofa bed in the bathroom. Ms. Sylvester estimated that she arrived within 5 to 7 minutes of getting the call from Claimant, and by this time, someone from hospital maintenance had already moved the sofa out of the way. Claimant did not tell her at that time that she attempted to move the couch and injured herself in doing so. Rather, Claimant reported this information to Ms. Sylvester at the end of her shift around 3:00pm.

19. Ms. Sylvester is the operations manager for the Employer and was the operations manager during the transition to the current ownership. Her job included daily operations, overseeing the staff, and staff trainings. Ms. Sylvester testified that there are safety policies in place, and there is training on how to lift and move items properly. She explained that they would have safety meetings, and the topics for these meetings would change from meeting to meeting. Ms. Sylvester said that during some of these meetings, the issue of when to call for help in regard to moving heavy or awkward objects was discussed. She also indicated that individuals were supposed to sign off on the trainings after they were accomplished.

20. There is no record in evidence that Claimant underwent any of the specific training Ms. Sylvester was referring to. Further, Ms. Sylvester testified she is unaware of any document signed by Claimant that she had undergone the specific training regarding the alleged safety rule.

21. Ms. Sylvester was asked if there is any specific procedure when somebody calls asking for assistance moving a heavy item. She explained that in such

an event, the worker is supposed to call a supervisor, who would then go get a dolly and take it to the object needing to be moved.

22. Ms. Sylvester agreed that her workers normally do have to move furniture, particularly away from a wall so that cleaning can be accomplished. The workers are expected to perform this activity on their own. Ms. Sylvester testified about the policy in the event the worker needs help: "If they—*if they **feel** it's too heavy*, yes, they ***should*** call [for help]" (emphasis added).

23. Ms. Sylvester indicated that this particular rule she is referring to is in the Employer's policy manual. Ms. Sylvester then conceded that no copy of the rule was provided to either her counsel or Claimant's counsel, and that she could not specifically recall what the rule actually stated. Her response was that, "Basically, if the object is too heavy to move or pick up, they *should* ask for help. It's ***just a common practice basically."*** (emphasis added). When asked whether workers' are required to move furniture, she testified that yes, they are, but *not for long distances*. Ms. Sylvester conceded the policy manual 'probably', did not address what to do when a vertical sofa bed is encountered in a shower.

24. The following exchange took place in furtherance:

> Q: And I believe you've testified that typically when the employees go through these [safety] trainings that there's some document that they sign—
>
> A: Yes
>
> Q: ---that indicates that they've actually been trained?
>
> A: Yes
>
> Q: Do you know if that document is in existence in this case, as it applies to Ms. Ramirez?
>
> A: There are documents for training, yes.
>
> Q: But for this particular training, in terms of moving furniture. Are you aware- -
>
> A: I- -I'm not aware of that.

25. Ms. Sylvester acknowledged that part of Claimant's job required her to move furniture, and in this particular situation with a vertical couch in the shower, she could understand how the job profile and alleged rule could be confusing when considered together:

Q: So could you see why it might be confusing that her job requires her to move furniture, but in this particular situation she wasn't supposed to move the furniture?

A: I can see where that would be somewhat confusing.

26: Ms. Sylvester confirmed that Claimant was never disciplined for failing to complete this room in the 30 minute window as alleged by Claimant. Notably, Ms. Sylvester was never asked if Claimant was ever disciplined for violating a safety policy by attempting to move this vertical couch on her own.

27. Ms. Virginia Black testified via telephone during Claimant's case-in-chief in her capacity as a former employee of the Employer who performed the same job duties as Claimant. Ms. Black was present at work on the day of the incident. She recalled seeing the room that Claimant had been cleaning with the furniture all being placed in the bathroom. She then went to take her lunch break, which occurred at the same time as Ms. Sylvester's break. Ms. Black recalled Ms. Sylvester answering her phone, saying something about a couch in a shower, and that she would be on her way up. Ms. Black testified that it was approximately 10 to 15 minutes before Ms. Sylvester left the lunch room.

28. Ms. Black further testified that, as part of her job duties, she was required to move furniture in order to clean. Ms. Black testified that she was unaware of any Employer rule when it came to moving or lifting heavy furniture.

29. Ms. Black testified that she saw Claimant later in the day, and that Claimant appeared to be in pain, so she asked Claimant what happened. Claimant told Ms. Black that she hurt her back moving the sofa bed. Ms. Black worked with Claimant every day, and never saw Claimant exhibit any similar outward signs of pain prior to August 31, 2017.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the Respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002).

Conflicts in Testimony

D. In this instance, there is a conflict in the testimony between Claimant, Pauline Sylvester, and Virginia Black on the time it took to respond to Claimant's initial request for help in moving the sofa. The ALJ finds that each of these individuals is telling the truth as they recall it. Each were merely providing their estimate of the time frame; none were checking a clock. In the final analysis, it doesn't matter whether Claimant waited 15-20 minutes, or 5 minutes, or 30 seconds, or an hour. It was a work injury.

E. Secondly, there is a conflict in the testimony between Claimant and Pauline Sylvester on how quickly the room was to be cleaned. The ALJ finds that Pauline Sylvester did not actually insist that this stat terminal clean be completed in 30 minutes. She knew better. The ALJ further finds, however, that Claimant reasonably believed, and in good faith, that time was of the essence in completing this room. The entire subject came up during her lunch break-itself not a routine assignment. Claimant did not just make this up. It is certainly possible that in the course of this lunch conversation, it was mentioned that the nurses wanted it done in 30 minutes. Claimant certainly felt pressure to complete it ASAP, due to direct inquiries by the nurses as well. Of course, Claimant reports to her supervisor and not the nurses- just like a waitress

reports to her supervisor and not the impatient customer- but the pressure to deliver is still very real. It's part of the job. See also *Skills/Aptitude* in Finding of Fact #2, above.

Compensability

F. A Claimant must prove by a preponderance of the evidence that she is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); S*ee*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 592 P.2d 792 (Colo. 1979).

G. An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires Claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

H. The ALJ finds that Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her thoracic and lumbar spine as a direct result of her work activities on August 31, 2017. There is virtually no evidence to the contrary. Claimant denied ever experiencing mid to lower back pain in the past and no records or testimony contradicts this. Ms. Black testified that she worked with Claimant and had never seen her in pain until after Claimant attempted to move the sofa bed on August 31, 2017, at which time Claimant told her she injured her back moving the sofa bed. Claimant also told her supervisor at the end of the shift that she injured herself moving the sofa bed. The slight delay in reporting this injury is of no consequence. It took Claimant a couple hours for the gravity of her situation to set in. Claimant told all of her medical providers and IMEs that she injured herself at work moving the sofa bed. All of the providers and experts involved, including Respondents expert, agree that Claimant likely sustained an injury to her mid to lower back when she attempted to move the couch at work on August 31, 2017.

Medical Benefits

I. For a compensable injury, Respondents must provide all medical benefits that are reasonably necessary to cure and relieve the injury. C.R.S. § 8-42-101 (2010). Respondents are liable for reasonable and necessary medical treatment by a physician to whom a claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987).

J. Claimant sustained a compensable injury to the mid to lower back on August 31, 2017. It therefore follows that Claimant is entitled to all reasonable, necessary, and related treatment for her condition stemming from the August 31, 2017 incident. This includes all treatment rendered to date. Even Respondent's IME concurs. To the extent there is truly a conflict in the medical testimony, the ALJ finds Dr. Hall's analysis to be more persuasive.

Temporary Total Disability

K. To receive temporary disability benefits, the claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the Claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *Jorge Saenz Rico v. Yellow Transportation, Inc*. W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

L. The parties stipulated that Claimant would be entitled to TTD from November 29, 2017 and ongoing until otherwise properly terminated by operation of law. Because the claim was found compensable, Claimant is therefore entitled to TTD from November 29, 2017 and ongoing until otherwise properly terminated by operation of law.

Safety Rule Violation

M. Section 8-42-112(1)(b), C.R.S. governs the imposition of a penalty for a violation of a safety rule. That section provides for a 50 percent reduction in Claimant's compensation when Respondents prove "the injury is caused by the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee". The question of whether the Respondents met their burden and proved a willful safety rule violation by a preponderance of the evidence is generally one of fact for determination by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995).

N. Respondents are required to show Claimant's conduct was willful, i.e., that she knew the rule, then intentionally did what the rule prohibited. Willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the Claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. The Respondent is not required to present direct evidence concerning the Claimant's state of mind or prove the Claimant had the rule "in mind" when he did the prohibited act. Rather, a "willful" violation may be inferred from evidence the Claimant knew the safety rule and did the prohibited act. *Bennett Props. Co. v. Indus. Comm'n*,

165 Colo. 135, 140, 437 P.2d 548, 551 (1968). As used in this statute, the word "willful" means "with deliberate intent", *City of Las Animas v. Maupin*, 804 P.2d 285, 286 (Colo. App. 1990)[citation omitted], or "the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences." *Johnson v. Denver Tramway Corp.*, 115 Colo. 214, 222, 171 P.2d 410, 414 (1946)(emphasis omitted)[quoting 1 William R. Schneider, *The Law of Workmen's Compensation* § 282, at 876 (2d ed. 1932)]. An ambiguous safety rule that may have led to a claimant having an unclear understanding of exactly what the rule is are appropriate grounds for an ALJ to opt not to impose a 50% reduction. *See Jerry Leon Hobbs v. Salida Auto Salvage, Inc.*, W.C. No. 4-289-777 (June 10, 1997)

O. The ALJ finds that Respondents have failed to prove by a preponderance of the evidence that Claimant willfully violated a known safety rule. The "rule" in question is ambiguous at best. According to Ms. Sylvester, there is a specific rule in the Employer's policy manual, but she was unable to produce a copy of said manual and she was unable to recite the exact rule. Ms. Sylvester summarized the rule generally by stating that if the worker "feels" the object is too heavy, they "should" call for assistance. *"It's just a common practice, basically."*

P. In order for Respondents to meet their burden, they must establish that Claimant knew what the rule was and that she willfully violated a known safety rule. The ALJ finds it to be unreasonable to expect the Claimant to know she was willfully violating a known safety rule when Claimant's supervisor is not familiar with the exact requirements of the rule. 'Common practice' does not sufficiently place a worker on notice of the Safety Rule. Even using the "Rule" as set forth by Ms. Sylvester (which the ALJ does not), Respondent's evidence falls short. Claimant had to ***try*** to move the sofa a few inches, before she could reasonably ***"feel"*** it was too heavy and ask for help. That is exactly what she did, and she got hurt. *Of course* she now regrets doing so. Her back now hurts. Had the sofa been better balanced internally, she likely could have bear hugged and scooted it a foot or two and kept on working without troubling anyone else. Claimant worked under pressure, both alone and as part of a team. See Skills/Aptitude under Finding of Fact #2, above.

Q. The ALJ finds that the alleged "Rule" in question is ambiguous at best. Claimant's formal job description explicitly requires her to move furniture- under pressure, and alone if need be. Claimant was also not disciplined by Employer for this alleged Safety Rule Violation. Ms. Sylvester herself testified that she could see how the situation Claimant was in with the sofa bed in the shower was particularly confusing. It does not matter if Claimant waited 5 minutes, or 15-20 minutes, before trying to move the sofa. She acted reasonably, and in good faith, and not in willful violation of a safety rule, and the ALJ so finds.

ORDER

It is therefore Ordered that:

1. Claimant has suffered a compensable work injury to her back. Respondents shall pay all reasonable, necessary, and related treatment stemming from this work injury.

2. Claimant is entitled to TTD payments-not subject to any 50% reduction-from November 29, 2017 and ongoing, unless terminated by operation of law.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 22, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Claimant's receipt of the Final Admission of Liability (FAL) and the timeliness of Claimant's objection to the FAL. Whether Claimant retains the right to object to the FAL and file a Notice and Proposal to Select an Independent Medical Examiner.

FINDINGS OF FACT

1. Claimant was employed by Employer as a resident care specialist, CNA. *See* Exhibit A.

2. On March 1, 2016 Claimant sustained an admitted compensable injury to his right shoulder when trying to assist a patient from the floor using a mechanical lift. *See* Exhibit A.

3. Claimant eventually underwent two shoulder surgeries and other authorized treatment for his injury.

4. As a result of his March 1, 2016 injury Claimant received temporary total disability (TTD) benefit checks bi-weekly beginning March 2, 2016. Claimant's TTD rate was $419.99/week. Claimant received checks bi-weekly in the amount of $839.98 at his home address. Claimant testified credibly that through October of 2017, he received all of his checks regularly at his correct home mailing address of: 1885 Terry St., Apt. 12, Longmont, CO 80501. *See* Exhibits B, E.

5. On October 10, 2017 Claimant was placed at maximum medical improvement (MMI) by Bruce Cazden, M.D. Dr. Cazden assigned a permanent partial disability impairment rating of Claimant's right upper extremity of 8%, which converts to a 5% permanent impairment of the whole person. *See* Exhibits 8, C.

6. Claimant testified that he recalled Dr. Cazden telling him that his treatment was pretty much done. Claimant testified that he continued to receive his bi-weekly benefits checks after Dr. Cazden said he was done with treatment.

7. On October 23, 2017 claims representative Coralyn Kiess filed a FAL with the Division. She mailed copies of the FAL to Claimant and to Respondent Employer. The FAL was mailed to Claimant at his correct home mailing address of: 1885 Terry Street, Apt. 12, Longmont, CO 80501. The FAL noted TTD payments from March 2, 2016 through October 9, 2017, the beginning of permanent partial disability (PPD) benefits on October 10, 2017, and that Respondents were admitting to a PPD rating of 8% scheduled impairment of the right upper extremity. The FAL noted that PPD would be paid at a

weekly rate of $286.91. The FAL also noted that Respondents would offset an overpayment of TTD against future benefits. *See* Exhibits 8, C.

8. Records show that Claimant's last TTD bi-weekly benefits check in the amount of $839.98 was issued to Claimant with a payment date of October 19, 2017 for a period of benefits from October 18, 2017 through October 31, 2017. *See* Exhibit F.

9. Records show that the first payment for PPD was issued to Claimant with a payment date of October 20, 2017 for benefits starting October 10, 2017 and going through October 23, 2017. This was issued in the amount of $573.82. This equals the amount of the weekly PPD rate listed on the FAL multiplied by two weeks. *See* Exhibit F.

10. Records show that the next payment for PPD was issued to Claimant with a payment date of November 3, 2017 for benefits starting October 24, 2017 and going through November 6, 2017 and was also issued in the amount of $573.82. *See* Exhibit F.

11. On approximately November 14, 2017 Claimant called Ms. Kiess to see why his normal bi-weekly check for $839.98 was late. Claimant testified that he was told by Ms. Kiess that his benefits had changed and that he should have received a FAL. Claimant testified that he told Ms. Kiess he had not received a FAL.

12. Claimant requested that Ms. Kiess mail him a copy of the FAL she had filed on October 23, 2017. Ms. Kiess mailed Claimant a copy of the FAL on November 14, 2017. *See* Exhibit 7.

13. Claimant testified that he did not receive the original FAL mailed on October 23, 2017. He testified that he received benefits checks every two weeks at the same address on the original FAL and always got them.

14. Ms. Kiess testified that she was responsible to make sure Claimant received benefits timely and that none of the TTD checks had come back. Ms. Kiess testified that she mailed the FAL to Claimant on October 23, 2017 and that it did not come back as undeliverable. Ms. Kiess testified that Claimant contacted her and that she mailed a copy of the October 23, 2017 FAL to Claimant on November 14, 2017.

15. On November 15, 2017 Claimant received in the mail the copy of the FAL that had been filed by Ms. Kiess on October 23, 2017.

16. On December 4, 2017 Claimant filed an objection to the FAL and a Notice and Proposal to Select an Independent Medical Examiner (notice). *See* Exhibits 6, D, E.

17. Thirty days from October 23, 2017 was November 22, 2017. Claimant did not file his objection or notice within thirty days of the date the FAL was filed.

18. Claimant argues that he had thirty days from the date the claims representative mailed him a copy of the FAL (November 14, 2017) to file his objection and notice and that he was within 30 days of his actual notice when he filed both.

19. Respondents argue that Claimant failed to timely object to the FAL and failed to timely file a notice within thirty days of the FAL (by November 22, 2017) and that the copy sent by the adjuster did not extend or expand the time within which Claimant had to object to the FAL. They therefore ask that his objection and notice be stricken.

20. Claimant had a prior work related injury to his left shoulder in 2015. As a result of that injury Claimant reached MMI on May 6, 2016 and a FAL was mailed to Claimant at his correct home mailing address of: 1885 Terry Street, Apt. 12, Longmont, CO 80501. Claimant testified that he received the FAL from this prior case. Claimant did not object to this prior FAL or request an independent medical examination. *See* Exhibit G.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Final Admission of Liability, Closure, and Notice

Section 8-43-203(2)(b)(II)(A), provides that a claim will be automatically closed "as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the admission in writing and request a hearing on any disputed issues that are ripe for hearing, including selection of an independent medical examiner pursuant to section 8-42-107.2." Section 8-43-203(2)(d), C.R.S., provides that once a case is closed under subsection (2) "the issues closed may only be reopened pursuant to section 8-43-303." The automatic closure provisions contained in these statues are designed to "promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of formal administrative determination in cases not presenting a legitimate controversy." *Dyrkopp v. Industrial Claim Appeals Office,* 30 P.3d 821, 822 (Colo. App. 2001).

If a party fails to comply with the time limits established in § 8-43-203(2)(b)(II) the ALJ may determine that an issue is closed and not subject to reconsideration unless reopened. *Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004); *Dyrkopp v. Industrial Claim Appeals Office, supra*. Although § 8-43-203(2)(b)(II) does not expressly state what is meant by "the date of the final admission," the ALJ concludes that the statute refers to the date the FAL is mailed to the Division of Workers' Compensation and the claimant. This conclusion is consistent with cases holding that an FAL must be served the claimant by mailing it to his home address. *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996). In similar fashion WCRP 1-2 which provides that: "Unless a specific rule or statute states to the contrary, the date a document or pleading is filed is the date it is mailed or hand delivered to the Division of Workers' Compensation or the Office of Administrative Courts." Finally, this conclusion is consistent with § 8-42-107.2(2)(a)(I)(A), C.R.S., which provides: "For the claimant the time for selection of an IME commences with the date of mailing of a final admission of liability."

The provisions of § 8-43-203(2)(b)(II) affording the claimant 30 days after the "date of the final admission" to object to the FAL and file an application for hearing are designed to insure an opportunity for informed decision-making regarding the right to contest the FAL. *See Paint Connection Plus v. Industrial Claim Appeals Office*, __P.3d__ (Colo. App. No. 09CA0598, January 7, 2010). Requiring that the claimant be mailed a copy of the FAL at his home address maximizes the probability the claimant will receive notice, and protects the claimant's due process right to be apprised of critical decisions in sufficient time to take necessary procedural steps to preserve his rights. *Bowlen v. Munford, supra; Hall v. Home Furniture Co.,* 724 P.2d 94 (Colo. App. 1986).

It has been held that when Respondents err by addressing a FAL to an old address, the error does not vitiate the FAL's effectiveness if the Claimant actually receives the FAL in sufficient time to file a timely objection. *Duran v. Russell Stover Candies,* WC 4-524-717 (ICAO April 13, 2004). Generally due process requires notice and an opportunity to be heard. *Hendricks v. Industrial Claim Appeals Office,* 809 P.2d 1076 (Colo. App. 1990). Where a party receives actual notice of a proceeding and is afforded a reasonable opportunity to participate, non-jurisdictional errors in the statutory notice process do not nullify the administrative determination. *Wunder v. Department of Revenue,* 867 P.2d 178 (Colo. App. 1993); *Shumate v. Department of Revenue,* 781 P.2d 181 (Colo. App. 1989).

Consequently, where a claimant actually receives a FAL in sufficient time to take the necessary procedural steps to protect his rights, the ALJ concludes that there has been substantial compliance with the notice requirement § 8-43-203(2)(b)(II)(A). *Cf. Kuhndog, Inc. v. Industrial Claim Appeals Office,* 207 P.3d 949 (Colo. App. 2009); *EZ Building Components Mfg. v. Industrial Claim Appeals Office,* 74 P.3d 516 (Colo. App. 2003). In cases where there is substantial compliance with the statutory notice requirements the time for contesting the FAL is not extended until the date of actual receipt. *Duran v. Russell Stove Candies, supra.*

Here, as found above, Claimant received actual notice of the FAL by November 15, 2017 when he received a copy of the FAL in the mail. Claimant also had actual notice that the FAL had been filed when he spoke with the claims representative on November 14, 2017. Even assuming that Claimant did not receive the FAL that was originally mailed on October 23, 2017, Claimant had actual notice by November 15, 2017. The ALJ finds that when he received actual notice, Claimant had sufficient time to take the necessary procedural steps of objecting and requesting an independent medical examination prior to the thirty day deadline of November 22, 2017. Claimant had approximately 7 days and had sufficient and meaningful opportunity to make an informed decision on whether or not he wished to contest the FAL. Despite having approximately 7 days after he received actual notice, Claimant failed to timely object and failed to use the existing process to protect his rights. As there was actual notice in this case that afforded Claimant a meaningful opportunity to lodge an objection to the FAL and to request an independent medical examination within the statutory thirty day time limit, his argument that the time for filing his requests was tolled or that the thirty day period should start from the date he received the copy of the FAL is not found persuasive.

If Claimant had not received actual notice of the FAL or if Claimant received actual notice of the FAL with only 1-2 days in which to act to protect his rights, the analysis of whether or not he had sufficient notice and a meaningful opportunity to respond would be different. However, in this case, with approximately 7 days in which to act, Claimant had sufficient time for informed decision making and his due process rights were not violated. Claimant failed to timely object to the FAL and failed to timely file a notice and proposal to select an independent medical examiner. Respondents' requests to strike the objection to the FAL and to strike the notice and proposal to select an independent medical examiner are granted.

It is therefore ordered that:

1. Claimant failed to timely object to the FAL and failed to timely file a notice and proposal to select an independent medical examiner.

2. Respondents requests to strike the Objection to Final Admission of Liability and to strike the Notice and Proposal to Select an Independent Medical Examiner are granted.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 22, 2018,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury in the form of an occupational disease.

II. If Claimant proved he sustained a compensable injury, whether Claimant proved by a preponderance of the evidence he is entitled to medical benefits.

III. If Claimant proved he sustained a compensable injury, whether Claimant proved by a preponderance of the evidence that he is entitled to temporary disability benefits.

STIPULATIONS

The parties stipulated to an average weekly wage of $1,277.64.

FINDINGS OF FACT

1. Claimant is a 33-year-old man who works for Employer as a control specialist technician. Employer operates a facility that handles and ships packages. Claimant began working for Employer on July 14, 2017, two months before the facility became fully operational.

2. Claimant's primary job duties involved tending to electrical work within the facility and programming systems to ensure the facility operated efficiently. Claimant also assisted with resolving issues with machinery when necessary. Claimant testified that he fixed conveyor belt jams, which required climbing a ladder to reach boxes on the conveyor belt, and either pull the boxes down one by one, or yank and organize the boxes to get them back on the conveyor system. Claimant stated that jams occurred frequently throughout a normal shift. Claimant assisted in removing heavy diverters, which required two employees to disconnect and lift the diverter. Claimant also participated in relocating uprights (steel shelving), which required three people to put the upright on its side and place the upright on a fork truck.

3. Claimant testified he also assisted with replacing belts on the machine used to seal packages, known as the "Little David." Claimant testified that the belts would often wear out quickly. He explained that two employees would pull the belt together while another employee secured the belt with a pin.

4. Claimant testified that he replaced belts on the Little Davids multiple times a day. Claimant replaced two diverters shortly before he left his shift early to go to the emergency room on October 25, 2017. Claimant testified he removed a number of uprights on October 22, 2018.

5. Employer's facility covers a million square feet. Claimant testified that he often had to walk from one point of the building to the other. Employer required Claimant to wear steel-toed boots. Claimant initially wore his own boots that Claimant estimated weighed ten pounds. Employer subsequently provided work boots to Claimant. Employer's facility is considered a non-sort facility meaning it only handles packages larger than 18-inches.

6. Claimant worked overnight shifts from 5:30 p.m. to 6:00 a.m. Claimant worked October 14-17, 2017. Claimant was not scheduled to work October 18-21, 2017. Claimant worked October 22-25, 2017.

7. Claimant testified he started to feel pain on October 15, 2017, but attributed the pain to aches and pain he experienced on a regular basis. Claimant testified he straightened up his garage that weekend (the weekend of October 20-21, 2017). He stated the pain progressively worsened, and he took some Tylenol before returning to work at 5:30 p.m. on October 22, 2017. Claimant testified the pain he felt on October 22, 2017 was a "new pain."

8. Claimant further testified that around 2:30 a.m. or 3:00 a.m. on October 25, 2017, he called his area manager, Andrew Martin Aragon, and informed him he was experiencing pain in his leg and that he was going to the emergency room.

9. Shortly thereafter, Claimant sought treatment at the UC Health emergency department complaining of leg and back pain shooting down his side. At about 3:21 a.m. on October 25, 2017, he told Kelli Hodge, RN, he noticed pain on Monday before work that had increased over time. Claimant was seen by Jacqueline Ward-Gaines, M.D., at about 4:02 a.m. He told Dr. Ward-Gaines he had left leg pain which started three days prior to arrival. He denied falls, trauma, or similar symptoms previously. He reported he had been at work that day and the pain became unbearable and he went to the emergency department.

10. While at the UC Health emergency department on October 25, 2017, Claimant sent a text message to Mr. Aragon advising that he was at the emergency room and would not be in that night. When asked if he pulled something at work, he responded, "It started happening Sunday at the beginning of my shift. I have no idea why…. As of now I'm not doing this as a workmen comp." Claimant did not tell Mr. Aragon his symptoms began October 15, 2017. Claimant testified that, at that time, he was not sure what caused his injury and he decided that he should use caution and at least receive a diagnosis before he attributed the injury to his work for Employer.

11. At about 8:37 a.m., on October 25, 2017 Julia Lehmann, RN, went to discharge Claimant from UC Health. Claimant informed Ms. Lehmann he just wanted to leave. Ms. Lehmann offered to have the doctor come speak with Claimant, but he refused. He also refused a work note. Claimant testified he left UC Health with no idea why he was hurt. He did not get any release paperwork or medications. Claimant testified he left the hospital before being released because he was angry about "being ignored in here for a long time, maybe eight hours, and nobody has seen or done anything with me."

Claimant testified that they asked for his "deductibles and things of that nature," but he then left angry.

12. When asked if he told Ms. Hodge or Dr. Ward-Gaines that his symptoms began on October 15, 2017 and then slowly progressed to the October 22, 2017, Claimant responded, "I'm saying that when was it pain? It was probably the 22nd, when I consider it pain." He also said he did not remember what he told Ms. Hodge or Dr. Ward-Gaines.

13. Claimant went to sleep upon arriving home from UC Health on the morning of October 25, 2017. Claimant testified that he later woke up, attempted to walk down the stairs, and fell down the stairs in pain. He then went to the emergency room at Sky Ridge Medical Center.

14. At about 5:45 p.m. on October 25, 2017, Claimant told Jennifer Bates, RN, he had right upper leg pain starting Sunday night. He denied trauma. When asked if he was telling Ms. Bates his symptoms started October 22, 2017 Claimant testified, "That is when the pain started, yes." At about 6:04 p.m., Claimant was seen by Katelyn Garel, PA, who noted Claimant presented with lumbar back pain with onset of the pain on Sunday, four days earlier. She noted Claimant reported the pain occurred when he was at work, an office job, and that he did not recall any specific movements. Claimant testified he did not remember what he told Ms. Bates and Ms. Garel. The records from Sky Ridge make no mention of symptoms beginning during the week of October 15, 2017. Claimant was diagnosed with lumbar radiculopathy. Claimant testified he was told he had a herniated disc that was caused by lifting and twisting.

15. The following morning, October 26, 2017, Claimant spoke with his supervisor, Mr. Aragon, and his regional manager, Ineko Thompson. He informed them that the discussions with his treatment providers at Sky Ridge led him to believe that his work for Employer caused his injury and that he wanted to file a workers' compensation claim. Both Mr. Aragon and Mr. Thompson testified Claimant did not report it as a work injury during their calls with Claimant. Claimant testified he decided on October 26, 2017 he had a workers' compensation claim because he believed he pulled his back, which he associated with the work he does every day. Claimant testified about work tasks which he felt were heavy and could be the explanation for an onset of symptoms in his low back.

16. On October 27, 2017, Claimant was seen by his personal physician, Ann E. Trawick, DO, for evaluation of low back pain. Claimant reported to Dr. Trawick that the pain started six days prior. Claimant acknowledged at hearing that this would be Sunday, October 22, 2017. Claimant reported no known trauma or inciting event. After physically examining Claimant and reviewing imaging studies taken at the emergency department, Dr. Trawick opined that there was nothing to relate to pain etiology and concluded that Claimant's weakness appeared to be pain-related.

17. On October 29, 2017, at 8:09 p.m., Claimant sent an e-mail inquiring how to "get this changed" from his insurance to Employer's. Mr. Thompson responded at 8:04

a.m. October 30, 2017, asking if this was a work-related incident and asking Claimant to confirm the information he conveyed to Mr. Aragon about it occurring on October 22, 2017 prior to his shift. On October 31, 2017, at 3:37 a.m., Claimant replied,

> This is a work related incident. Unfortunately it is NOT a 'I dropped a hammer on my foot a (sic) 6:32 on Tuesday' type of injury. It is an injury from repeatedly pushing myself until I got to a point of severe pain. I originally thought that I had pulled a muscle in my leg. It turns out that I had pulled my lower back out and had a pinch/irritated sciatic nerve, this started during my shift the week of 10/15. By Sunday my leg still hurt, I took some ibuprofen and came to work. By Wednesday 10/25/17 I was in a large amount of pain…" (emphasis not added).

18. Mr. Aragon testified that, when he saw this e-mail, he thought Claimant was changing his report of when and how the accident happened, because he had initially been told it was at the beginning of Claimant's shift on October 22, 2017.

19. Mr. Thompson testified Claimant's job was physical in nature, and required walking around and performing maintenance. He testified he followed up with Claimant by phone after Claimant left work for back pain. Mr. Thompson stated Claimant never told him this occurred at work until Monday, October 30, 2017, when Claimant said he wanted to make this claim as a workmen's comp issue. Mr. Thompson testified he asked Claimant if his claim was about the deductible being a thousand dollars and Claimant responded, "Yeah, it is a deductible, and it happened at work." At that point, Claimant told Mr. Thompson his symptoms began at the beginning of his shift on October 22, 2017, not October 15. Mr. Thompson then asked Claimant to write a summary of what occurred and when it happened, so he could file the claim. Mr. Thompson noted that in Claimant's written summary he reported that his pain started at the beginning of the shift on 10/15/17. Mr. Thompson testified Claimant changed his story about when his symptoms began and why they began between their conversation and the email.

20. Greg Gauna, a friend and co-worker of Claimant, testified Claimant started complaining about back and hip pain on Monday, October 23, 2017. Mr. Gauna did not hear from Claimant he was having any symptoms in his back during the week of October 15. Mr. Gauna testified Claimant was going through a list of what could have caused his back pain and mentioned his back could have been bothering him as a result of sleeping on his couch. Mr. Gauana testified that during the week of October 22, 2017, he and Claimant, moved "a lot of the uprights." He described the process of moving an upright as having to lift, pull, and twist the upright in order to relocate it.

21. On November 2, 2017, Claimant was seen by Stephen F. Pehler, MD, at Colorado Orthopedic Consultants for lower back pain and leg pain. On the Patient Medical History form, Claimant indicated the date of injury was "~10/25/17." He checked that this was not an accident. He did not check the box for "Work Comp. Dr. Pehler noted Claimant presented post a "lifting and twisting injury while at work." He noted that x-rays and a CT scan of Claimant's lumbar spine did not reveal any evidence of

instability, fracture, dislocation or other osseous pathologies. He released Claimant to work with temporary restrictions of no bending, lifting or twisting until Claimant underwent an MRI and follow-up appointment.

22. Despite being released to work, Employer informed Claimant that he was not allowed to return to work until he had an MRI and fully recovered from the injury.

23. On November 28, 2017, Respondents filed a Notice of Contest on the grounds the alleged injury/illness was not work-related.

24. On January 8, 2018, Claimant underwent a lumbar spine MRI. Kenneth Allison, MD gave the following impression: minimal degenerative changes at L5-S1, with no significant central canal stenosis, significant foraminal narrowing, or clear neural impingement at any level.

25. Dr. Pehler reevaluated Claimant on January 16, 2018. He noted the lumbar spine MRI findings were consistent with lumbar spondylosis at L5-S1 and a "very mild" left-sided L5-S1 disc protrusion, with no evidence of disc herniation or significant nerve root compression. Dr. Pehler released Claimant to work without any restrictions, and referred Claimant for physical therapy and pain management.

26. On January 19, 2018, Claimant presented to R. Carter Jones, III, MD, PhD, for a pain management evaluation. Claimant reported that the onset of his pain was gradual. The report contains no mention of Claimant's work activities. Dr. Jones diagnosed Claimant with lumbago and recommended daily exercise, physical therapy, and medication.

27. Claimant testified that outside of work, he engages in house chores such as cleaning and laundry. He also enjoys working on circuit boards. Claimant testified that he had not experienced any prior back or leg injuries.

28. The ALJ does not find Claimant's testimony as to the onset of symptoms and his activities outside of work credible or persuasive.

29. Claimant failed to prove by a preponderance of evidence that he sustained a compensable injury in the form of an occupational disease.

30. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of

proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC

4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An "injury" is traceable to a particular time, place and cause the claimant has sustained an "industrial accident." *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). In contrast, where an "injury" is acquired in the ordinary course of employment and is a natural incident of the employment, the claimant has sustained an "occupational disease." *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993).

"Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Claimant argues he sustained an occupational disease as a result of his work for Employer. Claimant acknowledges there was not a specific industrial accident that occurred. He contends extensive physical labor was characteristic of his job and caused his condition.

The ALJ concludes Claimant failed to prove by a preponderance of evidence that he sustained a compensable injury in the form of an occupational disease resulting directly from the employment or the conditions under which the work was performed for Employer. Claimant's inconsistency as to the onset of symptoms undermines his credibility. In an e-mail to Employer, Claimant alleged his symptoms began during his shift the week of October 15, 2017. Claimant testified he began to feel pain on October

15, 2017, but attributed the pain to normal aches and pain he experiences on a regular basis. Claimant's explanation is implausible, as it is unlikely he would clearly identify a particular date on which he specifically began experiencing symptoms if the symptoms were merely normal aches and pains typical of any other day. Claimant alleges his symptoms did not magnify until over that weekend. Per such timeline, Claimant's symptoms did not become problematic until after he straightened up his garage. Claimant did not attempt to report his condition as a work injury until he became responsible for a deductible under his personal health insurance. While Claimant's job involved physical activity, the ALJ is not persuaded that his job duties proximately caused his condition, or aggravated or accelerated any pre-existing condition. Although possible, the totality of the credible and persuasive evidence does not establish it is more likely than not his condition directly resulted from his employment or the conditions under which his work was performed.

As Claimant failed to meet his burden to establish a compensable injury, the remaining issues of medical benefits and temporary total disability are moot.

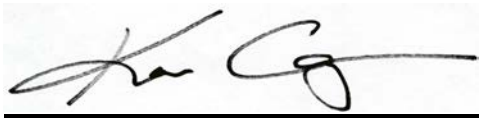
ORDER

It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence he sustained a compensable injury in the form of an occupational disease. Claimant's claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 22, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. WC 5-051-996-1

ISSUES

- Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits.

- Whether Respondents proved by a preponderance of the evidence that Claimant is responsible for the termination of his employment.

STIPULATIONS

The parties stipulated to the compensability of the claim, an average weekly wage of $606.00, and, if TTD is awarded, a closed period of TTD from June 13, 2017 to February 5, 2018.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. On March 22, 2017, Claimant began working for Employer as a short-rib boner. A short rib boner is part of a production line that manipulates meat on the table and cuts it.

2. Claimant testified he told his supervisor, Carlos Camacho, in mid-April 2017, that he was experiencing pain in his hands. Mr. Camacho sent Claimant to a "trainer" who escorted Claimant to the nurse at Employer's in-house clinic.

3. The nurse did not physically examine Claimant. Rather, she gave him two pain pills and told him he would get better with time. The nurse did not provide Claimant with work restrictions, so he continued to perform his job.

4. Claimant's pain worsened over the next week. Claimant told Mr. Camacho that his pain was worse and that he needed to see a doctor. Mr. Camacho did not respond verbally, but appeared angry and gestured with his hand that Claimant should go to the nurse. Again, the nurse did not examine Claimant. She gave Claimant a glove to support his right wrist and sent him back to the production line.

5. Claimant's pain continued to increase and he reported to Mr. Camacho a third time. He stated that he had already seen the nurse two times and that he needed to see a doctor. Claimant also told Mr. Camacho that his hands hurt so badly that he could not work. Mr. Camacho replied, "You f---ing Puerto Ricans! All you do is live off the system." Rather than send Claimant for medical treatment, Mr. Camacho told Claimant to "take it like a man."

6. Claimant consistently testified that he reported his pain and asked for medical attention at least ten times. Mr. Camacho still did not send Claimant for medical attention and still did not file a report of injury. Rather, Mr. Camacho would respond by making comments such as, "The Puerto Rican girl is crying again."

7. Claimant twice reported to Billy Martinez, Employer's supervisor of trainers, that Mr. Camacho was not letting him seek appropriate medical care and was making racial slurs. Mr. Martinez assured Claimant that he would go to the production line, but that Claimant never observed Mr. Martinez at the line. The second time Claimant reported his hand pain and Mr. Camacho's conduct; Mr. Martinez told Claimant that he needed to understand that Mr. Camacho was under a lot of pressure and that Claimant just had to deal with it. Mr. Martinez did not address Claimant's pain complaints on either occasion.

8. Claimant also complained to Mr. Brandon in Employer's human resource department. Mr. Brandon does not speak Spanish and Claimant credibly testified that he did not understand what Mr. Brandon said to him.

9. Claimant continued to work. His increasingly unbearable pain prevented Claimant from maintaining the speed required on the production line. When he would fall behind, Mr. Camacho would take Claimant's knives and his place on the line. Mr. Camacho would say that he "was a real man," and that "Puerto Ricans are crybabies with no balls."

10. Respondents emphasize that Claimant sought outside medical care on two occasions without mentioning his hand pain. On April 17, 2017, Claimant went to Colorado Plains Express Care (CPEC) where a nurse practitioner diagnosed him with influenza A and started on Tamiflu and a nebulizer. On June 7, 2017, Claimant returned to CPEC where Dr. Tawana Nix diagnosed him with acute streptococcal pharyngitis. Clamant credibly testified that he did not seek medical attention for his hand pain at those times because he was there for other reasons, and that he did not independently seek medical care for his hand pain in the United States because he did not have insurance and knew treatment would be expensive. Claimant sought independent medical care in Puerto Rico.

11. Respondents also emphasize that Claimant did not seek help through his union representative. The ALJ credits Claimant's testimony that he did not know that he could do so and did not know how a union worked.

12. Claimant worked through June 12, 2017. At that time his pain was so severe he feared his the damage to his hands could be permanent. He called into work the next several days and reached a recorded message that gave him the option of pushing one number for "sick," and a different number for "personal." There was no option to leave a message.

13. Claimant filed his worker's claim for compensation on July 14, 2017.

14. At some point between two and four weeks later, Claimant received a phone call from Insurer. He provided the information the representative requested. Insurer did not tell Claimant to go to a doctor. At that point, Claimant decided to return to Puerto Rico to seek medical attention. When Claimant left Employer on June 12, 2017, he intended to return when his condition improved.

15. Claimant treated in Puerto Rico.

16. On February 5, 2018, Claimant began working for a new employer in Atlanta, Georgia.

17. The ALJ credits Claimant's testimony and finds it credible and persuasive. Claimant testimony was consistent and reasonable. Further, his pain complaints are consistent with his difficulty meeting Employer's speed requirements. And, although Claimant appeared by phone, his speech was in a comfortable cadence.

18. Billy Martinez has worked for Employer for twenty-five years and recruited Claimant in Puerto Rico. He also is in charge of trainers. Mr. Martinez testified that Employer puts all new employees on a forty-five day probationary period for them to get up to speed on their job, and that Claimant had not qualified during that period. When asked if Claimant ever qualified for his position, Mr. Martinez responded, "I don't remember. I can't remember that far back."

19. Mr. Martinez acknowledged that Claimant had reported to him that Claimant's hands were sore. "He – well, a couple of times, he – like I said, he's seen me in the cafeteria quite a bit, and he would tell me his hands were sore." Mr. Martinez advised Claimant to do exercises and to ice his hands at home. Mr. Martinez later changed to answer and testified that Claimant had only come to him one time with complaints of hand soreness. Mr. Martinez initially denied that Claimant asked him if he could go to health services, but later testified that he told Claimant to go to his supervisor, Mr. Camacho. He also denied that Claimant ever told him that Mr. Camacho would not let him go to health services.

20. Mr. Martinez also denied that Claimant ever came to him reporting Mr. Camacho's derogatory comments about Puerto Ricans. However, he testified that Claimant did tell him once that Mr. Camacho was "a little loud." He responded that he would "tell Camacho to lower his voice when he's talking out in the – you know, in the – you know, just try to be a little more *calm* with his voice when he's trying to talk to employees." Later, Mr. Martinez testified that he told Claimant he "would get with Mr.

Camacho and *calm him down* a little bit when he's talking to his employees." The ALJ notes that "calm" is a word used to denote not volume, but affect or demeanor.

21. Mr. Martinez further denied that he had ever witnessed Mr. Camacho exhibit discriminating or harassing behavior. He also testified that no one had ever made a complaint of Mr. Camacho acting in that way.

22. Mr. Martinez testified that the only discrimination complaints he was aware of at Employer were "possibly – probably about two" complaints between co-workers. He later testified that there was only one incident. He described two employees getting into a fight and one calling the other "you know, names or what, -- you know, discriminatory – like either you're – you're – you're black or – or you – you're Mexican. You know something sort of like that nature."

23. Mr. Martinez testified that he and Mr. Camacho were friends and "co-partners." Later he testified, "I wouldn't say friends 'cause we don't really associate after work."

24. The ALJ does not find Mr. Martinez' testimony to be credible or persuasive for the following reasons:

- He acknowledged problems with his memory;
- His answers were often inconsistent with each other;
- His testimony about Mr. Camacho speaking loudly, and trying to calm him down was not forthcoming or credible;
- His testimony that on only once two employees discriminated against each other by one saying, "You're black," and the other responding, "You're Mexican," was disingenuous at best.
- Mr. Martinez stammered when answering questions, and was not spontaneous in his speech.
- Mr. Martinez is a current employee who has twenty-five years with Employer. It is unlikely he would testify against Employer.

25. Mr. Camacho has worked for Employer for more than six years, as a production supervisor, but since Employer has promoted him to a different position. As a production supervisor, he saw Claimant every day Claimant worked for Claimant's entire shift. Mr. Camacho acknowledged that Claimant complained of hand soreness and he had a trainer take Claimant to see the nurse. When asked if it happened more than once, he answered, "Maybe twice? I – I recall, specifically, the first time. It – he might have gone to the nurse – I think he did go two times to the nurse." He further testified that "any employee . . . at any time, can go up there and not have any kind of repercussion or disciplinary action if – if – if we wanted to."

26. Mr. Camacho acknowledged that he had a loud voice and that Mr. Martinez had brought that to his attention. He went on: "I'd like you to try to imagine, when – when you're on the production floor, we have moving belts and saws and 500 people down there, you know? Everybody's wearing ear protection . . . So for me to, kind of, get my – my verbiage out, sometimes I have to speak a little louder, right?" Mr. Camacho's testimony supports a finding that the problem was not the volume of his voice, given the context of a very loud environment where employees were using ear protection. And, without any question pending, Mr. Camacho volunteered all of the strategies he uses to be a friendly communicator and creates an atmosphere where he and a worker can understand each other.

27. Mr. Camacho testified that he "absolutely" never prevented Claimant from going to health services. He testified that it was "absolutely false" that he made disparaging remarks about Puerto Ricans, and that it "hurt his feelings" for someone to question his integrity. When asked if he ever told Claimant to take it like a man, he answered, "Absolutely not." When asked if he ever said that Puerto Ricans were crybabies and need to grow balls," he answered awkwardly, "No, no that's – that – that's never been said by myself."

28. Mr. Camacho responded "absolutely not," when asked if he ever discrimated against Claimant based on national origin. He also responded "absolutely not," when asked if he discriminated against Claimant based on ethnicity.

29. Mr. Camacho signed Claimant's termination letter dated June 19, 2017, explaining that Employer terminated Claimant "for – for – for absenteeism."

30. Mr. Camacho denied that he was under "pressure," but acknowledged, "We have goals, and we have – we have efficiencies that – that – that need to be met." When asked if having an underperforming employee put additional stress on him as a supervisor, he responded, "Absolutely not." Mr. Camacho denied ever stepping into Claimant's place on the line when meat started backing up. Mr. Camacho denied ever using foul language.

31. The ALJ does not find Mr. Camacho's testimony to be credible or persuasive for the following reasons:

- His answers were often inconsistent with each other;
- His testimony about the problem being the volume of his voice rather than his manner was unreasonable given the context of the work environment;
- His testimony was consistently and unnecessarily phrased in terms of absolutes;
- Mr. Camacho stammered when answering questions, and was not spontaneous in his speech;

- Mr. Camacho used awkward language in answering questions. For example, “that’s never been said by myself,” and “to get my – my verbiage out.”

- Mr. Camacho is a current employee who Employer promoted after the incidents of this case. It is unlikely he would testify against Employer.

32. Given the totality of the evidence, the ALJ finds Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits.

33. Given the totality of the evidence, the ALJ finds Respondents have not proven by a preponderance of the evidence that Claimant is responsible for the termination of his employment.

CONCLUSIONS OF LAW

The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ’s factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

This is an admitted claim as the Respondents stipulated at hearing that the injury is compensable. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once

respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). In this circumstance, Claimant requested to see a physician numerous times and Employer did not provide medical care. As such, Respondents was never designated a treatment provider in the first instance. Claimant attempted to seek medical care by returning to the nurse but his supervisor made derogatory and discriminatory comments instead of insuring he was provided medical care.

"Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

As found, Claimant has demonstrated that the treatment he received from his authorized treating providers was reasonable necessary and related to his admitted industrial injury. The right of selection passed to Claimant when Employer became aware of the Claimant's injury on the numerous occasions he reported it.

Claimant calling in sick and returning to Puerto Rico for treatment, under the circumstances, was reasonable and necessary.

Claimant is not responsible for his termination or wage loss.

ORDER

The ALJ therefore orders that:

1. Claimant has proven by a preponderance of the evidence that he is entitled to TTD from June 13, 2017 until February 5, 2018, at the stipulated average weekly wage of $606.00.

2. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 22, 2018

/s/ Kimberly Turnbow

Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Suite 400
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that the lumbar fusion surgery requested by Scott Prusmack, M.D. and performed on December 14, 2017 was reasonable, necessary and causally related to his December 11, 2007 industrial injury.

FINDINGS OF FACT

1. On December 11, 2007 Claimant suffered an admitted industrial injury to his lower back while working for Employer. Claimant initially received conservative medical treatment and diagnostic testing. On February 26, 2009 Claimant underwent an L5-S1 laminectomy. He subsequently required additional surgeries that included an L5-S1 fusion.

2. On October 3, 2013 Scott Hompland, M.D. performed a Division Independent Medical Examination (DIME). He determined that Claimant reached Maximum Medical Improvement (MMI) on January 11, 2012. Dr. Hompland explained that Claimant's medical condition was stable and static. Additional treatment would be "considered maintenance and related primarily to chronic pain management."

3. On June 26, 2014 Claimant was determined to be permanently and totally disabled.

4. During 2015 and 2016 Claimant received medical treatment from Yani Zinis, D.O. Claimant reported progressive worsening of his lower back symptoms.

5. By July 7, 2017 Claimant presented to Dr. Zinis with worsening lower back symptoms that reached a severe level of 9/10 pain. Dr. Zinis noted that the symptoms were related to a chronic condition that began on December 11, 2007. He commented that "the weakness has been more progressive over the last 2-3 months, but the left sided radicular pain has been progressive for more than a year." Dr. Zinis ordered a repeat lumbar MRI.

6. On July 31, 2017 neurosurgeon Chad Prusmack, M.D. recommended a lumbar discogram to evaluate Claimant's lower back pain. Claimant was also experiencing left-sided radiculopathy with foot drop.

7. On August 16, 2017 Claimant returned to Dr. Prusmack for an evaluation of the discogram. Dr. Prusmack determined that the discogram revealed a pain response of the L4-L5 disc with a grade three annular tear. He explained that

> this is a segment that does show degenerative changes on his MRI as well. The patient has severe limiting back pain that is causing him issues on a daily basis constantly. Based on the disk herniation and stenosis that exists on the left side at L4-5, he will need a full facetectomy with removal of the torn disk at the L4-5 level with interbody fusion and subsequent posterior instrumentation from L4-S1.

8. On September 28, 2017 Claimant returned to Dr. Zinis for an evaluation. Dr. Zinis commented that it was reasonable and necessary for Claimant to proceed with surgical intervention "proximal to his previous fusion." He emphasized that Claimant's disc herniation, progressive instability and degenerative changes were more likely than not a direct result of his "initial surgeries and fusion just proximally at L2-3 and L3-4."

9. On November 7, 2017 Claimant visited Dr. Zinis for an examination. He reported progressive lower back pain and leg weakness that had caused difficulties with routine daily activities. Dr. Zinis summarized that Claimant has been suffering

> progressive low back pain with left lower extremity radiculopathy, due directly to a progression of instability and degenerative changes just proximal to his previous fusion procedure. This includes a disc herniation at L2-3 which has become increasingly symptomatic over the last several months, and I'm concerned regarding his progressive weakness and pain symptoms with left-sided radiculopathy and myelopathy.
>
> Again I have voiced considerable concern about progressive myelopathy and an L2-3, L3-4 pattern on the left and within a reasonable degree of medical probability feel this is directly related to worsening of his condition related to the 3 back surgeries including fusion.

10. On November 9, 2017 Dr. Zinis performed an EMG/nerve conduction study on Claimant. The testing revealed "active progressive denervation apparent L2-3, L3-4 pattern on the left" that was caused by "complications related to the fusion procedure."

11. On December 13, 2017 Claimant visited the Sky Ridge Medical Center Emergency Room. Claimant identified Dr. Prusmack as his primary care physician. However, because Dr. Prusmack was unavailable, his surgical partner John Serak, M.D. evaluated Claimant.

12. Dr. Serak reviewed Claimant's radiographic records and noted "adjacent level disease with disc degeneration and moderate central stenosis." He remarked that Claimant suffered a worsening condition, weakness and spondylolisthesis that was mobile and unstable. On December 14, 2017 Dr. Serak performed a left transforaminal interbody fusion, L4-L5 percutaneous pedicle screw placement, posterior lateral fusions, aspiration of bone marrow and use of fluoroscopy for greater than one hour on Claimant's back.

13. Claimant testified that he volunteered at a food bank a few times each month. He acknowledged that he was the subject of video surveillance during 2016. The video reveals that Claimant lifted boxes of tiles. He also lifted pallets and boxes at the food bank. After conducting an independent medical examination and reviewing the video footage, John J. Raschbacher, M.D. determined that Claimant did not require any restrictions on physical activity. Claimant specifially did not appear to have any limitations regarding walking, standing, sitting, driving, climbing or bending forward.

14. In a January 3, 2018 report Dr. Raschbacher noted that he had reviewed additional medical records that included the December 14, 2017 surgical report. He reasoned that there was no clear connection between the surgery and Claimant's December 11, 2007 industrial injury. Dr. Raschbacher explained that Claimant had failed to provide accurate medical histories regarding his improvement.

15. Dr. Raschbacher testified through a pre-hearing evidentiary deposition on October 27, 2017 and at the hearing in this matter. In specifically addressing Claimant's emergency need for surgery on December 14, 2017, Dr. Raschbacher testified that the procedure was based on Claimant's subjective complaints. He remarked that the surgery was not related to Claimant's December 11, 2007 industrial injury at L5-S1 because it involved higher levels and structures in Claimant's back. Dr. Raschbacher summarized that there was no medical necessity for the surgery recommended by Dr. Prusmack that was performed on December 14, 2017.

16. On March 14, 2018 the parties conducted the post-hearing evidentiary deposition of Dr. Prusmack. After considering Claimant's activities in the surveillance video as detailed by Dr. Raschbacher, Dr. Prusmack maintained that Claimant warranted lower back fusion surgery on December 14, 2017. Dr. Prusmack explained that Claimant required the surgery because he suffered worsening instability and dysfunction. He noted that Claimant's condition had changed significantly since 2016 and sympotms including pain, weakness and the development of foot drop justified surgical intervention.

17. Dr. Prusmack summarized that Claimant's need for surgery on December 14, 2017 was related to his December 11, 2007 industrial injury. He detailed that

> indeed the essence of this case and the essence [of] neuro-surgically is the fact that [Claimant] had a lumbar fusion, at L5-S1, in 2011. It's very clear, once a lumbar fusion is performed, you run a risk of approximately 25 percent every 10 years of needing another fusion due to what's called adjacent segment disease. What that refers to is that the stabilization, of a previously mobile joint, transfers excess load to the next level above, in this case being L4-5. Therefore, an undeniable cause of this back problem, in my opinion, is his previous fusion.

Dr. Prusmack detailed that the spondylolisthesis in Claimant's spine was caused by "adjacent segment disease. It occurs adjacent to an existing fusion over the long-run." He commented that Claimant's condition was not "activity related" or a "degenerative condition seen in the elderly."

18. Claimant has established that it is more probably true than not that the lumbar fusion surgery requested by Dr. Prusmack and performed on December 14, 2017 was reasonable, necessary and causally related to his December 11, 2007 industrial injury. Initially, on December 11, 2007 Claimant suffered an admitted lower back injury. After receiving conservative treatment Claimant underwent multiple surgeries including an L5-S1 fusion. Claimant subsequently began to experience progressively worsening lower back pain. The persuasive medical records reflect that Claimant's need for the December 14, 2017 fusion surgery was caused by the progressive worsening of his condition as a result of his L5-S1 fusion surgery. Dr. Zinis determined that Claimant's lower back symptoms were related to a chronic condition that began on December 11, 2007. By August 16, 2017 a discogram revealed a pain response of the L4-L5 disc with a grade three annular tear. Based on Claimant's disc herniation and stenosis on the left side at L4-5, Dr. Prusmack recommended a full facetectomy with removal of the torn disk at the L4-5 level with an interbody fusion and posterior instrumentation from L4-S1. Dr. Zinis attributed Claimant's lower back symptoms to a progression of instability and degenerative changes that were proximal to his previous fusion procedure. He summarized that Claimant's disc herniation, progressive instability and degenerative changes were more likely than not a direct result of his "initial surgeries and fusion just proximally at L2-3 and L3-4."

19. In contrast, Dr. Raschbacher explained that the December 14, 2017 surgery was based on Claimant's subjective complaints. He remarked that the surgery was not related to Claimant's December 11, 2007 industrial injury at L5-S1 because it involved higher levels and structures in Claimant's back. Dr. Raschbacher summarized that there was no medical necessity for the surgery. However, Dr. Prusmack persuasively determined that Claimant required the surgery because he suffered worsening instability and dysfunction. He noted that Claimant's condition had changed significantly since 2016 and sympotms including pain, weakness and the development of foot drop justified surgical intervention. Dr. Prusmack concluded that Claimant suffered from adjacent segment disease that was caused by his prior fusion. The process occurred over a period of time because Claimant's previous fusion transferred an excess load to the L4-L5 level. The objective medical records thus reflect that Claimant's December 14, 2017 lumbar spine fusion surgery was reasonable, necessary and causally related to his December 11, 2007 industrial injury. Respondents are therefore financially responsible for the procedure.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has established by a preponderance of the evidence that the lumbar fusion surgery requested by Dr. Prusmack and performed on December 14, 2017 was reasonable, necessary and causally related to his December 11, 2007 industrial injury. Initially, on December 11, 2007 Claimant suffered an admitted lower back injury. After receiving conservative treatment Claimant underwent multiple surgeries including an L5-S1 fusion. Claimant subsequently began to experience progressively worsening lower back pain. The persuasive medical records reflect that Claimant's need for the December 14, 2017 fusion surgery was caused by the progressive worsening of his condition as a result of his L5-S1 fusion surgery. Dr. Zinis determined that Claimant's lower back symptoms were related to a chronic condition that began on December 11, 2007. By August 16, 2017 a discogram revealed a pain response of the L4-L5 disc with a grade three annular tear. Based on Claimant's disc herniation and stenosis on the left side at L4-5, Dr. Prusmack recommended a full facetectomy with removal of the torn disk at the L4-5 level with an interbody fusion and posterior instrumentation from L4-S1. Dr. Zinis attributed Claimant's lower back symptoms to a progression of instability and degenerative changes that were proximal to his previous fusion procedure. He summarized that Claimant's disc herniation, progressive instability and degenerative changes were more likely than not a direct result of his "initial surgeries and fusion just proximally at L2-3 and L3-4."

6. As found, in contrast, Dr. Raschbacher explained that the December 14, 2017 surgery was based on Claimant's subjective complaints. He remarked that the surgery was not related to Claimant's December 11, 2007 industrial injury at L5-S1 because it involved higher levels and structures in Claimant's back. Dr. Raschbacher summarized that there was no medical necessity for the surgery. However, Dr. Prusmack persuasively determined that Claimant required the surgery because he suffered worsening instability and dysfunction. He noted that Claimant's condition had changed significantly since 2016 and sympotms including pain, weakness and the development of foot drop justified surgical intervention. Dr. Prusmack concluded that Claimant suffered from adjacent segment disease that was caused by his prior fusion. The process occurred over a period of time because Claimant's previous fusion transferred an excess load to the L4-L5 level. The objective medical records thus reflect that Claimant's December 14, 2017 lumbar spine fusion surgery was reasonable, necessary and causally related to his December 11, 2007 industrial injury. Respondents are therefore financially responsible for the procedure.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's lumbar spine fusion surgery on December 14, 2017 was reasonable, necessary and causally related to his December 11, 2007 industrial injury. Respondents are therefore financially responsible for the procedure.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 22, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Has Claimant shown, by a preponderance of the evidence, that the metacarpophalangeal ("MP") surgery as proposed by Dr. Idler is reasonable, necessary, and related to her work injury which occurred on July 19, 2015?

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. This is an admitted injury. Claimant began employment for Employer as a stockbroker in June of 2012. On Sunday, July 19, 2015, she was playing second base at a company softball game sponsored by Employer. Claimant was playing second base, when a baserunner ran at high speed into her right hand and thumb. Claimant described him as a large man. After the impact, she felt immediate sharp pain in her thumb. She returned home and iced the thumb. Claimant had also injured her ankle on a separate play in the same game.

2. The next day, she made an appointment with Dr. Brad Dresher at Colorado Springs Orthopedic Group (which became Claimant's ATP) for Tuesday, July 21, 2015. She notified her employer that she would be missing a meeting on Tuesday, at which time she was advised that the injury would be covered under the employer's Worker's Compensation policy. At her visit to Dr. Dresher on July 21, 2015, Claimant was diagnosed with right ankle and right thumb sprains. He ordered X-rays, a cast boot for the ankle, a splint for the thumb, and occupational therapy. (Ex. 3).

3. The occupational therapy patient questionnaire for the initial visit indicated that Claimant complained of pain with gripping, trouble opening jars, doing heavy household chores, carrying a shopping bag, washing her back, using a knife, and engaging in recreational activities. The pain diagram of the same date shows that the entire right thumb was circled as the location of her discomfort. *Id.*

4. On August 19, 2015, Claimant came under the care of Dr. Richard Idler at the same orthopedic group. He ordered an MRI of the thumb, which showed a sprain of the right first carpometacarpal (CMC) joint. Dr. Idler also noted that the X-rays showed evidence of a "proximal metaphyseal fracture which is healed with an angular alignment apex dorsal." (Ex. 3).

5. At Claimant's visit with Dr. Idler, on November 5, 2015, Dr. Idler noted, "[o]verall the patient is improved." Claimant reported "improvement in her discomfort. Dr. Idler noted Claimant's right thumb CMC grind test produced no discomfort nor crepitance. Dr. Idler noted that Claimant had no pain on an MP shear maneuver. Dr.

Idler did not schedule a follow-up visit and noted Claimant may return on an as needed basis. (Ex. C, p. 18)

6. Dr. Idler's notes from February 15, 2016 state that she had a new onset of pain involving the MP joint, noting that her symptoms began “a few weeks ago”, and recommended consideration of an intraarticular steroid injection. (Ex. C, p.22). Claimant, however, testified at hearing that her thumb has always hurt since the softball injury, and that she was not asked specifically about one joint versus another.

7. Over the next eight months, Claimant continued in occupational therapy. She also tried splinting, and had numerous injections in her CMC and MP joints, although she noted an increase in pain following the MP injection on March 9, 2016. By April of 2016, Dr. Idler recommended surgery of tendon stabilization of the CMC joint and an MP joint capsulodesis. (Ex. 3) As a follow up to the MP joint complaints noted in February of 2016, Dr. Idler's office notes of October 13, 2016 state, "In association with her pain and instability of the right first CMC joint, the patient has developed a progressive hyperextension deformity of the MP joint." *Id.*

8. On 3/19/2018, Dr. Idler opined that he was not able to attribute Claimant’s right thumb MP joint issues to the July 19, 2015 injury:

> Based on the above I am not able with any degree of medical certainty to attribute Ms. Hartt’s present issues with the MP joint of her right thumb to her injury of 7/19/2015. I also believe that any expert witness reviewing this case would likely attribute her progressive MP joint hyperextension and pain to the angular deformity of the thumb metacarpal which predate her injury of 7/19/2015 (Ex. C, p. 30).

9. In May of 2017, Dr. Idler had requested another bone scan, which was denied by the Respondent/Insurer. Claimant obtained a second opinion with Dr. Clinkscales outside of the Worker's Compensation system on July 18, 2017. Dr. Clinkscales noted her history of the softball injury from 2015 with two prior thumb injuries as a child, and no subsequent intervening injuries. He diagnosed chronic symptomatic right thumb volar plate instability with associated MP joint laxity. Dr. Clinkscales never opined on the issue of relatedness of her condition to the work injury. Dr. Clinkscales concluded that the proposed fusion would have a more ‘predictable’ outcome for Claimant, and recommended it. (Ex. 6). On 8/10/2017, Dr. Idler then concluded that the MP fusion was more predictable than the capsulodesis, and more appropriate in case this joint had degenerative changes, as the bone scan subsequently revealed. (Ex. 3).

10. After the denial, Claimant pursued the bone scan through her health insurance, and it was completed on July 31, 2017. The scan revealed arthritis of the MP joint, making joint fusion the more viable surgical option, a conclusion with which Dr. Idler, Dr. Karl Larsen, and Dr. Clinkscales, now concur.

11. On May 31, 2017, Wallace K. Larson, M.D. issued another IME for Respondents. Initially, he had opined that the proposed fusion was not reasonable, necessary, or related to this claim. He placed her at MMI on 4/16/2106. (Ex. F, pp. 46-47) He then opined on August 23, 2017, after further record review, that within a reasonable degree of medical probability, the right thumb MP joint fusion is still not related to Claimant's work injury. Dr. Larson did, however, opine that the surgery was *now medically indicated,* but still not related to this claim. (Ex. F, pp. 48-49).

12. Claimant underwent a second independent medical examination at Respondents' request, with Dr. Karl Larsen on March 9, 2018 (Ex. 7). In his eight-page report, Dr. Larsen writes a detailed analysis of the issue of the relationship between the original CMC sprain and the present MP joint instability. Under Impression, he states, "Ms. Hartt has progressive symptoms of metacarpophalangeal joint pain and instability that *started* following an injury to her right thumb," referring to the 2015 softball injury (Ex. 7 at p. 5)(emphasis added). He now recommends the arthrodesis (fusion) as recommended by Dr. Clinkscales. Further on the issue of relatedness, he writes:

> I think the question here is about the proximate cause of her condition. She very clearly had a well-described injury on July 19, 2015. She had MRI evidence that clearly demonstrated an injury to the thumb CMC joint, so I think the fact that she sustained a CMC joint injury is *clearly related to her work activity.* While that thumb CMC joint injury seems to be resolved in terms of painful symptoms, she had developed enough increased instability to the thumb CMC joint to accentuate MP joint instability and *bring about the need for treatment* that she has now. It should be noted that this is a *very, very unusual* case…..
>
> Because Ms. Hartt was *not symptomatic* prior to her traumatic event of July 19, 2015, I think the *only* conclusion I can draw is that it is likely that *her injury of July 19, 2015* has led her through a series of mechanical changes in her thumb that *has now produced the need for treatment* of her thumb metacarpophalangeal joint. (Ex. 6, p. 6)(emphasis added).

13. Claimant testified that she had sustained two prior injuries to the right thumb, in 2001 and 2003. She fractured the first metacarpal of the thumb in 2003. That bone showed irregular healing even in 2003, i.e., "X-ray noteworthy for nondisplaced mildly angulated fracture at the base of the first metacarpal," according to her then-treating physician, Dr. Whiteside. (Ex. H, p. 59)

14. Claimant had been released to full activities in October of 2003. She testified that she experienced no difficulties whatsoever with her right thumb, no medical treatment, no limitations in her life, until the softball injury twelve years later.

15. She also testified that she sustained no thumb injuries subsequent to the softball injury in July of 2015. She testified that her thumb has never been pain-free, other than a brief few days following an injection, since the injury on July 19, 2015. She

testified that she is ready to proceed with the MP fusion at this time, after near three years of conservative treatment and a substantial negative impact on her life.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Credibility

D. The ALJ finds that each of the medical experts who provided medical opinions along the way-sometimes changing their opinions in the face of new evidence-have done so with the highest professionalism. Each are eminently qualified, and the

ALJ will analyze their conclusions more on the basis of persuasiveness, than credibility per se. The ALJ further finds that Claimant presents as credible, not only in her courtroom testimony, but also in giving the best possible medical history too all professional providers since the date of her injury. Claimant's sincere motivation is to get better and resume an active lifestyle.

Medical Benefits, Generally

E. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Reasonable and Necessary

F. Respondents essentially concede this issue. Drs. Idler, Clinkscales, and Karl Larsen all concur, after considerable testing and record review, that this fusion surgery is reasonable and necessary-or at least the best alternative currently available. Claimant herself was sincerely hoping to avoid this if possible, but still has pain, mobility issues and lack of grip strength. It has affected her ability to lead an otherwise active lifestyle, despite an ability to snowboard without incident. The ALJ finds that this surgery, as proposed, is reasonable and necessary to cure Claimant's condition.

Related to Work Injury

G. To quote Dr. Karl Larsen: "It should be noted that this is a *very, very unusual case".* It is an unusual case indeed where the Respondent's IME physician ultimately determines causation/relatedness in Claimant's favor, but that's what happened here. The opinions of each of the providers have evolved with the passage of time, as more information has become available. This is a credit to all involved in her care and diagnosis; 'Sticking to one's guns' in the face of mounting evidence does little to enhance one's persuasiveness. For that reason, the ALJ gives far greater weight to the *most recent* opinions of the providers, to those with the greatest access to information, and to those with the least potential for bias. Respondents essentially take the position that Dr. Larsen has not made his case (in the form of his most recent

opinion) for relatedness with great medical precision and certainty. What he has done, by a preponderance of the evidence, is to persuade the ALJ-along with Claimant's credible, consistent, and straightforward testimony and medical evidence that her thumb has never been the same since her work accident. What occurred herein is an aggravation of a preexisting condition, which does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce the need for medical treatment. The ALJ so finds.

ORDER

It is therefore ordered that:

1. The MP fusion surgery as proposed by Dr. Idler is reasonable, necessary, and related to Claimant's work injury. Respondents will pay for this procedure, and all costs associated with it.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 24, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUE

The issue set for hearing is whether Claimant established by a preponderance of the evidence that he injured his right shoulder and neck in the work related accident of December 18, 2015.

FINDINGS OF FACT

1. On December 18, 2015, Claimant had worked for Employer for approximately five years. His job involved lifting over 70 pounds. He worked 12 hours per day sandblasting pipe, coating pipe at welds, lifting and placing wood skids and sand bags around the pipes. The job was extremely physical. Claimant had worked his entire work career at very physically demanding jobs.

2. Claimant was injured on December 18, 2015, when he was working down in a ten foot ditch. He was facing the truck hoe outside of the ditch that was lifting another 30-36 inch pipe into the ditch. The operator of the truck hoe got out of his vehicle without shutting the mechanism down. The pipe came at Claimant in a swooping motion, hitting him in the lower extremity. Claimant tried to grab the pipe with both arms, leaning forward. The truck hoe pushed him against the pipe behind him and then further pushed him another eight to ten feet into other pipes that had been lined up.

3. Claimant was crushed between the two pipes for approximately five minutes before he was removed by coworkers. He passed out for a brief period of time then he first recalled being grabbed by his shoulders and taken out of the ditch by co-workers. He was seated in a chair where he awaited the arrival of paramedics.

4. When the paramedics arrived, they indicated that Claimant was complaining of pelvic pain and bilateral leg pain. These body parts had been crushed between the two large steel pipes. The paramedics determined that due to his slow respirations Claimant should be classified as code red. Claimant was placed on an IV and on c-spine precautions. He was then transported to the hospital by helicopter.

5. Claimant was a patient at North Colorado Medical Center in Greeley, CO, for two and a half days during which time he was heavily medicated. He was treated for low back, right knee, pelvis and hip injuries. Upon his release from the hospital, he was sent to Workwell.

6. Claimant testified that, at Workwell, he felt that only his right knee was being treated. The treatment notes from December 22, 2015, indicate that Claimant suffered from body pain. His major complaints were back pain, legs and a fracture in the pelvis that would heal itself. Throughout his visits with Workwell, it was noted that Claimant's chief complaint was body pain.

7. Feeling that his injuries were not being appropriately addressed, Claimant was able to change his medical care from Workwell to Concentra. Claimant first went to Concentra on February 3, 2016. It was noted that he had right arm numbness at that time.

8. Dr. Robert Nystrom first saw Claimant on March 8, 2016. He noted that Claimant presents today for a recheck of his neck, back, hips and knees. He also noted in his report a diagnosis of right shoulder strain.

9. In his testimony, Dr. Nystrom stated that the mechanics of the injury are consistent with an injury to Claimant's right shoulder and neck. He recited the fact that Claimant put his arms in front of him in an effort to push the pipe back and then endured a type of whiplash injury when he was thrown backwards into the pipes.

10. Dr. Nystrom also testified that with an accident such as the one that Claimant sustained, the more severe injuries would take precedence over the less severe and would be given priority in treatment.

11. Dr. Nystrom indicated that Claimant's neck injury was probably not going to result in surgery. He stated that he would probably order physical therapy then injections, if needed, for the neck. As far as the shoulder, he would start with conservative treatment and then progress to surgery if conservative treatment did not alleviate the symptoms.

12. Dr. Carlos Cebrian performed a record review of Claimant's medical records from this accident on March 24, 2017. The doctor prepared a Supplemental report on April 14, 2017, and prepared an independent medical examination report at the request of the Respondents on June 14, 2017. In the March 24, 2017, report, Dr. Cebrian references the report from the Transport North Colorado Med Evac in describing the accident. The accident was described as, "[the Claimant] was in a ditch laying pipe when the pipe dislodged and rolled over three workers. He was pinned for less than one minute. The pipe was a 2-3 feet diameter steel pipe."

13. The paramedic from the Southeast Weld Fire Department described the accident as Claimant being crushed between two pipes for approximately five minutes and Claimant had a loss of consciousness for about thirty seconds.

14. When Dr. Cebrian saw Claimant on June 14, 2017, Dr. Cebrian took a brief history of the accident. "[Claimant] was injured on 12/18/15 while he was working on a pipeline and states that one large pipe swung towards him. He states this was steel and it was approximately 100 feet long. This pushed him 8 feet back and dragged him into a second pipe. He stated the pipe was approximately two and a half to three feet wide. He was pinned between the pipes."

15. Dr. Cebrian's opinion was that Claimant had "an expansion" of complaints and that it is only the right knee, pelvis, hip and low back that were injured in the accident. Dr. Cebrian attributes his opinion regarding the relatedness of the neck and right

shoulder condition because of the lateness of reporting injuries to the various body parts. He also states that the expansion of complaints are non-organic in nature. In his deposition, he indicates additionally that he believes that the mechanism of injury is such that the upper part of Claimant's body could not have been injured and that there are psychological evaluations in which Claimant he is complaining of whole body pain which does not fit with an acute injury.

16. Aside from Dr. Cebrian, none of Claimant's treating physicians have voiced an opinion that Claimant's physical complaints are non-organic in nature. There are findings on the right shoulder MRI that there is severe infraspinatus tendinosis and interstitial tear that would support Claimant's complaints. (Exh.19 p. 2)

17. In an April 18, 2017, response to Respondents' attorney's letter to him dated April 17, 2017, Dr. Nystrom states his disagreement with Dr. Cebrian's opinion that there have been some symptom expansion. He goes on to indicate his opinion that "Claimant suffered a serious (potentially life ending) injury that could certainly result in the current constellation of symptoms currently being treated."

18. Claimant credibly testified that he is in need of medical treatment for his right shoulder and neck so that he can continue to get better and return to work.

19. Currently, Claimant is unable to work due to his conditions caused by the accident of December 18, 2015, which include the neck and right shoulder.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is evidence that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability of the right shoulder and neck

4. Dr. Cebrian's reports focus on what he calls Claimant's "expansion of symptoms." He states that Claimant continuously reported injuries to new body parts other than the right knee, hip, pelvis and low back, throughout his treatment. Dr. Nystrom explains that Claimant had an extremely serious accident. While Claimant sustained a crush injury to the lower portion of his body, the crush was not static. The accident involved Claimant being hit by a moving pipe that was 30 to 36 inches in diameter. The pipe drove him into another pipe that was two feet behind him then continued pushing him another eight to ten feet into the other pipes on the ground. Dr. Nystrom testified that when Claimant attempted to push at the incoming pipe with both of his arms, the right shoulder would have been injured. When the pipe pushed Claimant back, Claimant would have sustained a whiplash type injury to his neck. Dr. Cebrian did not go into an in depth analysis of the mechanics of the injury but rather dismissed the results of the accident as a "crush" injury.

5. Claimant credibly testified that he told doctors about his injured neck and right shoulder shortly after the accident. Workwell physicians, who saw him within four days of the accident, noted that Claimant had whole body pain. Claimant was probably hurting all over his body at that time due to the serious nature of the accident. Most probably, it took time for various parts of his body to calm down before it became apparent what parts of his body required medical treatment. Dr. Nystrom's testimony is consistent when he indicated that the most serious injuries are most probably treated first.

6. Dr. Cebrian does not address the fact that Claimant had a very heavy job. Claimant was able to perform that job for five years prior to the accident with Employer. If Claimant had had neck and shoulder problems, he would not have been able to perform the work that he was doing prior to the accident. The medical record shows Claimant has tenderness in the neck, trapezius area and pain in his right shoulder. Claimant testified that he never had injuries to his right shoulder and neck before the accident. There is no evidence of new injuries or accidents since the December 18, 2015, accident. It is therefore most probable that Claimant injured his neck and right shoulder as a result of the December 18, 2015, accident.

7. Dr. Cebrian briefly mentions that many of Claimant's injuries are somatic. There is no indication from any of Claimant's treating physicians that Claimant's physical complaints are somatic.

8. For reasons stated above, it is found that Claimant has proven by a preponderance of the evidence that he sustained injuries to his right shoulder and his neck as a result of the industrial accident of December 18, 2015.

Medical Benefits

9. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Once a Claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and the respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. In*dustrial Commission, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, *supra*
.

10. In this matter, Dr. Nystrom credibly testified that there is medical treatment for his right shoulder and neck that Claimant needs to cure and relieve the symptoms of his industrial accident. Claimant is awarded reasonable and necessary medical treatment for his neck and shoulder.

ORDER

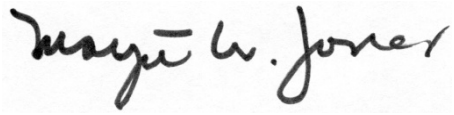
It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered additional injuries to his neck and right shoulder as a result of the December 18, 2015 industrial accident.

2. Respondents are responsible for reasonable and necessary medical treatment for claimant's neck and right shoulder injuries.

3. All further issues not determined by this Order are reserved for that time when they become ripe.

DATED: May 23, 2018



MARGOT W. JONES,
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits.

- Whether Respondents proved by a preponderance of the evidence that Claimant is responsible for the termination of his employment.

STIPULATIONS

The parties stipulated to the compensability of the claim, an average weekly wage of $606.00, and, if TTD is awarded, a closed period of TTD from June 13, 2017 to February 5, 2018.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. On March 22, 2017, Claimant began working for Employer as a short-rib boner. A short rib boner is part of a production line who manipulates meat on the table and cuts it.

2. Claimant testified he told his supervisor, Carlos Camacho, in mid-April 2017, that he was experiencing pain in his hands. Mr. Camacho sent Claimant to a "trainer" who escorted Claimant to the nurse at Employer's in-house clinic.

3. The nurse did not physically examine Claimant. Rather, she gave him two pain pills and told him he would get better with time. The nurse did not provide Claimant with work restrictions, so he continued to perform his job.

4. Claimant's pain worsened over the next week. Claimant told Mr. Camacho that his pain was worse and that he needed to see a doctor. Mr. Camacho did not respond verbally, but appeared angry and gestured with his hand that Claimant should go to the nurse. Again, the nurse did not examine Claimant. She gave Claimant a glove to support his right wrist and sent him back to the production line.

5. Claimant's pain continued to increase and he reported to Mr. Camacho a third time. He stated that he had already seen the nurse two times and that he needed to see a doctor. Claimant also told Mr. Camacho that his hands hurt so badly that he could not work. Mr. Camacho replied, "You f---ing Puerto Ricans! All you do is live off

the system." Rather than send Claimant for medical treatment, Mr. Camacho told Claimant to "take it like a man."

6. Claimant consistently testified that he reported his pain and asked for medical attention at least ten times. Mr. Camacho did not send Claimant for medical attention and still did not file a report of injury. Rather, Mr. Camacho would respond by making comments such as, "The Puerto Rican girl is crying again."

7. Claimant twice reported to Billy Martinez, Employer's recruiter, that Mr. Camacho was not letting him seek appropriate medical care and was making racial slurs. Mr. Martinez assured Claimant that he would go to the production line, but Claimant never observed Mr. Martinez at the line. The second time Claimant reported his hand pain and Mr. Camacho's conduct; Mr. Martinez told Claimant that he needed to understand that Mr. Camacho was under a lot of pressure and that Claimant just had to deal with it. Mr. Martinez did not address Claimant's pain complaints or provide him with a list of medical providers on either occasion.

8. Claimant also complained to Mr. Brandon in Employer's human resource department. Mr. Brandon does not speak Spanish and Claimant credibly testified that he did not understand what Mr. Brandon said to him.

9. Claimant continued to work. His increasingly unbearable pain prevented Claimant from maintaining the speed required of his position on the production line. When he would fall behind, Mr. Camacho would take Claimant's knives and his place on the line. Mr. Camacho would say that he "was a real man," and that "Puerto Ricans are crybabies with no balls."

10. Respondents emphasize that Claimant sought outside medical care on two occasions without mentioning his hand pain. On April 17, 2017, Claimant went to Colorado Plains Express Care (CPEC) where a nurse practitioner diagnosed him with influenza A and started on Tamiflu and a nebulizer. On June 7, 2017, Claimant returned to CPEC where Dr. Tawana Nix diagnosed him with acute streptococcal pharyngitis. Clamant credibly testified that he did not seek medical attention for his hand pain at those times because he was there for other reasons, and that he did not independently seek medical care for his hand pain in the United States because he did not have insurance and knew treatment would be expensive. Claimant sought independent medical care in Puerto Rico.

11. Respondents also emphasize that Claimant did not seek help through his union representative. The ALJ credits Claimant's testimony that he did not know that he could do so and did not know how a union worked.

12. Claimant worked through June 12, 2017. At that time his pain was so severe he feared the damage to his hands could be permanent. He called into work the next several days and reached a recorded message that gave him the option of pushing

one number for "sick," and a different number for "personal." There was no option to leave a message.

13. Claimant filed his worker's claim for compensation on July 14, 2017.

14. At some point later, Claimant received a phone call from a representative of Insurer. He provided the information the representative requested. Insurer did not tell Claimant to go to a doctor. At that point, Claimant decided to return to Puerto Rico to seek medical attention. When Claimant left Employer on June 12, 2017, he intended to return when his condition improved.

15. Claimant received reasonable and necessary treatment in Puerto Rico for his work injury.

16. On February 5, 2018, Claimant began working for a new employer in Atlanta, Georgia.

17. The ALJ credits Claimant's testimony and finds it credible and persuasive. Claimant's testimony was consistent and reasonable. Further, his pain complaints are consistent with his difficulty meeting Employer's speed requirements. And, although Claimant appeared by phone, his speech was in a comfortable cadence and he did not hesitate when answering questions.

18. Billy Martinez has worked for Employer for twenty-five years and recruited Claimant in Puerto Rico. Mr. Martinez testified that Employer puts all new employees on a forty-five day probationary period for them to get up to speed on their job, and that Claimant had not qualified during that period. When asked if Claimant ever qualified for his position, Mr. Martinez responded, "I don't remember. I can't remember that far back."

19. Mr. Martinez acknowledged that Claimant had reported to him that Claimant's hands were sore. "He – well, a couple of times, he – like I said, he's seen me in the cafeteria quite a bit, and he would tell me his hands were sore." Mr. Martinez advised Claimant to do exercises and to ice his hands at home. Mr. Martinez later changed his answer and testified that Claimant had only come to him one time with complaints of hand soreness. Mr. Martinez initially denied that Claimant asked him if he could go to health services, but later testified that he told Claimant to go to his supervisor, Mr. Camacho. He also denied that Claimant ever told him that Mr. Camacho would not let him go to health services.

20. Mr. Martinez also denied that Claimant reported Mr. Camacho's derogatory comments about Puerto Ricans to him. However, he testified that Claimant did tell him once that Mr. Camacho was "a little loud." He responded that he would "tell Camacho to lower his voice when he's talking out in the – you know, in the – you know, just try to be a little more *calm* with his voice when he's trying to talk to employees." Later, Mr. Martinez testified that he told Claimant he "would get with Mr. Camacho and

calm him down a little bit when he's talking to his employees." The ALJ notes that "calm" is a word used to denote not volume, but affect or demeanor.

21. Mr. Martinez further denied that he had ever witnessed Mr. Camacho exhibit discriminating or harassing behavior. He also testified that no one had ever made a complaint of Mr. Camacho acting in that way.

22. Mr. Martinez testified that the only discrimination complaints he was aware of at Employer were "possibly – probably about two" complaints between co-workers. He later testified that there was only one incident. He described two employees getting into a fight and one calling the other "you know, names or what, -- you know, discriminatory – like either you're – you're – you're black or – or you – you're Mexican. You know something sort of like that nature."

23. Mr. Martinez testified that he and Mr. Camacho were friends and "co-partners." Later he testified, "I wouldn't say friends 'cause we don't really associate after work."

24. The ALJ does not find Mr. Martinez' testimony to be credible or persuasive for the following reasons:

- He acknowledged problems with his memory;
- His answers were often inconsistent with each other;
- His testimony about Mr. Camacho speaking loudly, and trying to calm him down was not forthcoming or credible;
- His testimony that on only once two employees discriminated against each other by one saying, "You're black," and the other responding, "You're Mexican," was disingenuous at best.
- Mr. Martinez stammered when answering questions, and was not spontaneous in answering questions.
- Mr. Martinez is a current employee who has twenty-five years with Employer. It is unlikely he would testify against Employer.

25. Mr. Camacho was present in the courtroom for Claimant's and Mr. Martinez' testimony. He has worked for Employer for more than six years as a production supervisor. After the incidents involving this claim, Employer promoted him to a different position. As a production supervisor, Mr. Camacho saw Claimant every day that Claimant worked for Claimant's entire shift. Mr. Camacho acknowledged that Claimant complained of hand soreness and he had a trainer take Claimant to see the nurse. When asked if it happened more than once, he answered, "Maybe twice? I – I recall, specifically, the first time. It – he might have gone to the nurse – I think he did go two times to the nurse." He further testified that "any employee . . . at any time, can go

up there and not have any kind of repercussion or disciplinary action if – if – if we wanted to."

26. Mr. Camacho acknowledged that he had a loud voice and that Mr. Martinez had brought that to his attention. He went on: "I'd like you to try to imagine, when – when you're on the production floor, we have moving belts and saws and 500 people down there, you know? Everybody's wearing ear protection . . . So for me to, kind of, get my – my verbiage out, sometimes I have to speak a little louder, right?" Mr. Camacho's testimony supports a finding that the problem was not the volume of his voice, given the context of a very loud environment where employees were using ear protection. Without any question pending, Mr. Camacho volunteered all of the strategies he uses to be a friendly communicator and creates an atmosphere where he and a worker can understand each other. The ALJ found this testimony to be disingenuous.

27. Mr. Camacho testified that he "absolutely" never prevented Claimant from going to health services. He testified that it was "absolutely false" that he made disparaging remarks about Puerto Ricans, and that it "hurt his feelings" for someone to question his integrity. When asked if he ever told Claimant to take it like a man, he answered, "Absolutely not." When asked if he ever said that Puerto Ricans were crybabies and need to grow balls," he answered awkwardly, "No, no that's – that – that's never been said by myself."

28. Mr. Camacho responded "absolutely not," when asked if he ever discrimated against Claimant based on national origin. He also responded "absolutely not," when asked if he discriminated against Claimant based on ethnicity.

29. Mr. Camacho signed Claimant's termination letter dated June 19, 2017, explaining that Employer terminated Claimant "for – for – for absenteeism."

30. Mr. Camacho denied that he was under "pressure," but acknowledged, "We have goals, and we have – we have efficiencies that – that – that need to be met." When asked if having an underperforming employee put additional stress on him as a supervisor, he responded, "Absolutely not." Mr. Camacho denied ever stepping into Claimant's place on the line when meat started backing up. Mr. Camacho denied ever using foul language.

31. The ALJ does not find Mr. Camacho's testimony to be credible or persuasive for the following reasons:

- His answers were often inconsistent with each other;
- His testimony about the problem being the volume of his voice rather than his manner was unreasonable given the context of the work environment;
- His testimony was consistently and unnecessarily phrased in terms of absolutes;

- Mr. Camacho stammered when answering questions, and was not spontaneous in his speech;

- Mr. Camacho used awkward language in answering questions. For example, “that’s never been said by myself,” and “to get my – my verbiage out.”

- Mr. Camacho is a current employee who Employer promoted after the incidents of this case. It is unlikely he would testify against Employer.

32. Given the totality of the evidence, the ALJ finds Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits.

33. Given the totality of the evidence, the ALJ finds Respondents have not proven by a preponderance of the evidence that Claimant is responsible for the termination of his employment.

CONCLUSIONS OF LAW

The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ’s factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

This is an admitted claim as the Respondents stipulated at hearing that the injury is compensable. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury.

Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). In this circumstance, Claimant requested to see a physician numerous times and Employer did not provide medical care. As such, Respondents did not designate a treatment provider in the first instance. Section 8-43-404(5)(a) provides: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

As found, Claimant has demonstrated that the treatment he received from his authorized treating providers was reasonable necessary and related to his admitted industrial injury. The right of selection passed to Claimant when Employer became aware of the Claimant's injury on the numerous occasions he reported it.

Claimant calling in sick and returning to Puerto Rico for treatment, under the circumstances, was reasonable and necessary.

Claimant is not responsible for his termination or wage loss.

ORDER

The ALJ therefore orders that:

1. Claimant has proven by a preponderance of the evidence that he is entitled to TTD from June 13, 2017 until February 5, 2018, at the stipulated average weekly wage of $606.00.

2. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

3. Respondents have not proven that Claimant was responsible for his termination.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 25, 2018

/s/ Kimberly Turnbow

Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Suite 400
Denver, CO 80203

ISSUES

I. Whether Claimant produced clear and convincing evidence to overcome the DIME opinion on maximum medical improvement ("MMI") and permanent impairment.

II. Whether Respondent overcame the DIME's opinions regarding scheduled permanent impairment, and if so, whether Respondent is entitled to an overpayment for permanent partial disability ("PPD") benefits previously paid;

III. Whether Claimant has proven by a preponderance of the evidence that she is entitled to conversion of a scheduled impairment to a whole person impairment.

IV. Whether Claimant is entitled to temporary disability benefits;

V. Whether Claimant has proven by a preponderance of the evidence that the post-MMI medical treatment recommended by Dr. Faulkner is reasonable and necessary.

VI. Whether Claimant is entitled to an award for disfigurement pursuant to C.R.S. §8-42-108.

VII. Average weekly wage ("AWW").

STIPULATIONS

In exchange for a lump sum payment of $1,000.00, Claimant waives the right to any and all mileage reimbursement benefits to which she might be entitled for mileage incurred from the date of injury through July 5, 2017.

FINDINGS OF FACT

Prior History

1. Claimant has a pre-existing history of Systemic Lupus Erythematous. On June 1, 2006, Floyd Russak, M.D. authored a report in which he noted Claimant had "severe arthritis of the hip, fingers, knees and hands" due to the lupus, in addition to severely decreased circulation, which caused coldness and weakness in her hands.

2. On September 4, 2012, Claimant was involved in a rear-end motor vehicle accident ("MVA"). Claimant presented to the emergency department complaining of headache and diffuse spine pain from her neck to lower back.

3. Claimant continued to experience lower back pain. On October 10, 2012, she completed pain diagrams indicating pain in her back and buttocks, and reported having

severe back pain the previous evening. On January 3, 2013, she described "persisting right lower back pain." On February 6, 2013, she reported ongoing back pain. On March 23, 2014, she again sought treatment for low back pain, which she reported had been present for a month. On April 17, 2014, she sought care for right-sided low back pain which she reported had been present since late January 2014.

August 13, 2014 Industrial Injury

4. On August 13, 2014, Claimant suffered an admitted industrial injury when the heel of her left shoe became caught in a sidewalk.

5. Claimant presented to authorized treating physician ("ATP") Annu Ramaswamy, M.D. on August 13, 2014, reporting that she twisted her left ankle and left knee. Claimant reported falling forward on outstretched wrists/hands and landing on her computer bag. She denied striking her knee or ankle on the ground. Claimant reported pain in the left ankle, knee and leg in general, and pain in the left lower back SI joint. Examination of the lumbar spine revealed some tenderness in the left SI joint extending to the greater trochanter region, tenderness in the left knee and ankle, and some swelling in the left ankle. Dr. Ramaswamy diagnosed Claimant with a left ankle sprain, left knee sprain, and left hip/sacroiliac joint strain. He recommended Claimant ice the areas, exercise, and wear an ankle brace. He prescribed Claimant Tradmadol and suggested the use of over the counter ibuprofen. Claimant was released to modified duty.

6. Dr. Ramaswamy reexamined Claimant on August 15, 2014. Claimant reported left knee pain, along with swelling and coldness in her left ankle. Dr. Ramaswamy noted x-rays taken on August 13, 2014 revealed "a questionable nondisplaced pathologic fracture through the proximal tibia." X-rays of the left ankle were negative for fracture.

7. Claimant also underwent a left knee CT scan on August 15, 2014 that was negative for any abnormalities. A venous duplex study was performed the same day because Claimant reported having a history of blood clots. The study was negative for deep venous thrombosis.

8. On August 26, 2014, Claimant underwent a left ankle MRI that revealed a mild high ankle sprain, a mild deltoid sprain, and mild acute sprains of the collateral ligaments, with no ruptured ligaments or fractures. A left foot MRI performed the same day revealed medial haliux sesamoiditis with suspected stress fracture and reactive MTP joint effusion. Claimant also underwent a left knee MRI that was negative.

9. On September 2, 2014, Dr. Ramaswamy opined Claimant's secondary left hip and SI joint dysfunction was likely due to her altered gait. He referred Claimant for physical therapy and an orthopedic consultation with Stuart H. Myers, M.D.

10. Claimant saw Dr. Myers on September 2, 2014. On examination, Dr. Myers noted multiple points of tenderness in the left lower extremity with guarding behavior. Regarding the left knee, he noted there was no meniscal, ligamentous, or tenderness pathology, and no fracture. He noted that the left foot MRI revealed inflammation and

the left ankle MRI revealed fluid around multiple ligaments. Dr. Myer diagnosed Claimant with a high ankle sprain and recommended Claimant wear a brace and participate in physical therapy.

11. On September 18, 2014, Dr. Ramaswamy noted swelling, coolness, discoloration, and tenderness on physical examination. He recommended Claimant undergo a vascular ultrasound.

12. Claimant later sought treatment at the Castle Rock Adventist emergency department on September 18, 2014 with complaints of swelling, discoloration and coolness in her left leg, along with "shock waves" up the leg. No duskiness or discoloration was observed on physical examination. Claimant was diagnosed with leg pain.

13. Dr. Myers reevaluated Claimant on September 19, 2014. He gave the following impression: diffuse tenderness and hypersensitivity, and subjective autonomic complaints including coldness.

14. On October 2, 2014, Dr. Ramaswamy noted there were some elements of complex regional pain syndrome ("CRPS") present during physical examination. He recommended Claimant undergo CRPS testing and wear a smaller walking boot.

15. Claimant presented to George Schakaraschwili, M.D. on October 13, 2014. Dr. Schakaraschwili noted the following on physical examination: no swelling or discoloration, no skin, hair or nail changes, no hyperhidrosis, and temperatures equal to touch. Claimant reported some hyperesthesia in the foot and decreased pin sensation in the leg. Range of motion was somewhat limited at the ankle. He assessed pain and paresthesias in the left lower extremity following a sprain. He noted Claimant could have sustained injuries to the saphenous or common peroneal nerves which could be causing symptoms suggestive of CRPS. He stated, "I see few clinical signs consistent with complex regional pain syndrome and would only pursue workup for this if electrodiagnostic studies are negative." He scheduled Claimant for an EMG of the left lower extremity, which took place on October 21, 2014. The EMG was normal.

16. Dr. Schakaraschwili reexamined Claimant on October 21, 2014. Physical examination again revealed no swelling, discoloration, hyperhidrosis, or changes in skin, hair or nails. Temperature was equal to touch between the left and right feet. Dr. Schakaraschwili noted that there was no electrophysiological evidence of a peripheral nerve injury. He remarked that Claimant's description of pain was consistent with CRPS, but his physical examinations did not reveal strong clinical signs of CRPS. He recommended Claimant undergo an infrared thermogram test and QSART test.

17. Claimant underwent a CT scan of the left lower extremity on November 10, 2014, which was normal.

18. On December 2, 2014, Claimant presented to podiatrist Robert Anderson, D.P.M. Claimant reported that she was scheduled to have testing for CRPS. He noted no skin discoloration or significant trophic changes on the leg. He concluded that

Claimant was not suffering from a podiatry or orthopedic issue, and remarked he could not account for the burning discomfort and global nature of the discomfort from the injury and/or this stress fracture. He diagnosed Claimant with possible CRPS and recommended Claimant set up a consultation with a CRPS specialist.

19. Claimant returned to Dr. Ramaswamy for a follow-up evaluation on December 16, 2014. Claimant continued to complain of lower extremity discomfort, edema and discoloration. She also reported bilateral hip, neck, and thoracic and lower back discomfort. Claimant informed Dr. Ramaswamy she injured her spine at the time of injury, but that the prescribed Neurontin medication "likely 'masked' her symptoms." On physical examination of the left leg, Dr. Ramaswamy noted hyperesthesias, paresthesias, slight swelling, and some discoloration. He noted the left foot was colder than previous visits. Regarding Claimant's back complaints, Dr. Ramaswamy remarked, "In regards to causality – the patient did initially fall and therefore some somatic dysfunction likely is present in the spine. The hip discomfort likely relates to a chronically altered gait." Dr. Ramaswamy noted diagnostic testing for CRPS needed to occur.

20. Claimant underwent a three-phase bone scan on December 23, 2014. Wayne Wenzel, M.D. gave the following impression: increased activity in the right ankle and in the tarsals of the right foot.

21. On January 5, 2015, Dr. Schakaraschwili reexamined Claimant and noted the following on physical examination: mild edema in the left foot, mild reddish discoloration in the lower left leg, and coolness in the left leg as compared to the right. He also conducted an infrared stress thermogram, which produced abnormal findings. Dr. Schakaraschwili noted, "There were significant areas of cooler temperatures in the left lower leg circumferentially not corresponding to any dermatomal or peripheral nerve pattern. There was a normal sympathetic response to exposure to cooler temperatures." He concluded the findings were "consistent with although not strongly diagnostic for complex regional pain syndrome." He noted he was informed the bone scan was not suggestive for CRPS. Dr. Schakaraschwili recommended Claimant undergo an autonomic testing battery, stating if the findings were abnormal, Claimant would meet the criteria for CRPS with two abnormal diagnostic tests.

22. On January 8, 2015, Dr. Ramaswamy noted Claimant refused QSART testing due to her belief that the test would aggravate her fibromyalgia/lupus. Physical examination revealed allodynia, swelling, minimal discoloration, and tenderness. Dr. Ramaswamy listed CRPS as a possible diagnosis.

23. On January 10, 2015, John Gerhold, M.D., amended the bone scan report to correctly refer to the left foot instead of the right foot, and gave the following impression: "The findings of subtle diminished blood pool activity in left foot (*sic*) and subtle diminished delayed phase bone activity in the left foot suggest the possibility of chronic CRPS (complex regional pain syndrome) in the lower left leg and foot. Clinical correlation is recommended."

24. On January 28, 2015, Dr. Ramaswamy noted the bone scan report was revised to state CRPS is suggested in the left lower extremity.

25. Claimant underwent a left knee MRI on January 28, 2015 that revealed an isolated high-grade transverse chondral fissure with no evidence of ligament or meniscal injury. Claimant also underwent x-rays of the left foot, ankle, and tibia/fibula. Kelly Lindauer, M.D. noted the x-rays "were reviewed with specific attention to the presence of any radiographic findings of complex regional pain syndrome." She concluded there were no radiographic findings to suggest CRPS, as well as no acute or chronic fractures in left foot, ankle, and tibia/fibula.

26. On February 4, 2015, Claimant was seen by Barry A. Ogin, M.D. On physical examination Dr. Ogin noted no obvious swelling, redness, atrophic or dystrophic changes, marked discomfort to superficial palpation, and full knee range of motion. Dr. Ogin remarked, "She has a paucity of objective pathology. The thermography study was somewhat positive, but this could be influenced by other factors. It is certainly possible that she may have underlying CRPS, but that her pain conditions may also be highly influenced by anger, stress, anxiety or other psychological barriers." He recommended Claimant see a pain psychologist, and noted Claimant was "surprisingly incredibly resistant" to doing so. He offered to perform a sympathetic nerve block, which Claimant declined. Dr. Ogin recommended a QSART.

27. On March 5, 2015, Dr. Ramaswamy noted, "Examination is consistent with possible CRPS based on allodynia, discoloration and temperature changes. Thermogram testing was positive and bone scan study was suggestive of CRPS. It is reasonable for the patient undergo a nerve block (sympathetic block) for diagnostic and hopefully therapeutic purposes."

28. On March 25, 2015, Claimant presented to J. Scott Bainbridge, M.D. reporting left leg pain with discoloration and bruising, foot pain and weakness, and pain in the left hip and buttock wrapping to the low back. Claimant reported noticing the pain immediately after the fall on August 13, 2014. Dr. Bainbridge noted the following "abnormal" exam findings: cold toes, hypersensitivity in the leg and foot with pinprick, pain inhibition with strength testing on the left, right low back pain with thigh thrust, left groin pain, left SI joint tender to palpation, bilateral paralumbar tender to palpation, and low back pain. Dr. Bainbridge assessed thoracic or lumbosacral neuritis or radiculitis, reflex sympathetic dystrophy of the lower limb, pain in the joint pelvic region and thigh, left knee strain with medial compartment cartilage defect, left foot injury, and CRPS. He requested a lumbar MRI, sympathetic nerve block, and pelvis x-ray.

29. Dr. Bainbridge performed a left lumbar sympathetic nerve block on April 17, 2015. Claimant reported an immediate decrease in pain from 0/10 from 6/10, and increased warmth in the lower left extremity. Dr. Bainbridge did not record Claimant's pre-operative or post-operative skin temperatures. Claimant subsequently reported experiencing increased pain at the site of injection, starting April 19, 2015. She also reported developing pain in left lumbar area with radiation to the left arm region.

30. On April 28, 2015, Floyd O. Ring Jr., M.D. performed an Independent Medical Examination ("IME"). Dr. Ring reviewed medical records dated August 15, 2014 through April 2, 2015. He did not physically examine Claimant, as Claimant cancelled the appointment alleging increased pain from a recent intervention. Dr. Ring noted there remained some question as to whether Claimant sustained a fracture, as the more recent CT scan did not reveal a fracture. Dr. Ring remarked Claimant had persistent subjective complaints with inconsistent objective clinical findings. He noted the EMG was negative for a peripheral nerve injury or other findings, and the knee MRI revealed only minor, non-surgical changes, which could be compatible with Claimant's age and body habitus. Dr. Ring opined Claimant's CRPS diagnosis was questionable, based on the thermogram results which could have been influenced by Claimant's history of deep vein thrombosis and lupus. He noted the bone scan and x-rays were non-diagnostic. Dr. Ring recommended Claimant see a pain psychologist prior to consideration of any further treatment.

31. On April 30, 2015, a lumbar spine MRI revealed mild joint arthritis and a synovial cyst at L4-5.

32. On May 1, 2015, Claimant returned to Dr. Ramaswamy reporting significant lower back pain. She reported experiencing improvement in her left leg discomfort after the sympathetic block, but continued to complain of knee pain. Dr. Ramaswamy noted the lumbar MRI revealed a synovitis cyst at L4-L5 "likely related to facet degeneration." Physical examination revealed minimal paresthesias, hyperesthesias, and discoloration, no allodynia, and increased temperature in the left leg. Claimant was tender at the lumbar injection site with some spasms. He noted Claimant had a diagnostic response to the sympathetic block. Dr. Ramaswamy opined, "Therefore, the diagnosis of CRPS appears to have been established- positive bone scan, x-rays, and thermogram- along with diagnostic block." He remarked Claimant's lower back pain was likely secondary to the nerve block and noted that the injection did not cause the cyst.

33. Claimant continued to complain of pain in the lumbar spine and left hip. On May 8, 2015, Dr. Bainbridge administered a right L4-5 facet joint block and aspirated the facet cyst.

34. On May 22, 2015, Claimant saw Dr. Ramaswamy and reported improved lower back pain but increased discomfort in her left lower extremity.

35. On June 15, 2015, Dr. Ramaswamy opined the sympathetic block helped Claimant's left lower extremity discomfort, despite noting Claimant's left leg pain continued at a 6-7/10 with paresthesias and hyperesthesias. Claimant also reported continued pain in the low back. On exam, Dr. Ramaswamy noted tenderness and trigger points in the lumbar spine, paresthesias and hyperesthesias in the left lower extremity, and swelling and allodynia in the foot and ankle. He opined Claimant's left lower extremity sympathetic discomfort was stable at the time.

36. Claimant returned to Dr. Ramaswamy for a follow-up visit on August 25, 2015 and reported experiencing progressively worsening symptoms. Dr. Ramaswamy noted

the sympathetic block helped with Claimant's symptoms for approximately for 3 ½ months. On exam, he noted tenderness in lumbar spine and allodynia, swelling, purple discoloration, and coldness in the left leg. He further noted x-rays of Claimant's foot had no evidence of a fracture. He stated he was unable to relate Claimant's cyst to the sympathetic block, and referred Claimant for another sympathetic block.

37. On September 8, 2015, Dr. Ramaswamy issued a report after reviewing Dr. Ring's April 28, 2015 medical report. Dr. Ramaswamy disagreed with Dr. Ring's opinion regarding Claimant's CRPS diagnosis, noting his understanding was that the bone scan was suggestive of CRPS, the x-rays were suggestive of CRPS, and the sympathetic block was diagnostic and therapeutic.

38. On September 12, 2015, Claimant underwent a psychiatric examination by Robert Kleinman, M.D. Dr. Kleinman commented that the results of the CRPS testing are "equivocal and appear to be inconclusive," and "[d]espite the questionable diagnosis, [Claimant] has it in her mind that she does have CRPS." Dr. Kleinman diagnosed Claimant with psychological factors affecting medical condition and adjustment disorder with anxiety. He recommended complete psychological testing in the event of a delayed recovery lasting more than another three months. Dr. Kleinman also recommended reviewing all of Claimant's medical records, past and current, to help clarify her diagnoses and how she reacts to medical illness.

39. On October 6, 2015, Claimant continued to report worsening symptoms to Dr. Ramaswamy. He noted Claimant's pain levels and objective findings for CRPS decreased significantly for three to four months after the first sympathetic block. Dr. Ramaswamy further noted he reviewed medical records regarding the history of Claimant's low back pain and was "unable to link a lower back diagnosis to this claim."

40. On October 9, 2015, Lynn Parry, M.D. performed an IME at the request of Claimant. Dr. Parry performed a medical records review and physically examined Claimant. Physical exam revealed hyperpathia and allodynia. The temperature of Claimant's feet was symmetrical. Dr. Parry opined that Claimant had CRPS, stating, "While the bone scan and thermogram are not 'textbook' positive, they are consistent with the diagnosis and meet the criteria for the workers compensation guidelines. Her response to sympathetic blockade was unequivocal with a significant positive response and prolonged duration of that response." Dr. Parry assessed a total 36% whole person impairment, consisting of 15% whole person impairment for CRPS under Table 1 of the AMA Guides, 27% lower extremity impairment (11% whole person) for knee range of motion and chondromalacia, and 15% lumbar spine impairment for range of motion and specific disorders. She opined Claimant required maintenance treatment in the form of topical medication, access to a pool and personal trainer, follow-up appointments with Dr. Ramaswamy, and orthopedic access for her knee.

41. Claimant presented to Haley Burke, M.D. on October 16, 2015 with complaints of pain in her left lower extremity and foot. On physical examination Dr. Burke noted trace pedal edema in left extremity, some degree of allodynia in the foot and left lower extremity, erythema in the left lower extremity, and "markedly" cooler skin temperature

of the left lower extremity compared to the right. She diagnosed Claimant with CRPS type 1.

42. On December 3, 2015, Claimant reported to Dr. Ramaswamy having "no sensation in her [left] leg whatsoever." Dr. Ramaswamy noted Claimant believed she needed to undergo additional blocks and then gym/therapy for three to four months before being placed at MMI.

43. On January 28, 2016, Dr. Burke performed a left-sided popliteal nerve block, saphenous nerve block, posterior tibial nerve block, and superficial and deep peroneal nerve block.

44. On February 4, 2016, Claimant reported to Dr. Burke that she experienced complete resolution of her CRPS pain and increased temperature in her feet. Dr. Burke noted some ongoing "orthopedic" type pain in left knee and ongoing back pain.

45. Dr. Ramaswamy referred Claimant to orthopedist Nathan Faulkner, M.D. Dr. Faulkner diagnosed Claimant with chondromalacia and joint pain of the left knee. On May 19, 2016, Dr. Faulkner recommended full length custom orthotics, physical therapy, and possible intraarticular steroid injection if Claimant's pain did not improve with physical therapy. Claimant continued to treat with Dr. Faulkner. As of January 12, 2017, Dr. Faulkner recommended three months of physical therapy and the continuation of Celebrex.

46. On June 20 and June 23, 2016, Dr. Ring reviewed additional medical records and opined Claimant reached MMI. He opined that an independent exercise program, topical medications and an anti-inflammatory agent were reasonable medical maintenance, along with sympathetic blocks if substantial long-term benefits were documented. Dr. Ring concluded lumbar spine injections were not work-related and there were no indications for surgical intervention, orthopedic care or physical therapy.

47. On June 28, 2016, Dr. Ramaswamy opined Claimant's myofascial low back pain was related to her altered gait and recommended orthotics.

48. Dr. Ramaswamy placed Claimant at MMI on July 6, 2016 and assigned a 15% whole person impairment under Table 1 of AMA Guides for station and gait abnormalities associated with Claimant's CRPS diagnosis. He recommended orthotics, land/pool physical therapy, a gym pass, lidoderm patches, and sympathetic blocks as maintenance treatment.

49. On September 27, 2016, Lawrence A. Lesnak, D.O. performed an IME at the request of Respondent. Dr. Lesnak reviewed Claimant's medical records and physically examined Claimant. Dr. Lesnak noted Claimant was uncooperative and refused to complete certain paperwork, provide certain information, and perform certain maneuvers. On examination, sitting straight leg raise was to 90 degrees bilaterally without reproduction of any specific symptoms, and supine straight leg raise was to 90 degrees bilaterally without reproduction of any specific symptoms. Supine straight leg raising maneuvers on the right at 70 degrees reproduced no symptoms, and on the left

at 30 degrees had reproduction of increased left anterior knee pains, which Dr. Lesnak noted was nonphysiologic. Reversed straight leg raising maneuvers reproduced midline lower lumbar spine soreness. Dr. Lesnak noted Claimant exhibited several pain behaviors and nonphysiologic findings during examination.

50. Dr. Lesnak opined that, while Claimant may have sustained a left high ankle strain/sprain, "there is absolutely no medical evidence to suggest that she sustained any other type of injury as a result of this occupational incident of 08/13/2014." (emphasis not added). Dr. Lesnak concluded there were no clear clinical findings or diagnostic criteria to support a CRPS diagnosis. Dr. Lesnak opined the bone scan possibly suggested some subtle abnormalities, but were not conclusive for a CRPS diagnosis, and the thermogram also suggested a possible diagnosis of "subtle CRPS," but "did not meet any type of 'strong' diagnostic criteria." He questioned whether the nerve blocks resulted in any significant benefit because Dr. Bainbridge failed to document any temperature changes, Claimant's symptoms and function have not significantly improved as a result of them, and Claimant's subjective reports of post-block improvement are undependable due to her having a pain disorder, chronic generalized anxiety disorder, PTSD, and depression.

51. Dr. Lesnak placed Claimant at MMI. He concluded Claimant had no permanent impairment, opining that Claimant did not have CRPS or any impairment of the left ankle, knee, hip or low back. Dr. Lesnak recommended the ongoing use of lidocaine patches and occasional over-the-counter ibuprofen as maintenance, with no other medications, further interventions, or work restrictions.

52. Claimant underwent a DIME with John Sacha, M.D. on November 28, 2016. Dr. Sacha reviewed medical records and physically examined Claimant. Dr. Sacha noted Claimant's history of lupus, chronic low back pain, and stroke with left-sided symptoms. He also noted Claimant was involved in a prior MVA with low back, head and neck complaints and ongoing symptoms at the time of the work injury. Dr. Sacha listed the date of the MVA as 9/4/2010. The MVA was in 2012, not 2010. He also noted Claimant participated in massage therapy with acupuncture with Dr. Bondi for nine visits, Claimant had a QSART which had "essentially borderline findings," and Claimant was seen by a Dr. Failinger who did an injection of the left knee and recommended some physical therapy and orthotics. Dr. Sacha did not reference Claimant's thermogram. Claimant did not undergo massage therapy with acupuncture with Dr. Bondi, nor did she treat with or receive an injection from Dr. Failinger. Claimant did not undergo a QSART test.

53. Dr. Sacha further noted the triple-phase bone scan was negative, specifically stating, "It showed some uptake in the left foot consistent with chronic degenerative changes, but no evidence of sympathetic-mediated pain." He noted Dr. Bainbridge performed a lumbar sympathetic block, to which Claimant "had a diagnostic response with partial temporary relief and lasting relief for a couple months but had increased low back pain postprocedure." On examination, Dr. Sacha remarked Claimant had severe marked pain behaviors. He noted no allodynia, hyperapthia or skin trophic changes, equal temperatures in both lower extremities, pes planus bilaterally, some mild venous

stasis changes, decreased sensation in both legs in a patchy nondermatomal distribution, minimal tenderness over the anterior talofibular ligament and heel, pain in low back with straight leg raise and neural tension testing on the left side. He further noted minimal crepitus with range of motion in both knees, no medial or lateral laxity, positive patellar grind test on the left, negative McMurray and anterior drawer tests, and positive bowstring test on left.

54. Dr. Sacha gave the following impression: (1) history of dorsiflexion injury to the left ankle, (2) knee complaints with a negative MRI, (3) History of a diagnosis of CRPS with no evidence of sympathetic-mediated pain, (4) lumbar radiculopathy, non-work-related, and (5) delayed recovery.

55. Dr. Sacha opined Claimant's lumbar radiculopathy did not fit the mechanism of injury and was "clearly" related to her prior MVA. Dr. Sacha further opined there was no evidence of CRPS, stating, "She does not meet any of the criteria and does not have any findings on exam consistent with this." He remarked Claimant is high risk for delayed recovery and overutilization of resources.

56. Dr. Sacha opined Claimant reached MMI as of July 6, 2016 with no need for further interventions, surgery, lumbar sympathetic blocks, or a spinal cord stimulator. As maintenance treatment, Dr. Sacha recommended follow-ups with Dr. Ramaswamy, six pool physical therapy sessions, and a pool pass for two years. Dr. Sacha concluded Claimant had no work restrictions. He assigned a total 18% lower extremity impairment rating (7% whole person), consisting of 8% loss of range of motion impairment for the hindfoot, and 11% impairment for range of motion deficits in the knee. Dr. Sacha noted he did not give a Table 40 diagnosis for the knee because the MRI was negative, but there were some clinical findings.

57. On January 17, 2017, Albert Hattem, M.D. performed a physician advisor review and recommended denying a proposed left sciatic nerve block.

58. On January 24, 2017, Claimant underwent an IME by Rachel Basse, M.D. Dr. Basse performed a thorough medical records review and physically examined Claimant. Dr. Basse noted Claimant refused to complete the health history questionnaire and would not answer certain questions. On physical examination, Dr. Basse noted diffuse tenderness in the left lower extremity, no increased symptoms to regular light touch, very minimal color changes in the knee and ankle with overall symmetric appearance of the legs, no color, temperature, sweat, swelling, hair, or nail changes in the foot or toes. Dr. Basse noted bilateral hindfoot valgus and pes planus, which she opined was not trauma-related.

59. Dr. Basse noted Claimant's history of arthritis in her knees and low back pain. She noted that, while Claimant reported left SI and low back symptoms on the day of the fall, she did not again report low back issues until approximately two months later. Dr. Basse explained that Claimant was not on Neurontin at levels that would be expected to mask any significant low back injury. She opined the temporal relationship needed to establish causality was not present.

60. Dr. Basse also opined there were "no objective fall-related, traumatically acquired findings that can explain Claimant's current left knee symptoms," and no traumatically acquired injury to the foot or toe related to the work injury.

61. Dr. Basse further opined there was no objective evidence of confirmed CRPS, noting she looked at the "actual objective study results" for the CRPS analysis, including the stress thermogram, bone scan and x-rays. She opined the studies "are all negative and do not support the diagnosis of CRPS." Dr. Basse agreed the bone scan could suggest the possibility of chronic CRPS, but stated the findings were nonspecific and "highly atypical of the usual findings in ACUTE CRPS" (emphasis not added). She opined that the bone scan findings are "more likely representative of her decreased weight bearing with associated decreased bone metabolism/turnover." Dr. Basse further explained the stress thermogram noted a normal sympathetic response, and x-rays did not reveal CRPS. Dr. Basse further noted Claimant's positive short-term response to the sympathetic blockade was subjective and unreliable. She noted her exam findings, along with those of Drs. Schakaraschwili, Anderson and Ogin did not identify clinical symptoms. She explained Claimant's temperature asymmetry, color changes, and swelling could be due to Claimant's use of a walking boot, or other non-work-related conditions.

62. Dr. Basse opined Claimant suffered a high ankle sprain/strain and her continued diffuse left ankle symptoms are non-traumatic and not work-related. She concluded "[t]here was no objective evidence of any ongoing traumatically-related problems that can be attributed to the 08/13/2014 fall." Dr. Basse further concluded Claimant has some type of pain disorder, somatoform disorder, or other psychological diagnosis. She recommended that Claimant discontinue all passive treatment.

63. On February 13, 2017, Respondent filed a Final Admission of Liability, which admitted an AWW of $629.81, PPD benefits based on Dr. Sacha's 18% scheduled rating, and post-MMI medical benefits. Claimant objected and requested a hearing on several issues, thereby keeping them open, including PPD benefits, temporary disability benefits, medical benefits, and "what are all the areas of injury that should be . . . treated."

64. Claimant's pay records reflect she earned $1,259.62 for the biweekly pay period ending July 19, 2014 and $1,259.68 for the biweekly pay period ending August 2, 2014. $31.49 per hour, 40 hours per week.

65. Claimant testified at hearing she experienced significant pain relief from the sympathetic blocks, but that her symptoms ultimately returned. Claimant continued to participate in physical therapy and pool therapy at her own expense. Claimant stated she continues to experience pain, discoloration, weakness, temperature asymmetry, burning sensations, swelling, tenderness, and loss of sensation in her left lower extremity. She testified her symptoms are different from the symptoms she experiences from lupus flare-ups. During her testimony, Claimant also admitted the following: she had chronic low back pain prior to the accident, she suffered a brown recluse spider bite on the left leg prior to the work injury, she received treatment for arthritis in both knees

in 2006, and she testified at a deposition in February 2017 that a lupus flare can cause pain all over her body, including in her knees and ankles, and she sometimes has coldness in the upper extremities due to the lupus. Claimant further testified she received treatment for posttraumatic stress disorder and anxiety prior to the work injury, including Celexa, which she stopped taking for financial reasons, and she was also prescribed Celebrex prior to the accident. Claimant testified she wants additional treatment under this claim, including therapies, orthotics, blocks, imaging studies, and medications. She stated her current medications are Lidoderm patches, Celebrex, and Celexa. She testified Dr. Sacha and Dr. Lesnak did not measure the temperature of her lower extremities.

66. Dr. Lesnak testified at hearing as an expert in physical medicine and rehabilitation. Dr. Lesnak is board certified in physical medicine and rehabilitation and is Level II accredited by the Colorado Division of Workers' Compensation. Dr. Lesnak testified the August 13, 2014 work injury caused mild high ankle and deltoid ligament sprains. He opined Claimant's ongoing symptoms are inconsistent with the original mechanism of injury and the work-related diagnoses, as sprains typically resolve within a couple of months. Dr. Lesnak agreed with Dr. Sacha's opinion that Claimant is at MMI, but assigned an earlier date of January 5, 2015, because the negative thermogram was completed on that date and no subsequent treatment substantially improved Claimant's symptoms or function. Dr. Lesnak explained Claimant has undergone at least seventeen diagnostic studies, which is unusual in a non-surgical case, and the sole objective findings were the mild sprains identified by the original MRI.

67. Dr. Lesnak reiterated his opinion that Claimant does not have CRPS. He explained the timeframe for developing CRPS is inconsistent with the timing of Claimant's symptoms, as CRPS takes at least several weeks or months to develop, but Claimant reported knowing something was significantly wrong just days following the accident. Dr. Lesnak also testified CRPS does not cause loss of sensation. He stated his physical exam was negative for any color changes, temperature changes, swelling, or other hallmark signs of a CRPS diagnosis. Dr. Lesnak testified none of the objective tests confirmed CRPS. He acknowledged the bone scan had some subtle findings that could be consistent with chronic CRPS, but pointed out the bone scan was taken just four months after the date of injury, and chronic CRPS takes several years to develop. Dr. Lesnak explained there are several potential alternative causes for Claimant's condition. He disputed the notion that Claimant's allegedly positive responses to the blocks establish CRPS, explaining that any immediate relief in the recovery room would not constitute a diagnostic response because blocks are administered with pain medication, Dr. Bainbridge's records do not reflect that he applied appropriate controls in administering the blocks, and sympathetic blocks provide limited diagnostic benefit.

68. Dr. Lesnak testified he agrees with Dr. Sacha that Claimant should not receive a lumbar spine impairment rating, as there is no evidence Claimant sustained a work-related low back injury, the lumbar spine MRI was negative for any trauma-related problems, she had pre-existing low back pain, and her ongoing low back pain is most likely due to other non-work-related factors. Dr. Lesnak opined Claimant did not sustain any permanent impairment of the left knee or ankle. Concerning the knee, he explained

there is no work-related pathology, the mechanism of injury was inconsistent with a knee injury, and Claimant's preexisting arthritis may better explain her symptoms.

69. Dr. Lesnak further testified Dr. Sacha erred by assigning a rating for knee range of motion loss without a supporting Table 40 diagnosis, explaining "you need to have a reason why you are assigning a…range motion abnormality." Dr. Lesnak stated Dr. Sacha should have compared the range of motion for Claimant's right knee joint before assigning a range of motion rating for the left knee. Regarding the ankle, Dr. Lesnak explained sprains are not permanent conditions and the mild work-related sprains which Claimant sustained have clearly resolved after three years. Dr. Lesnak also testified Claimant's alleged lower extremity impairment does not extend into or affect the function of her whole person.

70. Dr. Lesnak testified no further medical benefits are reasonable or necessary for the resolved work-related injury, including, but not limited to, Celebrex, Tramadol, Lidoderm patches, pool therapy, orthotic inserts, or a gym membership.

71. The ALJ credits the opinions of Drs. Sacha, Lesnak, Basse and Ramaswamy as to Claimant's MMI status and finds Claimant reached MMI on July 6, 2016. Claimant failed to prove by clear and convincing evidence Dr. Sacha erred in his opinion that Claimant reached MMI on July 6, 2016.

72. The ALJ credits the opinions of Drs. Sacha, Lesnak and Basse over the conflicting opinion of Dr. Ramaswamy as to the lumbar spine and CRPS and finds Claimant does not have CRPS and did not sustain any work-related injury to her lumbar spine. Claimant failed to overcome Dr. Sacha's opinion on the lumbar spine and CRPS by clear and convincing evidence.

73. The ALJ credits the opinion of Dr. Lesnak as to whether the assigned scheduled impairment should be converted to a whole person impairment. Claimant failed to prove by a preponderance of the evidence that the scheduled impairment assigned by Dr. Sacha should be converted to a whole person impairment.

74. The ALJ credits the opinions of Drs. Lesnak and Basse as to the nature of Claimant's permanent impairment and finds Claimant did not sustain any permanent impairment as a result of the August 13, 2014 industrial injury. Respondent proved by a preponderance of the evidence the 18% scheduled impairment rating assigned by Dr. Sacha and admitted to in the February 13, 2017 is incorrect.

75. The ALJ credits the opinions of Drs. Lesnak and Basse as to the need for post-MMI medical treatment and finds the medical treatment recommended by Dr. Faulker is not reasonable and necessary to relieve Claimant of the effects of the industrial injury or prevent further deterioration of her condition. Claimant failed to prove by a preponderance of the evidence that she is entitled to the post-MMI treatment recommended by Dr. Faulkner.

76. Claimant's AWW is $1,259.62.

77. The evidence is insufficient to determine Claimant's entitlement to temporary disability benefits. While the evidence indicates Dr. Ramaswamy issued work restrictions, there is insufficient evidence establishing the actual time periods Claimant missed work, if any.

78. Claimant contends she is entitled to a disfigurement award based on an altered gait. Over the course of three hearings, the ALJ observed Claimant walking with a slight limp. However, based on the aforementioned findings of fact, there is insufficient persuasive evidence the gait is a result of the August 13, 2014 industrial injury. Accordingly, Claimant failed to prove entitlement to a disfigurement award.

79. Evidence and inferences contrary to these findings of fact were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

As found, Claimant failed to overcome Dr. Sacha's DIME opinion that Claimant is at MMI by clear and convincing evidence. Dr. Sacha's opinion on MMI is supported by Claimant's ATP, Dr. Ramaswamy, as well as Drs. Ring and Lesnak. Based on the totality of the evidence, Claimant's condition has plateaued and there does not currently appear to be any further medical treatment that is likely to improve her condition or prevent further deterioration.

Respondent contend Claimant reached MMI as of January 5, 2015. Dr. Lesnak opined Claimant reached MMI on January 5, 2015 because there was no substantial improvement in Claimant's functions or symptoms after such date. He further argued Dr. Ramaswamy's July 6, 2016 MMI date is based on Claimant's influence and personal opinions as to her status and further treatment. The ALJ concludes Dr. Lesnak's opinion

as to the MMI date represents a mere difference of opinion. Claimant underwent several diagnostic and therapeutic measures subsequent to January 5, 2015 in an attempt to further evaluate and define Claimant's condition and/or reduce her pain or improve function. Moreover, there is insufficient persuasive evidence Dr. Ramaswamy did not use his own independent medical judgment when placing Claimant at MMI on July 6, 2016.

Causation and Impairment

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning a claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The procedures of § 8-42-107(8)(c), which state that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence, has been recognized as applying only to non-scheduled impairments. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App.1998); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (2000). The burden of proof pertinent to a dispute concerning the impairment rating of a scheduled injury is a preponderance of the evidence. *Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007); *Ortiz v. IngersollRand Co*., W.C. No. 4-981-218-04 (January 25, 2018); *see generally, Wagoner v. City of Colorado Springs*, W.C. No. 4-817-985-03 (Oct. 21, 2013)(no presumptive weight afforded DIME physician concerning scheduled injuries; DIME opinion unnecessary to determination of scheduled impairment), aff'd *Wagoner v. Industrial Claim Appeals Office*, Colo. App. No. 13CA1983 (Oct. 23, 2014)(NSOP).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence

present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*.

Claimant argues Dr. Sacha erred by failing to assign impairment ratings for the lumbar spine and CRPS. Both conditions are not listed on the schedule of disabilities codified at Section 8-42-107(2), C.R.S. Accordingly, Claimant bears the burden of proof to overcome the DIME physician's findings regarding the non-scheduled injuries by clear and convincing evidence.

Based on the totality of the evidence, Claimant failed to meet her burden to overcome Dr. Sacha's opinions. Claimant points to inaccuracies in Dr. Sacha's DIME report, including, among other things, references to an incorrect MVA date and treatment Claimant did not actually receive. While Dr. Sacha referred to treatment Claimant did not actually undergo, he does not further discuss such treatment or specifically refer to the treatment in support of his opinions. Although Dr. Sacha referenced a date two years prior to the actual MVA date, it is not disputed the MVA occurred prior to the work injury. The ALJ is not persuaded that inaccurate references made by Dr. Sacha render his ultimate opinions highly probably incorrect.

Lumbar Spine

Dr. Sacha opined Claimant's low back condition is pre-existing and the result of a prior MVA. The medical records clearly establish Claimant had pre-existing low back issues for which she sought prior treatment. The lumbar spine MRI was negative for any trauma-related issues. Drs. Ring, Lesnak and Basse credibly and persuasively opined Claimant did not sustain any work-related impairment of her spine. Accordingly, Claimant failed to meet her burden to prove Dr. Sacha erred by finding Claimant's low back condition unrelated to the August 13, 2014 industrial injury and by not assigning impairment for the low back.

CRPS

Dr. Sacha opined Claimant does not have CRPS. Rule 17 of the Guidelines provides that a confirmed CRPS diagnosis requires both a clinical diagnosis and at least two positive tests from the following categories of diagnostic tests: (1) trophic tests, which include comparative x-rays and triple bone scans; (2) vasomotor/temperature tests (infrared stress thermography); (3) sudomotor test (autonomic test battery with an emphasis on QSART); and (d) sensory/sympathetic nerve test (sympathetic blocks).

The DIME report indicates Dr. Sacha considered Claimant's history, clinical findings, and diagnostic test results when rendering his opinion. Dr. Sacha's physical examination revealed no clinical signs of CRPS. Claimant's clinical signs of CRPS have been inconsistent throughout the medical records. Multiple physicians, including Drs. Ogin, Basse and Lesnak, found no clinical findings of CRPS. Additionally, Drs. Basse, Ogin and Lesnak credibly opined clinical findings noted by other physicians, including discoloration, swelling and coolness, could have resulted from Claimant's use of a

walking boot or other non-work-related medical conditions. Dr. Sacha's clinical findings are similar to the findings of multiple other physicians.

Regarding diagnostic tests, Claimant underwent x-rays, a triple bone scan, a stress thermography test and sympathetic blocks. Dr. Sacha specifically noted Claimant had "borderline" QSART results, a negative bone scan, negative x-rays, and a diagnostic response to lumbar sympathetic blocks. Multiple physicians opined the results of the diagnostic tests do not establish a clear diagnosis of acute CRPS.

The medical records indicate the x-rays were negative for CRPS. Dr. Sacha specifically noted the bone scan revealed some uptake in the left foot, but concluded the findings were consistent with degenerative changes and not evidence of sympathetic-mediated pain. His remarks indicate he reviewed the amended bone scan report, took the findings into consideration, and ultimately concluded the bone scan was negative for CRPS. Dr. Gerhold interpreted the amended bone scan findings as being suggestive of the "possibility of chronic CRPS" and recommended clinical correlation. Dr. Basse credibly explained that, while the bone scan suggested the possibility of chronic CRPS, the findings were nonspecific and not typical of acute CRPS. Furthermore, Drs. Ring and Lesnak also credibly opined that the bone scan was non-diagnostic and non-conclusive for a CRPS diagnosis. There is insufficient evidence establishing that Dr. Sacha's conclusion regarding the bone scan was incorrect.

It is undisputed Claimant did not undergo a QSART test. Claimant did, however, undergo a stress thermography test, which is not specifically referenced in the DIME report. Drs. Schakaraschwili, Ogin, Ring and Lesnak credibly and persuasively opined that, while the results of thermography test were somewhat positive, they were not strongly diagnostic, and could have been influenced by Claimant's medical history and other conditions. Dr. Basse opined the thermogram results were normal. Thus, under the specific circumstances, the ALJ is not persuaded Dr. Sacha's reference to a different "borderline" diagnostic test does not, by itself, render his opinion on CRPS highly probably incorrect.

While Dr. Sacha referred to Claimant's response to the lumbar sympathetic blocks as "diagnostic," based on his analysis of the other diagnostic tests and the clinical findings, he ultimately determined Claimant did not meet the criteria for a confirmed CRPS diagnosis. Dr. Sacha's opinion is supported by the medical records and the credible and persuasive opinions of Drs. Lesnak, Basse and Ring. Thus, while the evidence contains differing medical opinions, the ALJ concludes there is not clear and convincing evidence Dr. Sacha's opinion on CRPS in error.

Whole Person Impairment

To the extent Claimant argues her scheduled impairment rating should be converted into a whole person impairment rating, Claimant has the burden of proof by a preponderance of the evidence. *Vega v. Startek USA, Inc.*, W.C. No. 4-437-951 (ICAO

Oct. 29, 2003). To carry that burden, Claimant needed to establish that the situs of any functional impairment extended into her whole person. §8-42-101, C.R.S.

As found, Claimant failed to establish that her knee and ankle impairment affect the function of her whole person or should be converted into whole person ratings. Dr. Lesnak credibly opined Claimant's lower extremity impairment does not extend into or affect the function of her whole person.

Scheduled Impairment

An injured worker is typically limited to a scheduled impairment rating if the impaired body part is listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Ratings for knee and ankle injuries are listed on the schedule of disabilities at Section 8-42-107(2), C.R.S.

Respondent argues Dr. Sacha erred in assigning impairment for the knee and ankle, contending Claimant did not sustain any permanent impairment as a result of the August 13, 2014 work injury. As previously mentioned, the burden of proof pertinent to a dispute concerning the impairment rating of a scheduled injury is a preponderance of the evidence. *Maestas v. American Furniture Warehouse*, *supra*. The knee and ankle are scheduled injuries, and Claimant failed to prove the impairments should be converted into whole person ratings. Furthermore, Respondent filed a Final Admission of Liability on February 13, 2017, admitting for an 18% scheduled impairment rating in accordance with Dr. Sacha's opinion. Accordingly, Respondent bears the burden to of proof to establish Claimant did not sustain any permanent scheduled impairment by a preponderance of the evidence.

As found, Respondent overcame the 18% scheduled impairment rating assigned by Dr. Sacha by a preponderance of the evidence. Drs. Lesnak and Sacha credibly opined Claimant's ankle sprain was a temporary condition that resolved without any permanent impairment. Dr. Lesnak credibly opined there is no work-related pathology of the knee, the mechanism of injury was inconsistent with a knee injury, and Claimant's preexisting arthritis may better explain her symptoms. Dr. Lesnak also credibly opined Dr. Sacha erred in assigning a rating for range of motion deficits in the knee without a supporting Table 40 diagnosis, and without comparing contralateral range of motion measurements for normalization purposes.

Section 8-42-107(8)(c), C.R.S. provides, in relevant part, "For purposes of determining levels of medical impairment, the physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings." The Impairment Rating Tips state, in relevant part,

> In some cases, the contralateral joint is a better representation of the patient's pre-injury state than the AMA Guides population norms. The 3rd Revised Edition has little commentary on this procedure, however the 5th

> Edition and the Division consider it reasonable to compare both extremities when there are specific conditions which would make the opposite, non-injured extremity serve as a better individual baseline… Therefore, when deemed appropriate, the physician may subtract the contralateral joint ROM impairment from the injured joint's ROM impairment.

The Impairment Rating Tips are not part of the Guides, are merely guidance regarding the assessment of permanent impairment ratings, and are not binding rules, and, thus, are interpretive. *In re: Claim of Vuksic*, W.C. No. 4-956-741-02 August 4, 2016, referring to *Kurtz v. JBS Carriers*, W.C. No. 4-797-234 (Dec. 7, 2011), aff'd, Colo.App. No. 11CA2561 (Oct. 18, 2012). A physician's application of those Impairment Rating Tips when assessing an impairment rating and any deviation from those Impairment Rating Tips is a factor for the ALJ to consider and goes to the weight the ALJ chooses to give to an impairment rating. *Id*. Thus, although the Impairment Rating Tips may be relevant to the impairment rating under consideration by the ALJ, a physician's application of the Impairment Rating Tips, or lack thereof, goes to the weight the ALJ gives to an impairment rating. Compare *Ortiz v. Service Experts, Inc.*, W.C. No. 4-657-974 (January 22, 2009)(ALJ credited impairment rating of physician applying impairment Rating Tips).

Dr. Sacha indicated he assigned an impairment rating for the knee based his clinical findings, acknowledging he did not give a Table 40 diagnosis due to the lack of MRI findings. It was within Dr. Sacha's discretion to consider the contralateral measurements for normalization purposes. However, considering Claimant's specific case of having no work-related pathology of the knee, and longstanding pre-existing bilateral knee arthritis, the ALJ is persuaded it is more likely than not Dr. Sacha's scheduled impairment rating for the knee is incorrect. Based on the totality of the evidence, it is more probable than not Claimant did not sustain any permanent impairment as a result of the August 13, 2014 industrial injury.

Overpayment

Pursuant to Section 8-40-201(15.5), C.R.S., "overpayment" means "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which would result in duplicate benefits because of offsets that reduce disability or death benefits under said articles." For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received the subject disability benefits. *Id*. Here, Respondent is entitled to an overpayment for any PPD benefits which Claimant previously received.

Temporary Disability Benefits

As found, Claimant is at MMI as of July 6, 2016. Insufficient evidence was presented to determine Claimant's entitlement to temporary disability benefits. While Claimant endorsed the issue of temporary partial disability and temporary total disability

benefits in her Application for Hearing, Claimant did not further address the issue at hearing or in her position statement. At the beginning of the hearing, Respondent noted temporary total disability as an issue, without reference to any particular dates. In their position statement, Respondent argues Claimant is not entitled to any temporary total disability because Claimant failed to establish the injury caused any disability. While the record indicates Dr. Ramaswamy issued work restrictions, the record is insufficient as to actual dates and time periods Claimant missed from work, if any. The only admission of liability included in the record, the February 13, 2017 FAL does not indicate any temporary disability benefits were paid. As the record is insufficient to determine entitlement to temporary disability benefits, the parties may confer on the issue and file an Application for Hearing if so desired.

Medical Maintenance Benefits

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Respondent filed a Final Admission of Liability on February 13, 2017 admitting for reasonable, necessary and related post-MMI medical benefits. Claimant specifically argues she is entitled to the post-MMI medical benefits recommended by Dr. Faulkner. As of January 12, 2017, Dr. Faulkner recommended Claimant undergo three months of physical therapy and the continuation of Celebrex.

As found, Claimant failed to prove by a preponderance of the evidence that the medical treatment recommended by Dr. Faulkner is reasonable, necessary and related to the industrial injury. The ALJ credits the persuasive opinions of Drs. Lesnak and Dr. Basse that no further treatment is reasonable or necessary to relieve the effects of the August 13, 2014 industrial injury or prevent further deterioration of her condition.

Disfigurement

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." Claimant contends she is entitled to a disfigurement award for her altered gait. As found, Claimant failed to establish entitlement to a disfigurement award, as it has not been established that Claimant's current altered gait is a result of the August 13, 2014 work injury.

Average Weekly Wage

An employee's AWW shall be calculated upon the weekly remuneration he or she was receiving "at the time of the injury." §8-42-102(2)(b), C.R.S. Here, the ALJ concludes that an AWW of $1,259.62 best reflects Claimant's earnings at the time of the accident, as she earned $1,259.62 in gross wages during each of the four weeks which preceded the accident.

ORDER

It is therefore ordered that:

1. Claimant failed overcome the DIME physician's opinion on MMI by clear and convincing evidence. Claimant is at MMI as of July 6, 2016.

2. Claimant failed to overcome the DIME physician's opinion on permanent impairment regarding the lumbar spine and CRPS by clear and convincing evidence.

3. Claimant failed to prove by a preponderance of the evidence that any scheduled impairment should be converted to a whole person impairment.

4. Respondent proved by a preponderance of the evidence Claimant did not sustain any permanent impairment as a result of her August 13, 2014 industrial injury. Claimant is assigned a zero percent permanent impairment rating for the work-related injury. Respondent is entitled to an overpayment for any PPD benefits previously paid.

5. Claimant failed to prove by a preponderance of the evidence that she is entitled to the post-MMI medical treatment recommended by Dr. Faulkner.

6. Claimant's AWW is $1,259.62.

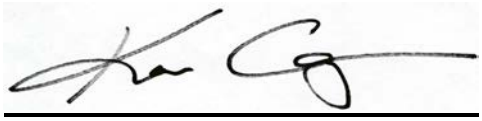
7. Claimant failed to prove entitlement to a disfigurement award.

8. As there is insufficient evidence for the ALJ to rule on Claimant's entitlement to temporary disability, the parties may confer on the issue and file and Application for Hearing on the issue if so desired.

9. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 25, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that he suffered an injury to his lumbar spine arising out of and in the course and scope of his employment with the employer.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that medical treatment he received constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that the surgical fusion recommended by Dr. Kirk Clifford is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

- If the claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

- If the claimant proves a compensable injury, what is the claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. The claimant was employed with the employer as an operations manager. The claimant testified that he was paid $26.00 per hour while working for the employer.

2. The claimant's job duties included taking care of radio communications at various tower locations. This involved moving, inspecting, and maintaining the employer's equipment. The claimant testified that the equipment he handled weighed between 2 pounds and 200 pounds. The claimant testified that prior to June 16, 2017, he was able to perform all of his job duties.

3. On Friday, June 16, 2017, the claimant was unloading work equipment from his work vehicle, specifically batteries. The claimant testified that while unloading these batteries he felt a "twinge" in his back. The claimant immediately informed his supervisor, Mr. Arnold, of this incident. As it was a Friday, Mr. Arnold told the claimant to take the weekend to rest and see if it was better by Monday.

4. On Monday, June 20, 2017, the claimant reported to Mr. Arnold that his symptoms were not better. Mr. Arnold instructed the claimant to seek treatment with is personal physician and the employer would reimburse the claimant for the cost of the visit.

5. Based upon this instruction from Mr. Arnold, the claimant sought treatment with his personal physician at Primary Care Partners. The claimant was seen at that practice by Dr. Brian DiMarzio on June 20, 2017. The claimant reported to Dr. DiMarzio that his low back pain started when he was removing items from his truck.

6. The claimant testified that he first told Dr. DiMarzio that the incident was related to work, but amended his statement when the doctor informed him that if it was work related, it would be "filed" as workers' compensation. As a result, the medical record of that date indicates that the claimant reported that the incident "was not work related". Dr. DiMarzio diagnosed a lumbar strain with L4-5 symptoms and prescribed pain medications.

7. The claimant testified that since the June 16, 2017 incident he has received medical treatment that has included referral to Spine Colorado, physical therapy, spinal injections, and magnetic resonance image (MRI) scans.

8. On July 3, 2017, the claimant underwent an MRI of his lumbar spine. The MRI showed degenerative disc disease at the L2-3, L3-4, and L4-5 levels; moderate foraminal narrowing on the right at the L3-4 level; moderate to severe foraminal narrowing on the left at the L4-5 level; mild compression of the traversing left S1 nerve root; and inflammation of the right L4-5 facet joint.

9. On July 6, 2017, the claimant was seen at Spine Colorado by Kim Byrd, PA-C. Based upon the MRI results, Ms. Byrd recommended that the claimant undergo left sided transforaminal epidural steroid injections (TFESIs) at L4-L5 and L5-S1. Ms. Byrd also completed a "return to work" notice for the claimant that indicated that the claimant could return to work as of July 6, 2017. This notice also indicated that the claimant could perform lifting "as tolerated".

10. The injections recommended by Ms. Byrd were administered by Dr. Santos at Spine Colorado on September 6, 2017.

11. A second MRI of the claimant's lumbar spine was performed on January 22, 2018 and showed mild disc desiccation with severe left foraminal stenosis at the L4-5 level.

12. After the claimant received medical treatment for his injury in Durango, Colorado, Dr. Craig Stagg became the claimant's authorized treating physician (ATP). The claimant was first seen by Dr. Stagg on February 8, 2018. The claimant testified that ultimately Dr. Stagg referred him to Dr. Kirk Clifford for a surgical consultation.

13. The records entered into evidence indicate that Dr. Clifford has recommended that the claimant undergo surgical management of the L4-5 lateral disc herniation.

14. At the request of the respondents, on March 3, 2018, the claimant attended an independent medical examination (IME) with Dr. Timothy O'Brien. Dr. O'Brien reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. O'Brien opined that the medical treatment the claimant has received for his lumbar spine has been reasonable and necessary. Dr. O'Brien further opined that the claimant's lumbar spine issues are not work related. In his report, Dr. O'Brien specifically pointed to the June 20, 2017 medical record in which the claimant reported to Dr. DiMarzio that the incident was not work related. In his IME report, Dr. O'Brien also noted that during the IME the claimant exhibited subjective complaints that are not organically based.

15. Dr. O'Brien's testimony at hearing was consistent with his written report. Dr. O'Brien reiterated his opinion that the June 16, 2017 incident was not work related. In support of this opinion, Dr. O'Brien noted that the most contemporaneous medical record, (that of June 20, 2017), shows that the claimant reported the incident a unrelated to work.

16. The claimant's supervisor, Mr. Arnold, testified at hearing that the claimant reported the June 16, 2017 incident to him as work related. Specifically, Mr. Arnold credibly testified that the claimant informed him that he hurt his back while lifting batteries out of his truck. Mr. Arnold also testified that the employer agreed to reimburse the claimant for the visit to his personal physician on June 20, 2017. Mr. Arnold testified that following the June 17, 2017 incident, the claimant continued to work full time. Mr. Arnold explained that any apparent reduction in the claimant's hours during this time was due to the employer asking employees to not work as much overtime as projects were coming to an end.

17. The claimant testified that his final day of employment with the employer was September 15, 2017. The claimant testified that because of the "lifting as tolerated" work restriction assigned by Ms. Byrd he was not able to perform all of his job duties between the July 16, 2017 incident and his final day of employment on September 15, 2017. The claimant also testified that he quit his job with the employer because of the number of hours he was working and the "amount of stress" that he experienced.

18. The claimant testified that he immediately found new employment with Adaptive Communications. While working for Adaptive Communications the claimant's job duties were less physically demanding and caused less stress on the claimant's back. The claimant testified that despite his low back pain, he was able to perform all of his duties while working for Adaptive Communications.

19. The claimant's employment with Adaptive Communications ended on November 1, 2017 when the claimant was laid off. The claimant testified that he has not worked since he was laid off from his employment with Adaptive Communications.

20. The claimant testified that after he was laid off by Adaptive Communications he received unemployment benefits. The claimant received unemployment benefits in the amount of $573.00 each week. The claimant received his final unemployment benefit payment on March 3, 2018.

21. The medical records entered into evidence indicate that on February 7, 2018, Dr. Stagg assigned work restrictions for the claimant. These work restrictions included no lifting, carrying, pushing, or pulling over 15 pounds, and that the claimant should avoid crawling, kneeling, squatting, and climbing. On March 23, 2018, Dr. Stagg responded to a number of questions posed to him by the claimant's attorney. In that response, Dr. Stagg confirmed that the claimant continued to have work restrictions of no lifting, pushing, or pulling greater than 15 pounds, and he was to avoid crawling, kneeling, and squatting. In that same response of March 23, 2018, Dr. Stagg indicated his agreement with Dr. Clifford's surgical recommendation.

22. The ALJ credits the claimant's testimony and the corroborating testimony of his supervisor, Mr. Arnold, over the conflicting opinion of Dr. O'Brien and finds that the claimant has demonstrated that it is more likely than not that he suffered a low back injury arising out of and in the course and scope of his employment. The ALJ further credits the claimant's testimony and finds that although the initial medical report identifies the June 16, 2017 incident as "not work related", the claimant credibly testified that he reported the incident in that way because the employer was going to reimburse him for the cost of the doctor visit.

23. The ALJ credits the testimony of the claimant and the medical records and finds that the claimant has demonstrated that it is more likely than not that the medical treatment the claimant has received since the June 16, 2017 work injury was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

24. The ALJ credits the opinion of Dr. O'Brien and the lack of medical records supporting the surgical recommendation from Dr. Clifford and finds that the claimant has failed to demonstrate that it is more likely than not that the recommended surgery is reasonable and necessary to cure and relieve the claimant from the effects of the work injury.

25. The ALJ credits the medical records and the testimony of Mr. Arnold over the conflicting testimony of the claimant and finds that following the July 16, 2017 injury the claimant continued to work full time. Until the work restrictions placed by Dr. Stagg on February 7, 2018, the claimant was able to continue working. The ALJ finds that from the claimant's date of injury until February 7, 2018, he did not suffer a wage loss due to his injury.

26. The ALJ credits the medical records, the opinion of Dr. Stagg, and the claimant's testimony and finds that as of February 7, 2018, the claimant had work restrictions that have limited his ability to seek and accept work. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that beginning on February 7, 2018, he had suffered a wage loss.

27. The ALJ credits the testimony presented at hearing and finds that the claimant received unemployment benefits as a result as his job separation from Adaptive Communications. Therefore, the respondents are entitled to an offset of TTD benefits for the period of February 7, 2018 through March 3, 2018.

28. The ALJ credits the payroll records admitted into evidence, and finds that the claimant worked an average of 66 hours per week for the sixteen week period immediately prior to the work injury (February 16, 2016 through June 20, 2017). At the pay rate of $26.00 per hour, the ALJ calculates that the claimant's average weekly wage (AWW) was $1,716.00.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also*

Subsequent Injury Fund v. Thompson, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. As found, the claimant has demonstrated by a preponderance of the evidence that he suffered an injury to his low back that arose out of and in the course and scope of his employment with the employer. As found, the testimony of the claimant and Mr. Arnold are credible and persuasive.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, the claimant has demonstrated by a preponderance of the evidence that the medical treatment he received following the June 16, 2017 work injury was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the claimant's testimony and the medical records are credible and persuasive.

7. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the surgery recommended by Dr. Clifford is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the opinion of Dr. O'Brien is credible and persuasive on this issue.

8. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

9. As found, the claimant has demonstrated by a preponderance of the evidence that as of February 7, 2018, he has suffered a wage loss due to his work injury and the related work restrictions placed on him by Dr. Stagg. Therefore, the claimant is entitled to temporary total disability benefits beginning February 7, 2018. As found, the medical records, the opinion of Dr. Stagg, and the claimant's testimony are credible and persuasive.

10. As found, the respondents are entitled to an offset of TTD payments for the period of February 8, 2018 through March 3, 2018 because of the claimant's receipt of unemployment benefits. As found, testimony presented at hearing regarding the claimant's unemployment benefits is credible and persuasive.

11. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include the reasonable value of any advantage or fringe benefit provided to the claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

12. As found, the claimant's AWW at the time of his work injury was $1,716.00. As found, the payroll records are credible and persuasive.

ORDER

It is therefore ordered that:

1. The claimant suffered a compensable injury on June 16, 2017.

2. Respondents shall pay for the claimant's reasonable medical treatment.

3. The claimant's claim for surgery, as recommended by Dr. Clifford, is denied and dismissed.

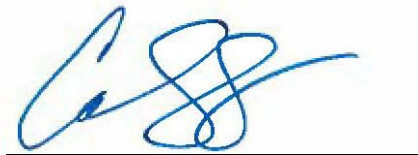
4. The claimant is entitled to temporary total disability (TTD) benefits beginning February 7, 2018 and ongoing until terminated by law.

5. The respondents are entitled to an offset of TTD payments due to the claimant's receipt of unemployment benefits from February 8, 2018 through March 3, 2018.

6. The claimant's average weekly wage (AWW) for this claim is $1,716.00.

7. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

Dated: May 24, 2018



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ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that she is entitled to maintenance medical treatment (including treatment recommended by Dr. Jeffrey Krebs) to prevent further deterioration to her physical condition pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

- Whether the claimant sustained a serious permanent disfigurement to areas of her body normally exposed to public view, resulting in additional compensation, pursuant to Section 8-42-108 (1), C.R.S.

FINDINGS OF FACT

1. The claimant was employed by the employer on March 31, 2015 when she hit her bilateral elbows on a work bench. The claimant reported her injury to the employer and was referred for medical treatment with Dr. Theodore Sofish.

2. Dr. Sofish initially examined the claimant on April 3, 2015. At that time, Dr. Sofish noted a history of hand numbness in both hands since December 2013. The claimant reported that her work duties included breaking down boxes and electrical pieces using knives, wire cutters, and screwdrivers. Dr. Sofish diagnosed carpal tunnel syndrome of unknown etiology.

3. The claimant returned to Dr. Sofish on May 8, 2015, and reported pain of 4 out of 10, tingling, and numbness in both hands with neck pain. On that date, Dr. Sofish diagnosed work related bilateral carpal tunnel syndrome with probable non-work related neck pain.

4. The claimant again returned to Dr. Sofish on June 8, 2015 and reported ongoing hand pain that was waking her at night. The claimant also reported to Dr. Sofish that her job with the employer included a lot of cutting, bagging, and ripping open bags. Dr. Sofish noted that the claimant was no longer working for the employer. At that time, Dr. Sofish recommended that the claimant undergo an electromyelogram and nerve conduction (EMG/NCV) study.

5. The claimant underwent the recommended EMG/NCV with Dr. Mitchell Burnbaum on June 25, 2015. The EMG/NCV demonstrated bilateral carpal tunnel syndrome, (left greater than right).

6. The claimant returned to Dr. Sofish on July 14, 2015. At that time, Dr. Sofish noted the results of the EMG/NCV study and referred the claimant to Dr. Mitchell Copeland for bilateral carpal tunnel surgery.

7. Dr. Copeland's office evaluated the claimant on July 14, 2015. Dr. Copeland noted the claimant's complaints in both hands and the EMG/NCV results and opined that the claimant had classic carpal tunnel symptoms. Dr. Copeland recommended that the claimant could treat conservatively with cortisteroid injection or undergo surgery.

8. The claimant returned to Dr. Copeland on September 16, 2015 and was evaluated by John Rexroth, PAC. Mr. Rexroth noted that the claimant's injury resulted after repetitive motion at work. Mr. Rexroth discussed non-surgical options with the claimant, but the claimant elected to proceed with carpal tunnel release surgery.

9. On September 24, 2015, the claimant underwent left carpal tunnel release surgery. Thereafter, on December 1, 2015, the claimant underwent right carpal tunnel release surgery. Both surgeries were performed by Dr. Copeland.

10. On October 12, 2015, the respondents filed a general admission of liability (GAL) admitting for temporary total disability (TTD) benefits beginning September 24, 2015.

11. On January 13, 2016, the claimant was seen by Mr. Rexroth and reported that the numbness and tingling symptoms and pain in the median nerve distribution had resolved. Mr. Rexroth noted that he believed the claimant was at maximum medical improvement (MMI) and released the claimant to return to work without restrictions.

12. The claimant was seen by Dr. Sofish on January 18, 2016. On that date, Dr. Sofish noted that the claimant was released to return to work without restrictions and had full range of motion of her wrists and fingers with no reported paresthesias. Dr. Sofish instructed the claimant to return in one month and noted she would likely be placed at MMI at that time.

13. On February 25, 2016, the claimant returned to Dr. Sofish and reported discomfort to the bilateral wrists with pain of 2 out of 10. Dr. Sofish noted that the claimant had full range of motion of both wrists and well-healed surgical scars. Dr. Sofish diagnosed post bilateral carpal tunnel surgery. Also on that date, Dr. Sofish placed the claimant at MMI, with no permanent impairment, and opined that the claimant did not need post MMI maintenance care.

14. On March 23, 2016, the respondents filed a final admission of liability (FAL) on March 23, 2016 admitting for no permanent impairment and no post MMI medical benefits.

15. The claimant objected to the FAL and requested a Division-sponsored Independent Medical Examination (DIME). Dr. Jeffrey Krebs was selected as the DIME physician and the claimant was initially evaluated by Dr. Krebs on August 17, 2016. Dr. Krebs reviewed the claimant's medical records, obtained a medical history, and performed a physical examination in connection with the DIME. In his DIME report, Dr. Krebs noted the diagnosis of bilateral carpal tunnel syndrome and the related bilateral carpal tunnel release surgeries performed by Dr. Copeland. Dr. Krebs noted that after the surgeries the claimant continued to report subjective complaints of tingling and some weakness over her hands and wrists. In addition, the claimant complained of dropping things. Dr. Krebs noted that his examination revealed positive Tinel's signs (left greater than right), with tingling both sides to ulnar and radial aspects of the hand and on both sides of the thumb.

16. Dr. Krebs also noted that range of motion testing resulted in an impairment rating of 9% for the claimant's right upper extremity and 4% for the left upper extremity. In addition, Dr. Krebs noted that the claimant would likely need some further medical treatment, or even surgical treatment for what appeared to be some persistent weakness. Dr. Krebs recommended reevaluation with neurology and Dr. Copeland to determine if further surgery would be warranted.

17. The respondents sent the claimant for an independent medical examination (IME) with Dr. Thomas Mordick on December 20, 2016. Dr. Mordick reviewed the claimant's medical records, obtained a medical history, and performed a physical examination in connection with the IME. Dr. Mordick noted the claimant's complaints of numbness on the both dorsal and palmar aspect of the hand extending from the wrist out into the fingers, with pain in the claimant's bilateral shoulders, elbows, and wrists. On examination, Dr. Mordick found full range of motion of the claimant's wrists and hands. Dr. Mordick diagnosed the claimant with non-specific pain and numbness in the upper extremity that was not consistent with carpal tunnel syndrome. Dr. Mordick opined that the claimant's symptoms did not fit an anatomic diagnosis and that the claimant's carpal tunnel syndrome had been appropriately addressed. Dr. Mordick also agreed that the claimant was appropriately placed at MMI by Dr. Sofish.

18. The claimant underwent a repeat EMG with Dr. Burnbaum on February 16, 2017. The EMG results were reported as normal.

19. On March 3, 2017, the claimant returned to Dr. Copeland and continued to report symptoms in her right hand including pain, numbness, and tingling. Dr. Copeland's examination showed negative impingement signs bilaterally and a negative Spurling's test. Dr. Copeland noted that he did not see evidence of any recurrence of the claimant's carpal tunnel syndrome and recommended that the claimant "live with" her condition and continue to work as tolerated.

20. On April 27, 2017, the claimant was seen by Dr. Krebs for a follow up DIME. Dr. Krebs reviewed the most recent EMG results and evaluation notes from Dr. Copeland. Dr. Krebs noted that the EMG did not demonstrate any issues stemming from higher areas, such as the claimant's cervical spine or elbow. Dr. Krebs opined that the claimant was at MMI as of August 16, 2017 and assessed permanent impairment of 18% for the claimant's left upper extremity and 13% for the claimant's right upper extremity.

21. Included in Dr. Krebs' April 27, 2017 DIME report are recommendations for additional medical treatment. Dr. Krebs noted that although the claimant would not benefit from further surgical intervention, it was his opinion that active medical treatment for the claimant was warranted. In that same DIME report, Dr. Krebs recommended 16 visits of occupational therapy for the claimant's right and left wrists. In addition, Dr. Krebs recommended that the claimant undergo a functional capacity evaluation (FCE)

22. Thereafter, Dr. Mordick provided a supplemental IME report and noted that Dr. Krebs did not provide any explanation as to why the claimant continued to complain of reduced motor control over a year and half after surgery or how that may be related to the carpal tunnel release surgeries. Dr. Mordick opined that the claimant's range of motion measurements, although consistent with Dr. Krebs' prior report, were not medically consistent with the diagnosis and evidence that the claimant's presentation had changed over time, including her presentation at Dr. Mordick's IME in December 2016.

23. On September 6, 2017 and October 6, 2017, the parties attended a prior hearing before ALJ Keith Mottram in which the respondents sought to overcome Dr. Krebs' opinions regarding the claimant's permanent impairment. In ALJ Mottram's October 24, 2017 Findings of Fact, Conclusions of Law and Order, he found that the respondents failed to overcome the opinions of the DIME physician, Dr. Krebs, and ordered the respondents to pay permanent partial disability (PPD) benefits based upon Dr. Krebs' impairment ratings.

24. Thereafter, the respondents filed an amended FAL admitting for PPD benefits pursuant to ALJ Mottram's order, but denying liability for post MMI medical benefits because no such treatment was recommended by the claimant's treating physician. The claimant objected to the amended FAL and requested a hearing on the issues of *Grover* medical benefits and disfigurement.

25. Thereafter, the respondents asked Dr. Mordick to provide an opinion as to whether the post MMI treatment recommended by Dr. Krebs in the April 27, 2017 DIME report would be reasonable and necessary to allow the claimant to remain at MMI. Dr. Mordick responded in a letter dated April 3, 2018, and opined that there was no justification for the claimant to attend occupational therapy, and an FCE was not necessary because the claimant is not returning to work for the employer. Dr. Mordick's testimony at hearing was consistent with his written reports.

26. The claimant testified that she continues to have symptoms (including numbness in both hands) that were present when she was placed at MMI by Dr. Sofish. The claimant wants to have the ability to seek further medical care because she still has the same symptoms that she had at MMI. She testified that she does not know specially what medical care she might need in the future, but she wants her medical treatment to remain open.

27. The ALJ credits the medical records, the claimant's testimony, and the opinion of Dr. Krebs over the contrary opinion of Dr. Mordick and finds that the claimant has shown that it is more likely than not that she is in need of continued medical treatment (including but not limited occupational therapy and an FCE) to prevent further deterioration of her condition as a result of her compensable claim.

28. The ALJ is not persuaded by Dr. Mordick's position that because the claimant will not return to employment with the employer that an FCE is not necessary. On the contrary, the Colorado Medical Treatment Guidelines allow for various "special tests" including an FCE.

29. At the May 3, 2018 hearing, the claimant demonstrated that as a result of the March 31, 2015 injury and the related bilateral carpal tunnel surgeries she has thin, well healed surgical scars on both palms. Each scar measures approximately 2 inches long.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2014).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

4. The Colorado Medical Treatment Guidelines (the guidelines) indicate that full functional capacity evaluations (FCEs) are rarely necessary and that in many cases, a work tolerance screening will identify the claimant's ability to perform certain job tasks. In the "frequency" section, the guidelines indicate that a FCE can be used initially to determine baseline status and that additional evaluations can be performed for case closure when the patient is unable to return to the pre-injury position and information is desired to determine permanent work restrictions.

5. As found, the claimant has demonstrated by a preponderance of the evidence that she is entitled to a general award of ongoing maintenance medical benefits (including, but not limited to, occupational therapy and an FCE) based upon the recommendations of Dr. Krebs and the claimant's ongoing complaints of persistent symptoms.

6. Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

7. As found, as a result of her March 31, 2015 work injury, the claimant has a visible disfigurement to her body consisting of scarring on her palms. Therefore, the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

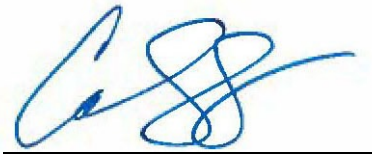
ORDER

It is therefore ordered that:

1. The respondents shall pay for maintenance medical treatment that is necessary to maintain the claimant at MMI and is designed to prevent further deterioration of her physical condition, including, but not limited to, occupational therapy and a functional capacity evaluation.

2. The insurer shall pay the claimant $500.00 for her disfigurement. The insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

Dated: May 29, 2018



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ISSUES

1. Determination of Claimant's Average Weekly Wage (AWW)

STIPULATIONS

1. Claimant is owed temporary total disability (TTD) benefits for the periods spanning September 18, 2016 through October 1, 2016 and October 2, 2016 through October 15, 2016.

FINDINGS OF FACT

1. Claimant is employed by Employer and has been so employed for approximately 17 years.

2. On May 23, 2016 Claimant sustained an admitted work related injury when he was involved in a motor vehicle accident. Claimant subsequently underwent treatment and missed time from work due to his injuries.

3. On June 26, 2017 Respondents filed a final admission of liability, admitting for a permanent partial disability impairment rating of 10% whole person and admitting to an average weekly wage of $513.70. *See* Exhibit 1.

4. On August 31, 2017 Claimant underwent a division independent medical examination.

5. On November 3, 2017 Claimant submitted an application for hearing endorsing, among other items, average weekly wage as an issue. Claimant disagrees with the admitted AWW from Respondents and believes his AWW for Employer should be higher than the admitted rate, and also believes it should be adjusted higher to include concurrent employment. *See* Exhibit 3.

6. Prior to May of 2016 Claimant was earning on average approximately $525 per week. *See* Exhibit L.

7. On May 8, 2016, a few weeks prior to his work related motor vehicle accident, Claimant received a salary increase for his work with Employer. His new salary start date was listed as May 8, 2016 and the new rate was $1,220.95 bi-weekly. *See* Exhibit 4.

8. This rate, per week, amounts to an average weekly wage of $610.48.

9. Claimant alleges that his AWW should be increased to include concurrent employment with Shankster, doing business as Concept Fur Dressing, owned by Tom and JoAnn Shankster.

10. A W-2 wage and tax statement issued to Claimant by Shankster showed that in 2016 Claimant was paid by Shankster total wages, tips, or other compensation in the amount of $2,285.22. *See* Exhibit 5.

11. Claimant worked occasionally for Shankster working on animal hides. Claimant has known the husband/wife owners of Shankster for many years and Claimant is the son of a longtime family friend of the Shanksters. Claimant initially was a paid part-time hourly employee for them and later became an employee paid by piece-work. From February of 2012 through May of 2014 Claimant was paid approximately $10/hour for his part time work with Shankster. From May of 2014 through May of 2016 Claimant was paid piece-work and Claimant would track the number of hides/pieces he had cut and would be paid based on his work.

12. Records from Shankster show various cuts of animal species including cape, full hide, etc with different measurement amounts and rates charged per cut. The cuts ranged from $9.40 to $43.39 per cut. From April 22, 2016 through May 9, 2016, Claimant was paid $449.79 for 20 cuts he indicated he performed on 8 different dates. May 9, 2016 was the last date Claimant performed cuts for the Shanksters and that he was paid for. In his paycheck, Shankster deducted federal, state, and local taxes as well as social security and medicare deductions. *See* Exhibit M.

13. In early May of 2016 Claimant decided to start his own company specializing in animal skull finishing. Claimant asked the Shanksters if they would advertise his services to their customers and they agreed. Claimant gave the Shanksters some of his newly created business cards and asked them to hand the cards out to their customers.

14. Claimant stopped working for the Shanksters in early May of 2016 to pursue his own skull finishing company. Claimant named his company “Smoking Skulls.” Claimant created a Facebook page advertising his new business and he also created business cards advertising his services.

15. The Shanksters had some issues with Claimant’s employment and with Claimant’s billing practices for his piece-work and were relieved that Claimant was parting ways and leaving their employment to start his own business.

16. The Shanksters sent some work to Claimant and Smoking Skulls in his first few weeks of running his own skull finishing company. They also gave Claimant a cooking burner machine of theirs to use in his new venture. The Shanksters paid Claimant by check for the skull work they sent to Claimant. The Shanksters did take any deductions out of this check for Claimant’s skull work and considered it as pay to Claimant’s new business and not as an employee paycheck.

17. The Shanksters and Concept Fur Dressing does not perform any skull work and they instead refer skull work out to companies/people who do skull work.

18. Claimant was injured in this work related injury just weeks after starting Smoking Skulls. His injury occurred on May 23, 2016 and he had decided to start his own company early in the month of May.

19. The testimony of JoAnn Shankster and Tom Shankster is more credible and persuasive than the testimony of Claimant. On the date of injury, May 23, 2016, Claimant was not employed by the Shanksters and had left their employment to pursue his own company and business.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014). Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM*

Corp., 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The ALJ concludes that Claimant's AWW is $610.48. This amount reflects Claimant's earnings at the time of his injury and is a fair approximation of Claimant's wage loss and diminished earning capacity. At the time of his work related injury, Claimant had recently received a pay increase from Respondent Employer. Claimant also had recently started his own business venture, Smoking Skulls. Claimant was not concurrently employed at the time of his work related injury, but he had recently started his own business with the hope of earning money but with no income yet from the business. The credible and persuasive testimony and evidence shows that Claimant was not concurrently employed at the time of his injury and that his employment with Shankster ended in early May of 2016 when he decided to start his own business. Claimant has established an increase to his AWW based on his increased salary with Respondent Employer but has failed to establish an increase in AWW based on concurrent employment.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wage is $610.48.

2. The Average Weekly Wage previously admitted to shall be modified to reflect this wage and any indemnity benefits owed shall be adjusted accordingly.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 29, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Has Claimant shown, by a preponderance of the evidence, that the two-level L4-S1 spinal fusion surgery as proposed by Dr. Bee, is reasonable and necessary to cure the effects of Claimant's admitted work injury? Respondents do not argue that Claimant's condition is unrelated to his work injury.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ enters the following Findings of Fact:

1. Claimant sustained an admitted injury to his lumbar spine on November 15, 2013. Claimant injured his lower back while moving a heavy pipe while in a bent over position. (Ex. 6, p. 57).

2. Claimant's ATP at the time, Dr. John Abbott, referred Claimant to Dr. James Bee for an orthopedic surgical evaluation, which took place on January 13, 2014. (Ex. 6, p. 57). After moving the heavy pipe, Claimant reported having pain in his lower back, with symptoms radiating down his right leg. Dr. Bee's review of the December 9, 2013 MRI indicated there was loss of disc hydration at L4-5. There was also a posterior disc bulging at L5-S1, which was affecting the right S1 nerve root, slightly more than the left. *Id.* at 58. Dr. Bee felt that Claimant should attempt conservative treatment before undergoing surgery, and recommended physical therapy and a course of epidural steroid injections.

3. Claimant returned to Dr. Bee on June 16, 2014. (Ex. 6, p. 61). It was noted that the injections previously requested had not been authorized by Respondents. Claimant reported that his symptoms were "bad enough to look at surgical intervention." *Id.* Dr. Bee indicated, "At this time, based on his history, his continued complaints, his incapacitation with the pain and the fact that he is not able to return to work, we are going to obtain a discogram to find out if he would be a good surgical candidate." *Id.* Dr. Bee stated that if the discogram did not have at least one positive level and a negative control level, he would not perform surgery. Dr. Bee referred Claimant to Dr. Martin Verhey for an L3-S1 discogram. *Id*

4. The discogram was not ultimately completed until October 27, 2016, more than two years after the initial request by Dr. Bee. (Ex. 14).

5. In the interim, Claimant's primary treating provider had been switched to Dr. Miguel Castrejon. Dr. Castrejon has been Claimant's primary ATP since October 28, 2015. (Ex. 7). As of October 28, 2015 (now nearly two years post-injury) Claimant

continued to complain of constant, stabbing pain in his lower back with the pain still radiating into the right leg. (Ex. 7 at p. 77).

6. Dr. Castrejon expressed concern with Claimant's lack of treatment over the course of two years. "Having had the opportunity to review the medical file I am concerned about the length of this case and the relative limited treatment that has been provided." (Ex. 7. P. 80). Dr. Castrejon made a referral for Claimant to see a psychologist to ensure there were no psychological barriers to recovery. Claimant received psychological care and counseling through Herman Staudenmayer, Ph.D., and Mr. William Beaver, M.A., LPC, BCIAC. (Exs. 8, 9).

7. Dr. Castrejon also recommended an EMG of the lower limbs to evaluate for radicular symptoms. He also wanted a spinal injection performed before considering a surgical second opinion. As of January 6, 2016, Respondents had yet to authorize the injection or the discogram. *Id.* at 84. Claimant continued to express increasing back pain.

8. Dr. Castrejon's progress notes of 2/24/16 show that the electrodiagnostic testing was finally performed and it did reveal findings consistent with an S1 radiculopathy. (Ex. 7, p. 87). Dr. Castrejon indicated this finding supported Claimant's subjective complaints. *Id.* By this time, Claimant had "persistent slow gait using cane for assisted ambulation". *Id.* Dr. Castrejon requested a right S1 nerve block with Dr. Stephen Ford. After the injection failed to provide relief, Dr. Castrejon referred Claimant back to Dr. Bee on June 8, 2016 for surgical evaluation. (Ex. 7, p. 88).

9. Claimant returned to Colorado Springs Orthopaedic Group on July 27, 2016 and was seen by Dr. Bee's physician's assistant, Nathan Carpenter. (Ex. 6, p. 63). Claimant reported ongoing, intense low back pain with radiation down the right leg. The pain was noted to be severely restricting Claimant's daily activities. Mr. Carpenter recommended a new MRI, since the last one had been completed almost three years prior. Claimant was also noted to be a nonsmoker.

10. Claimant returned to Mr. Carpenter on August 31, 2016 with new MRI results. (Ex. 6, p. 68). The MRI failed to identify a clear pain generator, so it was again recommended that Claimant undergo a discogram to better assess exactly which levels of the spine were causing Claimant's pain symptoms. *Id.* at 69. Mr. Carpenter felt the results of the discogram would dictate whether surgery was appropriate, as Dr. Bee had expressed years prior.

11. The discogram was authorized and performed on October 27, 2016 by Dr. Mark Meyer. (Ex. 14). The 'history of present illness' described Claimant as having ongoing lower back pain consistent with discogenic pain and right sided radicular pain. The exact procedure performed was an L3-4, L4-5, and L5-S1 discogram with fluoroscopic guidance. The discogram was negative for pain at the L3-4 control level, but markedly positive for pain at both L4-5, and L5-S1. The 85 psi pressure put on the L4-5 level produced pain at a level nine out of ten. The 30 psi pressure on the L5-S1 level produced pain at a level ten out of ten.

12. A post-discogram CT was performed the same date as the discogram. (Ex. 13, p. 152). The CT revealed contrast from the MRI extending to the outer third of the posterior annulus fibrosis. This was deemed consistent with a grade 4 annular tear.

13. Claimant returned to Dr. Bee on March 1, 2017 for further surgical consultation and to go over the results of the discogram. (Ex. 6, p. 73). Dr. Bee noted the discogram confirmed a negative control level with positive findings at L4-5 and L5-S1. There was also leakage noted at the L5-S1 level. Dr. Bee recommended an anterior posterior L4 to S1 fusion. The reviewing physician denied the request for surgery, largely based upon a lack of evidence of spinal instability in the documentation he reviewed. (Ex. 11, pp. 146-48).

14. Claimant was sent by Respondents to Dr. Allison Fall for an IME on June 22, 2017. (Ex. 15). Dr. Fall indicated in her report, "Certainly, if one follows the results of the discogram, which in my opinion was not specific in documenting that he had concordant pain, which is the typical phrase used, and relies upon the psychological indication, then [Claimant] may be considered a candidate for a lumbar fusion according to the medical treatment guidelines." (*Id.* at p. 160). Dr. Fall expressed concerns regarding possible psychological issues, and a mismatch between subjective reports of pain and objective findings, and recommended a second orthopedic evaluation.

15. Claimant was sent by Respondents to Dr. Bryan Castro for a second opinion. (Ex. 16, p. 161). Dr. Castro opined that discograms are poor indicators for surgical outcomes, and he did not feel that they adequately identify pain generators. Dr. Castro also noted that Claimant's pain was sometimes noted to be out of proportion to objective findings in his analysis.

16. Dr. Castrejon authored a special report on February 5, 2018 discussing Claimant's need for surgery. (Ex. 7, pp. 108-113). Dr. Castrejon noted that Claimant's psychological evaluation was completed by Dr. Herman Staudenmayer already. Dr. Staudenmayer indicated that Claimant was a reliable historian without defensiveness about his psychological issues, that his pain and that his anger and resentment were a result of his perceived lack of adequate medical care to date. Claimant expressed motivation to receive counseling to help deal with his claim induced anxiety and depression, which he also underwent. (Exs. 8, 9). Dr. Castrejon highlights the delays by Respondents on page three of his special report.

> This examiner had recommended and requested authorization to perform electrodiagnostic testing on October 28, 2015. The request was repeatedly denied. I performed electrodiagnostic testing on January 27, 2016 (approximately 3 months following request), despite lack of authorization in an effort to move forward with the claimant's work-up and care. At the completion of electrodiagnostic testing I recommended a right S1 nerve root block with Dr. Ford. That request was repeatedly denied. On May 11, 2016 I requested that the carrier provide authorization for the injection or forward reasoning as to why treatment was not being authorized…….The right S1 nerve root block was not completed until May

> 27, 2016 (approximately four months following request)…..Dr. Bee reviewed the repeat MRI on August 31, 2016, stating that the MRI revealed "marked degenerative changes of the 5-1 level". There was also reported to be mild loss of disc hydration seen at L3-4 and L4-5. The recommendation was made for proceeding with discography. Again, please note that this request had previously been made by Dr. Bee in 2014. (Ex. 7 at p. 110).

17. Dr. Castrejon provided an analysis of the medical treatment guidelines and their position on discograms. (Ex. 7, p. 111). He explained that Claimant met the requirements for a discogram under Rule 17 of the Medical Treatment Guidelines (hereinafter "Guidelines"), as it is intended for cases with equivocal MRI findings. Regardless, Dr. Castrejon stressed that the Guidelines are just "guides." *Id.* at 112.

18. Dr. Castrejon points out that Respondents are attempting to use Claimant's lack of diagnostics as a reason for denial: "In the case of this claimant, this examiner notes that the ability of the treating physician to carry out diagnostic measures intended to identify the diagnosis and therefore provide adequate treatment have been significantly limited by the [Respondents], thereby prolonging not only medical treatment but also directly contributing to the inability of this claimant to return to at or nor reinjury function." *Id.* Dr. Castrejon further pointed out that Claimant had annular *instability* in his lumbar spine as evidenced by the grade 4 annular *tear.* (emphasis added).

19. Dr. Castrejon concluded, "It would appear to this examiner that the request by Dr. Bee is one that is medically reasonable. It is easy to mischaracterize the claimant by bringing up loss of work time, need for prescription pain medication and development of psychological responses to pain yet the carrier needs to take responsibility with regard to delay and/or lack of appropriate diagnosis and treatment that has directly contributed to these issues." (Ex. 7, p. 112). Dr. Castrejon performed electrodiagnostic testing after three months without authorization, noting it would have taken eight months if he waited on Respondents. *Id.* at 113. The request for the right S1 nerve root block took four months for authorization. *Id.* Dr. Castrejon cited a study that indicated that although the discogram remains somewhat controversial, the data suggested that discography with imaging is a useful tool that reliably generates significantly positive outcomes. Dr. Castrejon also indicated "There was a significant association between concordant discogenic pain and annular tears as determined by discography and CT, respectively." *Id.*

20. Dr. James Bee testified via evidentiary deposition on March 12, 2018, in his capacity as an expert in orthopedic surgery. Dr. Bee explained that at his initial evaluation, he recommended conservative care because he wanted to avoid having to perform a fusion surgery on Claimant if it could be avoided. Dr. Bee anticipated a possible fusion surgery down the road based on Claimant's clinical findings. (Bee Depo. p. 8).

21. Dr. Bee explained what a discogram is. It involves putting needles directly into the disc and pressurizing the disc to look for reproduction of pain. Equally

important, there must be a negative control. (Bee Depo. p. 9). The purpose of the post-discogram CT is to see if there are any other abnormalities, such as extravasation of the contrast material, which was noted on the CT. (Bee Depo. p. 12). Dr. Bee indicated that what he puts the most faith in is the particular physician performing the discogram. Dr. Bee indicated that Dr. Mark Meyer, who performed the discogram, is a "great injectionist" and gives a fair assessment. (Bee Depo. pp. 12-13).

22. Dr. Bee was asked specifically about Dr. Castro's reservations in relying on a discogram. He indicated that one can find literature on both sides of the argument, but in his opinion, he would not have ordered and reordered a discogram if he did not feel it would help him find out what was causing Claimant's pain. (Bee Depo. p. 16).

23. Dr. Bee was asked about Dr. Castro's opinion that fusion surgery carries extremely poor outcomes in the absence of structural instability. Dr. Bee disagreed. He explained there can be a lot of different pain generators. One can have problems amenable to fusion surgery without having a defined instability based on White and Panjabi's' description of instability. (Bee Depo. pp. 16-17). He explained there are many patients with discogenic back pain that can benefit from this type of fusion surgery and opined Claimant's best chance of success rested with the L4-5, L5-S1 fusion. (Bee Depo. p. 17). Dr. Bee strongly maintained his position that this fusion was the best way to treat Claimant. (Bee Depo. pp. 18-19).

24. On Cross-examination, Dr. Bee testified that he was not sure what Dr. Castro was referring to in the way of a lack of "structural findings," but indicated Claimant had loss of disc hydration, collapse of disc height space, and high intensity zones/annular tears. (Bee Depo. p. 21). Dr. Bee was also asked about pain complaints out of proportion to objective findings. Dr. Bee testified that Claimant certainly has pain, but based on the objective findings and his examinations, he saw no red flags in Claimant's presentation. Dr. Bee specifically said that if Dr. Meyer had indicated Claimant's response to the discogram was pain at every level, even the L3-L4 control level, he certainly would not perform the surgery. Such was not the case here. (Bee Depo. pp. 23-24). Dr. Bee explained that the goal of the surgery is to decrease pain, increase function, and help get the Claimant off narcotic pain medication. (Bee Depo. p. 26).

25. Dr. Allison Fall testified via telephone during hearing on March 29, 2018 in her capacity as an expert in physical medicine and rehabilitation. She was concerned that Dr. Bee had indicated in his testimony that he had not taken the Guidelines into account when forming his opinion and she felt they were "good guidelines to follow." She noted that there are extenuating circumstances and the Guidelines should not necessarily be applied in every case. Dr. Fall testified that fusions are typically performed in the context of a structural abnormality. She also discussed the risks to the patient from this procedure, including the healing from the incisional wound, decreased range of motion, and increased stress on the level above the fusion, especially if two levels are fused.

26. On direct examination, Dr. Fall testified it was her understanding that Dr. Bee's surgery was intended to reduce pain by about 50%, but not to increase function. Surgery, she said, should be performed in the context of improving function, as she does not feel this procedure is designed to decrease pain. On cross-examination, Dr. Fall conceded that Dr. Bee testified that his surgery was intended to both decrease pain and increase function. (*See* Bee Depo. p. 26). Dr. Fall testified regarding her concerns of psychological overlay and subjective complaints of pain allegedly being out of proportion to objective findings, and that those are red flags when determining if fusion surgery is appropriate.

27. Dr. Fall testified that the lumbar spine fusion would result in Claimant being considerably less functional. Dr. Fall attributed decreased functionality to having two levels of his spine fused and further deconditioning from undergoing a major surgery. Dr. Fall also testified that a discogram was a somewhat controversial test which involved putting a probe into a disc that can cause significant pain. Dr. Fall testified that some surgeons rely on them whereas others think they're worthless due to the large subjective component. Dr. Fall testified further that surgical decisions should not be based on the results of a discogram.

28. Dr. Bryan Castro testified via post-hearing evidentiary deposition on April 23, 2018. Dr. Castro was asked whether fusion is contraindicated in the absence of flexion and extension x-rays demonstrating spinal instability. His response was that "Occasionally it's indicated. But the understanding is that the surgery is quite a large undertaking." (Castro Depo. pp. 7-8). He noted the procedure involved a fairly large incision, insertion of metal, screws, rods, and interbody cages. Recovery from such an operation took six months to one year. Dr. Castro testified that people would have less range of motion and be less functional as a result. Dr. Castro further testified that Claimant did not have instability in the lumbar spine. Dr. Castro testified that he felt the use of discograms was controversial, and he personally does not use them in his practice. (Castro Depo. pp. 8-9).

29. Dr. Castro testified that he was familiar with the Colorado Workers' Compensation Medical Treatment Guidelines. Dr. Castro testified that the Guidelines clearly noted reasons for fusions as instability, other tumors, and trauma fractures. He testified further that the Guidelines were very skeptical of discograms. Outside of the Workers' Compensation setting, he stated that people had gone away from discograms as being an accurate portrayal of diagnosing pain generators

30. Dr. Castro testified that he did not use discograms as identification of a pain generator had not been fully established. In addition, he testified that discograms can result in further degeneration of the disc just by injecting saline into a disc. Dr. Castro testified that outcomes were not any better after a discogram purportedly identified the pain generator, and the risk of a false positive was possible. While Dr. Castro agreed that a preoperative indication for lumbar fusion for the medial treatment guidelines was a positive discogram, he noted that the guidelines stated the procedure was controversial.

31. Dr. Castro agreed that the approach recommended by Dr. Bee was the correct approach if this surgery were to proceed, but he felt that Claimant should not have the operation. (Castro Depo. pp. 10-11). Ultimately, Dr. Castro felt Claimant's lack of benefit from conservative care was a primary reason for Claimant not undergoing this particular surgery. (Castro Depo. p. 14). On cross-examination, Dr. Castro did agree that the Guidelines establish a preoperative indication for a lumbar fusion in a positive discogram, but he still felt that discograms are controversial. (Castro Depo. p. 17). Dr. Castro also conceded that Claimant did receive a diagnostic response to the injection he was given at the right S1 level, and it was "great" that he received a response, but he would have *preferred* to see a *longer* response. (Castro Depo. pp. 18-19).

32. Dr. Castro testified that he questioned whether the proposed surgery would attack or relieve Claimant's pain, noting fusion surgeries often do not. Dr. Castro testified that the possibility of a 50% reduction in pain was not enough to consider a life-altering operation in hopes that Claimant may be 50% better. Dr. Castro testified he did not think any literature would support people being more functional after a two-level lumbar fusion, typically a young person. Dr. Castro testified that the lumbar spine fusion as proposed by Dr. Bee was not reasonable and necessary for the Claimant

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible

inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002).

Medical Benefits: L4-5, L5-S1 Two-Level Fusion

4. For a compensable injury, Respondents must provide all medical benefits that are reasonably necessary to cure and relieve the injury. C.R.S. § 8-42-101 (2010). Respondents are liable for reasonable and necessary medical treatment by a physician to whom a claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987). Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may challenge the reasonableness and necessity of treatment. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The Claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claims Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether a Claimant has proven by a preponderance of the evidence that a contested medical treatment is reasonably necessary is one of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496, 498 (Colo. Ct. App. 1997). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Delta Drywall v. Industrial Claims Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

5. Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January25, 2011). However, the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053

(Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

6. The Medical Treatment Guidelines regarding discography are reproduced in their entirety, with ***emphasis added*** as noted:

D. Provocation Discography

i. Description**:** Discography is *accepted, but rarely indicated.* It remains *extremely controversial* as an invasive diagnostic procedure to identify or refute a discogenic source of pain for patients who are surgical candidates for fusion or disc replacement. Discography should only be performed by physicians who are experienced and have been proctored in the technique. Discograms have a significant false positive rate. It is essential that all indications, pre-conditions, special considerations, procedures, reporting requirements, and results are carefully and specifically followed. Results should be interpreted judiciously.

ii. Indications**:** *Discography may be indicated when a patient has a history of* ***functionally limiting, unremitting low back pain of greater than four months duration, with or without leg pain,*** *which has been unresponsive to all conservative interventions and meets all of the criteria for spinal fusion. A* ***patient who does not desire operative therapeutic intervention is not a candidate*** *for an invasive non-therapeutic intervention, such as provocation discography.* When a patient exhibits pain with extension and lateral bending of the spine, facet pathology should be explored prior to a discogram.

Discography may prove useful in ***evaluating the number of lumbar spine levels*** *that might require* ***fusion.*** *Discography provides further detailed information about morphological abnormalities of the disc and possible lateral disc herniations.*

Discography may indicate disc degeneration and annular disruption in the absence of low back pain. *Discography may also elicit concordant pain in patients with mild and functionally inconsequential back pain. Because patients with* ***mild back pain*** *(3 points or less on a 10-point VAS measurement* ***should not be considered*** *for invasive treatment) discography should not be performed on these patients.* In symptomatic patients with annular tears, the side of the tear does not necessarily correlate with the side on which the symptoms occur. The presence of an annular tear does not necessarily identify the tear as the pain generator.

There is good evidence that a positive discogram does not predict positive results from a fusion with the same success rate as documented spondylolisthesis (27% success rate compared to 72% success rate). A similar prospective study found that a painful disc (that is, a positive discogram) is a poor independent predictor of low back pain in initially asymptomatic subjects. Psychometric profiles, work loss, medication usage were strongly predictive of subsequent low back pain. An annular tear of high intensity zone on MRI was weakly associated.

There is some evidence that discography with a small-bore needle

increases the risk of later disc herniation at the injected level, and this risk should be taken into account when deciding on a referral for discography.

iii. Pre-conditions for provocation discography include all of the following:

A) *A patient with **functionally limiting,** unremitting back and/or leg **pain** of greater than **four months** duration in whom conservative treatment has been unsuccessful and in whom the specific diagnosis of the pain generator has not been made apparent on the basis of other non-invasive imaging studies (e.g., MRI, CT, plain films, etc.).* It is recommended that discography be reserved for use in patients with equivocal MRI findings, especially at levels adjacent to clearly pathological levels. Discography may be more sensitive than MRI or CT in detecting **radial annular tears.** However, radial tears must always be correlated with clinical presentation.

B) Prior to consideration of discography, *the patient should undergo other diagnostic testing as appropriate in an effort to define the etiology of the patient's complaint including **psychological evaluation,** myelography, **CT, and MRI.***

C) ***Psychosocial evaluation has been completed***. There is some evidence that discography in patients with somatoform disorders is likely to create a risk of development of persistent low back pain in the year following the procedure. Therefore, discograms should not be performed on patients with somatoform disorders.

D) Patients are considered surgical candidates (e.g., symptoms are of sufficient magnitude and the patient has been informed of the possible surgical and non-surgical options that may be available based upon the results of discography). Informed decision making should always be documented. *Discography should **never be the sole indication** for surgery*.

E) **Informed consent** regarding the risks and potential diagnostic benefits of discography has been obtained.

iv. Complications**:** Include, but are not limited to, discitis, nerve damage, chemical meningitis, pain exacerbation, possible damage to the control disc being injected, and anaphylaxis.

There is some evidence that discography with a small-bore needle increases the risk of later disc herniation at the injected level, and this risk should be taken into account when deciding on a referral for discography.

v. Contraindications**:** Include: (a) active infection of any type or continuing antibiotic treatment for infection; (b) bleeding diathesis or pharmaceutical anticoagulation with warfarin, etc.; (c) significant spinal stenosis at the level being studied as visualized by MRI, myelography or CT scan; (d) presence of clinical myelopathy; (e) effacement of the cord, thecal sac or circumferential absence of epidural fat; and/or (f) known allergic reactions.

vi. Special Considerations:

Discography should not be performed by the physician expected to perform the therapeutic procedure *nor by physicians in the same practice. The procedure should be carried out by an* ***experienced*** *individual who has received specialized training in the technique of provocation discography.*

Discography should be performed in a blinded format that avoids leading the patient with anticipated responses. *The procedure should always include one or more disc levels thought to be normal or non-painful in order to serve as an* ***internal control.*** *The patient should not know what level is being injected in order to avoid spurious results.* An injection may be repeated on abnormal disc levels to confirm concordance.

Sterile technique must be utilized.

It is essential that only light sedation be used for diagnostic trials in order to avoid having the sedation interfere with the patient's ability to interpret pain relief from the injection itself. Many patients may not need any medication. For those requiring anxiolytics, short acting agents, such as midazolam, may be used. As with all patients, the pain diary and functional testing post injection must be rigorously adhered to in order to correctly interpret the results of the diagnostic injection.

The discography should be performed using a manometer to record pressure. The injection may continue until either: pain is produced; contrast medium escapes from the disc; the volume of injection reaches 3mL; or a maximum pressure range of 50-75 per square inch (psi) over opening pressure is reached.

Intradiscal injection of local anesthetic may be carried out after the provocation portion of the examination and the patient's response.

A ***post-discogram CT may be considered*** as it frequently provides additional useful information about disc morphology or other pathology, however it also increases radiation exposure.

vii. Reporting of Discography**:** In addition to a narrative report, the discography report should contain a standardized classification of (a) disc morphology (b) the pain response, and (c) the pressure at which pain is produced. All results should be clearly separated in the report from the narrative portion. Asymptomatic annular tears are common. The concordant pain response is an essential finding for a positive discogram.

When discography is performed to identify the source of a patient's low-back pain, both a ***concordant pain response*** *and* ***morphological abnormalities*** *must be present at the pathological level prior to initiating any treatment directed at that level.* The patient must be awake during the provocation phase of the procedure; therefore, sedative medication must be carefully titrated.

Caution should be used when interpreting results from discography. Several studies indicate that a false positive discogram for pain is likely above a pressure reading of 50 psi above opening pressure. When the

psi associated with concordant pain is 20 psi or less from the opening pressure, the false positive rate drops to approximately 25%.

Reporting disc morphology as visualized by the post-injection CT scan (when available) should follow the Modified Dallas Discogram Scale where:

Grade 0 = Normal Nucleus.

Grade 1 = Annular tear confined to inner one-third of annulus fibrosis.

Grade 2 = Annular tear extending to the middle third of the annulus fibrosis.

Grade 3 = Annular tear extending to the outer one-third of the annulus fibrosis.

Grade 4 = A grade 3 tear plus dissection within the outer annulus to involve more than 30° of the disc circumference.

Grade 5 = Full thickness tear with extra-annular leakage of contrast, either focal or diffuse.

Reporting the pain response should be consistent with the operational criteria of the International Spine Intervention Society (ISIS) Guidelines. The report must include the level of concordance for back pain and leg pain separately using a 10-point VAS, or similar quantitative assessment. It should be noted that change in the VAS scale before and after provocation is more important than the number reported. The definition of a positive discogram is noted below. ***Two*** *control discs are* ***no longer*** *routinely* ***recommended*** *due to the possibility* that a disc injection alone may cause later pathology.

A) Positive discogram

- Stimulation of the target disc reproduces ***concordant pain*****; <u>and</u>**
- **The pain is registered as at least 7 on a 10-point VAS;** and has increased significantly from the baseline value; **<u>and</u>**
- The pain is reproduced at a pressure of ***less than 50 psi*** above opening pressure; **<u>and</u>**
- **Stimulation of at least one adjacent disc does not produce pain at all.**

If the patient does not qualify using the criteria above, then the discogram should be considered negative. The VAS score prior to the discogram should be taken into account when interpreting the VAS score reported by the patient during the discogram.

Time Parameters for provocation discography are as follows:

- ❖ Frequency: One time only.

- ❖ Maximum Duration: Repeat Discography is rarely indicated.

7. The ALJ notes that if discography were contraindicated by the Guidelines, the Guidelines would flatly say so. Instead, the pertinent Guidelines devote 4 pages in 10-point type outlining the appropriate use of discograms, and the ALJ finds that Dr. Bee effectively "checked all the pertinent boxes" for Preconditions under iii A) through E). Dr. Bee also noted that the discogram was "positive", according to the four criteria listed in in vii A) of the Guidelines, with the partial exception of the pressure required to produce the pain at L4-L5 level. By all accounts, L5-S1 is the worse of the two levels at issue.

8. The Medical Treatment Guidelines are also reproduced in their entirety regarding the appropriateness of a spinal fusion surgery, with ***emphasis added*** as noted:

4. SPINAL FUSION (USUALLY COMBINED WITH DECOMPRESSION):

b. **Description:** Use of bone grafts, sometimes combined with instrumentation, to produce a rigid connection between two or more adjacent vertebrae.

c. **Complications:** Complications include instrumentation failure, bone graft donor, site pain, superficial infection, deep wound infection, and graft extrusion. There is an increased likelihood of complications with instrumented fusion, although the majority of them are minor. There is some evidence that morbid obesity increases hospital length of stay, mortality and postoperative complications of spinal fusion surgery and results in concomitant increases in cost. Fusion can accelerate adjacent level disease. In one study, more than 1/3 of patients required surgery at an adjacent level by ten years. Refer to the following recombinant human bone morphogenetic protein section for complications from their use.

d. **Surgical Indications:** **A *timely* decision-making process is recommended** when considering patients for possible fusion. The treatment for some patients with lumbar fractures may be immediate fusion. For chronic low back problems, fusion should not be performed within the first five months of symptoms, except for fracture, dislocation, or for some patients with functional loss due to stenosis and instability.

One study of lumbar fusion outcomes in a population of workers compensation patients showed that complications occurred in 36% of patients with a 26% reoperation rate. Only 26% of patients returned to work while 67% of non-operated case returned to work however, it is not clear that severity was fully controlled for. Of the patients with lumbar fusion the following predicted non-return to work: daily morphine usage above 25MEQ 90 days post-surgery, reoperation, complications from surgery, and days off work prior to surgery. Another study of workers compensation patients and others on government funded programs (Social Security Disability Insurance (SSDI), Medicaid and Medicare age below 50 years) found that workers compensation (WC) patients continued to have significantly less benefit for relief of leg and back pain and

lesser benefits on the Oswestry Disability Index than other patients, both controls and others on government programs. The American Pain Society Guidelines note that less than half of patients with degenerative changes treated by fusion experience no pain or only sporadic pain, only a slight restriction in function and occasional use of analgesics. Fusion outcomes are better for those with symptomatic stenosis and instability.

There is good evidence that decompression and fusion, with or without instrumentation, of lumbar stenosis with degenerative spondylolisthesis leads to better 2 year outcomes for patients whose symptoms are severe. However, patients who choose non-operative treatment can also expect their symptoms to improve with nonsurgical treatment, and non-operative treatment is acceptable if this is the patient preference. Physicians should consider this when advocating for surgical procedures in this population. To assure better outcomes fusions should only be performed on those who meet the indications below.

There is some evidence that provocative discography, facet joint blocks and temporary external transpedicular fixation do not adequately screen patients with nonspecific low back pain for fusion success. The tests tend to be sensitive but not specific.

In early studies of patients with spondylolisthesis undergoing decompression with or without instrumentation the relationship between a solid radiographic fusion and a good clinical outcome was not apparent. However, a later follow-up of the same population showed that 86% of the patients with a solid fusion had good to excellent clinical outcomes, compared to only 56% of patients who had a pseudarthrosis. There remains uncertainty concerning the optimal imaging method to detect a pseudarthrosis, with controversy about the amount of motion on flexion-extension films which indicate that a solid fusion has been achieved, and whether the information to be gained from a thin-cut CT justifies the radiation dose associated with that form of imaging. This guideline does not make a recommendation on the clinical significance of fusion detected by any form of imaging.

There is some evidence that fusion is likely to have a higher beneficial effect compared to multidisciplinary rehabilitation for patients with isthmic spondylolisthesis, as differentiated from those without the condition who suffered from chronic low back pain.

There is good evidence that intensive exercise for approximately 25 hours per week for four weeks, combined with cognitive interventions emphasizing the benefits of maintaining usual activity, produces functional results similar to those of posterolateral fusion in patients with chronic non-radicular back pain and no stenosis or instability after one year. *This population may not reflect the workers compensation population as there is frequently little access to intensive rehabilitation programs. There is some evidence that lumbar fusion produces better* ***symptomatic and functional results*** *in patients with chronic non-radicular pain when* ***several months of conservative treatment have not produced*** *a satisfactory outcome.* This population may better reflect the injured worker in Colorado. Fusions associated with decompression are more likely to reduce leg pain in the presence of stenosis.

The effect of comorbidities on surgical outcomes should be considered and discussed with the patient before proceeding with complex spinal surgery. There is some evidence that morbid obesity increases hospital length of stay, mortality, and postoperative complications after spinal fusion surgery, with concomitant

increases in hospital costs. Another similar study did not find increased hospital stays but did show an increased cost and higher rates of non-routine discharges and transfusions for obese and morbidly obese patients. A third study of spinal fusion and metabolic syndrome found higher hospital charges, higher rates of non-routine discharges and increased rates of major life-threatening complications.

Informed decision making should be documented for all invasive procedures. This must include a thorough discussion of the pros and cons of the procedure and the possible complications as well as the natural history of the identified diagnosis. The purpose of spinal injections, as well as surgery, is to facilitate active therapy by providing short-term relief through reduction of pain. Since most patients with these conditions will improve significantly over time, without invasive interventions, patients must be able to make well-informed decisions regarding their treatment.

i. Use Recombinant Human Bone Morphogenetic Protein (rhBMP-2) in fusions**:** A member of a family of cytokines capable of inducing bone formation. It is produced from genetically modified cell lines using molecular cloning techniques. At the time of this guideline revision, rhBMP-2 is FDA approved for use in anterior lumbar interbody fusion (ALIF) at one level from L4-S1 in a skeletally mature patient and is used with a carrier, such as a collagen sponge or other matrix, and a cage. There is some evidence that anterior interbody cage fusion using rhBMP-2 results in shorter operative time compared with the use of iliac crest bone autograft. Minor pain at the iliac crest donor site may persist for 24 months or longer in approximately 30% of patients who undergo an autograft procedure, although local bone graft can also be used for single level fusions. RhBMP-2 avoids the need for harvesting iliac crest donor bone and can therefore, avoid this complication of persistent pain. Despite this, there is good evidence that rhBMP has no clinically important advantage over bone graft for anterior lumbar interbody fusion or posterior lumbar fusion.

   There is a potential for patients to develop sensitizing or blocking antibodies to rhBMP-2 or to the absorbable collagen sponge. The long-term effects are unknown. The rhBMP-2 used with the interbody fusion device is contraindicated for patients with a known hypersensitivity to Recombinant Human Bone Morphogenetic Protein -2, bovine type 1 collagen, or to other components of the formulation. Use of rhBMP-2 outside the anterior cage may carry a risk of swelling and ectopic bone formation, which can encroach on neurovascular structures. One study noted a higher incidence of retrograde ejaculation in ALIF cases using rhBMP-2.

   One study has reported increased neurological compromise when rhBMP was used for posterior interbody fusion or transforaminal lumbar interbody fusion. Another systematic review of rhBMP for posterior interbody fusions, posterior lumbar interbody fusion and transforaminal lumbar interbody fusion, noted appreciable rates of complications including heterotopic ossification within the epidural space or neuroforamina, postoperative radiculitis and endplate osteolyosis with interbody subsidence. At the time of this guideline revision, it is still not FDA approved for posterior interbody fusion use and considered investigational. These results should be considered prior to its use. There is insufficient information to form a recommendation with

instrumentation other than the cage specifically designed for anterior procedures. If the FDA approves its use for other operative approaches, prior authorization is required. The patient must meet all indications on the device manufacturer's list and have no contraindications. The formation of exuberant or ectopic bone growth at the upper levels (L_2–L_4) may have a deleterious impact on certain neurovascular structures, such as the aorta and sympathetic nerve chain. There are also reports of osteoclastic activity with the use of rhBMP-2. One follow-up study noted bone resorption after transforaminal lumbar interbody fusion with rhBMP-2 at a moderate or severe level in 49% of patients treated with or without a cage. This can also result in worsening back pain in the first 3 months after the procedure. However early osteolyosis can resolve.

e. **Diagnostic Indications**: Diagnostic indications for spinal fusion may include the following:

viii. Neural Arch Defect usually with stenosis or instability**:** Spondylolytic spondylolisthesis, congenital unilateral neural arch hypoplasia. It should be noted that the highest level of success for spinal fusions is when spondylolisthesis grade 2 or higher is present.

ix. Segmental Instability**:** Excessive motion, as in degenerative spondylolisthesis 4mm or greater, surgically induced segmental instability.

x. Primary Mechanical Back Pain/Functional Spinal Unit Failure**:** Multiple pain generators objectively involving two or more of the following: (a) internal disc disruption (poor success rate if more than one disc involved), (b) painful motion segment, as in **annular tears,** (c) disc resorption, (d) facet syndrome, and/or (e) ligamentous tear. Because surgical outcomes are less successful when there is neither stenosis nor instability, the requirements for pre-operative indications must be strictly adhered to for this category of patients.

xi. Revision surgery for failed previous operation(s) if significant functional gains are anticipated.

xii. Other diagnoses: Infection, tumor, or deformity of the lumbosacral spine that cause intractable pain, neurological deficit, and/or functional disability.

f. **Pre-operative Surgical Indications:** Required pre-operative clinical surgical indications for spinal fusion include all of the following:

i. ***All pain generators are adequately defined and treated;*** **and**

ii. ***All physical medicine and manual therapy interventions are completed;*** **and**

iii. X-ray, MRI, or CT myelography demonstrate spinal **stenosis** with instability or disc pathology, requiring decompression that may surgically induce segmental instability or a ***positive discogram;*** **and**

iv. ***Spine pathology is limited to two levels***; **and**

v. **Psychosocial evaluation** with confounding issues addressed; (required for all cases except those with degenerative spondylolisthesis with persistent claudication or radicular leg pain with neurologic signs); **and**

vi. For any potential fusion surgery, it is recommended that the injured worker ***refrain from smoking*** for at least six weeks prior to surgery and during the period of fusion healing. Because smokers have a higher risk of non-union and higher post-operative costs, it is recommended that insurers cover a smoking cessation program peri-operatively.

g. **Operative Treatment:** Operative procedures may include: (a) Intertransverse fusion often with pedicle screws; (b) Anterior fusion (with or without rhBMP-2) – generally used for component of discogenic pain where there is no significant radicular component requiring decompression; (c) Posterior interbody fusion – generally used for component of discogenic pain where posterior decompression for radicular symptoms is also performed; or (d) Anterior/posterior (360°) fusion – most commonly seen in unstable or potentially unstable situations or non-union of a previous fusion. Iliac crest bone grafts do not appear to result in increased complications, reoperation or patient dissatisfaction.

h. **Post-Operative Treatment:** An individualized rehabilitation program based upon communication between the surgeon and the therapist and using the therapies as outlined in Section F. Therapeutic Procedures Non-Operative. In all cases, communication between the physician and therapist is important to the timing of exercise progressions. There is some evidence that it is appropriate to defer active rehabilitation until 12 weeks as groups beginning at 6 week had worse outcomes. Post-operative active treatment will frequently require a repeat of the therapy sessions previously ordered. The implementation of a gentle aerobic reconditioning program (e.g., walking), and back education within the first post-operative week is appropriate in uncomplicated post-surgical cases. Some patients may benefit from several occupational therapy visits to improve performance of ADLs. Participation in an active therapy program that includes core stabilization, strengthening, and endurance is recommended to be initiated once the fusion is solid and without complication. If it is performed, care should be taken not to overly mobilize the section above and below the fusion at that time. The goals of the therapy program should include instruction in a long-term home based exercise program (refer to F.12. Therapy – Active).

i. **Return to Work**: Barring complications, patients responding favorably to spinal fusion may be able to:

- Return to sedentary-to-light work within six to twelve weeks post-operatively;
- Light-to-medium work within six to nine months post-operatively;
- Medium-to-medium/heavy work within six to twelve months post-operatively; and
- Heavy-to-very-heavy post-operative labor should be considered for vocational assessment as soon as reasonable restrictions can be predicted.

The practitioner should release the patient with specific physical restrictions and should obtain a clear job description from the employer if necessary. Once an

> injured worker is off work greater than six months, the functional prognosis with or without fusion becomes guarded for that individual.

9. Despite Dr. Bee's acknowledgement that he was not specifically trying to check all the boxes according to the Guidelines' 'Pre-operative Surgical Indications', he has in essence done so anyway. The L4-L5 and L5-S1 levels of the spine (two levels only) are likely the pain generators as evidenced by the imaging studies, the opinions Drs. Bee and Castrejon, the positive EMG, and the diagnostic response at the S1 level to the ESI performed by Dr. Ford. All potential other medical interventions to cure or alleviate Claimant from the effects of his injuries have been exhausted, aside from the requested fusion. Claimant is also a non-smoker.

10. The December 9, 2013 MRI showed disc bulging at L5-S1 affecting the right nerve root more than the left. Claimant underwent psychological treatment and counseling with Dr. Herman Staudenmayer and Mr. William Beaver. Claimant underwent physical therapy that failed to provide any lasting relief. Claimant underwent an ESI that provided a diagnostic response. Claimant underwent an EMG that demonstrated findings consistent with an S1 radiculopathy. A discogram, performed by a physician-not associated with Dr. Bee's practice- provided positive results at L4-5 and L5-S1 with a negative control at L3-4, as anticipated by Dr. Bee. The post-CT discogram revealed a grade four annular tear-arguably an indicator of instability-in addition to credible complaints of intense, chronic pain.

11. To the extent that it might still be found that Dr. Bee and Castrejon have deviated from the Guidelines, the ALJ finds, by a preponderance of the evidence, that any such deviation is reasonable and necessary to cure Claimant of the effects of his work injury. As it stands now, and has for several years, Claimant is effectively disabled from the pain. The ALJ certainly finds the reports, testimony, and opinions of Dr. Castro and Dr. Fall to be sincerely and professionally rendered. However, the opinions of Dr. Castrejon and Dr. Bee are found to me more persuasive in this instance. Time will tell if this procedure proves to be successful in reducing Claimant's pain by at least 50%, and thereby restoring additional function, but Claimant has proven that he deserves the chance to find out. He has waited long enough.

ORDER

It is therefore Ordered that:

1. Respondents shall authorize and pay for the two-level L4-S1 fusion surgery as proposed by Dr. Bee, as well as all costs and treatment associated with it.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 30, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

Exhibit 9 was withdrawn. The Claimant attached her summary of update wage records to her Post-Hearing Reply Brief to Respondents' Post-Hearing Answer Respondents' Post-Hearing Answer Brief. Respondents' Exhibits A through LL were admitted into evidence, without objection.

Before the last session of the hearing, Claimant filed an interim brief on February 19, 2018, Respondents filed an interim answer brief on the same date, and on February 21, 2018, Claimant filed an interim reply brief on February 21, 2018. At the conclusion of the hearing, the ALJ ordered post-hearing briefs. Claimant's post-hearing opening brief was filed on April 20, 2018. Respondents' post hearing answer brief was filed on April 25, 2018. Claimant's post-hearing reply brief was filed on April 27, 2018 and referred to the ALJ on April 30, 2018, at which time the matter was deemed submitted for decision.

ISSUES

The designated issues concern the Claimant's Petition to Re-Open her claim, dated January 9, 2018, based upon an alleged change or worsening of condition, allegedly attributed to an admitted July 18, 2016 right knee injury; or, in the alternative, for temporary disability benefits, which were denied in the latest Final Admission of Liability (FAL), dated June 13, 2017 and timely objected to by the Claimant on July 10, 2017.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. In the final analysis, both parties did not accept offered stipulations by the opposing party.

2. On June 13, 2017, the Respondents filed an FAL, admitting for a date of maximum medical improvement (MMI) date of November 8, 2016; for zero permanent partial disability (PPD) benefits; denying temporary disability benefits; and, admitting for causally related and reasonably necessary post-MMI medical care and treatment. The Claimant filed a timely objection to the latest FAL on July 10, 2017.

The Injury and the Treatment

3. On July 18, 2016, the Claimant walked into the handle of a floor safe, and the handle poked her right knee below her kneecap. She did not fall, and she did not

injure any other part of her body at that time. She timely reported the incident to the Employer and she was sent to HealthOne. On July 19, 2016, Christian Updike, M.D., authorized treating physician (ATP) evaluated the Claimant, and noted that she had no visible sign of injury. On September 8, 2016, Dr. Updike's exam findings documented no warmth, redness or swelling; diffuse nonfocal tenderness, and questionable effort.

4. On November 4, 2016, Barry Ogin, M.D., a pain management specialist, noted that the Claimant had a possible somatization disorder and her physical exam was benign other than hypersensitivity. On November 8, 2016, ATP Dr. Updike placed the Claimant at MMI and reported that she had symptom magnification and delayed recovery concerns.

5. On February 22, 2017, the Claimant returned to Dr. Ogin for a maintenance care evaluation. She reported allodynia and altered sensation diffusely throughout her right leg anteriorly and posteriorly into her calf, foot and ankle. Dr. Ogin's impression was possible neuropathic pain/CRPS (chronic regional pain syndrome) with minimal objective findings of anything, and possible somatization disorder. Dr. Ogin suggested moving ahead with autonomic testing to fully rule out CRPS. He further indicated that he suspected this would be normal. He postulated that even if the testing was normal, the Claimant would be resistant to the suggestion that her pain is nonphysical.

Division Independent Medical Examination (DIME) of Mark Winslow, M.D.

6. On March 21, 2017, Dr. Winslow evaluated the Claimant for a DIME. He noted that while the Claimant was complaining of severe pain, there was no objective findings, no swelling, no redness, no skin color changes, no palpable temperature changes, her range of motion extension was full, as was her flexion. He commented that the Claimant seems to magnify her symptoms she had in the past and is currently hypervigilant regarding her symptoms and reactions to her injuries. Dr. Winslow's ultimate opinions were that the Claimant did not have CRPS, she had at most a right knee contusion, she was at MMI with no impairment, and no work restrictions.

7. Although maintenance care was admitted, the Claimant did not follow-up with Dr. Updike or Dr. Ogin. Instead, she shopped for her own physicians, and chose to pursue care outside of the worker's compensation system. At hearing, the Claimant admitted that she did not provide any of her new physicians with any of her worker's compensation claim related medical records.

8. On September 20, 2017, Simon Oh, M.D., evaluated the Claimant. Dr. Oh indicated there were some features that suggested CRPRS. He did not render a definitive diagnosis. He referred the Claimant to a pain specialist, apparently unaware that the Claimant had already been under the care of Dr. Ogin, who is a pain specialist. On November 27, 2017, the Claimant returned to Dr. Ogin for a maintenance visit. Her

pain was reported at 8/10, the same as it was in February 2017 before the alleged worsening. Dr. Ogin indicated that here was a remote possibility that the Claimant had a neuropathic component to her pain. He indicated that autonomic testing and thermography was warranted and reasonable, and that if the Claimant's testing was negative, he would not have further recommendations.

10. John Raschbacher, M.D., performed a physician advisor review of the request for autonomic testing, and thermography. Dr. Raschbacher reviewed the DIME report, and he was of the opinion that the CRPS testing was not reasonably necessary. Respondents' counsel wrote to Dr. Ogin and provided him with the Claimant's prior medical records showing hypersensitivity, as well as the MMI report from Dr. Updike, and the DIME report from Dr. Winslow. Dr. Ogin was asked to review these records, and his own medical file, and provide updated opinions.

11. In a response report, dated December 13, 2017, Dr. Ogin initially made it clear that "I have seen no clinical evidence of CRPS and I remain concerned about potential nonorganic cause of her knee pain". He then reviewed the additional records, commenting in his report about the findings and opinions of the other providers. Dr. Ogin then rendered the following opinion:

> In response to your questions and concerns, I do find these additional records compelling. He prior history of pain complaints with non- physiologic findings and hypersensitivity do indicate a pattern of chronic pain with probably underlying psychological barriers or other nonorganic factors. She had a minimal injury, and has failed to improve despite extensive treatment to date. I would anticipate that even if she had CRPS, she would have some improvement with range of motion and medication management. I would not expect the debility she is reporting. At this point, I do agree with Dr. Winslow that ongoing treatment and diagnostic testing will likely be unrevealing, and continued testing and focus on the patient's pain could adversely affect her outcome. Constantly focusing on organic pain generators (may) divert attention away from underlying psychological contributors. I would, therefore, withdraw my request for additional diagnostic testing for CRPS. Given this, I do not feel that this testing is medically necessary or reasonable or directly attributable to her occupational injury of 07/18/16.

Re-Opening

12. The Claimant filed a Petition to Re-Open, dated January 9, 2018, alleging a changed condition, with the attached report of Shannon Bock, PA-C (Certified Physician's Assistant, co-signed by Paul S. Leo, M.D., noting the Claimant's complaints of severe knee pain. There is no indication of a baseline of when and if the Claimant's condition worsened nor is there any indication that PA-C Bock and Dr. Leo were made aware of the Claimant's previous medical history. Therefore, the ALJ finds the report is neither persuasive nor credible on the issue of changed condition.

Ultimate Findings

13. The opinions of ATPs Dr. Updike and Ogin, DIME Dr. Winslow and Independent Physician Reviewer Dr. Raschbacher are highly persuasive and credible. They outweigh the conjecture of Dr. Oh, whom the Claimant sought on her own—without making Dr. Oh aware of her previous medical history. Indeed, the opinions of the ATPs and the DIME are virtually undisputed that the Claimant sustained a minor injury On July 18, 2016 and has continued to exhibit symptom magnification behaviors ever since. Other than the Claimant's testimony and the implications of Dr. Oh and Dr. Leo, there is no persuasive evidence that the Claimant did **not** reach MMI on November 8, 2016. There is no indication of a baseline of when and if the Claimant's condition worsened nor is there any indication that PA-C Bock and Dr. Leo were made aware of the Claimant's previous medical history. Therefore, the ALJ finds their report is neither persuasive nor credible on the issue of changed condition.

14. The ALJ makes a rational choice, based on substantial evidence, to accept the opinions of ATPs Updike and Ogin, DIME Dr. Winslow and Independent Physician Reviewer Dr. Raschbacher and to reject any opinions or implications to the contrary.

15. Based on the totality of the evidence, the ALJ finds that the Claimant has failed to prove, by a preponderance of the evidence that she did **not** reach MMI on November 8, 2016; that her permanent partial disability (PPD) exceeded zero percent; and, that her condition changed or worsened since she was declared to be at MMI. Also, she has not overcome the DIME of Dr. Winslow by clear and convincing evidence, in response to her timely objection to the FAL, however, this proposition is moot in light of the Claimant's Petition to Re-Open, dated January 8, 2018, which the Claimant has failed to sustain by preponderant evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-Contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the opinions of ATPs Dr. Updike and Ogin, DIME Dr. Winslow and Independent Physician Reviewer Dr. Raschbacher were highly persuasive and credible. They outweighed the conjecture of Dr. Oh, whom the Claimant sought on her own—without making Dr. Oh aware of her previous medical

history. Indeed, the opinions of the ATPs and the DIME were virtually undisputed that the Claimant sustained a minor injury on July 18, 2016 and continued to exhibit symptom magnification behaviors, without significant changes thereafter. Other than the Claimant's testimony and Dr. Oh's and Dr. Leo's co-signed implications, there was no evidence that Claimant did **not** reach MMI on November 8, 2016. There was no indication of a baseline of when and if the Claimant's condition worsened nor was there any indication that PA-C Bock and Dr. Leo were made aware of the Claimant's previous medical history. Therefore, their report was neither persuasive nor credible on the issue of changed condition.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of ATPs Updike and Ogin, DIME Dr.Winslow and Independent Physician Reviewer Dr. Raschbacher and to reject any opinions or implications to the contrary.

Re-Opening

c. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954

P.2d 637 (Colo. App. 1997). Where a claimant seeks to re-open based on a worsened condition, she must demonstrate a change in condition that is "causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985). It is well established that if an industrial injury leaves the body in a weakened condition, and that weakened condition is a proximate cause of further injury to the injured worker. The additional injury is a compensable consequence of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). Where the actual cause of symptoms is not discovered until after surgery and after a FAL had been filed, based on a DIME opinion of MMI, the Court held that a mutual mistake of fact concerning the claimant's condition was made at the time the DIME placed the claimant at MMI was a n appropriate ground for re-opening. *See Berg. V. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). As found, based on the totality of the evidence, the Claimant has failed to prove, by a preponderance of the evidence that she did **not** reach MMI on November 8, 2016; that her permanent partial disability (PPD) exceeded zero percent; or, that her condition changed or worsened since she was declared to be at MMI. Also, she did not overcome the DIME of Dr. Winslow by clear and convincing evidence, in response to her timely objection to the FAL, however, this proposition is moot in light of the Claimant's Petition to Re-Open, dated January 8, 2018, which the Claimant failed to sustain by preponderant evidence.

Overcoming the DIME of Dr. Winslow

d. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To

overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Claimant failed to overcome the DIME of Dr. Winslow by clear and convincing evidence, in response to her timely objection to the FAL, however, this proposition is moot in light of the Claimant's Petition to Re-Open, dated January 8, 2018, which the Claimant failed to sustain by preponderant evidence.

Burden of Proof on Re-Opening

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to additional benefits and to a re-opening of her claim based on a change of condition.. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to satisfy her burden of proof with respect to re-opening.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's Petition to Re-Open, dated January 8, 2018, is hereby denied and dismissed.

B. The Claimant having failed to overcome the Division Independent Medical Examination opinions of Mark Winslow, M.D., that the Claimant reached maximum medical improvement on November 8, 2016, with zero permanent partial improvement, the latest Final Admission of Liability, dated June 13, 2017, is hereby affirmed and adopted by reference as if fully restates herein.

DATED this 30 day of May 2018.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury to his right shoulder on October 4, 2017.

II. If Claimant established that he suffered a compensable right shoulder injury, whether he also proved by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was born on November 18, 1950 and was 67 years of age at the time of the hearing.

2. Claimant was hired on January 16, 2017, to work for Respondent-Employer. Claimant's job title was that of customer service representative. He worked at a call center answering calls from clients of Employer.

3. Claimant testified at approximately 11:00 a.m. on October 4, 2017, he went to the bathroom and, that upon attempting to exit while opening the door inward with his right hand/arm he heard or felt his shoulder "pop." According to Claimant, the door would stick making it difficult to pull open.

4. Claimant testified he did not think much of the popping. He thought he pulled a muscle. After the alleged incident, Claimant went into a coaching meeting with his supervisor, Brian Roe. After the coaching meeting, Claimant testified that he asked Mr. Roe if he had any Tylenol for pain, as he believed he had just pulled a muscle. Mr. Roe did not have any Tylenol.

5. Claimant testified on October 6, 2017 he again went to the same bathroom and had a similar experience. He testified he told Melissa Hicks about the door sticking and asked her to have maintenance adjust it.

6. John Coroneos is the general manager for Employer's call center on the third floor. Mr. Coroneos testified that Conduent Business Services took over for Xerox Business Services and provides customer service for a large international phone carrier.

7. Mr. Coroneos began his job October 2, 2017. He reported that he first became aware of the claim was when he received a letter from Claimant's attorney. According to Mr. Coroneos, the letter was received at the end of October 2017.

8. Mr. Coroneos testified there are two sets of restrooms on the third floor of Employer's office building. He reportedly used these restrooms on a regular basis. Mr. Coroneos testified he had no problems with the door that Claimant alleged, "stuck."

9. Melissa Hicks testified she has worked for Respondent-Employer for a little over two years in total, one year for Conduent and one year for Xerox. Ms. Hicks has been a team lead for the past 10 months. Her job duties are to help supervise employees and handle escalated calls for service.

10. Ms. Hicks is familiar with Claimant as part of the customer service team. Ms. Hicks testified that Claimant approached her about the bathroom door sticking but during their conversation, he did not claim that he had injured his shoulder. Rather he only reported that his shoulder was sore.

11. Brian Roe testified at hearing that he has worked for Conduent/Xerox for four years and was Claimant's supervisor. Mr. Roe's job duties include coaching customer service representatives, maintaining reports regarding their performance and being aware of any state or federal laws or rules concerning human resource issues. Mr. Roe's normal workdays in October 2017 were Sunday through Thursday 9:00 a.m. to 6:30 p.m.

12. Mr. Roe testified that on October 4, 2017, he had a regular weekly coaching meeting with Claimant. He testified that Claimant did not notify him of a work-related injury to his shoulder during that meeting. Mr. Roe testified that if Claimant had reported a work related injury during this meeting, he would have made sure the appropriate paperwork was filed to address the injury. Mr. Roe recalled Claimant asking him if he had any Tylenol because his (Claimant's) shoulder hurt. According to Mr. Roe, Claimant did not tell him that his shoulder pain was caused by an injury at work.

13. On October 16, 2017, Mr. Roe testified that Claimant sent him a text stating that he had hurt his shoulder while exiting the bathroom as he was pulling on the door on October 4, 2017. Claimant indicated that because he simply thought it was only a pulled muscle, he did not report it. Claimant also noted that since his shoulder had not improved by October 16, 2017, he felt there was something more going on. He requested that Mr. Roe begin the process of starting a workers' compensation claim. Claimant inquired in that text message as to where he should seek medical treatment. According to Mr. Roe, he informed Claimant that since he had not provided written notice of the injury in a timely fashion, i.e. four days, he was not covered by workers compensation and was barred from making a claim. Mr. Roe testified that he told Claimant that he should seek treatment with his personal physician. Mr. Roe testified that he was not aware of the medical provider designation form providing Claimant a choice of medical providers with whom he could treat for work related injuries. Consequently, Claimant was not provided with a designated provider list. Mr. Roe admitted to his erroneous understanding of the reporting rules concerning Colorado workers' compensation claims. He testified that he based this erroneous belief on his understanding of the Colorado Workers' Compensation Rules, which were also posted at the jobsite, and similar information from prior employers for whom he had worked.

14. Claimant's primary care physicians/providers work at Davita Medical Group. Review of Claimant's records from Davita establish that after his alleged injury Claimant was seen at Davita on a number of occasions without ever mentioning his alleged shoulder injury occurring on October 4th or 6th. The Davita records indicate that after his alleged October 4th injury, Claimant sought care on October 12, 2017 at 9:00 a.m. Claimant was evaluated for osteoarthritis of the hand and gastritis on this date. The report from this visit is devoid of any reference to shoulder pain or any injury occurring October 4th or October 6th. Rather, review of the active problem list 1 through 18 as documented does not establish Claimant reporting an active problem with his right shoulder. Review of the physical exam establishes claimant's neck was supple. Review of the musculoskeletal examination establishes degenerative changes unchanged from previous. Review of a neurologic examination reveals no focal deficits.

15. It is specifically found the October 12, 2017 chart note does not support the alleged October 4, 2017 industrial injury nor, for that matter, a subsequent incident of October 6, 2017.

16. Claimant returned to Davita on October 16, 2017 again at 9:00 a.m. As noted above, this is the same day that Claimant reported that he suffered an injury to his shoulder, although he did not say what had happened only that it happened at work according to the attendance log. Again, review of the report from this date of visit is devoid of any reference to a shoulder injury. Indeed, the report indicates that Claimant was seen for acute otitis media, fever and nasal congestion. Claimant continued to report his health was good without a loss in interest in doing pleasurable things over the past two weeks. Under history of present illness, it indicates that, "[Claimant] here c/o sleeping a lot, cough that is productive that is "reddish brown. He reports fever, ST and congestion X 3 days. No one else has been ill. He is taking Nyquil which has helped." Review of the past medical history, this time documenting eight issues, does not establish a shoulder problem. Review of the physical examination section of the report under neck indicates: "neck: the neck was supple and the appearance of the neck was normal." It is specifically found complete review of the October 16, 2017 chart note does not support any injury to the right shoulder at work as alleged either 10 or 12 days previously.

17. Claimant returned to Davita on October 27, 2017 this time at 10:00 a.m. This time Claimant was being seen for "cramp and spasm." Under chief complaint is the following notation: 66 y/o m here for right leg cramps x1 day. Since 2:00 a.m., constant. Patient rates his health is good. The patient has had no loss of interest in doing pleasurable things over the past two weeks. Under active problems nine are listed, none of which reveal a right shoulder problem. Under review of systems, portion of the report is the following: "musculoskeletal no joint pain no joint swelling, cramps." Motor strength was noted to be "normal" in both upper and lower extremities and no neurologic deficits were documented. It is specifically found that the October 27, 2017 chart note does not support Claimant's report of an alleged industrial injury occurring either October 4 or October 6, 2017.

18. Claimant returned to Davita on November 16, 2017, with a continued complaint of "cramp and spasm." The chief complaint is noted as "66 y/o m here for 2 week f/u on labs and leg cramping. Patient rates his health is very good. The patient has had no loss of interest in doing pleasurable things over the past two weeks. Under Active Problems this time, 10 are listed. No active shoulder problem is listed. Although limb pain is noted, the ALJ finds this likely leg pain based upon Claimant's chief complaint and the balance of the physical examination findings. It is specifically found the November 16, 2017 chart note does not support Claimant's assertion that he suffered a right shoulder injury on either October 4 or October 6, 2017.

19. The first medical notation of the alleged incident in the Davita records is contained in a noted from a December 4, 2017 noted authored by Shireen Rudderow, M.D. In this noted Claimant reported that he "injured his shoulder when he pulled on a "stubborn bathroom door" on October 4, 2017 and "reinjured it on October 6th when he pulled on the same door." According to Claimant, it "[felt] like his shoulder is coming out of the socket." The report form this date of visit also indicates the following: "Here with 2 months right shoulder pain. State (sic) "took this long to get OK from work comp to be seen." Was pushing/pulling on jammed door, felt immediate pain in shoulder, and did report to supervisor. According to the report, Claimant tried icing, rest and Vicodin without much relief." As noted, none of Claimant's medical reports prior to December 4, 2017, contain any information regarding the reporting of an alleged shoulder injury nor Claimant's attempts to relieve the pain associated with one.

20. Claimant admitted that he saw his primary care physician for other non-work-related conditions during October and November 2017. According to Claimant, he did not tell those physicians about his shoulder pain because it was his understanding that they were not workers' compensation doctors. The ALJ finds Claimant's explanation for the absence of shoulder complaints in the medical record unpersuasive.

21. Claimant was evaluated in an IME setting by Eric O. Ridings, M.D. at the request of Respondents on February 19, 2018. Upon completion of a physical examination, Dr. Ridings opined that Claimant presentation was "most similar to that of someone with a severe . . . massive rotator cuff tear, with secondary right upper quadrant myofascial pain." According to Dr. Ridings the described MOI would be unlikely to cause a rotator cuff tear because the movement associated with pulling on the door would not be "expected to cause any abnormality of the glenohumeral joint itself." Dr. Ridings concluded that Claimant may have a rotator cuff tear but that tear did not occur as a consequence of pulling on the door as Claimant alleged. Consequently, Dr. Ridings opined that Claimant's shoulder complaints were not work related and further examination/treatment should occur outside the workers' compensation system.

22. Dr. Timothy Hall performed an IME on March 19, 2018 at the request of the Claimant. Dr. Hall's examination was very limited due to complaints of extreme pain. He was unable to make a diagnosis based on his examination without an MRI of the joint. He did note that when he saw Claimant, his pain encompassed the entire shoulder girdle, which according to Dr. Hall could have changed in nature and location since the original injury in October of 2017. Dr. Hall testified that the act of pulling open

the door and then stepping around the door would cause the shoulder joint to be in some abduction heading toward external rotation. According to Dr. Hall, this mechanism of injury (MOI) would involve the biceps tendon. Older individuals (the Claimant is 67 years old) in the same age group as the Claimant tend to have weak rotator cuff humeral head stabilizers. Dr. Hall testified that the maneuver of pulling the door towards him could have led to subluxation of the humeral head which could, in turn, lead to tendon tears. Dr. Hall explained that pulling weight toward oneself can stress the rotator cuff, can cause impingement and could cause ligament strain. He also explained that there is really no way to know for sure what is going on in the Claimant's shoulder because an MRI, which is the gold standard test to show internal shoulder pathology, has not been completed. Dr. Hall opined that an MRI Arthrogram would be even more helpful. Dr. Hall felt that the Claimant could have a rotator cuff tear or there could be other pathology present. Dr. Hall further opined that although Claimant's MOI is not common, considering he was using his non-dominant extremity in a position that compromises the shoulder joint, he felt the right shoulder pain is related to the October 4th and 6th bathroom door incidents. Dr. Hall opined that Claimant is left handed and injured his non-dominant right shoulder is relevant in this case because non-dominant extremities tend to be weaker, less coordinated and more vulnerable to injury.

23. Dr. Hall testified that he could not say whether Claimant had a rotator cuff tear in the absence of an MRI or arthrogram, although the fact that Claimant obtained relief with an injection supports a conclusion that something is going on within the shoulder joint. According to Dr. Hall, the shoulder joint is in its most vulnerable position and prone to injury when in abduction and external rotation. He described the MOI in this case as the arm being abducted to 90° and externally rotated in order to pull the door open after which Claimant walked around it. Dr. Hall testified that there is no better explanation to support Claimant symptoms.

24. Upon receipt of Dr. Hall's IME report, Dr. Ridings commented further regarding causation. In a reported dated transcribed March 24, 2018, Dr. Ridings opined that Dr. Hall's description of the cause and MOI in this case was "so general and vague that it is unhelpful." According to Dr. Ridings, "[u]nless the humerus is elevated, either because the arm is elevated to 90° or above or because some external force is pushing up on the humerus from below, such as when one falls on the elbow or on an outstretched hand, no 'impingement' is expected to occur." The ALJ infers from Dr. Ridings report and his subsequent testimony that Claimant never placed his arm/shoulder in a position where it could have been injured by pulling on the door in question.

25. Dr. Ridings testified that Claimant's physical examination supports a number of different diagnoses; however, his pain focused in the subacromial space strongly suggests the presence of a rotator cuff tear. According to Dr. Ridings, the muscles making up the rotator cuff are not involved with pulling a door open. Dr. Ridings explained that the shoulder would not be abducted to 90° to pull the door in question open unless Claimant was much lower (on his knees) than the handle of the

door, which he did not allude to. Moreover, Dr. Ridings noted that Claimant's described MOI would not involve the biceps tendon and there would be no impact on the humeral head causing impingement of the rotator cuff.

26. Pictures of the door in question were admitted into evidence. Review of those pictures persuades the ALJ that Claimant's arm would be extended and the shoulder slightly flexed as he was pulling the door open based upon the location of the door's handle. The suggestion that Claimant walked around the door after abducting the shoulder to 90° to pull the door open as explained by Dr. Hall is not convincing. Based upon the evidence presented, the ALJ finds the opinions of Dr. Ridings credible and persuasive. His opinions, particularly those touching upon the MOI and the musculature involved in producing the upper extremity movement necessary to pull the door open in this case are more persuasive than the contrary opinions of Dr. Hall.

27. Claimant has failed to meet his burden of proof to establish by a preponderance of the evidence that he sustained an injury to his right shoulder arising out of and in the course of his employment as a customer service representative for Employer. Because Claimant has failed to prove he suffered a compensable injury, this order does not address his entitlement to medical benefits further.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo.App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,*

8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201. In this case, the ALJ finds Claimant's testimony regarding the reason he delayed the reporting of his alleged injury unpersuasive. The ALJ agrees with Dr. Ridings that it makes no sense that Claimant, assuming he had a painful shoulder, would not at least mention his pain/symptoms during four visits to his primary care physician after his alleged injury whether those physicians would have treated the condition or not. The ALJ finds the lack of shoulder complaints during these visits coupled with normal upper extremity examination findings concerning and suggestive of a lack of any medical condition of the shoulder requiring treatment. Here, the persuasive evidence presented calls into question Claimant's assertion that he sustained a work related injury on October 4th and/or 6th.

D. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo.App. 1990) To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the medical record evidence coupled with pictures of the door in question support the opinions of Dr. Ridings that Claimant's described MOI probably did not cause his right shoulder complaints. As found, the contrary opinions expressed by Dr. Hall are not convincing.

E. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo.App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment

relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits, i.e. the scope of his employment relationship with Employer and during an activity to minister to his personal comfort, i.e. using the bathroom.[1] Regardless, the question of whether the alleged injury/condition, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury can be deemed compensable.

G. The "arising out of" test is one of causation. There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* A causal connection exists if it is demonstrated that the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Marie Eslinger v. Kit Carson County Memorial Hospital*, W.C. No. 4-638-306 (ICAO, January 10, 2006)(citing *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). This includes discretionary activities on the part of the employee that are devoid of any duty component, and are unrelated to any specific benefit to the employer*. Id., citing Boulder v. Streeb, supra*; *L.E.L. Construction v. Goode,* 849 P.2d 876 (Colo. App. 1992), rev'd on other grounds 867 P.2d 875 (Colo. 1994). As noted, actions taken to minister to a worker's personal comfort, such as using the restroom have been held to be incidental to employment. Nonetheless, there must be a causal connection between Claimants shoulder condition and the act of pulling on the bathroom door for the alleged injury in this case to be compensable. The fact that Claimant may have experienced an onset of pain while engaged in an activity connected to his personal comfort does not mean that he sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

H. Under the Workers' Compensation Act ("Act") there is a distinction between the terms accident and injury. An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undesigned occurrence." *Section 8-40-201(1), C.R.S.* In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable" injury is one that requires medical treatment or causes disability. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an

[1] Colorado recognizes the "personal comfort doctrine" which holds that actions such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water and keeping warm have been held to be incidental to employment. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 22-23 (Colo. 1988).

industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S. While the ALJ is convinced that Claimant likely has pain in his shoulder, the evidence presented is persuasive of the fact that his shoulder pain/condition is probably not related to pulling on the bathroom door. Here, the ALJ has carefully considered Claimant's testimony and has weighed it against the balance of the competing evidence, including the medical records presented, the pictures of the door in question and the testimony of Dr. Ridings. Based upon that review, ALJ finds that Claimant's testimony regarding the cause of his shoulder pain cannot be reconciled with the more persuasive competing record evidence, including the testimony of Dr. Ridings that the described MOI is unlikely to cause injury to the shoulder.

I. Given the distinction between the terms "accident" and "injury", an employee can experience symptoms, including pain from an "accident" at work without sustaining a compensable "injury." This is true even when the employee is clearly in the scope of their employment. See *Aragon*, supra, (evidence supported ultimate finding that no injury occurred even where the claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where Claimant involved in motor vehicle accident without resultant injuries, no compensable injury occurred). As explained by a Panel of the Industrial Claims Appeals Office in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), a coincidental correlation between a claimant's work and his symptoms does not mean there is a causal connection between a claimant's injury and his/her work. To the contrary, as noted by the Panel in *Scully* "correlation is not causation." Simply put, there is no presumption that an employee found injured on the employer's premises is presumably injured from something arising out of his work. *See Finn v. Industrial Commission,* 437 P.2d 542, 544 (Colo. 1968). While the evidence presented supports that Claimant's use of the bathroom caused him to pull on the door handle, it does not support a nexus between his shoulder pain, for which a formal diagnosis remains elusive, and pulling on the handle. Although the evidence in this case supports that an incident occurred, it does not persuasively support a conclusion that the incident caused Claimant's shoulder pain and his need for treatment or a disability. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between his employment and his shoulder condition for which medical treatment benefits are sought. *§ 8-43-201, C.R.S.*; *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish he suffered a compensable "injury", his claim must be denied and dismissed and his remaining claims need not be addressed further.

ORDER

It is therefore ordered that:

1. Claimant claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 30, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, suite 810
Colorado Springs, CO 80906

ISSUES

- Did Respondent prove by a preponderance of the evidence Claimant was responsible for termination of his employment?

- The parties stipulated that if Claimant was not responsible for termination, he was disabled by the admitted June 15, 2017 injury and entitled to TTD benefits from June 16, 2017 through August 6, 2017, and from October 24, 2017 ongoing.

- The parties stipulated that Claimant's admitted average weekly wage is $252.27, and reserved the option to adjust the AWW in the future, if appropriate.

FINDINGS OF FACT

1. Claimant worked episodically for Employer as a day laborer. On June 15, 2017 he injured his right leg while operating a pallet jack. His right foot and ankle were crushed between the pallet jack and a steel beam, causing bilateral malleolar fractures.

2. Claimant was transported by ambulance to the UCHealth emergency department where he was diagnosed with bimalleolar fractures and a right ankle sprain. He was placed in a 3-way splint and given crutches, prescribed Percocet, and discharged with instructions to follow-up with his PCP.

3. A few days after the accident, Claimant smoked marijuana. There is no credible or persuasive evidence that Claimant had used marijuana before the accident or was under the influence of marijuana at the time of the accident.

4. In the days after the accident, Claimant made several attempts to contact Employer regarding treatment for his injuries. He eventually spoke with an employer representative who directed him to Colorado Occupational Medical Partners. Employer also instructed Claimant to undergo a urine drug screen in accordance with its established policy regarding post-accident drug testing.

5. Claimant saw Dr. Matthew Lugliani at Colorado Occupational Medical Partners on June 19, 2017. Dr. Lugliani restricted Claimant from all work and recommended he see an orthopedic surgeon "as soon as possible." Also on June 19, Claimant provided a urine sample for a drug screen per Employer's instructions.

6. Claimant saw Dr. Melissa Gorman at the UCHealth orthopedic trauma clinic on June 22, 2017, who recommended surgery to stabilize the ankle. Dr. Gorman performed a right ankle open reduction with internal fixation on June 28, 2017.

7. Claimant's drug screen came back positive for marijuana. Employer has a zero-tolerance policy regarding positive drug tests, including marijuana.[1] After receiving the results of Claimant's drug test, Employer sent Claimant a "Termination Notice" dated July 6, 2017.

8. Claimant knew he was subject to drug testing after an accident and could be terminated for failing a drug test.

9. At the time of his accident, Claimant had been working for Employer off and on for approximately two years. His employment contract contains several unique features owing to his status as a day laborer. Claimant's employment is entirely at will, and requires a mutual offer and acceptance for each day of work. Claimant is hired and fired each day he works for Employer. The most salient contract provisions are contained in paragraph 9 of the document entitled Employment Terms & Acknowledgments:

> I understand and agree that I am not required to work or register my availability to work for the Company on any particular day. If I want to work, I may register my availability to work by text, phone, or by visiting a branch. . . . **I understand that I am not employed just because I register availability to work. I am not employed until I actually begin working a job assignment, and my employment with the Company is terminated at the end of each day**. (Emphasis added).

10. As Claimant credibly testified, Employer makes it clear there is no ongoing employment relationship beyond any particular day's assignment. Claimant is paid at the end of each day and has no obligation to return for any future assignments. Nor is Employer obliged to offer him additional work if he requests it. Even if a particular job to which Claimant was assigned needs to be staffed for longer than one day, Claimant may or may not be reassigned to that job the following day.

11. Respondent failed to prove Claimant was responsible for termination of his employment. The plain language of the employment contract provides that his employment was terminated at the end of the workday on June 15, 2017, before he used marijuana or took the drug test. As a result, there was no causal connection between the failed drug test, and his termination.

CONCLUSIONS OF LAW

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work.

[1] Although Claimant was employed in Colorado, Employer follows federal law regarding controlled substances.

Culver v. Ace Electric, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Respondent stipulated that Claimant was "disabled" and left work due to the injury, but assert TTD is barred because he was terminated for cause (*i.e.*, failing the drug screen).

Section 8-42-103(1)(g) provides that a claimant who might otherwise be considered temporarily disabled is not eligible for TTD benefits if he or she was "responsible for termination of employment." *Kerstiens v. All American Four Wheel Drive*, W.C. No. 4-865-825-04 (August 1, 2013).

The respondents must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The mere fact that the employer discharged the claimant in accordance with its personnel rules does not automatically establish that the claimant acted volitionally or exercised control over the circumstances of the termination. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. App. 1987). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondent failed to prove that Claimant was responsible for the termination of his employment. The phrase "responsible for termination of employment" necessarily implies the claimant must actually be employed when he performs the predicate act that caused his termination. Here, Claimant was terminated at the end of the day on June 15, 2017 pursuant to his employment contract. Employer paid Claimant his wage for that day and his service was concluded. At that point, neither party had any remaining obligation to the other. Claimant was not required to report to work again, and Employer had no obligation to offer him work if he requested it. The subsequent drug test was of no consequence to his status as an employee because his termination had been effectuated several days before.

When Employer decided to "terminate" Claimant on July 6, 2017, he was no longer its employee under the explicit terms of the day-labor contract. Although Employer labeled its action a "termination," in reality Employer merely notified him it would not accept further applications to re-employ him in the future. Since there was no causal connection between Claimant's failed drug test and the termination of Claimant's employment, Respondent's defense under § 8-42-103(1)(g) must fail.

ORDER

It is therefore ordered that:

1. Respondent's defense to TTD benefits based on the theory that Claimant was "responsible for termination of employment" is denied and dismissed.

2. Respondent shall pay Claimant TTD benefits, at the rate of $168.18 per week, from June 16, 2017 through August 6, 2017, and from October 24, 2017 ongoing until modified or terminated by law.

3. Respondent shall pay Claimant statutory interest in the amount of eight percent per annum on all benefits not paid when due.

4. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 31, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that her workers' compensation claim should be reopened.

2. Should the claim be re-opened, whether Claimant's request for change of authorized treating physician should be granted.

FINDINGS OF FACT

1. On September 9, 2014 Claimant sustained an admitted work related injury to her right shoulder and neck. Claimant was working as a phlebotomist and a patient whose blood she was drawing passed out and grabbed and jerked Claimant's right hand downward. *See* Exhibits 1, A, D.

2. Claimant underwent treatment and by March 18, 2015 was assessed with chronic neck and back pain, shoulder pain, and degenerative joint disease of the spine. *See* Exhibit D.

3. Claimant underwent a surgical evaluation with Cary Motz, M.D. He noted that Claimant had no relief from a steroid injection and that Claimant had continued complaints of significant discomfort about the periscapular muscles and the thoracic area of her back. Dr. Motz doubted that Claimant would improve with a shoulder arthroscopy given Claimant's response to the shoulder injections and due to the location of most of her discomfort. Dr. Motz opined he had nothing further to offer from an orthopedic standpoint and opined that it would be reasonable for Claimant to be evaluated by a physiatrist and delayed recovery specialist. *See* Exhibit D.

4. By May 22, 2015 Claimant was still reporting pain at a 8-9/10 level and that her pain was getting worse. *See* Exhibit D.

5. On June 2, 2015 Claimant was evaluated by Scott Primack, D.O. Dr. Primack noted Claimant's problems at the cervical spine and that an MRI of the right shoulder had demonstrated cuff tendinosis and a rim-rent tear of the supraspinatus. Dr. Primack noted that the orthopedic referral, Dr. Motz felt that Claimant's MRI changes were consistent with her age and that there was not significant surgical pathology. Dr. Primack opined that Claimant's lumbar complaints were not work related. Dr. Primack recommended a TENS unit to help diminish Claimant's shoulder and trapezius discomfort and he recommended an MRI of the cervical spine. *See* Exhibit D.

6. On July 15, 2015 Claimant was evaluated by Allison Hedien, NP. Claimant reported entire back/body pain and pain at an 8-9/10 level. Claimant was tearful in the

room and crying stating that she was just in pain all the time and that nothing was helping. Claimant reported the pain was all over and that everything hurt including her right shoulder, neck, back, and lower back. NP Hedien noted that at the last visit with Dr. Primack, he opined Claimant was getting close to maximum medical improvement. NP Hedien assessed: chronic neck and back pain, right shoulder pain, and spondylosis. *See* Exhibit D.

7. On July 22, 2015 Claimant was evaluated by John Burris, M.D. Claimant reported diffuse pain involving the posterior neck diffusely and the right shoulder girdle on the posterior aspect extending all the way down to her arms and into her fingers. Claimant reported pain at an 8/10. Dr. Burris noted that the MRI of Claimant's shoulder had shown what Dr. Motz believed were normal aging findings not associated with the work event and that Dr. Motz had no surgical recommendations. Dr. Burris also noted that the cervical MRI ordered by Dr. Primack had shown mild diffuse degenerative changes with no acute abnormalities and no neural impingements identified. Dr. Burris noted that Claimant had marked pain behaviors identified by previous providers. Claimant reported that she had undergone physical therapy, massage therapy, ice, TENS unit, and medication management with no reported benefit and reported that her symptoms had all worsened and that she was 0% improved from the original onset. On physical examination, Dr. Burris found extreme pain behaviors and that Claimant was very somatically focused. Dr. Burris found diffuse tenderness without localization. He also found that at the shoulder Claimant self-limited her motion but that it was inconsistent. Dr. Burris diagnosed myofascial pain. He opined that Claimant's diffuse pain complaints had a non-physiologic presentation and that there were no objective findings. *See* Exhibit D.

8. On July 28, 2015 Claimant was evaluated by Dr. Primack. Dr. Primack noted that the cervical MRI was unremarkable and that nothing in treatment had worked. Dr. Primack opined that the only objective finding in the treatment was a partial thickness rotator cuff tear. Dr. Primack again opined that the lumbar spine was not work related and the mid thoracic spine pain was also not work related. Dr. Primack opined that Claimant had an exorbitant amount of pain behavior. Dr. Primack opined that Claimant was at maximum medical improvement (MMI). He opined that for the loss of motion and for the partial thickness rotator cuff tear there was a 12% impairment of the upper extremity which converts to a 7% impairment of the whole person. *See* Exhibit D.

9. On September 23, 2015 Claimant was evaluated by Dr. Burris. Claimant continued to report diffuse pain affecting the right shoulder girdle at 8/10 in pain level. Dr. Burris opined that Claimant was again very somatically focused and displayed clear psychosomatic overlay. Dr. Burris opined that the physical examination was obscured by marked pain behaviors. He again diagnosed myofascial pain. Dr. Burris noted that Claimant continued to have diffuse pain complaints one year after the work event despite a full course of conservative care. He opined that her workup had been somewhat unrevealing including MRIs of both the cervical spine and the right shoulder. He noted that Claimant was treated and released by orthopedic surgeon Dr. Motz and by

rehabilitation specialist Dr. Primack. Dr. Burris opined that there was really nothing further to offer Claimant. *See* Exhibit D.

10. Respondents filed a Final Admission of Liability (FAL) based on Dr. Primack's determination of MMI and impairment. Claimant objected and requested a Division Independent Medical Examination (DIME).

11. On November 9, 2015 Claimant underwent the DIME performed by Brian Shea, M.D. Dr. Shea reviewed medical records and performed a physical examination. Dr. Shea assessed: right shoulder partial rotator cuff tear; decreased range of motion of the right shoulder; myofascial pain of the right lower cervical and upper and mid thoracic muscles; myofascial pain the right lumbar muscles; and decreased motion of the cervical spine. Dr. Shea opined that Claimant's permanent impairment rating was 15% whole person including ratings of the right shoulder and cervical spine. Dr. Shea opined that the mechanism of injury did affect Claimant's cervical spine and that his exam revealed the likelihood of right sided cervical facet injury, which is why he rated for impairment of the cervical spine. Dr. Shea also opined that Claimant was not at MMI. He opined that Claimant needed a second opinion regarding her right shoulder pain which was likely driving most of the myofascial symptoms in the lower cervical and thoracic regions. Dr. Shea opined that if after an orthopedic evaluation of the right shoulder and MRI it was determined that Claimant was not a surgical candidate then Claimant would be at MMI. *See* Exhibit E.

12. After the DIME, and on January 7, 2016, Claimant was evaluated by orthopedic specialist John Papilion, M.D. Dr. Papilion reviewed the medical records and radiographs, interviewed Claimant, and performed a physical examination. Dr. Papilion reviewed the MRI of Claimant's right shoulder. He noted Claimant's pain was primarily in the neck, upper scapula, and the trapezius and that Claimant had very little shoulder pain. Dr. Papilion assessed myofascial shoulder girdle pain. Dr. Papilion opined that Claimant's symptoms and physical exam did not support evidence for intrinsic shoulder pathology. He noted that Claimant had failed extensive physical therapy and three sub acromial steroid injections and he did not recommend surgical intervention. Dr. Papilion opined that surgical intervention was not likely to help Claimant. *See* Exhibit D.

13. On January 13, 2016 Claimant was evaluated by Dr. Burris. Claimant reported diffuse pain at an 8/10 level throughout the right posterior shoulder girdle. Dr. Burris opined that Claimant remained somatically focused. Claimant reported that she was 0% better in her recovery and just needed rest. Dr. Burris found moderate pain behaviors obscuring the physical examination. Dr. Burris noted that the DIME had recommended further orthopedic evaluation and that Claimant had the evaluation with Dr. Papilion who found no surgical indications. Dr. Burris opined that Claimant was at MMI. Dr. Burris disagreed with Dr. Shea's rating of the cervical spine and opined that diagnostic testing of the cervical spine had been normal with no findings associated with the work event and Dr. Burris opined there was certainly no objective basis for impairment at the cervical spine. *See* Exhibit D.

14. On May 23, 2016 Claimant returned to DIME physician Dr. Shea. Dr. Shea noted that Claimant had been found not to be a surgical candidate for her right shoulder. Dr. Shea opined that given that Claimant had not improved since the time of Dr. Primack's placement at MMI on July 28, 2015 even with ongoing treatment and passage of time, Claimant was placed at MMI as of July 28, 2015. Dr. Shea again opined that Claimant had a 15% whole person impairment including both the right shoulder and cervical region. *See* Exhibit C.

15. On June 21, 2016 Respondents filed a FAL. They admitted to permanent partial disability of 15% whole person and to maintenance care. Respondents noted the MMI date of July 28, 2015 on the FAL. *See* Exhibits 1, A.

16. Claimant did not object to the FAL and the case closed.

17. On June 27, 2016 Claimant was evaluated by Susan Anzalone, M.D. Claimant reported her chief complaint was cervicogenic headache. Claimant reported a bad headache from the back right occiput and that her head felt cold and like a squeezing sensation. Claimant reported she had the headache every day. Dr. Anzalone noted that EMG/NCS imaging was normal, that a brain MRI was normal, and that a cervical MRI from May 31, 2016 had shown a C3-4 2 mm retrolisthesis with minor disc bulge, facet arthropathy likely moderate right foraminal stenosis, C4-5 trace retrolisthesis with facet hypertrophy, likely right and moderate left stenosis, and C5-6 facet hypertrophy with mild bilateral foraminal stenosis. Dr. Anzalone recommended that Claimant see Gin-Ming Hsu, M.D. for the cervicogenic headache, and recommended a migraine diet and exercise. Dr. Anzalone also prescribed hydrocodone. *See* Exhibit 5.

18. On September 21, 2016 Claimant underwent a full blood panel with results reported by Leah Cooper, M.D. Claimant was flagged as having: extremely high C-reactive protein; low TSH; high LDL Cholesterol; and high alkaline phosphatase. *See* Exhibit 6.

19. On September 26, 2016 Claimant was evaluated by Dr. Hsu. Claimant reported chronic pain syndrome that began two years prior without any precipitating trauma or injury. Claimant reported pain all over with no specific location but on the right more than the left. Claimant reported pain at 7-9/10. On examination, Dr. Hsu found tenderness along the right occiput, cervical paraspinals, and shoulder. She also found tenderness along the left occiput, cervical paraspinals, and shoulder. Claimant's range of motion was decreased due to Claimant's reported pain. Dr. Hsu noted that the MRI of the cervical spine from May 31, 2016 was reviewed by her and showed mild spondylosis, no significant central stenosis, and no significant degenerative disc disease. Dr. Hsu noted that Claimant had chronic neck/shoulder pain and headaches and that the headaches appeared to be cervicogenic. Dr. Hsu opined that Claimant's pain on examination was most consistent with myofascial pain and occipital neuralgia and recommended trigger point injections and occipital nerve blocks. *See* Exhibit 4.

20. On September 30, 2016 Dr. Hsu injected Claimant's left and right greater occipital nerves. On October 4, 2016 Dr. Hsu injected Claimant's bilateral trapezius muscles and bilateral levator scapula muscles. On October 13, 2016 Dr. Hsu injected Claimant's bilateral cervical paraspinals and bilateral trapezius muscles. *See* Exhibit 4.

21. November 17, 2016 Claimant was evaluated by Dr. Hsu. Claimant reported that she received some pain relief from the injections, but not much and that she was having headaches, neck pain, lower back pain, and shoulder pain. Dr. Hsu opined that Claimant did not have much benefit from the trigger point injections or the occipital nerve block injections and that they would hold off on repeating any injections. Dr. Hsu recommended Claimant begin a course of formal physical therapy. *See* Exhibit 4.

22. On December 15, 2016 Claimant was evaluated by Dr. Hsu. Claimant reported that physical therapy was helping with her neck pain and that overall her headaches had improved. Claimant reported pain at a level of 4-5/10. Dr. Hsu again noted that they would hold off on any repeat injections. *See* Exhibit 4.

23. On March 11, 2017 Claimant filed a Petition to Reopen alleging that the case should be reopened due to a change in her medical condition. *See* Exhibits 2, B.

24. Claimant attached to her Petition to Reopen two medical records, one from February 22, 2017 and one from February 27, 2017.

25. On February 22, 2017 Claimant was evaluated by Dr. Hsu. Claimant reported that her headaches had returned and that she was having them 1-2 times per week and that her neck pain and shoulder pain were increasing. Claimant continued to report that physical therapy was helping her neck and shoulder pain and that her pain level was at a 6/10. Dr. Hsu injected Claimant's right subacromial bursae and opined that the right shoulder examination and pain were consistent with subacromial bursitis but that the shoulder was difficult to assess fully. Dr. Hsu wanted Claimant to bring in the prior imaging studies of the right shoulder. Dr. Hsu noted that Claimant would be set up for neck shoulder trigger point injections. Dr. Hsu recommended Claimant continue physical therapy. *See* Exhibits 2, B.

26. On February 27, 2017 Claimant was evaluated by Susan Anzalone, M.D. Dr. Anzalone prescribed medications of sumatriptan and fioricet for headaches/migraines. Dr. Anzalone recommended a migraine diet and exercise. *See* Exhibits 2, B.

27. Claimant testified at hearing. Claimant reported that after she was placed at MMI her pain began to increase. Claimant testified that she has new headaches on the right side of her head. Claimant also testified that she has increased numbness in her right arm.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Reopening

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App.

2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988). The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

Claimant has failed to establish by a preponderance of the evidence that her case should be reopened due to a change in condition. Claimant's allegations of pain and that her pain is new and increased is not found credible or persuasive. Claimant had extreme pain complaints at the time she was placed at MMI and at the time the FAL was filed. The medical reports attached to her petition to reopen show that her pain complaints actually improved slightly following the FAL. Claimant alleges new complaints of headaches and worsened pain in her right scapular area, however, Claimant is not found credible or persuasive. She has had numerous constant severe pain complaints since her date of injury. She has reported little to no improvement with numerous modalities of treatment both before MMI and on her own after MMI.

CHANGE OF PHYSICIAN

Upon a proper showing to the division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee. Section 8-43-404(5)(a)(VI), C.R.S. Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. *Loza v. Ken's Welding,* WC 4-712-246 (ICAO January 7, 2009). The claimant may procure a change of physician where he/she has reasonably developed a mistrust of the treating physician. *See Carson v. Wal-Mart,* W.C. No. 3-964-07 (ICAO April 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of his/her injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (ICAO November 1995). But, where an employee has been receiving adequate medical treatment, courts need not allow a change in physician. *See Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (ICAO December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (ICAO August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (ICAO June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician).

Although Claimant indicated at the outset of hearing that her request for change of physician was contingent upon the re-opening of the case, the ALJ notes medical maintenance care has been left open and that Claimant's request to change physician

can be construed to any/all of her maintenance care. Claimant has failed to establish a proper showing to allow her to change her physician. Claimant has received numerous treatments including referrals to multiple specialists. Although Claimant believes, subjectively, that she is not better she has failed to show any mistrust, communication problems, or improper medical care to justify a change in physician. Claimant did not provide any specific testimony or evidence other than her belief that she was not getting better.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that her workers' compensation claim should be reopened due to change in condition. Her petition to reopen is denied and dismissed.

2. Claimant has failed to establish that she should be allowed a change in physician. Her request to change physicians is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

May 31, 2018 /s/ Michelle E. Jones

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Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury on November 17, 2017;

II. If Claimant has proven a compensable injury, what medical benefits are reasonable, necessary and related;

III. What is Claimant's Average Weekly Wage.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is employed as a Judicial Assistant III for Employer. Claimant's normal work hours are from 10:00 a.m. until 6:30 p.m.

2. Claimant must clock in and out of work and is not permitted to work or access work materials from home. She is not required to drive in the performance of her job duties.

3. Claimant works in two buildings, The Lindsey Flannigan Courthouse (hereinafter "Courthouse) and the Van Cise-Simonet Detention Center (hereinafter "Detention Center"). The Courthouse is located at 520 W. Colfax Avenue, Denver, Colorado 80204. The Detention Center is located at 490 W. Colfax Avenue, Denver, Colorado 80204. These two buildings are separated by a service road.

4. Employer does not dictate the method of transportation their employees must use to arrive at work. Employees may walk, take the bus, ride the light rail, or drive their own personal vehicles. If an employee chooses to drive to work, it is up to that employee to find a place to park. Employer does not provide any employee parking, nor does it reimburse parking expenses of any employee.

5. Claimant's supervisor, Kimberly Pooley, credibly testified that Employer does not recommend where employees park their vehicles. She testified that there are several parking lots close to the Courthouse and Detention Center. For example, Ms. Pooley parks at the Denver Justice Center Garage—which costs approximately $140 per month—and several employees park in lots located near W 13th Avenue and Cherokee Street.

6. Claimant testified that she could take the bus or drive to work. She testified that she chooses to drive to work. She also testified that she chooses to park in a lot located at 2223 Stout Street, Denver, Colorado. This lot is approximately one

mile away from the Detention Center and Courthouse and costs approximately $60 per month.

7. Claimant testified that she walks the same route from her car to the Detention Center every day and drew this route on a map provided by Respondent. (Respondent's Exhibit J). She testified that while she walks this route, she sees other parking lots that are closer to her place of employment, but she thinks these lots are full and does not know how much these lots cost.

8. On November 17, 2017, Claimant clocked out of work at 6:31pm. She began walking her normal route from the Detention Center to her parking spot at 2223 Stout Street. Claimant testified that while she was walking across the intersection of W 21st Street and Stout Street—which she testified is approximately one mile from the Detention Center—she was struck by a car and sustained injuries. The accident occurred at approximately 6:50 p.m. (Claimant's Exhibit 1). She testified that she was taken to Denver Health Emergency Department and underwent surgery to treat her left ankle injury. The driver of the motor vehicle who struck Claimant drove away from the scene after the accident, and Claimant has not been able to identify the driver.

9. Claimant testified that she had heard stories of other employees being hit by cars while walking in downtown Denver. However, despite hearing these stories, she continued to park in the lot for approximately one year.

10. Claimant has failed to demonstrate that it is more probably true than not that she suffered compensable industrial injuries during the course and scope of her employment with Employer on November 17, 2017. Applying the *Madden* factors, she has failed to establish an exception to the "going to or coming from" work rule because her travel was not considered the performance of services arising out of and in the course of employment. Claimant was injured after she clocked off work and approximately a mile away from her place of employment. Thus, the travel did not occur during working hours and was not on Employer's premises.

11. Likewise, Claimant has failed to demonstrate that this travel was contemplated by her employment contract or constituted a substantial part of her service to Employer. Specifically, Ms. Pooley persuasively testified that Employer did not require Claimant to use her automobile during work. Claimant testified that she was not required to use a vehicle to perform job her duties. The credible evidence reveals that Claimant drove her vehicle merely to get to her jobsite in order to work.

12. Claimant has also failed to demonstrate that Employer created a "zone of special danger" out of which Claimant's injuries arose. Claimant alleges that because the Employer does not provide employee parking, she was forced to park a mile away from work, and because she had to park a mile away from work, she was struck by a car. However, the credible evidence reveals that Claimant could have driven or taken the bus to work, and she made the personal choice to drive to work and made the personal choice of where to park her vehicle. Further, the credible evidence reveals that other employees park in lots closer to the Detention Center and Courthouse. Since several employees have found parking closer to the Detention Center, Claimant's testimony that every single parking lot is full between the Detention Center and where she chooses to park her vehicle is not credible. Further, Claimant fails to explain how

her employment with Employer created the risk of downtown Denver traffic. Rather, the risk she describes is true for all pedestrians—whether Employer's employees or not—in the greater downtown Denver area.

13. A review of the *Madden* factors thus reveals that Claimant has failed to demonstrate a nexus between her injuries and her employment for Employer. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigations. §8-40-102(1), C.R.S. A Claimant in a Worker' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or of the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witnesses; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of her employment at the time of her injury. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999); C.R.S. §8-41-301(1)(b). For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Madden*, 977 P.2d at 863; *See Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arise out of" requirement is narrower and requires the claimant to show a causal connection between the employment and the injury such that the injury had its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id*.

5. Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance

of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if "special circumstances" exist that demonstrate a nexus between the injuries and the employment. *Id*. at 864. In ascertaining whether "special circumstances" exist, the following factors should be considered: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose. *Id.* Whether meeting one of the variables, by itself, is sufficient to create a "special circumstance" warranting recovery depends upon whether the evidence supporting that variable demonstrates such a causal connection between the employment and the injury to bring the travel within the course and scope of employment. *Id*.

6. In considering whether travel is contemplated by the employment contract, the critical inquiry is whether the travel is a substantial part of service to the employer. *Madden*, 977 P.2d at 865. Travel may be contemplated by the employment contract when the employer delineates the employee's travel for special treatment as an inducement to employment. *See Staff Administrators Inc. v. Reynolds*, 977 P.2d 866, 868 (Colo. 1999). "Special circumstances" may also exist when the employee engages in the travel at the express or implied consent of the employer, and the employer receives a special benefit from the travel in addition to the employee's mere arrival at work. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259, 1260 (Colo. App. 1992). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location to perform his job duties the risk of travel become the risk of the employment. *Briedenbach v. Black Diamond, Inc.*, W.C.No. 4-761-479 (ICAP, Dec. 30, 2009).

7. "Special circumstances" may also be found when an injury occurs off an employer's premises but so close to the zone, environment, or hazards of such premises as to warrant recovery under the Act. *Madden*, 977 P.2d at 865. Under this "zone of danger" variable, where the route to the employment premises creates additional risk not applicable to the general public, the hazards of the route become the hazards of the employment. *Martin K. Eby Construction Company v. Industrial Commission*, 377 P.2d 745, 747 (Colo. 1963); *State Compensation Insurance Fund v. Walter*, 34 P.2d 591 (Colo. 1960); *Friedman's Market, Inc. v. Welham*, 653 P.2d 760 (Colo. App. 1982). For example, in *Martin K. Eby Construction Company*, a claimant's injuries incurred while driving through a missile site to get to work were deemed compensable because driving through the site was the only means to reach the work site and site created additional risks not applicable to the public. 377 P.2d at 747. In *State Compensation Insurance Fund v. Walter, supra,* the employer required employees to cross a public street to go from the employer parking lot to the work site. Because the public was not required to cross that street, an excavated ditch on that road created a "zone of special danger" and an employee who twisted his ankle in that ditch was held to be entitled to benefits. 345 P.2d at 551-52. Likewise, in *Friedman's Market, Inc. v. Welham, supra,* the employer's parking policy necessitated employees crossing railroad tracks that the public were not required to cross; therefore, the surviving spouse of a

worker who was killed while crossing those tracks was entitled to death benefits because the tracks constituted a “zone of special danger.”

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered compensable industrial injuries during the course and scope of her employment with Employer on November 17, 2017. Applying the *Madden* factors, she has failed to establish an exception to the “going to and coming from” rule because her travel was not considered the performance of services arising out of the course and scope of her employment.

9. Initially, Claimant clocked out of work and was approximately one mile away from her place of employment on November 17, 2017 when she was injured. The travel thus did not occur during working hours and was not on her employer’s premises.

10. As found, Claimant also failed to establish that her travel was contemplated by her employment contract and constituted a substantial part of her service to her employer. The record reveals that Claimant was not required to drive as part of her job duties, nor was she required to drive to work. Claimant instead had the discretion to choose the method of transportation she used to get to work and made the personal decision to drive. She was not compensated for this travel, nor did Employer provide her a parking spot or reimburse her parking expenses. Claimant’s choice to drive to work did not confer any benefit to Employer beyond the sole fact that it allowed her to arrive at work.

11. Because Claimant has failed to establish the first three *Madden* factors, Claimant would need to present substantial evidence of the fourth *Madden* variable to establish that her travel falls within the course and scope of her employment. However, as found Claimant has failed to establish that her Employer created a “zone of special danger” out of which her injuries arose. Claimant has presented no credible evidence that the route to her Employer created additional risks or hazards not applicable to the public that would make the hazards of the route part of her hazards of employment. Claimant alleges that the hazard of her route to her employer is downtown vehicle traffic. Claimant has provided no credible evidence that being an employee of Employer has elevated her risk of being involved in a pedestrian motor vehicle accident. Further, the record reveals that Employer does not require their employees to drive to work, nor does it dictate the route that employees must take to arrive at work. The record reveals that Claimant made the personal decision to drive to work, of which parking lot to use, and of which route to take to get to work. (Respondent’s Exhibit J).

12. A review of the *Madden* favors thus reveals that Claimant has failed to demonstrate a nexus between her injuries and her employment with her employer. As such, her claim for Workers’ Compensation benefits is denied and dismissed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to establish, by a preponderance of the evidence, that she suffered a compensable industrial injury on November 17, 2017;

2. Claimants' request for Workers' Compensation benefits, including medical benefits and temporary disability benefits, is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 7, 2018

/s/ Glen Goldman

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Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable industrial injury arising out of and in the course of his employment for Employer on May 25, 2017.

II. If Claimant sustained a compensable injury, whether he established, by a preponderance of the evidence, entitlement to medical benefits, as well as temporary partial disability benefits ("TPD") from June 2, 2017 through June 19, 2017.

III. If Claimant sustained a compensable injury, whether Claimant has proven that Dr. Kristin Mason is an authorized treating physician ("ATP").

IV. If Claimant sustained a compensable injury, whether Claimant should be penalized for late reporting, entitling Respondents to offsets.

FINDINGS OF FACT

Prior History

1. Claimant had a prior workers' compensation claim for a March 7, 2014 work injury. Claimant testified the injury involved his waist and spine. Claimant was diagnosed with cervical and lumbar strains and underwent treatment.

2. Claimant was placed at maximum medical improvement ("MMI") for the March 7, 2014 work injury on November 24, 2014 with a 5% permanent impairment rating for the lumbar spine. Claimant was provided with permanent restrictions of no lifting, pushing or pulling over 20 pounds, and limiting repetitive bending or twisting at the waist.

3. On March 24, 2015, Claimant underwent a Division Independent Medical Examination with Khoi D. Pham, M.D., who agreed with the recommended restrictions and MMI date of November 24, 2014. Dr. Pham assigned a 13% whole person impairment rating for Claimant's low back. He did not assign any cervical impairment.

Alleged May 25, 2017 Work Injury

4. Claimant is a 62-year-old man who has been employed by Employer as an office cleaner since 2011. Claimant's job duties include cleaning and replenishing restrooms, emptying trash and recycling bins, cleaning desks, vacuuming offices and common areas, cleaning, dusting, and mopping floors. Claimant works for Employer Monday through Friday, 4:00 p.m. to 11:00 p.m., and occasionally on Saturdays and Sundays. Claimant also has had concurrent employment since 2015. Claimant is employed as a

day porter for ICS, performing cleaning services. Claimant works for ICS Monday through Friday, 7:00 a.m. to 3:30 p.m., and three to four hour shifts on Saturdays.

5. Claimant testified that his supervisor, Francisco Perez, called him on Wednesday, May 24, 2017 and notified Claimant he would be out on vacation the remainder of the week.

6. Claimant alleges he sustained a work injury while emptying a recycling bin during a scheduled shift for Employer on Thursday, May 25, 2017 at approximately 6:00 p.m. or 7:00 p.m. Claimant testified that he lifted the bottom of the recycling container with his right hand and placed his left hand on the upper part of the container, and then used his knee to help push the container over the top of the larger recycling bin. He stated that he felt pain in his left ribcage, left shoulder, and along the left side of his neck while performing this activity. Claimant testified that he is aware of how to report work injuries. He stated he did not report the incident to Employer on May 25, 2017 because he thought his symptoms would resolve. He further testified that his supervisor, Francisco Perez, was not at work on May 25, 2017.

7. Claimant testified that he worked for Employer as scheduled on Friday, May 26, 2017. Claimant testified that he did not report the alleged injury to Employer on May 26, 2017 because Mr. Perez remained out of the office and Claimant continued to think his symptoms would resolve. Claimant testified that he told one of two colleagues, Maria or Ruben, that he believed he injured himself the day prior. Claimant also worked his scheduled shift for his concurrent employer on May 26, 2017.

8. Claimant was not scheduled to work for Employer on Saturday, May 27, 2017 or Sunday, May 28, 2017. Claimant testified he did not work for Employer on Monday, May 29, 2017 because it was Memorial Day. Claimant worked for Employer as scheduled on Tuesday, May 30, 2017. Claimant reported the alleged work injury to Mr. Perez on May 30, 2017.

9. On May 31, 2017, Claimant completed a statement regarding the alleged incident. Claimant reported to Employer that he sustained an injury while lifting a recycling bin on May 25, 2017 at around 6:00 p.m. to 7:30 p.m. Claimant reported that he dragged the recycle bin towards the recycle dumpster. Claimant reported he then, used his right arm to lift the bottom of the recycle bin, his left arm to grab the top of the bin, and his right knee to push the bin.

10. Claimant was offered care at Concentra and selected the Concentra on 38th Avenue in Aurora, Colorado. Employer records indicate that a choice of three Concentra locations were offered to Claimant and Claimant selected the location on Chambers Road in Aurora, Colorado, but the medical records indicate that he was seen at the Concentra on 38th Avenue in Aurora, Colorado.

11. On May 31, 2017, Claimant presented to Jocelyn Cavender, PA-C at Concentra, reporting a date of injury of May 25, 2017. Claimant reported injuring himself while lifting and stabilizing a heavy bin. Claimant complained of left shoulder pain that

radiated up his neck and down his left arm to his mid-back. Claimant denied prior problems with his left arm, shoulder, neck or upper back. He also denied participating in other activities or outside work that could have caused or aggravated his condition. Claimant reported that his average daily work hours were 6.30 per day and average weekly hours were 32.5 with no overtime. There is no mention of concurrent employment in the medical record. On physical examination, PA-C Cavender noted tenderness of the ribs on the left side, decreased cervical range of motion, left sided muscle spasms, and tenderness over the left paraspinals and left trapezius muscles. Claimant was released to return to work on May 31, 2017 with work restrictions of no use left upper extremity and very limited turning of neck. Claimant was prescribed medication and referred to physical therapy.

12. Claimant returned to Concentra on June 2, 2017 with left cervical and thoracic spine spasms and trapezius spasms. He had limited cervical spine range of motion. Claimant reported feeling a little worse, and reported the spasms in his neck seemed worse, aggravated by vacuuming even with the other hand. Claimant was taken off work due to increased spasms.

13. On June 6, 2017, Claimant returned to Concentra with increasing symptoms. On exam Claimant was very stiff, with decreased range of motion, and tenderness in the left paracervicals from occipital scalp to trapezius and shoulder with muscle spasms. Dr. Cava diagnosed Claimant with cervical radicular pain, cervical strain, muscle spasm, and thoracic myofascial strain. She recommended Claimant undergo an EMG and MRI. Physical therapy was placed on holding ending results.

14. Claimant also underwent cervical spine x-rays on June 6, 2017, that revealed no acute findings. Spondylotic spurring from C3-7 with slight accentuation of C4-5 and grade 1 spondylolisthesis in flexion was noted.

15. Claimant returned to Concentra on June 9, 2017 with ongoing problems. Claimant remained with a restriction of no work while they waiting for authorization of the requested MRI & EMG.

16. Respondents filed a Notice of Contest on June 9, 2017.

17. Claimant returned to Concentra on June 20, 2017 and reported having pain at night muscle weakness and swelling. Claimant reported that he had been working his day job for his concurrent Employer, but not his night job for Employer. Claimant complained of pain in his left neck and shoulder with increasing pain with movement of the neck and trouble reaching over head with the left upper extremity. Dr. Cava noted that the MRI referrals and claim had been denied. Claimant was released to return to modified activity, and allowed to work his entire shift with no reaching above shoulders with affected extremities, and no use left upper extremity. No further treatment was provided and Claimant was advised to return if claim is opened.

18. Claimant testified that he was taken off work by Concentra from June 2, 2017 through the discontinuation of care on June 20, 2017. Claimant testified that he did not

work his job for Employer during that period, but did continue to work his job with ICS. Claimant testified that he was not able to perform his full job for Employer when released to work on June 20, 2017, but that Mr. Perez permitted him to perform lighter duties.

19. On August 25, 2017, Claimant requested that Kristin Mason, M.D. be allowed to treat him on August 25, 2017. Claimant purports that he did not receive any response to this request.

20. Dr. Mason evaluated Claimant on November 14, 2017. Claimant reported a May 25, 2017 date of injury. Claimant denied previous neck problems and did not report having concurrent employment. He complained of pain in his left ribs, left upper extremity and trapezius area, and numbness in his left chest area, left forearm, and neck. On physical examination, Dr. Mason noted Claimant sat with his head tilted to the right and the arm in full supination resting on his lap. She noted decreased sensation in left C5 distribution consistently and tenderness and hypertonicity in the trapezius on the left. Dr. Mason diagnosed Claimant with a cervical sprain/strain with findings suggestive of C5 radiculopathy on the left, with no indication of a shoulder injury. Dr. Mason recommended an MRI and flexion extension x-rays. She prescribed medication and recommended holding off on physical therapy until imaging studies were obtained.

21. Claimant also saw Lawrence Lesnak, D.O. on November 14, 2017. Dr. Lesnak performed an independent medical evaluation ("IME") at the request of Respondents, completing a medical records review and physically examining Claimant. Claimant reported left-sided suprascapular pain/discomfort and occasional numbness in the left volar forearm. Claimant denied neck, mid back, low back and leg symptoms. Dr. Lesnak found no clinical evidence of symptomatic left shoulder joint pathology, or cervical or thoracic symptomatic spine pathology. He opined that Claimant did not sustain any injurious event while working for Employer on May 25, 2017. In support of his opinion, Dr. Lesnak noted that Claimant delayed reporting the injury, despite having at least three or four prior work injuries and being familiar with how to report work injuries. He further noted that Claimant continued to work the days following the alleged injury. Dr. Lesnak opined that, regardless of causality, Claimant does not require any diagnostic testing or specific treatments.

22. Dr. Lesnak testified at hearing as an expert in physical medicine and rehabilitation. Dr. Lesnak testified consistent with his IME report. He opined that Claimant's subjective complaints are not supported by any objective findings and that the mechanism of injury described by Claimant does not correlate with a shoulder or neck injury. Dr. Lesnak acknowledged that a cervical strain can cause referred pain into the shoulder, but continue to opine that Claimant did not sustain an injurious event. Dr. Lesnak testified that Claimant had chronic, pre-existing neck symptoms.

23. Claimant testified that he continues to have problems with the left side of his neck and shoulder and he has difficulty lifting overhead and feels pain when lifting certain weight, and feels pain when he has to use force with his hand/arm.

24. Per Employer's time records, Claimant did not work any hours for Employer on Thursday, May 25, 2017. The timecard records show Claimant did not work any hours for Employer the entire week of Monday, May 22, 2017 through Friday, May 26, 2017. The timecard records reflect Claimant worked 32.5 hours for Employer the week of Monday, May 15, 2017 through Friday, May 19, 2017, and 35 hours the week of Monday, May 29, 2017 through Friday, June 2, 2017.

25. Per Employer's pay records, Claimant was paid for a total of 35 hours for the for the pay period beginning Sunday, May 21, 2017 through Saturday, June 3, 2017. This information coincides with the timecard records, which reflect 35 hours worked during the week of Monday, May 29, 2017 through Friday, June 2, 2017, including 7.0 hours on May 29, 2017.

26. Claimant testified that he did not use a time clock or report his time using another timekeeping system. Claimant testified that his supervisor, Mr. Perez, was responsible for entering Claimant's time. Claimant contends that he did, in fact, work for Employer the week of Monday, May 22, 2017 through Friday, May 26, 2017. He testified that it was possible his timecards were not accurate or that there was some error on the part of his supervisor in inputting his time. Claimant did not indicate he addressed the alleged pay discrepancy with Employer. The pay records do not reflect any retroactive payments issued to Claimant for time worked May 22, 2017 through May 26, 2017.

27. ICS time records reflect that Claimant worked his concurrent job on Thursday, May 25, 2017, Friday May 26, 2017, and Saturday, May 27, 2017. The records indicate Claimant did not work his concurrent job on Sunday, May 28, 2017 or Monday, May 29, 2017. Claimant then worked his ICS job on Tuesday, May 30, 2017 through Saturday, June 3, 2017.

28. Claimant's testimony is not found credible or persuasive. The ALJ credits the opinion of Dr. Lesnak, as supported by the medical records and employment records, and finds that Claimant did not sustain an injury arising out of and in the course of his employment for Employer on May 25, 2017.

29. Claimant failed to prove, by a preponderance of the evidence, that he sustained a compensable injury working for Employer on May 25, 2017.

30. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201,

C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury while working for Employer on May 25, 2017. Employer's records reflect that Claimant did not, in fact, work any hours for Employer May 22, 2017 through May 26, 2017, and was not paid for any hours allegedly worked during such time period. While Claimant contends the time records are in error, there is no evidence Claimant attempted to address the alleged discrepancy with Employer or was subsequently paid for time he contends he worked. The lack of persuasive

explanation on Claimant's part as to what would be a significant discrepancy in pay supports Employer's contention that Claimant did not actually perform any work for Employer on the alleged date of injury. Moreover, Claimant has concurrent employment at which he performs similar physical job duties and worked on May 25, 2017. Claimant has had prior work injuries and is aware of how to report work injuries. Finally, Dr. Lesnak credibly opined no injurious event occurred. Based on the totality of the evidence, Claimant failed to prove that it is more likely than not he sustained an injury arising out of and in the course of his employment for Employer, and that his condition was proximately caused by the performance of services for Employer.

As Claimant failed to meet his burden to prove he sustained a compensable injury, the remaining issues of medical benefits, TPD, ATP, penalties and offsets are moot.

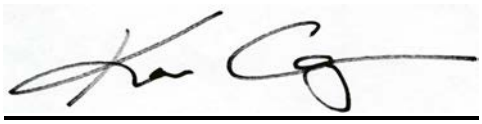
ORDER

It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence he sustained a compensable injury arising out of and in the course of his employment for Employer on May 25, 2017. Claimant's claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 9, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

a. Whether Claimant established by a preponderance of the evidence that his alleged work injury arose out of and in the course and scope of his employment on February 21, 2017;

b. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable, necessary and related medical treatment;

c. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning on February 23, 2017, and continuing until terminated by law ;

d. Whether Claimant was responsible for his termination under Sections 8-42-103(1)(g) and 8-42-105(4)(a); and

e. Whether Claimant's compensation shall be reduced by fifty percent for his willful failure to follow safety rules pursuant to Section 8-42-112(1)(b), C.R.S.

STIPUATION OF FACT

The parties stipulate and agree that Claimant's average weekly wage is $959.93.

FINDINGS OF FACT

1. Claimant began working for Employer on February 13, 2017. Claimant's duties were to drive Employer's truck which carried all the equipment necessary for the crew to work on the job site each day and to work as a general laborer pouring and finishing concrete.

2. Prior to beginning work for Employer, on February 12, 2017, Claimant completed paperwork for the Employer and signed an acknowledgement that he received and understood the Employer's Written Safety Plan. Claimant's acknowledgement reflected that Claimant read and understood Employer's written safety plan and agreed to follow all safety policies and rules.

3. Employer's safety rules included a prohibition regarding horseplay on the job. The rule warned that injury or termination could result from horseplay on the job. Charles Franklin, the General Manager for Employer, credibly testified that Claimant was given the safety policies and rules and instructed to read the written safety plan.

4. Mr. Franklin explained in his deposition testimony that, in January 2017, he and his parents purchased the concrete business, in which they employed all employees previously employed by the company.

5. On February 21, 2017, Claimant was on break with other employees waiting for concrete to be delivered. Two other employees were present with Claimant, Fermin Galindo and Joel Ernesto Escarecega-Olivas. While the group was waiting for the concrete to arrive, Claimant and Escarecega-Olivas decided to arm wrestle. Claimant initiated the arm wrestling.

6. Claimant, Galindo and Escarecega-Olivas were aware that arm wrestling was not part of their job duties. Galindo and Escarecega-Olivas knew that arm wrestling was not permitted and no such horseplay had been observed by them at work. During Claimant's brief employment with Employer, he had not observed anyone arm wrestling.

7. Claimant and Escarecega-Olivas started arm wrestling, facing each other and grasping each other's right hands. The arm wrestling match lasted about 30 seconds. Escarecega-Olivas declared that he had won the wrestling match, Claimant declared an end to the match and Claimant let go of Escarecega-Olivas's hand. Claimant step back from Escarecega-Olivas, tripped and fell to the ground landing on his back. Claimant fell almost immediately after ending the arm wrestling match. Escarecega-Olivas did not cause Claimant's fall.

8. Claimant provided contradictory testimony regarding the arm wrestling incident. Claimant's testimony was found to be less credible and persuasive than the testimony of Escarecega-Olivas and Galindo.

9. Claimant treated for his alleged injury with Dr. David Yamamoto, M.D. On February 22, 2017, Dr. Yamamoto recorded that Claimant suffered an injury while walking backwards when he tripped over rebar. Claimant is reported to have told the physician that he injured his right shoulder. On February 24, 2017, Dr. Yamamoto referred Claimant for a right shoulder MRI, which revealed a full thickness rotator cuff tear, as well as a partial tear of the infraspinatus tendon, strain of the deltoid and infraspinatus muscles, and moderate joint effusion.

10. On March 2, 2017, Claimant treated with Dr. Eric C. McCarty, an orthopedic surgeon. The doctor recommended and requested a right arthroscopic rotator cuff repair, subacromial decompression, distal clavicle excision and biceps tendenosis. The doctor opined that Claimant's right shoulder condition was acute.

11. On July 25, 2017, Claimant saw Dr. Peter Weingarten for an IME and the doctor reported that Claimant was pushed and fell backwards. Claimant reported to this doctor that he could not recall exactly how he fell, whether he fell on his shoulder or fell on his outstretched arm. Dr. Weingarten opined that

Claimant sustained a full thickness tear of the supraspinatus tendon in the February 21, 2017, fall incident.

12. Following the February 21, 2017, incident, Claimant continued to work the remainder of the day. On February 23, 2017, Claimant met with Mr. Franklin, the General Manager, about the safety rule violation and Claimant's tardiness for work. Claimant was issued a written warning regarding his violation of Employer's safety rules prohibiting horseplay. Employer also warned Claimant about his late arrival for work on three occasions. Employer sought Claimant's signature on the written warning regarding his horseplay and tardiness. Claimant refused to sign the warning and walked off the job addressing Mr. Franklin using expletives.

13. Mr. Franklin deemed Claimant's refusal to sign the written warning and his departure from the work site to be a resignation from his position. Later, on February 23, 2017, Claimant returned to the job site and surrendered his keys to the Employer's vehicle when he was advised his employment was deemed terminated.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. The claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with the employer. Section 8-41-301(1)(b) & (c), C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires the claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

Compensability

3. If the acts of an employee at the time of the injury are for the employee's sole benefit, then the injury does not arise out of and in the course of employment. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006), *Kater v. Industrial Claim Appeals Office,* 728 P.2d 746 (Colo.App. 1986); *Brogger v. Kezer,* 626 P.2d 700 (Colo.App.1980). If the claimant's activity at the time of the injury constitutes such a substantial deviation from the circumstances and conditions of the claimant's employment that the activity is for the claimant's sole benefit, the injury does not arise out of and in the course of employment. *Kater v. Industrial Commission, supra.* Where, the alleged deviation from employment involves "horseplay," our courts apply a four-part test to determine whether the resulting injury is compensable. In *Lori's Family Dining v. Industrial Claim Appeals Office,* 907 P.2d 715, 718 (Colo. App. 1995), the Court of Appeals held that the relevant factors are:

> (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, *i.e.,* whether it was commingled with the performance of a duty or involved an abandonment of duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay.

4. In any event, the critical concern is "whether the claimant's conduct constituted such a deviation from the circumstances and conditions of employment that the claimant stepped aside from his job and was performing the activity for his sole benefit." *Panera Bread, LLC v. Industrial Claim Appeals Office, supra. Ultimately, resolution of the issue is one of fact for determination by the ALJ. Panera Bread, LLC v. Industrial Claim Appeals Office*, *supra.*

5. In this matter, Claimant failed to prove by a preponderance of the evidence that he injured himself in the course and scope of his employment for Employer. Claimant's testimony regarding the mechanism of his injury was less credible and persuasive than that of his co-workers. Claimant's explanation to medical providers was evolving, changing and not credible. Claimant's assertions that he was pushed by a co-worker and fell, that he did not instigate the horseplay activity or that his injury did not occur in the midst of the horseplay was not deemed credible. Claimant's horseplay was a deviation from his duties and provided no service to Employer. Claimant's deviation was not co-mingled with Claimant's duties for Employer. Claimant's injury arises from a brief deviation from providing service to Employer. However, though the deviation was brief in the amount of time Claimant and his co-worker were involved with arm wrestling, the brevity of their deviation was dictated by the time it took for Claimant to injure himself bringing the deviation to an end.

6. The evidence established that Employer maintained a written safety policy which included a prohibition against horseplay at work. Claimant was provided with this written safety policy and was aware of the prohibition. Claimant's co-workers credibly testified that they observed no horseplay in the workplace. The evidence further established that despite Claimant's knowledge of Employer's safety policy, Claimant initiated an arm wrestling match. Upon concluding the horseplay which involved Claimant's right arm being wrapped around his co-worker's right arm, Claimant stepped backward and fell. It is concluded that Claimant's deviation from his employment for Employer was substantial to the extent that Claimant's activities leading up to his fall and at the time of his fall, provided no service to Employer, was outside the scope of Claimant's employment and did not arise from his employment for Employer.

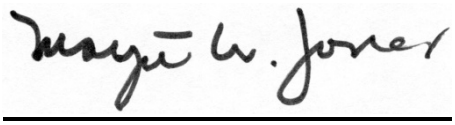
7. Claimant failed to sustain his burden of proof to establish that the injury occurred in the course and scope of his employment, therefore his claim is not found to be compensable.

ORDER

Claimant's claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43- 301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 14, 2018



Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable injury to her left shoulder.

II. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable occupational disease to her left shoulder.

III. Whether Claimant is entitled to reasonable, necessary, and related medical benefits.

IV. Claimant's average weekly wage ("AWW").

V. Whether Dr. Mason is an authorized treating provider.

VI. Whether Respondents have established that Claimant is subject to a penalty for late reporting pursuant to §8-43-102(2), C.R.S.

VII. Whether Claimant is entitled to temporary total disability benefits.

VIII. Offset of unemployment benefits against temporary disability benefits.

PROCEDURAL MATTERS

Claimant filed a workers' claim for compensation with a date of injury of May 20, 2016 and Respondent filed a First Report of Injury with an injury date of May 2, 2016. (Ex. 1 & 2.) This resulted in two workers' compensation claim numbers being assigned. The parties agreed that W.C. No. 5-043-691 and W.C. No. 5-043-459 involved the same incident. Therefore, the parties stipulated to merge the claims together and proceed under W.C. 5-043-459 as they were for the same injury claim. A procedural order was issued on June 21, 2017, approving the merger.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was born on May 30, 1958, and was 59 years of age at the time of the hearing.

2. Claimant was hired in December of 2014 by Respondent/Employer.

3. Respondent/Employer is a greenhouse.

4. In May of 2016 Claimant was employed by Employer as a production worker. Claimant had worked at the green house for a total of seven years and for Olson's since they bought the green house in December of 2014.

5. Claimant worked on the assembly line, planting the plants into containers and moving them from the assembly line onto carts. The carts were metal with 5 to 6 shelves depending on the plants that were being planted on that day. (Ex. 10, pg. 89-90.) According to the Job Site Analysis performed by Summit Vocational Consultants the racks were 7 inches from the floor and up to 68 inches high. Once the rack was filled it was moved and another empty rack was put in its place. A full rack required 18 pounds of force to move across a concrete floor. (Ex. 13, pg. 1.)

6. Claimant worked at a variety of work stations and rotated depending on need. The work stations were at a conveyor belt which was 36 inches from the floor and 15 inches wide. Depending on the plant that is being planted, the speed of the belt varied and often stopped so that the workers could complete the task in front of them. A robot would place cuttings and the workers would fill in those portions of the tray that the robots missed. (*See* Ex. 13, pg. 1.)

7. Claimant testified that on May 20, 2016, while working on the line, she was hit from behind by the metal corner of a rack - cart - that held the plants when a coworker pushed a line of carts into her. Claimant was struck from behind on her left shoulder. Claimant testified that after being hit by the cart, she stabilized herself by putting her hand or hands on the assembly line - conveyor belt.

8. Claimant testified that she reported the incident to her supervisor, Mr. Ernesto Zavala, on the same day. She testified that she also told Mr. Zavala on May 20, 2016, that she hurt her shoulder. She testified that she told him "it was hurting pretty bad" and that "I needed to go to the doctor. I wanted to be sent." (HT, pg. 29.) Claimant further testified that Mr. Zavala refused to send her to a doctor and instead told her to go see her own doctor. *Id.* Claimant testified that because she was not sent to a doctor, she went to her own physician in May of 2016. (HT, pg. 29-30.)

9. Mr. Zavala testified at hearing. He testified that there was an incident in May of 2016 in which a co-worker pushed a cart into Claimant. However, he also testified that after the incident, he asked Claimant if she was okay and whether she needed to be checked by a doctor. According to Mr. Zavala, Claimant said she was okay and that she did not need to see a doctor. (*See* HT, pg. 72.) The ALJ finds Mr. Zavala's testimony to be credible and persuasive.

10. On July 1, 2016, Claimant presented to Salud Family Health Centers. Claimant was evaluated for stomach pain, diabetes, shoulder pain, and depression. There is no mention of the cause of Claimant's shoulder pain. There is no mention of Claimant's shoulder being injured at work. There is, however, mention of the cause of Claimant's depression. It is noted that Claimant has been severely depressed for about a year and that her

depression stems from domestic abuse from her current partner. The severity of her depression was confirmed by a PHQ-9 and GAD-7 testing/screening. The report from this date indicates Claimant's antidepressant was refilled and she was given information for therapy. (Ex. I, pg. 87-92).

11. On July 19, 2016, Mr. Zavala met with Claimant to advise her that she was being laid off. After being advised that she was being laid off, Claimant became upset and angry. Claimant claimed that her "termination" was unfair due to the fact she had worked at the greenhouse longer than others, thought she worked harder than others, and felt the supervisors played favorites. Claimant also alleged that she was being laid off due to her injury in May of 2016. (HT, pg. 46-47.) Once Claimant alleged she was being laid off due to an injury that occurred in May of 2016, the issue of an alleged injury was brought to the attention of Kate Powell, in Human Resources.

12. Prior to being laid off, Claimant had been written up due to performance matters. On October 22, 2015, Claimant's supervisor, Mr. Zavala, wrote Claimant up for insubordination to management and disregarding company policies. (Ex. D, pg. 6.) Mr. Zavala testified Claimant was disciplined because she argued and fought with coworkers and threw a plant at a coworker. (HT, pg. 65-66.). On January 27, 2016, Mr. Zavala wrote Claimant up again for insubordination and for refusing work assignments. (Ex. D, pg. 8.) Mr. Zavala testified that claimant was written up for not doing her work and verbally and physically assaulting coworkers and throwing materials. (Ex. D, pg. 8; HT. pg. 66.)

13. Since Claimant left the Employer's premises after being laid off, Employer arranged for Claimant to come back the following day, May 20, 2016, and meet with Ms. Powell – in Human Resources - to discuss her alleged injury.

14. On July 20, 2016, Claimant, met with Ms. Powell to discuss her alleged work injury. Ms. Powell completed some paperwork and referred Claimant to an urgent care facility which refused to see Claimant.

15. On July 21, 2016, Claimant returned to Salud where she was seen by Dr. Denegri. Claimant complained of left sided neck and shoulder pain and alleged it was caused by an accident at work approximately two months ago.

16. Despite alleging she suffered a work related injury, and knowing how to file a workers' compensation claim since she had previously filed 4 other claims, Claimant did not file a workers' compensation claim soon after she was allegedly injured on May 20, 2016, or soon after she was laid off on July 19, 2016.

17. Instead, on or about July 22, 2016, Claimant filed a claim for unemployment benefits. (Ex. G, pg. 66.)

18. On or about July 29, 2016, Claimant signed a Medical Statement form which authorized her medical providers to provide medical information about Claimant's ability to work. Claimant's physician completed the form and

indicated Claimant was unable to return to work due to left shoulder pain. (Ex. 9, pg. 80.)

19. On August 11, 2016, a Notice of Decision was issued from the Colorado Department of Labor and Employment, Unemployment Insurance Program. (Department of Unemployment.) The notice indicated Claimant's claim for unemployment benefits was disallowed due to a medical condition. The Notice stated:

> A person must be able and available for suitable work during any period for which benefits are claimed or received. Due to a medical condition, you are unable to work; therefore, payments cannot be made because you do not meet the eligibility requirements of the law. (Ex. 9, pg. 83.)

20. On September 6, 2016, another Notice of Decision was issued by the Department of Unemployment. The Notice of Decision indicated:

> A person must be able and available for suitable work during any period for which benefits are claimed or received. Medical information received establishes that you are now able and available for work. Your claim is allowed as of September 4, 2016 provided that you continue to meet the eligibility requirements of the law. (Ex. 9, pg. 81)

21. The ALJ infers from this sequence of events that Claimant's claim for unemployment benefits was disallowed due to her alleged shoulder injury and pain complaints, but Claimant provided supplemental medical information to the Department of Unemployment indicating her shoulder condition did not preclude her from being able and available to work for purposes of receiving unemployment benefits.

22. Claimant was awarded unemployment benefits and paid unemployment benefits at a weekly rate of $323.00 from September 10, 2016, through March 4, 2017. (See Ex. 9, pg. 81 and 88.)

23. On March 6, 2017, just two days after her unemployment benefits stopped, Claimant filed a Workers' Claim for Compensation.

24. As part of her workers' compensation claim, Claimant is requesting temporary total disability benefits as of July 19, 2016, and continuing.

25. As found above, upon the termination of Claimant's unemployment benefits, which were premised on Claimant's contention she was able and available to work, Claimant filed a claim for workers' compensation benefits and is asserting that she has been unable to perform her regular job duties since July 19, 2016, and is entitled to temporary total disability benefits since July 19, 2016. The ALJ acknowledges that a Claimant may be able and available to work and eligible for unemployment benefits, but yet be disabled and entitled to temporary total disability benefits, during the same time period. Therefore, the truth of one position does not necessarily preclude the truth of the other. However, the fact that Claimant alleges she suffered a work injury

on May 20, 2016, and alleges she was laid off because of her injury, and immediately files a claim for unemployment benefits, but waits 8-10 months to file a claim for workers' compensation benefits seems a bit incongruous.

26. Claimant underwent an MRI of her shoulder on February 28, 2017. The MRI showed: i) a high-grade, near full-thickness bursal tearing of the anterior/mid supraspinatus footprint without tendon retraction, ii) superimposed moderate tendinosis, and iii) moderate infraspinatus tendinosis with local interstitial split tear.

27. On June 15, 2017, Claimant underwent an IME with Dr. Kriston Mason. In her report, she assessed Claimant with:

    a. A near full thickness left supraspinatus tear with significant infraspinatus interstitial tearing;

    b. A type 2 acromion with probable chronic impingement;

    c. Myofascial pain based on overutilization of the trapezius and substitution of scapulothoracic for glenohumeral motion; and

    d. Probable exacerbation of underlying longstanding major depression.

28. Although Dr. Mason did not address causation in her report, she recommended Claimant see a psychologist for her depression and an orthopedist for a surgical evaluation of her left shoulder.

29. After issuing her report, Dr. Mason testified via deposition. During her deposition, Dr. Mason was asked to address the cause of Claimant's shoulder condition and complaints. Dr. Mason opined that Claimant's pain generator is her near full thickness supraspinatus tear. (Dep., pg. 26.) She also opined that the tear occurred when Claimant was hit by a cart at work and braced herself from falling with her left hand. (Dep., pg. 8-10)

30. Dr. Mason stated that:

> So she may well have had some degenerative changes in the shoulder prior to this event. But, basically, the mechanism, as described to me, was being hit from behind, bracing out with the arm to prevent being pushed further, and that is essentially the same mechanism as what we call a FOOSH, or a fall on outstretched hand, when people fall, and that is the primary mechanism for injury to the rotator cuff. (Dep., pg. 8-9.)

31. Dr. Mason was asked to further opine on the alleged mechanism of injury in this case since Claimant did not fall to the floor and land on an outstretched hand. Dr. Mason indicated that it's the same motion, and with an unknown force behind it, it "certainly ***could*** cause the tearing." (Emphasis added.) (Dep., pg. 9-10.) Regarding the other findings on the MRI, and whether they were caused by the alleged incident, Dr. Mason stated that:

> So, we know that some of the things on her MRI are things that develop over time. And then other things on her MRI, particularly the tearing, are, you know, more likely to ***potentially*** be something that in the context of a trauma. (Emphasis added.) (Dep., pg. 10-11.)

32. Dr. Mason was again asked whether she had an opinion, within a reasonable degree of medical probability, whether Claimant's shoulder problems are related to the accident on May 20, 2016. Dr. Mason indicated that "the mechanism related to me is ***plausible*** as far as causing a tear to the supraspinatus tendon." (Emphasis added.) (Dep., pg. 22-23.)

33. Dr. Mason also testified that she thought Claimant's physical examination and physical findings correlated "reasonably well." (Dep., pg. 23.)

34. Dr. Mason testified that she did not know what Claimant fell against after being hit by the cart. She said it could have been a wall or a table. (Dep., pg. 29-30.) It does not appear Dr. Mason was aware Claimant was working on the assembly line at the time of the incident and if she needed to brace herself, she braced herself on the assembly line right in front of her, as seen in the photographs submitted at hearing and contained in the Job Site Analysis. (*See* Ex. 13 and Ex. F.) In other words, it is not clear if Dr. Mason was aware that there was very little distance for Claimant to "fall" towards a table or wall and gain momentum which could result in a significant amount of forced being exerted into her rotator cuff. This was not an event in which someone was pushed or lost their balance and fell forward and traveled quite a bit of distance before catching themselves against a wall or table and was therefore consistent with a "FOOSH." In addition, there is no indication that Claimant sought and obtained medical care immediately – or soon after - the incident. Assuming the incident described by Dr. Mason occurred and caused a torn rotator cuff with the immediate onset of pain as described by Claimant, and she requested Employer to send her to a doctor on the day it happened and they refused, Claimant did not seek treatment from her primary care provider, via Salud, close in time to the incident. Moreover, when she did seek treatment for a number of ongoing medical problems on July 1, 2016, and said she had shoulder pain, she did not indicate her shoulder pain was due to an accident, let alone an accident occurring at work.

35. Although Dr. Mason's opinions only need to be within a reasonable degree of medical probability, her use of various qualifiers when rendering opinions about causation such as "could" – "plausible" – and "potentially" make her opinions regarding causation unpersuasive.

36. The ALJ does not find Dr. Mason's opinions regarding causation to be persuasive.

37. Dr. Mason agreed that people can get degenerative rotator cuff tears. (Dep., pg. 41). She also agreed that there is no way to determine whether a rotator cuff tear shown on an MRI was caused by degeneration or an acute injury.

(Dep., pg. 41.) The ALJ does find this portion of her testimony to be credible and persuasive.

38. Claimant was evaluated in an Independent Medical Examination by Henry J. Roth, M.D. on August 10, 2017. Subsequently, Dr. Roth's evidentiary deposition was taken where the parties stipulated to Dr. Roth's qualifications and expertise as an Occupational Medicine Physician, Internal Medicine physician and Level II Accreditation. Dr. Roth not only reviewed all of Claimant's medical records, performed an Independent Medical Examination of Claimant but also was present at the workers' compensation hearing and heard Claimant's testimony as well as the other lay witnesses.

39. As set forth in Dr. Roth's report, Claimant described the mechanism of injury by stating that the edge of the cart hit her at the left medial scapular border and that it was a focal and isolated impact. She also identified the area of impact and discomfort is in the same periscapular region. (Ex. E, pg. 17.) Claimant did not tell Dr. Roth that she was injured when she braced herself after being hit by the cart.

40. It is Dr. Roth's expert medical opinion Claimant did not sustain an injury to her left shoulder on May 20, 2016 when she was hit by a cart. It is Dr. Roth's further expert opinion that Claimant's left upper quarter myofascial pain as well as any underlying left shoulder internal derangement (degenerative arthrosis/arthritis) is independent and unrelated to her workers' compensation claim date of May 20, 2016. The basis in part for Dr. Roth's opinion is:

> The mechanism of injury is not of a mechanical type that would medically be associated with internal derangement at the shoulder as there actually is no direct mechanism at the left shoulder. There is no direct impact to anatomically disrupt the rotator cuff or glenohumeral joint. There is no lateral compressive force. There is no postural or exertional shoulder strain. Currently, there is no indication symptoms are related to the left shoulder joint. (Ex. E, pg. 21.)

41. During his deposition, Dr. Roth testified that the mechanism of injury reported to him:

> [D]oes not provide the mechanism of injury to internal derangements in the shoulder. In other words, would an impact to your upper back result in pathology internal to your shoulder? The answer is no.
>
> There is no mechanism, the impact on her back is below her shoulder and doesn't specifically involve any force to the shoulder or motion to the shoulder joint. (Dep., pg. 12-13.)

42. Dr. Roth also addressed Claimant's contention that the injury occurred when she braced herself after being hit by the cart. Dr. Roth stated:

> The second element, would leaning forward onto a table have produced any disc pathology? And, again, the answer

> is no because it's involving ordinary degenerative change. And, again, what you're describing is not a mechanism where the shoulder joint is put into a position that exceeds the tolerance of the tissues, nor was any force being – significant force being applied. To wit, immediately afterwards she was able to continue the same activity she was performing, and she continued those activities for six weeks. If there would have been an acute injury with tear inside of a joint, it would swell, it would be immediately painful, and it probably would have precluded continuing normal activities of daily living, especially her work. So it's not medically likely that event was associated with a significant atomic change.
>
> Also, the degenerative changes that we're seeing are quite ordinary and almost universal at age 59. That doesn't mean all persons are symptomatic. We have medical studies showing that at age 60, 50 percent of asymptomatic males have partial or complete rotator cuff tears bilaterally. So degenerative changes are quite compatible with not having had previous shoulder symptoms; it doesn't require that. And that's a reflection of genetics, age, and deconditioning and poor health. Subsequently, we have an exaggerated pain response, but that is a reflection of personal circumstances. (Dep., pg. 12-14.)

43. Dr. Roth was also asked during his deposition whether incident alleged by Claimant aggravated, accelerated, or exacerbated Claimant's pathology documented by the February 28, 2017, MRI. Dr. Roth indicated that there is no relationship between the two. He further opined that:

> What you're looking at is the ordinary -- you know, medically probable ordinary degenerative change. And 5/20/16 does not provide a mechanism of clinical significance that would have resulted in alteration or exacerbation of shoulder anatomy. And, subsequently, there was no clinical course that would support an injury having been sustained on that date. (Dep., pg. 14.)

44. It is also Dr. Roth's expert medical opinion that Claimant's left shoulder condition is not due to an occupational disease. (Dep., pg. 19-20). After reviewing the Job Site Evaluation performed by Ms. Pickett, Dr. Roth stated in email correspondence to Respondents' counsel that Claimant's job duties:

> [D]id not breach the thresholds necessary to consider an upper extremity condition potentially work–related. This analysis holds true whether utilizing the evidence-based medicine within the cumulative trauma conditions guideline

or the non-evidence based potential thresholds as reported in the shoulder treatment guidelines. (Ex. E., pg 46.)

45. Claimant testified that her current pain is in the location where she was hit with the cart. (HT, pg. 39.) This is consistent with her presentation to Dr. Henry Roth. As set forth in Dr. Roth's report, Claimant stated that the edge of the cart hit her at the left medial scapular border and that it was a focal and isolated impact. She also identified the area of impact and discomfort is in the same periscapular region. (Ex. E, pg. 17.)

46. Claimant did not tell Dr. Roth that she was pushed forward and used her hand(s) to brace herself from falling and that is when she injured her shoulder. However, after hearing Claimant's revised version of the alleged mechanism of injury, Dr. Roth testified that even that alleged mechanism of injury "does not support an independent injury of any sort because when she presents for medical attention -- even when she presents 15 months later for independent medical examination - her discomfort is isolated to upper torso musculature, which is not a specific condition and doesn't relate to either of the mechanisms that are currently being discussed." (Dep., pg. 7-8.)

47. Claimant's job duties did not involve a peculiar risk that could cause an occupational disease of the shoulder. There was no occupational exposure that contributed to Claimant's shoulder condition, pain complaints, or alleged disability.

48. Dr. Roth's expert medical opinions are found to be credible and extremely persuasive. Dr. Roth's expert medical opinions regarding causation are found to be more credible and more persuasive than those of Dr. Mason.

49. Review of the medical records from Salud demonstrates as early as February 21, 2011, Claimant reported pain in her shoulder. (Ex. J, pg. 70.) On February 7, 2014, Claimant reported pain in her neck radiating to her left arm and had left shoulder pain on arc test. (Ex. J, pg. 72.)

50. A Job Site Analysis was prepared by Ms. Gail Pickett, of Summit Vocational Consultants. (Ex. 13.) Ms. Pickett's report includes a number of photographs of the assembly line – conveyor belt – at which Claimant was working when she was hit on the backside of her shoulder by a cart. The pictures show workers placing cuttings in those portions of the trays that the robots missed. The pictures demonstrate the workers – who appear to be a little shorter than average - like Claimant who is about 5 foot 2 inches - working at the assembly line. The assembly line is about waist height. Although Claimant might not have been placing cuttings in trays like the workers in the photographs when she was hit on the backside of her shoulder by a cart, the pictures demonstrate the proximity of the workers to the conveyor belt while working. This ALJ finds that upon being unexpectedly hit by a cart, Claimant would have most likely been pushed into the side of the conveyor belt and her waist or midsection of her body would have absorbed much of the force. Therefore, Claimant's contention that she braced herself with an outstretched

arm, which resulted in significant force being exerted into her shoulder joint, resulting in a torn rotator cuff, seems unlikely.

51. On April 6, 2017, counsel for Claimant signed a Workers' Claim for Compensation Form on behalf of claimant alleging a date of injury/disease of May 20, 2016 that occurred at 4:00 p.m. Claimant, through counsel, alleged a co-worker pushed a line of metal carts towards her. Claimant did not allege an occupational disease with a date of onset of disability of either July 1 or July 19, 2016.

52. Kate Powell testified post hearing by deposition. Ms. Powell attended the hearing. Ms. Powell was Employer's Human Resources manager. Ms. Powell testified that Claimant, and others, were laid off on July 19, 2016, due to a slowdown in work. She also testified that on July 20, 2016 Claimant, for the first time told Ms. Powell she was injured at work when someone ran a cart into her. She testified that Claimant did not report any type of injury to her in May or June of 2016 and did not report the injury until she was laid off on July 19, 2016. Based on Claimant's allegations, Ms. Powell, completed paperwork regarding Claimant's workers' compensation claim. Ms. Powell testified at no time between May, June and July before July 20 did Claimant report the alleged injury to Ms. Powell. Ms. Powell testified Claimant worked her regular hours through July 19, 2016. Ms. Powell's testimony is found to be credible and persuasive.

53. Mr. Vincente Savala testified at hearing. Mr. Savala was the production supervisor. Mr. Savala, Mr. Zavala and Ms. Powell credibly testified Claimant continued to work her regular job until she was laid off due to the end of season on July 19, 2016.

54. Claimant missed no time from work due to the May 20, 2016 incident, or the May 2, 2016 event and/or the alleged occupational disease.

55. Claimant never claimed to Mr. Zaval, Mr. Savala or Ms. Powell that her job duties caused problems requiring health care or was disabling and interfered or prevented her from working.

56. Review of the medical records from Salud demonstrates as early as February 21, 2011, Claimant reported pain in her shoulder. (Ex. J, pg. 70.) On February 7, 2014, Claimant reported pain in her neck radiating to her left arm and had left shoulder pain on arc test. (Ex. J, pg. 72.)

57. On February 7, 2014, Claimant had an x-ray of her cervical spine due to "radicular pain." On November 26, 2014, Claimant was seen for right shoulder pain also for left shoulder pain. On November 12, 2015, Claimant returned to Salud complaining of neck pain.

58. On December 21, 2015, claimant returned to Salud on follow up after being seen at Poudre Valley Medical Center after she fell and hit her head. Claimant's neck was tender and one of her assessments was neck pain.

59. Claimant returned to Salud on February 6, 2016 because of continuing neck pain. Claimant returned to Salud on February 11, 2016 for follow up for her neck pain. Claimant was seen at Salud on April 14, 2016 for medication refill due to her neck pain.

60. Review of the Salud records does not establish Claimant returning to Salud for any reason after April 14, 2016 until July 1, 2016. On July 1, 2016, claimant was seen for a behavioral health visit. Review of this chart note demonstrates, "The patient states that she fell and hurt her head and that in December 2015 and suffers from pain in those areas. The patient reports that she had difficulty sleeping, lack of energy and loss of appetite. She also reports lack of concentration and feels down and helpless. …the patient disclosed that she is in currently in a domestic violence situation. She has been feeling these depressive symptoms for about a year and this is when this relationship began."

61. Claimant was seen by Clandra Robinson, M.D. at Salud also on July 1, 2016 for stomach pain. Under history of present illness it also states, "also L shoulder pain had X-ray done in Feb but never got results." On physical examination claimant's neck was supple, neurologic grossly normal, musculoskeletal extremities no edema, pulse is equal bilaterally, normal strength and range of motion of shoulders but had tenderness to palpation throughout right half of trapezius muscle. Dr. Robinson noted assessments of diabetes, shoulder pain and depression.

62. It is specifically found the medical records from Salud from July 1, 2016 do not support an alleged industrial injury with a date of either May 2 or May 20, 2016, nor an occupational disease with a date of onset of disability of on or about July 1, 2016.

63. On July 21, 2016 claimant returned to Salud where she was seen by Dr. Denegri. The reason for appointment, "pp here c/o neck/shoulder pain. PP had an accident at work two months ago." Review of the examination, "general exam…in no acute distress, shoulder: left joint no pain with movement, palpation left moderate tenderness. Erythema left none. Edema left none present. Effusion left none present. Flexion left decrease, extension left decrease, ecchymosis none. Present bilaterally. Laceration none. Present bilaterally. Tenderness to palpation left mild diffuse. Dr. Denegri's assessment was shoulder pain.

64. It is specifically found the July 21, 2016 chart note does not support either an industrial injury of May 2 or May 20, 2016, or an occupational disease with a date of onset of disability of on or about July 1 or July 19, 2016. Merely

because Claimant complained of shoulder pain, merely because Claimant vaguely mentioned an accident at work and merely because Dr. Denegri noted some moderate tenderness and decreased motion does not mean either of those were because of what Claimant alleged occurred at work.

65. Based on the totality of the evidence presented, Claimant's testimony that she injured her left shoulder due to the incident with the cart or due to an occupational disease is not found to be credible for a number of reasons. Some of the reasons include, but are not limited to, the following:

First, Claimant testified that she went to her personal physician in May of 2016, after the incident with the cart. The medical records submitted by the parties do not support Claimant's testimony that she went to her own physician in May of 2016, after the May 20, 2016, incident. The first time Claimant went to her physician and complained of shoulder pain after May 20, 2016, was July 1, 2016. Moreover, when Claimant went to her personal physician on July 1, 2016, and was evaluated for a number of medical issues, and mentioned she also had shoulder pain, she did not mention that her shoulder pain was caused by an accident or an accident at work.

Second, Mr. Zavala testified at hearing and the ALJ finds his testimony to be credible and persuasive. He testified that there was an incident in May in which a co-worker pushed a cart into Claimant. However, he also testified that after the incident, he asked Claimant if she was okay and whether she needed to be checked by a doctor. According to Mr. Zavala, Claimant said she was okay and that she did not need to see a doctor. (HT, pg. 72.) In addition, Mr. Zavala also testified that if an employee reports a work injury, he fills out a form and gives the form to Ms. Powell, who then tells the employee where to go and which doctor to see. (HT., pg. 78-79.) In this case, when Claimant was laid off on July 19, 2016, and alleged she was being laid off due to suffering a work injury, the alleged injury was brought to the attention of Ms. Powell and Ms. Powell completed the appropriate paperwork. Had Claimant alleged she was injured on May 20, 2016, when she was hit by the cart, and asked to see a doctor – as Claimant alleges - it seems likely that Mr. Zavala would have advised Ms. Powell of an alleged injury as was done on July 19, 2016 and Ms. Powell would have completed paperwork regarding the alleged work injury as she did on July 20, 2016. Therefore, the ALJ finds that although an incident occurred on May 20, 2016, Claimant's testimony that she told Mr. Zavala on the day of the incident that her shoulder was hurting and that she wanted to be sent to a doctor is not credible.

Third, Claimant's medical records document Claimant has been the victim of domestic violence. As found above, the July 1, 2016, report from Salud documents Claimant has been severely depressed for about a year and that her depression stems from domestic abuse from her current partner. The report also indicates Claimant's antidepressant was refilled and she was given information for therapy. (Ex. I, pg. 87-92). On cross examination,

Claimant was asked whether the domestic violence to which she was subjected was physical. Claimant denied being subjected to any domestic violence and indicated that she does not know where the doctor got that information. (HT, pg. 56.) Claimant also completed a questionnaire when she was evaluated by Dr. Mason. Although Claimant stated that she suffers from depression, she indicated that her depression was due to being in too much pain – and did not indicate it was based upon personal matters. (Ex. 12, pg. 9.) The ALJ is mindful that domestic violence is particularly personal and extremely difficult for most victims to discuss, however, Claimant's failure to honestly answer questions about this matter further decreases Claimant's overall credibility regarding the alleged cause of her left shoulder problems and symptoms.

Fourth, it is Claimant's contention, based upon the testimony of Dr. Mason, the incident on May 20, 2016, tore her rotator cuff and the tear is the cause of her shoulder pain. However, Dr. Roth credibly testified that Claimant's actions of not seeking medical care for approximately 6 weeks and performing her regular work activities until she was laid off is inconsistent with suffering a traumatic rotator cuff tear. Dr. Roth further testified that if there was an acute injury with a tear inside the shoulder joint, it would swell, it would be immediately painful, and it probably would have precluded continuing normal activities of daily living, especially her work, and the ALJ finds this testimony to be credible and persuasive and finds that Claimant's actions are inconsistent with suffering rotator cuff tear when the cart hit her.

Fifth, this ALJ does not find the alleged mechanism of injury which was somewhat described by Claimant during her testimony and more fully described by Dr. Mason, which indicated Claimant fell on an outstretched hand after being hit by the cart, to be credible. As found above, based upon the photographs submitted at hearing, it would seem that upon being hit unexpectedly by a cart, Claimant would have been pushed into the side of the conveyor belt and her waist or midsection of her body would have absorbed much of the force. Moreover, Claimant did not describe to Dr. Roth that she injured her shoulder upon bracing herself after being hit by the cart. Therefore, Claimant's contention that she braced herself with an outstretched arm, which resulted in significant force being exerted into her shoulder joint, resulting in a torn rotator cuff, is not credible.

66. It is specifically found Claimant was not disabled from performing her regular job duties due to what she alleges occurred either on May 2 or May 20, 2016. It is specifically found Claimant's job did not end because of the alleged industrial injury, rather, due to Claimant being laid off due to the end of season. After being laid off Claimant applied for and received unemployment benefits beginning in September of 2016.

67. It is specifically found Claimant did not require healthcare treatment because of what she alleged occurred on either May 20 or May 2, 2016. The temporal

and credible medical evidence does not support Claimant seeking treatment because of the incident with the cart hitting the backside of her shoulder.

68. It is specifically found that Claimant's job duties did not involve a peculiar risk that could cause an occupational disease of the shoulder. It is specifically found that there was no occupational exposure that contributed to Claimant's shoulder condition, pain complaints, alleged disability, or need for medical treatment.

69. It is specifically found Claimant did not sustain a compensable occupational disease with a date of onset of disability of either July 1 or July 19, 2016. It is specifically found Claimant was not disabled from performing her regular job duties due to the alleged occupational disease. It is specifically found Claimant did not require medical treatment to cure or relieve her from the effects of the alleged occupational disease.

70. It is specifically found Claimant's claims for workers' compensation benefits whether due to an industrial injury or an occupational disease are denied and dismissed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ

determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Compensability

The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* WC 4-650-711 (ICAO February 15, 2007).

The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Claimant had the burden of proof to establish by a preponderance of the evidence found credible she suffered either a compensable industrial injury or a compensable occupational disease. It is specifically concluded the expert medical opinions of Dr. Roth, are more credible and more persuasive than Dr. Mason. It is also specifically concluded that Claimant's testimony regarding the alleged consequences of the incident with the cart as it relates to her left shoulder is neither credible nor persuasive.

The incident in which Claimant was hit by the cart did not cause, aggravate, or accelerate Claimant's shoulder condition or symptoms and necessitate the need for any medical treatment or cause any disability.

Claimant's job duties did not involve a hazard or peculiar risk that could cause an occupational disease of the shoulder. Moreover, there was no occupational hazard, exposure, or peculiar risk that contributed to, or caused, Claimant's shoulder condition, pain complaints, disability, or need for medical treatment.

Therefore, it is specifically concluded Claimant failed to meet her burden of proof and establish either a compensable industrial injury or a compensable occupational disease.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claims for workers' compensation benefits are denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 29, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury on or around January 31, 2017.

II. If Claimant proved he sustained a compensable injury, whether Claimant proved by a preponderance of the evidence he is entitled to medical treatment from Dr. John Tobey.

FINDINGS OF FACT

1. Claimant is a 38-year-old right-hand-dominant man who worked for Employer as a production cook. Claimant's job duties consisted of preparing foods for sale to Employer's customers, including setting up the salad bar for use by Employer's customers.

2. Claimant alleges that he sustained a work injury while working for Employer on Tuesday, January 31, 2017. Claimant testified that he walked into a walk-in cooler to collect product to set up the salad bar and reached his left arm above his head to grab a bag of lettuce when he felt a "shock wave" from his left shoulder and down his arm into his left elbow. Claimant testified that the bag of lettuce was located on the top shelf and required him to stand on his toes to reach the bag. Claimant testified that he later commented to a co-worker that the lettuce "kicked his butt" but went on working the rest of his shift. Claimant testified that the pain originally felt like a "Charley horse," but developed into tingling into his hand later in the day.

3. Claimant first sought medical treatment from his primary care physician, Steven Gary Mlodinow, M.D., on February 6, 2017. Claimant complained of left forearm pain radiating from his wrist to his elbow, with numbness and tingling in his fingers. Dr. Mlodinow noted the following under the History of Present Illness section: "6 days ago, awoke from sleep with moderate to severe L[eft] forearm pain, volar surface…No injury or change in use." On physical exam, Dr. Mlodinow noted tenderness along the forearm, hand, wrist, and elbow, and diminished sensation to fine touch. He diagnosed Claimant with a left forearm strain. He specifically noted, "Symptoms and finding perplexing. Much would point to CTS, but some symptoms point to ulnar neuritis or olecranon bursitis. Sudden onset of symptoms with this level of severity would suggest injury, which patient denies."

4. Dr. Mlodinow referred Claimant to Eric Traister, M.D., who diagnosed Claimant with carpal tunnel syndrome ("CTS") and tennis elbow (lateral epicondylitis) on February 22, 2017. Dr. Traister referred Claimant to Kristi Gill, D.O.

5. On February 23, 2017, Claimant sent an e-mail to Employer's Human Resources representative Sheila Nawrocki stating,

> On Monday Jan[uary] 30 my arm started to bother me, my arm from my elbow to my wrist and my hand felt numb and achy. I went to work on Tuesday January 31 and during the course of the day, my left hand and arm continued to hurt and got more painful as the day progressed…There was no specific incident that caused my injury either at work or at home.

He wrote that Dr. Traister diagnosed him with CTS and tennis elbow and stated, "I believe this is a result of the work that I do at [Employer]. There has not been an 'event' that could have caused this injury other than the daily routine of my job." Claimant made no mention in the e-mail of an incident reaching for lettuce in the e-mail reporting the alleged injury.

6. Claimant completed an Incident Report on February 24, 2017 stating, "On Jan[uary] 31 I noticed extrem (*sic*) pain in my arm to elbow and numbness + tingle in hand." Claimant again made no mention of an incident reaching for lettuce.

7. Claimant gave a recorded statement to the insurance adjuster on March 8, 2017. The recorded statement was played at hearing. During the conversation, Claimant stated, in relevant part:

> Adjuster: So where were you when it started hurting?
>
> Claimant: I usually work at like 6 in the morning, so I woke up and it was about 5:30 and on the way into work it kinda felt like … my hand was tingling a little bit and it kinda felt like something I could shake off but I went about my normal routine. About 7:00 that morning I actually opened a bag of lettuce and I was like 'man there is something wrong.'
>
> Adjuster: So it sounds … you said your hand was tingling when you were on the way to work?
>
> Claimant: Yeah, it was something I felt like I could shake off, like maybe it happened … I really wasn't … I really wasn't aware of it … like that morning my hand felt kinda tingly and yeah …
>
> I mean really all I do is go to work and come home and hang out with my kid, it's like there is nothing really that could have affected ... when I think what caused it, I can't tell you.
>
> Adjuster: OK, so there was no traumatic event?
>
> Claimant: No ma'am.

8. On March 8, 2017, Claimant presented to Janet Brown, M.D. at Concentra with complaints of left elbow pain for five weeks with numbness, tingling and swelling. Dr. Brown noted that Claimant noticed the pain on approximately February 6, 2017 while working as a chef for Employer. Dr. Brown diagnosed Claimant with a left elbow injury and recommended an MRI of the left upper extremity.

9. Claimant presented to Dr. Gill on March 9, 2017. Claimant reported an onset of symptoms around the end of January 2017 and beginning of February 2017. Claimant reported experiencing "rare" numbness and tingling in his left hand prior to the alleged work incident. Dr. Gill raised the possibility that Claimant's pain was coming from impingement of the C6-7 nerve root and recommended Claimant undergo an EMG.

10. On March 15, 2017, Claimant underwent MRIs of the left upper extremity. The left wrist MRI revealed a probable linear, interstitial tear of the jugular fibrocartilage complex. The left elbow MRI revealed nonspecific synovitis with small joint effusion. The left shoulder MRI revealed mild tendinosis of the supraspinatus component with no evidence of full-thickness rotator cuff defect.

11. On March 16, 2017, Claimant presented to Felix Meza, M.D. at Concentra. Claimant reported experiencing an onset of pain around February 1, 2017. Dr. Meza noted, "[Claimant] denies specific fall or trauma. Denies specific injury to the wrist or forearm. He does report repetitive activities as a chef in cutting and preparing food." Dr. Meza reviewed the MRIs and assessed left elbow and left wrist pain. He recommended EMG testing, physical therapy, and a worksite evaluation. He remarked, "I have discussed with the patient since he does not have an isolated incident or exact time of injury that he would need to meet the Colorado Workers' Compensation repetitive trauma guidelines." Dr. Meza referred Claimant to John Tobey, M.D. for an EMG.

12. A Job Demands Analysis and Risk Factor Analysis was completed on March 16, 2017. No primary or secondary risk factors were identified.

13. On April 13, 2017, Devin Jacobs, PA-C, evaluated Claimant under the supervision on Dr. Meza. PA-C Jacobs diagnosed Claimant with mild left carpal tunnel syndrome and lateral epicondylitis of the left elbow. He determined Claimant did not meet the criteria for a repetitive use injury and recommended Claimant see his primary care physician for any further treatment.

14. Dr. Tobey performed an EMG on May 9, 2017. He noted that Claimant reported being injured on February 1, 2017 when reaching above his head to grab a bag of lettuce. Based on the EMG findings, Dr. Tobey concluded that there was no evidence of left carpal tunnel syndrome, ulnar neuropathy or radial neuropathy. He diagnosed Claimant with probable mild left subacute C7 radiculopathy.

15. On February 21, 2018, F. Mark Paz, M.D. performed an independent medical evaluation ("IME") at the request of Respondents. Dr. Paz issued an IME report dated March 1, 2018. Dr. Paz interviewed and physically examined Claimant, and conducted a thorough medical records review. Claimant reported sustaining an injury on January 31,

2017 while pulling a bag of lettuce down from an overhead location using his left upper extremity. Dr. Paz gave the following assessment, in relevant part: left upper extremity paresthesias and weakness, left wrist and elbow pain, left wrist TFCC interstitial tear, left elbow synovitis, and left rotator cuff tendinosis. He concluded that there were no objective findings supporting Claimant's subjective symptoms. Dr. Paz included a causation analysis in his report, and opined that it is not medically probable Claimant's left upper extremity symptoms, including the paresthesias and weakness, are causally related to the January 31, 2017 incident.

16. On March 5, 2018, Dr. Tobey testified by deposition as an expert in physical medicine and rehabilitation, electrodiagnostic medicine, and sports medicine. Dr. Tobey explained that the electrodiagnostic findings indicated Claimant has nerve damage on the left, most likely associated with a pinched nerve from the neck. Dr. Tobey testified that Claimant probably has a disc bulge or disc herniation pinching on the C7 nerve root, which was likely caused by Claimant reaching for a bag of lettuce. However, on cross examination, Dr. Tobey testified that his opinion would change if Claimant's pain did not, in fact, begin with the alleged specific incident of reaching overhead for the bag of lettuce. Dr. Tobey stated:

> Q: You said that your opinion as to causation is based upon the fact that it -- that his pain began with a specific incident of lifting his arm over his head, correct?
>
> A: Yes, that's correct.
>
> Q: And is that important to you in reaching your causation analysis?
>
> A: Well, I think it -- I think it's important from the standpoint that, you know, there was a specific incident where it happened rather than just something that kind of developed over time.
>
> Q: And if it had been something that just developed -- Let's say he woke up and his arm was feeling that way, would that change your opinion?
>
> A: Yes. I mean, I think that there is – You know, there can be incidents where people herniate disks or bulge disks, you know, just with normal everyday life activities as well.

17. Claimant testified that he did not have pain in his left upper extremity prior to the alleged work incident. He stated he does not believe he was experiencing problems in his arm the morning of or the day prior to the alleged injury. Claimant testified that he did not initially attribute his symptoms to grabbing the bag of lettuce. He stated he began thinking about other ways that he could have been injured only after receiving medical treatment for CTS that did not improve his condition. Claimant testified that he now is certain his symptoms were caused by the alleged lettuce incident.

18. Claimant's testimony as to the mechanism of injury and onset of symptoms is not found credible or persuasive.

19. The ALJ credits the opinions of Drs. Meza and Paz, the medical records, and the employment records, over Dr. Tobey's conflicting opinion and Claimant's testimony, and finds that Claimant did not sustain an injury or occupational disease arising out of and in the course of his employment.

20. Claimant failed to prove by a preponderance of the evidence that his condition is proximately caused by, arose out of, and occurred in the course of his performance of services for Employer.

21. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury or occupational disease proximately caused by, arising out of, and in the course of his employment with Employer. Claimant's reports as to his mechanism of injury and onset of symptoms have been inconsistent throughout the medical and employment records. In his initial reports to medical providers, Employer and Insurer, Claimant repeatedly denied any specific event occurred. To the contrary, Claimant indicated he experienced symptoms prior to the alleged date of injury, reporting to Dr. Mlodinow that he woke up from sleep with pain in his arm, and telling the insurance adjuster he woke up with a tingling sensation in his hand prior to going to work on the alleged date of injury. There is no mention in the records of a reported specific incident until May 2017, after a Job Demands Analysis failed to identify any primary or secondary risk factors, and it was determined Claimant did not meet the criteria for a repetitive use injury. The inconsistencies in Claimant's reported mechanism of injury and onset of symptoms undermine Claimant's credibility.

Additionally, Dr. Paz and Meza credibly and persuasively opined that Claimant's condition is not work-related. While Dr. Tobey provided a conflicting opinion, his opinion is based on Claimant's reported mechanism of injury and onset of symptoms, which the ALJ found incredible. There is insufficient credible and persuasive evidence Claimant sustained an industrial injury or occupational disease. As found, no primary or secondary risk factors were identified, and it was determined Claimant did not meet the Guidelines for a repetitive use injury. Based on the totality of the evidence, Claimant failed to meet his burden to prove that he sustained a compensable injury and that he is entitled to medical benefits.

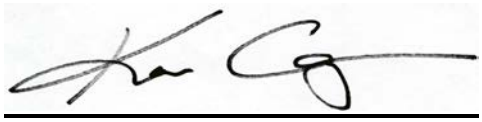
ORDER

It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence he sustained a compensable injury or occupational disease arising out of and in the course of his employment for Employer on or around January 31, 2017. Claimant's claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 15, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable industrial injury or compensable occupational disease.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to medical benefits.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability indemnity benefits from August 5, 2017 and ongoing.

4. Determination of Claimant's average weekly wage.

5. If the claim is found compensable, whether Respondents are entitled to a penalty against Claimant's entitlement to benefits for Claimant's late reporting.

FINDINGS OF FACT

1. Claimant is a 55 year old male who worked for Employer as a certified armored service technician from April of 2000 until he was found to be unfit for duty on August 7, 2017.

2. Claimant's duties included working six days per week, 8-10 hours per day, picking up and delivering customer change orders/deposits, carrying a minimum of 50 pounds by hand or up to several hundred pounds by cart, and having a minimum of 50 stops per day. His job duties also included loading and unloading vehicle cargo consisting of bags and boxes of coin weighing as much as 50 pounds per item 20/25 times per day, and required an unrestricted ability to bend, stoop, squat, stand, walk, climb, twist, turn, and reach out. *See* Exhibit 1.

3. In 2010 while working for Employer, Claimant was involved in a rollover accident in Employer's armored truck. Claimant injured his left knee and had surgery. After recovering from surgery, he returned to working his job as an armored service technician. Claimant was provided with a permanent partial disability impairment rating for his left lower extremity and his right upper extremity as a result of that incident. *See* Exhibits 12, A.

4. On February 11, 2016 Claimant was evaluated by his personal care provider Micah Miller, PA for an annual physical examination and diabetes check. A

history of hypertension, diabetes mellitus type 2, sleep apnea, and morbid obesity were noted. Claimant was noted to have a body mass index of 42.6. *See* Exhibit C.

5. On February 13, 2017 Claimant was evaluated by his personal care provider Sarah Reynolds, PA for an annual physical. Claimant reported that his left knee pain prevented him from exercising but that he did walk a lot on the job. Claimant reported that 30% of the cartilage in his left knee was removed following a prior car accident. PA Reynolds noted a history of diabetes type 2, sleep apnea, hypertension, and morbid obesity. Claimant reported that his left knee had been aching since surgery in 2012 and that it also had occasional swelling. Claimant denied difficulty walking. Claimant was noted to have normal gait and normal stance. Claimant was assessed with chronic left knee pain. It was recommended that Claimant try to do some form of moderate intensity exercise 30-45 minutes per day for 4-5 days per week and that he try wearing a knee brace for stability and pain control. Voltaren Gel was recommended for his left knee for symptom relief. *See* Exhibit C.

6. On May 10, 2017 Claimant was evaluated by his personal care provider Kyle Odvody, NP. Claimant reported recurrent right hip and knee pain that he attributed to his left knee pain and left knee surgery from 2012. Claimant reported that he got flare ups of pain in his left knee and that he compensated by walking differently and then would start having left hip pain. Claimant reported that the pain then shifted to his right knee and into his right hip region. Claimant reported that he was currently in the phase where his right hip hurt and that it had been going on for the last two weeks. Claimant reported getting into and out of his truck a lot during the day and walking a lot during the day. Claimant's body mass index was noted to be 43.1. On exam, NP Odvody found Claimant's right hip to have some tenderness on external rotation, minimal flexibility on external rotation, muscle tenderness and tightness in the right Piriformis muscle. Claimant was found to have no swelling or joint tenderness in his knees but generalized reduced flexibility. NP Odvody assessed: right hip pain, likely right piriformis syndrome or sciatica, obesity, and chronic left knee pain. NP Odvody discussed options for physical therapy evaluation and treatment, but Claimant believed he could not afford physical therapy and noted he may try to get physical therapy approved through his workers' compensation case. NP Odvody discussed stretching exercises twice per day and also discussed proper lifting. NP Odvody discussed 20-30 pound weight loss in order to allow back offload compensating from Claimant's abdominal weight. NP Odvody noted Claimant was to follow up in 3-4 weeks if his symptoms persisted or worsened and noted that Claimant would trial stretching and weight loss. *See* Exhibits 14, C.

7. On May 11, 2017 X-rays were performed of Claimant's pelvis and hips as well as his lumbar spine. The impression provided was no evidence of acute injury and no fracture in the hips. Degenerative changes in the bilateral hips, left significantly greater than right. The impression provided for the lumbar spine was no acute abnormality but mild degenerative changes of the spine with mild dextroconvex curvature of the lumbar spine. *See* Exhibit 15.

8. In the spring of 2017, Claimant was working full time for Employer. Claimant had passed and maintained his fit for duty certification. Claimant had passed his firearms certification and had positive performance evaluations. *See* Exhibits 2, 3, 4, 5.

9. On May 22, 2017 while helping his partner load boxes of coin and money bags into Employer's armored truck, Claimant reported that he began to experience excruciating pain in his knees and buttocks. Claimant reported to his work partner that he was in pain and wanted to go talk to someone. Claimant reported an injury to his operations lead and filled out a first report of injury.

10. In a statement filled out and signed by Claimant on May 22, 2017, Claimant reported that he had a prior left knee injury from a truck rollover that had required surgery at the time. Claimant reported that it flared up with pain, caused awkward walking motion, and placed strain on his right knee. Claimant reported that it usually would clear itself after about two weeks but that recently a flare of pain had continued for almost two months. Claimant reported intense pain in both knees and that he believed that there may be pressure on the sciatic nerve. Claimant reported that the pain had started about the beginning of May while he was "hopping." *See* Exhibits 7, B.

11. On May 22, 2017 Claimant was evaluated at Concentra by Jerold Solot, D.O. Claimant reported bilateral knee pain radiating up to his buttock. Claimant reported no specific mechanism caused it and that the date of injury was 6-7 weeks prior. Claimant reported a prior left knee surgery 6-7 years prior and that he had occasional fares of the left knee pain which would cause an antalgic gait and subsequent pain in the right knee. Claimant reported that presently his right knee pain was worse than the left knee pain. Claimant reported muscle pain, back pain, joint swelling, joint stiffness, limping, and night pain. Claimant's body mass index was noted to be 42.91. On Claimant's pain diagram, Claimant reported pain in both knees and in his right hip/buttock area. See Exhibits 22, D.

12. On May 23, 2017 Claimant was evaluated at Colorado Orthopedic Consults by Phillip Stull, M.D. On his intake form, Claimant reported pain in his knees, buttocks, and hips with an onset of symptoms approximately 7 weeks prior. Claimant reported a prior injury to his left knee several years ago with surgery and intermittent symptoms since. Claimant reported right sided hip pain for about 4 weeks with it being severe right sided posterior hip pain that radiates into the right hamstring area, mild low back pain but not severe low back pain, and limping on the right leg by the end of the work day. Antalgic gait was noted favoring the right leg. Mild groin pain was elicited with gentle range of motion testing and a mildly positive Trendelenburg sign was found on both the right and left. A mildly positive straight leg sign was found on the right. X-rays of the pelvis and right hip were performed and showed moderate right hip joint space narrowing and advanced, bone on bone changes in the left hip joint. X-rays of the lumbar spine were taken and showed mild degenerative scoliosis and disc space narrowing at L5-S1 as well as facet hypertrophy at L4-5 and L5-S1. Dr. Stull provided the impression of osteoarthritis of the right hip, degenerative disc and joint disease of the lumbosacral spine with likely

right lower extremity radiculopathy. Dr. Stull recommended a Medrol Dosepak and a spinal MRI. *See* Exhibits 16, E.

13. On May 23, 2017 Claimant underwent an MRI of his lumbar spine interpreted by Elizabeth Carpenter, M.D. The impression provided was: mild-moderate lumbar spondylosis from L2-L5; at L4-5 a moderate sized broad based central extrusion narrowing both lateral recesses and likely contacting the bilateral L5 nerve roots, more prominent on the left but annular fissuring along the right sub articular zone; L4-5 moderate facet arthropathy and left foraminal stenosis with mild right foraminal stenosis; at L3-4 mild-moderate facet arthropathy with mild bilateral foraminal stenosis; at L2-3 a small annular bulge that narrows both lateral recesses (left greater than right) and superimposed foraminal protrusions with moderate left, mild right foraminal stenosis. *See* Exhibits 17, F.

14. On May 24, 2017 Claimant was evaluated by Dr. Solot. Claimant reported no improvement and pain in the right knee radiating to the right hip and pain in the left knee. Claimant's left knee joint was injected. *See* Exhibit D.

15. On May 27, 2017 Claimant was evaluated by Dr. Solot. Claimant reported that his left knee was much improved after the injection but that he was still having pain in the right knee. Dr. Solot injected Claimant's right knee joint. *See* Exhibit D.

16. On May 31, 2017 Claimant was evaluated by Dr. Solot. Claimant reported persistent bilateral knee pain and right gluteal pain and that his right knee pain was improved status post injection. Claimant was noted to be walking with antalgic gait. X-rays were performed and showed no fracture and mild degenerative joint disease. The left knee x-rays showed no acute fracture, dislocation, or osseous lesion. They showed advanced arthritic change, marginal osteophyte formation present at the medial femoral condyle and lateral tibial plateau and no joint effusion. *See* Exhibit D.

17. In June of 2017, Respondents filed a Notice of Contest. Claimant filed an Application for Hearing in August of 2017. *See* Exhibits 9, 10.

18. On June 12, 2017 Claimant was evaluated by John Aschberger, M.D. Claimant reported a prior left knee injury and surgery and that he has had recurrent pain at the left knee. Claimant reported an antalgic gait and increasing soreness at the right knee and pain towards the right back and hip that has been on and off for him. Claimant reported a recent increase in symptoms with pain in both knees but also pain at the right gluteal area radiating to the anterolateral foreleg with sensation of cramping. Claimant reported recent bilateral knee injections with 75% relief on the right lasting about two weeks and recent injection on the left with good initial relief and gradual recurrence of symptoms. Dr. Aschberger assessed: left knee degenerative joint disease with x-rays showing advanced arthritic changes; right knee degenerative joint disease with x-rays showing advanced arthritic changes; and symptoms of a right lumbar radiculitis. Dr. Aschberger recommended MRIs of both knees. Dr. Aschberger noted that Claimant's records from the prior injury would be helpful in determining the extent of degenerative

changes prior to the incident and issues of progressive degenerative change. Dr. Aschberger noted there were no acute abnormalities with this injury and that it may represent a progressive degenerative process. Dr. Aschberger also discussed weight loss as a treatment for the knee symptomatology and noted Claimant was significantly overweight. Dr. Aschberger opined that the weight was likely a source, at least in part, of Claimant's recurrent aggravation to the knees. *See* Exhibit 23.

19. On June 14, 2017 Claimant was evaluated by Dr. Solot. Claimant reported soreness in both knees. *See* Exhibit D.

20. On July 19, 2017 Claimant was evaluated by NP Odvody. Claimant reported continued intermittent shifting bilateral knee, hip, and low back pain. Claimant reported currently his left knee was the main focus of pain and that everything with work aggravates his pain. Claimant reported that he had been seen over the last month or so as a work comp case and underwent bilateral knee injections with 1 week relief on the right knee and 3 days of relief on the left knee. Claimant also reported that he had undergone 4-5 physical therapy visits, but that he received a letter ceasing all treatment under work comp. Claimant reported low back pain worse on the right with radiation down the back of the leg, inside thigh, and stopping right above the knee. Claimant reported most often his pain was on the left side of the low back. Claimant reported physical therapy stretches minimally helped improve the discomfort in his low back but that his posterior thigh, hip, and knee pain were constant and interchangeable between the right and left side. Claimant's body mass index was noted to be 40.4. On examination, Claimant had right hip tenderness at the piriformis muscle and reduced range of motion. Claimant's knees were limited in flexibility. Claimant had a positive straight leg test with low back pain. Claimant was noted to have an abnormal ataxic gait due to his back pain. *See* Exhibits 19, C.

21. An MRI of the lumbar spine was performed and NP Odvody noted the impression of the MRI to be: L4-5 moderate sized central extrusion, narrowing both lateral recesses and likely contacting the bilateral L5 nerve roots, more prominent on the left but with annual fissuring along the right subarticular zone; L4-5 mild-moderate facet arthropathy and left foraminal stenosis; L4-5 mild right foraminal stenosis; L3-4 mild-moderate facet arthropathy with mild bilateral foraminal stenosis; L2-3 small annular bulge narrowing both lateral recesses (left greater than right); L2-3 superimposed foraminal protrusions with moderate left, mild right foraminal stenosis. *See* Exhibits 19, C.

22. NP Odvody assessed low back pain, right hip pain likely right piriformis syndrome or sciatica, obesity, right knee pain, and chronic left knee pain. NP Odvody recommended referral to Dr. Rauzzino for further evaluation and treatment of the lumbar spine issues. NP Odvody recommended continued use of physical therapy stretching exercises for the sciatica piriformis and again emphasized weight loss to improve some unloading of weight while trying to recover. *See* Exhibits 19, C.

23. On July 25, 2017 Claimant was evaluated by Michael Rauzzino, M.D. Dr. Rauzzino noted that Claimant had been referred to him by his family practice after what appeared to have been a work related injury on May 22, 2017. Dr. Rauzzino noted Claimant's history of knee injury but that this was a back injury that happened while at work and would seem to clearly be related to claimant's job. Claimant reported that he worked as a driver for an armored truck company and moves around money that is quite heavy. Claimant reported that the injury occurred when he was picking up a box or bag of coins and twisting and that he felt a sharp stabbing pain in his right buttock that slowly developed into pain going down the posterior and lateral aspects of his leg with numbness and tingling into the lower leg and foot. Claimant reported his back was sore but not overly painful and that the pain had been primarily in his legs and quite uncomfortable with sitting, standing, or even walking long distances. Dr. Rauzzino found decreased sensation in an L5 distribution on the right with a positive straight leg raise on the right. Dr. Rauzzino assessed a work related injury on May 22, 2017 that resulted in a moderate sized broad based disc extrusion with annular tear on the right. Dr. Rauzzino discussed treatment options and opined that given the acuity and the pain Claimant was in, he wanted to see if it could be treated non-operatively. Dr. Rauzzino recommended physical therapy and an epidural steroid injection in the foramen on the right at L4-5 and possibly a series of them. Dr. Rauzzino opined that depending on how effective conservative treatment was, Claimant may need decompression surgery at L4-5. *See* Exhibit 18.

24. On August 4, 2017 Claimant was suspended from work after being observed carrying an ATM cartridge in his hand, contrary to protocol. An employee counseling record indicates that all liability must be placed in a carryall bag. Claimant was suspended for one day. Due to his suspension, Claimant was required to undergo a fit for duty examination in order to return to work. *See* Exhibit B.

25. On August 7, 2017 Claimant underwent a fit for duty examination at Concentra. Claimant was deemed not fit for duty due to his knee pain. *See* Exhibit 25.

26. On August 8, 2017 Claimant was evaluated by NP Odvody. Claimant reported increased left knee pain, and continued intermittent shifting bilateral knee, hip, and low back pain. Claimant reported his low back pain was right side currently worse than left side and that the left knee was also a main focus of pain. Claimant wanted clearance to return to work with his back pain and knee pain since he was not released by his fit for duty provider. Claimant reported that everything with his work aggravated his pain. Claimant's body mass index was noted to be 39.8. NP Odvody discussed that he could not release Claimant for work duty due to Claimant's back condition. *See* Exhibits 19, C.

27. On August 16, 2017 Claimant underwent a transforaminal right lumbar epidural steroid injection. *See* Exhibits 20, H.

28. On August 31, 2017 Claimant underwent an independent medical evaluation performed by Kathleen D'Angelo, M.D. Dr. D'Angelo issued a report dated

October 11, 2017. Claimant reported that he was injured lifting coin boxes with an increase in leg pain. Claimant reported severe knee pain, severe hip pain, lower back pain/stiffness, and mid back pain/stiffness. Claimant reported that he had left knee recurrent pain since a prior left knee surgery in 2011 and that between 2011 and 2017 he would have pain in his left knee, then pain in his right knee, then pain in his right hip and that over time the pain would resolve. Claimant reported in May of 2017 he had that same pattern but that it didn't go away like it normally does and felt like it was getting worse. Claimant reported that by May 22, 2017 the pain had gotten so bad that he felt he couldn't do his job anymore and felt he needed to see someone. Dr. D'Angelo reviewed medical records and performed a physical examination. *See* Exhibit I.

29. Dr. D'Angelo assessed no work related claim diagnoses. Dr. D'Angelo assessed non claim related diagnoses of: diffuse osteoarthritis; degenerative changes to the right knee; degenerative changes to the right hip; degenerative changes to the left knee; and complaints of lumbar radiculopathy. Dr. D'Angelo noted that Claimant had intermittent pain since 2011 with a pattern of left knee soreness, right knee pain, and right hip pain. Dr. D'Angelo opined that Claimant had a history of diffuse osteoarthritis with no inciting incidents or injuries at work that caused or preceded Claimant's complaints of left knee, right knee, lumbar radicular pain, or right hip pain. Although Claimant reported to Dr. D'Angelo that his pain began when he lifted bags of coins, she opined that the medical records reviewed contradicted that statement and showed no type of work injury nor any particular untoward incident preceding Claimant's onset of pain. Dr. D'Angelo noted that Claimant's pain began as did all of his prior episodes, gradually and spontaneously. Dr. D'Angelo opined that Claimant's work duties of walking and stair climbing have not been linked to premature osteoarthritis onset and that after Claimant's absence from work, he had minimal if any improvement in symptoms. Dr. D'Angelo opined that if his work duties were causally related to his symptoms, he would have had a noticeable decrease or even resolution of symptoms with cessation of his duties. Dr. D'Angelo noted the bilateral knee x-rays showed degenerative changes. Dr. D'Angelo opined that she could not link Claimant's bilateral knee pain to work and that Claimant had recurrent intermittent bilateral knee and right hip pain for 6 years prior to the latest event. Dr. D'Angelo opined that regardless of Claimant's work duties, he would have had symptomatic bilateral knee or hip osteoarthritis. *See* Exhibit I.

30. On September 5, 2017 Claimant was evaluated by Dr. Stull. Claimant reported that since he had last seen Dr. Stull he had seen a spine surgeon and had a spinal injection that did not provide much relief in his right leg symptoms. Dr. Stull reviewed a May 25 MRI. Claimant reported significant pain in the right hip and right leg. X-rays were performed of the pelvis and right hip. They showed moderate to moderate plus arthritic changes in the right hip joint and bone on bone arthritis in the left hip joint. Dr. Stull provided the impression of right hip arthritis with some of the right leg symptoms possibly being from the spinal condition. Dr. Stull recommended a right hip cortisone injection. *See* Exhibits 21, E.

31. On September 11, 2017 Claimant underwent a right hip steroid injection performed by Dr. Stull. *See* Exhibits 21, E

32. On October 11, 2017 Claimant underwent an independent medical evaluation performed by John Hughes, M.D. Claimant reported a left knee injury in 2011 and surgery to correct a meniscus tear. Claimant reported that he continued to have left knee pain and that as a result of "hobbling about" due to his left knee pain he developed the gradual onset of right hip, right knee, and lumbar spine pain. Claimant reported that his job involved lifting boxes of coins and that it increased his pain, causing him to seek care. Claimant reported continued bilateral knee, left hip, and lumbar spine pain and that a recent right hip injection had helped his right hip. Dr. Hughes found Claimant to be deconditioned in apparent generalized musculoskeletal distress with fairly maximal antalgia of gait, ambulating with heavy use of cane. Dr. Hughes performed a physical examination. Dr. Hughes assessed: past history of work related left knee injury sustained as a result of a motor vehicle accident leading to surgical treatment; symptomatic left knee osteoarthritis due to the prior motor vehicle accident injury; occult right knee osteoarthritis and osteoarthritis of the bilateral hips; progressive bilateral knee and hip osteoarthritis with development of arthritis pain and osteoarthritis aggravated by repetitive heavy lifting at work; lumbar L4-5 disc extrusion due to heavy and repetitive lifting at work; deconditioning and obesity; type 2 diabetes; and hypertension. Dr. Hughes opined that Claimant had aggravated his bilateral knee osteoarthritis as a result of his work related activities for Employer. Dr. Hughes also opined that Claimant sustained bilateral hip and lumbar spine injuries. Dr. Hughes opined that Claimant was not at maximum medical improvement for any of the injuries and recommended bilateral knee MRIs, bilateral hip orthopedic surgical evaluations, MRIs of the bilateral hips, a second epidural steroid injection at L4-5 and reassessment by Dr. Rauzzino. *See* Exhibit 27.

33. On November 14, 2017 Claimant was evaluated by Dr. Stull. Claimant reported limited and some mild improvement with a recent right hip injection. Claimant was using a cane for ambulation and reported he was unable to work. Marked antalgia in Claimant's gait was noted. Dr. Stull provided the impression of osteoarthritis in both hips, clinically more significant in the right. Dr. Stull discussed with Claimant treatment options including injections, weight loss, activity modification, strengthening exercises, and hip replacement. *See* Exhibit E.

34. On November 21, 2017 Claimant was evaluated by Dr. Stull. Claimant reported increasing left hip pain over the last few weeks with popping, grinding, soreness, and difficulty getting in and out of bed. Claimant reported that he wished to have his left hip replaced. Dr. Stull noted that Claimant had been through a good trial of conservative measures but was not improved and recommended a left hip replacement. *See* Exhibit E.

35. On January 11, 2018 Dr. D'Angelo issued an addendum to her independent medical evaluation noting that she had received and reviewed additional medical records and would address treatment for bilateral hip osteoarthritis. Dr. D'Angelo noted that x-rays had shown bone on bone arthritis in the left hip joint and moderate to moderate-plus changes in the right hip joint. Dr. D'Angelo also noted that a recent chest x-ray had shown mild disc space narrowing and osteophytes in the thoracic spine consistent with mild

spondylosis. Dr. D'Angelo noted it was important to reiterate that Claimant had diffuse osteoarthritis which appeared to be present in his knees, hips, lumbar spine, and thoracic spine. Dr. D'Angelo noted that by Claimant's own admission there were no inciting incidents or injuries at work that caused or preceded his complaints of pain to the left knee, right knee, lumbar spine, or right hip and that at Claimant's first visit on May 22, Claimant reported bilateral knee pain that began 6-7 weeks prior with no specific mechanism. Dr. D'Angelo also noted that Claimant had been having similar symptoms periodically for 6 years prior. Dr. D'Angelo opined that this was significant and that the natural pattern for osteoarthritis is a series of flares and remissions in symptoms that are unrelated to and do not require any precipitating traumatic event. Dr. D'Angelo opined that Claimant had bilateral degenerative hip disease and that there was no findings in the records of any acute traumatic hip injury. Dr. D'Angelo opined that the changes of osteoarthritis in Claimant's bilateral hips were clearly present for years, if not decades, prior to the alleged May 22, 2017 work injury. Dr. D'Angelo again opined that Claimant had no work related diagnoses and that Claimant's current complaints were due to pre-existing and causally unrelated osteoarthritis. *See* Exhibit I.

36. Dr. Hughes and Dr. D'Angelo both testified by deposition in this matter.

37. Dr. Hughes opined that Claimant's complaints were due to his on the job duties generally without a specific acute event on a day certain and that Claimant had reported to him a gradual onset of symptoms. Dr. Hughes opined that Claimant's gradual onset of symptoms was predicated or preceded by lifting boxes of coin. Dr. Hughes agreed that Claimant's symptoms were in part due to his obesity and that obesity was a possible partial etiology of Claimant's symptoms. Dr. Hughes opined that Claimant's height, weight, and age were contributory factors in conjunction with Claimant's occupational exposure to physical tasks and Claimant's genetics. Dr. Hughes opined that Claimant's occupation aggravated and accelerated conditions in Claimant's knees, hips, and back. Dr. Hughes opined that Claimant had pre-existing osteoarthritis in both hips and both knees. Dr. Hughes opined that Claimant's weight would have a measurable and significant contribution to the development of osteoarthritis in the knees and hips and that obesity was a reasonable explanation for the development of osteoarthritis in Claimant's knees and hips. Dr. Hughes opined that Claimant's work aggravated and accelerated the osteoarthritis.

38. Dr. D'Angelo testified that Claimant had reported recurrent patterns of left knee being sore, swollen, tender then pain in his right knee and in his right hip and that they would resolve. She noted that Claimant reported these episodes were not due to lifting boxes of coin or moving at work but were due to his old left knee injury. Dr. D'Angelo noted Claimant's morbid obesity and opined that obesity may contribute to osteoarthritis of the knees. Dr. D'Angelo opined that the medical literature clearly showed a relationship between the development and progression of knee osteoarthritis and obesity. She also noted that, just as pregnant women, patients tend to hyperextend at the lumbar spine to offset weight they carry in the abdominal region which can place a lot of stress on the facet joints and ligaments of the lumbar spine. Dr. D'Angelo noted that the MRI completed

on May 23, 2017 of the lumbar spine showed no acute findings consistent with an acute injury to the lower back and that it showed clearly degenerative changes from L2 to L5.

39. Claimant's route partner, Mark Schwenk testified at hearing. He reported that he loaded the truck in the mornings with liability (cash, coin) with Claimant and that they did routes together. Mr. Schwenk testified that Claimant would occasionally complain of knee or back pain but that it never interfered with Claimant's regular job duties. Mr. Schwenk agreed that on May 22, 2017 Claimant indicated he was in pain and wanted to talk to somebody but did not indicate a specific incident of lifting with immediate back pain reported to him by Claimant.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id*. An activity arises out of and in the course of employment when the activity is sufficiently related to the conditions and circumstances under which the employee generally performs her job functions such that the activity may reasonably be characterized as an incident of employment*. Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

Claimant has failed to meet his burden by a preponderance of the evidence to establish that he sustained an acute industrial injury on May 22, 2017. As found above, Claimant had significant pre-existing reports of bilateral knee pain, hip pain, and low back pain before May 22, 2017. Although Claimant reported to Dr. Rauzzino that he had a specific incident on May 22, 2017 where he was lifting a box of coin and twisting when his lumbar back pain developed, this is inconsistent with other records. Records show reports of back pain earlier than that date and also show that he failed to report the same acute incident of lifting and twisting while lifting coin in his first report of injury and to the first providers that he saw following May 22, 2017. Rather, in his first visits he described continued pain on and off for several years in a certain pattern and that this time the pain had failed to go away. Dr. Rauzzino's opinion that Claimant sustained an acute injury to his lumbar spine on May 22, 2017 is based on Claimant's subjective reports that are overall inconsistent with the totality of evidence. Claimant has failed to establish and the overall credible evidence does not support an acute injury to any body part on May 22, 2017.

Additionally, Claimant has failed to meet his burden to establish by a preponderance of the evidence that he sustained an occupational disease to his bilateral knees, bilateral hips, or lumbar spine. Claimant has failed to show an occupational

disease or condition that has resulted directly from his employment fairly traced to his employment as a proximate cause. Claimant's baseline condition of significant degeneration and osteoarthritis in multiple body parts with flare-ups of pain over the past several years and his baseline condition of morbid obesity has not been shown to have changed due to his work activities. As found above, Claimant has significant degenerative changes and osteoarthritis in multiple body parts. Claimant has experienced flare ups of his osteoarthritis and degenerative changes for many years and has reported consistently that he has had pain in multiple body parts for several years. Dr. D'Angelo is credible and persuasive that the imaging shows extensive degenerative changes that has taken years or even decades to develop. Further, she is credible and persuasive in noting that there is significant degeneration throughout Claimant's body including his bilateral knees, bilateral hips, thoracic spine, and lumbar spine. It is found credible and persuasive that Claimant would naturally have flare ups of his degenerative condition consistent with the natural progression of his condition. Claimant had flare ups of pain for multiple years. Claimant has remained morbidly obese for multiple years, which both experts agreed contributes to and can progress and aggravate Claimant's degenerative condition. The credible and persuasive evidence does not show that Claimant's employment or hazards of his employment caused, intensified, or aggravated Claimant's underlying condition. Although Claimant definitely had symptoms at work of his underlying condition, this is more likely due to the natural progression of his significant pre-existing condition unrelated to his employment. Claimant's morbid obesity and severe degeneration noted on imaging supports the credible opinion of Dr. D'Angelo that his conditions are not work related and that his symptoms are typical and natural for the progression of his pre-existing conditions. Dr. Hughes agreed that Claimant's symptoms were in part due to his obesity and noted that Claimant's height, weight, and age were contributory factors. However, Dr. Hughes opined that the work duties aggravated and accelerated the pre-existing osteoarthritis Claimant had in both hips and knees. This opinion is not found as credible or persuasive as the opinion of Dr. D'Angelo. Dr. D'Angelo noted that Claimant's job duties had not been liked to premature osteoarthritis onset and that even after an absence from work, Claimant had only minimal, if any, improvement in symptoms.

Dr. D'Angelo is credible and persuasive that regardless of Claimant's work duties, Claimant would have had symptomatic bilateral knee and hip osteoarthritis consistent with the symptoms he had been having for multiple years and consistent with the natural progression of his underlying condition. Claimant's argument that he had chronic occupational injuries from 17 years of work duties as well as an acute injury on May 22, 2017 is not found persuasive. Rather, it is more likely that Claimant had multiple pre-existing non occupational conditions and did not sustain any acute injuries on May 22, 2017 but experienced pain at work similar to pain he had experienced for several years on and off consistent with the natural progression of his underlying conditions throughout his body. Claimant has failed to establish, more likely than not, that he sustained a compensable injury or occupational disease to his bilateral knees, bilateral hips, or lumbar spine.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that he sustained an occupational injury or occupational disease. His claim is denied and dismissed.

2. As Claimant has failed to establish that he sustained an occupational injury or occupational disease, his request for medical benefits and indemnity benefits is denied and dismissed.

3. As Claimant has failed to establish a compensable injury, the remaining issues are not addressed.

4. All matters not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 21, 2018

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffers functional impairment off the schedule of injuries set forth by § 8-42-107, C.R.S. and is entitled to permanent partial disability benefits based on a whole person conversion of the upper extremity rating.

FINDINGS OF FACT

1. Claimant is employed by Employer as a journeyman pressman and has been so employed for approximately 23 years.

2. As part of his job duties, Claimant operates the presses that print newspapers. Claimant's duties include setting rollers, lifting rollers, operating a computer console to adjust color, and keeping the machines running so that newspapers are printed on a timely basis.

3. On October 15, 2012 Claimant sustained admitted industrial injury to his left shoulder when he was pulling a blanket washer toward his body at shoulder level and felt pain in the anterior aspect of his left shoulder.

4. On November 14, 2012 Claimant was evaluated by orthopedic surgeon Michael Hewitt, M.D. Claimant reported pain with overhead use, weakness, and occasional pain radiating into the forearm. Claimant denied neck pain. *See* Exhibits 9, E.

5. Claimant continued working full duty for Employer without restrictions while he underwent treatment for his left shoulder injury. Claimant eventually underwent left shoulder surgery.

6. On February 12, 2013 Claimant underwent surgery performed by Dr. Hewitt that included: left shoulder arthroscopic biceps tenodesis; arthroscopic subacromial decompression; distal co-planing (resection of 1 cm inferiorly directed distal clavicle exostosis); and superior and posterior labral debridement. *See* Exhibits 9, E.

7. Following shoulder surgery, Claimant's symptoms improved somewhat. However he continued to report night pain, pain with overhead use, and stiffness with certain arm positions. *See* Exhibits 9, E.

8. On July 17, 2013 Claimant was evaluated by Dr. Hewitt. Dr. Hewitt placed Claimant at maximum medical improvement (MMI) and provided Claimant with a 14% scheduled impairment rating, which converts to an 8% whole person impairment rating.

Dr. Hewitt noted that Claimant had an injury and an MRI revealing a superior labral tear and that Claimant had undergone surgery. Dr. Hewitt noted that Claimant could return to work at full duty and that Claimant had occasional shoulder tightness but minimal pain and minimal night pain with no radicular symptoms. *See* Exhibits 9, E.

9. On September 25, 2013 Claimant was evaluated by Dr. Hewitt. Claimant reported he had returned to work activities and that his shoulder symptoms were relatively unchanged. *See* Exhibits 9, E.

10. On November 14, 2013 Respondents filed a final admission of liability admitting to a 14% extremity rating. Claimant's case closed.

11. On June 26, 2014 Claimant was evaluated by Dr. Hewitt. Claimant reported increasing pain in the superior aspect of his shoulder without specific trauma and that his pain was exacerbated with overhead reaching and lifting. Dr. Hewitt opined that the exam was consistent with symptomatic acromioclavicular arthropathy. Dr. Hewitt injected Claimant's AC joint and subacromial space. *See* Exhibits 9, E.

12. On December 5, 2014 Claimant was evaluated by Dr. Hewitt. Dr. Hewitt noted that the prior injection provided 30-40% improvement for several months. Claimant reported continued pain within the superior and lateral aspect of his shoulder. Dr. Hewitt discussed treatment options including observation, anti-inflammatories, activity modification, repeat cortisone injection, and finally surgery. *See* Exhibits 9, E.

13. On May 11, 2016 Claimant was evaluated by Dr. Hewitt. Claimant reported persistent pain at the acromioclavicular joint and Dr. Hewitt opined that given the duration of Claimant's symptoms and failure to resolve with conservative management, arthroscopy was appropriate. *See* Exhibits 9, E.

14. The recommendation for surgery was denied by Respondents. Ultimately, ALJ Margot Jones issued a Summary Order in March of 2017 reopening Claimant's claim and finding the surgical request by Dr. Hewitt to be reasonable, necessary, and related to the claim.

15. On June 27, 2016 Claimant underwent a left shoulder arthroscopic distal clavicle excision and superior and posterosuperior labral debridement performed by Dr. Hewitt. *See* Exhibits 9, E.

16. On September 6, 2017 Claimant was evaluated by Dr. Hewitt. Claimant reported still having some difficulty sleeping and concern with persistent pain. *See* Exhibits 9, E.

17. Claimant underwent multiple visits of physical therapy after his shoulder surgery. On August 24, 2017, Claimant noted continued pain to superior shoulder with certain positions of his arm. On September 19, 2017, Claimant noted only having a slight twinge or tingling in his shoulder. On September 21, 2017, Claimant noted that his

shoulder was not stiff anymore. On September 26, 2017, Claimant noted that his shoulder was doing well, there was "not much for sharp pain," and that he could sleep on his shoulder. On September 28, 2017, claimant noted that he was not having "much shoulder issues anymore." At the October 3, 2017 discharge appointment, claimant reported slight tingling to the superior shoulder, that work was going well, and he was able to sleep on his left side without any pain. Claimant was able to lift overhead 45 pounds each upper extremity and felt he was ready to return to work with restrictions. *See* Exhibit F.

18. On October 4, 2017 Claimant was evaluated by Dr. Hewitt. Dr. Hewitt opined that Claimant was at MMI. Dr. Hewitt noted some mild pain with reaching overhead, but noted that Claimant did not require any medications and that Claimant's sleep pattern was improving. Dr. Hewitt opined that Claimant could work full duty and provided a 15% extremity impairment rating, which converts to a 9% whole person impairment rating. *See* Exhibits 5, 9, E.

19. On October 30, 2017 Respondents filed a final admission of liability admitting to the 15% scheduled impairment rating for the left shoulder. *See* Exhibit A.

20. On November 16, 2017 Claimant filed a response, accepting the rating, but alleging that it should be a whole person impairment based on the situs of functional impairment and that he agreed with the rating provided by Dr. Hewitt. Claimant argues the correct rating is 9% whole person.

21. On March 2, 2018 Claimant underwent an independent medical evaluation performed by John Raschbacher, M.D. Claimant reported popping at the area around the shoulder aggravated with reaching and occasionally shooting to the left side of the neck. Claimant reported that he sometimes will awaken with a headache and that his left hand has some digits which go numb at night maybe every other night. Claimant reported that he was doing all work activities and that he was able to resume doing daily walks, yard work, and mowing the lawn. Claimant reported no limitations on his physical activity. Claimant reported with his left shoulder and left neck he had discomfort every fourth day or so and that if he slept on the left side it took a while to recover. Dr. Raschbacher reviewed medical records and performed a physical examination. Claimant had tenderness to palpation at the left AC joint. Claimant had mild discomfort at the base of his neck on the left. *See* Exhibits 10, D.

22. Dr. Raschbacher assessed: left shoulder AC joint arthritis, status post-surgical procedure. Dr. Raschbacher noted that Claimant had an accepted work related injury involving the left shoulder and surgery. Dr. Raschbacher noted that after the June 27, 2017 surgery, Claimant returned to his same job with no restrictions and that Claimant had resumed all previous work related and non-work related activity. Dr. Raschbacher opined that there was no clear medical basis for including a 10% rating for distal clavicle resection. He also opined that there was no clear medical explanation for why Claimant's abduction active range of motion decreased so significantly and by 50 degrees and opined that the abduction value of 110 degrees may not be an accurate descriptor of the level of active range of motion and consequent impairment in Claimant's case. Dr.

Raschbacher also opined that the rating is and would be a scheduled upper extremity rating and that there was no basis for finding there to be a situs of impairment more proximal than the shoulder. Dr. Raschbacher noted that it was the AC joint that was the site and source of the claim and that was treated. Dr. Raschbacher opined there was no impairment other than at the shoulder joint in this case, which would make it a scheduled upper extremity rating. Dr. Raschbacher opined that Claimant had returned to all previous levels of activity and had no evidence of whole person impairment which would anticipate restriction of physical activity and an inability to return to the same job. *See* Exhibits 10, D.

23. Claimant testified at hearing that prior to his October 2012 work injury he had no problems at all with his left shoulder. Claimant testified that he now has continued pain at night with both pain and sharp numbness. Claimant testified that he has a hard time putting on a shirt, that he has pain with overhead use including reaching overhead, and that he has tingling and sharp pain up his neck that goes from his shoulder up. Claimant testified that his shoulder pops and radiates up the neck and that he works with it and that it will sometimes relax itself and sometimes he uses Tylenol. Claimant testified that he still has pain over the superior aspect of his shoulder.

24. Claimant's testimony is found credible. Claimant continues to experience pain and loss of function due to his injury that is in his shoulder joint, trapezius region, neck, and scapula areas. The objective evidence of the surgical repairs combined with Claimant's credible testimony shows that, although he works through it, Claimant has pain and functional limitations beyond his arm at the shoulder and that he suffers limitations in his shoulder joint and beyond.

25. Dr. Swarsen testified at hearing. Dr. Swarsen reviewed and explained the surgical procedures that Claimant has undergone as a result of this injury. Dr. Swarsen highlighted in different colors the areas of the shoulder joint that were operated on in Exhibit 11. Dr. Swarsen opined that the glenohumeral joint is a joint that separates the arm from the shoulder. Dr. Swarsen opined that the surgeries performed were beyond the glenohumeral joint and above the joint. Dr. Swarsen opined that the situs of functional impairment was at the shoulder joint and the shoulder girdle itself and that there was loss of function at the shoulder girdle and that therefor Claimant was entitled to a whole person impairment rating for loss beyond the arm at the shoulder.

26. Dr. Raschbacher testified at hearing. He opined that Claimant does not have functional impairment beyond the shoulder and that Claimant's problem was with the shoulder itself and with the shoulder joint. He opined that the shoulder joint is an intersection where two parts meet and that the intersection/joint is where Claimant's problem is. Dr. Raschbacher opined that there was nothing beyond the shoulder in Claimant's case and nothing beyond the shoulder joint. Dr. Raschbacher thus opined that a scheduled impairment rating was appropriate.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Scheduled Injury vs. Whole Person Impairment

Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require

a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO November 16, 2007); *O'Connell v. Don's Masonry,* WC 4-609-719 (ICAO December 28, 2006). Claimant bears the burden of establishing functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under § 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4-662-369 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

In this case, Claimant's testimony, substantiated by the medical records, establish that Claimant is entitled to a whole person medical impairment under § 8-42-107(8)(c), C.R.S. because he has suffered functional impairment to a part of the body that is not contained on the schedule of impairment. Claimant has met his burden by a preponderance of the evidence that his functional impairment extends beyond the "arm at the shoulder." The credible evidence shows that Claimant's shoulder joint itself is impaired. It does not function as it did before Claimant's work injury. Activities cause pain and functional impairment in Claimant's shoulder joint, upper back muscles, and cervical area such that he is unable or limited in his ability to engage freely in motions that he had no trouble with prior to his work injury. Thus, Claimant has established that the situs of his functional impairment is beyond just the location of the arm at the shoulder. The mere fact that the shoulder joint might affect arm mobility does not mean Claimant sustained only a "loss of arm at the shoulder." Accordingly, the ALJ finds that Claimant has established by preponderant evidence that his impairment includes the shoulder joint, that he has functional impairment beyond the arm at the shoulder and up from the shoulder joint, and that his impairment is not on the schedule of impairments. As noted by Dr. Swarsen, physiologic structures beyond the arm at the shoulder and into the shoulder joint were affected. Claimant had numerous procedures above the arm and in his shoulder joint above the glenohumeral. Claimant has established, more likely than not, functional impairment beyond the arm at the shoulder and an entitlement to the 9% whole person rating.

ORDER

It is therefore ordered that:

1. Claimant suffered functional impairment beyond the shoulder at the arm and off the schedule of injuries listed at § 8-42-107(2), C.R.S. Claimant is entitled to permanent partial disability benefits based upon a whole person impairment rating of 9%.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 14, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issues set for determination included:

- Did Claimant sustained a compensable injury on August 21, 2016?
- If Claimant suffered a compensable injury, is she entitled to TTD benefits commencing November 26, 2016, ongoing, subject to an offset for unemployment compensation in the amount of $489.00 per week, commencing March 14, 2017 through July 24, 2017?
- If Claimant suffered a compensable injury, is her medical treatment reasonable, necessary, and related?

STIPULATIONS

The parties stipulated to the following: (1) Claimant's average weekly wage was $765.00 per week; (2) if the claim was found compensable, Anthony Euser, D.O. and his referrals are authorized under the Act; (3) Claimant received unemployment compensation from March 14, 2017 to July 24, 2017, paid at the rate of $489.00 per week.

The Stipulations were accepted by the Court and are incorporated by reference in this Order.

FINDINGS OF FACT

1. Claimant was employed as a deli clerk for Employer, starting in December 2015. Her job duties in this job involved assisting customers in the deli department.

2. There was no evidence in the record that Claimant suffered an injury to her low back prior to August 2016.

3. Claimant previously required treatment for various conditions immediately before the August 21, 2016 incident. On August 2, 2016, Claimant treated at Advanced Urgent Care, LLC. She was evaluated by Jill Postell, PA-C, whose assessment was vaginitis and acute urinary tract infection. Claimant received prescriptions for Diflucan, doxycycline hyclate and Tramadol.

4. Claimant returned to Advanced Urgent Care, LLC on August 10, 2016. She complained of continued vaginal symptoms, flu-like symptoms, migraines, nausea, cold sweats, chills, and back pain. She was evaluated by Linda Smith, M.D., who

administered an injection of ceftratriaxone and ketorolac, as well as prescribing oxycodone-acetominophen and diazepam.

5. Claimant treated at the Little Clinic for left upper eyelid swelling on August 14, 2016. She was diagnosed with septal cellulitis in the right upper eyelid. She was prescribed Bactrim and cephalexin. The ALJ noted there was no evidence of back symptoms reported by Claimant at the evaluation.

6. On August 21, 2016, Claimant was working for Employer and went into the freezer to get a box of chicken for another store. Claimant testified she pulled the top box from a stack of three and the remaining two stuck, which pulled her arms and back. The ALJ found the evidence support the conclusion that an incident occurred. Claimant testified she not feel immediate pain after the incident occurred and when she began experiencing back pain, thought it could be related to her kidney infection. Claimant stated the increased pain caused her to go to the emergency room.

7. A video of Claimant's work in the deli department on the date and time in question was admitted into evidence.[1] The video does not show the boxes falling in the freezer, but rather it shows Claimant walking through the deli, as well as a co-employee walking through the deli. Claimant was then seen walking out of the walk-in freezer. The ALJ found the video confirmed Claimant was working that day, but did not assist in the determination whether an injury occurred on the date and time in question.

8. Claimant was evaluated in the Emergency Department of the Platte Valley Medical Center on August 22, 2016. She complained of severe right flank pain and was initially evaluated by Ashlie Reuscher, R.N. who recorded the above complaint of pain and documented there was no injury. Claimant reported unresolved symptoms from a UTI and yeast infection. In the nursing assessment, Bridget Dwyer, R.N. noted Claimant complained of severe right flank pain and occurred at home. Claimant was evaluated by Erick Anderson, PA-C. PA-C Anderson stated Claimant's lower back pain onset was sudden and occurred 12 hours before. She had no sensory motor deficits. Claimant had right flank pain which and was concerned about a kidney stone. A CT was negative for kidney stones and PA Anderson thought the pain could be due to a herniated disc. The ALJ found it was significant Claimant did not describe the incident at work when she was evaluated in the Emergency Department.

9. An in-store investigation report was prepared by supervisor, Lori Plouff on August 23, 2016. Ms. Plouff noted Claimant was unsure when the incident happened, but stated Claimant requested to go to the doctor because of a kidney infection and denied it was work-related. Claimant texted Ms. Plouff the next day and reported she had a herniated disc and initially did not indicate it was a work-related injury. The following day, Claimant then related an incident occurred on Sunday (August 21) when she was lifting a box of chicken. Deli department manager Alan Herrera confirmed Claimant reported the incident to him.

[1] Exhibit S.

10. On August 24, 2016, Claimant sent an e-mail to Ms. Plouff describing the incident. She stated she went into the walk-in cooler to get a box of chicken and went to grab the top box at the end of the shelf. The whole stack of boxes fell, which caused her to reach and grab all the boxes. Claimant said initially her back did not hurt, but it was aching later, which she thought was related to kidney infection. The next day she could barely walk or bend and Claimant described her pain as excruciating. When she went to the ER, she was told she had a herniated disk.

11. A statement was given by Larry Michael, dated August 26, 2016.[2] Mr. Michael noted that it was a Sunday and a worker from Store 81 dropped by to pick up frozen chicken. Claimant went back to get the chicken and he followed to help. Mr. Michael went in and found her with three boxes on her.

12. An undated statement was given by Debbie Tom (culinary clerk) regarding what happened on the date of the incident. Ms. Tom indicated she was assisting an associate from another store who came by to borrow product. She heard the sound of boxes falling while in the deli walk-in and saw Claimant was attempting to catch the cases of chicken, as the boxes fell to the floor. She described Claimant as being in an awkward position as she twisted around and got up slowly. Ms. Tom was an independent witness to the incident on August 21, 2016 and the ALJ found this supported Claimant's description of what happened.

13. Claimant signed an Injury Review Form on August 28, 2016 said the injury occurred when she was lifting a box of chicken and the stack of boxes fell.

14. Claimant was referred to Julie Parsons, M.D. by Employer, who evaluated her on August 24, 2016. Dr. Parsons diagnosed Claimant with a low back strain. Dr. Parsons referred Claimant for an MRI of the lumbar spine, prescribed Soma and Tramadol, along with massage therapy and gave her lifting restrictions of 10 lbs. In the M-164, Dr. Parsons checked the box that her objective findings were consistent with history and/or work-related mechanism of the injury/illness.[3] That opinion was persuasive to the ALJ on the issue of compensability.

15. On August 28, 2016, Claimant underwent an MRI of the lumbar spine. The films were read by David Cosper, M.D., whose conclusions included: shallow disc displacement at T11-T12 and L4-L5, without substantive spinal canal stenosis, neural foraminal stenosis or nerve root compression; mild loss of intervertebral disc space height at T11-T12 and L4-L5; bilateral facet capsulitis at L4-L5 and L5-S1; general dextroconvex curvature of the lower lumbar spine which may be positional related to mild scoliosis.

16. Dr. Parsons oversaw Claimant's treatment through October 5, 2016. In the follow-up evaluations which occurred on August 29, September 1, 8, 22 and

[2] Exhibit C, p. 13.

[3] Exhibit N, p. 175.

October 5, 2016, Dr. Parsons' diagnoses remained the same: lumbar strain and radiculopathy. Claimant's restrictions were extended by Dr. Parsons.

17. Dr. Euser examined Claimant on October 12, 2016 at which time she reported muscle aches and swelling, along with neurologic pain down the right leg. She also complained of depression. Dr. Euser noted an irregular gait on examination, along with abnormal motor strength in the right leg. The assessment was: neuropathy of the lower limb; low back pain. Dr. Euser referred Claimant for physical therapy ("PT") and continued the 10 lb. restriction.

18. Claimant returned to Dr. Euser on October 24, 2016, with similar complaints. She also reported trouble sleeping. Dr. Euser's assessment was low back pain, neuropathy of the lower limb and difficulty sleeping. Claimant was referred for pain management.

19. On November 15, 2016, Claimant was evaluated by Dr. Euser, complaining of muscle aches and swelling, gait disturbance, along with numbness in both lower extremities. She had no relief from prednisone or gabapentin and continued to experience pain down right leg, along with depression. Claimant's mental status was described as depressed and agitated. On examination, Dr. Euser noted hypertonicity and abnormal motor strength in the right leg. Claimant was to continue taking medications and establish care with a pain management specialist.

20. Records from Employer admitted at hearing included a series of e-mails exchanged by Fred Woodward, the talent manager and Nate Judkins, assistant store manager regarding Claimant's return to work. Mr. Woodward stated on November 25, 2016, Claimant could not return to work because of her restrictions.

21. On December 7, 2016, Claimant underwent a bilateral facet injection at L4-5 and L5-S1, which was administered by Lief Sorenson, M.D.

22. On December 9, 2016, Claimant was transported by ambulance to the Emergency Department of the Platte Valley Medical Center. She was complaining of dizziness and lightheadedness, as well as a syncopal episode earlier that day. Claimant had another syncopal episode while at the hospital. She was evaluated by Erick Anderson, PA-C who diagnosed with low back pain and syncope. Claimant had subsequent syncope episodes and remained in the hospital until December 21, 2016.

23. On December 11, 2016, Claimant was evaluated by David Risher, M.D. He described her episodes of unresponsiveness as inconsistent with typical stupor or coma. Pseudoseizure seemed most likely. The MRI of the brain was unremarkable and she had a gag reflex, with no convincing seizure activity. Dr. Risher noted Claimant's lumbar spine MRI was normal, with no evidence of disc herniation. The results of the MRI constituted objective evidence of the condition of Claimant's lumbar spine at this point in time.

24. Claimant was evaluated by Hua Judy Chen, M.D. on December 11, 2016. Dr. Chen opined Claimant's unresponsiveness did not fit either a seizure or syncope, given the normal MRI of her brain and EEG. Her symptoms were non-physiologic. Dr. Chen agreed to a tilt-table test to look for a cardiac source of the blackout. If this test was normal, Dr. Chen recommended a psychological evaluation or prolonged EEG study. Dr. Chen issued a supplemental report on December 12, 2016, after the tilt-table test was negative and her impression was: episodic non-neurological unresponsiveness, question of syncope. Dr. Chen stated Claimant's episodes did not behave like seizures.

25. On December 16, 2016, Nicole Clements, R.N. completed a nursing note related to the hospitalization and noted Claimant had a consult with a psychiatrist to rule out possible psychosomatic causes of the syncopal episodes. Claimant was referred to a therapist.

26. Claimant was discharged on December 21, 2016 and the treatment note was completed by Arjune Patel, M.D. Claimant was noted to have no prior medical history of adrenal insufficiency and underwent an extensive workup, with the adrenal insufficiency likely related to previous systemic steroid use and a recent ESI. Claimant's MRI of the lumbar spine had no acute abnormality to explain her pain. Claimant was to follow-up with Dr. Rothman and her PCP.

27. Claimant was reevaluated by Dr. Euser on December 30, 2016. Claimant reported similar physical complaints. Dr. Euser diagnosed Claimant with severe adrenal insufficiency, low back pain, neuropathy of lower limb, and spasm of back muscles. He referred Claimant for an endocrinology and continued her medications for the back pain. The ALJ noted Dr. Euser did not offer an opinion regarding the cause of Claimant's adrenal insufficiency.

28. On January 13, 2017, Claimant returned to Dr. Euser. She was complaining of muscle aches and swelling, along with pain down the right leg, along with depression. Dr. Euser's assessment included: low back pain, neuropathy of lower limb, prolapsed lumbar intervertebral disc[4], and adrenal cortical hypofunction. Claimant was to continue PT and was prescribed Percocet, as well as advised to follow up with him an endocrinologist. Dr. user's assessment remained the same and follow-up evaluations which occurred on February 17, March 3 and April 14, 2017.

29. Dr. Roth was called as an expert witness by Respondent. He was qualified as an expert in Internal Medicine, the specialty in which he is board-certified. He is Level II accredited pursuant to the WCRP. Dr. Roth testified consistently with the conclusions expressed in his report, dated August 14, 2017. Dr. Roth testified that Claimant's back pain, including the degree of her pain, as well as the distribution of pain were not consistent with any mechanism described, nor was it physiologic. Dr. Roth

[4] It was not clear from the record whether Dr. Euser had the results of the MRI done on December 11, 2016.

opined Claimant did not sustain the lumbar spine injury on August 21, 2016.[5] Dr. Roth stated the MRI showed ordinary age-related degenerative changes to the lumbar spine. The ALJ credited the opinions of Claimant's ATPs over those expressed by Dr. Roth with regard to the lumbar spine strain.

30. Dr. Roth testified adrenal insufficiency symptoms would include fatigue, anxiety, static hypertension, loss of appetite, abdominal pain, nausea, and generalized weakness. Dr. Roth opined Claimant's adrenal insufficiency was not caused by the use of steroids after the incident on August 21, 2016. There was an insufficient quality and duration of steroids given to cause the adrenal insufficiency. Dr. Roth stated Claimant would have required a period of at least three weeks of a "super physiologic dose" of steroids. Dr. Roth opined the incidents when Claimant passed out on December 9-10, 2016 was not a result of the injection she received on December 7, 2016. This was caused by the adrenal insufficiency. Dr. Roth's expert testimony was credible with regard to the adrenal insufficiency.

31. A record review was performed by Howard Kerstein, M.D. (endocrinologist), who issued a report dated September 10, 2017. After reviewing Claimant's course of treatment, Dr. Kerstein opined that Claimant's secondary adrenal insufficiency was not related to her intermittent use of corticosteroids from August to December 2016. He opined the intermittent use of steroids did not cause secondary adrenal insufficiency associated with the multiple symptoms experienced by Claimant. This opinion was persuasive to ALJ.

32. On July 31, 2017, Dr. Parsons agreed the Medrol Dosepak and prednisone did not cause Claimant's adrenal insufficiency.

33. Claimant proved by a preponderance of the evidence she sustained an industrial injury on August 21, 2016.

34. No ATP placed Claimant at MMI.

35. Based upon the evidence in the record, the ALJ concluded Claimant's adrenal insufficiency was not caused by the incident at work, including the post-injury treatment she received.

36. Claimant's health issues related to adrenal insufficiency and/or periods of unresponsiveness (syncope) constituted a subsequent intervening event, which terminated Respondent's liability to pay wage and medical benefits for her work injury.

37. The ALJ concluded Claimant's need for medical treatment after December 9, 2016 was caused by her adrenal insufficiency, non-physiologic issues and/or periods of unresponsiveness (syncope). Claimant's need for treatment was related to these conditions.

[5] Deposition of Dr. Roth, page 22:18-23.

38. Claimant's wage loss after December 9, 2016 was the result of her adrenal insufficiency, non-physiologic issues and/or periods of unresponsiveness (syncope) which caused her to be hospitalized.

39. Evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Sections 8-41-301(1)(b) & (c), C.R.S. (2016). Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). However, no compensability exists if the disability and need for treatment was caused as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As a starting point, the evidence admitted at hearing led the ALJ to conclude that an incident occurred on August 21, 2016. (Finding of Fact 6). Specifically, Claimant traversed to the freezer to get a box of frozen chicken and as she lifted the top box, two other boxes of chicken fell. (Findings of Fact 6, 12). This pulled on her arms and back. As determined in Findings of Fact 11-13, this incident was witnessed by co-employees and was reported to Employer by Claimant. As found, statements were taken from employees who worked with Claimant on that day she alleged she was injured that corroborated her version of events. Respondent did not dispute the fact that an incident occurred that day.

Second, there was evidence in the form of medical records, which supported the conclusion that Claimant suffered an injury at work. Dr. Parsons opined Claimant's symptoms were consistent with the reported mechanism of injury. (Finding of Fact 14). In his treatment of Claimant, Dr. Euser also indicated there were findings made at his evaluations which supported the conclusion Claimant was injured at work.

In coming to this conclusion, the ALJ considered Respondent's argument that Claimant proffered insufficient evidence to support her claim she suffered a compensable injury. Respondent also pointed to the fact that Claimant failed to specifically identify the incident at work as the cause of her back pain when she was treated in the emergency department. While true, this latter argument did not outweigh the other evidence before the Court.

Based upon the totality of evidence, the ALJ concluded there was factual support for Claimant's contention that she suffered a compensable injury. In this regard, Claimant's testimony, as well as the statements of her co-employees led the Judge to conclude that she sustained an injury to her low back at work. The ALJ concluded when the boxes fell in the deli freezer, this caused an injury to the Claimant, which was diagnosed by Drs. Parsons and Euser. Therefore, Claimant satisfied her burden of proof by a preponderance of the evidence to establish he suffered a compensable work-related while working for Employer on August 21, 2016.

Temporary Disability Benefits

Claimant had work restrictions issued by Dr. Parsons and Dr. Euser. These restrictions were not lifted and there was no finding by an ATP that Claimant reached MMI. (Finding of Fact 34). From the records admitted at hearing, the ALJ determined Claimant lost time from work after August 22, 2016 and therefore would potentially be entitled to temporary partial disability ("TPD") benefits.[6] However, there was insufficient evidence in the record for the ALJ to determine the amount of TPD benefits to which Claimant would be entitled. Therefore, counsel for the parties will be ordered to confer on this issue to see if it can be resolved. If no resolution is reached, either party can file an Application for Hearing on this issue.

[6] Claimant initially requested TPD benefits in her AFH. However, in the statement of issues at the beginning hearing, only TTD was requested.

Claimant did not return to work after November 25, 2016. Records from Employer confirmed Claimant could not return to work with restrictions. (Finding of Fact 22). Accordingly, Claimant is entitled to TTD benefits from November 26 through December 9, 2016, payable at the rate of $510.00 per week (based upon the stipulated AWW of $765.00 per week).

Subsequent Intervening Event

Results flowing "proximately and naturally from an industrial injury are compensable". However, no compensability exists when a later accident or injury occurs as a direct result of an independent intervening cause. Whether a particular condition is a result of an independent intervening cause is a question of fact for resolution by the ALJ. *Owens v. Industrial Claim Appeals Office,* supra, 49 P.3d at 1188-1189.

As found, Claimant's adrenal insufficiency was not caused by the incident at work, including the treatment she received for said injury. (Finding of Fact 36). The ALJ's conclusion was based on the medical evidence, including the opinions expressed by Dr. Roth, Dr. Kerstein and Dr. Parsons. (Findings of Fact 31-33). In addition, Claimant was hospitalized in December 2016 due to a syncopal episode and received an extensive work-up at that time. There was a divergence of opinions by evaluating physicians as to the cause of Claimant's symptoms. The ALJ determined this hospitalization was not causally connected to Claimant's work injury. As found, the objective testing done when Claimant was hospitalized in December 2016 in connection with Claimant's low back pain was negative. (Finding of Fact 25). The ALJ found Claimant sustained a wage loss and required medical treatment for the adrenal insufficiency and other medical problems. (Findings of Fact 38-39). This was not related to her work injury. The ALJ concluded that this constellation of symptoms, her hospitalization and the treatment Claimant received for the adrenal insufficiency/syncope constituted an intervening event.

Under the standard articulated by the Court in *Owens v. Industrial Claim Appeals Office,* supra, the intervening event (Claimant's hospitalization and treatment for multiple symptoms) severs the chain of causation in this case. Claimant's need for treatment was related to these conditions and not the condition caused by her work injury. Thus, Respondent was not liable for medical benefits. The ALJ also determined that Claimant's adrenal insufficiency and periods of unresponsiveness constituted an independent intervening cause and the ALJ concluded this served to terminate Respondent's liability for wage benefits.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable low back strain on August 21, 2016.

2. Respondent shall pay medical benefits pursuant to the Workers' Compensation Fee Schedule to cure and relieve the effects of Claimant's injury through December 9, 2016. This includes treatment provided by Dr. Parsons, Dr. Euser and their referrals.

3. Claimant may be entitled to recover TPD benefits from August 22, 2016 through November 25, 2016. There was insufficient evidence in the record to calculate the amount due and owing, as records through November 5, 2016 were admitted. Counsel for Claimant and Respondent are ordered to confer with regard to the TPD issue. Either Claimant or Respondent may file an Application for Hearing on the issue of TPD benefits.

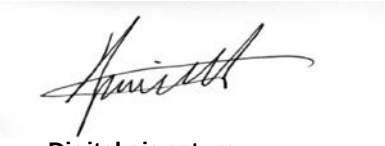
4. Respondent shall pay TTD benefits to Claimant at the rate of $510.00 per week from November 26, 2016 through December 9, 2016. These benefits are subject to the offset for Claimant's receipt of unemployment benefits, at the rate of $489.00 per week.

5. Claimant's claim for wage and medical benefits after December 9, 2016 is denied and dismissed.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 10, 2018



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that a left occipital nerve block is reasonable, necessary, and related to her June 24, 2016 work injury.

2. Whether Claimant has established by a preponderance of the evidence that the medication Imitrex (Sumatriptan) is reasonable, necessary, and related to her June 24, 2016 work injury.

3. Whether Claimant has established by a preponderance of the evidence that massage therapy is reasonable, necessary, and related to her June 24, 2016 work injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a merchandiser and in June of 2016 was working under contract at a Lowe's store.

2. Claimant's job duties included unloading plants from carts, deadheading plants, moving plants, sweeping, and helping customers choose plants. The position at Lowe's was to be seasonal and her hours varied but she worked full time.

3. On June 24, 2016 Claimant was so employed when she sustained a work related injury. While unloading plants off a pallet, Claimant tripped backwards over the pallet, fell, and hit her head on the pallet jack's metal handle.

4. Claimant was bleeding from her head and had a small gash. Claimant felt off and foggy. Claimant waited for her boyfriend to pick her up because she didn't feel safe to drive. After he picked her up, Claimant went to urgent care.

5. On June 24, 2016 Claimant was evaluated by Clinton Hartman, PA-C. Claimant reported that she was at work moving a pallet when her foot caught and she fell backwards, hitting her head on a pallet jack. Claimant reported that it made her dizzy for a moment but that she did not lose consciousness. Claimant reported pain at a 7/10 level. Claimant was found on examination to have a left occiput small laceration less than 1 cm with swelling on the left side of the back of her head. Claimant also reported a headache. Claimant was noted to have normal neck range of motion and normal mood and affect, judgment, and thought content. Claimant was diagnosed with open wound of scalp and nausea. Claimant was given a tetanus shot. Claimant was provided discharge instructions regarding head injury. *See* Exhibits 3, 6, E.

6. On June 29, 2016 Claimant was evaluated by Tracey Stefanon, D.O. Claimant reported that she had fallen backwards and hit her head on a pallet jack but did not lose consciousness. Claimant reported that she did not have a second job. Claimant reported dizziness, nausea, vomiting, and frontal headache. Claimant noted on the pain diagram pain from her head down to her mid back but denied hearing loss, tinnitus, blurred vision, double vision, photophobia, back pain, joint pain, and neck pain. Dr. Stefanon noted the small wound on the back of Claimant's head was healing well. Dr. Stefanon assessed: scalp laceration, and post concussive symptoms including nausea, headache, and intermittent dizziness. Dr. Stefanon opined that Claimant had symptoms related to concussion but had a very reassuring neurological examination and stability of symptoms without worsening. Dr. Stefanon recommended a bland diet, cognitive and physical rest with limited computer, tv, and reading, and part time restricted duty. *See* Exhibits 3, F.

7. On July 7, 2016 Claimant was evaluated by Dr. Stefanon. Claimant reported being the same or somewhat better than her last visit, but reported continued headaches on a daily basis. Claimant also reported continued dizzy spells at 2-3 per day. Claimant denied vision changes, balance difficulties, slurred speech, concentration difficulty, neck pain, upper extremity pain, and back pain. Claimant reported improvement in her nausea and vomiting and that she was sleeping well with 8-9 hours per night. Claimant denied any prolonged recovery from a prior injury or any prolonged periods off work in the past. Claimant reported she had been off work because her part time restricted duty restrictions were not available in her job. *See* Exhibits 3, G.

8. On July 14, 2016 Claimant was evaluated by Kimberly Siegel, M.D. Claimant reported that her condition had worsened and that her dizziness had increased to the point that she felt unsafe driving. Claimant also reported increased nausea and increased vomiting. Claimant reported trouble remembering things, feeling clumsy, and difficulty focusing her eyes to read. Claimant reported that when she was about to have a dizzy spell her vision turned double briefly and that she had noted some lines at the periphery of her vision. Claimant reported her headaches were slightly improved. Dr. Siegel noted a normal neurological examination. Dr. Siegel noted moderate tenderness to palpation at the left occiput where there was minimal soft tissue residual swelling. A head CT scan was performed and was also noted to be unremarkable and negative with no evidence of acute intracranial hemorrhage or infarction. A brain CT scan also was performed and was normal. Dr. Siegel reassured Claimant that although Claimant had worsened symptoms, Claimant could expect her symptoms to resolve over the next month, and 2 months at most. *See* Exhibits 3, 8, H, I.

9. Claimant began attending physical therapy on July 19, 2018.

10. On July 28, 2016 Claimant was evaluated by Dr. Siegel. Claimant reported her condition was unchanged to somewhat improved. Claimant reported continued dizzy spells, that her nausea had gotten somewhat better, and that her headaches were not as bad and not as frequent. Claimant reported developing neck and upper to mid back pain after her first session of physical/vestibular therapy but that it had improved. Claimant

reported that the physical/vestibular therapy had helped decrease her headaches and neck and back pain. Claimant was noted to be working modified duty part time. Claimant was found to have mild paracervical tenderness and spasm. Range of motion elicited pain at the neck bases within the entire paracervical region. Cervical myofascial pain syndrome and acute thoracic back pain were added to Claimant's assessments. *See* Exhibits 3, J.

11. On August 11, 2016 Claimant returned to Dr. Stefanon. Dr. Stefanon reviewed Claimant's first two initial visits from June 29 and July 7 and noted that Claimant did not have any neck or back pain, but developed neck and back pain remote from her injury a few weeks ago. Dr. Stefanon noted that Claimant initially related the onset of her neck and back pain to a treatment in physical therapy but that claimant had seen chiropractic care on her own with worsening pain the following day. Dr. Stefanon also noted Claimant's report of remote onset intermittent numbness in the left hand. Dr. Stefanon opined that Claimant's neck pain, upper back pain, and numbness in the left hand were not related to the June 24, 2016 work injury and referred Claimant to her primary care provider for those conditions. Dr. Stefanon opined that she had concerns regarding Claimant's delayed recovery and multiple complaints now that did not exist at her initial injury. Dr. Stefanon opined that it was not common in traumatic brain injury to have worsening symptoms. Dr. Stefanon opined that it was difficult to obtain an accurate history whether or not treatment modalities were helping as Claimant was inconsistent in responses throughout the extensive interview. Claimant reported initially that she was the same with physical and vestibular therapy, but when told that it would be stopped since it did not seem to be improving Claimant's functional ability, Claimant reported that she was actually having improvement. *See* Exhibits 3, 12, K.

12. On August 24, 2016 Claimant was evaluated by neuropsychologist Alissa Wicklund, PhD. Claimant reported that she sustained a concussion in a work accident on June 24, 2016 after falling backwards and hitting her head on a metal jack. Claimant reported a scalp laceration, and initial symptoms of headache with pressure, dizziness, nausea, vomiting, neck pain, and photophobia. Dr. Wicklund noted that the medical records showed an unclear pattern of recovery and a concern that the neck and back pain were not related to the initial injury and reflected delayed onset of symptoms. Claimant reported an overall decrease in intensity and frequency of symptoms but that she had headaches with pressure in the forehead and behind the eyes, dizziness and increased headache on cognitive and physical exertion, nausea, photophobia, sleep dysregulation, problems with short term memory, problems with concentration, and feelings of frustration and irritability. Claimant reported that she had attempted to work her second job and approximately 8 hours per week. Dr. Wicklund performed multiple tests on Claimant. Claimant's scores were within the expected average range on measures of working memory, speed of mental processing, retentive memory, simple sustained attention, and executive functioning. Dr. Wicklund opined that a weakness was apparent in encoding of verbal information without evidence of loss of information over time. Vestibular/ocular motor screening did not provoke an increase in symptoms in headache, dizziness, nausea, or mental fogginess. Dr. Wicklund opined that results of the evaluation suggested protracted recovery from concussion. *See* Exhibits 5, L.

13. On November 4, 2016 Claimant was evaluated by Donna Brogmus, M.D. Claimant reported falling over a pallet backwards and hitting the back of her head on the metal pallet jack. Claimant reported that her headache was so severe initially that she didn't feel her neck. Clamant reported a laceration to her scalp along with a concussion. Claimant reported headaches, dizziness, nausea, vomiting, neck pain, and photophobia. Claimant reported that she had been working a different job for the past four months where she does store resets, material handling, and labeling. Dr. Brogmus diagnosed cervical pain, chronic post traumatic headache, not intractable, and unspecified disorder of vestibular function. Dr. Brogmus opined that the cause of the problem was related to work activities. *See* Exhibit N.

14. On November 7, 2016 Claimant underwent x-rays of her cervical spine. The reason for the study was listed as neck pain radiating down her left arm. The impression provided was normal views of the cervical spine with negative findings. *See* Exhibits 8, O.

15. On December 9, 2016 Claimant was evaluated by Dr. Brogmus. Claimant reported headaches, dizziness and nausea all about the same as her last visit. Claimant reported neck pain and left hand numbness about 10+ minutes daily at least. Dr. Brogmus found tenderness over the cervical spine to palpation with cervical range of motion about 70% in all planes and tight and tender over the right and left trapezius to palpation. Dr. Brogmus noted that due to the ongoing left hand arm numbness she ordered a cervical MRI. *See* Exhibit P.

16. On January 23, 2017 Claimant underwent an MRI of her cervical spine. The impression was normal cervical spine MRI. *See* Exhibits 8, R.

17. On April 19, 2017 Claimant was evaluated by Benjamin Miceli, a neurology PA. Claimant reported neck pain, headache, and numbness in the left hand and ongoing post concussive syndrome. Claimant reported that she fell backward on a wooden pallet and hit her head on a pallet jack and later was told she had a concussion. Claimant reported an immediate headache post injury that lasted a week, dizzy spells, now down to 2-3 per week, and that she had resolution of previously blurred vision and cognitive "fog." Claimant reported intermittent spells of paresthesias in her thumb and first two digits in median nerve distribution. PA Miceli found a positive tinel at the left wrist, tenderness to palpation at the left trapezius and splenis capitis muscles with provocation of left sided headache and mild paresthesias of the left upper extremity. PA Miceli assessed cervicogenic headache, left sided, paresthesia of left arm and symptoms consistent with exacerbation of previous carpal tunnel syndrome, and cervicalgia. PA Miceli noted that if Claimant failed conservative treatment they would try trigger point injections or an occipital nerve block. *See* Exhibit T.

18. Claimant continued to treat with Dr. Brogmus. On April 26, 2017 Dr. Brogmus noted that Claimant's headaches started over the left occiput and moved forward. *See* Exhibit P.

19. On June 30, 2017 Claimant underwent an independent medical examination performed by Eric Ridings, M.D. Dr. Ridings reviewed medical records and performed a physical examination. Dr. Ridings opined that Claimant had sustained a contusion and small laceration to her occiput at work on June 24, 2016 and that objective findings, other than the occipital wound, had been entirely lacking. Dr. Ridings opined that there was no medical explanation for Claimant's continuing symptoms one year after what was objectively a quite mild injury. Dr. Ridings opined, strongly, that Claimant did not sustain any cognitive deficits, neck pain, back pain, shoulder pain, left upper extremity pain, numbness or tingling, vision changes, hearing changes, or any other diagnoses beyond a scalp wound and head pain as a result of her June 24, 2016 work injury. Dr. Ridings noted that at Claimant's first three visits she had no complaints or abnormal findings in areas where she later reported problems. Dr. Ridings opined that it was not medically probable that symptoms occurring weeks and months later would be related to the work injury. Dr. Ridings opined that the natural history of traumatic brain injury is for maximum cognitive symptoms to be present immediately after the injury with gradual progressive improvement subsequently. He noted, in Claimant's case, there were no complaints or findings of cognitive deficit at the initial evaluation but later Claimant had expanding symptoms, which is inconsistent with the course of traumatic brain injury. Dr. Ridings opined that there was no indication for any further medical treatment under the claim. Dr. Ridings pointed out all of Claimant's complaints were entirely subjective with repeated normal neurologic examinations and that there was no justification for any continued prescription of medications, physical therapy, chiropractic care, or massage therapy. *See* Exhibit A.

20. On July 11, 2017 Dr. Brogmus anticipated Claimant would be at maximum medical improvement in about 2 visits. Dr. Brogmus noted Claimant's headaches were about 2 mild headaches per week that were controlled with laying down or over the counter medications. Claimant also reported about one severe headache per week. *See* Exhibit Y.

21. On July 25, 2017 Claimant was evaluated by Kathi Patterson, NP. Claimant reported 2-3 headaches per week with a debilitating one every 3 weeks or so. Claimant reported an aura of peripheral blurred vision, seeing spots, and nausea and vomiting as well as photophobia and phonophobia. Claimant reported the frequency was mildly decreasing but that they were still debilitating and that Aleve was no longer helping with the acute headaches. Claimant reported using zanaflex when her neck was really tight, about 4-5 days per week and that she was no longer seeing chiro or massage. NP Patterson assessed occipital neuralgia of the left side and opined that Claimant met all the criteria for the diagnosis. NP Patterson opined that trigger points existed at the emergence of the greater occipital nerve or in the area of distribution of C2 and that Claimant had tenderness over the affected occipital nerve branches. NP Patterson recommended a left sided occipital nerve block for left sided occipital neuralgia and noted that Dr. Schmitt would do the procedure as soon as the schedule allowed. NP Patterson also recommended Sumatriptan for acute headaches since Aleve was no longer effective. *See* Exhibits 11, Z.

22. On August 14, 2017 NP Patterson issued a letter. NP Patterson noted that Claimant had an injury where she fell backward and hit the back of her head on a pallet jack, with an immediate headache following the fall and opined that the mechanism of injury certainly could have resulted in damage to the greater occipital nerve, resulting in headaches. NP Patterson opined that Claimant had tenderness and tingling in the occipital nerve distribution after light compression along the nerve distribution and that although the compression was done on both sides, only the left side elicited symptoms. NP Patterson opined that the symptoms elicited meet the full criteria for a diagnosis of occipital neuralgia and that an occipital nerve block is the treatment of choice for this diagnosis. NP Patterson also recommended Imitrex/Sumatriptan for the chronic headaches that were no longer responding to Aleve. *See* Exhibit 11.

23. On August 15, 2017 Claimant was evaluated by Dr. Brogmus. Dr. Brogmus reviewed Dr. Ridings IME and opined that Claimant was noted to have dizziness, nausea and vomiting with headache since the June 2016 injury. Dr. Brogmus noted that Claimant overall had trended better but that the intermittent dizziness and headaches, and nausea persisted. *See* Exhibit AA.

24. On September 12, 2017 Claimant was evaluated by Dr. Brogmus. Claimant reported that her medications had not been filled by insurer and that she had been out of meds for six weeks and had more headaches off the medications. Claimant reported 4-5 headaches per week starting over the occiput and lasting a few hours if she got Tylenol. Claimant reported her sleep was worse off the meds and that she was dizzy 2-3 times per week. Dr. Brogmus recommended an occipital block and a trial of Imitrex/Sumatriptan and opined that both were reasonable treatments. Dr. Brogmus did not agree with the IME conclusion that given a set amount of time a headache post fall should be gone. *See* Exhibit CC.

25. Respondents denied NP Patterson's request and had a review performed by Dr. Ridings who opined that the occipital nerve blocks and Imitrex/Sumatriptan were not related to Claimant's work injury and were not reasonable and necessary. *See* Exhibit GG.

26. Claimant filed an application for hearing in response to the denial. Respondents also later denied a request for massage therapy.

27. Dr. Brogmus testified by deposition. Dr. Brogmus agreed with the diagnosis of occipital neuralgia given to Claimant by NP Patterson. Dr. Brogmus opined that the occipital neuralgia was related to Claimant's work injury. Dr. Brogmus noted that the occipital nerve block is a steroid injected close to the occipital nerve to see if it can decrease inflammation to that nerve to see if the nerve is a pain generator and, if so, itwill hopefully decrease the inflammation and stop the pain generation. Dr. Brogmus opined that Claimant was a good candidate for the occipital nerve block since Claimant had ongoing headaches since the fall that were not responding to conservative treatment, medications, massage therapy, physical therapy, or chiropractic and opined that the

nerve block was an option to see if it would help. Dr. Brogmus also opined that Imitrex/Sumatriptan was a medication used for migraine treatment used commonly with headaches, whether they be tension or mixed migraine/tension headaches and that Claimant was a candidate for the medication because of the question of what type of headache Claimant has, whether it is a tension migraine, or all from the occipital nerve. Dr. Brogmus opined that the medication would give them an idea of how to further treat Claimant.

28. Dr. Brogmus opined that Claimant did not have a cervical spine injury, but that her headaches were probably causing the cervical myofascial pain and that the headaches were causing tension in Claimant's neck. Dr. Brogmus noted some improvement with massage therapy and opined that was probably due to the tightness factor. Dr. Brogmus noted that Imitrex/Sumatriptan was for the more severe headaches with nausea and vomiting and noted that at Claimant's first visit, she had nausea and vomiting, and photophobia that can be migrainous generally and treated by Imitrex/Sumatriptan. Dr. Brogmus opined that Claimant was not yet at maximum medical improvement because she hadn't finished trials of the nerve block or Imitrex/Sumatriptan. Dr. Brogmus noted that both were reasonable to trial for Claimant to determine diagnostically if they work in treating Claimant's headaches, which had been going on for over one year.

29. Dr. Ridings testified by deposition. He opined that Claimant sustained a contusion and small laceration to her occiput, causing some headache due to the impact in her June 2016 work injury. He noted that Claimant struck the back of her head, had a laceration on the back of her head, and had complained of headache throughout her course of treatment. Dr. Ridings opined, however, that Claimant had no additional diagnoses. He noted that Claimant had complained of many different diagnoses that were not mentioned in her first three visits including her complaints of neck pain, shoulder pain, symptoms all the way down her left arm, decreased vision, decreased hearing, and numbness in her left hand. Dr. Ridings opined that with a point source episode of trauma, you would expect any symptoms to be apparent within the first 24 hours.

30. Dr. Ridings opined that occipital nerve blocks are to treat pain that seems to radiate from the base of the skull up over the top of the head to behind the eye on the side of the occiput being injected. He opined Claimant did not have that type of headache pain during the first year of Claimant's symptoms and that her headache complaints were not in the occipital neuralgia pattern. Dr. Ridings opined that you can check of that type of pain by pressing a thumb over the particular nerve at the base of the skull and that it should cause a shooting pain in the distribution you are expecting if it is the occipital nerve. He opined that in the first year of treatment Claimant did not have this distribution but had complaints of headaches of all different sorts that were mostly generalized. Dr. Ridings opined that even if Claimant had occipital neuralgia now, it was not a consequence of having fallen down in 2016 since there were no initial findings of occipital neuralgia or complaints consistent with occipital neuralgia in the first year. Dr. Ridings opined that he did not believe Claimant actually had occipital neuralgia. Dr. Ridings also opined that Claimant had quite a bit of massage therapy already and that he failed to see

she was receiving any benefit from massage therapy and that it was not reasonable or necessary.

31. Claimant testified at hearing that she still has dizziness and headaches. She also testified that she gets migraines and that her headaches overall are milder but that on some days they are debilitating and she stays in a dark room. Claimant testified that her migraines are all over but that other headaches usually start in the very back of her head and go forward. Leading up to the June 2016 incident, Claimant had no headaches, migraines, or dizziness. Claimant testified that she was evaluated by neurologist Dr. Yang in January of 2018 and that Dr. Yang also recommended the occipital nerve blocks and Imitrex/Sumatriptan. Claimant testified that she would like to try both the nerve blocks and the medication.

32. Claimant failed to report concurrent employment and employment she was engaged in while undergoing treatment in this case. In a prior injury case, on functional evaluation, Claimant appeared not to be performing at her maximum level. *See* Exhibit B.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations,

the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Medical "treatment" encompasses both diagnostic and curative medical procedures. *Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949). Reasonable diagnostic procedures have been held to be a prerequisite to maximum medical improvement if they have reasonable prospect for defining claimant's condition and suggesting further treatment. *Villela v. Excel Corp.,* W.C. No. 4-400-281 (ICAO February 1, 2001). A Claimant bears the burden to establish by a preponderance of the evidence that the conditions for which they seek medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S.

Claimant has met her burden to establish by a preponderance of the evidence that the left occipital nerve block and the prescription medication Imitrex/Sumatriptan are reasonable, necessary, and causally related to her June 2016 work injury. As found above, Claimant's injury involved striking her left occiput. She has consistently reported headaches throughout her treatment. In July of 2016 Claimant had tenderness at her left occiput with residual soft tissue swelling. In August of 2016, Claimant had headaches with pressure behind her eyes. In April of 2017 it was noted that Claimant had tenderness to palpation at the left splenis capitis muscles that provoked left sided headache. Claimant also reported in April of 2017 that her headaches started over her left occiput and moved forward. In July of 2017, Claimant was noted to have trigger points at the emergence of the greater occipital nerve and tenderness over the affected occipital nerve branches.

Dr. Brogmus' opinions are found credible and persuasive. Claimant has established, more likely than not, a diagnosis of left occipital neuralgia due to her work injury where she struck her left occiput and has had consistent headaches since. It is credible and persuasive that occipital neuralgia can be caused by trauma to the occiput. Dr. Brogmus' opinion that it is reasonable and necessary to perform a left occipital nerve block to see if it can decrease inflammation to that nerve and determine if the nerve is a pain generator is persuasive. The ALJ finds this opinion to be consistent with recommendations made by PA Miceli, NP Patterson, and Dr. Yang (as credibly testified

by Claimant). The left occiput nerve block is reasonable both to diagnose and determine if, in fact, the left occipital nerve is causing Claimant's continued symptoms and to alleviate or cure Claimant's symptoms. The ALJ finds it persuasive that the recommended left occipital nerve block has a reasonable prospect to define Claimant's condition. The ALJ finds the opinions of Dr. Ridings not to be as persuasive. Dr. Brogmus is credible and persuasive that occipital neuralgia can cause headaches and that the headaches could be causing Claimant's cervical myofascial pain. Determining if the occipital nerve is the root cause through a diagnostic and potentially curative nerve block is found to be reasonable and necessary and casually related to Claimant's injury where she struck her left occiput.

Claimant has also established that the prescription for Imitrex/Sumatriptan is reasonable, necessary, and causally related to her June 2016 work injury. Since injury, Claimant has consistently reported headaches and migraine type headaches not present prior to her injury. Despite significant conservative treatment, the source of the headaches/migraines is not known. While Claimant is waiting the left occipital nerve block and while her treatment continues, it is both reasonable and necessary to allow this medication for her strong migraine type headaches and Dr. Brogmus' opinions that the medication offers a reasonable diagnostic and curative option for Claimant is credible and persuasive.

Claimant has failed to establish by a preponderance of the evidence that massage therapy is reasonable, necessary, or causally related to her June 2016 injury. Dr. Brogmus is unsure if massage therapy should continue. Dr. Ridings noted it had not helped throughout the course of treatment. As found above, Claimant has previously undergone significant conservative treatment including massage therapy that has not provided any ongoing relief. The ALJ finds that Claimant has presented insufficient evidence that massage therapy is reasonable or necessary.

Additionally, it is noted that the issues of whether or not Claimant sustained a traumatic brain injury, a cervical spine injury, a back injury, or shoulder pain as a result of this June 2016 work incident were not issues before the ALJ. The ALJ notes and agrees that the records contain some evidence of increasing symptoms and reports throughout. They also reference Claimant not putting forth maximum effort in a prior injury case. However, the limited issues for hearing were whether or not the occipital nerve block, Imitrex/Sumatriptan, and massage therapy were reasonable, necessary, and related to the injury. The ALJ finds that Claimant has met her burden to show, more likely than not, that the occipital nerve block is reasonable, necessary and causally related. Claimant struck her left occiput in the June 2016 injury. She has had consistent headaches since, with patterns described consistent with what would be expected for occipital neuralgia. She has responses to palpation consistent with occipital neuralgia. The nerve block offers a reasonable opportunity to diagnose and or cure the probable occipital neuralgia. If it offers no relief, and is non-diagnostic, a future determination as to whether or not any further treatment is reasonable or necessary is reserved. However, Claimant has established the nerve block to be reasonable, necessary, and related to her injury. Additionally, the medication Imitrex/Sumatriptan also is reasonable, necessary, and

causally related to her work injury and as testified by Dr. Brogmus it also offers a reasonable opportunity to further diagnose and or cure Claimant's condition. Again, if the medication offers no relief and is non-diagnostic, a future determination as to whether or not any further treatment is reasonable and necessary would also be reserved. Whether or not Claimant has more severe injuries or injuries including possible traumatic brain injury, cervical spine injury, back injury, etc. were not before the ALJ and are therefore not addressed.

ORDER

1. Claimant has established by a preponderance of the evidence that a left occipital nerve block is reasonable, necessary, and related to her June 24, 2016 work injury.

2. Claimant has established by a preponderance of the evidence that the medication Imitrex/Sumatriptan is reasonable, necessary, and related to her June 24, 2016 work injury.

3. Claimant has failed to establish by a preponderance of the evidence that massage therapy is reasonable, necessary, and related to her June 24, 2016 work injury. Her request for massage therapy is denied and dismissed.

4. All matters not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 9, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable occupational disease affecting both of her upper extremities.

II. If Claimant sustained a compensable occupational disease, whether she established by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment to cure and relieve the effects of that disease.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 33-year-old female who has no previous history of injuries prior to her employment with the Employer. She has been employed by Employer, a grocery store, for the last four years as a checker and night stocker.

2. Claimant became a night stocker approximately 2.5 years ago. (Ex. F, pg. 54.)

3. Claimant's job required her to stock grocery store shelves. Claimant worked from 10:30 p.m. until 7:00 a.m., five days a week, Monday through Friday. During her work shift, Claimant gets 2 fifteen minute breaks and a half-hour lunch break. (Ex. D, pg. 31.)

4. Claimant typically works with 10-12 other stockers. (Ex. D, pg. 31.) Claimant would usually be responsible for stocking 3-4 aisles during her shift.

5. Claimant ultimately became a foreman. As a foreman, Claimant made it a habit to work harder and faster than her crew members to set a good example regarding the pace at which her crew members should work.

6. Claimant described in detail the process of a night stocker for Employer. Claimant testified that the various grocery store products are delivered to the store in boxes – cases of product - which are on pallets. At the beginning her shift, Claimant is required to manually unload the boxes – cases - of product off the pallets by hand. The cases weigh approximately 5 to 50 pounds. Claimant must then lift, move, and sort the cases of product based on which aisle they need to go. Once the cases of product are sorted, Claimant must lift the boxes of product and place each box of product onto various U-boat carts which will be used to transport the cases of product to the proper aisle. Loading up the U-boat carts takes anywhere from 45 minutes to 2 hours, depending on the size of the

loads that day. (HT, pg. 16.) Once the U-boat carts are loaded with cases of product, Claimant would push and pull two U-boat carts at a time to the aisles she would be stocking. Once the U-boat carts were in the appropriate aisles, Claimant would begin stocking the shelves. This required Claimant to grab, lift and/or position the box she intended to open, cut or tear the box open, and then grab each individual item out of the box and place it on the shelf. Performing this activity required Claimant to flex and extend her wrists and pinch and grip the product in order to place it on the shelf. The product placed on the shelf weighs anywhere from ounces to 60 pounds. This activity is done repetitively throughout her shift and at a very fast pace. Claimant is required to work at a very fast pace in order to stock all of the delivered product without any overtime. Claimant spends approximately 90% of her shift loading cases of product onto U-boat carts and opening boxes and placing product on the proper shelf. This amounts to approximately 6.75 hours per day. The remaining 10% of her shift, which amounts to approximately 45 minutes, is spent breaking down the boxes and taking them to the storage area for discarding or compacting and making sure all product in her assigned aisles is properly faced. Claimant's job duties result in Claimant's wrists and upper extremities being in awkward postural positions such as bilateral wrist extension of greater than 30 degrees and bilateral supination and pronation of her hands and wrists. Claimant's job duties also require the use of forceful and powerful gripping and pinching with her hands. Therefore, her job duties require repetitive awkward posture and force - and combinations thereof – regarding the use of her hands and wrists to perform her job duties. (See Ex. D and HT.)

7. Claimant credibly testified that:

> As a foreman at King Soopers, I was told to work harder and faster than my crew. And I had to show them up so I would have to do the heavy aisles with the condiments like ketchup and olives and pickles and things like that.

(HT, pg. 31.)

When asked why she did that, Claimant credibly responded:

> That's what my manager wanted of me. They wanted me to show them that I can do the job.

(HT, pg. 31.)

8. In order to complete her stocking duties every night, Claimant pushed herself at all times. (HT, pg. 33.)

9. Claimant would start having symptoms in her hands after working approximately 3 hours into her shift. (HT, pg. 34.)

10. While working and upon developing numbness in her hands, Claimant would stretch her hands in the manner recommended by the signs posted at the job site for carpal tunnel syndrome. (HT, pg. 27. Claimant associated the symptoms with her job.

11. The symptoms were worse in her right hand compared to her left hand.

12. On November 2, 2017, Claimant was stocking shelves. Prior to this date, Claimant had been having tingling and numbness in her hands for approximately 1 year. At approximately 5:30 a.m., on Thursday, November 2, 2017, Claimant was stocking gallons of water. While lifting a gallon of water from a U-boat cart she had previously loaded, she felt a pop in her right wrist towards the end of her shift. She did not have the immediate onset of pain. Claimant finished her shift and did not report an injury. Later that evening, Claimant developed pain from the volar tip of the right long finger to the mid forearm. She also had tingling and numbness symptoms in her left hand.

13. On Monday, November 6, 2017, Claimant presented to Denver Health and was evaluated by Laura Metier, NP. The medical report from that date indicates Claimant has had hand numbness and tingling at night while sleeping for the last year. The report goes on to indicate that on November 3, 2017, Claimant went to lift a heavy box at work and got pain in both hands as well as shooting pains in her palms and into her fingers. Claimant was complaining of a weaker grip and was having difficulty holding things. The physical examination revealed positive Phalen's and Tinel's testing and weak grip strength bilaterally. NP Metier diagnosed Claimant as suffering from bilateral carpal tunnel syndrome, prescribed bilateral wrist splints, and took Claimant off work for one week. (Ex. 2, pg. 113, 116; Ex. G, pg. 85-91.)

14. On November 7, 2017, Claimant reported her injury to Employer. Employer provided Claimant a list of four designated primary care medical providers from whom she could seek treatment. As set forth on the Designated Medical Provider List, each provider was a specialized "Occupational Medicine Clinic." Claimant selected the Concentra Medical Centers, Occupational Medicine Clinic, at 1212 S. Broadway, Denver, CO. (Ex. A, pg. 8.)

15. On November 7, 2017, an Employee Incident - Questionable Claim Form - was completed by the store manager. The report indicates the manager thought the claim was questionable because Claimant was previously a checker at a different store and Claimant stated that the injury might have been caused by either checking or stocking shelves when she was lifting a gallon of water. (Ex A, pg. 9.)

16. On or about November 7, 2017, an "Associate Incident, In-Store Investigation Report," was also completed by the store manager. This form provides very little space for the Manager to write down the information gathered during the

"investigation." In the incident description, the manager noted that Claimant was placing a single gallon of water on the shelf when her right wrist popped. In the section for the incident type, the store manager indicated Claimant was lifting a case of water. (Ex. 4, pg. 190.) Therefore, the store manager wrote down two different activities he determined Claimant was performing at the time she felt a pop in her right wrist.

17. On November 8, 2017, Claimant presented to the Concentra Occupational Medical Clinic located at 1212 S. Broadway, Denver, Colorado. As found above, this was one of the employer's pre-designated occupational medical clinics for work related injuries which was selected by Claimant. Claimant was evaluated by Dr. Stephen Danahey. As set forth in Dr. Danahey's report, Claimant described stocking shelves at work and lifting gallons of water onto a shelf and feeling a pop in her right wrist. The report also notes that although Claimant did not have the immediate onset of pain in her right wrist, she developed excruciating pain later that evening. Claimant also complained of having numbness and tingling in both hands over the last year. Despite being told by Claimant that she felt a pop in her wrist while stocking water, Dr. Danahey noted that Claimant did not report a specific injury and that she attributed her symptoms to her work activities. Claimant advised Dr. Danahey that she recently saw her primary care physician and was diagnosed with carpal tunnel syndrome. (Ex. 3, pg. 11.) Dr. Danahey obtained Claimant's occupational history, job duties, as well as the days and hours worked each week. Dr. Danahey also asked Claimant about a second job and whether she participated in any significant sports or hobbies in order to rule out other causes of Claimant's carpal tunnel syndrome. Claimant denied having a second job and denied engaging in any significant sports or hobbies. (Ex. 3, pg. 11.) Dr. Danahey also reviewed Claimant's past medical, social, and family history to rule out other causes of Claimant's carpal tunnel syndrome. (Ex. 3, pg. 11.) Dr. Danahey performed a physical examination and noted positive Tinels testing for carpal tunnel syndrome. Dr. Danahey diagnosed Claimant with: i) Right wrist tendinitis, ii) Left wrist tendinitis, and iii) Carpal tunnel syndrome, bilaterally. (Ex. 3, pg. 13.)

18. On November 8, 2017, Dr. Danahey also completed a WC164 form. (Ex. 3, pg. 6.) Dr. Danahey concluded that the objective findings were consistent with Claimant's history and work related mechanism of injury/illness. He specifically noted the work related diagnosis was M77.8/tendinitis and G56.03/bilateral carpal tunnel syndrome. (See Ex. 3, pg. 6, 13.) Dr. Danahey referred Claimant to physical therapy and prescribed wrist braces to treat her work related bilateral tendinitis and bilateral carpal tunnel syndrome. He also placed Claimant on restricted duty and limited her lifting, pushing, and pulling to up to 5 pounds occasionally, advised Claimant to wear her braces, and advised Claimant to avoid gripping and grasping with her hands. (Ex. 3, pg. 14-15.) Lastly, Dr. Danahey advised Claimant to return to Concentra's occupational medical clinic

for a follow-up appointment in 2 days. (Ex. 3, pg. 14.) The ALJ finds Dr. Danahey's findings and opinions regarding his diagnosis of bilateral tendinitis and bilateral carpal tunnel syndrome, and that such conditions are work related, to be credible and persuasive.

19. On November 30, 2017, Claimant returned to Denver Health and was evaluated by Dr. Andrew Wood. The medical report from that visit indicates Claimant was "stocking night grocery, and while lifting a case of water, her wrist "popped;" then severe pain and burning." The medical report also indicates Claimant was "lifting a water bottle and felt a pop in her right wrist." Dr. Wood opined that Claimant's "etiology of her pain appears to be consistent with carpel tunnel especially given her occupation with manual labor. However, due to recent injury where she felt a pop while lifting and now having worsening pain will obtain MRI." (Ex. G, pg. 82) The ALJ finds Dr. Wood's opinion that Claimant's carpal tunnel syndrome is consistent with her job duties as a stocker, as well as his treatment recommendations, to be credible and persuasive.

20. On December 18, 2017, Dr. Jonathan Sollender performed an Independent Medical Examination on behalf of Respondents and issued a report. He diagnosed Claimant with right sided carpal tunnel syndrome and a right sided wrist strain. However, he did not provide a definitive opinion regarding causation in his initial report. Dr. Sollender indicated that before he could provide an opinion as to whether Claimant's conditions were caused by her job activities, he would need to have a Job Demands Analysis performed in order to apply the exposure and causation analysis set forth in Section 17-5 of the Medical Treatment Guidelines. (Ex. F.)

21. Dr. Sollender issued supplemental report on February 13, 2018. Dr. Sollender stated in his report that he relied upon the Medical Treatment Guidelines in assessing causation in this case. Dr. Sollender concluded that based upon his application of Section 17-5 of the Medical Treatment Guidelines, and the information contained in the Job Demands Analysis report prepared by Ms. Jill Adams, Claimant's carpal tunnel syndrome and right sided wrist strain were not caused by her job duties. (Ex. F.)

22. The ALJ does not find Dr. Sollender's opinions and conclusions to be credible or persuasive for a number of reasons.

23. First, the Medical Treatment Guidelines set forth a six step causation analysis process. One of the steps requires the physician to interview Claimant regarding their job duties. The Medical Treatment Guidelines provide:

> 3. **MEDICAL CAUSATION ASSESSMENT FOR CUMULATIVE TRAUMA CONDITIONS**
> General Principles of Medical Causation Assessment

> **Step 3.** ***Interview the patient to find out whether risk factors are present in sufficient degree and duration to cause or aggravate the condition.*** Consider any recent change in the frequency or intensity of occupational or non-occupational tasks. In some cases, a formal jobsite evaluation ***may*** be necessary to quantify the actual ergonomic risks. (Emphasis added.)

(Medical Treatment Guidelines, Rule 17, Exhibit 5 (D)(3)).

As set forth in his initial report, Dr. Sollender obtained very little information from Claimant regarding the physical requirements of her job. As documented in his initial report, Claimant told Dr. Sollender that she has worked for Employer as a checker and night stocker. She advised him that she has flipped back and forth between checking and night stocking because she found stocking to be too strenuous for her and switched back to being a night stocker about 4 months ago for better hours and pay. She also told Dr. Sollender that she worked 8.5 hours per day, which included two 15 minute breaks and a 30 minute lunch break, resulting in 7.5 hours of productivity. She also told Dr. Sollender that she performed repetitive motions of stocking at least five hours daily.

However, despite the requirement to "***Interview*** the patient to find out whether risk factors are present in sufficient degree and duration to cause or aggravate the condition," it is not evident from Dr. Sollender's report that he tried to actively interview Claimant to determine whether Claimant's job duties involved physical activities in sufficient degree and duration to cause carpal tunnel syndrome. For example, Claimant told Dr. Sollender that the physical aspects of her job as a stocker were too strenuous and caused her to alternate between checking and stocking. Dr. Sollender, however, did not ask Claimant, and document it in his report, what specific aspects of her job as a stocker were too strenuous; the repetition, force, and awkward positioning required to perform her job; the symptoms she developed while performing the strenuous aspects of her job; and whether her symptoms changed when she switched to checking which might not have required as much repetition, force, and awkward position of her hands and wrists. It appears to this ALJ that Claimant briefly told Dr. Sollender about her job, and Dr. Sollender chose not to actively interview Claimant to determine whether her job duties involved risk factors for the development of a cumulative trauma disorder, such as carpal tunnel syndrome.

24. After getting a general description of her work, and failing to adequately interview Claimant about her job duties, Dr. Sollender indicated in his report:

> She has not provided me any objective insight, only her subjective impression that her work is laborious and

> repetitive. As a layman, she has no idea of the true definition of repetitive.

The ALJ finds Dr. Sollender asked Claimant about her job duties and summarily dismissed any relevant information Claimant provided, or could have provided, about her job duties which could have been used to establish the cause of her carpal tunnel syndrome. It is also not clear from such statement what type of "objective insight" Claimant could have provided Dr. Sollender as a "layman." In essence, Dr. Sollender appears to be saying that Claimant, as a layman, is incapable of providing sufficient information regarding her job duties which would allow Dr. Sollender, or any other physician, to determine whether her tendinitis and carpal tunnel syndrome were caused by her job duties.

25. Moreover, Dr. Sollender contends the Medical Treatment Guidelines support his methodology of dismissing any information Claimant might have provided, had she been properly interviewed, by stating in his report that: "The current treatment guidelines Rule 17-5 does describe the potential for over reporting of risk factors, such that a job site evaluation is important." (Ex. F, pg. 55) The ALJ finds that although the Medical Treatment Guidelines indicate that a job site evaluation can help define the actual risk factors of a job, they do not indicate Claimants misrepresent and over report the risk factors associated with their jobs and that a job site evaluation is the only way to obtain accurate and credible information to determine causation.

See Medical Treatment Guidelines, Rule 17, Exhibit 5.

26. In addition, the Medical Treatment Guidelines set forth "standard procedures that should be utilized when initially diagnosing work-related upper extremity complaints." The Medical Treatment Guidelines indicate:

> History-taking and physical examination are generally accepted, well-established and widely used procedures that establish the foundation for subsequent stages of diagnostic and therapeutic procedures.

See Medical Treatment Guidelines, Rule 17, Exhibit 5.

The Guidelines also specifically indicate that the physician should include the "patient's perception of cause of symptoms." (*See* Medical Treatment Guidelines, Rule 17, Exhibit 5.) Therefore, the ALJ finds that Dr. Sollender's failure to actively interview Claimant and obtain a detailed job description from Claimant in order to assess whether Claimant's job duties might involve risk factors for the development of carpal tunnel syndrome diminishes the reliability and credibility of his ultimate opinion that Claimant's work activities did not cause her tendinitis or carpal tunnel syndrome.

27. Dr. Sollender also stated in his report:

> I have evaluated night stockers and dairy stockers who all allege the work is repetitive. Some have had ongoing medical problems which were the root cause of their condition.

The ALJ finds the above statement anecdotal and another attempt by Dr. Sollender to diminish the ability of Claimant to provide credible, accurate, and reliable information about her job duties which can be used to establish that her job duties caused her tendinitis and carpal tunnel syndrome.

From this statement, the ALJ finds Dr. Sollender has evaluated other stockers who alleged their jobs were repetitive, but ended up having jobs which were not repetitive, and had underlying medical conditions which were the direct and proximate cause of their cumulative trauma disorder, such as carpal tunnel syndrome.

The ALJ finds in this case that Claimant's job was repetitive and neither Dr. Sollender, nor any other physician, has identified Claimant as suffering from a non-work related medical condition which is the "root cause" of her tendinitis or carpal tunnel syndrome.

28. Dr. Sollender also made treatment recommendations including additional testing, immobilization, splinting, and work restrictions. Dr. Sollender stated in his report that:

> All these treatment recommendations are offered without regard to causation, but are simply suggestions for anyone with a similar condition, whether caused by non-work weekend warriors, or from a forceful job.

Dr. Sollender seems to be suggesting that another possible cause of Claimant's carpal tunnel syndrome might be activities she performs on the weekend as a "weekend warrior." Dr. Sollender, however, noted in his report that he asked Claimant about any hand intensive hobbies and she denied any. Moreover, his reports, and the record, are devoid of any credible and persuasive evidence that Claimant engaged in activities outside of work that would rise to the level of "weekend warrior" activities which would cause wrist tendinitis or carpal tunnel syndrome. Therefore, there is no credible and persuasive evidence that Claimant's wrist tendinitis and carpal tunnel syndrome were caused by activities she performed as a "weekend warrior."

29. Since Dr. Sollender did not obtain a detailed description of Claimant's job duties from Claimant, but stated he "needs data" to determine causation, he suggested a Job Demand Analysis be performed by a vocational expert. He stated that he

maintains a list of vocational experts who know the reporting requirements of Colorado Workers' Compensation Rule 17 Exhibit 5 for Job Demands Analysis and that he would share such list with Respondents if requested.

30. On January 18, 2018, Jill Adams, CRC, CCM, CEAS II, performed a Job Demands Analysis and issued a report. (Ex. D.) It is not clear whether Ms. Adams was on the list of vocational experts maintained by Dr. Sollender. The purpose of her analysis was to determine whether Claimant's job duties consisted of activities which are considered primary or secondary risk factors for developing carpal tunnel syndrome pursuant to the Medical Treatment Guidelines.

31. According to the Medical Treatment Guidelines, and Ms. Adams' report, the following risk factors where relevant based on Claimant's work and were analyzed:

Force & Repetition /Duration

Primary Risk Factors, include the following:

a. 6 hours of use of 2 pounds of pinch force or 10 pounds hand force 3 times or more per minute, or

b. 6 hours of lifting 10 pounds greater than 60 times per hour.

Secondary Risk Factors, include the following:

a. 3 hours of use of 2 pounds of pinch force or 10 pounds hand force 3 times or more per minute, or

b. 3 hours of lifting 10 pounds greater than 60 times per hour.

Awkward Posture & Repetition/Duration

Primary Risk Factors, include the following:

a. 4 hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees.

b. 6 hours of elbow flexion of greater than 90 degrees.

c. 4 hours of supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.

Secondary Risk Factors include the following:

a. 3 hours of elbow flexion of greater than 90 degrees.

b. 3 hours of supination/pronation of 45 degrees with power grip or lifting.

See Medical Treatment Guidelines, Rule 17, Exhibit 5.

32. Ms. Adams performed a Job Demands Analysis of Claimant's job and issued a report. (Ex. D.) She also testified at hearing. Although she could not evaluate Claimant performing her job, she evaluated other night stockers performing their

job at the store Claimant worked. She testified that she spent about 2 hours at the store and spent about 1½ hours evaluating the physical requirements of Claimant's job. Ms. Adams concluded Claimant's job as a stocker did not involve any primary or secondary risk factors for the development of a cumulative trauma disorder as defined by the Medical Treatment Guidelines.

33. The ALJ does not find certain aspects of Ms. Adams report, or testimony, to be persuasive or credible for a number of reasons.

34. First, Ms. Adams did not evaluate how Claimant performs her job and did not take into consideration the fact that Claimant typically stocked the heavier aisles.

35. Second, Ms. Adams states in her report that she performed the following study:

> A one hour time study was conducted of 2 pounds pinch force or 10 pounds hand force 3 times or more per minute. The data is cumulative.

Ms. Adams' report indicates that during a one hour time study of night stockers at King Soopers, which is broken down into 5 minute increments, the stockers she evaluated exerted 2 pounds of pinch force or 10 pounds of hand force 3 times or more per minute for a total of 15 minutes and 4 seconds. She extrapolated that data to equal one hour, thirty-seven minutes and thirty seconds over an entire work shift. Lacking from Ms. Adams' report or testimony is how she determined the amount of pinch force or hand force each stocker was using while performing each task during her evaluation. In addition, Ms. Adams' report contains a chart that lists the time she alleges she documented the stockers using 2 pounds of pinch force or 10 pounds of hand force 3 times or more per minute with their right hand and their left hand. Over a one hour period, Ms. Adams indicated that she observed stockers using 2 pounds of pinch force or 10 pounds of hand force 3 times or more per minute the exact amount of time - 15 minutes and 4 seconds - for each upper extremity – during a one hour period. A lack of any variability between the stockers' use of their right hand and left hand over an entire hour puts into serious doubt the accuracy of the data set forth in her report. In other words, the ALJ finds the data in Ms. Adams' chart setting forth her alleged documentation of the repetitive and forceful bilateral hand use of the stockers she observed performing their job is too consistent to be credible and reliable.

36. Ms. Adams report also indicates she performed the following study:

> A one hour study of ***bilateral lifting*** 10 pounds or more was conducted with the following observed. (Emphasis added.)

Ms. Adams states in her report that she observed a stocker lifting, ***bilaterally***, 10 pounds or more 12 times during a one hour period of observation and she extrapolated that out to 96 times over an 8 hour work shift. First, the Medical Treatment Guidelines discuss lifting 10 pounds or greater and do not indicate that lifting is to be measured when using both upper extremities concurrently/bilaterally and lifting a single item. Therefore, Ms. Adams did not address how many times the stockers lifted an item with one hand that weighed 10 pounds or more. Second, Ms. Adams was not present at the beginning of the

shift when the stockers are required to unload and sort the cases of product that have been delivered to the store on pallets and must be sorted and carried to the proper U-boat cart.

Moreover, lacking from Ms. Adams' report or her testimony is how she determined the weight of the items being handled by the stockers she observed and documented throughout her report. How did she determine which items weighed 10 pounds or more and the resulting force used to stock items on the U-boats and shelves? It is troubling to the ALJ that Ms. Adams was asked by Claimant's counsel how much a gallon "jug" of water weighs - the item Claimant was lifting and stocking when she felt a pop in her right wrist - and Ms. Adams stated "about 4 pounds." (HT, pg. 85) The ALJ takes judicial notice of the fact that a gallon of water weighs approximately 8.3 pounds.[1] The ALJ does not find Ms. Adams testimony that a gallon of water weighs about 4 pounds to be reliable or credible. Therefore, The ALJ does not find Ms. Adams' ability to determine and document the weight of the items being lifted, carried, and stocked, over Claimant's entire shift, as well as the force required to perform those activities, to be reliable or credible.

37. Ms. Adams also set forth data in her report regarding the amount of time the stockers tasks required wrist extension of greater than 30 degrees. Again, over a one hour period, there was merely a 1 second difference between the cumulative use of the right and left upper extremity. Again, the alleged parallel uniformity of the data noted in her report is not found to be credible.

38. Additionally, although Ms. Adams testified that she spent about 1½ hours observing the job duties of various stockers, she did not explain how she was able to concurrently and accurately observe, measure, and record all of the activities that have to be measured when determining primary and secondary risk factors under the Medical Treatment Guidelines, while each stocker was working at a production pace for an hour. She alleges in her report, and testimony, that she accurately observed and recorded all of the following risk factor data, in 5 minute increments, over a 1 hour period, while the stockers worked at a production pace:

    i. The amount of time the worker extended their right wrist greater than 30 degrees, every 5 minutes, for one hour.

    ii. The amount of time the worker extended their left wrist greater than 30 degrees, every 5 minutes, for one hour.

    iii. The amount of time the worker exerted 2 pounds of pinch force with their right hand, every five minutes, for one hour.

    iv. The amount of time the worker exerted 2 pounds of pinch force with their left hand, every five minutes, for one hour.

[1] See 8 CCR 1202-5-1.4(1.4.16) (The weight of a gallon (231 cubic inches) of water at 60ºF in air shall be 8.32828 pounds; *See also Allen v. Industrial Com'n*, 729 P.2d 15, (1986). (We take judicial notice that liquid milk weighs about the same as liquid water or approximately 8 1/3 pounds per gallon.)

v. The amount of time the worker exerted 10 pounds of hand force 3 times or more per minute with their right hand, every five minutes, for one hour.

vi. The amount of time the worker exerted 10 pounds of hand force 3 times or more per minute with their left hand, every five minutes, for one hour.

vii. The amount of time the worker exhibited ulnar deviation of the right wrist, greater than 20 degrees, every five minutes, for one hour.

viii. The amount of time the worker exhibited ulnar deviation of the left wrist, greater than 20 degrees, every five minutes, for one hour.

ix. The number for times the worker lifted more than 10 pounds bilaterally, every five minutes, for one hour.

x. The number of times the worker lifted 10 pounds with their right upper extremity, greater than 60 times per hour, for one hour.

xi. The number of times the worker lifted 10 pounds with their left upper extremity, greater than 60 times per hour, for one hour.

xii. The number of times the worker supinated their right wrist, every five minutes, for one hour.

xiii. The number of times the worker pronated their left wrist, every five minutes, for one hour.

xiv. The amount of time the worker had supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle of the right wrist.

xv. The amount of time the worker had supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle of the left wrist.

xvi. The amount of time the worker exhibited supination or pronation of 45 degrees with power grip or lifting of the right wrist and hand.

xvii. The amount of time the worker exhibited supination or pronation of 45 degrees with power grip or lifting of the left wrist and hand.

39. In addition, Ms. Adams concludes in her report that none of the Primary or Secondary Risk Factors were observed during her job demands analysis and directs the reader to “See Time Study” for the supporting data. For example, she states in her report to “See Time Study” regarding her conclusion that the data she obtained through her observation of stockers did not demonstrate the job required 4 hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees, during an entire shift. Her report only contains “Time Study” data regarding extension of greater than 30 degrees. The other “Time Study” data which apparently supports her

conclusion, and apparently documents the stockers were not flexing their wrist greater than 45 degrees or that the job did not cause the stockers to have an ulnar deviation of greater than 20 degrees, for any period of time, is missing. Her report also says "See Time Study" for the data regarding her analysis of a stocker engaging in supination/pronation with task cycles of 30 seconds or less or where posture is used for at least 50% of a task cycle to support her conclusion that such risk factors were also not present. Her report, however, only contains a time study with data regarding right and left arm supination/pronation. There is no data referencing the task cycles or posture used for at least 50% of the task cycle.

40. Her report also refers to another "Time Study" which apparently supports her conclusion that the job she observed did not require the stocker to engage in another risk factor involving 3 hours of supination/pronation of 45 ***degrees with power grip or lifting,*** which is a Secondary Risk Factor. (Emphasis added.) Again, there is no corresponding "Time Study" with any data in her report setting forth her observations and data of a stocker engaging in supination/pronation of 45 degrees ***with power grip or lifting***. (Emphasis added.) There is a "Time Study" contained in her report that references whether there was supination or pronation. But such data table does not indicate the degree of pronation or supination she was measuring and whether there was power grip or lifting. Although the additional power grip or lifting factors that are associated with meeting the definition of a Primary or Secondary Risk Factor due to supination or pronation might be irrelevant if there is not 3 or 4 hours of pronation or supination, it seems like the data has to be measured and collected concurrently and accurately in the first instance, to make that conclusion. And, there is no indication the data was collected.

41. The ALJ does not find Ms. Adams' conclusions that Claimant's job duties did not meet the primary or secondary risk factors set forth in the Medical Treatment Guidelines to be credible or reliable.

42. Despite the deficiencies in Ms. Adams' report and testimony, the ALJ finds that portions of her report and testimony establishes Claimant's job duties required the repetitive and forceful use of her upper extremities in awkward positions.

43. On January 29, 2018, Dr. Michael Blei performed an electrodiagnostic examination of Claimant's right upper extremity. The examination showed evidence of entrapment/compression neuropathy involving the median nerve across the wrist segments demonstrating moderate carpal tunnel syndrome. Dr. Blei recommended surgical release along with future evaluation of her left upper extremity at some point in the future. (Ex. G, pg. 74.)

44. On January 30, 2018, Claimant returned to Denver Health. Her diagnosis remained as bilateral carpal tunnel syndrome. Based on her symptoms, and the results of the EMG, she was scheduled with Dr. Ipaktchi for a right carpal tunnel release.

45. On February 5, 2018, Claimant underwent a right wrist carpal tunnel release which was performed by Dr. Ipaktchi at Denver Health. Dr. Ipaktchi noted that

the indication for the procedure was that Claimant had been suffering from paresthesia and numbness over the right hand median nerve distribution and that her symptoms also occurred nocturnally. He noted that on physical examination there was a positive Tinnel's sign over the right carpal tunnel, a positive Phalen's test, and a positive carpal tunnel compression test. He also noted that static 2 point discrimination was increased and demonstrated abnormal sensation over the median nerve innervated fingers. He also noted the electromyography and nerve conduction studies confirmed the diagnosis of right carpal tunnel syndrome.

46. On February 13, 2018, Dr. Sollender issued a supplemental report. As set forth in his report, he reviewed additional medical records, as well as the Job Demands Analysis prepared by Ms. Adams. There is no indication Dr. Sollender critically reviewed Ms. Adams' report, other than taking her conclusory findings that Claimant's job did not meet any of the primary or secondary risk factors set forth in the Medical Treatment Guidelines. Despite the deficiencies found by the ALJ in Ms. Adams' report, Dr. Sollender appears to have blindly adopted her findings and concluded that her report provided the objective data necessary to confirm Claimant was not exposed to adequate volumes of risk factors at work to assign a cause and effect relationship to her symptoms from work. He concluded that based upon Ms. Adams' Job Demands Analysis, the work Claimant performed was not forceful, awkward, or repetitive. He ultimately concluded Claimant's carpal tunnel syndrome as well as her wrist strain was not related to her job.

47. Dr. Sollender provides an analogy in both of his reports to explain and demonstrate that merely performing a task repetitively will not cause a cumulative trauma disorder like carpal tunnel syndrome unless the repetitive task also requires the use of force or is performed with an awkward posture. Dr. Sollender states:

> To be a risk factor, Colorado does require a job be both repetitive and forceful, or repetitive and awkward, or forceful and awkward. Imagine moving feathers at a fast rate. This would be repetitive, but not forceful. Compare moving a feather 10 times per minute versus moving a 20lb bucket of sand 10 times per minute. One is repetitive and one is repetitive and forceful. In Colorado we look at the combined repetitive and forceful activities as potential work-related conditions. In Colorado, the force is typically over 10lbs.

The ALJ finds Dr. Sollender's analogy to be instructive. Claimant's job did not require her to move feathers. Claimant's full time job required the forceful and repetitive use of her hands, wrists, and upper extremities, in awkward positions at times, to stock a grocery store.

48. Dr. Sollender also testified via deposition. His deposition testimony was consistent with his reports. Dr. Sollender testified that he reviewed the Job Demands Analysis of the night stocker performed by Ms. Adams and concluded

that Claimant's bilateral carpal tunnel syndrome and bilateral wrist tendonitis were not caused, aggravated or accelerated by Claimant's job duties:

> Q Did that job demands analysis assist you in reaching a conclusion on the causation of the bilateral wrist tendinitis and bilateral carpal tunnel syndrome?
>
> A. It did.
>
> Q. And how so?
>
> A. With this new information, which was purely objective as to the work she alleged to be doing that she thought was repetitive, and forceful, and awkward, by somebody who knows the Colorado definitions of these risk factors, who is on site watching the job being done by a night stocker, she confirmed that there was no primary and no secondary disk factors as defined by the Colorado Division of Workers' Compensation Rule 17, Exhibit 5, definitions. So with that information I can clearly confirm that her work is not forceful, her work is not repetitive, her work is not awkward in posture of the upper extremities, and her work would not have caused or contributed to the development of those kinds of conditions that she had. Moreover, she did have evidence of carpal tunnel syndrome that predated this claim.

[Sollender Deposition, pp. 7:17 to 8:14].

49. The ALJ does not find Dr. Sollender's ultimate conclusions to be reliable, credible, or persuasive based on the reasons set forth above, which include, but are not limited to, his methods used for gathering information about the physical requirements of Claimant's job as well as his unblinking reliance on Ms. Adams report. Dr. Sollender's steadfast reliance on Ms. Adams' data and conclusions, which the ALJ does not find reliable, makes his opinions regarding causation unreliable and not persuasive.

50. Moreover, Dr. Sollender based his conclusions regarding causation on his contention that he followed the causation analysis set forth in the Medical Treatment Guidelines. The Guidelines specifically indicate that preexisting cumulative trauma conditions may be aggravated by, or contribute to, exposures lower than those listed in the primary and secondary risk factor tables. (See Medical Treatment Guidelines, Rule 17, Exhibit 5 (D)(3)). Dr. Sollender testified that Claimant did have evidence of carpal tunnel syndrome that predated the filing of her claim in this case. Such statement is consistent with Claimant's testimony regarding the onset of her symptoms. Despite this information, Dr. Sollender did not analyze whether Claimant had preexisting non-occupational carpal tunnel syndrome and whether it was aggravated by her work activities that allegedly did not meet the primary or secondary risk factors set forth in the Medical Treatment Guidelines. Therefore, the ALJ finds Dr. Sollender did not

follow all aspects of the Medical Treatment Guidelines in assessing causation in this case.

51. The Division of Worker's Compensation Rule 17, Exhibit 5, Cumulative Trauma Conditions Medical Treatment Guidelines specifically provides that "acceptable medical practice may include deviations from these guidelines as individual cases dictate."

52. The Guidelines themselves indicate that the information about Claimant's job duties used by Drs. Danahey and Wood in determining causation is in line with the intent of the Guidelines which state:

> Mechanisms of injury for the development of cumulative trauma related conditions have been controversial. However, repetitive awkward posture, force, vibration, cold exposure, and combinations thereof are generally accepted as occupational risk factors for the development of cumulative trauma related conditions.

53. On June 21, 2016, Claimant wrote a statement in response to a complaint filed by a new stocker against Claimant. (Ex. 4, pg. 270-271.) The complaint was based on an incident that occurred between Claimant and the stocker during the evening/morning shift of June 16-17, 2016. Claimant provided the statement as part of her hearing submissions to support her contention that she was a hard worker, and as a foreman, pushed her co-workers to work hard as well. Respondent's counsel cross examined Claimant regarding the reason she wrote the statement and read aloud some of the contents of the complaint lodged against Claimant. Although Claimant stated: "that is a lie," it is not clear from the record which statements in the complaint Claimant asserted were not true. Claimant did, however, admit that the allegations or statements read by Respondent's counsel were contained in the complaint that was lodged against her. (HT, pg. 32, 58, and 59.) Respondent contends this exchange establishes Claimant is a liar and that certain statements attributed to Claimant that are contained in the medical records as well as her testimony cannot be believed. The ALJ does not find this exchange, taken as a whole, establishes Claimant was being untruthful.

54. The ALJ finds Claimant's testimony regarding her job duties, the physical requirements of her job duties, the pace at which she worked, the pace at which she worked compared to others, the aisles and items she had to stock, as well as the onset and progression of her symptoms to be credible.

55. Claimant's job as a stocker required her to use her upper extremities to perform repetitive tasks, with force, and in awkward positions, to stock shelves for the majority of her shift and she did this 5 days a week. These tasks represented a peculiar risk of her employment and were the industrial hazard that caused her bilateral wrist tendinitis and bilateral carpal tunnel syndrome and resulted in the need for medical treatment and became disabling as of November 2, 2017.

56. Claimant's job duties as a stocker for Employer was the proximate cause of Claimant's bilateral tendinitis and bilateral carpal tunnel syndrome.

57. The ALJ finds that the medical treatment provided to Claimant from November 6, 2017, through the date of hearing, to diagnose her bilateral upper extremity symptoms, and treat her bilateral tendinitis and bilateral carpal tunnel syndrome, which is documented in the medical records submitted at hearing, is found to be reasonable and necessary and related to her occupational disease.

GENERAL PROVISIONS

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Where the medical evidence is subject to conflicting inferences, it is the ALJ's sole prerogative to resolve the conflict. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

Compensability

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

When determining the issue of causation the ALJ may consider the provisions of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation. Rather, the ALJ may decide the weight to be assigned the provisions of the

Guidelines upon consideration of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

The Division of Worker's Compensation Rule 17, Exhibit 5, Cumulative Trauma Conditions Medical Treatment Guidelines specifically provides that "acceptable medical practice may include deviations from these guidelines as individual cases dictate." The Guidelines themselves indicate that the opinion provided by Dr. Danahey in determining causation is in line with the intent of the Guidelines which state:

> Mechanisms of injury for the development of cumulative trauma related conditions have been controversial. However, repetitive awkward posture, force, vibration, cold exposure, and combinations thereof are generally accepted as occupational risk factors for the development of cumulative trauma related conditions.

As found, Dr. Danahey reasonably attributed Claimant's bilateral wrist tendinitis and bilateral carpal tunnel syndrome to her work activities which were found to be repetitive, forceful, and required awkward posture. The ALJ finds and concludes that the opinion of causation offered by Dr. Danahey in the medical records, statements made by Dr. Wood in his report, Claimant's medical records, Claimant's credible testimony, and certain aspects of Ms. Adams' report and testimony, supports the ALJ's conclusion that Claimant's bilateral wrist tendinitis and bilateral carpel tunnel syndrome is causally related to her work activities. Dr. Sollender's opinions to the contrary are not persuasive because of his inadequate analysis of Claimant's actual job duties, based on his steadfast refusal to consider the job duties as described by Claimant, or which might have been described by Claimant had properly interviewed Claimant, combined with his unblinking reliance upon the Job Demands Analysis report of Ms. Adams, which this ALJ found to not be completely reliable.

Moreover, even if Claimant's job does not fall precisely within the primary or secondary risk factors outlined in the causation matrix of the Medical Treatment Guidelines, the ALJ finds and concludes that the particular facts in her case based upon the totality of the evidence presented makes it more likely than not that her bilateral wrist tendinitis and bilateral carpal tunnel syndrome was caused by her work. While the Medical Treatment Guidelines provide for specific steps in analyzing whether there is sufficient proof to causally connect Claimant's conditions and need for treatment to her job activities, the Court is not bound by the Medical Treatment Guidelines in deciding individual cases on the Guidelines or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or

> administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

Respondent contended, and pointed out at hearing, that Claimant did not provide a consistent and cohesive description of the exact task she was performing that ultimately caused her to seek medical treatment on November 6, 2017. However, the lack of a consistent and cohesive description of the exact task a worker was performing that ultimately caused them to seek medical treatment is consistent with Claimant's job duties and the development of an occupational disease - cumulative trauma disorder.

Respondent also asserted that Claimant's inability to accurately and consistently describe what conversations she had with her mother and her employer between the time she left work on November 3, 2017, and when she first presented to Denver Health for her upper extremity problems on November 6, 2017, and then reported her condition to her employer on November 7, 2017, should be fatal to her Claim. It was during this time that Claimant described her pain complaints and conversations she had with her mother about her symptoms, decision to seek medical treatment at Denver Health, and report her condition as work related. Although Claimant's testimony regarding these matters was a bit inconsistent, such inconsistencies are not fatal to her claim or overall credibility. It should be borne in mind that inconsistencies are not uncommon to the adversary process which, of necessity, must rely upon the sometimes contradictory and often incomplete testimony of human observers in attempting to reconstruct the historical facts underlying an event. *See People v. Brassfield*, 652 P.2d 588 (Colo. 1982). Therefore, Claimant is found to be credible.

Respondent's position regarding compensability and Claimant's entitlement to medical benefits is based primarily upon a rigid application of the Medical Treatment Guidelines causation matrix. Respondent's argument primarily rests upon the assumption that the causation matrix is absolute, and provides the only source of information to which we should turn to determine causation in this case. Such assumption is misplaced. Here, the opinion of Dr. Danahey regarding the cause of Claimant's bilateral tendinitis and bilateral carpal tunnel syndrome is credible and persuasive. The majority of Claimant's testimony regarding her job duties, symptomatology and onset of symptoms is similarly credible, persuasive, and consistent with the development of her occupational disease. The totality of the evidence presented persuades the ALJ that Claimant has established a causal connection between her work duties and bilateral tendinitis and bilateral carpal tunnel syndrome. Accordingly, the ALJ concludes that Claimant has proven by a preponderance of the evidence that she suffered an occupationally induced disease occasioned by the nature of her work, which did not come from a hazard to which she was equally exposed outside of her employment. Consequently, the injury is compensable.

Claimant has proven by a preponderance of the evidence that she suffered an occupational disease to her bilateral upper extremities, including bilateral wrist tendinitis and bilateral carpal tunnel syndrome.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury and occupational disease. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The medical reports from Concentra and Denver Health, and the medical opinions contained therein, as well as the rest of the record, establishes Claimant is in need of medical treatment for her occupational disease. The ALJ finds the reports of Dr. Danahey, as well as the reports of Claimant's other treating physicians and medical providers, to be credible and persuasive and support a finding that Claimant is in need of medical treatment for her occupational disease, which includes bilateral tendinitis and bilateral carpal tunnel syndrome. Therefore, the ALJ concludes Claimant has established by a preponderance of the evidence that she is entitled to medical treatment to cure and relieve her from the effects of her occupational disease.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has proven by a preponderance of the evidence she suffered a compensable occupational disease in the form of bilateral wrist tendinitis and bilateral carpal tunnel syndrome.

2. Claimant is entitled to reasonable and necessary medical treatment to cure and relieve her from the effects of her bilateral wrist tendinitis and bilateral carpal tunnel syndrome.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 17, 2018

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

PRELIMINARY PROCEDURAL MATTERS

Prior to commencement of hearing, the Judge provided Claimant with a detailed *pro se* Advisement on the record. After being advised of his right to legal counsel if he desired, and his responsibilities if he moved forward without counsel, Claimant elected to proceed *pro se*.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he has suffered a worsening of condition of his May 9, 2016 work injury to allow a reopening of WC Claim 5-015-591.

2. Whether Claimant has established by a preponderance of the evidence that his claim should be reopened due to alleged fraud by Insurer.

3. If the claim is reopened, whether Claimant has established by a preponderance of the evidence that he is entitled to additional medical benefits.

4. Whether Claimant has established by a preponderance of the evidence that his date of maximum medical improvement (MMI) should be changed from February 24, 2017 to July 15, 2017.

5. If the claim is reopened, whether Claimant has established by a preponderance of the evidence that he is entitled to additional temporary total disability (TTD) benefits from February 24, 2017 thru July 15, 2017.

6. Whether Claimant has established by a preponderance of the evidence that he is entitled to an award of permanent partial disability (PPD) benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 54-year-old male who briefly worked for the Employer as a driver. Employer hired Claimant on May 4, 2016; and Claimant began working on May 5, 2016.

2. On May 9, 2016, Claimant was delivering a large load of barley to a customer. The bags were on pallets in the back of the delivery truck. Claimant testified that the bags shifted during the trip, which made them more difficult to unload. Claimant strained his back while unloading the truck and “moving the pallet jack.”

3. Claimant acknowledged that he had expressed frustration and anger toward Employer, because he felt that Employer should have allowed him to use a hydraulic jack rather than the manual jack for that delivery.

4. After Claimant told Employer that he wanted to seek medical treatment, Claimant selected Concentra, one of the designated medical providers. On May 21, 2016, Dr. Steven Danahey evaluated Claimant. Dr. Danahey noted, "[E]mployed for one week at time of injury… He reports he was pulling 11,000# of barley on a 'hand truck' to get it out of the delivery truck . . . In the process he reports straining his back. He felt some discomfort at the time, which intensified over the next day or so. He is very upset at his employer because he feels they should have been using a 'hydraulic cart' to do the unloading. He is upset because he feels his employer did not provided [sic] it when they [sic] could have … He does report that he told his boss about the injury, bit [sic] also stated that he did not need to get a medical evaluation, just that he needed a few days off work. Since that time, he has not been back to work. He says he is not going back at this time. He is very angry with this employer and is acting out during the evaluation by using a loud angry voice . . . He is a poor historian regarding prior back injuries. He reports a WC claim at age 18, and several prior non-work related back injuries that healed well without any invasive treatment. He is s/p an MI with stent replacement. He is not taking any medications, and may have been noncompliant with follow-up. He also reports he has not been sleeping for 10 days because of pain. (I did obtain an XR today and the tech reported to me that he fell asleep on the XR table)."

5. Dr. Danahey noted in his May 21, 2016 report that lumbar x-rays were negative for acute findings. He diagnosed a lumbosacral strain, prescribed medication, and imposed temporary work restrictions.

6. Claimant returned to Dr. Dahahey for follow up on May 25, 2016. "Here to f/u on back injury that occurred on 5/9/16. He has had minimal improvement. The pain radiates to the right hip and he feels a click when he walks. He denies any numbness or tingling in his legs. He reports past injuries with 'electricity going into his legs', but he is not getting any of that at this time." On physical exam, Dr. Dahahey noted Claimant had no muscle spasms in the lumbosacral spine. His straight leg test was negative. His heel/toe gait was normal. Dr. Danahey ordered x-rays of the right hip that revealed no fracture, dislocation, or bony abnormality. Dr. Danahey recommended an MR arthrogram of the right hip and a MRI of the lumbar spine. He referred Claimant for physical therapy.

7. Claimant returned to Concentra on May 26, 2016, following a fall at home that morning. Dr. Amanda Cava evaluated Claimant that same day, recording, "Patient states he woke up and got out of bed this morning, took a few steps and had sudden burning sensation from his hip down his right leg. Patient states that the pain caused him to fall in the doorway of his bedroom. Patient states that he hurt his ankle and lower leg. Patient states he kind of fell against a wall, did not hit his head or lose consciousness. Patient denies trauma to hip or back… Patient reports history of multiple bilateral ankle injuries in the past playing hockey but states he has not had surgery on them… Patient states he took two muscle relaxers around 0100 today and slept much better than he had been." Concentra provided an ankle air cast, crutches, and a referral to an orthopedic specialist.

8. Claimant testified at hearing that he was not exactly sure what happened when he fell at home because it happened very quickly.

9. On May 27, 2016, Dr. Robert Fitzgibbons, an orthopedic specialist at Concentra, evaluated Claimant. Dr. Fitzgibbons reported Claimant's history: "Patient states that he fell down on 05/26/2016 due to back issues and he got a sharp pain going down his right leg. He fell injuring his right ankle and leg and as referred in for consultation." After reviewing x rays, Dr. Fitzgibbons diagnosed a right ankle deltoid disruption with proximal fibular fracture. He fit Claimant in a short walking boot to stabilize his ankle. Dr. Fitzgibbons instructed Claimant to ice and elevate his leg, and recommended that Claimant make a follow-up appointment with Dr. Gregg Koldenhoven, an orthopedist.

10. Claimant saw Dr. Koldenhoven at Front Range Orthopedics on June 8, 2016. The history noted in this report varies significantly from that previously provided to Dr. Fitzgibbons. Dr. Koldenhoven reported, "History of Present Illness. Patient words: Russell is being seen today at the request of Boulder Concentra, for his right ankle. He states that he fell while at work on 5/25/16 and twisted his right ankle. The pain is described as sudden in onset following an incident at work and has been occurring in persistent pattern for 14 days. The injury occurred while at work." Dr. Koldenhoven went on to report: "His injury and fracture of his proximal fibular highly suspicious for Maisonneuve ankle injury. I think he has a rupture of his deltoid and instability of his syndesmosis. Presently, would recommend repair of the deltoid and likely fixation of the syndesmosis. Patient is also having significant calf pain. DVT study obtained today demonstrates clot below the knee. Patient is instructed to go acutely to the emergency room or PCP for treatment for that. Patient does have stents in his heart and states that he stopped taking his heart medication several years ago. He has not seen a cardiologist recently as he states that since he is still smoking he is unlikely certain that a cardiologist will be happy to see him. I encouraged him that he needs to have cardiac clearance prior to anything surgical.

11. Claimant testified at hearing that the history contained in Dr. Koldenhoven's report was incorrect. Claimant said that he had not told the doctor that he had twisted his ankle and fallen at work, but that he had fallen at home.

12. On June 10, 2018, Dr. Koldenhoven's office sent a fax to Insurer's claims adjuster, Jessica Wareham, requesting authorization for a right ankle deltoid repair surgery. In accordance with Rule 16, Insurer had the request for authorization timely reviewed by a physician in the same area of medical specialty. Dr. Jon Erickson performed a physician advisor review of the surgery request on June 17, 2016. Dr. Erickson stated, "He apparently had gotten out of bed in the morning and fell, suffering a twisting injury to his right ankle. An orthopedic surgeon, Gregg Koldenhoven, M.D., subsequently saw him on 06/08/16. It was determined surgical intervention was indicated for a repair of the deltoid ligament and a possible repair of the syndesmosis. First of all, we have an issue with causality as far as the ankle is concerned. I believe that Mr. Stillman simply stumbled getting out of bed. He suffered a substantial injury to the right ankle. It is no way related to his work, and subsequent treatment for his right ankle should be done under his private healthcare insurance. I would therefore recommend a denial of this request for a surgical intervention from Dr. Koldenhoven's office."

13. After the peer review by Dr. Erickson, Insurer sent a letter to Front Range Orthopedics advising that the request for authorization of the right ankle deltoid procedure was being denied. Claimant was copied on the June 17, 2016 denial letter.

14. Jessica Wareham testified at hearing. Ms. Wareham has worked at Insurer for six years as a claims adjuster. She was assigned to Claimant's claim in early June 2016. Prior to that time, the claims adjuster had been Janet Lee. Ms. Wareham explained that Insurer authorized the initial orthopedic evaluation with Dr. FitzGibbons on May 27, 2016, as well as the initial appointment with Dr. Koldenhoven on June 8, 2016, while Insurer was investigating the fall at home and attempting to determine what happened. Insurer denied treatment for Claimant's right ankle after June 17, 2016, the date of Dr. Erickson's opinion letter.

15. Insurer sent denial letters to Front Range Orthopedics for follow-up office visits with Dr. Koldenhoven on June 22, 2016 and July 20, 2016. Insurer copied Claimant on these denial letters.

16. Claimant testified at hearing that Insurer had not provided him with mileage reimbursement or transportation for his medical appointments. In response, Jessica Wareham testified that Insurer had sent letters to Claimant on May 23, 2016 and June 3, 2016 providing the necessary information and forms for mileage reimbursement requests. Ms. Wareham confirmed that Claimant never submitted mileage reimbursement forms to Insurer. In addition, Ms. Wareham testified that she had personally spoken with Claimant on the phone on June 6, 2016 and asked if he needed transportation arranged for appointments – since she had seen in the medical records that he had a boot on his right foot. Claimant told Ms. Wareham that he did *not* need transportation.

17. On June 30, 2016, Nickolaus Cucija, PA-C, at Concentra evaluated Claimant. He reported, "[Claimant] is very angry at his employer and is acting out during the evaluation by using an angry voice and cursing. Upset at Insurance for not approving treatments/delaying treatments and having financial problems, states it is 'ruining his life.' Upset because he states it has been very difficult for him to get medications and also having to drive all over town in bad traffic to get to appointments. Insurance is denying the claim for his ankle fracture and blood clot. He has Medicaid insurance and that is covering his medications. He is s/p an MI with stent placement in past 2-3 years. Stress test done 06/20/2016 per Dr. Altmon, gave him cardiac clearance for surgery for his right ankle. He is going to do through his private insurance/physician." The June 30 report indicates that Concentra filled out a temporary handicap placard form for Claimant. The PA-C referred Claimant to Dr. Burris, a delayed recovery specialist, and to consult with Dr. Aschberger, a physiatrist. Claimant indicated that he would like to reschedule the appointment at a different location after he had started physical therapy.

18. When Claimant saw Dr. Koldenhoven again on June 8, 2016, the doctor reported, "Russell is doing much better. His pain is significantly improved. His fracture is healing proximally."

19. Claimant subsequently began treating with Dr. John Burris at Concentra. In his initial report dated July 28, 2016, Dr. Burris states, "Referred to our clinic for delayed recovery issues regarding his low back complaints. He works as a delivery driver and reports he was pulling a load of barley weighing 11,000 pounds with a manual pallet jack at work when he developed an acute on set of low back pain on 05/09/2016. He verbalizes frustration with his employer because he was using a manual pallet jack and believes he should have been using a hydraulic jack. His examination was benign. MRI of the lumbar spine on 06/08/2016 showed no acute or subacute deformities. Multilevel degenerative disc disease most pronounced at L4-5. No evidence of neural impingement." Claimant provided a different history to Dr. Burris in terms of his fall at home: "The patient states that he injured his right ankle *two days* after the 05/09/2016 event. He states that he fell while getting out of bed and suffered an injury to his ankle."

20. At the July 28, 2016 appointment, Claimant reported low back at a level of 8/10 and that his right hip was "much improved and is really not bothering him today." Claimant noted that he was still having some persistent pain in the right ankle, but told Dr. Burris, "I'm not allowed to talk to you about that issue." On physical exam, Dr. Burris noted that Claimant's lumbar range of motion was full in all planes without hesitation. There were no localized tenderness, muscle spasm, or trigger points. Claimant was neurologically intact throughout the lower extremities. Motor strength was 5/5 in all muscle groups. Seated straight leg raising was negative bilaterally. Dr. Burris recommended the following under the "Treatment Plan" section of his report: "The patient has persistent pain complaints three months after a lifting event at work. Examination is benign with no evidence of radiculopathy and the MRI shows no acute abnormalities. At this point, we need to just get him more mobile. I would recommend enrolling him in physical therapy two to three sessions a week over the next two weeks for acute treatment as well as education in a home exercise program. I also recommend chiropractic sessions and a referral was made."

21. Claimant attended physical therapy through Concentra in August 2016. In a note dated August 12, 2016, the physical therapist states: "As expected, Time was taken to listen to the patient's report that his stress levels are extremely high and what he thinks it will take to get him better."

22. Claimant received chiropractic treatment in August 2016 from Richard Mobus, DC.

23. Claimant attended a follow-up appointment with Dr. Burris on August 11, 2016: "Since our last visit, [Claimant] notes some improvement, but overall is stating that things are unchanged. Some of his pains have improved, but he cannot specify which ones. He is reporting 6/10 discomfort throughout the back. He finds excellent temporary relief with H-Wave in therapy. No numbness or weakness in the legs, bowel or bladder dysfunction, or new symptoms are reported. TREATMENT PLAN: Because he is finding relief with the H-Wave, I provided a prescription for H-wave rental for 3 months. He is not sure if he is receiving any real benefit from the therapy, so I would have him just continue with his home program. I will refer him for physiatry evaluation to see if he is a candidate

for possible injections." Insurer authorized the 3-month rental of the H-wave. Dr. Burris referred Claimant to Dr. John Sacha for the physiatry consult.

24. Claimant saw Dr. Sacha on August 23, 2016 for the physiatry consult. The history section of Dr. Sacha's report notes: "[Claimant] states he was taking a load to pull off of a truck with a power jack, and as he was loosening it up, he felt acute onset of low back pain. He went to Concentra Occupational Medical Centers about a week later. He states the delay was due to waiting to see if it would go away. He was seen and treated with medications, anti-inflammatories, but then his care was interrupted. He had a non-work related fall where he fractured his right fibula and deltoid ligament. He went to the emergency room and then to an orthopedic surgeon, and while being evaluated, they noted a possible DVT. He was sent for an ultrasound that was possible for DVT, and he was started on Coumadin. As a result, his orthopedic surgeon did not recommend surgery and wanted to take a wait-and-see approach and, apparently, things have healed up, although we do not have the records, and a pending x-ray is being done. Recently, he returned to Concentra and started physical therapy which he did for three visits and chiropractic for three visits but without any improvement. An MRI of the lumbar spine showed evidence of disc degeneration and facet spondylosis at the L4-5 ad L5-S1 levels with some mild foraminal narrowing. Recently, his case was transferred to Dr. Burris who sent the patient here." Dr. Sacha noted mild pain behaviors on physical exam. His impressions included, "1. Lumbosacral radiculopathy. 2. Fibular fracture, non-work related. 3. DVT, non-work related." With respect to a treatment plan, Dr. Sacha remarked, "We do need the patient to see his cardiologist and see if he can come off the Coumadin for four days or whether he needs to be treated with a low-molecular weight heparin for the four days while getting the spinal injection. We will then proceed with a lumbar epidural and also do a brief trial of pool PT. Because of the non-work-related ankle injury, I think pool PT is preferred to regular dry land PT because of the buoyancy effect of the water." Dr. Sacha indicated that the right L5 and SI transforaminal epidural steroid injection/selective nerve root block would be diagnostic and therapeutic. This would be done after Claimant contacted his cardiologist to see if he could hold the Coumadin for four days or if the preference was to put him on a low-molecular weight heparin. Dr. Sacha also prescribed Lyrica for Claimant.

25. Claimant returned to Dr. Burris on September 22, 2016: "Since our last visit he was evaluated by a specialist, Dr. Sacha who placed him on Lyrica, ordered a health club membership, and recommended injection therapy with a right L5-S1 epidural steroid/selective nerve root block for diagnostic and therapeutic purposes. It was not clear to him that the injections was for a potential radiculopathy. After today's discussion, he is now agreeable to get clearance so he can move forward with the injection therapy recommended by Dr. Sacha. The patient does not believe that he would benefit from formal pool therapy, although he is open to having access to a health club where he can perform his home exercises. Return in six weeks for reevaluation, sooner with any problems. Hopefully, he will have had the injection and this will give us more diagnostic clarity."

26. During a follow-up appointment on November 10, 2016, Dr. Burris reported, "He states there has been no change in his condition. He has not had the injection that

was proposed by Dr. Sacha. He indicates that he is now seeing a provider outside of the worker's compensation system, a Dr. Kitchen (?). The patient presents today with a rambling history regarding his ongoing complaints. The conclusion is that he would like to attend 4 weeks of a self-direct pool program and if this does not resolve his complaints, he has elected to have an injection in his low back with Dr. Kitchen. He requests a refill of Lyrica that Dr. Sacha previously provided, as he finds this beneficial and only takes occasionally. Lyrica 75 mg one p.o. q.h.s. p.r.n., #20 tables prescribed."

27. Claimant confirmed at hearing that he never moved forward with the injection recommended by Dr. Sacha. Claimant explained that he was not comfortable with that course of treatment.

28. Claimant went to Dr. Steven Kitchen at CHPG Ortho & Sports Medicine on his own on October 5, 2016. Dr. Kitchen is not an authorized treating physician for purposes of this claim. In his October 5, 2016 report, Dr. Kitchen commented, "The patient is unemployed at this point since his back injury in the early summer or late spring. He is a long-term smoker with at least a 20-pack-year history. He denies alcohol use but does use marijuana on a regular basis." Dr. Kitchen also remarked, "Patient was not entirely forthcoming about his history. It is unclear how recently he was seen by his lumbar spine doctor." Dr. Kitchen ordered x-rays of Claimant's right ankle. Those x-rays showed "evidence of a previous Masionneuve ankle injury now healed."

29. Claimant no-showed for his next appointment scheduled with Dr. Burris. As a result, Insurer scheduled a demand appointment for December 30, 2016. Claimant did not attend the demand appointment. Insurer then scheduled another appointment for Claimant with Dr. Burris for January 20, 2017. Claimant did attend the January 20, 2017 appointment.

30. In his January 20, 2017 report, Dr. Burris states, "returns after a 2-month absence for demand appointment. Since his last visit there has been no significant changes in his condition and he has not received any medical treatment. He states he went back to his home in Minnesota and had discussions with several people regarding his ongoing complaints. Their recommendation was to take Lyrica and ibuprofen. He knows that he currently cannot take ibuprofen when he is on Coumadin for unrelated blood clotting issues. On today's visit, he feels that he is improving somewhat. His only complaint is right-sided low back pain that he rates as 4/10 in severity. No numbness or weakness in the legs, bowel or bladder dysfunction. As with previous evaluations, the patient has a very rambling history regarding his ongoing complaints. The conclusion is that he would like to try 4 weeks of Lyrica prior to deciding if he will proceed with an injection that has been offered by previous providers. I did give him a prescription for Lyrica. Return to clinic in 4 weeks for reevaluation… The patient inquires about anti-inflammatory medications. Strict precautions were given and I told him that he cannot take anti-inflammatory medicines while he is on Coumadin. He discusses getting off of the Coumadin. I advised him to contact his provider who is currently prescribing the medicines which is his cardiologist to discuss this issue. The patient has a somewhat odd presentation with a rambling history. Although he can remain somewhat engaged,

there does appear to be some psychiatric overlay of unknown origin. He indicates that he is absolutely sure that he will be cured with 1 month of Lyrica treatment."

31. Claimant returned to Dr. Burris on February 24, 2017, as scheduled. Dr. Burris reported, "He returns stating that his pain is much improved. He found the Lyrica very helpful. He has also developed a new technique of sleeping with his feet off the end of the bed that has also helped him with his sleep hygiene and his back pain. He states he feels 'over the hump.' He does not believe that he needs any further treatment with regards to his low back issues." Dr. Burris noted that Claimant walked with a normal gait and transferred without hesitation; that he observed full range of motion of Claimant's lumbar spine, and noted Claimant to be neurologically intact. Dr. Burris placed Claimant at MMI on February 24, 2017, with no permanent impairment and no permanent restrictions. He noted that no formal maintenance care or follow-up were required.

32. Insurer filed a Final Admission of Liability on March 13, 2017, per the opinion of Dr. Burris. The prominent "Notice to Claimant" language on the FAL clearly sets forth a claimant's obligations if they wish to dispute any benefits admitted or not admitted. That language discusses Claimant's responsibility to file an objection within 30 days from the FAL and to file an Application for Hearing on any disputed issues. The FAL also notified Claimant that if he disagreed with the date of MMI or whole person impairment rating, he must file a Notice and Proposal to Select an Independent Medical Examiner form within the same 30 days.

33. Jessica Wareham confirmed that she mailed a copy of the March 13, 2017 FAL to Claimant. Ms. Wareham testified that Claimant did acknowledge to her that he had received the FAL and was aware that he had missed the deadline to file an objection of apply for a Division IME.

34. Ms. Wareham testified that after Claimant was placed at MMI and the Final Admission of Liability was filed, Claimant never requested to follow up with Dr. Burris or any other provider for medical treatment. Ms. Wareham testified that she was surprised when she received Claimant's Application for Hearing and Petition to Reopen from Claimant nearly 9 months later in December 2017.

35. Claimant's Application for Hearing, although undated, Respondents received it on December 11, 2017. The issues endorsed included: Compensability, Medical Benefits, Petition to Reopen, TTD from 02/24/17 – 7/15/17, TPD from "428" to ongoing, and PPD. In the remarks section of the Application, Claimant wrote "Another look at my ankle to see if it is repairable or not."

36. Claimant filed a Petition to Reopen on December 8, 2017. Claimant indicated that the grounds for reopening were "Change in Medical Condition" and "Fraud." Claimant attached extensive typed notes with his Petition, setting forth his position on his claim and what relief he was seeking. Claimant stated at the beginning of the attached documentation that he "objects to the Final Admission referred to above and another other Final Admission that has been filed, because Claimant is entitled to additional benefits as provided by law. Claimant requests ongoing medical treatment. Claimant requests

special consideration since his injury did not allow him the ability to familiarize himself with the intricate workings of the claim process or the legal aspects of the claim process. Claimant requests a hearing with the Office of Administrative Courts to address possible criminal activity by [Insurer], for knowingly not diagnosing and treating my back injury as a sciatic injury. This was done to avoid any responsibility for my subsequent leg/ankle, and DVT's injuries."

37. In the documentation attached to his Petition to Reopen, Claimant set forth his position that "[Insurer] prematurely initiated MMI which immediately stopped all benefit payments and medical evaluations causing me incredible economic hardships. Claimant requests that his MMI date be changed from February 24, 2017 to July 15, 2017. He submits that July 15, 2017 should be the proper date of MMI "as this was the time that I could perform a job safely and confidently without risk of re-injury." Claimant contends "07/15/2017 is when my back problems were officially over, because I SAY SO!! Nobody knows my body or limitations better than I do." Claimant produced no persuasive medical evidence to suggest that the original MMI date of February 24, 2017, should be rescinded and changed to July 15, 2017. In addition, following the filing of the Final Admission of Liability, Claimant did not apply for a Division IME to dispute his MMI status.

38. In his Petition to Reopen, Claimant states that he would like to "address his ankle again with ankle specialists." However, the ankle was previously determined to be unrelated to this worker's compensation claim. Claimant was aware that Insurer denied treatment for injuries sustained during his fall at home. Claimant did not apply for hearing to argue any medical benefits issues (including relatedness) prior to being placed at MMI. After he was placed at MMI and the Final Admission of Liability was filed, Claimant did not object to the FAL or apply for a Division IME to challenge his permanent impairment rating or the scope of any compensable conditions.

39. Among the documents with his Petition to Reopen, Claimant did attach two medical reports dated June 6, 2017 and June 15, 2017 from his family physicians at CHPG Primary Care Edgewater. The reports do not mention Claimant's ankle. There is mention of sleep disorder, the history of DVT, and reference to "LBP and finger pain." The June 6, 2017 report indicates that Claimant was leaving town permanently and that he will find a PCP in Minnesota to take over care. The report dated June 15, 2017 suggests that Claimant was requesting a letter from the physician to reopen his workers compensation case. There is a statement that "Pt wants to reopen worker's compensation case to get benefits for back injury. Pt to email forms." When asked about these forms on cross-examination at hearing, Claimant testified that he had not pursued that because he didn't want to place his family care physician "in that position."

40. Respondents filed their Response to Application for Hearing on December 21, 2017.

41. During his testimony at hearing, Claimant indicated that he is no longer seeking any further treatment for his back – or any treatment for his ankle. Rather, he requests that his MMI date be changed to July 15, 2017; that he be paid additional TTD benefits for the time period of February 24, 2017 (original MMI date) and July 15, 2017,

that he awarded PPD benefits; and that he be paid for mileage or transportation costs for all of his previous medical appointments (including appointments for his ankle and DVT condition). Based on his specific testimony at hearing, Claimant withdrew the issue of medical benefits.

42. Claimant present no persuasive evidence at hearing that would support an award of PPD benefits. Dr. Burris (ATP) opined that Claimant has no permanent impairment from the work-related back injury. Claimant did not pursue a Division IME to challenge that opinion on impairment. Claimant has produced no medical opinions or reports as to what permanent impairment rating he is alleging and for what condition(s).

43. Claimant's request for additional TTD benefits for the time frame of February 24, 2017 – July 15, 2017 is not supported by the evidence. When Claimant was placed at MMI on February 24, 2017, Dr. Burris stated that he was released to regular duty with no restrictions. In addition, Claimant testified at hearing that he has worked for at least three subsequent employers since being placed at MMI. The information regarding the subsequent employment was also mentioned in the materials submitted with Claimant's Petition to Reopen. The release to regular duty coupled with the wages earned from subsequent employment precludes any award of additional TTD benefits.

44. Jessica Wareham responded to Claimant's testimony that his claim should be reopened due to fraud because Insurer had "knowingly not diagnosed and treated his back injury as a sciatic injury" – and that this had been done to avoid responsibility for the expense of treatment for the subsequent leg/ankle, and DVT's injuries. Ms. Wareham testified that she did not understand these allegations. She is not a physician and does not make medical diagnoses on claims. That is, rather, the job of the treating physicians. Ms. Wareham testified that she has never told a treating physician what diagnosis to provide on a claim. Ms. Wareham also testified regarding the outcome of the Physician Advisor review by Dr. Erickson.

45. With respect to Claimant's contention that Insurer had caused him extreme financial hardship, Ms. Wareham confirmed that Claimant had been paid TTD befits from May 10, 2016 thru February 23, 2017. The FAL filed on March 13, 2017 documents that Claimant was paid $17,383.84 in TTD. There was actually an overpayment of $239.78.

46. At the close of Claimant's case-in-chief, Respondents' counsel moved for a directed verdict. The Judge took the motion under advisement. Respondents then proceeded with the testimony of their witness, Ms. Wareham.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to

injured workers at a reasonable cost to employers, without the necessity of litigation. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation is decided on its merits. Sections 8-43-201, *supra*.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo. App. 2001). The ALJ's factual findings concerns only evidence that is dispositive of the issues involved. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P. 3d 385 (Colo. App. 2000). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. ICAO*, 183 P. 3d 684 (Colo. App. 2008).

Reopening and Change of Condition

Once the treating physician has determined the claimant to be at MMI, the employer or insurer may file a Final Admission of Liability. § 8-42-107.2(2)(a)(1)(A). Unless the claimant requests the selection of an independent medical examiner within thirty days, the treating physician's findings and determinations are binding on all parties and on the Division. §8-42-107.2(2)(b). If a claimant does not object to the Final Admission of Liability and request a Division IME, reopening is required.

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S., *Berg v. Industrial Claim Appeals Office*, 128 P. 3d 270 (Colo. App. 2005). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office*, 197 P. 3d 220 (Colo. App. 2008). A change of condition, for purposes of the reopening statute, refers to a worsening of claimant's work-related condition after MMI. *El Paso County Dept. of Social Services v. Donn*, 865 P. 2d 877 (Colo. App. 1993). The pertinent and necessary inquiry is whether claimant has suffered any deterioration in his work related condition that justifies additional benefits. *Cordova v. Indus. Claim Appeals Office*, 55 P. 3d 186 (Colo. App. 2002). An ALJ has broad discretionary authority to determine whether a claimant has met his burden of proof justifying reopening. *See Renz v. Larimer Cnty. Sch. Dist. Poudre R-1*, 924 P. 2d 1177 (Colo. App. 1996).

In this case, Claimant has failed to demonstrate that he suffered a worsening of condition since being placed at MMI by the ATP (Dr. Burris). No medical records or testimony were presented to support this contention. Morever, Claimant represented at hearing that is no longer seeking any additional treatment for his back, nor is he seeking any treatment for his ankle.

Reopening and Fraud

Reopening is permitted on several grounds, including mistake, error, or fraud. *See* §8-43-303(1), C.R.S. The party attempting to reopen a claim "shall bear the burden as to any issues sought to reopened. § 8-43-303(4). Thus, Claimant bears the demonstrating that fraud has been committed that would merit a reopening of his claim.

In addition to the theory of change of condition, Claimant also marked "Fraud" on his Petition to Reopen. In his comments attached with the Petition to Reopen, Clamant stated, "Claimant requests a hearing with the Office of Administrative Courts to address possible criminal activity by [Insurer], for knowingly not diagnosing and treating my back injury as a sciatic injury. This was done to avoid any responsibility for my subsequent leg/ankle, and DVT's injuries." During his testimony at hearing, Claimant suggested that there had been fraud on the part of all of the workers' compensation doctors and Insurer for not diagnosing or mentioning a sciatica diagnosis in the records. It is Claimant's position that his back injury involved sciatica, and that this condition caused him to later fall at home – resulting in a fibula fracture and damage to ligaments in his ankle.

Claimant has failed to demonstrate by a preponderance of the evidence that the Insurer committed fraud of any sort such that his claim should be reopened on that ground.

Directed Verdict

A motion for directed verdict is an appropriate procedural step to testify the sufficiency of a party's case in a workers' compensation proceeding. *Romero v. Tristar Drywall, Inc*., W.C. No. 4-745-833 (ICAO May 24, 2010). C.R.C.P 50 and 41(b)(1) provides that, after a plaintiff in a civil action completed the presentation of the evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief.

In this case, Respondents moved for a directed verdict at the conclusion of Claimant's case-in-chief. The Judge took the motion under advisement for consideration at the conclusion of Respondents' presentation of their evidence, which included the testimony of Ms. Wareham.

After consideration of the evidence, the Judge agrees that Claimant failed to present a prima facie case for a reopening of his claim. Therefore, Respondents' motion for directed verdict is granted.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents' motion for a directed verdict is granted.

2. Claimant's claims for reopening based upon alleged worsening of condition or fraud are denied and dismissed.

3. Claimant's claim for additional medical benefits is denied.

4. Claimant's request that his MMI date be changed from February 24, 2017 to July 15, 2017 is denied.

5. Claimant's request for additional temporary disability benefits during the time frame of February 24, 2017 thru July 15, 2017 is denied.

6. Claimant's request for an award of permanent partial disability benefits is denied.

7. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: May 29, 2018

/s/ Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after the mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your Petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms - WC.htm.

ISSUES

Whether Claimant is permitted to move forward with a DIME despite the ruling and order from PALJ Barbo denying her request.

FINDINGS OF FACT

1. Claimant sustained a work-related injury on March 10, 2017, but did not have any compensable lost time from work. Claimant treated conservatively for the injury and was eventually placed at maximum medical improvement (MMI) on June 7, 2017 by Dr. John Burris with no impairment.

2. A final admission of liability (FAL) was filed on July 13, 2017, by the claims adjuster based on the findings of Dr. Burris of MMI and no impairment. Temporary disability benefits were denied as claimant did not have any compensable lost time. Respondents admitted to medical maintenance benefits per the opinion of Dr. Burris.

3. On July 26, 2017, claimant filed an objection to the FAL along with a notice and proposal to select an independent medical examiner.

4. On August 18, 2017, respondents filed a motion to strike claimant's DIME process. Citing the ruling by the Supreme Court holding in *Harmon-Bergstetd* v. *Loofbourrow* if no indemnity paid the claim is not considered compensable so the statutory definition of MMI would not apply. Prehearing Administrative Law Judge (PALJ) Michael Barbo granted Respondents' motion to strike the DIME. The motion was granted without prejudice

5. Claimant subsequently filed an Application for Hearing on October 13, 2017, to appeal the order of PALJ Barbo before an Administrative Law Judge.

CONCLUSIONS OF LAW

DIME Process

Based on the Colorado Supreme Court's holding in *Harmon-Bergstetd v. Loofbourrow*, 320 P.3d 327 (Colo. 2014), a determination of MMI has no statutory significance with injuries that do not result in a loss of no more than three days or shifts of work time or permanent disability. The court noted "maximum medical improvement" as a statutory term of art has no applicability or significance for injuries insufficiently serious to entail disability, indemnity, or compensation in the first place, *see* Section 8-42-107(8)(b)(I), C.R.S. While the concept is fine in terms of the ineffectiveness of further

medical treatment and may therefore be useful in assessing the extent to which an employer is obligated to continue furnishing medical services to an injured employee, as a statutory term of art with consequences for contesting a final admission of liability, reopening a closed claim, or filing a new claim for an injury that has become compensable for the first time, it can logically have applicability only for injuries for which disability indemnity is payable. The statutory consequences of a finding of "maximum medical improvement" can apply only to injuries as to which disability indemnity is payable. *Id* at 331.

Here, the filing of the FAL based on the authorized treating physician's (ATP) finding of MMI which provided that no disability indemnity was payable has been found by the Supreme Court to be premature and therefore claimant does not have the statutory right to begin the DIME process by filing her notice and proposal for DIME because as stated by the court, she does not meet the statutory definition of "maximum medical improvement" and does not have the right to seek a DIME under Section 8-42-107(8)(b)(II), C.R.S. As stated by the court, "maximum medical improvement" only has statutory significance in a determination of the amount, if any, of permanent disability benefit and in making a point in time at which temporary disability benefits terminate and permanent disability benefits begin.

Based on the Supreme Court ruling in *Loofbourrow*, the filing of the FAL premised on the finding of MMI with no disability indemnity payable does not allow claimant the opportunity to begin the DIME process by her filing of the notice and proposal for DIME and she ultimately cannot request a DIME under Section 8-42-107(8)(b)(II), C.R.S. Without an applicable determination of MMI, no DIME review of the MMI determination may be requested, Section 8-42-107(8)(b)(II), C.R.S. no permanent impairment rating may be calculated nor DIME review initiated, Section 8-42-107(8)(c), C.R.S. and the provisions of Section 8-43-203(2)(b)(II), C.R.S. cannot control because one of the options provided by that section includes the ability to request a DIME. *Kazazian v. Vail Resorts*, W.C. No. 4-915-969 (ICAO April 2017).

As found, the order of PALJ Barbo should be upheld based on the Supreme Court ruling in *Loofbourrow*. Since claimant does not meet the statutory definition of MMI per the Supreme Court, claimant does not have the statutory right under the Workers' Compensation Act to request a DIME.

Appeal of Interlocutory Order

Respondents contend the ALJ does not have jurisdiction to rule on the order of PALJ Michael Barbo. Pursuant to Section 8-43-207.5(3), C.R.S.:

"An order entered by a prehearing administrative law judge shall be an order of the director and binding on the parties. Such an order shall be interlocutory. Prehearing conferences need not be held on the record; however, any party to a claim may request in advance that a record be made of the prehearing conference, either taken verbatim

by a court reporter provided and paid for by the requesting party or electronically recorded by the division."

The order issued by PALJ Barbo is interlocutory. An order that does not grant or deny benefits is not a final order and therefore not subject to appeal. The right for claimant to obtain a DIME is not a medical benefit because there is no treatment provided by an ATP and no patient-physician relationship established. Since no benefit was awarded or denied, the order is interlocutory and therefore outside the jurisdiction of the ALJ.

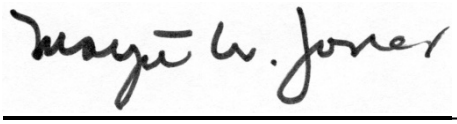
ORDER

IT IS ORDERED:

1. The order of PALJ Barbo is interlocutory and therefore not subject to review.

2. Claimant does not have the statutory right to a DIME based on the Supreme Court ruling in *Loofbourrow* therefore the order of PALJ Barbo is affirmed and claimant's request for a DIME is denied.

DATED: _May 1, 2018.



MARGOT W. JONES
ADMINISTRATIVE LAW JUDGE

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4 th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUE

Determination of Claimant's average weekly wage (AWW).

STIPULATIONS

1. Claimant's AWW for Respondent Employer is $264.96.

2. The parties agree that Claimant has additional self-employment wages that should be added to her AWW. The parties disagree as to the amount of self-employment wages that should be added to Claimant's AWW for Respondent Employer.

FINDINGS OF FACT

1. Claimant is employed by Employer.

2. On September 15, 2017 Claimant sustained an admitted work related injury. Due to her work related injury, Claimant has not been able to return to work for Employer and has not been able to continue her prior work as a self-employed massage therapist. Claimant has not worked since September 15, 2017.

3. On October 16, 2017 Respondents filed a General Admission of Liability (GAL) admitting to an AWW of $264.96. The parties agree that this wage accurately represents Claimant's AWW for the work she performed for Employer. *See* Exhibits 2, A, B.

4. On November 22, 2017 Respondents filed an updated GAL. Respondents admitted to an AWW of $318.33. Respondents stated on the updated GAL that they were increasing the AWW based on additional self-employment from Claimant's 2016 tax records. Respondents noted that the tax records documented Claimant's self-employment as a massage therapist and that self-employment AWW was based on net pay. Respondents indicated that they had taken Claimant's gross earnings of $2,775 and divided it by 52 weeks to come out to an increase of $53.37 to the AWW. Respondents indicated the new AWW was $264.96 plus $53.37 for a total of $318.33 as the new admitted AWW. *See* Exhibits 1, D.

5. On Claimant's 2016 U.S. Individual Income Tax Return, Form 1040, she reported a total of $2,775 in business income. *See* Exhibits 4, C.

6. On her 2016 Profit or Loss from Business, Schedule C, Claimant reported gross receipt or sales of $19,656. She then subtracted $11,023 in total expenses including advertising, car and truck, depreciation, legal and professional services, repair and maintenance, supplies, and "other" expenses. The "other" expenses listed on a

separate form included cell phone, internet, oils, towels, stones, music, laundry, continuing education, and outside services. Claimant listed her tentative profit before expenses for the business use of her home as $8,633. Claimant then also subtracted $5,858 for expenses for the business use of her home to arrive at a net profit of $2,775 for her massage therapy business. *See* Exhibits 4, C.

7. On Claimant's 2017 U.S. Individual Income Tax Return, Form 1040, she reported a total of business loss of -$671. *See* Exhibits 5, E.

8. On her 2017 Profit or Loss from Business, Schedule C, Claimant reported gross receipt or sales of $16,354. She then subtracted $17,025 in total expenses including advertising, car and truck, depreciation, legal and professional services, office expenses, rent or lease of business property, and "other" expenses. The "other" expenses listed on a separate form included cell phone, internet, laundry, continuing education, and outside services. Claimant did not subtract any expenses for the business use of her home in 2017. *See* Exhibits 5, E.

9. Claimant reported that in 2016 she was able to work at her self-employment massage therapy business for the entire year. Claimant testified that in 2017 she lost money as she had to stop working as of the date of her injury and wasn't able to perform massage therapy work in the last 3.5 months of the year. Claimant testified that prior to her injury she had been on track to make more money in 2017 than in 2016 because she had moved to a better location and had better clientele.

10. Claimant's testimony is credible. It tracks with her 2016 and 2017 tax returns which show an increase in 2017 for the rent or lease of business property and the removal in 2017 of business use of home. It is logically credible and persuasive that moving from a "home" based massage therapy business to a business location would put Claimant on track to earn more money due to what she testified was a better business location and better clientele.

11. In 2017 Claimant's gross receipts or sales from her massage therapy business were $16,354. This was for a period of 8.5 months prior to her injury. This amounts to a monthly average of gross receipts or sales of $1,924. Multiplying her average monthly gross receipts or sales of $1,924 by the 3.5 months left in 2017 calculates to $6,734. The ALJ finds it credible and persuasive and consistent with Claimant's testimony and the records that Claimant was on track to earn an additional $6,734 in 2017 had she not been injured.

12. Adding her actual gross receipts and sales of $16,354 through September 15, 2017 plus the estimated continued gross receipts and sales (had she not been injured) of $6,734 results in an estimated total gross receipts or sales for 2017 of $23,088.

13. Taking $23,088 and subtracting Claimant's total expenses from 2017 of $17,025 results in a total estimated net profit from her business for 2017 of $6,063.

14. $6,063 divided by 52 weeks results in an average weekly net profit from her massage therapy business of $116.60.

15. Although this number is based on an estimated net profit, the ALJ finds it to be a fair calculation of Claimant's estimated average weekly net profit at the time of her injury and concludes that Claimant was on track to earn more money in 2017 than in 2016 due to the change of her business location and better clientele.

16. An additional $116.60 added to Claimant's AWW is a fair approximation of her lost income due to her injury.

17. Claimant's AWW is thus $381.56 ($264.96 + $116.60).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. *See* § 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Average Weekly Wage

Section 8-42-102(2) C.R.S. requires the ALJ to base claimant's AWW on her earnings at the time of injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon her AWW on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), *supra*,

grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Where her earnings increase periodically, claimant's AWW should be calculated based upon her earnings during a given period of disability, and not based upon earnings at the time of injury. *Campbell v. IBM Corp.*, *supra*. Earnings from concurrent employment may be included in a claimant's AWW where the injury impairs earning capacity from such employment. *Jefferson County Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

After reviewing the evidence and testimony, the ALJ determines that Claimant's AWW at the time of her injury was $381.56. This is a fair approximation of Claimant's wage loss and diminished earning capacity due to her injury. This includes Claimant's AWW for Employer as well as an additional weekly AWW of $116.60 from her massage therapy business. As found above, Claimant was unable to continue her massage therapy work in mid-September when she was injured. If Claimant had not sustained a work related injury in mid-September, she would have continued work as a massage therapist and was on track to earn more money in 2017 than in 2016 due to her better business location and better clientele. The ALJ finds that the net profit is the appropriate amount to use for calculation of lost wages and diminished earning capacity. Claimant's argument that her gross receipt and sales and not her net profit should be used as the basis for her average weekly wage from self-employment is not found persuasive. Claimant testified to and acknowledged she had expenses and that the net profit is truly what she made and was her income. The ALJ finds that the 2016 and 2017 tax documents are the best reflection of Claimant's true receipts/sales/expenses and net profit or loss from her business. The tax records are found to be the most credible and persuasive evidence of total income and or expenses and are found more reliable than Claimant's personal banking account history or her testimony as to what she felt like she made in her self-employment.

For the reasons outlined above, the ALJ finds a fair determination of Claimant's AWW using the discretionary formula is $381.56. This accurately and fairly reflects Claimant's wage loss and diminished earning capacity due to her September 15, 2017 work injury.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wages is $381.56. Respondents shall file a new General Admission of Liability admitting to this AWW.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 21, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

The issues set for determination were:

- Is Claimant entitled to PPD benefits?
- If so, what was his permanent medical impairment rating?

FINDINGS OF FACT

1. Claimant was employed as a waste water operator for Employer.

2. Claimant sustained an admitted industrial injury on March 8, 2017 while working for Employer. Claimant was injured while lifting a metal plate in order to gain access to an electrical vault. He testified that he lifted the metal cover with his third finger and felt a pop.

3. Claimant's medical history was significant in that he previously injured his right wrist at age nine. There was no evidence Claimant had permanent restrictions or any limitations related to this injury.

4. On March 8, 2017, Claimant presented at the University of Colorado Health Center-Timberline Medical Walk-In Clinic and was evaluated by Curtis Weibel, N.P. He reported pain in his right hand, which was worsening. He also had an inability to bear weight, joint locking and swelling, as well as limited range of motion ("ROM") in the right hand. On examination, NP Weibel noted decreased ROM, tenderness and swelling in the right hand. The right third MP joint had snapping and crepitus. NP Weibel's diagnosis was tendon rupture of the hand, right, initial encounter; strain of right wrist, initial encounter. NP Weibel completed the M-164 form with this diagnosis. Physical therapy ("PT") was ordered and Claimant was referred to Timothy Pater, M.D.

5. On March 13, 2017, Claimant was evaluated by Dr. Pater. Dr. Pater's assessment was flexor tender rupture of hands, right. The x-ray of Claimant's right fingers showed no evidence of arthritis, fracture, joint subluxation or other soft-tissue or bony abnormalities. Claimant was given a prescription for Norco and surgery was to be scheduled for a right long finger flexor digitorum profundus repair.

6. Claimant returned to NP Weibel on March 20, 2017. He had pain in the right fingers, with associated symptoms including joint swelling and limited ROM. Claimant was scheduled for surgery the next day, but needed an echocardiogram due to a murmur and abnormal EKG. Claimant was to be cleared for surgery, if the echocardiogram was normal.

7. On March 23, 2017, Claimant underwent surgery on his right hand, which was performed by Dr. Pater. The procedure was: exploration of right long finger flexor tendon that tendon transfer of flexor digit profundus of right long finger to flexor digitorum superficialis, right long finger. At the time of the surgery, Dr. Pater found a lot of inflammatory synovial tissue and some rough surface at the bottom of the carpal canal, which led him to conclude that the tendon had eroded over time, which led him to conclude the tendon had eroded and then ruptured. He made an incision to the palm, debrided this area so that it would be smooth and did a small synovectomy, along with a side-to-side transfer of the superficialis to the profundus of the long and do a tendon weave to the palm. A release was done to this area. The pre-and post-operative diagnoses were the same: flexor digitorum profundus tendon repair, right long finger.

8. Following surgery, Claimant was evaluated by Lauren Bailey, OT at Front Range Orthopedics on March 27, 2017. As a result of this assessment, she concluded Claimant required skilled occupational therapy, in conjunction with a home exercise program, to address range of motion in the right hand and to increase Claimant's activities of daily living.

9. Dr. Pater reevaluated Claimant on April 3, 2017 and prescribed hand therapy, scar management, scar massage, control, desensitization, and ROM. Claimant continued to receive therapy provided by OT Bailey from April 3, 2017 through June 21, 2017. The ALJ noted therapy was provided to Claimant's right wrist and hand, including his fingers.

10. Claimant was seen at regular intervals by NP Weibel from June 1, 2017 through October 19, 2017. NP Weibel monitored Claimant's therapy and the progress of his symptoms was documented during this time. Deficits in Claimant's ROM were noted.

11. Claimant was evaluated by Dr. Pater on July 24, 2017. Claimant reported moderate pain and decreased ROM was found by Dr. Pater. Dr. Pater said Claimant did not have much pull-through with the profundus tendon and it was noted he did well after his mitral valve replacement (unrelated to work Injury). Dr. Pater stated Claimant would continue working on therapy and home exercises for his hand and would follow-up in approximately three months. There was a possibility of tenolysis.

12. On August 17, 2017, Claimant underwent an occupational therapy outpatient evaluation, which was performed by Lynn Stepaniak, OTR at Estes Park Medical Center. At that time, ROM deficits were noted in Claimant's middle, ring and small fingers. The goal was to increase right hand strength and ROM for three fingers on the right hand. Claimant received ultrasound and myofacial stretching to his wrist, forearm, as well as flexor tendon. The ALJ found these records support the conclusion that Claimant required treatment beyond his middle third finger as a result of his industrial injury.

13. Records for Claimant's treatment on August 21, 28, September 1,8, 15, 2017 were admitted into evidence. These records showed also showed OT treatments

were applied to Claimant's hand, wrist and forearm. Claimant was discharged from occupational therapy on September 19, 2017

14. Claimant returned to NP Weibel on October 19, 2017. Claimant described an aching quality to the pain in his hand, which occurred intermittently. Associated symptoms included an inability to bear weight, joint swelling, stiffness and tingling. Claimant was released to full duty and referred for an impairment evaluation by a Level II-accredited physician.

15. On November 16, 2017, Claimant was evaluated by Paul Fonken, M.D. to whom he was referred by Dr. Pater. At the time, Claimant reported a loss of dexterity and some weakness in the right hand. Dr. Fonken obtained final grip and pinch strength results from Estes Park Medical Center, as well as performing his own range of motion measurements. Dr. Fonken's found decreased ROM in the right hand, as well as decreased strength. Dr. Fonken opined Claimant sustained an impairment that exceeded the impairment beyond the loss of ROM in his fingers, including a loss of strength. He found 5% digit impairment in the index finger, 12% digital impairment of the middle finger and 13% digit impairment to the ring finger.

16. Dr. Fonken concluded Claimant's hand impairment added up to a total of 11% scheduled impairment, which converted to a 10% upper extremity impairment, pursuant to the *AMA* Guides, Chapter 3, Table 2. He also assigned impairment for Claimant's grip strength totaling 10%, which gave a total right upper extremity impairment of 19%, which converted to an 11% whole person impairment.[1] The ALJ credited this opinion and found Dr. Fonken's opinion of permanent medical impairment was more persuasive than that offered by Dr. Bisgard.

17. Respondent filed an Application for Hearing on or about December 19, 2017, listing the partial disability benefits as the issue to be adjudicated.

18. On February 12, 2018, Claimant was evaluated by Elizabeth Bisgard, M.D., at the request of Respondent. Claimant reported he had some loss of ROM in the finger, as well as loss of grip strength. Dr. Bisgard diagnosed FDP tendon rupture of the right middle finger. Dr. Bisgard agreed Claimant was at MMI and assigned a medical impairment rating of 8% upper extremity, with a functional loss at the level of the hand.

19. Dr. Bisgard opined that Dr. Fonken did not follow the AMA Guides in that he included impairment ratings for digits that were not involved. Dr. Bisgard noted Dr. Fonken also included grip strength, which was not appropriate. Dr. Bisgard cited page 53 of the *AMA* Guides, as follows:

> "Hand strength and its measurements are affected in the presence of amputations and loss of motion of the digits, and by disorders of bones, joints, and musculotendinous units. *These anatomical impairments are rated only according to the guidelines presented in section 3.1b, c, d, i and j, and no*

[1] Exhibit D, pp. 84-90.

separate strength impairment values are given. It should be noted that loss of strength of the upper extremity can occur without atrophy". [Emphasis in original].

20. The ALJ noted page 53 of the *AMA* Guides also specifies:

"*It must be stressed that, in general, grip and pinch measurements are functional tests and are not to be used for evaluating impairment.* However, if loss of strength is felt to represent an additional impairment not already taken into account, this may be measured and the loss rated. The impairment would be combined with other impairments of the hand". [Emphasis in original].

21. The ALJ found Dr. Fonken concluded that loss of strength in Claimant's right hand was an additional impairment. He identified it as such in the worksheet he completed. This loss of strength was identified by Claimant's ATP, Dr. Pater and other providers during his treatment.

22. Claimant was a credible witness.

23. No evidence was admitted at hearing which contravened the medical evidence in the record which showed Claimant sustained a permanent medical impairment related to his industrial injury.

24. Claimant sustained a permanent medical impairment which was caused by his industrial injury. The ALJ concluded Dr. Fonken's medical impairment rating, which included rating for a loss of hand strength, was a more accurate assessment of Claimant's impairment.

25. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S. (2016), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2016). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. (2016).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Permanent Medical Impairment

In the case at bench, Claimant's permanent medical impairment is governed by § 8-42-107(1)(a), C.R.S. This section provides in pertinent part:

"When an injury results in permanent medical impairment, and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, employee shall be limited to medical impairment benefits specified in subsection (2) of this section".

Claimant contended Dr. Fonken provided a more complete assessment of his medical impairment. Respondent argued Dr. Bisgard provided the more accurate assessment of Claimant's permanency.

As a starting point, the ALJ found Claimant sustained a permanent medical impairment as a result of his industrial injury. (Finding of Fact 24). The medical evidence the record established this and, in fact, there was no evidence to the contrary. (Finding of Fact 23). Therefore, Claimant was entitled to PPD benefits based upon his medical impairment.

The focus of the dispute then turned to a determination of what was Claimant's permanent medical impairment. There was a divergence of opinions on this subject between Dr. Fonken and Dr. Bisgard. As determined in Findings of Fact 14-15, the ALJ credited Dr. Fonken's opinion as to the correct medical impairment for Claimant. The ALJ's decision was premised first on the fact that Claimant's treatment records documented symptoms/treatment to not only to the third finger, but also the right hand and wrist. In addition, Dr. Pater's surgical note referenced the debridement of the carpal canal, a synovectomy and release procedure on the tendon, as well as to the surrounding tissues, including the old scar tissue. (Finding of Fact 7). Claimant's post-surgery treatment was not limited to the hand, but also included his fingers and wrist. ROM deficits were noted in Claimant's fingers. (Finding of Fact 12). The therapy records were replete with references to a loss of strength in Claimant's right hand. (Findings of Fact 12-13). At the conclusion of this treatment, Dr. Fonken determined Claimant's loss of strength in the hand was an additional impairment. (Finding of Fact 21).

Second, the ALJ considered Respondent's argument, based upon the expert opinion of Dr. Bisgard, who concluded Claimant had an 8% upper extremity medical impairment rating. Dr. Bisgard reasoned that the *AMA* Guides did not allow for impairment based upon loss of strength and therefore concluded Dr. Fonken's rating

was in error. As found, the succeeding paragraph in the *AMA* Guides (p. 53) following the one cited by Dr. Bisgard specified a rating could be given for loss of strength. The ALJ found Dr. Bisgard's reasoning was too circumscribed by limiting the impairment only to the finger and an additional impairment could be based on loss of strength was appropriate in the discretion of the rating physician. Accordingly, the ALJ credited Dr. Fonken's opinion and found this rating accurately assessed Claimant's medical impairment.

The rationale articulated by the Colorado Court of Appeals in *Martinez v. Industrial Commission* 511 P.2d 921, 922 (Colo. App.1973) supports the ALJ's conclusion. In that case, Claimant suffered an amputation of the hand and Insurer-Respondent admitted liability for a loss of hand and wrist. Claimant alleged he suffered additional permanent disability to his forearm and presented testimony of an orthopedic surgeon to support this claim. The expert testified the articulation of the hand was less than satisfactory and Claimant had limitation of supination and pronation of the forearm. Claimant's request for additional benefits was denied and that decision was affirmed by the Industrial Commission.

The Court of Appeals reversed, finding that the claim for additional disability of the forearm was supported by the evidence. The Court noted that on the schedule of injuries, compensation for an amputation "is limited to the specific amount provided on the statutory schedules for such permanent disability. An employee who suffers such an injury cannot receive additional compensation for disability measured as a working unit". Claimant, however, was seeking additional compensation for disability in addition to the amputation, specifically the forearm. The Court determined Claimant was entitled to this additional compensation. *Id.*

Although the case at bench did not involve a full amputation, the principle in *Martinez* supports a finding that Claimant's disability was not limited to the third finger, but rather involved additional impairment of loss of strength. The ALJ credited Dr. Fonken's opinion that Claimant was entitled to additional impairment in the form of loss of range of motion in other fingers and loss of strength. Based on the evidence introduced at hearing, the ALJ determined Claimant was entitled to this additional medical impairment, pursuant to the *AMA* Guides.

ORDER

It is therefore ordered:

1. Respondent shall pay permanent partial disability benefits to Claimant, based upon Dr. Fonken's rating.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 7, 2018

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Has Claimant shown, by the preponderance of the evidence, that he is entitled to post-MMI medical treatment to relieve the effects of his work injury and prevent deterioration of his condition?

2. Has Claimant suffered serious permanent disfigurement about the head, face, or parts of the body normally exposed to public view, which would entitle him to additional compensation?

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ enters the following Findings of Fact:

1. Claimant injured his left knee in an admitted work injury on 7/7/16, while stepping into a pothole. Prior to this injury, Claimant's knee had not been symptomatic, despite his having been previously diagnosed with rheumatoid arthritis.

2. He was referred to an orthopedist, Dr. Wiley Jinkins, M.D. Conservative treatment was not entirely successful. Dr. Jinkins eventually performed an arthroscopic surgery on 6/19/17, which Claimant tolerated well. Claimant had medical and lateral meniscus tears repaired, among other procedures.

3. Claimant continued to follow-up with Dr. Jinkins, who sought authorization for three injections of hyaluronate (Supartz) into the knee to relieve ongoing post-surgical pain. Those were performed, with some relief noted by Claimant, in the fall of 2017.

4. Dr. Jinkins placed Claimant at MMI on 11/14/17 following these injections. At this visit, Claimant noted that he was "75% better" as a result of the surgery and injections. Slight swelling in the knee was noted. In this final visit, Dr. Jinkins noted the following:

> The only medication he is taking at the present time is Relafin and I did give him a *new prescription on this date*. David will return to see me on an as needed basis. I do think it *reasonable for him to have a period of "maintenance care"* for a period of time into the future, should he need an injection, prescription, etc. (Ex. 1, p. 3) (emphasis added).

5. It was noted by Dr. Jinkins, and other physicians, that Claimant would likely need a knee replacement in the future, but no timeline for this has been established.

6. In a previous visit on 3/21/17, Dr. Jinkins had written to Claimant's ATP at Concentra that Claimant had reported that he had placed Claimant on Pennsaid as a

topical nonsteroidal anti-inflammatory medication which had helped to some degree. This Pennsaid prescription was refilled on this date.

7. Claimant had been going to Concentra in a series of visits since shortly after the injury, and had been seeing Randall Jones until March of 2017, after which he was seen by Dr. Daniel Peterson. In a visit dated 4/3/17 Dr. Peterson notes that Claimant had reported that the Pennsaid lotion was helping 'considerably' with the swelling. (Ex. E, p. 54).

8. Dr. Peterson's final visit with Claimant was 11/17/17. He concurred with the MMI assessment, but noted that "David Strine is at functional goal, not at end of healing." (Ex. 1, p.71). He noted at this visit that "Dr. Jinkins did his IR [Impairment Record] already. Specialist is not supposed to do this, but Dr. Jinkins does anyway! Will not waste time repeating it today". (Ex. 1, p. 69). In this visit, Dr. Peterson merely notes that Claimant "needs no medical maintenance care," without further explanation. (Ex. 1, p. 72).

9. Claimant testified at hearing. He reported that he benefitted from the surgery and treatment to date, but still experiences some pain and swelling. He described some benefit from the Relafin as an anti-inflammatory, and the Pennsaid lotion helped with his pain. He still sleeps with a pillow between his legs, and will occasionally awake at night from the pain.

10. Claimant acknowledges that he has not gone to the emergency room or urgent care in recent months, nor has he seen a primary care physician. Claimant explained that he is not currently working, and has no health insurance.

11. Claimant also presented for his disfigurement hearing. Claimant showed some slight swelling on the inner portion of his left kneecap, and two small arthroscopic scars around the kneecap. Each scar is slightly indented, and perhaps 5 mm in length. Additionally, Claimant does have a barely discernable gait disturbance, favoring his left knee when walking.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is

that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, no expert testimony was offered, but the medical reports have been reviewed, and the opinions of Claimant's treating physicians have been weighed.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

General Award of Medical Benefits after MMI

D. The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond MMI if the Claimant requires further treatment to relieve the effects of the injury or prevent deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

E. To establish entitlement to *Grover* medical benefits, a Claimant must prove that future medical treatment is or will be reasonably necessary to relieve the effects of the injury or to prevent deterioration of their condition. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI to obtain a general award of future medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1989). If the Claimant establishes the probability of a need for future treatment, the claimant is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity. *Hanna, supra*.

F. Claimant has established, with substantial evidence, the probability of a need for future medical treatment, which entitles him to a general award of future medical benefits. The ALJ finds Claimant's testimony to be credible. The ALJ further finds that Claimant accurately reported his symptoms to his medical providers. He continues to suffer pain and swelling related to his work injury. He reports some benefit from the Pennsaid and Relafin, which are not affordable through private insurance-nor is it reasonable to require him to resort to that. Additionally, the ALJ is more persuaded by the notes of Dr. Jinkins than those of Dr. Peterson-who does not explain his reasoning why Claimant could not benefit from post-MMI treatment.

Disfigurement

G. Section 8-42-108(1) provides that a Claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." Claimant's disfigurement, as found, is all exposed to public view. The ALJ concludes that Claimant should be awarded $1,800.00 for this disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore Ordered that:

1. Respondent shall cover all reasonable and necessary medical treatment from Authorized Treatment Providers to relieved the effects of Claimant's injury and prevent deterioration of his injury.

2. Respondent shall pay Claimant $1,800.00 for his disfigurement. Respondent may take credit for any disfigurement benefits previously paid to Claimant in this matter.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 3, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury on September 5, 2017.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment for his right shoulder.

III. Whether Claimant established by a preponderance of the evidence that the total reverse shoulder surgery recommended by Dr. Papillion is reasonable, necessary, and related treatment to cure and relieve Claimant of the effects of his work-related injury.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage was $384.00. The issue of any additional AWW based on the value of meals was reserved.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was 66 years old on the date of the hearing. His date of birth is June 14, 1951.
2. Claimant was hired as part of the security team at Ameristar Casino as a security officer. He was first signed in on August 3, 2017. Although there has been disputed testimony concerning the Claimant's commencement date, Respondents' records indicate, and it is found, that the Claimant did not start work full-time until August 15, 2017.
3. Claimant testified that on September 5, 2017, he was in the course and scope of employment as a security officer when he injured his right shoulder. This injury happened between 3:00 a.m. and 5:00 a.m. on the Labor Day Weekend when Claimant was working the night shift helping with a "table drop." Claimant testified that this was the second time he had been engaged in "table drop." A "table drop" entails gathering the boxes of poker chips and money from the various gaming tables.
4. Claimant testified that the boxes weigh between 25 and 40 pounds. Claimant testified that his two co-workers collected the boxes from the various gaming tables and placed them next to the "cage." Claimant testified that it was his

job to place the boxes in the "cage." The cage is a metal rolling cart which contains approximately three shelves and the top shelf is about shoulder height. Claimant testified that approximately five of the boxes were really heavy and while lifting one of the boxes up from the floor and placing it on a shelf in the cage he felt a pop and pain in his shoulder.

5. Claimant did not report his injury right when it happened. Claimant did, however, report his injury on Friday, September 8, 2017, which appears to have been the next day he was scheduled to work after the work accident. Claimant indicated in his written statement that he hurt his back and shoulder. Claimant also indicated that he did not report it right away because he was afraid he would be sent to see a doctor would not be called back to work again. (Exhibit 1.)

6. Employer maintains surveillance video of the job site and monitors all table drops. The video surveillance submitted by Claimant of September 5, 2017, is consistent with Claimant's testimony. The video shows two of Claimant's co-workers gathering the boxes from the gaming tables and placing them next to the cage. The video shows Claimant lifting the boxes from the floor and placing them onto various shelves in the cage. The video surveillance also contains video and sound of another room in which other employees monitor the casino. After the table drop was performed, one of Claimant's co-workers entered the room and said to another employee that Claimant was really struggling with the heavier boxes and indicated Claimant said he had back problems.

7. Employer also obtained a written statement from Claimant's co-worker, Garrett Flesh, who was assisting with the table drop. Mr. Flesh's statement is consistent with Claimant's testimony and the surveillance video. Mr. Flesh stated that Claimant:

> [W]as showing signs of struggle of picking up the Jackpot and the house boxes from the poker room. I checked on [Claimant] to see how he was doing. He then at that point told me he has lower back problems. Myself and Chris took it upon ourselves to assist [Claimant] with the extremely heavy boxes so he did not have to possibly hurt himself even more. (Exhibit 15.)

8. Employer also obtained a written statement from another co-worker, Christopher Venten (sp), who was also helping with the table drop. His statement also indicates Claimant was having a hard time lifting the heavy boxes and that they needed to help him. (Exhibit 15.)

9. Employer also has a job description which sets forth Claimant's job duties. The job description indicates Claimant's job duties require him to lift between 25 and 50 pounds. Claimant' job description is consistent with his testimony that the boxes he was lifting when he got injured weighed between 25 and 40 pounds. (Exhibit 14.)

10. Claimant's injury was described by the ATP doctors at Concentra as follows:

> History of Present Illness:
>
> Patient presents for evaluation of injuries sustained at work on September 5, 2017. While working at the casino, he was responsible for lifting heavy boxes of currency and chips and placing them on a rack. He did this about 5 times, and when placing one of the boxes on a rack that was above his shoulder level, he felt pain in the anterior and posterior right shoulder. He did not immediately report his injury. He also reports developing pain in the right thoracic and lumbar regions. Should ROM is painful and limited. Denies blunt trauma. Denies radiation of pain into the arms or legs. Denies parethesias. He has been taking aspirin and ibuprofen with mild relief, however, he notes a diagnosis of renal failure, currently under treatment by a nephrologist. He is right hand dominant.

(Exhibit 4, BS 70.)

11. The Claimant was sent for an MRI on October 2, 2017, which established the presence of significant degenerative problems in the right shoulder. The Claimant was then referred by Concentra for evaluation with orthopedist Dr. Papillion.

12. Dr. Papillion described the Claimant's condition as follows:

> I had the pleasure of seeing Manuel in the office in consultation today. As you know, he is a 66-year-old right-hand-dominant male. He sustained acute injury to his right shoulder on 09/05/2017. He was in his employment as a security guard for Ameristar Casino. He was lifting heavy boxes of 25-40 pounds overhead. He felt a pop in his right shoulder. He had immediate pain, weakness, and loss of motion. He believes that this was documented on surveillance video. Since then, he has had difficulty with any lifting or using the arm away from his body and overhead. He has tried NSAIDS. He has had a course of physical therapy with little improvement. He has significant loss of function. This bothers him some at rest but increases with any attempted activity. He has pain at night. He has no previous problems with the right shoulder and has been working at full duty without difficulty prior. He has no left-sided symptoms.

(Exhibit 6, BS 80.)

13. At the time, Dr. Papillion issued his opinion, he noted that he was aware that Claimant had undergone an MRI which showed severe tearing in the rotator cuff, as well as pre-existing atrophy. Nevertheless, he opined that Claimant's

condition was consistent with a rotator cuff arthropathy; that Claimant suffered a "irreparable rotator cuff tear" requiring intervention; and that his right shoulder had been "fully functional prior to the incident." (*Id*., BS 81.)

14. Dr. Papillion further opined in his report that:

> This does appear to be a tear with some chronicity. However, he was working at full duty and having no difficulty with lifting and using the arm away from his body and overhead prior to this incident. Currently, he is severely restricted in his function and has significant pain.

(*Id*., BS 81.)

15. Dr. Papillion opined that "Definitive care would be reverse total shoulder arthroplasty." (Exhibit 6, BS 82.)

16. Dr. Papillion also stated that under the Colorado Division of Workers' Compensation Medical Treatment Guidelines a reverse total shoulder arthroplasty is an appropriate procedure for individuals over 65 who have massive irreparable rotator cuff tears with rotator cuff arthropathy. (*Id*., BS 82.)

17. The ALJ finds Dr. Papillion's opinions to be credible and persuasive.

18. Claimant was also sent for evaluation with orthopedist Dr. Mark Failinger. He agreed with Dr. Papillion that a reverse total shoulder replacement was the appropriate treatment for the Claimant's condition and to help alleviate his symptoms. (Exhibit 7.)

19. Claimant testified that he had been working since he was young. He worked twenty years for Wells Fargo, he worked at a casino in Florida. Most recently he worked for seven years at Frontier Airlines. In his most recent employment with Frontier Airlines he was cleaning the interior of airplanes.

20. Claimant credibly testified that prior to his injury on September 5, 2017, he had never been given restrictions for his right shoulder nor had he been treated. No medical records show right shoulder treatment or restrictions prior to Claimant's injury of September 5, 2017. The records from the MRI of October 2, 2017, documented the presence of arthritic problems, as does an x-ray which was performed on January 10, 2014. (Exhibit 5, BS 79 and Exhibit K.)

21. Claimant testified that he was able to perform the essential functions of his job at Frontier, as well as at Ameristar during his brief tenure there. Claimant also testified that he has continued to work at Ameristar and is able to perform all of the essential functions of his modified duty.

22. Claimant is found to be a credible witness and his testimony is persuasive and consistent with the medical records, surveillance video, witness statements, and Employer's job description.

23. Respondents retained Dr. William Ciccone, an orthopedist who is Level II certified, to testify as an expert. Dr. Ciccone agreed with both Dr. Papillion and Dr. Failinger that a reverse shoulder arthroplasty was reasonable. However, it was his opinion that the Claimant's need for the surgery was unrelated to the Ameristar events of September 5, 2017.

24. Dr. Ciccone testified that his opinion was based significantly on the Claimant's failure to report his injury initially. This is belied by the report from Concentra dated September 11, 2017, where the treating medical provider recorded a detailed description the event. (Exhibit 4, BS 70.)

25. Dr. Ciccone also testified that Claimant did not inform him that he had felt a pop in his shoulder. Therefore he felt that the Claimant was engaging in a bit of "revisionist history" when he described popping. However, Dr. Papillion reported in his October 5, 2017, report that Claimant informed him that he "felt a pop in his right shoulder when he was lifting heavy boxes." (Exhibit 6, BS 80.)

26. Dr. Ciccone agreed that a competent orthopedist who felt that the Claimant's symptoms were inconsistent with his mechanism of injury would have noted this fact in his report. He also agreed that neither Dr. Papillion nor Dr. Failinger made a note to the effect in their reports.

27. Dr. Ciccone acknowledged that given the diagnostic impression of the MRI that he would not have recommend the Claimant engage in activity requiring him to lift above waist level. He also agreed that given the findings on the MRI of October 2, 2017, the Claimant would likely have felt pain and discomfort resulting from his lifting activities.

28. Dr. Ciccone testified that when he examined Mr. Lagasca, his right shoulder showed diffuse atrophy at the rotator cuff and active motion at 140 degrees, with external rotation actively of 10 degrees, but passively of 80 degrees, and an internal rotation of 70 degrees. Dr. Ciccone testified that these findings are associated with chronic rotator cuff disease (Respondents' Hearing Submission A; Hearing Transcript p. 63, ll 3-25; p. 64, ll 1-25; p. 65, ll 1-25).

29. Dr. Ciccone testified that the rotator cuff is a group of muscles and tendons that attach the humerus to the shoulder and allow movement of the arm. He testified that when there is a rotator cuff tear, the tendon is no longer attached to the bone. He testified that when the tendon is not attached to the bone the shoulder cannot functionally be used because it cannot lift the arm anymore. He testified that with a tear it is like not using your muscle and so the muscles get smaller and result in atrophy (Hearing Transcript p. 66, ll 1-13).

30. Dr. Ciccone testified that he reviewed imaging of Mr. Lagasca's shoulder in the form of x-rays and MRIs from 2009 through the present. He testified that his understanding of the mechanism of injury was lifting boxes at work when he had pain in his shoulder. Dr. Ciccone indicated that during his examination, Mr. Lagasca did not tell Dr. Ciccone that he felt a pop in his shoulder. As a result, Dr. Ciccone testified that there was no specific injury to

the Claimant's shoulder in his medical opinion (Hearing Transcript p. 66, ll 22-25; p. 67, ll 1-18).

31. Dr. Ciccone testified that the imaging and x-rays that he reviewed showed different things. He testified that x-rays dated September 11, 2017 showed no abnormalities in the bones. He testified that an MRI is necessary to see soft tissue. Dr. Ciccone further testified that in chronic rotator cuff tears, a process of a high riding humeral head progresses because the shoulder is no longer contained by the rotator cuff. Dr. Ciccone said you could see the high riding humeral head on the x-ray that he reviewed of September 11, 2017. With respect to the MRI, Dr. Ciccone testified that he saw an MRI performed on October 2, 2017, which again showed a high riding humeral head with a pseudoarticulation superiorly, which is part of the scapular bone called the acromion. He testified that when the rotator cuff is chronically torn at the humerus or the shoulder bone, the ball will ride up high and that will actually bump into or articulate the bone above it called the acromion. He testified that in long-standing cases a pseudoarticulaton will develop, which is what he viewed on the Claimant's MRI (Hearing Transcript p. 68, ll 3-25; p. 69, ll 1-4).

32. Dr. Ciccone testified that in his medical opinion, the findings on the MRI scan show a preexisting condition because one does not get significant rotator cuff atrophy with an acute rotator cuff tear. He testified further, that high riding humeral heads do not develop with an acute rotator cuff tear. He testified that pseudoarticulation also does not develop with an acute injury. Based on the evaluation of the MRI and the physical attributes shown, Dr. Ciccone testified that the MRI shows no acute injury (Hearing Transcript p. 69, ll 5-15).

33. Dr. Ciccone testified that he evaluated Dr. Papillion's assessment of "acute on chronic rotator cuff tear" and disagreed with that finding. Dr. Ciccone testified that if there were an acute on chronic rotator cuff tear, potentially bleeding in the shoulder could be seen as well as bruising on the skin from an acute injury. He testified that with a normal shoulder to a rotator cuff tear there is no atrophy or anything else that is present on Mr. Lagasca's MRI scan (Hearing Transcript p. 69, ll 16-25).

34. Dr. Ciccone testified that it was possible to tell that the tear in the Claimant's shoulder preexisted any work activity on September 5, 2017. The evidence that supports this opinion in his testimony is the high riding humeral head, the pseudoarticulation within the shoulder, the muscle atrophy and significant retraction of the rotator cuff tear (Hearing Transcript p. 70, ll 1-12).

35. Dr. Ciccone testified that he agreed with Dr. Papillion's opinion that the Claimant is a candidate for a reverse shoulder replacement but that it is not related to a work injury. Dr. Ciccone testified that he did not think that the Claimant actually suffered a work-related injury based on his findings on the MRI scan which are chronic and longstanding. Dr. Ciccone testified that the Claimant saw Dr. Failinger in a second opinion, who also agreed that the reverse arthroplasty would be appropriate, but that he did not perform any causation analysis in relation to his opinion. Dr. Ciccone testified that Dr.

Burris saw the Claimant in December of 2017 and he agreed with Dr. Burris' determination that the Claimant had advanced end stage degenerative changes to the right shoulder. Dr. Ciccone also concurred that the MRI findings and the described mechanism of injury would not represent an acceleration or aggravation of a preexisting condition based on the non-acute injury (Hearing Transcript p. 70, ll 1-25; p. 71, ll 1-25; p. 72, ll 7-25).

36. Dr. Ciccone further testified that the Claimant had a radiograph of his chest in January of 2014, which showed osteoarthritis on the glenohumeral joints bilaterally. Dr. Ciccone testified that this was significant because there is a difference between osteoarthritis of the glenohumeral joint verses AC joint arthritis. Dr. Ciccone testified that on examination Mr. Lagasca had no pain at the AC joint, which is a common finding in patients with rotator cuff tear arthropathy. He testified that the medical focus was on the rotator cuff because that was a more current finding with arthritis being even more chronic in nature than rotator cuff tears. Dr. Ciccone testified that the Claimant has very limited cartilage left in the shoulder, which represents arthritis. He testified that on top of that the Claimant has a rotator cuff tear. The chronic arthritis coupled with the rotator cuff tear results in rotator cuff tear arthropathy, which is what led to the need for the reverse shoulder according to Dr. Ciccone's testimony (Hearing Transcript p. 73, ll 7-25; p. 74, ll 1-13).

37. Dr. Ciccone testified that chronic tearing of the supraspinatus, the infraspinatus and severe atrophy would not be medically probably caused by the result of lifting boxes on one day (Hearing Transcript p. 74, ll 14-22).

38. Dr. Ciccone testified that the Medical Treatment Guidelines require causation analysis and the physicians who saw the Claimant at Concentra and Dr. Papillion did not perform a causation analysis. He testified that Dr. Papillion most likely did not have any previous medical records and had to relate his treatment plan based on the injury as related by the Claimant, Mr. Lagasca (Hearing Transcript p. 75, ll 7-19).

39. Dr. Ciccone testified that he in fact had done a causation analysis because he had the complete medical records and he could do a more thorough review of the preexisting and current medical treatment. Dr. Ciccone testified that the medical evidence significant to him in terms of a causation analysis were multiple. He cited failure to report the injury at the time of the event and a history of what exactly happened at the time of the event, which differed throughout the different evaluations. Dr. Ciccone noted that at the initial evaluation the written report was that he felt pain and there was no report of a pop. Dr. Ciccone testified he believed there was no specific injury and it would be expected that someone with chronic rotator cuff tearing and the cuff tear arthropathy would have pain in their shoulder irrelevant or irrespective of whatever they were performing at the time (Hearing Transcript p. 75, ll 20-25; p. 76, ll 1-17).

40. Dr. Ciccone testified that it would not be medically surprising that the Claimant felt symptoms the first time he performed the table drop. Dr. Ciccone testified that this is because someone trying to lift up to 30 pounds with a dysfunctional rotator cuff would have pain and symptoms. However, according to Dr. Ciccone's testimony, pain does not equate to an injury. Dr. Ciccone testified that in Mr. Lagasca's situation, multiple reasons exist for him to have symptoms and that these symptoms could occur at any time with any type of use of his shoulder without specific injury and pain is not related to work and that it would be more medically-probably related to the disease process itself (Hearing Transcript p. 76, ll 22-25; p. 77, ll 1-13).

41. Dr. Ciccone testified that the only medical record containing a report of a "pop" was made to Dr. Papillion (Hearing Transcript p. 77, ll 14-17).

42. The ALJ does not find Dr. Ciccone's opinion that Claimant did not suffer a work injury and that the work injury did not necessitate the need for medical treatment, including the surgery recommended by Dr. Papillion, to be persuasive.

43. The ALJ does not find Dr. Ciccone's ultimate opinions to be persuasive, for a number of reasons, which include, but are not limited to, the following:

    First, Dr. Ciccone testified that in assessing causation, he relied upon the fact that Claimant did not report his injury on the day it happened. However, Claimant's written statement indicates he did not report his injury on the day it happened because he was afraid he would be sent to the doctor and would not be called back to work. The ALJ finds this to be a very plausible explanation as to why Claimant did not report his injury on the day happened. In addition, the video surveillance of September 5, 2017, and witness statements, confirm Claimant's account of his job activities and that he was struggling with the heavy boxes.

    Second, Dr. Ciccone testified that he also took into consideration the fact that the history contained in Claimant's medical records "of what exactly occurred at that time has been different throughout the different evaluations." For example, Dr. Ciccone testified that the initial evaluation indicates Claimant felt pain [after lifting heavy boxes of currency] and there is no reference to a "pop", however, the medical report from Dr. Papillion's evaluation which took place approximately three weeks later indicates Claimant stated there was a "pop" at the time of the accident. Despite this difference in the medical records, and assuming there was not a pop, there is a lack of credible and persuasive evidence establishing a "pop" is a necessary element of a work related shoulder injury. Moreover, the ALJ does not find such a difference or variance in the medical records to be persuasive evidence that Claimant did not suffer a work injury on September 5, 2017, in light of the other evidence contained in the record. Besides, this ALJ finds Claimant's testimony to be credible and Claimant credibly testified that he felt a pop while lifting the box at work and that he told that to his medical providers.

Third, Dr. Ciccone testified that in his opinion, Claimant's shoulder pain and disability is due to the disease process instead of Claimant's work activities. Dr. Ciccone testified that:

> Well, I mean, there's multiple reasons to have pain. I mean, I--the--there's--there are in this situation, again, multiple reasons to have these symptoms. And these symptoms could occur at any time with any type of use. And without a specific injury, the pain is not related to the work. It would be more related to the disease process itself. (Hearing Transcript p. 77, ll 7-13).

However, the ALJ does not find this analysis to be persuasive because although there could be multiple reasons for Claimant's symptoms, which includes the natural progression of the disease process, Claimant's chronic pain and disability were proximately caused by the work activity of lifting a heavy box at work. This is not a case in which Claimant was merely at work performing sedentary activities, such as sitting at a desk or walking and developed shoulder pain and limited range of motion. This a case in which Claimant had an asymptomatic shoulder condition and the specific work activity of lifting a heavy box caused pain and disability, which has not abated, and caused the need for medical treatment. In other words, this is a work-related exposure that has rendered a previously asymptomatic condition symptomatic and subsequently requires medical treatment.

44. There is a single pain diagram from January 10, 2014. Respondents contend the pain diagram establishes Claimant had pre-existing bilateral shoulder pain. However, the pain diagram is part of the Patient Appointment Sheet, of the same date. The Patient Appointment Sheet indicates Claimant is having x-rays taken of his cervical, thoracic, and lumbar spine as well as his chest. There are no x-rays being taken of either of Claimant's shoulders. (Respondents' Hearing Submission I.) Therefore, the ALJ does not find the pain diagram demonstrates Claimant was having bilateral shoulder pain on January 10, 2014, and seeking treatment for such.

45. Claimant suffered a compensable injury to his right shoulder.

46. Claimant had a pre-existing right shoulder condition which was asymptomatic.

47. On September 5, 2017, during the course and scope of his employment, Claimant suffered an injury to his right shoulder when he lifted a 25-40 pound box at work and aggravated his pre-existing asymptomatic right shoulder condition.

48. Claimant was not having any pain or difficulty using his right shoulder prior to the work injury. The work injury caused Claimant to develop significant and chronic shoulder pain and has also severely restricted his shoulder function.

49. Claimant lifting the heavy box of poker chips and money at work was a work-related exposure that has rendered his previously asymptomatic shoulder condition symptomatic and subsequently requires medical treatment.

50. In order to treat Claimant's chronic shoulder pain and restricted shoulder function which were caused by the work injury, Dr. Papillion recommended a reverse total shoulder arthroplasty.

51. The reverse total shoulder arthroplasty surgical procedure is to decrease Claimant's shoulder pain and increase his shoulder function.

52. The reverse total shoulder arthroplasty is reasonable, necessary, and related to Claimant's work injury.

53. The need for medical treatment, including the shoulder surgery, is not attributable to Claimant's asymptomatic underlying preexisting shoulder condition.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App.

2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury on September 5, 2017.

Claimant is required to prove by a preponderance of the evidence that the condition for which he seeks medical treatment was proximately caused by an injury arising out of and in the course of employment. Section 8-41-301(1)(c), C.R.S.; *Singleton v. Kenya Corp.,* 961 P .2d 571 (Colo. App. 1998). Thus, when an injury occurs in a work place resulting in disability, it is compensable if the circumstances and conditions of employment have contributed to the injury sustained by the employee, as is the case here. See *National Health labs v. ICAO*, 844 P.2d 1259 (Colo. App. 1992)(a compensable injury can result from the aggravation of a pre-existing condition, see also *H & H Warehouse v. Vicory v. ICAO*, 805 P.2d 1167 (Colo. App. 1990)).

If an industrial disability is attributable to a stable pre-existing, condition and an occupational injury, the resulting disability and medical benefits are compensable if the injury has caused a pre-existing condition to become industrially disabling. See *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Thus, a pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). This is because compensation is not dependent on the state of an employee's health or his freedom from constitutional weakness. *Peter Kiewit Sons' Co., v. ICAO*, 236 P.2d 296 (Colo. 1951).

Claimant's right shoulder had degenerative changes that predated his injury. But, the degenerative pathology was asymptomatic before lifting the heavy box containing poker chips and money on September 5, 2017. Lifting the box which weighed between 25 and 40 pounds required Claimant to use his right shoulder in a manner that exceeded its physical capacity and resulted in an injury that resulted in chronic pain and limited function, i.e., disability, of his shoulder and necessitated the need for medical treatment.

Dr. Papillion, in his report, persuasively opined that before the incident of September 5, 2017, Claimant did not have any problems with his right shoulder and had been working at full duty without difficulty. At the time Dr. Papillion issued his opinion, he noted that he was aware Claimant had undergone an MRI which showed severe tearing in the rotator cuff, as well as pre-existing atrophy. Nevertheless, he opined that Claimant's condition was consistent with a rotator cuff arthropathy; that the Claimant suffered a "irreparable rotator cuff tear" requiring intervention; and that his right shoulder had been "fully functional prior to the incident." Dr. Papillion further opined in his report that:

> This does appear to be a tear with some chronicity. However, he was working at full duty and having no difficulty with lifting and using the arm away from his body and overhead prior to this incident. Currently, he is severely restricted in his function and has significant pain.

Claimant credibly testified that he experienced the onset of symptoms after lifting the heavy boxes. Moreover, Claimant's co-workers corroborated Claimant's testimony that he was struggling with the heavy boxes on September 5, 2017. In addition, the video surveillance further corroborated Claimant's description of the work he was performing at the time he was injured and the fact that he was struggling with the heavy boxes. Although temporal proximity alone does not automatically establish causation, it does suggest a causal relationship. In combination with other evidence contained in the record, the ALJ finds the clear temporal relationship between the onset of symptoms and Claimant's work activities to be a persuasive factor in favor of compensability.

Dr. Ciccone is correct that Claimant had shoulder pathology before the September 5, 2017, incident. Dr. Ciccone testified regarding the medical findings that supported his conclusion that Claimant had shoulder pathology before the incident of September 5, 2017. However, Claimant's preexisting shoulder pathology was asymptomatic and the activity that proximately caused Claimant's pain and disability on September 5, 2017, and necessitated the need for medical treatment, was a work-related job task within the course and scope of his employment. As such, Claimant's injury had its origins in a work-related function and is compensable.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment for his right shoulder.

III. Whether Claimant established by a preponderance of the evidence that the total reverse shoulder surgery recommended by Dr. Papillion is reasonable, necessary and related treatment to cure and relieve Claimant of the effects of his work-related injury.

Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S. 2007; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997);

Country Squire Kennels v. Tarshis, 899 P.2d 362 (Colo. App. 1995). Where the Claimant's entitlement to benefits is disputed, Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether Claimant sustained his burden of proof is generally a factual question for resolution by this ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

A preexisting disease or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the preexisting disease or infirmity to produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant had a preexisting shoulder condition which was asymptomatic. On September 5, 2017, during the course and scope of his employment, Claimant suffered an injury to his right shoulder when he lifted a 25-40 pound box at work and aggravated his preexisting asymptomatic right shoulder condition. Claimant was not having any pain or difficulty using his right shoulder prior to the work injury. The work injury caused Claimant to develop significant shoulder pain and severely restricted his shoulder function. In order to treat Claimant's shoulder pain and restricted shoulder function which was caused by the work injury, Dr. Papillion recommended a reverse total shoulder arthroplasty. Claimant was sent to Dr. Failinger for a second opinion. Dr. Failinger concurred that a reverse total shoulder arthroplasty was appropriate to treat Claimant's underlying condition and symptoms. As found, the reverse total shoulder arthroplasty is to decrease Claimant's shoulder pain and increase his shoulder function which were proximately caused by his work injury. The need for medical treatment, including the shoulder surgery, is not attributable to his asymptomatic underlying preexisting condition. Therefore, the ALJ concludes that the reverse total shoulder arthroplasty is reasonable, necessary, and related to Claimant's work injury.

Claimant, through his testimony, and the reports of Dr. Papillion and Dr. Failinger, has established by a preponderance of the evidence, his entitlement to medical benefits, including Dr. Papillion's recommended reverse total shoulder arthroplasty.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury to his right shoulder on September 5, 2017.

2. Respondents are liable for the medical care Claimant receives from authorized providers which is reasonably necessary to cure and relieve Claimant from the effects of his industrial injury to his right shoulder which occurred on September 5, 2017, as well as Dr. Papillion's recommended reverse total shoulder arthroplasty, subject to the Division of Workers' Compensation Medical Fee Schedule.

3. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 1, 2018

/s/ *Glen Goldman*

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a compensable "injury" as a result of an accident on September 30, 2017?

- If Claimant suffered a compensable injury, is he entitled to reasonably necessary and related medical treatment to cure and relieve the effects of the injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a stocker. On September 30, 2017, he slipped and fell while stocking product in a freezer. Claimant fell onto his left side, "on my hip." A co-worker, Austin Hanley, observed the fall "out of the corner of his eye." Mr. Hanley asked Claimant if he was okay and "he said he was fine, got up, and walked out of the freezer."

2. Claimant did not immediately request medical treatment and went home after his shift. Claimant testified he never felt pain in his left side but developed pain in the middle of his back toward the right side.

3. Claimant went to the St. Thomas More Hospital emergency department on October 2, 2017. He stated that he "fell at work (slipped in the freezer), landed on his left hip and hurt his lower back . . . . Pt reports the pain is central at his spine and radiates down into the right side and around the front of his leg." The physical examination was largely benign with only "moderate paraspinal tenderness." X-rays showed "advanced degenerative changes" but "nothing acute." The ER physician diagnosed a "myofascial strain" and discharged Claimant with prescriptions for ibuprofen and methocarbamol.

4. Later on October 2, 2017, Claimant reported the accident to his manager and completed an incident report. Claimant was given a list of designated providers, from which he chose Dr. Robert McCurry.

5. Claimant saw Dr. McCurry at the end of the day on October 2, 2017. He told Dr. McCurry "he slipped on ice in the freezing unit, landed on his left hip, and by the end of 2 more hours of work, had significant right low back discomfort, radiating into the buttocks." He had not filled the prescriptions given to him at the ER. Claimant denied any history of low back problems. Physical examination showed tenderness over the left trochanteric bursa but no ecchymosis. Dr. McCurry also appreciated tenderness and muscle spasm in the lumbar region, mainly on the right side. There were no findings relating to the left side of his back. Dr. McCurry diagnosed "acute mechanical low back pain secondary to fall." Claimant declined any specific treatment, stating instead "he will do self-directed home therapy program, with exercises given at the emergency

department today." Dr. McCurry took Claimant off work through October 8, with a follow-up visit on October 9 "before any returned to work."

6. Claimant returned to Dr. McCurry on October 9, 2017. He stated his pain was "much worse, 10/10, constantly," and he had severe pain with "any movement." At this visit, he told Dr. McCurry about a previous L4-5 herniated disc for which he received treatment "in the 1990s," even though he had denied any history of back problems at his first appointment.[1] Although Claimant was complaining of "10/10" pain, he had no difficulty walking into the exam room, causing Dr. McCurry to question whether his complaints were "exaggerated." Dr. McCurry recommended Claimant start physical therapy, renewed the ibuprofen and methocarbamol, and continued restrictions of "off work through 10-17-17."

7. Respondent obtained several hours of surveillance video of Claimant between October 16, 2017 and October 28, 2017. The video footage depicts Claimant engaged in a variety of activities with no observable difficulty or signs of pain, including bending and squatting to check and add air to his vehicle tires, entering and exiting his vehicle, shopping, lifting a microwave oven, carrying a gallon of milk, eating at restaurants, and bending over to pick up items from the ground.

8. Claimant next saw Dr. McCurry on October 31, 2017. He again reported severe pain and associated functional limitations. For example, he told Dr. McCurry after walking approximately 50-100 yards "the pain worsens to where he is no longer able to walk." He was not attending therapy or performing any home exercises. He arose from a chair and walked around Dr. McCurry's office without difficulty. He said he could not bend over or squat down due to severe pain, but on examination, his lumbar range of motion was significantly improved. There was no muscle spasm, tenderness, or reproducible discomfort with palpation of the lumbar spine and paravertebral musculature. Dr. McCurry stated "all of this is a significant improvement from his initial 2 visits." In contrast to Claimant's demonstrated improvement, Dr. McCurry noted "continued pain complaints of 10/10, unclear incongruency of his complaints to his exam tonight." Dr. McCurry released Claimant to modified duty and instructed him to follow-up in two weeks.

9. Dr. McCurry spoke to Claimant by telephone the next day. He did not report to work as planned because he was "in too much pain." Dr. McCurry stated, "I advised him that I watched him do the movements that he stated he could not do, and that he could use his pain medicine if he was in discomfort but that he needed to return to work." Claimant ended the call by hanging up on Dr. McCurry. Claimant subsequently canceled his November 15, 2017 follow-up appointment, and when Dr. McCurry's staff tried to reschedule, "he refused and said he would not be coming back to our office."

10. Dr. John Burris performed an IME for Respondent on February 27, 2018. Claimant reported pain of 7/10 in the low back and right leg. Despite that, he sat comfortably on the exam table and walked around the office with no difficulty. On examination, Claimant complained of diffuse superficial tenderness to light touch, but Dr.

[1] At hearing, Claimant admitted he had received a 27% whole person rating for this prior injury.

Burris appreciated no muscle spasm or trigger points. Lumbar flexion was self-limited to approximately 10°, at which point Claimant stated: "he can bend no further secondary to pain." He complained of pain on straight leg raising at approximately 10° bilaterally. Motor testing showed breakaway weakness with minimal effort. Claimant said he could not squat or kneel due to the pain. Dr. Burris commented, "he displays extreme pain behaviors which obscure his examination."

11. Dr. Burris reviewed the surveillance video and opined, "[Claimant] was seen to engage, in a normal manner, in numerous activities he currently states he cannot perform. All of his movements on the video are fluid, without hesitation, and appeared uninhibited. At no time did he appear to have difficulties, be limited in his movements, or to be in pain."

12. Dr. Burris concluded Claimant suffered a "minor myofascial lumbar strain from his reported slip and fall at work," but required no medical treatment. Dr. Burris explained, "the natural history of a minor myofascial strain is predictable recovery within days to weeks regardless of treatment." Dr. Burris further opined:

> Significant inconsistencies exist between [Claimant's] presentation at today's evaluation and activities documented on the surveillance video. On today's evaluation, he displays difficulties with all movements and range of motion of the lumbar spine. He states that there are several activities, such as squatting down, which he cannot perform. On the video surveillance, [Claimant] is seen moving freely without any difficulties in performing maneuvers that he does not perform, or states he cannot perform, during the examination. The discrepancy between today's presentation and the activity seen on the video surveillance, clearly indicates that [Claimant] is misrepresenting his physical capabilities."

13. Dr. McCurry testified in a deposition on March 27, 2018. Dr. McCurry opined that the location of Claimant's reported pain was unusual and "highly improbable" based on the mechanism of injury (*i.e.*, pain on the right side of his back after falling on his left hip). He testified Claimant's physical exams showed no significant objective findings to substantiate any injury. But despite several observed inconsistencies, he had given Claimant the benefit of the doubt and accepted his subjective complaints when recommending conservative treatment and restricting Claimant from work. Dr. McCurry had reviewed the surveillance video and opined it was inconsistent with Claimant's reported symptoms and claimed limitations. He used measured language and soft-pedaled some of his opinions to avoid unnecessarily disparaging his patient, but Dr. McCurry clearly has significant reservations regarding the veracity of Claimant's alleged symptoms.

14. Dr. Burris testified at hearing to reiterate and expound upon the opinions in his IME report. Dr. Burris' opinions and conclusions, as expressed in his report and clarified at hearing, are credible and persuasive.

15. Claimant failed to prove by a preponderance of the evidence that the September 30, 2017 accident proximately caused a compensable injury. Claimant's allegations of pain and limitations caused by the incident are not credible, and there is no persuasive objective evidence of injury. Although the ER physician and Dr. McCurry initially accepted Claimant's pain complaints at face value, prompting them to recommend treatment and impose work restrictions, the remainder of the evidence shows his subjective complaints are not reliable. When Claimant's allegations are removed from the equation, there is minimal persuasive evidence to substantiate his claim. Claimant told a co-worker immediately after the accident he was "fine," and displayed no observable sign of injury. He did not seek treatment for two days, and when he pursued treatment, he reported symptoms in his right lumbar area, which are not consistent with a fall on his left hip. Claimant initially denied any history of back problems to Dr. McCurry, even though he previously suffered an injury resulting in a 27% whole person lumbar spine rating. Claimant has undergone several post-accident physical exams with minimal findings, and his clinical presentation has generally been at odds with his contemporaneous reports of severe pain. Most important, the video shows Claimant performing a wide range of activities inconsistent with his reported pain levels and claimed incapacity. Claimant alleged he was "in too much pain" to work, but had no difficulty performing various activities around town, including putting air in his tires, going to restaurants, and shopping. Although the ALJ does not doubt Claimant slipped and fell in the freezer on September 30, he did not present sufficient evidence to prove that the accident proximately caused any "injury."

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO Aug. 17, 2016). Moreover, the

fact that a claimant receives some medical treatment after an accident does not automatically establish a compensable injury if the evidence ultimately shows the treatment was not reasonably necessary or proximately caused by the accident. *McTaggart-Kerns v. Dell, Inc*., W.C. No. 4-915-218-02 (May 29, 2014).

Based on the evidence presented, the ALJ concludes that Claimant did not suffer a compensable "injury" as a result of the September 30, 2017 accident. The minimal treatment and work restrictions Claimant received after the incident were based entirely on his subjective pain complaints, with no persuasive objective evidence of any injury. Although it is understandable for providers to give a patient the benefit of the doubt at their initial encounters, the overall evidentiary record casts serious doubt on the reliability of Claimant's complaints. The activity level demonstrated on the surveillance video is particularly concerning given Claimant's contemporaneous descriptions of "10/10" pain causing inability to perform even basic activities. As Dr. McCurry pointed out, the video shows Claimant "doing everything that he said that he could not perform." After reviewing all of the evidence, the ALJ concludes Claimant failed to prove that the September 30, 2017 slip and fall incident proximately caused a need for medical treatment or disability.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 6, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Gary Zuehlsdorff, M.D. that Claimant suffered a 16% whole person impairment as a result of her April 10, 2016 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant worked at Employer's fast food restaurant performing a variety of jobs. On April 10, 2016 Claimant slipped on trash while working in the kitchen area. She suffered right shoulder, right hip and back pain.

2. Claimant initially received medical treatment from Authorized Treating Physician (ATP) Robert Dixon, M.D. She subsequently underwent a course of conservative medical care and diagnostic testing.

3. On August 18, 2016 Claimant visited ATP Samuel Y. Chan, M.D. for an examination. Claimant reported pain in her thoracic spine and lower back. Dr. Chan prescribed a lumbar MRI to determine whether Claimant suffered from underlying discogenic disease or a neurological disorder. He noted that Claimant's right shoulder MRI was essentially normal.

4. On September 6, 2016 Claimant underwent a lumbar spine MRI. The MRI revealed degenerative changes at L4-L5 with moderate spinal canal stenosis and impingement on the descending L5 nerve root.

5. Beginning on November 29, 2016 Claimant underwent psychological counseling with Walter J. Torres, Ph.D. After administering psychological testing, Dr. Torres remarked that Claimant exhibited an extreme level of somatic complaints that were higher than 99% of all patients. Nevertheless, he commented that Claimant's "highly elevated symptom presentation on psychological testing reflects her overwhelmed state, and not necessarily a highly problematic characterological orientation."

6. Dr. Chan performed diagnostic epidural steroid injections and an S1 injection to address Claimant's lower back pain. However, the injections provided no benefit. On January 19, 2017 Dr. Chan thus remarked that Claimant's MRI findings did not constitute her pain generator.

7. Claimant completed a course of physical therapy through Select Physical Therapy. Claimant consistently reported lower back pain as a result of her April 10, 2016 slip and fall. She also completed chiropractic treatment but did not receive any benefit.

8. On March 20, 2017 Dr. Chan determined that Claimant had reached Maximum Medical Improvement (MMI). He noted that Claimant had received 11 months of "diagnostic, therapeutic intervention." Dr. Chan commented that, although Claimant was still reporting subjective pain complaints, her treatment had been "comprehensive and thorough." He noted that Claimant completed physical therapy and chiropractic treatment with no benefit. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)* he assigned a 5% rating for Claimant's lumbar spine. However, he did not assign a rating for lumbar flexion range of motion deficits because Claimant's measurements were invalid. Dr. Chan also assigned a 2% rating for a psychological disorder. Combining the 5% impairment for Claimant's lumbar spine with the 2% impairment for a psychological disorder yields a total 7% whole person rating.

9. In addressing Claimant's right shoulder condition Dr. Chan commented that, although Claimant reported right shoulder symptoms, her MRI was essentially normal. Claimant's lack of right shoulder pathology thus did not warrant a permanent impairment rating. Furthermore, Dr. Chan also did not assign an impairment rating for Claimant's cervical spine. He remarked that Claimant's cervical spine range of motion was within normal limits and "there was no tenderness with extension or rotation of the cervical spine bilaterally."

10. On March 24, 2017 Claimant visited Robert Broghemmer, M.D. from Dr. Dixon's office for an examination. He concurred with Dr. Chan's conclusion that Claimant reached MMI on March 20, 2017 with a 7% whole person impairment.

11. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Chan's MMI and permanent impairment determinations. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME).

12. On September 28, 2017 Claimant underwent a DIME with Gary Zuehlsdorff, M.D. Dr. Zuehlsdorff reported that Claimant was suffering from continuing pain in the "right lateral neck, right shoulder and right low back." He detailed that Claimant "had diffuse myofascial pain throughout the right side of her cervical spine, right shoulder girdle and right lumbosacral area." Dr. Zuehlsdorff agreed that Claimant reached MMI on March 20, 2017. However, he assigned a total 16% whole person impairment rating. The rating consisted of a 7% scheduled or 4% whole person rating for Claimant's right shoulder, 8% for her lumbar spine and 4% for her cervical spine. The lumbar spine rating consisted of 5% pursuant to Table 53 part 2-B of the *AMA Guides* and 3% for range of motion deficits. Dr. Zuehlsdorff assigned permanent work restrictions of no lifting, pushing, pulling or carrying in excess of 15 pounds. He did not recommend any medical maintenance benefits.

13. Dr. Zuehlsdorff explained his permanent impairment ratings. He commented that Claimant had continuously suffered subjective pain in her right neck, shoulder and lower back areas since the date of her industrial injury. Dr. Zuehlsdorff remarked that, although Claimant did not report cervical pain to her urgent care providers on the date of the accident, "urgent cares are notoriously poor for delineating all the pain

complexes." He thus determined that Claimant's cervical spine symptoms were "compensable." Dr. Zuehlsdorff concluded that Claimant suffered "fibromyalgia pain type syndrome" in the right lateral neck area, right shoulder girdle and right lumbosacral region." He acknowledged that other providers expressed concerns about Claimant's pain behaviors and lack of correlation between subjective and objective complaints. Dr. Zuehlsdorff could not verify whether Claimant's subjective pain complaints were valid. However, based on the moderate mechanism of injury and pain complaints since the date of the work accident, Dr. Zuehlsdorff reasoned that "she does have at least a fibromyalgia pain syndrome" that warranted impairment ratings. Dr. Zuehlsdorff thus "decided to assign" ratings for the lumbar spine, cervical spine and right shoulder.

14. On March 6, 2018 Lawrence A. Lesnak, D.O. performed an independent medical examination of Claimant. Dr. Lesnak reviewed Claimant's medical records and performed a physical examination. He agreed that Claimant had reached MMI on March 20, 2017. However, he assigned Claimant a total 5% whole person impairment rating for her lumbar spine based on Table 53 of the *AMA Guides*. Dr. Lesnak specifically noted that Claimant did not exhibit any lumbar range of motion deficits on dual inclinometer testing and thus assigned a 0% rating for lumbar spine range of motion impairment.

15. Dr. Lesnak detailed that Dr. Zuehlsdorff erroneously assigned Claimant an impairment rating for her right shoulder. He explained that Claimant did not exhibit any evidence of symptomatic right shoulder joint pathology related to the April 10, 2016 industrial accident. Dr. Lesnak remarked that Claimant demonstrated full active and passive range of motion of each shoulder joint. Similarly, Dr. Chan's medical records reflected that Claimant exhibited full range of motion of each shoulder in all planes. Dr. Lesnak thus concluded that Dr. Zuehlsdorff incorrectly assigned an impairment rating for Claimant's right shoulder.

16. Dr. Lesnak also explained that Dr. Zuehlsdorff erroneously and incorrectly assigned Claimant an impairment rating for her cervical spine. He remarked that Claimant "clearly" did not sustain any cervical spine pathology as a result of the April 10, 2016 work accident. Dr. Lesnak specified that there was no evidence that Claimant suffered "fibromyalgia-type" symptoms. Based on the administration of psychosocial screening tests, Claimant exhibited an underlying somatoform disorder that was unrelated to the April 10, 2016 industrial accident.

17. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Zuehlsdorff that Claimant suffered a 16% whole person impairment as a result of her April 10, 2016 admitted industrial injuries. Initially, on April 10, 2016 Claimant slipped on trash while working in Employer's kitchen area. She suffered pain in her right shoulder, right hip and back. Claimant underwent extensive conservative treatment and diagnostic testing. She reached MMI on March 20, 2017. Dr. Chan noted that Claimant completed physical therapy and chiropractic treatment with no benefit. He assigned a 5% whole person rating for Claimant's lumbar spine and a 2% rating for a psychological disorder for a total 7% whole person rating.

18. DIME Dr. Zuehlsdorff agreed that Claimant reached MMI on March 20, 2017. However, he assigned a total 16% whole person impairment rating. The rating consisted of a 7% scheduled or 4% whole person rating for Claimant's right shoulder, 8% for her lumbar spine and 4% for her cervical spine. He commented that Claimant had continuously suffered subjective pain in her right neck, shoulder and lower back areas since the date of her industrial injury. Dr. Zuehlsdorff determined that Claimant suffered "fibromyalgia pain type syndrome" in the right lateral neck area, right shoulder girdle and right lumbosacral region. He acknowledged that other providers expressed concerns about Claimant's pain behaviors and lack of correlation between subjective and objective complaints. Dr. Zuehlsdorff also could not verify whether Claimant's subjective pain complaints were valid. Nevertheless, based on the moderate mechanism of injury and pain complaints since the date of the work accident "she does have at least a fibromyalgia pain syndrome" that warranted impairment ratings. Dr. Zuehlsdorff thus "decided to assign" impairment ratings for the lumbar spine, cervical spine and right shoulder.

19. The record reveals that Dr. Zuehlsdorff based his diagnosis of "fibromyalgia type syndrome" on Claimant's subjective complaints. He acknowledged that he was unable to verify any correlation between Claimant's subjective complaints and the objective medical pathology. Dr. Zuehlsdorff's opinion is contradicted not only by Dr. Lesnak, but also by Drs. Chan and Broghemmer. He generally failed to adequately consider the diagnosis of somatoform disorder as confirmed by Dr. Lesnak during psychosocial screening tests. Moreover, Dr. Torres specifically found that Claimant had a high level of somatic pain complaints that rendered subjective reporting unreliable.

20. Dr. Zuehlsdorff specifically erred in determining that Claimant sustained a neck injury on April 10, 2016 because there is a lack of objective medical evidence in the record supporting the determination. Drs. Chan, Broghemmer and Dixon all evaluated Claimant and none of them diagnosed a specific neck injury. Dr. Lesnak remarked that Claimant "clearly" did not sustain any cervical spine pathology as a result of the April 10, 2016 work accident. He explained that there was no evidence that Claimant suffered "fibromyalgia-type" symptoms. Finally, Dr. Chan also did not assign an impairment rating for Claimant's cervical spine. He remarked that Claimant's cervical spine range of motion was within normal limits and "there was no tenderness with extension or rotation of the cervical spine bilaterally."

21. Dr. Lesnak persuasively reasoned that Dr. Zuehlsdorff erroneously assigned a permanent impairment rating for Claimant's right shoulder. The record lacks objective, clinical evidence of right shoulder joint pathology to warrant an impairment rating. Dr. Lesnak explained that Claimant did not exhibit any evidence of symptomatic right shoulder joint pathology related to the April 10, 2016 industrial accident. He remarked that Claimant demonstrated full active and passive range of motion of each shoulder joint. Furthermore, Dr. Chan commented that, although Claimant reported right shoulder symptoms, her right shoulder MRI was essentially normal. Claimant's lack of right shoulder pathology thus did not warrant a permanent impairment rating.

22. Respondents have produced unmistakable evidence free from serious or substantial doubt that it is highly probable that Dr. Zuehlsdorff's 16% whole person impairment rating is incorrect. The record is simply devoid of objective clinical evidence that Claimant suffered continuing cervical spine or right shoulder pathology as a result of the April 10, 2016 work accident. Dr. Zuehlsdorff linked Claimant's "fibromyalgia-type" symptoms to the work accident in the absence of objective evidence or a causal analysis.

23. Finally, Drs. Lesnak, Chan and Broghemmer agreed with Dr. Zuehlsdorff that Claimant suffered a 5% whole person impairment rating to her lumbar spine as a result of the industrial incident. However, based on Claimant's documented subjective symptoms that fail to correlate with objective findings, Dr. Zuehlsdorff erroneously assigned a 3% impairment rating for lumbar range of motion deficits. Dr. Chan did not assign a rating for lumbar flexion range of motion deficits because Claimant's measurements were invalid. Moreover, Dr. Lesnak specifically noted that Claimant did not exhibit any lumbar range of motion deficits on dual inclinometer testing and thus assigned a 0% rating for lumbar spine range of motion impairment. Accordingly, Claimant is entitled to receive a 5% whole person i9mpairment rating for her April 10, 2016 work accident.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. A physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings. §8-42-101(3.7), C.R.S. Table 53(II)(B) of the AMA Guides assigns a 5% whole-person rating where an injured worker suffers an "intervertebral disc or other soft tissue lesion" in the lumbar spine which is unoperated, with a medically documented injury and, "[A] minimum of six months of medically documented pain and rigidity with or without muscle spasm." The determination of whether a claimant meets the criteria of Table 53 II.B is made at the time of MMI and not at the time of any subsequent evaluation. *Lopez v. Cargill Meat Solutions*, W.C. Nos. 4-757-408 and 4-758-952 (Sept. 9, 2010). In order to receive a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established.

8. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the

correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., W.C. No. 4-600-47 (ICAP, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAP, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAP, Sept. 16, 2002).

9. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Zuehlsdorff that Claimant suffered a 16% whole person impairment as a result of her April 10, 2016 admitted industrial injuries. Initially, on April 10, 2016 Claimant slipped on trash while working in Employer's kitchen area. She suffered pain in her right shoulder, right hip and back. Claimant underwent extensive conservative treatment and diagnostic testing. She reached MMI on March 20, 2017. Dr. Chan noted that Claimant completed physical therapy and chiropractic treatment with no benefit. He assigned a 5% whole person rating for Claimant's lumbar spine and a 2% rating for a psychological disorder for a total 7% whole person rating.

10. As found, DIME Dr. Zuehlsdorff agreed that Claimant reached MMI on March 20, 2017. However, he assigned a total 16% whole person impairment rating. The rating consisted of a 7% scheduled or 4% whole person rating for Claimant's right shoulder, 8% for her lumbar spine and 4% for her cervical spine. He commented that Claimant had continuously suffered subjective pain in her right neck, shoulder and lower back areas since the date of her industrial injury. Dr. Zuehlsdorff determined that Claimant suffered "fibromyalgia pain type syndrome" in the right lateral neck area, right shoulder girdle and right lumbosacral region. He acknowledged that other providers expressed concerns about Claimant's pain behaviors and lack of correlation between subjective and objective complaints. Dr. Zuehlsdorff also could not verify whether Claimant's subjective pain complaints were valid. Nevertheless, based on the moderate mechanism of injury and pain complaints since the date of the work accident "she does have at least a fibromyalgia pain syndrome" that warranted impairment ratings. Dr. Zuehlsdorff thus "decided to assign" impairment ratings for the lumbar spine, cervical spine and right shoulder.

11. As found, the record reveals that Dr. Zuehlsdorff based his diagnosis of "fibromyalgia type syndrome" on Claimant's subjective complaints. He acknowledged that he was unable to verify any correlation between Claimant's subjective complaints and the objective medical pathology. Dr. Zuehlsdorff's opinion is contradicted not only by Dr. Lesnak, but also by Drs. Chan and Broghemmer. He generally failed to adequately consider the diagnosis of somatoform disorder as confirmed by Dr. Lesnak during psychosocial screening tests. Moreover, Dr. Torres specifically found that Claimant had a high level of somatic pain complaints that rendered subjective reporting unreliable.

12. As found, Dr. Zuehlsdorff specifically erred in determining that Claimant sustained a neck injury on April 10, 2016 because there is a lack of objective medical evidence in the record supporting the determination. Drs. Chan, Broghemmer and Dixon

all evaluated Claimant and none of them diagnosed a specific neck injury. Dr. Lesnak remarked that Claimant "clearly" did not sustain any cervical spine pathology as a result of the April 10, 2016 work accident. He explained that there was no evidence that Claimant suffered "fibromyalgia-type" symptoms. Finally, Dr. Chan also did not assign an impairment rating for Claimant's cervical spine. He remarked that Claimant's cervical spine range of motion was within normal limits and "there was no tenderness with extension or rotation of the cervical spine bilaterally."

13. As found, Dr. Lesnak persuasively reasoned that Dr. Zuehlsdorff erroneously assigned a permanent impairment rating for Claimant's right shoulder. The record lacks objective, clinical evidence of right shoulder joint pathology to warrant an impairment rating. Dr. Lesnak explained that Claimant did not exhibit any evidence of symptomatic right shoulder joint pathology related to the April 10, 2016 industrial accident. He remarked that Claimant demonstrated full active and passive range of motion of each shoulder joint. Furthermore, Dr. Chan commented that, although Claimant reported right shoulder symptoms, her right shoulder MRI was essentially normal. Claimant's lack of right shoulder pathology thus did not warrant a permanent impairment rating.

14. As found, Respondents have produced unmistakable evidence free from serious or substantial doubt that it is highly probable that Dr. Zuehlsdorff's 16% whole person impairment rating is incorrect. The record is simply devoid of objective clinical evidence that Claimant suffered continuing cervical spine or right shoulder pathology as a result of the April 10, 2016 work accident. Dr. Zuehlsdorff linked Claimant's "fibromyalgia-type" symptoms to the work accident in the absence of objective evidence or a causal analysis.

15. As found, finally, Drs. Lesnak, Chan and Broghemmer agreed with Dr. Zuehlsdorff that Claimant suffered a 5% whole person impairment rating to her lumbar spine as a result of the industrial incident. However, based on Claimant's documented subjective symptoms that fail to correlate with objective findings, Dr. Zuehlsdorff erroneously assigned a 3% impairment rating for lumbar range of motion deficits. Dr. Chan did not assign a rating for lumbar flexion range of motion deficits because Claimant's measurements were invalid. Moreover, Dr. Lesnak specifically noted that Claimant did not exhibit any lumbar range of motion deficits on dual inclinometer testing and thus assigned a 0% rating for lumbar spine range of motion impairment. Accordingly, Claimant is entitled to receive a 5% whole person i9mpairment rating for her April 10, 2016 work accident.

ORDER

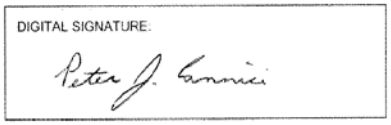
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant reached MMI on March 20, 2017 and suffered a 5% whole person impairment rating to her lumbar spine as a result of her April 10, 2016 admitted industrial injuries.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 6, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury/compensable aggravation to his left shoulder on December 16, 2017.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to medical benefits for his left shoulder injury including the treatment he received at urgent care, Platte Valley Medical Center, and with Dr. Mason.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from December 16, 2016 through December 23, 2016 and from February 16, 2018 and ongoing until terminated by statute.

STIPULATIONS

1. Claimant's average weekly wage is $1,198.15.

FINDINGS OF FACT

1. Claimant is employed by Employer as an inspector with duties that include inspecting oil and gas wells. In December of 2016 Claimant was inspecting oil and gas wells in northern Colorado.

2. On December 15, 2016 Claimant testified that he was out all day performing his normal job duties and that the wind was very strong. Claimant had to fight the wind when opening and closing the driver's side door on his vehicle which made his left arm sore.

3. On December 16, 2016 Claimant testified that it was again very windy with wind gusts he estimated at 40 to 50 miles per hour. Claimant testified that the wind "caught him again" when he opened his driver's door and that the wind yanked or jerked the driver's side door extremely hard on one specific occurrence while he was holding onto the door handle to prevent the door from being sprung out or slammed into the truck.

4. Claimant testified that previously he had let the door go during a wind event and that the door had "sprung" and caused some damage and that he didn't want that to happen again so held onto the door on the date in question.

5. Claimant testified that he felt pain in his left chest and left shoulder. Claimant testified that his chest was hurting, his fingers were tingling, his biceps hurt, and that the top of his left shoulder hurt. Claimant was worried that he was having a heart

attack due to his pain and symptoms. Claimant called his supervisor and went to urgent care.

6. On December 16, 2016 Walk Right In Urgent Care evaluated Claimant. Claimant reported left sided chest pain that started an hour prior after opening a car door. Claimant reported tightness, being sweaty, and nausea. Claimant reported discomfort at a 7/10 in severity localized to the left mid parasternal region and that it did not radiate. Claimant underwent an EKG, was given one dose of SL nitro with reported pain reduction, and was referred to Platte Valley Medical Center (PVMC) for further cardiac treatment. *See* Exhibit 1.

7. On December 16, 2016 Thientu Truong, M.D. evaluated Claimant at PVMC. Claimant reported chest pain while at work as a gas inspector and while driving. Claimant reported left sub sternal chest pain, aching in nature that radiated through the shoulder and down his arm with numbness and tingling of the first three digits of his left hand. Vitals showed Claimant to be hypertensive. Claimant reported that sublingual nitrol had been given to him and completely resolved his pain but that the chest pain had returned. Claimant also reported diaphoresis, shortness of breath, and nausea. Claimant reported never having had chest pain like this before. Claimant's EKG and portable chest x-ray were normal but Claimant was placed in observation. *See* Exhibits 1, D.

8. The next day, Claimant was discharged from PVMC with discharge diagnoses of chest pain, negative stress test, hypertension, hyperlipidemia, and gastro esophageal reflux disease. The hospital course listed Claimant's concerning symptoms of left shoulder pain with some numbness in the fingertips. It also noted that Claimant had done some lifting which may have caused the left shoulder pain. Claimant was discharged in stable condition with no further chest pain and was instructed to follow up with his primary care physician. *See* Exhibits 1, D.

9. On December 22, 2016 Claimant filled out an "employee statement of injury/illness exposure." Claimant reported that he was injured on December 16, 2016. Claimant reported that he pulled muscles in his chest, arm, and shoulder and that he "got out of truck wind gust caught door and I held on door to keep from springing hinges and tore muscles in my arm, shoulder, and chest, wind gusts were 40 to 50 mph that day, chest pains thought I was having heart attack." *See* Exhibit 2.

10. Following the incident, Claimant missed work on December 19, 20, 21, 22, and 23. Claimant was released back to work by his primary care physician Martin McDermott, M.D. who noted Claimant was fit to return to work after December 23, 2016. *See* Exhibits 2, D.

11. On December 23, 2016 Claimant returned to his normal job and continued working his normal duties. Claimant testified that the pain had let up a little bit and that he was able to live with it. Claimant did not seek treatment between the end of December, 2016 and the end of July, 2017, a period of approximately 7 months. Claimant testified

that after golfing in the summer, and realizing that he still had pain and it wasn't getting better on its own, he decided to seek treatment.

12. On July 31, 2017 Claimant was evaluated by Kristin Mason, M.D. Claimant reported that he was injured on approximately December 15 or 16, 2016 when working out on the prairie. Claimant reported there were 40-70 mile per hour wind gusts and that he had to get in and out of his truck multiple times in the day and that on about 10 to 12 occasions the door was blown open, yanking his left arm, and that on at least one occasion he came out of the truck with the door and landed hard on his right leg. The following day Claimant reported he had similar incidents about six to eight times. Claimant reported that he developed pain in the left pectoral area as well as some tingling into the hand and was seen in the emergency department for a cardiac workup that was negative. Claimant reported continued left shoulder pain since as well as pain in the sacroiliac area and some pain in the ball of his foot. Claimant reported that he had seen the chiropractor a few times and that he had continued to work full duty but felt he was getting worse at times. Claimant reported difficulty reaching away from his body, particularly over shoulder level. Claimant reported pain at a 3/10. Claimant reported that he had two prior left shoulder surgeries, one prior right shoulder surgery, and that he just had a total knee replacement in April of 2017. Dr. Mason performed a physical examination and provided the assessment of: patient with prior history of rotator cuff repair x2 now with possible re-tear as well as deformity of the biceps tendon consistent possibly with long head of the biceps tearing; and left SI area pain. Dr. Mason recommended an MRI of the left shoulder. *See* Exhibits 3, D.

13. On August 11, 2017 Claimant underwent an MRI of his left shoulder. The impression provided was: status post rotator cuff repair with a very large full thickness tear involving the majority of the supraspinatus and infraspinatus tendons and possibly extending into the cranial aspect of the subscapularis and teres minor tendons with retraction to near the level of the glenoid and moderate volume loss within all the rotator cuff muscles; full thickness tearing of the long head of the biceps tendon which is retracted and seen within the bicipital groove; mild degenerative changes in the acromioclavicular joint with contrast extending into the subacromial subdeltoid bursa; narrowing of the acromiohumeral distance with remodeling of the undersurface of the acromion; and mild to moderate chondral thinning over the humeral head and over the glenoid posteriorly and superiorly. *See* Exhibit 3.

14. On August 24, 2017 Dr. Mason evaluated Claimant. Claimant reported feeling the same with a pain level of 3/10. Dr. Mason reviewed the MRI results. Dr. Mason noted on physical examination that Claimant was actually able to abduct the left upper extremity to about 130 or 140 degrees. She opined that Claimant was still weak in the rotator cuff muscles and still had a popeye deformity of the left biceps. She assessed a history of prior rotator cuff repair x2 now with a massive re-tear of the supraspinatus, infraspinatus, and biceps longhead tendons and recommended a surgical referral. *See* Exhibits 3, D.

15. On November 14, 2017 Claimant was evaluated by Armodios Hatzidakis, M.D. Claimant reported that December 15 and 16, 2016 were very windy at work and that the wind constantly blew his car door outwards and pulled his arm back with him. Claimant reported that he went to the hospital for his pain and was evaluated and that since his shoulder had continued to be bothersome. Claimant reported that he could not golf anymore and that he had weakness with abduction. Claimant reported 4-5 previous rotator cuff repair surgeries performed by Dr. Cavanaugh all on the left side. Claimant reported that his shoulder had not been bothersome since 2000 until this incident. Claimant also reported that his shoulder was at 35-40% of normal. Dr. Hatzidakis performed a physical examination, took x-rays, and reviewed Claimant's August 2017 MRI. Dr. Hatzidakis assessed: left shoulder glenohumeral joint osteoarthritis with rotator cuff deficiency, history of previous surgery. Dr. Hatzidakis opined that Claimant would likely need a reverse shoulder arthroplasty. Dr. Hatzidakis noted that Claimant could continue with his shoulder as is and proceed with surgical intervention at a later point when Claimant was ready. *See* Exhibit D.

16. On February 5, 2017 William Ciccone II, M.D. performed an independent medical evaluation. Claimant reported that while working on a very windy day, he opened the truck door which pulled his left arm causing an injury to his shoulder. Claimant reported that it happened twice, initially on December 15, 2016. Claimant also noted that he had increasing pain in the chest at the time and thought he was having a myocardial infarction so went to an urgent care facility. Claimant reported a long history of left shoulder problems with four rotator cuff repairs in the shoulder, the first two in the 1990s and the last two in early 2000s. Claimant reported that he did not recall if he had a rating for his shoulder back at that time. Claimant reported that he was given permanent work restrictions in 2000. Claimant reported that he had been able to reach and lift overhead with occasional posterior pain and that he noted that the difference in his shoulder from prior to this injury versus after this injury was that it felt weaker. Dr. Ciccone reviewed medical records and performed a physical examination. *See* Exhibit D.

17. Dr. Ciccone opined that Claimant did not suffer a work related injury to the left shoulder and right hip on December 16, 2016. Dr. Ciccone opined that it was highly unlikely that a car dull pulling on the arm would cause significant injury to the shoulder, even in high winds. Dr. Ciccone also noted that Claimant's pain completely resolved in the emergency department on the day of the injury and that it would be unlikely for someone to suffer an acute rotator cuff tear and then have no pain in the same day. Dr. Ciccone noted that Claimant had a long history of shoulder problems with four rotator cuff surgeries in the past. Dr. Ciccone opined that the findings on the MRI scan were chronic in nature and that muscle loss occurs only in long standing rotator cuff pathology. Dr. Ciccone also noted that Claimant sought out no medical care for the injury for over seven months and that for a significant injury he would have expected medical follow up sooner. Dr. Ciccone opined that a reverse shoulder arthroplasty is appropriate for Claimant's chronic unrepairable rotator cuff pathology. Dr. Ciccone opined that the need for the procedure was not work related. *See* Exhibit D.

18. On February 26, 2018 Dr. Hatzidakis performed surgery on Claimant's left shoulder. The postoperative diagnosis was left shoulder extensive irreparable rotator cuff tear with end-stage glenohumeral osteoarthritis and retained hardware. Dr. Hatzidakis performed a total shoulder replacement. *See* Exhibits 4, D.

16. Claimant testified, and the medical records and evidence establish, that he had four prior left shoulder surgeries.

17. In 1996 Claimant injured his left shoulder after falling and catching himself with his left arm in an abducted and externally rotated position and had a left rotator cuff arthroscope in June of 1996. *See* Exhibit C.

18. In November of 1996 Claimant underwent a left distal clavicle resection. *See* Exhibit C.

19. In October of 2002 Claimant underwent a left rotator cuff surgery. *See* Exhibit C.

20. On August 31, 2009 Claimant was evaluated by Martin McDermott, M.D. Claimant reported moderate pain in both shoulders for years. Claimant reported this was a chronic problem aggravated by work which involved heavy labor. Dr. McDermott assessed joint pain of the shoulder and prescribed naproxen and hydromorphone. *See* Exhibit C.

21. On March 22, 2010 Claimant filled out an orthopedic patient history form. Claimant reported slipping and hitting his shoulders and that he had pain at a 6/10 in both shoulders that was always there. Claimant reported that the right shoulder hurt more that day but that he injured both shoulders at the same time. An MRI of the right shoulder was taken on April 21, 2010 and showed AC inferior spur, severe S tendonosis vs. complete tear, and longitudinal split biceps. *See* Exhibit C.

22. On November 4, 2010 Claimant was evaluated by Tony Euser, D.O. Claimant was there for follow up on right shoulder pain. Claimant also reported concerns of low back pain, left shoulder pain, and right knee pain and Dr. Euser reviewed that they were only authorized to treat the right shoulder. *See* Exhibit C.

23. Dr. Ciccone testified by deposition. Dr. Ciccone specializes in shoulder surgery and performs approximately 20-30 surgeries per month. Dr. Ciccone opined that the August 2017 MRI of Claimant's let shoulder showed no findings that were acute in nature. Dr. Ciccone noted that Claimant's MRI showed prior repairs of the rotator cuff with anchors placed in the humeral head which are used to pull the tendon back to the bone. Dr. Ciccone noted that Claimant's tendon retracted off the bone, and that while it could be an acute finding, in Claimant's case the tendons were retracted all the way back to the glenoid which occurs with more chronic tears. Dr. Ciccone also noted the significant atrophy of the musculature of the rotator cuff that and opined that only occurred with chronic tearing. Dr. Ciccone also opined that when you see remodeling of the

undersurface of the acromion, it means that the humeral head has been high riding for a long period of time which correlates to a chronic rotator cuff dysfunction. Dr. Ciccone also opined that the surgical findings matched the findings from the MRI and that there were no acute findings in the surgical report. Dr. Ciccone opined that surgery was reasonable and necessary for Claimant but that it was not related in any way to his complaints of a work injury on or around December 16 and 17, 2016.

24. Dr. Ciccone opined that the mechanism of injury described by Claimant did not correlate to either the MRI or the surgical findings and that the mechanism of injury described by Claimant did not correlate with an acute injury. Dr. Ciccone opined that catching a door when it was flying open would not have enough traction on the arm to cause the type of problems Claimant had. Dr. Ciccone opined that Claimant's complaints made in December of 2016 could potentially be consistent with a symptomatic flare of underlying degenerative condition and/or pre-existing rotator cuff injuries and that it was more probable than not that Claimant had symptomatology from his underlying condition without a new acute injury or acute aggravation. Dr. Ciccone opined that normal use could cause Claimant to go from being asymptomatic to symptomatic with the condition of Claimant's shoulder and the chronic shoulder pathology Claimant had.

25. Dr. Ciccone testified that a history of four prior rotator cuff surgeries made it more likely than not that Claimants' shoulder would need to be replaced in the future because rotator cuff degeneration is progressive in nature and that once you had a large tear, it usually gets worse with time and then you get the muscle atrophy on top of it. Dr. Ciccone testified that with time the shoulder dysfunction becomes greater and usually more painful and gets worse with time as a natural course of the disease not related to trauma, acute injury, or acute aggravation.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should

consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability of left shoulder

Claimant is required to prove by a preponderance of the evidence that the condition for which he seeks medical treatment was proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). ICAO has noted that pain is “a typical symptom from the aggravation of a pre-existing condition” and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet his burden to establish that he sustained a left shoulder injury or compensable aggravation of his left shoulder condition on December 16, 2016. Although Claimant argues that there is no evidence of any other event, incident, or

condition that could have caused Claimant's shoulder to become symptomatic such that he sought medical care in December 2016 other than the wind catching the door, this is not persuasive. The natural progression of Claimant's severe underlying condition is a condition that could have caused Claimant's underlying condition to become symptomatic and Claimant has failed to meet his burden to show, more likely than not, that the incident on December 16, 2016 aggravated his underlying condition.

Claimant reported pain at a 7/10 at the urgent care center. Within a short time, his pain level was reported as down to a 3/10 and he was able to return to full duty work. Dr. Ciccone is credible and persuasive that the MRI showed changes that take a long time to develop and that it showed nothing acute including no acute injury and no acute aggravation to the underlying condition. Prior to the incident with the wind and door at work, Claimant had severe tearing with severe retraction that takes years to develop. Claimant had muscle atrophy that also takes years to develop.

Claimant's reports that he had no problems with his left shoulder in the years leading up to this incident with the door and wind in December of 2016 are not found credible or persuasive. As found above, in August of 2009 Claimant reported that he had moderate pain in both of his shoulders and that he had the pain for "years." Claimant reported that the bilateral shoulder pain was a chronic problem. Over a year later, in November of 2010 Claimant wanted left shoulder treatment and reported concerns of left shoulder pain but Claimant was told that the doctor was only authorized to treat his right shoulder. Although there is a lack of treatment records for the left shoulder during a period of time leading up to this work incident in December of 2016, Claimant clearly reported his left shoulder pain as a chronic problem in August of 2009 and wanted treatment for it in November of 2010 which was denied. It is highly unlikely that the left shoulder pain he reported as a chronic problem in 2009 and that he sought treatment that was denied in 2010 suddenly went away given the amount of extensive damage in his left shoulder shown by MRI imaging.

Dr. Ciccone is credible and persuasive that the findings on the MRI scan were chronic in nature and that the muscle loss only occurs in long stating rotator cuff pathology. Dr. Ciccone's opinion that Claimant did not sustain a work related injury or work related aggravation to his underlying condition is credible and persuasive. Claimant has failed to show, more likely than not, that the incidents at work in December of 2016 aggravated his underlying condition. Rather, it is just as likely that any symptoms Claimant experienced while at work were the result of the natural progression of his pre-existing condition unrelated to his employment.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury/compensable aggravation to his left shoulder. His claim is denied and dismissed.

2. As Claimant did not sustain a compensable injury, his request for medical benefits and temporary indemnity benefits is also denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 7, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

W.C. No. 4-790-122-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

PINNACOL ASSURANCE,

Insurer/Respondents.

A hearing on the merits in the above-referenced matter is scheduled for June 28, 2018, in Denver, Colorado. On March 2, 2018, the Claimant filed an Application for Hearing on the issue of medical benefits and Petition to Re-open. Upon receipt of the Claimant's Application for Hearing on March 2, 2018, Respondents requested a pre-hearing conference on the issue of striking the Claimant's March 2, 2018 Application for Hearing. The pre-hearing conference was held on March 23, 2018 before Pre-Hearing Administrative Law Judge (PALJ), John H. Sandberg. Respondents alleged that the statute of limitations barred the Claimant's Application for Hearing. PALJ Sandberg determined that an affirmative defense, *i.e.* "statute of limitations" must be determined by an Administrative Law Judge (ALJ)t from the Office of Administrative Courts (OAC).

Thereafter, the Respondents filed Motion for Summary Judgment, dated April 18, 2018 on the issue of the Claimant's Application for Hearing as herein above specified.

The Motion contained attachments, including Respondents' Final Admission of Liability (FAL) [Exhibit D, attached to Motion]. As of the date of this decision, the Claimant has filed no timely written Response to the Motion for Summary Judgment. The matter was deemed submitted for decision on April 23, 2018 and was referred to ALJ Edwin L. Felter, Jr. on April 27, 2018 for a ruling.

Hereinafter Jesse Taylor shall be referred to as the "Claimant." Cade Drilling, LLC shall be referred to as the "Employer." All other parties shall be referred to by name.

ISSUES FOR SUMMARY JUDGMENT

The issues to be determined by this decision concern whether there are genuine issues of disputed material fact concerning whether the Claimant failed to contest the FAL and request a hearing within the time allowed by the statute of limitations. §8-43-203(b)(ii), C.R.S; AND, whether the Claimant's Petition to Re-Open was filed within the time specified in the statute of limitations pursuant to §8-43-303(1), § § (2)(a), and § § (2)(b). Respondents also raised the affirmative defense of laches.

Respondents bear the burden of proof, by preponderance of the evidence on the "statute of limitations" affirmative defense and the doctrine of laches affirmative defense.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Finding

1. A hearing is currently set in this matter for June 28, 2018, pursuant to the Claimant's Application for Hearing. The hearing issues include medical benefits and Petition to Re-open. The Claimant's request to re-open W.C. No. 4-790-122-001 for benefits under §8-43-303(1), § § (2)(a), and § § (2)(b), C.R.S., arise from a dental evaluation performed on November 16, 2017.

Undisputed Facts

2. The Claimant was an employee of the Employer at the time of his injury.

3. On December 16, 2008, the Claimant was injured in the course and scope of his employment. Pinnacol Assurance admitted liability for this claim and benefits were provided pursuant to statute.

4. Over the course of the claim, the Claimant failed to attend numerous medical appointments with his designated provider, Cathy D. Smith, M.D., including an appointment set for April 20, 2010 for a final evaluation and impairment rating. The final evaluation was rescheduled for June 22, 2010 and the Claimant failed to attend this appointment as well (Exhibit A, attached to Motion).

5. The Claimant was contacted in an attempt to reschedule the final evaluation and Dr. Smith's office was advised by the Claimant that he had moved out of state and he would not be returning for any further evaluations (Exhibit B, attached to Motion).

6. On August 3, 2010, Dr. Smith stated the opinion that the Claimant had reached maximum medical improvement (MMI) and Claimant was discharged from treatment due to non-compliance. Dr. Smith provided an impairment rating of 3% of the whole person, based upon the Claimant's last evaluation on March 23, 2010 (Exhibit C, attached to Motion).

7. On August 23, 2010, Respondents filed an FAL, admitting for the 3% whole person impairment rating provided by Dr. Smith and for reasonably necessary and causally related medical treatment and/or medications after MMI (Exhibit D, attached to Motion).

8. The Claimant filed **no** timely objection to the August 23, 2010 FAL. A Final Payment Notice was filed by Respondents on October 22, 2010.

Petition to Re-Open

9. On or about December 7, 2017, the Respondents received a Petition to Re-Open, dated December 4, 2017. This was received buy the Respondents more than ten (10) years from the Final Payment Notice, referenced herein above. The Claimant alleges that this claim should be re-opened due to a change in condition (Exhibit E, attached to Motion).

10. Thereafter, on March 2, 2018, the Claimant filed an Application for Hearing, endorsing medical benefits and Petition to Re-Open as issues for hearing. The hearing is set for June 28, 2018 (Exhibit F, attached to Motion),

11. Upon receipt of the Claimant's Application for Hearing, the Respondents scheduled a pre-hearing conference on the issue of striking the Claimant's March 2, 2018 Application for Hearing.

12. The pre-hearing conference was held on March 23, 2018 before PALJ Sandberg. PALJ Sandberg stated in part, “Respondents’ oral motion to strike the application for hearing as barred by the statute of limitations is, in effect, an affirmative defense that must be pled before OAC. This PALJ is without statutory authority to grant the relief sought, namely, finding as a matter of fact that the petition to reopen is untimely.” Therefore, Respondents request that Claimant’s March 2, 2018 Application for Hearing be stricken was denied (Exhibit G, attached to Motion).

13. On April 18, 2018, the Respondents filed a Motion for Summary Judgment stating that Claimant’s Application for Hearing does not comply with the statute of limitations specified in §8-43-203(2)(b)(ii), C.R.S. and that Claimant failed to apply to re-open this claim in accordance with §8-43-303(1), § § (2)(a), and § § (2)(b), C.R.S.

14. The Respondents attempted to confer with the Claimant regarding the Motion for Summary Judgment. Claimant has not responded to Respondents’ Motion for Summary Judgment.

Ultimate Findings

15. Respondents have established, by a preponderance of the evidence that there is no genuine, disputed issue of material fact concerning Claimant’s failure to comply with the statute of limitations set forth in §8-43-203(2)(b)(ii), C.R.S., and §8-43-303(1), § § (2)(a), and § § (2)(b).

16. It is undisputed that the Claimant has not responded, or denied, in writing, that his Application for Hearing and Petition to Re-Open were not timely.

17. It is undisputed that the Claimant has not alleged that he was **timely** in filing his Application for Hearing or petitioning to re-open this claim. The Claimant has failed to show or allege that there is a genuine issue of disputed material fact with respect to the timing of the Application for Hearing and Petition to Re-Open.

18. It is undisputed that Respondents took the position that Claimant had failed to comply with the statutes of limitations. It is undisputed that the Claimant failed to contest the FAL and file an Application for Hearing on or before September 23, 2010, thirty days after the FAL was filed. It is also undisputed that the Claimant did not petition to re-open his claim: on or before December 16, 2014, six years after the date of injury; on or before September 20, 2012, two years after the last permanent partial disability benefits became due or payable; on or before March 23, 2012, two years after the last medical benefits became due or payable. The Claimant’s failure to object to the FAL and request a hearing automatically closed the issue of overpayment. Because Claimant failed to comply with the statutory provisions cited above, the Claimant is barred from pursuing any additional benefits as this claim is closed by operation of law.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Summary Judgment is supported by documents. As further found, the Claimant has not responded in writing, nor has he alleged that his Application for Hearing was within the statute of limitations pursuant to §8-43-203(b)(ii), C.R.S. As further found, Claimant has not alleged that his Petition to Re-Open was within the statute of limitations pursuant to §8-43-303(1), (2)(a), and (2)(b), C.R.S.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the documentary evidence establishes that it is undisputed that the Claimant's Application for Hearing and Petition to Re-Open exceeded the statutes of limitations.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Respondents' Motion for Summary Judgment shows specific facts probative of a right to summary judgment; and, the Claimant has failed to show that there is a genuine issue of disputed material fact for hearing.

Claimant's Failure to Comply with the Statutes of Limitations

d. As found, the Claimant failed to object to Dr. Smith's finding that Claimant reached MMI as admitted in the FAL. A workers' compensation claim automatically closes after thirty days "as to the issues admitted" in a FAL if the claimant does not contest the FAL in writing and does not request a hearing on any disputed issues. § 8-43-203(2)(b)(II)(A), C.R.S. The phrase "as to the issues admitted" refers "to issues on which the employer affirmatively takes a position, either by agreeing to pay benefits or by denying liability to pay benefits." *Dyrkopp v. Indus. Claim Appeals Office*, 30 P.3d 821, 822 (Colo. App. 2001). "Once a case has closed, the issues resolved by the FAL are not subject to further litigation unless they are re-opened." *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005); and, an uncontested FAL "renders the final admission binding on all parties," *Cash v. Ciboloa Const.*, W. C. No. 4-192-809 [Indus. Claim Appeals Office (ICAO) April 17, 1998—not precedent but persuasive].

e. A claim may be re-opened at any time within six years after the date of injury based upon fraud, overpayment, an error, mistake or a change in condition. § 8-43-303(1), C.R.S. In addition, an ALJ may re-open a claim upon fraud, overpayment, an error, a mistake or a change in condition at "any time within two years after the date the last temporary or permanent disability benefits or dependent benefits excluding medical benefits become due or payable." § 8-43-303(2)(a), C.R.S. An ALJ may also re-open a claim "only as to medical benefits on the ground of an error, a mistake, or a change in condition" any time within two years after the last date medical benefits become due and payable. § 8-43-303(2)(b), C.R.S.

f. Self-represented claimants are bound by the same procedural rules as represented parties. *See Yadon v. Southward*, 64 P.3d 909, 912 (Colo. App. 2002) ("[P]ro se litigants must adhere to rules of procedure applicable to attorneys."); *Darby v. Trilogy Consulting Corp.*, W.C. No. 4-263-154 (ICAO May 14, 1996) ("[P]ro se litigants must adhere to the same principles and procedures as those who are qualified to practice law, and are not entitled to any special treatment.").

g. The statute of limitations is an affirmative defense and unless raised, it is waived. *See Kersting v. Indus. Comm'n,* 30 Colo. App. 297, 567 P.2d 394 (1977). To paraphrase the late U.S. Supreme Court Justice Oliver Wendell Holmes, Jr: "It has nothing to do with justice. It is a housekeeping device of the law to clean out old cases." When the time specified in a statute of limitations has passed, it could be conceptualized that there is a conclusive presumption that there will be prejudice to the side on the receiving end of the lawsuit. As found, herein above, the Respondents timely raised this affirmative defense herein.

Doctrine of Laches

h. The affirmative defense of laches must be based on an unconscionable delay in enforcing rights that has prejudiced the Respondents. *See Colorado State Board of Medical Examiners v. Ogin*, 56 P.3d 1233 (Colo. App. 2002). Laches does not grow out of the mere lapse of time, but rather is founded upon the inequity of permitting a claim to be enforced after some change in the condition or relation of the property or parties. *Arkins v. Arkins,* 77 P. 256 (Colo. App. 1904). Thus, Respondent must show: (a) an unconscionable delay; and, (b) **prejudice to Respondent,** which the Respondents have not done in this case. "Whether the elements of the doctrine are proved essentially presents a question of fact to be determined upon the evidence in the case." *Colorado State Board of Medical Examiners, supra.*

i. The doctrine of laches does not apply in the present case. It is undisputed that Respondents took the position that the substantial period of time that had passed between the Claimant's injury and the Claimant's Petition to Re-Open prejudiced the Respondents' ability to defend their position. Respondents have not produced any evidence that the Claimant's delay was unconscionable or that it prejudiced the Respondents' ability to defend their position. A mere conclusory statement that the doctrine of laches applies in insufficient.

Burden of Proof

.j. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Respondents have sustained their burden concerning the applicability of the statutes of limitations, but have failed their burden concerning the applicability of the doctrine of laches.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Summary Judgment on the issue of Claimant's Application for Hearing is hereby granted in favor of the Respondents.

B. The hearing of June 28, 2018 is hereby vacated.

D. Claimant is not entitled to and Respondents are not liable for any additional benefits on the closed claim W.C. No. 4-790-122-001.

DATED this_____day of June 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on February 9, 2017.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical treatment for his February 9, 2017 industrial injury.

FINDINGS OF FACT

1. Claimant is a 62-year-old male who worked for Employer as a Night Stocker. He began his employment in July 2011. His job duties involved stocking merchandise in Employer's grocery store.

2. Claimant testified that on February 9, 2017 he was placing canned goods on shelves in Employer's store. He explained that lifting and bending activities while stocking the shelves caused right lower back pain, right hip symptoms and right leg numbness. Although Claimant did not identify a specific, discrete event that caused his symptoms, he remarked that bending forward from his knees to stock bottom shelves precipitated his pain.

3. After completing his overnight work shift on February 9, 2017 Claimant visited personal physician Laurence Williams, M.D. for an examination. Claimant reported that he had developed pain in his lower back and right hip as a result of standing and kneeling while stocking shelves for Employer. Dr. Williams assigned light duty work restrictions for the period February 10, 2017 through February 17, 2017.

4. On February 10, 2017 Claimant reported his injuries to Employer. He specifically noted that, as a result of stocking shelves for two weeks, he developed increasing pain in his right lower back, hip and leg.

5. Employer referred Claimant to Workwell Occupational Medicine for treatment. Claimant visited Sara Harvey, M.D. for an examination. He reported that he had been stocking groceries in the can and soup aisle from his knees. Claimant noted pain on the right side of his lower back, hip and leg. He mentioned that he had suffered prior, similar symptoms. Dr. Harvey diagnosed Claimant with lower back pain and right-sided sciatica. She assigned work restrictions of no squatting and no lifting exceeding 10 pounds. Dr. Harvey prescribed physical therapy two times per week for three weeks.

6. On March 21, 2017 Claimant visited Paul Ogden, M.D. at Workwell. Dr. Ogden diagnosed Claimant with lower back pain and right-sided sciatica. He noted that

Claimant was "a bit better, but symptoms wax and wane." Dr. Ogden remarked that Claimant was "not back to his baseline" because he suffered intermittent tingling and numbness in the right lower extremity. He requested additional physical therapy and chiropractic treatment.

7. The medical records reflect that Claimant has suffered a long-history of degenerative disc disease. A January 22, 2011 MRI revealed significant lumbar spine degeneration that included a right far lateral disc herniation, bilateral disc bulges, mild to moderate spinal canal narrowing and bilateral facet degenerative changes. The medical records reveal that Claimant has experienced intermittent, waxing and waning lower back symptoms since 2011.

8. Claimant testified that he experienced significant back pain as a result of his job duties by December 2011. He thus ceased to perform his job as a Night Stocker and obtained modified duty employment facing and conditioning the aisles at Employer's store for the following four years. Claimant explained that during his four years of modified employment his lower back pain returned to manageable levels. However, Claimant continued to periodically receive treatment for his lower back pain and sciatica symptoms. By October 2016 Employer informed Claimant that modified duty of facing and conditioning was no longer available and he would be required to return to his regular position of Night Stocker.

9. On November 1, 2017 Kathy McCranie, M.D. conducted an independent medical examination of Claimant. She reviewed Claimant's medical records and performed a physical examination. Claimant reported that he began suffering right lower back pain and right lower extremity numbness in approximately 2011 or 2012. Dr. McCranie commented that by May 2012 Claimant was diagnosed with degenerative disc disease of the lumbosacral spine based on an MRI from the previous year. She remarked that Claimant was experiencing a flare-up of symptomatology and had been advised that "he was possibly doing too much work for a 56-year-old with his spine issues." Dr. McCranie noted that Claimant subsequently received follow-up evaluations for sciatica symptoms during July 2015 and February 2016.

10. Dr. McCranie recounted that Claimant had worked modified duty for Employer from 2012 through December 2016 based on work restrictions from his personal physician. When requested by new management to return to his regular duties as a Nigh Stocker Claimant reported right-sided lower back pain and right-sided lower extremity numbness. Dr. McCranie noted that Claimant developed the same symptoms that Dr. Williams had identified in 2015. Because Claimant denied any specific incident or injury in the present matter, Dr. McCranie determined that his current symptoms are "a continuation of his long-standing degenerative disc condition." She summarized that "it is expected" that an individual with a history of degenerative disc disease and a herniated disc "would have symptomatology with increased activity. The increased activity does not cause a new or different injury. Instead, there is an expected waxing and waning of symptomatology with changes in activity level."

11. On April 25, 2018 the parties conducted the post-hearing evidentiary deposition of Dr. McCranie. Dr. McCranie maintained that Claimant suffered from long-standing degenerative disc disease of the lumbar spine. She explained that Claimant's degenerative disc disease caused pain down his right leg or sciata because of nerve root impingement. Dr. McCranie remarked that Claimant's expected course of symptoms involved continuing lower back and lower extremity pain that would wax and wane over time. She determined that there was no objective evidence that Claimant suffered a new injury or aggravated his pre-existing condition while performing his job duties on February 9, 2017. In fact, she explained that Claimant's condition would have worsened regardless of whether he had been working during February 2017 because of the natural progression of his degenerative lumbar spine condition.

12. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on February 9, 2017. The record reveals that Claimant has suffered a long-history of degenerative disc disease. A January 22, 2011 MRI revealed significant lumbar spine degeneration that included a right far lateral disc herniation, bilateral disc bulges, mild to moderate spinal canal narrowing and bilateral facet degenerative changes. The medical records reveal that Claimant has experienced intermittent, waxing and waning lower back symptoms since 2011. In fact, by December 2011 Claimant ceased to perform his job as a Night Stocker and obtained modified duty employment facing and conditioning the aisles at Employer's store for the following four years. Nevertheless, Claimant continued to periodically receive treatment for his lower back pain and sciatica symptoms. By October 2016 Employer informed Claimant that modified duty of facing and conditioning was no longer available and he would be required to return to his regular position of Night Stocker.

13. Claimant explained that on February 9, 2017 he was placing canned goods on shelves in Employer's store. He commented that lifting and bending activities while stocking the shelves caused right lower back pain, right hip symptoms and right leg numbness. Although Claimant did not identify a specific, discrete event that caused his symptoms, he remarked that bending forward from his knees to stock bottom shelves precipitated his pain. However, the record demonstrates that Claimant's symptoms merely constituted the natural progression of his pre-existing degenerative disc disease.

14. Dr. McCranie persuasively determined that Claimant's current symptoms are "a continuation of his long-standing degenerative disc condition." She summarized that "it is expected" that an individual with a history of degenerative disc disease and a herniated disc "would have symptomatology with increased activity." The increased activity would not cause a new or different injury because there is an expected waxing and waning of symptoms with changes in activities. Dr. McCranie summarized that there was no objective evidence that Claimant suffered a new injury or aggravated his pre-existing condition while performing his job duties on February 9, 2017. In fact, she explained that Claimant's condition would have worsened regardless of whether he had been working during February 2017 because of the natural progression of his degenerative lumbar spine condition. Based on Claimant's significant history of degenerative disc disease with waxing and waning symptoms as well as the persuasive

opinion of Dr. McCranie, Claimant's work activities on February 9, 2017 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Instead, Claimant's symptoms constituted the natural progression of his pre-existing condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the

natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on February 9, 2017. The record reveals that Claimant has suffered a long-history of degenerative disc disease. A January 22, 2011 MRI revealed significant lumbar spine degeneration that included a right far lateral disc herniation, bilateral disc bulges, mild to moderate spinal canal narrowing and bilateral facet degenerative changes. The medical records reveal that Claimant has experienced intermittent, waxing and waning lower back symptoms since 2011. In fact, by December 2011 Claimant ceased to perform his job as a Night Stocker and obtained modified duty employment facing and conditioning the aisles at Employer's store for the following four years. Nevertheless, Claimant continued to periodically receive treatment for his lower back pain and sciatica symptoms. By October 2016 Employer informed Claimant that modified duty of facing and conditioning was no longer available and he would be required to return to his regular position of Night Stocker.

8. As found, Claimant explained that on February 9, 2017 he was placing canned goods on shelves in Employer's store. He commented that lifting and bending activities while stocking the shelves caused right lower back pain, right hip symptoms and right leg numbness. Although Claimant did not identify a specific, discrete event that caused his symptoms, he remarked that bending forward from his knees to stock bottom shelves precipitated his pain. However, the record demonstrates that Claimant's symptoms merely constituted the natural progression of his pre-existing degenerative disc disease.

9. As found, Dr. McCranie persuasively determined that Claimant's current symptoms are "a continuation of his long-standing degenerative disc condition." She summarized that "it is expected" that an individual with a history of degenerative disc disease and a herniated disc "would have symptomatology with increased activity." The increased activity would not cause a new or different injury because there is an expected waxing and waning of symptoms with changes in activities. Dr. McCranie summarized that there was no objective evidence that Claimant suffered a new injury or aggravated

his pre-existing condition while performing his job duties on February 9, 2017. In fact, she explained that Claimant's condition would have worsened regardless of whether he had been working during February 2017 because of the natural progression of his degenerative lumbar spine condition. Based on Claimant's significant history of degenerative disc disease with waxing and waning symptoms as well as the persuasive opinion of Dr. McCranie, Claimant's work activities on February 9, 2017 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Instead, Claimant's symptoms constituted the natural progression of his pre-existing condition.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 7, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

- Whether Claimant proved, by a preponderance of credible evidence, that the medical treatment in the form of a right L5 selective nerve root block is reasonably necessary to cure and relieve Claimant of the effects of his May 21, 2014, industrial injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. Claimant sustained an admitted injury to his lumbar spine on May 21, 2014.

2. Claimant treated with Dr. Sanjay Jatana until 2017, and then with Drs. David Wong and Allison Fall.

3. Dr. Wong's progress note dated August 16, 2017, noted Claimant's history of epidural steroid injections with partial temporary relief, analgesic anti-inflammatory medications, nerve stabilizers, and non-pharmaceutical modalities that produced partial improvement. On examination, Dr. Wong observed normal spinal contours, a desiccated disc at L4-5, and a mild desiccation at L5-S1. He assessed Claimant with low back pain, a possible element of irritation from prior surgery, an element of mechanical back pain secondary to degenerative changes, and pain on extension.

4. Dr. Wong recommended EMG and nerve conduction studies to clarify acute versus chronic radicular issues. If acute changes were observed, he was inclined to consider additional injections. Dr. Wong did not conclude his report with a definitive recommendation regarding the medical necessity of additional injections, and did not address Claimant's pre-injection status or functionality. Dr. Wong also did not mention whether there were any documented changes in response to the previous injections.

5. Dr. Fall examined Claimant on September 29, 2017. Claimant advised her that Dr. Wong recommended an injection. Claimant reported a 40% improvement generally, but could not provide a percentage improvement because of the injection. Dr. Fall referred Claimant for a right L5 selective nerve root block (SNRB) for diagnostic and therapeutic purposes. Dr. Fall did not document objective pain reduction or functional improvement following prior injections administered by Dr. Jatana. Her September 29, 2017 report accompanied a November 8, 2017 injection request to Respondents.

6. Respondents denied the prior authorization request for the SNRB on November 14, 2017 as not medically certified. Insurer supported its denial with Dr. Siva Ayyar's November 10, 2017 peer review report. Dr. Ayyar stated that the Colorado Chronic Pain Medical Treatment Guidelines require an 80% improvement in pain scores or reporting following receipt of a prior injection. In addition, the Guidelines required evidence of functional improvement with markers including evidence of a return to baseline function, a return to increased work duties, and measureable improvement in physical activity goals, which Dr. Fall did not address. Dr. Ayyar recommended denial of

the request for SNRB prior authorization because the Dr. Fall's request did not satisfy the Guideline's requirements.

7. Claimant returned to Dr. Fall on December 1, 2017. Dr. Fall noted that the 40% improvement referenced in her September 2017 report was overall improvement, not a response to a previous injection. Claimant reported an improvement in leg pain and in his ability to walk after his prior injection. Dr. Fall reported, "He tells me he was much improved with a great improvement in his leg pain after the prior injection. He had three months of relief. He was able to walk more and be more functional." Dr. Fall renewed the prescription and continued Claimant's work restrictions. Although she did not specifically address Dr. Ayyar's concerns about objective support for the recommendation, she clearly described pain relief and increased function that lasted for three months.

8. Dr. Fall's office faxed her renewed request for the right L5 SNRB to Respondents on December 19, 2017. The transmittal status information on Claimant's first seven pages of exhibits reflect that Insurer received pages 5/8, 6/8, 7/8, 2/8, 3/8, 8/8, and 1/8 of an 8 page transmission. These pages include:

- a three-page transcription of Dr. Fall's dictation from Claimant's December 1, 2017, appointment in which she recommended a SNRB;
- a Concentra Provider/Specialist Referral Form in which Dr. Fall referred Claimant to Dr. Kawasaki for a SNRB;
- a Patient Referral form;
- a Notification by Authorized Treating Provider completed and signed by Dr. Fall;
- a letter from a staff person at Colorado Pain and Rehabilitation to Insurer's adjuster for the claim, requesting authorization and providing, "Pursuant to Rule 16-9, if we do not receive a response by 12/28/17 (per Holiday), the procedure is deemed authorized and we will proceed with scheduling."

This information contained the procedure requested, Dr. Fall's notification as an authorized treatment provider, and an appropriate request for authorization.

9. Claimant did not proffer page 4/8 of the report. From context, the ALJ discerns that page 4/8 is the second page of a two-page Patient Referral indicating a service date of 12/01/2017 on a Concentra Advanced Specialists form. The form appears complete on the first page. The Judge finds that it is highly unlikely that page 4/8 contained information contrary to the rest of the document.

10. On January 2, 2018, Respondents denied the request for prior authorization of the SNRB as not medically certified, based on Dr. Ayyar's December 29, 2017 peer review report. Dr. Ayyar noted an absence of improved pain scores and an absence of

evidence as to functional improvement such as improved baseline function, a return to increased work duties, and increased physical activity goals. Dr. Ayyar noted continued dependence on adjuvant medications. Consequently, he found the request to be not medically necessary under the Medical Treatment Guidelines.

11. Claimant testified at hearing that he received his most recent injection in early 2017. He experienced pain relief and increased function, including the ability to walk farther, sleep better, and work more. These benefits lasted approximately three months. Claimant testified that his pain has steadily increased and his ability to work and sleep have steadily decreased since the injection wore off. Claimant testified that he wanted the SNRB. He understood Dr. Wong to have opined that surgery was the alternative in the absence of the SNRB.

12. The Judge finds Claimant to be a credible witness. His testimony was consistent with the medical records, and his demeanor was sincere.

13. The Judge finds Dr. Ayyar's report biased, as he is a current employee of Insurer. In addition, his review was of incomplete information about Claimant's experience.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits – Reasonably Necessary

Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. "Medical treatment" involves not only treatment or care designed to improve or maintain a claimant's condition, but also relief from symptoms including pain. *See Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). Respondents may challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence, which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17, 7 Code Colo. Regs. 1101-3 (the “Guidelines”) when furnishing medical aid under the Workers’ Compensation Act. The ALJ may also appropriately consider the Guidelines as an evidentiary tool. Certain cases may require treatment modalities that differ from those generally prescribed in the Guidelines, but otherwise the Guidelines are the accepted professional standards governing care under the Act absent presentation of evidence that a deviation from them is necessary. *Hall vs. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003).

Respondents argue that the recommended injection be denied because it is not reasonable and necessary. Respondents rely on the conclusions offered by Dr. Ayyar, their paid Peer Reviewer. Dr. Ayyar in part relied on the Dr. Fall’s notes September 5, 2017, and December 1, 2017 in formulating his opinion that the recommended injections were outside of the Guidelines and thus, not reasonably necessary. Dr. Ayyar applied “page 112 of the Colorado Chronic Pain Disorder Medical Treatment Guidelines” which states, “Epidural injections may be repeated only when a functional documented response lasts for 3 months.” Dr. Ayyar continues, “Colorado defines a functional documented response as an 80% reduction in pain scores and evidence of functional improvement, with markers of the same including evidence of return to baseline function, return to increased work duties and a measurable improvement in physical activity goals.”

Dr. Ayyar supports his determination of denial by stating that Claimant did not receive 80% improvement in functioning following his prior injection. However, in reaching this conclusion, Dr. Ayyar only reviewed the records from the 11/08/17 and 12/01/17 visits with Dr. Fall. Claimant testified at hearing that he had his most recent injection in “early, 2017”. Dr. Fall noted that Claimant did experience “three months of

relief" in her December 1, 2017 report, although she did not note when he had the prior injection. Further, Dr. Fall noted that while Claimant noted he was "40% better…[h]e tells me that he has difficulty giving a percentage, however, he was much improved with a great improvement in his leg pain after the prior injection." Regarding increased functionality, Dr. Fall noted, "[h]e is able to walk more and be more functional." Claimant further testified that he was able to work more, stretch more, and sleep better following his most recent injection. As for "physical activity goals," in her December 1, 2017, report, Dr. Fall noted, "the hope is to avoid surgery." Claimant reiterated at hearing that he would like to avoid surgery and that he believes the recommended injection could help achieve this goal.

Claimant has not been released from care and has not reached maximum medical improvement. As such, the recommended right L5 selective nerve root block is reasonable, necessary and related medical treatment.

Compliance with Rule 16

Workers' Compensation Rules of Procedure (WCRP) Rule 16-9(A) states, "[t]he Notification process is for treatment consistent with the Medical Treatment Guidelines . . . Providers may, but are not required to, utilize the Notification process to ensure payment for medical treatment that falls within the purview of the Guidelines. Therefore, lack of response from the payer within the time requirement set forth in section 16-9(D) shall deem the proposed treatment/service authorized for payment." WCRP 16-9(C) states, "[n]otification may be submitted using the 'Authorized Treating Provider's Notification to Treat' (Form WC 195)". WCRP Rule 16-9(D) states, "payers shall respond to a Notification submission within five (5) business days from receipt of the request with an approval or contest of the proposed treatment."

Dr. Fall properly submitted a Notification by an Authorized Treating Provider to Insurer on December 19, 2017. It was not until December 29, 2017, seven (7) business days (not including December 25 due to the Christmas holiday) after the initial Notification, that Respondents submitted the request to their internal peer reviewer (called the "Peer Review Services Division") to assess the reasonable, necessity of the recommended injections. On January 2, 2018, eight (8) business days (not including January 1 due to the New Year's Day holiday) after the initial Notification, that Respondents' issued their denial of the recommended injections. Respondents' failed to comply with the time requirement set forth in Rule 16(D) and as such, the recommended injections are authorized.

Claimant has proven, by a preponderance of credible evidence, that the requested SNRB is reasonable and necessary to cure and relieve the effects of the May 21, 2014 industrial injury at this time.

ORDER

1. Respondents have failed to comply with the time requirements set forth in WCRP Rule 16-9(D) following a proper Notification by an Authorized Treating Provider.

2. Claimant has met his burden of proof by a preponderance of the evidence that the recommended right L5 selective nerve root block is reasonable, necessary and related medical treatment.

3. Respondents are liable for payment of the costs associated with the L5 selective nerve root block.

4. All issues not ruled upon are reserved for future determination.

DATED: June 7, 2018

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a compensable injury on December 19, 2015?

- If Claimant proved a compensable injury, what part or parts of his body were injured as a result of the accident?

- The parties stipulated to an average weekly wage in the amount of $1,215.

FINDINGS OF FACT

1. Claimant works for Employer as a field technician. On December 19, 2015, he slipped and fell while carrying a ladder down an icy slope. He fell onto the left side of his body.

2. Claimant reported the injury to his supervisor and was directed to the emergency room for initial treatment. He was evaluated at the Memorial Hospital emergency department later that day. On examination, he was diffusely tender to palpation of the left upper arm, left shoulder, left trapezius, and left hip. There was an abrasion on the left hip. X-rays of the left arm and hip were normal. He was diagnosed with contusions of the left hip and left upper arm and abrasion of the left hip.

3. After leaving the ER, Claimant spoke with his supervisor and was referred to Concentra for ongoing care.

4. Claimant saw Dr. Nicholas Kurz at Concentra on December 21, 2015. He reported left-sided soreness, especially of the left upper arm. He did not mention neck or upper back pain. No physical exam was documented in the record. Dr. Kurz diagnosed contusions of the left arm, left hip, and by, and referred Claimant for physical therapy.

5. Claimant returned to Concentra on December 30, 2015, and saw Dr. Larimore. He indicated "the left shoulder and arm are better," and his left hip was "fine." His main complaint on that visit was "bilateral upper back and neck stiffness, pain, and achiness." Examination of his neck showed tenderness of the paraspinal muscles at C3-C7 and the trapezius muscles on both sides, but no palpable muscle spasms. The cervical spine itself was nontender. Cervical range of motion was full but painful. Spurling's maneuver was positive. He also had tenderness to palpation of theT1-T4 paraspinal muscles on the left and right sides. Dr. Larimore opined the left arm, left hip, and left thigh contusions had "resolved," but added a new diagnosis of "cervical strain." He prescribed ibuprofen and referred Claimant to physical therapy.

6. Claimant had at least one physical therapy session through Concentra.

7. On January 13, 2016, Claimant saw Dr. Kenneth Ginsburg at Concentra. He stated his symptoms had resolved and requested a full duty release. He was released from care at MMI with no impairment or restrictions.

8. Claimant was a credible witness. The medical records by and large support his testimony regarding the parts of his body that developed symptoms after, and as a result of, the accident. There is no documented record of any trapezius or upper back symptoms or treatment in at least the three years preceding the accident. The initial ER records confirm pain in his left arm, left hip, and left trapezius. Dr. O'Brien's opinion that Claimant's injuries were strictly limited to the left arm and left hip is not persuasive, because he fails to note the pain in the left shoulder and left trapezius documented in the ER records.

9. Claimant proved he suffered compensable injuries as a result of his slip and fall accident on December 19, 2015. Claimant sustained strains and contusions of his left hip, arm, and shoulder, and a cervical strain.

10. The treatment Claimant received at the emergency room on December 19, and at Concentra in December 2015 and January 2016, was authorized, reasonably necessary, and related to his compensable injuries.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

As found, Claimant proved he suffered compensable injuries as a result of the December 19, 2015 accident. Based on the evidence presented, the ALJ concludes Claimant sustained left arm, shoulder and hip strains and contusions, and a cervical strain. The Memorial Hospital ER and Concentra were authorized, and the treatment they provided was reasonably necessary and related to Claimant's compensable injuries.

ORDER

It is therefore ordered that:

1. Claimant's claim in W.C. No. 5-048-516 (DOI 12/19/2015) is compensable.

2. Respondents shall provide reasonably necessary medical treatment to cure and relieve the effects of Claimant's compensable injuries.

3. To the extent not already covered, Respondents shall pay for the treatment Claimant received at the Memorial Hospital emergency department on December 19, 2015, and the treatment he received from Concentra in December 2015 and January 2016.

4. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 11, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant, by clear and convincing evidence, overcome the DIME opinion of Dr. Stephen Gray on the issues of Causation, MMI, and Impairment?

II. Is Claimant entitled to ongoing medical treatment as a result of his admitted work injury which occurred on September 22, 2015?

III. Is Claimant entitled to Temporary Total Disability ("TTD") payments from October 14, 2015 and ongoing?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant suffered an admitted work-related injury which occurred on September 22, 2015. Claimant was employed by Employer as a Carpenter. Claimant suffered an episode of severe dehydration, resulting in rhabdomyolysis, while performing his work duties in extreme heat.

2. Claimant reported severe muscle cramps, resulting in treatment in the emergency room later that evening. He was treated with intravenous fluids to relieve his symptoms, and released. The medical records available indicate that Claimant had highly elevated Creatine Kinase ("CK") levels shortly after the incident, after which said levels gradually subsided.

3. Prior to this September 22, 2015 work related injury, the Claimant had suffered a right knee, non-work-related injury which resulted in arthroscopic knee surgery on July 10, 2015 by Dr. John Redfern, MD. The Claimant had a second surgery on his right knee injury on April 1, 2016.

4. Claimant was placed at MMI for this rhabdomyolysis injury on October 13, 2015 with a 0% PPD rating by P.A. Stephen Byrne. (Ex. C). Dr. Daniel Olson, MD concurred with this assessment on January 22, 2017. (Ex. D). Respondents filed a Final Admission of Liability based on that MMI report on February 14, 2017. The Claimant filed a timely objection to the Final Admission of Liability and sought review of the issues of MMI and rating via the Division IME process.

5. The Claimant proceeded to a Division IME with Dr. J. Stephan Gray on July 19, 2017. Upon completion of his evaluation, Dr. Gray agreed with the October 13, 2015 MMI date and that the Claimant suffered no permanent disability rating as a result of the work-related injury. He also opined that "the persistent right leg and knee pain is not causally related to the 9/22/17 work-related heat exposure." (Ex F, p. 12).

6. In Dr. Gray's DIME report, he references his review of Dr. Redfern's report from June 16, 2015: " This patient has degenerative joint disease in the medial compartment as well as a degenerative medical meniscus tear….He has had the symptoms for long-standing duration with no improvement." (Ex. F, p. 2).

7. The DIME report references comments by Dr. Redfern following the second right knee surgery, which had occurred on April 1, 2016. On June 16, 2016, Dr. Redfern notes: His [Claimant's] symptoms are consistent with his examination and arthroscopic findings of knee arthritis. Unfortunately, he has not had pain relief with the most recent knee arthroscopy." (Ex F, p. 3).

8. In the final DIME "Assessment", Dr. Gray concludes: "Work related heat exposure with probable rhabdomyolysis on September 22, 2015, *resolved without permanent sequelae."* (Ex. F, p. 12). (emphasis added).

9. Respondents filed a new Final Admission of Liability based on Dr. Gray's findings at the DIME on August 18, 2017, The Claimant filed a timely Objection to the Final Admission of Liability along with the Application for Hearing at issue at this hearing to overcome the DIME physician's findings.

10. At hearing, Claimant provided a handwritten note from the Claimant's primary care physician, Dr. Glover, which stated that she was "concerned that his right upper and lower leg pain and continued elevated serum CK is due to his rhabdomyolysis overheating incident", as well as several blood lab results noting a minimally elevated CK level. This note provides no statement that the findings and opinions are provided within a reasonable degree of medical probability. Dr. Glover also recommended that Claimant undergo an EMG.

11. Respondents submitted two reports from their medical expert, Dr. J. Tashof Bernton, dated January 26, 2017 and September 26, 2017. Dr. Bernton also testified at hearing, consistent with the opinions provided in his reports.

12. Dr. Bernton opined in his report and in his live testimony that the Claimant suffered heat exposure with an episode of rhabdomyolysis, with very mild impairment of his renal function, which returned to baseline by the time the Claimant was placed at MMI on October 13, 2015. He opined that the Claimant had the proper treatment at that time and that the condition resolved without impairment or need for additional medical treatment.

13. Dr. Bernton stated that the slightly elevated CK levels noted on the Claimant's more recent blood tests were clinically insignificant and provided a number of studies and articles to support this opinion. He also noted that such minimally

elevated levels could be related to a number of other issues unrelated to the Claimant's heat exposure. He noted that these slightly increased levels do not support Dr. Glover's concern or need for any type of medical workup, nor any concern regarding the Claimant's prior episode of rhabdomyolysis. Dr. Bernton opined that one would only be concerned if the level of CK was above 500, which would then be determined to be clinically significant.

14. Dr. Bernton opined that Claimant's reported right leg symptoms are related to his pre-existing right knee degenerative issues and subsequent surgeries. Dr. Bernton does recommend treatment for the non-work-related right knee injury/symptoms outside of the Claimant's workers' compensation claim. He concurs with the conclusions reached in the DIME report of Dr. Gray.

15. Dr. Bernton noted in his report of January 30, 2017 that while sleeping on the night of his work-related heat exposure incident, Claimant woke with very heavy muscle pain and cramping in **both** legs, which is indicative of the symptoms of the heat exposure. However, presently, the Claimant is complaining of ongoing symptoms which he relates to the heat exposure only in the **right** leg.

16. In his testimony, Dr. Bernton explained that the "muscle breakdown" that Claimant suffered during this episode was temporary, and did not result in *damage.* He explained: "Rhabdomyolysis is an event, not a disease". He further opined that the EMG as recommended by Dr. Glover might be useful if Claimant suffered from a muscle disease, but not from one acute episode of rhabdomyolysis.

17. Claimant testified at hearing. He described severe muscle cramping during this event, unlike pain he had experienced before. After several visits with Dr. Glover, his muscle issues remain, both above and below the right knee. Claimant asserts that the pain he is experiencing is muscular in nature, distinguishable from the pain from within his knee. He desires further treatment for the pain he is experiencing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME Opinion of Dr. Gray Regarding MMI, Causation, & Impairment

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

G. While sincere in his belief that his ongoing symptoms are related to his work injury, Claimant has not met his burden here. The DIME report has not been overcome. The scant medical evidence provided by Dr. Glover's notes amounts, at most, to a difference in medical opinion between her and Drs. Gray, Olson, Bernton, and P.A. Byrne. Claimant suffered no longstanding injury to his right leg from his work injury. The rhabdomyolysis, painful as it was, was an unfortunate event which resolved with the brief passage of time; within three weeks of his injury.

Medical Benefits and TTD Benefits

H. The ALJ therefore concurs with Dr. Gray on the issues of MMI, Causation, and Impairment. The Claimant, therefore, is not entitled to TTD payments, nor is he in need of further medical treatment as a result of his work injury.

ORDER

It is therefore ordered that:

1. Claimant's Claim for Workers Compensation benefits is denied and dismissed.

2, All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 13, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable injury.

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to reasonable, necessary, and related medical treatment.

III. Whether Respondent's are bound by the MMI date and impairment rating provided by Claimant's authorized treating physician which was issued prior to a determination as to whether Claimant suffered a compensable injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was hired by Employer on September 10, 2012. (Ex. N, pg. 84)
2. Claimant worked as a warehouse worker for Employer, a furniture company. Claimant's usual work hours were 5:00 a.m. to 1:30 p.m., Sunday through Thursday.
3. Claimant's job required him to pull furniture purchased by customers from the warehouse and bring it to the dock for pick up by the customers. Claimant was also responsible for stocking furniture in the warehouse in the proper location. In order to move the furniture, Claimant used a dolly and a lift.
4. Claimant alleges he injured his right shoulder and low back at work.
5. Claimant testified that he was injured at work on December 4, 2014, while moving a recliner at a loading dock. He stated that as a result of this injury, he had a sharp stabbing pain in his back, and pain in his right shoulder. (Transcript P 21, hereinafter references to the transcript denoted as "TP" with the page number). He testified that prior to December 4, 2014, he had never had low back pain. (TP 37).
6. Claimant testified that on December 4, 2014, his shift began at 5 AM (TP 55), that he was disciplined that morning for inventory errors (TP 35, 36), and that later that morning he was injured, although he did not remember the time of his injury. (TP 54).
7. Claimant testified that he reported his injury to his manager, Steve Harris, who then contacted another manager, Jeff Harris. Claimant testified that his managers had him wait until the emergency room opened (TP 21). Claimant testified that he did not fill out a report, but that he signed paperwork regarding

his injury (TP 19, 20), and that he was sent for treatment by his manager. (TP 22).

8. Claimant testified he went to the emergency room on December 4, 2014, (TP 39), and arrived at approximately 6:32 AM, according to the ER records. (TP 55). He testified that he told the ER doctor how he was injured, i.e., that he was moving a recliner at work. (TP 22).

9. On December 4, 2014, after leaving work, Claimant presented to Medical Center of Aurora at approximately 6:30 a.m. Claimant complained of pain in his right shoulder, upper arm, and forearm. Claimant alleged his symptoms developed one week earlier. Claimant also stated that he had similar symptoms approximately one month earlier, but they were relieved with swimming. At this visit, Claimant did not indicate his right shoulder and arm pain developed as a result of a lifting injury at work or anywhere else. Moreover, the medical report from this visit specifically notes Claimant "DENIES" thoracic pain and lumbar pain. (Ex. A, pg. 2.)

10. The ALJ is aware that some of the records generated by Claimant's December 4, 2014, ER visit reference "back" pain. However, the ALJ resolves this conflict in the evidence by finding that Claimant was complaining of pain in his right shoulder region and upper extremity and this region encompasses the front and back of his shoulder which Claimant might have also referred to as his back. This is supported by the fact that the x-ray report which indicates "chest, back, and shoulder pain" indicates that only frontal and lateral chest x-rays were taken. There were no x-rays taken of Claimant's lumbar spine or low back. Moreover, the ER report from Dr. Girard, dated December 4, 2014, specifically indicates Claimant denied thoracic and lumbar pain. (Ex. A, pg. 2.) Therefore, the ALJ finds Claimant did not report lumbar or thoracic back pain when he presented to the ER on December 4, 2014.

11. Due to Claimant's pain complaints and presentation regarding the development of his symptoms, which did not include any type of lifting injury or acute injury due to some type of traumatic event, an ultrasound of his right upper extremity was performed to rule out a blood clot. The indication for the ultrasound was "Right shoulder and upper extremity pain and edema for one week." The ultrasound was negative. The final impression of the physician evaluating Claimant was that there was no evidence of deep venous thrombosis or superficial venous thrombophlebitis within the right upper extremity.

12. Claimant testified that on the morning after his injury, i.e. on December 5, 2014, he met with Employer's director of HR and risk management (Ms. Lambert) to fill out paperwork for his WC claim. Although that paperwork (Exhibit B) reflects Claimant reported an injury of November 28, 2014, and that he woke up with pain on December 4, 2014, Claimant testified that he did not remember telling Ms. Lambert that he was injured on November 28, 2014, or telling her that he woke up with pain on December 4, 2014. (TP 47, 57, 59). Claimant testified that even

though he signed the forms stating that he was injured on November 28, 2014, he was not injured that day because he did not work that day.

13. Ms. Lambert testified that she was Employer's director of human resources and risk management, and worked in the same building (albeit at a different section) where Claimant worked, and that on Friday, December 5, 2014, Mr. Steve Harris called to advise her that Claimant wanted to report a work-related injury, but that Mr. Harris had no information about this injury. (TP 77). She directed Mr. Harris to have Claimant meet with her in her office. She then met with Claimant and prepared paperwork regarding his allegation of a work-related injury. She stated that she typed, then hand wrote, as Claimant reported the details of his alleged injury. She credibly testified that Claimant told her that he had been injured at work on November 28, 2014 at 11:40 AM, which she recorded on an "incident report". (TP 79, 80, Exhibit B, P 9-10).

14. Although Claimant testified that he did not work on November 28, 2014 (because it was a Friday which was his normal day off), Ms. Lambert stated that November 28, 2014 was the day after Thanksgiving, and Claimant's time records (which she stated she personally obtained from the company's records) showed Claimant worked his full shift that day. (TP 91, Exhibit K, P 67 reflecting Claimant worked 7.98 hours that day).

15. Ms. Lambert testified that Claimant told her that he was injured on November 28, 2014, around 11:40 AM at the dock area, where he was pulling "upholstery" (which she stated could be an upholstered recliner, a sofa, or similar upholstered furniture). (TP 80- 81). She stated that Claimant was not specific as to what he was doing at the time, and did not know what the specific item was, other than "upholstery" and knew of no witnesses to his alleged injury. (TP 80-81, 85).

16. Ms. Lambert testified that Claimant told her that although he had been hurt on November 28, 2014, he had not reported his injury to Employer until December 4, 2014. (TP 83). Claimant told her that on December 4, 2014, he woke up in pain, and that he let Mr. Steve Harris know that his pain was "unbearable", and that he went to the emergency room at HealthOne. (TP 83). Claimant told Ms. Lambert that the ER staff told him that he had a "bruise inside his arm". (TP 85).

17. Ms. Lambert stated she completed the forms and then had Claimant read them to be sure she had stated things correctly, and that he reviewed and signed those documents. (TP 85, see exhibit B). She stated that Claimant never stated to her that he had been injured on December 4, 2014, and that if he had, she would have changed the forms. While Claimant was present in her office, she called and set up an appointment for him to be seen that day by a WC physician. (TP 87). Later that day, she received a report from that WC physician (Dr. Broghammer at HealthOne), but that medical record showed a different date of injury. (TP 89). Although Claimant had told her he had been hurt on November 28, 2014, Dr. Broghammer's record (Exhibit C) shows Claimant reported he had been hurt on December 4, 2014, at 5:30 AM. (TP 88, see exhibit C, P 23, top right). To clarify whether this was an error by Dr. Broghammer, she asked her

staff to call his office, and they confirmed Claimant had reported to them a different date of injury than what he had told her. (TP 88-89).

18. Ms. Lambert testified that she had an investigation done to see whether anyone could support Claimant's allegations of a work-related injury, whether on November 28 or December 4, 2014, and that she found no one that knew anything that would support Claimant's allegations of a work injury. (TP 89, 90). The ALJ finds Ms. Lambert's testimony to be credible.

19. Mr. Jeff Harris testified that he was an assistant warehouse manager for Employer. He stated that on December 4, 2014, around 5:30 AM (i.e., the same time Claimant reported to Dr. Broghammer he was injured at work), he met with Claimant to discipline him for repeated inventory errors. He testified that Claimant made no statement of any work-related injury during that meeting. He later became aware that Claimant alleged that he had been hurt that day. He became aware that Claimant had also told Ms. Lambert that he was hurt at work on November 28, 2014. He found no records or witnesses to support any of claimant's allegations. (TP 98).

20. Mr. Jeff Harris testified that in March 2016 he fired Claimant, for timecard theft, because Claimant was found sleeping in his vehicle while "on the clock" at work. He testified that he confronted Claimant on this issue, and Claimant denied the allegations and stated he had been working. Mr. Harris reviewed store surveillance tapes which showed that while "clocked in", Claimant had left the workplace and gone to his vehicle in the parking lot where he was found sleeping. (TP 101-104).

21. The ALJ finds the testimony of Mr. Jeff Harris to be credible.

22. Steve Harris testified that he was Claimant's direct supervisor. He testified that on December 3, 2014, due to Claimant's poor job performance, he prepared a disciplinary report, and that on December 4, 2014, around 5:15 AM, he and Jeff Harris met with Claimant to administer the discipline. Mr. Steve Harris testified that the disciplinary meeting lasted around 15 minutes and Claimant made no reference to any work-related injury. (TP 114-116, 117).

23. Mr. Steve Harris testified that approximately 10-15 minutes after the disciplinary meeting, Claimant came up to him and said that he was sick and asked to go home. (TP 117). Claimant did not allege a work-related injury, because if he had, Mr. Steve Harris would have filled out an incident report. (TP 118). Mr. Steve Harris stated that he never filled out any injury forms for Claimant nor did he send Claimant for any treatment. Mr. Steve Harris stated that Claimant left the workplace on December 4, 2014, and that neither Claimant nor his wife returned to the work facility that day. (TP 118).

24. Mr. Steve Harris testified that Friday, December 5, 2014, was Claimant's scheduled day off, but Claimant came to the workplace and told him that he had seen a doctor and that he had a work injury to report. (TP 119-120). Mr. Harris replied that Claimant had not mentioned any work injury to him, otherwise he

would have filled out an incident report. Mr. Steve Harris then contacted Ms. Lambert and sent Claimant to her office. (TP 120).

25. The ALJ finds the testimony of Mr. Steve Harris to be credible.

26. Dr. Lawrence Lesnak testified for Employer as an expert in physical medicine and rehabilitation. He stated that he had reviewed Claimant's medical records and had evaluated Claimant. He stated that Claimant's testimony that he had never had prior back problems prior to his alleged work injury of December 4, 2014 was not correct; during the three months prior to Claimant's alleged work injury, Claimant had been twice treated for various pain complaints, which included low back pain, for which he had been prescribed opioids. He testified that his examination of Claimant was normal; although Claimant had subjective complaints, there was no objective pathology. (TP 132, 135).

27. Dr. Lesnak testified that the medical records showed numerous inconsistencies in Claimant's allegations as to how he allegedly injured himself at work and did not support Claimant's allegation of a work-related injury. The initial record from the Emergency Room at HealthOne from December 4, 2014 shows Claimant reported arm pain for the past week, which was similar to symptoms which he had a month previous. Claimant was diagnosed with cellulitis, a skin infection, or myofasciitis. Moreover, the medical report from that visit indicates Claimant specifically denied back pain, and the ER report contains no reference to any work-related condition or event. (TP 138-140).

28. Dr. Lesnak commented that Claimant's treatment records following his allegation of a WC injury on December 4, 2014 contained numerous different mechanisms of injury reflecting different renditions given by Claimant to different providers regarding how he was injured. (He referenced at least six different versions. TP 141). He stated that in his experience, when there are different versions, the very first medical record is usually the most accurate. (TP 141). He stated that there was a significant difference between the December 4, 2014 ER report and Dr. Broghammer's December 5, 2014 report. The ER report (from Claimant's alleged date of injury) reflected no work-related injury but instead arm pain which had been going on for a week, while Dr. Broghammer's report on the next day (hours after claimant told Ms. Lambert that he was hurt at work on November 28, 2014) referenced a December 4 2014 low back injury due to lifting at work.

29. Dr. Lesnak concluded within a reasonable degree of medical probability that Claimant did not suffer any injury at work on December 4, 2014. Dr. Lesnak also stated that the test results from Claimant's psychological screening suggested Claimant had an underlying somatic disorder/somatoform disorder. Dr. Lesnak stated that patients with these types of disorders commonly have unreliable subjective complaints at best and frequently embellish/exaggerate their symptomatology and frequently have no objective findings to support their symptomatology, as is the case with Mr. Irvine.

30. The ALJ finds Dr. Lesnak's opinions, as set forth in his report, and testimony, to be credible and persuasive.

31. The ALJ finds Dr. Lesnak's opinions, as set forth in his report, and testimony, to be credible and persuasive, based on a number of factors, which include the testimony at hearing, and the records submitted at hearing. The records submitted at hearing demonstrate, among other things, the various stories told by Claimant regarding the initial development of symptoms without reference to a work injury up to an injury that occurred at work in many different ways. For example:

- On December 4, 2014, after leaving work, Claimant presented to Medical Center of Aurora at approximately 6:30 a.m. Claimant complained to Dr. Girard of pain in his right shoulder, upper arm, and forearm. Claimant alleged his symptoms developed one week earlier. Claimant also stated that he had similar symptoms approximately one month earlier, but they were relieved with swimming. At this visit, Claimant did not indicate his right shoulder and arm pain developed as a result of a lifting injury at work or anywhere else. Moreover, the medical report from Dr. Girard regarding this visit specifically notes Claimant "DENIES" thoracic pain and lumbar pain.

- On December 5, 2014, Claimant presented to HealthOne and was evaluated by Dr. Broghammer. Claimant presented with complaints of right shoulder pain, upper back pain, and the additional complaint of lower back pain. Claimant stated that he injured himself yesterday at work. Claimant stated "he was moving a recliner off a lift" at 5:30 a.m. He also stated that "He was lifting with both hands when he noticed some symptoms in his right mid and upper back that extends into his lower back." (Ex C, pg. 21,23) Claimant also stated he had mild symptoms the day before, which would have been December 3, 2014, but no particular incident was noted.

- On December 29, 2014, Claimant returned to HealthOne and was seen by Dr. Hiep Ritzer. At this appointment, Claimant provided a different mechanism of injury. Dr. Ritzer noted Claimant stated:

> He was lifting this recliner by himself, lifting it 18 inches from the ground to the lift. He had to put it in a vertical position. It started to fall towards him, and he tried to stabilize it. In the process, he jerked his right shoulder." (Ex. C, pg. 26)

As set forth above, Claimant indicated that instead of being injured while lifting, he was actually injured while trying to catch or stabilize a recliner that he had lifted and moved 18 inches and placed on a lift, in a vertical position, and was falling towards him.

- On January 28, 2015, Claimant was evaluated by Dr. Davis. Claimant reported to Dr. Davis that "he was moving a sofa when he felt sudden pain in his back and shoulder."

  Although there might not be much of a difference between a recliner and sofa, in that both are pieces of furniture, the fact that it is noted in the medical records that Claimant is telling different stories about what he was lifting, or preventing from falling, when he got hurt, is relevant in this case. Moreover, the fact that Claimant told Dr. Ritzer that he was injured while trying to catch a recliner from tipping over or falling, which he had allegedly placed in a vertical position, does not make sense. Most recliners are fairly square, compared to a sofa which is usually rectangular. Therefore, a recliner would not fall over if put on any of its sides, compared to a couch being put in a vertical position on one of its sides.

- On February 27, 2015, Claimant was evaluated by Dr. Samuel Chan, a physiatrist. Claimant did not indicate he suffered an injury while lifting a single recliner or couch. Instead, Claimant told Dr. Chan that he developed right shoulder and low back pain the day after lifting approximately 200 recliners, which each weighed 300 pounds.

- On November 10, 2017, while being evaluated by Dr. Lesnak, Claimant alleged he was injured while lifting a recliner that weighed between 170 and 200 pounds.

32. In addition, Mr. Jeffrey Harris, the assistant warehouse manager, was asked whether Claimant's allegation that he was injured while lifting a recliner 18 inches from the ground to the lift makes sense and would be something Claimant would do to perform his job. Mr. Harris credibly testified that the way the warehouse is set up and the and the way the warehousemen perform their job, such contention could not be true. Mr. Harris stated that such contention could not be true because:

> The way our -- our -- our warehouse is set up and the way we put away merchandise we have what we call "order pickers" and it's a -- it's a machine that kind of looks like a forklift but it has a long bed, and at its lowest height it's probably four inches from the ground. And the way we put away merchandise, we have dollies. We have several dollies throughout the warehouse, and in order to put those merchandise away you -- you are instructed to grab a dolly, put it under there and lift it, and take it to your lift, and in its lifted position you set it down on the bed. That's how you lower any merchandise that we would have.

Q. Does anyone lift recliners 18 inches off the ground?

A. No, we do not. (TP 99.)

33. Therefore, the ALJ finds that Claimant's job did not require him to lift a recliner or couch 18 inches up off the ground and onto a lift as described by Claimant and finds that Claimant did not lift a recliner or couch in such a manner on November 28, 2014, or December 4, 2014.

34. Claimant contends in his proposed order that the different statements contained in the record regarding how and when he allegedly got injured are "understandable as each physician describes what happened in different terms;" and that the "difference between a sofa and a recliner is not significant;" and "lifting from the ground is not significantly different from lifting onto a lift." The ALJ is mindful that the words used by a Claimant to describe an accident and resulting injuries might not always be exactly the same. The ALJ is also mindful that even if a Claimant were to describe an accident and resulting injuries exactly the same to each medical provider, each medical provider might not document the information provided by Claimant in the same manner. However, the ALJ concludes that the inconsistencies in this case are more than the typical variations commonly seen in such matters. Therefore, the ALJ finds that the inconsistencies and variances involved in this case render Claimant's testimony unreliable and not credible.

35. In addition, Claimant testified that after he reported his injury to Employer on December 4, 2014, his manager had him wait for the ER to open before having Claimant go to the ER. Such testimony does not make any sense and is not credible.

36. The ALJ found the testimony of the Employer witnesses to be credible for a number of reasons. First, the testimony of each Employer witness is consistent with each other's testimony. Second, the testimony of the Employer witnesses is consistent with the Employment and medical records submitted at hearing. For example, Mr. Steve Harris testified that on December 4, 2014, shortly after going over Claimant's poor performance issues with Claimant, Claimant returned to his office and said he was not feeling well and asked if he could go home. Mr. Steve Harris testified that Claimant did not say he injured himself at work. Consistent with Mr. Harris' testimony, Claimant went to the ER and complained of various symptoms which primarily involved his right upper extremity. Claimant did not tell the ER physician that his symptoms were the result of an injury, let alone an injury at work. Moreover, once Claimant alleged he suffered a work related injury on December 4, 2014, and told his Employer on December 5, 2014, the matter was immediately addressed by Employer the same day and Claimant was provided a list of designated medical providers to evaluate Claimant's alleged work injury, and Claimant was seen that same day. Had Claimant reported an alleged injury on December 4, 2014, as alleged by Claimant, the ALJ finds that Employer would have immediately addressed the matter as was done the following day.

37. Claimant is not found to be credible based on a number of reasons. These reasons include, but not are not limited to:

- The inconsistencies contained in the medical records and his testimony regarding how he allegedly got hurt and when his various symptoms started.
- The inconsistencies in the employment records which include the statements made by Claimant to Ms. Lambert indicating the date he allegedly got hurt and the date listed in the medical records. As found above, Claimant told Ms. Lambert that he was injured on November 28, 2014, and then told the physicians he was injured on December 4, 2014.
- The fact that Claimant told his supervisor on December 4, 2014, about 10-15 minutes after being disciplined for poor performance, that he was sick and wanted to go home and did not mention he allegedly injured himself. Then, Claimant presented to the ER and did not indicate his symptoms were due to an injury or work injury.
- The inconsistencies between Claimant's testimony and the testimony of the Employer witnesses which this ALJ found credible.
- The overall demeanor of Claimant on the witness stand when testifying about his alleged injury and his demeanor when confronted with the numerous inconsistencies.
- The allegation that after reporting his injury to his supervisor on December 4, 2014, he was told by his supervisor to wait for the ER to open before going to the ER.

38. The ALJ finds Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

GENERAL PROVISIONS

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App.

2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Where the medical evidence is subject to conflicting inferences, it is the ALJ's sole prerogative to resolve the conflict. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable injury.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In this case, Claimant has failed to meet his burden of proof and establish that he suffered a compensable work injury. Claimant was found to not be credible regarding the onset of his symptoms and the cause of his symptoms.

Employer's witnesses have credibly refuted Claimant's testimony that he reported his injury to his supervisors on the morning of December 4, 2014, and that he was sent to the ER by his supervisor. Most significantly, the ER record from that day is inconsistent with Claimant's allegations of a work injury. That record makes no reference to an injury, let alone a work-related injury to claimant's low back. Instead, the medical record from Dr. Girard states Claimant denied back pain. The ER record from Dr. Girard shows that Claimant's complaint was arm pain that he had for one week, waxing and waning, and that he told the ER staff that he had similar pain a month previously.

In addition, Employer's risk manager credibly testified that on December 5, 2014, Claimant told her that he had been injured on November 28, 2014, that he had woken up in pain on the morning of December 4, 2014, and thus he had not reported his alleged injury until the morning of December 4, 2014. The risk manager prepared documents during her interview with Claimant and had Claimant review them. Claimant did so and then signed those documents. The risk manager then sent Claimant for treatment with a workers' compensation physician. That physician's records reflect that, approximately two hours after having told employer's risk manager that he was injured on November 28, 2014, Claimant told his physician he was injured on December 4, 2014.

During cross-examination, Claimant offered no explanation for this. He stated that he did not remember telling the risk manager that he was injured on November 28, 2014, and asserted that he could not have been injured on November 28, 2014 because he did not work that day. This testimony, like much of Claimant's testimony, was not credible. While testifying, many of Claimant's statements were inconsistent, and his demeanor on the stand, as observed by this ALJ, demonstrated to this ALJ that Claimant was not being truthful about injuring himself at work. Claimant offered no witness testimony nor credible and persuasive evidence (apart from his own testimony) to support his allegation that he was injured at work.

Moreover, Claimant's changing explanation to various providers as to how he allegedly got hurt further diminished Claimant's credibility.

The ALJ also found the opinions rendered by Dr. Lesnak in his report and testimony that Claimant did not suffer a work injury to be credible and persuasive.

Therefore, the ALJ concludes Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 14, 2018

/s/ Glen Goldman

Glen B. Goldman
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that the left knee surgery requested by Peter D. Wood, M.D. is reasonable, necessary and causally related to his February 18, 2015 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Sound Technician. His job duties involved monitoring noise generated at oil and gas drilling sites.

2. On February 18, 2015 Claimant was working at a drilling site in Wyoming. While carrying two batteries to power acoustic drilling equipment Claimant stepped into a prairie dog hole that was covered with snow. Claimant twisted his left knee and injured his left leg. He suffered immediate knee swelling.

3. Claimant informed his supervisor of the accident. The supervisor advised Claimant to visit his Primary Care Physician (PCP) for treatment.

4. On February 19, 2015 Claimant visited Heather Gray, PA-C at Partners in Family Health Medicine for an evaluation. PA-C Gray noted bruising and swelling in Claimant's left knee and ordered x-rays. The x-rays were negative for a fracture. PA-C Gray referred Claimant for an orthopedic consultation and left knee MRI.

5. Claimant received two days off work from Employer. Claimant explained that he then resumed full duty employment and repeatedly sought Workers' Compensation treatment. However, Employer continually denied Claimant's requests.

6. On October 27, 2016 Claimant returned to his PCP for an evaluation of his continuing left knee pain. PA-C Gray diagnosed arthralgia or joint pain of the left knee and was "suspicious" of a meniscal tear. She again referred Claimant for an orthopedic evaluation and left knee MRI.

7. On November 14, 2016 Claimant underwent a left knee MRI. The MRI reflected progressive patellofemoral chondromalacia with a prominent full thickness defect and degenerative fraying at the medial meniscus. The MRI did not reveal a lateral meniscus tear.

8. Respondents eventually admitted Claimant's Workers' Compensation claim. Claimant chose US Health Works Medical Group as his Authorized Treating Physician (ATP).

9. On November 16, 2016 Claimant visited US Health for an initial left knee evaluation. Claimant recounted that he had stepped in a hole in a field while carrying batteries at work and twisted his left knee. Donald Downs, PA-C remarked that diagnostic testing of Claimant's left knee revealed "chondromalacia with some lateral subluxation of the patella." He also noted that there was "some truncation of the medial meniscus body which may reflect degenerative fraying or small non-displaced free edge tear." PA-C Downs diagnosed Claimant with a left knee sprain and "likely" meniscal tear that was caused by his industrial accident on February 18, 2015. He permitted Claimant to continue his regular job duties and referred him to an orthopedist for a possible meniscal repair.

10. On December 16, 2016 Claimant visited Orthopedic Surgeon Peter D. Wood, M.D. for an examination. Claimant reported persistent, worsening left knee pain for approximately two years as a result of stepping into a hole at work. In reviewing Claimant's left knee MRI Dr. Wood noted "a slightly truncated medial meniscus but a distinct tear is not visible." He administered an injection and prescribed physical therapy.

11. Claimant subsequently underwent physical therapy and received injections. The physical therapy aggravated his symptoms and the injections only provided temporary pain relief.

12. On April 7, 2017 Claimant returned to Dr. Wood for an examination. Dr. Wood noted that Claimant continued to suffer significant discomfort despite a trial of Visco supplementation. He thus requested authorization for a left knee arthroscopy with a lateral release and chondroplasty.

13. Respondents denied the surgical authorization request based on the Rule 16 report of William Ciccone, M.D. dated April 17, 2017. Dr. Ciccone explained that the requested left knee surgery was not related to Claimant's February 18, 2015 industrial injury and was instead designed to address Claimant's pre-existing, degenerative patellofemoral changes. Moreover, Dr. Ciccone reasoned that Claimant was unlikely to benefit from the proposed surgery. He detailed that:

> On the orthopedic examination of December 16, 2016, the claimant has pain along the patellofemaoral joint with pain associated with kneeling, squatting, and stair climbing. These are symptoms that one would associate with degenerative changes in the patellofemoral joint and not to an acute injury. The minor twisting injury suffered by the claimant would not aggravate or accelerate the degenerative changes already occurring within the claimant's knee. I believe that the claimant's current symptoms are related to the natural progression of the cartilage degeneration within the knee and not to the work injury. I do not believe that the need for left knee arthroscopy is related to a work injury and therefore should be denied under worker's compensation insurance.

14. On July 25, 2017 Dr. Wood renewed his request for left knee surgery. He explained that, although Claimant had a pre-existing left knee condition, it was not

symptomatic until the February 18, 2015 industrial accident. Dr. Wood also noted that there was little treatment left to offer Claimant.

15. On August 8, 2017 Dr. Ciccone issued a letter again denying the left knee surgery requested by Dr. Wood. He explained that Claimant's MRI scan did not reveal an acute injury but only chronic, degenerative disease. The twisting injury did not aggravate or accelerate Claimant's pre-existing degenerative condition. Dr. Ciccone concluded that Claimant's February 18, 2015 industrial injury did not cause his degenerative changes or patellar misalignment. Accordingly, Dr. Ciccone recommended that the requested surgical procedure should not be authorized under the Workers' Compensation system.

16. On January 5, 2018 Claimant underwent a second left knee MRI. The MRI revealed a medial meniscus tear and full thickness cartilage defects in all compartments of Claimant's knee.

17. On January 22, 2018 Dr. Wood again requested authorization for Claimant's left knee surgery. He explained that Claimant's recent left knee MRI revealed "an oblique tear of the medial meniscus" and "significant chondromalacia" in all three compartments.

18. On January 28, 2018 Dr. Ciccone issued a Rule 16 medical record review again denying the left knee surgery requested by Dr. Wood. After reviewing Claimant's medical records, Dr. Ciccone reiterated that Claimant's symptoms are related to his continuing degenerative disease and not an acute injury to his left knee. He explained that degenerative arthritis is a progressive disease that is consistent with Claimant's intermittent symptoms. Dr. Ciccone noted that Claimant suffered a minor, twisting injury at work on February 18, 2015 with no acute damage reflected on the initial MRI scan. He explained that the January 5, 2018 MRI revealed progressive arthritic changes in the left knee involving all three compartments as well as a medial meniscus tear. Dr. Ciccone summarized that Claimant suffered a minor twisting injury on February 18, 2015, recovered quickly and "did not require another evaluation for over 18 months after the injury." He attributed Claimant's worsening symptoms to the natural progression of his pre-existing left knee condition.

19. On March 23, 2018 Claimant underwent an independent medical examination with John Papilion, M.D. Dr. Papilion reviewed Claimant's medical records and conducted a physical examination. He concluded that Claimant suffers from left knee progressive, degenerative arthritis as reflected on the January 5, 2018 MRI. In addressing Dr. Wood's request for surgery in the form of an arthroscopy, chondroplasty and lateral release, Dr. Papilion determined that the proposed procedure will not provide long-term relief for Claimant's degenerative arthritis. Furthermore, although Claimant had some evidence of a medial meniscus tear on MRI, his examination was not consistent with the diagnosis. Dr. Papilion thus concluded that Claimant's medial meniscus tear on MRI was not the likely pain generator for his symptoms.

20. Claimant has failed to establish that it is more probably true than not that the left knee surgery requested by Dr. Wood is reasonable, necessary and causally

related to his February 18, 2015 admitted industrial injury. Initially, on February 18, 2015 Claimant stepped in a hole in a field while carrying batteries at work and twisted his left knee. A November 14, 2016 left knee MRI reflected progressive patellofemoral chondromalacia with a prominent full thickness defect and degenerative fraying at the medial meniscus. The MRI did not reveal a lateral meniscus tear. Claimant subsequently underwent physical therapy and received injections. However, after conservative measures failed, Dr. Wood requested authorization for a left knee arthroscopy with a lateral release and chondroplasty. However, relying on the Rule 16 opinions of Dr. Ciccone, Respondents repeatedly denied Dr. Wood's surgical request.

21. Dr. Ciccone explained that Claimant's MRI scan did not reveal an acute injury but only chronic, degenerative changes to his left knee. Although Dr. Wood explained that Claimant's pre-existing condition did not become symptomatic until the February 18, 2015 twisting incident, Dr. Ciccone persuasively reasoned that the February 18, 2015 event did not aggravate or accelerate Claimant's left knee degenerative changes. After reviewing a second left knee MRI from January 5, 2018 Dr. Ciccone explained that degenerative arthritis is a progressive disease that is consistent with Claimant's intermittent symptoms. Dr. Ciccone noted that Claimant suffered a minor, twisting injury at work on February 18, 2015 with no acute damage reflected on the initial MRI scan. He explained that the January 5, 2018 MRI revealed progressive arthritic changes in the left knee involving all three compartments as well as a medial meniscus tear. Dr. Ciccone summarized that Claimant suffered a minor twisting injury on February 18, 2015 and recovered quickly. He attributed Claimant's worsening symptoms to the natural progression of his pre-existing left knee condition.

22. Dr. Papilion agreed with Dr. Ciccone's analysis. He concluded that Claimant suffers from left knee progressive, degenerative arthritis as reflected on the January 5, 2018 MRI. In addressing Dr. Wood's request for surgery in the form of an arthroscopy, chondroplasty and lateral release, Dr. Papilion determined that the proposed procedure will not provide long-term relief for Claimant's degenerative arthritis. Despite Dr. Wood's request for left knee surgery, the bulk of the persuasive medical evidence reveals that Claimant suffered a minor twisting incident on January 18, 2015 that did not cause his need for the requested surgical procedure. Instead, Claimant's need for left knee surgery is more likely attributable to the natural progression of his chronic, degenerative condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has failed to establish by a preponderance of the evidence that the left knee surgery requested by Dr. Wood is reasonable, necessary and causally related to his February 18, 2015 admitted industrial injury. Initially, on February 18, 2015 Claimant stepped in a hole in a field while carrying batteries at work and twisted his left knee. A November 14, 2016 left knee MRI reflected progressive patellofemoral chondromalacia with a prominent full thickness defect and degenerative fraying at the medial meniscus. The MRI did not reveal a lateral meniscus tear. Claimant subsequently underwent physical therapy and received injections. However, after conservative measures failed, Dr. Wood requested authorization for a left knee arthroscopy with a lateral release and chondroplasty. However, relying on the Rule 16 opinions of Dr. Ciccone, Respondents repeatedly denied Dr. Wood's surgical request.

6. As found, Dr. Ciccone explained that Claimant's MRI scan did not reveal an acute injury but only chronic, degenerative changes to his left knee. Although Dr. Wood explained that Claimant's pre-existing condition did not become symptomatic until the February 18, 2015 twisting incident, Dr. Ciccone persuasively reasoned that the February 18, 2015 event did not aggravate or accelerate Claimant's left knee degenerative changes. After reviewing a second left knee MRI from January 5, 2018 Dr. Ciccone explained that degenerative arthritis is a progressive disease that is consistent with Claimant's intermittent symptoms. Dr. Ciccone noted that Claimant suffered a minor,

twisting injury at work on February 18, 2015 with no acute damage reflected on the initial MRI scan. He explained that the January 5, 2018 MRI revealed progressive arthritic changes in the left knee involving all three compartments as well as a medial meniscus tear. Dr. Ciccone summarized that Claimant suffered a minor twisting injury on February 18, 2015 and recovered quickly. He attributed Claimant's worsening symptoms to the natural progression of his pre-existing left knee condition.

7. As found, Dr. Papilion agreed with Dr. Ciccone's analysis. He concluded that Claimant suffers from left knee progressive, degenerative arthritis as reflected on the January 5, 2018 MRI. In addressing Dr. Wood's request for surgery in the form of an arthroscopy, chondroplasty and lateral release, Dr. Papilion determined that the proposed procedure will not provide long-term relief for Claimant's degenerative arthritis. Despite Dr. Wood's request for left knee surgery, the bulk of the persuasive medical evidence reveals that Claimant suffered a minor twisting incident on January 18, 2015 that did not cause his need for the requested surgical procedure. Instead, Claimant's need for left knee surgery is more likely attributable to the natural progression of his chronic, degenerative condition.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for left knee surgery as recommended by Dr. Wood is denied and dismissed.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 13, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

W.C. No. 5-050-078-02 is an occupational disease claim for bilateral carpal tunnel syndrome alleging a date of injury of April 4, 2017 wherein New Hampshire was the insurance carrier until April 13, 201-based on a stipulation of the parties and finding of the ALJ. W.C. No. 6-056-383 is an occupational disease claim for bilateral carpal tunnel syndrome, alleging a date of injury of May 16, 2017 wherein travelers was the insurance carrier. On January 21, 2018, Prehearing ALJ (PALJ) Michael J. Barbo ordered a consolidation of both cases for hearing.

Claimant's Exhibits 1 through 6 were admitted into evidence, without objection. Respondents New Hampshire's Exhibits A through M were admitted into evidence, without objection. Respondent Travelers; Exhibits A through J and L through N were admitted into evidence without objection. Claimant objected to Travelers' Exhibit K, and it was withdrawn.

At the conclusion of the hearing, the ALJ ordered post-hearing briefs. Claimant's opening brief was filed on or about April 16, 2018. Respondent New Hampshire's answer brief was filed on or about April 20, 2018. On or about April 27, 2018, Claimant advised that he would **not** be filing a reply brief. On June 1, 2018, the ALJ granted Respondent New Hampshire's "Motion to Correct New Hampshire's Response Brief." Respondent Travelers filed no responsive post-hearing briefs and the matter was deemed submitted for decision on June 1, 2018.

ISSUES

The issues to be determined by this decision concern two fully contested occupational disease claims for alleged bilateral carpal tunnel syndrome. Depending on which insurance carrier is liable, additional issues concern medical benefits, average weekly wage (AWW) and temporary total disability (TTD) benefits from approximately June 15, 2017 (the last date the Claimant worked).

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds, that workers' compensation insurance coverage changed from New Hampshire to Travelers.

2. The Claimant began work for the Employer on February 6, 2017 as a crew chief on oil and gas drilling rigs. He was required to sign Rig Tickets showing the job title that he performed for the Employer. The Rig Tickets in evidence show from the date the Claimant began his employment until April 6, 2017 he was a crew chief. (Respondent New Hampshire's Exhibit G pp. 29 through 47). The ALJ infers and finds that Claimant's pre-April 6, 2017 duties were significantly **lighter** than his post-April 6, 2017 job duties. His job duties changed to relief operator, meaning he would do the work of a derrick worker or crewman as needed, on April 7, 2017(Respondent New Hampshire's Exhibit G, p. 47).

3. Beginning on April 7, 2017, the Claimant first worked as a derrick worker, and again on April 12, 2017 during New Hampshire's coverage (Respondent New Hampshire's Exhibit G, pp.47 and 50). He then worked on the day the coverage changed to Travelers as a derrick worker which was April 13, 2017 (Respondent New Hampshire's Exhibit G p.51).

4. After the change of coverage to Travelers, the Claimant worked one time as a derrick worker and 39 times as a crewman until which time he was taken off of work on June 16, 2017 (Respondent New Hampshire's Exhibit G, pp. 52 through 108).

5. The Claimant originally filed a workers' compensation claim in the State of Wyoming. In completing the required form, he was asked to describe his symptoms. He stated" first noted tingling and numbness in early April. Progressed to constant throbbing pain and numbness and loss of grip strength by May" (Respondent New Hampshire's Exhibit D p. 8).

6. The Claimant's last date worked was June 15, 2017. A Worker's Claim for Compensation was completed and filed on June 23, 2017. The Employer's First Report was filed August 16, 2017.

7. New Hampshire filed a Notice of Contest on July 28, 2017. Travelers filed a Notice of Contest on September 29, 2017.

Compensability/Last Injurious Exposure

8. The Claimant testified at hearing that by the time he needed a physician in May of 2017, his grip strength was bad enough that he could not hold a toothbrush.

9. In early April 2017, the Claimant's job duties prior to April 7, 2017 did not cause symptoms of carpal tunnel syndrome.

10. The ALJ finds that the Claimant developed bilateral carpal tunnel syndrome as a result of his employment with the Employer. The parties stipulated, and the ALJ found, that Respondent New Hampshire's coverage ended on April 13, 2017 and Respondent Travelers insurance coverage began on the same day.

11. Based on the testimony and records, if the Claimant's symptoms as of the date of the coverage change were primarily tingling and possibly some pain, Claimant's condition was not severe enough for him to seek medical care. After the date of the coverage change, however, according to the Claimant, his condition progressed to constant throbbing, pain, numbness, and loss of grip strength to include not being able to hold a toothbrush. By the end of May 2017, the Claimant's condition had progressed to the point where he believed he needed medical care and treatment.

12. The Rig Tickets from the Employer show that prior to the change in coverage the Claimant worked 2 times as a derrick worker and his third time as a derrick worker was on the date of coverage change. After the date of the coverage change, the Claimant worked one time as a derrick worker and 39 times as a crewman. Because the job duties prior to and after the coverage change were essentially the same, and the job duties cause the Claimant's carpal tunnel syndrome, the last injurious exposure occurred on June 15, 2017, when the Employer was insured by Travelers.

13. The ALJ finds that there was a substantial and permanent aggravation of the Claimant's bilateral carpal tunnel syndrome as of his last day on the job. The determinative factor is not how long the employment lasted but focuses on both the harmful nature of the concentration of the exposure and the magnitude of the effect of such exposure. In this case, after the coverage change the Claimant was subjected to the job duties that caused the original condition much more often and for an extended period of time. The fact that the Claimant's subjective complaints indicated that his condition progressed to include additional symptoms that were not present prior to the coverage change is a factor. The Claimant's symptoms were not severe enough to create the need for him to seek medical care until after the change of coverage. These factors lead to the factual conclusion that there was a substantial and permanent aggravation of the occupational disease of bilateral carpal tunnel syndrome after the change of coverage to Travelers.

Medical

14. The ALJ finds **no** evidence that there was no persuasive evidence presented concerning medical referrals or lack thereof by the Employer or either New Hampshire or Travelers. Therefore, the issues concerning carrier liability for medical care and treatment remains unresolved.

15. After seeking initial medical care on May 26, 2017, the Claimant had a medical appointment on June 19, 2017 with Nextcare. The medical report for that date of examination took the Claimant off of work stating that continuation of his work could worsen his condition. He has not worked after that date.

16. John Raschbacher, M.D., a Level-II accredited physician [by the Division of Workers' Compensation (DOWC)], examined the Claimant on December 15, 2017, in an Independent Medical Examination (IME). Dr. Raschbacher also consulted the DOWC Medical Treatment Guidelines (MTG) for carpal tunnel syndrome. He reviewed the Claimant's medical history, job duties, and medical records. In his report, Dr. Raschbacher wrote that the Claimant's bilateral carpal tunnel syndrome was work-related and was caused by the change in the work performed to relief operator in April 2017. Dr. Raschbacher stated: "My recommendation is to see a hand surgeon and have surgery (carpal tunnel release, bilaterally). "

17. At hearing, Dr. Raschbacher testified consistently with his report. He had since reviewed the original and amended jobsite analyses prepared by Dawn Leskinen, M.A., CRS, CVE, CEAS I, finding neither jobsite analysis changed his medical opinions and conclusion about work-relatedness.

.18. Dr. Raschbacher considered all of the available vocational information (both job site assessments and the Claimant's explanation of the errors in same), the EMG/NCV testing, as well as the 6-step causation analysis for cumulative trauma conditions - carpal tunnel syndrome set forth in the MTG.

19 Although the Claimant's burden of proof is never lessened, the ALJ can find no reasonable alternate mechanism as probably causing the Claimant's carpal tunnel syndrome. To be clear, neither Respondent Carrier is obliged to identify a plausible, alternative exposure.

20. As Dr. Raschbacher also notes, the way the Claimant specifically performed his tasks and the degree of force and duration of the work performed by the Claimant were enough to make it likely that he suffered the industrial disease due to what Claimant was doing, starting in March, 2017 for the Employer. According to the Claimant, he worked longer and was exposed to more weight, twisting, and vibrations than indicated in the jobsite analyses, and the jobsite analyses did not properly evaluate the work he was doing. The ALJ does not have to resolve who is correct on this point,

because there is no dispute. Suffice it to say, the Claimant was doing repetitive work at the time his symptoms occurred, and this repetitive work was at or near the primary and secondary risk factors set forth in the MTG.

Average Weekly Wage

21. The Claimant's AWW as of the date of his last injurious exposure, June 15, 2017, was $1,243.69, which was less than the State AWW for Fiscal Year (FY) 2016/2017, thus the Claimant's TTD rate is $829.13 per week, or $118,45 per day.

Temporary Total Disability

22. After seeking initial medical care on May 26, 2017, the Claimant had a medical appointment on June 19, 2017 with Nextcare. The medical report for that date of examination took the Claimant off of work stating that continuation of his work could worsen his condition. He has not worked after that date. There is **no** persuasive evidence that this total restriction has been lifted. The Employer has **not** offered the Claimant any modified work. The Claimant has not returned to any work nor has he earned any wages since June 16, 2017. No physician has declared him to be at maximum medical improvement (MMI). He has been sustaining a 100% temporary wage loss since June 15, 2017. Therefore, he has been temporarily and totally disabled since June 16, 2017 and continuing.

Ultimate Findings

23. Other than Dr. Raschbacher's IME opinions attributing the Claimant's last injurious exposure to his work after April 13, 2017, the date that coverage changed to Travelers, there are no other persuasive medical opinions contradicting Dr. Raschbacher's opinions. The ALJ finds Dr. Raschbacher's opinions highly persuasive and credible. Also, the ALJ finds the Claimant's testimony credible and undisputed.

24. The ALJ makes a rational choice to accept Dr. Raschbacher's opinions and the Claimant's testimony; and, to reject any opinions and evidence to the contrary.

25. The ALJ finds that the Claimant has sustained an occupational disease, bilateral carpal tunnel syndrome, which resulted directly from his employment or the conditions under which his work was performed, and can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the Claimant's employment, and which can be fairly traced to the employment as a proximate cause and which did not come from a hazard to which the Claimant would have been equally exposed outside of the employment. As found, the Claimant has proven an occupational disease with an onset date of March 2017 and a last injurious exposure of June 15, 2017, when Travelers was on the risk.

26. No persuasive evidence as presenting concerning the authorization of medical care and treatment for the Claimant's bilateral carpal tunnel syndrome was presented, however, the Claimant's first medical care was in May 2017, when Travelers was on the risk. Therefore, the issue of authorization must be reserved for future decision.

27. All of the Claimant's medical care and treatment for his bilateral carpal tunnel syndrome is and was causally related to his last injurious exposure of June 16, 2017, when Travelers was on the risk, and reasonably necessary to cure and relieve the effects thereof.

28. The Claimant's AWW as of the date of his last injurious exposure, June 15, 2017, was $1,243.69, which was less than the State AWW for Fiscal Year (FY) 2016/2017, thus the Claimant's TTD rate is $829.13 per week, or $118,45 per day.

29. The Claimant has been temporarily and totally disabled from June 16, 2017 through April 10, 2018, the hearing date, both dates inclusive, a total of 299 days; and, from April 11, 2018 and continuing until termination or modification of benefits is warranted.

30. The Claimant has proven, by a preponderance of the evidence that he sustained the occupational disease of bilateral carpal tunnel syndrome with a date of last injurious exposure of June 15, 2017, when Travelers was on the risk; that his medical care and treatment for the occupational disease was and is causally related to the last injurious exposure and reasonably necessary to cure and relieve the effects thereof; that his AWW is$1,243.69, thus, yielding a TTD rate of $829.13 per week, or $118.45 per day; and that he has been temporarily and totally disabled since June 16, 2017 and continuing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990);

Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, other than Dr. Raschbacher's IME opinions attributing the Claimant's last injurious exposure to his work after April 13, 2017, the date that coverage changed to Travelers, there are no other persuasive medical opinions contradicting Dr. Raschbacher's opinions. The ALJ finds Dr. Raschbacher's opinions highly persuasive and credible. Also, the ALJ finds the Claimant's testimony credible and undisputed.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions

in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice to accept Dr. Raschbacher's opinions and the Claimant's testimony; and, to reject any opinions and evidence to the contrary.

Compensability of Occupational Disease/Bilateral Carpal Tunnel Syndrome

c. An "occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). As found, the Claimant has proven an occupational disease of bilateral carpal tunnel syndrome, with an onset date of March 2017, and a last injurious exposure of June 15, 2017.

d. Section 8-41-304 (1), C.R.S., assesses sole and full liability for workers' compensation benefits on the employer in whose employment the claimant sustains the last injurious exposure. There has only been one employer herein. Consequently, the **substantial permanent aggravation** test is not apropos, the underlying rationale thereof is to affix liability on the last of successive employers. As found, Respondent travelers solely and fully liable for all workers' compensation benefits, including medical benefits (no medical costs were incurred before Travelers was on the risk).

Medical Benefits

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to his occupational disease of bilateral carpal tunnel syndrome, with an onset in March 2017 (no medical costs were incurred until May 2017). And a date of last injurious exposure of June 15, 2017. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary.

Average Weekly Wage (AWW)

f. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, Claimant has been losing 100% of his wages since June 15, 2017. *See also Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, the Claimant's AWW is $1,243.69.

Temporary Total Disability

g. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 [Indus. Claim Appeals Office (ICAO), December 18, 2000)]. As found, after seeking initial medical care on May 26, 2017, the Claimant had a medical appointment on June 19, 2017 with Nextcare. The medical report for that date of examination took the Claimant off of work stating that continuation of his work could worsen his condition. He has not worked after that date. There is **no** persuasive evidence that this total restriction has been lifted. The Employer has **not** offered the Claimant any modified work. The Claimant has not returned to any work nor has he earned any wages since June 16, 2017. No physician has declared him to be at maximum medical improvement (MMI).

h. Once the prerequisites forTTD are met (*e.g.*, no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant has been sustaining a 100% temporary wage loss since June 16, 2017. Therefore, he has been temporarily and totally disabled since June 16, 2017 and continuing.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an occupational disease, the date of last injurious exposure, and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012).. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on compensability; last injurious exposure on June 15, 2017; causal relatedness and reasonable necessity of medical care and treatment for the bilateral carpal tunnel syndrome; AWW of $1,243.60; and, TTD from June 16, 2017 and continuing.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims against Respondent New Hampshire Insurance Company are hereby denied and dismissed.

B. The Claimant's medical care and treatment for the occupational disease of bilateral carpal tunnel syndrome was and is causally related to the last injurious exposure of June 15, 2017; and, it was and is reasonably necessary to cure and relieve the effects thereof.

C. Respondent Travelers Indemnity Company shall pay the Claimant temporary total disability benefits $829.13 per week, or $118.45 per day, from June 16, 2017 through April 10, 2018, both dates inclusive, a total of 299 days, in the aggregate amount of $35, 415.55, which is payable retroactively and forthwith.

D. From April 11, 2018 and continuing as provided by law, Respondent Travelers Indemnity Company shall pay the Claimant $829.13 per week in temporary total disability benefits.

E. Respondent Travelers Indemnity Company shall pay the Claimant statutory interest of eight percent (8%) per annum on all amounts due and not paid when due.

F. Any and all issues not determined herein, including authorization of medical providers and treatment, are reserved for future decision,

DATED this 15 day of June 2018.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that he is entitled to an award of penalties pursuant to Section 8-43-304 C.R.S. for respondent's alleged failure to timely pay temporary total disability (TTD) benefits; alleged failure to pay for claimant's reasonable and necessary medical treatment; and alleged failure to file a bond with the Division of Workers' Compensation.

FINDINGS OF FACT

1. On January 3, 2018, ALJ Sidanycz issued Findings of Fact, Conclusions of Law, and Order in which the following was ordered:

   a. The claimant suffered a compensable injury on June 8, 2017 that arose out of and in the course and scope of his employment with the respondent.

   b. The respondent is responsible for payment of reasonable medical treatment necessary to cure and relieve the claimant from the effects of the June 8, 2017 work injury.

   c. The claimant's average weekly wage (AWW) for this claim is $1,500.00.

   d. The respondent shall pay the claimant temporary total disability (TTD) benefits for the periods of June 9, 2017 through June 30, 2017; September 18, 2017 through September 24, 2017; and October 16, 2017 and ongoing.

   e. The respondent shall pay the claimant temporary partial disability (TPD) benefits for the periods of July 31, 2017 through September 17, 2017; and September 25, 2017 through October 14, 2017.

   f. The claimant's benefits shall be increased by 50% because of the respondent's failure to obtain and maintain workers' compensation insurance.

   g. The respondent shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

2. In the January 3, 2018 Findings of Fact, Conclusion of Law, and Order, the ALJ also instructed the respondent to deposit the sum of $50,000.00 with the Division of Workers' Compensation, as trustee, or file a bond in the sum of $50,000.00 with the Division of Workers' Compensation, in lieu of payments to the claimant.

3. As of the date of the June 6, 2018 hearing, the employer has not provided any payment to the claimant, either directly or through counsel.

4. As of the date of the June 6, 2018 hearing, the employer has not provided any payment to the Division of Workers' Compensation.

5. The claimant testified at hearing that on April 11, 2018 he began new employment as a CNA at Palisade Living Center.

6. Based upon records provided by the claimant, the claimant is owed temporary total disability (TTD) benefits in the amount of $35,646.03 for the period of October 16, 2017 through April 10, 2018. In addition, interest accrued on this amount totals $1,099.24.

7. Since beginning new employment on April 11, 2018, the claimant is owed temporary partial disability (TPD) benefits totaling $7,797.49. Total interest owed by the employer for unpaid TPD is $41.70.

8. The respondent failed to appear at the hearing in this matter. As a result, there is no persuasive evidence on the record to demonstrate any mitigating circumstances that would have resulted in the respondent's failure to comply with the January 3, 2018 order. Nor has the respondent provided any explanation that his failure to comply is reasonable.

9. The ALJ relies upon the claimant's testimony and the exhibits entered into evidence and finds that the claimant has demonstrated that it is more likely than not that the respondent has failed to comply with the ALJ's January 3, 2018 order.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and

actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

3. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that any employer or insurer:

> "who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey any lawful order…, shall be subject to … a fine of not more than one thousand dollars per day for each such offense."

This provision has been construed as applying to violation of an order issued by an ALJ. *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

4. Before penalties may be assessed the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the employer's actions were objectively unreasonable. Section 8-43-304, C.R.S*. City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

5. An order is defined as including "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." *See* Section 8-40-201(15), C.R.S. The fine shall be apportioned in whole or part at the discretion of the director or administrative law judge between the aggrieved party and the workers' compensation cash fund created in Section 8-44-112, C.R.S. with the amount apportioned to the aggrieved party being a minimum of fifty percent of any penalty assessed. *See* Section 8-43-304, C.R.S. In addition, Section 8-43-305 C.R.S. provides that each day a party engages in the violation is construed as a separate offense.

6. In this case, the claimant seeks penalties for the employer's failure to comply with the ALJ's January 23, 2018 order. As found, the claimant has demonstrated by a preponderance of the evidence that the employer has failed to comply with the ALJ's January 23, 2018 order.

7. Pursuant to Section 8-43-301(2), C.R.S., the ALJ's January 3, 2018 order became final 20 days after it was issued. However, applying Section 8-43-401(2)(a), C.R.S., the employer had 30 days from the date of the order to pay benefits as ordered. Therefore, any penalties begin on the 31st day. In this matter, 31 days from January 3, 2018 is February 3, 2018.

8. For failing to comply with the January 3, 2018 order, the employer shall be assessed penalties in the amount of $500.00 per day beginning on February 3, 2018 through and including the date of hearing on June 6, 2018. This is a total of 124 days, resulting in penalties of $62,000.00.

ORDER

It is therefore ordered that:

1. The employer shall pay the claimant past due TTD benefits and interest totaling $36,745.27.

2. The employer shall pay the claimant past due TPD benefits and interest totaling $7,839.19.

3. The employer shall be liable to the claimant for penalties totaling $62,000.00. The penalties shall be paid 90% (or $55,800.00) to the claimant and 10% (or $6,200.00) to the subsequent injury fund.

4. The employer shall pay the Director of the Division of Workers' Compensation on behalf of the Workers' Compensation Subsequent Injury Fund as follows: employer shall issue any check payable to "Colorado Subsequent Injury Fund" and shall mail the check to Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee.

5. The employer continues to be responsible for filing a bond in the original amount of $50,000.00 with the Division of Worker's Compensation as ordered by the ALJ on January 3, 2018.

6. The employer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

8. In lieu of payment of the above compensation and benefits to the claimant, the employer shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $100,400.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee and mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; or

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $100,400.00 with the Division of Workers' Compensation within ten (10) days of the date of this order that is:

i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

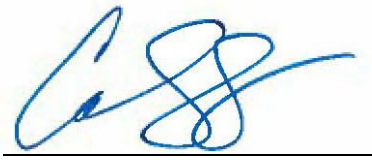
ii. Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

9. It is further ordered that the employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

10. It is further ordered that the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

Dated: June 19, 2018



Cassandra M. Sidanycz
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If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

The issues to be determined herein concern whether the Claimant sustained a compensable injury to his left hip on November 28, 2016. If so, what are the consequences of the injury; and, medical benefits, including the causal relatedness of a total left hip replacement. By agreement, the parties struck issues concerning temporary disability for the herein hearing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing and in the event the claim was deemed compensable, the parties stipulated that the Claimant's average weekly wage (AWW) was $618.68, which would increase by $110.20 for COBRA after April 1, 2018, for an AWW of $728.88. After the hearing, the parties stipulated, in the event the claim was deemed compensable; also, that Respondents are entitled to an offset of temporary benefits due to the Claimant's receipt of unemployment benefits. These stipulations are academic in light of the fact that issues concerning temporary disability benefits were withdrawn for purposes of the hearing.

2. The Claimant was employed by the Employer as a security guard on November 28, 2018.

3. The Claimant sustained a compensable injury to his left hip when he slipped and twisted without falling at work November 28, 2016. As found herein below, this injury was minor and amounted to a compensable aggravation of a pre-existing degenerative left hip condition, which degeneration was in the normal course of progression.

4. The Claimant had a long history of left hip pain prior to November 28, 2016. He was seen for left hip pain and stiffness November 6, 2000 (Respondents' Exhibit C, p. 017). On February 21, 2001, the Claimant was seen by Douglas H. Green, M.D., complaining of left inguinal pains over the previous five months. Dr. Green's impression was the pain was musculoskeletal (Respondents' Exhibit D, p. 020) As recently as January 25, 2016, the Claimant completed a New Patient Health History Form on which he indicated he had joint problems with his hips (Respondents' Exhibit E, p. 023) At hearing, the Claimant testified that when he completed Exhibit E, he was

referring to the symptoms he had in 2000. The ALJ infers and finds that the Claimant's testimony in this regard does not add up and is, therefore, not credible

The Incident of November 28, 2016 and Aftermath

5. The Claimant was seen by Keith Meier, FNP-C (certified nurse practitioner) on December 1, 2016. The Claimant reported that he had slipped on some hydraulic fluid **and caught himself without falling.** He complained of intermittent pain in the left hip and left groin. Meier's assessment was sprain of groin. The Claimant was released to return to full work and activity that day (Respondents' Exhibit F, pp. 024–026). On February 14, 2017, Rosalinda Pineiro, M.D., issued a WC164 form for the December 1, 2016 appointment. She noted that the Claimant had no restrictions (Respondents' Exhibit T, p. 063)

6. On December 5 and 14, 2016, the Claimant was seen again by Meier. He reported his symptoms were improving. Mr. Meier's assessment continued to be sprain of groin. The Claimant was released to return to full work and activity at each appointment. On December 14, 2016, Mr. Meier referred the Claimant for physical therapy. (Exhibit G, pp. 027–029, Exhibit H, pp. 030–032)

7. On December 15, 2016, the Claimant had physical therapy with Brian Busey, MPT. Mr. Busey noted no tenderness was found with palpation, and range of motion was within normal limits. (Exhibit I, pp. 034–035)

8. On December 20, 2016, the Claimant was seen again by Busey. He reported his hip had felt good the past two days. (Exhibit J, p. 036) On December 22, 2016, the Claimant reported to Busey his hip was feeling pretty good, 60% better overall. (Exhibit K, p. 037)

9. On December 29, 2016, the Claimant was seen by Bren F. Schmidt, MPT. He reported his hip was feeling pretty good, 70% better overall. Schmidt noted no significant postural deviations, normal gait with no observed deviations, no tenderness found with palpation, range of motion within normal limits, and manual muscle testing within normal limits. (Exhibit L, p. 040)

10. On January 3, 2017, the Claimant was seen again by MPT Busey. He estimated that overall he had a 70 to 75% improvement since initiating physical therapy. (Exhibit M, p. 043) On January 5, 2017, the Claimant reported to Busey he was still 75% improved. He had tried jogging at the gym earlier that day with no adverse reactions. Busey noted the Claimant was able to stand for six hours pain free, his goal of standing pain-free was 90% achieved, and his goal of walking pain-free was 100% achieved. His therapy assessment was: "Overall progress. As expected. Decreased pain complaints, improved function." (Exhibit N, p. 046–047)

11. On January 13, 2017, the Claimant was seen by Amy Patrick, PA, at Banner Health to complete deployment paperwork. No hip issues were noted. (Exhibit O, p. 049).

12. On January 17, 2017, the Claimant was seen again by MPT Busey. He reported 80% improvement. Busey noted no significant postural deviations, normal gait with no observed deviations, no tenderness found with palpation, range of motion within normal limits, manual muscle testing within normal limits, and negative FABER test. Busey noted the Claimant was able to stand for six hours pain free, his goal of standing pain-free was 90% achieved, and his goal of walking pain-free was 100% achieved. His therapy assessment was: "Overall progress. "As expected. Decreased pain complaints, improved function." (Exhibit P, pp. 052–053)

13. On January 19, 2017, the Claimant was seen again by MPT Busey. He reported >80% improvement. Busey noted no significant postural deviations, normal gait with no observed deviations, no tenderness found with palpation, range of motion within normal limits, manual muscle testing within normal limits, and negative FABER test. Busey noted the Claimant's goals of standing and walking pain-free were 100% achieved. His therapy assessment was: "Overall progress. "As expected. All functional and impairment goals have been achieved." Busey recommended discontinuation of therapy with emphasis on continuation of home exercise program for prophylaxis. (Exhibit Q, pp. 055–056).

14. On January 19, 2017, the Claimant was seen by Derek Wright, M.D. Dr. Wright noted the Claimant had been working full time without restrictions. He had completed PT and knew his home exercises to perform at home. The Claimant said his hip was feeling better. The Claimant reported he had no pain currently, but he got "a little gnawing every now and then" after a workout at the gym. Symptoms resolved within about an hour. Dr. Wright's left hip exam was normal. There was no tenderness. Internal and external rotation were painless. Neurovascular function was intact. Straight leg raise was negative. Upper and lower extremity reflexes were symmetric bilaterally. The Claimant's gait was normal. Dr. Wright's assessment was sprain of groin. Dr. Wright released the Claimant from care with a maximum medical improvement (MMI) date of January 19, 2017. The Claimant was released to return to full work and activity. Dr. Wright did not address permanent impairment. (Exhibit R, pp. 058–060).

15. `The Claimant testified he had to perform a physical fitness test to remain employed with respondent employer. That test involved the Claimant running a distance of 1/1.5 miles under a certain time scaled to the age of the employee. The Claimant was able to run the required distance and meet the benchmark to pass his timed fitness tests.

16. On February 10, 2017, the Claimant was seen by Ms. Patrick at Banner Health for hypertension. She noted he was exercising 3–4 days a week. No hip issues were noted. (Ex. S, p. 061). On February 22, 2017, the Claimant was seen again by Ms.

Patrick at Banner Health for hypertension. She noted he was exercising regularly. No hip issues were noted. (Exhibit U, p. 064)

17. On July 13, 2017, the Claimant was seen by Robert Nystrom, D.O. Dr. Nystrom had not treated the Claimant previously. He is seeing the Claimant for a one-time evaluation. The Claimant advised Dr. Nystrom that he was placed at MMI on January 19, 2017 "he had been placed at MMI concerning his hip injury on 1/19/17. He was still having some discomfort at that time but it was felt that it would gradually resolve. Unfortunately it did not, in fact it seems to have worsened." However, this is not a fair characterization of the Claimant's status at discharge at MMI and Dr. Nystrom did not indicate he reviewed the prior chart. Dr. Nystrom recommends the case be reopened but Dr. Nystrom did not evaluate the cause of the worsening of condition and the history he was given was not accurate. The Claimant was released to return to full work and activity. (Exhibit V, pp. 066–067)

18. On July 26, 2017, the Claimant had an MRI of the left hip without contrast. It was read by Derek Burdeny, M.D., whose impression was: "Right hip arthrosis with grade 4 chondral loss to the articular surfaces and small joint effusion. Marginal osteophytes may predispose to combine CAM and pincer impingement." (Claimant's Exhibit 5, p. 115).

19. On August 15, 2017, the Claimant was seen by Joshua T. Snyder, M.D., at Orthopaedic & Spine Center of the Rockies. The Claimant reported his hip catches and he continued to have significant pain within the groin. The Claimant reported it had affected his activity and he was unable to run and walk distances he usually would be able to do. Dr. Snyder's impression was left hip osteoarthritis. He recommended conservative treatment with anti-inflammatories, physical therapy, and possibly cortisone injection. He also recommended the Claimant follow up with one of their primary joint replacement specialist for consideration of total hip arthroplasty. Dr. Clark did not do a causation analysis. (Claimant's Exhibit 6, p. 124)

20. On September 5, 2017, the Claimant was seen by C. Dana Clark, M.D. Dr. Clark recorded a history that in November the Claimant twisted and fell and had had pain in his left hip since then. Dr. Clark did not review the medical records. The Claimant told Dr. Clark he had undergone physical therapy without relief, the pain was getting worse and now he was limping with every step. Dr. Clark noted the radiographic studies showed the Claimant had severe osteoarthritis, bone-on-bone, complete loss of joint space, osteophytes, and cysts, which the MRI further corroborated. Dr. Clark's diagnosis was end-stage left hip arthrosis with failure of non-operative management. Dr. Clark recommended a hip replacement. (Exhibit 6, p. 122)

21. The history the Claimant reported to Dr. Clark is inconsistent with his previous medical records for treatment of the November 28, 2016 injury. Specifically, Dr. Clark was under the impression the Claimant fell in November. Furthermore, the Claimant apparently reported to Dr. Clark that physical therapy had not provided relief.

The physical therapy records at the time of MMI documented the Claimant's goals of standing and walking pain-free were 100% achieved. Dr. Wright's record when he placed the Claimant at MMI documented the Claimant's report his hip was feeling better; he had no pain currently, but he got "a little gnawing every now and then" after a workout at the gym, which resolved within about an hour. (*See* Exhibits Q and R). The Claimant also advised Dr. Clark he was limping, yet the PT notes on multiple occasions indicated the Claimant was not observed to have a limp.

22. In his September 13, 2017 report, Peter L. Weingarten, M.D., stated the Claimant's diagnosis was advanced degenerative arthritis superimposed with the left hip sprain/exacerbation of osteoarthritic symptoms. He stated the arthritic changes were 100% pre-existing and unrelated to the November 28, 2016 incident, and the need for total hip arthroplasty was related to the pre-existing condition and not to the relatively minor November 28, 2016 incident. Dr. Weingarten further stated the course and progression of the degenerative arthritis was not altered or accelerated by the November 28, 2016 incident. Dr. Weingarten agreed the left hip replacement was indicated and appropriate for treatment of the pre-existing degenerative arthritis, but reiterated that the need for hip replacement was not related to the November 28, 2016 incident. Dr. Weingarten stated the Claimant did not have a disability related to the November 28, 2016 incident, and no further treatment was indicated for injuries sustained in the November 28, 2016 incident. (Respondents' Exhibit Y, pp. 076–078)

23. On October 12, 2017, Dr. Nystrom listed his assessment as left hip pain. He noted the Claimant had decided to go ahead with the hip replacement surgery by Dr. Clark through his private insurance. (Exhibit X, pp. 071–072)

24. On October 25, 2017, Dr. Clark performed left anterior total hip arthroplasty. (Claimant's Exhibit 6, p. 118)

25. The adjuster filed a Notice of Contest on November 13, 2017, stating: "Request for surgery not work related per Dr. Weingarten's attached report." (Respondents' Exhibit Y, p. 074)

26. On December 7, 2017, Dr. Clark noted the Claimant had no restrictions outside of no running and jumping. He released the Claimant to return to work. (Respondents' Exhibit Z, pp. 080–081)

27. On February 8, 2018, Dr. Nystrom noted the Claimant had been working regular duty without any problems, but he had not been released to run yet by Dr. Clark. Dr. Nystrom noted the Claimant was released to return to full work and activity. (Respondents' Exhibit AA, pp. 082–083)

28. The Claimant testified he did not miss any time from work from the date of his injury until he was placed at MMI.

Ultimate Findings

29. The ALJ finds the opinions of Dr. Ciccone and Dr. Weingarten on causation highly persuasive and credible. The ALJ further finds the opinions of Dr. Nystrom and Dr. Clark lacking in credibility on the causal relatedness to the November 28, 2016 incident, primarily because they were based on the Claimant's failure to give them an accurate history of previous problems with his left hip. Also, because the Claimant was not forthcoming with initial treating physicians and Surgeon Dr. Clark, concerning an accurate medical history of previous left hip problems and treatment, the ALJ finds the Claimant's testimony lacking in credibility.

30. Between conflicting medical and lay opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of IME Dr. Ciccone and Dr. Weingarten, on the causal relatedness of medical treatment after January 19, 2017 (the MMI date for the left hip sprain/strain) and the left knee replacement performed by Dr. Clark on October 25, 2017. Both Dr. Ciccone and Dr. Weingarten establish the work-relatedness of the sprain/strain of November 28, 2016, from which the Claimant recovered by January 19, 2017, and was back to the baseline of his naturally progressing degenerative condition of the left hip.

31. The sprain/strain incident of November 28, 2016 necessitated medical care and treatment until January 19, 2017, and was, therefore, a compensable event. Consequently, medical care and treatment for the strain/sprain until January 19, 2017, was authorized, causally related to the sprain/strain, and reasonably necessary to cure and relieve the effects of the November 28, 2016 sprain/strain incident.

32. The Claimant is **not** entitled to temporary disability benefits from November 28, 2016 and January 19, 2017. Although this issue was withdrawn at the commencement of the hearing, this finding is necessary to underscore the Claimant's entitlement to medical benefits during this period of time.

33. The Claimant has failed to prove, by a preponderance of the evidence that there is a causal link between his left hip condition after January 19, 2017, including the total left hip replacement of October 25, 2017 by Dr. Clark.

34. At this juncture, the stipulation concerning AWW is academic for purposes of this decision, however, it amounts to a judicial admission by the Respondents that the Claimant's AWW as of November 28, 2016 wasa$618.69, and as of April 1, 2018, it increased to $728.88.

Discussion of Lack of Applicability of *Loofbourrow*

Harman-Bergstedt, Inc. v. L*oofbourrow*, 320 P.3d 327 (Colo. 2014), which applied very narrow, fact specific principles, without establishing a sweeping precedent. *Trujillo* determined that MMI is a term of art, and has no legal significance in a case with no indemnity benefits payable. This makes implicit sense because MMI is the demarcation line between temporary and permanent disability indemnity benefits.

Indeed, it is the demarcation line between temporary disability benefits and **zero** permanent disability. In *Loofbourrow* by extension, an FAL is not effective to close a case as to further medical benefits. The Court stated that a claimant could still seek further medical benefits, with the burden of proof as to reasonableness and causal relatedness on the claimant. The holding of the case is that a petition to reopen need not be filed under §8-43-303, if the claimant should seek further medical benefits. The case sets no precedent as to any broader meaning than in the context of reopening for medical benefits, and it does not specify what type of medical benefits it is meant to address (*i.e*. *Grover* or pre-MMI substantive treatment). To accept the Respondents argument that the sprain/strain incident of November 28, 2016 is **not compensable**, although it was work-related and necessitated medical treatment for which the Respondents were liable if it met the workers' compensation tests would overturn the reasonable expectations of the community of injured workers who choose to go to hearing to establish an employer's liability for denied medical benefits in a work-related claim. Such an argument bears the hallmarks of a circular argument that may amount to sophistry. This could be the situation in a parallel universe (where technical form triumphs over due process), but not in Colorado.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a

witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* §8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Ciccone and Dr. Weingarten on causation were highly persuasive and credible. As further found, the opinions of Dr. Nystrom and Dr. Clark were lacking in credibility on the causal relatedness to the November 28, 2016 incident, primarily because they were based on the Claimant's failure to give them an accurate history of previous problems with his left hip. Also, because the Claimant was not forthcoming with initial treating physicians and Surgeon Dr. Clark, concerning an accurate medical history of previous left hip problems and treatment, the Claimant's testimony lacked credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical and lay opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of IME Dr. Ciccone and Dr. Weingarten, on the causal relatedness of medical treatment after January 19, 2017 (the MMI date for the left hip sprain/strain) and the left knee replacement performed by Dr. Clark on October 25, 2017. Both Dr. Ciccone and Dr. Weingarten established the work-relatedness of the sprain/strain of November 28, 2016, from which the Claimant recovered by January 19, 2017, and was back to the baseline of his naturally progressing degenerative condition of the left hip.

Sufficiency for Compensability of November 28, 2016 Left Hip Sprain/Strain

c. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). Respondents argue that the holding in *Harman-Bergstedt, Inc. v. Loofbourrow* effectively negates the compensability of injuries where the worker is not disabled for more than three days or shifts. Such is a misinterpretation of *Loofbourrow* and the prevailing law of compensability. *Loofbourrow* was decided on very narrow, specific circumstances not applicable to the present case. § 8-41-301, C.R.S.,*Henderson, supra* and *Gaudett, supra,* distinguished something in the nature a work-related paper cut, where no medical care was sought or given—not to a situation where the effects of a strain are treated for almost two months and an employer is ultimately held liable whether or not it chose to pay medical bills without admitting or denying liability. As found, the Claimant sustained a sprain/strain of the left hip on November 28, 2016; he received medical care and treatment for the sprain/strain from November 28, 2016 through January 19, 2017, when he returned to the baseline of his naturally progressive degenerative condition, which ultimately necessitated the non-work related total left hip replacement of October 25, 2017.

Lack of Compensability of Left Hip Condition After January 19, 2017

d. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** A manner of conceptualizing the matter is, essentially, that a presumption of work-relatedness may arise when an unexplained injury occurs during the course of employment. However, it is incumbent to show that non-work related factors caused the injury. Nonetheless, proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant failed to prove, by a preponderance of the evidence that there was a causal link between his left hip condition after January 19, 2017, including the total left hip replacement of October 25, 2017 by

Dr. Clark. Therefore, the Claimant failed to prove entitlement to any workers' compensation benefits for his left hip condition after January 19, 2017.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven the compensability of the left hip sprain/strain of November 28, 2016, a temporary phenomenon which lasted until January 19, 2017, when he was placed at MMI for the sprain/strain. As further found, the Claimant failed to prove the causal relatedness and/or compensability of his left hip condition after January 19, 2017, including the causal relatedness of the total hip replacement of October 25, 2017.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of authorized, causally related and reasonably necessary medical care and treatment for the Claimant's left hip sprain/strain of November 28, 2016 from that date until January 19, 2017, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all claims for medical care and treatment for the Claimant's naturally progressing, degenerative left hip condition, including the total left hip replacement of October 25, 2017, are hereby denied and dismissed.

DATED this_____day of June 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

The issues to be determined herein concern whether the Claimant sustained a compensable injury to his left hip on November 28, 2016. If so, what are the consequences of the injury; and, medical benefits, including the causal relatedness of a total left hip replacement. By agreement, the parties struck issues concerning temporary disability for the herein hearing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing and in the event the claim was deemed compensable, the parties stipulated that the Claimant's average weekly wage (AWW) was $618.68, which would increase by $110.20 for COBRA after April 1, 2018, for an AWW of $728.88. After the hearing, the parties stipulated, in the event the claim was deemed compensable; also, that Respondents are entitled to an offset of temporary benefits due to the Claimant's receipt of unemployment benefits. These stipulations are academic in light of the fact that issues concerning temporary disability benefits were withdrawn for purposes of the hearing.

2. The Claimant was employed by the Employer as a security guard on November 28, 2018.

3. The Claimant sustained a compensable injury to his left hip when he slipped and twisted without falling at work November 28, 2016. As found herein below, this injury was minor and amounted to a compensable aggravation of a pre-existing degenerative left hip condition, which degeneration was in the normal course of progression.

4. The Claimant had a long history of left hip pain prior to November 28, 2016. He was seen for left hip pain and stiffness November 6, 2000 (Respondents' Exhibit C, p. 017). On February 21, 2001, the Claimant was seen by Douglas H. Green, M.D., complaining of left inguinal pains over the previous five months. Dr. Green's impression was the pain was musculoskeletal (Respondents' Exhibit D, p. 020) As recently as January 25, 2016, the Claimant completed a New Patient Health History Form on which he indicated he had joint problems with his hips (Respondents' Exhibit E, p. 023) At hearing, the Claimant testified that when he completed Exhibit E, he was

referring to the symptoms he had in 2000. The ALJ infers and finds that the Claimant's testimony in this regard does not add up and is, therefore, not credible

The Incident of November 28, 2016 and Aftermath

5. The Claimant was seen by Keith Meier, FNP-C (certified nurse practitioner) on December 1, 2016. The Claimant reported that he had slipped on some hydraulic fluid **and caught himself without falling.** He complained of intermittent pain in the left hip and left groin. Meier's assessment was sprain of groin. The Claimant was released to return to full work and activity that day (Respondents' Exhibit F, pp. 024–026). On February 14, 2017, Rosalinda Pineiro, M.D., issued a WC164 form for the December 1, 2016 appointment. She noted that the Claimant had no restrictions (Respondents' Exhibit T, p. 063)

6. On December 5 and 14, 2016, the Claimant was seen again by Meier. He reported his symptoms were improving. Mr. Meier's assessment continued to be sprain of groin. The Claimant was released to return to full work and activity at each appointment. On December 14, 2016, Mr. Meier referred the Claimant for physical therapy. (Exhibit G, pp. 027–029, Exhibit H, pp. 030–032)

7. On December 15, 2016, the Claimant had physical therapy with Brian Busey, MPT. Mr. Busey noted no tenderness was found with palpation, and range of motion was within normal limits. (Exhibit I, pp. 034–035)

8. On December 20, 2016, the Claimant was seen again by Busey. He reported his hip had felt good the past two days. (Exhibit J, p. 036) On December 22, 2016, the Claimant reported to Busey his hip was feeling pretty good, 60% better overall. (Exhibit K, p. 037)

9. On December 29, 2016, the Claimant was seen by Bren F. Schmidt, MPT. He reported his hip was feeling pretty good, 70% better overall. Schmidt noted no significant postural deviations, normal gait with no observed deviations, no tenderness found with palpation, range of motion within normal limits, and manual muscle testing within normal limits. (Exhibit L, p. 040)

10. On January 3, 2017, the Claimant was seen again by MPT Busey. He estimated that overall he had a 70 to 75% improvement since initiating physical therapy. (Exhibit M, p. 043) On January 5, 2017, the Claimant reported to Busey he was still 75% improved. He had tried jogging at the gym earlier that day with no adverse reactions. Busey noted the Claimant was able to stand for six hours pain free, his goal of standing pain-free was 90% achieved, and his goal of walking pain-free was 100% achieved. His therapy assessment was: "Overall progress. As expected. Decreased pain complaints, improved function." (Exhibit N, p. 046–047)

11. On January 13, 2017, the Claimant was seen by Amy Patrick, PA, at Banner Health to complete deployment paperwork. No hip issues were noted. (Exhibit O, p. 049).

12. On January 17, 2017, the Claimant was seen again by MPT Busey. He reported 80% improvement. Busey noted no significant postural deviations, normal gait with no observed deviations, no tenderness found with palpation, range of motion within normal limits, manual muscle testing within normal limits, and negative FABER test. Busey noted the Claimant was able to stand for six hours pain free, his goal of standing pain-free was 90% achieved, and his goal of walking pain-free was 100% achieved. His therapy assessment was: "Overall progress. "As expected. Decreased pain complaints, improved function." (Exhibit P, pp. 052–053)

13. On January 19, 2017, the Claimant was seen again by MPT Busey. He reported >80% improvement. Busey noted no significant postural deviations, normal gait with no observed deviations, no tenderness found with palpation, range of motion within normal limits, manual muscle testing within normal limits, and negative FABER test. Busey noted the Claimant's goals of standing and walking pain-free were 100% achieved. His therapy assessment was: "Overall progress. "As expected. All functional and impairment goals have been achieved." Busey recommended discontinuation of therapy with emphasis on continuation of home exercise program for prophylaxis. (Exhibit Q, pp. 055–056).

14. On January 19, 2017, the Claimant was seen by Derek Wright, M.D. Dr. Wright noted the Claimant had been working full time without restrictions. He had completed PT and knew his home exercises to perform at home. The Claimant said his hip was feeling better. The Claimant reported he had no pain currently, but he got "a little gnawing every now and then" after a workout at the gym. Symptoms resolved within about an hour. Dr. Wright's left hip exam was normal. There was no tenderness. Internal and external rotation were painless. Neurovascular function was intact. Straight leg raise was negative. Upper and lower extremity reflexes were symmetric bilaterally. The Claimant's gait was normal. Dr. Wright's assessment was sprain of groin. Dr. Wright released the Claimant from care with a maximum medical improvement (MMI) date of January 19, 2017. The Claimant was released to return to full work and activity. Dr. Wright did not address permanent impairment. (Exhibit R, pp. 058–060).

15. `The Claimant testified he had to perform a physical fitness test to remain employed with respondent employer. That test involved the Claimant running a distance of 1/1.5 miles under a certain time scaled to the age of the employee. The Claimant was able to run the required distance and meet the benchmark to pass his timed fitness tests.

16. On February 10, 2017, the Claimant was seen by Ms. Patrick at Banner Health for hypertension. She noted he was exercising 3–4 days a week. No hip issues were noted. (Ex. S, p. 061). On February 22, 2017, the Claimant was seen again by Ms.

Patrick at Banner Health for hypertension. She noted he was exercising regularly. No hip issues were noted. (Exhibit U, p. 064)

17. On July 13, 2017, the Claimant was seen by Robert Nystrom, D.O. Dr. Nystrom had not treated the Claimant previously. He is seeing the Claimant for a one-time evaluation. The Claimant advised Dr. Nystrom that he was placed at MMI on January 19, 2017 "he had been placed at MMI concerning his hip injury on 1/19/17. He was still having some discomfort at that time but it was felt that it would gradually resolve. Unfortunately it did not, in fact it seems to have worsened." However, this is not a fair characterization of the Claimant's status at discharge at MMI and Dr. Nystrom did not indicate he reviewed the prior chart. Dr. Nystrom recommends the case be reopened but Dr. Nystrom did not evaluate the cause of the worsening of condition and the history he was given was not accurate. The Claimant was released to return to full work and activity. (Exhibit V, pp. 066–067)

18. On July 26, 2017, the Claimant had an MRI of the left hip without contrast. It was read by Derek Burdeny, M.D., whose impression was: "Right hip arthrosis with grade 4 chondral loss to the articular surfaces and small joint effusion. Marginal osteophytes may predispose to combine CAM and pincer impingement." (Claimant's Exhibit 5, p. 115).

19. On August 15, 2017, the Claimant was seen by Joshua T. Snyder, M.D., at Orthopaedic & Spine Center of the Rockies. The Claimant reported his hip catches and he continued to have significant pain within the groin. The Claimant reported it had affected his activity and he was unable to run and walk distances he usually would be able to do. Dr. Snyder's impression was left hip osteoarthritis. He recommended conservative treatment with anti-inflammatories, physical therapy, and possibly cortisone injection. He also recommended the Claimant follow up with one of their primary joint replacement specialist for consideration of total hip arthroplasty. Dr. Clark did not do a causation analysis. (Claimant's Exhibit 6, p. 124)

20. On September 5, 2017, the Claimant was seen by C. Dana Clark, M.D. Dr. Clark recorded a history that in November the Claimant twisted and fell and had had pain in his left hip since then. Dr. Clark did not review the medical records. The Claimant told Dr. Clark he had undergone physical therapy without relief, the pain was getting worse and now he was limping with every step. Dr. Clark noted the radiographic studies showed the Claimant had severe osteoarthritis, bone-on-bone, complete loss of joint space, osteophytes, and cysts, which the MRI further corroborated. Dr. Clark's diagnosis was end-stage left hip arthrosis with failure of non-operative management. Dr. Clark recommended a hip replacement. (Exhibit 6, p. 122)

21. The history the Claimant reported to Dr. Clark is inconsistent with his previous medical records for treatment of the November 28, 2016 injury. Specifically, Dr. Clark was under the impression the Claimant fell in November. Furthermore, the Claimant apparently reported to Dr. Clark that physical therapy had not provided relief.

The physical therapy records at the time of MMI documented the Claimant's goals of standing and walking pain-free were 100% achieved. Dr. Wright's record when he placed the Claimant at MMI documented the Claimant's report his hip was feeling better; he had no pain currently, but he got "a little gnawing every now and then" after a workout at the gym, which resolved within about an hour. (*See* Exhibits Q and R). The Claimant also advised Dr. Clark he was limping, yet the PT notes on multiple occasions indicated the Claimant was not observed to have a limp.

22. In his September 13, 2017 report, Peter L. Weingarten, M.D., stated the Claimant's diagnosis was advanced degenerative arthritis superimposed with the left hip sprain/exacerbation of osteoarthritic symptoms. He stated the arthritic changes were 100% pre-existing and unrelated to the November 28, 2016 incident, and the need for total hip arthroplasty was related to the pre-existing condition and not to the relatively minor November 28, 2016 incident. Dr. Weingarten further stated the course and progression of the degenerative arthritis was not altered or accelerated by the November 28, 2016 incident. Dr. Weingarten agreed the left hip replacement was indicated and appropriate for treatment of the pre-existing degenerative arthritis, but reiterated that the need for hip replacement was not related to the November 28, 2016 incident. Dr. Weingarten stated the Claimant did not have a disability related to the November 28, 2016 incident, and no further treatment was indicated for injuries sustained in the November 28, 2016 incident. (Respondents' Exhibit Y, pp. 076–078)

23. On October 12, 2017, Dr. Nystrom listed his assessment as left hip pain. He noted the Claimant had decided to go ahead with the hip replacement surgery by Dr. Clark through his private insurance. (Exhibit X, pp. 071–072)

24. On October 25, 2017, Dr. Clark performed left anterior total hip arthroplasty. (Claimant's Exhibit 6, p. 118)

25. The adjuster filed a Notice of Contest on November 13, 2017, stating: "Request for surgery not work related per Dr. Weingarten's attached report." (Respondents' Exhibit Y, p. 074)

26. On December 7, 2017, Dr. Clark noted the Claimant had no restrictions outside of no running and jumping. He released the Claimant to return to work. (Respondents' Exhibit Z, pp. 080–081)

27. On February 8, 2018, Dr. Nystrom noted the Claimant had been working regular duty without any problems, but he had not been released to run yet by Dr. Clark. Dr. Nystrom noted the Claimant was released to return to full work and activity. (Respondents' Exhibit AA, pp. 082–083)

28. The Claimant testified he did not miss any time from work from the date of his injury until he was placed at MMI.

Ultimate Findings

29. The ALJ finds the opinions of Dr. Ciccone and Dr. Weingarten on causation highly persuasive and credible. The ALJ further finds the opinions of Dr. Nystrom and Dr. Clark lacking in credibility on the causal relatedness to the November 28, 2016 incident, primarily because they were based on the Claimant's failure to give them an accurate history of previous problems with his left hip. Also, because the Claimant was not forthcoming with initial treating physicians and Surgeon Dr. Clark, concerning an accurate medical history of previous left hip problems and treatment, the ALJ finds the Claimant's testimony lacking in credibility.

30. Between conflicting medical and lay opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of IME Dr. Ciccone and Dr. Weingarten, on the causal relatedness of medical treatment after January 19, 2017 (the MMI date for the left hip sprain/strain) and the left knee replacement performed by Dr. Clark on October 25, 2017. Both Dr. Ciccone and Dr. Weingarten establish the work-relatedness of the sprain/strain of November 28, 2016, from which the Claimant recovered by January 19, 2017, and was back to the baseline of his naturally progressing degenerative condition of the left hip.

31. The sprain/strain incident of November 28, 2016 necessitated medical care and treatment until January 19, 2017, and was, therefore, a compensable event. Consequently, medical care and treatment for the strain/sprain until January 19, 2017, was authorized, causally related to the sprain/strain, and reasonably necessary to cure and relieve the effects of the November 28, 2016 sprain/strain incident.

32. The Claimant is **not** entitled to temporary disability benefits from November 28, 2016 and January 19, 2017. Although this issue was withdrawn at the commencement of the hearing, this finding is necessary to underscore the Claimant's entitlement to medical benefits during this period of time.

33. The Claimant has failed to prove, by a preponderance of the evidence that there is a causal link between his left hip condition after January 19, 2017, including the total left hip replacement of October 25, 2017 by Dr. Clark.

34. At this juncture, the stipulation concerning AWW is academic for purposes of this decision, however, it amounts to a judicial admission by the Respondents that the Claimant's AWW as of November 28, 2016 wasa$618.69, and as of April 1, 2018, it increased to $728.88.

Discussion of Lack of Applicability of *Loofbourrow*

Harman-Bergstedt, Inc. v. L*oofbourrow*, 320 P.3d 327 (Colo. 2014), which applied very narrow, fact specific principles, without establishing a sweeping precedent. *Trujillo* determined that MMI is a term of art, and has no legal significance in a case with no indemnity benefits payable. This makes implicit sense because MMI is the demarcation line between temporary and permanent disability indemnity benefits.

Indeed, it is the demarcation line between temporary disability benefits and **zero** permanent disability. In *Loofbourrow* by extension, an FAL is not effective to close a case as to further medical benefits. The Court stated that a claimant could still seek further medical benefits, with the burden of proof as to reasonableness and causal relatedness on the claimant. The holding of the case is that a petition to reopen need not be filed under §8-43-303, if the claimant should seek further medical benefits. The case sets no precedent as to any broader meaning than in the context of reopening for medical benefits, and it does not specify what type of medical benefits it is meant to address (*i.e*. *Grover* or pre-MMI substantive treatment). To accept the Respondents argument that the sprain/strain incident of November 28, 2016 is **not compensable**, although it was work-related and necessitated medical treatment for which the Respondents were liable if it met the workers' compensation tests would overturn the reasonable expectations of the community of injured workers who choose to go to hearing to establish an employer's liability for denied medical benefits in a work-related claim. Such an argument bears the hallmarks of a circular argument that may amount to sophistry. This could be the situation in a parallel universe (where technical form triumphs over due process), but not in Colorado.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a

witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* §8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Ciccone and Dr. Weingarten on causation were highly persuasive and credible. As further found, the opinions of Dr. Nystrom and Dr. Clark were lacking in credibility on the causal relatedness to the November 28, 2016 incident, primarily because they were based on the Claimant's failure to give them an accurate history of previous problems with his left hip. Also, because the Claimant was not forthcoming with initial treating physicians and Surgeon Dr. Clark, concerning an accurate medical history of previous left hip problems and treatment, the Claimant's testimony lacked credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical and lay opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of IME Dr. Ciccone and Dr. Weingarten, on the causal relatedness of medical treatment after January 19, 2017 (the MMI date for the left hip sprain/strain) and the left knee replacement performed by Dr. Clark on October 25, 2017. Both Dr. Ciccone and Dr. Weingarten established the work-relatedness of the sprain/strain of November 28, 2016, from which the Claimant recovered by January 19, 2017, and was back to the baseline of his naturally progressing degenerative condition of the left hip.

Sufficiency for Compensability of November 28, 2016 Left Hip Sprain/Strain

c. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). Respondents argue that the holding in *Harman-Bergstedt, Inc. v. Loofbourrow* effectively negates the compensability of injuries where the worker is not disabled for more than three days or shifts. Such is a misinterpretation of *Loofbourrow* and the prevailing law of compensability. *Loofbourrow* was decided on very narrow, specific circumstances not applicable to the present case. § 8-41-301, C.R.S.,*Henderson, supra* and *Gaudett, supra,* distinguished something in the nature a work-related paper cut, where no medical care was sought or given—not to a situation where the effects of a strain are treated for almost two months and an employer is ultimately held liable whether or not it chose to pay medical bills without admitting or denying liability. As found, the Claimant sustained a sprain/strain of the left hip on November 28, 2016; he received medical care and treatment for the sprain/strain from November 28, 2016 through January 19, 2017, when he returned to the baseline of his naturally progressive degenerative condition, which ultimately necessitated the non-work related total left hip replacement of October 25, 2017.

Lack of Compensability of Left Hip Condition After January 19, 2017

d. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** A manner of conceptualizing the matter is, essentially, that a presumption of work-relatedness may arise when an unexplained injury occurs during the course of employment. However, it is incumbent to show that non-work related factors caused the injury. Nonetheless, proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant failed to prove, by a preponderance of the evidence that there was a causal link between his left hip condition after January 19, 2017, including the total left hip replacement of October 25, 2017 by

Dr. Clark. Therefore, the Claimant failed to prove entitlement to any workers' compensation benefits for his left hip condition after January 19, 2017.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven the compensability of the left hip sprain/strain of November 28, 2016, a temporary phenomenon which lasted until January 19, 2017, when he was placed at MMI for the sprain/strain. As further found, the Claimant failed to prove the causal relatedness and/or compensability of his left hip condition after January 19, 2017, including the causal relatedness of the total hip replacement of October 25, 2017.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of authorized, causally related and reasonably necessary medical care and treatment for the Claimant's left hip sprain/strain of November 28, 2016 from that date until January 19, 2017, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all claims for medical care and treatment for the Claimant's naturally progressing, degenerative left hip condition, including the total left hip replacement of October 25, 2017, are hereby denied and dismissed.

DATED this_____day of June 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

STIPULATION

The parties stipulated to an average weekly of $675.35.

ISSUES

The following issues were raised for consideration at hearing.

- Whether Respondents established by a preponderance of the evidence a safety rule violation pursuant to C.R.S. §8-42-112(1)(a), for Claimant's failure to maintain 3-points of contact at all times with a ladder when he fell while descending the ladder while holding a water bottle or water bottle and lunch box.

- Whether Respondents established by a preponderance of the evidence a safety rule violation pursuant to C.R.S. §8-42-112(1)(a), for Claimant's failure to comply with an OSHA rule prohibiting the carrying of objects while descending or ascending a ladder that could cause an employee lose balance and fall.

- Whether Respondents established by a preponderance of the evidence a safety rule violation pursuant to C.R.S. §8-42-112(1)(d) that Claimant willfully mislead the Employer by admittedly failing to inform Employer that he was restricted to avoid ladders in case of a seizure and Claimant was injured six weeks later after falling from a ladder at work.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 55 year old, 13-year employee, roofer for Employer. Employer has an accident prevention plan to promote the safety of its employees, especially around ladders. Approximately 12-years ago, a different employee fell from a ladder while using his cell phone. Since then, Employer has been adamant about educating all employees and enforcing ladder safety.

2. Employer contends Claimant violated three separate safety rules, two involving ladders. The first is the "3-point ladder rule" which provides that when ascending or descending a ladder, at least one hand must be free to grasp the ladder at all times. The employee must maintain "at least three points of contact with the ladder (two feet and one hand or two hands and one foot) when climbing the ladder." The rule goes on to state that: "[s]upplies or equipment shall not be hand carried by the worker on the ladder; instead a rope, block, tool belt, or pulley system shall be used to carry tools or equipment."

3. The second is OSHA's ladder rule that "an employee shall not carry any object or load that could cause the employee to lose balance and fall." Any carried object should not impede the employee's ability to maintain full control while climbing up and/or down a ladder. "It is OSHA's belief that the employee's focus and attention while climbing up and/or down a ladder should be on making a safe ascent or descent and not on transporting items up and down the ladder."

4. Claimant admitted he was aware of both ladder safety rules. Employer made the rules known to Claimant upon hiring and frequently restated them during safety meetings and throughout the course of any given day. Significantly, the ladder rules were "common knowledge" with experienced roofers and/or long-term roofers for Employer. New and inexperienced roofers most commonly violated the ladder rules.

5. Jeremy Shull, Employer's owner, testified that both ladder rules were strictly enforced, company-wide for the entire time Claimant worked for Employer. Mr. Shull persuasively explained that the company was concerned about employee safety as well as company liability. If any Employee, including Claimant, violated the 3-point ladder rule, that Employee would be issued a company safety citation and reprimanded. Ladder rule violations, however, were uncommon among experienced roofers because Employer strictly enforced the rules and were strictly enforced and because experienced roofers likely did not desire to fall.

6. Nathan Shull, Employer's Safety Director (and brother of owner Jeremy Shull) testified that he conducted safety trainings that Employer required all employees, including Claimant, to attend. He regularly and repeatedly discussed the rule requiring employees to maintain three points of contact with ladders at all times. Employer also maintained pulleys and ropes available for employees to use to transport supplies and equipment to and from the roof instead of carrying them up and down the ladder, specifically as a safety precaution to avoid injuries.

7. Claimant fell from an extension ladder approximately 10 feet tall while descending the ladder at the point on the ladder about halfway down where the ladder goes from 2-rungs for foot support to 1-rung. Claimant contends that he was carrying an empty industrial sized water bottle with a strap that he brought to court. According to Claimant, he placed the strap over his forearm above the elbow and was able to descend the ladder while complying with the 3-point ladder rule because his hands were allegedly free.

8. Claimant claimed he was going down the ladder because he was thirsty and needed to fill his water bottle. Claimant explained that his industrial sized water bottle was empty by late morning because he shared his water with his co-workers. Claimant testified inconsistently that all employees bring their own water bottles to the roof. If all employees brought their own water bottles, they would not have needed to drink Claimant's water, and more likely than not his water bottle would not have been empty when he climbed down the ladder. Moreover, Employer persuasively explained that employees used ropes and a pulley to transport water bottles to the roof. Claimant denied carrying anything other than the water bottle down the ladder when he fell.

9. Nathan Shull demonstrated in court the scenario admitted to by Claimant and descended the ladder with the empty water bottle strapped to his arm. The water bottle swayed back and forth and caught repeatedly on the ladder rungs making it impossible for Shull to maintain 3-points of contact with the ladder all times. The ALJ finds that given the size of the water bottle and Claimant's allegation that it was empty, the water bottle would not remain stationary. Rather, an empty water bottle would swing back and forth and hit the ladder resulting in Claimant having to break contact with the ladder to move the water bottle out of the way and back up his arm.

10. During each demonstration without the water bottle strapped to his arm, Nathan Shull was able to grab hold of the ladder with both hands to prevent himself from falling no matter how hard the ladder shook or how many times he feigned missing a step. As long as both of his hands were free, Shull was able to hang onto the ladder and indicated he could hang there "all day" without falling.

11. Claimant testified that while descending the ladder, each of his hands were 6 inches from the side of the ladder. That was not possible because that would place Claimant's hands on top of each other in the middle of the rungs. The ALJ finds that Claimant did not correctly understand the unit of measure.

12. Shull demonstrated that wherever he placed his hands on the ladder, if he had the water bottle hanging over his arm as Claimant described, the water bottle swung on his arm as he descended the ladder, making it impossible for Shull to maintain 3-points of contact. No matter where he placed his hands without the water bottle, Shull was able to hold onto the ladder to avoid falling. The ALJ finds that Claimant would not have fallen if both of his hands were in fact free and if Claimant maintained 3-points of contact with the ladder at all times. The ALJ finds that Claimant did not maintain 3-points of contact.

13. Employer disputes Claimant's version of the fall. Employer asserts that Claimant was carrying the water bottle *and* his lunch box as he was climbing down the ladder when he fell.

14. Claimant's co-worker Eduardo Rodriguez witnessed Claimant's fall. According to Rodriguez, Claimant was carrying his lunch box on a shoulder strap and he was carrying his water bottle with his hand. In this scenario, the water bottle would not have been swinging back and forth because it would not have been empty. Claimant would have been climbing down the ladder with his partially full water bottle and his lunch box because it was time for lunch. Rodriguez continued to watch Claimant slip where the rungs of the ladder went from two to one rung and fall. If Claimant had carried his lunch box and water bottle as witnessed by Rodriguez, more likely than not, he would not have fallen from the ladder as both hands would have been free. The ALJ finds it more likely true than not that Claimant violated Employer's 3-point ladder rule, and the OSHA rule that an employee shall not carry any object that would cause him to lose his balance or fall. The ALJ also finds it more likely than not that but for the violation of the rules Claimant would not have fallen.

15. Claimant denied carrying his lunch box down the ladder, although he admitted that he fell right next to his water bottle and upside down lunch box and that other employees observed the items next to him on the ground. Claimant explained this by testifying that he happened to fall in a spot by a tree where many of the employees' lunch boxes, including Claimant's, were all lined up. When asked why, following his fall, was Claimant's lunch box spotted by others on the ground upside down next to his water bottle, Claimant maintained that he may have kept his lunch box in an upside down position while he worked or that it was just a coincidence. The ALJ rejects this testimony as unlikely and not persuasive.

16. Claimant first claimed that he carried his water bottle up and down ladders all the time without consequence. The ALJ rejects the notion that Employer would issue citations for safety rule violations for everything "other than" the 3-point ladder rule.

17. Jeremy Shull explained that he never before observed Claimant violating the 3-points of contact ladder rule. While Shull was not always on the job site, a foreman typically was and it was part of the foremen's job to issue safety rule citations. They did so as evidenced by the citations submitted into evidence.

18. Finally, Claimant testified that he had seen Nathan Shull descending quickly down a ladder with his hands sliding down the sides, seeming to suggest that even the Safety Director himself did not comply with the rule. Claimant, however, admitted that when he observed Shull doing this, Claimant had no idea that Shull was simply showing another employee how to make an emergent descent from a ladder, which is known as a "firefighter" descent.

19. Alternatively, on July 17, 2017, six weeks before Claimant fell from the ladder, he presented to Denver Health for "follow-up of his epilepsy." Claimant has had two late in life non-work-related seizures. The first seizure was approximately two years prior to the medical visit and the second seizure occurred in May 2017, at which time he began taking anti-seizure medication. According to the medical record, Claimant's wife witnessed both seizures reporting that Claimant's eyes closed; the seizures lasted about 5-10 minutes; and that Claimant clenched his upper extremities during the episodes. Claimant was confused for several hours after each episode.

20. Claimant underwent a brain MRI at Denver Health that revealed chronic small vessel ischemic changes ("CSVIC"), likely secondary to age and smoking. The CSVIS increased Claimant's risk for seizures. The physician documented that Claimant "has about an 80% chance of having recurrent episodes" of seizures. During the July 17, 2017 medical evaluation, Claimant's doctor gave him "seizure precautions" which included "avoid activities where it is dangerous with a seizure such as bathing, swimming, lifting, etc." Claimant testified that he did not know he had a seizure condition because his MRI was "normal." However, Claimant also admitted to taking anti-seizure medication for more than a year in effort to prevent a future seizure. Claimant also admitted that if he had a potential for a future seizure that climbing up and descending a ladder or being on a ladder at all would qualify as a "dangerous activity" that Claimant should avoid.

21. It is undisputed that Claimant did not inform Employer of his medical restriction to avoid dangerous activity because he had an 80% likelihood of having another seizure. Jeremy Shull testified that had Claimant told Employer about this restriction, Employer would not have allowed Claimant to continue working on ladders. According to Shull, he would have accommodated Claimant's restriction and assigned Claimant job duties that did not require ladder use. Claimant presented no persuasive evidence that he refrained from telling Employer about his seizure likelihood because he forgot. Rather, Claimant denied having the condition and denied knowledge that he was likely to have another seizure claiming that nobody ever told him. The ALJ rejects Claimant's testimony as not credible, especially given that Claimant admitted to taking anti-seizure medication for over a year to avoid another seizure.

22. Claimant contends that a seizure did not cause his fall. Respondents do not contend otherwise. However, the ALJ finds that Claimant willfully mislead Employer concerning Claimant's physical ability to ascend and descend ladders. Claimant injured himself falling from a ladder when he was medically restricted from being on a ladder. The fact that a seizure did not cause the fall is irrelevant. Claimant would not have fallen from the ladder on August 31, 2017 had he told Employer about the 80% likelihood of having another seizure. Claimant would not have been on a ladder on August 31, 2017.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). As found, the testimony of Jeremy and Nathan Shull are credible and persuasive. Claimant's testimony on significant issues is not credible and in some instances not plausible.

Pursuant to C.R.S. section 8-42-112(1), a claimant's compensation is reduced 50% when claimant's injury results from the willful failure to obey any reasonable rule adopted by the employer for the safety of the employee. A safety rule does not have to

be written to be violated. "Rather, a verbally communicated safety rule is sufficient to trigger the provisions of §8-42-112(1)(b), if the rule, warning, or prohibition is heard and understood by the employee." *Id.* Further, the safety rule does not have to be formally adopted by the employer and does not have to be posted. *See Bennett Properties Co.,* 165 Colo. 135, 437 P.2d 548, 552 (1968). In addition, the safety rule does not need to be specific. *See Jentzen v. Northwest Transport,* W.C. No. 4-009-435 (ICAO April 24, 1992)

Respondents carry the burden of proof to establish willful violation of the safety rule. *See Juarez v. Pillow Kingdom, Inc.,* W.C. No. 4-364-252 (ICAO January 22, 1999). However, "there is no extraordinary burden of proof [on the part of respondents], and the ALJ's finding of willful conduct must be upheld if supported by substantial evidence in the record." *Id.* A presumption against willful conduct does not exist. *Id.* Once respondents make a prima facie case of a safety rule violation, the burden of going forward shifts to claimant to rebut the prima facie case or establish the claim lacks merit. *See Bauer v. CF&I Steel, L.P. dba Rocky Mountain Steel Mills,* W.C. No. 4-495-198 (ICAO October 20, 2003).

Willfulness must be the result of deliberate intent and not mere negligence or forgetfulness*. Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (Colo. 1946). However, to establish willfulness, respondents are not required to present direct evidence of claimant's state of mind or that claimant had the rule in mind when he performed the act that constituted a violation. It is sufficient to show that claimant had knowledge of the rule and deliberately performed the prohibited act. *Alvarado, supra; Bennett Properties Co. v. Industrial Comm'n*, 437 P.2d 548 (Colo. 1968). As noted in *Gargano v. Metro Wastewater Reclamation District,* W.C. No. 4-435-104 (ICAO February 19, 1999), "willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer. Moreover, there is no requirement that the respondents produce direct evidence of the claimant's state of mind…Indeed, it is a rare case where the claimant admits that his conduct was the product of a willful violation of the employer's rule."

As found, according to Claimant's version of events, Claimant admits that he willfully climbed down the ladder to fill up his water bottle because he was thirsty. He simply claims he was able to do so while at the same time comply with the three-point ladder rule because both hands were on the ladder at all times because the water bottle was hanging from Claimant's arm. As demonstrated, it is not possible for the water bottle to remain immobile in such position. Instead, the water bottle swings back and forth and becomes caught on the ladder rungs. The bottle also slides up and down the carrier's arm to the point where he or she must take a hand off the ladder to move the bottle so it stops swinging and hitting the ladder's rungs.

Respondents maintain that Claimant was carrying his water bottle in his hand and his lunch box on his shoulder. Eduardo Rodriguez documented that he saw:

- Claimant holding his water bottle in his hand with his lunch box strapped around his shoulder.

- Claimant slip where the ladder changed from two rungs to one.

- Claimant was unable to grab hold of the sides of the ladder with both hands because one of his hands was holding a water bottle.

This eye witness account, coupled with Claimant's admission that he fell and landed right next to his upside down lunch box, and Nathan Shull's demonstrations, lead the ALJ to conclude that Claimant would not have fallen if both of his hands were free. Whether carrying an empty water bottle or a lunch box and water bottle, Claimant would have been unable to maintain three points of contact with the ladder. When he did slip, he could not grab the sides of the ladder to avoid the fall because one or both of his hands would not have been holding onto the ladder or free to grab onto the ladder to avoid the fall.

In sum, Respondents have shown by a preponderance of the evidence that

- Claimant willfully violated the three-point ladder rule and the OSHA Rule.

- Claimant was aware of the rules and understood them.

- Employer adopted and enforced the Rules.

- But for the violation, Claimant would not have fallen from the ladder as he claims .

- Respondents are entitled to the safety rule violation deduction pursuant to § 8-42-112(1) (a).

Independently section 8-42-112. (1)(d) provides that compensation is also reduced by fifty percent where an employee willfully misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job as a result of the physical ability about which the employee willfully mislead the employer. The term "willful" means with "deliberate intent" as opposed to mere thoughtlessness, forgetfulness, or negligence. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968); *Johnson v. Denver Tramway Corp.,* 115 Colo. 214, 171 P.2d 410 (1946). The phrase "physical ability" is described in terms of the ability to do some physical action. The question of whether the respondents proved willfulness was one of fact for determination by the ALJ. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995).

Claimant had two late in life seizures, one in 2015 and one in May 2017, six weeks before his work injury. Claimant's doctor told him to avoid activities that can be dangerous to a person who has a seizure, using "bathing, swimming and lifting, etc." as activities to avoid. Claimant admitted that he was aware that such dangerous activities included driving and climbing up or down ladders. Claimant also admitted that he did not tell Employer that his doctor advised him to refrain from being on ladders due to an 80% likelihood that he would experience another seizure. Claimant testified that he was

unaware that he was supposed to avoid dangerous activities because the doctor told him he did not have a risk for future seizures because his MRI was normal. However, Claimant admitted he was taking anti-seizure medication for more than one year. Jeremy Shull persuasively explained that he would not have allowed Claimant to step foot on a ladder had Claimant told Employer about his medical condition. It follows that Claimant could not have fallen from a ladder if he was not on a ladder in the first place. Here, on July 17, 2017, Claimant's doctor cautioned him to avoid dangerous activities such as climbing ladders. Had Claimant timely informed Employer of this restriction, he would not have been on a ladder at work on August 31, 2017.

ORDER

It is therefore ordered that:

1. Respondents have proven by a preponderance of the evidence that they are entitled to a 50% reduction in benefits pursuant to C.R.S. section 8-42-112(1) (a) and (d).

2. All matters not determined herein are reserved for future determination.

DATED: June 20, 2018

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Court
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable injury on December 8, 2016 or December 11, 2016.

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical treatment.

STIPULATIONS

At the time of hearing, the parties stipulated and agreed as follows:

- Claimant's average weekly wage is $520.00, with a corresponding benefit rate of $346.67;
- Claimant lost no time from work as a result of the alleged work incident; and
- In the event the claim is found compensable, Respondents will pay the medical bill from Blue Sky Neurology for the evaluation that was performed on January 24, 2018.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 66-year-old man with an April 3, 1952, date of birth. Exhibit A. Claimant was hired by the Respondent Employer on November 29, 2016 to work as a security officer. (Exhibit A.)
2. On December 8, 2016, Claimant was on patrol, when he slipped and fell while walking on a flat roof of a building, which was slippery, to make sure a door was locked. Claimant reported both legs twisted inwards and he fell back onto his lower back. (Exhibit E, Bates 18.) Claimant testified the slip and fall occurred at approximately 10:00 p.m., and he completed his shift, which ended at 11:00 p.m. Claimant did not initially request medical treatment. Claimant worked his regular shifts on December 9th and December 10th, 2016.
3. On December 12, 2016, Claimant surreptitiously recorded Employer's Director of Security, his General Manager, Mr. Jackson Marshall, apparently advising Claimant to give a December 11, 2016, date of injury as opposed to a December 8, 2016, date of injury.

4. On December 12, 2016, Employer filed a First Report of Injury documenting a reported slip and fall incident involving Claimant occurring at 10:00 p.m., December 11, 2016.

5. Employer referred Claimant for medical care at Concentra Medical Centers on December 12, 2016.

6. On December 12, 2016, PA Ron Rasis evaluated Claimant at Concentra. Claimant reported he was patrolling a flat roof at work "yesterday", when both legs "twisted inward" and he "fell back onto his lower back. [The claimant denied] hitting his head, neck pain. . . ." PA Rasis discussed with Claimant and noted the "odd mechanism to twist both knees and fall backwards, difficult to generate significant twisting force in bilateral knees while falling back." (Exhibit E, Bates 18.) Claimant reported muscle pain, back pain and stiffness, but there was no swelling on physical exam. The was no external swelling on or of the head and no evidence of trauma. The knee exam showed no ecchymosis, no effusion, no crepitus on palpation with normal warmth. Judgment and insight were normal, with intact recent and remote memory. Examination of Claimant's skin revealed normal skin and no rashes or lesions. Therefore, there was no documentation of redness or bruising on Claimant's lower back. Despite a number of physical complaints, Claimant's physical examination appeared to be objectively normal. Notwithstanding Claimant's physical examination, the initial assessment provided by PA Rasis included back pain, contusion of lower back, left knee sprain, and right knee sprain. (Exhibit E, Bates 19.)

7. On December 12, 2016, Claimant was not having any problems with his memory or cognition. (Exhibit E, Bates 19.)

8. Claimant testified his memory and cognition problems developed later, over time. (Hearing audio @ 2:50 p.m.)

9. On December 14, 2016, Physical Therapist, Christi Galindo, evaluated Claimant. Claimant reported "doing the splits" and then falling on his back. Claimant also reported hitting the back of his head. (Exhibit F, Bates 34.) Although Claimant admitted to having a prior back injury, he denied having any prior knee issues. (Exhibit F, Bates 36.) Claimant was evaluated and treated for complaints of back and bilateral knee pain. Ms. Galindo noted that although Claimant complained of 10/10 pain, he was able to walk in to the physical therapy facility independently. (Exhibit F, Bates 36.)

10. On December 15, 2016, Claimant was again evaluated and treated by Ms. Galindo. She noted Claimant continued to complain of 8-10/10 lumbar and bilateral knee pain. She also noted Claimant's reported pain levels were high compared to his actual functional ability to walk into therapy and get on and off the physical therapy table. She further noted Claimant's ability to sit and hang his legs off the physical therapy table with 90 degrees of flexion while sitting, but yet he demonstrated having less than 90 degrees of active flexion. She noted signs of symptom magnification. (Exhibit F, Bates 41.)

11. On December 21, 2016, PA Ron Rasis reevaluated Claimant. On that date, Claimant reported no change in his condition. PA Rasis again noted the questionable mechanism of injury and indicated Claimant's exam was concerning due to limited effort and signs that were suggestive of delayed recovery. (Exhibit E, Bates 22.) He also noted that on physical exam, Claimant actively resisted as the provider attempted passive range of motion. He further noted that despite Claimant's subjective complaints, his lumbosacral spine had no erythema, no ecchymosis, no swelling, no bilateral muscle spasms, no warmth and his neurovascular function was intact. In addition, it is noted that Claimant alleged he was unable to get onto his toes standing, which the provider noted, "would seem incompatible with walking." He also noted Claimant's recent and remote memory remained intact. Based on Claimant's presentation, PA Rasis referred Claimant to delayed recovery specialist, Dr. Eric Tentori. (Exhibit E, Bates 23.)

12. X-rays of Claimant's bilateral knees were performed at Kaiser Permanente on November 30, 2017. Claimant's knee x-rays were read as normal, showing well preserved joint spaces without degenerative changes. (Exhibit G, Bates 70.)

13. On December 29, 2016, Claimant returned to Ms. Galindo for physical therapy. Ms. Galindo again noted ongoing signs of symptom magnification. (Exhibit F, Bates 57.)

14. On January 4, 2017, Claimant returned to Ms. Galindo for physical therapy. Ms. Galindo again noted ongoing signs of symptom magnification with pain being 10/10 regardless of performing any movement, regardless of position, and regardless of the time of day. (Exhibit F, Bates 62.) On January 5, 2017, Ms. Galindo noted similar findings, which again included symptom magnification. (Exhibit F, Bates 66.)

15. On January 6, 2017, Dr. Tentori evaluated Claimant. Claimant told Dr. Tentori that while falling backwards, he twisted both knees inwards and that he also struck his head. For the first time, Claimant indicated he "may have lost consciousness." Claimant presented describing that his "whole body" hurt and, instead of improving, his symptoms were worsening. Claimant alleged the medical treatment he had been provided had not produced any benefit. Claimant described neck pain, back pain, bilateral shoulder pain, and bilateral knee pain. Upon direct questioning by Dr. Tentori, Claimant denied any historical issues with pain affecting his shoulders, neck, back or knees. (Exhibit E, Bates 25.) Claimant stated he had some surgery in the remote past, but reported he could not recall the details of the surgical procedures and purportedly could not even recall what body parts required surgical intervention. Claimant explained that his memory may be affected from the alleged December 11, 2016, work injury. Dr. Tentori noted Claimant appeared to have "some difficulties with regard to recall/memories as it relates to recent events and remote events." Physical exam revealed diffuse tenderness of the entirety Claimant's cervical, thoracic and lumbar spine and lumbosacral junction. Examination of his shoulders revealed symmetrical findings of diffuse tenderness with palpation. Examination of his knees also revealed symmetrical findings, no effusion and no warmth with palpation. The neurological examination was without significant/focal findings

other than breakaway-type weakness with regard to strength testing of all extremities. Dr. Tentori assessed:

- Diffuse pain complaints of *unclear/undetermined etiology*;
- *Possible* musculoskeletal strain of the patient's cervical spine, thoracic spine, and lumbar spine;
- *Possible* strain of the bilateral shoulders and bilateral knees.
- Report of associated closed head injury and *possible related loss of consciousness;*
- Subjective complaints appear to be in excess of objective findings. *Cannot rule out symptom magnification*.

(See Exhibit E, Bates 25-27. [Emphasis supplied.])

16. On February 9, 2017, Claimant, through counsel filed a Workers' Claim for Compensation alleging an 8:30 p.m., December 8, 2016, incident with the Respondent Employer resulting in injuries to his "bilateral knees, low back and head", with no reference to the shoulders or neck being injured. (Exhibit C, Bates 10.)

17. On January 24, 2018, Neurologist, Dr. Karen Karwa, evaluated Claimant, on referral from his primary care physician for evaluation and management of chronic headaches. Claimant told Dr. Karwa he thought bread and yeast were possible triggers for his headaches. Claimant reported he sometimes experienced memory loss when he was off work and at home. "He forgets what he is doing intermittently. He hasn't no symptoms of problems with memory or attention or at work." [Sic] (Exhibit H, Bates 72.) On physical exam, Claimant's neck was "supple", he was alert and oriented times three, memory was intact and gait was normal. Dr. Karwa assessed:

- Chronic daily headache;
- Polyneuropathy;
- Daytime sleepiness;
- Fatigue, unspecified type;
- Memory disturbance.

(Exhibit H, Bates 73.)

18. Dr. Karwa opined the etiology of Claimant's alleged chronic daily headaches was likely multifactorial and included medication overuse. She also noted Claimant's sleep deprivation, daytime sleepiness, and fatigue was concerning for possible obstructive sleep apnea. She also stated that Claimant's alleged memory symptoms were fairly nonspecific and appeared to be more related to attention matters. Dr. Karwa specifically noted that Claimant's memory disturbance did not appear to be impacting his job. She also stated that Claimant reported tingling and numbness in his feet which was described as a sensory predominant polyneuropathy which was most likely caused by Claimant's diabetes. Dr. Karwa

did not relate Claimant's headache complaints to his slip and fall at work, despite being aware of the alleged incident. (Exhibit H, Bates 73.)

19. Dr. Marc Steinmetz performed an independent medical examination (IME) of Claimant on November 21, 2017, at Respondents' request, and issued a report. As set forth in his report, Claimant was asked to complete an intake questionnaire. Claimant refused to complete the questionnaire in any detail. According to his report, Claimant told Dr. Steinmetz that he was injured when he:

> [F]ell backwards. He says his knees were bent and his feet were underneath him, and his legs were spread apart when he fell onto his back and head. He says he thinks he lost consciousness.

(Exhibit I, Bates 77.)

20. Dr. Steinmetz also asked Claimant about prior work injuries. Claimant admitted to having a prior work injury involving his knees and back. However, Claimant was evasive as to whether he had any permanent restrictions or ongoing problems due to his prior work injury. (Exhibit I, Bates 78.)

21. Dr. Steinmetz performed a physical examination of Claimant and observed Claimant during the IME. Dr. Steinmetz noted in his report that while observing Claimant, sometimes he would limp and sometimes he would not. He also noted that Claimant attempted to demonstrate his body position when he fell by getting up on the exam table and voluntarily showing him how his knees were bent all the way underneath him and his legs were spread apart. Dr. Steinmetz also noted that while Claimant was taking off his shoes and socks, and putting them back on, he fully flexed his back forward without any pain behaviors. However, upon formal examination, Claimant had limited lumbar flexion. Dr. Steinmetz noted that while Claimant demonstrated how he fell, he fully flexed his knees. However, upon formal examination, he could barely bend his knees to 90 degrees. He also noted that while casually sitting in the clinic and walking into his exam room, he would fully extend his knees, but Claimant would not fully extend his knees during his physical examination. Despite Claimant's limited range of motion of his knees during Dr. Steinmentz' physical examination, Dr. Steinmetz noted no instability and no crepitous. Dr. Steinmetz also noted Claimant demonstrated limited shoulder range of motion during his examination, but had normal shoulder range of motion when demonstrating how he fell. He also noted Claimant's legs and arms had full musculature, with some breakaway weakness noted with strength testing. (Exhibit I, Bates 78-79.)

22. After observing and physically evaluating Claimant, Dr. Steinmetz determined Claimant had a normal physical examination. Dr. Steinmetz concluded that based upon Claimant's inconsistent and normal physical examination as well as the inconsistent mechanism of injury, he did not think Claimant sustained any injuries due to the December 2016 work accident. (Exhibit I, Bates 79-80.)

23. Dr. Steinmetz also testified at hearing and testified consistent with his report.

24. Numerous medical providers who evaluated Claimant expressed doubts about the reported mechanism of injury. They also observed and documented nonphysiological findings together with symptom magnification.

25. Dr. Tentori assessed diffuse pain complaints of unclear/undetermined etiology. Dr. Tentori was unaware of Claimant's prior work-related knee and back injuries resulting in permanent physical impairment, and surgeries to Claimant's knees. As set forth above, Dr. Tentori assessed possible musculoskeletal strain of Claimant's cervical spine, thoracic spine and lumbar spine, possible strain of the bilateral shoulders and bilateral knees and report of closed head injury and possible related loss of consciousness. In other words, Dr. Tentori noted lots of possibilities, but very few certainties.

26. Dr. Steinmetz credibly testified that the medical records do not contain any objective and credible evidence supporting a work injury. Dr. Steinmetz credibly testified Claimant does not have a work-related diagnosis of closed head injury, cervical, thoracic or lumbar spine strain, or strain of the bilateral shoulders and knees. Dr. Steinmetz credibly testified it is not medically probable Claimant suffered injuries to his head, neck, shoulders, low back or bilateral knees in the course and scope of his employment with the Respondent Employer.

27. The ALJ finds Dr. Steinmetz' opinions as set forth in his report and hearing testimony to be credible and persuasive. Dr. Steinmetz' opinions are consistent with the other medical providers who questioned Claimant's reliability regarding how he allegedly fell and allegedly hurt so many body parts as well as the reliability of his reported symptoms.

28. Claimant testified at hearing and tried to explain how he slipped and fell, twisted both knees, hit and injured his low back on the ground, and also hit and injured his head on the ground. Claimant described how his feet went under him, twisted, and ended up under his back, and his low back and the back of his head hit the ground.

29. During his testimony, Claimant took a piece of tissue paper and used it to demonstrate how he contends he fell and injured his knees, back and head. Claimant rolled the tissue into a tube and began folding the tissue at various junctures which were meant to correlate with his ankles, knees, and low back. Each fold was meant to demonstrate how he fell with his feet and lower legs ending up underneath his back and hitting his back and head on the ground. At the end of his demonstration, he ended up with a piece of tissue paper that was folded so many times and in such a manner, that his demonstration drove home the point that his contention as to how he allegedly fell and hurt his knees, back, and head appears to be physiologically and anatomically impossible.

30. The ALJ does not find Claimant credible as it relates to how he allegedly fell, the alleged symptoms caused by the fall, or the injuries allegedly caused by the fall.

31. The ALJ finds insufficient evidence to establish that it is more likely than not that Claimant suffered an injury requiring medical treatment, resulting in disability or permanent physical impairment, arising out of, and in the course and scope of his

employment with the Respondent Employer on December 8, 2016, or December 11, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Legal Principals

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. The claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits, including medical benefits, by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable injury on December 8, 2016 or December 11, 2016.

Colorado's Workers' Compensation Act creates a distinction between the terms "accident" and "injury". The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." See §8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury."

A compensable injury is one which requires medical treatment or causes a disability. It is well established that it is Claimant's initial burden to prove a compensable injury. *City of Boulder v. Payne*, *supra*; *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The determination of whether Claimant proved an injury which required medical treatment or resulted in disability is one of

fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Moreover, the ALJ's findings may be based on reasonable inferences from circumstantial evidence. *Ackerman v. Hilton's Mechanical Men, Inc.*, 914 P.2d 524 (Colo. App. 1996).

In the instant claim, Claimant alleges a slip and fall on December 8, 2016. Claimant filed a January 26, 2018, Application for Hearing, alleging a December 11, 2016, date of injury. Claimant testified the accident occurred at 10:00 p.m., December 8, 2016. Claimant's Worker's Claim for Compensation indicates the accident occurred at 8:30 p.m. Claimant initially described the accident occurring when his legs twisted inwards with a fall landing on his low back. Claimant reported to the physical therapist that he "did the splits" and landed on his low back. Claimant demonstrated "doing the splits" and falling to Dr. Steinmetz. At hearing, Claimant described his knees coming together prior to the alleged fall.

At hearing, and during his testimony, Claimant took a piece of tissue paper and used it to demonstrate how he contends he fell and injured his knees, back and head. Claimant rolled the tissue into a tube and began folding the tissue at various junctures which were meant to correlate with his ankles, knees, and back. Each fold was meant to demonstrate how he fell with his feet and lower legs ending up underneath his back and hitting his back and head on the ground. At the end of his demonstration, he ended up with a piece of tissue paper that was folded so many times and in such a manner, that his demonstration drove home the point that his contention as to how he allegedly fell and hurt his knees, back, and head appears to be physiologically and anatomically impossible.

Claimant denied any history of prior shoulder, back or knee pain to Dr. Tentori. He reported a history of surgery, but suggested he had no memory of the surgical body part. At hearing, Claimant first denied but then admitted to prior back and knee injuries resulting in permanent physical impairment ratings and settlement, and prior knee surgeries. Claimant testified that he had no memory problems immediately following the accident. The memory issues, headache and cognitive problems allegedly developed and allegedly worsened progressively. Dr. Steinmetz credibly testified it is not medically probable traumatically induced headache and memory issues would not be present immediately post-accident and develop later. Dr. Steinmetz credibly testified it is not medically probable traumatically induced memory loss would not be present while the claimant was working, but would be present intermittently while Claimant was at home. Dr. Steinmetz credibly testified it is not medically probable Claimant would fall with his knees together, landing backwards and hit multiple body parts. Dr. Steinmetz credibly opined, based on Claimant's inconsistent history, inconsistent/normal physical exam and demonstrated functional capacity, it is not medically probable Claimant suffered an injury to his neck, low back, shoulders, knees or head on December 8, 2016 or December 11, 2016.

Despite medical treatment, including diagnostics, medications, physical therapy and specialist referral, no medical provider has identified objective and credible evidence of a work related injury requiring medical treatment, resulting in disability or permanent medical impairment.

It is Claimant's burden to prove a causal connection between his employment and the resulting condition for which medical treatment and indemnity benefits are sought. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The determination of whether Claimant sustained that burden of proof is factual in nature. Claimant bears the burden of proof, by a preponderance of the evidence, to establish that an injury arising out of and in the course of the employment was the cause of the disability and need for treatment. The question of whether Claimant has met the burden is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*.

It is Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between his employment and his injuries. An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to causation. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ). *See also, In the Matter of the Claim of Tammy Manzanares, Claimant*, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. 2008). In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part, or none, of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ also had the opportunity to observe Claimant testify at the hearing and observe his demeanor, which included Claimant's intonations, facial expressions, gestures, fluid movements, and demonstration as to how he allegedly fell and got hurt. Such observations contradicted Claimant's testimony and alleged physical complaints regarding the extent of his symptoms which he contends flow from the accident. Such observations also included his demonstration as to how he allegedly fell and got hurt and exposed the implausibility as to Claimant's contortionistic account as to how he fell.

As found, Claimant's statements to various medical providers, Dr. Steinmetz, and his testimony at hearing regarding how he allegedly slipped and fell and injured himself was not found to be credible. In fact, it was found implausible. In addition, Claimant's pain complaints and complaints of memory problems and headaches was also not found to be credible.

The ALJ does credit Claimant's testimony that he slipped at work on December 8, 2016, and that his supervisor appears to have told him to use December 11, 2016, as the date of the accident. Although the reason the supervisor wanted Claimant to use a different date of accident is unknown, the ALJ does not find the statements of the supervisor to be relevant as to the ultimate findings and conclusions in this case. The ultimate findings and conclusions in this is are that despite falling, Claimant did not suffer an injury that required medical treatment or caused any disability or medical impairment.

Claimant contends that the fact that he presented to numerous medical providers with various complaints and symptoms and was provided medical treatment and referred to other medical providers proves he suffered a compensable injury. However, in this case, the ALJ has found Claimant did not suffer any injury at work that required medical treatment. In this case, the ALJ found that the causal connection between the slip and fall and the need for any medical treatment was absent.

The facts of this case present an example of doctors and other medical providers prescribing and providing treatment and assigning work restrictions based upon a worker's subjective complaints and misrepresentation of his symptoms. The provision of treatment under such circumstances cannot be deemed tantamount to a compensable work injury.

Claimant has failed to prove, by a preponderance of the evidence, that he suffered an injury requiring medical treatment, or resulting in disability or permanent physical impairment as a result of a December 8, 2016, or December 11, 2016, accident in the course and scope of his employment with the Respondent Employer. Therefore, the ALJ concludes Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable work injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 20, 2018

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- The issue for determination involves the impact of ALJ Lamphere's December 30, 2016 final order on Claimant's eligibility for temporary disability benefits. Specifically, Claimant asserts ALJ Lamphere's order left open the issue of temporary disability. Conversely, Respondents assert all issues regarding indemnity benefits are closed, and the statute of limitations for reopening has run.

- Claimant's Application for Hearing describes the disputed issue as an appeal of PALJ Barbo's October 18, 2017 order striking Claimant's prior application for hearing. In his order, PALJ Barbo discussed at length the effect of the reservation clause in ALJ Lamphere's December 30 order. Claimant's brief did not address the reservation clause, and at the May 31, 2018 supplemental hearing Claimant's counsel stated he is not pursuing that issue.

FINDINGS OF FACT

1. Claimant worked as a computer support technician for Employer. On September 7, 2010, she injured her low back while moving a file cabinet.

2. Respondent admitted liability and Claimant underwent a lengthy and complex course of conservative care. Claimant was eventually put at MMI, and her claim was closed by an uncontested Final Admission of Liability (FAL) dated September 18, 2013. The FAL admitted for "reasonable, necessary, and related medical care after MMI that is provided by an authorized treating physician."

3. Claimant continued to receive maintenance care for several years after her claim closed per the FAL. Her symptoms progressively worsened to the point that Dr. David Wong recommended surgery in March 2016.

4. Respondent denied the procedure, and the matter went to hearing before ALJ Lamphere on October 20, 2016. The issues for ALJ Lamphere's determination were: (1) Respondent's request to withdraw its admission of liability for medical benefits after MMI; (2) whether the surgery proposed by Dr. Wong was reasonably necessary "as maintenance care"; and (3) in the alternative, whether Claimant's condition had worsened, entitling her to reopen her claim to obtain the surgery recommended by Dr. Wong.

5. ALJ Lamphere issued his Findings of Fact, Conclusions of Law and an Order on December 30, 2016. ALJ Lamphere found the proposed surgery was reasonably necessary and causally related to Claimant's industrial injury, and denied Respondent's request to withdraw its admission. ALJ Lamphere further determined Claimant proved "that her condition has worsened and that the requested spinal surgery is reasonable and

necessary to prevent further deterioration of the spinal conditions caused by [ ] her September 7, 2010 work-related injury." ALJ Lamphere ordered Respondent to cover the surgery as "maintenance" treatment. Since the claim remained open for medical benefits, ALJ Lamphere determined Claimant's petition to reopen was moot.

6. Claimant eventually had the surgery and missed time from work. She requested temporary disability benefits, which Respondent denied on the theory that indemnity benefits were closed and it was more than six years past the injury.

7. Claimant applied for a hearing on August 30, 2017 on: "Whether Claimant is eligible for TPD benefits under the Court Order dated December 30, 2016." Respondent moved to strike the application as "unripe and frivolous," so PALJ Barbo convened a prehearing conference on October 16, 2017. Respondent argued Claimant was "attempting an end run around the statute of limitations in order to reopen this matter." Claimant argued ALJ Lamphere's order was "ambiguous" and she was entitled to a hearing to "clarify" alleged "inconsistencies" in the order. PALJ Barbo disagreed, and struck Claimant's application for hearing.

8. Claimant then applied for a hearing on December 18, 2017 to appeal PALJ Barbo's prehearing order.

9. The "inconsistencies" Claimant perceives in ALJ Lamphere's order are contained primarily in Findings of Fact #53 and #61, and Conclusions of Law ¶ M and ¶ N. Those sections provide:

> 53. The medical records submitted generally support Claimant's March 4, 2015 report to Dr. Wong that her symptoms have been worsening with time. Moreover, the medical records subsequent to March 4, 2015 support Claimant's testimony that her condition is deteriorating. Indeed, by records from CCOM, Claimant is now experiencing stabbing pains down both legs, reported weakness in the legs, loss of sensation in the right leg, causing her to fall, and a loss of bladder control. Consequently, the ALJ credits Claimant's testimony to find that she has suffered a worsening of condition since being placed at MMI.
>
> 61. Claimant has proven by a preponderance of the evidence that her condition has worsened and that the requested spinal surgery is reasonable and necessary to prevent further deterioration of the spinal conditions caused by, i.e. related to, her September 7, 2010 work-related injury.
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> * * *
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> M. Although Claimant asserts that she is not at MMI, she presented scant evidence to support such a conclusion. Here, the evidence presented persuades the ALJ that Claimant remains at MMI and the proposed surgery is contemplated for maintenance purposes to control Claimant's pain and maintain her current level of function. Given that

> Claimant has proven that the recommended surgery is reasonable, necessary and related to her September 7, 2010 industrial injury, the question concerning her entitlement to additional medical treatment becomes whether Dr. Wong's recommendation for surgery is properly considered maintenance treatment.
>
> N. The ALJ recognizes that surgery is often directed to curing and relieving a claimant's medical condition and not necessarily with maintaining and preventing deterioration of the claimant's condition. However, it is the purpose for which treatment is provided, not the "nature" of the treatment, which determines whether the treatment is curative or provided for maintenance reasons. . . . In this case, the ALJ concludes that irrespective of the nature of the surgery recommended . . . the purpose of the procedure is to relieve the worsened pain associated with Claimant's spinal injuries and to prevent deterioration of her present condition by decompressing the affected areas and in the case of fusion, stabilizing the mobile segment. Consequently, the ALJ concludes that Claimant is entitled to the recommended surgery on a maintenance basis.

10. The ALJ finds this claim remains open for medical benefits but is closed for additional indemnity benefits. ALJ Lamphere's December 30, 2016 order does not allow Claimant to receive temporary disability benefits without reopening the indemnity portion of her claim.

CONCLUSIONS OF LAW

The Supreme Court has held that the propriety of the PALJ's order is reviewable by an ALJ with the OAC. *Industrial Claim Appeals Office v. Orth*, 965 P.2d 1246 (Colo. 1998). Since then, it has been accepted that the appeal procedure is to bring the issue to an ALJ. There is no statutory or rule-based authority requiring deference to the PALJ's order, and the ALJ reviews the order *de novo*. *Dee Enterprises v. Industrial Claim Appeals Office*, 89 P.3d 430 (Colo. App. 2003) (ALJ has authority to overrule PALJ's order).

Although PALJ Barbo dismissed Claimant's application for hearing, Claimant's right to appeal the prehearing order to an ALJ essentially nullifies the order, as there is no way to consider Claimant's appeal without allowing her a hearing and considering her underlying arguments. The ALJ has, in effect, overruled PALJ Barbo's order by permitting Claimant to litigate the merits of her position.

Although this matter is postured as an appeal of PALJ Barbo's order, it is really a dispute over whether Claimant can pursue additional temporary disability benefits without reopening her claim. Claimant concedes the time to reopen indemnity benefits has expired but argues reopening is unnecessary due to findings in ALJ Lamphere's order. Claimant argues ALJ Lamphere's order "allows" her to seek temporary disability benefits because he found Claimant's condition had worsened. Claimant further asserts "[ALJ Lamphere's] finding of worsening was consistent with the Claimant no longer being at MMI. . . . Since there was a specific finding that Claimant's condition had worsened after

being placed at MMI, this is inconsistent with the requirement that a claimant's condition remain 'stable' in order to be at MMI."

The ALJ disagrees with Claimant's argument that the issue of temporary disability benefits remains open simply because ALJ Lamphere found Claimant's condition had worsened. ALJ Lamphere awarded the surgery as post-MMI treatment and merely cited Claimant's worsened condition as evidence that the surgery was needed to prevent further deterioration. Although the finding that Claimant's condition had worsened *could have* supported a finding she was no longer at MMI, ALJ Lamphere did not find that to be the case. Rather, he explicitly found Claimant "remains at MMI." The ALJ knows of no authority that a worsening of condition ***invariably*** means a claimant is no longer at MMI. ALJ Lamphere's factual findings were well-supported by the record and his conclusions of law were consistent with governing law regarding post-MMI treatment.

Had Claimant been dissatisfied with the determination she remained at MMI despite her worsened condition, the remedy would have been to request reconsideration or file a timely Petition to Review. She did not do so, and ALJ Lamphere's order is final and binding. The ALJ sees nothing in ALJ Lamphere's factual findings or conclusions of law that would permit Claimant to pursue additional temporary disability without first reopening the indemnity portion of her claim. Since the time to request reopening has expired, there is no apparent basis to do so.

ORDER

It is therefore ordered that:

1. Claimant's claim remains open for medical benefits but is closed for additional indemnity benefits.

2. Claimant's request for a determination that ALJ Lamphere's December 30, 2016 order allows her to pursue temporary disability benefits without reopening the indemnity portion of her claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 21, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to a 30% scheduled right upper extremity impairment rating assigned by her authorized treating physician ("ATP").

II. Whether Claimant proved by a preponderance of the evidence that she is entitled to a general award of maintenance medical benefits.

FINDINGS OF FACT

1. Claimant is a 62-year-old right-hand-dominant woman who works for Respondent as both a health technician and a team leader in Respondent's after-school program.

2. On March 28, 2017, Claimant suffered an admitted industrial injury while on a field trip to a skating rink. In an attempt to avoid crashing into students, Claimant fell and landed on her right wrist.

3. On March 28, 2017, Claimant was seen by her ATP, Lori Rossi, M.D., at U.S. Health Works Medical Group. On examination, Dr. Rossi noted deformity, tenderness, and crepitus of the right wrist. X-rays revealed a fracture of the distal radius and ulna with scapholunate widening. Dr. Rossi diagnosed Claimant with a work-related closed fracture of the right distal radius and ulna and right scapholunate dissociation. She referred Claimant for a hand surgery consultation and prescribed medication.

4. Nathan Faulkner, M.D. performed Claimant's hand surgery consultation. On March 30, 2017, Dr. Faulkner diagnosed Claimant with a comminuted intra-articular distal radius fracture and noted that his colleague, Craig Davis, M.D., would assume Claimant's care.

5. On April 7, 2017, Claimant underwent surgery with Dr. Davis, who performed an open reduction and internal fixation of the right distal radius fracture with freeze-dried cancellous graft and skeletal dynamics plate.

6. Claimant attended follow-up evaluations with Dr. Rossi on April 20, May 11, and May 25, 2017. Dr. Rossi did not document crepitus of the right wrist during these examinations. Dr. Rossi noted minimal active range of motion of the wrist on May 11, 2017 and improved active range of motion in the wrist on May 25, 2017, but mild to moderate index finger stiffness.

7. On May 8, 2017, Timothy Abbott, PA-C, evaluated Claimant under the supervision of Dr. Davis. Claimant reported continued stiffness in her fingers. Dr. Davis

noted limited wrist range of motion, without crepitation, and nearly full extension of the fingers with composite flexion limited to about 1 cm distal palmar crease. He remarked, "We discussed the fact that she may not regain full motion but hopefully we'll have no functional deficit."

8. On June 5, 2017, Dr. Davis reevaluated Claimant. He noted limited wrist and digital range of motion and remarked, "She is very stiff at this point and even her fingers have limited motion. I explained that some people have a tendency to form a lot of scar tissue as she evidently does." Dr. Davis did not document crepitus of the wrist. Dr. Davis referred Claimant for electrodiagnostic testing for concerns of carpal tunnel syndrome.

9. On June 16, 2017, Claimant saw Barry Ogin, M.D. for an evaluation and electrodiagnostic testing. Claimant reported she began experiencing numbness and tingling in her right hand approximately two weeks after the surgery. She complained of swollen fingers and stiffness. On physical examination, Dr. Ogin noted slight swelling in Claimant's fingers and a decreased ability to close her fist. Dr. Ogin gave the following impression:

> 1. Right distal radius fracture, status post open reduction and internal fixation. 2. Persistent complaints of right hand stiffness and abnormal sensation and mild dystrophic change. 3. Possible early chronic regional pain syndrome. 4. Electrodiagnostic testing reveals borderline median neuropathy at the wrist, similar to the asymptomatic left side, query clinical significance.

10. Claimant subsequently treated with Dr. Ogin on June 30, July 28, August 28, September 11 and September 22, 2017. Dr. Ogin documented stiffness in Claimant's hand and wrist and restricted range of motion of the wrist. Dr. Ogin did not document crepitus of the wrist in any of his examinations.

11. On June 23, 2017, Claimant returned for a follow-up evaluation with Dr. Rossi complaining of a club hand with radiating pain, tightness, tingling, and minimal functionality. On exam, Dr. Rossi noted crepitus of the right wrist with minimal active range of motion and markedly decreased active range of motion of the right hand.

12. On June 30, 2017, Dr. Rossi's physical exam revealed decreased grip strength and pinch on the right compared to the left, with no crepitation of the right wrist.

13. On July 17, 2017, Dr. Davis noted improved digital flexion. Dr. Davis made no mention of crepitus in the right wrist.

14. On July 27, 2017, Dr. Rossi noted crepitus of right wrist with improved right wrist range of motion.

15. On August 7, 2017, Dr. Rossi noted crepitus of the right wrist with restrictions to right wrist range of motion.

16. On August 17, 2017, Dr. Rossi's physical exam revealed crepitus of the right wrist with limited range of motion, swollen fingers, and difficulty with flexion and strength. Pinch and grip testing on the right were unequal to the left.

17. On September 5, 2017, Dr. Rossi noted that Claimant's injury was 5% better. Dr. Rossi performed a physical exam and determined Claimant was approaching maximum medical improvement ("MMI"). She again noted crepitus of the right wrist.

18. Claimant continued treating with Dr. Rossi, who continued to note restricted wrist, finger and thumb range of motion, as well as crepitus of the right wrist at follow-up evaluations on October 2, 2017, October 23, 2017, November 2, 2017, November 20, 2017 and December 11, 2017.

19. Dr. Rossi placed Claimant at MMI on December 13, 2017. Physical examination revealed restricted range of motion in the wrist, fingers and thumb, crepitus in the right wrist, and muscle weakness in the hand and fingers. Dr. Rossi opined that Claimant's fingers were affected by the surgery. She assigned a combined 30% upper extremity impairment rating under the AMA Guides, consisting of 21% upper extremity impairment for the right wrist (14% wrist range of motion and 20% joint crepitation for moderate crepitation), and 11% upper extremity impairment for the hand (12% impairment to hand based on impairment to fingers and thumb). Dr. Rossi did not assign any permanent restrictions. Regarding maintenance medical benefits, she stated that Claimant "may follow up with Dr. Davis, if needed, up to December 13, 2018."

20. On February 26, 2018, Carlos Cebrian, M.D., performed an independent medical evaluation ("IME") at the request of Respondent. Dr. Cebrian issued an IME report on March 16, 2018. Dr. Cebrian reviewed medical records dating back to March 2004 and physically examined Claimant. Claimant reported not experiencing any significant improvement since being placed at MMI. Claimant further reported difficulty with fine movements, as well as numbness and tingling of the right hand. Physical exam revealed decreased wrist range of motion with no crepitus, and slightly decreased range of motion of the right index finger, middle finger, and thumb. Dr. Cebrian diagnosed Claimant with a work-related right wrist fracture and agreed Claimant reached MMI as of December 13, 2017. He opined that Claimant's finger stiffness and decreased range of motion was likely due to inactivity and not a permanent condition. Dr. Cebrian assessed a 12% upper extremity impairment rating for range of motion loss to the wrist. Dr. Cebrian noted that crepitus was not present on his examination or documented in early medical records. He opined that, even if Claimant had crepitus, assigning a separate impairment rating for crepitation would be inappropriate under the AMA Guides, as Claimant's total impairment was adequately addressed with the impairment for wrist range of motion deficits. Dr. Cebrian further opined that no range of motion deficits for the fingers was appropriate and no maintenance care was medically reasonable or necessary.

21. Dr. Cebrian testified at hearing on behalf of Respondent as a Level II accredited expert in occupational medicine. Dr. Cebrian testified consistent with his IME report. He acknowledged that his range of motion measurements of Claimant's right wrist were

similar to those of Dr. Rossi, but continued to opine that Claimant sustained a 12% impairment due to wrist range of motion deficits, instead of 14% impairment assigned by Dr. Rossi.

22. Dr. Cebrian testified that Dr. Rossi's impairment rating was erroneous and not a proper application of the AMA Guides, specifically referring to the section 3.1j of the AMA Guides regarding bone and joint crepitation. Dr. Cebrian explained that crepitus is a sound and is produced by inflammation of the tendon sheath. He testified that he did not find crepitus on his examination, nor did any other ATP, with the exception of Dr. Rossi. Dr. Cebrian testified that under the AMA Guides, even if Claimant did have crepitus, it would be duplicative to assess a separate impairment rating for crepitation because the range of motion rating adequately addressed Claimant's functional impairment. Furthermore, Dr. Cebrian testified that Dr. Rossi's crepitation impairment based on "moderate" crepitation was improper because "moderate" crepitation requires constant crepitation, and Claimant's crepitation was not present on a constant basis.

23. The AMA Guides section 3.1j "Impairment Due to Other Disorders of the Upper Extremity Joint," page 48, provides in relevant part:

> The evaluator must use judgment and avoid duplication of impairments when other findings, such as synovial hypertrophy, carpal collapse with arthritic changes, or limited range of motion are present. The latter findings may indicate a greater severity of the same underlying pathological process and take precedence over joint crepitation, which should not be rated in these instances.
>
> * * *
>
> It must be stressed that impairments secondary to these disorders are usually rated by other parameters. The following disorders [including joint crepitation] are to be rated only when other factors have not adequately rated the extent of impairment. Whether or not to consider these disorders separately is left to the discretion of the examiner.

24. Dr. Cebrian also testified that Claimant did not require an impairment rating for the fingers, because Claimant did not have any ratable pathology in the fingers. Dr. Cebrian testified that, to a reasonable degree of medical probability, Dr. Rossi's 11% upper extremity rating for the fingers was not a proper application of the AMA Guides. Dr. Cebrian opined that, while Claimant did report stiffness in the fingers, without an underlying pathology or anatomic injury to the fingers, it is not appropriate to rate this symptomology relative to a wrist fracture. Additionally, He testified that on examination, Claimant's range of motion in her fingers was very close to normal and similar to her left hand. Dr. Cebrian acknowledged that permanent impairment is determined as of the date of MMI.

25. Dr. Cebrian further testified that maintenance medical care was not reasonably necessary or related because Claimant has returned to work, is not taking medication,

is continuing to improve, and there is no indication that she requires an orthopedic follow-up.

26. Claimant testified at hearing that, prior to March 28, 2017, she had no history of any symptoms, limitations, pain complaints, or restrictions in her right or left upper extremities. Claimant testified that it took Dr. Rossi over an hour to perform impairment rating measurements while referring to a book, while it took Dr. Cebrian only 15 minutes and he did not refer to a book during such time period. Claimant described her understanding of crepitus as "clickety clacks." She testified that her crepitus is present daily, but not every minute of the day. Claimant testified she continues to have numbness and stiffness in her right hand. She stated that she works with therapy putty at home and is no longer taking medication. Claimant testified that she has not seen Dr. Davis since November 2017 and, as of the date of hearing, has not scheduled an appointment to see Dr. Davis in the upcoming months. Claimant stated she would like the ability to follow-up with Dr. Davis as needed.

27. Claimant's testimony is found credible and persuasive.

28. The ALJ credits the opinion of Claimant's ATP, Dr. Rossi over the conflicting opinion of Dr. Cebrian on impairment and maintenance medical benefits.

29. The ALJ finds Claimant has proven by a preponderance of the evidence she sustained a 30% scheduled right upper extremity impairment.

30. The ALJ finds that Claimant has proven by a preponderance of the evidence that she is entitled to a general award of maintenance medical benefits.

31. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every

inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Permanent Impairment

A rating physician must rate impairment in accordance with the provisions of the AMA Guides. Section 8- 42-101(3.7), C.R.S.; § 8-42-107(8)(c), C.R.S.; *see also, Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003). Impairment is to be determined as of the date of MMI. The burden of proof pertinent to a dispute concerning the impairment rating of a scheduled injury is a preponderance of the evidence. *Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007); *Ortiz v. IngersollRand Co*., W.C. No. 4-981-218-04 (January 25, 2018); *Gagnon v. Westward Dough Operating Co*., W.C. No. 4-971-646-03 (February 6, 2018).

Respondent argues Claimant's permanent impairment is limited to a 12% upper extremity impairment based on range of motion deficits to the right wrist. Respondent contends Claimant is not entitled to an impairment rating for her hand, as there is no ratable pathology in Claimant's fingers, and any range of motion deficits are likely not permanent. Respondent further argues that Dr. Rossi's impairment rating for crepitation is duplicative and erroneous.

As found, Claimant has proven by a preponderance of the evidence that she sustained a 30% scheduled right upper extremity impairment. Dr. Rossi assigned a 14% impairment rating for range of motion deficits in the wrist, which is similar to Dr. Cebrian's 12% impairment rating. Claimant's right wrist range of motion limitations are consistently documented throughout the medical records, with some improvement noted at times, but not sustained. There is no contention Dr. Rossi performed the wrist range

of motion measurements incorrectly, or that her wrist range of motion calculations under the AMA Guides are incorrect. Accordingly, the ALJ is persuaded Claimant sustained a 14% range of motion impairment of the right wrist.

Regarding the impairment rating for crepitation, Dr. Cebrian specifically found no crepitation, while Drs. Davis and Ogin did not mention either the presence or absence of crepitation in their medical notes. Dr. Rossi, who examined Claimant on several occasions, noted crepitus of the right wrist during all but 1 of 12 examinations of Claimant from June 23, 2017 to the date of the impairment evaluation, December 13, 2017. Claimant credibly testified that she experiences crepitus on a daily basis, but not at every minute of the day. While the AMA Guides emphasize avoiding duplicative ratings, the AMA Guides specifically state that rating the disorders separately is within the discretion of the examiner. The ALJ is persuaded Dr. Rossi properly exercised her discretion under the AMA Guides and correctly assigned Claimant a 20% impairment rating for moderate joint crepitation.

Lastly, with respect to the Claimant's hand impairment, Dr. Rossi credibly opined that Claimant's fingers were affected by the surgery. Claimant consistently reported stiffness in her fingers subsequent to the surgery up to the time of the impairment evaluation. On multiple occasions, Dr. Rossi noted restricted finger range of motion and issues with pinch and grip testing on physical examination. Claimant credibly testified she continues to experience stiffness in her hand. While Dr. Cebrian opined that Claimant's hand stiffness is not permanent, Dr. Cebrian acknowledged that permanent impairment is determined as of the date of MMI. Accordingly, the ALJ is persuaded Claimant sustained a 12% impairment of the hand, as provided by Dr. Rossi.

Based on the totality of the evidence, Claimant has proven it is more probably true than not she sustained a combined 30% scheduled impairment of the right upper extremity, as assigned by her ATP, Dr. Rossi.

Medical Maintenance Benefits

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

As found, Claimant has established by a preponderance of the evidence that she is entitled to maintenance medical benefits. Claimant credibly testified that she continues to experience crepitus in her wrist, and limited motion in her hand and wrist. Dr. Rossi suggested that, as maintenance, Claimant may follow-up with Dr. Rossi, as needed. Claimant has proven by a preponderance of the evidence that she is entitled to a general award of medical maintenance benefits. The ALJ is persuaded Claimant is entitled to a general award of maintenance medical benefits, subject to Respondent's right to contest the compensability, reasonableness and necessary of specific treatments.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant permanent partial disability benefits based on a 30% scheduled right upper extremity impairment rating.

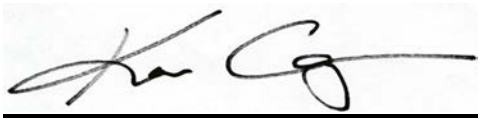
2. Respondent is responsible for maintenance medical benefits reasonably necessary to relieve the effects of Claimant's March 28, 2017 industrial injury or prevent further deterioration of her condition.

3. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 21, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she sustained a compensable work injury to her right hip on July 22, 2107?

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to medical treatment which is reasonable, necessary, and related to her work injury of July 22, 2017?

III. Has Claimant shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability benefits from 8/13/2017 through 9/2/2017 as a result of a compensable work injury which occurred on July 22, 2017?

STIPULATIONS

At hearing, the parties stipulated that Claimant's Average Weekly Wage for her employment at Marshalls is $183.48. The ALJ accepted this stipulation. The issue of concurrent wages and concurrent wage loss is reserved for future determination.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following Findings of Fact:

Claimant's Concurrent Workers Compensation Claim

1. On January 17, 2017, Claimant reportedly suffered substantial injuries as a result of an altercation with a student at her former place of employment. Claimant sought treatment on the date of injury. An excerpt from that initial visit describes the January 17, 2017 incident as follows (emphasis added) (Ex. 3):

> She states that earlier today she was seated and attacked from behind by a student who started hitting her on her back and the top of her head. **She was kicked in the L lateral hip off of her seat and landed on her R hip/side** and caught herself with her R hand.

2. On June 13, 2017 (one month before this alleged incident), Claimant underwent a Division sponsored IME (DIME) for her concurrent claim. The DIME physician, Dr. Timothy Hall, MD. reported the following (emphasis added) (Ex. H):

> The patient states a student pushed her out of her chair and hit her in the head, neck, and back…She was kicked, left lateral hip off the seat and **landed on her right hip**/side and caught herself with her right hand….There was a history of a **previous head injury** she sustained….A

note 1/31/17, rescheduled her appointment a week early as she is having **bilateral hip aching** as well as stiffness/tightness in her lower back.

Notes from 03/13/17, overall feeling a little better…..She does continue to have pain, mainly left sided lower back as well as **lateral hip** and thigh pain.

There is a 5/09/17 note with Theodore Stringer where the patient was complaining of **right hip pain,** left hip, mid back, and low back…..She represents with persistent posttraumatic pain best localized to the lateral aspect, **bilateral lower hips, pain rated from 5 to 9** depending on position and activity. Her diagnosis included **pain in the right hip** and pain in the left hip. (Ex. H, p.1)

I met with Margaret Hicks, who calls herself Peggy……she was hit on the head on her back with the student's fist, kicked in the left hip, and **landed on her right hip** and right hand…..She complains of pretty much daily pain in her low back, radiating out into the SI area, **out towards the hips,** and laterally into the trochanteric area….She reports that ***both*** **of her hips now "pop".**

She has had her left hip replaced. She has had both her knees replaced, all with Dr. Stringer. She has seen Dr. Stringer recently and I have reviewed his note from 05/09/2017, where she is discussing an **aching right hip,** left hip, mid back, and low back radiating into the lower extremity and back of both legs. He describes her history with him including surgeries for **arthritis of the right hip** with arthroplasty in July 2004 and bilateral knee arthroplasty….(Ex. H, p. 2)

I asked about any other symptoms that she has noted since the accident and she had quite a list of what sounds like post concussive symptoms. She reports the following issues:

1. **Word-finding difficulties**
2. Being more **forgetful**
3. **Losing things regularly**
4. Difficulty multitasking
5. **Impaired memory**
6. **Balance issues** including trouble walking……

She tells me before this event in January, she was quite proud of her somewhat exceptional memory.(Ex. H, p. 3)

Compensability/Instant Claim

3. Claimant has worked for employer, Marshalls, for approximately 19 years as a dressing room associate. Claimant issues numbers to customers corresponding with the number of items they carry into the dressing room. Claimant then collects the unsold items, and puts them back on the sales racks.

4. Claimant testified at hearing that after a break around 2:00 p.m., she was walking back to the dressing room area, when she tripped over a "lifetime" table which was lying flat on the floor. At that time, she alleges that she injured her knees and right hip in this fall.

5. At various points in the hearing, Claimant testified to four different dates of injury for this same alleged incident: July 29, 2017; July 22, 2017; July 17, 2017 (via interrogatories), or another unknown date occurring some weeks after July 22, 2017.

6. Claimant reported the alleged incident to assistant manager, Pam Porter, within minutes of it occurring. Claimant told Ms. Porter that she fell and bumped her head. Claimant testified that she reported no physical injuries and no pain to any body parts. On the same day, Ms. Porter reported the incident to Marshalls' insurer, Zurich American Insurance Company. (Ex. A).

7. Pam Porter testified at hearing. Ms. Porter testified that Claimant reported the alleged incident to her on July 22, 2017. Ms. Porter testified that she observed no visible injury at the time Claimant reported the alleged incident. Additionally, she observed no difference in Claimant's ability to walk after the alleged incident. Ms. Porter testified that Claimant never communicated that she needed a break due to any physical discomfort. At some point, Claimant appeared at work using a cane. Ms. Porter recalls that to have been "around holiday time" (November/December, 2017). Prior to this, she had not observed Claimant to be displaying any physical symptoms.

8. Claimant testified that a few days following the alleged incident, she spoke with Robert Singleton, store manager at Marshalls, about what allegedly happened. Claimant testified that she told Mr. Singleton that she fell and bumped her head. Claimant testified that she did not mention any other physical injuries, nor any pain to any body parts as a result of the alleged incident.

9. Robert Singleton testified at hearing. Mr. Singleton testified that a few days after the alleged incident, Claimant told him that she was fine. She explained to him that she tripped over a table, and bumped her head. Mr. Singleton testified that at that time (a few days after the alleged incident) he did not observe any difference in Claimant's ability to walk. Mr. Singleton testified that Claimant never communicated that she needed a break due to any physical discomfort. He also began to note that Claimant began to use a cane at work, around "the holiday season…December."

10. Debra Gibbs, assistant manager at Marshalls, also testified at hearing. Ms. Gibbs testified that after Claimant reported the alleged incident to Ms. Porter, she asked Claimant if she was okay. Ms. Gibbs testified that Claimant responded by saying she was "fine" and "dandy." Ms. Gibbs testified that Claimant did not mention any injuries nor any pain as a result of the alleged incident. Ms. Gibbs testified that Claimant never communicated that she needed a break due to any physical discomfort. The first time Claimant told her of any pain was in mid-August, when she was referred to Emergicare.

11. Claimant testified that on the date of the alleged incident (which the ALJ finds actually occurred on July 22, 2017), she was working with a fellow fitting room associate, Sue Andrews. Claimant testified that when she returned to the fitting rooms after the alleged incident, she told Ms. Andrews that she just fell and bumped her head. Claimant testified that she did not mention any pain to any body parts to Ms. Andrews.

12. Claimant testified that the First Report of Injury, repeatedly indicating no physical injury, is truthful.

13. Claimant testified that an entire family, including a mother, father, and two children, witnessed her fall. They reported to her that one of the daughters had tripped over this same table moments prior. Claimant testified that she wrote down the names and contact information of the alleged witnesses on a paper towel. Claimant went on to explain that her disabled daughter threw away the alleged contact information by accident. In doing so, the alleged contact information "got garbage on it, so you couldn't read it." As a result, Claimant then threw it away herself.

14. Claimant testified that Allen Hecker of Zurich Insurance conducted a recorded interview of Claimant on August 17th, 2017.

15. Claimant subsequently verified an excerpt from the transcript of this interview, regarding the alleged witnesses' contact information in which Claimant told Mr. Hecker: "I should have kept it. You could have called them. But I pitched it." (Ex. E p. 4)

16. Ms. Gibbs also testified regarding Claimant's story that a family witnessed her alleged fall and that a child had tripped over the same table right before she allegedly tripped. Ms. Gibbs offered the following:

> If that is -- had happened, management is to be informed immediately and we file an accident report. Any accidents inside that building, there are signs throughout the building and in the break room, everywhere else that lets people know we have to call Zurich and let them know that something's happened. Even if it's something that the customer doesn't

want to give us information, we still report it to Zurich.
(transcript p. 119**)**

17. Ms. Gibbs testified that no witnesses to Claimant's alleged incident were listed in the accident report and that no report was made to her about a child falling over the same table as Claimant asserted.

18. During hearing testimony, within a few minutes, Claimant provided the following answers regarding her alleged fall:

Q: …..So, I want to talk about your fall again, but more specifically on how you supposedly landed. Now, the only point of impact mentioned in the first report of injury is you head, correct?
A: That's right. (transcript, p. 50)

Q: And during your recorded interview with Alan Hecker, when you described your accident you said you fell smack dab on both knees?
A: On my knees, Uh-huh.
Q: okay.
A: And over to the side. I did not say that, I just said smack dab on my knees.
Q: Okay. So just to clarify—
A: Uh-huh. That's what I said.
Q: You told Alan Hecker that you—you fell smack dab on your knees?
A: That's right.
Q: Okay. Now I'm looking at your November 15th, 2017, medical report from Colorado Rehabilitation Occupational Medicine, Respondent's Exhibit I. Did you tell Dr. Primack that you fell on your hands and knees and that you remember hitting your head?
A: I did hit my head and when I fell down I fell, knees, over.
Q: Ms. Hicks, did you tell Dr. Primack that you fell on your hands and knees and that you remember hitting your head?
A: I don't recall, but if that's what it says that would be what I said.
Q: Okay. ….Well , when you went in for your IME on March 22nd did you tell Dr. Rook that you landed on the ground with the weight of the—of your body on the side of your right hip?
A: Yep. Because—
Q: Okay
A: Never mind. (transcript, pp. 51-52).

19. The first time Claimant sought treatment for this incident was on August 13, 2017. Claimant's explanation for this delay was due to a series of personal issues, including supporting her husband and disabled daughter, being laid off from a teaching class, and setting up interviews for a possible CNA position. Claimant stated she could not afford to miss work. Despite her high pain tolerance, she self-medicated over the counter. At some point, Claimant asserts,

"It got to the point of just through the time….I couldn't walk. I mean, I could not walk. And I was just forcing myself to work." (transcript, p. 30). Claimant eventually reported this to Deb Gibson, and was then referred to Emergicare.

20. At this initial visit to Emergicare on 8/13/17, Claimant was treated by Dr. Erik Ritch (Ex. 7, pp 83-86). Based upon the history provided and the symptoms then noted, Dr. Ritch took Claimant off of work until MRIs of both knees could be performed.

21. Claimant followed up at Emergicare on 8/16/17, and was seen by Dr. Robert Hamilton (Ex. 7, pp 87-90). No mention in her medical history is made of her treatment which had occurred 5 days prior with UC Health. Claimant complained at this time of right "sciatic" pain along with lower leg and foot numbness. The same work restrictions remained in place, pending bilateral knee MRIs.

22. Claimant returned to EmergiCare on August 29, 2017 and saw another physician, Dr. George Johnson. Claimant described to him the same mechanism of injury. (Ex. 7, pp. 91-93). Claimant was specifically complaining of bilateral knee, bilateral hip, and lower back pain at this time. She reported having minimal pain prior to the fall and did not take any medications. Dr. Johnson noted that Claimant remained out of work and was set to return back to work on Sunday, which would have been September 3, 2017. Examination of the right hip revealed generalized tenderness. Dr. Johnson placed Claimant at MMI at her next visit on September 12, 2017, indicating that although he felt Claimant did sustain a work injury, he felt most of Claimant's present symptoms were due to past problems.

23. Although there was an MMI determination by Dr. Johnson, Claimant continued to treat through EmergiCare and receive physical therapy for pain in her right anterior thigh and hip. (Ex. 7, pp. 99-102). Claimant also saw Dr. Ritch again on October 6, 2017. He documented that Claimant's left knee was getting better while the right knee was getting worse. Claimant's back remained quite painful and the right hip was described to him as feeling "unbearable at most times…." *Id.* at 103.

24. On 9/27/17, Claimant returned to her treating surgeon, Dr. Theodore Stringer, who had performed Claimant's bilateral knee replacements and left hip replacement in the past. (Ex. 9, pp. 127-132). He indicated that Claimant was doing well when he last saw her in May of 2017, but she had significant ongoing problems since her fall at work in late July. He reported that Claimant had tripped over a piece of furniture on the floor and fell forward landing on both knees and her right side. Dr. Stringer preliminarily diagnosed Claimant with post-traumatic hip and bilateral knee pain and hip trochanteric bursitis. Dr. Stringer performed an injection into Claimant's right hip.

25. Claimant returned to Dr. Stringer on October 6, 2017 and reported to him that she received a minimal therapeutic response to the injection. He felt that

Claimant's symptoms might be coming from her lower back, and recommended a lumbar MRI. The lumbar MRI was performed on November 21, 2017 and revealed the following: 1.) At L5-S1 there is apparent bulging of the left facet joint capsule with fatty tissue or complex cyst formation with mild displacement and impingement of the left S1 nerve anteriorly; 2.) At L4-5 there is severe facet arthropathy, chronic degenerative disc disease, grade 1 spondylolisthesis, and moderately severe spinal canal stenosis with moderate right foraminal stenosis; and 3.) At L2-3 and L3-4, there is chronic disease and disc bulging without nerve impingement or disc protrusion. (Ex. 8, p. 122).

26. Claimant was referred to Dr. Michael Sparr to consider injections in the lumbar spine. Her first evaluation with him occurred on January 18, 2018. (Ex. 11, pp. 143-147). Claimant described to Dr. Sparr that her greatest pain at that time was in her right lateral hip with pain in the right central and lateral buttock. Dr. Sparr was concerned that Claimant had a labral tear based on the history taken and physical examination of Claimant. He recommended an MR Arthrogram of the right hip.

27. The MR Arthrogram was performed on January 30, 2018 and revealed significant pathology. (Ex. 8, pp. 123-25). The imaging showed marked degenerative changes of the right hip articulation, prominent bone marrow edema, a probable healing fracture of the right posterior superior acetabulum and a probable fracture of her sacrum, right greater than left.

28. Dr. Ritch evaluated Claimant again on March 16, 2018. (Ex. 7, pp. 117-120). Claimant reported to Dr. Ritch that she was going to have her right hip replaced, but it would be covered under her private insurance as her claim remained denied. Dr. Ritch specifically opined on the work-relatedness of this condition: "In my opinion, this is directly a result of her fall and should be covered. We were slow to diagnose her true problem as her initial complaints were more in her knees and, only after some time, did problems localize more to her legs." *Id.* at 117. Claimant continued to report to him severe hip and groin pain.

29. Claimant underwent an IME with Dr. Jack Rook on March 22, 2018 to address the compensable nature of her fall. (Ex. 13). She described to Dr. Rook the following mechanism of injury: "The injury occurred while she tripped on a display table whose legs were folded so that its surface was only a few inches above the floor. Her left foot got caught under the table causing her to fall forwards and to the right." *Id.* at 156. Claimant continued to work for financial reasons, but eventually sought treatment due to the increasingly severe pain.

30. Dr. Rook diagnosed Claimant with a permanent aggravation of her right hip osteoarthritis, a fracture of the acetabulum that likely occurred when she fell at work in July of 2017, and a probable fracture of the sacrum that also likely occurred when she fell at work. Dr. Rook addressed the fact that Claimant had a separate injury earlier in the year on January 17, 2017 with a separate employer.

Id. at 169. According to Dr. Rook, the records from that injury show that Claimant did have some right hip complaints, but the records suggested it was nothing more than trochanteric bursitis and the records from the ATP, Dr. Dean, documented a normal right hip examination. Claimant underwent a DIME for her January 17, 2017 injury and was not assigned an impairment rating for her right hip.

31. Claimant initially testified that prior to initially seeking treatment for this claim on August 13, 2017, the last time she had seen a doctor for any reason was for a routine physical at the beginning of June of 2017. Claimant then verified at hearing the following excerpts from her UC Health medical report dated August 11th, 2017 (two days before she initially sought treatment related to the instant claim) (Ex. L):

> "Patient comes to clinic for scheduled follow-up work injury visit, **she is here for follow-up of R hand, hip, back pain**. She was seated and attacked from behind by a student who started hitting her on her back and the top of her head. **She was kicked in the L lateral hip off of her seat and landed on her R hip/side and caught herself with her R hand.** She states she is mildly sore everywhere else but is most worried about her R hand, since she fractured it 7 weeks ago and it required percutaneous pinning, casting and splinting. She had her splint removed last week."
>
> "Today she presents after having an IME and having her case reopened. She states that after discharge, her head symptoms started getting worse – ***her headaches and forgetfulness intensified*** and **her back and hip pain worsened**. (emphasis added).

32. Claimant acknowledged that on August 11th, 2017, she was treated for injuries she sustained for her concurrent worker's compensation claim. Claimant further admitted that on August 11th, 2017 she received treatment to the same body parts and for the same conditions she alleges are related to the instant claim.

33. Claimant testified that, during her recorded interview with Mr. Hecker on August 17, 2017 (Ex. E), she did not inform him about her concurrent claim when he asked her about any prior work injuries. Claimant reasoned that she did not do so because at the time of the interview "my pain was so bad that day, the pain was unbearable, that I didn't even -- it didn't even come into my head." (transcript, pp. 57-58)

34. Claimant then verified the following excerpt from the transcript of the recorded interview, in which Claimant described other worker's compensation claims from many years ago, but did not mention her concurrent claim (Ex. E, p. 10):

> AH: Any prior work injuries in the past?

MH: Um, I had a Marshalls' injury years and years ago but it was, it was minor. And 2004, I was going to school and there was a very, very cracked sidewalk that was about 60 years old and my right toe caught on a piece of raised concrete *(inaudible)* and that's what, and I fell and that's what led to hip replacements, both knees and both hands being operated on.

35. Claimant subsequently admitted that during the recorded interview with Mr. Hecker, she omitted information that had anything to do with her concurrent claim. She admitted that when Mr. Hecker asked her if she had any prior work injuries, she mentioned other worker's compensation claims, but not her concurrent claim. She admitted that when Mr. Hecker asked about any recent medical attention, she did not inform him about the treatment she had been receiving relating to her concurrent claim. Claimant further admitted that she did not mention to Mr. Hecker the fact that on June 13, 2017 (about one month before she allegedly tripped at Marshalls), she had received a 20% impairment rating from the DIME physician for her concurrent claim. (Ex. H) (transcript, pp. 58-59).

36. Claimant testified that she does not recall what she told Mr. Hecker during her recorded interview when he asked her about the condition of her hips and knees *prior to* the date she allegedly tripped at Marshalls. Thereupon, Claimant verified the following excerpt from the transcript of the recorded interview (Ex. E page 8)(emphasis added):

AH: Okay, alright. And you said he took x-rays of both your knees and the hip back when you saw him?

MH: Yes, he did, mm hmm.

AH: And everything checked out okay?

MH: **Everything was great, mm hmm**.

AH: Okay. And, um, but he didn't do an MRI? He just did x-rays?

MH: Yeah, he just did x-rays.

AH: Okay.

MH: In their, in their orthopedic group.

AH: Okay. And any problems with your knees prior to the fall at work?

MH: **No. They've been good.**

37. Claimant verified the following excerpts of her DIME report, relating to her concurrent claim, dated June 13, 2017: (Ex. H, with emphasis added):

> She complains of pretty much daily pain in her low back, **radiating out into the SI area, out toward the hips**, and laterally into the trochanteric area. **She has posterior radiating thigh pain, usually not past the knees**. **She reports that both of her hips now "pop."**
>
> She has seen Dr. Stringer recently and I have reviewed his note from 05/09/17, where **she is discussing an aching right hip,** left hip, mid-bad and low back **radiating into the lower extremity and back of both legs.**

38. Claimant was asked if the above instance was the only time she failed to mention symptoms relating to her concurrent claim. Claimant replied "I-- I--you know, I really do not know. (transcript, p. 62).

39. Thereupon Claimant verified with the following excerpt from her January 18, 2018 Accelerated Recovery Specialist report, in which Dr. Michael Sparr wrote (emphasis added) (Ex. J):

> **She reports that she is never experienced left hip pain and denies any previous history of low back pain** with the exception of what she described as muscle spasms in September 2016 and November 2016.

40. Claimant testified that Dr. Sparr's report reads the way that it does because of what she told Dr. Sparr at her appointment.

41. Next, Claimant verified an excerpt from her September 1, 2017 Emergent Care report, relating to treatment for her concurrent claim, stating (emphasis added) (Ex. N):

> **PT states that she did not mention to MD's that she was attacked by a student in January.** She states that the student attacked her and hit her repeatedly on her head and "at least 30 times in her back."

42. Claimant initially testified that she has only had three other Colorado Worker's Compensation claims, outside of the instant claim. Claimant subsequently admitted that the instant claim is her seventh worker's compensation claim. (transcript, pp. 65-67).

43. Claimant testified that she did not disclose all of her prior claims in discovery because "they must have been so minor that I just didn't think about them." Claimant further explained "…I really do not remember what the other ones were because they must have been so simple and so long ago that I just don't think about it." Claimant subsequently admitted that she would not consider her 2004 worker's compensation claim which settled for about $70,000 a minor claim. Claimant also testified that she had suffered a *traumatic brain injury* during this incident "not major, minor to moderate I…guess I would say."(transcript, p. 34).

44. Claimant was asked if she has had any subsequent injuries or accidents since the date she allegedly tripped at Marshalls. Claimant testified that she only "fell on the steps just at home, just landed, but that's all. That's the only thing." (transcript, p. 67)

45. Thereupon Claimant verified with the following excerpt from her August 18, 2017 Emergent Care medical report, (Ex. M):

> Patient notes that her knees were hurting enough yesterday
> that she actually fell going down some stairs.

46. Claimant next verified the following excerpts from her November 21st, 2017 MRI reports authored by Dr. Sherman, (Ex. Q):

> Right-sided low back, hip, and leg pain for three months post fall.
>
> History of fall and hitting head three months ago.

47. Dr. Sherman's reports reference a date of injury within the same timeframe that Claimant initially sought treatment for the instant claim on August 13, 2017. (Ex. Q) When asked to confirm this fact, Claimant replied: "You know what, I honestly do not know." (transcript, p. 70)

48. Claimant then verified the following excerpt from her January 9th, 2018 medical report from Dr. Lauren Halby, MD., (Ex. O):

> First week of Dec, walked up 4-5 steps, right hip
> and knee gave way and fell onto buttocks on the wall
> and steps, now with pain in right groin and down right
> leg which is different than before.

49. Claimant then verified the following excerpt from her January 9th, 2018 medical report from Dr. Farrel VanWagenen, MD., (Ex. P):

> Fall on 12/03/17. Increased right hip and groin pain.

50. Claimant was asked if her right hip injury is related to her January 2017 concurrent claim. Claimant testified “not that I recall.” (transcript, p. 85)

51. Claimant again verified the following excerpts from her June 13, 2017 DIME report relating to her concurrent claim (emphasis added) (Ex. H p.2):

> **Her diagnosis included pain in the right hip and pain in the left hip**.
>
> **She complains of pretty much daily pain in her low back, radiating out into the SI area, out toward the hips**, and laterally into the trochanteric area. She has posterior **radiating thigh pain, usually not past the knees. She reports that both of her hips now “pop.” It is usually when she is walking and it is audible and concerning.**
>
> She has seen Dr. Stringer recently and I have reviewed his note from 05/09/17, where **she is discussing an aching right hip, left hip, mid-back and low back radiating into the lower extremity and back of both legs**.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers’ Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers’ compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Credibility/Generally

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Credibility/ Pamela Porter, Robert Singleton, Debra Gibbs

D. In this case, the ALJ finds the witnesses called by Respondents to be credible and reliable. They have no issues of secondary gain; indeed, it appears they like Claimant personally. They are consistent in their accounts of what they saw, and what they didn't. They appear to have followed proper protocol in complying with all Workers Comp procedures once notified of this alleged incident. Had Claimant notified her of the alleged fall by the customer (as required), Debra Gibbs would have taken a statement and notified Zurich. Claimant failed to so notify her as required. If Claimant's version of events is to be believed, she would have just handed the alleged contact information on the paper towel to Ms. Gibbs at the time. There was no reason to take it home at all, where it was allegedly damaged and thrown away.

E. None of these witnesses saw evidence of the alleged fall. None of them heard Claimant complain of injuries, until she reported pain weeks later. She told Debra Gibbs right afterwards that she was "fine and dandy". None of these witnesses noticed any signs of pain or disability, until Claimant showed up at work using a cane during the holiday season- three to four months after Claimant indicates she could "no longer walk". Claimant never complained to them, nor even asked for extra break time or modified duty.

Compensability

F. The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the

accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967). Soto-Carrion v. C & T Plumbing, Inc., WC 4-650-711 (ICAO February 15, 2007).

G. The mere fact that a Claimant experiences pain at work does not necessarily require a finding of a compensable injury. In Miranda v. Best Western Rio Grande Inn, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition."

H. However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of a natural progression of a pre-existing condition that is unrelated to the employment. See F.R. Orr Construction v. Renta, 717 P.2d 965 (Colo. App. 1995).

I. In this case, while Claimant might have tripped over this table, no compensable injury occurred. Claimant was "fine and dandy" when she got right back up, and the ALJ so finds. From that moment on, Claimant has simply been an unreliable historian in connection with this alleged incident. Perhaps some of this is through no fault of her own, due to her extensive self-reported post-concussive symptoms from her January, 2017 case. Nonetheless, the ALJ simply cannot rely upon what Claimant has reported, either in hearing testimony, or to her medical providers along the way.

J. The severe pain Claimant now reports would have manifested itself far sooner than she reports. Her coworkers would have noticed it. Claimant says that by August, she essentially could not walk, yet she only appeared using a cane at work in November or December-even then, not complaining of pain. Claimant's alleged mechanism of injury is not internally consistent, nor is any version consistent with the injuries she now complains of. The only reason the date of this alleged fall could be ascertained is the incident report prepared by Marshalls. Claimant's reasons for delaying treatment for nearly a month are not persuasive. Claimant was already familiar with the Workers Compensation process, having been down that road a number of times already.

K. Claimant has serious pre-existing conditions to her right hip, regardless of any lack of impairment rating for it. Her lack of condor in failing to simply report this during the discovery process, and during her recorded interview, renders much of what she now says highly suspect. Examining her hearing testimony, her excuse for not disclosing her prior Workers Comp cases during discovery goes beyond mere "forgetfulness". It is clear that Claimant actually recalled it, unilaterally decided on her own what she thought was relevant, and purposefully failed to disclose this information. That was not her call to make. A total of seven Workers Compensation cases in her lifetime would teach her that much. Tell the truth, then let your attorney advocate for you.

L. The ALJ is also not persuaded by the theory of compensability put forth by Dr. Rook. To the extent that Claimant might not be exaggerating her current right hip symptoms, more likely than not, they are due to her past injuries and degenerative conditions. Neither her past injuries, nor her degenerative conditions were aggravated by this fall, and the ALJ so finds.

Medical Treatment

M. As the ALJ has found this claim not compensable, no medical treatment is ordered through this Workers Compensation claim.

Temporary Total Disability

N. On one hand, several credible co-workers do not recall Claimant missing any work while she sought treatment for her alleged injury. On the other hand, available records from Marshalls suggest Claimant missed work for about three weeks. As this claim is not compensable, this issue need not be addressed further by the ALJ.

ORDER

It is therefore Ordered that:

1. Claimant's claim for Workers Compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 22, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable shoulder, elbow and wrist injuries during the course and scope of her employment with Employer on June 5, 2017.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive causally related, reasonable and necessary medical treatment for her June 5, 2017 injuries.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period June 13, 2017 until terminated by statute.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant was responsible for her termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving indemnity benefits.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $549.37.

FINDINGS OF FACT

1. Claimant began working for Employer on May 6, 2013 as a Vinyl Technician. Her job duties involved working at a computer and applying thin layers of film lettering to plexiglass boards to create posters and signs for Employer.

2. In April of 2017 Claimant's job duties increased with the temporary addition of operating the CNC router. The CNC router was used to cut large pieces of aluminum and steel for making signs. The router was located at ground level but the computer used for programming the machine was located approximately six feet above the router in the "crow's nest." The crow's nest was only accessible through a makeshift ladder.

3. Claimant testified that on June 5, 2017 she was lifting a large piece of aluminum that weighed approximately 87 pounds onto the router table with co-worker Damon Shields. She felt a "pop" in her left shoulder and immediately experienced pain in both shoulders. Claimant described her arms as tired and heavy after the incident. She acknowledged that she did not mention her injuries to Mr. Shields.

4. Mr. Shields testified that he worked as a Sign Builder in the same area as Claimant. Although he acknowledged lifting a piece of aluminum with Claimant on June 5, 2017, he had no information that she was injured.

5. Claimant explained that she immediately reported her accident to her direct supervisor Randy Flores. However, she did not seek medical assistance because she was hopeful that her symptoms would improve with time. Claimant completed her June 5, 2017 shift and worked for the next couple of days. However, she noted that she completed her job duties in a modified capacity because of her continued shoulder and neck pain.

6. Mr. Flores denied that Claimant reported a specific injury on June 5, 2017. Instead, he noted that Claimant was involved in a yelling incident with another employee. Claimant received a write-up and underwent a performance review on June 7, 2017. Claimant did not mention the June 5, 2017 incident at the performance review.

7. On June 8, 2017 Claimant submitted a written notice to Mr. Flores regarding her inability to perform her job duties involving the CNC router. She specifically explained that she had been helping to run the router since April 15, 2017. However, she remarked that she was "physically unable to continue to climb up and down the perch area safely without causing serious or permanent injuries to myself. My arms feel like they are going to fall off even on the days I don't run the router. I wake up multiple times during the night with pain and throbbing in both of my elbows, wrists and shoulders. I think it would be a good idea to let them heal for a week and if pain and night throbbing still persist then I will have to visit a workers comp doctor to fix." Claimant did not mention any June 5, 2017 lifting incident.

8. Business Development Manager Bill O' Gorman testified at the hearing in this matter. He explained that he helped Claimant complete an Employer's First Report of Injury on June 8, 2017. Claimant reported that she had pain in her shoulders, elbows and wrists. In describing the cause of her symptoms Claimant noted that she had experienced pain for several weeks as a result of "repeatedly climbing in and out of the crow's nest." Claimant did not mention any acute injury while lifting a sheet of aluminum on June 5, 2017.

9. Employer referred Claimant for medical care. Claimant chose Colorado Urgent Care for treatment.

10. On June 8, 2017 Claimant visited Bethany Wallace, D.O. for an evaluation. Claimant reported pain in her shoulders, elbows and wrists. She noted that at work she was required to lift heavy objects and pull herself up four feet. Claimant also remarked that she had fallen at work previously and injured her left shoulder. However, her left shoulder had healed. Claimant commented that she had been performing her job for two months but did not delineate a specific accident or injury on June 5, 2017. Dr. Wallace referred Claimant to an occupational medicine physician and assigned work restrictions until June 22, 2017 of no lifting in excess of 10 pounds, no reaching away from the body and no lifting above shoulder level.

11. As part of the initial evaluation for a work-related incident, Claimant underwent a toxicology screening on June 8, 2017. Claimant tested positive for cannabinoids/THC.

12. On June 9, 2017 Claimant returned to restricted work duties. She continued working in a restricted capacity through June 12, 2017.

13. On June 13, 2017 Claimant was terminated because of her positive drug screening for cannabinoids/THC. At the termination meeting Claimant was advised that her Workers' Compensation claim was distinct from her termination. Employer emphasized that Claimant should follow-up with an occupational medicine physician for treatment. However, Claimant failed to obtain additional medical treatment for the period June 8, 2017 until November 14, 2017.

14. On November 14, 2017 Claimant visited Authorized Treating Physician (ATP) Brian Beatty, D.O. for an evaluation. Claimant reported pain in her shoulders, elbows and wrists. Claimant remarked that she had been using a hammer and nails at work for four years and had to pull her whole body weight up to a work area. She detailed that she was using a hammer and nails and running a router at work on June 5, 2017 when she developed pain in her shoulders, elbows and wrists. Claimant did not report any injuries while lifting a sheet of aluminum on June 5, 2018. After conducting a physical examination, Dr. Beatty diagnosed Claimant with strains/sprains of the shoulders, elbows and wrists.

15. Dr. Beatty continued to provide medical treatment to Claimant. He referred Claimant for an orthopedic evaluation with Mark Failinger, M.D. and a consultation with Barry Ogin, M.D.

16. On December 28, 2017 Claimant underwent an independent medical examination with David W. Yamamoto, M.D. Claimant reported that she injured her shoulders, elbows and wrists while lifting a piece of aluminum onto a table at work. However, she explained that the main problem was pulling herself up to a workstation that was four feet above the floor. She noted that, although there was a ladder to access the workstation, the ladder did not reach high enough and she thus had to pull herself up on vertical bars. Claimant commented that the elevated workstation had been taken down but she took photos before it was removed. After conducting a physical examination Dr. Yamamoto concluded that Claimant "likely injured herself while having to pull herself up to a work platform. She stated that she did not usually do this and that it was difficult for her to get up on the platform." Dr. Yamamoto diagnosed Claimant with bilateral shoulder strains "from pulling herself up on the platform," a cervical strain and bilateral upper extremity myofascial pain. He recommended bilateral shoulder MRI's and evaluation by an orthopedic surgeon.

17. On March 7, 2018 Claimant visited Dr. Failinger for an orthopedic evaluation. Claimant reported bilateral shoulder pain that began approximately one year earlier while lifting at work. Dr. Failinger determined that Claimant suffered from right shoulder impingement syndrome but did not recommend surgery.

18. On April 9, 2018 Claimant visited Barry A. Ogin, M.D. for a follow-up consultation. Dr. Ogin noted that he had initially seen Claimant in December 2017 for diffuse pain complaints in her shoulders, upper back and arms. Claimant recounted that her symptoms began when she had to climb up and down a short ladder at work. She explained that there were two bars on top of the ladder that she was required to hold in order to climb to the upper level. Claimant specifically noted an incident in May 2017 when she fell off a step after her arms gave out and an accident in June 2017 when she was lifting a large piece of aluminum with a coworker. Dr. Ogin determined that it was "difficult to attribute any of [Claimant's] current complaints to her occupational insult." He remarked that walking up and down while grabbing bars would not cause diffuse myofascial complaints in Claimant's upper extremities. Dr. Ogin commented that Claimant's failure to improve despite being laid off from work for approximately 10 months suggested there was no relationship between her occupational activities for Employer and her physical symptoms.

19. On May 15, 2018 the parties conducted the post-hearing evidentiary deposition of Dr. Beatty. He recounted that Claimant had reported bilateral shoulder pain as a result of using a hammer and power tools at work. She specifically noted that she was required to pull herself into an "unsafe workplace" and was also running a router. Dr. Beatty determined that Claimant's symptoms were not caused by her occupational activities but instead were related to her underlying anatomy.

20. In addressing whether Claimant may have aggravated pre-existing arthritis in her shoulder by lifting a heavy piece of aluminum weighing 70 to 80 pounds, Dr. Beatty felt that it was a possibility but did not believe that the arthritis had anything to do with her symptoms. He also testified that it was possible, but not probable, that Claimant could have injured her bilateral shoulders, elbows and wrists with one act of reaching out holding a sheet of aluminum. Furthermore, Dr. Beatty testified that, after evaluation and treatment including the consultation with Dr. Failinger, the MRIs, EMG and Dr. Ogin's evaluations, Claimant suffers from more of an anatomic body habitus issue as opposed to any ongoing problem related to a work injury. He summarized that Claimant's treatment beginning in November 2017 was unrelated to the work-related incidents either recorded in his history or based on Claimant's hearing testimony about lifting a sheet of aluminum.

21. Claimant has failed to demonstrate that it is more probably true than not that she suffered compensable shoulder, elbow and wrist injuries during the course and scope of her employment with Employer on June 5, 2017. Initially, Claimant testified that on June 5, 2017 she was lifting a large piece of aluminum that weighed approximately 87 pounds onto the router table with co-worker Mr. Shields. She felt a "pop" in her left shoulder and immediately experienced pain in both shoulders. However, the record is replete with contrary evidence that Claimant did not suffer an acute injury on June 5, 2017. Notably, Claimant repeatedly informed Employer and medical providers that she had difficulties performing her job duties operating the CNC router because the computer used for programming the machine required her to access the crow's nest using a makeshift ladder.

22. Claimant's supervisor Mr. Flores denied that Claimant reported a specific injury on June 5, 2017. In fact, on June 8, 2017 Claimant submitted a written notice to Mr. Flores regarding her inability to perform her job duties involving the CNC router. She specifically explained that she had been helping to run the router since April 15, 2017. However, she remarked that she was "physically unable to continue to climb up and down the perch area safely without causing serious or permanent injuries to myself. My arms feel like they are going to fall off even on the days I don't run the router." Furthermore, Claimant reported to Mr. O'Gorman that she had pain in her shoulders, elbows and wrists. In describing the cause of her symptoms Claimant noted that she had experienced pain for several weeks as a result of "repeatedly climbing in and out of the crow's nest." Claimant did not mention any acute injury while lifting a sheet of aluminum on June 5, 2017.

23. In her initial evaluation with Dr. Wallace Claimant noted that at work she was required to lift heavy objects and pull herself up four feet. Claimant commented that she had been performing her job for two months but did not delineate a specific accident or injury on June 5, 2017. In her initial visit with Dr. Beatty Claimant reported pain in her shoulders, elbows and wrists. Claimant remarked that she had been using a hammer and nails at work for four years and had to pull her whole body weight up to a work area. She detailed that she was using a hammer and nails and running a router at work on June 5, 2017 when she developed pain in her shoulders, elbows and wrists. Claimant did not report any injuries while lifting a sheet of aluminum on June 5, 2018. After conducting a physical examination, Dr. Beatty diagnosed Claimant with strains/sprains of the shoulders, elbows and wrists. In her independent medical examination with Dr. Yamamoto Claimant reported that she injured her shoulders, elbows and wrists while lifting a piece of aluminum onto a table at work. However, she explained that the main problem was pulling herself up to a workstation that was four feet above the floor. She noted that, although there was a ladder to access the workstation, the ladder did not reach high enough and she thus had to pull herself up on vertical bars. Dr. Yamamoto concluded that Claimant "likely injured herself while having to pull herself up to a work platform." Finally, Claimant recounted to Dr. Ogin that her symptoms began when she had to climb up and down a short ladder at work. She explained that there were two bars on top of the ladder that she was required to hold in order to climb to the upper level. Claimant's reports to Employer and medical providers thus reflect that she did not suffer an acute injury at work on June 5, 2017.

24. The records of Drs. Ogin and Beatty also reflect that Claimant's symptoms were not caused by her work activities on June 5, 2017. Dr. Ogin determined that it was "difficult to attribute any of [Claimant's] current complaints to her occupational insult." He remarked that walking up and down while grabbing bars would not cause diffuse myofascial complaints in Claimant's upper extremities. Dr. Ogin commented that Claimant's failure to improve despite being laid off from work for approximately 10 months suggested there was no relationship between her occupational activities for Employer and her physical symptoms. Furthermore, in addressing whether Claimant may have aggravated pre-existing arthritis in her shoulder by lifting a heavy piece of aluminum weighing 70 to 80 pounds, Dr. Beatty felt that it was a possibility but did not believe that Claimant's arthritis had anything to do with her symptoms. He also testified that it was

possible, but not probable, that Claimant could have injured her bilateral shoulders, elbows and wrists with one act of reaching out holding a sheet of aluminum. Dr. Beatty concluded that Claimant suffers from more of an anatomic body habitus issue as opposed to any ongoing problem related to a work injury. Accordingly, based on the persuasive testimony and medical records, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical

treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered compensable shoulder, elbow and wrist injuries during the course and scope of her employment with Employer on June 5, 2017. Initially, Claimant testified that on June 5, 2017 she was lifting a large piece of aluminum that weighed approximately 87 pounds onto the router table with co-worker Mr. Shields. She felt a "pop" in her left shoulder and immediately experienced pain in both shoulders. However, the record is replete with contrary evidence that Claimant did not suffer an acute injury on June 5, 2017. Notably, Claimant repeatedly informed Employer and medical providers that she had difficulties performing her job duties operating the CNC router because the computer used for programming the machine required her to access the crow's nest using a makeshift ladder.

8. As found, Claimant's supervisor Mr. Flores denied that Claimant reported a specific injury on June 5, 2017. In fact, on June 8, 2017 Claimant submitted a written notice to Mr. Flores regarding her inability to perform her job duties involving the CNC router. She specifically explained that she had been helping to run the router since April 15, 2017. However, she remarked that she was "physically unable to continue to climb up and down the perch area safely without causing serious or permanent injuries to myself. My arms feel like they are going to fall off even on the days I don't run the router." Furthermore, Claimant reported to Mr. O'Gorman that she had pain in her shoulders, elbows and wrists. In describing the cause of her symptoms Claimant noted that she had experienced pain for several weeks as a result of "repeatedly climbing in and out of the crow's nest." Claimant did not mention any acute injury while lifting a sheet of aluminum on June 5, 2017.

9. As found, in her initial evaluation with Dr. Wallace Claimant noted that at work she was required to lift heavy objects and pull herself up four feet. Claimant commented that she had been performing her job for two months but did not delineate a specific accident or injury on June 5, 2017. In her initial visit with Dr. Beatty Claimant reported pain in her shoulders, elbows and wrists. Claimant remarked that she had been

using a hammer and nails at work for four years and had to pull her whole body weight up to a work area. She detailed that she was using a hammer and nails and running a router at work on June 5, 2017 when she developed pain in her shoulders, elbows and wrists. Claimant did not report any injuries while lifting a sheet of aluminum on June 5, 2018. After conducting a physical examination, Dr. Beatty diagnosed Claimant with strains/sprains of the shoulders, elbows and wrists. In her independent medical examination with Dr. Yamamoto Claimant reported that she injured her shoulders, elbows and wrists while lifting a piece of aluminum onto a table at work. However, she explained that the main problem was pulling herself up to a workstation that was four feet above the floor. She noted that, although there was a ladder to access the workstation, the ladder did not reach high enough and she thus had to pull herself up on vertical bars. Dr. Yamamoto concluded that Claimant "likely injured herself while having to pull herself up to a work platform." Finally, Claimant recounted to Dr. Ogin that her symptoms began when she had to climb up and down a short ladder at work. She explained that there were two bars on top of the ladder that she was required to hold in order to climb to the upper level. Claimant's reports to Employer and medical providers thus reflect that she did not suffer an acute injury at work on June 5, 2017.

10. As found, the records of Drs. Ogin and Beatty also reflect that Claimant's symptoms were not caused by her work activities on June 5, 2017. Dr. Ogin determined that it was "difficult to attribute any of [Claimant's] current complaints to her occupational insult." He remarked that walking up and down while grabbing bars would not cause diffuse myofascial complaints in Claimant's upper extremities. Dr. Ogin commented that Claimant's failure to improve despite being laid off from work for approximately 10 months suggested there was no relationship between her occupational activities for Employer and her physical symptoms. Furthermore, in addressing whether Claimant may have aggravated pre-existing arthritis in her shoulder by lifting a heavy piece of aluminum weighing 70 to 80 pounds, Dr. Beatty felt that it was a possibility but did not believe that Claimant's arthritis had anything to do with her symptoms. He also testified that it was possible, but not probable, that Claimant could have injured her bilateral shoulders, elbows and wrists with one act of reaching out holding a sheet of aluminum. Dr. Beatty concluded that Claimant suffers from more of an anatomic body habitus issue as opposed to any ongoing problem related to a work injury. Accordingly, based on the persuasive testimony and medical records, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

ORDER

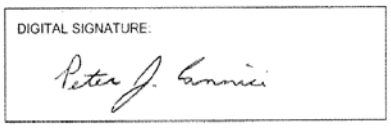
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20)

days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 25, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-019-091-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 7, 2018, in Denver, Colorado. The hearing was digitally recorded (reference:) 6/7/18, Courtroom 5, beginning at 8:30 AM, and ending at 9:05 AM).

Claimant's Exhibits 1 through 3 were admitted into evidence, without objection. Respondents' Exhibits A through G were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The sole issue to be determined by this decision concerns whether the Claimant has overcome the Division Independent Medical Examiner's (DIME's) opinion that the Claimant reached maximum medical improvement (MMI) on January 4, 2017, with permanent medical impairment of 9% whole person. The Claimant's position was that the DIME opinions were erroneous as a whole because Dr. Green allegedly **did not** evaluate all body parts requested in the DIME request. This is the only point of contention. The DIME physician was Justin D. Green, M.D. In their Case Information

Sheet (CIS), Respondents did not designate the issue of "overpayment of $2,217.99, listed on the Final Admission of Liability (FAL).

The DIME challenger (in this case the Claimant) bears the burden of proof, by clear and convincing evidence.

Respondents claimed an overpayment of $2,217.99, in the FAL, based upon the differential in the rating of 10% whole person by authorized treating physician (ATP) Paul Raford, M.D., and the admitted 9% whole person rating in the FAL, based on the DIME physician's opinion.

Because the Claimant's challenge to the DIME was placed on controversy, the entire DIME became inoperative and the FAL is hereby superseded by the evidence, or lack thereof, and the decision based on the evidence. Consequently, the Respondents bear the burden of proof on their affirmative defense of "overpayment."

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant was an employee of the Employer at the time of the injury.

2. On May 13, 2016, during the course and scope of her employment, the Claimant sustained an injury to her back, buttocks, and reportedly right groin. The Claimant visited the emergency room (ER) that day and was subsequently referred to a primary worker's compensation physician including both Paul Raford, M.D., and Martin Kalevik, D.O.

3. The Claimant applied for a DIME on August 10, 2017 requesting evaluation of her right lower extremities, back, and "any and all other body parts the DIME physician believes were injured in the work injury." (Claimant's Exhibit 1). In addition, the Claimant requested that the DIME physician address maintenance treatment and permanent restrictions.

4. Following the DIME conducted on December 19, 2017, Respondents filed a FAL on February 1, 2018, admitting for post-MMI medical maintenance treatment at the hands of ATPs (Dr. Raford and Dr. Kalevik); an MMI date of January 4, 2017; and, 9% whole person permanent medical impairment, pursuant to DIME Dr. Green's opinions.

5. On February 23, 2018, the Claimant filed an Objection to the FAL and Application for Hearing on the issue of overcoming the DIME.

6. On May 4, 2018, Respondents filed their Response to the Claimant's Application for Hearing, requesting to add the issue of overpayment and to add additional witnesses. The Claimant opposed the Respondents response on the grounds that it was beyond filed after the 15-day period required in Office of Administrative Courts Rules of Procedure (OACRP), Rule 8(G).

7. A pre-hearing conference was held on May 22, 2018 before Pre-Hearing Administrative Law Judge (PALJ) Laura Broniak, who denied the Respondents request to file a late response.

Medical Examination

8. Following the injury and initial visit to the ER at St. Joseph's Hospital on May 13, 2016, the Claimant had an initial evaluation with a nurse practitioner (NP) at Healthone Occupational Medicine and Rehabilitation on May 16, 2016 (Respondents' Exhibit E). The Claimant was subsequently referred to a primary workers' compensation physician including Dr. Raford and Dr. Kalevik. In relevant part, the Claimant sought medical assistance numerous times over the course of this claim, complaining of spinal, lower back, and pelvic pain. The Claimant was also referred to physical therapy (PT) and massage therapy over the course of the claim.

9. On January 4, 2017, Authorizing Treating Physician (ATP) Dr. Raford examined the Claimant and declared that the she had reached MMI. Dr. Raford noted that the Claimant could not accomplish range of motion (ROM) tests, and offered that the Claimant could return at a later date to reassess ROM. The Claimant declined, and Dr. Raford assigned a total of 5% whole person permanent impairment rating for the Claimant's spine. Dr. Raford also assigned an additional 5% whole person-impairment rating "for her otherwise consistent reports of pain and severe impact on her ADLs [(Activities of Daily Living)]." (Claimant's Exhibit 2).

10. On December 19, 2017, DIME physician Dr. Green evaluated the Claimant. Dr. Green conducted a motor exam for lumbar flexion and extension, and straight leg raising to find that the Claimant exhibited tenderness over the thoracic and lumbar parspinals, SI joints, gluteal notches and midline, but that passive ROM of the right hip did not provoke groin pain. Dr. Green concluded in his report that the Claimant was at MMI with 5% specific lumbar disorders impairment and 4% ROM impairment. Regarding Dr. Raford's 10% whole person impairment rating, Dr. Green stated that the rating was "of unknown reference" (Claimant's Exhibit 3).

Overpayment

11. The ALJ takes administrative notice of the fact that the differential between 10% whole person, under the particular circumstances of this case, and 9% whole person, is $2,217.99. Therefore, the Respondents have proven an overpayment of $2,217.99, by preponderant evidence.

Ultimate Findings

12 The opinions of DIME Dr. Green are presumed persuasive and credible. The Application for the DIME requested was in broad language, the DIME physician's professional medical opinion to examine any other body parts he saw relevant to the injury in addition to the Claimant's right lower extremities and back. In his medical opinion, DIME physician Dr. Green did not find it necessary to further examine the Claimant's reported groin injury. The fact that Dr. Green did not directly deal with the Claimant's reported groin injury does not negate the findings in his report. In fact, it implies that Dr. Green did not consider the groin complaints germane, or serious enough, to deal with in his DIME. DIME Dr. Green's opinions were credible and dealt with the issues with which he was requested to deal.

13. The Claimant presented no persuasive, additional evidence to establish that it is highly likely, unmistakable and free from serious and substantial doubt that Dr. Green's opinions are in error. Therefore, the Claimant has failed to prove that it is highly likely, unmistakable, and free from serious and substantial doubt that Dr. Green's DIME opinions are in error. Therefore, Claimant has failed to prove, by clear and convincing evidence that Dr. Green's DIME determinations were incorrect.

14. Respondents have proven, by a preponderance of the evidence that they overpaid the Claimant in the amount of $2,217.99.

15. The Claimant has proven, by preponderant evidence that post-MMI medical treatment at the hands of ATPs Dr. Raford and Dr. Kalevik is causally related to the compensable injury and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, DIME Dr. Green's opinions were credible and dealt with the issues with which he was requested to deal.

Overcoming Dr. Green's DIME

b. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office***,** 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's

determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Claimant failed to overcome Dr. Green's DIME by clear and convincing evidence.

Overpayment

c. Recovery of overpayments, based on mistake and on a retroactive basis, was previously prohibited by *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). In 1997, the General Assembly amended the re-opening statute to include overpayments as a ground for re-opening as to overpayments only. § 8-43-303 (1) and (2) (a), C.R.S. Now, employers have a statutory right to review and recalculate payments if an insurance carrier made a mistake in previous payments. *Simpson v. Indus. Claim Appeals Office,* 2009 Colo. App. LEXIS 576 (No. 07CA1581, April 16, 2009) (NSOP). Previously, an admission of liability could only be withdrawn retroactively on the basis of fraud. *Vargo v. Indus. Comm'n,* 626 P.2d 1164 (Colo. App. 1981). To the extent that a case may be re-opened, based on mistake and not fraud, if there were overpayments, the *Vargo* grounds for retroactively modifying a previously admitted award has been altered to include employer mistakes in calculations. In the present case, Respondents paid PPD benefits to the Claimant, based on the ATP's (Dr. Raford) of 10% whole person PPD. A DIME occurred and DIME physician, Dr, Green

rated the Claimant's PPD at 9% whole person, the differential being $2,217.99. As found, the Respondents made a clerical mistake in paying the Claimant PPD benefits, based on 10% whole person. Rather than elevating form over substance and requiring the Respondents to file a petition to re-open to correct the clerical error, the ALJ herewith allows the correction, which Respondents have proven by preponderant evidence by virtue of the ALJ taking administrative notice of the differential.

d. Because the Claimant failed to overcome the DIME and no further disability benefits are due and payable, the provisions of § 8-42-113.5, C.R.S., concerning the reduction of disability benefits is not applicable and the Respondents have no practical remedy within the workers' compensation system.

Post-MMI Medical Maintenance Care

e. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address the injury. As found, the Claimant is entitled to post-MMI medical maintenance care at the hands of ATPs Dr. Raford and Dr. Kalevik.

Burden of Proof on Post-MMI Medical Maintenance Care

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v.*

Clark, 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to post-MMI medical maintenance care at the hands of ATPs Dr. Raford and Dr. Kalevik.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant, having failed to overcome the Division Independent Medical Examination, the Final Admission of Liability, is hereby approved and adopted as if incorporated herein by reference.

B. Because the Claimant failed to overcome the DIME and no further disability benefits are due and payable, the provisions of § 8-42-113.5, C.R.S., concerning the reduction of disability benefits is not applicable.

C. Respondents shall pay the costs of post maximum medical improvement maintenance medical care at the hands of authorized treating physicians, Paul Raford, M.D., and Martin Kalevik, D.O., subject to the Division of Workers' Compensation Medical Fee Schedule.

DATED this_____day of June 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of June 2018 electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

The parties noticed the following issues for hearing:

- Whether Claimant established by a preponderance of the evidence that she was entitled to additional reasonably needed medical care.
- Whether Claimant established by a preponderance of the evidence that she was entitled to temporary partial disability ("TPD") benefits.
- Whether Claimant established by a preponderance of the evidence that she was entitled to temporary total disability ("TTD") benefits.
- A determination of Claimant's average weekly wage.
- Whether Respondents overcame by clear and convincing evidence the DIME report of Dr. Kristen Mason on the issue of maximal medical improvement ("MMI").

STIPULATIONS

After the hearing concluded, Claimant stipulated to the following:

- Claimant reached MMI on October 25, 2017 based upon Dr. Ethan Moses' IME report of the same date.
- Dr. Moses noted that Claimant had completed the treatment recommended by DIME Dr. Kristen Mason, including cognitive/behavioral therapy, biofeedback, imaging, trigger point injections, Biofreeze, and myofascial release.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant experienced an admitted work injury on January 9, 2015, while working for Employer.

2. Claimant underwent treatment for her symptoms and Dr. Wakashema, one of her authorized treating physicians, placed her at MMI on June 2, 2016. Respondents paid for Claimant's treatment related to her work injury.

3. Claimant received additional medical treatment after Dr. Mason's DIME. Respondents paid for that treatment as well. Claimant stipulates that she reached MMI on October 25, 2017. Claimant presented no persuasive evidence that Insurer denied her any recommended care or that any payment for such care remains outstanding.

4. Claimant has not met her burden of proving entitlement to additional medical treatment.

5. Employer paid Claimant for Friday, January 9, 2015, the day she sustained her injury and sought medical treatment from Dr. Updike. Claimant did not work the next two days, Saturday and Sunday, as scheduled. On Monday, January 12 Claimant met with Mr. Pody Hunnicutt, Employer's Safety and Training Manager, to discuss Dr. Updike's restrictions placing Claimant on light duty. He informed Claimant that Employer could accommodate with light duty work within her restrictions. Mr. Hunnicutt needed time to put Claimant's official letter together, and he called her on Tuesday, January 13 after he had done so asking her to come in the next day. Mr. Hunnicutt met with Claimant on Wednesday, January 14 to offer her light duty within her restrictions.

6. Mr. Hunnicutt credibly and persuasively testified that he went over the details of the offer at length with Claimant. He explained that for the four hours she was restricted to sitting, she would be folding laundered uniforms that employees had turned in, cleaning wheelchairs, and sorting and filing paperwork in the maintenance office. For the other four hours of light duty, Claimant would be on light duty janitorial work that meant picking up papers and helping empty some of the lighter, smaller trashcans in the office area. Mr. Hunnicutt testified that he explained to Claimant that she would have a two-wheeled small cart to put trash in and Employer would give her a reaching tool so she would not have to bend when picking up trash. Mr. Hunnicutt showed Claimant a diagram showing the wheeled cart and reaching tool. Mr. Hunnicutt testified that not only did he explain the task of picking up trash; he also demonstrated how to do it.

7. Claimant testified that the light duty Employer offered was only picking up trash, which she assumed involved bending and hauling bags of trash. This is highly unlikely given that her restrictions required her to sit for four hours per eight-hour shift. She further testified that she thought light duty was "sitting at a desk putting envelopes into envelopes." Although Claimant's restrictions only called for sitting for four hours, Claimant wanted light duty that involved sitting for her entire shift. Claimant testified that she did not know that Employer would pay her for her light duty work and did not know where she would be working. Claimant testified that she did sign the modified work offer; however, she did not read it. She also testified that she told Mr. Hunnicutt that she wanted "to rest up" and chose to stay home.

8. Claimant declined to do the light duty work that Employer offered her. Mr. Hunnicutt explained to Claimant that her decision could jeopardize her workers' compensation benefits and her employment status. At the January 14, 2015 meeting, Claimant asked Mr. Hunnicutt if she could use her accrued sick and vacation time instead of working light duty. He advised Claimant that he thought she could and would confirm with Employer's corporate office. On Friday, January 16, 2015, Mr. Hunnicutt notified Claimant that corporate had approved her request to use her accrued time off. Claimant used the eight hours of accrued vacation and the 20 hours of accrued sick leave. When Claimant exhausted her accrued leave, she asked Employer if she could take unpaid leave while she continued her medical treatment, and Employer allowed her to do so.

9. The ALJ finds Mr. Hunnicutt's version of the events to be more likely true than Claimant's version for the following reasons, among others:

- Claimant is a poor historian. For example, when asked the date of her injury, she provided an incorrect date. She also gave an incorrect date for the last day she worked for Employer even though it was only ten days prior to testifying. She did not remember how much time she took off, receiving spinal injections, whether she had asked Dr. Updike to send her back to work, or what body part she injured in a work-related injury that occurred one year prior to her injury in this claim.

- Claimant's testimony tested the limits of credulity. For example, she testified at hearing that she felt immediate pain of 5/10 in her back at 9:30 a.m., the time she sustained her work injury. Employer requires the immediate reporting of a work injury; however, Claimant did not report her injury for a number of hours. When Employer disciplined her for late reporting, Claimant appealed arguing that she did not report the injury immediately because she did not experience immediate pain. Claimant answered "None" to the interrogatory, "List all workers' compensation claim made by Claimant up through the present (other than the instant claim)." Claimant, though, had filed a claim against a past employer arising from a work-related auto accident that occurred on January 14, 2014, and possibly another claim in 2011. In addition, she filed a complaint in Denver District Court against the other driver in the 2014 accident alleging permanent injuries to her neck, shoulders, and back – the same body parts she claims were injured in this claim. However, she testified in this claim that she did not remember what body parts were injured. She treated briefly and then was "fine." While Claimant identified Drs. Updike and Wakeshima as the only medical providers who had treated her neck, upper back, and shoulder; in her tort case, she claimed past reasonable medical expenses as an element of her damages in the 2014 case. In responses to interrogatories in the District Court case, which Claimant answered a few months before her injury in the instant claim, she complained of ongoing pain in her back and left shoulder.

- Claimant's testimony was often unreasonable and illogical. For example, when Respondents' counsel inquired about Claimant mowing her lawn in surveillance video, she testified, "I did it to get my vitamin D." Claimant testified that her shoulder was hurting before her work injury, and that she did not seek treatment because she "thought [her] passengers would have to take care of [her]."

10. Dr. Updike released Claimant from her restrictions on March 10, 2015. She returned to full-time, full-duty the following day. Claimant has worked full-time, full-duty from that time until Employer terminated her employment on March 13, 2018.

11. The ALJ finds that Claimant received regular pay through and including January 14, 2015. Employer allowed Claimant, per her request, to use her accrued time off for time she missed from work. After Claimant exhausted her accrued time off, she

voluntarily chose to remain off work, unpaid, rather than work available light duty within her restrictions.

12. Claimant has not met her burden of proving entitlement to TTD or TPD benefits. Thus, the issue of Claimant's AWW is moot.

13. Given Claimant's stipulation that she reached MMI on October 25, 2017, and the fact that Respondents provided her with appropriate medical treatment when she was arguably not at MMI, the issue of overcoming the DIME on MMI is moot.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation is decided on its merits. Sections 8-43-201, *supra*.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo. App. 2001). The ALJ's factual findings concerns only evidence that is dispositive of the issues involved. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P. 3d 385 (Colo. App. 2000). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. ICAO*, 183 P. 3d 684 (Colo. App. 2008).

The ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Claimant stipulated that she reached MMI on October 25, 2017, and that she had completed the treatment recommended by DIME Dr. Kristen Mason, including cognitive/behavioral therapy, biofeedback, imaging, trigger point injections, Biofreeze,

and myofascial release. Claimant has presented no persuasive evidence that she is entitled to additional medical treatment.

As found, Employer paid Claimant for the first three days of work Claimant missed. Then Employer accommodated Claimant's request to use accrued time off and then unpaid leave rather than accept Employer's available, appropriate light duty work assignment. Claimant returned to full-time, full-duty when her ATP removed her work restrictions. Claimant has presented no persuasive evidence that she is entitled to TPD or TTD benefits.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for additional medical treatment is denied and dismissed.

2. Claimant's claim for TPD benefits is denied and dismissed.

3. Claimant's claims for TTD is denied and dismissed.

4. Claimant's claim for a determination of Claimant's average weekly wage is denied and dismissed as moot.

5. Whether Respondents overcame by clear and convincing evidence the DIME report of Dr. Kristen Mason on the issue of maximal medical improvement is denied and dismissed as moot.

6. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: June 25, 2018, 2018

/s/ Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after the mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your Petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms - WC.htm.

ISSUES

I. Whether Claimant produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinions of Dr. Brian Mathwich regarding causation and maximum medical improvement (MMI). Concerning MMI, Claimant agrees that he is presently at maximum medical improvement, but disagrees with the date assigned by Dr. Mathwich.

II. Whether Claimant established, by clear and convincing evidence, that Dr. Mathwich's impairment rating opinions are highly probably incorrect and if so, a determination of the correct impairment rating to be awarded in this case given the various ratings assigned and whether apportionment applies to the rating.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to maintenance medical benefits.

IV. Whether Claimant suffered permanent disfigurement to a part of the body normally exposed to public view entitling her to additional benefits pursuant to C.R.S. §8-42-108(1).

V. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recovery of a stipulated $2,407.50 overpayment of indemnity benefits if Claimant is determined to be at MMI as of the date found by Dr. Mathwich.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Claimant's Prior Low Back Injuries and Pre-Existing Back Condition

1. Claimant has a significant history of prior injury to the lumbar spine. In 1993, he injured his low back in a non-work related incident when he pulled a tuna fish off a boat in Puerto Vallarta, Mexico. Epidural shots, physical therapy, and other conservative measures failed to produce lasting pain relief. Consequently, Claimant underwent a partial discectomy performed by Dr. Illig, to address his ongoing pain complaints.

2. Claimant recalls a full recovery from his 1993 injury; however, in 1995 he lifted a television out of a car at his then-employer's request. Claimant reinjured his low back and underwent a second partial discectomy by Dr. Illig. Although this was a work

related injury, Claimant did not file a workers' compensation claim. The evidentiary record fails to demonstrate that Claimant was assigned any work restrictions or impairment as a consequence of this injury.

3. Claimant was hired by Respondent-Employer on October 20, 2004 and currently works as a store manager. On May 13, 2009, Claimant injured his low back for a third time while lifting a box of paper weighing 30-35 pounds at work. Dr. Anjmun Sharma treated Claimant for this injury. On May 20, 2009, Claimant underwent an MRI of the lumbar spine. The MRI demonstrated a "posterior desiccated disc bulge contributing to marked thecal sac effacement without evidence of cauda equine compression" at the L4-L5 segmental level. Also noted at the L4-L5 level was bilateral neural foraminal narrowing, worse on the left, without evidence of nerve root impingement. At the L5-S1 spinal segment, post-surgical changes were noted along with moderate degenerative changes and "posterior osteophyte formation causing moderate to severe bilateral neural foraminal narrowing, worse on the left, with at least mild chronic left foraminal L5 nerve root compression." No evidence of "recurrent or residual" disc herniation was observed. Claimant responded to conservative treatment for this injury and was placed at maximum medical improvement (MMI) by Dr. Sharma without permanent impairment on June 3, 2009. In his closing report of June 3, 2009, Dr. Sharma imposed a permanent 30-pound lifting, carrying, pushing/pulling restriction noting that these restrictions were "due to previous back surgery." The ALJ finds from the evidence presented that the aforementioned lifting and pushing/pulling restrictions were likely imposed as a consequence of Claimant's prior surgeries necessitated by his 1993 and 1995 low back injuries rather than his 2009 injury.

B. Claimant's Current Claim

4. In addition to the above outlined injuries, Claimant alleged an injury to his lower back while performing job related functions on December 27, 2013. Respondents denied liability for this injury and a hearing was set to commence before ALJ Donald Walsh on July 8, 2015.

5. Prior to the scheduled hearing, Claimant underwent an MRI of the lumbar spine on March 22, 2014. The March 22, 2014 MRI was compared to Claimant's previous exam and read as signifying "no change" except for high signal intensity in the posterior annulus consistent with an associated annular tear at the L4-L5 disc level.[1]

6. Claimant also requested an independent medical examination (IME) with Dr. Timothy Hall prior to the July 8, 2015 hearing. The IME was completed on December 12, 2014, after which Dr. Hall noted that Claimant was not having any significant ongoing back problems leading up to the December 2013 injurious event. According to Dr. Hall's IME report, Claimant did not require medication and was not missing time from work prior to the December 27, 2013 incident. The record evidence also fails to establish that Claimant was receiving treatment directed to the lumbar spine

[1] Repeat MRI performed December 8, 2015, after Claimant's July 8, 2015 hearing also demonstrated annular tearing at L4-L5 and L5-S1.

between his June 3, 2009 release by Dr. Sharma and his presentation to ExpressCare Plus on March 20, 2014 for back pain he associated with the December 27, 2013 injurious event. Dr. Hall provided a diagnosis of moderate-to-severe lumbar spinal stenosis exacerbated by the December 27, 2013 work injury. Dr. Hall concluded, that Claimant's "December 2013 event [had] led to a permanent aggravation of these previous issues, which [had] not responded to conservative intervention", noting further that Claimant would likely require surgery to "return him to pre-accident levels of function and comfort."

7. Respondents sought an opinion from Dr. Kathleen D'Angelo and she performed the same on March 29, 2015, prior to the compensability hearing. At the outset of the IME, it was asked if Claimant had gradual or delayed effects, to which he responded, "I dealt with the pain as it intensified until it became unbearable. After 3 months I went to see a physician." Claimant told Dr. D'Angelo that after he "babied" his back over the weekend with ibuprofen, heat, and rest, the pain "kind of subsided." Dr. D'Angelo revisited Claimant's original complaints of pain after the injurious event. Again, Claimant explained the pain was "tolerable" for the first two weeks with ibuprofen, but it just continued to get worse, despite attempting his own therapy based on techniques he learned after his 2009 back injury. At no point did Claimant report a resolution of his symptoms.

8. Following her IME, Dr. D'Angelo concluded that Claimant's symptoms were a consequence of the natural progression of pre-existing lumbar degenerative disc disease, despite the existence of a specific traumatic event causing his symptoms. Dr. D'Angelo "strongly urged" against surgery as she did not believe it would result in a favorable outcome for Claimant.

9. A compensability hearing was held on July 8, 2015 before ALJ Walsh. Following the aforementioned hearing, ALJ Walsh issued a Summary Order on September 14, 2015. In his Summary Order, ALJ Walsh found that Claimant experienced an immediate onset of low back pain while assisting a coworker move 20-25 pound boxes of stationary from an upper shelve in Employer's warehouse. As the co-worker was passing the boxes down from a ladder, Claimant reached over his head with both arms, took the boxes and lowered them to the ground. After moving a few boxes, Claimant felt a tremendous amount of pain in his lower back above his left buttock and down his left leg. The pain caused Claimant to collapse to the warehouse floor where he remained for an estimated 15 minutes waiting for the pain to subside before attempting to stand up.

10. Claimant was eventually able to get off the floor, take some ibuprofen and rest for about an hour before returning to work, albeit in a "very limited" manner. As a manager for Employer, Claimant was able to sit in a chair in front of a computer and verbally direct his staff for the duration of his shift.

11. On the evidence presented, ALJ Walsh concluded that Claimant's "condition did not abate over the next several months at which time [he] sought medical

care." In his order, ALJ Walsh found that Claimant had "established by a preponderance of the evidence that he suffered an industrial injury to his back on December 27, 2013 in the course and scope of his employment at the respondent-employer."

12. ALJ Walsh also found that the evidence "established by a preponderance . . . that [a] back surgery recommended by Dr. [Orderia] Mitchell [was] reasonable, necessary, and related" to the December 27, 2013 industrial injury. Consequently, ALJ Walsh ordered Respondents to "approve and cover the costs for the back surgery recommended by Dr. Mitchell."

13. Claimant underwent a lumbar decompression for the L5 disc herniation and a fusion at L4-5 with Dr. Mitchell on April 13, 2016. The record evidence documents significant pain relief following Claimant's surgery with Dr. Mitchell. These records coupled with Claimant's testimony persuasively establishes that Dr. D'Angelo's reported concern over proceeding with surgery was overstated and incorrect. Indeed, the ALJ finds that Claimant had a favorable outcome from his April 13, 2016 surgery, the need for which was determined to be related to Claimant's December 27, 2013 industrial injury.

14. After the injury was determined to be compensable, Claimant's medical care was transferred to Dr. Miguel Castrejon. Claimant continued his post-surgical treatment with Dr. Castrejon who placed him at MMI on September 22, 2016. Dr. Castrejon assigned 19% whole person impairment for Claimant's lumbar spine. The 19% impairment rating was based on 12% for range of motion loss and 8% specific disorder rating according to Table 53 and the combined values chart of the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (*Revised*).

15. Respondents challenged the findings of Dr. Castrejon by filing a request for a Division Independent Medical Examination (DIME). Dr. Brian Mathwich was selected to perform the DIME and the same took place on January 31, 2017. Dr. Mathwich documented a mechanism of injury (MOI) consistent with that contained in the Summary Order of ALJ Walsh. He also documented that following the injury Claimant presented to an Urgent Care Clinic but was not seen because he decided not to wait to see a provider. According to Dr. Mathwich's report, Claimant reportedly took "ibuprofen occasionally" and his low back pain "began" to subside, though his radicular symptoms persisted. Dr. Mathwich documented that the pain became "much less" over the next several weeks and that it was not until three months later that Claimant began having increasing pain throughout the entire low back, his bilateral legs into the arms. According to the DIME report, Claimant even reported that his "eyeballs hurt." Claimant testified that he did not recall saying that, but if he did, it was obviously hyperbole to express the amount/severity of pain he was experiencing.

16. Upon thorough review of the DIME report, the ALJ finds that Dr. Mathwich took Claimant's reference to eyeball pain at face value to conclude that Claimant was reporting eye pain as a consequence of his lifting injury. Dr. Mathwich would

subsequently reference this statement to focus attention on Claimant's credibility and in turn raise questions concerning the legitimacy and severity of Claimant's December 27, 2013 injury. Indeed, Dr. Mathwich documented as follows: "Diffuse pain throughout [the] entire body to include bilateral legs arms and 'eyeballs' is not consistent with a lifting injury." The undersigned ALJ credits Claimant's testimony to find that if he made a reference to "eyeball pain", it was a misguided attempt to describe the amount of pain he was feeling as a consequence of his low back injury rather than the contrary conclusion reached by Dr. Mathwich that he actually had pain in his eyes as a consequence of his lifting injury.

17. Dr. Mathwich ultimately concluded that Claimant suffered a minor exacerbation of his underlying pre-existing spinal disease. He opined that the MOI was inconsequential and that Claimant's condition resolved "very quickly." He opined further that the "pain episode which prompted [Claimant's] presentation to a physician 3 months after the original injury was not directly related to the 12/27/13 incident rather it was due to and part of the natural course of his underlying pre-existing spinal disease." Because he did not believe that Claimant suffered an "acute" spinal injury nor did he manifest a permanent aggravation of his pre-existing disease, Dr. Mathwich concluded that Claimant suffered no permanent physical impairment related to the December 27, 2013 incident. Finally, Dr. Mathwich concluded that while the surgery performed by Dr. Mitchell was "necessary and warranted", this procedure and Claimant's previous care was not related to the December 27, 2013 incident, but rather Claimant's pre-existing spinal condition.

18. The ALJ finds Dr. Mathwich's DIME report to conclude that Claimant suffered a temporary work-related exacerbation of a pre-existing condition, which subsequently completely resolved and thereafter a non-work related return of low back/leg pain due to the natural progression of a pre-existing spinal condition.

19. Dr. Mathwich also stated in his report that, "[h]ad the patient presented to his occupational medicine physician initially after the injury, it is [his] opinion that he would have been placed at MMI within 6 weeks of his injury. Therefore, [he] would consider [Claimant] at MMI on 2/15/14 or approximately 6 weeks after his original injury."

20. Claimant was examined, at the request of his attorney by Dr. Jack Rook on July 17, 2017. Dr. Rook authored an IME report and testified at hearing. In his report, Dr. Rook addressed Dr. Mathwich's opinion that Claimant's low back pain was due to the natural course of his underlying pre-existing spinal disease rather than the December 27, 2013 incident. In doing so, Dr. Rook documented as follows: "[I]t is important to note that [Claimant] was not having problems with his back at the time of the December 27, 2013 on-the-job injury." Dr. Rook also noted that "[t]here is no medical documentation between his recovery from the 2009 occupational injury (at which time it was noted by his physical therapist and ATP that his low back condition had completely resolved and there was no permanent impairment) and the on-the-job injury of December 27, 2013, which would suggest that he was experiencing clinical or

functional problems with this 'pre-existing spinal disease'". As noted above, independent review of the record supports Dr. Rook's observation.

21. At hearing, Dr. Rook explained that Claimant was asymptomatic prior to December 27, 2013. He became symptomatic after that event. Dr. Rook noted that the MOI described by Claimant is the type of mechanism that can either cause or significantly aggravate spinal stenosis. He opined that Dr. Mathwich gave his ultimate opinion concerning the cause of Claimant's symptoms on mistaken § of the medical history in this case. He also explained that Dr. Mathwich's opinion that Claimant's symptoms "should have" resolved in six weeks if he had seen a physician was pure speculation and contrary to the reported medical history provided by Claimant.

22. Dr. Rook agreed with the MMI date assigned by Dr. Castrejon; however, he disagreed with Dr. Mathwich that Claimant had no impairment as a result of this injury. He also noted that Dr. Castrejon erred concerning Claimant's overall impairment. While Dr. Rook adopted the 12% range of motion impairment as assigned by Dr. Castrejon, he pointed out that Dr. Castrejon should have taken into account the fact that Claimant had a two-level fusion surgery with some residuals, which warrants a 13% table 53 rating rather than the 8% assigned by Dr. Castrejon. These figures combine to equal a 23% whole person rating not 19% as stated by Dr. Castrejon. During his testimony, Dr. Castrejon admitted he erred in the completion of the impairment rating in this case. He agreed with Dr. Rook's methodology in completing the impairment rating in this case. Based upon the evidence presented, the ALJ finds that Claimant's 23% impairment is causally related to the December 27, 2013 injury.

23. Dr. Rook also addressed the question of whether any impairment rating assigned in this case should be apportioned. He explained why apportionment is improper in this case. In analyzing the apportionment instructions contained in the Division of Workers' Compensation Desk Aids, (submitted as Respondents' Exhibit N) Dr. Rook clarified that under paragraph 2, it states, "For injuries that occurred on or after July 1, 2008: if you determine that the *previous* injury is (1) non-work related, and (2) was not independently disabling at the time of the current injury, do *not* continue with this process. Noting that Claimant's 2009 injury was not only work related but also resulted in no impairment and was non-disabling at the time of the 2013 injury, Dr. Rook opined that the apportionment principals outlined in Respondents Exhibit N would not apply to the 2009 injury. Respondents countered by arguing that after Claimant's 2009 work injury, Dr. Sharma alternatively imposed permanent restrictions for the 1993, 1995 or 2009 injuries. Respondents ostensibly contend that Dr. Sharma's imposition of restrictions as part of the 1993, 1995 or 2009 injuries supports a finding that these injuries were independently disabling at the time of the 2013 injury. Accordingly, Respondents assert that the apportionment principals set forth in Respondents Exhibit N should apply to any of Claimant's prior spinal injuries. Based upon the evidence presented, the ALJ is not persuaded.

24. While it is clear that Claimant has suffered both prior work and non-work related injuries to the same body part involved in the current claim, the evidence

presented persuades the ALJ that none of these prior injuries were independently disabling at the time of the 2013 injury. In this case, the evidence presented supports a finding that Claimant's 1993, 1995 and 2009 injuries were not disabling because he sustained no permanent impairment, had returned to full duty work, did not lose time from work and otherwise enjoyed full functional capacity within the year prior to 2013 injury. Moreover, he was not actively pursuing medical treatment for either the 1993, 1995 or 2009 injuries in the 12 months leading up to his 2013 injury. In short, none of the prior injuries adversely affected Claimant's capacity to function independently nor did they impair his ability to perform his job.

25. Claimant's 1993 injury was non-work related but was not independently disabling at the time of Claimant's 2013 injury. Consequently, under §8-42-104(5)(b) and paragraph 2 of the instructions to apportionment of spinal injuries/conditions contained at Respondents' Exhibit N, the ALJ finds that apportionment of any impairment to Claimant's prior 1993 non-work related injury is unwarranted.

26. Moreover, while Claimant's prior 1995 and 2009 injuries were work related; there is a paucity of evidence to support a finding that either injury resulted in impairment entitling Claimant to an award or settlement under the Workers' Compensation Act of Colorado or a similar act from another state. As set forth in §8-42-104(5)(a), apportionment of any "permanent medical impairment rating applicable to [a] previous injury to the same body part, is appropriate when that impairment is established by an award or settlement. In this case, no evidence of any such award or settlement was presented for either the 1995 or the 2009 injuries. Claimant's 2009 injury resulted in approximately one month of treatment followed by a full recovery without evidence of permanent impairment as opined by his authorized treating physician assigned to the claim. Because the 2009 injury was not disabling at the time of the 2013 injury and did not result in an impairment award or a settlement, the ALJ finds that apportionment does not apply to the 2009 injury. While Claimant's 1995 injury arguably could have resulted in impairment, this injury was also not disabling at the time of the 2013 claim. Furthermore, no workers' compensation claim was filed, no impairment was assigned and no award/settlement was effectuated for this injury. Consequently, the ALJ is not persuaded that apportionment applies in the case of Claimant's 1995 injury.

27. Dr. D'Angelo authored a supplemental report in Response to the DIME opinions of Dr. Mathwich and the opinions expressed by Dr. Rook. She indicated in her report, "[W]hen Claimant's first visit at Express Care is review (sic); the patient's evaluation involved his upper back, neck, arms, and shoulders, NOT his lumbar spine" (Claimant's Exhibit 17, pg. 173). In reviewing the report from Claimant's initial evaluation at ExpressCare Plus (ExpressCare) on March 20, 2014, the ALJ notes the following history: "50 y o male presents to clinic with complaints of severe neck and lumbar pain." Moreover, directed physical examination revealed "mid lumbar bony tenderness at L3-L4 and L4-L5." Finally, a pain diagram completed during this evaluation depicts pain in the low back and bilateral legs. Based upon the content of the report from Claimant's initial evaluation, the ALJ finds that he reported low back and

leg pain. The evidence presented also persuades the ALJ that Claimant's low back complaints were addressed as part of the initial evaluation based upon the results of the physical examination. Consequently, the ALJ finds Dr. D'Angelo's comments that Claimant did not report low back pain until his second visit to ExpressCare and that his low back was not part of the initial evaluation erroneous and unpersuasive.

28. Dr. Castrejon testified that Dr. Mathwich erroneously opined in his report that the MRI of Claimant's lumbar spine after the December 2013 injury showed no significant acute changes or pathology, which would be considered pain generators. Dr. Mathwich summarized the May 20, 2009 MRI in his report, focusing on the L4-5 and L5-S1 levels. The L4-5 level showed bilateral neural foraminal narrowing with no evidence of nerve root impingement and a posterior disc bulge. The March 22, 2014 MRI showed "diffuse" annular disc bulging at the L4-5 level with central disc protrusion along with posterior annular tearing. As noted above, the December 8, 2015 MRI showed the L4-5 annular tearing centrally and left subarticular with extension into the neural foramen. It further showed that there was annular tearing near the exiting L4 nerve root. There is no annular tearing noted in the 2009 MRI. According to Dr. Castrejon, Dr. Mathwich failed to recognize these particular changes. Dr. Castrejon opined that Claimant's MOI caused these changes and that the annular tears were likely the cause of Claimant's severe pain.

29. Citing Claimant's need to lay on the floor for approximately 20 minutes until the pain subsided sufficiently enough for him return to his feet, Dr. Castrejon disagreed with Dr. Mathwich's opinion that Claimant's injury was a "very minor" type of event.

30. Dr. Castrejon also disagreed with Dr. Mathwich's opinion that Claimant did not experience a permanent aggravation of a pre-existing condition. Dr. Castrejon testified he did not feel that Dr. Mathwich really looked at the MOI and take into consideration how that had resulted in an aggravation of a pre-existing condition in a man who had been working full-duty, full-time up until the event of December 27, 2013 and, who thereafter required spinal surgery.

31. Dr. Castrejon was asked about Dr. Mathwich's conclusion that had Claimant presented to an occupational medicine physician initially after the injury, he would have been at MMI within six weeks. Dr. Castrejon disagreed as there was no supporting documentation for this opinion and it is not consistent with the credible history provided by Claimant and the content of the existing medical records. Dr. Castrejon opined the appropriate date of MMI would have to be after Claimant's surgery. He reiterated that his original MMI date of September 22, 2016 was appropriate.

32. Dr. Castrejon testified that he reviewed both the impairment rating he provided and Dr. Rook's report. He agreed that he used an incorrect Table 53 rating. He also agreed that Claimant's rating should have been 23% whole person as explained by Dr. Rook.

33. Dr. D'Angelo testified as an expert in internal medicine and occupational medicine. Dr. D'Angelo continued to express concerns that Claimant has diabetes and that his symptoms are consistent with and caused by complications from this disease. The ALJ has carefully reviewed the existing records and is unable to find any medical record documenting that Claimant has been diagnosed with diabetes. While the ALJ finds that diabetes may produce lower extremity symptoms similar to those reported by Claimant, the ALJ finds that his lower extremity symptoms likely would not have been relieved, as they were in this case by a lumbar fusion, if they were related to a peripheral neuropathy caused by diabetes. Based upon the totality of the evidence presented, Dr. D'Angelo's suggestion that Claimant's symptoms are explained by the potential that he has diabetes is unpersuasive.

34. Claimant testified that his lower back was never completely pain free from December 27, 2013 through March 20, 2014. Claimant was specifically asked about his use of the term "subsided" which Dr. D'Angelo and Dr. Mathwich interpreted to mean "resolved." Claimant explained that when he mentioned to Dr. D'Angelo that his pain had "subsided," he meant that it initially "eased up" with his home remedies. A full reading of Claimant's statement wherein he uses the term "subsided" supports his claim. Indeed, Claimant stated: "And then you know a couple of days since, I didn't get in to see anybody, I just kinda babied it with Ibuprofen, didn't do too much that weekend and the pain just kind of subsided. You know I knew it was there and I know what it feels like so I just kinda went with it you know, maybe it's just kinda a fluke and go away." (Claimant's Exhibit 17, p. 178) (emphasis in original). It is evident that Claimant's pain merely "eased up" temporarily with ibuprofen, heat, and rest per his report.

35. Claimant further testified that he modified his work activities between December 27, 2013 and March 20, 2014. He was extremely careful with his work activities and, as a manager, simply had his staff perform the activities he was physically incapable of performing. According to Claimant, he sat at his desk for three months because "a lot of my business is electronic and digital, so I'm able to work that a lot."

36. Claimant testified regarding his previous 2009 lumbar injury. He explained that he was at work, lifted a box, and twisted the wrong way. He was prescribed medications, underwent physical therapy, and that was the extent of the injury. Claimant testified that his symptoms resolved fully by the time he was released at MMI by Dr. Sharma on June 3, 2009. He did not sustain any new injuries to his lower back between June 3, 2009 and December 27, 2013. He had no back pain during this interim period. Careful review of the record evidence supports this testimony as demonstrated by the following: Claimant's injury occurred on May 12, 2009. As of May 28, 2009, Claimant was experiencing a 1 out of 10 level of pain and on June 3, 2009, he was experiencing no back pain at all. Consequently, Dr. Sharma released him at MMI without impairment. Claimant's intake form from his March 20, 2014 ExpressCare visit further supports his testimony. During the March 20, 2014 evaluation, Claimant

documented that he did have previous injuries to the same body part; however, he also noted the following in response to the question of whether his previous injuries caused problems for him: "If yes, has this [previous] injury caused problems for you up to the time of this injury" to which he responded, "No."

37. The ALJ finds the Claimant to be credible and a reliable historian.

38. Based upon the evidence presented, The ALJ finds Dr. Mathwich's conclusion that Claimant's symptoms resolved "very quickly" contrary to the evidence presented at hearing and the decision reached by ALJ Walsh following the July 8, 2015 hearing during which similar evidence was, more probably than not, presented. During the hearing in the current case, Claimant vehemently denied that his symptoms had ever resolved, testifying credibly that he continued to self-medicate and manage the pain for "weeks and weeks" by modifying his activity and work duties. Based upon the evidence presented, the ALJ finds that Claimant's symptoms may have waxed and waned but they never fully resolved as suggested by Dr. Mathwich. Instead, the ALJ is persuaded that the condition of Claimant's low back slowly regressed while the symptoms associated with it intensified.[2] While Claimant modified his duties and took medication to manage his pain, the discomfort eventually became intolerable necessitating formal medical intervention, including surgery performed by Dr. Orderia Mitchell on April 13, 2016. This finding is supported by the totality of the evidence presented. It mirrors the findings/conclusions reached by ALJ Walsh who, after hearing found Dr. Mitchell's recommendation for back surgery "reasonable, necessary and related" to Claimant's December 27, 2013 work related injury and ordered Respondent's to approve and cover the attendant costs associated with this surgery. Accordingly, the ALJ is persuaded that Dr. Mathwich's opinion that the MOI in this case caused a "minor exacerbation" of pre-existing spinal disease, which "resolved very quickly" is erroneous and highly probably incorrect.

39. As noted above, the undersigned ALJ credits Claimant's testimony to find that his symptoms, while manageable shortly after his accident, never completely resolved and his condition progressively regressed over time despite activity modification. The ALJ credits Dr. Castrejon's testimony to find that Dr. Mathwich probably failed to account for specific changes on Claimant's 2014 and 2015 MRI studies, including the extent of annular tearing and its contribution to Claimant's need for surgery, when he placed Claimant at MMI. The evidence presented, including Claimant's April 13, 2016 surgery and response thereto persuasively refutes and disproves Dr. Mathwich's opinion that Claimant's condition had stabilized to the point that no further treatment would reasonably be expected to improve it by February 15, 2014. Consequently, the ALJ finds Dr. Mathwich's assignment of a February 15, 2014 MMI date arbitrary and highly probably incorrect.

[2] During his original interview with Dr. D'Angelo at the IME requested by Respondents, Claimant explained that his symptoms were "continually getting worse and worse and about the second week of March, first week of March, [he] started having spasms . . . from [his] lower back all the way up [the] back into [his] shoulder, in [the] neck, down [the] arms to where [he] had to go see somebody it was to the point where [he] couldn't . . . work."

40. The ALJ finds the opinions and analyses of Drs. Castrejon and Rook to be more reliable and persuasive than those of Dr. D'Angelo and Dr. Mathwich.

41. The ALJ finds that as a result of his December 27, 2013 work injury, Claimant has a visible disfigurement consisting of a roughly 10 inch long by 1/8 inch wide, rough appearing and variously pigmented scar located in the midline of lumbar spine. There are multiple pairs of small, slightly raised, suture/staple scars running the entire 10-inch length of the above-described scar lending to its roughened appearance.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2013, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215, C.R.S. 2013, this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). As found here, the ALJ concludes that the Claimant is a reliable witness. His testimony is consistent with and supported by the

content of the record evidence, including the medical reports from ExpressCare Plus, Front Range Orthopedics and Dr. Castrejon's Office.

D. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Drs. Rook and Castrejon are credible and supported by Claimant's testimony, the medical record as a whole and the apportionment principals set forth in Desk Aid 10 and §8-42-104(5), C.R.S. 2013. When the evidentiary record is considered in its totality, the opinions of Dr. Rook and Dr. Castrejon are more persuasive than contrary opinions of Dr. D'Angelo and Dr. Mathwich.

Overcoming the DIME regarding Causation, MMI and Permanent Medical Impairment

E. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* W.C. No. 4-782-625 (ICAO, May 24, 2010).

F. The question of whether the Claimant has overcome the DIME physician's findings regarding causality, MMI and impairment is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, *supra*. In deciding whether Claimant has met his burden of proof, the ALJ is empowered, "[t]o resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). Moreover, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). In this case, the issue of whether Claimant was properly placed at MMI by Dr. Mathwich involves a complex medico-legal question regarding the cause of Claimant's low back symptoms and his need for a spinal fusion

surgery. Claimant, through Dr. Rook, contends that Dr. Mathwich erred when he "took it upon himself to re-write the legally determined compensability issues in this case, essentially doing his own causation analysis for a case that had already been litigated in front of an administrative law judge, who ruled that the patient's low back spinal condition was compensable and related to the injury that occurred at his workplace on December 27, 2013." The ALJ agrees with Respondent's position that, as part of the DIME process, Dr. Mathwich is permitted to address causation, regardless of the prior decision of ALJ Walsh. See, *Nunnally v. Eastman Kodak Co.*, W.C. No. 4-720-435 (ICAO, May 28, 2009); see also, *Holcomb v. FedEx Corp*., W.C. No. 4-824-259-05 (ICAO, March 24, 2017)(doctrine of issue preclusion inapplicable where the burdens of proof in two adjudications are not the same). While the ALJ agrees that Dr. Mathwich was permitted to address causation as part of the DIME completed in this case, the evidence presented is convincing that his conclusion that Claimant's MOI caused a "minor exacerbation" of pre-existing spinal disease, which "resolved very quickly" is erroneous and highly probably incorrect. To the contrary the ALJ is convinced that Claimant's MOI, more probably than not, caused additional traumatic injury to Claimant's lumbar spine which never completely resolved and simply regressed with time despite attempts at activity modification. Indeed, the MRI of 2014 and 2015 reveal previously undisclosed annular tearing which Dr. Castrejon persuasively testified that Dr. Mathwich failed to completely account for in addressing causality and before placing Claimant at MMI.

G. Because the question of whether Claimant attained MMI inherently requires a determination of the cause of Claimant's medical condition and his need for medical treatment and the evidence presented convincingly persuades the ALJ that Dr. Mathwich erred in his causality determination, the ALJ finds/concludes that his opinions regarding MMI are also fatally flawed. Here, the evidence presented persuades the ALJ that Dr. Mathwich's opinion concerning MMI is highly probably incorrect because it is based upon erroneous conclusions regarding the cause of Claimant's medical condition and his need for spinal surgery. As found above, the evidence surrounding Claimant's April 13, 2016 surgery and response thereto persuasively contradicts the speculative nature of Dr. Mathwich's opinion that Claimant's condition had stabilized by February 15, 2014. Based upon the evidence presented, the ALJ agrees with Dr. Castrejon that Claimant's condition had stabilized to the point that no further treatment would reasonably be expected to improve it by September 22, 2016. Accordingly, the ALJ concludes that Claimant reached MMI on September 22, 2016. Because Claimant has proven by clear and convincing evidence that Dr. Mathwich erred in his MMI determination, Respondents claimed overpayment for temporary total disability (TTD) benefits collected from April 13, 2016 through April 29, 2016 and temporary partial disability (TPD) benefits collected April 30, 2016 through May 13, 2016, totaling $2,407.50 is moot and need not be addressed further.

H. To the extent that Dr. Mathwich's opinions concerning causality, and therefore, MMI diverge from those expressed by Dr. Rook and Dr. Castrejon, the ALJ concludes those discrepancies constitute more than a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error

pursuant to well-settled case law. See, *Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). As noted, the undersigned ALJ finds/concludes that Dr. Mathwich's opinions regarding causality and MMI are contrary to the evidence presented tending to establish that Claimant's symptoms did not resolve after the December 27, 2013 incident, that Claimant suffered additional injury (annular tearing) to the lumbar spine and that this injury directly caused Claimant's need for surgery. Indeed, ALJ Walsh concluded similarly. Consequently, while there is a difference of opinion between Drs. Mathwich, Rook and Castrejon, the evidence presented persuades the ALJ that Dr. Mathwich's opinions are simply wrong.

I. Where the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate a claimant's impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). The ALJ adopts the unrefuted testimony of Dr. Castrejon that he erred in the completion of his impairment rating. Accordingly, the ALJ finds that Claimant's impairment rating was properly calculated at 23% working unit by Dr. Rook as part of his IME.

Apportionment

J. As found above, the ALJ concludes that apportionment of Claimant's current impairment rating to any of his prior low back injuries is not warranted in this case. Pursuant to the instructions offered into evidence at Respondents' Exhibit N, paragraph 2, it states, "For injuries that occurred <u>on or after July 1, 2008</u>: if you determine that the *previous* injury is (1) non-work related, and (2) was not independently disabling at the time of the current injury, do *not* continue with this process." As found, none of Claimant's previous lower back conditions were independently disabling at the time of the December 27, 2013 incident. Consequently, apportionment of the rating in this case to Claimant's 1993 non-work related injury is not appropriate. Moreover, while Claimant did have two previous work-related injuries to his back, these injuries were not independently disabling at the time of the 2013 injury. Furthermore, in the case of Claimant's 1995 injury no work injury claim was filed, no impairment was assigned and no impairment related award/settlement was effectuated. While Claimant filed a work related injury claim as part of the 2009 injury, the evidence presented persuades the ALJ that after approximately one month of treatment Claimant was released from care without permanent impairment. Because neither the 1995 nor the 2009 injury was independently disabling or resulted in impairment established by award or settlement, the ALJ concludes that Respondents request to deduct from the current rating, impairment associated with the 2013 claim must be denied and dismissed.

Maintenance Care

K. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical treatment is reasonable, necessary and related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

L. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the ALJ concludes that Claimant has met his burden to establish entitlement to maintenance medical treatment. Dr. Castrejon recommended maintenance care at the time of maximum medical improvement to include follow up visits with the orthopedic surgeon and additional x-rays and Claimant credibly testified that he remains symptomatic despite extensive treatment. Here, substantial persuasive evidence demonstrates that although Claimant enjoyed significant pain relief following surgery he is only 90% pain free. There is an ongoing need to treat Claimant's persistent pain caused the injuries sustained in the December 27, 2013 accident. Without ongoing treatment, including follow-up visits with his surgeon, the ALJ concludes that Claimant's present condition will likely deteriorate.

Disfigurement

M. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant has surgical scarring located on the left leg on either side of the knee, which alters the natural appearance of skin in these areas. Consequently, the ALJ concludes that Claimant has suffered a visible disfigurement entitling her to additional benefits as provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME opinion of Dr. Mathwich regarding maximum medical improvement is GRANTED. Claimant is found to have reached MMI effective September 22, 2016 as originally assigned by Dr. Castrejon.

2. Claimant's request to set aside the DIME opinion of Dr. Mathwich regarding permanent impairment is GRANTED. The 0% whole person impairment assigned by Dr. Mathwich is set aside and replaced by the 23% impairment rating assigned by Dr. Rook which is supported by Dr. Castrejon.

3. Respondents' request to apportion Claimant's 23% whole person impairment is denied and dismissed.

4. Claimant is entitled to maintenance care, including, but not limited to follow-up visits with Dr. Mitchell subject to Respondents right to challenge any future request for treatment on the grounds that it is not reasonable, necessary or related to Claimant's December 27, 2013 industrial injury.

5. Claimant is entitled to and Respondents shall pay disfigurement benefits in the amount of $3,500.00.

6. Respondents' request to recoup a stipulated $2,407.50 overpayment of indemnity benefits is denied and dismissed as moot since the MMI determination of Dr. Mathwich has been overcome and set aside.

DATED: June 26, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- When Claimant filed his Application for Hearing on December 6, 2017, this was a contested claim. At the commencement of the June 5, 2018 hearing, Respondents' counsel stipulated that the claim is compensable and Respondents intend to file a General Admission of Liability. That stipulation narrowed the remaining issues to:

- What is Claimant's average weekly wage (AWW)?

- Is Claimant entitled to TTD benefits from October 25, 2016 ongoing?

- Should Claimant's TTD benefits be reduced as a "late reporting" penalty?

- What is the proper offset for Social Security disability benefits?

FINDINGS OF FACT

1. Claimant worked for Employer as a cement pump operator. He was stationed in Brighton Colorado, but also worked in many neighboring states, including New Mexico and Texas.

2. Claimant developed coccidioidomycosis (a.k.a. "valley fever") because of work-related exposure to coccidioides spores between mid-August and mid-October 2016.[1] Due to the relative rarity of the condition, Claimant was misdiagnosed for many months and did not receive a proper diagnosis until February 2017.

3. Claimant started having flulike symptoms in mid-October 2016. The symptoms persisted for several days, and on October 23 he told his manager he needed to see a doctor because he was "sick with the flu or something." At the time, Claimant did not suspect that his condition was work-related. The supervisor did not refer Claimant for medical care and he pursued treatment on his own.

4. Claimant went to Advanced Urgent Care in Brighton, Colorado on October 24. He was diagnosed with pneumonia and given a prescription for antibiotics.

5. Claimant responded marginally to antibiotics, and he sought further evaluation at the Memorial Hospital emergency department on November 16, 2016. Chest x-rays and a CT scan showed pneumonia and a mass in the right lung, which the radiologist thought was probably malignant.

[1] It is impossible to determine the exact date Claimant was exposed to coccidioides spores. The parties have designated October 24, 2016 the date of injury for this claim, which corresponds to the last day Claimant worked.

6. Claimant was referred to Dr. Ronald Rains, a pulmonologist, for further evaluation of lung cancer. He underwent a battery of tests which eventually ruled out cancer.

7. A lung needle biopsy on February 9, 2017 showed coccidioidomycosis and Dr. Rains referred Claimant to Dr. Brookmeyer, an infectious disease specialist.

8. Claimant saw Dr. Brookmeyer on February 22, 2017. Dr. Brookmeyer confirmed the diagnosis of coccidioidomycosis and prescribed itraconazole, an anti-fungal medication.[2]

9. Claimant returned to Dr. Rains on March 6, 2017 to discuss Dr. Brookmeyer's findings. Dr. Rains opined the coccidioidomycosis was "very likely" due to work-related exposure in August or September 2016.

10. Approximately "four or five days" later, Claimant contacted Employer to report the diagnosis. He spoke with "Rachel" in Employer's HR department, and told her his doctor believed it was probably work-related. Rachel advised Claimant to consult with an attorney for assistance with this matter. Employer did not refer Claimant to a physician and he continued with the physicians he was already seeing. Claimant's testimony regarding reporting the potentially compensable condition in early-to-mid-March is credible and persuasive.

11. Employer took no immediate action based on Claimant's verbal report of injury. The earliest written report in evidence is an Employer's First Report of Injury, completed by Respondents' claims adjuster on April 12, 2017.

12. Claimant has been off work due to his medical condition since October 25, 2016. He suffers from ongoing symptoms including fatigue and shortness of breath which prevent him from meeting the physical demands of his pre-injury work.

13. The last pay period before the date of injury ended October 22, 2016. In the forty-four (44) weeks before the date of injury (12/20/2015 through 10/22/2016), Claimant earned gross wages of $63,488.60. That equates to an average weekly wage of $1,442.92 ($62,488.60 ÷ 44 = $1,442.92). The ALJ finds this period provides a fair approximation of Claimant's injury-related wage loss and diminished earning capacity.

14. With an AWW of $1,442.92, Claimant is entitled to compensation based on a weekly rate of $939.82, the maximum TTD rate in effect on his date of injury.

15. Claimant was found disabled and awarded Social Security Disability Insurance (SSDI) benefits in late 2017. The SSDI Notice of Award shows an initial

[2] Claimant later developed hypertension as a side effect of the itraconazole.

entitlement amount of $1,802 per month,[3] commencing April 1, 2017. Claimant was represented by an attorney in his SSDI claim and paid an attorney's fee of $3,604.

16. Claimant proved by a preponderance of the evidence he suffered a wage loss proximately caused by his compensable injury commencing October 25, 2016.

17. Respondents failed to prove a basis for imposition of a "late reporting" penalty. Claimant verbally reported the injury to Employer within a reasonable time after realizing the nature, seriousness, and probable compensable character of his condition. Although his verbal report did not strictly comply with the requirement to report the injury in writing, the ALJ finds a penalty is not warranted under these circumstances. Employer received actual notice shortly after Claimant learned he might have a compensable injury, and there is no persuasive evidence of any prejudice to Respondents caused by lack of written notice. It appears both parties were confused about how to proceed given the unusual circumstances surrounding Claimant's injury.

18. Respondents are entitled to offset Claimant's SSDI benefits at the rate of $207.93 per week ($1,802 x 12 ÷ 52 = $415.85 x 50% = $207.93). After accounting for the SSDI offset, Claimant's weekly TTD rate is $731.89 ($939.82 – $207.93 = $731.89).

19. The SSDI offset must be reduced by $3,604 to account for the attorney's fees Claimant incurred to obtain his SSDI award. The attorney's fee equates to two (2) months of benefit payments ($1,802 x 2 = $3,604). The easiest way to account for the attorney's fee is simply to delay the effective date of the offset by two months, to June 1, 2017. Accordingly, the ALJ finds Respondents are entitled to an SSDI offset commencing June 1, 2017.

CONCLUSIONS OF LAW

A. Average weekly wage:

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity as a result of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

Claimant proposes averaging his earnings from the start of 2016 through the date of injury, which is reasonable because it encapsulates a broad swath of earnings. Claimant's wages generally fluctuated based on the amount of work available. He

[3] Although Claimant's benefit amount is technically $1,802.50, as the Notice of Award explains, SSA rounds the payment "down to the nearest dollar." Section 8-42-103(1)(c)(I) refers to disability benefits "payable" to a claimant, so the offset is properly calculated based on the disability payments he actually receives after rounding, *i.e.*, $1,802.00.

commonly worked overtime, but the number of overtime hours varied greatly. The ALJ agrees it is most appropriate to average the 44 weeks before the date of injury, using pay periods covering 12/20/2015 through 10/22/2016. As found, during that period Claimant earned gross wages of $63,488.60, which equates to an average weekly wage of **$1,442.92** ($62,488.60 ÷ 44 = $1,442.92).

Claimant's average weekly wage of entitles him to compensation based on the maximum TTD rate of **$939.82** in effect on his date of injury.

B. TTD benefits commencing October 25, 2016:

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

As found, the persuasive evidence shows that Claimant was disabled by the effects of his admitted injury and suffered a wage loss commencing October 25, 2016, as a direct and proximate consequence of his injury.

C. Late reporting penalty:

Section 8-43-102(1)(a) requires a claimant to report his injury to the employer in writing within four days of its occurrence, and failure to strictly comply with this requirement subjects the claimant to a potential penalty. *Postlewait v. Industrial Claim Appeals Office*, 905 P.2d 21 (Colo. App. 1995). The statute further provides that the claimant "*may* lose up to one day's compensation for each day's failure to so report." (Emphasis added). Use of the term "may" signifies that imposition of a penalty is not mandatory, but is left to the ALJ's discretion. *E.g., Johnson v. United Airlines*, W.C. No. 4-490-900 & 4-642-480 (December 7, 2006). A late reporting penalty is an affirmative defense which the respondents must prove by a preponderance of the evidence.

As found, Respondents failed to prove that Claimant's TTD benefits should be reduced for "late reporting." The claimant's duty to report an injury is only triggered when he, as a reasonable person, recognizes the nature, seriousness, and probable compensable nature of the injury. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Here, Claimant did not reasonably appreciate a connection between his medical condition and his job until his March 6, 2017 appointment with Dr. Rains. He verbally reported the injury to Employer soon after that. His verbal report did not strictly comply with the requirement to report the injury in writing, but it gave Employer actual notice, and there is

no persuasive evidence of any prejudice to Respondents caused by lack of written notice. Both parties were reasonably confused about how to proceed given the unusual circumstances surrounding Claimant's injury.

D. Social Security offset:

Section 8-42-103(1)(c)(I) allows Respondents to offset their liability for TTD benefits by one-half of Claimant's SSDI benefits. The offset is based on the claimant's initial entitlement amount and does not include any subsequent cost of living adjustments. *Englebrecht v. Hartford Accident and Indemnity Co*., 680 P.2d 231 (Colo. 1984) (COLAs do not constitute "periodic disability benefits" under the offset statute). As found Claimant's initial entitlement was $1,802, which produces a weekly offset of **$207.93** per week ($1,802.00 x 12 ÷ 52 = $415.85 x 50% = $207.93). After accounting for the SSDI offset, Claimant's weekly TTD rate is **$731.89** ($939.82 – $207.93 = $731.89).

Claimant was represented by an attorney in his SSDI claim and paid an attorney's fee of $3,604 out of his past-due SSDI benefits. Respondents may only offset SSDI benefits paid to a claimant, and cannot offset the amount withheld from his benefits to pay his attorney. *See St. Vincent's Hospital v. Alires*, 778 P.2d 277 (Colo. App. 1989); *Jones v. Industrial Claim Appeals Office*, 892 P.2d 425 (Colo. App. 1994); *Schramek v. Chico's Fas*, W.C. No. 5-601-867 (December 3, 2009). Thus, the total amount of Respondents' SSDI offset must be reduced by $3,604 to account for the attorney's fee Claimant incurred to obtain his SSDI award. The attorney's fee equates to two (2) months of benefit payments ($1,802 x 2 = $3,604). The easiest way to account for the attorney's fee is to delay the effective date of the offset by two months, to June 1, 2017. [4] Accordingly, the ALJ concludes Respondents are entitled to an SSDI offset commencing June 1, 2017.

ORDER

It is therefore ordered that:

1. Claimant's claim in W.C. No. 5-042-777 is compensable per the parties' stipulation.

2. Insurer shall cover all reasonably necessary medical treatment from authorized providers to cure and relieve the effects of Claimant's compensable injury.

3. Claimant's average weekly wage is $1,442.92

4. Insurer shall pay Claimant TTD benefits at the rate of $939.82 per week from October 25, 2016 through May 31, 2017.

[4] This methodology is also consistent with the procedure SSA uses to account for the attorney's fee when calculating the so-called "windfall offset" in cases where a claimant is eligible for both SSDI and SSI benefits. See 20 C.F.R. § 416.1123(b)(3); POMS SI 02006.200.C.1.

5. Insurer shall pay Claimant TTD benefits at the rate of $731.89 per week from June 1, 2017 and continuing until terminated by law.

6. Insurer shall pay Claimant statutory interest in the amount of 8% per annum on all indemnity benefits not paid when due.

7. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 26, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

deemed submitted for decision on June 8, 2018, upon the lodging of the written transcript of Katie Montoya's evidentiary deposition.

ISSUES

The issues to be determined as a result of the May 7, 2018, hearing concern permanent total disability (PTD) and post-maximum medical improvement (MMI) ancillary medical care, consisting of: the reasonable necessity of home-based care services as prescribed by treating physician David Yamamoto, M.D., on October 2, 2017; bodily disfigurement; penalties for Respondents' alleged failure to timely pay the medical bills of Dr. Brown; penalties pursuant to § 8-43-304 for Respondents' alleged violation of Workers' Compensation Rules of Procedure (WCRP), Rule 16-11(B) because Respondents allegedly did not meet the requirements of the rule to contest authorization of injections requested by Dr. Brown; and penalties pursuant to § 8-43-304 for Respondents' alleged violation of WCRP, Rules 16-10(G) and 16-11(B) with respect to Dr. Yamamoto's prescription for home-based care.

The Claimant bears the burden of proof, by a preponderance of the evidence on both of the above issues.

PROCEDURAL HISTORY.

This matter was previously heard by ALJ Felter, who determined that the Division Independent Medical Examination (DIME) had been overcome and the Claimant was found to be at MMI as of July 21, 2015. In the ALJ's decision, dated November 18, 2015, a trial spinal cord stimulator trial was also found to be reasonably necessary. A new DIME was also ordered for the sole purpose of determining the degree of the Claimant's permanent medical impairment.

The above-mentioned decision was appealed to the Industrial Claim Appeals Office (ICAO). The ALJ's decision was affirmed except the portion of the decision regarding a new DIME, which was reversed. The case was remanded for further proceedings and a new decision on the issue of the Claimant's permanent impairment rating. The Court of Appeals affirmed ICAO on January 26, 2017 2017and the Supreme Court denied *certiorari* on July 3, 2017.

Therefore, the above-captioned matter is back on remand for the determination of a permanent impairment rating. In the meantime, the Claimant filed an Application for Hearing on the issues as designated herein above.

The remand regarding permanent partial disability and the issues endorsed in Claimant's Application for Hearing were combined into one hearing. At the commencement of the latest hearing, the Claimant withdrew the issue regarding the reasonable necessity of transforaminal epidural steroid injections at L5-S1 as requested

by treating physician Dr. Brown on October 24, 2017; penalties pursuant to § 8-43-304 for Respondents alleged violation of. § 8-43-503(3) for dictating care by refusing to pay Dr. Brown who subsequently refused to treat Claimant and penalties pursuant to § 8-43-401(2)(a) for Respondents' failure to timely pay the medical bills of Dr. Robert Brown. A hearing proceeded on May 7, 2018, on the issues set forth below.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. This matter concerns an admitted low back injury of September 9, 2010.

2. The Findings of Fact, Conclusions of Law and Order, dated November 18, 2015, are incorporated herein by reference as if fully restated and not inconsistent with the herein decision.

3. Since 2015, the Claimant has undergone a trial spinal cord stimulator (TNS Unit) and the subsequent implantation of a permanent spinal cord implant on March 22, 2016.

4. The TNS Unit provided relief to Claimant by reducing his sciatica to the point where he can now sit down for short periods of time.

5. L. Barton Goldman, M.D., is of the opinion that the TNS Unit also led to a 37.5% reduction in the fentanyl Claimant needs to take to manage his pain.

6. The Claimant continues treating with David Yamamoto, M.D. He also sees licensed, treating clinical psychologist Lupe Ledezma, Ph.D.

7. Twice a week, the Claimant personally pays for acupuncture treatment, which he credibly testified provides some relief from his symptoms.

8. The Claimant continues to have low back pain and pain in his legs, right more than left.

Permanent Impairment Ratings

9. Prior to the implantation of the TNS Unit, Dr. Yamamoto calculated an impairment rating of 32% whole person. The rating was calculated on October 28, 2014, at the same time Dr. Yamamoto placed the following work restrictions on Claimant: a

10 lbs. maximum lifting restriction and a 5 lbs;.occasional lifting restriction; carrying limited to 5-10 lbs; pushing and pulling limited to 10 lbs; a recommendation that Claimant should do no repetitive lifting; Claimant should avoid bending and twisting at the waist; walking and standing should be limited to 1-2 hours per day; Claimant may sit up to 6-8 hours but he will likely need to lie down for 1-2 hours per 8 hour period; he will need to change positions every 15-20 minutes as needed.

10. After the implantation of the TNS Unit, Dr. Yamamoto calculated additional impairment on February 14, 2018. He calculated an additional impairment of 6% whole person. In regard to permanent restrictions, Dr. Yamamoto wrote in his February 14, 2018, report, "He had a recent functional capacity evaluation by Sherry Young, OTR (occupational therapist). The report was submitted on 06/16/2017. [Claimant] performed poorly on the examination including failing to lift 7 pounds from floor level to overhead in a safe manner. He was also limited in sitting and spent much of the time lying down or walking around. It was noted that sedentary jobs which best suited to his lifting abilities require substantial sitting which he is unable to do. It was her conclusion that **[Claimant] is totally disabled from his typical occupation sales as well as any occupation for which he would be reasonably qualified. I concur with this opinion"** (emphasis supplied).

11. On April 23, 2018, Dr. Yamamoto's deposition was taken. He testified that the combined impairment rating in this case is 37% whole person (Yamamoto Depo. Tr. p. 13, ln. 4-20).

Functional Capacity Evaluations (FCEs)

12. The Claimant underwent a 3-day FCE at Starting Point on May 15th, 16th and 17th, 2017. Sherry Young, an occupational therapist, performed the evaluation.

13. Sherry Young determined there were no signs of symptom exaggeration in the evaluation. She wrote:

> [Claimant] demonstrated the ability to lift 7 pounds from knee to shoulder height on an occasional basis. He was unable to demonstrate a lift with the empty box (7 pounds_ from floor level or to overhead in a safe manner. His maximum safe carry was also 7 pounds. When more weight was attempted, his pain increased and he felt (and looked) more unstable. These findings are very consistent with the physical therapist's findings of higher risk for falls due to decreased balance and decreased strength in the core muscles as well as lower extremities. Bilateral moderate to severe lymphedema compound this safety issue. There will be times when he is unable to lift any weight at all.

(Claimant's Exhibit 2, p. 45).

14. . Young testified that what is more problematic for the Claimant is his positional tolerance. She credibly opined that the Claimant cannot sit long enough to be employable and that his need to lie down during the work day excludes him from the competitive labor market. She wrote:

> Positional tolerances were greatly restricted during this 3-day evaluation. He was most limited in sitting (causing the most pain). He sat for a total of 65 minutes over a 7-hour day. The rest of the time was lying down (100 minutes), or standing/walking around, trying to control pain levels. Sedentary jobs (which best suits lifting abilities) all require substantial sitting. Even if allowed the opportunity to sit and stand using an adjustable table, he would still need frequent breaks to walk around (1-3 minutes with every position change) to try and control pain levels. Frankly, his positional limitations were his primary barrier to completing any activity in a competitive, dependable, or reliable fashion which would be expected in any work environment.

(Claimant's Exhibit 2, p. 45).

15. Based on her 3-day FCE, Young is of the opinion that the Claimant could not sustain employment.

16. On February 15, 2018, the Claimant underwent A FCE at O.T. Resources (Claimant's Exhibit 1), under the direction of Doris Shriver, OTR. As a result of the FCE, it was determined that the Claimant could do a one-time lift of a maximum of 10 lbs. and should avoid occasional lifting with the exception of incidental items. As for work posture, tit was observed in the FCE that the Claimant could sit for a maximum of 39 minutes at one time and could stand for a maximum of 43 minutes. The Claimant laid down during the evaluation at O.T. Resources, in order to complete his questionnaire and academic testing. Overall, he was laying down for 111 minutes of the 288-minute evaluation.

17. According to Doris Shriver, although Starting Point (Sherry Young) and O.T. Resources use different methodologies in their FCEs, the results in Claimant's case came out the same regarding his lifting abilities and positional tolerances.

18. Sherry Young also testified that the results of the O.T. Resources and the Starting Point evaluations were essentially the same.

19. Doris Shriver is of the opinion which is, essentially undisputed, that Claimant’s pain causes sleep deprivation which results in cognitive difficulties.

20. On the November 13, 2017, Claimant underwent a FCE at Peak Form. (Respondents' Exhibit E). The Peak Form report states that, "The client failed to give maximum voluntary effort during today's FCE. Therefore, it is undeterminable at this time safe, maximum lifting capabilities and/or other functional capabilities." The ALJ infers and finds that Peak View has rendered a non-FCE opinion that is highly subjective and not subject to verification, *i.e.* "failed to give maximum voluntary effort…."

21. The Peak Form report relies on a lever or system entitled, "XRTS." According to Sherry Young, the system is a proprietary system to determine validity of the evaluation.

22. Claimant credibly testified that the XRTS lever was not working during his evaluation. He testified that staff hit the lever and restarted the computer program in an attempt to get the lever to work. Peak View did not contradict the Claimant's testimony in this regard. Consequently, Peak View's statement that the Claimant "failed to give maximum effort" is invalid and lacking in credibility.

23. Sherry Young credibly testified that a malfunction of the XRTS would make sense given the grip strength scores related in the Peak Form report.

24. When the Claimant used unmarked steel bars, as opposed to the XRTS lever, at the Peak Form evaluation, the lifting results were consistent with the evaluations done by O. T. Resources and Starting Point (Respondents' Exhibit E, p. 157). The Peak Form FCE did not test positional tolerances.

David Yamamoto, M.D., Authorized Treating Physician (ATP) and L. Barton Goldman, M.D.

25. Dr. Yamamoto testified that based on the evaluation at Starting Point, he would increase Claimant's lifting restriction from 5 to 7 pounds, but other than that his restrictions would remain the same as those imposed on October 28, 2014.

26. Dr. Goldman, Respondents' expert, determined that **if Claimant was able to find a job it would have to be accommodated.** Dr. Yamamoto was questioned about Dr. Goldman's report and stated:

> Q. Okay. If [Claimant] were able to find work, do you agree with him that it would have to be accommodated work?
>
> A. Well, if there was a job that he could do, he would have to be accommodated. He would have to accommodate, in my opinion, the restrictions that I've outlined, like lying down for one to two hours,

changing positions and not lifting. But the main thing is not being able to really tolerate a workday because he would have to lie down.

Q. Well, even if he could tolerate one work day, do you think he could come back and do it again the next day?

A. No.

Q. Or the day after that?

A. No.

(Yamamoto Depo. Tr. p. 31, ln. 18 to p. 32, ln. 8).

Respondents' IME by Barton Goldman, M.D.

27. Dr. Goldman was retained by Respondents and has evaluated the Claimant multiple times. In his report dated April 12, 2018, Dr. Goldman wrote regarding jobs submitted by Katie Montoya, Respondent's vocational expert:

> All of these jobs would need to accommodate the patient's (and most individuals') need to change static positioning every 5-10 min/h and would ideally provide the patient the ability to complete his tasks in standing, seated, and partially seated (stool height) positions throughout the day.

(Respondents' Exhibit B, p. 57).

28. Dr. Goldman last examined the Claimant on December 22, 2017. In his report of that date, he notes the Claimant's need to lie down:

> He did not need to be supine or lying down for as extended a time as on our prior evaluations. However, he did lay on his left side with the stimulator turned off for approximately 44 minutes through the 1.75hours was spent face-to face.

(Respondents' Exhibit B, p. 86).

29. Concerning the Claimant's lifting abilities, Dr. Goldman testified that he relied on the results of the Peak Form evaluation and surveillance video and the ALJ finds that Dr. Goldman speculated that the Claimant could lift more than 10 pounds.

30. Dr. Goldman also testified that Claimant needed additional therapy to reach his maximum functional capability. The ALJ finds and concludes that this opinion does not negate the established date of MMI as July 22, 2015.

Vocational Specialists

31. Vocational specialist Doris Shriver credibly testified that Claimant is unable to earn a wage. According to Shriver, the Claimant would be unable to sustain employment based on the FCE and the determinations of Dr. Yamamoto.

32. Vocational specialist Katie Montoya admitted that under Dr. Yamamoto's restrictions, THE Claimant is unable to earn a wage. Montoya relied on the restrictions provided by Dr. Goldman for her assessment that Claimant is able to earn a wage. Because Dr. Goldman admitted that a job would have to be accommodated in order for the Claimant to do the work, then Montoya's assessment is based on the assertion that jobs would have to be accommodated or modified for the Claimant to do them. A modified job is not an open market job in the competitive labor market.

33. Montoya's testimony at the hearing was not completed. Consequently, her evidentiary deposition, post-hearing, was taken on May 23, 2018, and a written transcript thereof was lodged on June 8, 2018. Montoya testified that she did not complete any analysis based on Dr. Yamamoto's opinion that Claimant "was unable to work (Montoya Depo., pp 6: lns. 23-25, p. 7, lns: 1-7). The ALJ infers and finds that Montoya indicated that she was not interested in Dr. Yamamoto's opinion that the Claimant could not work (Montoya Depo., p. 7: lns 1-7).

34. Montoya indicated that "modified sedentary-type classification with consideration of positional tolerances," with a consideration of Dr. Yamamoto's subsequent restrictions, could be feasible for the Claimant (Montoya Depo., p. 10: lns 8-16). With the additional need of the Claimant to lie down, "part-time work, four to six hours per day, might be reasonable (Montoya Depo., p. 10: lns.16-21).

35. For sedentary desk work, the Claimant would need a Varidesk (a special desk that raises up and down), which some employers have. Otherwise, an employer would have to make the Varidesk accommodation (Montoya Depo., p. 20: lns 14-23).

36. Montoya noted that Dr. Yamamoto was of the opinion that the Claimant needed to lie down for one to two-hours in a six to eight-hour shift (Montoya Depo., p. 30: lns10-17). She also noted that Claimant was with Dr. Goldman for 1.75 hours and laid down for 44 minutes (Montoya Depo., p. 30:lns 18,19). During the hearing of May 7, 2018, the ALJ observed that the Claimant laid down for a substantial part of the hearing

Permanent Total Disability

37. The Claimant is 57 years old. He is college educated and worked his entire career in sales and training. He was working as a branch manager for the Employer when he was injured. The job he was working at the time he was injured was

not sedentary because he was doing job fairs and trade shows where he would have to carry equipment to set up. He worked for the Employer from 2004 to the date he was injured in 2010. He has not worked at all since Dr. Yamamoto took him off work in December of 2010. Based on Dr. Yamamoto's restrictions and the reports and testimony of Sherry Young and Doris Shriver, the ALJ finds that the Claimant is unable to earn wages in the open, competitive job market on a reasonably sustainable basis and this has been so since he reached MMI on July 21, 2015. Therefore, the Claimant is permanently and totally disabled. Indeed, Dr. Goldman and Katie Montoya, the Respondents' experts, do **not** support the proposition that the Claimant can earn wages in the open, competitive job market, on a reasonably sustainable basis, without accommodations and modifications of a part-time job being made. The ALJ infers and finds that these opinions essentially support the idea that Claimant could work at "sheltered" employment if the right community-minded employer is found. This amounts to speculation on the parts of Dr. Goldman and Katie Montoya.

Permanent Total Disability Benefit/Social Security Disability Offset

38. As admitted on the Final Admission of Liability (FAL), dated August 8, 2014, the Claimant is entitled to the maximum permanent total disability compensation rate in effect for FY 2010/2011, for his date of injury (September 8, 2010) which is $810.67. As stated in the decision, dated November 18, 2015, the Claimant received an SSDI (Social Security Disability) award which reduced his weekly benefit rate to $576.28 per week. After SSDI offset, Claimant's permanent total disability rate is $576.28, or $82.33 per day.

Home-Based Health Care

39. On October 2, 2017, Dr. Yamamoto wrote a prescription for Claimant to have help cleaning his house, etc., 4 to 8 hours a week.

40. Dr. Yamamoto testified that he thought the request for help with cleaning Claimant's house was reasonable because cleaning a house is not easy.

41. The Claimant testified that physical activity he does has later repercussions. For instance, if he goes to the doctor and/or gets groceries one day then he is resting the next day.

42. Sherry Young addressed Claimant's daily activities and wrote:

> He attends acupuncture, which he states is exhausting,
> twice a week on top of other doctors' appointments,
> pharmacy trips, and performs his physical therapy exercises.
> He attempts to do chores but seems to keep falling further

> and further behind stating that laundry and bed making are the worst as severe pain shoots through him. He is able to tend to his house with moderate to severe pain for activities such as linens, laundry, dusting, picking up objects from the floor or upper/lower cabinets, food preparation, dishes, and sweeping. However, he is no longer able to vacuum or move furniture due to severe pain. Tending to his lawn causes moderate pain as he takes extreme care with his movements, except mowing the lawn which he is no longer able to do due to severe pain. He is no longer able to drive, attend church, engage in physical intimacy, and can only go grocery shopping with moderate to severe pain.

(Claimant's Exhibit 2, p. 50).

43. The Claimant argues that the provision of 4 to 8 hours a week help with cleaning his house will help him keep his appointments for his medical care. If Claimant does too much activity, he has to rest the next day. According to the Claimant, home-based house-cleaning services will reduce his pain and help him maintain his medical appointments. The ALJ infers and finds that these arguments are a "stretch," and provision of these services are not indispensable to the Claimant's medical care and treatment.

Bodily Disfigurement

44. The Claimant walks with an altered gait due to his compensable work injury. He testified that if he takes too big of a step, it sends pain through his body. Therefore, the Claimant walks with a stiff body posture, taking short steps. As evidenced in the courtroom, he looks awkward because he does not move fluidly as a healthy person moves.

45. The Claimant also has scars on his body from the surgeries. He has had: 2 fusion surgeries, a hardware removal surgery, a surgery to implant a spinal cord stimulator, and a surgery for a battery implant. Claimant Exhibits 17, 18, 19 and 20, which are pictures of the scars, illustrate the Claimant's scarring. The photos show 13 inches of surgical scars on Claimant's back and stomach.

Penalties

46, Dr. Yamamoto prescribed home-based cleaning services for help cleaning Claimant's house on October 2, 2017. As found, the Claimant is not entitled to these services because they are not indispensable to the Claimant's medical care and treatment. Consequently, the Claimant has failed to prove, by preponderant evidence, entitlement o penalties regarding this issue.

47. Dr. Brown requested prior authorization for injections, Bilateral L5-S1 TFESI, on October 25, 2017 (Claimant's Exhibit 7, p. 116).

48. On October 26, 2017, Respondents faxed Dr. Brown's office a letter stating that the request was denied and stated that an IME (Independent Medical Examination) had been scheduled with Dr. Goldman but did not attach a copy of Goldman's credentials. The ALJ takes administrative notice of the fact that Dr. Goldman is well known in the workers' compensation community as a Level II accredited physician, and failure to attach his credentials amounts to a curable technical defect. Therefore, Claimant has failed to prove, by a preponderance of the evidence, entitlement to penalties on this issue.

49. Because the IME had been scheduled, WCRP, Rule 16-11 (E) excuses Respondents if they did not fully comply with Rule 16-11 (B).

Ultimate Findings

50. Based on the totality of the evidence, the ALJ finds the opinions of ATP Dr. Yamamoto, vocational expert and OTR Doris Shriver plus OTR Sherry Young, more credible and persuasive than all opinions to the contrary. Indeed, Dr. Goldman and Vocational Specialist Katie Montoya, agree, in part, with Dr. Yamamoto, Doris Shriver and Sherry Young, *i.e.,* that if the Claimant could be employable, accommodations would have to be made. The ALJ infers and finds that the need to make accommodations would render the employment as "sheltered employment." Also, the ALJ finds the Claimant's testimony and behavior to be credible.

51. Between conflicting opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Yamamoto, Doris Shriver and Sherry Young, and to reject all opinions to the contrary, other than the opinions of Dr. Goldman and Katie Montoya that accommodations would be required for any job, including part-time work.

52. The Claimant has proven that his medical impairment rating is 37% whole person as assessed by ATP Dr. Yamamoto.

53. The ALJ has considered the Claimant's "human factors," including his age (58), work history, general physical condition, education, mental ability, prior training and experience, and the feasible availability of work, if any, could perform. After such a consideration, the ALJ ultimately finds that the Claimant is permanently and totally disabled.

54. The Claimant has proven, by a preponderance of the evidence that he is incapable of earning a wage in the open, competitive job market, on a reasonably

sustainable basis. As found, if accommodations/modifications must be made and if the Claimant could perform part-time work at best, it is speculation and these options do not amount to open, competitive work Therefore, the Claimant is permanently and totally disabled, having reached MMI on July 22, 2015.

55. The Claimant reached MMI on July 22, 2015. His AWW was at the maximum for 2010/2011 (the time frame within which the date of injury occurred), thus entitling the Claimant to a weekly PTD benefit of $576.28, after the SSDI Offset is taken, or $82.33 per day net PTD benefits

56. The period from July 22, 2015, through the last hearing date, May 7, 2018, both dates inclusive, is 1,021 days. For this period of time, Respondents are liable for past due PTD benefits in the aggregate amount of $82, 058.93.

57 The Claimant has failed to prove, by a preponderant evidence, that the home-based healthcare services prescribed by Dr. Yamamoto are reasonably necessary for the Claimant to receive medical care and treatment, as contemplated by the case law relative thereto.

58. The Claimant has proven, by a preponderance of the evidence that he has sustained bodily disfigurement, consisting of a limp and scars as herein above described. The disfigurement does **not** affect the Claimant's face, is **not** comprised of extensive body scars or burns, **nor** does it manifest itself as stumps due to loss or partial loss of limbs. In the present case, the Claimant's disfigurement affects his gait, and his scars are unpleasant looking and plainly visible to public view in swimming trunks. It is not among the listed schedule disfigurements in § 8-42-108 (2), with an $8,608 maximum award for FY 2010/2011. It is within the purview of a maximum $4,304 for FY 2010/2011.

59. The Claimant has failed to prove by a preponderance of the evidence that Respondents did not comply with the Workers' Compensation Rules of Procedure in their response to Dr. Brown regarding injections. Claimant failed to show that there was **no** reasonably colorable argument to support a delay in treatment or a delay in payment of medical bills.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences

from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, based on the totality of the evidence, the opinions of ATP Dr. Yamamoto, Vocational Expert and OTR Doris Shriver plus OTR Sherry Young, were more credible and persuasive than all opinions to the contrary. Indeed, Dr. Goldman and Vocational Specialist Katie Montoya, agree, in part, with Dr. Yamamoto, Doris Shriver and Sherry Young, *i.e.,* that if the Claimant could be employable, accommodations would have to be made. As inferred and found, the need to make accommodations would render employment to be "sheltered employment." Also, as found, the Claimant's testimony and behavior was credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a

particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Yamamoto, Doris Shriver and Sherry Young, and to reject all opinions to the contrary, other than the opinions of Dr. Goldman and Katie Montoya that accommodations would be required for any job, including part-time work.

Grover Medicals

c. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care at the hands of ATPs, which is reasonably necessary to address the injury.

Ancillary Home-Based Services Prescribed by Dr. Yamamoto

d. To be a compensable medical benefit, the service requested must be medical in nature or incidental to obtaining such medical or nursing treatment. *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Services that are "medical in nature" include home health services in the nature of "attendant care," if reasonably needed to cure or relieve the effects of the industrial injury. *Atencio v. Quality Care, Inc.*, 791 P.2d 7 (Colo. Ct. App. 1990). As found, the house-cleaning services are not **indispensable** to the Claimant obtaining medical care. The Claimant argues that if he cleans his house, he's tired the next day and may miss a medical appointment. This argument is tenuous and speculative.

e. The prescribed services must directly treat a claimant's physical condition and injury. *See Jacobs v. Ed Bozarth Chevrolet Company*, W.C. No. 4-222-373 [Indus. Claim Appeals Office(ICAO), June 26, 1997] (holding that housekeeping and lawn care were **not** necessary to treat or cure and relieve the claimant's symptoms and therefore, **not** reasonable or necessary). If the attendant care is simply for household chores, it is not medically necessary. *See Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. Ct. App. 1992) [holding that "compensation is not awarded to a spouse if the only services being rendered to the claimant are ordinary household services"]. Furthermore, the mere fact that a treating physician has prescribed the attendant care does not make the care medically necessary. *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. Ct. App. 1995). As found, the house cleaning services prescribed by Dr. Yamamoto are not reasonably necessary.

Permanent Total Disability

f. An employee is permanently and totally disabled if he is unable to earn any wages in the same or other employment. § 8-40-201(16.5) (a) C.R.S. The "full responsibility rule," applicable to claims for permanent total disability benefits, provides that the industrial injury need not be the sole cause of a claimant's permanent total disability. Under the rule, when an "employer hires an employee who, by reason of a pre-existing condition or by reason of a prior injury, is to some extent disabled, he takes the man (person) with such handicap," and the employer is liable for a "full award of benefits" if a subsequent industrial injury combines with the pre-existing disability to produce permanent total disability. See *United Airlines, Inc. v. Indus. Claim Appeals Office,* 993 P.2d 1152, 1154-1155 (Colo. 2000). The only exception to the established rule is where the industrial injury is not a significant causative factor in the claimant's disability. See *Seifried v. Indus. Comm'n,* 736 P.2d 1262 (Colo. App. 1986) [the claimant suffered from several pre-existing ailments, and the treating physician opined that the claimant had reached maximum medical improvement, and concluded that the claimant remained disabled because of non-occupational factors].; *Lindner Chevrolet v. Indus. Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995). *See also Holly Nursing Care Center v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). As found, the admitted injury of September 8, 2010, ultimately caused the Claimant to be permanently and totally disabled.

g. In determining whether a claimant is permanently and totally disabled, an ALJ may consider the claimant's "human factors," including the claimant's age, work history, general physical condition, education, mental ability, prior training and experience, and the availability of work that the claimant could perform. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998*); Joslin's Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The critical test is whether employment exists that is reasonably available to a

claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. *See Joslins Dry Goods Company v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). As found, the Claimant has proven that he is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to him. Permanent total disability does not need to be proven by medical evidence. *See Baldwin Construction, Inc. v. Indus. Claim Appeals Office,* 937 P.2d 895 (Colo. App. 1997). *Calvert v. Roadway Express, Inc.,* W.C. No. 4-355-715 [Indus. Claim Appeals Office (ICAO), November 27, 2002]; *In re Claim of Randy Blocker v. Express Personnel,* W.C. No. 4-622-069-04 (ICAO, July 1, 2013). As further found, the Claimant has proven permanent total disability by medical and expert vocational evidence.

Bodily Disfigurement

h. Section 8-42-108 (1), C.R.S., provides for a disfigurement award up to $4,304 for a first-tier bodily disfigurement with an injury date in FY 2010/2011, and $8,608 for a Tier-2 disfigurement in FY 2010/2011. Bodily disfigurement is assessed according to appearance not loss of function. *Arkin v. Indus. Comm'n. of Colorado,* 145 Colo. 463, 358 P.2d 879 (1961). Compensation beyond $4,304 for FY 2010/2011 is only appropriate if the disfigurement affects the face, is comprised of extensive body scars or burns, or manifests itself as stumps due to loss or partial loss of limbs. § 8-42-108 (2). Because facial deformities "are presumed to impact on an individual's social and vocational functioning." the statutory maximum award is appropriate. *See Gonzales v. Advanced Component Systems*, 949 P.2d 569 (Colo. 1997). As found, in the present case, the Claimant's disfigurement affects his gait and his scars, which are unpleasant looking and plainly visible to public view in swimming trunks. It is not among the listed schedule disfigurements in § 8-42-108 (2), with an $8,8,608 maximum award for FY 2010/2011. It is within the purview of a maximum $4,304. Therefore, an award of $3, 500 is appropriate.

Penalties

i. The imposition of penalties is governed by an objective standard of negligence. *See Pueblo School Dist. No. 70 v. Toth,* 924 P. 2d 1094, 1097 (Colo. App. 1996); *Miller v. Indus. Claim Appeals Office,* 49 P. 3d 334 (Colo. App. 2001); *City Market, Inc. v. Indus. Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Jimenez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). There must be a reasonably colorable argument to support a delay in treatment or a delay in payment of medical bills. *See Miller v. Industrial Claim Appeals Office,* 49 P. 3d 334 (Colo. App. 2001). As found, Respondents had a reasonably colorable argument for delaying full payment until correct and appropriate bills with the correct measurement of Tubigrip were rendered. *Also see Carson v. Industrial Claim Appeals Office,* ___P. 3d____(Colo. App. No. 03CA0955, October 7, 2004), *cert. denied,* February 22, 2005.

As found, by any objective standard of negligence, Respondents were **not** negligent in delaying prior authorization of injections by Dr. Brown during the pendency of an IME by Dr. Goldberg.

Overcoming the DIME

j. Overcoming the DIME is moot by virtue of the fact that it is hereby determined that the Claimant is permanently and totally disabled.

Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to PTD and post-MMI medical maintenance care at the hands of Dr. Yamamoto and Dr. Brown, ATPs. The Claimant has failed to meet his burden with respect to home-based cleaning services and penalties.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of Claimant's post-maximum medical improvement maintenance care and treatment at the hands of authorized treating physicians, David Yamamoto, M.D., and Robert Brown, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Based on the Claimant's average weekly wage as of the date of injury, Respondents shall pay the Claimant permanent total disability benefits of $576.28 per week, after the Federal Social Security Disability Offset is taken, or $82.33 per day. For

the period from July 21, 2015, the date of maximum medical improvement, through the last hearing date, May 7, 2018, both dates inclusive, a total of 1,021 days, Respondents shall pay the Claimant past due permanent total disability benefits in the aggregate amount of $84, 058.93, which is payable retroactively and forthwith.

C. From May 8, 2018 for the rest of the Claimant's natural life, Respondents shall pay the Claimant $576.28 per week in net permanent total disability benefits (after the Social Security Offset).

D. For the bodily disfigurement as herein above described, in addition to other benefits due and payable, Respondents shall pay the Claimant the sum of $3,500, payable in one lump sum.

D. Respondents shall pay the Claimant statutory interest at the rate of eight per cent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

E. Respondents may take credit for any indemnity benefits paid after the date of maximum medical improvement, July 21, 2015.

F. Any and all claims for home cleaning services and penalties are hereby denied and dismissed.

DATED this_____day of June 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-017-566-01 and 5-042-920-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 24, 2018 and June 4, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 4/24/18, Courtroom 1, beginning at 1:30 PM, and ending at 4:30 PM; and, 6/4/18, Courtroom 5, beginning at 1:30 PM, and ending at 3:15 PM). The official Punjabi/English Interpreter was Ken Singh.

W.C. No. 5-017-566-01 concerns an admitted and closed right lower extremity (RLE) and low back injury f June 1, 2016. W.C. No. 5-042-920-01 concerns a fully contested back injury of February 6, 2017.

Claimant's Exhibits 1 through 14 were admitted into evidence, without objection. Respondent's Exhibits A through O were admitted into evidence, without objection. Respondent's Exhibit P was rejected.

A written transcript of the evidentiary deposition of Scott Primack, D.O., taken on April 16, 2018, was lodged at the commencement of the first session of the hearing on April 24, 2018.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. It was filed, electronically, on June 11, 2018. Respondent was given two working days within which to file objections. None were timely filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether or not W.C. No. 5-017-566-01 should be re-opened based upon a change in condition; and, whether the Claimant suffered a new work-related injury on February 6, 2017, in W.C. No. 5-042-920-01. Additional issues, if W.C. No. 5-017-566-01 is re-opened and/or W.C. No. 5-042-920-01 is determined compensable, concern medical benefits, average weekly wage (AWW), and temporary total disability (TTD) benefits from June 1, 2016, through May 31, 2017, and from March 28, 201`7, and continuing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant's AWW was $616.70 from June 1, 2016 through May 31, 2017, with an applicable TTD rate of $411.13.

2. The Claimant's AWW is $871.24 beginning June 1, 2017 with an applicable TTD rate of $580.83.

3. If Claimant it is determined that W.C. No. 5-017-566 should be reopened, or that W.C. No. 5-042-920 is compensable, the Claimant is owed TTD benefits from March 28, 2017 and continuing.

4. All medical care and eatment received by Claimant, beginning June 1, 2016 andf continuing is authorized and reasonably necessary.

5. The Claimant was born on March 15, 1956. She was 62 years old as of the dates of both sessions of the hearing.

6. The Claimant was employed by the Employer in the Produce Department for approximately 10 years.

7. The Claimant's duties included stocking produce, slicing produce, and sometimes pricing produce. She was required to lift the produce and produce boxes. The boxes sometimes weighed up to 50 lbs. She would bend and squat to complete her tasks.

W.C. No. 5-017-566-01/Re-Opening and/or New Injury (W.C. No. 5-042-920-01)

8. On June 1, 2016, the Claimant suffered an admitted, work related injury to her low back when she bent over a produce ben to lift out a watermelon. She felt immediate pain in her low back. She was treated conservatively for less than two months. She was placed at maximum medical improvement (MMI) on September 15, 2016, with no permanent impairment and no permanent work restrictions.

9. The Claimant returned to her job in the Produce Department doing her regular job without restrictions after she was released from care for her June 1, 2016 injury.

10. The Respondent filed a Final Admission of Liability (FAL) in W.C. No. 5-017-566 on February 17, 2017.

11. The Claimant suffered a worsening of her condition at the beginning of February 2017. She was doing her regular job duties that included lifting heavy boxes. She suffered an increase in low back pain and an increase in right radicular pain. Her pain was so severe that she sought medical treatment on February 8, 2017 from her primary care physician, Dr. Baker. She was prescribed medications that allowed her to continue to work despite the increasing back pain.

12. On March 28, 2017, the Claimant was examined by a workers' compensation physician, Robert Broghammer, M.D. Dr. Broghammer took her off of work, referred her for EMG nerve conduction studies of the RLE and prescribed medications.

13. On April 13, 2017, the Claimant had an MRI (magnetic resonance imaging) that showed a large extruded disc fragment with radiating symptoms going into the RLE. It demonstrated some fairly significant compression at the L5 nerve root.

14. Dr. Broghammer and Angela Elizabeth Downs, D.O., both found that THE Claimant's symptoms correlated with the MRI study.

15. Dr. Broghammer referred the Claimant to Scott Primack, D.O., who examined Claimant on April 26, 2017 and found she was a reasonable candidate for surgical intervention. Claimant was also examined by Dr. Reiss who recommended surgery.

16. On May 13, 2017, the Claimant's pain became so extreme that she reported to the emergency room (ER). She underwent a surgical repair on May 13, 2017, performed by Michael Rauzzino, M.D. Despite the surgical intervention, the Claimant continued to have back pain and it was determined she had a recurrent disc herniation. The Claimant had a second surgery on June 7, 2017, again performed by Dr. Rauzzino.

17. Dr. Primack found that the Claimant's herniated disc had a direct correlation to a work injury. "One would not have such a large disk herniation without an acute/subacute load. There was quite a large right paracentral disk extrusion superimposed on the bulge." Dr. Primack was of the opinion that given the history and the lifting, this would be work-related. Dr. Primack was of the opinion that the Claimant should not have been released back to her regular duties after her June 1, 2016.

18. The ALJ finds the Claimant's testimony credible that she reported her pain to her Employer. The ALJ infers and finds that the Claimant was confused as to whether or not her pain was from her old injury or a new incident. The ALJ also finds the testimony of Paula Mane and Kandice Taylor credible. English is not the Claimant's first language. Due to some problems in communication and understanding, the Employer was unaware until March 28, 2017 that the Claimant had a condition that should have been addressed as a workers' compensation matter.

Ultimate Findings

19. The ALJ finds the Claimant's testimony to be persuasive and credible. Also, the ALJ finds the opinions of Dr. Primack concerning work-relatedness persuasive and credible.

20. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence to accept the testimony of the Claimant and the opinions of Dr. Primack; and, to reject any testimony and opinions to the contrary.

21. The Clamant has proven, by a preponderance of the evidence that she experienced a worsening (change) of her condition, related to the admitted injury of June 1, 2016, after the finality of the FAL therein. Therefore, she has proven that a re-opening of W.C. No. 5-017-566-01 is warranted.

22. There was no persuasive evidence that the Claimant aggravated or accelerated her June 1, 2016 injury in either a new event or over time. Moreover, the totality of the evidence supports the proposition that the injury of June 1, 2016 naturally progressed and got worse. Therefore, the Claimant has failed to prove, by preponderant evidence that she sustained a new, aggravating and accelerating injury on February 6, 2017. Consequently, a dismissal of W.C. No. 5-042-920-01 is warranted.

23. Based on the stipulations of the parties, accepted and found as fact by the ALJ, the Claimant's AWW from June 1, 2016 through May 31, 2017, was $616.70, this yielding a TTD benefit rate $411.13 per week OR $58.73 per day; and, beginning on June 1, 2018, her AWW is $871.24, thus yielding a TTD benefit rate of $580.83 per week, or $82.98 per day; the Claimant was and is temporarily and totally disabled from March 28, 2017 and continuing; and, all medical care for the Claimant's admitted work-related injury of June 1, 2016 was authorized, reasonably necessary and causally related.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found,

the Claimant's testimony was persuasive and credible. Also, the opinions of Dr. Primack concerning work-relatedness were persuasive and credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and opinions, the ALJ made a rational choice, based on substantial evidence to accept the testimony of the Claimant and the opinions of Dr. Primack; and, to reject any testimony and opinions to the contrary.

Re-Opening W.C. No. 5-017-566-01

c. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Where a claimant seeks to re-open based on a worsened condition, she must demonstrate a change in condition that is "causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985). As found, the cause of the Claimant's worsening condition stems from the June 1, 2016 admitted injury. As found, the Claimant established a worsening condition stemming from the june 1, 2016, admitted compensable injury.

W.C. No. 5-042-920-01 (February 6, 2017 Alleged New Injury

d. II an industrial injury leaves the body in a weakened condition, and that weakened condition is a proximate cause of further injury to the injured worker, the additional injury is a compensable consequence of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, there was no persuasive evidence that the Claimant aggravated or accelerated her June 1, 2016 injury in either a new event or over time. Moreover, the totality of the evidence supported the proposition that the injury of June 1, 2016 naturally progressed and got worse. Therefore, the Claimant failed to prove that she sustained a new, aggravating and accelerating injury on February 6, 2017. Consequently, a dismissal of W.C. No. 5-042-920-01 is warranted.

Medical Benefits, AWW AND TTD

e. As found, all medical care and treatment for the admitted June 1, 2016 injury was and is authorized, causally related, and reasonably necessary to cure and relieve the effects thereof.

f. As found, the Claimant's AWW from June 1, 2016 through May 31, 2017, was $616.70, this yielding a TTD benefit rate $411.13 per week or $58.73 per day; and, beginning on June 1, 2018, her AWW is $871.24, thus yielding a TTD benefit rate of $580.83 per week, or $82.98 per day; the Claimant was and is temporarily and totally disabled from March 28, 2017 and continuing; and, all medical care for the Claimant's

admitted work-related injury of June 1, 2016 was authorized, reasonably necessary and causally related. The period from June 1, 2016, through May 31, 2017, both dates inclusive, equals 365 days. The period from June 1, 2017, through the hearing date, June 4, 2018, both dates inclusive, equals 368 days. Based on the AWW through May 31, 2017, retroactive, past due TTD benefits in the aggregate amount of $21, 436.45. Based on the AWW from June 1, 2017, through the hearing date, June 4, 2018, retroactive, past due TTD benefits in the aggregate amount of $30,536.64, are due. The grand total of retroactive, past due TTD benefits through the hearing date is $51,973.09.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury, the right to re-open a claim and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven a worsening of her condition stemming from the June 1, 2016, admitted injury. The Claimant has failed to prove a new aggravation and acceleration of the June 1, 2016 injury as opposed to a natural progression thereof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims in W.C. No.5-042-920-01 (February 6, 2017 claim) are hereby denied and dismissed.

B. The Claim in W.C. No. 5-017-566-01 (June 1, 2016) is hereby re-opened.

C. The Respondent shall pay all of the costs of medical care and treatment for the admitted and re-opened injury of June 1, 2016, subject to the Division of Workers' Compensation Medical Fee Schedule.

D. . For the period from June 1, 2016, through May 31, 2017, both dates inclusive, equals 365 days, Respondent shall pay the Claimant retroactive, past due temporary total disability benefits in the aggregate subtotal amount of $21, 436.45. For the period from June 1, 2017, through the hearing date, June 4, 2018, both dates inclusive, equals 368 days, Respondent shall pay the Claimant retroactive, past due temporary total disability benefits in the aggregate subtotal amount of $30,536.64. Respondent shall pay the Claimant a grand total of retroactive, past due temporary total disability benefits of $51,973.09, which is payable retroactively and forthwith.

E. From June 5, 2018, and continuing until cessation or modification of benefits is warranted by law, Respondent shall pay the Claimant $580.83 per week in temporary total disability benefits.

E. Respondent shall pay the Claimant statutory interest of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

F. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

1. Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on October 14, 2017 and his non-medical benefits should thus be reduced by fifty percent.

2. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant's injury resulted from the use of a controlled substance in violation of §8-42-112.5(1) C.R.S. on October 14, 2017 and his non-medical benefits should thus be reduced by fifty percent.

FINDINGS OF FACT

1. On March 1, 2016 Claimant was hired by Employer as a maintenance worker at a hotel. Claimant's job duties involved performing routine maintenance activities and repairs. He was also required to observe and promote workplace safety and environmental practices as well as comply with all OHSA, state and local safety and regulatory requirements relating to maintenance functions and activities. Furthermore, Claimant had to possess the "ability to read and interpret technical manuals and mechanical and electrical documents and specifications."

2. In early September 2017 Claimant also assumed night laundry duties for Employer. He was the only employee who worked the night laundry position. Claimant worked two days per week performing maintenance duties and two nights per week completing night laundry duties.

3. Claimant explained that on October 14, 2017 he was working the night laundry shift. He started a load of laundry in Employer's commercial washing machine at about 3:50 a.m. Claimant then folded towels in the backroom area. He remarked that, after the washing machine had been running for approximately 30 minutes, he heard a "thumping sound" coming from the machine. He stopped folding towels to determine the origin of the sound.

4. Peering through a small glass window in the front of the washing machine, Claimant believed he observed a partially full Coca-Cola bottle spinning inside the machine. Claimant was concerned that the soda bottle might explode and damage the sheets that he was washing. Although the machine was spinning at a high rate of speed, Claimant opened the washing machine door.

5. Claimant reached inside the machine basket with his right arm while it was still spinning at a high rate of speed. However, Claimant's right arm became wrapped in a sheet and he "flipped up like a cartwheel" and landed with his back towards the washing

machine. Although Claimant initially believed he had broken his arm, his right arm was instead severed at the elbow. Claimant subsequently called 9-1-1 for medical assistance.

6. Sergeant Justin Baumgartner arrived on the scene in approximately 1-2 minutes. He applied a tourniquet to Claimant's right arm to diminish blood loss. The Denver Fire Department arrived approximately five to ten minutes later. Firefighters found Claimant's severed right arm in the washing machine and gave it to Denver Health. No other foreign objects were found in the washing machine.

7. Claimant was subsequently transported to Denver Health for medical treatment. He was diagnosed with a total amputation of the right mid-forearm and partial amputation of the proximal elbow.

8. Employer's District Manager Amar Patel testified at the hearing in this matter. He explained that the washing machine that Claimant operated on October 14, 2017 was "a Unimark Commercial Industrial style washer." Mr. Patel noted that "it's a 65-pound washing unit…It goes about 550 rpm's…It's a pretty big, pretty powerful unit." He noted that the machine proceeded through various cycles in completing a load of laundry. They included a soak cycle, multiple spin cycles, a rinse cycle and the final spin cycle. While on spin cycle, the machine's basket runs about 550 rpm's or 75 miles per hour.

9. Mr. Patel explained that Claimant received the proper training, documentation and guidance to properly operate the washing machine. He remarked that Employer provided employees with safety training. The training consisted of "employees being shown how to visually operate the machine, how to turn the machine on, how to turn the machine off…Certain safety features…How to pull laundry out of the washing machine…How to put it into the dryer." Mr. Patel emphasized that a district manager would not allow anyone to operate the washing machine without proper training.

10. Mr. Patel commented that the washing machine could only be stopped mid-cycle by pushing the "stop" button on the machine or moving the emergency switch to "off" on the breaker box. Once the stop button was pressed, approximately two minutes elapsed before the spin cycle would come to a complete stop. Opening the washing machine door before the machine came to a complete stop constituted a violation of safety protocol.

11. A poster on the washing machine provided the following notice: "warning, machine may be hot and cause burns, attempt no entry until basket has stopped, serious injury may result." The warning sign is located directly above the front door of the washing machine. The poster is not obscured in any way. Mr. Patel emphasized that the warning sign was enforced to ensure that employees were not opening the door while the basket was spinning.

12. A circuit breaker that controlled power to the washing machine was located on the wall to the left of the machine. The circuit breaker could be turned "on" or "off" by the flip of a switch. Once the circuit breaker was switched "off," power to the machine immediately ceased.

13. Although Claimant testified that he did not receive any training regarding the operation of Employer's washing machines, he acknowledged that he "had someone to kind of show me the door lock mechanisms, how to program and open doors." He also received training for the night laundry position from Sandy Smith that included correctly folding linens and sheets.

14. Claimant explained that he did not have the time to "unfold and inspect every sheet" before placing them in the washing machine. Housekeeper Tiffany Springer testified that she would remove sheets from beds in guest rooms, roll them into a ball and throw them into a laundry bag. She remarked that foreign objects, including small liquor bottles and utensils, were thus often inadvertently placed in the washing machine.

15. Claimant remarked that he believed it was an emergency to pull the Coke bottle out of the washing machine but did not utilize the nearby emergency switch to cut power to the device. He specified that he had reached his arm into the washing machine while it was still spinning on numerous previous occasions.

16. Mr. Patel noted that the proper protocol to follow if an employee suspects a foreign object is inside the washing machine included the following: (1) pressing the stop button; (2) waiting for the cycle to stop; (3) pressing the door unlock button; and (4) removing the foreign object from the washer. Mr. Patel testified further that it was never justifiable to pull open the door without going through the proper protocol.

17. Claimant acknowledged that there was a warning sign directly above the washing machine. He also recognized that placing his arm into the spinning basket of the machine constituted a dangerous situation. Claimant agreed that the warning sign constituted a safety rule and by reaching his arm into the machine he intentionally disregarded a safety rule. He summarized that he "went against the posted safety code" by inserting his arm into the washing machine while it was on spin cycle.

18. Claimant explained that he has an extensive history of illicit drug use. He commented that he began using heroin daily approximately four to five years ago as a substitute for prescription pain medications. Claimant also receives treatment and counseling from a local methadone clinic called Behavioral Health Group. Methadone acts as a replacement for heroin. It is designed to allow Claimant to function through an entire day without using heroin or feeling the effects from heroin withdrawal. However, Claimant noted that by midnight the effects of the methadone would wear off. Once this occurred, Claimant would experience opiate withdrawal symptoms including uncontrollable sneezing, diarrhea, vomiting and shaky hands. To avoid experiencing withdrawal symptoms while at work, Claimant used heroin during his night laundry shifts. He could thus remain functional until his morning visit with the Behavioral Health Group.

19. Claimant remarked that he used heroin at about 12:00 a.m. on October 14, 2017. He noted that he used only a small amount of heroin or about 1/10 of a gram. Heroin that belonged to Claimant and found at the scene of the accident weighed 2.7 grams.

20. When Claimant arrived at Denver Health at approximately 4:45 a.m. physicians took a blood sample. The Colorado State University Analytic Toxicology Laboratory, through a facility called Chematox, conducted laboratory testing. The qualitative and quantitative findings from the Colorado State University analysis were positive for methadone, morphine, codeine, EDDP and amitriptyline.

21. Dr. Dooley was the laboratory physician at the Colorado State University Analytic Toxicology Laboratory noted in the Chematox record. He determined that "the substances that were detected, the quantity that was detected from the blood draw indicate that whether it (the heroin) was used 24 hours earlier or four hours earlier or just before the injury, that under any of these conditions, [Claimant] was absolutely not normal… and he would have been adversely affected by the use of heroin."

22. On May 11, 2018 the parties conducted the post-hearing evidentiary deposition of Kathey Verdeal, Ph.D. Dr. Verdeal testified that heroin could have the following effects on a person's behavior: impulsivity, clouding of consciousness, disturbed cognitive effects, sedation, drowsiness, blurred vision, altered perception, illusions and auditory and visual hallucinations. She remarked that individuals who are high on heroin have a disregard for their own safety. She concluded that to a reasonable degree of forensic toxicology Claimant's October 14, 2017 injury was the result of drug usage.

23. Respondents have proven that it is more probably true than not that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on October 14, 2017 and his non-medical benefits should thus be reduced by 50%. Initially, Claimant explained that while working the night laundry shift for Employer he reached inside a commercial machine basket while it was still spinning at a high rate of speed. However, Claimant's right arm became wrapped in a sheet and was severed at the elbow.

24. The record establishes that Claimant received basic training on compliance with safety rules and how to use the washing machine through employee handbooks, job analysis forms and job descriptions. Training also occurred through physical demonstrations from fellow employees or managers. Moreover, the record reveals the danger of the washing machine while in the spin cycle because it rotated at about 550 rpm or 75 miles per hour. Furthermore, the washing machine had a written warning notice in unobstructed, plain view on the front that instructed against attempting to open the machine while the basket was still moving because serious injury could result. Claimant was also aware of a circuit breaker to the left of the machine. The circuit breaker could be turned on or off by the flip of a switch and cause immediate termination of power to the machine.

25. Claimant also acknowledged that placing his arm into the spinning basket of the machine constituted a dangerous situation. He agreed that the warning sign constituted a safety rule and by placing his arm into the machine he intentionally violated a safety rule. Claimant summarized that he "went against the posted safety code" by inserting his arm into the washing machine while it was on spin cycle. Claimant's action of inserting his right arm into a commercial washing machine during the spin cycle ignored the obviousness of the risk. His conduct lacked a plausible purpose because his action

in ostensibly removing a Coca-Cola bottle from the washing machine while the basket was spinning was an attempt to speed the completion of his job duties. Claimant also disregarded multiple safety warnings and violated protocol for removing foreign objects. His activities demonstrate that he deliberately violated Employer's safety rule regarding operation of the washing machine. Accordingly, Claimant's actions constituted a willful failure to obey a reasonable safety rule adopted by Employer in violation of §8-42-112(1)(b) C.R.S. and warrant the reduction of his non-medical benefits by fifty percent.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including "evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct." *Id.*

5. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez,* W.C. No. 4-561-352 (ICAP, Apr. 29, 2004). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

6. Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAP, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, § 35.04.

7. As found, Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on October 14, 2017 and his non-medical benefits should thus be reduced by 50%. Initially, Claimant explained that while working the night laundry shift for Employer he reached inside a commercial machine basket while it was still spinning at a high rate of speed. However, Claimant's right arm became wrapped in a sheet and was severed at the elbow.

8. As found, the record establishes that Claimant received basic training on compliance with safety rules and how to use the washing machine through employee handbooks, job analysis forms and job descriptions. Training also occurred through physical demonstrations from fellow employees or managers. Moreover, the record reveals the danger of the washing machine while in the spin cycle because it rotated at about 550 rpm or 75 miles per hour. Furthermore, the washing machine had a written warning notice in unobstructed, plain view on the front that instructed against attempting to open the machine while the basket was still moving because serious injury could result. Claimant was also aware of a circuit breaker to the left of the machine. The circuit breaker could be turned on or off by the flip of a switch and cause immediate termination of power to the machine.

9. As found, Claimant also acknowledged that placing his arm into the spinning basket of the machine constituted a dangerous situation. He agreed that the warning sign constituted a safety rule and by placing his arm into the machine he intentionally violated a safety rule. Claimant summarized that he "went against the posted safety code" by inserting his arm into the washing machine while it was on spin cycle. Claimant's action of inserting his right arm into a commercial washing machine during the spin cycle ignored the obviousness of the risk. His conduct lacked a plausible purpose because his action in ostensibly removing a Coca-Cola bottle from the washing machine while the basket was spinning was an attempt to speed the completion of his job duties. Claimant also disregarded multiple safety warnings and violated protocol for removing foreign objects. His activities demonstrate that he deliberately violated Employer's safety rule regarding operation of the washing machine. Accordingly, Claimant's actions constituted

a willful failure to obey a reasonable safety rule adopted by Employer in violation of §8-42-112(1)(b) C.R.S. and warrant the reduction of his non-medical benefits by fifty percent.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents may reduce Claimant's non-medical benefits by fifty percent for his violation of a safety rule pursuant to §8-42-112(1)(b), C.R.S. on October 14, 2017.

2. Because Respondents have established that Claimant committed a safety rule violation pursuant to §8-42-112(1)(b), C.R.S., it is unnecessary to address whether Claimant's injury resulted from the use of a controlled substance in violation of §8-42-112.5(1) C.R.S. on October 14, 2017.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 28, 2018.

DIGITAL SIGNATURE.
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on October 14, 2017 and his non-medical benefits should thus be reduced by fifty percent.

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1. On March 1, 2016 Claimant was hired by Employer as a maintenance worker at a hotel. Claimant's job duties involved performing routine maintenance activities and repairs. He was also required to observe and promote workplace safety and environmental practices as well as comply with all OHSA, state and local safety and regulatory requirements relating to maintenance functions and activities. Furthermore, Claimant had to possess the "ability to read and interpret technical manuals and mechanical and electrical documents and specifications."

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22. On May 11, 2018 the parties conducted the post-hearing evidentiary deposition of Kathey Verdeal, Ph.D. Dr. Verdeal testified that heroin could have the following effects on a person's behavior: impulsivity, clouding of consciousness, disturbed cognitive effects, sedation, drowsiness, blurred vision, altered perception, illusions and auditory and visual hallucinations. She remarked that individuals who are high on heroin have a disregard for their own safety. She concluded that to a reasonable degree of forensic toxicology Claimant's October 14, 2017 injury was the result of drug usage.

23. Respondents have proven that it is more probably true than not that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on October 14, 2017 and his non-medical benefits should thus be reduced by 50%. Initially, Claimant explained that while working the night laundry shift for Employer he reached inside a commercial machine basket while it was still spinning at a high rate of speed. However, Claimant's right arm became wrapped in a sheet and was severed at the elbow.

24. The record establishes that Claimant received basic training on compliance with safety rules and how to use the washing machine through employee handbooks, job analysis forms and job descriptions. Training also occurred through physical demonstrations from fellow employees or managers. Moreover, the record reveals the danger of the washing machine while in the spin cycle because it rotated at about 550 rpm or 75 miles per hour. Furthermore, the washing machine had a written warning notice in unobstructed, plain view on the front that instructed against attempting to open the machine while the basket was still moving because serious injury could result. Claimant was also aware of a circuit breaker to the left of the machine. The circuit breaker could be turned on or off by the flip of a switch and cause immediate termination of power to the machine.

25. Claimant also acknowledged that placing his arm into the spinning basket of the machine constituted a dangerous situation. He agreed that the warning sign constituted a safety rule and by placing his arm into the machine he intentionally violated a safety rule. Claimant summarized that he "went against the posted safety code" by inserting his arm into the washing machine while it was on spin cycle. Claimant's action of inserting his right arm into a commercial washing machine during the spin cycle ignored the obviousness of the risk. His conduct lacked a plausible purpose because his action

in ostensibly removing a Coca-Cola bottle from the washing machine while the basket was spinning was an attempt to speed the completion of his job duties. Claimant also disregarded multiple safety warnings and violated protocol for removing foreign objects. His activities demonstrate that he deliberately violated Employer's safety rule regarding operation of the washing machine. Accordingly, Claimant's actions constituted a willful failure to obey a reasonable safety rule adopted by Employer in violation of §8-42-112(1)(b) C.R.S. and warrant the reduction of his non-medical benefits by fifty percent.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including "evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct." *Id.*

5. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez,* W.C. No. 4-561-352 (ICAP, Apr. 29, 2004). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

6. Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAP, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, § 35.04.

7. As found, Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on October 14, 2017 and his non-medical benefits should thus be reduced by 50%. Initially, Claimant explained that while working the night laundry shift for Employer he reached inside a commercial machine basket while it was still spinning at a high rate of speed. However, Claimant's right arm became wrapped in a sheet and was severed at the elbow.

8. As found, the record establishes that Claimant received basic training on compliance with safety rules and how to use the washing machine through employee handbooks, job analysis forms and job descriptions. Training also occurred through physical demonstrations from fellow employees or managers. Moreover, the record reveals the danger of the washing machine while in the spin cycle because it rotated at about 550 rpm or 75 miles per hour. Furthermore, the washing machine had a written warning notice in unobstructed, plain view on the front that instructed against attempting to open the machine while the basket was still moving because serious injury could result. Claimant was also aware of a circuit breaker to the left of the machine. The circuit breaker could be turned on or off by the flip of a switch and cause immediate termination of power to the machine.

9. As found, Claimant also acknowledged that placing his arm into the spinning basket of the machine constituted a dangerous situation. He agreed that the warning sign constituted a safety rule and by placing his arm into the machine he intentionally violated a safety rule. Claimant summarized that he "went against the posted safety code" by inserting his arm into the washing machine while it was on spin cycle. Claimant's action of inserting his right arm into a commercial washing machine during the spin cycle ignored the obviousness of the risk. His conduct lacked a plausible purpose because his action in ostensibly removing a Coca-Cola bottle from the washing machine while the basket was spinning was an attempt to speed the completion of his job duties. Claimant also disregarded multiple safety warnings and violated protocol for removing foreign objects. His activities demonstrate that he deliberately violated Employer's safety rule regarding operation of the washing machine. Accordingly, Claimant's actions constituted

a willful failure to obey a reasonable safety rule adopted by Employer in violation of §8-42-112(1)(b) C.R.S. and warrant the reduction of his non-medical benefits by fifty percent.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents may reduce Claimant's non-medical benefits by fifty percent for his violation of a safety rule pursuant to §8-42-112(1)(b), C.R.S. on October 14, 2017.

2. Because Respondents have established that Claimant committed a safety rule violation pursuant to §8-42-112(1)(b), C.R.S., it is unnecessary to address whether Claimant's injury resulted from the use of a controlled substance in violation of §8-42-112.5(1) C.R.S. on October 14, 2017.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 28, 2018.

DIGITAL SIGNATURE.
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that medical treatment recommended by Dr. Brittany Matsumura and Dr. Kenneth Lewis constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted April 19, 2017 work injury.

FINDINGS OF FACT

1. The claimant was employed with the employer as a paramedic and clinic nurse. The claimant suffered an injury at work on April 19, 2017. The injury occurred when the claimant was seated at her desk, and stood and turned to walk away from the desk. While the claimant was turning, her right foot became caught in a floor mat. The claimant's right foot remained facing forward, while the rest of the claimant's body turned to the right. The claimant then turned quickly to the left and attempted to catch herself on the desk with her arms. While the claimant's body was twisting in this manner she heard or felt a pop in her right knee.

2. The claimant testified that immediately following the incident her right knee became quite swollen. The claimant self-treated her knee with ice, elevation, and ibuprofen. The claimant also testified that the following morning she had pain in her right knee, low back, right hip, and right groin. These symptoms continued to worsen over the course of that day.

3. Due to this worsening of the claimant's symptoms, on April 21, 2017, she sought medical treatment at the emergency room at the direction of the employer. The claimant described the twisting incident to emergency room staff as described above. The claimant complained of pain and swelling in her right knee with clicking and pain into her right calf. At that time, the claimant did not report pain in her low back, hip, or groin. The claimant credibly testified that she did not tell the emergency room staff about these body parts because she did not feel those symptoms warranted emergency treatment.

4. The claimant's authorized treating physician (ATP) for this claim is Dr. Brittany Matsumura. Claimant was first seen by Dr. Matsumura on April 27, 2017. At that time, the claimant reported pain in her right knee, with some tingling and numbness in her right leg. In addition, the claimant reported soreness in her left shoulder, her low back, right hip, groin, and gluteals. In her physical exam of the claimant's lumbar spine, Dr. Matsumura noted tenderness of the gluteus medius, the inguinal ligament, and the piriformis. Dr. Matsumura opined that the claimant's back pain, hip pain, and groin pain were likely secondary to muscle strain from the act of attempting to catch herself on April 19, 2017.

5. Thereafter, the claimant continued to treat with Dr. Matsumura. The claimant testified that she had ongoing pain in her low back, right hip, and right groin, but that the focus of treatment was on her right knee because that was the area of greatest pain and swelling. Throughout the claimant's initial treatment, Dr. Matsumura opined that the claimant's pain in her low back, right hip, and right groin was likely due to the change in the claimant's gait caused by her right knee pain.

6. Subsequently, the claimant was referred to Dr. John Knutson for surgical consultation regarding her right knee. On October 27, 2016, Dr. Knutson performed an arthroscopic partial debridement and partial synovectomy of the claimant's right knee. The claimant continued to experience pain and instability in her right knee and on July 11, 2017, Dr. Knutson performed a right total knee replacement.

7. Following the total knee replacement, the claimant returned to Dr. Matsumura on August 9, 2017. At that time the claimant complained of severe right low back, gluteal, groin, and hip pain. Dr. Matsumura opined that the claimant's low back and gluteal pain was likely either low back etiology, sacroiliac (SI) joint, or sciatic nerve and ordered physical therapy and a magnetic resonance image (MRI) of the claimant's lumbar spine.

8. On October 13, 2017, the MRI of the claimant's lumbar spine showed moderate canal stenosis at the L4-L5 level, possible slight impingement of the right L4 nerve root, and a minimal disc bulge at the L1-L2 level without significant impingement on the neural elements.

9. On October 18, 2017, the claimant returned to Dr. Matsumura and reported continued pain in her low back, right hip, and right groin. Based upon the claimant's symptoms and the MRI results, Dr. Matsumura diagnosed lumbar radiculopathy and referred the claimant to Dr. Kenneth Lewis for consultation and treatment of her low back pain.

10. On November 7, 2017, the claimant was first seen at Dr. Lewis' practice by Chelsea Olson FNP-C. At that time, the claimant described her low back pain as mostly on her right, but at times traveling to the left side as well. The claimant also reported to Ms. Olson that the pain traveled down her right buttock and down the back of her right leg to her knee. The pain also traveled down the lateral side of the claimant's right leg to her knee, with numbness and tingling in her right thigh. On examination Ms. Olsen noted midline pain from L2 to L5 with moderate tenderness over the zygapophysial/facet joints, and tenderness over the right SI joint.

11. Ms. Olson listed possible diagnoses as nerve root impingement, internal disc disruption, SI joint dysfunction, and facet arthropathy. At that time, Ms. Olsen recommended that the claimant undergo an epidural steroid injection (ESI) at the L4-5 level, and a selective nerve root block at the right L4 level.

12. On January 2, 2018, Dr. Lewis administered a right L4-L5 transforaminal epidural steroid injection (TFESI). In the medical report of that same date, Dr. Lewis noted that the claimant has lumbrosacral degenerative arthritis with right L4 radiculopathy symptomology, with possible right L4 nerve impingement.

13. On January 30, 2018, the claimant returned to Ms. Olson and reported that she had 80% relief from the injection for approximately three weeks. However, the claimant was beginning to have pain in her right groin that she described as achy spasmodic, and sharp. At that time, Ms. Olson recommend that the claimant undergo a repeat right L4-L5 TFESI. Thereafter, the claimant was seen by Dr. Lewis. Dr. Lewis agreed that further injections would be helpful to the claimant, but recommended that the claimant undergo a right L2-L3 TFESI. The respondents have denied the recommended injections.

14. On January 24, 2018, the claimant was again seen by Dr. Matsumura. On that date the claimant reported continuing pain in her right groin with a pain of 5 out of 10. At that time, Dr. Matsumura noted that the claimant's symptoms had persisted for several months and then exacerbated. As a result, Dr. Matsumura recommended that the claimant undergo x-rays of her right hip and pelvis. The respondents have denied the recommended x-rays.

15. At the request of the respondents, the claimant attended an independent medical examination (IME) with Dr. Frederick Scherr on February 9, 2018. In connection with the IME, Dr. Scherr reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Scherr opined that the incident on April 19, 2016 did not result in an injury to the claimant's low back, hip, and groin. Dr. Scherr also noted that if there was any injury to the claimant's low back it was "a very mild strain" to the lumbar spine that resolved within a month or two of the incident.

16. With regard to the injections recommended by Dr. Lewis and the x-rays recommended by Dr. Matsumura, Dr. Scherr opined that the recommended treatment is reasonable to treat the claimant's underlying degenerative lumbar spine condition. However, Dr. Scherr again reiterated his opinion that the claimant's low back symptoms are not related to the April 19, 2016 work injury. Dr. Scherr's testimony at hearing was consistent with his IME report.

17. Dr. Lewis testified at hearing that the claimant has radiculopathy at the L4 level. Therefore, it is Dr. Lewis' opinion that the recommended repeat TFESI at L4-L5 would be beneficial to the claimant. In support of this opinion, Dr. Lewis noted the dermatomal pattern of the claimant's pain symptoms and the success of the previous injection at L4-L5.

18. Dr. Matsumura testified by deposition in this matter and confirmed her opinion that initially she believed that the claimant's right knee injury and related altered gait was the cause of the claimant's low back, hip, and groin pain. Dr. Matsumura also testified that following the claimant's total knee replacement, she began to suspect that

the claimant's issues were in fact a lumbar spine issue and not caused by the altered gait. This is why Dr. Matsumura recommended physical therapy treatment for the claimant's low back and made the referral to Dr. Lewis. Dr. Matsumura testified that the recommended x-rays will assist in determining if there are any other pain generators that require treatment. Dr. Matsumura also testified that an individual with previously asymptomatic degenerative disc disease could become symptomatic as a result of the claimant's mechanism of injury and the resulting altered gait.

19. The claimant testified that she continues to experience low back pain that begins on the right side, wraps around her right hip and into her right groin. This pain also travels down the outside of the claimant's right thigh into her knee. The claimant describes her current pain symptoms as deep and sharp aches that wax and wane. In addition the claimant has numbness and pain from the top of the thigh down into her right buttock and into the top of her right knee.

20. The claimant testified that prior to the April 19, 2017 work injury she did not have back, hip, or groin pain. The claimant believes that these symptoms were caused by the April 1, 2017 work injury. In addition, the claimant testified that following the TFESI in January 2018, she experienced "huge improvements" in her function. Specifically, the claimant was able to stand and walk longer, and complete housework. The claimant's spouse also testified at hearing. His testimony was consistent with the claimant's testimony.

21. The ALJ credits the medical records, the claimant's testimony, and the opinions of Drs. Lewis and Matsumura over the conflicting opinion of Dr. Scherr and finds that the claimant has demonstrated that it is more likely than not that her low back, right hip, and right groin symptoms are related to the admitted April 19, 2017 work injury. The claimant experienced these symptoms following the injury and reported them to her providers throughout this claim. It was reasonable for the medical treatment to focus on the claimant's right knee as it was causing her the greatest level of pain. It was also reasonable for Dr. Matsumura to opine that the claimant's altered gait was the cause of the pain her low back, right hip, and right groin. Once the claimant underwent the total knee replacement, and her low back, right hip, and right groin symptoms persisted, it was further reasonable to turn to other treatment modalities, such as TFESIs, to address these symptoms.

22. The ALJ credits the medical records, the claimant's testimony, and the opinion of Dr. Lewis over the conflicting opinion of Dr. Scherr. The ALJ finds that the claimant has demonstrated that it is more likely than not that the repeat L4-L5 TFESI recommended by Dr. Lewis constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the April 19, 2017 work injury.

23. The ALJ credits the medical records, the claimant's testimony, and the opinion of Dr. Matsumura over the conflicting opinion of Dr. Scherr. The ALJ finds that the claimant has demonstrated that it is more likely than not that the x-rays recommended by Dr. Matsumura constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the April 19, 2017 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, the claimant has demonstrated by a preponderance of the evidence that her low back, right hip, and right groin symptoms are related to the admitted April 19, 2017 work injury. As found, the medical records, the claimant's testimony, and the opinions of Drs. Lewis and Matsumura are credible and persuasive.

5. As found, the claimant has demonstrated by a preponderance of the evidence that the repeat L4-L5 TFESI recommended by Dr. Lewis constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records, the claimant's testimony, and the opinion of Dr. Lewis are credible and persuasive.

6. As found, he claimant has demonstrated by a preponderance of the evidence that the x-rays recommended by Dr. Matsumura constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records, the claimant's testimony, and the opinion of Dr. Matsumura are credible and persuasive.

ORDER

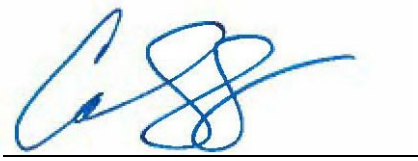
It is therefore ordered that:

1. The respondents shall pay for the recommended repeat L4-L5 TFESI, pursuant to the Colorado Medical Fee Schedule.

2. The respondents shall pay for the recommended x-rays of the claimant's right hip and pelvis, pursuant to the Colorado Medical Fee Schedule.

3. All matters not determined herein are reserved for future determination.

Dated: June 29, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved, by a preponderance of credible evidence, that she is entitled to a disfigurement award;

2. Whether Claimant proved, by a preponderance of credible evidence, that she is entitled to an award of permanent total disability benefits (PTD); and

3. Whether Respondents are entitled to an offset based on Claimant's receipt of social security retirement benefits.

FINDINGS OF FACT

1. Claimant is 70 years old female and resides in Ault, Colorado. The town is approximately 17 miles north of Greeley and the drive between those towns takes Claimant approximately 25 minutes to accomplish.

2. Claimant is left handed and a high school graduate. She provided transportation and administrative services for Employer between June 2007 and February 2017. The Employer's business operations were located in Fort Collins, Colorado, a trip of approximately 25 minutes from Claimant's home.

3. Prior to driving a shuttle for Employer, Claimant worked as a bus driver from 1995 or 1996 through 2006. Before becoming a bus driver, Claimant held a variety of positions in assembly and security with IBM in San Jose, California for approximately 16 years.

4. Claimant sustained an injury on November 28, 2014 while operating as a shuttle driver for Employer. She fell while inspecting her vehicle, injuring her left hand, left wrist, and left knee. Her primary treating physicians were Drs. Rosalinda Pineiro at Concentra, David Conyers, and Dirk Dolbeare.

5. After her injury, Claimant was able to return to driving for Employer with her duties modified so she would not have to lift heavy objects. Otherwise, she performed office duties as a dispatcher, a position which required occasional standing or walking and sitting for at least eighty percent of the time. Claimant was terminated during February 2017 when Employer sold its Fort Collins business operations to another company.

6. At hearing, Claimant reported left knee symptoms consisting of pain, instability, and swelling after thirty minutes to two hours. She complained of pain and problems grasping with the left hand.

7. Claimant has a 12 year old grandson who requires speech and OT therapy once a week in Loveland. Claimant drives her grandson to those appointments,

a journey of approximately 45 minutes in duration. She spends a great deal of her time helping her grandson doing his school work, easing his frustration and coaching him to improve his focus.

8. Claimant was treated at Concentra by several physicians, primarily Dr. Pineiro, a board certified family medicine specialist and level II accredited physician.. As of Claimant's March 3, 2015, visit with Dr. Shimon Blau, Claimant reported intermittent left wrist pain. On examination, her upper and lower extremities were observed as being normal in sensation, and symmetrical. She exhibited normal gait.

9. Claimant presented to Concentra on December 12, 2016. With respect to her left lower extremity, she had a pain level of 1/10 without decreased range of motion, no tenderness, no weakness and no decreased weight bearing. She was released for modified duty with restrictions.

10. Claimant returned to Dr. Pineiro on January 6, 2017. Claimant was released to modified duty of no more than five hours per day, three days per week, a restriction imposed by Dr. Keith Meier on February 3, 2017.

11. Claimant visited Dr. Pineiro on March 8, 2017. Dr. Pineiro found a left wrist and left knee which were normal in appearance with some limited range of motion. She continued the modified duty restrictions of sitting at least 75% of the time, push/pull no more than three pounds, no squatting, no kneeling, and limiting work activities to five hours per day, three days per week.

12. Dr. Pineiro saw Claimant on March 31, 2017. On page 3 of her transcription from that date, Dr. Pineiro identified permanent restrictions as three pounds lifting and push/pull, sitting as needed, no kneeling or squatting, and limiting activities to five hours per day, three days per week. In the final page of her report and in the M-164 Physician's Report of Worker's Compensation Injury, she listed the permanent restrictions as maximum lifting/pushing/pulling of between three and five pounds with the left hand, no kneeling or squatting, and sitting 75% of the time. There was no reference to a durational restriction on Claimant's activities. Dr. Pineiro placed Claimant at maximum medical improvement (MMI) on March 31, 2017. Dr. Pineiro opined that Claimant had sustained permanent partial disability of 22% of the upper extremity and 21% of the lower extremity.

13. Dr. Pineiro testified via deposition on March 16, 2018. She clarified her opinions as to Claimant's restrictions. Specifically, she said that the limitation of Claimant to work no more than five hours per day, three days per week was a temporary restriction and not a permanent one. She also stated that she had not reviewed a February 27, 2017, report from Dr. Conyers when she authored her final report. After considering that report, Dr. Pineiro testified that she would not have imposed any restrictions on Claimant's lifting or pushing/pulling. Ultimately, Claimant's only permanent restrictions were no kneeling, no squatting, and that she should try sitting 75% of the time.

14. Dr. David Conyers began treating Claimant's left upper extremity on May 1, 2015, on referral from Dr. Pineiro. Dr. Conyers is an orthopedic specialist who specializes in upper extremity complaints. He performed a left wrist arthroscopy with triangular cartilage and dorsal capsular debridement and a small finger carpometacarpal arthrodesis on September 16, 2015, and a fluoroscopic left localization with excision on January 5, 2016. He performed a third procedure on December 20, 2016, an "extensor digit minimi, abductor digit minimi tenosis, scar revision, and lysis of the dorsal sensory branch of the ulnar nerve". Dr. Conyers last saw Claimant on February 27, 2017. At that time, he noted full range of motion, improved sensation and a self-report as "doing very well." Dr. Conyers discharged her from care and placed no specific restrictions on her activities.

15. Dr. Dolbeare performed a left arthroscopic partial lateral menisectomy on September 23, 2016. He last examined Claimant on March 9, 2017. At that time, Claimant reported occasional stiffness which Dr. Dolbeare felt was more related to arthritic pain under the knee cap. Claimant reported no locking, catching or sense of instability. Dr. Dolbeare observed full extension.

16. Respondents filed a final admission of liability consistent with Dr. Pineiro's opinion. Claimant objected to the final admission and requested a Division of Workers' Compensation sponsored independent medical examination (DIME). A DIME was performed by Dr. Gary Zuehlsdorff on August 31, 2017. Dr. Zuehlsdorff agreed with Dr. Pineiro's opinion as to MMI and work restrictions, but disagreed with the impairment ratings. Dr. Zuehlsdorff did not comment on the February 27, 2017, report of Dr. Conyers and it is not known whether he reviewed it.

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35. Claimant has a visible disfigurement to the body consisting of a left and/wrist scar. Claimant's scar is one and ½ inches long causing a left hand indentation on the outside of the hand.

CONCLUSIONS OF LAW

General Principles

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Disfigurement

Section 8-42-108 (1), C.R.S. states that if a claimant "is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, in addition to all other compensation benefits provided in this article and except as provided in subsection (2) of this section, the director may allow compensation not to exceed four thousand dollars to the employee who suffers such disfigurement."

Claimant had several surgeries to her left upper extremity and left knee during the course of her claim. While Claimant had surgery on her knee, no permanent scars were observable during the viewing on February 16th. The upper extremity surgeries resulted in permanent scars to a part of the body normally exposed to public view and, consequently, Claimant is entitled to a disfigurement award in the amount of $2,000.00.

Permanent Total Disability

Generally, Claimant has the burden of proving her entitlement to benefits by a preponderance of credible evidence. Section 8-43-201, C.R.S.*; City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). Specifically, the burden of proof rests with a claimant to prove an inability to earn any wages in the same or other employment by a preponderance of credible evidence. Section 8-40-201(16.5)(a), C.R.S.

An ALJ must look to whether a claimant remains capable of earning any wages within a commutable labor market*. Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). This determination involves consideration of both medical conditions and human factors. *Id.; Best-Way Concrete Co. v. Baumgartner,* 908 P.2d. 1194 (Colo. App. 1995).

Claimant sustained an injury to her left wrist and was found to have sustained permanent medical impairment to which Respondents have already admitted. Dr. David Conyers, an orthopedic specialist who treated her for two years and who specializes in upper extremity complaints placed no specific restrictions on her upper extremity activities in his last report of February 27, 2017. Dr. Pineiro initially imposed lifting and push/pull weight restrictions on Claimant. When she imposed those restrictions, she was unaware of Dr. Conyers' closing report. When presented with that report in deposition, Dr. Pineiro conceded that she would not impose upper extremity restrictions on Claimant. Dr. Dolbeare did not address upper extremity restrictions. Dr. Zuehlsdorff did not independently opine as to the presence or extent of upper extremity restrictions. The most reasonable interpretation of his report is that he deferred to Dr. Pineiro and would likely defer to her on any clarification of her prior statement of upper extremity limitations.

Claimant testified that she experienced pain and a loss of grip strength with prolonged upper extremity use. That is in conflict with the opinions of Drs. Conyers and

Pineiro. In resolving that conflict, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Here, the medical providers have no demonstrable motive to minimize Claimant's restrictions. Claimant does have an interest, pursuit of her claim for permanent total disability benefits. Moreover, Claimant's complaints of pain with upper extremity use are inconsistent with and effectively undermined by the fact that Claimant doesn't use prescription pain medication. A preponderance of credible evidence supports the proposition that Claimant has no identifiable upper extremity restrictions.

Claimant relied, in part, on a durational restriction in that a portion of Dr. Pineiro's final report stated that Claimant should not work more than five hours per day and not more than three days per week. This conflicted with the conclusion of Dr. Pineiro's report and a separate form in which the durational restrictions were omitted. Based on that conflict, a deposition of Dr. Pineiro was taken and submitted. In her deposition, Dr. Pineiro did not impose any durational restrictions on Claimant's work activities. Drs. Conyers, Dolbeare and Zuehlsdorff did not impose any durational restrictions on Claimant. Claimant did not state she could not work more than three days per week for five hours per day. A preponderance of credible evidence supports the proposition that Claimant has no durational restrictions.

A preponderance of credible evidence does, however, support the proposition that Claimant is restricted from any kneeling or squatting and that she should sit at least 75% of the work day. Claimant has not shown, by a preponderance of credible evidence, that the lower extremity restrictions, by themselves, render her permanently and totally disabled. Accordingly, she must prove the parameters of a commutable labor market and that the medical restrictions combine with human factors preclude her from any wages within that labor market.

Claimant and Mr. Wilson did not identify a commutable labor market. Dr. Zierk identified a triangular area of Ault-Greeley and Fort Collins as such a market in his report. Claimant, by her testimony, testified as to her driving tolerances and the duration of commutes from her home in Ault to both Greeley and Fort Collins, supporting Dr. Zierk's formulation. On cross examination, Mr. Wilson agreed with an Ault-Greeley-Fort Collins labor market. That area is an appropriate labor market to consider Claimant's ability to earn any wages.

Mr. Wilson considered Claimant's age to be a negative human factor as the commutable labor market encompasses at least two universities within which a large number of younger workers can be found. Dr. Zierk disagreed, noting the exceptionally low unemployment rate in the market and felt that Claimant's age would either be a neutral factor given the demand for workers or a positive factor given her reliability and

good work ethic, an analysis supported by Claimant's long tenure with her two most recent employers and positive performance appraisals.

Mr. Wilson administered a single version of the Perdue Pegboard test and concluded that Claimant would not be proficient at jobs involving upper extremity use. He did not perform validity testing and did not consider the opinion of Dr. Conyers. He administered written tests to determine Claimant's suitability for unspecified clerical positions and concluded that Claimant did not have the skills for those unspecified clerical positions. He looked at Claimant's job history and determined that Claimant's skills were outdated and that she could not find work.

In contrast, Dr. Zierk administered a number of psychosocial tests and determined that Claimant retained the capacity to dedicate herself to potential new employers, present herself as a responsible and serious job candidate, and to obtain entry level employment with the ability to grow within a job.

There is a substantial contrast between the backgrounds, methodology and ultimate opinions of Mr. Wilson and Dr. Zierk. Both have been accepted as expert witnesses and have worked in their respective fields for many years. Mr. Wilson is a vocational expert. Dr. Zierk is a vocational expert and a licensed clinical psychologist. Dr. Zierk has been retained by claimants and respondents alike. Mr. Wilson's record in this regard is unknown. Dr. Zierk quickly identified a commutable labor market. Mr. Wilson did not. Dr. Zierk identified inconsistencies within the medical statements of restrictions and between those statements and Claimant's self-reporting. Mr. Wilson had difficulty incorporating new information, Dr. Conyers' final report, when it conflicted with his preconceived opinion. In short, Dr. Zierk's methodology and opinions are more credible than those of Mr. Wilson. As Dr. Zierk's opinions as to human factors are more credible and persuasive, Claimant has failed to sustain her burden of proving, by a preponderance of credible evidence, that she is incapable of earning any wages.

Offset

At the start of the hearing on February 16th, the parties stipulated that Claimant is receiving social security retirement benefits and that her first year on entitlement amounted to $16,537.80.

Section 8-42-103(1)(c)(II) and (IV), C.R.S. addresses Respondents entitlement to an offset under certain circumstances. Here, Claimant reached sixty six years of age at the time of her injury. Based on the stipulation of the parties, a potential offset would amount to $159.02 per week. As Claimant is not permanently and totally disabled, the request for an offset is moot.

Order

It is therefore ordered that:

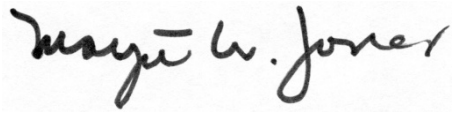
1. Respondents shall pay Claimant disfigurement benefits of $2,000.00 in a lump sum.

2. Claimant's request for permanent total disability benefits is denied and dismissed.

3. Respondents' request for an offset based upon Claimant's receipt of social security retirement benefits is denied as moot.

4. All matters not herein determined are reserved for future determination.

DATED: June 27, 2018



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved, by a preponderance of credible evidence, that she is entitled to a disfigurement award;

2. Whether Claimant proved, by a preponderance of credible evidence, that she is entitled to an award of permanent total disability benefits (PTD); and

3. Whether Respondents are entitled to an offset based on Claimant's receipt of social security retirement benefits.

FINDINGS OF FACT

1. Claimant is 70 years old female and resides in Ault, Colorado. The town is approximately 17 miles north of Greeley and the drive between those towns takes Claimant approximately 25 minutes to accomplish.

2. Claimant is left handed and a high school graduate. She provided transportation and administrative services for Employer between June 2007 and February 2017. The Employer's business operations were located in Fort Collins, Colorado, a trip of approximately 25 minutes from Claimant's home.

3. Prior to driving a shuttle for Employer, Claimant worked as a bus driver from 1995 or 1996 through 2006. Before becoming a bus driver, Claimant held a variety of positions in assembly and security with IBM in San Jose, California for approximately 16 years.

4. Claimant sustained an injury on November 28, 2014 while operating as a shuttle driver for Employer. She fell while inspecting her vehicle, injuring her left hand, left wrist, and left knee. Her primary treating physicians were Drs. Rosalinda Pineiro at Concentra, David Conyers, and Dirk Dolbeare.

5. After her injury, Claimant was able to return to driving for Employer with her duties modified so she would not have to lift heavy objects. Otherwise, she performed office duties as a dispatcher, a position which required occasional standing or walking and sitting for at least eighty percent of the time. Claimant was terminated during February 2017 when Employer sold its Fort Collins business operations to another company.

6. At hearing, Claimant reported left knee symptoms consisting of pain, instability, and swelling after thirty minutes to two hours. She complained of pain and problems grasping with the left hand.

7. Claimant has a 12 year old grandson who requires speech and OT therapy once a week in Loveland. Claimant drives her grandson to those appointments,

a journey of approximately 45 minutes in duration. She spends a great deal of her time helping her grandson doing his school work, easing his frustration and coaching him to improve his focus.

8. Claimant was treated at Concentra by several physicians, primarily Dr. Pineiro, a board certified family medicine specialist and level II accredited physician.. As of Claimant's March 3, 2015, visit with Dr. Shimon Blau, Claimant reported intermittent left wrist pain. On examination, her upper and lower extremities were observed as being normal in sensation, and symmetrical. She exhibited normal gait.

9. Claimant presented to Concentra on December 12, 2016. With respect to her left lower extremity, she had a pain level of 1/10 without decreased range of motion, no tenderness, no weakness and no decreased weight bearing. She was released for modified duty with restrictions.

10. Claimant returned to Dr. Pineiro on January 6, 2017. Claimant was released to modified duty of no more than five hours per day, three days per week, a restriction imposed by Dr. Keith Meier on February 3, 2017.

11. Claimant visited Dr. Pineiro on March 8, 2017. Dr. Pineiro found a left wrist and left knee which were normal in appearance with some limited range of motion. She continued the modified duty restrictions of sitting at least 75% of the time, push/pull no more than three pounds, no squatting, no kneeling, and limiting work activities to five hours per day, three days per week.

12. Dr. Pineiro saw Claimant on March 31, 2017. On page 3 of her transcription from that date, Dr. Pineiro identified permanent restrictions as three pounds lifting and push/pull, sitting as needed, no kneeling or squatting, and limiting activities to five hours per day, three days per week. In the final page of her report and in the M-164 Physician's Report of Worker's Compensation Injury, she listed the permanent restrictions as maximum lifting/pushing/pulling of between three and five pounds with the left hand, no kneeling or squatting, and sitting 75% of the time. There was no reference to a durational restriction on Claimant's activities. Dr. Pineiro placed Claimant at maximum medical improvement (MMI) on March 31, 2017. Dr. Pineiro opined that Claimant had sustained permanent partial disability of 22% of the upper extremity and 21% of the lower extremity.

13. Dr. Pineiro testified via deposition on March 16, 2018. She clarified her opinions as to Claimant's restrictions. Specifically, she said that the limitation of Claimant to work no more than five hours per day, three days per week was a temporary restriction and not a permanent one. She also stated that she had not reviewed a February 27, 2017, report from Dr. Conyers when she authored her final report. After considering that report, Dr. Pineiro testified that she would not have imposed any restrictions on Claimant's lifting or pushing/pulling. Ultimately, Claimant's only permanent restrictions were no kneeling, no squatting, and that she should try sitting 75% of the time.

14. Dr. David Conyers began treating Claimant's left upper extremity on May 1, 2015, on referral from Dr. Pineiro. Dr. Conyers is an orthopedic specialist who specializes in upper extremity complaints. He performed a left wrist arthroscopy with triangular cartilage and dorsal capsular debridement and a small finger carpometacarpal arthrodesis on September 16, 2015, and a fluoroscopic left localization with excision on January 5, 2016. He performed a third procedure on December 20, 2016, an "extensor digit minimi, abductor digit minimi tenosis, scar revision, and lysis of the dorsal sensory branch of the ulnar nerve". Dr. Conyers last saw Claimant on February 27, 2017. At that time, he noted full range of motion, improved sensation and a self-report as "doing very well." Dr. Conyers discharged her from care and placed no specific restrictions on her activities.

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CONCLUSIONS OF LAW

General Principles

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Disfigurement

Section 8-42-108 (1), C.R.S. states that if a claimant "is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, in addition to all other compensation benefits provided in this article and except as provided in subsection (2) of this section, the director may allow compensation not to exceed four thousand dollars to the employee who suffers such disfigurement."

Claimant had several surgeries to her left upper extremity and left knee during the course of her claim. While Claimant had surgery on her knee, no permanent scars were observable during the viewing on February 16th. The upper extremity surgeries resulted in permanent scars to a part of the body normally exposed to public view and, consequently, Claimant is entitled to a disfigurement award in the amount of $2,000.00.

Permanent Total Disability

Generally, Claimant has the burden of proving her entitlement to benefits by a preponderance of credible evidence. Section 8-43-201, C.R.S.*; City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). Specifically, the burden of proof rests with a claimant to prove an inability to earn any wages in the same or other employment by a preponderance of credible evidence. Section 8-40-201(16.5)(a), C.R.S.

An ALJ must look to whether a claimant remains capable of earning any wages within a commutable labor market*. Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). This determination involves consideration of both medical conditions and human factors. *Id.; Best-Way Concrete Co. v. Baumgartner,* 908 P.2d. 1194 (Colo. App. 1995).

Claimant sustained an injury to her left wrist and was found to have sustained permanent medical impairment to which Respondents have already admitted. Dr. David Conyers, an orthopedic specialist who treated her for two years and who specializes in upper extremity complaints placed no specific restrictions on her upper extremity activities in his last report of February 27, 2017. Dr. Pineiro initially imposed lifting and push/pull weight restrictions on Claimant. When she imposed those restrictions, she was unaware of Dr. Conyers' closing report. When presented with that report in deposition, Dr. Pineiro conceded that she would not impose upper extremity restrictions on Claimant. Dr. Dolbeare did not address upper extremity restrictions. Dr. Zuehlsdorff did not independently opine as to the presence or extent of upper extremity restrictions. The most reasonable interpretation of his report is that he deferred to Dr. Pineiro and would likely defer to her on any clarification of her prior statement of upper extremity limitations.

Claimant testified that she experienced pain and a loss of grip strength with prolonged upper extremity use. That is in conflict with the opinions of Drs. Conyers and

Pineiro. In resolving that conflict, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Here, the medical providers have no demonstrable motive to minimize Claimant's restrictions. Claimant does have an interest, pursuit of her claim for permanent total disability benefits. Moreover, Claimant's complaints of pain with upper extremity use are inconsistent with and effectively undermined by the fact that Claimant doesn't use prescription pain medication. A preponderance of credible evidence supports the proposition that Claimant has no identifiable upper extremity restrictions.

Claimant relied, in part, on a durational restriction in that a portion of Dr. Pineiro's final report stated that Claimant should not work more than five hours per day and not more than three days per week. This conflicted with the conclusion of Dr. Pineiro's report and a separate form in which the durational restrictions were omitted. Based on that conflict, a deposition of Dr. Pineiro was taken and submitted. In her deposition, Dr. Pineiro did not impose any durational restrictions on Claimant's work activities. Drs. Conyers, Dolbeare and Zuehlsdorff did not impose any durational restrictions on Claimant. Claimant did not state she could not work more than three days per week for five hours per day. A preponderance of credible evidence supports the proposition that Claimant has no durational restrictions.

A preponderance of credible evidence does, however, support the proposition that Claimant is restricted from any kneeling or squatting and that she should sit at least 75% of the work day. Claimant has not shown, by a preponderance of credible evidence, that the lower extremity restrictions, by themselves, render her permanently and totally disabled. Accordingly, she must prove the parameters of a commutable labor market and that the medical restrictions combine with human factors preclude her from any wages within that labor market.

Claimant and Mr. Wilson did not identify a commutable labor market. Dr. Zierk identified a triangular area of Ault-Greeley and Fort Collins as such a market in his report. Claimant, by her testimony, testified as to her driving tolerances and the duration of commutes from her home in Ault to both Greeley and Fort Collins, supporting Dr. Zierk's formulation. On cross examination, Mr. Wilson agreed with an Ault-Greeley-Fort Collins labor market. That area is an appropriate labor market to consider Claimant's ability to earn any wages.

Mr. Wilson considered Claimant's age to be a negative human factor as the commutable labor market encompasses at least two universities within which a large number of younger workers can be found. Dr. Zierk disagreed, noting the exceptionally low unemployment rate in the market and felt that Claimant's age would either be a neutral factor given the demand for workers or a positive factor given her reliability and

good work ethic, an analysis supported by Claimant's long tenure with her two most recent employers and positive performance appraisals.

Mr. Wilson administered a single version of the Perdue Pegboard test and concluded that Claimant would not be proficient at jobs involving upper extremity use. He did not perform validity testing and did not consider the opinion of Dr. Conyers. He administered written tests to determine Claimant's suitability for unspecified clerical positions and concluded that Claimant did not have the skills for those unspecified clerical positions. He looked at Claimant's job history and determined that Claimant's skills were outdated and that she could not find work.

In contrast, Dr. Zierk administered a number of psychosocial tests and determined that Claimant retained the capacity to dedicate herself to potential new employers, present herself as a responsible and serious job candidate, and to obtain entry level employment with the ability to grow within a job.

There is a substantial contrast between the backgrounds, methodology and ultimate opinions of Mr. Wilson and Dr. Zierk. Both have been accepted as expert witnesses and have worked in their respective fields for many years. Mr. Wilson is a vocational expert. Dr. Zierk is a vocational expert and a licensed clinical psychologist. Dr. Zierk has been retained by claimants and respondents alike. Mr. Wilson's record in this regard is unknown. Dr. Zierk quickly identified a commutable labor market. Mr. Wilson did not. Dr. Zierk identified inconsistencies within the medical statements of restrictions and between those statements and Claimant's self-reporting. Mr. Wilson had difficulty incorporating new information, Dr. Conyers' final report, when it conflicted with his preconceived opinion. In short, Dr. Zierk's methodology and opinions are more credible than those of Mr. Wilson. As Dr. Zierk's opinions as to human factors are more credible and persuasive, Claimant has failed to sustain her burden of proving, by a preponderance of credible evidence, that she is incapable of earning any wages.

Offset

At the start of the hearing on February 16th, the parties stipulated that Claimant is receiving social security retirement benefits and that her first year on entitlement amounted to $16,537.80.

Section 8-42-103(1)(c)(II) and (IV), C.R.S. addresses Respondents entitlement to an offset under certain circumstances. Here, Claimant reached sixty six years of age at the time of her injury. Based on the stipulation of the parties, a potential offset would amount to $159.02 per week. As Claimant is not permanently and totally disabled, the request for an offset is moot.

Order

It is therefore ordered that:

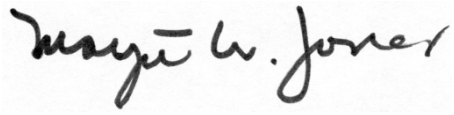
1. Respondents shall pay Claimant disfigurement benefits of $2,000.00 in a lump sum.

2. Claimant's request for permanent total disability benefits is denied and dismissed.

3. Respondents' request for an offset based upon Claimant's receipt of social security retirement benefits is denied as moot.

4. All matters not herein determined are reserved for future determination.

DATED: June 27, 2018



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that medical treatment for his right wrist is causally related to his February 2, 2016 work injury.

STIPULATIONS

1. if treatment for Claimant's right wrist is found causally related to the February 2, 2016 work injury, Respondents agree that treatment for the wrist including the surgery recommended by Dr. Yi is reasonable and necessary.

FINDINGS OF FACT

1. Claimant is a 49-year-old right hand dominant male who is employed by Employer as a heavy equipment operator.

2. On February 2, 2016 Claimant sustained an admitted work related injury to his bilateral knees after slipping on ice. Respondent admitted liability for the injury.

3. As a result of his injury Claimant has undergone bilateral total knee replacements. Claimant's right knee was replaced on June 30, 2016 and his left knee was replaced on November 15, 2016.

4. From the date of his injury and until his right knee was replaced on June 30, 2016 Claimant required the use of crutches. Records show that on February 3, 2016 when evaluated at Denver Health Center for Occupational Safety and Health (COSH), Claimant was prescribed crutches with instructions to be non-weight bearing on his left leg. *See* Exhibit D.

5. Between the February 2, 2016 injury and the eventual total knee replacements, Claimant underwent a course of conservative care including medications and physical therapy.

6. Claimant testified that while using crutches from early February and until June of 2016 he had no issues or problems, including problems with his right wrist. Claimant testified that he began having right wrist pain in June and reported it to his COSH physician.

7. Claimant testified that directly after his June 30, 2016 right knee replacement, he did not experience symptoms in his wrist, but that he was on pain medication at the time and that as he weaned off the pain medications following knee surgery he felt the right wrist pain more.

8. After his right knee replacement, Claimant used a walker to help him ambulate.

9. On August 23, 2016 Claimant was evaluated by Hyeongdo Kim, M.D. Dr. Kim noted that Claimant was almost two months post op for his right knee surgery. Claimant reported that he was progressing well and happy with his right knee. Claimant reported, however, that his chief complaint was right wrist pain that started about two weeks prior to his right knee surgery. Claimant believed his right wrist pain may have been caused by the use of crutches and reported that the pain worsened when he had to use the walker to ambulate post operation. Claimant reported that the pain was at 2-3/10 when at rest and at 7-8/10 when he bore weight on the wrist to stand up or when using crutches. Dr. Kim found limited active flexion and extension at the wrist joint and point tender to palpation on the lateral aspect of the wrist. Dr. Kim suspected a subacute strain due to change in ergonomics of having to use a walker for 2-3 months. *See* Exhibit 4.

10. On September 13, 2016 Claimant was evaluated by Alisa Koval, M.D. Claimant's right wrist was noted to be swollen and painful. Claimant was fitted for a wrist brace and his crutches were adjusted so that he was leaning over on his wrists less. Dr. Koval found swelling and tenderness to palpation as well as decreased strength on wrist flexion, extension, radial deviation, and ulnar deviation. *See* Exhibit 5.

11. On September 19, 2016 Claimant was evaluated by Steven Kitchen, M.D. Claimant reported that he had a slip injury in February of 2016 and that he started having more problems with his wrist after having to use crutches for a prolonged period of time. Claimant reported a prior history of problems with his right wrist including difficulties 20 some years ago where he underwent a surgery for what he termed a ligament repair. Claimant reported that after physical therapy and recuperation he went back to all of his normal activities including bowling, golfing, and working with heavy equipment. Claimant reported really having no other major problems with his right wrist until recently. Dr. Kitchen found Claimant's right wrist to be swollen on examination with tenderness over the mid and radial portion and crepitation with flexion and extension. Dr. Kitchen also found decreased range of motion in all directions and diminished grip strength. *See* Exhibits 6, F.

12. Dr. Kitchen had Claimant undergo x-rays of the right wrist. The x-rays showed: bony alignment with evidence of scapholunate disassociation with a significantly widened scapholunate interval and some mild dorsal tilting of the lunate; extensive arthritic change at the radial scaphoid joint grade 4; and some changes of the scapha capitate joint grade 3 to grade 4. Dr. Kitchen opined that Claimant had significant synovitis in the right wrist due to a scapholunate dissociation and significant secondary osteoarthritic changes of the radius scaphoid joint. Dr. Kitchen opined that the grade 4 change noted on the x-ray correlated with Claimant's history of a previous wrist problem, surgery, current pain, swelling, and loss of motion. Dr. Kitchen performed a corticosteroid injection in the wrist and noted that Claimant would be fitted for a short arm cast brace. *See* Exhibits 6, F.

13. On October 11, 2016 Claimant was evaluated by Dr. Koval. Dr. Koval noted a left knee replacement was pending for November 15, 2016 and that rehab for the right knee was going fairly well. Dr. Koval noted that Claimant had attributed the pain in his right wrist to extended crutch use and that he had not engaged in any other activities that required forceful grabbing/pushing/pulling. Claimant reported mild on/off right wrist pain for several weeks prior to his right knee replacement and that the pain was a nuisance until he had the right knee replaced and then had to use a walker which aggravated the right wrist pain to the point where he felt it was appropriate to mention it. Claimant was worried that with the next knee replacement and required walker use after surgery, his right wrist would continue to be aggravated. Dr. Koval opined that, in the absence of another mechanism of injury, she was inclined to believe that Claimant's right wrist pain was related to both long-term crutch use significantly aggravated by use of the walker and would require ongoing monitoring as he underwent left knee replacement. *See* Exhibit 5.

14. On June 16, 2017 Dr. Koval answered questions posed to her in a letter from Claimant's counsel. Dr. Koval opined that the crutches started Claimant's right wrist problem and that use of the walker after surgery made it worse. Dr. Koval noted that Claimant used crutches or a walker for a total of 5-6 months in 2016. *See* Exhibit 5.

15. On July 14, 2017 Claimant was evaluated by In Sok Yi, M.D. Claimant reported having an injury in February of 2016 when he slipped and that he essentially underwent bilateral total knee replacements sequentially and that he was basically on either crutches or a walker from February of 2016 until February of 2017. Claimant reported that during this time, he developed increasing pain in his right wrist and that an injection performed by Dr. Kitchen did not give him relief. Claimant reported that his pain started in about August of 2016, that he had an injury to the right wrist and surgery about 15 years prior, and that he did not have any problems until he got to weight bear on his wrist after his knee surgeries. Dr. Yi opined that Claimant had a prominent exacerbation of an underlying scapholunate diastasis with arthritis in the wrist. Since Claimant had failed non operative treatment with activity modification, splints, and injections, Dr. Yi recommended proceeding with a right wrist proximal row carpectomy with posterior interosseous neurectomy and radial styloidectomy. *See* Exhibits 7, G.

16. On August 6, 2017 Wallace Larson, M.D. performed a medical records review. Dr. Larson reviewed and summarized records from the injury through the surgical recommendation made by Dr. Yi. Dr. Larson diagnosed pre-existing scapholunate ligamentous injury with subsequent development of degenerative arthritis known as the scapholunate advanced collapse (SLAC) deformity. Dr. Larson opined that the radial graphic findings were completely typical of what is known as SLAC wrist and that it was not caused or aggravated by Claimant's occupational exposure or by the use of crutches or a walker. Dr. Larson noted that with a pre-existing arthritic wrist, it would be completely understandable that Claimant would notice pain from the pre-existing wrist arthritis but that it was not caused or aggravated by the occupational injury, use of crutches, or the use of a walker after the knee arthroplasties. Dr. Larson opined that the need for surgery

recommended by Dr. Yi was completely related to Claimant's previous wrist ligamentous injury and subsequent development of posttraumatic arthritis. Dr. Larson opined that Claimant's degenerative arthritis of the right wrist followed the typical course of wrist arthritis seen after a scapholunate ligament injury with no documented information in the medical records indicating any recent traumatic change within the right wrist. *See* Exhibit H.

17. On August 7, 2017 Respondent sent a letter to Dr. Yi noting that the surgery request had been denied. Respondent attached a copy of the medical records review report from Dr. Larson. *See* Exhibits 7, G.

18. Claimant testified at hearing. Claimant reported a prior right wrist injury approximately 20 years ago and that he underwent surgery including what he described as a ligament repair surgery. Claimant testified that afterwards he had no continuing pain. Claimant reported he was able to return to his normal activities following the injury and surgery including bowling, golf, basketball and his work in heavy labor.

19. Records show that on October 30, 2012 Claimant was evaluated at Aspen Family Medicine for a chief complaint of right wrist pain and swelling. Claimant reported that he was pulling himself up into his semi-truck the week prior and messed up his right wrist while using the grub handle. Claimant reported that he thought it was a gout flare-up and started taking gout medicine but it didn't seem to help much. Claimant reported reduced movement of his right wrist and hand and some numbness in the top of his right thumb as well as weakness and swelling. On exam, Clamant had limited range of motion at the right wrist/hand and reduced grip strength. X-rays of the right hand and wrist were performed and showed widened scapholunate interval with a question of scapholunate ligament tear. It was noted that Claimant would get an MRI of his right wrist. Claimant was offered a wrist brace but declined so an ace wrap was applied. *See* Exhibit J.

20. Claimant testified at hearing that due to his bilateral knee surgeries he had to push up on his right wrist every time he needed to get up because he couldn't bear weight on his knees. Claimant testified that the pain in his right wrist now was much different than the ligament injury pain he had 20 years prior. Claimant reported that until this injury he had been bowling on a regular basis. Claimant also reported that he had no symptoms in his right wrist from his first right wrist surgery and until he used crutches for this knee injury.

21. Dr. Larsen testified at hearing consistent with his medical records review report. Dr. Larson is an orthopedic surgeon with a subspecialty in hand and upper extremity surgery. Dr. Larson noted that he had reviewed the 2012 x-ray reports of Claimant's right wrist and opined that the 2012 x-rays showed a chronic condition of post traumatic arthritis and widening and that the recent 2016 x-rays showed essentially the same problem as shown by the 2012 injuries but with worsening over time and grade 3-4 changes. Dr. Larson agreed with the diagnoses made by Dr. Kitchen and Dr. Yi. Dr. Larson testified that Claimant's injury 20 years prior with a ligament that was torn between the scaphoid bone and lunate bone involved a ligament that is supposed to keep the

bones from widening and that degeneration after such injury is expected. Dr. Larson testified that the surgery described by Claimant that Claimant underwent 20 years prior is a surgery that is now known not to work. Dr. Larson also testified that the surgery is known to cause post degenerative arthritis.

22. Dr. Larson testified that Claimant had SLAC wrist deformity with a rupture of the scaphoid lunate ligament and osteoarthritis that started to degenerate with the ruptured ligament. Dr. Larson testified that x-rays show Claimant has bone rubbing on bone with no joint space and no cartilage as the cartilage had worn out and opined that it was a painful and progressive condition. Dr. Larson opined that crutch use did not exacerbate or worsen Claimant's condition. He testified that it might have caused pain but that it would not damage or change Claimant's underlying condition because Claimant's ligament was already gone and Claimant's bone was already rotated. Dr. Larson opined that it couldn't get much worse or be made worse and that Claimant had complete loss of cartilage already. Dr. Larson agreed that Claimant needed surgery and that the procedure recommended by Dr. Yi was appropriate. Dr. Larson opined that Claimant had no anatomical change and no change to his underlying condition due to the crutch or walker use. Dr. Larson opined that the grade 4 changes shown by imaging in 2016 started years prior and showed that Claimant's cartilage had already disappeared. Dr. Larson testified that the lengthy crutch use didn't cause anatomic arthritic worsening but that a person using crutches who has arthritis will feel pain using crutches but that the arthritis causes the pain not the crutches.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Causation and Relatedness

To be a compensable benefit, medical treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish, by a preponderance, of the evidence that treatment for his right wrist is causally related to his February 2, 2016 work injury. Claimant, overall, is not found credible or persuasive. Although Claimant reported having no right wrist issues following an injury 20 years ago and until he started using crutches in recovery for his bilateral knee surgeries, this is not consistent with the medical records. Significantly, in 2012 Claimant had such significant right wrist pain at an evaluation that x-rays were performed. At that 2012 evaluation both a right wrist brace and a right wrist MRI were recommended. Instead, Claimant's right wrist was wrapped and Claimant did

not follow up on treatment recommendations for an MRI or wrist brace. The x-rays performed in 2012 showed widened scapholunate interval concerning for scapholunate ligament tear. They also demonstrated post-traumatic arthritis. Dr. Larson is found credible and persuasive. The new right wrist x-rays in 2016 show a continued degeneration naturally expected from the condition shown in the 2012 x-rays. Claimant's SLAC wrist deformity and the diagnoses made by Dr. Larson, Dr. Kitchen, and Dr. Yi involves an abnormal rotation of Claimant's scaphoid against the distal radius bone leading to the development of an arthritic wrist. As shown by 2016 x-rays, Claimant's arthritic condition was bone on bone, stage 4, which took years to develop. Dr. Larson is credible and persuasive that Claimant's condition was not caused, accelerated, or exacerbated by his use of crutches and that Claimant had a complete loss of cartilage which would not have been further degenerated by crutch use. Dr. Larson opined that although Claimant had pain, Claimant had no additional damage or change in the anatomical condition and simply had symptoms of his underlying degenerative condition.

Claimant's reports to Dr. Kitchen in September of 2016 that he had no other major problems with his right wrist following his injury 20 years prior until recently is discredited by the medical records from 2012. Dr. Kitchen noted that the condition from the x-rays with significant osteoarthritis correlated with the history of a previous wrist problem 20 years prior. As found above, Dr. Koval's opinion on the right wrist pain being related to long term crutch use was given in the absence of another mechanism of injury. Dr. Koval does not reference the significant injury from 20 years prior nor does she reference the findings and treatment recommendations from 2012. Here, there is another mechanism of injury with a prior significant injury, surgery, and demonstrated arthritic changes and pain in the 2012 imaging. Dr. Koval indicated that the use of crutches started Claimant's right wrist problem which that ALJ finds not to be accurate based on a totality of the evidence. Claimant had right wrist problems prior to crutch use in 2016. Further, Claimant's reports to Dr. Yi that he did not have any problems following his right wrist surgery years prior until he got to weight bear on his wrist after his knee surgeries is not accurate. Overall, Claimant is not credible or persuasive given the 2012 records. Dr. Larson is found credible, persuasive, and his opinions are consistent with the weight of the evidence.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that treatment for his right wrist, including surgery recommended by Dr. Yi, is reasonable, necessary, and causally related to his February 2, 2016 injury.

2. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 06/28/2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-055-527-001 and 5-065-822-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 5, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 6/5/18, Courtroom 5, beginning at 1:30 PM, and ending at 4:30 PM).

Claimant's Exhibits 1 through 17 were admitted into evidence, without objection. Respondents' Exhibits A through O were admitted into evidence, without objection.

W.C. No. 5-055-527-001 concerns an admitted left shoulder injury of December 21, 2016. W.C. No. 5-065-822-001 concerns a fully contested left shoulder injury of March 21, 2017.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision. Was filed, electronically, on June 12, 2018. No timely objections were filed. Therefore, the proposed decision was deemed submitted for decision on June 15, 2018. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a new, compensable injury on March 21, 2017 (W.C. No. 5-065-822-001); or, whether the Claimant's continuing left shoulder problems are related to the admitted injury of December 21, 2016, on which a filed Admission of Liability (FAL) was filed on March 23, 2017 and the Claimant thereafter filed a timely objection; medical benefits; average weekly wage (AWW); temporary total disability (TTD) benefits from August 27, 2017 and continuing; and, Respondents entitlement to a Federal Social Security Disability Benefit offset from February 1, 2018 and continuing.

The Claimant bears the burden of proof on all issues, other than Federal Social Security Disability offset, in which case Respondents bear the burden of proof. Both sides burden is by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of hearing the parties stipulated that: (1) should this case be found compensable James Ferrari, M.D. and Braden Reiter, D.O., are authorized; (2) the Claimant's last day worked was August 26, 2017; (3) at the time of the injury the Claimant's average weekly wage (AWW) was $1,238.65; and, (4) the Claimant was awarded SSDI commencing on February 1, 2018. The ALJ accepts these stipulations and so finds as fact.

2. The Claimant (date of birth January 20, 1956), a thirty-two-year employee of the Employer was a credible witness. His testimony was both persuasive and consistent with the medical records in the case, although his recollection of certain events was limited.

The Injury of December 21, 2016 (W.C. No. 5-055-527-001)

3. The evidence establishes that the Claimant suffered a left shoulder injury when he fell on December 21, 2016, while working as a beer delivery driver for the Employer. He reported his injury to his Employer and the Employer completed an Injury

Notification (Claimant's Exhibits 4 and 16, BS 109) The Employer's First Report of Injury states that the Claimant "slipped on ice and fell in the employee parking lot. At the time of the incident, he sustained cuts and bruises. He claims he has been suffering left shoulder pain since the accident" (Claimant's Exhibit 16, BS 109).

4. According to the Claimant, and it is undisputed, that following this event he returned to work but was given a "helper" for his delivery work. The Claimant continued to work full duty as a delivery driver with a "helper" driver through March 24, 2017, when he suffered a further left shoulder strain when he was taking a beer keg downstairs using a dolly (Claimant's Exhibit 3, BS 11).

5. Both events of December 21, 2016 and the event of March 24, 2017, were timely reported to the Employer.

6. The Claimant continued working with vacation breaks, through early August 2017, when he complained of worsening left shoulder pain and he was sent to authorized treating physician (ATP) Dr. Reiter by his Employer. On August 24, 2017, ATP Dr. Reiter restricted the Claimant to no lifting, pushing, or pulling with he left arm (Claimant's Exhibit 7, BS 32 and 33).

7. ATP Dr. Reiter referred the Claimant for an MRI (magnetic resonance imaging), which found that the Claimant had a complete full thickness supraspinatus tear, AC joint arthropathy, glenohumeral arthropathy, as well as moderate infraspinatus and subscapularis tendinopathy (Claimant's Exhibit 8, BS 35) ATP Dr. Reiter also referred the Claimant to ATP surgeon Dr. Ferrari on August 28, 2017. *Id*., BS 34. Thereafter, ATP surgeon Dr. Ferrari recommended that the Claimant undergo a left arthroscopic cuff repair with distal clavicle resection and decompression (Claimant's Exhibit 5, BS 26). The Claimant credibly testified that he is prepared to undergo the surgery recommended by ATP surgeon Dr. Ferrari.

8. Respondents issued a letter authorizing surgeon ATP Dr. Ferrari's surgery on September 5, 2017 (Claimant's Exhibit 5, BS 30 and 31). The surgery, however, has not yet been performed to date because Respondents are challenging the compensability of the Claimant's left shoulder injury.

9. In disputing whether the Claimant suffered a left shoulder injury requiring surgical intervention, Respondents rely on the fact that in multiple records from 2017, the Claimant did not tell medical providers about his left shoulder exacerbation in March 2017. Thus, the medical records from ATPs Dr. Reiter or Dr. Ferrari, or from DIME (Division Independent Medical Examiner) Jade Dillon, M.D., right shoulder, DIME, unrelated to the present claim, and IME (independent Medical Examiner) Allison Fall, M.D. (right shoulder) indicate that the Claimant failed to mention or emphasis the event of March 24, 2017, as causing additional medical problems or suggesting that this was in intervening event.

10. ATP surgeon Dr. Ferrari was of the opinion that the Claimant's left shoulder problems started with his December 2016 fall and were likely aggravated (exacerbated) as he continued heavy work. This included the 165 lb. keg event of March 2017, which the ALJ finds to be an exacerbating event along the natural progression of the left shoulder problems set in motion by the traumatic event of December 21, 2016.

11. ATP surgeon **Dr. Ferrari described the Claimant's left shoulder problems as a natural progression from the December 2016 left shoulder injury due to the Claimant's continued heavy work.**

12. ATP surgeon Dr. Ferrari testified:

A I mean, pure speculation, but it probably started with the December fall.

Q All right. And let's say it did start with the September (sic) fall. Would the - - if he continued to work, would the events of March 21 be essentially a natural progression if he continued to do heavy work?

A Yes. Yes.

Q All right. So we could use the December fall as the event that triggered this problem, but the events of March 21 constituted a natural progression which would eventually require him to have surgery?

A Yes.

Q Am I - - did I state that correctly? Because I don't want to overstate my case. All right.

A Okay.

Q So you would still - - I mean, what we're still working on is an assumption that the December 21, 2016, event was the

triggering event and that ironically despite whatever happened on March 21, that was a natural progression from that injury, correct?

A Yes.

[Evidentiary Deposition of ATP James Ferrari, MD (January 29,2018) p. 36, lns11 – 25 though p. 37; lns 1 – 11—also Claimant's Exhibit 10, BS 52)]

13. Subsequent to his injury of December 21, 2016, the Employer provided the Claimant with a "helper" due to his left shoulder limitations. This continued throughout the remainder of 2016 and through the early summer of 2017. This supports ATP surgeon Dr. Ferrari's opinion that it was the Claimant's December 21, 2016 injury which caused both the Claimant's disability and his need for surgery.

14. Prior to the Claimant's left shoulder injury on December 21, 2016, he had returned to work full duty after recovering from an admitted right shoulder injury occurring earlier on March 23, 2016.

15. The Claimant was evaluated at the request of the Respondents by Dr. Fall in connection with his previously admitted right shoulder injury. Dr. Fall issued a report on November 15, 2017. She stated that she was unclear of how the injury of December 21, 2016, occurred. Consequently, she could not render an opinion about the events occurring on that date, although she did acknowledge that the Claimant has lifting restrictions on his left shoulder (Claimant's Exhibit 9, BS 39). Dr. Fall notes that the Claimant described the event of December 21, 2016, as well as a follow-up event occurring when he was taking a keg downstairs, but without specifying a date. *Id.*, BS 37.

16. Respondents argue that the Claimant failed to comply with the requirements of § 8-43-102(1)(a), C.R.S. by not providing a written report of injury for either the December 21, 2016 or the March 2017 events. An award of penalties against an injured worker for a violation of this statute is requires the Employer to display a regulation notice required in paragraph (b) of subsection (1). Respondents presented **no** evidence of such a displayed sign. Consequently, the Claimant's failure to report the events in writing did not serve as a trap for the unwary injured worker.

Medical

17. The parties stipulated that the ATPs for the Claimant's December 21, 2016, claim are ATP Dr. Reiter and ATP surgeon Dr. Ferrari. The treatment rendered by these doctors and the surgery recommended by ATP surgeon Dr. Ferrari is found to be

authorized, reasonably necessary and causally related to the admitted December 21, 2016, injury.

Temporary Total Disability

18.. The Claimant's last day worked was August 26, 2017. At that time, he was under restrictions preventing his return to work. He demonstrated that he has been temporarily and totally disabled from August 27, 2017 and ongoing. He has earned no wages, not been declared to be at MMI and the Employer has not offered him modified work.

19. The Claimant has proven that the admitted injury of December 21, 2016, has caused a "disability," and that he has suffered a wage loss which, "to some degree," is the result of that I injury. The Claimant's testimony alone, along with ATP Dr. Reiter's report establishes the Claimant's "disability."

Penalties for Claimant's Failure to Report in Writing

20. Respondents argue that they are entitled to a penalty due to the Claimant's failure to file a written report of injury, pursuant to § 8-43-102(1)(a), C.R.S., despite the evidence that they were on notice of the December 21, 2016, and the March 21, 2017 events.

21. The imposition of a penalty reducing an employer's liability for disability benefits is in the nature of an affirmative defense. Thus, the employer bares the initial burden of proving it did not receive written notice from the employee. See *Postewiat v. Midwest Barricade*, 905 p.2d 21 (Colo. App. 1995). § 8-43-102, imposes an additional burden on the employer to show that it posted a "reporting notice" in compliance with § 8-43-102(1)(b), C.R.S. The Respondents failed to produce evidence that the notice required by statute was posted.

Ultimate Findings

22. The ALJ finds the Claimant's testimony persuasive and credible. Also, the ALJ finds the opinions of Dr. Reiter and Dr. Ferrari more credible and persuasive than the opinions of Dr. Fall.

23. Between conflicting testimony and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony, the opinions of Dr. Reiter and Dr. Ferrari, and to reject any opinions to the contrary.

24. The Claimant has proven, by a preponderance of the evidence that he sustained a compensable injury to his left shoulder on December 21, 2016 (W.C. No. 5-055-527-01).

25. The Claimant has failed to prove that he sustained a compensable aggravating and accelerating injury to his left shoulder on March 21, 2017 (W.C. No. 5-065-822-01).

26. The Claimant has proven, by preponderant evidence that all medical care and treatment for his left shoulder, at the hands of Dr. Reiter and Dr. Ferrari, including the surgery recommended by Dr. Ferrari, was and is authorized, causally related to the December 21, 2016 injury, and reasonably necessary to cure and relieve the effects thereof.

27. The Claimant's AWW is $1,238.65, which yields a TTD benefit rate of $825.76 per week, or $117.97 per day, which is less than the maximum rate for FY 2016/2017.

28. As stipulated, the Claimant was temporarily and totally disabled, without Federal Social Security Disability (SSDI) benefits, from August 26, 2017, through January 31, 2018, a total of 159 days, with a TTD benefit of $825.76 per week, or $117.97 per day. Aggregate TTD benefits equal $18, 757.23.

29. As stipulated, the Claimant was awarded SSDI benefits of $2,372 per month, effective February 1, 2018, which equates to $547.38 per week, 50% of which is subject to offset, thus, establishing an allowable offset of $273.69 per week. Consequently, the Claimant's net TTD benefit after offset is $552.07 per week, or $78.87 per day. The period from February 1, 2018, through the hearing date, June 5, 2018, both dates inclusive, is 125 days. Aggregate TTD benefits for this period equal $9,858.75. Grand total past due TTD benefits as of June 5, 2018, the hearing date equal $28,615.98.

30. As stipulated, the Claimant continues to be temporarily and totally disabled after June 5, 2018.

31. Respondents failed to prove, by preponderant evidence that the Employer met the requirements for penalizing the Claimant for not reporting his injury in writing, pursuant to § 8-43-102 (1) (a), C.R.S.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was persuasive and credible. Also, as found, the opinions of Dr. Reiter and Dr. Ferrari were more credible and persuasive than the opinions of Dr. Fall.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005).

Also see Martinez v. Indus. Claim Appeals Office, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimony and opinions, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony, the opinions of Dr. Reiter and Dr. Ferrari, and to reject any opinions to the contrary.

Compensability of W.C. No. 5-055-527-001

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** (essentially creating a presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant has demonstrated that he suffered a left shoulder injury on December 21, 2016.

Compensability of W.C. No. 5-065-822-001

d. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-**

existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the incident of March 21, 2017 did **not** amount to an aggravation/acceleration of the Claimant's pre-existing left shoulder condition. Moreover, it amounts to an exacerbation during the natural progression set in motion by the compensable injury of December 21, 2016.

Average Weekly Wage (AWW)

e. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, Claimant lost 100% of his wages from August v26, 2017 and continuing.

Medical, Temporary Total Disability

f. As stipulated and found, all medical care and treatment for the Claimant's left shoulder, at the hands of Dr. Reiter and Dr. Ferrari, including the surgery recommended by Dr. Ferrari, was and is authorized, was and is causally related to the December 21, 2016 injury, and reasonably necessary to cure and relieve the effects thereof.

g. The Claimant was temporarily and totally disabled, without Federal Social Security Disability (SSDI) benefits, from August 26, 2017, through January 31, 2018, a total of 159 days, with a TTD benefit of $825.76 per week, or $117.97 per day. Aggregate benefits for this period of time equal $18, 757.23.

Federal Social Security Disability Benefit Offset (SSDI) and Net TTD Benefits

h. As stipulated and found, the Claimant received Federal Social Security Disability (SSDI) benefits, effective February 1, 2018. Consequently, the Respondents are entitled to the statutory offset, pursuant to § 8-42-103(1)(c), C.R.S. The offset amount is 50% of the initial entitlement award, pursuant to *Englebrecht v. Hartford Acc. & Indem. Co.*, 680 P.2d 231 (Colo. 1984). The Claimant was awarded SSDI benefits of

$2,372 per month, effective February 1, 2018, which equates to $547.38 per week, 50% of which is subject to offset, thus, establishing an allowable offset of $273.69 per week. Consequently, the Claimant's net TTD benefit, after offset, is $552.07 per week, or $78.87 per day. The period from February 1, 2018, through the hearing date, June 5, 2018, both dates inclusive, is 125 days. Aggregate TTD benefits for this period equal $9,858.75. Grand total past due TTD benefits as of June 5, 2018, the hearing date equal $28,615.98.

i. After, June 5, 2018, the Claimant continues to be temporarily and totally disabled, with a net TTD benefit of $552.07 per week.

Penalties for Claimant Not Reporting Injury in Writing

j. As found, Respondents argue that they are entitled to a penalty due to the Claimant's failure to file a written report of injury, pursuant to § 8-43-102(1)(a), C.R.S., despite the evidence that they were on notice of the December 21, 2016, event.

k. The imposition of a penalty reducing an employer's liability for disability benefits is in the nature of an affirmative defense. Thus, the Employer bears the initial burden of proving it did not receive written notice from the employee. See *Postewiat v. Midwest Barricade*, 905 p.2d 21 (Colo. App. 1995). §8-43-102, imposes an additional burden on an employer to show that it posted a regulation notice in compliance with § 8-43-102(1)(b), C.R.S. As found, the Respondents failed to prove that the notice required by statute was posted.

Burden of Proof

l. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven the compensability of the December 21, 2016 (W.C. No. 5-055-527-001) left shoulder injury. He has failed to prove the compensability of the March 21, 2017 event

(W.C. No. 5-065-822-001). The Claimant has further proven entitlement to medical benefits as herein above described; AWW; and, TTD benefits from August 27, 2017 and continuing.

m. The Respondents have proven entitlement to an SSDI offset of $273.69 per week, this reducing the Claimant's net TTD benefit to $552.07 per week. Respondents failed to prove entitlement to a penalty for the Claimant's failure to report his injury in writing.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for workers' compensation benefits in W.C. No. 5-065-822-001, are hereby denied and dismissed.

B. Respondents are liable for benefits in W.C. No.5-055-527-001.

C. Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's left shoulder injury of December 21, 2016, subject to the Division of Workers' Compensation Medical Fee Schedule.

D. Respondents shall pay the Claimant temporary total disability benefits, without the Federal Social Security Disability (SSDI) offset, from August 26, 2017, through January 31, 2018, a total of 159 days, with a benefit rate of $825.76 per week, or $117.97 per day. Respondents shall pay the Claimant subtotal aggregate benefits for this period of time of $18, 757.23.

E. The allowable SSDI offset is $273.69 per week, thus, the net temporary total disability benefit after offset is $552.07 per week, or $78.87 per day. For the period from February 1, 2018, through the hearing date, June 5, 2018, both dates inclusive, a subtotal of 125 days. Respondent shall pay the Claimant aggregate subtotal net temporary total disability benefits of $9,858.75.

F. Respondent shall pay the Claimant grand total past due temporary total disability benefits as of June 5, 2018, the hearing date, of $28,615.98, which is payable retroactively and forthwith.

G. From June 6, 2018 and continuing until cessation or modification of indemnity benefits is warranted by law, Respondents shall pay the Claimant net temporary total disability benefits of $552.07 per week.

H. Any and all claims for the Claimant **not** reporting his injury in writing are hereby denied and dismissed.

I. Respondents shall pay the Claimant statutory interest of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

J. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable industrial injury arising out of and in the course of her employment for Employer on April 21, 2017.

II. If Claimant proved she suffered a compensable injury, whether Claimant established by a preponderance of the evidence that the medical treatment she received is reasonable, necessary and related to the April 21, 2017 industrial injury.

III. If Claimant proved she suffered a compensable injury, whether Claimant established by a preponderance of the evidence that she is entitled to temporary partial disability ("TPD") and temporary total disability ("TTD") benefits.

IV. If Claimant proved she suffered a compensable injury, Claimant's average weekly wage ("AWW").

V. If Claimant proves she suffered a compensable injury, whether Respondent proved, by a preponderance of the evidence, that Claimant is responsible for her termination of employment.

FINDINGS OF FACT

Prior 2013 Work Injury

1. Claimant is a 52-year-old woman with a prior history of back pain, neck pain, lower extremity paresthesia and headaches.

2. On July 11, 2013, Claimant suffered a work injury while working for a different employer. Claimant complained of cervical spine pain, secondary cephalalgia, low back pain, left lower extremity paresthesia, and thoracic pain. Claimant was diagnosed with cervical and thoracic spine strains.

3. Claimant underwent an EMG, which returned normal. A lumbar spine MRI revealed degenerative disc disease at T11 and L4-5, no evidence of a herniated disc, and hypertrophic degenerative change posterior facets at L5-S1. A cervical spine MRI revealed mild facet hypertrophy at several levels, mild right neural foraminal stenosis at C4-5 on the right and C6-7 on the left, and degenerative disc disease, with no herniation.

4. Dr. Walter Torres performed a psychological evaluation of Claimant on October 29, 2013 and diagnosed Claimant with adjustment disorder with depression/anxiety. Claimant underwent psychological counseling and took Zoloft and then Lexapro.

5. Claimant underwent several modalities of treatment, including epidural steroid injections, physical therapy, pool therapy, chiropractic treatment, and acupuncture, without improvement in her pain complaints.

6. Claimant underwent a Functional Capacity Evaluation on May 28, 2014 that placed Claimant in the sedentary physical demand category due to low back pain, neck pain and decreased endurance. The examiner noted that Claimant tested positive on "all four Waddell's non-organic signs," and that pain was her primary limiting factor, not maximum effort or a breakdown in mechanics.

7. On June 20, 2014, occupational therapist Susan Hernandez questioned whether Claimant was malingering, noting findings that were inconsistent with functional abilities demonstrated earlier in the therapy session.

8. On August 20, 2014, a different therapist, Betsy Kyle, also noted that Claimant's results were inconsistent with observations of her functional mobility. As part of her discharge summary on the same date, physician assistant Adam Olson opined that Claimant's anxiety appears to be "strongly contributive to her overall symptoms," of chronic back pain and leg weakness related to the 2013 injury, and noted "inconsistent weakness suspicious for Waddell's sign."

9. On July 17, 2014, Caroline Gellrick, M.D. placed Claimant at maximum medical improvement ("MMI") for her July 11, 2017 work injury. Dr. Gellrick assigned 20% whole person impairment, consisting of 8% cervical spine impairment, 12% lumbar spine impairment, and 1% psychiatric impairment. Her final diagnoses were lumbar strain, cervical spine strain with secondary cephalalgia, and reactive adjustment disorder with anxiety.

10. On August 21, 2015, Claimant filed for social security disability insurance ("SSDI"), alleging an inability to work due to the July 2013 work injury. She filled out a questionnaire, stating that prior to her 2013 injury she was able to "work, run, go to the gym, dance, live my life, clean my house properly." She wrote that since the 2013 she is "not able to move" like she used to, and is unable to run, dance, or go to the gym. She reported that her social life is not existent, and she only spends time with her children at home. Claimant was denied SSDI.

11. On September 20, 2015, Claimant reported to Salud Health with "complete body pain," and was diagnosed with chronic pain syndrome, depression and anxiety. She was prescribed hydroxyzine for her depression with anxiety.

12. On January 28, 2016, Meredith Campbell, Psy.D. performed a psychological assessment of Claimant. Dr. Campbell noted that, while Claimant believed her depression began with her physical issues, Claimant did indicate feeling depression and anxiety during her abusive 25-year marriage with her ex-husband. Dr. Campbell opined

that Claimant had some symptoms of depression and anxiety, but did not clearly meet the criteria for major depression, generalized anxiety, or PTSD. She noted that Claimant chronic pain was primary and caused her to feel helpless, which likely aggravated her symptoms of anxiety and depression.

13. On January 29, 2016, Laura Moran, D.O. performed an examination of Claimant to assess her work restrictions. Claimant presented with constant back pain since 2013 which radiated to her left leg. On examination, Dr. Moran noted normal cervical and thoracic spine range of motion, decreased lumbar spine range of motion, "near absence" of range of motion in both knees, no evidence of radiculopathy or neuropathy, and no pain significant behaviors. Dr. Moran remarked that there were several inconsistencies on Claimant's physical exam. Dr. Moran opined that Claimant was unable to bend or squat, but could alternate between sitting, standing and walking, and was able to lift and carry about 20 pounds.

14. Claimant underwent a lumbar spine x-ray on February 1, 2016 that revealed "very mild levoscoliosis," which the radiologist noted may be positional.

Alleged April 21, 2017 Work Injury

15. Claimant worked for Employer cleaning chicken coops. Claimant testified that she began working for Employer 2-4 months prior to the alleged work injury on April 21, 2017. However, employment records indicate a start date of April 18, 2017. Claimant's supervisor, Rigoberto Jacobo, testified that Claimant only worked for Employer approximately 1 ½ to 2 days prior to the alleged injury.

16. Claimant alleges she suffered a work injury while working for Employer on April 21, 2017. Claimant testified that she was going up stairs at work holding a bucket of water in her left arm, slipped on egg yolk, and fell. Claimant testified she fell backwards and her low back hit the ground, followed by her head, which bounced like a ball. Claimant testified that when she attempted to get up, she slipped again and landed on her right knee. Claimant testified that after falling backwards, her co-workers, Manuel Gutierrez and Sergio Gonzalez, looked over and saw her. She testified they then attempted to help her up by grabbing her arms and pulling her up. Claimant testified that she felt pain in her low back, right knee, and left shoulder. She testified she later developed neck pain. Claimant testified she was not sure how her left arm got injured.

17. Claimant's co-workers retrieved Mr. Jacobo. Claimant testified that she explained to Mr. Jacobo what happened and then worked the remainder of her shift.

18. Mr. Jacobo testified that he investigated the scene of the accident and found no broken eggs. Mr. Jacobo testified that Claimant initially said her left knee was hurt, but the following day she was grabbing her right knee and alleging it was hurt.

19. Mr. Gonzalez testified at hearing that he was approximately 3-4 feet away from Claimant at the time she fell. He testified that he did not see Claimant fall. He stated he heard a sound, looked, and saw Claimant on the floor. He demonstrated that Claimant's

arms were outstretched in front of her. He testified he went to assist Claimant in standing up but she refused his help. When he saw Claimant she was face forward, and demonstrated that Claimant's arms were outstretched in front of her. Mr. Gonzalez testified that he tried to help Claimant up, but she refused the help. He testified that he did not observe any broken eggs in the area where Claimant fell.

20. Mr. Gutierrez testified at hearing that he was facing Claimant as she walked up the stairs, and that he saw Claimant fall forward onto her hands and knees. He testified that she did not fall backwards onto her back. Mr. Gutierrez testified that there were no broken eggs where Claimant fell. He testified that after the fall, she got up by herself, and refused help from Mr. Gonzalez.

21. On April 22, 2017, Mr. Jacobo took Claimant to Advanced Urgent Care. Claimant presented to Mary Louder, D.O., with complaints of low back, right knee and left shoulder pain after slipping and falling at work. On physical examination, Dr. Louder noted tenderness to palpation at the left and right paracervical muscles, right SI joint, and left greater trochanter, restricted left shoulder range of motion, diffuse and nonspecific tenderness about the hip and knee joints, no bruising, and normal gait and station. Dr. Louder diagnosed Claimant with a low back strain, shoulder strain, and hip contusion, and recommended Naproxyn, and temporary restrictions of no lifting, carrying, pushing, pulling more than five pounds, and limit walking, standing and sitting up to two hours.

22. On April 27, 2017 Claimant returned to Advanced Urgent Care and was seen by Katie Krueger, PA-C. Claimant reported slipping and falling on yolk, then falling again when attempting to stand up, causing right knee pain. Claimant complained of pain in the low back radiating up the back and neck, along with pain in her left shoulder and right knee. Claimant denied bruising or swelling of the right knee. On physical examination, PA-C Krueger noted tenderness of the right knee with normal range of motion, tenderness at L1-3 and paraspinal region, and tenderness at the left deltoid muscle and trapezius, with abnormal shoulder range of motion. PA-C Krueger diagnosed a low back strain, left shoulder sprain, right knee contusion, right knee strain, low back pain, shoulder joint pain, and pain in right knee. She ordered x-rays of left shoulder, lumbar spine and right knee, which were negative for acute bony abnormality or fracture. She continued Claimant on Naproxen and temporary restrictions of no lifting, carrying, pushing, or pulling more than five pounds.

23. On April 28, 2017 the Employer's First Report of Injury prepared by the adjuster Brandon Behanish notes on April 21, 2017, "Employee was walking and slipped and fell causing injury to her left shoulder, right knee strain and lower back strain." He notes her employer was notified on April 21, 2017 and that she had a "Contusion-bruise with intact skin surface-hematoma."

24. On May 11, 2017, Claimant was seen by Julie Parsons, M.D. at Advanced Urgent Care. On physical examination, Dr. Parsons noted musculoskeletal tenderness and limited range of motion, with 5/5 Waddell signs. Dr. Parsons assessed Claimant with an accidental fall, headache, neck sprain, strain of thoracic region, and low back

strain. She referred Claimant for physical therapy, prescribed Cyclobenzaprine, and placed Claimant under temporary restrictions of no lifting, pushing or pulling more than 10 pounds. On May 15, 2017, Dr. Parsons referred Claimant for a pain management consultation.

25. On May 22, 2017, Claimant presented to Ryan Mansholt, PA-C at Ascent Medical Consultants, under the supervision of Roberta Anderson-Oeser, M.D. Claimant reported slipping on broken egg and falling on her outstretched left upper extremity, as well as slipping and falling on her right knee while getting up from the first fall. Claimant complained of cervical pain, left shoulder pain, lumbar spine pain, headaches, and radicular symptoms and paresthesia throughout her left upper extremity. She denied any previous history of pain or injuries to these areas. On exam, PA-C Mansholt noted myofascial spasm and limitation with range of motion in the lumbar spine, radicular symptoms down Claimant's left lower extremity with some paresthesia through her left upper extremity with weakness, and pain in the anterior aspect of the left shoulder with painful popping, grinding, and limited range of motion. He reviewed Claimant's April 27, 2017 lumbar spine and left shoulder x-ray reports and noted the lumbar x-ray revealed degenerative changes with endplate osteophyte and disc space narrowing at L5-S1, and the left shoulder x-ray revealed slight degenerative changes. PA-C Mansholt diagnosed Claimant with cervical sprain/strain with spondylosis and myofascial pain headache and left upper extremity radiculopathy, lumbar sprain/strain with myofascial pain spondylosis and left lower extremity radiculopathy, sacroilitis, left shoulder sprain/strain with cuff tendinopathy, partial tear possible, biceps tendinopathy, depression and anxiety. He recommended that Claimant begin Celebrex, baclofen, tramadol and lidopro cream and patch, and physical therapy. He referred Claimant to Dr. Esparza for pain psychology evaluation and treatment.

26. On June 19, 2017, Dr. Anderson-Oeser noted palpable spasms in the lumbar spine and gave the following impression: cervical strain, thoracic strain, lumbar strain, left shoulder strain, left shoulder impingement, left sacroiliac joint strain, and muscle spasms. She continued to recommend medication and physical therapy.

27. On July 10, 2017, Clamant underwent a psychological assessment with Ricardo Esparza, Ph.D. Claimant reported slipping and falling on broken eggs and slipping again with attempting to stand up. Dr. Esparza diagnosed Claimant with adjustment disorder with depression and anxiety. He noted there was no indication of malingering.

28. On July 17, 2017, Dr. Anderson-Oeser recommended Claimant undergo an MRI of the lumbar spine. She continued her recommendations for medications, physical therapy, and restrictions.

29. On July 19, 2017, Dr. Esparza completed his initial psychological assessment of Claimant. Claimant told Dr. Esparza she can do minor activities such as performing hygiene, meal preparation, and assisting with laundry. She also reported that, prior to the April 21, 2017 accident, she enjoyed hiking, swimming, and dancing, but has now withdrawn from these due to her pain. Dr. Esparza opined that Claimant is experiencing depression and anxiety due to these changes in her health, mobility, activity level, and

competency as a result of the April 21, 2017 injury. He further opined that psychological factors were influencing Claimant's pain management and stress resiliency. He recommended six sessions of psychological counseling. Claimant continued to treat with Dr. Esparza on July 24, July 31, August 8 and August 14, 2017. Despite containing detailed information about Claimant's past, Dr. Esparza's records do not contain any indication that Claimant informed him of her 2013 injury and her resulting physical and psychological impairments.

30. On July 31, 2017, Claimant underwent a lumbar spine MRI that revealed:

> 1. L4-5 central and left disc protrusion. Subtle effacement of the left and abutment of the right L5 roots in the lateral recesses. 2. L5-S1 broad slightly superiorly migrated disc protrusion and annular rent. S1 root abutment in the lateral recesses and L5 root abutment in the root foramina. 3. No acute vertebral fractures.

31. On August 3, 2017, PA-C Mansholt noted on physical exam severe mid-line pain at L4-5 and L5-S1, moderate of severe bilateral sacroiliac pain and lumbar facet pain from L3-4 through L5-S1, and positive seated straight leg raise bilaterally left greater than right. He reviewed Claimant's July 31, 2017 lumbar MRI and recommended bilateral L5 and S1 transforaminal epidural steroid injections.

32. On August 21, 2017, Claimant underwent another lumbar spine MRI that revealed:

> 1. L4-5 annular fissure and small posterior central disc extrusion. Mild lateral recess narrowing bilaterally, left more so than right. 2. L5-S1 annular fissure and irregular disc bulge. Left greater than right neural foraminal narrowing, with compression of the exiting L5 nerves. Mild left lateral recess narrowing, potentially affecting the descending left S1 nerves.

33. Dr. Anderson-Oeser administered left L5 and S1 transforaminal epidural steroid injections on August 21, 2017.

34. On August 23, 2017, Claimant reported experiencing a flare-up of pain with some paresthesia and weakness to the lower extremities following the injections. PA-C Mansholt recommended that Claimant be off of work until August 25, 2017, and then return to work light duty lifting no more than 15 pounds and no bending and twisting.

35. On September 5, 2017, Claimant continued to complain of neck and low back pain with bilateral upper and lower extremity weakness. On exam, Claimant reported pain with all movements. Dr. Anderson-Oeser noted that Claimant had giveway weakness, "making it difficult to assess if she truly has any weakness in the lower extremities, or is this psychological overlay."

36. On September 13, 2017, Dr. Anderson-Oeser recommended Claimant undergo an EMG and a cervical spine MRI, referred Claimant to Dr. Gutterman and Dr. Esparza, and continued medications and the same work restrictions.

37. On September 29, 2017, Laura Clark, PA-C at Salud Family Health noted that she assumed Claimant's medical care. She recommended that Claimant be off of work for the next four weeks.

38. On October 19, 2017, PA-C Clark recommended that Claimant be off of work until November 13, 2017.

39. On October 25, 2017, Respondents sent Dr. Anderson-Oeser a questionnaire regarding Claimant's work restrictions. Dr. Anderson-Oeser opined that Claimant required the following work restrictions: "Seated work primarily with ability to stand/walk as needed for comfort. Max lift 15 lbs; max carry 15 lbs; max push/pull 20 lbs. No repetitive or frequent lifting, bending, twisting."

40. On October 26, 2017, PA-C Mansholt recommended Claimant undergo an EMG, MRI of her cervical spine, and referred Claimant to Dr. Gutterman and Dr. Esparza. He continued Claimant on medications and recommended Claimant be off of work from October 26 to November 26, 2017.

41. On October 27, 2017, Stephen A. Moe, M.D. performed a psychiatric independent medical examination ("IME") at the request of Respondents and issued a report dated October 30, 2017. Dr. Moe interviewed Claimant and reviewed Claimant's medical records, including Dr. Gellrick's July 17, 2014 report. Claimant reported that she was experiencing no physical problems whatsoever in the lead-up to her employment with Employer, nor was she taking any medications in the months leading up to the work injury. Claimant acknowledged having one prior work injury but could not remember what injuries she suffered. Claimant reported undergoing some treatment for the prior work injury and reaching a full recovery. Claimant could not recall if she received a settlement for that work injury. Dr. Moe noted that Claimant provided unreliable information on a variety of topics, which he stated could either be attributed to an intentional effort to influence his evaluation, or to unconscious psychological factors. He concluded that, Claimant's statements to him were, to some degree, a product of the former. Dr. Moe opined that Claimant's post-injury physical complaints were significantly influenced by psychological factors unrelated to the April 21, 2017 injury or/and by intentional exaggeration, and that her current psychiatric symptoms are not due to the alleged work injury of April 21, 2017.

42. Dr. Moe was present at hearing and observed Claimant, and testified by post-hearing deposition on as an expert in psychiatry. Dr. Moe testified consistent with his IME report. In discussing Claimant's memory loss about her prior workers' compensation injury, Dr. Moe opined that he found no cognitive issues to explain her memory loss, and that she was cognitively intact. Dr. Moe opined that an explanation for her selective memory loss is impression management, defined as manipulating her physicians to reach a certain conclusion. Dr. Moe continued to opine that Claimant's

current psychiatric symptoms are not related to the April 21, 2017 injury. Dr. Moe opined that Claimant's non-work related psychological factors, and/or intentional exaggerations, are influencing the physical symptoms she reports. Dr. Moe noted that potential causes of Claimant's psychological issues and depression include her history of abuse and life of missing opportunities she wanted for herself.

43. Dr. Moe reviewed Dr. Meredith Campbell's psychiatric evaluation from 2016, which documented Claimant's pre-injury condition. Dr. Moe noted that this report suggests that if Dr. Esparza is correct in finding that Claimant's physical condition has been causing her depression, then it has been doing so for years, since her 2013 injury. Dr. Moe opined that if Claimant is suffering from somatization, as found by Dr. Hughes, then the most probable explanation for her unconscious amplification of symptoms is that it took root years ago, and not from the work injury. Dr. Moe opined that Claimant's injury was objectively mild and not sufficient to initiate somatization.

44. On October 31, 2017, Douglas C. Scott, M.D. performed an IME at the request of Respondents and issued an IME report dated November 7, 2017. Dr. Scott interviewed Claimant, performed a physical examination, and reviewed Claimant's medical records, including Dr. Gellrick's July 17, 2014 report. He noted that Claimant "had difficulty recalling her past worker's compensation injury." Regarding the mechanism of the April 21, 2017 injury, Claimant reported that she slipped on egg yolk, fell backwards, and struck her right knee and left shoulder. Claimant reported again slipping forward upon attempting to get up. Claimant reported neck, head, and low back pain, rare pain in her right knee, and some popping in the left shoulder. Claimant reported having bruising over the right knee. Claimant reported that the only treatment that helped thus far was the pool therapy. Dr. Scott noted that the first examination by Dr. Louder indicated no findings of acute trauma.

45. On physical examination, Dr. Scott noted tenderness to touch over the bilateral L5-S1 junction, no neck or lumbar spine muscle spasms, multiple Waddell's signs, and no tenderness to palpation of the left shoulder. Dr. Scott opined that Claimant had pre-existing depression and anxiety with permanent impairment, along with pre-existing permanent impairment of the neck and lumbar spine. He opined that, as a result of the April 21, 2017 injury, Claimant suffered a low back strain, right knee strain and left shoulder strain, which should have resolved within six weeks of the injury. He further opined that Claimant's ongoing pain complaints are not physiologic and her current reported symptoms are either psychological or related to secondary gain. He placed Claimant at MMI as of October 31, 2017 with no permanent impairment, restrictions or need for further treatment.

46. Dr. Scott was present during hearing and observed Claimant, and testified by post-hearing deposition as an expert in occupational medicine. Dr. Scott testified consistent with his IME report. Regarding his observations of Claimant at hearing, Dr. Scott testified that Claimant walked without a limp, had a quick gait, sat at counsel's table without appearing in any distress, did not require help getting out of her chair, and demonstrated no observable pain behaviors. Dr. Scott testified that observable pain

behaviors would be expected with a physiological injury, and particularly with an individual reporting pain at 7/8 out of 10.

47. Dr. Scott testified that Claimant does not have a physiological or anatomic basis for her current pain complaints, noting that Claimant tested positive for all five Waddell's signs on his examination. Dr. Scott testified that his diagnoses of low back, right knee and left shoulder strains were based on Claimant's complaints to him, and the complaints as documented in the medical records contemporary to the work injury. He stated that his diagnoses are dependent on the truthfulness of Claimant's complaints. Dr. Scott testified that a mild strain is expected to resolve within six weeks. He testified that he questions whether Claimant's problem is psychological, or related to secondary financial gain, and testified that Claimant may need further treatment for psychological issues outside of the workers' compensation system.

48. Dr. Scott acknowledged that Claimant's MRI findings prior to April 21, 2017 were different than the MRI findings after the April 21, 2017 work injury. He further acknowledged that Claimant's more recent MRI could cause Claimant's pain, yet testified that, if so, it would be expected that the treatment would have improved Claimant's symptoms. Dr. Scott testified that Claimant's MRI findings could be degenerative. He further stated that Claimant's neck and back complaints were the same complaints from Claimant's 2013 work injury.

49. On December 6, 2017, John S. Hughes, M.D. performed an IME at the request of Claimant. Dr. Hughes interviewed Claimant, reviewed medical records, and performed a physical examination. He noted that medical records prior to April 21, 2017 were not made available for his review. Claimant reported "essentially whole body pain," and constant neck and low back pain rated 8/10, radiating into her arms and legs, worst in the left leg. When asked about prior injuries, Claimant "vaguely and evasively" answered that she fell, but could not recall what body part was injured or whether it was work related. Dr. Hughes' report makes no mention of Claimant's history of chronic pain or depression and anxiety. Dr. Hughes opined that Claimant had a work-related fall with multiple injuries sustained on April 21, 2017 which includes left shoulder sprain, right knee strain, lumbar spine strain, and adjustment disorder with depression and anxiety meriting further psychiatric evaluation with Dr. Gutterman as recommend by Dr. Anderson-Oeser. He opined that Claimant sustained progressive somatization as a result of an adjustment disorder with depression and anxiety, which he concluded stemmed from Claimant's April 21, 2017 work injury. Dr. Hughes recommended proceeding with cervical spine MRI and EMG, and restrictions of lifting, pushing or pulling a maximum of 10 pounds. He further recommended reviewing Claimant's past medical records prior to the assignment of a permanent impairment rating. He opined that Claimant's medical evaluation and treatment had been reasonable, necessary and related to the April 21, 2017 injury.

50. On January 4, 2018, Claimant returned to Dr. Anderson-Oeser with continued complaints of diffuse pain in the cervical and low back with numbness and tingling in upper and lower extremities. Dr. Anderson-Oeser noted that she received the IME reports of Dr. Scott and Dr. Moe and briefly reviewed the IME report of Dr. Scott. She

noted she had been unaware of Claimant's 2013 injury and the resulting impairment and restrictions. She stated, "The patient initially informed us that she had no prior history of low back symptoms; therefore, I question how much of her current back pain is related to a more recent injury versus her prior back injury." Dr. Gellrick noted that she would review the IME reports and determine if additional treatment was warranted. She continued Claimant on pool therapy and medications. She placed Claimant on the work restrictions given to her by Dr. Gellrick in 2014.

51. Dr. Anderson-Oeser reevaluated Claimant on February 12, 2018. Claimant rated her pain 9/10, despite also reporting that her medications were 50-75% effective in controlling her symptoms. Dr. Anderson-Oeser opined that Claimant was quickly approaching maximum medical improvement ("MMI"), and that additional treatment other than medication management would not be of benefit to Claimant due to her limited response to treatments rendered to date. Dr. Anderson-Oeser refilled Claimant's prescriptions and continued the work restrictions given to her by Dr. Gellrick. Dr. Anderson-Oeser did not further discuss the IME reports.

52. At her most recent visit with Dr. Anderson-Oeser, on March 14, 2018, Claimant reported 7-8/10 pain with no significant improvement of her symptoms. Dr. Anderson-Oeser opined that there was "not much more to offer this patient other than continuing with her independent program." She suggested Claimant continue with medication management for several months. Claimant's diagnoses were cervical, left shoulder, and lumbar strains, cervicalgia, lumbar radiculitis, chronic low back pain, lumbar degenerative disc disease, and major depressive disorder. Dr. Anderson-Oeser noted that she would place Claimant at MMI after receiving and reviewing Dr. Gellrick's report. She recommended that Claimant remain on the same permanent work restrictions given to her by Dr. Gellrick after her 2013 injury.

53. Claimant testified at hearing that she did not remember what she was doing when she was injured in 2013, her symptoms, the specifics of her past treatment, or if she had any permanent restrictions resulting from the 2013 injury. Claimant stated that she perhaps received an impairment rating for her prior injury. Claimant testified that she does not recall having chronic low back or neck pain prior to the alleged April 21, 2017 work injury. Despite testifying she had no recollection of her prior symptoms, Claimant also testified that the pain from her prior injury was "very different" and "entirely different" than her current pain and symptoms. She also testified that, while her symptoms from the 2013 work injury did not resolve completely, they resolved enough such that she was able to live her life and work. Claimant initially testified that her depression and anxiety began after the alleged April 21, 2017 injury, then later testified that she had received prior treatment for her depression and anxiety, improved, and was not experiencing either prior to beginning her employment with Employer. When asked about the hydroxyzine, Zoloft, and Celexa she was prescribed prior to her current injury, Claimant testified that she did not think she ever took medication before.

54. Claimant testified that did not feel the need to apply for SSDI in connection with the 2013 work injury, but did so pursuant to the insurance carrier's instruction. Claimant later testified that she felt like she could not work at the time she filed for SSDI and that

she completed her SSDI application truthfully. On the SSDI application, Claimant reported that prior to her 2013 injury she was able to work, run, go to the gym, dance, live her life, and clean her house properly, and that by the time of her application for disability on 8/21/2015, she could no longer do those activities. When asked about this on cross-examination, Claimant said that she actually did do these activities and was capable of doing them.

55. Claimant further testified that, between the date of MMI for the 2013 injury and when she began her employment with Employer, she worked in a restaurant kitchen, as well as performed cleaning duties and arranging boxes through a temporary employment agency. Claimant testified at hearing that, prior to being hired by Employer, she underwent and passed a physical evaluation. She testified that she felt capable of performing the job duties when hired by Employer.

56. Despite testifying that she did not remember whether or not she had permanent restrictions from the 2013 injury, Claimant also testified that she informed Employer of her permanent restrictions, and which she claimed Employer disregarded. Claimant testified that she did not tell Dr. Anderson-Oeser of her prior conditions when asked because she forgot. She later testified that she did not tell her providers of her prior condition because she was focusing on the current moment and not the past.

57. Claimant testified that her primary ongoing issue is neck and low back pain radiating to her left leg. Claimant testified that her pain started at 10/10 and now is 6-7/10 because of the medications. Claimant testified that none of the treatments have improved her symptoms.

58. Claimant testified that she worked approximately 45 hours per week at $14.00 per hour. Claimant later testified she was hired at $12.00 per hour, and in June 2017 all employees received a raise to $14.00 per hour. She testified she worked modified duty, approximately 30-35 hours per week, from April 23 to September 23, 2017. Claimant testified she did not work at all from September 24, 2017 to January 21, 2018 because Employer could not accommodate her work restrictions. She testified that from January 22 to February 21, 2018 she worked a modified job at ARC, which was arranged by Employer. Claimant testified she was paid $14.00 an hour and worked 9:00 a.m. to 4:00 p.m. five days a week at ARC.

59. Claimant testified that while working at ARC, her manager, Victoria Olivas, told her that she could not talk to her coworkers. Claimant testified that she questioned why she was prohibited from talking to co-workers, which caused Ms. Olivas to become upset. She testified that Ms. Olivas told her she should no longer work there. Claimant testified that two days later she received a letter from Employer stating she was no longer employed. Claimant denied that another employee told her she was “pulling clothes” wrong. Claimant testified that there were no issues with her job performance. Claimant testified that she did not do anything to cause her termination.

60. Maria Avalos, Assistant Store Manager at ARC, testified by post-hearing deposition. Ms. Avalos testified that Claimant was given various job duties, including

"ragging out," which entails pulling clothing items of a certain size or color to be recycled. Ms. Avalos testified that Claimant would clock-in late but want credit for clocking in on time. Ms. Avalos testified that Claimant's employment came to an end when she decided to leave. Ms. Avalos testified that Claimant left because she was not ragging out correctly, and did not want others telling her what to do, so she became upset. She testified that Claimant said she felt like she was being treated like she was in the military.

61. Victoria Olivas, Store Manager at ARC, testified by post-hearing deposition. On the date Claimant's volunteer assignment ended, Ms. Olivas testified that a co-worker, Martha, reported that Claimant was upset for being told she was doing her ragging out work incorrectly. Ms. Olivas called Claimant into the office to discuss the issue, and also called in Martha and Ms. Avalos. Ms. Olivas testified that she told Claimant she sensed she was not happy, and Claimant then began crying and asked if she should leave. Ms. Olivas testified that she told the Claimant no, and that she was not being fired, but that if she wanted to leave that was up to her. Ms. Olivas testified that Claimant then asked for copies of her paperwork and left.

62. Claimant's testimony is found incredible and unpersuasive.

63. The ALJ finds the opinions of Drs. Scott and Moe more credible and persuasive than the opinions of Drs. Anderson-Oeser, Esparza and Hughes.

64. The ALJ finds the testimony of Mr. Gutierrez, Mr. Gonzalez, Mr. Jacobo, Ms. Avalos and Ms. Olivas credible and persuasive.

65. The ALJ finds that Claimant slipped and fell onto her knees and hands at work on April 21, 2017. The ALJ further finds that this minor accident did not cause any disability or need for treatment. Claimant's physical and psychological conditions were pre-existing, and the employment did not aggravate, accelerate or combine with such conditions to cause disability or the need for treatment.

66. Claimant failed to prove, by a preponderance of the evidence, that she suffered a compensable injury arising out of and in the course of her employment on April 21, 2017.

67. As Claimant failed to meet her burden to prove that she suffered a compensable injury, the other designated issues are moot.

68. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the alleged injury he was performing service arising out of and in the course of the employment, and that the alleged injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-

existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ concludes Claimant failed to prove, by a preponderance of the evidence, she suffered a compensable injury on April 21, 2017. Although Claimant's July and August 2017 MRIs evidenced disc herniations that were not present on the MRI taken in connection with the 2013 injury, such findings are not irrefutable proof of a back injury. Dr. Scott credibly testified that the MRI findings could be degenerative. Moreover, even if the MRI findings were considered irrefutable proof of an injury, there is insufficient credible and persuasive evidence establishing such injury occurred during the course and scope of Claimant's employment.

Claimant's testimony regarding the mechanism of injury, her symptoms, her limitations, and her termination was not credible. Claimant's testimony regarding the mechanism of injury was refuted by the credible and persuasive testimony of Mr. Gutierrez, who personally observed the incident and testified that he saw Claimant going up the stairs and fall forward onto her knees and hands. Mr. Gutierrez credibly testified that Claimant did not fall onto her back, as Claimant alleges, nor did he testify that there was a second slip and fall.

Claimant has a documented history of pre-existing cervical and lumbar pain, left lower extremity pain and paresthesias, headaches, complete body pain, and adjustment disorder with anxiety and depression. As a result of the 2013 injury, Claimant was deemed to have permanent physical impairments to her cervical and lumbar spine, as well as a psychiatric impairment. In filing for SSDI in 2015, Claimant purported to be unable to work as a result of the 2013 injury. Medical records reflect that Claimant continued to experience "complete body pain," including chronic low back pain, left leg paresthesias, as well as symptoms of anxiety and depression in 2015 and 2016. Claimant's current primary complaints she attributes to the alleged April 21, 2017 injury are longstanding, pre-existing issues for Claimant. Her testimony that these physical

and psychological conditions improved prior to her employment with Employer and that her current symptoms are "entirely different" are incredible and unpersuasive.

Claimant, from both her 2013 and current injuries, has consistently presented with non-physiologic exams that indicate her pain is psychologically driven. From the 2013 claim, three physical therapists and one physician assistant found inconsistent non-physiologic findings including: signs of malingering, positive Waddell findings, and anxiety induced pain and weakness. The same non-physiologic findings and positive Waddell findings have been found in her current claim, by her treating physician, Respondents' experts, and Claimant's expert.

In her reports to physicians, Claimant repeatedly withheld information regarding the 2013 injury. Despite undergoing over a year of treatment for her 2013 neck and back injury and being assigned permanent physical and psychological impairments, Claimant failed to divulge such conditions to her physicians. Claimant either specifically denied any history of pain or injury to the areas at issue, or withheld such information entirely from certain providers. When each IME physician specifically questioned Claimant about the 2013 injury, they all noted Claimant could not recall specifics, and noted Claimant was unreliable, vague and evasive. Dr. Moe credibly opined that there are not any cognitive issues explaining Claimant's memory loss and concluded she was, in part, attempting to manipulate his evaluation. At hearing, Claimant contradicted herself by testifying that her current symptoms are entirely different than her prior symptoms, which she simultaneously alleged she did not remember.

Dr. Anderson-Oeser was unaware of Claimant's 2013 injury until January 4, 2018, at which time she questioned the relatedness of Claimant's back symptoms. While Drs. Esparza and Hughes opined that Claimant's condition is work-related, both doctors make no reference to Claimant's pre-existing physical and psychological conditions. While Dr. Scott opined that Claimant sustained strains of the low back, right knee and left shoulder, Dr. Scott testified that his opinion was based on the truthfulness of Claimant's statements. The opinions that Claimant sustained a work-related injury are based on Claimant's reported mechanism of injury, symptoms and limitations, which have been found incredible.

Based on the totality of the evidence, Claimant failed to prove it is more probable than not she sustained a compensable injury on April 21, 2017. While Claimant slipped and fell at work, the ALJ is persuaded such incident did not cause any disability or need for treatment. Claimant's physical and psychological conditions were-pre-existing, and the employment did not aggravate, accelerate or combine with such conditions to cause the need for treatment.

As Claimant failed to meet her burden to prove she sustained a compensable injury on April 21, 2017, the remaining issues of medical benefits, temporary indemnity benefits, AWW, and responsibility for termination are moot.

ORDER

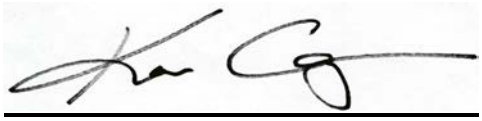
It is therefore ordered that:

1. Claimant failed to establish, by a preponderance of the evidence, that she suffered a compensable injury on April 21, 2017. Claimant's claim for workers' compensation benefit is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 28, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-058-502-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer, and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 19, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 6/19/18, Courtroom 4, beginning at 1:30 pm, and ending at 3 pm).

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection. Respondents' Exhibits A through J were admitted into evidence, without objection, with the exception of Respondents' Exhibit I. Claimant objected on the basis that there was inadequate foundation to introduce the evidence. The ALJ reserved judgment on the foundation objection, and admitted Exhibit I after testimony.

At the conclusion of the hearing, the ALJ took the matter under advisement, and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether or not the Claimant sustained a compensable right shoulder injury on September 21, and, if compensable, medical benefits. The Claimant bears the burden of proof by a preponderance of the evidence on these issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural Posture

1. Respondents filed a Notice of Contest on October 7, 2017, denying coverage based upon the need for "Further investigation for compensability" (Claimant's Exhibit 6, p. 27).

2. Respondents filed a Notice of Contest on October 18, 2017, denying coverage based upon the reason: "Injury/Illness Not Work Related" (Respondents' Exhibit B).

3. A hearing took place on June 19, 2018, where testimony was presented before the undersigned ALJ.

Preliminary Findings

4. At the commencement of the hearing, the parties stipulated, and the ALJ finds, that if the claim is compensable: (a) the time period for TTD benefits is September 26, 2017, through September 29, 2017, both dates inclusive, and October 5, 2017, for a total of five days, and (b) Michael Ladwig, M.D. and Gary Childers, M.D., are the Claimant's authorized treating physicians (ATP).

5. At the commencement of the hearing, the parties disagreed on Claimant's average weekly wage (AWW). Respondent reported the AWW as $1,155 on the Employer's First Report of Injury form (Respondents' Exhibit A). There is no further explanation to how this number was reached. Claimant reported his AWW as $1,529.06. This number was calculated by taking the average of the pay he received each week for the 8 weeks leading up to the injury (Claimant's Exhibit 8, p. 29). This calculation is allegedly supported by a copy of his payroll information, but it is illegible (Claimant's Exhibit 8, p. 30).

6. Claimant was born on November 11, 1962, and was 55 years old on the date of hearing.

7. Claimant has worked in construction for 38 years; 3 of those years were spent discontinuously employed by GTH Excavating.

The Injury

8. Claimant arrived at Dakota Ridge job site on September 21, 2017, around 6:30 am He waited in his car, drinking coffee, until approximately 6:45 am, at which time he left his car to use the on-site port-a-potty.

9. In order to access the port-a-potty, Claimant had to remove a pole from a temporary fence. This involved grasping the pole above the fence, pulling the pole upwards, and twisting the pole from left to right. While making this motion, Claimant felt a "sharp pain in the joint of [his] shoulder but nothing debilitating." Ex. 4 p. 25.

After the Injury

10. On the day of the injury, Claimant continued his work of operating an excavator despite a "dull ache in the right shoulder." Ex. 4 p. 25. He applied a heating pad during the evening of September 21, 2017, and continued work on September 22, 2017 with the aid of Advil and Tiger Balm patches.

11. Claimant worked Monday, September 25, 2017, but informed his supervisor Jesus "BC" Morales of his shoulder pain. Mr. Morales procured a stand-in operator for the rest of the week, allowing Claimant to take off of work September 26 through September 29, 2017, inclusive.

12. Claimant is unclear if he visited a medical doctor between September 21 and September 29, 2017. On the Employee's Report of Injury Form, submitted October 3, 2017, Claimant lists he saw "Dr. Bill" on September 29, 2017; there is no surname listed for Dr. Bill (Claimant's Exhibit 4, p. 24).

13. Mr. Morales told Claimant he needed to be cleared to work by a doctor before returning to work. On October 4, 2017, Dr. Lisa Winkler of Clinica Family Health authorized Claimant to return to work that day (Respondents' Exhibit D).

14. Claimant was told by Respondent he needed a doctor authorized by Employer's insurance to sign off on his return to work, so he visited Dr. Michael Ladwig of Aviation and Occupational Medicine on October 5, 2017 (Claimant's Exhibit 2 pp. 1-4). Aviation and Occupational Medicine is an approved medical provider under Employer's insurance. Ex. H. Dr. Ladwig found that Claimant had a sprain of his right shoulder joint, and in his medical opinion "that there is greater than a 51% probability that this is a work related injury or condition." (Exhibit E). At that appointment, Dr. Ladwig signed off on Claimant's return to full duty with no restrictions, and scheduled a follow-up appointment for October 12, 2017 (Respondents' Exhibit E).

15. On October 12, 2017, Claimant saw Dr. Gary Childers, another doctor at Aviation and Occupational Medicine. Ex. 2 p. 17-18. Dr. Childers prescribed Claimant an anti-inflammatory steroid, and scheduled a follow up appointment on October 18, 2017.

16. On October 18, 2017, Dr. Childers referred Claimant to Health Images for an MRI (magnified resonance imaging) exam on October 25, 2017, based on the diagnosis of shoulder strain (Respondents' Exhibit F). There is nothing on the record to indicate Claimant had the MRI done.

17. On November 8, 2017, Claimant saw William Van Eimeren, M.D., a doctor at Clinica Family Health (Claimant's Exhibit 1, pp. 5-7). Dr. Van Eimeren ordered an MRI from Health Images.

18. On November 13, 2017, Claimant had an MRI performed at Health Images by Patrick O'Malley, M.D., on the basis of Dr. Van Eimeren's referral (Claimant's Exhibit 3, pp. 22-23). The results were discussed in an appointment between Claimant and Dr. Van Eimeren on November 30, 2017; at that appointment, Dr. Van Eimeren recommended orthopedic surgery on Claimant's right shoulder. (Claimant's Exhibit 1, pp 8-10).

19. Claimant has continued working since being cleared to return to work; according to Mr. Morales' testimony, Claimant doesn't seem to have trouble or experience shoulder pain while working. Claimant has not visited a doctor for his shoulder injury in 2018, and has continued his normal work duties in 2018.

Ultimate Findings

20. Claimant credibly testified that he injured his right shoulder, while in the course of his employment. Claimant's testimony is corroborated by the medical records, which demonstrate a consistent pattern of complaint. The ALJ finds that Claimant presented in a straight-forward and credible manner. The medical records of a right shoulder injury are undisputed. Although there was some dispute about the date of the injury, whether Claimant had seen a doctor on September 29, 2017, and whether Claimant told Mr. Morales the injury was a manifestation of a preexisting injury, the ALJ finds that his testimony does not detract from the Claimant's credibility.

21. Further, the Claimant's testimony regarding the mechanism of injury is credible. The Claimant notified a supervisory individual with the Employer of his injury in a timely manner on September 25, 2017, and again, on October 1, 2017. The medical records following Claimant's date of injury corroborate Claimant's testimony concerning the mechanism of injury. Claimant's testimony was persuasive and credible.

22. Based on the totality of the evidence, the ALJ infers and finds that the event of September 21, 2017 constituted an aggravation and acceleration of a dormant preexisting fragility of the Claimant's right shoulder and the incident, which arose out of the course and scope of the Claimant's employment, required medical treatment and was temporarily disabling.

23. The care and treatment for the Claimant's compensable right shoulder injury at Aviation Occupational Medicine Clinic was authorized, causally related to the September 21, 2017 injury, and reasonably necessary to cure and relieve the effects thereof. Medical treatment at Clinica and its doctors was **not** authorized. The Employer

promptly referred the Claimant to the Aviation Occupational Medicine Clinic; and, there were no authorized referrals to Clinica.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See Prudential Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). Moreover, the ALJ, as the fact finder, is allowed to use reason and common sense in drawing inferences from other facts that have been proved. *Venetucci v. City of Colorado Springs*, 99 Colo. 389, 63 P.2d 462 (1936); *Independence Coffee & Spice Co. v. Kalkman*, 61 Colo. 98, 156 P. 135 (1916). *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, there is inconsistency on whether or not Claimant visited a doctor on September 29, 2017; however, Claimant is not asking for compensation for this visit and several medical professionals confirmed the shoulder injury after September 29, 2017. Therefore, Claimant is credible. The medical evidence is virtually undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the medical opinions are undisputed.

Compensability

b. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the

industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, based on the totality of the evidence, the event of September 21, 2017 caused an injury to the Claimant's right shoulder arising out of and in the course and scope of his employment with the Employer. Therefore, the Claimant sustained a compensable injury on September 21, 2017.

Medical Benefits

c. Under the provisions of § 8-43-404 (5) (a) (I) (A), C.R.S. an "employer or insurer shall provide a list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee." Rule 8-2 (A) (1) – (2) of the Workers' Compensation Rules of Procedure (WCRP), 7 CCR 1101-3, provides for the written list in compliance with § 8-43-404 (5) (a) (I) (A). As found, the Employer provided this list and Aviation and Occupational Medicine was authorized. Clinica was **not** authorized.

d. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the Claimant's medical treatment is causally related to the shoulder injury sustained on September 21, 2017. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment at Aviation Occupational Medicine was reasonably necessary to cure and relieve the effects of the September 21, 2017 injury.

e. Authorization refers to the physician's legal authority to treat the injury at Respondents' expense, and not necessarily the reasonableness of the particular

treatment. *Popke v. Indus. Claim Appeals Office*, 944 2d 677 (Colo. App. 1997). § 8-43-404(5), *supra*, allows an employer the right in the first instance to designate the authorized treating physician (ATP); the right to select however passes to claimant where the employer fails to designate in the first instance. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). An employer's right to select the treating physician is triggered when the employer receives oral or written notice from the employee or has:

> [S]ome knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.

Jones v. Adolph Coors Co., 689 P.2d 681 (Colo.App. 1984). Where the right to select passes to a claimant, treatment from the physician the claimant selects after that date is authorized. *See Grove v. Denver Oxford Club*, et al., W.C. No. 4-293-338 [Indus. Claim Appeals Office (ICAO), November 14, 1997]. A physician may become authorized to treat a claimant as a result of a referral from a previously authorized treating physician made in the normal progression of authorized treatment. *Greager v. Indus. Commi'n*, 701 P.2d 168 (Colo. App. 1985). As found, Respondents are liable for all medical services rendered by Aviation Occupational Medicine related to the Claimant's compensable right shoulder, injury and are not liable for medical services rendered by Clinica Family Health.

Average Weekly Wage (AWW)

f. An AWW calculation is designed to compensate for temporary total wage loss. *Pizza Hut v. Industrial Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). An ALJ has the discretion to determine a claimant's AWW, based not only on a claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). § 8-42-102 (2) (d), C.R.S. sets forth the method for calculating the AWW. The overall purpose of the statutory scheme is to calculate "a fair approximation of a claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). Because the payroll information offered by Claimant is illegible, the AWW provided by Employer will be used. As found, the Claimant's AWW is $1,155 per week. Based on this AWW, a TTD benefit rate of $769.99 per week, or $110 per day, which is less than the maximum for FY 2017/2018.

Temporary Total Disability (TTD)

g. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss

necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's time off from work in this case was not his fault but as a result of the shoulder injury sustained September 21, 2017. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant was temporarily and totally disabled for five days: September 26 – 29 and October 5, 2017.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on compensability, medical benefits, AWW and TTD.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all of the causally related and reasonably necessary costs of medical care provided by Aviation and Occupational Medicine, subject to the Division of Workers Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary total disability benefits at the rate of $769.99 per week, or $110 per day, from September 26, 2017, through September 29, 2017, both dates inclusive, and October 5, 2017, a total of 5 days, in the aggregate amount of $550, which is payable retroactively and forthwith.

C. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

D. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury to his lower back on May 18, 2017?

II. If Claimant suffered a compensable injury, are Aspen Creek Medical Associates, and Ronald Hammers, MD, now Claimant's Authorized Treatment Providers?

III. If Aspen Creek Medical Associates and Ronald Hammers, MD are Claimant's ATPs, has Claimant shown, by a preponderance of the evidence, that the spinal surgery performed by Dr. Hammers- and all related treatment- is reasonable, necessary, and related to Claimant's work injury?

IV. If Claimant suffered a work injury as noted above, is he entitled to Temporary Total Disability payments from May 23, 2017, until terminated by operation of law?

V. If Claimant is entitled to TTD benefits, was Claimant responsible for his own termination by resigning his employment with Employer?

PRELIMINARY MATTERS

During the hearing, the ALJ found that the issue of Average Weekly Wage was not ripe for determination at this hearing, due to unresolved, good faith issues with discovery process.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant testified at hearing that he worked for the Employer beginning November 14, 2007 until the employment relationship ended effective August 24, 2017. Claimant testified that he sustained an injury to his back while working the Employer on May 18, 2017.

2. Claimant characterized his work for the Employer as being "heavy duty construction." He explained that in the weeks prior to the May 18, 2017 injury, he was hanging 12-foot and 8-foot sheets of drywall. He estimated, based on his experience in this field that a 12-foot, ½" sheet of drywall weighs approximately 80 pounds. In addition to the heavy lifting, Claimant testified that he routinely had to climb ladders, bend, squat, crawl, move scaffolding, load and unload equipment.

3. Claimant was involved in a motorcycle accident on September 9, 2014. Claimant testified that he underwent treatment for his lumbar spine, including

chiropractic care, pain management, and injections. Claimant recalled finishing treatment for that condition within a year of the accident. Claimant testified that his symptoms were much better after he finished his treatment.

4. During Claimant's March 20, 2015, examination with Dr. Kleiner, (one-month prior to Claimant settling this motorcycle accident claim) Claimant complained of "severe pain with position change, and is unable to find a comfortable position for longer than 10 to 15 minutes at a time." (Ex. M, p.179). Claimant was recommended to undergo fusion surgery as this would allow Claimant his "best chance for being able to resume an active lifestyle." It was Dr. Kleiner's hope that Claimant would discontinue cigarette consumption and schedule the recommended surgery.

5. Additional medical records show Claimant attended an examination with his PCP in March 2016, where he complained of significant back pain and received a referral for pain management and further injections. (Ex.G, pp. 33-35).

6. Claimant did continue to report ongoing lower back pain. He explained that he had been working as a carpenter for the last thirty plus years. He described as "average" the pain for the type of career he was in. He no longer required any sort of narcotic pain medication after conclusion of this treatment.

7. Claimant returned to work for the next few years performing his full job duties for Employer after recovering from the motorcycle accident. Claimant reviewed an "Employee Details Report" (Ex. 12), and was asked about the work he was performing prior to May, 2017. Claimant could not recall the specific job tasks being performed, but he knew that it was "construction oriented" and "definitely labor intensive."

8. At the time of the incident, Claimant was performing a fire station remodel at "617 Arrawana" in Colorado Springs, CO. Claimant had been working on this particular jobsite for several weeks prior to the incident, while performing his usual duties. Claimant testified that he performed all of the steel stud framing and all of the drywall hanging. Shortly before the injury occurred, Claimant was moving all of the furniture into one room so that work could be done. He moved office furniture, a large industrial stove and shelving units with no help.

9. Claimant was moving two full sized desks, stacked upon each other, which were roughly three feet tall, three feet wide, and six feet long. He described the desks as being "very dense" and "very heavy." Claimant described that he was just attempting to "muscle" the desks out of the way and was attempting to lift and push when he felt a "snap and a pop" in his back, at which time he knew he injured himself.

10. He experienced pain in his lumbar region and his buttocks with shooting pains and tingling immediately. Claimant testified that, just prior to the work incident, his lower back was at the point where he was feeling like himself again, with no lingering effects from the previous motorcycle accident. He testified that he was able to lift 12

foot sheets of drywall by himself. It was revealed at hearing that Claimant did not elect to go forward with a lumber fusion surgery from this 2014 accident, instead settling the case and terminating his medical care. After fees and accrued medical expenses to date, Claimant netted $34,081.05. (Ex. E, p. 14).

11. Claimant testified that he sent a text to his brother and supervisor the night he was injured to inform him that he would likely be unable to work the next day. He did not ask to see a workers' compensation doctor at that time, because he did not know the extent of the injury. He testified that he didn't want to cause any problems for the family owned business. There were no witnesses to this incident other than Claimant.

12. Claimant was referred to Concentra by employer, and was first seen on 6/6/2017 by Nicholas Kurz, MD. (Ex. J). X-rays were performed, but not an MRI. During this visit, Claimant acknowledged having chronic back pain from his 2014 motorcycle accident. He also told Dr. Kurz that he had recently been referred by his PCP for an MRI and given gabapentin. Based upon this examination, Dr. Kurz felt that Claimant's injuries were unlikely (less than 50%) to be related to his work activities. He then referred Claimant to his primary care physician (Ex. J, p. 116, p. 120), Dr. Jeffrey Kent with Aspen Creek Medical Associates, for further treatment. Claimant's providers at Aspen Creek Medical then completed the referral process for Claimant to receive an MRI.

13. Based on the MRI results, Aspen Creek referred Claimant to Dr. Ronald Hammers for surgical evaluation. Claimant did undergo surgery and reported good relief initially; however, Claimant testified at hearing that his back has regressed to the point of being in more pain than he had been prior, and that he must use narcotic pain relievers daily.

14. On June 12, 2017, Claimant was medically recommended to be restricted from performing any work at all by his provider at Aspen Creek until after his evaluation with the surgeon. (Ex. 4, p. 39) Claimant testified that he has never been released to work again since that date.

15. Claimant did not work on Friday, May 19, 2017. He attempted work on Monday, May 22, 2017, despite his pain. Claimant testified that his ability to work was limited essentially to give instruction and provide tools. Claimant has not worked for Employer again since May 22, 2017.

16. Claimant testified that his anniversary was on May 21, and is wife's birthday was on May 22. He went to Manitou Springs to take "old timey" photos with his family, but described the entire ordeal as grueling. He testified that wife and son had to assist him back to the car. Claimant also performed some painting activities for his father beginning August 11, 2017. Claimant explained that he did perform some light painting for his father after his savings was entirely depleted, as Claimant had been out of work for almost three months at this point. Claimant testified he performed painting for perhaps 2 hours per day, while in extreme pain.

17. Claimant testified that he ultimately quit his job on August 24, 2017 due to his inability to perform the physical demands of his construction job. He never would have quit this job if it was not for the injury. With it being a family business, he did not want them to have to wait around for him forever. Claimant testified that he was never offered modified employment by the employer.

18. At hearing, Claimant was asked about a note from Aspen Creek Medical dated March 7, 2016 which indicated that Claimant "Still has a lot of pain from accident years ago. Injections in back have ended." (Ex. 4, p. 27). Claimant was unable at hearing to specifically recall what he was feeling on that date, but he was certain that pain was nowhere near the level of pain he has experienced after the May 18, 2017 incident.

19. The "Employee Details Report" from Employer notes that the only single, full-days off work for "illness" for 2016 occurred on 1/6/16, 1/7/16, 3/9/16, and 4/18/16. (Ex. 12, p. 159).

20. On May 23, 2017, Claimant went to see his personal chiropractor for evaluation of his new back pain. (Ex. 5, pp. 100-01). Dr. Becco did not document a mechanism of injury; however, he did document that Claimant was presenting with an acute problem to his lumbar, sacral, right buttock, and mid-to-upper thoracic spine. Claimant was tender in his mid-thoracic, lower lumbar, and lower sacral areas.

21. Claimant was sent to Concentra for evaluation and treatment. Claimant reported to Dr. Kurz that on May 18, he was at work moving furniture in order to be able to paint behind it when he felt like he pulled a muscle. (Ex. 7, p. 104). Claimant also mentioned that he had recently been seen by his PCP, who had requested an MRI and prescribed gabapentin. Dr. Kurz placed Claimant at MMI on June 6, 2017 and released Claimant from care, as noted.

22. The MRI was performed on June 9, 2017. The pertinent **Findings** noted were:

> L4-L5: Moderate broad-based disc herniation but with *superimposed large fragment* that his *likely* extruded, measuring approximately 2.9 cm in craniocaudal dimension and 1.8 cm in AP dimension. There is *severe* spinal stenosis. There is *significant mass effect* on the nerve roots within the spinal canal. *Moderate-to-severe* left foraminal stenosis as this extends into the left foramen.
>
> Under **Impression**, the MRI narrative notes:
>
> 1. *Severe* L4-L5 spinal stenosis from broad-based disc herniation but with *significant contribution from a large probably extruded fragment. Significant* mass effect on the nerve roots within the spinal canal. This also extends into the

left foramen causing *severe* left foraminal stenosis proximally. (Ex. 8, p. 112)(emphasis added).

23. Dr. Ronald Hammers concluded that the findings on the MRI were "quite significant" and corresponded with Claimant's history of two months of bilateral lower extremity symptoms after the May 18, 2017 work injury. (Ex. 9, p. 115). Claimant had reported to Dr. Hammers that he had had "a strenuous day at work, followed by the onset of symptoms the next morning." Dr. Hammers felt the pain generator was coming from the L4-L5 level due to the imaging. Although Claimant had chronic spondylosis, he felt those findings were chronic and not contributing to Claimant's current symptoms. Dr. Hammers recommended surgery right away due to the significant bilateral stenosis and recommended an L4-5 laminectomy and discectomy.

24. Claimant underwent surgery on June 29, 2017. In Dr. Hammers' **Description of Procedure**, he noted:

> ……This revealed the underlying dura, which was *severely shifted* to the patient's left, and there was a large mass on the right side in the entire lateral recess, nearly from pedicle to pedicle, as well as essentially dorsal to the thecal sac. *Indeed, as interpreted on the MRI, this was a very large extruded disk fragment which had migrated to that particular location.* This disk herniation was initially entirely adherent to the dura, and so I simply opened it and took disk out from within it, at which point the dura became nicely decompressed. I then reached up to the L4 nerve root and pedicle region and decompressed fragments of *disc herniation* from that region as well as the foramen, until the foramen and the nerve were nicely decompressed and the nerve was clearly identified…..(Ex. 10, p. 132)(emphasis added).

25. Claimant underwent an IME with Dr. Jack Rook on October 9, 2017. (Ex. 11). Claimant disclosed his previous back injury and reported that he has had some degree of chronic low back pain and discomfort as a result of his lengthy career in the construction business. *Id.* at 139. However, he reported no physical limitations on his ability to perform his job leading up to May 18, 2017, and had reported hanging over 200 sheets of 12-foot drywall in the two weeks prior to the work incident. *Id.* It was while Claimant was in the act of moving the desks that caused a sudden, sharp stabbing pain in Claimant's lower back. Dr. Rook acknowledged that he did not have Claimant's medical records from any times before this May 18, 2017 incident, including from his 2014 motorcycle accident.

26. Dr. Rook diagnosed Claimant with claim-related diagnoses of Status post L4-5 laminectomy and discectomy for treatment of an acute disc herniation and associated disc fragment with lumbar radiculopathy involving both lower extremities. (Ex. 11, p. 143). He outlined the reasons for believing that Claimant had suffered an acute on-the-job injury on May 18, 2017:

● Prior to the on-the-job injury the patient was able to perform physically demanding labor for a sustained period of time after his motorcycle accident that occurred three years earlier;

● He did not have any physical restrictions prior to the occupational injury;

● He was not experiencing lower extremity symptoms at the time of his on-the-job injury;

● It is the patient's history that he developed severe acute pain that immediately radiated into his legs associated with numbness, tingling, and weakness on the right side. This history is consistent with the development of an acute disc herniation (as was seen on this MRI scan) with acute nerve root compression;

● It is unlikely that the patient would have been able to perform heavy labor, such as hanging 12 foot sheets of drywall in the weeks prior to the on-the-job injury, with a large disc fragment compressing multiple nerve roots;

● The patient was performing excessive lifting and pushing of desks that he estimates weighed more than 400 pounds when he developed the acute low back and lower extremity pain. This type of activity greatly increases intra-abdominal pressure and places great stress on low back structures including intervertebral disc tissue;

● It is the patient's history that although he had a long history of chronic low back pain associated with the rigors of this job and the 2014 motorcycle accident that he remained functional with respect to the performance of the physical demands required of his work. (Ex. 11, p. 144).

27. Claimant underwent an IME *at Respondents' request* with Dr. Rachel Basse on October 19, 2017. (Ex. 14). Dr. Basse took a history from Claimant regarding the mechanism of injury and his medical history. Dr. Basse reviewed records from September 10, 2014 and up through the date of the incident. Dr. Basse indicated that Claimant did have a long history of waxing and waning lower back pain related to his years of heavy work in construction. However, Dr. Basse recognized that Claimant was able to return to work without restriction after recovery from his 2014 motorcycle accident.

28. Dr. Basse opined that, *assuming Claimant's history was accurate,* that he did sustain a substantial aggravation of his pre-existing lower back pain at work on May 18, 2017. Dr. Basse felt that if Claimant's symptoms did not improve with the surgery he already underwent, he may prove to be a candidate for a two-level fusion.

29. At hearing, Respondents called Mr. Scott Palmer, a supervisor for the Employer, and brother of Claimant. Mr. Palmer recalled that he, Claimant, and a man named "Terry" were all working at the Arrawana job on May 18, 2017, finishing the

inside of the building. Mr. Palmer left the Arrawana job for several hours to handle an issue with another tenant, returning at approximately 2:00 to 3:00pm. Mr. Palmer did not recall seeing Claimant exhibit any outward symptoms of pain when he returned to the job site for the next thirty to forty-five minutes. Mr. Palmer also did not recall seeing Claimant have any symptoms the next day (May 19, 2017).

30. Mr. Palmer did remember seeing Claimant again at work on Monday, May 22, and that Claimant was holding his back in pain, and Claimant told him he had hurt himself at work the prior week and was in a lot of pain over the weekend. Nor did Mr. Palmer recall Claimant texting him around the date of this incident to inform him of his injury, or that he would be absent from work.

31. Mr. Palmer testified that after the motorcycle accident, but prior to this incident he would have conversations with Claimant where Claimant would stop talking mid-sentence, wrinkle up his face, and jump a little, due to shooting pains he was experiencing in his back and legs.

32. Mr. Palmer confirmed that Claimant was hanging drywall, and in the week before this incident, he was hanging doors, trimming, and painting. Mr. Palmer testified that they hired an outside company to do the taping and texturing because Claimant "couldn't do the taping and texturing."

33. Claimant then explained that he was physically capable of performing the taping and texturing; it was simply his recommendation to hire this particular work out to save money. He explained it made financial sense to hire it out to cheaper labor than to have Claimant perform simply taping and texturing at $25 per hour. Claimant estimated the doors he had hung before this incident to weigh approximately 200 lb. each, and he had to lift them numerous times himself.

34. Mr. Palmer testified that his brother, Claimant, "very rarely complains" and agreed it would be consistent with Claimant's character to not want to file a Workers' Compensation claim or complain of back pain to him. Mr. Palmer testified that the Employer offers no sort of "light duty" which Claimant may have been able to perform after the May 18, 2017 injury. There is no documentation of any modified job offer in the record.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden

of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).*

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*.

3. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

4. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

5. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

6. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo.App.2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

7. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment

relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

8. In this case, Claimant has not been a totally consistent historian. His reporting of symptoms, including from his prior 2014 motorcycle accident and the incident at issue, has not been fully and internally consistent. They symptoms reported do not follow a linear progression. There is some conflict between what Claimant reports, and what Scott Palmer has credibly testified to.

9. However, the ALJ finds that what Claimant has reported right before and right after May 18, 2017 is sufficiently accurate to find this injury compensable. The MRI taken less than three weeks afterwards makes it clear that Claimant had recently suffered a recently debilitating injury to his L4 L5 disc. This was confirmed by Dr. Hammers' real-time surgical observations, and vindicates his advice to proceed without undue delay. No plausible alternative mechanism of this severe injury has been put forth.

10. For the reasons set forth by Dr. Rook-which the ALJ finds persuasive, and incorporates by reference-Claimant would not have been able to function with the disc in the condition it was in during the weeks preceding the injury. This was more than a natural progression of a preexisting condition-degenerative or otherwise; it was an *event* which occurred on 5/18/17, and the ALJ so finds, by a preponderance of the evidence. Even Respondents' IME physician agrees, assuming Claimant provided a sufficiently accurate history.

Authorized Treatment Provider/Right of Selection

11. The ALJ has concluded that Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his thoracic and lumbar spine on May 18, 2017. The ALJ disagrees with Dr. Kurz, as it does not appear that Dr. Kurz reviewed any records in conjunction with his opinion and prematurely dismissed Claimant's injury as being pre-existing. Dr. Kurz's refusal to treat for non-medical reasons, to wit: his belief that Claimant's injury was not work related, resulted in the right of selection passing to Claimant, at which time he chose Aspen Creek Medical Associates. Aspen Creek Medical Associates is now deemed to be Claimant's ATP, and all referrals made from Aspen Creek Medical, and any referrals within the chain of referrals, including, but not limited to, Dr. Hammers. Dr. Kurz's MMI determination is found to be invalid. *See* *Zolman v. Pinnacol Assurance,* W.C. No. 4-636-044 (ICAO, November 3, 2010). The *Zolman* court explains that § 8-43-404(5)(a)—the ATP designation statute—implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. This is an issue of fact for resolution by the ALJ. See also, *Cabela v. Industrial Claims Appeals Office*, 198 P. 2d 1277 (Colo. App. 2008). A referral by an ATP [under an erroneous causation/compensability analysis] to a Claimant's personal physician (and further referral to surgeon) is valid, and employer is responsible for costs of surgical treatment.

Medical Benefits

12. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

13. The ALJ has found that Claimant sustained a compensable injury. All treatment Claimant has had to date, including the surgery performed by Dr. Ronald Hammers, is found, by a preponderance of the evidence, to be reasonable, necessary, and related. Respondents have not challenged this aspect of Claimant's claim and relied on the defense of compensability, as opposed to a defense of specific medical benefits.

Temporary Total Disability

14. To receive temporary disability benefits, the Claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *Jorge Saenz Rico v. Yellow Transportation, Inc*. W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

15. Claimant has been found to have sustained significant injuries at work. Claimant was medically restricted from working from May 22, 2017 through the present and ongoing as a matter of law. Dr. Kurz did not address formal restrictions at his initial evaluation, as he opined Claimant's present symptoms were solely related to his pre-existing condition; however, the ALJ finds based on the evidence of record that Claimant was medically restricted from May 22, 2017 through June 12, 2017, when his ATP/PCP at Aspen Creek restricted Claimant from all work. Claimant has not been given any new restrictions since being taken out of all work completely beginning June 12, 2017.

Claimant Responsible for his Own Termination with Employer

16. Claimant argues that Respondents have waived the affirmative defense of "Claimant responsible for termination" to terminate TTD benefits. Ordinarily, an affirmative defense must be explicitly pled and is deemed waived if not raised at a point in the proceedings which affords the opposing party an opportunity to present rebuttal evidence. *See* C.R.C.P. 8(c); *Kersting v. Industrial Commission, supra; Terry v. Terry*, 154 Colo. 41, 387 P.2d 902 (1963); *Lewis v. Scientific Supply Co.*, 897 P.2d 905 (Colo. App. 1995). This principle protects the parties' due process rights to notice and an opportunity to be heard. *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990); *see also* Rule of Procedure VIII(A)(5), 7 Code Colo. Reg. 1101-3 at 21 (a party may not add an "issue" after the filing of the application or response, "except on agreement of all parties, or approval of an administrative law judge for good cause shown"). This affirmative defense was not pled in the Response to Claimant's Application for Hearing. It was not endorsed in the Case Information Sheet. It was not announced as an issue at the outset of the hearing, not addressed in opening statements. In this case, however, the ALJ finds that, read as a whole, the transcript shows that this issue was essentially *tried by consent*- including questions and answers elicited by Claimant's counsel.

17. Even though Respondents may therefore raise this argument, Claimant remains entitled to ongoing TTD benefits after his resignation. A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (ICAO July 18, 2003).

18. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo.1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996)(unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C.no. 4-676-410 (ICAO April 9, 2008). "Fault" can include poor job performance, but Claimant is not at fault if the termination is due to claimant's physical or mental inability to perform assigned duties, *Johnston v. Deluxe/Current Corporation*, W.C. No. 4-376-417 (Industrial Claim Appeals Office, June 7, 1999).

19. In this case, the evidence presented persuades the ALJ that Claimant voluntarily resigned his position with the company due to his work injury. Nevertheless,

Blair v. Art C. Klein Construction Inc., W.C. No. 4-556-576 (Industrial Claim Appeals Office, November 3, 2003), held that Claimant's voluntary resignation is not dispositive of the issue of whether he is responsible for termination of his employment. *Blair, supra,* held that the pertinent issue is the reason the claimant quit because the claimant is not "responsible" where the termination is the result of the injury. *See Colorado Springs Disposal v. Industrial Claim Appeals Office, supra; Gregg v. Lawrence Construction Co.,* W.C. No. 4-475-888 (ICAO, April 22, 2002); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAO April 24, 2002). According to *Blair, supra,* "if the claimant was compelled to resign from this employment such that it can be said the termination was a necessary and natural consequence of the injury, rather than the claimant's subjective choice, the claimant would not be at fault for the termination."

20. The ALJ finds that Claimant was essentially compelled to resign from his employment as a natural consequence of his injury, as it was evident given his condition that he would be unable to perform the full duties of his job. The Employer witness testified that he is unaware of any light or modified duty that Claimant may have been able to perform, thus precluding him from any ongoing employment with the Employer. There is no evidence to suggest the Employer had offered Claimant modified duty in attempt to bring him back to work. Although Claimant voluntarily resigned in this matter, the facts are similar to those in *Blair* that warrant ongoing TTD benefits paid to Claimant after his resignation. The sole cause of Claimant's ongoing wage loss since May 22, 2017 has been the May 18, 2017 work injury.

Unresolved Issues

21. The record as it currently stands does not show when, or if, Claimant might have returned to MMI status in the interim. The issue of Average Weekly Wage is not ripe for determination, due to evidentiary and discovery issues. While the record contains references to unemployment benefits being payable to Claimant, the periods of payout are unclear. While plainly subject to offsets to TTD payments, these unemployment benefits, and commensurate offsets, cannot be ascertained at this time.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable injury to his back on May 18, 2017.

2. Claimant's ATPs are now Aspen Creek Medical Associates and Ronald Hammers, MD.

3. Respondents are responsible for the surgery provided by Dr. Hammers, as well as all treatment and referrals associated therewith.

4. Claimant is entitled to TTD benefits from May 23, 2017, until terminated by operation of law.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 3, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-059-710-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 19, 2018 and June 25, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 4/19/18, Courtroom1, beginning at 8:30 AM, and ending at 12:00 PM; and, 6/25/18, Courtroom 3, beginning at 8:30 AM, and ending at 11:00 AM). The official Spanish/English Interpreter for the April 19, 2018 hearing was Nina Izqiuerdo. The official Spanish/English Interpreter for the June 25, 2018 hearing was Silvina Irimia.

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection. Respondent's Exhibits A through P were admitted into evidence, without objection.

Written transcripts of the evidentiary depositions of Christopher James Hood and Ivan Herrera Rodriguez, taken on June 14, 2018 in lieu of live testimony, were filed in advance of the second hearing, which took place on June 25, 2018.

At the conclusion of the second session of the hearing on June 25, 2018, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether Claimant suffered a compensable injury to his low back while in the course and scope of his employment on October 5, 2017; if compensable, whether he is entitled to reasonably necessary and causally related medical benefits to cure and relieve him from the effects of his low back injury; and, whether he is entitled to temporary total disability (TTD) benefits from October 9, 2017 thru October 17, 2017; for October 23, 2017, and from October 27, 2017 and continuing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds, that (a) the Claimant's average weekly wage (AWW) was $711.16, with an applicable TTD rate of $474.11 per week (which equates to $67.73 per day); and (b) that James Rafferty, M.D., and Robert Benz, M.D., are the authorized treating physicians (ATPs) for this claim.

2. The Claimant was born on August 25, 1992, and was 35 years old as of the dates of both sessions of the hearing.

3. The Employer employed thye Claimant as a stone fabricator and polisher for 5 years.

4. The room where Claimant worked always had a wet floor from the water used for grinding and polishing.

The Injury

5. On Thursday, October 5, 2017, the Claimant was working as a stone fabricator and polisher for the Employer.

6. The Claimant was carrying a piece of granite stone, weighing approximately 50 pounds. As he was walking on the wet floor with the stone, he slipped

and twisted his back. He began to feel pain in his lower back, and went home shortly thereafter [Transcript (hreinafter "Tr.") , p. 30].

After The Injury

7. The Claimant worked on Friday, October 6, 2017 but continued to feel pain in his lower back (Tr., p. 30 and Respondent's Exhibit I, p. 123). The Claimant continued to feel pain which worsened throughout the next few days (Tr., p. 30)

8. The Claimant reported the injury to Christopher Hood, Claimant's supervisor, on Monday, October 9, 2017. Hood called Erin Woodyard (who was reponsible for making workers compensation claims) to handle the Claimant's report.

9. On October 9, 2017, Woodyard documented the report, provided the Claimant with the necessary paperwork, and gave him directions to visit UCHSC (University of Colorado Health Sciences Center).

10. On Monday, October 9, 2017, Claimant visited Dwayne Strong , PA-C (Certified Physician's Assistant) at UCHSC, who ordered an x-ray on THE Claimant's lower back. PA-C Strong noted mild degenerative change at L4-L5 (Respondents' Exhibit E, pp. 44-46)

11. PA Strong discharged the Claimant and put him on work restrictions (Respondent's Exhibit E, p. 47.

12. The Claimant returned to UCHSC and was examined by Dr. Rafferty on Thursday, October 19, 2017. Dr. Rafferty ordered an MRI (magnetic resonance imaging) to be taken for Claimant's lower back (Respondents' Exhibit E, p. 50).

13. On Thursday, October 26, Dr. Rafferty determined that the Claimant had a lubar disc extrusion at L4-L5, and disc protrusion at L5-S1 (Respondents' Exhibit E, p. 53). The Claimant began treating for this injury with Dr. Rafferty, who became one of the Claimant's ATPs.

14. The Claimant was referred to Orthopaedic & Spine Center of the Rockies and visited Dr.Benz on November 3, 2017. Dr. Benz also became an ATP. Dr. Benz diagnosed the Claimant with L4-L5 disc herniation (Respondents' Exhibit H, pp. 96, 97). Dr. Benz determined different options for treatment of the Claimant, including injections, spine surgery, or just leaving it alone (Respondents' Exhibit H, p. 97).

15. The Claimant's claim was denied due to the allegation that he suffered a previous lower back injury while working for the same employer and the present claim was not compensable.

16. Christopher James Hood, co-owner of the Emplyer, testified in his deposition that the Claimant reported the slipping incident on October 5 or 6, 2017, and the Claimant clarified the work-relatedness of his back injury on Monday, October 9, 2017. Hood also testified that he had **no** knowledge of prior back problems on the part of the Claimant (Hood Depo., p. 11).

17. Ivan Herrera Rodriguez worked with the Claimant.as his direct supervisor. He denied that Claimant had reported injuring his back on Ocrtober 5, 2017. Herrera Rodriguez furrther testified that the slab of granite in the back of the Claimant's truck was work-related ---to install a kitchen, but Heera Rodriguez did not know how it got there (Herrera Rodriguez Depo., pp. 1 – 12).

18. The Claimant visited the Salud Family Health Center three times between October 9, 2015 and November 31, 2015, complaining of lower back pain. Additionally, it is noted in the Claimant's visit to Salud Family Heatlh Center on January 17, 2017 that he experienced lower back pain (Respondents' Exhibit B, pp. 10-16, 23).

19. After the injury of October 5, 2017, the Claimant worked for the Employer within his restrictions between October 18, 2017 thru October 20, 2017, and October 24, 2017 thru October 27, 2017 (Respondents' Exhibit I, p. 124).

20.. The Claimant has been unable to work full duty and the Employer has not made modified work available to the Claimant from October 6, 2017 through October 17, 2017, both dates inclusive, a subtotal of 12 days; from October 21, 2017 through October 23, 2017, both dates inclusive, a subtotal of 3 days; and, from October 28, 2017 and continuing. The period from October 28, 2017 through June 25, 2018, the date of the last session of the hearing, both dates inclusive, is a subtotal of 241 days. During all of these times the Claimant has experienced a 100% temporray wage loss and he has not been declared to be at MMI.Through the date of the last session of the hearing, June 25, 2018, the Claimant has been temporarily and totally disabled for an aggregate of 256 days. Fromj June 26, 2018 and ciontinuing, he remains temporarily and totally disabled.

Independent Medical Examination (IME) by Wallace K. Larson, M.D.

21. Dr. Larson performed an IME of the Claimant, at the request of the Respondents, He reviewed medical records and examined the Claimant. In his report and live testimony, Dr. Larson stated: "Whether or not this was aggravated at work canniot be determined with a high degree of certainty…It (*sic*) was no way on the MRI scan to date when thwe estruded fragment occurred at L4-5." Dr. Larson felt that the Claimant's history was not accurate. He was of the opinion that the Claimant had a pre-existing back condition. Ultimately, Dr. larson stated: "It is my opinion his ruptured disc and need for surgery does not rise to the level of probability related to his occupational

exposure." The ALJ infers and finds that Dr. Larson's opinions are somewhat equivocal, however, his "fail-safe" position is "does not rise to the level of reasonable probability."

22. In the present case, the ALJ finds the opinions of the ATPs more creible and persuasive than the opinions of IME Dr. Larson.

Ultimate Findings

23. Claimant credibly testified that he injured his back, while in the course of his employment. Claimant's testimony is corroborated by the medical records, which demonstrate a consistent pattern of his report of lower back pain. The ALJ finds that the Claimant presented in a credible manner. Although there is some dispute about the time the injury occurred, and whether it actually occurred in the scope of employment, the ALJ finds that none of the evidence detracts from the Claimant's credibility. Additionally, although there is evidence that there was a piece of granite stone in the back of Claimant's truck around the time of the injury, there has been no credible evidence that the Claimant was involved in the lifting or installing of this piece of granite. Also, the ALJ finds the opinions of Dr. Rafferty and Dr. Benz concerning work-relatedness, causation, and appropriate treatment more persuasive and credible than the opinions of IME Dr. Larson.

24. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the testimony of the Claimant and the opinions of Dr. Rafferty and Dr. Benz; and, to reject any testimony and opinions to the contrary.

25. The Claimant has proven, by a preponderance of the evidence that the event of October 5, 2017 constituted an aggravation and acceleration of a pre-existing condition of the Claimant's lower back, which arose out of the course and scope of the Claimant's employment, required medical treatment, and was temporarily disabling.

26. The care and treatment for the Claimant's compensable lower back injury at UCHSC and Orthopaedic & Spine Center of the Rockies was authorized, casually related to the October 5, 2017 injury, and reasonably necessary to cure and relieve the effects thereof.

27. It was stipulated, and the ALJ found that the Claimant's AWW IS $711.16, which yields a TTD benefit of $474.11 per week, or $67.73 per day.

28. As found in Finding No. 18 hereinabove, as of the date of the last session of the hearing, June 25, 2018, the Claimant has been temporarily and totally disabled for aggregate of 256 days. The Claimant continues to be temporarily and totally disabled.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was persuasive and credible. Also, the opinions of Dr. Rafferty and Dr. Benz and concerning work-relatedness, causation, and reasonably necessary treatment were more persuasive and credible than the opinions of IME Dr. Larson. As further found, the Claimant's testimony that he has been unable to work and has not been offered modified employment for the dates specified in Finding Nos. 18 and 25 herein above, concerning TTD was persuasive, credible and, essentially, undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005).

Also see Martinez v. Indus. Claim Appeals Office, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by substantial evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and opinions, the ALJ made a rational choice, based on substantial evidence, to accept the testimony of the Claimant and the opinions of Dr. Rafferty and Dr. Benz; and, to reject any testimony and opinions to the contrary, including the IME opinions of Dr. Larson. The Claimant's testimony concerning TTD was credible and virtually undisputed.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a pre-existing condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, based on the totality of the evidence, the event of October 5, 2017 caused an injury to the Claimant's lower back arising out of and in the course and scope of his employment with the Employer, aggravating and accelerating dormant pre-

existing back conditions. Therefore, the Claimant sustained a compensable injury on October 5, 2017.

Medical and Average Weekly Wage

d. As stipulated and found, Dr. Raffery and Dr. Benz were authorized, their medical care and treatment was causally related to the Claimant's low back injury of October 5, 2017, and it was reasonably necessary to cure and relieve the effects of that injury. Also, the Claimant's AWW is $711.16, thus yielding a TTD benefit rate of $74.11 per week, or $67.73 per day.

Temporary Total Disability (TTD)

e. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's time off from work in this case was not his fault but as a result of the back Injury sustained on October 5, 2017. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant has established entitlement to TTD benefits during the times he was unable to work and modified work was not offered to him specifically, as found in Finding No. 18 hereinabove, as of the date of the last session of the hearing, June 25, 2018, the Claimant has been temporarily and totally disabled for aggregate of 256 days. As of the date of the last session of the hearing, June 25, 2018, past due TTD benefits equal an aggregate amount of $17,338.88.

f. From June 26, 2018, the Claimant continues to be temporarily and totally disabled until at ATP releases him to return to full duty, without restrictions; until he is declared to be at MMI; or until he earns wages in the open, competitive labor market.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on compensability, medical benefits, AWW and TTD benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all of the causally related and reasonably necessary costs of medical care, including the costs of James Rafferty, M.D., and Robert Benz, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary total disability benefits at a rate of $474.11 per week, or $67.73 per day, for 256 days, past due, in the aggregate amount of $17, 338.88, which is payable retroactively and forthwith.

C. From June 26, 2018, Respondents shall continue paying the Claimant temporary total disability benefits of $474.11 per week, until cessation or modification thereof is warranted by law.

D. Respondent shall pay the Claimant statutory interest of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of July 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury to his cervical region, upper back, or upper extremities on or about April 5, 2017?

II. If Claimant suffered a compensable work injury, what medical treatment is reasonable, necessary, and related to treat said injury?

III. If Claimant suffered a compensable work injury, is he entitled to Temporary Total Disability payments? If so, for what period of time?

STIPULATIONS

The parties stipulated that if a compensable injury occurred, Claimant's Average Weekly Wage is $1304.64. Further, if compensable, Indemnity benefits would commence on 5/3/2017. Further, that the amount of Temporary Total Disability is not ripe for determination by the ALJ, as factual issues remain regarding subsequent employment of Claimant. The ALJ accepted these stipulations.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Pre-existing Cervical Radiculopathy

1. On September 4, 2015, Claimant obtained flexion and extension x-rays of his cervical spine. These studies established "moderate to advanced degenerative findings from C3-T1" and some "slippage" or retrolistheses at C3-C5. (Ex. K, p. 171)

2. On June 24, 2016, Claimant sought treatment with Dr. Scott Stanley at Denver Vail Orthopedics for a four-year history of cervical, thoracic, and lumbar pain. The Claimant reported pain levels at 7-8/10 that increased to 9-10/10 "when it is severe". He specifically described the character of his pain to be constant pain between his shoulder blades and constant burning, numbness, and tingling down his arms. (Ex. I, p. 143).

3. In his intake forms for the June 24, 2016 evaluation, Claimant documented stabbing pain in his cervical spine, with burning and aching symptoms in his bilateral arms, shoulders, and upper back, and pins and needles in his digits. (Id at p. 149).

4. Claimant testified at hearing that at the time of the June, 2016 evaluation, he was experiencing burning sensations down both arms and into his hands. For this symptom, he took Lyrica.

5. Dr. Stanley had recommended that Claimant undergo a cervical MRI (among other tests), but initially diagnosed the claimant with degeneration of a cervical disc without myelopathy based on x-rays obtained of the cervical spine. Lyrica was recommended for pain management. (Ex. I, pp. 145-146).

6. On June 28, 2016, Claimant underwent a MRI of the cervical spine, which established discogenic changes at C3-C7 and degenerative facet changes-left greater than right-at C3-C7. Foraminal stenosis-left greater than right-was noted at C5-C7. (Ex. K, pp. 167-168).

7. On July 15, 2016, Claimant returned to Denver Vail Orthopedics. He reported cervical pain that *radiates into both shoulders*. After reviewing the MRI, Dr. Knight opined that Claimant had the following diagnoses: cervical spondylosis with radiculopathy, displacement of cervical intervertebral disc, degenerative cervical disc, and cervical radiculopathy. She prescribed tramadol, and recommended a C7/T1 cervical epidural injection. (Ex. I., pp. 137-140)(emphasis added).

8. Claimant obtained a translaminar epidural steroid injection at C7/T1 on August 4, 2016. Thereafter, he reported minimal pain relief. (Ex. J, pp. 160-161). Claimant also testified that his symptoms returned after the first injection.

9. Claimant obtained a second translaminar epidural steroid injection at C7/T1 on September 22, 2016, due to his recurrent symptoms. Once again, Claimant reported no pain relief post-injection. (Ex. J, pp.155-156).

10. Claimant testified that the June 2016 treatment was for a prior work injury in February 2016 which he had reported to his immediate supervisor, Fred Platt. Fred Platt testified at hearing that no such injury was ever reported to him.

11. Claimant originally testified on direct examination that he had returned to baseline after his second injection in 2016. However Claimant indicated on cross-examination that the he had no relief after the second injection.

12. Mr. Platt testified that in late January 2017, Claimant had requested time off in early February of 2017, to obtain injections. Mr. Platt was unable to grant this time off due to scheduling issues. Mr. Platt testified that Claimant had informed him that he needed time off to get some shots in his neck. Specifically, Mr. Platt testified that Claimant told him that "he was getting a cortisone shot in his neck for a bulging disc."

Claimant's Incident of April 5, 2017

13. Claimant now alleges that on April 5, 2017, he sustained an injury to his neck and left upper extremity, when he slipped on the track of an excavator and had to catch his fall with his left arm. There were no witnesses to this injury.

14. The claimant testified he felt a pop in his neck and that he knew something was "immediately wrong."

15. Despite this, Claimant completed his 11.1 hour shift on April 5, 2017 and did not report any injury to his employer on that date. (Ex. L, p. 183).

16. The Claimant also completed a 10.7 hour shift on April 6, 2017 and a 10.4 hour shift on April 7, 2017. Claimant did not report any injury to Employer during either the April 6 or April 7 shifts. (Ex. L, p. 183).

17. Claimant's job tasks (which were performed on April 5-7, 2017) can require heavy lifting of over 50 pounds. (Ex. L, p. 178).

Claimant's First Report of Injury

18. Despite knowing something was "immediately wrong" Claimant did not seek out medical treatment until Monday, April 10, 2017. (Ex. F). Claimant explained at hearing that he waited that amount of time because he wanted to try to work through the injury to see if it would go away.

19. Mr. Platt testified he saw Claimant periodically between April 5 and April 10. Claimant never informed him of any work incident or injury. Mr. Platt testified that, had Claimant sustained an injury, it should have to be reported to him per employer policy.

20. Mr. Platt also testified that Claimant was able to complete all job tasks in the days between the alleged injury on April 5 and the reporting of the alleged injury on April 10, as evidence by company transportation logs. (Ex. L, pp. 189-194).

21. Mr. Platt testified the Claimant's job was a "very physical job" that required lifting heavy objects and sometimes contorting one's body into various positions, including lifting arms overhead.

22. Mr. Platt testified that if an injury was reported to a dispatcher by Claimant, he should have known, because the dispatcher was trained to tell employees to report injuries to Mr. Platt. Claimant testified he did not timely report the injury, because he thought he would try to work through the pain.

23. Claimant testified that he met with Fred Platt on Monday, April 10. In that meeting Mr. Platt informed Claimant that it would be best to put any treatment for injuries under his own personal insurance. Mr. Platt said "that is what the rest of the guys do." Claimant testified that Mr. Platt told him that if he put this under Workers' Compensation, they would deny the whole thing and Claimant would end up having to pay for all of the doctor bills. Claimant testified that he was nervous and didn't want that type of problem and bills. Claimant testified that he had an issue in his lower neck and upper back and instead of running it through Workers' Compensation, 'they' decided (he and Fred Platt) that he go to a chiropractor and pay for treatment with his own personal insurance.

24. Claimant testified that in his nearly 5 years at Wagner Equipment, he never knew of an employee who filed a Workers' Compensation claim. Claimant testified that he believes that was the case because Fred Platt likes to keep a zero incident rate at the branch.

25. Fred Platt testified that Wagner does like to minimize Workers' Compensation claims at Wagner Equipment for the management group. Mr. Platt testified that bonuses are paid to the management team if Workers' Compensation claims are low. No such bonuses were paid out in 2017; he was uncertain if any were paid for 2016.

26. At hearing, Mr. Platt denied ever encouraging any employee to not file a Workers Compensation claim, including Claimant.

Claimant's Failure to Report Pre-existing Conditions to Medical Providers

27. On April 10, 2017, Claimant presented to Chiropractor Bradley Hennen for an initial appointment and evaluation. Claimant testified he found this chiropractor on the internet.

28. In Dr. Hennen's intake form, Claimant reported he "learned about [Hennen's] office" because he was "referred by Dr. Boykins office." Despite filling this out in his own handwriting, Claimant testified this was not correct.

29. In the intake form, Claimant was asked to check a box in the intake form if various symptoms, including pain in back or neck, were "new in the past 3 months." Despite the boxes appearing prominently on the form, Claimant did not check this box. (Ex. F, p. 116).

30. Claimant also left blank a section of the intake form where it asked for any prior x-rays or MRIs. Claimant had had x-rays in 2015 and a MRI in 2016. (Ex. F, p. 119; K, pp. 167-68, 171).

31. At hearing, Claimant then testified this was a mistake, and that he misread the intake form when filling it out. He testified he should have marked that his symptoms were new pain within the past three months. Specifically, he testified "obviously marked the wrong ones, 'cause, even at this point, ***I didn't even realize those boxes were down on that right side. I didn't even notice them." The ALJ notes that Claimant specifically marked an "X" in the "New in past 3 months" box for the question: "Are you having trouble performing your daily activities?"*** (Ex. F, p. 115)(emphasis added).

32. In this intake form filled out on April 10, 2017, Claimant indicated he was seeing this chiropractor because he had a "pinched nerve in center of back between shoulder blades, numbness, tingling." (Ex. F, p. 112).

33. Claimant then testified he told Chiropractor Hennen he had a pinched nerve because it "burn[ed] like crazy all the way down [his] arm" and because he couldn't feel his fingers." Claimant testified he did not have these symptoms previously.

34. However, Claimant's intake form for the June 24, 2016 with Denver Vail Orthopedics appointment states his symptoms were "between shoulder blades a lot of pain, make the nerves down my arms burn and hands go numb." (Ex. I, p. 151).

35. On May 3, 2017, Claimant presented to Centura for an initial evaluation. In his intake form, Claimant specifically responded "no" to the question "have you been treated in the past for this?" (Ex. B, p. 80).

36. On June 27, 2017, Claimant reported to Dr. Finn that, in response to a question of whether he had "any previous injuries or problems to areas that we are seeing you for today" that he only had "slight arthritis above injury." (Ex. D, p. 90).

37. On September 7, 2017, PA Mark Stafford (working with Dr. William Lippert, MD) documented that the Claimant had *"no surgeries or injections to date".* (Ex. C, p. 82). Claimant now denies making such statement to Dr. Lippert's office.

Claimant's Treatment, Post-Reporting

38. Claimant testified that he went to the ER at UC Health in late April because he was in agonizing pain and he couldn't take it any longer due to burning, stabbing pain in his neck and all the way down his arm, down to his last two fingers and the inside of his arm, and up into his armpit. Claimant testified that it was swollen up like crazy and it was the worst pain that he had ever had. Claimant testified that he never had that type of pain prior to this accident.

39. He treated at the ER at UC Health due to this accident on April 29, 2017. (Ex. 4). At this time, the tentative diagnosis was cervical radiculopathy and foraminal stenosis.

40. Claimant then started treating at CCOM. (Ex. 5). Dr. Jay Neubauer is the Authorized Treating Physician in this claim. CCOM, has served as the ATP for over 13 months. Dr. Neubauer opined that the following diagnosis applies due to the April 5, 2017 injury: (1) Injury of brachial plexus, (2) Sprain of cervical spine, (3) Cervical radiculopathy, and (4) Strain rotator cuff, Left Shoulder. (Ex. 5, pp. 163 – 164).

41. Dr. Neubauer opined that based upon his "knowledge of the mechanism of injury (slipping while exiting an excavator and grabbing a handle to catch himself with his left arm) it is more likely than not that the injuries Mr. Mills sustained on 4/5/2017 were caused by the work place accident." (Ex. 5, pp.163 – 164).

42. Dr. Neubauer opined that the following treatment and referrals are recommended to treat the work place injuries in this claim: (1) Pain management specialist recommends cervical injection, and (2) EMG. *Id.* He further opined that his

proposed treatment/referrals are reasonable, necessary, and related to the work place accident. *Id.*

Claimant's Commercial Driving Examination

43. On August 7, 2017, Claimant underwent a medical examination for his commercial driving certification. (Ex. M). In his application, when asked *"Do you have, or have you ever had"* Claimant marked the "NO" box for the following questions:

19. Missing or *limited use* of *arm,* hand, finger, leg, foot, toe

20. *Neck* or back problems

21. Bone, muscle, joint, or *nerve problems* (emphasis added).

44. After filling the questionnaire out, Claimant signed the document "certifying" that the information is "accurate and complete" and that "submission of fraudulent or intentionally false information may subject [him] to civil or criminal penalties." Claimant testified at hearing that he understood that intentionally false information could subject him to civil or criminal penalties. (Ex. M, p. 204).

45. Further, the CDL physical examination conducted by Elizabeth Stroh, FNP-C, MSN, on August 7, 2017 noted that the *Claimant had a **"normal"** exam, including boxes to check for **back/spine, extremities/joints,** and **neurological system.*** (Ex. M, p. 203) (emphasis added). Claimant testified at hearing that the examiner "put me through some tests and I was able to pass it."

Claimant's Testimony Regarding Omissions

46. Claimant testified he made a mistakes on the intake forms for Chiropractor Hennen, stating his injuries were not new in the past 3 months. He also made a mistake by signing the CDL paperwork stating he had no neck or back injuries as of August 7, 2017 (even though this mistake would subject him to civil and criminal penalty).

Objective Testing / Pre- and Post- Injury

47. Claimant underwent a post- injury x-ray of his cervical spine on April 18, 2017. This study was compared against the prior extension/flexion x-ray performed on September 4, 2015. The findings in the 2017 x-ray established there were *"no definitive interval change compared to the exam dated September 4, 2015."* (Ex. K, p. 164)(emphasis added).

48. Chiropractor Chad Abercrombie documented that the April 2017 x-ray showed "a few mm retrolisthesis of C3-C5 *that had not changed from a previous x-ray performed in 2015."* (Ex. G, p. 123)(emphasis added). It was also noted that Claimant "*does not list ever having pre-existing neck* or back problems." *Id.*

49. Dr. Lesnak (Respondent's IME physician) testified the 2016 cervical MRI showed multi-level degenerative disc changes, with multiple areas of narrowing and foraminal stenosis. He testified the 2016 findings were "*moderately severe."*

50. The MRI from 2016 states that Claimant had foraminal narrowing and stenosis C3-C7, left worse than right. (Ex. K, pp. 167-168).

51. The 2017 MRI indicated there were "moderate-to-severe left neuroforaminal stenosis at C3/C4 and C4/C5." This study does not indicate whether it was compared to the 2016 study by the radiologist. (Ex. K, pp. 162-163).

52. In addition to testifying that Claimant's MRI findings were already "moderately severe" in 2016, Dr. Lesnak testified that the 2017 MRI is "the same MRI that was done in 2016. Same findings." Dr. Lesnak concluded there was no objective evidence of an acute injury in those records.

53. Dr. Lesnak testified there was no objective evidence that an injury occurred on April 5, 2017 based on the diagnostic testing. He specifically testified "the diagnostic testing is … unchanged from pre- and post-April 5th, 2017."

54. Further, while Claimant underwent an EMG to evaluate for abnormalities associated with his nervous structures, that examination established no evidence of acute cervical radiculopathy or plexopathy. (Ex. D, p. 86).

55. Dr. Lesnak testified that Claimant had progressive neck pain and bilateral upper extremity symptoms for years, and that Claimant had significant enough pain in 2016 (reported as 7-10 out of 10) that he warranted both a MRI and injections.

Respondents' IME of Claimant

56. Dr. Lawrence Lesnak, DO, performed an IME on Claimant on 8/3/2017 (Ex. A). This IME was four days prior to Claimant's Commercial Driving exam. Dr. Lesnak was qualified as an expert in physical medicine and rehabilitation. Dr. Lesnak testified that Claimant's physical examination at his IME was "quite difficult." He indicated that Claimant would not move his neck or back at all, due to reported pain, and that Claimant had very limited left shoulder motion. Dr. Lesnak opined that this was evidence of 'submaximal effort.'

57. Since Claimant's objective testing status had not changed, Dr. Lesnak testified that he performed psychosocial screening to evaluate the reliability of the claimant's symptom complaints. The screening found the Claimant had an "extremely high level [of] somatic pain complaints" which Dr. Lesnak testified was evidence that Claimant's complaints were not caused by any anatomic or physiologic abnormality. He also testified a somatic disorder typically causes an individual to embellish or exaggerate symptoms, making those reported symptoms unreliable. In this case, Dr. Lesnak testified that in somatic screening, a high level of pain complaints is a 12. Claimant scored a "19"-way above high levels.

58. At hearing, Dr. Lesnak testified that during the IME, Claimant refused to move his neck or back at all, alleging it would hurt him too much:

> …when I saw him, I mean, even when I gently touched the back of his neck, he's jumping off my—stool in pain, yelling and moaning. That's a non-physiologic finding….an abnormal, aberrant pain response….touching one's skin—unless there's an obvious, you know, burn or a deep wound, that shouldn't cause someone to jump off a chair or table.

Surveillance Video of Claimant from 8/15/2017

59. Dr. Lesnak also testified that he had reviewed the surveillance video taken of Claimant on 8/15/2017, and recognized him from this video. He noted that Claimant was "walking around parked cars, getting in and out of cars, driving vehicles on that day." Specifically, he notes that Claimant "reaches behind his head with both arms…sitting up against….the chair of his front seat for a period of time.

60. The ALJ notes that, upon his own review of this video, Claimant, while engaged in apparent routine activities, demonstrates no visible signs of distress at any time; indeed at one point, Claimant places both palms behind the back of his head/neck and appears to lounge back in the driver's seat of his car.

Claimant's IME

61. Dr. Jack Rook performed an Independent Medical Examination on the Claimant on March 19, 2018. (Claimant's Exhibit 7). Dr. Rook reviewed all medical records in this claim and performed a physical examination on the Claimant at that time. *Id.*

62. Rook diagnosed Claimant with the following:

1. Permanent aggravation of cervical degenerative disc disease;

2. Left upper extremity neurogenic pain;

    a. Cervical radiculopathy

    b. Rule out secondary to brachial plexus traction injury.

3. Sleep disturbance secondary to pain. (Ex. 7, p. 191)

63. Dr. Rook opined that based upon his knowledge of the mechanism of injury, after review of the medical records, and after examination of Mr. Mills, that it is more likely than not that the injuries sustained on April 5, 2017 were caused by the workplace accident. He rendered that opinion for the following reasons:

"This patient sustained a significant traumatic event when he fell off of the excavator. He sustained a traction injury to his left arm associated with an acutely painful popping sensation in his neck, following which he developed left upper extremity burning pain and paresthesias, suggestive of nerve injury;

The patient has had unrelenting symptoms since April 5, 2017 that have been of a markedly different quality and intensity as compared to any similar problems that he was having at the time of, and prior to his on-the-job injury;

Based on the patient's history and my review of his medical records, it appears that the cervical symptoms he was experiencing prior to the April 5, 2017 occupational injury was more than likely related to another work injury event that occurred in February 2016 while he was working for the same employer, when he slipped outside of his snowplow;

Mr. Mills was able to work without the need for physical restrictions prior to the occupational injury event of April 5, 2017. He was performing his job (which was in a heavy physical demand level) without the need for any restrictions when he sustained the April 2017 occupational injury;

He had never missed work due to the cervical condition prior to the April 2017 on-the-job injury; and

He was not involved in active medical treatment for his neck at the time of the occupational injury event in 2017." (Ex. 7, pp. 191 – 192).

64. Dr. Rook opined, based on his review of the medical records and after his examination of Mr. Mills, that the work place injury of April 5, 2017 caused/brought about the need for the current treatment. Specifically, Dr. Rook opined that if not for that event, Mr. Mills would not currently require treatment for his neck and left upper extremity. (Ex. 7, p. 192).

65. Dr. Rook further stated:

"This patient has sustained a permanent aggravation of his pre-existing cervical degenerative disc disease and he also likely has a new injury involving his left brachial plexus. The permanent aggravation of the cervical condition has resulted in an immediate need for treatment. The current need for this treatment is the work event that occurred on April 5, 2017. His need for treatment at this time is not representative of a natural progression of a condition that was stable and non-impairing on that date." (Ex. 7, pp. 192 – 193).

Claimant's Need for Treatment

66. Dr. Rook stated the following regarding recommended treatment:

> I believe the patient should proceed with spinal injection therapy. This might include an epidural steroid injection, selective nerve root blocks, or other diagnostic and possibly therapeutic cervical injections. I would recommend a repeat MRI of the cervical spine, as well as a neurosurgical evaluation. If there is no improvement with conservative treatment, I believe that surgical intervention will be needed to treat Mr. Mills' neck and left upper extremity symptoms." (Ex. 7, p. 193).

67. Dr. Lesnak testified that the need for treatment and medical evaluations after the alleged incident was not caused by the reported April 5, 2017 incident. Rather, Dr. Lesnak testified that any need for treatment was related to the progressive symptoms that had existed pre-incident.

68. Dr. Lesnak opined that, even if an incident occurred on April 5, 2017, there was no evidence that the incident caused any acceleration of his pre-existing symptomatic symptoms or pathology.

69. Dr. Rook, opined that Claimant sustained a permanent aggravation of his pre-existing condition and sustained a new injury to his brachial plexus. However, Dr. Lesnak persuasively testified that EMG testing specifically ruled out any injury to the brachial plexus and there was no changes in the x-rays, MRIs or reported symptomology to support either a temporary or permanent aggravation of the underlying pre-existing condition. (Ex. 7, pp.191-192).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the LAJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A Claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on the merits. *Id.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Credibility

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

4. The ALJ finds Claimant to be a patently unreliable historian, both to his medical providers, and at hearing. The ALJ finds that Claimant, despite claims to the contrary, reports pain levels not according to actual pain experienced, but according to the context of his ad hoc circumstances. Despite alleging an immediate, serious injury on the job, Claimant continued to work several days in a demanding position. Once Claimant decided to enter the Workers Comp system (despite Claimant's less-than-credible assertions of being dissuaded by Mr. Platt), he knowingly failed to disclose his history of pre-existing complaints and treatment for similar pain to Chiropractor Hennings, Denver Vail Orthopedics, Centura Health, Dr. Finn's Office, and Dr. Lippert's Office. One omission might be an honest mistake; two omissions becomes careless- and counterproductive to effective treatment. Claimant herein displayed a pattern of nondisclosure which the ALJ finds to be both knowing and self-serving.

5. Claimant also knowingly filled out a Commercial Driver questionnaire, after voluntarily quitting his job, denying any relevant medical issues. He then passed the physical examination. At his IME four days prior, he had been jumping off a stool upon being touched, and refused to move his neck, due to the unbearable pain. Eleven days after his IME, surveillance video shows Claimant engaging in activities wholly inconsistent with his reported pain and disability. Despite all of this, Claimant testified at hearing that his condition had then *worsened* after being forced by the pain to resign his position on 7/17/17. The ALJ finds that Claimant's subjective complaints of pain, without objective evidence in support, renders an accurate medical diagnosis and causation analysis untenable.

Compensability, Generally

6. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *Wherry v. City and City of Denver*, W.C. No. 4-475-818 (I.C.A.O., March 7, 2002). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). A compensable injury is an injury which "arises out of" and "in the course and scope of employment." §8-41-301(1)(b) C.R.S. The term "in the course and scope of employment" refers to the time, place and circumstances

under which the injury occurred. The injury must have occurred in the time and place limits of the employment, and during an activity having connection with the employee's job functions. Additionally, the term "arising out of" establishes that there must be a causal relationship between the employment and the injury. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). Claimant must establish by a preponderance of the evidence that the condition for which he seeks medical treatment for was proximately caused by an injury arising out of and in the course and scope of employment. §8-41-301(1) C.R.S. Claimant also must prove a causal nexus between the disability and the work-related injury. *Singleton v. Kenya Corp*., 961 P.2d 571 (Colo. App. 1998).

7. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates, accelerates, or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse,* 805 P.2d at 1167*.*

Claimant's Pre-existing Condition

8. Claimant had a significant pre-existing condition to his cervical spine and upper extremities that required progressive treatment over the six years prior to the reported incident. Significantly, Claimant's pre-existing condition required a MRI and two epidural steroid injections mere months prior to the reported event. There is insufficient indication in the totality of the record that any incident of April 5, 2017 aggravated, accelerated, or combined with Claimant's ***(significant, and knowingly undisclosed)*** pre-existing conditions to cause the need for medical care or disability. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949).

9. The ALJ also finds persuasive the testimony of Dr. Lesnak that the 2016 and 2017 MRIs were substantially similar, and without evidence of an acute injury. Insufficient diagnostic evidence exists which would establish the presence of an acute injury or aggravation of a prior injury. The objective testing has eliminated an injury to Claimant's brachial plexus. Taken as a whole, the ALJ finds Dr. Lesnak's analysis more persuasive than that of Dr. Rook, and Claimant's ATP. Both were in the unfortunate circumstance of having to rely upon Claimant's subjective complaints of symptoms, without any supporting objective data, in reaching their conclusions.

10. Consequently, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury or aggravation on April 5, 2017 in the course and scope of his employment with the employer.

Medical Benefits/Temporary Total Disability

11. Claimant has not suffered a compensable injury. His claim for medical benefits and Temporary Total Disability benefits is denied and dismissed.

ORDER

It is therefore Ordered that:

1. Claimant's claim for workers compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 9, 2018

/s/ /William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury on September 14, 2017.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment for her September 14, 2017 injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability indemnity benefits from September 14, 2017 and ongoing until terminated by law.

4. Determination of Claimant's average weekly wage.

5. Whether the treatment provided by the Medical Center of Aurora on October 16, 2017 was reasonable, necessary, and causally related to the September 14, 2017 work injury.

6. Whether the right to select an authorized treating provider has passed to Claimant.

FINDINGS OF FACT

1. Claimant is a 21-year-old female who was employed by Employer as a baker/caterer. Claimant traveled to sites to perform catering work and also worked at Employer's business location baking goods. Claimant began employment on May 6, 2017 and went through training for several weeks. Claimant was paid hourly and overtime for her work. From May 29, 2017 through September 10, 2017 she earned gross wages of $8,542.51.

2. On September 14, 2017 while so employed, Claimant was involved in a motor vehicle accident while on her way to a catering event in Employer's company van.

3. Claimant was in the front passenger seat at the time of the motor vehicle accident. Her sister, also employed by Employer, was the driver. Claimant was wearing her seatbelt and was looking down at her cell phone and over at her sister when the company van they were in was rear ended by another driver.

4. Air bags did not deploy and Employer's van had no damage from the accident.

5. Claimant contends that she was thrown forward and almost hit the dash and that she immediately had neck pain, back pain, and later had headaches, dizziness, and blackouts.

6. The owner of Employer Company, Bob Graham, arrived on scene shortly after the accident. He testified that there was no damage to Employer's van and that there was no damage to the other vehicle involved. He drove Claimant to US Healthworks for evaluation.

7. On September 14, 2017 Claimant was evaluated at U.S. Healthworks by Michael Malmgren, PA. Claimant reported that she was wearing her seatbelt and looking down at a cell phone while the vehicle she was a passenger in was stopped at a light. Claimant reported that another vehicle hit the van she was in from behind. Claimant reported noticing some discomfort but that in 2-3 minutes she had pain, tingling, and numbness in the lower neck on the left and that when she exited the car she noted her lower back to be stiff and sore on the left as well. Claimant reported pain at a level of 8/10. On examination PA Malmgren found no evidence in the neck of ecchymosis, hematoma, deformities, open wounds, or swelling. PA Malmgren found an abnormal posture with neck stiffness or splinting and posterior cervical tenderness, neck muscle tenderness in the paracervical, sternocleidomastoid, and trapezius, he found a positive nerve root cervical compression test, spasms of the thoracolumbar spine on the right, tenderness of the thoracolumbar spine and paravertebral musculature, and restricted range of motion of the back. PA Malmgren diagnosed whiplash injury to neck and lumbar sprain. PA Malmgren expected maximum medical improvement October 30, 2017. PA Malmgren recommended physical therapy and no work through September 18, 2017. *See* Exhibits 10, M.

8. On September 19, 2017 Claimant was evaluated by PA Malmgren. Claimant reported that her pain was at a 7/10 since the motor vehicle accident and that the neck pain was the worst part and the lower back was much less of a problem. PA Malmgren performed a physical examination noting exaggerated head tilt to the left, neck stiffness or splinting, posterior cervical tenderness, paracervical and trapezius neck muscle tenderness, and restricted neck range of motion. PA Malmgren noted that Claimant had scoliosis postural only and that she had no spasms in the thoracolumbar spine or paravertebral musculature. He diagnosed: cervical myofascial strain, and sprain of low back. PA Malmgren continued the restriction of unable to work from September 19, 2017 to September 25, 2017. *See* Exhibits 10, M.

9. On September 25, 2017 Claimant was evaluated by PA Malmgren. Claimant reported that she was really no better since the date of the accident. Claimant reported that dry-needling caused her more pain in the lower back. Claimant reported sharp and dull pain/stiffness in her lower back and limited back motion. Claimant also reported numbness in her neck. Claimant reported pain at a 7/10. PA Malmgren opined that Waddell signs for symptom magnification were positive and that Claimant had the appearance of exaggerated dermal sensitivity not associated with neural anatomical

distribution. PA Malmgren found no spasms of the thoracolumbar spine or paravertebral musculature but tenderness in these areas. He again anticipated maximum medical improvement October 30. He noted that he performed a careful examination the areas of complaint and found a head tilt to the left with an elevated left shoulder. He noted that Claimant was wearing the stay-put heat pack that was supplied to her on her left lower back and that after removal, Claimant presented with a bending to the left side. PA Malmgren noted that very light stroking of the cervical and lumbar area caused a flinching motion and complaints of pain that were out or proportion to the mechanism reported to have caused the injury. PA Malmgren released Claimant to modified duty work noting that she had to take a 3-5 minute break away from standing every hour and that she was limited to lifting, repetitive lifting, and carrying at 5 pounds, standing for 4 hours per day, and pushing/pulling 0 pounds. *See* Exhibits 10, M.

10. On October 4, 2017 Claimant was evaluated by Lori Rossi, M.D. Claimant reported that she was in a catering van that was rear ended by an SUV and that the SUV had front end damage and the van had mild damage. Claimant reported her injury was worse and that she had neck and low back pain. On examination Dr. Rossi found ecchymosis of the left side of the neck, and ecchymosis and scars- bilateral multiple areas of healing subQ abrasions and ecchymosis in the thoracolumbar spine and/or adjacent tissues. Dr. Rossi noted an abnormal posture with stiff neck, loss of cervical lordosis, and minimal active range of motion. Dr. Rossi found spasms of the neck muscles in the paracervical, sternocleidomastoid, and trapezius. Dr. Rossi also found spasms in the thoracolumbar spine and paravertebral musculature with tenderness in those areas. Dr. Rossi opined that it was difficult to assess due to Claimant's pain. Dr. Rossi opined that Claimant had an extremely rigid cervical spine and lumbar spine posture with minimal active range of motion due to pain and stiffness. Dr. Rossi noted multiple left neck and back abrasions to the sub Q areas with white discoloration. Dr. Rossi ordered x-rays for the neck and low back. Dr. Rossi noted that given the degree of splinting, size, number, and extent of abrasions and contusions now present twenty days out, she felt the complaints were legitimate. Dr. Rossi provided work restrictions of 3-5-minute break away from standing every hour, and maximum lifting, repetitive lifting, and carrying of 5 pounds. She also continued the restriction provided by PA Malmgren of standing 4 hours per day. *See* Exhibits 10, M.

11. On October 3, 2017 Claimant was mailed a Notice of Contest indicating that her claim had been contested/denied for the reason that the injury/illness was not work related. *See* Exhibit F.

12. On October 16, 2017 Claimant went to the emergency department of the Medical Center of Aurora. Claimant reported diffuse back pain from her upper back all the4 way down to her lower spine following a car accident on September 14. On exam, Claimant was found to have diffuse tenderness of the thoracic and lumbar spine with diffuse midline tenderness and paraspinous muscle tenderness. Claimant was noted to have full range of motion of her neck without pain or difficulty and full flexion and extension of her spine. It was noted that Claimant and her mother wanted x-rays done since they had not been done since the accident. X-rays of the cervical spine, thoracic spine, and

lumbar spine were performed and were negative. Claimant was referred for further care as an outpatient and Claimant was found to not have an acute medical emergency requiring further emergency management. The clinical impression provided was thoracic spine strain and lumbar strain. *See* Exhibit 11.

13. On October 18, 2017 Employer mailed Claimant a letter noting that the claim had been denied and noting that the restrictions she was given included a 5-pound lift limit and a required 3-5 minute break every hour. Employer indicated they had no position that would comply with those restrictions. Employer encouraged Claimant to consult her own physician to examine her and certify that her condition had improved and that the restrictions had been lifted and indicated that her job would be held open for another ten-day period. *See* Exhibit Q.

14. Claimant's restrictions were not removed and she was terminated from employment with Employer as they could not accommodate her restrictions.

15. On December 22, 2017 Lawrence Lesnak, D.O. performed an independent medical evaluation. Claimant reported that she was the restrained front seat passenger traveling in a GMC box truck company vehicle that was stopped in traffic. Claimant reported that she was looking down at her phone when the car was rear ended by another GMC box truck. Claimant reported that no airbags deployed and that she was able to get out of the vehicle under her own power and developed acute neck pain. Claimant reported that she currently had a constant pinching sensation in her left mid back/interscapular region diffusely with frequent muscle spasms in that same region Claimant denied any specific neck or low back symptoms. Claimant reported occasional very mild left lateral arm numbness. Claimant reported her pain level of 75/100. Dr. Lesnak reviewed medical records and performed a physical examination. *See* Exhibit K.

16. Dr. Lesnak opined that on musculoskeletal examination Claimant exhibited numerous pain behaviors and non-physiologic findings throughout his evaluation and that she provided very poor effort with active cervical spine range of motion and that Claimant was unwilling to perform any range of motion of the cervical spine greater than approximately 10 degrees because of complaints of left upper back pain. Dr. Lesnak opined that when Claimant was distracted she appeared to exhibit essentially normal motion of her neck and right upper extremity but that during attempts at formal range of motion testing, Claimant was only willing to perform minimal active range of motion in these regions which was completely non-physiologic. Dr. Lesnak provided the impression of: subjective complaints of constant diffuse upper back and mid back pains with frequent muscle spasms; possible mild cervical/thoracic strain/sprain injury that occurred as a result of a motor vehicle accident during work hours on 9/14/17; no current objective findings that correlate with subjective complaints; possible residual left sided trapezius myalgias without clinical findings. Dr. Lesnak opined that the examination was frequently inconsistent and severely effort dependent. Dr. Lesnak noted that Claimant's psychosocial screening tests were at a very extremely high level of depressive symptoms and a very extremely high level of somatic complaints strongly suggestive of the

possibility of an underlying somatic disorder/somatoform disorder; likely conversion disorder. *See* Exhibit K.

17. Dr. Lesnak opined that Claimant did not require any further diagnostics or treatment for her neck or back region and the occupational incident of 9/14/17. He strongly recommended Claimant undergo a formal psychologic evaluation for a likely conversion disorder and likely somatic disorder/somatoform disorder but opined that the likely psychologic/psychiatric disorders were completely unrelated to the occupational incident of 9/14/17. *See* Exhibit K.

18. On February 1, 2018 John Hughes, M.D. performed an independent medical examination. Claimant reported that she was a restrained front passenger of a vehicle that was slowed and coming to a full stop when it was hit from behind and that she had neck and low back pain immediately after the collision. Claimant reported being taken to a medical facility where she was examined and given medications. Claimant reported that after evaluation by Dr. Rossi on October 4, further medical evaluation and treatment were denied and that the only other treatment she had was an emergency department assessment in October. Claimant reported continued symptoms of dorsal and left posterior neck pain that was constant at a 6/10 pain level and that it radiated into her left arm. Claimant reported that when she turned her head to the left, it felt like her neck wants to pop. Claimant reported low back constant mid and lower lumbar pain at a 6/10. Claimant's mother reported a history of scoliosis but no other family history of spine injuries or diseases. Claimant reported that she used marijuana 2-3 days per week and that it was kind of helpful for her pain. Dr. Hughes noted some exaggerated pain behaviors, particularly a guarded posture tilting her head to the left. He noted that Claimant's posture was remarkable for a left lateral flexion of 13 degrees and extremely hypertonic posterior trapezius musculature on the left with palpation. Dr. Hughes also found other cervical spine ranges of motion limited. Dr. Hughes found no palpable paraspinous muscular hypertonicity in the thoracolumbar spine and found active ranges of motion near normal. Dr. Hughes assessed: motor vehicle collision with multiple injuries; lumbosacral spine sprain/strain, essentially resolved over time; and cervicothoracic spine sprain/strain with persistence of left paracervical hypertonicity and scapular dyskinesis meriting further medical evaluation and treatment. See Exhibits 12, L.

19. Dr. Hughes opined that Claimant had a rather straightforward history of primarily cervicothoracic spine injuries sustained as a result of a motor vehicle collision. He opined that was a fairly typical mechanism of injury and noted the left trapezius hypertonicity and postural abnormalities were noted in Claimant's case and documented in the medical records from fairly immediately subsequent to the motor vehicle collision. He opined that the treatment so far had been reasonable, necessary, and related to the motor vehicle collision but opined that Claimant was not yet at maximum medical improvement. Dr. Hughes recommended further medical evaluation before a course of treatment including cervical spine and lumbar spine MRIs and that further treatment may be directed based on the findings of the MRIs. He anticipated Claimant would need 2-3 months of prescriptive care and non-surgical care. See Exhibits 12, L.

20. Dr. Lesnak testified by deposition. Dr. Lesnak testified that during his examination of Claimant she was barely willing to move her head or cervical spine in any plane but that when Claimant was talking to her sister in the exam room, Claimant was turning her head to the side to talk with her sister and functioning fairly normally. Dr. Lesnak noted that although Claimant reported muscle spasms, he did not identify any type of specific trigger points or muscle spasms on exam. Dr. Lesnak noted that based on the descried mechanism of the incident and the reports from the providers who saw Claimant initially on the same day as the motor vehicle accident, it was possible that Claimant may have had a mild sprain/strain of the cervical/thoracic region. Dr. Lesnak testified that the reports from October 16, 2017 showed Claimant had full range of motion of her neck and spine without any pain, two months before he evaluated her and closer in proximity to the motor vehicle accident.

21. Dr. Hughes also testified by deposition. He opined that Claimant's history seemed consistent with a spine injury with persistence of symptoms. Dr. Hughes noted that Claimant had some exaggerated pain behaviors, particularly including a left lateral flexion posture of her head. Dr. Hughes opined that Claimant had sustained multiple injuries in the motor vehicle collision including a lumbosacral spine strain/sprain that had resolved over time and a cervical spine injury with persistence of left paracervical hypertonicity and movement disorder of the left scapula, scapular dyskinesis, meriting further medical evaluation and treatment. Dr. Hughes testified that Claimant had objective findings of really, really tight musculature in the left posterior trapezius. Dr. Hughes opined that Claimant's cervical spine injury made sense in terms of a motor vehicle collision. Dr. Hughes testified that a cervical spine strain or sprain can resolve itself without any treatment but opined that it did not in Claimant's case. Dr. Hughes opined that Claimant could not have volitionally tensed up her posterior trapezius muscle like what he found on examination. Dr. Hughes testified that despite perceiving Claimant's pain behaviors as exaggerated, he still was able to make a diagnosis and believed Claimant was actually injured

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even

if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established, by a preponderance of the evidence that she sustained a work related injury on September 14, 2017 when she was involved in a work related motor vehicle accident while traveling from Employer’s place of business to a client’s location to provide catering services. Immediately after the accident Claimant had pain in her neck and back. Although Claimant appears to have some non-physiologic findings and some subjective reports out of proportion to objective findings, Claimant also has objective findings consistent with the mechanism of injury. The testimony of Dr. Hughes is found credible and persuasive and consistent with the overall weight of the evidence. Claimant has established that she sustained a compensable injury.

Reasonable and Necessary Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and

necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has established by a preponderance of the evidence that she sustained a compensable work related injury on September 14, 2017. Thus, Respondents are liable for reasonable, necessary, and related medical treatment to cure and relieve her from the effects of the injury. As found above, after Claimant's claim was denied she sought x-rays and treatment at the Medical Center of Aurora. The x-rays were part of the imaging requested by Dr. Rossi prior to the denial of the claim and the treatment received at the Medical Center of Aurora is specifically found to be reasonable, necessary, and related to her September 14, 2017 injury.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). Temporary total disability benefits continue until the first occurrence of Claimant reaching maximum medical improvement, the attending physician giving the claimant a written release to return to regular employment, or the termination of employment for which the claimant is responsible. *See* § 8-42-105(3), C.R.S.

As found above, Claimant was unable to return to work and was placed on a no work restriction for 11 days following the accident. Once she was released to return to work with restrictions, Employer was unable to accommodate Claimant's restrictions and Employer failed to offer Claimant modified duty work within her restrictions. Claimant was terminated from employment shortly thereafter. Claimant has not yet been placed at maximum medical improvement, has not been released to regular duty, and was terminated because of her medical restrictions and was not responsible for termination. Thus, Claimant has established an entitlement to temporary total disability benefits from the date of injury and ongoing until terminated pursuant to law.

Authorized Treating Provider

Respondents have the right in the first instance to select the physician who attends an injured employee. *See* § 8-43-404(5)(a)(I)(A). Respondents are required to provide a list of designated providers from which the claimant may select a physician within seven days of notice of injury. If respondents fail to do so, the injured worker may select an authorized treating physician of the workers' choosing. *See* W.C.R.P. 8-2(A), 8.2(D).

As found above, on the date of the motor vehicle accident, the owner of Employer arrived to the scene and drove Claimant to a clinic for evaluation. Claimant is credible and persuasive that she was never provided with a list of designated providers, and that one was not provided within seven days of the notice of injury to Employer. As such, Claimant has demonstrated that the right to select an authorized treating physician has passed to her.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.

Wage records show that between May 29, 2017 and September 10, 2017 Claimant earned gross wages of $8,542.51. This was during a period of 15 weeks and amounts to an average weekly wage of $569.50. The ALJ finds that this is a fair approximation of Claimant's wage loss and diminished earning capacity. The ALJ removed two pay periods that were substantially lower pay that reflected Claimant's initial training period. Using the remaining pay periods is a fair way to approximate Claimant's wage loss and diminished earning capacity given that her schedule and hours varied.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that she sustained a compensable work related injury on September 14, 2017.

2. Claimant has established, by a preponderance of the evidence an entitlement to reasonable, necessary, and causally related medical treatment to treat her September 14, 2017 work injury including, but not limited to, the treatment provided at the Medical Center of Aurora.

3. Claimant is entitled to TTD benefits from the date of injury and ongoing until terminated pursuant to law.

4. Claimant's average weekly wage is $569.50.

5. The right to select an authorized treating provider has passed to Claimant.

6. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 12, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Respondent's request for recoupment of overpayment in the amount of $6,967.54.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant sustained an admitted injury on February 4, 2014.
2. The authorized treating physician (ATP) placed Claimant at maximum medical improvement (MMI) on April 13, 2017. The ATP assigned a 23% scheduled rating. Claimant had been receiving temporary total disability (TTD) benefits, which terminated due to MMI. Thereafter, Respondent commenced permanent partial disability (PPD) benefits. (R's Ex. B.) Respondent's filed a Final Admission of Liability on May 2, 2017, consistent with the date of MMI and rating provided by the ATP. (R's Ex. B.)
3. Claimant requested a Division-sponsored independent medical examination (DIME). The DIME physician agreed that Claimant reached MMI, but assigned an earlier MMI date of March 14, 2017. The DIME physician also assigned a lower scheduled rating of 9%. Respondent admitted consistent with the DIME physician's opinions. (R's Ex. A.) Because Respondent paid TTD through April 12, 2017, the DIME physician's opinion resulted in an overpayment of TTD from March 14, 2017 through April 12, 2017, in the amount of $3,751.79. Because Respondent paid the 23% scheduled rating, subject to the statutory cap, Respondent overpaid PPD benefits as well, in the amount of $3,215.75. (R's Ex. A.)
4. The combined overpayment equals $6,967.54, which Respondent asserted on the FAL dated December 21, 2017. Claimant did not object to the FAL.
5. At hearing, Respondent requested recoupment of the overpayment. Counsel for Claimant agreed that the overpayment calculation is correct.
6. Claimant testified regarding his current financial situation and Respondent's submitted Claimant's wage records: Claimant's testimony and wage records (R's Ex. C.) established the following:

- Claimant remains employed with Employer;
- Claimant earns approximately $75,000 annually;
- Claimant earns gross wages of approximately $2,983.52 every two weeks;
- After deductions for taxes, insurance, 401(k), and his FSA, Claimant's total net pay every two weeks is approximately $1,796.80, which equates to approximately $3,893.07 per month.
- Claimant's mortgage is approximately $1,500 per month;
- Claimant does not have car payments;
- Claimant lives with his wife, who is two months retired, along with a 25 year old son;
- Claimant pays approximately $3,000 per semester for his son's education, which equates to approximately $500 per month;
- Claimant has $34 in his bank account;
- Claimant has approximately $106,000 in a 401k;
- Claimant has a pension from a previous employer;
- Claimant testified that he has no other assets other than those listed above;
- Claimant did not testify regarding any additional liabilities or expenses.

7. There was no testimony elicited regarding Claimant's ability to access the funds contained in his 401k at this time.
8. Claimant's 401k is not an available liquid asset to be considered in fashioning a repayment schedule.
9. Based on Claimant's testimony and wage records, Claimant's net monthly income is approximately $3,893.07 and his monthly expenses for his mortgage and son's education total approximately $2,000 per month. Therefore, Claimant has approximately $1,893.07 remaining each month to pay other expenses.

10. Although Claimant did not testify as to the amount of his other expenses, the ALJ infers from the limited available assets of $34.00 in his bank account that Claimant has limited resources available to pay back the overpayment in either a lump sum or at a rate of $1,000.00 per month as requested by Respondent.

11. However, Claimant's failure to testify about additional monthly expenses such as food, utilities, car expenses, or minimum payments on any other liability, etc., hinders the ability of this ALJ to consider Claimant's complete financial

picture in fashioning a repayment schedule different from the one outlined below.

12. Claimant was overpaid $6,967.54.

13. Based on the evidence submitted at hearing, the ALJ finds Claimant has the ability to repay the overpayment.

14. Claimant shall repay the overpayment at a monthly rate of $300 until the overpayment has been fully repaid.

15. Claimant shall pay Respondent's $300 per month for 23 consecutive months and then a final payment of $67.54 in the 24th month.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

Unless stated otherwise, the burden of proof is a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Overpayment

The meaning of the statutory definition of "overpayment" in § 8-40-201(15.5), C.R.S. is clear and unambiguous. *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, 232 P.3d 777 (Colo. 2010). Section 8-40-201(15.5) states:

> "Overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

"Generally, an 'overpayment' is anything that has been 'paid' but is not 'owing as a matter of law.'" *Cooper v. ICAO*, 109 P.3d 1056 (Colo. App. 2005). Further, in *Simpson*, the Court considered the statutory definition of "overpayment" in § 8-40-201(15.5) and found it provided for three distinct categories of overpayment:

> The statute makes clear that the phrases are disjunctive such that three categories of possible overpayment are included in the statutory definition: one category is for overpayments created when a claimant receives money "that exceeds the amount that should have been paid"; the second category is for money received that a "claimant was not entitled to receive"; and the final category is for money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. § 8-40-201(15.5).

See *Simpson*, 219 P.3d at 359.

In *Marquez v. Americold Logistics*, W.C. No. 4-896-504-04 (ICAO August 7, 2014), the ATP assigned a 12% whole person rating. Respondent admitted and paid PPD benefits totaling $19,213.82. Thereafter, a DIME assigned a zero impairment rating. Respondent admitted to the zero rating and asserted a $19,213.82 overpayment. Claimant objected. The ALJ concluded Respondent correctly asserted an overpayment. The ICAO affirmed.

In *Turner v. Chipotle Mexican Grill*, W.C. No. 4-893-631-07 (ICAO February 8, 2018), Respondent admitted and paid TTD beginning July 16, 2012. A 24-month DIME

took place on October 20, 2014. The DIME physician opined that Claimant reached MMI on June 14, 2012. Respondent admitted consistent with the DIME opinion, which resulted in $97,614.12 in TTD being paid after MMI. Accordingly, Respondent asserted an overpayment and sought recoupment. The ALJ granted Respondent's request. The ICAO affirmed.

The same reason and result applies here. The overpayment results from (1) an earlier MMI date and (2) a lower impairment rating. The ICAO concluded in both instances that such payments constitute on "overpayment". Claimant's argument to the contrary must be rejected as contrary to law.

Claimant asserts that Respondent is only entitled to prospective relief. Claimant is mistaken. Sections 8-43-303(1) and (2), C.R.S., expressly provide for the recovery of overpayments, even as to "moneys already paid." In *Haney v. Shaw, Stone & Webster*, W.C. No. 4-796-763 (ICAO, July 28, 2011), the ICAO held that in the case of an overpayment an ALJ has the authority to remedy the situation by ordering repayment. The ICAO explicitly rejected the claimant's argument that an ALJ was prohibited from requiring a retroactive reimbursement of admitted benefits, citing to the *Simpson* case.

As noted by Respondent's, recoupment of overpayments can be pursued via the reopening procedure in §§ 8-43-303(1) and (2), and repayment is mandatory upon a prima facie showing of an overpayment. While the statute states "No such reopening shall affect the earlier award as to moneys already paid," it goes on to say "except in cases of fraud **or overpayment**." Sections 8-43-303(1) and (2), C.R.S. (Emphasis added). Thus, in the case of a reopening on the issue of overpayment, a judge may order a claimant to pay back such moneys, even if it affects an earlier award. Respondent persuasively contends that if repayment can be required under these circumstances on reopening, it can certainly be required during the pendency of the claim, as is the case here.

Further, once the existence of an overpayment is proven, an ALJ can issue an order requiring repayment. Section 8-43-207, C.R.S. states:

> (1) Hearings shall be held to determine any controversy concerning any issue arising under articles 40 to 47 of this title. In connection with hearings, the director and administrative law judges are empowered to:
>
> [. . .]
>
> (q) Require repayment of overpayments.

Claimant refers to *United Airlines v. Industrial Claim Appeals Office*, 312 P.3d 235 (Colo. App. 2013), arguing that the opinion in that case supports her position. However, that case had a uniquely different set of facts that distinguish it from the matter at hand. The *United Airlines* case involved an injured worker who received over $99,000 in TTD benefits before she was assigned an impairment rating that would limit her indemnity benefits to $75,000 pursuant to § 8-42-107.5, C.R.S. In affirming there was no overpayment, the Court of Appeals relied heavily on § 8-42-105(3), C.R.S., which states that TTD payment "shall continue" until one of four qualifying events occurs. Since TTD payments could not be stopped pursuant to the statute, they

continued, and the court held that there was no provision in the Workers' Compensation Act requiring TTD benefits exceeding the statutory cap to be repaid.

The ALJ concludes Respondent has proven the existence of an overpayment in this case and Respondent is entitled to recover the overpayment. Respondent has proven Claimant was overpaid TTD from March 14, 2017 through April 12, 2017, in the amount of $3,751.79, and that Clamant was overpaid PPD benefits in the amount of $3,215.75. Therefore, the ALJ concludes Claimant was overpaid $6,967.54

Overpayment Repayment Terms

The ALJ has the discretion to determine repayment terms. *See Louisiana Pacific Corporation v. Smith*, 881 P.2d 456 (Colo. App. 1994) (holding that the ALJ did not abuse his discretion by prorating the repayment over claimant's expected life span where the recovery rate was not mandated by statute and the ALJ's order was supported by substantial evidence and plausible inferences drawn from conflicts in the record); *Smith, supra* ("Concerning claimant's assertion that the recoupment schedule in onerous, the ALJ has discretion to fashion a remedy, and claimant has not demonstrated any abuse of that discretion*"); In re Claim of Schramek,* W.C. No. 4-601-867 (2001); *In re Claim of Reekstin-Martinez*, W.C. No. 4-832-902 (May 9, 2013).

The ALJ found that Claimant's 401k is not an available or liquid asset which this ALJ can consider - or require Claimant to use – to satisfy the overpayment. There was no testimony regarding Claimant's ability to access his 401k retirement account. Moreover, a request for such is tantamount to a request for an order to circumvent the protection of pension and retirement plans from creditors as set forth in § 13-54-102(1)(s), C.R.S., and circumvent the non-alienation provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq. (1994). See also 26 U.S.C. § 401, et seq. (1994). Therefore, the ALJ concludes that Claimant's 401k is not an available liquid asset which can be considered in fashioning the terms of repayment.

The ALJ found that based on Claimant's testimony and wage records, Claimant's net monthly income is approximately $3,893.07 and his monthly expenses for his mortgage and son's education total approximately $2,000 per month. Therefore, Claimant has approximately $1,893.07 remaining each month to pay other expenses.

Although Claimant did not testify about other expenses, the ALJ inferred from the limited available assets of $34.00 in his savings account that Claimant has limited resources available to pay back the overpayment in either a lump sum or at a rate of $1,000.00 per month as requested by Respondent.

However, Claimant's failure to testify about additional monthly expenses such as food, utilities, car expenses, and any minimum payments for any other liabilities, etc., hinders the ability of the ALJ to consider Claimant's complete financial picture in fashioning a repayment schedule other than the one set forth in this Order. Although Claimant contends in his position statement that he is the sole breadwinner, because his wife recently retired, there was no testimony elicited from Claimant as to whether she pays any of the other monthly expenses, such as food, utilities, and car expenses, etc., from her own savings, retirement, or other resources.

Therefore, based on the evidence presented at hearing, the ALJ concludes Claimant shall repay the overpayment at a rate of $300 per month.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has been overpaid $6,967.54.
2. Claimant shall pay Respondent's $6,967.54 at the rate of $300 per month for 23 consecutive months and then a final payment of $67.54 in the 24th month.
3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 25, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Bennett Machanic, M.D. that she reached Maximum Medical Improvement (MMI) on January 19, 2017.

II. Whether Claimant has proven entitlement to the L5-S1 fusion surgery recommended by unauthorized providers.

III. Whether Dr. Machanic's report should be set aside and a new IME physician panel issued given Claimant's prior success in overcoming Dr. Machanic's April 15, 2015, DIME opinions.

IV. If Claimant failed in overcoming the DIME, whether Claimant proved entitlement to the L5-S1 fusion surgery as maintenance care.

V. Whether Claimant has proven entitlement to a change in authorized provider.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant suffered an accepted injury to her mid-low back when she slipped on ice while working on February 3, 2014. (Respondents' Exhibit (hereinafter "R. Ex." A)

2. On February 3, 2014, Julia Balderson, PA-C of Concentra evaluated Claimant and noted Claimant had lower back and mid back pain. Claimant was tender to palpation over the bony processes of the spine in the mid thoracic and the lumbar region. She was also tender to palpation over the paraspinal musculature on the back. Ms. Balderson specifically noted Claimant denied any radiation of pain into her legs, denied any numbness or tingling in the back of the legs, denied any saddle anesthesia, and denied any bladder or bowel dysfunction. Ms. Balderson reviewed x-rays and stated that she questioned a thoracic compression fracture. She ordered a CT scan to rule out further injury. Ms. Balderson assessed Claimant as having a back contusion and questionable compression fracture of thoracic vertebrae.

3. On February 3, 2014, Dr. Bao Nguyen read Claimant's thoracic spine x-rays as showing no vertebral fracture, compression deformity or focal kyphosis.

4. On February 4, 2014, Claimant returned to Conentra and was evaluated by Nickolas Curija, PA-C. Claimant continued complaining of back pain, but denied having any numbness, tingling, or weakness into her lower extremities. There is also no mention of any neck pain.

5. On February 10, 2014, Claimant returned to Concentra and saw PA-C Balderson. The assessment remained lumbar and thoracic back contusion and strain. Claimant still denied having any radicular symptoms into her lower extremities and denied having any neck pain and symptoms into her upper extremities.

6. On March 7, 2014, Dr. Sarah Harvey released Claimant to modified duty with restrictions. On March 19, 2014 Nickolas Curcija, PA-C noted Claimant was having more pain since she had been back to work. Claimant had pain in the lumbar spine with all range of motion, and was reduced in all directions. He provided Claimant work restrictions. During subsequent visits to P.A. Curcija and Dr. Don Aspegren, they noted that Claimant continued to report discomfort in the thoracic, lumbosacral and hip region.

7. On April 9, 2014, Claimant returned to see PA-C Curcija. Claimant was working within her restrictions and felt that the restrictions helped her back. She continued to deny any radicular symptoms into her lower extremities. PA-C Curcija's assessment at that time was lumbar contusion and anterolisthesis at L5/S1.

8. On April 23, 2014, Claimant was again evaluated by PA-C Curcija. At this visit, Claimant complained of some pain radiating into her right buttock and right thigh. PA-C Curcija did, however, note Claimant did not have any leg weakness, numbness, saddle paresthesia, fecal or urine incontinence, etc.

9. On May 14, 2014, Claimant returned to PA-C Curcija. She did not complain of any symptoms radiating into her lower extremities. She did, however, begin to complain of neck pain.

10. On May 22, 2014, Claimant was evaluated by Dr. Robert Kawasaki. His impression of Claimant's condition included lumbar and sacral contusions. He also noted that the patient appears to be doing well, even though she said she was not improving. He noted only minimal findings and anticipated a quick recovery and return to full duty work within about 4 weeks.

11. On May 28, 2014, Ms. Ziomek noted that Claimant's low thoracic and lumbar area felt worse. On July 18, 2014, P.A. Curcija noted that Claimant had tenderness in the thoracic spine and that she had some cervical pain.

12. On June 27, 2014, Claimant was evaluated at Concentra. Claimant complained of back pain and neck pain. She also completed a pain diagram and noted neck and back pain. She did not, however, note any symptoms going into her upper or lower extremities.

13. On August 6, 2014, Claimant completed another pain diagram and noted only mid back and back pain. She did not note any neck pain or symptoms in her upper or lower extremities.

14. On September 16, 2014, Dr. Ericson Tentori evaluated Claimant and noted she had tenderness with palpation at the upper thoracic region and lower lumbar/lumbosacral region. Dr. Tentori assessed Claimant as having lumbar and sacral region contusions, myofascial pain/irritation involving the thoracic spine/shoulder girdles, and development of chronic back pain. Dr. Tentori

recommended Claimant be reevaluated by Dr. Kawasaki prior to consideration of case closure.

15. On November 17, 2014, Dr. Kawasaki performed an EMG/NCV to rule out lumbosacral radiculopathy, plexopathy, and compression neuropathy. The testing was normal.

16. On December 4, 2014, Dr. Kawasaki placed Claimant at maximum medical improvement. He also determined Claimant had a 5% whole person impairment for specific disorders of the lumbar spine. (R. Ex. E, Bates 49).

17. Based on Claimant being placed at MMI, Respondents filed a Final Admission of Liability and Claimant requested a Division IME.

18. On January 6, 2015, Dr. Tentori noted Claimant was frustrated with Dr. Kawasaki because a thoracic spine MRI was never obtained during the course of her claim. Dr. Tentori stated it was reasonable to obtain a thoracic spine MRI to ensure Claimant did not sustain a compression fracture as a result of the original work injury, as an explanation for Claimant's ongoing thoracic spine regional pain.

19. On February 5, 2015, Dr. J. Raschbacher stated that it would be reasonable to obtain a thoracic MRI and see if it had any clear objective findings that would mandate further care or evaluation or other change in her previously delineated MMI date.

20. On March 3, 2015, Dr. Tentori referred Claimant for a thoracic MRI to rule out disc pathology. Dr. Tentori stated that if the MRI revealed any significant pathology, then it would be potentially conceivable that Claimant's claim would not be at MMI and that Claimant may require additional treatment and/or provision of permanent physical impairment based on thoracic spine-related issues.

21. An MRI of Claimant's thoracic spine, taken on March 9, 2015, revealed subtle rightward disc displacement at T7-8, and a T8 remote compression fracture deformity, about 50%. There was also a tiny hemangioma associated with T8.

22. In March 2015, Claimant underwent a follow-up x-ray of the thoracic spine, which demonstrated a T8 remote compression fracture of about 50%. Dr. Kawasaki opined this was not related, especially given the original films of the thoracic spine were negative for compression fracture. (R. Ex. E, Bates 49)

23. On March 19, 2015, Dr. Kawasaki noted Claimant had a thoracic compression fracture at T8. Dr. Kawasaki stated, "Thoracic CT scan revealed the compression fracture seen at this point, and there may be evidence to help determine acuity. With the patient's mechanism of injury and initial evaluation suspecting thoracic fracture, this would be significant." However, Dr. Kawasaki also stated: "At this point, there would not be any specific treatments to perform for the thoracic fracture." He also noted that Claimant had tenderness to palpation in the mid-thoracic region and the lower lumbar segments into the lumbar region of the lumbosacral junction. He also noted that she had tenderness to palpation most significantly over the sacroiliac joint region. She noted her pain level was 4/10. There was no mention of a pain radiating into her lower extremities. Dr. Kawasaki did recommend a sacroiliac joint injection.

24. Claimant disagreed with Dr. Kawasaki's opinions and applied for a Division IME (DIME). Dr. Bennett Machanic ultimately performed the DIME exam.

25. On April 15, 2015, Dr. Machanic issued his DIME report, which agreed with Dr. Kawasaki's opinions. Dr. Machanic assigned Claimant a 9% whole person impairment rating for the lumbar spine, with 4% of the impairment being for lost range of motion. Dr. Machanic opined that as the original thoracic films did not demonstrate a compression fracture, that the compression fracture was new and unrelated to the subject injury. (R. Ex. E)

26. On June 22, 2015, in an addendum report, Dr. Nguyen reviewed the x-rays a second time and stated, "In retrospect, there is a shallow wedge deformity of the superior endplate of a mid-thoracic vertebral body, possibly T8, visible only on the lateral view."

27. On October 1, 2015, Claimant was evaluated by Dr. Kawasaki. Dr. Kawasaki noted that Claimant was seen for a follow up evaluation. He noted that:

> She has some continued pain. She has had primarily low back pain; however, now is increasing her pain complaints, expanding into the bilateral lower extremities. The patient is reporting burning sensations and numbness in her feet. ***Looking back through her chart and pain diagrams, which the patient fills out at every visit, the patient did not have bilateral lower extremity burning and pins-and-needles sensation and reported numbness in her feet until the last visit. At the last visit, on 09/08/15, she had a mark for some burning sensation in her buttock and an ache in her right knee.*** (Emphasis added.)
>
> The patient is also indicating that she is having increased pain in the mid-thoracic region. Also reporting pain in her neck and shoulder girdles and some pain, numbness, tingling, and paresthesias in her upper extremities. The upper extremity symptoms are all new.

Regarding Claimant's expanding and worsening symptomology, Dr. Kawasaki noted:

> ***They appear to be expanding at this point. She is now reporting some radicular-type symptoms, which are new, in both the arms and legs. It would be unlikely for new symptoms to develop at this point related to the Workers' Compensation Claim.*** (Emphasis added.)

(C. Ex. 27, Bates 252)

28. Claimant subsequently filed an Application for Hearing to overcome Dr. Machanic's opinions and proceeded to hearing before ALJ Margot Jones. At hearing, Claimant called an expert, Dr. Edwin Healey. Dr. Healey testified that he spoke with Dr. Bao Nguyen, the radiologist who originally read Claimant's February 3, 2014 thoracic x-ray, who agreed there was a T8 compression fracture present on the films. As found above. Dr. Eduardo Seda re-reviewed the films on June 22,

2015, which was after the DIME, and agreed that there was a T8 compression fracture present on the February 3, 2014 thoracic spine x-ray. Dr. Kawasaki also stated that if there was a T8 compression fracture on the February 3, 2014 x-rays, that the condition was likely work related. Given this evidence, Judge Jones found Dr. Machanic's opinions were based on the radiologist's erroneous readings of the February 3, 2014 thoracic spine x-rays. Therefore, she found Claimant had successfully overcome Dr. Machanic's opinions and Claimant was not at MMI for her February 3, 2014 injury. Judge Jones, however, denied Claimant's request to change her authorized provider (R. Ex. B, *See* Specific Findings of Fact, Conclusions of Law, and Order, dated August 17, 2016.)

29. Respondents accepted ALJ Jones's findings and returned Claimant to treat with Dr. Kawasaki.

30. On the first visit with Dr. Kawasaki after ALJ Jones issued her findings, Claimant received trigger point injections and Dr. Kawasaki recommended subsequent massage therapy. Dr. Kawasaki reviewed imaging Claimant obtained on her own while in Mexico. The brain MRI was normal, and a CT scan of the thoracic spine showed evidence of the compression fracture at the T8 level. Claimant also underwent an MRI of the cervical spine in Mexico, which demonstrated mild degenerative changes. (R. Ex. F, Bates 161)

31. Claimant returned to Dr. Kawasaki for follow-up trigger point injections on October 13, 2016. Claimant indicated "improvement overall, although she reports her pain level is a 9/10. She reports pain in the neck, mid back, low back, and numbness and tingling in both of her arms, more on the left side, and numbness and tingling in her left leg." (T. Ex. F, Bates 172)

32. Following a referral from Dr. Kawasaki, Claimant saw Dr. Bryan Castro, an orthopedic surgeon.

33. On October 5, 2016, Claimant was evaluated by Dr. Castro. Claimant described falling and hurting her back. She indicated that her pain was initially 10/10. She indicated that she underwent physical therapy, massage therapy, and SI joint injections, which were all helpful, but that her pain at this time is largely unchanged. Dr. Castro performed a comprehensive physical examination, reviewed her imaging, and noted the following:

> Neck: Good range of motion to flexion, extension, lateral bending, and rotation. He also noted her lumbar spine had full range of motion with flexion, extension, lateral bending, and rotation.
>
> Upper Extremities: Good function and strength to all motions of the shoulders, elbows, wrists, and intrinsicts. Grip strength is 5/5 and symmetric. Deep tendon reflexes at the brachioradialis, biceps, and triceps are within normal limits. Hoffman signs is negative, sensory dermatomes are intact.
>
> Lower extremities: Good function and strength to all motions of the hips, knees, ankles, EHLs, and peroneals bilaterally. Deep tendon reflexes of the patellae and ankles are within normal limits. Downgoing toes on

Babinski testing. No clonus is elicited bilaterally. Sensory dermatomes are grossly intact. Nontender active/passive ROM to hips bilaterally.

Dynamic Exam: The patient can stand and walk on her toes, stand and walk on her heels, squat down, and arise from a squatted position. No appreciable gait disturbance is noted. She is able to squat down and walk on her heels and toes. Straight leg raising test is negative bilaterally. There is some mild pain in the hip and buttocks area.

X-Rays/MRI: Having overall good alignment. No coronal or sagittal plane deformities. No severe neural encroachment is appreciated. There is some radiculopathy at L4-L5 having moderate stenosis, but I do not see any severe nerve impingement.

Impression: This is a 49-year old female. She has degenerative changes in her lumbar spine. Her symptoms are fairly diffuse. She does have some isthmic spondylosis and a grade 1 listhesis; however, I believe this is an incidental finding. Certainly, the slip and fall did not cause the isthmic spondylolysis. She is not having any referable L5 radiculopathy and the back pain is although significant, I do not believe it is brought on by the isthmic spondylolysis. Again, she does have a good range of motion to extension, and loading the pars fracture does not seem to be exacerbating her pain and her pain is rather nonanatomic and somewhat diffuse.

(See R. Ex. D)

34. Dr. Castro concluded Claimant was not a surgical candidate and that he would see her back on an as needed basis. He recommended continued physical therapy and possibly an epidural injection. The ALJ finds Dr. Castro's opinions as set forth in his report to be credible and persuasive.

35. On October 18, 2016, Claimant was evaluated outside of the workers' compensation system by Dr. Lonnie Loutzenhiser. He diagnosed Claimant as suffering from spondylolisthesis at L5/S1, 8mm, Grade 1; Radiculitis; Pars L5, bilateral; and Spondylosis of the lumbar spine. He evaluated Claimant and reviewed her radiographs. He concluded that Claimant would benefit from an L5/S1 anterior lumbar interbody fixation minimally invasive posterior spine fusion which would include a decompression. He also stated that continuation of non-operative treatment includes many options such as activity modification, physical therapy, short term analgesics, NSAIDS, Medrol dose pack, lumbar epidural steroid injections, selective nerve root blocks for diagnostics and/or therapeutic purposes, oral medications for neurogenic pain such as Nuerontin and Lyrica, and observation. Then, despite listing a litany of conservative treatment options, he indicates that despite conservative treatment options, he recommends surgery. There is no indication in his report that he has any idea regarding the actual onset and progression of Claimant's pain complaints and symptoms as documented in her medical records.

36. After her consultation with Dr. Castro and Dr. Loutzenhiser, Claimant followed up with Dr. Kawasaki and provided Dr. Kawasaki with Dr. Loutzenhiser's evaluation and surgical recommendation. Dr. Kawasaki stated:

> I believe that a lumbar fusion in this case has very little hope of success. The patient has diffuse spinal pain that does not specifically localize to the L5-S1 level. She also has sacroiliac joint dysfunction, which has improved, at least for a few months after the sacroiliac joint injections. She has pain certainly above the L5-S1 level. Post-fusion at L5-S1, she will likely have increased motion through the sacroiliac joint, likely making her SI joint pain worse. There are also adjacent level stresses that will occur moving up the spine, and she has diffuse spinal pain. I believe that an L5-S1 fusion is ill-advised.

(R. Ex. F, Bates 176-177)

Dr. Kawasaki recommended further injections at the L5-S1 area. (R. Ex. F, Bates 176-177)

37. On November 18, 2016, Dr. Kawasaki administered a right sacroiliac joint injection and Claimant tolerated the procedure well.

38. On December 7, 2016, Claimant returned to Dr. Loutzenhiser. She stated that she wanted to undergo the surgery. She also stated that "her symptoms began on 02/03/14 when she fell on ice and hit her back on the truck that she was getting out of while at work." He also noted that she was complaining of right buttock and posterior thigh radicular pain, which has not improved, despite physical therapy, massage therapy, and over the counter medications. He again recommended surgery.

39. On January 17, 2017, Claimant underwent further injections with Dr. Scott Bainbridge. Dr. Bainbridge performed a sacroiliac lateral branch block, which demonstrated a non-diagnostic pain response. (R. Ex. H, Bates 219-220)

40. Claimant returned to Dr. Kawasaki on January 19, 2017 with a desire to receive a rhizotomy procedure. Dr. Kawasaki advised Claimant that, given her non-diagnostic response to the lateral branch blocks, that a rhizotomy procedure was not indicated. (R. Ex. F, Bates 184-1186)

41. Dr. Kawasaki also outlined in his February 2, 2017 note that he believed Claimant again reached MMI as of January 19, 2017. He opined her thoracic spine fracture had healed and a majority of her other issues were unrelated to the subject claim. He opined Claimant should return to the DIME physician for follow-up evaluation. (R. Ex. F, Bates 190)

42. Prior to the follow-up Division IME with Dr. Machanic, the parties conducted depositions of Dr. Loutzenhiser, Dr. Castro, and Dr. Kawasaki. Transcripts of these depositions along with additional medical records, including records from Dr. Loutzenhiser, were sent to Dr. Machanic for his evaluation and consideration in forming his opinions. (R. Ex. E)

43. Dr. Machanic performed a follow-up DIME examination on April 12, 2017. He notes "a multitude of pain complaints, predominately however over the middle and lower back areas." Following examination of Claimant from "top to bottom," an analysis of the new medical documentation, and a thorough analysis of the depositions of Drs. Castro, Kawasaki, and Loutzenhiser, Dr. Machanic stated:

> At this point in time, I have carefully evaluated the patient's clinical state and have reviewed the medical records. I am extremely reluctant to recommend surgery for the patient's condition as I do think the risk-benefit ratio is not favorable and indeed at this point, I think there is a very high probability that the patient not only will not respond to surgery but will develop significant posteroperative complications and I would fully agree with Dr. Kawasaki and respectfully disagree with Dr. Loutzenhiser regarding his approach.

(R. Ex. E, Bates 65)

44. In Dr. Machanic's April 14, 2017 DIME report, he agreed with Dr. Kawasaki that Claimant reached MMI on January 19, 2017. He assigned Claimant a combined 20% whole person impairment rating for her injuries to the thoracic and lumbar spine. (R. Ex. E)

45. On July 5, 2017, Respondent filed an amended FAL consistent with Dr. Machanic's April 14, 2017 DIME report.

46. Claimant timely objected to the July 5, 2017 FAL and filed the subject Application for Hearing.

47. After filing the subject Application for Hearing, Claimant began to treat with another series of physicians outside of the workers' compensation system.

48. After Claimant filed the subject Application for Hearing, Claimant sought treatment with Drs. Tobey, Rajpal, and Dr. Patel.

49. On April 16, 2018, Dr. Tobey performed a lumbar facet injection at the L5-S1 level. He noted that immediately after the injection Claimant had 0% pain relief. (C. Ex. 43, Bates 702-703.) He also performed an intralaminar epidural injection at the L5-S1 level. Dr. Tobey did not, however, document Claimant's response to the intralaminar injection at the L5-S1 level. *Id*.

50. On May 7, 2018, Dr. Rajpal, and his assistant, evaluated Claimant. They noted that Claimant said her pain went from 9 to a 2 after she underwent the intralaminar epidural steroid injection, but that "not all of her pains improved with the injection and she continued to have gluteal pain and burning in the bottom of her feet." Despite Claimant's continuing pain complaints following the injection, Dr. Rajpal recommended a "L5/S1 gill decompression/laminectomy, TLIF, L5-S1 PSF." Dr. Rajpal did not outline why Claimant's condition as outlined on the MRI warranted the fusion surgery. (C. Ex. 40, Bates 674-676)

51. Claimant's response to any of the injections is subjective. Moreover, neither Dr. Tobey nor Dr. Rajpal documented the expected time frame(s) for a diagnostic response from each injection and whether Claimant's subjective response was

consistent with the expected time frame(s). In other words, neither Dr. Tobey nor Dr. Rajpal analyzed and documented how Claimant's subjective response to each injection compared to the expected duration of the local anesthetic phase of each injection.

52. At hearing, Claimant's attorney indicated Claimant wanted the surgery recommended by Dr. Rajpal.

53. Dr. Castro also testified at hearing. Since he was an authorized treating physician/surgeon, Respondents had not discussed with him the most recent surgery recommended by Dr. Rajpal. However, at hearing, Dr. Castro was provided updated medical records and reviewed those records before testifying. Dr. Castro credibly testified at hearing that neither the surgery recommended by Dr. Loutzenhiser nor the surgery recommended by Dr. Rajpal, which was different, but still a fusion, were reasonable and necessary. Dr. Castro testified that based on his physical examination and findings, review of the imaging and medical records, as well as Claimant's reported pain complaints, surgery was not reasonable and necessary. The ALJ finds Dr. Castro's testimony and opinions to be credible and persuasive.

54. Dr. Loutzenhiser testified via deposition. He testified that he believes Clamant suffers from a pars defect, i.e., a stress fracture at the L5 level, and isthmic spondylolisthesis – and such condition is causing Claimant's symptoms. Dr. Loutzenhiser testified that although the pars defect – stress fracture – has probably been present since Claimant was a teenager, and was not caused by the accident at work, the fall probably caused the stress fracture to loosen up the bone or scar tissue and resulted in slippage/instability which in turn caused Claimant's pain and symptoms. (Dep. Tran., Pg. 14.) He also testified that the fact that the MRI showed 3 mm of slippage and the standing x-rays showed 8 mm of slippage establishes there is slippage/instability and such slippage/instability is causing her symptoms. (Dep. Tran., Pg. 14-15.) The ALJ does not find Dr. Loutzenhiser's opinions to be persuasive. Dr. Loutzenhiser attempts to correlate Claimant's fall with her back pain and radicular plain. In essence, he opines that the fall caused the slippage/instability and the slippage/instability is aggravated or accentuated when Claimant stands and is causing Claimant's back and radicular pain. He appears to be basing his opinion on Claimant's contention that she developed back and radicular pain right after the accident. However, the ALJ finds that the medical records do not support the contention upon which he bases his opinion. Claimant did not have radicular symptoms immediately after the accident. Claimant did not complain of radicular pain or symptoms to Dr. Kawasaki until about September of 2015. As noted by Dr. Kawasaki on October 1, 2015:

> She has had primarily low back pain; however, now is increasing her pain complaints, expanding into the bilateral lower extremities. The patient is reporting burning sensations and numbness in her feet.

At the same appointment of October 1, 2015, Dr. Kawasaki commented further about Claimant's expanding symptoms: Dr. Kawasaki commented about Claimant's radicular symptoms and stated:

> ***They appear to be expanding at this point. She is now reporting some radicular-type symptoms, which are new, in both the arms and legs. It would be unlikely for new symptoms to develop at this point related to the Workers' Compensation Claim.*** (Emphasis added.)

(C. Ex. 27, Bates 252)

Had the fall aggravated Claimant's underlying pars defect and caused additional slippage by breaking or loosening up the scar tissue or bone, which in turn caused Claimant's radicular symptoms, it seems like Claimant would have developed and reported to Dr. Kawasaki radicular pain and symptoms at the time of the accident, or shortly thereafter, and consistently thereafter, and not over a year later. Moreover, once the radicular pain was reported by Claimant, her alleged radicular pain complaints should have followed a specific dermatomal pattern, which according to Dr. Castro, they did not. Therefore, the ALJ does not find Dr. Loutzenhiser's opinions to be persuasive.

55. Dr. Castro testified that although the imaging he reviewed did not demonstrate 8 mm of slippage, even if such slippage existed, such slippage would still be graded as a grade 1, and surgery would not be appropriate based on Claimant's physical examination and complete clinical picture. He also testified that slippage is only one factor, and other factors, such as Claimant having well maintained disc space, supported his conclusion that surgery was not reasonable and necessary.

56. Dr. Castro also testified by deposition. He testified that Claimant's pain was non-anatomic in that her pain complaints did not seem to be related to one individual nerve root system. He indicated that "typically with a pars fracture, the only nerve root involved is L5, and that's a different area where she was having leg pain." (Dep. Tran., Pg. 14). Dr. Castro was also asked whether there was anything objective that he found which would substantiate or explain the seemingly high levels of pain Claimant was complaining about. Dr. Castro indicated there was not. (Dep. Tran., Pg. 16.) Dr. Castro also testified that Claimant's MRI did not demonstrate any findings or markers of instability such as gapping or fragments, with the pieces pulling apart. (Dep. Tran., Pg. 52.) Dr. Castro ultimately concluded that based on Claimant's clinical presentation, the surgery recommended by Dr. Loutzenhiser has a high risk of making claimant worse. (Dep. Tran., Pg. 61)

57. Dr. Castro also testified at hearing that the surgery recommended by Dr. Rajpal had an even a greater risk to cause Claimant additional problems due to the likelihood of increased scar tissue resulting in increased leg and buttocks pain.

58. The ALJ finds Dr. Castro's opinions in his report, deposition testimony, and hearing testimony to be credible and persuasive.

59. The ALJ does not find that there is credible and persuasive evidence which establishes Dr. Machanic erred when he agreed with Dr. Kawasaki and Dr. Castro and found Claimant was not a surgical candidate and that she was at MMI as of January 19, 2017.

60. The ALJ is persuaded by the opinions of Dr. Castro - an authorized provider - as set forth in his report, deposition testimony and hearing testimony, that Claimant is not a surgical candidate for an L5-S1 fusion based on her imaging, his examination of Claimant, her reported response to the various injections, and review of her medical records.

61. The ALJ is also persuaded by the opinion of Claimant's authorized provider, Dr. Kawasaki, who has opined Claimant is at MMI and is not a surgical candidate.

62. The ALJ is not persuaded by the medical documentation from Drs. Tobey, Rajpal, and Loutzenhiser, as well as Dr. Loutzenhiser's deposition testimony, that lumbar surgery is reasonable and necessary.

63. The ALJ finds that the back surgery recommended by Dr. Loutzenhiser and Dr. Rajpal is not reasonable and necessary to cure or relieve Claimant from the effects of her industrial injury.

64. The ALJ finds the discrepancies in opinions as to whether Claimant should undergo surgical intervention for the lumbar spine constitutes a difference in opinion, at most.

65. Although suffering an injury, Claimant has been returned to modified duty, and is working modified duty. Claimant testified at hearing regarding some of her job duties such as doing laundry and mopping. The ALJ finds that the degree of pain and disability alleged by Claimant is inconsistent with her ability to perform modified duty. The ALJ also finds that Claimant's pain complaints are diffuse and non-anatomic. Therefore, the ALJ finds Claimant's representations to her medical providers and her testimony in court regarding the extent and location of her pain as well as her degree of disability is not an accurate indication of such matters. The Judge is mindful that Claimant complained of thoracic pain, and a fracture was ultimately diagnosed, however, such fact does not cloak all of Claimant's reported pain complaints and symptoms with an unassailable degree of reliability.

66. Claimant has been receiving adequate and proper medical care from her authorized treating physicians, which includes Drs. Kawasaki and Castro. Dr. Kawasaki has provided Claimant extensive treatment and referred Claimant to other specialists such as Dr. Catsro and Dr. Bainbridge for additional evaluations and treatment. Moreover, Dr. Castro's evaluation and recommendation against surgery is found to be credible and persuasive and evidence that Clamant is being provided adequate and proper care. There is no indication that a change of physician is required in order for Claimant to obtain additional reasonable and necessary medical care to treat her work injury.

67. Claimant contends in her post hearing position statement that her subjective response to the diagnostic injections which were performed in 2018 after Dr. Machanic performed his DIME provides sufficient evidence to establish that the back surgery is reasonable and necessary to cure or relieve her from the effects of her industrial injury and that she is not at MMI. The ALJ is not persuaded by this argument. As previously stated, Claimant's response to the injections were subjective. Moreover, this additional information was presented to Claimant's

authorized treating physician/surgeon Dr. Castro – at hearing – and it did not alter his opinions.

68. Claimant failed to present clear and convincing evidence that Dr. Machanic erred in determining she reached MMI on January 19, 2017.

69. Claimant reached MMI on January 19, 2017.

70. Lumbar surgery is not reasonable and necessary to cure or relieve Claimant from the effects of her work injury.

71. Claimant has not established that a change of physician is appropriate.

72. There is no credible and persuasive evidence that Claimant objected to Dr. Machanic performing a follow up DIME before Claimant underwent the follow up DIME and Dr. Machanic issued his report. Regardless, the ALJ finds Claimant has failed to establish that Dr. Machanic should have been precluded from performing a follow up DIME merely because his prior opinion was overcome by clear of convincing evidence.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion

of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I-II Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Bennett Machanic, M.D. that she reached Maximum Medical Improvement (MMI) on January 19, 2017.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of Claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of Claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that Claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The ALJ did not find the opinions of Dr. Loutzenhiser and Dr. Rajpal, each of whom recommended lumbar surgery, to be persuasive. As found, the surgery recommended by Dr. Loutzenhiser and Dr. Rajpal is not reasonable and necessary to treat Claimant's work related injury. The ALJ credited the opinions of Dr. Kawasaki and Dr. Castro that Claimant is not a surgical candidate. The fact that Claimant underwent additional injections in 2018 and subjectively reported an 80% decrease in her pain does not alter this conclusion. Therefore, the ALJ concludes Claimant failed to present clear and convincing evidence that Dr. Machanic erred when he determined Claimant reached MMI on January 19, 2017.

III. Whether Dr. Machanic's report should be set aside and a new IME physician panel issued given Claimant's prior success in overcoming Dr. Machanic's April 15, 2015 DIME opinions.

Claimant argues that due to her prior success in overcoming Dr. Machanic's April 15, 2015 DIME opinions, that the entire DIME process should be restarted with an issuance of a new physician panel after Dr. Kawasaki again placed Claimant at MMI on January 19, 2017. Claimant correspondingly argues that the April 14, 2017 DIME report from Dr. Machanic is void and instead, a new DIME physician panel should be issued and a physician from a new panel should perform the exam.

It is undisputed that Claimant succeeded in overcoming Dr. Machanic's April 15, 2015 opinion that Claimant was at MMI. This was due to imaging reports that were erroneously read on initial review by the radiologist.

Neither party asserts the DIME process was erroneously commenced when the Division of Workers' Compensation DIME Unit issued the original physician panel which ultimately yielded Dr. Machanic as the examining physician.

Neither party could locate authority which directly addresses the issue brought forth by Claimant.

Workers' Compensation Rule of Procedure (W.C.R.P.) 11-7 states, "[s]ections of this Rule 11 apply to follow-up procedures, as appropriate. If a Level II IME physician determines a claimant has not reached MMI and recommends further treatment a follow-up IME examination shall to the extent possible be schedule with the original IME physician." Here, Dr. Machanic was able to perform the follow-up DIME without delay.

W.C.R.P. 11-7 goes on to state, "[a] new IME physician (for a follow-up IME examination) may be selected only if agreed upon by both parties. Here, the parties did not reach an agreement to select a different physician for the follow-up exam.

W.C.R.P. 11-7 also allows for an ALJ to order "a new physician and designate which party shall pay the examination fee." The record is void of any credible and persuasive evidence suggesting good cause. This ALJ finds ALJ Machanic was not biased due to Claimant's prior success in overcoming his original opinions. Dr. Machanic's prior opinions were only erroneous in that he relied on a radiologist's erroneous reading of imaging.

This ALJ is also persuaded by the Director's Bulletin dated February 24, 2004 as outlined by the ICAO panel in *Nancy Sanchez-Ortega v. Central Uniform & Linen* W.C.

No. 4-358-716 (March 12, 2004). The *Sanchez-Ortega* panel stated, “we agree with the Director that…once the DIME is conducted, there is an “open DIME” after the DIME determines the claimant is not at MMI and there is no need to repeat the selection process to designate a “new” DIME physician…..the *Sanchez* panel went on to state, the February 24, 2004 bulletin states the "Division has construed this language as a directive" that there be "one case, one DIME." *Id*. The ALJ finds that although the scenario at hand is factually distinguishable from the factual scenario addressed in *Sanchez-Ortega*, the same principles apply. The “one case, one DIME” rule along with W.C.R.P. required Claimant to return to Dr. Machanic for a follow-up DIME as he performed the prior exam and was available to perform the follow-up exam. Further, the record is void of any credible and persuasive evidence to support a finding of good cause to support a ruling requiring the issuance of a new panel or a new physician to replace Dr. Machanic.

Therefore, Dr. Machanic’s DIME examination on April 14, 2017 was appropriate and is binding unless overcome by clear and convincing evidence. Claimant’s request for a new DIME panel or DIME physician is denied.

IV. If Claimant failed in overcoming the DIME, whether Claimant proved entitlement to the L5-S1 fusion surgery as maintenance care.

Respondents are liable to provide such medical treatment “as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.” Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

In cases where Respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When Respondents challenge Claimant’s request for specific medical treatment, Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether Claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The fact that the post MMI treatment in question involves surgery does not necessarily require that the treatment be considered as aimed at significant improvement of the claimant's condition. *Chism v. Walmart*, W.C. No. 4-809-103-3 (January 9, 2017) and (July 10, 2017). As the Panel stated in *Hayward v. Unisys Corp*.,

W.C. No. 4-230-686 (July 2, 2002), aff'd, Colo. App. No. 02CA1446 (Jan. 9, 2003), "surgery is not as a matter of law 'curative' treatment." The Hayward panel instead explained that medical treatment "which does not tend to cure or improve the claimant's condition may nevertheless be ordered under Grover upon the presentation of substantial evidence that such treatment 'will be reasonably necessary to relieve a claimant from the effects of the injury or to prevent further deterioration of his or her condition' after MMI." *Id.* (knee surgery may be curative or may be a form of Grover-style maintenance treatment designed to alleviate deterioration of the claimant's condition); see also *Grover v. Industrial Commission, supra*.

Whether medical treatment is provided to cure or merely to relieve Claimant's condition does not depend on the type of treatment, but rather the reason for the treatment. Therefore, if the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far, such medical treatment, *irrespective of its nature*, must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition. (emphasis added) *Milco* at 542.

The question of whether Claimant carried his burden of proof regarding post-MMI medical treatment is one of fact for resolution by the ALJ. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Here, as noted above, Claimant is at maximum medical improvement per Dr. Machanic. This means Claimant must prove, by a preponderance of the evidence, that the recommended surgery is appropriate maintenance care and that it is necessary to prevent further deterioration of her current condition and to keep her at maximum medical improvement or relieve her from the effects of her injury. The record is void of credible and persuasive evidence that the surgeries recommended by Dr. Loutzenhiser or Dr. Rajpal are reasonably necessary to prevent further deterioration of her work-related condition or to relieve her from the effects of her injury and have been proposed as maintenance treatment. Dr. Castro credibly opined that Claimant is not a surgical candidate and the ALJ found that surgery is not reasonably necessary. So, even if the surgery was proposed as maintenance treatment, the surgery is not indicated in Claimant's instance. For these reasons, Claimant's request for a lumbar fusion at L5-S1 is not reasonably necessary maintenance medical treatment and her surgical request is denied.

V. Whether Claimant has proven entitlement to a change in authorized provider.

Upon a proper showing to the division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee. Section 8-43-404(5)(a)(VI), C.R.S. Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. *Loza v. Ken's Welding,* WC 4-712-246 (ICAO January 7, 2009). Claimant may procure a change of physician where he/she has reasonably developed a mistrust of the treating physician. *See Carson v.*

Wal-Mart, W.C. No. 3-964-07 (ICAO April 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of his/her injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (ICAO November 1995). But, where an employee has been receiving adequate medical treatment, courts need not allow a change in physician. *See Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (ICAO December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (ICAO August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (ICAO June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician).

In this case, it was found that Claimant has been receiving proper medical treatment by Drs. Kawasaki and Dr. Castro. As found, Dr. Kawasaki has provided extensive treatment and made appropriate referrals for additional evaluations and treatment. It was also found that Dr. Castro's opinion that Claimant is not a surgical candidate was appropriate. Claimant has failed to establish that her authorized treating physicians are providing inadequate treatment. Therefore, the ALJ Concludes Claimant has failed to establish by a preponderance of the evidence that she is entitled to a change of physician.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to overcome the opinion of the DIME physician, Dr. Machanic, that she reached MMI on January 19, 2017. Claimant is at MMI for her February 3, 2014 work injury per Dr. Machanic as of January 19, 2017.
2. Claimant's request for L5-S1 fusion surgery as recommended by Dr. Loutzenhiser and/or Dr. Rajpal is denied and dismissed.
3. Claimant's request for a new DIME panel or DIME physician is denied and dismissed. Claimant's follow-up DIME appointment with Dr. Machanic was appropriate.
4. Claimant's request for a change in authorized provider is denied and dismissed.
5. Any and all issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 27, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-056-371

ISSUES

- Whether Claimant proved, by a preponderance of the evidence, he sustained an injury in the course and scope of his employment on August 29, 2017.

- Whether Claimant proved, by a preponderance of the evidence, an average weekly wage in the amount of $1,526.87, which would increase on November 5, 2017 to $1,942.44, based on Claimant's loss of health insurance benefits.

- Whether Claimant proved, by a preponderance of the evidence, he is entitled to temporary partial disability benefits between August 29, 2017 and October 31, 2017, to the extent he did not earn his average weekly wage.

- Whether Claimant proved, by a preponderance of the evidence, he is entitled to ongoing temporary total disability benefits since November 1, 2017.

- Whether the treatments provided by Advanced Urgent Care, where Claimant was treated by PA-C Christopher Wright and Julie Parsons, M.D., and their referrals, including Cherry Creek Imaging and Western Orthopaedics are reasonable, necessary and related to the August 29, 2017 injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 54 years old, and has worked as a delivery driver for Employer for approximately eleven years.

2. Claimant testified that as a delivery driver he averages 130 to 150 stops a day, delivering at those stops approximately 200 to 300 packages. Claimant credibly testified that he also picks up approximately 200 to 250 packages a day. The packages delivered and picked up vary in size and weight, ranging from a letter to a package weighing up to 150 pounds.

3. Prior to August 29, 2017, the Claimant suffered an admitted right shoulder injury on April 27, 2016 and credibly testified that prior to April 27, 2016 he had no symptoms, limitations or pain complaints in either shoulder.

4. Claimant requests an average weekly wage ("AWW"), based on his earnings prior to his admitted April 27, 2016 right shoulder injury of $1,526.87. Employer previously accepted this amount on Claimant's right shoulder claim. The

ALJ finds this amount appropriate given that Claimant worked for approximately ten weeks prior to his left shoulder injury of August 29, 2017.

5. Claimant received a COBRA letter stating that he lost his employee paid health insurance on November 5, 2017. Claimant was eligible for COBRA coverage at $415.57 a week. The ALJ finds that the cost of his COBRA benefits should be added to his requested AWW of $1,526.87, effective after November 5, 2017.

6. Claimant credibly testified, and the records support, that his ATP released him to full-duty on April 17, 2017 for his admitted right shoulder injury.

7. Claimant credibly testified he was unable to return to his position as a delivery driver for Employer on April 17, 2017, as he was unable to pass his Colorado Department of Transportation ("CDOT") exam, due to hypertension, a non-work-related condition. Claimant eventually controlled that condition with medications and returned to work on June 23, 2017.

8. Claimant credibly testified that upon returning to work his right shoulder was only 90% of where it should have been. It was Claimant's opinion that he had been released to work earlier than he should have been following his right shoulder injury, in part based on comments his surgeon made. He testified that since returning to his job in June 2017 with Employer, he overused his left upper extremity to compensate for remaining weakness in his right shoulder.

9. Claimant worked full-duty without restrictions from June 23, 2017 until the events of August 29, 2017.

10. On August 29, 2017, in the course and scope of his employment, Claimant was moving packages on a truck when he felt pain in his left upper extremity. One occasion in particular being when he was moving a 100-pound BBQ grill onto a porch. Claimant testified he did not inform his supervisor the night of his injury, because his supervisor was not on the premises, nor did he call his supervisor because he believed that with ice and heat his left upper extremity symptoms would go away.

11. Claimant testified that he was unable to sleep the night following his August 29, 2017, injury due to pain in his left extremity. He reported his injury to his supervisor the following morning and Employer provided a list of four designated treating providers to choose from for medical care.

12. Claimant indicated he did not desire to return to John Ogrodnick, M.D., who had been the designated provider on his right shoulder case. Instead, he selected Advanced Urgent Care and commenced treatment with PA-C Christopher Wright. On August 31, 2017, PA-C Wright took a history of injury as follows:

> *Location/Where on body?:* upper extremity; left (Shoulder, neck, wrist, elbow)
> *Quality/Description of Symptom (i.e. burning, cramping, constant):* Pain to left shoulder, elbow, neck. Numbness and tingling in left wrist, Pt. sts he has pain with gripping motion. Pain with ROM of left arm. Pt. describes shoulder as constant ache, elbow and wrist pain is sharp upon movement.
> *Severity/Pain Level*: pain level 6/10
> *Duration/How long?* Date of injury (08/29/17)
> *Context/How did it occur?* Work injury (UPS)
> *Modifying Factors/what makes feel better? Worse?* Ice; OTC medication (ibu); Easton maching
> *Notes***:** Pt. was moving packages on truck, felt pain in left shoulder during four occasions, One occasion pt. was moving a 100lb BBQ grill onto porch.

13. PA Wright concluded that Claimant suffered a "work-related mechanism of injury" by "moving oversized packages and felt a sharp pain." He placed Claimant on temporary work restrictions of 10 pounds on the left arm and assigned Claimant "light-duty" work.

14. Claimant credibly testified that Employer has a policy of placing injured workers on light-duty work called temporary alternative work "TAW." Employer did not permit Claimant to work overtime hours and limited him to a 40-hour week following PA-C Wright's assignment of temporary work restrictions. Claimant requested temporary partial disability benefits while on TAW, to the extent he did not earn his preinjury AWW of $1,526.87.

15. On September 12, 2017, Claimant returned to Advanced Urgent Care and Julie Parsons, M.D. evaluated him. Dr. Parsons diagnosed a "neck sprain, shoulder strain - left, and injury of the elbow," and instructed Claimant to begin physical therapy, to use heat, and to return to the clinic in two weeks. Dr. Parsons concluded that Claimant had suffered "a work-related mechanism of injury" to his "cervical, left shoulder strain, and left elbow." Dr. Parsons maintained Claimant on temporary work restrictions of 25 pounds.

16. On September 13, 2017, Claimant began physical therapy at Dr. Parson's direction. His physical therapist noted his primary concern and chief complaint as follows:

> L neck/shoulder/elbow/hand pain. He has both numbness and tingling that goes down the outside of his upper arm, around the lateral aspect of the elbow and into the forearm. One of his biggest restrictions is shooting pain with gripping, starting around the elbow and shooting into the dorsal aspect of the forearm. He

> also gets increased pain with reaching above the shoulder. He gets increased pain with holding his arm in position or turning when driving – he feels pain in the posterior neck. He wakes up 4-5 times/night due to pain. He has had to sleep on his back, but he prefers sleeping on his R side or his stomach. He has less pain at rest, increased pain with activities. Ice and heat both help. Ibuprofen also helps with increased pain.

17. Claimant testified he did not have the symptoms in his left upper extremity described in the physical therapy report of September 13, 2017 prior to the events of August 29, 2017. While certain medical records contradicted this testimony, the ALJ finds that his left upper extremity symptoms became more appreciable with his August 29, 2017 work injury.

18. On September 26, 2017, Claimant returned to Dr. Parsons who continued physical therapy, kept Claimant on a 25-pound temporary work restriction, and requested that he return in three weeks.

19. On October 10, 2017 Claimant underwent a fluoroscopic – guided left shoulder aspiration and arthrogram which had the following findings:

> Moderate infraspinatus tendinopathy with mild/moderate partial articular tear of the myotendinous junction on series 6, images 7-9 of 30% thickness. Moderate subscapularis tendinopathy and mild/moderate partial articular surface tear of 30% thickness.
>
> * * *
>
> Impressions:
> 1. Postoperative left shoulder status post rotator cuff repair. No recurrent full-thickness tear. Attenuated supraspinatus tendon with mild/moderate tendinopathy.
> 2. **Moderated infraspinatus tendinopathy and mild/moderate partial interstitial tear at the myotendinous junction.**
> 3. Moderate subscapularis tendinopathy and mild/moderate **partial articular surface tear.**
> 4. Mild to moderate intra-articular long head biceps tendinopathy. Medial subluxation at the bicipital grove is consistent with biceps pulley mechanism dysfunction.
>
> Thank you for this referral. Study was interpreted by a Fellowship trained musculoskeletal radiologist.

20. On October 12, 2017, Claimant continued physical therapy with the physical therapist noting:

> Pt notes had MRA so L shoulder is really sore from that. Pt notes had Monday off so was able to rest the arm so it is feeling better today in the forearm. Pt notes his grip is very weak and fatigues very quickly with just picking clothes and laundry the forearm gets painful and tired and tingling.

21. On October 17, 2017 Claimant returned to ATP Parsons who kept Claimant on restrictions, instructed him to continue physical therapy and directed him to specialist Armodios Hatzidakis, M.D., at Western Ortopaedics. *See* Claimant's Submission Tab 6, BS 33 and 36.

22. On October 19, 2017, Claimant continued physical therapy as at Dr. Parson's direction. The physical noted:

> the elbow is still what is bothering him the most with driving, lifting, reaching and event buttoning the buttons on his shirt.

23. On October 23, 2017, Claimant's next physical therapy visit, the therapist noted:

> David is a 47 year old male with L shoulder/neck/elbow pain. He was sliding 100# boxes to the back of a truck and felt an increase in pain. He later moved a BBQ grill up some stairs and felt the pain again. He has had intermittent shoulder pain but nothing very irritating.
>
> * * *
>
> Current Complaints/Gains: 10/23/17: Pt notes elbow is still the same the pain and functional tolerance has not changed since starting therapy. Pt notes arm just hurts with gripping, lifting, even just getting dressed and doing daily activities around the house. Pt is still has same numbness tingling with activity. Pt notes the shoulder is slightly better. Pt notes neck pain is about the same.
>
> L Neck/shoulder/elbow/hand pain. He has both numbness and tingling that goes down the outside of his upper arm, around the lateral aspect of the elbow and into the forearm. One of his biggest restrictions is shooting pain with gripping, starting around the elbow and shooting into the dorsal aspect of the forearm. He also gets increased pain with reaching above the

> shoulder. He gets increased pain with holding his arm in position or turning when driving – he feels pain in the posterior neck. He wakes up 4-5 times/night due to pain. He has had to sleep on his back, but he prefers sleeping on his R side or his stomach. He has less pain at rest, increased pain with activities. Ice and heat both help. Ibuprofen also helps with increased pain.

24. On October 31, 2017, the physical therapist made the following notations with regard to Claimant's end of light-duty work and the fact that Claimant's care was denied on the left shoulder injury as a work related injury stating:

> 10/31/17: Pt notes yesterday was last day of 29 days of light duty. Pt is now off work until further notice. Pt notes the insurance is denying his L shoulder claim. Pt will be seeing Dr. Parsons tomorrow. Pt notes his elbow and shoulder are really bothering him today because of work yesterday.

25. Claimant's last physical therapy appointment occurred on October 31, 2017. His treatment provider discharged him from physical therapy "due to lack of authorization from insurance. Pt's physical therapy goals were not met and still has ongoing symptoms."

26. On November 1, 2017, Claimant returned to Advanced Urgent Care where Dr. Parsons had the opportunity to review the MRI report, concluding that Claimant had suffered a "partial RCT IFS and subscap with bicep pulley dysfunction." Claimant was instructed to follow up with Dr. Hatzidakis and was kept on restrictions.

27. On November 22, 2017 Claimant returned to Dr. Parsons who changed her diagnosis from that of shoulder strain to "partial thickness rotator cuff tear; lateral epicondylitis." Dr. Parsons kept Claimant on temporary work restrictions of 25 pounds and continued to opine that Claimant's "related mechanism of injury/illness" was consistent with a work-related event.

28. On December 11, 2017, Claimant was evaluated by PA-C Rose G. Christensen at Western Orthopaedics under the direction of Dr. Armodios Hatzidakis, who took a history of present illness as follows:

> Mr. Sedillos is a well-established patient in our clinic, who is here today specifically to discuss his left upper extremity. **He had a previous left shoulder arthroscopic rotator cuff repair back in 2014, was doing very well up until recently, when he re-injured it around the date of August 29, 2017.** It had

been getting more painful, as well, as he had been rehabbing his right shoulder, which was recovering from a work-related injury with associated arthroscopic rotator cuff repair on date of surgery of October 4, 2016. **His shoulder and elbow pain were exacerbated from an injury, again, that he sustained on August 29, 2017,** while at work, where he was pushing a heavy piece of furniture and sliding it cross-body. He states it weighed approximately 100 pounds, and since then he has been having neck, shoulder and elbow pain that has been worsening. He feels overall that the function of the upper extremity is 70% of normal. He describes pain in the front of the shoulder that radiates down into the biceps. He also experiences pain over the lateral and medial aspect of the elbow, which can radiate into the extensor tendon. He has been taking ibuprofen for pain management and has been experiencing numbness and tingling in bilateral hands.

* * *

Left shoulder MRI over-read from Cherry Creek Imaging shows previous rotator cuff repair to be intact. There does appear to be medial subluxation of the long head of the biceps with partial articular sided subscapularis tearing, notes previous decompression of subacromial space, and possible partial-thickness articular sided tearing of the posterior rotator cuff at the junction of the **supraspinatus**; however, I believe this is more artifact than postoperative surgical findings. No significant arthritic change seen within the AC joint.

ASSESSMENT:

1. Left shoulder strain with associated pain, medial subluxation of long head of biceps, with subscapularis tearing.
2. Left elbow strain with lateral epicondylitis and mild medial epicondylitis.

* * *

We discussed conservative versus surgical treatment options. The former consisting of activity modification, physical therapy, anti-inflammatories, cortisone injection. We also discussed more definitive treatment for arthroscopic biceps tenodesis with possible repair of the rotator cuff,

if required, with intraoperative biopsies for culture, given his history of previous surgery.

29. Claimant testified at hearing that Insurer has not authorized the cortisone injections and that he would like to pursue that treatment.

30. Following Claimant's August 29, 2018 injury, after his TAW ended, on October 31, 2017, Claimant received a COBRA Continuation Coverage Election Notice. It informed him that his health insurance for himself and his family ended on November 4, 2017 and that if he wished to continue paying for health insurance from November 5, 2017, he had to pay the amount of $415.57 per week. Claimant requested that his AWW from November 5, 2017 moving forward be increased by the weekly amount of $415.57 for the loss of his health insurance.

31. At hearing, Respondents limited their presentation of evidence to the cross-examination of Claimant and the Respondent-requested medical evaluation report authored by Kathleen D'Angelo, M.D., on January 27, 2018. Dr. D'Angelo opined that Claimant's left upper extremity symptoms were not new, but rather "demonstrate the anticipated natural history of degenerative changes to the left shoulder."

32. Respondents' expert opined: "I believe [Claimant] is at MMI for his left shoulder claim of August 29, 2017. He required no permanent work restrictions or permanent impairment for his left shoulder. No further active or maintenance treatment is warranted or appropriate through the workers' compensation system." He should return to "his PCP, to rule out arthropathy and/or connective tissue abnormalities."

33. Dr. D'Angelo's report does not address whether Dr. Parsons or PA-C Wright's conclusions of an on-the-job injury are appropriate, nor does it address whether the cortisone injection recommended by Dr. Hatzidakis is appropriate. The majority of Respondent expert's report addresses Claimant's admitted right shoulder claim. The ALJ infers from Dr. D'Angelo's report that the assignment of temporary work restrictions by PA-C Wright and Dr. Parsons was inappropriate based on her opinion that Claimant was at MMI for his left shoulder.

34. The ALJ finds it more likely than not, that Claimant suffered a left upper extremity injury at work on August 29, 2017, which resulted in symptoms in his cervical spine, left upper extremity, and left wrist requiring medical care. These symptoms are still present. The ALJ is not persuaded by the report of Respondents' expert and finds the reports of Claimant's treatment providers at Advanced Urgent Care and Western Orthopedics, in connection with the MRI, more persuasive.

35. Thus, the ALJ finds the claim is compensable.

36. The persuasive evidence in the record regarding Claimant's employment is that Employer would not permit Claimant to work overtime hours

after this August 29, 2017 injury, when he was placed on TAW until October 31, 2017. After October 31, 2017, Claimant was not permitted to work, based upon the temporary work restrictions assigned by the designated medical providers at Advanced Urgent Care. Accordingly, Claimant is entitled to temporary partial disability ("TPD") from August 29, 2017 through October 31, 2017 and temporary total disability ("TTD") benefits from November 1, 2017 ongoing until terminated pursuant to statute.

37. The ALJ finds that Claimant's AWW at the time of injury was $1,526.87, as there is no other documentation submitted challenging that wage. On November 5, 2017, Claimant's AWW shall be increased by $415.57 to $1,942.44 to reflect the loss of his health insurance benefits. Two-thirds of either AWW, however, exceeds the statutory maximum temporary total disability rate in place for Claimant's date of injury, which is $948.15.

38. The ALJ finds that all medical care rendered by Employer's designated physicians at Advanced Urgent Care, including PA-C Wright and Dr. Parsons, as well as their referrals to FIT Physical Therapy, Western Orthopaedics, and Cherry Creek Imaging are reasonable, necessary and related. This includes Western Orthopaedics' request for cortisone injections.

39. Any determination concerning other issues is premature at this time.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion. The ALJ may reject evidence contrary to the findings above as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

In order to recover benefits a claimant must prove that he sustained a compensable injury. A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work-related functions. *Finn v. Indus. Comm'n,* 165 Colo. 106, 437 P.2d 542 (1968). It is the claimant's burden to prove by a preponderance of the evidence that there is

a direct causal relationship between the employment and the injuries. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

Based on the totality of the evidence, the ALJ concludes that Claimant has sustained his burden of proving by a preponderance of the evidence that he sustained a cervical strain, left shoulder and left upper extremity injury on August 29, 2017 and, therefore, is entitled to benefits under the Workers' Compensation Act.

Once compensability is established, Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *See Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ, and an ALJ's resolution should not be disturbed if supported by substantial evidence in the record.

Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Respondents designated Advanced Urgent Care as the authorized provider.

The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The ALJ concludes the medical care rendered by Advanced Urgent Care and its referrals to FIT physical therapy, Cherry Creek Imaging and Western Orthopaedics, are reasonable, necessary and related, as well as Western Orthopaedics requested for Claimant to have a cortisone injection.

Claimant has established by a preponderance of the evidence that his earnings plus overtime at the time of injury equate to an AWW of $1,526.87, and that on November 5, 2017 he lost is Employer paid health insurance benefits, increasing his wage by $415.57 to $1,942.44.

Claimant has established by a preponderance of the evidence that, due to restrictions assigned by the ATP at Advanced Urgent Care, he was placed on TAW for the period of time from August 29, 2017 to October 31, 2017 and was unable to earn his preinjury wage. Claimant has been on TTD since November 1, 2017 when he was not permitted to return to work, due to his workplace restrictions. Accordingly, Claimant is entitled to TPD benefits for the period of time from August 29, 2017 and October 31, 2017 and to TTD benefits from November 1, 2017 ongoing, subject to termination pursuant to statute.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury on August 29, 2017.

2. Claimant has established by a preponderance of the evidence an average weekly wage off $1,526.87 at the time of his on-the-job injury and that he lost his health insurance on November 5, 2017, raising his AWW to $1,942.44.

3. Claimant established by a preponderance of the evidence he is entitled to temporary partial disability benefits from August 29, 2017 to October 31, 2017, to the extent he did not earn his preinjury wage of $1,526.87.

4. Claimant established by a preponderance of the evidence he is entitled to temporary total disability benefits from November 1, 2017, ongoing, based on an average weekly wage prior to November 5, 2017 of $1,526.87 and, thereafter, at an average weekly wage of $1,942.44, but subject to the statutory temporary total disability limitation of $945.15, ongoing and subject to applicable offset.

5. Respondents shall pay for all medical care rendered to date by the medical providers at Advanced Urgent Care, including their referrals for physical therapy at FIT Physical Therapy, an MRI of Claimant's left shoulder on October 10, 2017 at Cherry Creek Imaging, and treatment with the medical providers at Western Orthopaedics, including PA-C Rose G. Christensen and Armodios M. Hatzidakis, M.D., as reasonable, necessary and related, including Western Orthopaedics request for a cortisone injection.

6. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

7. Issues not expressly decided herein are reserved to the parties for future determination.

8. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when

filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 28, 2018

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered an injury in the course and scope of his employment on February 1, 2018; and

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to an order awarding related, reasonable and necessary medical benefits.

FINDINGS OF FACT

1. Claimant is a 73-year-old male employee who was employed by Employer. Claimant was injured in a motor vehicle accident in the course and scope of his employment. Claimant is employed by Employer as a sales associate selling commercial contract furniture. Claimant has 231 accounts covering a large geographic area.

2. Claimant's job required him to make sales presentations to clients and new customers. Claimant's sales pitches involved a personal appearance, producing packets of literature and live demonstration of samples. A significant, daily component of Claimant's employment included Claimant doing sales pitches to current and prospective clients. Claimant's job in sales is found to be a job in the business world. Claimant's personal dress code, requiring a starched white dress shirt, is consistent with business attire. Claimant credibly testified that he always meets new clients dressed neatly, with a starched white dress shirt, tie, creased pants and a jacket.

3. Claimant's employment history includes 34 years in the U.S. military and 45 years in the business world. At 73 years of age, Claimant believed his traditional business attire was important to a successful sales presentation for Employer.

4. On February 1, 2018, Claimant's work day began by traveling to Greeley, Colorado from his Denver home office in order to check on a current client and confirm the furniture the client ordered would fit in the intended space. From Greeley, Claimant drove to Tabernash, Colorado to service another client. Following the visit to the Tabernash client, Claimant traveled to Fort Collins, Colorado for the same purpose. Following his business visit with the Fort Collins client, Claimant began traveling south back towards Denver. Claimant first stopped for lunch before continuing on in order to visit a client in the Stapleton neighborhood in Denver. This client was 1 Point Furniture.

5. 1 Point Furniture had contacted Claimant earlier in the week and scheduled to meet with Claimant in Colorado Springs, Colorado on February 2, 2018. The meeting with 1 Point Furniture on February 2, 2018, was originally set to take place in the afternoon. Upon arriving at 1 Point Furniture, Claimant was informed

that the 1 Point Furniture representatives could not meet in the afternoon on February 2, 2018, and the meeting would have to be in the morning instead.

6. Claimant prepared presentation materials for the morning meeting in Colorado Springs with 1 Point Furniture. The meeting concerned furniture sales worth one million dollars. To prepare for the sales meeting, Claimant needed presentation binders from Home Depot and a clean dress shirt from the dry cleaners.

7. After leaving 1 Point Furniture, Claimant traveled to his home office in order to drop off a sample stool that he had with him in his car. After dropping the stool off, Claimant planned to go to the dry cleaner and Home Depot.

8. Claimant left his home and drove approximately two blocks to an intersection. Claimant elected to pick up his dry cleaned dress shirts first and then planned to continue on to Home Depot. Claimant started through an intersection onto Smokey Hill Road when another vehicle collided with Claimant's front, driver-side door causing severe injury to him.

9. Claimant's injuries included a pulverized pelvis on the left side, injury to a left hip replacement, three broken ribs, a broken left clavicle and right wrist.

10. It is found that Claimant's work injuries occurred in the course and scope of his employment for Employer. It is found that Claimant's activities on February 1, 2018, going to the dry cleaners, was in furtherance of the Employer's work activities, provided service to the Employer and was not a substantial deviation.

CONCLUSIONS OF LAW

General Principles

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

4. In this case, Claimant contends that he was in the course and scope of his employment when he was injured in a MVA. Claimant argues that his duties in service of the Employer included the stop he made to pick up a laundered shirt for work from the drycleaners. Claimant contends that any deviation to go to the drycleaners was not substantial. Respondents contend that Claimant's testimony was not credible and that Claimant deviated from his job duties taking Claimant outside the course and scope of his employment when the MVA occurred. Respondents contend therefore that Claimant failed to prove a compensable injury.

5. To be compensable, an employee's injury must have been sustained while performing services arising out of and in the course of the employment at the time of the injury. Section 8-41-301(1)(b), C.R.S.; *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). An injury "arises out of employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's services to the employer in connection with the contract of employment. *Id.* An employee whose work requires travel away from the employer's premises is held to be within the course of employment continuously during the trip, except when the employee makes a distinct departure on a personal errand and is therefore engaged in a substantial, personal deviation. *Employer's Liability Assurance Corp. v. Industrial Commission,* 147 Colo. 309, 363 P.2d 646 (1961); *Alexander Film Co. v. Industrial Commission,* 136 Colo. 486, 319 P.2d 1074 (1957); *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9 (Colo. App. 1995). The existence of a substantial, personal deviation are generally questions of fact for resolution by the ALJ. *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986).

6. Moreover, the court in *Hirst, supra,* explained that when a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. A claimant's deviation is considered substantial when that deviation is for his sole benefit. *See Kater v. Industrial Commission*, 728 P.2d 746 (Colo. App. 1986).

7. Here, Claimant was retrieving laundered shirts needed for an early morning business meeting. The ALJ cannot find this deviation to be so substantial as to take Claimant outside of the course and scope of his employment. It is uncontested that Claimant's work required extensive driving and that his duties required sales presentations to customers and prospective customers. It is further uncontested that there was a last minute change in Claimant's February 2 work appointments and he was required to be in Colorado Springs early in the morning. Claimant's job in sales is found to be a job in the business world and Claimant's personal dress code, requiring a starched white dress shirt, is consistent with business attire.

8. Claimant established by a preponderance that his injury in the MVA occurred in the course and scope of his employment and any deviation taken was insubstantial. The totality of the circumstances exposes an employment relationship in which Claimant drove extensively. Claimant's itinerary earlier in the day on February 1 evidenced the breath of his travel. He credibly testified to a code of dress consistent with his professional obligations and he credibly described a valuable sales opportunity in Colorado Springs on February 2 which had been rescheduled to first thing in the morning. It is concluded that Claimant's actions on February 1 going to the drycleaners was within the course and scope of his employment and any deviation was not substantial.

Medical benefits

9. Respondents are not liable for medical treatment unless it is rendered for an injury "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Section 8-41-301(1)(c), C.R.S. Similarly, the statute provides respondents are liable for reasonable and necessary medical treatment to cure or relieve the employee "from the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

10. Once causation is established, respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S.*; Colorado Comp. Ins. Auth. v. Nofio,* 886 P.2d 714 (Colo. 1994).

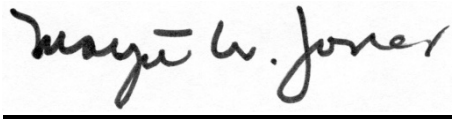
11. Here, Claimant established by a preponderance of the evidence that he suffered a work related injury in the course and scope of his employment for Employer on February 1, 2017. Respondents shall be liable for all reasonably necessary and related medical expenses.

ORDER

1. Claimant proved by a preponderance of the evidence that he was injured in the course and scope of his employment on February 1, 2018.

2. Claimant has proven his entitlement to medical benefits that are reasonable, necessary, and causally-related.

DATED: July 17, 2018



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4 th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Respondents have established an entitlement to a 50% reduction in Claimant's temporary total disability (TTD) indemnity benefits due to a safety rule violation.

2. Whether Respondents established that Claimant's injury was a result of Claimant's willful failure to obey a reasonable safety rule.

3. Whether Respondents established that Claimant's industrial injury was a result of Claimant willfully misleading Employer concerning Claimant's physical ability to perform the job of over the road truck driver.

4. Whether Respondents have established that Claimant was responsible for the termination of his employment.

STIPULATIONS

1. A duplicate sample of Claimant's urine that was tested and positive for illegal substances while he was hospitalized following the March 14, 2017 motor vehicle accident was not preserved for purposes of a second sample.

2. At hearing, the parties stipulated to an average weekly wage of $1,043.72. Subsequent to hearing, the parties recalculated the correct average weekly wage and stipulated to an average weekly wage of $1,133.14.

FINDINGS OF FACT

1. On December 14, 2016 Claimant was hired by Employer as a commercial over the road truck driver. On his employment application Claimant was asked if he had previously failed any employment-related drug screenings and he responded in the negative. Claimant also was asked on the application if he had ever been terminated from any prior employment due to failing employment related drug screenings and he again responded in the negative. Prior to his hire, his employment history was verified by Employer and none of his prior employers indicated he had been fired for drug related problems.

2. Prior to his employment with Employer, Claimant underwent a pre-employment drug screen that was negative.

3. Claimant had several years of commercial truck driving experience when he was hired by Employer. Claimant had worked for a driving company used by Employer on occasion and was known to Employer before they hired him as an employee.

4. Employer did not perform a background check on Claimant before hiring him or at any time while Claimant worked for them before his March 14, 2017 motor vehicle accident.

5. For Employer, Claimant's primary route involved delivering the U.S. mail from Denver to Grand Junction and usually required Claimant to work and drive at night. Claimant worked between 40 and 70 hours per week. Claimant was able to perform his job duties between December and March.

6. Employer has a "Drug, Alcohol, and Controlled Substances Policy" and a zero tolerance for the use of drugs, alcohol or controlled substances by drivers while in a company vehicle or while performing company business. The policy was made known to all employed in orientation and in safety meetings and is strictly enforced. The policy prohibits the presence of an amount of any controlled substance that results in a positive test of any employee while in a company vehicle or while performing company business. The policy outlines screening processes to prevent the hiring of individuals who use illegal drugs or whose use indicates a potential for impaired or unsafe job performance. The policy provides that a positive drug test will lead to immediate termination. *See* Exhibit H.

7. Employer also has a policy prohibiting the presence of any illegal drugs or drugs not sold by prescription or over the counter in company vehicles with any employee violating the policy being subject to termination. *See* Exhibit H.

8. Employer additionally has a driver safety policy precluding its drivers from operating a company vehicle while ill or fatigued. *See* Exhibit H.

9. Claimant signed and acknowledged that he received and had full understanding and agreement to abide by Employer's policies. *See* Exhibit H.

10. On March 14, 2017 Claimant was involved in a serious motor vehicle accident when the semi-tractor he was driving while delivering mail for Employer was traveling eastbound on Interstate 70 and traveled off the right side of the road, colliding with a fence, traveling through the fence, and eventually colliding with the mountain.

11. Claimant was found around 4:30 a.m. slumped over in the semi-tractor. It is unclear what time the actual accident occurred.

12. Claimant was severely injured and transported to St. Anthony's Hospital. Claimant's injuries included a fractured lumbar spine and multiple brain hemorrhages.

13. A Trooper with the Colorado State Patrol arrived to the scene of the accident at 5:55 a.m. after Claimant had already been transported away to the hospital. The Trooper estimated the time of accident at 4:30 a.m. and based on the travel pattern of the vehicle believed it probable that the accident had been due to fatigue. Trooper McDowell testified at hearing and explained it was not probable the accident was caused by distracted driving as there was no indicia of distraction such as immediate braking or jerking. Trooper McDowell also indicated that Claimant was not at the scene and he did not speak to Claimant and had no indication that drugs/alcohol were at play at the time he was doing the on scene investigation. Claimant was cited for careless driving.

14. A urine screen was performed at St. Anthony Hospital. The results were positive for amphetamines and MDMA.

15. It is unclear when Claimant used drugs or if Claimant was under the influence of drugs at the time of his motor vehicle accident. No values or expert extrapolation evidence was presented. Claimant could have used drugs in the days prior to the accident or could have been under the influence of drugs at the time of the accident. The evidence only shows a positive test.

16. Trooper McDowell later learned of the positive urine drug screen and believed that driving under the influence was the cause of the accident. Trooper McDowell did not amend the citation of careless driving to driving under the influence because of a determination made regarding burden of proof.

17. At some point later, the tractor-trailer was towed back to Employer's facility. While Claimant's co-workers were cleaning it out, they found a clear glass pipe with burn marks and white residue. This pipe was turned over to Trooper McDowell.

18. Respondents filed a general admission of liability and began paying Claimant temporary total disability benefits starting the day after the accident. Respondents reduced Claimant's benefits by 50% pursuant to § 8-42-112, C.R.S.

19. After the accident, and while in recovery, Claimant reported that he regularly used illicit substances, specifically crystal meth, and that he believed he could function well while under the influence. It was found that Claimant had an acute on chronic substance abuse problem and a history of jail time due to his substance abuse problems including heavy drinking, methamphetamine use, and cocaine abuse. Claimant reported that he had never been able to maintain sobriety despite past participation in abuse treatment.

20. Prior to being hired by Employer, Claimant had been incarcerated multiple times in the past four years for drug related issues. Claimant did not disclose his incarceration periods on his employment application.

21. Employer had no serious issues with Claimant's performance while he was an employee and until the accident at issue occurred.

22. Just prior to the March 14, 2017 serious motor vehicle accident, Claimant had an incident where his tractor-trailer went off the road but with no injury and minor damage to the vehicle. The tractor-trailer was pulled out, and Claimant continued to drive it. Claimant reported to Employer that he had swerved to avoid deer/elk on the roadway but later reported to others that he had fallen asleep.

23. On April 24, 2017 Employer terminated Claimant's employment. Claimant was terminated due to the positive drug urine screen after the March 14, 2017 accident and due to the paraphernalia found in the tractor trailer.

24. Both the general manager and safety and compliance manager for Employer indicated that if they had known of Claimant's substance abuse problems or prior history of incarceration they would not have hired Claimant. After the investigation of the accident and information came to be known by Employer, Employer decided to terminate Claimant's employment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations,

the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

SAFETY RULE VIOLATION

Sections 8-42-112(1)(b) and (d), C.R.S. provide for a 50% reduction in compensation when an injury results from an employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee or a 50% reduction when an employee willfully misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job as a result of the physical ability about which the employee willfully misled the employer.

The safety rule penalty is only applicable if a violation is willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intention. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Stockdale v. Industrial Commission*, 232 P. 669 (Colo. 1925); *Brown v. Great Peaks, Inc.*, W.C. No. 4-368-112 (Industrial Claim Appeals Office, July 29, 1999). A violation which is the product of mere negligence, forgetfulness or inadvertence is not willful. *Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (Colo. 1946). Willfulness does not require that the claimant have the "rule in mind" and then determine to break it. Rather willfulness may be inferred from various circumstances including the frequency of warnings and the obviousness of the danger. However, mere negligence is not sufficient to show willful conduct. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968); *Johnson v. Denver Tramway Corp.,* 171 Colo. 214, 171 P.2d 410 (1946). The question of whether the respondents proved willful violation of a safety rule is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office, supra.*

Respondents have failed to establish an entitlement to a 50% reduction in any owed compensation in this matter. The evidence is insufficient to establish that Claimant's injury resulted from his willful failure to obey a safety rule. Further, the evidence is insufficient to establish that Claimant's injury was as a result of Claimant misleading Employer about his physical ability to perform the job.

Employer has a policy/safety rule prohibiting the use, sale, purchase, transfer, manufacture, or possession of a controlled substance by any employee while in a company vehicle or while performing company business. Their policy prohibits being under the influence of a controlled substance while in a company vehicle or while performing company work. The policy also indicates that the presence of an amount of any controlled substance that results in a positive test of any employee while in a company vehicle or while performing company business is prohibited. Although these

rules are aimed at the safety of the employees, Respondents have failed to establish that Claimant's motor vehicle accident or his injury resulted from a willful failure to obey these rules.

The urine screen at the hospital was positive for illegal drugs. However, there is insufficient evidence to establish that Claimant was actually under the influence of the drugs found in his system at the time of his motor vehicle. Similarly, there is insufficient evidence to establish that the drugs or violation of the drug policy caused the motor vehicle accident or caused his injuries. There was insufficient evidence that Claimant was under the influence of drugs at the time he was driving and there was insufficient evidence that the drugs impaired his ability to operate a vehicle thus causing injury.

Employer additionally has a rule that requires drivers to not operate a company vehicle while ill or fatigued. Although Claimant possibly may have been fatigued, there is insufficient evidence to establish that Claimant willfully violated this safety policy/rule or that he intentionally drove while fatigued, thus causing injury.

Although it is possible the accident and injuries were caused by Claimant driving under the influence of drugs and although it is also possible the accident and injuries were caused by Claimant driving while fatigued, there is insufficient evidence to establish by a preponderance of the evidence that either is the case or that a violation of a safety rule caused the injury. There is insufficient evidence that the drug screen showed levels indicating Claimant was intoxicated or under the influence while driving (versus having used the illegal drugs days prior). There is also insufficient evidence showing Claimant was fatigued and willfully decided to drive anyways in violation of the safety rules. Although the injuries sustained possibly could be related and connected to a safety rule violation, Respondents have failed to show by a preponderance of the evidence that the injuries resulted from Claimant's willful violation of a safety rule.

Further, Respondents have failed to establish that Claimant was injured on the job after misleading Employer about his physical ability to perform the job. As found above, Claimant worked for Employer for several months without issue and was physically able and capable of driving a commercial motor vehicle. Respondents have failed to show that the injury was due to Claimant's inability physically to perform the job duties. Someone who uses and is addicted to drugs may very well be able to physically perform the job of commercial driver and may then abuse drugs on their off hours. It has not been established that Claimant misled Employer about his ability to perform the job.

TERMINATION

In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury. *See* § 8-42-103(1)(g), C.R.S.; 8-42-105(4)(a), C.R.S. In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the

unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.*

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). However, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. This is true even if the claimant is not specifically warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office, supra.*

Respondents have established that Claimant was responsible for the termination of his employment on April 24, 2017. The evidence establishes, more likely than not, that Claimant's termination was not due to his injuries as a result of the motor vehicle accident but was due to the results of a drug urine screen that he completed and due to the drug related paraphernalia found in the truck after it was towed back to Employer's facility. The positive urine drug screen showed that Claimant had violated Employer's policies. Although there was insufficient evidence to establish that a violation of a safety rule caused Claimant's injury, there is ample evidence that Claimant violated Employer's policy by testing positive for drugs shortly after the motor vehicle accident. As found above, Employer has a policy to drug test potential employees and to randomly screen current employees. Claimant acted volitionally when he used drugs at some point in time close to the motor vehicle accident knowing it was against Employer's policies. The positive urine drug screen provides sufficient evidence that Claimant acted volitionally and violated Employer's policy on drug usage justifying his termination. Claimant was not terminated due to his severe injuries as a result of the motor vehicle accident. Rather, he was terminated after Employer learned he had tested positive for drugs in violation of policy. It is found credible and persuasive that Employer was unaware of Claimant's drug usage and that they would not have hired or continue to employ him had they been aware of his drug history. When Employer became aware of the positive urine drug screen and of the pipe found in Claimant's tractor-trailer, they made the determination in April to terminate Claimants' employment which was justified for violation of Employer's policies.

ORDER

1. Respondents have failed to establish that Claimant's injuries resulted from his willful failure to obey a reasonable safety rule.

2. Respondents have failed to establish that Claimant's injuries resulted from him willfully misleading Employer concerning his ability to perform the job.

3. Respondents have failed to establish a 50% reduction in benefits due to the alleged safety rule violation.

4. Respondents have established that Claimant was terminated for cause and that any lost wages after April 24, 2017 were due to Claimant's at fault termination and not due to his injury.

5. Temporary indemnity benefits are thus owed from March 15, 2017 through Claimant's termination. Any lost wages after April 24, 2017 not due to Claimant's injury.

6. All matters not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 26, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that her low back condition is related to her August 15, 2016 admitted work related injury.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits, including but not limited to lumbar steroid injections, for her low back condition.

STIPULATIONS

1. Claimant's average weekly wage is $790.16.

FINDINGS OF FACT

1. Claimant is employed by Employer as a nurse. In August of 2016 Claimant was working as a home health nurse and traveled to visit clients in their homes to provide nursing services.

2. On August 15, 2016 Claimant was at a home and went into a room to call a physician to discuss orders. Claimant sat in an office chair at a desk.

3. As Claimant leaned back in the chair the tilt part of the chair opened/broke and Claimant fell backwards. Claimant hit her head, her left elbow, and landed half way on the chair and half way off with the arm of the chair hitting her lower back.

4. Claimant had severe pain in her head and elbow and felt as though everything was stiff. Claimant was taken by ambulance to the hospital.

5. Emergency medical services records indicate that emergency medical technicians arrived on scene and found Claimant laying on the floor in minor distress. Claimant reported a severe headache with hematoma to the back left side of the head and that she hit her had on the hard wood floor. Claimant was found to be alert and oriented x4 and denied loss of consciousness, cp, nvd, shortness of breath, neck pain, back pain, blurry vision, or dizziness. Claimant reported pain at 9/10. Claimant reported her head felt "swimmy like." They transported her to the emergency department of Medical Center of the Rockies. *See* Exhibit J.

6. At the Medical Center of the Rockies emergency department, Claimant reported that she was sitting in a chair when it went over backwards and that she struck the posterior aspect of her head and had a sense of fullness, a sense of being

unbalanced, and a severe headache. Claimant reported a sense of feeling like she was in a fish bowl. Claimant reported no tingling or numbness in her arms or legs. Claimant's psychiatric status was noted to be negative for confusion. A CT of the brain was done with the impression of left parietal scalp soft tissue contusion and no evidence of acute intracranial pathology. X-rays of the left elbow were done and read as having mild soft tissue swelling and no fracture or osseous abnormality. Claimant was discharged in stable condition and advised to follow up with workers' compensation. *See* Exhibits G, H, I.

7. On August 18, 2016 Claimant was evaluated by Bruce Cazden, M.D. Claimant reported that she was working as a home care nurse when she leaned back in a chair and the chair back seemed to fall causing her to fall backwards striking her head and left elbow on the ground. Claimant reported a diagnosis of mild concussion and that this was her fifth head injury with her last one being four years prior. Claimant reported having a headache, some ongoing mild nausea, and feeling slightly woozy. Claimant did not appear to have cognitive difficulty and had good recall of recent and remote events. Claimant reported primarily pain in the head and left elbow. On exam Claimant was able to walk without antalgia, got in and out of a chair easily and on the exam table without difficulty. Claimant had a small lump on the back of the head. She had mild tenderness and reduced range of motion in the cervical spine and no tenderness in the thoracolumbar spine. Dr. Cazden diagnosed concussion without loss of consciousness, postconcussional syndrome, and sprain of ligaments of cervical spine. He recommended she return to work her next scheduled shift and provided medications. *See* Exhibits 2, K.

8. On August 26, 2016 Claimant was evaluated by Nurse Practitioner Bill Ford. Claimant reported continued headache and tenderness over the crown of her scalp where she struck the floor. Claimant also reported some elbow pain and tenderness. NP Ford found some mild range of motion deficits in the cervical spine. Claimant appeared to be cognitively intact. NP Ford recommended physical therapy 2x per week for 8 total visits and opined that Claimant would benefit from her neck stiffness and headache pain by attending physical therapy. *See* Exhibits 2, K.

9. On August 30, 2016 Claimant underwent an initial physical therapy evaluation. Claimant reported her primary problem as a sprain to her cervical spine, a contusion, and a headache in the head and neck that was severe and constant. Claimant reported pain with pressure to her elbow accompanied by tingling and numbness down the medial forearm to the wrist. Claimant reported memory loss for 3 days after her incident. Claimant was noted to have a flattened thoracic kyphosis and flattened lumbar lordosis. Therapeutic exercises were performed to the cervical and thoracic spine to decrease tension and increase range of motion. Hot packs were applied to the thoracic spine, lumbar spine, and cervical spine to decrease pain and increase blood flow. Claimant was educated on the cervical spine and thoracic spine. The therapist noted that Claimant was status post thoracic, cervical, and head contusions with associated sprain/strains and that she had tenderness to palpation, swelling/edema, lumbopelvic asymmetry, limited functional tolerance, limited work tolerance, numbness/tingling,

decreased range of motion, strs, postural insufficiency, and postural mal-alignment. *See* Exhibits 6, F.

10. On September 2, 2016 Claimant returned to physical therapy. Claimant reported no new complaints and that she received massage after her prior session which reduced the tension in the base of her neck. Therapeutic exercises were provided for the cervical and thoracic spine. Hot packs were applied to the cervical and thoracic spine. The therapist noted that after physical therapy Claimant had improved tissue quality in the upper back and improved neck extension. The therapist noted that he focused on the SI joint and the low back first to create a stable base for Claimant's mid back and neck to sit on. *See* Exhibits 6, F.

11. On September 6, 2016 Claimant underwent physical therapy. Claimant reported improvement since the last session and that she could extend her neck much better. Therapeutic exercises were provided to the cervical and thoracic spine. Hot packs were applied to the cervical and thoracic spine. The therapist noted that Claimant's cervical extension and mid thoracic tension were improving. *See* Exhibits 6, F.

12. On September 6, 2016 Claimant was evaluated by NP Ford. Claimant reported headache and mild improvement in her neck stiffness. Claimant reported continued pain with her left elbow contusion. Claimant reported that she had been working regular duty. Claimant reported some fogginess intellectually with memory. Claimant had some tenderness on exam in her neck area. NP Ford recommended she continue physical therapy and in home exercise program and noted he would consider a consultation with Dr. Boyd if Claimant continued to complain of intellectual/cognitive issues. *See* Exhibits 2, K.

13. On September 13, 2016 Claimant underwent massage therapy. Claimant reported pain and stiffness with reduced range of motion in the cervical spine. Claimant also reported that she had been having low back pain. The therapist noted the objective would be to focus massage therapy for iliolumbar and SMR technique. *See* Exhibits 6, E.

14. Claimant also underwent physical therapy on September 13, 2016. Claimant reported her tension headache was much better with mainly stiffness and soreness in the base of the skull. Therapeutic exercises were provided to the cervical and thoracic spine and hot packs were applied to the cervical and thoracic spine. The therapist noted that he got Claimant's SI joint aligned and worked on the lumbar region. He noted he would recheck those regions next session and work up through the thoracic spine to the neck where Claimant had a cervicothoracic junction/upper cervical compensation that still needed to be corrected. *See* Exhibits 6, F.

15. On September 16, 2016 Claimant underwent massage therapy. Claimant reported that after her last massage and physical therapy she felt sore in the hips for about a day but had relief of her low back pain. Claimant reported that she was continuing to have low back pain when standing for long periods of time and also with going from a

sitting position to standing position. Claimant also reported that her neck felt better after the last physical therapy visit but that now she felt tightness when rotating cervical. *See* Exhibits 6, E.

16. On September 16, 2016 Claimant was evaluated by Brian Mathwich, M.D. Claimant reported continued neck stiffness and low back discomfort improved from the original injury but still very problematic. Claimant reported working full duty without problems and that she was seeing physical therapy and massage therapy with good results. Dr. Mathwich found slight upper thoracic kyphosis with an enlarged C7-T1 area and increased pain on palpation of the left trapezius with trigger point. He also found decreased range of motion of the cervical spine due to stiffness and pain. Dr. Mathwich found positive pain on palpation in the low back along the right side of the sacrum with trigger points in the gluteus muscles medially. Claimant had full range of motion and was able to bend over and touch her toes but it was quite uncomfortable for her to stand back up. *See* Exhibits 6, K.

17. On September 30, 3016 Claimant was evaluated by NP Ford. Claimant reported that physical therapy and deep tissue massage seemed to be helping and that she was working normal duty. Claimant reported other health issues going on over the weekend. Claimant reported taking a muscle relaxer at bedtime, Tylenol during the day, and occasional Vicodin at bedtime. Claimant reported decreased cervical range of motion. On exam Claimant had some limitations in cervical range of motion. NP Ford recommended 6 additional physical therapy and deep tissue massage visits. NP Ford also recommended a consultation with Dr. Oeser for treatment guidance and noted Claimant was still struggling with stiffness and occasional headache. *See* Exhibits 2, K.

18. On October 11, 2016 Claimant underwent physical therapy. She reported that her left low back had been very tender lately with soreness at the base of the neck and right ribcage. Therapeutic exercise was performed on the cervical spine and lumbar spine. Hot packs were applied to the lumbar spine and thoracic spine. *See* Exhibits 6, F.

19. On October 18, 2016 Claimant was evaluated by Roberta Anderson Oeser, M.D. Claimant reported cervical pain, headaches, left shoulder girdle pain, and low back pain. Claimant reported she fell on her left side at the time of the injury and that she had low back pain and left hip and lateral thigh pain and felt as though physical therapy had helped with her low back pain. On examination, Claimant had tenderness in the lumbar spine over the L5-S1 facet joints, bilateral SI joints, and left piriformis muscle. Dr. Oeser noted that Claimant's hip height was asymmetrical and that Claimant had mild decreased motion in the SI joints, mildly restricted extension and rotation, and increased discomfort in the lower lumbar region with the maneuvers. Dr. Oeser provided the impression of concussion without loss of consciousness, post concussive syndrome, cervical strain, muscle spasms, and lumbar strain. Dr. Oeser recommended x-rays of the cervical and lumbar spine. *See* Exhibit 3.

20. X-rays of the lumbar spine performed on October 18, 2016 showed lumbar vertebral body height and alignment maintained with mild disc height loss at L4-5, advanced disc height loss at L5-S1, and advanced bilateral facet arthrosis at L4-5, and advanced bilateral facet arthrosis at L5-S1. The impression was degenerative disc disease and facet arthrosis at L4-5 and L5-S1. *See* Exhibits 4, I.

21. On October 21, 2016 Claimant was evaluated by Terrel Web, M.D. Claimant reported she had a head injury, cervical spine injury, and low back strain/sprain and that x-rays of her neck and low back had recently been obtained. Dr. Web found mild loss of lumbar lordosis in the lumbar spine as well as tenderness to palpation over the lower paraspinous muscles. *See* Exhibits 2, K.

22. On November 1, 2016 Claimant was evaluated by Dr. Oeser. Claimant reported cervical pain, headaches, low back pain, and cognitive problems. Dr. Oeser noted that the s-rays showed multilevel degenerative disc disease and facet arthropathy. Dr. Oeser recommended chiropractic treatment and dry needling to address the cervical and lumbar pain and muscle spasms. Dr. Oeser also recommended Claimant be seen by Dr. Boyd for a neuropsychological evaluation. *See* Exhibit 3.

23. On December 28, 2016 Claimant was evaluated by Dr. Oeser. Claimant reported shooting spasming pain in the neck with numbness and tingling radiating to the left elbow and occasionally past the elbow. Claimant reported an aching burning pain in the left low back, buttocks, and hip. Dr. Oeser noted that a cervical MRI had been completed and reviewed the findings and recommended transforaminal epidural steroid injections for the cervical spine. *See* Exhibit 3.

24. On January 31, 2017 Claimant was evaluated by Dr. Oeser. Claimant was quite concerned that she continued to have ongoing low back, buttocks, and hip pain and also reported pain and intermittent paresthesias in her left lower extremity. Dr. Oeser noted that Claimant had been through a course of physical therapy and chiropractic treatment without resolution of her low back or hip symptoms and recommended an MRI of the lumbar spine to rule out a disc lesion with nerve root compromise and facet arthrosis in addition to an MRI of the left hip to rule out trochanteric bursitis versus internal derangement of the hip. *See* Exhibit 3.

25. On February 1, 2017 Claimant underwent an MRI of her lumbar spine. The findings included a minimal disc bulge at L3-L4, a mild disc bulge at L4-L5 with moderate bilateral facet arthrosis and no significant spinal canal or foraminal stenosis, and a disc bulge with midline annular fissure and moderate bilateral facet arthrosis at L5-S1. At L5-S1 it was noted that there was moderate left foraminal stenosis with disc abutting the undersurface of the exiting left L5 nerve root. The impression provided was lower lumbar degenerative disc disease with no spinal canal stenosis and moderate left L5-S1 foraminal stenosis. *See* Exhibits 4, I.

26. On February 1, 2017 Claimant also underwent an MRI of her left hip. The impression provided was mild degenerative osteoarthrosis of the hip and otherwise the findings were negative. *See* Exhibits 4, I.

27. On February 9, 2017 Claimant was evaluated by Dr. Oeser. Dr. Oeser noted that the left hip MRI revealed mild degenerative osteoarthritis and that the MRI of the lumbar spine revealed degenerative disc disease with no spinal canal stenosis as well as moderate left L5-S1 foraminal stenosis with disc abutment of the exiting L5 nerve root. Dr. Oeser opined that the disc bulge with annular fissure and moderate left foraminal stenosis with a disc abutting the exiting left L5 nerve root may be accounting for Claimant's left lower extremity symptoms and recommended a diagnostic/therapeutic left L5 transforaminal epidural steroid injection. *See* Exhibit 3.

28. On April 10, 2017 Dr. Oeser performed a left L5 transforaminal epidural steroid injection. Dr. Oeser noted Claimant had degenerative disc disease and facet arthropathy most notably in the lower lumbar region in the epidurogram. *See* Exhibit 3.

29. On April 27, 2017 Claimant was evaluated by Dr. Oeser. Claimant reported minimal improvement in her lumbar symptoms with the injection. Dr. Oeser recommended an EMG/Nerve Conduction study of the lower extremities to rule out a definitive lumbar radiculopathy. *See* Exhibit 3.

30. On May 18, 2017 the EMG/NCS was performed by Dr. Oeser. It was found to be a normal study. Dr. Oeser again reviewed Claimant's lumbar spine MRI and noted it had a disc bulge with midline annular fissure at L5-S1 and disc material abutted the undersurface of the exiting left L5 nerve root that may or may not be accounting for the ongoing left lower extremity symptoms. Dr. Oeser recommended a referral to spine surgeon Dr. Janssen to see if Claimant could be considered a surgical candidate versus continuing with conservative care. *See* Exhibit 3.

31. On May 25, 2017 Claimant was evaluated by Michael Janssen, D.O. He noted that he did not have an extensive amount of medical records and would summarize the information Claimant gave him. Claimant reported falling off of a defective chair landing directly on her back and that she had terrible pain in her neck, left arm, and low back and had a concussion. Claimant reported injections in the lower back did not improve her condition. Claimant also reported injections in her cervical spine and that she did not get substantial relief. Dr. Janssen performed a physical examination and found no sacroiliac joint restriction, positive stretch root sign to the left lower extremity with reproduction of leg pain. Dr. Janssen reviewed the MRIs of the cervical and lumbar spine. He found modic changes and disc incompetency with vertical instability at L5-S1 with a small disc protrusion eccentering to the left. He assessed nonspecific low back pain with symptoms for 10+ months with disc pathology and vertical instability of L5-S1. Dr. Janssen noted that Claimant complained that her low back was much more symptomatic than her neck and that if the primary pathology was the low back he recommended an L4-5 and L5-S1 lumbar discogram. *See* Exhibits 8, D.

32. On June 7, 2017 Albert Hattem, M.D. issued a report indicating that Claimant did not complain of low back pain to any of her treating practitioners until October 18, 2016 when she reported low back pain to Dr. Oeser. Dr. Hattem noted that Claimant did not report low back pain when initially presented to the emergency department and did not report low back pain to Dr. Cazden prior to October of 2016. Dr. Hattem opined that due to the interval of time between the injury and Claimant's first complaint of low back pain, it was unlikely the condition was claim related. *See* Exhibit C.

33. On June 13, 2017 Claimant was evaluated by NP Ford. Claimant reported authorization for a lumbar discogram was denied by Insurer. NP Ford reviewed Claimant's initial presentation and pain questionnaire from Claimant's first visit and noted that Claimant had complained of head pain, elbow pain, and some cognitive issues. NP Ford noted that in review, Claimant's complaints of back pain began when Claimant visited Dr. Oeser. However, NP Ford opined that Claimant was not thinking clearly and her cognitive issues were beginning to clear up somewhat at that time. *See* Exhibit 2.

34. On July 6, 2017 Claimant was evaluated by Dr. Oeser. She reported that Dr. Janssen had recommended a L4-5 and L5-S1 discogram but that it was denied by Insurer due to a question over when Claimant reported low back pain. Claimant told Dr. Oeser that she had severe head and neck pain at the time of her injury which was far more pressing and painful than her low back pain. Dr. Oeser reviewed a September 16, 2016 note from Dr. Mathwich where Claimant reported continued low back discomfort and noted in exam pain to palpation in the low back. Dr. Oeser noted that Claimant reported low back and left lateral thigh pain at the first visit with her in October of 2016. Dr. Oeser noted that she did not have physical therapy notes to determine whether or not Claimant was complaining of low back pain at the first physical therapy visit. However, Dr. Oeser opined that based on the mechanism of injury, Claimant's current low back symptoms were related to her work injury and mechanism of falling off the chair landing on her left side. *See* Exhibit 3.

35. On July 13, 2017 Claimant was evaluated by Dr. Janssen. Claimant reported that the discogram of the lumbar spine had been denied. Dr. Janssen noted that his recommendation was only that if the primary pathology was truly low-back and had been going on for 10 months than a discogram was reasonable based on the morphological anatomy. Claimant reported that she wanted to focus on her upper extremity and pain. Dr. Janssen recommended Claimant follow up with Dr. Oeser and was not 100% convinced that the C5-6 pathology and morphological changes on the MRI correlated with Claimant's clinical findings and the absence of electrophysiological findings. Dr. Janssen noted that surgery may be needed but only if all the cards lined up and the diagnostic indicates clearly suggested surgery. He indicated at the time, he was somewhat confused. *See* Exhibit 8.

36. On August 16, 2017 Allison Fall, M.D. performed an independent medical examination of Claimant. Claimant reported that she was injured when sitting in a chair on the phone taking orders from a doctor and leaned back in her chair. Claimant reported

that when she tilted back, the chair did not hold and she fell backwards and landed hitting her left posterior head on the ground and that she was half on and half off the chair more to the left side. Claimant reported severe pain in her neck, head, and left elbow and that she did not remember a lot around that time. Claimant reported not remembering anything until seeing a provider at Workwell on Friday. Claimant reported that she was having severe headache, spasms in her neck and shoulders predominantly on the left side. Claimant reported that she had low back pain from the "get-go." Claimant reported neck pain with radiculopathy into the shoulder and left arm and hand. Claimant also reported low back pain with numbness and pain down the left leg and foot as well as extremely achy pain in the left hip to the outer left leg. Dr. Fall reviewed medical records and performed a physical examination. *See* Exhibit B.

37. Dr. Fall opined that Claimant had lumbar spondylosis and that her low back condition was not directly related to the August 15, 2016 work injury. Dr. Fall opined that Claimant's low back symptoms were related to somatic reactivity or were related to Claimant's underlying degenerative condition. Dr. Fall opined that given the absence of symptoms in the initial timeframe after the work related incident, she was unable to relate the low back complaints to the fall. Dr. Fall noted that Claimant had reported that she had low back pain from the "get-go" but that it was not reported in any of the medical records. *See* Exhibit B.

38. On September 19, 2017 Claimant was evaluated by NP Ford. He opined that Claimant's symptoms were a direct result of her fall at work. He opined that Claimant had some degenerative changes present, but that Claimant had no symptoms prior to her work related fall which led him to believe that the fall precipitated the radicular symptoms in the neck and the lower back. *See* Exhibit 2.

39. On October 2, 2017 Claimant was evaluated by Dr. Cazden. He noted that over the initial 2 months of Claimant's treatment, she complained of mostly headache with cognitive symptoms along with some neck pain and some mild symptoms in the left upper extremity. He noted that 2 months post injury, Claimant mentioned that her back was hurting and that her symptoms had since escalated. He noted Claimant had an MRI of the lumbar spine that showed degenerative disc disease and moderate left L5-S1 foraminal stenosis but that Claimant had a normal EMG of the left lower extremity. Dr. Cazden opined that it was less clear whether the lumbar spine was part of the work related claim or not and that Claimant did not seem to have any symptoms or complaints of lower back pain for 2 months post injury. Dr. Cazden noted that it did not appear that Claimant had a strong claim for causality with regard to her lower back pain and that the ongoing neck pain appeared more appropriate related but he also noted some inconsistency with her left upper extremity symptoms and the pathology in the neck and opined it was not clear that surgery would be a good option for Claimant. *See* Exhibit 2.

40. On November 21, 2017 Claimant was evaluated by Dr. Oeser. Dr. Oeser noted that Claimant may be a candidate for injection therapy in the future for her low back, left buttocks, and trochanteric bursal pain. Dr. Oeser explained to Claimant that it would be difficult to prove that the low back and buttocks symptoms were work related if

Claimant was not complaining of any symptoms within the first one to two weeks. Dr. Oeser opined that if the medical records documented that Claimant was having low back pain or left hip pain in the first one to two weeks, then she would recommend Claimant be allowed further treatment for those areas. *See* Exhibit 3.

41. Dr. Fall testified at hearing consistent with her report. She noted that since her report she had reviewed additional records but had not changed her opinion. Dr. Fall opined that there was no suggestion of an acute injury to Claimant's low back in this case. Dr. Fall opined that there was no change, temporary or permanent, to Claimant's underlying degenerative condition. Dr. Fall opined that the temporal relationship is extremely important and typically is immediate. Dr. Fall agreed that if there was a severe injury, you could see the focus elsewhere but that in Claimant's case the spine was examined early on with no tenderness or indication of acute injury. Dr. Fall opined that if Claimant had an extremely painful low back as a result of the fall, she would have expected pain reports in the EMS or ER records. Dr. Fall noted that the first pain complaints to a provider were over a month after the incident. Dr. Fall pointed out Claimant's neuropsych testing that showed an unusual combination of responses and opined that maybe Claimant's subjective reports of symptoms could not be relied upon. Dr. Fall opined that it was highly unlikely Claimant's back pain was related to the August 15, 2016 incident.

42. Dr. Fall testified that she had not reviewed physical therapy records from August 30, September 2, or September 13 but that if the first subjective complaints of back pain were earlier her opinion would not change. Dr. Fall opined that low back pain was not reported to EMS, to the ER, or to Workwell at the first visit. Dr. Fall opined that Claimant has stenosis and that a nerve root is abutted but that the MRI findings are not what are causing Claimant's lumbar spine symptoms and were ruled out by EMG and epidural steroid injection. Dr. Fall opined that she was not sure what was causing Claimant's pain. Dr. Fall opined that a modic change is a chronic and longstanding change. Dr. Fall opined that it was not physiologic that Claimant's symptoms have gotten worse and worse with more treatment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet her burden by a preponderance of the evidence to establish that her low back complaints are causally related to the August 15, 2016 injury. She has failed to establish that medical treatment, including epidural steroid injections, is reasonable, necessary, and causally related to her August 15, 2016 injury.

As found above, initially when transported by EMS to the medical center, Claimant reported no low back pain. At the emergency department she also reported no low back pain. Claimant did not report low back pain at her initial visit with the workers' compensation provider on August 18, 2016. She did not report low back pain at a visit with the workers' compensation provider on August 26, 2016. At her initial physical therapy evaluation on August 30, 2016 Claimant did not report low back pain. Although the therapist noted on August 30, 2016 that Claimant had a flattened lumbar lordosis, lumbopelvic asymmetry, and postural mal-alignment, there are no opinions supporting that her flattened lumbar lordosis, lumbopelvic asymmetry and postural mal-alignment were due to the August 15, 2016 fall. The evidence shows that these postural deficits were noted by the physical therapist on August 30, 2016 but also shows Claimant reported no low back pain on that date. At her next physical therapy visit on September 2, 2016 Claimant reported no new complaints and again failed to report any low back pain. As found above, the therapist noted that he focused on the SI joint and the low back not due to any pain complaints in those areas but ***in order to*** create a stable base for Claimant's mid back and neck to sit on. The decision on how to effectively treat her complaint areas of the neck by focusing lower and on the SI joint and the low back in order to create a stable base were treatment decisions made by the therapist. There is no report by Claimant on September 2, 2016 that she had low back pain. On September 6, 2016 at physical therapy Claimant reported improvement and that she could extend her neck better. The therapist noted improvement in cervical extension and mid thoracic tension. No mention of low back pain is in the September 6, 2016 records. Claimant was again evaluated by the workers' compensation provider NP Ford on September 6, 2016 and she did not report any low back pain.

The first report Claimant provided of low back pain was on September 13, 2016 at a massage therapy visit. This is approximately one month following her work related injury. At prior evaluations Claimant had articulated various areas of concern and it is not credible or persuasive that her head injury or confusion caused her to fail to report low back pain that she claims existed immediately following the August 15, 2016 incident.

Dr. Fall's opinions are overall consistent with the medical records which document an absence of any reported low back pain until September 13, 2016. The opinions regarding the lack of temporal relationship between the August 15, 2016 fall and the low back pain are found credible and persuasive. Claimant has failed to establish that she sustained a low back injury on August 15, 2016. This is consistent overall with the opinion of Dr. Cazden who noted that Claimant did not have a strong claim for causality with regard to her low back pain (although he believed the first symptoms/pain complaints were 2 months post injury when they were 1 month post injury). Dr. Hattem also came to a similar conclusion. Additionally, as found above, by November of 2017 Dr. Oeser opined that she would recommend Claimant be allowed treatment under workers' compensation for her low back pain or left hip pain ***if*** the medical records documented that Claimant was having low back pain or left hip pain in the first one to two weeks following the August 15, 2016 fall. The medical records do not document any low back or left hip pain complaints in the first one to two weeks. Further, Dr. Janssen noted specifically at his July 13, 2017 evaluation (after finding out that the requested discogram had been denied due to questions of causation) that his recommendation for discogram

was ***only*** an opinion that a discogram was reasonable based on the morphological anatomy and low back pain for 10 months. Dr. Janssen qualified his recommendation as only being that the discogram was reasonable and provided no opinion on whether or not it was causally related to the August 15, 2016 fall after finding out the discogram had been denied. Claimant, overall, is not found credible or persuasive that she had low back pain immediately following the August 15, 2016 incident. Claimant did not report low back pain with EMS, at the ER, at her first visit with Dr. Cazden, during her first two visits with NP Ford, or during her first three visits with physical therapy. This is inconsistent with someone who has sustained an acute injury/aggravation to the low back and who has immediate pain following the incident.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that her low back condition is related to her August 15, 2016 work injury.

2. Her claim for medical benefits related to her low back is denied and dismissed including, but not limited to, injections performed by Dr. Oeser.

3. All matters not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 27, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician Clarence Henke M.D. regarding Claimant's permanent impairment rating.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to a disfigurement award, and if so, the amount of award.

STIPULATIONS

1**.** Respondents admitted to and are not disputing a left upper extremity impairment rating of 9% scheduled impairment.

2. The parties agree Claimant is entitled to a general award for maintenance medical care (general Grover admission).

FINDINGS OF FACT

1. Claimant is a 62-year-old female who is employed by Employer as a Security II Supervisor with Employer's police department. Claimant has worked for Employer since approximately 2007.

2. On January 21, 2015 Claimant responded to a call where a student was stuck in an elevator. On her way back from responding to that call, it was snowing.

3. As claimant stepped off a sidewalk, she slipped and fell on black ice. Claimant fell quickly forward but more to the left side and her left hand landed under her body. Claimant sustained a laceration over her left eye.

4. Claimant continued walking to the police station and went to the restroom to clean up. When cleaning up her laceration Claimant noticed pain in her left hand and wrist while washing her hands.

5. Claimant went to Boulder Community Hospital for emergency treatment and received sutures for her left eyebrow laceration and splinting for a left wrist fracture.

6. Claimant denied neck or back pain while at the hospital. Claimant testified that she developed worsening symptoms of neck pain, left hip pain, and hand pain over the next few days.

7. Two weeks prior to the January 21, 2015 slip and fall injury, Claimant had undergone a Division Independent Medical Examination (DIME) for a 2012 work related injury.

8. On January 7, 2015 Claimant was evaluated by DIME physician John Hughes, M.D. for her 2012 injury. Dr. Hughes noted that Claimant had developed progressive arthritis involving her left and right hip, leg problems, cervical spine problems, and back problems. Claimant had reported knots in her neck and tension beginning on September 26, 2013 and bilateral posterior hip pain. Claimant reported that she was still symptomatic with constant neck pain of an aching quality at a magnitude of 8/10 that radiated into her shoulders. Claimant also reported bilateral hip pain, right greater than left, with right hip pain at 5/10 and left hip pain at 3-4/10. Dr. Hughes measured cervical spine and bilateral hip range of motions. He assessed: right hip sprain with aggravation of underlying osteoarthritis due to her February 2012 fall, cervical spine sprain/strain due to her February 2012 fall resolved by April 2012, progressive bilateral hip osteoarthritis, and cervical spinal spondylosis. He rated Claimant's right hip impairment at 6% lower extremity and opined that she sustained a right hip injury with aggravation of right hip osteoarthritis, as arthritis due to trauma. Dr. Hughes opined that Claimant did not sustain a work related injury to the left hip. He also opined that Claimant did not require any additional treatment directed to her right hip that could be attributed to the work related injury per se. He opined that Claimant clearly required treatment directed to her progressive arthritis. *See* Exhibit H.

9. On January 22, 2015 Claimant was evaluated by Richard Shouse, PA. Claimant reported slipping on some black ice and breaking her fall with her outstretched left hand and striking her eyebrow. Claimant reported getting 9 sutures to the eyebrow and a splint to her left wrist with a non-displaced fracture of the distal radius. On examination, Claimant had no neck pain. PA Shouse diagnosed laceration of the eyebrow and fractured left wrist. He referred Claimant to Dr. Conyers for follow up to the wrist fracture. *See* Exhibit 11.

10. On January 26, 2015 Claimant was evaluated by Lori Long, M.D. Dr. Long noted that Claimant was there for a follow up on her facial laceration and contusion and her left distal radius fracture. Claimant reported some tightness in her left neck and some bruising on her left thigh. Claimant reported no left hip pain or thigh pain and that the bruise was resolving. Dr. Long removed 9 sutures from Claimant's left eyebrow laceration and noted it was well healed. On neck examination, Dr. Long found slight restriction in range of motion and marked increased tone in the left paracervical musculature. Dr. Long noted normal gait and normal left hip mobility. Dr. Long assessed: left facial laceration with suture removal, left facial contusion, left cervical strain, left distal radius fracture, and left hip contusion. *See* Exhibit 5.

11. On February 2, 2015 Claimant was evaluated by Dr. Long. Claimant reported having a great deal of neck pain with no headaches from the cervical strain. Claimant reported ecchymosis was still present on her left hip and that she had a great deal of discomfort at night. Dr. Long found decreased range of motion in all planes of the

neck particularly with right rotation and right flexion and also found marked increased tone in the paracervical musculature on palpation. Dr. Long observed an 8 cm by 3 cm resolving ecchymosis on the left hip and thigh starting at the greater trochanter and extending distally that was tender to palpation. *See* Exhibit 5.

12. On February 15, 2015 Claimant was evaluated by Dr. Long. Claimant reported her neck pain was pretty significant with difficulty sleeping at night and left sided neck muscle tightness causing headaches. Claimant reported her hip pain was worse at night but that she felt like the bruising was resolving. Dr. Long noted that they may need to proceed toward imaging of the hip and that they knew Claimant did not have a fracture or bony injury but that the possibility of hip labral tear should be considered. On exam, Dr. Long found spasm of the left paracervical musculature including the sternocleidomastoid and that those muscles were very tender to palpation limiting range of motion significantly. Left hip mobility was noted to be full. Dr. Long assessed: severe left cervical strain and spasm, left distal radius fracture, and left hip injury. *See* Exhibit 5.

13. On March 6, 2015 Claimant was evaluated by Dr. Long. Claimant reported 8/10 neck pain without radicular symptoms and that the pain was localized to the paracervical musculature with pain while turning her head. Dr. Long noted that given the severity of Claimant's pain and the lack of options for treatment, a cervical MRI was needed to direct treatment. Claimant continued to report left hip pain particularly at night and no left hip pain with mobility. On exam, Dr. Long found restricted range of motion of the neck in all planes, marked increased tone throughout the paracervical muscles, scalene, superior traps, and levators. Dr. Long noted that it was difficult to treat Claimant because Claimant was unable to tolerate most medications and did not find benefit from most treatments. Dr. Long suspected the cervical pain was all muscle related. *See* Exhibit 5.

14. On March 11, 2015 Claimant underwent an MRI of her cervical spine.

15. On March 19, 2015 Claimant was evaluated by Dr. Long. Claimant reported still having a lot of neck pain with a slight bit of improvement with massage therapy. Claimant reported her left hip pain waxed and waned. Dr. Long reviewed the cervical MRI. Dr. Long opined that the inflammatory osteoarthropathy of the C3-4 facet joints with bone marrow edema and effusion and surrounding soft tissue swelling was likely the pain generator for Claimant's neck pain. Dr. Long again found increased tone throughout the paracervical musculature slightly improved from last visit and found range of motion restrictions in all planes. Dr. Long assessed: left C3-4 facet arthropathy, severe, with surrounding soft tissue inflammation; small central to left foraminal disc protrusion with left disc osteophytes at C5-6 with mild to moderate left neuroforaminal narrowing and moderate left facet hypertrophy, improving left distal radius fracture, and left hip pain. *See* Exhibit 5.

16. On April 15, 2015 Claimant was evaluated by Sander Orent, M.D. He titled the report follow up report and noted claimant had ongoing severe pain in her hips and that Claimant had a recent fall. He noted on examination some changes in pain with

internal and external rotation. Dr. Orent opined that the only thing they could do would be to get an image of the hip to make sure there was no labral tear. Dr. Orent noted that Claimant had been complaining bitterly of both hips for some period of time and that both had at various times caused her pain and seemed to have been related to her injury but that Claimant also had severe early onset osteoarthritis. Dr. Orent opined that the severe early onset osteoarthritis was probably substantially aggravated by her 2012 fall and that there was really nothing further to offer Claimant. *See* Exhibit 8.

17. Claimant continued to treat with Dr. Long. Dr. Long noted she was at a loss for what additional therapy they could offer Claimant who didn't want pain management medications. Claimant also indicated that she was not interested in a facet injection for the inflamed facet in the neck that was the pain generator. Dr. Long noted during this time that nothing had provided lasting benefit to Claimant including massage, physical therapy, chiropractic care, acupuncture, traction, or topicals. Dr. Long noted she was out of options to treat Claimant's continued pain but recommended physical therapy with a therapist who had expertise in hips. *See* Exhibit 5.

18. On June 22, 2015 Claimant was evaluated by Dr. Long. Claimant did not follow through with the hip specialist physical therapist. Claimant reported continued neck pain and cervicogenic headaches. Claimant reported her left hip hurt with inactivity and not with range of motion or walking. Dr. Long opined that Claimant was approaching MMI. Dr. Long noted that Claimant would have an impairment rating for the neck but that she saw no impairment for the hip pain and opined that the changes on MRI were chronic and degenerative. Dr. Long also opined that she saw no impairment for the eyebrow laceration of the left distal radius fracture. *See* Exhibit 5.

19. On July 24, 2015 Claimant was evaluated by Dr. Long. Claimant again reported left neck pain and left hip pain. Claimant indicated again that she was not open to a steroid injection even though they knew her neck pain was facetogenic from an inflamed facet on the left side. Dr. Long thus opined Claimant was at MMI for the neck. Claimant reported not being interested in orthopedic evaluation or injections for her left hip pain either and that it was worse when she was at rest. Dr. Long performed cervical and hip range of motion measurements on the left side. Dr. Long noted significant range of motion restrictions on the left hip and thought at that point in time that she could do an impairment on the left hip. Dr. Long opined that the range of motion impairments for the left hip equaled 26% lower extremity impairment, with flexion at 75 degrees, extension of 10 degrees, abduction of 25 degrees, adduction of 15 degrees, internal rotation of 20 degrees, and external rotation of 30 degrees. Dr. Long wanted Claimant to come back after using the occi pivot on her neck before determining neck impairment. *See* Exhibit 5.

20. On August 20, 2015 Claimant was evaluated by Dr. Long. Dr. Long noted that Claimant was there to follow up on her neck pain, cervicogenic headaches, and left hip pain and that Claimant's left distal radius fracture had healed as had Claimant's eyebrow laceration. Claimant reported that her hip pain was flaring upon the left side periodically. Dr. Long noted that the MRI showed primarily a tendinitis and some

degenerative fraying of the labrum on the left hip. Claimant reported that she had changed her mind and now wanted to follow up with an orthopedist regarding her hip. Dr. Long also noted that Claimant's cervical MRI showed left C 3-4 facet inflammation and was fairly confident that Claimant's neck pain was facetogenic pain from the inflamed facet causing reactive neck muscle tightness and resultant cervicogenic headaches. Dr. Long noted that other than obtaining an orthopedic evaluation Claimant was pretty much at MMI. Dr. Long opined that Claimant had a hip impairment rating of 27% lower extremity and that she had made an error in the prior rating. Dr. Long performed cervical spine range of motion and found flexion at 5 degrees, extension at 20 degrees, right lateral cervical flexion of 8 degrees, left lateral cervical flexion of 8 degrees, cervical rotation on the right of 20 degrees and cervical rotation on the left of 25 degrees for a total of 20% whole person cervical spine rating. Dr. Long opined that Claimant's whole person impairment including the cervical spine and left hip was 29% whole person. *See* Exhibits 5, 3.

21. On September 3, 2015 Claimant was evaluated by Clint Blackwood, M.D. Claimant reported left hip pain after a fall 3.5 years ago and again in January of 2015 with pain worse at night and while sitting. Claimant reported a right hip torn labrum due to a fall with a right hip injection that didn't help. On the left hip Claimant reported symptoms for 7 months. X-rays of the left hip and pelvis were performed and showed a small inferior femoral head osteophyte. Dr. Blackwood opined that Claimant had mild left hip arthritis, recommended a left hip injection for treatment, and opined that Claimant may need a future total hip arthroplasty but not for an expected 3-5 years. *See* Exhibit B.

22. On September 9, 2015 Claimant was evaluated by Dr. Orent. He noted that Claimant hip symptoms were progressively worsening and he agreed with dr. Blackwood that Claimant would someday require a hip replacement. Dr. Orent provided the impression of severe and aggressive osteoarthritis. He opined that Dr. Long was handling Claimant's January 2015 injury and that for what he had been doing for her 2012 injury, he had nothing to offer Claimant but that it would be advantageous for Claimant to do water exercises. *See* Exhibit 8.

23. On September 28, 2015 Claimant returned to Dr. Long. Dr. Long opined that since Claimant did not want injections, Claimant was at MMI. Dr. Long continued her opinion that Claimant's impairment was 29% whole person. *See* Exhibits 4, 5.

24. On February 17, 2016 Claimant was evaluated by Dr. Orent. Claimant reported progressively worse hip pain especially on the left and that she could not sleep at night. Claimant reported bilateral hip pain since her injuries and neck pain since her injuries. Dr. Orent noted that it appeared the osteoarthritis was accelerating in Claimant's hips and that her pain was becoming worse. Claimant made it clear to Dr. Orent that she never had any of these problems prior to her falls and that she was highly functional and could do just about everything. Dr. Orent explained to Claimant that the osteoarthritis took years to develop and that when she was traumatized it flared the underlying osteoarthritis and that they had not been able to get her back to her asymptomatic

baseline. Dr. Orent provided the impression of bilateral hip pain, residual from the fall with underlying osteoarthritis. *See* Exhibit 23.

25. On April 20, 2016 Claimant underwent a Division Independent Medical Examination with Clarence Henke, M.D. Claimant reported slipping on ice in a parking lot, falling forward, and striking her forehead and both hands. Claimant reported aching in the thorax and cervical spine, throbbing and stiffness in the neck and bilateral shoulders, aching burning numbness and pain in the bilateral wrists and hands, and aching burning stabbing in the bilateral hips with pain levels varied from a 4 to a 9 out of 10 increased with any hand gripping, movement, or prolonged walking or standing. Dr. Henke noted the division instructions were to evaluate distal forearm fracture, cervical sprain/strain, facial lacerations, and pre-existing severe osteoarthritis in hips, spine, and thumb. Dr. Henke noted that other concerns to be addressed were prior claims and ratings for hips and thumbs. Dr. Henke noted that medical records provided by Integrated Medical Evaluations, Inc. and a comprehensive patient medical history form and pain diagram completed by Claimant were reviewed. A letter from Respondents to Dr. Henke noted the records enclosed for review included the emergency department record from January 21, 2015, multiple records from Dr. Long and Dr. Orent, multiple records from Dr. Conyers, multiple records from alpha rehabilitation, and multiple records from Dr. Cahn as well as some records from Claimant's prior injury including the DIME performed by Dr. Hughes. Dr. Henke noted that the medical records covered the period from July 17, 2012 through April 5, 2016 and that they would be discussed in chronological order when possible. *See* Exhibits 13, F, H.

26. Dr. Henke specifically discussed a record from the January 21, 2015 date of injury from Boulder Community Hospital, two records from before this injury including a January 2, 2015 record from Dr. Conyers and a January 7, 2015 DIME from Dr. Hughes, as well as three records from after the date of injury including a February 17, 2015 record from Arbor Occupational Medicine, a February 17, 2015 record from Dr. Conyers, and an April 5, 2015 record from Dr. Conyers. *See* Exhibits 13, F.

27. On physical examination, Dr. Henke noted Claimant's symptoms of neck stiffness, occasional headaches, and bilateral hip symptoms but that her greatest concern was her left wrist and fingers. Dr. Henke found a well healed scar over the left eyebrow, decreased left wrist active ranges of motion due to pain, and scar tissue of palm of hand with bowstringing of the flexor tendon of the left long finger. Dr. Henke diagnosed left upper eyebrow laceration and left wrist and long finger tenosynovitis caused by palmar scar formation. *See* Exhibits 13, F.

28. Dr. Henke opined that based on the two reports from prior to this injury from Dr. Conyers on January 2, 2015 and the DIME from Dr. Hughes on January 7, 2015 as well as due to the emergency room report on January 21, 2015 his opinion was that that Claimant did not aggravate or cause any injuries to her neck, lower back, or bilateral hips in this fall. Dr. Henke agreed with Dr. Hughes that Claimant reached maximum medical improvement on April 10, 2013 for her right upper extremity, left upper extremity, and left lower extremity and opined the impairment rating of 19% whole person was correct. He

opined, however, that Claimant was not at MMI for the left wrist fracture and aggravation of the left long finger contracture deformity aggravated by the January 21, 2015 injury and that Claimant needed a continued follow up examination with Dr. Conyers for the left wrist and digit conditions of radial styloid tenosynovitis and contracture of the long finger flexor tendon. *See* Exhibits 13, F.

29. On June 22, 2016 Claimant was evaluated by Dr. Orent. He noted that Claimant had a DIME with Dr. Henke and noted that Dr. Henke did not consider Claimant's hips or neck or low back to be injured in the January 2015 fall. Dr. Orent took exception and noted that the medical records reviewed by Dr. Henke were incomplete and that it was quite obvious that Claimant had injuries to these structures, specifically the hips well documented by the medical records where a hip contusion was diagnosed in February and pain in the neck noted in February when the injury was in January. Dr. Orent noted that an MRI of the neck was done as early as March 2015 due to ongoing neck pain that was new. Dr. Orent indicated that it should be clear that Claimant had none of these problems before this event occurred. Dr. Orent opined that the Claimant had edema in the hip MRI and facet inflammation in the cervical MRI, signs of acute injuries. Dr. Orent noted that it was hard for him to understand how Dr. Henke could dismiss notes and findings and he strongly disagreed with Dr. Henke that Claimant's hip, neck, and low back were not involved in the January 2015 injury. Dr. Orent noted that while Claimant had an extensive history of osteoarthritis these areas were not symptomatic until Claimant fell. *See* Exhibit 22.

30. On August 16, 2016 Claimant underwent an MRI of her left hip with a history noted of left hip pain, remote fall, and history of labral tear. The impression was: mild-moderate bilateral hip osteoarthritis including extensive labral degeneration and presumed degenerative labral tearing within the left hip; tendinopathy and low grade partial thickness tearing of the gluteus minimus tendon, no full thickness tendon rupture or tendon retraction, mild edema and fluid adjacent to the left greater trochanter suggesting mild trochanteric bursitis, and 9 mm focus of sclerosis within right iliac bone statistically most like a bone island. *See* Exhibit G.

31. On August 17, 2016 Claimant was evaluated by Dr. Orent. He noted that in this most recent fall, Claimant fell directly on her left hip and that the MRI showed extensive labral degeneration and tearing on the left side. He noted a cortisone injection in the past had failed and was certainly not going to be successful now given that there was re-trauma. He noted the MRI showed pre-existing osteoarthritis but that Claimant was never symptomatic like she was now until she took the most recent fall and that the obligation was to get her back to baseline and the only way to do so would be with a hip replacement. *See* Exhibit 23.

32. On October 13, 2016 Claimant was evaluated by Dr. Blackwood. Claimant reported left hip pain for about two years. Claimant reported acute and chronic onset after multiple falls and that her pain was exacerbated by physical activity. Dr. Blackwood noted that an MRI of the left hip showed moderate osteoarthritis and a labral tear. Dr.

Blackwood opined that Claimant would likely need a total hip arthroplasty due to the progression of the osteoarthritis and labral tear. *See* Exhibit B.

33. On November 30, 2016 James Lindberg, M.D. performed a record review. Dr. Lindberg reviewed records from 2011 through October of 2016. Dr. Lindberg opined that Claimant was a 60-year-old female with aggressive osteoarthritis. Dr. Lindberg opined that it was difficult based on the mechanism of injury to attribute any impairment or injury to the hips and that it would be difficult to say that the mechanism of injury caused Claimant's hip arthritis or aggravated her hip arthritis. Dr. Lindberg opined that Claimant's activities of daily living would definitely aggravate her bilateral underlying mild osteoarthritis but that it was unlikely that the slip and fall caused any injury to Claimant's hip. Dr. Lindberg opined that although Claimant may have contemporaneously had pain in her hip it was not caused by the slip and fall and was caused by Claimant's underlying osteoarthritis and femoral acetabular impingement syndrome. He opined that any further treatment of the hips should be done under Claimant's own insurance. *See* Exhibit C.

34. In January of 2017, Dr. Mars responded to a letter from Respondents' attorney. Dr. Mars noted that he agreed with Dr. Lindberg that Claimant's need for a hip replacement was not related to her occupational injury. Dr. Mars also pointed out that Dr. Blackwood commented that a hip arthroplasty was not indicated. *See* Exhibit E.

35. On May 17, 2017 Claimant was evaluated by Dr. Mars. Claimant reported restrictive range of motion of her left middle finger postoperatively and some problems with her left hip with some degenerative changes. Dr. Mars opined that Claimant was at maximum medical improvement and provided an impairment rating of 47% of the left middle finger digit, that converted to a 9% hand impairment, that converted to an 8% upper extremity impairment, that converted to a 5% whole person impairment. Dr. Mars also recommended maintenance treatment with occupational therapy and a gym pass. *See* Exhibits 12, E.

36. On August 8, 2017 Claimant returned to DIME physician Dr. Henke. Claimant reported aching, burning, and stabbing sensations in her left hand and fingers. Claimant reported restricted range of motion of her left long finger following surgery as well as problems with her left hip with some degenerative changes. Claimant reported no pain in the left hand just restricted rang e of motion of the long finger. Dr. Henke examined the left hand. Dr. Henke opined that Claimant had reached MMI on May 17, 2017 and that her permanent impairment rating was 8% upper extremity impairment. He recommended maintenance treatment. *See* Exhibits 13, F.

37. On March 9, 2018 Claimant underwent a return independent medical examination performed by Dr. Hughes. He noted that he had previously evaluated Claimant on January 7, 2015 through a DIME evaluation for a February 9, 2012 injury. He noted that at the time of his DIME he had diagnosed a cervical spine sprain/strain (resolved), cervical spinal spondylosis, and progressive bilateral hip osteoarthritis. He attached Claimant's pain diagram from the January 7, 2015 DIME that showed she related constant aching neck pain at an 8/10 radiating into her shoulders, and bilateral

hip pain in with the left hip at 3-4/10. Dr. Hughes noted that he had performed hip range of motion testing on January 7, 2015 for the left hip with some impairment in extension at 19 degrees, external rotation at 46 degrees and internal rotation at 30 degrees. Dr. Hughes noted that he was re-evaluating Claimant for a new injury that occurred on January 21, 2015 just two weeks after his prior DIME. *See* Exhibit 1.

38. Claimant reported to Dr. Hughes that she slipped on ice and fell on January 21, 2015 and that she immediately had left hand and wrist symptoms and a cut over the left eyebrow. Claimant reported that she developed worsening symptoms of neck pain and left hip pain and worse hand pain. Dr. Hughes noted that on January 26 Claimant was diagnosed with left sided cervical spine strain and left hip contusion. Dr. Hughes noted that cervical spine and left hip pain and symptoms continued until Claimant was placed at MMI for the cervical spine in August 2015 and assigned permanent impairment for the cervical spine by Dr. Long. Dr. Hughes also noted that in April of 2016 Claimant had undergone a DIME for this injury performed by Dr. Henke. He was surprised by the appearance that Dr. Henke did not review many medical records and did not make mention in his report of cervical spine or left hip problems. He noted that in August of 2017 Claimant had a follow up DIME with DR. Henke and again noted that Dr. Henke did not appear to have reviewed medical records he missed previously. Dr. Hughes also noted that Dr. Henke again did not mention Claimant's left hip and cervical spine injuries and agreed with the MMI regarding Claimant's left hand. *See* Exhibit 1.

39. Claimant reported that she continued to be symptomatic with left neck and shoulder pain at an 8/10, left worse than right hip pain at a 5/10, and burning pain in her left hand centered on the ring finger that locked up and difficulty flexing her left middle finger. Dr. Hughes performed a physical examination. He found positive facet joint loading on the left cervical spine with asymmetric losses of left lateral flexion and rotation of the head and neck measured at 14 and 32 degrees and active flexion and extension of the cervical spine at 38 and 43 degrees. Dr. Hughes also found left hip flexion at 81 degrees, extension at 7 degrees, abduction at 25 degrees, adduction at 25 degrees, external rotation at 20 degrees, and internal rotation at 22 degrees. The left hip range of motions, overall, were worse than the right hip range of motions. *See* Exhibit 1.

40. Dr. Hughes opined that Claimant sustained a slip and fall on January 21, 2015 with multiple injuries including: left hand contusion and nondisplaced left distal radial fracture with healing of fracture but persistence of scarring post complex surgical treatment; cervical spine sprain/strain with development of symptomatic left facet joint arthropathy of C3-4; and left hip contusion/sprain with worsening of pre-existing osteoarthritis. Dr. Hughes opined that it appeared fairly clear that Dr. Henke did not reference the rather substantial documentation of Claimant's cervical spine and left hip symptoms that emerged shortly after her fall on January 21. Dr. Hughes also noted that he had a perspective of having had just evaluated Claimant on January 7, immediately prior to her January 21 fall. He noted that he had found pre-existing cervical spine and left hip symptoms. He opined, however, that her cervical spine at his DIME was diffuse, bilateral and of an "aching" quality whereas after the January 21, 2015 injury Claimant had localizing signs and symptoms of left sided neck pain that had persisted with MRI

findings of left sided facet joint arthropathy at C3-4 considered to be the primary pain generator. Dr. Hughes opined that Claimant sustained a substantial and permanent aggravation of her cervical spine degenerative condition as a result of the January 21 fall and that permanent impairment of the cervical spine was appropriate. Dr. Hughes also opined that Claimant had left hip range of motion deficits he identified in the January 7 DIME and had a baseline impairment that could be used compared to her findings now. He opined that Claimant now had worsened range of motion in the left hip. He opined that Claimant sustained both cervical spine and left hip injuries when she fell on January 21, 2015 and that the injuries appeared not to have either been reviewed or addressed by the DIME physician Dr. Henke in either of his reports. *See* Exhibit 1.

41. Dr. Hughes testified at hearing consistent with his report. He testified he was perplexed by Dr. Henke's report and opined that Claimant had sustained injuries to her left hip and neck in the January 2015 fall. He noted a change in the neck pain generator and pattern of neck pain symptoms and the left hip pain that went from a 3-4/10 to a 5/10 and had worse range of motion following the January 2015 fall. Dr. Hughes agreed Claimant had neck pain at 8/10 before the January 2015 fall and also agreed that Dr. Henke probably had the opportunity to review all the records but noted Dr. Henke only listed a few records. Dr. Hughes agreed Claimant had aggressive pre-existing bilateral osteoarthritis.

42. Claimant testified at hearing and demonstrated disfigurement as a result of this injury. Claimant has a 1-inch scar above her left eyebrow that is slightly lighter than her normal skin tone. Claimant also has a scar on the inside of her left palm measuring approximately 3.5 inches. Claimant cannot completely close her left hand into a fist and her middle finger and ring finger lock up and cannot completely close as normal.

43. Claimant testified that before her falls at work she never had problems with her hips or neck. She testified that Dr. Henke appeared disorganized at the DIME appointments.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even

if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

OVERCOMING DIME ON IMPAIRMENT

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim*

Appeals Office, 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Here, Claimant has failed to meet her burden to overcome the opinion of DIME physician Dr. Henke regarding her permanent impairment rating by clear and convincing evidence. As found above, Dr. Henke opined that Claimant did not aggravate or cause any injuries to her neck, lower back, or bilateral hips in the January 21, 2015 fall. He did not fail to address the neck or hips, rather, he opined that Claimant did not aggravate her neck and left hip in the January 21, 2015 fall. This opinion has not been overcome by clear and convincing evidence.

As found above, the opinion of Dr. Henke is consistent with the opinions of orthopedic surgeon Dr. Lindberg. Dr. Lindberg opined that it was difficult based on the mechanism of injury to attribute any impairment or injury to the hips and that it would be difficult to say that the mechanism of injury caused Claimant's hip arthritis or aggravated her hip arthritis. Additionally, it is noted that Dr. Long on June 22, 2015 indicated that Claimant would not have impairment for her hip pain because the changes to on MRI were chronic and degenerative. At the next appointment on July 24, 2015 Dr. Long found significant range of motion restrictions in the left hip and indicated she thought she could do an impairment of the left hip and rated it at 27% lower extremity. Dr. Long appears to believe the hip is not ratable, then changes her opinion without further explanation other than significant range of motion restrictions.

Dr. Orent places a heavy emphasis on his belief that Claimant sincerely did not have any prior neck or hip issues prior to her falls (plural) and that the falls aggravated her underlying osteoarthritis. As found above, after her first fall and during treatment for her 2012 injury, Claimant reported pretty severe neck and left sided hip problems. These pre-dated her January 21, 2015 fall in this case. Her symptoms and diagnoses prior to January 21, 2015 included neck pain at 8/10, left hip pain at 3-4/10, cervical spondylosis, and severe aggressive osteoarthritis. Although she may or may not have been symptomatic prior to her 2012 fall in a different claim, it is well documented that she was highly symptomatic in her neck and left hip prior to the January 21, 2015 fall in this claim. The opinion of Dr. Henke that the January 21, 2015 fall did not aggravate or cause any new injury to her neck or left hip is supported by the overall weight of the medical records and evidence and has not been overcome by clear and convincing evidence.

Dr. Hughes has a difference of opinion from Dr. Henke. Dr. Hughes acknowledged that Claimant had degenerative arthritis that was progressive in nature in her cervical spine as well as in her bilateral hips. Two weeks prior to the January 21, 2015 fall Dr. Hughes noted Claimant's reports of constant neck pain at 8/10 radiating into the shoulders and bilateral stabbing hip pain. Although he believes her symptoms and range of motion measurements after the 2015 fall and measured by him at his March 2018 evaluation were objectively worse or different than the measurements he obtained just prior to the fall in January of 2015, he agreed that her pre-existing conditions were

progressive. Claimant has failed to establish that the condition or symptoms were due to a new acute injury or acute aggravation on January 21, 2015 versus being due to the natural progression of Claimant's severe pre-existing conditions in both her neck and left hip that are well documented as existing prior to January 21, 2015.

Claimant's argument that Dr. Henke either forgot to review all the medical records or ignored the cervical and hip complaints throughout the records are not supported by the record. Dr. Henke indicated he reviewed the contents of all the medical records provided to him and specifically opined that Claimant had no permanent cervical or hip impairment due to the January 21, 2015 injury. Dr. Henke outlined specific reports prior to the January 21, 2015 injury that show the pre-existing pain symptoms and diagnoses Claimant had in her neck and left hip. Although Dr. Hughes has a difference of opinion the difference of opinion does not rise to the level of clear and convincing evidence that Dr. Henke erred. The weight of the overall evidence supports Dr. Henke's determination that Claimant had no permanent impairment to her cervical spine or left hip as a result of her January 21, 2015 injury.

DISFIGUREMENT

As a result of her January 21, 2015 work injury, Claimant has visible disfigurement to the body. The disfigurement includes a 1-inch scar above her left eyebrow that is slightly lighter than her normal skin tone. Claimant also has a scar on the inside of her left palm measuring approximately 3.5 inches. Claimant cannot completely close her left hand into a fist and her middle finger and ring finger lock up and cannot completely close as normal. Claimant has therefore sustained serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. § 8-42-108(1), C.R.S.

Insurer shall pay Claimant $2,750.00 for the disfigurement outlined above. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome by clear and convincing evidence the DIME opinion of Dr. Henke regarding Claimant's permanent partial disability impairment rating.

2. Insurer shall pay Claimant $2,750 for the disfigurement outlined above.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 20, 2018,

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Faulkner is causally related to his January 5, 2017 work injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a journeyman plumber. Claimant began working for Employer in June of 2015. In June of 2016 Claimant became a test crew foreman.

2. Claimant's job duties involve testing piping that is installed in buildings, determining the type of piping required for a job, and repairing any breaks in piping lines. When installing piping, it can weigh up to 200 pounds. Claimant is required to carry ladders, hoses, bundles of pipe, and to lift as needed.

3. On January 5, 2017 Claimant sustained an admitted work related injury when he slipped on a patch of ice in the roadway at his worksite. As he stepped on ice, Claimant's feet came out from underneath him and he reached out with his right arm to catch himself. Claimant described that as he and his right arm hit the ground, it threw him to the left and he tried to catch himself with his left arm and that his left elbow hit the ground. Claimant testified that his left elbow got jammed into his shoulder and that he felt a lot of pain in his left shoulder.

4. Claimant testified that he felt a lot of pain in his left shoulder, some pain in his right shoulder, and that he could hardly move his left arm.

5. Claimant reported the injury to Employer and was referred for treatment.

6. On January 5, 2017 Bruce Cazden, M.D. evaluated Claimant. Claimant reported that he slipped and fell jamming his left elbow and shoulder and that he had significant immediate pain and was unable to move the arm in a forward position. Claimant reported his primary pain was in the left shoulder and was worse by working overhead and improved with laying on his side. On examination, Dr. Cazden found no gross deformity, swelling, erythema, or heat. Dr. Cazden found tenderness at the anterior aspect of the glenohumeral joint and over the bicipital groove as well as in the proximal bicep. Dr. Cazden found profoundly decreased range of motion with active flexion and significant weakness. Dr. Cazden noted that x-rays showed no fracture or dislocation and he diagnosed unspecified sprain of left shoulder joint and acute pain due to trauma. Dr. Cazden recommended ice, decreased activity, gentle range of motion exercises, and naproxen every 12 hours. Dr. Cazden opined that Claimant would likely need physical

therapy at the very least and that if Claimant was not making any progress, an MRI would probably be needed to rule out a rotator cuff tear. *See* Exhibit 4.

7. On January 5, 2017 John McDonald, M.D. provided an interpretation of left shoulder x-rays. Dr. McDonald found no acute findings and chronic changes. The chronic changes found on x-ray included a corticated bone density along the superior lateral margin of the clavicle that Dr. McDonald opined may be from old trauma as well as a 2x1 mm faint density along the lateral aspect of the acromion which he also believed to be chronic and perhaps from an old injury. *See* Exhibits 5, C.

8. On January 9, 2017 Elizabeth Otto, NP evaluated Claimant. Claimant reported that he was a lot better and that his shoulder was not 100% improved because if he moved it wrong it still "twinges" but that it was "so much better." Claimant reported that at rest his pain was a 0/10 and with twinges the pain was a 6-7/10. Claimant reported that he was working and taking naproxen every 12 hours. NP Otto fond slight tenderness with palpation over the acromioclavicular joint and normal range of motion on exam with slight pain in the deltoid on internal rotation and slight pain with resisted flexion and resisted abduction. *See* Exhibit 4.

9. On January 18, 2017 Kevin Keefe, D.O. evaluated Claimant. Claimant reported that initially his left shoulder had improved significantly but that the improvement had leveled off. Claimant reported that he was able to do his regular work duties although lifting heavy items bothers him. Claimant reported no history of shoulder problems. Dr. Keefe did not place restrictions on Claimant and noted that Claimant was able to limit his duties. Dr. Keefe found range of motion in abduction and flexion to be normal but internal rotation to be limited. Internal rotation reproduced Claimants pain in the lateral shoulder. Dr. Keefe diagnosed unspecified sprain of the left shoulder joint and recommended physical therapy. *See* Exhibit E.

10. On February 6, 2018 NP Otto evaluated Claimant. Claimant reported continuing soreness in his left shoulder with a pain level at 1-2/10 when at rest and at a 5-6/10 when he reached overhead or behind him. Claimant reported that he was taking naproxen every 12 hours and that he believed it was helpful. Claimant reported that he was working regular duty but that he was the supervisor and could limit any painful activities. NP Otto recommended Claimant continue with physical therapy and begin massage therapy and chiropractic. *See* Exhibits 4, F.

11. On Feb 20, 2017 NP Otto evaluated Claimant. Claimant reported that his left shoulder hurt in the upper bicep and deltoid with pain at a 3/10 with movement and pain when holding his arm straight out to the side and reaching for his wallet. Claimant reported the pain had improved and did not last as long as it did before. NP Otto found tenderness over the glenohumeral joint, superior bicep, and deltoid on left shoulder examination. NP Otto noted pain in range of motion maneuvers. Claimant reported problems with his right shoulder and imaging of the right shoulder was completed and an MRI of the right shoulder was recommended due to the elevated humorous suggesting a rotator cuff tear shown by the right shoulder imaging. *See* Exhibit 4.

12. On March 6, 2017 Dr. Keefe evaluated Claimant. Claimant reported that initially he thought his left shoulder was improving but it was now giving him more problems. Claimant reported no prior history of problems with his left shoulder. Dr. Keefe recommended an MRI of the left shoulder and that Claimant continue physical therapy. Dr. Keefe found pain with range of motion and pain with the empty can test. *See* Exhibit 4.

13. On March 17, 2017 Claimant underwent an MRI of his left shoulder interpreted by Peter Koplyay, M.D. Dr. Koplyay provided the impression of: large full thickness rotator cuff tear involving the supraspinatus and infraspinatus tendons which are retracted 4 to 5 cm medially with mild atrophy of the muscle bellies; full thickness tearing of the upper fibers of the distal subscapularis with minimal tendon retraction and severe atrophy of the muscle belly; torn biceps tendon retracted into the proximal arm; truncation and degenerative tearing of the superior labrum with underlying cystic change in the supraglenoid tubercle; moderate to severe AC joint hypertrophy with subacromial spurs present; and a high riding humeral head that articulates with the undersurface of the acromion with secondary degenerative changes present. *See* Exhibits 8, D.

14. On March 20, 2017, Dr. Keefe evaluated Claimant. Dr. Keefe noted that significant rotator cuff tears were found on the MRI of the left shoulder. Dr. Keefe referred Claimant to orthopedics and provided a work restriction of no use of the left arm. *See* Exhibit 4.

15. On April 4, 2017 David Beard, M.D, an orthopedic specialist, evaluated Claimant. Claimant reported a slip and fall at work and pain in his left shoulder. Claimant reported that due to persistent symptoms he underwent an MRI of the left shoulder and was there for surgical evaluation. Claimant reported that prior to the work slip and fall he had no problems with his left shoulder. Dr. Beard noted that the MRI showed a chronic and massive rotator cuff tear involving the entire supraspinatus and infraspinatus with retraction of approximately 4.5 to 5 cm back to the level of the superior glenoid. Dr. Beard opined that there was significant atrophy of the supraspinatus, infraspinatus, and subscapularis muscle bellies and elevation of the humeral head with respect to the glenoid such that the humeral head was articulating with the undersurface of the acromion. Dr. Beard also opined that there was severe AC joint osteoarthritis and also a torn biceps tendon. Dr. Beard diagnosed: chronic massive rotator cuff tear, left shoulder, with rotator cuff arthropathy; and left shoulder acromioclavicular joint osteoarthritis. Dr. Beard opined that it appeared to be more of an acute-on-chronic type of injury. Dr. Beard opined that the rotator cuff was not surgically repairable given the amount of retraction and that represented likely that the rotator cuff tear had been present for much longer than just the last three months. Dr. Beard discussed an intraarticular steroid injection to decrease pain but opined that Claimant's final option would be a reverse shoulder arthroplasty. *See* Exhibit 9.

16. On April 7, 2017 NP Otto evaluated Claimant. Claimant reported that Dr. Beard had told him the only two options were arthroplasty or steroid injections and that

he wanted to have an arthroplasty so that he could use his arm. Claimant reported pain at rest of 2-3/10 and with movement at 5-6/10 and that he had continued pain, loss of function, and reduced range of motion. Claimant reported that he stopped physical therapy and was not using his left arm per restrictions. NP Otto referred Claimant for a second opinion. *See* Exhibit 4.

17. On April 11, 2017 Dr. Beard performed a steroid injection in Claimant's left shoulder and injected the subacromial space and the glenohumeral joint. *See* Exhibit 9.

18. April 24, 2017 Dr. Keefe evaluated Claimant. Claimant reported that a recent cortisone injection had helped but that he still had a fair amount of pain in his left shoulder. Dr. Keefe noted that it seemed like Claimant would not be able to return to unrestricted duty for his job that involved heavy lifting often above his head and they discussed the job and whether or not Claimant wanted to proceed with a shoulder replacement. Dr. Keefe recommended Claimant restart physical therapy and referred Claimant to an orthopedic surgeon who would actually do the shoulder replacement so that Claimant could ask questions and to determine if Claimant was a candidate. *See* Exhibit 4.

19. On May 15, 2017 Michael Hewitt, M.D. evaluated Claimant for the purpose of a second opinion. Claimant reported night pain, decreased range of motion, and weakness in his left shoulder. Dr. Hewitt reviewed the imaging and noted Claimant's chronic rotator cuff tear with rotator cuff atrophy and a high riding humeral head. Dr. Hewitt opined that Claimant sustained an acute on chronic injury. Dr. Hewitt noted that Claimant understood that the surgical prognosis for a chronic rotator cuff tear was poor and that the final treatment option would be a reverse shoulder replacement. *See* Exhibit 11.

20. On June 7, 2017 Timothy O'Brien, M.D., an orthopedic specialist, evaluated Claimant for purposes of an independent medical examination. Claimant reported that when he slipped on ice he fell backwards, put his right arm out, rolled to the left side, and hit his left elbow against the ground and that it loaded his left arm and really hurt his left shoulder. Claimant reported also having right shoulder pain. Claimant reported that he had immediate pain and sought immediate attention. Claimant reported that his right shoulder started to hurt more than his left and that his right shoulder continues to hurt more severely, but that his left shoulder is not far behind. Claimant reported pain at a 2 to an 8-9 on a scale of 0 to 10. Claimant reported that an MRI scan demonstrated a significant retracted tear that the doctors did not feel they could repair, except for one doctor who thought he might be able to repair it. Claimant reported that all doctors had indicated he might need a shoulder replacement and that he just wanted to get back to work. Dr. O'Brien reviewed medical records and performed a physical examination. *See* Exhibit A

21. Dr. O'Brien diagnosed a left shoulder strain/sprain from the January 5, 2017 and opined that the work injury temporarily aggravated pre-existing and longstanding degenerative tearing in Claimant's left shoulder rotator cuff. Dr. O'Brien opined that the

work injury did not accelerate the pre-existing condition beyond its normal rate of progression and that Claimant's pre-existing and longstanding rotator cuff tear had undergone retraction and atrophy. Dr. O'Brien opined that an end of healing was reached on or before February 6, 2017 when Claimant had a normal left shoulder range of motion, no significant weakness, and no significant pain with provocative testing. Dr. O'Brien opined that Claimant's course of healing between the injury date of January 5 and the end of healing date of February 6 was progressive and rapid regarding the return of Claimant's range of motion, strength, and the reduction in his pain. Dr. O'Brien opined that by February 6, Claimant had returned to his pre-injury level of function. Dr. O'Brien opined that Claimant had an incurable and relentlessly progressive left shoulder condition with an onset predating the January 5, 2017 minor work incident by years. Dr. O'Brien opined that Claimant's rotator cuff failed because of Claimant's age and genetic makeup, accelerated by his addiction to nicotine. Dr. O'Brien noted that after the failure of the rotator cuff, and over time, the muscle continued to pull on the tendon and pulled the tendon away over the course of time causing increased retraction for years. *See* Exhibit A.

22. On July 28, 2017 Dr. Hewitt evaluated Claimant. Claimant reported relatively unchanged symptoms with persistent night pain, decreased range of motion, and weakness. Claimant denied prior left shoulder restrictions or symptoms and that he had been unable to return to his previous level of function. Dr. Hewitt noted that Claimant understood that attempted repair of the rotator cuff had a poor prognosis and that the final treatment option was a reverse shoulder. Dr. Hewitt noted that he performed arthroscopic shoulder surgeries and that Claimant would be referred to a shoulder specialist to discuss a reverse shoulder replacement. Dr. Hewitt opined that Claimant had not reached maximum medical improvement and that Claimant had not returned to his baseline status. *See* Exhibit 11.

23. On August 21, 2017 Nathan Faulkner, M.D. evaluated Claimant. Claimant reported continued deep/lateral shoulder pain but fairly good range of motion. Dr. Faulkner noted that Claimant had a massive rotator cuff tear on the left but had been able to maintain fairly good range of motion. Dr. Faulkner reiterated that the rotator cuff repair would be difficult and associated with a high likelihood of re-tear but noted that due to Claimant's age he was not an ideal candidate for a shoulder replacement. Dr. Faulkner recommended proceeding with left shoulder superior capsular reconstruction to prevent further progression of the arthropathy and to give Claimant a stable fulcrum for overhead motion. *See* Exhibit 11.

24. On August 22, 2017 Dr. Pinero evaluated Claimant. Claimant reported that he wanted the surgery offered by Dr. Faulkner and that he was told that the procedure would help his pain and buy time before a total shoulder replacement down the road. *See* Exhibit 12.

25. On October 17, 2017 Dr. Hughes evaluated Claimant for an independent medical examination. Claimant reported that he had fallen at work backwards, catching himself with his outstretched right arm and lurching over as he fell to strike his left elbow

that jammed up into his left shoulder. Claimant reported initially pain and problems moving his left arm that was centered in his left shoulder. Claimant reported starting physical therapy and that he had globalization of his symptoms to include problems with his right shoulder blade and neck and that with overall non-improvement he underwent an MRI of his left shoulder and surgical assessment by Dr. Beard. Claimant reported a cape distribution of aching quality pain extending over the posterior trapezius musculature bilaterally with bilateral lateral shoulder burning pain at a 3/10. Claimant reported no history of left shoulder problems or injuries. Claimant reported that he had worked following his injury until he was laid off in May of 2017. Dr. Hughes noted in the medical records Claimant's improved ranges of motion of the left shoulder but significant restrictions in the right shoulder motion at a February 6 evaluation.

26. Dr. Hughes assessed: occult bilateral shoulder osteoarthritis with no documentation of symptoms or functional limitations prior to January 5, 2017; slip and fall with multiple injuries sustained on January 5, 2017; left shoulder sprain/strain with progression of left shoulder osteoarthritis and development of irreparable rotator cuff tears meriting surgical treatment; and early post-fall onset of right scapular dyskinesis meriting further evaluation. Dr. Hughes opined that it appeared clear that Claimant had occult and probably end stage arthritis in the bilateral shoulders prior to his January 5, 2017 fall. He opined, however, that there was no documentation that it was symptomatic or limited Claimant's function prior to the date of the fall. Dr. Hughes endorsed the surgery recommended by Dr. Faulkner. Dr. Hughes opined that Claimant was not yet at maximum medical improvement and that Claimant had aggravated his previously occult left shoulder arthritis. *See* Exhibit 13.

27. Dr. O'Brien testified at hearing consistent with his independent medical examination report. Dr. O'Brien opined that the work injury did not accelerate Claimant's pre-existing left shoulder condition beyond its normal rate of progression and that Claimant had end-stage rotator cuff pathology which had resulted in such massive tearing of the rotator cuff that the humeral head rode up and literally could not go any higher because it rested on the bone that's the roof of the shoulder. Dr. O'Brien testified that the MRI scan performed eight weeks after the incident did not demonstrate any evidence of an acute injury or acute acceleration. Dr. O'Brien testified that the full thickness rotator cuff tear retracted as far as Claimant's, 5 to 5 centimeters medially takes years to manifest on an MRI scan. Dr. O'Brien opined that there was a zero percent likelihood that someone with Claimant's chronic, massive rotator cuff tears experienced no symptomatology. Dr. O'Brien testified that the proposed surgery would address a pre-existing and longstanding condition that should not be pinned on Claimant's fall.

28. Dr. O'Brien's is found credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to

injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d

786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet his burden to establish that the surgery requested by Dr. Faulkner is reasonable and necessary to cure and relieve the effects of his industrial injury. Here, the effects of the industrial injury included a left shoulder strain and a temporary aggravation of pre-existing and longstanding degenerative tears in Claimant's left shoulder. Within a short time after the fall at work, Claimant was much improved and back to baseline. Dr. O'Brien is credible and persuasive that the MRI done eight weeks after the fall at work showed no acute injury or acute acceleration but showed changes that take years to develop. Dr. O'Brien is credible and persuasive that the requested surgery is not causally related to the January 5, 2017 work incident.

Prior to his fall at work, Claimant had non-work end stage rotator cuff tearing and massive tears of his rotator cuff that had retracted significantly over the course of several years. As found above, Dr. Beard noted chronic and massive rotator cuff tears, significant atrophy, and severe osteoarthritis. Dr. Hughes also noted Claimant's probable end stage osteoarthritis of the bilateral shoulders and opined that it existed before the fall on January 5, 2017. Although Dr. Beard characterized the injury as appearing to be more of an acute on chronic type of injury, and although Dr. Hughes believes the pre-existing condition was aggravated or accelerated by the January 5, 2017 fall, the ALJ does not find this persuasive. Dr. Hughes opinion was based, in part, on information provided to him by Claimant that is inaccurate. Claimant reported to Dr. Hughes that he had pain after the fall and pain moving his left arm centered in his shoulder, globalization of his symptoms, and overall non-improvement that led to an MRI being done on his left shoulder. This is not consistent with the medical records which show great improvement immediately after the fall and that Claimant's range of motion was much improved in the left shoulder after the fall. Dr. O'Brien is credible and persuasive that by February 6, 2017 Claimant was back to his baseline level of function given his chronic and significant pre-existing tears in the left shoulder. The testimony and reports of Dr. O'Brien are found the most persuasive and most consistent with the weight of the overall evidence. The surgery proposed is to cure and relieve the effects of Claimant's pre-existing condition in his left shoulder.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Faulkner is causally related to his January 5, 2017 work injury. The request for left shoulder superior capsular reconstruction is denied.

2. All matters not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 5, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-057-193-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 27, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 6/27/18, Courtroom 2, beginning at 1:30 PM, and ending at 2:45 PM).

Claimant's Exhibits 1 through 11 were admitted into evidence, without objection. Respondents' Exhibits A through G were admitted into evidence, without objection.

The evidentiary depositions of Timothy O'Brien, M.D., taken on May 3, 2018; and Cary B. Motz, M.D., taken on the same date, were filed, and read by the ALJ prior to the hearing.

ISSUES

The issues to be determined by this decision concern the causal relatedness and reasonable necessity of an arthroscopy surgery for the Claimant's compensable injury on her left shoulder from August 2, 2017. The Claimant takes the position of the authorizing treating physicians (ATPs) Cary Motz, M.D. and Michael Hewitt, M.D. that the surgery is reasonably necessary to treat her work-related injury. Respondents take the position of Independent Medical Examiner (IME) Timothy O'Brien, M.D. that the Claimant's symptoms are magnified, making surgery irrelevant and unnecessary for the Claimant's healing.

The Claimant bears the burden of proof, by a preponderant evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural Posture/Findings

1. On March 7, 2018, the Respondents filed an Application for Hearing endorsing the issue of medical benefits, specifically, whether left shoulder surgery is reasonably necessary and causally related to the Claimant's admitted August 2, 2017 injury as issues for hearing (Claimant's Exhibit 1, pp. 001).

2. On March 8, 2018, the Claimant filed a Response to the Respondents' Application for Hearing, endorsing as an issue that the request for shoulder surgery was reasonably necessary and causally related to the Claimant's injury; and, that it was the desire of the Claimant to undergo the surgery recommended by Dr. Hewitt (Claimant's Exhibit 2, pp. 005).

3. On March 27, 2018, the Respondents filed a General Admission of Liability (GAL), admitting for medical benefits and temporary partial disability (TPD) benefits (Claimant's Exhibit 3, pp. 007).

4. On April 24, 2018, pursuant to a second request of the Respondents, the Claimant was again examined by IME Dr. O'Brien, whose medical opinion that the Claimant's injury was minor and nonorganic did not change (Claimant's Exhibit 11, pp. 141).

Preliminary Findings

5. The Claimant was employed as a parcel handler and trainer for the Employer at the time of the injury.

6. On August 2, 2017, during the course and scope of her employment, the Claimant sustained an injury to her left shoulder when she was pulling a bag of boxes and parcels weighing around 50 pounds off a shelf. The injury occurred around 7:30 PM after the Claimant's lunch break.

7. The Claimant is right-handed and does not have any prior history of left shoulder pain or injury prior to August 2, 2017. She made visits to her primary care physician Julia Jung, M.D. from January 4, 2013 through November 30, 2017 for non-work related physical abnormalities such as a rash and a cough. (Respondents' Exhibit

A). The ALJ infers and finds that medical reports from the Claimant's primary care physician detailing complaints unrelated to the August 2, 2017 work injury do **not** disprove her work-related injury. The ALJ finds that he Claimant suffered a work-related injury on August 2, 2017 to her left shoulder.

Medical History

8. After the end of her work shift at 11:30 PM on August 2, 2017, the Claimant attempted to obtain medical attention at Urgent Care. Because Urgent Care was closed, the Claimant was not examined by any medical professional and returned home.

9. The Claimant returned to work on August 3, 2017 and reported to her manager on duty, Michael Carapella, that she was not feeling any better. Carapella had the Claimant apply ice to her shoulder and "told [her] just to give it a bit of time to see if it would resolve", and then told the Claimant to go see a doctor when the pain persisted. (Respondents' Exhibit E, pp. 045).

10. On August 4, 2017, the Claimant visited Jerald Solot, D.O. who assessed the Claimant with a rotator cuff disorder at her left shoulder. Dr. Solot prescribed oral pills, referred the Claimant for Physical Therapy (PT), ordered a shoulder sling for her and placed her on work restrictions that she could return to work for her entire work shift, and could not use her left upper extremity (LUE) (Claimant's Exhibit 4, pp. 016).

11. On August 8, 2017, the Claimant, complaining of severe pain, had a follow up examination with Dr. Solot, who assessed the Claimant with a rotator cuff disorder at her left shoulder and a left shoulder strain. Dr. Solot further restricted the Claimant's work movements requiring her to wear a shoulder splint constantly as needed, use her left hand only for fingering/grasping light objects, and not to reach outward or overhead with her LUE (Claimant's Exhibit 4, pp. 021). The Claimant is still performing her work duties with the Employer within these restrictions.

12. The Claimant had further follow up appointments biweekly to monthly with Dr. Solot through November 15, 2017, with little or no change in the severity of pain complained of or work restrictions prescribed (Claimant's Exhibit 4). Throughout this time, the Claimant was advised to wear the shoulder sling and given conservative treatment including Ibuprofen and a cortisone injection (Respondents' Exhibit E, pp. 048).

13. The Claimant received PT at the hands of physical therapist Abigail Bruger and physical therapist assistant Natashal Shkrobor from August 7, 2017 to October 25, 2017 at which point the Claimant still reported pain with little improvement, and was discontinued because she was determined to no longer benefit from PT (Claimant's Exhibit 5, pp. 084). The PT included therapeutic exercises such as stretching and strengthening, manual therapy such as joint and soft tissue mobilization,

and modalities such as heat/cold to address localized pain and inflammation (*Id.* at pp. 060). On October 3, 2017, Abigail Bruger, PT, noted the need to seek a second opinion from Michael S. Hewitt., M.D., *Id.* at pp. 070.

14. On September 6, 2017, the Claimant underwent an MRI (magnetic resonance imaging) upon referral from Dr. Solot. The MRI revealed distal supraspinatus tendinosis, a nondisplaced anteroinferior labral tear, moderate AC joint osteoarthritis with hypertrophy, and subchondral cyst formation of the greater tuberosity humeral head, but no muscle atrophy. The MRI also suggested signs of a type III SLAP tear to the superior labrum (Claimant's Exhibit 6, pp. 086-087).

15. On September 20, 2017, the Claimant was seen by ATP Cary B. Motz, M.D., who diagnosed the Claimant with having left shoulder rotator cuff strain and impingement syndrome, and that it was unlikely the Claimant had a SLAP tear given her age. Dr. Motz also noted the Claimant's MRI exhibited "the expected degenerative changes of the joint consistent with a 58-year-old patient" (Claimant's Exhibit 7, pp. 089). It was Dr. Motz's opinion at the time that the Claimant's stiffness in her shoulder had developed due to her continued use of the sling. Dr. Motz did not advise surgery at that time because nothing on the MRI suggested the need for it, and out of concern that the Claimant would not be able to successfully rehabilitate after surgery (Claimant's Exhibit 9, pp. 105). The Claimant was also not interested in surgery at that time (Claimant's Exhibit 7, pp. 089).

16. On October 9, 2017, the Claimant was seen by ATP Dr. Hewitt for a second medical opinion (Claimant's Exhibit 8, pp. 098). Dr. Hewitt found that the Claimant suffered mild rotator cuff tendinopathy, tearing of the superior labrum, and moderate acromioclavicular athropathy (*Id.* at 097). It was Dr. Hewitt's opinion at the time that "[g]iven the nature of the superior labral tear… arthroscopy is medically reasonable" (*Id.* at pp. 098).

17. On February 19, 2018, the Claimant was seen again by Dr. Hewitt. He reported that the Claimant had active range of motion (ROM)100 degrees of forward flexion, 130 degrees passively, and external rotation of 45 degrees. Dr. Hewitt discussed treatment options, including the risks and benefits of surgery, with the Claimant, who expressed her desire to proceed with arthroscopy. Because of the Claimant's prolonged symptoms and failure to respond to conservative treatment, Dr. Hewitt recommended that arthroscopy was appropriate (Claimant's Exhibit 8, pp. 093).

18. When questioned at the deposition conducted on May 3, 2018. after reviewing Dr. Hewitt's medical examination reports of the Claimant, Dr. Motz agreed with Dr. Hewitt's February 19, 2018 recommendation for arthroscopy. Dr. Motz agreed that because the Claimant had not responded to six months of conservative treatment and still exhibited limited ROM and pain, surgery was appropriate (Claimant's Exhibit 9, pp. 113).

Respondents' Independent Medical Examination by Timothy O'Brien. M.D.

19. On December 14, 2017, at the request of the Respondents, the Claimant was examined by Independent Medical Examiner (IME) Dr. O'Brien, who expressed the opinion that the Claimant suffered a minor injury on August 2, 2017 because she did not seek medical attention until two days later on August 4, 2017, and her behavior was inconsistent with a worker who suffered a significant injury (Claimant's Exhibit 10, pp.132). In Dr. O'Brien's medical opinion, greater than 95% of minor injuries heal within four weeks' time, Dr. O'Brien reported that the Claimant reached maximum medical improvement (MMI), on September 2, 2017, and that her "ongoing subjective complaints of pain were a manifestation of her personal health," and that surgery was not reasonable (*Id.* at pp. 133). Dr. O'Brien has no demonstrated credentials in psychiatry or the behavioral sciences, yet his opinions rely heavily on these disciplines. Consequently, the ALJ infers and finds that Dr. O'Brien's opinions are based on speculation, without a full appreciation of the actual facts. Therefore, the ALJ.accords minimal weight to Dr. O'Brien's opinions in this regard.

Ultimate Findings

20. The ALJ finds the opinions of Dr. Motz and Dr. Hewitt on reasonable necessity and causal relatedness highly persuasive and credible. The ALJ further finds the opinions of Dr. O'Brien lacking in credibility on the reasonable necessity and causal relatedness of the August 2, 2017 incident, primarily because they were based, heavily, on the Claimant's alleged two-day delay in seeking immediate medical attention. The ALJ finds that the Claimant's inability to seek immediate medical services was reasonable given that Urgent Care was closed the night of the injury, and that the Claimant made a reasonable attempt to return to work the next day on the advice of her manager. Therefore, the Claimant did not reach MMI on September 2, 2017, and has a continuing need for medical treatment for her left shoulder injury. Consequently, the ALJ

21. Between conflicting medical and lay opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of ATPs Dr. Motz and Dr. Hewitt, on the reasonable necessity and causal relatedness of arthroscopy shoulder surgery, and to reject opinions to the contrary. Both Dr. Motz and Dr. Hewitt established the work-relatedness of the left shoulder injury of August 2, 2017, from which the Claimant suffered continued pain and limited ROM despite conservative treatment.

22. The left shoulder injury of August 2, 2017 necessitated medical care and treatment, and was, therefore, a compensable event. Also, the medical care and treatment for the injury was authorized, causally related to the injury, and reasonably necessary to cure and relieve the effects of the August 2, 2017incident.

23. The Employer referred the Claimant to an authorized medical provider, whereupon the Claimant saw Jerald Solot, D.O., at Concentra (an Employer authorized

medical provider). Thereafter all left shoulder related referrals emanated from Dr. Solot and were in the authorized chain of referrals.

24. The Claimant has proven, by preponderant evidence that the medical care for her left shoulder and the arthroscopy shoulder surgery, recommended by the ATPs, is causally related to the compensable injury and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* §8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Motz and Dr. Hewitt on reasonable necessity and causal relatedness of the medical treatment and recommended surgery are highly persuasive and credible. As further found, the opinions of Dr. O'Brien were lacking in credibility on the reasonable necessity and causal relatedness of the August 2, 2017 incident, primarily

because they were based, heavily, on the Claimant's alleged two-day delay in seeking immediate medical attention. As found, the Claimant's inability to seek immediate medical services was reasonable given that Urgent Care was closed the night of the injury, and the Claimant made a reasonable attempt to return to work the next day on the advice of her manager. As found, Dr. O'Brien had no demonstrated credentials in psychiatry or the behavioral sciences, yet his opinions relied heavily on these disciplines. As found, inferentially, Dr. O'Brien's opinions were based on speculation, without a full appreciation of the actual facts. Therefore, the ALJ accorded minimal weight to Dr. O'Brien's opinions in this regard.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical and lay opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of ATPs Dr. Motz and Dr. Hewitt, on the causal relatedness and reasonable necessity of arthroscopy for the Claimant's shoulder injury; and, to reject opinions to the contrary.

Causal Relatedness of the Claimant's Compensable Injury for Which Surgery is Reasonably Necessary

c. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, a claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). In order for an injury to be compensable under the

Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** A manner of conceptualizing the matter is, essentially, that a presumption of work-relatedness may arise when an unexplained injury occurs during the course of employment. However, it is incumbent to show that non-work related factors caused the injury to avoid compensability. Nonetheless, proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant has proven that there was a causal link between her left shoulder injury and the work related incident on August 2, 2017. Therefore, she suffered a compensable injury and received authorized, reasonably necessary and causally related medical care and treatment for the injury since August 4, 2017 with little improvement and she has not reached MMI.

Medical

d. The employer's initial right to select the treating physician is triggered once the employer has some knowledge of the facts concerning the injury or occupational disease with the employment and indicating "**to a reasonably conscientious manager**" that a **potential** workers' compensation claim may be involved. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). As found, The Employer referred the Claimant to an authorized medical provider, whereupon the Claimant saw Jerald Solot, D.O., at Concentra (an Employer authorized medical provider). Thereafter

e. All referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all left shoulder related referrals emanated from Dr. Solot and were in the authorized chain of referrals.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the entitlement to benefits beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus.*

Claim Appeals Office, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven the causal relatedness and compensability of the left shoulder injury on August 2, 2017, and the reasonable necessity of medical treatment and the left shoulder arthroscopy to treat said injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of authorized, causally related and reasonably necessary medical care and treatment, including the recommended arthroscopy surgery for the Claimant's left shoulder injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The general Admission of liability, dated February 27, 2018, remains in full force and effect.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of July 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a compensable injury on June 9, 2016?

- If Claimant suffered a compensable injury, does the ALJ have jurisdiction to consider medical benefits after June 15, 2016 or August 12, 2016, when Dr. Larimore declared Claimant at MMI?

- If Claimant suffered a compensable injury, was treatment he received from his personal providers reasonably necessary, authorized, and causally related to the injury?

- The parties stipulated to an average weekly wage of $1,215.

FINDINGS OF FACT

1. Claimant works for Employer as a field technician, installing and repairing cable TV and telephone service. On June 9, 2016 he was walking in a shady location on what appeared to be level ground, but there was a step he did not see. He unexpectedly stepped down and jarred his low back.

2. Claimant had a history of low back problems before the June 2016 incident. He had prior worker-related low back injuries, including an injury in September 2009. The last treatment note relating to that claims is from Dr. Neil Pitzer who saw Claimant at Concentra on June 9, 2010. Dr. Pitzer documented that Claimant had been given oral steroids which were "significantly beneficial," although he still had some numbness. He was working full duty with no apparent difficulty. His lumbar range of motion was "excellent," and he had only "mild" tenderness over the sciatic area. Claimant was "not terribly interested" in injections or medications and Dr. Pitzer concluded, "I think we can just watch this problem resolve." Claimant did not return for further care, and Concentra closed his file in August 2010. The ALJ infers from the lack of follow-up Claimant was doing well and did not perceive a need for additional treatment.

3. Claimant hurt his back again when he slipped and fell at home in May 2013. X-rays showed a nondisplaced coccyx fracture. He also suffered a lumbar strain with symptoms of left leg "sciatica." His PCP, Dr. DeMuth, referred Claimant for physical therapy, prescribed naproxen and hydrocodone-acetaminophen 5/325 (Norco or Vicodin), and instructed Claimant to "follow-up if no improvement."

4. Claimant did not see Dr. DeMuth again regarding his back until June 30, 2014, although it appears he continued to refill the medications periodically. Dr. DeMuth's June 30, 2014 report noted "the patient does have a long history of lower back pain . . . . He works as a technician for a communication company and spends many hours of his

day in tight spaces and on ladders doing installations. Associated with this he has ongoing complaints of lumbosacral pain doubt[1] radicular symptoms. In the last couple of months he has had worsening discomfort and has been taking hydrocodone twice-daily." On examination, Claimant had mild lumbosacral paraspinous tenderness and limited flexion. He had negative straight leg raising bilaterally with normal heel walk, normal toe walk, and intact reflexes. Dr. DeMuth refilled the Norco, referred for Claimant for physical therapy, and stressed the need for strength and conditioning to help his back pain.

5. In March 2015, Claimant reported ongoing pain in his low back, shoulders, and knees, which he attributed to his "work as a technician for a cable company he spends many hours on his knees and crawling on the floor." Physical exam revealed no significant abnormalities. Dr. DeMuth noted, "I have given him written prescriptions to last until July to take 1-2 hydrocodone daily and I told [him] that I will not increase the dose of this medication and intend to transition him to just nonsteroidal anti-inflammatory medications." On June 22, 2015, Dr. DeMuth documented "he has ongoing complaints of low back pain for which he has been taking hydrocodone once or twice daily. He continues to work in a physically demanding job." Claimant asked about weight loss medication to help with his low back and knee pain. On July 20, 2015, Dr. DeMuth documented "I have written him a prescription for hydrocodone to last for the next 2 months and I discussed the need for tapering and discontinuing his medication in the near future." Dr. DeMuth's records indicate the last prescription for hydrocodone was issued in September 2015. There was no further mention of low back pain in his primary care records before the June 9 incident.

6. There was indication of lower extremity symptoms related to Claimant's low back for at least three years before June 9, 2016.

7. When the incident occurred at work on June 9, 2016, Claimant felt a "pull" in his back but no severe pain and finished his shift. His pain steadily increased over the next few days. He saw his primary care physician, Dr. Patrick DeMuth, on June 13, 2016. He described 10/10 low back pain radiating down his right leg. He said the "symptoms started after missing a step the other day." He was taking OTC ibuprofen which was not helping. Dr. DeMuth further documented, "[h]e reports he missed a step 4 days ago and tweaked his back. He has a long history of back pain, with x-rays taken and 2013. He was taken off hydrocodone about a year ago and has been using Robaxin and ibuprofen which has been minimally efficacious. He would like a referral to pain management today." Physical examination showed Claimant to be "limping, pain with toe walk, unable to sit long, positive SLR." Dr. DeMuth prescribed a five-day supply of OxyContin and referred Claimant for "pain management."

8. Claimant saw Dr. Walter Larimore at Concentra Medical Centers, Employer's designated provider, on June 15, 2016. He described 8/10 pain in his back radiating into the right leg. Regarding the onset of symptoms, Dr. Larimore documented:

[1] The ALJ infers the word "doubt" is likely a transcription error, and was intended to read "without."

> [He] was at work on an installation of the customer's home on Thursday, 6/9/16. He was walking and did not see a step. He continued as if the surface was flat and upon stepping down did not fall but jerked his lower back. He felt a pull but no pain and was able to finish that shift and his regular work on Friday. However, Friday evening through the weekend he developed increasing low back pain with radiation down the right lateral leg to the anterior thigh to the knee. . . . His PCP at CSHP takes care of him for chronic recurrent LBP and he has a RX for 800 mg IBU that is helpful. He has been seen here in the past (he thinks 2-3 years ago) for a low back injury with right-sided sciatica for which he has had 2 or 3 ESI injections which helped relieve his sciatica completely. He went to his PCP on Monday and was told to continue[2] the IBU and OxyContin and referred to a physiatrist, but when his private insurance found out this started at work, they had him have his employer send him here for evaluation.

9. Dr. Larimore ordered x-rays which showed bone spurring at multiple lumbar levels. The report concludes with:

> We had a long discussion that his low back pain with radiation is most likely an exacerbation of pre-existing, non-work-related, degenerative disease. . . . I'll close his case with no IR or PWR so he can have this cared for by his PCP. The patient is to continue the meds and/or any restrictions recommended by his PCP. [ ] The patient is released from care as maximum medical improvement was reached for the patient's injur(ies).

10. Claimant returned to Dr. DeMuth on June 23, 2016, as instructed by Dr. Larimore. Dr. DeMuth's report states:

> Patient has a long history of lumbar spondylosis and recurrent low back pain. He had been taking narcotic analgesics on a fairly regular basis until last fall when he discontinued this medication. . . . Approximately one month ago the patient had a misstep while he was home visiting his family in Trinidad. Since then he has had low back pain with radiation of pain to both lower extremities. Two weeks ago while at work he had another misstep without an actual fall and now complains of ongoing low back pain with intermittent numbness in his right lower extremity which is worse with walking and with pain in his left posterior thigh. He complains of numbness and tingling in his right lower extremity radiating into his foot.

11. Dr. DeMuth prescribed a 12-day course of prednisone to treat the back pain and leg symptoms.

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[2] It appears Dr. Larimore misunderstood Claimant's history, because Dr. DeMuth did not advise Claimant to "continue" OxyContin on June 12. Claimant was first prescribed OxyContin on June 12, *after* the accident at work. In the past he had been prescribed hydrocodone, but that prescription was last renewed in September 2015.

12. At hearing, Claimant disputed that he had a misstep while at home in Trinidad. He credibly testified he had gone home to help his mother who had fallen and injured herself. He did not recall any incident in Trinidad, nor did he recall telling Dr. DeMuth about an incident in Trinidad.

13. Claimant developed vision problems after taking the prednisone for several days. His vision became blurry, he saw brief flashes of light, and developed "floaters." He called Dr. Demuth's office, and was told the steroids likely raised the pressure in his eyes. He discontinued the steroids, but the vision issues did not resolve.

14. Claimant continued to have severe low back pain, prompting him to seek treatment the Memorial Hospital emergency department on the morning of July 29, 2016. He saw Della Lane, a nurse practitioner, at the ER. He told Ms. Lane "he walked on uneven ground at work and somehow injured his back 1 month ago." Ms. Lane noted his neurological exam was normal with no worrisome deficits such as loss of bowel or bladder control. Claimant was working full duty which helped "keep his mind off the pain." Ms. Lane concluded "no work restrictions applied at this time. He is advised to schedule with occupational medicine first available for further evaluation of sx in light of injury occurring at work."

15. After leaving the ER, Claimant contacted Respondent's claims adjuster and requested permission to return to Concentra for further treatment. The adjuster obliged and he went to Concentra later than morning. Claimant saw Dr. Randall Jones instead of Dr. Larimore. Dr. Jones noted the case was "reopened per ins adj tallisa reed who is requesting the MRI of spine ? neck and lumbar." Claimant explained his PCP had prescribed steroids "which elevated pressure in left eye and [caused] 'floaters.'" Dr. Jones ordered cervical and lumbar MRIs, referred him to a pain specialist, and recommended three weeks of physical therapy.

16. Claimant saw Dr. Ripp, a pain specialist, on August 3, 2016. Dr. Ripp noted "he reinjured himself 06/09/2016 and has had difficulty obtaining treatment with pain management. He has had recent oral steroids which caused significant visual difficulty with floaters. His pain has persisted . . . ." Dr. Ripp diagnosed lumbar pain with intermittent left sciatica due to DDD and facet arthrosis clinically. He recommended medications and "consider injections; however he has had SE with steroids."

17. Claimant retuned to Concentra on August 12, 2016. This time he saw Dr. Larimore, who opined:

> I've reiterated to the patient . . . my opinion is that both the December 2015 and June 2016 injuries were clearly exacerbations of pre-existing, non-work-related, degenerative disease. Through the years he has had ongoing workup and therapy by his PCP. In the past he has had ESI of the L/S spine which helped. Given the chronicity of his symptoms, their exacerbation by work, but their not being caused by work, and his return to baseline after appropriate therapy, in my opinion, he is still at MMI for both of these claims

and should have his future care for these pre-existing, non-work-related, degenerative changes managed by his PCP.

18. Respondents authorized no further care after August 12, 2016. Apparently Claimant's health insurance carrier agreed to provide coverage, because he resumed evaluation and treatment in January 2017.

19. On January 23, 2017, Claimant saw Dr. Scott Smetana at Colorado Eye Associates, for evaluation of his vision problems. Dr. Smetana diagnosed a retinal tear and referred Claimant to the "first available retina doctor for further workup and/or treatment."

20. Claimant saw Dr. Ramin Sarrafizadeh, a retinal specialist, later that day. Dr. Sarrafizadeh confirmed Dr. Smetana's impressions and noted a horseshoe retinal tear in the left eye. He diagnosed a retinal tear, epiretinal membrane, and posterior vitreous detachment, and referred Claimant for cryotherapy. The ALJ finds the vision issues were likely related to the oral steroids Dr. DeMuth prescribed.

21. On January 30, 2017, Claimant had the MRIs that were originally ordered by Dr. Jones on July 29, 2016. The lumbar MRI showed multilevel degenerative changes, including L4-5 and L5-S1 stenosis "crowding" multiple nerve roots.

22. Claimant saw Dr. Timothy O'Brien on March 18, 2018 for an IME at Respondents' request.[3] Dr. O'Brien concluded Claimant sustained no work-related injury on June 9, 2016, and his symptoms merely represented a natural progression of his pre-existing underlying degenerative disc disease. Specifically, Dr. O'Brien opined:

> [Claimant] did not sustain a work-related injury and the history provided to Dr. DeMuth clearly establishes that fact. Even if a work-related injury did occur, in my opinion it did not, an end of healing was reached on or before August 12, 2016 when Dr. Larimore's evaluation demonstrates normal exam findings. [Claimant] does have an incurable and relentlessly progressive lumbosacral multilevel spondylosis. This is expected to result in episodic pain due to no injury. These episodes of pain wax and wane in their severity and duration. They are often associated with innocuous daily activities such as sweeping or prolonged sitting or "misstep." Just because the daily activities are associated with pain it does not mean that an injury has occurred or any new tissue breakage or yielding has occurred to causes pain. The arthritic condition in and of itself causes pain and that is what [Claimant] experienced on June 9, 2016.

23. Dr. O'Brien testified at a deposition on May 8, 2018 consistent with the opinions expressed in his IME report.

[3] Dr. O'Brien's IME report dated March 26, 2018 was not included in Respondents' Exhibit packet but was attached to the deposition transcript as Exhibit A.

24. Claimant was a credible witness.

25. Dr. Larimore's opinions that Claimant required no further injury-related treatment as of June 15, 2016 or August 12, 2016 are not persuasive.

26. Dr. O'Brien's opinion that Claimant sustained no injury on June 9, 2016 and that his symptoms are entirely the product of his pre-existing condition is not persuasive.

27. Claimant proved by a preponderance of the evidence he suffered a work-related low back injury on June 9, 2016. Although Claimant had pre-existing degenerative changes in his lumbar spine, the June 9, 2016 accident aggravated the pre-existing condition and proximately caused a need for treatment.

28. There is no persuasive evidence Claimant missed time from work or is entitled to TTD or other indemnity compensation because of this injury.

29. The treatment Claimant received from Concentra, Dr. DeMuth, Dr. Smetana, Dr. Sarrafizadeh, and Dr. Ripp after June 9, 2016 was reasonably necessary and causally related to his industrial injury.

30. Dr. DeMuth was authorized after June 15, 2016.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant does not have to present expert opinion evidence regarding causation and may rely on lay testimony, medical records, or any other admissible evidence to sustain his burden of proof. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). Each case is decided on its merits, and the facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201.

If an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-91-616-03 (September 9, 2016).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment*. Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved he suffered a work-related injury on June 9, 2016. Although Claimant had a history of low back problems, the symptoms were stable and easily managed with relatively low doses of pain medication before the June 9 accident. The narcotics had been stopped nearly nine months before the accident. After the accident, Claimant's pain was bad enough that his physician prescribed OxyContin, whereas Vicodin/Norco had previously been sufficient to manage his pain. Additionally, he was prescribed oral steroids, which caused him to develop vision problems. There is no persuasive evidence that Claimant's pre-existing low-level back pain substantially limited his ability to perform vocational or recreational activities, as evidenced by his ability to work without limitation in a physically demanding occupation. Claimant credibly testified he developed new pain radiating to his legs that he did not have immediately before the accident. Although Claimant had right leg radicular symptoms in 2009 and 2010, and a brief episode of left leg "sciatica" in May 2013, there is no documentation of ongoing leg symptoms for several years before his June 2016 accident. Since the work accident, his back symptoms were more persistent and severe, causing him to seek more aggressive treatment.

The most troublesome piece of evidence is Dr. DeMuth's June 23, 2016 note stating Claimant reported a different "misstep" occurring when he was in Trinidad two weeks before the work accident. If credited, that note would entirely undermine this claim because it would mean Claimant's testimony at hearing was false. But the ALJ found Claimant to be a credible witness who appeared forthright and sincere in his testimony. Claimant seemed genuinely perplexed as to how that information came to be in Dr. DeMuth's report. The ALJ does not believe Claimant's testimony was fabricated. Rather, the ALJ concludes Dr. DeMuth's report is likely erroneous, probably due to miscommunication or misunderstanding.

As for the opinion evidence, the ALJ is not persuaded by Dr. Larimore or Dr. O'Brien's opinions that Claimant's condition is strictly a manifestation of his pre-existing underlying degenerative spine condition. Dr. Larimore conceded the June 9 incident "exacerbated" Claimant's condition but failed to appreciate the legal standard regarding

compensable aggravations of pre-existing conditions. Furthermore, Dr. Larimore had no access to Claimant preinjury medical records and based his opinions on erroneous assumptions regarding the severity of Claimant's condition before the accident. Dr. Larimore was under the impression Claimant was regularly using OxyContin before the accident, when in fact, he previously only used low doses of Norco or Vicodin, and stopped those medications more than six months before the accident. The persuasive evidence shows Claimant had not returned to "baseline" by June 15 or August 12, 2016.

Nor is the ALJ persuaded by Dr. O'Brien's opinions that Claimant's symptoms arose spontaneously and coincidently due to natural "waxing and waning" of his underlying condition. Rather, the persuasive evidence shows the June 9, 2016 accident triggered Claimant's increased symptoms. As found, the June 9 accident aggravated Claimant's pre-existing condition, causing him to seek medical treatment he would not have otherwise required but for the accident. Thus, he sustained a compensable injury on June 9, 2016.

B. Jurisdiction to consider medical benefits after June 15, 2016 or August 12, 2016.

Before considering liability for treatment Claimant received from his personal physicians after June 15, 2016, the ALJ must first resolve a jurisdictional issue. Dr. Larimore placed Claimant at "MMI" with no impairment on June 15, 2016, and reaffirmed that opinion on August 12, 2016. As a general rule, a declaration of MMI by an ATP precludes an ALJ from awarding further medical benefits intended to "cure" a claimant's condition absent a DIME. *E.g., Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995); *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (January 27, 2006); *Eby v. Wal-Mart Stores Inc*., W.C. No. 4-350-176 (February 14, 2001) *Cass v. Mesa County Valley School District*, W.C. No. 4-69-69 (August 26, 2005).

But in *Harman-Bergstedt v. Loofbourrow*, 320 P.3d 327 (Colo. 2014), the Supreme Court held that a determination of MMI has no legal significance if it occurs before the claimant suffers a compensable *disability* because of the injury. The court explained:

> "Maximum medical improvement," as a statutory term of art, therefore has no applicability or significance for injuries insufficiently serious to entail disability indemnity compensation in the first place. . . . The statutory consequences of a finding of "maximum medical improvement" can only apply to injuries as to which disability indemnity is payable.

Loofbourrow used the term "compensable" strictly in reference to claims in which disability indemnity benefits are payable. In practice, the parties in the workers' compensation system (including ALJs, the ICAO, and the courts) frequently use the term "compensable" more broadly, to include cases or issues involving liability for medical benefits only.[4] *E.g., Gianzero v. Wal-Mart Stores*, W.C. No. 4-669-749 (July 14, 2009) (recognizing that the courts have "used the terms compensability and causation somewhat interchangeably"); *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App.

[4] This ALJ has used the term "compensable" to refer to Claimant's injury, which as this time is a "medical only, no lost time" claim.

2003) (employer retains the right to contest "compensability," reasonableness, or necessity of medical benefits after MMI); *Rodriguez v. Pueblo County*, W.C. No. 4-911-673-01 (January 21, 2016); *Reekstin-Martinez v. City and County of Denver*, WC. No. 4-832-902-03 & 4-891-828 (December 17, 2015); *Montoya v. Kaiser-Hill Company, LLC*, W.C. No. 4-633-835 (April 26, 2006); *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

Common parlance notwithstanding, a line of cases recognizes a distinction between "compensation" and medical benefits, and it was in that sense that *Loofbourrow* used the term "compensable." *E.g., Royal Globe Insurance Co. v. Collins*, 723 P.2d 731 (Colo. 1986); *Wild West Radio Inc. v. Industrial Claim Appeals Office*, 886 P.2d 304 (Colo. App. 1984); *Support Inc. v. Industrial Claim Appeals Office*, 968 P.2d 174 (Colo. App. 1998); *Racon Construction v. Industrial Claim Appeals Office*, 775 P.2d 61 (Colo. App. 1989); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). *Loofbourrow* is clear that MMI only deprives the ALJ of jurisdiction where the claimant has become entitled to disability indemnity benefits before the declaration of MMI.

Relying on *Loofbourrow*, the ICAO has repeatedly held a DIME is not a prerequisite to adjudicating medical benefits in a non-*indemnity*-compensable claim. *See, e.g., Trujillo v. Elwood Staffing*, W.C. No. 4-957-118-02 (June 22, 2017) (ATP and DIME findings of MMI did not preclude the claimant from requesting further medical benefits since he had not missed more than three days of work or suffered permanent disability); *Kazazian v. Vail Resorts*, W.C. No. 4-915-969-03 (April 24, 2017) (determination of MMI was of no consequence in claim where no disability indemnity was payable); *Cross v. Genuine Parts Co*., W.C. No. 4-961-489-01 n.1 (September 20, 2016) ("claims that do not feature liability for temporary or permanent indemnity benefits are not affected by the concept of MMI is that finding is only germane to the issue of indemnity benefits."); *Thibault v. Ronnie's Automotive Services*, W.C. No. 4-970-099-01 (August 2, 2016) ("FAL premised on a finding of MMI, in which found that no disability indemnity was payable, does not preclude the claimant from requesting further medical benefits."); *Sanchez v. Denver Water*, W.C. No. 4-978-703-01 (June 10, 2016) ("Because the claimant's injury was a non-lost time claim when MMI was determined, the question of whether the claimant's alleged back injury was a compensable component of the [ ] injury was a question of fact for the ALJ and not a Division Independent Medical Examiner (DIME)").

Until Claimant's injury becomes "compensable" in the *Loofbourrow* sense of entitlement to indemnity benefits, the concept of MMI is inapplicable and the ALJ retains jurisdiction to decide all issues involving medical benefits. When Dr. Larimore issued his MMI opinions on June 15 and August 12, 2016, Claimant had not yet suffered a compensable disability. Claimant continued working despite his symptoms, and there is no persuasive evidence of lost time to entitle him to disability indemnity compensation. Although the ALJ has found Claimant's claim is "compensable" in the sense that Respondents are liable for medical benefits, the claim was not "compensable" by June 15 or August 12, 2016 as that term is defined in *Loofbourrow*. Dr. Larimore's declarations of MMI are of no special significance, but are merely additional opinions to consider when evaluating the totality of evidence. Therefore, Dr. Larrimore's findings of MMI do not

preclude the ALJ from considering Claimant's entitlement to medical treatment after that date.

C. Reasonably necessary medical benefits after June 15, 2016

The mere fact that a claimant suffered a compensable injury does not require an ALJ to find that all subsequent treatment was caused by the industrial injury. The compensable consequences of an industrial injury are only those which flow proximately and naturally from the injury. Therefore, even where a claimant suffers a compensable injury, an ALJ must deny specific medical treatment that was not proximately caused by the injury. The claimant must prove a causal relationship between the industrial injury and the medical condition for which he seeks benefits. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, the Claimant proved the treatment he received from Dr. DeMuth, Dr. Smetana, Dr. Sarrafizadeh, and Dr. Ripp after June 9, 2016, was reasonably necessary and causally related to his industrial injury. This includes treatment for eye problems, including a retinal tear and posterior vitreous detachment proximately caused by prednisone prescribed to treat his work-related injury.

D. Dr. DeMuth was authorized after June 15, 2016

Besides proving that medical treatment was reasonable, necessary, and causally related to the injury, a claimant must prove the treatment was "authorized." "Authorization" refers to a physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8-43-404(5) gives the employer the right to select the claimant's treating physician "in the first instance." Once the respondents have exercised their right of selection, the claimant may not change physicians without permission from the insurer or an ALJ. *Giannetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). A physician who treats a claimant on referral from an ATP in the "normal progression of authorized treatment" becomes authorized. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

In *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008), the Court of Appeals held that if an ATP determines that a claimant's condition is not work-related and instructs the claimant to pursue treatment with personal physicians, the treatment will be deemed authorized if it is later determined the condition was compensable. The court held that "the risk of mistake by an ATP in concluding that an injury is noncompensable lies with the employer" rather than the claimant. Dr. Larimore released Claimant on June 15, 2016 because he believed Claimant had no work-related condition. He thought Claimant still required care and advised him follow-up with his primary care provider. Thus, Dr. DeMuth was authorized as of June 15, 2016.

E. Respondents are liable for all injury-related treatment Claimant received after June 15, 2016

Section 8-42-101(6)(a) provides:

> If an employer or, if insured, the employer' insurance carrier . . . fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays or related medical treatment, for the cost of reasonable and necessary treatment that was provided.

Claimant's case is the type of scenario that § 8-42-101(6)(a) was intended to address. In light of the ALJ's determination that Claimant's injury is compensable, Respondents are liable for injury-related all medical care he has received.

ORDER

It is therefore ordered that:

1. Claimant's claim in W.C. No. 5-048-517 is compensable.

2. Respondents shall provide all reasonably necessary medical treatment from authorized providers to cure and relieve the effects of Claimant's June 9, 2016 injury.

3. Respondent shall cover all injury-related medical treatment Claimant received to date, including, but not limited to, charges from Concentra, Dr. DeMuth, Dr. Smetana, Dr. Sarrafizadeh, Dr. Ripp, Memorial Hospital, and Colorado Springs Imaging.

4. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 5, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Claimant has established by a preponderance of the evidence that the cervical surgeries requested by J. Paul Elliott, M.D. in the form of a C5-C6, C6-C7 anterior cervical discectomy and fusion (ACDF) or anterior cervical fusion and disc replacement are reasonable, necessary and causally related to her October 19, 2016 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked as an underground utility locator for Employer. On October 19, 2016 Claimant was bent over with her head down working on her computer. A tractor on the site dislodged two sections of fence. A fence panel struck Claimant on the top of her head, knocked her to the ground and landed on top of her. Claimant completed her shift but on the following day suffered neck stiffness, upper back pain and arm pain.

2. Claimant initially received medical treatment through Concentra Medical Centers. Claimant reported pain in her head, neck and both shoulders. Physicians ordered a cervical MRI.

3. On November 30, 2016 Claimant visited John Aschberger, M.D. for an examination. Dr. Aschberger noted that the cervical MRI demonstrated severe foraminal stenosis at C6-C7. However, a physical examination did not reveal any spinal cord signal abnormalities.

4. On December 21, 2016 Claimant returned to Dr. Aschberger for an examination. Claimant continued to report pain across her upper back that radiated into her extremities. She also noted pain in her thoracic and lumbar regions. Dr. Aschberger ordered an EMG to ascertain the origin of Claimant's symptoms.

5. On January 9, 2017 Claimant underwent an EMG/NCS. The diagnostic testing revealed bilateral Carpal Tunnel Syndrome (CTS), no cervical radiculopathy and reduced ulnar sensory amplitude on the left. Dr. Aschberger thus diagnosed a cervical strain, unrelated bilateral CTS and upper back myofascial pain. He subsequently recommended a surgical consultation and referred Claimant to B. Andrew Castro, M.D.

6. On February 17, 2017 Claimant underwent a surgical evaluation with Dr. Castro. Claimant reported that she periodically experiences numbness and tingling in her arms, neck and shoulders. After reviewing the November 14, 2017 MRI and x-ray images Dr. Castro determined Claimant suffers multilevel degenerative changes from C4 through C7. He noted that the most significant findings were located at the C6-C7 level and

included disc bulging that contributed to central canal stenosis. Dr. Castro also remarked that there was no cord signal abnormality and Claimant did not exhibit symptoms consistent with a myelopathy. He thus did not recommend surgical intervention but referred Claimant for epidural steroid injections.

7. On February 21, 2017 Claimant visited John Burris, M.D. for an examination. Claimant reported diffuse pain symptoms in her neck, down the back of both upper extremities, in the middle and lower back, and down the back of both legs. After conducting a physical examination Dr. Burris concluded that Claimant's diffuse symptoms did not follow a neurologic, anatomic pattern.

8. In February 2017 Claimant's care was transferred to Authorized Treating Physician (ATP) Kristin D. Mason, M.D. In Dr. Mason's initial evaluation and several follow-up examinations she did not find any signs of myelopathy. On February 17, 2017 Dr. Mason specifically diagnosed Claimant with a cervical disc protrusion impinging on the foramina at C6-C7. She noted no signs of myelopathy but Claimant exhibited some radiculopathy.

9. On March 3, 2017 Claimant underwent a second MRI. The MRI reflected decreased disc height, bilateral facet hypertrophy, posterior disc osteophyte complex, central stenosis and bilateral foraminal stenosis at C6-C7.

10. On July 7, 2017 Claimant visited Gary Ghiselli, M.D. for a spinal evaluation. Claimant reported neck pain that radiated into her upper back and shoulders since her October 19, 2016 industrial accident. Imaging studies of Claimant's cervical spine revealed degenerative changes including central and foraminal stenosis from C4-C7. Dr. Ghiselli determined that Claimant did not exhibit any "true weakness and is not myelopathic." He diagnosed Claimant with cervical spondylosis with radiculopathy, disc degeneration and spinal stenosis. Dr. Ghiselli emphasized that Claimant should "maximize all non-operative treatment" and avoid surgery. He determined that Claimant's "main problem" was neck pain.

11. Claimant subsequently received conservative treatment that included physical therapy. An August 11, 2017 MRI revealed disc space narrowing and osteophytes at C6-C7.

12. On October 2, 2017 Claimant visited J. Paul Elliott, M.D. for a surgical consultation. Dr. Elliott remarked that Claimant's symptoms were progressively worsening and diagnosed her with cervical spinal stenosis. He commented that Claimant had not responded to conservative care and was exhibiting signs of myelopathy. Dr. Elliott also remarked that Claimant exhibited axial neck pain and bilateral upper extremity radiculopathy that he attributed to C6-C7 and C5-C6 stenosis. He recommended surgical intervention in the form of an anterior C5-C6 and C6-C7 cervical discectomy and fusion (ACDF).

13. On October 26, 2017 Claimant underwent an MRI. The imaging reflected severe canal stenosis at C6-C7 with mild cord compression and mild cord signal

abnormality. The study also revealed severe bilateral foraminal stenosis at C6-C7 that could result in nerve root impingement.

14. On January 3, 2018 Claimant underwent an independent medical examination with Brian Reiss, M.D. Dr. Reiss reviewed Claimant's medical records and conducted a physical examination. He issued his report on February 20, 2018. He determined that Claimant had spinal stenosis at the C6-C7 level that he attributed to a degenerative process instead of an acute injury. Dr. Reiss detailed that Claimant's cervical stenosis was probably not caused, aggravated or accelerated by her October 19, 2016 industrial accident. He explained that cervical stenosis is not likely the cause of neck pain and the proposed cervical fusion did not constitute reasonable treatment for axial neck pain. Dr. Reiss summarized that Claimant's work accident simply caused a cervical strain that led to myofascial pain.

15. On March 13, 2018 Claimant returned to Dr. Mason for an evaluation. Dr. Mason reviewed Dr. Reiss' independent medical examination report. She remarked that Dr. Reiss determined that cervical stenosis was not the cause of Claimant's problems. However, she did not "really know how to respond to it because it makes no sense to me whatsoever." Dr. Mason diagnosed Claimant with C6-C7 stenosis with gradually progressing myelopathy. She recommended continued physical therapy and medications.

16. On April 23, 2018 Dr. Elliott issued a follow-up report. He recommended surgery in the form of a C5-C6, C6-C7 anterior discectomy and disc replacement.

17. On April 25, 2018 Dr. Castro issued a letter addressing the proposed surgery. After reviewing additional medical records, he agreed with Dr. Reiss that the proposed surgery "would not be helpful in treating axial neck pain."

18. Dr. Reiss testified at the hearing in this matter. He maintained that the surgeries proposed by Dr. Elliott were not causally related to Claimant's October 19, 2016 industrial accident. In reviewing Claimant's initial medical records Dr. Reiss noted that when Claimant was struck by a section of fence she suffered a myofascial neck and upper back injury. The accident did not aggravate, accelerate or worsen her pre-existing spinal stenosis. Moreover, Claimant did not suffer myelopathy. In fact, Claimant did not develop symptoms consistent with myelopathy for at least one tear after her industrial accident. If Claimant had suffered acute or sudden damage to the spinal cord she would have immediately reported symptoms consistent with myelopathy. The late development of the symptoms suggested that Claimant's current condition is instead related to the natural progression of her pre-existing spinal stenosis.

19. The medical records reveal that numerous physicians had not identified symptoms of myelopathy prior to Dr. Elliott's report of October 2, 2017. The temporal proximity of the development of symptoms consistent with myelopathy suggests a tenuous connection between Claimant's October 19, 2016 industrial injury and current condition. Dr. Reiss summarized that the surgical indications for either surgery proposed by Dr. Elliott involve the presence of myelopathy. However, because the myelopathy was

not caused by Claimant's industrial accident, the proposed surgeries are not causally related to the October 19, 2016 work accident. Instead, the recommended surgeries constitute prophylactic procedures designed to prevent future deterioration of Claimant's pre-existing condition.

20. Claimant testified at the hearing in this matter. She explained that she suffers from neck pain, headaches and arm numbness. She remarked that her symptoms have gradually worsened since her industrial accident. Claimant noted that she did not suffer any neck, shoulder, upper back or radicular symptoms prior to her date of injury.

21. Claimant has failed to establish that it is more probably true than not that the cervical surgeries requested by Dr. Elliott in the form of a C5-C6, C6-C7 ACDF or an anterior cervical fusion and disc replacement are causally related to her October 19, 2016 admitted industrial injury. Initially, on October 19, 2016 Claimant suffered an admitted industrial injury when a fence panel struck her on the top of her head. Claimant completed her shift but on the following day suffered neck stiffness, upper back pain and arm pain. After diagnostic testing and conservative treatment Dr. Elliott recommended surgical intervention in the form of a C5-C6, C6-C7 ACDF procedure. Dr. Elliott subsequently recommended surgery in the form of a C5-C6, C6-C7 anterior discectomy and disc replacement. ATP Dr. Mason agreed with Dr. Elliott that Claimant was suffering from gradually progressing myelopathy.

22. Despite Dr. Elliott's surgical requests, the bulk of the persuasive medical evidence reveals that Claimant's current symptoms and necessity for surgery are not causally related to her October 19, 2016 industrial accident. Instead, Claimant's current condition is likely related to the natural progression of her pre-existing spinal stenosis. As noted by Dr. Castro, imaging studies reveal that Claimant suffers from multiple degenerative changes in her cervical spine from the C4 through C7 levels. Dr. Castro noted that the most significant findings were located at the C6-C7 level and included disc bulging that contributed to central canal stenosis. He also remarked that there was no cord signal abnormality and Claimant did not exhibit symptoms consistent with a myelopathy. Moreover, Dr. Ghiselli agreed that Imaging studies of Claimant's cervical spine revealed degenerative changes including central and foraminal stenosis from C4-C7. Dr. Ghiselli determined that Claimant did not exhibit any "true weakness and is not myelopathic." He diagnosed Claimant with cervical spondylosis with radiculopathy, disc degeneration and spinal stenosis.

23. After conducting an independent medical examination Dr. Reiss determined that Claimant had spinal stenosis at the C6-C7 level that he attributed to a degenerative process instead of an acute injury. Dr. Reiss detailed that Claimant's cervical stenosis was not caused, aggravated or accelerated by her October 19, 2016 industrial accident. He explained that cervical stenosis is not likely the cause of neck pain and the proposed cervical fusion did not constitute reasonable treatment for axial neck pain. Dr. Castro agreed that the proposed surgery "would not be helpful in treating axial neck pain." Moreover, Claimant did not develop symptoms consistent with a myelopathy for at least one tear after her industrial accident. Dr. Reiss reasoned that if Claimant had suffered acute or sudden damage to the spinal cord she would have immediately reported

symptoms consistent with myelopathy. The late development of the symptoms suggested that Claimant's current condition is instead related to the natural progression of her pre-existing spinal stenosis. Dr. Reiss explained that the temporal proximity of the development of symptoms consistent with myelopathy suggests a tenuous connection between Claimant's October 19, 2016 industrial injury and current condition. Based on the diagnostic studies, medical records and persuasive opinions of Drs. Castro, Ghiselli and Reiss, Claimant has failed to demonstrate that the surgeries proposed by Dr. Elliott are causally related to her October 19, 2016 work injury. Accordingly, Claimant's surgical requests are denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has failed to establish by a preponderance of the evidence that the cervical surgeries requested by Dr. Elliott in the form of a C5-C6, C6-C7 ACDF or an anterior cervical fusion and disc replacement are causally related to her October 19, 2016 admitted industrial injury. Initially, on October 19, 2016 Claimant suffered an admitted industrial injury when a fence panel struck her on the top of her head. Claimant completed her shift but on the following day suffered neck stiffness, upper back pain and arm pain. After diagnostic testing and conservative treatment Dr. Elliott recommended surgical intervention in the form of a C5-C6, C6-C7 ACDF procedure. Dr. Elliott subsequently recommended surgery in the form of a C5-C6, C6-C7 anterior discectomy and disc replacement. ATP Dr. Mason agreed with Dr. Elliott that Claimant was suffering from gradually progressing myelopathy.

6. As found, Despite Dr. Elliott's surgical requests, the bulk of the persuasive medical evidence reveals that Claimant's current symptoms and necessity for surgery are not causally related to her October 19, 2016 industrial accident. Instead, Claimant's current condition is likely related to the natural progression of her pre-existing spinal stenosis. As noted by Dr. Castro, imaging studies reveal that Claimant suffers from multiple degenerative changes in her cervical spine from the C4 through C7 levels. Dr. Castro noted that the most significant findings were located at the C6-C7 level and included disc bulging that contributed to central canal stenosis. He also remarked that there was no cord signal abnormality and Claimant did not exhibit symptoms consistent with a myelopathy. Moreover, Dr. Ghiselli agreed that Imaging studies of Claimant's cervical spine revealed degenerative changes including central and foraminal stenosis from C4-C7. Dr. Ghiselli determined that Claimant did not exhibit any "true weakness and is not myelopathic." He diagnosed Claimant with cervical spondylosis with radiculopathy, disc degeneration and spinal stenosis.

7. As found, after conducting an independent medical examination Dr. Reiss determined that Claimant had spinal stenosis at the C6-C7 level that he attributed to a degenerative process instead of an acute injury. Dr. Reiss detailed that Claimant's cervical stenosis was not caused, aggravated or accelerated by her October 19, 2016 industrial accident. He explained that cervical stenosis is not likely the cause of neck pain and the proposed cervical fusion did not constitute reasonable treatment for axial neck pain. Dr. Castro agreed that the proposed surgery "would not be helpful in treating axial neck pain." Moreover, Claimant did not develop symptoms consistent with a myelopathy for at least one tear after her industrial accident. Dr. Reiss reasoned that if Claimant had suffered acute or sudden damage to the spinal cord she would have immediately reported symptoms consistent with myelopathy. The late development of the symptoms suggested that Claimant's current condition is instead related to the natural progression of her pre-existing spinal stenosis. Dr. Reiss explained that the temporal proximity of the development of symptoms consistent with myelopathy suggests a tenuous connection between Claimant's October 19, 2016 industrial injury and current condition. Based on the diagnostic studies, medical records and persuasive opinions of Drs. Castro, Ghiselli and Reiss, Claimant has failed to demonstrate that the surgeries proposed by Dr. Elliott are causally related to her October 19, 2016 work injury. Accordingly, Claimant's surgical requests are denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's requests for the cervical surgeries recommended by Dr. Elliott are denied and dismissed.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 5, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

- Did Respondents prove by a preponderance of the evidence Claimant suffered no compensable injury on June 11, 2017, entitling them to withdraw their admissions of liability?

- If the claim remains compensable, Claimant requests a general award of reasonably necessary medical benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a hydraulic fracturing ("fracking") operator assistant. Her claim arises out of an incident on June 11, 2017 when she was exposed to vapors from BE-7, a chemical biocide used in the fracking process.

2. Before being hired in May 2017, Claimant completed a medical questionnaire, underwent a physical examination, and participated in functional capacity testing. In her pre-employment questionnaire, Claimant denied any history of pulmonary problems including shortness of breath, coughing, wheezing, or chest pain. A physical exam on April 27, 2017 found her lungs, chest, and cardiovascular system to be "normal." She denied any "lung disease" or "chronic (long-term) cough, shortness of breath, or other breathing problems." Claimant was issued a two-year CDL medical certificate with no restrictions. An FCE on May 4, 2017 demonstrated the ability to work at the heavy physical demand level. Although her performance during the FCE was somewhat limited by "general deconditioning," there is no persuasive indication of any pulmonary issues.

3. The ALJ adopts the following findings from Employer's post-incident investigation: Claimant went to open the prime up line at approximately 8:30 AM; Claimant was wearing a half-face respirator when she bent over to open the prime valve; she did not remove her respirator but may have lost the seal when bending over; Claimant waved her hand in front of her face to indicate a smell in the air; her supervisor came up the missile and smelled a chemical; the source of the smell was a leak of a chemical called BE-7; a bucket was being used to hold a pump and BE-7 was flowing into the bucket; approximately 2 gallons of BE-7 had spilled over; the wind was moving in the direction toward where Claimant smelled the BE-7.

4. Claimant felt ill within 1-2 hours after inhaling the BE-7 vapor and went to the shower trailer to rest. At the time, she thought she might be suffering from heat exhaustion. She eventually resumed work and finished her shift despite feeling poorly. That evening, Claimant's supervisor, Joshua Spendlove, sent her a text message stating, "Matt left me a message that you are still not feeling better. Do not worry about it one bit if you are not well enough to come in tomorrow. . . . I'm concerned inhaling that strong

chemical smell may have caused some of what you're feeling." Claimant rested the next day because she did not feel well enough to work.

5. On June 14, 2017, Claimant texted Mr. Spendlove stated, "I hate to bother you on your day off but what was that chemical I inhaled … I'm still having problems with my chest and stomach." Mr. Spendlove later replied that "the chemical is called biocide, it kills microorganisms in the water."

6. Later that night, Claimant went to the Memorial Hospital emergency room for ongoing symptoms including chest pain and difficulty breathing. The triage note indicates, "Pt states she works for oil fracking and inhaled chemicals at work on Sunday causing nausea and chest pain, worse tonight." The medical history portion of the report states, "The patient is a 46 .y.o. female who presents for evaluation of difficulty breathing with chest discomfort. She works as an oil fracture [sic] and was at work on Sunday. She walked by some pipes that had some gas blowing out of them. She accidentally inhaled it. About a half hour later she got sick and ever since then she has had some difficulty breathing. Her chest feels tight. . . . It is not coming and going; it is constant." Claimant also reported ongoing nausea and abdominal pain. The ER physician opined, "Diagnostic considerations included . . . pneumonitis secondary to chemical exposure, reactive airway disease, viral syndrome, [and] upper respiratory infection . . . ." She was given prednisone and an albuterol inhaler.

7. Claimant returned to the emergency department on June 16, 2017. She reported she "was feeling much better after an albuterol nebulizer here in the emergency department on Wednesday. Patient states that over the last 24 hours, however, patient has been experiencing increased shortness of breath." The report noted, "She has had these symptoms ever since she inhaled a chemical called Biocide while at a job site." Testing was negative for any acute coronary issues or urinary tract infection. The provider opined "[it] is very possible the patient is having some continued reaction to pesticide. I did personally review MSDS regarding the pesticide called BIOCIDE and inhalation of the substance can cause lung irritation . . . ." She was discharged with diagnoses of acute chemical pneumonitis and acute dyspnea.

8. Claimant saw Dr. Julie Parsons, Employer's designated physician, on June 19, 2017. Dr. Parsons noted a history of "inhaled chemical exposure Biocide." She reviewed the ER records, the MSDS sheet and "discussed [the matter] with Lonie" (presumably Lonnie Farris of Employer). Dr. Parsons diagnosed "chemical pneumonitis" and "injury due to chemical exposure," and opined the objective findings were consistent with a work-related mechanism of injury. Dr. Parsons prescribed prednisone and recommended Claimant continue using the albuterol inhaler.

9. On June 22, Dr. Parsons referred Claimant to a pulmonologist, Dr. Marc Voelkel.

10. Claimant went back to the emergency room on July 3, 2017 complaining of "a dry cough since the chemical exposure. She has posterior lung pain, and right anterior

lung pain. She has pain with breathing, she does not have increased work of breathing right now." The discharge diagnoses were "pneumonitis," and "inhalation injury."

11. Respondents filed General Admissions of Liability on July 11 and July 13, 2017. The first GAL was for "medical only" and the second GAL admitted for TPD benefits.

12. Claimant had her first appointment with Dr. Voelkel on July 13, 2017. She described "severe cough, bronchospasm and pain, dyspnea, worse with exertion, and chest tightness." She reported improvement since starting the inhaler but was still having difficulty tolerating certain activities. He reviewed the MSDS sheet for BE-7 and noted it contains "sodium hypochlorite and sodium hydroxide. . . . [T]he substance seems to be an aqueous based skin irritant/corrosive (and seems to probably have alkali burn character)." Dr. Voelkel obtained spirometry, which was "improved" compared to the initial testing.[1] He diagnosed "inhalation injury" and "restrictive lung disease." He ordered full pulmonary function testing and a high-resolution chest CT.

13. Claimant returned to Dr. Voelkel on August 10, 2017 to review the test results. Dr. Voelkel diagnosed reactive airways dysfunction syndrome ("RADS"), and opined "patient has an inhalational injury with chlorate/chloride containing gas. Likely significant RADS although improving on PFTs and spirometry, DLCO is normal as are lung volumes. Cough and dyspnea are the main problems at this point, and we will need to clean up her inhaler regimen, and find appropriate ways to deal with cough." He also recommended nocturnal oximetry "to verify that she gets enough oxygen at night to treat her inhalational injury, lung damage and oxygen needs."

14. Dr. Pia Schalin took over as Claimant's primary ATP on August 29, 2017. She noted Claimant "continues feeling very unwell, has difficulty functioning, feels exhausted, SOB, with burning chest pain & HA." On physical exam, Dr. Schalin noted "LUNGS: have some scattered hint of wheezes & dry crackles in lower posterior lung fields. Air movement is fair. Has no visible retractions. No definite dullness. Breath sound has a slightly raspy quality diffusely, more in lower lobes." Dr. Schalin diagnosed "toxic inhalation with chest pain, RDS, COPD & headaches."

15. Dr. Lawrence Lesnak performed an IME for Respondents on October 3, 2017. Dr. Lesnak noted Claimant only had "possible brief (several seconds) exposure" to BE-7 and did not develop symptoms until approximately 60-90 minutes later. He opined any acute reaction would have occurred "within several seconds" and "would have been clearly visible on chest x-ray and clinical exam." He opined any condition related to noxious gas exposure would show "evidence of obstructive pathology rather than restrictive pathology." He thought the progression of symptoms over three days before going to the ER was "nonanatomic" and her condition was most likely the result of anxiety. Dr. Lesnak concluded Claimant's symptoms were "completely unrelated to the occupational incident that allegedly occurred on 06/11/17."

[1] Multiple providers, including Dr. Voelkel, Dr. Schalin, and Dr. Schwartz, have questioned the quality of the initial spirometry results. Consequently, Claimant's treating physicians have placed greater emphasis on subsequent testing and clinical findings in reaching their conclusions.

16. On October 16, Dr. Voelkel reviewed the nocturnal oximetry results and concluded, “Patient likely has nocturnal hypoxemia as a result of other airways disease. She was asymptomatic prior to her inhalation exposure, and has since then been having morning headaches, tiredness, and afternoon somnolence. She may have underlying sleep apnea, although asymptomatic prior, this is likely if at all exacerbated by her lung disease.” He recommended Claimant use supplemental oxygen at night.

17. Dr. Jeffrey Schwartz, a pulmonologist, performed an IME for Respondents on October 30, 2017. Dr. Schwartz interpreted Claimant’s history as manifesting no respiratory complaints “until the third day after her exposure,” which he believed was inconsistent with an exposure-related diagnosis. He disagreed with Dr. Voelkel’s interpretation of the test results and opined “there has been no evidence [Claimant] suffered an acute respiratory illness as a result of her possible work-related exposure on 06/11/2017 and no evidence she has any ongoing respiratory disorder as a result of this possible exposure.” Dr. Schwartz opined Claimant does not have asthma, so by definition cannot have irritant-induced asthma. He concluded Claimant’s symptoms were more likely related to cardiovascular deconditioning, “psychogenic dyspnea,” and anxiety.

18. Dr. Schalin wrote to Respondents’ counsel on November 29, 2017 to address Dr. Schwartz’ opinions. She opined, “I agree that [Claimant’s] inhalation exposure was unlikely in the ‘very high concentration,’ however both the sodium hypochlorite & sodium hydroxide in BE-7 gas are strong alkaline compounds, with pH 11 & 13 respectively, both caustic & being capable of causing lung damage, and alkaline compounds continues [sic] to be corrosive over time, as opposed to an acid . . . .” Dr. Schalin opined Claimant has at least “lower-level” RADS, and occupational chemical bronchitis.

19. Dr. Schalin has authored several reports and clinic notes outlining her opinion that Claimant’s current pulmonary problems are causally related to the June 11, 2017 BE-7 exposure.

20. On December 30, 2017, Dr. Schalin ordered a methacholine challenge test and recommended Claimant go to National Jewish for a cardiopulmonary stress test, if deemed necessary.

21. Claimant saw Dr. Silpa Krefft, a pulmonologist at National Jewish, on January 9, 2018. Dr. Krefft met with Claimant for approximately 90 minutes to obtain details regarding her clinical history, occupational exposure, and symptoms. Dr. Krefft ordered pulmonary function testing, which showed no significant bronchodilator response but some abnormalities of flow volume loop and FEV1/FVC ratio. Dr. Krefft opined:

> Based on the information that is available to me there is certainly concern for [Claimant] having occupational irritant-induced asthma as evidenced by some of the airflow limitation that is notable on her flow volume loop and her FEV1/FVC ratio that is borderline at 71.9%, with lower limits of normal being 70.9%. In order to obtain diagnostic clarity it would be helpful to refer her for a methacholine challenge and laryngoscopy to both look for asthma

as well as vocal cord dysfunction that may also be contributing to her clinical symptoms.

22. Claimant underwent a methacholine challenge test on January 10, 2018 at Dr. Voelkel's office. She had a second methacholine challenge test and a laryngoscopy at National Jewish on January 11, 2018.

23. Dr. Schalin formally referred Claimant to Dr. Krefft for evaluation and treatment on January 16, 2018.

24. Claimant returned to Dr. Krefft on January 17 to review the test results. Dr. Krefft opined:

> [The] recent methacholine challenge demonstrated airways hyperresponsiveness, and her laryngoscopy did not demonstrate any vocal cord dysfunction. Based on my review of her medical history, account of the workplace exposure, and review of diagnostic data, it is my reasoned medical opinion that [Claimant's] clinical presentation is due to a work-related irritant-induced asthma.

25. On February 9, 2018, Dr. Voelkel noted the methacholine challenge test performed at his office was also positive for "airways hyper-reactivity." He opined the etiology was "unclear," although "presumably this was secondary to inhalational injury." He further stated:

> I continue to be assured that: A) patient reports being asymptomatic prior. B) She had manifest airways symptoms after the event documented 3 days after . . . and was so symptomatic she was treated with inhalers and lidocaine nebs. C) She presented to my clinic still wheezing, coughing, miserable, with chest tightness and pain, as well as borderline normal spirometry. D) She was treated for RADS with Symbicort + Flovent, and has had interval improvement, with time, rehab, and medical therapy. E) Methacholine was positive. F) She had nocturnal hypoxemia (new). This is likely from her injury.

26. Dr. Lesnak and Dr. Krefft testified via pre-hearing depositions. Dr. Schwartz and Dr. Schalin testified at the May 1 hearing. Each physician testified to opinions and conclusions consistent with their respective reports.

27. The opinions of Claimant's treating physicians are more persuasive than those of Respondents' IMEs. The ALJ was particularly persuaded by Dr. Krefft's opinions regarding diagnosis and causation as discussed in her deposition testimony.

28. Respondents failed to prove they should be permitted to withdraw their admissions of liability. The persuasive evidence shows the BE-7 exposure more likely than not caused Claimant to develop irritant-induced asthma. She was exposed to BE-7 vapors, at least briefly, and developed symptoms including chest pain and difficulty breathing shortly thereafter. Mr. Spendlove, who is familiar with BE-7, described the smell as "strong" and immediately became concerned the exposure had caused Claimant to

become sick. Claimant's symptoms persisted and worsened over several days prompting her to seek emergent treatment. By the time she arrived at the emergency department, her condition was severe enough to warrant prescriptions of prednisone and albuterol. Claimant has no pre-injury history of asthma or other symptomatic airway disease, and a pre-employment physical exam showed no evidence of pulmonary problems. She underwent an FCE on May 4, 2017 which demonstrated the ability to work at the heavy physical demand level. Although her performance during FCE was somewhat limited by "general deconditioning," there was no persuasive indication of any pulmonary issues. It is not plausible that the development of symptoms was merely coincidental or the result of anxiety. Rather, her condition was more likely than not caused by exposure to BE-7.

CONCLUSIONS OF LAW

Respondents are seeking to withdraw their admissions based on their experts' opinions that Claimant suffered no compensable injury. The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. Rather, a compensable injury requires medical treatment or causes a disability. *Montgomery v. HSS, Inc.*, W.C. No. 4-989-682-01 (Aug. 17, 2016).

By filing an admission of liability, the respondents have "admitted that the claimant has sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). If the respondents seek to withdraw the admission of liability, they must prove by a preponderance of the evidence that the claimant suffered no compensable injury. *See* § 8-43-201(1) ("a party seeking to modify an issue determined by a general or final admission … shall bear the burden of proof for any such modification.").

As found, Respondents failed to prove a basis to withdraw their admissions of liability. The persuasive evidence shows Claimant more likely than not developed irritant-induced asthma because of exposure to BE-7 vapors on June 11, 2017. She was exposed to the vapors, at least briefly, and developed symptoms including chest pain and difficulty breathing shortly thereafter. The ALJ sees no other likely explanation for the onset of Claimant's symptoms other than the work exposure. She has no pre-injury history of asthma or other symptomatic airway disease, and a pre-employment physical exam showed no evidence of pulmonary problems. Claimant's treating providers have persuasively attributed her condition to the vapor exposure at work, and the ALJ was particularly impressed with Dr. Krefft's expert opinions regarding diagnosis and causation discussed in her deposition testimony. After reviewing all the evidence, the ALJ is convinced Claimant suffered a compensable injury on June 11, 2017 because of exposure to BE-7. The claim was appropriately admitted and shall remain so.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury on June 11, 2017. Respondents' request to withdraw their admissions of liability is denied and dismissed.

2. Respondents shall cover all reasonably necessary medical treatment from authorized providers to cure and relieve the effects of Claimant's compensable injury.

3. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 6, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury to his cervical region, upper back, or upper extremities on or about April 5, 2017?

II. If Claimant suffered a compensable work injury, what medical treatment is reasonable, necessary, and related to treat said injury?

III. If Claimant suffered a compensable work injury, is he entitled to Temporary Total Disability payments? If so, for what period of time?

STIPULATIONS

The parties stipulated that if a compensable injury occurred, Claimant's Average Weekly Wage is $1304.64. Further, if compensable, Indemnity benefits would commence on 5/3/2017. Further, that the amount of Temporary Total Disability is not ripe for determination by the ALJ, as factual issues remain regarding subsequent employment of Claimant. The ALJ accepted these stipulations.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Pre-existing Cervical Radiculopathy

1. On September 4, 2015, Claimant obtained flexion and extension x-rays of his cervical spine. These studies established "moderate to advanced degenerative findings from C3-T1" and some "slippage" or retrolistheses at C3-C5. (Ex. K, p. 171)

2. On June 24, 2016, Claimant sought treatment with Dr. Scott Stanley at Denver Vail Orthopedics for a four-year history of cervical, thoracic, and lumbar pain. The Claimant reported pain levels at 7-8/10 that increased to 9-10/10 "when it is severe". He specifically described the character of his pain to be constant pain between his shoulder blades and constant burning, numbness, and tingling down his arms. (Ex. I, p. 143).

3. In his intake forms for the June 24, 2016 evaluation, Claimant documented stabbing pain in his cervical spine, with burning and aching symptoms in his bilateral arms, shoulders, and upper back, and pins and needles in his digits. (Id at p. 149).

4. Claimant testified at hearing that at the time of the June, 2016 evaluation, he was experiencing burning sensations down both arms and into his hands. For this symptom, he took Lyrica.

5. Dr. Stanley had recommended that Claimant undergo a cervical MRI (among other tests), but initially diagnosed the claimant with degeneration of a cervical disc without myelopathy based on x-rays obtained of the cervical spine. Lyrica was recommended for pain management. (Ex. I, pp. 145-146).

6. On June 28, 2016, Claimant underwent a MRI of the cervical spine, which established discogenic changes at C3-C7 and degenerative facet changes-left greater than right-at C3-C7. Foraminal stenosis-left greater than right-was noted at C5-C7. (Ex. K, pp. 167-168).

7. On July 15, 2016, Claimant returned to Denver Vail Orthopedics. He reported cervical pain that *radiates into both shoulders*. After reviewing the MRI, Dr. Knight opined that Claimant had the following diagnoses: cervical spondylosis with radiculopathy, displacement of cervical intervertebral disc, degenerative cervical disc, and cervical radiculopathy. She prescribed tramadol, and recommended a C7/T1 cervical epidural injection. (Ex. I., pp. 137-140)(emphasis added).

8. Claimant obtained a translaminar epidural steroid injection at C7/T1 on August 4, 2016. Thereafter, he reported minimal pain relief. (Ex. J, pp. 160-161). Claimant also testified that his symptoms returned after the first injection.

9. Claimant obtained a second translaminar epidural steroid injection at C7/T1 on September 22, 2016, due to his recurrent symptoms. Once again, Claimant reported no pain relief post-injection. (Ex. J, pp.155-156).

10. Claimant testified that the June 2016 treatment was for a prior work injury in February 2016 which he had reported to his immediate supervisor, Fred Platt. Fred Platt testified at hearing that no such injury was ever reported to him.

11. Claimant originally testified on direct examination that he had returned to baseline after his second injection in 2016. However Claimant indicated on cross-examination that the he had no relief after the second injection.

12. Mr. Platt testified that in late January 2017, Claimant had requested time off in early February of 2017, to obtain injections. Mr. Platt was unable to grant this time off due to scheduling issues. Mr. Platt testified that Claimant had informed him that he needed time off to get some shots in his neck. Specifically, Mr. Platt testified that Claimant told him that "he was getting a cortisone shot in his neck for a bulging disc."

Claimant's Incident of April 5, 2017

13. Claimant now alleges that on April 5, 2017, he sustained an injury to his neck and left upper extremity, when he slipped on the track of an excavator and had to catch his fall with his left arm. There were no witnesses to this injury.

14. The claimant testified he felt a pop in his neck and that he knew something was "immediately wrong."

15. Despite this, Claimant completed his 11.1 hour shift on April 5, 2017 and did not report any injury to his employer on that date. (Ex. L, p. 183).

16. The Claimant also completed a 10.7 hour shift on April 6, 2017 and a 10.4 hour shift on April 7, 2017. Claimant did not report any injury to Employer during either the April 6 or April 7 shifts. (Ex. L, p. 183).

17. Claimant's job tasks (which were performed on April 5-7, 2017) can require heavy lifting of over 50 pounds. (Ex. L, p. 178).

Claimant's First Report of Injury

18. Despite knowing something was "immediately wrong" Claimant did not seek out medical treatment until Monday, April 10, 2017. (Ex. F). Claimant explained at hearing that he waited that amount of time because he wanted to try to work through the injury to see if it would go away.

19. Mr. Platt testified he saw Claimant periodically between April 5 and April 10. Claimant never informed him of any work incident or injury. Mr. Platt testified that, had Claimant sustained an injury, it should have to be reported to him per employer policy.

20. Mr. Platt also testified that Claimant was able to complete all job tasks in the days between the alleged injury on April 5 and the reporting of the alleged injury on April 10, as evidence by company transportation logs. (Ex. L, pp. 189-194).

21. Mr. Platt testified the Claimant's job was a "very physical job" that required lifting heavy objects and sometimes contorting one's body into various positions, including lifting arms overhead.

22. Mr. Platt testified that if an injury was reported to a dispatcher by Claimant, he should have known, because the dispatcher was trained to tell employees to report injuries to Mr. Platt. Claimant testified he did not timely report the injury, because he thought he would try to work through the pain.

23. Claimant testified that he met with Fred Platt on Monday, April 10. In that meeting Mr. Platt informed Claimant that it would be best to put any treatment for injuries under his own personal insurance. Mr. Platt said "that is what the rest of the guys do." Claimant testified that Mr. Platt told him that if he put this under Workers' Compensation, they would deny the whole thing and Claimant would end up having to pay for all of the doctor bills. Claimant testified that he was nervous and didn't want that type of problem and bills. Claimant testified that he had an issue in his lower neck and upper back and instead of running it through Workers' Compensation, 'they' decided (he and Fred Platt) that he go to a chiropractor and pay for treatment with his own personal insurance.

24. Claimant testified that in his nearly 5 years at Wagner Equipment, he never knew of an employee who filed a Workers' Compensation claim. Claimant testified that he believes that was the case because Fred Platt likes to keep a zero incident rate at the branch.

25. Fred Platt testified that Wagner does like to minimize Workers' Compensation claims at Wagner Equipment for the management group. Mr. Platt testified that bonuses are paid to the management team if Workers' Compensation claims are low. No such bonuses were paid out in 2017; he was uncertain if any were paid for 2016.

26. At hearing, Mr. Platt denied ever encouraging any employee to not file a Workers Compensation claim, including Claimant.

Claimant's Failure to Report Pre-existing Conditions to Medical Providers

27. On April 10, 2017, Claimant presented to Chiropractor Bradley Hennen for an initial appointment and evaluation. Claimant testified he found this chiropractor on the internet.

28. In Dr. Hennen's intake form, Claimant reported he "learned about [Hennen's] office" because he was "referred by Dr. Boykins office." Despite filling this out in his own handwriting, Claimant testified this was not correct.

29. In the intake form, Claimant was asked to check a box in the intake form if various symptoms, including pain in back or neck, were "new in the past 3 months." Despite the boxes appearing prominently on the form, Claimant did not check this box. (Ex. F, p. 116).

30. Claimant also left blank a section of the intake form where it asked for any prior x-rays or MRIs. Claimant had had x-rays in 2015 and a MRI in 2016. (Ex. F, p. 119; K, pp. 167-68, 171).

31. At hearing, Claimant then testified this was a mistake, and that he misread the intake form when filling it out. He testified he should have marked that his symptoms were new pain within the past three months. Specifically, he testified "obviously marked the wrong ones, 'cause, even at this point, ***I didn't even realize those boxes were down on that right side. I didn't even notice them." The ALJ notes that Claimant specifically marked an "X" in the "New in past 3 months" box for the question: "Are you having trouble performing your daily activities?"*** (Ex. F, p. 115)(emphasis added).

32. In this intake form filled out on April 10, 2017, Claimant indicated he was seeing this chiropractor because he had a "pinched nerve in center of back between shoulder blades, numbness, tingling." (Ex. F, p. 112).

33. Claimant then testified he told Chiropractor Hennen he had a pinched nerve because it "burn[ed] like crazy all the way down [his] arm" and because he couldn't feel his fingers." Claimant testified he did not have these symptoms previously.

34. However, Claimant's intake form for the June 24, 2016 with Denver Vail Orthopedics appointment states his symptoms were "between shoulder blades a lot of pain, make the nerves down my arms burn and hands go numb." (Ex. I, p. 151).

35. On May 3, 2017, Claimant presented to Centura for an initial evaluation. In his intake form, Claimant specifically responded "no" to the question "have you been treated in the past for this?" (Ex. B, p. 80).

36. On June 27, 2017, Claimant reported to Dr. Finn that, in response to a question of whether he had "any previous injuries or problems to areas that we are seeing you for today" that he only had "slight arthritis above injury." (Ex. D, p. 90).

37. On September 7, 2017, PA Mark Stafford (working with Dr. William Lippert, MD) documented that the Claimant had *"no surgeries or injections to date".* (Ex. C, p. 82). Claimant now denies making such statement to Dr. Lippert's office.

Claimant's Treatment, Post-Reporting

38. Claimant testified that he went to the ER at UC Health in late April because he was in agonizing pain and he couldn't take it any longer due to burning, stabbing pain in his neck and all the way down his arm, down to his last two fingers and the inside of his arm, and up into his armpit. Claimant testified that it was swollen up like crazy and it was the worst pain that he had ever had. Claimant testified that he never had that type of pain prior to this accident.

39. He treated at the ER at UC Health due to this accident on April 29, 2017. (Ex. 4). At this time, the tentative diagnosis was cervical radiculopathy and foraminal stenosis.

40. Claimant then started treating at CCOM. (Ex. 5). Dr. Jay Neubauer is the Authorized Treating Physician in this claim. CCOM, has served as the ATP for over 13 months. Dr. Neubauer opined that the following diagnosis applies due to the April 5, 2017 injury: (1) Injury of brachial plexus, (2) Sprain of cervical spine, (3) Cervical radiculopathy, and (4) Strain rotator cuff, Left Shoulder. (Ex. 5, pp. 163 – 164).

41. Dr. Neubauer opined that based upon his "knowledge of the mechanism of injury (slipping while exiting an excavator and grabbing a handle to catch himself with his left arm) it is more likely than not that the injuries Mr. Mills sustained on 4/5/2017 were caused by the work place accident." (Ex. 5, pp.163 – 164).

42. Dr. Neubauer opined that the following treatment and referrals are recommended to treat the work place injuries in this claim: (1) Pain management specialist recommends cervical injection, and (2) EMG. *Id.* He further opined that his

proposed treatment/referrals are reasonable, necessary, and related to the work place accident. *Id.*

Claimant's Commercial Driving Examination

43. On August 7, 2017, Claimant underwent a medical examination for his commercial driving certification. (Ex. M). In his application, when asked *"Do you have, or have you ever had"* Claimant marked the "NO" box for the following questions:

19. Missing or *limited use* of *arm,* hand, finger, leg, foot, toe

20. *Neck* or back problems

21. Bone, muscle, joint, or *nerve problems* (emphasis added).

44. After filling the questionnaire out, Claimant signed the document "certifying" that the information is "accurate and complete" and that "submission of fraudulent or intentionally false information may subject [him] to civil or criminal penalties." Claimant testified at hearing that he understood that intentionally false information could subject him to civil or criminal penalties. (Ex. M, p. 204).

45. Further, the CDL physical examination conducted by Elizabeth Stroh, FNP-C, MSN, on August 7, 2017 noted that the *Claimant had a **"normal"** exam, including boxes to check for **back/spine, extremities/joints,** and **neurological system.*** (Ex. M, p. 203) (emphasis added). Claimant testified at hearing that the examiner "put me through some tests and I was able to pass it."

Claimant's Testimony Regarding Omissions

46. Claimant testified he made a mistakes on the intake forms for Chiropractor Hennen, stating his injuries were not new in the past 3 months. He also made a mistake by signing the CDL paperwork stating he had no neck or back injuries as of August 7, 2017 (even though this mistake would subject him to civil and criminal penalty).

Objective Testing / Pre- and Post- Injury

47. Claimant underwent a post- injury x-ray of his cervical spine on April 18, 2017. This study was compared against the prior extension/flexion x-ray performed on September 4, 2015. The findings in the 2017 x-ray established there were *"no definitive interval change compared to the exam dated September 4, 2015."* (Ex. K, p. 164)(emphasis added).

48. Chiropractor Chad Abercrombie documented that the April 2017 x-ray showed "a few mm retrolisthesis of C3-C5 *that had not changed from a previous x-ray performed in 2015."* (Ex. G, p. 123)(emphasis added). It was also noted that Claimant "*does not list ever having pre-existing neck* or back problems." *Id.*

49. Dr. Lesnak (Respondent's IME physician) testified the 2016 cervical MRI showed multi-level degenerative disc changes, with multiple areas of narrowing and foraminal stenosis. He testified the 2016 findings were "*moderately severe."*

50. The MRI from 2016 states that Claimant had foraminal narrowing and stenosis C3-C7, left worse than right. (Ex. K, pp. 167-168).

51. The 2017 MRI indicated there were "moderate-to-severe left neuroforaminal stenosis at C3/C4 and C4/C5." This study does not indicate whether it was compared to the 2016 study by the radiologist. (Ex. K, pp. 162-163).

52. In addition to testifying that Claimant's MRI findings were already "moderately severe" in 2016, Dr. Lesnak testified that the 2017 MRI is "the same MRI that was done in 2016. Same findings." Dr. Lesnak concluded there was no objective evidence of an acute injury in those records.

53. Dr. Lesnak testified there was no objective evidence that an injury occurred on April 5, 2017 based on the diagnostic testing. He specifically testified "the diagnostic testing is … unchanged from pre- and post-April 5th, 2017."

54. Further, while Claimant underwent an EMG to evaluate for abnormalities associated with his nervous structures, that examination established no evidence of acute cervical radiculopathy or plexopathy. (Ex. D, p. 86).

55. Dr. Lesnak testified that Claimant had progressive neck pain and bilateral upper extremity symptoms for years, and that Claimant had significant enough pain in 2016 (reported as 7-10 out of 10) that he warranted both a MRI and injections.

Respondents' IME of Claimant

56. Dr. Lawrence Lesnak, DO, performed an IME on Claimant on 8/3/2017 (Ex. A). This IME was four days prior to Claimant's Commercial Driving exam. Dr. Lesnak was qualified as an expert in physical medicine and rehabilitation. Dr. Lesnak testified that Claimant's physical examination at his IME was "quite difficult." He indicated that Claimant would not move his neck or back at all, due to reported pain, and that Claimant had very limited left shoulder motion. Dr. Lesnak opined that this was evidence of 'submaximal effort.'

57. Since Claimant's objective testing status had not changed, Dr. Lesnak testified that he performed psychosocial screening to evaluate the reliability of the claimant's symptom complaints. The screening found the Claimant had an "extremely high level [of] somatic pain complaints" which Dr. Lesnak testified was evidence that Claimant's complaints were not caused by any anatomic or physiologic abnormality. He also testified a somatic disorder typically causes an individual to embellish or exaggerate symptoms, making those reported symptoms unreliable. In this case, Dr. Lesnak testified that in somatic screening, a high level of pain complaints is a 12. Claimant scored a "19"-way above high levels.

58. At hearing, Dr. Lesnak testified that during the IME, Claimant refused to move his neck or back at all, alleging it would hurt him too much:

> …when I saw him, I mean, even when I gently touched the back of his neck, he's jumping off my—stool in pain, yelling and moaning. That's a non-physiologic finding….an abnormal, aberrant pain response….touching one's skin—unless there's an obvious, you know, burn or a deep wound, that shouldn't cause someone to jump off a chair or table.

Surveillance Video of Claimant from 8/15/2017

59. Dr. Lesnak also testified that he had reviewed the surveillance video taken of Claimant on 8/15/2017, and recognized him from this video. He noted that Claimant was "walking around parked cars, getting in and out of cars, driving vehicles on that day." Specifically, he notes that Claimant "reaches behind his head with both arms…sitting up against….the chair of his front seat for a period of time.

60. The ALJ notes that, upon his own review of this video, Claimant, while engaged in apparent routine activities, demonstrates no visible signs of distress at any time; indeed at one point, Claimant places both palms behind the back of his head/neck and appears to lounge back in the driver's seat of his car.

Claimant's IME

61. Dr. Jack Rook performed an Independent Medical Examination on the Claimant on March 19, 2018. (Claimant's Exhibit 7). Dr. Rook reviewed all medical records in this claim and performed a physical examination on the Claimant at that time. *Id.*

62. Rook diagnosed Claimant with the following:

1. Permanent aggravation of cervical degenerative disc disease;

2. Left upper extremity neurogenic pain;

    a. Cervical radiculopathy

    b. Rule out secondary to brachial plexus traction injury.

3. Sleep disturbance secondary to pain. (Ex. 7, p. 191)

63. Dr. Rook opined that based upon his knowledge of the mechanism of injury, after review of the medical records, and after examination of Mr. Mills, that it is more likely than not that the injuries sustained on April 5, 2017 were caused by the workplace accident. He rendered that opinion for the following reasons:

"This patient sustained a significant traumatic event when he fell off of the excavator. He sustained a traction injury to his left arm associated with an acutely painful popping sensation in his neck, following which he developed left upper extremity burning pain and paresthesias, suggestive of nerve injury;

The patient has had unrelenting symptoms since April 5, 2017 that have been of a markedly different quality and intensity as compared to any similar problems that he was having at the time of, and prior to his on-the-job injury;

Based on the patient's history and my review of his medical records, it appears that the cervical symptoms he was experiencing prior to the April 5, 2017 occupational injury was more than likely related to another work injury event that occurred in February 2016 while he was working for the same employer, when he slipped outside of his snowplow;

Mr. Mills was able to work without the need for physical restrictions prior to the occupational injury event of April 5, 2017. He was performing his job (which was in a heavy physical demand level) without the need for any restrictions when he sustained the April 2017 occupational injury;

He had never missed work due to the cervical condition prior to the April 2017 on-the-job injury; and

He was not involved in active medical treatment for his neck at the time of the occupational injury event in 2017." (Ex. 7, pp. 191 – 192).

64. Dr. Rook opined, based on his review of the medical records and after his examination of Mr. Mills, that the work place injury of April 5, 2017 caused/brought about the need for the current treatment. Specifically, Dr. Rook opined that if not for that event, Mr. Mills would not currently require treatment for his neck and left upper extremity. (Ex. 7, p. 192).

65. Dr. Rook further stated:

"This patient has sustained a permanent aggravation of his pre-existing cervical degenerative disc disease and he also likely has a new injury involving his left brachial plexus. The permanent aggravation of the cervical condition has resulted in an immediate need for treatment. The current need for this treatment is the work event that occurred on April 5, 2017. His need for treatment at this time is not representative of a natural progression of a condition that was stable and non-impairing on that date." (Ex. 7, pp. 192 – 193).

Claimant's Need for Treatment

66. Dr. Rook stated the following regarding recommended treatment:

> I believe the patient should proceed with spinal injection therapy. This might include an epidural steroid injection, selective nerve root blocks, or other diagnostic and possibly therapeutic cervical injections. I would recommend a repeat MRI of the cervical spine, as well as a neurosurgical evaluation. If there is no improvement with conservative treatment, I believe that surgical intervention will be needed to treat Mr. Mills' neck and left upper extremity symptoms." (Ex. 7, p. 193).

67. Dr. Lesnak testified that the need for treatment and medical evaluations after the alleged incident was not caused by the reported April 5, 2017 incident. Rather, Dr. Lesnak testified that any need for treatment was related to the progressive symptoms that had existed pre-incident.

68. Dr. Lesnak opined that, even if an incident occurred on April 5, 2017, there was no evidence that the incident caused any acceleration of his pre-existing symptomatic symptoms or pathology.

69. Dr. Rook, opined that Claimant sustained a permanent aggravation of his pre-existing condition and sustained a new injury to his brachial plexus. However, Dr. Lesnak persuasively testified that EMG testing specifically ruled out any injury to the brachial plexus and there was no changes in the x-rays, MRIs or reported symptomology to support either a temporary or permanent aggravation of the underlying pre-existing condition. (Ex. 7, pp.191-192).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the LAJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A Claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on the merits. *Id.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Credibility

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

4. The ALJ finds Claimant to be a patently unreliable historian, both to his medical providers, and at hearing. The ALJ finds that Claimant, despite claims to the contrary, reports pain levels not according to actual pain experienced, but according to the context of his ad hoc circumstances. Despite alleging an immediate, serious injury on the job, Claimant continued to work several days in a demanding position. Once Claimant decided to enter the Workers Comp system (despite Claimant's less-than-credible assertions of being dissuaded by Mr. Platt), he knowingly failed to disclose his history of pre-existing complaints and treatment for similar pain to Chiropractor Hennings, Denver Vail Orthopedics, Centura Health, Dr. Finn's Office, and Dr. Lippert's Office. One omission might be an honest mistake; two omissions becomes careless- and counterproductive to effective treatment. Claimant herein displayed a pattern of nondisclosure which the ALJ finds to be both knowing and self-serving.

5. Claimant also knowingly filled out a Commercial Driver questionnaire, after voluntarily quitting his job, denying any relevant medical issues. He then passed the physical examination. At his IME four days prior, he had been jumping off a stool upon being touched, and refused to move his neck, due to the unbearable pain. Eleven days after his IME, surveillance video shows Claimant engaging in activities wholly inconsistent with his reported pain and disability. Despite all of this, Claimant testified at hearing that his condition had then *worsened* after being forced by the pain to resign his position on 7/17/17. The ALJ finds that Claimant's subjective complaints of pain, without objective evidence in support, renders an accurate medical diagnosis and causation analysis untenable.

Compensability, Generally

6. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *Wherry v. City and City of Denver*, W.C. No. 4-475-818 (I.C.A.O., March 7, 2002). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). A compensable injury is an injury which "arises out of" and "in the course and scope of employment." §8-41-301(1)(b) C.R.S. The term "in the course and scope of employment" refers to the time, place and circumstances

under which the injury occurred. The injury must have occurred in the time and place limits of the employment, and during an activity having connection with the employee's job functions. Additionally, the term "arising out of" establishes that there must be a causal relationship between the employment and the injury. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). Claimant must establish by a preponderance of the evidence that the condition for which he seeks medical treatment for was proximately caused by an injury arising out of and in the course and scope of employment. §8-41-301(1) C.R.S. Claimant also must prove a causal nexus between the disability and the work-related injury. *Singleton v. Kenya Corp*., 961 P.2d 571 (Colo. App. 1998).

7. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates, accelerates, or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse,* 805 P.2d at 1167*.*

Claimant's Pre-existing Condition

8. Claimant had a significant pre-existing condition to his cervical spine and upper extremities that required progressive treatment over the six years prior to the reported incident. Significantly, Claimant's pre-existing condition required a MRI and two epidural steroid injections mere months prior to the reported event. There is insufficient indication in the totality of the record that any incident of April 5, 2017 aggravated, accelerated, or combined with Claimant's ***(significant, and knowingly undisclosed)*** pre-existing conditions to cause the need for medical care or disability. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949).

9. The ALJ also finds persuasive the testimony of Dr. Lesnak that the 2016 and 2017 MRIs were substantially similar, and without evidence of an acute injury. Insufficient diagnostic evidence exists which would establish the presence of an acute injury or aggravation of a prior injury. The objective testing has eliminated an injury to Claimant's brachial plexus. Taken as a whole, the ALJ finds Dr. Lesnak's analysis more persuasive than that of Dr. Rook, and Claimant's ATP. Both were in the unfortunate circumstance of having to rely upon Claimant's subjective complaints of symptoms, without any supporting objective data, in reaching their conclusions.

10. Consequently, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury or aggravation on April 5, 2017 in the course and scope of his employment with the employer.

Medical Benefits/Temporary Total Disability

11. Claimant has not suffered a compensable injury. His claim for medical benefits and Temporary Total Disability benefits is denied and dismissed.

ORDER

It is therefore Ordered that:

1. Claimant's claim for workers compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 9, 2018

/s/ /William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries to his low back and neck during the course and scope of his employment on February 10, 2017.

II. If Claimant proved that he sustained a compensable back/neck injury, whether he also established, by a preponderance of the evidence, that he is entitled to receive reasonable, necessary and causally related medical benefits for these industrial injuries.

III. If Claimant established that he sustained compensable injuries on February 10, 2017, whether he also proven by a preponderance of the evidence that he is entitled to temporary total disability (TTD) and temporary partial disability (TPD) benefits.

IV. A determination of Claimant's Average Weekly Wage (AWW).

Because the ALJ concludes that Claimant failed to prove that he sustained compensable injuries, this order does not address issues II-IV above.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant claims to have suffered an injury to his low back on February 10, 2017 after falling 20-25 feet with a ladder off the side of a building owned by Fred Gonzales, a long-time customer of Employer. According to Claimant, he was working alone to service blower motors on a couple of swamp coolers located on the roof when the accident occurred.

2. Claimant testified that he finished the job and unhooked the fasteners of an extension ladder that had been raised up two stories to the roof and secured at the top of the building. Claimant testified that as be began to descend the unsecured ladder, a gust of wind blew him and the ladder from the side of the building and he fell 20 to 25 feet to the pavement below. Claimant reportedly landed on both feet. He testified that he immediately felt pain in his back and a sensation that his brain had struck the bottom of his skull. Claimant's alleged fall was unwitnessed.

3. Claimant testified that a co-employee, whom he had been assigned to work with and whom had left the job-site to retrieve parts, returned shortly after he had

fallen. Claimant reported his fall to his work partner and was subsequently driven to Employer's business office a block or two away.

4. Claimant testified that he reported his fall to Daniel Boyd, the President of Respondent-Employer immediately upon arriving at the office. Claimant admitted that there was neither a request for medical assistance, nor was he referred to any physician upon reporting the incident.

5. Claimant testified that he provided written notice of his injury to Employer on February 11, 2017. He testified that he placed his hand written notice of injury, identified as Claimant's Exhibit 4, on Mr. Boyd's desk rather than handing it to him directly. Mr. Boyd testified that he never saw/received Claimant's hand written report of injury. He testified that Claimant had never left written messages (notes) for him because they had a close working relationship. Claimant agreed that he had a close working relationship with Mr. Boyd and could "tell him anything."

6. Claimant continued to work, what he described was sporadic hours after February 10, 2017. He testified that he performed a full range of duties including lifting, bending and crawling in, out and around in attics and crawl spaces.

7. Claimant testified that although his back hurt, he did not report a need to see a doctor, as he was afraid that his employment would be terminated.

8. Claimant testified that he continued to work full duty for Employer until October 24, 2017. Claimant testified that between the date of injury and October 24, 2017, he worked on projects requiring heavy labor. Occasionally he worked in the presence of Mr. Boyd. He testified that on his last day of work he was involved in a job that required the lifting of heavy ductwork. Claimant testified that he tweaked his back during this job. He did not make a claim for this incident. Claimant testified that he never tried to return to work after October 24, 2017, because he could not perform the physical duties associated with his job. According to Claimant, he relied on the charity of family and friends to survive after October 24, 2017. While Claimant asserted that he never tried to return to work for Employer, he did admit that he returned to Employer's offices to retrieve his tools in December 2017.

9. Claimant also admitted that he never requested a referral for medical care for his alleged February 10, 2017 work injury despite having knowledge on how to secure treatment because of having prior workers' compensation claims.

10. Both Claimant and Mr. Boyd, as owner and operator of Employer, testified that they have known each other for years, dating back to the 1990s. As noted above, they testified that they had a good working relationship with one another. Mr. Boyd referred to the Claimant has a "friend."

11. Despite his good working relationship and his testimony that he could tell Mr. Boyd anything, Claimant filed a workers' compensation directly with the Insurer without informing Mr. Boyd. Insurer notified Mr. Boyd about the claim and filed a "Notice of Contest" on January 9, 2018. Insurer contested liability on the grounds that Claimant's injury/illness was not work related. Upon be notified of the claim, Mr. Boyd filed an Employer's First Report of Accident identified as Respondents' Exhibit "A".

Employer's first report of injury was filed on January 12, 2018. Claimant testified that he was aware that the Employer had workers' compensation insurance.

12. On February 9, 2018, one year after his alleged 20-25 foot fall and one month after his claim was denied, Claimant presented to the Southern Colorado Clinic where he was evaluated by Dr. Sergio Murillo-Herrera "because he [needed] his back checked." During his clinic appointment, Claimant relayed to Dr. Herrera that he "[h]ad to jump off a ladder as it was falling from 25 feet." According to Dr. Herrera's report, Claimant had not had any imaging and had not seen a physician for his back in the year preceding his February 9, 2018 visit due to a lack of health insurance coverage. By the time of his February 9, 2018 appointment, Claimant had secured Medicaid coverage and was seen under that program. At his initial evaluation, Claimant described sharp back pain "going down to his hips" and "associated neck pain" with radiation into the shoulders. He also complained of lateral thigh numbness. Claimant was assessed with having somatic lumbar dysfunction and lumbar radiculopathy. Dr. Herrera ordered an MRI and instructed Claimant to return to the clinic for a follow-up appointment.

13. The MRI of the lumbar spine was completed on March 16, 2018. It revealed mild lumbar scoliosis, a desiccated degenerative bulging, disc and 4 mm broad-based right paracentral disc protrusion and osteophyte at L5-S1 with mild to moderate foraminal narrowing, right greater than left and a dehydrated bulging disc and broad-based posterior disc protrusion at L4-5 with mild foraminal stenosis on the left.

14. Claimant returned to the Southern Colorado Clinic for a follow-up visit to "discuss his MRI findings" on March 21, 2018, where he was once again seen by Dr. Herrera. Dr. Herrera assessed Claimant with lumbar disc disease, osteophyte formation and lumbar radiculopathy.

15. Mr. Boyd testified that Claimant told him that he had fallen from the ladder, but did not request any medical assistance. Upon hearing about Claimant's fall, Mr. Boyd called Mr. Gonzales' and asked whether they had any report of an injury or video evidence recording the fall. Mr. Gonzales' owns a marijuana growing operation and maintains a high-level of security. He badges individuals checking in/out of his business and employs a video security system operating on multiple cameras covering the building.

16. At the request of Mr. Boyd, Mr. Gonzales reviewed the security video from February 10, 2017 and found no evidence to establish that Claimant fell from the ladder. Mr. Boyd testified that he confronted Claimant with this information to which Claimant reportedly told Mr. Boyd he simply could not perform the heavy nature of his job and needed to find some other way to make money. Mr. Boyd interpreted Claimant's statement to indicate that the fall did not occur and that Claimant was being deceitful about being injured so he could collect workers' compensation benefits.

17. Mr. Boyd testified that because he believed that no fall had occurred and Claimant continued to work regular duties with the Respondent Employer, he took no action to report the incident to his workers' compensation insurance carrier. He testified further that Claimant appeared to acknowledge that no incident had occurred and they continued their good working relationship for several months until October 24, 2017, after which Claimant stopped appearing for work. Mr. Boyd testified that he did not

know that the Claimant had filed for workers' compensation until January of 2018 when he heard from his insurance company that a claim had been made. Once he was aware that a claim had been made, Mr. Boyd testified he filed his first report of injury. He also authored a letter to Insurer, entitled "To Whom It May Concern", which was introduced into evidence as the Claimant's Exhibit "5." This letter recounts the events surrounding Claimant's alleged February 10, 2017 fall, including the fact that Mr. Boyd contacted Mr. Gonzales asking him to review the security camera video. According to the letter, Mr. Boyd called Mr. Gonzales requesting the video check and after about five minutes he received a call back from Mr. Gonzales who reported that the video demonstrated that the "[w]ind blew the ladder over, but [Claimant] was not on [it] at the time."

18. Mr. Boyd testified that he had personally worked with Claimant on construction jobs after February 10, 2017 and that these jobs occasionally required heavy physical labor. According to Mr. Boyd, Claimant was able to perform the physically demanding duties associated with his position after February 10, 2017, without difficulty.

19. Mr. Boyd testified that October 24, 2017 was the last day Claimant worked for Employer. Although Claimant testified that he called numerous times after October 24, 2017 to inquire about the availability of work, Mr. Boyd testified that he heard nothing from the Claimant until December 2017. According to Mr. Boyd, Claimant simply showed up to work when as he (Mr. Boyd) was preparing to pass out Christmas bonuses. Mr. Boyd testified that Claimant inquired about available employment during his December 2017 visit, noting that Claimant reported that he was having a hard time financially and needed to make some money. Mr. Boyd testified that he informed Claimant that he had failed to show up for work for an extended period of time and had also failed to call in to inform Employer that he would not be showing up for work. Mr. Boyd testified that Employer had a policy that employees had to call in and inform someone in the office that they would not be working. Mr. Boyd testified that the Claimant had generally called in previously to explain his absences from work but that after October 24, 2017, he failed to call in or show up for work until his December, 2017 visit. Mr. Boyd testified that although he had worked with Claimant through personal problems and absences from work before, he informed Claimant that his extended period of not showing up or calling to explain his failure to show up for work was unacceptable and he had no work for him.

20. Claimant testified that he was fired from his position after Thanksgiving. He also claimed that he presented to Employer's offices in December to retrieve his tools, not to work. Claimant filed a claim for unemployment benefits, claiming that he was fired. Both Claimant and Employer testified about the unemployment claim. Claimant acknowledged that it was Employer's position that he failed to show up for work. Claimant also admitted that he was not awarded any unemployment benefits.

21. Fred Gonzales testified by telephone. Mr. Gonzales testified that his company could not provide the requested video tape in this case because security video is only kept for 40 days before it is subsequently recorded over. Because the request for the tape came outside of this 40-day period, Mr. Gonzales reiterated that he could not provide the camera records form February 10, 2017. He testified that he has 10-15

employees on site and if something like Claimant described had happened someone would have seen or heard about it. According to Mr. Gonzales, he has 56 security cameras on location. He testified that in reviewing the video before any re-recording had taken place, none of the various angles from any of the 56 cameras caught an individual falling from a ladder on February 10, 2017.

22. Ian Shatford testified that he was a co-employee of Claimant's when he worked for Employer. Mr. Shatford was one of the technicians who, along with Claimant, responded to Mr. Gonzales' business on February 10, 2017. He testified that he was pulled off the job and left Claimant alone for approximately 10 minutes while he went to get parts for another job at Mr. Gonzales' business. When he returned, he testified that Claimant was sitting in the truck. He made contact with Claimant who reported that he had fallen with the ladder 20 to 25 feet. He noticed that the Claimant had lifted and secured the 50 to 60 pound ladder to the top of the work truck. Mr. Shatford testified that Claimant appeared uninjured. He questioned how someone could have fallen 20 to 25 feet and not have any visible injuries. Nonetheless, he acknowledged Claimant's reported fall and drove him back to Employer's offices.

23. Mr. Shatford testified that he had worked with the Claimant in the months following his alleged February 10, 2017 fall through October 2017. He testified that during this period, Claimant did not have any difficulty in performing the physical duties associated with his position. According to Mr. Shatford, Claimant was able to lift ductwork, move furnaces and other equipment, and work in tight places, such as attics and crawl spaces.

24. Mr. Boyd testified that he and his employees would often get together in the mornings before work and have coffee. He testified that before February 10, 2017, they discussed their concern that Claimant would claim an injury based on an unwitnessed event. Mr. Boyd testified that on February 10, 2017, before Claimant and Mr. Shatford had returned to the office, he received a telephone call from Mr. Shatford who reported, "Well, it happened," which Mr. Boyd understood to mean that the anticipated unwitnessed claim of injury had occurred.

25. Mr. Boyd testified that the notice of how to report a workers' compensation injury along with the identification of Employer's designated medical provider were published on the premises on the Respondent Employer.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-

of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Claimant's Credibility and Compensability

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). Although there is conflicting evidence in this case, the ALJ finds Claimant's testimony regarding the events leading up to his alleged injury unreliable and unpersuasive. The overwhelming evidence presented at hearing belies Claimant's assertion that he sustained a work related injury. Here, the evidence presented persuades the ALJ that Claimant probably did not fall as he alleges. Review of security video failed to capture any fall involving Claimant and the fall was otherwise unwitnessed. Moreover, the ALJ finds/concludes it improbable that Claimant could have fallen 20-25 feet onto pavement without sustaining some obvious disabling injuries. In this case, Claimant asserts that he hit the pavement so hard that he felt his brain hit the bottom of his skull. While this description regarding the severity of his impact with the pavement is likely hyperbole and improbable, it does constitute some evidence concerning the force with which Claimant alleges he hit the ground. Based upon the height from which Claimant asserts he fell, the ALJ agrees with Respondents that he probably would have hit the pavement hard enough to cause serious bodily injury, including injuries to his feet/legs if the fall occurred. No visible injuries were observed and Claimant requested no medical attention. Furthermore, Claimant's asserted injuries, as serious as he contends there were/are, did not prevent him from lifting a 50-60 pound ladder, securing it to his work truck and returning to work. Indeed,

the evidence presented is convincing of the fact that Claimant worked without limitation, in a physically demanding position, for over 8 months after his alleged fall. Consequently, even if Claimant's fall did occur he required no medical treatment and suffered no disability for almost a year before he filed his claim for benefits.

D. A "compensable" injury is one that requires medical treatment or causes disability. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S. While the ALJ is convinced that Claimant likely has pain in his back, the evidence presented is persuasive of the fact that pain 11 months after his alleged fall is probably related to the natural progression of his pre-existing degenerative lumbar disc disease. This is especially true when one considers that Claimant worked in a physically demanding position without limitation and without treatment needs in excess of 8 months following his alleged fall. The ALJ does not believe it credible that the Claimant would forego medical treatment for 11 months if he suffered a significant and disabling injury as a consequence of a 20-25 foot fall. As presented, the evidence does not support that Claimant sustained an injury, including a compensable aggravation of an underlying pre-existing condition of the lumbar spine. Because Claimant failed to establish he suffered a compensable "injury", his claim must be denied and dismissed and his remaining claims need not be addressed further.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

DATED: July 9, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

The issues set for determination included:

- Did Respondents overcome the opinions of the physician who performed the DOWC Independent Medical Examination ("DIME") [Gregory Reichhardt, M.D.] regarding maximum medical improvement by clear and convincing evidence?

- If so, what was Claimant's medical impairment rating?

- Did Respondents prove by a preponderance of the evidence an overpayment existed with regard to temporary total disability benefits?

FINDINGS OF FACT

1. Claimant was employed as a delivery driver for Employer, starting in April 2016. This job involved delivering plants and other materials to retailers.

3. There was no evidence in the record that prior to May 2016, Claimant suffered an injury to his left ankle or required treatment for the left ankle. Claimant previously suffered an injury to his right foot/ankle for which he received treatment.

4. Claimant received Social Security benefits, beginning in December, 2014. Claimant testified he received these benefits related to a low back fusion. Claimant's monthly benefit was $686.90.[1] This document shows $67.00 was withheld to recover an overpayment. The basis of the overpayment was not explained in the letter. The record was unclear (including Claimant's testimony) whether Claimant received SSDI benefits during the entire time he received TTD benefits.

5. On May 5, 2016, Claimant sustained an admitted industrial injury when a vehicle drove over his left foot and ankle while he was unloading his truck.

6. Claimant was evaluated in the Emergency Department at the University of Colorado Medical Center (Poudre Valley) on May 6, 2016. He complained of left

[1] A letter from the Social Security Administration was admitted into evidence which showed this as Claimant's monthly Social Security benefit.

foot/ankle pain and was evaluated by Kevin Perotti, PA-C. An x-ray showed no evidence of fracture. PA-C Perotti's clinical impression was: contusion of left ankle; sprain of deltoid ligament. Ibuprofen was prescribed.

7. On May 9, 2016, Claimant was evaluated by Robert Schulte, DPM. Claimant had pain on palpation all around the ankle, but his tendons were intact. Dr. Schulte's assessments included: unspecified injury of the left ankle, initial encounter; unspecified injury of the left foot, initial encounter; pain in joint, foot-left; pain in left ankle and joints of left foot. Claimant returned to Dr. Schulte for follow-up evaluations on May 16, 25, and June 10, 2016 during which he was advised to wear a walking boot and referred for physical therapy ("PT").

8. Claimant received treatment for his work injury from Mark-Andres Chimonas, M.D. at Workwell. On August 17, 2016, Dr. Chimonas diagnosed a sprain of unspecified ligament in the left ankle and pain in the left ankle and joints of left foot. Dr. Chimonas oversaw Claimant's treatment, including PT.

9. Claimant underwent an MRI of his left ankle on September 7, 2016. The films were read by Samuel Fuller, M.D. Dr. Fuller's impression was: short segment full-thickness longitudinally oriented intrasubstance split tear of the peroneous brevis tendon, extending from approximately the level of the inferior tip of the fibula to the peroneal tubercle; evidence of previous moderate to high-grade partial tearing of talofibular ligament. After the MRI, Claimant was referred for an orthopedic evaluation. The ALJ inferred Dr. Chimonas concluded there were objective findings from the MRI, which warranted the orthopedic referral.

10. On October 6, 2016, Claimant was evaluated by Wesley Jackson, M.D. Claimant had pain in the lateral area of his ankle and around the peroneal tendon. Dr. Jackson's diagnoses were: left lateral ankle pain and soft tissue impingement; peroneal tendon tearing. Dr. Jackson opined Claimant would probably benefit from a left ankle arthroscopy, debridement and peroneal tendon repair. Nonoperative modalities recommended by Dr. Jackson included a brace and a cortisone shot, which Claimant chose. Claimant received a cortisone shot in the anteromedial portal of the left ankle at this appointment.

11. On November 3, 2016, Claimant returned to Dr. Jackson and noted minimal relief from the cortisone shot. No swelling was noted on examination, but he had pain with resistance and tenderness over the peroneal tendons and anterolateral gutter. Dr. Jackson opined Claimant had exhausted almost all nonoperative options and recommended surgery.

12. Claimant was referred by Dr. Chimonas on November 10, 2016 for a second opinion. On November 28, 2016, Claimant was evaluated by Gregg Koldenhoven, M.D. Claimant was complaining of persistent pain since his injury. Localized swelling was noted in the lateral aspect of his left ankle, as well as tenderness at the medial malleolus. Dr. Koldenhoven reviewed the MRI report and based on the

physical exam, concluded Claimant had laxity in the ankle. Dr. Koldenhoven issued a prescription for PT and Claimant was to continue to work within his restrictions.

13. On December 27, 2016, Claimant was evaluated by Brian Mathwich, M.D. at Workwell. Claimant had pain at the medial aspect of the ankle. Dr. Mathwich found near normal range of motion ("ROM"), with point tenderness just anterior to the lateral malleolus. Claimant was kept on modified duty and his PT was continued. Dr. Mathwich noted that if Claimant did not want to undergo surgery, he would be at MMI.

14. Claimant returned Dr. Koldenhoven on January 9, 2017. Claimant had continued ankle complaints which were on the front, sides and back of his ankle. On examination, localized swelling was noted, along with tenderness at the medial malleolus. Tenderness was found at the peroneal tendons, along with decreased ROM. Dr. Koldenhoven administered a cortisone injection.

15. On January 16, 2017, Claimant was evaluated by Kevin Keefe, D.O. at Workwell. Dr. Keefe noted Claimant underwent a repeat cortisone injection, which did not offer significant benefit. Surgery was discussed, but Claimant decided not to proceed. Dr. Keefe placed Claimant at MMI and assigned a 4% lower extremity impairment, which converted to a 2% whole person impairment. Permanent restrictions were assigned, which included: no lifting over 20 pounds; no squatting or climbing, no driving with clutch/stick shift; limit walking or standing to 30 minutes per hour.

16. On January 24, 2017, a Final Admission of Liability ("FAL") was filed on behalf of Respondents. The FAL admitted for the 4% extremity rating issued by Dr. Keefe. Respondents admitted for temporary total disability benefits from May 28, 2016 through January 15, 2017 (33 2/7 weeks) at a rate of $320.00 per week, with a total of $10,651.43 paid in TTD benefits. An overpayment of $220.57 was noted. Respondents admitted for reasonable, necessary post-MMI medical treatment and medications.

17. Claimant testified he had decided to put off surgery, as he wanted to see if his ankle got better. The pain improved in his ankle, but it did not go away. Claimant then decided to undergo surgery.

18. Claimant returned to Dr. Keefe on March 17, 2017 and advised he had changed his mind regarding pursuing the surgery. He presented with a slight limp and with diffuse pain over his entire ankle. Dr. Keefe's diagnoses were: sprain of unspecified ligament left ankle, subsequent encounter; pain in left ankle and joints of left foot. Dr. Keefe noted he would see Claimant pre-operatively.

19. The ALJ found Claimant presented to the ATPs with symptoms consistent with the industrial injury in his left ankle. There were objective findings made by these physicians, including swelling and reduced ROM in the left ankle. This led to conservative treatment, as well as a recommendation for surgery by Dr. Koldenhoven.

20. Dr. Koldenhoven reexamined Claimant on April 3, 2017 and noted Claimant's abnormal pathology was on the lateral side of his ankle, but a lot of his reported symptoms were on the medial and anterior side of the ankle. Dr. Koldenhoven was concerned about proceeding with surgery in light of this discrepancy and mentioned there could be CRPS involvement. He also requested a CT scan to evaluate degenerative joint disease before making any recommendations.

21. Surveillance video of Claimant was admitted into evidence.[2] This covered April 13, 19, 22, and 24, 2017. The video depicted the following:

- April 13, 2017 10:46 a.m.: Claimant is seen outside operating a remote-controlled helicopter. He walks on pavement and grass, forward and backward, with no evidence of a limp.

- April 19, 2017 8:53 a.m.: Claimant is seen walking into and out of a store. At one point he is caring a package in each hand and walking without difficulty. He then carries a large plastic bin out of the store and places it in in his vehicle, and walks with a slight limp, favoring the left leg. He also favored the left leg when getting in the truck.

- April 22, 2017 8:53 a.m.: Claimant is observed walking up a small flight of stairs into a car dealership office, walking around a car dealership looking at cars. Claimant walks slowly. Claimant is seen at a campground and walks around with a mild limp.

- April 24, 2017 10:34 a.m.: Claimant is seen walking in and out of two stores. He pushes a cart without difficulty and exhibited no significant altered gait or no sign of discomfort.

22. ALJ concluded Claimant's ankle condition did not limit him from performing the aforementioned activities. The ALJ noted the video was evidence of Claimant's activity level on the date and time the video was taken. While the video was evidence of Claimant's ability to perambulate, it was not dispositive on the question of maximum medical improvement.

23. On or about May 10, 2017, Dr. Koldenhoven sent a request for authorization of surgery. The procedure identified was left ankle peroneal tendon repair, lateral ankle reconstruction and excision of medial ankle osteophytes, with removal of dorsal talar and navicular osteophytes.

24. On August 22, 2017, Claimant underwent a DIME, which was performed by Dr. Reichhardt. At that time, Claimant complained of 7/10 pain throughout the ankle, with some pain in the heel. On examination, Dr. Reichhardt noted the assessment was limited by pain. Claimant's reflexes were 2/4 at the patella and Achilles, but no

[2] Exhibit N.

diminished sensation was present on the left foot. Diffuse tenderness to palpation was noted about the left ankle, but no effusion was present.

25. Dr. Reichhardt's impression was: left ankle pain-mechanism of injury, a 5/6/16 work-related injury in which an SUV drove over his foot; 5/6/16 left ankle x-ray no acute fracture; 9/7/16 left ankle MRI which showed short segment, full thickness longitudinally oriented intrasubstance tear over the peroneus brevis tendon starting from the tip of the fibula to the peroneal tubercle; evidence of previous moderate to high-grade partial tear of the anterior tibiofibular ligament. No evidence of focal osteochondral lesion or other significant pathology of the talar dome or cartilage. 4/8/17 CT scan showed mild osteoarthritis of the left tibiotailar joint with soft-tissue ossifications about the joint space suggesting prior deltoid ligaments, anterior talofibular ligament and anterior tibiofibular ligament sprains. Prominent dorsal spurs along the lateral margin of the patella navicular joint, likely seqelae of old joint capsular injury; mild first metatarsophalangeal joint osteoarthritis. Rule out CRPS and psychological factors affecting physical condition. Dr. Reichhardt diagnosed a left ankle injury with underlying degenerative changes noted above.

26. Dr. Reichhardt noted Claimant was recently placed at MMI on January 16, 2017, as he was declining surgical intervention. He later decided to proceed with surgical intervention and by May 3, 2017 had decided to proceed with surgery. Dr. Reichhardt concluded Claimant was not at MMI by that date and required further treatment, specifically the surgery. The ALJ found Dr. Reichhardt's conclusion that Claimant was not at MMI was based on the proposed surgical procedure. Dr. Reichhardt gave a provisional impairment rating of 14% for the range of motion loss in Claimant's ankle and toes. The ALJ was persuaded that Dr. Reichhardt was correct when assessing Claimant's impairment.

27. Scott Resig, M.D. evaluated Claimant on November 7, 2017 at the request of Respondents. Claimant walked with an antalgic gait and had tenderness throughout his entire ankle. Dr. Resig noted he had 2/5 strength with dorsiflexion, plantar flexion, inversion, and eversion testing. Dr. Resig viewed the surveillance video submitted by Respondents. Dr. Resig stated Claimant's gait during the examination and as documented by the DIME with Dr. Reichhardt did not correlate with the functions he was able to perform in the surveillance video. Dr. Resig opined Claimant would not improve with surgery. There was nothing to explain Claimant's weakness, nor did Dr. Resig believe the weakness could be solved with surgery. The ALJ credited this opinion expressed by Dr. Resig. Dr. Resig agreed with the January 16, 2017 MMI date and Dr. Keefe's 4% lower extremity impairment rating.

28. Dr. Koldenhoven authored a letter, dated January 10, 2018, after reviewing the surveillance tape. Dr. Koldenhoven noted Claimant was able to walk forward and backward without a limp. He expressed a different opinion with regard to the severity of Claimant's symptoms and need for surgery. Dr. Koldenhoven opined surgery was no longer needed for this patient. He concluded Claimant was at MMI and did not anticipate surgical management. Dr. Koldenhoven noted, although Claimant

had abnormalities on both the MRI scan and CT scan, he was tolerating these quite well.

29. Dr. Resig testified as an expert witness. He is a board-certified orthopedic surgeon, whose practice focused on lower extremity issues, including hip and knee replacements, as well as surgeries on the foot and ankle. He is Level II accredited pursuant to the WCRP. Dr. Resig noted Claimant had a small peroneal tendon tear, an injury to his ATFL and mild arthritic changes in the ankle joint. Claimant's tendon was still intact, although it had a longitudinal tear. Dr. Resig noted he could not explain the basis for Claimant's pain complaints and thought he was not honest in his presentation of his symptoms.

30. Dr. Resig testified that CRPS testing was not indicated, because Claimant's exam was not typical of CRPS, including swelling, color changes or temperature changes. Dr. Resig reiterated he believed Claimant was at MMI as of January 16, 2017. Dr. Resig noted Claimant had a fairly pronounced limp and expressions of pain during the examination, which were not demonstrated on the video. Dr. Resig reiterated his conclusion that surgery was not necessary for Claimant, as the requested surgery would not address the pain and weakness exhibited by Claimant on exam. He stated fixing ligaments does not fix pain or weakness. The ALJ credited Dr. Resig's opinions with regard to Claimant's need for surgery.

31. Dr. Reichhardt's conclusion that Claimant was not at MMI was overcome by clear and convincing evidence.

32. Claimant was at MMI as of January 16, 2017.

33. Claimant suffered a permanent medical impairment as a result of his May 5, 2016 work injury.

34. The ALJ determined Dr. Reichhardt's medical impairment rating of 14% was the most complete assessment of Claimant's permanent impairment.

35. Respondents are entitled to an offset for Claimant's receipt of SSDI benefits.

36. Evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be

interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Overcoming the DIME

In resolving the issues, the ALJ notes the question of whether Respondents overcame Dr. Reichhardt's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence". § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*. The elevated burden is evidence of the Colorado Legislature's intent to limit overcoming the DIME physician's

opinion to those cases where it is more probable than not that the opinion was incorrect. In the case at bar, the ALJ determined Respondents met this burden.

The ALJ's rationale was twofold; first, there was sufficient evidence introduced by Respondents to overcome Dr. Reichhardt's conclusion that Claimant was not at MMI. (Finding of Fact 31). Dr. Reichardt's conclusion with regard to MMI was predicated on the fact Claimant was to undergo the surgery recommended by Dr. Koldenhoven. The fact Claimant required the surgery was based upon his ongoing symptoms and this was the *conditio sine qua non* of Dr. Reichhardt's opinion. As found, there was no evidence Dr. Reichhardt was aware Dr. Koldenhoven retracted that opinion, as that occurred at a later time. (Finding of Fact 26). Since Claimant was not undergoing that procedure, the basis for Dr. Reichhardt's conclusion regarding MMI was no longer present. The ALJ determined concluded Respondents introduced sufficient evidence to overcome the opinion on MMI.

Second, the evidence from other medical providers, including Claimant's ATPs, Dr. Keefe and Respondents' IME (Dr. Resig) supported the conclusion Claimant was at MMI. This provided additional support for the ALJ to conclude that Respondents met their burden of proof to overcome Dr. Reichhardt's conclusion on the subject of MMI.

In coming to this conclusion, the ALJ considered Claimant's argument that because there was a possible diagnosis of CRPS, he was not at MMI. Claimant averred Respondents did not meet the clear and convincing evidentiary standard, as there were conflicting medical reports and Dr. Koldenhoven raised the possibility of CRPS. The ALJ found in his latter reports Dr. Koldenhoven did not believe Claimant required CRPS testing and concluded Claimant was at MMI. As the DIME examiner, Reichhardt discussed CRPS, as it related to the possible surgery. There was no evidence in the record Dr. Reichhardt diagnosed Claimant with CRPS. In this regard, the ALJ was persuaded by Dr. Resig's testimony that Claimant's symptoms did not meet the criteria for a CRPS diagnosis. (Finding of Fact 30). Based upon the totality of the evidence the ALJ was persuaded that Claimant was at MMI. (Finding of Fact 32).

Claimant's Medical Impairment Rating

The ALJ was persuaded that Dr. Reichhardt's opinion concerning Claimant's permanent medical impairment was the most accurate assessment of Claimant's permanency. (Finding of Fact 34). Dr. Reichhardt took into account the lost ROM in the ankle, as well as other parts of the foot. The ALJ was persuaded this was a correct and accurate evaluation of permanent impairment, as Claimant had symptoms and received treatment for not only his ankle, but other parts of the foot. Respondents did not dispute this fact and there was medical evidence in the form of the treatment records from Claimant's ATPs which showed treatment to other parts of the foot. In addition, Dr. Reichhardt's role as an independent examiner was persuasive. No evidence was admitted to that Dr. Reichhardt's rating was not valid and this independent assessment of Claimant's impairment was persuasive to the ALJ.

Therefore, Claimant sustained a 14% scheduled impairment rating to his lower extremity. Claimant is entitled to PPD benefits based upon the 14% extremity rating assessed by Dr. Reichhardt. Respondents shall pay PPD benefits based upon Dr. Reichhardt's impairment rating. They will be entitled to a credit for permanency previously paid.

Offset

As found, Claimant received SSDI benefits in 2014 in the amount of $686.90 per month. The offset for Respondents totals $79.26 per week. ($686.90 × 12 months = $8,232.80 per year divided by 52 weeks= $158.52 per week x 50% equals $79.26 per week). Respondents are entitled to offset Claimant's indemnity benefits by 50% of SSDI benefits he received. Claimant did not dispute that Respondents are entitled to this offset.

However, the ALJ was unable to conclude when Claimant received these benefits while receiving TTD and PPD benefits. There was evidence introduced regarding Claimant's receipt of SSDI benefits. (Finding of Fact 4). However, Claimant's testimony did not definitively show that he received SSDI benefits at all times he was receiving indemnity benefits under the Act. Under these circumstances, additional evidence is needed regarding the offset issue. Accordingly, counsel for the parties will be requested to confer to attempt the reach an agreement on the offset.

ORDER

It is therefore ordered:

1. Respondents met their burden to overcome the DIME physician's findings with regard to MMI by clear and convincing evidence. Claimant was at MMI as of January 16, 2017.

2. Claimant sustained a 14% medical impairment of his left lower extremity as a result of his industrial injury.

3. Respondents shall pay PPD benefits based upon a 14% scheduled impairment rating. Respondents are entitled to a credit for PPD benefits previously paid.

4. Respondents shall pay 8% statutory interest on all benefits not paid when due.

5. Respondents are entitled to a $79.26 weekly offset for Claimant's receipt of SSDI benefits. Counsel for Claimant and Respondents shall confer regarding the issue of what period Claimant received SSDI benefits vis a vis the time Claimant was receiving indemnity benefits. If no agreement is reached, either Claimant or Respondents may file an Application for Hearing regarding the offset issue.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 2, 2018

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that she developed an occupational disease that arose out of and in the course and scope of her employment with the employer.

- If the claimant proves a compensable occupational disease whether the claimant has demonstrated by a preponderance of the evidence that medical treatment she has received is reasonable medical treatment necessary to cure and relieve he claimant from the effects of the occupational disease.

FINDINGS OF FACT

1. The claimant testified that she was employed with the employer as a medical assistant. The claimant described her job duties as being those of a registered nurse, but with more supervision.

2. The claimant testified that in September 2016 she developed a cough and sought medical treatment with her primary care provider, who prescribed antibiotics. The claimant also testified that a chest x-ray taken at that time showed "nothing".

3. The claimant testified that approximately one year after the start of her cough she reported this cough to Amy Allen, Administrator with the employer. The claimant further testified that Ms. Allen sent her to Centura Center for Occupational Medicine (CCOM) for medical treatment.

4. Based upon the medical records entered into evidence, the claimant was first seen at CCOM by Dr. Randall Jernigan on November 15, 2017. At that time, Dr. Jernigan determined that the cause of the claimant's cough was unclear and placed the claimant on mometasone.

5. The claimant returned to Dr. Jernigan on November 30, 2017. At that time, Dr. Jernigan noted that the claimant had a chest x-ray in March that showed no lung issues and a tuberculosis test was negative. Dr. Jernigan also noted that two rounds of antibiotics and a two week trial of steroid inhalers were not helpful to the claimant. Dr. Jernigan noted that the cause of the claimant's symptoms was unclear, but it was possible that it was an allergic aggravation to mold, or underlying COPD. On that date, Dr. Jernigan referred the claimant to Dr. Barry Holcomb for a pulmonology consultation.

6. The claimant was first seen by Dr. Holcomb on December 26, 2017. The claimant testified that Dr. Holcomb diagnosed her with occupational asthma. In a medical record dated March 16, 2018, Dr. Holcomb diagnosed the claimant with

"chronic cough secondary to occupational asthma/reactive airways dysfunction syndrome" and "intermittent occupational/mild intermittent asthma". In that same report, Dr. Holcomb opined that the claimant does not have COPD.

7. The records entered into evidence demonstrate that a mold analysis of the claimant's work location was performed at the request of the employer. The mold analysis dated November 15, 2017 shows that samples were collected at the claimant's workplace on November 6, 2017. The mold analysis indicates that mold levels were "not elevated". The claimant testified that she understood the mold analysis to show that there was mold present at her workplace, but it was "within normal limits".

8. Dr. Jernigan was asked to review the mold analysis report. In response, Dr. Jernigan noted that he is not specifically trained in air analysis or mold analysis. However, based upon his review of the report, Dr. Jernigan noted that it appears that there was very minimal mold in the claimant's workplace, and that the total scores were less than outdoor exposure. Dr. Jernigan also opined that the claimant's symptoms were not related to the molds tested.

9. The claimant testified that her cough resolved after she left her employment with the employer. The claimant testified that February 27, 2018 was her final day of employment with the employer.

10. The ALJ credits the medical records and the opinion of Dr. Jernigan over the conflicting opinion of Dr. Holcomb and finds that the claimant has failed to show that it is more likely than not that she suffered an occupational disease that arose out of and in the course and scope of her employment with the employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and

actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo.

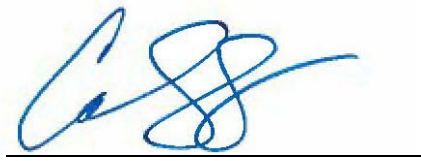
App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008)

7. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable occupational disease arising out of and in the course of her employment with the employer. As found, the medical records and the opinion of Dr. Jernigan are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed.

Dated: July 10, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUES

- Whether the respondent has demonstrated by a preponderance of the evidence that on August 24, 2016 the claimant was an independent contractor and not an employee of the employer.

- Whether the claimant has demonstrated by a preponderance of the evidence that his compensation should be increased by 50% pursuant to Section 8-43-408, C.R.S.**,** for the respondent's failure to obtain and maintain worker's compensation insurance.

STIPULATIONS

The parties have stipulated that if the claimant is found to have been an employee of the employer:

1. The claimant suffered a compensable injury at work on August 24, 2016.

2. The medical treatment the claimant received (including treatment from Yampa Valley Emergency Room and related ambulance transport; Dr. Alexander Meininger; Swedish Hospital; and Sports Med Physical Therapy); was reasonable and necessary to cure and relieve the claimant from the effects of the work injury.

3. The claimant's average weekly wage (AWW) for this claim is $1,100.00.

4. The claimant is entitled to temporary total disability (TTD) benefits from August 25, 2016 through January 31, 2017.

5. The employer did not carry workers' compensation insurance at the time of the claimant's injury on August 24, 2016.

6. The parties have also agreed that the issue of temporary partial disability (TPD) benefits beginning February 1, 2017 is held in abeyance.

FINDINGS OF FACT

1. The claimant testified that he previously worked in maintenance at a condominium development, The Phoenix (TP). While employed at TP, the claimant met Denis Marchbanks, owner of the respondent. Thereafter, the claimant left employment with TP and obtained a full time position with Alpine Fireplace and Appliance (AFA). The claimant's positon with AFA involves repairing fireplaces and appliances in customer homes.

2. Subsequently, the respondent offered the claimant work with respondent's company, Straight Up Construction. At that time, the claimant was in the process of purchasing a house and was interested in a part-time position with the respondent. The claimant testified that the respondent offered to pay the claimant $15.00 per hour to perform carpentry work. The claimant's carpentry experience is limited to framing.

3. In July 2016, the claimant began working for the respondent on his days off from AFA. The parties did not enter into a written contract.

4. The claimant testified that during the time he provided services to the respondent he hung doors, completed plumbing and electrical tasks, and installed a skylight. The claimant further testified that he had no prior experience performing these types of tasks. As a result, in each instance the respondent provided the claimant with instruction and training in the completion of the work. The ALJ finds no persuasive evidence on the record that the claimant has provided the same or similar services to others.

5. The respondent asserts that the claimant was paid a fixed rate for each job, and not hourly. However, based upon the checks and related invoices entered into evidence, the ALJ finds that the claimant was paid $20.00 per hour. In addition, the claimant was paid in his own name and not in any business name.

6. The invoices entered into evidence were not prepared by the claimant. Instead, Mr. Marchbanks prepared the invoices to "teach" the claimant how to issue an invoice. The ALJ finds this to be another instance of the respondent providing the claimant with training.

7. While providing services for the respondent, the claimant completed time cards. The respondent testified that he has workers complete time cards to ensure proper bidding on future jobs. The claimant testified that he was instructed to complete time cards because he was often working at different job locations throughout the work day.

8. Mr. Marchbanks testified that he has no employees and requires all contractors to provide him with proof of liability insurance. These contractors include his son, Nick Marchbanks, and his nephew, Matt Marchbanks. However, the claimant was allowed to perform work for the respondent without proof of insurance. The claimant testified that Mr. Marchbanks knew that he did not have liability insurance.

9. The claimant testified that he brought hand tools to work. These hand tools included a tool bag, hammer, and square. The claimant also testified that the respondent provided him with all other tools necessary to complete his assigned tasks.

10. The claimant testified that he was expected to arrive at the job site at 8:00 a.m. on the days he was scheduled to work. Mr. Marchbanks would arrive and give instructions on the tasks to be completed. Mr. Marchbanks would also tell Nick and Matt what time to finish for the day. Nick and Matt would communicate this information

to the claimant. The claimant was also told when to take lunch breaks and how long of a break he was allowed.

11. Nick Marchbanks, son of Denis Marchbanks, testified at hearing on behalf of the respondent. He testified that he provides services to the respondent as an independent contractor. He also testified that he has his own company, Twisted Pines Construction.

12. On August 24, 2016, the claimant and Nick Marchbanks were instructed to install two skylights. As part of this process, the respondent specifically instructed the claimant to place plastic sheeting on the floor under the ladder he was to use to install the skylight. The claimant disagreed with placing plastic in this way, but followed the respondent's instructions. While the claimant was on the ladder, the ladder slipped on the plastic and the claimant fell.

13. The medical records entered into evidence indicate that the claimant suffered a right calcaneal fracture, which required surgery. On September 7, 2016, Dr. Wade Russell Smith performed an open reduction and internal fixation (ORIF).

14. On May 3, 2016, the claimant filed Articles of Incorporation for "Evans Construction LLC" with the Colorado Secretary of State. Thereafter on July 27, 2017, the claimant filed a Periodic Report with the Colorado Secretary of State. The claimant testified that he established Evans Constriction LLC to use "someday", but has not been paid as Evans Construction LLC, nor has he obtained any jobs as Evans Construction LLC. The claimant does not advertise his LLC and has not submitted bids on any projects as the LLC.

15. The parties offered conflicting testimony about the nature of the relationship between the claimant and the respondent, which the ALJ resolves in favor of the claimant. The ALJ finds no persuasive evidence on the record to indicate that the claimant intended to be treated as an independent contractor while performing services for the respondent. The ALJ credits the claimant's testimony and the records entered into evidence and finds that the respondent has failed to overcome the presumption that the claimant was an employee of the respondent/employer.

16. Mr. Marchbanks agrees that the respondent did not have workers' compensation coverage on August 24, 2016 when the claimant fell and was injured.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation

case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

1. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation. . . under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

2. Under Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

3. As found, the claimant provided services to the respondent and was paid for his services. Therefore, claimant is presumed to be an employee of respondent.

4. The respondent has the burden of proving that the claimant was an independent contractor rather than an employee. Section 8-40-202(2)(b)(II), C.R.S., sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. *See Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993). Those nine factors are whether the person for whom services are provided:

- required the individual to work exclusively for the person for whom services are performed; (except that the individual may choose to work exclusively for that person for a finite period of time specified in the document);

- established a quality standard for the individual; (except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed);

- paid a salary or hourly rate but rather a fixed or contract rate;

- may terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce results that meet the specifications of the contract;

- provided more than minimal training for the individual;

- provided tools or benefits to the individual; (except that materials and equipment may be supplied);

- dictated the time of performance; (except the completion schedule and range of mutually agreeable work hours may be established);

- paid the individual personally, instead of making checks payable to the trade or business name of the individual; and,

- combined their business operations in any way with the individual's business, or maintained such operations as separate and distinct.

5. A document may satisfy the requirement to prove independence, but a document is not required. Section 8-40-202(2)(b)(III), C.R.S, provides that the existence of any one of those factors is not conclusive evidence that the individual is an employee. Consequently, the statute does not require satisfaction of all nine criteria in Section 8-40-202(2)(b)(II) in order to prove by a preponderance of the evidence that the individual is not an employee. See *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1999).

6. In *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) the Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not "engaged" in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court stated "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in Section 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015.

7. The *Softrock* Court pointed to *Long View Systems Corp. v. Industrial Claim Appeals Office,* 197 P.3d 295 (Colo. App. 2008) in which the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for

performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the employer. See *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015.

8. Section 8-40-202(b)(IV), C.R.S., provides that a written document may create a rebuttable presumption of an independent contractor relationship if it meets the nine criteria listed in Section 8-40-202(b)(II), C.R.S. and includes language in bold faced font or underlined typed that the worker is not entitled to workers' compensation benefits and is obligated to pay all necessary taxes. Additionally, the document must be signed by both parties. Here there was no written contract.

9. The ALJ has considered the nine factors listed in Section 8-40-202(2)(b)(II), C.R.S. and the totality of the circumstances of the relationship of the parties and concludes that the claimant was an employee of the respondent. The respondent has failed, by a preponderance of the evidence, to overcome the presumption of an employee-employer relationship.

10. In reaching this conclusion the ALJ notes that the claimant was paid an hourly rate and was paid in his own name. The respondent provided the claimant with instruction, training, and tools. These facts indicate that the respondent exercised direction and control over the claimant in the performance of the work. Although the claimant did establish Evans Construction, LLC in 2016, the ALJ finds that this is not dispositive of the relationship between the parties. The ALJ finds that the claimant did not engage in an independent trade or business providing similar services to others, nor did he intend to do so at the time of the injury. For all of the foregoing reasons, the ALJ concludes that the claimant was an employee of the respondent and was not an independent contractor.

11. Section 8-43-408(1) C.R.S., provides that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits provided in said articles shall be increased fifty percent (50%).

12. As found, the claimant has proven by a preponderance of the evidence that the respondent was not insured for workers' compensation at the time of the claimant's August 24, 2016 injury. Therefore, the claimant's compensation and benefits shall be increased by fifty percent pursuant to Section 8-43-408(1), C.R.S.

ORDER

It is therefore ordered that:

1. The claimant was an employee of the employer at the time of the August 24, 2016 injury.

The ALJ adopts the stipulation of the parties and further orders:

2. The claimant suffered a compensable injury at work on August 24, 2016.

3. The medical treatment the claimant received (including treatment from Yampa Valley Emergency Room and related ambulance transport; Dr. Alexander Meininger; Swedish Hospital; and Sports Med Physical Therapy); was reasonable and necessary to cure and relieve the claimant from the effects of the work injury.

4. The claimant's average weekly wage (AWW) for this claim is $1,100.00.

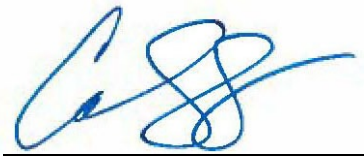
5. The claimant is entitled to temporary total disability (TTD) benefits from August 25, 2016 through January 31, 2017.

6. The employer did not carry workers' compensation insurance at the time of the claimant's injury on August 24, 2016. Therefore, the claimant is entitled to a 50% increase in any compensation he receives during this claim.

7. The respondent shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. By agreement of the parties the issue of temporary total disability (TPD) benefits is held in abeyance.

Dated: July 10, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as

long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Is this claim closed by a Final Admission of Liability dated November 15, 2017?

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on December 6, 2016. He was placed at MMI by his ATP on August 28, 2017, with a 10% lower extremity rating.

2. Respondents filed Final Admission of Liability (FAL) on November 15, 2017 based on the ATP's MMI report. The FAL was addressed to all parties and the Division of Workers' Compensation (DOWC) on November 15. The FAL was sent to Claimant at his home address and to Claimant's counsel addressed to: "Wes Hassler, 616 West Abriendo Ave., Pueblo, CO 81004." Claimant is represented by Stephen Johnston, Esq., with the same mailing address as Mr. Hassler.

3. Claimant received PPD payments based on the FAL via direct deposit. No persuasive evidence was presented to suggest Claimant did not receive a copy of the FAL sent to him on November 15, 2017.

4. Claimant's counsel did not receive the copy of the FAL mailed to his office. Counsel's paralegal, Sarah Malouff, testified credibly to the office's procedures for processing and distributing incoming mail. Based on the evidence presented, the ALJ finds Claimant's counsel's copy of the FAL was likely "lost in the mail."

5. Claimant's counsel was unaware an FAL had been filed until he received a Motion to Withdraw filed by Respondents' counsel on January 8, 2018. Claimant's counsel was puzzled by the Motion to Withdraw because he believed the claim was ongoing. Ms. Malouff contacted the claims adjuster and was told Respondents had filed an FAL on November 15. Ms. Malouff requested a copy of FAL from Respondents, and also requested a copy from the DOWC.

6. Respondents' counsel emailed Claimant's counsel a copy of the FAL on January 8, 2018.

7. The FAL contained all required attachments, including the objection forms and the ATP's MMI report. The ALJ appreciates no technical errors or omissions on the FAL, and the only defect alleged by Claimant is late receipt by his attorney.

8. Claimant's attorney applied for a hearing on January 11, 2018, endorsing the sole issue of: "the Final Admission of Liability dated November 15, 2017 should be void ab initio." Claimant did not file an Objection to Final Admission of Liability or a Notice and Proposal to Select an Independent Medical Examiner.

9. Claimant indicated at hearing he may wish to pursue a DIME depending on the outcome of this litigation.

10. The time to object to the November 15, 2017 FAL commenced on January 8, 2018 when Claimant's attorney received it via email. Claimant was required to perfect his objection no later than February 7, 2018.

11. Although Claimant's application for hearing served as a timely objection to the FAL, it only preserved the single issue that was specifically endorsed.

12. This claim is closed as to all issues admitted in the November 15 FAL.

13. This claim is closed with respect to the DIME process.

CONCLUSIONS OF LAW

An FAL provides a statutory mechanism for the respondents to initiate closure of a claim. Once an FAL is filed, the claimant must take certain actions within thirty days or the claim will "automatically close." A claimant has two options to prevent their claim from closing. The claimant can object to the FAL and request a hearing on any ripe and disputed issues, or initiate the DIME process by filing a "notice and proposal." If the claimant files a DIME notice and proposal, he does not have to apply for a hearing until the DIME process is complete. *See* §§ 8-43-203(2)(b)(II)(A); 8-42-107.2(2)(b).

The purpose of an FAL is to notify the claimant of the exact bases on which benefits have been admitted or denied so the claimant "can make an informed decision whether to accept or contest the final admission." *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). If a claimant is represented by counsel, due process requires that a claimant *and his attorney* must receive actual notice of an FAL before it can close a claim. *Hall v. Home Furniture Co*., 724 P.2d 94 (Colo. App. 1986).

An application for hearing can serve as a constructive objection to an FAL. *Mitchell v. Office Liquidators*, W.C. No. 4-409-905 (December 29, 2000). But the application only preserves issues that are specifically endorsed. *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004); *Cortez v. Minco Manufacturing Inc*., W.C. No. 4-596-318 (March 20, 2008). Furthermore, an application for hearing cannot substitute for a DIME notice and proposal, which is a "jurisdictional" prerequisite to a DIME. *Williams v. Devereux Cleo Wallace*, W.C. No. 4-620-507 (August 10, 2006).

In this case, there was nothing defective about the FAL itself. It contained all the required information and attachments, and was properly mailed to all parties on November 15, 2017. The problem here relates solely to delayed *receipt* of the FAL by Claimant's counsel. But the lack of receipt by a claimant or his attorney does not automatically vitiate an otherwise valid FAL or render it "void ab initio." Rather, unless the lack of receipt is attributable to the respondents, it merely tolls the objection period until all parties receive the FAL. *E.g., Hall v. Home Furniture Co., supra* (time limitation did not commence running "until claimant's attorney first received notification . . . that the

admission had been filed"); *Henriquez v. K. R. Swerdfeger Construction, Inc*., W.C. No. 4-439-726 (May 5, 2003) (time to object was triggered when claimant's attorney received the FAL); *cf*. *Tenorio v. Poudre Valley Hospital*, W.C. No. 4-162-954 (March 18, 1999) (FAL was invalid because it was not mailed to the claimant's correct address); *Koehler v. United Parcel Service*, W.C. No. 4-597-912 (June 14, 2011) (FAL was invalid because it was not sent to claimant's counsel).

The critical distinction in the above-cited cases hinges on whether the lack of receipt by the claimant or their attorney was due to factors within the respondents' control. When the FAL is not properly addressed and served in the first instance, it is void and cannot close a claim, even though the parties may receive it later. But when the FAL is properly addressed and sent, any delays in receipt due to the vagaries of the mail system or other external factors only toll the objection period.

Under the circumstances presented here, the time to object to the November 15, 2017 FAL was tolled until January 8, 2018 and expired on February 7, 2018. The DIME process is closed because Claimant filed no DIME notice and proposal within the window. Although Claimant timely objected to the FAL by requesting a hearing, he endorsed no substantive issues other than the validity of the FAL. Consequently, all issues admitted in the November 15, 2017 FAL are closed.

ORDER

It is therefore ordered that:

1. Claimant's claim is closed as to all issues admitted in the November 15, 2017 FAL, subject to statutory reopening.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 12, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Respondents have overcome by clear and convincing evidence Division Independent Medical Examination (DIME) physician James Regan, M.D.'s opinion that Claimant is not at maximum medical improvement (MMI) for her left wrist/thumb and for her left knee.

2. If Respondents overcome the DIME opinion and establish that Claimant is at MMI, determination of Claimant's correct permanent partial disability (PPD) rating for Claimant's left wrist/thumb and her left knee.

3. If Respondents overcome the DIME opinion and establish that Claimant is at MMI, determination of whether or not medical maintenance care is reasonable, necessary, and causally related to Claimant's July 27, 2014 injury.

4. If Respondents fail to overcome the DIME opinion and Claimant is determined not to be at MMI for her left wrist/thumb and for her left knee, whether or not the surgeries Claimant underwent in August of 2017 for her left wrist/thumb and in March of 2017 for her left knee were authorized and the responsibility of Respondent.

5. If Respondents fail to overcome the DIME opinion and Claimant is determined not to be at MMI, whether or not an overpayment exists due to Claimant's receipt of social security disability insurance benefits.

6. Determination of disfigurement for Claimant's bilateral wrists/thumbs.

PRELIMINARY MATTERS

1. If the ALJ find that Respondents have overcome the DIME opinion and that Claimant is at MMI with the correct impairment ratings being those provided by Dr. Cebrian and Dr. Broghammer, and if maintenance care is denied, Respondents will not seek an overpayment.

2. The issues of temporary total disability and permanent total disability indemnity benefits were held in abeyance. The period of disability indemnity benefits for future determination that Claimant is seeking depending on the outcome of this proceeding would be October 26, 2016 and ongoing and the parties stipulate to that period.

3. Determination of disfigurement for Claimant's left knee was not addressed and Claimant did not pursue it in this proceeding.

FINDINGS OF FACT

1. Claimant began employment with Employer on July 9, 2014. She was in training to become an assistant manager.

2. On July 27, 2014 Claimant sustained an admitted work related injury to her left knee and bilateral hands when she slipped and fell on a grease spot in a parking lot of Pep Boys in Highlands Ranch. At the time, as part of her job duties and training for Employer, Claimant was comparison shopping and was in the course and scope of her employment.

3. Claimant reported the injury to Employer and began treatment through the workers' compensation system. The issues for hearing focus on Claimant's bilateral wrists/thumbs and her left knee. The remaining areas that she may have treated or mentioned during her extensive treatment are not evaluated in this case.

4. Claimant treated extensively for her **left knee**.

5. On August 14, 2014 Claimant was evaluated by Richard Lotspeich, PA-C. Claimant reported new left knee pain and instability after a slip and fall on the job. Claimant reported since the fall she had pain, swelling, and instability of the left knee. Claimant reported that she did not note any instability prior to the fall. PA Lotspeich noted that Claimant had her left knee ACL reconstructed in 2008 and he assessed new left knee injury with likely re tear of her ACL. He recommended MRI and follow up with Dr. Loucks. *See* Exhibit 2.

6. On August 19, 2014 Claimant underwent an MRI of her left knee. The impression provided was: ACL graft appearing to be contiguous but with secondary signs of ACL insufficiency; chondral degeneration of the medial tibial plateau with some chondral fissuring and reactive subcortical bone marrow edema; postoperative removal of the body and a portion of the posterior horn of the medial meniscus presumed; chondral degeneration of the lateral joint compartment grade 1/grade II and a small area of grade III/minimal grade IV change in the posterior aspect of the lateral femoral condyle; small joint effusion with synovitis change. The findings included osteophytic ridging of the medial femoral condyle and lateral femoral condyle. *See* Exhibits 4, A.

7. On September 10, 2014 Claimant was evaluated by D. Craig Loucks, M.D. Dr. Loucks reviewed the MRI of the left knee and noted there were some questions about the integrity of the ACL graft and some changes suggestive of instability that fit the clinical exam. Dr. Loucks noted chondral degeneration in the posterior aspect of the lateral femoral condyle as well as some subcortical bone marrow edema. Dr. Loucks found some laxity in the ACL clinically and Claimant reported her knee felt unstable. Dr. Loucks was suspicious that the ACL was clinically incompetent. Dr. Loucks planned to have Claimant see Dr. Fitzgerald for a second opinion to determine whether a revision ACL reconstruction was in order. *See* Exhibit 2.

8. Claimant saw Dr. Fitzgerald the next day, September 11, 2014, for a second opinion on the left knee. Dr. Fitzgerald noted that Claimant had significant symptoms of subjective instability but that she had an intact ACL radiographically. Dr. Fitzgerald noted that he had a lengthy discussion with Claimant about risks and benefits of a surgical revision ACL reconstruction. Claimant wished to proceed with revision ACL reconstruction. *See* Exhibit 2.

9. On October 3, 2014 Claimant underwent left knee surgery performed by Dr. Fitzgerald. He noted that he performed a left knee revision, complex ACL reconstruction with patella tendon harvest, notchplasty, patellofemoral chondroplasty, and partial medial meniscectomy. In the indications for procedure, Dr. Fitzgerald noted that Claimant had been complaining of progressive left knee instability and that Claimant had a history of prior hamstring auto graft ACL reconstruction in 2008 and had noticed progressive instability since that time. Dr. Fitzgerald noted that the MRI scan showed signs of graft instability with a lax appearing graft. In surgery, Dr. Fitzgerald found grade 3 chondromalacia with multiple loose chondral flaps that were debrided and he found a degenerative tear of the body and posterior horn of the medial meniscus that was debrided. When Dr. Fitzgerald entered the notch to examine the ACL he found it was in a very vertical position with the femoral tunnel in the 12 o'clock position and found the graft to be lax in tendon appearance. He removed the residual hamstring fibers from the 2008 surgery and performed the graft seating. Dr. Fitzgerald noted bone spurring in the intercondylar notch and performed a notchplasty as well. *See* Exhibits 2, 6.

10. On November 28, 2014 Claimant underwent an MRI of her left knee. The impression was: sequelae of ACL reconstruction identified with apparent moderate tearing of the proximal graft fibers of about 70% thickness near the femoral tunnel origin; high grade partial medial meniscectomy without discrete recurrent tear noted and mild/moderate medial compartment chondromalacia with moderate subchondral edema of the medial tibial plateau; focal moderate chondral defect of the central to posterior junction lateral femoral condyle; mild patellofemoral chondromalacia; extensive post-operative findings of the patella and proximal to mid patellar tendon due to graft harvesting; small left knee effusion with synovitis. *See* Exhibit 7.

11. On December 4, 2014 Claimant was evaluated by Dr. Fitzgerald. Claimant reported increasing medial sided pain and pain over her patellar tendon. Dr. Fitzgerald noted that a recent MRI scan demonstrated continued inflammation around the graft harvest site of the patella tendon but no recurrent meniscal tear or tear of the ACL graft. He noted the MRI scan demonstrated medial tibial plateau edema which would be consistent with Claimant's medial compartment chondromalacia and opined that this was the main source of Claimant's symptoms. He recommended and performed an intraarticular injection. *See* Exhibit 2.

12. On June 2, 2015 Claimant was evaluated by Heather Cresmen, PA-C for Dr. Fitzgerald. Claimant reported continuing to have significant pain in her left knee along both the medial and lateral joint lines that did not respond to injections. Images of the left

knee were taken and showed some progressive joint space narrowing when compared to January 2015 and August 2014 films and showed gradual progression of the medial more than the lateral compartment and were still being reported as Kellgren Grade III. PA Cresmen provided the impression of: stable status post left knee revision ACL reconstruction with bone patella bone; left knee degenerative arthritis; and snapping tendon syndrome. PA Cresmen noted that Claimant requested a second opinion with Dr. Hugate and that Claimant's files would be transferred with a medical release. PA Cresmen recommended Claimant consider viscosupplementation to help reduce Claimant's pain due to her arthritis. *See* Exhibit 2.

13. On June 29, 2015 Claimant was evaluated by Dr. Hugate for her left knee issues. Dr. Hugate noted that Claimant had a complex history but essentially underwent a revision ACL reconstruction a few months ago and continued to have popping on the medial aspect of the knee and a feeling of instability. Dr. Hugate reviewed the MRI and x-rays of the left knee and noted that Claimant had moderate arthritis of her knee, tri compartmental. He noted the ACL was attenuated somewhat proximally. Dr. Hugate opined that Claimant was probably heading down the road of a knee replacement at some point on the left side. He noted that Claimant was 5'6'' and 220 pounds and that her weight would be an issue for both of her knees. He noted he had revised Claimant's right knee a few months ago and that it was doing reasonably well but that neither knee would do well if she maintained her current weight. Dr. Hugate recommended bariatric procedure. He opined that if he replaced Claimant's knees now they would fail if she maintained her current weight. *See* Exhibit 10.

14. On September 16, 2015 Dr. Hugate noted that Claimant had recently undergone a small left knee arthrotomy medially with resection of osteophytes and femoral chondroplasty. He noted that the surgery was done after a dynamic ultrasound showed her pes tendon snapping over the medial knee osteophyte which was causing pain. He wanted Claimant to wean off crutches and see a doctor for bariatric surgery. He encouraged physical therapy. *See* Exhibit 10.

15. On December 26, 2015 Claimant was evaluated by Jared Michalson, M.D. for a second opinion regarding continued treatment of her left knee. Dr. Michelson noted that Claimant had extensive soft tissue related tenderness to even light tough a significant distance away from her knee. Dr. Michalson opined that the vast majority of Claimant's discomfort was soft tissue and not related to osteoarthritis. Given that as well as Claimant's current pain management situation and less than satisfactory results from the contralateral knee replacement, Dr. Michalson strongly discouraged Claimant from seeking any surgical intervention on her left knee. He felt that attempted knee replacement would lead to an almost certainly poor outcome. He opined that if the extraordinary amount of soft tissue pain in the lower extremity unrelated to the knee joint were to dissipate in the future and if her examination was more telling for pain related to osteoarthritis, then she may be a candidate in the future for a total knee replacement. *See* Exhibit 15.

16. On January 7, 2016 Claimant underwent an MRI of her left knee. The findings showed that her ACL graft was intact without evidence of re-tear or cystic degeneration and the posterior cruciate ligament was intact. The impression was: previous ACL reconstruction with intact graft; previous partial medial meniscectomy with resultant significant chondromalacia and osteoarthritis of the medial femoral tibial compartment; post-surgical changes of the medial collateral ligament and patellar tendon with no acute tear; and moderate sized knee joint effusion. *See* Exhibit 17.

17. Claimant continued to be evaluated by Dr. Hugate and eventually underwent bariatric surgery losing a significant amount of weight. On November 7, 2016 Claimant returned to Dr. Hugate. Claimant reported continued left knee pain globally and snapping around the medial condyle and wanted to move ahead with a total knee replacement. Dr. Hugate opined that Claimant would benefit from a knee replacement, but he was concerned based on Claimant's multiple past histories where she had not been happy with the results of numerous surgeries except for a right thumb surgery. *See* Exhibit 10.

18. On March 21, 2017 Claimant underwent a left total knee arthroplasty performed by Dr. Hugate. He noted the pre-operative diagnoses as: end stage arthritis of the left knee with pain; snapping pes of the medial left knee; and painful nodular scar left medial knee. *See* Exhibit 21.

19. Claimant also treated extensively for her **bilateral wrists/thumbs.**

20. On August 11, 2014 Claimant was evaluated by orthopedic hand specialist Davis Hurley, M.D. Claimant reported bilateral wrist pain with most of the pain over the volar aspect of the palm. Dr. Hurley recommended split immobilization and follow up with x-rays if the pain persisted. *See* Exhibit 1.

21. On September 5, 2014 Claimant underwent bilateral x-rays of the wrists that showed no discrete fractures within either the right or left wrist. *See* Exhibit 5.

22. On September 8, 2014 Claimant was evaluated by Dr. Hurley. Claimant reported persistent pain at the right and left thumb base. Dr. Hurley noted that previous x-rays demonstrated a small avulsion fracture off the tip of the trapezium volarly and that x-rays that day demonstrated normal bony alignment. Dr. Hurley found maximum tenderness at the right and left wrist in the volar trapezium. Dr. Hurley opined that Claimant had significant thumb CMC arthritis, left worse than right and suspected the arthritis was aggravated by the fall and injury. He recommended a splint for comfort and opined that it should resolve over time. *See* Exhibit 1.

23. On October 24, 2014 Claimant was evaluated by In Sok Yi, M.D. Claimant reported falling at work and landing on her outstretched left hand with pain in both of her hands since. Claimant reported pain at the base of her thumb and that she had seen Dr. Hurley but wanted a second opinion. Claimant reported that her right hand bothered her as much as the left. Claimant denied any previous history of trauma or history to her hand

and denied a previous history of pain prior to the onset of pain after the fall. Dr. Yi reviewed x-rays of both hands that revealed Eaton Stage II bilateral thumb carpal metacarpal arthritis. Dr. Yi provided the impression of CMC arthritis and proceeding with a right thumb CMC joint injection. *See* Exhibit 2.

24. On November 17, 2014 Claimant was evaluated by Dr. Yi. Claimant reported the injection had helped her symptoms on the right CMC joint by greater than 50% but reported that her left thumb continued to be painful. Dr. Yi injected Claimant's left thumb CMC joint. *See* Exhibit 2.

25. On January 20, 2015 Claimant was evaluated by Dr. Yi. Claimant was in tears with pain and reported difficulty pinching and grasping. Claimant reported only short term relief with injections. Dr. Yi discussed leaving it alone versus surgical treatment and Claimant indicated she wanted to get it surgically treated. Dr. Yi noted that Claimant would be scheduled for a right thumb CMC arthroplasty with ligament reconstruction tendon interposition and de Quervain's release. *See* Exhibit 2.

26. On February 11, 2015 Sean Griggs, M.D., an orthopedic surgeon specializing in fingertips to shoulder, performed a medical records review. Dr. Griggs diagnosed bilateral thumb joint arthritis aggravated by a fall in which Claimant had contusions to her bilateral hands. Dr. Griggs opined that Claimant had no medical records indicating that she had trouble with her CMC joints prior to her fall in July of 2014 and that following her injury she developed pain from her bilateral CMC joint arthritis that was not improved with conservative management. Dr. Griggs opined that the fall did not cause the CMC joint arthritis but aggravated the arthritis to the point that Claimant required management surgically. Dr. Griggs opined that if Claimant proceeded with surgical management of her CMC joint arthritis he would apportion part of her final impairment to a pre-existing condition. See Exhibit 8.

27. On April 17, 2015 Claimant underwent right thumb CMC arthroplasty with ligament reconstruction, tendon interposition, and de Quervain's release, and a left thumb CMC joint injection performed by Dr. Yi. Dr. Yi noted the pre and post-operative diagnosis was right thumb CMC arthritis. *See* Exhibits 2, 9.

28. On December 11, 2015 Claimant was evaluated by Dr. Yi. Dr. Yi noted that Claimant was able to do most things but had some soreness in her right thumb with prolonged activity. Dr. Yi opined that it should continue to improve with time. Dr. Yi opined that Claimant could use her right hand as tolerated. Dr. Yi noted that the left continued to be very painful with pain in the thumb CMC grind test. Dr. Yi noted that Claimant would be scheduled for a left thumb CMC arthroplasty with ligament reconstruction, tendon interposition, and de Quervain's release. *See* Exhibit 2.

29. On January 8, 2016 Claimant underwent left thumb CMC arthroplasty with ligament reconstruction, tendon interposition, and de Quervain's release performed by Dr. Yi. Dr. Yi noted the pre and post-operative diagnosis as left thumb CMC arthritis and de Quervain's tendinitis. *See* Exhibits 2, 18.

30. On September 2, 2016 Claimant was evaluated by Dr. Yi. Claimant reported having more pain and crepitus in her left thumb which was not resolving. On exam, Dr. Yi found crepitus with axial loading the thumb with load transferred to the second metacarpal. Dr. Yi felt as though there might be some impingement at the base of the first metacarpal to the second metacarpal and recommended a CT scan to better evaluate. *See* Exhibit 2.

31. A CT scan of the left wrist was performed on September 13, 2016. It showed the tendon reconstruction with interposition with focal advanced degenerative changes where the first metacarpal base abuts the trapezoid and mild to moderate widening of the scapholunate interval. *See* Exhibit 19.

32. On October 7, 2016 Dr. Yi evaluated Claimant. Dr. Yi noted that the CT scan revealed Claimant's first metacarpal base was abutting the trapezoid. Claimant reported continued clicking and pain. Dr. Yi recommended a left thumb CMC revision arthroplasty with tendon interposition and pinning with slight distraction to prevent impingement within the base of the first metacarpal and the trapezoid with increase resection of the base of the first metacarpal. Dr. Yi anticipated it would be about four to six months for Claimant to be at maximum medical improvement. *See* Exhibit 2.

33. On August 31, 2017 Claimant underwent a left thumb carpometacarpal revision arthroplasty with tendon graft and pinning of the carpometacarpal joint performed by Dr. Yi. *See* Exhibit 25.

IME'S/MEDICAL OPINIONS

34. On December 23, 2015 Levi Miller, D.O. performed a medical record review and dictated records of Claimant's visits. Dr. Miller did not provide any opinions or causation analysis. *See* Exhibit 16.

35. On December 16, 2016 Claimant underwent an independent medical evaluation performed by Carlos Cebrian, M.D. Claimant reported that she was injured on July 27, 2014 when she slipped on grease and fell forward landing on her hands and knees with her body twisted to the left. Claimant reported that at the time she had been working out regularly and walking up to 6 miles per day. Claimant reported pain in her left hand with difficulty gripping objects. Claimant reported a feeling like there was a knife in her left knee and that her left knee would give out. Claimant reported that the most she could walk was a couple of aisles at Costco. Dr. Cebrian reviewed medical records and performed a physical examination. *See* Exhibit B.

36. Dr. Cebrian assessed claim related diagnoses to include left ACL graft tear and bilateral wrist contusions. Dr. Cebrian assessed Claimant with having non claim related diagnoses of right knee problems with 3 prior surgeries, bilateral CMC osteoarthritis left worse than right, chronic pain disorder, gastric sleeve surgery, obesity,

gastrointestinal complaints, right foot surgery, and left knee problems with a prior ACL surgery and tri compartmental arthritis. *See* Exhibit B.

37. Dr. Cebrian opined that Claimant had an extensive past medical history including her prior right knee replacement with two revisions, her prior left knee ACL reconstruction, her bilateral CMC osteoarthritis, and her obesity. He noted that her claim had been complicated by the non-claim related surgeries to the right knee and bariatric surgery. Dr. Cebrian opined that from the beginning of the claim, Claimant's subjective complaints had been out of proportion to the objective findings. Dr. Cebrian noted Dr. Reilly's opinion that non organic factors were contributing to symptom production and/or maintenance in the form of compensation/litigation factors which appeared to be contributing to delayed recovery/chronic pain syndrome. Dr. Cebrian opined that Dr. Reilly's opinions explained why Claimant's subjective complaints have been out or proportion. Dr. Cebrian pointed to a January 2016 visit where it was noted that Claimant's narcotics had increased and that she still rated her pain at 10/10. He also noted that Claimant continued to utilize crutches long after her medical providers recommended she do so. *See* Exhibit B.

38. Regarding her left knee, Dr. Cebrian opined that Claimant sustained a tear of her prior ACL graft due to the July 27, 2014 claim that was surgically treated on October 3, 2014. Dr. Cebrian opined that Claimant's ongoing left knee complaints were due to non-claim related osteoarthritis of the left knee. Dr. Cebrian opined that any osteoarthritic changes were due to the underlying natural history of the condition and were not due to anything causally related to Claimant's July 27, 2014 injury and opined that the injury did not change Claimant's underlying disease process. Dr. Cebrian opined that no further treatment under the claim was indicated for the left knee as the injury was no longer the proximate cause of the left knee complaints. He opined that the current complaints were due to osteoarthritis not caused by or aggravated by the July 27, 2014 claim. *See* Exhibit B.

39. Regarding the bilateral wrists, Dr. Cebrian opined that Claimant sustained contusions to her bilateral wrists as a result of the injury on July 27, 2014. He noted that Claimant was diagnosed with Eaton Stage II bilateral thumb CMC arthritis in October of 2014 and that in October of 2014 Dr. Broghammer opined it was not reasonable to proceed with any overly aggressive treatment for Claimant's CMC arthropathy given that she merely had evidence of contusions to the bilateral hands. Claimant underwent the bilateral surgeries for her CMC osteoarthritis in April of 2015 for the right and in January of 2016 for the left. Dr. Cebrian opined that the need for the bilateral surgeries was not causally related to Claimant's July 27, 2014 injury. He opined that at most, Claimant had a temporary aggravation to her pre-existing CMC osteoarthritis and that a contusion related aggravation was a medical event of limited duration which did not change Claimant's underlying chronic problem. He noted, nevertheless, that Claimant underwent surgeries under the claim accepted as compensable and that an additional left CMC surgery has been requested and Dr. Cebrian recommended against any additional surgeries. *See* Exhibit B.

40. Dr. Cebrian opined that Claimant was at maximum medical improvement. He opined that Claimant's impairment for the left knee would be 16% lower extremity. He opined that Claimant did not have an impairment for the right wrist or thumb or left wrist. Dr. Cebrian opined that Claimant's impairment for the left thumb would be 7% upper extremity. Dr. Cebrian opined that the final impairments were 16% lower extremity and 7% upper extremity and that if they were combined they would be 10% whole person. *See* Exhibit B.

41. On January 25, 2017 Dr. Broghammer responded to questions from Respondents. Dr. Broghammer agreed with Dr. Cebrian that Claimant was likely at maximum medical improvement as of October 26, 2016. Dr. Broghammer opined that Claimant's need for a left knee replacement was due to personal genetic factors and that unless a fracture to the articular cartilage had occurred or there was some other significant injury (as opposed to a contusion and/or tear of the meniscus or ligament) then a knee replacement would not be related to an injury. Dr. Broghammer also opined that Claimant's need for CMC arthroplasty was related to personal factors and not due to the contusions to Claimant's bilateral wrists. Dr. Broghammer opined that unless a fracture to the articular cartilage had occurred or there was some type of other significant injury that occurred (as opposed to simple contusions with no evidence of damage to the bone) then he was of the opinion that the work injury did not accelerate beyond normal progression Claimant's CMC arthritis. Dr. Broghammer opined that Claimant likely did not need maintenance treatment and he agreed with Dr. Cebrian's impairment ratings of 16% lower extremity and 7% upper extremity. *See* Exhibit C.

42. On February 3, 2017 Respondents filed a final admission of liability and attached the reports of Dr. Cebrian and Dr. Broghammer. Respondents admitted to a 7% upper extremity impairment and a 16% lower extremity impairment. *See* Exhibit G.

43. Claimant objected to the final admission of liability and requested a division independent medical examination.

44. On March 6, 2017 Claimant was evaluated by Dr. Hurley. He noted that Claimant was there for follow up of hand pain on the left greater than right with pain at the base of the thumbs. Dr. Hurley noted that he had seen Claimant in 2014 after a fall and that there was some confusion regarding possible fractures at the time of the injury. Dr. Hurley reviewed the x-rays of the wrists from August of 2014. He opined that the left carpal tunnel viewed showed a lucency at the volar tubercle of the trapezium consistent with a fracture and that the right carpal tunnel view showed a lucency in the volar aspect of the scaphoid consistent with an injury. He noted that the x-rays also showed right and left thumb CMC arthritis with the left side being more significant in the 2014 x-rays. He opined that the fall exacerbated the underlying arthritis. *See* Exhibit 1.

45. On June 6, 2017 Claimant underwent a division independent medical examination (DIME) performed by James Regan, M.D. Dr. Regan noted that Claimant had a mammoth record and that he would record visits that represented a material change in complaints, diagnosis, therapeutics, consultations, procedures, etc. Claimant reported

to Dr. Regan that prior to the July 27, 2014 work injury she was fine left-knee wise and that the 2008 ACL work had been quite successful. Claimant also reported that prior to the event she had no hand issues whatsoever. Dr. Regan noted that MRI imaging showed progressive changes over the months from August of 2014 until January of 2016 and that **the last imaging identified the October 2014 surgical procedure as contributing to Claimant's osteoarthritis**. Dr. Regan noted that Claimant had four left knee surgeries, the first in 2008 and the next three following the July 2014 accident with the most recent being the March 2017 total knee arthroplasty. He noted on exam that Claimant had a warm left knee with a healing total knee arthroplasty wound. He opined that Claimant's impairment of the left knee was 30% lower extremity that translated to a 12% whole person impairment. Dr. Regan opined that Claimant's impairment of the left and right thumbs were 6% upper extremity bilaterally which translated to 4% whole person for each upper extremity. He opined that combining 12% whole person for the knee and 8% whole person for the thumbs resulted in a 19% whole person impairment rating. *See* Exhibits 22, D.

46. Dr. Regan opined that although the imaging showed degenerative changes at Claimant's bilateral CMC joints, Claimant had no wrist issues prior to the fall and was asymptomatic with no restrictions prior to her work related injury. He opined therefore that the thumbs were work related and the proposed follow up surgery on the left thumb should be covered as part of the claim. Dr. Regan also opined that Claimant's left knee was sound after her 2008 ACL repair and that Claimant's July 2014 injury clearly led to her debility and need for left knee surgery. Dr. Regan opined that the MRI's showed progressive deterioration of the knee. Dr. Regan noted that the **January 2016 MRI report had a remark "previous partial medial meniscectomy (10/3/14) with resultant significant chondromalacia and osteoarthrosis of the medial femoral tibial compartment**" which indicated that the surgery in October, necessitated by the July 2014 injury, hastened Claimant's degenerative joint disease at the left knee. Dr. Regan opined that the work related injury resulted in such degeneration of the left knee that a left knee total arthroplasty was subsequently necessary. Dr. Regan opined that the left knee total arthroplasty should be considered a direct consequence of the work injury of July, 2014. Dr. Regan concluded that Claimant was not at maximum medical improvement and that Claimant had no prior thumb issues and that her left knee was sound so no apportionment was necessary. *See* Exhibits 22, D.

47. On August 28, 2017 Dr. Hugate wrote a letter answering specific questions raised by Claimant's attorney. Dr. Hugate opined that Claimant had sustained a permanent injury to her left knee and had undergone numerous surgeries in an attempt to improve her pain and function but opined that her knee would never be normal again. Dr. Hugate opined that the condition of Claimant's left knee was related to the slip and fall that occurred on July 27, 2014 as she had been doing well after her prior 2008 ACL reconstruction prior to the slip and fall. Dr. Hugate opined that the slip and fall aggravated a pre-existing condition in her knees, created new instability, and exacerbated her arthritis. See Exhibit 10.

48. On September 1, 2017 Claimant underwent an independent medical evaluation performed by orthopedic surgeon Robert Messenbaugh, M.D. Claimant reported that following her 2008 left ACL surgery she was 100% back and she also reported that she never knew that she had any arthritis. Dr. Messenbaugh reviewed medical records. He noted that in March of 2014 prior to her work injury, Claimant reported that she had pain in the medial side of her right knee radiating down her shin occasionally going into the bottom of her right foot and that Claimant had recently noticed some similar pains in the medial aspect of her left knee. He also noted that at another evaluation in March of 2014 Claimant reported some ongoing bilateral medial knee pain with radiation down the left into the foot at times. Dr. Messenbaugh also performed a physical examination. *See* Exhibits 23, E.

49. Dr. Messenbaugh opined that as a result of her July 27, 2014 slip and fall incident Claimant had sustained right and left basilar palmar contusions without confirmed evidence of wrist fractures; a resolved lumbar strain; and a contusion of the left knee without tearing of the ACL. Dr. Messenbaugh opined that Claimant had pre-existing degenerative arthritis involving her thumb metacarpal joints and although she sustained contusions to her left and right palms as a result of the fall, Claimant did not sustain injury, fracture, dislocation, or aggravation to her pre-accident thumb arthritis. Dr. Messenbaugh noted that on August 11, 2014 hand surgeon Dr. Hurley made no mention of any thumb pain or issues as a result of the fall and that on that date Claimant's Finkelstein's test was negative with no mention that the test caused Claimant any thumb discomfort. Dr. Messenbaugh opined that if an individual had an injury to their thumbs, the Finkelstein test proves to be very provocative causing thumb pain. Dr. Messenbaugh opined that the surgeries to Claimant's left and right thumbs were for thumb arthritis that predated Claimant's accident and were not necessitated by or related to her July 2014 fall. Dr. Messenbaugh also opined that Claimant, at most, sustained a contusion to her left knee as a result of the July 2014 fall and did not sustain a tear of her ACL. Dr. Messenbaugh noted that the August 2014 MRI of the left knee showed the ACL graft from her 2008 surgery was still intact. He noted that there was not tearing on the MRI 3 weeks after her fall but there was evidence of degenerative arthritis within the left knee on that MRI and showed signs of chronic ACL insufficiency. *See* Exhibits 23, E

50. Dr. Messenbaugh noted the signs on the MRI 3 weeks after the July 2014 fall along with Dr. Fitzgerald's operative summary reporting degenerative tearing of the medial meniscus and finding of the ACL graft vertical within the foraminal canal in the 12 o'clock position that was lax in tendon appearance, Dr. Messenbaugh opined that Claimant's original 2008 ACL graft was in all probability not properly positioned (too vertical). Dr. Messenbaugh opined that this caused Claimant to experience some degree of cruciate instability thereby causing Claimant to experience progressive arthritic wear within her left knee long before her July 2014 accident. Dr. Messenbaugh noted that in surgery Dr. Fitzgerald described the ACL as lax but not as torn and not as acutely torn. Dr. Messenbaugh opined that a left knee total arthroplasty was due to degenerative issues within Claimant's left knee that predated her July 2014 fall and were not due to any tearing of the ACL or other injuries sustained in the July 2014 fall. Dr. Messenbaugh opined that Claimant would have required left knee surgeries and thumb surgeries due to

her pre-accident pathology involving her left knee and thumbs even had she not experienced a fall on July 27, 2014. *See* Exhibits 23, E.

51. On November 16, 2017 Dr. Cebrian provided a supplemental report to his October 2016 independent medical evaluation. Dr. Cebrian noted that he had received and reviewed additional medical records since his October 2016 IME. Dr. Cebrian noted that in November of 2016 Dr. Hugate was concerned that Claimant would not do well with additional surgery as Claimant had multiple surgeries and was not pleased with the results. Dr. Cebrian noted that a body mass index above 25 is a significant risk factor for eventual knee replacement and that there is good evidence that obesity increases the risk of symptomatic knee osteoarthritis resulting in knee replacement eleven fold in women. Dr. Cebrian opined that Claimant had multiple risk factors for left knee osteoarthritis including: her prior ACL surgery in 2008, her obesity (before her bariatric surgery) where her weight had been well over 200 pounds with a BMI up to 36.8. Dr. Cebrian opined that any aggravated osteoarthritis and need for left knee replacement surgery is due to Claimant's pre-existing left knee pathology and her obesity. Dr. Cebrian opined that Dr. Regan erred by ignoring information in the medical treatment guidelines. *See* Exhibits 20, B.

52. Claimant has extensive pre-existing degenerative arthritis that pre-dated her July 27, 2014 injury.

53. In January of 2014 Claimant underwent a right total knee replacement. Claimant underwent a revision of the right total knee replacement on May 9, 2014. While treating for her right knee and in March of 2014, Claimant reported having bilateral knee pain and that she was having pain in the medial aspect of her left knee. *See* Exhibit E.

54. Claimant had previously undergone a left knee ACL surgery in 2008. Evidence shows that the ACL graft was placed improperly and that a partial medial meniscectomy was also performed at that time.

55. On August 14, 2015 Claimant underwent a psychological consultation with Kevin Reilly, Psy.D. Dr. Reilly opined that Claimant had features of anxiety and strong somatic focus and that there also appeared to be non-organic factors contributing to symptom production and/or maintenance in the form of compensation/litigation factors. Dr. Reilly opined that all of those factors appeared to be contributing to delayed recovery/chronic pain syndrome. *See* Exhibit 12.

HEARING/DEPOSITION TESTIMONY

56. On November 28, 2017 Dr. Broghammer testified by deposition. Dr. Broghammer opined that Claimant's 2014 MRI showed that her prior ACL graft was stretched. Dr. Broghammer noted that he had in August of 2017 opined that Claimant's need for a left total knee arthroplasty was a direct result and consequence of her work injury because he believed the medical records indicated that Claimant had re-torn her ACL graft. Dr. Broghammer testified that Claimant had actually not re-torn her ACL graft

and that it was just lax. Dr. Broghammer testified that the stretched tendon could have happened when Claimant fell and that it also could have stretched as a result of time or degeneration since it was repaired in 2008 and over the period of six years prior to the 2014 MRI. Dr. Broghammer opined that the left total knee replacement surgery was more likely than not for Claimant's pre-existing condition based on the most recently provided medical records he had reviewed. Dr. Broghammer opined that the need for a total knee replacement surgery was not related to the claim.

57. Dr. Broghammer also opined that the thumbs and surgery to the thumbs were more likely than not unrelated to Claimant's July 27, 2014 fall. Dr. Broghammer testified that he had opined that Claimant had contusions to her bilateral palmar areas and didn't agree that the fall had aggravated her pre-existing arthritic condition since there was no fracture, thumb dislocation, or other significant injury and that he only deferred to the opinions of Dr. Yi and Dr. Griggs who both felt Claimant had aggravated her pre-existing CMC joint arthritis when she fell. He disagreed with the two hand surgeons who felt Claimant aggravated her pre-existing arthritis. Dr. Broghammer opined that the fall did not result in a material aggravation or acceleration beyond the normal progression of Claimant's pre-existing arthritis. Dr. Broghammer noted that there was no evidence of damage to the articular cartilage as a result of the fall and noted that the subsequent workup demonstrated a pre-existing degenerative condition.

58. Dr. Cebrian and Dr. Messenbaugh testified at hearing consistent with their prior medical evaluation reports.

59. Dr. Cebrian opined that after the July 2014 fall, Claimant had no signs of an acute tear of her left knee ACL and had looseness or laxity and wearing away of her chondral surface. Dr. Cebrian opined that Claimant's left knee was at maximum medical improvement and that a total left knee replacement was not related to the work injury. Dr. Cebrian also opined that the bilateral wrist/thumb injury sustained in July 2014 involved contusions and temporary aggravation to Claimant's underlying condition but caused no permanent change. Dr. Cebrian pointed out that Claimant was not asymptomatic in her left knee from her 2008 surgery until the July 2014 fall like she reported and pointed out her reports of left knee pain four months prior to the July 2014 fall. He also pointed out Claimant's reports of progressive instability since 2008 in her left knee. Dr. Cebrian testified that DIME physician Dr. Regan did not comment on the records showing Claimant's reports of left knee pain before the July 2014 fall. Dr. Cebrian testified that treatment had been based on Claimant's subjective complaints yet Claimant was shown by Dr. Reilly to have anxiety, somatic focus, non-organic factors, and delayed recovery. Dr. Cebrian opined that Claimant's subjective complaints had been out of proportion to objective findings.

60. Dr. Cebrian opined that Claimant had pre-existing degenerative arthritis in both her knee and her bilateral thumbs. He opined that Claimant had no objective acceleration. He opined that Claimant was not asymptomatic in the left knee as she reported and that Claimant would have needed a total knee replacement regardless of her work related fall. Dr. Cebrian noted Claimant's body mass index over 30 was a

significant accelerator for the need for a total knee replacement. Dr. Cebrian also testified that Claimant had no acute fracture or exam findings of acute swelling in her bilateral hands and opined that if the July 2014 fall had accelerated her underlying arthritis in both CMC joints, she would have had acute swelling and more prominent findings on examination other than just her pain. He opined that Claimant's total knee replacement was not work related and was related to Claimants' pre-existing degenerative osteoarthritis and obesity and prior ACL repair from 2008. He opined that the bilateral wrists/thumbs were not work related and that surgery needed was due to the natural progression of Claimant's underlying degeneration.

61. Dr. Messenbaugh testified that Claimant did not sustain a tear of her ACL in the July 2014 fall and testified that was significant because there was no evidence of an acute injury or acute ACL tear. He testified that multiple degenerative changes were shown on MRIs after the fall and that osteophytes (bone spurs) were also found which take a long time to develop. He also pointed out the chronic changes shown in the patellofemoral joint. Dr. Messenbaugh opined that although the ACL was not torn there were signs of ACL insufficiency and that the 2008 ACL graft had not been properly placed. Dr. Messenbaugh pointed out that the imaging and later surgery showed the 2008 ACL graft had been placed at the noon position and not the 2:00 position and that the goal in a surgery is to put it in the exact right position for total stability. He testified that because Claimant's 2008 ACL graft was not put in the right position, it was not providing stability for Claimant and could lead to degenerative tearing and chondral changes. He opined that her 2008 surgery left her ACL lax because they drilled in the wrong spot and attached at 12:00 when it should have been attached at 2:00. He pointed out Claimant's left knee pain reports in the months before her July 2014 fall. Dr. Messenbaugh also opined that in the October 2014 left knee surgery they didn't find an ACL tear but took out the bad positioned graft from the 2008 surgery and replaced it with a patellar graft in a good position and that in surgery there was no evidence of acute injury but multiple chondral and degenerative changes. Dr. Messenbaugh opined that there was no injury to any left knee ligaments identified on the MRIs following the July 2014 fall. Dr. Messenbaugh pointed out that DIME physician Dr. Regan did not note Claimant's left knee symptoms that existed prior to her July 2014 fall

62. Dr. Messenbaugh opined that Claimant suffers from an arthritic condition at the base of her thumbs and that the two surgeries were due to her pre-existing arthritis and not due to her July 2014 fall. Dr. Messenbaugh opined that he would have expected objective findings after the fall and that there were none other than abrasions on her hands and no fractures. Dr. Messenbaugh pointed out that after the fall and immediately Claimant had pain at the base of her palms but no pain at the base of her thumbs and noted she was given a wrist splint and not a thumb splint. He opined that she sustained no injury to the base of her thumbs at the time of the fall and that her surgeries were due to her osteoarthritis. Dr. Messenbaugh testified that lucency and bony cyst shown in imaging was created by chronic arthritis and a hole in the bone and that no fracture was found on MRI or in surgery when Claimant was opened up. Dr. Messenbaugh noted that in the second left thumb/wrist surgery Dr. Yi removed prominent bone spurs which were created by Claimant's osteoarthritis. Dr. Messenbaugh testified that he reviewed the MRI

report which showed no fracture and significant arthritis at the base of the thumb. Dr. Messenbaugh opined that the surgery at the carpometacarpal was not related to Claimant's July 2014 fall and was related to her arthritis.

63. Claimant testified at hearing that prior to her July 2014 fall she had never gone to a doctor for any kind of hand or wrist injuries or arthritis and did not suspect that she had arthritis in her wrists. Claimant also testified that she did not feel that her left knee was unstable at all between 2009 and July of 2014. Claimant testified that prior to her July 2014 fall she was walking and riding a stationary bike up to 6 miles per day and was working full time. Claimant testified that between July 9, 2014 and her fall July 27, 2014 while working for Employer, she worked 50+ hours per week and was climbing ladders, unloading semis, putting the merchandise from the semis away, and doing several physical manual labor jobs and was able to do them.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME on MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment ***as a result of injury*** has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

As found above, DIME physician Dr. Regan opined that Claimant was not at MMI for her left knee and her left wrist/thumb. Respondent have overcome this opinion by clear and convincing evidence. Respondents have shown, and the overall evidence establishes, that it is highly probable Dr. Regan is incorrect. Claimant's physical impairment ***as a result of her injury*** was stable at the time of the DIME and further treatment would not reasonably have been expected to improve her work related condition at the time the DIME was performed.

Left knee:

Dr. Regan did not appreciate that Claimant had symptoms of left knee pain and instability prior to her July 2014 fall. Claimant denied these problems to multiple providers despite them being documented in the medical records. Additionally, as found above, Claimant did not tear her ACL in the July 2014 fall. Rather, the ACL was lax due to being improperly positioned during her 2008 surgery. Claimant reported progressive instability following her 2008 surgery to Dr. Fitzgerald. Claimant reported left knee pain to a provider just months before her July 2014 fall. Claimant, overall, is not credible or persuasive that her left knee was fine before the fall and that her instability was "new." Further, Dr. Regan erred when he misinterpreted the January 2016 left knee MRI. He quoted it as saying that the October 2014 left knee surgery of partial medial meniscectomy caused resultant significant chondromalacia and osteoarthritis of the medial femoral tibial compartment. However, the actual MRI impression provides, "previous partial medial meniscectomy with resultant significant chondromalacia and osteoarthritis of the medial femoral tibial compartment..." This is significant because Dr. Regan concluded that the January 2016 MRI showed that the October 2014 surgery had hastened Claimant's degenerative joint disease at the left knee resulting in such degeneration that a total left knee arthroplasty was necessary and should be considered a direct consequence of the July 2014 work injury. However, Dr. Regan appears to miss the impression of the August 2014 left knee MRI that indicated Claimant had the finding of postoperative removal of the body and a portion of the posterior horn of the medial meniscus presumed. The radiologist noted postsurgical change of the body and posterior horn of the medial meniscus. The January 2016 MRI found lack of substance of the medial meniscus consistent with a previous partial meniscectomy which is a very similar finding to the August 2014 MRI. Thus, Dr. Regan erred by assuming that the reference to previous partial medial meniscectomy with resultant significant chondromalacia and osteoarthritis was due to the October 2014 surgery since the previous partial medial meniscectomy had taken place prior to the August 2014 MRI and certainly prior to the October 2014 surgery.

Claimant had significant degeneration in her left knee, prior reports of pain, prior reports of instability, and bone osteophytes that take significant time to develop. Dr. Regan erred by failing to consider the prior left knee pain and instability reports and by relying on Claimant's own subjective reports that her left knee was fine prior to the July 2014 fall. Dr. Regan also erred by assuming the January 2016 MRI related the significant chondromalacia and osteoarthritis to the October 2014 left knee surgery when findings of medial meniscus removal were found prior to the October 2014 surgery. Dr. Regan's opinion that the October 2014 surgery hastened Claimant's degenerative joint disease in

the left knee is not credible or persuasive and is in error based on the totality of the medical records and evidence. Dr. Fitzgerald, as found above, opined credibly that the medial compartment chondromalacia was the main source of Claimant's symptoms.

The opinions of Dr. Cebrian, Dr. Broghammer, and Dr. Messenbaugh are credible and persuasive. Claimants left knee complaints and issues at the time of the DIME were not due to her work related injury and were due to non-claim related osteoarthritis of the left knee and due to the underlying natural history and progression of her disease process. The July 2014 injury did not change, aggravate, or accelerate her significant pre-existing disease process. Claimant would have required a total left knee replacement whether or not she fell at work and the fall did not contribute to or accelerate her need for the total knee replacement. Respondents have established by clear and convincing evidence that Dr. Regan erred and that Claimant is at maximum medical improvement for her left knee.

Left wrist/thumb:

Respondents have also established by clear and convincing evidence that Dr. Regan erred in opining that Claimant's left wrist/thumb was not at MMI. The opinions of the medical providers, and the overall evidence, establishes that Claimant's need for further treatment of the left wrist/thumb is due to her underlying osteoarthritis that was not aggravated or accelerated by her July, 2014 injury. The opinions of Dr. Cebrian and Messenbaugh are found credible and persuasive.

Dr. Messenbaugh testified that lucency and bony cyst shown in imaging was created by chronic arthritis and a hole in the bone and that no fracture was found on MRI or in surgery when Claimant was opened up. Dr. Messenbaugh noted that in the second left thumb/wrist surgery Dr. Yi removed prominent bone spurs which were created by Claimant's osteoarthritis. Dr. Messenbaugh testified that he reviewed the MRI report which showed no fracture and significant arthritis at the base of the thumb. Dr. Messenbaugh opined that the surgery at the carpometacarpal was not related to Claimant's July 2014 fall and was related to her arthritis. Additional surgery to Claimant's left wrist is also related to her arthritis and not to her work injury.

Claimant's subjective reports cannot be relied upon to any degree of certainty and Dr. Regan based his opinion on the left wrist/thumb mainly on Claimant's reports that she had no problems with her left wrist/thumb prior to the July 2014 fall. Although true that no medical records exist, Claimant is not found credible or persuasive. She misled and reported no prior left knee issues when medical records demonstrate otherwise. She has had subjective reports throughout that have been out of proportion to objective findings. Her subjective reports are unreliable and Dr. Regan erred by relying on them.

The objective evidence of significant arthritis and the opinions of Dr. Cebrian and Messenbaugh are credible and persuasive. The need for left wrist/thumb treatment and/or further surgery is due to her underlying disease process not aggravated or accelerated by the work injury. Claimant is at MMI for the left wrist/thumb as any physical impairment from the injury is stable with no further treatment reasonably expected to

improve it. Although treatment may improve her underlying and non-related disease process of arthritis, as a result of the injury, Claimant is stable and at MMI.

Permanent Impairment

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has stated in this respect that: Scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of § 8-42-107(8)(c), which states that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

Claimant has the burden of showing the extent of his scheduled impairment by a preponderance of the evidence. *Maestas v. American Furniture Warehouse and G.E. Young and Company*, W.C. No. 4-662-369 (2007); *Burciaga v. AMB Janitorial Services, Inc. and Indemnity Care ESIS Inc*., W.C. No. 4-777-882 (2010). Respondents are not required to overcome the scheduled impairment rating assigned by the DIME and the usual preponderance of the evidence burden of proof applies for Claimant to prove entitlement to benefits. *Id.*

As found above, Claimant's significant underlying degeneration in her left knee and bilateral wrists/thumbs was not aggravated or accelerated by her work injury and Claimant reached maximum medical improvement on October 26, 2016. Despite this, Respondents accepted and paid for multiple surgeries during the course of the claim. As a result, Claimant is entitled to and Respondents admitted to an impairment rating in the final admission of liability. After review the medical records as whole, the ALJ finds the appropriate rating to be 7% upper extremity and 16% lower extremity as opined by Dr. Cebrian and Dr. Broghammer. Although Dr. Regan gave a slightly lower rating on the left upper extremity and a higher rating on the left lower extremity, Dr. Regan's lower extremity rating was performed while Claimant was notably still tender from her non work related total left knee replacement and is not an accurate reflection of her impairment as a result of the injury. The evidence, overall, establishes that the ratings provided by Dr. Cebrian and Dr. Broghammer accurately reflect Claimant's impairment as a result of the claim.

Medical Maintenance

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As found above, Claimant's continued need for treatment is due to her underlying and pre-existing degenerative conditions. There is insufficient evidence that there is a future need for medical treatment reasonably necessary to relieve Claimant from the effects of the injury or to prevent her further deterioration. Medical maintenance benefits for her left knee and left wrist/thumb is thus denied.

Disfigurement

As a result of her July 2014 injury, Claimant underwent a right wrist/thumb surgery and a left wrist/thumb surgery performed by Dr. Yi that was authorized by Respondents. Claimant has visible disfigurement as a result of the surgeries. The disfigurement includes a scar on her left hand that measures approximately 2'" in length, a scar on her right hand that measures approximately 1.5" two scars measuring approximately ½ ", and areas where grafts were taken measuring approximately 2" x 1.5." The ALJ was able to visually appreciate the demonstrated areas of scarring presented by Claimant at hearing and concludes that Claimant sustained permanent disfigurement as a result of this claim to her left and right wrists/thumb.

ORDER

1. Respondents have overcome by clear and convincing evidence DIME physician Dr. Regan's opinions on MMI. Claimant reached MMI for her left knee and her left wrist/thumb as of October 26, 2016. Claimant's subsequent March 2017 left total knee replacement and her August 2017 left wrist/thumb surgery are not related to the claim.

2. Claimant's correct PPD rating for the left knee is 16% scheduled lower extremity. Claimant's correct PPD rating for her left wrist/thumb is 7% scheduled upper extremity.

3. No further medical maintenance care is reasonable, necessary, or casually related to Claimant's July 27, 2014 injury.

4. Respondents waive any outstanding overpayment.

5. Claimant is entitled to disfigurement in the amount of $3,500 for her bilateral wrists/thumbs.

6. All matters not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 12, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on September 16, 2017.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary, and causally related medical treatment for his September 16, 2017 injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) indemnity benefits.

FINDINGS OF FACT

1. Claimant was employed by Employer as an electronic technician with duties that included troubleshooting oil field equipment, maintenance, repair, monitoring satellite systems, etc.

2. As part of his job duties, Claimant often had to move and monitor electronics systems and often had to lift items.

3. On September 16, 2017 Claimant had been assigned a project to rearrange and move some equipment with co-workers. Claimant and co-worker Nick Canavan attempted to carry a Pelican box loaded with computers weighing approximately fifty to 60 pounds. As Claimant attempted to lift the box, he felt his right side give way and his knee give out and he fell to the ground.

4. Claimant alleges that he injured his right shoulder and right knee in this incident. Claimant alleges that after he fell, he sat on the ground for a few minutes dazed and that his co-workers Nick and David came over to see if he was okay. He also testified that he reported the incident to his supervisor Reese within minutes of the injury. Claimant testified that he worked until September 26, 2017 and then made a short term disability claim.

5. Claimant was paid short term disability from September 26, 2017 until January of 2018. Claimant testified that his workers' compensation doctors kept telling him his injuries were work related so he decided to file a claim.

6. On May 22, 2018 Nicholas Canavan testified by deposition. Mr. Canavan worked as a technician with Claimant. Mr. Canavan testified that on September 16, 2017 he and Claimant were moving Pelican cases together which are plastic cases that hold electronics. Mr. Canavan testified that one of the cases they were attempting to move

was known to be heavy because it usually housed computers so he asked Claimant to help him move it. He testified that he and Claimant were going to take the box from the top of another metal box about 3 feet high, move it to the ground, then move it inside. Mr. Canavan testified that there was a handle on each side of the box that you could grab and that he went to one side while Claimant went to the other side. He testified that they moved the box toward the edge of the table and then lifted it off. Mr. Canavan testified that immediately once the weight was off the table/box, Claimant fell and he pulled his end of the box so it wouldn't land on Claimant and it didn't. He testified that the box fell to the ground and Claimant fell to the ground. Mr. Canavan testified that Claimant got up and said he was okay and that it was just an injury he had from the Army. Mr. Canavan testified that Claimant brought up his Army injury frequently and would say he had bad knees, couldn't run, had little movement and looseness in his knees and that it happened during a training exercise in the Army. Mr. Canavan testified that Claimant popped back up after falling down and said he was fine and that they proceeded to finish lifting and moving the box and finished the rest of the tasks outside. Mr. Canavan testified that after they were done moving stuff, he believed both he and Claimant went inside to their work benches to work on electronics. Mr. Canavan testified that they probably brought in 15-20 Pelican boxes that day. Mr. Canavan testified that Claimant didn't complain about being injured or anything and wasn't walking any different than he normally did. Mr. Canavan testified that Claimant's normal walk looked like something was wrong with his knees and that Claimant's normal gait was not very fluid.

7. Reese Batiste, a surface department manager for Employer, testified at hearing. Mr. Batiste recalled Claimant reporting that they had dropped a box outside on the day in question. Mr. Batiste asked Claimant if he was okay and Claimant said he was fine and was going to complete his day as normal. Mr. Batiste testified that the leave tracking system showed Claimant worked a complete day on the date in question. Claimant also worked September 17, 2017. Mr. Batiste also talked to Claimant on Monday September 18, 2017 to see if Claimant was okay and Claimant said he was. Mr. Batiste testified that the next week on September 25, 2017 Claimant said he was not feeling well and not able to complete tasks and that he couldn't type with his right arm. Claimant did not say it was because of the fall the week prior. Mr. Batiste directed Claimant to human resources. Mr. Batiste testified that he did not learn Claimant had filed a workers' compensation claim until January of 2018. After he found out, Mr. Batiste interviewed Claimant's co-workers who corroborated that Claimant reported he was fine after falling down on September 16, 2017.

8. David Martin testified at hearing. Mr. Martin worked on a crew with Claimant and was present on September 16, 2017 when Claimant fell down. Mr. Martin testified that it was a slow work day and they were tasked with straightening up and reorganizing the electronics and boxes from an overflowing supplies and electronics storage area. He testified that he was driving a tugger while Nick and Claimant were putting boxes on the tugger. Mr. Martin testified that Nick and Claimant lifted a rack mount, a box with basically 3 pc units in it, and that Claimant took a few steps back and a side step and went down. He testified that Nick got the rack mount off Claimant and guided it. Mr. Martin testified that Claimant's fall was not a hard fall, that Claimant was controlled going down, and that

Claimant popped up within seconds and said his knees had given out. Mr. Martin testified that Claimant brushed himself off and said he was fine and that his knee just gives out sometimes. Mr. Martin testified that he drove the tugger off and that they kept doing cleanup and work. He testified that Claimant worked the rest of the day at the bench and didn't make any complaints about any injury that he was aware of the rest of the day.

9. Claimant initially sought treatment at the VA before reporting the injury as a workers' compensation injury.

10. On December 29, 2017 Claimant underwent a right shoulder MRI. The impression provided was rotator cuff tendinosis. AC joint arthrosis was found, cystic foci likely degenerative was found, infraspinatus and supraspitantus tendinosis with equivocal partial thickness interstitial tear versus severe tendinosis was found. No full thickness rotator cuff tear was found. *See* Exhibit 6.

11. On January 22, 2018 Claimant was evaluated at the VA. Physical therapy was ordered for Claimant's right shoulder pain based on a right shoulder tendinosis diagnosis with goals of strengthening, increasing motion, and decreasing pain. John Maynard, PA opined that Claimant's pain was exaggerated per the reports of imaging and noted that Claimant walked as if his arm was broken. *See* Exhibit 6.

12. On February 13, 2018 Claimant was evaluated by John Sacha, M.D. Claimant reported that he was at work lifting a computer, turning to the side, and that he collapsed. Claimant reported no specific injury, no specific pain, and was noted to be a poor historian. Dr. Sacha noted that per his family, he fell on the side landing and hitting his right shoulder and right knee and started developing neck and low back pain. Claimant reported diffuse right anterior superior shoulder pain worse with overhead activity, pain in the neck with radiation into the right periscapular area, pain in the low back and buttocks, and right knee pain. Claimant reported a service connected disability of his right knee pain at 20%. Dr. Sacha noted on examination pain behaviors in the severe category with 5/5 positive on Waddell testing. Dr. Sacha provided the impression of: non physiologic presentation; right shoulder complaints; low back complaints; neck complaints; long pre-existing psychological history; and long pre-existing history of closed head injury. Dr. Sacha opined that causality was a significant issue and that it was hard for him to find anything that would be work related. *See* Exhibit 1.

13. On February 19, 2018 Claimant was evaluated by Michael Hewitt, M.D. Claimant reported injuring his right knee on September 16, 2017 when picking up a heavy computer with a coworker and reported that his body gave way and he fell to the ground. Claimant reported previous history of right knee patellar dislocation in the 1990s without surgery related to military service. Claimant reported pain involving the entire knee with instability. Claimant reported a prior left knee arthroscopy in 2002. X-rays were performed and showed small osteophytes from the superior patella. Dr. Hewitt noted Claimant's relatively diffuse knee complaints and history of patellofemoral instability and opined there was no evidence of ligamentous laxity. Dr. Hewitt recommended conservative treatment. *See* Exhibit 2.

14. On February 27, 2018 Claimant was evaluated by Dr. Sacha. Dr. Sacha noted that since the last visit he had reviewed Claimant's prior medical records from the VA hospital. Dr. Sacha noted a long complex history of psychological dysfunction and some evidence in the records of exaggerated pain. Dr. Sacha noted that Claimant continued to have diffuse complaints and that it did not appear that many of the areas would be work related. Dr. Sacha also noted that Claimant was not a surgical candidate and opined that the MRI of the right shoulder showed evidence of some mild tendinopathy but no full-thickness tear. *See* Exhibit 1.

15. On March 9, 2018 Claimant underwent a psychological consultation with Joel Cohen, Ph.D. Claimant reported lifting a piece of equipment transferring it from one box to another and that his body collapsed and he went to the ground. Clamant reported remaining on the jobsite for an hour but then leaving due to pain in his right shoulder, right knee, and low back. Claimant was late to the March 9 appointment and returned on March 12 to complete the consultation. Dr. Cohen opined on Claimant's high anxiety level, somatization, and pre-existing history. *See* Exhibit 4.

16. On March 21, 2018 Claimant was evaluated by Dr. Sacha. Claimant reported continued symptoms especially in the right knee and Dr. Sacha opined that a one-time corticosteroid injection was reasonable, but opined that it was unclear whether the right knee was truly a work related issue. Dr. Sacha also noted that it was unclear if the neck and low back were work related either but that chiro and acupuncture had worked great. Dr. Sacha injected Claimant's right knee two days later. *See* Exhibit 1.

17. On April 18, 2018 Claimant was evaluated by Dr. Sacha. Claimant reported about 50% lasting relief to the injection for about two weeks but then the pain returned. Claimant reported that about two weeks after the injection, his right knee gave out and he fell and landed on his right side which flared up his right knee pain, low back pain, and shoulder pain. Dr. Sacha recommended continued injection, chiro, and acupuncture and opined that Claimant would likely be at maximum improvement in approximately 3 weeks. Dr. Sacha noted that at that time he would have a discussion of causality and impairment ratings and would discuss the shoulder and knee at the final follow up visit. *See* Exhibit 1.

18. Claimant testified and reported that he had no prior right shoulder problems before the September 16, 2017 incident at work and that he had no right knee issues following a right knee surgery in 2002. The medical records show otherwise.

19. On May 8, 2017 Claimant underwent an annual physical with his primary care provider, Larry Doehring, D.O. Dr. Doehring diagnosed chronic right shoulder pain and post-traumatic stress disorder. Claimant reported back pain and chronic right shoulder pain. *See* Exhibit A.

20. On June 3, 2014 Claimant was evaluated by Catherine Corsello, M.D. Claimant reported that he enjoyed being in the military but blew out his knee and was

sent home. Claimant reported past psychological treatment and PTSD. Dr. Corsello recommended restarting Luvox medication. *See* Exhibit B.

21. On July 1, 2013 Claimant underwent bilateral knee x-rays. Claimant was diagnosed with knee joint pain right greater than left, with a history of right patellar dislocations and left knee arthroscopy for loose bodies. The findings and impression from x-rays were negative. *See* Exhibit B.

22. On September 1, 2017 Claimant was evaluated by Randy Drechsel, M.D. In the primary care provider note, Dr. Drechsel noted that Claimant had a service connected disability of 20%, 10% for tinnitus and 10% for knee condition. Claimant reported to Dr. Drechsel that he had periodic knee pain bilaterally and that he had a prior arthroscopy. *See* Exhibit C.

23. On September 12, 2017 Claimant underwent a mental health initial evaluation performed by Mary McEnany, M.D. Dr. McEnany took a comprehensive history from Claimant. Claimant reported a prior right knee scope surgery in 2002. Claimant reported that he couldn't meet PT standards for the Army due to his knee and shoulders. On review of symptoms, Claimant reported knee and shoulder degenerative joint disease form what he had been told. Dr. McEnany diagnosed (among other diagnoses) knee/shoulder pain. Dr. McEnany noted a 20% service connected disability (knee, hearing, tinnitus) and that Claimant had been discharged as unable to complete physical requirements. *See* Exhibit C.

24. Claimant's testimony, overall is not found credible or persuasive. The medical records document several pre-exiting issues with his knee and shoulder prior to his September 16, 2017 work place fall. Additionally, the testimony of Claimant's co-workers is consistent that immediately after the incident, Claimant popped up, said he was fine, and related it to his knees giving out due to an old Army injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ

to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the

accident causes a compensable "injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Wherry v. City and County of Denver,* W.C. No. 4-475-818 (ICAO March 7, 2002).

Claimant has failed to establish by a preponderance of the evidence that he sustained a work related injury on September 16, 2017. Although an incident occurred at work where he fell down when attempting to lift a Pelican box, Claimant has failed to establish that he sustained an injury at that time. Rather, the testimony of his co-workers that he popped back up, said he was fine, and continued working immediately after the incident is credible and persuasive. Claimant's medical records also contradict his reports that his right shoulder and right knee were fine before the September 16, 2017 incident. Rather, he had significant pre-existing issues in both the right knee and right shoulder and has failed to show that the work incident caused new injury or aggravated/accelerated his underlying pre-existing conditions. As found above, Claimant underwent bilateral knee x-rays in 2013, in September of 2017, just prior to his fall at work, reported that he had bilateral knee pain and degenerative joint disease of the knee and shoulder. Claimant also reported prior to this fall that he couldn't meet the physical testing requirements for the Army due to his knee and his shoulders. Further, as found above, Dr. Sacha noted and opined that Claimant had severe pain behaviors and that causality was a significant issue. Dr. Sacha opined initially that it would be hard for him to find anything that would be work related. Dr. Sacha's final evaluation noted that he would discuss causality of the shoulder and knee at the final follow up visit. Overall, the preponderant evidence does not support that Claimant sustained a work related injury on September 16, 2017 and his claim is denied and dismissed.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work related injury on September 16, 2017. His claim is denied and dismissed.

2. As he has failed to establish a compensable injury, his claim for medical benefits and temporary total disability is also denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 13, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STIPULATION

At the commencement of hearing, the parties stipulated that Claimant received unemployment insurance (UI) benefits after being placed at maximum medical improvement (MMI) by Dr. Terrance Lakin on November 2, 2018. The parties agreed that any offset against any awarded retroactive temporary total (TTD) due to Claimant's receipt of UI benefits may be calculated and addressed by the parties. If the parties cannot resolve any such overpayment issue amongst themselves, either party may file an application for hearing to address the issue before the OAC.

REMAINING ISSUES

I. Whether Respondents produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinions of Dr. Brian Mathwich regarding causation and maximum medical improvement (MMI).

II. If Respondents established that Dr. Hall's opinion regarding MMI is clearly erroneous, whether Claimant established, by a preponderance of the evidence, that the need for additional low back/hip treatment is causally related to his admitted June 17, 2015 industrial injury.

III. Whether Respondents are entitled to an overpayment for temporary total disability (TTD) benefits paid between October 16, 2017 and November 1, 2017.

III. Whether Dr. James Massey is an authorized treating provider for this claim.

IV. Whether Claimant is entitled to TTD benefits from October 16, 2017 to November 2, 2018.

V. Whether Claimant is entitled to TTD benefits from October 16, 2018 and ongoing.

VI. If Respondents are successful in overcoming the Division IME opinion of Dr. Hall that Claimant is not at MMI, whether Claimant is entitled to PPD benefits.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Lakin, the ALJ enters the following findings of fact:

1. Employer operates a home health care company. As part of their mission, Employer sends its employees into the community to provide home health care services

to contracted patients. Claimant is a registered nurse (RN) who was often called upon to travel to client's homes to provide direct patient care. She is a long time employee having worked for Employer for approximately 14 years.

2. On June 21, 2017, Claimant was driving a sport utility vehicle (SUV) in the course and scope of her employment when she was rear-ended by another driver. Claimant was wearing her seat belt. The accident occurred at approximately 11:18 a.m., after Claimant entered a construction zone, came to a stop at a stoplight and was struck from behind by the other driver.

3. Photographs of the damage to Claimant's automobile were entered into evidence. Based upon descriptions of the accident in the medical records and the pictures admitted into evidence, the ALJ finds that the collision was bumper-to-bumper, was low speed in nature and the resultant damage to Claimant's SUV was minimal.[1]

4. Emergency personnel were dispatched to the accident scene. Upon contact with the paramedic, Claimant reported neck and hip pain along with numbness in her extremities. The ambulance record indicates that assessment of Claimant's back revealed "no crepitus, deformity [or] pain." Claimant was transported to Parkview Medical Center for emergency treatment.

5. The emergency room (ER) records from the Parkview Medical Center document that Claimant was evaluated at 12:40 p.m. Upon evaluation by the triage nurse, Claimant reported left sided back and neck pain, left arm numbness from her shoulder to the fingers, and left hip pain, which she described as "achy" in nature. Claimant was provided with pain medication and advised that things would be more painful the following day. She was then discharged from the ER with instructions to follow-up with her primary care physician (PCP) within 24-48 hours.

6. A workers' compensation claim was filed on behalf of Claimant and she was directed to the Southern Colorado Clinic, Employer's designated health care provider, for treatment.

7. Claimant presented to the Southern Colorado Clinic for her initial evaluation on June 22, 2017. She was seen by physician assistant (PA-C) Terry Schwartz. During her evaluation, Claimant reported that she "was in the construction on the blvd when she was hit from behind when she was stopped at a red light and immediately felt pain to her neck, left shoulder, bilateral hips, and left leg." She was reportedly told in the ER that she was suffering from "muscular pain." Physical examination revealed lumbar paraspinal tenderness at L1-L5, S1. Claimant had a positive straight leg raise test on the left. She also complained of frontal headaches, which were "different from [her] migraines." She complained of marked tenderness in the left paraspinal muscles from the base of the skull to T1. X-rays were obtained which

[1] The emergency medical personnel who responded to the accident scene documented an impact speed of 5 mph, noting further that the damage to Claimant's vehicle was minor, consisting of paint damage but no vi8sible deformity.

revealed cervical spine straightening, degenerative disc disease at C4-C6 and lumbar disc narrowing at L5-S1. Concerning the accident Claimant reported: "I seen (sic) the guy coming and it looked like he sped up." She expressed considerable anger toward the other driver as if he purposefully hit her. She also claimed that her vehicle sustained "extensive damage" all the way into the wheel wells. Claimant was noted to be "very" emotionally liable and had difficulty tolerating the x-rays. Consequently, she was given an injection of Toradol, referred to physical therapy and taken off work.

8. Claimant's next visit to Southern Colorado Clinic occurred on June 26, 2017. On this occasion, Claimant was seen by Dr. Terrance Lakin. The medical records from this visit document that Claimant had not yet been set up with physical therapy. Claimant stated that her low back was the most painful and that the shot of Torodol had provided her some pain relief. Dr. Lakin recommended MRI's of the cervical and lumbar spine. Dr. Lakin also referred Claimant to Dr. Dwight Caughfield for pain management and nerve conduction studies. Dr. Lakin kept Claimant off work due to her injuries.

9. Claimant began physical therapy (PT) with Southern Colorado Clinic on June 28, 2017. Examination revealed objective findings in both the cervical and lumbar spinal areas. Additionally, Claimant was noted to have diminished flexibility in the "bilateral hamstrings, hip flexors, and piriformis." Palpation revealed the "greatest point tenderness over L5-S1 and [the] bilateral SIJ and piriformis." The ALJ finds "SIJ" to refer to the sacroiliac joints. Claimant was found to be extremely guarded but felt to have "excellent rehabilitation potential" as she tolerated initial activities well.

10. Between June 28, 2017 and September 8, 2017, Claimant participated in sixteen (16) sessions of PT. Although the records document minimal improvement in Claimant's condition, they do document specific exercises Claimant performed at each session. As such, it appears from the record that Claimant was able to participate in physical therapy.

11. Claimant was next seen by PAC Schwartz on July 6, 2017. Claimant conveyed to PAC Schwartz that her cervical spine complaints were improved. However, she was still experiencing significant low back and lower extremity issues. PAC Schwartz noted that Claimant's left leg feels like it will give out and that she had a positive bilateral straight leg raise test result. Among the list of problems included in the note form, this date of visit is an indication that Claimant was suffering from a "WC sprain of unspecified parts of the lumbar spine and pelvis" (emphasis added). PAC Schwartz continued the recommendations made by Dr. Lakin and Claimant remained off work.

12. During a physical therapy appointment on July 7, 2017, Claimant reported that she was still in pain but "trying to walk more." She expressed continued "intermittent trouble with her left leg giving out."

13. On July 11, 2017, Claimant underwent lumbar and cervical MRI's. The lumbar MRI showed:

- Desiccated bulging disc and broad-based posterior disc protrusion at L5-S1 without stenosis.

- Bulging disc and moderate facet arthropothy towards the left at L4-5 with mild left foraminal narrowing on the left.

- A 5 mm left far lateral disc protrusion at L3-4 with mild foraminal narrowing on the left.

- Desiccated bulging disc with left paracentral disc protrusion at L12-L1 with mild foraminal narrowing on the left.

14. On July 12, 2017, Claimant reported to her physical therapist that her right hip was locking up and that she could not move consistently without pain.

15. Claimant returned to PT on July 14, 2017. She reported continued hip locking while walking. She also reported that when she would feel random sharp pain when standing and with some movements. The physical therapist documented that Claimant's pain appeared to center in the right psoas with pain across sacroiliac joints bilaterally (SIJ B) with additional pain being focused at the anterior hip at the insertion of psoas on hip. Based upon the evidence presented, the ALJ is persuaded that Claimant's physical therapy findings are consistent with SI joint dysfunction. The therapist recommended continuing the "current plan of care to restore joint mobility, strength and function. She also noted that "dry needling" would be added to Claimant's treatment protocol at her next scheduled visit.

16. Claimant followed-up with PT on July 17, 2017. At the outset of her therapy session, Claimant reported that she was "really sore across the lower back and especially on the right side . . ." The therapist performed a brief reassessment, noting that Claimant had a "large right pelvic upslip and rotation. Palpation revealed "increased tone and trigger points in bilateral quadratus lumborum, glutes, piriformis and paraspinals. The therapist proceeded with work on Claimant's pelvic alignment and performed trigger point dry needling. Therapy was successful in correcting Claimant's pelvic alignment; however, this caused increased pain lowering Claimant's tolerance to trigger point dry needling (TDN). Consequently, dry needling was limited.

17. At a July 19, 2017 PT session, Claimant reported that dry needling helped for "about a day." Nonetheless, she reported that she was "still getting sharp pain with random motion." Claimant had similar complaints during a follow-up PT appointment on July 21, 2017 when she reported that she was still getting unpredictable extreme pain and sharp catching in my right low back. During this visit, it was noted that Claimant had poor tolerance for all exercise secondary to pain.

18. On July 25, 2017, Claimant was examined by Dr. Dwight Caughfield at Southern Colorado Clinic. Dr. Caughfield took a very detailed history of the present illness, which included a description of the accident. Dr. Caughfield was able to perform a physical examination and recommended lumbar and ESI's as well as low extremity EMG's. Dr. Caughfield also recommended a psychosocial consult for pain management.

19. On July 27, 2017, Claimant was examined by PA-C Schwartz. PA Schwartz documents that Claimant indicated that physical therapy helps a little and he went ahead and requested additional sessions. He also noted that treatment recommended by Dr. Caughfield.

20. Claimant followed up with Dr. Lakin on August 17, 2017. Dr. Lakin notes no improvement and recommended an "IME from WC Carrier to assist with outside opinion regarding this constellation of symptoms and suggestions for delayed recovery."

21. Claimant returned to Dr. Caughfield on August 23, 2017, for EMG testing. The EMG did not reveal any radiculopathy or polyneuropathy. Dr. Caughfield recommended referral to Dr. Benjamin Massey for ESI's. Based upon the evidence presented, the ALJ finds that Dr. Massey is within the chain of referrals from an authorized provider.

22. On August 9, 2017, Claimant was seen by Dr. Herman Staudenmayer. Dr. Staudenmayer performed a psychological evaluation. After a lengthy report, Dr. Staudenmayer opined that Claimant:

> . . . suffered injuries from an MVA with residual chronic pain. She is defensive about discussing or acknowledging psychosocial issues. She denies emotional dysfunction. However, she is somatazing her stress and emotional dysfunction. She is focused on her pain symptoms and amplifying them consistent with somatization. Her multisystem somatic complaints are not supported by multisystem physiological pathology. She manifests and acknowledges significant neuromuscular stress, which can be addressed with biofeedback.

23. Consistent with the recommendations made by Dr. Staudenmayer, Claimant began biofeedback with William Beaver, M.A. Claimant treated with Mr. Beaver from August 31, 2017 to November 2, 2017. Mr. Beaver consistently notes that Claimant's affect is normal, that her participation is satisfactory, and that she generally exhibits moderate pain behaviors. Mr. Beaver would continue to treat Claimant up until November 2, 2017, when she was placed at MMI by Dr. Lakin. Following the MMI determination, all treatment within the workers compensation system was terminated.

24. On October 16, 2017, Claimant was examined by Dr. Wallace Larson as part of an IME at the request of Insurer. Upon review of Claimant’s medical records and after completing his examination, Dr. Larson opined that Claimant sustained no physical

injuries as part of the June 21, 2017 MVA. Rather, Dr. Larson opined that Claimant was suffering from a psychiatric problem based upon his assessment that she had “multiple nonphysiologic symptoms and subjective complaints that could not be explained in the absence of anatomic deficits. Ultimately, Dr. Larson concluded that Claimant "[had] not sustained any physical injury to her spine. She [was] therefore at maximum medical improvement without any ratable condition."

25. On October 20, 2017, Dr. Lakin noted that Claimant was “[u]nable to work from 10/20/17 to 11/10/2017.

26. On October 30, 2017, the IME Report of Dr. Larson was sent to Dr. Lakin for review/comment. Dr. Lakin provided a response on November 2, 2017. Dr. Lakin essentially agreed with the opinions Dr. Larson expressed in the IME Report, including his opinion regarding Claimant’s capacity to work without restriction. Nonetheless, he fixed the date of MMI as of November 2, 2017. He then released Claimant from care.

27. On November 3, 2017, Respondents filed a FAL. The FAL used an MMI date of October 16, 2017 (the date of Dr. Larson's IME Report) instead of November 2, 2017 (the date of MMI given by Claimant’s authorized treating provider, Dr. Lakin). Consistent therewith, Respondents claimed an overpayment of $3,087.98 due to the fact they paid TTD benefits up to November 2, 2017. The FAL is otherwise consistent with Dr. Lakin's November 2, 2017 letter.

28. Claimant objected to the FAL and requested a Division Independent Medical Examination (DIME). Dr. Timothy Hall was selected to complete the requested DIME. The Division IME was completed on January 15, 2018. Dr. Hall reviewed relevant medical records, including medical records that predate Claimant date of injury. He also performed a physical examination of Claimant. Dr. Hall noted on physical examination that Claimant exhibited some significant pain behaviors. However, Dr. Hall was able to complete this physical examination and noted his findings in his Report. Dr. Hall assessed Claimant with “Low back/SI injury with pelvic obliquity, SI joint dysfunction, Piriformis syndrome resulting in lower extremity symptoms, doubt radiculopathy and Myofascial pain, cervicothroacic area.” He concluded that Claimant’s ongoing back/hip/leg symptoms were likely unrelated to the degenerative findings demonstrated on MRI because those findings were predominately left-sided while her ongoing symptoms primarily affected the right side. Consequently, he opined that Claimant’s symptoms were more likely related to a “piriformis/sciatic nerve problem” which he concluded was common in the presence of pelvic obliquity and SI joint dysfunction. According to Dr. Hall, Claimant’s locking episodes are likely emanating from her SI dysfunction and a “big” part of her ongoing problem was stemming from postural distortion and persistent psoas muscle spasm. While Dr. Hall noted that Claimant's reported symptoms were a bit extreme, he has seen the same presentation numerous times in this setting. He went on to opine that Claimant is not at MMI and suggested a “SI joint guided injection for diagnostic/therapeutic purposes.” He also recommended, “[n]euromuscular therapies/massage therapy focusing on psoas, quadratus lumborum, piriformis, and IT band, primarily right sided twice a week for six

weeks" and "[c]oncomitant chiropractic work for mobilization of sacroiliac joint to work on pelvic positioning." Dr. Hall provided a provisional impairment rating including a 5% table 53.2B rating and a 9% for range of motion deficit. When combined these values equal 14% whole person impairment. Finally, Dr. Hall provided physical restrictions that would preclude Claimant from returning to her pre-injury job.

29. Respondents filed an Application for Hearing endorsing the issue of overcoming the DIME opinions of Dr. Hall as to MMI.

30. On March 14, 2018, Respondents requested opinions from Dr. Eric Ridings. Dr. Ridings performed an independent medical examination (IME) opining that, in his lay opinion, the forces generated by the collision of the automobiles in this case was not sufficient to cause injury. Dr. Ridings further opined that, because the EMG was negative for radiculopathy or polyneuropathy, there was no injury. He further opined that because the lumbar MRI did not show an abnormality that explained Claimant's symptoms, there was no injury. Concerning Dr. Hall's DIME findings of SI joint dysfunction, pelvic obliquity, and piriformis syndrome, Dr. Ridings stated that "[n]o one else had documented those findings throughout her course . . ."

31. Dr. Hall testified consistent with his report. He testified that his diagnoses of SI joint dysfunction, pelvic obliquity, and piriformis syndrome, are not medical conditions that would show up on an EMG or a lumbar MRI. Dr. Hall disagrees the opinion of Dr. Larson and Dr. Ridings that Claimant suffered no injuries in this case. Dr. Hall testified that spasms were present on Claimant's DIME examination and she had pelvic asymmetry. He explained that SI joint dysfunction represents laxity in the sacroiliac joint, which in turn causes unpredictable movement precipitating pain, and a sensation that the joint is locking. He testified that Claimant's ongoing symptoms are likely related to the diagnoses he assessed in this case based on the assessment/treatment of prior patients with similar presentation/conditions. Dr. Hall reaffirmed his position that Claimant is not at MMI.

32. According to Dr. Hall, a diagnosis of somatization disorder does not mean that Claimant did not suffer injuries in this case. Indeed, Dr. Staudenmayer opined that Claimant suffered injuries and resultant chronic pain because of the MVA in this case.[2] He also opined that because Claimant has maladaptive coping mechanisms, she amplifies and focuses disproportionately on her pain complaints consistent with somatization. While the ALJ is persuaded that Claimant is probably unconsciously magnifying her symptoms, the evidence presented supports a finding that she sustained injuries to her low back, SI joints (hips) and legs despite the low speed nature of the

[2] During his deposition, Dr. Lakin was asked whether he agreed with Dr. Hall that Claimant had suffered an injury in this case. While clearly concerned about the magnitude of injuries Claimant may have suffered as a consequence of her MVA, the ALJ finds it would be erroneous to conclude that Dr. Lakin's testimony supports a conclusion that Claimant suffered no injury as a result of the crash. Indeed, Dr. Lakin testified: "I seriously doubt whether there was the magnitude of injury that would not have resolved with just time and normal healing and some conservative care." The ALJ interprets the testimony of Dr. Lakin to indicate that Claimant suffered injuries but psychological conditions, including somatization are playing a role in her perceived magnitude of those injuries.

accident in question. Consequently, the ALJ finds Claimant's ongoing low back, SI and leg symptoms related to her MVA.

33. Dr. Ridings testified. He agreed that the diagnoses of SI joint dysfunction, pelvic obliquity, and piriformis syndrome, are not medical conditions that would show up on an EMG or a lumbar MRI. However, Dr. Ridings went on to testify that because Claimant had a normal EMG, and a lumbar MRI that did not show an obvious explanation for Claimant's pain complaints, she did not suffer any injury in the motor vehicle accident. Dr. Ridings also testified that no one, during Claimant's course of treatment, had documented findings consistent with the diagnoses of SI joint dysfunction, pelvic obliquity, and piriformis syndrome. Careful review of the medical records summarized in Dr. Ridings report supports a finding/conclusion that he did not include a review of the physical therapy notes from the Southern Colorado Clinic. When asked about this on cross-examination, Dr. Ridings eluded to the fact that these types of records are not what he relies upon when conducting an IME. Based upon a review of the physical therapy records, the ALJ finds Dr. Ridings testimony that no one other than Dr. Hall documented findings consistent with the diagnoses of SI joint dysfunction, pelvic obliquity, and piriformis syndrome incorrect. Contrary to Dr. Ridings' testimony, the PT records document the presence of physical findings consistent with the diagnoses reached by Dr. Hall. Indeed, Claimant's PT records contain references to pelvic upslip (obliquity) and rotation, increased muscle tone in musculature of the low back and hip, including the piriformis along with trigger points requiring dry needling and complaints of locking in the back/hip with movement and walking.

34. Both Dr. Hall and Dr. Ridings testified that SI joint dysfunction can cause low back pain, pain that spreads into the hips or buttocks, sciatic like pain, and stiffness. Both testified that this condition can cause the feeling of instability and cause the lower extremity to feel as if it is going to buckle. Based upon the evidence presented, the ALJ finds that Claimant has reported similar symptoms throughout her treatment in this case.

35. Both Dr. Hall and Dr. Ridings testified that piriformis syndrome is a neuromuscular disorder that is caused when the piriformis muscle compresses the sciatic nerve. Both testified that the symptoms associated with this condition usually start with pain, tingling, or numbness in the buttocks. Both testified that this pain can be severe and extend down the length of the sciatic nerve. The ALJ finds that the medical records entered into evidence, which include the physical therapy notes, document that Claimant complained of these types of symptoms throughout her treatment.

36. This ALJ finds that Respondents have failed to overcome the Division IME opinions of Dr. Hall by clear and convincing evidence. Based upon the evidence presented, the ALJ is persuaded that Dr. Ridings was probably unaware of the content of the physical therapy records when he concluded that no one outside of Dr. Hall documented findings consistent with SI joint dysfunction or piriformis syndrome. Perhaps Dr. Ridings was not provided the records or maybe he chose not to review them because they are not the type of records he relies upon when completing an IME.

Regardless, the ALJ finds the physical therapy records to contain objective medical findings supporting the opinions of Dr. Hall. Crediting the content of the PT records in this case, the ALJ finds the opinions of Dr. Ridings unconvincing. Moreover, to the extent that the opinions of Dr. Larson and Dr. Ridings deviate from those of Dr. Hall, the evidence presented persuades the ALJ that their conclusions simply represent a difference of opinion between them and Dr. Hall.

37. Consistent with the above referenced findings, Claimant is not at MMI. Claimant left work in this case due to her work-related medical condition. She has not been able to return to full duty work as evidence by the medical record of Dr. Cheryl Cavalli who is Claimant's primary care physician and no evidence was presented that Claimant has been offered modified duty. Furthermore, Dr. Hall, in his January 15, 2018 IME report provided Claimant with physical restrictions that will not allow her to return to her pre-injury job. Based upon the evidence presented, the ALJ credits the opinions of Dr. Hall regarding Claimant's need for work restrictions to find that she is incapable to returning to full duty work. The contrary opinion of Dr. Lakin, whose opinion regarding Claimant's work capacity was based largely on the unpersuasive opinions of Dr. Larson, is equally unconvincing. Because Claimant is not at MMI and she has proven that she is unable to return to full duty work, she has proven her entitlement to TTD benefits from November 2, 2017 and ongoing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40- 101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Hall are credible and supported by the medical record as a whole. When the evidentiary record is considered in its totality, the opinions of Dr. Hall are more persuasive than contrary opinions of Dr. Lakin, Dr. Larson and Dr. Ridings.

Overcoming the Division IME

D. A DIME physician's findings of causation and MMI are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI or the cause of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo.App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. The question of whether the Claimant has overcome the DIME physicians findings regarding MMI and/or causality, are one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, *supra*. Because the question of whether Claimant attained MMI inherently requires a determination of the cause(s) of Claimant's medical condition and need for medical treatment, the ALJ concludes that an analysis of whether Claimant's need for an SI joint injection, neuromuscular therapies and chiropractic care are causally related to the MVA is fundamental to the question of whether she Claimant is at MMI. Here, the evidence presented establishes that Dr. Hall opined that Claimant was not at MMI because she has not been adequately

evaluated/treated for conditions he concludes are related to her MVA. As found above, the record evidence supports Dr. Hall's opinion, that Claimant's SI joint condition and suspected piriformis syndrome are related to her MVA despite its low speed nature and her tendency to magnify her symptoms.

F. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if a course of treatment has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990). Additionally, a finding that a claimant is not at MMI may rest solely upon recommendations for further diagnostic evaluation if such procedures have a reasonable prospect of diagnosing or defining the claimant's condition to suggest a course of further treatment. *E.g., Soto v. Corrections Corp*., W.C. No. 4-813-582 (ICAO, October 27, 2011). Because Dr. Hall's recommended treatment represents a reasonable prospect for curing and relieving Claimant of the ongoing effects caused by her industrial injury, she is not at MMI. See *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001), *aff'd. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, (Colo.App. No. 01CA0401, February 14, 2002)(*not selected for publication)* (citing PDM *Molding v. Stanberg*, 898 P.2d 542 (Colo. App. 1995) *and Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995)]; *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000).

G. After considering the totality of the evidence presented, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that Dr. Hall's determination regarding MMI is highly probably incorrect. In this case, the persuasive medical evidence establishes that Claimant likely suffers from SI joint dysfunction, pelvic obliquity, and piriformis syndrome. The record contains multiple references to symptoms throughout Claimant's course of treatment that are consistent with these diagnoses. Furthermore, the trial testimony of Dr. Hall and Dr. Ridings make it clear that these diagnoses do not show up on either an EMG or an MRI. As such, the opinion that Claimant did not suffer an injury because her EMG was negative and her lumbar MRI was not revealing, is simply insufficient to support a conclusion that Dr. Hall was highly probably incorrect in his determination that Claimant had not reached MMI for all conditions related to her June 21, 2017 MVA. Here, the evidence presented supports a conclusion that there is difference of opinion between the DIME physician and Respondents' retained medical experts. A professional difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Hall's opinion concerning MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set the MMI determination aside.

Medical Benefits

H. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However,

the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

I. Section 8-43-404(5)(a), C.R.S. gives the respondents the right in the first instance to select the authorized treating physician (ATP). Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). In this case, the Southern Colorado Clinic was designated by Respondents as the primary authorized treating provider for this claim. Claimant was seen at Southern Colorado Clinic by Dr. Lakin and Dr. Caughfield. Dr. Caughfield referred Claimant to Dr. Massey for ESI injections. Here, the ALJ agrees with Claimant that the ESI injection provided by Dr. Massey in this case was authorized because Dr. Caughfield, an authorized provider at the Southern Colorado Clinic, referred her to him for this treatment, which was otherwise reasonable, necessary and related to Claimant's MVA. The ALJ finds and concludes that this constitutes a valid referral for authorization purposes under *Cabela v. ICAO*, 198 P.3d 1277 (Colo. App. 2008). In *Cabela*, the designated ATP had concluded that a knee condition was not causally related to her employment, and recommended that the claimant follow-up with her personal physician. Subsequently, the claimant established compensability for her knee condition at hearing. In concluding that all treatment received through the claimant's primary care providers was considered authorized, the Court held:

> As the ALJ found, the employer's physician, an ATP, referred claimant to her personal primary care physician. The referral reflects no purpose other than treatment for claimant's knee problems, and claimant's testimony indicates that she understood the referral to be for treatment of her knee. Indeed, the ALJ found that claimant sought medical attention for her knee from her primary care doctor. Thus, even if the employer's physician provided the referral under the mistaken belief that the knee condition was not work-related, we perceive no factual basis for the ALJ's conclusion that the referral was made outside the ordinary course of treatment. Instead, ***we hold that the risk of mistake by an ATP in concluding that an injury is noncompensable lies with the employer***. We thus conclude the referral made here was in the ordinary course of treatment. *Id*. at 1281. (Emphasis added).

Accordingly, Respondents are liable for this treatment.

TTD Benefits and Overpayment

J. To establish entitlement to temporary disability benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions, which impair the Claimant's ability effectively, and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). In this case, Claimant was taken off work on June 22, 2017, due to her work-related medical condition. Claimant has not returned to work since. Claimant was placed at MMI by her ATP on November 2, 2017. However, Respondents filed an FAL in this case stopping TTD benefits as of October 16, 2017. October 16, 2017 is the date Claimant was seen by Dr. Wallace Larson as part of an IME requested by Respondents. Dr. Larson opined Claimant was at MMI but did not provide an MMI date. Nevertheless, Colorado workers compensation law does not recognize, for termination of temporary disability benefits, the MMI determination of an independent medical examiner retained outside the DIME process. Consequently, the ALJ concludes that Claimant is entitled to TTD benefits from October 16, 2017 to November 2, 2017. Because Claimant is entitled to this period of TTD benefits, Respondents request for an overpayment for TTD paid beyond October 16 through November 2, 2017 must be denied and dismissed.

K. The evidence presented persuades the ALJ that Claimant has remained "disabled" within the meaning of section 8-42-105, C.R.S. since November 2, 2017. This disability has been continuous based upon the opinion of her primary treating physician, Dr. Cheryl Cavalli. Dr. Cavalli has opined that Claimant is physically incapable of performing her pre-injury employment. This opinion is supported by Dr. Hall's DIME opinion, which found Claimant not to be at MMI and provided physical restrictions that will not allow Claimant to perform her pre-injury job. Consequently, Claimant is entitled to TTD benefits from the erroneous MMI date (11/2/17) to the present.

PPD Benefits

L. As Claimant is determined not to be at MMI, issues concerning permanent impairment are premature and need not be addressed further.

ORDER

It is therefore ordered that:

1. Respondents request to set aside the DIME opinions of Dr. Hall regarding MMI is denied and dismissed.

2. Dr. Massey is an authorized treating provider for this claim and Respondents are liable for the medical treatment he provided Claimant on December 8, 2017.

3. Claimant is entitled to TTD benefits from October 17, 2017 to November 1, 2018.

4. Respondents request for an overpayment of TTD paid between October 16, 2017 and November 2, 2017 is denied and dismissed.

5. Claimant is entitled to TTD benefits from November 2, 2017 and ongoing.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

DATED: July 13, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, Co 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Is Claimant's claimed psychological injury based in part on circumstances common to all fields of employment?

II. Did Claimant prove by a preponderance of the evidence that he endured psychologically traumatic event(s) generally outside of a worker's usual experience that would have evoked significant symptoms of distress in a similarly situated worker?

III. Did Claimant's claimed psychological injury arise from a work evaluation, disciplinary action and/or job promotion taken in good faith by Respondent-Employer?

Because the ALJ concludes that Claimant failed to prove the elements required to establish a claim of mental impairment as required by § 8-41-301(2)(a), his claim must be denied and dismissed.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant has been working for the State of Colorado, Department of Corrections, since August 15, 2005. (Exhibit A) Claimant testified that around March 1, 2017, he was promoted to the Program Management I position for the Canon Minimum Centers, a facility complex within the Colorado Department of Corrections. As the Program Manager, Claimant acts as the head of custody and control. With his promotion, Claimant became responsible for, among other things, the safety and security of the approximate 200 staff members and 1300 inmates working and housed in the complexes three facilities.

2. On January 15, 2018, Claimant reported that beginning around February 2017; he was the subject of a "pattern" of harassing treatment by his supervisor, which resulted in mental stress manifesting itself in the form of insomnia, diarrhea, and headaches. He reported increased anxiety and depression. Claimant did not elaborate on what types of "harassment" he was subjected to. He simply indicated that he was "harassed" as defined by Respondent-Employers policies.

3. Claimant was seen by Dr. Daniel Olson on January 19, 2018 after reporting his stress as a worker's compensation injury. (Exhibit F) Claimant reported insomnia, anxiety, depression, and diarrhea as a result of job stress beginning in February 2017. Dr. Olson opined that Claimant did not experience a psychologically traumatic event that would qualify him for workers' compensation benefits under the

statute. (Exhibit F, bate stamp 43) Claimant was released to return to work full duty with no restrictions and no follow-up. (Exhibit F, bate stamp 43)

4. Claimant testified generally that since receiving his promotion, he had noticed increased stress. He testified that as a result of that stress, he was off work for three (3) weeks from January 15, 2018 through February 5, 2018. During that time, Claimant reported that he participated in three (3) counseling sessions through the Colorado State Employee's Assistance Program (CSEAP) where he learned coping skills and stress management techniques. Claimant testified that his condition was only temporary and that he returned to work full duty with no additional/persistent symptoms.

5. Claimant had two performance evaluations following his promotion in which he received positive remarks and feedback for his performance as a Program Manager. (Exhibit C) Nonetheless, the evidence presented establishes that by January 18, 2018, Claimant was not meeting the "expectations set forth by the Appointing Authority" for his position and "this was being addressed through private meeting and Performance Management." According to Major Ryan Flores, the Appointing Authority had very high expectations for the position. Nonetheless, he never witnessed the appointing authority harass Claimant. (Exhibit C, bate stamp 23)

6. While other non-work related medical conditions and Claimant's decision to quit smoking may have contributed to his alleged stress as suggested by Respondent, the evidence presented persuades the ALJ that Claimant's stress, as reported in January 2018 and stretching into February 2018, was probably emanating principally from his inability to completely meet the expectations of a new job following his promotion. Indeed, the evidence includes a convincing statement from a similarly situated co-worker indicating that the position was highly demanding, that Claimant was not meeting the expectations for the position and was involved in performance management counseling. To the extent that performance-counseling amounts to a disciplinary action, the content of Claimant's performance evaluations persuades that ALJ that such action was taken in good faith to assist a new but highly motivated and promising employee succeed in a very challenging position.

Claimant failed to establish that she was subjected to psychologically traumatic events generally outside her employment that would evoke significantly distress in a worker in similar circumstances and/or that the corrective action issued June 21, 2017, was taken in bad faith, i.e. "vindictively."

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. To receive compensation or medical benefits, a claimant must prove that he/she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *see also, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985);

Pacesetter Corp. v. Collett, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

B. "Mental-mental" injuries are injuries in which mental impairment follows a solely emotional stimulus. *Oberle v. Indus. Claim Appeals Office,* 919 P.2d 918, 920 (Colo. App. 1996). "An injury that is 'the product of purely an emotional stimulus that results in mental impairment' requires a 'heightened standard of proof' to 'help prevent frivolous or improper claims.'" *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205–06 (Colo. App. 2012) (internal citations omitted). This is true because "[c]ases in which a claimed disability is based on emotional or psychological cause and in which physical injury is absent are less subject to direct proof and more susceptible to being frivolous in nature." *Dushane v. Beneficial Colorado, Inc.,* W.C. No. 4-218-217 (ICAO July 17, 1996).

C. Section 8-41-301(2)(a), C.R.S., addresses this heightened burden of proof and provides the conditions of recovery for claims of mental impairment. According to § 8-41-301(2)(a), the claim "must be proven by evidence supported by the testimony of a licensed physician or psychologist." Moreover, the mental injury must "consist of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances." *Id.* "This interpretation of the statute serves the legislative purpose of weeding out frivolous claims predicated on alleged idiosyncratic responses to non-stressful, or mildly stressful, occurrences which would not have produced significant distress in a reasonable worker." *Gaudett v. Stationers Distributing Company,* W.C. No. 4-135-027 (ICAO April 5, 1993). Finally, "a mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement or similar action taken in good faith by the employer." Section 8-41-301(2)(a), C.R.S. Good faith personnel actions are those which are reasonable under an objective standard. The question of whether employer discipline is objectively reasonable is a question of fact to be determined by examining the surrounding facts and circumstances. *Spencer v. Synthes USA,* W.C. No. 4-370-762 (ICAO, Dec. 28, 2000).

D. Section 8-41-301(2), C.R.S. applies to claims of multiple, allegedly traumatic events, as well as claims alleging a single traumatic event. "When multiple stressors are alleged, that determination must include a separate analysis of each event to ascertain whether the claim is based in whole or in part upon facts or circumstances common to all fields of employment." *Pub. Serv. of Colorado v. ICAO,* 68 P.3d 583, 585 (Colo. App. 2003). If a claim is based on one or more incidents that are common to all

fields of employment, it should be denied. *Trujillo v. ICAO,* 957 P.2d 1052, 1054 (Colo. App. 1998).

E. In this case, the ALJ agrees with Respondents that Claimant failed to present the testimony or a report from a licensed physician or psychologist that he suffered a mental impairment on or about January 15, 2018. Accordingly, his claim must be denied and dismissed under the current version of the statute, See *Kieckhafer v. Industrial Claim Appeals Office*, 284 P.3d 202 (Colo. App. 2012); §8-42-301(2), C.R.S. 2017.

F. Even if Claimant had presented the testimony of a licensed physician or psychologist the ALJ concludes that Claimant's stress claim is based at least in part on incidents common to all fields of employment, specifically routine conflict and stress related to managing and being managed by others at work. Conflict between employees and supervisors over unpopular directives, job performance, schedules, budgetary concerns, personality differences and perceived lack of support is not isolated to correctional facilities, but rather widespread and shared with all fields of employment. Here, the evidence presented convinces the ALJ that Claimant's allegation that he was repeatedly harassed which in turn caused conflict and stress beyond the level common to all fields of employment is most probably overstated. While Claimant alleged a "pattern" of harassment, he presented no specifics on what he alleged was an escalating campaign to belittle him in front of other people. Based upon a totality of the evidence presented, the ALJ concludes that none of the conflict that Claimant alleges he had with his appointing authority constitutes a psychologically traumatic event that would be considered outside of a correctional facility manager's usual working experience.

G. In concluding that Claimant's claim involves incidents common to all fields of employment and that Claimant was not subjected to conflict which was so unusually intense that it was outside the normal conditions of her employment as a principal, the ALJ finds the case of *Spencer v. Synthes USA,* W.C. No. 4-370-762 (ICAO, Dec. 28, 2000) instructive. In *Spencer*, the claimant's relationship with her supervisor became "quite strained" when the supervisor disciplined her for failure to keep her radio and keys in her possession. Analogous to the instant case, the claimant in *Spencer* alleged that her supervisor "set out on a course of behavior with the sole intent of harassing and belittling her" and that his conduct caused her anxiety and depression. The ALJ ruled, "claimant presented insufficient evidence to demonstrate that her conflict with her supervisor, and the results which flowed from that conflict, were so unusually intense that they were outside of the normal conditions of employment." *Id.* The ICAO upheld the ALJ's dismissal of the claim stating: "We agree with the ALJ's conclusion that some level of conflict between employees and supervisors is 'objectively common' to all fields of employment." *Id.* Because the ALJ finds/concludes that Claimant's conflict with his appointing authority is based in part upon facts and circumstances common to all fields of employment, it must be denied under the principals announced in *Trujillo, supra.*

H. Even if Claimant had established that the incidents he asserts exposure to were so unusually intense that they would be considered to be outside of the normal conditions of his employment, he failed to establish that those events would evoke significant symptoms of distress in a worker whose experience, training, and duties are similar to his, i.e. an experienced correctional facility manager in charge of the management of 200 staff persons and 1300 inmates. Here, the persuasive evidence persuades the ALJ that none of Claimant's allegations meets this standard. As noted above, Claimant's allegedly traumatic events simply include a general allegation that he was harassed and belittled in front of others and felt unsupported by the Warden who gave him lists of things to do and whom sent him text messages at night and on weekends. The ALJ finds/concludes, as did Dr. Olson that Claimants perceived lack of supervisor support and the aforementioned events likely did not a specific psychologically traumatic event that would cause significant emotional distress in a similarly situated worker possessing the same training and work experience as Claimant.

I. In this case, the ALJ finds Claimant's allegations similar to those where certain behavior/events were not found to be outside a worker's usual experience or so abusive as to cause significant distress in a similarly situation worker. Those events/circumstances include, enforcing polices regarding overtime and the length of lunch breaks (*Davis v. Minnequa Bank of Pueblo,* W.C. No. 4-506-911 (ICAO Jan. 17, 2002); not taking claimant's ideas seriously at meetings (*Trujillo,* 957. P.2d at 1053); minor harassment by coworkers including kicking and shoving (*Gaudett, supra)*; departure of subordinate due to problems with claimant; and a telephone conversation regarding claimant's job performance. (*McCallum v. Dana's Housekeeping,* W.C. No. 4-211-605 (ICAO Feb. 22, 1996). By contrast, the following work place events have been found to be objectively traumatizing to a similarly situated worker resulting in a claim for psychological trauma, sabotage of equipment for which claimant was responsible, puncturing claimant's car tire with a knife, rumors that claimant traded his testimony for money and sexual favors, and threats that claimant's wife would be informed he was allegedly engaged in extramarital affairs. *Pub. Serv. of Colorado v. ICAO,* 68 P.3d 583 (Colo. App. 2003). As noted above, the evidence presented persuades the ALJ that Claimant's reaction to the perceived harassment he alleges is probably an idiosyncratic response to non-stressful or mildly stressful events that are unlikely to evoke significant symptoms of distress in a similarly situated worker called upon to address said behavior. *See generally*, *Brown v. Family Inn of Colorado Springs*, W.C. No. 4-271-351 (November 12, 1996); *Gaudett, supra.*

J. Finally, as required by § 8-41-301(2)(a), claims for mental impairment "shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer." In this case, it is probable that Claimant filed his claim for mental impairment following his need to participate in performance management, as he was not meeting all of the expectations of his new position after his promotion. To the extent that Claimant asserts that he suffered mental impairment as a consequence of the stress created by

having to participate in individual meetings and performance management sessions, the evidence presented fails to establish that Respondent-Employer took such action in bad faith.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet the statutory requirements set forth in §8-42-301(2), C.R.S. to establish a claim of mental impairment. Accordingly, his claim must be denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 16, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the motorized scooter recommended by her authorized treating physician is reasonable, necessary, and related to her May 17, 2012 work injury.

2. Whether Respondents are entitled to reimbursement for a missed appointment fee for Claimant's failure to attend a properly noticed Respondent Independent Medical Examination (IME).

FINDINGS OF FACT

1. Claimant is a female with a date of birth of August 19, 1975.

2. On May 17, 2012 Claimant sustained a work related injury after she crouched down, stood up, and heard a pop in her right knee while in the course and scope of her employment. Claimant ultimately was diagnosed with a meniscus tear and underwent right knee surgery.

3. While recovering from surgery on her right knee, Claimant fell and hurt her left knee. Claimant ultimately underwent left knee surgery.

4. Following her left knee surgery, Claimant was diagnosed with chronic regional pain syndrome (CRPS) in her lower extremities. Claimant has been treating for chronic pain since.

5. Her chronic pain treatment has been extensive and has included implantation of a spinal cord stimulator with revision surgeries.

6. Claimant has also been undergoing physical therapy since her knee surgeries.

7. In 2014 Claimant's physical therapist recommended pool therapy rather than regular therapy and Claimant independently obtained a pool pass in order to complete pool therapy strengthening.

8. Despite the spinal stimulator and therapy, Claimant continues to have severe chronic pain symptoms on a regular basis and finds it difficult to maintain an average quality of life.

9. Claimant testified at hearing that she can walk 10-15 minutes and sometimes farther but that she uses a motorized scooter if she knows she will be shopping

for a while or going longer distances. Claimant testified that some stores like Walmart have them up front and that if the scooters are not there or are being used by other customers, she knows she will have to make the trip short. Claimant testified that she has also rented motorized scooters at venues when they are available and that they help her to make it farther than she would otherwise be able. Claimant testified that she also has used a wheelchair before but that a scooter would require only her to operate it and she wouldn't need anyone to push her.

10. Claimant testified that she wants her legs to work better and doesn't want her legs to atrophy. Claimant testified that she would only use the scooter when she needed it but that it would allow her on those occasions to do a lot more. Claimant is found credible.

11. On May 9, 2017 Claimant was evaluated by Dr. Fox. Dr. Fox noted that Claimant was still seeing Dr. Wernick for pain management and that there were talks about a revision spinal stimulator but that the procedure was delayed by Claimant's motor vehicle accident on February 23, 2017. Dr. Fox noted that Claimant was having quite a bit of difficulty walking, suggesting a motorized scooter. Claimant reported that she had been having significant difficulty with ambulating recently and had used a wheelchair on several occasions. Dr. Fox discussed getting a motorized scooter and Claimant requested a prescription but Dr. Fox advised her she should probably discuss it with her attorney to see if the insurance company would over it or not. At some point, Dr. Fox filled out a prescription for a motorized scooter dated May 9, 2017. *See* Exhibits 3, 4, B.

12. On June 12, 2017 Claimant was evaluated by Dr. Wernick. He assessed CRPS type I of the left lower extremity. Dr. Wernick recommended against routine use of a motorized scooter but noted that it could be considered for occasional use for mobility on long days. *See* Exhibits 5, C.

13. On June 27, 2017 Claimant underwent an evaluation with O.T. resources. Claimant reported that all tasks take longer, cause pain, and/or that she needed assistance. Claimant reported that she usually had assistance for grocery shopping and would use the scooters in the store and shop with her son or mother. Claimant was found to have poor balance throughout the evaluation and a weight distribution evaluation showed her to distribute her weight on the right at 120 pounds and the left at 30 pounds. Claimant was unable at the evaluation to tolerate even light tough to her bilateral lower extremities due to pain. Claimant had an awkward limping wide gait pattern and tended to lean to the right when sitting. The opinion was that there was a high correlation between subjective and objective measures with over 30 tests given to assess consistency of Claimant's performance. *See* Exhibit 6.

14. On August 15, 2017 Claimant was evaluated by Dr. Fox. Claimant reported severe pain in her lower extremities and back with quite a bit of pain along the lateral side of the foot. Dr. Fox noted that Claimant had previously requested a motorized scooter and that Dr. Wernick wrote a prescription for that. Dr. Fox noted on examination moderate

diffuse swelling in the lower extremities with extreme tenderness to even light touch. *See* Exhibits 4, B.

15. Respondents scheduled Claimant for an independent medical evaluation with Joseph Fillmore, M.D. On February 15, 2018 Dr. Fillmore's office sent a reminder email to Claimant's former attorney regarding the upcoming Rule 8-IME appointment. This was forwarded to Claimant by her former attorney on February 15, 2018. *See* Exhibit I.

16. On February 16, 2018 Claimant replied to her former attorney by email. Claimant indicated that Dr. Fox was trying to cancel that appointment and that he was tired of whomever was scheduling appointments behind his back. Claimant indicated that Dr. Fox had already set up her MMI appointment with another doctor and that she would keep her former attorney posted. *See* Exhibit I.

17. Claimant failed to attend the February 20, 2018 IME with Dr. Fillmore. His office noted that she had failed to keep the appointment and they sent an invoice reflecting the charge for the missed appointment. The invoice showed a charge of $734.00 for 2 units of a now show IME rule 8 appointment. *See* Exhibit H.

18. Claimant testified that she was aware of the appointment with Dr. Fillmore but thought it was for an MMI determination and testified that she thought she didn't have to go. Claimant testified that she later learned it was an IME appointment because of the new surgery request and that once she learned what it was, she attended the newly scheduled appointment.

19. Claimant testified that her former attorney never told her that she needed to attend the February 20, 2018 appointment after she emailed him believing it was an MMI appointment.

20. On March 2, 2018 Claimant was evaluated by Dr. Fox. Claimant reported severe and constant pain. Claimant reported that Dr. Barolet advised her that she had type II CRPS and not type I. On examination, Claimant's legs had moderate diffuse tenderness to even light tough, mottling, and swelling. They also had pain with ambulation and motion. Dr. Fox noted that Claimant would like to be able to walk for more than 5-10 minutes without significant leg and knee pain but opined that given her condition, that goal was unlikely to be met. *See* Exhibit 4.

21. On March 20, 2018 Claimant underwent an independent medical evaluation performed by Joseph Fillmore, M.D. Dr. Fillmore issued a report on March 29, 2018. Dr. Fillmore opined that the recommendation for a motorized scooter was related to Claimant's workplace injury but opined that a motorized scooter was not a reasonable treatment option. Dr. Fillmore opined that for CRPS an individual should use the affected extremities as much as possible and weight bear as much as possible to aid in desensitizing them and to improve function. Dr. Fillmore opined that a motorized scooter may very well foster dependence and hamper improvement. *See* Exhibits 9, D.

22. Dr. Fillmore testified at hearing. He noted that Claimant had undergone significant treatment without significant improvement in function. He opined that for the treatment of CRPS it is better to use the affected limb. He opined that the motorized scooter was not reasonable or necessary because the treatment for Claimant should be the use of her extremity and that it is better to continue with other treatment rather than immobilize a person.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Motorized Scooter

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Section 8-42-101(1)(a), C.R.S., provides as follows:

> Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and ***apparatus*** as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury."

Claimant has established by a preponderance of the evidence that the motorized scooter apparatus is reasonable, necessary, and causally related to her May 17, 2012 work injury. As a result of her work injury, Claimant developed CRPS and remains limited in the amount and distance that she is able to walk without pain. Claimant is credible and persuasive that a motorized scooter will help cure and relieve her of the effects of her injury. The effects of her injury include severe limitations on how far and long she can walk and interfere with her ability to shop, recreate, travel, and perform other normal daily activities where walking distances might be involved. The motorized scooter and the ability to use it when Claimant wishes to shop, recreate, travel, or perform daily activities that involve traveling more than minimal distances will cure and relieve her from the effects of her limited ability to otherwise be mobile due to her injury.

The ALJ appreciates concern from Dr. Fillmore that if Claimant becomes reliant on the motorized scooter it will be harmful to her and that using the affected extremity is part of treatment. However, the ALJ finds Claimant credible that she wants to avoid atrophy and maintain the best possible function and that she intends to only use the motorized scooter as needed and intends to continue with therapy and use of her extremities as much as possible. Claimant has requested a motorized scooter up to the amount of $1,200 and that ALJ finds that Claimant has met her burden by preponderant evidence that this request and medical apparatus is reasonable, necessary, and causally related to her work injury.

Reimbursement of IME fee

Respondents have requested the ALJ order Claimant to reimburse them for the missed IME fee in the amount of $734.00. As found above, Respondents scheduled Claimant for an IME with Dr. Fillmore on February 20, 2018. Claimant was aware of the appointment but was under a mistaken belief that it was an appointment for MMI and that Dr. Fox had already set up a different appointment for MMI for her. Claimant was unaware that the appointment was an IME with Respondents' expert. Claimant testified that as soon as she knew it was a Respondent IME, she attended the next set appointment. Claimant's testimony is credible and consistent with an email to her former attorney where she indicated that Dr. Fox was trying to cancel the February 20, 2018 appointment and had already set up an MMI appointment with another doctor. Claimant is credible and

persuasive that her former attorney did not respond to her email and did not advise her it was a Respondent IME or that she had to attend. Although the IME was properly noticed in writing, Claimant mistakenly believed she did not have to attend the appointment.

Respondents had the right to suspend Claimant's compensation and could have sought an order compelling Claimant's attendance at a rescheduled IME under statute. However, Respondents did not seek that remedy and, as found above, Claimant attended the rescheduled March 20, 2018 IME with Dr. Fillmore once she knew it was a Respondent IME. Respondents have failed to show that a penalty in the form of requiring Claimant to pay the missed IME fee is appropriate in this case. Claimant, although mistaken, did not intentionally cancel a Respondent IME or attempt to thwart the IME process. She mistakenly believed the February 20, 2018 IME with Dr. Fillmore to be an MMI appointment that she did not need to attend because she already had an MMI appointment set up by her authorized treating provider. She attended the Respondent IME one month after the missed IME after realizing it was a different appointment. Once she was aware, she cooperated with the process requiring her to attend Respondents' scheduled IME. Respondents have failed to establish that Claimant should be subject to the missed IME fee.

ORDER

1. Claimant has established by a preponderance of the evidence that a motorized scooter, up to the amount of $1,200, is reasonable, necessary, and causally related to her May 17, 2012 work injury.

2. Claimant is not required to reimburse Respondents for the February 20, 2018 missed IME fee.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 17, 2018 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Have Respondents overcome, by clear and convincing evidence, the DIME opinion of Dr. Michael Volz, that Claimant was not at MMI as a result of his September 28, 2014 work injury?

II. Have Respondents shown, by a preponderance of the evidence, that Dr. Volz in fact made a valid MMI determination during his DIME examination.

ISSUES NOT RIPE FOR DETERMINATION

In his position statement (and in his Response to Respondent's Application for Hearing), Claimant now seeks relief, to wit: Dr. Silpa Krefft to be designated an ATP, Reimbursement for treatment to date by Dr. Krefft and National Jewish Hospital; TTD and TPD benefits. The ALJ concludes that such issues are not ripe for determination, based upon the totality of the hearing record, including this exchange:

> THE COURT: So right now, before we get to the exhibits, Mr. Biddle, are there any additional issues besides the fact that Respondents are challenging the DIME, that you think are at issue today?
>
> MR. BIDDLE: No, your honor. (Hearing Transcript, pp. 13, 14)

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed as a Millwright. His job requires that he complete routine, general maintenance projects, to include welding. On September 28, 2014, the Claimant was assigned to weld a broken rail in the steel mill. On that date, a water hose became trapped underneath the Ladle Refinery Furnace (LRF) ladle. The water travelled underneath the slag contained in the LRF. The steam trapped underneath the LRF caused a steam explosion. (Ex. C at pp. 4-5).

2. The steam explosion shattered the outside glass panel of the LRF, and knocked off a considerable amount of dust which had been accumulating on the rafters. The steel mill became dark. Claimant described the situation as dark, chaotic and difficult to navigate; nonetheless, he was able to leave the building without assistance. The Employer's emergency response team arrived at the scene shortly thereafter. Claimant initially alleged multiple injuries as a result of the explosion, including a neck injury, right shoulder injury, various head injuries, and a chest inhalation injury.

3. Claimant was immediately treated following the incident at St. Mary's Corwin Hospital. The initial record from St. Mary's Corwin on the date of injury stated that Claimant presented with a Chief Complaint of "Inhalation of particles."

> …..a hot oven…exploded, and the room was filled with the power particles from the burning brick. The patient presents complaining of some shortness of breath and the fact that he's been coughing up dust-like material. He denies any smoke inhalation or exposure to extreme heat…The patient was made a level II trauma due to mechanism of action. (Ex. N, p. 113).

4. It was documented that "the patient was given a DuoNeb, he was in absolutely no respiratory distress." upon discharge. (Ex. N, p. 116). Physical Examination failed to reveal any physical injuries, including abrasions, burns, contusions, wounds or lacerations. The hematological blood test, chest x-ray, and respiratory tests were all normal. Claimant was discharged and told to return to the ER with additional complaints.

5. Claimant went on his own to the emergency room at Parkview medical center on October 24, 2014. Claimant denied chest pain, denied dyspnea on exertion, and denied shortness of breath, but did note that patient "sometimes has cough in the middle of the night". (Ex. L, p. 79). The examination revealed a normal respiratory rate. The respiratory and chest examination was normal. Respiratory examination revealed no findings of respiratory distress. Claimant underwent a second chest x-ray on October 24, 2014. The x-ray revealed that the lungs were clear with no chest abnormalities. No acute cardiopulmonary diseases were noted. (Ex. K, p. 65).

6. On November 4, 2014, Claimant underwent a psychiatric fitness for duty assessment with Dr. Robert Kleinman. Dr. Kleinman made no recommendations regarding the physical complaints of respiratory symptoms. Dr. Kleinman opined that it was not clear if he sustained an injury. Dr. Kleinman further opined that "if he does enter the workers' compensation system, it is predictable that it will be drawn out and antagonistic." (Ex. P, p. 149).

7. Claimant underwent an IME at Respondents' request with Dr. Jeffrey Schwartz on January 21, 2015. (Ex. R) Dr. Schwartz conducted an interview, medical records review, and a lung function spirometry test. He found that "my exam of the Claimant was unremarkable." In addition, his spirometry was normal and a methacholine challenge study showed he had no evidence of hyper-active airways." Dr. Schwartz noted that "the cause of his shortness of breath with exertion is unclear, given his normal breathing tests, normal chest x-ray, normal exam and normal oxygen levels." Dr. Schwartz found no evidence of a long term respiratory injury on October 28, 2014. (Ex. R, pp.173 –175).

8. On February 23, 2015, Dr. Charles Hanson reported that Claimant had reached maximum medical improvement for his alleged orthopedic injuries on February 12, 2015. Claimant then began treating with Dr. Michael Dallenbach on his own. This examination revealed equal and clear breath sounds. No tenderness was noted in the sternum or chest. Dr. Dallenbach diagnosed Claimant with questionable post concussive syndrome, headaches, cervical strain, right upper extremity strain with possible rotator cuff tear, bilateral tinnitus, and vertigo. There was no mention at this exam of any respiratory issue. (Ex. T. p. 198).

9. The initial claim was contested, and the parties went to an administrative hearing on January 25, 2016. Dr. Dallenbach testified via deposition on July 6, 2015. (See, Ex. 3, p. 52).The presiding Administrative Law Judge, Richard Lamphere, issued an Order on July 13, 2016. *Id.* The ALJ opined that, based on the opinion of Dr. Schwartz, the dust likely irritated Claimant's lungs resulting in his immediate need for treatment in the emergency room at St. Mary's. The ALJ opined that the exposure to dust caused a compensable injury to Claimant's lungs. The ALJ was not persuaded that Claimant suffered from Reactive Airways Dysfunction Syndrome (RADS). ALJ Lamphere opined that the treatment required onsite and at St. Mary's Corwin was reasonable, necessary and related to the September 28, 2014, explosion. (Ex. C, p. 19).

10. ALJ Lamphere further opined that Claimant could not be accepted as an accurate and reliable historian. He opined that Claimant failed to prove by a preponderance of the evidence that he sustained compensable injuries to his head, neck, or right shoulder. (Ex. C, p. 20). Ultimately, ALJ Lamphere opined that Claimant sustained a compensable lung injury and denied and dismissed his other claims. He further ordered that the change of treating provider to Dr. Michael Dallenbach was granted.

11. Following this Order, Claimant sought treatment with Dr. Dallenbach on August 2, 2016. The examination was essentially normal. Dr. Dallenbach diagnosed Claimant with a post inhalation injury. A referral was made for further pulmonary evaluation with Dr. Shapiro for treatment recommendations. Claimant remained at full duty with no restrictions. (Ex. T, p. 201). The available medical records do not reflect that Claimant continued to treat with Drs. Dallenbach and Shapiro.

12. Due to the perceived lack of treatment, Respondents pursued a 24-Month DIME on January 3, 2017. Dr. Michael Volz, d/b/a Advanced Allergy, Asthma, and Immunology, was selected as the DIME physician. The DIME occurred on March 6, 2017. Under "History", the following are noted:

> Symptoms began almost immediately including shortness of breath, dry throat. Since that time he has had shortness of breath upon walking up stairs, which when occurs is followed by some dizziness…..Since the DOI, the problem has neither worsened or improved although he went to National Jewish Hospital outside of

> his WC claim iniitially≈6 weeks ago, has had some tests done but has not yet had a chance to follow-up to review all of the test results. The test included various lung functions tests and a CT scan of the chest. In addition to the as needed inhaler he uses, he was given another inhaler to use twice daily. He feels these inhalers reduce his symptoms but *there is not known as of yet* objectively determined improvement due to the use of these inhalers. (Ex. X, p. 243)(emphasis added).

13. The DIME examination revealed that the respiratory effort was found to be good. Airflow was normal with no unordinary breath sounds. (Ex. X. p. 245). Dr. Volz noted that the three primary subjective complaints were for cough, shortness of breath, and chest tightness. Dr. Volz opined that "there is no **current** evidence for a respiratory disorder that might be attributed to the September 28, 2014 injury." (Ex. X, p. 249). However, he emphasized in the following sentence, that "However, there are various points I differ from Dr. Schwartz as well as I believe the ***evaluation*** and *efforts to manage are* ***incomplete*** despite my statements above. Id (emphasis added).

14. Dr. Volz further noted that "the argument that Dr. Schwartz has made that since the dust was very visible and thick, the size of particles was not small enough to be "respirable" of sufficiently small to get into the lower or smaller lung airways *cannot be substantiated." Id.*

15. Dr. Volz was quite clear in what he felt should happen next:

> There are *additional tests in my opinion justifiable to perform,* if they have not yet been performed and are not in the records provided to me. These tests would include a more detailed lung function test to include FRC, other lung volume tests, DLCO related tests, High Resolution CT scan of the chest (possibly on inspiration and expiration) and an exercise related test to see if his oxygen level drops. Some of these tests might need to be performed at the end of consecutive days of work. (Ex. X, p. 250).(emphasis added).

After citing several medical articles in support of his position, Dr. Volz mentioned a detailed treatment plan with the evidence he currently had at his disposal. He then stated:

> *Due to the above comments*, there are no restrictions recommended and no impairment. Since *no known* or suggested work related illness from the injury can be ***currently*** *identified,* **MMI** and an impairment rating are ***not determinable.*** *This opinion would change if further information is collected to reassess the idea.* (Id at p.250)(emphasis added).

16. While the DIME process was proceeding, Claimant sought treatment on his own through National Jewish Hospital. The initial evaluation by Sr. Silpa Krefft, MD, occurred on December 8, 2016. Claimant's chief complaint was for shortness of breath and a cough which he stated was present since a workplace accident on September 28, 2014. (Ex. W, p. 216) The examination revealed normal resting pulmonary function testing. (Id at 221). Dr. Krefft recommended *additional diagnostic testing* for potential airways disease.

17. Claimant returned to National Jewish on February 2, 2017. Dr. Krefft diagnosed Claimant with *probable* upper airway dysfunction. She stated that there was a concern for occupational contribution given the work place incident in 2014 and the ongoing exposure. (Ex. W, p. 232). She further opined in her report that *she would need additional information to make a causation determination.* (*Id.*)

18. Based on the DIME report, Respondents filed an Application for Hearing on April 14, 2017. The sole issue raised on the Application for Hearing was overcoming the DIME opinion regarding MMI. (Ex. D). The parties proceeded to hearing in this matter on September 12, 2017.

19. At this hearing, Dr. Eric Ridings testified as Respondents' expert. Dr. Ridings opined that Claimant was in a room where there had been an explosion, which didn't cause him any injury, although some discomfort from having to breathe in some particles to some extent, and was coughing. Dr. Ridings testified that throughout the claim Claimant never really had any findings of abnormalities. He simply had complaints. Dr. Ridings opined that in his opinion Claimant reached MMI for the pulmonary condition following the negative pulmonary examination on January 29, 2015.

20. Dr. Ridings addressed the DIME report in his testimony. Dr. Ridings opined that Dr. Volz had opined that there were no objective diagnosis of any lung condition, but then indicates that he (Dr. Volz) recommends additional tests to rule out GERD and rhinitis. Dr. Volz never addresses whether a confirmation of any diagnosis at this point would even be related. Dr. Ridings testified that Dr. Volz opined that there was no confirmed diagnosis <u>at the present time</u>. Dr. Ridings opined that Dr. Volz does not address in any way that even if he found something two and a half years after the injury, how it would be medically probable to be a direct result of the exposure over two years prior.

21. Dr. Ridings ultimately opined that Claimant was at MMI and did not require any additional medical treatment.

22. Claimant testified on his own behalf. Claimant recounted the history of his prior symptomology and treatment. Claimant stated to Dr. Krefft that the reported pulmonary symptoms have been present since the date of injury. Claimant had initially complained of shortness of breath and a cough. During his testimony, the first thing he recalled right after the explosion was an inability to breathe. He was

coughing while making his way to the outside, and noticed that what he was coughing up was black. Emergency responders cleaned out his eyes, whereupon he noticed he was covered in soot. Once he was released from the ER, he still felt nauseous that day.

23. Currently, Claimant testified that he still is short of breath upon exertion. He still has issues with his voicebox. He reports no pulmonary issues prior to this workplace accident.

24. Dr. Silpa Krefft testified at a post-hearing deposition on February 8, 2018. Dr. Krefft outlined her professional training and experienced to date, including pulmonary and critical care training, and board certifications in internal medicine, pulmonary medicine, and occupational and environmental medicine. She also holds a master's degree in public environmental and occupational health. The purpose of her training was to train in occupational lung disease, including military deployment and mining related diseases.

25. Dr. Krefft opined (after performing some of the tests which had been recommended in Dr. Volz' DIME report- high –resolution CT scan, repeat methacholine challenge. a laryngoscopy, and a consult with an ear, nose, and throat physician) that she was able to diagnose Claimant with *probable* vocal cord dysfunction:

> So with all those test results, what I was able to diagnose Mr. Rodriguez with was *probable* vocal cord dysfunction of this inducible laryngeal obstruction.
>
> That I could say to a reasonable degree of medical certainty, that I believe that he has that condition *and that it was directly related to his workplace exposure,* and he *likely* had an *aggravation* of that condition with his continued employment with the Ervaz facility (Krefft Depo, p. 14).(emphasis added).

26. Dr. Krefft also addressed concerns that Claimant may have been inconsistent in describing his symptoms to various medical providers:

> So I would say that he has not had complete resolution of his symptoms, but has waxing and waning symptoms that seem to be triggered.
>
> But he also, I would say, *is* ***not at Maximum Medical Improvement*** *because his management has not been optimized.* He has not really been able to complete speech therapy consultation with some reinforcement in like a short period of time, which I think would benefit from. (Krefft Depo, p. 53)(emphasis added).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

DIME Procedure, Generally

D. Section 8-42-107(8)(b)(II) and (III), C.R.S. provide as follows regarding the twenty-four-month DIME procedure:

(II) If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2; except that, if an authorized treating physician has not determined that the employee has reached maximum medical improvement, the employer or insurer may only request the selection of an independent medical examiner if all of the following conditions are met:

(A) At least twenty-four months have passed since the date of injury;
(B) A party has requested in writing that an authorized treating physician determine whether the employee has reached maximum medical improvement;
(C) Such authorized treating physician has not determined that the employee has reached maximum medical improvement; and
(D) A physician other than such authorized treating physician has determined that the employee has reached maximum medical improvement.

(III) Notwithstanding paragraph (c) of this subsection (8), if the independent medical examiner selected pursuant to subparagraph (II) of this paragraph (b) finds that the injured worker has reached maximum medical improvement, the independent medical examiner shall also determine the injured worker's permanent medical impairment rating. The finding regarding maximum medical improvement and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence. A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division. (Emphasis added.)

E. The purpose of a DIME under § 8-42-107(8)(b)(II) is to make an independent determination of whether the claimant reached MMI Consequently, pursuant to § 8-42-107(8)(b)(II) and (III), C.R.S, once a twenty-four-month DIME physician reaches a finding regarding MMI and permanent impairment and the finding has been filed with the Division of Workers' Compensation, a hearing may take place. The twenty-four-month DIME physician's finding on MMI and permanent impairment is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *York v. Manpower International*, Inc., W.C. No. 4-837-612-04 (May 4, 2016), aff'd 16CA0877 (Jan. 26, 2017)(NSOP). “Clear and convincing” evidence has been defined as evidence which demonstrates that it is highly probable the DIME physician's opinion is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. Id. The standard of review is whether the ALJ's findings of fact are supported by substantial

evidence in the record. Section 8-43-301(8), C.R.S; *Metro Moving & Storage Co. v. Gussert, supra*.

F. Maximum Medical Improvement (MMI) is defined as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. 2004; *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002).

Ambiguity of the DIME Report

G. If a physician issues ambiguous or conflicting reports concerning whether or not the claimant has reached maximum medical improvement, the ALJ may resolve the issue as a matter of fact by determining the doctor's true position. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2003). Similarly, the question of whether the authorized treating physician has issued conflicting or ambiguous opinions on maximum medical improvement is itself a question of fact. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385, 388 (Colo. App. 2000). An ALJ must resolve ambiguities in DIME physician's report regarding whether claimant is at MMI. *MGM Supply Co. v. Indus. Claims Appeals Office*, 62 P.3d 1001, 1005 (Colo.App. 2002). In determining the DIME physician's opinion, the ALJ may consider all of the DIME physician's reports and testimony. *See Lambert & Sons, Inc..v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998).

H. When assessing whether a Claimant is at MMI, and whether the Claimant has suffered injury-related impairment, it is the DIME physician's responsibility to determine the cause or causes of the claimant's reported condition(s). *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). In some cases, the medical records and other information submitted to the DIME physician may prove inadequate to resolve the issues and the DIME physician may request that additional tests or procedures be performed to clarify causation. Indeed, Rule of Procedure XIV (L)(4)(a), 7 Code Colo. Reg. 1101-3 at 58-59, contemplates that the DIME physician's functions may require additional tests and establishes a mechanism for performance of "non-routine procedures." Thus, we have held that if the DIME physician recommends additional testing to complete the DIME process an ALJ <u>may</u> conclude that such testing is not inconsistent with MMI because it is not primarily performed for the purpose of treatment or diagnosis, but to assist the DIME physician in performing his evidentiary role. *See Mandel v. Sears*, W.C. No. 4-575-413 (January 24, 2005); *Beede v. Allen Mitchek Feed & Grain*, W.C. No. 4-317-785 (April 20, 2000).

I. The issue in this instant case is whether Dr. Volz unambiguously rendered an MMI determination. The ALJ finds that Dr. Volz *unambiguously found Claimant <u>not</u> to be at MMI.* The testing that Dr. Volz believed was warranted was squarely for diagnosis, and ergo for subsequent treatment, of Claimant. It was not to simply assist the DIME physician in performing his evidentiary role. Dr. Volz either wanted the following tests done, **or** wanted to see the results if they had been already performed: FRC, other lung volume tests, DLCO related tests, High Resolution CT

chest scan, and exercise related tests to see if Claimant's oxygen levels dropped. Of course there was not yet an objective diagnosis related to this industrial accident. Claimant was refused testing. As things turned out, Dr. Volz was largely vindicated, as Dr. Krefft-trying to conserve resources for Claimant through his private insurance-ordered a battery of tests, including a high-resolution CT scan. A chest X-ray would not provide sufficient resolution. Since an accurate diagnosis was not yet possible, of course MMI was not yet determinable. Since MMI was not determinable, *the DIME report cannot possibly be interpreted to mean that Claimant was at MMI.*

Overcoming the DIME Report / MMI

J. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000).

K. At most, what Respondents have presented is a good faith difference in medical opinions between Drs. Schwartz and Ridings on the one hand, and Drs. Volz and Krefft on the other. Given their respective expertise and time commitment, the ALJ finds Dr. Volz' report, along with Dr. Krefft's report and testimony to be ***more persuasive*** than the report of Dr. Schwartz, along with the report and testimony of Dr. Ridings. Neither Claimant's shortcomings as a medical historian, nor his occasional penchant for exaggeration do not invalidate the medical conclusions they have drawn. Other medical providers along the way-on this respiratory issue-do not play significantly in this analysis. Given that, it certainly cannot be said that Dr. Volz' DIME report is highly probably incorrect. Respondents have failed to overcome this DIME report.

L. Claimant is not at MMI. He cannot be said to be at MMI until the DIME physician has had sufficient information to make an accurate diagnosis of his condition, then Claimant must receive the needed treatment by his ATP. Only then can one determine when MMI might be reached.

Claimant's Other Requests for Relief

M. In his position statement, Claimant also seeks to have Dr. Krefft designated as an ATP, costs reimbursed for his treatment at National Jewish Hospital, and TTD and TPD benefits. While perhaps meritorious, these claims are not ripe for determination in this Order. Both parties at hearing clearly delineated the sole issue to overcoming the DIME report on determining MMI. The ALJ finds, based upon the entire record, that these other issues were not subsequently tried by consent. Further,

Respondents only addressed the two DIME issues in their position statements. To order further relief at this time would be patently inequitable, without the opportunity to fully litigate these issues.

ORDER

It is therefore Ordered that:

1. Dr. Volz DIME report is unambiguous; he found that Claimant is not yet at MMI.

2. The DIME report of Dr. Volz has not been overcome on the issue of MMI.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 19, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Respondents overcome the DIME by clear and convincing evidence regarding MMI and impairment?

- If Respondents did not overcome the DIME, have Respondent shown they complied with the DIME's recommendations and Claimant should return for a follow-up DIME?

- Has Claimant proven by a preponderance of the evidence he is entitled to a change of physician to Dr. Phillip Engen or Dr. Jeffrey Kesten?

FINDINGS OF FACT

1. Claimant worked for Employer as a "repo man." He suffered admitted injuries to his bilateral upper extremities on August 26, 2015 while lifting dollies.

2. Claimant's treatment has been managed and directed by providers at Concentra Medical Centers, including Dr. Bryan Counts and Dr. Albert Hattem.

3. Claimant was initially diagnosed with bilateral "sprains," and treated with medication and therapy. When he did not improve, he was referred to Dr. Kulvinder Sachar for a surgical evaluation. Bilateral upper extremity MRIs ordered by Dr. Sachar were normal, except for a small area of subchondral marrow edema across the left anterolateral radial head. Dr. Sachar saw no indication for surgery and suggested referral to a physiatrist. He injected Claimant's left radial tunnel, which was not helpful.

4. Claimant next saw Dr. McCranie, who diagnosed bilateral epicondylitis and recommended EMG/NCV testing. The testing showed no abnormalities, so Dr. McCranie recommended additional occupational therapy and acupuncture. Neither modality provided significant relief.

5. Claimant saw Dr. In Sok Yi for a second surgical opinion on May 3, 2016. Dr. Yi injected Claimant's left elbow, which did not help. He ordered repeat MRIs, which showed mild to moderate chronic common extensor tendinopathy. Dr. Yi did not recommend surgery. He recommended a platelet-rich plasma (PRP) injection in the left elbow, which was ineffective.

6. Claimant started seeing Dr. Hattem in November 2016. Claimant reported ongoing severe pain and limitation of his upper extremities. Dr. Hattem opined Claimant had significant pain behaviors and minimal objective findings but recommended testing for possible complex regional pain syndrome (CRPS).

7. A thermogram conducted in February 2017 by Dr. George Schakaraschwili was consistent with bilateral CRPS. Dr. Schakaraschwili then performed QSART testing, which showed a "high probability" of bilateral CRPS. Dr. Schakaraschwili opined Claimant met the criteria for confirmed CRPS per the MTGs. He recommended bilateral stellate ganglion blocks and medications such as gabapentin (Neurontin), pregabalin (Lyrica), or duloxetine (Cymbalta).

8. Dr. Hattem referred Claimant to Dr. Ronald Carbaugh for a psychological evaluation and treatment. Dr. Carbaugh evaluated Claimant in April 2017 and diagnosed an injury-related adjustment disorder. He recommended biofeedback and cognitive behavioral therapy for "better pain and frustration management."

9. Claimant attended one additional session with Dr. Carbaugh but complained about the distance between Dr. Carbaugh's office and his home. Dr. Carbaugh recommended he discuss the issue with Dr. Hattem, but Claimant never returned for further treatment. He testified that he had no "rapport" with Dr. Carbaugh.

10. Claimant saw Dr. John Sacha in May 2017, who recommended a stellate ganglion block and a skin desensitization program. Dr. Sacha opined if Claimant declined stellate ganglion blocks he would be at MMI.

11. Claimant returned to Dr. Hattem on July 13, 2017 and said he did not want to pursue sympathetic blocks. Dr. Hattem inferred Claimant was not interested in psychological follow-up given that he not returned to Dr. Carbaugh. Since Claimant was unwilling to try stellate ganglion blocks, Dr. Hattem placed him at MMI with a 15% whole person impairment. Dr. Hattem recommended maintenance care, primarily relating to medication management.

12. On August 21, 2017, Respondents filed a Final Admission of Liability (FAL) based on Dr. Hattem's report. Claimant timely objected and requested a DIME.

13. Respondents obtained video surveillance of Claimant in December 2017 eating at a restaurant, getting into a vehicle, and entering his home. Claimant's appearance in the video was incongruous with his presentation at the hearing, which raises concern Claimant may be exaggerating the severity of his condition. But the video was brief and filmed from poor angles, making it difficult to draw definitive conclusions from these few isolated snapshots.

14. Claimant underwent a DIME with Dr. David Yamamoto on January 17, 2018. Dr. Yamamoto found Claimant was not at MMI due to "significant anxiety and depression as a result of the injury" which "have not been adequately addressed." He noted Claimant was "not comfortable" with Dr. Carbaugh but was not referred to aother psychologist for counseling. Dr. Yamomoto recommended an evaluation with a different psychologist and a referral to a psychiatrist "to help with the medication management." Dr. Yamamoto agreed with the recommendation for a stellate ganglion block, and thought Claimant may be more receptive to blocks if his anxiety and depression were better controlled. Dr. Yamamoto noted Claimant tried gabapentin with limited benefit and

suggested a trial of pregabalin or duloxetine. He also recommended evaluation by a surgeon or specialist familiar with implanting spinal cord stimulators. He assigned advisory ratings of 15% whole person for the CRPS and 8% for injury-related depression and anxiety.

15. Dr. Joseph Fillmore performed an IME for Respondents on April 5, 2018. Dr. Fillmore's practice includes evaluating patients for spinal cord stimulators and performing stimulator trials. He disagreed with Dr. Yamamoto that claimant is not at MMI. He reviewed the video which "clearly supports that [Claimant] is capable of more activity and function then was demonstrated to Dr. Yamamoto or myself." Dr. Fillmore opined Claimant was not a candidate for spinal cord stimulation but concurred with Dr. Yamamoto's recommendation for a psychiatric evaluation. Dr. Fillmore agreed with Dr. Hattem that Claimant was at MMI as of July 13, 2017.

16. Dr. Gary Gutterman performed a psychiatric IME for Respondents on May 7, 2018. Dr. Gutterman noted Claimant was experiencing significant distress relating to the disintegration of his marriage.[1] Dr. Gutterman opined Claimant's presentation at the IME was "strikingly in contrast to how the patient appeared in videotapes." Dr. Gutterman diagnosed adjustment disorder with mixed features, which he opined is "primarily related to nonemployment injury factors." Specifically, Dr. Gutterman believes Claimant's mental health issues are related to his marital difficulties and long-standing personality features. Because of the activities he viewed in the video footage, Dr. Gutterman opined Claimant was consciously embellishing his symptoms and limitations "to make himself appear more impaired."[2] Dr. Gutterman disagreed with Dr. Yamomoto that Claimant is not at MMI from a psychiatric perspective.

17. Dr. Schakaraschwili reviewed Dr. Fillmore's and Dr. Gutterman's IME reports on May 16, 2018. He opined "(1) Pt. declined stellate ganglion blocks, the most appropriate next step in treatment for CRPS, therefore at MMI. (2) Poor candidate for SCS, a much more invasive treatment than stellate ganglion blocks, due to psych factors, expanding symptoms, and what appears to be symptom magnification."

18. Respondents proved by clear and convincing evidence Claimant is at MMI for his physical condition.

19. Respondents failed to prove by clear and convincing evidence Claimant is at MMI for his psychological condition.

[1] Claimant's marital problems became prominent in late 2017.

[2] Dr. Fillmore and Dr. Gutterman observed more extensive footage than was submitted at hearing. Although the ALJ has considered the doctors' impressions of the video in evaluating their opinions, the ALJ is not inclined to give substantial weight to secondhand descriptions of video without personally viewing the source material. While concerning, the brief video tendered into evidence is not sufficient to convince this ALJ that Claimant is consciously misrepresenting his symptoms. The ALJ also notes Claimant does have objective evidence of CRPS, including positive QSART and thermography.

20. Respondents failed to prove they complied with Dr. Yamamoto's recommendations regarding treatment to bring Claimant to psychological or psychiatric MMI. A follow-up DIME is premature.

21. Claimant failed to prove he is entitled to a change of physician.

CONCLUSIONS OF LAW

A. Did Respondents overcome the DIME regarding MMI?

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5). The DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). In determining whether a claimant is at MMI, the DIME "inherently" must decide whether further treatment is causally related to the industrial injury, and the DIME's determination that a particular condition is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI finding is incorrect. *Qual-Med*, 961 P.2d at 592; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A "mere difference of medical opinion" does not constitute clear and convincing evidence that the DIME is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As found, Respondents overcame the DIME regarding Claimant's physical condition. The ALJ agrees with Dr. Hattem, Dr. Schakaraschwili and Dr. Fillmore that Claimant's refusal to consider stellate ganglion blocks renders him at MMI from a *physical* standpoint. *E.g., Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080 (Colo. App. 1990) (a claimant's unwillingness to submit to reasonably necessary treatment supports a determination of MMI). The ALJ credits Dr. Schakaraschwili's opinion that Claimant's unwillingness to pursue stellate ganglion blocks due to fear of complications forecloses more aggressive procedures such as neurostimulation. Although all invasive procedures carries some risk, stellate ganglion blocks are a well-accepted and relatively routine intervention for CRPS, and far less risky than a neurostimulator trial or permanent implant. Dr. Yamamoto did not actually recommend neurostimulation but merely recommended an evaluation. Since Claimant is not an appropriate candidate for a spinal cord stimulator, an evaluation is pointless and not a persuasive basis for a finding of not-at-MMI.

Nor does the need to adjust Claimant's medications support Dr. Yamamoto's opinion Claimant is not at MMI. Medications are unlikely to be "curative" and are primarily intended to "relieve" Claimant's symptoms. The recommendations to try Lyrica and Cymbalta are reasonable but do not preclude a finding of MMI. Based on the evidence

presented, the ALJ finds Dr. Yamamoto's determination Claimant is not at MMI for his physical condition is highly probably incorrect.

But that is not the end of the analysis, because the ALJ is persuaded by Dr. Yamamoto's opinion Claimant is not at MMI from a *psychological* perspective. Dr. Carbaugh previously opined Claimant would benefit from biofeedback and cognitive-behavioral therapy to address his injury-related anxiety and depression and help manage his pain. Although Claimant did not follow through with Dr. Carbaugh's recommendations, the ALJ gives Claimant the benefit of the doubt that he did not "connect" with Dr. Carbaugh and did not fully appreciate his need for therapy at that time. His perspective in that regard appears to have changed, as evidenced by his willingness to pay for therapy out of his own pocket.

Dr. Gutterman's opinion that Claimant's anxiety and depression are attributable to non-injury-related factors is not persuasive. Claimant had documented injury-related anxiety and depression issues well before the marital difficulties began. Dr. Hattem was concerned about Claimant's mental status in February 2017, and Dr. Carbaugh recommended treatment for an "adjustment disorder" in April 2017. Claimant did not learn of his wife's infidelity until December 2017. Depression and anxiety are understandable and predictable reactions to chronic pain. The mere fact that personal issues may contribute to Claimant's anxiety and depression does not diminish or negate the injury's causal role in his need for mental health treatment.

As found, Respondents failed to overcome Dr. Yamamoto's determination that Claimant is not at MMI for his psychological condition. Although Respondents overcame the DIME *in part*, MMI is not "divisible," and Respondents must prove Claimant is at MMI for "each component of the injury." *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Lozano v. Alvarados, Inc*., W.C. No. 4-904-266-06 (February 27, 2017).[3] It necessarily follows Respondents failed to overcome the DIME's ultimate conclusion Claimant is not at MMI.

B. Have Respondents complied with the DIME's recommendations?

Respondents argue that, if they did not overcome the DIME, they "complied" with the DIME's recommendations by referring Claimant to Dr. Fillmore and Dr. Gutterman. The ALJ disagrees. IMEs cannot substitute for evaluations on referral from ATPs in the normal progression of authorized treatment. Once the employer exercises its initial right to choose the treating physician, the respondents' ability to unilaterally choose a

[3] The ALJ acknowledges when a DIME's whole person *rating* is overcome "in any respect" the issue of *impairment* becomes a factual question for the ALJ under the preponderance standard. *E.g., Deleon v. Whole Foods Market*, W.C. No. 4-600-477 (November 16, 2008). But as explained in *Lozano, supra*, the analysis is different with respect to MMI. In any event, the burden of proof is not dispositive here. Even if the ALJ were applying the preponderance standard, Claimant would still prevail because the ALJ is persuaded Claimant is not at MMI from a psychological standpoint.

claimant's providers comes to an end, and all subsequent referrals must be under the direction of the ATPs.[4]

This principle is evident in the structure of the Act and the case law. For instance, § 8-43-404(5)(a) allows the employer to designate a treating physician in "in the first instance," but § 8-43-503(3) precludes any party from "dictating" to any ATP the type or duration of treatment. After treatment has commenced, additional physicians must be within a "chain of referrals" made "in the normal progression of authorized treatment." *E.g., Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277, 1281 (Colo. App. 2008); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). This limitation on unilateral direction also applies where the right of first selection passed to the claimant. *E.g., Pickett v. Colorado State Hospital*, 513 P.2d 228 (Colo. 1973) (once the claimant exercises the right of selection, he cannot change physicians without permission from the respondents or the Division).

Since the ALJ has upheld the DIME's determination regarding psychological MMI, Claimant must return to Dr. Hattem to implement the DIME's recommendations, including referrals to a psychiatrist, and a psychologist other than Dr. Carbaugh. A follow-up DIME is premature.

C. Did Claimant prove entitlement to a change of physician?

Section 8-43-404(5)(a)(VI)(A) allows a claimant to obtain a change of physician "upon a proper showing" to an ALJ. The statute does not define a "proper showing," and the ALJ has discretion to decide if the circumstances justify a change of physician. *Jones v. T.T.C. Illinois, Inc*., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant is receiving reasonably necessary treatment while protecting the respondents' legitimate interest in being apprised of treatment for which they may ultimately be held liable. *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider a variety of factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g*., *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995). An ALJ is not obliged to approve a change of physician because of a claimant's personal reasons, including mere dissatisfaction with the ATP. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (November 27, 2007).

As found, Claimant failed to prove a basis for a change of physician. The treatment provided by Concentra has been reasonable and appropriate, and Dr. Hattem's hands were largely tied by Claimant's unwillingness to try sympathetic blocks. There is no

[4] Nothing prohibits the parties from mutually agreeing to other physicians without a referral, but that was not the case here.

persuasive reason to assume Dr. Hattem will refuse to refer Claimant for mental health treatment or adjust his medications as recommended by the DIME.

The primary basis for Claimant's request to change physicians is his hope another doctor will offer something that has not been previously recommended. Although Claimant is understandably hoping for treatment to resolve his condition, CRPS is notoriously difficult to treat, with few effective options. Claimant has not been evaluated by either physician he proposes, and does not know whether they would even accept him as a patient at this late stage of his claim. In any event, Claimant presented no evidence of any alternative treatment plan they might implement, and there is no persuasive evidentiary basis to conclude Dr. Kesten or Dr. Engen would provide treatment that is objectively any better — or even substantially different — than provided by Dr. Hattem.

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME's determination that Claimant is not at MMI is denied and dismissed.

2. Respondents provide all further treatment reasonably necessary to cure and relieve the effects of Claimant's industrial injury and bring him to MMI.

3. Respondents' request to return Claimant to Dr. Yamamoto for a follow-up DIME is denied and dismissed without prejudice as premature.

4. Claimant's request for a change of physician is denied and dismissed.

5. Any issues not determined herein are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 20, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to terminate Claimant's Temporary Total Disability (TTD) benefits effective June 23, 2017.

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment for which Yusuke Wakeshima, M.D. has requested prior authorization, including neurological evaluation by Hayley Burke, M.D., serial Doppler ultrasounds of the right upper and left lower extremities, trials of Botox injections, and a trigeminal nerve stimulator, is reasonable, necessary and causally related to Claimant's March 24, 2016 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant is a 76-year old male who worked for Employer as a Front End Manager. On March 24, 2016 he suffered admitted industrial injuries during the course and scope of his employment. When Claimant was walking with a customer to complete a propane tank exchange he slipped on an icy sidewalk, fell to the ground and struck his head.

2. After completing an Incident Report for Employer Claimant was transported by private vehicle to the North Suburban Emergency Room. He reported headaches and head pain as a result of a slip and fall at work just prior to his arrival. Claimant provided a past medical history that was significant for bile duct cancer, stroke, anemia and myocardial infarction. He also has a history of chronic kidney disease that was complicated by a right nephrectomy.

3. Following discharge from North Suburban, Claimant returned to employment until he was taken off work on June 30, 2016. On July 18, 2016 Claimant again returned to work with restrictions. However, Claimant was taken off work by Employer on March 15, 2017 due to concerns about his balance issues. On March 16, 2017 Insurer filed an Amended General Admission of Liability (GAL) acknowledging responsibility for Temporary Total Disability (TTD) benefits from March 15, 2017 until terminated.

4. On June 12, 2017 Claimant visited Authorized Treating Physician (ATP) Yusuke Wakeshima, M.D. for an examination. Dr. Wakeshima completed a WC-164 form keeping Claimant off work because "he would not be safe returning back to work with his current balance issues."

5. On March 26, 2017 the parties participated in a hearing before Administrative Law Judge (ALJ) Margot Jones. On June 23, 2017 ALJ Jones issued a Summary Order concluding that Claimant's hearing loss, dizziness and disequilibrium were not related to his March 24, 2016 industrial injuries. ALJ Jones also dismissed Claimant's request for Respondents to pay for pain medications including Oxycodone, Percocet and Norco because they were not reasonable, necessary or related to his March 24, 2016 industrial injuries.

6. On all dates subsequent to June 12, 2017 Dr. Wakeshima continued to restrict Claimant from all work activities. He commented that Claimant would be unsafe because of a "significant balance disorder."

7. On January 26, 2017 ATP Dr. Wakeshima requested prior authorization for serial Doppler ultrasound studies of the right upper extremity and left lower extremity as well as a trial of Botox injections and a trigeminal nerve stimulator. He also recommended a neurological evaluation with Hayley Burke, M.D.

8. On March 19, 2018 the parties conducted the pre-hearing evidentiary deposition of J. Carlos Cebrian, M.D. Dr. Cebrian testified that Dr. Wakeshima's referral to Dr. Burke for a neurological evaluation was not reasonable or necessary medical treatment for Claimant's March 24, 2016 industrial injuries. After conducting a physical examination and reviewing Claimant's medical records he detailed that Claimant has not had any improvement in his symptoms with any treatment. Furthermore, Claimant has already been evaluated by neurologist Fredric Zimmer, M.D. Claimant has also been evaluated and treated by Gregory Reinhardt, M.D., a physiatrist with fellowship training in brain injuries, and Kristin Mason, M.D. a physiatrist who regularly treats brain injuries. Dr. Cebrian summarized that another evaluation by another neurologist is not medically necessary.

9. Dr. Cebrian also explained that Dr. Wakeshima's request for a trial of Botox injections for Claimant was not reasonable and necessary. He remarked that Botox is used for a small subset of patients who suffer chronic migraines but have not improved with three different preventative classes of medications. Dr. Cebrian noted that Claimant has not been trialed on any preventative classes of migraine medications to warrant an attempt at using Botox. Moreover, Dr. Cebrian did not expect Claimant to obtain any benefit from Botox because of his lack of responses to prior medications.

10. Dr. Cebrian detailed that Dr. Wakeshima's request for serial Doppler ultrasounds of the right upper extremity and left lower extremity was not related to Claimant's March 24, 2016 industrial injuries. He explained that the purpose of the ultrasounds was to detect blood clots. Although physicians found a small blood clot in the brachial vein of Claimant's right arm, Dr. Cebrian reasoned that there was nothing about Claimant's March 24, 2016 mechanism of injury that would cause a blood clot in the right upper extremity or left lower extremity. Furthermore, Dr. Cebrian rejected Dr. Wakeshima's explanation that Claimant may have suffered blood clots as a result of immobility after his March 24, 2016 industrial accident. He detailed that blood clots typically occur when an extremity is completely immobilized after surgical intervention.

However, Claimant did not wear a brace after the March 24, 2016 accident and could move his right arm. Dr. Cebrian thus concluded that there was no medical reason for the serial Doppler ultrasounds recommended by Dr. Wakeshima.

11. Dr. Cebrian also addressed Dr. Wakeshima's recommendation for a trigeminal nerve stimulator. He explained that the device is similar to a TENS unit for the head. The patient places electrodes on his head and wears a halo to provide some kind of electrical stimulation and distract the brain. Dr. Cebrian noted that the trigeminal nerve stimulator is a relatively new device that has not been recognized by the Colorado Division of Workers' Compensation Medical Treatment Guidelines (*Guidelines*). Accordingly, Dr. Cebrian concluded that the trigeminal nerve stimulator does not constitute reasonable and necessary treatment for Claimant's March 24, 2016 industrial injuries.

12. Dr. Cebrian concluded that there is no additional medical treatment that would be reasonable and necessary to address Claimant's March 24, 2016 industrial injuries. He remarked that Claimant has reached Maximum Medical Improvement (MMI). Dr. Cebrian determined that Claimant was entitled to receive a 5% whole person impairment rating for his head injury and mild traumatic brain injury as a result of the March 24, 2016 accident.

13. Respondents have failed to demonstrate that it is more probably true than not they are entitled to terminate Claimant's TTD benefits. Respondents assert that Claimant's TTD benefits should be terminated effective June 23, 2017 because he suffered the subsequent intervening condition of a balance disorder that was not related to his March 24, 2016 industrial injuries. In fact, on June 23, 2017 ALJ Jones issued a Summary Order concluding that Claimant's hearing loss, dizziness and disequilibrium were not related to his March 24, 2016 industrial injury. Moreover, ATP Dr. Wakeshima restricted Claimant from all work activities because he would be unsafe based on a "significant balance disorder." Respondents reason that, because Claimant's inability to work for Employer was caused by balance issues unrelated to his industrial injuries, his TTD benefits should be terminated. However, an ALJ lacks authority to terminate TTD benefits absent one of the statutory conditions enumerated in §8-42-105(3)(a)-(d), C.R.S. Because Claimant has not reached MMI, returned to regular or modified employment, or received a written release to return to regular or modified employment by ATP Dr. Wakeshima, TTD benefits may not be terminated. Accordingly, Claimant's TTD benefits shall continue until terminated by statute.

14. Claimant has failed to prove that it is more probably true than not that the medical treatment for which Dr. Wakeshima has requested prior authorization, including a neurological evaluation by Dr. Burke, serial Doppler ultrasounds of the right upper and left lower extremities, trials of Botox injections and a trigeminal nerve stimulator, are reasonable, necessary and causally related to his March 24, 2016 admitted industrial injuries. Although Claimant has not contested Respondents denial of the preceding treatments, the prior authorization request from ATP Wakeshima reflects that the relatedness, reasonableness and necessity of the requested treatments are in dispute.

15. As outlined by Dr. Cebrian, Dr. Wakeshima's referral to Dr. Burke for a neurological evaluation was not reasonable or necessary medical treatment for Claimant's March 24, 2016 industrial injuries. Claimant has already been evaluated by neurologist Dr. Zimmer. He has also been examined and treated by Drs. Reinhardt and Mason for neurological concerns. Dr. Cebrian summarized that another evaluation by another neurologist is not medically necessary. Moreover, Dr. Cebrian persuasively explained that Dr. Wakeshima's request for a trial of Botox injections for Claimant was not reasonable and necessary. He remarked that Botox is reserved for a small subset of patients who suffer chronic migraines but have not improved with three different preventative classes of medications. Dr. Cebrian noted that Claimant has not been trialed on any preventative classes of migraine medications to warrant Botox treatment.

16. Dr. Cebrian detailed that Dr. Wakeshima's request for serial Doppler ultrasounds of the right upper extremity and left lower extremity was not related to Claimant's March 24, 2016 industrial injuries. He explained that the purpose of the ultrasounds was to detect blood clots. Although physicians found a small blood clot in the brachial vein of Claimant's right arm, Dr. Cebrian reasoned that there was nothing about Claimant's March 24, 2016 mechanism of injury that would cause a blood clot in the right upper extremity or left lower extremity. He also noted that, because Claimant's right arm was not immobilized after the March 24, 2016 accident, a blood clot was unlikely and there was thus no medical reason for the serial Doppler ultrasounds recommended by Dr. Wakeshima. Furthermore, Dr. Cebrian noted that the trigeminal nerve stimulator is a relatively new device that has not been recognized by the *Guidelines*. Accordingly, Dr. Cebrian persuasively concluded that the trigeminal nerve stimulator does not constitute reasonable and necessary treatment for Claimant's March 24, 2016 industrial injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

TTD Benefits

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

5. TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Section 8-42-107(8)(b)(I) & (II), C.R.S. provide that the initial determination of MMI is to be made by an ATP. If either party disputes the ATP's MMI determination, the claimant must undergo a Division Independent Medical Examination (DIME). The statute also provides that the ALJ lacks authority to determine MMI until there has been a medical determination of MMI by an ATP or DIME physician. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, W.C. Nos. 4-947-316-01&4-935-813-03 (ICAP, July 31, 2015); *see also Blue Mesa Forest v. Lopez,* 928 P.2d 831, 833 (Colo, App. 1996) (noting that "the initial determination of MMI shall be made by an authorized treating physician"). Finally, the ATP also determines whether a claimant's industrial injury prevents him from returning to work. *See Burns v. Robinson Dairy,* 911 P.2d 661 (Colo. App. 1995); *In Re Smith,* No. 4-733-532 (ICAP, Mar. 15, 2010).

6. As found, Respondents have failed to demonstrate by a preponderance of the evidence that they are entitled to terminate Claimant's TTD benefits. Respondents assert that Claimant's TTD benefits should be terminated effective June 23, 2017 because he suffered the subsequent intervening condition of a balance disorder that was not related to his March 24, 2016 industrial injuries. In fact, on June 23, 2017 ALJ Jones issued a Summary Order concluding that Claimant's hearing loss, dizziness and disequilibrium were not related to his March 24, 2016 industrial injury. Moreover, ATP Dr. Wakeshima restricted Claimant from all work activities because he would be unsafe based on a "significant balance disorder." Respondents reason that, because Claimant's

inability to work for Employer was caused by balance issues unrelated to his industrial injuries, his TTD benefits should be terminated. However, an ALJ lacks authority to terminate TTD benefits absent one of the statutory conditions enumerated in §8-42-105(3)(a)-(d), C.R.S. Because Claimant has not reached MMI, returned to regular or modified employment, or received a written release to return to regular or modified employment by ATP Dr. Wakeshima, TTD benefits may not be terminated. Accordingly, Claimant's TTD benefits shall continue until terminated by statute.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. As found, Claimant has failed to prove by a preponderance of the evidence that the medical treatment for which Dr. Wakeshima has requested prior authorization, including a neurological evaluation by Dr. Burke, serial Doppler ultrasounds of the right upper and left lower extremities, trials of Botox injections and a trigeminal nerve stimulator, are reasonable, necessary and causally related to his March 24, 2016 admitted industrial injuries. Although Claimant has not contested Respondents denial of the preceding treatments, the prior authorization request from ATP Wakeshima reflects that the relatedness, reasonableness and necessity of the requested treatments are in dispute.

9. As found, as outlined by Dr. Cebrian, Dr. Wakeshima's referral to Dr. Burke for a neurological evaluation was not reasonable or necessary medical treatment for Claimant's March 24, 2016 industrial injuries. Claimant has already been evaluated by neurologist Dr. Zimmer. He has also been examined and treated by Drs. Reinhardt and Mason for neurological concerns. Dr. Cebrian summarized that another evaluation by another neurologist is not medically necessary. Moreover, Dr. Cebrian persuasively explained that Dr. Wakeshima's request for a trial of Botox injections for Claimant was not reasonable and necessary. He remarked that Botox is reserved for a small subset of patients who suffer chronic migraines but have not improved with three different

preventative classes of medications. Dr. Cebrian noted that Claimant has not been trialed on any preventative classes of migraine medications to warrant Botox treatment.

10. As found, Dr. Cebrian detailed that Dr. Wakeshima's request for serial Doppler ultrasounds of the right upper extremity and left lower extremity was not related to Claimant's March 24, 2016 industrial injuries. He explained that the purpose of the ultrasounds was to detect blood clots. Although physicians found a small blood clot in the brachial vein of Claimant's right arm, Dr. Cebrian reasoned that there was nothing about Claimant's March 24, 2016 mechanism of injury that would cause a blood clot in the right upper extremity or left lower extremity. He also noted that, because Claimant's right arm was not immobilized after the March 24, 2016 accident, a blood clot was unlikely and there was thus no medical reason for the serial Doppler ultrasounds recommended by Dr. Wakeshima. Furthermore, Dr. Cebrian noted that the trigeminal nerve stimulator is a relatively new device that has not been recognized by the *Guidelines*. Accordingly, Dr. Cebrian persuasively concluded that the trigeminal nerve stimulator does not constitute reasonable and necessary treatment for Claimant's March 24, 2016 industrial injuries.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

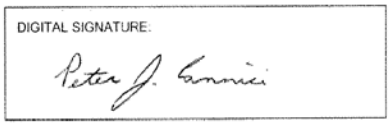
1. Respondents' request to terminate Claimant's TTD benefits effective June 23, 2017 is denied and dismissed.

2. Claimant's request for Respondents to pay for a referral to Dr. Burke, serial Doppler ultrasounds of the right upper and left lower extremities, trials of Botox injections, and a trigeminal nerve stimulator is denied and dismissed.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 23, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that the cervical surgery performed by Dr. James Gebhard on April 11, 2018 was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 18, 2015 work injury.

- Whether the claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits beginning February 28, 2018 and ongoing until terminated by law.

FINDINGS OF FACT

1. The claimant has been employed with the employer since November 2002 as an equipment operator. While at work on November 18, 2015, the claimant slipped on ice and fell.

2. The claimant initially received medical treatment at Uncompahgre Medical Center on November 19, 2015. At that time, the claimant reported pain in his neck with lower back pain. Dr. Heather Linder diagnosed neck strain and muscle spasm. Dr. Linder prescribed Flexeril and recommended ibuprofen and ice. Dr. Linder also placed claimant on work restrictions of no lifting, pushing, or pulling over 20 pounds. Thereafter, the claimant continued to report neck and shoulder pain. The claimant testified that he underwent physical therapy, but it did not seem to help his symptoms. On December 3, 2015 claimant's work restrictions were increased to no lifting, pushing, or pulling over 50 pounds.

3. On January 8, 2016, the claimant was seen at Uncompahgre Medical Center by Robin Richards, PA-C. Ms. Richards ordered a magnetic resonance image (MRI) of the claimant's cervical spine. On January 14, 2016, the cervical spine MRI showed no acute abnormality with multilevel mild degenerative disease and canal stenosis.

4. The claimant returned to Ms. Richards on January 27, 2016. At that time, Ms. Richards noted that there were no findings on MRI to correlate to the claimant's symptoms or to warrant a referral to neurosurgery. On February 26, 2016, the claimant was released to return to full duty work with no restrictions. However, the claimant continued to report neck and shoulder pain and was referred to Spine Colorado for consultation.

5. On May 19, 2016, the claimant was seen at Spine Colorado by Dr. James Santos. On that date, Dr. Santos ordered and reviewed imaging of the claimant's cervical spine. Based upon his review, Dr. Santos noted mild degenerative disc disease

in the claimant's cervical spine. Dr. Santos recommended left medial branch blocks at C6-7. Dr. Santos also noted that if the medial branch blocks were not successful, he would recommend radiofrequency ablation.

6. The recommended medial branch blocks at left C6-7 were administered by Dr. Santos on May 27, 2016. Thereafter on June 27, 2016, Dr. Santos administered radiofrequency ablation of the left C6 and C7 medial branch nerves.

7. On August 1, 2016, the claimant returned to Dr. Santos and reported that following the ablation procedure he had 100 percent pain relief in his neck for four to five days. Although the pain had returned, it was less than the pain prior to the procedure. The claimant also reported to Dr. Santos instances of dizziness and nausea with certain movements. Dr. Santos opined that the claimant had positional vertigo and referred him for an ear, nose, and throat (ENT) evaluation.

8. On August 3, 2016, the claimant was seen by Dr. Philip Wiley for ENT consultation. Dr. Wiley determined that the claimant had some hearing loss, but no evidence of vestibular pathology causing imbalance. Dr. Wiley opined that the claimant's symptoms were due to either cervical neck or post concussive syndrome.

9. On September 26, 2016, the claimant returned to Dr. Santos and reported that he had attended physical therapy (including myofascial release, dry needling, manual therapy, and an exercise program) and he had obtained 30 percent relief in his pain symptoms. On that date, Dr. Santos administered a trigger point injection. In addition, Dr. Santos recommended that the claimant undergo left C5-6 and C7-T1 intra-articular steroid injections, for diagnostic and therapeutic purposes. On October 3, 2016, Dr. Santos administered a left C7-T1 intra-articular facet joint injection.

10. Dr. Santos referred the claimant to Dr. Mitchell Burnbaum for a neurological consultation. The claimant was first seen by Dr. Burnbaum on October 19, 2016. At that time, Dr. Burnbaum noted that the claimant had no evidence of root compression or cord injury, and no evidence of vestibular injury. Dr. Burnbaum opined that further neurological workup was not necessary. Dr. Burnbaum recommended that the claimant obtain chiropractic treatment and receive a trigger point injection to the medical scapula. Dr. Burnbaum further opined that the claimant was able to return to work at full capacity.

11. On November 14, 2016, the claimant returned to Dr. Santos and reported that he received pain relief of 50 to 60 percent following the October 3, 2016 injection, but that relief lasted only two to three hours and had returned to baseline. On that same date, Dr. Cyril Bohachevsky administered left C7-T1 and T1-2 facet joint blocks.

12. Thereafter, the claimant was seen by Dr. Brittany Matsumura on March 1, 2017. Dr. Matsumura diagnosed the claimant with neck pain, cervical facet joint pain, musculoskeletal pain, and isolated cervical dystonia and recommended Botox injections to address the claimant's neck spasms. The recommended Botox injections were

administered on March 22, 2017. The claimant testified that his neck pain was worse following the Boxtox injections.

13. Subsequently, Dr. James McLaughlin became the claimant's authorized treating physician (ATP) for this claim. The claimant was first seen by Dr. McLaughlin on May 22, 2017. The claimant reported that his balance issues had resolved, but he continued to have neck pain, fatigue, headaches, lightheadedness, and dizziness. Dr. McLaughlin opined that cervical surgery was not likely to be helpful because the claimant did not have radicular issues. At that time, Dr. McLaughlin recommended MRIs of the claimant's brain and left shoulder as well as an x-ray of the claimant's thoracic spine, and a laboratory evaluation. On June 12, 2017, Dr. McLaughlin noted that the claimant's brain MRI was normal, the left shoulder MRI was "fairly normal", and the lab work was normal.

14. On August 23, 2017, the claimant underwent a functional capacity evaluation (FCE) with Marty Haraway, OTR. Ms. Haraway opined that the claimant was able to sit for four to five hours; bend, squat, kneel, and crawl with no limits; lift up to 75 pounds occasionally; and up to 50 pounds frequently. To address the claimant's headache and neck symptoms, Ms. Haraway recommended that the claimant adjust his vehicle armrest; drop his arms at his sides; use mirrors when driving; and take Motrin at the onset of a headache.

15. On July 25, 2017, the claimant was first seen by Todd Ousley, PA-C with Rocky Mountain Orthopaedic Associates. At that time, the claimant reported fairly severe pain in his neck and into his left shoulder. Mr. Ousley noted that the claimant had no numbness or tingling in his arms. Mr. Ousley also noted that the imaging showed no significant central or spinal stenosis.

16. On January 23, 2018, an MRI of the claimant's cervical spine showed mild to moderate canal stenosis at the C3-4, C4-5, and C5-6 levels. The MRI also showed mild right foraminal narrowing at C3-4 and C4-5 with moderate left foraminal narrowing at C5-6.

17. The claimant returned to Rocky Mountain Orthopaedic Associates on February 22, 2018 and was seen by Dr. James Gebhard. At that time, the claimant reported issues with balance and "giving way" of the right knee. The claimant also reported that his neck pain was 8 to 9 out of 10 and his shoulder and arm symptoms were 7 to 8 out of 10. Dr. Gebhard noted that the most recent MRI showed that central stenosis at the C4-5 and C5-6 levels had progressed from mild to moderate. Dr. Gebhard opined that there was evidence of cervical myelopathy. Following this exam, Dr. Gebhard and Dr. McLaughlin determined that the claimant should be seen by Dr. Burnbaum for further neurological consultation and consideration of cervical decompression of the cervical stenosis.

18. On February 23, 2018, the claimant spoke with Dr. McLaughlin by telephone and reported that his right leg was giving out on him. Based upon the claimant's reports Dr. McLaughlin assessed cervical injury with concerns regarding

cervical myelopathy and placed the claimant on a no work status. The claimant testified that he has not worked for the employer, or for any other employer, since February 23, 2018. The claimant also testified that because of weakness in his right leg he began using a cane in 2018.

19. On February 26, 2018, the claimant again returned to Dr. McLaughlin. At that time, the claimant reported that his right leg was not giving out as much. In addition, the claimant reported that he felt that he has to hold his bladder "a little bit" and felt some urgency, with no bladder incontinence. This is the first report in the medical records of bladder related issues. The medical records indicate that prior to this date, the claimant repeatedly denied bladder incontinence at his medical appointments.

20. On March 1, 2018, the claimant returned to Dr. Burnbaum. At that time, Dr. Burnbaum noted that the claimant's neurological exam was "essentially normal". In addition, Dr. Burnbaum conducted (EMG) testing and noted no abnormalities. Dr. Burnbaum also noted that the MRI taken in January 2018 showed that the claimant's cervical cord was unremarkable. Although Dr. Burnbaum noted that the claimant exhibited no difference from the prior exam in October 2016, he described the claimant's gait as "very bizarre".

21. The claimant was also seen by Dr. Gebhard on March 1, 2018. At that time, Dr. Gebhard noted that the claimant's cervical stenosis was moderately severe and significant. Dr. Gebhard recommended that the claimant undergo an anterior cervical discectomy to decompress the spinal canal at C4-5 and C5-6.

22. On March 7, 2018, Dr. Wallace Larson performed a review of the claimant's medical records and opined that the claimant's need for cervical surgery is related to the natural progression of the preexisting degenerative condition in his cervical spine and not due to the work injury. Dr. Larson also noted that although the claimant's symptoms suggest myelopathy, the results of the cervical MRI and EMG testing do no support that diagnosis. Based upon Dr. Larson's opinion, the respondent denied the surgery recommended by Dr. Gebhard.

23. On March 9, 2018, Dr. McLaughlin referred the claimant to Dr. Caleb Stepan for a urological consultation. Dr. McLaughlin also recommended that the claimant's personal medical provider Kenneth Jenks, PA, evaluate the claimant for myasthenia gravis.

24. On March 13, 2018, the claimant was seen by Dr. Stepan. Dr. Stepan noted that the claimant had a normal urinalysis and opined that the claimant's pathology was neurologic.

25. At the recommendation of Dr. McLaughlin, Mr. Jenks, PA, with the Basin Clinic, performed and facilitated laboratory studies related to myasthenia gravis. On March 20, 2018, Dr. McLaughlin noted that he had received the laboratory testing results from the Basin Clinic, which were negative for myasthenia gravis.

26. Despite the respondent's denial, the claimant elected to proceed with the recommended surgery. On April 11, 2018, Dr. Gebhard performed a C4-5 and C5-6 cervical disc replacement.

27. Following the surgery, the claimant was seen by Dr. McLaughlin on May 16, 2018. At that time the claimant reported reduced neck pain, no leg weakness, no bladder incontinence, and no further need for a cane. Dr. McLaughlin opined that the claimant's need for the surgery was related to the November 18, 2015 work injury.

28. The claimant testified that following the April 11, 2018 surgery he has had improvement in his symptoms. Specifically, the claimant testified that he has reduced pain and improved balance which has resulted in him no longer needing a cane to walk.

29. At the request of the respondent, the claimant attended an independent medical examination (IME) with Dr. B. Andrew Castro on May 23, 2018. In connection with the IME, Dr. Castro reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his June 6, 2018 IME report, Dr. Castro opined that the claimant suffered a cervical sprain/strain at the time of the November 18, 2015 injury. Dr. Castro also opined that the claimant's cervical symptoms and need for surgery were not related to the work injury. In support of this opinion, Dr. Castro noted that the claimant's myelopathy symptoms did not begin until over two years after the work injury. Dr. Castro's testimony by deposition was consistent with his written report.

30. The ALJ credits the medical records and the opinions of Drs. Larson and Castro over the conflicting opinion of Dr. McLaughlin and finds that the claimant's cervical symptoms are not related to the November 18, 2015 work injury. The January 2016 cervical MRI showed no acute abnormality with only mild degenerative disease and canal stenosis. It was two years later that the claimant developed myelopathy and a progression from mild to moderate stenosis as evidenced by the January 2018 MRI. The claimant has failed to demonstrate that it is more likely than not that the claimant's cervical symptoms are related to the November 18, 2015 work injury. Therefore the ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that the surgery performed by Dr. Gebhard on April 11, 2018 cured and relieved the claimant from the effects of the work injury.

31. The ALJ credits the medical records and the opinions of Drs. Larson and Castro and finds that the claimant has failed to demonstrate that it is more likely than not that the claimant is entitled to TTD benefits. Dr. McLaughlin's placement of a "no work" restriction on the claimant on February 23, 2018 is related to the claimant's cervical myelopathy. As the myelopathy is not related to the November 18, 2015 work injury, the ALJ finds that the claimant has failed to demonstrate that wage loss beginning on that date is related to the original work injury. On the contrary, the claimant's inability to work and related wage loss beginning on February 23, 2018 is related to his cervical myelopathy.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, the claimant has failed to demonstrate that the April 11, 2018 cervical surgery is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 18, 2015 work injury. As found, medical records and the opinions of Drs. Larson and Castro are credible and persuasive.

5. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he or she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical

opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair a claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

6. As found, the claimant has failed to demonstrate that the wage loss he has experienced since February 23, 2018 is related to his work injury. As found, the claimant is not entitled to TTD benefits. As found, the medical records and the opinions of Drs. Larson and Castro are credible and persuasive.

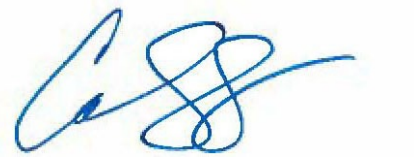
ORDER

It is therefore ordered that:

1. The claimant's request that the respondent pay for the April 11, 2018 cervical surgery is denied and dismissed.

2. The claimant's claim for temporary total disability (TTD) benefits beginning February 23, 2018 is denied and dismissed.

3. Dated: July 24, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS STATE OF COLORADO

WORKERS' COMPENSATION NO. WC 5-065-188-001

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and occurring within the course of her employment with Respondent.

- Whether Claimant has proven by a preponderance of the evidence that she is entitled to an MRI of her right lower extremity.

FINDINGS OF FACT

1. At all relevant times, Claimant worked as a customer service clerk for Employer, a large grocery store. Claimant's job duties included waiting on customers at the customer service desk, selling cigarettes and lottery tickets, processing returns of grocery items, and working the cash.

2. On December 24, 2017, as the store was closing, Claimant closed out her cash register and walked around the customer service counter to give her cash register drawer to her supervisor, Mike Bemis. While she was walking, Claimant felt her right calf muscle tighten "very, very tight." She then heard a loud pop and felt a sharp pain in the back of her right knee.

3. Claimant then unlocked the office door for her supervisor and quickly walked to the back of the store to obtain a grocery item for her personal use. While walking to the "U-scan" cash register, Claimant felt discomfort to the back of her right knee and upper calf area. That evening, Claimant's right knee/upper calf began to swell and became painful.

4. Claimant reported the injury to Employer on December 26, 2017. Claimant sought treatment from Concentra Urgent Care, where a physician's assistant diagnosed a strain of her calf muscle and rupture of the right plantaris tendon.

5. An ultrasound of Claimant's right knee and right calf on January 15, 2018, showed a likely torn plantaris tendon.

6. Occupational Medicine physician John R. Burris, M.D., performed an Independent Medical Examination of Claimant on April 10, 2018. Dr. Burris testified that the plantaris muscle is a "tiny" muscle that assists with plantar flexion of the foot (pointing the toes down). The plantaris muscle is small compared to the other muscles that also control plantar flexion, and is the longest tendon in the body. The medical community sometimes refers to it as "useless" in terms of function. Further, doctors often harvest the plantaris to replace more important tendons.

7. Dr. Burris testified that Claimant's right calf ultrasound showed the proximal (closest to the bone) portion of the plantaris muscle was dystrophic, meaning that Claimant's muscle and tendon were atrophied and essentially were "dying" from disuse. Dr. Burris testified that the dystrophic changes had occurred over a period of years. The Judge finds Dr. Burris' opinion consistent with Claimant's history of a prior significant right ankle injury that required the placement of permanent hardware and resulted in a significant decrease in Claimant's physical activities.

8. Dr. Burris testified that Claimant's right plantaris tendon tore because of the dystrophy and inherent weakness of the tendon itself, and not because of Claimant's job duties required walking. Dr. Burris testified that the tear was "idiopathic" in the sense that the tendon simply "wasted away" because of Claimant's personal health condition, and that the forces generated while Claimant was walking were not the cause of the tear.

9. The Judge finds that Claimant has failed to prove it more likely than not that the plantaris muscle/tendon tear and calf muscle strain arose out of or occurred within the scope of her employment. Claimant's plantaris tendon had "wasted away" because of disuse. The cause of the muscle/tendon tear was idiopathic in the sense that it was caused by her personal health condition and not by the forces generated while walking.

10. To the extent that Claimant argues that the tear of the plantaris muscle/tendon was caused by the tightening of Claimant's calf muscle immediately before Claimant felt the pop, the Judge finds that said muscle tightening also is idiopathic to Claimant. The forces generated while walking do not cause calf muscles to tighten "very, very tight." If the tightening of the calf muscle caused Claimant's plantaris muscle/tendon to tear, Claimant's personal health condition caused the condition, not Claimant's job duties.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that amount which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. § 8-43-201.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

The claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any workers' compensation is awarded. § 8-41- 301(1)(c); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo.App.1997). The mere fact that an injury occurred at work does not necessarily make it compensable. *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014).

All risks that cause injury to employees can be placed within three well-established, overarching categories: (1) employment risks, which are directly tied to the work itself; (2) personal risks, which are inherently personal or private to the employee him- or herself; and (3) neutral risks, which are neither employment related nor personal. *City of Brighton v. Rodriguez*, 318 P.3d at 502. The second category contains risks that are entirely personal or private to the employee herself. *City of Brighton*, 318 P.3d at 503. These risks include, for example, an employee's preexisting idiopathic illness or medical condition that is completely unrelated to his or her employment, such as fainting spells, heart disease, or epilepsy. *Id.*

The Administrative Law Judge finds and concludes, considering the totality of the evidence, that Claimant has failed to prove by a preponderance of the evidence that her calf muscle strain and plantaris muscle/tendon tear arose out of her employment duties with Employer. Dr. Burris testified that the plantaris tendon tore because of the dystrophy and inherent weakness of the tendon itself, and not because of Claimant's job duties requiring walking. Dr. Burris testified that the tear of the plantaris tendon was "idiopathic" in the sense that the tendon simply "wasted away" as a result of Claimant's personal health condition, and that the forces generated while Claimant was walking did not cause her the plantaris muscle/tendon tear.

ORDER

The Judge therefore orders:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

DATED: July 24, 2018

/s/ Kimberly Turnbow

Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on January 29, 2018.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to a general award of medical benefits for his January 29, 2018 injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a loader operator with duties that included moving/driving heavy pieced equipment and loading items into the vehicles of customers by operating equipment.

2. On January 29, 2018 Claimant was in Employer's office filling out paperwork when a stool that he was sitting on collapsed causing him to fall to the ground. Claimant reported that he fell backwards, landing onto his back and left side. Claimant reported that he was unable to stand up and an ambulance was called. Claimant's supervisor was in the same office and was immediately aware of the incident.

3. UC Health EMS responded to Employer's office. They noted that they found Claimant laying supine on the floor awake and alert. Claimant reported that a leg on a stool he was sitting on gave out and he fell backward onto the floor landing on his back and left side. Claimant reported 9/10 pain and was given IV fentanyl for his pain which reduced his pain to 7/10. Claimant was transported by ambulance to the emergency room. *See* Exhibit 9.

4. At UC Health emergency room Claimant reported that he was sitting on a stool at work when one of the legs gave way and he fell backwards landing on his left buttock and low back. Claimant reported low back pain at an 8/10. Claimant denied any new neurologic symptoms such as numbness, tingling, or weakness. Claimant reported some history of chronic spine issues including a previous cervical fusion. Claimant was noted to have tenderness, bony tenderness, pain and spasm in his lumbar back on examination. A CT of Claimant's lumbar spine was performed. The impression and findings included a slight convexity left scoliosis with slight retrolisthesis of L3 on L4, diminutive L5-S1 disc space, anterior endplate spurring at L3-4, and linear lucency between the anterior endplate spurring and the anterior aspect of the L4 vertebral body. The radiologist opined that the age-indeterminate linear lucency between the anterior L4 vertebral body and anterior endplate osteophyte was favored to represent a chronic incompletely fused osteophyte and was less likely an acute fracture. However, the radiologist opined that an MRI could be utilized for underlying marrow edema if there was high concern for an acute fracture at that level. The Emergency Department physician

noted that even if it represented a fracture it would be a stable fracture and that with a normal neurologic exam, additional imaging was not felt to be necessary. Claimant was discharged with pain medications and was recommended to follow up with his primary care doctor. *See* Exhibit 10.

5. On February 1, 2018 Claimant was evaluated by Kimberly Siegel, M.D. Claimant reported that he was sitting on a bar stool doing some paperwork when one of the stool legs folded causing him to fall down to the floor landing on his left low back and left hip and that he had severe pain and could not get up. Claimant reported that things were getting worse and that his left low back pain was worse and his left hip hurt. Claimant reported that he developed left leg pain 1 or 2 days after the injury and that the leg pain ran down the lateral aspect of his left leg all the way to his foot. Claimant reported that his left foot felt cold and left leg felt weak. Claimant reported two prior cervical fusions and a prior left hip arthroscopic repair. Dr. Siegel assessed: contusion of lower back and pelvis; contusion of left hip; subjective symptoms out of proportion to mechanism of injury and objective findings; and concern for possible drug seeking behavior. Dr. Siegel planned to get an MRI of the lumbar spine to rule out herniated nuclear pulposus. Dr. Siegel counseled Claimant that opioid pain medication was not indicated for his minor mechanism of injury. He asked for a referral to pain management and she told Claimant that a pain management referral for acute pain was not indicated. Dr. Siegel opined that the injury occurred out of and in the course of employment and was probably work related. *See* Exhibit 12.

6. On February 8, 2018 Claimant was evaluated by Dr. Siegel. Claimant reported that he was unchanged to somewhat worse. Claimant reported now that he was having pain all across his low back instead of just on the left side and that his left heel hurt to put weight on it. Claimant reported continued pain all the way down the back of his left leg. Claimant reported that his neck hurt and that he had a headache and that he had pain at the left low back when he coughed and that his left foot felt cold. Claimant reported that physical therapy hurt and requested to be referred to a specialist of some kind. Dr. Siegel noted that Claimant received more Norco from an urgent care center. Claimant reported prior low back pain in 2016 and that he had physical therapy, saw a neurosurgeon, and had some injections and that it resolved. Claimant also reported two prior cervical fusions. Dr. Siegel noted that the history from physical therapy also included a history of a concussion and head injury due to motor cycle crash and a left lateral temple injury in 2006. Dr. Siegel noted that upon rising to standing Claimant grimaced and vocalized pain and was unable to attain a fully erect position and stood with his lumbosacral and thoracic sine partially flexed and knees partially flexed. Dr. Siegel reviewed the MRI that showed no evidence of acute fracture in the lumbar spine and multilevel disc and facet degenerative changes with multilevel mild neural foraminal narrowing and multilevel mild lateral recess narrowing. Dr. Siegel assessed: contusion of lower back and pelvis; contusion of left hip; left leg pain; pain of left sacroiliac joint; and pain and other subjective symptoms out of proportion to mechanism of injury and objective findings. Dr. Siegel noted that greater than 50% of the encounter was spend reviewing MRI results, reassuring Claimant that there was no significant lumbosacral spine pathology, and addressing multiple subjective complaints and their inconsistency

with the mechanism of injury, and dealing with pain management issues. Dr. Siegel recommended an MRI of the left hip to rule out internal derangement and to evaluate the cause of the left leg pain given the lumbar MRI was negative for radiculopathy. *See* Exhibit 12.

7. On February 28, 2018 Claimant was evaluated by Dr. Siegel. Claimant reported he was unchanged to modestly improved but still had stabbing pain in his low back and aching down the lateral aspect of the thigh to knee level. Claimant reported a muscular headache that he felt was coming from his neck. Dr. Siegel reviewed the MRI of the left hip that showed: moderate severity left greater than right hip joint osteoarthritis; postoperative changes from prior left hip acetabular labral repair with focal areas of metal susceptibility artifact and abnormal left acetabular labrum in morphology which may be related to the prior meniscal debridement/repair and possibility of recurrent acetabular labral tear recommended for consideration; and subchondral cyst formation within the left hip superolateral acetabulum consistent with the underlying changes of osteoarthritis. The radiologist opined that the subchondral edema and cyst formation within the superolateral acetabulum may be related to the osteoarthritis. A rim of osteophytes was found at the femoral head and neck junction. The radiologist noted that the acetabular labrum was abnormal and that while It may be partially related to prior debridement, recurrent labral tearing should also be considered. Dr. Siegel opined that it was still unclear if Claimant's high level of pain was emanating from his low back or his left hip or both. She noted that Claimant's old medical records indicated pre-existing left hip osteoarthritis, chondromalacia, and labral tear for which Claimant previously had surgery. She also noted that the records indicated that Claimant had recurrent left hip symptoms after surgery and that there was discussion of total hip replacement/arthroplasty. She also noted that the records showed left leg pain and radiation of the hip pain into the low back. Dr. Siegel opined that the prior distribution of pain was similar to Claimant's current distribution of pain. *See* Exhibit 12.

8. On March 7, 2018 Claimant was evaluated by Trenton Scott, D.C. Claimant reported pain in his low back and left hip radiating down his left leg as well as neck pain and stiffness with daily headaches. Claimant reported that he fell off a stool and landed backwards hitting his head on the ground when he fell. *See* Exhibit 11.

9. On March 16, 2018 Claimant was evaluated by Arden Mahaffey, D.O. Claimant reported low back pain with radiation into his left lower limb after falling from a stool while seated. Claimant reported that he had a history of low back pain without referral but that it had been notably exacerbated and now referred into his left lower limb along the lateral posterior aspect to his ankle. Dr. Mahaffey noted that the MRI revealed no significant stenosis but that Claimant's symptoms were suggestive of a left lumbar radiculopathy with symptoms in the L5-S1 distribution. Dr. Mahaffey recommended a lumbar epidural steroid injection at L5-S1. Claimant also reported left posterior hip pain and that he had a history of left hip pain with prior surgery. Claimant reported that he had lateral hip pain postoperatively that was chronic but that now the pain had been acutely exacerbated and combined with new pain in the posterior hip and buttock. Dr. Mahaffey recommended changes to physical therapy regimen. *See* Exhibit 13.

10. On March 21, 2018 Claimant was evaluated by Dr. Siegel. Claimant reported modest improvement and that he could arch his back a bit. Claimant reported that his left lower extremity pain receded further to the buttock and proximal thigh level when it had initially been all the way to the ankle. Claimant noted that he had a previous epidural steroid injection in 2016 that benefitted him and that he had been referred for a left L5-S1 epidural steroid injection. Claimant reported that he had an opportunity to do landscape maintenance work and requested that his restrictions be modified so he could do work. Dr. Siegel noted that Claimant was able to rise smoothly without pain behaviors to a fully erect standing position and that the pronounced pain behaviors from previous exams were absent that day. On exam Claimant had no tenderness in the low back. Dr. Siegel opined that Claimant had significant objective progress evidenced by absent pain behaviors and much improved movement/position transitions. *See* Exhibit 12.

11. On April 2, 2018 Claimant underwent an independent medical evaluation performed by Brian Shea, D.O. Claimant reported that his left hip muscles hurt, that his low back pain was better and less tight with occasional left leg radiating pain below the knee to the foot, and that his headaches were less frequent. Claimant reported that he was still unable to do recreational activities because of the deep left gluteal, piriformis, IT band pain and that prior to his injury he worked out at a gym lifting weights 3-4 times per week. Dr. Shea reviewed medical records and performed a physical examination. Dr. Shea assessed: lumbar strain, improving; left hip area muscle strain especially in the gluteal, sacrotuberous ligament and IT band tensor fascia lata complex; and past medical history of significance including two cervical fusions and significant left hip joint repair. Dr. Shea opined that Claimant had sustained a lumbar strain not ratable for impairment as Claimant had low back pain for 12 years and was returning to his baseline. Dr. Shea also opined that the left hip was a new problem and injury, involving muscle skeletal issues, as opposed to the hip joint itself. Dr. Shea noted the significant left hip joint surgical history and opined that impairment for the left hip joint was not ratable. Dr. Shea opined that Claimant was not at maximum medical improvement and recommended continued physical therapy with dry needling, massage, and a program to build up more core strength. Dr. Shea also recommended considering sacrococcygeal x-rays to see if there was a misalignment of the coccyx on the sacrum, possible trigger point injections, and opioid pain medication tapering. *See* Exhibit 8.

12. On April 4, 2018 Claimant underwent an independent medical evaluation performed by Douglas Scott, M.D. Dr. Scott issued a report on May 20, 2018. Claimant reported limitation in lower back range of motion, tightness in his lower back when walking, tightness in left buttock when bending forward, and a tight ball like fist in his left buttock after sitting for a while. Claimant reported that he was sitting on a stool at a counter and one of the stool legs folded and the stool collapsed. Claimant reported that he fell and landed on his left buttocks and lower back. Claimant reported that prior to the January 29, 2018 fall he had no back pain or limitations and that he was able to perform all the duties of the job. Claimant reported that he had a low back strain in 2016 that was treated with NSAID, epidural steroid injection, and physical therapy and that one day everything “went back aligned” and that he had no permanent work restrictions and no

impairment rating. Claimant reported that he lived in Loveland on a farm and does farm chores within his activity restrictions. Dr. Scott opined that Claimant's presumptive clinical diagnoses from the injury include: contusion of the lower back and pelvis; and contusion of the left hip. Dr. Scott noted that Claimant reported to him that his low back and left leg pain were worsening but that two days prior he reported to Dr. Shea that his low back pain was improving. Dr. Scott noted the chronic history of low back pain for at least 10 years before 2016 but that Claimant reported that before the January 29, 2018 fall he had no back pain or functional limitations. Dr. Scott assessed numerous issues that pre-dated the January 29, 2018 fall. Dr. Scott assessed the following issues after the January 29, 2018 fall: probable soft tissue contusion of the low back and left buttock, resolved; possible lumbar myofascial pain significantly improved and stable; possible temporary exacerbation of his pre-existing and underlying lumbar spondylosis with nerve root radiculitis; possible left hip musculotendinous strain, significantly improved; no evidence of acute structural injury to the lumbosacral spine; no evidence of acute discopathy or radiculopathy; initial concern expressed for possible drug seeking behavior. *See* Exhibit 29.

13. Dr. Scott opined to a reasonable degree of medical probability that Claimant's' low back pain was related to his January 29, 2018 fall and strike of the low back and left buttock area and noted that the diagnoses included contusion and strain of the lumbar spine. Dr. Scott opined that Claimant's cervical spine pain was not work related. Dr. Scott opined that Claimant's headaches were not work related. Dr. Scott opined that Claimant's left hip discomfort was not work related and noted the prior diagnosis of left hip osteoarthritis requiring injection, surgery, and anticipated left hip total replacement. Dr. Scott opined that Claimant had not reached maximum medical improvement and that Claimant had possibly temporarily exacerbated his pre-existing and underlying lumbar spondylosis with nerve root radiculitis and that Claimant may not be stable, maximally improved with treatment, or back to his baseline. Dr. Scott recommended EMG/nerve conduction studies to rule out or rule in lumbar nerve rood radiculopathy vs. radiculitis; depending on results follow up with epidural steroid injection, facet joint injection, or physical therapy program, consideration for use of mobilization trigger point injection, massage therapy, or acupuncture; and consideration of non-opioid medications. *See* Exhibit 29.

14. Dr. Scott indicated under other issues he felt were relevant that his opinions were based on Claimant's report that he had no back or leg pain or dysfunction proximate to his claimed January 29, 2018 work injury. Dr. Scott also indicated that given Claimant's conflicting reports of worsening low back pain to him on 4/4/18 but improving low back pain and function to Dr. Shea on 4/2/18, he questioned Claimant's credibility or consistency of complaints. *See* Exhibit 29.

15. On April 11, 2018 Claimant was evaluated by Dr. Siegel. Dr. Siegel noted that Claimant presented for follow up to his acute on chronic low back pain and acute on chronic left hip pain with radiation to the left leg. Claimant reported some improvement in his condition. Claimant reported improvement in that he was now able to stand fully erect and could even slightly arch his back without pain. Claimant reported pain at a 5/10

level. Claimant reported he had not been working except for about 8 hours of training for a new job that he expected to start soon in yard maintenance. Dr. Siegel noted that there were no significant structural changes on Claimant's current MRI compared to a lumbar MRI from September of 2015 and opined that both studies showed mild multilevel degenerative changes. Dr. Siegel changed Claimant's work restrictions to allow heavier lifting, carrying, and pushing/pulling at up to 25 pounds. She also recommended infrequent bending and twisting at the waist with no specific limit but must be able to change positions frequently and as needed for comfort and no sustained/prolonged awkward positions, no shoveling longer than 5 minutes with at least 30 minutes of other activity between episodes of shoveling. *See* Exhibits 12, 14, D.

16. On May 3, 2018 Claimant was evaluated by Dr. Mahaffey. Dr. Mahaffey continued to recommend a lumbar epidural steroid injection and opined that if Claimant had no relief with the injection, presumably It would be irritation of the sciatic nerve at the piriformis region and that a piriformis injection would then be recommended. He wanted to await the results of the epidural steroid injection as he believed Claimant's symptoms were in an L5 distribution. *See* Exhibit 13.

17. On May 16, 2018 Claimant was evaluated by Dr. Siegel. Claimant reported that his condition was unchanged and that he believed the epidural steroid injection had not been approved because he had a settlement conference regarding his case. Claimant reported increased pain in his left buttock at about noon every day. Claimant requested that Dr. Siegel review his work activity restrictions and noted that he had been doing yard maintenance work and was quite limited by his restrictions. Claimant reasoned that he had pain with restrictions anyway so he might as well be able to earn money while putting up with the pain. Dr. Siegel released Claimant to full duty work. *See* Exhibits 12, 14.

18. On May 18, 2018 Claimant underwent the left L5-S1 transforaminal epidural steroid injection.

19. On May 31, 2018 Dr. Siegel responded to a letter from Respondents after she had reviewed surveillance video of Claimant. She opined that it appeared Claimant had exceeded his restrictions but that the restrictions were probably out of date and that his restrictions were removed on May 16. She opined that the video demonstrated that Claimant was functioning very well despite his low back/buttock pain and left leg complaints. She noted the video showed him loading and unloading items from his pickup truck, climbing into and out of the bed of the pickup truck, bending over multiple times to pick up items from the ground, using a chain saw, riding a commercial mower, using a backpack type leaf blower and sprayer, and ambulating with an easy gait. She noted that throughout all the activities Claimant's movements were non antalgic and fluid and that there was no grimacing or other pain behavior. She also noted that she saw no rolling of his left ankle which he had previously reported as a problem due to left foot numbness. Dr. Siegel opined that Claimant did not appear to be at all functionally limited by his injury and/or symptoms. Dr. Siegel noted that Claimant's left L5-S1 epidural steroid injection provided him no benefit and that his symptoms were more likely due to piriformis

syndrome and she recommended a piriformis muscle injection and opined that if it did not reduce his pain, he would be at maximum medical improvement. She also recommended a left lower extremity nerve conduction study to evaluate for possible lumbosacral radiculopathy versus piriformis syndrome. She opined that Claimant would not have permanent restrictions and that he was already working successfully without restrictions. *See* Exhibit 19.

20. Respondents hired an investigator to perform surveillance of Claimant. Video surveillance was introduced into evidence and reviewed in its entirety. The surveillance shows Claimant on April 28, 2018 performing various landscaping work without issue. Claimant fills up a pickup truck at a gas station, climbs into a trailer, climbs in and out of the bed of the pickup truck, pulls weeds, uses a chainsaw to cut down tree branches, bends multiple times, straps a container with liquid to his back and sprays plants/weeds, jumps out of the bed of the pickup truck, pulls a cord to start a lawnmower, uses a leaf blower, and operates a larger riding lawn mower. At no point in surveillance did Claimant demonstrate any outward or visible signs of his pain during the multitude of activities.

21. Claimant has a significant pre-existing history.

22. On May 21, 2015 Claimant was evaluated by Seth Nodine, M.D. Claimant reported persistent back pain in the middle back that radiates to his lower and right back. On June 3, 2015 Claimant reported worsening middle back pain. *See* Exhibit 21.

23. On September 3, 2015 Claimant was evaluated by Dr. Nodine. Claimant reported lower back pain that had been present for months but six days prior got much worse. Claimant reported the pain was aggravated by bending and lifting. *See* Exhibit 21.

24. Claimant underwent an MRI of the lumbar spine on September 18, 2015. The MRI showed bulging disks in the lumbar spine accounting for Claimant's symptoms. Dr. Nodine opined that the bulging disks can sometimes heal on their own with conservative treatment such as physical therapy and back exercises and if they worsen, an epidural steroid injection would be the next possibility and/or surgery from there if it continues to worsen. Dr. Nodine noted he would try all conservative measures first. *See* Exhibit 21.

25. On November 12, 2015 Claimant reported worsening lower back pain aggravated by ascending stairs, bending, changing positions, daily activities, etc. The assessment noted radicular pain of the left lower extremity and spondylosis with myelopathy of the lumbar region. An evaluation for epidural steroid injection and/or other treatment was recommended. Claimant was noted to have bulging disc and was taking naproxen and Norco. Claimant was referred to pain management. *See* Exhibit 21.

26. On December 10, 2015 Claimant was evaluated by Scott Anthony, D.O. Dr. Anthony noted that Claimant had degenerative disk disease at L4-5 and at L5-S1 and

that Claimant's back pain had been present for a number of years. Claimant reported no significant leg radiation other than pain into his left hip. Dr. Anthony found Claimant's lumbar spine to be painful on examination. Dr. Anthony provided the impression of persistent and chronic lower back pain syndrome due to lumbosacral spondylosis. Dr. Anthony performed an L5-S1 interlaminar epidural steroid injection due to his pre and post-operative diagnoses of lumbar radicular pain and herniated disc at L5-S1. See Exhibit 25.

27. On December 17, 2015 Claimant was evaluated by Dr. Nodine. Claimant reported persistent lower back pain and neck pain. Claimant reported that an injection in his back had helped some but that he still felt weak.

28. On January 21, 2016 Claimant was evaluated by Jeremy Thomas, D.O. Claimant reported left hip pain and that the symptoms were acute and traumatic and began on January 20, 2016 at home after he fell from a ladder and got his leg caught. Claimant reported a prior labral repair in his hip and prior physical therapy for his hip. X-rays of the left hip were performed and showed moderate femoroacetabular narrowing, early per articular osteophyte formation and subchondral sclerotic change. X-rays of the left pelvis showed moderate femoroacetabular narrowing and early peri articular osteophyte formation and subchondral sclerotic change. The assessment was moderate hip degenerative joint disease. They discussed treatment options including intra articular hip injections, surgical hip resurfacing, and total hip arthroplasty. They recommended a left intra articular hip injection be performed first. See Exhibit 21.

29. On January 22, 2016 Claimant was evaluated by neurosurgeon John Marouk, D.O. Claimant reported that he had back pain, left hip pain, and left leg pain with numbness and tingling into his feet. Claimant reported that he had back pain ongoing for 2 years and also has hip pain. Claimant reported that he had surgery for his hip and Tulsa Bone and Joint but that it did not help with his symptoms. Claimant reported that yesterday he fell off a ladder and his leg got hung up and he had increased pain since that time. Claimant also reported around Thanksgiving of 2015 that he was involved in a motor vehicle accident that also escalated his symptoms. Claimant reported that he had a lumbar epidural steroid injection a month ago. Claimant had tenderness in the paraspinal muscles around the L4-5 and L5-S1 level, a positive straight leg raise test on the left, and reproducible hip pain with internal and external rotation of the left leg. Dr. Marouk noted that a prior MRI of the lumbar spine showed an anomalous lumbosacral junction with narrowing at the L5-S1 level on the left, L3-4 and L4-5 level bilaterally, as well as a central disk bulge at the L2-3 level. Dr. Marouk opined that the L4-5 and L5-S1 appeared to be the worst of Claimant's symptoms. Dr. Marouk recommended a new updated MRI of the lumbar spine. Dr. Marouk provided the impression of: ruptured disk at L4-5 and L5-S1 level and worsening of back pain since a fall off ladder. Dr. Marouk recommended a new MRI of the lumbar spine and a second epidural steroid injection in the lumbar spine. See Exhibit 20.

30. On February 4, 2016 Claimant was evaluated by Dr. Thomas. Dr. Thomas noted that the left hip intra-articular injection performed in late January had helped about

50% but that Claimant was still having some pain and increased pain with range of motion. Claimant reported that he wanted something further done for his hip degenerative joint disease and he was recommended to see a hip subspecialist. Dr. Thomas noted that he was hopeful Claimant would be a candidate for hip resurfacing arthroplasty. See Exhibit 21.

31. On February 12, 2016 Claimant was evaluated by Dr. Marouk. Claimant reported that he had to take off work the last 3 to 4 weeks mainly due to his low back pain. Claimant reported symptoms were now in his left hip and that he had a scope of his left hip a couple of times and was recently seen by a doctor who recommended a resurfacing procedure. Claimant reported most of his symptoms to be in his hip and low back. Claimant reported that he wanted to pursue treatment of his hip as his back pain was not near as prominent as his hip and Dr. Marouk released him from care and noted he would see Claimant back if his symptoms worsened. See Exhibit 20.

32. On March 2, 2016 Claimant was evaluated by Dr. Nodine. Claimant reported moderate severe and persistent back pain. Dr. Nodine noted that Claimant's hip pain aggravated his back pain but that Claimant was too young for a hip replacement. Dr. Nodine noted that Claimant was set for pain management and that they were trying to postpone surgery at this age for hip replacement. Dr. Nodine assessed: primary osteoarthritis of the left hip; bulging lumbar disc; cervical pain; low back pain; and radicular pain of the left lower extremity. See Exhibit 21.

33. In October of 2016 Claimant moved to Colorado.

34. Claimant testified at hearing that prior to the fall at work in January of 2018 he had no pain below his hip or down his left leg. This is contradicted by his prior medical records.

35. Claimant testified at hearing that he quit treating in Oklahoma because he was done with treatment and was fine with no restrictions. This is also contradicted by the prior medical records. His last visit shows his continued report of moderately severe and persistent back pain and hip pain. His last visit also shows that Claimant would continue pain management and that they were trying to postpone a total hip replacement at Claimant's young age. The records do not support Claimant's contention that he was fine.

36. Claimant testified at hearing that after his prior left hip surgery he had no further problems other than occasional stiffness from arthritis. This is contracted by the medical records that show reports that the hip surgery did not help and that he continued to have severe left hip pain.

37. Claimant, overall, is not credible or persuasive and his subjective reports cannot be relied upon to any degree of certainty.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

As found above, Claimant fell off a stool at work on January 29, 2018. However, Claimant has failed to establish by a preponderance of the evidence that this accident/incident caused a compensable work related injury. Falling off the stool at work did not cause disability or the need for medical treatment. Rather, Claimant's disability and need for treatment in his lumbar spine and left hip has been ongoing and dates back many years.

As found above, at his first visit with a workers' compensation provider, Claimant was noted to have subjective complaints out of proportion to objective findings. Despite testifying and indicting that he was unable to stand or move much after his fall from the stool, Claimant was discharged the same day from the emergency department with just pain medications. Much of the focus of treatment in this case has been based on Claimant's subjective reports to providers. However, Claimant's subjective reports cannot be relied upon to any degree of certainty.

Claimant's reports that he stopped treatment for his lower back and left hip because he was doing fine are not credible or persuasive. Rather, at his last evaluation in Oklahoma before he moved to Colorado, Claimant reported moderate severe and persistent back pain and hip pain. The plan in March of 2016 was to keep Claimant in a pain management program and attempt to delay a total hip replacement due to Claimant's young age. Claimant's assessments at this last visit included osteoarthritis of the left hip, bulging lumbar disc, low back pain, and radicular pain of the left lower extremity. Claimant's testimony that he never had pain into his left leg and that he had been fine prior to the January 29, 2018 incident at work is contradicted by the medical records and not logically credible given his severe history of reported low back pain and his recommendation to continue pain management in an attempt to delay a total hip replacement. As found above, in September of 2015 the plan for Claimant's lumbar spine

included attempting conservative treatment, then epidural steroid injection, then surgery if his pain continued to worsen. Claimant's report to Dr. Siegel that his prior low back pain from 2016 had resolved is not credible or consistent with the medical records. Although Claimant chose to focus on his most severe pain which involved his left hip, Claimant had significant low back complaints in 2016 and had a recommendation for a second epidural steroid injection and a new lumbar spine MRI made in January of 2016. The records do not demonstrate that Claimant went from reports of low back pain and a recommendation for a second epidural steroid injection and an updated lumbar spine MRI to being fine. Rather, the last treatment record from 2016 shows the lumbar spine and left leg as having ongoing complaints. Shortly after the January 29, 2018 incident Dr. Siegel attempted to reassure Claimant that there was no significant new lumbosacral spine pathology and that Claimant's subjective complaints were inconsistent with his mechanism of injury. On February 28, 2018 Dr. Siegel noted that Claimant's pre-existing issues and medical records demonstrated a prior distribution of pain similar to what Claimant was reporting as his current distribution of pain. Dr. Siegel noted that the prior medical records showed that Claimant was not better after the prior left hip surgery but continued to have symptoms and that a discussion of total left hip replacement took place. Contrary to Claimant's reports she also noted that the medical records documented Claimant's prior left leg pain. Dr. Siegel also later opined that there were no significant structural changes on Claimant's current MRI compared to a lumbar MRI from September of 2015 and opined that both studies showed mild multilevel degenerative changes.

Claimant's reports to Dr. Mahaffey that his prior low back pain did not refer and that the pain had been exacerbated and now referred into his left lower limb also are not credible or consistent with prior records. Claimant's reports to Dr. Mahaffey that his hip pain had been acutely exacerbated and combined with new pain in his posterior hip and buttock also are not found credible. As found above, after performing an independent medical evaluation and opining that Claimant had sustained a work related injury to his lumbar spine but not to other areas of the body including the hip, Dr. Scott qualified his opinion. Dr. Scott indicated that his opinions were based on Claimant's subjective reports that Claimant had no back or leg pain or dysfunction proximate to the January 29, 2018 incident. Dr. Scott also questioned Claimant's credibility.

The multiple providers, including EMS who arrived at the scene of Employer's office, have treated and made treatment recommendations based on Claimant's subjective reports of pain and injury. From the medical records it is clear that Claimant had ongoing severe low back and left hip pain prior to the January 29, 2018 incident at work. Dr. Siegel is found credible and persuasive that Claimant's pre-existing issues and medical records demonstrate a prior distribution of pain similar to what Claimant has now and that Claimant has no significant structural changes on his current MRI compared to his September 2015 lumbar MRI. Claimant argues that he was able to fully function and work without restriction prior to this January 29, 2018 incident and until the incident caused him disability and the need for medical treatment. This is not found persuasive. The only reason the incident on January 29, 2018 was viewed as possibly causing a new disability was due to Claimant's subjective reports that the pain, symptoms, and location were "new," and that he had been doing fine when he decided to stop treatment.

Claimant, as demonstrated by surveillance, is able to work a physical job at a high function without any signs of pain or discomfort. This surveillance was taken approximately three months after the January 29, 2018 incident. It is not persuasive that the January 29, 2018 incident caused a new disability or need for medical treatment or that it aggravated Claimant's severe pre-existing condition. Claimant stopped treatment in Oklahoma after he was placed in pain management and advised they would try to hold off a total hip replacement due to his young age. At the time he had low back complaints and pain into his left lower leg. Claimant continues to have the same problems and issues and has failed to establish, more likely than not, any new disability or aggravation due to the January 29, 2018 incident. Although an incident occurred on that date, Claimant has not established that an injury or aggravation to a pre-existing condition occurred. Rather, the weight of the credible evidence establishes that Claimant remains in the same condition he was prior to the January 29, 2018 incident: with low back pain and pain into his left lower leg and with left hip pain and the probable need for a total left hip replacement. For these reasons his claim is denied and dismissed.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work related injury. His claim is denied and dismissed.

2. As Claimant has not sustained a compensable injury, his request for a general award of medical benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 25, 2018

Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Did Respondent overcome the DIME's determination that Claimant is not at MMI by clear and convincing evidence?

2. Did Claimant prove by a preponderance of the evidence that he is entitled to a second surgical evaluation?

3. If Respondents overcome the DIME, did Claimant prove by a preponderance of the evidence that he has 11% upper extremity impairment?

FINDINGS OF FACT

1. Claimant worked as a warehouse employee for Employer. He suffered an admitted injury to his left elbow while lifting heavy shingles on September 10, 2015. He was moving bundles of shingles and experienced a pop in the left elbow with immediate pain and swelling.

2. Employer referred Claimant to Concentra Medical Centers for authorized treatment. At the initial evaluation, Dr. Lori Ross documented swelling of the left elbow, tenderness of the lateral epicondyle and reduced range of motion in all planes. Treating providers also observed swelling at several other appointments, which provides objective evidence of an injury to Claimant's left elbow.

3. Claimant received treatment through Concentra for diagnoses including left elbow strain, left radial nerve irritation, and left lateral epicondylitis. Claimant underwent conservative care including injections, pain medications, Lidoderm patches, splinting and bracing, and physical therapy, without substantial benefit.

4. An MRI of the left elbow on November 16, 2015 revealed a partial tear in the left superficial common extensor tendon.

5. An EMG performed on December 1, 2015 suggested mild left radial tunnel syndrome.

6. Claimant saw Dr. Hart, a hand surgeon, on several occasions. Dr. Hart initially thought Claimant's presentation was more consistent with radial tunnel syndrome rather than epicondylitis. He administered two radial tunnel injections which provided only short term relief. On February 4, 2016, Dr. Hart expressed concern that "we may not have the accurate diagnosis, since neither injection offered him any significant long-term relief, and I am concerned that if we undertake a radial tunnel release, it may not alleviate his symptoms." Dr. Hart recommended repeat EMG testing before making a final determination regarding surgery.

7. There was a gap in Claimant's treatment between February and August 2016 due to a dispute regarding whether he suffered an intervening injury. The issue went to hearing before ALJ Broniak on July 19, 2016, who found there was no intervening event and denied Respondents' request to terminate TTD benefits.

8. When Claimant resumed treatment at Concentra, he saw a new physician, Dr. Nicholas Kurz.

9. Dr. Kenneth Finn performed the repeat EMG on August 30, 2016. The testing was normal with no evidence of radial or ulnar nerve entrapment.

10. Claimant followed up with Dr. Hart on September 8, 2016 to review the EMG results. Dr. Hart revised his diagnosis and opined that Claimant likely has "a persistent case of lateral epicondylitis." Dr. Hart opined "it is reasonable at this point in time since we now have a normal nerve test to consider only releasing his left lateral epicondyle and debridement of the proximal origin of the ECRB tendon. Hopefully, that will alleviate some of his lateral epicondylar and proximal forearm pain." Dr. Hart estimated a 65% to 75% success rate for lateral epicondylitis surgery.

11. Claimant underwent a left lateral epicondylar release with exostectomy on October 4, 2016.

12. Claimant did not receive significant benefit from the surgery, and post-surgery medical records reflect significant ongoing pain and limitations.

13. Claimant saw Dr. Kurz on November 8, 2016, reporting severe elbow pain with light touch and minimal use of the upper extremity. Dr. Kurz recommended a second opinion with a different hand specialist, Dr. Kobayashi or Dr. Larsen. He also referred Claimant for a pain psychology evaluation with Dr. Staudenmayer.

14. The referrals were submitted to Respondents for authorization, but there is no indication they were approved.

15. Claimant returned to Dr. Kurz on November 29, 2016, and reported ongoing severe pain. Dr. Kurz opined that Claimant's pain appeared exaggerated and "out of proportion" to the physical exam. Dr. Kurz put Claimant at MMI with no impairment and released him to work without restrictions.

16. Claimant saw Dr. Thomas Higginbotham for a DIME on February 5, 2017. Dr. Higginbotham diagnosed an elbow strain/sprain with structural diagnostic evidence of partial tearing of the superficial common extensor tendon at its origin. Dr. Higginbotham also suspected subluxation of the proximal radioulnar joint with ongoing annular ligamentous sprain. Dr. Higginbotham opined Claimant is not at MMI "due to persistence of moderately severe pain and limitations and function of the left elbow. He merits a second orthopedic opinion as requested by his treating providers."

17. Respondents obtained video surveillance of Claimant in April and May 2017. A portion of the video shows Claimant entering and exiting a convenience store

and driving away. Another portion shows Claimant walking in the parking lot of a grocery-type store with a young girl, presumably his daughter. The bulk of the video footage was taken inside a nightclub where Claimant apparently works as a DJ. Most of the nightclub video is dark and shot from a distance, although there are a few segments with relatively clear views of Claimant. He appears to move his left arm freely, with no visible evidence of pain or limitation. He does not lift anything heavy or perform any forceful gripping activities.

18. Claimant saw Dr. Mark Failinger for an Independent Medical Examination (IME) at Respondents' request on May 8, 2017. Claimant reported persistent pain and weakness in the left elbow, worsened by gripping or lifting more than 6 pounds. He said the pain in the elbow was perhaps worse after the surgery. He indicated his range of motion had improved, but his functional ability remained about the same.

19. Based on his examination and review of Claimant's records, Dr. Failinger considered Claimant "very believable" and a "straightforward historian." Initially, he was inclined to agree with Dr. Higginbotham's recommendation for a second surgical opinion. But Dr. Failinger's impression changed dramatically after viewing the surveillance footage. He opined there was a "significant mismatch" between Claimant's appearance in the video and his presentation at the IME. Ultimately, Dr. Failinger agreed with Dr. Kurz that Claimant was at MMI on November 29, 2016 with no impairment.

20. Respondents failed to present clear and convincing evidence to overcome the DIME's determination that Claimant is not at MMI.

21. Claimant proved by a preponderance of the evidence that a second opinion as recommended by Dr. Higginbotham is reasonable and necessary treatment for his admitted injury.

CONCLUSIONS OF LAW

A. Respondents did not overcome the DIME's determination regarding MMI

The DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). This is a higher standard of proof than the typical "preponderance" standard. Clear and convincing evidence is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). Therefore, the party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI finding is incorrect. *Qual-Med*, 961 P.2d at 592; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5). A finding of MMI is premature if a course of treatment has "a reasonable prospect of success" and the claimant is willing to submit to the treatment.

Reynolds v. Industrial Claim Appeals Office, 794 P.2d 1080, 1081-82 (Colo. App. 1990). Additionally, a finding that a claimant is not at MMI may rest solely upon recommendations for further diagnostic evaluation if such procedures have a reasonable prospect of diagnosing or defining the claimant's condition to suggest a course of further treatment. *E.g., Soto v. Corrections Corp*., W.C. No. 4-813-582 (ICAO, October 27, 2011).

As found, Respondents failed to overcome the DIME's MMI determination by clear and convincing evidence. The medical evidence consistently documents ongoing symptoms and limitations associated with Claimant's September 2015 work injury. Claimant had objective evidence of injury and ultimately underwent surgery, but remains symptomatic. The evaluation recommended by Dr. Higginbotham is essentially diagnostic, and ICAO has repeatedly held that "diagnostic procedures constitute compensable medical benefits that must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining the claimant's condition so as to suggest the course of further treatment." *E.g., Watier-Yerkman v. Da Vita*, W.C. No. 4-882-517-02 (January 12, 2015); *Soto v. Corrections Corp. of America*, W.C. No. 4-831-582 (October 27, 2011); *Jacobson v. American Industrial Service*, W.C. No. 4-487-349 (April 24, 2007).

The surveillance video is the lynchpin of Respondents' argument. Dr. Failinger initially agreed that a second opinion was reasonable, but changed his mind after viewing the video. Admittedly, the surveillance video depicts Claimant using his left arm with no apparent difficulty or pain, which gives the ALJ pause regarding the veracity of Claimant's pain complaints. But the activities Claimant performs in the video are relatively minimal, and do not require significant lifting or forceful gripping with his left arm. Furthermore, most of the video was taken from a distance in a darkened nightclub, which makes it difficult for the ALJ to draw definitive conclusions regarding Claimant's true level of function. Clear and convincing evidence must be "unmistakable and free from serious and substantial doubt," and the ALJ does not find the video sufficient to overcome the DIME's determination, particularly when juxtaposed against the persuasive medical evidence.

B. A second opinion is reasonably necessary

The respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Where the respondents dispute a claimant's entitlement to medical benefits, the claimant must prove that the requested treatment is reasonable, necessary, and causally related to the injury. Section 8-42-101(1)(a); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

A DIME's recommendation regarding specific treatment is not entitled to presumptive weight, but is simply another medical opinion to consider when evaluating all the evidence under the preponderance standard. *Goff v. Schwan's Home Services*, W.C. No. 4-947-921-03 (August 9, 2017); *Holcombe v. FedEx Corp*., W.C. No. 4-824-

259-05 (March 24, 2017); *Duplissis v. Shepard's*, W.C. No. 4-508-725 (December 3, 2002).

As found, Claimant proved by a preponderance of the evidence that a second surgical opinion is reasonable and necessary treatment for his injury. Claimant remains symptomatic despite conservative treatment and surgery. Dr. Kurz's initial decision to refer Claimant for a second opinion with a different hand specialist was reasonable and appropriate at the time. There is no persuasive justification for Dr. Kurz's decision to abruptly discharge Claimant barely three weeks later without even allowing him to complete the evaluation.

Based on the totality of evidence presented, the ALJ concludes that a second surgical opinion with Dr. Larsen or Dr. Kobayashi is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME regarding MMI is denied and dismissed.

2. Respondents shall pay for reasonable and necessary treatment to cure and relieve the effects of Claimant's injury and bring him to MMI, including a second surgical opinion with Dr. Larsen or Dr. Kobayashi.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 7, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right upper extremity injury during the course and scope of his employment with Employer on February 1, 2017 in case number 5-059-644.

2. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable right upper extremity injury during the course and scope of his employment with Employer on July 25, 2017 in case number 5-068-156.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his industrial injuries.

4. Whether Claimant has established by a preponderance of the evidence that the right shoulder surgery requested by John Papilion, M.D. is reasonable, necessary and causally related to his February 1, 2017 or July 25, 2017 industrial injuries.

5. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period March 5, 2018 until terminated by statute.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $824.40.

FINDINGS OF FACT

1. Employer is a manufacturer of polyurethane foam products used for mattresses and furniture. Claimant is a 62-year-old male who worked for Employer in shipping and receiving. His job duties involved loading and unloading furniture and mattresses from semi-trailers. Claimant remarked that he loads and unloads between 500 and 1,000 pieces each day.

2. Claimant testified that on February 1, 2016 he was experiencing pain in his shoulders and neck area. He specified that the pain began near the end of 2015.

3. On February 1, 2017 Claimant visited Melissa A. Wells, M.D. at the Colorado Center for Arthritis & Osteoporosis after he completed his work shift. He was referred by personal physician Christopher Carlson, M.D. Claimant reported diffuse joint pain and had multiple tender points on examination. He noted that he had been suffering pain "for a while but things have gotten worse over the last year." Claimant's worst

shoulder and neck pain occurred around Christmas 2015. He did not mention any acute work incident on February 1, 2017 that caused his symptoms.

4. On February 7, 2017 Claimant underwent bilateral shoulder radiographs. The diagnostic testing revealed a "chronic right rotator cuff tear."

5. On March 8, 2017 Claimant returned to Dr. Wells. He reported right shoulder pain. Dr. Wells suspected that the shoulder pain was caused by "rotator cuff issues." She remarked that, if the shoulder symptoms did not improve, "we may need to consider MRI, PT or surgery." Dr. Wells performed a right shoulder injection. Claimant did not mention any acute work incident on February 1, 2017 that caused his symptoms.

6. On May 10, 2017 Claimant again visited Dr. Wells for an examination. He reported right shoulder pain. Dr. Wells noted that Claimant's shoulder had improved from the previous injection but it was "too early for another injection." She commented that Claimant had signs of "rotator cuff tendonitis." Claimant exhibited normal active range of motion in both shoulders.

7. Claimant testified that on July 25, 2017 he was unloading foam mattresses from a trailer at work. The mattresses weighed approximately 35-45 pounds. He felt a "pop" in his right shoulder and experienced immediate pain. Claimant reported his right shoulder symptoms to Employer and selected Concentra Medical Centers for treatment.

8. On July 31, 2017 Claimant visited Concentra for an examination. He reported that he was removing fairly heavy bedding materials from a trailer at work. While unloading a package from overhead it became unstable. Claimant immediately experienced a "pop" and felt pain in his right shoulder. Amanda Cava, M.D. diagnosed Claimant with a history of arthritis and a rupture of the right biceps tendon.

9. On August 4, 2017 Claimant underwent an MRI of his right shoulder. The MRI revealed a massive rotator cuff tear, complete destruction of the long head of the biceps tendon and degenerative changes.

10. On August 8, 2017 Claimant returned to Concentra and was evaluated by Jerald Solot, D.O. Dr. Solot agreed that Claimant had a rupture of the right biceps tendon. He authorized Claimant to return to modified duty and permitted Claimant to work his entire shift.

11. Claimant's work restrictions prevented him from performing his regular job duties. He began working modified duty in customer service and received his full wages. A review of Claimant's employment records reveals that he earned his regular wages from July 25, 2017 through March 4, 2018. Claimant was subsequently terminated from employment.

12. Dr. Solot referred Claimant to Cary Motz, M.D. for a surgical consultation. Claimant visited Dr. Motz on August 15, 2017. He recounted that he injured his right shoulder at work while lifting a heavy object on July 25, 2017. Dr. Motz commented that Claimant "felt a pop and developed some bruising in the arm. He has developed a

popeyes deformity." He diagnosed Claimant with a torn biceps tendon. Dr. Motz remarked that Claimant's right shoulder MRI reflected a chronic massive rotator cuff tear. He noted that Claimant's "rotator cuff does not appear repairable to me. He has a high-riding humeral head and significant atrophy, and in addition, he is diabetic. I think attempt to repair would be fruitless."

13. On September 12, 2017 Claimant again visited Dr. Motz for an examination. He determined that surgical intervention was not warranted under Claimant's Workers' Compensation claim. Dr. Motz predicted that Claimant "will eventually require a reverse shoulder replacement that in my opinion would be done outside the work comp claim."

14. On October 10, 2017 and November 7, 2017 Claimant returned to Dr. Motz for evaluations. Dr. Motz explained that Claimant had plateaued with physical therapy and did not have any additional treatment recommendations. He remarked that "if Dr. Papilion feels that reversed shoulder replacement would be reasonable, then compensability for this might be something that should be looked into given his job description. At this point I'm going to release him from my care and refer him to Dr. Papilion."

15. On November 30, 2017 Claimant visited John Papilion, M.D. for an examination. Dr. Papilion noted that Claimant has worked for 11 years in a warehouse and does not have access to a forklift. Claimant is thus regularly required to lift in excess of 75-100 pounds below shoulder and overhead. On July 25, 2017 Claimant was unloading a heavy box and felt a pop in his right shoulder. He also noticed bruising and deformity. Claimant has subsequently suffered significant loss of motion and difficulty with lifting when using his arm away from his body and overhead. He had some soreness prior to the July 25, 2017 incident but was able to work full duty without restrictions. Claimant remarked that he underwent a significant course of physical therapy and a subacromial steroid injection but only received mild, temporary relief. Dr. Papilion's assessment included a long head biceps rupture, a massive right rotator cuff tear and early rotator cuff arthropathy. Dr. Papilion detailed that "it may be that [Claimant] had some rotator cuff pathology prior to this incident on July 25, 2017, however, he has worked in this capacity for 11 years at full duty which requires constant and significant lifting away from his body and overhead. It may have been that this incident pushed him over the edge to the point where the tear completed and now he has pseudoparalysis with significant loss of function and pain." He concurred with Dr. Motz that Claimant has an irreparable rotator cuff tear and recommended a reverse total shoulder arthroplasty. Dr. Papilion concluded "beyond a reasonable doubt" that Claimant's need for surgery was "directly related to his work activities" and specifically the July 25, 2017 incident.

16. On April 10, 2018 Claimant underwent an independent medical examination with Hugh H. Macaulay, II, M.D. Claimant reported that he had worked for Employer for 11 years unloading trailers. He specifically worked with foam, bedding materials and quilting rolls that weighed up to 900 pounds. Claimant noted that he began to feel pain in his right shoulder prior to February 2017. He commented that he suffered a minor injury on February 1, 2017 and reported the incident to Employer, but his request to visit a physician was denied. He thus visited his personal physician and was diagnosed with

a right rotator cuff tear. Claimant recounted that on July 25, 2017 he was unloading a trailer and experienced a "pop" in his right shoulder. He subsequently received conservative medical treatment.

17. Dr. Macaulay performed a causation analysis pursuant to the Level II curriculum from the Division of Workers' Compensation. He diagnosed Claimant with a right rotator cuff tear and a right ruptured biceps tendon. Dr. Macaulay reasoned that Claimant had a pre-existing, asymptomatic right shoulder condition. Claimant was fully functional until he developed right shoulder symptoms on July 25, 2017. Dr. Macaulay noted that a pre-existing medical condition that may predispose a worker to an injury does not mean the case is not work related. He thus determined that Claimant suffered a right shoulder injury on July 25, 2015 while working for Employer. Dr. Macaulay agreed with Dr. Papilion that Claimant requires a reverse total shoulder arthroplasty for his condition.

18. On May 30, 2018 the parties conducted the pre-hearing evidentiary deposition of Cary R. Motz, M.D. Dr. Motz maintained that Claimant suffered a torn biceps tendon that caused a popeyes deformity on July 25, 2017 but his need for a right shoulder replacement is related to his pre-existing massive rotator cuff tear. He explained that a biceps tendon tear would not cause a significant loss of shoulder use. In fact, the biceps tendon tear would not preclude Claimant from using his right arm to lift above his waist. In contrast, the right rotator cuff tear "might limit the amount that [Claimant] would feel comfortable lifting to the waist level." Dr. Motz summarized that Claimant's request for a right shoulder replacement was caused by the massive rotator cuff tear and is unrelated to his torn biceps tendon. Although Dr. Motz acknowledged that the July 25, 2017 incident could have accelerated Claimant's pre-existing right shoulder condition, he did not know when the rotator cuff tear occurred. Moreover, he could not state to a reasonable degree of medical probability that any remaining, attached residual fibers were torn during the July 25, 2017 incident. Dr. Motz remarked that "I can't say one way or the other."

19. On January 15, 2018 Claimant underwent an independent medical examination with Wallace K. Larson, M.D. Dr. Larson also testified at the hearing in this matter. Claimant reported that on July 25, 2017 he felt a "pop" in his right shoulder while unloading a mattress from a trailer at work. After reviewing Claimant's medical records and performing a physical examination, Dr. Larson determined that Claimant ruptured the long head of his right biceps tendon while at work on July 25, 2017. He detailed that Claimant likely had "severe chronic changes to the long head of the biceps tendon such that even holding his arm at his side with some support of the product resulted in rupture of the few remaining fibers and thus the deformity of the biceps." Claimant did not require any medical treatment for his July 25, 2017 biceps tendon tear.

20. Dr. Larson commented that diagnostic testing revealed Claimant suffers from a chronic, massive rotator cuff tear. He specified that the condition degrades cartilage and causes arthritic changes. Dr. Larson noted that Claimant's high riding humoral head and the detachment of aging tendons reflects a degenerative condition. He explained that, although Claimant has performed manual labor for many years and stressed his right shoulder, "it is medically not probable that this is the cause of his rotator cuff arthropathy." Dr. Larson summarized that the work incident on July 25, 2017 did not

cause or aggravate Claimant's pre-existing rotator cuff condition. The recommendation for a total shoulder arthroplasty is thus not related to Claimant's job duties for Employer. Instead, Claimant's massive rotator cuff tear and need for surgery constitutes the natural progression of a pre-existing condition. Finally, after reviewing additional medical records from Concentra, Dr. Motz and Dr. Papilion, Dr. Larson maintained that Claimant suffered from a "long-standing, pre-existing very large rotator cuff tear." He reiterated that the July 25, 2017 injury did not cause or aggravate Claimant's right shoulder rotator cuff tear.

21. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable right upper extremity injury during the course and scope of his employment with Employer on February 1, 2017 in case number 5-068-156. Initially, Claimant testified that on February 1, 2017 he was experiencing pain in his shoulders and neck area. He specified that the pain began near the end of 2015. In a visit with Dr. Wells on February 1, 2017 Claimant reported diffuse joint pain with multiple tender points on examination. He noted that he had been suffering pain "for a while but things have gotten worse over the last year." Claimant did not mention any acute work incident on February 1, 2017 that caused his symptoms. A February 7, 2017 MRI revealed a "chronic right rotator cuff tear." Furthermore, in an April 10, 2018 independent medical examination with Dr. Macaulay Claimant commented that he suffered a minor injury on February 1, 2017. He reported that he had worked for Employer for 11 years unloading trailers containing foam, bedding materials and quilting rolls that weighed up to 900 pounds. Claimant noted that he began to feel pain in his right shoulder prior to February 2017.

22. Although Claimant worked in a strenuous position loading and unloading heavy materials from trailers for a number of years, the record is devoid of evidence that he suffered an acute injury on February 1, 2017. In fact, the record reveals that Claimant has suffered long-standing right shoulder pain and an MRI reflected a chronic right rotator cuff tear. It is thus speculative to attribute Claimant's right shoulder condition to an industrial event on February 1, 2017. Accordingly, Claimant's request for Workers' Compensation benefits in case number 5-059-644 is denied and dismissed.

23. Claimant has established that it is more probably true than not that he suffered a compensable right upper extremity injury during the course and scope of his employment with Employer on July 25, 2017 in case number 5-068-156. However, the injury was limited to a right biceps tendon tear. Initially, Claimant testified that, while unloading mattresses from a trailer at work on July 25, 2017, he felt a "pop" in his right shoulder and experienced immediate pain. On August 8, 2017 Dr. Solot diagnosed Claimant with a rupture of the right biceps tendon. Dr. Motz determined that Claimant had developed a popeyes deformity and suffered a torn biceps tendon as a result of the July 25, 2017 incident. Although Dr. Motz acknowledged that the event could have accelerated Claimant's pre-existing right shoulder condition, he did not know when the rotator cuff tear occurred. Moreover, he could not state to a reasonable degree of medical probability that any remaining, attached residual fibers were torn during the July 25, 2017 incident.

24. In contrast, Dr. Papilion concluded that Claimant suffered a long head biceps rupture, a massive right rotator cuff tear and early rotator cuff arthropathy. He detailed that Claimant may have had some rotator cuff pathology prior to the July 25, 2017 incident but "he has worked in this capacity for 11 years at full duty which requires constant and significant lifting away from his body and overhead." Dr. Papilion concluded that the July 25, 2017 incident may have completed the tear. Furthermore, Dr. Macaulay diagnosed Claimant with a right rotator cuff tear and a right ruptured biceps tendon. He reasoned that Claimant had a pre-existing, asymptomatic right shoulder condition. Claimant was fully functional until he developed right shoulder symptoms on July 25, 2018. Dr. Macaulay thus concluded that Claimant suffered a right shoulder injury on July 25, 2017 while working for Employer.

25. Although Drs. Papilion and Macaulay concluded that Claimant may have suffered a right shoulder injury or aggravated his pre-existing right shoulder condition on July 25, 2017, the record is replete with evidence that Claimant suffered from a chronic right rotator cuff tear that was not aggravated or accelerated by the biceps tendon tear on July 25, 2017. Dr. Larson persuasively explained that Claimant ruptured the long head of his right biceps tendon while at work on July 25, 2017. The condition did not require any medical treatment. He commented that diagnostic testing revealed Claimant suffers from a chronic, massive rotator cuff tear. He specified that the condition degrades cartilage and causes arthritic changes. Dr. Larson noted that Claimant's high riding humoral head and the detachment of aging tendons reflects a degenerative condition. He explained that, although Claimant has performed manual labor for many years and stressed his right shoulder, the work event on July 25, 2017 did not cause Claimant's rotator cuff arthropathy or aggravate his pre-existing condition. Accordingly, the bulk of the medical records and opinions demonstrate that Claimant's July 25, 2017 work incident caused only a biceps tendon tear. Although Claimant experienced symptoms while performing work and suffered a right biceps tendon tear, an inference that there has been an aggravation or acceleration of his pre-existing right rotator cuff tear is attenuated and speculative. Finally, as Dr. Motz noted, Claimant's right biceps tendon condition had plateaued by the Fall of 2017 with physical therapy and he did not require any additional medical treatment.

26. Claimant has failed to establish that it is more probably true than not that the right shoulder surgery requested by Dr. Papilion is reasonable, necessary and causally related to his February 1, 2017 or July 25, 2017 industrial injuries. Dr. Papilion attributed Claimant's right rotator cuff tear to the July 25, 2017 work incident and determined that Claimant has an irreparable rotator cuff tear. He recommended a reverse total shoulder arthroplasty. He concluded "beyond a reasonable doubt" that Claimant's need for surgery was "directly related to his work activities" and specifically the July 25, 2017 incident. Furthermore, Dr. Macaulay agreed with Dr. Papilion that Claimant requires a reverse total shoulder arthroplasty for his industrial right shoulder injury.

27. In contrast, Dr. Motz persuasively reasoned that Claimant suffered a torn biceps tendon that caused a popeyes deformity on July 25, 2017, but his need for a right shoulder replacement is related to his pre-existing massive rotator cuff tear. He explained that a biceps tendon tear would not cause a significant loss of shoulder use. In fact, the

biceps tendon tear would not preclude Claimant from using his right arm to lift above his waist. In contrast, the right rotator cuff tear "might limit the amount that [Claimant] would feel comfortable lifting to the waist level." Dr. Motz summarized that Claimant's request for a right shoulder replacement was caused by the massive rotator cuff tear and is unrelated to his torn biceps tendon. Dr. Larson agreed that the work incident on July 25, 2017 did not cause or aggravate Claimant's pre-existing rotator cuff condition. The recommendation for a total shoulder arthroplasty is thus not related to Claimant's job duties for Employer. Instead, Claimant's massive rotator cuff tear and need for surgery constitutes the natural progression of a pre-existing condition. Based on the medical records and persuasive opinions of Drs. Motz and Larson, Claimant's request for a reverse total right shoulder arthroplasty is denied and dismissed.

28. Claimant has failed to demonstrate that it is more probably true than not that he is entitled to receive TTD benefits for the period March 5, 2018 until terminated by statute. He has failed to establish a causal connection between the industrial injury and subsequent wage loss. Claimant has not proven that he suffered an industrial injury on February 1, 2017 and his injury on July 25, 2017 was limited to a torn right biceps tendon. As Dr. Motz explained, a biceps tendon tear would not cause a significant loss of shoulder use. In fact, the biceps tendon tear would not preclude Claimant from using his right arm to lift above his waist. Furthermore, Dr. Larson remarked that Claimant did not require any medical treatment for his July 25, 2017 biceps tendon tear. Claimant has thus failed to prove that his biceps tendon tear caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. He has not shown that he suffered a complete inability to work or that there are restrictions that impair his ability to effectively and properly perform his regular employment as a result of his torn right biceps tendon. Accordingly, Claimant's request for TTD benefits for the period March 5, 2018 until terminated by statute is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable right upper extremity injury during the course and scope of his employment with Employer on February 1, 2017 in case number 5-068-

156. Initially, Claimant testified that on February 1, 2017 he was experiencing pain in his shoulders and neck area. He specified that the pain began near the end of 2015. In a visit with Dr. Wells on February 1, 2017 Claimant reported diffuse joint pain with multiple tender points on examination. He noted that he had been suffering pain "for a while but things have gotten worse over the last year." Claimant did not mention any acute work incident on February 1, 2017 that caused his symptoms. A February 7, 2017 MRI revealed a "chronic right rotator cuff tear." Furthermore, in an April 10, 2018 independent medical examination with Dr. Macaulay Claimant commented that he suffered a minor injury on February 1, 2017. He reported that he had worked for Employer for 11 years unloading trailers containing foam, bedding materials and quilting rolls that weighed up to 900 pounds. Claimant noted that he began to feel pain in his right shoulder prior to February 2017.

8. As found, although Claimant worked in a strenuous position loading and unloading heavy materials from trailers for a number of years, the record is devoid of evidence that he suffered an acute injury on February 1, 2017. In fact, the record reveals that Claimant has suffered long-standing right shoulder pain and an MRI reflected a chronic right rotator cuff tear. It is thus speculative to attribute Claimant's right shoulder condition to an industrial event on February 1, 2017. Accordingly, Claimant's request for Workers' Compensation benefits in case number 5-059-644 is denied and dismissed.

9. As found, Claimant has established by a preponderance of the evidence that he suffered a compensable right upper extremity injury during the course and scope of his employment with Employer on July 25, 2017 in case number 5-068-156. However, the injury was limited to a right biceps tendon tear. Initially, Claimant testified that, while unloading mattresses from a trailer at work on July 25, 2017, he felt a "pop" in his right shoulder and experienced immediate pain. On August 8, 2017 Dr. Solot diagnosed Claimant with a rupture of the right biceps tendon. Dr. Motz determined that Claimant had developed a popeyes deformity and suffered a torn biceps tendon as a result of the July 25, 2017 incident. Although Dr. Motz acknowledged that the event could have accelerated Claimant's pre-existing right shoulder condition, he did not know when the rotator cuff tear occurred. Moreover, he could not state to a reasonable degree of medical probability that any remaining, attached residual fibers were torn during the July 25, 2017 incident.

10. As found, in contrast, Dr. Papilion concluded that Claimant suffered a long head biceps rupture, a massive right rotator cuff tear and early rotator cuff arthropathy. He detailed that Claimant may have had some rotator cuff pathology prior to the July 25, 2017 incident but "he has worked in this capacity for 11 years at full duty which requires constant and significant lifting away from his body and overhead." Dr. Papilion concluded that the July 25, 2017 incident may have completed the tear. Furthermore, Dr. Macaulay diagnosed Claimant with a right rotator cuff tear and a right ruptured biceps tendon. He reasoned that Claimant had a pre-existing, asymptomatic right shoulder condition. Claimant was fully functional until he developed right shoulder symptoms on July 25, 2018. Dr. Macaulay thus concluded that Claimant suffered a right shoulder injury on July 25, 2017 while working for Employer.

11. As found, although Drs. Papilion and Macaulay concluded that Claimant may have suffered a right shoulder injury or aggravated his pre-existing right shoulder condition on July 25, 2017, the record is replete with evidence that Claimant suffered from a chronic right rotator cuff tear that was not aggravated or accelerated by the biceps tendon tear on July 25, 2017. Dr. Larson persuasively explained that Claimant ruptured the long head of his right biceps tendon while at work on July 25, 2017. The condition did not require any medical treatment. He commented that diagnostic testing revealed Claimant suffers from a chronic, massive rotator cuff tear. He specified that the condition degrades cartilage and causes arthritic changes. Dr. Larson noted that Claimant's high riding humoral head and the detachment of aging tendons reflects a degenerative condition. He explained that, although Claimant has performed manual labor for many years and stressed his right shoulder, the work event on July 25, 2017 did not cause Claimant's rotator cuff arthropathy or aggravate his pre-existing condition. Accordingly, the bulk of the medical records and opinions demonstrate that Claimant's July 25, 2017 work incident caused only a biceps tendon tear. Although Claimant experienced symptoms while performing work and suffered a right biceps tendon tear, an inference that there has been an aggravation or acceleration of his pre-existing right rotator cuff tear is attenuated and speculative. Finally, as Dr. Motz noted, Claimant's right biceps tendon condition had plateaued by the Fall of 2017 with physical therapy and he did not require any additional medical treatment.

Medical Benefits

12. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

13. As found, Claimant has failed to establish by a preponderance of the evidence that the right shoulder surgery requested by Dr. Papilion is reasonable, necessary and causally related to his February 1, 2017 or July 25, 2017 industrial injuries. Dr. Papilion attributed Claimant's right rotator cuff tear to the July 25, 2017 work incident and determined that Claimant has an irreparable rotator cuff tear. He recommended a reverse total shoulder arthroplasty. He concluded "beyond a reasonable doubt" that Claimant's need for surgery was "directly related to his work activities" and specifically the July 25, 2017 incident. Furthermore, Dr. Macaulay agreed with Dr. Papilion that Claimant requires a reverse total shoulder arthroplasty for his industrial right shoulder injury.

14. As found, in contrast, Dr. Motz persuasively reasoned that Claimant suffered a torn biceps tendon that caused a popeyes deformity on July 25, 2017, but his

need for a right shoulder replacement is related to his pre-existing massive rotator cuff tear. He explained that a biceps tendon tear would not cause a significant loss of shoulder use. In fact, the biceps tendon tear would not preclude Claimant from using his right arm to lift above his waist. In contrast, the right rotator cuff tear "might limit the amount that [Claimant] would feel comfortable lifting to the waist level." Dr. Motz summarized that Claimant's request for a right shoulder replacement was caused by the massive rotator cuff tear and is unrelated to his torn biceps tendon. Dr. Larson agreed that the work incident on July 25, 2017 did not cause or aggravate Claimant's pre-existing rotator cuff condition. The recommendation for a total shoulder arthroplasty is thus not related to Claimant's job duties for Employer. Instead, Claimant's massive rotator cuff tear and need for surgery constitutes the natural progression of a pre-existing condition. Based on the medical records and persuasive opinions of Drs. Motz and Larson, Claimant's request for a reverse total right shoulder arthroplasty is denied and dismissed.

TTD Benefits

15. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability.

16. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to receive TTD benefits for the period March 5, 2018 until terminated by statute. He has failed to establish a causal connection between the industrial injury and subsequent wage loss. Claimant has not proven that he suffered an industrial injury on February 1, 2017 and his injury on July 25, 2017 was limited to a torn right biceps tendon. As Dr. Motz explained, a biceps tendon tear would not cause a significant loss of shoulder use. In fact, the biceps tendon tear would not preclude Claimant from using his right arm to lift above his waist. Furthermore, Dr. Larson remarked that Claimant did not require any medical treatment for his July 25, 2017 biceps tendon tear. Claimant has thus failed to prove that his biceps tendon tear caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. He has not shown that he suffered a complete inability to work or that there are restrictions that impair his ability to effectively and properly perform his regular employment as a result of his torn right biceps tendon.

Accordingly, Claimant's request for TTD benefits for the period March 5, 2018 until terminated by statute is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for Workers' Compensation benefits with a date of injury of February 1, 2017 in case number 5-059-644 is denied and dismissed.

2. Claimant suffered a right biceps tendon tear on July 25, 2017 in case number 5-068-156. He is not entitled to receive any additional medical benefits.

3. Claimant's request for a reverse total right shoulder arthroplasty is denied and dismissed.

4. Claimant's request for TTD benefits for the period March 5, 2018 until terminated by statute is denied and dismissed.

5. Claimant earned an AWW of $824.40.

6. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 26, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici

Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether respondent is responsible for payment of medical bills from the Golden Autumn Care Home ("Zlotan Jesien" in Polish), the nursing home where Claimant resides and receives medical treatment in Gdansk, Poland.

2. Whether Respondent is subject to penalties pursuant to § 8-43-304, C.R.S. for failing to timely pay or deny medical bills from Golden Autumn Care Home in violation of W.C.R.P. 16-11.

FINDINGS OF FACT

1. On May 30, 2007 Claimant sustained a work related injury while operating a cab for Respondent. On that date, an unknown individual entered the rear driver's side door of Claimant's cab, pulled a gun, and shot Claimant in the back of the head and neck.

2. A hearing was held on September 17, 2010 before ALJ Cannici. The hearing addressed whether or not Claimant was an "employee" at the time of the injury and entitled to workers' compensation benefits, whether Respondent maintained workers' compensation coverage, and whether Respondent was responsible for reasonable and necessary medical benefits related to the injury.

3. On November 10, 20110 ALJ Cannici issued an Order finding that Claimant was an "employee" of Respondent and that Respondent was responsible for past medical treatment and ongoing reasonable and necessary medical benefits related to the May 30, 2007 industrial injury. *See* Exhibits 2, A, 3.

4. Both sides appealed ALJ Cannici's Order. Ultimately, after appeals, the determination that Claimant was an "employee" and that Respondent was responsible for past medical treatment and ongoing reasonable and necessary medical benefits related to the May 30, 2007 industrial injury was affirmed. *See* Exhibits 4, 5, 6, 7, 8.

5. Claimant was extensively injured in the work related injury and shooting. Following his work related injury, Claimant remained in the United States for several years residing in, and being cared for, at two separate nursing homes. *See* Exhibits 2, 3.

6. In July of 2014 Claimant moved back to Gdansk, Poland. On July 2, 2014 Claimant became resident and patient of the Golden Autumn Care Home (hereinafter Golden Autumn).

7. Respondent paid for invoices and care from Golden Autumn from the beginning of Claimant's residency in July of 2014 through an invoice for care and

residency covering April of 2017. As of April, 2017, Claimant's reasonable and necessary medical treatment related to his May 30, 2007 work related injury had been paid by Respondent.

8. On March 14, 2017 Respondent's counsel sent a letter to Claimant's counsel notifying him that Golden Autumn should direct invoices to a new billing address:

> Metro Taxi
> Attention: Mr. Kyle Brown, General Manager
> 5909 East 38th Avenue
> Denver, CO 80207 USA

See Exhibits K, 21.

9. The March 2017 and April 2017 invoices from Golden Autumn were paid for by Respondent in June of 2017. *See* Exhibit I.

10. On July 5, 2017 Respondent's counsel sent an electronic mail message to Claimant's counsel stating that Respondent was having difficulty receiving invoices from Golden Autumn which had led to corresponding difficulty in paying. Respondent requested that Claimant's counsel assist in facilitating Golden Autumn getting invoices to the proper person, Kyle Brown, so that the invoices could be paid. *See* Exhibit 22.

11. On August 18, 2017 Claimant filed an Application for Hearing endorsing medical benefits and penalties. The Application stated: penalties against Respondent pursuant to 8-43-304, C.R.S., for their failure to timely pay or deny medical treatment from Claimant's nursing home and medical providers in violation of W.C.R.P. 16-11. *See* Exhibit 9.

12. That same day, August 18, 2017, Kyle Brown the General Manager for Respondent sent an electronic mail message to Claimant's counsel. Mr. Brown apologized for any inconveniences that this may have caused Claimant. Mr. Brown indicated that Respondent had been in a low side of their business for some time now and had been juggling their expenses to just keep the doors open. Mr. Brown indicated disruption in their industry by Lyft and Uber along with market saturation of 3 new taxi companies had made it very difficult for them. Mr. Brown indicated Respondent was living week to week. Mr. Brown also indicated that last February one of the owners had suddenly passed away and that the deceased owner had been the one who took on the responsibility at the company for the management of Claimant's case. Mr. Brown stated that Respondent had been responsible for Claimant's care for many years and had met all of its requirements. Mr. Brown explained that Respondent had simply hit a bump in the road. Mr. Brown expressed that Respondent desired an opportunity to rectify the issue without adding expense. *See* Exhibit 23.

13. On August 21, 2017 Claimant's counsel sent an electronic mail message to Mr. Brown and to Respondent counsel thanking them for their recent honest

communications regarding the current situation. The electronic mail message expressed that Golden Autumn was threatening to evict Claimant and asked Mr. Brown and Respondent's counsel for a timeframe within which they intended to rectify the situation. Claimant's counsel also asked if anyone from Respondent contacted the nursing home to let them know what was going on and asked whether Respondent had an English speaking contact at the nursing home that they could discuss the situation with. Claimant's counsel indicated that if Respondent did not have an English speaking contact, he could see if he could find a contact for Respondent. *See* Exhibit 24.

14. That same day, August 21, 2017, Mr. Brown responded by electronic mail message. Mr. Brown thanked Claimant's counsel and indicated that they did not have an English speaking contact and would accept the gracious offer to help Respondent find one. Mr. Brown indicated that would be a big help because of all that he was dealing with to keep Respondent company afloat. Mr. Brown stated that he would to make it his personal responsibility to work with that person to get this back on track and that he anxiously awaited Claimant's counsel's response on who to contact. *See* Exhibit 24.

15. On August 24, 2017 Mr. Brown emailed Claimant's counsel asking if they had luck locating an English speaking contact at the nursing home and indicated that Respondent was anxious to get back on track. Claimant's counsel replied by email indicated that he had emailed Claimant's brother but had not heard back. *See* Exhibit 25.

16. On September 5, 2017 Mr. Brown sent an electronic mail message to Claimant's counsel. Mr. Brown stated that he was prepared to send payment to Golden Autumn on that day or the next. Mr. Brown also asked what the payment of $943 bi-weekly was for and indicated he was trying to get a full understanding of the matter. *See* Exhibit 25.

17. On September 18, 2017 Respondent filed a Response to Application for Hearing. The Response stated: Respondent is not denying treatment of Claimant by the Golden Autumn Nursing Home. *See* Exhibit 10.

18. In late fall of 2017 Mr. Brown left the employment of Respondent. Employer records showed that as of the May 2018 hearing, no payment had been made to Golden Autumn by Respondent for Claimant's treatment bills June 2017 or later.

19. On November 13, 2017 Claimant served discovery on Respondents.

20. On November 13, 2017 in response to the discovery propounded, Respondent claimed that they had not received bills from Golden Autumn since February of 2017. Respondent acknowledged that medical bills from March 2017 to the present likely existed, but indicated they were simply not in possession of them. Respondent indicated that at hearing Kyle Brown was expected to testify regarding Respondent's payment of medical bills for the Golden Autumn nursing home and that he had not received any bills from Golden Autumn nursing home since February of 2017. Records attached to the discovery responses show that between February 13 and June 4 2017

Respondent made no payment to Golden Autumn and on June 5, 2017 Respondent made payments for the March and April 2017 nursing home bills. Records showed that no payments had been made to Golden Autumn since the June 5, 2017 payment. Records also showed that Respondents had continually paid Claimant bi-weekly temporary indemnity benefits. *See* Exhibit 11.

21. On November 15, 2017 Claimant's counsel's paralegal sent an electronic mail message to Respondent's counsel forwarding invoices from Golden Autumn for June, July, August, September, and October of 2017. *See* Exhibit 26.

22. The June, July, August, September, and October 2017 bills from Golden Autumn to Respondent all list an address of:

Metro Taxi- CaseNet MC
2224 S. Fraser St, Suite 5
Aurora, CO 80014

See Exhibit 20.

23. On January 16, 2018 the August 18, 2017 Application for Hearing was withdrawn without prejudice. *See* Exhibit 12.

24. On January 17, 2018 Claimant submitted a new Application for Hearing again endorsing penalties under 8-43-304, C.R.S. for Respondent's failure to timely pay or deny medical bills from Claimant's nursing home and medical providers in violation of W.C.R.P. 16-11. *See* Exhibit 13.

25. On March 20, 2018 Claimant's counsel's paralegal sent a letter to Respondent's counsel forwarding invoices from Golden Autumn for June, July, August, September, October, November, and December of 2017 as well as for January and February of 2018. All the invoices from Golden Autumn had an address on the front of the invoice of:

Metro Taxi- CaseNet MC
2224 S. Fraser St., Suite 5
Aurora, CO 80014.

See Exhibit 27.

26. On April 6, 2018 Paralegal to Claimant's counsel sent an email to Respondent's counsel. The email attached the copy of an envelope sent from Golden Autumn with billing for the month of February 2018 that was stamped "not known" and "unable to forward." The paralegal asked Respondent counsel to explain what happened and asked if the address changed. The envelope shows that it was mailed to:

Metro Taxi

Attn: Mr. Kyle Brown, General Manager
5909 East 38th Ave.
Denver, CO 80207 USA

See Exhibit 28.

27. On May 15, 2018 Respondent supplemented discovery responses. Respondent again indicated that their position was that Respondent had not received bills from Golden Autumn since February of 2017. In regard to medical bills from Golden Autumn since February 2017, Respondent also indicated that Respondent counsel had been provided a few additional medical bills by counsel for Claimant and had forwarded them to Respondent. *See* Exhibit 18.

28. The last payment Respondent made to Golden Autumn was in June of 2017 covering treatment provided in April of 2017. The hearing in this matter was held on May 16, 2018. Respondent had not, as of the date of hearing, made any payments to Golden Autumn for Claimant's treatment and the bills for treatment covering June, July, August, September, October, November, and December of 2017 and January and February of 2018. As of the date of hearing the evidence shows 9 months of treatment bills from Golden Autumn that had not been paid by Respondent.

29. Respondent Employer's current Vice President testified at hearing. He indicated that no payment had been issued to Golden Autumn based on the records he had since June of 2017. He also indicated that Employer was still in business, still paying employees, and still paying their general business expenses.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony

and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Reasonable and Necessary Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found above, a prior hearing found Respondent to be liable for reasonable, necessary, and causally related medical treatment for Claimant's May 30, 2007 work related injury. Respondent is not disputing that the care provided by Golden Autumn is reasonable and necessary treatment for Claimants' work related injury. The evidence has established that Claimant was severely injured and currently requires care at a nursing home type facility due to his work related injury. Respondents do not dispute that the care provided by Golden Autumn is reasonable, necessary, and causally related to the work injury. Respondents continue to be responsible for the treatment provided by Golden Autumn and are liable for the invoices and bills issued by Golden Autumn on a monthly basis.

Penalties

Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational

argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. If the claimant makes such a prima facie showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

W.C.R.P. at 7 CCR 1101-3 under Rule 16-11 requires that all bills submitted by a provider are due and payable in accordance with the Medical Fee Schedule within 30 days after receipt of the bill by the payer. *See* W.C.R.P. 16-11(A)(3). It further provides that date of receipt of the bill may be established by the payer's date stamp or electronic acknowledgement date; otherwise, receipt is presumed to occur three (3) business days after the date the bill was mailed to the payer's correct address. *See* W.C.R.P. 16-11(A)(5). The Rules go on to advise that unreasonable delay in processing payment or denial of payment of medical service bills, as determined by the Director or an administrative law judge, may subject the payer to penalties under the Workers' Compensation Act. *See* W.C.R.P. 16-11(A)(6).

Here, the requirement in the W.C.R.P. to pay medical bills submitted by a provider within 30 days of receipt of the bill is a duty lawfully enjoined of Respondent. Claimant has established that Respondent violated W.C.R.P. rule 16-11 when Respondent failed to pay medical bills from Golden Autumn within 30 days of receipt of those bills.

Respondents argue that their actions were not objectively unreasonable due to the troubles with billing address, change in employees in their company, and argued that they could not pay bills that they had not received. Under W.C.R.P Rule 16-11 the date of receipt of medical bills can be established if the payer date stamps the bills or there is an electronic acknowledgment of the receipt of the bills. Otherwise, there is a presumption that the bills have been received three business days after they were mailed to the payer's correct address. Here, the bills in question all list an outdated or incorrect address for Respondent. In March of 2017 Respondent indicated that all bills from Golden Autumn should be sent to a new address. The bills themselves show the old address continued to be listed on the bills through the February 2018 invoice. As found above, Respondent communicated with Claimant surrounding the problems in receiving bills after the change of address was made. Although there is one returned mail envelope for the February 2018 invoice showing that by February 2018 Golden Autumn had mailed an invoice to the new and correct address, there is no evidence that prior invoices were sent to the payer's correct address as required by W.C.R.P 16-11. Therefore, there is no presumption that

Respondent received the bills three business days after mailing. However, the date of receipt of the bill may also be established by an electronic acknowledgement date. Here, the evidence established an electronic mail message was sent and received by Respondent counsel on November 15, 2017 with unpaid invoices from Golden Autumn for June, July, August, September, and October of 2017 attached.

Respondents were well aware of the issues of unpaid bills prior to November 15, 2017. As found above, in August of 2017 Respondent indicated problems with business downturn and that they wanted to get back on track with the payments to Golden Autumn. In September of 2017 Respondent indicated they were prepared to make payment. However, statutory penalties are only available for violation of a duty lawfully enjoined or required of Respondent. Here, Respondent certainly should have sought out copies of the bills and made earlier payment. Respondents admit in discovery that bills likely existed but that they had not received them yet. Although Respondent should have taken earlier action knowing bills likely existed, Respondent is only lawfully required to pay medical bills within 30 days of receipt. The evidence does not establish, more likely than not, that Respondents received invoices or bills from Golden Autumn until the electronic message to Respondent's counsel on November 15, 2017.

After the back and forth for several months between the parties, the ALJ finds that Respondent had actual receipt of the Golden Autumn bills on November 15, 2017. Under W.C.R.P 16-11 this makes payment due by December 15, 2017. As found above, Respondents had not paid any of the bills as of the date of hearing May 16, 2018. Claimant has established that there was a violation of W.C.R.P. 16-11 from December 15, 2017 through May 15, 2018.

After weighing the evidence and testimony, the ALJ also concludes that Respondents inaction in failing to pay invoices by December 15, 2017 was objectively unreasonable. As found above and as noted by the parties, Respondent is not denying that the treatment was reasonable, necessary, or causally related. Respondent was well aware of the issue of unpaid bills (although they didn't have actual receipt of the bills yet) as early as July 2017. Respondent knew in August of 2017 that Claimant had applied for hearing on the issue of the unpaid bills. When they finally received the actual invoices/bills on November 15, 2017 they were well aware that they had not paid bills for several months and their failure to pay within 30 days is objectively unreasonable given the circumstances and facts of this case. Respondent knew several months prior to the November 15, 2017 receipt of the invoices/bills that Claimant was potentially facing eviction from the nursing home. Respondent's failure to act within 30 days of the November 15, 2017 receipt is unexplainable and objectively unreasonable.

December 15, 2017 through May 15, 2018 (the day prior to hearing as Respondent could have paid invoices the day of hearing after it concluded), amounts to a violation period of 151 days. When assessing penalties under § 8-43-304, C.R.S. an ALJ should consider several factors including the extent of harm to a claimant, the duration and type of violation, a respondent's motivation for the violation, any mitigation attempted by a respondent, and whether or not the misconduct Is representative of pattern of misconduct. *Anderton v. Hewlett Packard*, W.C. No. 4-344-781 (November 23, 2004); *Grant v.*

Professional Contract Services, W.C. No. 4-531-613 (September 16, 2005). Although statute allows for a penalty of up to $1,000 per day or up to $151,000, the ALJ has weighed the evidence and factors in this specific case and finds a penalty of $250 per day to be appropriate. Although it appears from the evidence that Claimant was not evicted from Golden Autumn, the ALJ finds there was harm to Claimant who requires care in a nursing home facility in having unpaid bills with no timeframe or indication the bills would be paid. Further, Respondent's motivation for failing to pay bills appears most likely to be related to their downturn in business and their poor record keeping/management skills when employees left their employment and did not transmit important information about Claimant's bills. Additionally, Respondent as of the date of hearing had not paid the bills or shown significant attempts at mitigation. As found above and found in an earlier order, Respondent was uninsured on Claimant's date of injury. After weighing evidence, the ALJ orders a penalty of $250/day times 151 days for a total penalty of $37,750 against Respondent.

If a penalty is assessed under § 8-43-304, C.R.S. the ALJ must apportion payment of the penalty between the aggrieved party and the Colorado uninsured employer fund created by § 8-67-105 C.R.S. except that the amount apportioned to the aggrieved party shall be a minimum of twenty-five percent of any penalty assessed. The ALJ determines in this case that 65% of the penalty shall be apportioned and paid to Claimant and 35% shall be apportioned and paid to the Colorado uninsured employer fund.

ORDER

1. Claimant has established by a preponderance of the evidence that medical treatment at Golden Autumn for the period June, 2017 through February 2018 was reasonable, necessary, and causally related to his work injury. Respondents shall pay for the care and treatment and shall pay invoices from Golden Autumn.

2. Claimant has established by a preponderance of the evidence a violation of W.C.R.P. 16-11 from December 15, 2017 through May 15, 2018 and an entitlement to penalties for a period of 151 days.

3. Respondent shall pay a penalty of $24,537.50 to Claimant.

4. Respondent shall pay a penalty of $13,212.50 to the Colorado uninsured employer fund.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 27, 2018

Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STIPULATION

At the commencement of the hearing, the parties agreed to reserve the issues of average weekly wage and temporary disability benefits for future determination, if applicable.

REMAINING ISSUES

I. Was Claimant's filing of her claim for compensation with the Division of Workers' Compensation outside of the time limitations set forth in § 8-43-103(2), C.R.S. accompanied by a reasonable excuse?

II. Was Claimant's filing of her claim for compensation with the Division of Workers' Compensation outside of the time limitations set forth in § 8-42-103(2) accomplished without prejudice to the rights of Respondent-Employer?

III. If Claimant's late filing was accompanied by a reasonable excuse and did not prejudice the rights of Respondent-Employer, whether Claimant established, by a preponderance of the evidence, that she sustained a compensable injury to her cervical spine on or about January 5, 2015?

IV. Whether Respondents liable for Claimant's March 13, 2015 surgery?

V. Whether Respondents are liable for reimbursement of co-payments made to Claimant's personal health insurance company?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was born December 17, 1969 and was 49 years old at the time of the hearing. (Exhibit F).

2. Claimant has been a dental hygienist for 13 years and is currently working part-time as a hygienist for a dental practice other than Employer.

3. Claimant's job duties as a dental hygienist include meeting with patients, taking any necessary x-rays, and performing cleaning procedures, including root planing and scaling on patients.

4. Claimant worked for Employer from September 27, 2010 to January 27, 2015.

5. On July 30, 2012, Claimant reported to Employer that she was experiencing mild pain and tingling running down her arm and into her hand. She also told him that her doctor informed her that this pain was likely work related.

6. Claimant has a prior workers' compensation claims history. On March 13, 2009, she filed a claim for compensation against a former employer, Ronald Cockrell DDS/New Image Dental, for a neck injury, which occurred on February 9, 2009. The February 9, 2009 claim was denied, but Claimant signed settlement documents to resolve that claim on December 3, 2010.

7. On April 12, 2010, Claimant filed a claim for compensation for an alleged work-related neck injury with an injury date of March 20, 2009. Her employer at that time was Douglas Reid, DDS. The March 20, 2009 claim was denied, but Claimant signed settlement documents to resolve that claim on January 21, 2011.

8. The evidence presented persuades the ALJ that Claimant was aware that the symptoms she was experiencing on July 30, 2012 were possibly related to her work duties and were serious in nature. Indeed, she asked Employer to initiate a workers' compensation claim.

9. Employer immediately contacted Berkley Risk Services, the company that handles all of his business-related insurances, and acquired an Employer's First Report of Injury Form, which he erroneously gave to Claimant to complete. Regardless, the claim was filed and Claimant undertook treatment for her neck.

10. Claimant's 2012 claim was Employer's first and only experience with filing an employee's workers' compensation claim.

11. Employer testified that the office break room contained signs/posters notifying employees that they must file workers' compensation claims within four working days if they are injured on the job.

12. Zurich Insurance Company (Zurich), Employer's workers' compensation carrier at the time, admitted liability for Claimant's injury and as noted, she pursued treatment. Conservative care failed to provide lasting relief. Consequently, Claimant underwent surgery with Dr. Michael Brown on March 6, 2013. Dr. Brown performed a C5-6 fusion in an effort to relieve Claimant of her persistent right sided radicular symptoms.

13. By August 1, 2013, Insurer had assumed workers' compensation coverage for Employer's dental practice.

14. After her surgery, Claimant returned to work for Employer. Her schedule consisted of four eight-hour shifts per week until December of 2013. At that time, she requested a reduction to two days per week, specifically Monday and Tuesday, because she was having residual pain and symptoms associated with her July 30, 2012 injury.

15. Claimant's requested schedule change was accommodated and Employer hired a second part time dental hygienist, Cindy McNesse who worked the remaining days the practice is open, i.e. Wednesday and Thursday. Employer's offices are closed on Friday.

16. In November of 2014, Ms. McNesse alerted Employer that her other part-time employer wanted her to quit his office to work full-time there or her part-time employment (and full-time benefits) with them would be terminated.

17. On December 16, 2014, after much discussion with both Claimant and Ms. McNesse, Employer informed Claimant that she would be terminated as of February 1, 2015, because she had informed him that she could not handle three or four full workdays. Given Ms. McNesse's situation and Claimant's inability to work full time, Employer had decided that Ms. McNesse would be given the office's hygienist job on a full time basis. Claimant then left work unexpectedly and without notice. She did not return to the office that day.

18. Claimant's alleged work-related injury occurred on Monday morning, January 5, 2015. Regarding this injury, Employer testified that Claimant called him at 6:00 am to inform him she could not work that day because she had awoken with neck pain and painful shooting sensations extending from the left shoulder down the arm. Claimant confirmed this testimony.

19. Employer testified further that during this phone call, Claimant did not ask him, as she had done previously, to file a new workers' compensation claim, nor did she alert him of anything else that would indicate that this was a new work-related injury. Based upon the evidence presented, the ALJ finds that Employer was not provided with sufficient information to lead a reasonably conscientious manager to believe the alleged injury in this case may involve a claim for compensation.

20. Claimant testified that she last worked for Employer on the previous Tuesday, i.e. six days before the January 5, 2015 phone call to Employer. She testified that she felt discomfort on Sunday leading up to the excruciating and debilitating pain she experienced Monday morning. According to Claimant, when she stood up to get out of bed, she felt pressure and an immediate onset of severe pain in her neck, left shoulder and left arm. She admitted that she did not experience this pain on Tuesday night after work, Wednesday morning or night, Thursday morning or night, nor Friday morning or night.

21. Disability certificates provided by Claimant to Employer dated January 5 and January 8, 2015, from Physician Assistant (PA-C) Stacy Concelman at Woodland Park Family Medicine refer only to an "illness." The certificates do not reference a diagnosis or contain any statement regarding the relatedness of Claimant's "illness" to her work duties.

22. By report dated January 5, 2015, PA Concelman reported, "Left neck, shoulder, arm pain for 2 days. Pain is 'excruciating'. History of C5-C6 fusion. Pain is

similar but in a different location. She denies trauma or anything that seemed to onset the pain. Onset was sudden." (Emphasis added).

23. An MRI performed January 21, 2015 revealed disc herniation at C6-C7.

24. Claimant was aware that she had bulging discs at C6-C7 prior to January 5, 2015. She testified that she had symptoms on both sides of her neck at the time of her 2012 injury. According to Claimant, the left sided symptoms she experienced during 2012 abated but the right sided symptoms persisted. Prior to her C5-6 fusion in 2013, Claimant and Dr. Brown discussed the possibility of extending the fusion to the C6-C7 levels. However, as her left sided symptoms had abated and her persistent symptoms were not consistent with C7 compression she and Dr. Brown agreed that a fusion at the C6-7 level was not necessary at that time.

25. Following her sudden onset of debilitating pain on January 5, 2015, Claimant received conservative care and injection therapy, which failed to provide sustained relief. Dr. W.L. (Larry) Lippert performed the aforementioned injections.

26. In a note dated March 27, 2015, Dr. Brown's PA Todd Luft stated that Claimant had elected to proceed with surgery at C6-C7 because her left arm symptoms had returned and her pain was severe.

27. On March 31, 2015, Dr. Brown performed surgery for a herniated disc at C6-C7 in an effort to relieve Claimant's ongoing symptoms.

28. Claimant did not request pre-authorization for her surgery from Zurich or Employer. She testified that she was in too much pain to concern herself about who may be responsible for payment.

29. By letter dated June 12, 2015, counsel for Zurich, Michelle Prince, informed Claimant's attorney that the carrier denied coverage for medical services in February and March 2015 because a note from Claimant's primary doctor dated January 14, 2015 seemed to indicate that the injections recommended were for "the new left sided arm symptoms claimant began experiencing after she returned to work and therefore would not be related to this admitted claim." In another letter dated June 12, 2015, Attorney Prince advised Claimant's counsel that Dr. Lippert's bills for injections did not relate to the admitted July 30, 2012 claim.

30. Claimant attempted to settle her July 30, 2012 claim with Zurich by participating in a settlement conference on July 18, 2017. During this conference, Claimant and her attorney discovered that the insurance company at risk for her alleged 2015 injury was not Zurich. Claimant testified that she knew Zurich would be released from further liability under the 2012 case should that case settle.

31. While Claimant participated in the settlement conference on July 18, 2017, she did not sign settlement documents for the July 30, 2012 injury until September 25, 2017. Claimant testified that she signed the documents knowing that another insurance carrier (Insurer) was on the risk to cover losses associated with her alleged January 5,

2015 injury, should that injury be found compensable. The settlement cleared Zurich Insurance of all remaining liability for the July 30, 2012 injury.

32. Between July 18, 2017 and the date that she signed the settlement documents involving Zurich (September 25, 2017), Claimant took no action to advise Employer of a claim for a January 5, 2015 injury despite knowing that another insurer covered Employer for workers' compensation injuries. Instead, Claimant filed her claim for the January 5, 2015 injury on September 25, 2017, the same day that she signed the settlement documents releasing Zurich from further liability under the 2012 claim.

33. Claimant's claim for the January 5, 2015 injury was filed 33 months (997 days), after the alleged injury date.

34. Claimant noted the injury date in the Worker's Claim for Compensation as Saturday, January 3, 2015, but she did not work that day because by this time, she was only working Mondays and Tuesdays due to the ongoing effects of her 2012 injury and the office is closed on Saturdays.

35. Insurer's first notice of a new injury or claim was October 6, 2017. Insurer filed a notice of contest on October 12, 2017, taking the position that the alleged injury was not work-related.

36. Kathy Trevino, the current adjustor for Insurer on the 2015 claim testified that Claimant's filing of the claim two years and 9 months after the alleged work-related injury precluded Respondents from efficiently and effectively preparing their defense in several respects including the following:

- Respondents could not take a statement from Claimant about this new injury.
- Respondents could not immediately collect medical records.
- Respondents could not immediately collect prior claim files.
- Respondents could not designate four doctors to attend to Claimant's alleged injuries, including a surgeon.
- Respondents could not obtain a job analysis from the same time period when Claimant worked for employer.
- Respondents could not investigate Claimant's other work or recreational activities.
- Respondents could not retain an independent medical examiner regarding causation and reasonableness of surgery before the surgery was performed.

- Respondents could not immediately hire an attorney to defend the claim.

- Respondents could not have requested a Rule 16 medical opinion, if a Rule 16 request was made.

- Respondents may have controlled where Claimant went for physical therapy, but they could not do so.

- Respondents may have retained an independent medical examiner regarding causation, restrictions, return to work, and impairment rating, but could not do so.

- Respondents could have talked to employer about light duty job possibilities.

- Respondents could have been involved in the settlement conference with Zurich, which now amounts to a lost opportunity to determine accurate liability for the surgery and the new claim.

- Respondents lost the opportunity to pool resources with Zurich Insurance to investigate and defend against the claim.

- Respondents could have talked to Dr. Brown in a SAMMS conference before he reached a final opinion regarding causation.

(Ms. Trevino Testimony, Hearing Tr. pp. 51-55).

37. Employer also raised many of the same concerns regarding his rights being prejudiced by Claimant's late filing of her 2015 claim as were enumerated by Ms. Trevino.

38. Ms. Trevino estimated the fees for defending the current claim will be around $10,000, an amount that would probably have been lower had Insurer been notified sooner, and a price that will be reflected in Employer's future premium payments.

39. Dr. Brown testified by deposition as an expert in neurosurgery. He is not Level II accredited under the Colorado Division of Workers' Compensation Rules of Procedure and has not taken/participated in a formal course offered by the Division of Workers' Compensation (DOWC) in how to perform a causation analysis. According to Dr. Brown, Claimant's work as a dental hygienist, particularly the combined lateral bending and flexion of the neck can lead to compression and aggravation of the nerve roots causing pain and weakness. Such movement creates intradiscal pressure that can result in disc herniation and exacerbation of pre-existing pathology. He testified that Claimant had degenerative problems, including bone spurs and a congenitally small spinal canal, at both C5-6 and C6-7, in addition to disc herniation, causing her

symptoms and need for surgery. He testified that the disc herniation of 2015 likely occurred "somewhere around the time of the onset of her pain." (Emphasis added).

40. Dr. Brown testified that that in 2013 Claimant's symptoms were "so clearly related to C6, that just doing that level would be appropriate for her and it did work" and at that time, he "did not see evidence of right C7 nerve root compression.

41. Dr. Brown testified that he had not seen a large number of patients come back needing surgery at adjacent spinal levels after an initial fusion surgery. He explained that questions remain as to whether the need for additional fusion surgery at adjacent levels should be considered causally related to the impact that the original fusion surgery has on adjacent levels or whether the need for such surgery simply represents the natural progression of the underlying disease process as the patient continues to age and the adjacent levels degenerate. In Claimant's case, Dr. Brown testified that there was no particular accident or injury that triggered the onset of her left arm pain in January 2015.

42. Joseph Blythe, MA, CRC reviewed Claimant's job description and performed a job demands analysis on May 10, 2018 using Dr. Bayne as a model to demonstrate the essential duties of Claimant's position at all times relevant. In his report dated May 12, 2018, Mr. Blythe concluded that none of Claimant's job duties presented with a risk factor for injury.

43. On December 22, 2017, Claimant was evaluated by Dr. Lloyd Mobley III at the request of Respondents. As part of his independent medical examination (IME), Dr. Mobley reviewed a substantial number of medical records. He would subsequently review the job demands analysis (JDA) prepared by Joe Blythe. He completed a physical examination and issued a report wherein he concluded that it was "unlikely" that Claimant's C6-7 disc herniation was "directly caused by her activities as a dental hygienist" because "her symptoms weren't related to a specific incident or injury at work."

44. Dr. Mobley testified at hearing as a neurosurgeon with 14 years of experience. After some questioning, Dr. Mobley conceded that he is not currently Level II accredited. Nonetheless, he testified that he has performed a substantial number (700-1200) of cervical spine surgeries and is familiar with the causation principals taught in the Level II curriculum. Consequently, Dr. Mobley was recognized as an expert in neurosurgery.

45. Dr. Mobley testified that his review of the JDA did not reveal job duties that would pose risk factors consistent with causing C6-7 disc herniation. Moreover, he testified that Claimant's work activities as described in Mr. Blythe's JDA report did not substantially and permanently aggravate a pre-existing progressive neck condition. In short, Dr. Mobley concluded that while awkward neck posture can cause disc herniation, there is no evidence that Claimant had any pain accompanying her work duties in the week leading up to her January 5, 2017 incident where she experienced

severe pain while getting out of bed. Without concurrent pain, Dr. Mobley testified that it is unlikely that awkward posturing at work caused Claimant's disc herniation.

46. Dr. Mobley disagreed with Dr. Brown's opinion that foraminal narrowing set Claimant up for a disc herniation at C6-C7. Rather, he cited several other non-work related risk factors, which when combined probably caused Claimant's C6-7 herniation. Specifically, Dr. Mobley testified that Claimant's age, genetics and her prior fusion at C5-C6 all played a role in causing the disc herniation at C6-7. According to Dr. Mobley, Claimant's C5-6 fusion likely caused increased stress on the adjacent C6-7 level, which was already compromised given the findings on her 2009 MRI and as previously identified by Dr. Brown at the time he fused Claimant's C5-6 level. The ALJ interprets Dr. Mobley's testimony to indicate that the likely cause of Claimant's C6-7 disc herniation is related to the natural progression of a pre-existing degenerative condition possibly hastened by the mechanical forces affecting that level because of her C5-6 fusion following her 2012 injury.

47. Claimant testified that the purpose for the hearing on the compensability issue was to provide her personal health insurance provider, Blue Cross Blue Shield, with a judicial determination concerning compensability of the asserted 2015 injury. She also testified that Blue Cross Blue Shield notified her that they had decided to "retract" their payments "to everyone for that surgery that day". She wants to avoid a negative credit report and creditor harassment.

48. Claimant submitted a summary of co-payments she had made to date to Blue Cross Blue Shield relating to her January 5, 2015 alleged neck injury. The co-payments made total $1,286.85.

49. Claimant contends that her "reasonable excuse" for late filing of her claim for compensation is that she did not know that Hanover was the carrier at risk on the date of her alleged January 5, 2015 injury until July 18, 2017 at the settlement conference, and that counsel for Zurich withheld that information until the settlement conference. In essence, Claimant contends that she assumed that Zurich was responsible for her January 5, 2015 injury, and that her assumption was reasonable under the circumstances.

50. Based upon the evidence presented, the ALJ finds that by the time of her January 5, 2015 claim, Claimant had filed three prior claims for compensation against her employers. Therefore, it is reasonable to infer that Claimant knew or should have known about the importance of, and procedures for, filing a claim for compensation when there is an alleged injury at work.

51. Claimant contends that her "reasonable excuse" for late filing of her claim for compensation is that she did not know that there had been a change in carriers on the date of her alleged January 5, 2015 injury until July 18, 2017 at the settlement conference, and that counsel for Zurich withheld that information until the settlement conference. In essence, Claimant contends that she assumed that Zurich was

responsible for her January 5, 2015 injury, and that her assumption was reasonable under the circumstances.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

I. Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). Based upon the evidence presented, the ALJ finds Claimant's testimony concerning the alleged reasons that she did not file her claim within the time frames set forth in § 8-43-103(2) unpersuasive.

D. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Mobley are credible and supported by the medical record as a whole. When the evidentiary record is considered in its totality, the opinions of Dr. Mobley are more persuasive than contrary opinions of Dr. Brown.

II. Dismissal of the Claim

E. Issue 1: Was Claimant's filing of her claim for compensation with the Division of Workers' Compensation 33 months (997 days) after the alleged injury date accompanied by a reasonable excuse?

A valid claim for compensation can be dismissed if a claimant waits too long to pursue his/her claim. *See Grant v. Industrial Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). Section 8-43-103(2) of the Colorado Workers' Compensation Act provides in relevant part:

> [T]he right to compensation and benefits . . . shall be barred unless, **within two years after the injury** . . . a notice claiming compensation is filed with the division. **This limitation shall not apply . . . if it is established . . . within three years after the injury . . . that a reasonable excuse exists for the failure to file such notice***.*

C.R.S. § 8-43-103(2) (2017). (Emphasis added).

F. The limitation period commences when the claimant reasonably should have recognized the nature, seriousness, and probable compensable character of the injury. *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967); *see Intermountain Rubber Indus., Inc. v. Valdez,* 688 P.2d 1133, 1136–37 (Colo.App. 1984) (reasoning that because no treating physician diagnosed claimant with any disc or musculoskeletal disorder nor gave him any indication in 1976 that the accident predisposed him to more serious back injury, claimant did not know of the nature, seriousness, or compensable character of his injury until he was diagnosed with a herniated disc in 1980).

F. When an occupational disease is at issue, the limitation period begins to run as of the date the claimant becomes disabled. *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504, 506 (Colo.App. 2004)(asserting that for "a claimant to recognize the probable compensable nature of an injury, the injury must be of sufficient magnitude to cause a disability that would lead a reasonable person to

recognize that her or she may be entitled to disability benefits"). In this case, the evidence presented persuades the ALJ that Claimant, by her own indication that she was unable to work, became disabled as a consequence of her alleged occupational disease on January 5, 2015. Given Claimant's assertion that she was suffering from an occupational disease, the limitation period in § 8-43-103(2), C.R.S. began to run as of that date.

G. "The statute does not require that the reasonable excuse be one that is legally watertight." *City and County of Denver, Police Dept. v. Phillips*, 166 Colo. 312, 319, 443 P.2d 379, 383 (1968). However, the Colorado Supreme Court has distinguished between a claimant's reasons for delayed filing and legally excusable reasons for so failing to act. *Armour & Co. v. Indus. Comm'n*, 149 Colo. 251, 256, 368 P.2d 798, 800 (1962); *see Monks Excavating & Redi-Mix Cement v. Kopsa*, 367 P.2d 321 (Colo. 1961). Among the most legally sound excuses are a claimant's reliance on a physician's opinions about the severity of the injury and the employer's advice, or other employer or insurer conduct that results in failure to file a claim, *e.g., Valdez*, 688 P.2d at 1137; *see Industrial Comm'n v. Newton Lumber & Mfg. Co.*, 135 Colo. 594 (Colo. 1957)(holding that the First Report of Injury form showing the employer's knowledge of the injury and its details along with employer providing the incorrect address on the form such that the claimant did not receive claim forms in the mail amounted to a reasonable excuse for claimant's untimely claim); *see also Prager v. Lakeridge Theater*, 483 P.2d 408 (Colo.App. 1971)(finding that the untimely filing of a claim may be excused because the employer or employer's insurer misled claimant into thinking he had no claim).

H. In this case, it is undisputed that Claimant failed to file a claim for compensation within 2 years as required by Section 8-43-102(3). As such, she must show that she had a reasonable excuse for filing 9 months after the 2-year deadline. Based upon the evidence presented, Claimant has failed, by a preponderance of evidence, to carry that burden for the following reasons:

- Since both Employer and Insurer had no knowledge of the alleged C6-C7 injury until over two years after it took place, it is improbable that their conduct could have influenced Claimant's actions such that reliance on any employer and/or insurer conduct was the reason for delay.

- Contrary to Claimant's assertion that she "immediately reported her claim" to Employer, the evidence presented persuades the ALJ that she merely informed Employer that she was not able to come to work on January 5, 2015 because she was having pain in her neck. Left shoulder and arm. The ALJ is not convinced that Claimant gave Employer any indication that her condition was work related. Claimant's assertion that Employer was sufficiently apprised of the work-related nature of her neck pain, left shoulder and arm after he received "communication from [her] doctor's office" equally unpersuasive, as the content of those records fails to document a work-related cause for her neck pain.

- Claimant was aware of the process for filing claims for compensation since she had filed three claims for compensation prior to the January 5, 2015 claim. Yet, the evidence presented is persuasive of the fact that she did not ask Employer, as she had previously in 2012, to file a claim despite her knowledge that her pain was either related to the 2012 injury or a new injury.

- Because Claimant discovered during the July 2017 settlement conference with Zurich Insurance that her employer's insurance coverage had changed at least once, Claimant reasonably knew or should have known the insurer at risk for her 2015 injury was not Zurich. Indeed, Claimant testified that she was aware that the carrier on the risk had changed and that her signature on the settlement documents would release Zurich from further liability under the 2012 claim. Despite this knowledge, she took no action to file her claim against Insured for an additional two months.

- Because Zurich's counsel wrote to Claimant's counsel twice on June 15, 2015 to inform her of Zurich's position on medical charges after January 5, 2015, Claimant knew or should have known by that date that Zurich denied liability for her medical bills, and that they were asserting that there was a new injury.

- In any event, Section 8-43-102(3) requires notice to **the Division of the Workers' Compensation**, not to a specific carrier, in order to avoid a statute of limitations defense. Claimant's argument that no one informed her that there was a new insurance carrier is unpersuasive because under the statute knowledge of the appropriate carrier at risk is irrelevant to the duty to file a claim for compensation with the Division. Moreover, the ALJ is unaware of and Claimant's cites no authority for the proposition that a carrier or employer has an affirmative duty to keep an allegedly injured worker apprised of policy changes. To the contrary, it is Claimant's burden to prove when the employer had sufficient knowledge to trigger the duties required by § 8-43-101(1). *See City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002) (burden of proof rests upon the party asserting the affirmative of a proposition). This is true because the tolling provisions create an exception to the claimant's duty to file a claim within two years of the injury. *Procopio v. Army Navy Surplus*, W. C. No. 4-465-076 (June 10, 2005). As referenced, an employer has notice of an occupational disease or lost time injury when it obtains some knowledge of facts connecting the claimant's injury or condition with the employment, and indicating to a reasonably conscientious manager that the case may involve a potential claim for benefits. See *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984); *Wilson v. Radisson* Hotel Denver, W.C. No. 3 839 812

> (April 8, 1998); *Procopio v. Army Navy Surplus*, W.C. No. 4-465-076 (June 10, 2005). The question of whether the employer was placed on notice sufficient to trigger its reporting duties is largely one of fact. *Doughty v. Poudre Valley Health,* W. C. No. 4 488 749 (January 13, 2003). As found, Claimant failed to carry her burden in this regard.

I. For the reasons stated above, this ALJ finds and concludes that Claimant's claim for compensation for a January 5, 2015 injury should be denied on the basis that she has not provided a reasonable excuse for her delay in filing a claim for compensation within 2 years.

J. Issue 2: Was Claimant's filing of her claim for compensation with the Division of Workers' Compensation 33 months (997 days) after the alleged injury date accomplished without prejudice to the employer?

Assuming there was a reasonable excuse; lack of prejudice to the employer is a necessary prerequisite to the acceptance of a claim. *City & Cty. of Denver (Denver Highway Unit) v. Bush*, 166 Colo. 76, 79–80, 441 P.2d 666, 667–68 (1968). Section 8-43-103(2) of the Colorado Workers' Compensation Act provides in relevant part:

> [T]he right to compensation and benefits . . . shall be barred unless, within two years after the injury . . . a notice claiming compensation is filed with the division. This limitation shall not apply . . . if it is established . . . within three years after the injury . . **. and if the employer's rights have not been prejudiced thereby**."

C.R.S. § 8-43-103(2) (2017). (Emphasis added).

K. Notice of the accident or injury is not equivalent to notice of a claim for compensation. *Monks Excavating*, 367 P.2d 321. The Colorado Supreme Court found that the employer was prejudiced by the claimant's 20-month delay in filing a claim for compensation because the employer was deprived of its statutory right to have the claimant medically examined, denied an opportunity to provide medical care that could potentially reduce the disability claim, and denied the right to consult with prior treating physicians concerning any connection between claimant's condition and the accident. *Bush*, 166 Colo. 76 at 81, 441 P.2d 666 at 668.

L. Prejudice to the employer cannot be presumed from untimely filing but must be actual and must be shown to be actual. *Newton Lumbar*, 135 Colo. at 596 (holding that untimely filing of the claim did not prejudice employer because the employer's report showed that employer knew of the accident, when it occurred, who the medical attendants of claimant were, where he was hospitalized, when admitted and when discharged from the hospital, and therefore could have taken steps to protect itself).

M. When the employer has notice that a claim for compensation will be or has been filed it can take steps to protect itself and its rights. *E.g. Armour & Co. v. Indus. Comm'n*, 149 Colo. 251, 257–58, 368 P.2d 798, 801 (1962)(reasoning that the untimely claim prejudiced the employer because the claimant suffered increasing pain and difficulty from her industrial accident without notifying the employer, and consequently the employer could not "take necessary and proper steps to protect its rights").

N. In this case, the ALJ finds and concludes that Respondents have proved, by a preponderance of evidence, that the rights of Employer have been prejudiced by Claimant's failure to report her January 5, 2015 claim within 2 years. The reasons for this conclusion are enumerated under Findings of Fact, paragraph 36 above. The ALJ also agrees with Respondents that if Claimant had filed her claim within the 2- year limitation period, the Division of Workers' Compensation would have advised her of the name of the carrier at risk for the alleged date of injury. Thereafter Insurer could have taken action to join all potential parties, and they could have participated in the defense of the case, and settlement negotiations, with all other possible Respondents. It is concerning that Claimant, despite gaining knowledge in July, 2017 that another insurance carrier was at risk, took no steps to advise Insurer of an impending settlement with Zurich, then proceeded to settle her claim with Zurich on September 25, 2017, the exact day that she filed her claim against Insurer. This ALJ finds that Claimant's behavior in this regard was likely intentional and designed to unfairly prejudice the rights of Insurer to bring Zurich into the claim as a fellow respondent regardless of the strength of any defense in pointing downstream to Zurich.

O. For the reasons stated above, this ALJ finds and concludes that, even if Claimant had provided a reasonable excuse for her delay in filing her claim, Claimant's claim for compensation for a January 5, 2015 injury should be denied pursuant to Section 8-43-103(2) on the basis that Respondents have demonstrated substantial prejudice in protecting the rights of their insured employer. Even if Claimant's claim was filed timely and did not prejudice Employer's rights, the evidence presented persuades the ALJ that she did sustain a compensable injury on January 5, 2015.

III. Compensability

P. Issue 3: Did Claimant suffer a compensable injury to her cervical spine on or about January 5, 2015?

Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place

limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, questions exist as to whether Claimant's alleged injury/symptoms occurred in the scope of employment and whether her C6-7 disc herniation arose out of her employment.

Q. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

R. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges that she developed neck, left shoulder and arm pain as a consequence of prolonged splinting/posturing of her neck associated with her duties as a dental hygienist. She did not allege the occurrence of a discrete injury but rather an occupational disease.

S. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). The failure to satisfy each element by a preponderance of credible evidence is fatal to an occupational disease claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). In this case, Claimant contends that she has proven that she sustained a compensable occupational disease. Based upon the evidence presented, the ALJ is not convinced. The ALJ bases this conclusion on the evidence outlined at Findings of Fact, paragraphs 45-46, including:

- Claimant's condition/symptoms developed suddenly over 5 days after Claimant had last worked for the employer and during an activity, i.e. standing up, that had no connection to any work-related duty.

- According to Drs. Brown and Mobley, pain associated with disc herniation is generally felt within a short period after the herniation. As noted, Claimant's debilitating pain came on suddenly. Based upon this evidence, this ALJ finds and concludes that the temporal delay in the appearance of severe pain makes it highly improbable that Claimant's work activities on the Monday and Tuesday before caused her disc herniation/symptoms.

- There is no evidence of a traumatic injury associated with any work duties in this case.

- Dr. Mobley credibly testified that the disc herniation in this case could have been caused by a number of non-work-related factors, including sleeping motions, genetics, prior bone spurring, spinal canal narrowing caused by bulging, and the presence of a previous fusion of adjoining spinal segments secondary to Claimant's 2012 injury.

- Claimant had difficulties with her cervical spine since at least 2009 when she filed her first claim for compensation. It is clear from the record that she has had a progressive cervical condition for over 5 years predating the onset of her left sided cervical pain on January 5, 2015.

T. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

U. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Here, the totality of the evidence presented persuades the ALJ that Claimant's current symptoms and need for treatment, including her C6-7 surgery is probably related to age, genetic predisposition and her long standing pre-existing disc disease. While the ALJ is convinced that Claimant's need for surgery was reasonable and necessary, the convincing evidence establishes that it was not related to an industrial cause. Based upon the evidence presented, the undersigned ALJ credits Dr. Mobley opinions to conclude that Claimant's alleged January 5, 2015 work injury is, more probably than not, related to the natural progression of her pre-existing degenerative cervical disc disease, which may have been accelerated, to an unknown degree, by the forces acting upon the C6-7 spinal level as a consequence of her C5-6 fusion surgery. Accordingly, even if Claimant's claim were not barred by the applicable statute of limitations, she has failed to prove by a preponderance of the evidence that she suffered a work-related injury to her cervical spine at the C6-C7 level.

IV. Claimant's Remaining Issues

V. Issue 4: Are Respondents liable for Claimant's March 13, 2015 surgery?

Since Claimant's claim for any benefits is barred by operation of Section 8-43-103(2), and because she has failed to prove that she suffered a compensable injury on or about January 5, 2015, her claim that Respondents should pay for her March 2015 surgery is denied and dismissed.

W. Issue 5: Are Respondents liable for Claimant's copayments relating to treatment after the alleged January 5, 2015 injury?

Since Claimant's claim for any benefits is barred by operation of Section 8-43-103(2), and because she has failed to prove that she suffered a compensable injury on or about January 5, 2015, her claim for reimbursement of co-payments made to her personal health insurer, Blue Cross Blue Shield is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claims for compensation arising out of an alleged injury date of January 5, 2015 are barred by operation of Section 8-43-103(2).

2. Claimant's request for payment of her March 2015 cervical surgery as performed by Dr. Brown is denied and dismissed since all of her claims are barred by Section 8-43-103(2), C.R.S. and because she failed to prove that she suffered a compensable injury occurring on or about January 5, 2015.

3. Claimant's request for payment of her medical co-payments is denied and dismissed since all of her claims are barred by Section 8-43-103(2), C.R.S. and because she failed to prove that she suffered a compensable industrial injury occurring on or about January 5, 2015.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 27, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove she suffered a compensable occupational disease?
- If Claimant proved a compensable injury, is she entitled to TTD benefits commencing March 16, 2016?
- If Claimant is entitled to TTD benefits, did Respondents prove a basis to terminate those benefits?
- Did Respondents prove an offset against TTD?
- The parties stipulated to an average weekly wage of $641.43.

FINDINGS OF FACT

1. Claimant worked for Employer as a telephone sales representative, starting in September 2014.

2. Shortly after Claimant began working, she was given a headset with no independent volume control. The volume was controled by her computer, but the level adjustment was very limited.

3. Claimant perceived the headset volume to be excessively loud. In September 2015, she complained about the volume to her coworkers and team leaders. An "IT guy" checked the computer volume but could not adjust it. Claimant tried to manage the sound level by moving the earpieces partly off her ears and putting cotton in her ears.

4. In February 2016, Claimant developed ear pain and ringing in her ears. On February 28, 2018 she informed her supervisor, Sarah Kolstad, and requested a different headset. She received a new headset on March 2, 2016 with an adjustable volume control. Although this provided some relief, her symptoms of "ear pain, extreme sensitivity to loud noise and constant ringing in my ears" did not go away.

5. Claimant saw her primary care provider, Dr. Scott Trapman, on March 14, 2016 and reported "bilateral ear pain. Patient works at a call center and has been having to use headset without volume control and ears have been ringing and have now become painful." Dr. Trapman diagnosed "Tinnitus . . . hyperacusis, ringing in the ears and pain that worsens with loud noises." He further noted, "She works as a telemarketer and wears a headset that she currently cannot tolerate." Since Claimant attributed her symptoms to her headset, Dr. Trapman suggested she report it to Employer as a possible workers' compensation claim.

6. Claimant formally reported the injury later that day. She completed an injury/accident report in which stated:

> This injury occurred to me over a period of time. I have worked here for approximately 18 months and I have not had the ability to turn down the volume on my computer, it prevents you from turning down beyond a certain point. I also had a headset with no volume controls. . . . The last week of February 2016 I started experiencing ear pain as a result of customers calling me speaking loudly and not being able to turn down the volume. To describe – it was as if loud stereo bursts, blasting my ears, enough to startle me on occasion. I did complain to my sup[ervisor] about my ears hurting.

7. Ms. Kolstad completed an accident investigation report around the same time. She confirmed, "over a period of 6 months approximately [Claimant] was stating her headset was too loud. Recently on 2/28/16 became unbearable and she reported it to me [ ] for 1st time." Ms. Kolstad also noted, "when [Claimant] noticed the pain and ringing she verbally told her leaders and peers." Regarding steps Employer could have taken to prevent the injury, Ms. Kolstad stated, "in addition to having our IT support come down to help adjust volume, it should have been addressed that we needed more volume control options. I provided a new headset on 3/2/2016 with a volume control." She concluded Claimant's injury was due to "computer volume and phone headset volume."

8. Employer referred Claimant to its designated provider, Concentra. Claimant saw Dr. Randall Jones at her initial visit on March 15, 2016. Her chief complaint was "ringing in the ears." Dr. Jones documented the history of symptoms as:

> Inbound sales rep x 18 mos with tinnitus severe x 1mo approx. States when she started job she had an adjustable headset volume. After several weeks she (and others) had them replaced with nonadjustable headset as some colleagues were muting calls. Also the computer audio has minimal control audio volume. She said she would have to place ½ way across ears or stuff cotton. She reported this to her supervisors. Finally 3 days ago she received adjustable set.

9. Dr. Jones diagnosed "persistent tinnitus probably secondary to noise" and noted "in my opinion it is work-related on a >50% probability." He referred Claimant to Dr. Joseph Romett, an otolaryngologist, for further evaluation and treatment. Dr. Jones advised Claimant to avoid loud noises and restricted her from using a headset to communicate with customers. He also recommended she be allowed to use foam earplugs at work as needed.

10. Claimant did not return to work after March 15 because Employer had no work that did not require headset use. She was placed on FMLA leave in April 2016.

11. Insurer filed a Notice of Contest on March 29, 2016 "pending investigation."

12. Claimant saw Dr. Romett on April 5, 2016. Audiometric testing showed mild bilateral sensorineural hearing loss. The pattern of hearing loss was consistent with noise exposure, but also consistent with aging. Dr. Romett noted spasm of the pterygoid muscles and ear pain, which he thought was related to stress from the tinnitus. The hearing loss was not bad enough to warrant specific treatment such as hearing aids. He recommended Flexeril for the muscle spasms. He also ordered electrocochleography and otoacoustic emissions testing, which came back normal.

13. Claimant started seeing Dr. Albert Hattem on June 23, 2016. She was still suffering from tinnitus and had recently started having problems with balance and dizziness. Dr. Hattem opined it was "questionable" whether her symptoms were work-related because a large number of co-workers used the same headset with no known problems. He also opined "it is doubtful that the patient's current complaint of wobbliness that began yesterday is claim related."

14. Claimant underwent vestibular testing which showed bilateral vestibulopathy. Dr. Romett recommended vestibular therapy, but "I explained to her I did not think this imbalance was related to her noise exposure in February."[1]

15. Dr. Romett repeated the audiometric testing on July 1, 2006, which showed a slight improvement. In his deposition, Dr. Romett testified the improvement in Claimant's hearing supports a causal link to the workplace noise exposure because noise-induced hearing loss tends to "normalize" over time after the noise is removed.

16. Dr. Romett further explained Claimant requires no specific treatment for her mild hearing loss, and has probably exhausted available treatment options for tinnitus.

17. Claimant had a brain MRI on August 3, 2016 which showed no abnormalities of the internal auditory canals. The MRI showed nonspecific white matter changes, possibly related to premature microangiopathic disease or multiple sclerosis.

18. Dr. Hattem released Claimant from his care on September 8, 2016. He explained:

> I informed [Claimant] that it was my opinion that her dizziness, balance problems and tinnitus were not work-related considering the abnormal MRI. I instructed her to seek ongoing diagnostics and care for this condition outside her workers' compensation claim through her private insurance. [Claimant] protested this opinion. She insisted that her headset use was the cause of her condition. He informed her that she could discuss this with the insurance or if Dr. Romett at a different opinion she could forward that report to me.

[1] Dr. Romett reiterated and elaborated on that opinion in his deposition testimony.

19. Dr. Hattem also released Claimant to "full duty, though the patient may require restrictions secondary to a non-work-related condition.

20. Claimant saw Dr. Michael Striplin for an IME at Respondents' request on July 6, 2016. Dr. Striplin opined Claimant "has mild bilateral sensorineural hearing loss that is compatible with her age and which may be related to noise exposure." Dr. Striplin discussed NIOSH literature that identified potential noise hazards associated with working in call and dispatch centers, including acoustic trauma from a sudden spike in headset volume, headset feedback, and background noise. NIOSH found some headsets with maximum output 4 to 18 dB above the recommended limit of 85 dB. He opined "to determine whether the headset that the patient used could produce hearing loss, information regarding the actual sound level produced by the headset speaker, if available, would need to be evaluated." He noted tinnitus is often idiopathic. Dr. Striplin concluded "medically probable work-related causality cannot be established" based on the information he had.

21. Dr. Carlos Cebrian performed an IME for Respondents on October 2, 2017. Claimant told Dr. Cebrian she noticed sensitivity to telephone calls in September 2015. She explained:

> [B]ecause of the sensitivity to the telephone calls, she had to move the headset so that she would not have it on both ears of the same time. She states when she was doing the outbound sales she was able to adjust depending on her anticipation of when the customer would be speaking. She states she was able to adjust the volume a little bit on the computer but after doing that, the sound would go back to normal. She was told by a computer poerson at her work that all the computers were set up so that all the volume would be the same for everyone.
>
> In late December 2015 or early 2016 she states her department switched to inbound calls. When it was outbound calling she states there was predictability. With inbounding she had no idea what was coming in and she would be startled when the customers would speak. She states she would move her headphones regularly.

22. Claimant denied any significant noise exposure outside of work such as firearms, loud rock music, or military service.

23. Dr. Cebrian opined Claimant's hearing loss and tinnitus were not related to her work. He indicated her noise exposure was below the threshold required to cause hearing damage. He cited personal risk factors for developing tinnitus including hypertension and history of smoking.

24. Claimant saw Dr. Allison Fall for an IME on April 19, 2018. Claimant described the headset issues and onset of symptoms in a manner consistent with her description to other providers. Dr. Fall agreed with Dr. Striplin that "given the information available, there is not sufficient evidence that, within a reasonable degree of medical

probability, she was exposed to 85 or more decibels through the headset to lead to a hearing loss." Dr. Fall said knowing the exact decibel level would be "helpful" but thought it "unlikely" the noise exposure was greater than 85 dB for an eight hour day.

25. On May 6, 2018, Dr. Romett authored a report opining "it is my opinion that there is a greater than 50% probability that [Claimant]'s persistent tinnitus is due to noise exposure from loud noise and her work environment."

26. Dr. Striplin, Dr. Fall, and Dr. Romett testified in deposition and elaborated on the opinions expressed in their reports.

27. Claimant was a credible witness.

28. Dr. Romett's opinions are credible and more persuasive than opinions in the record to the contrary. The ALJ credits Dr. Romett's opinions that the bilateral hearing loss and tinnitus are work-related but the vertigo and vestibular-type symptoms are not. The ALJ further credits Dr. Romett's opinions regarding treatment reasonably needed for the compensable components of her condition.

29. The noise to which Claimant was exposed at work exceeded any nonoccupational noise exposure.

30. Claimant proved by a preponderance of the evidence she suffered a compensable occupational disease due to of noise exposure at work. Specifically, Claimant developed mild bilateral sensorineural hearing loss and bilateral tinnitus due to her work. As noted, Dr. Romett's opinions regarding causation are credible and persuasive. Dr. Hattem, Dr. Fall, and Dr. Striplin agreed Claimant's headset could have caused hearing damage depending on the volume level. The ALJ also credits Claimant's credible testimony regarding the development of her symptoms and their association with the loud headset volume. Although the exact volume of the headset is unknown, Claimant described it as akin to a stereo "blasting" in her ears, a sensation reasonably within most people's experience. The loud bursts of sound became unpredictable when she switched to outbound sales in December 2015, which lessened her ability to mitigate the noise. Claimant's supervisor concluded the hearing problems were caused by "computer volume and phone headset volume." Given all the information available, the ALJ finds a work-related etiology far more likely than a coincidental and spontaneous development of symptoms from idiopathic factors. Based on the persuasive evidence, the ALJ finds Claimant's work more likely than not caused the hearing loss and tinnitus.

31. Claimant failed to prove her vertigo and other vestibular-type symptoms were proximately caused by her work.

32. Claimant was disabled from her regular job and suffered an injury-related wage loss commencing March 16, 2016.

33. Dr. Hattem declared Claimant at MMI on September 8, 2016.

34. There is no persuasive evidence Claimant received any disability benefits or wages between March 16, 2016 and September 8, 2016 to give rise to an offset.

CONCLUSIONS OF LAW

A. Claimant proved a compensable occupational disease in the form of bilateral sensorineural hearing loss and tinnitus.

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant proved she suffered a compensable occupational disease in the form of bilateral sensorineural hearing loss and bilateral tinnitus. The ALJ credits

Claimant's credible testimony regarding the development of her symptoms and their association with the loud headset volume. Although the exact volume of the headset is unknown, Claimant described it similar to a stereo "blasting" in her ears. The sound level was sufficiently bothersome that she routinely adjusted her earpieces and eventually started stuffing cotton in her ears. The loud bursts of sound became unpredictable when she switched to outbound sales in December 2015, which lessened her ability to mitigate the noise. Claimant's supervisor concluded the hearing problems were caused by "computer volume and phone headset volume." The ALJ also credits Dr. Romett's opinions regarding causation and reasonably necessary treatment. Dr. Hattem, Dr. Fall, and Dr. Striplin agreed Claimant's headset could have caused hearing damage depending on the volume level. Given all the available information, the ALJ finds a work-related etiology more likely than a coincidental and spontaneous development of symptoms from unknown factors. The persuasive evidence shows Claimant's hearing loss and tinnitus were more likely than not caused by her work.

B. Claimant is entitled to TTD benefits commencing March 16, 2016

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once the claimant establishes temporary disability, the right to benefits is measured by the degree of the wage loss, not the claimant's willingness to seek employment or the claimant's hypothetical ability to perform modified employment. *See Black Roofing Inc. v. West*, 967 P.2d 195 (Colo. App. 1998); *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987).

The persuasive evidence shows Claimant was disabled and suffered a wage loss commencing March 16, 2016 as a direct and proximate consequence of her industrial injury. Claimant was restricted from using a headset to communicate with customers and Employer had no modified work available within those restrictions. In light of these facts, Respondents' counsel agreed at the hearing Claimant is entitled to TTD benefits starting March 16, 2016 if the claim is found compensable.

C. Claimant's entitlement to TTD benefits ended on September 8, 2016 when Dr. Hattem declared her at MMI.

Once commenced, TTD benefits continue until the occurrence of one of the four terminating events specified in § 8-42-105(3). Termination of TTD is an affirmative defense that Respondents must prove by a preponderance of the evidence. *Strombitski*

v. Man Made Pizza, 4-403-661 (December 1, 2003). Section 8-42-105(3)(a) provides that TTD terminates when the claimant reaches MMI. The initial determination of MMI is made by a treating physician, and if either party disputes the ATP's determination, they must obtain a DIME. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Although the ALJ can resolve ambiguities in an ATP's opinion, the ALJ has no authority to question the ATP's MMI determination absent a DIME. *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996).

As found, Dr. Hattem placed Claimant at MMI on September 8, 2016. Although he opined Claimant still required medical treatment he did not believe it related to any work-related condition. Assessing the cause of a claimant's condition and need for treatment is "inherent" in determining MMI. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988); *Sinkey v. Paint Connection Plus*, W.C. No. 4-714-996 (March 2, 2009). An ATP's declaration of MMI necessarily reflects a determination that all conditions caused by the industrial injury are stable and no further treatment is reasonably expected to improve the compensable components of the injury. *Lopez v. South Valley Drywall*, W.C. Nos. 4-248-401; 4-302-144 (April 28, 1999). Dr. Hattem found Claimant's condition was not work-related and discharged her from further care. Although he did not specifically use the term "MMI," to the extent there is any ambiguity, the ALJ concludes his September 8 report constitutes a determination of MMI. If Claimant wishes to dispute Dr. Hattem's determination she was at MMI as of September 8, 2016, she must request a DIME.

ORDER

It is therefore ordered that:

1. Claimant's occupational disease claim in W.C. No. 5-010-179 is compensable.

2. To the extent not already provided, Insurer shall pay for reasonably necessary medical treatment from authorized providers to cure and relieve the effects of Claimant's bilateral hearing loss and tinnitus.

3. Claimant's request for medical benefits relating to vertigo and other vestibular-type symptoms is denied and dismissed.

4. Claimant's average weekly wage is $641.43 per the parties' stipulation.

5. Insurer shall pay Claimant TTD at the rate of $427.62 per week from March 16, 2016 through September 7, 2016.

6. Insurer shall pay Claimant interest at the statutory rate of 8% per annum on all benefits not paid when due.

7. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 30, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Claimant raised the issues of medical benefits: authorized provider and "enforcing Judge Margot Jones' order, dated January 20, 2017, awarding workers' compensation benefits for this compensable injury, 8% interest on all amounts not paid when due. The employer did not properly designate medical providers under the Act and therefore the right of physician selection transferred to the claimant."

Based upon a complete review of the evidence the Judge enters the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. On March 19, 2015, Claimant was involved in a motor vehicle accident.

2. Claimant's wife took him to Swedish Medical Center that same day. Swedish Medical Center HPI documents provide, "PT was the restrained driver and in an MVA, traveling at 40 m.p.h. PT hit a car head on that ran a red light, PT's airbags deployed, no LOC." Claimant underwent x-rays at Swedish that revealed no acute findings.

3. Claimant testified he reported the accident to his employer, and that Employer did not provide him with a choice of medical providers.

4. Claimant testified he retained Dianne Sawaya, Esq., for his motor vehicle accident case. Claimant testified Ms. Sawaya gave him a list of providers to choose from, and that he chose Patrick J. Noel, D.C. at Noel Chiropractic.

5. Claimant saw Dr. Noel on April 6, April 9, April 13, April 15, April 20, April 29, May 4, May 6, and May 11, 2015. Dr. Noel's records contain no mention of him referring Claimant to Dr. Allan.

6. Claimant sought care by Kenneth Allan, M.D. at Injury Solutions. The new patient evaluation indicates, "other healthcare providers: chiropractic: Patrick Noel, D.C." Dr. Allan's records do not support a finding that Dr. Noel referred Claimant to Dr. Allan. Rather, Dr. Allen's initial note provides, "The patient presented for evaluation and treatment on their own accord today with no prior scheduled appointment." In a note dated May 27, 2016, Dr. Lindenbaum recorded that "Initially, [Claimant] had been seen by Dr. Noll [sic], a chiropractor, but it was too far for him to drive; for that reason, he went to Injury Solutions."

7. Dr. Allan then referred Claimant to physical therapy and an MRI.

8. Claimant's attorney, Dianne Sawaya, referred Claimant to John Mark Disorbio, M.D. for a comprehensive psychological report.

9. Claimant later saw Robert A. Chinisci, Ph.D., a clinical psychologist and neuropsychologist. Dr. Chinisci listed "Personicare" as the referral source. Dr. Chinisci's records do not support a finding that Dr. Noel referred Claimant.

10. Claimant later saw Kevin S. Berry, DDC. Dr. Berry's records do not support a finding that Dr. Noel referred Claimant to Dr. Berry.

11. Claimant later saw cognitive therapist, Robert K. Veach, MA, C.D.M.S.. The initial intake shows the notes were sent to Personicare. The report does not support a finding that Dr. Noel referred Claimant Dr. Veach. Rather, Claimant's Initial Intake form states that "Dr. Chinisci referred [Claimant] to me."

12. Still later, Claimant saw S.D. Lindenbaum, M.D. His report does not support a finding that Dr. Noel referred Claimant to Dr. Lindenbaum. However, the report does indicate that Dr. Lindenbaum's office sent a facsimile to Claimant's lawyer, Dianne Sawaya.

13. The Judge specifically finds Claimant initially sought "emergent" treatment at Swedish Hospital and that under the emergency doctrine treatment provided at Swedish Hospital is "authorized."

14. The Judge specifically finds Claimant chose to treat with Dr. Noel. Therefore, Dr. Noel is Claimant's authorized treating provider.

15. No persuasive evidence suggests that Dr. Noel referred Claimant to Dr. Allan or to any other healthcare providers who Claimant saw during pendency of his claim. As such, the provider at Injury Solutions, Dr. Allan, Touchstone Imaging, physical therapy, the MRI, Dr. Disorbio, Dr. Chinisci, Dr. Berry, Dr. Veach and Dr. Lindenbaum are not authorized treating providers.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting

conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

In order for a Judge to find a healthcare provider to be authorized, the claimant must prove by a preponderance of the evidence either:

- the care was rendered due to an emergency,
- the care was rendered based on referral from the employer pursuant to rule 8-2 and statute,
- where no rule 8-2 choice of medical provider was timely provided, the provider the claimant chose in the first instance, or
- where in the natural progression of healthcare, care is provided by another provider on direct referral from the original authorized treating provider.

The ALJ concludes as a matter of law Claimant's treatment at Swedish was "authorized as it occurred due to an emergency.

The ALJ concludes as a matter of law that because Employer did not tender within seven (7) business days the rule 8-2 choice of providers, the choice of providers transferred to Claimant.

The ALJ concludes as a matter of law that Claimant chose Dr. Noel in the first instance, and Dr. Noel is authorized.

The ALJ concludes as a matter of law that Claimant failed to prove Dr. Noel referred him to Injury Solutions, Dr. Allan, Dr. Disorbio, Dr. Chinisci, Dr. Berry, Dr. Veach or Dr. Lindenbaum. Therefore, the ALJ concludes as a matter of law that none of these providers or their referrals are authorized or in the chain of authorized treating providers.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's emergency treatment at Swedish Hospital is authorized.

2. Claimant's authorized treating provider is Dr. Noel. Injury Solutions, Dr. Allan, Dr. Disorbio, Dr. Chinisci. Dr. Berry, Dr. Veach and Dr. Lindenbaum are not authorized treating providers.

3. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

DATED: July 30, 2018

/s/ Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
633 17th Street, Suite 400
Denver, CO 80202-3660

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to terminate Claimant's Temporary Total Disability (TTD) benefits effective June 23, 2017.

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment for which Yusuke Wakeshima, M.D. has requested prior authorization, including neurological evaluation by Hayley Burke, M.D., serial Doppler ultrasounds of the right upper and left lower extremities, trials of Botox injections, and a trigeminal nerve stimulator, is reasonable, necessary and causally related to Claimant's March 24, 2016 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant is a 76-year old male who worked for Employer as a Front End Manager. On March 24, 2016 he suffered admitted industrial injuries during the course and scope of his employment. When Claimant was walking with a customer to complete a propane tank exchange he slipped on an icy sidewalk, fell to the ground and struck his head.

2. After completing an Incident Report for Employer Claimant was transported by private vehicle to the North Suburban Emergency Room. He reported headaches and head pain as a result of a slip and fall at work just prior to his arrival. Claimant provided a past medical history that was significant for bile duct cancer, stroke, anemia and myocardial infarction. He also has a history of chronic kidney disease that was complicated by a right nephrectomy.

3. Following discharge from North Suburban, Claimant returned to employment until he was taken off work on June 30, 2016. On July 18, 2016 Claimant again returned to work with restrictions. However, Claimant was taken off work by Employer on March 15, 2017 due to concerns about his balance issues. On March 16, 2017 Insurer filed an Amended General Admission of Liability (GAL) acknowledging responsibility for Temporary Total Disability (TTD) benefits from March 15, 2017 until terminated.

4. On June 12, 2017 Claimant visited Authorized Treating Physician (ATP) Yusuke Wakeshima, M.D. for an examination. Dr. Wakeshima completed a WC-164 form keeping Claimant off work because "he would not be safe returning back to work with his current balance issues."

5. On March 26, 2017 the parties participated in a hearing before Administrative Law Judge (ALJ) Margot Jones. On June 23, 2017 ALJ Jones issued a Summary Order concluding that Claimant's hearing loss, dizziness and disequilibrium were not related to his March 24, 2016 industrial injuries. ALJ Jones also dismissed Claimant's request for Respondents to pay for pain medications including Oxycodone, Percocet and Norco because they were not reasonable, necessary or related to his March 24, 2016 industrial injuries.

6. On all dates subsequent to June 12, 2017 Dr. Wakeshima continued to restrict Claimant from all work activities. He commented that Claimant would be unsafe because of a "significant balance disorder."

7. On January 26, 2017 ATP Dr. Wakeshima requested prior authorization for serial Doppler ultrasound studies of the right upper extremity and left lower extremity as well as a trial of Botox injections and a trigeminal nerve stimulator. He also recommended a neurological evaluation with Hayley Burke, M.D.

8. On March 19, 2018 the parties conducted the pre-hearing evidentiary deposition of J. Carlos Cebrian, M.D. Dr. Cebrian testified that Dr. Wakeshima's referral to Dr. Burke for a neurological evaluation was not reasonable or necessary medical treatment for Claimant's March 24, 2016 industrial injuries. After conducting a physical examination and reviewing Claimant's medical records he detailed that Claimant has not had any improvement in his symptoms with any treatment. Furthermore, Claimant has already been evaluated by neurologist Fredric Zimmer, M.D. Claimant has also been evaluated and treated by Gregory Reinhardt, M.D., a physiatrist with fellowship training in brain injuries, and Kristin Mason, M.D. a physiatrist who regularly treats brain injuries. Dr. Cebrian summarized that another evaluation by another neurologist is not medically necessary.

9. Dr. Cebrian also explained that Dr. Wakeshima's request for a trial of Botox injections for Claimant was not reasonable and necessary. He remarked that Botox is used for a small subset of patients who suffer chronic migraines but have not improved with three different preventative classes of medications. Dr. Cebrian noted that Claimant has not been trialed on any preventative classes of migraine medications to warrant an attempt at using Botox. Moreover, Dr. Cebrian did not expect Claimant to obtain any benefit from Botox because of his lack of responses to prior medications.

10. Dr. Cebrian detailed that Dr. Wakeshima's request for serial Doppler ultrasounds of the right upper extremity and left lower extremity was not related to Claimant's March 24, 2016 industrial injuries. He explained that the purpose of the ultrasounds was to detect blood clots. Although physicians found a small blood clot in the brachial vein of Claimant's right arm, Dr. Cebrian reasoned that there was nothing about Claimant's March 24, 2016 mechanism of injury that would cause a blood clot in the right upper extremity or left lower extremity. Furthermore, Dr. Cebrian rejected Dr. Wakeshima's explanation that Claimant may have suffered blood clots as a result of immobility after his March 24, 2016 industrial accident. He detailed that blood clots typically occur when an extremity is completely immobilized after surgical intervention.

However, Claimant did not wear a brace after the March 24, 2016 accident and could move his right arm. Dr. Cebrian thus concluded that there was no medical reason for the serial Doppler ultrasounds recommended by Dr. Wakeshima.

11. Dr. Cebrian also addressed Dr. Wakeshima's recommendation for a trigeminal nerve stimulator. He explained that the device is similar to a TENS unit for the head. The patient places electrodes on his head and wears a halo to provide some kind of electrical stimulation and distract the brain. Dr. Cebrian noted that the trigeminal nerve stimulator is a relatively new device that has not been recognized by the Colorado Division of Workers' Compensation Medical Treatment Guidelines (*Guidelines*). Accordingly, Dr. Cebrian concluded that the trigeminal nerve stimulator does not constitute reasonable and necessary treatment for Claimant's March 24, 2016 industrial injuries.

12. Dr. Cebrian concluded that there is no additional medical treatment that would be reasonable and necessary to address Claimant's March 24, 2016 industrial injuries. He remarked that Claimant has reached Maximum Medical Improvement (MMI). Dr. Cebrian determined that Claimant was entitled to receive a 5% whole person impairment rating for his head injury and mild traumatic brain injury as a result of the March 24, 2016 accident.

13. Respondents have failed to demonstrate that it is more probably true than not they are entitled to terminate Claimant's TTD benefits. Respondents assert that Claimant's TTD benefits should be terminated effective June 23, 2017 because he suffered the subsequent intervening condition of a balance disorder that was not related to his March 24, 2016 industrial injuries. In fact, on June 23, 2017 ALJ Jones issued a Summary Order concluding that Claimant's hearing loss, dizziness and disequilibrium were not related to his March 24, 2016 industrial injury. Moreover, ATP Dr. Wakeshima restricted Claimant from all work activities because he would be unsafe based on a "significant balance disorder." Respondents reason that, because Claimant's inability to work for Employer was caused by balance issues unrelated to his industrial injuries, his TTD benefits should be terminated. However, an ALJ lacks authority to terminate TTD benefits absent one of the statutory conditions enumerated in §8-42-105(3)(a)-(d), C.R.S. Because Claimant has not reached MMI, returned to regular or modified employment, or received a written release to return to regular or modified employment by ATP Dr. Wakeshima, TTD benefits may not be terminated. Accordingly, Claimant's TTD benefits shall continue until terminated by statute.

14. Claimant has failed to prove that it is more probably true than not that the medical treatment for which Dr. Wakeshima has requested prior authorization, including a neurological evaluation by Dr. Burke, serial Doppler ultrasounds of the right upper and left lower extremities, trials of Botox injections and a trigeminal nerve stimulator, are reasonable, necessary and causally related to his March 24, 2016 admitted industrial injuries. Although Claimant has not contested Respondents denial of the preceding treatments, the prior authorization request from ATP Wakeshima reflects that the relatedness, reasonableness and necessity of the requested treatments are in dispute.

15. As outlined by Dr. Cebrian, Dr. Wakeshima's referral to Dr. Burke for a neurological evaluation was not reasonable or necessary medical treatment for Claimant's March 24, 2016 industrial injuries. Claimant has already been evaluated by neurologist Dr. Zimmer. He has also been examined and treated by Drs. Reinhardt and Mason for neurological concerns. Dr. Cebrian summarized that another evaluation by another neurologist is not medically necessary. Moreover, Dr. Cebrian persuasively explained that Dr. Wakeshima's request for a trial of Botox injections for Claimant was not reasonable and necessary. He remarked that Botox is reserved for a small subset of patients who suffer chronic migraines but have not improved with three different preventative classes of medications. Dr. Cebrian noted that Claimant has not been trialed on any preventative classes of migraine medications to warrant Botox treatment.

16. Dr. Cebrian detailed that Dr. Wakeshima's request for serial Doppler ultrasounds of the right upper extremity and left lower extremity was not related to Claimant's March 24, 2016 industrial injuries. He explained that the purpose of the ultrasounds was to detect blood clots. Although physicians found a small blood clot in the brachial vein of Claimant's right arm, Dr. Cebrian reasoned that there was nothing about Claimant's March 24, 2016 mechanism of injury that would cause a blood clot in the right upper extremity or left lower extremity. He also noted that, because Claimant's right arm was not immobilized after the March 24, 2016 accident, a blood clot was unlikely and there was thus no medical reason for the serial Doppler ultrasounds recommended by Dr. Wakeshima. Furthermore, Dr. Cebrian noted that the trigeminal nerve stimulator is a relatively new device that has not been recognized by the *Guidelines*. Accordingly, Dr. Cebrian persuasively concluded that the trigeminal nerve stimulator does not constitute reasonable and necessary treatment for Claimant's March 24, 2016 industrial injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

TTD Benefits

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

5. TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Section 8-42-107(8)(b)(I) & (II), C.R.S. provide that the initial determination of MMI is to be made by an ATP. If either party disputes the ATP's MMI determination, the claimant must undergo a Division Independent Medical Examination (DIME). The statute also provides that the ALJ lacks authority to determine MMI until there has been a medical determination of MMI by an ATP or DIME physician. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, W.C. Nos. 4-947-316-01&4-935-813-03 (ICAP, July 31, 2015); *see also Blue Mesa Forest v. Lopez,* 928 P.2d 831, 833 (Colo, App. 1996) (noting that "the initial determination of MMI shall be made by an authorized treating physician"). Finally, the ATP also determines whether a claimant's industrial injury prevents him from returning to work. *See Burns v. Robinson Dairy,* 911 P.2d 661 (Colo. App. 1995); *In Re Smith,* No. 4-733-532 (ICAP, Mar. 15, 2010).

6. As found, Respondents have failed to demonstrate by a preponderance of the evidence that they are entitled to terminate Claimant's TTD benefits. Respondents assert that Claimant's TTD benefits should be terminated effective June 23, 2017 because he suffered the subsequent intervening condition of a balance disorder that was not related to his March 24, 2016 industrial injuries. In fact, on June 23, 2017 ALJ Jones issued a Summary Order concluding that Claimant's hearing loss, dizziness and disequilibrium were not related to his March 24, 2016 industrial injury. Moreover, ATP Dr. Wakeshima restricted Claimant from all work activities because he would be unsafe based on a "significant balance disorder." Respondents reason that, because Claimant's

inability to work for Employer was caused by balance issues unrelated to his industrial injuries, his TTD benefits should be terminated. However, an ALJ lacks authority to terminate TTD benefits absent one of the statutory conditions enumerated in §8-42-105(3)(a)-(d), C.R.S. Because Claimant has not reached MMI, returned to regular or modified employment, or received a written release to return to regular or modified employment by ATP Dr. Wakeshima, TTD benefits may not be terminated. Accordingly, Claimant's TTD benefits shall continue until terminated by statute.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. As found, Claimant has failed to prove by a preponderance of the evidence that the medical treatment for which Dr. Wakeshima has requested prior authorization, including a neurological evaluation by Dr. Burke, serial Doppler ultrasounds of the right upper and left lower extremities, trials of Botox injections and a trigeminal nerve stimulator, are reasonable, necessary and causally related to his March 24, 2016 admitted industrial injuries. Although Claimant has not contested Respondents denial of the preceding treatments, the prior authorization request from ATP Wakeshima reflects that the relatedness, reasonableness and necessity of the requested treatments are in dispute.

9. As found, as outlined by Dr. Cebrian, Dr. Wakeshima's referral to Dr. Burke for a neurological evaluation was not reasonable or necessary medical treatment for Claimant's March 24, 2016 industrial injuries. Claimant has already been evaluated by neurologist Dr. Zimmer. He has also been examined and treated by Drs. Reinhardt and Mason for neurological concerns. Dr. Cebrian summarized that another evaluation by another neurologist is not medically necessary. Moreover, Dr. Cebrian persuasively explained that Dr. Wakeshima's request for a trial of Botox injections for Claimant was not reasonable and necessary. He remarked that Botox is reserved for a small subset of patients who suffer chronic migraines but have not improved with three different

preventative classes of medications. Dr. Cebrian noted that Claimant has not been trialed on any preventative classes of migraine medications to warrant Botox treatment.

10. As found, Dr. Cebrian detailed that Dr. Wakeshima's request for serial Doppler ultrasounds of the right upper extremity and left lower extremity was not related to Claimant's March 24, 2016 industrial injuries. He explained that the purpose of the ultrasounds was to detect blood clots. Although physicians found a small blood clot in the brachial vein of Claimant's right arm, Dr. Cebrian reasoned that there was nothing about Claimant's March 24, 2016 mechanism of injury that would cause a blood clot in the right upper extremity or left lower extremity. He also noted that, because Claimant's right arm was not immobilized after the March 24, 2016 accident, a blood clot was unlikely and there was thus no medical reason for the serial Doppler ultrasounds recommended by Dr. Wakeshima. Furthermore, Dr. Cebrian noted that the trigeminal nerve stimulator is a relatively new device that has not been recognized by the *Guidelines*. Accordingly, Dr. Cebrian persuasively concluded that the trigeminal nerve stimulator does not constitute reasonable and necessary treatment for Claimant's March 24, 2016 industrial injuries.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

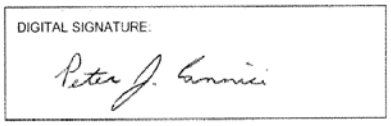
1. Respondents' request to terminate Claimant's TTD benefits effective June 23, 2017 is denied and dismissed.

2. Claimant's request for Respondents to pay for a referral to Dr. Burke, serial Doppler ultrasounds of the right upper and left lower extremities, trials of Botox injections, and a trigeminal nerve stimulator is denied and dismissed.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 23, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on September 30, 2017.

2. Whether Claimant has established by a preponderance of the evidence that the medical treatment he received at South Denver Cardiology and Littleton Adventist Cardiology was reasonable and necessary to cure or relieve the effects of his September 30, 2017 industrial injuries.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period September 30, 2017 through December 7, 2017.

5. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

.6. Whether Respondents have established by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on September 30, 2017 and his non-medical benefits should thus be reduced by fifty percent.

STIPULATIONS

The parties agreed to the following:

1. Video surveillance of Claimant's September 30, 2017 accident is admissible.

2. If the claim is found compensable Respondents are financially responsible for Claimant's medical care except his cardiology treatment from South Denver Cardiology and Littleton Adventist Cardiology.

FINDINGS OF FACT

1. Employer is in the business of renting trucks and equipment to customers. On September 18, 2017 Employer hired Claimant to work as a Customer Service

Representative. Claimant's job duties involved cleaning returned rental trucks. He earned $11.25 per hour.

2. On September 30, 2017 Claimant and co-workers Daniel Romero and Anthony Treo were working together to clean out the back of multiple rental trucks. Claimant testified that, after the trio had completed cleaning one of the trucks, he climbed on to the back of the truck to close the rear door. He pulled down the back door and planned to jump off the end of the truck. However, Mr. Romero started to drive the truck forward at a high rate of speed. Claimant attempted to hold on to the truck, but Mr. Romero made a sharp left turn. The motion caused Claimant to lose his grip and fall off the back of the truck on to concrete.

3. Claimant landed on the right side of his body and head. He briefly lost consciousness and was transported to Littleton Adventist Hospital. Claimant reported head, neck, right clavicle and right knee pain. Diagnostic testing revealed an intracerebral hemorrhage and an abnormal ECG. Subsequent CT scans of Claimant's head and facial bones confirmed hemorrhaging and edema. An echocardiogram was normal.

4. On October 3, 2017 Claimant was discharged from Littleton Adventist Hospital. He visited Concentra Medical Centers for additional treatment.

5. On October 11, 2017 Claimant visited South Denver Cardiology Associates for an evaluation. The physician noted that Claimant's initial electrocardiogram was abnormal and consistent with left ventricular hypertrophy. However, a subsequent echocardiogram did not reveal any evidence of hypertrophy or cardiomyopathy. There was normal left and right ventricular systolic function. After wearing an outpatient event cardiac monitor for several days he did not demonstrate any heart disease and was released from cardiac care.

6. After additional conservative care, Claimant visited Kathryn Bird, M.D. on November 16, 2017 for an examination. Dr. Bird remarked that Claimant's healing was "almost sufficient" to return to regular duty, but he required a recheck prior to discharge.

7. On December 7, 2017 Dr. Bird determined that Claimant had reached Maximum Medical Improvement (MMI). She released him to full duty employment.

8. Claimant's co-worker Mr. Romero testified at the hearing in this matter. He explained that on September 30, 2017 he was cleaning trucks with Claimant and Mr. Treo. After finishing one truck the trio was talking behind the vehicle. The back door of the truck was closed. Mr. Romero told the others that he was going to move the truck into a parking space. He climbed into the cab of the vehicle while Mr. Treo walked away to begin work on another truck. Mr. Romero started the truck, honked the horn and drove to a parking space in another area of Employer's lot.

9. Claimant testified that he climbed on to the back of the truck to close the door to the vehicle. However, Mr. Romero and Mr. Trio completed witness statements

shortly after Claimant's September 30, 2017 fall. The statements confirm that the truck had been cleaned and the back door was closed.

10. Contrary to Claimant's testimony, Mr. Romero commented that the rear door of the truck could only be fully open or closed. The back door will not remain partly open. Mr. Romero specified that there was no legitimate work reason for Claimant to be on the back of the truck when it started moving.

11. Videotape surveillance confirms Mr. Romero's testimony and the witness statements. The video shows Claimant climb up on the back of a truck and face away from the vehicle. The surveillance does not depict Claimant pulling down the door of the vehicle because it is already closed. Claimant did not attempt to signal the driver, waive his arms or jump from the vehicle when it began moving. His position of facing away from the truck while standing on the bumper reflects that he was attempting to ride on the vehicle until it reached another area of Employer's parking lot. In fact, Claimant acknowledged that he was aware the truck was only traveling a short distance within Employer's lot in order to be parked.

12. Claimant has failed to demonstrate that it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer. The record reflects that Claimant was injured on September 30, 2017 while engaging in horseplay by riding on the bumper of a rental truck. Claimant and co-workers Mr. Romero and Mr. Treo were cleaning rental trucks at Employer's facility. After finishing one truck the trio was talking behind the vehicle. Mr. Romero credibly testified that he told the others that he was going to move the truck into a parking space. He climbed into the cab of the vehicle while Mr. Treo walked away to begin work on another truck. Mr. Romero started the truck, honked the horn and drove to a parking space in another area of Employer's lot. Although Claimant testified that he climbed on the back of the truck to close the rear door before it drove away, Mr. Romero and Mr. Treo completed witness statements confirming that the truck had been cleaned and the back door was closed. Mr. Romero specified that there was no legitimate work reason for Claimant to be on the back of the truck when it started moving. Furthermore, video surveillance shows Claimant climb up on to the back of a truck and face away from the vehicle. The surveillance does not depict Claimant pulling down the door of the vehicle because it is already closed. Claimant did not attempt to signal the driver, waive his arms or jump from the vehicle when it began moving. His position of facing away from the truck while standing on the bumper reflects that he was attempting to ride on the vehicle until it reached another area of Employer's parking lot.

13. Riding on the bumper of the rental truck after the vehicle was cleaned constituted a deviation from employment so substantial as to remove it from the employment relationship. The deviation from employment was significant because Claimant and his co-workers had finished cleaning the vehicle and closed the rear door. The activity of riding on the bumper did not constitute an employment duty but was instead a distinct activity designed to reach another area of Employer's parking lot. The deviation was brief, but Claimant had ceased working when he climbed on to the truck. He engaged in an activity outside of his employment duties for his sole benefit that

caused his injuries. Therefore, Claimant's deviation constituted horseplay and thus removed the activity from the employment relationship. Accordingly, Claimant's injuries did not arise out of his duties for Employer on September 30, 2017.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

5. Regardless of the theoretical framework that is applied, the issue is whether the "claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing activity for his sole benefit." *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1,

2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

6. When the employer asserts a personal deviation from employment activities "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). However, ministerial actions for an employee's personal comfort do not constitute a substantial deviation from employment unless the personal need being met or the means chosen by the employee to satisfy his personal comfort is unreasonable. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008); *see Larson's Workers' Compensation Law,* §21.00. In *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 718 (Colo.App. 1995), the court announced the following four part test to analyze whether an activity constitutes a deviation or horseplay: (1) The extent and seriousness of the deviation; (2) the completeness of the deviation; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is a factual determination for the ALJ. *Id.*

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer. The record reflects that Claimant was injured on September 30, 2017 while engaging in horseplay by riding on the bumper of a rental truck. Claimant and co-workers Mr. Romero and Mr. Treo were cleaning rental trucks at Employer's facility. After finishing one truck the trio was talking behind the vehicle. Mr. Romero credibly testified that he told the others that he was going to move the truck into a parking space. He climbed into the cab of the vehicle while Mr. Treo walked away to begin work on another truck. Mr. Romero started the truck, honked the horn and drove to a parking space in another area of Employer's lot. Although Claimant testified that he climbed on the back of the truck to close the rear door before it drove away, Mr. Romero and Mr. Treo completed witness statements confirming that the truck had been cleaned and the back door was closed. Mr. Romero specified that there was no legitimate work reason for Claimant to be on the back of the truck when it started moving. Furthermore, video surveillance shows Claimant climb up on to the back of a truck and face away from the vehicle. The surveillance does not depict Claimant pulling down the door of the vehicle because it is already closed. Claimant did not attempt to signal the driver, waive his arms or jump from the vehicle when it began moving. His position of facing away from the truck while standing on the bumper reflects that he was attempting to ride on the vehicle until it reached another area of Employer's parking lot.

8. As found, riding on the bumper of the rental truck after the vehicle was cleaned constituted a deviation from employment so substantial as to remove it from the employment relationship. The deviation from employment was significant because Claimant and his co-workers had finished cleaning the vehicle and closed the rear door. The activity of riding on the bumper did not constitute an employment duty but was instead a distinct activity designed to reach another area of Employer's parking lot. The deviation was brief, but Claimant had ceased working when he climbed on to the truck. He engaged in an activity outside of his employment duties for his sole benefit that caused his injuries. Therefore, Claimant's deviation constituted horseplay and thus removed the activity from the employment relationship. Accordingly, Claimant's injuries did not arise out of his duties for Employer on September 30, 2017.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 19, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

_____
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on October 5, 2017.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to medical benefits for his October 5, 2017 injury and specifically whether he has established that the right knee scope, meniscectomy, and chondroplasty recommended by Mark Failinger, M.D. is reasonable, necessary, and causally related to an October 5, 2017 injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability benefits and temporary total disability benefits.

4. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 43-year-old man who is employed by Employer.

2. Claimant has worked for Employer for over ten years with job duties that include preparing food orders for delivery, lifting/moving heavy boxes of food items, and performing deliveries. Claimant typically worked Monday through Friday and overtime hours.

3. Claimant had concurrent employment at a Mexican restaurant and typically worked Friday evenings, and all day shifts on Saturday and Sunday.

4. On October 5, 2017 Claimant was working as a food delivery driver. Claimant alleges that on that date he sustained an acute work related injury to his right knee. Claimant testified that he was performing deliveries that day and carrying some produce to put on a two-wheel dolly and that he twisted his right knee. Claimant testified that he was running behind with the truck and driving that day and that he continued work and finished his route but that the next day he had heavy swelling and made a report of injury.

5. On October 6, 2017 Claimant was evaluated by Valerie Skvarca, PA. Claimant reported that he was delivering and carrying heavy 60 pound cases of food at work and twisted his right knee while carrying the cases in and out of his truck. Claimant reported pain in his right anterior and posterior knee at a level of 8/10. Claimant was noted to have a body mass index of 38.62. Claimant reported no prior injury and that he played soccer occasionally with his last game more than 1 month ago. PA Skvarca noted

swelling in the medial and lateral aspect of the right knee, tenderness diffusely over the anterior knee and posterior knee, crepitus with palpation, and limited range of motion in all planes with pain. PA Skvarca assessed right knee strain. *See* Exhibits 3, D.

6. Claimant also underwent physical therapy on October 6, 2017. Claimant reported that he had a normal day at work making deliveries and doing some work in the warehouse afterwards with about 10 hours of work. Claimant reported he noted pain in his right knee as he was working but that he was able to continue. Claimant reported constant pain with diffuse swelling. Claimant reported a prior right knee injury 17 years prior while playing soccer and that he had no knee issues since then. *See* Exhibit C.

7. On October 9, 2017 Claimant was evaluated by Kathy Okamatsu, NP. Claimant reported that he had been wearing tennis shoes and was in the process of lifting and carrying a case of food weighing approximately 60 pounds from the inside of his delivery truck when he twisted his right knee. Claimant reported continued pain that was not getting better. Claimant was noted to have no joint swelling or stiffness and tenderness over the lateral and medial joint lines. *See* Exhibit 3.

8. On October 24, 2017 Claimant underwent an MRI of his right knee. The impression provided was: undersurface horizontal tear of the medial meniscus, tri compartmental osteoarthritis with moderate knee joint effusion and synovitis, lateralization of the patella within the trochlear groove with bone on bone in the lateral patellofemoral compartment, and .8x1.6 cm near full thickness cartilage defect to the neutral weight bearing surface medial femoral condyle and a region of grade 3 cartilage fissuring within the flexion weight bearing surface of the lateral femoral condyle. *See* Exhibits 5, F.

9. On November 9, 2017 Claimant was evaluated by Mark Failinger, M.D. Claimant reported that he injured his right knee on October 5 when he was carrying things and twisted his knee. Claimant reported that he had pain, discomfort, and swelling. Claimant reported pain on the inner side of the knee and that he had pain with squatting, stairs, and ladders. Claimant declined to provide his height and weight. Claimant had some discomfort in the medial joint line of his right knee and no pain in the lateral joint line. Dr. Failinger noted some retropatellar crepitus and range of motion lacking a few degrees on full extension and flexion. Dr. Failinger noted that an MRI of the right knee showed medial meniscus tear and severe loss of the articular cartilage in the femoral trochlea and patella. Dr. Failinger provided the impression of: right knee medial meniscus tear; right knee patellofemoral degenerative joint disease; and some medial compartment chondromalacia. *See* Exhibits 6, D, E.

10. Dr. Failinger went through the pathology with Claimant and explained the risks, alternatives, and benefits of surgery versus injections and recommended Claimant undergo injections. Claimant declined injections and said he wanted to get his knee "fixed." Dr. Failinger explained in great detail that there was no fix for Claimant's knee as his cartilage was gone and his meniscus was torn. Dr. Failinger opined that if Claimant really wanted surgery the only thing they could do would be to clean things up. Dr.

Failinger noted that Claimant knew he would likely need a knee replacement and that they would hopefully buy Claimant some time before a knee replacement. Dr. Failinger again recommended injections and also viscosupplemenation. Claimant declined and indicated he wanted the surgery. Dr. Failinger noted that Claimant knew there were no guarantees given his arthritic condition. Dr. Failinger noted they would try to get approval and put in a request for surgery. *See* Exhibits 6, D, E.

11. On December 1, 2017 Jon Erickson, M.D. performed a physician review. Dr. Erickson noted that Claimant had sustained a form of twisting injury to his right knee when loading 60 pound bags of product into the back of a truck. Dr. Erickson noted that the right knee MRI showed advanced chondral damage in the medial femoral condyle, advanced bone on bone arthritic changes in the patellofemoral joint, and tri compartmental periarticular osteophytes consistent with advanced tri compartmental osteoarthritis. Dr. Erickson noted that Dr. Failinger had discussed the poor results usually seen with arthroscopic debridement. Dr. Erickson noted that the American Academy of Orthopedic Surgeons had issued a position letter indicating that arthroscopic debridement in the face of advanced end-stage osteoarthritis was not recommended. Dr. Erickson opined that the clinical results with the procedure are less than good and usually result in eventually a total knee replacement and opined that a total knee replacement appears to be what Claimant requires. Dr. Erickson recommended a denial of the surgical request. Dr. Erickson recommended vigorous non operative treatment with possible steroid injection and opined that if Claimant did not note substantial improvement and continued to be severely symptomatic, Claimant would have to address issues with his private healthcare insurance. Dr. Erickson opined that on the MRI report it was clear that there was no evidence of aggravation or worsening of Claimant's severe pre-existing condition. *See* Exhibits 2, A.

12. On December 21, 2017 Claimant was evaluated by Dr. Failinger. Claimant reported that surgery was denied because they told him his arthritis caused his meniscal tear. Claimant reported sometimes having a little discomfort around the kneecap but that his pain was mostly in the inner side of the knee particularly with loading his knee and weight bearing and turning, twisting, squatting. Dr. Failinger opined that it was incorrect that Claimant's arthritis caused a meniscus tear. Dr. Failinger opined that Claimant had meniscus pain and that it was likely caused by his work injury and appeared as though the meniscus pathology was work related. Dr. Failinger opined that Claimant's arthritis was not work related. Claimant underwent a cortisone injection to see if it would settle down his right knee complaints and Dr. Failinger continued to recommend the meniscectomy surgery. *See* Exhibit E.

13. On January 4, 2018 Claimant was evaluated by Dr. Failinger. Dr. Failinger opined that Claimant's arthritis was pre-existing but was probably flared up. Dr. Failinger opined that the biggest problem was the meniscus where Claimant hurts and opined that it appeared to be an extension of a previous tear and/or a new tear. Dr. Failinger noted that Claimant was not doing well and suggested surgery to try to rectify Claimant's condition since Claimant had not done well with conservative measures. Dr. Failinger noted that he would submit the request again for surgery. *See* Exhibit E.

14. On January 16, 2018 Peter Weingarten, M.D. reviewed the surgery request. Dr. Weingarten opined that Claimant had a complex degenerative tear of the meniscus which was not acute or traumatic. Dr. Weingarten opined that Claimant had advanced tri compartmental osteoarthritis. He concurred with Dr. Erickson's prior denial of the meniscectomy and opined there was a poor prognosis for arthroscopic surgery to treat advanced arthritis. Dr. Weingarten opined that Claimant's problem was basically arthritis and not the degenerative meniscus. *See* Exhibit B.

15. On February 12, 2018 Claimant was evaluated by Keith Cook, M.D. Claimant walked in due to pain that started the day prior and reported that his pain increased a lot the day prior and was almost back to the level at the time of the initial injury in October. Claimant indicated he wanted to try being off work for a couple of days and wanted to get another injection. Claimant's knee was injected and he was taken off work that day and February 13. *See* Exhibit D.

16. On March 8, 2018 Claimant was evaluated by Dr. Failinger. Dr. Failinger noted again that Claimant's pain seemed to be coming from the medial meniscus and not the patellofemoral region and again recommended surgery for resection of the meniscus. Dr. Failinger noted that Claimant was on hold for surgery pending an independent medical evaluation. *See* Exhibit E.

17. On March 21, 2018 Claimant underwent an independent medical evaluation performed by Dr. Erickson. Claimant reported that he was working full duty but that he had persisting and moderate knee pain primarily medial parapatellar following a twisting work injury to the right knee. Claimant reported that on the date of injury he was in the back of a delivery truck loading supplies onto a two-wheel dolly. Claimant reported that on one occasion his tennis shoe got stuck and he twisted his right knee and had some pain but no pop. Claimant reported that he did not pay attention and worked through the remainder of the day and overtime and closed the shop. Claimant reported that the next morning, his knee was swollen and painful and he went to work and reported the injury and was referred for treatment. Dr. Erickson noted that he had previously reviewed a surgery request and found no evidence on the MRI of any acute trauma that would herald aggravation or worsening of Claimant's underlying condition. Dr. Erickson noted that after his prior review, Dr. Failinger had opined that Claimant's meniscus tear was not caused by arthritis and that Claimant had meniscal symptoms caused by the work injury. He noted that Dr. Failinger also found very little pain in the patella and felt that most of the discomfort was along the medial joint line and that Claimant's pre-existing osteoarthritis had likely been flared up and that the pre-existing medial meniscal tear had been re-torn or complicated by a new tear and had re-submitted a surgical request. *See* Exhibit A.

18. Dr. Erickson noted that the new surgical request was reviewed by Peter Weingarten, M.D. and that Dr. Weingarten opined that the medial meniscal tear was not acute or traumatic and that Claimant suffered from advanced pre-existing right knee osteoarthritis. Dr. Weingarten also recommended denial of the surgical request. Dr. Erickson noted that Claimant had never stopped working after his injury and that although

Claimant reported an increase in pain, Claimant was able to tolerate his work activities including his second job at a Mexican restaurant in Denver. Claimant reported that he had no symptoms or difficulties before October of 2017 and that now he has popping and swelling in the right knee joint and pain in the patella. *See* Exhibit A.

19. Dr. Erickson reviewed medical records and performed a physical examination. Dr. Erickson opined that Claimant was very severely obese with a body mass index of 40.72. Dr. Erickson provided the impression of tri compartmental osteoarthritis of the right knee, severe in the medial and patellofemoral compartments, with no evidence of aggravation or worsening following a minor knee injury on October 5, 2017. Dr. Erickson noted that Claimant's immediate symptoms were not severe and did not require immediate medical attention and that imaging studies failed to show evidence of any acute trauma and only showed severe pre-existing osteoarthritis. Dr. Erickson opined that the history of a twist accompanied by pain with negative acute imaging dictated a minor sprain/strain which was appropriately treated with modification of work activities, anti-inflammatory medication, and appropriate rehabilitation program. He opined that he would assume that in relatively short order, the minor injury resolved with no disability. Dr. Erickson noted Dr. Failinger's opinion that Claimant had an acute meniscal tear on October 5, 2017 but disagreed and noted that an expert radiologist opined that the meniscal tear was degenerative, atraumatic, and without evidence of an acutely displaced flap and therefore he opined that the proposed surgery was wholly and solely directed at Claimant's pre-existing condition. Dr. Erickson also opined that the proposed surgery would not be prudent given Claimant's severe patellofemoral symptomatic arthritis and that a total knee arthroplasty under Claimant's private healthcare insurance would be a more appropriate plan. *See* Exhibit A.

20. Dr. Erickson disagreed with Dr. Failinger's opinion on the cause of the medial meniscal tear. Dr. Erickson noted there was substantial research documenting that advancing arthritis can cause degenerative meniscal tears without the necessity of trauma. Dr. Erickson opined that when a traumatic meniscal tear occurs, it is readily evident on imaging studies with a displaced flap or bucket handle and surrounding soft tissue edema. Dr. Erickson opined that the injury on October 5, 2017 did not cause any objective evidence of aggravation or worsening of Claimant's pre-existing advanced osteoarthritis and that the most likely non occupational risk factors for the development of Claimant's condition are his age, pre diabetic condition, and most significantly his body habitus. Dr. Erickson opined that Claimant's pre-existing advanced osteoarthritis became symptomatic not because of an injury but because his disease is progressive. *See* Exhibit A.

21. Dr. Erickson testified at hearing consistent with his reports. He testified that he evaluated Claimant and went over the history with Claimant in great detail. He concluded that Claimant sustained no acute injury and that Claimant had advanced bi-compartmental osteoarthritis and a degenerative medial meniscus tear. Dr. Erickson testified that it was easy to tell if a meniscus tear was acute or degenerative and that there was no question that Claimants' meniscus tear was a degenerative tear. He opined that Claimant sustained no injury or a relatively minor injury. Dr. Failinger opined that the

condition on the MRI of Claimant's knee takes years to develop and that the meniscal tear did not occur on October 5, 2017 and was there prior to October. Dr. Failinger testified that the 17-year-old knee injury Claimant mentioned in physical therapy would make sense since it was a little unusual to see someone with Claimant's right knee condition at Claimant's young age but with a prior injury, pounding, and slamming with soccer it made sense. Dr. Failinger opined that nothing in Claimant's knee changed due to the October 5, 2017 injury and opined that the surgery recommended was not likely to help Claimant. Dr. Failinger opined that Claimant had some pain in the medial area on examination but that most of his pain was in the patellofemoral compartment which is where Claimant's arthritis is the worst. He opined that Claimant certainly would have needed treatment even without the October 5, 2017 incident.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish, by a preponderance of the evidence, that he sustained a compensable work related injury on October 5, 2017. The opinions of Dr. Erickson are found credible and persuasive. Claimant has a severe pre-existing degenerative condition in his right knee. Claimant's meniscal tear is degenerative and not acute. Claimant's need for surgery and/or any treatment is due to his underlying and pre-existing condition. Claimant has failed to establish a causal connection and has failed to show that his employment aggravated or accelerated his severe underlying condition. Rather, Claimant had symptoms at work as would be expected in a severely degenerative knee. Claimant's pain got better and swelling went down and then he had another flare up later on in treatment. This is the expected course for a severely damaged and arthritic knee with expected periods of pain flare-ups. Dr. Erickson is credible and persuasive that the meniscus tear is clearly a degenerative tear and that it predated October 5, 2017. The weight of the overall evidence does not support Claimant's contention that he sustained an acute work related injury on October 5, 2017. The claim is denied and dismissed.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work related injury. His claim is denied and dismissed.

2. As Claimant has not sustained a compensable injury, the remaining issues are not addressed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 23, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven, by a preponderance of evidence, that he sustained a compensable injury or occupational disease to his left foot.

II. Whether Claimant has proven, by a preponderance of evidence, that he is entitled to reasonable and necessary medical benefits for his left foot.

III. Whether Claimant has proven, by a preponderance of evidence, that he is entitled to temporary partial and temporary total disability benefits.

IV. Whether Dr. Robert S. Anderson is an authorized treating provider.

STIPULATIONS

The parties stipulated that Claimant's Average Weekly Wage is $1,722.11.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a thirty-nine-year-old package car driver for United Parcel Service, who alleged an injury to his left foot stemming from a June 1, 2016 incident. (Hearing Transcript from June 14, 2018 "Tr." at 18). Claimant alleged that while entering the package car he grabbed the handrail to climb in. When he went to climb in the truck he allegedly let go of the handrail and fell back. When he went to jump back in he felt a "pop" in his foot. (Tr. at 21-22).
2. Claimant stated that approximately three to four days later he noticed a bump on the bottom of his left foot. (Tr. at 22). Claimant stated that he showed the bump to his supervisor Dan Kelly. According to Claimant, no report was ever filed as the parties agreed to see how it went. (*Id.*)
3. Claimant did not seek treatment or report the alleged injury for over a year. Claimant continued to work full duty from June 1, 2016 through August 3, 2017. On June 20, 2017, Claimant sought treatment with his primary care physician. Claimant complained of pain in his left foot. The examination revealed a palpable nodule to the left plantar foot near the heal. Claimant was diagnosed

with plantar fascial fibromatosis. (Respondents Hearing Exhibits ("RHE") RHE I at 36-37).

4. Claimant initially treated at Concentra on June 22, 2017. Claimant stated that he was working approximately one year ago when he felt a "pop" in his foot with immediate pain. (RHE J at 53). Claimant stated that a bump grew on the arch of his foot and the pain progressed throughout the past year. Claimant was diagnosed with a sprain of the left foot and plantar fasciitis. (*Id.*)

5. On July 11, 2017, Claimant underwent an MRI on his left foot. The MRI revealed plantar fibromatosis at the mid portion of the medial band of the plantar fascia. (RHE K at 113).

6. On August 11, 2017, Claimant was examined, at the referral of his primary care physician, by Dr. Dan Mallet at Front Range Foot and Ankle. Claimant complained of a lump which formed under the foot in the arch on his left foot. (RHE N at 138). Claimant stated that the lump was very painful and had been present for approximately one year. Claimant was diagnosed with plantar fascial fibromatosis. (RHE N at 139).

7. On September 27, 2017, Claimant was referred to Colorado Orthopedic Consultants through the workers' compensation system. The record indicated that Claimant complained of sharp pain in his left foot. (RHE P at 150). The records revealed the examination consisted of focal swelling consistent with plantar fibroma along the medial aspect of the plantar fascia underneath the midfoot. The diagnosis was consistent with the previous medical providers. (*Id.*) An injection was administered during this examination.

8. Claimant underwent an Independent Medical Examination (IME), with Dr. Paul Stone, on October 6, 2017. (RHE H). Dr. Stone is an expert in podiatric medicine and has been practicing in the field for over thirty-five years. Dr. Stone is currently the residency director for Presbyterian St. Luke's Hospital. Dr. Stone noted that Claimant presented to the IME with symptoms consistent with Ledderhose disease of the central band medial aspect of the left plantar fascia. Dr. Stone pointed out that this is the typical place for a hereditary plantar fibromatosis to occur. (RHE H at 16).

9. Dr. Stone examined Claimant and performed a complete medical records review. *Id.* The record noted that Claimant discovered a bump on the left arch of his foot in 2016. Approximately, one year later the pain became more severe and he went to see his primary care physician. Claimant was initially diagnosed with a neuroma. (*Id.*) Claimant stated that the lesion became larger and more painful as time progressed. Claimant further noted the left arch pain is aggravated when he gets in and out of his vehicle at work. The record indicated that Claimant is very active in his daily life running 5k's, hiking, and riding his motorcycle. (*Id.*)

10. Dr. Stone agreed with the prior medical history in this claim and agreed with the diagnosis of plantar fibromatosis of the central midportion of the central band of the plantar fascia and not the medial band. (RHE H at 17). Dr. Stone diagnosed

Claimant with Plantar fasciitis of the left foot, also known as Ledderhose's disease.

11. Dr. Stone noted that Claimant was of German decent which is common ancestry for the development of Claimant's condition in this claim. (RHE H at 18). Dr. Stone credibly opined that Claimant's condition is not a work-related injury. (*Id.*) Dr. Stone elaborated that once someone develops a plantar fibroma especially if it becomes large and painful, placing the arch of the foot on a step repetitively can certainly be aggravating to an already enlarged mass in the arch. (*Id.*) Dr. Stone reiterated in his testimony that walking, or stepping on a step, is not aggravating the condition, but simply causing pain from the condition being present. Dr. Stone opined that in his expert opinion he did not believe that the current case resulted from an actual injury. (*Id.*)

12. Dr. Stone ultimately opined that the based on a degree of medical probability, Claimant did not sustain a work-related injury or aggravation to his left foot on June 1, 2016. It is Dr. Stones' opinion the current complaints of left foot pain are a natural progression of a hereditary and naturally occurring condition. Dr. Stone concluded that from his discussion with the patient, from the mechanism of the alleged injury described, the diagnosis, and his thirty-five years of podiatry experience that Claimant did not sustain a work-related injury.

13. On December 26, 2017, Claimant underwent an examination with a podiatrist Dr. Robert Anderson. Dr. Anderson examined Claimant and noted a very firm enlargement subcutaneous mass involving the medial aspect of the central band of the plantar fascia. Dr. Anderson noted that plantar fibroma is a benign lesion, but due to the irregularity if the collagen fibrils as a result of this mass it leads to discomfort. Dr. Anderson did not provide his opinion regarding the work-relatedness of the condition. (RHE Q at 172).

14. Dr. Anderson issued an addendum to his report on December 27, 2017. (RHE Q at 177) Dr. Anderson stated in the second report that a plantar fibrous tumor occurs naturally in the plantar fascia. They are slow growing and get to a size where they can be aggravated by activity. Dr. Anderson opined that certainly walking, standing, and job duties are enough to aggravate and cause chronic discomfort to this pre-existing benign fibrous tumor of the plantar fascia. (*Id.*) Dr. Stone testified at hearing that he trained Dr. Anderson. Dr. Stone credibly testified that he agreed with Dr. Anderson that the tumor occurs naturally, he agreed that they are slow growing, and he agreed with Dr. Anderson that they can get to a size where they can be aggravated by activity. Dr. Stone testified that in his expert opinion, Dr. Anderson is referring to aggravation in the same way he is. When the growth becomes big enough, anything you do, even walking down the stairs at home will aggravate it in the sense that it hurts. It is the growth that is uncomfortable. (Tr. at 55-56). Dr. Stone opined that the activity does not cause the growth to grow, but simply causes pain. (Tr. at 56).

15. The parties proceeded to hearing on June 14, 2018, over the issues of compensability, temporary indemnity benefits, and ongoing medical benefits.

16. Claimant testified on his own behalf. Claimant recounted the history of his prior symptomology and treatment. Claimant testified that on June 1, 2016, he began to enter the package car and grab the handrail when he slipped and fell back. He allegedly felt a pop in his left foot and felt a burning and irritation in the foot. (Tr. at 21-22). Claimant stated that he initially did not report the injury and did not think much of it as everyone is sore at work. A couple days later he showed the bump on his foot to his supervisors. Claimant stated that no formal report was filed. He stated that it was "one of those let's see how it turns out." (Tr. at 22).

17. Claimant testified that after the pain increased in 2017, he reported the alleged injury and was instructed to go to Concentra. (Tr. at 24). Claimant testified that he does not have any other health conditions and that he was "a pretty healthy guy." (Tr. at 26).

18. Dan Kelly testified at the hearing as an employer witness. Mr. Kelly was subpoenaed to hearing at the request of Claimant. Mr. Kelly testified that he remembered speaking with Claimant back in 2016. He testified that Claimant came into his office and showed him a bump on his foot. (Tr. at 39-40). Mr. Kelly testified that he always asks employees if the injury occurred at work. He further testified that he did not recall Claimant stating that the foot pain happened at work. (Tr. at 40). Pursuant to Mr. Kelly, Claimant never approached him regarding his foot at any point between 2016 and his retirement in 2017. (*Id.*)

19. Dr. Stone testified as Respondents expert at hearing. He credibly testified that Claimant has a condition known as plantar fibromatosis or Ledderhose disesae, which is a hereditary proliferation of the fibrous tissue in the plantar fascia. (Tr. at 46). Dr. Stone testified that the fibrosis grows by the proliferation of cells known as fibrocytes, which Dr. Stone explained is essentially a benign tumor which grows. (Tr. at 47). Dr. Stone testified that fibromas, as seen in this case, are more common in males between the ages of 20-40, and most common in males of Scandinavian descent. Dr. Stone testified that Claimant meets the general indicators for the condition. (Tr. at 48).

20. Dr. Stone testified that when the Claimant stepped down and felt a pulling on the alleged date of injury, that he likely felt the bump that was present at the time of the injury. (Tr. at 49). Dr. Stone noted that fibromatosis is an actual hyperproliferation, it is a physiologic turning on of the fibrocytes. This is why there is a hereditary component because there is a genetic predisposition to develop this abnormal growth. (*Id.*)

21. Dr. Stone credibly testified at hearing that repeated trauma to the foot is not a factor in causing a person to develop plantar fibromatosis. Dr. Stone credibly testified that Claimant's contention that he stepped down, felt a "pop," and noticed a bump almost immediately, does not correlate with a traumatic onset of plantar fibromatosis. Dr. Stone testified that following a traumatic event it would take months for the bump to develop. Additionally, Claimant's ability to continue working full-duty, without treatment or complaints following the alleged date of injury for over a year, suggests that he did not suffer an acute injury as serious as a tear in the foot which would ultimately result in a plantar fibromatosis.

22. Dr. Stone testified that the effect of walking, standing, wearing certain shoes, can aggravate the pain and cause the patient to be aware of the symptomatology but the growth is not affected. The fact that patients are walking makes them more aware of the pain, but does not increase the size of the mass. (Tr. at 52). The tumor grows at its natural course and simply walking on the mass does not accelerate the condition it is just the feeling of pain as a symptom of the condition. (Tr. at 53).

23. Dr. Stone credibly testified that to a reasonable degree of medical probability that Claimant did not sustain a work-related injury to his left foot. (Tr. at 50). He testified that in his expert medical opinion, the mass in Claimant's foot began to grow at some point, but was never recognized until Claimant became aware of it. The growth has continued to grow by its natural course, it became more and more symptomatic to the point where it now hurts with every step. Dr. Stone credibly testified this is natural course of Ledderhose Disease - plantar fibromatosis. (Tr. at 50 – 51).

24. Claimant did not suffer an injury to his left foot on June 1, 2016, while getting into his delivery truck.

25. Claimant suffers from Ledderhose Disease - plantar fibromatosis – which is a hereditary condition and occurred spontaneously.

26. Claimant's work activities did not cause or aggravate his Ledderhose Disease - plantar fibromatosis. The condition has naturally progressed to where the mass has increased in size and has become more symptomatic to the point where it now hurts with every step. Such progression in size and symptoms is the natural course of Ledderhose disease – plantar fibromatosis.

27. The mass is painful when Claimant puts pressure on it by getting into his work truck or by walking, but such activities have not aggravated or accelerated the underlying condition.

28. Claimant has pain when he walks, regardless of whether he is working.

29. Claimant's symptoms at work merely represent the result and progression of his pre-existing Ledderhose disease – plantar fibromatosis - that is unrelated to his employment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. §

8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven, by a preponderance of evidence, that he sustained a compensable injury or occupational disease to his left foot.

a. Whether Claimant has proven, by a preponderance of the evidence, that he sustained a compensable injury.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.

Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

It is Claimant's position that he sustained an acute injury to his left foot while attempting to reenter his truck on June 1, 2016. Claimant stated that he felt a "pop" in his foot followed by pain. He testified that two days later he noticed a bump on his left foot, which he showed to his supervisors at UPS. No report of injury was filed and no mention of the injury occurring at work was provided. No action to pursue the claim was taken by Claimant for over one year. In June of 2017, the pain in his foot progressed and Claimant sought treatment with his primary care physician. At this time, Claimant reported the injury as a work-related injury.

This court first must address whether Claimant sustained an acute injury on June 1, 2016. Based on medical evidence and expert testimony of Dr. Stone, this Court finds Claimant did not sustain an acute injury to his left foot on June 1, 2016. Dr. Stone credibly testified at hearing that repeated trauma to the foot is not a factor in causing a person to develop plantar fibromatosis. Dr. Stone credibly testified that Claimant's contention that he stepped down, felt a "pop," and noticed a bump almost immediately, does not correlate with a traumatic onset of plantar fibromatosis. Dr. Stone testified that following a traumatic event it would take months for the bump to develop. Additionally, Claimant's ability to continue working full-duty, without treatment or complaints following the alleged date of injury for over a year, suggests that he did not suffer an acute injury as serious as a tear in the foot which would ultimately result in a plantar fibromatosis.

Claimant's current complaints are a natural and probable progression of his preexisting condition. Dr. Stone credibly testified that it would be farfetched for an individual to sustain a traumatic injury to his left foot and never have symptoms prior until 2016. Additionally, both expert physicians in this claim, Drs. Stone and Anderson, opined that the current condition is a benign fibrous tumor which occurred naturally in the plantar fascia. Therefore, the ALJ concludes Claimant did not suffer an acute injury to his left foot on June 1, 2016.

Claimant also contends that his work duties caused an aggravation to his naturally occurring condition. The primary evidence Claimant relies on is the fact that he walks nearly 15 miles a day at work. This evidence does not constitute sufficiently reliable evidence in this case to carry Claimant's burden in proving the work-relatedness of his left foot condition. Dr. Stone credibly testified that individuals who have had a documented injury to the plantar fascia, such as a rupture, may develop a bump within six months to a year. The bump in these injuries will consist of some scar tissue. Dr. Stone credibly testified that Claimant had no additional injury, such as scar tissue, to the plantar fascia.

Dr. Stone opined in his IME, that the medical records in this claim and his examination revealed a natural progression of Ledderhose disease. Dr. Stone opined that the mass in the foot began to grow at some point naturally. At some point, Claimant became aware of it, the mass then continued to grow by natural course, to where it became more symptomatic to a point where it hurts with every step. Dr. Stone credibly testified that the effect of walking and standing with this condition can aggravate the amount of pain one feels. However, walking on the mass itself does not accelerate the condition, it is just feeling pain as a symptom of the condition.

Claimant's testimony that he felt a "pop" in his foot on June 1, 2016, and developed a bump two days later, has no bearing on the relatedness of this condition. Claimant testified that he continued to work for the following year which aggravated his condition to cause greater pain. Claimant believes that his job duties, specifically getting into his truck and walking 15 miles a day, is the cause of the mass in his left foot. Even taking Claimant's testimony to be true, his testimony is not probative and persuasive to the ALJ as to the cause of Claimant's left foot condition and pain. To the contrary, the medical evidence and expert testimony of Dr. Stone strongly supports a finding that Claimant's condition is naturally occurring and progressing and would have occurred regardless of his occupation. Specifically, both expert physicians in the field of podiatry opined that it was a naturally occurring condition. Dr. Stone credibly testified that Claimant's walking and being on his feet at work did not have any effect on the condition or its growth. Dr. Stone credibly opined that the condition is a naturally occurring progression of the preexisting condition. The ALJ concludes Claimant failed to demonstrate by credible and persuasive evidence that his condition was aggravated by his employment.

Therefore, the ALJ concludes Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury to his left foot on June 1, 2016. The ALJ also concludes that Claimant failed to establish by a preponderance of the evidence that his work aggravated his preexisting and naturally occurring plantar fibromatosis - Ledderhose disease.

b. Whether Claimant has proven, by a preponderance of the evidence, that he sustained an occupational disease.

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v.*

IBM Corporation, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* Claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, Claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

Claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether Claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once Claimant makes such a showing, the burden shifts to Respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Based on the testimony from Dr. Stone, Claimant did not sustain a compensable occupational disease. Claimant's assertion is that the increased walking at work either caused or aggravated his left foot condition. Dr. Stone testified that once someone develops a plantar fibroma or Ledderhose's disease - especially if it becomes large and painful, placing the arch of the foot on a step repetitively can certainly be aggravating, i.e., elicit pain, to an already enlarged mass in the arch. Dr. Stone reiterated in his testimony that walking or stepping on a step, is not aggravating the condition, but simply causing pain from the condition being present. Dr. Stone credibly testified that walking, standing, hiking, etc., does not cause the injury or increase the size of the growth. Dr.

Stone credibly opined that in his expert opinion he did not believe that the current case resulted from an actual injury or Claimant's work activities.

As found and stated above, Claimant's work activities did not cause or aggravate Claimant's underlying non-work related condition. Claimant's work activities did not cause or aggravate his Ledderhose Disease - plantar fibromatosis. The condition has naturally progressed to where the mass has increased in size and is painful when Claimant puts pressure on it. Claimant's work activities simply elicited reactionary pain when stepping into his work truck or when walking for work. Therefore, the ALJ concludes that based upon the credible and persuasive evidence, which includes the testimony of Dr. Stone, Claimant has failed to establish by a preponderance of the evidence that he suffered an occupational disease regarding his left foot or that his work activities aggravated or accelerated his preexisting and naturally occurring plantar fibromatosis – Ledderhose disease – in his left foot.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 25, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues set for determination included:

- Did Claimant sustained a compensable injury on August 21, 2016?
- If Claimant suffered a compensable injury, is she entitled to TTD benefits commencing November 26, 2016, ongoing, subject to an offset for unemployment compensation in the amount of $489.00 per week, commencing March 14, 2017 through July 24, 2017?
- If Claimant suffered a compensable injury, is her medical treatment reasonable, necessary, and related?

STIPULATIONS

The parties stipulated to the following: (1) Claimant's average weekly wage was $765.00 per week; (2) if the claim was found compensable, Anthony Euser, D.O. and his referrals are authorized under the Act; (3) Claimant received unemployment compensation from March 14, 2017 to July 24, 2017, paid at the rate of $489.00 per week.

The Stipulations were accepted by the Court and are incorporated by reference in this Order.

FINDINGS OF FACT

1. Claimant was employed as a deli clerk for Employer, starting in December 2015. Her job duties in this job involved assisting customers in the deli department.

2. There was no evidence in the record that Claimant suffered an injury to her low back prior to August 2016.

3. Claimant previously required treatment for various conditions immediately before the August 21, 2016 incident. On August 2, 2016, Claimant treated at Advanced Urgent Care, LLC. She was evaluated by Jill Postell, PA-C, whose assessment was vaginitis and acute urinary tract infection. Claimant received prescriptions for Diflucan, doxycycline hyclate and Tramadol.

4. Claimant returned to Advanced Urgent Care, LLC on August 10, 2016. She complained of continued vaginal symptoms, flu-like symptoms, migraines, nausea, cold sweats, chills, and back pain. She was evaluated by Linda Smith, M.D., who

administered an injection of ceftratriaxone and ketorolac, as well as prescribing oxycodone-acetominophen and diazepam.

5. Claimant treated at the Little Clinic for left upper eyelid swelling on August 14, 2016. She was diagnosed with septal cellulitis in the right upper eyelid. She was prescribed Bactrim and cephalexin. The ALJ noted there was no evidence of back symptoms reported by Claimant at the evaluation.

6. On August 21, 2016, Claimant was working for Employer and went into the freezer to get a box of chicken for another store. Claimant testified she pulled the top box from a stack of three and the remaining two stuck, which pulled her arms and back. The ALJ found the evidence support the conclusion that an incident occurred. Claimant testified she not feel immediate pain after the incident occurred and when she began experiencing back pain, thought it could be related to her kidney infection. Claimant stated the increased pain caused her to go to the emergency room.

7. A video of Claimant's work in the deli department on the date and time in question was admitted into evidence.[1] The video does not show the boxes falling in the freezer, but rather it shows Claimant walking through the deli, as well as a co-employee walking through the deli. Claimant was then seen walking out of the walk-in freezer. The ALJ found the video confirmed Claimant was working that day, but did not assist in the determination whether an injury occurred on the date and time in question.

8. Claimant was evaluated in the Emergency Department of the Platte Valley Medical Center on August 22, 2016. She complained of severe right flank pain and was initially evaluated by Ashlie Reuscher, R.N. who recorded the above complaint of pain and documented there was no injury. Claimant reported unresolved symptoms from a UTI and yeast infection. In the nursing assessment, Bridget Dwyer, R.N. noted Claimant complained of severe right flank pain and occurred at home. Claimant was evaluated by Erick Anderson, PA-C. PA-C Anderson stated Claimant's lower back pain onset was sudden and occurred 12 hours before. She had no sensory motor deficits. Claimant had right flank pain which and was concerned about a kidney stone. A CT was negative for kidney stones and PA Anderson thought the pain could be due to a herniated disc. The ALJ found it was significant Claimant did not describe the incident at work when she was evaluated in the Emergency Department.

9. An in-store investigation report was prepared by supervisor, Lori Plouff on August 23, 2016. Ms. Plouff noted Claimant was unsure when the incident happened, but stated Claimant requested to go to the doctor because of a kidney infection and denied it was work-related. Claimant texted Ms. Plouff the next day and reported she had a herniated disc and initially did not indicate it was a work-related injury. The following day, Claimant then related an incident occurred on Sunday (August 21) when she was lifting a box of chicken. Deli department manager Alan Herrera confirmed Claimant reported the incident to him.

[1] Exhibit S.

10. On August 24, 2016, Claimant sent an e-mail to Ms. Plouff describing the incident. She stated she went into the walk-in cooler to get a box of chicken and went to grab the top box at the end of the shelf. The whole stack of boxes fell, which caused her to reach and grab all the boxes. Claimant said initially her back did not hurt, but it was aching later, which she thought was related to kidney infection. The next day she could barely walk or bend and Claimant described her pain as excruciating. When she went to the ER, she was told she had a herniated disk.

11. A statement was given by Larry Michael, dated August 26, 2016.[2] Mr. Michael noted that it was a Sunday and a worker from Store 81 dropped by to pick up frozen chicken. Claimant went back to get the chicken and he followed to help. Mr. Michael went in and found her with three boxes on her.

12. An undated statement was given by Debbie Tom (culinary clerk) regarding what happened on the date of the incident. Ms. Tom indicated she was assisting an associate from another store who came by to borrow product. She heard the sound of boxes falling while in the deli walk-in and saw Claimant was attempting to catch the cases of chicken, as the boxes fell to the floor. She described Claimant as being in an awkward position as she twisted around and got up slowly. Ms. Tom was an independent witness to the incident on August 21, 2016 and the ALJ found this supported Claimant's description of what happened.

13. Claimant signed an Injury Review Form on August 28, 2016 said the injury occurred when she was lifting a box of chicken and the stack of boxes fell.

14. Claimant was referred to Julie Parsons, M.D. by Employer, who evaluated her on August 24, 2016. Dr. Parsons diagnosed Claimant with a low back strain. Dr. Parsons referred Claimant for an MRI of the lumbar spine, prescribed Soma and Tramadol, along with massage therapy and gave her lifting restrictions of 10 lbs. In the M-164, Dr. Parsons checked the box that her objective findings were consistent with history and/or work-related mechanism of the injury/illness.[3] That opinion was persuasive to the ALJ on the issue of compensability.

15. On August 28, 2016, Claimant underwent an MRI of the lumbar spine. The films were read by David Cosper, M.D., whose conclusions included: shallow disc displacement at T11-T12 and L4-L5, without substantive spinal canal stenosis, neural foraminal stenosis or nerve root compression; mild loss of intervertebral disc space height at T11-T12 and L4-L5; bilateral facet capsulitis at L4-L5 and L5-S1; general dextroconvex curvature of the lower lumbar spine which may be positional related to mild scoliosis.

16. Dr. Parsons oversaw Claimant's treatment through October 5, 2016. In the follow-up evaluations which occurred on August 29, September 1, 8, 22 and

[2] Exhibit C, p. 13.

[3] Exhibit N, p. 175.

October 5, 2016, Dr. Parsons' diagnoses remained the same: lumbar strain and radiculopathy. Claimant's restrictions were extended by Dr. Parsons.

17. Dr. Euser examined Claimant on October 12, 2016 at which time she reported muscle aches and swelling, along with neurologic pain down the right leg. She also complained of depression. Dr. Euser noted an irregular gait on examination, along with abnormal motor strength in the right leg. The assessment was: neuropathy of the lower limb; low back pain. Dr. Euser referred Claimant for physical therapy ("PT") and continued the 10 lb. restriction.

18. Claimant returned to Dr. Euser on October 24, 2016, with similar complaints. She also reported trouble sleeping. Dr. Euser's assessment was low back pain, neuropathy of the lower limb and difficulty sleeping. Claimant was referred for pain management.

19. On November 15, 2016, Claimant was evaluated by Dr. Euser, complaining of muscle aches and swelling, gait disturbance, along with numbness in both lower extremities. She had no relief from prednisone or gabapentin and continued to experience pain down right leg, along with depression. Claimant's mental status was described as depressed and agitated. On examination, Dr. Euser noted hypertonicity and abnormal motor strength in the right leg. Claimant was to continue taking medications and establish care with a pain management specialist.

20. Records from Employer admitted at hearing included a series of e-mails exchanged by Fred Woodward, the talent manager and Nate Judkins, assistant store manager regarding Claimant's return to work. Mr. Woodward stated on November 25, 2016, Claimant could not return to work because of her restrictions.

21. On December 7, 2016, Claimant underwent a bilateral facet injection at L4-5 and L5-S1, which was administered by Lief Sorenson, M.D.

22. On December 9, 2016, Claimant was transported by ambulance to the Emergency Department of the Platte Valley Medical Center. She was complaining of dizziness and lightheadedness, as well as a syncopal episode earlier that day. Claimant had another syncopal episode while at the hospital. She was evaluated by Erick Anderson, PA-C who diagnosed with low back pain and syncope. Claimant had subsequent syncope episodes and remained in the hospital until December 21, 2016.

23. On December 11, 2016, Claimant was evaluated by David Risher, M.D. He described her episodes of unresponsiveness as inconsistent with typical stupor or coma. Pseudoseizure seemed most likely. The MRI of the brain was unremarkable and she had a gag reflex, with no convincing seizure activity. Dr. Risher noted Claimant's lumbar spine MRI was normal, with no evidence of disc herniation. The results of the MRI constituted objective evidence of the condition of Claimant's lumbar spine at this point in time.

24. Claimant was evaluated by Hua Judy Chen, M.D. on December 11, 2016. Dr. Chen opined Claimant's unresponsiveness did not fit either a seizure or syncope, given the normal MRI of her brain and EEG. Her symptoms were non-physiologic. Dr. Chen agreed to a tilt-table test to look for a cardiac source of the blackout. If this test was normal, Dr. Chen recommended a psychological evaluation or prolonged EEG study. Dr. Chen issued a supplemental report on December 12, 2016, after the tilt-table test was negative and her impression was: episodic non-neurological unresponsiveness, question of syncope. Dr. Chen stated Claimant's episodes did not behave like seizures.

25. On December 16, 2016, Nicole Clements, R.N. completed a nursing note related to the hospitalization and noted Claimant had a consult with a psychiatrist to rule out possible psychosomatic causes of the syncopal episodes. Claimant was referred to a therapist.

26. Claimant was discharged on December 21, 2016 and the treatment note was completed by Arjune Patel, M.D. Claimant was noted to have no prior medical history of adrenal insufficiency and underwent an extensive workup, with the adrenal insufficiency likely related to previous systemic steroid use and a recent ESI. Claimant's MRI of the lumbar spine had no acute abnormality to explain her pain. Claimant was to follow-up with Dr. Rothman and her PCP.

27. Claimant was reevaluated by Dr. Euser on December 30, 2016. Claimant reported similar physical complaints. Dr. Euser diagnosed Claimant with severe adrenal insufficiency, low back pain, neuropathy of lower limb, and spasm of back muscles. He referred Claimant for an endocrinology and continued her medications for the back pain. The ALJ noted Dr. Euser did not offer an opinion regarding the cause of Claimant's adrenal insufficiency.

28. On January 13, 2017, Claimant returned to Dr. Euser. She was complaining of muscle aches and swelling, along with pain down the right leg, along with depression. Dr. Euser's assessment included: low back pain, neuropathy of lower limb, prolapsed lumbar intervertebral disc[4], and adrenal cortical hypofunction. Claimant was to continue PT and was prescribed Percocet, as well as advised to follow up with him an endocrinologist. Dr. user's assessment remained the same and follow-up evaluations which occurred on February 17, March 3 and April 14, 2017.

29. Dr. Roth was called as an expert witness by Respondent. He was qualified as an expert in Internal Medicine, the specialty in which he is board-certified. He is Level II accredited pursuant to the WCRP. Dr. Roth testified consistently with the conclusions expressed in his report, dated August 14, 2017. Dr. Roth testified that Claimant's back pain, including the degree of her pain, as well as the distribution of pain were not consistent with any mechanism described, nor was it physiologic. Dr. Roth

[4] It was not clear from the record whether Dr. Euser had the results of the MRI done on December 11, 2016.

opined Claimant did not sustain the lumbar spine injury on August 21, 2016.[5] Dr. Roth stated the MRI showed ordinary age-related degenerative changes to the lumbar spine. The ALJ credited the opinions of Claimant's ATPs over those expressed by Dr. Roth with regard to the lumbar spine strain.

30. Dr. Roth testified adrenal insufficiency symptoms would include fatigue, anxiety, static hypertension, loss of appetite, abdominal pain, nausea, and generalized weakness. Dr. Roth opined Claimant's adrenal insufficiency was not caused by the use of steroids after the incident on August 21, 2016. There was an insufficient quality and duration of steroids given to cause the adrenal insufficiency. Dr. Roth stated Claimant would have required a period of at least three weeks of a "super physiologic dose" of steroids. Dr. Roth opined the incidents when Claimant passed out on December 9-10, 2016 was not a result of the injection she received on December 7, 2016. This was caused by the adrenal insufficiency. Dr. Roth's expert testimony was credible with regard to the adrenal insufficiency.

31. A record review was performed by Howard Kerstein, M.D. (endocrinologist), who issued a report dated September 10, 2017. After reviewing Claimant's course of treatment, Dr. Kerstein opined that Claimant's secondary adrenal insufficiency was not related to her intermittent use of corticosteroids from August to December 2016. He opined the intermittent use of steroids did not cause secondary adrenal insufficiency associated with the multiple symptoms experienced by Claimant. This opinion was persuasive to ALJ.

32. On July 31, 2017, Dr. Parsons agreed the Medrol Dosepak and prednisone did not cause Claimant's adrenal insufficiency.

33. Claimant proved by a preponderance of the evidence she sustained an industrial injury on August 21, 2016.

34. No ATP placed Claimant at MMI.

35. Based upon the evidence in the record, the ALJ concluded Claimant's adrenal insufficiency was not caused by the incident at work, including the post-injury treatment she received.

36. Claimant's health issues related to adrenal insufficiency and/or periods of unresponsiveness (syncope) constituted a subsequent intervening event, which terminated Respondent's liability to pay wage and medical benefits for her work injury.

37. The ALJ concluded Claimant's need for medical treatment after December 9, 2016 was caused by her adrenal insufficiency, non-physiologic issues and/or periods of unresponsiveness (syncope). Claimant's need for treatment was related to these conditions.

[5] Deposition of Dr. Roth, page 22:18-23.

38. Claimant's wage loss after December 9, 2016 was the result of her adrenal insufficiency, non-physiologic issues and/or periods of unresponsiveness (syncope) which caused her to be hospitalized.

39. Evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Sections 8-41-301(1)(b) & (c), C.R.S. (2016). Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). However, no compensability exists if the disability and need for treatment was caused as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As a starting point, the evidence admitted at hearing led the ALJ to conclude that an incident occurred on August 21, 2016. (Finding of Fact 6). Specifically, Claimant traversed to the freezer to get a box of frozen chicken and as she lifted the top box, two other boxes of chicken fell. (Findings of Fact 6, 12). This pulled on her arms and back. As determined in Findings of Fact 11-13, this incident was witnessed by co-employees and was reported to Employer by Claimant. As found, statements were taken from employees who worked with Claimant on that day she alleged she was injured that corroborated her version of events. Respondent did not dispute the fact that an incident occurred that day.

Second, there was evidence in the form of medical records, which supported the conclusion that Claimant suffered an injury at work. Dr. Parsons opined Claimant's symptoms were consistent with the reported mechanism of injury. (Finding of Fact 14). In his treatment of Claimant, Dr. Euser also indicated there were findings made at his evaluations which supported the conclusion Claimant was injured at work.

In coming to this conclusion, the ALJ considered Respondent's argument that Claimant proffered insufficient evidence to support her claim she suffered a compensable injury. Respondent also pointed to the fact that Claimant failed to specifically identify the incident at work as the cause of her back pain when she was treated in the emergency department. While true, this latter argument did not outweigh the other evidence before the Court.

Based upon the totality of evidence, the ALJ concluded there was factual support for Claimant's contention that she suffered a compensable injury. In this regard, Claimant's testimony, as well as the statements of her co-employees led the Judge to conclude that she sustained an injury to her low back at work. The ALJ concluded when the boxes fell in the deli freezer, this caused an injury to the Claimant, which was diagnosed by Drs. Parsons and Euser. Therefore, Claimant satisfied her burden of proof by a preponderance of the evidence to establish he suffered a compensable work-related while working for Employer on August 21, 2016.

Temporary Disability Benefits

Claimant had work restrictions issued by Dr. Parsons and Dr. Euser. These restrictions were not lifted and there was no finding by an ATP that Claimant reached MMI. (Finding of Fact 34). From the records admitted at hearing, the ALJ determined Claimant lost time from work after August 22, 2016 and therefore would potentially be entitled to temporary partial disability ("TPD") benefits.[6] However, there was insufficient evidence in the record for the ALJ to determine the amount of TPD benefits to which Claimant would be entitled. Therefore, counsel for the parties will be ordered to confer on this issue to see if it can be resolved. If no resolution is reached, either party can file an Application for Hearing on this issue.

[6] Claimant initially requested TPD benefits in her AFH. However, in the statement of issues at the beginning hearing, only TTD was requested.

Claimant did not return to work after November 25, 2016. Records from Employer confirmed Claimant could not return to work with restrictions. (Finding of Fact 22). Accordingly, Claimant is entitled to TTD benefits from November 26 through December 9, 2016, payable at the rate of $510.00 per week (based upon the stipulated AWW of $765.00 per week).

Subsequent Intervening Event

Results flowing "proximately and naturally from an industrial injury are compensable". However, no compensability exists when a later accident or injury occurs as a direct result of an independent intervening cause. Whether a particular condition is a result of an independent intervening cause is a question of fact for resolution by the ALJ. *Owens v. Industrial Claim Appeals Office,* supra, 49 P.3d at 1188-1189.

As found, Claimant's adrenal insufficiency was not caused by the incident at work, including the treatment she received for said injury. (Finding of Fact 36). The ALJ's conclusion was based on the medical evidence, including the opinions expressed by Dr. Roth, Dr. Kerstein and Dr. Parsons. (Findings of Fact 31-33). In addition, Claimant was hospitalized in December 2016 due to a syncopal episode and received an extensive work-up at that time. There was a divergence of opinions by evaluating physicians as to the cause of Claimant's symptoms. The ALJ determined this hospitalization was not causally connected to Claimant's work injury. As found, the objective testing done when Claimant was hospitalized in December 2016 in connection with Claimant's low back pain was negative. (Finding of Fact 25). The ALJ found Claimant sustained a wage loss and required medical treatment for the adrenal insufficiency and other medical problems. (Findings of Fact 38-39). This was not related to her work injury. The ALJ concluded that this constellation of symptoms, her hospitalization and the treatment Claimant received for the adrenal insufficiency/syncope constituted an intervening event.

Under the standard articulated by the Court in *Owens v. Industrial Claim Appeals Office,* supra, the intervening event (Claimant's hospitalization and treatment for multiple symptoms) severs the chain of causation in this case. Claimant's need for treatment was related to these conditions and not the condition caused by her work injury. Thus, Respondent was not liable for medical benefits. The ALJ also determined that Claimant's adrenal insufficiency and periods of unresponsiveness constituted an independent intervening cause and the ALJ concluded this served to terminate Respondent's liability for wage benefits.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable low back strain on August 21, 2016.

2. Respondent shall pay medical benefits pursuant to the Workers' Compensation Fee Schedule to cure and relieve the effects of Claimant's injury through December 9, 2016. This includes treatment provided by Dr. Parsons, Dr. Euser and their referrals.

3. Claimant may be entitled to recover TPD benefits from August 22, 2016 through November 25, 2016. There was insufficient evidence in the record to calculate the amount due and owing, as records through November 5, 2016 were admitted. Counsel for Claimant and Respondent are ordered to confer with regard to the TPD issue. Either Claimant or Respondent may file an Application for Hearing on the issue of TPD benefits.

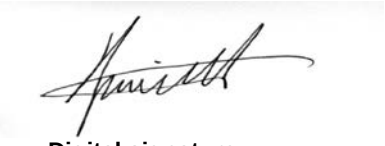
4. Respondent shall pay TTD benefits to Claimant at the rate of $510.00 per week from November 26, 2016 through December 9, 2016. These benefits are subject to the offset for Claimant's receipt of unemployment benefits, at the rate of $489.00 per week.

5. Claimant's claim for wage and medical benefits after December 9, 2016 is denied and dismissed.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 10, 2018



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Claimant's Workers' Compensation case numbers 4-973-089 and 4-973-090 remain open because he timely objected and filed an application for hearing on each of the claims.

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

1. Claimant has the following two Workers' Compensation claims against Employer: (1) W.C. No. 4-973-089 with a date of injury of September 17, 2014; and (2) W.C. No. 4-973-090 with a date of injury of January 12, 2015. Claimant reached Maximum Medical Improvement (MMI) and sought a Division Independent Medical Examination (DIME) in both cases. On January 10, 2017 Claimant underwent a DIME with Allison M. Fall, M.D. On February 13, 2017 Respondents filed Final Admissions of Liability (FAL's) on each of the claims.

2. On March 8, 2017 Claimant timely objected and filed an application for hearing on each of the cases. The applications for hearing endorsed the issues of overcoming the DIME, Permanent Partial Disability (PPD) benefits and Permanent Total Disability (PTD) benefits. Hearings were scheduled for July 6, 2017.

3. Claimant obtained a new attorney. The parties agreed to allow Claimant to withdraw his applications for hearing and re-file to permit new counsel to prepare for hearing. On June 23, 2017 the Office of Administrative Courts entered orders on both claims memorializing the agreement. The orders also stated, "Claimant must re-file his application for hearing within ten (10) days of the date of this order." Claimant was thus required to re-file the applications for hearing on or before July 3, 2017. Claimant did not re-file the Applications for Hearing until August 30, 2017.

4. Respondents filed a motion to strike and dismiss Claimant's applications for hearing. Respondents asserted that Claimant's failure to comply with the extended deadline established by the June 23, 2017 orders closed the issues admitted in the FAL pursuant to §8-43-203(2)(b)(II)(A), C.R.S. Moreover, Respondents contended the ALJ lacked jurisdiction over the issues endorsed by Claimant. In an Order dated September 15, 2017 ALJ Cannici granted Respondents' motion and struck the applications for hearing in both claims.

5. Claimant filed a motion for reconsideration. On September 26, 2017 the ALJ denied the motion. On September 28, 2017 Claimant filed a petition to review and a request for Specific Findings of Fact, Conclusions of Law and Order. ALJ Cannici denied the motion for reconsideration on October 4, 2017.

6. Claimant appealed the September 15, 2017 order to the Industrial Claim Appeals Office (ICAP). He asserted that the ALJ erred as a matter of law in striking the applications for hearing. Relying on *Del Ramirez v. ConAgra Beef Company*, W.C. No. 4-478-614 (ICAP, June 19, 2003) and *Gerchman v. Wal-Mart Stores, Inc.* W.C. No. 4-525-960 (July 23, 2004), the ICAP concluded that Claimant satisfied the requirement to file an application for hearing and the jurisdictional requirements of §8-43-203(2)(b)(II)(A), C.R.S. Accordingly, the ICAP set aside ALJ Cannici's September 15, 2017 order and remanded the matters for further proceedings.

7. Workers' Compensation case numbers 4-973-089 and 4-973-090 remain open because Claimant timely objected and filed an application for hearing on each of the claims. By timely filing applications for hearing, Claimant satisfied the jurisdictional requirements of §8-43-203(2)(b)(II), C.R.S. The June 23, 2017 order memorializing the agreement to cancel the scheduled hearing did not eliminate the effectiveness of the timely filed applications for hearing. Furthermore, Claimant's failure to set the hearings did not constitute a jurisdictional defect. Claimant's failure to comply with the extended deadline established by the June 23, 2017 orders thus did not close the issues admitted in the FAL. Accordingly, Claimant's claims in W.C. Nos. 4-973-089 and 4-973-090 remain open.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-203(2)(b)(II)(A), C.R.S. provides, in relevant part:

> An admission of liability for final payment of compensation must include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing included in the selection of an independent medical examiner pursuant to section 8-42-107.2, C.R.S., if an independent medical examination has not already been conducted.

5. In *Del Ramirez v. ConAgra Beef Company*, W.C. No. 4-478-614 (June 19, 2003), the ICAP determined that §8-43-203(2)(b)(II)(A), C.R.S. only requires filing an application for hearing within 30 days of the FAL. The failure to set the hearing in accordance with a rule of procedure did not constitute a jurisdictional defect. The panel noted that §8-43-203(2)(b)(II), C.R.S. does not establish a time limit for setting a hearing to contest a FAL and declined to read a nonexistent provision into the jurisdictional requirements of the statute. *See Kraus v. Artcraft Sign* Co., 710 P.2d 480 (Colo. App. 1985) (statute is product of legislative action and court should not read nonexistent provisions into the Act).

6. In *Gerchman v. Wal-Mart Stores, Inc*., W.C. No. 4-525-960 (July 23, 2004), the ICAP detailed the *Del Ramirez* reasoning. The ICAP noted that §8-43-203(2)(b)(II), C.R.S. only requires filing of the application for hearing within 30 days of the FAL. The failure to set the hearing in accordance with a rule of procedure did not amount to a jurisdictional defect. Moreover, §8-43-203(2)(b)(II), C.R.S. does not delineate a time limit for setting a hearing to contest an FAL. Accordingly, in *Gerchman* the ICAP concluded that the claimant satisfied the statutory requirement to prevent claim closure by filing an application for hearing on ripe issues. The ICAP explained that "there is nothing in the statute or rules that suggests that by agreeing to cancel a hearing a party is admitting that an otherwise timely application for hearing will be treated as if it was never filed for purposes of §8-43-203(2)(b)(II)." Instead, the withdrawal and cancellation of a hearing is a procedural matter and procedural steps may occur for a variety of reasons.

7. As found, Workers' Compensation case numbers 4-973-089 and 4-973-090 remain open because Claimant timely objected and filed an application for hearing on each of the claims. By timely filing applications for hearing, Claimant satisfied the jurisdictional requirements of §8-43-203(2)(b)(II), C.R.S. The June 23, 2017 order memorializing the agreement to cancel the scheduled hearing did not eliminate the effectiveness of the timely filed applications for hearing. Furthermore, Claimant's failure to set the hearings did not constitute a jurisdictional defect. Claimant's failure to comply with the extended deadline established by the June 23, 2017 orders thus did not close

the issues admitted in the FAL. Accordingly, Claimant's claims in W.C. Nos. 4-973-089 and 4-973-090 remain open.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claims in W.C. Nos. 4-973-089 and 4-973-090 remain open.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 11, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. The amount of medical mileage to which Claimant is entitled for the period of May 21, 2012 through July 11, 2017.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was born on August 19, 1975 and was 42 years of age at the time of hearing.
2. Claimant currently lives at 191 Clear Creek Drive #B, P.O. Box 574, Empire, CO 80438.
3. During the relevant period, May 21, 2012 through July 11, 2017 ("relevant period"), Claimant lived at 5 addresses in Colorado. Those addresses are listed on the Excel spreadsheet. (Claimant's Exhibit 2-7.)
4. On May 17, 2012, Claimant injured her right leg while at work.
5. Respondents admitted liability for this injury and they have provided extensive medical care through the date of hearing.
6. On account of the industrial injury, Claimant currently suffers from complex regional pain syndrome (CRPS).
7. Because of extensive treatment, Claimant has necessarily had to travel from home to the location of her various medical providers, including pharmacies.
8. Prior to April 11, 2017, Claimant had not submitted a mileage log or requested reimbursement for any of her mileage expenses.
9. At no time during the pendency of her Claim did Respondents provide Claimant with information about her right to obtain reimbursement for mileage to and from medical appointments and obtain her prescriptions at the pharmacy and a suggested time frame to submit such requests.
10. On April 11, 2017, Claimant's attorney, submitted to Respondents a handwritten mileage log that was completed by Claimant. The mileage log covered almost 5 years. Although Claimant had seen multiple physicians and therapists over the years, and obtained numerous prescriptions, the mileage log she created and which was submitted by her attorney listed roundtrip mileage for only one of her physicians, Dr. Fox. Claimant's mileage log listed 68 appointments at 91 miles round trip and one trip at 94.2 miles for a total of 6,282.2 miles. Claimant's handwritten mileage log did not request reimbursement for any money and did not list an amount she alleged was owed to her. (Exhibit I)

11. On April 14, 2017, Respondents' attorney sent Claimant's attorney a letter stating they had received Claimant's mileage log reimbursement request and it appeared to contain several inconsistences since Claimant used a single address as her home address to calculate the round trip mileage, even though Claimant had moved numerous times since her date of injury and notified Respondents of her moves. Respondents stated "[a]s a courtesy, we will permit you to retract this mileage request prior to my client undertaking further steps to respond."

12. On May 8, 2017, a typed out mileage log from the Law Offices of Dianne Sawaya LLC was provided to Respondents via facsimile. Although there is a designated signature line for the submitting party to sign and certify that the mileage listed is accurate, no one signed and certified the mileage log. The log appears to be a restatement of the handwritten log written by Claimant. However, Claimant credibly testified that she did not complete the typed log and did not review the typed log before it was submitted to Respondents by someone at the Law Offices of Dianne Sawaya LLC.

13. On August 1, 2017, Claimant's attorney filed an Application for Hearing endorsing mileage reimbursement in conjunction with WCRP 18-6(E).

14. Respondents filed a Response to Application for Hearing on August 31, 2017, stating "Respondents contest Claimant's mileage request as fraudulent or misrepresentative."

15. At the first hearing, Claimant essentially testified that she created a single mileage log identifying one physician, Dr. Fox, and used the longer distance from her home in Empire, Colorado, to Dr. Fox's office in Westminster, Colorado, to simplify her mileage log. Claimant testified that she attempted to simplify her mileage log due to the chaotic nature of her life over the last five years. Claimant indicated that in addition to undergoing extensive treatment for her work injury, she has moved numerous times to be closer to her father who was in hospice and to change schools for her child. She also indicated that she did not have a historical list going back almost five years that listed each medical appointment she attended with each physician or physical therapist. She also did not have a historical list with each trip to each pharmacy. Thus, Claimant had to go through old medical records and call each medical provider's office in an attempt to create an accurate mileage log. Therefore, Claimant thought she could simplify her mileage log by merely listing the mileage to and from Empire, Colorado, to Dr. Fox's office in Westminster, Colorado, over the last five years and not include all of her other mileage for treating with other providers and getting prescriptions. In other words, Claimant thought that although she was overstating the actual mileage to and from Dr. Fox, she was approximating the actual mileage she had driven over the last five years to obtain medical treatment. The ALJ finds Claimant's testimony to be credible and persuasive and does not find Claimant completed the handwritten mileage log with the intent to misrepresent and defraud Respondents. The ALJ finds Claimant hastily completed the initial handwritten mileage log without much thought and provided it to her attorney's office so she could attend to and deal with a multitude of other difficulties in her

life. The ALJ also finds that Claimant's prior attorney, or his staff, did not help matters by forwarding the handwritten mileage log to Respondents, without getting an explanation from Claimant and/or providing one to Respondents with the mileage log, or confirming the information contained in the log, before submitting it to Respondents.

16. At hearing, Respondents asserted that Claimant's April 11, 2017, hand written mileage log and typed mileage log which overstated her roundtrip mileage to and from Dr. Fox's office was a material misrepresentation. Respondents asserted that Claimant's alleged material misrepresentation regarding her mileage should divest Claimant of her right to obtain reimbursement for any mileage expenses during her claim.

17. Although the hearing commenced on January 24, 2018, at 1:30 p.m., the hearing was not completed.

18. At the end of the first hearing, Claimant's attorney requested the record to be reopened in order to submit additional documentary evidence which purportedly set forth the amount of mileage at issue and was provided to Respondents during the discovery phase. Respondents objected. Over Respondents' objection, the ALJ allowed Claimant to reopen the record and submit additional documentary evidence in the form of the purported written mileage requests Claimant provided to Respondents in her answers to discovery since Claimant's initial attorney and Respondents' attorney each certified in their Case Information Sheet, which was filed with the court, that discovery had been completed and that they had conferred with each other within the last 30 days and had made a good faith attempt to resolve the issues set for hearing. The documents were marked as Claimant's Exhibit 9.

19. Upon further review of Claimant's Exhibit 9, the ALJ concluded that the documents contained in Exhibit 9, which were provided by Claimant's first attorney, did not comply with Colorado Workers' Compensation Rule of Procedure 18-6(E) by providing the information necessary to quickly and accurately determine the amount of medical mileage at issue. The documents did not specifically set forth the round trip mileage for each medical appointment or trip to the pharmacy. Instead, Exhibit 9 contained just the alleged date Claimant attended each medical appointment with a particular provider or the date she picked up a prescription at a particular pharmacy. There was neither round trip mileage listed for each trip nor the addresses between which Claimant traveled. In addition to the date of each appointment or trip to the pharmacy, the information provided by Exhibit 9, which consists of seven pages, can be summarized as follows:

    a. Fifty-five appointments with Dr. Wernick,

    b. Two appointments with Dr. Chan,

    c. Five appointments with Dr. Fox that were not on Claimant's initial list,

    d. Fifteen or seventeen appointments with Dr. Wertz,

    e. Thirty-two physical therapy appointments, and

f. Eighty-eight trips to various pharmacies.

20. The hearing record from the first hearing did contain Claimant's answers to discovery which set forth her various addresses over the last five years. The hearing record also contained Claimant's initial handwritten mileage log which stated the mileage between her residence in Empire, Colorado, and Dr. Fox's office in Westminster, Colorado. But, the hearing record from the first hearing did not contain the distance traveled for each medical appointment and trip to the pharmacy.

21. After reviewing Exhibit 9 submitted by Claimant's attorney, as well as the other hearing exhibits submitted by the parties, the ALJ concluded that in order to conserve judicial resources, better define the issues to be decided by the ALJ, and allow each party the opportunity to fairly make their claims and defenses, the hearing would be continued, and the parties would be required to confer and set forth the exact mileage reimbursement at issue for the entire period so the litigation would not proceed in a piecemeal fashion.

22. The ALJ issued a number of procedural orders directing the parties to confer and provide the information the ALJ needed, and the manner in which the information was to be submitted to the court, in order for the ALJ to resolve the dispute between the parties in the most efficient manner and in the most equitable manner for both parties. The ALJ reminded the attorneys that each of them certified, through the Application for Hearing and Case Information Sheet, that they completed discovery – since discovery was undertaken - and conferred and made a good faith effort to resolve the issues set for hearing before appearing at the hearing on January 24, 2018. At a minimum, the completion of discovery, and attempt to resolve the issues set for hearing, should have resulted in the parties defining the amount of medical mileage at issue – with the understanding that Respondents contended either nothing was payable or much less was payable.

23. Based on the procedural orders issued by the ALJ, the parties conferred and defined the amount of mileage at issue and defined Respondents' defenses to each mileage request. The parties then returned to complete the hearing on May 4, 2018. At the second hearing, Claimant submitted an Excel spreadsheet which purportedly reflected all known medical mileage recorded during the relevant period. The spreadsheet included the date of travel, starting location, medical provider's address, purpose, round-trip mileage, rate per mile, and total amount of mileage claimed for each travel event. Claimant's submission was organized primarily by medical provider, then secondarily by date of travel. (Claimant's Exhibit 2-7).

24. In the Excel spreadsheet submitted by Claimant and Respondents, the total requested medical mileage by Claimant was $10,755.20.

25. However, at the second hearing, Claimant testified that her previous attorney's office erroneously included charges for mileage related to treatment provided by her personal treating physician, Dr. Hilburn, and that those charges should be removed from the spreadsheet. Claimant's attorney contended that removal of

these requested medical mileage charges would reduce the requested mileage reimbursement to $10,639.83.

26. Respondents did not object to most of the spreadsheet entries on the grounds that the travel never occurred, or that the roundtrip mileage claimed was incorrect. Instead, Respondents objected to the payment of medical mileage on other grounds. Respondents contended that Claimant fraudulently misstated her mileage to and from Dr. Fox on her first mileage sheet (Ex. I) and Claimant has also submitted multiple mileage requests for the same day, that such submissions must be fraudulent, and therefore Claimant should not receive any medical mileage whatsoever. Respondents also contend that it is unreasonable for Claimant to travel between several of her residences and a Safeway pharmacy located at 7561 W. 80th Ave. Arvada, CO 80003 when she could have used a pharmacy closer to her home. Respondents further contended that many of Claimant's trips to obtain medical treatment, physical therapy, and prescriptions should have been consolidated into a single trip to minimize her travel and prevent multiple trips on the same day or on consecutive days. Therefore, Respondents argue in the alternative, the mileage she receives for her travel to and from medical appointments and pharmacies should be substantially reduced from the actual submission of mileage incurred by Claimant to a more reasonable number of miles.

27. Claimant testified that, to the best of her knowledge, all of the mileage claimed in the Exel spreadsheet presented at the second hearing, with the exception of the mileage to Dr. Hilburn, was accurate. She credibly testified that she compiled most of the data included on the Excel spreadsheet herself by reference to available medical records. She testified credibly that her prior attorney's office may have made some mistakes in the preparation of the final Excel spreadsheet. She further testified credibly that she did approve the submission by that firm of the spreadsheet for use at the second hearing, but that she did not knowingly submit any mileage that was inaccurate.

28. Claimant further testified that there were days when she traveled several times to a medical provider on the same day. Claimant credibly testified that sometimes she would go to a doctor, receive a prescription from that doctor, and then travel to the pharmacy to get the prescription filled. Sometimes the pharmacy would fill one or more of the prescriptions but then told Claimant they could not obtain authorization from the insurance carrier to fill others. This often occurred when a narcotic medication was involved. In such instances, Claimant decided that she was not going to wait around for an indefinite period of time until the insurance adjuster approved her medications. She testified that she had two school-age children who could not remain unattended for long periods of time. Instead, she testified, she would go home to wait for notice from the pharmacy that the prescription had been filled and then she would return to the pharmacy to pick it up. On some occasions she had to return to the pharmacy once or twice in one day, or on subsequent days.

29. Claimant credibly testified that she went to one specific Safeway pharmacy, located at 7561 W. 80th Ave. Arvada, CO 80003, on numerous occasions

because that was the pharmacy that was designated on her narcotics contract with Drs. Wernick and Wakeshima. She further credibly testified that no one told her that she could have changed the pharmacy location in her narcotics contract. Therefore, when she submitted a request for medical mileage, she submitted the actual mileage that she traveled from the residence where she lived at the time of each travel event, regardless of the distance.

30. Claimant credibly testified that, while she was waiting for prescriptions, she did not go to a house that she owned in Westminster, at 6331 93rd Avenue, Westminster 80031 to wait for authorization because she does not live there.

31. Claimant credibly testified that, because of Dr. Wertz' policy, she could not go directly from a Dr. Wertz appointment to physical therapy. Instead she was required to make an appointment for physical therapy later on the same day of the doctor's appointment or on a later day. She understood that the insurance carrier accused Dr. Wertz of double billing when she had previously gone directly from his appointment to physical therapy, which was at the same address. To avoid the accusation of double billing, Dr. Wertz adopted a policy that precluded attendance at physical therapy immediately after his physician visit. Because of this policy, Claimant chose to return to home before proceeding to her physical therapy appointment.

32. Connie Cridlebaugh, the insurance adjustor assigned to Claimant's case, testified that sometimes there were delays in authorizing prescriptions.

33. As set forth in Respondent's Exhibit K, Respondents were aware of Claimant's various addresses since the inception of her claim.

34. Moreover, Respondents had an adjuster who was adjusting the claim. As set forth in Respondents' exhibit F and G, Respondents' adjuster would adjust Claimant's case and schedule demand appointments, if Claimant missed a medical appointment, and indicate that Claimant's failure to attend the demand appointments either could or would affect the continuation of her benefits. The adjuster also reviewed and authorized the payment of the prescriptions.

35. Based on the evidence submitted at hearing, Claimant has been provided a significant amount of medical treatment by various medical providers. Claimant has also been prescribed and received an extensive amount of prescription medication.

36. Respondents contend in their post hearing submission that they have been prejudiced by Claimant's delay in seeking reimbursement for her mileage expenses. Respondents assert that:

> Claimant's five year delay in seeking any reimbursement has resulted in prejudice to Respondents. In delaying her request for reimbursement, Respondents did not have the ability to review the reasonableness of Claimant's alleged pharmacy and medical appointment trips in excess of 80 miles roundtrip until the end of the January 2018. Had Respondents been provided a request for reimbursement for pharmacy trips in excess of 80 miles they could

have prompted a change to a more reasonably located pharmacy provider.

37. Respondents contention of prejudice due to Claimant's delay in requesting reimbursement for her mileage expenses is not found to be persuasive for a number of reasons.

First, Respondents knew they were not providing Claimant transportation to and from her medical appointments or the pharmacy. Respondents also knew Claimant's medical providers were not treating Claimant at her home. Therefore, Respondents knew, or reasonably should have known, Claimant was probably driving to and from her medical appointments. Respondents also knew, or reasonably should have known, that Claimant was probably driving to and from the pharmacy to pick up her prescriptions. Despite this knowledge, there was a lack of credible and persuasive evidence submitted at either hearing which established Respondents requested Claimant to timely submit mileage reimbursement requests on a regular basis so the adjuster could adjust this portion of the claim. Had Respondents done so, and had Claimant complied, Respondents could have reviewed the mileage logs and then asked Claimant to consolidate her medical appointments, if possible, and change her narcotics contract, if possible, and identify a different pharmacy which was close to her new residence each time she moved.

Second, there was also no credible and persuasive evidence submitted by Respondents that the adjuster noted Claimant's address at various times and compared it to the pharmacy at which Claimant was obtaining her prescriptions in order to manage and adjust the medical mileage portion of the Claim. It is only after Claimant submitted a request going back to 2012 that Respondents objected and asserted that such mileage was not reasonable and necessary.

Third, although Respondents do not have a duty to advise Claimant of available benefits, such as mileage reimbursement, and actively manage and adjust all aspects of her claim, there can be consequences for their failure to do so. Whether Respondents chose not to timely advise Claimant about her right to obtain mileage reimbursement and manage or adjust the medical mileage portion of the claim from the beginning - with the hope that Clamant would not request reimbursement for her mileage expenses - is unknown. Nevertheless, such action, or inaction, has contributed to the extent of the mileage expenses incurred by Claimant. Therefore, Respondents' contention that they are innocent bystanders to any prejudice caused by Claimant's delay in requesting medical mileage is not found to be persuasive. In other words, if Respondents were concerned about any possible prejudice they might have incurred due to Claimant's failure to timely submit her mileage requests, they could have done something about it at any time throughout the pendency of this claim, but did not. Therefore, Respondents own conduct contributed to any prejudice to which they claim.

38. Claimant did not submit all of her mileage because she could not obtain certain medical records to be used for verification. The mileage request submitted by

Claimant at the second hearing was prepared to the best of her ability based on the lengthy time period at issue and the number of medical appointments and pharmacy trips at issue.

39. Respondents also contend Claimant is not entitled to mileage for the July 1, 2015, medical appointment that was scheduled with Dr. Fox because she did not attend the appointment. (Respondent's Exhibit O.) As demonstrated by Exhibit O, Claimant failed to attend a medical appointment with Dr. Fox and the adjuster promptly scheduled a demand appointment with Dr. Fox for July 20, 2015, and notified Claimant that if she failed to attend the demand appointment, her temporary total disability benefits would be suspended without a hearing. (Ex. O.) However, the request for mileage reimbursement for July 1, 2015, is not for Claimant receiving treatment from Dr. Fox, but for treatment with "A Fox Physical Therapy." (See Exhibit 2-7). There is no contention by Respondents that Claimant failed to attend her physical therapy appointment at A Fox Physical Therapy on July 1, 2015.

40. Claimant credibly testified that she attempts to comply with her doctors' orders whenever possible.

41. Claimant credibly testified that she would not willfully submit medical mileage requests that were inaccurate to obtain benefits she was not entitled to and the ALJ finds that she did not do so. The request and submission of accurate and complete mileage records which were submitted after the first hearing and at the second hearing were at the request of the ALJ to prevent the piecemeal litigation of Claimant's mileage reimbursement of such a long period of time and to allow each party the opportunity to fairly litigate the medical mileage matter in a manner that would also conserve judicial resources.

42. Claimant testified that the closest Safeway pharmacy to her current residence involves a 22-mile round-trip travel.

43. There was no evidence submitted at either hearing which established any of the medical treatment or prescriptions for which Claimant incurred mileage expenses was not reasonable and necessary.

44. The ALJ finds that the mileage incurred by Claimant as set forth in the Appendix of this decision was reasonable and necessary under the unique factual circumstances of this case to obtain medical treatment and prescription medications to treat her industrial accident.

45. The ALJ finds that Claimant is entitled to medical mileage reimbursement in the amount of $10,583.28 as set forth and calculated in the Appendix of this decision.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. The amount of medical mileage to which Claimant is entitled for the period of May 21, 2012 through July 11, 2017.

Where Claimant's entitlement to a medical benefit, including mileage, is disputed, Claimant has the burden to prove that the requested medical benefit is reasonable, necessary and related. See *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App. 1997); *Barrett v. Xcel Energy*, W.C. No. 4-991-534-01, (ICAP Jun. 22, 2016).

Medical mileage is routinely paid by insurance carriers and ordered by the courts. *See, e.g., Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103 (Colo. App.

2008) (holding that Claimant who sought mileage reimbursement for travel to medical appointments was entitled to that reimbursement as incidental to medical treatment under the Workers Compensation Act).

This ALJ was not presented with any persuasive legal authority to support Respondent's argument that Claimant's entire request for medical mileage reimbursement should be denied if any portion of her reimbursement request is found to be fraudulent. Respondents' argument is inapposite in the first place, however, because this ALJ further finds and concludes that there is no credible and persuasive evidence that Claimant willfully attempted to defraud the insurance company by submitting medical mileage requests that were inaccurate or duplicative in an attempt to obtain benefits to which she was not entitled.

On the contrary, the preponderance of the evidence supports the following conclusions: First, Claimant in good faith submitted to her attorney a hastily prepared hand written medical mileage log based on her review of available medical records, with some help from her former attorney's office staff. Although her first list of mileage overstated the mileage to Dr. Fox, Claimant did not intend at that time to submit additional requests for mileage reimbursement for the same period. She erroneously assumed it would be the easiest way to approximate her actual mileage incurred during that period and prevent her from having to spend the time to recreate her entire medical treatment and prescription mileage history since the inception of her claim for each medical appointment and trip to the pharmacy – from each of her various residences - in light of the other stressful matters she was dealing with in her personal life. Moreover, it does not appear her prior attorney, employees of his office, or the Respondents, advised Claimant of the importance in preparing a complete and precise mileage log. Claimant's prior attorney, or his office, merely submitted the handwritten log to Respondents without any evaluation and without any explanation to Respondents.

Second, neither Claimant's former attorney nor Respondents advised Claimant that she could have changed the location of the pharmacy designated in her narcotics contract in order to reduce her travel distance. Accordingly, Claimant continued to travel between her current residence to the original designated pharmacy, regardless of the distance. When submitting a request for medical mileage reimbursement, she submitted actual miles traveled rather than a negotiated or suggested compromised distance.

Third, because of problems in obtaining authorization for prescriptions it was reasonable for Claimant to choose not to wait around for authorization and she returned to her residence to wait for authorization for the prescriptions that she needed. This is especially true because she has two school age children who cannot remain unattended for long periods. Therefore, under these facts, multiple trips to medical providers on the same date were reasonable.

Fourth, because it was the policy of Dr. Wertz's office that her physical therapy appointment on the same day as an appointment with the doctor could not occur immediately after the doctor's appointment, it was reasonable for Claimant to return to

her home before traveling to the physical therapy appointment. Therefore, because of this policy, multiple trips to medical providers on the same date were reasonable.

Fifth, all of Claimant's submitted mileage as set forth in Exhibit 2-7, with the exception of the mileage to and from Dr. Hilburn, is reasonable and necessary under the unique facts of this case and should be paid to Claimant. The ALJ has reformatted the Claimant's Exhibit 2-7 and recalculated the amount of medical mileage that should be awarded in this case. The ALJ concludes that Claimant shall be paid medical reasonable and necessary mileage in the amount of $10,583.28. The calculation for the mileage being awarded is set forth in the Appendix to this Order.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay to Claimant the amount of $10,583.28 for medical mileage as set forth in the Appendix, pages 14-33, for the time period of May 21, 2012 through July 11, 2017.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 17, 2018

Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove she suffered a compensable work-related injury to her right shoulder on September 8, 2017?

- If Claimant had a compensable injury, did she prove entitlement to medical benefits, including treatment received at Denver Health?

- Employer stipulated Claimant was an "employee" on the alleged date of injury.

- Employer stipulated it had no workers' compensation insurance coverage on the alleged date of injury.

FINDINGS OF FACT

1. Employer is a staffing agency that places workers at marijuana grow facilities. Claimant was hired in August 2017 and assigned to a warehouse processing harvested marijuana plants.

2. Claimant alleges an injury to her right shoulder on September 8, 2017 while "de-fanning" marijuana plants. Claimant was cutting the large fan leaves off harvested plants hung upside down from the ceiling. Claimant stands five feet one inch tall, so she needed to reach over her shoulder level to cut the higher leaves.

3. Claimant performed the de-fanning task for approximately two hours on the morning of September 8, 2017. She noticed pain in her right shoulder near the end of the task. The pain progressed throughout the remainder of her shift. Claimant did not report it to a supervisor because she assumed the pain would resolve over the weekend.

4. Claimant's co-worker, Phil Long, gave her a ride home after work on September 8. Claimant told Mr. Long she was having pain in her right shoulder from de-fanning plants that day.

5. Claimant was still having significant pain on September 10, 2017, so she went to the emergency room at Denver Health Medical Center. The reason for her visit was listed as "shoulder pain." She was diagnosed with a "strain of right trapezius muscle" and prescribed Soma (a muscle relaxer). The E.R. physician took her off work for four days and opined "she may return to work on 09/14/17."

6. After Claimant left the E.R., she reported the injury by email to her manager, Barbara Acosta. Claimant told Ms. Acosta, "I injured my shoulder Friday at work and even though I rested Saturday, this morning the pain was worse! Just got back from the E.R. and they have me out until the 14th."

7. Claimant returned to the Denver Health E.R. on September 13, 2017 for persistent shoulder pain. She was diagnosed with "trapezius strain" and prescribed Flexeril, Voltaren, and Lidoderm patches to relieve pain and muscle spasms. She was referred to physical therapy and advised to remain off work until September 16.

8. Claimant went to the E.R. again on September 17, 2017 and was diagnosed with "acute pain of right shoulder." She was continued off work until September 20th and advised to follow-up with her primary care provider. Claimant had no PCP at the time but had a new patient appointment scheduled with Dr. David Elwell the following week.

9. Claimant saw Dr. Elwell on September 26, 2017 for "acute pain of right shoulder and trapezius strain." Dr. Elwell ordered x-rays of the right shoulder and prescribed tramadol for pain. He kept Claimant off work until October 2, 2017.

10. On October 3, 2017, Claimant exchanged emails with Ms. Acosta, who had just returned from out of the country:

> [Ms. Acosta]: As far as workers compensation I would have to check into it. You did nothing working for us that could cause you an injury.
>
> [Claimant]: Please check into it. The injury occurred on Friday, September 8th during the defanning. I noticed the pain at 9:15 AM that morning as I believe you were considering giving us a break but since we'd moved through the plants so quickly, you pushed the break until 10:08 that morning. By 5:30pm that afternoon, I felt it TREMENDOUSLY.
>
> [Ms. Acosta] Break time is at 11:00. If you had pain, you did not mention it. You are not fast at defanning, wondering how you hurt yourself.
>
> [Claimant]: I mentioned it to you in the email that I haven't recovered from that Friday. We took a break at 10:08 that morning because we'd cleared the intended area ahead of the schedule is what I assumed. I have the Doctor's note and the many times I went to the E.R. regarding this injury. It was due to the tight squeeze we were positioned. I'm certain I mentioned the lack of space considering the room had been partially cleared. Seems the injury is related to that muscle being confined for an extended period. I finally got a Primary Dr., who is hoping to fully determine what has occurred to this area. I have been in literal pain since that date.

11. There is no persuasive evidence Claimant suffered from right shoulder or trapezius problems before September 8, 2017.

12. Claimant's reasonably sought emergent treatment at the Denver Health E.R. on Sunday, September 10, 2017.

13. Employer did not refer Claimant for treatment after she reported the injury. The right of selection passed to Claimant and she chose to continue with Denver Health.

14. Claimant proved by a preponderance of the evidence she suffered a compensable injury to her right shoulder on September 8, 2017.

15. The treatment Claimant received at the Denver Health on September 10, September 13, September 17, and September 26, 2017, was reasonably necessary to diagnose and treat the compensable shoulder injury.

16. Physical therapy is reasonably necessary to cure and relieve the effects of Claimant's compensable injury.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must prove an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201.

A compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the nature or extent of the industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000). Even a minor "strain" can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused her to seek medical treatment. The ICAO's decision in *Garcia v. Express Personnel*, *supra*, is instructive regarding the minimal extent of an injury that can satisfy the basic threshold requirement of compensability. In *Garcia*, the claimant felt pain in her abdomen and hip while lifting a piece of glass at work. The employer referred the claimant to Dr. Caughfield, who diagnosed a lumbar strain, but opined she had already reached MMI. The ALJ found that the claimant suffered a "minor back sprain," but also found the sprain had "resolved" within five days of the incident. The ALJ denied the claim on the theory that the claimant suffered no "injury." The ICAO reversed and held that the claimant had established a compensable injury as a matter of law:

> Where pain triggers the claimant's need for medical treatment, the claimant has established a compensable injury if the industrial injury is the cause of the pain. The term medical treatment includes diagnostic procedures required to ascertain the extent of the industrial injury.

> Here, the ALJ found there was an industrial accident which caused a minor lumbar strain. Further, the ALJ determined that when the injury was reported to the employer, the employer offered the claimant medical services from Dr. Caughfield, which the claimant accepted. Although Dr. Caughfield placed the claimant at MMI based upon his [ ] examination, the ALJ found with record support that Dr. Caughfield diagnosed a lumbar strain. Thus, the ALJ's findings compel the conclusion the claimant established a compensable injury which entitled her to an award of medical benefits. (Citations omitted).

As found, Claimant proved she suffered a compensable injury on September 8, 2017. The persuasive evidence demonstrates she developed right shoulder pain associated with reaching over shoulder level to de-fan marijuana plants. She mentioned the symptoms to her co-worker on the way home from work that day. When the pain persisted, she reasonably sought treatment at Denver Health and was diagnosed with acute shoulder pain and a trapezius strain. She was restricted from work and prescribed medications to relieve the symptoms. There is no persuasive evidence of any pre-existing right shoulder problems or any alternative explanation for the onset of her symptoms on September 8. Although Claimant had conflicts with Mr. Basaldua including a dispute over late-paid wages, the ALJ finds it unlikely those conflicts would lead her file a fraudulent workers' compensation claim. Based on all the evidence presented, the ALJ concludes Claimant more likely than not injured her right shoulder at work on September 8, 2017.

B. Medical benefits

The employer is liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999)

As a general rule, an employer is only liable for "authorized" medical treatment. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a physician's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Section 8-43-404(5)(a) allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances of the particular case. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010).

As found, the evaluations and treatment Claimant received from Denver Health in September 2017 were reasonably necessary and related to her compensable right shoulder injury. The September 10, 2017 E.R. visit was authorized under the emergency treatment doctrine because Claimant was experiencing severe pain outside of normal business hours. After leaving the E.R., she gave Employer written notice of the injury via email. Employer did not refer Claimant to a doctor, allowing her to select Denver Health to provide authorized treatment. Claimant was prescribed non-narcotic medications commonly used to treat acute pain and muscle spasms. She was also referred for physical therapy, a well-recognized treatment for shoulder pain under the Medical Treatment Guidelines. *See* WCRP 17, Exhibit 4 § (F)(13). Employer is liable for these benefits, subject to the Colorado Workers' Compensation Fee Schedule.

C. Payment to Division trustee or a bond to secure payment of benefits

Employer conceded it was uninsured for workers' compensation liability at the time of Claimant's injury. Under § 8-43-408(2), Employer must pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at the rate of 4% per annum. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by some surety company authorized to do business in the state of Colorado. Claimant submitted no medical bills or other documentation of her injury related medical expenses, so no specific order regarding payment to the trustee or a bond may issue. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right shoulder injury in W.C. No. 5-060-411 is compensable.

2. Subject to the Workers' Compensation fee schedule, Employer shall cover reasonably necessary medical treatment to cure and relieve the effects of Claimant's compensable injury, including, but not limited to, charges from Denver Health on September 10, September 13, September 17, and September 26, 2017, and physical therapy if still recommended by Dr. Elwell or other treating providers at Denver Health.

3. Claimant did not submit any medical bills or other documentation of her injury related medical expenses, so no specific order regarding the required payment or bond may issue. Employer may contact

4. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 1, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved, by a preponderance of the evidence, that she sustained a compensable injury.

II. If Claimant proved she sustained a compensable injury, whether Claimant proved by a preponderance of the evidence that the surgery recommended by Dr. Shah is reasonable, necessary and causally related to the compensable injury.

FINDINGS OF FACT

1. Claimant is a 32-year-old right-hand dominant woman who works as a production assistant assembling parts for firearms.

2. Claimant's regular job duties include operating large and small arbor press machines, which requires raising and lowering the lever of the arbor press to form parts. Claimant testified she worked on approximately 1,000 parts per day and, at times, it took three or four up/down motions on the arbor press to fully form a part.

3. At hearing, Claimant demonstrated the motion needed to operate the small and the large arbor presses. Claimant extended her right arm up to approximately 150 degrees when demonstrating the large arbor press motion, versus approximately 100 degrees when demonstrating the small arbor press motion.

4. Claimant testified that she first felt pain in her right shoulder while performing her regular job duties on or around May 25, 2017. She testified she felt pain around midday while using the larger arbor press. Claimant testified she informed her supervisor Barbara, of her pain, then finished her shift per her supervisor's instructions. Claimant testified she had ongoing pain overnight and took medication for the pain.

5. Claimant testified she returned to work the next day and worked on the same machine. By midday her pain worsened, and she mentioned her shoulder pain to her manager and worked the remainder of her shift. Claimant again worked the large arbor press the following day, which broke midday. Claimant was then assigned to a different job station that did not involve using her shoulder.

6. Claimant testified that she continued to work over the next two weeks and experienced intermittent pain in her right shoulder. Claimant did not seek healthcare treatment from May 25, 2017 through June 8, 2017. Claimant testified that she did not seek medical attention prior to June 8, 2017 because she was not provided clinic information by Employer and she had recently relocated from Louisiana to Colorado and did not have a family doctor at the time.

7. Claimant testified that, on June 8, 2017, she was assigned to a job station using a smaller arbor press and a hand file. Claimant testified that, after approximately 45 minutes using the press, she experienced a sudden onset of pain in her right shoulder, to the point that she could not move her right extremity. Claimant testified the pain was worse than the pain she had experienced in the days prior. Claimant reported this to her manager and was sent to U.S. HealthWorks for evaluation.

8. Employer's First Report of Injury form, dated June 9, 2017, notes, "EE stated she started having right shoulder pain due to her type of work, constant pain, not able to sleep, swelling."

9. On June 9, 2017, Donald Downs, PA-C, evaluated Claimant under the supervision of Ryan Otten, MD. Claimant reported she started experiencing right shoulder pain while working, with the pain worsening that day. Regarding Claimant's job characteristic, PA-C Downs noted, "sit down job, prolonged standing or walking, repetitive use of hands/keyboard/mouse and operating hand tools, machinery, lifting, pushing or pulling up to 25lbs." PA-C Downs documented the mechanism of injury as "repetitive use of the right shoulder. A lot of overhead work. Yesterday got sore end of day and today worse. Weakness now. There are no known prior acute trauma or cumulative trauma to the affected body part." On physical exam, PA-C Downs noted tenderness of the right trapezius muscle, right subacromial regions, and right biceps tendon, as well as restricted range of motion in the right shoulder. Impingement testing was positive on the right. PA-C Downs opined that the reported injury was more likely than not the cause of Claimant's current symptoms and findings. He diagnosed Claimant with a right shoulder strain, prescribed medication, referred Claimant to physical therapy, and released to her to work modified duty.

10. On June 19, 2017, Claimant presented to Dr. Otten. Dr. Otten remarked that he reviewed the health history and review of symptoms obtained at the June 9, 2017 evaluation. He stated,

> There was a specific event of an injury or illness. MOI: repetitive use of the right shoulder. A lot of it is overhead work. Yesterday got sore end of day and today worse. There are no known prior acute trauma or cumulative trauma to the affected body part.

On physical examination, Dr. Otten noted tenderness of the right trapezius muscle and right subacromial regions, restricted range of motion of the right shoulder, and positive impingement testing. He opined that Claimant's exam findings and diagnosis are consistent with the injury Claimant reported. He diagnosed Claimant with a repetitive strain of the right shoulder, performed a steroid injection, and released Claimant to modified duty.

11. Claimant continued to see PA-C Downs. On June 26, 2017, he noted Claimant reported having symptoms for 32 days. Claimant further reported that the steroid injection was helpful but did not resolve her symptoms. On July 10, 2017, PA-C Downs noted Claimant's injury was 50% better. Claimant reported that light duty aggravated

her shoulder. PA-C Downs placed Claimant on restrictions prohibiting the use of her right arm.

12. On July 18, 2017, Claimant saw Peter Mars, MD at U.S. HealthWorks. Claimant reported that her right shoulder pain was unchanged. Dr. Mars noted Claimant's pain developed from lifting and overhead activity on the job. On physical exam, Dr. Mars noted restricted shoulder range of motion and positive impingement testing. He diagnosed Claimant with a right shoulder strain, released Claimant to work with temporary restrictions, and ordered an MRI.

13. Claimant underwent a right shoulder MRI on August 9, 2017. Craig Stewart, MD's impression was as follows:

> Abnormal signal throughout the superior and posterosuperior labrum, suspicious for labral degeneration and probable superimposed labral tear. 8 mm cystic structure along the anterosuperior margin of glenoid may indicate a small amount of joint fluid or a paralabral ganglion cyst, with paralabral ganglion cyst felt to be more likely. No evidence of rotator cuff tear. Mild acromioclavicular joint arthrosis with adjacent bone marrow and soft tissue edema.

14. On August 11, 2017, PA-C Downs reevaluated Claimant and noted the MRI revealed some labral injury, but the rotator cuff was intact. PA-C Downs referred Claimant for orthopedic consultation and treatment.

15. On August 17, 2017, Nirav R. Shah, MD performed an orthopedic consultation. Claimant reported developing right shoulder pain on June 8, 2017 at work while lifting/pressing repetitively on a machine. Claimant complained of "popping" with movement. Dr. Shah noted, "The onset of the shoulder pain has been sudden and has been occurring in a persistent pattern for weeks. On physical exam, Dr. Shah noted decreased range of motion, positive O'Brien, impingement, and Hawkins testing, as well as cross adduction and AC joint tenderness. Dr. Shah reviewed the August 9, 2017 MRI, which he stated revealed "a superior and posterosuperior labrum tear, paralabral cyst and mild AC OA." He diagnosed Claimant with a right shoulder labral tear, arthritis of the right acromioclavicular joint, right shoulder pain, and right shoulder impingement. He recommended surgical treatment to improve Claimant's pain and function.

16. On August 31, 2017, John Douthit, MD, performed a Rule 16 medical record review for Respondents. Dr. Douthit diagnosed Claimant with work-related aggravated tendinitis/bursitis of the right shoulder. He opined that the MRI findings were not causally related to the June 8, 2017 injury. He stated,

> [t]his is a very aggressive approach to a painful shoulder condition which appears to be a tendonitis/bursitis aggravated by her work. The possibility of a labral tear was a red herring and she has minimal arthritis in acromioclavicular joint. There are no indications to do a distal clavicle excision and shoulder arthroscopy would at best be diagnostic. Her history

> is typical of aggravation of degenerative tendonitis of the rotator cuff tendon or of one with poor physical condition and is not one that will benefit from surgery. The story is likely to be prolonged with a continued poor response to medical treatment and much frustration by the claimant as well as the treating physicians. However, this is not going to be improved by aggressive and invasive methods.

Dr. Douthit recommended Claimant undergo a subacromial bursal injection with cortisone and stay off of work to rest the shoulder indefinitely, with improvement expected in approximately three months.

17. Claimant continued to treat with PA-C Downs and Dr. Otten on September 8, 2017 and October 2, 2017. They continued to note muscle tenderness, restricted range of motion and positive impingement testing.

18. Dr. Shah reevaluated Claimant on October 26, 2017, noting similar exam findings as his initial evaluation. Dr. Shah noted Claimant continued to have significant pain and dysfunction. He reiterated that the "MRI obtained previously shows findings of subacromial bursitis and labral tear with parallel labral cyst." Dr. Shah remarked,

> [Claimant] has received a denial letter which I strongly disagree with. The denial letter indicates treatment for rotator cuff tendinitis and impingement, which she has already tried and failed. She has received subacromial cortisone injection as is recommended as well as physical therapy, as is recommended…Given her failure with conservative measures and symptoms consistent with structural pathology, recommend surgical intervention. Her symptoms are more consistent with labral tear and resultant inflammation and dysfunction.

Dr. Shah continued to recommended right shoulder arthroscopy, extensive debridement, subacromial decompression, labral repair, and distal clavicle excision.

19. On November 7, 2017, Eric O. Ridings, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Ridings noted certain records indicated "two different exacerbating incidents or at least two different days about two weeks part in which [Claimant] had increased right shoulder symptoms." Claimant reported to Dr. Ridings that she first experienced right shoulder pain approximately two weeks prior to the given date of injury on the claim of June 8, 2017. She reported that the pain increased during the second day and began to feel warm inside. She reported that, after working two weeks on a different job, on June 8, 2017 she experienced unbearable pain in the right shoulder.

20. On exam, Dr. Ridings noted limited right shoulder range of motion. He noted he was unable to perform impingement testing due to Claimant's complaints of pain. Dr. Ridings opined that there was no mechanism of injury at work that would be expected to cause any significant injury to Claimant's shoulder. He concluded that the MRI findings are insufficient to explain the severity of Claimant's complaints and the labral tear is

unrelated to the mechanism of injury. Dr. Ridings opined that Claimant's primary diagnosis is voluntary guarding of the right upper extremity and, to the extent Claimant sustained a work-related injury, it would be mild tendonitis and muscular shoulder strain. Dr. Ridings further opined that there is no indication for arthroscopic surgery or a distal clavicular excision, and that surgery is more likely to worsen Claimant's condition.

21. On November 15, 2017, Respondents sent Dr. Otten a copy of Dr. Ridings' IME report and a letter with several questions regarding Claimant's status. In his response, Dr. Otten opined that Claimant is not at maximum medical improvement ("MMI") stating, "MRI confirmed labral tear, needs surgical repair (it is also clear that there were underlying, pre-existing degenerative changes that should not be treated under this claim)."

22. Dr. Ridings testified at hearing on behalf of Respondents as a medical expert in physical medicine and rehabilitation. Dr. Ridings is Level II accredited and board certified in physical medicine and rehabilitation. Dr. Ridings testified consistent with his IME Report. Dr. Ridings testified that the mechanism of injury is not consistent with causing a labral tear or aggravating, accelerating or exacerbating an underlying labral tear, as there was not enough force to cause the pathology. Dr. Ridings testified that Claimant has a work-related condition of bursitis and/or tendinitis of the shoulder, and that the surgery recommended by Dr. Shah is neither reasonable nor necessary to cure or relieve from or related to the effects of the "industrial injury.

23. Claimant testified at hearing that she had no prior issues with her right shoulder. She testified that the shoulder injection was not helpful and she remains in constant pain, with a warm sensation in her right shoulder that occasionally radiates up her neck and down her arm.

24. Dr. Otten testified by post-hearing deposition on April 23, 2018. Dr. Otten is Level II accredited and board certified in occupational medicine. Regarding the mechanism of injury, Dr. Otten testified that there was mention of repetition, but also mention of a sudden onset of pain during Claimant's work shift, which he considered an acute event. Dr. Otten testified that Claimant had pre-existing osteoarthritis of the acromioclavicular joint and bland degeneration in the glenohumeral joint, which was seen on the MRI. Dr. Otten discussed the anatomy of the glenohumeral joint, and how thinning of the labrum with degeneration would affect the mechanics of the joint, increasing the likelihood of a tear from working the arbor press in this case over a thousand times a day. Dr. Otten testified that Claimant was predisposed to injury because of the existence of pre-existing degenerative changes, stating,

> …there are these degenerative changes there that makes her shoulder function probably not as good as somebody who's healthy, and then she is doing a very labor-intensive job. And then like we were just discussing, I think it is reasonable to think that she caused an acute labral tear from the job description.

25. Dr. Otten testified that limited range of motion and strength were objective evidence of injury during his first examination of Claimant. Dr. Otten testified that Claimant is not at MMI and continues to have objective findings on examination and has not shown significant improvement.

26. Dr. Otten testified that Claimant's injury could fall under Exhibit 4 (Shoulder Injury) or Exhibit 5 (Cumulative Trauma Conditions) of the Guidelines because there was both repetitive use and a sudden onset of pain. Dr. Otten testified that there are no specific guidelines addressing a shoulder labral tear under Exhibit 5 (Cumulative Trauma Conditions) of the Guidelines. Dr. Otten testified that he performed his usual medical causation analysis in Claimant's case and reiterated his opinion that Claimant's work activities could cause a labral tear.

27. Dr. Otten testified that he would recommend Claimant undergo a limited surgical procedure focusing on the work-related labral tear, which he opined was most likely the cause of her current problems.

28. Claimant's testimony is found credible and persuasive.

29. The ALJ credits the opinions of Drs. Shah and Otten over the conflicting opinions of Drs. Douthit and Ridings on Claimant's work-related diagnosis and recommended treatment.

30. Claimant proved by a preponderance of the evidence that she suffered a compensable injury in the form of a right shoulder labral tear.

31. Claimant proved by a preponderance of the evidence that the surgical procedure recommended by Dr. Shah is reasonable, necessary and related to Claimant's compensable injury.

32. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant's treating physicians, Dr. Otten and Dr. Shah, both credibly and persuasively opined that Claimant sustained a work-related labral tear, and that the labral tear is the most likely cause of Claimant's current symptoms. Dr. Otten credibly testified that Claimant was predisposed to injury because of the existence of pre-existing degenerative changes, and her work activities likely caused her injury. Claimant was credible in her testimony that she did not have prior shoulder issues. Claimant did not become symptomatic until performing duties that required high repetition, overhead reaching, and force pressing the part into shape. Dr. Shah reviewed the MRI film and

credibly opined that there is a labral tear, and that Claimant's symptoms are more consistent with a labral tear. Accordingly, based on the totality of the evidence, the ALJ is persuaded Claimant suffered an industrial injury in the form of a labral tear to which she was predisposed because of underlying degenerative changes, causing her symptoms and the need for medical treatment.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Dr. Shah and Dr. Otten credibly and persuasively opined that labral repair surgery is reasonable, necessary and related to Claimant's compensable injury. Claimant has failed more conservative treatment, including injections and physical therapy. Claimant credibly testified she continues to experience symptoms. Dr. Otten credibly testified Claimant continues to have objective findings on examination. As previously mentioned, Dr. Shah credibly opined that Claimant's symptoms are more consistent with a labral tear. Based on the totality of the evidence, the ALJ is persuaded it is more probable than not that the labral repair surgery recommended by her authorized treating providers is related to Claimant's compensable injury and is reasonably necessary to cure and relieve Claimant of its effects.

ORDER

It is therefore ordered that:

I. Claimant established by a preponderance of the evidence that she suffered a compensable injury.

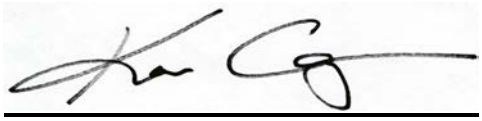
II. Claimant established by a preponderance of the evidence that the labral repair surgery of the right shoulder is to be reasonable, necessary and related to Claimant's work injury. Insurer shall authorize the proposed labral repair surgery for the right shoulder as requested by Dr. Shah.

III. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 31, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Is the L4/L5 fusion surgery as recommended by Claimant's treating surgeon, Dr. Ronald Hammers, reasonable, necessary, *and related* to her work injury of March 24, 2017?

II. Has the burden of proof on the above issue shifted to Respondents, by clear and convincing evidence, since the unchallenged DIME report has found that the work injury *caused* Claimant's back condition, which now requires a fusion surgery?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. The Claimant is a registered nurse who describes her job as physically demanding, with frequent bending, heavy lifting, standing and walking. At hearing, she described it as "hard on my back."

2. The Claimant testified that she has been on medications for her low back since around 2003. She concedes that her tolerance to these medications has "possibly" built up over time, but had never been told that by any of her treating physicians.

3. Claimant testified that prior to her work injury she had low back pain that she treated with daily Norco and chiropractic treatment; however, since her work injury occurred, "Now I take the Norco three times a day. I take nine ibuprofen a day and two Tylenol a day and still do not have pain control. Whereas, before I was not taking drugs like that."

4. Claimant testified that prior to her work injury, her personal care provider told her she would have flare-ups of low back pain which could cause her to miss work. Because she thought she was only permitted to miss three days of work per six-month period, the Claimant testified that she handled these flare-ups by taking FMLA leave one to two days per month. She testified that she would normally miss work after working a fifth consecutive shift.

5. The Claimant testified regarding what work functions she has had difficulty performing since her injury:

A. I have a brand-new granddaughter and it kills me to lean over to change a diaper. I can't do it. I can't like unloading my dishwasher, my dryer, get clothes out of it. Any lifting at all to carry my trash bag to the trash can….And my car kills me driving it.

Q. Did you ever had difficulties with these chores before March 24, 2017?

A. I did with the vacuuming, and vacuuming—and I had told Dr. Demechek that I did have some burning like bending over my patients, leaning, like to get their clothes on. If I had to lean over tor too long it would hurt.

6. The Claimant testified that prior to her work injury she did not have associated pain in her groin and thighs. Claimant also testified that prior to her work injury, she did not have associated loss of feeling in her legs and feet.

7. The Claimant testified that prior to her work injury her personal care providers were telling her that she may eventually need to have lumbar surgery.

8. In 2012, the Claimant was excused from jury duty by her personal physician because she could not sit for the amount of time required by the service.

9. In March 2012, the Claimant was treating for a rash. In her history, it was noted that she was usually taking one Vicodin in one day for her low back pain and radiating right buttock pain- a second one later on if needed. She reported that bending and sitting made the pain worse, and that she had trouble standing up after sitting for a while. She reported that it was painful to drive. At this time, the Claimant also reported a prior motor vehicle accident from four years prior. She was diagnosed with chronic low back pain. (Ex. B, p.10).

10. In April 2012, the Claimant reported trying to "change everything" to help Her lower back pain, including her bed, her shoes, and her car seat. She reported that she "[t]akes an hour to get going" and that her low back condition had worsened over the last year after she moved herself and began carrying her grandchild on her hip. (Ex. B., p.13).

11. In May 2012, the Claimant reported that her low back "[f]eels stiff when first gets going" and that her symptoms radiated down into her right leg. (Ex. B., p.15).

12. In August 2014, the Claimant was examined at Maple Leaf Orthopedics for bilateral hip pain, which had recently become problematic. She explained that she had pain associated with sitting because her back stiffens up causing her pain in her low back and hips. She was prescribed 2-3 Norco per day at this time for the hip pain, but reported that she had only been taking over the counter medications up to this point

for her back issues. (Ex. B., p.19-21).

13. On August 18, 2014, the Claimant had a lumbar spine MRI that confirmed Grade II anterolisthesis at L4-5 with desiccated disc and bilateral facet arthropathy with severe central spinal stenosis and severe foraminal narrowing, bilaterally. The MRI also revealed a desiccated bulging disc protrusion at L5-S1, and a bulging disc at L3-4. (Ex. B., p.22).

14. In October 2014, the Claimant reported radiation of pain from her low back into her right leg. She takes Norco 'occasionally'. (Ex. B., p.26).

15. In June 2015, the Claimant reported that a trial of physical therapy did not help her low back pain, and that she continued to have occasional flare-ups of pain, the last one in May 2015. (Ex .B p. 30).

16. In October 2015, the Claimant was examined by Maple Leaf Orthopedics, primarily for neck and upper extremity complaints. She was found to have restricted range of motion in the lumbar spine. She was given a 30 lb. lifting restriction. At this time, the Claimant's primary care provider remarked: "I am quite impressed that she is able to continue to work." (Ex. B, p.33).

17. Also, on October 25, 2015 Claimant was struck in the face twice by a patient with a closed fist that caused neck pain for which she received treatment at CCOM. (Ex. 6, p. 50). She was placed at MMI less than a month later on November 11, 2015. Dr. Richard Nanes documented that Claimant was ambulating normally and had good cervical *and lumbar range of motion.*

18. In November 2015, the Claimant reported that her low back and neck pain. She reported feeling increased depression and anxiety as a result of her pain. (Ex. B, p.35).

19. In March 2016, the Claimant's primary complaint was chest pain. She also reported pain across her low back that radiates down through her buttocks into her thighs with burning behind both knees. She reported problems picking up her right foot. (Ex. B, p.38).

20. The next mention of back pain in the notes from Dr. Danylchuk is dated April 19, 2016. (Ex. 4, p. 32). The purpose of this appointment was to discuss FMLA to allow for Claimant to take "a few days off" because of her neck and back pain, though it was again noted that Claimant continued to work taking care of geriatric patients and must perform a lot of lifting. *Id.* Claimant testified that she was only allowed to take so many days off from work without FMLA, so she went to Dr. Danylchuk to get the paperwork filled out so that she could take a day or two off work per month to rest her neck and her back. No additional treatment was discussed, recommended, or offered at this visit. *Id.*

21. In November 2016, the Claimant reported being hesitant to try epidural injections for her low back pain because her father and sister had tried them without success. Claimant at this point still expressed no interest in quitting smoking. *(Ex. B,* p.42).

22. At hearing, Claimant testified that in December 2016 her pain medication for her low back was losing its effectiveness. To combat this ineffectiveness, she requested and had administered an epidural injection on December 10, 2016.

23. Claimant did not return to Dr. Danylchuk for another 8 months until her visit on December 15, 2016. (Ex. 4, p. 34). She had undergone an epidural steroid injection of the L4-L5 interspace on December 10, 2016 with Dr. Douglas Hess. (Resp. Ex. B, p. 45). Dr. Danylchuk noted that Claimant did receive relief from the injection and indicated that Claimant was still performing a lot of bending at work for the Employer when she is helping patients. (Ex. 4, p. 34). The note reflects that Claimant remained comfortable at rest, was able to get up without difficulty, was able to ambulate without a limp, and was able to stand on her heels and toes. The plan was to follow-up with Dr. Hess for a possible second epidural steroid injection, but Claimant did not pursue a second injection, at least not until after March 24, 2017. This is the last medical record in evidence prior to Claimant's March 24, 2017 injury.

24. On March 24, 2017, around 3:30 a.m., the Claimant suffered an admitted exacerbation of her existing low back condition when she was moving a patient. She testified that she felt pain at the time but "didn't think anything of it" because "it's normal for me to feel pain sometimes."

25. The Claimant testified that the physical activity she engaged in on March 24, 2017 when moving the patient was a common and regular activity in her job. Initially, she described the pain from this incident:

> A: So I didn't think anything of it. I thought I'd go home and rest and I'll be okay. And that night after sleeping I had enough that I was in severe pain. It just….hurt and I went into work and told them, you know, I need to file Because I wasn't going to file a Workman's Comp claim, I thought I'll be okay….
>
> Q: And the severe pain that you had the following day, did you ever have the pain that severe prior to?
>
> A: Not that severe, no. No. I used to take Norco like one a day and this last year I have to take—I take Norco 7.5/325 with three up two of them and a Tylenol and it doesn't do anything for the pain. It—and then if I get any little but of help from that, it lasts maybe two or three hours…
>
> Q: All right. So have you had ongoing lower back pain every day since March 24th, 2017?

A: Constant. It's been constant, there's not been—been no relief.

Q: ..So as of today, are you still experiencing the lower back symptoms?

A: I took pain medication just before I came here and I'm still in a lot of pain.

Q: ….And these symptoms that you're having now, are they still different than the symptoms that you had prior to Mach 24th of 2017?

A: Prior to March 24th I didn't have the pain in my groin and on the inside of my things… And then when I get up I couldn't feel my legs, I'm standing there and I had no feeling whatsoever. I couldn't move my foot a fraction of an inch forward…..it felt like my legs were dead.

26. The next day, on March 25, 2017, Claimant presented to the emergency room complaining of an increase in her existing low back symptoms. She complained of pain radiating down to her lower extremities, greater on the right side. The Claimant noted that incidents of greater pain on the right side than left had occurred before. She noted that sitting made it worse. (Ex.8, p.124).

27. Claimant missed the next 45 days from work for which she was paid TTD before she returned to work on light duty. (Ex. 3).

28. On March 27, 2017, Claimant saw an occupational health provider. The Claimant reported: "She said the symptoms she has now are exactly the same as what she has had in the past when her low back pain *exacerbates*." (Ex. C, p.48)(emphasis added).

29. On March 27, 2017, the Claimant denied numbness or tingling in her lower extremities, but did report pain radiating from her right lower back down into her right knee. *Id*.

30. On March 27, 2017, the Claimant was given work restrictions: no bending, climbing, crawling, squatting, stooping, and twisting. No physical management or takedowns of patients. 5 pounds lifting with right arm, 10 pound push or pull limit. *Id.* at 50.

31. Claimant was again seen by Nurse Kuhn on March 30, 2017 complaining of ongoing, persistent low back pain. (Ex. 6, p. 58). Claimant reported improvement with the shoulder, but no difference in the back pain. At her follow up visit on April 6, 2017, her pain diagram demonstrated pain from the mid-to-lower back and down both legs with pain complaints 100% of the time with her back pain at that time being 10 out of 10 and shoulder pain being only 4 out of 10. *Id.* at 67. By April 21, 2017, Claimant continued reporting persistent ongoing lower back pain that was made worse with physical therapy, again complaining of 10 out of 10 pain in her lower back and indicating

she did not feel that she was improving. Dr. Thomas Centi documented that Claimant was having difficulty with prolonged standing and walking, complaints that were not documented prior to March 24, 2017.

32. On April 28, 2017, the Claimant reported improving pain and "no problems with function." Her physical examination, however, was the same as when she reported a pain level of 10 and a worsening of her pain on April 21. *Id.* at 79.

33. On June 2, 2017, the Claimant was placed at MMI with no restrictions and no permanent impairment, and the Respondent filed a Final Admission of Liability in response to those determinations from the ATP. (Ex. A, pp.5-6).

34. On June 6, 2017, the Claimant again reported improving pain (Ex. C, p. 89).

35. Claimant again did not return to Dr. Danylchuk until June 8, 2017, about two-and-a-half months after the March 24, 2017 work injury. (Ex. 4, p. 36). Dr. Danylchuk specifically documented that since the work injury, "Her back pain and leg pain has intensified."

36. On June 14, 2017, the Claimant had a MRI of her lumbar spine as referred by her primary care provider. Her lumbar spine was stable when compared to her August 2014 MRI, and there were no changes since the August 2014 MRI. *Id.* at 93.

37. On June 20, 2017, the Claimant objected to the Respondent's Final Admission of Liability and initiated the DIME process.

38. On June 24, 2017, the Claimant underwent an epidural injection at the L4-5 level. *Id.* at 99.

39. On August 22, 2017, the Claimant attended a neurosurgery consultation as referred by her primary care provider. The Claimant reported her history of low back pain as well as her work incident in March 2017. The Claimant's MRI films were reviewed. Ultimately, the Claimant received diagnoses for her spondylolisthesis, stenosis, neurogenic claudication and lumbar radiculopathy. "Symptoms are consistent with neurogenic claudication and lumbar radiculopathy." *Id*. at 108-109.

40. On August 29, 2017, the Claimant underwent a Division Independent Medical Examination with Dr. Timothy Hall. Dr. Hall is accredited by the Colorado Division of Workers' Compensation in physical medicine and rehabilitation. Dr. Hall is not a surgeon. The Claimant reported a history of injury to Dr. Hall that described multiple events that led to a build-up of pain as opposed to one acute incident on the date of injury. (Ex. C, p.112). Dr. Hall found her to be a good historian. Dr. Hall also stated that he did not review any records from prior to the work injury. Regardless, Dr. Hall stated there was nothing in the record to contradict that the Claimant suffered a significant worsening since her work incident. He stated that a future L4-5 fusion would be the responsibility of the workers' compensation carrier because there was nothing in

the record to imply a fusion being contemplated beforehand. Dr. Hall found the Claimant "Not at MMI." Dr. Hall also provided a provisional rating of 17% for Claimant's *permanent* aggravation of her pre-existing lumbar spine condition.

41. On September 8, 2017, the Division of Workers' Compensation issued its Notice of "Not at MMI" Determination. On September 13, 2017, the Respondent filed a General Admission of Liability in response to the DIME report with no purported limitation of conditions. The General Admission of Liability states: "Injured worker is no longer at MMI per attached DIME Dr. Hall's 8/29/17 med report."

42. On September 14, 2017, the Claimant received another epidural injection into her lumbar spine. *Id*. at 118.

43. On October 12, 2017, the Claimant returned to the ATP upon receipt of the DIME report. The ATP ordered new x-rays, physical therapy and prescribed continuing medications. He scheduled a follow-up appointment for October 19, 2017, and anticipated MMI in December 2017 *Id.* at 120-21.

44. On October 12, 2017, the Claimant had the x-rays ordered by the ATP. They found severe osteoarthritis at L4-5, degenerative disc disease and spondylolisthesis. There was no instability noted with flexion or extension. *Id*. at 122.

45. On October 19, 2017, the Claimant saw the ATP again. The Claimant reported that her condition was stable. The ATP made an orthopedic referral. *Id.* at 123-24.

46. On November 4, 2017, the Claimant had another epidural injection into her lumbar spine. *Id.* at 126.

47. On November 14, 2017, the Claimant went to her personal orthopedist for continued evaluation of her low back pain. She told him that she was not yet ready for surgery. *Id*. at 130.

48. On November 22, 2017, the Claimant had a CT scan of her lumbar spine. It revealed facet arthropathy, advanced sclerosis, degenerative disc disease, and stenosis. *Id.* at 138.

49. On November 28, 2017, the Claimant underwent an evaluation with a spinal neurosurgeon, Dr. Botolin, at the referral of her primary care provider. Dr. Botolin reviewed the Claimant's images and took her history. He diagnosed stenosis, neurogenic claudication, spondylolisthesis, and facet arthropathy. He diagnosed a progressive worsening of her condition. Dr. Botolin recommended a L4 to sacrum posterior spinal fusion with multilevel decompression. He did, however, recommend the Claimant quit smoking before surgery due to the high rate of non-union in nicotine users. (Ex. 9, p. 224)

50. On January 9, 2018, the Claimant saw Dr. Ronald Hammers, M.D. Dr. Hammers noted symptoms consistent with neurogenic claudication. Dr. Hammers reviewed the Claimant's MRI films and noted degenerative changes, particularly spondylolisthesis and stenosis at L4-5. He diagnosed spondylolisthesis, stenosis and neurogenic claudication. Because of her stenosis and spondylolisthesis, he recommended a fusion at L4-5. Dr. Hammers also advised that she quit smoking before the surgery. *Id.* at 146-148. Dr. Hammers documented: "*The worsening of her pain correspondence [sic] with a workplace incident in March of 2017*."(emphasis added).

51. Dr. Hammers concluded the following: "[Claimant] has a history of back and lower extremity symptoms consistent with lumbar stenosis and spondylolisthesis at L4-5. *These symptoms significantly affect her ADL and she has failed to improve with appropriate conservative management.* She is a good candidate for surgery, L4-5 TLIF. She would like to proceed and we will begin planning." (Ex. 12, p. 243). Part of Dr. Hammers' conclusion that Claimant was a surgical candidate was the impact of her symptoms on her activities of daily living that she did not have prior to March 24, 2017.

52. On January 15, 2018, the Respondent wrote Dr. Hammers and the Claimant informing them that the surgery request was not authorized as the "requested services" were not causally related to the admitted injury. (Ex. A, p.8).

53. On January 25, 2018, the Claimant returned to her ATP, who continued her medications, scheduled a follow-up appointment for March 1, 2018, and estimated a MMI date of March 29, 2018. (Ex. C, p.150).

54. On February 8, 2018, the Claimant field an Application for Hearing on the sole issue of "Authorization of surgery requested by Dr. Ronald Hammers. Relatedness of need for surgery." (Ex.1).

55. On February 20, 2018, the Respondent filed a Response to Application for Hearing that did not endorse the issue of causation of the Claimant's low back condition. *(Ex.2)*.

56. On March 8, 2017, the Claimant returned to her ATP, who continued her medications, scheduled a follow-up appointment for April 19, 2018, and estimated a MMI date of June 21, 2018. (Ex. C, pp. 153-154).

57. On March 12, 2018, the Claimant had another MRI of her lumbar spine. This MRI indicated spondylolisthesis and stenosis. *Id.* at 155.

58. On March 26, 2018, the Claimant saw Dr. Jack Rook for an independent medical examination. Dr. Rook is Level II accredited by the Colorado Division of Workers' Compensation in physical medicine and rehabilitation. Claimant reported that her low back pain began about four years ago with burning pain down her lower extremities, right greater than left. She told Dr. Rook that these symptoms got progressively worse between 2014 and 2017. (Ex. C, p.156).

59. The Claimant told Dr. Rook, as she did Dr. Hall, that she had not discussed *actually proceeding with* lumbar surgery with her medical providers before her work injury. (Ex. C, p.162).

60. Dr. Rook opined that Claimant's need for lumbar surgery was related to her work injury, because the Claimant was working beforehand without the need for restrictions, her clinical condition changed abruptly on the date of her work injury, there was no prior discussion of proceeding with lumbar surgery, and her sleep had deteriorated since her work injury. Dr. Rook also relied upon the DIME report and a utilization review report. *Id*. at 166-67. Dr. Rook also noted: Dr. Hall, the DIME, felt the Claimant had a permanent aggravation of her lumbar spinal stenosis which now necessitates treatment. Dr. Hall predicted this outcome and specifically opined it was causally related to the work incident, thus it should be Respondents' burden by clear and convincing evidence to prove it is not causally related.

61. On April 16, 2018, the Claimant returned to the ATP, who continued medications, scheduled a follow-up appointment for May 21, 2018 and now estimated a MMI date of December 10, 2018. *Id*. at 169-70.

62. On May 12, 2018, Dr. Jorge Klajnbart, D.O., issued an independent medical evaluation report, based upon a records review. Dr. Klajnbart has been an orthopedic surgeon for over twenty years. Ten to twenty percent of his practice is devoted to treating lumbar conditions. He has been trained in and has performed lumbar surgeries. Dr. Klajnbart is Level II accredited by the Colorado Division of Workers' Compensation in orthopedics, and that accreditation includes training in causation. Dr. Klajnbart was trained during his orthopedic residency in correlating mechanisms of injury and causes for low back pain during his education and residency.

63. Dr. Klajnbart reviewed more than three inches of medical records pertaining to the Claimant's low back from 2012, 2014, 2015, 2016, 2017 and 2018. *Id.* at 172-78. Dr. Klajnbart reviewed the lumbar MRI imaging films from August 18, 2014, June 14, 2017, and March 12, 2018. He also reviewed the imaging films from the November 22, 2017 CT scan of the lumbar spine. *Id.* at 172.

64. Dr. Klajnbart opined that no acute changes appeared on the June 14, 2017 MRI films as compared to those from August 2014.

65. Dr. Klajnbart testified that the November 22, 2017 CT scan films demonstrate longstanding spondylolisthesis at L4-5 as opposed to an acute manifestation of the condition, meaning those findings are not related to her work injury. *Id.* at 177.

66. Dr. Klajnbart opined with a high degree of medical probability that the Claimant suffered only a *temporary* aggravation to her preexisting low back condition as a result of her work injury. He said there is no objective evidence to support a *permanent* aggravation of the Claimant's low back condition as a result of the work

injury. He states: "The overwhelming evidence and medical data point to a stable MRI, which was compared to a previous MRI showing no acute changes or increase in the degenerative condition of her lumbar spine." *Id*. at 178. In his opinion, the 'temporary' nature of this aggravation was determined to be for a one year period; how this figure was arrived at was not made entirely clear from the record.

67. On June 1, 2018, the Respondent filed a General Admission of Liability. That GAL has no remarks regarding limitation of conditions. (Ex. A, p.9).

68. On June 4, 2018, the parties took the evidentiary deposition of Dr. Rook. Dr. Rook testified that the Claimant suffered a *permanent* aggravation of her preexisting low back condition that necessitated the surgery recommended by Dr. Hammers.

69. Dr. Rook testified on direct examination that *subjectively* the Claimant's condition appears to have worsened as a result of the work injury. He elaborated: "You don't have to have an objective change to have an aggravation of a condition, because an aggravation usually doesn't necessarily imply that there is new pathology."

70. When asked what objective evidence he relied upon in giving his opinions, Dr. Rook stated the diagnostic imaging and physical examination. From his physical examination, he relied upon diminished reflexes in the lower extremities. He also stated that the diminished reflexes could be caused by peripheral neuropathy, a problem in her pelvis, or a pinched nerve in her back.

71. With regard to the imaging, he relied upon its indication of severe spinal stenosis and spondylolisthesis. But he conceded that those conditions did not objectively worsen after the work injury.

72. Dr. Rook admitted that the Claimant's functional deterioration is a subjective determination based upon the accuracy of the Claimant's history. He was not aware of any objective evidence used by the Claimant's treating providers in assigning work restrictions.

73. He did testify, however, that he would have restricted the Claimant from working in heavy physical demanding jobs based upon her August 2014 MRI.

74. Dr. Rook testified that both of the recommended lumbar surgeries were aimed at curing the Claimant's preexisting conditions, but which had been aggravated by this work injury.

75. Dr. Rook testified that that the only objective evidence supporting his opinion of a permanent aggravation from the work injury is "perhaps" the Claimant's diminished reflexes from his physical exam.

76. Dr. Rook further testified that you need to look beyond simply the objective data, such as an MRI, when determining whether a surgery is related to a work injury:

> It's my understanding if there's a functional deterioration in a patient's condition to the point where they can no longer work like they did, and their symptoms are much worse than they were, they now involve both legs instead of just one leg, their ability to ambulate is deteriorated by 50 percent, and that it's had a profound changing in their life since the occupational injury, which has not changed any -- has not gone back to its baseline as suggested by Dr. Klajnbart, that you're talking about a permanent aggravation of a condition. You don't have to have an objective change to have an aggravation of a condition, because an aggravation usually doesn't necessarily imply that there is new pathology.

77. Dr. Rook acknowledged that it was certainly a possibility that Claimant may have needed this surgery at some point in the future, but if she had not had the work injury on March 24, 2017 that significantly changed her levels of pain and function, she would not be having this surgery as early as she needs it. Furthermore, Dr. Rook explained that only so much can be seen on an MRI, and with a client that already has severe stenosis, we are talking about microns of movement in the spine or additional impingement that can cause symptoms that would not necessarily be apparent on an MRI when compared to a previous MRI, hence the need to take into account pain and function.

78. On June 8, 2018, the parties took the deposition of Dr. Jorge Klajnbart, MD.

79. Based upon his training, Dr. Klajnbart testified that in his medical opinion, objective data supersedes subjective information when determining causation of the need for surgery. He cites the low back provisions of the Colorado Division of Workers' Compensation Medical Treatment Guidelines as holding that objective data such as MRI imaging and other diagnostic studies have greater validity and reliability in this regard, as opposed to a functional or subjective examination.

80. Dr. Klajnbart testified that evaluations of functional capacity lack significant credibility or reliability and therefore do not weigh significantly in performing a forensic exam on the need for surgical intervention. He testified that the Medical Treatment Guidelines give evaluations of functional capacity a low-validity quotient in this context.

81. Dr. Klajnbart testified that, with a high degree of medical probability, a significant deterioration in functional capacity should correlate with some objective data, such as visible markers on MRI imaging. He testified that visible markers indicating such a permanent aggravation would include increased uptake on the vertebral bodies, fluid around the arthritic facet joints and inflammatory changes at the ligaments and the tendons. He testified that these same markers would be possible evidence that the work injury accelerated the Claimant's preexisting lumbar condition. He testified that none of these markers exist on the Claimant's MRI imaging.

82. Dr. Klajnbart testified that, in his opinion, the Claimant's diminished reflexes during Dr. Rook's exam do not impact the question of whether the proposed lumbar fusion is related to the work injury because the Claimant's preexisting lower extremity weakness would correlate with those findings.

83. Dr. Klajnbart testified that the Claimant's mechanism of injury, a hyperflexion moment, would not narrow the spinal canal as testified to by Dr. Rook. Rather, such a motion would open up the neural foramen of the lumbar spine roots to allow them greater space. Accordingly, he opines, the Claimant's reported mechanism of injury compliments the MRI imaging in not supporting a permanent aggravation.

84. Dr. Klajnbart did testify that the Claimant needs low back surgery for her stenosis, spondylolisthesis and neurogenic claudication. Specifically, Dr. Klajnbart testified that the Claimant needs a multi-level fusion as opposed to the single-level fusion recommended by Dr. Hammers because her disease is represented at multiple levels. He testified, however, that the need for this surgery is not *related* to the work injury. Rather, the Claimant satisfied the DOWC Medical Treatment Guidelines for this procedure back in 2015. Dr. Klajnbart was unaware that Claimant missed 45 days of work in a row after the initial incident. Dr. Klajnbart further indicated that, even though Claimant was functioning well enough to be missing only one or two days of work per month, and that her pain was under control, he would have recommended Claimant undergo this surgery as of late 2015. (Klajnbart Depo, 31:3-21).

85. With regard to the lumbar fusion at issue, Dr. Klajnbart testified that the Medical Treatment Guidelines require forensic physicians to ask if the recommended treatment for the condition would be the same if the work-related exposure had never occurred. He answered 'yes' in the case of the Claimant. "This isolated injury in no way, with a high degree of medical probability, has led to her requirement or their [sic] medically reasonable acceptance, of her undergoing the surgery."

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the LAJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). The ALJ finds Claimant to be credible.

Medical Benefits: L4-5 Fusion

D. For a compensable injury, Respondents must provide all medical benefits that are reasonably necessary to cure and relieve the injury. C.R.S. § 8-42-101 (2010). Respondents are liable for reasonable and necessary medical treatment by a physician to whom a claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987). An aggravation of a pre-existing condition is compensable. *State v. Richards*, 405 P.2d 675 (Colo. 1965). The question of whether there has been a permanent aggravation is one of fact for determination by an ALJ. *Monfort Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993).

E. Pursuant to WCRP 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at WCRP 17, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However, the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented

in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

F. A DIME physician's finding of MMI is binding on the parties unless overcome by clear and convincing evidence. Because an MMI determination requires the DIME physician to ascertain the cause of the claimant's medical conditions, the DIME physician's determination of *causation* must also be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002)." *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172, 1179 (Colo. App. 2005) (internal citations included). Respondents argue (not without merit) that notwithstanding the DIME's conclusions on causation, they are free to challenge any proposed treatment modality, shifting the burden to the Claimant, even if Respondents' challenge is *solely to the relatedness component,* as here.

G. Assuming, *arguendo,* that the relatedness burden is on Claimant, the ALJ finds that the weight of the evidence supports a finding that Claimant's need for surgery is causally related to the work incident by a preponderance of the evidence. Although Claimant has a history of lower back pain which required treatment, the ALJ is persuaded that Claimant sustained a *permanent* aggravation of her underlying condition as a result of the work injury. Surgery is now needed to correct this medical condition-it is directly related to her work injury. The ALJ credits the testimony of Claimant that her condition in terms of both pain and function have been and continue to be substantially worse than prior to March 24, 2017. Claimant's testimony is supported by the medical record. The first visit to the emergency room the day after the incident documented that Claimant was complaining of lower back symptoms "over [her] baseline" after the patient at work dropped all of his weight onto her.

H. Dr. Klajnbart opined that Claimant's work injury was merely a temporary aggravation of her underlying condition that would have resolved approximately one year later. Respondents might reasonably argue that, with the passage of approximately one year, Claimant will recover with conservative care; ergo no need for surgery. This is not the case; Respondents' own expert agrees that a fusion surgery is reasonable and necessary- in fact, Dr. Klajnbart thinks a two level fusion is more appropriate for her condition. The ALJ is not persuaded by Dr. Klajnbart's opinion that Claimant's ongoing symptoms might be currently work related, but will become unrelated (to her work injury) at some indefinite point in time, approximately a full year after the work injury.

I. Dr. Klajnbart downplayed the significance of Claimant's pain and function in determining whether her need for surgery was causally related to the work injury. As explained in the General Principles section of WCRP 17, Ex. 1, at page 2 of the Low Back Pain section of the Guidelines, "Patients, with the assistance of their health care practitioner, should identify their personal and professional *functional goals* of treatment at the first visit." Moreover, in determining whether a Claimant is having positive results from treatment, the Guidelines also state, "Positive results are defined primarily as *functional gains*…." Finally, under the "Surgical Interventions" heading of the General

Principles, it states, “Surgery should be contemplated within the context of *functional outcome* and not purely for the purpose of pain relief.”

J. In review of Dr. Hammers’ notes, a critical factor in his recommendation for surgery was that Claimant’s symptoms significantly interfere with her activities of daily living: a problem that Claimant did not have prior to the work injury. The ALJ also credits the testimony of Dr. Rook that while Claimant did have significant underlying pathology, she then sustained a permanent aggravation, and her significant *functional* deterioration after the work injury is what is now necessitating surgery. Although Claimant may have been a surgical candidate under the Guidelines prior to her work accident, there was no indication that she was then, or soon to be, in need of a lumbar fusion. Claimant remained largely functional until her injury. Claimant is a nurse by training; compared with most other professionals, she is acutely aware of the downsides of a fusion surgery. She purposely avoided it during earlier consultations, preferring instead to work through some pain. The notes suggest that she was unwilling to give up smoking to facilitate the procedure. Eventually, this work injury aggravated her weakened back to the point that she had to throw in the towel. Surgery is now the lesser of the two evils for her. It is a rational decision.

Burden of Proof, in Light of the DIME Opinion on Causation

K. The ALJ has found, by a preponderance of the evidence, that the L4-L5 fusion surgery, as proposed by Dr. Hammers, is reasonable, necessary, *and related* to Claimant’s work injury. Because of this, there is no need to definitively reassess the burden of proof in light of the DIME’s causation analysis.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the L4/L5 spinal fusion surgery as proposed by Dr. Hammers, along with all related treatment.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 1, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

2. On August 25, 2017, Kathleen J. Smith, BSN, RN, completed a case report. Based upon her review of the medical records pertaining to Dr. Melton's treatment of the Claimant, Ms. Smith indicated that a medical utilization review of Dr. Melton would be appropriate.

3. Thereafter, the Director of the DOWC appointed a Utilization Review Panel (Panel) consisting of Sara Meadows, D.O., Hiep Ritzer, M.D., and Lynne Fernandez, M.D.

4. Panel member, Lynne Fernandez, M.D. issued her report on January 13, 2018 and opined that that Dr. Melton's treatment of the Claimant was reasonable and necessary to cure and relieve the Claimant from the effects of the work injury. However, Dr. Fernandez also opined that Dr. Melton's treatment of the Claimant was not reasonably appropriate according to accepted professional standards; that the treatment did not comply with the Colorado Medical Treatment Guidelines (the MTG); and deviations from the MTG were not reasonable. Finally, Dr. Fernandez noted that Dr. Melton's care was no longer reasonable beginning May 13, 2017. Dr. Fernandez opined that Dr. Melton should no longer treat the Claimant.

5. In her written report, Dr. Fernandez pointed to Dr. Melton's unclear records, and opined that it was possible that the electronic medical record (EMR) utilized by Dr. Melton was inadequate to fully document the treatment. Dr. Fernandez raised concerns related to the Claimant's continued use of opioids, and unclear records regarding whether these medications were being tapered. In addition, Dr. Fernandez raised a concern regarding the lack of documentation by Dr. Melton regarding drug screens and lab results. Dr. Fernandez also noted that Dr. Melton's records identified a lower extremity amputation that Claimant did not receive.

6. Panel member Dr. Meadows issued her report on January 25, 2018 and opined that Dr. Melton's treatment of the Claimant was reasonable and necessary to cure and relieve the Claimant from the effects of the work injury and reasonably appropriate according to accepted professional standards. However, Dr. Meadows also noted that Dr. Melton did not meet the MTG and deviations from the guidelines were not reasonable.

7. In her narrative report, Dr. Meadows noted that the management of the Claimant's opioid use as not complying with the MTG. Dr. Meadows opined that if Dr. Melton continued to treat the Claimant, it would be necessary for Dr. Melton to document the Texas equivalent of the prescription drug monitoring program (PDMP), document urine drug screens, and document improved pain and function to be able to comply with the MTG.

8. Dr. Meadows also noted that the format of Dr. Melton's medical records "are not ideal for being able to evaluate the quality of care provided." Dr. Meadows opined that there were documentation errors that may have led to questions about the care provided to the Claimant. Dr. Meadows also made reference to the mention of a lower extremity amputation in Dr. Melton's records.

9. Panel member Dr. Ritzer issued her report on February 2, 2018. Dr. Ritzer noted that although Dr. Melton's treatment of the Claimant was reasonable and necessary to cure and relieve the effects of the Claimant's work injury, she opined that the care was not appropriate under professional standards. Similarly, Dr. Ritzer noted that Dr. Melton did not comply with the MTG and that deviations from the MTG were not reasonable. Dr. Ritzer opined that Dr. Melton's care stopped being reasonable and necessary as of January 11, 2017.

10. In support of her opinions Dr. Ritzer specifically noted concerns with Dr. Melton's management of Claimant's use of opioids. These concerns included failure to regularly obtain drug screens, no discussion of functional improvements, and no referral to a psychologist. With regard to the date of January 11, 2017, Dr. Ritzer notes that this is the first date in which Dr. Melton began identifying Claimant's diagnosis as a below the knee amputation, although there is confirmation elsewhere in the records that the Claimant underwent no such amputation.

11. In his March 20, 2018 order, the Director summarized the findings of the Panel as follows. The Panel unanimously agreed that Dr. Melton's care was reasonably necessary to cure and relieve the Claimant from the effects of the work injury. By a majority, the Panel agreed that Dr. Melton's care was not reasonably appropriate according to professional standards to cure and relieve the Claimant from the effects of the work injury. The panel unanimously agreed that Dr. Melton's plan of care and treatment did not follow the MTG. The panel unanimously agreed that the deviations from the MTG were not reasonable or appropriate. By a majority the Panel recommended a change of provider.

12. Relying upon the opinions and recommendations of the Panel, the Director ordered a change of provider in accordance with Section 8-43-501(3)(c)(I), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. A party appealing an order specifying that a change of provider shall be made bears the burden of overcoming the MUR panel's findings by clear and convincing evidence. Section 8-43-501(5)(a), C.R.S. A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier of fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

4. The ALJ is required to give great weight to the findings of the MUR panel. Section 8-43-501(5)(a), C.R.S. Unless the assessment of the MUR panel is entirely arbitrary or based upon factors other than medical considerations, the judge my not substitute his or her judgement for the assessment of the provider's care made by the MUR panel. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005).

5. The statutory and regulatory scheme of the MUR process contemplates that the MTG are to be regarded as accepted professional standards for care under workers' compensation law. *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003).

6. The Claimant argues that because Dr. Melton is licensed in Texas and not Colorado, she should not be expected to comply with the MTG. The ALJ is not persuaded by this assertion. Dr. Melton availed herself to the MTG when she agreed to treat the Claimant for his Colorado workers' compensation claim and billed the Insurer for said treatment.

7. Even if the Claimant's argument is found persuasive, the ALJ notes that the Panel also agreed that Dr. Melton's treatment of the Claimant was not reasonably appropriate according to professional standards.

8. The Claimant further argues that the record keeping issues raised by members of the Panel can be explained as clerical errors. The ALJ is not persuaded by this assertion. Dr. Melton was provided with an opportunity to respond to the MUR. Based upon the ALJ's review of the DOWC file, Dr. Melton did not provide any statement regarding this process. Although the provider, Dr. Melton, is not required to provide any such statement, the ALJ notes that there is no explanation by Dr. Melton with regard to the repeated reference in Dr. Melton's records to a below the knee amputation that never occurred. Furthermore, the ALJ is unpersuaded that the repeated description of a non-existent amputation could be construed as clerical error.

9. The Claimant further argues that the MUR process is unconstitutional when applied, as here, to an out of state provider. Specifically, the Claimant raises two constitutional concerns. First, the Claimant raises an equal protection argument that Colorado claimants living outside Colorado are treated differently that those residing in Colorado. Second, the Claimant asserts that his inability to confront members of the Panel violates due process.

10. As an initial matter, the ALJ lacks jurisdiction to address the Claimant's constitutional argument. *Kinterknecht v. Industrial Commission*, 485 P.2d 721 (Colo. 1971); *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). However, administrative agencies have the authority to determine whether "an otherwise constitutional statue has been unconstitutionally applied. *Horrell v. Department of Administration*, 861P.2d 1194 (Colo. 1993).

11. The threshold question in an equal protection challenge is whether the legislation results in dissimilar treatment of similarly situated individuals. *Pepper v. Industrial Claim Appeals Office*, 131 P.3d 1137 (Colo. App. 2005), *aff'd on other grounds sub nom. City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006). "To violate equal protection provisions, the classification must arbitrarily single out a group of persons who are similarly situated." *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004).

12. Colorado courts have repeatedly held that workers' compensation claimants are not a suspect class and that workers' compensation benefits are not a fundamental right. *Sanchez v. Industrial Claim Appeals Office*, 411 P.3d 245 (Colo. App. 2017) (*citing Dillard v. Indus. Claim Appeals Office,* 134 P.3d 407, 413 (Colo. 2006); *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192, 1197 (Colo. App. 2002)).

13. A claimant's right to procedural due process is implicated only when a fundamental property right is threatened. *Wolff v. McDonnell*, 418 U.S. 539 (1974). A workers' compensation claimant does not have a property right to receive treatment from a particular provider. *Colorado Compensation Insurance Authority v. Nofio*, 886 P2d 714 (Colo. 1994).

14. The ALJ finds that the Claimant has failed to demonstrate that he is part of a group of persons being treated disparately from similarly situated persons. On the contrary, reliance on the MTG as part of the MUR process ensures that Colorado Claimants receive the same reasonable medical treatment regardless of whether they reside in Colorado or in another state.

15. The ALJ also finds that, pursuant to *Nofio*, the Director's order of a change in provider does not violate the Claimant's due process rights.

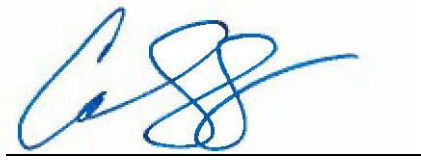
16. For all of the foregoing reasons, the ALJ concludes that the Claimant has failed to show that the Colorado Workers' Compensation Act is unconstitutional as applied in this proceeding.

17. The ALJ concludes that Claimant has failed to show that that it is highly probable and free from substantial doubt that the Director's March 20, 2018 order was incorrect and should be overturned.

ORDER

It is therefore ordered that the Director's March 20, 2018 order is affirmed.

Dated: August 2, 2018



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ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that his claim should be reopened pursuant to Section 8-43-303, C.R.S.

FINDINGS OF FACT

1. On February 18, 2016, the claimant sustained an admitted injury to his neck. The injury occurred when the claimant tripped on an electrical cord while carrying a table. Following the injury the claimant received medical treatment from Dr. Jenny Connery, Dr. Anne Goyette, and Dr. Joel Cohen.

2. On October 27, 2016, the claimant was seen by Dr. Connery. At that time, Dr. Connery noted that the claimant had seen shoulder surgeon, Dr. Kazemi. This medical record indicates that Dr. Kazemi informed the claimant that his symptoms were coming from his cervical spine.[1]

3. On December 1, 2016, Dr. Connery placed the claimant at maximum medical improvement and referred him to Dr. Goyette for assessment of permanent impairment. Dr. Connery recommended maintenance medical care including continuing the claimant's home exercise program, continuing Cymbalta for one year, and ongoing treatment with Dr. Cohen. Dr. Connery also recommended that the claimant continue working light duty with work restrictions of no pushing, pulling, or lifting over 10 pounds.

4. The claimant was seen by Dr. Goyette on January 10, 2017. At that time, Dr. Goyette agreed that the claimant reached MMI on December 1, 2016. Dr. Goyette assessed permanent impairment of 51% whole person.

5. Thereafter, the respondents requested a Division-sponsored independent medical examination (DIME). On June 13, 2017, the claimant attended a DIME with Dr. Robert McLaughlin. In connection with the DIME, Dr. McLaughlin reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. McLaughlin agreed with Drs. Connery and Goyette that the claimant reached MMI on December 1, 2016. However, he assessed a permanent impairment rating of 26% whole person. Dr. McLaughlin agreed with the maintenance care recommended by Dr. Connery.

[1] At hearing, neither party provided Dr. Kazemi's records as evidence.

6. In his IME report Dr. McLaughlin makes reference that Dr. Kazemi had recommended that the claimant see a spine surgeon. Dr. McLaughlin agreed that such a referral could be prudent, but with the caveat that the claimant should also receive treatment from a psychologist.

7. Following the DIME, the respondents filed a Final Admission of Liability on September 6, 2017 and the claimant's claim was closed.

8. Claimant was seen by Dr. David Miller on January 17, 2018 for evaluation of his cervical spine. Dr. Miller reviewed and compared magnetic resonance images (MRIs) of the claimant's cervical spine taken on June 24, 2016 and January 16, 2018. Both MRIs showed a fairly large disc herniation at the C6-C7 level on the right side with distortion of the spinal cord. Both MRIs also showed marked straightening of the cervical spine. Dr. Miller opined that "it will be possible that surgical intervention could help [the claimant]". Dr. Miller specifically recommended an anterior cervical microdisectomy fusion and plating at the C6-C7 level.

9. On January 29, 2018, the claimant filed a Petition to Reopen his claim with Dr. Miller's January 17, 2018 report as support. On the Petition to Reopen, the claimant indicated that the reasons for reopening were change in medical condition and error.

10. The claimant testified that prior to being placed at MMI there were discussions with his medical providers that surgery could be helpful to him. The claimant also testified that he was afraid of undergoing surgery at that time. However, the claimant testified that he would now like to undergo the recommended surgery.

11. Claimant's former supervisor, Mr. Del Rosario testified that the claimant was placed under his supervision in the laundry department because the claimant was working light duty. The claimant testified that he was working in that position in laundry both before and after being placed at MMI on December 1, 2016.

12. The ALJ credits the medical records, the claimant's testimony, and the testimony of Mr. Del Rosario and finds that the claimant has worked in a light duty position both before and after MMI. The ALJ also credits the medical records and finds that the cervical spine MRIs do not show any change to the claimant's condition. Therefore, the claimant has failed to demonstrate that it is more likely than not that he has experienced a change in his medical condition.

13. The ALJ credits the medical records and the claimant's testimony and finds that the claimant declined surgical treatment prior to MMI because he was afraid of surgery. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that there was an error in the closing of his claim.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-

102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g., Standard Metals Corporation v. Gallegos*, 781 P.2d 142 (Colo. App. 1989); *see also Amin v. Schneider National Carriers*, W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission*, 646 P.2d 399 (Colo. 1981).

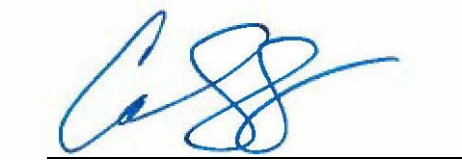
4. A change in condition refers to "a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that he has suffered a change in condition. As found, the claimant has failed to demonstrate by a preponderance of the evidence that his claim was closed due to error or mistake. As found, the claimant has failed to meet his burden of proof that his claim should be reopened. As found, the medical records, claimant's testimony, and Mr. Del Rosario's testimony are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request to reopen his claim it is denied and dismissed.

Dated: August 1, 2018



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ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that the left total knee arthroplasty recommended by Dr. Raymond Kim is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted September 5, 2017 work injury.

FINDINGS OF FACT

1. The claimant is employed with the employer as a bartender at the employer's restaurant and bar. On September 5, 2017, the claimant was at work performing her normal duties. The claimant testified that on that date she injured her left knee when she turned to remove a beer from the beer cooler. She then turned and tripped on the fatigue mat and began to fall. The claimant testified that she was able to catch herself, but in the process of falling she her left knee pop and it felt like it "exploded" in different directions. This incident was observed by the claimant's supervisor and other employees.

2. The claimant has an extensive history of bilateral knee issues including prior surgeries. On October 13, 2010, Dr. Michael Huang performed a left knee partial medial meniscectomy, chondroplasty and shaving of the patella, with loose body removal and perimeniscal cyst decompression.

3. The claimant testified that following the 2010 surgery performed by Dr. Huang she returned to full time employment and had no issues with her left knee until the September 5, 2017 incident at work.

4. Prior to the September 5, 2017 incident at work, the claimant sought treatment with her personal physician, Dr. Susan Sayers at Primary Care Partners. On June 5, 2017, the claimant was seen by Dr. Sayers for bilateral knee pain and left foot pain. At that time, the claimant reported that she had previously received injections and hoped to have more injections. The claimant testified that she sought treatment at that time because she was experiencing pain in her left foot that caused a change in her gait.

5. On June 7, 2017, the claimant returned to Primary Care Partners and was seen by Dr. Fletcher Colwell who administered corticosteroid injections to both of the claimant's knees. On June 14, 2017, the claimant reported that following the injections she had increased function and less pain. The claimant also testified that after these injections and prior to the September 5, 2017 incident she was working full time without any issues.

6. The claimant first sought treatment related to the September 5, 2017 injury on September 6, 2017 at the emergency department at St. Mary's Hospital. An x-ray of the claimant's left knee showed moderate to severe degenerative joint disease with suprapatellar effusion, but no evidence of fracture. At that time, the claimant was diagnosed with a knee sprain. The claimant was provided a knee stabilizer and instructed to follow up with orthopedics.

7. On September 8, 2017, the employer reported the September 5, 2017 incident to the insurer. Thereafter, Dr. Robert McLaughlin became the claimant's authorized treating physician (ATP) for this claim.

8. Prior to seeing Dr. McLaughlin, the claimant sought treatment with Dr. Richard Price on September 12, 2017. At that time, Dr. Price noted that the claimant had a history of advanced osteoarthritis in her left knee, but that her left knee had been more painful and swollen since her twisting injury. Dr. Price administered a kenalog injection to claimant's left knee and aspirated that same knee. In addition, Dr. Price discussed with claimant possible total left knee replacement. Thereafter on September 19, 2017, Dr. Price authored a letter in which he opined that the claimant needed total knee replacement. The claimant testified she went to Dr. Price because she was hopeful that her left knee problem would resolve quickly without requesting workers' compensation benefits.

9. The claimant was first seen by Dr. McLaughlin on September 20, 2017. At that time, the claimant reported that she felt that her left knee would not bear any weight and it would buckle. Dr. McLaughlin opined that the claimant aggravated a preexisting degenerative condition in her left knee when she tripped on September 5, 2017. In the medical record of that date, Dr. McLaughlin indicated concern that the claimant may have disrupted the remaining meniscus in her left knee. As a result, Dr. McLaughlin referred the claimant for Dr. Mitchell Copeland for an orthopedic consultation.

10. The claimant was seen by Dr. Copeland on September 29, 2017. Dr. Copeland opined that the claimant likely had end stage arthritis in her left knee and recommended a weight bearing magnetic resonance image (MRI) of the claimant's left knee.

11. The recommended MRI of the claimant's left knee was taken on October 3, 2017. The MRI showed advanced articular cartilage loss and irregularity in the medial joint compartment with bony changes; extrusion of the middle third of the medial meniscus and prominent foreshortening of the posterior third of the meniscus; abnormal signal about the PCL, consistent with prominent strain and/or chronic tendinosis; and fairly advanced spurring about the patella and about the proximal anterior tibia in the medial compartment.

12. Following the MRI, the claimant did not return to Dr. Copeland and Dr. McLaughlin referred her to Dr. Mark Luker for orthopedic consultation. The claimant was seen by Dr. Luker on October 24, 2017. Dr. Luker noted that the claimant had severe osteoarthritis prior to the work injury and opined that the claimant's injury on

September 5, 2017 exacerbated her preexisting pain symptoms. Dr. Luker diagnosed the claimant with severe bilateral knee osteoarthritis and recommended cortisone injections, Synvisc injections, and left total knee replacement. The claimant did not return to Dr. Luker.

13. On November 15, 2017, the claimant returned to Dr. McLaughlin and reported increased knee pain. At that time, Dr. McLaughlin noted that the claimant could try further injections or consider knee replacement. In addition, Dr. McLaughlin referred the claimant to Dr. Melissa Carris for treatment of chronic pain and adjustment disorder and to Dr. Dr. Raymond Kim for orthopedic consultation.

14. On December 7, 2017, the claimant was seen by Dr. Carris. At that time, the claimant discussed her injury and Dr. Carris noted the claimant's prior knee problems. Dr. Carris noted that the claimant was "nervous about a possible surgery but is working on accepting that likelihood, given the severity of her injury."

15. The claimant was seen by Dr. Kim on January 11, 2018. On that date, x-rays of the claimant's left knee showed end stage arthritis with joint space narrowing and peri-articular osteophytes. Dr. Kim noted that the claimant had exhausted conservative treatment measures and recommended a left total knee arthroplasty. The respondents have denied authorization for the recommended left total knee arthroplasty.

16. At the request of the respondents, on March 6, 2018, the claimant attended an independent medical examination (IME) with Dr. John McBride, Jr. In connection with the IME, Dr. McBride reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. McBride opined that a left total knee replacement is reasonable treatment of the claimant's condition. However, Dr. McBride also opined that the claimant's knee condition is not related to the September 5, 2017 incident, but is the natural progression of the degenerative condition in the claimant's left knee. Dr. McBride's testimony at hearing was consistent with is IME report.

17. On March 8, 2018, the claimant was again seen by Dr. McLaughlin. In the medical record of that date, Dr. McLaughlin opined that the need for the knee replacement surgery was related to the claimant's work injury.

18. On May 7, 2018, Dr. McLaughlin responded to questions posed to him by the respondents' counsel. In his responses Dr. McLaughlin opined that the claimant had not reached maximum medical improvement (MMI) because she had not returned to her functional baseline. Dr. McLaughlin noted that he was aware that Dr. Colwell treated the claimant's left knee in the months preceding the September 5, 2017 work injury. Dr. McLaughlin noted that although the claimant had knee pain during that time, she had normal range of motion, full strength, and full function of the left knee, which changed after the work injury.

19. The ALJ credits the medical records, the claimant's testimony, and the opinions of Dr. McLaughlin over the contrary opinions of Dr. McBride and finds that the claimant has demonstrated that it is more likely than not that the left total knee arthroplasty is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the September 5, 2017 work injury.

20. The ALJ specifically credits Dr. McLaughlin's opinion that the claimant's fall on September 5, 2017 resulted in the need for total knee replacement. Although the claimant has an extensive history of issues with her left knee, the ALJ is persuaded by the claimant's testimony that between the injections she received on June 7, 2017 and the September 5, 2017 injury she was able to work full time without issue. It was only as a result of her fall at work on September 5, 2017 that the claimant required medical treatment. It was the fall on September 5, 2017 that has resulted in the need for a left total knee arthroplasty.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, the claimant has demonstrated by a preponderance of the evidence that the left total knee arthroplasty recommended by Dr. Kim is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the September 5, 2017 work injury. As found, the medical records, the claimant's testimony, and the opinions of Dr. McLaughlin are credible and persuasive.

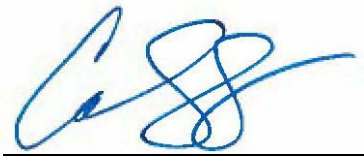
ORDER

It is therefore ordered that:

1. The respondents shall pay for the left total knee arthroplasty recommended by Dr. Kim, pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

Dated: August 2, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

EVIDENTIARY ISSUE

I. Whether Claimant's Exhibits 3 and 4 are relevant, and should therefore be admitted into evidence.

ISSUES

I. Whether Claimant has produced clear and convincing evidence to overcome Dr. Stanley Ginsburg's Division IME opinion that Claimant is at MMI as of September 15, 2016 for her December 27, 2013 admitted injury.

II. Alternatively, what is the actual opinion of Division IME physician Stanley H. Ginsburg, M.D., on the issue of whether Claimant has reached Maximum Medical Improvement?

III. Whether Claimant's concurrent earnings with Pueblo County should be factored into her average weekly wage ("AWW").

STIPULATIONS

The parties agreed on the following stipulated facts at hearing:

1. Claimant has worked for this Employer since 2001 and continues to work for the Employer.

2. Claimant has concurrent employment with Pueblo County that she began in 2006. Claimant continues to work for Pueblo County through the present.

3. If Claimant undergoes hip surgery, she will miss time from work from both employers.

4. To date, Claimant has not missed time from either employer.

The ALJ accepted these stipulations.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained an admitted work injury while working for Employer on December 27, 2013. Claimant slipped and fell, landing primarily on her left side. (Ex. 14, p. 302).

2. Employer did not refer Claimant to an authorized provider, so she treated with her chiropractor, David Pool, D.C. Claimant treated with Dr. Pool for almost three years after her work injury. The first six months of Dr. Pool's records are handwritten and difficult to interpret, but typewritten notes starting on July 29, 2014 reference "left hip" pain, and later notes document pain and spasm in the "left pelvic" area. (Ex. D; Ex. 11).

3. In early January of 2014, Claimant received a call from a "workers' compensation representative" recommending Claimant present to the emergency department because "there was no actual provider associated with" her workers' compensation claim. (Ex. H, p. 157). Claimant presented to the St. Mary Corwin Hospital Emergency Department on January 9, 2014, where she stated that she "injured her left shoulder and arm, left elbow and left thigh." The Emergency Department Report documents that Claimant "ambulated into the emergency department with a steady gait and no limp." (Ex. H, p. 158). Left hip examination revealed no guarding or irritability, no increased warmth, no swelling, mild tenderness over about the lateral aspect, no evidence of residual ecchymosis, and full range of motion." (Ex. H, p. 159). The Emergency Department physician documented that "No imaging will be undertaken" and Claimant's primary diagnosis was "Fall injuries – improving."

4. On August 21, 2014, Claimant returned to the St. Mary Corwin Hospital Emergency Department with a Chief Complaint of "left buttocks pain and right jaw pain." (Ex. H, p. 150). Claimant's History of Present Illness documented that "[h]er back pain is pain in her left buttocks that radiates to her left lateral thigh." Physical examination again revealed a normal gait. (*Id* at p. 151).

5. In July of 2015, the parties attempted to agree on CCOM in Pueblo as the ATP; however, CCOM refused to accept Claimant as a new patient. (Ex. 11, p. 283).

6. On July 27, 2015, David L. Reinhard, M.D., opined that continued chiropractic was not reasonably necessary. (Ex. 6, pp. 13-14).

7. Respondents scheduled Claimant for an Independent Medical Examination with John J. Raschbacher, M.D., on November 30, 2015. As part of that IME, Claimant completed a pain diagram. On the back of the body, Claimant marked pain from the back of the left knee to the top of the left shoulder and the left neck. On the front of the body, Claimant marked pain along the lateral left thigh from the waist to the knee. (Ex.G, p. 144).

8. Dr. Raschbacher's report states that "[o]n physical examination, her area of greatest tenderness is at the lateral left hip at the greater trochanter area. This raises the question of the possibility of a trochanteric bursitis being the pain generator." (Ex. G,

p. 141). Dr. Raschbacher opined that the "examination was not very suggestive of intrinsic hip joint pathology." (*Id* at p. 142). Dr. Raschbacher further opined that Claimant's "mechanism of injury of slip and fall on the left side would be consistent with a left trochanteric bursitis" and recommended an orthopedic referral, with consideration of a left trochanteric bursa injection.

9. Claimant began treating with orthopedist Dr. Kenneth Danylchuk of Maple Leaf Orthopedics on February 16, 2016. (Ex. 12, p. 284). She reported ongoing pain in her "lumbar region" from the fall at the end of 2013 and physical examination documented irritation of the left hip. A lumbar spine MRI was ordered.

10. Claimant returned to Dr. Danylchuk on March 22, 2016. (Ex. 12, p. 289). Dr. Danylchuk noted that the lumbar spine MRI was completely normal; however, Claimant was 'upset' that she was sent to a "spine doctor" as she discussed her ongoing hip complaints. Claimant explained that her chiropractor has simply been 'putting her hip back into place' since the accident. She further pointed to her left side buttock area as the source of the pain. Dr. Danylchuk ordered an MRI of the left hip.

11. The left hip MRI was completed on April 8, 2016 and revealed a displaced anterior superior labral tear. (Ex. 11, p. 277). Dr. Danylchuk opined that intra-articular anesthetic administration could be performed to confirm symptomatology." (Ex. F, p. 121).

12. Claimant returned to Dr. Danylchuk on April 19, 2016 to review the MRI results. (Ex. 12, p. 291). Claimant's pain at this time was globally tender around the hip joint over the greater trochanter and into the left buttock. Dr. Danylchuk performed a left hip injection into the trochanteric bursa.

13. This injection provided no relief as documented by PA-C Sloan at Claimant's next visit to Maple Leaf Orthopedics on May 19, 2016. (Ex. 12, p. 293). Claimant continued to complain of left hip pain "all over" and that sometimes it is in the buttocks, sometimes it is in the lateral aspect of the hip, and sometimes it is in the groin. Mr. Sloan again recommended intra-articular anesthetic injection of the left hip for diagnostic purposes, but Claimant declined the injection. Claimant was then referred to a hip specialist, Dr. Brian White of Western Orthopaedics, for further evaluation and treatment.

14. Dr. Raschbacher performed a follow-up examination of Claimant on September 15, 2016. When discussing the intra-articular hip injection, Dr. Raschbacher noted "she did not understand what the hip injection was. It appears she understood that this might be essentially the same as a bursa injection." Dr. Raschbacher explained that "an intra-articular hip injection is quite a bit different than a bursa injection and the two are not 'comparable.' " (Ex. G, pp. 124-125).

15. Regarding treatment, Dr. Raschbacher opined:

> I do not recommend any further treatment of any type unless [Claimant] wishes to have an intra-articular left hip injection for diagnostic and possibly therapeutic purposes. Depending on her response to that, the issue of surgery on the left hip labrum could be addressed. A diagnostic arthroscopy and possibly therapeutic arthroscopy may be in order depending on if she does an intra-articular left hip injection and what result she has with this. It appears she would possibly benefit from returning to the orthopedic physician to discuss in detail and obtain an understanding of left hip intraarticular injection. (Ex. G, p. 128).

Since Claimant had declined the intra-articular hip injection, Dr. Raschbacher opined that Claimant had reached Maximum Medical Improvement.

16. After the earlier referral, Dr. Brian White then evaluated and examined Claimant on February 1, 2017. (Ex. 13, p. 297). Claimant reported ongoing left hip symptoms, as well as her growing frustration that she continued to be in pain and that her function and activity was becoming more and more limited. Dr. White's examination of the hip documented a re-creation of her hip pain with the anterior impingement maneuver. Dr. White diagnosed Claimant with "Combined impingement with labral tear resulting from injury on December 27, 2013." Dr. White indicated that "At this point, [Claimant] is a very reasonable candidate for hip arthroscopy on the left side with femoral osteoplasty, acetabular rim trimming, [and] labral reconstruction." (*Id.* at p. 299). Dr. White requested authorization of this surgery, which was denied by Respondents.

17. Dr. Timothy O'Brien, M.D., performed an Independent Medical Examination of Claimant on March 31, 2017. Dr. O'Brien's report documents Claimant's medical records, which show "migratory" pain complaints from December 2013 through September 2016:

- "Eighty-three chiropractic visits in total were numbered. A note from July 14, 2014, indicates that there was left sacroiliac pain, right sacroiliac pain, left lumbar pain, and it was worse since the last visit. Spinal adjustments were performed. By July 23, 2014, there was left sacroiliac pain, lumbar pain, sacral pain, left temporomandibular pain, cervical pain, left buttock pain, left cervical dorsal and right cervical dorsal pain. There was waxing and waning pain in the following areas: Left sacroiliac, lumbar, left TMJ, cervical, left buttock, left cervical dorsal, right cervical dorsal, and left hip palpation of the muscles revealed spasm in the following areas: Left cervical dorsal, upper thoracic, right cervical dorsal, cervical, left sacroiliac, left buttock, left hip. By August 12, 2014, there was left and right sacroiliac, lumbar, right cervical dorsal, left cervical dorsal, upper thoracic, and mid-thoracic." (Ex. E, p. 115).

- "Based on Ms. Olguin's pain diagrams, especially by comparison to the November 30, 2015 pain diagram, versus the November (sic) 15, 2016 [ALJ infers this to mean September] pain diagram in the Midtown Occupational Health

> Services, clearly establishes the migratory nature of Ms. Olguin's symptomatology. The earlier pain diagram demonstrates the rather diffuse nonspecific nature of her pain that was noted in the chiropractor's serial exams. The pain diagram from September of 2015 has very little in common in comparison with the pain diagram that was completed immediately after the work injury. In addition to Ms. Olguin's migratory pain, she also had escalating pain, which can only be explained by implicating nonorganic factors as the etiology for that increasing pain rather than the decreasing pain that is associated with injuries that are organically based and therefore respond to the immune system's ability to orchestrate the inflammatory pathways to resolve organically-based pain." (Ex. E, p. 117).

18. Dr. O'Brien concurred with the opinions of Dr. Raschbacher and Dr. Danylchuk regarding the necessity of an intra-articular injection before consideration of surgery: "An intra-articular injection has never corroborated whether or not there would be pain relief or whether or not pain relief could be obtained with this diagnostic and potentially therapeutic intervention. If this intervention is performed, it needs to be done so in a blinded fashion… A significant component of Ms. Olguin's pain is nonorganic in nature, and therefore Ms. Olguin's blinding to the expectations of an intra-articular injection need to be firmly enforced…. In my opinion, Dr. White has not established any foundation upon which a surgical recommendation could be made. Therefore, regardless of causation, I do not feel that the surgery recommended is either necessary or reasonable." (Ex. E, p. 118).

19. Claimant filed an application for a hearing on the issue of whether the proposed surgery was reasonable, necessary, and related. This issue was heard before ALJ Patrick Spencer on May 26, 2017. (Clmt. Ex. 3). ALJ Spencer issue his Findings of Fact, Conclusions of Law, and Order dated October 19, 2017. ALJ Spencer found that Claimant had proven, by a preponderance of the evidence, that Claimant's need for left hip surgery was reasonable, necessary, and related to the work injury. (*Id.* at 15-16).

20. Respondents appealed the Order of ALJ Spencer. (Ex. 4). The ICAO affirmed the Order of ALJ Spencer on March 6, 2018. No further appeal was filed and the ICAO Order became final.

21. Respondents filed for a 24-month DIME while the aforementioned proceedings were still taking place. The DIME occurred on February 1, 2018 with Dr. Stanley Ginsburg, roughly a month prior to the final order from ICAO. (Ex. 14). Dr. Ginsburg performed a records review, examined Claimant, and took a medical history from Claimant before rendering his final opinion:

> The opinion expressed above that the hip abnormalities seen on MRI were pre-existing is an interesting concept but there is absolutely no history that suggests that this, in fact, was the case and I am not certain how the evaluator determined that the hip pathology seen on MRI was pre-existing if I understand him correctly. We are, therefore, left with a patient who

had [a] slip and fall, landed on her left side, has had proximal lower extremity discomfort, and pelvic discomfort for four years now and the only objective abnormality is the abnormality seen on [the] hip MRI. There obviously is a difference of opinion concerning the need for surgery. If the patient wanted to do that and there is a "hint" that prior to that being done, an intraarticular injection is utilized as a "test injection." Therefore, we will do hip mobility testing and suggest this as an impairment rating. *I will also declare the patient at maximal medical improvement* ***but will suggest that another surgical opinion from a "hip surgery specialist" be obtained about the advisability of surgery – prior to an intraarticular injection being accomplished.*** I also think the patient has certainly had enough chiropractic care***.***

….*I am going to state that MMI date is September 15, 2016,* at which point the attending physician declared the patient's treatment completed….. ***Again, I do recommend another opinion concerning possible injection and surgery.*** (Ex. 14, p. 311)(emphasis added).

22. Dr. Jack Rook performed an IME of Claimant on April 3, 2017, prior to the hearing before ALJ Spencer. (Ex. 15). Dr. Rook performed an analysis of the issue before him regarding Claimant's need for hip surgery. He ultimately concluded that Claimant's need for the surgery as proposed by Dr. White was reasonable, necessary, and related to the work injury. Dr. Rook reviewed additional records, including ALJ Spencer's Order and the DIME report, and authored a supplemental report on April 18, 2018. (Ex. 16, p. 322). Dr. Rook noted that Dr. Ginsburg agreed with the ALJ and essentially all the physicians of record that Claimant's MRI abnormalities did not pre-exist the fall, and therefore are related to the work injury. Dr. Rook analyzed Dr. Ginsburg's ultimate conclusions, and concluded that Claimant was not at MMI based on Dr. Ginsburg's own rationale:

Dr. Ginsburg believes the patient is at maximum medical improvement, yet at the same time he recommends that the patient be evaluated by another orthopedist described as a "hip surgery specialist" regarding the advisability of surgery. The patient has already seen a hip surgery specialist, Dr. White, who has already recommended hip surgery…. It seems Dr. Ginsburg is recommending the patient undergo a consultation to determine if surgery should be performed in lieu of an intra-articular injection. *In either scenario, the patient would not be considered at maximum medical improvement.* (*Id.* at p. 325)(emphasis added).

23. Dr. Ginsburg testified via deposition on May 31, 2018. Dr. Ginsburg maintained his opinion that the findings on the hip MRI were "most likely" caused by the fall at work on December 27, 2013.

24. When asked if Administrative Law Judge Spencer's Findings of Fact, Conclusions of Law and Order dated October 19, 2017, impacted his opinion on Maximum Medical Improvement, Dr. Ginsburg stated the following:

Q. And in reviewing the -- particularly the findings of fact in this order from ALJ Spencer, and has that impacted your opinion regarding maximum medical improvement?

A. The issue of maximum medical improvement is a somewhat strange one, because it's administrative. Rather than being medical, it has a lot of administrative kinds of considerations.

What does the term mean? Well, *the term means that everything that's been done, has been done,* and even though the patient may be still symptomatic as related to the symptoms from the incident, what's been done to improve that circumstance has already been done, even though the patient may require main—some maintenance care.

Well, what I'm saying is, ***if it's decided* that under no circumstances will this patient have hip surgery,** that's the way it is, although she may go to a private doctor and get hip surgery done, but for the consideration of workmen's compensation case, she has had what everybody says is the maximum possible to improve her symptoms, *so I'm saying, yes, she's at maximum medical improvement*, but then I add, I put in an addendum in saying, *in case I'm wrong **or** in case everybody else is wrong, get another opinion about whether or not hip surgery will help her, **and if it's determined that hip surgery would help her**, **then my Maximum Medical Improvement isn't necessarily correct.*** There's something else that can be done

… ***So if it's determined that hip surgery may help her* and *that's accepted, then my MMI designation, so to speak, can be thrown out.*** (emphasis added).

25. Later testimony by Dr. Ginsburg reiterated the following:

Q: So according to these tips, you know, it defines MMI as "a point in time when any medically determined" -- "determinable physical or mental impairment has become stable, and when no further treatment is reasonably expected to improve the condition." So based on your testimony, *if it's found that surgery could significantly improve claimant's condition, would it be your opinion that claimant remained at maximum medical improvement?*

A. No. What I just said, in wordy and probably nonunderstandable form, was ***I'm willing to say that my MMI designation,** by my own word, **would then not apply if there's an administrative decision to allow hip surgery*** to take place, because that would change the entire clinical -- the entire clinical picture, if you will.

26. Respondents filed a Final Admission of Liability dated March 9, 2018, admitting to an Average Weekly Wage of $126.53. (Ex. 5, p. 24).

27. In regard to Claimant's AWW for her concurrent employment with Pueblo County, her wage records document that she earned $37,653 from January 1, 2013 through December 31, 2013. (Ex. 17). Divided by 52, this would equate to an AWW of $724.10. However, Exhibit 17 also notes that Claimant's *monthly* gross wages for the current period are $3151.00. Pursuant to 8-42-102(2)(a), C.R.S., $3151 x 12 ÷ 52 = $727.15.

28. Combining both employers, Claimant's Average Weekly Wage is therefore $853.68.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the LAJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned

expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

Relevance of Claimant's Exhibits 3 and 4

D. Respondents challenged the admissibility of ALJ Spencer's October 19, 2017 Findings of Fact, Conclusions of Law, and Order, as well as the ICAO's March 6, 2018 Final Order affirming ALJ Spencer's determination. Relevant evidence is defined by CRE 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Colorado, by these rules, or by other rules prescribed by the Supreme Court, or by the statutes of the State of Colorado." CRE Rule 402.

E. The ALJ finds that Claimant's exhibits 3 and 4 *are relevant* to the proceedings in this matter and are accepted into evidence. This claim involves overlapping determinations of an ALJ and a DIME physician regarding the specific medical treatment ordered at the hearing before ALJ Spencer. Moreover, Dr. Ginsburg specifically testified in his deposition that his own MMI determination would not apply if there is an administrative decision allowing hip surgery to take place. The ALJ finds that Claimant's Exhibit 3 is clearly relevant under the present circumstances and takes administrative notice of Exhibit 3. The Final Order from the ICAO is merely confirmation that the Order from ALJ Spencer was affirmed and has now become final. For the same reasons stated above, the ALJ finds that Claimant's Exhibit 4 is also relevant and the ALJ takes administrative notice of Exhibit 4.

Overcoming the DIME Regarding MMI

F. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased

tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* W.C. No. 4-782-625 (ICAO, May 24, 2010).

G. Maximum Medical Improvement is defined as:

> [A] point in time when any medically determinable physical or mental impairment as a result of injury *has become stable and when no further treatment is reasonably expected to improve the condition*. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement. §8-40-201(11.5) C.R.S.(emphasis added).

H. Recommendations for future treatment have been discussed by the courts in the context of whether a Claimant is at MMI. "A recommendation for therapies which present a reasonable prospect for improving physical function may be viewed as evidence that the claimant's condition is not stable, and the resulting impairment is not measureable. Therefore, such treatment recommendations are inconsistent with MMI…." *Gebert v. Nordstrom, Inc.*, W.C. No. 4-428-645 (ICAO, June 20, 2003). The Impairment Rating Tips published by the Division of Workers' Compensation refers to the *Gebert* case in this context of a DIME physician recommending additional *curative* treatment. The Tips stress the importance of curative treatment remaining being inconsistent with an MMI finding.

I. Dr. Ginsburg himself stated that he recommended further evaluation for possible hip surgery or further injections in the hip. Dr. Ginsburg's statement that Claimant is at MMI is at odds with his recommendation for further evaluation and treatment. More importantly, Dr. Ginsburg's recommendations for further treatment and evaluation [as articulated by Dr. Rook] are inconsistent with the very definition of MMI. Even Dr. Ginsburg clearly stated: … "***So if it's determined that hip surgery may help her* and *that's accepted, then my MMI designation, so to speak, can be thrown out.***" (Finding of Fact #24). It has now been judicially determined that hip surgery is reasonable, necessary, and related to Claimant's injury by an ALJ. Ergo, even Dr. Ginsburg agrees, ipso facto, that Claimant is not at MMI.

J. The ALJ finds, by clear and convincing evidence, that Dr. Ginsburg erred in declaring Claimant at MMI. Alternatively, by clear and convincing evidence, the ALJ interprets the entire body of work of the DIME physician, to include his deposition after reviewing the ALJ's Order, to conclude that Claimant is not at MMI. Either way, ***this ALJ finds that Claimant is not at MMI.*** The Order from ALJ Spencer regarding the left hip surgery now takes effect because Claimant is not at MMI. ICAO has also issued a final order affirming ALJ Spencer's determination.

Average Weekly Wage

K. "Average weekly wages for the purpose of computing benefits provided in articles 40 to 47 of this title, except as provided in this section, shall be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of the injury…." C.R.S. § 8-42-102(2). There is nothing in § 8-42-102 that indicates a Claimant must have missed time from work to calculate an AWW. "[T]he determination of a claimant's average weekly wage is based upon the claimant's wages at the time of the injury. Furthermore, [the statute] does not restrict the calculation of medical impairment benefits to claimants who actually receive temporary total disability benefits. Nor does it restrict the calculation to the actual amount of the temporary total disability benefits awarded." Broadmoor Hotel and Continental Insurance Co. v. Industrial Claims Appeals Office, 939 P.2d 460 (Colo. App. 1996) (internal citations omitted). The overall purpose of the statutory scheme is to calculate a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993); *see also Loofbourrow v. Industrial Claims Appeals Office*, 321 P.3d 548 (2011); *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

L. The ALJ finds that Claimant's concurrent employment with Pueblo County shall be added to her admitted AWW from Employer. Respondents assert that Claimant's concurrent earnings should not be factored into her overall AWW because Claimant has not yet been shown to have lost time from work for her concurrent employment. The ALJ is not persuaded. As indicated above, the overall purpose of the AWW scheme is to calculate a fair approximation of a claimant's wage loss *and* diminished earning capacity. It has been stipulated that Claimant will lose earnings from both of her employers *if she undergoes surgery.* Since Claimant is not at MMI, and ALJ Spencer's Order remains in effect, the issue of Average Weekly Wage is ripe for determination. How, or if, Claimant's actual benefits are to be calculated is not ripe until further events unfold. As noted by Respondents, Claimant has yet to miss work, nor has she actually undergone surgery. Nonetheless, the ALJ finds, by a preponderance of the evidence, that Claimant's Average Weekly Wage is $853.68

ORDER

It is therefore Ordered that:

1. Claimant is not at MMI. The previous Order from ALJ Spencer, dated 10/19/2017, remains in effect. Respondents shall pay for the left hip surgery as previously ordered.

2. Claimant's Average Weekly Wage is $853.68.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 2, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

STIPULATIONS

At the commencement of hearing, the parties stipulated to an average weekly wage ("AWW") of $1,711.17.

ISSUES

I. Both Claimant and Respondents challenge the maximum medical improvement (MMI) determination of the Division Independent Medical Examiner, Dr. Rosemary Greenslade. Claimant asserts that Dr. Greenslade erred in placing him at MMI. Respondents agree that Claimant is at maximum medical improvement; however, they challenge the MMI date given by Dr. Greenslade. Consequently, the issues regarding MMI are whether Claimant produced clear and convincing evidence to overcome the opinion of Dr. Greenslade that he reached MMI regardless of the date assigned and whether Respondents produced clear and convincing evidence to overcome Dr. Greenslade's determination that Claimant reached MMI on May 31, 2015.

II. If Claimant is found to be at MMI, whether Respondents have established by a preponderance of the evidence that Dr. Greenslade erred in her assignment of a 15% upper extremity rating.

III. Whether Claimant established by a preponderance of the evidence that a carpal tunnel release recommended by Dr. Dale Cassidy is reasonable, necessary and related to his September 30, 2016 industrial injury.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits beginning May 4, 2017 and continuing through June 3, 2018.

V. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a disfigurement award.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On September 30, 2016, Claimant sustained a contusion to the dorsal aspect of his hand when a metal rake struck him as he was shoveling concrete.

2. Claimant was evaluated by Dr. Miguel Castrejon on October 4, 2016. Dr. Castrejon noted swelling over the dorsum of the hand but no redness. X-rays did not reveal any acute bony abnormality. No other active treatment was provided.

3. Dr. Castrejon released Claimant at MMI without restrictions, no permanent impairment and no maintenance treatment following his evaluation on October 4, 2016. He would subsequently rescind his MMI determination on May 4, 2017.

4. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Castrejon's opinions on February 14, 2017. Claimant would subsequently object to the FAL and request a Division Independent Medical Examination (DIME).

5. On May 4, 2017, approximately seven months after his claimed injury, Claimant returned to Dr. Castrejon for what he described was persistent pain and swelling in his right hand. Claimant explained that he had waited several months the pain to subside. When it did not, he sought further evaluation with Dr. Castrejon. Claimant was unable to get back in to see Dr. Castrejon so he sought legal representation and a follow-up appointment was secured. During his follow-up appointment, Dr. Castrejon documented Claimant's reported ongoing right hand pain and swelling. Physical examination documented continued swelling of the dorsum of the hand. Wrist flexion and extension were limited by pain and grip strength decreased. Dr. Castrejon opined that Claimant was not at MMI. He imposed restrictions of no use of the right hand and ordered an MRI due to Claimant's persistent symptoms.

6. MRI of the right hand was performed on May 11, 2017. While the MRI did not reveal contusion, fracture or infiltrative process of the marrow, it did demonstrate cystic changes. Consequently, a rheumatology evaluation was suggested.

7. Claimant returned to Dr. Castrejon for follow-up after his MRI. Based upon the MRI, Dr. Castrejon referred Claimant to Colorado Springs Orthopedic Group where Dr. Dale Cassidy evaluated him on May 31, 2017. Dr. Cassidy documented that Claimant's symptoms began after his work injury and had become a chronic condition. Examination revealed a positive Phalen's with radiation to the middle finger, suggestive of carpal tunnel syndrome. Dr. Cassidy recommended that an EMG be performed. Dr. Cassidy noted that Claimant seemed to have excellent muscle bulk and tone and it did not appear as though he had been unable to use his hands normally. Dr. Cassidy indicated that someone who had very limited use of the hand would have developed some atrophy and clearly, Claimant had not. Dr. Cassidy also felt that any nerve compression in the wrist(s) was likely unrelated to the work incident, given that the median nerve is located on the volar aspect of the hand/wrist and would have been protected from a blow to the dorsal surface of the hand.

8. Dr. Castrejon performed an EMG on June 26, 2017 that was consistent with moderate to severe bilateral carpal tunnel syndrome and referred Claimant back to Dr. Cassidy.

9. Claimant returned to Dr. Cassidy on July 17, 2017. Dr. Cassidy reviewed the EMG that documented abnormal sensory changes in the bilateral wrists leading Dr. Cassidy to opine as follows: "I couldn't necessarily fault his work-related injury for this

solely because he does have evidence of carpal tunnel syndrome on the contralateral side."

10. Claimant underwent his requested DIME with Dr. Rosemary Greenslade on September 28, 2017. Dr. Greenslade reached the following conclusions:

- Bilateral carpal tunnel syndrome, worse on the right than the left symptomatically. This is NOT related to his work comp injury of September 30, 2016.
- Contusion/dorsum of his right hand, work-related and resolved.
- Primary osteoarthritis of the first carpal-metacarpal joint of his thumb, NOT work-related.
- Primary osteoarthritis of the 2nd through 5th metacarpal joints, NOT work-related.

(Respondents' Exhibit C, Bate Stamp page 9)(Emphasis in original).

11. Dr. Greenslade further concluded that Claimant reached MMI for this injury on May 31, 2017 indicating that no further surgical, medical or invasive therapeutic intervention would likely lead to significant improvement in ongoing symptoms or Claimant's current level of function.

12. Dr. Greenslade assigned a 15% upper extremity rating based on range of motion measurements. Dr. Greenslade did not provide a specific disorder of the upper extremity, which would entitle Claimant to range of motion impairment determination.

13. Dr. Timothy Hall performed an independent medical examination (IME) at the request of Claimant's counsel on January 3, 2018. Dr. Hall summarized his review of pertinent medical records and took a history from Claimant. Dr. Hall documented that Claimant continues to be symptomatic with most of his pain over the dorsum of the right hand and the right wrist with symptoms of numbness and tingling more so in the median distribution. Dr. Hall pointed out a professed flaw in Dr. Greenslade's rationale that carpal tunnel syndrome is the result of recurrent repetitive motions over a prolonged period. While this is true, Dr. Hall opined that carpal tunnel syndrome can also be caused by trauma. Given the fact that Claimant's EMG was positive on both sides, but Claimant was only experiencing the median nerve type symptoms on the right, Dr. Hall opined that Claimant's entrapment was probably occurring due to ongoing swelling. According to Dr. Hall, "[i]f the wrist joint swells and the hand swells, the carpal tunnel is where a good bit of swelling is likely to occur." He ultimately opined that Claimant was experiencing traumatic right sided CTS primarily due to diffuse swelling in the area of the carpal tunnel, which he attributed to Claimant's industrial injury. As "[Claimant's] right wrist, hand, and distal extremity were working just fine prior to this work event/injury" Dr. Hall related the two.

14. Dr. Allison Fall performed a medical records review at Respondents request. Upon completion of her review, Dr. Fall issued a report dated January 23, 2018. In her report, Dr. Fall concluded that, consistent with Dr. Castrejon's original opinion, Claimant reached MMI on October 4, 2016. According to Dr. Fall, Claimant experienced an uncomplicated contusion, which would not require any additional medical care to heal. Consequently, she opined that any complaints of increased pain and persistent swelling in May 2017 were "not likely related to the work-related injury but rather related to his underlying degenerative changes and [his] carpal tunnel syndrome, both of which were determined to not have been caused by the work-related injury, per Dr. Cassidy and the DIME physician." Because Claimant's contusion would be expected to heal without the need for additional treatment (as expressed by Dr. Castrejon on October4, 2016) and because his persistent hand pain and swelling is not attributable to work-related causes, i.e. his contusion, Dr. Fall testified that Dr. Greenslade erred in her conclusion that Claimant reached MMI on May 31, 2017.

15. Dr. Fall also opined that Dr. Greenslade erred in assigning 15% scheduled impairment of the upper extremity attributable to Claimant's right hand contusion. According to Dr. Fall, Dr. Greenslade erred in assigning impairment at the wrist because "she did not provide an explanation for how a dorsal hand contusion could lead to wrist impairment" in light of her stated opinion that Claimant's carpal tunnel syndrome (CTS) was not causally related to his industrial injury. Dr. Fall also cited as error Dr. Greenslade's failure to reconcile her opinion that Claimant's contusion "resolved" with her contrary decision to assign impairment for it. According to Dr. Fall, this internal inconsistency amounts to a clear error regarding the assignment of impairment to Claimant's admitted injury in this case.

16. At hearing, Dr. Fall testified that the act of being struck on the dorsum of the hand, distal to the wrist, is not a mechanism of injury (MOI) which would cause a traumatic carpal tunnel syndrome. Per Dr. Fall, the fact that Claimant had bilateral carpal tunnel syndrome further strengthens the argument that his CTS is not related to the incident of September 30, 2016. Dr. Fall indicated there was no industrially based MOI likely to cause the significant range of motion decrease in this case as the only work-related condition, (Claimant's contusion) had resolved. Dr. Fall reiterated her opinion that Claimant's underlying carpal tunnel or underlying rheumatological condition is the probable cause of his decreased range of motion in the hand/wrist. Accordingly, Dr. Fall repeated her conclusion that it was objectively erroneous for Dr. Greenslade to assign impairment for Claimant's contusion as the only work-related diagnosis in this case.

17. On cross-examination, Dr. Fall agreed that swelling of the wrist joint could increase pressure on the carpal tunnel causing median nerve impingement in the carpal tunnel. Nonetheless, she testified that Claimant never actually experienced swelling at the wrist by her review of the records. She never personally examined Claimant. Careful review of the medical record evidence supports Dr. Fall's assertion. Indeed

when Dr. Castrejon evaluated Claimant upon his return visit in May, he only documented swelling over the dorsum of the hand, not the wrist. Moreover, Dr. Cassidy conducted a thorough examination of the right hand and wrist on two occasions, noting that Claimant had "no visible deformity or gross abnormalities appreciated about the right wrist." Finally, when the undersigned visually inspected Claimant's right hand as part of a requested disfigurement viewing, he was unable to appreciate swelling over the volar surface of the right wrist. Indeed, visual inspection only revealed mild swelling over the dorsum of the right hand, distal to the wrist.

18. In terms of wage loss, Claimant testified that he stopped working for the Respondent employer on November 9, 2016. He then obtained new employment with a company named "Mel-Ro Construction" for which he only worked for a couple of months that came to an end before Claimant returned to Dr. Castrejon on May 4, 2017 and restrictions were imposed. Claimant did return to work for Mel-Ro Construction for the months of November and December of 2017. He also began working for Mel-Ro Construction again approximately three weeks prior to the court hearing, which would be May 29, 2017; however, he only anticipated that work lasting for another month. Claimant testified that he has not sustained any new injury to his right upper extremity since the work event on September 30, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to

resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Drs. Fall and Cassidy regarding the relatedness of Claimant's right sided CTS to his September 30, 2016 work injury are credible and supported by the medical record as a whole. When the evidentiary record is considered in its totality, the opinions of Dr. Fall and Dr. Cassidy are more persuasive than contrary opinions of Drs. Castrejon and Hall.

Overcoming the DIME regarding MMI

D. A DIME physician's findings of causation and MMI are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo.App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* W.C. No. 4-782-625 (ICAO, May 24, 2010).

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo.App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo.App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998).

F. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if a course of treatment has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990). Moreover, a finding that a claimant is not at MMI may rest solely upon recommendations for further diagnostic evaluation if such procedures have a reasonable prospect of diagnosing or defining the claimant's condition to suggest a course of further treatment. *E.g., Soto v. Corrections Corp*., W.C. No. 4-813-582 (ICAO, October 27, 2011). Here, the weight of the persuasive evidence demonstrates that Claimant's need for additional diagnostic testing/evaluation was necessary to determine the cause of Claimant's persistent right hand pain/swelling and to formulate an appropriate treatment plan for his condition. Because Claimant's ongoing symptoms were arguably related to his admitted industrial injury, the ALJ finds that Dr. Castrejon properly rescinded his prior MMI declaration of October 4, 2016. Consequently, the ALJ agrees with Claimant that he was not at MMI after he returned to Dr. Castrejon's attention on May 4, 2017. However, the evidence presented is insufficient to establish that Claimant was not at MMI prior to May 4, 2017.

G. While Claimant was not at MMI as of May 4, 2017, the additional diagnostic testing revealed that Claimant's ongoing symptoms were most likely emanating from non-work-related causes, i.e. his degenerative arthritis involving the right hand and non-work-related CTS at the right wrist. Indeed, Dr. Cassidy opined on May 31, 2017, that Claimant's right hand x-rays and MRI demonstrated degenerative changes and were "consistent with a possible arthropathy" which would not be "attributed to an injury related to work." Moreover, he noted that Claimant demonstrated evidence of compressive nerve symptoms that would likely be "unrelated" to his work injury "given that the median nerve is located on the volar aspect of the hand and would be protected from any dorsal blow." The subsequent results of Claimant's EMG would strengthen Dr. Cassidy's opinion that Claimant's work-related injury did not cause his right sided CTS in as much as the EMG study demonstrated the presence of carpal tunnel syndrome on the contralateral, i.e. left side as well.

H. Based upon the evidence presented, the ALJ concludes that neither Claimant nor Respondents have overcome the Division IME with regard to MMI. The credible evidence establishes that Claimant's ongoing symptoms are probably related to his carpal tunnel syndrome and not the work-related incident of September 30, 2016. Although Claimant remains symptomatic and that he requires ongoing treatment, the ALJ credits the opinions of Dr. Cassidy and Dr. Fall to find and conclude that his symptoms and need for treatment are causally related to non-industrially based conditions. Contrary to Claimant's assertion, the evidence presented persuades the ALJ that Claimant's work related contusion has stabilized and no further treatment is reasonably expected to improve that condition. Consequently, the ALJ agrees with Respondents that Claimant was properly placed at MMI. Nonetheless, the date by which Claimant attained MMI must be addressed given Respondents challenge to Dr. Greenslade's MMI opinion.

I. Respondents' contention that Dr. Greenslade erred in assigning an MMI date of May 31, 2017 is unpersuasive. In this case, the evidence supports Dr. Greenslade's opinion that Claimant reached MMI by this date. Indeed the diagnostics lead Dr. Cassidy to conclude that while Claimant remained symptomatic, his symptoms and need for additional treatment correlated to his non-work-related conditions. Moreover, the medical record supports Dr. Greenslade's indication that Claimant's residual dorsal hand swelling had resolved by this date. Consequently, she chose this as Claimant's date of MMI. After considering the totality of the evidence presented, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that the DIME physician's determination regarding MMI is highly probably incorrect. Rather, the ALJ concludes that the evidence presented at hearing establishes a mere difference of opinion between the DIME physician and Respondents' retained medical expert. A professional difference of opinion do not rise to the level of clear and convincing evidence that is required to overcome Dr. Greenslade's opinion concerning MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents request to set aside Dr. Greenslade's MMI determination must be denied and dismissed.

Dr. Greenslade's Impairment Rating

J. While a DIME physician's opinions are entitled to special weight on issues of MMI and whole person impairment, they are not entitled to any special weight when it comes to extremity ratings. See *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998)(DIME provisions do not apply to the rating of scheduled injuries). Consequently, where permanent impairment is limited to a portion of the body included on the list of scheduled ratings in C.R.S. § 8-43-107(2)(a) a DIME opinion merely has to be rebutted by a preponderance of the evidence to be overcome. *Delaney v. Industrial Claims Appeals Office,* 30 P.3d 691, 693 (Colo.App. 2000). Based upon the evidence presented, the ALJ agrees with Respondents that Dr. Greenslade's decision to award a range of motion deficit in this case is in error. Here, Claimant's only work-related diagnosis, i.e. a contusion, more probably than not, resolved without objective pathology that would provide a basis for a rating. The evidence presented persuades the ALJ that Claimant's residual pain and range of motion loss is likely emanating from his non-work-related CTS and arthritis rather that any mild residual dorsal hand swelling

K. Non-work related conditions cannot form the basis for a permanent impairment rating based on range of motion. *See Serena v. SSC Pueblo Belmont OP Co.*, 2015 Colo. Wrk. Comp. LEXIS 120, W.C. No. 4-922-344-01 (ICAO, December 1, 2015) (holding that DIME physician's range of motion rating for the spine was overcome by clear and convincing evidence showing that the claimant's spinal condition was pre-existing and therefore non-work related).

Claimant's Entitlement to Additional Medical Benefits

L. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury or prevent further deterioration of the claimant's condition. § 8-42-101, C.R.S.; *Grover v. Industrial*

Commission, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609, 611 (Colo.App.1995). However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App. 2000). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that the need for subsequent medical treatment was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those, which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 1997. Based upon the totality of the evidence presented, the ALJ concludes that Claimant has failed to establish a causal relationship between his need for CTS surgery and his September 30, 2016 work injury, i.e. he failed to overcome the causality opinion of Dr. Greenslade. While Claimant's need for CTS surgery is reasonable and necessary, the ALJ credits the opinions of Dr. Greenslade, Dr. Cassidy and Dr. Fall to find that his need for surgery is not causally related to his September 30, 2016 industrial injury. As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship between a claimant's alleged injury and his/her work based on temporal proximity. To the contrary, as noted by the panel in *Scully* "correlation is not causation." Because Claimant has failed to establish that his need for additional medical treatment, including his need for surgery was proximately caused by an injury arising out of and in the course of the employment, his claim for additional medical benefits must be denied and dismissed.

Claimant's Entitlement to Temporary Total Disability Benefits

M. To establish entitlement to temporary disability benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo.App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element may be evidenced by a complete inability to work, or by restrictions, which impair the Claimant's ability to effectively, and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998). In this case, the evidence presented establishes that on May 4, 2017, Dr. Castrejon rescinded MMI and imposed physical restrictions, which the ALJ concludes would have impaired Claimant's ability to effectively, and properly perform his regular work. Moreover, the record is devoid of any convincing evidence that Employer offered Claimant modified duty after May 4, 2017. Consequently, the ALJ concludes that Claimant was "disabled"

within the meaning of section 8-42-105, C.R.S. beginning May 4, 2017. Claimant did not return to work and his "disability" continued through the date that Dr. Greenslade placed him at MMI- May 31, 2017. Consequently, the ALJ concludes that Claimant is entitled to TTD benefits from May 4, 2017 through May 30, 2017.

Claimant's Entitlement to Disfigurement Benefits

N. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found at Finding of Fact, ¶ 17 above, visual inspection of Claimant's right hand reveals mild dorsal swelling when compared to the same area on the left hand. While the natural appearance of the right hand tissue is altered minimally, it is nonetheless perceptive. Consequently, the ALJ concludes that Claimant has suffered a visible disfigurement entitling him to additional benefits as provided for in C.R.S. §8-42-108 (1).

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME opinion of Dr. Greenslade regarding MMI is denied and dismissed.

2. Respondents' request to set aside the DIME opinion of Dr. Greenslade regarding MMI is denied and dismissed. Claimant is found to have reached MMI effective May 31, 2017.

3. Respondents' request to set aside the DIME opinion of Dr. Greenslade regarding Claimant's scheduled impairment is granted. The 15% scheduled impairment rating assigned by Dr. Greenslade is set aside and replaced by the 0% impairment rating originally assigned by Dr. Castrejon as supported by Dr. Fall.

4. Claimant's request for additional medical treatment, including CTS surgery, is denied and dismissed.

5. Claimant is entitled to TTD benefits from May 4, 2017 to May 30, 2017 when said benefits shall terminate based upon his being placed at MMI on May 31, 2017.

6. Claimant is entitled to and Respondents shall pay disfigurement benefits in the amount of $500.00.

7. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 2, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Timothy O. Hall, M.D. that Claimant suffered an 18% whole person impairment as a result of his February 8, 2016 admitted industrial injury in case number W.C. 5-007-076.

2. Whether Claimant has proven by a preponderance of the evidence that he suffered a lumbar spine injury during the course and scope of his employment with Employer on December 14, 2017 in case number W.C. 5-066-360.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits as a result of his December 14, 2017 industrial injury for the period December 15, 2017 until terminated by statute.

FINDINGS OF FACT

1. Claimant works for Employer as a Delivery Driver. His job duties involve delivering automobile and RV parts throughout Colorado. Claimant ears $9.40 per hour.

2. On February 8, 2016 in case number W.C. 5-007-076 Claimant suffered an admitted lumbar strain when he was involved in an automobile accident. He underwent a conservative course of treatment at Concentra Medical Centers that included injections and physical therapy.

3. On June 22, 2016 Claimant visited Authorized Treating Physician (ATP) Douglas E. Hemler, M.D. for an evaluation. Dr. Hemler diagnosed Claimant with spondylosis, radiculopathy and intervertebral disc degeneration in the lumbar region. He recounted that Claimant had "done well with the combination of physical therapy, epidural steroid injections and the course of cognitive behavioral therapy." Dr. Hemler determined that Claimant had reached Maximum medical Improvement (MMI). Relying on Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)* he assigned a 7% rating for Claimant's lumbar spine. He specifically assigned the impairment for moderate to severe degeneration at the L5-S1 level. Dr. Hemler also assigned a 2% whole person impairment rating for lumbar spine range of motion deficits. Finally, Claimant received a 1% whole person rating for sensory impairment based on residual elements of radiculopathy. Combining the ratings yields a 10% whole person impairment. Dr. Hemler released Claimant to regular employment with a 50-pound independent lifting restriction.

4. On December 14, 2017 Claimant was performing his regular job duties for Employer when he re-injured his lower back. Claimant specifically testified that, while he was pushing a "grill guard" or "bumper" out of a truck, he felt a "pop" and experienced immediate pain in his lower back. He completed his work shift after the accident. Claimant reported his injury to Employer three days later on December 17, 2016.

5. On December 20, 2017 Claimant returned to Dr. Hemler for a follow-up examination. Dr. Hemler noted that Claimant was "generally doing well with persistent low back pain and occasional leg pain." He remarked that Claimant "has sustained one additional flareup but does not feel that there was a new injury." Dr. Hemler prescribed a short course of chiropractic care that focused on "active release techniques." He also recommended a few days off work so that Claimant could adequately participate in initial chiropractic care. Dr. Hemler returned Claimant to full duty employment with breaks every one to two hours and a 50-pound lifting restriction.

6. On January 9, 2018 Claimant visited Ronald Peveto, M.D. at Concentra for an examination. Claimant reported continued, radiating lower back pain since his December 14, 2017 work accident. He commented that he was pushing a bumper when he felt a "pop" in his lower back and pain in his right lower extremity. Dr. Peveto remarked that Claimant had suffered an industrial lower back injury because of a motor vehicle accident on February 8, 2016. Claimant reached MMI after receiving conservative medical treatment. Dr. Peveto diagnosed Claimant with a lumbar strain and radiculopathy of the right leg.

7. On January 10, 2018 Claimant underwent a Division Independent Medical Examination (DIME) with Timothy O. Hall, M.D. for his February 8, 2016 admitted industrial injury. After reviewing Claimant's medical records and conducting a physical examination, Dr. Hall agreed that Claimant had reached MMI on June 22, 2016. He remarked that Claimant "certainly appeared" to be stable at the time of MMI. In considering an impairment rating Dr. Hall noted that the matter was a "bit tricky" with Claimant's subsequent December 14, 2017 injury. Relying on the *Guides*, Dr. Hall assigned Claimant a 7% rating pursuant to Table 53 for severe degenerative changes at L5-S1. He also assigned Claimant an 11% rating for range of motion deficits and a 1% impairment for neurological deficits. Dr. Hall explained that the 11% range of motion rating was "quite a bit different" from the impairment assigned by Dr. Hemler. He noted that "this likely relates to this intervening event. How that might get worked out logistically is up to others."

8. On February 6, 2018 Claimant visited Randall Jones, M.D. at Concentra for an evaluation. Dr. Jones noted that Claimant had reached MMI in June 2017 for his February 8, 2016 injury. He commented that the December 14, 2017 incident "has a component of exacerbation" of the February 8, 2016 injury.

9. On February 19, 2018 Claimant visited Kirk Prochnio, P.A. at Star Spine & Sport. Claimant reported lower back pain that radiated into his right lower extremity. P.A. Prochnio recounted that Claimant suffered an industrial injury in February 2016 but completed treatment and reached MMI in June 2017. He noted that Claimant had a flare-

up at work on December 15, 2017 when he was delivering a rear bumper. While pushing the bumper Claimant felt a "pop" in his back with pain radiating into his right lower extremity. P.A. Prochnio recommended chiropractic treatment.

10. On March 9, 2018 Claimant visited Natasha Deonarain, M.D. at Concentra. Dr. Deonarain recounted that Claimant had initially suffered a lumbar spine injury on February 8, 2016 and received conservative treatment. Claimant exacerbated his symptoms in December 2017 when he suffered a "pop" while pushing a weight and leaning to his left. He continued to experience symptoms that radiated into his right lower extremity.

11. Allison M. Fall, M.D. testified at the hearing in this matter. She had conducted an independent medical examination of Claimant and issued a written report on April 5, 2017. Dr. Fall also performed a records review and issued a written report on May 22, 2018. She agreed that Claimant reached MMI on June 22, 2016 for his February 8, 2016 admitted industrial injury. Dr. Fall thoroughly reviewed Dr. Hemler's report and agreed that Claimant warranted a 10% whole person impairment rating pursuant to the *AMA Guides*.

12. However, Dr. Fall disagreed with Dr. Hall's 18% whole person impairment rating because it constituted an incorrect application of the *AMA Guides*. She explained that Dr. Hall's increase in Claimant's impairment rating was based on a subjective increase in pain complaints that was inconsistent with the *AMA Guides*. As Dr. Hall acknowledged, the 11% range of motion rating was significantly different from Dr. Hemler's rating. The increased rating was based upon the December 14, 2017 intervening event. However, as Dr. Fall remarked, an impairment rating is determined at the time of MMI and there would be no reason for Claimant's impairment to increase over time. She summarized that there was no medical reason for Claimant's range of motion to decrease from June 22, 2016 until the date of the DIME. Accordingly, Dr. Hall's 18% whole person impairment rating was clearly erroneous.

13. Dr. Fall also maintained that Claimant did not suffer a new lumbar spine injury on December 20, 2017. Considering the December 20, 2017 report from Dr. Hemler, Dr. Fall explained that Claimant suffered a flare-up or temporary increase in symptoms. Claimant's physical findings remained the same and his lumbar MRI's before and after the December 14, 2017 incident only reflected diffuse, degenerative findings and no acute changes. Dr. Fall commented that flare-ups occur with lower back conditions. She summarized that there was no objective evidence that Claimant suffered a new injury on December 14, 2017.

14. Claimant testified at the hearing in this matter. He explained that he received additional work restrictions after his December 14, 2017 injury and was unable to perform his regular job duties. Claimant commented that, because of his re-aggravation, he has been unable to return to work.

15. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Hall that Claimant suffered an 18% whole person impairment as

a result of his February 8, 2016 admitted industrial injury. Initially, on February 8, 2016 in case number W.C. 5-007-076 Claimant suffered an admitted lumbar strain when he was involved in an automobile accident. He underwent a conservative course of treatment at Concentra that included injections and physical therapy. On June 22, 2017 Dr. Hemler concluded that Claimant had reached MMI. He assigned a 7% impairment for moderate to severe degeneration at the L5-S1 level of the lumbar spine. Dr. Hemler also assigned a 2% whole person impairment rating for lumbar spine range of motion deficits. Finally, Claimant received a 1% whole person rating for sensory impairment based on residual elements of radiculopathy. Combining the ratings yields a 10% whole person impairment.

16. On January 10, 2018 Claimant underwent a DIME with Dr. Hall. Dr. Hall assigned Claimant a 7% rating pursuant to Table 53 for severe degenerative changes at L5-S1. He also assigned an 11% rating for range of motion deficits and a 1% impairment for neurological deficits. Dr. Hall explained that the 11% range of motion rating was "quite a bit different" from the impairment assigned by Dr. Hemler. Absent a causal analysis, he commented "this likely relates to this intervening event. How that might get worked out logistically is up to others."

17. In contrast, Dr. Fall persuasively disagreed with Dr. Hall's 18% whole person impairment rating because it constituted an incorrect application of the *AMA Guides*. She explained that Dr. Hall's increase in Claimant's impairment rating was based on a subjective increase in pain complaints that was inconsistent with the *AMA Guides*. As Dr. Hall acknowledged, the 11% range of motion rating was significantly different from Dr. Hemler's rating. The increased rating was based upon the December 14, 2017 intervening event. However, as Dr. Fall remarked, an impairment rating is determined at the time of MMI and there would be no reason for Claimant's impairment to increase over time. She summarized that there was no medical reason for Claimant's range of motion to decrease from June 22, 2016 until the date of the DIME. Therefore, Dr. Hall's 18% whole person impairment rating was clearly erroneous. Moreover, Dr. Hall was evaluating Claimant for the February 8, 2016 injury but assigned a range of motion impairment predicated on a separate incident that occurred on December 14, 2017. By increasing Claimant's range of motion impairment based on an event unrelated to the February 8, 2016 admitted industrial injury, Dr. Hall's evaluation was incorrect. Respondents have thus produced unmistakable evidence free from serious or substantial doubt that it is highly probable that Dr. Hall's 18% whole person impairment rating is incorrect.

18. The 10% whole person impairment rating assigned by ATP Dr. Hemler is appropriate. Dr. Hemler assigned a 7% rating for Claimant's lumbar spine. In the absence of the December 20, 2017 event, he also assigned a 2% whole person impairment rating for lumbar spine range of motion deficits. Claimant also received a 1% whole person rating for sensory impairment based on residual elements of radiculopathy. Finally, after reviewing Dr. Hemler's analysis, Dr. Fall agreed that Claimant warranted a 10% whole person impairment rating for his February 8, 2016 admitted industrial injury.

19. Claimant has failed to prove that it is more probably true than not that he suffered a lumbar spine injury during the course and scope of his employment with

Employer on December 14, 2017 in case number W.C. 5-066-360. Initially, on December 14, 2017 Claimant was pushing a "grill guard" or "bumper" out of a truck when felt a "pop" and experienced immediate pain in his lower back. The record reveals that the incident did not constitute a new injury. Instead, the medical records are replete with evidence that Claimant's December 14, 2017 symptoms were a flare-up or exacerbation of his admitted February 8, 2016 lumbar spine injury. Dr. Jones noted that the December 14, 2017 incident "has a component of exacerbation" of the February 8, 2016 injury. P.A. Prochnio remarked that Claimant had a flare-up at work on December 14, 2017 when he was delivering a rear bumper. Dr. Deonarain recounted that Claimant had initially suffered a lumbar spine injury on February 8, 2016 and received conservative treatment. However, Claimant exacerbated his symptoms in December 2017 when he suffered a "pop" while pushing a weight and leaning to his left.

20. Dr. Fall also persuasively maintained that Claimant did not suffer a new lumbar spine injury on December 20, 2017. Considering the December 20, 2017 report from Dr. Hemler, Dr. Fall explained that Claimant suffered a flare-up or temporary increase in symptoms. Claimant's physical findings remained the same and his lumbar MRI's before and after the December 14, 2017 incident only reflected diffuse, degenerative findings without any acute changes. Dr. Fall commented that flare-ups occur with lower back conditions. She summarized that there was no objective evidence that Claimant suffered a new injury on December 14, 2017. Claimant's December 20, 2017 work incident did not constitute a distinct injury but was simply a flare-up of his February 8, 2016 admitted industrial injury. Accordingly, Claimant's Workers' Compensation claim in case number W.C. 5-066-360 is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME in case number W.C. 5-007-076

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. A physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings. §8-42-101(3.7), C.R.S. Table 53(II)(B) of the AMA Guides assigns a 5% whole-person rating where an injured worker suffers an "intervertebral disc or other soft tissue lesion" in the lumbar spine which is unoperated, with a medically documented injury and, "[A] minimum of six months of medically documented pain and rigidity with or without muscle spasm." The determination of whether a claimant meets the criteria of

Table 53 II.B is made at the time of MMI and not at the time of any subsequent evaluation. *Lopez v. Cargill Meat Solutions*, W.C. Nos. 4-757-408 and 4-758-952 (Sept. 9, 2010). In order to receive a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established.

8. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., W.C. No. 4-600-47 (ICAP, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAP, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAP, Sept. 16, 2002).

9. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Hall that Claimant suffered an 18% whole person impairment as a result of his February 8, 2016 admitted industrial injury. Initially, on February 8, 2016 in case number W.C. 5-007-076 Claimant suffered an admitted lumbar strain when he was involved in an automobile accident. He underwent a conservative course of treatment at Concentra that included injections and physical therapy. On June 22, 2017 Dr. Hemler concluded that Claimant had reached MMI. He assigned a 7% impairment for moderate to severe degeneration at the L5-S1 level of the lumbar spine. Dr. Hemler also assigned a 2% whole person impairment rating for lumbar spine range of motion deficits. Finally, Claimant received a 1% whole person rating for sensory impairment based on residual elements of radiculopathy. Combining the ratings yields a 10% whole person impairment.

10. As found, on January 10, 2018 Claimant underwent a DIME with Dr. Hall. Dr. Hall assigned Claimant a 7% rating pursuant to Table 53 for severe degenerative changes at L5-S1. He also assigned an 11% rating for range of motion deficits and a 1% impairment for neurological deficits. Dr. Hall explained that the 11% range of motion rating was "quite a bit different" from the impairment assigned by Dr. Hemler. Absent a causal analysis, he commented "this likely relates to this intervening event. How that might get worked out logistically is up to others."

11. As found, in contrast, Dr. Fall persuasively disagreed with Dr. Hall's 18% whole person impairment rating because it constituted an incorrect application of the *AMA Guides*. She explained that Dr. Hall's increase in Claimant's impairment rating was based on a subjective increase in pain complaints that was inconsistent with the *AMA Guides*. As Dr. Hall acknowledged, the 11% range of motion rating was significantly different from Dr. Hemler's rating. The increased rating was based upon the December 14, 2017 intervening event. However, as Dr. Fall remarked, an impairment rating is determined at the time of MMI and there would be no reason for Claimant's impairment to increase over

time. She summarized that there was no medical reason for Claimant's range of motion to decrease from June 22, 2016 until the date of the DIME. Therefore, Dr. Hall's 18% whole person impairment rating was clearly erroneous. Moreover, Dr. Hall was evaluating Claimant for the February 8, 2016 injury but assigned a range of motion impairment predicated on a separate incident that occurred on December 14, 2017. By increasing Claimant's range of motion impairment based on an event unrelated to the February 8, 2016 admitted industrial injury, Dr. Hall's evaluation was incorrect. Respondents have thus produced unmistakable evidence free from serious or substantial doubt that it is highly probable that Dr. Hall's 18% whole person impairment rating is incorrect.

12. As found, the 10% whole person impairment rating assigned by ATP Dr. Hemler is appropriate. Dr. Hemler assigned a 7% rating for Claimant's lumbar spine. In the absence of the December 20, 2017 event, he also assigned a 2% whole person impairment rating for lumbar spine range of motion deficits. Claimant also received a 1% whole person rating for sensory impairment based on residual elements of radiculopathy. Finally, after reviewing Dr. Hemler's analysis, Dr. Fall agreed that Claimant warranted a 10% whole person impairment rating for his February 8, 2016 admitted industrial injury.

Compensability in case number W.C. 5-066-360

13. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

14. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

15. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job

function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

16. As found, Claimant has failed to prove by a preponderance of the evidence that he suffered a lumbar spine injury during the course and scope of his employment with Employer on December 14, 2017 in case number W.C. 5-066-360. Initially, on December 14, 2017 Claimant was pushing a "grill guard" or "bumper" out of a truck when felt a "pop" and experienced immediate pain in his lower back. The record reveals that the incident did not constitute a new injury. Instead, the medical records are replete with evidence that Claimant's December 14, 2017 symptoms were a flare-up or exacerbation of his admitted February 8, 2016 lumbar spine injury. Dr. Jones noted that the December 14, 2017 incident "has a component of exacerbation" of the February 8, 2016 injury. P.A. Prochnio remarked that Claimant had a flare-up at work on December 14, 2017 when he was delivering a rear bumper. Dr. Deonarain recounted that Claimant had initially suffered a lumbar spine injury on February 8, 2016 and received conservative treatment. However, Claimant exacerbated his symptoms in December 2017 when he suffered a "pop" while pushing a weight and leaning to his left.

17. As found, Dr. Fall also persuasively maintained that Claimant did not suffer a new lumbar spine injury on December 20, 2017. Considering the December 20, 2017 report from Dr. Hemler, Dr. Fall explained that Claimant suffered a flare-up or temporary increase in symptoms. Claimant's physical findings remained the same and his lumbar MRI's before and after the December 14, 2017 incident only reflected diffuse, degenerative findings without any acute changes. Dr. Fall commented that flare-ups occur with lower back conditions. She summarized that there was no objective evidence that Claimant suffered a new injury on December 14, 2017. Claimant's December 20, 2017 work incident did not constitute a distinct injury but was simply a flare-up of his February 8, 2016 admitted industrial injury. Accordingly, Claimant's Workers' Compensation claim in case number W.C. 5-066-360 is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

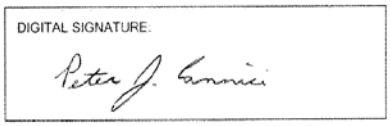
1. Claimant reached MMI on June 22, 2016 and suffered a 10% whole person impairment rating as a result of his February 8, 2016 admitted industrial injury in case number W.C. 5-007-076.

2. Claimant's Workers' Compensation claim in case number W.C. 5-066-360 is denied and dismissed.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 3, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Respondents established by a preponderance of evidence that they are entitled to withdraw their July 24, 2017 General Admission of Liability.

II. Whether Respondents have proven by a preponderance of the evidence that Claimant's injury was caused by a willful violation of a safety rule, entitling Respondents to a 50% reduction of benefits pursuant to Section 8-42-112(1)(b), C.R.S.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits to cure and relieve the effects of the industrial injury.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits from September 6, 2017 to February 17, 2018.

STIPULATIONS

The parties stipulated to an average weekly wage ("AWW") of $359.60.

FINDINGS OF FACT

1. Claimant is a 45-year-old man who worked for Employer as a campground host in the Timberline Campground. Claimant was hired to work for the summer 2017 season. Claimant was required to live on the Timberline Campsite grounds five days a week, and that during those five days a week he was on duty twenty-four hours a day.

2. Lenny Dame and Darla Dame, Area Managers, supervised Claimant.

3. At the time of hire, Claimant received Employer's Host Operating Plan and 2017 Employee Handbook, which detailed Claimant's job duties. Claimant testified he received and read both documents. The Host Operating Plan provides, "safety of visitors is paramount." It further states, "All campsites will be policed regularly and between occupancies for litter and debris. Particular attention will be paid to finding and correcting potentially hazardous situations." One of the specific safety hazards listed in the Host Operating Plan is "fire dangers."

4. The list of Campground Hosts Responsibilities notes that hosts are required to "[o]versee several responsibilities within a Campground Unit" including meeting and greeting customers, collecting fees, completing reports, performing routine cleaning, responding to emergency situations, monitoring facilities for repair and safety needs,

and reporting problems to general manager. An orientation document further provides, "If no cell coverage in campground; know exactly where cell coverage is available."

5. The Employer provided Claimant an ATV to use in the completion of his job-related duties. The "Company Property" section of the 2017 Employee Handbook provides that Employer property,

> [m]ust be maintained according to Company rules and regulations. They must be kept clean and are to be used only for work-related purposes. [Employer] reserves the right to inspect all Company property including computer or phone date or messages to ensure compliance with its rules and regulations…Prior authorization must be obtained before any
>
> Company property may be removed from the premises. Company vehicles must be maintained in a manner that ensures they are safely operating…Cell phone use is not permitted while driving company vehicles.

The handbook lists lockers, furniture, desks, computers, cell phones, data processing equipment/software, vehicles, boats, power tools, trailers, rental equipment, golf carts, and ATVs as company property. The handbook also includes a "Safety and Health" section that contains no specific rules regarding ATV usage.

6. Claimant testified that his job duties during included enforcing campsite rules, controlling camper parking, cleaning fire pits, restocking the bathrooms, patrolling the campsite premises, and performing general cleaning and maintenance of the camp property. Claimant testified that he believed he had job duties that extended beyond the campground property, including: provide safety to campers through proper cell phone connections, and fire safety, patrol the overflow parking outside of the campground, watch for burning fires and clean up dispersed campsites.

7. On June 30, 2017, Claimant was injured when he fell off of the ATV that was provided to him by Employer. Claimant testified he drove the ATV out of the Timberline Campground. He initially drove south on County Road 125, then turned right onto County Road 58 and traveled westbound to the intersection of County Road 48 and 811. Claimant turned around at that intersection, waited for a truck to pass, and then made a right-hand turn onto County Road 58 to travel back toward the Timberline Campground. Claimant testified that he likely traveled 40 or 50 yards before he lost control and rolled the ATV. Claimant testified he woke up on the ground approximately 20 to 25 feet away from the ATV.

8. Medical records from the Platte Canyon Fire Protection District note Claimant was found covered in dust and abrasions "as if he tumbled several times." Claimant was transported to St. Anthony's Hospital via Flight for Life and diagnosed with traumatic subarachnoid hemorrhage with loss of consciousness. He was released to return to work on July 5, 2017 with restrictions of no lifting.

9. Ms. Dame testified that a camp host from another campsite notified her that Claimant was taken to the hospital after overturning an ATV. Ms. Dame completed an Incident Report and an Accident Report. The Accident Report noted the accident occurred on County Road 58. The Incident Report noted Claimant "was not in the campground" at the time of the incident.

10. On July 24, 2017, Respondents filed a General Admission of Liability in this case, admitting liability for Claimant's June 30, 2017 accident. On September 1, 2017, Respondents filed a second General Admission of Liability on September 1, 2017 amending for admitted TTD, noting Claimant returned to work with full wages on July 5, 2017.

11. Claimant testified that he drove the ATV off of the Timberline Campground site on June 30, 2017 for two reasons: to check for messages on his cellular phone and to ensure that there were not any fires burning in the dispersed campsites located in the areas surrounding Timberline Campground.

12. It is undisputed Claimant did not have cellular phone service within the Timberline Campground site. Claimant also testified that the campsite grounds did not have any internet access or mail service. Claimant testified that he could find cellular phone service by traveling west on County Road 58 from the Timberline Campground. Claimant testified he hoped to obtain any available information about local fire bans and federal camp codes and to download text and voicemail messages from his supervisors and/or from his friends and family. Claimant testified he was not attempting to access cellular phone service to report any emergency at the time of the accident.

13. Claimant testified that the second purpose of his ATV ride on June 30, 2017 was to check for unattended fires burning in the dispersed campsites immediately outside of the Timberline Campground site near the intersection of County Road 58 and 811. Claimant testified that he routinely did this because an unattended fire would constitute a safety hazard that would pose a safety risk to himself and to the campers at Timberline Campground. Claimant testified that he believed that his job duties required such precautionary measures. At the time, there was a fire ban in his county. Claimant testified that he was not specifically instructed to check the dispersed campsites, but that there also were no instructions to not do so. Claimant testified that, in conversation, Mr. Dame told him to keep an eye out for burning and unattended campfires. Claimant testified that Mr. Dame mentioned in a prior conversation that he himself had checked the dispersed campsites. Claimant further testified that in conversations prior to the accident he had mentioned to the Dames that he looked for campfires in the areas of the dispersed campsites. Claimant testified that the only way he was able to observe the dispersed campsites was by traveling on County Road 58.

14. Regarding his use of the ATV, Claimant testified he was aware the ATV was to be used for job-related duties. Claimant testified that neither Mr. Dame nor Ms. Dame told him that he should not take the ATV off campsite property, or of any other restrictions regarding the use of the ATV. Claimant testified that he did not seek permission to take the ATV off campsite because he believed doing so was within his

job duties and he was unaware of breaking any rules or company policies. Claimant testified that, prior to the accident, he did not read any signs on County Road 58 prohibiting ATV use. Claimant testified that he did not believe he was violating any traffic or state laws by riding the ATV on County Road 58.

15. Claimant testified that, despite his work restrictions, he returned to work for Employer following the June 30, 2017 accident and worked in a modified capacity for Employer until the position ended on September 6, 2017. Claimant testified that, to his knowledge, he remains under his initial work restrictions. Claimant testified that, following the end of the camping season, he was still experiencing painful symptoms as a result of the June 30, 2017 accident, including pain, difficulty standing or sitting for long periods of time, and difficulty bending and lifting heavy objects. Claimant testified that he looked for work that would fit within his restrictions and physical abilities, but he was initially unable to find a position that he could complete and, as a result, he was unemployed from September 6, 2017 to February 17, 2018. Claimant began employment at a grocery store on February 17, 2018.

16. Both Mr. Dame and Ms. Dame deny the assertion that Claimant was responsible for any duties off of the campsite grounds. They testified that Claimant's job duties were to greet customers, collect fees, clean bathrooms and fire pits, keep general campground clean. Ms. Dame testified that she never told Claimant that part of his duties included taking care of areas outside Timberline Campground, nor to care for dispersed sites, nor to check for fires in other areas. According to Ms. Dame, there was no reason why Claimant would have had to check on these dispersed camp sites as part of his duties and responsibilities as a camp host. Ms. Dame testified that she has never stopped in a dispersed campsite because it is within the jurisdiction of the United States Forest Service, not Employer. Ms. Dame testified that she never gave Claimant permission to take the ATV offsite and was not aware that he was using it offsite. She stated, "We told him it was not to be used outside the campground, it was for campground use only." Ms. Dame testified that there are signs on County Road 58 prohibiting the use of ATVs.

17. Mr. Dame also testified that he never told Claimant he was supposed to go offsite to look for fires, and that it was not Claimant's responsibility to look for fires outside of the campground. He testified that there are dangers associated with maintaining outside campsites, and he did not ask his employees to assume those risks.

18. Mr. Dame further testified that there are no dispersed campsites anywhere on or off County Road 58, other than those on the same side of the road of the Timberline Campground. Mr. Dame testified that one is located no more than 500 feet from the gate of the campground, and there are two more that are a short quarter of a mile away Those campsites were within walking distance and would not have required the use of an ATV for access. Mr. Dame testified that beyond the County Road 58 turnoff, the terrain would not even support a dispersed campsite. Mr. Dame stated that, in any event, Claimant was not required to monitor any dispersed campsites. Ms. Dame confirmed there were no dispersed campsites on the opposite side of Country Road 58

from the Timberline Campground. Mr. Dame testified he was unaware Claimant was checking the dispersed sites. In regard to fire safety, the area around the campsite was managed by the Forest Service.

19. Mr. Dame testified that he also instructed Claimant that the ATV was only to be used in the campground. He testified he instructed Claimant to "keep the ATV on the dirt roads in the campground. And 5 miles per hour just like you tell your customers for the speed limit. And I told him indirectly, that this is a bonus for you, if you abuse it, or you think it's an off-road vehicle and you want to go flying around, I will take it away from you." Mr. Dame also testified that use of ATVs on County Road 58 is prohibited, stating, "There's signs all over the roads out there that says no ATV off road riding." He testified that he could read the signs before the accident. Mr. Dame testified that, after Claimant returned to work, he advised Claimant that Claimant was not supposed to take the ATV out of the campground, reminded him that they had that conversation before, and told him not to do it again.

20. Mr. and Ms. Dame acknowledged that the safety of campers should be of paramount concern to a camp host, that part of Claimant's job was to watch for safety hazards that could pose a threat to the campers at Timberline Campground, and that an unattended or uncontrolled fire could constitute a safety hazard.

21. On January 18, 2018, Claimant presented to Roman Kesler, D.O., who diagnosed Claimant with a traumatic subarachnoid hemorrhage, right hip pain and low back pain. He recommended a brain MRI, EEG and neuropsychology assessment, and orthopedics evaluation. Dr. Kesler did not address work restrictions.

22. On February 15, 2018, George Schakaraschwili, M.D., performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Schakaraschwili opined that Claimant needed to be cleared by neuropsychology and neurology for any sequel of his traumatic brain injury, and that his hip and low back pain needed to be addressed. Regarding Claimant's work status, Dr. Schakaraschwili stated that Claimant's work status could be clarified after the source of his back/hip pain was evaluated.

23. The ALJ finds Claimant's testimony more credible and persuasive than the testimony of Mr. and Ms. Dame.

24. Respondents failed to prove by a preponderance of the evidence that Claimant did not sustain a compensable industrial injury arising out of and in the course and scope of his employment on June 30, 2017. Respondents are not entitled to withdraw their July 24, 2017 General Admission of Liability.

25. Respondents failed to prove by a preponderance of the evidence that Claimant willfully violated a safety rule.

26. Claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment related to the industrial injury.

27. Claimant established by a preponderance of the evidence that he is entitled to TTD benefits from September 6, 2017 to February 17, 2018.

28. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Withdrawing an Admission of Liability

Section 8-43-201, C.R.S. provides that a Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence.

Generally, a claimant bears the burden of proving by a preponderance of the evidence that an injury occurred within the course of, and arose out of, employment with the employer. Section 8-41-301(1), C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). However, by filing an admission of liability, respondents to a workers' compensation claim admit that the injured worker has met that burden. *Rocky Mountain Cardiology v. Industrial Claim Appeals Office*, 94 P.3d 1182 (Colo. App. 2004). Once an admission of liability has been filed, the employer may not unilaterally withdraw it, but must continue making payments consistent with the admitted liability until the ALJ enters an order allowing the employer to revoke the admission in full or in part. *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001); *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). A party seeking to modify or withdraw an admission of liability bears the burden of proof for such a modification or withdrawal. Section 8-43-201, C.R.S.; *Rodriguez v. City of Brighton,* W.C. No. 4-782-516 (ICAO August 23, 2011).

Here, Respondents seek to withdraw a previously filed General Admission of Liability admitting the compensability of Claimant's June 30, 2017 industrial injury. Therefore, in order to withdraw the previously filed admission of liability, Respondents bear the burden of proof to establish, by a preponderance of the evidence, that Claimant did not suffer a compensable injury arising out of and during the course of his employment.

The ALJ concludes Respondents failed to meet their burden to prove Claimant did not suffer a compensable injury arising out of and in the course of his employment. Claimant was responsible for ensuring the safety of campers and finding and correcting potentially hazardous situations. While it was not mandatory for Claimant to go outside of the campground to check for unattended fires, the ALJ is persuaded that doing so had its origin in Claimant's work-related functions and was sufficiently related to his job duties. Unattended fires in surrounding dispersed campsites could reasonably pose a threat to campers within the Timberline Campground. The injury occurred while Claimant was on his way back to the campsite, traveling on the closest road that provided visibility to observe surrounding dispersed campsites. The ALJ is persuaded Claimant was operating within the course and scope of his employment at the time of the accident. Accordingly, Respondents have failed to prove by a preponderance of the evidence that Claimant did not suffer a compensable injury, and thus are not entitled to withdraw their General Admission of Liability.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-

101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As found, Claimant proved by a preponderance of the evidence he is entitled to receive reasonable and necessary medical treatment related to the June 30, 2017 industrial injury. Both Drs. Kesler and Schakaraschwili have opined Claimant requires additional medical treatment. Respondents shall be liable for reasonable and necessary treatment to cure or relieve the effects of the June 30, 2017 industrial injury.

Temporary Total Disability

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. Anderson v. Longmont Toyota, 102 P.3d 323 (Colo. 2004); PDM Molding, Inc. v. Stanberg, 898 P.2d 542 (Colo. 1995); City of Colorado Springs v. Industrial Claim Appeals Office, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. PDM Molding, Inc. v. Stanberg, supra. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. Culver v. Ace Electric, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. Ortiz v. Charles J. Murphy & Co., 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; City of Colorado Springs v. Industrial Claim Appeals Office, supra.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. Lymburn v. Symbios Logic, 952 P.2d 831 (Colo. App. 1997).

Claimant was assigned work restrictions immediately following the June 30, 2017 injury. No evidence was presented indicating the restrictions have been lifted. Although Claimant was able to continue working in a modified capacity for Employer until the end of the camping season, Claimant credibly testified that he was unable to secure work between September 6, 2017 and February 16, 2018 due to his inability to lift heavy objects and sit and stand for periods of time as a result of the industrial injury. The ALJ is persuaded the restrictions and continued symptoms resulting from the June 30, 2017 injury impaired Claimant's ability to effectively and properly perform his regular employment, thus resulting in wage loss. Accordingly, Claimant is entitled to TTD benefits from September 6, 2017 to February 17, 2018.

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S., provides for a fifty percent reduction in benefits if the employee is injured due to a willful failure to obey any reasonable rule adopted by the employer for the safety of the employee. The respondents carry the burden of establishing all five elements of a safety rule violation, which are: 1) There must be a specific, unambiguous and definite safety rule adopted by the employer; 2) The safety rule must be reasonable; 3) The safety rule must be "brought home" to the employee and diligently enforced; 4) Violation of the safety rule must be willful; 5) The violation of the safety rule must be a cause of the claimant's injury. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715, 719 (Colo. App. 1995).

Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Indus. Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.*, 171 Colo. 214, 171 P.2d 410 (1946). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Respondents contend Claimant violated a safety rule when he took the Employer's ATV offsite. The ALJ is not persuaded Employer's rule regarding taking the ATV off company premises was a rule adopted for the safety of Claimant. The rule regarding taking the ATV offsite specifically refers to Employer property, including furniture, computers, cell phones, and data processing equipment/software. The rule refers to the right to inspect employer property to ensure compliance and use for business purposes. Although the handbook contains an entire section regarding safety and health, there is no other reference to the usage of ATVs. The ALJ is persuaded the rule relied on by Respondents was for the purpose of protection of company property, not the safety of the employee.

Even assuming, arguendo, the rule was adopted by Employer for the safety of the employee, Respondents failed to prove it is more likely than not Claimant willfully violated the rule. Claimant credibly testified he was not instructed by either Mr. or Ms. Dame to keep the ATV within the campgrounds. Claimant credibly testified he was aware the ATV was to be used only for work purposes, and that he did not seek permission to take the ATV offsite because he reasonably believed his use of the ATV was within his job duties. Claimant credibly testified he took the ATV on County Road 58 for the purpose of obtaining cellular telephone service and checking for unattended fires that could pose risk to the campsite, which were reasonably within Claimant's duties. Accordingly, Respondents failed to meet their burden to prove a willful violation of a safety rule.

ORDER

It is therefore ordered that:

1. Respondents' request to withdrawal the General Admission of Liability is denied.

2. Respondents failed to establish that Claimant's injury resulted from his willful failure to obey a reasonable safety rule adopted for the safety of the employees and therefore Respondents are not entitled to a reduction in benefits.

3. Respondents shall pay TTD benefits to Claimant for the period of September 6, 2017 to February 17, 2018.

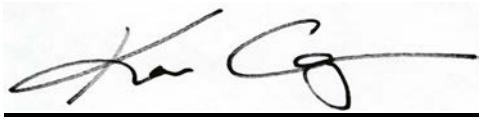
4. Respondents shall pay for reasonable and necessary medical treatment related to the June 30, 2017 industrial injury.

5. The parties' stipulation with respect to average weekly wage is hereby approved. Claimant's average weekly wage is $359.60 unless and until it is subject to adjustment pursuant to law.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 3, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Is this claim closed by a December 20, 2017 Final Admission of Liability?
- Disfigurement benefits.

FINDINGS OF FACT

1. Claimant sustained admitted injuries to her left leg and ankle on April 5, 2017 in a slip and fall accident. She suffered a complex fibular fracture and underwent an open reduction with internal fixation (ORIF) on April 10, 2017.

2. Claimant was placed at MMI by her ATP on December 5, 2017, with a 12% left lower extremity impairment rating.

3. Melissa Mcleod is the adjuster at Broadspire assigned to administer this claim for Insurer. On December 20, 2017, Ms. Mcleod filed a Final Admission of Liability (FAL) admitting for the 12% scheduled rating. The certificate of mailing indicates the FAL was sent to the Division, Employer, and to Claimant's home address. Claimant was not represented by counsel at the time.

4. Ms. Mcleod credibly explained her procedures for preparing and mailing FALs from her home office. Crediting Ms. Mcleod's testimony, the ALJ finds the FAL was properly addressed and mailed on December 20 as reflected on the certificate of mailing.

5. Consistent with her standard procedures for FALs, Ms. Mcleod also issued Claimant's first PPD check on December 20, 2017. The indemnity payments are sent from a central printing facility in Georgia.

6. Claimant received the PPD check on December 27 or 28, 2017. She did not understand what the payment was for, so she called Ms. Mcleod the next day for an explanation. Ms. Mcleod did not answer because she was out of the office for the holidays. Claimant called a few more times over the next several days.

7. Ms. Mcleod returned Claimant's call on January 4, 2018. Claimant asked about the check, and Ms. Mcleod explained it was PPD based on the ATP's rating. Claimant expressed concern about continuing with her chiropractor, but Ms. Mcleod said she could finish the sessions already scheduled. Ms. Mcleod informed Claimant she had mailed a FAL under separate cover containing detailed information regarding the status of her claim. Claimant said she had received no documents other than the check, so Ms. Mcleod agreed to send her another copy of the FAL.

8. Claimant received the second copy of the FAL on January 9 or 10, 2018.[1] She read it but did not understand the technical legal issues being addressed. A friend who is an attorney reviewed the FAL and recommended she consult an attorney who specializes in a workers' compensation claims.

9. Claimant retained Ms. Roepke on February 1, 2018. That day, Ms. Roepke objected to the FAL and filed a DIME Notice and Proposal on Claimant's behalf. Ms. Roepke also applied for a hearing endorsing medical benefits and disfigurement.

10. PALJ Barbo entered a prehearing conference order on March 8, 2018 holding the DIME process in abeyance pending the outcome of the present litigation.

11. Claimant and Ms. Mcleod were credible and persuasive regarding their respective aspects of the events in question.

12. Claimant credibly testified she and her husband have been vigilant and well-organized regarding all mail received from Broadspire during the pendency of her claim. Claimant's actions after receiving the PPD check on December 27 or 28 were consistent with an individual who had not received the FAL. Claimant acted diligently and expeditiously to protect her rights after she received the FAL.

13. Respondents proved by a preponderance of the evidence the FAL was properly addressed and mailed to Claimant on December 20, 2017.

14. Claimant proved by a preponderance of the evidence she never received the original FAL mailed to her on December 20, 2017. She received a different copy of the FAL on January 9 or 10, 2018.

15. Claimant had no meaningful opportunity to act on the FAL between the date she received it and the original objection deadline of January 19, 2018.

16. The time to object to the FAL was tolled until Claimant received a copy on January 9 or 10, 2018. Claimant's February 1, 2018 objection, DIME Notice and Proposal, and application for hearing were timely.

17. The December 20, 2017 FAL did not close this claim.

18. Claimant has injury-related disfigurement consisting of: (1) a 10-inch long by 1/8 to 1/4 inch wide, irregular, indented and discolored surgical scar on the left lower leg; (2) the primary scar is flanked along its length by many pairs of suture scars; (3) permanent swelling around the left ankle joint; and (4) a slight alteration of gait favoring the injured leg. The ALJ finds that Claimant should be awarded $4,500 for disfigurement.

[1] The ALJ finds it of no consequence whether Claimant received the FAL on January 9 or 10, because neither date afforded a meaningful opportunity to act on it. Furthermore, Claimant perfected her objection less than 30 days from either date.

CONCLUSIONS OF LAW

A. This claim is not closed

An FAL provides the primary mechanism for the respondents to initiate administrative closure of a claim. Once an FAL is filed, the claimant must take certain actions within thirty days or the claim will "automatically close." A claimant can either request a hearing on ripe and disputed issues or initiate the DIME process by filing a "notice and proposal." *See* §§ 8-43-203(2)(b)(II)(A); 8-42-107.2(2)(b).

The FAL procedure is "part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy." *Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). The purpose of an FAL is to notify the claimant of the exact bases on which benefits have been admitted or denied so the claimant "can make an informed decision whether to accept or contest the final admission." *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Due process requires that a claimant receive actual notice of the FAL before it can operate to close a claim. *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996). Due process also requires parties be afforded sufficient time to protect their rights. *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003).

Proof that a letter was properly addressed and mailed raises a rebuttable presumption of receipt. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). If the addressee denies receipt, the ALJ must resolve the issue as a question of fact. *Trujillo v. Industrial Commission*, 735 P.2d 211 (Colo. App. 1987).

If the claimant does not receive an FAL that was properly addressed and mailed, the objection window is tolled until the claimant receives the FAL. *E.g., Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986) (time limitation did not commence running "until claimant's attorney first received notification . . . that the admission had been filed"); *Davies v. Kindred Healthcare*, W.C. No. 4-727-298-03 (July 30, 2014); *Henriquez v. K. R. Swerdfeger Construction, Inc*., W.C. No. 4-439-726 (May 5, 2003) (time to object was triggered when claimant's attorney received the FAL in copy of DOWC file).

Although Claimant received a copy of the December 20 FAL less than thirty days after it was originally served, the remaining time was too short to give a "meaningful opportunity" to act it. *See Whiteside v. Smith, supra; Duran v. Russell Stover Candies*, W.C. No. 4-524-717 (April 13, 2004) (objection deadline not tolled despite improper address because claimant actually received the FAL five days after it was mailed). By the time Claimant received the FAL, only nine or ten days remained in the original 30-day objection window. That did not allow sufficient time to determine whether — and how — to object to the FAL. This is particularly true since Claimant was not represented by counsel, which meant she had to contact attorneys, find one willing to meet with her, schedule an appointment, and attend a consultation, before she could obtain legal advice. Despite her diligence, it took Claimant at least twenty-two days to complete that process.

Colorado has long had a "strong" public policy that "in workers' compensation cases the goal of achieving a just result overrides the interests of litigants in achieving a final resolution of their dispute." *Padilla v. Industrial Commissi*on, 696 P.2d 273, 278 (Colo. 1985). At the same time, Respondents have a legitimate interest in achieving prompt closure of claims where there is no ongoing controversy not amenable to resolution by administrative closure. *E.g., Mitchell v. Office Liquidators Inc*., W.C. No. 4-409-905 (December 29, 2000). The General Assembly balanced those competing interests by allowing claimants thirty days, less a reasonable time for transit through the mail, to evaluate their options in response to a FAL. Here, it took at least twenty days after the initial service for Claimant to receive the FAL, far in excess of customary mailing times. Strictly enforcing the original objection deadline under these circumstances would be a denial of Claimant's due process rights.

After considering all the evidence presented, the ALJ concludes the time to object to the FAL was tolled until Claimant received it on January 9 or 10, 2018. Thus, her objection was timely and the claim is not closed.

B. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if she is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained noticeable disfigurement as a direct and proximate result of her April 5, 2017 injury. The ALJ concludes Claimant should be awarded $4,500 for her disfigurement.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant $4,500 for disfigurement. Insurer may take credit for any disfigurement previously paid on this claim.

2. Respondents' defense that this claim is closed by the December 20, 2017 FAL is denied and dismissed. This claim remains open.

3. Claimant may proceed with the DIME process, if desired, in accordance with PALJ Barbo's March 8, 2018 prehearing conference order.

4. All issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 7, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits to treat his left upper extremity CRPS and whether the left upper extremity CRPS is causally related to his January 15, 2016 work injury.

FINDINGS OF FACT

1. On January 15, 2016, Claimant sustained an admitted work related injury while employed by Employer. On that date, Claimant was drilling through a piece of metal wall plate when a bit snagged on the metal and jerked his right wrist, causing pain and injury.

2. Claimant's right wrist was casted for three months, but he had continued symptoms and ultimately underwent surgery on June 3, 2016.

3. Following surgery, Claimant continued to have right forearm pain, hand pain, and paresthesias. In September of 2016 Roberta Anderson Oeser, M.D. noted his hypersensitivity in the forearm and hand. Dr. Oeser noted that Claimant may require further work-up to rule out CRPS and she recommended an EMG/NCS. *See* Exhibit 1.

4. On October 4, 2016, Claimant underwent an EMG test performed by Dr. Oeser that was normal. She recommended Claimant undergo a QSART study and stress thermogram to rule out CRPS of the right upper extremity with Dr. Schakaraschwili. *See* Exhibit 1.

5. On October 24, 2016, George Schakaraschwili, M.D. evaluated Claimant. Claimant reported right forearm and hand pain and paresthesias. Claimant reported that after surgery he had numbness in the right thumb and in the fourth and fifth digits with pain radiating from the hand and wrist to the elbow. Claimant reported sensitivity in the forearm and sharp pain at the medial and lateral distal wrist. Claimant reported episodes of reddish to purplish discoloration, swelling in the wrist, decreased range of motion in the wrist, and inability to make a fist. Claimant reported that his right upper extremity felt cold when compared to the left side. On examination Dr. Schakaraschwili found mild redness on the right when compared to the left, trace edema in the hand and fingers as shown by decreased skin folds in the fingers on the right, decreased range of motion at the right wrist and fingers, and the right upper limb feeling cold in some areas and warm in some areas when compared to the left side. Dr. Schakaraschwili noted that Claimant underwent an infrared stress thermographic analysis of the upper extremities followed by an autonomic testing battery (QSART). *See* Exhibit 1.

6. Dr. Schakaraschwili opined that the study was abnormal and showed paradoxical cooling of the right hand with exposure to cool ambient temperatures. He also noted that there were significant areas of temperature asymmetry between the left and right upper limbs. Dr. Schakaraschwili noted that the resting and stimulated sweat output was very symmetrical between the left and right but that the resting skin temperatures were significantly asymmetric with differences exceeding 3 degrees Celsius at some sites. *See* Exhibit 1.

7. Dr. Schakaraschwili opined that the findings were high probability for complex regional pain syndrome (CRPS). *See* Exhibit 1.

8. Claimant returned to Dr. Oeser who provided the impression of CRPS and noted the results of testing performed by Dr. Schakaraschwili. *See* Exhibit 1.

9. On January 31, 2017, Claimant first reported pain in his left wrist/lower forearm area on a pain diagram at a visit with Dr. Oeser. *See* Exhibit 1.

10. On May 2, 2017, Dr. Oeser evaluated Claimant. Claimant reported intermittent left upper extremity pain in addition to his continued right forearm and hand pain and paresthesias. Claimant reported a burning sensation in the left upper extremity. Dr. Oeser hoped that stellate ganglion blocks would better control Claimant's right upper extremity CRPS and hoped that they would also decrease the left upper extremity symptoms. *See* Exhibit 1.

11. On September 12, 2017, Dr. Oeser evaluated Claimant. Claimant reported that he had not undergone right stellate ganglion blocks due to problems with authorization when he switched facilities. Claimant reported that he was quite concerned that he was having more symptoms in his left upper extremity in addition to hypersensitivity of his left arm. He was quite worried about his future and how he would be able to provide for his family. Dr. Oeser found bilateral upper extremity hypersensitivity, numbness, and tingling. Claimant was noted to have hyperhidrosis on the right and his right hand was warmer to touch than his left. *See* Exhibit 1.

12. On September 28, 2017, Dr. Oeser evaluated Claimant. On exam, Dr. Oeser noted that both of Claimant's hands were warm to touch. Claimant was again concerned about his recent flare up in right upper extremity pain and the increasing symptoms in his left upper extremity. Dr. Oeser discussed the case with Dr. Schakaraschwili and they agreed that repeating the QSART and stress test to determine whether Claimant's CRPS had spread to the left upper extremity would be appropriate. *See* Exhibit 1.

13. On October 9, 2017 Lawrence Lesnak, M.D. performed a medical records review. Dr. Lesnak opined that Claimant had not met the diagnostic criteria for CRPS of the right upper extremity based on documented subjective complaints and clinical findings. Dr. Lesnak opined that Claimant may have sustained a right wrist strain/sprain on January 15, 2016 but noted that Claimant's right wrist MRI revealed minimal findings.

Despite the minimal findings, Dr. Lesnak noted that surgery was done and had not surprisingly failed to improve Claimant's symptoms. Dr. Lesnak opined that Claimant did not appear to qualify for the later diagnosis of right upper extremity CRPS based on the lack of difference between resting and stimulated sweat testing. Dr. Lesnak noted that since the right upper extremity CRPS diagnosis, Claimant had undergone numerous right sided stellate ganglion blocks that had reportedly provided temporary relief of symptomatology. However, Dr. Lesnak noted that Claimant's symptoms and functions seemed to have steadily progressed. Based on all the information, Dr. Lesnak opined that it appeared Claimant had significant psychosocial factors that were currently affecting his symptoms, recovery, and his perceived function. Dr. Lesnak opined that Claimant had primarily subjective complaints without any clear objective findings to support the complaints. Dr. Lesnak opined that with the lack of long-term improvement of symptoms or function, Claimant had reached a status of maximum medical improvement for his injury. Dr. Lesnak also noted that although Dr. Oeser documented recent complaints of left upper extremity symptoms, there were absolutely no documented objective findings whatsoever to support any type of diagnosis of CRPS involving the left upper extremity. *See* Exhibit B.

14. On October 20, 2017, Dr. Schakaraschwili performed testing on Claimant's left upper extremity. Dr. Schakaraschwili found 0 of 3 points on vasomotor index with no evident swelling, 1 of 3 points for slight but measurable end range of motion restriction, 0 of 3 points for visible asymmetry of skin coloration, skin appearance, or nail growth and overall 1/9 on the clinical scale. Dr. Schakaraschwili found 3 of 3 points for skin temperature asymmetry greater than or equal to 1 degree Celsius in a diffuse distribution; 0 of 3 points for resting sweat index; and 1 of 3 points for stimulated sweat output asymmetry with a total of 4/9 points on the laboratory scale. *See* Exhibit 1.

15. Dr. Schakaraschwili noted that a laboratory score of 4/9 combined with a clinical score of 1/9 was consistent with a high probability for the presences of CRPS in the left upper extremity. Dr. Schakaraschwili noted that Claimant had been seen previously one year prior for right forearm and hand pain and paresthesias. Claimant reported that he had recently been developing pain in his left upper extremity that was previously asymptomatic and that he was now having pain in his left wrist and hand similar to the pain he was experiencing on the right. Claimant also noted that when he had right stellate ganglion blocks and the nurse started an IV in his left arm, the tape used to secure the IV began to cause a burning sensation on his skin on the left. Dr. Schakaraschwili noted that Claimant's right upper extremity appearance had improved since the last examination. Dr. Schakaraschwili noted that both hands were slightly red and that at the prior exam, the right hand was warner than the left and now the left was warmer than the right. Claimant reported dysesthesias and sensitivity to touch throughout the upper extremities. Dr. Schakaraschwili noted that the prior study one year ago found the right upper extremity hyperthermic compared to the left side whereas today's study found the left upper extremity hyperthermic when compared to the right. Dr. Schakaraschwili found both upper extremities demonstrated paradoxical warming with exposure to cool ambient temperatures, which was an abnormal sympathetic autonomic response. He noted that the infrared stress thermogram was abnormal in both upper extremities with asymmetric

stimulated sweat responses and significant temperature abnormalities and temperature relationships that were reversed compared to the prior study. He opined that there was objective evidence meeting the Division Diagnostic Criteria for a diagnosis of CRPS of the left and right upper extremities. *See* Exhibit 1.

16. On October 31, 2017, Dr. Oeser evaluated Claimant. She noted the results of the stress thermogram and QSART of the upper extremities and opined that based on the results, unfortunately, Claimant's CRPS had spread to the other extremity. Dr. Oeser ordered stellate ganglion blocks on the left. *See* Exhibit 1.

17. On November 7, 2017, Dr. Lesnak performed another medical records review after reviewing the October 20, 2017 testing performed by Dr. Schakaraschwili. Dr. Lesnak reviewed the medical treatment guidelines and the diagnostic components required for a clinical diagnosis of CRPS. Dr. Lesnak opined that at least three subjective complaints in four different categories were required. Dr. Lesnak opined that at the time of the October 20, 2017 evaluation Claimant did not meet any of the criteria required for the subjective complaint component of the diagnostic criteria required for a diagnosis of CRPS. Dr. Lesnak opined that Claimant also must have documentation in two or more of four categories for clinical findings and that on the recent exam, there were no clinical findings and thus opined that Claimant did not satisfy the clinical exam criteria where you need at least two or more of four categories. Dr. Lesnak opined that it was required that a patient satisfy the criteria in the subjective complaints and clinical exam findings prior to meeting criteria for diagnostic testing. Dr. Lesnak noted that although Claimant may have had a reported positive thermogram, Claimant had at best equivocal results from sympathetic nerve blocks. Dr. Lesnak opined that Claimant did not meet the required diagnostic criteria for CRPS. He opined, therefore, that additional diagnostic testing such as a left sided stellate ganglion injection trial was therefore not medically necessary or reasonable. *See* Exhibit C.

18. On November 14, 2017, Gary Gutterman, M.D. evaluated Claimant. Dr. Gutterman opined that Claimant had experienced an adjustment disorder with mixed emotional features including anxiety and depression and that the adjustment disorder was due to Claimant's employment injury, which led to CRPS. Dr. Gutterman noted that Claimant had trouble dealing with his chronic pain and altered mobility. *See* Exhibit E.

19. On November 15, 2017, Dr. Oeser evaluated Claimant. She disagreed with many of Dr. Lesnak's findings. She opined that under the medical treatment guidelines Claimant met both the clinical and diagnostic criteria for CRPS. Dr. Oeser opined specifically for the diagnostic components of clinical CRPS, Claimant met the criteria of continuing pain disproportionate to any inciting event and met the criteria for more than one symptom in the category of sensory, vasomotor, pseudo motor/edema, and motor/trophic. Dr. Oeser opined that Claimant had hyperesthesia and allodynia in both upper extremities, temperature asymmetry, prior skin color changes and hyperhidrosis, particularly of the right hand, and hyperalgesia and allodynia to light touch, pinprick, and joint movement with no other diagnosis that better explained the signs and symptoms. She noted that Claimant also met criteria under diagnostic components with his positive

infrared stress thermography, positive QSART, and positive response to sympathetic blocks. *See* Exhibit 1.

20. On December 6, 2017, Dr. Schakaraschwili issued a report responding to Dr. Lesnak's medical records review from November 7, 2017. Dr. Schakaraschwili reviewed the clinical criteria for diagnosing CRPS per Rule 17, Exhibit 7 of the medical treatment guidelines. Dr. Schakaraschwili noted that he was usually skeptical when hearing reports that CRPS had spread to other parts of the body and noted that the physiological mechanism by which patients develop pain and sensitivity in other areas of the body after the initial diagnosis of CRPS is not understood. Dr. Schakaraschwili noted that when Claimant was examined on October 20, 2017 Claimant had some objective changes in his left upper extremity compared to the previous examination including color change, warmness in the left hand, dysesthesias and sensitivity to touch, and pain disproportionate to any inciting event. Dr. Schakaraschwili also noted that Claimant reported hyperesthesia and allodynia. Dr. Schakaraschwili noted therefore that Claimant had symptoms in two of the four categories sensory and vasomotor. Dr. Schakaraschwili noted that the objective testing in October of 2017 showed temperature asymmetries with the left upper extremity as the warmer one, pseudo motor changes, and high probability on the autonomic testing battery. Dr. Schakaraschwili noted that paradoxical warming was found on the infrared stress thermogram and on the prior testing there was no evidence of paradoxical warming on the left. Dr. Schakaraschwili opined that paradoxical warming was an abnormal sympathetic autonomic response. Dr. Schakaraschwili opined that although Claimant did not meet all the clinical criteria outlined in the treatment guidelines for the left (with two not three symptoms) he did meet criteria based on physical examination and tested positive on two objective tests. Dr. Schakaraschwili opined that he had no other explanation for the temperature abnormalities and paradoxical sympathetic responses observed in the left upper extremity on testing and concluded, more likely than not, that Claimant has CRPS of the left upper extremity. *See* Exhibit 1.

21. On December 13, 2017, Dr. Oeser evaluated Claimant. She reviewed Dr. Schakaraschwili's report and agreed that Claimant had CRPS of both upper extremities. *See* Exhibit 1.

22. On January 17, 2018, Dr. Lesnak performed another medical records review after reviewing Dr. Schakaraschwili's December 6, 2017 report. Dr. Lesnak noted that it seemed quite clear that Dr. Schakaraschwili had admitted that Claimant did not meet all the required criteria for diagnosis of CRPS in the left upper extremity. Dr. Lesnak agreed that CRPS was difficult to assess and diagnose and that therefore we must rely on the medical treatment guidelines and that since Claimant did not meet the required criteria for diagnosis of left upper extremity CRPS, proceeding with an invasive procedure such as a left sided stellate ganglion block was not appropriate or reasonable. Dr. Lesnak also believed that Dr. Schakaraschwili had failed to take into consideration the significant psychosocial factors affecting Claimant's symptoms, recovery, and perceived function. *See* Exhibit D.

23. Dr. Lesnak and Dr. Schakaraschwili testified at hearing consistent with their prior reports.

24. Dr. Lesnak testified that because CRPS is a difficult diagnosis, specific clinical criteria must be present before proceeding with that diagnosis. He testified that there had to be 3/4 categories of subjective complaints and 2/4 physical findings before considering a CRPS diagnosis. Dr. Lesnak opined that psychosocial factors were very important because physicians rely heavily on reported subjective complaints. He opined that psychosocial factors or psychiatric disorders such as anxiety or depression affect subjective complaints making the subjective complaints less reliable. Dr. Lesnak opined that the documented subjective complaints and documented clinical findings do not meet the guidelines for the diagnosis of left upper extremity CRPS. He opined that the only subjective complaint documented was some burning of Claimant's skin with tape, which did not fit any categories and noted that no other subjective complaints were listed. Dr. Lesnak also noted that the clinical findings did not meet the required criteria with no asymmetry in distal upper extremity color, no swelling, and improved range of motion. Dr. Lesnak opined with no subjective complaint criteria and only 1/4 clinical findings, Claimant did not meet the criteria and should not have proceeded with diagnosis and testing of the left upper extremity for CRPS.

25. Dr. Schakaraschwili testified and agreed that CRPS was not well understood and continued to be controversial. Dr. Schakaraschwili testified that the spread of CRPS is rare but that it makes sense in Claimant's case given the objective and subjective findings. Dr. Schakaraschwili opined that given the difficulty in diagnosis the condition of CRPS, rigid application of the abundance of available criteria was not required. Dr. Schakaraschwili testified that psychosocial issues or factors could not create the objective temperature asymmetries that Claimant had on testing.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should

consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment are proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits for his left upper extremity CRPS. Claimant has established, more likely than not, that he has left upper extremity CRPS is causally related to his January 15, 2016 work injury.

Both experts in this case agree that CRPS is not well understood and difficult to diagnose. The Medical Treatment Guidelines give guidance on diagnosis and treatment of CRPS. Here, with the pain in Claimant's left upper extremity disproportionate to any inciting event, the allodynia, asymmetry in temperature, skin color changes, sweat asymmetry, weakness, and objective testing Clamant has met his burden. Although not well understood, Claimant has shown more likely than not that his CRPS has spread to his left upper extremity. The opinions of Dr. Schakaraschwili and Dr. Oeser are credible and persuasive that enough criteria exist to diagnose left upper extremity CRPS related to the work injury. Claimant's credible reports of subjective symptoms are similar to those he experiences in his right upper extremity.

The weight of the overall evidence supports the opinion of Dr. Schakaraschwili that although Claimant does not meet all the criteria under the guidelines, Claimant has

enough subjective and objective criteria for the diagnosis of left upper extremity CRPS and that his CRPS has spread. The ALJ finds Claimant has met his burden by preponderant evidence.

ORDER

1. Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits to treat his left upper extremity CRPS. Claimant has established, by a preponderance of the evidence, that his left upper extremity CRPS is causally related to his January 15, 2016 work injury.

2. All other issues are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 8, 2018

Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issues presented for hearing were compensability; reasonable, necessary and authorized medical providers; and Respondent's contention that the accident or injury claimed was fully compensated in W.C. No. 5-009-471.

FINDINGS OF FACT

1. On March 3, 2016, Claimant sustained a compensable injury when she struck her head on a counter in the course and scope of employment. Respondent admitted liability and Claimant's case proceeded as W.C. No. 5-009-471. Claimant treated with Dr. Brian McIntyre and several other providers in the chain of his referrals.

2. On November 9, 2016, while still treating for her March 3, 2016 injury, Claimant struck the left side of her head and neck on an x-ray machine at work. She experienced increased symptomology because of the November 9, 2016 event.

3. Claimant reported the November 9, 2016 event and her increased symptoms to Dr. McIntyre on November 15, 2016. Dr. McIntyre's note from that visit states that Claimant struck the back, left side, of her head on an x-ray machine at work. At that time, Dr. McIntyre referred to the event variably as a "re-injury" and an "injury" that caused some regression and worsening in her symptomology.

4. On November 21, 2016, claims representative Kaylee Rowe (p/k/a Kaylee Shaddy) contemporaneously documented a conversation with Claimant. The note indicates that Ms. Rowe and Claimant discussed the November 9, 2017 event and whether Respondent would open a new claim or cover Claimant under claim W.C. No. 5-009-471. Ms. Rowe's note states: *"I advised [Claimant] since it was the same body part and DMP [designated medical provider, Dr. McIntyre] opined that it was an aggravation and that it would continue to be handled under her current claim. [Claimant] expressed understanding."* Ms. Rowe testified that the note set forth the essence of the conversation and her impression that she had answered all of Claimant's questions and informed Claimant that Respondent was going to handle the November 9 event under the original workers' compensation claim, W.C. No. 5-009-471. Ms. Rowe testified that she did not have any direct conversations with Dr. McIntyre but based her decision upon a review of Dr. McIntyre's reports.

5. At hearing, Claimant contested Ms. Rowe's version of the conversation and insisted that the November 9 event was a new claim. Claimant testified that she also took contemporaneous notes of the discussion. However, Claimant did not introduce into evidence any such notes.

6. Dr. McIntyre treated Claimant for both the March 3, 2016 injury and the November 9, 2016 event as part of W.C. No. 5-009-471. Dr. McIntyre's medical reports for the next several months indicate that he was treating Claimant for post-concussive syndrome and strain of the muscle, fascia and tendon at the neck level. His reports also document Claimant's progress and her gradual ability to return to work. Claimant testified at hearing that Dr. McIntyre treated her for both the March injury and November event.

7. Dr. McIntyre testified by June 6, 2018 deposition, that he treated Claimant for over a year. Claimant had a combination of head injury symptoms, including dizziness, difficulty with concentration, fatigue, headache pains and neck pains. Dr. McIntyre indicated that he was aware of the original March 3, 2016 event, and the subsequent November 9, 2016 event. He testified that the November 9, 2016 head contusion occurred to the same general posterior aspect of the skull and that both events shared the following four elements:

- The strain of muscle, fascia and tendon at neck level,
- post concussive syndrome;
- concussion without loss of consciousness, and
- Claimant's head striking against other stationary object.

8. Dr. McIntyre testified that the diagnosis for both incidents same. He also testified that he did not treat the November 9, 2016 event as a completely new injury. Dr. McIntyre testified that they were **"**continuing the same vein of treatment from her previous injury," and that he hoped he would Claimant would not need much more treatment for the November 9, 2016 event because **"**it was just a slight increase in symptomology."

9. Claimant's treatment after November 9, 2016 included:

- Dr. McIntyre referred the Claimant to a neurological specialist, Dr. Patricia Soffer.
- Claimant underwent a CT scan to rule out any new abnormalities.
- Dr. Soffer read the scan and determined it to be normal.
- Dr. McIntyre treated the Claimant's subjective complaints until April 4, 2017.

10. Dr. Patricia Soffer's narrative report on January 27, 2017, indicated that Claimant had improved by that time. She had no further headaches, her cognitive difficulties had resolved, as had her neck pain. Dr. Soffer also found that Claimant's neck was supple with full range of motion. Dr. Soffer discharged Claimant from care on January 27, 2017.

11. Claimant returned to Dr. McIntyre's care until she eventually reached maximum medical improvement on April 4, 2017. Dr. McIntyre released Claimant to full regular activity and duty and prescribed maintenance treatment to consist of two visits with a neurologist, Dr. Patricia Soffer, within the following six (6) months and four (4) chiropractic visits within the following three (3) months of her MMI status. Dr. McIntyre testified that he felt that Claimant was at MMI from *both* the March 3, 2016 injury and November 9, 2016 event.

12. Respondent filed a Final Admission of Liability in W.C. No. 5-009-471 noting that the Claimant had reached MMI and had no impairment. The Respondent also admitted for post-MMI maintenance care with Dr. Soffer and chiropractic care.

13. On January 19, 2018, nine months after receiving the Final Admission of Liability, Claimant filed a new Workers' Claim for Compensation for the November 9, 2016 event. On February 20, 2018 Respondent filed a Notice of Contest, taking the position that the November 9, 2016 event was subsumed within W.C. No. 5-009-471 and that the case was closed.

14. At hearing, Claimant testified that her symptoms worsened because of the November 9, 2016 event and that she did not believe she had received adequate care and treatment.

15. Claimant presented no persuasive evidence that she lost any time or experienced a permanent medical impairment that the Final Admission of Liability in W.C. No. 5-009-471 did not address.

16. Claimant testified that she did not pursue any follow-up treatment with the neurological specialist, Dr. Patricia Soffer, following Dr. McIntyre's recommendation of maintenance medical care. She offered no persuasive evidence that she followed up with any authorized chiropractic care after Dr. McIntyre made those recommendations.

17. Rather, Claimant treated with her private physicians at Kaiser Permanente. She continued to complain of neck pain and headaches in those records.

18. Based on the totality of the evidence, the ALJ finds that Respondent administrated the November 9, 2016 event as a component of W.C. No. 5-009-471.

19. Based on the totality of the evidence, the ALJ finds that Respondent provided Claimant medical care and treatment for the November 9, 2016 event as a component of W.C. No. 5-009-471.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted

neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

In accordance with section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Assessing weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

Compensability

Compensation can be awarded only for an injury that is sufficient for the employee to miss more than three (3) days from work or to result in fatality or permanent disability. §8-41-301(1) and (2), C.R.S. Otherwise, the employee is not entitled to compensation payments even though a work-related injury has occurred. §8-42-105(1), §8-42-107(1)(a) and (b), C.R.S., and §8-42-114, C.R.S. The ALJ concludes that in the face of conflicting testimony, there is no credible evidence that the November 9, 2016 bump on the Claimant's head resulted in entitlement to benefits under the Colorado Workers' Compensation Act which were not fully compensated in W.C. No. 5-009-471. The Claimant appears to have been paid temporary benefits until April 4, 2017 when she reached MMI. Claimant presented no persuasive evidence that she was denied any care or treatment related to the November 9, 2017 incident under W.C. No. 5-009-471. The ALJ concludes that there was a work-related incident, but no benefits are due and payable for the November 9, 2016 incident that have not been previously paid and recited in the Final Admission of Liability in W.C. No. 5-009-471.

Claimant did seek unauthorized medical treatment from her personal physicians at Kaiser Permanente. However, Claimant presented no persuasive evidence to support a finding that this treatment should be considered authorized treatment. Dr. McIntyre recommended potential maintenance medical care and Respondent admitted for that maintenance care with authorized providers in W.C. No. 5-009-471.

Respondent is liable only for authorized treatment. See C.R.S. §8-42-201(1); *Pickett v. Colorado State Hospital,* 513 P.2d 228 (1973). Once an ATP has been designated, the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. §8-43-404(5)(a)(i)(A), C.R.S.; WCRP 8-2(E). The ALJ concludes that Dr. McIntyre and his referrals were designated ATPs, as well as providers of authorized maintenance care. Claimant chose to treat with Kaiser Permanente physicians, rather than continue to treat with ATPs. Respondent did not agree to the change, neither did an ALJ authorize it. Therefore, Kaiser Permanente's medical providers are not ATPs.

The ALJ further concludes that Claimant and Ms. Reeves discussed whether the November 9, 2016 event should be handled as two distinct claims or continue under the original claim, W.C. No. 5-009-471. Based on conflicting testimony, the ALJ concludes that Claimant was informed in November 2016 that symptoms she developed as a result of the November 9 event would be handled under the March 3, 2016 injury (W.C. No. 5-009-471). Claimant's actions, until January 9, 2018 when she filed a new claim, are consistent with the understanding that Respondent would handle the November 9, 2016 event handled under W.C. No. 5-009-471.

The ALJ ultimately concludes that even if the two incidents had been treated as separate claims, the credible testimony of Dr. McIntyre indicates that there was no additional necessary and reasonable medical care for either incidents after April 4, 2017. The Final Admission of Liability in W.C. No. 5-009-471 recited all benefits payable for both incidents and that Claimant had no additional temporary disability or permanent impairment for either of the work-related head injuries that had not been concluded by MMI for both incidents by April 4, 2017. Claimant has failed to meet her burden of proof that she is entitled to additional benefits under the Colorado Workers' Compensation Act in this claim.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant had an undisputed event on November 9, 2016 while she was treating for a March 3, 2016 injury which was the subject of W.C. No. 5-009-471.

2. Claimant received all reasonable and necessary medical treatment and appropriate disability and/or impairment benefits for the November 9, 2016 event as part of W.C. No. 5-009-471. Those benefits are set forth in Respondent's Final Admission of Liability dated April 5, 2017.

3. Claimant's claims for benefits not covered in W.C. No. 5-009-471 are denied and dismissed with prejudice.

4. Any medical care provided by Kaiser Permanente is not authorized medical care for which the Respondent is responsible.

DONE this 8th day of August 2018.

OFFICE OF ADMINISTRATIVE COURTS

/s/ Kimberly Turnbow
Kimberly B. Turnbow,
Administrative Law Judge

NOTE: If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-wc.htm.

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits beginning February 20, 2018 and ongoing until terminated by law.

- Whether the respondents have proven by a preponderance of the evidence that the claimant's claim for TTD is barred by the doctrine of issue preclusion; the doctrine of claim preclusion; or the law of the case.

- At hearing, the parties stipulated that if the claimant is found to be entitled to TTD benefits, the respondents are entitled to an offset for the claimant's receipt of unemployment benefits.

FINDINGS OF FACT

1. The employer operates in the oil and gas industry. The claimant sustained an admitted work injury on March 21, 2013. The injury occurred when the claimant and his coworkers were unloading a trailer full of pipe and the mechanism that held the pipe in place opened and an aluminum "cheater pipe" hit the claimant across the face.

2. The claimant's authorized treating provider (ATP) for this claim has been Work Partners. The claimant was initially seen at Work Partners by Erica Herrera, PA and Dr. Craig Gustafson. On June 25, 2013, the claimant was seen by Ms. Herrera. On that date, Ms. Herrera determined that the claimant could return to work with modified duty. The claimant's work restrictions included sedentary desk work with no strenuous lifting or work, and no safety sensitive work.

3. On August 5, 2013, the claimant returned to Ms. Herrera. On that date, Ms. Herrera released the claimant to full duty, with an instruction to avoid respirator use.

4. On June 9, 2014, Dr. Merrell performed a septoplasty with bilateral inferior turbinate reduction to address the claimant's deviated septum.

5. Thereafter, the claimant continued to treat with Work Partners. On January 7, 2015, the claimant was placed at maximum medical improvement (MMI) by Dr. Gustafson. At that time, Dr. Gustafson assessed a permanent impairment rating of 7% whole person. Dr. Gustafson opined that the claimant would likely need maintenance medical treatment including follow up treatment with Work Partners and Dr. Merrell, repeat surgeries, and medication management.

6. On January 16, 2015, the respondents filed a Final Admission of Liability (FAL) admitting for the January 7, 2015 date of MMI, the 7% whole person impairment rating, and reasonable, necessary, and related maintenance medical treatment.

7. After being placed at MMI, the claimant continued to work for employer without restrictions until he was laid off due to a work slowdown in April 2015.

8. After he was laid off by the employer, the claimant began working for Intermountain Wood Products (IWP) as a truck driver. The claimant testified that although he was able to perform all of his job duties while employed with IWP he experienced "anger fits". The claimant's employment with IWP ended when he was discharged for refusing to drive during a snow storm.

9. Subsequently, the claimant was hired by Gonzo to drive a water truck in the oil and gas industry. On June 30, 2017 while he was working for Gonzo, the claimant was operating a water truck that did not have a working air conditioner so he was driving with the windows down. With the windows down, the cab of the truck filled with dust and claimant experienced what he later learned was a panic attack.

10. On July 17, 2017, the claimant returned to Work Partners and was seen by Dr. Lori Fay. The claimant reported to Dr. Fay that he was still experiencing nosebleeds and headaches. The claimant also reported that his panic attacks seemed to be related to breathing. At that time, Dr. Fay recommended that the claimant avoid dust exposure and specifically included that recommendation as a work restriction. Dr. Fay also recommended that the claimant return to Dr. Merrell for an evaluation and referred the claimant to Dr. Joel Cohen, a psychologist.

11. On August 8, 2017, the claimant returned to Dr. Merrell's office and was seen by Dr. Mark Griffin. Dr. Griffin noted that the claimant's septum was straight and there did not appear to be any anatomical issues.

12. The claimant was first seen by Dr. Cohen on August 17, 2017. At that time, the claimant reported that he was having panic attacks two to three times per week, at a minimum. Dr. Cohen recommended that claimant see psychiatrist, Dr. David Good, for consultation regarding appropriate medication.

13. On August 29, 2017, the claimant was seen at Work Partners by Ms. Herrera. At that time, Ms. Herrera noted that the claimant's panic attacks were getting worse and he was continuing to report memory and cognitive deficits. Based upon the claimant's symptoms, Ms. Herrera opined that the claimant was no longer at MMI and agreed with Dr. Cohen's recommendation that the claimant see Dr. Good for pharmacologic management of his anxiety and depression.

14. On September 27, 2017, the claimant was seen by Dr. Good who diagnosed the claimant with major depression, panic disorder, attention deficit disorder (ADD), concussion, and panic disorder. Dr. Good recommended supportive therapy and prescribed Prozac.

15. On November 27, 2017, the claimant was seen by Dr. Stephen Moe for a psychiatric independent medical examination (IME). Dr. Moe reviewed the claimant's medical records and obtained a medical history from the claimant. In his IME report Dr. Moe diagnosed the claimant with anxiety disorder and opined that the claimant's psychiatric symptoms were related to the March 21, 2013 work injury. Dr. Moe also opined that as of June 30, 2017 the claimant was no longer at MMI.

16. On December 14, 2017, the claimant was seen by Dr. Eric Hammerberg for an IME. Dr. Hammerberg reviewed the claimant's medical records, obtained a medical history from the claimant, and performed a physical examination. In his IME report Dr. Hammerberg agreed with Dr. Moe's assessment that the claimant was no longer at MMI and the claimant's anxiety and depression symptoms were related to the work injury.

17. On February 7, 2018, the parties went to hearing on the issues of reopening the claimant's claim, medical benefits, and temporary total disability (TTD) benefits beginning June 30, 2017.

18. At the February 7, 2018 hearing, the claimant testified that following the June 30, 2017 panic attack he had not yet returned to work for Gonzo. The claimant also testified that Gonzo would not allow him to return to his job duties until he obtained a release from a physician. At the time of the February 7, 2018 hearing, the claimant understood that he was still employed by Gonzo, but was unable to report to work because of the no dust work restriction. The claimant also testified on February 7, 2018 that even if he were able to drive a truck for Gonzo with the windows rolled up, he would still be exposed to dust throughout his work day in the oil fields. The claimant testified that he had not sought employment elsewhere because he wanted to return to work for Gonzo.

19. On March 20, 2018, the undersigned ALJ issued an order reopening the claimant's claim, and ordering authorization of neuropsychological testing and treatment. In that same order, the ALJ denied the claimant's claim for TTD benefits from July 30, 2017 and ongoing. The ALJ specifically found that:

> Claimant has not worked since his panic attack that occurred on June 30, 2017. Currently claimant's only work restriction is "no dust". Claimant has failed to demonstrate that he is unable to work. On the contrary, claimant testified that he has not sought employment elsewhere because he would like to return to work for Gonzo. The ALJ finds that claimant's wage loss is due to claimant's personal preference to not seek work elsewhere, and not due to a physical disability or medical condition.

20. The ALJ's March 20, 2018 order is pending appeal with the Industrial Claim Appeals office.

21. On February 20, 2018, the claimant was seen by Ms. Herrera. The claimant testified that he did not seek treatment with Work Partners prior to February 20, 2018 because the respondents had denied treatment. On that date, Ms. Herrera noted that the triggers of the claimant's panic attacks were dust, driving semi-trucks, eating too much, and/or very stressful situations. At that time, Ms. Herrera changed the claimant's work restrictions by adding "no semi-truck driving" to the no dust exposure restriction. Since February 20, 2017, Work Partners has continued to include "no semi-truck driving" as a work restriction for the claimant. The claimant testified that "triggers" for panic attacks all include a feeling that he cannot breathe.

22. On June 14, 2018, Ms. Herrera participated in a SAMMS conference with the claimant's attorney and the respondents' attorney. At that time, Ms. Herrera clarified that the no semi-truck driving work restriction was based upon the claimant's subjective statement to her at the February 20, 2018 appointment that semi-truck driving triggered his panic attacks.

23. On June 22, 2018, Ms. Herrera responded to correspondence that confirmed information discussed at the SAMMS conference. In her response, Ms. Herrera indicated that the claimant was working on "desensitization techniques". The claimant testified that these techniques included gradually getting back into a semi-truck as a passenger, and then gradually starting to drive a semi-truck. The claimant testified that he had contacted a commercial driver's license (CDL) school to begin this desensitization process.

24. At the current hearing, the claimant reiterated that he did not return to work for Gonzo because he was unable to be exposed to dust and unable to drive a semi-truck. The claimant further testified that at the time of the prior hearing he believed that he was still employed with Gonzo. However, following the February 7, 2018 hearing, the claimant learned that he had been laid off by Gonzo in October 2017 when he received his year end tax document from Gonzo. Once he found out he was laid off by Gonzo, the claimant applied for unemployment benefits. The claimant has been receiving unemployment benefits since April 3, 2018 in the amount of $289.00 per week.

25. The claimant testified that since late February 2018, he has been following the unemployment guidelines and applying for approximately five jobs each week. The claimant testified that he did not apply for jobs before that time because he incorrectly believed that Gonzo was holding his job for him.

26. The claimant testified that since his claim was reopened by order of the ALJ, he has not been able to return to work, despite applying for approximately five jobs per week since February 2018. The claimant also testified that since beginning his job search he has been offered two positions (with Reddy Ice and United Companies). However, those job offers were retracted when the employers learned that the claimant is medically restricted from driving a semi-truck.

27. The claimant testified that all of his job duties for the employer would have violated his current work restrictions, because he was constantly exposed to dust and/or driving a semi-truck. The claimant also testified that he would be unable to return to work for Gonzo because he is unable to be exposed to dust and unable to drive semi-trucks.

28. The claimant testified that although his panic attacks are decreasing in severity, he believes that he is still unable to be exposed to dust or drive semi-trucks, because these are triggers of his anxiety and panic attacks. The claimant testified that the last time he drove a semi-truck was on June 30, 2017, at the onset of the panic attack on that date.

29. Prior to February 20, 2018, no medical records note the claimant reporting panic attacks associated with driving a semi-truck. The medical records prior to February 20, 2018 reflect that the claimant reported a number of other causes of his panic attacks. These causes include: breathing issues at work when exposed to dust; nasal congestion made worse by laying down; after he eats too much; allergic rhinitis; stressful situations; a large meal that puts pressure on his abdomen; and laying on his side.

30. The respondents assert that the issue of the claimant's entitlement to temporary total disability (TTD) benefits is barred by the doctrines of issue preclusion, claim preclusion, and/or the law of the case.

31. The ALJ agrees that the claimant litigated the issue of TTD benefits at the February 7, 2018 hearing. However, at the time of that prior hearing, Ms. Herrera had not yet amended the claimant's work restrictions. Additionally, at time of the February 7, 2018 hearing, the claimant continued to believe that he was employed by Gonzo and as a result limited his search for employment. The claimant's testimony at the current hearing addressed his job separation from Gonzo and his attempts to obtain employment. These are facts that were unknown at the time of the February 7, 2018 hearing. Therefore, the ALJ concludes that the issue of TTD benefits as presented on February 7, 2018 and July 10, 2018 are not identical. As a result, the ALJ finds that that the respondents have failed to prove that it is more likely than not that the doctrines of issue preclusion, claim preclusion, or law of the case apply to bar the claimant's claim for TTD benefits beginning February 20, 2018 and ongoing. Therefore, the claimant's current claim for TTD benefits is not barred.

32. The ALJ credits the claimant's testimony and the medical records, particularly Ms. Herrera's record of February 20, 2018, and finds that the claimant has proven that is more likely than not that he has experienced a wage loss since February 20, 2018. The ALJ also finds that the claimant has demonstrated it is more likely than not that his wage loss is the result of the March 21, 2013 work injury.

33. The claimant credibly testified that one of the triggers of his panic attacks is driving a semi-truck. While the ALJ recognizes that driving semi-trucks was not identified as a trigger until February 2018, the medical records demonstrate that the claimant previously identified "stressful situations" as a cause of his panic attacks. It is reasonable that driving a semi-truck would be a stressful situation for the claimant. This is even more persuasive given that the claimant's first documented panic attack occurred while the claimant was operating a semi-truck. It is also reasonable that this is a legitimate trigger of the claimant's panic attacks.

34. The ALJ specifically credits the claimant's testimony regarding his search for employment since learning he was layoff by Gonzo. The ALJ also credits the claimant's testimony regarding the two job offers that were retracted by potential employers when they learned the claimant was medically restricted from driving a semi-truck. For all of the foregoing reasons, the ALJ finds that the claimant has demonstrated that it is more likely than not that he is entitled to TTD benefits beginning February 20, 2018.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

4. Claim preclusion, or *res judicata*, works to preclude the relitigation of matters that have already been decided, as well as matters that could have been raised in a prior proceeding but were not. *Foster v. Plock*, 2016 COA 41, *reh'g denied* (Apr. 7, 2016), *cert. granted in part*, No. 16SC366, 2016 WL 4628185 (Colo. Sept. 6, 2016) (c*iting Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005)). The doctrine is intended to promote judicial economy and to confirm the finality of judgments by preventing inconsistent decisions. *Id*. For a claim in a second judicial proceeding to be precluded by a previous judgment, there must exist: "(1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, and (4) identity or privity between parties to the actions." *Id*., *citing Argus,* 109 P.3d at 608.

5. Issue preclusion may be invoked in workers' compensation proceedings. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. 2001). Issue preclusion precludes relitigation of an issue where: (1) the issue to be precluded is identical to an issue determined in the prior proceeding; (2) the party against whom preclusion is sought was a party to or in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.* at 47; citing *Bebo Constr. Co. v. Mattox & O'Brien, P.C.,* 990 P.2d 78 (Colo. 1999); *Guar. Nat'l Ins. Co. vs. Williams*, 982 P.2d 306 (Colo. 1999) ; and *Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1*, 732 P.2d 616 (Colo. 1987). See also *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973).

6. The doctrine of the law of the case is a discretionary rule of practice which directs that prior relevant rulings made in the same case generally are to be followed. *Governor's Ranch Professional Center, Ltd. v. Mercy of Colorado, Inc.,* 793 P.2d 648 (Colo. App.1990). Under the law of the case doctrine, "prior relevant rulings made in the same case are to be followed unless such application would result in error or unless the ruling is no longer sound due to changed conditions." *People v. Dunlap,* 975 P.2d 723, 758 (Colo. 1999); *see also People v. Warren,* 55 P.3d 809, 813 (Colo. App. 2002).

7. Reliance on a prior determination may be characterized as the "law of the case." However, application of the "law of the case" doctrine is discretionary. An ALJ may elect not to follow a prior ruling if new facts, changes in the law or other "persuasive circumstances" warrant modification of the ruling. *Dworkin, Chambers and Williams v. Provo*, 81 P.3d 1053 (Colo. 2003); *In re Younger*, W.C. No. 4-326-355 (ICAO, June 17, 2004).

8. As found, the issue of TTD benefits as presented by the claimant on February 7, 2018 and July 10, 2018 are not identical. As found, the respondents have failed to demonstrate by a preponderance of the evidence that the doctrines of issue preclusion, claim preclusion, and/or the law of the case bar the claimant's current claim for TTD benefits.

9. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in

an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

10. As found, the claimant has demonstrated by a preponderance of the evidence that beginning February 20, 2018 he has suffered a wage loss which has impaired his ability to perform his regular employment. As found, the claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits beginning February 20, 2018 and ongoing until terminated by law.

ORDER

It is therefore ordered that:

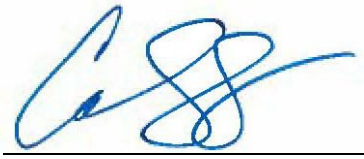
1. The claimant is entitled to temporary total disability (TTD) benefits beginning February 20, 2018 and ongoing until terminated by law.

2. As stipulated by the parties, the respondents are entitled to an offset related to the claimant’s receipt of unemployment benefits.

3. The insurer shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

Dated: August 9, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he has suffered a worsening of his original work-related condition, to warrant a reopening of his case?

II. Has Claimant shown, by a preponderance of the evidence, that he is entitled specific medical treatment, to include epidural steroid injections as requested by Dr. Kenneth Finn, as well as a surgical referral for L4-L5 surgical reassessment?

III. Is Dr. Ali Murad now an Authorized Treating Physician for this claim?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained an admitted work injury to his low back on February 15, 2012. At the time of this injury, Claimant worked for Employer performing heavy industrial labor. Following the injury, Claimant developed pain in his low back, eventually displaying cauda equine syndrome and radicular symptoms in his lower extremities.

2. An MRI conducted on March 22, 2012, revealed severe levels of stenosis most significant involvement is at L4-5 where there is central and left lateral recess stenosis and likely L5 nerve root compression left greater than right. Other levels of narrowing at L3-4 on the left and bilaterally at L5-S1. (Ex. K, p. 53)

3. On April 19, 2012, Dr. Kenneth Finn (an ATP) performed right L5-S1 interlaminar epidural steroid injections based on the recommendation by Dr. Roger Sung, who noted claimant had multilevel lumbar degenerative disc disease and a left paracentral disc herniation. Claimant reported very good results from the injections. (Ex. T, p. 319)

4. Claimant returned to Dr. Finn on May 10, 2012, for a second set of epidural steroid injections to the right L5-S1 interlaminar region. Claimant reported a little bit of residual pain but no radicular symptoms when he returned to the ATP, Dr. Richard Nanes, on June 11, 2012.

5. Claimant was placed at MMI on August 13, 2012 by the ATP. A final admission of liability (FAL) was filed by respondents admitting for the 16% whole person impairment rating assigned by the ATP. No work restrictions were assigned and maintenance medical care was recommended. (Ex. P, pp. 223-227).

6. On October 29, 2013, Dr. Kenneth Finn proceeded with a right L5-S1 interlaminar epidural steroid injection. Claimant returned to the ATP, Dr. Nanes, on November 8, 2013, and

complained his severity of pain was 9/10 and that there was nothing he could do to help alleviate the pain.

7. On November 12, 2013, a repeat L5-S1 interlaminar epidural steroid injection was performed by Dr. Finn and claimant returned to the ATP on November 22, 2013, where Claimant indicated he was having extreme difficulty trying to walk or do any activities. The ATP opined that claimant's herniated disc at L4-5 did not get better with conservative treatment.

8. A MRI taken on December 4, 2013 revealed a large, extruded L4-5 herniated central disc. (Ex. 10, p. 193).Claimant had an emergency L4-5 microdiscectomy performed by Dr. Roger Sung on December 6, 2013. At the time of this surgery, it was discovered that Claimant had a large synovial fluid leak, secondary to the extrusion of the herniated disc. Dr. Sung could not repair the large leak so he was forced to use Floseal in an attempt to close it.

9. Following the December 6, 2013 surgery, Claimant had a significant decrease in his low back and lower extremity symptoms. Claimant progressed through post-surgical treatment and was placed at MMI on June 25, 2014 by his primary authorized treating provider, Dr. Richard Nanes at CCOM. Dr. Nanes returned Claimant to his pre-injury employment without restriction. He also noted that Claimant *"continues with right sided radiculopathy".* Dr. Nanes then noted the following:

> Ongoing medical needs: The patient will need ongoing medical care and pain medication in the form of Vicodin and Percocet. He may need a referral to a pain management specialist in the next 2 month time if he continues to need these medications. *There is a chance that he may have to get back to Dr. Sung if his low back condition should become worse again.* We will see him on a maintenance basis every 6 months for the next 2 year time. (Ex 1, p. 2) (emphasis added).

10. Claimant requested a Division IME that was performed by Dr. William Watson on December 2, 2014. Dr. Watson noted the history described above. Dr. Watson also noted that Claimant continued to complain of low back pain, with intermittent numbness in the *right* lower extremity in the *L5 overlapping with the S1 distribution.* Dr. Watson provided a 24% lumbar impairment rating. He also agreed with Claimant being released to unrestricted full duty as well as the maintenance recommendations made by Dr. Nanes.

11. On January 6, 2015, Respondents issued a Final Admission of Liability consistent with Dr. Watson's opinions. There was no objection to the FAL and the claim was allowed to close subject to Respondents general admission for maintenance medical care benefits, and the reopening provisions of the Colorado Workers' Compensation Act.

12. On July 20, 2015, claimant was evaluated by his pain management physician, Dr. Douglas Hess, who noted Claimant's UA from the last visit was inappropriate as it did not show any Percocet in claimant's urine, although he was being prescribed this medication. Dr. Hess further indicated that this was the fifth UA that Claimant did not have Percocet in his system and

this would imply he does not take the Percocet as prescribed. Dr. Hess told Claimant this was unacceptable and he must take the medication as prescribed (Ex. M, p. 150).

13. Following closure of the claim, Claimant continued to work unrestricted full duty for Employer in the heavy industrial labor arena. From the date of MMI in June of 2014 through the fall of 2017, Claimant testified that his condition essentially remained at baseline, which had been established by the MMI Report and Division IME Report. During this time, Claimant testified that he was not limited in his ability to perform his job functions due to low back or lower extremity symptoms. Claimant testified that he did not miss any time from work due to his low back or lower extremity symptoms. Claimant testified that that his symptoms would wax and wane during this period. Claimant further testified that during this period, his symptoms were manageable, and would always return to baseline.

14. From the time of MMI through the fall of 2017, Claimant continued to pursue his maintenance medical care. Claimant regularly attended appointments with his medical providers at CCOM in Pueblo, CO. Claimant was periodically seen for pain management and physiatry with Dr. Kenneth Finn at Springs Rehabilitation, PC.

15. Claimant also received medications from Physician Anesthesia of Pueblo with Dr. Brian Bell. The medical records of these providers document that Claimant's condition would wax and wane, with good days, bad days, good weeks, bad weeks. Overall, however, the condition remained essentially at the MMI baseline.

16. In the fall of 2017 Claimant testified that he began to experience an increase in his symptoms. The increase in symptoms was gradual; there was no event or incident which caused his symptoms to increase. By this time, Claimant had begun work for a new employer, Xcel Energy, as a plant operator. He described this position as occasionally requiring physical labor, but mostly consisting of watching a computer and physically inspecting machinery.

17. In October of 2017, Claimant experienced a severe increase in his low back and right leg symptoms. Claimant was unable to work for a few days due to this flare up. He could identify no cause which might have precipitated this. This was the first time since MMI that Claimant had to miss work due to his work-related low back and right leg condition. Claimant returned to work following this flare up but his condition never returned to baseline. By this time, Claimant was taking extra pain medication to get through the day.

18. Due to the increasing symptoms, and to the increasing functional deficit, Claimant requested that Dr. Bell fill out FMLA paperwork allowing Claimant to periodically miss time from work due to his low back and right leg condition. Dr. Bell filled out the paperwork, which was filed with Claimant's current employer. Since that time, Claimant has been unable to perform his job on numerous occasions and has had to use his FMLA leave.

19. In February of 2018, Claimant experienced another significant flare of this low back and right leg symptoms. Claimant first noticed that his right leg was going numb while standing and talking to a friend at a basketball game. The pain intensified over the weekend, by which

time he could barely get out of bed. He had to use a cane to get around. This time Claimant was unable to work for a period of approximately two weeks.

20. Due to this significant flare up of his symptoms, Claimant presented to Dr. Finn on February 9, 2018 for treatment. The medical record from Springs Rehabilitation dated February 9, 2018 documents Claimant's worsening of condition. Due to the significant increase in Claimant's symptoms, Dr. Finn recommended a contrast lumbar MRI.

21. On February 13, 2018, Claimant filed a Petition to Reopen his workers' compensation claim due to a worsening of his condition.

22. On March 13, 2018, Claimant underwent a contrast MRI with a Tesla 3 magnet. The MRI showed, in pertinent part, under Findings:

> L4-L5: There is *moderate to severe* posterior facet hypertrophy combining with broad based disc bulge to result in moderate to severe spinal canal stenosis. There is ***mild*** *right greater than left foraminal narrowing.*
>
> L5-S1: An eccentric left broad-based disc bulge *minimally* effaces the *l*eft lateral recess and approaches the descending *left greater than right S1 nerve.* There is *moderate* facet hypertrophy. There is ***mild*** *right greater than left* foraminal narrowing.

Under Impression:

> 1. There are **postsurgical changes** at the L4-L5 level. *Severe* posterior facet hypertrophy combines with a broad-based disc-osteophyte complex to result in *moderate to severe* spinal canal stenosis at this level.
>
> 2. There is *mild right greater than left foraminal narrowing* at L4-L5 and L5-S1. (Ex. 10, p. 199)(emphasis added).

23. Claimant followed up with Dr. Finn on March 19, 2018. At that time, Dr. Finn reviewed this MRI and recommended a surgical reassessment with Dr. Sung, as well as a lumbar epidural steroid injection. Dr. Finn requested a pre-authorization surgical evaluation and lumbar ESI. Authorization was denied.

24. On March 20, 2018, Dr. Finn requested authorization for lumbar epidural steroid injections (ESIs). A record review was done by Dr. John Aschberger, who opined the recommended lumbar ESI's were not reasonable necessary or related to the February 15, 2012 industrial injury. Dr. Aschberger further noted that claimant's lumbar radicular process and new changes were insufficient to warrant proceeding with the lumbar epidural injection. Claimant's back pain was described as worse than his leg pain and there was no progression regarding neurological deficit identified. Dr. Aschberger opined the stenosis identified in the MRI scan reflects progressive degenerative changes and that although claimant may have had persistent radicular symptomatology, nothing in the records indicates the need for interventional injections

or surgical intervention for the original work comp related abnormality. Dr. Aschberger also noted that Dr. Sung had already opined chronic issues are an expectation. (Ex. T, pp. 285-286)

25. Claimant then sought a surgical opinion outside the workers' compensation system. On May 10, 2018, Claimant was seen by Dr. Ali Murad at Parkview Neurosurgery Services. Dr. Murad took a medical history from Claimant and reviewed the March 19, 2018 MRI. Dr. Murad provided Claimant two treatment options.

> 1: conservative treatment with medications, physical therapy, interventional pain treatment. This will be favored as symptoms of radiculopathy have been present for about 3 months and he has not maximized medical treatment.
>
> 2: surgical treatment. This would be right L4-L5 reexploration decompression, with consideration of right L5-S1 as well. He had residual S1 numbness after the disc herniation at L4-L5 with cauda equina–like scenario. Surprisingly there is no L5 pattern distribution. So this is either due to variable dermatomes, or that S1 nerve root is more sensitive because of previous injury, but one *cannot exclude* that right L5-S1 lateral recess is contributing to his symptoms as well in addition to the L4-L5. (Ex. R, pp. 240-241).(emphasis added).

26. Dr. Murad also noted this conversation with Claimant from this appointment:

> We also had a frank discussion about the Workers Comp aspect of his situation. Unless there are acute findings following the incident at work- such as a fracture or new herniation, *it is not possible for me to say definitively* whether the findings on MRI are due to a work-related injury from 2012 or primarily a result of degenerative facet and ligamentum flavum hypertrophy. (Ex. R, p. 241)(emphasis added).

27. Claimant obtained written opinions from Dr. Bell and Dr. Finn. Both Dr. Finn and Dr. Bell opined that Claimant's condition is getting worse. (Ex. 5, 6).

28. Claimant also obtained an IME opinion from Dr. Miguel Castrejon. Claimant was seen by Dr. Castrejon on May 3, 2018. Dr. Castrejon reviewed the medical records, took a medical history from Claimant, and performed a physical examination. Dr. Castrejon opined:

> Based upon the repeat MRI, his examination findings today and in the absence of any new injury or aggravating activity it is my professional opinion that the claimant has experienced an *overall significant worsening of his lumbar spine condition* from the time of placement at maximum medical improvement. The subjective and objective findings support taking the claimant off maximum medical improvement so that he may proceed with curative treatment that *will in all medical probability include additional surgery.* (Ex. 3, p. 35) (emphasis added).

29. Respondents obtained an IME opinion with Dr. Mark Paz. Dr. Paz ultimately opined that Claimant's work-related medical condition has not worsened since MMI. Dr. Paz states that Claimant's condition has not worsened, because it continues to wax and wane as it has done since MMI. Dr. Paz also supports his position by stating that, although Claimant has begun to miss time from work due to his condition, he has been able to return to work each time. Dr. Paz also points out that Claimant is a "very fit for an individual with chronic back pain." Claimant is described as “functionally stable,” and “opioid dependent”

30. Dr. Paz opines that Claimant’s CDL application would necessitate the ability to lift 75 pounds. Dr. Paz ultimately asserts that Claimant's work-related medical condition has not worsened because the surgery in 2013 was to the L4-5 level and that Claimant also has MRI findings at the L5-S1 level. (Ex. J). Dr. Paz’ assessment in his report simply states “piriformis syndrome, right side, *possible*” (Ex. J, p. 8)(emphasis added).

31. In his oral testimony presented at hearing, Dr. Paz asserted that Claimant's work-related medical condition has not worsened because, in Dr. Paz' opinion, Claimant's current symptoms are not due to the L4-L5. Dr. Paz disagreed with Dr. Bell’s conclusions, as follows:

> A. …..Based on reasonable medical probability, the piriformis syndrome is the most likely explanation for current symptoms and would explain why there’s a substantial increase in pain. Second most likely probability would be an L5-S1 bulge. Less likely is L4-5 stenosis. Stenosis does not give you radicular symptoms down the leg. (Transcript, p. 153).

32. During his testimony, Dr. Bell, upon reading the MRI reports, indicated that the foraminal *narrowing* noted at L5-S1 was also present in the 2012 MRI, and opined that it appeared not to be progressing. He did not feel this *narrowing*- as opposed to actual *stenosis*- at either level, was sufficient to cause Claimant’s current symptoms. He could not state definitely that Claimant’s current symptoms were from L4-L5, as opposed to L5-S1. While he did not actively treat piriformis syndrome, he described such condition as “rather rare.”

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the LAJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers’ Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a

workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007). In this case, the ALJ finds Claimant to be credible, both in his courtroom testimony, and in the symptoms he has reported to the various medical providers along the way. The ALJ finds that Claimant sincerely wants to improve his health, and would rather cure the underlying issue, rather than simply treat the pain with medication-which he would rather stay off of. The ALJ finds plausible that Claimant would take the medication on an *as-needed* basis, which could vary with the waxing and waning of his symptoms. The fact that he would sometimes test negative for opioids suggests he is *not opioid dependent,* as otherwise surmised by Dr. Paz.

D. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Reopening Pursuant to C.R.S. 8-43-303

E. Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The reopening authority reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and the decision whether to reopen a claim when the statutory criteria have been met is left to the ALJ's

discretion. *Id*. The party requesting reopening bears the burden of proof on any issue sought to be reopened. Section 8-43-304(4).

F. Here, Claimant is seeking to reopen his case based on a change of condition. In the reopening context, a change in condition refers "to a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 741 P.2d 1328, 1330 (Colo. App. 1985). Even if a claimant proves a change in condition, she is not automatically entitled to have his claim reopened. Rather, reopening is only appropriate if additional benefits will be awarded. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000).

G. Claimant sustained a work injury to his low back on February 15, 2012. Following this injury, Claimant developed pain in his low back with cauda equine syndrome and radicular symptoms in his lower extremities. The MRI taken on December 4, 2013 revealed a large extruded L4-5 herniated disc, as well as findings at L5-S1. Claimant went on to have an urgent L4-5 microdiscectomy performed by Dr. Roger Sung on December 6, 2013. Following this December 6, 2013 surgery, Claimant had a significant decrease in his low back and lower extremity symptoms. Claimant progressed through post-surgical treatment and was placed at MMI on June 25, 2014 by his primary authorized treating provider.

H. Following closure of the claim, Claimant continued to work, unrestricted, at full duty for Employer performing heavy labor. From the time of MMI in June of 2014 through the fall of 2017, Claimant's condition essentially remained at baseline as established by the MMI Report and Division IME Report. During this time, Claimant was not functionally limited in his ability to perform his job functions due to low back or lower extremity symptoms. Claimant did not miss any time from work as a result of this injury. During this time, Claimant asserts, and the medical records support, that his symptoms would wax and wane. However, Claimant testified that during this time, his symptoms would eventually return to their baseline.

I. However, in the fall of 2017 Claimant began to experience and increase in his symptoms. The increase in symptoms was gradual and there was no event or incident that caused the symptoms to increase. Due to the significant increase in Claimant's symptoms, Dr. Finn recommended a contrast lumbar MRI. The MRI showed "There are ***postsurgical changes*** at the L4-5 level. Severe posterior facet hypertrophy combines with a broad based disc-osteophyte complex to result in moderate to severe spinal canal stenosis at this level."

J. The mere number of witnesses in support of a position is not dispositive of the issue. In this case the ALJ must weigh the opinions of Dr. Aschberger (who performed a record review) and Dr. Paz (who performed a complete IME examination), vs. those of Dr. Castrejon (who performed a complete IME examination), Dr. Bell (who has personally treated Claimant for over a year, after taking over his care from Dr. Hess), Dr. Finn (and ATP who has personally treated Claimant with several epidural steroid injections since 2012), Dr. Murad (who has consulted with Claimant privately), notes from Dr. Sung (who performed the original surgery), and Dr. Nanes (an ATP, who warned that his low back condition could worsen with time).

K. Several conclusions by Dr. Paz are not persuasive. Dr. Paz opines that Claimant is opioid dependent, as a result of not taking his opioids regularly. The suggestion at hearing was that Claimant was "diverting" his own pain medication, presumably to unnamed third parties. While the ALJ is not persuaded of this, assuming it were true, this would not make Claimant opioid dependent- it would make him quite the opposite. Dr. Paz asserts that Claimant must have fudged his CDL renewal, since he's have to be able to lift 75 pounds. Nowhere in Exhibit W does it indicate Claimant could lift 75 pounds, nor represented that he could. It appears from Exhibit W that Claimant accurately disclosed all his conditions. Claimant also credibly indicated that the class of CDL he sought to renew was not for a full-sized commercial truck. Dr. Paz asserts that Claimant has not suffered a worsening of his condition, since his condition would wax and wane. However, while that was true through fall of 2017, Claimant's symptoms worsened, no longer waxing and waning back to baseline. Claimant is no longer "functionally stable". Dr. Paz sees Claimant's overall fitness as evidence that he must not suffer from chronic pain. Equally plausible is that Claimant watches his diet, and endures the pain in spite of it.

L. Dr. Paz ultimately opines that the most likely culprit is now piriformis syndrome (a rare condition, according to Dr. Bell, whose practice is centered around treating pain). However, there is no evidence, objective or otherwise, in support of this theory. Claimant's current symptoms appear similar to those he experienced in 2013-which surgery to L4-L5 largely corrected. Claimant was not given piriformis treatment back then. The second most likely culprit, he says, is L5-S1. While that cannot be totally eliminated as a possibility, the ***right*** foraminal narrowing findings are not only *stable*, but also *mild* across both L4-L5, and L5-S1. The ALJ is not persuaded that foraminal narrowing is the cause, from either level. The *minimally* effacing disc bulge at L5-S1 is on the *left side;* Claimant's symptoms are on the *right.* Again, not persuasive.

M. The medical providers seeking to assist Claimant are candid in stating that they cannot definitely state that his original L4-L5 work related condition is now the cause of his existing symptoms. However, it need not be definitively proven in this forum. The ALJ finds, by the required preponderance of the evidence, that Claimant's original work injury to his L4-L5 lumbar spine, has now worsened, thus allowing his claim to be reopened.

Medical Benefits

N. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial*

Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

O. Claimant has established that he is entitled to the lumbar ESI and surgical reassessment as recommended by Dr. Finn. Throughout this claim, both during the primary treatment phase, as well as during maintenance medical phase, Claimant has been recommended for and received several ESI's. These injections have provided benefit and are reasonable, necessary, and claim related. Furthermore, based upon the March 18, 2018 MRI, as well as Claimant's worsening symptoms, a surgical reassessment with Dr. Sung was, and is, reasonable, necessary, and related to the original claim.

P. Respondents have denied Claimant an opportunity to be evaluated by Dr. Sung after the March 18, 2018 MRI. Claimant pursued a surgical opinion on his own outside of the workers' compensation system. Claimant was seen by Dr. Murad who provided two treatment options. Option one is to treat conservatively with medications, physical therapy, and interventional pain treatment. Based upon a review of the medical records, it appears Claimant has undergone conservative treatment of his condition for many years. Notwithstanding the conservative treatment, Claimant's condition has worsened. Option two is a surgical option. The surgical option is the one favored by Claimant as he feels this will allow him to reduce or eliminate his pain medications. Furthermore, Claimant feels the surgical option gives him the greatest chance of obtaining long-term functionality, and without having to resort to a lifestyle of pain medications. As such, the surgical procedure recommended by Dr. Murad is reasonable, necessary, and claim related.

Authorized Treating Provider

Q. Section 8-43-404(5)(a), C.R.S. gives the respondents the right in the first instance to select the authorized treating physician (ATP). Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). If upon notice of the injury the employer fails forthwith to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

R. In this case, Claimant was referred to Dr. Roger Sung by Dr. Richard Nanes. Dr. Nanes was the primary authorized treating provider. As such, Dr. Sung became an authorized treating provider in this case. Claimant received treatment from Dr. Sung including the December 6, 2013 lumbar surgery. However, after Claimant obtained the March 18, 2018 MRI that showed a progression of Claimant's L4-5 pathology, Respondents refused to authorize

Claimant to see Dr. Sung. At that point, Claimant had no choice but to pursue a surgical evaluation on his own. The ALJ finds this to be reasonable and necessary to cure Claimant of his work related condition. Claimant chose Dr. Ali Murad at Parkview Neurosurgical Services. As such, Dr. Murad is an authorized treating provider for this claim.

ORDER

It is therefore Ordered that:

1. Claimant's original claim is reopened.

2. Respondents shall pay for the epidural steroid injections as recommended by Dr. Finn.

3. Dr. Ali Murad is now an Authorized Treating Physician.

4. Respondents shall pay for the surgical procedure as recommended by Dr. Murad.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 9, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-041-219-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 17, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 5/17/18, Courtroom 1, beginning at 1:30 PM, and ending at 3:00 PM). Anabel Cuadros-Yeiser was the official Spanish/English Interpreter.

Claimant's Exhibits 1, and 3 through 12 were admitted into evidence, without objection, with the exception of Exhibit 2, pages 5 through 9, and 18 through 36, to which Respondents objected and ruling was reserved. Respondents' objection is hereby sustained and those portions of Exhibit 2 are rejected. Respondents' Exhibits A through I were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ordered post-hearing briefs. Because the principal issue concerned Respondents' request to withdraw the General Admission of Liability (GAL), dated October 13, 2017, on the ground that the Claimant did not suffer a compensable injury, as previously admitted, the Respondents bear the burden of proof and the burden of going forward. Therefore, the ALJ ordered the Respondents to file the opening brief, which was filed on June 15, 2018. Also, the post-hearing evidentiary deposition of Timothy O'Brien, M.D., was filed on June 15, 2018. The Claimant's answer brief was filed on June 25, 2018. No timely reply brief was filed

within 5 days of the answer brief, or by July 2, 2018. Consequently, the matter was ready for decision on July 3, 2018. Due to an extended leave, the herein decision is past its due date of July 25, 2018. The decision is hereby issued.

ISSUE

The sole issue to be determined by this decision concerns Respondents' request to withdraw its previously filed GAL on the allegation that the Claimant did not suffer a compensable injury as now alleged, and to deny the Claimant's request for right rotator cuff repair as requested by Joseph, Hsin, M.D. of Cornerstone Orthopedics & Sports Medicine, a surgeon within the authorized chain of referrals.

The Respondents bear the burden of proof by a preponderance of the evidence. The Claimant has the burden of proof on the authorization of surgery by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant was born on February 9, 1967. She has been employed as production operator at Employer since September 2012.

2. The Claimant's admitted average weekly wage (AWW) is $605.78.

3. The Respondents filed a GAL, dated October 13, 2017, admitting for medical benefits; an AWW of $605.78; and, temporary total disability (TTD) benefits of $403.86 per week from February 9, 2017 through March 22, 2017, which the Respondents now seek to withdraw based on the Independent Medical Examination (IME) opinion of Timothy O'Brien, M.D., resulting from his IME of January 11, 2018, at the request of the Respondents, wherein Dr. O'Brien expressed the opinion that the Claimant "did not sustain an April 2016 work injury (Respondents' Exhibit I , bates stamp 000049). This after-acquired IME opinion of Dr. O'Brien basis of Respondents' request to withdraw the GAL.

4. The ALJ explicitly finds that on April 28, 2016, the Claimant injured her right shoulder when she was lifting a garbage can to dump it into a dumpster with her co-worker, Miguel Ramirez, who lifted the garbage can too high and too fast pulling the Claimant's right shoulder in the process.

5. The Claimant was completely asymptomatic prior to this work injury. There is no record on any treatment or pathology of the right shoulder prior to the date of April 28, 2016, incident.

6. The Claimant did not initially report the injury to her Employer because she thought the pain would subside. As the pain continued, the Claimant feared that if she reported the injury she would lose her job and the Employer would retaliate against her for getting injured on the job. Claimant claims that she had observed discrimination and retaliation by managers at the Employer toward co-workers that reported injuries. The truth or falsity of this perception is not in issue—it only goes to the Claimant's state of mind for not timely reporting her injury.

7. The Claimant continued to work her normal shifts, but had to change her manner of working to compensate for the pain she experienced in her right shoulder. The pain in her shoulder continued to worsen. In late August, the Claimant was lifting pallets and felt a sudden increase in pain in her right shoulder.

8. The Claimant went to her personal doctor on September 9, 2016, because she could not deal with the pain in her shoulder any longer (Claimant's Exhibit 5-51). She reported pain in her right shoulder for several months. She was diagnosed with rotator cuff strain (Ex. 5-52).

9. The Claimant reported the injury to Belinda Harrington at the Employer on September 26, 2016.

10. The Respondents referred the Claimant to Workwell where Terrell R. Webb, M.D., performed an examination on October 3, 2016 (Claimant's Exhibit 6-55). She reported injuring her right shoulder when lifting a trash can with a coworker (Claimant's Exhibit 5-56). Dr. Webb that the objective findings were consistent with the history and/or work related mechanism of injury (Exhibit 6-55). Dr. Webb diagnosed the Claimant with shoulder pain and sprain of right shoulder joint (Exhibit 6-58). Dr. Webb reported that the cause of the problem was not known at this time due to the time between the injury and the reporting (Exhibit 6-55, 58). Dr. Webb placed the Claimant on work restrictions.

11. The Claimant returned to Dr. Webb on October 17, 2016 (Exhibit 6-62). She reported that her symptoms persisted. Dr. Webb was of the opinion that the cause of the problem was related to work activities (Exhibit 6-63). Dr. Webb continued the Claimant's restrictions.

12. The Claimant underwent an MRI (magnetic resonance imaging) on December 9, 2016 (Exhibit 11). The MRI showed a superior labral tear, thinning of the biceps tendon, and mild supraspinatus tendinosis.

13. The Respondents referred the Claimant to Robert E. Fitzgibbons, M.D. (Exhibit 8). Dr. Fitzgibbons reviewed the MRI and was of the opinion that surgery was necessary to treat the work related injury (Exhibit 8-186).

14. The Claimant underwent right shoulder arthroscopy with extensive debridement, biceps tenotomy, and open subpectoral biceps tenodesis to repair her right shoulder on February 9, 2017 (Exhibit 8-179). This surgery was authorized.

15. The Claimant continued to experience symptoms in her right shoulder after the surgery. The symptoms did not cease despite ongoing physical therapy (PT) and physician care.

16. On February 22, 2017, Bill Ford, Nurse Practioner (NP) of Workwell, an authorized provider, examined the Claimant (Exhibit 6-86). Ford was of the opinion that the medical causation of the Claimant's injury was due to work related activities (Exhibit 6-87).

Respondents' Request to Withdraw the General Admission of Liability

17. The Respondents performed and investigation into the claim due to the late reporting of the injury. The investigation was performed by Covent Bridge Group (Exhibit 2-11-17). Claimant's statements were consistent with the account of the accident in the medical records and in testimony.

18. The Respondents filed a General Admission of Liability (GAL) on March 16, 2017. This was not filed by mistake or in error. Respondents had conducted a thorough investigation of the claim and decided to accept liability for the compensable injury. Respondents had an outside company conduct an investigation as well as the normal investigation performed by the adjuster (Exhibit 2).

19. The Claimant underwent an MRI on June 28, 2017 (Exhibit 12). The MRI showed tendinosis with mild understructure tear of the supraspinatus and marked thinning of the long head of the biceps tendon (Exhibit 12-203).

19. The Claimant underwent an injection of her AC joint by Dr. Fitzgibbons on July 18, 2017 (Ex. 8-170). The injection did not offer Claimant relief of her symptoms.

20. On August 7, 2017, the Claimant was treated by David Kistler, M.D., of Workwell (Exhibit 6-121). Dr. Kistler was of the opinion that the objective findings were consistent with the work related mechanism of injury (Exhibit 6-120).

21. The Claimant was referred for a second opinion to Joseph Hsin, M.D. (Exhibit 7). Dr. Hsin was of the opinion that the cause of the injury was the work related activities. Dr. Hsin concluded that the Claimant was a candidate for repeat surgery.

22. Claimant was seen by Bruce Cazden, M.D. of Workwell on September 14, 2017 (Exhibit 6-128). Dr. Cazden was of the opinion that the medical causation of the injury was the work related activities (Exhibit 6-129).

23. On November 17, 2017, Dr. Hsin recommended repeat shoulder surgery to repair the Claimant's right rotator cuff along with acromio/clavicular canvas (Exhibit 7-160). Dr. Hsin noted that the surgery was recommended and necessary to repair the tear shown on the MRI (Exhibit 7-158). Respondents denied Dr. Hsin's request for prior authorization request, pending resolution of their contest of the recommended repeat surgery (Claimant's Exhibit 7, pp.163,164). The ALJ infers and finds that this denial was ultimately parlayed into a request to withdraw the GAL.

Independent Medical Examination (IME) by Timothy O'Brien, M.D.

24. Respondents hired Dr. O'Brien to perform an IME (Exhibit 9). Dr. O'Brien also testified by deposition on May 7, 2018 (Depo.Tr. followed by a page number and line numbers").

25. Dr. O'Brien testified that Claimant was first treated on August 3, 2016 (Depo. Tr. p.28; ln.3). Dr. O'Brien noted that Claimant, however, was not seen for her work injury until October 3, 2016. Dr. O'Brien was not familiar with the basic facts of the case.

26. Dr. O'Brien testified that Dr. Webb was at first uncertain of the medical causation in the claim (Depo. Tr., p. 28; ln. 24). Dr. O'Brien went on to testify that Dr. Webb later came to the conclusion that the injury was the result of work activities (Depo. Tr., p. .29; ln 23).

27. Dr. O'Brien stated that he agreed with Dr. Fitzgibbons in both the analysis of the MRI and the first recommendation for surgical intervention (Depo. Tr., p. 31; lns 4,-9).

28. Dr. O'Brien testified that Dr. Webb and Mr. Ford came to similar conclusions as to medical causation after doing an analysis (Depo. Tr., p. 33; ln. 23).

29. Dr. O'Brien testified that the stated mechanism of injury **could have** caused the injury that Claimant has sustained (Depo. Tr. p. 38; ln. 8).

30. In his IME report, dated January 18, 2018 (Respondents' Exhibit I, bates stamp 000049), dr. O'Brien stated: "In summary, [Claimant] did not sustain an April

2016 work injury. her symptoms in October was (*sic*) a manifestation of nonorganic factors and personal health issues." Against a backdrop of the aggregate medical records of authorized treating physicians and medical providers, the ALJ finds Dr. O'Brien's opinion that the Claimant did **not** sustain a compensable injury as substantially lacking in credibility.

Ultimate Findings

31. The ALJ finds the Claimant's testimony regarding the injury incident to be credible and persuasive. The Claimant testified consistently with the investigative reports and the medical records as to the mechanism of injury.

32. The ALJ finds Dr. O'Brien's testimony lacking in credibility and persuasiveness in regard to the compensability of Claimant's injury. Dr. O'Brien agreed that the mechanism of injury could cause the injury. He also agreed that Claimant was asymptomatic according to the medical records prior to the date of injury. Furthermore, six different doctors were of the opinion that the injury was caused by the work related activities.

33. The ALJ does not find Dr. O'Brien's testimony persuasive or credible regarding the need for repeat surgery. Dr. Hsin is recommending repairing the rotator cuff, which did not occur in the first surgery. The rotator cuff repair is likely to relieve Claimant's symptoms from her injury.

34. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of the six authorized medical providers, including Dr. Hsin, and to reject the opinions of Dr. O'Brien.

35. The Respondents have failed to prove, by a preponderance of the evidence that a clerical error, warranting a prospective withdrawal of the GAL occurred. The Respondents do not get to re-litigate **compensability,** based on an after-acquired IME opinion (after the filing of a GAL) that the Claimant did not suffer a compensable injury.

36. The Claimant has proven, by preponderant evidence that the repeat surgery recommended by Dr. Hsin is warranted and appropriate. Dr. Hsin was credible and persuasive in this regard. The Claimant's need for repeat right shoulder surgery was reasonably necessary and causally related to her compensable injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony regarding the injury incident was credible and persuasive. The Claimant testified consistently with the investigative reports and the medical records concerning to the mechanism of injury. Also, Dr. O'Brien's testimony was lacking in credibility and persuasiveness in regard to the compensability of Claimant's injury. Dr. O'Brien agreed that the mechanism of injury could cause the injury. He also agreed that Claimant was asymptomatic according to the medical records prior to the date of injury. Furthermore, six different doctors were of the opinion that the injury was caused by the work related activities. Further, Dr. O'Brien's testimony was not persuasive or credible regarding the need for repeat surgery. Dr. Hsin is recommending repairing the rotator cuff, which did not occur in the first surgery. The rotator cuff repair is likely to relieve

Claimant's symptoms from her injury. As found, Dr. Hsin was credible and persuasive in this regard.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the opinions of the six authorized medical providers, including Dr. Hsin, and to reject the opinions of Dr. O'Brien.

Withdrawal of General Admission of Liability

c. Section 8-43-203(2) (d), C.R.S., does not require a showing of "fraud, mistake, or excusable neglect," in order to withdraw a general admission of liability prospectively. *See In the Matter of the Claim of Sherry Faulkner v. Alexander Dawson School*, W.C. No. 4-294-162, [Indus. Claim Appeals Office (ICAO), May 21, 1999]. A respondent, who has all the facts pertinent to a claimant's claim, cannot withdraw a general admission of liability. *Indus. Comm'n v. Johnson Pontiac*, *Inc.*, 344 P.2d 186, 187-88 (Colo. 1959); *Continental Casualty Co. v. Indus. Comm'n*, 367 P.2d 355, 358 (Colo. 1961). When an employer files an admission of liability, the employer has "admitted that the claimant has sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). If the employer subsequently seeks to withdraw its admission of liability, it must prove by a preponderance of the evidence that the claimant's injuries were not compensable. See § 8-43-201(1) ("a party seeking to modify an issue determined by a general or final admission … shall bear the burden of proof for any such modification."). Respondents have not shown that Claimant **did not suffer** a compensable injury. Claimant was injured in the course and scope of her employment. The medical records along with

Respondents own investigation supports that Claimant suffered a compensable injury for which they admitted liability. Under the unique circumstances of this case, the Respondents had all of the pertinent facts by virtue of its investigation, as found, before filing the GAL. It is contrary to the purpose of the Workers' Compensation Act to provide a speedy and efficient remedy to injured workers to allow re-litigation of "compensability," based on an after-acquired (after the GAL) IME opinion of non-compensability. Such scenario flies in the face of a self-executing system (admitting claims in lieu of litigation), designed to make the system speedy and efficient. Such a scenario would encourage more litigation. Besides being misplaced, Respondents' request to withdraw the GAL is overcome by an overwhelming preponderance of the evidence, establishing compensability.

Compensability

d. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant has established that she suffered a compensable injury on April 28, 2016.

Medical Benefits

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to her compensable right shoulder injury of April 28, 2016. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's need for repeat shoulder surgery was reasonably necessary and causally related to the compensable injury.

f. Workers' Compensation Rules of Procedure (WCRP), Rule 16, 7 CCR 1101-3, governs the authorization of medical procedures. There is no dispute that Dr. Hsin complied with Rule 16 in seeking authorization of the recommended surgery. Respondents denied his request, pending resolution of their contest of the repeat surgery. The surgery recommended by Dr. Hsin was found to be authorized, reasonably necessary and causally related to the compensable injury herein.

g. Respondents are liable for authorized medical treatment that is reasonably necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 [Indus. Claim Appeals Office (ICAO), May 31, 2006]; *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000). As found, Respondents should be liable for all medical care related to the industrial injury herein, whicdh is reasonably necessary to cure and relieve the effects thereof, including the repeat surgery recommended by Dr. Hsin.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Respondents have failed to sustain their burden with respect to the withdrawal of the GAL. The Claimant, however, has sustained her burden with respect to the repeat surgery recommended by Dr. Hsin.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents request to withdraw the general Admission of Liability, dated October 13, 2017, is hereby denied and dismissed. The general Admission shall remain in full force and effect.

B. Respondents shall pay the costs of all reasonably necessary and causally related medical care and treatment for the Claimant's compensable right shoulder injury of April 28, 2016, subject to the Division of Workers' Compensation Medical Fee Schedule, including the costs of the repeat right shoulder surgery recommended by authorized surgeon, Joseph Hsin, M.D.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of August 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

STIPULATION

Prior to the hearing, the parties stipulated that should the claimed injuries be found compensable, the Salud Family Health Centers and Dr. Douglas McFarland are authorized treating providers in this case.

REMAINING ISSUES

I. Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable low back and SI joint injury on December 4, 2017.

II. If Claimant proved that she sustained compensable back/SI joint injuries, whether she also established, by a preponderance of the evidence, that she is entitled to receive reasonable, necessary and causally related medical benefits for these industrial injuries.

III. If Claimant established that she sustained compensable injuries on December 4, 2017, whether she also proved, by a preponderance of the evidence, that she is entitled to both a period of temporary total disability (TTD) and temporary partial disability (TPD) benefits.

IV. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Burris, the ALJ enters the following findings of fact:

1. Claimant was hired by Respondent-Employer as a production baker. She testified that she was subsequently promoted to head baker and was working in this capacity at the time she injured her low back on December 4, 2017. Claimant testified that she began her workday on December 4, 2017 at approximately 4:00 a.m. According to Claimant, she would report to work at 4:00 a.m. on days when inventory was taken.

2. Based upon the evidence presented, Claimant's AWW while working for Respondent-Employer is $667.23.[1]

[1] Counsel for Claimant recalculated her AWW based on the full wage records in Respondents' exhibit packet and subsequently agreed with their calculation.

3. Claimant testified that around 7:00 a.m. on December 4, 2017, she entered the large freezer in the back of the bakery department where inventory is stored. Claimant testified that she went into the freezer so she could count supplies. As she entered the freezer, Claimant discovered a large pallet stacked with bagged ice blocking her path to the material she had to inventory. Claimant estimated the pallet of ice to be six feet in height. She sought to move the ice with a pallet jack. Claimant placed the pallet jack in position and lifted the pallet off the floor. She then pulled on the handle of the jack in an attempt to move the material out of the way. It did not move. Consequently, Claimant testified that she "put more strength into it," by forcefully pulling and twisting at the same time. As she pulled and twisted, Claimant felt a sharp pain in her lower back going down her left leg.

4. Claimant testified that she immediately attempted to locate the store director, Ms. Billi Warren to report the incident. Claimant recalled closing the freezer door and going to look for Ms. Warren directly. She also sent her a text message. Claimant located Ms. Warren in front of the customer service desk. She recalled telling Ms. Warren exactly what she testified to regarding her injury and how it occurred.

5. The first report of injury, completed by the claims adjuster for Respondents, indicated that Claimant was injured on December 4, 2017 at work and that the injury was reported to the Employer on December 4, 2017. This report documents that Claimant reported she was "doing inventory in the freezer and while [she] was moving a pallet of ice, [she] hurt [her] lower back." Ms. Warren, the store director for Employer, testified that she and Claimant were in the same room while the information regarding the injury was being relayed to the claims adjuster.

6. Claimant testified that Ms. Warren asked her if she was "okay." Claimant reportedly answered that she thought so. Therefore, she returned to work. Claimant testified further that she was not asked to fill out an incident report, nor was she given a list of medical providers to choose from to attend to her reported injury.

7. Claimant's pain did not subside. She continued working for a couple of weeks in the face of increasing pain. She eventually presented to the emergency room (ER) of Mt. San Rafael Hospital on December 29, 2017. Claimant testified that she decided to go to the ER because the pain associated with the December 4, 2017 incident was getting worse and because the night before she presented, i.e. December 28, 2017, she made a batch of bread, which required her to lift a 50-pound bag of flour triggering more pain.

8. While in the ER, Claimant reported lower back pain radiating into her left buttocks and posterior left thigh. The mechanism of injury (MOI) documented in the ER record was that Claimant frequently lifts 50-pound bags of flower and other ingredients at work and thinks her pain is from this. According to Claimant, she told the triage nurse that she injured her back pulling the pallet jack. She surmised that the history she gave concerning lifting bags of flour as the cause of her pain was misunderstood. She purportedly explained to the ER personnel that lifting the bag of flour was a recent event

exacerbating the pain caused by her December 4, 2017 and not the start of her presenting symptoms. Specifically, Claimant testified: "I didn't tell them I got injured with that. I told them [it] triggered my – my pain more." Physical examination documented painful range of motion. Claimant's pain was listed as acute and she was instructed to follow-up with her primary care provider (PCP).

9. Claimant testified at hearing that her primary care provider's offices were undergoing renovation. Consequently, she was unable to seek treatment from them until January 11, 2018. In the interim, Claimant presented to Mt San Rafael Hospital ER two more times before seeing her PCP. A January 5, 2018 note documents that her pain had persisted and increased since her last visit. A CT scan was performed. It demonstrated a large L4/5 disc protrusion, which was felt to be the source of Claimant's ongoing pain.

10. Claimant returned to the emergency room two days later on January 7, 2018. It was explained that Claimant was offered stronger pain medications two days prior, but she "wisely" refused the narcotics choosing instead to "tough it out." Unfortunately, Claimant's pain became too severe and she was prescribed hydromorphone until she was able to get in to see her PCP. It was noted that Claimant already had an appointment scheduled with her PCP in two days.

11. Claimant followed-up for treatment with her PCP, Salud Family Health Centers[2], on January 11, 2018. Physician Assistant (PA) Normajean Mower evaluated Claimant. PA Mower documented that Claimant was injured at work when she picked up a box and twisted wrong and pain developed. Claimant testified that she recalled telling PA Mower that she was trying to move the pallet of ice so that she could get to the boxes, not that she was injured lifting the boxes. According to Claimant, she spent approximately fifteen minutes total with PA Mower because she was very busy. PA Mower indicated that Claimant needed to remain off work until she could see and be evaluated by an occupational therapist.

12. Claimant underwent occupational therapy from January 22, 2018 through March 14, 2018, before seeing PA Mower again on April 3, 2018. Claimant presented to PA Mower asking for a work release. PA Mower indicated that Claimant could return to work with restrictions of no lifting more than five pounds. PA Mower also referred Claimant to Dr. McFarland; a level II accredited workers' compensation doctor for further evaluation.

13. Dr. McFarland evaluated Claimant on May 15, 2018. Dr. McFarland obtained a detailed description of the MOI. Dr. McFarland documented that Claimant injured herself on December 4, 2017 while working for the Employer. According to Dr. McFarland's report, Claimant was "[t]rying to move a pallet loaded with sacks of ice. She reports that she lifted the pallet with a pallet jack and pulled on it a couple of times. It was the 2nd time she pulled on it she felt a strain in her back. She reported that she

[2] Salud Family Health Centers was formerly known as Mt. Carmel Health, Wellness and Community Center.

tried treating the condition with ibuprofen and continued working, but continued to have problems." Claimant testified that she spent approximately one and a half hours with Dr. McFarland at her first visit with him. Dr. McFarland diagnosed Claimant with a low back strain, displacement of lumbar intervertebral disc without myelopathy, and left side sciatica. Dr. McFarland released Claimant to work with restrictions of no more than 10 pounds lifting or five pounds of repetitive lifting.

14. Claimant has a prior history of low back pain and what she testified was right sided sciatica for which she was received physical therapy. She testified that her prior low back and right leg pain was nothing like the left sided pain she experienced after pulling on the pallet jack on December 4, 2017. Per Claimant's testimony, the pain she experienced after pulling on the pallet jack handle was much worse and deteriorated with time.

15. Medical records concerning Claimant's prior low back and leg pain were admitted into evidence. These records establish that PA Jamie Nelson evaluated Claimant at "Spine Colorado" clinic on December 27, 2016. At the time of this evaluation, Claimant was complaining of low back pain and pain radiating down the posterior aspect of the legs bilaterally, left greater than right.[3] Physical examination revealed a positive seated straight leg raise on the *left* (emphasis added). X-rays were obtained which revealed "moderate disc space degeneration at L5-S1. Claimant was referred for an MRI and physical therapy (PT).

16. An MRI study was performed January 10, 2017. The MRI demonstrated "mild to moderate left lateral recess stenosis and moderate left and mild to moderate right neural foraminal stenosis at L5-S1 secondary to left sided paracentral and lateral recess disc extrusion, mild underlying circumferential disc bulge, and mild facet joint osteoarthritis. There was contact of the descending left S1 nerve root in the lateral recess and the bilateral exiting L5 nerve roots in the neural foramen. Claimant was also noted to have additional degenerative disc disease along with caudal central disc extrusion at the L4-L5 level. Moderate bilateral neural foraminal stenosis at L4-L5, sufficient to result in contact with the bilateral exiting L4 nerve roots was noted.

17. Claimant was reevaluated by PA Nelson on January 10, 2017, following her MRI. Discussion was had about the option of treating her ongoing symptoms with an interlaminar steroid injection at L5-S1. Claimant elected to try PT first. A follow-up examination was anticipated but never occurred as Claimant moved from the area.

18. As noted, Claimant relocated. She established care with PA Mower at Mt. Carmel Health, Wellness and Community Center (Mt. Carmel) on April 6, 2017. At the time she established care, Claimant had no complaints of low back or leg pain. Rather, she wanted to establish care for continued treatment of her diabetes.

[3] During cross-examination, Claimant testified that all references to left sided leg pain in her medical records are in error as she had right leg pain not left.

19. On May 17, 2017, Claimant returned to Mt. Carmel where PA Mower re-evaluated her. Claimant presented on this date with complaints of right sciatic nerve pain and numbness in her hands. The report from this date of visit indicates that Claimant had undergone an MRI in Durango a few months prior and that she had received PT, which "helped." PA Mower referred Claimant for additional PT for both her right sided sciatica, as well as her carpal tunnel syndrome.

20. Claimant began physical therapy for her right sided sciatica on May 22, 2017. During this initial visit, Claimant reported constant 3-9/10 lumbroscaral pain with the "right being worse than the left and pain that extends down the right posterior leg and toes. Based upon the evidence presented, the ALJ finds that Claimant enjoyed a short reprieve in the pain she experienced in her back and legs from 2016 into early 2017. The ALJ also finds that for reasons unknown Claimant had a return in her back and leg pain in May 2017. While she probably had pain in her legs bilaterally in 2016 and early 2017, the pain she developed in May 2017, was focused primarily in the right leg.

21. Claimant's last physical therapy session occurred on September 19, 2017. At this appointment, the therapist working with Claimant noted that her pain level that day was zero out of ten. Claimant's worst pain level was 4 out of ten. According to the physical therapist, Claimant was ready to be discharged from therapy. Claimant's primary therapist, Brandon Baca, discharged Claimant from PT on September 26, 2017. Per the PT note from September 26, 2017, Claimant experienced a significant reduction in pain, significant improvement in range of motion, and significant improvement in strength/stabilization.

22. The last medical record in evidence that pre-dates the December 4, 2017 work injury is a note from PA Mower dated October 9, 2017, approximately two months prior to the December 4, 2017 incident. PA Mower documented that Claimant had finished PT and was doing well. It was documented that Claimant had a hard time carrying boxes at work when she first began working for Respondent-Employer in April, but that she no longer had any problems carrying the boxes. The only additional treatment recommended by PA Mower at this time was for Claimant's carpal tunnel syndrome. Claimant testified that she had no back injuries and no subsequent flares ups of low back/leg pain after her release from PT up to the December 4, 2017 date of injury in this case. According to Claimant, she was "fine" after her PT concluded.

23. At the request of her attorney, Claimant underwent an independent medical examination (IME) with Dr. Timothy Hall on May 22, 2018. Dr. Hall performed a records review, a physical examination, and took the time to clarify Claimant's MOI. Claimant again reported that she was injured on her second attempt at moving the heavily ladened pallet jack. She described that she was pulling and twisting simultaneously when she felt a sharp pain on the left side of her upper buttock. Claimant was doing "quite a bit better" by the time of her evaluation with Dr. Hall, but she continued to have symptoms exacerbated by prolonged standing, walking, twisting, bending, or lifting. *Id.* Dr. Hall performed a physical examination, noting that Claimant

was “very tender” in the left SI/sacrotuberous ligaments and into the quadratus lumborum. Claimant’s IT band was tender on the left and not tender on the right. There was also some breakaway weakness involving the left dorsiflexors due to leg pain. Dr. Hall diagnosed Claimant with probable SI joint dysfunction/local myofascial pain and possible discogenic pain due to the potential for radiculopathy seen on imaging.

24. Dr. Hall opined that Claimant sustained a work-related injury to the body parts described above based on the fact that the injury occurred at work, the mechanism of injury was consistent with her symptoms, she had fully treated for and resolved her *right* sided sciatic issues prior, and that she was working with this employer at full duty when the incident occurred.

25. Claimant subsequently underwent an IME with Dr. John Burris on June 1, 2018 at the request of Respondents. Claimant reported the same MOI that was documented in her first report of injury and in the reports authored by both Drs. McFarland and Hall. Claimant also told Dr. Burris that she reported the incident right away and tried to treat herself over the next few weeks until the pain became intolerable prompting her to present to the ER. Dr. Burris, felt the MOI was not clear because: “[Claimant] provides 3 distinctly different histories.” Based upon his IME report, it is clear that Dr. Burris attributes the differences in the reported mechanisms of injury (MOI’s) to Claimant. Regardless of the documented histories, Dr. Burris concluded any of the stated MOI’s would be consistent with causing a minor soft tissue strain that would not be sufficient to cause structural damage to the lumbar spine. Dr. Burris supported his opinion by relying on the January 5, 2018 CT scan, which he indicated, “did not identify any acute abnormalities.” Dr. Burris opined that Claimant’s symptoms could not be causally related to an injury occurring on December 4, 2017 because of the “numerous subjective and objective inconsistencies” in the record. Thus, he concluded that Claimant’s symptoms, based upon the “overall” clinical picture” were consistent with the natural progression of pre-existing lumbar degenerative disc disease.

26. Dr. Burris testified via pre-hearing deposition on June 15, 2018. He confirmed the MOI reported to him was the same as the mechanism Claimant testified to at hearing. (Depo. 4:8-19). Dr. Burris felt that Claimant’s current symptoms were “very similar” to those that she had experienced in the past. (Depo. 7:17 – 8:5). He further opined that Claimant’s MRI findings from January of 2017 were likely to progress over time. (Depo. 9:13 – 10:23). However, Dr. Burris also testified that the CT scan from January of 2018 shows that the imaging findings “kind of regressed to a disc protrusion instead of a true herniation.” (Depo. 11:19 – 12:16). Dr. Burris testified that on physical examination, he did document a positive Patrick’s Maneuver on the left side, which is meant to stress the SI joint. (Depo. 13:8-21). Dr. Burris did feel that, if Claimant did experience an injury on December 4, 2017, it was likely a soft tissue strain. (Depo. 14:25 – 15:7). Dr. Burris was specifically asked about Dr. Hall’s SI joint diagnosis, to which he testified: “He’s saying sacroiliac joint dysfunction and local myofascial pain. That means muscle pain. So localized pain to the pelvis, to the back of- - in the low back from the SI joint. So I would agree with that.” The ALJ interprets Dr. Burris’ testimony to indicate that Claimant’s SI joint and localized myofascial low

back pain is would be related to the December 4, 2017 incident (assuming there was one), because the SI joint is held together by ligaments and tendons and muscles, and you can irritate that with the reported MOI's Claimant reported in this case. (Depo. 16:22 – 17:17). On cross-examination, Dr. Burris testified that he did not have the September 2017 physical therapy notes documenting that all of Claimant's PT goals had been met. He conceded that these notes would be significant in determining causation for an injury occurring months thereafter. (Depo. 20:22 – 21:19). Dr. Burris agreed that, if Claimant did sustain an injury, her initial treatment of physical therapy and imaging was appropriate. (Depo. 25:13-24).

27. Dr. Timothy Hall testified at hearing via telephone. Dr. Hall explained that the reported MOI to him was the pain Claimant experienced after the second attempt at moving the pallet by twisting and pulling. It was his opinion that this caused an SI joint sprain with myofascial pain. He explained that an SI joint sprain is common with maneuvers that involve loading of the low back and twisting or torqueing simultaneously. Dr. Hall was asked about his report indicating Claimant may have discogenic pain. He testified that low back pain is difficult when it comes to differentiating specific pain generators. He also noted that some of Claimant's pain maybe coming from sources such as a disc or facet given the significant abnormalities on her MRI but a medical practitioner would not be able to determine if Claimant's pain was discogenic without further testing.[4] Regardless, he felt the most likely cause of Claimant's symptoms was an SI joint strain.

28. Dr. Hall was asked to comment on Dr. Burris' opinion that Claimant sustained a "minor soft tissue sprain." His disagreement was with the use of the term "minor" because SI joint and soft tissue pain can create significant discomfort resulting in a major life event. Dr. Hall further disagreed with Dr. Burris that Claimant's clinical picture was consistent with the natural progression of her pre-existing degenerative disc disease (DDD) because there is no consistent presentation with DDD. According to Dr. Hall, if there were such a concept as "natural progression", such progression would not suddenly result in symptoms. Rather, Dr. Hall testified as follows:

> We all have degenerative disc disease and degeneration of our spines. Most of us will have only fleeting episodes of low back pain through our lives. So the natural progression, if - - if there is such a thing, is for it not to hurt. . . . When these degenerative events occur slowly over time, which is what they do naturally, they're usually not symptomatic.
>
> * * * *

[4] Dr. Burris' testimony tends to establish his agreement with Dr. Hall's opinion in this regard. Indeed, in response to a question on what symptoms he would expect a patient with MRI findings similar to those of Claimant would report, Dr. Burris answered as follows: "Well, the problem with that is that some symptoms don't always correlate with diagnostic testing, and sometimes we can see these types of findings if they're degenerative in nature. And they might have been there for a while, and the patient has no symptoms."

> So I disagree with the idea that this was - - that this can be characterized as simply something that was bound to happen despite what this patient may or may not have done.

28. Finally, Dr. Hall disagreed with Dr. Burris that Claimant's present symptoms would no longer be related to the initial injury because these injuries do not have some "inherent life span or predictable presentation…." According to Dr. Hall some soft-tissue injuries heal within days, others take months, and some never recover. Dr. Hall's testimony directly contradicts Dr. Burris' opinion that soft-tissue stains are self-limiting conditions that heal without complication regardless of treatment.

29. After examination from counsel, the ALJ asked Dr. Hall for clarification concerning his opinion(s). The ALJ asked if he understood Dr. Hall's testimony correctly to be that Claimant had two possible sources for her leg pain, both a discogenic source and a piriformis syndrome related to SI joint dysfunction. Dr. Hall indicated that was "very close," but clarified that he felt her lower extremity symptoms would either be caused by foraminal stenosis—not so much the disc itself—or the piriformis problem. Based on all current information, Dr. Hall reiterated his opinion that piriformis syndrome was the more likely cause of Claimant's symptoms, and that this would be related to the SI joint injury caused on December 4, 2017. Dr. Hall explained that if the SI joint is unstable, the piriformis, the quadratus lumborum, and the psoas will spasm or tighten in order to stabilize the pelvis. Because the sciatic nerve goes through the piriformis, patients get very similar leg symptoms from piriformis syndrome as they get from radiculopathy caused by stenosis.

30. Billi Warren testified at hearing in her capacity as the store director for Respondent-Employer. She testified that she did not recall receiving any report of injury from Claimant on December 4, 2017. According to Ms. Warren Respondent-Employer's procedure is to contact the call center to report the injury and then "go from there" as far as doctors' orders, and that this is the same procedure whether somebody requests treatment or not. Ms. Warren testified that she was not aware Claimant was claiming an injury until she brought in a doctor's note with restrictions in late December. Ms. Warren testified that Claimant did not make it clear that her need for work restrictions was attributable to an on the job injury. Ms. Warren testified that because Claimant did not indicate that her restrictions were related to an on the job injury, Claimant was taken off the schedule since Respondent-Employer does not allow injured workers to work with restrictions unless such restrictions are related to "work comp issues." Per Ms. Warren, Claimant was notified that she would be taken off the schedule and would have to produce another doctor's note releasing her back to full duty before she could return to work. After being so notified, Ms. Warren testified that Claimant reported her injury as being work related. Ms. Warren testified that Claimant reported the injury as being work related on January 31, 2018.

31. On cross-examination, Ms. Warren testified that she never bothered to ask Claimant about her injury or what caused it. Ms. Warren explained that she and Claimant were both involved in the formal reporting of the injury to the claims adjuster,

but had no explanation as to why the first report of injury documented that the injury was reported to the Employer on December 4, 2017.

32. Ms. Erlinda Encinias testified in her capacity as the bakery manager. Ms. Encinias explained that she was aware that Claimant had some form of a back condition that pre-dated December 4, 2017, as she too was getting PT in the same clinic as Claimant prior to her December 4, 2017 alleged injury. Ms. Encinias testified that she and she alone performed the inventory on December 4, 2017. Ms. Encinias testified that on the date of Claimant's alleged injury and that there was no pallet of ice in the freezer on this day. According to Ms. Encinias, she does inventory "as a ritual" every month and that the floors have to be empty because "we have to have accurate inventory." Ms. Encinias testified that she entered the freezer to organize it on the 31st; a day she claimed was "the day" prior to Claimant's alleged date of injury (DOI). She saw no pallet of ice when she went in. The ALJ takes judicial notice that there are only 30 days in November not 31. The ALJ further finds that the day before Claimant's alleged DOI in this case would have been December 3, 2017 as the injury allegedly occurred December 4, 2017. Consequently, the ALJ is not persuaded that Ms. Encinias did inventory on December 4 as she suggested. While it is possible that Ms. Encinias' organized the freezer several days prior to the December 4, 2017 incident, this is inconsistent with her testimony that she organized the freezer "the day prior." Moreover, assuming that Ms. Encinias entered the freezer the day before Claimant alleged injury, i.e. December 3, 2017 as she suggested, that does not persuasively establish that there was not a pallet of ice in the freezer on December 4, 2017. As presented, the ALJ finds Ms. Encinias' testimony both unreliable and unconvincing.

33. Claimant testified that she was effectively removed from work on January 1, 2018 after providing Respondent-Employer with a note from the ER imposing work restrictions. According to Claimant, Ms. Warren told she could not return to work until she could be "at her fullest", meaning that she had to be released to full unrestricted duty. Based upon the evidence presented, the ALJ finds that Claimant was unable to perform the essential functions of her position as a head baker for Respondent-Employer due to the effects of her industrial injury. The evidence also persuades the ALJ that Respondent-Employer did not provide Claimant with modified duty employment opportunities. Consequently, Claimant accepted a position at Bob & Earls Café as a hostess/cashier and part time waitress.

34. Based upon the payroll records admitted into evidence, Claimant's AWW while working for Bob & Earls Café equaled $286.31.

35. While Claimant asserted in her opening statement that she returned to work for Bob & Earl's Café on March 22, 2018, her opening remarks do not constitute evidence and she failed to establish an actual return to work date for the café. Payroll records admitted into evidence reflect that Claimant was paid $268.68 for a pay period extending from March 12, 2018 through March 25, 2018. While it is possible that Claimant returned to work on March 22, 2018, as she alluded to in her opening statement, the evidence presented is insufficient to make a finding concerning

Claimant's actual start date with Bob & Earl's Café. Consequently, while the evidence presented persuades the ALJ that Claimant is entitled to temporary total and temporary partial disability benefits, an ending date for Claimant's entitlement to TTD and a beginning date for her TPD cannot be determined.

36. The ALJ finds the opinions and analyses of Dr. Hall to be more credible and persuasive than those of Dr. Burris.

37. The ALJ finds the testimony of Claimant to be more credible and persuasive than the testimony of her supervisors.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principles

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals*

Office, 53 P.3d 1192 (Colo.App. 2002). While there are inconsistencies in the testimony of Claimant and medical records from the ER and PA Mower regarding the MOI in this case, the ALJ resolves those conflicts in favor of Claimant to conclude that Claimant's reported MOI in the ER and later to PA Mower was probably misunderstood and documented incorrectly. The ALJ finds Claimant's explanation regarding the likely cause of the inconsistencies between her testimony and the MOI described in the ER records from the ER and PA Mower's reports persuasive. Consequently, the ALJ concludes that Claimant's testimony concerning the cause of her alleged injury is reliable and persuasive.

D. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Hall are credible and persuasive. Regardless of the documented MOI's, Dr. Burris agrees that they are all likely to cause a soft tissue injury. As found here, the ALJ credits Claimant's testimony regarding the MOI over the content of the records of PA Mower and the ER. Based upon the evidence presented, the ALJ concludes that Dr. Hall's opinion that the accepted MOI likely caused a SI joint strain is supported by the record evidence as a whole and in particular the physical examinations of both Dr. Burris and Dr. Hall.

Compensability

E. A "compensable" injury is one that requires medical treatment or causes disability. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo.App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S.

F. Under the Workers' Compensation Act, an injured employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals,*

supra; Deterts v. Times Publ'g Co., 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, the ALJ finds that Claimant produced sufficient evidence to support a conclusion that her symptoms/injury occurred in the scope of employment while she tried to move a heavy pallet stacked with bags of ice in order to complete inventory for the bakery department. As found, Ms. Encinias' contrary testimony is unpersuasive.

G. While Claimant established that she was injured in the course and scope of her employment, it is necessary to address whether her symptoms/injury arose out of that employment. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.*

H. There is no presumption that an injury, which occurs in the course of employment, also arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996). As found, the totality of the evidence presented, including opinions of Drs. Hall and Burris persuade the ALJ that the pulling and twisting incident involved in this case likely resulted in an acute soft tissue sprain involving the low back and SI joint.[5] Accordingly, the injury is compensable.

Medical Benefits

I. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo.App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent

[5] While the MOI may have aggravated Claimant's preexisting lumbar degenerative disc disease, the evidence supporting this conclusion is insufficient to establish compensability based upon the testimony of Dr. Hall.

medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

J. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo.App. 1984). As found here, Claimant has proven by a preponderance of the evidence that she sustained an acute soft tissue injury involving the low back and SI joint. The evidence presented convinces the ALJ that these compensable "injuries" are the proximate cause of Claimant's need for medical treatment including her visits to the ER and her PCP. Moreover, the totality of the evidence presented establishes that the care received was reasonable and necessary in light of Claimant persistent symptoms and functional decline.

K. Medical services provided during a bona fide emergency are an exception to the normal requirement that a claimant obtain authorization for all treatment of the industrial injury. Larson's Workers' Compensation Law, § 94.02[6] (1999); *Sims v. Industrial Claim Appeals Office, 797 P.2d 777* (Colo.App. 1990). There is no precise legal test for determining the existence of a medical emergency.[6] Rather, the question of whether a claimant has proven a bona fide emergency is dependent on the particular facts and circumstances of the claim. *Timko v. Cub Foods,* W. C. No. 3969-031 (June 29, 2005). In this case, the ALJ is persuaded that Claimant's acute unrelenting back, leg and SI joint pain constituted a genuine medical emergency to rule out potentially life altering conditions such as "spinal epidural abscess, cauda equine syndrome and spinal cord compression syndrome . . ." Consequently, Claimant did not need to obtain prior authorization for the treatment associated with her treatment in the ER. As the emergent treatment was reasonable, necessary and directly related to Claimant's admitted work related injury, Respondents are liable to pay for it. While Respondents are liable for Claimant's ER care, they are not obligated to pay for care Claimant sought on her own after the emergency passed. Consequently, Respondents are not obligated for the care Claimant received from her PCP, PA Mower after being discharged from the ER. Even with a general award of medical benefits, Respondents retain the right to dispute whether the need for medical treatment is reasonable, necessary and related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

Average Weekly Wage

[6] The exception is not limited to situations where life is threatened. *Bunch v. Industrial Claim Appeals Office of State of Colorado,* 148 P.3d 381 (Colo.App.2006).

L. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993); *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997). The ALJ concludes that Claimant's wage records constitute the best evidence concerning her earnings around the time she was injured. As noted, Claimant concedes that Respondent-Employer correctly calculated her AWW based upon her full wage records as contained in Respondents' exhibit packet. Accordingly, Claimant's AWW while working as a baker for Respondent-Employer is $667.23.

M. Concerning Claimant's employment at Bob & Earl's Café, the wage records support varied earnings based upon the payroll records admitted into evidence. Regarding this employment, Claimant's average weekly wage (AWW) is best calculated using the entire period of earnings given the fluctuating nature of Claimant's pay. Here, Claimant earned anywhere from $268.68 to $926.80 for any given pay period. Because of her irregular earnings, the ALJ concludes that using the broader 10 week time period of Claimant's employment with Bob & Earl's allows for the most accurate calculation of a figure that most closely approximates Claimant's diminished earning capacity after her December 4, 2017 compensable work related injury. Accordingly, the ALJ finds that Claimant's AWW while employed by Bob & Earl's Café is $286.31

Temporary Disability Benefits

N. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that she left work because of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo.App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability to effectively and properly perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

O. In this case, the persuasive evidence demonstrates that Claimant was incapacitated by and suffered a wage loss as a direct and proximate consequence of her industrial injury. It is undisputed that Claimant's medical condition prevented her from returning to her regular employment as a baker for Respondent-Employer beginning January 2, 2018. Furthermore, the evidence presented is convincing of the fact that Respondent-Employer did not extend modified duty to Claimant. Although Claimant never returned to her regular position for Respondent-Employer, the evidence establishes that she subsequently went to work for Bob & Earl's Café where she was

employed as a hostess, cashier and part time waitress, albeit for less remuneration than she received as a baker for Respondent-Employer. The ALJ concludes that the evidence presented establishes that Claimant has proven that she is "disabled" within the meaning of section 8-42-105, C.R.S. and therefore, entitled to a period of TTD benefits as well as ongoing TPD benefits. See *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999). Claimant last worked for Respondent-Employer on January 1, 2018, and as noted, returned to work for a different employer on date uncertain in March 2018. Because the evidence presented is insufficient to determine Claimant's return to work date for Bob & Earl's Cafe, an ending date for Claimant's entitlement to TTD and a beginning date for her TPD cannot be determined.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her lower back and SI joint on December 4, 2017, while working for Respondent-Employer.

2. Respondents shall pay for all reasonable, necessary, and related treatment for Claimant's lower back and SI joint conditions, including but not limited to her ER treatment on December 29, 2017, January 5, 2018 and January 7, 2018.

3. Claimant's AWW for purposes of her employment with Respondent-Employer is determined to be $667.23.

4. Claimant's AWW for purposes of her employment with Bob & Earl's Café is determined to be $286.31.

5. Claimant has proven that she is entitled to a period of TTD benefits and ongoing TPD benefits. Because the evidence presented is insufficient to determine Claimant's return to work date with Bob & Earl's Café, the ending date for TTD and beginning date for TPD cannot be determined.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That

you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 14, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the surgical procedures to her right wrist and elbow as recommended by Dr. Karl Larsen are reasonable, necessary and related to her admitted work injury?

II. Has Claimant shown, by either a preponderance of the evidence or by clear and convincing evidence, that she is entitled to penalties from Respondents for failure to timely exchange a medical report, pursuant to W.C.R.P. 5-4(A)(5)?

STIPULATIONS

The parties stipulated that the IME report of Dr. McCranie was received by Insurer on December 14, 2017, and was tendered to Claimant on January 26, 2018. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant has worked for over 30 years as a coil winder. She has worked for Employer for approximately 3 of those. Her job duties included operating machines which spun magnetic wire for use in transformers.

2. As a result of her employment, Claimant developed the progressive onset of symptoms in her right upper extremity, right shoulder, upper back and neck. In March 2015, the symptoms intensified, and prompted Claimant to seek medical attention. Respondents admitted liability for Claimant's injuries. March 31, 2015 was determined to be the date of injury.

3. George Johnson, M.D. at CCOM was the initial authorized treating physician. On May 18, 2015 Dr. Johnson took a medical history regarding Claimant's problems with her right shoulder, right arm, and upper back. At this time, Claimant reported her most significant pain was in her neck and upper back. Physical examination showed tenderness of the right rhomboid muscle with muscle spasm and multiple trigger points. Dr. Johnson's diagnoses included cervical and thoracic strains, right carpal tunnel syndrome, right shoulder AC joint sprain, and thoracic myofascial syndrome. Dr. Johnson administered trigger point injections and referred Claimant for physical therapy. He also referred her to Dr. Karl Larsen for consideration of carpal tunnel surgery. (Ex. 3, p. 131, Ex. 1, p. 17).

4. Claimant saw Dr. Larsen on June 1, 2015. His evaluation was primarily focused on the right elbow and right wrist. Dr. Larsen diagnosed severe carpal tunnel

syndrome on the right and recommended carpal tunnel release surgery. (Ex. 1, p. 19). Claimant also testified at hearing that the symptoms in her right hand and wrist prior to surgery were "miserable."

5. Claimant underwent right carpal tunnel release surgery on June 30, 2015. Subsequent medical records show that the surgery significantly reduced her symptoms. Claimant also testified that the symptoms in her right hand and wrist "all went away" after the surgery. She returned to full duty work on August 7, 2015. Dr. Larsen released her from his care regarding her carpal tunnel syndrome on August 10, 2015. (Ex. 1, p. 11).

6. Dr. Johnson then placed Claimant at MMI on September 25, 2015. On that date, he documented that her symptoms were significantly improved. Dr. Johnson opined that Claimant was at MMI with no permanent impairment and no permanent work restrictions. (Ex. 7, p. 165).

7. Respondents filed a Final Admission of Liability ("FAL") on September 30, 2015, denying liability for treatment after MMI. (Ex. 7, p. 164).

8. On November 16, 2015, Claimant returned to CCOM with complaints of worsening right shoulder pain. She denied any specific new injury to the shoulder and attributed the increased pain to her ongoing work duties. On physical examination, she had decreased right shoulder range of motion, decreased strength in the supraspinatus tendon and a positive empty can test. Dr. Johnson provided a cortisone injection, referred Claimant for physical therapy and put her back on "light duty." (Per Findings of Fact and Conclusions of Law by ALJ Spencer, dated 11/15/2016, Ex. 6, p.152). Claimant testified at hearing that Employer did not provide light duty work for her, and as a result she stopped working.

9. Claimant underwent a MRI of her right shoulder on December 23, 2015. Based on the results, Dr. Johnson referred her to Dr. John Pak for an orthopedic evaluation. (Ex. 6, pp. 152, 153). Respondents declined to authorize the referral.

10. Claimant underwent a DIME with Dr. Jeffrey Jenks on January 26, 2016. Dr. Jenks diagnosed right carpal tunnel syndrome and right shoulder pain, with probable impingement syndrome as work-related conditions. Dr. Jenks opined that Claimant had reached MMI on September 25, 2015. Dr. Jenks assigned permanent impairment based on residual right carpal tunnel syndrome and right shoulder symptomatology. Dr. Jenks calculated 10% right upper extremity impairment for the right wrist and 14% right upper extremity impairment for the right shoulder. Dr. Jenks recommended maintenance care to include periodic steroid injections for the right shoulder. (Ex. 6, p. 153).

11. Respondents filed a FAL on March 15, 2016, based on Dr. Jenks' DIME report. The FAL admitted for scheduled impairment only. Additionally, Respondents admitted liability for reasonable, necessary and related medical benefits after MMI. (Ex. 7, p. 163).

12. On April 1, 2016, Dr. Johnson evaluated Claimant and opined that she was at MMI. At that time, she reported continuing right upper back pain in conjunction with her right shoulder pain, worse with movement of her arm. She had reduced shoulder range of motion. O'Brien's test and impingement signs were positive. Claimant's right upper back was tender to palpation in the scapular region, with four trigger points noted. Dr. Johnson administered another series of trigger point injections and told Claimant he could repeat the injections up to three times per year as maintenance care. (Ex. 6, p. 153).

13. A hearing was held on October 5, 2016 before ALJ Spencer. Issues for the hearing included whether Clamant proved by a preponderance of the evidence that Dr. Johnson's referral to Dr. Pak was reasonable and necessary treatment after MMI. ALJ Spencer ruled the orthopedic evaluation with Dr. Pak was reasonable and necessary, and ordered Respondents to authorize and pay for the evaluation. (Ex. 6).

14. Dr. John Pak examined Claimant on January 30, 2017 and recommended right shoulder surgery. (Ex. 4, pp. 138-141). Claimant testified at hearing that her right hand and wrist continued to be "fine" prior to shoulder surgery. Dr. Pak performed the surgery on February 1, 2017. *Id.*

15. Claimant followed-up with Dr. Johnson after her shoulder surgery. He saw her on February 2, 16, and 23 of 2017. On each visit, he noted "the shoulder is stabilized in a shoulder immobilizer." (Ex. 3, pp. 132, 128, 124). At hearing, Claimant testified she wore a shoulder immobilizer device "all the time" after surgery, including when sleeping. Dr. Pak provided the immobilizer and told her to use it. This immobilizer prevented her shoulder and arm from moving.

16. Dr. Daniel Olson replaced Dr. Johnson at CCOM. He saw Claimant on March 30, 2017 and reported, "…She is also complaining of some wrist pain all of a sudden. She did have carpal tunnel syndrome with surgery about a year and a half ago. She is also noticing some elbow pain…" (Ex. 3, p. 119).

17. Claimant testified at hearing that the shoulder surgery had been successful, providing 90% relief of her symptoms. However, she explained that after the surgery on her shoulder, she began to experience symptoms again in the right wrist. It became painful and she experienced the sensation of "pins and needles," "falling asleep," and cramping. She began experiencing similar symptoms in the right elbow. Claimant testified she currently experiences pain, numbness, tingling, and cramping in both her right wrist and right elbow. The wrist, she testified, feels similar to the way it felt prior to the carpal tunnel surgery on June 30, 2015.

18. On May 3, 2017 Dr. Olson noted Clamant was pleased with the progress of her shoulder, but "…She has other complaints of pain including her elbow, her right wrist as well as her neck…She's got some aching in her wrist area. A little bit in the elbow and neck area…" (Ex. 3 p. 117).

19. On May 31, 2017 Dr. Olson noted, "…She is noticing more numbness and tingling in her right hand particularly at night…" (Ex. 3, p. 114). Under Comments, Dr. Olsen noted: "…She is having some recurrent carpal tunnel symptoms so I will have her use a cock-up splint at night…I am not sure why her carpal tunnel symptoms are returning. She did have surgery by Dr. Larsen about 2 years ago. I hope that the splint will help her nighttime symptoms and we don't have to reinvestigate this problem…" (Ex. 3, p. 115).

20. Dr. Jay Neubauer at CCOM then took over Claimant's care. On July 12, 2017 Dr. Neubauer reported, "…She continues to describe numbness and crampy pain in her wrist. She occasionally gets aching pain with use [sic] pins and needles in the whole hand. She notes increased numbness and typing [sic] and writing…" (Ex. 3, p. 108). Dr. Neubauer confirmed Claimant was improving from shoulder surgery, but under Comments, noted: "…Patient also has return of mild carpal tunnel symptoms. Will extend occupational therapy and physical therapy. Reevaluate in 4 weeks. I expect we will be close to MMI *unless carpal tunnel symptoms persist or get worse*. (Id. at 109)(emphasis added).

21. On August 9, 2017 Dr. Neubauer noted "…Patient continues to have ongoing myofascial pain in the right arm and intermittent tingling in the right hand. We'll refer to pain management specialist to consider options…" (Ex. 3, p. 105). He referred Claimant to Dr. Dwight Leggett. (Id. at 107).

22. Dr. Leggett examined Claimant on September 12, 2017. He reported, "…Examination into the elbow revealed a large amount of diffuse tenderness, over both the medial and lateral upper condyle, as well as into the tunnel region, and antebrachial region. Similar tenderness identified into the right wrist as well. This was present over the anterior and posterior aspect of the wrist…" (Ex. 2, p. 48). Dr. Leggett recommended a MRI of the cervical spine, and electrodiagnostic testing of the right upper extremity. (Id. at 49).

23. In his September 12, 2017 report, Dr. Leggett also noted that Claimant had diffuse pain in her right neck, shoulder, elbow, wrist and hand with hypersensitivity, making it difficult to differentiate between structural pain and discussed additional diagnostic testing with MRI and EMG. He noted the DRAM test showed presence of depressed and distressed symptoms. (Ex. C, pp. 4-5).

24. Dr. Michael Sparr performed electrodiagnostic testing on October 17, 2017. Under Impression, he reported, "This is an abnormal electrodiagnostic study of the right upper extremity. There is evidence of right sensory greater than motor, primarily demyelinating carpal tunnel syndrome without distal denervation. This is moderate in degree. This is evident despite the previous carpal tunnel release." (Ex. 2, p. 39).

25. Dr. Leggett reviewed the EMG results with Claimant on October 27, 2017. He referred her back to hand surgeon Dr. Karl Larsen for evaluation and treatment. (Ex. 2, p. 35).

26. Dr. Larsen met with Claimant on November 17, 2017 and reported, "…I last saw her in 2014 when she had been released following a carpal tunnel release surgery. She had had complete resolution of her symptoms and had done very well until this year. She has had problems with her shoulder that stemmed from before I was treating her. She ultimately came to surgery on February of this year with rotator cuff repair and some type of biceps tenodesis by Dr. Pak. Subsequent to this, she has developed numbness and tingling in the hand that was initially intermittent. It has been near constant for the past 4 months. She has been using her wrist brace at night that seems to help some but the relief is incomplete. She had a lot of swelling throughout her hand that she noted after the surgery…She complains of lot of pain along the medial elbow and this seems like an electric shock coming up from her elbow when something brushes against it or episodically while using her hand. She has had repeat electrodiagnostic studies and is now here for discussion of additional treatment options." (Ex. 1, p. 7).

27. Dr. Larsen examined Claimant and reviewed her EMG results. He concluded:

> Ms. Ruacho has what appears to be recurrent carpal tunnel syndrome as well as evidence of ulnar neuritis at the elbow. This seems to have happened subsequent to her shoulder surgery. I have seen this scenario a number of times where the swelling and physical alterations associated with a shoulder surgery seem to produce nerve compression. I think however that it would be worth trying nonsurgical treatment. In this case, I would recommend corticosteroid injection and continued use of wrist bracing and therapy with nerve gliding and desensitizing exercises, especially for the elbow." (Ex. 1, p. 8).

Dr. Larsen injected Claimant's right elbow. (Ex. 1, p. 9).

28. Dr. Kathy McCranie performed an Independent Medical Examination ("IME") at Respondents' request on November 30, 2017. At this IME it was noted: *"Medical documentation supports a causal relationship between her accident and carpal tunnel syndrome* as this can be caused by combined repetition and force as was evident by repetitive hammering" (Ex. E, p. 16)(emphasis added).

29. Dr. McCranie concluded that; "…I do think it is reasonable for her to follow-up with him [Dr. Larsen] and make a determination as to whether any additional carpal tunnel surgery is needed…" (Ex. E, p. 16). Dr. McCranie provided an opinion regarding a shoulder impairment rating, but then added "…Carpal tunnel rating is deferred as this condition may require additional treatment prior to MMI." (Ex. E, p. 17).

30. At hearing the parties stipulated that Respondent-Insurer received Dr. McCranie's report on December 14, 2017 but said report was not provided to Clamant until January 26, 2018.

31. At a follow-up appointment on December 29, 2017, Dr. Larsen reported, "…The corticosteroid injection performed last time helped her hand symptoms a lot and *it did not help her elbow symptoms.* The duration of benefit was about 1 ½ weeks, starting about 5 days after injection. She feels like she has returned to baseline. She has thought about her discussion last time and is specifically interested in pursuing surgery." (Ex. 1, p. 5)(emphasis added).

32. Dr. Larsen discussed the diagnosis and treatment plan:

> Ms. Ruacho has recurrent carpal tunnel syndrome as well as ulnar neuritis. She has some elbow pain associated with medial epicondylitis. We have discussed options. I think the corticosteroid injection response that her *wrist* [sic] is favorable indicator that she would benefit from a revision carpal tunnel release. I think in the same sitting it would be reasonable to pursue ulnar nerve decompression and through the same incision perform a medial epicondylar debridement repair to try to attack all of her medial elbow pain in one sitting. We also discussed the option of just proceeding with a carpal tunnel release and trying to manage her elbow nonsurgically. However, she is resistant to this idea and would like to try to address it all at once if she is going to the OR. (Ex. 1, p. 5).

33. Dr. Larsen submitted a "Surgery Authorization Request" to Insurer on January 3, 2018. (Ex. 1, p. 4). In said request, he requested "right revision carpal tunnel, [and] cubital tunnel vs SQUNT, [and] medial tennis elbow debridement/repair." Insurer denied it on January 11, 2018. (Ex. A). Insurer based its denial on a Rule 16 review conducted at its request by Dr. Thomas Mordick. Dr. Mordick never actually examined Claimant.

34. With regard to *cubital* tunnel surgery, Dr. Mordick's Rule 16 report states, "she has demonstrated an inconsistent examination and numerous complaints that have no relationship to a diagnosis of cubital tunnel syndrome. In addition she has had 2 EMG/NCV's that have demonstrated no evidence of this condition. Therefore clearly under the Cumulative Trauma Guidelines this should be denied." (Ex. A, p. 8).

35. With regard to *elbow pain*, Dr. Mordick's Rule 16 report states, "[Claimant] did have complaints of elbow pain in the spring of 2017. No diagnosis was ever established as her examination was not consistent with any specific diagnosis. This complaint resolved and only re-appeared many months later. Again no diagnosis has been established at this time. It appears her recurrent pain developed while she was un-employed. In medical probability *I cannot attribute her current complaints to her employment."* (Ex. A, p. 8)(emphasis added).

36. With regard to the *carpal tunnel* portion of the surgery, Dr. Mordick's Rule 16 report states that "[C]laimant has documented psychological stressors and her examination as documented by her various examiners demonstrates changing complaints and examinations over a brief time in the fall of 2017. This suggests there may be psychological issues at play. First, [Claimant's] pre-operative NCV's

demonstrated no response on the sensory latency and a motor latency of 10 msec. While these are still mildly abnormal on the repeat study in October 2017, they are markedly improved and the residual may simply represent some permanent damage to the median nerve at the carpal tunnel. On the balance, it would be my opinion, in medical probability that she will not benefit from a repeat carpal tunnel release. If surgery is to be entertained certainly a repeat psychological evaluation should be done first." (Ex. A, p. 8).

37. Dr. Larsen responded to the denial in a letter dated January 14, 2018. He noted, "…I think Dr. Mordick has made a very thorough records review but has not benefitted from being able to examine the patient and understand her condition." (Ex. 1, p. 2). Concerning the carpal tunnel issue, Dr. Larsen explained; "…I do believe this is a recurrence of her carpal tunnel syndrome. The condition is present electrodiagnostically and more importantly, she had a favorable response to corticosteroid injection *into the carpal tunnel.* Carpal tunnel syndrome is a condition that can recur and in true recurrences, people do benefit from release…" *(Id)*(emphasis added).

38. Regarding Claimant's elbow, Dr. Larsen explained:

> I recognize that ulnar neuritis is an irritation of the nerve that may not result in electrodiagnostic findings. Indeed even in some cubital tunnel cases, electrodiagnostic tests are not always terribly accurate detecting the condition and this is a well-recognized issue. More importantly when using this as a denial basis for surgery, I always advise that we recognize that we are operating on a person and not her electrodiagnostic tests. Again, this is something where examination and evaluation of the patient would be valuable. Dr. Mordick did not have [the] opportunity to do this…" (Id. at 2).

Dr. Larsen concluded:

> I would recommend reconsidering request for surgery for Ms. Ruacho. If it is intended to deny it, then I would recommend that she have an independent medical evaluation with another hand specialist to try to make some treatment determinations for her. Simply denying treatment is not an adequate answer and I would make the exam request recommendations for treatment to bring about resolution of Mr. Ruacho's condition. (Ex. 1, p. 3).

Respondents did not arrange for Claimant to be examined by another hand specialist.

39. Dr. Larsen testified by deposition on July 2, 2018. He explained his opinion regarding how the shoulder surgery most likely caused the recurrent carpal tunnel and the elbow problems;

A. Well, it -- this practice in this building, I have a lot of partners that do a lot of shoulder surgery, and so we see patients that were probably on the edge of developing carpal and cubital tunnel syndrome *of some sort, and they get a big shoulder operation. So that produces swelling in the arm, accumulation of fluid in the arm. Remember, the fluid is not water; it's bodily fluid. So it has the proteins and polysaccharides and things that comprise body fluid.*
And then they have disuse of the extremity, right? So edema or extra fluid in the arm generally gets milked out through your lymphatics under the muscle contractions in use of your limb, but if you're mobilized in a sling, you don't do any of that. So that residual fullness causes compression of structures in enclosed spaces, like the ulnar nerve at the elbow or the median nerve at the wrist.
And you would argue and say, "Wait a minute. She had her carpal tunnel released, right?" But the roof of the carpal tunnel does not remain open forever. It heals, and there's more space under it, but anything that would have caused accumulation or pressure, swelling in there, can bring that problem back.
(Dr. Larsen depo. pp. 15:8 to 16:7)(emphasis added).

40. Dr. Larsen testified about Dr. Mordick's assertion regarding possible "psychological issues" and his impressions regarding the electrodiagnostic testing;

Q. Have you ever been concerned about psychological issues in Ms. Ruacho's case?

A. It's not been a major concern of mine. I think they're valid in terms of affecting her outcomes, but it's not a decision about whether or not I'm going to proceed with her treatment.

Q. How about Dr. Mordick's opinions about the NCV studies?

A. He feels like that the nerve conduction studies don't -- are not terribly severe and they're better than they were before I did her first surgery. And so he feels like that they may be permanent changes, which is a valid concern. That's why I performed a diagnostic injection for her before considering doing a revision carpal tunnel release. That was the purpose to that.

Q. So that answered that question in your mind?

A. It did for me, yes.

Q. He addresses the cubital tunnel in the next paragraph and notes that she's had two electrodiagnostic studies that have demonstrated no evidence of cubital tunnel and opines that that makes it something that

should be denied under the cumulative trauma guidelines. What are your thoughts about the fact that the EMG testing did not show evidence of cubital tunnel syndrome and yet she presents to you with symptoms of cubital tunnel syndrome?

A. Well, I think it's a muddy circumstance, because we split cubital syndrome and ulnar neuritis apart a little bit. So ulnar neuritis is irritation or aggravation of the ulnar nerve at the elbow that's painful and produces symptoms, but electrodiagnostically looks pretty normal, right? The nerve can be bad but still conduct its signal appropriately. Cubital tunnel syndrome is really a manifestation of ulnar neuropathy. The nerve is unhealthy and does not conduct well. I started out earlier saying that electrodiagnostic tests have a subjective component to them. They're not purely objective tests, and for that reason, people can have subtle ulnar nerve issues that just don't show up very well electrodiagnostically. I felt like her exam was fairly consistent across my visits with her. He's made an opinion in here that she's been variable in her presentation, and that doesn't match with what I've seen.

Q. Okay. So the fact that the EMGs themselves, the NCVs, purport to show no evidence of cubital tunnel does not rule that out in your mind?

A. No. When I teach my medical students, one of the lessons I try to teach them is that we operate on people, not their tests. I think I used that in response to this also, and that's really the basis of trying to make a surgical decision. If we relied on our tests all the time, you don't need me, right? (Dr. Larsen depo. pp. 25:21 to 28:3)

41. Dr. Larsen acknowledged in his deposition that typically surgeons did not want to operate on medical epicondylitis as it is "largely self-limiting" and "if you wait long enough, will get over it." He also noted epicondylitis was a "very controversial" subject, "it's a condition that's generally agreed is not harmful, and while it's painful and aggravating, it's not dangerous," and "largely resolves." Therefore, he stated as the surgery "15 to 20 percent of the time doesn't do so well, you don't want to do that surgery very often unless you have no choice." (Larsen depo, pp. 18:20 to19:18). Dr. Larsen also acknowledged that the EMG/NCV studies, taken alone, did not demonstrate cubital tunnel or epicondylitis. (Larsen depo pp. 41:3-10).

42. Dr. Larsen also acknowledged that Dr. Mordick in his Rule 16 report noted that the nerve conduction study "are not terribly severe and they're better than they were before … her first surgery. [T]hey may be permanent changes, which is a valid concern." However, he believed Dr. Mordick's finding that the NCV results were "mildly abnormal and markedly improved" were possibly correct but that Dr. Mordick ignores Claimant's symptoms. (Larsen depo, pp. 26:2-11 and 38:3 to 39:6).

43. With regard to Claimant's symptoms, Dr. Larsen acknowledged that, at the time of his deposition, he was unaware of the DRAM testing (psychological testing) that Dr. Leggett completed due to his concerns of Claimant's diffused pain complaints. After reviewing Dr. Leggett's records, he advised it did not change his recommendations but instead added another layer to treatment. (Larsen depo at 39:7 to 41:2 and 42:4-22).

44. On Friday, January 26, 2018 at 2:26 p.m., the following email was sent to Respondent's Attorney by a paralegal for Claimant:

> Hi Greg,
>
> Did you receive the IME report from Dr. McCranie, and if so can you please provide?
>
> Thank you,

45. At 3:00 p.m. the same day, Respondent's Attorney Greg Plank sent the following response:

> Here it is.

(Ex. F) (The ALJ assumes with the IME report attached).

46. Beyond Exhibit F, there were no documents, nor pertinent testimony offered on this disclosure/penalty issue.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the LAJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. In this case, the ALJ finds Claimant to be sincere and credible in her courtroom testimony. Further, the ALJ finds that Claimant has, to the best of her abilities at all times pertinent, provided accurate descriptions of her ongoing symptoms to her medical providers in a sincere effort to get better. The ALJ is not persuaded by Dr. Mordick's opinion that a repeat psychological study should be performed, based on Dr. Leggett's simple observation that Claimant had rather diffuse pain complaints, and that her DRAM testing showed the presence of distressed/depressed symptoms. Being in disabling pain is distressing and depressing. Beyond assuring Claimant's overall well-being, her psychological condition was not of concern to her medical providers in forming an accurate diagnosis and treatment plan.

E. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As found here, the opinions of Dr. Larsen are more persuasive than the contrary opinions of Dr. Mordick.

F. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Medical Benefits, Generally

G. Section 8-42-101(1), C.R.S., requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury. See *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Consequently, compensability of the requested medical treatment is dependent on proof that the treatment is reasonably necessary to cure and relieve the effects of the industrial injury. See *Snyder v. Industrial Claim Appeals Office*, supra; *Westendorf v. Jackson & Jackson*, W.C. No. 4-598-193 (October 25, 2005). Because the claimant bears the burden to prove her entitlement to benefits, it is the claimant's burden to prove by a preponderance of evidence that the requested treatment is reasonably necessary to cure and relieve the effects of the industrial injury. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999); *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The question whether medical treatment is reasonable and necessary to cure and relieve the effects of the injury is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Carpal Tunnel Surgery

H. Based upon the entirety of the record, the ALJ, finds, by a preponderance of the evidence, that the proposed Carpal Tunnel surgery as proposed by Dr. Larsen, is reasonable, necessary, and related to Claimant's original work injury. Even Respondents' IME physician largely concurs. The ALJ is not persuaded by Respondents that this surgery should be deferred, based upon Dr. McCranie's notation that the 2015 and 2017 EMG/NCV studies should be compared to see if Claimant's condition had markedly improved. Nor is the ALJ persuaded by Dr. Mordick's opinion that the lack of objective comparison between these studies renders Dr. Larsen's conclusions insufficiently persuasive. Dr. Larsen has considerable experience with Claimant, and has achieved good, if not permanent, results in treating Claimant since 2015. He has reasonably relied upon her reported symptoms, in addition to the objective data. The ALJ finds Dr. Larsen's conclusions more persuasive than Dr. Mordick's.

Cubital Tunnel Syndrome/Elbow Debridement and Repair

I. Based again on the entirety of the record, the ALJ finds, by a preponderance of the evidence, that these additional procedures, as recommended by Dr. Larson, are reasonable, necessary, and related to Claimant's underlying work injury. The ALJ is more persuaded by Dr. Larsen's analysis that a patient can be symptomatic in the absence of compelling objective data:

> *Well, I think it's a muddy circumstance, because we split cubital syndrome and ulnar neuritis apart a little bit. So ulnar neuritis is irritation or aggravation of the ulnar nerve at the elbow that's painful and produces*

symptoms, but electrodiagnostically looks pretty normal, right? The nerve can be bad but still conduct its signal appropriately. Cubital tunnel syndrome is really a manifestation of ulnar neuropathy. The nerve is unhealthy and does not conduct well. I started out earlier saying that electrodiagnostic tests have a subjective component to them. They're not purely objective tests, and for that reason, people can have subtle ulnar nerve issues that just don't show up very well electrodiagnostically. I felt like her exam was fairly consistent across my visits with her. He's [Dr. Mordick] made an opinion in here that she's been variable in her presentation, and that doesn't match with what I've seen.

Reasonable minds might differ on the wisdom of the elbow debridement and repair, but the ALJ is sufficiently persuaded that Claimant should have the opportunity to diminish her work related pain in this fashion. It is reasonable, necessary, and related to her work injury.

Penalties

J. C.R.S. §8-43-304(1) provides that;

> Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by the articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the Colorado uninsured employer fund created in section 8-67-105; except that the amount apportioned to the aggrieved party shall be a minimum of twenty-five percent of any penalty assessed

K. The term "order" as used in this penalty provision includes a "rule." See §8-40-201(15), C.R.S. 2009; *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001); *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). Section 8-40-201(15) defines an "order" as "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." In *Rio Blanco County*, supra, the court of appeals affirmed the imposition of a penalty as a failure to obey an "order" within the meaning of §8-43-304(1), for failure to comply with then W.C.R.P. VIII which at the time provided workers' compensation adjudication rules. To summarize, violation of a Workers' Compensation Rule of Procedure is tantamount to violation of an order.

L. C.R.S § 8-43-304(1) identifies four categories of conduct and authorizes the imposition of penalties when an employer or insurer: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under § 8-43-304(1), supra, requires a two-step analysis. The ALJ must first determine whether the disputed conduct constituted a violation of a rule or order. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If the ALJ finds a violation, the ALJ must determine whether the employer's actions which resulted in the violation were objectively reasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). The reasonableness of the employer's action depends on whether it is predicated in a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003).

M. Three criteria are to be considered when fashioning a constitutionally appropriate level for a fine. These include the following: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm suffered and the fine to be assessed; and (3) the difference between the fine imposed and the penalties authorized or imposed in comparable cases. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d at 326.

N. The imposition of a penalty under §8-43-304(1) is governed by an objective standard of negligence. As such, it is measured by the reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable or in bad faith. Thus, penalties may be assessed against an insurer neglecting to take action that a reasonable insurer would take to comply with either a lawful order or a provision of the Workers' Compensation Act. *Pueblo School Dist. v. Toth*, 924 P.2d 1094 (Colo. App. 1996). §8-43-304(1) does not require Claimant to demonstrate she has suffered specific "harm" as a result of Respondent's conduct.

O. C.R.S. § 8-43-304(4) provides that if the alleged violator cures the violation within a twenty day period, and the party seeking such a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. *Dennis Walker v. Mesa Vista of Boulder,* W.C. 4-751-936 (May 13, 2009) and *Matthys v. City of Colorado Springs,* W.C. No. 4-662-890 (April 2, 2007).

P. WCRP 5-4(A)(5) requires "[a] copy of every medical report not filed with the Division shall be exchanged with all parties within fifteen (15) business days of receipt."

Q. Insurer received Dr. McCranie's report on December 14, 2017. According to WCRP 5-4(A)(5), Insurer should have provided the report on January 8, 2018 (excluding weekends and the Christmas and New Year Day holidays).

R. This report was provided on January 26, 2018, by Respondents' counsel and within an hour of Claimant's counsel request for status of the report. Therefore, Respondents cured the violation in 18 days. Since Respondent's cured this violation within 20 days, Claimant must now show by clear and convincing evidence that Respondents knew or reasonably should have known that they were in violation of WCRP5-4(A)(5). The ALJ finds, by clear and convincing evidence, that Respondents *reasonably should have known* that they were in violation of said rule.

S. Nothing in the record suggests this was anything more than an honest administrative oversight by Respondents. All the parties knew full well that an IME had occurred; there was no serious consideration that this report could somehow be concealed. The issue was cured as soon as the issue was highlighted, in good faith, by Claimant. There is nothing before the ALJ suggesting that this is part of any pattern of noncompliance by Respondents.

T. Further, no showing of harm or prejudice to Claimant has been alleged or shown. While not a necessary component to establishing the prima facie elements for imposition of penalties, this plainly mitigates the penalty to be imposed. An Application for Hearing had yet to be filed when this all occurred.

U. There are no aggravating circumstances present. As noted above, the mitigating evidence as noted above substantially outweighs the nonexistent aggravation.

The ALJ finds that the penalty to be imposed should be calculated at $10.00 per day, times 18 days, for a total of $180.00. Although no harm or prejudice to Claimant has resulted, the ALJ apportions 50% of this penalty to Claimant, and 50% to Colorado Uninsured Employer Fund.

ORDER

It is therefore Ordered that:

1. Respondents shall authorize and pay for the surgical procedures for which Dr. Larson requested authorization on January 3, 2018.

2. Respondents shall penalties of $10.00 per day, for a period of 18 days, for a total of $180.00. Of this amount $90.00 shall be payable to Claimant, and $90.00 shall be payable to the Colorado Uninsured Employer Fund.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 14, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

The issues set for determination included:

- Did Claimant suffer a compensable industrial injury on July 30, 2017, while working for Employer?
- If Claimant suffered a compensable injury, is he entitled to medical benefits to cure and relieve the effects of the injury?

FINDINGS OF FACT

1. Claimant was employed as a deputy for Employer. He has held that position for seventeen years and works at the detention center.

2. Claimant's medical history was significant in that he previously underwent surgery on his right knee in 2005. Claimant also suffered injuries to his right knee on September 12, 2012 and May 20, 2014. These injuries were industrial injuries for which Claimant received treatment.

3. On October 1, 2012, Claimant underwent an MRI of his right knee and the films were read by Melissa Simms, M.D. Dr. Simms' impression was: orthopedic hardware in the proximal tibia; mild blunting of the free edge of the anterior horn and body segment of the medial meniscus; focal full-thickness cartilage loss along the central to posterior weight bearing surface of the medial femoral condyle; focal full-thickness chondral loss along the anterior aspect of the lateral femoral condyle and high-grade partial thickness chondral degeneration along the posterior weight bearing surface of the lateral femoral condyle; focal four-thickness cartilage loss along the median patellar eminence and central aspect of the lateral trochlea; small knee joint effusion and mild edema of the lateral soleus muscle; intact lateral meniscus, cruciate and collateral ligaments.

4. Claimant underwent an MRI of his right knee on July 1, 2012. The films were read by Samuel Fuller, M.D. whose impression was: abnormal signal and pathology of the body and adjacent segment of the posterior horn of the medial meniscus; mild to moderate chondral degenerative changes in the medial and patellofemoral compartments; and small joint effusion.

5. Claimant underwent a meniscal excision surgery on his right knee, which was performed by David Beard, M.D. on August 4, 2014.

6. On September 22, 2014, Claimant was evaluated by Hope Edmonds, M.D. at Workwell. On this date, Dr. Edmonds noted: Patient returns doing very well. He

had a partial meniscectomy of both medial and lateral ligaments, as well as chondroplasty performed by Dr. Beard on August 4, 2014. He was released to ramp up to normal activity by Dr. Beard with prn follow up only. Dr. Beard indicated Claimant was performing all ADLs and there was no swelling and or pain in the right knee.

7. Dr. Edmonds diagnosed Claimant with a medial collateral ligament sprain and a medial meniscus tear. Dr. Edmonds placed Claimant at MMI and assigned a 31% lower extremity rating. Claimant was released to full duty. Dr. Edmonds did not recommend further medical treatment for Claimant's right knee.

8. Claimant returned to Dr. Beard on September 1, 2015, as he was experiencing bilateral knee pain, greater on the right side of the left. On examination, Dr. Beard found patellofemoral and tibiafemoral crepitus bilaterally. There was joint line tenderness in both the medial and lateral aspects of the right and left knees, but negative McMurray, Lachman, anterior and posterior drawer tests. X-rays showed evidence of prior tibial tubercle osteotomies, with screws in the proximal tibia. Degenerative changes were noted affecting the medial compartment of the right knee and there was evidence of patellofemoral arthrosis. Dr. Beard's assessment was: osteoarthritis, bilateral knees. Dr. Beard noted Claimant was trying to defer total joint arthroplasty as long as possible. He administered an intraarticular steroid injection in both knees at that appointment.

9. On May 6, 2016, Claimant was evaluated by Dale Martin, M.D. with complaints of increasing pain in both knees, along with popping, difficulty squatting, kneeling, crawling and climbing stairs in both knees. Dr. Martin noted the x-rays of the right knee showed advanced patellofemoral disease, along with medial compartment narrowing. Dr. Martin's impression was: bilateral knee osteoarthritis, worse right than left. Dr. Martin administered injections in both knees.

10. Claimant was evaluated by Bruce Cazden, M.D. on April 20, 2017. The chief complaint was right Achilles tendinitis, which Claimant had developed most recently.[1] No significant tenderness was noted in the right knee, nor was there effusion present. Claimant had full extension and flexion was approximately 125°. Dr. Cazden's diagnoses were: sprain/strains-medial collateral ligament of knee; tear of medial cartilage or meniscus of knee; Achilles tendinitis-right leg. Dr. Cazden stated he did not feel it was medically probable that this was related to the previous right knee work injury on May 20, 2014. Claimant was given a prescription for Naprosyn and physical therapy ("PT ") was recommended.

11. When Claimant returned to Dr. Cazden on May 12, 2017, it was noted that the treatment was covered under the previous knee surgery claim. The focus of this appointment was Claimant's right Achilles tendinitis. Claimant was working full duty and

[1] The date of injury listed was May 20, 2014 and the description of the accident was "responding to an emergency and knee popped". This related to the prior workers' compensation claim.

tolerating that well. Claimant had started physical therapy and was taking ibuprofen. Dr. Cazden continued the PT program and started a trial of meloxicam.

12. Claimant had objective evidence of degenerative changes in his right knee prior to July 2017.

13. Claimant testified he did not miss time from work from September 22, 2014[2] to July 30, 2017 due to the condition of his right knee.

14. Claimant testified he was working at the intake area on July 30, 2017 and was performing a ”status”, which involved walking the area every 15 minutes. There were bedrolls stacked up and he was carrying a bedroll which weighed 7 to 10 pounds. The bedroll bumped against his leg and his right knee buckled. When he attempted to catch himself, his knee popped and felt immediate pain.[3]

15. Claimant stated he called his supervisor, Sgt. Harteker and told him that his knee had popped. The pain continued and Claimant could not continue working. He was directed to medical treatment at Workwell.

16. Claimant was a credible witness.

17. Sgt. John Harteker testified on behalf of Employer. He stated Claimant reported that he bumped his knee with a bedroll and it was hurting. Sgt. Harteker stated Claimant had approached them approximately one month (June 2017) before the incident and said he was having some knee pain, requesting an accommodation where he would not have to walk up so many stairs or do as many status checks. Employer accommodated Claimant as much as it could. On cross-examination, Sgt. Harteker admitted Claimant looked like he was limping somewhat in the video on the day of the incident.[4] Sgt. Harteker did not question Claimant’s honesty or trustworthiness.

18. On July 31, 2017, Claimant was evaluated by Robert Dupper, M.D. at Workwell. On examination, Dr. Dupper found no laxity in the ACL, PCL, MCL and LCL. Claimant’s gait was antalgic, but no effusion was found. Tenderness was present over the medial joint line and swelling present in the knee. Dr. Dupper’s diagnosis was: derangement of unspecified meniscus due to old tear or injury, right; pain in right knee; unspecified abnormalities of gait and mobility. Dr. Dupper opined the cause of this problem was related to work activities and issued work restrictions. Dr. Dupper completed a WCM-164 which indicated that the objective findings of the complaints were consistent with history and/or work-condition.[5] Claimant’s restrictions included use

[2] Date of MMI for 2014 injury.

[3] Hearing transcript (“Hrg. Tr.”) p. 24:8-15.

[4] Hrg. Tr. p. 48:18-24.

[5] Respondent stipulated to this fact.

of crutches, sedentary duty, no carrying/lifting. Dr. Dupper did not recommend a specific course of treatment.

19. Claimant returned to Dr. Dupper on August 2, 2017, as he was having trouble sleeping due to pain. Tenderness was present over the medial joint line and active flexion measured 90°. This was an objective finding. Limitations in extension were noted, as well as mild swelling. The diagnoses were the same as the July 31, 2017 evaluation. Claimant's work restrictions were extended.

20. Dr. Dupper did not evaluate Claimant after August 2, 2017 and did not place him at MMI.

21. Claimant testified he has continued to work and has been on light duty since August 2, 2017.

22. An Employer's First Report of Injury was prepared on August 7, 2017, which specified Claimant was injured at 10:45 a.m. John Harteker was listed as the Employer representative notified, which comported with Claimant's testimony. The injury was listed as a right knee strain.

23. On August 22, 2017, Claimant underwent an MRI of his right knee. The films were read by Stanley Weinstein, M.D., whose impression was: diminutive body and posterior horn of the medial meniscus, which may be secondary to partial meniscectomy, however, recommend a correlation with operative history; small joint effusion; advancing chondromalacia at the lateral patellofemoral compartment.

24. On December 29, 2017, William Ciccone II, M.D. performed an independent medical evaluation, at Respondent's request. Claimant reported his current symptoms were numbness, throbbing, stabbing, giving out and tingling in the right knee. On examination, Dr. Ciccone noted normal alignment of the right knee, with range of motion ("ROM") of approximately 120° of flexion -0° of full extension. There was no effusion and no pain along the patellofemoral joint or along the lateral joint line. Pain was noted along the medial joint line, with negative McMurray's sign and medial-sided pain was present with circumduction maneuvers. Claimant was stable in varus, valgus and the cruciate ligaments were intact.

25. Dr. Ciccone opined Claimant did not suffer a work injury to the right knee, as it was unlikely that being struck by a seven-pound bedroll would cause a significant damage to the knee. This was confirmed by the August 2017 MRI which revealed no injury and no structural damage. Dr. Ciccone did not believe this event exacerbated or accelerated any already occurring degenerative changes in Claimant's knee, nor did he suffer an injury to the peroneal nerve. Dr. Ciccone stated Claimant had knee pain unrelated to the work injury, which could be the result of degenerative changes in the right knee. He did not believe Claimant required additional treatment or diagnostic testing and concluded Claimant was at MMI. The ALJ found the opinions expressed by Dr. Ciccone were credible. The ALJ inferred from Dr. Ciccone's conclusion that

Claimant suffered a temporary aggravation of the underlying osteoarthritis in his right knee and was at MMI as of December 29, 2017.

26. Dr. Ciccone testified as an expert in Orthopedic Surgery at his deposition taken on January 10, 2018. He is level II accredited pursuant to the WCRP. Dr. Ciccone stated the bedroll did not generate much force when it struck Claimant's right knee and to have a significant injury, the joint has to be hit with force. Dr. Ciccone said Claimant did not suffer an injury on July 30, 2017, which was borne out in the MRI findings on August 22, 2017. There was no evidence of an acute injury, including a contusion or soft tissue swelling. Dr. Ciccone noted arthritic joints tend to have small effusions, as found in the MRI done in July 2014.

27. Dr. Ciccone testified there was no diagnosis caused by the incident and opined this did not aggravate Claimant's pre-existing condition.[6] Claimant had advancing chondromalacia of the lateral patellafemoral compartment, which showed the progressive nature of arthritic changes in the knee that were unrelated to work activities. Progressive degenerative changes in knee tend to get worse.[7] Dr. Ciccone did not believe the incident at work exacerbated ongoing degenerative changes within Claimant's right knee. Dr. Ciccone agreed Claimant reported pain in the knee when he examined him. He also had less than full range of motion on flexion (120°). The ALJ noted this was an objective finding with regard to the right knee.

28. Dr. Dupper testified as an expert in Emergency Medicine at his deposition on March 7, 2018. He is Level II accredited pursuant to the WCRP. Dr. Dupper testified that at the initial evaluation, Claimant was unable to bear weight on his leg and was using crutches for ambulation. He observed swelling in the knee.[8] Dr. Dupper opined the reason he evaluated Claimant was a direct result of the July 30, 2017. Dr. Dupper stated there was objective evidence of injury (including the small joint effusion), which was caused by the July 30, 2017 work incident. Dr. Dupper's testimony supported the conclusion that the incident on July 30, 2017 was compensable.

29. On cross-examination, Dr. Dupper testified that the chondromalacia seen in the MRI was a degenerative finding. He believed the small joint effusion was more consistent with an acute injury, but did not dispute Dr. Ciccone's opinion that this could be consistent with degenerative changes. Dr. Dupper agreed with Dr. Ciccone's opinion that there was no objective evidence of structural damage from the July 30, 2017 work event. He also agreed with Dr. Ciccone there wasn't any aggravation or acceleration of a pre-existing pathology by the July 30, 2017 incident. He stated that in his initial report in the medical causation section, the "cause" of the problem referred to Claimant's increased pain.

[6] Ciccone deposition, pp. 8:22-9:3; 11;16-20.

[7] Ciccone deposition: p. 21:7-11.

[8] Dupper deposition, p. 8:8-9.

30. Claimant proved he suffered an aggravation of his right knee condition on July 30, 2018 when it was struck by a bedroll. This occurred while he was performing his job duties for Employer.

31. Claimant proved he was entitled to receive medical benefits to cure and relieve the effects of his industrial injury. Dr. Dupper and Workwell are authorized to provide said treatment.

32. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability-Right Knee

Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S. (2016). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995). Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The question in the case at bar was whether the July 30, 2017 incident aggravated or accelerated the underlying condition of Claimant's right knee. In particular, did the increase in Claimant's symptoms, his need for medical treatment and work restrictions rise to the level of a compensable injury, where there was no evidence of structural damage to the right knee. Claimant argued that the evidence showed a compensable injury occurred and there was evidence of disability, as seen in the work restrictions. Respondent averred Claimant did not suffer a compensable injury and relied on the conclusions of Dr. Ciccone, who concluded there was no structural damage to the right knee. Respondent asserted, even if there was a temporary aggravation, Claimant returned to baseline and required no further treatment. On balance, the ALJ determined this was a compensable injury, albeit a minor one, which caused Claimant to experience symptoms and require treatment.

As a starting point, the medical evidence showed Claimant had prior injuries and degenerative changes present in the right knee. (Findings of Fact 2-9). Claimant required medical treatment for his right knee and, in fact, he underwent two surgeries on his right knee before July 2017. He also had pain complaints in his right knee for which he required treatment in 2015 and 2016. (Findings of Fact 10-11). Claimant reported he was having knee symptoms within one month of the injury. (Finding of Fact 17).

The ALJ concluded the incident occurred, as alleged by Claimant, who was a credible witness. Claimant was performing a "status" and was carrying a bedroll at the facility when he struck his right knee. (Finding of Fact 14). Respondent did not dispute the fact that the incident in which Claimant's right knee was struck by the bedroll occurred. Indeed, Claimant's testimony was corroborated by Sgt. Harteker. Claimant reported the injury immediately and was unable to complete his shift. (Finding of Fact 17). Accordingly, Claimant's injury arose out of and was in the course of his employment activities. The ALJ determined that the July 30, 2017 work incident caused an increase in pain in Claimant's right knee.

In this regard, the ALJ found the incident on July 30, 2017, caused symptoms and resulted in the ATP issuing work restrictions. Dr. Dupper documented restrictions in Claimant's range of motion in the right knee. As found, Dr. Dupper issued work restrictions as a result of the injury. (Findings of Fact 18-19). Claimant testified that he continued to work, but still had restrictions. (Finding of Fact 21).

As determined in Findings of Fact 23-26, Dr. Ciccone opined there was no structural damage to the Claimant's right knee as a result of the July 30, 2017 work injury. Dr. Ciccone articulated that this incident at work did not aggravate or accelerate the condition of Claimant's right knee and the ALJ credited these opinions. Dr. Dupper essentially agreed with the opinions concerning the pre-existing degenerative changes and the lack of structural damage. On cross-examination, Dr. Dupper agreed the work incident did not aggravate or accelerate the condition of Claimant's knee. However, the ALJ determined these opinions do not preclude the conclusion that the incident on July 30, 2017, however minor, caused a temporary aggravation of Claimant's right knee which required treatment.

Based on the totality of the evidence before the Court, the ALJ concluded Claimant satisfied his burden of proof to show that he suffered a compensable injury. First, the ALJ found there was no dispute the incident occurred and Claimant experienced symptoms as a result of the July 30, 2017 incident. Sgt. Harteker's testimony supported the conclusion that the incident, as described by Claimant, occurred and showed Claimant limping afterwards. This led the ALJ to conclude the injury was compensable.

Second, this incident required Claimant to seek treatment and when evaluated by Dr. Dupper, swelling was noted and work restrictions were issued. Claimant had not required treatment for more than a year before the injury (Finding of Fact 9) and had not missed time from work for almost three years (Finding of Fact 13), even though he subjectively reported pain one month prior to July 30, 2017. Thus, while the medical records revealed degenerative changes right, which caused periodic symptoms, this incident standing alone required medical treatment and restricted Claimant's ability to work. Under these circumstances, where the incident caused an underlying condition to become symptomatic and Claimant required treatment, it is compensable. *Duncan v. Industrial Claim Appeals Office*, *supra*, 107 P.3d at 1001.

The ALJ considered Respondent's argument that Claimant suffered a temporary aggravation of his underlying pre-existing condition, but was at MMI as of December 29, 2017 evaluation. A similar argument was put forth by Respondents in *Davis v. Little Pub Holdings, LLC*, W.C. No. 4-947-977-01 (ICAO June 17, 2015). Claimant alleged she suffered an injury to her low back while lifting an empty beer keg. Claimant suffered from fibromyalgia and a chronic pain syndrome, along with Sjogrens syndrome and other rheumatologic chronic pain symptoms. Respondents contested the compensability of the injury and referred Claimant for an independent medical evaluation with Allison Fall, M.D. The IME physician opined Claimant's presentation was consistent with her prior injury history of worsening back pain and stiffness and there was no new specific work-related injury or aggravation of the pre-existing condition. Dr. Fall determined Claimant's low back systems constituted the natural progression of her pre-existing condition.

After the hearing, the ALJ determined it was more probable than not Claimant suffered a compensable lower back injury. This entitled her to medical benefits, along with temporary disability benefits. However, the ALJ also concluded that the incident constituted a temporary aggravation of a chronic, pre-existing condition. This temporary aggravation was resolved by March 19, 2014 and accordingly Respondents were not liable for medical benefits or temporary disability benefits after that time.

The Industrial Claim Appeals Office set aside the ALJ's Order and concluded the ALJ erred in terminating TTD and medical benefits. The Panel determined the ALLJ lacked authority to determine MMI until there had been a medical determination of MMI by an ATP or a DIME. [Citing §8-40-201 (11.5) C.R.S and §8-42-107(8)(b)(I)(II). In determining that Claimant's temporary aggravation of her pre-existing condition had returned to baseline, the Panel found the ALJ implicitly determined MMI. However, there had been no medical determination of MMI by an ATP or a DIME. Accordingly, wage and medical benefits could not be terminated under these circumstances. *Davis v. Little Pub Holdings, LLC, supra,* at pp. 7-8. The case was remanded for further findings and a new Order on TTD benefits and medical benefits.

In the case at bar, there was evidence in the form of Dr. Dupper's treatment records, Claimant's testimony and the testimony of Sgt. Harteker which led the ALJ to conclude Claimant suffered a compensable aggravation of his right knee condition. While it may ultimately turn out this was a temporary aggravation of Claimant's right injury knee, that is a determination to be made by Dr. Dupper as an ATP.

Given the finding on the issue of compensability, the ALJ concluded Claimant proved he was entitled to medical benefits to cure and relieve the effects of his industrial injury. As the Panel noted in *Davis v. Little Pub Holdings, LLC,* this determination does not preclude Respondent from challenging the reasonableness, relatedness, and the necessity for any particular treatment.

ORDER

It is therefore ordered:

1. Claimant met his burden by a preponderance of the evidence to show he suffered a compensable injury to his right knee on July 30, 2017.

2. Respondent shall pay medical benefits to cure and relieve the effects of the aggravation of Claimant's right knee condition, including Dr. Dupper and Workwell.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail,

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 14, 2018

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

- Whether Respondents have proven by a preponderance of the evidence that Claimant's injuries from November 28, 2014 are not the result of a compensable work-related assault.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. On November 28, 2014, Claimant was assaulted outside Employer's premises near the back of the building. Claimant reported that he was performing his job duty of taking out garbage at the time and that he did not know his assailants.

2. Respondents admitted the claim and paid benefits based on Claimant's representations.

3. In this action, Respondents seek to withdraw their admission alleging that Claimant's assault was personal in nature and not work related.

4. Video surveillance taken the night of the assault from inside Employer's location shows three men enter the restaurant. All three sat at a table across from the cash register and looked into the back, by the kitchen, where Claimant was working. Within moments, Claimant approached the register and leaned toward the table where the three men were sitting. At that point, the three men immediately got up and walked out of the restaurant. Claimant then left the restaurant a few minutes later.

5. Claimant repeatedly reported that he was taking out Employer's trash when assailants assaulted him.

- At the hospital on November 28, 2014, Claimant reported to Investigator Robinson of the Arapahoe Sheriff's Office that he "was taking the trash out to the dumpsters behind the business."

- On December 2, 2014, Claimant reported to physicians at the Medical Center of Aurora that on November 28, 2014 "he went to take the trash out of the restaurant when 4 other males assaulted him."

- On December 4, 2014, Claimant reported to his counselor Nick Neujahr at Aurora Mental Health Center, that "during an evening shift at work last Friday 11/28/14, while he was taking out the trash, [Claimant] was attacked by four men who assaulted him severely."

- Also on December 4, 2014, Claimant told Investigator Johnston that he remembered taking the trash out and that he believed it was the four men in the store earlier that had attacked him.

- On December 11, 2014, Claimant's medical provider noted that Claimant stated he "continues to struggle with physical and interpersonal complications as the result of being attacked while taking the trash out at work two weeks ago."

- On December 15, 2014, Claimant reported to the authorized treating provider, OccMed Colorado, that "he was taking trash out from his workplace at [Employer's location] when he was apparently assaulted by four different individuals…"

- At the December 20, 2017 hearing, Claimant testified that he told the Investigator that he was taking out the trash.

6. Claimant testified inconsistently at hearing about taking out the trash.

- Claimant testified that his manager, Ben Reiners, told him to take the trash out.

- At another point, Claimant testified that there was "a mountain of trash in the back" and he told Mr. Reiners he was going to take out the trash.

- Claimant testified that Mr. Reiners usually "took out the trash with me, but for some reason he didn't that night."

- At another point, Claimant testified, "Ben never took out the trash with me."

- Mr. Reiners testified that he did not send Claimant to take out the trash or to clean up the trash area on November 28, 2014. He also testified that Claimant did not tell him he was going to the trash area. Mr. Reiners testified that he went to the back of the restaurant and noticed there were many dirty dishes. He asked the other worker if he had seen Claimant. The co-worker had not, so Mr. Reiners started looking around. He testified he saw a "commotion" at [a neighboring establishment] and asked an officer if Claimant was involved.

7. Videotape of Claimant leaving the restaurant establishes that Claimant did not take trash with him. The video from inside the restaurant on November 28, 2014 shows Claimant leaving the restaurant with empty hands. Moreover, Claimant walked within inches of a full trash can on the way out of the restaurant without removing the bag from the container to bring with him.

8. Investigator Johnston testified that she reviewed video of the assailants running away after the assault and identified them as the same three men who appeared in the restaurant video.

9. The ALJ finds that video evidence directly contradicts Claimant's reports to his treatment providers and Arapahoe County Sheriff's investigators that he was taking trash out at the time of the assault.

10. After Investigator Johnston directly confronted Claimant about having nothing in his hands when he left the restaurant, Claimant changed his story. He then claimed that he went out either to smoke a cigarette, to break down boxes, or to clean up around the trashcans.

11. Mr. Reiners testified that the employee smoking area was between Employer's restaurant and at [a neighboring establishment], not where the assault occurred. During the hearing, Mr. Reiners identified the smoking area on Respondents' Exhibit H. Mr. Reiners also identified the garbage area where the assault took place. The ALJ finds that the dumpster is not near the employee smoking area.

12. Claimant gave contradictory reports about whether he knew the assailants and whether they took money from him.

- An ambulance transported Claimant to the hospital. At the hospital, on November 28, 2014, Investigator Robinson interviewed Claimant. Claimant reported:
    - He saw his assailants loitering behind the store earlier in his shift;
    - The assailants might have been in the restaurant before;
    - He was unsure whether anything had been taken from him;
    - He had been assaulted one week earlier while working;[1]
    - "Every time he is attacked, it is always by a black person."
    - Investigator Robinson noted that Claimant had $260 in new twenty-dollar bills in his wallet and asked whether he was missing any money. Claimant answered that he did not know.
- On December 3, 2014, when Investigator Johnston first spoke with Claimant, Claimant reported that he "really doesn't recall what happened other than [his assailants] trying to kill him." He also told the investigator that he "didn't really know if that was true, because that is what he had been told." Claimant's mother told the investigator she was nervous that whoever assaulted Claimant was someone Claimant knew.

[1] Claimant's mother told Investigator Robinson that no such event had occurred.

- On December 4, 2014, Claimant told Investigator Johnston that right before the assault, "four guys came into the [restaurant] and were "mean mugging" him.[2]

13. Having reviewed the videotapes, the ALJ finds that the three assault suspects appear to be looking specifically for Claimant.

14. Prior to the assault, Claimant had been treating with Nick Neujahr, his psychological therapist at the Aurora Mental Health Center for psychotherapy related to anxiety, paranoia, and depression. On December 4, 2014, –one or two hours before he first met with Investigator Johnston –Claimant attended an appointment with Mr. Neujahr. Mr. Neujahr's contemporaneous notes record Claimant stating that while he was taking out the trash at work, four men attacked and assaulted him. Claimant told Mr. Neujiahr that he vaguely knew the four men from approximately two years before when he assisted them in purchasing marijuana with his medical marijuana card.

- Mr. Neujahr confirmed at hearing that his report from December 4, 2014 was an accurate account of Claimant's statements made to him on December 4, 2014. As Claimant's counselor, Mr. Neujahr opined that Claimant did not appear to have any recall issues at the time he provided these statements nor did he believe Claimant was being deceptive.

- Mr. Neujahr testified that during their December 4, 2014 session, Claimant also stated that he suspected they attacked him because of his association with a friend of his who was in jail. Mr. Neujahr testified that Claimant's statements to him regarding the assailants never changed.

- Mr. Neujahr also testified that Claimant stated that he thought the assailants were rivals of a gang that he had been involved with years before. Claimant, however, testified that he had "never been in a gang in his whole life," and that he never told Mr. Neujahr that he had been.

15. The ALJ finds Mr. Neujahr credible and persuasive. The ALJ finds that, Claimant likely told Mr. Neujahr, as Claimant's therapist, things that he might not have told others. The ALJ finds that Claimant admitted to Mr. Neujahr that he knew his assailants and that they attacked him for personal reasons unrelated to work.

16. Claimant has a history of using and selling illicit drugs. Medical records document amphetamine abuse, cannabis abuse, heroin addiction, and "other substance-induced psychotic disorder with delusions." In 2006, Claimant was hospitalized after a suicide attempt. He reported to his provider that his main problem was "nightly dreams about his life as a drug dealer and user." His provider described him as having "severe and chronic drug addiction problems," and noted that Claimant had sold his bottle of

[2] The Online Slang Dictionary defines "mugging" when used as a verb, to mean, "To stare at a person in an aggressive way."

Adderall when last prescribed. The provider also noted that Claimant appeared to "like the rush" he got selling meth and buying alcohol for his underage friends.

17. Claimant testified that at the time of the assault he was receiving Methadone for a heroin addiction and was using recreational marijuana, which medical records support.

18. On December 2, 2014, Claimant presented at The Medical Center of Aurora. He reported that his "home medications" included oxycodone and Methadone. Claimant "is very clear about not wanting to stay in the hospital. He states he wants to go home and smoke a cigarette and have a blunt.[3]"

19. Claimant testified he had sold drugs in the past, but denied selling anything other than marijuana. Claimant's testimony was contrary to medical records documenting him selling his prescription Adderall and "meth."

20. Claimant admitted on cross-examination that he "jacked"[4] some people when he was selling drugs. He testified that one of them later confronted him, they fought, and he broke the person's nose.

21. Benjamin Reiners, general manager at the restaurant where Claimant was working, testified he had concerns that Claimant was using drugs at work. He testified that shortly before the assault, he observed Claimant in the back of the restaurant with a piece of foil inhaling something through a straw. Mr. Reiners testified he confronted Claimant who said, "It's not crack." Mr. Reiners told Claimant he could be fired for using drugs at work and that Claimant could not do that on work property.

22. Claimant denied that the incident of inhaling a substance through a straw occurred. He accused Mr. Reiners of making up the incident. He also accused a co-employee of making stories up about his drug use and testified the co-employee "was suspended for defamation of character." Claimant offered no persuasive evidence to support his version of the events.

23. Investigator Johnston testified that when she told Claimant that the video showed him leaving the restaurant without trash, Claimant volunteered, without any questioning on the subject, "This was not a drug deal." Her investigative report notes Claimant told her: "He knows I think this is a drug deal gone badly because of his past." "ALLEN brought this up on his own at no time did I ask him if this was a drug deal."

24. Medical providers have diagnosed Claimant with a number of mental health issues.

- Claimant carries diagnoses of non-specific mood disorder, mild mental retardation, and several substance addictions.

[3] "Blunt" is slang for a large marijuana cigarette.

[4] The Online Slang Dictionary defines "jack" when used as a verb, to mean, "injured."

- In October 2006, a medical provider at Kaiser Permanente diagnosed Claimant with schizoaffective disorder – Bi-polar type.

- Claimant reported struggling with rage episodes and that he could go from "being in a good mood to…fights…threatening people…"

- He reported anxiousness that made him "want to punch someone," and that he was worried about "exploding from stress."

25. Claimant testified that he has been on social security insurance (SSI) since he was ten years old and medical records from one month prior to the assault show he was receiving SSI at that time. While neither party presented evidence identifying what qualified Claimant for this benefit, the ALJ notes that prior to the November 28, 2015 assault, providers had diagnosed Claimant with a number of mental health issues.

26. Claimant exhibited paranoia after the assault.

- Claimant testified that after the assault he became paranoid of black people.

- Claimant testified, "Every time I went out, I took my smartphone out, and everybody that was black, and I thought was an – attempted assailant – I videotaped for my detective."

- He was convinced that black men who visited his neighbor were his assailants, and later that black men in another restaurant were his assailants.

- In both instances, Claimant called the investigator assigned to his case and reported that he had found his assailants.

- Claimant left a phone message for Investigator Johnston advising her that "he has been having his friend JOSH drive him around with a loaded weapon" in search of his assailants.

27. Claimant's prior psychotherapist at Aurora Mental Health Center, Nick Neujahr, testified that, in his professional opinion, the assault did not significantly affect Claimant's cognitive ability.

28. Claimant inconsistently reported whether and how much cash the assailants took from him during the assault.

- At the hospital, on November 28, 2014, Claimant told Investigator Robinson that he did not know whether he was missing any cash. According to Investigator Robinson's notes, Claimant had $260 in his wallet at the hospital the night of November 28, 2014.

- Investigator Johnston noted that Claimant later reported $400 missing following the assault. Then Claimant increased the missing amount to $500.

- Investigator Johnston testified Claimant reported that during the assault, he told the assailants that he had $500 and they should take it and leave him alone.

29. Claimant testified that he had an ACE Cash Express loan, that "if not paid the day it was due, they will garnish the whole lump sum that you owe." Claimant testified that the loan was due on November 28, 2014, and that he drew down his account to prevent ACE from garnishing his account.

30. Respondents admitted to an average weekly wage of $319.19. Claimant testified Employer paid him every two weeks. This would amount to a paycheck of approximately $638.38.

31. Investigator Johnston testified that a scenario in which assailants beat and robbed a person of $240, leaving the person with $260, did not make sense. She testified further that a scenario where the assailants took no money and just beat Claimant also did not make sense. "Usually there's a reason why people get assaulted or beat up." Investigator Johnston determined after investigating the assault that Claimant's story lacked credibility.

32. The ALJ finds it highly unlikely that Claimant had $500 in his wallet before the assault and $260 after the assault. The ALJ finds it highly unlikely that the assailants took part but not all of Claimant's money.

33. The ALJ finds Claimant's testimony concerning the circumstances of the assault not credible. Video evidence directly contradicts Claimant's reports to medical providers and criminal investigators that he was taking trash out when assaulted. . Additionally, the ALJ not credible Claimant's alternative stories that he instead went out to smoke a cigarette, or went to the garbage area to break down boxes, or to clean up trash. Additionally, Claimant's supervisor directly contradicted Claimant's story that his supervisor asked him to take the trash out or told him to pick up trash at the dumpster.

34. The ALJ finds Investigator Johnston, Mr. Neujahr and Mr. Reiners to be more credible and persuasive than testimony or evidence to the contrary.

35. The ALJ further finds that Respondents filed an admission in this case based upon Claimant's representations to his medical providers that he was performing the work-related task of taking out the trash when unknown assailants assaulted him.

36. Respondents later discovered that Claimant had contemporaneously reported to Mr. Neujahr, his personal psychotherapist, that he vaguely knew his assailants either from a drug deal, in association with a friend, or a rival gang. The ALJ finds the video evidence supports a finding that Claimant knew his assailants. It appears the three men on the video, who Investigator Johnston identified by as the assailants, came into

Employer's restaurant looking specifically for Claimant, as they were looking into the back by the kitchen while sitting at the table. Video evidence shows the three men left the restaurant immediately upon Claimant leaning toward them. Moreover, the video evidence shows Claimant left the restaurant a short time later with nothing in his hands, despite his reports to medical providers and police investigators that he was taking out the trash.

37. The ALJ finds the video evidence of the circumstances surrounding this claim to be persuasive.

38. The ALJ finds that Respondents have proven by a preponderance of the evidence that Claimant's November 28, 2014 injury was a personal assault and not a work-related, compensable incident.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Generally

The purpose of the Workers' Compensation Act (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

Compensability - Assaults

For an injury to be compensable, it must arise out of and in the course of the employment. An accident "arises out of" employment when there is a causal connection

between the work conditions and the injury. *Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965).

Assaults in Colorado workers' compensation claims have been divided into three different categories: (1) assaults that result from the duties of the job (i.e., inherently work related); (2) assaults that are personal in nature or due to a personal dispute or connection (inherently non-work related); and (3) neutral assaults where "nothing connects it with the victim privately; neither can it be shown to have a specific employment origin" (deemed to be work related). *See In re Question by the U.S. Court of Appeals for the Tenth Cir.*, 759 P.2d 17 (Colo. 1988).

Withdrawal of Admissions

Section 8-43-201, C.R.S. generally establishes the burden of proof in disputes arising under the Workers' Compensation Act. It provides, in pertinent part, that:

> A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; a workers' compensation case shall be decided on its merits; and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

Thus, under the provisions of section 8-43-201(1), the party seeking to modify an issue already determined by a general or final admission shall bear the burden of proof (a preponderance of the evidence) for any such modification. *Rodriguez v. City of Brighton,* W.C. No. 4-782-516 (I.C.A.O., Aug. 23, 2011). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Where a claimant files a timely objection to a final admission, then the admitted issues remain open, and respondents may seek a withdrawal of the final admission. *Fausnaucht v. Inflated Dough, Inc.* W.C. No. 4-160-133 (I.C.A.O., July 20, 1999). There being no issue raised indicating the objection to the admission was not timely, the ALJ infers that the parties concede this issue. Respondents carry the burden of establishing that there was no compensable injury on November 28, 2014.

However, where a claimant supplied materially false information upon which his employer and its insurer relied in filing an admission of liability, the admission is *void ab initio* and is therefore withdrawn retroactively. *Vargo v. Colo. Indus. Comm'n*, 626 P.2d 1164 (Colo. App. 1981).

As found above, Respondents initially filed an admission based on the assault being neutral in character as Claimant reported that he was taking out the trash and did not know the assailants. As further found, however, Respondents have established by a preponderance of the evidence that Claimant's November 28, 2014 assault was personal in nature, and was not work-related. *See In re Question by the U.S. Court of Appeals for the Tenth Cir.*, 759 P.2d 17 (Colo. 1988). As such, Claimant did not sustain a compensable injury arising out of and in the course of his employment with the employer on November 28, 2014. *Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965).

Based on substantial evidence and reasonable inference, the ALJ finds that Respondents admission of liability relied upon Claimant's misrepresentation that he was performing a work duty, in this case taking out the trash, when he was assaulted by unknown assailants who were trying to rob him. The ALJ finds that that Claimant's representation was materially false as detailed in the findings of fact above, as such, the admission in this claim is *void ab initio*. *Vargo v. Colo. Indus. Comm'n*, 626 P.2d 1164 (Colo. App. 1981).

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Respondents have proven by preponderance of the evidence that the assault on Claimant on November 28, 2014 was a personal assault, which did not result in a compensable injury.

2. Respondents have also proven by a preponderance of the evidence that their admission in this claim was filed pursuant to materially false information provided by Claimant. As such, the admission in this claim is hereby *void ab initio*.

3. The claim is denied and dismissed with prejudice.

DATED this 14th day of August 2018.

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge

This decision of the Administrative Law Judge is final, unless a Petition to Review this decision is filed within twenty (20) days from the date of this decision is mailed. Section 8-43-301(2), C.R.S. The Petition to Review must be filed with the Office of Administrative Courts, 1525 Sherman Street 4th Floor, Denver, Colorado 80203. For statutory reference, see §8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. A Petition to Review form may be accessed at: http://www.colorado.gov/oac/appeals.

ISSUE

Whether Respondents have proven by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S.

STIPULATION

The parties agreed that, if Claimant was an employee at the time of his injuries on December 19, 2017, his entitlement to medical and Temporary Total Disability (TTD) benefits will be considered at a future time.

FINDINGS OF FACT

1. Employer is a company that installs drywall on construction projects. Claimant began working with Employer on September 22, 2017 building framing and installing drywall on various projects. Claimant had in excess of 10 years of experience in the industry.

2. On September 20, 2017 Claimant executed a Subcontractor Agreement with Employer. The document specified that Claimant was a subcontractor of Employer who would provide labor and materials at the rate of $9.00 per sheet of drywall. Employer's president and part owner Patrick A. Hess testified that he reviewed the Subcontracor Agreement with Claimant. He remarked that Claimant had received an offer to work as an employee for Employer but rejected the proposal because he could earn more money as an independent contractor. Item eight of the Subcontractor Agreement specifically provided that Claimant agreed to permit only employees and supervisors covered by Workers' Compensation insurance on jobsites.

3. Because Employer maintains a policy that independent contractors must carry their own Workers' Compensation insurance, Claimant met with Travis Lease of Security Insurance Group to obtain insurance. Mr. Lease has provided a written statement noting that Claimant visited him on September 20, 2017 and requested insurance because he was working for himself. The insurance policy Claimant obtained identified him as operating under the business name of Noe Lopez Construction.

4. On September 20, 2017 Claimant also filed a Form W-9 to request a Taxpayer Identification Number. Claimant identified himself as Noe Lopez Construction and affirmed that he was the individual/sole proprietor of a single member LLC.

5. On September 22, 2017 Claimant met with representatives of Employer and submitted a Declaration of Independent Contractor Status Form. The Form provided that Claimant would operate as an independent contractor. Claimant would not receive Workers' Compensation benefits, was responsible for paying all federal and

state income taxes and would furnish Workers' Compensation insurance for any workers hired by Noe Lopez Construction. Claimant listed his trade name as Noe Lopez Construction and specified that he was the owner.

6. On September 22, 2017 Claimant began working on Employer's construction projects in Greeley and Fort Collins, Colorado. Claimant submitted invoices to Employer for work performed. When creating the invoices Claimant listed Noe Lopez Construction. The invoices provided a description of the work, unit price and amount of requested payment. As explained by Mr. Hess, Employer originally planned to pay Claimant by sheet of drywall, but because he did not have a partner, he was asked to do "back out work." Mr. Hess remarked that "back out work" could only be calculated on an hourly basis. Claimant received compensation at the rate of $24.00 per hour.

7. Mr. Hess confirmed that the majority of Employer's 40-60 person workforce is composed of employees. However, Employer also uses independent contractors to comprise its workforce. Mr. Hess outlined the differences between the employees and independent contractors who work for Employer. He remarked that supervisors could fire employees and direct them to complete a myriad of tasks. Employees have a specific start and end time every day, submit timecards and are told when they can take lunch breaks. In contrast, Claimant was an independent contractor who did not have to report when he was coming to work or taking a lunch break. Employer did not provide Claimant with any training or tools other than ladders and scaffolding.

8. On December 19, 2017 Claimant was working on a project at the Copper Leaf Apartments in Fort Collins, Colorado. While attempting to pass a ladder down to another worker, Claimant fell approximately 12 feet to the ground when a temporary railing failed. Claimant was transported by ambulance to the Poudre Valley Hospital in Fort Collins but then to the Medical Center of the Rockies in Loveland because of the severity of his injuries. He was diagnosed with a displaced and comminuted left anterior column acetabular fracture. Claimant also sustained various other injuries. Dr. Robert M. Baer performed an open reduction and internal fixation of the fracture on December 21, 2017.

9. Claimant was not required to work exclusively for Employer and was customarily engaged in an independent trade or occupation related to drywall installation. Claimant received a 1099 miscellaneous tax form from Employer that listed Noe Lopez Construction and reflected nonemployee compensation of $12,252. Claimant used the 1099 form to prepare his 2017 Federal Income Taxes. Claimant testified that the 1099 form did not represent all of his 2017 income because he also worked for another company. He noted that he earned approximately $900 per week in cash from the other entity. His total 2017 income was approximately $30,000-$40,000.

10. Claimant's testimony and tax documents reflect that he operated as an independent contractor throughout 2017. Claimant testified that he identified himself as self-employed in his 2017 Federal Tax Return and claimed deductions for various

business expenses. Claimant specifically took $3082 in deductions for truck expenses for traveling 5760 miles, $2250 for business insurance expenses, $2500 in work tool expenses and $360 for work phone expenses. Claimant commented that he drove approximately 10 miles each day for about 90 days for a total of 900 miles while working for Employer. However, because he deducted for a total of 5760 miles, he necessarily used his truck during 2017 for business activities unrelated to his work for Employer. Claimant also remarked that he paid $750 for his insurance for Employer but was unable to explain the remaining $1500 of his insurance deduction. Claimant further explained that he owned drills, screwdrivers, laser devices, tool belts, tool bags, work clothes and work shoes that he used for work. He commented that he had to purchase many power tools throughout the course of e year because they break and cost approximately $200-$400 each to replace. He thus incurred expenses of approximately $2500 for tools and supplies for the year 2017 even though he only worked for Employer for approximately three months at the end of the year. Finally, Claimant deducted $360 for a work cell phone but did not have a personal cell phone.

11. Claimant further confirmed at his deposition that he has previously worked under aliases and used different Social Security numbers. He has previously worked under the name of Sergio Macias for different employers.

12. On June 22, 2018 Project Foreman Blaine Mulnix testified through an evidentiary deposition in this matter. Mr. Mulnix was present at the Copper Leaf Apartments when Claimant was injured on December 19, 2017. He confirmed that Claimant was not an employee but an independent contractor. Mr. Mulnix explained that he awarded projects to Claimant and inspected the work upon completion. He did not work directly with Claimant and only saw him in the morning when he would arrive, possibly at lunchtime and at another two points during the day while completing his rounds. Mr. Mulnix explained that Employer did not supply Claimant or other independent contractors with tools, dictate work hours or provide any training. He detailed that with Claimant and other independent contractors he did not specify when they needed to be present at the jobsite. Claimant could choose to work certain days and not work for Employer on others.

13. Mr. Mulnix testified that Employer provided ladders and scaffolding to all independent contractors and subcontractors at a jobsite for purposes of safety and efficiency. He noted that the scaffolds are meticulously maintained, serviced and OSHA approved. Moreover, it would be inefficient for each independent contractor to move his own ladders and repeatedly build his own scaffolding at the jobsite.

14. Claimant testified at the hearing in this matter and through a post-hearing evidentiary deposition on June 15, 2018. He explained that he has approximately 10 years of experience framing and installing drywall. Claimant noted that he had previously worked for companies as an employee but not as an independent contractor. He provided his own tools while working for Employer, but Mr. Mulnix told him where to work every day. He worked approximately eight hours each day for Employer. Claimant explained that he recorded his daily hours on a form and earned $24.00 per

hour from Employer. Nevertheless, he acknowledged that he created invoices for Employer that included a unit price. Claimant stated that he did not understand the independent contractor forms he completed for Employer but received two days to review and complete the paperwork. Finally, Claimant acknowledged that his last Employer went out of business in 2015.

15. Respondents have proven that it is more probably true than not that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S. Initially, Claimant completed paperwork in which he acknowledged that he was an independent contractor responsible for his own Workers' Compensation insurance. On September 22, 2017 Claimant submitted a Declaration of Independent Contractor Status Form. The Form provided that Claimant would operate as an independent contractor. Claimant would not receive Workers' Compensation benefits, was responsible for paying all federal and state income taxes and would furnish Workers' Compensation insurance for any workers hired by Noe Lopez Construction. Furthermore, on September 20, 2017 Claimant executed a Subcontractor Agreement with Employer. The document specified that Claimant was a subcontractor of Employer who would provide labor and materials at a rate of $9.00 per sheet of drywall.

16. The record reflects that Claimant also operated as an independent contractor. Respondents have proven that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the services performed. Claimant was also not required to work exclusively for Employer. Claimant received a 1099 miscellaneous tax form from Employer that identified Noe Lopez Construction and reflected nonemployee compensation of $12,252. Claimant used the 1099 form to prepare his 2017 Federal Income Taxes. He testified that the 1099 form did not represent all of his 2017 income because he also worked for another company. He noted that he earned approximately $900 per week in cash from the other entity. His total 2017 income was approximately $30,000-$40,000. Because Claimant earned approximately $20.00-$30,000 during 2017 working for another entity his income was not significantly dependent upon continued employment with Employer.

17. Claimant also identified himself as self-employed in his 2017 Federal Tax Return and claimed deductions for various business expenses. Claimant specifically took $3082 in deductions for truck expenses for traveling 5760 miles, $2250 for business insurance expenses, $2500 in work tool expenses and $360 for work phone expenses. Claimant's tax documents thus reflect that he used his truck, drywall tools and phone to earn approximately $900 each week as an independent contractor for another entity.

18. The record also reveals that Claimant was free from direction and control in the services he performed. Mr. Hess outlined the differences between the employees and independent contractors who work for Employer. He remarked that employees have a specific start and end time every day, submit timecards and are told when they can take lunch breaks. In contrast, Claimant was an independent contractor who did not have to report when he was coming to work or when he was taking a lunch break.

Moreover, Mr. Mulnix credibly explained that he awarded projects to Claimant and inspected the work upon completion. He did not work directly with Claimant and only saw him in the morning when he would arrive, possibly at lunchtime and at another two points during the day while completing his rounds. He detailed that Claimant was not required to be at the jobsite on specified days or times. Claimant could choose to work certain days and not work for Employer on others.

19. Employer did not establish a quality standard for Claimant's drywall work. Mr. Mulnix did not work with Claimant or oversee his work. He simply inspected the work upon completion to address project specifications.

20. Claimant's payment arrangement with Employer also reflects that he operated as an independent contractor with Employer. Although Claimant received compensation at the rate of $24.00 per hour, his Subcontractor Agreement with Employer specified that he would provide labor and materials at a rate of $9.00 per sheet of drywall. Mr. Hess noted that Employer originally planned to pay Claimant by sheet of drywall, but because he did not have a partner, he was asked to do "back out work." Mr. Hess remarked that back out work could only be calculated on an hourly basis. Claimant also submitted invoices to Employer for work performed. He issued the invoices in his trade name of Noe Lopez Construction. The invoices provided a description of the work, unit price and amount of requested payment.

21. Employer also did not provide training to Claimant about drywall installation. Claimant had significant drywall experience and did not require supervision of his work. He acknowledged that he has approximately 10 years of experience framing and installing drywall. Mr. Hess and Mr. Mulnix also confirmed that Employer did not provide Claimant or other independent contractors with any training.

22. Employer did not provide tools or benefits to Claimant. Although Employer furnished ladders and scaffolding to all independent contractors for purposes of safety and efficiency, Employer did not provide Claimant with tools to complete his work. Claimant testified that he owned drills, screwdrivers, laser devices, tool belts, tool bags, work clothes and work shoes that he used for work. He commented that he has to replace many power tools throughout the course of a year because they break and cost approximately $200-$400 each.

23. The record thus demonstrates that Claimant was an independent contractor. Claimant completed extensive paperwork prior to working for Employer in which he agreed to operate as an independent contractor under the tradename Noe Lopez Construction. Claimant's testimony and tax documents establish that he was customarily engaged in an independent trade regarding drywall services. Finally, balancing the statutory factors in §8-40-202(2) C.R.S. reflects that Claimant operated as an independent contractor while working for Employer. Accordingly, Respondents have proven that Claimant was an independent contractor when he suffered injuries on December 19, 2017 at Copper Leaf Apartments.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document.

5. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAP, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011).

6. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an

independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

7. As found, Respondents have proven by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S. Initially, Claimant completed paperwork in which he acknowledged that he was an independent contractor responsible for his own Workers' Compensation insurance. On September 22, 2017 Claimant submitted a Declaration of Independent Contractor Status Form. The Form provided that Claimant would operate as an independent contractor. Claimant would not receive Workers' Compensation benefits, was responsible for paying all federal and state income taxes and would furnish Workers' Compensation insurance for any workers hired by Noe Lopez Construction. Furthermore, on September 20, 2017 Claimant executed a Subcontractor Agreement with Employer. The document specified that Claimant was a subcontractor of Employer who would provide labor and materials at a rate of $9.00 per sheet of drywall.

8. As found, the record reflects that Claimant also operated as an independent contractor. Respondents have proven that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the services performed. Claimant was also not required to work exclusively for Employer. Claimant received a 1099 miscellaneous tax form from Employer that identified Noe Lopez Construction and reflected nonemployee compensation of $12,252. Claimant used the 1099 form to prepare his 2017 Federal Income Taxes. He testified that the 1099 form did not represent all of his 2017 income because he also worked for another company. He noted that he earned approximately $900 per week in cash from the other entity. His total 2017 income was approximately $30,000-$40,000. Because Claimant earned approximately $20.00-$30,000 during 2017 working for another entity his income was not significantly dependent upon continued employment with Employer.

9. As found, Claimant also identified himself as self-employed in his 2017 Federal Tax Return and claimed deductions for various business expenses. Claimant specifically took $3082 in deductions for truck expenses for traveling 5760 miles, $2250 for business insurance expenses, $2500 in work tool expenses and $360 for work phone expenses. Claimant's tax documents thus reflect that he used his truck, drywall tools and phone to earn approximately $900 each week as an independent contractor for another entity.

10. As found, the record also reveals that Claimant was free from direction and control in the services he performed. Mr. Hess outlined the differences between the employees and independent contractors who work for Employer. He remarked that employees have a specific start and end time every day, submit timecards and are told when they can take lunch breaks. In contrast, Claimant was an independent contractor who did not have to report when he was coming to work or when he was taking a lunch break. Moreover, Mr. Mulnix credibly explained that he awarded projects to Claimant and inspected the work upon completion. He did not work directly with Claimant and only saw him in the morning when he would arrive, possibly at lunchtime and at another two points during the day while completing his rounds. He detailed that Claimant was not required to be at the jobsite on specified days or times. Claimant could choose to work certain days and not work for Employer on others.

11. As found, Employer did not establish a quality standard for Claimant's drywall work. Mr. Mulnix did not work with Claimant or oversee his work. He simply inspected the work upon completion to address project specifications.

12. As found, Claimant's payment arrangement with Employer also reflects that he operated as an independent contractor with Employer. Although Claimant received compensation at the rate of $24.00 per hour, his Subcontractor Agreement with Employer specified that he would provide labor and materials at a rate of $9.00 per sheet of drywall. Mr. Hess noted that Employer originally planned to pay Claimant by sheet of drywall, but because he did not have a partner, he was asked to do "back out work." Mr. Hess remarked that back out work could only be calculated on an hourly basis. Claimant also submitted invoices to Employer for work performed. He issued the invoices in his trade name of Noe Lopez Construction. The invoices provided a description of the work, unit price and amount of requested payment.

13. As found, Employer also did not provide training to Claimant about drywall installation. Claimant had significant drywall experience and did not require supervision of his work. He acknowledged that he has approximately 10 years of experience framing and installing drywall. Mr. Hess and Mr. Mulnix also confirmed that Employer did not provide Claimant or other independent contractors with any training.

14. As found, Employer did not provide tools or benefits to Claimant. Although Employer furnished ladders and scaffolding to all independent contractors for purposes of safety and efficiency, Employer did not provide Claimant with tools to complete his work. Claimant testified that he owned drills, screwdrivers, laser devices, tool belts, tool bags, work clothes and work shoes that he used for work. He commented that he has to replace many power tools throughout the course of a year because they break and cost approximately $200-$400 each.

15. As found, the record thus demonstrates that Claimant was an independent contractor. Claimant completed extensive paperwork prior to working for Employer in which he agreed to operate as an independent contractor under the tradename Noe

Lopez Construction. Claimant's testimony and tax documents establish that he was customarily engaged in an independent trade regarding drywall services. Finally, balancing the statutory factors in §8-40-202(2) C.R.S. reflects that Claimant operated as an independent contractor while working for Employer. Accordingly, Respondents have proven that Claimant was an independent contractor when he suffered injuries on December 19, 2017 at Copper Leaf Apartments. *See Industrial Claim Appeals Office v. Softrock Geological Services, Inc*., 325 P.3d 560 (Colo. 2015) (whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant worked for Employer as an independent contractor.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 9, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

- Whether Respondents have proven by a preponderance of the evidence that Claimant's injuries from November 28, 2014 are not the result of a compensable work-related assault.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. On November 28, 2014, Claimant was assaulted outside Employer's premises near the back of the building. Claimant reported that he was performing his job duty of taking out garbage at the time and that he did not know his assailants.

2. Respondents admitted the claim and paid benefits based on Claimant's representations.

3. In this action, Respondents seek to withdraw their admission alleging that Claimant's assault was personal in nature and not work related.

4. Video surveillance taken the night of the assault from inside Employer's location shows three men enter the restaurant. All three sat at a table across from the cash register and looked into the back, by the kitchen, where Claimant was working. Within moments, Claimant approached the register and leaned toward the table where the three men were sitting. At that point, the three men immediately got up and walked out of the restaurant. Claimant then left the restaurant a few minutes later.

5. Claimant repeatedly reported that he was taking out Employer's trash when assailants assaulted him.

- At the hospital on November 28, 2014, Claimant reported to Investigator Robinson of the Arapahoe Sheriff's Office that he "was taking the trash out to the dumpsters behind the business."

- On December 2, 2014, Claimant reported to physicians at the Medical Center of Aurora that on November 28, 2014 "he went to take the trash out of the restaurant when 4 other males assaulted him."

- On December 4, 2014, Claimant reported to his counselor Nick Neujahr at Aurora Mental Health Center, that "during an evening shift at work last Friday 11/28/14, while he was taking out the trash, [Claimant] was attacked by four men who assaulted him severely."

- Also on December 4, 2014, Claimant told Investigator Johnston that he remembered taking the trash out and that he believed it was the four men in the store earlier that had attacked him.

- On December 11, 2014, Claimant's medical provider noted that Claimant stated he "continues to struggle with physical and interpersonal complications as the result of being attacked while taking the trash out at work two weeks ago."

- On December 15, 2014, Claimant reported to the authorized treating provider, OccMed Colorado, that "he was taking trash out from his workplace at [Employer's location] when he was apparently assaulted by four different individuals…"

- At the December 20, 2017 hearing, Claimant testified that he told the Investigator that he was taking out the trash.

6. Claimant testified inconsistently at hearing about taking out the trash.

- Claimant testified that his manager, Ben Reiners, told him to take the trash out.

- At another point, Claimant testified that there was "a mountain of trash in the back" and he told Mr. Reiners he was going to take out the trash.

- Claimant testified that Mr. Reiners usually "took out the trash with me, but for some reason he didn't that night."

- At another point, Claimant testified, "Ben never took out the trash with me."

- Mr. Reiners testified that he did not send Claimant to take out the trash or to clean up the trash area on November 28, 2014. He also testified that Claimant did not tell him he was going to the trash area. Mr. Reiners testified that he went to the back of the restaurant and noticed there were many dirty dishes. He asked the other worker if he had seen Claimant. The co-worker had not, so Mr. Reiners started looking around. He testified he saw a "commotion" at [a neighboring establishment] and asked an officer if Claimant was involved.

7. Videotape of Claimant leaving the restaurant establishes that Claimant did not take trash with him. The video from inside the restaurant on November 28, 2014 shows Claimant leaving the restaurant with empty hands. Moreover, Claimant walked within inches of a full trash can on the way out of the restaurant without removing the bag from the container to bring with him.

8. Investigator Johnston testified that she reviewed video of the assailants running away after the assault and identified them as the same three men who appeared in the restaurant video.

9. The ALJ finds that video evidence directly contradicts Claimant's reports to his treatment providers and Arapahoe County Sheriff's investigators that he was taking trash out at the time of the assault.

10. After Investigator Johnston directly confronted Claimant about having nothing in his hands when he left the restaurant, Claimant changed his story. He then claimed that he went out either to smoke a cigarette, to break down boxes, or to clean up around the trashcans.

11. Mr. Reiners testified that the employee smoking area was between Employer's restaurant and at [a neighboring establishment], not where the assault occurred. During the hearing, Mr. Reiners identified the smoking area on Respondents' Exhibit H. Mr. Reiners also identified the garbage area where the assault took place. The ALJ finds that the dumpster is not near the employee smoking area.

12. Claimant gave contradictory reports about whether he knew the assailants and whether they took money from him.

- An ambulance transported Claimant to the hospital. At the hospital, on November 28, 2014, Investigator Robinson interviewed Claimant. Claimant reported:
    - He saw his assailants loitering behind the store earlier in his shift;
    - The assailants might have been in the restaurant before;
    - He was unsure whether anything had been taken from him;
    - He had been assaulted one week earlier while working;[1]
    - "Every time he is attacked, it is always by a black person."
    - Investigator Robinson noted that Claimant had $260 in new twenty-dollar bills in his wallet and asked whether he was missing any money. Claimant answered that he did not know.
- On December 3, 2014, when Investigator Johnston first spoke with Claimant, Claimant reported that he "really doesn't recall what happened other than [his assailants] trying to kill him." He also told the investigator that he "didn't really know if that was true, because that is what he had been told." Claimant's mother told the investigator she was nervous that whoever assaulted Claimant was someone Claimant knew.

[1] Claimant's mother told Investigator Robinson that no such event had occurred.

- On December 4, 2014, Claimant told Investigator Johnston that right before the assault, "four guys came into the [restaurant] and were "mean mugging" him.[2]

13. Having reviewed the videotapes, the ALJ finds that the three assault suspects appear to be looking specifically for Claimant.

14. Prior to the assault, Claimant had been treating with Nick Neujahr, his psychological therapist at the Aurora Mental Health Center for psychotherapy related to anxiety, paranoia, and depression. On December 4, 2014, –one or two hours before he first met with Investigator Johnston –Claimant attended an appointment with Mr. Neujahr. Mr. Neujahr's contemporaneous notes record Claimant stating that while he was taking out the trash at work, four men attacked and assaulted him. Claimant told Mr. Neujiahr that he vaguely knew the four men from approximately two years before when he assisted them in purchasing marijuana with his medical marijuana card.

- Mr. Neujahr confirmed at hearing that his report from December 4, 2014 was an accurate account of Claimant's statements made to him on December 4, 2014. As Claimant's counselor, Mr. Neujahr opined that Claimant did not appear to have any recall issues at the time he provided these statements nor did he believe Claimant was being deceptive.

- Mr. Neujahr testified that during their December 4, 2014 session, Claimant also stated that he suspected they attacked him because of his association with a friend of his who was in jail. Mr. Neujahr testified that Claimant's statements to him regarding the assailants never changed.

- Mr. Neujahr also testified that Claimant stated that he thought the assailants were rivals of a gang that he had been involved with years before. Claimant, however, testified that he had "never been in a gang in his whole life," and that he never told Mr. Neujahr that he had been.

15. The ALJ finds Mr. Neujahr credible and persuasive. The ALJ finds that, Claimant likely told Mr. Neujahr, as Claimant's therapist, things that he might not have told others. The ALJ finds that Claimant admitted to Mr. Neujahr that he knew his assailants and that they attacked him for personal reasons unrelated to work.

16. Claimant has a history of using and selling illicit drugs. Medical records document amphetamine abuse, cannabis abuse, heroin addiction, and "other substance-induced psychotic disorder with delusions." In 2006, Claimant was hospitalized after a suicide attempt. He reported to his provider that his main problem was "nightly dreams about his life as a drug dealer and user." His provider described him as having "severe and chronic drug addiction problems," and noted that Claimant had sold his bottle of

[2] The Online Slang Dictionary defines "mugging" when used as a verb, to mean, "To stare at a person in an aggressive way."

Adderall when last prescribed. The provider also noted that Claimant appeared to "like the rush" he got selling meth and buying alcohol for his underage friends.

17. Claimant testified that at the time of the assault he was receiving Methadone for a heroin addiction and was using recreational marijuana, which medical records support.

18. On December 2, 2014, Claimant presented at The Medical Center of Aurora. He reported that his "home medications" included oxycodone and Methadone. Claimant "is very clear about not wanting to stay in the hospital. He states he wants to go home and smoke a cigarette and have a blunt.[3]"

19. Claimant testified he had sold drugs in the past, but denied selling anything other than marijuana. Claimant's testimony was contrary to medical records documenting him selling his prescription Adderall and "meth."

20. Claimant admitted on cross-examination that he "jacked"[4] some people when he was selling drugs. He testified that one of them later confronted him, they fought, and he broke the person's nose.

21. Benjamin Reiners, general manager at the restaurant where Claimant was working, testified he had concerns that Claimant was using drugs at work. He testified that shortly before the assault, he observed Claimant in the back of the restaurant with a piece of foil inhaling something through a straw. Mr. Reiners testified he confronted Claimant who said, "It's not crack." Mr. Reiners told Claimant he could be fired for using drugs at work and that Claimant could not do that on work property.

22. Claimant denied that the incident of inhaling a substance through a straw occurred. He accused Mr. Reiners of making up the incident. He also accused a co-employee of making stories up about his drug use and testified the co-employee "was suspended for defamation of character." Claimant offered no persuasive evidence to support his version of the events.

23. Investigator Johnston testified that when she told Claimant that the video showed him leaving the restaurant without trash, Claimant volunteered, without any questioning on the subject, "This was not a drug deal." Her investigative report notes Claimant told her: "He knows I think this is a drug deal gone badly because of his past." "ALLEN brought this up on his own at no time did I ask him if this was a drug deal."

24. Medical providers have diagnosed Claimant with a number of mental health issues.

- Claimant carries diagnoses of non-specific mood disorder, mild mental retardation, and several substance addictions.

[3] "Blunt" is slang for a large marijuana cigarette.

[4] The Online Slang Dictionary defines "jack" when used as a verb, to mean, "injured."

- In October 2006, a medical provider at Kaiser Permanente diagnosed Claimant with schizoaffective disorder – Bi-polar type.

- Claimant reported struggling with rage episodes and that he could go from "being in a good mood to…fights…threatening people…"

- He reported anxiousness that made him "want to punch someone," and that he was worried about "exploding from stress."

25. Claimant testified that he has been on social security insurance (SSI) since he was ten years old and medical records from one month prior to the assault show he was receiving SSI at that time. While neither party presented evidence identifying what qualified Claimant for this benefit, the ALJ notes that prior to the November 28, 2015 assault, providers had diagnosed Claimant with a number of mental health issues.

26. Claimant exhibited paranoia after the assault.

- Claimant testified that after the assault he became paranoid of black people.

- Claimant testified, "Every time I went out, I took my smartphone out, and everybody that was black, and I thought was an – attempted assailant – I videotaped for my detective."

- He was convinced that black men who visited his neighbor were his assailants, and later that black men in another restaurant were his assailants.

- In both instances, Claimant called the investigator assigned to his case and reported that he had found his assailants.

- Claimant left a phone message for Investigator Johnston advising her that "he has been having his friend JOSH drive him around with a loaded weapon" in search of his assailants.

27. Claimant's prior psychotherapist at Aurora Mental Health Center, Nick Neujahr, testified that, in his professional opinion, the assault did not significantly affect Claimant's cognitive ability.

28. Claimant inconsistently reported whether and how much cash the assailants took from him during the assault.

- At the hospital, on November 28, 2014, Claimant told Investigator Robinson that he did not know whether he was missing any cash. According to Investigator Robinson's notes, Claimant had $260 in his wallet at the hospital the night of November 28, 2014.

- Investigator Johnston noted that Claimant later reported $400 missing following the assault. Then Claimant increased the missing amount to $500.

- Investigator Johnston testified Claimant reported that during the assault, he told the assailants that he had $500 and they should take it and leave him alone.

29. Claimant testified that he had an ACE Cash Express loan, that "if not paid the day it was due, they will garnish the whole lump sum that you owe." Claimant testified that the loan was due on November 28, 2014, and that he drew down his account to prevent ACE from garnishing his account.

30. Respondents admitted to an average weekly wage of $319.19. Claimant testified Employer paid him every two weeks. This would amount to a paycheck of approximately $638.38.

31. Investigator Johnston testified that a scenario in which assailants beat and robbed a person of $240, leaving the person with $260, did not make sense. She testified further that a scenario where the assailants took no money and just beat Claimant also did not make sense. "Usually there's a reason why people get assaulted or beat up." Investigator Johnston determined after investigating the assault that Claimant's story lacked credibility.

32. The ALJ finds it highly unlikely that Claimant had $500 in his wallet before the assault and $260 after the assault. The ALJ finds it highly unlikely that the assailants took part but not all of Claimant's money.

33. The ALJ finds Claimant's testimony concerning the circumstances of the assault not credible. Video evidence directly contradicts Claimant's reports to medical providers and criminal investigators that he was taking trash out when assaulted. . Additionally, the ALJ not credible Claimant's alternative stories that he instead went out to smoke a cigarette, or went to the garbage area to break down boxes, or to clean up trash. Additionally, Claimant's supervisor directly contradicted Claimant's story that his supervisor asked him to take the trash out or told him to pick up trash at the dumpster.

34. The ALJ finds Investigator Johnston, Mr. Neujahr and Mr. Reiners to be more credible and persuasive than testimony or evidence to the contrary.

35. The ALJ further finds that Respondents filed an admission in this case based upon Claimant's representations to his medical providers that he was performing the work-related task of taking out the trash when unknown assailants assaulted him.

36. Respondents later discovered that Claimant had contemporaneously reported to Mr. Neujahr, his personal psychotherapist, that he vaguely knew his assailants either from a drug deal, in association with a friend, or a rival gang. The ALJ finds the video evidence supports a finding that Claimant knew his assailants. It appears the three men on the video, who Investigator Johnston identified by as the assailants, came into

Employer's restaurant looking specifically for Claimant, as they were looking into the back by the kitchen while sitting at the table. Video evidence shows the three men left the restaurant immediately upon Claimant leaning toward them. Moreover, the video evidence shows Claimant left the restaurant a short time later with nothing in his hands, despite his reports to medical providers and police investigators that he was taking out the trash.

37. The ALJ finds the video evidence of the circumstances surrounding this claim to be persuasive.

38. The ALJ finds that Respondents have proven by a preponderance of the evidence that Claimant's November 28, 2014 injury was a personal assault and not a work-related, compensable incident.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Generally

The purpose of the Workers' Compensation Act (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

Compensability - Assaults

For an injury to be compensable, it must arise out of and in the course of the employment. An accident "arises out of" employment when there is a causal connection

between the work conditions and the injury. *Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965).

Assaults in Colorado workers' compensation claims have been divided into three different categories: (1) assaults that result from the duties of the job (i.e., inherently work related); (2) assaults that are personal in nature or due to a personal dispute or connection (inherently non-work related); and (3) neutral assaults where "nothing connects it with the victim privately; neither can it be shown to have a specific employment origin" (deemed to be work related). *See In re Question by the U.S. Court of Appeals for the Tenth Cir.*, 759 P.2d 17 (Colo. 1988).

Withdrawal of Admissions

Section 8-43-201, C.R.S. generally establishes the burden of proof in disputes arising under the Workers' Compensation Act. It provides, in pertinent part, that:

> A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; a workers' compensation case shall be decided on its merits; and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

Thus, under the provisions of section 8-43-201(1), the party seeking to modify an issue already determined by a general or final admission shall bear the burden of proof (a preponderance of the evidence) for any such modification. *Rodriguez v. City of Brighton,* W.C. No. 4-782-516 (I.C.A.O., Aug. 23, 2011). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Where a claimant files a timely objection to a final admission, then the admitted issues remain open, and respondents may seek a withdrawal of the final admission. *Fausnaucht v. Inflated Dough, Inc.* W.C. No. 4-160-133 (I.C.A.O., July 20, 1999). There being no issue raised indicating the objection to the admission was not timely, the ALJ infers that the parties concede this issue. Respondents carry the burden of establishing that there was no compensable injury on November 28, 2014.

However, where a claimant supplied materially false information upon which his employer and its insurer relied in filing an admission of liability, the admission is *void ab initio* and is therefore withdrawn retroactively. *Vargo v. Colo. Indus. Comm'n*, 626 P.2d 1164 (Colo. App. 1981).

As found above, Respondents initially filed an admission based on the assault being neutral in character as Claimant reported that he was taking out the trash and did not know the assailants. As further found, however, Respondents have established by a preponderance of the evidence that Claimant's November 28, 2014 assault was personal in nature, and was not work-related. *See In re Question by the U.S. Court of Appeals for the Tenth Cir.*, 759 P.2d 17 (Colo. 1988). As such, Claimant did not sustain a compensable injury arising out of and in the course of his employment with the employer on November 28, 2014. *Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965).

Based on substantial evidence and reasonable inference, the ALJ finds that Respondents admission of liability relied upon Claimant's misrepresentation that he was performing a work duty, in this case taking out the trash, when he was assaulted by unknown assailants who were trying to rob him. The ALJ finds that that Claimant's representation was materially false as detailed in the findings of fact above, as such, the admission in this claim is *void ab initio*. *Vargo v. Colo. Indus. Comm'n*, 626 P.2d 1164 (Colo. App. 1981).

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Respondents have proven by preponderance of the evidence that the assault on Claimant on November 28, 2014 was a personal assault, which did not result in a compensable injury.

2. Respondents have also proven by a preponderance of the evidence that their admission in this claim was filed pursuant to materially false information provided by Claimant. As such, the admission in this claim is hereby *void ab initio*.

3. The claim is denied and dismissed with prejudice.

DATED this 14th day of August 2018.

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge

This decision of the Administrative Law Judge is final, unless a Petition to Review this decision is filed within twenty (20) days from the date of this decision is mailed. Section 8-43-301(2), C.R.S. The Petition to Review must be filed with the Office of Administrative Courts, 1525 Sherman Street 4th Floor, Denver, Colorado 80203. For statutory reference, see §8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. A Petition to Review form may be accessed at: http://www.colorado.gov/oac/appeals.

ISSUES

The issues raised by Claimant were reasonable and necessary medical benefits and average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant was born on July 23, 1975, and was 42 years of age at the time of the hearing. Claimant was employed at Employer as a certified nursing assistant.

2. On November 24, 2016, Claimant sustained a compensable industrial injury to her low back in the course and scope of her employment. The incident occurred when Claimant and a nurse lifted a patient into a wheelchair. Claimant felt the muscle in her middle to lower back on the right side "tear."

3. Claimant reported the incident and Concentra in Ft. Collins became her authorized treating physicians. Claimant was initially seen on November 25, 2016, at Concentra by Amber Payne, PA-C. Based upon Claimant's complaints and findings on physical examination, Claimant was diagnosed with a lumbar strain.

4. Review of Claimant's pain diagrams beginning November 25 and continuing through December 20, 2016, demonstrates Claimant only indicated symptoms on the right side of her mid to lower back. Beginning January 5, 2017, Claimant's pain diagram reflected pain in her right heel and, beginning March 5, 2017, Claimant reported right hamstring pain.

5. Claimant was referred for an orthopedic surgical evaluation by William D. Biggs, M.D. This took place on July 20, 2017. Claimant complained of bilateral leg pain which she claimed started following her work related injury. Claimant claimed her symptoms were consistent and progressive for the past eight months. Despite Claimant's complaints, the physical examination showed motor strength of 5/5 of all lower extremity muscle groups although on the right side she had decreased motor strength at approximately 4/5. Dr. Biggs found Claimant was neurovascularly intact with normal reflexes and had a normal appearing gait. Dr. Biggs' assessment/diagnosis was lumbar disc degeneration with stenosis. It was Dr. Biggs opinion based upon clinical examination as well as imaging reviews Claimant does not have a surgical lesion.

6. Claimant obtained a referral to Douglas W. Beard, M.D. for a second surgical opinion. Dr. Beard evaluated Claimant on August 16, 2017. Dr. Beard noted that in late December, Claimant had a secondary injury to her lumbar spine again lifting. Claimant reported that the secondary injury exacerbated and aggravated her low back pain. Claimant did not file a workers' claim for compensation for the subsequent intervening event.

7. Claimant complained to Dr. Beard of right leg pain present from the buttock all the way down to her heel. There is no medical record support of this claim from her authorized treating physician through June 2, 2017.

8. Despite Claimant's complaints of symptomatology, Dr. Beard and Dr. Biggs noted that Claimant's gait was normal. Dr. Beard noted that Claimant had a significant amount of somatization going on with her widened myriad complaints.

9. Dr. Beard interpreted Claimant's MRI showing degenerative disc disease. Dr. Beard did not have a reasonable medical explanation for Claimant's significant complaints. Dr. Beard opined that Claimant is not a good surgical candidate and Claimant's surgical outcome, based on her presentation, will be rather guarded. Dr. Beard warned Claimant that any type of surgical intervention presented significantly high potential risks of poor outcomes

10. Claimant underwent an Independent Medical Examination with Kathleen D'Angelo, M.D. on September 27, 2017. Dr. D'Angelo was offered and accepted as a medical expert in Occupational Medicine, Level II Accredited. Dr. D'Angelo reviewed all of Claimant's medical records. Dr. D'Angelo opined Claimant's diagnosis of degenerative disc disease with disc protrusion is not consistent with her examination findings or her EMG/NCV results. Dr. D'Angelo's medical opinion of Claimant's condition was lumbar strain for which Claimant reached MMI without impairment or permanent work restrictions. Dr. D'Angelo opined Claimant's MRI findings are incidental to and predate the Claimant's industrial injury. Dr. D'Angelo's opinions are credible and persuasive.

11. Claimant obtained a referral for a third surgical opinion from Michael Janssen, M.D. on December 5, 2017. Dr. Janssen's physical examination demonstrated that Claimant had no palpable muscle spasm, normal spinal contour, normal sensation and gross motor examination was within normal limits. Dr. Janssen opined that Claimant has a condition suggestive of a disc compression.

12. Dr. Janssen recommended a microscopic hemilaminotomy, partial discectomy, nerve root decompression at the L4-5 and L5-S1 levels to make more anatomical and physiological room for the nerve. Dr. Janssen's opinions are found to lack credibility and are unpersuasive.

13. During his deposition, Dr. Janssen testified the recommended surgery is an option and whether or not that helps the patient is variable. Dr. Janssen could not explain the cause of Claimant's problems.

14. After Dr. Janssen recommended surgery, Dr. D'Angelo was asked to perform a WCRP, Rule 16 evaluation. This occurred on December 18, 2017. Dr. D'Angelo opined Dr. Janssen's request for surgical authorization should be denied. Dr. D'Angelo relied on the fact that Claimant had symptoms which changed and metastasized over her treatment course. Dr. D'Angelo noted that Dr. Janssen

represents the third spinal surgeon consulted by Claimant when the prior surgical opinions were that Claimant was not a surgical candidate.

15. Dr. D'Angelo noted that Claimant exhibited physical agility which was inconsistent with Claimant's claim of pain and limitation seen in medical records. Dr. D'Angelo's observations made the doctor strongly recommend against future invasive procedure.

16. Claimant was evaluated by board certified Orthopedic Surgeon, Brian Reiss, M.D. on February 7, 2018. Dr. Reiss reviewed the MRI scans and Claimant's medical records. Dr. Reiss disagreed with Dr. Janssen surgical recommendation. Dr. Reiss was of the opinion Claimant sustained a lumbar strain at work. Dr. Reiss recommended no further injections in light of the lack of MRI findings and opined that decompression surgery for Claimant would be unlikely to have a positive effect on Claimant's low back or her lower extremity symptoms. Dr. Reiss' expert opinions were also found to be credible and persuasive.

17. It is specifically found Claimant failed to meet her burden of proof to establish by a preponderance of the evidence that the surgical procedure recommended by Dr. Janssen is reasonable and necessary to cure or relieve the effects of the work injury of the November 24, 2016, industrial injury.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions, the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

4. Claimant seeks an order finding that Dr. Janssen's recommendation for surgery is reasonably necessary and related medical treatment which Respondents should be ordered to authorize. Respondents contend that, based on the opinions of numerous experts, Dr. Janssen's recommendation for surgery is not reasonably necessary or related medical treatment and Respondents should not be ordered to authorize this treatment.

5. It is concluded the expert medical opinions of Drs Reiss, D'Angelo, Biggs and Beard are more credible and more persuasive than the opinions of Dr. Janssen. It is concluded that Claimant failed to meet her burden of proof by a preponderance of the evidence that the surgical procedure recommended by Dr. Janssen is reasonable and necessary medical treatment.

AWW

6. Claimant contends that her AWW should be increased based on the cost to her of COBRA. The issue of AWW was added for consideration at hearing by a February 27, 2018, prehearing order of a prehearing administrative law judge. At the prehearing conference, Respondents' counsel did not object to the addition of AWW as an issue. At hearing and in a post hearing position statement, Respondents make no argument regarding Claimant's entitlement to increased AWW.

7. At hearing Claimant offered testimony regarding her health insurance. She testified that while employed by Employer, Claimant had health insurance. She testified that her health insurance was cancelled on December 31, 2017. Claimant testified that her health insurance covered her spouse. Claimant further testified that on December 23, 2017, she received a letter regarding her medical and dental insurance. Claimant submitted as an exhibit, "Exhibit 1," designated by Claimant as the "General Admission dated February 23, 2017." Attached to Exhibit 1 are wage records for Claimant for the period July 22, 2016, through January 4, 2017. The wage records contain no information regarding the cost of health insurance. The handwritten notations on the wage records concern AWW and temporary total disability rates. Testimony at hearing was not offered regarding Exhibit 1 or the notations on Exhibit 1.

8. Claimant failed to prove by a preponderance of the evidence that she is entitled to increased AWW or the amount of that increase. While it appears that this issue is uncontested, Claimant has the burden of proof to establish entitlement to increased AWW and the amount of that increase. The wage records and Claimant's testimony do not establish evidence regarding the COBRA increase. Claimant's argument in her

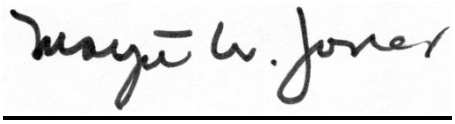
closing statement does not point to evidence presented at hearing regarding Claimant's AWW or the COBRA increase. In closing, Claimant argues generally that the law permits increasing AWW by the amount of the cost of COBRA and that therefore Claimant's AWW should be increased. Without more, the ALJ does not have substantial evidence to support a finding regarding increased AWW.

ORDER

1. Claimant's request for surgery, as recommended by Dr. Janssen, is denied and dismissed.

2. Claimant's claim for increased AWW is denied and dismissed.

Dated: August 14, 2018



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable Workers' Compensation injury when he was bitten by a bug while working for Employer on August 15, 2015.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his industrial injuries.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period August 17, 2018 until terminated by statute.

4. Whether Claimant's claim is barred by the two-year statute of limitations in §8-43-103(2), C.R.S.

FINDINGS OF FACT

1. Employer is a city located in Colorado. Claimant worked for Employer at its waste processing plant.

2. Claimant testified that on August 15, 2015 he was cleaning the screens in Employer's treatment plant when he experienced a sudden, sharp pain in his left forearm. He noticed a red spot on the site and cleaned the area with hand sanitizer. Claimant believed he had been bitten by an insect, mosquito or spider but never identified a culprit.

3. On August 17, 2017 Claimant visited Loran David Sherwood, M.D. for an evaluation. Dr. Sherwood completed a Physician's Report of Workers' Compensation Injury. Claimant reported that he had not been feeling well since he was bitten by an insect on August 15, 2017 while working for Employer at a treatment plant. He specifically noted that he had been suffering fever, chills and fatigue over the previous two days. Dr. Sherwood remarked that claimant had not been suffering any headaches, back pain or myalgias. After conducting a physical examination Dr. Sherwood determined that Claimant's symptoms were most likely the result of a viral infection. Although Dr. Sherwood remarked that he could not rule out West Nile virus, the condition "would be uncommon at the elevation of the waste water treatment plant." He thus ordered blood testing for West Nile virus.

4. On August 20, 2017 Insurer issued a letter to Claimant. The document specified that its purpose was to provide Claimant "with important information about [his] Workers' Compensation claim."

5. On August 20, 2017 Claimant returned to Dr. Sherwood for an evaluation. Dr. Sherwood noted that Claimant presented for "follow-up on the presumed viral illness that developed after being bitten by a mosquito" while working at Employer's water treatment plant. He remarked that Claimant's fever had resolved and he was feeling "somewhat better." Dr. Sherwood stated that he was still waiting for the results of the West Nile virus test. He maintained that Claimant's symptoms were most likely the result of a viral infection. Although Dr. Sherwood remarked that he could not rule out West Nile virus, he reiterated that the condition "would be uncommon at the elevation of the waste water treatment plant."

6. On September 9. 2015 Respondents filed a Notice of Contest challenging Claimant's claim for compensation with the Division of Workers' Compensation. The Notice specified that Respondents planned to conduct further investigation into the claim.

7. On September 20, 2015 Claimant received a letter from the Division of Workers' Compensation. The letter explained that Claimant's Workers' Compensation claim had been denied and he should have received a Notice of Contest stating the reason for the denial. The letter provided that Claimant could challenge the denial by requesting a hearing before an Administrative Law Judge.

8. On December 21, 2015 Claimant visited William Lockwood, M.D. for an infectious disease follow-up. Dr. Lockwood remarked that Claimant had been suffering episodic fevers and fatigue since August 2015. However, a temperature diary revealed that Claimant had not experienced any fevers within the preceding week. Claimant reported new symptoms that included pain in his right knee and both feet. Dr. Lockwood diagnosed Claimant with chronic fatigue. He noted that Claimant "lacked many other symptoms and we are unable to make an initial diagnosis." Claimant had completed testing for lymphoma, TB and CMV but all results were negative. Claimant's testing and evaluation for West Nile virus were also negative.

9. On January 25, 2016 Claimant returned to Dr. Sherwood for an examination. Dr. Sherwood commented that Dr. Lockwood had not found anything related to an infectious disease that would cause the development of Claimant's symptoms after an insect bite while working at a treatment plant on August 15, 2015. He noted that an Epstein-Barr Virus (EBV) tier was positive, but was "not convinced" that Claimant's symptoms were secondary to an EBV infection. Dr. Sherwood explained that he discussed with Claimant that "there appears to be a clear correlation with the onset of his symptoms and wastewater plant." However, he cautioned that "obviously that does not prove causation, but does make it suspicious." Dr. Sherwood summarized that "we do not have a clear etiology for his symptoms at this point."

10. On January 23, 2018 Claimant filed an Application for Hearing. He sought a determination of compensability regarding the August 15, 2015 incident. Claimant also requested medical benefits and Temporary Total Disability (TTD) benefits.

11. On June 4, 2018 Gabriela Kaufman, M.D. performed a records review of Claimant's claim. She considered Claimant's mechanism of injury, symptoms, diagnostic

testing and medical treatment. Dr. Kaufman remarked that Claimant developed fever, chills, night sweats, fatigue, a swollen left neck lymph node and right knee pain after August 15, 2015. Although Claimant may have suffered a viral infection, there was no definitive diagnosis. Claimant did not meet the criteria for chronic fatigue syndrome because his symptoms have not existed in excess of six months. In assessing causation, Dr. Kaufman reasoned that "it would be very difficult to tie his symptoms to the alleged insect bite" because no insect was seen and there is no established diagnosis. Furthermore, she commented that the lack of a definitive diagnosis "makes the prognosis more difficult to establish." Dr. Kaufman remarked that, because Claimant has not suffered any more fevers and his lab tests were normal, he did not require a work-up or medications.

12. Claimant's claim is not barred by the two-year statute of limitations in §8-43-103(2), C.R.S. Section 8-43-103(2), C.R.S. provides that a claim for Workers' Compensation is barred unless a notice claiming compensation is filed within two years of the injury. The record reveals that Claimant realized he may have suffered a Workers' Compensation injury from an insect bite when he sought medical treatment with Dr. Sherwood on August 17, 2015. However, the record is replete with evidence that the Division of Workers' Compensation was apprised of Claimant's claim within two years of August 17, 2015.

13. On August 20, 2015 Insurer notified Claimant that he had initiated a Workers' Compensation claim. On September 9. 2015 Respondents filed a Notice of Contest challenging Claimant's claim for compensation with the Division of Workers' Compensation. The Notice specified that Respondents planned to conduct further investigation into the claim. On September 20, 2015 the Division of Workers' Compensation informed Claimant that his Workers' Compensation claim had been denied and he should have received a Notice of Contest stating the reason for the denial. The letter provided that Claimant could challenge the denial by requesting a hearing before an Administrative Law Judge. The record thus contains significant evidence that the Division of Workers' Compensation was aware of Claimant's claim and that Respondents had denied liability. Accordingly, the two year statute of limitations in §8-43-103(2), C.R.S. does not preclude Claimant's request for Workers' Compensation benefits.

14. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable Workers' Compensation injury when he was bitten by a bug while working for Employer on August 15, 2015. Initially, on August 15, 2015 Claimant was cleaning the screens in Employer's treatment plant when he experienced a sudden, sharp pain in his left forearm. He noticed a red spot on the site and cleaned the area with hand sanitizer. Claimant believed he had been bitten by an insect, mosquito or spider. He subsequently developed a fever, chills and fatigue. There was thus a close temporal proximity between Claimant's insect bite and the development of symptoms. However, it is speculative to infer a causal connection between Claimant's insect bite and symptoms.

15. The medical records reflect that Claimant has undergone significant diagnostic testing and physicians have been unable to develop a plausible diagnosis for

his symptoms. Dr. Sherwood initially determined that Claimant's symptoms were most likely the result of a viral infection. Although Dr. Sherwood remarked that he could not rule out West Nile virus, the condition "would be uncommon at the elevation of the waste water treatment plant." Dr. Lockwood subsequently diagnosed Claimant with chronic fatigue. He noted that Claimant "lacked many other symptoms and we are unable to make an initial diagnosis." Claimant completed testing for lymphoma, TB and CMV but all results were negative. Claimant was also tested and evaluated for West Nile virus but all results were negative. In a subsequent evaluation Dr. Sherwood explained that "there appears to be a clear correlation with the onset of his symptoms and wastewater plant." However, he cautioned that "obviously that does not prove causation, but does make it suspicious." Dr. Sherwood summarized that "we do not have a clear etiology for his symptoms at this point." Finally, in assessing causation, Dr. Kaufman reasoned that "it would be very difficult to tie his symptoms to the alleged insect bite" because no insect was seen and there is no established diagnosis. Furthermore, she commented that the lack of a definitive diagnosis "makes the prognosis more difficult to establish." The record thus reflects that physicians were uncertain about the diagnosis and treatment for Claimant. Although Claimant's symptoms arose after the performance of a job function, he has not established a causal relationship. The coincidental correlation between Claimant's work activities and symptoms is insufficient to create a causal connection between his episodic symptoms and work activities. Accordingly, Claimant's Workers' Compensation claim is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Statute of Limitations

4. Section 8-43-103(2), C.R.S. provides, in relevant part, that "the right to compensation and benefits provided by said articles shall be barred unless, within two years after the injury … , a notice claiming compensation is filed with the division." The statute of limitations begins to run when the claimant, as a reasonable person, should have recognized the nature, seriousness, and probable compensable character of the industrial injury. *Intermountain Rubber Industries v. Valdez*, 688 P.2d 1133 (Colo. App. 1984). The claimant, as a reasonable person, must recognize that the injury is sufficiently serious that it entitles him to compensation benefits under the Act. *City of Colorado Springs v. Industrial Claim Appeals Office,* 89 P.3d 504 (Colo. App. 2004). Moreover, the "seriousness" of the injury refers to the claimant's recognition of the "gravity of the medical condition." *Finkenbinder v. Jefferson County Government,* W.C. No. 4-661-714 (ICAP July 13, 2006). The question of when a claimant, recognized the nature, seriousness and probable compensable character of the injury is one of fact for determination by the ALJ. *Id.*

5. As found, Claimant's claim is not barred by the two-year statute of limitations in §8-43-103(2), C.R.S. Section 8-43-103(2), C.R.S. provides that a claim for Workers' Compensation is barred unless a notice claiming compensation is filed within two years of the injury. The record reveals that Claimant realized he may have suffered a Workers' Compensation injury from an insect bite when he sought medical treatment with Dr. Sherwood on August 17, 2015. However, the record is replete with evidence that the Division of Workers' Compensation was apprised of Claimant's claim within two years of August 17, 2015.

6. As found, on August 20, 2015 Insurer notified Claimant that he had initiated a Workers' Compensation claim. On September 9. 2015 Respondents filed a Notice of Contest challenging Claimant's claim for compensation with the Division of Workers' Compensation. The Notice specified that Respondents planned to conduct further investigation into the claim. On September 20, 2015 the Division of Workers' Compensation informed Claimant that his Workers' Compensation claim had been denied and he should have received a Notice of Contest stating the reason for the denial. The letter provided that Claimant could challenge the denial by requesting a hearing before an Administrative Law Judge. The record thus contains significant evidence that the Division of Workers' Compensation was aware of Claimant's claim and that Respondents had denied liability. Accordingly, the two year statute of limitations in §8-43-103(2), C.R.S. does not preclude Claimant's request for Workers' Compensation benefits.

Compensability

7. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re*

Swanson, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

8. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

9. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

10. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable Workers' Compensation injury when he was bitten by a bug while working for Employer on August 15, 2015. Initially, on August 15, 2015 Claimant was cleaning the screens in Employer's treatment plant when he experienced a sudden, sharp pain in his left forearm. He noticed a red spot on the site and cleaned the area with hand sanitizer. Claimant believed he had been bitten by an insect, mosquito or spider. He subsequently developed a fever, chills and fatigue. There was thus a close temporal proximity between Claimant's insect bite and the development of symptoms. However, it is speculative to infer a causal connection between Claimant's insect bite and symptoms.

11. As found, the medical records reflect that Claimant has undergone significant diagnostic testing and physicians have been unable to develop a plausible diagnosis for his symptoms. Dr. Sherwood initially determined that Claimant's symptoms were most likely the result of a viral infection. Although Dr. Sherwood remarked that he could not rule out West Nile virus, the condition "would be uncommon at the elevation of the waste water treatment plant." Dr. Lockwood subsequently diagnosed Claimant with chronic fatigue. He noted that Claimant "lacked many other symptoms and we are unable

to make an initial diagnosis." Claimant completed testing for lymphoma, TB and CMV but all results were negative. Claimant was also tested and evaluated for West Nile virus but all results were negative. In a subsequent evaluation Dr. Sherwood explained that "there appears to be a clear correlation with the onset of his symptoms and wastewater plant." However, he cautioned that "obviously that does not prove causation, but does make it suspicious." Dr. Sherwood summarized that "we do not have a clear etiology for his symptoms at this point." Finally, in assessing causation, Dr. Kaufman reasoned that "it would be very difficult to tie his symptoms to the alleged insect bite" because no insect was seen and there is no established diagnosis. Furthermore, she commented that the lack of a definitive diagnosis "makes the prognosis more difficult to establish." The record thus reflects that physicians were uncertain about the diagnosis and treatment for Claimant. Although Claimant's symptoms arose after the performance of a job function, he has not established a causal relationship. The coincidental correlation between Claimant's work activities and symptoms is insufficient to create a causal connection between his episodic symptoms and work activities. Accordingly, Claimant's Workers' Compensation claim is denied and dismissed.

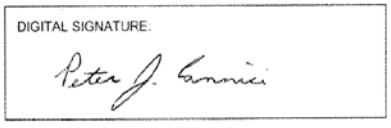
ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's Workers' Compensation claim is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 16, 2018.



Peter J. Cannici
Administrative Law Judge

Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to conversion of her right upper extremity impairment rating to a whole person impairment rating.

FINDINGS OF FACT

1. Claimant is a 54-year-old woman who has worked for Employer as a transportation officer for approximately 12 years. Claimant is responsible for transporting inmates to and from a facility. Claimant's work is below shoulder level.

2. Claimant suffered an admitted industrial injury to her right shoulder and left knee on July 1, 2016. Claimant slipped on stairs while attempting to exit a bus, hit her left knee, and pulled her right arm while holding onto an overhead handle. Following her injury, Claimant was referred to Workwell Occupational Medicine and Paul Ogden, M.D. for medical treatment.

3. Claimant underwent a right shoulder MRI on July 27, 2016, which revealed rotator cuff tendinosis with a partial thickness tear near the distal insertion, as well as tendon retraction and degenerative changes to the humeral head.

4. Claimant underwent surgery with Michael Hewitt, M.D. on January 10, 2017. The surgery consisted of an arthroscopic subacromial decompression, distal clavicle co-planing, superior labral debridement, and rotator cuff debridement.

5. Dr. Ogden placed Claimant at maximum medical improvement ("MMI") on June 7, 2017. On examination, Dr. Ogden noted there was no tenderness to palpation of the humerus, clavicle, scapula, AC joint or remainder of the shoulder, and that shoulder strength was otherwise normal. He noted Claimant was back to full duty work with some ongoing stiffness of the shoulder. Using the AMA Guides, Dr. Ogden provided 2% whole person impairment for right shoulder loss of motion, and 2% whole person impairment for left knee chondromalacia, combining for a 6% whole person impairment. Dr. Ogden released claimant to return to her regular duty with no restrictions and recommended Claimant have access to Dr. Hewitt for one to two visits over the course of the next year, if necessary, and medications.

6. Respondents filed a Final Admission of Liability based on Dr. Ogden's MMI report. Claimant challenged Dr. Ogden's impairment rating and sought a Division IME.

7. John D. Douthit, M.D. performed the Division IME on November 28, 2017. Dr. Douthit reviewed medical records and physically examined Claimant. He noted Claimant had been seen on May 18, 2011 for right shoulder pain after a fall. Claimant

reported having pain since that time. Claimant reported having persisting pain and limited motion in the right shoulder. Examination of the right shoulder revealed no crepitation, guarding and some mild atrophy. Active range of motion was 90 degrees abduction, 110 degrees flexion, 80 degrees internal rotation, 80 degrees of external rotation, 30 degrees adduction, and 50 degrees extension.

8. Dr. Douthit opined Claimant did not sustain any permanent impairment to the knee, but assessed 10% impairment of the right shoulder due to loss of range of motion. He noted this 10% extremity rating would be equal to 6% whole person impairment if converted. He advised Claimant participate in exercises to maintain her range of motion. He specifically stated, "I found no evidence of injuries of the trapezius or the neck area and the impairment is confined to the right shoulder."

9. Respondents filed a Final Admission of Liability based on Dr. Douthit's DIME report. Claimant timely objected to the Final Admission of Liability and filed an Application for Hearing seeking conversion of Dr. Douthit's 10% extremity rating to 6% whole person impairment.

10. Claimant testified at hearing that she had a prior right shoulder injury in 2011 for which she received medical treatment and injections. Medical records indicate Claimant was assessed with AC joint degenerative disease and rotator cuff tendinitis. Claimant testified that she did not continue to experience pain after the 2011 injury and was not assigned any impairment for the 2011 injury. Claimant testified her pain level is higher now than the 2011 level injury. She credibly testified prior to her injury on July 1, 2017, she was able to perform all of the essential functions of her job without restrictions to her right shoulder.

11. Claimant testified that, since the July 1, 2017 injury, she is no longer able to sleep on her right side without experiencing pain. She also testified that she is no longer able to carry her purse weighting 10 lbs. on her right shoulder due to pain, or lift objects above her head weighing more than 10 lbs. due to limitations with the use of her right shoulder girdle. Claimant testified she experiences pain in the front of her shoulder and numbness in the back of shoulder above her shoulder blade on a daily basis.

12. Claimant further testified that, following her placement at MMI and release to regular duty by Dr. Ogden, she had been able to perform her usual job duties of the Transportation Officer position she had been working at the time of, and prior to, her injury.

13. Ronald Swarsen, M.D. testified at hearing on behalf of Claimant as a Level II accredited expert in occupational medicine. Dr. Swarsen performed a medical records review but did not physically examine Claimant. Dr. Swarsen described the shoulder girdle as a scaffolding upon which the arm operates. He also described the shoulder as being anatomically distinct from the arm. Dr. Swarsen identified the structures which were surgically repaired on Claimant's right shoulder, and which are described on the MRI. He opined that all of the structures repaired are above the glenohumeral joint and to the right shoulder, not the arm. Dr. Swarsen opined that Claimant's injury is to her

right shoulder, and that Claimant has suffered functional impairment to her right shoulder, not her arm. Although Claimant has returned to work full duty, Dr. Swarsen opined that her right shoulder continues to be functionally impaired and a whole person impairment rating is appropriate. He testified that Dr. Douthit's conversion was appropriate under the AMA Guides and was consistent with the AMA Guides.

14. The testimony of Claimant and Dr. Swarsen is found more credible and persuasive than the opinion of Dr. Douthit.

15. Claimant has proven by a preponderance of the evidence she sustained functional impairment beyond her right arm at the shoulder and is entitled to the conversion of her 10% right upper extremity impairment rating to a 6% whole person impairment rating.

16. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or

none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Whole Person Impairment

The claimant bears the burden of establishing functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under§ 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4- 662-3 69 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W. C. No. 4-536-198 (ICAO June 20, 2005). The question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ.

In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996); *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004). There is no requirement that functional impairment take any particular form in order to be compensable under § 8-42-107(8)(c), C.R.S. Evidence of pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered impairment for this purpose. Aligaze *v. Colorado Cab Co. / Veolio Transportation*; W.C. No. 4-705-940 (ICAO April 29, 2009); *Chacon v. Nichols Aluminum Golden, Inc.,* W.C. No. 4-521-005 (ICAO November 29, 2004); *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-878 (ICAO November 20, 2001), aff'd., *Pinnacle Glass Co. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA2386, August 22, 2002) (not selected for publication).

The courts have held that damage to structures of the "shoulders" may or may not reflect a "functional impairment" enumerated on the schedule of disabilities. *See Walker v. Jim Fouco Motor Company,* supra*; Strauch v. PSL Swedish Healthcare System,* supra, *Langton v. Rocky Mountain Health Care Corp.,* supra*; Price v. United Airlines,* W.C. No. 4-441-206 (ICAO January 28, 2002); *Johnson-Wood v. City of Colorado Springs,* supra. Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (ICAO, September 12, 2000).

The ALJ concludes Claimant satisfied her burden in proving she sustained functional impairment beyond the right arm to her shoulder. Although Claimant was not

assigned permanent work restrictions and has returned to performing her regular work duties, Claimant's regular work duties only require movement below shoulder level. While permanent restrictions and ability to perform usual job activities are relevant considerations, the analysis of whether Claimant sustained functional impairment is not strictly confined to these or any one factor, as there is no requirement functional impairment take any particular form.

The ALJ credited testimony of Claimant and Dr. Swarsen over the opinion of Dr. Douthit. Claimant credibly testified that she is no longer able to reach overhead, sleep on her right side, or carry objects on her right shoulder without experiencing pain and discomfort. Claimant's injury and subsequent failed surgery resulted in continuing discomfort that has interfered with Claimant's ability to use a portion of her body. Dr. Swarsen credibly testified Claimant sustained damage to structures of the shoulder which resulted in functional impairment beyond the arm at the shoulder. Based on the totality of the evidence, Claimant has met her burden to establish she suffered functional impairment beyond the list of scheduled disabilities and is entitled to permanent partial disability ("PPD") benefits based on a whole person impairment rating.

ORDER

It is therefore ordered that:

1. Claimant's request to convert the scheduled impairment rating of her right shoulder to a whole person impairment is granted.

2. Respondents shall pay PPD benefits based on a 6% whole person impairment rating assigned by Dr. Douthit.

3. Respondents make take a credit for any PPD benefits previously paid to Claimant.

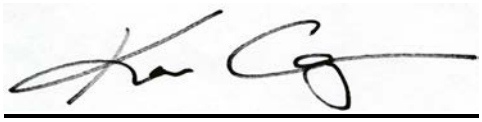
4. Respondents shall be given credit for any Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 16, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-036-365-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on August 7, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 8/7/18, Courtroom 2, beginning at 1:30 PM, and ending at 3:30 PM).

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection. Respondent's Exhibits A through I were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondent. It was filed, electronically, on August 14, 2018. No timely objections thereto were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The issue to be determined by this decision concerns whether the Claimant is entitled to temporary total disability (TTD) benefits from November 23, 2016 through April 26, 2017, excluding the period from January 15, 2017 through January 20, 2017,

after the period from January 15, 2017 through January 20, 2017 (both dates inclusive, a total of 6 excluded days) is excluded, 149 days of TTD is in issue.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant is a former firefighter for the Employer. On November 21, 2016, she suffered a compensable right knee injury while descending a flight of stairs at the firehouse. Respondent filed a Notice of Contest on January 23, 2017 for further investigation. Respondent later admitted liability, filing a General Admission of Liability (GAL) on April 17, 2017.

2. The parties the stipulated that Claimant's average weekly wage (AWW) is $1,748.60, as admitted in Respondent's April 17, 2017 GAL. The ALJ finds that this AWW yields the maximum TTD weekly benefit of $939.82 for FY 2016/2017, or $134.26 per day.

Medical Chronology

3. Claimant was initially seen by Alisa Koval, M.D., the authorized treating physician (ATP) at Denver Health, on November 23, 2016. Claimant was diagnosed with a sprain of the right knee and was referred for physical therapy. Dr. Koval noted that the Claimant was scheduled to have the next 4 days off, and provided work restrictions of: no kneeling, no climbing ladders, no working at heights and no squatting.

4. The Claimant returned to Dr. Koval on November 30, 2016 with ongoing complaints of right knee pain. Dr. Koval referred the Clamant for an MRI (magnetic resonance imaging) of the right knee and continued the work restrictions provided on November 23, 2016.

5. The Claimant was next seen by Dr. Koval on December 5, 2016. At this evaluation, the Claimant was referred to an orthopedist. Work restrictions consisting of: no kneeling, no climbing ladder, no working at heights and no squatting, were continued. At a December 20, 2016 appointment with Dr. Koval, the work restrictions were continued. The Claimant did not attend scheduled appointments with Dr. Koval on January 11, 2017 and January 17, 2017.

6. Claimant was admitted to the emergency room (ER) at Sky Ridge Medical Center on the evening of January 14, 2017, with concerns of alcohol intoxication and

suicidal ideation. She was placed on an M1 hold, and stayed in in-patient rehabilitation at West Pines Medical Center until January 20, 2017. On January 20, 2017, the Claimant voluntarily admitted herself to an in-patient rehabilitation program at Parker Valley Medical Center. She remained at this rehabilitation facility until February 13, 2018.

7. The Claimant returned to Denver Health on March 9, 2017 and was evaluated by Sadie Sanchez, M.D. At this evaluation, Dr. Sanchez noted that the Claimant was requesting a release to full duty. Dr. Sanchez returned the Claimant to full duty without restrictions, pending approval for right knee surgery.

The Testimony at Hearing

8. At hearing, the Claimant testified regarding her employment and whether the Respondent made an offer of modified duty. She stated, with record support, that she continued working for the Respondent, albeit in a modified capacity, from the date of injury through January 14, 2017. The ALJ finds that the Claimant worked modified duty without a formal offer of modified duty from the Respondent, and that her job duties consisted primarily of warehouse functions.

9. Claimant testified that, on discharge from Parker Valley Medical Center, she would have returned to modified duty if she had been aware of a modified duty position available to her. Claimant testified that she did not remember whether her knee injury was the reason she did not work from February 13, 2017 through her release to full duty on March 9, 2017.

10. Claimant testified that she retired from her employment with the Respondent on June 1, 2018.

11. Records concerning doctor visits and medical appointments, other than those to Denver Health (which were related to her admitted right knee injury were referenced, however, the Claimant could not remember whether they were for her admitted right knee injury.

Ultimate Findings

12. The Claimant's testimony was credible and essentially undisputed, however, she could not remember specific times when she worked modified duty, or why she saw different medical providers other than those at Denver Health for her admitted injury and the providers of rehabilitation for the treatment of alcoholism. The medical opinions in evidence are undisputed and credible.

13. The Claimant was temporarily and totally disabled for the period November 23, 2016 through March 9, 2017, however, she continued to work in a

modified capacity for the Employer from the date of injury through January 14, 2018. She was paid by the Employer for her work during this time period. Because she was working during this time, albeit in a modified duty capacity at full pay, she cannot receive both TTD benefits and regular wages, and she is, therefore, she has failed to prove entitlement to TTD benefits from November 23, 2016 through January 14, 2017.

14. The ALJ finds that the Claimant was not working during her time in in-patient rehabilitation from January 15, 2017 through February 13, 2017. Claimant's wage loss for this period of time was because of non-work related rehabilitation for alcoholism. The Claimant is not entitled to TTD benefits from January 15, 2017 through February 13, 2017. Therefore, the Claimant has failed to prove entitlement to TTD benefits for this period of time.

15 The ALJ finds that the Claimant was unable to work due to her temporary work restrictions from February 14, 2017 through her release to full duty on March 9, 2017, a period of 23 days. Therefore, the Claimant has sustained her burden, by preponderant evidence that she is entitled to TTD benefits for the period from February 14, 2017 through March 9, 2017, both dates inclusive, a total of 23 days. She credibly testified that she would have worked during this period but for her work restrictions and the lack of a modified duty position provided by the Employer during this period of time. The Claimant was released to full duty, effective March 9, 2017. The Claimant has not yet reached maximum medical improvement (MMI).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability

or improbability) of a witness' testimony and/or actions As found, the Claimant's testimony was credible and essentially undisputed, however, she could not remember why she saw different medical providers other than those at Denver Health for her admitted injury and the providers of rehabilitation for the treatment of alcoholism. The medical opinions in evidence are undisputed and credible. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the Claimant testified credibly with respect to her periods of employment, work restrictions and time in rehabilitation. Her testimony was consistent with the records of the Employer reflecting when she was working and earning a regular wage and when she was not working. As found, the medical reports of Drs. Koval and Sanchez are credible with respect to Claimant's work restrictions and her release to full duty.

Temporary Total Disability Benefits

b. Pursuant to §§ 8-42-103, 8-42-105, C.R.S., a claimant is entitled to an award of TTD benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872 (Colo. App. 2001). As found, the Claimant was unable to work due to her temporary work restrictions from February 14, 2017 through her release to full duty on March 9, 2017, a period of 23 days. Therefore, the Claimant has sustained her burden, by preponderant evidence that she is entitled to TTD benefits for the period from February 14, 2017 through March 9, 2017, both dates inclusive, a total of 23 days.

d. Sections §8-42-105(3)(a) through (d), mandate that temporary total disability benefits continue until the first occurrence of one of several factors, including: (a) Claimant reaches MMI; (b) Claimant returns to regular or modified employment; (c) The attending physician provides claimant a written release to return to regular employment; or (d) The attending physician gives claimant a written release to return to modified employment, such employment is offered to claimant in writing, and claimant fails to begin such employment. As found, the Claimant failed to establish that she was entitled to TTD benefits until February 14, 2017. As found, the Claimant was working in a modified duty capacity from November 23, 2016 through January 14, 2017. Because she was working, she was unable to establish that she was sustaining a temporary wage loss for this period because of her admitted injury. She also failed to establish that she was entitled to TTD benefits from January 14, 2017 through February 13, 2017. The Claimant was in a rehabilitation facility during this period of time for a non-work related condition, and her presence in rehabilitation was the cause of her wage loss.

e. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant has established that she is entitled to TTD benefits from February 14, 2017 through March 9, 2017, both dates inclusive, a period of 23 days. As found, the Claimant would have worked during this period but for her work restrictions and the lack of a modified duty position provided by the employer under C.R.S. § 8-42-105(3)(d). Also, she has not yet reached MMI.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to meet her burden of proof with respect to establishing entitlement to TTD benefits from November 23, 2016 through February 13, 2017. She has met her burden of proof with respect to TTD benefits from February 14, 2017 through her release to full duty on March 9, 2017, a period of 23 days.

ORDER

IT IS, THEREFORE ORDERED THAT:

A. Claimant's claim for temporary total disability benefits from November 23, 2016 through February 13, 2017 is hereby denied and dismissed.

B. Claimant's claim for temporary total disability benefits from February 14, 2107 through March 9, 2017 a total of 23 days, is hereby granted. Respondent shall pay the Claimant for 23 days of temporary total disability, at the rate of $939.82 per week, or $134.26 per day, in the aggregate amount of $3,087.98, which is payable retroactively and forthwith.

C. The Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

C. Otherwise, the General Admission of Liability, dated April 28, 2017, remains in full force and effect.

D. Any and all issues not determined herein are reserved for future decision.

DATED this___day of August 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

Whether Claimant established by a preponderance of the evidence that he is permanently and totally disabled as a consequence of the admitted work-related injuries he sustained on July 22, 2012?

Whether Claimant established by a preponderance of the evidence that he is entitled to a general award of maintenance medical benefits?

FINDINGS OF FACT

1. Claimant is a 57-year-old former forklift operator at Employer's Distribution Center. On July 22, 2012, Claimant was injured when he slipped on soap that was spilled on the ground and fell into his forklift. He did the splits and twisted. Claimant filed a Worker's Claim for Compensation on December 4, 2012, reporting injuries to his lower back, buttocks and left hip as a consequence the July 22, 2012, injury.

2. Thereafter, Claimant was referred to Concentra Medical Centers for medical care. Claimant reported severe back pain and was treated with conservative care which reduced the spasms as well as persistent pain in his left hip and buttock, which was treated with injections. Claimant was referred to Dr. Jeffrey Wunder, a consulting physician at Concentra Medical Centers, for primary care and pain management. Claimant was referred to numerous orthopedists following the industrial injury who suggested that he may need a left total hip arthroplasty, may have a pinched nerve and may just require injections to control the pain.

3. Claimant returned to modified work with Employer but was advised in December 2012 that they could no longer accommodate his work restrictions.

4. After a course of conservative care for the lower back and left hip, Claimant was placed at maximum medical improvement (MMI) by Dr. Wunder on June 3, 2013, who assigned a 15% impairment of the left lower extremity that converted to a 6% impairment of the whole person. Dr. Wunder recommended maintenance medical care and assigned permanent work restrictions of 25 lbs. lift and no more than 20 minutes per hour of weight bearing, standing and walking.

5. Upon Claimant's placement at MMI, he requested a Division Independent Medical Examination (DIME). Dr. Wallace Larson was selected to serve as the DIME examiner and Claimant was evaluated on October 23, 2013. Dr. Larson opined that the Claimant was not at MMI and would most likely require a total left hip arthroplasty. He did also find, at that time, that there was not a ratable impairment of the lumbar spine.

6. On November 4, 2013, Claimant was approved for Social Security Disability benefits beginning in June 2013.

7. Following the DIME examination with Dr. Larson, Respondents filed a General Admission of Liability on February 28, 2014.

8. Dr. Wunder did not serve as the Claimant's authorized treating physician (ATP) immediately after Claimant's DIME with Dr. Larson. In February 2015, after Dr. Wunder returned to work following a leave of absence, Claimant re-commenced medical care with him. Claimant was referred to Joshua T. Snyder, M.D. for evaluation and treatment of his left hip condition.

9. On March 27, 2015, Claimant was evaluated by Dr. Joshua Snyder. Dr. Snyder noted that Claimant had back pain and joint swelling. After reviewing both old and new radiographs, Dr. Snyder recommended that Claimant undergo a left total hip arthroplasty.

10. Claimant underwent a left total hip arthroplasty on May 20, 2015. Dr. Snyder reported that the unanticipated size of implant was placed, had a good fit proximally though it was still slightly open distally, but that it seemed satisfactorily stable.

11. Post surgically, Claimant returned to Dr. Wunder for medical care. Dr. Wunder forwarded a letter to the Insurer on May 27, 2015. Dr. Wunder enclosed the surgical report and stated that there were some surgical complications and that Claimant was unable to fully weight bear and had an unsteady gait. He requested home health care assistance as Claimant was not doing well.

12. On June 1, 2015, along with other services and equipment, Dr. Wunder prescribed a front wheeled walker for Claimant. On July 8, 2015, Claimant treated with Dr. Wunder and Claimant's opiate medication was reduced. Dr. Wunder noted that Claimant is getting around better yet still is having pain in the left hip. Claimant reported to the doctor that he no longer requires assistance with activities of daily living (ADLs) but requires a housecleaner visiting two times a week and assistance with grocery shopping. On July 8, 2015, Claimant was still off work.

13. On August 12, 2015, Claimant returned to Dr. Wunder for medical care noting that Claimant was doing okay overall but had increased pain in his hip in the groin area occasionally radiating to his knee. He noted tenderness in the anterior hip area and groin with reduced mobility. Dr. Wunder prescribed a pistol grip adjustable cane to offload his hip during ambulation.

14. On September 9, 2015, Dr. Wunder noted that Claimant's pain was somewhat improved. Claimant's most recent urine drug screen yielded expected results and Claimant's cane was being used occasionally with good results. Records reflect that on September 9, 2015, Claimant is taking Vicodin 5/325 mg b.i.d. The treatment plan on September 9, 2015, was to wean Claimant from opiod usage.

15. On September 24, 2015, Claimant treated with Dr. Snyder. The doctor reported that Claimant did well until 3 weeks ago when he started having increased pain along the inside of the thigh down to the knee. At this appointment, Claimant used crutches

because of pain and the doctor observed an antalgic gait and quad atrophy. Dr. Snyder recommended strengthening and stretching of the adductor and decreased activity.

16. On October 7, 2015, Dr. Wunder evaluated Claimant who reported more pain. Claimant weaned off Vicodin and was prescribed naproxen, 500 mg b.i.d. Dr. Wunder noted reduced left hip range of motion.

17. On November 16, 2015, Claimant's symptoms persisted and he was ambulating with bilateral underarm crutches. Claimant treated with Dr. Wunder who recommended an EMG nerve conduction study of the left lower extremity and a left intra-articular hip injection to diagnose the pain generator and made a referral to Dr. Pouliot. No reference in this report was made to pain medication.

18. On November 19, 2015, Dr. Snyder found Claimant started having increasing pain in the medial thigh down the leg nine weeks ago. Dr. Snyder was unsure why this is happening and supported Dr. Wunder's search for the pain generator. Dr. Snyder did not believe that Claimant's pain was caused by his total hip replacement.

19. On November 19, 2015, Dr. Wunder responded to a letter from Respondents' counsel posing questions about Claimant's condition. Dr. Wunder opined that Claimant is not at MMI and that the pain generator had not been determined yet. Dr. Wunder recommended an EMG and intra-articular hip injection for diagnostic purposes.

20. On December 17, 2015, Dr. Wunder reported that Claimant continued to ambulate with crutches and had hip pain with internal rotation. Claimant's prescription for naproxen was refilled for pain control. Dr. Wunder obtained a urine drug screen which showed a compliant result. Dr. Wunder recommended a lumbar MRI to make sure a lumbar disc protrusion was not responsible for left groin and thigh pain.

21. On January 18, 2016, Dr. Wunder evaluated Claimant finding increased pain and continued ambulation with crutches. Dr. Wunder's request for authorization for a lumbar MRI and injection of Claimant's left hip remained unauthorized. Dr. Wunder noted that Claimant was unable to work.

22. On March 14, 2016, Dr. Wunder examined Claimant and indicated that the hip injection was still not authorized. Dr. Wunder re-prescribed hydrocodone for Claimant's pain and Belsomra for sleep. He remained of the opinion that Claimant was not at MMI and unable to weight bear and to work.

23. Claimant was referred for an independent medical examination (IME) with Dr. Jorge Klajnbart on April 6, 2016, at Respondents' request. Dr. Klajnbart noted that the Claimant ambulated with crutches on that date, Dr. Klajnbart challenged him on his crutch usage. He noted that the Claimant had an antalgic gait and was unable to heel toe walk for the exam and the doctor documented atrophy of his left thigh muscle. Dr. Klajnbart opined that none of the treatments or procedures Dr. Wunder sought authorization for were deemed to be work related, reasonable or necessary. He further opined that Claimant reached MMI, assigned a 36% impairment of the lower extremity and recommended that Claimant follow a home exercise program.

24. Claimant returned to Dr. Snyder for a 6 month follow up on May 2, 2016, Dr. Snyder noted that Claimant continued to have significant pain and that the doctor's recommendation that Claimant see a spine surgeon was not approved. X-rays showed no obvious problem with Claimant's hip replacement. Dr. Snyder reported that Claimant has chronic left hip pain since the left hip arthroplasty which was of undetermined origin. Dr. Snyder wanted Claimant to follow up with a joint specialist to see if there is something else that may be causing his pain and Dr. Snyder again recommended evaluation with a spine surgeon.

25. On May 13, 2016, Claimant was evaluated by Dr. Wunder who noted that Claimant had decreased hip mobility and hip range of motion produced left inguinal ligament pain. Claimant was non-weight bearing. Dr. Wunder continued to want to locate the pain generator since Claimant had undergone a total hip replacement one year earlier. He indicated that Claimant's case was at a standstill until this happened. Dr. Wunder continued to prescribe Belsomra for sleep and hydrocodone for pain control. Claimant was unable to return to work.

26. On July 11, 2016, Claimant returned to Dr. Wunder for medical care. Dr. Wunder noted nothing had changed and continued to express his frustration at the lack of authorization for medical treatment to pinpoint the pain generator. He found that the Claimant was unable to return to work and refilled his prescriptions for hydrocodone and Belsomra.

27. Parties proceeded to hearing on the issues of prior authorization for the medical care Dr. Wunder and Dr. Snyder had requested on August 12, 2016, before ALJ Peter J. Cannici. On October 7, 2016, ALJ Cannici issued an order directing Respondents to provide authorization for the lumbar MRI and left hip injection.

28. On November 22, 2016, Claimant proceeded to a follow-up DIME with Dr. Larson. Dr. Larson opined that Claimant reached MMI on April 6, 2016, assigned a 37% left lower extremity rating and opined that Claimant required no maintenance medical care. Dr. Larson opined that Claimant's pain complaints were out of proportion to objective findings.

29. Claimant returned to Dr. Wunder on December 6, 2016. Dr. Wunder opined that Claimant remained unable to return to work and, pursuant to Order of ALJ Cannici, Claimant was referred for the intra-articular left hip injection and lumbar MRI.

30. Claimant's lumbar MRI was completed in December 2016 and showed that there was no disc herniation. The upper lumbar segments are normal and there was some disc bulging at L3 to S1 with some degenerative changes including facet disease and minor foraminal stenosis at the L3-L4 and L4-L5 levels.

31. On December 19, 2016, Claimant returned to Dr. Wunder. Dr. Wunder reviewed the lumbar MRI scan and concluded the MRI effectively ruled out any significant defects which could lead to his symptom patterns. Dr. Wunder noted that he was scheduled for

the intra-articular left hip injection on December 21, 2016. He continued to opine that Claimant was unable to return to work.

32. On January 9, 2017, Claimant returned to Dr. Wunder following the intra-articular lidocaine injection. Claimant's pain level, on a scale of 1 to 10, went from a grade 6-7 down to a 1 on the day of the injection, the next day his pain was completely absent and subsequently Claimant's pain recurred. Dr. Wunder opined that the test strongly indicated that there is an intra-articular hip pain generator and Claimant should proceed with a second opinion from Dr. Brian White, M.D.

33. On March 14, 2017, Claimant returned for medical care to Dr. Wunder. Dr. Wunder reported that his referral to Dr. White was not approved by Insurer. Instead, Respondents requested that Claimant undergo a Functional Capacity Evaluation (FCE). Dr. Wunder reports that a FCE might cause harm since Claimant may have an intra-articular pain generator. Claimant continued to ambulate with a cane. He had reduced range of motion in his left hip with internal pain rotation and Dr. Wunder recommended a MRI arthrogram of Claimant's hip.

34. On March 15, 2017, upon the request of Respondents, Claimant participated in the FCE with Alexander Garrido, P.T., D.P.T., at Peak Form Physical Therapy. Physical Therapist Garrido noted Claimant exerted valid and consistent effort, showed no pain behaviors, did not exhibit Waddell signs and no extreme overt pain behaviors during the evaluation. Claimant's gait was antalgic and present throughout the exam.

35. Based on the FCE result, it was found that Claimant could safely occasionally carry 12 pounds, push 26 pounds and pull 23 pounds. He further found that Claimant could walk for 13 minutes with an assistive device and sit for approximately 15 minutes. The FCE recommendation is to allow Claimant to have authority to self-regulate and self-monitor the following activities: ambulation over slippery, uneven or unstable surfaces; repetitive flexion of the spine, including during activities such as forward bending, side bending, squatting and overhead use of the upper extremities, particularly during weight bearing work, and sit and stand as needed throughout a work shift.

36. On April 10, 2017, Claimant returned to Dr. Wunder for medical care. Dr. Wunder noted that Claimant was in a holding pattern waiting for care to be authorized and, therefore, Dr. Wunder refilled Claimant's prescriptions and again referred Claimant to Dr. White. Dr. Wunder opined contrary to the DIME opinion that Claimant is not at MMI.

37. On June 14, 2017, Claimant's overall pain levels were the same and Claimant was having more frequent aggravations. Dr. Wunder injected tender points in Claimant's left anterior thigh with lidocaine and Kenalog. The recommended MRI and referral to Dr. White had not been authorized, so Dr. Wunder refilled prescriptions for hydrocodone and Belsomra.

38. On August 10, 2017, and September 7, 2017, Claimant returned to Dr. Wunder and no medical treatment was authorized, so the doctor refilled Claimant's pain and sleep medications and restricted Claimant's work to "sit down work" only.

39. On August 23, 2017, Dr. Klajnbart completed an addendum of his IME evaluation of Claimant and was furnished a copy of the March 15, 2017, FCE. Dr. Klajnbart noted that Claimant gave maximum voluntary effort and he opined that he concurred with this FCE. The doctor opined that none of his earlier opinions were changed.

40. With regards to Claimant's past relevant education, the record shows that he attended Fort Collins High School and dropped out in the tenth grade. Claimant credibly testified that he struggled in school and was told that he had dyslexia, writing and spelling is difficult for him. His grades were poor in 10th grade. Claimant enrolled in night school to complete his high school diploma in 1982 at Centennial High School but was unable to complete the program. Claimant also completed a certificate program at the Denver Institute of Technology in HVAC, a primarily hands on study and a vocation in which Claimant never worked.

41. With regard to Claimant's past relevant work, he was employed as a stand-up forklift operator and order picker with lifting requirements of 100 lbs. for Employer for approximately 13 years. Prior to that he worked as a laborer at a concrete plant, shoveling rock onto a conveyor belt for several years. He worked in construction as a laborer, drywall installer, siding installer and framing carpenter. At a paper recycling center, he bundled and cut paper by hand. He worked in grounds maintenance doing sprinkler repairs and caring for lawns. As a teenager, Claimant worked in the kitchen at a Denny's. Claimant was separated from his employment with Employer in December 2012.

42. On September 7, 2017, Claimant underwent a vocational evaluation with William M. Hartwick, MS, CRC, CLCP a Certified Rehabilitation Consultant/Life Care Planner. Mr. Hartwick completed a medical records review, educational records review, FCE review, educational records review, a client interview, work history analysis and skills analysis, summarizing and concluding that Claimant is unable to perform any of his prior occupations due to the injury of his left hip, resultant surgical intervention, documented physical limitations and chronic pain. Mr. Hartwick further opined that given that Claimant's employment history is primarily unskilled labor positions and positions that required limited education, he will be unable to qualify for or perform any light or sedentary unskilled occupations that exist in the local or regional economy and will therefore be unable to earn any wages. Mr. Hartwick further opined that based on the Claimant's medical reports, testimony and interviews he had completed that, even if a job could be found that accommodated his work restrictions, that he would not be able to maintain sustained employment due to his frequent need for breaks and inevitable need to miss work, secondary to pain.

43. On February 12, 2017, Claimant was evaluated by Gail Pickett, MA, QRC, ABDA, Vocational Consultant and her vocational assessment report is dated September 12, 2017. Ms. Pickett completed a medical summary, educational summary, computer

skills summary, employment summary, license and certification and activity summary. She concluded that Claimant could obtain a position completing production work or a temporary position doing trimming work. Ms. Pickett opined that Claimant is employable using either set of work restrictions.

44. Ms. Pickett also furnished her testimony by deposition. Ms. Pickett opined that Claimant was employable, specifically stating that a trimmer at a mask company, an earring assembler, carporter, general cleaning, injection molding and produce sorting based upon the restrictions of Dr. Wunder and the FCE of March 2017. Ms. Pickett opined that Claimant had transferable educational skills which were derived largely from his completion of a HVAC certificate program despite never working in that position and the consistent report of having a learning disability, poor grades and inability to finish high school.

45. Ms. Pickett observed Claimant's antalgic gait. She testified that Claimant was precluded from all prior employment. Ms. Pickett testified that she believed that Claimant could work manufacturing small parts with his 15 minute sit and 13 minute stand with a cane restriction. Ms. Pickett identified an earring assembly job and trimming masks for Claimant. Ms. Pickett did not explain how the positions would be carried out without bilateral hand usage. Ms. Pickett further identified a singular position where a scope is picked up and looked through, which she believed Clamant could successfully perform the duties with one hand. Finally, Ms. Pickett testified that the FCE did not take the Claimant's stamina into consideration which is an important factor of employability. Ms. Pickett's testimony and opinions were found to be less credible and persuasive than the testimony and opinions of Mr. Hartwick.

46. On October 6, 2017, Claimant returned to Dr. Wunder who refilled his prescriptions for sleep and opioid pain medication. Dr. Wunder opined that Claimant could return to sit down work only. Dr. Wunder commented on Respondents continued refusal to authorize a MRI scan and referral of Claimant to Dr. White. Dr. Wunder opined that his hands were tied as long as the Insurer would not authorize treatment.

47. Claimant credibly testified that his pain had increased and that sleep was increasingly difficult due to pain complaints. He noted that he was only able to minimally weight bear on his left foot and essentially needed his cane for ambulation and balance. Claimant reported that a friend completes yard work and assists with or completes shopping activities. Claimant pays a cleaning agency $425.00 per month to assist with household chores, such as laundry, vacuuming, sweeping and dishes, which he was unable to complete on his own. Claimant's testimony is consistent with Dr. Wunder's reports and the assessments of the vocational experts.

48. Claimant was able to complete and gave maximum effort at the March 15, 2017, FCE but that he had to take frequent breaks where he laid down in between activities noting that he rested or laid down 1.5 hours out of the 4 hours of testing. Claimant testified that he can stand/walk for about 5 minutes before his pain increases and 30 minutes before the pain is unbearable.

49. Claimant has not sought work because he did not feel that he could furnish an employer with a full day of work. Claimant credibly testified that if he could work he would be and that he did not believe with his present pain and restrictions that he was employable. After Claimant was initially placed at MMI in June 2013, Claimant reported to the Workforce Center and was advised that the Workforce Center could not find work for him that complied with his 25-pound lift restriction and standing no more than 20 minutes per hour.

50. Mr. Hartwick credibly testified that Claimant was only able to complete sit down work which precluded him from employment for which he was qualified which had been medium to heavy unskilled labor. Mr. Hartwick credibly opined that Claimant's lack of training and learning disabilities in light clerical or customer service occupations precluded him from work. Claimant's employability was further complicated by his need to alternate between sitting and standing as well as his limitations with lifting while standing could be disruptive to the work flow and adversely affect his ability to perform sedentary jobs in an assembly or production setting. Mr. Hartwick further credibly testified that any job where Claimant was permitted a sit/stand option, he would be unable to use both his hands to complete the job while standing because he would need to keep one hand on his cane for balance.

51. Mr. Hartwick testified that, consistent with his report, Claimant is not employable nor able to earn wages secondary to his educational, vocational background, permanent work restrictions and chronic pain.

52. Dr. Klajnbart testified that he would offer alternative sleep aids as well as cease the opioid pain medications that Dr. Wunder was prescribing Claimant. Dr. Klajnbart believed that the left hip MRI and second opinion from Dr. White as requested by Dr. Wunder were reasonable, necessary and related and should be furnished to Claimant in pursuit of the answer to questions regarding pain generation. Dr. Klajnbart noted measurable atrophy between Claimant's left and right legs.

53. Dr. Larson offered deposition testimony consistent with the DIME report.

54. On March 23, 2018, Dr. Wunder provided rebuttal testimony by deposition. Dr. Wunder credibly testified that he continued to prescribe Claimant hydrocodone for pain management because treating providers of Claimant remained unable to establish the pain generator and Claimant has pain. Dr. Wunder testified that he was prescribing Belsomra for sleep. Dr. Wunder tried to change to a less expensive medication, and authorization was denied by Insurer. Dr. Wunder opined that as long as the Respondents continued to fail to authorize diagnostic testing necessary to isolate the pain generator that Claimant would need these medications indefinitely.

55. Dr. Wunder testified that the 85% improvement that Claimant experienced with the intraarticular injection showed that there was something happening in the hip that is causing pain which is why he requested a left hip MRI and referral to Dr. White, who is an expert in hips and would serve as fresh eyes as Claimant had already been to Dr. Snyder, his surgeon, multiple times for postsurgical evaluations. Dr. Wunder clarified

that he agreed with the assessment of the FCE evaluator in terms of frequent positional changes needed and an inability to perform multiple positions and that he did not agree that Claimant was capable of doing sit down work. Dr. Wunder clarified that he does believe that the Claimant's use of a cane is necessary from a medical standpoint.

56. Dr. Wunder testified that Claimant was no longer receiving functional improvement from his dosage of hydrocodone but that he believed he needed it for pain control. And, that he needed the Belsomra for sleep, that without it he would not have any sleep at all. Finally, Dr. Wunder testified that Claimant's presentation on the surveillance video was consistent with his presentation at the clinic.

57. Dr. Wunder is a level II accredited and board certified physician who furnished medical care to Claimant for more than 6 years and is in the best position to assess what medical care is needed to maintain MMI as well as the validity of the FCE and work restrictions.

58. Claimant, testified consistent with the record. His testimony was credible, reliable and persuasive.

59. Drs. Larson and Klajnbart credibly testified that the continued prescriptions of sleep and narcotic pain medication for Claimant was neither reasonable nor necessary medical benefit to maintain Claimant's condition at maximum medical improvement. Dr. Larson credibly opined that ongoing prescriptions of hydrocodone is also not within the Colorado Medical Treatment Guidelines. Dr. Larson points to the fact that Claimant did not undergo a psychological evaluation recommended under the Guidelines for ongoing opiod medication usage. Further, the prescribing physician has not maintained a record of Claimant's functional history nor set forth function goals. Also, Claimant did not sign a narcotic pain contract. Dr. Larson credibly testified the medications Claimant is currently taking are not reasonable or necessary and he requires a weaning program.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions, the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Permanent Total Disability

4. Claimant proved by a preponderance of the evidence that he is permanently and totally disabled as defined by Section 8-40-201(16.5), C.R.S. and has proven that he is unable to earn wages in the same or any other employment.

5. To prove permanent total disability, a claimant must show by a preponderance of evidence that he is incapable of earning any wages in the same or other employment. Section 8-40-201(16.5)(a), C.R.S. A claimant therefore cannot receive permanent total disability benefits (PTD) if he or she is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. *See, Lobb v. ICAO*, 948 P.2d 115 (Colo. App. 1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995).

6. The critical test is whether employment exists that is reasonably available to a claimant under his particular circumstances. *Weld County School Dist. RE-12 v. Bymer, supra.* In determining whether the claimant is unable to earn any wages, the ALJ may consider a number of "human factors." 933 P.2d 1330 Colo. 1997) *Christie v. Coors Transp. Co., 933 P.2d 1330 (Colo. 1997)* These factors include the claimant's physical condition, mental ability, age, employment history, education, and the "availability to work" the claimant can perform. W*eld County School Dist., supra.* Another human factor is the claimant's ability to obtain and maintain employment within his physical abilities. *See Professional Fire Protection, Inc. v. Long,* 867 P.2d 175 (Colo. App. 1993).

7. The claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages. Rather the claimant must demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried v. Industrial Commission*, 736 P. 2d 1262 (Colo. App. 1986). Under this standard, it is not sufficient that an industrial injury creates some disability which ultimately contributes to permanent total disability. Rather, *Seifried, supra,* requires the claimant to prove a direct causal relationship between the precipitating event and the disability for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995), rev'd on other grounds, *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996).

8. Here, Claimant provided substantial evidence that he suffered injuries to his left hip and lower back. The consequences of the injuries have limited Claimant's ability to sit or stand on a sustained basis and have affected his stamina. Further, Claimant's transferrable skills and work history qualifies him to perform an unskilled position with a sit or stand option. However, Claimant requires any position he might qualify for to be a position allowing use of only one hand while Claimant stands using his cane. It is concluded that Claimant's limitations effectively eliminated all positions found by Respondents' vocational expert. The relevant work restrictions are consistent with the findings and opinions of Dr. Wunder, Dr. Klajnbart and the findings of the FCE. It is further supported by the testimony of Claimant and vocational expert, William Hartwick.

9. A claimant's occasional ability to complete and perform work activities does not preclude a finding of permanent total disability if the evidence shows that a claimant would be unable to sustained the activities for a sufficient period of time to earn wages. *Moller v. North Metro Community Services*, W.C. No. 4-216-439, I.C.A.O. August 6, 1998. This is because the ability to earn wages inherently includes consideration of whether the claimant is capable of getting hired and sustaining employment. *See Christie v. Coors Transportation Co., supra; Cotton v. Econ. Lube N Tune*, W.C. No. 4-220-395 (January 16, 1997), aff'd, *Econ. Lube N Tune v. Cotton* (Colo. App. No. 97CA0193, July 17, 1997) (not selected for publication). Furthermore, a claimant's occasional performance of physical activities which are useful in the labor market does not preclude a finding of permanent total disability if the evidence indicates that the claimant is unable to sustain the activities for a sufficient period of time to be hired and paid wages. *See Marek v. Children's Hospital*, W.C. No. 4-2211-079 (September 30, 1996).

10. Mr. Hartwick credibly opined that Claimant's ability to work on a sustained basis, with his pain and physical limitations would adversely affect his ability to maintain employment as he would need frequent breaks to lay down as well as have frequent days off to recover from increased pain.

11. Having considered the evidence presented at hearing, Claimant has proven by a preponderance of the evidence that he is unable to earn a wage. The work injury is a significant causative factor in his inability to earn a wage. Further, the restrictions of Dr. Wunder and the March 2017 FCE most accurately reflect Claimant's physical limitations and abilities. The ALJ credits the opinions of Dr. Wunder and Dr. Klajnbart which corroborate the findings of the FCE.

12. Mr. Hartwick's testimony and vocational opinions were found to be more credible and persuasive than Ms. Pickett's deposition testimony and vocational report. Here, Claimant provided credible evidence that he suffered injuries to his left hip and lower back. Claimant further established by a preponderance of the evidence that the consequences of the injuries have limited Claimant's ability to sit/stand on a sustained basis and have affected his stamina. Further, Claimant proved that his need to have an unskilled position with a sit/stand option, which can be completed with the use of only one hand, while the Claimant stands using a cane, effectively eliminated all positions found by Respondents' vocational expert.

Maintenance Medical Benefits

13. Claimant sustained his burden of proof to establish that he is entitled to a general award of maintenance medical benefits. Colorado courts have ruled that the need for medical treatment may extend beyond the point of maximum medical improvement (MMI) where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). Respondents are obligated to provide treatment which is "reasonably needed" to cure and relieve the claimant from the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. Once the claimant establishes his entitlement to *Grover* type medical benefits, the respondents are liable for such treatment which is authorized. *Renate Owens v. Conam Management and American Home Assurance*, WC 4-350-674 (2001).

14. In establishing entitlement to *Grover*-type benefits, the claimant is not required to prove that a "particular" or "specific course of treatment" is anticipated. *See Stollmeyer v. Industrial Claim Appeals Office, supra.* Furthermore, there is no distinction between "active treatment" and "diagnostic procedures." *See Brock v. Jack Brach and Sons Trucking*, W.C. No. 3-107-451, December 15, 1995; *Atwood v. Western Slope Industries*, W.C. No. 3-069-135, November 28, 1994. Medical monitoring is a compensable benefit. *Atwood v. Western Slope Industries*, W.C. No. 3-069-135, November 28, 1994.

15. Claimant seeks an order continuing opiate pain and sleep medications prescribed by Dr. Wunder to address Claimant's left hip pain. Claimant contends, with the support of Dr. Wunder's testimony and medical reports, that these medications are reasonable and necessary medical maintenance medical benefits for Claimant's left hip injury.

16. Dr. Wunder's medical records document his prescription of hydrocodone and Belsomra. In his records and testimony, Dr. Wunder expresses frustration over Respondents' failure to authorize Claimant's arthrogram MRI and second opinion from Dr. Brian White for purposes of discovering the source of Claimant's pain generator. Dr. Wunder's continued prescription of sleep and pain medications for Claimant is justified primarily based upon Respondents' failure to authorize further medical treatment that might discover the source of Claimant's pain allowing treatment to be directed to the pain generator. The medical records reflect Dr. Wunder's awareness of the contra indicators for Claimant's continued use of sleep and narcotic pain medications yet the doctor continues his prescriptions for lack of a better alternative in the face of Respondents' failure to authorize additional treatment and tests

17. Respondents' argue Claimant's medications, hydrocodone and Belsomra, are not reasonable and necessary medications and that Claimant should be weaned from use of these medications. Drs. Larson and Klajnbart testified that the continued prescription of sleep and narcotic pain medication for Claimant is neither a reasonable

or necessary medical benefits to maintain Claimant's condition at maximum medical improvement.

18. Dr. Larson credibly opined that ongoing prescription of hydrocodone is not within Colorado Medical Treatment Guidelines. Dr. Larson points to the fact that Claimant did not undergo the psychological evaluation recommended under the Guidelines for ongoing opioid medication usage and did not sign a narcotic contract. Further, the prescribing physician has not maintained a record of Claimant's functional history nor set forth functional goals. Dr. Larson credibly testified the medications Claimant is currently taking are not reasonable or necessary and he requires a weaning program.

19. It is found and concluded that the pain medication, hydrocodone, and sleep medication, Belsomra, prescribed for Claimant are not reasonably necessary maintenance medical benefits. It is further found and concluded that Claimant shall be weaned from use of narcotic pain medication and Belsomra medication for sleep under Dr. Wunder's care and direction.

ORDER

1. Respondents shall be liable to Claimant for permanent total disability benefits.

2. Claimant is denied a general award of maintenance medical benefits. Specifically, Respondents shall be liable for weaning Claimant from use of opioid pain medication and Belsomra sleep medication.

DATED: August 20, 2018.

Margot W. Jones

MARGOT W. JONES
ADMINISTRATIVE LAW JUDGE

ISSUES

- Did Claimant prove by a preponderance of the evidence she suffered a compensable industrial injury to her left knee on September 20, 2017?

- If Claimant proved a compensable injury, with medical treatment she obtained at The Little Clinic on September 21, 2017 authorized?

- If Claimant proved a compensable injury, did she prove that a left knee arthroscopy recommended by Dr. Michael Simpson is reasonably necessary treatment to cure and relieve the effects of the industrial injury?

FINDINGS OF FACT

1. Claimant works for Employer as a convenience store clerk. She alleges a compensable left knee injury on September 20, 2017 while she was taking out the trash. She threw the trash into the dumpster and was turning to walk back into the store when she experienced a painful "pop" in her left knee. Claimant had lifted her left leg and was turning to the right with her weight on her right leg when the "pop" occurred. Claimant did not catch her foot or twist her knee, nor did she stumble, slip or trip. The ground was free from debris, obstructions or other surface defect.

2. Claimant saw her primary care provider at The Little Clinic on September 21, 2017. She described the onset of knee pain while taking out the trash at work. She also stated, "she does note hearing her knee pop two other times in the past and had a similar injury on the right knee as well." She was diagnosed with acute left knee pain and advised to use the RICE protocol.

3. Claimant went to the store on September 21, 2018 to discuss the incident with her manager, Keith Callahan. Mr. Callahan referred Claimant to Concentra.

4. Claimant saw Dr. Randall Jones at Concentra on September 22, 2017. Dr. Jones diagnosed a left knee strain and opined "on a greater than 50% probability I believe this is work-related."

5. On September 25, 2017, Claimant completed an incident report on which she stated, "I don't know why it happened. I just turned to my right to walk in [the] store and felt this happen."

6. Claimant underwent a left knee MRI on October 13, 2017. The radiologist appreciated a full thickness and partially displaced tear of the posterior root of the medial meniscus, degenerative changes of the body and posterior horn of the medial meniscus, mild chondromalacia of the medial compartment, grade 3 chondromalacia of the median

eminence and the inferior medial aspect of the femoral trochlea, patellofemoral joint effusion, tendinosis of the patellar tendon, and soft tissue edema.

7. Claimant saw Dr. Michael Simpson, an orthopedic surgeon, on October 23, 2017. He misunderstood the mechanism of injury as "at work taking the trash out and her knee *twisted*." (Emphasis added). Dr. Simpson diagnosed an acute root tear of the medial meniscus. He opined "she does have some chronic degenerative changes of her meniscus that predate this. I suspect that made her more prone to this injury." He recommended arthroscopic surgery, either a partial meniscectomy or a root repair.

8. Dr. Mark Failinger performed an IME for Respondent on December 7**,** 2017. Although Dr. Failinger agreed with Dr. Simpson's surgical recommendation, he disagreed it was proximately caused by the September 20 incident. He opined that "a twist with significant force on a flexed knee can cause further tearing of meniscus," but noted Claimant did not twist her knee. He thought the need for treatment was related to her degenerative meniscus and degenerative articular surface rather than her work.

9. Claimant saw Dr. Timothy Hall for an IME at the request of her counsel on March 1, 2018. Claimant described the injury mechanism as: "she went out with a small bag of garbage, threw it in the dumpster, backed up, turned to her right to walk away and apparently, rotated on a ***fixed right leg*** and felt a pop." (Emphasis added). Dr. Hall diagnosed an acute meniscal tear superimposed on pre-existing degenerative changes. He echoed Dr. Simpson's opinion that the pre-existing degenerative changes "predisposed her to this fairly significant injury despite relatively minor trauma." Dr. Hall opined the incident "obviously created enough force to cause a traumatic event, i.e., tearing of the meniscus." Although Dr. Hall opined Claimant suffered a knee injury as "the direct result" of her work, he also conceded "it appears to me this is more of a legal issue than a medical one."

10. Dr. Hall reiterated and expounded on his opinions in his deposition testimony.

11. Dr. Failinger testified at hearing and submitted a supplemental report after the hearing. He persuasively explained:

> One looks for a mechanism which would be consistent with tearing of meniscus, or even accelerating the pre-existing degenerative arthritis and/or degenerative medial meniscal tear. . . . I specifically tried to find a mechanism that would be consistent with causing new pathology, and I could not. Although I appreciate Dr. Hall's assumption that "something must have happened" that is not borne out by the objective studies . . . . I turn to page 3 of his Independent Medical Examination, which states the patient "rotated on a fixed right leg and felt a pop." The right knee is not even the knee involved. If the patient's weight was on [her] right knee, and the patient had a significant force such as a slip or a fall, one could certainly make a case for a right knee injury. The **left knee** is the involved knee, and therefore his rationale of a work-related left knee injury is not borne out by the history.

His rationale does not make sense from a mechanism standpoint. (Bold in original).

12. Dr. Failinger's opinions are credible and more persuasive than medical opinions in the record to the contrary.

13. Claimant failed to prove she sustained a compensable injury arising out of her employment on September 20, 2017. Claimant was bearing no weight on her left knee when she felt the painful pop. Claimant testified she felt the pop "after" she lifted her left foot, and no injurious force was being applied to the left knee at that time. Claimant was pivoting with her weight on her right leg, and her left leg was merely following the twisting motion of her body. Claimant's left knee spontaneously popped, with no causal influence from her job duties. Claimant's injury was not due to an employment risk, or a neutral risk that would not have been injurious "but for" being at work. The injury was "precipitated" by pre-existing degenerative changes in her knee rather than her work duties. There was no "special hazard" to take this out of the category of "purely personal" risks. Claimant's work did not aggravate, accelerate, or combine with her preexisting condition to cause the torn meniscus, and it was pure happenstance her symptoms developed at work.

CONCLUSIONS OF LAW

To prove a compensable injury, a claimant must prove the injury occurred while performing service arising out of and in the course of employment. Section 8-41-301(1)(b). The terms "arising out of" and "in the course of" are not synonymous. The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower, and requires an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

The mere fact that a claimant develops symptoms at work does not automatically establish a compensable injury. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal connection between the injury and the duties or conditions of her work. *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

The existence of a pre-existing condition does not disqualify a claim for compensation. If a claimant's work aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain was proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Cotts v. Exempla*, W.C. No. 4-606-

563 (August 18, 2005). Rather, when a claimant experiences symptoms at work, the ALJ must determine whether the subsequent need for treatment was caused by an industrial aggravation or due to the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (October 2, 2009).

In *City of Brighton v. Rodriguez*, 318 P.2d 496 (Colo. 2014), the Supreme Court addressed whether an unexplained fall at work satisfies the "arising out of" test. The court identified three categories of risks that cause injuries to employees: (1) employment risk directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment -related more personal. The first category of risks encompasses risks inherent to the work environment and are compensable, whereas the second category of risks is not compensable, unless an exception applies. The court further defined the category of personal risks to encompass so-called idiopathic injuries, which are considered "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, or similar conditions. The third category — "neutral risks" — are compensable if application of a "but for" test shows any employee would have been injured simply by virtue of being at work at that time. The court was careful to point out that the "but for" test does not relieve the claimant the burden of proving causation, nor does it suggest that all injuries occurring at work are compensable.

When a claimant's injury is "precipitated" by a pre-existing condition, the injury is not compensable unless a "special hazard" of employment increased the probability or severity of the injury. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985). The classic case is the employee who suffers an epileptic seizure at work which causes him to fall from a scaffold or ladder. *E.g., Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant failed to prove she suffered a compensable injury to her left knee on September 20, 2017. Claimant's left knee spontaneously popped, with no causal relationship to her job duties. Claimant's injury was not due to an employment risk, or a neutral risk that that was injurious simply because Claimant was at work. Claimant's injury was precipitated by pre-existing degenerative changes in her knee rather than her work duties, with no special hazard to take this out of the category of "purely personal" risks.

The ALJ finds the case of *Miles v. City and County of Denver*, W.C. No. 4-961-742-01 (December 15, 2015) analogous and instructive. In *Miles*, the claimant suffered a knee injury when she stepped forward to hand lunch boxes to her co-workers. The claimant had bent over to grab lunches for two employees, stood up, turned, and took a step with her left leg. As she stepped forward, she heard a pop and felt immediate pain in her left knee. The claimant did not twist her knee as she stepped forward, but "merely took a step forward with her left leg after which he experienced pain and heard a pop." She was diagnosed with a medial meniscus tear and degenerative arthritis. The ALJ in *Miles* found the claimant failed to prove a compensable injury arising out of her work, and the ICAO affirmed. The undersigned ALJ sees no meaningful distinction between the facts in *Miles* and the circumstances of Claimant's case.

Claimant clearly had pre-existing degenerative changes in her left knee, and the symptoms she developed on September 20, 2017 reflected the natural progression of her underlying condition. Her work did not aggravate, accelerate, or combine with her preexisting condition to cause the torn meniscus or other injury, and it was pure happenstance her symptoms developed at work. Thus, Claimant failed to prove a compensable injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits in W.C. No. 5-061-014 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 22, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained compensable lower back and finger injuries on September 25, 2017 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 3, 2017 until January 6, 2018.

5. Whether Employer is subject to penalties pursuant to §8-43-408(1), C.R.S. for failing to carry Workers' Compensation insurance on September 25, 2017.

6. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304, C.R.S. for Employer's failure to timely report his Workers' Compensation claim pursuant to §8-43-103(1), C.R.S.

7. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties for Employer's failure to timely admit or deny his Workers' Compensation claim pursuant to §8-43-203(2)(a), C.R.S.

FINDINGS OF FACT

1. Employer is a service establishment owned by Im Hoe. On July 26, 2017, Claimant began working for Employer.

2. On September 25, 2017 Claimant was working in the bar area of Employer's facility. Claimant testified that he injured his lower back, left little finger and right middle finger while changing a beer barrel in the bar area. Employer did not possess Workers' Compensation insurance on September 25, 2017.

3. Claimant immediately reported his injuries to General Manager Dong Gil Kim but was terminated on the following day. Mr. Kim informed Claimant that October 2, 2017 would be his last day working for Employer.

3. On October 2, 2017 Claimant drafted a letter to Mr. Hoe. He explained that he had been injured at work on September 25, 2017 at 11:00 p.m. He specifically

noted that he strained his back, sprained his left little finger and sprained his right middle finger. Claimant remarked that he reported his injuries to Mr. Kim and requested medical benefits. He stated that he would file a Workers' Compensation claim because he was uncertain about future treatment and recovery.

4. Employer did not respond to Claimant's request for medical treatment. Claimant thus obtained acupuncture and chiropractic treatment for his industrial injuries through personal providers. The chiropractic treatment included therapeutic massage and manipulation of Claimant's lower back. Claimant paid $60.00 to Yang Acupuncture and $2,743 to Kevin Hwang Chiropractic for a total of $2,803.

5. Claimant explained that he was unable to work for the period October 3, 2017 until January 6, 2018 because of his September 25, 2017 work injuries. The period consists of 95 days or 13.57 weeks.

6. For the period July 26, 2017 until October 2, 2017 Claimant earned total wages of $7050. The period covered 68 days or 9.71 weeks. Dividing $7050 by 9.71 yields an Average Weekly Wage (AWW) of $726.05. An AWW of $726.05 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

7. Claimant has established that it is more probably true than not that he sustained compensable lower back and finger injuries on September 25, 2017 during the course and scope of his employment with Employer. Claimant credibly testified that on September 25, 2017 he injured his lower back, left little finger and right middle finger while changing a beer barrel in Employer's bar area. In an October 2, 2017 letter to Employer Claimant explained that he was injured at work on September 25, 2017 at 11:00 p.m. He specifically noted that he strained his back, sprained his left little finger and sprained his right middle finger. Claimant reported his injuries to Mr. Kim and sought medical benefits for his injuries. Based on Claimant's credible testimony and a review of the record, Claimant suffered a disability that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer.

8. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. Because Employer did not respond to Claimant's request for medical care he obtained acupuncture and chiropractic treatment for his industrial injuries at his own expense. The chiropractic treatment included therapeutic massage and manipulation of Claimant's lower back. Claimant paid $60.00 to Yang Acupuncture and $2,743 to Kevin Hwang Chiropractic for a total of $2,803. All of the preceding medical treatment was reasonable, necessary and related to Claimant's September 25, 2017 industrial injuries. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of his lower back and finger conditions.

9. Claimant has proven that it is more probably true than not that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 3,

2017 until January 6, 2018. Claimant's credible testimony reveals that he was unable to perform his job duties between October 3, 2017 and January 6, 2018. Claimant was obtaining medical treatment for his lower back and finger symptoms. He is entitled to an award of TTD benefits because his September 25, 2017 industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Multiplying Claimant's AWW of $726.05 by 66.67% yields a weekly TTD rate of $484.06.

10. Employer was not insured on September 25, 2017. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period October 3, 2017 until January 6, 2018. The period covers 95 days or 13.57 weeks. Claimant's TTD rate is $484.06, increased by 50% for a lack of insurance, to a TTD rate of $726.09 each week. Multiplying $726.09 for a period of 13.57 weeks yields a total TTD amount of $9853.04.

11. Claimant has failed to demonstrate that it is more probably true than not that he is entitled to recover penalties under §8-43-304, C.R.S. for Employer's failure to timely report his Workers' Compensation claim pursuant to §8-43-103(1), C.R.S. The record demonstrates that Claimant notified Mr. Kim of his September 25, 2017 work injuries on the date they occurred. Claimant also drafted a letter to Mr. Hoe on October 2, 2017 advising of his work injuries. However, Claimant has produced insufficient evidence that Employer failed to report the September 25, 2017 claim to the Division of Workers' Compensation within 10 days or advise Claimant that he might be entitled to Workers' Compensation benefits. Accordingly, Claimant's request for penalties pursuant to §8-43-103(1), C.R.S. is denied and dismissed.

12. Claimant has failed to establish that it is more probably true than not that he is entitled to recover penalties for Employer's failure to timely admit or deny his Workers' Compensation claim pursuant to §8-43-203(2)(a), C.R.S. Although Employer was informed of Claimant's work injuries, Claimant has produced insufficient evidence that he missed work as a result of the injuries. The record reveals that Claimant was terminated from employment on October 2, 2017 but is devoid of evidence that Employer was aware of Claimant's subsequent disability. Accordingly, Claimant's request for penalties pursuant to §8-43-203(2)(a), C.R.S. is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that he sustained compensable lower back and finger injuries on September 25, 2017 during the course and scope of his employment with Employer. Claimant credibly testified that on September 25, 2017 he injured his lower back, left little finger and right middle finger while changing a beer barrel in Employer's bar area. In an October 2, 2017 letter to Employer Claimant explained that he was injured at work on September 25, 2017 at 11:00 p.m. He specifically noted that he strained his back, sprained his left little finger and sprained his right middle finger. Claimant reported his injuries to Mr. Kim and sought medical benefits for his injuries. Based on Claimant's credible testimony and a review of the record, Claimant suffered a disability that was proximately

caused by injuries arising out of and within the course and scope of his employment with Employer.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. Because Employer did not respond to Claimant's request for medical care he obtained acupuncture and chiropractic treatment for his industrial injuries at his own expense. The chiropractic treatment included therapeutic massage and manipulation of Claimant's lower back. Claimant paid $60.00 to Yang Acupuncture and $2,743 to Kevin Hwang Chiropractic for a total of $2,803. All of the preceding medical treatment was reasonable, necessary and related to Claimant's September 25, 2017 industrial injuries. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of his lower back and finger conditions.

Average Weekly Wage

9. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

10. As found, for the period July 26, 2017 until October 2, 2017 Claimant earned total wages of $7050. The period covered 68 days or 9.71 weeks. Dividing

$7050 by 9.71 yields an AWW of $726.05. An AWW of $726.05 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

11. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

12. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period October 3, 2017 until January 6, 2018. Claimant's credible testimony reveals that he was unable to perform his job duties between October 3, 2017 and January 6, 2018. Claimant was obtaining medical treatment for his lower back and finger symptoms. He is entitled to an award of TTD benefits because his September 25, 2017 industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Multiplying Claimant's AWW of $726.05 by 66.67% yields a weekly TTD rate of $484.06.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

13. Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. Section 8-43-408(1), C.R.S. provides that an injured employee's benefits shall be increased by 50% for an employer's failure to comply with the insurance provisions of the Act. If compensation is awarded the Judge shall compute and require the employer to pay a trustee an amount equal to the present value of all unpaid compensation or require the employer to file a bond within 10 days of the order. §8-43-408(2), C.R.S. The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005).

14. As found, Employer was not insured on September 25, 2017. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period October 3, 2017 until January 6, 2018. The period covers 95 days or 13.57 weeks. Claimant's TTD rate is $484.06, increased by 50% for a lack of insurance, to a TTD rate of $726.09 each week. Multiplying $726.09 for a period of 13.57 weeks yields a total TTD amount of $9853.04.

Penalties for Employer's Failure to Timely Report Claim pursuant to 8-43-103(1), C.R.S.

15. Section 8-43-103(1), C.R.S. requires that an employer report an injury to the Division of Workers' Compensation (DOWC) within 10 days of notice or knowledge that an employee has suffered a lost-time injury. A "lost-time injury" is defined as one that causes a claimant to miss more than three shifts or three calendar days of work. *Grant v. Industrial Claims Appeals Office*, 740 P.2d 530 (Colo. App. 1987). An employer is deemed to have "notice" of an injury when the employer has some knowledge of the facts that would lead a reasonably conscientious manager to believe the claimant may seek benefits for the injury. *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984).

16. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304, C.R.S. for Employer's failure to timely report his Workers' Compensation claim pursuant to §8-43-103(1), C.R.S. The record demonstrates that Claimant notified Mr. Kim of his September 25, 2017 work injuries on the date they occurred. Claimant also drafted a letter to Mr. Hoe on October 2, 2017 advising of his work injuries. However, Claimant has produced insufficient evidence that Employer failed to report the September 25, 2017 claim to the Division of Workers' Compensation within 10 days or advise Claimant that he might be entitled to Workers' Compensation benefits. Accordingly, Claimant's request for penalties pursuant to §8-43-103(1), C.R.S. is denied and dismissed.

Penalties for Employer's Failure to Admit or Deny Liability

17. Section 8-43-203(1)(a), C.R.S. provides:

> The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee . . . within twenty days after a report is, or should have been filed with the division pursuant to section 8-43-101, whether liability is admitted or contested; except that, for purpose of this section, any knowledge on the part of the employer, if insured, is not knowledge on the part of the insurance carrier.

18. Section 8-43-203(2)(a), C.R.S. specifies that if such notice is not filed, "the employer, or if insured, the employer's insurance carrier, may become liable to the claimant, if successful on the claim for compensation, for up to one day's compensation for each failure to so notify." Because the claimant seeks the imposition of a penalty for failure timely to admit or deny liability, the claimant bears the burden of proof to establish the circumstances justifying the imposition of the penalty. *See Pioneer Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005) (claimant seeking imposition of penalty under § 8-43-304(1) bore burden of proof to establish circumstances justifying a penalty).

19. Under the language of § 8-43-203(1)(a), knowledge of an insured may not be imputed to the insurer. *See State Compensation Insurance Fund v. Wilson,* 736 P.2d 33 (Colo. 1987); *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). Thus, an insurer is not responsible for admitting or denying liability until 20 days after it has knowledge of information that would require the employer to file a first report of injury with the DOWC under §8-43-101, C.R.S. Those circumstances include injuries that result in "lost time from work for the injured employee in excess of three shifts or calendar days." The mere knowledge that the claimant sustained an injury and that the injury resulted in restrictions resulting in a prescription for modified duty does not establish that the claimant missed work as a result of the injury or the number of days missed. *See Ralston Purina-Keystone v. Lowry,* 821 P.2d 910 (Colo. App. 1991); *Atencio v. Holiday Retirement Corp.,* W.C. No. 4-532-443 (ICAP Nov. 15, 2002).

20. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to recover penalties for Employer's failure to timely admit or deny his Workers' Compensation claim pursuant to §8-43-203(2)(a), C.R.S. Although Employer was informed of Claimant's work injuries, Claimant has produced insufficient evidence that he missed work as a result of the injuries. The record reveals that Claimant was terminated from employment on October 2, 2017 but is devoid of evidence that Employer was aware of Claimant's subsequent disability. Accordingly, Claimant's request for penalties pursuant to §8-43-203(2)(a), C.R.S. is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable lower back and finger injuries on September 25, 2017 during the course and scope of his employment with Employer.

2. Employer is financially responsible for payment of Claimant's medical expenses for the treatment of lower back and finger injuries as well as authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his September 25, 2017 industrial injuries. Claimant has incurred medical expenses totaling $2,803 for acupuncture and chiropractic care.

3. Claimant earned an AWW of $726.05.

4. Claimant shall receive TTD benefits for the period October 3, 2017 until January 6, 2018. The period covers 95 days or 13.57 weeks. Claimant's TTD rate is $484.06, increased by 50% for a lack of insurance, to a TTD rate of $726.09 each week. Multiplying $726.09 for a period of 13.57 weeks yields a total TTD amount of $9853.04.

5. Claimant's request for penalties pursuant to §8-43-103(1), C.R.S. is denied and dismissed.

6. Claimant's request for penalties pursuant to §8-43-203(2)(a), C.R.S. is denied and dismissed.

7. In lieu of payment of the above compensation and benefits to Claimant, Respondent shall:

a. Deposit the sum of $14,000 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of $14,000 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

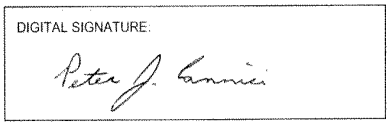
d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

8. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 22, 2018.



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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

PRELIMINARY MATTERS

Respondents' June 27, 2018, motion to strike Claimant's post hearing position statement is granted to the extent the statement presents evidence that was excluded at hearing.

ISSUE

Whether Respondents overcame the Division independent medical examiner's opinion by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant is a 55 year old female. In September 2014, Claimant was employed as an investigatory for an auto insurance company. She was a licensed independent claims examiner. She has a master's degree in psychology and business administration. Claimant's job at this time was in Colorado.

2. On September 3, 2014, Claimant was seen at OnPoint Urgent Care for an ankle injury. She stated that on September 2, 2014, she was at work wearing four inch heels and had inverted her right ankle, but did not actually fall. Claimant had ankle and foot pain that woke her from sleep. She presented with an abnormal gait and was too tender to walk on her right foot and ankle. Foot and ankle x-rays were normal. Minimal swelling was noted at the foot/ankle. The assessment was a foot and ankle sprain. She was given crutches and was to follow up, as needed.

3. On September 4, 2014, Claimant returned to OnPoint asking about a work note/restrictions. Medical records reflect that Claimant reported to Dr. Rogg, who had seen her the previous day that she had been told she could take 10 days off work. That information was not found in a review of her chart. They spoke with Dr. Leep who stated Claimant did not need work restrictions and could get an excuse for September 3 and 4 returning to work on September 5.

4. Claimant was seen at Concentra on September 8, 2014, and reported coming down stairs and fell and twisted her ankle. She complained of pain in her hip, upper leg, knee, lower leg and ankle. Examination of the right leg and ankle showed non-weight bearing on the right leg, swelling, tenderness, limited ROM and weakness. X-rays of foot and ankle appeared to be within normal limits. She was to continue using crutches. A foot and ankle MRI was ordered.

5. On September 10, 2014, a MRI of the foot was essentially normal with no evidence of fracture, dislocation or stress fracture. MRI of the right ankle showed what was read as complex longitudinal tears of the distal tibial tendon in the foot noted with tenosynovitis along with longitudinal tear of the peroneus longus tendon above the malleolus. No fracture or bone marrow contusion.

6. Claimant was referred to an orthopedist, Dr. Myers, for right ankle sprain. At a September 16, 2014, visit, her complaints on exam were mostly of pain in the arch of

her foot. She had been wrapping the ankle and was wearing a boot. Exam of the right lower extremity showed diffuse tenderness, with sensation to light touch globally decreased. The assessment was enthesopathy of ankle and tarsus, unspecified. For unknown reasons, Claimant left Dr. Myers office before he could complete his examination.

7. On September 18, 2014, Claimant returned to Concentra. Assessment was right ankle sprain, foot contusion and tear of the tendon of the right ankle. She was to follow up for care in Atlanta where she lived.

8. On October 8, 2014, Claimant was evaluated by Dr. Beskin at Peachtree Orthopaedic Clinic in Georgia. The mechanism of injury was reported as Claimant was going down stairs, another lady tried to grab her badge from her shirt and in the process she mis-stepped on the stairs twisting her right foot and ankle. She did not fall. Her pain was localized at the lateral aspect of the ankle and in the big toe area mostly plantar and in the distal arch. Minimal, if any, pain in the medial ankle. Clinical exam showed mild swelling at the lateral aspect of the right ankle with tenderness along the peroneal tendons. ROM was guarded by pain. Dr. Beskin did not think there was any significant instability. Foot swelling was minimal. X-rays showed the ankle mortise was well maintained and appeared stable. Clinical correlation with the MRI findings showed there was not much pain referable to the posterior tibial tendon area and the reported tear may not then be clinically significant. She was tender over the peroneal tendons but the MRI study showed relatively benign findings and that then might represent a chronic tendinopathy rather than an acute injury. There was no urgency for surgical intervention and he recommended physical therapy (PT) and increased activities out of the boot she had been wearing. Dr. Beskin opined that Claimant's pain was out of proportion to the x-ray and MRI findings.

9. Claimant returned to see Dr. Beskin on October 22, 2014. He ordered a DVT Doppler study and that was negative. Claimant was seven weeks post accident, complaining of pain involving the entire right leg, for which therapy was not helping and, without pain medications, Claimant broke a dental crown while clenching her teeth.

10. On exam, Dr. Beskin noted relatively normal appearance, temperature and color symmetric between the right and left side. Tape measurements revealed little if any discrepancy at the ankle and calf. Claimant complained of pain with any range of motion of the toes, ankle, knee or hip.

11. Dr. Beskin reviewed the imaging studies and noted that as the abnormal signal in the peroneus longus was relatively mild, it was unlikely to cause the amount of pain Claimant exhibited. Also, Claimant was only mildly symptomatic at the posterior tibial tendon where there was abnormal signal as well. Dr. Beskin noted Claimant's presentation did not correlate with the objective findings.

12. Dr. Beskin again noted that, from his perspective, Claimant's complaints were not supported by his findings. There was difficulty communicating with Claimant, and the doctor recommended Claimant should find another treater.

13. On November 11, 2014, Claimant saw Dr. Scott at Roswell Resurgens Orthopaedics. Her complaints were swelling, pain, a sense of imbalance and numbness and tingling to the toes. She had a significant antalgic gait and avoided pressure on the affected right leg. On exam, her calves were symmetrical. Mild swelling in the right ankle only. The right foot and ankle were diffusely tender. Right ankle x-ray showed maintained ankle mortise. The diagnosis was ankle pain. She was referred to PT and a pain management consult to, in part, rule out/evaluate early RSD related to her severe ankle pain post her ankle sprain.

14. On December 2, 2014, Claimant again saw Dr. Scott. He stated Claimant's pain seemed out of proportion to the nature of injury. The pain started at the ankle and radiated up the leg. He reviewed the ankle MRI taken in Colorado and stated he was unsure how her current pain complaints which were more lateral at the ankle and below the tip of the fibula related to those findings.

15. On January 2, 2015, Dr. Scott noted Claimant was scheduled to see Dr. Joel for sympathetic blocks. Dr. Joel was with the Pain Anesthesia Group across the street, and he had referred her there.

16. On January 30, 2015, Dr. Scott noted Claimant was to continue pain management with Dr. Joel. She was more comfortable on exam and not having nearly the pain levels she had presented with before.

17. On April 13, 2015, Dr. Scott noted Claimant presented with continued pain. She had a recent independent medical examination (IME). He did not see surgical indications at that point in time.

18. Claimant had an IME with Dr. Rizor on April 8, 2015. This was performed at the request of the Respondents. Dr. Rizor reviewed medical records as well as a copy of the *MTG,* WCRP, Rule 17, Exhibit 7 covering Complex Regional Pain Syndrome (CRPS).

19. On examination, the skin of the lower extremity showed normal and symmetrical color. There were no trophic changes in the skin or nails. The hair on both legs had been shaved. There were no gross differences in skin temperature between the two extremities. There was extensive amounts of fatty tissue in both lower extremities with the amount of fatty tissue in the right leg being greater than the left, making the right lower extremity in general appear larger than the left. There was no apparent edema in the lower extremities, with no pretibial pitting and no evidence of swelling in the toes.

20. Claimant was assessed for CRPS using the diagnostic criteria set forth in the *MTG.* While subjective findings were present, objective results were not. As such, Dr. Rizor stated the diagnosis of CRPS was not supported by objective evidence.

21. His assessment was Claimant had a tendon sprain with disuse changes secondary to immobilization and use avoidance behaviors. Recommended treatment was to focus on PT and perhaps cognitive/behavioral pain management to address fear

of movement. Pain medications were not appropriate for her condition. She was capable of full time employment.

22. On July 1, 2015, a nerve conduction study/EMG ordered by Dr. Scott in May, was read as normal. There was evidence of right tarsal tunnel syndrome. There was no evidence of peripheral neuropathy or lumbar radiculopathy. On exam, there was allodynia of the right foot. No temperature change or atrophy were noted.

23. On July 7, 2015, Dr. Scott indicated surgery was still not recommended due to the broad and diffuse nature of Claimant's pain complaints. EMG and NCV testing showed no evidence of peripheral neuropathy or radiculopathy but some evidence of tarsal tunnel syndrome.

24. On August 12, 2015, Dr. Scott indicated Claimant was much improved post sympathetic block and tarsal tunnel injection with Dr. Joel.

25. On October 9, 2015, Dr. Scott noted Claimant continued with significant ankle pain although better than she was a few months ago. She needed a neurology evaluation for EMG looking for evidence of any permanent nerve damage. She then needed to follow up and finish with Dr. Joel. She would then get rated for permanent impairment and a FCE might be helpful. Dr. Scott still did not think any surgical intervention would be sufficiently worth the risk. He welcomed additional opinions from orthopedic foot and ankle experts or other practitioners. As far as work, she could do a desk job where she sat and did not have to do lifting, carrying or climbing.

26. Per a December 24, 2015, report from Dr. Freschi, "In summary, these electro diagnostic studies were entitled normal and showed no evidence of peripheral nerve impairment in the right lower extremity." These studies were to evaluate complaints of right foot pain.

27. On January 15, 2016, Dr. Scott noted Claimant went in for an FCE but she was unable to participate to the full extent of the test so it was stopped. Dr. Scott's care was at an end and he had nothing surgical to offer. Her MRI in the past had showed a question of peroneal tear, yet her symptoms were not localized to that structure.

28. On February 12, 2016, Dr. Scott noted that on exam, patient's pain complaints were wide spread over her leg. Some of the pain continued to have an element of nonphysiologic pain.

29. A lower extremity veinous dopplar study conducted on July 29, 2016, at Northside Radiology showed normal venous flow in the right lower extremity with no evidence of deep vein thrombosis.

30. On August 26, 2016, Dr. Scott noted that at the last visit, Claimant's pain was very specific while now, that had broadened out again. He wanted to talk with Dr. Joel about the spinal cord stimulator. He also wanted a repeat higher quality ankle MRI to determine if there were tears at the peroneal tendons. She remained a possibility for surgery depending on the MRI results.

31. A right ankle MRI taken on September 6, 2016, showed only peroneal tensynovitis without associated tear.

32. On September 13, 2016, Dr. Scott noted again that Claimant's pain had expanded. The right ankle MRI was reviewed with her. She found it to be contradictory that the test results pointed to 'nothing is wrong with her.' While the MRI was read as not showing any tears in any tendons or ligaments, Dr. Scott looked at it and he noted he could not see the peroneus longus very well. No surgery was offered. Claimant was offered inversion tilt laxity ankle x-ray but she refused this.

33. On October 11, 2016, Dr. Scott noted the Claimant reported being in extreme pain. Additional treatment options were limited. He wanted to speak with Dr. Joel. Her pain complaints were once again much too broad to consider surgery.

34. On November 15, 2016, Dr. Scott noted Claimant had not seen Dr. Joel since this past summer for the ketamine injections. The injection caused only a slight improvement. Dr. Scott spoke with Dr. Joel who stated he had nothing else to offer and that Claimant was not a candidate for a spinal cord stimulator. Exam for ROM was very self-limited. She was two years post injury with pain complaints on both sides of her ankle. No surgery or additional treatment needed. Dr. Scott placed her at maximum medical improvement (MMI) with an impairment rating for ankle restrictions.

35. On December 1, 2016, Dr. Roth reviewed Dr. Scott's rating. Dr. Roth opined that based on the limited information he had, no rating was appropriate as the injury, an ankle sprain, should have healed without complications no later than 4-6 months post event. There was no physiological correlation to explain Claimant's pain complaints and impairment cannot be based on pain complaints alone.

36. On March 23, 2017 Dr. Ginsburg performed a Division independent medical examination (DIME). Throughout the course of his exam, Claimant exhibited a good deal of pain behavior. His examination of her lower extremities revealed no significant differences in appearance of palpation comparing the right and left sides. He saw no significant differences in the lower extremities. He did not take measurements, but he noted neither did Dr. Joel. Claimant had presented to Dr. Joel with a slow and shiny right lower extremity with temperature differences, Dr. Ginsburg did not appreciate that on his examination.

37. Dr. Ginsburg found it interesting that Dr. Joel's reported observations of Claimant's lower extremities did not fit his observations upon exam.

38. Dr. Ginsburg testified in his deposition that Dr. Joel was the only one of Claimant's treaters who made the finding of CRPS.

39. Dr. Ginsburg noted criteria which should be performed or at least attempted to document the presence of CRPS and that those were not done here.

40. He placed Claimant at MMI as of January 1, 2017, with a 10% whole person rating for CRPS, spinal cord, nervous system, station and gait. He admitted in his report

that his conclusion was ". . . less than satisfactory to me and it may be less than satisfactory to others reading this report." He concluded that Claimant needed to maintain her medications for about 1 year and then she should treat with her primary care physician.

41. On July 3, 2017, a DEXA axial skeleton, bone density study, showed findings within normal limits.

42. On July 6, 2017, Dr. Ginsburg conducted a repeat DIME. Claimant returned for repeat ROM testing. He noted that just as in his earlier report, Claimant not only did not improve with treatment, she seemed to have gone from being ambulatory to a far more restricted circumstance in her functional activity. He therefore believed there were, based on what he saw at each visit with Claimant, "significant elements of non-physiological problems".

43. Dr. Ginsburg admitted in deposition testimony that to his knowledge none of the tests traditional used to diagnose CRPS, e.g. triple phase bone scan or QSART, were performed in this matter. He admitted that his opinion about CRPS was made knowing that it conflicts with the mandates set forth in the MTG and that Dr. Joel was the only treater who diagnosed Claimant with CRPS.

44. Dr. Joel practices at the North Fulton Pain & Spine Center in Roswell, Georgia. Medical records reflect that one of Dr. Joel's go to treatment modalities for CRPS is having his patients undergo ketamine infusions. That drug use is not recognized in Colorado as treatment for patients validly diagnosed with CRPS.

45. Based upon the evidence presented at hearing, the ALJ credits the evidence tendered by Respondents over the exhibits Claimant tendered.

46. Claimant's diagnosis of CRPS is not supported by the record. The evidence presented persuades the ALJ that Claimant's symptoms and presentation do not establish grounds on which a CRPS diagnosis can be made. Given the totality of the medical records, the ALJ finds that Respondents sustained their burden of proof by clear and convincing evidence to establish that the DIME determination with regard to Claimant's CRPS diagnosis is most probably incorrect. Evidence presented by Claimant was unconvincing.

CONCLUSIONS OF LAW

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions, the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. As found in this case, the ALJ concludes that the clear and convincing evidence presented supports Respondents' argument that the DIME opinion regarding CRPS is most probably incorrect.

5. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

6. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S*.; Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

7. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio*, W.C. No. 4-660-149 (ICAP, June 30, 2008); see Andrade v. Industrial Claim Appeals Office, 121 P.3d 328 (Colo. App. 2005.

8. Here, the DIME chose to disregard the clear directive of *MTG*, WCRP 17, Exhibit 7 which defines the parameters required to make a diagnosis of CRPS. Only one of Claimant's treaters, Dr. Joel, diagnosed CRPS. Dr. Joel is from Georgia and he never applied any of the diagnostic tests required by WCRP 17, Exhibit 7 to make such a diagnosis. His diagnosis of CRPS came after he had only treated Claimant a few times.

9. The introductory words to the *MTG,* WRCP 17, Exhibit 7, states that:

> [The MTG] was prepared by the Colorado Department of Labor and Employment, Division of Workers' Compensation (Division) and should be interpreted within the context of guidelines for physicians/providers treating individuals qualifying under Colorado's Workers' Compensation Act as injured workers with Complex Regional Pain Syndrome (CRPS), formerly known as Reflex Sympathetic Dystrophy (RSD). Although the primary purpose of this document is advisory and educational, these guidelines are enforceable under the Workers' Compensation Rules of Procedure, 7 CCR 1101-3. The Division recognizes that acceptable medical practice may include deviations from these guidelines, as individual cases dictate. Therefore, these guidelines are not relevant as evidence of a provider's legal standard of professional care

10. The Division expressly states that the provisions are, indeed, "guidelines." Nevertheless, the Division adopted the provisions as an enforceable rule, not simply an unofficial policy position of the Division. The Guidelines expressly acknowledge that one can deviate from the *MTG* in particular cases, but the deviation should be explained. The primary purpose of the *MTG* is to advise and educate medical professionals and others about the current state of the medical literature. In so doing, the Guidelines provide an objective basis for decisions about causation of particular diagnoses, CRPS/RSD.

11. WCRP 17, Exhibit 7 contains general guideline principles. For instances, 'Positive patient response' is defined as:

> "Positive results are defined primarily as functional gains that can be objectively measured. Objective functional gains include, but are not limited to: positional tolerances, range-of-motion, strength, endurance, activities of daily living, ability to function at work, cognition, psychological behavior, and efficiency/velocity measures that can be quantified. Subjective reports of pain and function should be considered and given relative weight when the pain has anatomic and

physiologic correlation. Anatomic correlation must be based on objective findings."

12. Further, the MTG provides:

A. CRPS I is defined as a syndrome that usually develops after an initiating noxious event, is not limited to the distribution of a single peripheral nerve, and appears to be disproportionate to the inciting event. It is associated at some point with evidence of edema, changes in skin, blood flow, and abnormal sudomotor activity in the region of the pain, allodynia, or hyperalgesia.

B. A physical examination for CRPS should include changes in appearance including trophic changes, changes in hair and nail growth, muscular atrophy, changes in skin tugor, swelling and color changes.

C. Temperature evaluations should be based on objective testing and while differences of 1 degree Celsius may be significant, such also commonly occur with other pain complaints.

D. Edema is an important finding in CRPS. Its presence should be described in detail by the physician and when possible verified with objective testing such as volumetric testing or bilateral circumference measurements, usually performed by therapists.

E. "Sensory Evaluation: A detailed sensory examination is crucial in evaluating a patient with chronic pain complaints, including the presence of allodynia and the anatomic pattern of any associated sensory abnormalities to light touch, deep touch, pain, and thermal stimulation. Quantitative sensory testing may be useful."

F. "Evaluation of Non-physiologic Findings: Determine the presence of the following: variabilities on formal exam including variable sensory exam; inconsistent tenderness, and/or swelling secondary to extrinsic sources. Inconsistencies between formal exam and observed abilities of range-of-motion, motor strength, gait, and cognitive/emotional state; and/or observation of inconsistencies between pain behaviors, affect and verbal pain rating, and physical re-examination can provide useful information."

13. In *Hall v.* Industrial *Claim* Appeals *Office*, 74 P.3d 459 (Colo. App. 2003), the Colorado Court of Appeals noted that the guidelines are to be used by health care practitioners when furnishing medical aid. *See* Section 8-42-101(3)(b), C.R.S. While the Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act, it is well settled that they are not definitive*. See Hall v. Industrial Claim Appeals Office, supra*; *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (May 5, 2006), aff'd *Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007)(NSOP)(it is appropriate for the ALJ to consider Guidelines on questions such as diagnosis, but the guidelines are not definitive). For instance, an ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *See Logiudice v. Siemans Westinghouse,* W.C. No. 4-665-873 (January 25, 2011). Accordingly, Section 8-43-201, C.R.S. was amended effective July 1, 2014, by S.B. 14-191 to add subsection (3) and to make explicit that when deciding whether certain medical treatment is reasonable, necessary and related "[t]he director or administrative law judge is not required to utilize the MTG as the sole basis for such determinations*." See Andregg v. Arch Coal*, WC4-629-269, January 24, 2017.

14. While the treatment guidelines cover various body parts, when dealing with CRPS, the admonition contained in the diagnostic criteria section of Rule 17 provides that CRPS is a controversial diagnoses. The diagnoses must be weighed against the evidence in this matter.

15. That evidence in this case shows Claimant had few or no objective findings that merit a CRPS diagnosis. Evidence established that Claimant had little to no positive patient responses to the myriad of care she received over three plus years. The evidence shows Claimant with little to no anatomic and physiologic correlation based on objective findings. Claimant's physical examination showed little to no changes in appearance including trophic changes, changes in hair and nail growth, muscular atrophy, changes in skin tugor, swelling and color changes.

16. During the course of Claimant's treatment, her test results did not show at least two positive diagnostic tests, e.g. comparative x-rays of both extremities, a triple phase bone scan, infrared stress thermography, QSART or sympathetic blocks, needed by the *MTG* to make a CRPS diagnosis.

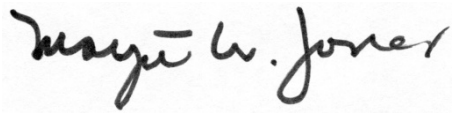
17. Based on the above, Respondent have provided clear and convincing evidence that it is highly probable Dr. Ginsburg's opinion that Claimant has CRPS is incorrect.

ORDER

Respondents overcame by clear and convincing evidence the DIME's opinion that Claimant has CRPS as a result of her ankle sprain in this matter.

Any and all issues not determined herein are reserved for future decision.

DATED: August 23, 2018.



MARGOT W. JONES
ADMINISTRATIVE LAW JUDGE

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant's Application for Hearing should be stricken and whether the claim is closed by failure to timely object to the final admission of liability.

FINDINGS OF FACT

1. On June 4, 2014, Claimant sustained an admitted work related injury.

2. Claimant underwent medical treatment and was placed at maximum medical improvement (MMI) on October 19, 2017. *See* Exhibit 4.

3. On November 1, 2017, Respondents filed a Final Admission of Liability (FAL). Claimant objected and requested a Division Independent Medical Examination (DIME). *See* Exhibits A, B.

4. In late January of 2018 Respondents' attorney and Claimant's attorney exchanged emails regarding settlement negotiations. Claimant's attorney indicated that her client had seemed to have been placed at a less than sedentary work capacity and that a settlement demand would likely start with the PTD value. Respondents' attorney indicated that her clients did not consider this a PTD claim and indicated that they should let the claim go through the DIME process and see how it goes and then discuss possible settlement again. *See* Exhibit 3.

5. On February 15, 2018, Claimant underwent a DIME. On March 5, 2018, the Division of Workers' Compensation issued a Notice of Receipt of Division IME (DIME) Report, DIME Process Concluded. The notice indicated that within 20 days, Insurer had to either admit liability consistent with the IME report or file an application for hearing. *See* Exhibit 4.

6. On March 15, 2018, Respondents filed a FAL. The FAL provides that if you disagree with the benefits admitted or not admitted you must within 30 days complete the attached objection form…and you must also file an application for hearing with the Office of Administrative Courts on any disputed issues. *See* Exhibits 4, E.

7. On April 6, 2018, Claimant filed an Objection to Final Admission of Liability. Paralegal for Claimant's attorney sent this form to the Division of Workers' Compensation and to Respondents' attorney. The form indicated that Claimant would mail or deliver an Application for Hearing form on disputed issues to the Office of Administrative Courts within 30 calendar days of the date of the Final Admission. The form also indicated on the certificate of mailing that it was placed in the U.S. mail or delivered to the carrier's attorney. *See* Exhibits 2, F

8. On April 6, 2018, Paralegal for Claimant's attorney emailed the Objection to Final Admission of Liability to Respondents' attorney and to the paralegal for Respondents' attorney. *See* Exhibit F.

9. On April 19, 2018, Respondents' attorney emailed Claimant's attorney indicating that she had received the objection to the FAL but had not received an application for hearing. She asked if an application for hearing had been filed, and if so, to please send her a copy. *See* Exhibit G.

10. On April 19, 2018, paralegal for Claimant's attorney responded to the email stating, "please see the application for hearing that was filed on 4/6/18." She attached a copy of the Application for Hearing to the email. *See* Exhibit G.

11. On April 20, 2018, Respondents' attorney emailed Claimant's attorney. She indicated that she had received an email the day prior with an application for hearing attached and that the email stated the application for hearing was mailed or emailed to her on April 6, 2018. She indicated that it was not emailed and that she had received the objection to final admission dated 4/6/18 but that there was not an application with it. She indicated that she had checked with OAC and that they had no application for hearing in the matter. She indicated that Respondents would be objecting to setting any hearing in the matter and took the position that the claim was closed by operation of the final admission. *See* Exhibit H.

12. Claimant's attorney respondent on April 23, 2018 indicating that the application for hearing had been served by mail. *See* Exhibit H.

13. On April 23, 2018, Respondents' attorney responded stating that she did not get a copy in the mail and that the OAC had advised that they did not get a copy either. *See* Exhibit H.

14. On April 24, 2018, paralegal for Claimant's attorney emailed Respondent's attorney and the Office of Administrative Courts. The email indicated the parties should see the attached hearing confirmation and application for hearing that was never received by OAC. *See* Exhibit J.

15. On May 2, 2018, OAC emailed both parties confirming that they received the application on 4/24/18. *See* Exhibit J.

16. The Application for Hearing at issue lists a certificate of mailing indicating that it was mailed or delivered to Respondent's attorney on April 6, 2018. Shawntell Sharrock, the paralegal to Claimant's attorney, signed the certificate of mailing. The Application for Hearing checked permanent total disability and overcoming the DIME as issues to be considered at hearing and the application was signed by Claimant's attorney. *See* Exhibit G.

17. At Hearing, Ms. Sharrock testified that she was the paralegal handling Claimant's file for Claimant's attorney. Ms. Sharrock testified that her normal practice was to fill out an Application for Hearing on her computer, print it out, sign and date the certificate of service, scan it into electronic form and then put the printed copies into envelopes for mailing. She then weighs the envelopes, stamps them, and puts them into a basket. At the end of each day, she takes any envelopes from the basket out the blue U.S. Postal mailbox outside their office. She testified that she knows that both an objection to the FAL and an application for hearing have to be filed. She testified that she filled out and served both documents in this case on April 6, 2018. Ms. Sharrock testified that she emailed the objection to the FAL to the division and Respondent's attorney but did not attach the Application for Hearing to the email, because the Application for Hearing does not go to the Division and goes to OAC. Ms. Sharrock testified that after she received an email from Respondent's attorney saying they had not received the Application for Hearing, she looked in the electronic file they maintain. She testified that the Application for Hearing was there and was filed, signed, dated, and scanned in on April 6, 2018 per the computer so she was confident she had completed the Application and mailed it on that day consistent with her normal practices.

18. Veronica Gonzalez, the paralegal for Respondents' attorney also testified at hearing. She testified that on April 19, 2018 she was asked to find out if OAC had an application for hearing. She testified that Respondents did not receive the Application for Hearing until April 19, 2018.

19. Ms. Sharrock is found credible and persuasive that she followed her routine practices and mailed the Application for Hearing to both OAC and Respondents on April 6, 2018.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony

and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Application for Hearing

Section 8-43-203(2)(b)(II), C.R.S., provides that a claim will be automatically closed "as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the admission in writing and request a hearing on any disputed issues that are ripe for hearing." Section 8-43-203(2)(d), C.R.S., provides that once a case is closed under subsection (2) "the issues closed may only be reopened pursuant to section 8-43-303." The courts and the Industrial Claim Appeals Office have treated these provisions as jurisdictional. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *Dalco Industries, Inc. v. Garcia,* 867 P.2d 156 (Colo. App. 1993); *Lam v. Royal Crest Dairy,* W.C. No. 4-506-429 (I.C.A.O. November 4, 2005).

These provisions are part of an overall statutory scheme designed to provide a method to determine the claimant's medical condition, afford the claimant an opportunity to contest a determination of his or her medical condition, to close all issues when there is no dispute and need for a hearing, and to permit reopening on appropriate grounds including change of condition. *Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004). In *Stefanski v. Industrial Claim Appeals Office,* 128 P.3d 282 (Colo. App. 2006), *aff'd. on other issues, Sanco Industries v. Stefanski,* 147 P.3d 5 (Colo. 2006), the court held that a "motion to strike" an FAL filed because the claimant was not referred to a follow-up Division-sponsored medical examination (DIME) constituted a sufficient written objection to the FAL for purposes of § 8-43-203(2)(b)(II). The court stated that, "any pleading that adequately notifies the employer that the claimant does not accept the FAL constitutes substantial, if not actual, compliance with the statutory obligation to provide written objection." In *Peregoy v. Industrial Claim Appeals Office, supra*, the court held that in order to contest an FAL by filing an application for hearing on issues ripe for a hearing, the claimant must file an application for hearing contesting some aspect of the FAL, and must "state the benefit to which he or she is entitled."

The Workers' Compensation Rules of Procedure at 7 CCR 1101-3, and specifically, rule 1-2 provide that unless a specific rule or statute states to the contrary, the date a document or pleading is filed is the date it is mailed or hand delivered to the Division of Workers' Compensation or the Officer of Administrative Courts. Similarly, the Procedural Rules for Workers' Compensation Hearings, specifically, OAC rule 4 provides that the date of filing shall be the date served on the OAC as indicated on the certificate of service, or, if no certificate of service is included, the date received by the OAC. OAC Rule 6 provides that service of pleadings on a party may be made by hand delivery, mail, facsimile, or email and that when an attorney represents a party, service shall be made on the attorney.

The existence of a business practice custom is sufficient to warrant a presumption that notice was sent, and it is the province of the trier of fact to decide whether that presumption is overcome by other evidence. *EZ Building Components Mfg., LLC v. Industrial Claim Appeals Office*, 74 P.3d 516 (Colo. App. 2003), citing *National Motors, Inc. v. Newman*, 484 P.2d 125 (Colo. App. 1971).

Ms. Sharrock credibly testified that she followed her normal business practice in filing the objection to the FAL and the application for hearing. As found above, the objection to FAL was sent and received on April 6, 2018 by email. Ms. Sharrock credibly testified that on the same date she mailed the Application for Hearing and that she later verified in the computer system that the Application for Hearing had been signed and scanned in on April 6, 2018 consistent with her normal business practices. Ms. Sharrock credibly explained why she did not email the objection to FAL and application for hearing at the same time, as the documents were going to different entities. The certificates on both the objection to FAL and application for hearing indicate that the documents were either mailed or delivered. Ms. Sharrock is credible that the objection was emailed while the application was placed in the U.S. mail. Both were sent to attorney of record for Respondents, as required by rule. The credible testimony creates a presumption that the notice was mailed on April 6, 2018. Although Respondents presented evidence that neither they nor the Office of Administrative Courts received the Application for Hearing until a later time, they have not presented sufficient evidence to overcome the presumption that the application was mailed on April 6, 2018 by paralegal to Claimant's attorney.

Thus, Claimant has established that the Application for Hearing, was mailed to the Office of Administrative Courts on April 6, 2018 and thus was timely filed within 30 days of the Final Admission of Liability. Respondents had the objection to FAL on April 6, 2018 and had the Application for Hearing on April 19, 2018. The April 6, 2018 Application for hearing is not stricken, the claim is not closed, and the claim may proceed on the merits.

ORDER

1. Claimant timely filed an Application for Hearing on April 6, 2018.

2. The April 6, 2018 Application for hearing is not stricken, the claim is not closed, and the claim may proceed on the merits.

3. All other issues are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 23, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. May Respondents withdraw the General Admission of Liability which was filed on March 1, 2018?

II. Has Claimant shown, by a preponderance of the evidence, that the spinal surgery which was performed by Dr. Serak was reasonable, necessary, and related to a work injury which occurred in July, 2017?

STIPULATIONS

The parties stipulated that Claimant's Average Weekly Wage is $600.00. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Respondents originally admitted this claim on 3/1/18. (Ex. 8). Respondents now seek to withdraw their General Admission of Liability.

2. Claimant testified that she currently works for Sabaru Auto Service ("Sabaru"), which is a family-owned business. Claimant's uncle, father, and brother are owners of this business, which repairs and sells cars in the Colorado Springs area.

3. Claimant testified that she had worked for Sabaru for about 3 ½ years prior to being injured.

4. Claimant testified that prior to being injured, her main job at Sabaru was the "front desk" which consisted of bookkeeping, writing up work orders, inventory, taking cars back to mechanics, and detailing used cars to get them ready for sale.

5. Claimant testified that after being injured, she now only works at the front desk and does not detail cars any longer.

6. Claimant testified that she never filed a Workers' Compensation claim prior to this injury.

7. Claimant testified that this injury occurred on July 1, 2017. She testified that the injury occurred on a Saturday (the ALJ takes administrative notice that July 1, 2017 was a Saturday), later in the afternoon, when she was detailing the interior

of a car, vacuuming, shampooing, and cleaning all the nooks and crannies of the vehicle. Claimant testified that while either shampooing or vacuuming a car when she was bending over, her back started to get very tight and really started hurting. Claimant testified that she knew something was immediately wrong that day because of the tightness and soreness in her back.

8. Claimant testified that her back was not hurting when she showed up at work on July 1, 2017 or in the days before the accident.

9. Claimant testified that the symptoms after the July 1, 2017 incident were very different than any prior back symptoms. She testified that before this accident, she would have some stiffness but she would stretch and do yoga which would help resolve any symptoms. After the accident, it was hard to sit or walk, and lying down was uncomfortable.

10. Claimant testified that in the 6 months prior to the accident, she would have some stiffness in her back, but that stiffness would go away with stretching.

11. Claimant testified that she was receiving "maintenance" work from her chiropractor approximately once a month prior to this work place accident.

12. In the latter part of 2016, Claimant treated with her chiropractor (Dr. Uthe) on these dates:

    8/3/16; 8/5/16; 8/8/16; 8/12/16; 8/15/16; 8/19/16; 8'22/16; 8/26/16; 8/29/16; 8/31/16;

    9/2/16; 9/5/16; 9/7/16; 9/9/16; 9/12/16; 9/19/16; 9/23/16; 9/26/16; 9/30/16;

    10/3/16; 10/7/16; 10/10/16; 10/14/16; 10/27/16; 10/24/16; 10/31/16;

    11/7/16; 11/11/16; 11/16/16; 11/21/16; 11/28/16;

    12/5/16; 12/23/16 (Ex. I, pp. 1-51)

13. Claimant treated with Dr. Uthe on 8 occasions in the 6 months prior to this incident on these dates:

    1/4/17;

    2/1/17;

    3/20/17;

    4/19/17;

5/9/17; 5/17/17; 5/26/17;

6/16/17. (Ex. 5, pp. 161 – 168).

14. Records show that Claimant treated with Dr. Uthe on 65 occasions in the 6 months after this incident on these dates:

    7/7/17; 7/10/17; 7/12/17; 7/14/17; 7/21/17; 7/24/17; 7/26/17; 7/28/17; 7/31/17;

    8/1/17; 8/2/17; 8/4/17; 8/7/17; 8/9/17; 8/10/17; 8/11/17; 8/14/17; 8/15/17; 8/21/17; 8/25/17; 8/28/17; 8/30/17;

    9/1/17; 9/4/17; 9/6/17; 9/11/17; 9/13/17; 9/15/17; 9/18/17; 9/20/17; 9/22/17; 9/25/17; 9/27/17; 9/29/17;

    10/23/17; 10/4/17; 10/6/17; 10/10/17; 10/13/17; 10/18/17; 10/20/17; 10/25/17; 10/27/17; 10/31/17;

    11/3/17; 11/7/17; 11/10/17; 11/14/17; 11/17/17; 11/20/17; 11/22/17; 11/24/17; 11/27/17; 11/29/17;

    12/4/17; 12/6/17; 12/8/17; 12/11/17; 12/13/17; 12/18/17; 12/19/17; 12/21/17; 12/22/17; 12/27/17; and 12/29/17. (Ex. 5, pp.169-263).

15. Claimant was admitted to the ER at UC Health on July 14, 2017. (Ex. 4, pp. 31 – 57). An MRI of the lumbar spine was taken in that visit. This MRI revealed:

    (1) The L2-3 disc demonstrates a 5 mm x 11 mm posterior midline protrusion with annular tear.

    (2) The L3-4 disc demonstrates a broad-based 5.1 mm posterior annular bulge with tear. There is mild left foraminal narrowing.

    (3) The L4-5 disc is narrowed, desiccated and demonstrates a 7.7 mm AP by 15.9 mm transverse left paracentral protrusion/extrusion. There is moderate canal stenosis measuring 5.6 mm. There is moderate left foraminal stenosis.

    No fluid leakage or sign of acute trauma was noted.

16. Claimant received physical therapy and an epidural steroid injection on her back. (Ex. 4, p. 58).

17. Claimant was also admitted to the ER at UC Health on January 18, 2018 due to her back condition. (Ex. 4, pp. 61–108). Another lumbar MRI was also performed.

18. Claimant testified that she informed her father that her back was hurting after this incident, but she did not tell him how it had happened.

19. Claimant testified that she waited until December of 2017 to file a Workers Compensation claim because she was not familiar with Workers' Compensation and she thought that she needed to "slip and fall or cut myself" in order for there to be a claim.

20. Claimant testified that she finally decided to file a Workers' Compensation claim when she and her mother were talking one day in December. Claimant testified that her mother informed her that because this happened at work, she should "at least try to file a claim." Claimant testified that she told her mother that since it was now December, she thought it would be too late to file the claim. Claimant testified that her mother said to report the injury and "at least put it on record."

21. Claimant testified that she informed her father in December, 2017 of the July injury, and he instructed her to file the necessary paperwork.

22. Claimant testified that she first sought legal help for this claim after her proposed back surgery had been denied in this claim. Claimant testified that when she originally filed this Workers' Compensation claim, she did not even think surgery would be required.

23. Claimant testified that the surgery in this matter was performed by neurosurgeon Dr. John Serak under her private insurance. Claimant testified that the back surgery was performed because she was starting to lose bladder function and she was experiencing muscle weakness. Claimant testified that physical therapy and chiropractic weren't engaging her muscles correctly and surgery needed to be performed. Claimant testified that the surgery was considered an emergency because she could have lost permanent function of her bladder and bowels if the surgery was not performed.

24. Claimant testified that that she had never lost control of her bladder prior to the July 1, 2017 work place incident.

25. Claimant testified that in the six months prior to the July 1, 2017 incident she was able to lift 20 pound car parts to provide to the mechanics. She performed yoga, and did walk/running. Claimant testified that after July 1, 2017 she can no longer lift 20 pound car parts, and can no longer perform those fitness activities.

26. Claimant testified that in 2016 she had had a little bit of low back pain but more of the left leg/sciatic nerve pinching. Claimant testified that she treated with physical therapy and chiropractic and within six months she was back to normal.

27. Claimant testified that the 2016 back pain was likely brought about by riding a bike. The day before that, she walked six blocks in high heels. Those two combined activities put a strain on her left leg. She testified that the back pain and left leg pain started in about July of 2016, but she was back to normal around January of 2017.

28. Claimant testified that in January of 2017, she had no medical restrictions, as she was again performing all activities she was able to perform prior to July of 2016.

29. Claimant testified that she never missed work due to this 2016 incident prior to the July 1, 2017.

30. Claimant testified that she had never received an MRI on her low back prior to the work incident. Claimant testified that she has now received 3 MRI's.

31. Claimant testified that she never received injections in her low back prior to July 1, 2017. Claimant testified that she has now received 3 injections in her left leg after July 1, and she has also received an epidural steroid injection in her low back.

32. Claimant testified that she was on a once-a-month maintenance program with her chiropractor in the months prior to this work place accident. Claimant testified that she chose to undergo these chiropractic treatments as prevention-type treatment. Claimant testified that she did not have to do the maintenance program. Claimant testified that she was not treating with any physicians in the 6 months leading up to this injury.

33. Claimant testified that the chiropractic treatment drastically changed after July 1, 2017, because of the back pain that she was experiencing and the pain in her leg.

34. Claimant testified that as a result of her work injury, her mother now lives with her. Claimant testified that her mother did not live with her prior to July 1, 2017. Claimant testified that she cannot do laundry now, she cannot clean now, and her mother has to take her children to school. Claimant testified that she could perform all of these duties prior to the July 1, 2017 accident.

35. Claimant testified that after July 1, 2017 she could only sit for 20 minutes max before she would have to walk around. Prior to the accident, she could sit for a couple of hours straight. Claimant testified that after July 1, 2017 she could only stand in one place for a couple of minutes and then she would have to walk around. Prior to the accident, she could stand for maybe 30 minutes without issue. Claimant testified that after the July 1, 2017 accident she could only sleep for about 3 hours or so, before she would wake up. Prior to the accident, she did not have these issues, and had no trouble sleeping through the night.

36. Claimant first started treatment with Dr. Uthe on August 3, 2016. (Ex. 5, pp.109, 208). In an opinion letter to Claimant's attorney, Dr. Uthe opined that she believes a back injury occurred at work on July 1, 2017:

> In the months leading up to this injury, Tiffany was doing very well on a once a month maintenance program between Dec. 2016 and July 1, 2017. She described her pain as minimal to none and was also increasing her exercise levels without complication. (Ex. 5, p.288)

37. Dr. Uthe agreed with Dr. Serak's request for an L4-5 microdisectomy to "decompress her nerve roots in order to relieve her pain and prevent worsening of her weakness." *Id.* at 289.

38. Dr. Uthe opined that the surgery performed by Dr. Serak on March 30, 2018 was reasonable, necessary, and related to the July 1, 2017 work place accident. *Id.*

39. Dr. Uthe opined that based on her treatment provided to Claimant, and her knowledge of the mechanism of injury, in her professional medical opinion, it is more likely than not that the work place accident of July 1, 2017 brought about/caused the immediate need for the current treatment/surgery. *Id.*

40. Dr. Shireen Rudderow is the Authorized Treating Physician in this claim. (Ex. 1). Responding to an inquiry from Claimant's attorney, Dr. Rudderow opined that, based upon her knowledge of the mechanism of injury and treatment provided to Claimant, she believes that Claimant sustained a back injury at work with Subaru Auto Service. (Ex. 1, p. 10).

41. Dr. Rudderow opined that her diagnosis of the injuries sustained by Claimant in the work place accident are: (1) L4/5 disc herniation, (2) lumbar radiculopathy, and (3) left leg weakness and paresthesia. *Id.*

42. Dr. Rudderow opined that based on her treatment provided to Ms. Morales and her knowledge of the mechanism of injury, in her professional medical opinion, it is more likely than not that the work place accident has brought about/caused the immediate need for the current treatment/surgery performed by Dr. Serak. *Id.* at 11.

43. Dr. Rudderow opined that the surgery performed by Dr. Serak was reasonable, necessary, and related to the work place injury. *Id.*

44. Dr. Tim O'Brien performed an IME for Respondents in this matter. (Ex. M). Dr. Rudderow provided the following response to Dr. O'Brien's IME:

> I have reviewed the IME by Dr. O'Brien, orthopedist. I disagree with Dr. O'Brien's conclusions regarding the cause of the injury. The patient does have history of lower back pain in the past that was resolved. It is reasonable to assume the cause of her current

> lower back pain is related to her duties at Sabaru, where she would spend hours bending awkwardly, cleaning cars. I do agree with Dr. O'Brien that surgical intervention should proceed. I am concerned that delay of care by her worker's compensation carrier may cause permanent neurologic damage. I think the claim should proceed." (Ex.1, p. 7).

45. Dr. Serak opined that based upon his knowledge of the mechanism of injury and treatment provided to Claimant that a back injury occurred at work on July 1, 2017 as "onset of symptoms correspond with back + leg pain developed while working per patient." (Ex. 2, p. 17).

46. In response to an inquiry by Claimant's attorney, Dr. Serak provided the following diagnosis of injuries: "Lumbar disc herniation with radiculopathy." *Id.*

47. Dr. Serak opined that based upon his treatment provided to Claimant and knowledge of the mechanism of injury, it is more likely than not that the work place accident of July 1, 2017 has brought about/caused the immediate need for the current treatment/surgery. *Id.* at 18.

48. Dr. Serak opined that the surgery that he performed on March 30, 2018 was deemed necessary due to: "Progressive lower extremity weakness and bladder incontinence consistent with signs + symptoms of the development of cauda equina syndrome." *Id.* at 18.

49. Dr. Serak opined that the surgery that he performed was reasonable, necessary, and related to the July 1, 2017 work place injury. *Id.*

50. Dr. Jack Rook performed an Independent Medical Examination for Claimant in this matter. (Ex. 7). Dr. Rook reviewed the medical records in this matter and performed a physical examination of Claimant.

51. Dr. Rook diagnosed Claimant's work related diagnosis as follows:

> (1) Permanent aggravation of lumbar degenerative disc disease with the development of, or worsening of a herniated disc at the L4-5 level and subsequent migration of the disc with nerve root impingement and then development of cauda equine syndrome.
>
> (2) Status post L4-5 decompression/laminectomy with postoperative gradual improvement of the preoperative cauda equine syndrome.
>
> The patient's history is consistent with the development of a clinically worsening low back pain and left lower extremity sciatica condition as a result of the work activities she performed on July 1, 2017. The patient had a subacute deterioration in her clinical condition with the progressive development of lumbar radiculopathy and eventually the

cauda equine syndrome within six months of the occupational injury event. (Ex. 7, pp. 319-320).

52. Dr. Rook opined that based on his knowledge of the mechanism of injury, after review of the medical records, and after examination of the Claimant, it is more likely than not that a back injury occurred at work on July 1, 2017. Specifically Dr. Rook stated:

> With respect to the mechanism of injury, the extreme twisting, bending, and awkward trunk positioning required of 'detailing' the interiors of motor vehicles for the two months prior to her DOI, are the types of motions that are known to place significant stress on structures in the lower lumbar spine." *Id.* at 320-321.

53. Dr. Rook opined that based upon his review of the medical records in this file and his examination of the Claimant, the work place injury of July 1, 2017 caused/brought about the need for the current treatment:

> There is chiropractic documentation possibly indicative of mild sciatica symptoms involving her left lower extremity. However, it is the patient's history that these problems were not incapacitating and her history is support by the paucity of medical documentation during this time frame. In contrast, the patient's clinical condition deteriorated significantly after July 1, 2017 and at that point became consistent with a frank lumbar radiculopathy which…progressed rapidly to cauda equine syndrome due to the presence of a huge disc herniation with migration at the L4-5 level. Prior to her date of injury, this patient was not experiencing such symptoms and she was not in need of surgical intervention." *Id*. at 321.

54. Dr. Rook further opined:

> There is no doubt that this patient had a pre-existing condition of degenerative disc disease in her lumbar spine. However, as noted above the injury that developed on July 1, 2017 *permanently aggravated* this pre-existing condition, and more than likely was associated with disc damage at the L4-5 level that led to a rapid progression of disc disease, disc migration, radiculopathy, and the development of cauda equine syndrome. *Id.* at 321-322. (emphasis added).

55. Claimant was again admitted into the Emergency Room at UC Health on January 18, 2017. (Ex. 4, pp. 61-105). In that visit, a 2nd MRI was taken and read by the neurosurgeon, Dr. Medel. The record indicate that Claimant is showing a disc rupture that would most likely require surgery." *Id.* at 75.

56. Respondents' IME physician, Dr. Timothy O'Brien, testified in a deposition that the surgery performed by Dr. John Serak on March 30, 2018 was reasonable for someone in Claimant's condition. (Deposition Transcript p. 32, l. 24).

57. Dr. O'Brien testified that he examined the Claimant on one occasion, on 2/9/18. (Deposition Transcript p. 32, l. 1). Dr. O'Brien testified that the Claimant had been "open and honest" about prior medical treatment with him. (Deposition Transcript p. 32 ll. 2–6 and 14–17).

58. Dr. O'Brien stated that if Dr. Serak's historical input he documented in the exam findings in March of 2017 were accurate, "then surgery is getting very, very close to necessary, necessary to preserve nerve function." (Deposition Transcript p. 33 ll.15–20).

59. Dr. O'Brien further noted that upon physical examination, Claimant did not display atrophy on her lower extremity, which did not correlate with her reported radicular symptoms. He attributed her lack of strength, both in his deposition and his written narrative, to "failed effort." He noted at the onset of injury, this was not recorded as an industrial incident in the records. He also noted that Claimant's pain increased on two occasions outside of work.

60. Dr. O'Brien opined that while Claimant did have documented back issues, there was not an actual incident at work. He reasoned that surgery was not reasonable and necessary at that time in that upon physical exam, claimant did not display neurological deficits. He also noted that there was not evidence in the July 14, 2017 MRI of an acute trauma.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado, §8-40-101 C.R.S., *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1) C.R.S.

2. Since Respondents are seeking to withdraw their General Admission of Liability, the burden of proof is on Respondents to prove, by preponderance of the evidence, that a compensable injury did not occur here. §8-43-201(1) C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clarke*, 592 P.2d 792 (Colo. 1979).

3. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

4. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

5. In this instance, the ALJ finds Claimant to be credible in her testimony. Her explanation for delaying in reporting her injury is plausible, given her lack of legal sophistication. It was a family business; thus a lack of any adversarial relationship between employer and employee. The ALJ further finds her to be credible in reporting her symptoms to her medical providers, in a sincere effort to improve her condition. The ALJ is not persuaded by Dr. O'Brien's opinion that Claimant put submaximal effort into her IME physical exam.

Compensability/ Withdrawal of GAL

6. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). A compensable injury is an injury which "arises out of" and "in the course and scope of employment." §8-41-301(1)(b) C.R.S. The term "in the course and scope of employment" refers to the time, place and circumstances under which the injury occurred. The injury must have occurred in the time and place limits of the employment, and during an activity having connection with the employee's job functions. Additionally, the term "arising out of" establishes that there must be a causal relationship between the employment and the injury. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

7. A compensable injury may be the result of an industrial aggravation of a pre-existing condition as long as the aggravation is the proximate cause of the disability or need for the current treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). The mere fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo.

1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

8. The weight and credibility to be assigned to expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

9. In this instance, the ALJ has found Claimant to be a credible medical historian and witness. As concluded earlier, the ALJ finds that Claimant put a sincere effort into not only her IME exam, but in reporting her symptoms to her own medical providers. While it might be argued that there is a financial motive to put submaximal effort into an IME exam, the same cannot be said for a person being examined by her own neurosurgeon in anticipation of an expensive and difficult surgery being paid through private insurance. Her reported symptoms are consistent during the downward progression of her condition, which was occasioned by a work injury.

10. Claimant relied heavily upon her chiropractor in treating her back pain in 2016 and 2017. As measured by the number of visits, Claimant-consistent with her testimony-treated regularly in the fall of 2016, then got better by December. She remained on a near monthly maintenance regimen in the first half of 2017, then was clearly in considerable distress starting in July, with 65 visits in the next 6 months. (While not outcome determinative to this case, the ALJ notes that during her ER visit on 7/14/17, Claimant reported to ER personnel that this 'flareup' started on "*Saturday*; 6 days ago." (Ex. 4, p. 32). The ALJ finds that, more likely than not, this work injury while cleaning cars actually occurred on Saturday, July 8, 2017.)

11. While the mere number of witnesses for or against a proposition is not outcome determinative, the IME report and testimony of Dr. O'Brien is not sufficiently persuasive to outweigh the combined medical opinions of Dr. Rook, Dr. Rudderow, Dr. Serak, and her chiropractor, Dr. Uthe. The ALJ finds that on or about July 8, 2018, while at work, Claimant permanently aggravated her (admittedly) pre-existing L4/L5 condition, which then progressively worsened until she required surgery to correct it. The injury is compensable. Respondents may not withdraw the General Admission of Liability which had been filed on 3/1/2018.

Medical Benefits/Surgery by Dr. Serak

12. Respondents must provide all medical benefits which are reasonably needed at the time of injury and thereafter during the disability to cure and relieve the effect of the injury §8-42-101 C.R.S. Where the relatedness, reasonableness, or

necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. AllRight Colorado Inc.,* W.C., No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a Claimant from the effects of the injury, is a question of fact. *City and County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984).

13. The ALJ has found this work injury to be compensable. Claimant's treatment providers have opined that this surgery by Dr. Serak was reasonable and necessary; even Dr. O'Brien concurred that this procedure was reasonable and necessary for someone in Claimant's condition-assuming Claimant was accurately reporting her symptoms. The ALJ has found that Claimant did so accurately report them. Claimant could have suffered permanent harm and disability had this not been addressed promptly.

14. There is nothing in the record but speculation by Dr. O'Brien that some intervening event, such as a sneeze, between her work injury and the 2nd MRI caused Claimant's condition to further deteriorate, thus requiring the surgery. By a preponderance of the evidence, the ALJ finds that this surgery which was performed was reasonable, necessary, *and related* to her work injury. As such, Claimant is to be reimbursed for all costs incurred.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury in July, 2017. Respondents may not withdraw the General Admission of Liability filed in connection therewith.

2. Respondents shall reimburse Claimant for all costs associated with the surgery which was performed by Dr. Serak in March, 2018.

3. Claimant's Average Weekly Wage is $600.00

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 24, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary partial disability (TPD) benefits for the period of April 1, 2017 through October 13, 2017.

- Whether the claimant has demonstrated by a preponderance of the evidence that he is entitled to permanent partial disability (PPD) benefits due to probable residual disability, if he had lived to reach maximum medical improvement (MMI).

- If the claimant successfully demonstrates entitlement to TTD and/or PPD benefits, what was the claimant's average weekly wage (AWW) at the time of the admitted March 31, 2017 work injury?

FINDINGS OF FACT

1. The claimant worked for the employer as a frac operator. On March 31, 2017, the claimant injured his left knee at work. On September 22, 2017, the employer filed a General Admission of Liability (GAL) admitting for medical benefits only.

2. At the time of his March 31, 2017 work injury, the claimant was paid $18.69 per hour. The employer pays employees every two weeks. The payroll records entered into evidence indicate that in the twelve (12) weeks prior the work injury, the claimant earned at total of $18,897.80. This total included regular hours, overtime hours, paid holidays, and additional bonuses. The ALJ calculates that this averages to $1,574.82 per week ($18,897.80 divided by 12 weeks).[1]

3. Following the March 31, 2017 injury the claimant received medical treatment from Dr. Lori Fay. The claimant was first seen by Dr. Fay on April 7, 2017. At that time, Dr. Fay assigned work restrictions that included no kneeling, squatting, climbing, or crawling.

4. Thereafter, the claimant was on a scheduled vacation from April 7, 2017 through April 19, 2017. The claimant returned to work, as scheduled, on April 24, 2017. Ms. Sutliff testified that the claimant's April 2017 vacation was scheduled prior to the March 31, 2017 work injury. While the claimant was on that vacation, his rate of pay was increased to $20.65 per hour.

[1] This would equate to an average of $3,149.64 for each two week pay period.

5. The claimant was on modified duty from his return to work on April 24, 2017 until October 2017. Ms. Sutliff testified that the claimant's final day of employment with the employer was October 11, 2017. Ms. Sutliff also testified that the claimant's employment ended on that date because he was injured at home.

6. Based upon the payroll records entered into evidence, from April 24, 2017 through October 7, 2017 the claimant's earnings were as follows:

> For the pay period of April 23, 2017 through May 6, 2017, the claimant's earnings were $1,404.11;
>
> For the pay period of May 7, 2017 through May 20, 2017, the claimant's earnings were $2,893.49;
>
> For the pay period of May 21, 2017 through June 3, 2017, the claimant's earnings were $2,214.62;
>
> For the pay period of June 4, 2017 through June 17, 2017, the claimant's earnings were $2,436.61;
>
> For the pay period of June 18, 2017 through July 1, 2017, the claimant's earnings were $2,255.92
>
> For the pay period of July 2, 2017 through July 15, 2017, the claimant's earnings were $1,721.60;
>
> For the pay period of July 16, 2017 through July 29, 2017, the claimant's earnings were $1,386.03;
>
> For the pay period of July 30, 2017, through August 12, 2017, the claimant's earnings were $3,226.47;
>
> For the pay period of August 13, 2017 through August 26, 2017, the claimant's earnings were $3,807.25;
>
> For the pay period of August 27, 2017 through September 9, 2017, the claimant's earnings were $2,312.71;
>
> For the pay period of September 10, 2017 through September 23, 2017, the claimant's earnings were $3,807.25;
>
> For the pay period of September 24, 2017 through October 7, 2017, the claimant's earnings were $709.76; and

It is clear from this evidence that there were pay periods in which the claimant earned less than he was earning before his March 31, 2017 work injury.

7. Prior to the claimant's work injury, he and his crew were working outside of Denver, Colorado. When the claimant returned to work on April 24, 2017, he was assigned to a job location near Parachute, Colorado. Ms. Sutliff testified that the claimant's entire crew experienced this change in job location, not just the claimant. While working at the Parachute job site, crew members worked fewer hours than they had worked while at the Denver location. Both Ms. Sutliff and Mr. Bevan testified that this reduction in hours occurred because noise restrictions limited the number of hours the crew was allowed to work.

8. On December 27, 2017, the claimant was seen by Dr. William Ciccone for an independent medical examination (IME). In connection with the IME, Dr. Ciccone reviewed the claimant's medical records, obtained a medical history from the claimant, and performed a physical examination. In his IME report, Dr. Ciccone diagnosed the claimant with left knee arthritis and opined that the claimant suffered a minor injury to his left knee at work. Dr. Ciccone further opined that the "development of arthritis predated the incident at work and is not related to a work injury". Dr. Ciccone noted that the claimant had reached maximum medical improvement (MMI) and that a permanent impairment rating would not be appropriate "given the claimant's long history of pain from his degenerative arthritis as it would be impossible to know the claimant's baseline range of motion prior to the incident".

9. The claimant died on January 4, 2018. The parties agree that the claimant's death is not related to the March 31, 2017 work injury.

10. On January 22, 2018, the respondents filed a Final Admission of Liability (FAL) admitting for medical benefits only.

11. On June 29, 2018, the claimant's counsel asked Dr. Fay to opine regarding whether the claimant would have had "probable residual disability" if he had lived to reach MMI. In her July 5, 2018 response, Dr. Fay opined that the claimant would have had probable residual disability. Based upon range of motion measurements taken by Dr. Ciccone at the IME, Dr. Fay also opined that the claimant would have had a 2% whole person impairment.

12. The ALJ credits the testimony of the respondents' witnesses and the payroll records entered into evidence and finds that it is more likely than not that after the claimant returned to work on April 24, 2017 his wages were lower because of the change in job location and not because of the claimant's work restrictions.

13. The ALJ credits the testimony of the respondents' witnesses and the payroll records entered into evidence and finds that the claimant was absent from work for a planned vacation from April 7, 2017 through April 23, 2017. Therefore any reduction in wages during that period of time was not related to the work injury or the actions of the employer.

14. The ALJ credits the opinion of Dr. Ciccone over the conflicting opinion of Dr. Fay and finds that the claimant had reached MMI as of the date of the IME and had

no permanent impairment. Therefore, the ALJ finds that the claimant has failed to demonstrate that that he had probable residual disability at the time of his death. Thus, the ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that he is entitled to permanent partial disability (PPD) benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). TPD payments ordinarily continue until either claimant reaches maximum medical improvement or an attending physician gives claimant a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. *See* 8-42-106, C.R.S.

4. The Colorado Court of Appeals and the Industrial Claim Appeals Office (ICAO) have previously held that an injured worker's wage loss for "economic reasons" does not preclude him from the continued receipt to TPD benefits. *J.D. Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989). *See also Kaminski v. Grand County Roofing and Sheet Metal, Inc*. WC No. 4-525-562 (ICAO 2003); *Ashmore v. NU Horizon Window Systems, Inc.* WC No 4-593-027 (ICAO 2004); *and Edgar v. Halliburton Energy Services*, WC No 4-971-336-01 (ICAO 2015).

5. As found, the claimant's wage loss following his work injury was not related to his work restrictions. Rather, the reduction of the claimant's wages beginning April 24, 2017 was the result of reduced hours for the entire crew. However, given the holdings in the *Sawatsky* line of cases, the claimant has demonstrated by a preponderance of the evidence that he is entitled to TPD benefits for the period of April 24, 2017 through October 13, 2017. As found, the testimony of the respondents' witnesses and the payroll records are credible and persuasive.

6. Section 8-42-116, C.R.S., addresses the payment of benefits when a claimant dies of causes unrelated to the work injury. Specifically, the statute provides, in part:

> "(1) If death occurs to an injured employee, other than as a proximate cause of any injury, before indemnity ceases and the deceased leaves persons wholly dependent upon the deceased for support, death benefits shall be as follows: … (b) Where the injury proximately caused permanent partial disability, the death benefit shall consist of unpaid and unaccrued portion of the permanent partial disability benefit which the employee would have received had he lived."

7. To calculate permanent partial disability (PPD) benefits when a claimant dies before reaching MMI "[t]he proper procedure is to make the best possible medical estimate of the probable residual disability that would have remained had the employee had lived to complete his healing period." *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998) (*citing 4 Larson's Workers' Compensation Law* Section 58.45 (1997)). It is not necessary for a claimant to reach MMI before death for Section 8-42-116, C.R.S. to apply. *Id.*

8. As found, the claimant has failed to demonstrate by a preponderance of the evidence that he would be entitled to PPD benefits. As found, the claimant was at MMI at the time of the IME, with no permanent restrictions. Therefore, the claimant did not have probable residual disability at the time of his death. As found, the opinion of Dr. Ciccone is credible and persuasive.

9. The ALJ must determine a claimant's average weekly wage (AWW) by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

10. As found, the claimant's average weekly wage (AWW) at the time of the March 31, 2017 injury was $1,574.82. As found, the payroll records are credible and persuasive.

ORDER

It is therefore ordered that:

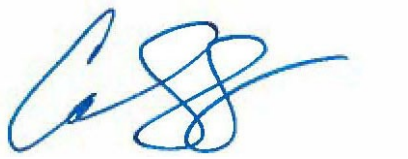
1. The claimant is entitled to temporary partial disability (TPD) benefits for the period of April 24, 2017 through October 13, 2017.

2. The claimant's claim for permanent partial disability (PPD) benefits is denied and dismissed.

3. The claimant's average weekly wage (AWW) was $1,574.82.

4. The insurer shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

Dated: August 27, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

I. Whether Respondents produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinions of Dr. Jonathan Bloch regarding permanent impairment.

II. Whether Claimant established by a preponderance of the evidence that she is entitled to maintenance medical care under W.C. No. 5-034-574

III. Whether Claimant established by a preponderance of the evidence that she is entitled to medical impairment benefits based upon 14% of the right upper extremity rather than 39% of the right thumb.

IV. Whether Claimant established by a preponderance of the evidence that she is entitled to maintenance medical benefits under W.C. No. 5-020-726

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Claimant's November 26, 2014, Low Back Claim- W.C. No. 5-034-574-001

1. At the time of her low back injury, Claimant worked for Employer as a resident program coordinator. On November 26, 2014, Claimant, along with a co-worker were loading a boxed artificial Christmas tree into vehicle when the box unexpectedly began to fall apart. Claimant was knocked off balance twisting suddenly to avoid falling to the ground. Claimant felt a "popping" in her lower back. Several hours later, she developed low back and right buttock pain.

2. Claimant called off work for a few days; however, when her pain failed to improve she sought treatment from her primary care physician (PCP) who administered two steroid injections and took an x-ray of the right hip that was reportedly negative for fracture.

3. Claimant's low back pain continued to worsen. She developed pain down the right leg extending to the lateral portion of the ankle along with numbness to the level of the knee.

4. On February 6, 2015, Claimant was evaluated by Dr. Joseph Zaremba for her "work injury." Claimant denied a prior history of back pain. After taking a history, Dr. Zaremba assessed Claimant with a lumbar sprain/strain and "overexertion from

sudden strenuous movement." As Claimant's pain was worsening, Dr. Zaremba suspected disc pathology. Consequently, he ordered an MRI, noting that if there was "significant pathology" on the MRI, he would refer Claimant to another physician for treatment options. He also noted that if there was nothing compressive on Claimant's MRI, he would refer her to Dr. Sparr for injection therapy.

5. An MRI of the lumbar spine was performed on February 16, 2015. The MRI revealed "[s]pondylosis and facet joint arthropathy involving [the] thoracolumbar spine . . .". The MRI was also read as being consistent with "reactive/inflammatory bone edema associated with right-sided facet joint arthropathy, at L4-5 and L5-S1."

6. Claimant would subsequently undergo a series of injections, including medial branch blocks with Dr. Stephen Scheper which would fail to provide lasting relief. Accordingly, she was referred for a radiofrequency nerve ablation (RFA), also referred alternatively to as a radiofrequency neurotomy, denervation and/or rhizotomy. Denervation of the L4-5 and L5-S1 facet joints was performed June 15, 2015.

7. On July 1, 2015, Claimant presented for a follow-up after undergoing the aforementioned ablation. She reported "remarkable improvement overall" with improved sleep quality and mobility." In addition, Claimant reported that she was not taking pain medication.

8. Although she had complete relief of her back and leg symptoms after her RFA procedure, she noticed a "gradual recurrence" of back and leg pain approximately one week later. Nonetheless, at the time of her July 1, 2015 appointment, Claimant reported they she was 60% improved.

9. Claimant's residual pain intensified and by July 27, 2015, she was reporting pain in the low back with radiation down the leg into the foot not resolved with a facet injection.

10. Electrodiagnostic (EMG) evaluation was carried out on August 3, 2015. At the time of this testing, Claimant reported "6/10 pain radiating into the anterior and posterior aspect of the thigh into the anterior, greater than posterior right leg below the knee, [but] not really into the foot." Claimant's EMG study demonstrated abnormal results consistent with a "chronic, latent L5 radiculopathy with chronic axonal loss in the right EDB, also likely on the left" without "evidence of recent neuropathology consistent with Claimant's symptoms within the timeframe of the DOI." According to Dr. Scheper, Claimant's conduction pattern was "potentially related to early findings of a peripheral polyneuropathy" rather than any traumatic injury. Dr. Scheper discussed the findings of Claimant's EMG with her. He noted that "without clear evidence of active neuropathology, per work comp guidelines there are no justifiable treatment options for her discogenic and radiating right lower extremity dermatonal pain." According to Dr. Scheper, Claimant's ongoing pain was "likely related to local inflammation from active facet arthritis and active inflammatory changes at the 2 lowest disks which were demonstrated with type I Modic changes." While Claimant's L4-5 and L5-S1

facetogenic pain was substantially improved with nerve ablation, Dr. Scheper opined that "no further treatment [was] necessary for [this] component of her injury."

11. On January 26, 2017, Claimant was evaluated by Dr. Eric Jepson of the Colorado Springs Orthopedic Group for bilateral hip pain. According to Dr. Jepson's note from this date of visit, Claimant "fell two years ago and had a right sided facet injury." He went on to document that Claimant was having similar symptoms on the left side with pain in the low back wrapping around to the groin and down the leg. He also noted that Claimant reported symptoms similar to those she had with a past blood clot in the leg. Dr. Jepson assured Claimant that he did not believe she had a hip condition nor did he think she required surgical intervention. Nonetheless, given her reported symptoms, Dr. Jepson referred Claimant for a venous ultrasound (US) of the left lower extremity to rule out a deep vein thrombosis (DVT) as well as an updated MRI.

12. Claimant's repeat MRI was performed February 10, 2017. The MRI demonstrated "minimal" disc bulging without spinal canal stenosis at L4-5. Mild facet joint osteoarthrosis was present as was minimal left neural fomaminal stenosis. At the L5-S1 level the findings were similar except that there was "mild bilateral, right-greater-than-left, facet joint osteoarthrosis present. Overall, the impression of the MRI findings was reported as revealing "no compressive disc disease, spinal canal stenosis or high-grade neural foraminal narrowing [present] at any level."

13. Claimant presented to Dr. Jepson in follow-up on March 2, 2017. During this visit, Claimant reported ongoing and worsening pain. Claimant noted pain across the low back with burning pain radiating down the left and right leg. She was unable to sit or sleep comfortably. Dr. Jepson documented that Claimant was to see Dr. William Lippert in consultation as Dr. Scheper was unable to "take her on as a patient because he saw her for work comp in the past and now . . . doesn't see patient under private insurance.

14. Claimant was placed at maximum medical improvement (MMI) without impairment and without the need for maintenance medical care on March 6, 2017 by Dr. Frank Polanco, the authorized treating physician (ATP) for her low back work injury.

15. Claimant was evaluated by Dr. Lippert on March 16, 2017. Dr. Lippert performed an additional medial branch blocks at L3, L4, L5, and S1.

16. Claimant requested a Division Independent Medical Examination (DIME) following her placement at MMI. Dr. Jonathan Bloch completed the requested DIME on August 18, 2017. After reviewing medical records, taking a history and completing a physical examination, Dr. Bloch assessed Claimant with a "low back strain with symptoms of bilateral lower extremity radiculopathy involving dermatomes L5, improved for 6 or more months post rhizotomies, first on the right and then on the left."

17. Dr. Bloch concurred with Dr. Polanco's date of MMI. He also opined that Claimant had an 18% whole person impairment arising from a Table 53(II)(C) rating at

L4-L5 and L5-S1, range of motion loss, and neurologic sensory and motor loss. He also opined that maintenance care would be appropriate as "outlined in the Division Guidelines for Chronic Pain Disorder Maintenance Management, Rule 17, Exhibit 9, Section H." He then documented four pages of copied "recommendations," including: home exercise programs, patient education, psychological management, non-opioid and opioid management, physical therapy, injections, and use of durable medical equipment.

18. The Division IME Unit issued an "Incomplete Notice – IME Report" because the medical maintenance recommendations were not "specific to the patient involved [or] justified by the medical record." The Division noted that while the medical treatment guidelines "reference treatments that may be appropriate to a population of patients" the recommendations "should not simply be copied for patient specific post-MMI care."

19. The Division IME Unit also noted that the DIME report invalidated Claimant's lumbar flexion measurements based upon straight-leg raise (SLR) validity testing, but that the range of motion measurements recorded were actually valid. Dr. Bloch was asked to review his report and clarify the discrepancy.

20. Dr. Bloch subsequently issued an "Addendum to Division Independent Medical Examination wherein he explained his position regarding post-MMI maintenance medical care. Per Dr. Bloch, the recommendations for maintenance care as set forth in his original DIME report were not "simply copied" and thus, represented care specific to Claimant. He reiterated that Claimant would require the following care: (1) a home exercise program that may include purchased equipment or a program to be conducted at an external facility if it would improve Claimant's compliance with exercise; (2) education and/or sessions with a personal trainer to improve exercise compliance; (3) psychological management for future exacerbation of symptoms; (4) non-opioid medication management; (5) opioid medications is required for symptom management; (6) additional therapy, including modalities for occasional exacerbations; (7) continued interventional injections; and (8) durable medical equipment/supplies. Dr. Bloch also addressed the concerns regarding his impairment for the lumbar spine noting that his range of motion measurements for lumbar flexion were valid when SLR validity testing was accounted for. Upon reviewing Claimant's range of motion (ROM) for lumbar flexion as requested, Dr. Bloch corrected an error in his original report concerning Claimant's impairment for ROM loss. In his original report Dr. Bloch assigned 7% whole person impairment for ROM loss. He corrected this error, noting that Claimant's actual ROM loss was 9% rather than 7%. All other aspects of Claimant's impairment rating remained unchanged. With the additional 2% impairment for ROM loss, Claimant's impairment rating increased to 20%.

21. Respondents requested an opinion from Dr. Allison Fall. Dr. Fall performed what she documented was an independent medical examination (IME) concerning Claimant's low back. As part of her IME, Dr. Fall reviewed medical records provided to her. While her report concerning Claimant's low back injury dated

December 7, 2017 contains a section entitled "Physical Examination", Dr. Fall admitted during her deposition that she did not physically touch Claimant's back. She did not palpate the back, test Claimant's reflexes or sensation nor did she take any range of motion measurements or perform SLR testing. Indeed, during her deposition, Dr. Fall admitted that the "majority of [her] opinions in this case [were] based upon the medical record review . . . as opposed to any physical examination findings [she] had at the time that [she] saw [Claimant]." Based upon a review of the "IME" report, including the section entitled "physical examination", the ALJ finds that Dr. Fall did not conduct a meaningful examination of Claimant to generate "examination findings" when she evaluated Claimant. At best, her "physical examination" can be said to consist of observational findings, concerning Claimant's gait pattern and ability to ambulate and otherwise move about the examination room. Consequently, the ALJ finds that Dr. Fall's IME essentially constitutes a medical records review.

22. In her IME report, Dr. Fall outlined the following errors she believes Dr. Bloch made in completing his DIME:

- Dr. Bloch merely copied and pasted his maintenance medical treatment recommendations from the Guidelines, which is inappropriate because not all treatments listed in the Guidelines are indicated for Claimant.

- Dr. Bloch provided for Table 53 ratings for L4-L5 and L5-S1 which is incorrect because, according to Dr. Fall, the L4-5 and L5-S1 spinal segment levels were never determined to be pain generators for Claimant. As stated by Dr. Fall, "[o]nly objective evidence of pain generators and not MRI findings should be rated."

- While technically valid, Dr. Bloch's measurements for sacral flexion were "quite rare," thus raising significant questions about the accuracy of his measurements.

- The impairment rating for neurologic system impairment was clearly incorrect given Claimant's EMG findings and the supporting opinions of Dr. Scheper regarding the same.

23. During her deposition testimony, Dr. Fall reiterated that there was no objective evidence confirming that L4-5 and L5-S1 were pain generators in this case. She explained that she would have expected a positive response to a radiofrequency neurotomy as evidence that these were Claimant's pain generators, but that Claimant did not have a positive response to her rhizotomy.

24. While Dr. Fall testified that it might be appropriate to assign 7% whole person for a single level under Table 53 due to "pretty significant degenerative changes," she took issue with the addition of assigning an additional 1% whole person impairment for L5-S1 as a second level under Table 53. According to Dr. Fall, Dr.

Bloch's decision to assign an additional 1% impairment for the L5-S1 level was an obvious error because Claimant's treatment focused on the L3-4 and L4-5 levels and there was no evidence that the L5-S1 level was a pain generator for Claimant.

25. As noted, Dr. Fall testified questioned the lumbar range of motion measurements obtained by Dr. Bloch. She specifically addressed the measurements for sacral flexion (forward flexing) at sixty degrees. She explained that in her twenty years of performing ROM measurements, she had never seen a patient with such "extreme" flexion. She testified that this "hyper-flexibility" in the sacral joint did not make clinical sense given Claimant's hip joint pain, low back pain, arthritis, and age.

26. Dr. Fall suspected that Dr. Bloch may have used an electronic device to measure Claimant's ROM, testifying further that it was possible that Dr. Bloch erroneously flipped the lumbar flexion angle (45 degrees) with the sacral range of motion (60 degrees). If these were flipped (i.e. sacral having 45 degrees of motion and flexion having 60 degrees), Claimant's ROM measurements would make clinical sense to Dr. Fall, given Claimant's age and comorbidities. Accordingly, Respondents contend that the impairment rating for ROM loss should be 7% whole person rather than 9% whole person based on Dr. Bloch's measurements.

27. With regard to neurologic system impairment assigned by Dr. Bloch, Dr. Fall testified he clearly erred because there was no nerve damage as a result of the work-related injury based upon Claimant's EMG testing results.

28. Based on the above, Dr. Fall testified that Claimant's impairment rating could be calculated as high 14% whole person impairment (7% under Table 53 and 7% for range of motion loss) or as low as 0% because Claimant had pre-existing and chronic pain complaints involving the right hip area and because there was insufficient objective evidence to support a Table 53 rating at either of the spinal levels identified by the Division IME (L4-5 and L5-S1). Without the Table 53 rating, Dr. Fall testified that no range of motion impairment could be assessed.

29. The evidence presented persuades the ALJ that Dr. Bloch erred in his assignment of neurologic system impairment. Indeed, the evidence presented is persuasive of the fact that Claimant did not have EMG findings consistent with neuropathy correlating with Claimant's symptoms within the timeframe of the DOI but rather findings supportive of the presence of findings consistent with early peripheral polyneuropathy, not traumatic injury. As noted, Dr. Scheper discussed the findings of Claimant's EMG with her, noting that "without clear evidence of active neuropathology, per work comp guidelines there are no justifiable treatment options for her discogenic and radiating right lower extremity dermatonal pain." According to Dr. Scheper, Claimant's ongoing pain was "likely related to local inflammation from active facet arthritis and active inflammatory changes at the 2 lowest disks which were demonstrated with type I Modic changes." Given the objective findings demonstrated on the EMG along with the opinions of Dr. Scheper, the ALJ finds Dr. Bloch's opinion concerning Claimant's entitlement to neurologic impairment highly probably incorrect.

Consequently, the ALJ finds Respondents have overcome the Division IME's impairment rating by clear and convincing evidence in this regard. The evidence presented persuades the ALJ that Claimant has no neurologic impairment associated with her admitted work-related low back injury.

30. While Dr. Fall has strong opinions about Claimant's ROM, her opinions do not convince the ALJ that Dr. Bloch erred in measuring Claimant's ROM. Although it may be quite rare for Claimant to have the degree of sacral flexion she demonstrated when evaluated by Dr. Bloch, Dr. Fall did not perform independent ROM measurements to confirm her suspicions that Dr. Bloch erroneously flipped the lumbar flexion angle (45 degrees) with the sacral range of motion (60 degrees) in this case. Consequently, the ALJ is not convinced that Dr. Bloch's ROM measurements are erroneous and highly probably incorrect. Moreover, the ALJ is not convinced that providing an additional 1% spinal impairment for the L5-S1 segment in this case was highly probably incorrect. As noted, Dr. Fall challenged Dr. Bloch's decision to assign an additional 1% impairment for the L5-S1 level on the grounds that Claimant's treatment focused on the L3-4 and L4-5 levels, that there was no evidence that the L5-S1 level was a pain generator for her and that she did not have a positive response to a radiofrequency neurotomy. The ALJ is not persuaded. As found above, Dr. Scheper opined that Claimant's ongoing pain was "likely related to local inflammation from active facet arthritis and active inflammatory changes at the 2 lowest disks which were demonstrated with type I Modic changes." Furthermore, while Claimant did receive some treatment directed to the L3-4 spinal level, denervation was carried out at both L4-5 and L5-S1. Contrary to Dr. Fall's testimony, the ALJ finds the record to contain substantial evidence that the rhizotomy provided her pain relief. Based upon the evidence presented the ALJ finds that there is simply a difference of opinion between Dr. Fall and Dr. Bloch as it pertains to the spinal impairment associated with Claimant's November 26, 2014 work-related low back injury.

31. Based upon the evidence presented, the ALJ finds the correct impairment rating for Claimant's admitted low back injury to equal the combined value of her 7% specific disorder rating from Table 53 plus the 1% for the additional spinal segment with the 9% measured ROM loss. Based upon the evidence presented, the ALJ is unable to render a specific finding concerning this combined value.

32. With regard to the maintenance recommendations of the Division IME, Dr. Fall testified that not all the recommended treatment is appropriate in this case. Specifically, she testified that: (a) psychological management was not reasonable or necessary as there was no work-related psychological or mental issue; (b) the recommendation for opioid medication management was not reasonable because short-acting opioids is not indicated for a chronic pain condition; (c) chiropractic treatment is not reasonable as it was already tried and determined to be ineffective for the claimant; (d) injection therapy was not reasonable because the claimant did not have a radiculopathy to support epidural or nerve root injections, there was no indication for facet injections due to the negative therapeutic response from the nerve ablation, and a SI joint injection was not causally related to the work-related diagnoses; (d) a

radiofrequency medial branch neurotomy was not reasonable because it was already tried and failed.

33. Dr. Fall testified the only reasonable maintenance care would be self-management and home exercises.

34. Although the evidence presented fails to support that any provider is currently requesting authorization to perform additional treatment and the ALJ is convinced that many of the maintenance treatment recommendations of Dr. Bloch are unnecessary, the evidence presented persuades the ALJ that Claimant benefited from a period injections and contrary to Dr. Fall's suggestion from a denervation procedure at L4-5 and L5-S1 in the past. Moreover, the record establishes that Claimant's condition has had a tendency to deteriorate necessitating additional treatment, specifically additional injections. Just as the prior medial branch injections and rhizotomy were beneficial in decreasing Claimant's pain, the ALJ concludes that additional maintenance injections, as suggested by Dr. Bloch are likely to relieve Claimant from ongoing low back symptoms caused by her work related injury. Consequently, the ALJ finds that substantial evidence demonstrates that there is an ongoing need to treat Claimant's chronic pain caused by the injuries sustained in this admitted claim. Claimant was injured in excess of three and one-half years ago, has undergone substantial care and yet continues to have persistent low back pain which she credibly testified is functionally limiting. Without ongoing maintenance treatment, the ALJ concludes that Claimant's present condition will likely deteriorate resulting in greater functional decline than that she presented at hearing. As such, Claimant has proven, by a preponderance of the evidence, that she is entitled to a general award of maintenance medical benefits for her low back.

Claimant's May 21, 2016, Right Thumb Injury- W.C. No. 5-020-726-001/002

35. On May 21, 2016, Claimant was offloading some residents of the senior center from an activity bus after a community outing. Claimant was forced to use a hand crank to lower a wheelchair bound client to the ground after the buses primary lift malfunctioned. As she was lowering the client, the crank released suddenly forcing Claimant's thumb backward into a hyperextended position. Claimant heard a pop and her thumb began to swell immediately.

36. Liability for Claimant's injury was admitted and she was evaluated by Dr. Lisa Baron on June 1, 2016. During this initial evaluation, Dr. Baron echoed Claimant's reported mechanism of injury (MOI) stating that Claimant's thumb pushed backward. Dr. Baron referred Claimant for further evaluation.

37. Claimant was evaluated by Dr. David Walden on June 6, 2016. Dr. Walden completed a physical examination of the right thumb which revealed "a small around (sic) of swelling over the volar surface of the metacarpophalangeal joint" and "slight swelling present at the interphalangeal joint. Palpation revealed "triggering" at the base of the metacarpophalangeal joint. Claimant's right thumb was noted to be

stable to AP and radial stress testing. Sensation was intact and there was good capillary refill. Dr. Walden documented that the "remainder of the hand shows no swelling" and his report is devoid of any reference to swelling of the wrist or forearm.

38. Claimant was evaluated by hand specialist, Dr. Timothy Hart on June 8, 2016. Prior to seeing Dr. Hart, Claimant completed patient intake forms wherein she documented that she was being seen due to an "injury to right thumb." Physical examination demonstrated pain and tenderness in the area of the A1 pulley. Active catching, locking and triggering of the right thumb was present. X-rays revealed mild age related arthritic changes of the right thumb, but "no acute bony injury." Claimant was diagnosed with a right trigger thumb and given a cortisone injection.

39. Claimant's injection failed to provide lasting relief. On June 22, 2016 she was noted to have a "locked right trigger thumb" on assessment of Dr. Hart. He recommended moving Claimant to ahead to surgery to release the A1 pulley as rapidly as possible. Claimant wanted a second opinion.

40. On July 11, 2016, Claimant was evaluated by Dr. Zaremba as part of a follow-up examination. Claimant reported off and on swelling of the hand with pain extending down into the wrist. Outside of IP tenderness of the right thumb, Claimant's right upper extremity examination was "normal." An MRI of the right thumb was ordered.

41. On July 15, 2016, Claimant returned to Dr. Hart's offices were she was evaluated by physician assistant (PA) Andrew Domer. PA Domer noted continued tenderness of the right thumb to palpation along with catching, locking and triggering. He also specifically noted that Claimant had "[g]ood overall range of motion throughout the remainder of the fingers as well as the hand and wrist. Based upon the content of PA Domer's record, the ALJ finds that he examined Claimant's right hand and wrist. No swelling of the hand, wrist or forearm was documented.

42. Claimant's right upper extremity was examined by Dr. Zaremba again on July 18, 2016. During this examination, Claimant reported "swelling when she firts (sic) wakes up in teh (sic) morning." She was treating her swelling with ice. Physical examination failed to reveal swelling in the extremities, loss of motion in the extremities, tenderness in the extremities or numbness in the extremities." It was noted that Claimant was scheduled for a July 19, 2016 surgery.

43. Dr. Hart performed a right thumb A1 pulley release procedure on July 19, 2016.

44. Claimant presented to Emergicare on July 25, 2016, where she was evaluated post-surgically by Dr. Baron. Claimant was noted to have trace swelling in the right thumb along with a swollen right hand. While Claimant was performing ROM exercises she had not been engaged in physical or occupational therapy.

45. Claimant presented to Dr. Hart on August 8, 2016. Dr. Hart noted that Claimant was "doing very well status post her right thumb A1 pulley release." Claimant was noted to have "full flexion, full extension, good pinch, good grip, good grasp, and [a] well-healed wound." According to Dr. Hart, Claimant was doing "wonderfully." She was released to full duty work without restriction or impairment.

46. Claimant was placed at MMI with regard to her right thumb injury on October 26, 2016 by Dr. Zaremba. Claimant was noted to have impaired ROM and sensation of the right thumb. Dr. Zaremba assigned 39% right thumb impairment for Claimant's ROM loss and impaired sensation. Thirty-nine percent right thumb impairment equates to 14% right upper extremity impairment.

47. On February 20, 2017, after an approximate 6-month hiatus and about 3 months after being placed at MMI, Claimant returned to Dr. Hart with complaints of continued numbness in her thumb. She also had a positive Tinel's, Phalen's and compression test of the right wrist. Dr. Hart diagnosed carpel tunnel syndrome (CTS) and ordered an electrodiagnositc evaluation (EMG).

48. An EMG was performed on April 4, 2017, by Dr. Dwight Caughfield. Test results were consistent with "[a]cute, severe right carpal tunnel syndrome."

49. Claimant presented to Dr. Hart in follow-up on June 28, 2017. Based upon Claimant's EMG findings, Dr. Hart recommended a forthwith right wrist carpal tunnel release. Claimant was adamant that her right thumb and hand were "normal" prior to her May 21, 2016 accident and was very concerned that her injury had altered the function of her right thumb and wrist. Although Dr. Hart submitted a request for approval of a carpal tunnel release procedure to Insurer, he noted that he did not want Claimant to "get lost in the weeds of causation" as her pathology was acute, severe and "should be addressed with surgery as soon as possible."

50. On October 18, 2017, Claimant was evaluated by Dr. Dale Cassidy for ongoing CTS symptoms. Dr. Cassidy completed both a right wrist and hand examination. Concerning the right wrist, his examination findings included appreciable thenar atrophy, decreased thumb abduction strength, a positive Tinel's, Phalen's and carpal compression test. He did not document the presence of wrist swelling; however, Dr. Cassidy noted that Claimant had arthritis in her hands which he felt was contributing to swelling and stiffness. Dr. Cassidy did not believe that Claimant's CTS explained all of her pain as she "clearly [had] arthritis involving her fingers as well as triggering. Carpal tunnel release was recommended.

51. Dr. Cassidy performed a right carpal tunnel release procedure on November 7, 2017.

52. Claimant contends that her carpal tunnel syndrome is causally related to her May 21, 2016 industrial injury. Consequently, Respondents sought an opinion from Dr. Fall. Similar to the request for an opinion regarding questions concerning Dr.

Bloch's low back impairment, Dr. Fall performed an IME to address questions regarding the cause of Claimant's CTS and her right thumb impairment.

53. In a report dated December 10, 2017, Dr. Fall concluded that Claimant's right CTS is unrelated to her May 21, 2016 industrial injury. According to Dr. Fall, Claimant's CTS is "most likely related to her history of thyroid disease."

54. Dr. Fall testified that Claimant's MOI is not consistent with the development of acute or occupationally related carpal tunnel syndrome. According to Dr. Fall, acute carpal tunnel syndrome is onset by a severe trauma "usually with fractures causing alteration of the anatomy of the canal or a severe degree of swelling with compression." She noted the swelling had to be present in the area of the median nerve for swelling to be a contributing factor in a carpal tunnel diagnosis. She testified that swelling of the thumb does not affect the median nerve, noting further that swelling in areas other than the carpal tunnel compartment (as described by Claimant) would not cause carpal tunnel syndrome. Dr. Fall testified that Claimant did not initially present with symptoms of carpal tunnel syndrome and that there was no temporal relationship between the MOI in this case and the onset of symptoms.

55. Dr. Fall testified carpal tunnel treatment is neither maintenance treatment for a right trigger thumb condition nor representative of a worsening of condition of the right trigger thumb condition.

56. Dr. Fall documented that Claimant had current complaints of buzzing in all the fingers radiating up her arm, forearm pain that starts in the hand and radiates into the forearm, a loss of grip strength, and weakness in the right thumb, index finger, hand, wrist, and lower arm. Dr. Fall testified she did not associate these radiation complaints to the thumb injury. She indicated the radiation complaints and pain into the forearm are inconsistent with a trigger thumb injury. According to Dr. Fall, Claimant's radiation complaints were likely related to her severe (and non-work-related) CTS. She also testified the weakness in the wrist and lower arm would also be related to the carpal tunnel syndrome rather than the thumb injury because it is a neurological condition that affects those muscles. Finally, Dr. Fall testified that Claimant does not have any functional loss of the upper extremity beyond her thumb related to her admitted industrial thumb injury.

57. Claimant testified she informed both Dr. Hart and Dr. Baron that she had symptoms in her wrist and that she had swelling throughout her forearm. She specifically testified she was swollen from her fingertips to her elbow "about twice the size of [her] arm." She described this swelling to be present daily for the first three months after the injury. To the extent that the medical records failed to document these symptoms or complaints, Claimant testified it must be an error or omission in the records.

58. Based upon a careful review of the medical record evidence, the ALJ finds that Claimant's initial thumb treatment records do not reference any wrist complaints,

symptoms, or diagnoses. The ALJ infers, from the evidence presented, that if Claimant was experiencing swelling to the levels she testified to, the initial medical reports would have documented such findings. The ALJ infers that the absence of any reference to severe swelling in the thumb and contrary documentation that no swelling of the hand or upper extremity was present on June 6th and July 18, 2016 is persuasive that Claimant's injury was limited to the right thumb.

59. The ALJ notes a singular reference to wrist pain in Claimant's treatment records prior to MMI. Specifically, Claimant reported pain in her wrist on July 11, 2016. However, four days later, Claimant was evaluated in preparation for her right thumb surgery and there is no documentation of wrist pain even though the wrist was examined during which "good overall range of motion throughout the remainder of the fingers as well as the hand and wrist" was documented. No other records reference wrist symptoms until February 2017.

60. Based upon the evidence presented, the ALJ is convinced that Claimant's CTS is not causally related to her admitted work-related right thumb injury. In so finding, the ALJ credits the IME report testimony of Dr. Fall. Claimant's contrary assertions, including her concerns regarding the dates listed on Dr. Fall's IME reports are unpersuasive.

61. As Claimant's CTS is not causally related to her admitted work-related right thumb injury, Claimant has failed to establish, by a preponderance of the evidence, that the treatment for this condition, including the CTS release procedure performed by Dr. Cassidy on November 7, 2017, is causally related to her work injury. Accordingly, her claim for medical benefits related to her CTS must be denied and dismissed. While Claimant failed to establish a causal link between her CTS and her May 21, 2016 industrial injury, the evidence presented persuades the ALJ that Claimant is entitled to a general award of maintenance treatment for her right thumb. Careful review of the medical record evidence establishes that Claimant has received substantial care, including injections and surgery to address her thumb pain, triggering, catching and locking. While surgery definitively addressed her triggering, catching and locking, Claimant still had numbness and tingling of the thumb on her follow-up visit to Dr. Hart on February 20, 2017. Dr. Zaremba recommended 12 months of maintenance care along with referral to Dr. Hart for injections and/or needed physical therapy by report dated November 15, 2016. For reasons similar to those outlined in ¶ 34 above, the ALJ is convinced that without ongoing office visits with Emergicare and/or Dr. Hart, Claimant's right thumb condition is prone to deterioration. As such, Claimant has proven, by a preponderance of the evidence, that she is entitled to a general award of maintenance medical benefits, without limitation regarding duration for her right thumb.

62. Based upon the evidence presented, the ALJ finds that Claimant did not sustain her burden to establish that conversion of her thumb impairment to an upper extremity impairment is appropriate in this matter. Rather, the ALJ is persuaded that Claimant's continued functional impairment in the right hand, wrist and forearm are,

more likely than not, caused by her non-work-related arthritis and carpal tunnel syndrome.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on the merits. *Id.*

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. Assessing the weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). As found above, the undersigned ALJ concludes that the expert medical opinions of Dr. Fall concerning Dr. Bloch's decision to assign neurologic impairment in Claimant's low back case and causality concerning Claimant's CTS are credible and supported by the medical record as a whole. When the

evidentiary record is considered in its totality, the opinions of Dr. Fall are more persuasive than contrary opinions of Dr. Bloch and Claimant in these regards.

Overcoming the Division IME

D. A DIME physician's findings of causation and MMI are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI or the cause of a claimant's medical condition, the party challenging the DIME must demonstrate that the physician's determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo.App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In this case, the totality of the evidence presented establishes that Respondents have proven by clear and convincing evidence that Dr. Bloch's decision to assign neurologic impairment as being associated with Claimant's low back injury are highly probably incorrect. As found, Dr. Fall credibly and persuasively testified that Dr. Bloch erred by including 5% whole person rating for neurologic system impairment when the record evidence, including the EMG findings establishes that Claimant's neurologic symptoms were likely related to early peripheral polyneuropathy rather than any active neuropathy caused by a traumatic injury. However, after considering the balance of the evidence presented, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that the balance of Dr. Bloch's impairment rating, i.e. specific disorder rating(s) and his ROM impairment is highly probably incorrect. As found, the persuasive evidence establishes that Claimant likely has unusual sacral mobility which Dr. Fall failed to confirm when competing her IME. The evidence also persuades the ALJ that Claimant probably suffers from local inflammation from active facet arthritis and active inflammatory changes at the L4-5 and L5-S1 disc levels which demonstrated type I Modic changes. Thus, while Claimant did receive some treatment directed to the L3-4 spinal level, denervation was carried out at both L4-5 and L5-S1, which according to the record presented provided Claimant with what was described as "remarkable improvement overall." As such, the ALJ concludes that Dr. Fall's suggestion that Dr. Bloch "flipped" his ROM measurements is speculative. Furthermore, her opinion that the L5-S1 spinal segment was not determined to be a pain generator for Claimant along with her conclusion that Claimant did not have a positive response to her rhizotomy is contrary to the more persuasive record evidence. Here, the evidence presented supports a conclusion that there is difference of opinion between Dr. Bloch as the DIME physician and Dr. Fall, Respondents' retained medical

expert. A professional difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Bloch's opinion concerning spinal impairment. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set Dr. Bloch's spinal impairment rating determination aside. As found, the correct impairment rating for Claimant's admitted low back injury to equal the combined value of her 7% specific disorder rating from Table 53 plus the 1% for the additional spinal segment (8%) with the 9% measured ROM loss. Nonetheless, the evidence presented is insufficient for the ALJ to render a conclusion concerning this combined value.

Claimant's Entitlement to Low Back Maintenance Treatment

F. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical treatment is reasonable, necessary and related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

G. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the ALJ concludes that Claimant has met her burden to establish entitlement to maintenance medical treatment. Dr. Bloch recommended maintenance care at the time of his DIME and Claimant credibly testified that she remains symptomatic despite extensive treatment. Here, substantial evidence demonstrates that although Claimant enjoyed pain relief following her injections and rhizotomy, her condition deteriorates as the effect of the blocks and rhizotomies wear off. Consequently, there is an ongoing need to treat Claimant's persistent pain caused the injuries sustained in the November 26, 2014 accident.

Without ongoing treatment, including injections, the ALJ concludes that Claimant's present condition will likely deteriorate.

Conversion of Claimant's Right Thumb Impairment to Upper Extremity Impairment

H. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award.[1] Section 8-42-107(1)(a), C.R.S. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment beyond the schedule listed. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). The claimant carries the burden to prove a functional impairment beyond the scheduled body part. § 8-42-107(b)(1), C.R.S. Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. The question of whether the claimant proved function impairment beyond the thumb at the metacarpal bone is an issue of fact for the ALJ and depends upon the particular circumstances of the individual case. *See Delaney v. indus. Claim Appeals Office*, 30 P.3d 691.

I. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or "functional impairment", pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment." *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008*). Accordingly, referred pain from the primary situs of the industrial injury to another part of the body may establish proof of functional impairment beyond the identified schedule listing including to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005).* Nonetheless, symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader*

[1] The loss of a thumb is compensated on the schedule. *See* §§ 8-42-107(2)(d)-(f), C.R.S.

v. Popejoy Construction Co., Inc., W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment beyond the listing, including the whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his/her "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Consequently, the ALJ concludes that an injury to the thumb may or may not result in functional impairment of the upper extremity.

J. Based upon the evidence presented, the ALJ finds that Claimant has failed to meet her burden to establish that she has sustained functional impairment beyond the thumb warranting conversion to the scheduled impairment of the upper extremity. In this case, the evidence presented persuades the ALJ that Claimant's functional impairment, i.e. her upper extremity disability and continued hand, wrist and forearm pain are probably related to her non-work-related arthritis and carpal tunnel syndrome. Consequently, the ALJ concludes that Claimant's permanent impairment is limited to the 39% impairment of the right thumb. The claimant's request for additional permanent impairment of the upper extremity beyond the thumb is denied and dismissed.

Claimant's Entitlement to Post-MMI Medical Benefits for CTS

K. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo.App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

L. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the

injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo.App. 1984). As found here, Claimant has failed to prove by a preponderance of the evidence that her CTS and the treatment rendered for it are causally related to her May 21, 2016 industrial injury. Nonetheless, the evidence presented persuades the ALJ that Claimant is entitled to a general award of maintenance treatment for her right thumb subject to Respondents right to contest any recommended maintenance care on the grounds that it is no longer reasonable, necessary or related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003)(a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

ORDER

It is therefore ordered that:

1. Respondents request to set aside Dr. Bloch's Division IME opinion regarding impairment is granted in part. Dr. Bloch's opinion that Claimant sustained permanent neurologic impairment is highly probably incorrect and set aside. Respondents request to set aside the remainder of Dr. Bloch's impairment rating, specifically his specific disorders rating and impairment for associated ROM loss is denied and dismissed. Claimant is at MMI with whole person impairment equal to the combined value of her 8% impairment for specific disorder(s) and the 9% impairment associated with ROM loss.

2. Respondent shall provide all reasonable, necessary and related treatment to relieve and otherwise prevent deterioration of Claimant's low back condition subject to Respondents right to challenge any future request for treatment on the grounds that it is not reasonable, necessary or related to Claimant's November 26, 2014 industrial injury. *See generally*, *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo.App. 1995); Section 8-42-101 (1) (a), C.R.S.; *Hanna v. Print Expediters Inc., supra.*

3. Claimant's request for conversion of her 39% scheduled right thumb impairment to 14% upper extremity impairment is denied and dismissed.

4. Claimant's request for medical benefits related to her right CTS is denied and dismissed.

5. Respondent shall provide all reasonable, necessary and related treatment to relieve and otherwise prevent deterioration of Claimant's right trigger thumb, subject to Respondents right to challenge any future request for treatment on the grounds that it is not reasonable, necessary or related to Claimant's May 21, 2016 industrial injury. *See generally*, *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer*

v. Industrial Claim Appeals Office, 916 P.2d 609 (Colo.App. 1995); Section 8-42-101 (1) (a), C.R.S.; *Hanna v. Print Expediters Inc., supra.*

6. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 24, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary partial disability (TPD) benefits for the period of April 1, 2017 through October 13, 2017.

- Whether the claimant has demonstrated by a preponderance of the evidence that he is entitled to permanent partial disability (PPD) benefits due to probable residual disability, if he had lived to reach maximum medical improvement (MMI).

- If the claimant successfully demonstrates entitlement to TTD and/or PPD benefits, what was the claimant's average weekly wage (AWW) at the time of the admitted March 31, 2017 work injury?

FINDINGS OF FACT

1. The claimant worked for the employer as a frac operator. On March 31, 2017, the claimant injured his left knee at work. On September 22, 2017, the employer filed a General Admission of Liability (GAL) admitting for medical benefits only.

2. At the time of his March 31, 2017 work injury, the claimant was paid $18.69 per hour. The employer pays employees every two weeks. The payroll records entered into evidence indicate that in the twelve (12) weeks prior the work injury, the claimant earned at total of $18,897.80. This total included regular hours, overtime hours, paid holidays, and additional bonuses. The ALJ calculates that this averages to $1,574.82 per week ($18,897.80 divided by 12 weeks).[1]

3. Following the March 31, 2017 injury the claimant received medical treatment from Dr. Lori Fay. The claimant was first seen by Dr. Fay on April 7, 2017. At that time, Dr. Fay assigned work restrictions that included no kneeling, squatting, climbing, or crawling.

4. Thereafter, the claimant was on a scheduled vacation from April 7, 2017 through April 19, 2017. The claimant returned to work, as scheduled, on April 24, 2017. Ms. Sutliff testified that the claimant's April 2017 vacation was scheduled prior to the March 31, 2017 work injury. While the claimant was on that vacation, his rate of pay was increased to $20.65 per hour.

[1] This would equate to an average of $3,149.64 for each two week pay period.

5. The claimant was on modified duty from his return to work on April 24, 2017 until October 2017. Ms. Sutliff testified that the claimant's final day of employment with the employer was October 11, 2017. Ms. Sutliff also testified that the claimant's employment ended on that date because he was injured at home.

6. Based upon the payroll records entered into evidence, from April 24, 2017 through October 7, 2017 the claimant's earnings were as follows:

> For the pay period of April 23, 2017 through May 6, 2017, the claimant's earnings were $1,404.11;
>
> For the pay period of May 7, 2017 through May 20, 2017, the claimant's earnings were $2,893.49;
>
> For the pay period of May 21, 2017 through June 3, 2017, the claimant's earnings were $2,214.62;
>
> For the pay period of June 4, 2017 through June 17, 2017, the claimant's earnings were $2,436.61;
>
> For the pay period of June 18, 2017 through July 1, 2017, the claimant's earnings were $2,255.92
>
> For the pay period of July 2, 2017 through July 15, 2017, the claimant's earnings were $1,721.60;
>
> For the pay period of July 16, 2017 through July 29, 2017, the claimant's earnings were $1,386.03;
>
> For the pay period of July 30, 2017, through August 12, 2017, the claimant's earnings were $3,226.47;
>
> For the pay period of August 13, 2017 through August 26, 2017, the claimant's earnings were $3,807.25;
>
> For the pay period of August 27, 2017 through September 9, 2017, the claimant's earnings were $2,312.71;
>
> For the pay period of September 10, 2017 through September 23, 2017, the claimant's earnings were $3,807.25;
>
> For the pay period of September 24, 2017 through October 7, 2017, the claimant's earnings were $709.76; and

It is clear from this evidence that there were pay periods in which the claimant earned less than he was earning before his March 31, 2017 work injury.

7. Prior to the claimant's work injury, he and his crew were working outside of Denver, Colorado. When the claimant returned to work on April 24, 2017, he was assigned to a job location near Parachute, Colorado. Ms. Sutliff testified that the claimant's entire crew experienced this change in job location, not just the claimant. While working at the Parachute job site, crew members worked fewer hours than they had worked while at the Denver location. Both Ms. Sutliff and Mr. Bevan testified that this reduction in hours occurred because noise restrictions limited the number of hours the crew was allowed to work.

8. On December 27, 2017, the claimant was seen by Dr. William Ciccone for an independent medical examination (IME). In connection with the IME, Dr. Ciccone reviewed the claimant's medical records, obtained a medical history from the claimant, and performed a physical examination. In his IME report, Dr. Ciccone diagnosed the claimant with left knee arthritis and opined that the claimant suffered a minor injury to his left knee at work. Dr. Ciccone further opined that the "development of arthritis predated the incident at work and is not related to a work injury". Dr. Ciccone noted that the claimant had reached maximum medical improvement (MMI) and that a permanent impairment rating would not be appropriate "given the claimant's long history of pain from his degenerative arthritis as it would be impossible to know the claimant's baseline range of motion prior to the incident".

9. The claimant died on January 4, 2018.

10. On January 22, 2018, the respondents filed a Final Admission of Liability (FAL) admitting for medical benefits only.

11. On June 29, 2018, the claimant's counsel asked Dr. Fay to opine regarding whether the claimant would have had "probable residual disability" if he had lived to reach MMI. In her July 5, 2018 response, Dr. Fay opined that the claimant would have had probable residual disability. Based upon range of motion measurements taken by Dr. Ciccone at the IME, Dr. Fay also opined that the claimant would have had a 2% whole person impairment.

12. The ALJ credits the testimony of the respondents' witnesses and the payroll records entered into evidence and finds that it is more likely than not that after the claimant returned to work on April 24, 2017 his wages were lower because of the change in job location and not because of the claimant's work restrictions.

13. The ALJ credits the testimony of the respondents' witnesses and the payroll records entered into evidence and finds that the claimant was absent from work for a planned vacation from April 7, 2017 through April 23, 2017. Therefore any reduction in wages during that period of time was not related to the work injury or the actions of the employer.

14. The ALJ credits the opinion of Dr. Ciccone over the conflicting opinion of Dr. Fay and finds that the claimant had reached MMI as of the date of the IME and had no permanent impairment. Therefore, the ALJ finds that the claimant has failed to

demonstrate that that he had probable residual disability at the time of his death. Thus, the ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that he is entitled to permanent partial disability (PPD) benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). TPD payments ordinarily continue until either claimant reaches maximum medical improvement or an attending physician gives claimant a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. *See* 8-42-106, C.R.S.

4. The Colorado Court of Appeals and the Industrial Claim Appeals Office (ICAO) have previously held that an injured worker's wage loss for "economic reasons" does not preclude him from the continued receipt to TPD benefits. *J.D. Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989). *See also Kaminski v. Grand County Roofing and Sheet Metal, Inc*. WC No. 4-525-562 (ICAO 2003); *Ashmore v. NU Horizon Window Systems, Inc.* WC No 4-593-027 (ICAO 2004); *and Edgar v. Halliburton Energy Services*, WC No 4-971-336-01 (ICAO 2015).

5. As found, the claimant's wage loss following his work injury was not related to his work restrictions. Rather, the reduction of the claimant's wages beginning April 24, 2017 was the result of reduced hours for the entire crew. However, given the holdings in the *Sawatsky* line of cases, the claimant has demonstrated by a preponderance of the evidence that he is entitled to TPD benefits for the period of April 24, 2017 through October 13, 2017. As found, the testimony of the respondents' witnesses and the payroll records are credible and persuasive.

6. Section 8-42-116, C.R.S., addresses the payment of benefits when a claimant dies of causes unrelated to the work injury. Specifically, the statute provides, in part:

> "(1) If death occurs to an injured employee, other than as a proximate cause of any injury, before indemnity ceases and the deceased leaves persons wholly dependent upon the deceased for support, death benefits shall be as follows: … (b) Where the injury proximately caused permanent partial disability, the death benefit shall consist of unpaid and unaccrued portion of the permanent partial disability benefit which the employee would have received had he lived."

7. To calculate permanent partial disability (PPD) benefits when a claimant dies before reaching MMI "[t]he proper procedure is to make the best possible medical estimate of the probable residual disability that would have remained had the employee had lived to complete his healing period." *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998) (*citing 4 Larson's Workers' Compensation Law* Section 58.45 (1997)). It is not necessary for a claimant to reach MMI before death for Section 8-42-116, C.R.S. to apply. *Id.*

8. As found, the claimant has failed to demonstrate by a preponderance of the evidence that he would be entitled to PPD benefits. As found, the claimant was at MMI at the time of the IME, with no permanent restrictions. Therefore, the claimant did not have probable residual disability at the time of his death. As found, the opinion of Dr. Ciccone is credible and persuasive.

9. The ALJ must determine a claimant's average weekly wage (AWW) by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

10. As found, the claimant's average weekly wage (AWW) at the time of the March 31, 2017 injury was $1,574.82. As found, the payroll records are credible and persuasive.

ORDER

It is therefore ordered that:

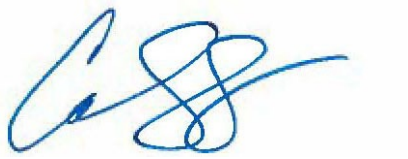
1. The claimant is entitled to temporary partial disability (TPD) benefits for the period of April 24, 2017 through October 13, 2017.

2. The claimant's claim for permanent partial disability (PPD) benefits is denied and dismissed.

3. The claimant's average weekly wage (AWW) was $1,574.82.

4. The insurer shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

Dated: August 28, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury on August 6, 2017.

II. Whether Claimant has established by a preponderance of the evidence that he is entitled to all reasonable, necessary, and related medical treatment stemming from a compensable work injury occurring on August 6, 2017.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability benefits beginning August 17, 2017 through September 25, 2017.

IV. Claimant's Average Weekly Wage.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On August 6, 2017, Claimant was working at Owens & Minor through ProLogistix, which is a subsidiary of EmployBridge.

2. While working at Owens & Minor, Claimant's job duties included unloading trucks.

3. Claimant testified that when he unloaded trucks at Owens & Minor, he would pull out all of the racks, which took 15 minutes, and then he would move boxes or bags coming off a rail system and place them onto a cart. Claimant testified that the weight of the boxes varied. He indicated that some of the boxes weighed 35 or 40 pounds, some weighed 60 or 70 pounds, and sometimes they were very light.

4. On August 6, 2017, Claimant was unloading a truck at Owens & Minor. Claimant testified that after working the first portion of his shift, he went to lunch. Claimant did not testify that he developed any pain or symptoms while working and before going to lunch. In addition, Claimant did not testify that he developed any pain or symptoms while at lunch. Claimant testified that while walking back from lunch, he developed the spontaneous onset of left hip pain. Claimant testified that he had "no clue" what happened, and that "it just started hurting."

5. Claimant testified that the pain in his hip area was 10/10. Despite his contention that his pain was 10/10, Claimant worked the remainder of the day and did not report a work injury and did not seek any medical treatment. Claimant testified

that he did not work the following day, but worked the remainder of his work schedule that week. However, wage records submitted at hearing document Claimant worked 40 hours, plus 3.38 hours of overtime, for the pay period of August 7, 2017 through August 13, 2017, which is the week following the alleged onset of his hip pain which he contends developed while walking back from lunch. Claimant's contention he had 10/10 pain on August 6, 2017, and had continuing problems is not credible in light of the fact that he worked the remainder of that day – without reporting a work injury - and then worked 43.38 hours the following week.

6. Despite alleging an injury occurred on August 6, 2017, which allegedly caused excruciating pain, Claimant did not obtain medical treatment until August 15, 2017.

7. On August 15, 2017, Claimant was seen at Concentra where he was examined by Physician's Assistant (PA) Glenn D. Petersen. Under chief complaint, the report notes:

> The patient presented today with DOI: 8/6/17 at 8:00 p.m. left leg, hip and gluteal region. Patient was moving boxes and felt pain instantly he is not sure if he twisted wrong.

Under History of Present Illness, the report states Claimant:

> Strained left hip and thigh squatting and lifting and pivoting while squatted heavy item at work August 6 about 8:00 PM, Sunday while at work.

The history PA Peterson documented is inconsistent with Claimant's testimony at hearing that he developed pain while walking back from lunch and that he had no clue what caused it. (*See* Clmt. Ex. 4, at 15).

Based on the history provided by Claimant, which this ALJ does not find credible because it is inconsistent with his hearing testimony, PA Petersen diagnosed Claimant with a strain of his left hip and thigh, and referred him to physical therapy. (Clmt. Ex. 4, at 16).

8. On August 16, 2017, Claimant started physical therapy. At that appointment, Claimant complained of pain in his left "glut," and denied pain, tingling, or numbness going down his left leg. (Clmt. Ex. 4, at 18). Treatment notes associated with Claimant's initial medical treatment revolve around a diagnosed strain of the left hip and thigh.

9. However, beginning on Claimant's September 1, 2017 appointment with Sharon O'Connor, M.D. at Concentra, treatment was directed at left sided sciatica associated with a disorder of the lumbosacral spine. (Clmt. Ex. 4 at 51.) Dr. O'Connor ordered an MRI of the left hip and the lumbar spine.

10. Claimant underwent an MRI of his lumbar spine on September 15, 2017. (Clmt. Ex. 7, pp. 126-39). Michael Preece, M.D. interpreted its findings, most notably finding what he described as an acute fracture of the left sacral ala, degenerative disc disease at the L5-S1 level with impingement on the exiting right L5 nerve and encroachment on the exiting left L5 nerve, and other assorted minor degenerative findings. *Id*. at 127.

11. Subsequent to his left hip MRI, Claimant was diagnosed with a fracture of the left sacral ala, as well as a right sided gluteus median tendon tear. *Id*. at 67 and Ex. 7 at 126-127). It is also noted that the right sided gluteus medius tendon tear had associated edema that could represent a relatively recent injury, but yet the muscle was mildly atrophic suggesting more chronicity. (Resp. Ex. C at 9).

12. Claimant was referred to John Sacha, M.D and evaluated on September 27, 2017. (Clmt. Ex. 4, at 77-79). Dr. Sacha's notes from the first evaluation document the following history:

> [W]hile doing a bunch of lifting and twisting before his lunch break, started feeling some mild stiffness in the low back and left the buttock He then went to lunch, and as he was walking back from lunch, he felt severe pain in the left buttock, posterior thigh, and down the left leg as well as some low back pain. It felt like his leg was giving way. (Clmt. Ex. 4 at 77).

His report also noted Claimant's current symptoms to be:

> Pain constant in nature to left low back, left buttock, down in the posterior thigh to the level of the ankle with occasional numbness and tingling to the foot. *Id* at 77.

The history Claimant provided Dr. Sacha is different than the history Claimant provided at hearing and the history noted by PA Peterson. At this visit, Claimant alleges he started developing some stiffness in the low back and left buttock while working and before going to lunch. The history also indicates Claimant has had pain down his left leg since August 6, 2017, which is inconsistent with the medical records and Claimant's first visit with Concentra's physical therapist on August 16, 2017, when Claimant denied pain going down his left leg.

Dr. Sacha also noted Claimant had pain with straight leg raise and neural tension testing on the left. However, this finding is different than PA Peterson's August 15, 2017, physical examination which noted a negative straight leg raise, bilaterally. (Clmt. Ex. 4 at 14).

13. Despite the inconsistencies in Claimant's medical records, Dr. Sacha diagnosed Claimant with lumbosacral radiculopathy. While he noted Claimant's evident gluteal tendon pathology on the right side and left sided sacral ala fracture, Dr. Sacha concluded that these were coincidental findings and could not be explained based upon the mechanism of injury provided by Claimant. *Id*. at 78. Dr. Sacha recommended a lumbar epidural injection/spinal nerve block at the L5-

S1 level and a bone scan to assess whether the sacral ala fracture was acute. *Id*.

14. Claimant obtained additional employment, taking a job at Home Depot. Claimant testified that he began this work at the end of September, roughly around September 25, 2017. Claimant could not testify as to the exact date, although he estimated that he began working part time at Home Depot, concurrent with his part time work with Respondents, on or around that date. Claimant subsequently resigned from his employment with Respondents entirely, taking instead another part-time position at Lowe's. Dr. Bird's October 2, 2017 treatment note indicates that this modified duty was easier for him, as he just had to stand and did not have to lift much. (Clmt. Ex. 4, p. 81).

15. The bone scan recommended by Dr. Sacha was performed on October 12, 2017. (Clmt. Ex. 4, p. 86). The bone scan revealed three-phase abnormalities along the left sacrum, which was noted to be consistent with the known sacral fracture, and three-phase abnormalities along the right sacroiliac joint, which "could indicate an inflammatory or degenerative arthritis." *Id*.

16. On November 16, 2017, Claimant underwent a left-sided L5 and S1 transforaminal epidural injection from Dr. Sacha. (Clmt. Ex. 5, pp. 110-112). Dr. Sacha also provided Claimant a pain diary. Although the purpose of the pain diary is not stated in Dr. Sacha's report, it appears the pain diary was provided so Claimant could track his symptoms after the injection in order to assist Dr. Sacha in determining whether Claimant had a diagnostic response to the injection. However, on the same day of the injection, Dr. Sacha interpreted the results of the injection as diagnostic, noting Claimant had greater than 80% relief of his subjective pain symptoms 30 minutes after the injection, combined with reproduction of Claimant's symptoms with placement of injectate at the L5 and S1 levels. *Id*. at 110. Dr. Sacha's finding that the injection was diagnostic, without considering Claimant's longitudinal pain diary data, seems premature.

17. Dr. Sacha also indicated Claimant was to return in a week to monitor his response to the injection. However, the next time Claimant was evaluated by Dr. Sacha was on December 4, 2017.

18. On December 4, 2017, Dr. Sacha evaluated Claimant and concluded Claimant had a diagnostic response and had excellent lasting relief from the injection and that Claimant's condition had improved 50-60%. However, there is no indication Claimant completed and provided Dr. Sacha his pain diary and whether Dr. Sacha's conclusion that the injection was diagnostic and that Claimant had improved 50-60% was based on his evaluation of Claimant's pain diary or statement made by Claimant on the day of the examination. On the other hand, Dr. Sacha noted Claimant was exhibiting moderate pain behaviors, but yet he does not comment as to whether the pain behaviors were non-physiologic and out of proportion with the working diagnoses, or consistent with the working diagnoses.

19. On January 3, 2018, Claimant attended a final appointment with Dr. Sacha who opined Claimant reached MMI and had a 7% whole person impairment. Despite

having previously ruled Claimant's sacral ala fracture a coincidental finding, i.e., not related to any work incident, Dr. Sacha assigned Claimant a 7% rating pursuant to the AMA Guides based upon that fracture and not for the lumbosacral radiculopathy at the L5-S1 level he previously identified and for which he performed the epidural steroid injection two months prior. Therefore, Dr. Sacha's rating of a condition he previously found to not be related diminishes the reliability and credibility of his opinions.

20. Claimant attended an Independent Medical Examination with Timothy Hall, M.D. on April 26, 2018. (Clmt. Ex. 3, pp. 7-11). Dr. Hall took a patient history from Claimant, performed a physical exam, and reviewed the medical record. Dr. Hall discussed Claimant's then-current pain complaints and found no difficulty in performing his job tasks with the exception of twisting, which would cause a significant increase in pain. Dr. Hall noted that that "[i]nterestingly, this is the activity he was doing when the injury occurred." *Id.* at 10. Finding the case unique, Dr. Hall concluded that Claimant had likely strained his left buttock on August 6, 2017, in part because Claimant did not present a "classic picture of radiculopathy or radiculitis." *Id*. Dr. Hall additionally agreed that Claimant's acute onset of pain was not related to the sacral fracture. However, Dr. Hall based his causation opinion on Claimant's assertion at the IME that his symptoms developed initially during the first part of his shift while moving boxes and that he had a pulling sensation on the left side of his buttock. Claimant also told Dr. Hall that he took a break [lunch] which was uneventful, and then went back to work and while moving more boxes, it started hurting more. The ALJ finds that time line Claimant provided to Dr. Hall regarding the onset of his symptoms is inconsistent with his testimony at hearing that he was not having any problems until he was walking back from lunch and developed the immediate onset of pain while merely walking. Therefore, because the ALJ does not find the history Claimant provided to Dr. Hall to be reliable, the ALJ does not find Dr. Hall's opinions to be reliable or persuasive.

21. Claimant subsequently attended an Independent Medical Examination with Eric Ridings, M.D. at Respondents' request on May 1, 2018. (Resp. Ex. C, pp. 8-16). Dr. Ridings took a patient history, performed a physical exam, and reviewed the medical record. The ALJ finds that Dr. Ridings performed a very thorough and detailed analysis of this case.

22. Dr. Ridings' conclusions differed markedly from those of Dr. Sacha and Dr. Hall. Dr. Ridings agreed that the sacral ala fracture could not be linked to any incident on August 6, 2017, as such fractures are typically insufficiency fractures caused because the bone is "insufficient" to support the weight of the body at that point. *Id*. at 16. Dr. Ridings did not agree with Dr. Sacha that Claimant showed signs of radiculopathy, placing emphasis on Claimant's initial report of no leg pain when he first presented to Concentra on August 15, 2017. *Id*. at 14. Contrary to Dr. Sacha's opinion that the epidural steroid injection was diagnostic, Dr. Ridings concluded Claimant did not have a diagnostic response to the injection because Claimant told Dr. Ridings that he had about 3-4 days of pain relief from the injection, but that the Marcaine contained in the injection would have numbed up

his back for a bit, possibly up to 6 hours, but not 3-4 days. Dr. Ridings also noted on the lack of documentation to support Dr. Sacha's contention that Claimant had 80% relief from the injection. Dr. Ridings stated in his report that although Dr. Sacha noted Claimant had a positive straight leg test, Dr. Sacha failed to document whether Claimant's pain complaints were down the left lower extremity or localized to the back and buttock, hence, one could not tell whether it was a positive straight leg test or not. In addition, Dr. Ridings noted that before Claimant was evaluated by Dr. Sacha, there were no complaints suggesting lumbosacral radiculopathy. Dr. Ridings also stated that Dr. Sacha's final discharge diagnosis regarding Claimant was sacral fracture and secondary lumbar radiculopathy, but yet such diagnosis does not make sense because it is not possible for a sacral ala fracture to secondarily cause radiculopathy. Moreover, Dr. Ridings also pointed out that although Dr. Sacha stated the sacral fracture was not work related, Dr. Sacha provided Claimant an impairment rating for the fracture.

23. In his report, Dr. Ridings makes a number of comments regarding his impression of the information he reviewed and how that factored into his opinion regarding causation. Dr. Ridings' comments include, but are not limited to, the following:

> The fracture of the left sacral ala was an unexpected finding. This is typically an insufficiency fracture with the most common risk factor being osteoporosis. These fractures are most common, therefore, in elderly women. At L5-S1 it was stated that there was "minimal disc bulging and mild bilateral facet arthropathy" causing the foraminal stenosis right greater than left with most significant effect on the right L5 nerve root radiographically. This is the side opposite the patient symptoms, and to this point there had been no documented symptoms or findings consistent with nerve root impingement. The gluteus medius tear appears to be acute on chronic, and again is on the opposite side as the patient's complaints. The patient's history to this point is entirely consistent with the left sacrum ala fracture without any necessary contribution from any of the other findings.

(Resp. Ex. C, pg. 9).

> The history [provided to Dr. Sacha] is not consistent with the more contemporaneous documentation when he was first seen at Concentra. He reported that his pain as in the left hip and thigh initially, but without any radiation further down the left lower extremity. The patient's history per Dr. Sacha was severe pain in the left buttock, posterior thigh, and down the left leg had continued for the following week. Dr. Sacha's history does not explain how the patient could continue working many hours a day moving heavy boxes throughout that week given the symptoms.

(Resp. Ex. C, pg. 10).

24. Dr. Ridings concluded that Claimant's symptoms flow from his left sacral ala fracture, and not from a lumbar radiculopathy as opined by Dr. Sacha or a left buttock muscle sprain/strain as opined by Dr. Hall. Dr. Ridings concluded that Claimant's left sacral ala fracture was not caused, aggravated, or accelerated by his activities at work, but was either something that could have happened at any point based on an underlying disease process, for which Claimant has not been evaluated, or less likely due to an episode of trauma that Claimant has not reported, given that he had an acute right gluteal muscle tear also seen on MRI for which there is no explanation. Dr. Ridings concluded that within a reasonable degree of medical probability, Claimant did not sustain a work-related injury on August 6, 2017.

25. Dr. Ridings also testified at hearing and testified consistent with his report.

26. The ALJ credits Dr. Ridings' opinions as set forth in his report and hearing testimony. The ALJ finds Dr. Ridings' opinions to be reliable, credible, and persuasive.

27. Dr. Sacha's deposition testimony of June 14, 2018, was also submitted to the court. The ALJ does not find Dr. Sacha's testimony to be persuasive. The ALJ finds Dr. Sacha's opinions as set forth in his deposition to be vague and somewhat conclusory. In other words, his opinions lack specificity, clarity, and persuasive analysis. For example, when offering an opinion as to whether Claimant sustained an injury at work, Dr. Sacha testified that:

> My opinion on this guy is that he probably tweaked his back or tweaked a disk in his back from the lifting and twisting activities. That's the normal mechanism and the normal and expected pathology for someone that's having lifting and twisting.

(Depo. Tr., at 7).

After testifying that Claimant probably "tweaked his back or tweaked a disk in his back," Dr. Sacha went on to testify that the injections he performed "proved that he had disk damage." Dr. Sacha testified that the injections were very diagnostic because:

> [Claimant] had reproduction of the symptoms with placement of the injectate; we saw mild foraminal narrowing on the epidurogram; [Claimant] had temporary relief of his symptoms, including with and without provocative maneuvers. So [Claimant] met all diagnostic criteria.

(Depo. Tr., at 12).

Dr. Sacha also based his opinion that the injection was diagnostic because he asserts Claimant had over 80 percent reduction in his pain symptoms due to the injection. (Tr., at 120.) However, a review of the VAS Pre and Post-Injection Pain Diagram, which is associated with Claimant's November 16, 2017, injection,

and attempts to quantify Claimant's response to the injection fails to provide the ALJ with sufficient reliable information to substantiate Dr. Sacha's testimony that that the injections were "very diagnostic." (Clmt. Ex. 5, at 112). For example, the Pre-Injection Pain Diagram has pain levels from 0-10 and asks the patient to rate their pain while resting and while engaging in aggravating activities. The Pre-Injection Pain Diagram has 1 and 2 circled for pain while resting and 6 and 7 circled for pain with aggravating activities. But, there is also the front, back, right side, and left side, of a human figure on which the location and type of pain complaints and symptoms the patient is experiencing are to be marked. The ALJ assumes that the Pre and Post-Injection pain complaints, pain levels, symptoms, and diagrams are analyzed to determine if the symptoms and alleged response to the injection are medically plausible and diagnostic. However, the human figures, for both Pre and Post-Injection symptoms are devoid of any markings outlining Claimant's pain complaints and symptoms before and after the injection. Moreover, although the pain diagram has a signature block for Claimant, Claimant never signed off of the pain diagram. (Clmt. Ex. 5, at 112). In addition, as previously found, Dr. Sacha's November 16, 2017, report indicates he provided Claimant a pain diary and the record is not clear as to whether Claimant completed the diary, provided the diary to Dr. Sacha, and whether Dr. Sacha analyzed the information in rendering his opinions. Therefore, the ALJ does not find Dr. Sacha's opinions and findings as set forth in his reports and testimony to be reliable or persuasive.

28. Claimant's hearing testimony and statements contained in the medical records regarding when and where he developed his symptoms, the extent of his symptoms, the location of his symptoms, and the temporal relationship of his symptoms to various work activities he was performing on the alleged date of injury are not found to be reliable or credible. Therefore, the ALJ finds Claimant's testimony was not credible or reliable.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury on August 6, 2017.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

In addition, Claimant is not required to present medical evidence to prove the cause of his condition. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997); *Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986). Pertinent lay testimony may support a finding of causation despite conflicting medical evidence or testimony. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

However, the question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant's hearing testimony as well as his statements contained in the medical records regarding the onset of his symptoms, where he was at when his symptoms developed, the extent of his symptoms, the location of his symptoms, and the relationship and timing of his symptoms to various work activities, were not reliable or credible. Therefore, any opinions or findings which relate Claimant's symptoms, need for medical treatment, or disability to his work are not found to be reliable or persuasive.

As found, the ALJ credited the opinions of Dr. Ridings. Dr. Ridings concluded that Claimant did not suffer an injury at work in the form of an acute injury or in the form of an aggravation or acceleration of a preexisting underlying condition. Dr. Ridings concluded Claimant most likely suffered from an insufficiency fracture of his left sacral ala that most likely occurred spontaneously, or less likely, a fracture due to a trauma. The fact that Claimant also had findings of a right sided gluteus median tendon tear, although asymptomatic, adds to the possibility that Claimant has been involved in a prior undisclosed non-work related accident - involving sufficient trauma to result in a torn gluteus median tendon and/or fractured sacral ala - and has not divulged such information.

The ALJ did not find the opinions of Dr. Hall or Dr. Sacha to be reliable or persuasive regarding the cause of Claimant's symptoms, need for medical treatment, or disability.

There is insufficient reliable and credible evidence for the ALJ to find and conclude Claimant's work activities caused, aggravated, or accelerated his sacral ala fracture – or any other condition - and necessitated the need for medical treatment or caused any disability.

Therefore, the ALJ finds and concludes Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 28, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-066-750-02

ISSUE

- Whether Respondents proved by a preponderance of the evidence that Claimant's indemnity benefits should be reduced by 50% due to Claimant's willful failure to obey a reasonable safety rule pursuant to C.R.S. section 8-42-112(1)(a) and (b).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a machine operator who Employer hired on November 18, 2004. Employer is a Colorado based steel contractor that employs shop laborers, including machine operators, fitters, welders, and fitter/welders.

2. Employer adopted and enforces to a company safety policy. Employer provides new employees a copy of its safety manual, and requires employees to certify they have reviewed the policies. Further, Employer's Safety Supervisor provides job safety training when an employee is first hired and when an employee starts a different position on the shop floor. Employer provides mandatory monthly safety training meetings often covering safe material handling practices. Employer has a seven-person safety committee. Employer enforces its safety rules, and when an employee receives written discipline for a safety rule violation, he or she loses their quarterly gain share for that quarter.

3. Claimant participated in new hire orientation and safety training. On January 7, 2015, Claimant certified that he reviewed the latest edition of Employer's safety manual. Claimant attended mandatory monthly safety meetings throughout his thirteen plus years with Employer.

4. Claimant attended three safety meetings exclusively devoted to safe material handling during the year prior to his work injury, including a meeting held less than a month before his injury. Kelly Miller, Employer's Quality Control Manager, ran the safety meetings and repeatedly emphasized that Employer's safe material handling policy required employees to set materials and material bins on flat, stable surfaces, which include floors and work horses. Outside of the safety meetings, Mr. Miller regularly reminded Claimant of safe material handling and counseled Claimant several times when he observed Claimant performing unsafe acts. Employer did not consider Claimant's prior unsafe acts to be serious enough to result in formal written discipline or loss of gain share.

5. Mr. Miller confirmed that Employer wrote up employees for unsafe material handling both before and after Claimant's injury.

6. On January 12, 2018, Hugo Carrazco, a fitter working on the shop floor with Claimant, placed a parts order requesting materials (angle irons) be brought to his work station. Claimant began moving the heavy angle irons from one side of the shop floor to Mr. Carrazco's workstation on the other side of the shop floor. Claimant gathered the angle irons in a bin next to Claimant's workstation. Claimant then used an overhead remote operated crane to hoist the bin and move it to a wheeled cart. Once Claimant lowered the bin onto the cart, he unhooked the bin from the crane so he could push the cart to the other side of the shop.

7. Mark Tanner, a fitter/welder, was walking by when he noticed Claimant by the cart. The bin was already on the cart, but Claimant still needed to push the cart to the other side of the shop. Because the bin of angle irons was heavy, Mr. Tanner helped Claimant push the cart towards Mr. Carrazco's workstation.

8. As the cart arrived at the east side of the shop, Mr. Carrazco walked by, and told Claimant to move the bin of angle irons to the floor of his workstation in front of a large stack of 3" x 3" metal tubes. He pointed to the floor to communicate non-verbally where he wanted the bin. Mr. Tanner, who was standing next to Claimant, heard Mr. Carrazco's instructions and described them as clear.

9. Mr. Tanner is a member of Employer's safety committee. He testified that if Mr. Carrazco had instructed Claimant to move the bin to the top of the stack of tubes, as Claimant claims, he would have immediately corrected those instructions because they created a dangerous situation and violated Employer's safe material handling policy. Mr. Tanner testified that he left to return to his own work and saw Mr. Carrazco walked over to his workstation and point directly at the ground in front of the stack of 3" x 3" tubes, again showing Claimant where he wanted him to move the bin.

10. The ALJ finds the testimony of Mr. Carrazco and Mr. Tanner regarding Mr. Carrazco's instructions to Claimant about where to place the bin is credible and persuasive. They each corroborated the same events, and their testimony is reasonable and consistent with Employer's policy and training.

11. After Claimant received Mr. Carrazco's instructions, Claimant hooked the metal bin to a second crane, and he hoisted the bin from the cart, moving the bin towards Mr. Carrazco's station. However, instead of lowering the bin to the floor, Claimant lowered the bin on top of a large stack of 3" x 3" heavy iron tubes.

12. The tubes were approximately five rows wide, of lengths differing between ten and twenty feet, and stacked approximately three feet high. A twenty foot 3" x 3" tube could weigh up to 100 pounds. The tubes are not truly flat, and do not sit square. An oil-based product used during the manufacturing process covers the tubes making them slippery. A stack of 3" x 3" tubes, such as the stack in front of Mr. Carrazco's workstation, is not a stable surface.

13. Claimant testified that the stack looked stable to him and that he tested its stability with his hand. Given the totality of the evidence, including the description above

of the stacked tubes and Employer's witnesses' testimony that the risk was obvious, the ALJ finds Claimant's testimony is not reasonable or credible. The ALJ also finds that Claimant's description of the events is unlikely.

14. Employer's witnesses testified that the stack of 3" x 3" tubes described above is an obviously dangerous surface to place material, such as a bin. They all recognized that whatever a worker placed on the stack could fall off, and/or cause the stack itself to shift, resulting in the entire load coming down.

15. On the date of the accident, directly behind the stack of 3" x 3" tubes was a stack of three equal length 14" x 6" tubes. The ALJ finds it more likely true than not that Claimant lowered the bin on the stack of 3" x 3" tubes. The bin did not lay flat on the 3" x 3" tubes; instead, it leaned against the larger and higher stack of 14" x 6" tubes.

16. Nathan Everson, a fitter whose station was next to Mr. Carrazco's station, saw Claimant lower the bin onto the 3" x 3" tubes. He recognized immediately that Claimant had created a dangerous situation. Before he could respond, Claimant pulled the bin toward himself, apparently trying to level the bin on the 3" x 3" tubes before unhooking the bin from the crane. At that time, the 3" x 3" tubes shifted and several of those tubes came down on Claimant's left leg. Claimant's left leg was wedged between an "L" piece of iron on the ground, and the fallen tubes, with other tubes landing on his leg, resulting in multiple left leg and ankle fractures.

17. Claimant's left leg was trapped under the pile of tubes, and he was in obvious distress. Several co-workers ran to the scene to help, including Mr. Miller, Mr. Everson, Mr. Carrazco, and Mr. Tanner. At the scene, Mr. Carrazco stated that he told Claimant to put the bin on the floor, not on the tubes. Mr. Everson heard this statement.

18. After emergency personnel came and took Claimant to the hospital, Mr. Miller conducted an accident investigation. He took several pictures of the aftermath showing there were two stacks of tubes, the 3" x 3" stack that had fallen over, and the 14" x 6" stack that remained upright. Mr. Miller also interviewed Mr. Everson, Mr. Tanner and Mr. Carrazco. The investigation report appends Mr. Carrazco, Mr. Everson and Mr. Tanners' witness statements.

19. Mr. Miller concluded that Claimant violated Employer's safe material handling safety rule. By putting the bin on the stack of 3" x 3" tubes, Claimant violated safe material handling training and company policy.

20. Claimant admitted that he intended to put the material bin on the 3" x 3" stack of tubes. Thus, the ALJ concludes that Claimant acted intentionally and that his intentional action directly resulted in his injuries.

21. The ALJ finds that Claimant's statements to the effect that he did not apprehend the risk of placing the bin on the stack of 3" x 3" tubes not credible or persuasive.

22. The ALJ finds that Respondents have met their burden of establishing that Claimant intentionally violated Employer's enforced safety policy and training concerning safe material handling, and that Claimant's injuries resulted therefrom.

CONCLUSIONS OF LAW

Section 8-42-112 (1), C.R.S., provides for a fifty percent (50%) reduction in benefits when an "injury is caused by the willful failure of the employee to use safety devices provided by the employer" or "(b) Where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." The term willful connotes deliberate intent. Mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). Moreover, Respondents bear the burden proof to establish that claimant's conduct was willful. *Lori's Family Dining, Inc. v. ICAO*, 907 P.2d 715 (Colo. App. 1995); *Johnson v. Denver Tramway Corp*., 115 Colo. 214, 171 P.2d 410 (1946).

The elements of proving a violation of Section 8-42-112(1)(b) include the following:

1) There must be a safety rule adopted by the employer.

2) The safety rule must be reasonable.

3) The safety rule must be known by the employee; i.e. "brought home" to the employee and diligently enforced. *Pacific Employer's Insurance Co. v. Kilpatrick,* 111 Colo. 470, 143 P.2d 267 (Colo. 1943)

4) The meaning and content of the safety rule must be specific, unambiguous and definite, clear and non-conflicting. *Butland v. ICAO*, 754 P.2d 422 (Colo.App. 1988).

5) The violation of the safety rule must be willful, done with deliberate intent by the employee. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Respondents carry the burden of proving each element justifying a reduction in compensation for willful failure to obey a reasonable safety rule. *Horton v. JBS Swift and Company*, W.C. No. 4-779-078 (2010); *Strait v. Russell Stover Candies*, W.C. No. 4-843-592 (2011). Whether Respondents met the burden of proof is one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). Here, the ALJ finds and concludes that Respondents have met their burden of proof.

Settled law provides that the alleged safety-rule "does not need to be formally adopted, does not have to be in writing, and does not have to be posted for reduction pursuant to section 8-42-112(1)(b) to apply. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). Rather, oral warnings, prohibitions, and directions are sufficient if heard and understood by the employee and if given by someone generally in authority. *Id.* Moreover, a safety rule, if sufficiently obvious to the claimant, can be based solely on common sense without any direction of the employer to

follow it. *Indus. Comm'n v. Golden Cycle Corp.*, 246 P.2d 902 (Colo. 1952). Finally, a willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that the conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation District*, W.C. No. 4-335- 104 (February 19, 1999).

An ALJ may infer willfulness from a variety of circumstantial evidence, including:

- The obviousness of the danger, *see Golden Cycle Corp.*, 246 P.2d at 906 ("the operator of a saw mill surely would not be held to liability for failure to post a notice reading, 'Keep your hands out of the buzz saw.'");

- The employee's knowledge of the safety rule and the deliberateness with which the employee performed an act prohibited by the rule. *See, e.g. Salamanca v. Golden Aluminum Co*., W.C. No. 4-416-802 (ICAO July 16, 2001).

The Industrial Claim Appeals Office has held that to establish that a claimant willfully violated the safety rule, "It is not necessary that the claimant specifically determined to break the rule. It is enough to show that knowing the rule; he intentionally performed the forbidden activity." *Romero v. Cherry Park Health Care*, W.C. No. 4-121-942 (ICAO Feb. 16, 1993).

In *Oldson v. Digital Communication*, W.C. No. 4-563-466 (2004), the Industrial Claim Appeals Office affirmed an ALJ's decision to reduce compensation benefits where claimant had not worn his seatbelt, and there was testimony that the injuries were caused or made more severe because of the failure to wear the seatbelt. The ICAO noted the following with regard to the determination of whether conduct is willful:

> Willfulness means that the claimant acted with deliberate intent. However, a finding of willfulness does not require the ALJ to find the claimant, having in mind the rule, determined to break it. Rather, it is sufficient to show that the claimant, knowing the rule, intentionally did the forbidden thing. *Stockdale v. Industrial Commission*, 76 Colo. 494, 232 P. 669 (1925). Willful conduct may be inferred from the circumstances, including evidence that the claimant was aware of the rule and the obviousness of the danger. *See Bennett Properties Co. v. Industrial Commission, 165 Colo. 135, 437 P.2d 548 (1968)*; *Gargano v. Metro Wastewater Reclamation District,* W.C. No. 4-335- 104 (February 19, 1999).

Applying these well-settled legal principles and rulings to the facts of this claim, the ALJ finds and concludes that Respondents have met their burden of proof, and Claimant's indemnity benefits should be reduced by 50% due to Claimant's willful violation of a safety rule. Claimant conceded that Employer trained him on safe material handling. He

conceded he reviewed the safety manual. In addition, he conceded that he intentionally placed the bin of angle iron on top of the stack of 3" x 3" tubes. Employer's frequent safe material handling training, constant reminders regarding safe material handling, and basic common sense dictate that placing a heavy bin on a large stack of different length tubes, several rows across, and several rows high, lubricated by oil and "bellied" in the middle, is inherently dangerous. Any force applied to such a stack could cause the stack to shift, and fall, which is what occurred in the instant case.

Claimant willfully violated a safety rule, and his indemnity benefits should thus be reduced by 50%.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have proven by a preponderance of the evidence that they are entitled to a 50% reduction of benefits pursuant to C.R.S. section 8-42-112(1)(a) and (d)

2. All matters not determined herein are reserved for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 28th day of August 2018.

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment for Employer on October 29, 2017.

II. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits and that Respondents are liable for medical treatment provided by PA-C Schoenefeld from October 11, 2017 through December 12, 2017.

III. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits ("TTD") from November 16, 2017 and ongoing.

IV. If Claimant has proven a compensable injury and entitlement to TTD benefits, determination of Claimant's average weekly wage ("AWW").

V. If Claimant has proven a compensable injury and entitlement to TTD benefits, whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for his termination.

FINDINGS OF FACT

1. Claimant is a 57-year-old man who worked for Employer as a heavy equipment operator.

Prior History

2. In 2013, Claimant had a workers' compensation claim in California involving an injury to his left shoulder and neck. A July 12, 2013 left shoulder MRI revealed tendinopathy of the supraspinatus tendon, moderately advanced degenerative changes at the acromioclavicular joint, and no full thickness retracted rotator cuff tear. Claimant also underwent a cervical spine MRI that revealed left C6-7 disc extrusion with C7 root compression. Claimant underwent a left C6-7 anterior cervical discectomy and fusion on August 22, 2013.

3. Claimant continued reporting neck, left shoulder and left upper extremity symptoms. On December 17, 2013, Michael Prince, MD diagnosed Claimant with left shoulder bursitis and impingement with positive AC symptoms and adhesive capsulitis, left shoulder tendinopathy of the supraspinatus tendon, moderately advanced degenerative disease of the AC joint, and cervical strain. Claimant treated with Alan Moelleken, MD for his cervical spine, and Chad Burgoyne, MD for his left shoulder.

4. A functional capacity evaluation was performed on June 10, 2014, which concluded Claimant was physically incapable of working as a heavy equipment operator.

5. On December 16, 2014, Claimant underwent anterior C6-7 hardware removal. As of February 9, 2015, Claimant expressed a desire to return to work as a heavy equipment operator due to financial concerns and Dr. Moelleken allowed Claimant to return to modified duty as an operator of a loader. At follow up evaluations in March and April 2015, Claimant reported worsening neck pain, and Dr. Moelleken provided restrictions of no lifting more than five pounds.

6. On April 29, 2015, Claimant reported to Dr. Burgoyne with increased left shoulder pain that he rated 7-10/10, noting the pain became worse in July 2013. He complained of increased pain, generalized weakness in the left hand and occasional numbness in his third, fourth and fifth digits. Claimant reported that chiropractic treatment provided temporary relief for his left shoulder, acupuncture treatment helped with relaxation, and the cortisone injection was not helpful. Claimant advised that he "would like to discuss shoulder surgery at this time." Dr. Burgoyne ordered a new left shoulder MRI scan to rule out possible rotator cuff tear or further soft tissue pathology.

7. On May 15, 2015, Dr. Moelleken placed Claimant at MMI with permanent medical impairment ratings for both the left shoulder and neck. Dr. Moelleken indicated Claimant was prohibited from returning to work as a heavy equipment operator due to his injuries.

8. The new left shoulder MRI recommended by Dr. Burgoyne was performed on June 10, 2015. Jennifer Kosek, MD provided the following impression:

> 1. No definitive tear or tendinosis seen of the biceps tendon. 2. Supraspintus tendinosis and suspected partial thickness tearing. No definitive full thickness rotator cuff tendon tear, although exam is limited by motion. 3. Possible defect in the anterior superior labrum, not well assessed on this exam, with labral tear not excluded.

9. On June 12, 2015, Dr. Burgoyne noted that Claimant "would like to discuss surgery at this time. He feels he is right back where he started when he was originally injured." Claimant rated his left shoulder symptoms 7-10/10. Dr. Burgoyne assessed left shoulder bursitis and impingement and left shoulder AC arthritis and recommended left shoulder surgery. Claimant did not undergo left shoulder surgery.

10. Claimant's prior workers' compensation claim was filed against multiple prior employers for continuous trauma to the left shoulder and neck. Claimant admitted he received an impairment rating for both the left shoulder and neck as a result of his injuries, and settled his claim against all of the employers and their insurers on March 24, 2017 for a sum of $170,000.

October 26, 2017 Alleged Work Injury

11. Claimant testified he relocated to Colorado in October 2015 to work as a heavy equipment operator. Claimant joined a union and worked for various companies in Colorado between 2015 and 2017. Claimant testified that he did not inform the union that he was medically restricted from working as a heavy equipment operator, nor did he inform Employer of his restrictions, despite being aware of such restrictions. In 2017, Claimant worked for Employer on several projects. He began for Employer on another project on October 26, 2017.

12. Claimant alleges he sustained an injury to his left shoulder while performing work duties for Employer on October 29, 2017. Claimant testified that, on the morning of October 29, 2017, his supervisor, Kiambu Dillard, drove a pickup truck to a shed that stored a 90-pound jackhammer. Claimant testified that he loaded the jackhammer and some tools into the back of the truck, then he and Mr. Dillard retrieved the air compressor. Claimant testified he hooked up the air compressor to the truck and then drove his excavator down to the job site. Claimant testified that, upon arrival at the job site, either he or Mr. Dillard retrieved the jackhammer from the truck. Claimant believes Mr. Dillard began using the jackhammer first, and that he and Mr. Dillard subsequently took turns using the jackhammer to break up concrete. Claimant testified he used the jackhammer for a total of approximately two to three hours, having to repeatedly pull out the jackhammer when it got stuck in the concrete.

13. Claimant further testified that the superintendent, Tom Gelsinger, eventually realized that they were not making progress, and went with and Mr. Dillard to retrieve a saw to cut the concrete. After Mr. Gelsinger and Mr. Dillard used the saw, Claimant was able to remove the concrete with his excavator. Claimant testified he then loaded the jackhammer back into the truck. He stated that he had problems lifting his left arm and shoulder when loading the jackhammer back into the truck. Claimant testified that he injured himself either during the process of using the jackhammer or lifting the jackhammer. Claimant testified he heard a pop stating, “I really didn’t feel it, per se, but I heard it, and it felt like somebody shot me with a gun.”

14. Claimant testified that he told Mr. Dillard of his injury at the end of the workday on October 29, 2017. He further testified that the following Monday, October 30, 2017, he told Mr. Dillard that he had a doctor’s appointment that following Wednesday.

15. Claimant continued to work for the following two weeks running other equipment. Claimant earned $27.75 per hour and was expected to work at least 40 hours per week.

16. Claimant presented to his personal physician, Steven Wayne Olson, MD, on November 1, 2017. Dr. Olson noted, “[Claimant] is a 56 y.o. male here for follow up hypertension…He has had worsening neck and left shoulder pain for 4 days since working with a jackhammer. No specific trauma though.” Dr. Olson diagnosed Claimant with hypertension, cervical spine stenosis, and a left shoulder injury and referred Claimant for an orthopedic evaluation.

17. Claimant testified he saw Eve Noel Schoenefeld, PA-C on November 15, 2017, and PA-C Schoenefeld recommended that he undergo an MRI. Claimant testified that he then immediately called Employer and spoke with who he believes was Melissa Perona and informed her that he had been injured on the job and required an MRI. The evidence admitted at hearing does not contain a November 15, 2017 medical record.

18. Claimant testified that he did not initially pursue a worker's compensation claim because he wanted to keep his job and planned on addressing the alleged injury on his own.

19. Claimant was terminated by Mr. Gelsinger on November 16, 2017. Claimant testified he worked his entire shift and was then informed by Mr. Gelsinger that he was being terminated due to a safety violation. The termination form completed by Mr. Gelsinger lists the following reasons for termination: "Won't wear gloves, doesn't follow safety policys (*sic*)." Claimant testified that, on one occasion, he was observed not wearing the required safety gloves because he was attempting to remove water from a work area and did not want to get the gloves wet.

20. Claimant testified that he has not worked since November 16, 2017.

21. On November 29, 2017, Claimant saw Eve Noel Schoenefeld, PA-C 2017 with complaints of left shoulder pain. He reported that he was using a jackhammer on October 29, 2017, went to lift the machine into a truck, and felt a pop. Claimant reported feeling a sharp pain in the anterior aspect of his left shoulder and hearing a pop. On shoulder examination, PA-C Schoenefeld noted decreased range of motion, tenderness to palpation, and positive Hawkins, Neer and CAA tests. She diagnosed Claimant with a shoulder injury, noted she was concerned about rotator cuff and biceps tendon injuries, and ordered an MRI.

22. On January 3, 2018, Claimant underwent a third left shoulder MRI without contrast. Louis Gregory Arvanetes, MD, noted subluxation of the biceps tendon anteriorly prior to insertion with "no definite labral tear although a prominent superior labral recess is present." He gave the following impression: partial thickness partial width tear supraspinatus insertion and AC joint edema.

23. On January 15, 2018, PA-C Schoenefeld diagnosed Claimant with an incomplete left rotator cuff tear and subluxation of tendon of long head of biceps. Claimant advised that he wished to proceed with surgery.

24. On January 25, 2018, Claimant presented to Sergiu Botolin, MD reporting progressive worsening of his ability to turn his head over the last few years and left shoulder pain. It was noted Claimant was scheduled for shoulder surgery.

25. On April 3, 2018, Claimant attended an independent medical examination ("IME") with Peter Weingarten, MD at the mandate of American Medical Experts in conjunction with a disability/pension claim he had with the California union regarding his prior workers' compensation claim. Dr. Weingarten's IME report contains no mention of

any October 2017 shoulder injury, despite the fact Claimant did advise Dr. Weingarten that he had not worked since being laid off in November 2017.

26. On June 19, 2018, Claimant underwent an IME with orthopedic surgeon James Lindberg, MD at the request of Respondents. Dr. Lindberg performed a records review and physically examined Claimant. Claimant provided the following history of injury to Dr. Lindberg:

> He stated on October 29, 2017, he was using a jackhammer, busting up concrete for three hours, when he felt like he was shot on the front of his left shoulder. He did not report it to work. It was only his third day on the job and he went to the doctor on his own to make sure he had a real injury before he reported it.

27. Dr. Lindberg reviewed three MRI scans of Claimant's left shoulder. He noted the July 13, 2013 MRI revealed tendinosis of the supraspinatus, AC arthritis and subluxation of biceps and no full thickness tear. He noted the June 10, 2015 MRI revealed a subluxed biceps tendon, questionable anterior labral tear, intact rotator cuff, tendinosis and partial thickness tearing of the bursal surface, type 1 acromion, large osteophyte in the anteriolateral humeral head and AC joint arthritis in the anterior biceps tendon that was difficult to evaluate because of motion artifact. He further noted the January 3, 2018 MRI evidenced some questionable anterior labral tear, subluxed biceps tendons, and AC joint arthritis with partial intrasubstance tearing and tendinosis of the supraspinatus and anterolateral bone mass. Dr. Lindberg opined that the January 3, 2018 MRI findings are "virtually identical in their presentation and appearance [to the June 10, 2015 MRI] except for motion artifact on the earlier MRI."

28. Dr. Lindberg noted inconsistencies in Claimant's reported mechanism of injury, that Claimant had been symptomatic in his left shoulder and neck since 2013. Dr. concluded that there was no evidence of progressive injury to Claimant's left shoulder and no evidence of a need for surgical intervention. Dr. Lindberg opined that Claimant did not sustain any permanent impairment and no treatment should be rendered under the workers' compensation system.

29. Dr. Lindberg testified at hearing on behalf of Respondents as a Level II expert in orthopedic surgery, specializing in knees, shoulders, and hips. Dr. Lindberg testified consistent with his IME report, and continued to opine that Claimant did not sustain any work-related injury to his shoulder as a result of his work for Employer. He testified Claimant informed him that he did not report the alleged injury to Employer, and that Claimant did not mention to him any history relating to lifting a jackhammer.

30. Dr. Lindberg testified that the three MRI scans he reviewed reflect virtually identical findings from year to year. He opined that there is no objective evidence of any progression or change in the structures of Claimant's shoulders, or objective evidence of any acute injury to the shoulder. Dr. Lindberg opined that the small partial thickness rotator cuff tear noted on the 2018 MRI was questionable, and explained that the questionable tear was present on the 2013 and 2015 MRIs. He opined that the

questionable tear would not cause the amount of pain Claimant alleges, and that Claimant would not benefit from surgery. Dr. Lindberg testified that Claimant's pain could be the result of pre-existing biceps tendon subluxation.

31. In Claimant's responses to interrogatories, regarding the mechanism of injury Claimant stated he was using the jackhammer at work on October 29, 2017, went home after work and started to feel pain in his neck and shoulder. He stated he then contacted the doctor to make an appointment to see what the problem was. Claimant's response does not contain any reference to lifting the jackhammer or hearing/feeling a pop.

32. Claimant testified that he believes he has been consistent with the reported mechanism of injury, but possibly did not tell Dr. Lindberg about lifting the jackhammer into the truck. He testified that he did not notify Mr. Gelsinger about his alleged shoulder injury or request medical attention at the time of his termination because he assumed Mr. Gelsinger already knew about the alleged injury. Claimant testified that he wants shoulder surgery because his arm is "pretty much dead."

33. Mr. Dillard testified at hearing on behalf of Respondents. Mr. Dillard testified that, on October 29, 2017, he worked as a lead man with Claimant breaking and removing concrete. He stated at no time did Claimant use the jackhammer. Mr. Dillard testified that he used the jackhammer while Claimant used the mini-excavator, which was Claimant's job duty per his union contract. Mr. Dillard further testified that at no time did he see Claimant lift the jackhammer in or out of the truck. Mr. Dillard testified that the jackhammer was already connected to the air compressor on the truck, and that, upon arriving to the worksite, he removed the jackhammer from the truck while Claimant was in the excavator. Mr. Dillard estimated he used the jackhammer from approximately 7:15 a.m. to 8:30 a.m. Mr. Dillard recalled re-attaching the air compressor and jackhammer to the truck and taking it back to the yard while Clamant remained on the excavator. Mr. Dillard testified he then brought the walk-behind saw to the job site with Mr. Gelsinger. Thereafter, he and Mr. Gelsinger began using the saw, and were successful in breaking up the concrete so that Claimant could remove it with his excavator. Mr. Dillard testified that this occurred at about 9:00 a.m. He testified that the tip of the jackhammer did not repeatedly get stuck in the concrete, as Claimant alleges. Mr. Dillard further testified that at no time on October 29, 2017, or at any time prior to or after the date of Claimant's termination, did Claimant ever report the alleged injury to him or request medical attention. Mr. Dillard testified that Claimant never told him he was seeking medical attention or that he had seen a doctor for a shoulder injury.

34. Mr. Gelsinger testified at hearing on behalf of Respondents. Mr. Gelsinger worked as a field superintendent the date of Claimant's alleged injury. Mr. Gelsinger testified that Claimant was hired through the union as a heavy equipment operator, which involved running the excavator and the skid steer. Mr. Gelsinger testified that he went around the jobsite checking on the progress of the crew. He testified that, on October 29, 2017, he did not observe Claimant or Mr. Dillard using a jackhammer. He testified that he did assist Mr. Dillard with using the walk-behind saw to break the concrete. Mr. Gelsinger stated that, at no time between October 29, 2017 and November 16, 2017 did Claimant report any work-related injury to him or request

medical care. Mr. Gelsinger testified that Claimant had performance issues leading up to his termination, and that Claimant was terminated for unsafe work practices.

35. Melissa Perona testified at hearing on behalf of Respondents. Ms. Perona is the Safety Manager/Workers Compensation Coordinator for Employer. She testified she was on vacation and did not become aware of Claimant's alleged injury until early December 2017, when her supervisor informed her of Claimant's allegations. She testified that she contacted Claimant, who told her he felt general soreness in his shoulder. She testified Claimant did not mention anything regarding a jackhammer, and did not identify a specific event resulting in the alleged injury. Ms. Perona stated that Claimant informed her he needed a workers' compensation claim number in order to undergo an MRI. Claimant testified that she was unaware of any alleged shoulder injury prior to Claimant's termination. Ms. Perona testified that she completed an Employer's First Report of Injury form on December 8, 2017, based on the information provided to her by her supervisor.

36. Claimant recently applied for and was deemed eligible to receive social security disability insurance benefits ("SSDI") beginning approximately June 2018. He is receiving SSDI at the rate of $2,540.00/month. Claimant testified that he is also receiving $1,283.00/month from the California Union, and $107.00/month from the Colorado Union as disability/pension. Claimant also received unemployment benefits.

37. Claimant's testimony is found less credible and persuasive than the testimony of Dr. Lindberg, which is supported by the medical records, and Mr. Dillard, Mr. Gelsinger, and Ms. Perona.

38. Claimant failed to prove by a preponderance of the evidence that he sustained a compensable industrial injury arising out of and in the course of his employment on October 29, 2017.

39. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ concludes Claimant failed to prove by a preponderance of the evidence that he suffered a compensable industrial injury arising out of and in the course of his employment for Employer on October 29, 2017. Claimant has an extensive documented history of pre-existing neck and left shoulder symptoms, for which Claimant underwent extensive treatment, received permanent impairment, and was restricted from continuing working as a heavy equipment operator. Claimant was requesting shoulder surgery as far back as June 2015, after reporting that he received no long term relief from chiropractic treatment, acupuncture, and cortisone injections.

Claimant's credibility is undermined by various inconsistencies in his reported mechanism of injury. Claimant testified that he distinctly remembered hearing a pop and feeling like he had been shot, but could not identify if this happened while using the jackhammer or when lifting the jackhammer. When Claimant presented to his personal physician on November 1, 2017, Claimant reported left shoulder symptoms in connection with jackhammer use, but did not report any specific trauma, and there was no mention in the medical record of a pop. On November 29, 2017, Claimant reported to PA-C Schoenefeld that a pop occurred while lifting the jackhammer. Ms. Perona credibly testified Claimant made no mention of a pop or a specific event when he discussed the alleged injury with her. In his responses to interrogatories, Claimant made no mention of feeling or hearing a pop or lifting a jackhammer. Claimant reported to Dr. Lindberg that he felt like he was shot after busting up concrete for three hours, with no mention of lifting a jackhammer or hearing/feeling a pop. In addition to these various inconsistencies, Claimant's versions of the alleged mechanism of injury are refuted by Mr. Dillard's credible testimony. Mr. Dillard was present with Claimant while working throughout the day on October 29, 2017, and denies Claimant ever lifted a jackhammer or used a jackhammer.

Similarly, there are inconsistencies as to whether Claimant reported the alleged injury to Employer. Dr. Lindberg credibly testified Claimant informed him he did not report the injury to Employer. Claimant's responses to interrogatories make no mention of reporting the injury to Employer, and Mr. Dillard, Mr. Gelsinger, and Ms. Perona credibly testified Claimant did not notify them of any injury between the date of the alleged injury and the time of Claimant's termination.

Even assuming, arguendo, that one of Claimant's many versions regarding the alleged mechanism of injury and his report of injury to Employer is credible, Dr. Lindberg credibly testified that there is no objective evidence Claimant sustained any progressive or acute injury on October 29, 2017. The record contains three left shoulder MRIs reports, two obtained prior to the alleged injury, and one obtained after the alleged injury. Dr. Lindberg reviewed the actual MRI film and credibly testified that the findings of each MRI were virtually identical. He further credibly testified that, to the extent a rotator cuff tear exists, such tear is questionable, it was present on prior MRI scans, and is not the cause of Claimant's reported symptoms. There is insufficient credible and persuasive evidence that Claimant's work duties caused, aggravated, accelerated, or combined with a pre-existing condition to produce a disability or need for medical treatment.

Based on the totality of the evidence, Claimant failed to prove it is more probable than not he sustained a compensable injury on October 29, 2017. As Claimant failed to prove a compensable injury, the remaining issues medical benefits, TTD, AWW, and responsibility for termination are moot.

ORDER

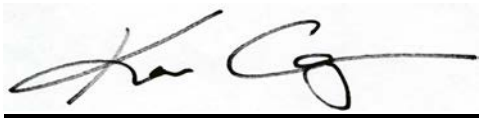
It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 28, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues set for determination included:

- Did Claimant prove by a preponderance of the evidence that his condition worsened related to the injuries he suffered on September 6, 2013?

- If Claimant proved his condition worsened that requires a reopening of his claim, did Claimant prove by a preponderance of the evidence that he is entitled to TTD benefits from September 28, 2015 and continuing?

- If Claimant has proven his condition worsened, did he prove an entitlement to reasonable and necessary medical benefits?

1. On September 6, 2013, Claimant sustained an admitted industrial injury while working for Employer. He was working on an oil rig as a floor hand. Claimant was injured when a large piece of equipment hit him in the back and pushed his chest against a handrail.

2. Claimant was evaluated by Margaret Irish, D.O. at Workwell (the ATP for Employer) on September 6, 2013. At that time, he was complaining of pain in the upper and lower back, as well as ribs. X-rays showed no fractures of the spinous processes in the thoracic and lumbar spine. Limited range of motion ("ROM") was noted in the thoracic and lumbar spine.

3. Dr. Irish diagnosed Claimant with a chest wall contusion, back contusion and contusion of the thoracic spine. No diagnosis was given with regard to the lumbar spine. Claimant was given a prescription for Ibuprofen and Tramadol. Dr. Irish completed a M-164 that gave work restrictions of no lifting, pushing, pulling or carrying over 10 pounds and no reaching overhead/away from the body. Claimant was not to crawl, kneel or squat.

4. Claimant was evaluated by Dr. Irish, whose assessment was the same on September 9, 2013. Claimant received conservative treatment, including prescriptions. It was noted that a radiologist's review of the x-rays indicated there may be a cracked rib on the left posterior-lateral eighth rib. In the appointment on October 2, 2013, Claimant reported improvement. Claimant's lifting restrictions were increased to 40 pounds.

5. On October 16, 2013, Claimant returned to Dr. Irish. Claimant had good active ROM throughout his spine. Claimant was to continue physical therapy ("PT") as scheduled. Claimant was returned to regular duty.

6. When he returned to Dr. Irish on October 29, 2013, Claimant had complaints of chest and low back pain, shortness of breath, as well as leg pain. Dr. Irish reinstituted the 20 pound lifting restriction at that time. Dr. Irish also evaluated Claimant on November 7, 2013, at which time she reviewed the MRI and noted the MRI revealed small central disc protrusions at L4-5 and L5-S1. Dr. Irish opined these were probably pre-existing prior to the work injury. Claimant re-started PT and was given a home TENS unit. Claimant was also referred to a chiropractor. At the time of the December 5, 2013, Dr. Irish noted Claimant reported improvement with the chiropractic treatments.

7. Claimant received a total of nine PT sessions at Workwell from September 27 through December 11, 2013. He reported his back felt about the same, with a new throbbing pain in the lumbar spine.

8. Claimant received chiropractic manipulation from December 12, 2013 through January 21, 2014. He was complaining of lumbosacral pain and received adjustments from Michael Springfield, DC, Dipl. Ac., who concluded Claimant's symptoms were consistent with left piriformis syndrome.

9. Dr. Irish evaluated Claimant on February 6, 2016. Claimant was referred to Dr. Wunder for a second opinion. His prescriptions were continued and Dr. Irish anticipated MMI.

10. On February 13, 2014, Claimant was examined by Jeffrey Wunder, M.D. to whom he was referred by Dr. Irish. Claimant reported left lumbosacral pain, as well as pain radiating into the left groin. He also reported pain in his thoracic spine. Claimant rated his pain as 7/10. On examination, no spinal asymmetries were noted and there was no paravertebral muscle spasm. Claimant reported diffuse lumbosacral tenderness over the left sacroiliac joint area and the L4 to S1 facet joint area.

11. Dr. Wunder's impression was: thoracic strain; nonspecific low back pain. He opined that the physical examination shed no light on the underlying pain generator, as there was no evidence of disc injury, lumbosacral radiculopathy, facet syndrome or sacroiliac joint dysfunction. He also noted there was a one-month delay in the onset of low back pain. Dr. Wunder opined there was local tenderness thoracic area, but no pain with movement of the spine. He recommended an MRI of the thoracic spine and if no trauma was indicated, Claimant would be at MMI.

12. On March 13, 2014, Claimant underwent an MRI of his lumbosacral and thoracic spine. The films were read by Philip Cook, M.D. Dr. Cook's impression was small central disc protrusions at L4-5 and L5-S1interspaces, but otherwise negative exam. These were not causing significant encroachment on the canal or lateral recesses and there were no significant extra disk fragments or foraminal stenosis. An MRI of the thoracic spine was negative.

13. Dr. Wunder re-evaluated Claimant on March 20, 2014. Dr. Wunder noted

the thoracic spine MRI was completed on March 13, 2014, which was normal and had no evidence of osseous or disc abnormality or spondylosis. On examination, Claimant had no paravertebral muscle spasm in either the thoracic or lumbar area. He reported midline tenderness from T1 to S1, which differed from the previous exam. Dr. Wunder opined there was nothing to offer Claimant from a rehabilitation standpoint, as there were no objective findings. Claimant was at MMI, with 0% impairment. The ALJ found Dr. Wunder's opinions regarding Claimant's condition and need for treatment were persuasive.

14. Claimant returned to Dr. Irish on March 27, 2014. On examination, Dr. Irish noted pain complaints upon light palpation throughout the thoracic and lumbosacral areas. Dr. Irish's assessment was contusion, chest wall; contusion, back; pain, thoracic spine. Dr. Irish stated the cause of this problem was related to work activities, but there were no objective findings at the time of this examination. Claimant declined to participate in a Functional Capacity Evaluation. Dr. Irish determined Claimant was at MMI, with 0% medical impairment rating and returned him to regular duty.[1]

15. The ALJ found Dr. Irish evaluated Claimant at regular intervals as the ATP. She reviewed the diagnostic testing, as well as the PT treatments Claimant received. The ALJ credited Dr. Irish's opinions with regard to MMI and impairment, as she was in the best position to determine Claimant's status and need for treatment.

16. On April 29, 2014, a Final Admission of Liability ("FAL") was filed on behalf of Respondents. The FAL admitted for Dr. Irish's medical impairment rating (0%). Maintenance medical benefits were specifically denied.

17. There was no evidence in the record that Claimant objected to the FAL. There was no evidence Claimant requested a Division of Workers' Compensation Independent Medical Examination ("DIME").

18. On May 12, 2014, Claimant was evaluated by Sean Filipovitz, M.D. at SCH Monfort Family Clinic and reported low back pain. Dr. Filipovitz was not an ATP, as he was not within the chain of referral. Dr. Filipovitz concluded Claimant's pain was most consistent with piriformis syndrome. He prescribed Naproxen, Flexeril and a continuation of conservative treatments such as ice, heat, and stretching. There was no evidence that Dr. Filipovitz had Dr. Irish's records available for his evaluation. Claimant received PT at Northern Colorado Medical Center that day, which included therapeutic exercises, ultrasound, electrical stimulation, hot/cold packs.

19. Claimant did not return Northern Colorado Medical Center for PT and was discharged on June 11, 2014.

20. There was no evidence in the record Claimant was evaluated by a healthcare provider from June 12, 2014 until July 2015.

[1] Exhibit Q p. 215; Exhibit 9, p.6.

21. Edwin Healey, M.D. performed an IME on behalf of Claimant on July 17, 2015. At that time, Claimant was complaining of persistent lower thoracic and primarily left lumbar and left buttock pain, with burning, aching pain radiating into his left posterior thigh, calf and occasionally to his left anterior thigh. His pain level was 7 out of 10. On examination, mild hypertonicity was in the lower thoracic spine, with several trigger points and pain radiated to his left lumbar region into his left buttocks. Increased pain on examination was noted in the left piriformis and left sacroiliac joint.

22. Dr. Healey's diagnoses were: thoracic spine pain secondary to contusion sprain/strain with component of left lower T9 through T12 thoracic paraspinal myofascial pain with active trigger points; lumbosacral sprain/strain/contusion with lumbar paraspinal myofascial pain in active trigger points; (piriformis syndrome versus sacroiliac joint dysfunction, caused by the September 6, 2013 injury); left lumbar central disc protrusions at L4-5 and L5-S1; adult adjustment disorder with depression and anxiety due to chronic pain and decreased function. Dr. Healey concluded Claimant was not at MMI and required treatment of the thoracic and lumbar myofascial pain and SI joint, which he opined were related to the work injury. Dr. Healey provided an advisory medical impairment rating of 15% whole person, which included mental impairment.

23. On September 30, 2015, Claimant filed a Petition to Reopen. Claimant alleged a change in medical condition and attached Dr. Healey's July 17, 2015 report. Claimant also alleged that the FAL was not mailed to Claimant's counsel.[2]

24. Claimant was evaluated on December 3, 2015 by Eric Hoffman, PA-C[3] at Colorado Clinic. In the description of the injury, Claimant was noted to have been caught in between the rail of the platform and another 50 piece of machinery. The platform was then lowered, which caused Claimant to fall approximately 4 feet. (This reference to Claimant falling differed from the initial report of injury). Claimant stated since being placed at MMI, he has had increasing thoracic pain, with radiation to his flank, bilateral low back pain, radiation to the left leg down to the bottom of his foot.

25. On examination, PA-C Hoffman noted full ROM in Claimant's thoracic and lumbar spine, as well as his right hip. His left hip revealed no tenderness, edema or crepitus. PA-Hoffman's diagnosis was: history of work injury; thoracic pain, thoracic myofascial pain syndrome; lumbago; lumbar radiculopathy; and sciatica-left leg. The ALJ noted the symptom of sciatica was a new symptom. X-rays were ordered for the thoracic spine, as well as a lumbar MRI. Gabapentin was considered. This report was signed by C. Bradley Sisson, M.D.

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[2] That issue was resolved by the Findings of Fact, Conclusions of Law and Order issued by ALJ Cannici on Respondents' Motion for Summary Judgment. Claimant's counsel confirmed at the outset of the hearing that Claimant was not contesting that ruling.

[3] From this report, it was not clear what medical records PA-C Hoffman had available at the time of the evaluation, although he referred to Dr. Healey's report.

26. On December 11, 2015, Claimant underwent an MRI of the lumbar spine. The films were read by Jeremy McCue, M.D., whose impression was: mild degenerative changes at L4-5 and L5-S1, with central annular fissure and small focal L5-S1 protrusion. There was no resulting stenosis. The MRI was objective evidence of the condition of Claimant's lumbar spine. The ALJ concluded the findings in the MRI in 2015 were not significantly different than those in the one Claimant underwent in 2014.

27. On December 17, 2015, Claimant returned to PA-C Hoffman after the x-rays and MRI were completed. Normal ROM was documented in the thoracic and lumbar spine, although Claimant reported pain in both areas. The diagnoses were the same as the previous evaluation, with the addition of lumbar degenerative disc disease. Claimant was prescribed Norco and Gabapentin, along with an epidural steroid injection.

28. Claimant underwent an interlaminar epidural steroid injection at L5-S1 on January 4, 2016. The procedure was performed by Doug Larner, NP.

29. Claimant returned to PA-C Hoffman on January 25, 2016. At that time, he reported his pain remained unchanged. PA-C Hoffman noted he would have expected benefit from the ESI and decided to defer that for now. He ordered an EMG to assess for radicular symptoms.

30. On February 15, 2016, Claimant was examined by Kathleen D'Angelo, M.D., at the request of Respondents. His complaints were mid- and low-back pain, leg pain and weakness, insomnia, leg numbness, and depression. On examination, Claimant's gait and posture were normal. Claimant had diffuse tenderness with palpation to the interscapular region, with pain behaviors on light touch. Claimant had diffuse complaints of discomfort with palpation of the paraspinal musculature at the thoracic and lumbar sacral region bilaterally. Full range of motion was found in the left and right hip.

31. Dr. D'Angelo's diagnoses were: contusion to the thoracic and lumbar region; chest contusion; myofascial pain complaints. Dr. D'Angelo reviewed Dr. Healey's report and disagreed with his conclusions. She noted it was reasonable to expect myofascial pain complaints in the 48-72 hours after Claimant's injury. Dr. D'Angelo said Claimant would have presented with immediate radicular symptoms, if he sustained an acute disc herniation with neurological impingement due to his work injury. Dr. D'Angelo also opined Claimant's statement that the ESI worsened his pain was not consistent with true lumbar radiculopathy. Dr. D'Angelo opined Claimant was at MMI and did not require further active or maintenance treatment, diagnostics or medications. The ALJ credited this opinion of Dr. D'Angelo regarding the cause of Claimant's pain complaints. Dr. D'Angelo stated Claimant required no impairment rating due to his minimal MRI findings, negative physical examination findings, the late onset of radicular complaints, as well as his lack of response to treatment.

32. Claimant was evaluated on February 22, 2016 by Alicia Feldman, M.D. Claimant reported bilateral low back pain with radiation to his left leg, down to the bottom of the foot. He had numbness and tingling in his left foot and specifically his big toe. Dr. Feldman noted that EMG studies were suggestive of peripheral neuropathy, no radiculopathy. She recommended consideration of a repeat injection, left TFESI.

33. Claimant testified he continues to have pain related to the work injury. Specifically, bending and twisting hurts his lower back and leg. He is still treating at the Colorado Clinic with Dr. Feldman and Dr. Sisson.

34. Claimant failed to prove that the condition of his lumbar and thoracic spine worsened.

35. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The credibility of the parties' respective experts were at-issue in this case.

Reopening

§ 8-43-303(1), C.R.S. authorizes an ALJ to reopen any award within six years after the date of injury on a number of grounds, including error, mistake, or change in

condition. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

A change in condition refers either "to a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury". *Chavez v. Industrial Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985).

The reopening authority granted ALJs by § 8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ". *Cordova v. Industrial Claim Appeals Office*, *supra,* 55 P.3d at 189. The party seeking reopening bears "the burden of proof as to any issue sought to be reopened". § 8-43-303(4), C.R.S. In the case at bar, Claimant was required to prove by a preponderance of the evidence that his condition worsened.

The medical evidence before the Court led to the conclusion that Claimant's condition did not worsen. First, the objective medical evidence demonstrated that the condition of Claimant's lumbar and thoracic spine had not changed appreciably from the time Dr. Irish placed him at MMI. Both Dr. Irish and Dr. Wunder evaluated his low back complaints. Dr. Wunder noted that his physical examination did not reveal a specific pain generator. As found, Dr. Wunder concluded after his evaluations there was no additional treatment to offer Claimant. (Finding of Fact No. 13). In addition, the MRIs Claimant underwent for his lumbar spine were substantially similar. (Finding of Fact No. 24). The ALJ credited the findings of Dr. D'Angelo with regard to a worsening of condition. (Finding of Fact No. 31). Claimant failed to introduced a sufficient quantum of evidence to show that his physical or mental condition worsened in a way that was causally connected to the compensable injury. *Chavez v. Industrial Comm'n*, *supra,* 714 P.2d at 1330. Therefore, the ALJ determined Claimant introduced insufficient evidence to meet his burden and show a worsening of condition.

Second, the failure to request a DIME constitutes a legal bar to Claimant's Petition to Reopen. Under the Act, contesting the finding of MMI by the ATP required Claimant to avail himself of the DIME process. § 8-42-107(8)(b)(II), C.R.S. No contrary authority was provided by Claimant. As determined in Finding of Fact No. 17, Claimant did not request a DIME and under these factual circumstances, the Petition to Reopen is denied.

The ALJ considered Claimant's argument that he was not provided the treatment necessary to remedy his low back condition. The ALJ concluded that as an ATP, Dr. Irish saw Claimant at regular intervals, as well as making referrals for diagnostic testing and to Dr. Wunder. The ALJ concluded Dr. Irish was in the best position to determine Claimant's need for treatment. (Finding of Fact No. 15). The ALJ was persuaded that Claimant received treatment to cure and relieve the effects of his injury. Claimant received conservative treatment, which included multiple evaluations by Dr. Irish, medications, PT and chiropractic treatment. Claimant also received diagnostic testing. Dr. Irish referred Claimant for a further evaluation (Dr. Wunder), as he was approaching MMI. (Findings of Fact No. 3-8, 10-14). In this regard, to the extent Claimant disagreed

with the authorized treating physicians as to the course of treatment and the MMI determination, it was incumbent on him to request a DIME.

In light of the ruling on the Petition to Reopen, Claimant's request for TTD benefits and medical benefits is moot.

ORDER

IT IS HEREBY ORDERED:

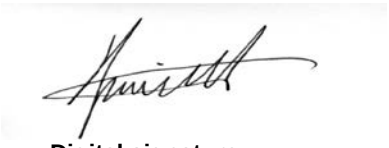
1. Claimant's Petition to Reopen his claim is denied and dismissed.

2. Claimant's request for medical and indemnity benefits is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 27, 2018



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether Claimant sustained an injury on October 4, 2017 to his left knee that occurred within and arose out of the course and scope of his employment.

- In the event of a compensable claim, whether the findings on the October 27, 2017 MRI study, with possible lateral meniscal tear, are reasonable, necessary, and related to the compensable injury.

STIPULATIONS

The parties stipulated, in the event of a compensable claim, to an AWW of $1,473.87.

FINDINGS OF FACT

1. Claimant is a package car driver for Employer. Claimant has worked for Employer for fifteen years. Employer annually trains its employees how to report work injuries. Claimant carries a Delivery Information Acquisition Device (DIAD), provided by Employer, during his deliveries. Claimant also carries a cell phone at all times and is capable of contacting an Employer supervisor on his phone.

2. Claimant suffered a left knee injury on or around February 14, 2012, and experiences chronic left knee pain. On September 5, 2012, Claimant underwent left knee surgery, which Dr. Rajesh Bazaz performed.

3. Claimant alleges that at approximately 2:30 p.m. on October 4, 2017, he suffered an injury to his left knee, while on his delivery route. Claimant claims that he stepped out of his package car with his right foot and that his left foot slipped, causing him to roll his left ankle. Claimant claims he heard a pop in his left knee.

4. Claimant testified at hearing that he experienced immediate pain because of the alleged injury and claims he injured both his left knee and left ankle. Claimant claims that his knee swelled "really bad" after the injury and he was limping "really bad" after the injury. Claimant claims that his pain was so bad "at that point" that he felt like he had torn his Achilles tendon.

5. Despite experiencing these immediate and severe symptoms, Claimant did not immediately contact any Employer supervisors or personnel to report a work-related injury. Rather, Claimant completed the remainder of his shift, through approximately 6:00 p.m., completing approximately ten stops on his route, carrying and delivering packages to their destinations.

6. On October 4, 2017, Employer contacted Claimant during his route, and directed him to drive from Monaco Street to Broadway (in Denver) to make a delivery. Claimant refused this directive and instead returned to Employer's Hub in Commerce City.

7. Upon his return to Employer's Hub, Claimant parked his package car and walked through the facility to "punch out," according to check out procedures. Claimant claims he walked with a limp at this time. Claimant testified that by that time he knew he was injured. Claimant acknowledged there were "a million" supervisors at the facility at the time, but still did not report his alleged injury.

8. Claimant left Employer's facility that evening, picked up his daughter, and went home. Claimant claims that his pain became worse at home and that his knee swelled to "two to three times the size" of his other knee.

9. On the morning of October 5, 2017, Claimant presented to work his scheduled shift. Claimant claims his knee was severely swollen and he could "barely walk into work." Claimant maintains that he had a limp at the time he came into work.

10. Josh Maddox, Claimant's supervisor, called Claimant into his office on the morning of October 5, 2017, when Claimant arrived at work. Claimant claims he still had a swollen and painful knee at the time. Claimant did not report a work injury or any pain complaints upon entering the office. Claimant claims that Tameka Austin, a union steward, was present at this meeting. Mr. Maddox terminated Claimant for insubordination. Then Claimant reported a work injury to Mr. Maddox.

11. Employer provided Claimant a list of medical providers and later that day, Claimant saw Emily Kuper, FNP, at Advanced Urgent Care.

12. Claimant reported left knee and ankle pain. RHE C at 36. Claimant reported injuring himself when he stepped out of his truck, caught his left foot/slipped, felt a pull to the posterior ankle, twisted to grab a package, and then felt a pop in his left knee. RHE C at 40. Claimant claimed 4/10 knee pain with weight bearing, and 8/10 ankle pain. Claimant reported no swelling but had some tenderness and swelling upon examination. Claimant reported a gait disturbance/imbalance but had a normal gait and station upon presentation as NP Kuper noted, "Ambulating normally." A left-knee x-ray taken on this date was unremarkable. NP Kuper diagnosed Claimant with a strain of the left knee and ankle and gave Claimant 10-pound work restrictions for lifting, carrying, pushing, and pulling.

13. Claimant appealed his termination through his union, which subsequently reinstated Claimant to his position at Employer several days after his termination. Upon reinstatement, Claimant worked a brief period of modified duty (temporary alternate work, or "TAW," per Employer nomenclature).

14. Claimant saw Dr. Julie Parsons (ATP), on October 17, 2017. Claimant continued to report a gait disturbance and that walking aggravated his pain. Dr. Parsons noted that Claimant had "limited ambulation." She kept Claimant on restrictions and recommended an MRI of his left knee.

15. Claimant returned to see Dr. Parsons on October 31, 2017, for a scheduled appointment at 11:15 a.m. Claimant again presented with limited ambulation. Dr. Parsons kept Claimant at 10-pound restrictions and restricted him from commercial driving. Dr. Parsons recommended an orthopedic consultation, which Insurer denied.

16. On November 30, 2017, Claimant presented to Brittany D'Orio, P.A. at Colorado Pain Management for left knee, left hip and left leg pain. The ALJ notes that Claimant received a prescription for Percocet on October 24, 2017. PA D'Orio noted concerns with medication intake. PA D'Orio assessed chronic pain syndrome, chronic pain due to trauma, and opioid dependence. Claimant underwent a random urine drug test, administered "to evaluate for drug misuse, abuse, or diversion in the practice population." PA D'Orio noted that both urine drug screens on file did not show Percocet. PA D'Orio stated that the reason the tests were negative was that Claimant "runs out of Percocet before his appointments, indicating that he is consuming more than his prescribed daily dosage." PA D'Orio was concerned because Claimant represented that he did not take Percocet when he drove, and previously gave several excuses for not being able to make it in for random pill counts. PA D'Orio stated, "If he doesn't take Percocet on these days, I'm not sure how he is taking them."

17. Claimant continued to work TAW through December 11, 2017, until TAW expired. Claimant was completely off work, with restrictions, from December 12, 2017, through April 4, 2018. While Claimant was off work, he did not treat with any providers. Claimant self-treated with rest and ice only. Claimant testified at hearing that "just being off of my knee" helped him regain function.

18. The ALJ finds the great weight of the evidence contradicts Claimant's testimony. Further, the timing of Claimant's claim is suspect. At best, Claimant's testimony is not persuasive.

19. On December 27, 2017, Claimant underwent a left knee MRI. The MRI showed "slightly complex tearing of the anterior horn of the lateral meniscus." The reading radiologist noted the findings to be "suspicious for degeneration and tearing" of the lateral meniscus, but no medial meniscal tear. There MRI revealed no cruciate or collateral ligament abnormality and a slight chondral irregularity in patellofemoral articulation.

20. On March 18, 2018, Dr. Kathleen D'Angelo evaluated Claimant for a Respondents sponsored IME. Claimant reported to Dr. D'Angelo that his knee was actually worse since the injury. Dr. D'Angelo opined that, given the absence of work for three months, it was medically probable that Claimant's left knee pain would have lessened over time and that his report of worsening was not a medically anticipated outcome. Claimant told Dr. D'Angelo that, at the time of the IME, his knee was "freakin' killing me," and that he was having difficulty picking up his two-year-old child. Dr. D'Angelo noted Claimant's gait was non-antalgic at the time of the IME and that Claimant appeared comfortable, lifting and carrying his daughter without pain.

21. Dr. D'Angelo noted that Claimant reported having unresolved, ongoing knee pain since his 2012 surgery, but that this simply became worse on October 4, 2017.

Claimant reported that, on the evening of October 4, 2017, he told the union "safety manager," Tameka Austin, about his alleged work injury because the part-time supervisors "don't listen to the drivers." Claimant told Dr. D'Angelo that he told other drivers, Steven Herrera and Chris Demling, about the injury the day it occurred. Claimant claims that the "safety manager" talked to Liberty Mutual, and that Claimant made the report "right when it happened." The ALJ finds that the undated transcript of a conversation between Claimant and Insurer's claims adjuster must have occurred on or after October 17, 2017, because the two discussed a medical visit with Dr. Parsons. Claimant first visited Dr. Parsons on that date.

22. Claimant testified that after his medical provider released him to TAW, his manager forced him to work beyond his restrictions.

- Claimant claims that on October 31, 2017, his supervisor sent him out on a route over his objections, where he worked from "8 or 9'ish" for about five hours.

- Dr. D'Angelo noted that Dr. Parsons' medical report from October 31, 2017, indicated that Claimant attended his 11:15 a.m. appointment without delay or mention of having aggravated his injury due to a violation of work restrictions.

- Claimant claimed that his knee was swollen "4 times the size" of his other knee on that date, prompting him to see Dr. Parsons.

- Dr. D'Angelo noted that Dr. Parson's medical note indicated no such swelling.

23. Dr. D'Angelo testified there was a significant disconnect between Claimant's subjective complaints of pain and his observed behavior. Dr. D'Angelo opined that she did not believe that there was likely any work-related injury. Dr. D'Angelo noted significant issues with Claimant's credibility, which affected her opinion of whether a work-related event occurred as Claimant claimed. Dr. D'Angelo noted that the MRI findings were not acute, but degenerative. She opined that she would not have expected an acute injury to result in a complex tear of the meniscus, as observed on the MRI. Dr. D'Angelo found no evidence of a strain or sprain to the left ankle and opined, "the left knee findings of mild effusion, upon examination, may be a consequence of underlying osteoarthritis." Dr. D'Angelo opined that Claimant was not a reliable historian and had no work-related diagnoses.

24. On April 5, 2018, Claimant returned to work, without restrictions. Claimant testified that he became better without medical treatment.

25. Joshua Maddox, Employer's station manager and Claimant's supervisor, testified at hearing as follows:

- All package car drivers receive annual training to report work injuries immediately, so that they can receive appropriate medical attention and so that Employer has the ability to investigate any reports of injury.

- Claimant carries a DIAD with GPS and communications capabilities that would allow Claimant to report immediately an injury where it occurred.

- He was aware that Claimant always carried a cellular phone, and was able to contact his supervisors by phone because Claimant had previously done so.

- At 2:30 p.m., the approximate time Claimant claims he injured himself; five supervisors would have been on duty to take an injury report.

- He had been in contact with Claimant throughout the day, on October 4, 2017, concerning his route.

26. Mr. Maddox testified that when drivers return to Employer's Hub, they come through the "gun shack," unload any pick-ups or Next Day Air, park their trucks in a bay, do a pre-trip with their DIAD, check-out near the check-in area, and walk into the dispatch office to return their DIADs. Mr. Maddox testified that supervisors would have been available in the Employer Hub during the checkout procedure. Part-time supervisors also are able to take reports of injury. Mr. Maddox testified that there is no time when a supervisor would not be available to take a report of injury.

27. Mr. Maddox testified that he personally interacted with Claimant on the evening of October 4, 2017, when Claimant was checking out at around 6:00 p.m. Mr. Maddox testified that Claimant was not limping and did not appear to be in pain at that time.

28. Mr. Maddox testified that, on October 5, 2017, he notified the union steward, Nate Weaver that he needed to see Claimant in his office and that Mr. Weaver and Claimant entered his office together. According to Mr. Maddox,

- Tameka Austin was not present at the meeting.

- Claimant was not limping when he came into the office and did not indicate that he was in any pain.

- He terminated Claimant under Article 17 of the master contract between Employer and the Teamsters union for "insubordination and other serious offenses."

- Claimant had a history of disciplinary issues involving failure to work as directed and acts of dishonesty.

29. Mr. Maddox testified that Claimant did not report a work-related injury until after he completed the termination meeting. Claimant then reported having rolled his ankle the previous day, and walked out of the meeting with an observable limp.

30. The ALJ finds Mr. Maddox's testimony to be credible and persuasive.

CONCLUSIONS OF LAW

Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009).

In determining whether a claimant has met his burden of proof, the ALJ may resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness, probability or improbability, of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice and interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936). The ALJ should consider an expert witness' special knowledge, training, experience, or research, and has broad discretion to determine the weight of evidence on this basis. *See Young v. Burke*, 338 P.2d 284 (Colo. 1959).

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Substantial evidence is that "quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. *See Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). It is not necessary that the ALJ address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

Based on the totality of the evidence, the ALJ finds and concludes it highly unlikely that Claimant suffered a work-related injury on October 4, 2017, at the time and in the manner he claims. Claimant contends that he suffered an acute injury at 2:30 p.m. when he stepped out of his vehicle and rolled his ankle, causing his knee to "pop." The MRI does not reflect an acute injury but does show degenerative changes suffered over the course of time.

Claimant claims he experienced immediate, debilitating pain but did not report a work injury, as trained. Claimant instead finished the entirety of his shift, delivering the rest of his packages to approximately ten destinations, before returning to Employer's Hub to checkout. Claimant did not report a work-related injury at this time, despite having seen several supervisors, including Mr. Maddox. Claimant did not report an injury or seek medical treatment after returning home, despite claiming that his knee swelled to three times the size of his other knee. Instead, Claimant waited until Employer had terminated him to report an alleged work-related injury.

The ALJ resolves the multiple inconsistencies between Claimant and Mr. Maddox's testimony in favor of Mr. Maddox. For example, Claimant claims that he was experiencing significant pain and limping at the time he was checking out of work on October 4, 2017. However, Mr. Maddox testified that he observed no such limp and received no reports of pain when Claimant left the facility. Claimant claims that he was limping so badly the next day, October 5, 2017, that he could barely walk into work. However, Mr. Maddox testified that he did not observe a limp until after he terminated Claimant. Claimant claims that he immediately told several of Employer's personnel, including Tameka Austin, about his alleged injury. However, Claimant presented no persuasive evidence to support his claim.

Claimant also claimed that Employer forced him to deliver packages, in violation of his work restrictions, on October 31, 2017, for approximately five hours after 8-9 a.m. Claimant claims that his knee swelled to four times the size of normal because of this activity, prompting him to see Dr. Parsons. However, Claimant presented to Dr. Parsons at 11:15 a.m. on October 31, 2017 for a scheduled appointment. There was no indication that he was late, had injured himself at work, or had any significant increased swelling in the knee.

Dr. D'Angelo found Claimant's presentation to be grossly dissimilar to his complaints. Claimant complained of pain and discomfort with carrying his daughter but exhibited no such condition. Claimant also ambulated normally, despite having indicated he was worse than the time of the injury. While Dr. D'Angelo pined that it was medically improbable that Claimant suffered a complex tear in the manner described, especially considering the above evidence.

Last, Claimant claimed to have worsened from the time he was off work completely, to the time he saw Dr. D'Angelo, a period of over three months. Claimant claimed that he had done nothing but rest and ice during that time. Nevertheless, Claimant claimed improvement and was able to return to work at regular duty less than a month after he saw Dr. D'Angelo, with no change to his medical care.

Based on the totality pf the evidence, the ALJ finds and concludes that Claimant did not sustain his burden of proving by the preponderance of the evidence that he sustained a compensable injury.

ORDER

1. Claimant has failed to meet his burden to prove by a preponderance of the evidence that he sustained a compensability injury. Thus, Claimant's claim for compensation is denied and dismissed.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 27, 2018

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St, 4th Floor
Denver, CO 80203

ISSUES

- Did Respondents overcome the DIME's determination Claimant is not at MMI by clear and convincing evidence?

- If Respondents overcame the DIME regarding MMI, did they overcome the DIME regarding impairment and proof by clear and convincing evidence Claimant sustained permanent impairment only to his left shoulder because of the admitted work accident?

FINDINGS OF FACT

1. Claimant suffered admitted injuries in a fall on September 3, 2015. He was "metalizing" a wind turbine tower laying horizontally on its side. He stepped backward and fell through an open door on the tower. He landed on his left side and upper back. He also hit his head, and his helmet was pulled off. At hearing, Claimant showed a post-accident photograph taken with his cell phone showing a large area of abrasion and bruising around his left thoracic and scapular area.

2. Claimant was taken to the emergency room at St. Mary Corwin Hospital. He reported left-sided chest wall pain, left shoulder pain, left hip pain, and left-sided neck pain. X-rays and CT scans of his chest, head, and neck were negative. The ER physician diagnosed "blunt injury of back" and left-sided rib contusions.

3. Claimant began treating with Teresa Turgeon, PA-C at the Hansen Clinic the following day. His primary complaint was constant aching over his left scapular region extending up over the superior aspect of the left shoulder. Physical examination showed pain with cervical range of motion, and tenderness to palpation over the scapular spine, medial border, infraspinatus fossa, and body of the scapula. He could not tolerate O'Brien's, Neer's and Speed's tests due to pain. PA-C Turgeon diagnosed "contusion scapula[ar] region" and placed Claimant in a left shoulder immobilizer.

4. By October 1, 2015, Claimant was noted to be "much better" but was still complaining of pain in the left shoulder, neck, and "across the upper traps." Cervical range of motion was inconsistently described as "full" and "decreased." Claimant had questions about ongoing "time loss episodes" and "memory loss," which PA-C Turgeon opined "most likely [are] from the concussion." Despite that, for unknown reasons, she "suggested that he see his primary physician for this."

5. Claimant returned to PA-C Turgeon on October 19, 2015. His left side complaints were improved, but he was having problems with his right shoulder. PA-C Turgeon documented "his right shoulder is painful even after being on vacation in Hawaii for 2 weeks. . . . [He] does not remember an injury and has not complained about this

prior to this visit." PA-C Turgeon gave Claimant a right shoulder steroid injection "for rotator cuff tendinitis." She opined "he has not mentioned or complained of the right shoulder pain prior to today's visit and had no mention or problems with this and [sic] his initial date of injury, so I do not feel that this is injury related."

6. At his next visit on October 27, 2015, Claimant reported "continued" pain in his right shoulder and mid back. He described an incident at work on October 23 where he was lifting an object and experienced pain in his mid-back at the thoracolumbar level. PA-C Turgeon stated the "new" mid back pain was in the T6 to T10 area.

7. Claimant started seeing Dr. Jorge Klajnbart, an orthopedic surgeon, on November 3, 2015. The treatment note contains some cloned information from prior notes, making it difficult to determine the actual exam findings. Dr. Klajnbart ordered a left shoulder MRI, which showed moderate-to-severe acromioclavicular osteoarthritis, moderate-to-severe tendinosis and a low-grade articular surface partial tear of the supraspinatus tendon. Dr. Klajnbart also ordered a thoracic MRI which showed degenerative changes but no acute pathology.

8. Claimant had an MRI of the right shoulder on January 27, 2016. It showed a full thickness tear of the mid-supraspinatus insertion, tendinopathy of multiple tendons, marked AC joint arthritis, and a degenerative tear of the superior labrum. When he reviewed the MRI in February 2016, Dr. Klajnbart described the right shoulder issues as "posttraumatic."

9. Dr. Klajnbart ultimately performed bilateral shoulder surgeries. He performed right shoulder surgery on March 22, 2016, and left shoulder surgery on September 22, 2016. Both surgeries were authorized and covered under this claim.

10. Dr. Matthew Furman administered thoracic facet blocks on February 24, 2016. The facet blocks provided good, but only temporary, relief. In July 2016, Dr. Klajnbart referred Claimant to Dr. Kenneth Danylchuk "for further evaluation and treatment regarding his thoracic pain." Claimant informed Dr. Klajnbart he attributed the thoracic pain to his original injury.

11. Claimant saw Dr. Danylchuk on September 13, 2016. Dr. Danylchuk noted Claimant had been referred by Dr. Klajnbart fro "ongoing neck, mid thoracic and lumbar spine pain. He has not had any previous neck, mid back or lumbar spine pain from any other source." was referred noted Claimant's pain was "mostly in the cervical spine." Dr. Danylchuk was "perplexed that he has not seen a physician for his neck and his back." He ordered cervical and lumbar MRIs. The cervical MRI showed degenerative changes producing spinal stenosis and neuroforaminal narrowing at multiple levels. There was also a paracentral disc protrusion at C7-T1. The lumbar MRI showed neuroforaminal stenosis and moderate facet joint disease, most notable at L4-5 and L5-S1.

12. On January 25, 2017, Dr. Joseph Fillmore performed a Physician Advisor record review for Insurer in response to a request for authorization of cervical ESIs from

C5-T1. He opined injections at four levels were not appropriate but recommended approval of injections at C5-6 and C6-7.

13. On February 3, 2017, Dr. Danylchuk responded to an inquiry from Insurer's nurse case manager regarding the cervical ESIs. He noted Claimant "had no treatment to his cervical spine prior to this significant fall at work. Even with the noted degenerative findings, his need for current treatment most likely is related to this work injury."

14. Dr. Stephen Ford performed three cervical ESIs in February, March, and April of 2017.

15. In May 2017, Claimant saw Dr. Gary Ghiselli, a spine surgeon, at Dr. Danylchuk's request. Claimant described neck pain, headaches, and numbness in his arms. He noted the April 2017 cervical ESI gave good pain relief for approximately eight days. Dr. Ghiselli's diagnoses included "upper neck pain and headaches since a work injury in September 2015." He opined that the precise pain generator "has not been thoroughly teased out as of yet." He recommended that Claimant "work closely with a physiatrist to get more specific injections such as facet injections and/or a right C3-4 TFESI. If the facets are teased out then a rhizotomy could be done. If the source of his pain is teased out and he wants to further discuss possible surgery then he can return to see us."

16. Dr. Allison Fall performed an IME for Respondents on July 27, 2017. Dr. Fall opined Claimant's injury-related conditions were limited to the left shoulder and left scapulothoracic area. She believed Claimant suffered a permanent aggravation of a pre-existing condition in the left shoulder for which surgery was appropriate. She also diagnosed left scapulothoracic myofascial pain, i.e., "myospasms." She opined Claimant had "no specific separate injury to the cervical spine," nor did he injure the lumbar spine. She opined Claimant was at MMI with permanent impairment limited to the left shoulder. She thought rating the scapulothoracic myofascial pain would be "duplicative" of the left shoulder rating.

17. Dr. Klajnbart reviewed Dr. Fall's IME in October 2017. He opined "I do not concur and do disagree with the IME results. . . . Individual [was] able to lay greater than 3000 pounds of concrete and working mechanized 50-pound machine prior to this injury. Although I do concur that there is pre-existing disease process in the cervical spine [this] individual was asymptomatic prior to this injury and presented with new findings and continues to progress with new findings significant on today's exam with neurological changes in the C7 C8 nerve root pattern." Dr. Klajnbart recommended a neurosurgical consultation, electrodiagnostic testing of the upper extremities, and "formalized counseling secondary to his chronic pain and inability to sleep with some family distress."

18. Dr. James Regan performed a 24-month DIME at Respondents' request on November 24, 2017. Dr. Regan opined Claimant's bilateral shoulders were at MMI, but Claimant was not at MMI for the cervical and thoracic issues. He recommended evaluation by a physiatrist for further treatment of the thoracic spine and cervical spines. He also thought Claimant should have a chance to follow-up with Dr. Ghiselli after

physiatric treatment. He agreed with Dr. Klajnbart's recommendation for EMG/NCV testing which "will help regarding any surgical considerations." Although he found Claimant was not at MMI, Dr. Regan calculated an advisory impairment rating of 38% whole person, encompassing the cervical spine, thoracic spine, and bilateral shoulders.

19. Dr. Fall reviewed the DIME and authored a supplemental report on January 17, 2018 stating her opinions regarding causation and MMI were unchanged. She also disagreed with Dr. Regan's impairment rating in several respects.

20. Dr. Fillmore performed an IME for Respondents on February 22, 2018. Dr. Fillmore indicated the fall could have irritated Claimant's cervical spine initially, but the current complaints were not related to the accident. He opined the right shoulder was not injury-related because there was no documentation Claimant fell on his right side, and the early records said Claimant recalled no injury to the right shoulder. He opined the thoracic symptoms were degenerative and not injury-related. Dr. Fillmore concluded the only injury-related body part is the left shoulder, for which Claimant was at MMI.

21. Respondents obtained several hours of video surveillance in March 2018. The video depicts Claimant performing a variety of activities, including operating a bobcat, performing yard work, picking up items in his yard, and driving his vehicle. Claimant does not demonstrate any overt pain behaviors and appears to perform all activities without difficulty.

22. Claimant saw Dr. Rook for an IME at the request of his counsel on March 12, 2018. Dr. Rook noted Claimant had a prior neck injury in 2009 that resolved without sequelae. He emphasized Claimant had no symptoms, limitations or treatment any neck or other musculoskeletal condition for several years before the industrial accident. Dr. Rook opined the accident aggravated Claimant's pre-existing but "previously asymptomatic" cervical and thoracic degenerative disc disease. He agreed with Dr. Regan's determination Claimant was not at MMI for his neck and mid back. He opined that Dr. Fall's opinions represented a mere "difference of opinion" with the DIME.

23. Dr. Rook reviewed the surveillance video after he issued his IME report. Dr. Rook acknowledged Claimant "did not appear to be in any distress" while performing various activities, but noted the activities "appeared to fall within a sedentary physical demand level." He opined the video did not change any of his conclusions regarding causation of the cervical and thoracic conditions, although it might be useful in assessing Claimant's physical restrictions.

24. Dr. Klajnbart testified in deposition for Respondents on May 4, 2018. He had minimal specific recollection of Claimant's history and had to rely primarily on his notes for details. Dr. Klajnbart was impressed with the surveillance video, which he believed was inconsistent with Claimant's clinical presentation. Dr. Klajnbart saw no evidence of any medical condition that required further treatment. He opined the left shoulder was the only injury-related condition and Claimant was at MMI.

25. Dr. Fillmore testified at hearing for Respondents. He had reviewed the surveillance video in the interim, which strengthened his conviction regarding the opinions expressed in his IME report. He opined the activities depicted on the video were inconsistent with Claimant's clinical presentation at the IME.

26. Respondents took a post-hearing deposition of Dr. Regan on June 29, 2018. In his deposition, Dr. Regan modified the opinions expressed in his DIME report. Dr. Regan explained he had not previously undertaken a detailed causation analysis because he assumed causation of the bilateral shoulders, thoracic spine and cervical spine was admitted and undisputed. Upon further questioning and reflection during the deposition, Dr. Regan affirmed his conclusion that Claimant's left shoulder and cervical spine problems were caused by the accident. Dr. Regan explained his use of the term "cervical" includes Claimant's left scapular pain, which he believes emanates from the cervical spine. He determined the right shoulder and low back are not causally related to the industrial accident.

27. Dr. Regan gave conflicting testimony regarding whether Claimant's ongoing thoracic symptoms are related to the September 3, 2015 fall or the October 23, 2015 lifting incident. Specifically, Dr. Regan's testified:

> A. I personally think the ongoing difficulties he had with his thoracic spine were from the workers' comp injury. (p. 40).
>
> * * * *
>
> A. I'm still going to stick with my original contention that the T-spine, midback dates back to the September 3, 2015 injury. (pp. 56-57).
>
> * * * *
>
> A. I don't think I'm going to be able to buttress my opinion, other than a subjective instinct. [ ] I'm not going to be able to, within the context of a reasonable medical doubt – or however we put that legally. I'm not going to be able to ascribe the thoracic pain to 9/3/15. Even if I believe that, I would not be able to prove it without reasonable doubt. So I have to agree that the intervening accident certainly muddles the situation, and it makes me unable to with certainty say from that point on any midback pain can be ascribed to 9/3 as opposed to the 10/23.
>
> * * * *
>
> Q. [H]ow about if I say that within a reasonable degree of medical probability we can only say as of today that the cervical spine and the left shoulder are body parts related to his original work accident?
>
> A. I'd agree with exactly what you just said. (p.73).
>
> * * * *

Q. [R]egarding the midback. . . . [is it] your opinion that this fall that, according to the emergency room, resulted in a blunt injury of his back . . . he had essentially resolved that condition by the time he had the subsequent lifting injury in October [2015]; is that your opinion?

A. That's not my opinion. I would agree that I can't with utter confidence claim that any ongoing back pain after the 10/23 event should still be traced to September. I already said that. I can't say with certainty, meaning that any ongoing pain thereafter could be from the 10/23 injury. (p.96).

28. The primary ambiguity arose when Dr. Regan was asked to agree with a question posed by Respondents' counsel whether he could state his opinion with a "reasonable degree of medical probability." When given the opportunity to state his opinion directly, he repeatedly expressed his belief Claimant's thoracic symptoms are related to the September 2015 accident. Dr. Regan was clearly confused about the degree of "certainty" to which he must express his opinions, and the ALJ doubts he could define the term "reasonable medical probability." [1] The ALJ finds Dr. Regan's true opinion is the thoracic spine is related to the admitted accident, even though he cannot state that opinion "with utter confidence," beyond "a reasonable medical doubt," or "with certainty."

29. Dr. Regan expressed conflicting opinions regarding MMI, stating at various points in the deposition Claimant was at MMI and was not at MMI. In the end, Dr. Regan maintained Claimant is not at MMI.[2]

30. Respondents failed to overcome the DIME's revised determination of MMI by clear and convincing evidence.

CONCLUSIONS OF LAW

The DIME's determination of MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). This is a higher standard of proof than the typical "preponderance" standard. Clear and convincing evidence is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI finding is incorrect. *Qual-Med*, 961 P.2d at 592; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A "mere difference of medical opinion" does not constitute clear and convincing evidence that the DIME is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

[1] Dr. Regan's confusion is understandable because the courts have "no consensus" as to the meaning of the phrase "reasonable medical probability." *People v. Ramirez*, 155 P.3d 371, 376, fn.6 (Colo. 2007). The Supreme Court described the phrase as "outdated," and the ALJ is aware of no authority which requires the DIME to state his conclusions with "reasonable medical probability."

[2] Dr. Regan concluded, "[T]he man I saw . . . was not at maximum medical improvement. I felt more could be done for his neck. . . . [T]here is a possibility that more can be done to help this individual until he is decreed to be at MMI, and I'm not content to do it just based on a video . . . ." (p.92).

In determining whether a claimant is at MMI, the DIME "inherently" must decide whether further treatment is causally related to the industrial injury, and the DIME's determination that a particular condition is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). MMI is not "divisible," so Respondents must prove Claimant is at MMI for "each component of the injury." *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Lozano v. Alvarados, Inc*., W.C. No. 4-904-266-06 (February 27, 2017).

The DIME's "determination" is not limited to conclusions reached in the initial report, but includes any supplemental reports and testimony. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). If the DIME issues conflicting or ambiguous opinions about whether the claimant's condition is work-related, or whether the claimant has reached MMI, the ALJ must determine the DIME's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2005). Once the ALJ clarifies any ambiguity regarding these issues, the party seeking to overcome the opinion must do so by clear and convincing evidence. *Id.*

As found, Respondents failed to overcome the DIME's revised determination regarding MMI and causation of the cervical and thoracic spines by clear and convincing evidence. As an initial matter, Dr. Regan's recommendations for further evaluation and diagnostic testing (evaluation by a physiatrist, EMG/NCV testing, reevaluation by Dr. Ghiselli) are sufficient to find Claimant not at MMI. Reasonably necessary diagnostic procedures are a prerequisite to MMI if they have a "reasonable prospect" of diagnosing or defining the claimant's condition so as to suggest a course of further treatment." *E.g., Soto v. Corrections Corp*., W.C. No. 4-813-582 (October 27, 2011); *Villela v. Excel Corporation*, W.C. No. 4-400-281 (February 1, 2001). Indeed, the recommendation for electrodiagnostic testing alone would be a legally justifiable basis for a not-at-MMI finding. *Soto v. Corrections Corp*., *supra*.

The persuasive evidence presented by Respondents does not rise to the level of "clear and convincing." The opinions expressed by Drs. Fall, Klajnbart, and Fillmore[3] amount to "mere differences of medical opinion" regarding causation and the need for further evaluation and treatment. While the surveillance video gives the ALJ pause regarding the reliability of Claimant's pain complaints, it was not compelling enough to convince Dr. Regan to change his ultimate conclusion regarding MMI. Dr. Rook expressed a similar opinion. Although the movements and activities demonstrated in the video would be compelling evidence on the issue of impairment,[4] the ALJ finds it less useful on the question of MMI. Although Claimant has probably exaggerated the severity of his symptoms to some extent, he does have significant objective pathology in his cervical and thoracic spines that is reasonably likely to produce some level of pain. There

[3] The ALJ notes Dr. Klajnbart and Dr. Fillmore have expressed conflicting opinions in this matter. In October 2017, Dr. Klajnbart disagreed with Dr. Fall's conclusions, but essentially agreed with her opinions in his deposition testimony. And Dr. Fillmore supported injections for Claimant's neck in January 2017, but later determined the neck was not related to the accident.

[4] Indeed, Dr. Regan agreed his advisory impairment rating is invalid given the significant discrepancy between clinical ROM measurements and the movements demonstrated on the video.

is no persuasive evidence he was symptomatic or required any treatment for his underlying cervical and thoracic degenerative changes before the accident. The impact from his fall was significant enough to cause a large area of bruising around his left scapula and mid back. The argument that Claimant's thoracic symptoms are instead related to the trivial event at work on October 23, 2015 is unpersuasive. Claimant reported neck pain from the outset — at the emergency room and at the Hanson Clinic — which he states never resolved. Dr. Danylchuk was "perplexed" why Claimant had still not received treatment for the neck a year after the accident. Dr. Regan credited Claimant's assertion that PA-C Turgeon discounted and failed to properly document his complaints, which is a legitimate basis for him to question the accuracy of the treatment records. Dr. Regan's conclusions are one reasonable interpretation of the available evidence, and the ALJ is not persuaded that his conclusions were "highly probably incorrect."

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME regarding MMI is denied and dismissed.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 30, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable right shoulder injury on December 13, 2017 or December 25, 2017 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment, including the right shoulder surgery recommended by Cary Motz, M.D., that is reasonable and necessary to cure or relieve the effects of his industrial injury.

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period February 26, 2018 until terminated by statute.

4. Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on December 13, 2017 and his non-medical benefits should thus be reduced by fifty percent.

FINDINGS OF FACT

1. Claimant is a 61-year-old male Feeder Driver for Employer. He has worked as a long-haul driver for Employer for 13 years.

2. The record reflects that Claimant has suffered an extensive history of chronic right shoulder pain. On April 12, 2016 Claimant visited personal medical provider Peak Vista for right shoulder symptoms. He reported that the pain began four months earlier and was located in his right rotator cuff area. Claimant had been injured in a motor vehicle accident. He remarked that his right shoulder pain is aggravated by lifting but relieved by ice and chiropractic treatment. Katrina De Romana, NP diagnosed Claimant with chronic right shoulder pain and referred him for physical therapy.

3. On May 6, 2016 Claimant visited Parker Adventist Hospital for an initial physical therapy evaluation. He reported chronic right shoulder issues that were exacerbated after a December 2015 motor vehicle accident in which he struck the left, front quarter panel of his vehicle. Regular chiropractic visits did not alleviate Claimant's right shoulder symptoms. Claimant also reported a direct fall onto his right shoulder 30 years earlier and noticed a bump on his shoulder as a result of the incident. A physical examination revealed a prior AC joint separation. Claimant commented that he enjoyed golf and tennis but was unable to participate because of his right shoulder condition. His therapeutic goals included resuming golf and tennis as well as working around the

house without shoulder irritation. The physical therapist noted that Claimant suffered from a "chronic dysfunction that may not fully resolve."

4. A June 3, 2016 note from Parker Adventist Hospital stated that Claimant visited a chiropractor on a weekly or monthly basis. However, the treatment was not improving his symptoms.

5. On December 1, 2017 Claimant visited primary care physician Oladiran Oluwaseun, M.D. at Peak Vista. Claimant reported right shoulder pain.

6. Claimant testified that on December 13, 2017 he injured his right shoulder while working for Employer when detaching a tractor from a trailer. The process involved removing a portable fifth wheel or dolly that connects trailers. Claimant specifically remarked that he felt a pop in his right shoulder when he was lifting the tongue of the dolly. He commented that on December 25, 2017 he aggravated his right shoulder condition while completing the same activity.

7. On December 27, 2017 Claimant returned to Dr. Oluwausen at Peak Vista. Claimant reported "right shoulder pain, multiple injuries of past 45 years, wants to get stem cell injections." Dr. Oluwaseun noted that the onset of Claimant's condition was "45 years ago" and stable. The symptoms were persistent but relieved by physical therapy. Dr. Oluwaseun diagnosed Claimant with chronic right shoulder pain and ordered an MRI. Claimant did not report any work injury or acute onset of pain.

8. On January 5, 2018 Claimant underwent a right shoulder MRI. On the intake form Claimant noted "pain when raised," "MVA-2015" and "Golfing Sept. 2017." He remarked that the onset of symptoms was two years ago. Claimant did not mention any work injury or acute onset of pain around December 13, 2017 or December 25, 2017. The MRI revealed a full-thickness complete tear of the distal supraspinatus tendon with retraction of degenerated torn tendon fibers. Claimant also exhibited mild supraspinatus muscle atrophy without fatty infiltration. The clinical impression was "chronic right shoulder pain and recurrent prior trauma."

9. On January 16, 2018 Claimant reported a work injury to Employer. Claimant had recently been advised by Peak Vista that his right shoulder MRI revealed a rotator cuff tear. He noted that he suffered a right shoulder injury on December 13, 2017 when he lifted the tongue of a dolly from the stowed position to attach to the pintle hook of a tractor. He completed a written statement in which he explained that he felt something pull but did not think he was injured. However, he underwent an MRI and was advised that he had a rotator cuff tear. Claimant selected Carrie Burns, M.D. at Concentra Medical Centers as his Authorized Treating Physician (ATP).

10. On January 17, 2018 Claimant visited Gary Scofield, PA-C at Concentra for an evaluation. Claimant reported that on December 13, 2017 he was pulling a heavy dolly to a hitch at work and felt a sharp pain in his right shoulder. He did not mention any right shoulder injury on December 25, 2017. PA-C Scofield diagnosed Claimant

with a right rotator cuff tear. He assigned Claimant a 15 pound lifting restriction and referred him for an orthopedic evaluation. Claimant began working light duty.

11. On January 23, 2018 Claimant visited Orthopedic Surgeon Cary Motz, M.D. for an examination. Claimant reported a right shoulder injury while pulling a dolly at work on December 13, 2017. He did not mention an injury on December 25, 2017. Claimant denied any significant prior right shoulder issues. Dr. Motz diagnosed Claimant with: a right shoulder large rotator cuff tear, inferior clavicular spur and impingement syndrome. He recommended arthroscopic rotator cuff surgery. Dr. Motz remarked that his decision to recommend surgery was based on Claimant's functional loss and discomfort.

12. On January 24, 2018 Claimant underwent a physiatry evaluation with Shimon Blau, M.D. Claimant reported that he suffered a right shoulder injury at work on December 13, 2017 but did not report any injury on December 25, 2017. He was not currently experiencing right shoulder pain and was working light duty with restrictions. Dr. Blau agreed with the referral to orthopedist Dr. Motz and noted that he should assume Claimant's pain medication management.

13. On February 26, 2018 Claimant was terminated from light duty employment. He has not worked subsequent to his termination.

14. On May 31, 2018 Claimant underwent an independent medical examination with Kathleen D'Angelo, M.D. Claimant reported right shoulder pain after pulling a fifth wheel handle to release a trailer at work on December 13, 2017. He remarked that he aggravated his right shoulder condition while again pulling a fifth wheel handle on December 25, 2017. After reviewing Claimant's medical history and performing a physical examination Dr. D'Angelo determined that Claimant did not suffer a rotator cuff tear as a result of the December 13, 2017 or December 25, 2017 work incidents. She explained that Claimant has suffered a long history of chronic right shoulder problems. The rotator cuff tear was not an acute injury because Claimant was able to continue working for over one month after the fifth wheel incident. Dr. D'Angelo attributed Claimant's chronic right rotator cuff tear to atrophy and age. She commented that atraumatic rotator cuff tears are common in individuals over the age of 50.

15. Dr. D'Angelo testified at the hearing in this matter. Claimant reported that he had not suffered a right shoulder injury prior to December 13, 2017 but had some issues with the shoulder that stemmed from a motor vehicle accident. Dr. D'Angelo remarked that Claimant's clinical history was inconsistent with an acute rotator cuff tear because an acute injury would cause significant pain and disability. She would have expected evidence of significant swelling and subcutaneous blood deposits with an acute injury. However, swelling and blood deposits were absent at the time of his initial evaluation, MRI and subsequent examinations.

16. Dr. D'Angelo explained that Claimant's presentation and MRI findings were consistent with a degenerative rotator cuff tear. She noted that the right shoulder MRI reflected atrophy with no fatty infiltration. Dr. D'Angelo commented that it takes a

muscle approximately 18 months to two years to atrophy, but fatty infiltration does not develop for about three to five years after a degenerative tear. She thus reasoned that Claimant's degenerative right rotator cuff tear occurred approximately 18 months to five years prior to the January 5, 2018 MRI. Furthermore, Claimant's ability to continue working was consistent with a degenerative rotator cuff tear because they can be asymptomatic for extended periods of time. Claimant's ability to continue to use his shoulder at work by resting and using ice did not suggest an acute injury. An acute tear would have been traumatic, caused swelling and reflected bleeding on the MRI. Dr. D'Angelo thus summarized that Claimant did not suffer an acute rotator cuff tear while working for Employer on December 13, 2017 or December 25, 2017.

17. Claimant has failed to establish that it is more probably true than not that he sustained a compensable right shoulder injury on December 13, 2017 or December 25, 2017 during the course and scope of his employment with Employer. Initially, Claimant testified that he injured his right shoulder while detaching a tractor from a trailer. He specifically remarked that he felt a pop in his right shoulder when he was lifting the tongue of a dolly. However, the medical records are replete with evidence that Claimant has suffered an extensive history of chronic right shoulder symptoms from a degenerative tear that was not caused, aggravated or accelerated by his work activities for Employer on December 13, 2017 or December 25, 2017.

18. Claimant has experienced right shoulder symptoms and pain from a myriad of injuries over many years. Claimant acknowledged that he suffered from chronic right shoulder symptoms that were exacerbated after a December 2015 motor vehicle accident. Regular chiropractic visits did not alleviate Claimant's right shoulder symptoms. Claimant also reported a direct fall onto his right shoulder 30 years earlier and noticed a bump on his shoulder as a result of the incident. A physical examination at a May 6, 2016 physical therapy visit also revealed a prior AC joint separation. Even by December 1, 2017 Claimant reported to his primary care provider Dr. Oluwaseun that he had suffered multiple right shoulder injuries over 45 years and wanted stem cell injections. Furthermore, on the January 5, 2018 right shoulder MRI intake form Claimant noted "pain when raised," "MVA-2015" and "Golfing Sept. 2017." He remarked that the onset of symptoms was two years ago. Claimant did not mention any work injury or acute onset of pain around December 13, 2017 or December 25, 2017.

19. On January 16, 2018 Claimant reported a work injury to Employer after he had been informed that his MRI revealed a right rotator cuff tear. However, as Dr. D'Angelo persuasively explained Claimant's clinical history was inconsistent with an acute rotator cuff tear because an acute injury would have caused significant pain and disability. She commented that there would be evidence of significant swelling and subcutaneous blood deposits with an acute injury. However, swelling and blood deposits were absent at the time of Claimant's initial evaluation, MRI and subsequent examinations. Claimant's presentation and MRI findings were more consistent with a degenerative rotator cuff tear. Dr. D'Angelo noted that the right shoulder MRI reflected atrophy with no fatty infiltration. She explained that it takes a muscle approximately 18 months to two years to atrophy, but fatty infiltration does not develop for about three to five years after a degenerative tear. Dr. D'Angelo thus reasoned that Claimant's

degenerative right rotator cuff tear occurred approximately 18 months to five years prior to the January 5, 2018 MRI. Furthermore, Claimant's ability to continue working was consistent with a degenerative rotator cuff tear because they can be asymptomatic for extended periods of time. In contrast, an acute tear would have been traumatic, caused swelling and reflected bleeding on the MRI. Dr. D'Angelo thus summarized that Claimant did not suffer an acute rotator cuff tear while working for Employer on December 13, 2017 or December 25, 2017.

20. Claimant's extensive history of chronic right shoulder problems in conjunction with the persuasive opinion of Dr. D'Angelo reflects that he likely did not suffer an acute tear while working for Employer on December 13, 2017 or December 25, 2017. Claimant's job activities did not aggravate, accelerate or combine with a pre-existing condition to produce a need for medical treatment. In fact, Claimant worked full duty subsequent to December 17, 2017 and did not report a right shoulder injury to Employer until after discovering a right rotator cuff tear on an MRI. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re*

Swanson, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable right shoulder injury on December 13, 2017 or December 25, 2017 during the course and scope of his employment with Employer. Initially, Claimant testified that he injured his right shoulder while detaching a tractor from a trailer. He specifically remarked that he felt a pop in his right shoulder when he was lifting the tongue of a dolly. However, the medical records are replete with evidence that Claimant has suffered an extensive history of chronic right shoulder symptoms from a degenerative tear that was not caused, aggravated or accelerated by his work activities for Employer on December 13, 2017 or December 25, 2017.

8. As found, Claimant has experienced right shoulder symptoms and pain from a myriad of injuries over many years. Claimant acknowledged that he suffered from chronic right shoulder symptoms that were exacerbated after a December 2015 motor vehicle accident. Regular chiropractic visits did not alleviate Claimant's right shoulder symptoms. Claimant also reported a direct fall onto his right shoulder 30 years earlier and noticed a bump on his shoulder as a result of the incident. A physical examination at a May 6, 2016 physical therapy visit also revealed a prior AC joint separation. Even by December 1, 2017 Claimant reported to his primary care provider

Dr. Oluwaseun that he had suffered multiple right shoulder injuries over 45 years and wanted stem cell injections. Furthermore, on the January 5, 2018 right shoulder MRI intake form Claimant noted "pain when raised," "MVA-2015" and "Golfing Sept. 2017." He remarked that the onset of symptoms was two years ago. Claimant did not mention any work injury or acute onset of pain around December 13, 2017 or December 25, 2017.

9. As found, on January 16, 2018 Claimant reported a work injury to Employer after he had been informed that his MRI revealed a right rotator cuff tear. However, as Dr. D'Angelo persuasively explained Claimant's clinical history was inconsistent with an acute rotator cuff tear because an acute injury would have caused significant pain and disability. She commented that there would be evidence of significant swelling and subcutaneous blood deposits with an acute injury. However, swelling and blood deposits were absent at the time of Claimant's initial evaluation, MRI and subsequent examinations. Claimant's presentation and MRI findings were more consistent with a degenerative rotator cuff tear. Dr. D'Angelo noted that the right shoulder MRI reflected atrophy with no fatty infiltration. She explained that it takes a muscle approximately 18 months to two years to atrophy, but fatty infiltration does not develop for about three to five years after a degenerative tear. Dr. D'Angelo thus reasoned that Claimant's degenerative right rotator cuff tear occurred approximately 18 months to five years prior to the January 5, 2018 MRI. Furthermore, Claimant's ability to continue working was consistent with a degenerative rotator cuff tear because they can be asymptomatic for extended periods of time. In contrast, an acute tear would have been traumatic, caused swelling and reflected bleeding on the MRI. Dr. D'Angelo thus summarized that Claimant did not suffer an acute rotator cuff tear while working for Employer on December 13, 2017 or December 25, 2017.

10. As found, Claimant's extensive history of chronic right shoulder problems in conjunction with the persuasive opinion of Dr. D'Angelo reflects that he likely did not suffer an acute tear while working for Employer on December 13, 2017 or December 25, 2017. Claimant's job activities did not aggravate, accelerate or combine with a pre-existing condition to produce a need for medical treatment. In fact, Claimant worked full duty subsequent to December 17, 2017 and did not report a right shoulder injury to Employer until after discovering a right rotator cuff tear on an MRI. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's Workers' Compensation claim is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 30, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

_____
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that the proposed vestibular testing is reasonable, necessary, and related to the industrial injury?

- Did Claimant prove by a preponderance of the evidence that the prescription for hearing aids is reasonable, necessary, and related to the industrial injury?

FINDINGS OF FACT

1. Claimant began working for Employer in approximately 2010. He worked as a driver/warehouse worker. In that capacity, he works in the warehouse loading and unloading trucks.

2. On May 6, 2010, Claimant sustained a work-related injury in which he tripped over a fence and struck his head. Albert Hattem, M.D. determined Claimant was at MMI on March 4, 2013. Dr. Hattem's impression was status post C4-5 anterior cervical decompression and fusion by Dr. Ghiselli on November 2, 2011 for severe spinal stenosis and associated instability. Dr. Hattem assigned a 20% whole person impairment, which included loss of range of motion for the cervical spine, C5 radiculopathy and a single level operation. Claimant was also assigned a 3% upper extremity impairment. At the time of this determination, no symptoms related to Claimant's hearing were noted, nor did Dr. Hattem identify issues with regard to balance. Claimant received a full duty release to return to work, with no restrictions.

3. Claimant's medical history was significant in that he saw his family physician regarding decreased hearing. More particularly, Claimant was evaluated on September 30, 2014 by Larry Doehring, D.O. at Complete Family Care. Decreased hearing was listed as the present illness, along with diabetes, back pain and flu immunization. In the review of systems, bilateral hearing loss was noted, but there was no indication in the report how that was determined. There was no record of the hearing testing done time. No treatment recommendations were made by Dr. Doehring with regard to the hearing loss.

4. On January 11, 2017, Claimant suffered an admitted industrial injury while working for Employer. He had unloaded carpet for customer and went to get another roll that was stuck. He pulled on the roll and fell in between the dock and the truck, hitting the back of his head against a forklift.

5. Claimant was transported to the hospital by ambulance. Claimant reported a loss of consciousness ("LOC") and was unable to identify the date. In the Denver Health and Hospital Paramedic Division report, EMT Leigh Foster's impression was:

head trauma. A dime-sized hematoma was noted on the left lateral occipital region. There was also a note that bystanders observed video footage and said there was not a LOC or seizure activity.[1]

6. Claimant was evaluated in the Emergency Department at Swedish Medical Center by Kelly Wong, PA and attending physician Glenda Quan, M.D. Claimant reported a loss of consciousness when he missed a step and fell, hitting his head. He complained of neck and shoulder pain, numbness and tingling in the hands and forearms, with right by pain. The CT demonstrated a failure of the fusion at C4-5 and Claimant was evaluated by Peter Syre, M.D. Dr. Syre recommended surgical decompression, likely C3-7 posterior fusion to address the cord compression.

7. On January 13, 2017, Claimant underwent surgery for his cervical spine, which was performed by Dr. Syre. In particular, Dr. Syre performed a C3-4, C4-5 and C5-6 laminectomy, C3-4 C4-5, C5-6 and C6-7 posterior arthrodesis and posterior instrumentation.

8. While Claimant was still hospitalized, on January 14, 2017, an MRI and plain x-ray films showed a contusion to the right lateral musculature of the right leg. Claimant was discharged on January 17, 2017.

9. On February 16, 2017, Claimant was evaluated by Hiep Ritzer, M.D. at Colorado Occupational Medicine. Claimant's complaints included multiple concussive-type symptoms-headache, blurred vision, hearing, neck pain, bilateral upper back pain and low back pain, bilateral upper extremity parasthesias. Dr. Ritzer's assessment was: closed head injury; concussion; central cord syndrome; cervical instability-stable post-surgery January 14, 2017, with parasthesias, bilateral upper extremities; right thigh hematoma; left calf strain, with negative DVT.

10. Dr. Ritzer concluded Claimant's complaints were consistent with history and work-related mechanism of injury. He was to continue with his medications and home PT. Dr. Ritzer referred Claimant to Dr. Politzer for visual complaints. Claimant's hearing loss and other cognitive complaints were to be monitored to see if there was improvement. The ALJ inferred Dr. Ritzer was of the opinion that the hearing loss, visual and cognitive complaints were causally related to work injury.

11. In a follow-up evaluation on March 13, 2017, Dr. Ritzer's diagnoses were the same as on February 16, 2107. Dr. Ritzer referred Claimant to Yusuke Wakeshima, M.D. for pain management.

12. On May 23, 2017, Matthew Lugliani, M.D. evaluated Claimant. At that time, Claimant was complaining of headaches, neck pain, persistent numbness and tingling involving both hands. Dr. Lugliani noted Dr. Wakeshima recommended referral to ENT and vestibular therapy. Dr. Lugliani's assessment was: closed head injury;

[1] The ALJ noted that it did not appear from this reference that the paramedics viewed the video. No video was admitted into evidence at hearing.

concussion; central cord syndrome; cervical instability, status post-surgery January 14, 2017, with bilateral upper extremity parasthesias.

13. On June 16, 2017, Dr. Wakeshima evaluated Claimant and included as part of the assessment: closed head injury, visual abnormalities and hearing loss. No specific treatment recommendations were made with regard to those problems.

14. Claimant returned to Dr. Lugliani on July 18, 2017. At that time, it was noted Claimant had not heard anything with regard to referrals for ENT and vestibular therapy. Dr. Luke Leon he issued new referrals for vestibular therapy and ENT. The ALJ inferred Dr. Lugliani was of the opinion that the vestibular complaints were causally related to work injury and Claimant required an ENT evaluation, which was the basis of the referral to Dr. Lipkin.[2]

15. Claimant was evaluated by Dr. Lipkin on August 7, 2017. Claimant stated he felt pressure both ears, along with constant high-pitched non-versatile tinnitus bilaterally. He also had experienced hearing loss since the accident and reported his hearing was normal prior to the injuries. Dr. Lipkin's assessment was tendinitis, bilateral; dizziness; bilateral sensorineural hearing loss; peripheral vertigo, specified laterality.

16. Dr. Lipkin noted Claimant was unsteady on his feet, with no focal vestibular signs. The audiogram showed hearing WNL sloping to a moderately severe SNHL, AU, which made Claimant a good candidate for high-quality hearing aids. Dr. Lipkin ordered a videonystagmogram, fistula test, and evoked potential studies.

17. Dr. Lipkin testified as an expert in Otolaryngology, the specialty in which he is board-certified. He is Level II accredited pursuant to the WCRP. Dr. Lipkin noted he was not the physician makes a determination as to whether someone has a brain injury.

18. Dr. Lipkin stated balance issues can be associated with cervical injuries. As an ear specialist, he generally dealt with patients like this concerning balance problems and hearing problems. Dr. Lipkin testified the testing he recommended could be helpful in treatment and these tests were consistent with the Medical Treatment Guidelines ("MTG"). Dr. Lipkin stated that although Claimant was not grossly unsteady on his feet, additional testing was warranted.

19. Dr. Lipkin disagreed with Dr. Lesnak who opined Claimant did not require balance evaluations, therapies, ENT evaluations or treatments. Dr. Lipkin stated:

[2] This was supported by Dr. Lugliani's note on August 29, 2017 questioning why ENT had not been approved by insurance and noting it was unclear whether or not vestibular therapy was approved.

”This is somebody with persisting lingering post-traumatic balance problems, has not been tested and could easily have a treatable condition. He might. He might not. But something that we need to try to find out”.[3]

The ALJ found this testimony to be persuasive, as Dr. Lipkin articulated why he believed the testing was necessary.

20. Dr. Lipkin also testified that it was difficult to make a determination whether hearing loss was associated with old age and the injury.[4] Claimant had nerve loss in both ears and it was not always completely possible to determine whether this was due to age or injury. Dr. Lipkin noted that audiogram can have all kinds of patterns and with blows to the occipital area, he had seen flat type of hearing loss. He had also seen patients with sloping high-frequency hearing loss out of proportion to what one would normally expect, as in the present case. Dr. Lipkin opined that the current symptoms appearing on his work-related to the 2017 injury. Dr. Lipkin went on to state that it was not possible to make an apportionment from pre-or post-injury, but the type of injury mechanism of injury can be associated with hearing loss. The ALJ noted Dr. Lipkin could not definitively state what portion of Claimant’s hearing loss preexisted the subject injury.

21. Claimant testified he noticed his hearing worsened after he was injured. He said he had trouble hearing what people were saying at work, which was noticed by his wife.[5]

22. On March 6, 2018, was evaluated by Lawrence Lesnak, M.D. at the request of Respondents. Claimant was complaining of constant frontal parietal headaches, which increased with activity. He also had mild suboccipital headaches and residual mild neck pain/stiffness. Claimant reported he had never had auditory/hearing tests.

23. Dr. Lesnak noted in his impression claimant suffered a possible cervical/trapezius strain/sprain injury that occurred on January 11, 2017. There was clinical evidence of residual cervical myelopathy, with possible associated C5-C6 radiculopathy, as well as chronic neck pain. There was no current clinical evidence of intrinsic shoulder joint pathology will continue impingement signs. Claimant also had possible bilateral tinnitus. A possible mild posterior scalp contusion was noted, but Dr. Lesnak said it there was no current clinical evidence that the patient sustained any type of traumatic brain injury or specific closed head injury. There was no current clinical evidence of cognitive abnormalities. Claimant’s previous ENT evaluations/hearing tests that apparently showed evidence of high-frequency sensory neural hearing loss, which he characterized as consistent with presbycusis-age-related nontraumatic hearing loss.

[3] Lipkin deposition, p.17:1-11.

[4] Lipkin deposition, p.10:17-11:4.

[5] Hearing Transcript (“Hrg. Tr.”) p. 17:18-18:3.

Dr. Lesnak said there was no current clinical evidence of nystagmus or any other clinical exam findings to suggest vestibular abnormality.

24. Dr. Lesnak testified as an expert in Physical Medicine and Rehabilitation on behalf of Respondents. He is Level II accredited pursuant to the WCRP. Dr. Lesnak testified that 95% of his practice involves patients with occupational injuries. He did two years in a neurosurgical program in his residence before switching to Physical Medicine and Rehabilitation.

25. Dr. Lesnak reviewed the audiogram, which showed a high high-frequency hearing loss. He stated this type of hearing loss was from noise exposure or age. He noted brain injuries that cause hearing loss results in hearing loss across the board, including low- and mid-frequency. Dr. Lesnak opined Claimant's hearing loss was not consistent with trauma. Dr. Lesnak noted Dr. Lipkin did not have Claimant's report of hearing loss in 2014 when he initially evaluated Claimant. Dr. Lesnak noted there was a question concerning whether Claimant suffered a loss of consciousness. Dr. Lesnak stated there was no evidence that Claimant's hearing problems related to any brain injury, especially January 11, 2017 incident.[6]

26. Dr. Lesnak testified Claimant had chronic cervical myelopathy, which was a result of his injury 2010 involving the spinal cord. Cervical myelopathy can cause gait issues.

27. Claimant proved that the vestibular testing, videonystagmogram, fistula test, and evoked potential studies were reasonable, necessary and related to the January 11, 2017 work injury.

28. Claimant failed to prove his need for hearing aids was reasonable, necessary and related to the January 11, 2017 work injury.

29. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

[6] Hrg. Tr. p.72:2-8.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The credibility of the parties' respective experts were at-issue in this case.

Medical Benefits-Proposed Vestibular Testing and Hearing Aids

Respondents are liable for medical treatment reasonably necessary to cure or relieve the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability, which may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296.

The ALJ concluded the need for the proposed testing was related to the industrial injury. First, the findings of Claimant's ATPs, including Dr. Lipkin, supported the need for testing. Dr. Ritzer and Lugliani made referrals that led the ALJ to conclude they determined Claimant's balance and other issues were related to the work injury. The inference drawn from the referrals support the ALJ's conclusion that additional testing was necessary. (Findings of Fact 10,12 and 14).

As determined in Findings of Fact 18-19, the ALJ credited Dr. Lipkin's opinions (as an ear nose and throat specialist) regarding the reason for such testing. In this regard, Dr. Lipkin noted that testing could potentially identify the reason Claimant was experiencing balance issues. (Finding of Fact 19). The ALJ determined recommendation for such testing was reasonable, as it could potentially identify the etiology of Claimant's balance issues. On this question, Dr. Lipkin's testimony was more persuasive Dr. Lesnak's.

Second, there was objective evidence of trauma to the head, which supported the need for such testing. In this regard, Respondents contested whether Claimant lost consciousness and cited a conflict in the evidence. However, the paramedics report

documented a hematoma, which the ALJ concluded was directly related to the subject accident. (Finding of Fact 5). On this issue, the Colorado Workers' Compensation Medical Treatment Guidelines have application to the case at bar.

When determining the issue of whether the proposed medical treatment is reasonable and necessary, the ALJ also considered the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he or she determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009). The undersigned considered the MTG when determining whether Dr. Lipkin's proposed testing and recommendation for bilateral hearing aids were reasonable and necessary. MTG Rule 17, Exhibit 5, Section (J) provides in pertinent part:

"2. NEURO-OTOLOGIC TREATMENTS: For patients with dizziness causing nausea or affecting balance, treatment of these conditions may be necessary before other rehabilitative therapy can be accomplished.

a. Treatment of Fixed Lesions:

i. Post-Traumatic Tinnitus: Individuals with TBI may suffer from debilitating tinnitus (ringing in the ears). They may benefit from anti-depressants, anti-seizure medicines, and anxiolytics. In many situations, devices are recommended and may include hearing aids, maskers, and tinnitus trainers. Tinnitus trainers require a 30 day trial to determine masking. More sophisticated devices that use music as opposed to masking are not recommended due to no proof of their superiority.

ii. Hyperacusis/Sonophobia: Individuals with TBI may suffer from significant sensitivity to sound. These individuals may benefit from devices such as tinnitus trainers, musician's plugs, and simple noise plugs.

iii. Sensorineural Hearing Loss: Individuals with TBI may suffer from nerve hearing loss that may be treated with amplification (hearing aids). A full audiometric evaluation may determine if the individual could benefit from such devices.

iv. Vestibular Loss: Individuals with TBI may suffer from loss of inner ear balance function resulting in dizziness and imbalance. This can result from labyrinthine concussion, penetrating injuries, injury to the 8th nerve, and

explosive pressure changes. Vestibular rehabilitation is of benefit in speeding compensation for these losses".

These sections of the MTG reference the fact that treatment of the enumerated conditions may be necessary before other rehabilitative therapy. As found, Claimant suffered a closed head injury, as evidenced by the findings of the paramedics and Claimant's ATPs. (Finding of Fact 5-6, 9 and 12.) The ALJ concluded this injury led to the need for additional testing. (Finding of Fact 27.) Therefore, Dr. Lipkin's recommendation for additional testing is warranted.

The issue of whether Claimant proved the recommendation for hearing aids was reasonable and necessary is a close one. As found, Dr. Lipkin noted there is difficulty in distinguishing between age-related hearing loss and that related to trauma. (Finding of Fact 20.) Dr. Lipkin noted there can be hearing loss in various ranges, both with age-related hearing loss and trauma. Dr. Lipkin offered his view that Claimant's hearing loss was caused by work accident. However, Dr. Lipkin did not provide an explanation for this opinion. That fact, coupled with Claimant's report of hearing problems two years before the subject injury and Dr. Lesnak's testimony regarding the range of Claimant's hearing loss, led the ALJ to conclude Claimant failed to meet his burden of proof to show this was related to the subject accident. Thus, while Claimant sustained head trauma in this accident, on balance, he failed to prove the hearing loss was causally related. (Finding of Fact 28.) As such, his request for medical benefits, i.e. the hearing aids is denied.

ORDER

It is therefore ordered:

1. Respondents shall pay for the testing recommended by Dr. Lipkin as it is reasonable, necessary, and related to Claimant's January 11, 2017 industrial injury.

2. Claimant's request that Respondents pay for hearing aids is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 31, 2018

Digital signature

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. 5-034-710

STIPULATIONS

- The parties stipulated to an average weekly wage of $1,651.14.

- The parties stipulate that, if the claim is found compensable, Claimant is entitled to temporary total disability benefits during the period from December 13, 2016, through March 27, 2017, and temporary partial disability benefits from March 28, 2017, through April 27, 2017.

ISSUES

- Did Claimant establish by a preponderance of the evidence that she sustained a mild Traumatic Brain Injury (TBI) that arose out of the course and scope of her employment with Employer and was causally related to an accident that occurred on or around October 2, 2016?

- If Claimant did establish compensability by a preponderance of the evidence, did Claimant establish an entitlement to medical benefits by a preponderance of the evidence?

FINDINGS OF FACT

1. On October 2, 2016, Claimant, who is currently 63 years old, was walking into the emergency room at the Employer to commence her work day as a pediatric Emergency Room nurse. Claimant was holding a box of toys when she tripped on the sidewalk of the ambulance bay and fell. Claimant testified that she struck the right side of her face.

2. Claimant did not seek any medical treatment on the date of accident and Claimant was able to work and perform her regular shift duties on October 2, 2016. Claimant testified that she informally consulted with a co-worker who was a resident in the ER about her alleged head injuries, but Claimant agrees that this was not a medical evaluation and that Employer does not condone informal medical assessments between co-workers.

3. Claimant reported the trip and fall incident to Employer's "Ouch line" on October 3, 2016. The "Ouch line" report indicates that Claimant reported a hematoma to the eyebrow and an elbow abrasion related to the fall. The report confirms that Claimant declined medical treatment. Claimant agreed that she did not necessitate any medical

treatment for her elbow or hematoma. The report does not indicate that Claimant was experiencing a headache or any other symptoms related to a TBI.

4. Claimant testified that after her trip and fall on October 2, 2016, she began to experience symptoms such as increased anger, having a slower reaction time, feeling dizzy, confused, dazed, that she had a hard time processing, she was distracted, had difficulties with communication, and she felt that she was letting down her co-workers. Claimant testified that her symptoms remained the same in the days and weeks after the alleged date of accident. Claimant denied that her symptoms worsened, changed, or improved in the days and weeks after the date of accident.

5. On November 9, 2016, Claimant had her annual performance evaluation at the Employer. Claimant testified that it was her worst performance review in the history of her career. Claimant testified that she believed that her poor evaluation at work was caused by the TBI that she sustained on October 2, 2016.

6. Claimant's performance evaluation dated November 9, 2016, indicates that Claimant was an "excellent RN" with a "great pediatric skill set." Claimant was counseled in her performance evaluation for having a:

> " . . . difficult time managing her assignment. She often tends to focus on other patients in the department when there are things needing to be done while there is a delay in orders on her patients. [Claimant] often tends to come across to her coworkers as negative. In huddles she often focuses on the negative aspects of things rather than looking for the positive. She is very vocal about these things and her attitude rubs off on other employees. [Claimant] makes snyde remarks to staff and does not communicate very well. [Claimant] seems to have a hard time keeping up with her tasks and will focus on things that aren't as important as other things to get done, is slow at triaging." *See Respondents' Exhibit OO.*

7. Although the performance evaluation was dated November 9, 2016, Claimant agreed that she had been made aware of the performance evaluation by at least November 2, 2016. Claimant agreed that her performance evaluation is based on her performance over a one-year period, yet Claimant maintained at hearing that all the negative aspects in her review were caused by her the accident that had occurred only one month prior to her review being finalized. Claimant was very upset with the negative 2016 review. Claimant testified that this was her first only negative review that she had ever received.

8. Claimant did not seek medical treatment for her alleged work related TBI injuries until December 13, 2016, almost 10 weeks after her date of accident. Claimant described at this evaluation with Dr. Sanders that she was experiencing excessive fatigue, sleepiness, memory problems, and that she felt slower at work. Claimant described to Dr. Sanders that she just recently undergone the worse evaluation that she had ever had in her career. Claimant testified that as of December 13, 2016, she was

experiencing headaches and had a difficult time managing her patient load. These complaints are not noted in Dr. Sanders' medical report. *Claimant's Exhibit 6.*

9. Claimant has a long of history of pre-existing anxiety, depression, and ADHD predating her date of accident. Claimant testified that she has been taking anti-depressants, Abilify and Effexor, since 2009 and has been taking Aderrall since 2009 for ADHD, and she has a script of Ambien for sleep medication. Claimant agreed that she has been taking medication to assist with problems with concentration and focus since 2005. Claimant has a history of migraines dating back to 2003. Claimant has been taking Topamax on a daily basis for headaches since 2003. Claimant has additionally been taking Imitrex for migraines as needed prior to October 2, 2016. Claimant alleges that her headaches have "changed" since her October 2, 2016, in terms of the location of the headache.

10. Claimant's psychiatric medical records date back to 2011. On August 10, 2011, Claimant consulted with Lisa McGloin, M.D. for a history of depression, which she reported had been going on for over 20 years. Claimant described a history of in-patient hospitalizations for possible suicidal ideations. Claimant additionally diagnosed a history of anxiety with "some spaciness/difficulty with word finding and sleep difficulties as well as decreased focus." *See Respondent's Exhibit E, p. 11*.

11. At an October 21, 2011 evaluation with Dr. McGloin, Claimant reported that she was feeling less anxious at work with an increased dose of Effexor. On May 9, 2012, Claimant was evaluated by Dr. McGloin and was seen for continued depression and difficulty with focus and concentration. At another appointment with Dr. McGloin on October 2, 2013, Claimant reported that she was feeling as though she "doesn't fit in at work."

12. On January 8, 2014, Claimant discussed with Dr. McGloin that she had experienced chest pain at work as a result of stress. At a May 20, 2015 evaluation with Dr. McGloin, Claimant reported that she was feeling stressed, tired, and unable to keep up at work. Dr. McGloin increased Claimant's dosage of Effexor and noted that Claimant should consider restarting Abilify. Claimant reported on her intake form that she felt nervous, anxious and on edge nearly every single day.

13. On September 8, 2015, Claimant reported to Dr. McGloin that she was scheduled to transition from nighttime work to daytime work based on a promotion. Claimant testified that when she worked day shifts for the Employer that she was in a managerial position. Claimant described to Dr. McGloin that she was interested in pursuing therapy in addition to psychiatric medication management.

14. On February 15, 2016, Claimant reported to Dr. McGloin regarding recent hallucinations that she had experienced including seeing things out of the corner of her eye, that she thought she heard someone calling her name in a public bathroom and she thought she heard music that was not there. Claimant reported that she had switched to

day shifts in mid-September and that her work was very stressful, that she was having difficulty getting along with coworkers and that she was feeling tired and exhausted.

15. The following month, Claimant reported to Dr. McGloin on March 16, 2016, that she was talking to her manager about her difficulties at work with getting support. Claimant completed a general anxiety disorder self-report where she noted that she was feeling "easily annoyed or irritable nearly every day especially at work."

16. At a May 9, 2016, evaluation with Dr. McGloin, Claimant reported that the previous month she had decided that she could no longer handle working the day shift in the charge nurse position secondary to "lack of support/respect" and in order to step down from the charge nurse position, Claimant was required to transition back to night shifts. Claimant reported to Dr. McGloin that she was experiencing fatigue, poor focus, depression, and that she was feeling stressed and overwhelmed. Claimant continued to report hallucinations including thinking that someone was calling her name when that was not actually happening. Dr. McGloin diagnosed Claimant with generalized anxiety disorder, social anxiety disorder, ADHD, major depressive disorder and insomnia.

17. When Claimant stepped down as the day shift charge nurse, she wanted to stay on the day shift, but her supervisor did not accommodate that request. Claimant was disappointed to be required to transition back to the night shift in the spring of 2016.

18. Claimant's medical records confirm that she qualified for the diagnosis of chronic migraine as of May 18, 2016. On June 10, 2016, Claimant emailed Dr. McGloin and reported that she had been seen for complaints related to dizziness on May 19, 2016. Claimant agreed that she sought medical treatment related to complaints of dizziness in May 2016, five months prior to the date of accident.

19. At a July 18, 2016, evaluation with Dr. McGloin, Claimant reported that returning to the night shift over the past couple of months had taken a toll on her, that she was feeling overwhelmed, having a hard time focusing, that she was having a difficult time prioritizing her work, that she felt she had many "piles" at work and home, that she felt unsupported and defeated in many areas, including at work and at home with relationships. Claimant continued to report that she felt as though her "brain is playing tricks on her" and she reported that she had thought she had seen a Dalmatian in the back of a truck and when she looked again there was no Dalmatian, that she continued to think that she heard her name being called when there was no one there.

20. Claimant agreed that she was having hallucinations in the months preceding the alleged date of accident and Claimant believed that these hallucinations were caused by stress at work and at home.

21. On September 20, 2016, Claimant was evaluated by Dr. McGloin, less than two weeks prior to the date of accident in this case. At this evaluation, Claimant continued to report a feeling of extreme hopelessness at work, feeling overwhelmed, that she felt

stuck, and that she had experienced such decreased energy, interest, motivation, and hopelessness that she had a moment of suicidal ideation at work. Claimant described that she was finding the EPIC system inefficient and difficult to use and was experiencing difficulty keeping up with her work-flow.

22. Claimant testified that the EPIC system was a new computer software program that was implemented at Employer in the spring of 2016 to manage medical record documentation. Claimant agreed that she had a difficult time learning the new EPIC software program. Claimant agreed that she felt she was falling behind at work in the months prior to the date of accident because of the transition to the EPIC system.

23. On May 19, 2016, Claimant was evaluated by Lori Kaufman, PA at Employer for complaints of chronic intractable headache and dizziness.

24. On November 2, 2016, one month after the alleged date of accident, Claimant returned to Dr. McGloin for a psychiatric evaluation. Claimant reported to Dr. McGloin that she was feeling "better than at last visit, depression improving. 'Less angry' at work, feels less stuck. Focus a little better." Claimant described that she had recently had a poor performance evaluation and that there were comments about her difficulty managing the high patient load and regarding her negativity on the job. Claimant expressed to her psychiatrist that she felt betrayed and unsupported at work.

25. The November 2, 2016, report from Dr. McGloin does not make any mention of Claimant's alleged work related accident, a possible head injury, and there is no discussion of any symptoms attributable to the accident. To the contrary, the November 2, 2016, report indicates that Claimant's psychiatric condition had improved since the month prior to the alleged date of accident. Claimant agreed at hearing that her concentration and focus in November 2016 had improved as compared to her ability to concentrate and focus in September 2016. The November 2, 2016, evaluation does not support Claimant's allegation that she had sustained a work related traumatic brain injury on October 2, 2016. The report further rebuts Claimant's allegation that she was suffering from post-concussive type symptoms in the days and weeks following October 2, 2016.

26. On November 15, 2016, Claimant underwent a mental health intake with Shannon Richardson, LCSW at Employer. Claimant testified that this was an extensive evaluation as it was an initial intake and the evaluation occurred pursuant to a referral from her personal psychiatrist, Dr. McGloin. Claimant was in the process of setting up a new counseling and therapeutic relationship with counselor Richardson. Counselor Richardson's lengthy report does not make any mention of Claimant's alleged October 2, 2016, traumatic brain injury. Claimant provided an extensive medical history to Counselor Richardson, including a history of her anxiety, excessive worry, that she felt as though she would start talking in a group and almost blackout, that she had been experiencing hallucinations, that her diagnosis of depression and ADHD dated back to 2003, that she had been hospitalized for suicidal ideation in 2009, and had treated with Dr. McGloin since 2011. Given this extensive medical history provided by Claimant at this medical

evaluation, it is significant that there is no mention in the intake history of Claimant's alleged traumatic brain injury stemming from an October 2, 2016, fall.

27. On December 2, 2016, Claimant was evaluated by another new personal provider, psychologist, Trina Seefeldt, Ph.D. Claimant again described a long history of depression, anxiety, ADHD, and complained of a depressed mood, sleep disturbance, feeling hopeless and helpless, and experiencing psychosocial stressors at work and at home. Claimant described to Dr. Seefeldt that she was struggling with relationships at work after changing from the day shift charge nurse position and returning to the night shift in the emergency room in May 2016. Claimant described that she wanted to attempt to resolve her workplace stressors. Claimant discussed that her husband had chronic health problems and was retired and that she was forced to continue working due to financial constraints. Again, there is no mention of Claimant's alleged traumatic brain injury or the fall of October 2, 2016.

28. At a March 6, 2017, evaluation with Dr. Seefeldt, Claimant reported that she was frustrated because she wanted to retire but was financially unable to afford to do so.

29. On March 9, 2017, Claimant underwent an independent medical evaluation with Dr. John Burris. Dr. Burris testified at the hearing regarding his evaluation of Claimant, his review of Claimant's medical records, and his opinion regarding the October 2, 2016, event at work. Dr. Burris opined to a reasonable degree of medical probability that he does not believe Claimant sustained a concussion, post-concussive syndrome, and/or traumatic brain injury as a result of the slip and fall on October 2, 2016.

30. Dr. Burris explained that the typical presentation for a TBI is for the symptoms to be at their worst in the immediate days and weeks following the accident. The majority of mild traumatic brain injuries resolve within a period of days and weeks. Claimant's medical records are not consistent with the typical presentation of a traumatic brain injury. Claimant's first medical evaluation with Dr. McGloin on November 2, 2016, following the October 2, 2016, date of accident, documents an improvement of symptomatology. Claimant reported that she was feeling less fatigued, less overwhelmed, having less anxiety, and did not report symptoms such as a headache or memory loss.

31. Claimant underwent a neuropsychological evaluation on January 25, 2018, with Jennifer Peraza, Psy.D. Dr. Peraza spent over 12 hours performing the evaluation and neurological workup of Claimant. Dr. Peraza's findings as a result of the neuropsychological evaluation were that Claimant did not demonstrate any cognitive deficits, which would normally be attributable to a traumatic brain injury or postconcussive syndrome. Dr. Peraza attributed any deficits noted during the evaluation to Claimant's preexisting diagnosis of ADHD and to Claimant's long-term preexisting use of Topamax for treatment of chronic migraines. Dr. Peraza further postured that Claimant likely had a learning disability and should undergo a comprehensive evaluation to assess for a learning disability. Dr. Peraza recommended additional psychotherapy for stress management and stress reduction techniques.

32. Dr. Burris testified that the neuropsychological evaluation supported his conclusion that Claimant did not suffer from a traumatic brain injury or post-concussive syndrome related to the October 2, 2016, slip and fall event. Claimant reported to Peraza at her evaluation that "her symptoms started gradually about 2-3 weeks after the fall." Claimant alleged that 2-3 weeks after the fall she began to experience "problems with distractibility, fatigue, slower thinking, and trouble remembering and completing tasks." Claimant's report of the temporal onset of her symptoms 2-3 weeks after her fall is not consistent with a typical presentation for a traumatic brain injury or post-concussive syndrome. It is not typical for symptoms to start 2-3 weeks after a traumatic event.

33. The Colorado Medical Treatment Guidelines support that TBI symptoms start immediately after a traumatic event and improve within a period of 2-3 weeks.

34. Claimant's further reports of symptoms related to feeling fatigued, having slower processing, difficulty completing tasks, and feeling distracted are all preexisting complaints that are well supported by Claimant's preexisting medical records with Dr. McGloin. Claimant has been reporting complaints related to fatigue, processing difficulties, and distractibility for years prior to her date of accident in this claim and Dr. McGloin's medical records document that these symptoms peaked at their worst in the two weeks prior to October 2, 2016. Dr. Burris further explained that all of Claimant's alleged TBI symptoms were symptoms that were attributable to her extensive prescription medication regimen that she has been utilizing for almost a decade. Dr. Burris agreed with Dr. Peraza's conclusion regarding the likely impact of Claimant's lengthy history of utilizing Topamax as causing memory deficits.

35. Claimant underwent an independent medical evaluation with Dr. Bennett Machanic at her own expense. Dr. Machanic testified that he did not have an opportunity to review any of Claimant's predate of accident medical records. Dr. Machanic had not reviewed any of the pre October 2, 2016, medical records from Dr. McGloin.

36. Dr. Machanic agreed that a typical presentation for traumatic brain injuries is that within the first 72 hours following the acute accident the patient will experience the worst onset of symptomatology. Dr. Machanic specifically agreed that Claimant's TBI symptoms should have been at their worst during the first week following the October 2, 2016, date of accident.

37. Dr. Machanic agreed that at best Claimant's findings are indicative of a "very mild traumatic brain injury." Dr. Machanic went on to agree that the symptoms related to the very mild traumatic brain injury were "spotty," but Dr. Machanic felt there were cognitive deficits that could not otherwise be explained. When confronted with Dr. Peraza's conclusion that the cognitive deficits could be related to an undiagnosed learning disability, Dr. Machanic disagreed, but was unable to provide the medical basis for his disagreement, conceding that he has little to no experience with learning disabilities. Dr. Machanic agreed that he did defer to Dr. Peraza's interpretation of the neuropsychological data compiled during the neuropsychological testing. Dr. Machanic

agreed that the prescription for Topamax that Claimant had been utilizing for more than 10 years could have caused at least some of the memory deficits noted during the neuropsychological evaluation.

38. It is found that Dr. Machanic's opinions are less credible and persuasive than the opinions expressed by Dr. Burris and reflected by the medical record. Dr. Machanic did not have the advantage of reviewing Claimant's medical records dating back to 2011. Dr. Machanic was unaware of Claimant's symptom complaints that long predated October 2, 2016, alleged TBI, including complaints related to fatigue, processing difficulties, feeling of being overwhelmed and disorganized, and forgetful. Although Dr. Machanic is a neurologist, he testified that he does not typically treat or manage TBIs. Dr. Burris testified that he is currently managing TBIs. Thus, Dr. Machanic's personal experience and credentials do not render him better suited to render an opinion on the alleged TBI diagnosis than Dr. Burris.

39. Claimant's testimony is not credible as it is not supported by the weight of the medical evidence. If Claimant had in fact sustained a TBI on October 2, 2016, it is probable that this would have been documented in either the November 2, 2016, report from Dr. McGloin, the November 15, 2016, report from Ms. Richardson, or the December 2, 2016, report from Dr. Seefeldt. All three of these evaluations addressed issues that are central to the symptoms that Claimant now associates as being caused by a TBI and as such the absence of documentation of the alleged TBI in these reports strongly weighs against Claimant's credibility.

40. Claimant's belief that her negative annual performance review was caused by her TBI is not credible. Claimant's performance review documents snyde comments and negativity, which are not symptoms associated with a TBI. Further, it is implausible to conclude that the negative review was based on one month of work performance as Claimant contends, rather than a year of performance, which is the nature of an annual review.

41. Dr. Burris' opinion that the course of medical treatment that Claimant underwent per the referral of the COSH clinic was not reasonable and necessary is credited. There is no indication that Dr. Sanders or any of the COSH providers were aware of Claimant's medical history and pre-date of loss complaints to Dr. McGloin or that these providers considered the temporal history of Claimant's alleged TBI presentation.

CONCLUSIONS OF LAW

1. The purpose of the Act, Section 8-40-101, C.R.S. *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably

true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. A "compensable industrial accident is one which results in an injury requiring medical treatment or causing disability." *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). It is undisputed that Claimant did not obtain medical treatment for almost ten weeks after the slip and fall on October 2, 2016, and that during this time period Claimant continued to work and perform her regular work duties. Claimant has failed to establish by a preponderance of the evidence that her October 2, 2016 injury caused an injury that required her to obtain medical treatment or caused a disability.

5. Claimant has failed to establish by a preponderance of the evidence that her industrial fall caused her to develop post-concussive syndrome or a mild TBI. The medical opinion of Dr. Burris is credited over the opinion of Dr. Machanic. Dr. Machanic rendered his opinions without the advantage of having reviewed the Claimant's pre-date of accident medical records. Claimant's pre-date of loss medical records document complaints that are identical to the post-accident complaints. Further, the temporal progression of Claimant's symptoms is not consistent with the typical presentation for a TBI in that Claimant's immediate presentation following the accident was better than her

presentation before the accident. Claimant's testimony is not credible and her allegation that her poor performance evaluation in November 2016 resulted from her TBI is not supported by the weight of the evidence.

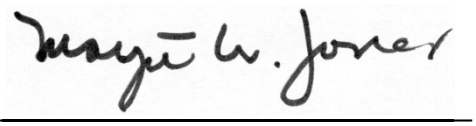
ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits for an October 2, 2016, date of accident is denied and dismissed.

2. Any issues not determined in this decision are reserved for future determination.

DATED: October 4, 2018



Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

4. Claimant's medical history was significant in that she was previously diagnosed with fibromyalgia. Claimant treated with multiple physicians from 2005 through 2009 this condition.[1] In August 2013, Claimant was hospitalized for one day for back, hip and leg pain. She received physical therapy ("PT"), medications and chiropractic treatments. Claimant also treated for chronic low back pain in 2012-2015.

5. On December 16, 2013, Claimant underwent an initial evaluation at the Spine Correction Center.[2] In the patient history form, she said the onset of pain started in January 2013 and she received chiropractic care from January through April, as well as a cortisone shot in the right hip. She also reported radiating pain in legs and cramping in the right calf. The diagnosis was lumbago, low back; stiffness and low back; and myalgia. X-rays taken at the previous evaluation showed loss of/severely decreased lumbar lordotic curve. Claimant received a trigger point injection on December 23, 2013. Claimant received chiropractic treatments from December 16, 2013 through August 14, 2014, with the frequency of treatments decreasing over the last four months.

6. Claimant was evaluated by Anne Robinson, M.D. (Associates in Family Medicine P.C) on June 17, 2015, complaining of difficulty walking and going upstairs. On examination, Claimant exhibited tenderness in both hips. Dr. Robinson diagnosed Claimant with fatigue and noted Claimant did not want to try antidepressants or gabapentin. No medications were prescribed.

7. There was no evidence in the record Claimant missed time from work in 2014 and 2015 as a result of the prior treatment for her back.

8. Claimant testified she was injured on March 24, 2016 at work while sitting on the edge of her chair. The chair rolled out and caused her to fall onto the ground. She landed on her right elbow and gluteal region.

9. Respondents did not dispute the incident on March 24, 2016 occurred.

10. There was no evidence in the record that Respondents designated an ATP for Claimant before May 9, 2016.

11. Claimant testified she felt symptoms the next day, but continued to work. Two days later (Saturday), she did not have to work and applied ice to her hip and side. On Sunday, she experienced pain when putting dish away. She then went to Harmony Urgent Care.

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[1] The ALJ notes the medical records which documented treatments were not initially admitted into evidence, but were summarized in the report prepared by Henry Roth, M.D.

[2] This facility was also associated with the name Physical Medicine Center of the Rockies, PLLC.

12. On March 27, 2016, Claimant was evaluated by Karen Hill, D.O. at Harmony Urgent Care [University of Colorado Health ("UC Health")].[3] At that time, she reported falling onto her right elbow and back on March 24, 2016. Claimant initially had upper back pain, which lessened and the following day had bilateral lumbar pain, left more than right. She also reported pain in her bilateral hips. X-rays were taken of the lumbar spine, which were read by J. Paul Doye, M.D. There was no evidence of acute osseous abnormality of the lumbar spine, but straightening of the normal lordosis was present, along with mild multilevel spondylosis. Claimant received a prescription for Valium.

Dr. Hill's diagnosis was low back pain without sciatica, unspecified back pain laterality. Dr. Hill completed a M-164 and issued work restrictions of no repetitive lifting, lifting, carrying and pushing/pulling limited to 5 pounds.

13. Claimant was evaluated by Colleen Wolf, PA-C at UC Health on March 29, 2016. She reported a rolling chair slid from underneath her, causing her to fall to the floor. She struck the right elbow and rear end on the floor. Claimant stated she didn't feel well that night, but was somewhat improved the next day. On Sunday she bent over to put a dish in the lower cabinet at home, which cause sudden pain and spasm. On examination, Claimant exhibited decreased range of motion ("ROM"), specifically with forward flexion and bilateral side bending. PA-C Wolf's assessment was: low back strain, initial encounter; sacroiliac joint dysfunction of the right side.

Claimant was taken off work for March 29-30, 2016 and a 5 pound lifting restriction was issued. PA-C Wolf completed a M-164, which was also signed by Kevin O'Toole, D.O. The work-relatedness of this premises injury was to be determined. Claimant was referred to Scott Parker, DC of Colorado Chiropractic and Sports.

14. Claimant was evaluated by Dr. Parker of Colorado Chiropractic and Sports Injury Specialist PC on March 30, 2016. She was complaining of bilateral low back pain (4/10), along with lateral thigh discomfort, as well as numbness and tingling. Restricted lumbar ROM was noted on examination. Dr. Parker's impression was: lumbosacral/ sacroiliac joint strain/dysfunction; reported fibromyalgia and goiter-unrelated; see past medical history. Claimant was scheduled for up to five chiropractic treatments.

15. On April 6, 2016, Claimant returned to Dr. Parker for a third chiropractic treatment with Dr. Parker. She reported improvement, but then had a setback. Claimant received manual lumbosacral traction and soft tissue mobilization, along with neuromuscular reeducation. Claimant was advised regarding home exercises, proper body mechanics and lifting techniques.

16. Within Dr. Parker's records, there was a note which stated the claim was denied by Insurer on April 7, 2016.[4]

[3] The evidence was unclear whether Respondents paid for Claimant's treatment at UC Health.

[4] Exhibit A, p.5.

17. On April 7, 2016, Claimant returned to UC Health and was evaluated by Tracey Stefanon, D.O. On examination, back ROM was limited in forward flexion-fingertips were just below the knee. Extension was approximately 5" and side bending/rotation were full and symmetrical. Dr. Stefanon's impression was: fall from rolling chair; low back pain with probable right SI dysfunction; history of fibromyalgia-not work-related, but could be contributing to current recovery; concern for delayed recovery. The ALJ inferred that Dr. Stefanon was of the opinion that will be low back pain and probable right SI dysfunction was work-related.

Dr. Stefanon instructed Claimant on a gentle range of motion stretching program to be before her PT began. Claimant's 5 pound lifting restriction was continued.

18. There was no evidence Claimant returned to UC Health for further treatment.

19. On April 13, 2016, a Notice of Contest was filed on behalf of Respondents.

20. On April 19, 2016, Claimant was evaluated at the Spine Correction Center. She was diagnosed with low back pain, radiculopathy and lumbosacral region, pain and right leg, myalgia, sacroiliitis and cervicalgia. A letter was signed by multiple providers at this facility. A subsequent note documented Claimant had received five treatments as of April 28, 2016. Seven more treatments were recommended.

21. A Designation of Medical Providers, was admitted into evidence.[5] Banner Occupational Health was selected as the provider. This document also had contact information for Insurer. Claimant signed this document and it was dated May 9, 2016.

22. There was no evidence in the record that Claimant treated at Banner Occupational Health.

23. On May 26, 2016, Claimant returned for treatment and was evaluated by Mary Eller-Conte NP at the Spine Correction Center. She was complaining of continuous low back pain, radiating to her buttocks. NP Eller-Conte's diagnoses were: low back pain; radiculopathy, lumbosacral region; pain and right leg; and myalgia. Claimant received therapeutic exercise, stretching treatments and neuromuscular reeducation.

24. On July 30, 2016, Claimant fell on a slippery surface at an apartment complex. She experienced pain and returned to the Spine Correction Center.

25. Henry Roth, M.D. performed an IME at the request of Respondents on November 2, 2016. Claimant complained of low back pain, buttock pain, and bilateral

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[5] Exhibit 9.

leg pain. Dr. Roth felt that Claimant had a widespread pain presentation that was consistent with her pre-existing history of fibromyalgia and idiopathic back pain. Dr. Roth opined there was no structural abnormality that would explain Claimant's pain complaints.

In his testimony at hearing, Dr. Roth elaborated on the conclusions in the report. He is board-certified in Internal Medicine and has practiced in the Occupational Medicine field. He is level II accredited pursuant to the WCRP. Dr. Roth stated there was no medical evidence Claimant suffered any soft tissue or structural injuries as a result of the March 24, 2016 work incident. He testified that it is not medically probable or plausible that Claimant's sudden onset of symptoms was related to an event that had occurred over 72 hours earlier. He testified that in his expert opinion, Claimant did not suffer an injury or disability as a result of the March 24, 2016 incident. The ALJ credited the opinions of Claimant's treating physicians over those offered by Dr. Roth, which established that Claimant's symptoms and need for treatment resulted from the March 24, 2016 incident.

26. Claimant proved she suffered a compensable injury on March 24, 2016.

27. Claimant testified she did not know the exact amount of time she lost from work, but estimated it was 200 hours. Claimant failed to introduce evidence to fully support the TPD claim, including documents which showed hours worked and/or time lost during the period of March 24, 2016 through August 1, 2016.[6] The ALJ inferred from the evidence that Claimant's earnings were less than her AWW of $1,288.46, but had no specific evidence as to what those earnings were.

28. The July 30, 2016 fall constituted a subsequent intervening event. The ALJ found Claimant required medical treatment as a direct result of this incident. This event served to terminate Respondents' liability for wage and medical benefits.

29. Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S. (2016). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment

[6] Exhibit 3 was a letter sent from Insurer to Employer, dated April 12, 2016, which documented that Claimant's hours were reduced to four hours per day and she was working with a lifting restriction. However, this document failed to show how long Claimant worked a reduced schedule and what her actual earnings were.

aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995). Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). However, no compensability exists if the disability and need for treatment was caused as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). The question of whether Claimant met her burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In the case at bench, the ALJ was persuaded Claimant suffered an aggravation of her underlying condition by working for Employer. Claimant was performing her job duties at the time she lost her balance and fell off a chair at work, which caused her to experience low back pain. This aggravated the condition of her low back. Respondents did not dispute the circumstances of this injury. As found, Claimant's treating physicians, Dr. Hill, Dr. O'Toole and Dr. Parker documented her symptoms, treatment, as well as work restrictions after she was injured. The ALJ concluded it is more probable than not that Claimant was injured arising out of and in the course of her employment.

30. Based upon the finding that Claimant suffered a compensable injury, Respondents are required to provide medical benefits to cure and relieve the effects of the industrial injury. As found, there was no evidence in the record that Respondents provided Claimant with a designation of provider until May 9, 2016. Therefore, Respondents are liable for the treatment to Claimant received through July 30, 2016, at which time she sustained a new injury.

31. Results flowing "proximately and naturally from an industrial injury are compensable". However, no compensability exists when a later accident or injury occurs as a direct result of an independent intervening cause. Whether a particular condition is a result of an independent intervening cause is a question of fact for resolution by the ALJ. *Owens v. Industrial Claim Appeals Office,* supra, 49 P.3d at 1188-1189. Here, Claimant's fall on July 30, 2016 constituted an independent intervening cause and the ALJ concluded this terminated Respondents' liability for wage and medical benefits.

32. As found, there was insufficient evidence to support Claimant's claim for TPD benefits. Claimant did not adduce evidence of the time she lost from work. In the absence of evidence which showed the number of hours Claimant worked, as well as the pay she received during the period of time, the ALJ found Claimant failed to prove this claim.

ORDER

It is therefore ordered:

1. Claimant met her burden of proof by a preponderance of the evidence to show she suffered a compensable injury on March 24, 2016 while working for Employer.

2. Respondents shall provide medical benefits to Claimant through July 30, 2016, including treatment received at University of Colorado Health, Colorado Chiropractic and Sports Injury (Dr. Parker) and Spine Correction Center.

3. Claimant's claim for TPD benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

This decision is final and not subject to appeal unless a full order is requested. The Request shall be made at the Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203 within seven working days of the date of service of this Summary Order. § 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under § 8-43-301, C.R.S.

If a Request for Specific Findings of Fact and Conclusions of Law is made, Claimant's or Respondents' counsel may submit proposed Amended Specific Findings of Fact, Conclusions of Law, and Order (Amended) that substantially incorporates the above findings of fact and conclusions of law within five working days from the date of the Request. The proposed order must be submitted by e-mail in Word or Rich Text format to oac-dvr@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

DATED: September 11, 2018

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-959-328-005

ISSUES

The parties noticed the following issues for hearing:

- Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury on January 26, 2014, while working for Employer.

- Whether Claimant established by a preponderance of the evidence that she is entitled to medical benefits.

    - Whether authorized treatment providers (ATPs) provided Claimant's treatment.

    - Whether Claimant's medical care was reasonable and necessary.

- What is Claimant's average weekly wage (AWW).

- Whether Claimant established by a preponderance of the evidence that she is entitled to temporary partial disability (TPD) benefits.

- Whether Claimant established by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits.

- Whether Claimant established by a preponderance of the evidence that she is entitled to permanent total disability (PTD) benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer hired Claimant as a full time bus driver in 2009. Claimant passed Employer's pre-employment physical examination.

2. In 2006 and 2007, Claimant underwent cervical spine fusions at two levels and continued to treat her upper back symptoms at University Hospital. Claimant's low back was asymptomatic and she was able to perform her job duties without restrictions.

3. Claimant's job duties included driving the bus and helping passengers with wheelchairs, bicycles and luggage. The job description required the ability to lift up to 50 to 70 pounds. She worked from 2009 until 2013 without any difficulty. In early 2013, Claimant had surgery on a toe and was off work for approximately two months. She passed Employer's physical exam and returned to work full time (45 hours per week).

4. On January 26, 2014, Claimant was in a motor vehicle accident (MVA) in the course of her employment. She was driving Employer's bus at between 45 to 55 miles per hour when a car sideswiped the bus in a construction zone. She lost control of the bus and ran over the median and off the road. The bus struck two light polls and a sign before coming to a stop approximately twenty feet off the highway. The force of the accident was sufficient to break several lights inside the bus, dislodge the bus's windshield, crack and split the front bumper, and crush the iron bike rack mounted on the front of bus. Both the bus and the car that hit it were so badly damaged they were not drivable.

5. Claimant experienced the immediate onset of left knee pain. Her pain increased as the day progressed, and she reported to an emergency department. Medical providers evaluated Claimant and diagnosed arthritis and a bruised knee. Claimant did not complain of back pain at that visit or two days later when Dr. Raschbacher evaluated her and placed her at MMI. Claimant testified that she did not immediately return to work because she did not feel ready to go back to work.

6. Claimant credibly testified that her back pain began more than two days after the MVA. She testified that she had some stiffness in her low back right after the accident but thought her muscles were just sore. Additionally, at the time of the MVA Claimant was taking Voltaren (a/k/a Diclofenac) for her previously diagnosed arthritis and the Judge infers from the totality of the evidence that this medication could have masked her initial low back symptoms.

7. Because Dr. Raschbacher placed Claimant at MMI without restrictions, she returned to work for one week before taking a previously scheduled vacation. During the week she worked, Claimant began experiencing nagging pain in her low back, hip, and tailbone. Claimant took Tylenol and a previously prescribed anti-inflammatory to calm the pain. During her vacation, Claimant's back pain increased and she began to experience pain radiating down the back of her leg to her foot, and numbness in her left foot.

8. Claimant's symptoms caused her to make an appointment to have her low back evaluated. Claimant credibly testified that she saw the doctor approximately five days later, on February 13, 2014. Claimant's medical provider diagnosed sciatica.

9. On February 16, 2014, Claimant presented at the Emergency Department because her back pain was unbearable. Claimant associated her symptoms with her MVA. Claimant gave a history of being in a motor vehicle accident in January. The records of that visit indicate that the low back problem was something new and state: "Pain associated with an MVA".

10. On February 20, 2014, Claimant returned to University Hospital. The record for that visit mentions that Claimant's pain had come on two to three weeks previous to the visit, which puts it within four or five days after the January accident.

11. Claimant was working for Employer at that time and experienced difficulty with her routes because they required her to sit for four hours at a time, which exacerbated her pain.

12. On March 25, 2014, Claimant's medical provider prescribed Norco and took Claimant off work due to her high level of pain and the medication's sedating side effects. The University Hospital note states, "Work note provided since patient is a bus driver and is requiring pain medications."

13. Claimant took the provider's note to Employer. Employer's representatives did not instruct Claimant to return to Dr. Raschbacher or to seek medical treatment through Workers' Compensation. Rather, Employer terminated Claimant on March 23, 2014. Claimant has not worked since.

14. Claimant credibly testified that she did know she needed to report her back injury to Employer because Dr. Raschbacher had released her to full duty and placed her at MMI, and she initially was able to work her normal schedule of forty-five hours per week.

15. Respondents offered no persuasive evidence that Claimant previously sustained a low back injury, experienced symptomology in her low back, or received treatment to that part of her body.

16. At the time Employer terminated Claimant's employment, she was earning $20.25 dollars per hour and time and one-half for overtime. Claimant worked approximately forty-five hours per week. Employer provided Claimant's health insurance coverage. Her coverage expired in March 2015 because she was not able to pay the premium of approximately six hundred dollars per month.

17. The ALJ finds Claimant's average weekly wage is $961.88 plus the cost of her health insurance coverage.

18. Claimant continued to treat outside of the Workers' Compensation system. She participated in physical therapy and received injections without much benefit. Claimant eventually underwent surgery that fused her lumbar spine from L-4 through S-1.

19. While recovering from surgery, Claimant developed a MERSA infection. Her treatment required re-hospitalization for one to two months while she received IV antibiotics.

20. When Claimant was able to leave the hospital, she moved to her daughter's home in Mississippi to recuperate. While in Mississippi, Claimant treated with Dr. Cullom who recommended a spinal cord stimulator. Claimant also treated with pain specialists for pain medications. Because Claimant carried health insurance through the state of Colorado, she returned to Colorado to continue treatment.

21. Upon her return to Colorado, Claimant pursued treatment at Rocky Mountain Pain Solutions. Claimant's treatment provider prescribed OxyContin for breakthrough pain and Morphine around the clock. Claimant testified that her pain on these medications still ranges between three and four over ten, with breakthrough pain as high as six over ten. Claimant testified that she experiences side effects from the medication that prevent her from working. These include:

- Feeling like being in a fog,
- Constant sleepiness,
- An inability to concentrate, and
- Slow reflexes.

22. In June 2014, Claimant applied for Social Security Disability Benefits. In her application, Claimant stated she was not pursuing workers' compensation. Claimant credibly and persuasively testified that at the time she filled out the application she was not pursuing a workers' compensation because she was unaware that she could do so because Dr. Raschbacher had placed her at MMI and Employer did not have her seek further care when her back pain became so severe that she sought treatment.

23. Nurse Practitioner Lindsey Goldstein supported Claimant's application for FMLA, and Claimant remained on FMLA for twelve months. When Claimant's FMLA ended, Dr. Cullum's restrictions (no lifting, stooping, crawling, or prolonged sitting) prevented her from returning to work with Employer.

24. Dr. Collum supported Claimant's application for unemployment benefits. However, Employer opposed the application taking the position that Claimant was unable to perform any work.

25. Upon her return to Colorado, Claimant returned to treatment with Dr. Burger at University Hospital. Dr. Burger determined that the hardware from Claimant's L4-S1 fusion was in place, but that degenerative changes at L3-L4 caused Claimant's pain. Claimant's prior fusion caused the degenerative changes. Dr. Burger declined to place a spinal cord stimulator because the procedure could cause Claimant's previous MERSA infection to recur.

26. Based on the totality of the evidence, Claimant is not a candidate for additional surgery, including the placement of a spinal cord stimulator.

27. Katherine D'Angelo, MD, testified for Respondents at hearing. After examining Claimant once, she opined:

- Claimant's MVA was not related to any of her symptoms;
- Claimant's pain generator is osteoarthritis;

- Claimant sustained no trauma during the MVA that could have caused her current symptoms, need for surgery, or current pain.

28. Dr. D'Angelo spends 40% of her time performing Respondent-sponsored "Independent" Medical Evaluations.

29. Dr. D'Angelo acted as an advocate for Respondents. For example, she pointed out multiple times in her report that Claimant's pursuit of a workers' compensation claim coincided with Claimant's loss of personal insurance.

30. Dr. D'Angelo prepared an eighty-three page report for Respondents. Dr. D'Angelo charges fee scheduled rates for such work.

31. Although she is self-employed, Dr. D'Angelo testified that she did not know how much she has billed Respondents on this case. She "couldn't even estimate." She also testified that she could not recall whether she had done other work for Employer. The ALJ finds this testimony disingenuous.

32. Dr. D'Angelo relied on a study published in 2009 to support her opinion that Claimant's degenerative spine was genetically caused. However, the study she relied on studied micro-trauma, not macro-trauma that Claimant experienced.

33. Dr. D'Angelo acknowledged that the MVA could have caused injury to Claimant's low back, especially because that portion of Claimant's back exhibited degenerative disc disease.

34. Claimant's counsel asked Dr. D'Angelo whether she had reviewed the police report of the MVA to understand the magnitude of the impact. She responded, "Maybe." She acknowledged that she did not refer to the police report in her report.

35. The ALJ finds Dr. D'Angelo's opinions to be biased towards Respondents. She performs IMEs only for respondents and was disingenuous in responding to questions about whether she had done other work for Respondents, and not being able to estimate what she had billed Respondents for her work on this claim.

36. Hugh Macaulay, MD, testified at hearing and by deposition. Dr. Macaulay reviewed both the police report of the MVA and photographs of the accident site and determined that the MVA involved a significant amount of force. He determined that Claimant's back pain prior to the MVA related to her cervical spine and upper extremities. Claimant's low back was asymptomatic before the MVA. Dr. Macaulay relied on University Hospital notes from February 13, 2014, which recorded Claimant's low back symptoms as "new," and notes from February 16, 2014 where Claimant described having low back pain for two to three weeks. Dr. Macaulay opined that the MVA caused Claimant's low back to become symptomatic.

37. Dr. Macaulay testified that the MVA did not cause Claimant's degenerative disc disease, but it left her a "sitting duck," meaning that Claimant's low back was

compromised and that something of a relatively nature would become a significant problem.

38. Dr. Macaulay opined that Claimant's treatment at University Hospital and her subsequent providers was reasonable, necessary, and directly related to her January 26, 2014 work injury.

39. Dr. Macaulay opined that Claimant had an extremely limited functional capacity. Specifically:

- Claimant's right ankle reflex is absent due to nerve damage;
- Claimant has left foot problems in the L5 and S1 dermatomes;
- Claimant has left SI joint dysfunction; and
- Claimant experiences neural pain both from her lumbar fusion and from the MRSA infection.

Dr. Macaulay also noted that Claimant's medications limit her ability to work, and cause her to be ineligible for a driver's license.

40. The ALJ finds the opinions of Dr. Macaulay to be persuasive. They are consistent with Claimant's explanation of her experience and symptoms. They take into account the mechanism of injury. They acknowledge that Claimant had pre-existing degenerative disc disease and explain how that left Claimant susceptible to the injury she suffered.

41. Ms. Dorris Shriver testified as an expert in the fields of occupational therapy/vocational rehabilitation/and life care planner. Ms. Shriver evaluated Claimant on January 12, 2017 and issued a report containing her opinions. Ms. Shriver reviewed Claimant's medical records and was familiar with Claimant's work restrictions. Ms. Shriver opined Claimant is not employable even in part-time, sheltered position. Her opinion is supported by these findings:

- Claimant has issues with hand sensitivity and decreased ranges of motion in her low back, neck, and bilateral shoulders, hips, and knees.
- Claimant is a high school graduate with some learning delays.
- Claimant is unable to perform skilled labor and has no transferable skills.
- Claimant has exceptionally limited fine and gross motor skills.
- Claimant's use of narcotic pain medications would prohibit many employers from hiring Claimant.

- Claimant is in observable chronic severe pain, and cannot become pain free enough to work.

The ALJ finds Ms. Shriver's opinions to be well founded, credible, and persuasive.

42. Claimant testified she has not looked for work because her only experience is bus driving, and she remains on pain medication with no current plans to discontinue. Claimant continues to suffer from severe pain in her low back and legs.

43. Based on the totality of the evidence, Claimant is unable to return to work given her symptoms and the side effects of her medications. She can lift only approximately fifteen pounds on a less than daily basis. While she can walk, a walk of four or five blocks causes her symptoms to flare.

44. The ALJ finds that Claimant established by a preponderance that the low back injury she sustained on January 26, 2014, while working for Employer, constitutes a compensable work related injury.

45. The ALJ finds that Claimant established by a preponderance of the evidence that authorized treatment providers provided Claimant's treatment.

46. The ALJ finds that Claimant established by a preponderance of the evidence that the medical care she received was reasonable, necessary, and directly related to her work injury and complications from the treatment for that injury.

47. The ALJ finds that Claimant established by a preponderance of the evidence that Claimant's average weekly wage is $961.88 plus the cost of her health insurance coverage.

48. The ALJ finds that Claimant has not established by a preponderance of the evidence that she is entitled to temporary partial disability benefits.

49. The ALJ finds that Claimant has not established by a preponderance of the evidence that she is entitled to temporary total disability benefits.

50. The ALJ finds that Claimant established by a preponderance of the evidence that she is entitled to permanent total disability benefits as of March 24, 2014.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In determining credibility, the ALJ should consider the witness's manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990). Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968), *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the ALJ finds the opinions of Dr. Macaulay and the testimony of Claimant to be credible and persuasive. The ALJ is not persuaded by the opinions of Dr. D'Angelo whom the ALJ finds to be biased.

In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In workers' compensation law, an employer "takes the employee as he comes through the gate." A work injury is compensable if makes an underlying non-symptomatic condition become symptomatic. See: *Peter Kiewit Sons' Co. v Industrial Com. of Colorado*, 124 Colo. 217, 236 P.2d 296 (1951), *Seifried v. Industrial Com. of Colorado*, 736 P.2d 1262 (Colo.App.1986).

Although Claimant may have had pre-existing degenerative changes in her low back, she passed a physical exam when Employer hired her and passed repeated physical exams thereafter. Respondents presented no persuasive evidence that Claimant had low back complaints or had received treatment to that part of her body. Rather, Claimant performed her job duties without difficulty, including working overtime, prior to her January 26, 2014 work injury.

Immediately after the MVA, Claimant's low back was stiff. When it became increasing more painful, rather than resolving as she anticipated it would as a muscle strain, Claimant sought timely medical care.

Claimant tried over-the-counter medications without relief, and, finally, saw a physician regarding the problem on February 13, 2014, complaining of hip and low back pain. She sought treatment in the University Hospital ER on February 16, 2014 because of increasing back pain, and specifically, mentioned the January 26, 2014 accident. Claimant testified, without objection, that one of her treating physicians indicated that the bus accident probably aggravated her back problems and made them symptomatic. A

nurse practitioner also mentioned the bus accident as playing a role in Claimant's back problems in a FMA Application, dated April 15, 2014. The nurse practitioner stated:

> [Claimant] was involved in a MVC in 1/2014. . . . She has since been diagnosed with lumbar spondylolisthesis, which contributes to foraminal narrowing/nerve compression and is prone to worsening with events such as MVC.

Dr. Macaulay agreed with the nurse practitioner, explaining:

> The problem was that [Claimant] had significant degenerative change in her low back, and as such, she was a sitting duck. She was waiting for the right event at the right time to occur to cause her to develop symptoms. And in this case, with a . . . neural foraminal constriction, the holes through which the nerves exit in the low back to go down to the legs were significantly compromised so that something of a relatively minor nature could become a significant problem.
>
> We see this also a lot in older people who are working...depending on where the issue is located, they can go from asymptomatic to significantly changed, and that is the case with [Claimant], in my opinion.

Dr. Macaulay explained that nerve injuries can take some time to demonstrate themselves and this is why doctors will not do an EMG study until at least three weeks after a suspected injury to a nerve occurs.

The ALJ is not persuaded by Dr. D'Angelo's opinion that Claimant's onset of severe back pain within a week of the MVA was mere coincidence. Here, Claimant had performed all of her work duties for over four years, working 45 hours a week, without any low back problem. The ALJ finds it unlikely that Claimant's back would suddenly become symptomatic within a week of the MVA but for the MVA.

Dr. D'Angelo acknowledged that the Workers' Compensation Medical Treatment Guidelines in discussing radiologically noted spinal degenerative changes, state in part: "The presence of these (degenerative) findings cannot be used to justify an argument that back pain in a specific individual was inevitable and not due to a work-related exposures." Dr. D'Angelo admitted that Claimant's imaging studies showed that she had several herniated and protruding discs in her lumbar spine and that trauma to the spine can cause such findings.

The ALJ finds and concludes that more likely than not, the MVA on January 26, 2014, either caused actual injury to Claimant's lumbar spine, or played a significant role in making Claimant's underlying degenerative changes permanently symptomatic. The ALJ finds the opinions of Dr. Macaulay to be more persuasive than those of Dr. D'Angelo.

An employee is entitled to Permanent Total Benefits if he or she can no longer earn any wages and the loss of earning capacity is at least in part due to a work-related injury or condition. Section 8-40-201(16.5) provides the test is met if: "the employee is unable to earn any wages in the same or other employment."

In determining whether an employee meets the above test, the courts have set forth several "human factors" that need to be considered in addition to the residuals of the work-related injury itself. These include, but are not limited to age, education, work experience and vocational training, overall physical condition and mental condition. *See Best-Way Concrete Co. v. Baumgartner*, 908 P.2d 1194 (Colo.App.1995), *Weld County Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550 (1998).

Claimant's testimony and the medical records establish that Claimant's fusion surgery was not successful. Claimant testified that she has never had any period where she was pain free since her fusion surgery.

Claimant's health care providers have indicated that she has very substantial limitations as the result of her back condition. A Medical Statement from E. Thomas Cullom, III, M.D., dated April 15, 2015, states that Claimant has chronic pain and is not able to lift, bend, crawl, or stoop, and can do no prolonged sitting, standing or walking. Claimant was also limited to lifting less than 10 pounds and would be expected to miss more than four days a month from work even if she could find a job.

Dr. Macaulay testified that Claimant has serious permanent damage to the nerves in her low back and that he agreed with the functional limitations set forth by the physicians in the records from Claimant's Social Security Disability case.

> Q. Now, in your actual physical examination, you indicated that her right ankle reflex was absent. What's the significance of that, if any?
>
> A. it means that the nerves that supply the reflex arc have been damaged.
>
> Q. And she has decreased sensation in her left L5 and S1 dermatomes of the left foot. What's the significance of that in layman's terms?
>
> A. She sustained neural damage.
>
> Q. And this type of damage, is this something that should improve with time or is it likely to be permanent in light of the fact she had it as of the time you saw her in June of 2016?
>
> A. It is likely to be permanent.
>
> ***
>
> Q. First of all, do you agree with the functional limitations set forth by these health care providers in these records that were provided from the Social Security Administration?

> A. They're consistent. They are consistent with what I saw and what [Claimant] related to me.
>
> Q. And in light of those restrictions, what opinion, if any, do you have on her ability to be able to perform any employment activities on any type of regular basis?
>
> ***
>
> A. In looking at the restrictions that they have listed, she does not appear to be a good candidate for about any that I can think of. Others may be able to define one, but it would be elusive to me.
>
> ***
>
> Q. And without the spinal cord stimulator, what is your prognosis for her as far as recovery to the point that she might be able to return to some type of employment?
>
> A. Improbable.

A spinal cord stimulator was not an option because Claimant ran too high a risk of experiencing a recurrent MRSA infection.

Vocational expert, Doris Shriver evaluated Claimant's abilities and reviewed her extensive medical records. Ms. Shriver's concluded that Claimant was not able to perform any employment. The report states in relevant part:

> [Claimant] has chronic pain, mental fatigue and physical weakness, which prohibit sustaining activities at home or at work. She is emotionally compromised with signs of depression/anxiety. Due to the combination of her vocational limitations, she would have difficulty sustaining even sheltered work. Vocational rehabilitation could be attempted, but the odds are against her being successful.

Ms. Shriver testified at the hearing that Claimant could not even do sheltered work, indicating that Claimant's functional capacity was so limited that no work was possible.

Respondents failed to provide any persuasive evidence to counter Ms. Shriver's opinion that Claimant is unemployable because of her multitude of health problems, including her low back condition and the side effects of her treatment. Further, Employer took the position that Claimant is disabled from employment when it contested Claimant's application for unemployment benefits. Further, the Social Security Administration found Claimant to be totally disabled based on her restrictions.

As result of the above evidence, this ALJ finds the opinions of Ms. Shriver, to the effect that Claimant is totally unemployable, to be consistent with the great weight of persuasive evidence.

Claimant incurred significant costs for the treatment of her low back conditions. Dr. Macaulay testified that the Claimant's surgery and subsequent treatment were all reasonable and necessary for her low back condition. Respondents offered no persuasive evidence to the contrary.

As mentioned above, Claimant filed an Application for Family Leave and the health care provider who completed the form, dated April 15, 2014, specifically mentioned the bus accident as being a possible cause of Claimant's back problem. The nurse practitioner who completed the form stated:

> Ms. Okoro was involved in a MVC in 1/2014. This may have exacerbated her low back and radicular leg pain. She has since been diagnosed with lumbar spondylolisthesis, which contributes to foraminal narrowing/nerve compression and is prone to worsening with events such as MVC.

Claimant provided the form to Employer, putting Employer on notice that a possible causal relationship existed between Claimant's work-related accident and her low back symptoms. This action triggered Employer's duty to provide medical care. Employer failed to provide any such treatment or to make a referral.

Once Claimant became aware that her injury might be compensable through Workers' Compensation, she formally notified Employer. Claimant filed a Claim for Compensation Form, on August 26, 2014, alleging that her low back condition related to her January 26, 2014 accident. In response, Respondents contested her case. As a result, Claimant had the right to pick an authorized provider pursuant to section 8-43-404(5)(a)(C.R.S.). Therefore, Respondent shall be responsible for reimbursing for Claimant's medical care for her low back in compliance with the relevant fee schedules.

In summary, the preponderance of evidence presented in this matter establishes that the work related MVA caused Claimant's low back to become symptomatic. Claimant's low back condition, and treatment she has received for it, has made her unemployable in any kind of employment. Testimony from Claimant, Dr. Macaulay and the vocational expert, Doris Shriver, support a conclusion that Claimant is permanently and totally disabled. Further, Respondents have failed to pay Claimant any wage loss benefits. Therefore, Claimant is entitled to Permanent Total Disability Benefits since her last day of employment with the Respondent-employer.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable low back injury in the course of her employment on January 26, 2014.

2. Respondent shall pay PTD benefits retroactive to March 24, 2014.

3. Respondent shall pay for any outstanding medical bills for treatment of Claimant's low back condition, and shall reimburse Claimant's Health Insurance Carrier, Medicaid, and/or Medicare for any expenses they incurred for the treatment of Claimant's low back condition, in compliance with the Workers' Compensation Fee Schedules.

4. Respondent shall pay for any reasonable and necessary continuing medical care for Claimant's low back injury in conformance with the Compensation Act.

5. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

DATED: October 16, 2018

Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

ISSUE

- Whether Claimant established by a preponderance of the evidence that he suffered a work related injury arising out of and in the course and scope of his employment on June 6, 2014.

FINDINGS OF FACT

1. Claimant is a 43 year old male with admitted to ongoing memory issues. Claimant acknowledged to a neurologist that he has a "lifelong history of excessive alcohol intake," that he had been in several alcohol treatment programs in the past, and he drinks large quantities of beer each day. That neurologist diagnosed "alcohol induced cerebellar degeneration and polyneuropathy," relating those issues to alcohol abuse over the years.

2. Claimant has carried diagnoses of alcoholism, alcohol dependence and alcohol abuse since at least 2009, and his medical records reveal a history of heavy alcohol abuse dating back to college. On June 3, 2009, when Claimant was admitted to Good Samaritan Hospital following a suicide attempt, he disclosed a 14 year alcohol abuse history, including that he usually drinks 10 to 12 beers each day and keeps a beer keg in his garage. On April 13, 2010, Claimant told his personal physician that he stopped drinking alcohol two weeks earlier after his teenage daughter wrote a paper about living with an alcoholic father. Less than three months later he was arrested for a DUI. On December 21, 2011, Claimant went to Kaiser Permanente with his mother to discuss his alcoholism, and on that date he admitted to drinking 8 to 10 beers every night since college. On March 27, 2012, Claimant admitted to drinking at least an 18 pack of beer per week. On July 29, 2014, his personal physician noted that Claimant drinks up to a case of beer each week. On December 21, 2015, when Claimant was admitted at Good Samaritan Hospital for a second suicide attempt, it was documented that he has a long history of alcohol abuse and that he "reports he drinks a 6 pack a day but he is likely minimizing his intake." At that time, Claimant admitted that he lost his job the prior summer due to drinking on the job. On December 29, 2015, Claimant was diagnosed with "alcohol dependence syndrome." On February 17, 2016, Claimant was advised he could develop dementia, an inability to walk, or a fatal alcohol withdrawal syndrome if he continued to drink alcohol. Claimant admitted that he continued to drink alcohol anyway. Multiple providers have opined that Claimant minimizes his alcohol consumption.

3. The competent evidence demonstrates that Claimant is an alcoholic who is likely in denial, and who also suffers from memory issues due to years of alcohol abuse. These problems negatively impact his credibility in this matter.

Claimant's Employment with Employer

4. Claimant was hired as the Key Accounts Manager by Employer on April 28, 2013. Employer is a family owned Denver company specializing in flooring for "turns" and renovations aimed at multifamily and commercial properties. Claimant's duties included developing high level relationships with upper management people in the multifamily housing industry in order to sell Employer's products. Claimant was expected to arrange evening entertainment events for high level clients and targets. Claimant was issued a company credit card to pay for these expenses.

5. Claimant's direct supervisor was Jennifer "Jenny" Jacobs, Employer's Vice President of Multifamily Services. At that time Ms. Jacobs ran all of the sales and customer service activities for Employer's multifamily division. As the Key Accounts Manager, Claimant worked very closely with Ms. Jacobs, and they continuously discussed his clients and prospects/targets. Claimant submitted a written list of prospects/targets with his sales plan to Ms. Jacobs on three separate occasions, including in September 2013, January 2014, and September 2014. Every Monday Ms. Jacobs would go over the prospects/targets and sales plan with Claimant. Ms. Jacobs was aware of all of Claimant's prospects/targets and every job he bid on. Claimant was not permitted to bid a project without Ms. Jacob's express authorization. Likewise, Claimant identified all clients and prospects/targets he wanted to entertain, but he could not entertain any clients or prospects/targets without clearing it with Ms. Jacobs and receiving her authorization.

6. In 2014, Employer purchased season tickets for Colorado Rockies' baseball games which employees could use for business purposes. Claimant signed up to use four tickets for a game scheduled for Friday night June 6, 2014. This is the night Claimant was involved in an altercation at a bar that led to this claim.

7. Shortly before June 6, 2014, Claimant notified Ms. Jacobs he wanted to take Mr. Jordan Brown (regional maintenance director for Rocky Mountain Mutual Housing Association), Mr. Brown's wife, and one of Mr. Brown's employees (identified as a maintenance technician) to the June 6th game. Mr. Brown and his company were existing clients. Ms. Jacobs authorized Claimant to take this group to the game.

8. Claimant alleged that Ms. Jacobs approved him to bring Bill Bryant of Riverstone Residential Group ("Riverstone") to the game on June 6, 2014. Mr. Bryant and Riverstone were not clients or targets at any time during Claimant's employment. Claimant never bid on a Riverstone project. Claimant did not entertain Mr. Bryant before or after June 6, 2014. Mr. Bryant and Riverstone were not identified on any of Claimant's prospect lists before or after June 6, 2014. Riverstone was not a target due to the fact that it was a national company who used national vendors and whose vendor decisions were made at a national level. Also, there was bad blood between Riverstone and Employer, and Riverstone had an exclusive agreement with a different flooring company, Arbor Carpet.

9. Claimant and Bill Bryant were friends and former coworkers, having worked together before Claimant went to work for Employer while at a different company. On several occasions prior to June 6, 2014, Claimant asked Ms. Jacobs if he could bring Mr. Bryant to Employer sponsored events, and each time Ms. Jacobs said no. Not only did Employer have no chance to obtain work from Mr. Bryant's employer, Riverstone, but Mr. Bryant had a reputation as a job hopper who moved around a lot and who liked to use vendors to obtain free things without coming through with work. Employer is a family run business with limited resources, and Ms. Jacobs did not want to waste Employer money, time and resources on entertaining Mr. Bryant given his shortcomings, and given the fact that there was no chance for Employer to obtain Riverstone's work.

10. Ms. Jacobs did not authorize Claimant to take Mr. Bryant to the Rockies' game on June 6, 2014. She repeatedly prohibited him from entertaining Mr. Bryant at Employer's expense. Claimant's testimony that Mr. Bryant and Riverstone were active targets/prospects at that time, and that Ms. Jacobs authorized him to entertain Mr. Bryant on June 6, 2014, is not credible and is rejected.

June 6, 2014 – The Date of Alleged Injury

11. On June 6, 2014, between 5:00 p.m. and 5:30 p.m., Claimant met with Jordan Brown, Mr. Brown's wife, and Bill Bryant at LoDo's, a bar near Coors Field where the Rockies' game was to be held at 6:30 p.m. that night. The group had drinks and dinner at LoDo's. Claimant charged $142.80 at LoDo's in the hour or so he was there.

12. Following LoDo's, Claimant, the Browns and Mr. Bryant went to the Rockies' game, arriving around 6:30 p.m. During the course of the game, Claimant spent $58 on food and more drinks. The true amount of alcohol he consumed at LoDo's and the Rockies' game is unclear, but given his known history of minimizing his alcohol intake, Claimant likely had many more than two alcoholic drinks throughout this night, which was a violation of Employer's alcohol policy.

13. The Browns left the Rockies' game after the 5th or 6th inning, leaving Claimant alone with Mr. Bryant at the Rockies' game, and subsequently at a bar. Once the Browns left, Claimant was no longer working, as he was no longer entertaining a client or a potential client. Claimant was simply drinking and hanging out with his friend and former coworker, Bill Bryant, while charging everything to Employer.

14. After Claimant and Mr. Bryant left the Rockies' game they walked towards their cars, but heard music emanating from Howl at the Moon bar and decided to go in for more drinks. Once inside Howl at the Moon, Claimant and Mr. Bryant ordered drinks. At some point, Claimant went to the bar to purchase additional drinks for himself, Mr. Bryant, and a bachelorette party that was standing at the bar. It was at that time he had an altercation with another bar patron, Jason Ruedy.

15. Jamie Boekhoff was a bartender at Howl at the Moon who served Claimant that night. Ms. Boekhoff confirmed that Claimant had been at the bar drinking for about an hour before his altercation with Mr. Ruedy. Claimant did not seem "overly" intoxicated.

Claimant bought drinks for himself and his friend, and later bought a round of shots and two drinks for a group of females Ms. Boekhoff identified as a bachelorette party.

16. When Mr. Ruedy first encountered Claimant at the bar, Claimant appeared drunk. Mr. Ruedy observed Claimant buy a round of drinks and drink shots of alcohol with the bachelorette party that was standing right next to him.

17. In the two plus hours Claimant was at Howl at the Moon, he spent $229.45 on his company credit card, none of which was spent on food, which is consistent with him drinking heavily before and after the incident in question. When Claimant went to the ER that night after his fight, he admitted to having several alcoholic beverages, and even at 2:05 a.m. the ER physician noted that Claimant was "intoxicated."

Claimant's Altercation with Jason Ruedy at Howl at the Moon

18. Mr. Ruedy was standing at the bar with a bachelorette party situated to his left. Claimant approached the bar, wedged himself between Mr. Ruedy and one member of the bachelorette party, he turned his back and buttock to Mr. Ruedy, and then "donkey-kicked" Mr. Ruedy apparently to make space, in the process breaking the big toe toenail off of Mr. Ruedy's sandaled foot. At that point Mr. Ruedy and Claimant had words, with Mr. Ruedy asking Claimant what his problem was. Claimant appeared drunk. Mr. Ruedy walked away to avoid an escalation, telling his friend Jason Clark that they needed to leave, and starting the process of closing out his tab. Claimant approached Mr. Ruedy and Mr. Clark, indicating he wanted to buy them shots in an apparent attempt to apologize. The three men drank the shots together, at which time Mr. Ruedy believed the situation was resolved. Claimant's mood changed, however, and he and Mr. Ruedy started having more words. Ms. Boekhoff saw Claimant and Mr. Ruedy standing face-to-face, quite close, as their discussion was getting heated.

19. Mr. Ruedy, a trained boxer, read Claimant's body language to indicate Claimant was about to throw a punch, as his body was leaning in and his wrist starting to come up. Mr. Ruedy beat Claimant to the draw striking Claimant in the nose, and knocking Claimant down, causing injuries.

20. According to Ms. Boekhoff, she saw Claimant get knocked down and fall to the floor, but he was not unconscious. This statement is consistent with what Claimant reported to the ER physicians later that night, including that after he was struck he fell backwards but did he lose consciousness.

21. Claimant called his wife to pick him up. Mr. Bryant made sure Claimant's bar tab was taken care of. Claimant continued to drink. Claimant's wife drove him to Good Samaritan Hospital where he was admitted at 1:29 a.m. As noted above, at 2:05 a.m., Claimant was still "intoxicated." Claimant was diagnosed with nasal fractures and his nose was set with splints.

June 9, 2014 – Claimant's Report of Incident to Employer

22. On the morning of June 9, 2014, Claimant phoned Jenny Jacobs to call in to work sick, notifying her that he would not be in due to the injuries he sustained in a fight after the Rockies' game on June 6, 2014. Claimant explained that after he went to the Rockies' game with Jordan Brown, Mr. Brown's wife and Mr. Brown's maintenance technician, the maintenance technician left and he and the Browns walked to their cars which were parked near the stadium across from Howl at the Moon. They decided to go into Howl at the Moon to allow traffic time to clear. They sat at a table, and when Claimant went up to the bar to get drinks for himself and the Browns, he ran into Bill Bryant. Claimant did not tell Ms. Jacobs that Mr. Bryant had been with him the entire night, nor that he was entertaining Mr. Bryant at Employer's expense. During that conversation, Claimant told Ms. Jacobs that as he was buying drinks for the Browns, he had a confrontation with Mr. Ruedy which resulted in him being assaulted, and injured. He claimed that Mr. Ruedy struck him blindside. He told Ms. Jacobs he went to the ER that night, and he needed further care, including surgery.

23. Ms. Jacobs was concerned for her employee. She told Claimant she was not sure whether his injuries would be covered under Employer's workers' compensation policy but she was going to report the claim to Employer's carrier just in case. She wanted to make sure the company was doing the right thing.

24. On June 10, 2014, Ms. Jacobs completed a hand written Employers' First Report of Injury within which she indicated Claimant was assaulted while "entertaining client" after a Rockies' game. The client Ms. Jacobs was referring to was Jordan Brown, as Claimant continued to maintain that Mr. Brown was with him at the bar. Ms. Jacobs had no issue with the claim being found compensable if Claimant was still entertaining Mr. Brown at the time of the assault.

25. Claimant continued to work for Employer until October 2014 when he left Employer to work for a different company. During those three months they spoke about the incident several times. Claimant never told Ms. Jacobs he was entertaining Bill Bryant at Employer's expense that night, or that the Browns had left the Rockies' game early and never went to Howl at the Moon. Claimant always maintained that the Browns were with him at Howl at the Moon, and that he simply ran into Mr. Bryant coincidentally while at the bar with the Browns. Ms. Jacobs only learned that Mr. Bryant was with Claimant the entire night and that Claimant was claiming that he was entertaining Mr. Bryant as a prospect/target three years later when Claimant applied for hearing.

26. Ms. Jacobs credibly testified that Bill Bryant was not a client, or a prospective client on the night of this incident. As found, on the night of June 6, 2014, Mr. Bryant was Claimant's former coworker, and Claimant's longtime friend, but he was not Employer's client or prospective client. Claimant was not performing any activity to benefit Employer after the Browns left the Rockies game earlier that night.

CONCLUSIONS OF LAW

General Legal Principals

The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

In rendering a decision, the ALJ must make credibility determinations, draw plausible inferences from the record, and resolve essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* In determining credibility, the ALJ considers the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Credibility is a significant consideration when determining compensability. As found here, Claimant's critical testimony regarding Mr. Bryant being a target/prospect on the night of June 6, 2014, is incredible and unconvincing, while Ms. Jacobs' testimony that Mr. Bryant was never a target/prospect is far more credible, and consistent with other evidence, including Claimant's own prospect/target lists.

Compensability

The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

Here, Claimant's injuries did not occur within the course and scope of his employment with Employer, as the altercation leading to his injuries took place well after Claimant's client (Jordan Brown) had gone home, while at a bar, while Claimant was

heavily drinking, and likely intoxicated, with his friend, Bill Bryant, buying shots for a bachelorette party. Mr. Bryant was not a client nor a prospective client, and Claimant was prohibited by his Employer from entertaining Mr. Bryant. Claimant's injuries occurred while drinking with Mr. Bryant at Howl at the Moon, buying drinks for a bachelorette party, and arguing/fighting with a bar patron, none of which constitute an activity connected to Claimant's job-related functions. Claimant's injuries did not occur within the course of his employment, and his claim is therefore denied.

Claimant's injuries also did not arise out of his employment with Employer. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). It is generally not necessary for an employee to be actually engaged in work duties at the time of the accident for an injury to be compensable. *See Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995) It is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985)

When a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Silver Engineering Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973); *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986)

Claimant's injuries did not arise out of his employment because the incident leading to his injuries was not sufficiently related to his employment to be considered part of his service to the employer. After Jordan Brown left, Claimant was not performing any service for Employer. There was no benefit to Employer provided by Claimant going to Howl at the Moon with Mr. Bryant. The competent evidence shows that Claimant was not entertaining Mr. Brown or Mr. Bryant when he was struck in the face. Claimant had substantially deviated from any employment activities by that time. Claimant was intoxicated and buying drinks for a bachelorette party when he initiated a confrontation that led to him being struck. "If the acts of an employee at the time of the injury are for the employee's sole benefit, then the injury does not arise out of and in the course of employment." *Kater v. Industrial Comm'n*, 728 P.2d 746 (Colo. App. 1986).

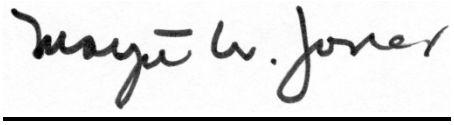
Here, Claimant had deviated from any possible employment activity when he entered Howl at the Moon. There was no evidence that anything that occurred within Howl at the Moon was an accepted part of Claimant's employment. Claimant was well outside of Employer's alcohol policy as well. As such, Claimant's injuries did not occur within the course and scope of his employment, and they did not arise out of his employment. Claimant failed his burden of proving a compensable claim, and his claim is therefore denied.

ORDER

Claimant has failed to establish by a preponderance of the evidence that he sustained injuries arising out of and in the course and scope of his employment on June 6, 2014.

Claimant's claim for workers' compensation benefits is denied and dismissed.

Dated: This 23 day of August, 2018.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), CR.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Whether Respondent's have overcome the Division Independent Medical Examiner's opinions regarding permanent impairment.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to an award of maintenance medical benefits.

III. Whether Respondent's properly endorsed the issue of permanent impairment to be heard at the hearing.

IV. Disfigurement benefits.

PROCEDURAL MATTERS

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was born on December 12, 1960 and is 57 years old. She resides at 20426 Brookdale Lane, Parker, CO 80138.
2. Claimant is a Food Service Manager at Jefferson County Public Schools. She has worked at Jefferson County Public Schools since 2000.
3. On October 15, 2015, Claimant was on the job placing milk crates along the wall of the kitchen when she turned and slipped on water, landing on all fours. (Transcript at 95-96). Claimant fractured her right patella during the fall and was taken to Dr. Braden Mayer, M.D. for treatment. (Cl's Ex. 2 at 29).
4. On October 15, 2015, Dr. Braden diagnosed Claimant as suffering from a displaced transverse patellar fracture. Due to the significant displacement of the fracture, Dr. Braden recommended open reduction and internal fixation of her right patella. (Cl. Ex. 2 at 29.)
5. Dr. Braden Mayer performed surgery on October 16, 2015 to correct Claimant's fractured right patella. (Cl's Ex. 2 at 30-31). Dr. Mayer performed an open reduction and internal fixation of her right displaced patellar fracture. This required Dr. Mayer to reduce and compress the displaced fracture with screws and sternal wire. *Id.*
6. Claimant saw Dr. Mayer again on October 29, 2015 for a two-week follow-up on the operation. (Cl's Ex. 2 at 37). On December 17, 2015, Dr. Mayer saw Claimant

and reported a range of motion of zero to ninety degrees for Claimant's right knee. (*Id.* at 38).

7. Claimant saw Dr. Mayer on April 7, 2016 for left shoulder pain. (Cl's Ex. 2 at 180). Dr. Mayer's impression was that Claimant had left sided neck pain and left shoulder pain that was suggestive of muscular tightness and spasm. *Id.*

8. On May 19, 2016, Dr. Mayer saw Claimant to recheck her neck pain and review her May 16, 2016 MRI. (Cl's Ex. 2 at 181). Dr. Mayer reported degenerative disc changes in Claimant's cervical spine at the C5-C6 level. *Id.*

9. On September 29, 2016, almost a full year after Claimant's right knee surgery, Dr. Mayer documents that Claimant's right knee has only 135 degrees of flexion, a sub-normal range of motion. (Cl's Ex. 2 at 188). There is also a finding of "mild quad atrophy of her right lower extremity" and notes that "There is mild irregularity of the inferior articular surface region" of her right knee joint. *Id.* Dr. Mayer also discusses continued treatment needed for Claimant's right knee. *Id.*

10. On September 30, 2016, Dr. Mayer completed a Patient Enrollment & Prescription Form for Orthovisc injections. On the form, Dr. Mayer listed the ICD code as "unilateral primary osteoarthritis, right knee." (Cl's Ex. 2 at 187).

11. On October 20, 2016, Dr. Mayer again examined Claimant and documented right knee range of motion of 0 degrees extension and 125 degrees of flexion. *Id.* at 193. He also noted "minor joint space narrowing at the medial compartment." Id. at 193.

12. On October 26, 2016, Dr. Mayer performed a Orthovisc injection into Claimant's right knee to reduce her pain complaints due to the arthritic changes in her knee. (See (Cl's Ex. 2 at 187,188, and 194).

13. Dr. Sharon R. Walker, M.D. of On the Mend Occupational Medicine first saw Claimant on October 26, 2015. (Cl's Ex. 2 at 51). This examination is where Claimant first complains of pain in her right shoulder, only eleven days after her fall at work, and Claimant's first visit with a doctor who was not her right knee surgeon. *Id.* Dr. Walker documents that it is medically probable that Claimant's "complaints are the result of [Claimant's] work." *Id.* at 54.

14. On November 5, 2015, Dr. Walker examined Claimant and documented pain in her neck and back. (Cl's Ex. 2 at 56).

15. On May 9, 2016, Dr. Walker noted a history of "cervicothoracic somatic dysfunction" since February 3, 2016. Dr. Walker ordered an MRI of Claimant's cervical spine on May 9, 2016, as it was causing Claimant continued pain. (Cl's Ex. 2 at 99).

16. The MRI was performed on May 16, 2016 and revealed "degenerative disc and joint changes with mild dural sac indentation," and "foraminal narrowing most prominently at C5-C6 bilaterally." (Cl's Ex. 2 at 105). The MRI report itself documents "moderate disc space narrowing," along with "both foramina are moderately narrowed appears probably bony and due to uncinate hypertrophy,"

and “endplate edema is noted, active degenerative endplate changes Modic type I,” for the C5-C6 region. *Id.* at 208.

17. On September 1, 2016, Dr. Walker documents that Claimant has crepitus in her right knee. (Cl’s Ex. 2 at 117).

18. Dr. Walker documented a decreased range of motion in Claimant’s right knee on September 21, 2016, nearly eleven months after her surgery. (Cl’s Ex. 2 at 121). Claimant continued to see Dr. Walker periodically with continuing, documented pain in her right knee. *Id.* at 121-245. Dr. Walker did not record any figures for range of motion for Claimant’s right knee during this time. *Id.*

19. On January 30, 2017, Dr. L. Barton Goldman, M.D., evaluated Claimant, based on a referral from Dr. Walker. Dr. Goldman noted that Claimant’s right knee had full extension, but only 120 degrees of flexion. (Cl’s Ex. 2 at 257). Dr. Goldman’s impression of Claimant included a diagnosis of bilateral upper trapezius and middle trapezius myofascial pain with secondary cervical facet dysfunction resulting from the October 15, 2015 work injury. (Cl’s Ex. 2 at 258 and Tr. At 70:5-10). Dr. Goldman’s impression also included “status post right patellar fracture requiring internal fixation with aggravation of pre-existing degenerative joint disease and osteoarthritis secondary to October 15, 2015, work related injury” and a probable somatization disorder. (Cl’s Ex. 2 at 258).

20. On March 15, 2017, Zachary Fox, P.T. documented Claimant at 66% on the Neck Index with decreased range of motion for her cervical spine. (Cl’s Ex. at 321). Inclinometers were used to find the range of motion. *Id.*

21. On September 9, 2017, after nearly two years of treating Claimant for her right knee and neck injuries (and indicating at least twice that she anticipated permanent impairment), Dr. Walker found Claimant had reached maximum medical improvement (MMI) without any permanent impairment. (Cl’s Ex. 2 at 245, and *see* Cl’s Ex. 2 at 238 *and* 244 indicating that Dr. Walker anticipated Claimant would have permanent impairment rating three months before and less than one month before placing her at MMI). According to Division Impairment Rating Tips:

> Whenever 6 months of treatment of the spine has occurred and a Table 53 zero percent rating is assigned, the physician must provide justification for the zero percent rating, based on the lack of physiological findings. The rating physician shall be aware that a zero percent rating in this circumstance implies that treatment was performed in the absence of medically documented pain and rigidity. (R’s Ex. K at 127, ¶ 2)

Dr. Walker, however, did not offer any explanation for her assignment of a zero percent rating for Claimant’s cervical spine after almost two years of documented treatment. (Cl’s Ex. 2 at 245-249). Moreover, even though Dr. Walker noted Claimant’s knee had full range of motion, she did not provide

any indication that she actually measured Claimant's range of motion since actual numerical range of motion measurements are not listed in her report. (Cl's Ex. 2 at 245-249).

22. Dr. Stanley Ginsburg examined Claimant as the Division Independent Medical Evaluation (DIME) doctor on January 25, 2018. (Cl's Ex. 1 at 1). He found Claimant to be at MMI and assigned her a permanent impairment rating of 8% whole body impairment for her cervical spine and 16% lower extremity impairment for Claimant's right knee. *Id.* at 16-17. Dr. Ginsburg, using the AMA Guides, found 2% impairment for cervical spine mobility through reproducible range of motion tests with dual inclinometers and a 6% impairment through Table 53 II (C). *Id.* at 17. Dr. Ginsburg, after reviewing medical records and taking his own measurements, found that Claimant had decreased range of motion in her right knee as well as ratable arthritis and/or chondromalacia due to trauma (the fracture and surgery). *Id.* at 16. Dr. Ginsburg, disagreeing with previous evaluations and complying with Impairment Rating Tips, wrote:

> I must disagree respectfully with the opinion of some of the providers. I do think the patient has an impairment.
>
> In regard to the right knee, clearly the patient had significant trauma requiring surgery and does have residua. Range of motion is 11% impairment based on flexion. Extension is not impaired. Table 40, diagnosis is to be considered. Under #5, "arthritis due to any cause including trauma, chondromalacia," I believe the patient has 5%. Combining 11% and 5% is 16% lower extremity impairment, 16% lower extremity is 6% while person impairment. I think very clearly the pain, which the patient has had in the "shoulder," is in fact cervical pain. She does not have any pain distribution in the shoulder joint itself nor is she tender – I failed to mention this above. There is tenderness in the left paracervical/suprascapular area and I believe this is radicular. There is underlying pre-existing degenerative change but while one may say this is not accident-related, clearly she was asymptomatic previously and is not asymptomatic presently. The concluding evaluation states that she has marked improvement in pain but this is not the history seen throughout the charts – even considering somatization – and has discomfort now. A statement is made that the pain distribution does not conform to the distribution of abnormalities in regard to pre-existing changes but I believe there is generalized distribution of degenerative changes and again, I state that the patient was asymptomatic previously. There is 2% impairment for cervical mobility. On page 80, specific disorders, is IIC – 6%. This results in 8% impairment for cervical spine

> abnormalities. This results in 14% overall whole person impairment.
>
> There is no apportionment. Multiple body parts have been listed for analysis for impairment. Rather than listing all of these, I will say that only cervical spine and right knee should have impairment and I have so indicated this. *Id.* at 16-17.

23. Table 53, Section II, of the AMA Guides, provides for an impairment rating for "Intervertebral disc or soft-tissue lesions." (Ex. K, pg. 123.) Subsection II(C) provides a 6% rating for injuries to the cervical spine which are "Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with *moderate* to severe degenerative changes on *structural tests*; includes unoperated herniated nucleus pulposus with or without radiculopathy." (Emphasis added.) *Id.*

24. Claimant's MRI, i.e., a structural test, dated May 16, 2016, documents moderate degenerative changes. The MRI documents at the C5-6 region: "*moderately* dark disc signal with *moderate* disc space narrowing," along with "both foramina are *moderately* narrowed appears probably bony and due to uncinate hypertrophy," and "endplate edema is noted, active degenerative endplate changes Modic type I." (Emphasis added.) (Cl. Ex 2, pg. 208). The MRI report also documents at the C6-7 region: "*moderately"* dark signal with *moderate* disc space narrowing." (Emphasis added.) *Id.* Therefore, Claimant's MRI supports a 6% Table 53 II(C) rating based on "moderate" changes found on Claimant's MRI.

25. Claimant's medical records also demonstrate six months of cervical pain and rigidity, with and without muscle spasm. These findings also support a Table 53 Rating.

26. As stated above, Dr. Ginsburg concluded that: "A statement is made that the pain distribution does not conform to the distribution of abnormalities in regard to pre-existing changes but I believe there is generalized distribution of degenerative changes and again, I state that the patient was asymptomatic previously." Therefore, Dr. Ginsburg determined Claimant's MRI findings were consistent with her pain distribution. After physically evaluating Claimant, and reviewing her medical records, Dr. Ginsburg concluded Claimant qualified for a 6% rating pursuant to Table 53, Section II(C) of the AMA Guides.

27. Dr. Ginsburg also concluded that based on Claimant's range of motion deficits of her cervical spine, she was entitled to an additional 2% impairment.

28. Regarding Claimant's right knee, Dr. Ginsberg noted that Claimant had only 120 degrees of flexion and provided her an 11% scheduled rating for that decrease in range of motion. He also concluded that Claimant was entitled to an additional 5% extremity rating for arthritis and/or chondromalacia in her

knee. He therefore concluded that Claimant's knee extremity rating under the AMA Guides was 16%.

29. Table 39 of the AMA Guides provides for an 11% extremity rating if knee flexion is limited to 120 degrees. (Re. Ex. K at 122.)

30. Table 40, Section 5, of the AMA Guides, also allows the rating physician to provide additional impairment for "arthritis due to any cause including trauma; chondromalacia." (Re. Ex. K at 122.) The amount of additional impairment which can be assigned under Section 5 is discretionary and ranges from 0 to 20%. In this case, Dr. Ginsburg provided Claimant an additional 5% under Table 40, Section 5, of the AMA Guides for "arthritis due to any cause including trauma; chondromalacia." (Rs' Ex. D.)

31. Dr. Walker saw Claimant again on May 14, 2018 after Dr. Ginsburg's DIME exam. (Rs' Ex. A at 7). During that visit, Dr. Walker documented Claimant's right knee range of motion at "full extension and about 90 degrees of flexion," in clear conflict with Dr. Cebrian's findings. Id. at 9. Moreover, she did not provide any indication that she actually measured Claimant's range of motion since actual numerical range of motion measurements are not listed in her report. Instead, Dr. Walker stated Claimant has "full" extension and "about" 90 degrees of flexion. *Id*.

32. Respondent retained Dr. Carlos Cebrian, M.D. to examine Claimant on August 10, 2017. (Cl's Ex. 2 at 485). He concluded Claimant was at MMI and did not assign any permanent impairment rating. *Id.* at 514-516. Dr. Cebrian did not have any actual measurements with which to compare his range of motion findings for Claimant's right knee. Dr. Cebrian also failed to give weight to – or credibly explain why he dismissed - Zachary Fox's, P.T. cervical spine range of motion measurements when taking his own range of measurements of Claimant's cervical spine. (R's Ex. C at 45 and Tr. at 76:4-10). In his report, Dr. Cebrian briefly mentioned the physical therapy records. (R's Ex. C at 45). Dr. Cebrian's cervical spine range of motion measurements are inconsistent with Zachary Fox's, P.T. records. (*Compare* Cl's Ex. 1 at 3 *with* Cl's Ex. 2 at 320-440). Dr. Cebrian placed significant weight on Claimant's somatic symptom disorder diagnosis. However, Dr. Ginsburg gave Claimant permanent impairment despite the diagnosis and consideration of such underlying condition. The ALJ finds that Dr. Ginsburg, who is a board-certified in neurology and psychiatry (and completed a research fellowship in psychiatry), is more credible, and his opinions are more persuasive, regarding Claimant's somatic symptom disorder and analyze its impact in this case compared to Dr. Cebrian who is board-certified in family medicine. (Cl's Ex. 1 at 18; Tr. at 27:9-12; and Tr. at 78:11-14). Dr. Cebrian also agreed that a person with somatic symptom disorder is not faking their pain, and that the person experiences intense thoughts, feelings, and behaviors related to the symptoms that interfere with daily life. (Tr. at 82:7-13). Dr. Cebrian also stated that a person with somatic symptom disorder can experience symptoms more intensely than somebody else with a low level or no level of pathology. (*Id.* at 82:24 to 83:4). There is a clear pathology, however, with Claimant as Dr.

Goldman linked Claimant's shoulder pain as cervical pain secondary to the facet joints from the neck. (*Id.* at 85:14 to 86:3). The ALJ finds that Dr. Ginsburg's opinions are more credible and persuasive than those presented by Dr. Cebrian regarding whether Claimant has a ratable impairment to her cervical spine and right knee.

33. A Table (II)(C) diagnosis requires a minimum of six months of medically documented pain and rigidity, which Claimant had starting from at least her April 7, 2016 visit with Dr. Mayer through her visit with Dr. Ginsburg in January 2018. Dr. Goldman also documents Claimant's neck pain and attributes it to October 15, 2015 work injury. This neck pain can be with or without muscle spasm. The pain must also be associated with degenerative changes on structural tests. As found above, the May 16, 2016 MRI revealed degenerative joint changes on Claimant's cervical spine. Claimant meets the criteria for a Table (II)(C) diagnosis. In his testimony, Dr. Cebrian confirmed six months of documented pain involving Claimant's cervical spine and findings of degenerative changes – which he called mild - in Claimant's cervical spine. (Tr. at 68:9-20). Dr. Cebrian also acknowledged numerous documentations of right paracervical muscular tenderness, muscle knots, and other issues surrounding Claimant's cervical spine. (Tr. at 75:14-21).

34. Dr. Cebrian admitted that with the range of motion findings Dr. Ginsburg measured, Dr. Ginsburg was correct in his assignment of 11% impairment for Claimant's right knee for ROM loss. (*Id.* at 81:1-4).

35. Claimant credibly testified that she did not have any symptoms in her right knee, cervical spine, or right thumb before her fall on October 15, 2015. (Tr. at 104:9-12). Dr. Cebrian admitted that he was not aware of any medical symptoms or treatment for Claimant's right knee, cervical spine, or right thumb before her fall on October 15, 2015. (*Id.* at 65:20 to 66:9).

36. Dr. Cebrian noted, Claimant has been diagnosed with a Somatic Symptom Disorder by Dr. Hawkins. Dr. Cebrian noted that this provides an explanation as to why Claimant has had prolonged physical complaints, that at times, were resistant to treatment in addition to an expansion of her physical complaints. He further noted that with "a Somatic Symptom Disorder, there are complaints that suggest a physical cause that cannot be explained by the physical cause." (Ex. C, p. 48)

37. Dr. Cebrian also testified at hearing and stated that: "in individuals with somatic symptoms disorders it's incumbent on the regular treating doctors to make sure that what they are treating is based on pure objective evidence as opposed to the expression of the somatic symptoms disorder that was diagnosed by psychological testing that was performed by Rebecca Hawkins." (Hearing Transcript, p. 40-41)

38. Dr. Cebrian agreed with Dr. Hawkin's diagnosis of somatic symptom disorder. "That's an appropriate diagnosis and it also makes sense and kind of puts together why Claimant was treated for such an extensive period of time. Most of the time throughout her case the findings were all myofascial in origin

which is something you see a lot in people with somatic symptoms disorder because they – they handle stress on a physical – psychological stress presents itself in their body with physical complaints such as tight muscles and various things like that. And so based on the injuries that she had in her fall in October of 2015 the fact that she has a somatic symptom disorder explains why her treating doctors continue to treat her for two years as her symptoms were in excess of what the physical findings were." (Ex. C, p. 41)

39. With regards to Claimant's knee, Dr. Cebrian testified there was no documented injury to any internal structures such as her ligaments or meniscus. (Hearing Transcript, p. 44)

40. Dr. Cebrian testified, "the fracture healed and in the x-ray follow-ups with Dr. Myer it showed that there was good alignment of the fractured pieces and that it was healed." (Hearing Transcript, p. 44)

41. Dr. Cebrian testified that the AMA Guides do not provide an impairment rating specifically for a patella fracture. "Her range of motion when I evaluated her was 150 degrees of flexion and 0 degrees of extension which is a normal range of motion. She didn't have any positive tests for the internal derangement that we test for." (Hearing Transcript, p. 44-45)

42. Dr. Cebrian testified that Claimant did not qualify for a Table 40 rating for a specific disorder. "[T]here was no findings of post traumatic arthritis and so I didn't think it was appropriate to rate for that. She didn't have any removal of her meniscus or anything else, so there was no specific disorder impairment, so her impairment rating was zero." (Hearing Transcript, p. 45-46)

43. Dr. Cebrian testified that his range of motion measurements were identical to Dr. Walker's range of motion measurements. "[S]he didn't give the specific percentage or the degrees which you do not have to do if you're not going to assign impairment, but by saying there's full range of motion based on the guides that would be 150 degrees in flection so that would be the same as what I had." (Hearing Transcript, p. 47)

44. With regard to Dr. Ginsburg's range of motion measurements, Dr. Cebrian testified, "Dr. Ginsburg at the time of his DIME found range of motion measurements, flexion of the knee 30 degrees worse than had been documented more recently. And so it essentially, you know, sticks out like the oddball; that is so much worse than anything that had been seen before and he didn't give an explanation as to why he thought that the range of motion was significantly worse that had been identified before. And at this time he had the benefit of not only Dr. Walker's evaluation that I didn't have at the time, he also had my evaluation that had shown it was normal range of motion at that time." (Hearing Transcript, p. 48-49)

45. Dr. Cebrian testified that he disagreed with Dr. Ginsburg's assignment of an impairment rating under Table 40 as there's no evidence of any post-traumatic arthritis as a result of the patella fracture. (Hearing Transcript, p. 52)

46. Per Dr. Cebrian, if Claimant had arthritis, “you would expect to see findings of an x-ray that demonstrated arthritis in the patella. Potentially you could assign that post traumatic arthritis if the patella wasn’t aligned properly and there was significant displacement of the patella and that it didn’t heal properly, but you would base that on some diagnostic objective findings that you had.” (Hearing Transcript, p. 50-51) Dr. Cebrian further testified that Dr. Ginsburg did not cite to, and he was not aware of any, diagnostic x-ray that showed post traumatic arthritis or other diagnostic criteria. (Hearing Transcript, p. 51)

47. With regard to Claimant’s cervical spine, Dr. Cebrian testified, “in terms of the examination that I performed Claimant had discomfort palpation diffusely in the muscles. She had no spasms that were identified or trigger points. Her range of motion was within normal limits using dueling inclinometers and there was negative findings for radicular type pain with the Spurling’s Test and she didn’t have pain with acts of compression.” (Hearing Transcript, p. 53) Further, “there were no findings objectively on exam when I saw her.” (Hearing Transcript, p. 53)

48. Dr. Cebrian noted when Dr. Walker placed claimant at MMI, she did not include any neck injury as part of her assessment. With regard to the cervical spine, He stated that Dr. Walker found “tenderness to palpation of the paracervical musculature bilaterally, so the muscles on the side of the cervical spine, also into the bilateral trapezius muscles with some tightness in the trapezius muscles, worse on the left, and then there was also full range of motion.” (Hearing Transcript, p. 54)

49. Dr. Cebrian testified that these findings were similar to his. “I did not find any tightness, Dr. Walker did not document any spasms, but tightness was something that – that I didn’t appreciate.” (Hearing Transcript, p. 54)

50. Dr. Cebrian testified that individuals with somatoform pain disorders “tend to hold a lot of psychological stress in a physical way and can keep their shoulders tight and that can be something that can be seen in individuals with that diagnosis.” (Hearing Transcript, p. 54-55)

51. Dr. Cebrian testified that there was never a specific diagnosis of any structural abnormality of the cervical spine. He did, however, admit that Dr. Goldman at one point suggested Claimant’s cervical muscle spasms might be due to a facet problem. (Hearing Transcript, p. 55)

52. Dr. Cebrian testified that Claimant is not entitled to a Table 53 rating under the AMA Guides for a cervical spine injury. “[S]he did have an MRI that was…performed that showed some mild degenerative changes, there’s no disc herniation, there was no nerve root impingement that was found on the cervical MRI and plus the symptoms that she had were primarily myofascial in nature or consistently documented as myofascial in nature without objective findings to support them. Now, she did have some tightness at different times, there were trigger points documented at different times, spasms documented at different times but that doesn’t mean that those are permanent kind of conditions that deserve an impairment rating. And I think it’s important to note

even when Dr. Ginsburg evaluated her for the DIME he specifically documented that she had tenderness but no spasms and so he on his examination – even though he said there were radicular findings – there were no examination findings that he documented that would suggest any kind of evidence of radicular findings, the sensation exam was normal, strength was normal, reflexes were normal, and so he said that he thought there were radicular findings but on his examination apart from tenderness and range of motion restrictions the examination findings were completely normal." (Hearing Transcript, p. 56-57)

53. Dr. Cebrian also testified that Claimant's mechanism of injury (falling on her hands) would be unlikely to cause any kind of radicular symptoms. (Hearing Transcript, p. 57)

54. Dr. Cebrian also testified that Dr. Ginsburg assigned impairment to the cervical spine pursuant to Table 53(II)(C) which requires a medically documented injury and a minimum of six months of medically documented pain and rigidity with or without spasm associated with moderate to severe degenerative changes on structural tests which includes an operated herniated disc with or without radiculopathy. He further stated that: "So to the level at which Dr. Ginsburg decided to rate her at the moderate to severe level, there's no documentation that there's any moderate to severe level of degenerative changes that are correlating with her symptoms. He chose to rate her at quite a high level for that that is typically reserved for herniated nucleus pulposus, so if somebody has a disc protrusion that touches a nerve root, somebody has a herniated disc that causes symptoms, that would be the level that (C) is typically used for as opposed to just what he said were generalized degenerative changes…And so he's in err in assigning a (II)(C) impairment." (Hearing Transcript, p. 59-60)

55. Per Dr. Cebrian, the guidelines require a correlation between the impairment rating and objective evidence. "[T]he reason for that is that unfortunately once all of us get to a certain age – usually quite young – we all have degenerative findings. And so if we assign impairment ratings for degenerative findings only all of us would be walking around with very large impairment ratings." (Hearing Transcript, p. 60)

56. Dr. Cebrian opined that Dr. Ginsberg was clearly incorrect to assign a (II)(C) rating under the facts of this case. He noted that Dr. Ginsberg was the only Level II physician to assign an impairment rating for the neck (Hearing Transcript, p. 60-61).

57. Dr. Cebrian noted that upon his examination, and using cervical inclinometer testing, Claimant's range of motion was normal and he also stated that Dr. Walker also documented normal range of motion-even though there is not credible and persuasive evidence that she actually measured Claimant's cervical range of motion. (Hearing Transcript, p. 61) Further, he stated that pursuant to the AMA Guides, it is improper to assign a rating for loss of range of motion to the cervical spine without a proper Table 53 diagnosis. (Hearing

Transcript, p. 61) However, Dr. Ginsburg, determined Claimant's accident resulted in an injury to Claimant's cervical spine in the nature of an aggravation of her preexisting asymptomatic degenerative spine condition which resulted in radicular symptoms, with pain and rigidity, and that she qualified for a Table 53 rating. (Ex. D, pg. 66-67.)

58. Dr. Cebrian testified regarding alleged errors in Dr. Ginsburg's report. "It's a significant error. It's – he's rated at a level that isn't supported by the medical records, isn't supported by the information in the medical records, and it's wrong to rate at that level for the information that we have. And he also comments that he's aware of the – and I think he might have referred to it as somatization; that he was aware of that but discounting – even with all that he still felt that the findings were appropriate because she was asymptomatic before the injury and so he still assigned impairment even with all that information." (Hearing Transcript, p. 62)

59. On May 14, 2018, Claimant returned to Dr. Walker. Dr. Walker reviewed Dr. Ginsburg's DIME report and made several comments regarding some of his findings and recommendations. Dr. Walker's report has a section for "Permanent Impairment." After the section titled "Permanent Impairment:" Dr. Walker noted "Per Dr. Ginsburg." Therefore, Dr. Walker did not refute or dispute in her May 14, 2018 report the impairment rating provided by Dr. Ginsberg.

60. Dr. Ginsburg made maintenance care recommendations. Dr. Ginsburg stated that "during the year following assignment of maximum medical improvement, Claimant should be seen, perhaps two to four times, to see if any changes occurred and for appropriate medications. (Cl's Ex. 1 at 17).

61. Dr. Cebrian also made maintenance care recommendations, which included a short course of 4 to 6 visits of PT for any complaints that Claimant has when returning to regular duty over the first three months and to complete her final cognitive-behavioral counseling session with Dr. Hawkins. (Rs' Ex. C at 49).

62. While Dr. Walker initially stated there should be no medical maintenance treatment, she saw Claimant on May 14, 2018, and recommended maintenance care, including a right-hand x-ray and reevaluation following that x-ray. (Rs' Ex. A at 10).

63. The post MMI treatment recommended by Drs. Ginsburg, Cebrian, and Walker is reasonable and necessary medical treatment which is intended to relieve Claimant from the effects of her injury and prevent further deterioration of Claimant's condition.

64. Claimant has a scar on her right knee that is approximately three and a half to four inches long with suture marks and slight discoloration extending about a quarter of an inch in width for the length of the scar. (Tr. at 102:16 to 103:3). Claimant's right thumb has a very faint one-half-inch long scar and swelling at the base of her thumb. (Tr. at 103:25 to 104:8). These disfigurements are

related to the compensable injury, are permanent, and have been present for more than six months.

65. Claimant argued at hearing that Respondent's failure to check the box indicating that PPD was at issue constitutes a waiver of the issue and that the issue of PPD was closed and Respondent is bound by the impairment rating assigned by the Division Examiner, Dr. Ginsburg.

66. Respondent's Application for Hearing clearly stated, "Rule 5 application for hearing to overcome DIME physician's impairment rating."

67. Respondent's endorsement properly put the issue of Claimant's medical impairment rating – PPD – at issue and put Claimant on notice of the issues to be heard at the hearing set pursuant to Respondent's Application for Hearing.

68. The ALJ finds Respondent properly endorsed the issue of Claimant's permanent medical impairment – PPD - as it relates to the industrial injury and overcoming the rating provided by the Division Examiner, Dr. Ginsburg.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondents have overcome the Division Independent Medical Examiner's opinions regarding permanent impairment.

a. Whole Person Cervical Spine Rating

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000). Moreover, not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009).

Dr. Ginsburg determined Claimant's work accident aggravated her preexisting asymptomatic degenerative cervical spine disease and resulted in pain, loss of range of motion, and radiculopathy, which are ratable under the AMA Guides. Dr. Ginsburg concluded Claimant is entitled to a 6% rating pursuant to Table 53 II(C) of the AMA Guides and an additional 2% for a loss of range of motion.

As found above, Table 53, Section II, of the AMA Guides, provides for an impairment rating for "Intervertebral disc or soft-tissue lesions." (Ex. K, pg. 123.) Subsection II(C) provides a 6% rating for injuries to the cervical spine which are "Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with *moderate* to severe degenerative changes on *structural tests*; includes unoperated herniated nucleus pulposus with or without radiculopathy." (Emphasis added.) *Id.*

As found, Claimant's MRI, i.e., structural tests, dated May 16, 2016, documents moderate degenerative changes. The MRI documents at the C5-6 region: "*moderately* dark disc signal with *moderate* disc space narrowing," along with "both foramina are *moderately* narrowed appears probably bony and due to uncinate hypertrophy," and "endplate edema is noted, active degenerative endplate changes Modic type I." (Emphasis added.) (Cl. Ex 2, pg. 208). The MRI report also documents at the C6-7 region: "*moderately"* dark signal with *moderate* disc space narrowing." (Emphasis added.) *Id.*

Moreover, Claimant's medical records demonstrate six months of cervical pain and rigidity, with and without muscle spasm.

In addition, as found, and stated above, Dr. Ginsburg concluded that: "A statement is made that the pain distribution does not conform to the distribution of abnormalities in regard to pre-existing changes but I believe there is generalized distribution of degenerative changes and again, I state that the patient was asymptomatic previously." Therefore, Dr. Ginsburg determined Claimant's MRI findings were consistent with her pain distribution and that such symptoms were radicular and such symptoms were caused by her work accident which resulted in an injury to her cervical spine. In other words, Dr. Ginsburg tied the MRI findings to Claimant's symptoms and he did not think the MRI findings were merely incidental or that Claimant's symptoms were not caused by an injury to her neck that occurred when she fell. He also did not think that her symptoms were purely the result of her somatization disorder. The ALJ has considered the fact Dr. Ginsburg is a neurologist and has training and board certification in psychiatry and finds his opinion that Claimant suffered an injury to her cervical spine, is having radicular symptoms due to the injury, and that such injury resulted in an 8% impairment rating under the AMA Guides to be credible and persuasive. Moreover, Dr. Ginsburg clearly notes in his report that Claimant has a somatization disorder and in spite of such condition, he concluded Claimant suffered an injury to her cervical spine – neck - and is entitled to an impairment rating pursuant to the AMA Guides. It should also be noted that although Claimant complained of pain in her shoulders, left knee, SI joint, and back, Dr. Ginsburg did not provide Claimant an impairment rating for those body parts based on her pain complaints.

Respondents contend Claimant did not suffer an injury to her cervical spine which is ratable under the AMA Guides. In support of their contention, they rely upon the zero percent rating provided by Claimant's primary treating physician as well as the opinions set forth by Dr. Cebrian in his report and hearing testimony. They also contend that Dr. Ginsburg committed numerous errors in providing Claimant a 6% whole person impairment rating for her cervical spine and a 16% scheduled rating for her right knee. However, as found, and stated above, the impairment rating provided by Dr. Ginsburg is based on his interpretation and application of the AMA Guides. The fact that Dr. Walker and/or Dr. Cebrian disagree with how Dr. Ginsburg interpreted and applied the AMA Guides does not rise to the level of clear and convincing evidence. Moreover, the ALJ finds and concludes that the "errors" Dr. Cebrian contends Dr. Ginsburg made in determining Claimant's cervical impairment rating are not true errors or mistakes, but merely differences of opinion as to how to interpret and apply the AMA Guides in general - and in this case.

Therefore, the ALJ concludes Respondents have failed to overcome by clear and convincing evidence the 8% whole person cervical spine impairment rating Dr. Ginsburg provided Claimant.

b. **Extremity Rating for Right Knee**

The burden of proof pertinent to a dispute concerning the impairment rating of a scheduled injury is a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4-662-369 (June 5, 2007); *Ortiz v. Ingersoll-Rand Co.,* W.C. No. 4-981-218-04 (January 25, 2018); *see generally Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691, 693 (Colo. App. 2000);*Wagoner v. City of Colorado Springs,* W.C. No. 4-817-985-03 (Oct. 21, 2013)(no presumptive weight afforded DIME physician concerning scheduled injuries; DIME opinion unnecessary to determination of scheduled impairment), *aff'd Wagoner v. Industrial Claim Appeals Office,* Colo. App. No. 13CA1983 (Oct. 23, 2014)(NSOP).

As found, Dr. Mayer performed surgery on October 16, 2015 to correct Claimant's fractured right patella. Dr. Mayer performed an open reduction and internal fixation of her displaced patella fracture. This required Dr. Mayer to reduce and compress the displaced fracture with screws and sternal wire.

As found, on September 29, 2016, almost a full year after Claimant's right knee surgery, Dr. Mayer documented that Claimant's right knee had only 135 degrees of flexion, a sub-normal range of motion. There is also a finding of "mild quad atrophy of her right lower extremity" and he also noted that "There is mild irregularity of the inferior articular surface region" of her right knee joint. Dr. Mayer also discusses continued treatment needed for Claimant's right knee.

As found, on September 30, 2016, Dr. Mayer completed a Patient Enrollment & Prescription Form for Orthovisc injections for Claimant. On the form, Dr. Mayer listed the ICD code for Claimant's condition as "unilateral primary osteoarthritis, right knee." On October 20, 2016, Dr. Mayer again examined Claimant and documented right knee

range of motion which consisted of 125 degrees of flexion. He also noted "minor joint space narrowing at the medial compartment."

In addition, on January 30, 2017, Dr. Goldman evaluated Claimant, based on a referral from Dr. Walker. Dr. Goldman noted Claimant's right knee had full extension, but had only 120 degrees of flexion. Dr. Goldman's impression – diagnosis –included "status post right patellar fracture requiring internal fixation with *aggravation of pre-existing degenerative joint disease and osteoarthritis secondary to October 15, 2015, work related injury.*" (Emphasis added.) Moreover, the decreased flexion found by Dr. Goldman on January 30, 2017 is the same amount measured and rated by Dr. Ginsburg during his DIME.

When Dr. Ginsburg evaluated Claimant's right knee pursuant to the DIME, he noted the following:

> In regard to the right knee, clearly the patient had significant trauma requiring surgery and does have residua. Range of motion is 11% impairment based on flexion. Extension is not impaired. Table 40, diagnosis is to be considered. Under #5, "arthritis due to any cause including trauma, chondromalacia," I believe the patient has 5%. Combining 11% and 5% is 16% lower extremity impairment

The ALJ finds that Dr. Ginsburg's impairment rating for Claimant's right knee for her loss of range of motion as well as her arthritis and/or chondromalacia to be consistent with the findings of Drs. Mayer and Goldman and is also consistent and in conformity with the AMA Guides. First, Dr. Ginsburg found Claimant's right knee flexion was limited to 120 degrees. This is the exact amount of limited flexion measured and documented by Dr. Goldman when he evaluated Claimant on January 30, 2017. This is also very close to the ROM measured and documented by Dr. Mayer on October 30, 2016. Moreover, limited knee flexion of 120 degrees, as measured by Dr. Ginsburg, results in an 11% extremity rating pursuant to Table 39 of the AMA Guides.

Second, Dr. Mayer also noted in his reports that there was "mild irregularity of the inferior articular surface region" of Claimant's right knee joint and that she also had "joint space narrowing at the medial compartment" of her right knee. Moreover, Dr. Mayer listed the ICD code for Claimant's right knee condition as "unilateral primary osteoarthritis, right knee" when prescribing Orthovisc injections. Lastly, Dr. Goldman's assessment and diagnosis included a diagnosis of "status post right patellar fracture requiring internal fixation with aggravation of pre-existing degenerative joint disease and osteoarthritis secondary to October 15, 2015, work related injury."

Table 40, Section 5, of the AMA Guides, allows the rating physician to provide additional impairment for "arthritis due to any cause including trauma; chondromalacia." (Re. Ex. K at 122.) The amount of additional impairment which can be assigned under Section 5 is discretionary and ranges from 0 to 20%. In this case, Dr. Ginsburg provided Claimant an additional 5% under Table 40, Section 5, of the AMA Guides for "arthritis due to any cause including trauma; chondromalacia." The ALJ concludes that Dr. Ginsburg's provision of an additional 5% under Table 40, Section 5, is consistent with the findings and opinions of Drs. Mayer and Goldman, and consistent and in conformity with the AMA Guides.

Respondent contends Claimant is not entitled to an impairment rating because when Claimant was placed at MMI by Dr. Walker, and provided a 0% impairment rating regarding her right knee fracture, Dr. Walker noted in her report Claimant's knee had full range of motion. However, there is no indication in her report that Dr. Walker actually measured Claimant's right knee range of motion and what those measurements were. As found above, Dr. Walker did not list any numerical measurements regarding Claimant's right knee when she placed Claimant at MMI and determined Claimant had no impairment due to her work accident. In addition, Claimant credibly testified that Dr. Walker did not formally measure her knee range of motion. Therefore, Dr. Walker's mere declaration, without more, is not persuasive to the ALJ that Claimant actually had normal range of motion of her right knee when Dr. Walker placed Claimant at MMI.

Respondent also contends that based upon the opinions of Dr. Cebrian, Clamant is not entitled to an impairment rating for the residuals of her right knee fracture for a number of reasons. First, Dr. Cebrian stated that the AMA Guides do not specifically provide an impairment rating for a patella fracture. While that might be true, the ALJ concludes that Dr. Ginsburg properly applied the AMA Guides, which allow for the rating of medical impairment caused by an injury, regardless of whether the name of the injury is specifically enumerated in the AMA Guides. Second, Dr. Cebrian asserted that because he found Claimant's range of motion of her knee to be normal – as did Dr. Walker - the deficiency found by Dr. Ginsburg is inconsistent and not reliable and therefore should not be used to support an impairment rating. However, as found, and noted above, Dr. Goldman evaluated and measured the range of motion of Claimant's knee joint and documented the exact deficit measured and rated by Dr. Ginsburg. Third, Dr. Cebrian also disagreed with the 5% Table 40 rating provided by Dr. Ginsburg. Dr. Cebrian testified that Claimant did not qualify for a Table 40, Section 5, rating under the AMA Guides for a specific disorder of arthritis because "there was no findings of post traumatic arthritis and so I didn't think it was appropriate to rate for that. She didn't have any removal of her meniscus or anything else, so there was no specific disorder impairment, so her impairment rating was zero." However, as found, and noted above, Dr. Mayer documented articular changes in Claimant's right knee such as "mild irregularity of the inferior articular surface region" and "joint space narrowing at the medial compartment" and also wrote a prescription for Orthovisc injections and listed the ICD code in support of such prescription as "unilateral primary osteoarthritis, right knee." Moreover, Dr. Goldman opined Claimant was suffering from "status post right patellar fracture requiring internal fixation with aggravation of pre-existing degenerative joint disease and osteoarthritis secondary to October 15, 2015, work related injury." Therefore, the ALJ does not find Dr. Cebrian's opinions that Claimant is not entitled to an impairment rating for her right knee due to a loss of range of motion or a Table 40, Section 5, rating based on arthritis or chondromalacia to be persuasive.

The ALJ finds Dr. Ginsburg's opinions to be very credible and very persuasive. Therefore, the ALJ concludes that Claimant has established by a preponderance of the evidence her entitlement to a scheduled permanent impairment rating for her right knee as determined by Dr. Ginsburg. Dr. Ginsburg appropriately assigned range of motion impairment to the right knee of 11%. Dr. Ginsburg also appropriately rated the arthritis and/or chondromalacia in the right knee post-fracture and post-surgery for an additional

5%. Therefore, the ALJ find and concludes that the 16% lower extremity rating provided by Dr. Ginsburg is appropriate.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to an award of maintenance medical benefits.

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As found, Dr. Ginsburg made maintenance care recommendations. Dr. Ginsburg stated that "during the year following assignment of maximum medical improvement, Claimant should be seen, perhaps two to four times, to see if any changes occurred and for appropriate medications. Dr. Cebrian also made maintenance care recommendations, which included a short course of 4 to 6 visits of PT for any complaints that Claimant has when returning to regular duty over the first three months and to complete her final cognitive-behavioral counseling session with Dr. Hawkins. Moreover, although Dr. Walker initially stated there should be no medical maintenance treatment, she saw Claimant on May 14, 2018, and recommended maintenance care, including a right-hand x-ray and reevaluation following that x-ray.

The ALJ finds the recommendations of Dr. Ginsburg, Cebrian, and Walker for maintenance treatment to be credible and persuasive. The post MMI treatment recommended by Drs. Ginsburg, Cebrian, and Walker is reasonable and necessary medical treatment which is intended to relieve Claimant from the effects of her injury and prevent further deterioration of Claimant's condition. Thus, this ALJ concludes that Claimant has proven by a preponderance of the evidence her entitlement to maintenance medical treatment.

III. Whether Respondent's properly endorsed the issue of permanent impairment to be heard at the hearing.

Claimant argued at hearing that Respondent's failure to check the box indicating that "PPD" was at issue constitutes a waiver of the issue and that the issue of PPD was closed and the Respondent is bound by the impairment rating assigned by the Division Examiner, Dr. Ginsburg.

Respondent's Application for Hearing clearly stated under Other issues to be heard at this hearing are: "Rule 5 application for hearing to overcome DIME physician's impairment rating." As found, Respondent's endorsement properly put the issue of Claimant's permanent medical impairment rating at issue and put Claimant on notice of the issues to be heard at the hearing set pursuant to Respondent's Application for Hearing.

Claimant did not provide the ALJ with any legal authority for her position at the hearing or in her post-hearing filing that Respondent's endorsement was insufficient.

In *Leprino v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005), the court of appeals held that the requirements of §8-42-107.2(4), C.R.S. are jurisdictional and if the parties fail to request a hearing to contest the DIME physician's findings, those findings become binding on the parties and the ALJ and the ALJ lacks jurisdiction to resolve a dispute as to those findings. The court reasoned that the 30 day time limit was part of an overall statutory scheme designed to ensure the prompt payment of benefits without the necessity of litigation in cases that do not present a legitimate controversy. *Leprino v. Industrial Claim Appeals Office, supra*. The Leprino court also stated that the provisions of §8-42-107.2(4), C.R.S. are clear and require the insurer either to contest the DIME report within thirty days or to admit in accordance with the report. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003 (upholding the imposition of penalties for the employer's failure to file an application for hearing or admit to the DIME report). Because these requirements have been construed to be jurisdictional, the requirements must be strictly construed. *Speier v. Industrial Claim Appeals Office*, 181 P.3d 1173 (Colo. App. 2008*); Leprino v. Industrial Claim Appeals Office, supra.; Schneider Nat'l Carriers, Inc. v. Industrial Claim Appeals Office*, 969 P.2d 817 (Colo. App. 1998)(because filing requirements are jurisdictional, statutory provisions governing such requirements must be strictly construed).

Moreover, substantial compliance with the statutory requirement for objecting to an FAL can be sufficient to prevent closure of a claim. *See, e.g., Mitchell v. Office Liquidators, Inc.,* W.C. No. 4-409-905 (December 29, 2000) (timely application for hearing sufficed for purposes of objecting to FAL). However, there must be evident a genuine effort to comply with statutory requirements. *See Pinon v. U-Haul*, W.C. No. 4-632-044 (April 25, 2007), aff'd *sub. nom*. *Pinon v. Industrial Claim Appeals Office* (Colo. App. 07CA0922, April 3, 2008) (not selected for official publication) (substantial compliance requires party intent to or actually make good faith or colorable effort to comply with statutory requirements).

The current version of §8-42-107.2(4), C.R.S. provides that the Respondent had to either file an admission of liability or "request a hearing before the division contesting one or more of the IME's findings or determinations."

Here, Respondent's clearly stated on their application for hearing that they were contesting the impairment rating provided by the Division Examiner, Dr. Ginsburg. Therefore, the ALJ finds and concludes Respondent's not only substantially complied and made a genuine effort to comply, but they did comply and properly endorsed the

issue of Claimant's impairment rating for hearing which was a finding and determination of Dr. Ginsburg.

Respondents' Application for Hearing unequivocally stated the endorsed issue, Claimant had notice of the issues for hearing, and therefore Claimant's argument regarding waiver is denied. The ALJ finds and concludes Respondent properly endorsed the issue of Claimant's medical impairment as it relates to the industrial injury and overcoming the impairment rating provided by the Division Examiner, Dr. Ginsburg.

IV. Disfigurement benefits.

As found, Claimant has a scar on her right knee that is approximately three and a half to four inches long with suture marks and slight discoloration extending about a quarter of an inch in width for the length of the scar. Claimant's right thumb has a very faint one-half-inch long scar and swelling at the base of her thumb. These disfigurements are related to the compensable injury, are permanent and have been present for more than six months.

Therefore, the ALJ concludes Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation in the amount of $1,200. *See* Sec. 8-42-108 (1), C.R.S.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondent shall pay Claimant permanent impairment benefits based on an 8% whole person rating of the cervical spine and a 16% scheduled lower extremity rating for the right knee;
2. Respondent shall pay Claimant $1,200.00 for disfigurement of Claimant's right knee and right thumb. Respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim;
3. Respondent shall admit for a general award of maintenance medical benefits;
4. Respondent shall pay interest of 8% per annum on all benefits not paid when due;
5. Respondent shall file a final admission consistent with this Order as required by the Rule 5-5(C)(1); and
6. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 10, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered left shoulder and cervical spine injuries during the course and scope of his employment with Employer on April 13, 2017.

2. Whether Claimant has established by a preponderance of the evidence that the cervical interlaminar epidural steroid injection at the C7-T1 level recommended by Usama Ghazi, D.O. is reasonable, necessary and causally related to his April 13, 2017 industrial injuries.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period November 30, 2017 until terminated by statute.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $413.68.

FINDINGS OF FACT

1. Claimant is a 43-year-old male who works for Employer as a part-time box pre-loader. His job duties involve removing boxes from a rotating cage for placement in delivery trucks.

2. Claimant testified that approximately four to six weeks prior to April 13, 2017 he was pulling a box when he experienced a burning sensation in his left lower scapular area. He noted that he reported the injury to his supervisor but wanted to determine whether the condition would improve without the necessity for medical treatment.

3. On April 13, 2017 Claimant reported a work-related injury to his left shoulder. Claimant discussed the injury with supervisor Alexander Common. Mr. Common completed a First report of Injury and directed Claimant for medical treatment. The First Report of Injury provided that Claimant was injured while "loading packages from boxline into package car." The report specified that the "injury happened over time and that there wasn't a one-time incident that caused it."

4. On April 13, 2017 Claimant visited Authorized Treating Physician (ATP) Tomm VanderHorst, M.D. for an examination. Claimant reported left shoulder and arm pain. He did not mention a specific trauma or date of onset, but noted that his symptoms began approximately four to six weeks earlier. Claimant noted an inciting event when he "was pulling on a package and felt a burning irritation in his left lower scapular border area." Dr. VanderHorst diagnosed Claimant with a left scapular strain and brachial

plexopathy. He was unable to determine whether Claimant's condition was caused by his work activities. Dr. VanderHorst prescribed pain medications and therapeutic massage sessions.

5. On April 28, 2017 Claimant returned to Dr. VanderHorst for an evaluation. Dr. VanderHorst characterized Claimant's condition as "left scapulothoracic irritation." A cervical spine x-ray reflected multiple levels of degenerative changes but no evidence of an acute injury. A left shoulder examination revealed normal sensation and circulation. Claimant continued to work regular duty employment.

6. On May 1, 2017 Claimant began massage therapy at SCL Health, Wheat Ridge Occupational Medicine. Claimant had developed increased scapula area symptoms, left arm pain and hand paresthesis over the preceding few months. He told the therapist that he did not suffer a single incident at work that precipitated his symptoms but they gradually developed.

7. On May 26, 2018 Claimant again visited Dr. VanderHorst for an examination. Dr. VanderHorst recorded that Claimant had suffered persistent left shoulder pain. Claimant noted that, when he is off from work his symptoms improve, but they return when he begins working. Based on Claimant's continued exacerbation of symptoms Dr. VanderHorst assigned work restrictions. Employer accommodated the restrictions through the Temporary Alternative Work (TAW) program.

8. On June 6, 2017 Claimant reported to Dr. VanderHorst that he was no longer experiencing a significant exacerbation of pain while at work because of the TAW program. Claimant did not report any neck complaints and exhibited "full active range of motion" on physical examination.

9. On June 30, 2017 Claimant suffered an admitted fracture of his right foot while working for Employer. He specifically fractured the fifth metatarsal. Claimant was taken completely off work from July 31, 2017 until November 29, 2017 because of his foot injury.

10. On July 14, 2017 Claimant reported to Dr. VanderHorst that his left shoulder continued to improve with therapeutic massage and physical therapy. His shoulder became achy only when sitting for too long. Claimant exhibited full, active range of motion of the neck and Dr. VanderHorst anticipated that Claimant would reach Maximum Medical Improvement (MMI) after completing a home exercise and stretching program. Claimant's work restrictions consisted of seated duty with minimal walking because of hjs foot injury.

11. On July 25, 2017 Claimant underwent surgery for his right foot fracture. He used crutches for mobility.

12. On August 1, 2017 Dr. VanderHorst determined that Claimant had reached MMI for his left shoulder and arm symptoms. He did not assign any permanent impairment. Dr. VanderHorst also did not assign any left shoulder restrictions. He noted that Claimant had completed physical therapy and therapeutic massage with only reports

of mild ongoing discomfort into the left shoulder. Dr. Vanderhorst commented that Claimant might experience mild flares of brachial plexopathy with the use of his crutches but otherwise would have no significant issues. A physical examination of the neck revealed that it was nontender with full active range of motion and intact sensation. Dr. VanderHorst's diagnoses at the time of MMI was scapulothoracic syndrome and brachial plexopathy.

13. On August 10, 2017 Claimant visited Bernadette Niblo, LMT at Lutheran Medical Center. Claimant reported that "he was working out on Monday and overexerted himself and has been feeling intense constant pain in left upper back between scapula and spine." He stated that he had not slept the past two nights because of pain.

14. Claimant returned to Dr. VanderHorst on September 12, 2017 for a one-time evaluation. Dr. VanderHorst noted that Claimant had initially presented "after lifting boxes overhead at work and developing periscapular pain." He noted that Claimant reached MMI on August 1, 2017 but developed additional pain using crutches for his foot injury. Claimant specifically reported pain in the scapular and suprascapular region and was suffering persistent numbness in the right dorsal hand over the first, second and third metacarpals. He noted radiation into the posterior lateral neck. Claimant did not recall any history of significant cervical injury or trauma. Dr. VanderHorst revoked the assignment of MMI for the April 13, 2017 incident. He imposed a 10-pound restriction with minimal reaching overhead and away from his body with his left arm. Dr. VanderHorst referred Claimant to Usama Ghazi, D.O. for an evaluation. He also recommended an EMG of the left upper extremity.

15. Claimant underwent an EMG with Eric K. Hammerberg, M.D. on September 22, 2017. The EMG did not reveal any evidence of cervical radiculopathy or brachial plexopathy. The findings were compatible with clinical diagnoses of left carpal tunnel syndrome and left cubital tunnel syndrome.

16. On September 27, 2017 Claimant visited Dr. Ghazi for an evaluation. Dr. Ghazi noted that Claimant "felt a twinge burn while flexing his left shoulder to retrieve a small package" at work. He did not record a date of the incident. Dr, Ghazi characeterized the incident as a "lifting injury with the left rotator cuff in a forward-flexed position while grabbing a small package from overhead." He explained that Claimant subsequently had progressive symptoms that eventually encompassed his cervicothoracic spine with aching and burning into the left arm.

17. On October 16, 2017 Dr. VanderHorst commented that Claimant's EMG showed left carpal and cubital tunnel syndrome but no evidence of cervical radiculopathy or brachial plexopathy. He remarked that the abnormal EMG did "not rule out possible cervical radiculopathy."

18. On October 16, 2017 Claimant underwent an MRI of the cervical spine. The MRI reflected a large left paramedian/foraminal disc extrusion at C6-7 causing moderate/severe left foraminal stenosis with compressed C7 nerve root.

19. On October 25, 2017 Claimant returned to Dr. Ghazi for an examination. After reviewing the October 16, 2017 MRI, Dr. Ghazi diagnosed Claimant with a "large C6-7 protrusion with left C6-7 radiculopathy." He scheduled Claimant for two sets of cervical interlaminar epidural steroid injections performed at the C7-T1 level.

20. Insurer disputed the reasonableness, necessity and relatedness of Claimant's cervical condition and requested injections.

21. On October 31, 2017 Claimant returned to Dr. VanderHorst for an examination. Dr. VanderHorst recounted that he initially determined that, if Claimant's symptoms had a cervical origin, they were not work-related. However, he reviewed Claimant's mechanism of injury and changed his opinion. Dr. VanderHorst detailed that:

> [Claimant's] work requires him to reach forward and upward repeatedly with his neck in extended position while straining at packages. This combination of action can put increased pressure on the cervical discs and result in rupture. His history was one of rather sudden onset of symptoms while doing this type of activity. He failed to respond to protracted treatments to his shoulder and periscapular area and was ultimately found to have a cervical disc rupture which appears to be the proximate cause of his ongoing symptoms. I believe that this is a work causality condition with greater than 50% probability.

22. On November 3, 2017 F. Mark Paz, M.D. performed a Rule 16 utilization review regarding Claimant's request for prior authorization of cervical injections. He determined that neither Claimant's C6-7 herniated disc nor the C7 compressed nerve were causally related to the April 13, 2017 work incident. Dr. Paz noted that the mechanism of injury described by Claimant was not consistent with the symptoms. He thus recommended denial of the injections.

23. On November 6, 2017 Dr. Ghazi responded to Insurer's denial of the request for epidural steroid injections. He explained that Claimant's overhead activity with his neck hyperextended "could cause undue pressure on a disk and result in herniation." Dr. Ghazi summarized that:

> It is quite common, in my experience, that patients that do significant bending, twisting, and rotation with extension of the cervical spine, do suffer herniations, even though we tend to "classically" think of patient's only herniating in flexed positions. This is quite frankly, not the case. The proximal nature of the patient's activity with the onset of weakness, atrophy, and severe pain, all point towards this being a causally related cervical disk herniation which would be related to the mechanism of injury, in my profession medical opinion.

24. While Respondents were disputing medical care on the cervical spine, Claimant was released from treatment on his admitted foot claim with no permanent work restrictions on November 29, 2017. After Claimant's release at MMI Employer would

not permit him to return to work due to the temporary work restrictions assigned by Dr. VanderHorst for the shoulder and neck.

25. On March 8, 2018 Claimant underwent an independent medical examination with Dr. Paz. Claimant reported that in April of 2017 he was pulling packages out of cages for Employer. He began to experience a "tingling" sensation in his left scapula area. The "tingling" subsequently evolved into a "burning" sensation. After conducting a physical examination and reviewing Claimant's medical records, Dr. Paz performed a causation analysis. He reasoned that Claimant's medical record documented "an expanding symptomatology of the left scapula and infrascapular region over 6-8 weeks not specifically associated with work activities." Dr. Paz diagnosed Claimant with back pain.

26. Dr. Paz specifically addressed Claimant's C6-7 cervical disc extrusion. He concluded that the condition was not causally related to Claimant's April 2017 industrial incident. He specified that "having the neck in an extended posture is inconsistent with causing or contributing to the development of a disc extrusion in the cervical area." Dr. Paz also explained that Claimant's C6-7 disc extrusion was not aggravated or accelerated by his work activities for Employer in April 2017. Moreover, Claimant's left carpal/cubital tunnel syndrome and left rotator cuff strain were inconsistent with his mechanism of injury in pulling packages out of cages for Employer.

27. Claimant testified at the hearing in this matter. He explained that he was pulling a box out of a cage at waist level while working for Employer when he felt a burning sensation in his left shoulder. Although Claimant noted that he reported the injury to a supervisor, he waited a few weeks to obtain medical treatment. He specifically remarked that his symptoms worsened and he sought medical treatment on April 13, 2017. Claimant acknowledged that he trained and "shadowboxed' at a gym but ceased his workouts when he was injured. He remarked that he injured himself while performing physical therapy exercises on August 7, 2017.

28. Pre-load Manager for Employer Michael Romano testified at the hearing in this matter. Mr. Romano remarked that, in the weeks preceding the April 13, 2017 report of injury, Claimant was involuntarily moved from his preferred assignment at the middle cage load area to the top cage. He commented that at the top cage Claimant would not have been required to move packages higher than chest/shoulder height. The arrangement was designed so that employees could stay within their "power zone" while lifting packages. The purpose of the "power zone" is to eliminate stress and strain of the back and shoulder muscles to avoid injuries.

29. Dr. Paz also testified at the hearing in this matter. He maintained that Claimant's work activities on April 13, 2017 did not cause his left shoulder or cervical symptoms. He specifically addressed Dr. VanderHorst's explanation of Claimant's mechanism of injury. Dr. VanderHorst noted that Claimant's "work required him to reach forward and upward repeatedly with his neck extended while moving packages." He remarked that "this combination of actions can put increased pressure on the cervical discs and result in rupture." Dr. Paz disagreed with Dr. VanderHorst's analysis because

flexing or extending the head would not herniate a disc at the C7 level. Furthermore, based on the testimony of Claimant and Mr. Romano, Dr. Paz noted that Claimant was not involved in overhead lifting activity on April 13, 2017. Dr. Paz also disagreed with Dr. Ghazi's opinion that Claimant suffered a herniated disc from moving packages on a consistent basis. Instead, Claimant's activity of moving packages at waist level on April 13, 2017 did not cause his disc herniation.

30. Claimant has failed to demonstrate that it is more probably true than not that he suffered left shoulder and cervical injuries during the course and scope of his employment with Employer on April 13, 2017. Initially, Claimant explained that he was pulling a box out of a cage at waist level while working for Employer when he felt a burning sensation in his left shoulder. His symptoms worsened over a few weeks and he sought medical treatment on April 13, 2017. Although Claimant worked in a strenuous position and moved numerous heavy packages over an extended period of time, the record lacks sufficient evidence that he suffered an acute injury in April of 2017. Claimant's reports do not reveal a distinct injury and the medical opinions supporting his position are predicated upon incorrect presumptions about Claimant's mechanism of injury and development of symptoms.

31. The record is replete with evidence that Claimant did not suffer an acute injury on April 13, 2017 but his symptoms developed gradually over time. Claimant's supervisor Mr. Common completed a First Report of Injury on April 13, 2017. The Report provided that Claimant was injured while "loading packages from boxline into package car." The report specified that the "injury happened over time and that there wasn't a one-time incident that caused it." When Claimant visited Dr. VanderHorst on April 13, 2017 he reported left shoulder and arm pain. He did not mention a specific trauma or date of onset, but noted that his symptoms began approximately four to six weeks earlier. An April 28, 2017 cervical spine x-ray revealed multiple levels of degenerative changes but no evidence of an acute injury. At a physical therapy visit on May 1, 2017 Claimant reiterated that he did not suffer a distinct incident at work, but his symptoms gradually developed.

32. Drs. VanderHorst and Ghazi attributed Claimant's left shoulder and cervical spine symptoms to his work activities for Employer. Dr. VanderHorst was initially unable to determine whether Claimant's conditions were caused by his work activities. However, by October 31, 2017 Dr. VanderHorst determined that Claimant's conditions were work-related. He reasoned that Claimant's "work requires him to reach forward and upward repeatedly with his neck in extended position" while moving packages. The combination "of action can put increased pressure on the cervical discs and result in rupture." Dr. Ghazi explained that individuals who engage in significant bending, twisting, and rotation with extension of the cervical spine can suffer disc herniations. He attributed Claimant's disc protrusion to his overhead activity with his neck hyperextended. The opinions of Drs. VanderHorst and Ghazi are based on the presumption that Claimant gradually developed symptoms while moving packages upward and overhead.

33. In contrast, pre-load manager Mr. Romano credibly explained that Claimant did not reach upward or overhead while removing packages from cages for Employer.

He commented that at the top cage Claimant would not have been required to move packages higher than chest/shoulder height. The arrangement was designed so that employees could stay within their "power zone" while lifting packages. Claimant also noted that he was injured while pulling a box from a cage at waist level. The record thus does not reflect that Claimant was engaged in the upward or overhead movement of packages.

34. After conducting a physical examination and reviewing Claimant's medical records, Dr. Paz persuasively maintained that Claimant's work activities on April 13, 2017 did not cause his left shoulder or cervical symptoms. He specifically detailed that Claimant experienced "an expanding symptomatology of the left scapula and infrascapular region over 6-8 weeks not specifically associated with work activities." Dr. Paz remarked that "having the neck in an extended posture is inconsistent with causing or contributing to the development of a disc extrusion in the cervical area." He also explained that Claimant's C6-7 disc extrusion was not aggravated or accelerated by his work activities for Employer in April 2017. Moreover, Claimant's left carpal/cubital tunnel syndrome and left rotator cuff strain were inconsistent with his mechanism of injury in removing packages from cages. In specifically addressing Dr. VanderHorst's analysis, Dr. Paz noted that flexing or extending the head would not herniate a disc at the C7 level. Based on the testimony of Claimant and Mr. Romano, Dr. Paz explained that Claimant was not involved in overhead lifting activities on April 13, 2017. Moreover, Dr. Paz disagreed with Dr. Ghazi's opinion that Claimant suffered a herniated disc from moving packages overhead on a consistent basis. Instead, Claimant's activity of moving packages at waist level on April 13, 2017 did not cause his disc herniation. Accordingly, based on Claimant's inconsistent account of the development of symptoms, the incorrect presumptions about Claimant's mechanism of injury and development of symptoms by Drs. VanderHorst and Ghazi, and the persuasive opinion of Dr. Paz, Claimant has not demonstrated that he suffered acute left shoulder and cervical spine injuries while working for Employer on April 13, 2017. Claimant's Workers' Compensation claim and request for benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to

a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered left shoulder and cervical injuries during the course and scope of his employment with Employer on April 13, 2017. Initially, Claimant explained that he was pulling a box out of a cage at waist level while working for Employer when he felt a

burning sensation in his left shoulder. His symptoms worsened over a few weeks and he sought medical treatment on April 13, 2017. Although Claimant worked in a strenuous position and moved numerous heavy packages over an extended period of time, the record lacks sufficient evidence that he suffered an acute injury in April of 2017. Claimant's reports do not reveal a distinct injury and the medical opinions supporting his position are predicated upon incorrect presumptions about Claimant's mechanism of injury and development of symptoms.

8. As found, the record is replete with evidence that Claimant did not suffer an acute injury on April 13, 2017 but his symptoms developed gradually over time. Claimant's supervisor Mr. Common completed a First Report of Injury on April 13, 2017. The Report provided that Claimant was injured while "loading packages from boxline into package car." The report specified that the "injury happened over time and that there wasn't a one-time incident that caused it." When Claimant visited Dr. VanderHorst on April 13, 2017 he reported left shoulder and arm pain. He did not mention a specific trauma or date of onset, but noted that his symptoms began approximately four to six weeks earlier. An April 28, 2017 cervical spine x-ray revealed multiple levels of degenerative changes but no evidence of an acute injury. At a physical therapy visit on May 1, 2017 Claimant reiterated that he did not suffer a distinct incident at work, but his symptoms gradually developed.

9. As found, Drs. VanderHorst and Ghazi attributed Claimant's left shoulder and cervical spine symptoms to his work activities for Employer. Dr. VanderHorst was initially unable to determine whether Claimant's conditions were caused by his work activities. However, by October 31, 2017 Dr. VanderHorst determined that Claimant's conditions were work-related. He reasoned that Claimant's "work requires him to reach forward and upward repeatedly with his neck in extended position" while moving packages. The combination "of action can put increased pressure on the cervical discs and result in rupture." Dr. Ghazi explained that individuals who engage in significant bending, twisting, and rotation with extension of the cervical spine can suffer disc herniations. He attributed Claimant's disc protrusion to his overhead activity with his neck hyperextended. The opinions of Drs. VanderHorst and Ghazi are based on the presumption that Claimant gradually developed symptoms while moving packages upward and overhead.

10. As found, in contrast, pre-load manager Mr. Romano credibly explained that Claimant did not reach upward or overhead while removing packages from cages for Employer. He commented that at the top cage Claimant would not have been required to move packages higher than chest/shoulder height. The arrangement was designed so that employees could stay within their "power zone" while lifting packages. Claimant also noted that he was injured while pulling a box from a cage at waist level. The record thus does not reflect that Claimant was engaged in the upward or overhead movement of packages.

11. As found, after conducting a physical examination and reviewing Claimant's medical records, Dr. Paz persuasively maintained that Claimant's work activities on April 13, 2017 did not cause his left shoulder or cervical symptoms. He specifically detailed

that Claimant experienced "an expanding symptomatology of the left scapula and infrascapular region over 6-8 weeks not specifically associated with work activities." Dr. Paz remarked that "having the neck in an extended posture is inconsistent with causing or contributing to the development of a disc extrusion in the cervical area." He also explained that Claimant's C6-7 disc extrusion was not aggravated or accelerated by his work activities for Employer in April 2017. Moreover, Claimant's left carpal/cubital tunnel syndrome and left rotator cuff strain were inconsistent with his mechanism of injury in removing packages from cages. In specifically addressing Dr. VanderHorst's analysis, Dr. Paz noted that flexing or extending the head would not herniate a disc at the C7 level. Based on the testimony of Claimant and Mr. Romano, Dr. Paz explained that Claimant was not involved in overhead lifting activities on April 13, 2017. Moreover, Dr. Paz disagreed with Dr. Ghazi's opinion that Claimant suffered a herniated disc from moving packages overhead on a consistent basis. Instead, Claimant's activity of moving packages at waist level on April 13, 2017 did not cause his disc herniation. Accordingly, based on Claimant's inconsistent account of the development of symptoms, the incorrect presumptions about Claimant's mechanism of injury and development of symptoms by Drs. VanderHorst and Ghazi, and the persuasive opinion of Dr. Paz, Claimant has not demonstrated that he suffered acute left shoulder and cervical spine injuries while working for Employer on April 13, 2017. Claimant's Workers' Compensation claim and request for benefits is thus denied and dismissed.

ORDER

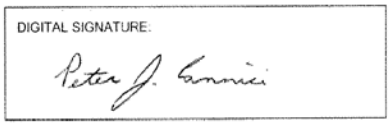
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's Workers' Compensation claim and request for benefits based on an April 13, 2017 incident is denied and dismissed.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 9, 2018.



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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Respondents have established by a preponderance of the evidence that they are entitled to withdraw their December 12, 2006 Final Admission of Liability (FAL) that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's April 25, 2004 industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. On April 25, 2004 Claimant suffered an admitted industrial injury to his lower back. Claimant testified that he specifically strained his lower back while lifting a heavy box over his head.

2. Claimant subsequently underwent conservative care that included physical therapy and chiropractic treatment. He also received facet and epidural steroid injections.

3. On October 28, 2004 John J. Aschberger, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned a 7% whole person impairment rating for Claimant's lower back condition.

4. Claimant challenged Dr. Aschberger's MMI determination and sought a Division Independent Medical Examination (DIME). Edwin M. Healey, M.D. performed the DIME. Dr. Healey determined that Claimant had not reached MMI and recommended additional treatment in the form of injections and a surgical consultation.

5. Claimant subsequently underwent additional epidural steroid injections with Dr. Aschberger. Orthopedic Surgeon Gary Ghiselli, M.D. concluded that continued conservative care was reasonable but Claimant was not a surgical candidate.

6. On November 20, 2006 Claimant visited Dr. Healey for a follow-up DIME. Dr. Healey determined that Claimant reached MMI on June 1, 2006 and assigned a 13% whole person impairment rating. He also recommended continued medications for Claimant's persistent back pain.

7. On December 12, 2006 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Healey's MMI and impairment determinations. Respondents also acknowledged that Claimant was entitled to receive continued reasonable, necessary and related medical maintenance benefits.

8. On September 5, 2007 Claimant returned to Dr. Aschberger for an evaluation. After conducting a physical examination, Dr. Aschberger determined that

Claimant's symptoms were suggestive of facet or SI joint irritation. He recommended use of anti-inflammatories, regular stretching and home exercises.

9. On August 21, 2008 Claimant again visited Dr. Aschberger. Dr. Aschberger recommended a short course of chiropractic care. He noted that he would discharge Claimant from treatment at the following appointment.

10. On April 28, 2010 Claimant returned to Dr. Aschberger. Dr. Aschberger noted Claimant's prior "good diagnostic response" to a lumbar facet block performed one year earlier. He thus recommended repeat facet blocks. Robert Kawasaki, M.D. subsequently performed bilateral facet injections at L4-L5 and L5-S1.

11. On December 15, 2010 Claimant again visited Dr. Aschberger and requested a repeat injection because the prior injection was wearing off. Dr. Aschberger responded that he could not justify a repeat injection because Claimant had reported no significant benefit in the months following the injection.

12. On March 29, 2011 Claimant visited Dr. Aschberger and reported increasing lower back pain. Claimant felt that the prior injection was wearing off. Although Dr. Aschberger cautioned against a repeat facet injection, he recommended medial branch blocks to address Claimant's symptoms.

13. Claimant's next appointment with Dr. Aschberger occurred on February 14, 2012. Claimant requested another injection. Dr. Aschberger commented that the medial branch block injection performed on June 17, 2011 had produced worsening symptoms and the facet injections administered two years earlier provided minimal relief. He recommended against further intervention.

14. On December 2, 2014 Claimant returned to Dr. Aschberger for care. Dr. Aschberger reviewed notes from Dr. Kawasaki's SI injection. Dr. Kawasaki commented that Claimant reported complete symptomatic relief after the injection, but his pain journal reflected 8/10 levels shortly after the injection. An x-ray did not reveal any evidence of acute injury or instability. Dr. Aschberger concluded that more therapy or other interventions were not warranted, but prescribed Robaxin and told Claimant he would see him as needed.

15. On June 10, 2015 Claimant returned to Dr. Aschberger for treatment. Claimant reported temporary benefits from chiropractic care. Because Claimant reported that Robaxin had been helpful, Dr. Aschberger authorized another prescription.

16. On September 10, 2015 Claimant visited Dr. Aschberger and requested intervention for his continued lower back symptoms. Dr. Aschbeger reiterated that he could not justify additional injections or other intervention. He instead recommended a TENS unit and prescribed Robaxin.

17. Claimant testified that on February 21, 2016 he went to Guatemala in order to complete the process to become a permanent legal resident of the United States. He remained in Guatemala until May 14, 2017. During his time in Guatemala Claimant did

not work or seek medical care. He also rationed his Robaxin.

18. Claimant explained that, when he returned to Colorado, he contacted Concentra Medical Centers to schedule an appointment with Dr. Aschberger. However, Insurer denied the request.

19. In March 2018 Claimant underwent an independent medical examination with John Tashof Bernton, M.D. Dr. Bernton also testified through a post-hearing evidentiary deposition in this matter on June 18, 2018. He reviewed Claimant's medical records and conducted a physical examination. Dr. Bernton maintained that additional medical maintenance treatment was neither reasonable, necessary nor related to Claimant's April 25, 2004 industrial lower back injury. He explained that Claimant suffered a lumbar strain while lifting a box 14 years earlier. Dr. Bernton summarized that injections of the SI, facet and epidural area did not produce a positive diagnostic response. Physicians have thus not identified a specific pain generator. Additional injections would be inconsistent with the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*).

20. Dr. Bernton explained that, to the extent Claimant presently requires care for his lower back, "it is not because he lifted a box 14 years ago." He noted that lumbar complaints are common and degenerative changes can occur over a 14 year period. Dr. Bernton detailed that Claimant exhibited some "soft findings" on examination as well as evidence of a psychological overlay for his symptoms. He commented that evaluation of whether Claimant suffered an intervening event within the 14 year period since his injury would be reasonable but not work-related. Dr. Bernton concluded that there was no reasonable medical probability that Claimant currently requires any medical treatment as a result of his April 25, 2004 admitted lower back injury.

21. Respondents have established that it is more probably true than not that they are entitled to withdraw their December 12, 2006 FAL that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's April 25, 2004 industrial injury or prevent further deterioration of his condition. Initially, on April 25, 2004 Claimant suffered an admitted industrial lower back injury while lifting a box over his head. In a December 12, 2006 FAL Respondents acknowledged that Claimant was entitled to receive continued reasonable, necessary and related medical maintenance benefits. Claimant subsequently underwent extensive conservative treatment for his condition including medications and chiropractic care. He also underwent SI, facet and epidural injections for diagnostic purposes and treatment. However, Dr. Aschberger repeatedly noted that the injections did not produce a positive diagnostic response. Physicians have thus been unable to identify a specific pain generator. Dr. Aschberger ultimately explained that he could not justify additional injections or other intervention. Nevertheless, he recommended a TENS unit and prescribed Robaxin.

22. Dr. Bernton persuasively explained that additional medical maintenance treatment was neither reasonable, necessary nor related to Claimant's April 25, 2004

industrial lower back injury. Dr. Bernton commented that, to the extent Claimant presently requires care for his lower back, "it is not because he lifted a box 14 years ago." He noted that lumbar complaints are common and degenerative changes can occur over a 14 year period. Dr. Bernton detailed that Claimant exhibited some "soft findings" on examination as well as evidence of a psychological overlay for his symptoms. He concluded that there was no reasonable medical probability that Claimant currently requires any medical treatment as a result of his April 25, 2004 admitted lower back injury. Based on the medical records as well as the persuasive opinion of Dr. Bernton, Claimant has received extensive treatment in the form of injections, medications, physical therapy and chiropractic care for an injury that occurred 14 years ago with no improvement and physicians have been unable to identify a pain generator. Additional maintenance benefits are thus neither reasonable, necessary nor related to Claimant's April 25, 2004 lower back injury. Continued treatment would not be designed to relieve the effects of Claimant's April 25, 2004 industrial injury or prevent further deterioration of his condition. Accordingly, Respondents' request to withdraw the December 12, 2006 FAL is granted.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo.

1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2015), C.R.S. On February 8, 2008 Respondents filed a FAL in response to Dr. Crosby's MMI and impairment determinations. The FAL also specified that Claimant was entitled to receive reasonable, necessary and related medical benefits. In order to withdraw the FAL Respondents thus have the burden of proving by a preponderance of the evidence that Claimant is not entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her April 18, 2005 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

6. As found, Respondents have established by a preponderance of the evidence that they are entitled to withdraw their December 12, 2006 FAL that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's April 25, 2004 industrial injury or prevent further deterioration of his condition. Initially, on April 25, 2004 Claimant suffered an admitted industrial lower back injury while lifting a box over his head. In a December 12, 2006 FAL Respondents acknowledged that Claimant was entitled to receive continued reasonable, necessary and related medical maintenance benefits. Claimant subsequently underwent extensive conservative treatment for his condition including medications and chiropractic care. He also underwent SI, facet and epidural injections for diagnostic purposes and treatment. However, Dr. Aschberger repeatedly noted that the injections did not produce a positive diagnostic response. Physicians have thus been unable to identify a specific pain generator. Dr. Aschberger ultimately explained that he could not justify additional injections or other intervention. Nevertheless, he recommended a TENS unit and prescribed Robaxin.

7. As found, Dr. Bernton persuasively explained that additional medical maintenance treatment was neither reasonable, necessary nor related to Claimant's April 25, 2004 industrial lower back injury. Dr. Bernton commented that, to the extent Claimant presently requires care for his lower back, "it is not because he lifted a box 14 years ago." He noted that lumbar complaints are common and degenerative changes can occur over

a 14 year period. Dr. Bernton detailed that Claimant exhibited some "soft findings" on examination as well as evidence of a psychological overlay for his symptoms. He concluded that there was no reasonable medical probability that Claimant currently requires any medical treatment as a result of his April 25, 2004 admitted lower back injury. Based on the medical records as well as the persuasive opinion of Dr. Bernton, Claimant has received extensive treatment in the form of injections, medications, physical therapy and chiropractic care for an injury that occurred 14 years ago with no improvement and physicians have been unable to identify a pain generator. Additional maintenance benefits are thus neither reasonable, necessary nor related to Claimant's April 25, 2004 lower back injury. Continued treatment would not be designed to relieve the effects of Claimant's April 25, 2004 industrial injury or prevent further deterioration of his condition. Accordingly, Respondents' request to withdraw the December 12, 2006 FAL is granted.

ORDER

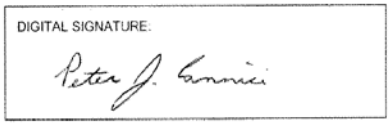
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents' request to withdraw the December 12, 2006 FAL acknowledging reasonable, necessary and related medical maintenance benefits is granted.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 20, 2018.



Peter J. Cannici
Administrative Law Judge

Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that she is entitled to maintenance medical treatment to prevent further deterioration to her physical condition pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

- Whether the claimant sustained a serious permanent disfigurement to areas of her body normally exposed to public view, resulting in additional compensation, pursuant to Section 8-42-108 (1), C.R.S.

FINDINGS OF FACT

1. The claimant was employed by the employer on March 31, 2015 when she hit her bilateral elbows on a work bench. The claimant reported her injury to the employer and was referred for medical treatment with Dr. Theodore Sofish.

2. Dr. Sofish initially examined the claimant on April 3, 2015. At that time, Dr. Sofish noted a history of hand numbness in both hands since December 2013. The claimant reported that her work duties included breaking down boxes and electrical pieces using knives, wire cutters, and screwdrivers. Dr. Sofish diagnosed carpal tunnel syndrome of unknown etiology.

3. The claimant returned to Dr. Sofish on May 8, 2015, and reported pain of 4 out of 10, tingling, and numbness in both hands with neck pain. On that date, Dr. Sofish diagnosed work related bilateral carpal tunnel syndrome with probable non-work related neck pain.

4. The claimant again returned to Dr. Sofish on June 8, 2015 and reported ongoing hand pain that was waking her at night. The claimant also reported to Dr. Sofish that her job with the employer included a lot of cutting, bagging, and ripping open bags. Dr. Sofish noted that the claimant was no longer working for the employer. At that time, Dr. Sofish recommended that the claimant undergo an electromyelogram and nerve conduction (EMG/NCV) study.

5. The claimant underwent the recommended EMG/NCV with Dr. Mitchell Burnbaum on June 25, 2015. The EMG/NCV demonstrated bilateral carpal tunnel syndrome, (left greater than right).

6. The claimant returned to Dr. Sofish on July 14, 2015. At that time, Dr. Sofish noted the results of the EMG/NCV study and referred the claimant to Dr. Mitchell Copeland for bilateral carpal tunnel surgery.

7. Dr. Copeland's office evaluated the claimant on July 14, 2015. Dr. Copeland noted the claimant's complaints in both hands and the EMG/NCV results and opined that the claimant had classic carpal tunnel symptoms. Dr. Copeland recommended that the claimant could treat conservatively with cortisteroid injection or undergo surgery.

8. The claimant returned to Dr. Copeland on September 16, 2015 and was evaluated by John Rexroth, PAC. Mr. Rexroth noted that the claimant's injury resulted after repetitive motion at work. Mr. Rexroth discussed non-surgical options with the claimant, but the claimant elected to proceed with carpal tunnel release surgery.

9. On September 24, 2015, the claimant underwent left carpal tunnel release surgery. Thereafter, on December 1, 2015, the claimant underwent right carpal tunnel release surgery. Both surgeries were performed by Dr. Copeland.

10. On October 12, 2015, the respondents filed a general admission of liability (GAL) admitting for temporary total disability (TTD) benefits beginning September 24, 2015.

11. On January 13, 2016, the claimant was seen by Mr. Rexroth and reported that the numbness and tingling symptoms and pain in the median nerve distribution had resolved. Mr. Rexroth noted that he believed the claimant was at maximum medical improvement (MMI) and released the claimant to return to work without restrictions.

12. The claimant was seen by Dr. Sofish on January 18, 2016. On that date, Dr. Sofish noted that the claimant was released to return to work without restrictions and had full range of motion of her wrists and fingers with no reported paresthesias. Dr. Sofish instructed the claimant to return in one month and noted she would likely be placed at MMI at that time.

13. On February 25, 2016, the claimant returned to Dr. Sofish and reported discomfort to the bilateral wrists with pain of 2 out of 10. Dr. Sofish noted that the claimant had full range of motion of both wrists and well-healed surgical scars. Dr. Sofish diagnosed post bilateral carpal tunnel surgery. Also on that date, Dr. Sofish placed the claimant at MMI, with no permanent impairment, and opined that the claimant did not need post MMI maintenance care.

14. On March 23, 2016, the respondents filed a final admission of liability (FAL) on March 23, 2016 admitting for no permanent impairment and no post MMI medical benefits.

15. The claimant objected to the FAL and requested a Division-sponsored Independent Medical Examination (DIME). Dr. Jeffrey Krebs was selected as the DIME physician and the claimant was initially evaluated by Dr. Krebs on August 17, 2016. Dr. Krebs reviewed the claimant's medical records, obtained a medical history, and performed a physical examination in connection with the DIME. In his DIME report, Dr. Krebs noted the diagnosis of bilateral carpal tunnel syndrome and the related bilateral carpal tunnel release surgeries performed by Dr. Copeland. Dr. Krebs noted that after the surgeries the claimant continued to report subjective complaints of tingling and some weakness over her hands and wrists. In addition, the claimant complained of dropping things. Dr. Krebs noted that his examination revealed positive Tinel's signs (left greater than right), with tingling both sides to ulnar and radial aspects of the hand and on both sides of the thumb.

16. Dr. Krebs also noted that range of motion testing resulted in an impairment rating of 9% for the claimant's right upper extremity and 4% for the left upper extremity. In addition, Dr. Krebs noted that the claimant would likely need some further medical treatment, or even surgical treatment for what appeared to be some persistent weakness. Dr. Krebs recommended reevaluation with neurology and Dr. Copeland to determine if further surgery would be warranted.

17. The respondents sent the claimant for an independent medical examination (IME) with Dr. Thomas Mordick on December 20, 2016. Dr. Mordick reviewed the claimant's medical records, obtained a medical history, and performed a physical examination in connection with the IME. Dr. Mordick noted the claimant's complaints of numbness on the both dorsal and palmar aspect of the hand extending from the wrist out into the fingers, with pain in the claimant's bilateral shoulders, elbows, and wrists. On examination, Dr. Mordick found full range of motion of the claimant's wrists and hands. Dr. Mordick diagnosed the claimant with non-specific pain and numbness in the upper extremity that was not consistent with carpal tunnel syndrome. Dr. Mordick opined that the claimant's symptoms did not fit an anatomic diagnosis and that the claimant's carpal tunnel syndrome had been appropriately addressed. Dr. Mordick also agreed that the claimant was appropriately placed at MMI by Dr. Sofish.

18. The claimant underwent a repeat EMG with Dr. Burnbaum on February 16, 2017. The EMG results were reported as normal.

19. On March 3, 2017, the claimant returned to Dr. Copeland and continued to report symptoms in her right hand including pain, numbness, and tingling. Dr. Copeland's examination showed negative impingement signs bilaterally and a negative Spurling's test. Dr. Copeland noted that he did not see evidence of any recurrence of the claimant's carpal tunnel syndrome and recommended that the claimant "live with" her condition and continue to work as tolerated.

20. On April 27, 2017, the claimant was seen by Dr. Krebs for a follow up DIME. Dr. Krebs reviewed the most recent EMG results and evaluation notes from Dr. Copeland. Dr. Krebs noted that the EMG did not demonstrate any issues stemming from higher areas, such as the claimant's cervical spine or elbow. Dr. Krebs opined that the claimant was at MMI as of August 16, 2017 and assessed permanent impairment of 18% for the claimant's left upper extremity and 13% for the claimant's right upper extremity.

21. Included in Dr. Krebs' April 27, 2017 DIME report are recommendations for additional medical treatment. Dr. Krebs noted that although the claimant would not benefit from further surgical intervention, it was his opinion that active medical treatment for the claimant was warranted. In that same DIME report, Dr. Krebs recommended 16 visits of occupational therapy for the claimant's right and left wrists. In addition, Dr. Krebs recommended that the claimant undergo a functional capacity evaluation (FCE)

22. Thereafter, Dr. Mordick provided a supplemental IME report and noted that Dr. Krebs did not provide any explanation as to why the claimant continued to complain of reduced motor control over a year and half after surgery or how that may be related to the carpal tunnel release surgeries. Dr. Mordick opined that the claimant's range of motion measurements, although consistent with Dr. Krebs' prior report, were not medically consistent with the diagnosis and evidence that the claimant's presentation had changed over time, including her presentation at Dr. Mordick's IME in December 2016.

23. On September 6, 2017 and October 6, 2017, the parties attended a prior hearing before ALJ Keith Mottram in which the respondents sought to overcome Dr. Krebs' opinions regarding the claimant's permanent impairment. In ALJ Mottram's October 24, 2017 Findings of Fact, Conclusions of Law and Order, he found that the respondents failed to overcome the opinions of the DIME physician, Dr. Krebs, and ordered the respondents to pay permanent partial disability (PPD) benefits based upon Dr. Krebs' impairment ratings.

24. Thereafter, the respondents filed an amended FAL admitting for PPD benefits pursuant to ALJ Mottram's order, but denying liability for post MMI medical benefits because no such treatment was recommended by the claimant's treating physician. The claimant objected to the amended FAL and requested a hearing on the issues of *Grover* medical benefits and disfigurement.

25. Thereafter, the respondents asked Dr. Mordick to provide an opinion as to whether the post MMI treatment recommended by Dr. Krebs in the April 27, 2017 DIME report would be reasonable and necessary to allow the claimant to remain at MMI. Dr. Mordick responded in a letter dated April 3, 2018, and opined that there was no justification for the claimant to attend occupational therapy, and an FCE was not necessary because the claimant is not returning to work for the employer. Dr. Mordick's testimony at hearing was consistent with his written reports.

26. The claimant testified that she continues to have symptoms (including numbness in both hands) that were present when she was placed at MMI by Dr. Sofish. The claimant wants to have the ability to seek further medical care because she still has the same symptoms that she had at MMI. She testified that she does not know specially what medical care she might need in the future, but she wants her medical treatment to remain open.

27. The ALJ credits the medical records, the claimant's testimony, and the opinion of Dr. Krebs over the contrary opinion of Dr. Mordick and finds that the claimant has shown that it is more likely than not that she is in need of continued medical treatment to prevent further deterioration of her condition as a result of her compensable claim.

28. The ALJ is not persuaded by Dr. Mordick's position that because the claimant will not return to employment with the employer that an FCE is not necessary. On the contrary, the Colorado Medical Treatment Guidelines allow for various "special tests" including an FCE.

29. At the May 3, 2018 hearing, the claimant demonstrated that as a result of the March 31, 2015 injury and the related bilateral carpal tunnel surgeries she has thin, well healed surgical scars on both palms. Each scar measures approximately 2 inches long.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2014).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

4. The Colorado Medical Treatment Guidelines (the guidelines) indicate that full functional capacity evaluations (FCEs) are rarely necessary and that in many cases, a work tolerance screening will identify the claimant's ability to perform certain job tasks. In the "frequency" section, the guidelines indicate that a FCE can be used initially to determine baseline status and that additional evaluations can be performed for case closure when the patient is unable to return to the pre-injury position and information is desired to determine permanent work restrictions.

5. As found, the claimant has demonstrated by a preponderance of the evidence that she is entitled to a general award of ongoing maintenance medical benefits based upon the opinion of Dr. Krebs and the claimant's ongoing complaints of persistent symptoms.

6. While the ALJ is persuaded by the specific recommendations of Dr. Krebs in finding that maintenance medical treatment is necessary for the claimant, the ALJ lacks jurisdiction to order the respondents to pay for specific medical treatment recommended by a DIME physician. *See Short v. Property Management of Telluride*, W.C. No. 3-100-726 (IAO May 4, 1995); and *Torres v. City and County of Denver*, W.C. No. 4-937-329-036 (ICAO May 15, 2018).

7. Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

8. As found, as a result of her March 31, 2015 work injury, the claimant has a visible disfigurement to her body consisting of scarring on her palms. Therefore, the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

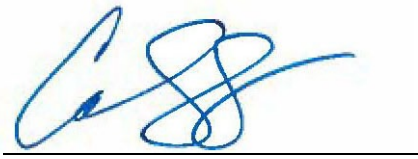
ORDER

It is therefore ordered that:

1. The respondents shall pay for maintenance medical treatment that is necessary to maintain the claimant at MMI and is designed to prevent further deterioration of her physical condition.

2. The insurer shall pay the claimant $500.00 for her disfigurement. The insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

Dated: September 4, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed, electronically, on August 29, 2018. The Claimant was given two working days within which to file objections. The matter was deemed submitted for decision on September 4, 2018. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The initial issues designated by the Claimant concerned compensability; medical benefits; temporary total disability (TTD) benefits from March 1, 2018 through March 13, 20-18; and, temporary partial disability (TPD) benefits from March 19, 2018 and continuing. At the commencement of the hearing, the Claimant withdrew the TTD and TPD issues. In light of the following decision, compensability is the only issue and the medical benefits issue is moot.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural Findings

1. The Claimant filed a Workers' Claim for Compensation after the slip-and-fall at work on January 31, 2018. Thereafter, Respondents filed a Notice of Contest, contesting the compensability of the work incident.

2 The Claimant filed an Application for Hearing on March 23, 2018.

The Non-Work Related Skiing Mishap

3. The Claimant's initial injurious event occurred when she was skiing down a mountain on January 19, 2018. This was not a work related event. The Claimant indicated that she twisted her knee, heard a pop, and fell to the ground. Her knee gave out when she tried to stand. She indicated that she dislocated her knee, but it popped back into place (Respondents' Exhibit A, pp. 4-5). In her testimony, the Claimant minimized the effects of this event.

4. The Claimant testified that she experienced immediate pain in her right knee when she fell. She stated that she had difficulty standing but was able to ski down the mountain.

5. On January 25, 2018, after the non-work related skiing mishap and before the slip-and-fall at work, the Claimant was evaluated by Deborah Saint-Phard, M.D. for injuries sustained in the ski accident. The Claimant reported an "achy" pain, instability in the knee, and indicated that she was unable to bear weight without significant limping. She further reported a history of left knee patella dislocation from playing soccer. Dr. Saint-Phard noted, "positive Lachman's" and "McMurray's is limited by pain Claimant sustained an injury to her right knee on January 19, 2018 while skiing. with flexion to 130°." Claimant was referred for an MRI (magnetic resonance imaging) of the right knee to "assess for internal derangement of the knee including anterior cruciate ligament tear resulting in instability and severe pain." Dr. Saint-Phard indicated that the "MRI would be used for surgical pre-procedural planning" (Respondents' Exhibit A, pp. 4-5).

The Alleged Compensable Event

6. On January 31, 2018, the Claimant alleges that she slipped on the floor while wearing booties and further injured her right knee. In the emergency room (ER), an x-ray was negative and no acute fractures or dislocations were noted. There was no persuasive evidence that the floor was slick, wet, or presented a special hazard to employees. The wearing of booties was standard for anyone in a similar hospital job. Consequently, it created no special hazard.

7. The Claimant underwent an MRI of the right knee on February 2, 2018, which had been requested by Dr. Saint-Phard on January 25, 2018. It was previously scheduled to address the effects of the skiing injury. The MRI revealed a complete mid-substance ACL tear, bone contusions consistent with a pivot shift injury, a large effusion, a complex medial meniscus posterior horn tear with meniscal extrusion, a lateral meniscal root tear, fluid collection in the posterior lateral corner, and torn fibers of the medial retinaculum along the medial edge patella, and a likely reflective patella dislocation (Respondents' Exhibit B, pp. 93-94).

8. The Claimant was referred to Henry Jules Roth, M.D. as the designated authorized treating physician (ATP) on February 7, 2018. Dr. Roth was of the opinion that the initial medical evaluation after the ski injury indicated there was already a medial meniscus, patella, and ACL injury (Respondents' Exhibit B, pp. 93-96).

9. The Claimant treated with Armando Vidal, M.D. on February 8, 2018. She had independently established care with Dr. Vidal following the non-work related ski injury. Dr. Vidal noted an ACL rupture, a peripheral posterior horn medial meniscus tear, and a low-grade MCL tear. He recommended an ACL reconstruction given the

Claimant's activity level and the demands of her job (Respondents' Exhibit A, pp. 13-14).

10. Dr. Roth authored a letter to insurance carrier on February 13, 2018, stating as follows: "I believe it is more likely than not...the current need for treatment reflects injuries sustained on 1/19/18" (Respondents' Exhibit B, p. 94)

11. The Claimant treated with Dr. Roth on February 21, 2018. Dr. Roth noted that the Claimant was scheduled for surgery. Dr. Roth was of the opinion that the need for surgery was pre-existing and not work related (Respondents' Exhibit B, pp. 97-100).

12. Without the receiving prior authorization, Claimant underwent a right knee arthroscopy, ACL reconstruction with quad autograft, and a meniscal repair performed by Dr. Vidal on March 2, 2018 (Respondents' Exhibit A, pp. 61-66).

13. Dr. Vidal testified at hearing by telephone. Dr. Vidal testified that the Claimant injured her ACL while skiing on January 19, 2018. He stated that the medial meniscus tear was caused by the ACL instability which was a direct result of the January 19, 2018 skiing injury. Dr. Vidal failed to persuasively establish a causal connection between the Claimant's work activities on January 31, 2018 and any injury to her right knee.

Independent Medical Examination (IME) by Timothy S. O'Brien, M.D.

14. Dr. O'Brien performed a records review at Respondents' request (Respondents' Exhibit C). According to Dr. O'Brien, [Claimant's] January 31, 2018 episode of right knee instability, which occurred while she was employed at University of Colorado Hospital, was a manifestation of her personal health. She did not sustain an acute anterior cruciate ligament tear on January 31, 2018. She did not sustain an acute medial meniscus tear on January 31, 2018 and she did not dislocate her patella on January 31, 2018. (Respondents' Exhibit C, p. 105).

15. Dr. O'Brien stated, "[t]he acute right knee anterior cruciate ligament and medial meniscus tears occurred on January 19, 2018, nearly 2 weeks prior to the episode of instability on January 31, 2018. The exam on January 25, 2018 definitively establishes the fact that there was a positive Lachman, which is pathognomic for an anterior cruciate ligament tear. There was also swelling. An MRI was ordered. All of these facts establish the presence of a pre-existing anterior cruciate ligament tear that dates back to the January 19, 2018 skiing injury" (Respondents' Exhibit C, p. 105).

16. Dr. O'Brien was of the opinion that no new injury occurred on January 31, 2018. He provided hearing testimony consistent with this opinion. Dr. O'Brien stated that what occurred on January 31, 2018 was yet another episode of instability of the right knee that is completely consistent and expected but based on the previous injury (Respondents' Exhibit C, p. 105). Dr. O'Brien noted that, "the presence of a medial meniscal tear, which occurred following the January 19, 2018 incident, would also produce the sense of instability or the giving way episodes" (Respondents' Exhibit C, p. 106)

17. Dr. O'Brien explained in his report that, "it is medically improbable that the giving way episode on January 31, 2018 produced more tearing in these structures that were already in essence completely disrupted" (Respondents' Exhibit C, p. 106). Dr. O'Brien was of the opinion that the incident of January 31, 2018 was causally insufficient to alter the pathological structure of the Claimant's right knee.

18. Dr. O'Brien noted that slipping on a floor is not the type of mechanism that would produce further tearing or any type of injury to the anterior cruciate ligament or meniscus. "One foot needs to be planted on the floor and then the body twisted around the fixed foot, ankle, and knee so that there is a torsional force that occurs while the knee is being loaded by the weight of the upper body (often times this occurs with contact); this mechanism produces tears of the ligamentous and meniscal structures. When one's foot is slipping across the floor and thus not planted, forces cannot be generated with a torsional effect such that these structures tear. Therefore, the mechanism of injury which [Claimant] indicates caused more tearing or damage to the knee is, in fact, not the type of injury mechanism that would do so" (Respondents' Exhibit C, p. 106)

19. According to Dr. O'Brien, the surgery performed by Dr. Vidal was not causally related to the incident at work on January 31, 2018. "The surgical intervention performed by Dr. Vidal was solely causally related to the January 19, 2018 incident and had no causal relationship to the sensation of instability that [Claimant] experienced on January 31, 2018 which was a manifestation of her underlying health.

20. Dr. Vidal testified that the course of recommended treatment did not change following the January 31, 2018 work incident.

21. No physician has rendered an opinion that a disability or a need for medical treatment resulted from the January 31, 2018 episode of instability. [Claimant] did not require any medical treatment or activity restrictions causally related to that incident. (Respondents' Exhibit C, p. 107).

Ultimate Findings

22. There is no credible medical evidence that the slip-and-fall incident at work on January 31, 2018, aggravated and accelerated the Claimant's non-work-related right knee injury of January 18, 2018, while skiing.

23. The Claimant's lay testimony is insufficient to overcome the weight of the medical evidence to the contrary.

24. The Claimant has failed to prove, by a preponderance of the evidence, that she sustained a compensable aggravation and acceleration of her right knee condition as a result of the slip-and-fall incident at work on January 31, 2018.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad

discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, there was no credible medical evidence that the slip-and-fall incident at work on January 31, 2018, aggravated and accelerated the Claimant's non-work-related right knee injury of January 18, 2018, while skiing.

b. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The facts in these cases were extreme. As found, The Claimant's lay testimony is insufficient to overcome the weight of the medical evidence to the contrary.

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the C laimant failed to meet her burden of proof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits arising out of the slip-and-fall at work on January 31, 2018, are hereby denied and dismissed.

DATED this 4 day of September 2018.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he has a change in medical condition justifying a reopening of his case.

2. Whether Claimant has proven by the preponderance of the evidence that the left reverse total shoulder operation requested by authorized treating physician, Dr. James Ferrari, is reasonable, necessary and related to this workers' compensation claim.

3. Whether Respondents violated WCRP 16 by failing to properly respond to the authorized treating physician's request for approval of surgery on June 2, 2017, and July 21, 2017, such that penalties against Respondents should be imposed.

4. Whether Respondents violated Section 8-43-203(4), C.R.S. by failing to produce the complete claims file within 15 days of June 17, 2017.

FINDINGS OF FACT

1. Claimant is a 62 year old man who had worked in the elevator construction and maintenance business since 2005. Claimant began his employment with Employer in July 2013. He was employed by Employer on October 15, 2013, as a new construction elevator mechanic assistant.

2. On October 15, 2013, Claimant tripped on warped plywood on a jobsite and fell, hitting and landing on his left forearm and elbow, jamming his left shoulder upwards.

3. The claim was admitted by Respondents with payment of medical care and temporary disability benefits.

4. Dr. Cedillo provided medical care and then acted as the primary care provider.

5. Dr. Cedillo referred Claimant to orthopedic surgeon, Dr. James Ferrari, who reviewed Claimant's MRI of the left shoulder and diagnosed Claimant with a massive left rotator cuff tear involving the entire supraspinatus and infraspinatus.

6. Claimant underwent surgical repair of his left shoulder by Dr. Ferrari on January 16, 2014.

7. Claimant underwent postsurgical physical therapy from February 18, 2014, until October 3, 2014.

8. Because Claimant continued to experience left shoulder pain with continued weakness after the surgery, a postsurgical MRI was ordered by Dr. Ferrari, which occurred on September 19, 2014. The MRI showed a recurrent large full thickness tear of the supraspinatus and infraspinatus tendons.

9. On September 29, 2014, Dr. Ferrari opined that Claimant was at maximum medical improvement (MMI), but that he will need maintenance medical care. Dr. Ferrari wanted to see Claimant once a year with x-rays to assess for worsening rotator cuff tear arthropathy. Dr. Ferrari indicated that if Claimant developed this as well as worsening function or increased pain due to arthrosis, his next step would be to do a reverse total shoulder operation. He further opined that he did not think Claimant was ready for that procedure at that time because he still had good function and his pain was not terribly bad.

10. Dr. Cedillo placed Claimant at MMI on October 27, 2014. He gave Claimant an 18% scheduled rating, which converted to 11% whole person. He recommended post maintenance medical benefits to consist of follow up with Dr. Ferrari in six months to be scheduled and annually there afterwards per Dr. Ferrari's discretion as he had opined on September 29, 2014, and a possible reverse total shoulder surgery in the future, per Dr. Ferrari as well.

11. Respondents filed a Final Admission of Liability admitting for 18% scheduled impairment and admitted for medical benefits after MMI, per Dr. Cedillo's report admitting to future medical benefits that are reasonable and necessary. Claimant did not object to the Final Admission of Liability.

12. Claimant's first maintenance medical appointment occurred March 23, 2015. Dr. Ferrari indicated he wanted to see Claimant in a follow-up appointment in one year with x-rays and thereafter annually for follow-up appointments.

13. Claimant returned to working with Respondents with the permanent restrictions pronounced by Dr. Cedillo. The restrictions were above waist level, lifting 25 pounds maximum on an occasional basis, repetitive lifting a 20-pound maximum, carrying 20 pounds maximum and a maximum of 10 to 15 pounds reaching overhead with the left arm and no lifting restrictions below waist level.

14. Claimant's next maintenance medical appointment was on December 7, 2015. At that time. Dr. Ferrari noted that supraspinatus strength was normal, but infraspinatus strength was weak. He did detect crepitus in the shoulder. X-rays were taken and compared revealing slightly worsening proximal humeral head migration with narrowing at the superior aspect of the glenoid as well as underneath the acromion. Dr. Ferrari opined that it was okay for the Claimant to continue working in his current capacity. He again indicated that at some point the Claimant may need a reverse total shoulder operation. He indicated this was likely in a few more years certainly he wanted to see him back in a year's time to repeat x-rays.

15. Claimant's next maintenance medical appointment with Dr. Ferrari occurred on August 22, 2016. Claimant was 60 years old at this appointment. He reported pain and decreased range of motion on the left side indicating the symptoms occurred occasionally and that Claimant rated his symptoms as mild to moderate. The pain was described as aching and the symptoms occurred with activity. Dr. Ferrari indicated on the WC 164 on August 22, 2016, that he should have a return appointment in a year

consisting of an annual follow-up and indicating that he will need a reverse total shoulder surgery in the future.

16. Claimant's next maintenance medical appointment with Dr. Ferrari occurred on May 17, 2017. Dr. Ferrari noted some atrophy in the supraspinatus and infraspinatus regions. He noted four out of five weakness in the infraspinatus and supraspinatus. He noted crepitus in the shoulder. X-rays taken showed significant worsening of his proximal humeral migration with bone on bone change between the humeral head and the acromion and the humeral head in the superior glenoid. Dr. Ferrari assessed advanced left shoulder rotator cuff tear arthropathy. Dr. Ferrari opined that Claimant's condition had progressed a lot faster than anticipated. He indicated his best option is to consider doing a reverse total shoulder replacement and to do so at that time. Dr. Ferrari indicated he would try and get the surgery scheduled for mid-June 2017.

17. On June 26, 2017, Claimant through counsel, via email, requested a complete claims file to be provided within 15 days pursuant to Section 8-43-203 (4), C.R.S. The claims file was not produced until October 5, 2017.

18. On June 2, 2017, Dr. Ferrari's staff member, Jade Gardner, contacted via telephone Insurer asking for approval for the surgery. The claims adjuster told Ms. Gardner that Claimant's workers' compensation case was closed. On the same date, Dr. Ferrari's office sent a surgery scheduling sheet requesting approval of the surgery on June 22 2017. Insurer took no further action regarding the surgery.

19. On July 21, 2017. Dr. Ferrari's office sent a request for surgery by a fax that was received by Insurer.

20. Dr. Ferrari's office received no answer to the July 21. 2017, fax.

21. Claimant through counsel filed a Petition to Reopen on September 20, 2017, alleging change in medical condition and attaching the surgery request by Dr. Ferrari and medical notes of May 17, 2017, September 29. 2014, March 25, 2015 and December 7, 2015. No pleading response was filed to the Petition to Reopen. Instead a letter was sent to Claimant's counsel stating that the petition was being denied.

22. Respondents then scheduled Claimant to see Dr. William Ciccone II on Novembers, 2017.

23. Dr. Ciccone opined that the Claimant suffered a strain/sprain of the left shoulder as a result of his fall at work and that the acute component of the injury was minor in nature. He further opined that it was a chronic rotator cuff tear that was not work related and that the Claimant's fall at work did not accelerate the natural history of rotator cuff disease. Dr. Ciccone was unable to state when such chronic condition started or what degree of it was present before the Claimant fell.

24. Dr. Ciccone agreed that a reverse arthroplasty would be a reasonable procedure for Claimant and he agreed that Claimant had an irreparable cuff tear at this point. Dr.

Ciccone opined that the rotator cuff tear did not happen at the time of Claimant's fall, and the majority of the tear was all chronic in nature.

25. Dr. Ciccone did not review the MRI films and only reviewed the reports.

26. Dr. Ferrari opined that the type of fall Claimant had was the type of injury that could damage the rotator cuff.

27. Claimant credibly testified that he had no previous problems with his left shoulder. He never required any assistance from co-workers for any shoulder problems. He had no pain or weakness with his shoulders. He had no previous medical care for any shoulder problems. He had no previous Workers' Compensation claims related to his shoulders. He was able to regularly work out at a gym prior to injury. He never missed any work because of any shoulder problems prior to this claim.

28. Dr. Ferrari disputed that Claimant's first MRI should have shown significant swelling if there had been acute trauma. The doctor opined that the first MRI test was an MRI arthrogram making finding swelling and Inflammation difficult.

29. Dr. Ferrari ordered a postsurgical MRI approximately 10 months after surgery because the Claimant was not progressing as Dr. Ferrari had hoped in terms of his strength. Claimant was weak in his external rotation which the doctor opined indicated problems with the infraspinatus.

30. The postsurgical MRI essentially showed a complete re-tear of what Dr. Ferrari had repaired during surgery.

31. Dr. Ferrari explained that rotator cuff repair retears are very common. He indicated that it is a failure of the tissue healing back into the bone not a failed suture or knot.

32. Dr. Ferrari opined that the postsurgical MRI showed moderate to advanced supraspinatus and Infraspinatus muscle atrophy caused by the tear in the rotator cuff. Once the rotator cuff surgery failed, the doctor credibly opined that the reverse total shoulder operation was the only reasonable medical option.

33. Dr. Ciccone opined that a superior capsule reconstruction procedure might be a more reasonable medical option at this time. Dr. Ciccone further asserted that when Dr. Ferrari did surgery he was addressing a minor strain or sprain and that no surgical procedure at this point should be found related to the work injury. Dr. Ferrari disagreed and opined that Claimant had a tear in his rotator cuff from the injury and that is what Dr. Ferrari fixed in the surgery.

34. Dr. Ferrari disputed Dr. Ciccone's contention that Claimant would have progressed to the point he is at now, with or without any trauma. Dr. Ferrari based his reasoning on the fact that Claimant suffered an acute tear. Alternatively, Dr. Ferrari indicated that, if there had been some pre-existing pathology, the trauma that Claimant

experienced when he fell is the type that could accelerate or aggravate a pre-existing condition.

35. Dr. Ferrari credibly opined Claimant's work-related injury caused an acute tear. The doctor offered in support of his opinion of work relatedness that Claimant had no previous symptoms, the work incident was not a minor fall and the MRI showed an acute event since the MRI showed no evidence of atrophy and fatty infiltration.

36. Finally, Dr. Ferrari opined that a superior capsule reconstruction procedure is contraindicated when there is arthritis between the humeral head and the acromion, a condition present in Claimant’s shoulder.

37. Dr. Ferrari noted worsening in the Claimant's condition when he evaluated the Claimant in May 2017. X-rays taken May 17, 2017, showed Claimant's arthritis had progressed faster than the doctor had anticipated. He opined that his best option was to do the reverse total shoulder replacement and that It did not make sense for him to continue to wait on this.

38. Although the need for the reverse total shoulder operation was established at the time the Claimant was placed at MMI, it was medically appropriate to put off the procedure, as long as possible.

39. Claimant credibly testified that he has now has increased pain symptoms, increased weakness and more frequent bouts of excruciating pain and episodes of his shoulder locking up compared to when he was placed at MMI. At this appointment with Dr. Ferrari on May 17, 2017, the Claimant reported pain and symptoms to be moderate to severe and he described the pain as aching, deep, sharp, throbbing and burning and he rated his pain numerically seven out of 10.

40. Dr. Ferrari noted that there was pre-existing AC joint arthritis but that is very different than glenohumeral arthritis. They are two different joints and the glenohumeral joint is the ball and socket of the shoulder. The AC joint, the acromion bone articulates with the clavicle which is basically a strut to keep the arm out. There is cartilage on the end of the clavicle and not really much on the acromion because there's a little disc in between. He indicated that AC joint arthritis would not be a reason to do a reverse total shoulder surgery. He explained that the main function that the rotator cuff has is to keep the ball centered in the socket so a reverse total shoulder operation is done in situations where there isn't a rotator cuff and there is arthritis or you've got such severe pseudoparalysis from a large rotator cuff tear. It is called a reverse because the surgeon cuts out the ball of the shoulder, the socket is ground down, and the socket is replaced with the ball and the ball is replaced with the socket and it fits tightly together with the fixed center of rotation, similar to a hip joint and then a rotator cuff is not needed for it to work because the deltoid muscle is what empowers the arm.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Petition to Reopen

4. Section 8-43-303, C.R.S. permits a claim to be reopened based upon "a change in condition." A change in condition refers to either "a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Comm'n*, 714 P. 2d 1328, 1330 (Colo. App. 1985); *Accord Anderson v. Longmont Toyota, Inc.,* 102 P. 3d 323, 330 (Colo. 2004*); See also Helnicki v. Industrial Claim Appeals Office,* 197 P. 3d 220 (Colo. App 2008).

5. In this matter, attached to Claimant's Petition to Reopen were several medical records of his treatment since MMI which showed a gradual worsening of his condition, culminating in the visit of May 17, 2017, where Dr. Ferrari

recommended that the Claimant now go forward with the reverse total shoulder operation. Further, it should be noted that testimony from Claimant as to an increase in problems is sufficient to order reopening of the case. *Savio House v. Dennis,* 665 P. 2d 141 (Colo. App. 1983). There is both evidence through x-rays and expert medical opinion as well as Claimant's credible testimony as to the increase of weakness, increase in pain, increase in the shoulder locking up, as well as increase in the frequency of Claimant's ongoing symptomology.

6. The medical evidence shows that by May 17, 2017, the glenohumeral joint where the rotator cuff sits had deteriorated to the point that there was bone-on-bone change between the humeral head and the acromion and the humeral head and the superior glenoid. Dr. Ferrari noted significant worsening of the Claimant's proximal humeral migration in the x-ray of May 17, 2017. His assessment was advanced left shoulder rotator cuff arthropathy. Earlier x-rays and x-rays at the time of MMI did not show this positioning of the glenohumeral joint. Dr. Ferrari credibly opined that although the rotator cuff had either failed in surgery or was completely re-torn, initially at MMI, Claimant had less pain, less weakness and less loss of function than he presented on May 2017.

Medical benefits

7. Respondents are liable to provide medical treatment that is reasonably needed at the time of injury and thereafter during disability to cure and relieve the worker of the effects of the injury. *See* Section 8-42-101(1)(a). Case law has established that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P 2D 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P. 2d 609 (Colo. App. 1995).

8. Where Respondents have filed a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness and necessity of specific treatments. *Hanna v. Print Expediters Inc*., 77 P. 3d 863 (Colo. App. 2003). When Respondents dispute the Claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits.

9. Respondents in this case did file a Final Admission of Liability dated December 2, 2014, admitting for reasonable, necessary and related post-MMI medical benefits. Specifically, they stated, "per Dr. Cedillo's report rec'd 11/17/14; at MMI 10/27/14; admit to future medical that is reasonable/necessary."

10. Claimant has provided substantial evidence by way of expert medical testimony and objective medical documents including x-rays which document the worsening of his condition. Claimant offers credible and persuasive expert testimony to explain why it was important to put off the surgical procedure, as

long as possible. Even Respondents' expert agreed that it was important to do a reverse total shoulder operation as late as possible for a patient. Dr. Ferrari has explained why it is now reasonable to proceed with the surgery, why it is necessary and why it is related to the original fall and the failed surgery.

11. Both Dr. Ferrari and Dr. Cedillo agreed that the reverse total shoulder operation is the most reliable procedure for Claimant at this juncture. The surgery is necessary now since Claimant has reached a point where he can no longer handle the pain and the increasing loss of function due to the deterioration of the glenohumeral joint area. Dr. Ferrari provided credible testimony regarding what he observed by looking at the films of the MRA and MRI studies as well as the serial x-rays he took after surgery, and thereafter annually, which showed the gradual worsening to the point that Claimant has bone-on-bone in the joint. Both Dr. Cedillo and Dr. Ferrari opined that Claimant sustained injury to his shoulder when he fell on October 15, 2013. Claimant provided substantial evidence that the requested surgery is reasonable, necessary and related to the original injury.

12. Respondents shall be liable for maintenance medical benefits, specifically, Claimant's reverse total shoulder operation***.***

Penalties – Claims file

13. On September 28, 2017, Claimant filed an application for hearing raising the claim of a penalty violation for failure to timely provide the claims file. Claimant cited Section 8-43-203(4). Section 8-43-203(4) pertains to Respondents' duty to produce to Claimant the claims file within 15 days of the request. In Claimant's post hearing position statement, it is alleged that Respondents failure to timely produce the claims file justifies imposition of a penalty under the provision of Section 8-43-305, C.R.S.

14. Respondents assert, in defense to Claimant's penalty claim, the provisions of Section 8-43-304(4), C.R.S. Respondents pled in their response to application for hearing that Claimant failed to plead penalties with specificity. Respondents further contend that no penalty is justified because Respondents' explanation of the reason for their failure to timely produce the claims file was reasonable. Respondents explains that Claimant directed the request for production of the claims file to an employee at Insurer that was no longer employed by Insurer thus the request for the claims file went unattended.

15. Claimant's claim for penalties for failure to timely produce the claims file is denied because the claim lacks the requisite specificity. Claimant cites Sections 8-43-203(4), C.R.S. and 8-43-305, C.R.S. in support of the claim for penalties. However, neither of these sections, provide specificity regarding the specific nature of the penalty claim. Neither of the cited sections, Sections 8-43-203(4), C.R.S. and 8-43-305, C.R.S., provide a basis for the claim of penalties.

Penalties – Failure to respond to the request for authorization of medical treatment

16. Claimant also poses the question on the application for hearing whether a penalty violation occurred in regard to Respondents' failure to timely respond to the authorized treating physician's request for approval of surgery for the reverse total shoulder operation. In Claimant's post hearing position statement, he relies on Section 8-43-305, C.R.S. in support of the penalty claim.

17. Respondents again assert that Claimant's claim for penalties is not alleged with specificity. Respondents rely on Section 8-43-304(4) in arguing the Claimant's claim lacks specificity. Respondents also contend that a penalty should not be imposed because the letter requesting authorization for surgery was not properly addressed and therefore never reached Insurer for a response. Further, Respondents contend that the request for authorization of medical treatment was not valid under WCRP 16 because the request did not indicate that the need for surgery was related to Claimant's work injury.

18. Section 8-43-305, C.R.S. does not pertain to a specific penalty provision. Section 8-43-305 pertains to the legislative pronouncement that each day during which a party fails to perform any duty imposed by the Act shall constitute a separate and distinct violation for purposes of imposition of the penalty. A penalty may be imposed for each day the party is proven to be in violation of the Act.

19. It is concluded that the claim for penalties lacked the requisite specificity and is therefore denied. Claimant's application for hearing does not indicate what provision of Act is relied upon in claiming penalties.

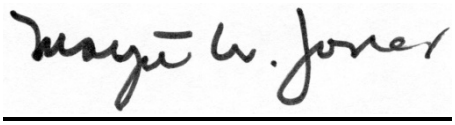
ORDER

1. Claimant's petition to reopen his claim is granted on the grounds of a worsened condition.

2. Respondents shall be liable for maintenance medical benefits. Specifically, it is concluded that Claimant sustained his burden of proof to prove by a preponderance of the evidence that the reverse total shoulder operation is a reasonable, necessary and related medical procedure.

3. Claimant's claims for penalties are denied and dismissed.

DATED: September 4, 2018



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4 th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a compensable work-related injury to his left knee on or about December 9, 2017?

- If Claimant proved a compensable injury, did he prove arthroscopic surgery recommended by Dr. David Walden is reasonably necessary treatment for the industrial injury?

STIPULATIONS

The parties stipulated to an average weekly wage of $797.77.

FINDINGS OF FACT

1. Claimant works for Employer as a correctional officer. He was hired in May 2016. As part of the hiring process, he completed a multi-day physical training program on defensive tactics, restraining prisoners, takedowns, and similar maneuvers. He also underwent a physical examination. Claimant satisfied all pre-employment physical requirements and performed the job without difficulty or limitation.

2. On December 9, 2017, Claimant was ascending a staircase after a meeting. He caught his toe on a metal strip on the top edge of a stair, stumbled, and began to fall. Although he stopped himself from falling, he hyper-flexed his left knee. Claimant felt pain in the knee, but finished climbing the stairs and walked to his "pod." By the time he arrived at the pod, the knee had "stiffened" and he noticed swelling in the back of the knee. Claimant completed his shift that day, which involved primarily sedentary duties in the control center.

3. Claimant's knee was "sore" that evening when he went home. He worked the next day and the knee continued to "throb." It also became stiff and painful with prolonged sitting associated with driving to and from work. At some point on Sunday, December 10, he tried to contact CCOM for an appointment but did not reach anyone.

4. Claimant formally reported the injury on December 11, 2017, and requested medical treatment. Employer referred him to Emergicare.

5. Claimant saw Dr. J. Douglas Bradley at Emergicare on the afternoon of December 11. The documented physical exam findings were relatively benign, with the only abnormality being tenderness in the back of the left knee. X-rays showed no fracture, joint effusion, or other findings of acute trauma. Dr. Bradley diagnosed a knee sprain and opined the objective findings were "consistent with the history and/or a work-related mechanism of injury." Dr. Bradley anticipated MMI in a week. He instructed Claimant to perform home exercises and released him to regular duties.

6. Claimant returned to Emergicare on December 15 due to worsening symptoms. He was having difficulty weightbearing and flexing or extending the knee fully. He walked with an antalgic gait. He was given a Toradol injection for pain. Dr. Bradley prescribed methocarbamol, Biofreeze, ibuprofen, and gave Claimant a hinged knee brace. Claimant was advised to continue the home exercises and stretching. Dr. Bradley imposed work restrictions including maximum 10 pounds lifting, no kneeling, squatting or crawling, and "minimal stairs." Employer initially accommodated Claimant's restrictions by assigning him to the control room. [1]

7. By December 20, Claimant was still reporting pain and difficulty weightbearing, so Dr. Bradley ordered an MRI.

8. Claimant had a left knee MRI on January 8, 2018. It showed joint effusion, a tear of the posterior horn of the medial meniscus, tearing of the anterior horn and body of the lateral meniscus, an ACL strain, patellar tendinitis, a popliteal strain, and patellofemoral degenerative changes.

9. After receiving the MRI results, Dr. Bradley referred Claimant to Dr. David Walden for an orthopedic evaluation.

10. Claimant saw Dr. Walden on January 25, 2018. Dr. Walden's physical examination appears more detailed than any conducted at Emergicare, showing significant findings including trace effusion, crepitus with range of motion, and pain along the medial and lateral joint lines. McMurray's testing was positive for the medial meniscus and equivocal for the lateral meniscus. Dr. Walden ordered x-rays which showed "mild" osteoarthritis. He reviewed the MRI images which he interpreted as showing a tear of the posterior horn of the medial meniscus, a possible tear of the anterior horn of the lateral meniscus, and ACL edema. He diagnosed an acute medical meniscus tear and "unspecified type" tear of the lateral meniscus. Dr. Walden opined "his mechanism of injury, clinical evaluation, and MRI findings are all consistent with a medial meniscus tear and a possible lateral meniscus tear." He recommended arthroscopic surgery.

11. Respondent filed a Notice of Contest on February 12, 2018. The attached cover letter explained "denial is based on the MRI documenting pre-existing degenerative joint disease and the description of the accident as just a normal body movement without any special hazard specific to work. Please be advised we are willing to pay for conservative treatment with your employer's authorized medical provider until 2/14/18. Any treatment after that date will be considered your responsibility."

12. Dr. Gwendolyn Henke, an orthopedic surgeon, performed a record review for Respondent on May 11, 2018. Dr. Henke reviewed the MRI images and interpreted them differently than the radiologist and Dr. Walden. She opined the meniscal tears were degenerative rather than traumatic. She appreciated horizontal cleavage tears of the anterior and posterior horns of the lateral meniscus, and degenerative changes "throughout" the posterior horn of the medial meniscus. She saw no vertical or radial

[1] Claimant was placed on FMLA leave in May 2018. The parties reserved the issue of temporary disability benefits.

meniscal tears, or other evidence of acute trauma such as effusion, hemarthrosis, or bone contusion. Dr. Henke noted "moderate" degenerative arthritis affecting all three compartments. She opined Claimant's clinical presentation in the days after the accident was not consistent with a traumatic meniscal tear because there was no documented swelling or increased joint fluid, or reports of catching, locking, or giving away.

13. Dr. Henke disagreed with the recommendation for surgery. She thought the meniscal tears pre-dated the incident and were not likely pain generators. She further opined:

> [C]urrent orthopedic guidelines do not recommend arthroscopic meniscal surgery for patients with radiographic evidence of osteoarthritis. Many studies (involving hundreds of thousands of patients) have concluded that arthroscopic partial meniscectomy is contraindicated in knees with degenerative changes since there is no improvement in their long-term (greater than six months) pain or function.

14. Dr. Henke opined the accident did not change to the underlying anatomy of Claimant's knee but "resulted in an exacerbation of his underlying pre-existing left knee condition." Ultimately, she concluded surgery is neither reasonably necessary nor causally related to the December 9, 2017 accident.

15. Dr. Miguel Castrejon performed an IME for Claimant on May 31, 2018. Although he had no records to review, the verbal history he obtained from Claimant was consistent with that documented in the medical records. Claimant described pain, popping, clicking, and occasional locking of the knee. He also reported two prior episodes of knee buckling associated with a sudden onset of sharp pain in the medial aspect of the knee. Dr. Castrejon's physical exam findings were similar to those documented by Dr. Walden.

16. Regarding causation, Dr. Castrejon noted an injury is not compensable merely because it happened at work, and if the injury arose "out of purely natural phenomenon – the internal workings of the human body – the employment situation may then be an irrelevant coincidence." He summarized his understanding of the law regarding pre-existing conditions as:

> For the purpose of compensability . . . a condition does not have to be caused by work . . . [or] permanently aggravated . . . . If the job . . . aggravates a pre-existing or non-work-related condition and renders the condition more symptomatic and, in this case, more painful to the point where it interferes with the employee's work, the employee is entitled to medical care under the [Act].

17. Dr. Castrejon concluded claimant sustained a work-related injury and should be allowed to proceed with surgery, followed by an appropriate course of physical rehabilitation.

18. Dr. Henke testified for Respondent in a deposition dated July 10, 2018. Regarding the statement in her report that the accident "exacerbated" Claimant's pre-existing condition, she explained:

> My use of that word means that he had a flare, that the incident of stumbling and falling on the steps created an increase in his symptoms, caused his arthritis to become symptomatic. And it's kind of synonymous with a flare-up.

19. Dr. Henke elaborated on her opinion that the meniscal changes shown on MRI are degenerative rather than traumatic. She reiterated that surgery for meniscal tears is "not indicated" if the patient has degenerative arthritis. She indicated there are "many studies" showing arthroscopic surgery does not change the natural history of arthritis or prevent the need or desire for total knee arthroplasty in the future, but provided no citations or other identifying information to allow verification of their findings or conclusions. She opined arthroscopy in this context is "not cost-effective" and can accelerate the progression of underlying arthritis.

20. Dr. Castrejon testified via deposition on July 16, 2018. Dr. Castrejon agreed Claimant has pre-existing arthritis, but it was asymptomatic and caused no functional limitations before December 9, 2017. Dr. Castrejon emphasized the physically demanding nature of Claimant's job including prisoner "takedowns." He explained whether the meniscal tears are traumatic or pre-existing is not dispositive because, "I've had many patients who have had an aggravation of a joint condition, and yet, the MRI only demonstrates pre-existing degenerative changes."

21. Dr. Castrejon disagreed with Dr. Henke's interpretation of the medical literature regarding arthroscopy for meniscal tears. His literature review showed the decision whether to pursue surgery cannot be categorically ruled out or in, but must be made on a "case-by-case" basis. [2] He also relied on outcomes from his patient population, noting "some have not done well; but . . . the majority have done, actually, better, in terms of being able to regain their function for home activities and getting back to work."

22. Dr. Castrejon's opinions regarding the aggravation of a pre-existing condition and the reasonable necessity of surgery are credible and more persuasive than those of Dr. Henke.

23. Claimant proved by a preponderance of the evidence he suffered a compensable injury to his left knee. The incident at work on December 9, 2017 proximately caused disability and a need for medical treatment.

24. The arthroscopic surgery recommended by Dr. Walden is reasonably necessary to cure and relieve the effects of the compensable injury.

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[2] Dr. Castrejon referenced specific literature supporting his position including a 2013 study in The New England Journal of Medicine and the MeTeOR Trial.

CONCLUSIONS OF LAW

A. Compensability

To obtain medical or indemnity benefits, a claimant must prove he suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must prove an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally for either the claimant or respondents. Section 8-43-201.

If an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-91-616-03 (September 9, 2016).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

As found, Claimant proved he suffered a compensable injury on December 9, 2017. Dr. Henke is probably correct that at least some of the meniscal tears in Claimant's knee are degenerative rather than traumatic. But that does not end the analysis, because a claimant is entitled to medical benefits if an accident aggravates a preexisting but previously asymptomatic condition. Although Claimant has a remote documented history of intermittent left knee pain and treatment, there is no persuasive evidence he was symptomatic or required any treatment for at least ten years before the accident. Nor is there any persuasive evidence of preinjury functional limitations caused by his left knee. Claimant obtained and maintained a physically demanding job as a correctional officer

without difficulty for more than a year before the accident. Dr. Henke agreed the accident "exacerbated" Claimant's pre-existing arthritis and caused it to become symptomatic. The new symptoms reasonably prompted Claimant to seek treatment and interfered with his ability to perform his regular job. The December 9 accident either caused one or more acute meniscal tears or aggravated pre-existing tears that were previously asymptomatic. Either scenario results in a compensable claim.

B. The proposed surgery is reasonably necessary and related to the compensable injury

The respondents must provide medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). But the mere fact that a claimant suffers a compensable injury does not mean all requested treatment is reasonably necessary or caused by the industrial injury. A claimant is only entitled to treatment that flows proximately and naturally from the injury, and must prove the requisite causal connection by a preponderance of the evidence. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove the requested treatment is reasonably necessary, if disputed. *Id*.

The Director has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure the quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP Rule 17, Exhibit 6 addresses lower extremity conditions, including meniscal pathology. As the final arbiter of disputes regarding medical treatment, the ALJ may consider the MTGs as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). But the ALJ is not bound by the MTGs when determining whether requested medical treatment is reasonably necessary or injury-related. Section 8-43-201(3).

As found, Claimant proved by a preponderance of the evidence the surgery recommended by Dr. Walden is reasonably necessary to cure and relieve the effects of his compensable injury. Even if the meniscal tears were pre-existing, they were asymptomatic before December 9, 2017.

Dr. Henke's opinion that meniscal surgery is "contraindicated" and ineffective for patients with osteoarthritis is not consistent with the Lower Extremity MTGs. Congruent with Dr. Castrejon's opinions, the MTGs countenance arthroscopic surgery as a viable option for meniscal pathology despite the presence of arthritis. Rule 17, Exhibit 6 § (E)(1)(f)(iv)(D) provides:

> There is *some* evidence that, for many patients with nontraumatic degenerative tears of the medial meniscus, an exercise program alone will be an adequate treatment for up to 5 years post initiation of symptoms. *However, one-third of patients initially treated conservatively may go on to require surgery and will have an outcome similar to patients treated with early surgery*.

> There is *some* evidence that, in patients with degenerative tears of the medial meniscus, a conservative treatment plan *may* yield substantial functional and symptomatic benefits similar to arthroscopic meniscectomy when measured 2 years after the beginning of treatment. This conservative treatment plan must include both supervised physical therapy and a home exercise program.
>
> There is good evidence that, in the initial management of knee OA with a torn meniscus, it is reasonable to *start with* nonoperative physical therapy. *There is also good evidence that about 30% of patients may not respond to PT alone*. (Italics added).

Similar language is found in § (E)(1)(f)(iv)(G):

> There is some evidence that, in the setting of non-traumatic meniscal tears, a treatment plan focusing on supervised exercise followed by home exercise has an equal probability of success as a treatment plan involving early arthroscopic partial meniscectomy. *This assumes that a surgical option is offered to patients who have persistent knee limitations after several months of exercise therapy*.
>
> * * *
>
> [T]here is strong evidence that partial meniscectomy provides no clear benefit over initial exercise therapy for patients with an *isolated* degenerative meniscal tear. Therefore, it is ***not recommended***. *It may be appropriate for the patients who continue to have significant functional deficits of activities of daily living or work duties after six weeks of therapy*. (Bold italics in original, non-bold italics added).

Based on the MTGs, the primary dispute in the literature involves the comparative efficacy of surgery versus therapy and exercise. The upshot of the aforementioned provisions is that surgery is a reasonable option for patients who do not respond to conservative treatment. Thus, the MTGs do not support Dr. Henke's opinion that partial meniscectomy is categorically "contraindicated" for patients with degenerative changes. Claimant remains symptomatic and functionally impaired despite many months of home exercises and relative rest. After considering all the evidence presented, the ALJ concludes the proposed arthroscopy is reasonably necessary and causally related to the compensable injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for a left knee injury is compensable.

2. Claimant's AWW is $797.77 per the parties' stipulation.

3. Respondent shall cover all reasonably necessary treatment to cure and relieve the effects of Claimant's compensable left knee injury, including, but not limited to, the arthroscopic surgery recommended by Dr. Walden.

4. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 5, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable injury on or about December 29/30, 2017?

II. If compensable, has Claimant shown, by a preponderance of the evidence, that she is entitled to all reasonable, necessary, and related medical treatment for said injury?

III. If compensable, is Claimant entitled to Temporary Total Disability ("TTD") payments?

IV. If TTD payments are awarded, have Respondents shown, by a preponderance of the evidence, that Claimant was responsible for her own termination?

V. If compensable, have Respondents shown, by a preponderance of the evidence, that Claimant willfully violated a safety rule of Employer?

STIPULATIONS

1. The parties stipulated that if the injury were compensable, Claimant's Authorized Treating Physician ("ATP") is to be Michael Sparr-assuming he will accept Claimant as a patient.

2. The parties stipulated that Claimant's Average Weekly Wage ("AWW") is $326.44.

The ALJ accepted and adopted these stipulations.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed with Employer as a resident and care specialist ("RCS") at Cedarwood Senior Living, working overnight shifts from 10pm to 6am. Claimant started work with Employer on October 24, 2017.

2. Claimant testified that at the time of her hiring, she had reached a verbal agreement with Director of Nursing Sharonda Camacho that she would be able to arrive to work 15 minutes after the start of her shift and leave 15 minutes before the end of her shift in exchange for working through her half hour lunch. Claimant has also worked for some time as the caregiver for her disabled daughter, and she would need to be present at 10:00 p.m. and again at 6:00 a.m. in order to provide her daughter the

medications she required. The ostensible purpose of this arrangement was to facilitate Claimant providing her daughter's care in this fashion. On those days when her work was too hectic to allow this procedure to be followed, Claimant testified that she would stay past 6 a.m. in order to finish her duties as necessary, or forego her half-hour lunch break.

3. At hearing, Claimant recalled one incident where she was disciplined for attendance prior to her injury date of 12/29/17, but no details were provided at hearing.

4. Claimant's employee records indicate that Claimant did occasionally arrive to work roughly 15 minutes after 10 p.m. and leave about 15 minutes before 6 a.m. (Ex. B, pp. 17-18). The records additionally show that Claimant would, on occasion, stay past 6 a.m.

5. Claimant testified that in the early hours of December 30, 2017, a coworker asked for her assistance in dealing with 'Zita', a resident at Cedarwood. Tammy was not able to help with Zita, and as such asked for Claimant's help in moving Zita who needed to use the restroom. Zita had limited mobility and use of her legs and had to be physically lifted from her bed in order to use the restroom.

6. Claimant was emphatic that the Hoyer lift batteries (which must be charged in order for the lift to function) were never charged for use on the overnight shift; instead, they were "left out on a desk". Claimant testified that she only saw the Hoyer lift being used a total of four times during her entire tenure, each time on 'Zita'. Otherwise, she never saw it being used, nor did she ever use it herself. She testified that she was never trained by Cedarwood in the use of the Hoyer lift, and was never aware that the "no lift" policy was ever enforced; this, despite lifting residents was a regular part of her job duties. Employees were 'expected' by Employer to lift residents without assistance; This would occur "almost every shift."

7. When Claimant was hired she was provided written orientation with the employee handbook (Ex. B, pp. 3-10). Clamant acknowledged receipt and review of the employee handbook (Ex. B, p. 10). In the employee handbook there is a heading entitled Employers' Notice of Workers Compensation Coverage contained therein there are two bullet points:

- You have a responsibility to follow all safety rules and procedures, including immediate notification to your supervisor or manager of all unsafe working conditions or injuries.

- If you have an on the job injury or work-related illness, you are required to fully complete, sign and date a written employee incident report as soon as possible and deliver to your supervisor/manager by the end of your work shift.

One of the safety rules taught to claimant was Cedarwood is a no lift facility. If a resident needed to be transferred, the CNA's were required to use a Hoyer lift.

8. Claimant testified that on her way to Zita's room, she asked for assistance in moving her from Damian Elswick, an RN on duty that evening. She testified that Elswick refused to assist her; he had referred to Zita as a "bitch". As help was not available at the time, Claimant testified that she proceeded to move Zita herself, putting her in a 'bear hug' and then lifting and rotating her to the right to place her on the commode. Claimant testified that as she lifted Zita, she immediately felt a shooting pain down her spine, from her neck to her lower back and down her right leg.

9. Claimant testified that in the aftermath of this injury, she reported what had just happened to Vera Holeckova, the RN she was assigned to work with that evening. Holeckova offered her ibuprofen, which she accepted. Claimant testified that she finished her shift, returned home, and lay down, hoping that her back pain would subside. When the pain did not go away by around 4 p.m., she presented for treatment at UC Health. Claimant testified that she called Camacho to tell her that she had hurt herself during her shift and to tell her she was seeking medical treatment.

10. Claimant testified that at her appointment with UC Health on December 30, 2017, she was taken off of work until January 3, 2018. In the narrative from Respondents' IME, it indicates that Claimant was diagnosed with an acute lumbar sprain, acute lumbar strain, upper back strain, and neck strain. (Ex. D, p. 41). Claimant was instructed to follow up with her doctor in three to four days and given prescriptions for various medications to control her pain and symptoms.

11. For reasons entirely unclear, the UC Health treatment records referenced in this IME narrative were not tendered by either party at hearing. The only medical records tendered at hearing are three prescriptions filled out on December 30, 2017 for pain relief and muscle stiffness-consistent with the above diagnoses.

12. Claimant testified that when she returned to work after January 3, 2018, she attempted to obtain from Employer a medical provider she could see to address her injury. She testified that this conversation kept getting put off, and no provider list was ever offered. Claimant accordingly never received medical treatment beyond her one visit to UC Health on December 29-30, 2017.

13. On January 8, 2018, Barbara Waters wrote a note, apparently to Claimant's personnel file, reading in its entirety:

> I spoke with Kennyne and discussed the need for her to see our Occupational Health physician. She refused to go Occupational Health as *she had an order to return to work already*. I discussed with her how she injured herself lifting a resident herself rather than utilizing the mechanical lift as care planned. She said she couldn't get anyone else *as they were out on break.* I explained that she should not have transferred the resident independently. Ex. B, p. 20)(emphasis added).

14. Claimant was terminated on January 23, 2018. (Ex. B, p. 16). The reason cited in Employer's Disciplinary Action Record ("DAR") is for Claimant's 15 days of absence from work, of which "at least" two were evidently recorded as being "No call, No show". Claimant refused to sign the DAR. The DAR does not record the dates of initial, second, or final warnings, nor does it indicate that any prior disciplinary steps were ever taken. Claimant testified that she had received disciplinary action on one occasion prior to December 29, 2017 stemming from an incident which had occurred in November.

15. By her own estimation Ms. Waters had been informed of Claimant's work injury by January 8, 2018 at the latest. Waters then filed an injury report on February 7, 2018. (Ex. B, p. 21). In it, she indicated that Claimant injured her neck and lower back by lifting a resident without assistance. Waters also completed an Injury Review Process ("IRP") form on that date, indicating that Claimant had failed to use a mechanical lift or receive assistance with moving a resident, resulting in her injury. No recommended corrective actions were listed, as Claimant had been terminated two weeks before.

16. At Respondents' request, Claimant attended an Independent Medical Exam ("IME") with Eric Ridings, M.D. on May 14, 2018. (Ex. D, pp. 39-45). Dr. Ridings reviewed the medical record, took a patient history, and performed a physical exam. As of May 14, 2018, Claimant was still complaining of pain through her thoracic and lumbar spine. Claimant's cervical spine complaints had reportedly resolved, so long as she did not rotate her neck too far to the right.

17. Dr. Ridings noted that Claimant had to shift around frequently in order to reduce pain in her legs and low back. Dr. Ridings ultimately concluded that, barring the existence of records indicating a pre-existing condition was causing her complaints, Claimant's injury was work related. In his report, Dr. Ridings did not detect signs of symptom magnification in Claimant's presentation and found Claimant to be "very motivated to try to improve as quickly as possible, both to be able to get back to work to support her family, and simply to be able to perform her caregiving activities at home." Dr. Ridings recommended that Claimant begin treatment with a lumbar MRI, electrodiagnostic testing, physical therapy, and potentially meet with a spinal surgeon.

18. Barbara Waters was deposed on July 11, 2018. (Ex. E, pp. 46-64). Waters testified that she had been an administrator at Cedarwood for over three years. Her primary responsibilities included ensuring compliance with state and federal law, as well as directing staff and ensuring the safety and care of facility residents. She testified that the attendance policy at Cedarwood provided in its employee handbook indicates that employees are to arrive on time. Late appearances are considered "tardies," and three instances of tardiness are considered one "occurrence." Seven occurrences in a given rolling twelve-month period would be grounds for termination of the offending employee.

19. Waters further testified that Cedarwood is a "no-lift facility," meaning that employees are not permitted to lift residents without the assistance of another employee

or the use of a mechanical lift. Waters also testified that Claimant was educated on Cedarwood policy with respect to both attendance and lifting residents, and that Claimant was terminated on January 23, 2018 due to attendance issues. Waters noted that an employee "could be disciplined" for violating the "no-lift" policy. Waters also testified that Claimant had come to her to discuss the work injury on January 8, 2018. She testified that she offered Claimant a referral to see Cedarwood's occupational health physician, and that Claimant refused to go.

20. Damien Elswick testified by telephone at hearing on behalf of Respondents. Mr. Elswick could not recall whether or not Claimant worked on the night of December 29, 2017, nor could he recall being asked to assist with moving a resident named Zita. Despite not recalling this incident, he did state that he would have "absolutely helped" because he had "always helped the CNAs when they've needed help." Elswick testified that Claimant did not report an injury to him on that date. He also testified that he did not refer to Zita as a bitch. Elswick also testified that the Hoyer lifts used at Cedarwood were charged prior to the night shift, and that they were in regular use. He also indicated that a no-lift policy was taught to employees such as Claimant.

21. Vera Holeckova testified by telephone at hearing on behalf of Respondents. Holeckova is employed as a nurse at Cedarwood, and has worked there for three years. She testified that she worked the night shift between December 29 and December 30, 2017; however, she could not remember whether Claimant approached her that evening about an injury. Holeckova did indicate that normal procedure would be for an injured worker to fill out an incident report and give it to Barbara Waters. She did also concede that Camacho could have been an appropriate contact for an injured worker.

22. Denise Steininger also testified by telephone at hearing on behalf of Respondents. Ms. Steininger worked at Cedarwood in an HR capacity on December 29, 2017. She testified that Cedarwood is a non-lift facility, meaning that staff members would not normally be permitted to lift residents alone. The purpose of this policy was to prevent injuries associated with lifting residents.

23. Steininger testified that Claimant had contacted her several times, although she could not recall when those contacts occurred. She testified that Claimant contacted her to complain about her administrator, and to indicate that the schedule was being changed on her. She testified that she followed up on this complaint, and concluded that no such thing had occurred. Ms. Steininger further testified that Claimant was terminated due to attendance issues, stemming from the facility's "no-call, no-show" policy. She testified that Claimant was terminated based upon this policy, and not as a result of reporting a work injury.

24. Sharondo Camacho testified in-person at hearing on behalf of Respondents. Ms. Camacho is the director of nursing at Cedarwood, where she has worked for over a year. Although she normally works during the day, she testified that she has occasionally had to work the night shift when staffing required it. As such, she

was familiar with normal hospital procedure at such times. Camacho testified that in those instances the no-lift policy was followed, and that several types of lifts are available for use depending upon the ability of the resident being moved to support their own weight.

25. Camacho also testified that she was familiar with the 'Zita' in question, and that as a resident she required use of a Hoyer lift when being moved. Ms. Camacho testified that all resident care specialists such as Claimant go through a training process to explain use of such lifts, although she did not perform the demonstration component of this training herself. She further testified that she had personally educated Claimant on the transfer process, and to get help if needed.

26. Camacho also testified directly as to Claimant's schedule. She contradicted Claimant's assertion that they had reached any arrangement as to when Claimant was to arrive to work, indicating that it would have to be a "big computer process" to accommodate Claimant's schedule, as Claimant had testified. However, Camacho did testify that she was aware that Claimant cared for her disabled daughter and had to be present to provide her daughter's medications at appropriate intervals.

27. Dr. Ridings subsequently testified in-person at hearing on behalf of Respondents. At hearing, Dr. Ridings cast some doubt on the reliability of Claimant's reported mechanism of injury and pain complaints. Dr. Ridings testified that he did not see outward signs of pain symptoms while observing Claimant's in-person hearing testimony, and that this was inconsistent with her behavior at his IME. Despite diagnosing Claimant with a possible acute disc herniation in his IME report, Dr. Ridings testified that Claimant's presentation of decreased sensation along the L4, L5, and S1 dermatomes was non-diagnostic.

28. Although he found Claimant to be credible in his May 14, 2018 report, Dr. Ridings in his testimony questioned the veracity of Claimant's pain complaints and her range of motion, saying that "we can all just stop bending whenever we want to." Dr. Ridings did agree that Claimant's reported mechanism of injury was consistent with her reported complaints and that he had received no indication that Claimant either had lumbar pain pre-dating December 30, 2017, nor had she suffered an acute incident involving increased back pain after that date.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. § 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

litigation. C.R.S. § 8-40-102(1). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

Compensability

3. Claimant must prove by a preponderance of the evidence that she is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); S*ee*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 592 P.2d 792 (Colo. 1979).

4. An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract.

5. Claimant testified sufficiently credibly as to how she attempted to lift 'Zita', during which she immediately felt pain along her entire spine, as well as her right leg. Some Cedarwood employees indicated that Claimant did notify them that she had sustained a work injury stemming from lifting a resident. Claimant's description of this

incident is reasonably consistent across the record, from her testimony in court to her discussion with Dr. Ridings. While Dr. Ridings was uncertain at hearing that an injury occurred, his IME report acknowledged that "in the absence of objective evidence to the contrary…..the patient's injury is work-related." He recommended a lumbar MRI in the near future. He also found Claimant not to be at maximum medical improvement. The ALJ concludes, by a preponderance of the evidence, that Claimant suffered a compensable injury while lifting the patient "Zita"- in willful violation of a safety rule, as noted below.

Medical Benefits

6. The Claimant has the burden to prove her entitlement to medical benefits by a preponderance of the evidence. C.R.S. §8-43-201. The respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. C.R.S. §8-42-101(1)(a).

7. The Claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

8. The ALJ concludes that Claimant is entitled to all reasonable, necessary, and related medical treatment as it relates to the December 30, 2017 lifting injury. Although Claimant has evidently not received more than a single episode of medical treatment to address the injury she sustained on that date, the close temporal proximity of that medical visit to the work injury and Claimant's discussions with Ms. Camacho would indicate that this visit was due to the work injury. Additionally, Dr. Ridings concluded in his IME report that Claimant did sustain a work injury on December 30, 2017, for which she had not yet reached a point of maximum medical improvement. Accordingly, the ALJ concludes that Claimant is entitled to all reasonable, necessary, and related medical treatment to address said injury through the parties' agreed-upon ATP, Dr. Sparr.

Temporary Total Disability Benefits

9. To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM*

Molding, Inc. v. Stanberg, supra. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

10. The ALJ concludes that Claimant meets the threshold requirements for access to TTD benefits. Claimant's medical visit on December 30, 2017 resulted in her being ordered off of work until January 3, 2018. As such, Claimant was unable to work for at least those four days, some of which she was scheduled to work, but under doctors' orders not to return to work. While Claimant apparently declined a visit to a physician as offered by Cedarwood later in January, she has yet to be cleared by an ATP to return to work without restrictions.

Claimant Responsible for her Own Termination

11. An injured worker's access to TTD is ended when that worker is responsible for termination of employment. § 8-42-105(4)(a), C.R.S. This notably includes situations involving at-fault termination of the employment relationship. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). The ALJ concludes that the Claimant's termination on January 23, 2018 was not due to her work injury; rather, it was for repeat violations of the written attendance policy of Cedarwood.

12. While the ALJ has found that Claimant has credibly established a compensable injury, this does not extend to her testimony on her attendance. However much Claimant wished to have special dispensation to see to her daughter's needs, she has not shown that it was given by Cedarwood. The ALJ does not find her testimony on this issue to be persuasive; Respondents' credible witnesses have established to the ALJ's satisfaction, by a preponderance of the evidence, that she was terminated for repeat violations of the written attendance policies. While Claimant insists that her schedule was repeatedly changed by administration with no notice to her, the ALJ finds otherwise. Except for the days following her work injury, Claimant repeatedly missed work without justification. Her reported work injury had nothing to do with losing her job. Claimant was responsible for her own termination, effective January 23, 2018.

Willful Violation of Safety Rule

13. Section 8-42-112(1)(b), C.R.S. permits imposition of a 50 percent reduction in compensation where Respondents prove that the Claimant's injury resulted from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee. Under § 8-42-112(1)(b), C.R.S., it is the Respondents' burden to prove every element justifying a reduction in compensation for the willful failure to obey a reasonable safety rule. *Triplett v. Evergreen Builders, Inc.*, W.C. No. 4-576-463 (May 11, 2004). In order to impose the reduction of compensation it is not enough for the employer to demonstrate that the claimant failed to obey a safety rule.

Johnson v. Denver Tramway Corp., 171 P.2d 410 (Colo. 1946). Rather, it is also necessary for respondents to show that there was a "willful" violation of the rule. *City of Las Animas v. Maupin*, 804 P.2d 285, 286 (Colo. App. 1990). The term "willful" connotes deliberate intent. Mere carelessness, negligence, forgetfulness, remissness, or oversight does not satisfy the statutory requirement. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968). Whether Respondents meet their burden to prove a willful safety rule violation is generally one of fact for determination by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995).

14. "The most frequent ground for rejecting imposition of a penalty, whether it be for violation of a safety rule or willful misconduct, is the lack of enforcement of the rule or policy by an employer with knowledge of and acquiescence in its violation." *Lori's Family Dining*, 907 P.2d at 719, *citing Pacific Employers Insurance Co. v. Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (1943) (rule against jumping on moving vehicles that was not diligently enforced could not be invoked to reduce compensation).

15. The evidence presented at hearing shows that Cedarwood is a "no-lift" facility where employees are required to lift residents with the assistance of another employee, a mechanical lift, or often both. The ALJ finds such rule to be reasonable, and for the safety of the employees of Cedarwood. The ALJ also finds that the Hoyer lift is a safety device, as contemplated by C.R.S. 8-42-112(1)(a). The ALJ finds the witnesses presented by Respondent on this issue to be credible. This is policy-no exceptions. The only person claiming that this policy is loosely enforced is Claimant herself. The ALJ is not persuaded that the Hoyer lift batteries were never charged, and instead were "left out on a desk." The ALJ further finds Claimant not to be credible when she claims that she was never trained by anyone in its usage. Cedarwood would have every reason to insist on strict compliance with this rule, both for the safety of its workers, and for the residents. While Claimant was lifting "Zita" (against policy) and felt this pain, the results could have been catastrophic-*for Zita, as well as Claimant.* Claimant knew better, but did so anyway. 'Zita' may well have been a difficult customer, but it was not Claimant's call to cut corners to avoid dealing with her further.

16. Claimant argues that since she was not terminated for violating the "no-lift" policy, it was not being enforced at all. The ALJ is not persuaded. Claimant was fired for cause for attendance violations; there was no need to fire her further for "no lift" violations. One ground for termination is adequate. The ALJ is unaware of case law which goes as far as stating that workers must be formally disciplined upon first violation of a safety rule in order for Employer to avoid being held "acquiescent" to the conduct. Claimant was admonished by a supervisor upon Employer's first finding out what had occurred. If Claimant violated this rule with regularity, the ALJ finds no evidence that Cedarwood was aware of it. Claimant's willful violation of this clearly stated, reasonable, and enforced "no-lift" policy and use of a safety device was the proximate cause of her back injury, and the ALJ so finds, by a preponderance of the evidence.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury; Respondents are responsible for all reasonable, necessary, and related medical treatment.

2. Claimant's ATP is Dr. Michael Sparr, MD- assuming he accepts Claimant as a patient.

3. Claimant's AWW is $326.44.

4. Claimant was responsible for her own termination, effective 1/23/2018. TTD payments are terminated, effective that date.

5. Claimant willfully violated a safety rule of Employer, which was the proximate cause of her injuries. Claimant's Workers Compensation benefits are to be reduced according to C.R.S. 8-42-112(1).

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 5, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence the left shoulder surgery recommended by Dr. Reister is reasonably necessary and causally related to his admitted industrial injury?

FINDINGS OF FACT

1. Claimant worked for Employer as an electrician. He suffered admitted injuries on October 27, 2016 in an electrocution accident. He was working on a ladder replacing a light fixture when someone came into the area and turned on the light switch. This sent 270 volts of electricity through his body, entering at the right thumb and exiting out the left hand. Claimant was "pinned in place with a wicked, titanic contraction of muscle." Eventually he wiggled his feet off the ladder and fell approximately 4 feet to the floor.

2. Claimant was initially treated at the Sky Ridge emergency room, and referred to the burn clinic at Swedish Medical Center for the electrical burns on his hands.

3. Claimant saw Dr. James Woodward, an orthopedic surgeon, on November 14, 2016. He reported pain in both shoulders and his neck. Dr. Woodward documented reduced range of motion in both shoulders and ordered MRIs.

4. The MRIs were performed on November 29, 2016. The left shoulder MRI showed a partial tear of the supraspinatus tendon, a partial tear of the subscapularis tendon superimposed on mild tendinopathy, mild subacromial/subdeltoid bursitis; superior labral fraying, an arch ligament sprain, and capsular edema and edema in the rotator interval consistent with adhesive capsulitis. The right shoulder MRI showed a full thickness subscapularis tear, a SLAP tear, and a dislocated biceps tendon.

5. Claimant saw Dr. Douglas Scott on January 2, 2017 for an IME at Respondents' request. His primary complaints were bilateral shoulder pain and low back pain. The right shoulder was significantly worse than the left. Dr. Scott noted, "he has soreness in his left shoulder from what he believes is over compensation for his right shoulder." Dr. Scott measured "good" active left shoulder ROM. Dr. Scott opined Claimant injured "the tissues in his right arm, right shoulder, right upper chest quadrant, left upper chest quadrant left shoulder and left arm. This was the probable course of the electrical current as a passed through [his] body."

6. Claimant saw Dr. Reister, Dr. Woodward's partner, on January 4, 2017. Dr. Reister opined Claimant needed surgery on the right shoulder but the left shoulder could be treated conservatively. He gave Claimant a left shoulder cortisone injection and

instructed him on rotator cuff strengthening exercises. He opined Claimant's bilateral shoulder problems were "100% related" to the accident.

7. Dr. Scott performed a Rule 16 records review on January 17, 2017 and recommended approval of right shoulder surgery.

8. Although Respondents approved the surgery in January 2017, there was substantial delay in getting it done. Surgery was scheduled and canceled several times. The delay was partially attributable to Claimant moving out of state, and partially due to apparent lack of motivation and timely follow through on Claimant's part. On September 11, 2017, ALJ Goldman suspended Claimant's TTD benefits under § 8-43-404(3) for unreasonably delaying treatment.

9. Dr. Reister performed a right biceps tenodesis and rotator cuff repair in October 2017.

10. Claimant started post-surgical therapy in December 2017. At the initial evaluation, he reported bilateral shoulder pain, worse on the right. Left shoulder active ROM was reduced, although not as much as the right shoulder. Manual muscle testing of the left shoulder was unremarkable. The therapist opined "the patient's present symptoms are directly related to injuries sustained at the time of the accident."

11. Claimant returned to Dr. Reister on January 3, 2018. The right shoulder was progressing well, but he was still having problems with the left shoulder. Dr. Reister noted:

> His other injuries from the same accident include a left shoulder which although not as symptom producing as the right has been symptom producing all along. [He] has been treated with extensive physical therapy and has had MRI identifying low-grade partial tears in the rotator cuff and mild bursal symptoms and his exam has been classic for bursitis and impingement and he is now ready to deal with it as the right shoulder is improving and the left shoulder is not; the left shoulder becoming the more symptomatic shoulder and he is a failure of conservative management for bursitis and partial cuff tear. [T]he next step for his left shoulder is going to be EUA arthroscopy, subacromial decompression, and thorough inspection.

12. Dr. Scott performed a Rule 16 record review regarding the proposed left shoulder surgery on January 15, 2018. He recommended Respondents deny the surgery as not reasonably necessary or related to the industrial accident. He noted Claimant's left shoulder ROM was normal at his IME in January 2017. He opined the November 2016 MRI findings appeared congenital or degenerative and stated, "any 10/27/2016 work accident with a soft tissue injury to the left shoulder resolved and was at MMI without permanent impairment by 1/2/2017." Irrespective of causation, he agreed the left shoulder required additional treatment, but surgery was premature because Claimant had not tried conservative care as set forth in the Medical Treatment Guidelines.

13. Dr. Scott issued an addendum report on May 30, 2018 after reviewing additional records and a surveillance video. He reiterated the original left shoulder

capsular injury was “improved and resolved” by the time of his January 2017 IME. He noted no medical records or other evidence of ongoing left shoulder pain between January 4, 2017 and January 3, 2018. He concluded, “[Claimant’s] current complaints of left shoulder pain occurred after his 10/12/2017 [sic] right shoulder injury, i.e., an exacerbation of a previously asymptomatic left shoulder condition.” He diagnosed “recurrent left shoulder pain due to overcompensating for his right shoulder after right shoulder surgery,” and opined Claimant’s prognosis was “guarded for the left shoulder without further treatment.” He again recommended conservative treatment, but opined “if further nonsurgical treatment does not resolve [Claimant’s] left shoulder condition he may require shoulder surgery as proposed by Dr. Reister.” Dr. Scott went on to state, inconsistently, that the left shoulder condition was “0% apportioned to his 10/27/2016 accident,” and “probably not directly related to the 10/27/2016 work accident.” He did not find the video significant.

14. Dr. Scott testified at hearing to elaborate on the opinions expressed in his reports. He maintained his opinion surgery is premature but agreed it “would not be unreasonable” if Claimant fails conservative care. He opined any treatment is related to underlying congenital and degenerative changes, not the industrial accident.

15. There is no persuasive evidence Claimant had any pre-injury left shoulder symptoms, treatment or limitations. He maintained employment as an electrician for an extended period before the accident.

16. Dr. Reister’s reports and opinions are credible and persuasive.

17. Claimant proved by a preponderance of the evidence the surgery proposed by Dr. Reister is reasonably necessary to cure and relieve the effects of his October 27, 2017 industrial injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not mean that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant’s entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). A claimant is entitled to treatment for new conditions caused by an accident, and pre-existing conditions aggravated by the accident. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

The Director has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure the quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP Rule 17, Exhibit 6 addresses lower extremity conditions, including meniscal pathology. As the final arbiter of disputes regarding medical treatment, the ALJ may consider the MTGs as an evidentiary tool, but the ALJ is not bound by the MTGs when determining whether requested medical treatment is reasonably necessary or injury-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

As found, Claimant proved the surgery recommended by Dr. Reister is reasonably necessary to cure and relieve the effects of his October 2017 injury. All providers agree Claimant suffered some injury to shoulder in the accident, and Dr. Scott's supposition that the left shoulder injury "resolved" by January 2017 is not persuasive. Admittedly, there is no documentation of left shoulder symptoms between January and November 2017, but that is because Claimant apparently saw no providers during that interval. Absence of evidence is not necessarily evidence of absence, and in this case the lack of documented symptoms is more likely a function of limited medical appointments. The available records show ongoing shoulder pain throughout the claim, dating to Dr. Woodward's initial evaluation in November 2016. Claimant told Dr. Reister in January 2018 the left shoulder "has been symptom-producing all along" and "is not improving," and the ALJ sees no persuasive evidence to contradict those statements. In any event, Dr. Scott opined the current left shoulder symptoms are due to "overcompensating for his right shoulder after right shoulder surgery," which would also be a sufficient causal nexus to entitle Claimant to treatment.

Dr. Scott is probably correct that at least some of the MRI findings are degenerative and predate the industrial accident. But there is no persuasive evidence Claimant had symptoms or needed treatment for his left shoulder before the electrocution. To the extent some (or even all) of Claimant's shoulder pathology was pre-existing, the credible evidence shows the accident aggravated his pre-existing condition and proximately caused the need for treatment.

The ALJ is not persuaded Claimant must complete additional conservative care before he can have surgery. Claimant has completed at least some conservative treatment outlined in the MTGs, *i.e*., a steroid injection and home exercise, but his symptoms have not resolved. Dr. Reister believes Claimant has "failed" conservative management and is how an appropriate candidate for surgery, and the ALJ is not persuaded to second-guess the treating surgeon in favor of a non-surgeon who has not seen Claimant since January 2017. It has been almost two years since the industrial accident and surgery appears to be the most efficacious and expeditious way to bring Claimant to MMI.

ORDER

It is therefore ordered that:

1. Insurer shall cover the left shoulder arthroscopic surgery recommended by Dr. Reister.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 7, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she is entitled to maintenance medical care.

II. Whether Claimant established by a preponderance of the evidence that her scheduled right upper extremity impairment should be converted to impairment beyond the hand to the arm at the shoulder or beyond to whole person impairment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a long term employee of Employer having worked for Employer for approximately 19 years. She is employed as a baker. On July 13, 2014, Claimant injured her right long finger when a baking tray fell between the shelves of a baking rack used to hold baked goods. Claimant's right long finger was crushed between the tray and the shelves.

2. Claimant initially sought treatment at the Parkview Medical Center Emergency Room with a complaint of "chronic ongoing right middle finger PIP joint pain and swelling status post an injury a year ago, which she reinjured . . . today." X-rays were read as showing a "possible tiny avulsion chip fracture at the dorsal base of the third middle phalanx". An aluminum splint was applied to the right middle finger.

3. On July 14, 2014, Claimant elected to treat with the Southern Colorado Clinic where Dr. Terrence Lakin evaluated her. Dr. Lakin prescribed Tramadol, Ibuprofen, and continued splinting. Claimant was released to return to work with no use of the right hand. She returned to Dr. Lakin on July 28, 2014, with ongoing complaints of pain at a level 2/10. Dr. Lakin opined, "Suspect from patient history of continued pain and limited ROM of digit, that the recent injury exacerbated previous injury of 5/2013." To expedite Claimant's recovery, Dr. Lakin referred her to hand specialist, Dr. Philip Marin, for further evaluation and treatment.

4. Dr. Marin evaluated Claimant on August 25, 2014. Dr. Marin diagnosed a crush injury to the middle finger with a PIP dorsal fracture near the central slip sight. Dr. Marin prescribed a custom splint and topical anti-inflammatory gel. Although she noted improvement, Claimant continued to experience middle finger PIP joint swelling and pain. Dr. Marin performed cortisone injections to treat Claimant's joint inflammation. He also discussed with Claimant that if her pain continued, she might require an arthroplasty with a silicone joint. On July 27, 2015, Dr. Marin recommended against

further cortisone injections and instead offered Claimant a silicone arthroplasty, if the pain was intolerable. On March 3, 2016, Dr. Marin performed a right middle finger silicone arthroplasty at the PIP joint. Following surgery, Dr. Marin recommended that Claimant "really push" the finger joint passively and actively to increase her range of motion. Additional cortisone injections were performed to "loosen up" the scar tissue. Dr. Marin continued to recommend aggressive therapy and stretching the finger passively.

5. Claimant continued to complain of pain and loss of range of motion. Dr. Lakin re-evaluated Claimant on May 5, 2016. She reported that she was going slow and did not want to be aggressive as suggested by occupational therapy and Dr. Marin. Dr. Lakin advised Claimant to perform occupational therapy like the therapist and Dr. Marin recommended. On June 17, 2016, Claimant reported dissatisfaction with her work and described a long list of problems she felt had contributed to the "her hand not getting better". Dr. Lakin opined arthritis was playing a part in Claimant's general right-hand pain. He encouraged Claimant to soak her hand in warm Epsom salt water a couple of times per day and to perform stretching exercises in the warm bath. On July 11, 2016, Claimant presented to Dr. Lakin voicing frustration of the replaced joint not working well. Dr. Lakin modified Claimant's lifting limitations to 1 pound. He also encouraged her to try and use her finger. Claimant presented in follow-up on November 4, 2016. During this appointment, Claimant's voiced persistent pain despite ongoing physical and occupational therapy. She reported depression due to the loss of her son in October. Dr. Lakin noted he was "not optimistic" that Claimant's joint arthroplasty would improve her function, noting further that she "may need scar release or revision." By November 29, 2016, Dr. Lakin opined that Claimant did not appear to be gaining much with physical therapy.

6. Dr. Gregg G. Martyak evaluated Claimant for purposes of a second opinion on January 17, 2017. Dr. Martyak diagnosed a failed right long finger PIP joint arthroplasty. He recommended removal of the silicone implant, and revision surgery of the right long finger PIP joint. Dr. Martyak performed the recommended surgery on March 3, 2017. Following surgery, Claimant resumed physical and occupational therapy. Her work was completely restricted until April 18, 2017, when Dr. Lakin released her to return to modified work, with minimal use of the right hand with pencil/pen, light clipboard type activity. Claimant was also instructed to wear a protective splint or guard. Dr. Lakin noted that Claimant was still grieving the loss of her son, reported high anger to drivers in her neighborhood and high anxiety about returning to work. Dr. Lakin opined, "with her pain, anxiety of returning to work, and son that was killed, she has BSPE (biopsychosocial economic) profile that is not helping her recovery. The claimant was encouraged to schedule an appointment with psychologist, Dr. Gary Neuger, as she was "very stressed out due to multiple family issues with her mother and adult children". Despite treatment, Claimant remained very reserved about her progress. She expressed her condition was "about the same" and "not going to be able to use it".

7. Dr. Martyak evaluated Claimant on July 11, 2017 and placed her at MMI for her right long finger injury.

8. A Functional Capacity Evaluation was performed on July 27, 2017, documenting near full, but not entirely full, effort on Claimant's part, as well as some inconsistencies to the reliability/accuracy of her subjective reports of pain and limitation.

9. Dr. Lakin placed Claimant at MMI on August 23, 2017. He assigned 14% hand impairment for Claimant's right long finger injury. He combined the 14% hand impairment with 7% impairment for a right PIP implant arthroplasty to reach 19% right upper extremity scheduled impairment. Nineteen percent upper extremity scheduled impairment converts to 11% whole person impairment. Dr. Lakin imposed permanent work restrictions of lifting ten to fifteen pounds, occasionally. He further noted that Claimant had limited grip strength, with an ability to manipulate only three to four pounds with the right hand. He recommended medical treatment to maintain MMI, including follow up with the hand surgeon, every 3-6 months, if needed, for two years and steroid injections or repeat surgery, if warranted.

10. Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Lakin's opinions on MMI, impairment, and medical treatment post-MMI. The FAL specifically admitted to Claimant's 14% hand impairment listed as body code 03, "Hand below the wrist". Claimant objected and requested a Division Independent Medical Examination (DIME).

11. Dr. Nicholas Kurz performed the DIME on January 2, 2018. Based on his review of the medical records and physical examination findings, Dr. Kurz agreed with the assigned August 23, 2017, MMI date. Due to documented improvement in range of finger motion since August 23, 2017, Dr. Kurz assigned 12% scheduled impairment of the hand below the wrist. Twelve percent hand below the wrist scheduled impairment converts to 11% arm at the shoulder scheduled impairment, which converts to 7% whole person impairment. Regarding maintenance medical care, Dr. Kurz opined that since Claimant adamantly refused any future surgical intervention or injections, including fusion or amputation, no maintenance treatment is warranted.

12. Insurer filed an Amended Final Admission of Liability consistent with Dr. Kurz's opinions on MMI, impairment and the claimant's need for medical treatment post-MMI on January 26, 2018. The amended FAL specifically admitted for 12% scheduled hand below the wrist impairment.

13. Claimant testified that none of the treatment modalities provided in connection with the July 13, 2014, injury, including rest, relative rest, medications, physical therapy, occupational therapy, cortisone injections, or surgery have improved the pain or stiffness in her right long finger. Claimant specifically noted that while the cortisone injections help decrease her swelling, they did not help decrease her pain. On direct exam, Claimant testified that she feels more rehabilitation is necessary to improve the range of motion (ROM) in her finger. She testified that she would like to revisit physical therapy to see if it will help her achieve "a little more movement" at the tip of her right long finger. Claimant has undergone over 80 physical therapy sessions, without

improvement in pain complaints or function. She reportedly must hold things with both hands secondary to reduced ROM and grip strength.

14. Dr. Kurz testified that it is not medically probable that additional therapy will result in improvement of Claimant's right long finger ROM. Dr. Kurz testified the Claimant's passive range of finger motion has consistently exceeded her active range of finger motion, suggesting that Claimant is either not giving full effort on active testing or is not performing the required home exercise program to maintain gains achieved in range of motion through therapy.

15. Dr. Kurz credibly testified that Claimant demonstrated no sustained meaningful improvement in reported pain levels or gains in function resulting from any treatment modality provided to date. Dr. Kurz's testimony that Claimant does not require medical treatment to maintain her condition at MMI is persuasive and supported by the medical record evidence presented.

16. Claimant has failed to prove, by a preponderance of the evidence, that she requires medical treatment to maintain her condition at MMI. Rather, the ALJ is persuaded that Claimant's ROM can be sufficiently maintained by her active participation in her home exercise program.

17. Dr. Kurz' testified that Claimant's injury is to her right long finger and her functional impairment relates to use of the hand below the wrist. Although Claimant has impaired ROM in the right finger, she retains a functional gripping angle in the PIP joint of the middle finger at 40 degrees of ROM, according to Dr. Kurz. Consequently, Dr. Kurz testified that Claimant has no functional impairment beyond the finger/hand. Based upon the evidence presented, including the medical records and testimony of Dr. Kurz, the ALJ is not persuaded that Claimant has functional impairment beyond the hand below the wrist. The evidence presented does not support a finding that Claimant's functional impairment extends beyond the hand to the wrist, arm, shoulder or whole person as argued by Claimant. Indeed, the evidence presented indicates that as of the date she was placed at MMI, Claimant had trouble with fine motor movements, including the ability to apply makeup and write. She also was experiencing loss of grip strength in the right hand resulting in her dropping items. Consequently, the ALJ finds the situs of Claimant's functional impairment to involve the hand, below the wrist.

18. Claimant has failed to prove that the situs of her functional impairment extends beyond the hand below the wrist, arm, shoulder or whole person. Therefore, § 8-42-107(7)(b)(II), C.R.S. precludes an award of medical impairment benefits based on conversion to the upper extremity or whole person in this case. The evidence presented persuades the ALJ that Claimant sustained an 12% scheduled impairment of the hand below the wrist due to the July 13, 2014, industrial injury as admitted by Respondents in this case.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on the merits. *Id.*

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. Assessing the weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the ALJ finds and concludes that the testimony of Dr. Kurz is credible and more persuasive than the contrary testimony of Claimant and opinions of Dr. Lakin.

Claimant's Entitlement to Maintenance Treatment

D. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical treatment is reasonable, necessary and related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

E. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the ALJ concludes that Claimant has failed to meet her burden to establish entitlement to maintenance medical treatment. The evidence presented establishes that Claimant has received extensive treatment for her industrial injuries including rest, physical/occupational therapy, splinting, medications, injections and two surgeries. While, Claimant testified that she would like to participate in additional physical therapy in an effort to see if it would help her achieve additional ROM at the tip of her right long finger, more than 80 physical therapy sessions failed to produce improvement in Claimant's pain complaints or increase her ROM. Indeed, outside of some improvement concerning the amount of swelling in the finger after steroid injections, Claimant admitted that she did not receive any functional benefit or pain relief from any of the treatment modalities provided, including therapy. Consequently, the ALJ is not persuaded that additional maintenance medical treatment, is likely to relieve the effects of the injury or to prevent deterioration of the Claimant's present condition. Rather, the evidence presented persuades the ALJ that Claimant's condition, including her ROM can be maintained by active participation in her home exercise program. Accordingly, the claim for maintenance treatment must be denied and dismissed.

Conversion of Claimant's Right Upper Extremity Impairment to Whole Person Impairment

F. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award.[1] Section 8-42-107(1)(a), C.R.S. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment beyond the schedule listed. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo.App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo.App. 1996). The claimant carries the burden to prove a functional impairment beyond the scheduled body part. § 8-42-107(b)(1), C.R.S. Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. The question of whether Claimant proved functional impairment beyond the finger at the PIP joint is an issue of fact for the ALJ and depends upon the particular circumstances of the case. *See Delaney v. indus. Claim Appeals Office*, 30 P.3d 691.

G. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or "functional impairment", pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment." *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 658 (Colo.App. 1998). Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Functional impairment need not take any particular form. *See Nichols v. LaFarge Construction,* W.C. No. 4-743-367 (October 7,2009); *Aligaze v. Colorado Cab Co.,* W.C. No. 4-705-940 (April 29, 2009); *Martinez v. Albertson's LLC,* W.C. No. 4-692-947 (June 30, 2008). Accordingly, referred pain from the primary situs of the industrial injury to another part of the body may establish proof of functional impairment beyond the identified schedule listing, including to the whole person." *Hernandez v. Photronics, Inc.,* W.C. No. 4-390-943 (July 8, 2005). Nonetheless, symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo.App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment beyond the listing, including the whole person, the issue is not whether the claimant has

[1] The loss of a finger is compensated on the schedule. *See* §§ 8-42-107(2)(d)-(f), C.R.S.

pain, but whether the injury has impacted part of the claimant's body which limits his/her "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Consequently, the ALJ concludes that an injury to the finger may or may not result in functional impairment of the whole person.

H. In this case, Respondents have admitted to impairment of the hand below the wrist. Claimant seeks conversion of her admitted impairment beyond the hand up to and including the whole person. Based upon the evidence presented, the ALJ is not convinced that conversion is warranted in this case. While Claimant may have continued pain to areas of the body beyond the right fingers/hand, i.e. the wrist, forearm arm and shoulder, neither these symptoms nor the index injury have caused "functional impairment" or disability beyond the hand. Indeed, the evidence presented regarding functional impairment is limited to fine motor movements involving the fingers and hand, i.e. applying makeup, writing and gripping items with the hand itself. Claimant's functional capacity, as demonstrated, substantially erodes her claims that the injury has resulted in a decreased capacity to meet her personal, social or occupational demands. Based upon a totality of the evidence presented, the ALJ concludes that the situs of Claimant's functional impairment does not extend beyond the hand to the arm at the shoulder or the whole person. Consequently, Claimant's request for additional permanent impairment of the upper extremity beyond the hand, to the upper extremity or beyond to the whole person must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request for an award of medical benefits to maintain her condition at MMI is denied and dismissed.

2. Claimant's request for conversion of the 12% hand below the wrist scheduled impairment assigned by the Division IME, Dr. Nicholas Kurz, to 11% arm at the shoulder scheduled impairment or 7 % whole person impairment is denied and dismissed.

DATED: September 7, 2018

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Are Respondents entitled to penalties as a result of Claimant's violation of the December 1, 2017 Order requiring Claimant to repay $13,354.60 at the rate of $50.00 per month?

II. Are Respondents entitled to penalties as a result of Claimant's violation of the January 2, 2018 Order requiring Claimant to attend a medical examination with ATP Dr. Frank Polanco?

III. Are Respondents entitled to an 8% penalty, pursuant to C.R.S. 8-43-401?

IV. Shall all ongoing medical benefits shall be terminated?

V. If ongoing medical benefits are terminated, shall this claim shall be closed?

PROCEDURAL BACKGROUND

The ALJ takes administrative notice of case WC 4-907-620 in its entirety.

Claimant was employed by Respondent-Employer, and sustained a compensable injury on December 27, 2012. Respondents paid Claimant indemnity benefits in excess of the statutory cap, resulting in an overpayment in indemnity benefits totaling $13,354.60. A hearing was held on this issue of overpayment. Administrative Law Judge Richard M. Lamphere ordered Claimant to repay the overpayment to Respondents. ALJ Lamphere also ordered Claimant to participate in an opioid weaning program with Dr. Polanco in effort to bring the claim to closure.

A prehearing conference was held on January 2, 2018 regarding Respondents' Motion to Compel Claimant to attend medical examination with Dr. Polanco. Consistent with ALJ Lamphere's Order, PALJ John A. Steninger ordered Claimant to attend a medical examination with Dr. Polanco. Claimant did not so attend this examination. Additionally, Claimant has informed Respondents as well as the Office of Administrative Courts that he is no longer willing to participate in the Workers' Compensation system due to their "biases" and "violations of his Constitutional Rights".

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's Failure to Repay the Overpayment as Ordered by ALJ Lamphere.

1. On November 7, 2017, a hearing took place on the issue of overpayment. The *pro se* Claimant did not appear for the hearing. ALJ Lamphere noted in his order, "Claimant made it clear that he would not appear for nor would he participate in the proceeding on the grounds that the Courts and ALJ's were prejudiced against him." (Ex. A, p.1) ALJ Lamphere found that Claimant had knowingly and voluntarily waived his appearance at hearing.

2. On December 1, 2017, ALJ Lamphere issued an Order requiring Claimant to repay $13,354.60 to Respondents at a rate of $50.00 per month. (Ex. A, p.13)

3. On December 4, 2017, Respondents emailed Claimant requesting repayment to commence on January 15, 2018. (Ex. C, p. 19) Claimant did not respond to that email and Claimant has not made any payment to Respondents.

Claimant's Refusal to Follow Orders by ALJ Lamphere and PALJ Steninger

4. ALJ Lamphere also ordered Respondents to pay for maintenance medical treatment associated with weaning Claimant from the opioid medication, coordinated through Dr. Polanco. (Ex. A, p. 13) ALJ Lamphere ordered Claimant's ongoing medical appointments with the treating providers to be tapered down and discontinued over a time "left to the sound medical discretion of Dr. Polanco." (Ex. A, p. 13)

5. On December 6, 2017, Respondents' counsel sent a letter to Claimant informing him of a demand appointment scheduled with Dr. Polanco on December 18, 2017. (Ex. D, p. 20) Claimant did not respond to this letter, nor did he attend the demand appointment with Dr. Polanco.

6. On December 19, 2017, Respondents sent correspondence to Claimant notifying him a demand appointment with Dr. Polanco was *rescheduled* for January 4, 2018. (Ex. E, p. 24) Claimant responded with an email to Respondents dated December 20, 2017, stating, "I will not be attending Dr. Polanco's apt. on January 4, 2018. This is a forced appointment on me, by a Judge and court that is bias, and has denied and ignored my Constitutional Rights; therefore, I will not any [sic] judgement forced upon me. . . ." (Ex. F, p. 28)

7. On December 20, 2017, Respondents' counsel emailed Claimant conferring on a prehearing conference to compel him to attend a demand appointment with Dr. Polanco. (Ex. G, p. 29) Claimant responded with an email stating, "there will be no more pre-hearing conferences, nor hearings, that includes me with a lower court system that has deemed my United States Constitutional rights null and void; moreover, ignoring their own rule . . . I would appreciate no more contact from your firm, that pushes the Agenda of the U.S. Constitutional Rights bias." (Ex. G, p. 29)

8. On January 2, 2018, a prehearing conference was held regarding Respondents' oral Motion to Compel Claimant to attend a medical examination with Dr. Polanco, which Claimant had not attended. (Ex. B, p. 15) PALJ Steninger issued a prehearing order on January 2, 2018, stating, "Claimant, as self-represented, notified the Division, by email, on 12/22/2017 that he was *refusing* to appear for this prehearing conference. Such communication shows that Claimant had actual notice of the prehearing conference." (Ex. B, p. 15) (emphasis added).

9. PALJ Steninger found:

> Claimant's *refusal* to attend the medical appointment appears to this PALJ as an act of resistance to Judge Lamphere's order. The judge specifically found that the continued use of opioids is not reasonable, necessary, or related to the injury. However, the judge, humanely did not require "cold turkey" withdrawal from the opioids . . . . The Claimant's *refusal* to start the weaning process appears to be designed to sabotage the judge's order through extra-judicial means. (Ex. B, p. 16)(emphasis added).

10. PALJ Steninger noted, "[s]hould the Claimant fail to start a drug rehabilitation (weaning) process it is likely that the opioid medications will ultimately be terminated. . . ." (Ex. B, p. 16) PALJ Steninger granted Respondents' Motion to Compel and ordered Claimant to attend a medical examination on January 4, 2018 with Dr. Polanco. (Ex. B, pp. 16-17) PALJ Steninger ordered, "Claimant is advised and admonished that failure to attend the appointment may require him to pay for the cost of the missed appointment and other sanctions pursuant to the Rules of Procedure and the WC Act." (Ex. B, p. 17)

11. PALJ Steninger further explained:

> Claimant may think that refusal to start the weaning process means that his prescription for opioids will continue uninterrupted. Ultimately, this will not be the case. In the opinion of this PALJ, Judge Lamphere wanted the opioid medications terminated but in such a way that would provide the least difficulty for the Claimant. No one can force an individual to perform an action (short of incarceration in criminal cases) or to go to a medical appointment. However, failure to perform such an action, when compelled to do so, has other consequences under the WC Act. (Ex. B, p. 16).

12. On January 5, 2018, Dr. Polanco's office called and informed Respondents that Claimant did not attend the demand appointment. Ever since PALJ Steninger's Order was issued, Claimant has not attended an appointment with Dr. Polanco. After this second "no show" by Claimant, no further attempts were made by Respondents to reschedule further.

Claimant's Hearing Testimony

13. In summary, Claimant now acknowledges that he must repay the overpayment. He would like to be able to do so, but has been unsuccessful at obtaining employment-at least employment he feels capable of performing. To date, he has paid nothing towards this debt, due to an inability to do so. His only current source of income is child support arrearage payments from his ex-wife, payable at $168.00 every two weeks-although his children are now grown, and they don't need these payments for their own support. He lives with his brother, to whom he contributes $125.00 towards the rent of $625.00. The rest of his income goes towards food and basic expenses. He feels hopeless and depressed.

14. Further, Claimant is now obtaining medical care through Medicaid, and has not been taking any opioid medications "for the past two months" (as of the hearing date). Claimant would like to forego further Workers Compensation medical benefits, in exchange for 'nullifying' his overpayment obligations. At hearing, the ALJ notes that Claimant displayed none of the defiance which had permeated his earlier interactions with all concerned.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Penalties, Generally

A. Section 8-43-304(1), C.R.S. provides for penalties against an employee, employer or insurance carrier who does any of the following: "(1) violates any provision of the Workers' Compensation Act (Act); (2) does any act prohibited by the act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or the Panel." *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84, 87 (Colo. App. 2004).

B. The imposition of penalties under Section 8-43-304(1), C.R.S. is a two-step process, first requiring the ALJ to determine if the person's conduct violated the Act, a rule, or an order. If a violation occurred, the ALJ must determine whether the party's actions were objectively reasonable. *Colorado Compensation Insurance Authority v. Industrial Appeals Office*, 907 P.2d 676 (Colo. App. 1995); *see also Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003) (reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact); *but see Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (conduct examined to determine whether conduct was merely unreasonable without consideration of whether it was based on a rational argument).

C. Section 8-43-305, C.R.S., provides:

> [E]very day during which any employer or insurer, or officer or agent of either, or any employee, or any other person fails to comply with any lawful order of an administrative law judge, the director, or the panel or fails to perform any duty imposed by articles 40 to 47 of this title shall constitute a separate and distinct violation thereof. In any action brought to enforce the same or to enforce any penalty provided for in said articles, such violation shall be considered cumulative and may be joined in such action.

D. Section 8-43-304(1), C.R.S. provides for the imposition of a penalty up to $1,000.00 per day if a party fails or refuses to perform a duty lawfully required within the time prescribed, for which no penalty has been specifically provided, or if a party fails or refuses to obey any lawful order. *Mills v. Jacobs Entertainment, LLC*, W.C. No. 4-609-019 (April 6, 2012)(ICAO affirmed the ALJ's order awarding penalties for claimant's violation of an order, although the respondents did not suffer great prejudice.)

E. C.R.S. 8-43-306 states:

> [A] certified copy of any final order of the director or an administrative law judge ordering the payment of any penalty or repayment of overpayments pursuant to articles 40 to 47 of this time may be filed with the clerk of the district court of any county in this state at any time after the period of time provided by articles 40 to 47 of this title for appeal or seeking review of the order has passed without appeal or review being sought. . . .

Claimant's Failure to Repay the Overpayment

F. Here, by his own admission, Claimant violated ALJ Lamphere's court order by failing to repay the Court ordered overpayment. By a preponderance of the evidence, the ALJ finds that Claimant's violation of this order was objectively unreasonable, since Claimant refused to comply with the order and court proceedings due to alleged "judicial bias" and violation of his Constitutional rights. Claimant has been in violation of the December 1, 2017 order for 233 days, dated from January 15, 2018, when the first payment was requested, to the date of this hearing. Claimant's actions knowingly and needlessly protracted the course of the litigation. They cost Respondents time and money in having to file a Motion to Compel and Application for Hearing. The ALJ finds that, while Claimant may not have been able to pay $50.00 per month with regularity, he could have paid *something*- and communicated with Respondents to this effect. Due to Claimant's mitigated personal circumstances, the ALJ finds that a penalty of $2.00 per day is sufficient to meet the statutory purposes of the penalty provisions, for a total of $466.00. The ALJ, pursuant to C.R.S. 8-43-304(1), apportions said penalties to be payable 50% to Respondents, and 50% to the Colorado Uninsured Employer Fund.

Claimant's Failure to Attend Medical Examinations

G. Claimant was ordered by ALJ Lamphere to attend the medical examination with Dr. Polanco, to wean off his opioid medication. This was scheduled initially for December 18, 2017. Claimant had proper notice, and willfully failed to attend this appointment. After a prehearing conference was held, Claimant was ordered by the PALJ to appear at the rescheduled appointment with Dr. Polanco on January 4, 2018. Claimant not only willfully failed to do so; he clearly stated his intentions in writing to not so appear. Not unreasonably, Respondents ceased further efforts to seek compliance, as it was clear to all concerned that Claimant would not attend another rescheduled appointment. Claimant's defiant email showed he was not "yanking anyone's chain"; he made it clear up front that Respondents were wasting their time pursuing the matter further.

H. The ALJ finds that this willful and objectively unreasonable violation of the ALJ's and PALJ's Orders began on December 18, 2017 (when Claimant failed to appear the first time), and ended on January 4, 2018, (when he failed to appear the second time), for a total of 18 days, inclusive. The ALJ declines to find (in contrast to his failure to repay on an ongoing basis, noted above) that this is an ongoing violation that extended up to the hearing date. Respondents knew full well that that game was over as of January 4, 2018. No further efforts were expended on Claimant until this Application was filed. Nor were any further Court orders issued in connection therewith.

I. The ALJ finds that Respondents gave their best effort in helping Claimant follow ALJ Lamphere's order providing maintenance medical treatment, but have been unduly burdened by Claimant's behavior and prolonging of this claim. All Claimant needed to do to avoid being penalized was discontinue his opioids, or attend the appointments. He was duly and fairly warned by the PALJ that there would be consequences for noncompliance. He chose instead to waste everyone's time with his Quixotic antics. Such conduct was unreasonable, knowing, and willful, and the ALJ so finds, by a preponderance of the evidence. The ALJ finds that the statutory purposes of the penalty provisions are best met with a penalty of $100.00 per day, for a total of $1,800.00. The ALJ, pursuant to C.R.S. 8-43-304(1), apportions said penalties to be payable 50% to Respondents, and 50% to the Colorado Uninsured Employer Fund.

Respondents' Request for Penalties of 8% under C.R.S 8-43-401.

J. Respondents have stated their intentions to enforce the overpayment judgment against Claimant by obtaining an Order which will allow them to pursue enforcement against Claimant in District Court under Section 8-43-306, C.R.S., if needed. This they may do, with no further action by the Office of Administrative Courts. Respondents may also seek, through the District Court, any post-judgment interest allowable by statute.

K Respondents have further requested an 8% penalty, citing C.R.S. 8-43-401. Such reliance is misplaced. C.R.S. 8-43-401(2) plainly states that such remedies are available solely against insurers or employers who delay or withhold payments

owed to an injured worker; no such remedy is available to an employer or insurer seeking repayment of an overpayment *from* an injured worker.

Termination of Medical Maintenance Benefits

L. Pursuant to Section 8-43-201(1), C.R.S., Respondents carry the burden by a preponderance of the evidence, to terminate their liability for ongoing maintenance medical treatment. *See Bolton v. Cherry Creek School District*, W.C. No. 4-935-211-03 (April 20, 2018), *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012). In *Salisbury v. Prowers County School District*, the ICAO held that previously admitted maintenance medical treatment shall be terminated where such treatment is not reasonable, necessary or related.

M. The ICAO has held it is appropriate to terminate a claimant's maintenance medical benefits where a claimant failed to participate in treatment arguing, "the workers' compensation system is biased against him as a characteristic unconstitutional breach of substantive due process." *Munoz v. JBS Swift & Co. USA*, W.C. No. 4-780-871-03 (October 7, 2014).

N. PALJ Steninger's January 2, 2018 Order states, "[p]resumably, Claimant is still receiving and using opioid medications. A judge has already found that these medications are not reasonable, necessary, or related to the injury." (Ex. B, p.16) However, PALJ Steninger noted ALJ Lamphere humanely awarded Claimant a mechanism for weaning off his opioid use.

O. Claimant has indicated, both through his conduct and in writing, that he is not willing to take reasonable-and court ordered- steps to utilize the medical benefits awarded to him. Further, Claimant testified at hearing that he quit using opioids "about two months ago" (from the date of hearing). Claimant has expressed to the Court his unwillingness to participate in this "lower court system" due to bias and violation of Constitutional due process. While Claimant was collecting indemnity benefits, he apparently saw nothing unconstitutional in the Workers Compensation statutes. Despite that, as PALJ Steninger stated in his January 2, 2018 Order, Claimant has been afforded due process in this system and has refused to participate. Claimant's unwillingness to participate in court procedures and follow orders are sufficient grounds alone for terminating maintenance benefits.

P. However, independent of Claimant's non-cooperation, the ALJ finds, by a preponderance of the evidence, that any further usage of prescription opioids is no longer reasonable or necessary to treat Claimant for his work injuries in this case. He has, to his credit, quit taking them on his own. Accordingly, the ongoing maintenance medical benefits shall be terminated.

Closure of Claim

Q. Section 8-43-203(2), C.R.S., provides a mechanism for the administrative closure of claims, without the necessity of litigation, in cases presenting no legitimate

controversy. *Cibola Construction v. Industrial Claim Appeals Office*, 971 P.2d 666 (Colo. App. 1998). The ICAO had held that a claimant's failure to comply with orders is grounds for dismissing a claim with prejudice. See *Muragara v. Manitou & Pikes Peak Railway*, W.C. No. 4-698-365-07 (July 8, 2014) (The claim was properly dismissed with prejudice, based on claimant's failure to comply with discovery orders.) If maintenance medical benefits are terminated, this claim shall be closed, as these benefits were the final remaining benefit in this claim. The ALJ finds that this claim should be closed, unless otherwise permitted by law to be reopened.

ORDER

It is therefore Ordered that:

1. Claimant shall pay penalties of $466, apportioned 50% to Respondent, and 50% to the Colorado Uninsured Employer Fund, for his continuing failure to pay towards his overpayments as ordered by ALJ Lamphere.

2. Claimant shall pay penalties of $1800 apportioned 50% to Respondent, and 50% to the Colorado Uninsured Employer Fund, for his failure to attend the medical appointments as ordered by ALJ Lamphere and PALJ Steninger.

3. Ongoing maintenance medical benefits are terminated in their entirety.

4. This case is closed, subject only to reopening as permitted by law.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 10, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-972-988-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on August 23, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 8/23/18, Courtroom 4, beginning at 8:30 AM, and ending at 11:30 AM).

Claimant's Exhibits 1 through 15 were admitted into evidence, without objection. Respondents' Exhibits A through TT were admitted into evidence, without objection. The evidentiary deposition of Timothy R. Kuklo, M.D., taken on July 18, 2018, served in lieu of his testimony at the hearing.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. The Claimant's opening brief was filed, electronically, on August 30, 2018. Respondents' answer brief was filed on September 4, 2018. No timely reply brief was filed as September 6, 2018, the due date. Therefore, the matter was deemed submitted for decision on September 7, 2018, and the ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern permanent total disability (PTD); post maximum medical improvement (MMI) medical maintenance benefits; overpayment of $48,836.84, by the Respondents, of permanent **medical** impairment benefits; and, issue preclusion as it pertains to PTD, based on a February 14, 2018 decision of ALJ Kimberley B. Turnbow, which determined that Respondents had overcome the Division Independent Medical Examination (DIME) opinion of Brian Shea, D.O., and the Final Admission of Liability (FAL) insofar as it admitted liability for 18% whole person, based on DIME Dr. Shea's opinion. ALJ Turnbow also determined that the DIME opinion concerning MMI as of March 17, 2016 had not been overcome.

The judicial doctrine of issue preclusion bars the re-litigation of an issue when the following four elements are present:

(1) The issue sought to be precluded is identical to an issue actually determined in a prior proceeding;
(2) The party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding;
(3) There is a final judgment on the merits in the prior proceeding; and,
(4) The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Feeley v. Indus. Claim Appeals Office, 195 P.3d 1154 (Colo. App. 2008).

The issue allegedly precluded in the present case is whether ALJ Turnbow's determination that the DIME of Dr. Shea's opinion had been overcome as to permanent **medical** impairment, based on the opinions of Barry Ogin, M.D., and Brian Reiss, M.D. [independent medical examiners (IMEs) hired by the Respondents]. Their opinions were that the admitted back injury of January 20, 2015, amounted to a temporary aggravation of a pre-existing degenerative back condition, insofar as it pertained to permanent **medical** impairment, thus, precluding a consideration of PTD because the doctrine of issue preclusion applies. Respondents argue that ALJ Turnbow's decision, based on a factual determination that the opinions of Dr. Ogin and Dr. Reiss that the admitted injury was a temporary aggravation of the Claimant's degenerative arthritic back insofar as **permanent medical impairment** was concerned, triggers the doctrine of issue preclusion concerning **permanent total disability (PTD).** Resolution of this issue concerning Dr. Ogin's and Dr. Reiss' opinions, in part, implicates credibility determinations, based on the totality of the evidence insofar as the issue of **permanent total disability** is concerned. It also implicates whether the Claimant had a full and fair opportunity to litigate the issue of **permanent total disability** before ALJ Turnbow at the December 12, 2017 hearing before her, which resulted in her February 14, 2018 decision.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Determinations Based on ALJ Turnbow's Decision of February 14, 2018

1. Claimant is collaterally estopped from re-litigating ALJ Turnbow's determination that Claimant's MMI date was March 17, 2016. Therefore, the doctrine of issue preclusion applies to the MMI determination.

2. Claimant is collaterally estopped from re-litigating ALJ Turnbow's determination that Respondents overcame DIME Dr. Shea's opinion of 18% whole person and the subsequent Final Admission of Liability (FAL), dated April 5, 2018 (Respondents' Exhibit QQ) for zero **permanent medical** impairment. Therefore, the doctrine of issue preclusion applies to this **medical impairment** determination.

3. The factors in a PTD determination (a disability concept as opposed to a strict **medical** impairment concept) differ substantially from the factors in making a **medical** impairment determination based on a Division of Workers' Compensation (DOWC) accredited physician's opinions with reference to the American Medical Association's (AMA's) *Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. **Permanent total disability** refers to the ALJ's evaluation of a claimant's ability to earn a wage under the claimant's particular circumstances. Permanent **medical** impairment refers to an accredited physician's medical diagnosis of a claimant's physical condition and its relation to the industrial injury. The latter is strictly governed by medical guidelines. The former is the result of a totality of the circumstances analysis that considers but is not determined by the DIME and the **permanent medical impairment** rating.

4. At the commencement of the hearing on August 23, 2018, the parties stipulated that the Claimant was overpaid $48,836.84 in **permanent medical impairment** benefits, in light of ALJ Turnbow's determination that Respondents had overcome the DIME concerning **permanent medical impairment,** the net effect being zero permanent **medical** impairment.

Procedural Posture

5. Brian Shea, D.O., performed a Division Independent Medical Examination (DIME) on August 25, 2016. He placed the Claimant at maximum medical improvement

(MMI) on March 17, 2016, and assigned the Claimant an 18% whole person impairment rating. Dr. Shea stated that the Claimant should be restricted from lifting or carrying of greater than twenty pounds and limiting pulling to forty pounds. Dr. Shea further restricted the Claimant from squatting, pivoting, crawling, or kneeling (Claimant Exhibit 4, bates 33). Ultimately, Respondents' Independent Medical Examiner (IME), Barry Ogin, M.D., agreed with these permanent restrictions. Based on the description of the Claimant's job, he could not work at his pre-injury job with these permanent restrictions.

6. Respondents filed a Final Admission of Liability (FAL) based on Dr. Shea's report (Claimant's Exhibit 15, bates 130). The Claimant timely objected to the FAL and filed an Application for Hearing. In their Response to the Application for Hearing, the Respondents endorsed medical benefits, offsets, and causal relatedness (Respondents' Exhibit TT, bates 177).

7. Hearing was held on December 12, 2017, before ALJ Kimberley Turnbow. In her decision of February 14, 2018, ALJ Turnbow found that the Claimant suffered a temporary aggravation to a pre-existing condition as pertains to **permanent medical impairment.** Consequently, she ruled that Respondents met their burden of clear and convincing evidence, in overturning Dr. Shea's 18% whole person impairment rating (Respondents' Exhibit TT, bates 187). The Claimant did **not** have an opportunity to litigate the issue of **permanent total disability (PTD)** at the December 12, 2017 hearing before ALJ Turnbow.

8. After ALJ Turnbow's decision, the Claimant filed an Application for Hearing on May 15, 2018, endorsing the issues of medical benefits (*Grover* medicals), authorized provider, reasonably necessary, and **permanent total disability benefits (PTD).**

9. On July 31, 2018, Respondents submitted a Motion for Partial Summary Judgment. In their Motion, Respondents alleged that the decision of ALJ Turnbow implicates the doctrine of issue preclusion and precludes the Claimant from contending at hearing that the symptoms in his back, and by necessary implication, his permanent physical restrictions, are causally related to his admitted industrial injury of January 20, 2015.

10. In the Response to Respondents' Motion for Partial Summary Judgment, the Claimant cited to *Dish Network*, which states that once a claimant applies for PTD benefits, the DIME opinion no longer carries its presumptive weight. "The determination of the DIME physician as to which body parts and resulting work restrictions were related to the work injury can be considered, but they are not entitled to additional weight by the statute." *Cole v. Dish Network*, W.C. No. 4-918-651-02 [Indus. Claim Appeals Office (ICAO), January 15, 2016] (*aff'd sub nom. Dish Network v. Indus. Claim Appeals Office,* 2016 WL 7404847 (Colo. App., December 22, 2016). (Claimant's Exhibit 5, Response to Respondents' Motion for Partial Summary Judgment).

11. The Claimant argued that a claimant has the burden to establish, by preponderant evidence, that the industrial injury acts as a "significant causative factor" in a determination of PTD. *Id*.

12 On August 22, 2018, ALJ Peter Cannici denied Respondents' Motion for Partial Summary Judgment. ALJ Cannici agreed that because the Claimant is now asserting PTD, the DIME opinion and the subsequent decision of ALJ Turnbow do not function in the same capacity as they did during the **permanent medical impairment** stage of the claim.

13. In his Order Denying Partial Summary Judgment, ALJ Cannici found that the analysis required to determine whether or not the Claimant is entitled to PTD differs from the analysis used by ALJ Turnbow in deciding if the DIME doctor erred in his medical impairment rating of the Claimant's back. ALJ Cannici concluded that the Claimant has the burden to prove that his industrial injury acts a "significant causative factor" in making him permanently and totally disabled.

Issue Preclusion

14. In the first Final Admission of Liability (FAL), dated September 28, 2016, Respondents admitted for post maximum medical improvement (MMI); medical benefits; an average weekly wage (AWW) of $938.37; temporary total disability benefits of variable amounts from January 21, 2015 through March 17, 2016 (a period of almost one year and two months); and **permanent medical impairment** of 18% whole person, based on DIME Dr. Shea's opinion, which amounted to $48, 836.84 in aggregate **permanent medical impairment** benefits (Claimant's Exhibit 15).

15. Respondents sought a hearing to overcome the DIME's 18% whole person rating. The Claimant sought to overcome the DIME's MMI date of March 17, 2016.

16. ALJ Turnbow conducted a hearing on December 12, 2017 and as a result thereof issued a decision, dated February 14, 2018 (Respondents' Exhibit TT), that the Respondents had overcome DIME Dr. Shea's **medical** impairment rating of 18% whole person by clear and convincing evidence, based on the opinions of IMEs, Dr. Ogin and Dr. Reiss; and, that the admitted injury was a temporary aggravation of the Claimant's underlying degenerative back condition as it pertains to permanent **medical impairment.**

17. As a result of ALJ Turnbow's decision, the Respondents filed a subsequent FAL, dated April 5, 2018, denying post-MMI medical benefits, re-affirming the previous admission for one year and almost two months TTD benefits (from January

21, 2015 through March 17, 2016); and, admitting for zero permanent **medical impairment** (Respondents' Exhibit QQ). Thereafter, the Claimant applied for a hearing on the issues of **permanent total disability (PTD)** and post-MMI medical maintenance benefits, which had previously been admitted in 2016.

18. Based on a review of ALJ Turnbow's decision of February 14, 2018, the ALJ herein finds that the Claimant did not have a full and fair opportunity to litigate the issue of **permanent total disability** at the hearing before ALJ Turnbow. No vocational evidence was referenced in her decision. There was no indication that human factors, including vocational abilities, work in the competitive, commutable labor market, age, education, etc., were considered in the hearing before ALJ Turnbow. There was no indication that these factors entered into the opinions of Dr. Ogin and Dr. Reiss. Indeed, their opinions were strict medical opinions that the Claimant's admitted injury amounted to a temporary aggravation of the Claimant's medical condition as it related to permanent **medical impairment.** As found herein below, Dr. Ogin was of the opinion that the Claimant's permanent restrictions were causally related to the admitted injury. This opinion is inconsistent with the "temporary aggravation" opinion.

19. Respondents have not sought to withdraw the FAL, including the subsequent FAL, filed almost two months after ALJ Turnbow's decision which, among other things, re-affirmed the admission for one year and almost two months' TTD benefits. The ALJ infers and finds that this was apparently the alleged temporary aggravation of Claimant's admitted low back injury of January 20, 2015, at least according to Dr. Ogin and Dr. Reiss. Both doctors articulate the legal terms "did not aggravate or accelerate." Respondents focus their issue preclusion argument on the latter proposition as this relates to causation of PTD. In light of the totality of the evidence, including the evidence that Claimant was able to perform heavy duty work, full time, prior to the admitted injury of January 20, 2015 and has not been able to work since that time, the ALJ herein infers that the Respondents' argument "pushes the outer edges of the envelope" by parlaying a **medical impairment** determination into a dispositive determination concerning **permanent total disability**, creating a disingenuous twist as it pertains to PTD.

20. Based on the evidence presented at the August 23, 2018 hearing before the ALJ herein, the ALJ infers and finds that the Claimant was a regular and consistent worker at "heavy duty" tasks before the admitted injury of January 20, 2015. He graduated from high school in 1988 and consistently worked at heavy duty jobs ever since that time. He consistently worked as a tow truck driver from 1992 through 2014, before working for the Employer herein. He has not worked since January 21, 2015. The ALJ finds that the Claimant credibly expressed a desire to return to work but he cannot return to his former heavy job of mill mechanic at the mine in Leadville, Colorado, or any other job he has done in the past. Based on the Respondents' argument concerning "temporary aggravation" as it relates to PTD, the ALJ infers that Respondents' theory must be that it is coincidentally related to the Claimant's

underlying, progressive back degeneration that the Claimant has not worked since January 21, 2015, and the inability to earn a wage is not caused by the admitted injury, but by the progression of this 48-year old man's (date of birth, November 17, 1969) return to a baseline of his naturally progressing degenerative condition—after the one-year and two month, alleged "temporary aggravation." In weighing this theory against the idea that the admitted injury was the "straw that broke the camel's back," thus, ultimately causing the Claimant's inability to earn wages in the competitive, commutable labor market, the latter is more persuasive.

21. The ALJ finds that there is not an identity of issues between **permanent medical impairment** and **permanent total disability.** There no incentive or ability to litigate **permanent total disability** in a hearing involving **overcoming a DIME on permanent medical impairment.** An attempt to litigate PTD factors in such a hearing would be irrelevant. Consequently, there was not a full and fair opportunity for the Claimant to litigate PTD before ALJ Turnbow at the hearing of December 12, 2017. Degree of permanent medical impairment can be one of many factors considered in a **permanent total disability** determination, to be weighed along with other factors.

PERMANENT TOTAL DISABILITY

Pre-Existing Back Problems

22. A few weeks prior to the work injury, Claimant treated for low back problems with a chiropractor, Dr. Clark, and with Physician Assistants Tyler Norton and Amy King at Dr. Lisa Zwerdlinger's office. On January 4, 2015, Tyler Norton, PAC, noted that Claimant injured his back three weeks prior when he picked something heavy off the ground. After this incident, Claimant continued working full-time at heavy duty jobs. Claimant treated several times with Dr. Clark. Claimant reported pain severity of 5/10, increasing to 8/10 with walking. Claimant's pain was constant and radiated down the back of his buttocks and right leg. On January 8, 2015, Amy King PA reported Claimant still had a lot of back pain despite medication and Ms. King prescribed Vicodin. (See Respondents' Exhibit C and Exhibit TT, para 2 of ALJ Turnbow's February 14, 2018 order).

23. Despite the Claimant's previous back pain and treatments, he continued working full time at his heavy duty jobs with the Employer. The question at hand, is whether the admitted injury of January 20, 2015, contributed significantly to the Claimant's inability to earn wages and **permanent total disability** thereafter. In terms of **permanent total disability,** was the admitted injury of January 20, 2015 the "straw that broke the camel's back." Contrary to the description of the January 20, 2015 incident, Dr. Ogin states that there was no identifiable traumatic event on that date. This fact creates a credibility gap in Dr. Ogin's overall opinions. Along with his attribution of the Claimant's permanent restrictions to the admitted injury, it undermines his opinion of "temporary aggravation" to a significant degree.

The Circumstances of the Admitted Injury

24. On January 20, 2015, the Claimant suffered an admitted industrial injury while employed by the Employer, located in Leadville, Colorado (Claimant's Exhibit 4, bates 30).

25. The Claimant injured himself when he, and three other coworkers, carried a magnetic belt weighing an estimated 400-450 pounds. One of the workers lost his grip on the belt, jolting the Claimant forward and causing him to fall to his knees (Claimant's Exhibit 4, bates 30).

26. The Claimant immediately felt severe pain in his lower back. Lisa Zwerdlinger, M.D., the Claimant's primary care physician, saw him on the same day of his injury. She took the Claimant off work. Since his date of injury, the Claimant has not worked (Claimant's Exhibit 4, bates 32) nor has he been released to return to his pre-injury job by an authorized treating physician.

27. The Claimant had seen Dr. Zwerdlinger prior to his injury. Although Dr. Zwerdlinger's reports indicate that the Claimant had back pain prior to January 4, 2015, she noted that the Claimant's back pain had "significantly improved" after visits with a chiropractor (Respondents' Exhibit C, bates 31).

28. At hearing of August 23, 2018, the Claimant stated that the pain prior to his injury was related to his hip. Notwithstanding the Claimant's prior symptoms, the Claimant testified that he had no problems performing the duties related to his heavy duty job for the Employer until his admitted injury occurred on January 20, 2015.

Medical

29. The Claimant had an MRI (magnetic resonance imaging) on March 16, 2015. He then had an X-ray done on March 25, 2015. After reviewing the findings, Donald S. Corenman, M.D., D.C. -- the Claimant's primary authorized treating provider (ATP) -- found a central L3-L4 disc herniation with mild to moderate central stenosis. He also found an L4-L5 disc bulge and left lateral recess stenosis. Dr. Corenman stated that the Claimant was unable to work. He further added, "I do not expect [Claimant] will ever be able to do heavy lifting" (Claimant's Exhibit 6, bates 43-44). The ALJ infers that Dr. Ogin and Dr. Reiss considered this disc **herniation** as a "temporary aggravation" of the "naturally progressing" degenerative arthritic condition that "coincidentally" occurred at the time of the Claimant's admitted January 20, 2015 injury.

30. On May 6, 2015, Kelly Lindauer, M.D., performed an MRI on the Claimant's lumbar spine. Dr. Lindauer found a disc protrusion at both Claimant's L3-4 and L4-5 (Claimant's Exhibit 10, bates 104-105).

31. Two years later, in April of 2017, Dr. Lindauer performed an additional MRI on the Claimant. She compared her findings to the prior imagining from May of 2015. At the L3-L4, Dr. Lindauer found an "unchanged broad-based 5 mm central disc protrusion." She agreed that the findings were similar to the prior imaging done on the Claimant's lumbar spine in 2015. At Claimant's L4-5, Dr. Lindauer found that the pathology had progressed since the earlier imaging noting a "left posterolateral disc extrusion" (Claimant's Exhibit 10, bates 106-107).

32. ATP Dr. Corenman placed the Claimant at maximum medical improvement (MMI) on March 17, 2016. After performing a range of motion test on the Claimant's lumbar spine, he gave the Claimant a **permanent medical impairment** rating of 11%. Dr. Corenman placed the Claimant on permanent restrictions including no lifting of more than twenty pounds; no pushing or pulling of more than forty pounds; and no squatting, pivoting, crawling, or kneeling (Respondents' Exhibit S, bates 70-71). The ALJ infers and finds that the Claimant cannot perform his pre-injury work with these permanent restrictions, and this proposition is medically supported in the evidence. IME Dr. Ogin agrees with these restrictions and attributes them to the admitted injury.

Timothy R. Kuklo, M.D.

33. In January of 2018, according to the Claimant, he googled orthopedic surgeons who accept Medicare and scheduled an appointment with Dr. Kuklo. The Claimant sought an evaluation from Dr. Kuklo, an expert in spinal disorders. In his report, Dr. Kuklo stated that the Claimant has a herniated disc in his L3-L4 and L4-L5 lumbar region. Dr. Kuklo noted that the Claimant has tried physical therapy, chiropractic manipulations, and over twenty spinal injections without relief. He called the lack of further intervention "egregious." Dr. Kuklo further asserted that the Claimant would benefit from a L3-L5 two-level fusion with laminectomy (Claimant's Exhibit 2, bates 17). In her testimony, Respondents' vocational expert, Donna Ferris, assumed the recommended surgery would occur and be successful. Consequently, she speculated that the Claimant could become even more employable than she believed he was at the present time. The ALJ infers and finds that such speculation is unwarranted and Ferris' opinion must be weighed as if there was no surgery and no surgical outcome.

34. Furthermore, Dr. Kuklo offered the opinion that this is "clearly a workers' compensation injury" (Claimant's Exhibit 2, Bates 17). In his evidentiary deposition (taken on July 18, 2018 and not available to ALJ Turnbow at the December 12, 2017 hearing or as of her February 14, 2018 decision), Dr. Kuklo explained that a "450-pound load can literally hit 1500 pounds of force across the disk (*sic*), which tears the annulus or the outer rim resulting in a disk (*sic*) bulge, back pain, [or] strain." (Kuklo Depo. Tr., p.

9, bates 11-20). Dr. Kuklo is of the opinion that the Claimant's condition has worsened since his industrial injury, which he attributed to standing and ambulating. "He [Claimant] clearly has significant stenosis that worsens with standing in the upright posture" (Claimant's Exhibit 2, bates 17). As the Claimant's condition relates to his inability to earn wages, the ALJ finds Dr. Kuklo's opinion highly persuasive and credible. Dr. Kuklo's opinions were not available to ALJ Turnbow before her decision of February 14, 2018.

35. Dr. Kuklo recommended back surgery: "it is unclear to me, [how] anyone could recommend no intervention" and he reported that the "recommendations given to him to date have been egregious." Subsequently, Dr. Kuklo testified that he would not have recommended surgery two-years prior either, but Claimant's condition changed for the worse and he needs surgery now. Dr. Kuklo anticipated that surgery will lessen Claimant's pain and that Claimant will be more functional after surgery. Dr. Kuklo related the Claimant's present back problems to the January 20, 2015, admitted work injury. Dr. Kuklo discounted prior back symptoms as regular back aches that we all experience. Dr. Kuklo dismissed that Claimant's diabetes played any role in Claimant's lower extremity symptoms. Dr. Kuklo has effectively rendered an opinion, to a reasonable degree of medical probability that the admitted injury of January 20, 2015, permanently aggravated and accelerated Claimant's underlying degenerative back condition. The ALJ finds this opinion highly persuasive, credible, and corroborated by the weight of credible medical evidence in the exhibits.

Further Medical

36. ATP Dr. Corenman reviewed an MRI with the Claimant in February of 2018. He found an L4-5 angular collapse and central disc herniation and an annular tear at the L3-L4. Dr. Corenman noted that the Claimant's symptoms have become worse since his January 20, 2015, industrial injury. He reiterated that he does not expect the Claimant to return to heavy lifting (Claimant's Exhibit 6, bates 69).

37 At hearing, the Claimant testified that he has undergone a host of conservative treatments, including numerous physical therapy sessions and several injections, without finding relief from his symptoms. He stated that these symptoms significantly limit his functional ability. The Claimant stated that he has not been able to work since the day of his injury. He testified that he applied for numerous jobs in and around the Leadville area without any success at finding work. The ALJ finds the Claimant's testimony persuasive and credible in this regard.

38. The Claimant testified that he has exhausted all medical options, with the possible exception of the surgery recommendation of Dr. Kuklo who, as found herein below, is neither authorized nor within the chain of authorized referrals.

Claimant's Vocational Expert Cynthia Bartmann

39. On March 28, 2018, Cynthia Bartmann performed an employment evaluation of the Claimant. In her report, Bartmann concludes that the Claimant is incapable of earning a wage and is permanently and totally disabled (Claimant's Exhibit 1, bates 14).

40. In support of her opinion, Bartmann stated that because the Claimant's job with the Employer required him to lift up to 150 pounds, in additional to standing and walking the entire shift, the Claimant is unable to return to his job with the Employer (Claimant's Exhibit 1, bates 12).

41. Bartmann stated that because the Claimant is restricted from stooping, bending, or twisting, he would not be able to find work in the light duty category (Claimant's Exhibit 1, bates 13).

42. Bartmann noted that the Claimant worked as a mechanic for his father's Ford dealership. The Claimant also owned and operated his own towing company from 1992 to 2014. His primary responsibilities included driving the tow truck and performing mechanical work on the trucks. Because the Claimant's entire work history consists of operating a tow truck and performing mechanical work, Bartmann is of the opinion that the Claimant does not have any marketable, transferable skills consistent with his permanent restrictions (Claimant's Exhibit. 1, bates 12-13).

43. Bartmann also focused on the job market in and around the Leadville area. She noted that Leadville is a "small mountain rural town with few employment opportunities." She further found that most common occupations in Leadville include "construction, retail trade, arts, entertainment, recreation, educational services, professional, science, technical services, public administration, [and] healthcare, and social assistance." Because of the Claimant's physical limitations and lack of transferable skills, Bartmann is of the opinion that the Claimant would not be able to find work in Leadville (Claimant's Exhibit 1, bates 13).

44. If the Claimant were to travel outside of Leadville to work, Bartmann is of the opinion that a commute of thirty to forty-five minutes would be reasonable. Nonetheless, Bartmann noted that the towns closest to Leadville are small communities with limited employment opportunities. She further stated that the Claimant would have substantial difficulty travelling outside of Leadville during winter without significantly increasing his commute time (Claimant's Exhibit 1, bates 13).

Respondents' Vocational Expert, Donna Ferris

45. In her report, Donna Ferris stated her opinion that the Claimant is not permanently and totally disabled. To support her opinion, Ferris stated that the Claimant is capable of performing light duty and sedentary work (Respondents' Exhibit A, bates 20). At hearing, Ferris modified her opinion stating that the Claimant would be substantially limited in finding work at this time. As one of her assumptions, Ferris relied heavily on the proposition that the January 20, 2015 admitted injury was a "temporary aggravation," based on ALJ Turnbow's February 14, 2018 decision and the opinions of Dr. Ogin and Dr. Reiss. "Permanent Total Disability," however, is a different issue than **permanent medical impairment** upon which Dr. Ogin and Dr. Reiss rendered opinions.

46. Ferris prepared reports dated April 6, 2018, (Respondents' Exhibit A) and August 1, 2018 (Respondents' Exhibit B), and she testified at hearing. Ferris testified that Claimant's work injury did not impact or have any effect on Claimant's employability or access to the labor market based on ALJ Turnbow's conclusions and order that Claimant suffered a "temporary work-related aggravation" of a pre-existing back condition that resolved without permanent impairment. In addition, Ferris testified that, independent of ALJ Turnbow's determination, Claimant remained employable in his local labor market based on Dr. Corenman's and Dr. Shea's recommended light duty restrictions at the time of MMI of no lifting more than 20 pounds, no pushing or pulling more than 40 pounds, no squatting, pivoting, crawling or kneeling, limited stooping, bending, twisting, and limited overhead lifting and work. Ferris mentioned several job positions within Claimant's restrictions and labor market that included: parking booth attendant, ticket scanner, visitor center ambassador, doorperson, gate guard, and cashier. The ALJ infers and finds that these positions are purely academic and not readily available in the Claimant's Leadville labor market. Indeed, at hearing, Ferris modified her opinion stating that the Claimant would be substantially limited in finding work at this time. According to Ferris, based on Dr. Ogin's recent restrictions, the Claimant's current employability is significantly hampered.

47. Ferris assumed that the surgery recommended by Dr. Kuklo would occur and be successful. Consequently, she speculated that the Claimant could become even more employable than he was as of the present time. The ALJ infers and finds that such speculation is unsubstantiated by the totality of the evidence, and Ferris' opinion must be weighed as if there was no surgery and no favorable surgical outcome.

Respondents' Independent Medical Examiner (IME), Brian Reiss, M.D.

48. On April 16, 2016, Dr. Reiss performed a Respondent sponsored IME. Dr. Reiss stated the opinion that Claimant suffered a work-related temporary exacerbation of a pre-existing condition that resolved without impairment. Dr. Reiss was of the opinion that Claimant had reached MMI on May 6, 2015. Dr. Reiss noted "If physical restrictions are needed they would be related to his pre-existing condition." (See Exhibit T, and Exhibit TT, para 11 of ALJ Turnbow's February 14, 2018 order). Because of the Findings herein above and herein below, the ALJ infers and finds that Dr. Reiss' opinions are contrary to the totality of the evidence and lacking in credibility on the issue of **permanent total disability.** Indeed, his opinion concerning restrictions is contrary to IME Dr. Ogin's ultimate opinion that Dr. Corenman's permanent restrictions are attributable to the "occupational injury."

49. Dr. Reiss' recitation of the legal terms "no aggravation or acceleration" is accorded no weight because it is a phrase that does not significantly amplify Dr. Reiss' medical opinions.

50. The ALJ finds Dr. Reiss' ultimate opinions lacking in persuasiveness and credibility because they are contrary to the weight of the evidence.

Respondents' Independent Medical Examiner (IME), Barry Ogin, M.D

51. Dr. Ogin, the Respondents' IME, attributed the Claimant's symptoms to degenerative spine disease. Nonetheless, Dr. Ogin noted that the Claimant has had a disc herniation in his L3-L4 and a disc bulge in his L4-L5 as of March 2015. He further noted that the Claimant has experienced a "significant functional decline" due to the pathology in his lumbar spine. He also noted that the Claimant now has a disc herniation in his L4-L5. Regarding treatment, Dr. Ogin stated that the Claimant may require lumbar fusion surgery (Respondents' Exhibit MM, bates 155-157). Dr. Ogin's conclusory statement that the admitted injury did not "aggravate or accelerate" Claimant's pre-existing back condition is contradicted by the totality of the evidence and by the inconsistency in his attribution of the Claimant's permanent restrictions to the occupational injury versus his previous opinion that the admitted injury amounted to a "temporary aggravation" of the Claimant's underlying degenerative back condition. The "temporary aggravation" opinion was for the purpose of strict **medical** impairment determination.

52. Because of the Claimant's pathology in his lumbar spine, Dr. Ogin stated that the Claimant would not be able to stand for long periods of time. He further noted that the Claimant's functional limitations would prevent him from performing any of the work activities discussed by Donna Ferris in her report (Respondents' Exhibit MM, bates

157). Regarding the Claimant's permanent work restrictions, Dr. Ogin stated that he agreed with the work restrictions from Dr. Corenman and Dr. Shea, and he was of the opinion that the Claimant's permanent work restrictions related to his industrial injury. The ALJ infers and finds that the "industrial injury" is the admitted injury of January 20, 2015.

In his IME Report of June 27, 2018, Dr. Ogin stated as follows:

> I believe that the physical restrictions offered to him by Dr. Corenman at the time of Maximum Medical Improvement as well as by Dr. Shea at the time of the Division Independent Medical Examination, remain appropriate **as related to the occupational injury** (emphasis supplied)

(Respondents' Exhibit MM, bates 156).

53. The ALJ finds that IME Dr. Ogin's attribution of the Claimant's permanent work restrictions to the "occupational injury" is inconsistent with his previous opinion concerning "temporary aggravation," which was not available to ALJ Turnbow at the time of her February 14, 2018 decision. Indeed, as it pertains to **permanent total disability**, in light of the totality of the evidence, which includes Cynthia Bartmann's vocational opinion, Donna Ferris' ultimate concession in her testimony at hearing, and the Claimant's lay testimony, Dr. Ogin's attribution of the permanent restrictions to the admitted injury in question undermines the credibility of his previous opinion concerning a "temporary aggravation," and illustrates that his opinion concerning "temporary aggravation" strictly went to **medical impairment** and not to **permanent total disability**.

THE CRUX OF RESPONDENTS' ARGUMENTS

The two linchpins of Respondents' arguments are: (1) ALJ Turnbow's decision of February 14, 2018, precludes consideration of the issue of **permanent total disability;** and, (2) if consideration of the issue of **permanent total disability** is not precluded, then, Claimant's **permanent total disability** would be attributable to his pre-existing back condition and not to an aggravation/acceleration thereof, occurring on January 20, 2015.

As found herein above, Dr. Ogin's attribution of the Claimant's permanent work restrictions to the "occupational injury" is inconsistent with his opinion concerning "temporary aggravation," which was not available to ALJ Turnbow at the time of her February 14, 2018 decision. Indeed, as it pertains to **permanent total disability**, in light of the totality of the evidence, which includes Cynthia Bartmann's vocational

opinion, Donna Ferris' ultimate concession in her testimony at hearing, and the Claimant's lay testimony, Dr. Ogin's attribution of the permanent restrictions to the admitted injury in question, undermines the credibility of his previous opinion concerning a "temporary aggravation," and illustrates that his opinion concerning "temporary aggravation" went strictly to **medical impairment** and not to **permanent total disability**. Other than these arguments, Respondents assail the credibility of the seriousness of the consequences of the admitted injury of January 20, 2015, which the ALJ does not find persuasive in light of the totality of the evidence.

Ultimate Findings

54. Regardless of the different facts and posture in *Dish Network*, once a claimant applies for **permanent total disability** benefits, a DIME opinion no longer carries its presumptive weight. "The determination of the DIME physician as to which body parts and resulting work restrictions were related to the work injury can be considered, but they are not entitled to additional weight by the statute." *Cole v. Dish Network*, W.C. No. 4-918-651-02 [Indus. Claim Appeals Office (ICAO), January 15, 2016] (*aff'd sub nom. Dish Network v. Indus. Claim Appeals Office,* 2016 WL 7404847 (Colo. App., December 22, 2016). Consequently, the ALJ finds that a consideration of the issue of **permanent total disability** is **not precluded** by virtue of ALJ Turnbow's decision of February 14, 2018. Her decision was based on a consideration of strict medical factors leading to a determination of **permanent medical impairment** – not to **disability** factors, such as matching permanent restrictions with the ability to earn wages. Indeed, IME Dr. Ogin was of the opinion that the Claimant's permanent restrictions were attributable to the admitted work injury.

55. A consideration of the issues of **permanent medical impairment** and MMI is precluded by virtue of ALJ Turnbow's February 14, 2018 decision. It is established fact that the degree of the Claimant's **permanent medical impairment** is zero; and that MMI was reached on March 17, 2016.

56. The ALJ finds that the weight of the medical evidence, including the opinions of ATP Dr. Corenman, Dr. Zwerdlinger and Spine Surgeon, Dr. Kuklo, are more credible and persuasive than the IME opinions of Dr. Reiss and Dr, Ogin-- for purposes of a consideration of **permanent total disability**. Indeed, Dr. Ogin's attribution of the Claimant's permanent work restrictions to the "occupational injury" is inconsistent with his previous opinion concerning "temporary aggravation," which was not available to ALJ Turnbow at the time of her February 14, 2018 decision. As it pertains to **permanent total disability**, in light of the totality of the evidence, which includes Cynthia Bartmann's vocational opinion, Donna Ferris' ultimate concession in her testimony at hearing, and the Claimant's lay testimony, Dr. Ogin's attribution of the permanent restrictions to the admitted injury in question, undermines the credibility of his previous opinion concerning a "temporary aggravation," at least as it goes to a consideration of **permanent total disability**; and, it illustrates that his opinion

concerning “temporary aggravation” was strictly for **medical impairment** and not for **permanent total disability**.

57. The Claimant’s lay testimony concerning “before-and-after” the admitted back injury of January 20, 2015, plus the totality of facts and circumstances, outweigh the opinions of Dr. Reiss and Dr. Ogin concerning “temporary aggravation.” Before the admitted injury, the Claimant was able to work full duties, full time at heavy and demanding work. After the admitted injury, he has not worked for 3 ½ years. Respondents argue “so what” –the reason for this is not causally related to an “aggravation and acceleration” of the Claimant’s pre-existing degenerative back condition, but to a “temporary aggravation” thereof. This alleged “temporary aggravation” lasted for one year and two months—the time Respondents admitted for continuing TTD benefits. Although this fact alone does not disprove a “temporary aggravation,” when considered with other factors, such as permanent restrictions conceded as causally related to the admitted injury by IME Dr. Ogin, it is a significant in determining whether the Claimant is permanently and totally disabled.

58. The ALJ finds that the Claimant presented credibly and although Respondents allege that he Claimant’s minimizes his pre-existing back condition, the lay evidence supports the fact that the Claimant worked full time at a heavy duty job for years before the admitted injury and he has not been able to work in the last 3 ½ years because of his permanent physical restrictions.

59. The ALJ finds the vocational opinions of Cynthia Bartmann more persuasive and credible than the vocational opinions of Donna Ferris, which were heavily premised on ALJ Turnbow’s decision on medical impairment and the idea of a “temporary aggravation.” Ferris’ opinion was equivocal when she speculated on the proposed occurrence and success of the surgery recommended by Dr. Kuklo, Dr. Corenman and Dr. Ogin. Also, Ferris conceded that based on Dr. Ogin’s recent restrictions, the Claimant’s current employability is significantly hampered. Bartmann’s credible opinion is that the Claimant is incapable of earning a wage in the competitive, commutable labor market from Leadville and is, thus, permanently and totally disabled. The ALJ accepts Bartmann’s opinion as more credible than Ferris’ opinion.

60. Between conflicting opinions, evidence and testimony, the ALJ makes a rational decision, based on substantial evidence, to accept the opinions of ATP Dr. Corenman, Spine Surgeon Dr. Kuklo, Vocational Specialist Cynthia Bartmann and the Claimant, and to reject any opinions, evidence, and testimony to the contrary.

61. The ALJ finds that the Claimant’s admitted injury resulted from a concurrence of his pre-existing degenerative back condition and the admitted injury of January 20, 2015, when the Claimant and three other workers were carrying a 400-450 pounds magnetic belt, one of the workers lost his grip on the belt, jolting the Claimant forward and causing him to fall on his knees, as found herein above. As Dr. Ogin

conceded, this injury resulted in the Claimant's present, permanent restrictions. Although the direct cause of the Claimant's **permanent total disability** may have been his underlying degenerative back condition, the admitted injury of January 20, 2015 contributed significantly to the Claimant's **permanent total disability** by virtue of his permanent restrictions, attributable to the admitted injury, which would not permit him to return to his pre-injury work. Therefore, the ALJ finds that the admitted injury of January 20, 2015 permanently aggravated and accelerated the Claimant's condition to the extent that he is now **permanently and totally disabled.**

62. The ALJ finds that although significant weight is accorded to the opinions of Dr. Kuklo, he was neither authorized nor was in the chain of authorized referrals.

63. The Claimant has proven, by a preponderance of the evidence, that he is incapable of earning a wage in the competitive, commutable labor market and he is, therefore, permanently and totally disabled, attributable to the admitted back injury of January 20, 2015.

64. Based on the Claimant's admitted average weekly wage of $938.37, the permanent total disability weekly benefit is $625.58, or $89.37 per day.

65. Based on the Stipulation of the parties, the Claimant was overpaid $48, 836.84 in **permanent medical impairment benefits.**

66. At the present time, Dr. Kuklo, ATP Dr. Corenman and Respondents' IME Dr. Ogin recommend a surgery.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Issue Preclusion

a. Sections 8-42-108, C.R.S., provides a method for determining a **permanent medical impairment** rating as the result of an industrial injury. First, the authorized treating physician (ATP) assigns a **permanent medical impairment** rating. Any party dissatisfied with the ATP's rating may request a Division Independent Medical Examination (DIME). A physician accredited to complete the DIME examines the injured worker and assigns a **permanent medical impairment** rating. The DIME opinion carries presumptive weight on the issue of any **permanent medical impairment** rating unless overcome by clear and convincing evidence. *Leprino Foods v. Indus. Claim Appeals Office*, 134 P.3d 475, 482-84 (Colo. App. 2005); *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). Thus, the determination of a claimant's **permanent medical impairment** and attendant right to receive permanent partial

disability benefits is based a physician's medical diagnosis and rating. *See Leprino Foods*, 134 P.3d at 482-83.

b. Permanent total disability refers to the ALJ's evaluation of a claimant's ability to earn a wage under the claimant's particular circumstances. Permanent medical impairment refers to an accredited physician's medical diagnosis of a claimant's medical condition and its relation to the industrial injury. The latter is strictly governed by medical guidelines. The former is the result of a totality of the circumstances analysis that considers but is not determined by the DIME and the **permanent medical impairment** rating.

c. Because the focus of the query is different, the DIME physician's assessment of **permanent medical impairment** is not entitled to special weight in a permanent **total** disability determination and is merely a factor to be evaluated by the ALJ in conjunction with other factors. *Leprino Foods*, 134 P.3d at 483; *Dish Network*, at *3. It follows that a court's determination that a respondent overcame the DIME's evaluation of claimant's **permanent medical impairment** rating is only one factor in determining permanent total disability. The Workers' Compensation Act considers **medical impairment** benefits and disability benefits differently for various purposes. *Wal-Mart Stores, Inc. v. Indus. Claim Office*, 989 P.2d 251, 253 (Colo. App. 1999). Even when a claimant has pre-existing conditions which were aggravated by the work-related injury, that aggravation, if found to be a significant cause of the inability to earn a wage, can be appropriate grounds to find that the claimant suffers from a permanent total disability which is compensable. *Seifried v. Indus. Comm'n*, 736 P.2d 1262, 1263 (Colo. App. 1986); *Dish Network* at *4-5. Therefore, because there is no privity of issues between the **permanent medical impairment** and **permanent total disability** determination, the doctrine of issue preclusion does not bar a claimant from asserting **permanent total disability** on the same facts by which the claimant was found not to warrant a **permanent medical impairment** rating.

d. The ALJ concludes that the doctrine of issue preclusion does **not** apply to this case.

Credibility

e. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S. As found, the weight of the medical evidence, including the opinions of ATP Dr. Corenman, Dr. Zwerdlinger and Spine Surgeon, Dr. Kuklo, are more credible and persuasive than the IME opinions of Dr. Reiss and Dr, Ogin for purposes of a consideration of **permanent total disability**. Indeed, Dr. Ogin's attribution of the Claimant's permanent work restrictions to the "occupational injury" is inconsistent with his previous opinion concerning "temporary aggravation," which was not available to ALJ Turnbow at the time of her February 14, 2018 decision. As it pertains to **permanent total disability**, in light of the totality of the evidence, which includes Cynthia Bartmann's vocational opinion, Donna Ferris' ultimate concession in her testimony at hearing, and the Claimant's lay testimony, Dr. Ogin's attribution of the permanent restrictions to the admitted injury in question, undermines the credibility of his previous opinion concerning a "temporary aggravation," at least as it goes to a consideration of **permanent total disability**; and, it illustrates that his opinion concerning "temporary aggravation" was strictly for **medical impairment purposes** and not for **permanent total disability**.

f. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, the Claimant's lay testimony concerning "before-and-after" the admitted back injury of January 20, 2015, plus the totality of facts and circumstances, outweigh the opinions of Dr. Reiss and Dr. Ogin concerning "temporary aggravation." As found, before the admitted injury, the Claimant was able to work full time at a heavy duty job. After the admitted injury, he has not worked for 3 ½ years. Respondents argue "so what" –the reason for this is not causally related to an "aggravation and acceleration" of the Claimant's pre-existing degenerative back condition, but to a "temporary aggravation" thereof. This alleged "temporary aggravation" lasted for one year and two months—the time Respondents admitted for continuing TTD benefits. Although this fact alone does not disprove a "temporary aggravation," when considered with other factors, such as permanent restrictions conceded as causally related to the admitted injury by IME Dr. Ogin, it is significant.

g. As found the Claimant presented credibly and although Respondents allege that the Claimant's minimizes his pre-existing back condition, the lay evidence supports the fact that the Claimant worked full time at heavy duty before the admitted injury and he has not been able to work in the last 3 ½ years.

h. As further found, the vocational opinions of Cynthia Bartmann were more persuasive and credible than the vocational opinions of Donna Ferris, which were heavily premised on ALJ Turnbow's decision on medical impairment and the idea of a "temporary aggravation." Ferris' opinion was equivocal when she speculated on the proposed occurrence and success of the surgery recommended by Dr. Kuklo. Also, Ferris conceded that based on Dr. Ogin's recent restrictions, the Claimant's current employability is significantly hampered. Bartmann's credible opinion is that the Claimant is incapable of earning a wage in the competitive, commutable labor market from Leadville an is, thus, permanently and totally disabled. The ALJ accepts this opinion as more credible than Ferris' opinion.

Substantial Evidence

i. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of

conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions, evidence and testimony, the ALJ made a rational decision, based on substantial evidence, to accept the opinions of ATP Dr. Corenman, Spine Surgeon Dr. Kuklo, Vocational Specialist Cynthia Bartmann and the Claimant, and to reject any opinions, evidence, and testimony to the contrary.

Aggravation and Acceleration of Pre-Existing Condition for Permanent Total Disability Purposes

j. A claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a pre-existing condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*; *Duncan v. Indus. Claims Apeals. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's admitted injury resulted from a concurrence of his pre-existing degenerative back condition and the admitted injury of January 20, 2015, when the Claimant and three other workers were carrying a 400-450 pounds magnetic belt, one of the workers lost his grip on the belt, jolting the Claimant forward and causing him to fall on his knees, as found herein above. As Dr. Ogin conceded, this injury resulted in the Claimant's present permanent restrictions. Although the direct cause of the Claimant's **permanent total disability** may have been his underlying degenerative back condition, the admitted injury of January 20, 2015 contributed significantly to the Claimant's **permanent total disability** by virtue the permanent restrictions, attributable to the admitted injury, which would not

permit him to return to his pre-injury work. Therefore, as found, the admitted injury of January 20, 2015 permanently aggravated and accelerated the Claimant's ability to earn a wage to the extent that he is now **permanently and totally disabled.**

Permanent Total Disability

k. An employee is permanently and totally disabled if he is unable to earn any wages in the same or other employment. § 8-40-201(16.5) (a) C.R.S. The "full responsibility rule," applicable to claims for permanent total disability benefits, provides that the industrial injury need not be the sole cause of a claimant's permanent total disability. Under the rule, when an "employer hires an employee who, by reason of a pre-existing condition or by reason of a prior injury, is to some extent disabled, he takes the man (person) with such handicap," and the employer is liable for a "full award of benefits" if a subsequent industrial injury combines with the pre-existing disability to produce permanent total disability. See *United Airlines, Inc. v. Indus. Claim Appeals Office,* 993 P.2d 1152, 1154,1155 (Colo. 2000). The only exception to the established rule is where the industrial injury is not a significant causative factor in the claimant's disability. See *Seifried v. Indus. Comm'n,* 736 P.2d 1262 (Colo. App. 1986) [the claimant suffered from several pre-existing ailments, and the treating physician opined that the claimant had reached maximum medical improvement, and concluded that the claimant remained disabled because of non-occupational factors]; *Lindner Chevrolet v. Indus. Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995). *See also Holly Nursing Care Center v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). As found, the facts in the present case are significantly distinguishable from the facts in *Seifried.* Here, the Claimant had a non-disabling back condition (as found herein above, he was able to work full time, full duty at heavy work before the admitted injury and now he has not worked for 3 ½ years.

l. In determining whether a claimant is permanently and totally disabled, an ALJ may consider the claimant's "human factors," including the claimant's age, work history, general physical condition, education, mental ability, prior training and experience, and the availability of work that the claimant could perform. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998*); Joslins Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The critical test is whether employment exists that is reasonably available to a claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. *See Joslins Dry Goods Company v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). As found, the Claimant has proven that he is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to him in his commutable labor market. Permanent total disability

does not need to be proven by medical evidence. *See Baldwin Construction, Inc. v. Indus. Claim Appeals Office,* 937 P.2d 895 (Colo. App. 1997); *Calvert v. Roadway Express, Inc.,* W.C. No. 4-355-715 [Indus. Claim Appeals Office (ICAO), November 27, 2002]; *In re Claim of Randy Blocker v. Express Personnel,* W.C. No. 4-622-069-04 (ICAO, July 1, 2013). Ultimately, as found, the Claimant is permanently and totally disabled.

Authorized Post-MMI Maintenance Medical Care

m. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, Dr. Kuklo was neither authorized nor within the chain of authorized referrals. ATP Dr. Corenman as of February 13, 2018, however, recommends a surgical procedure to de-compress nerves.

Post-MMI Medical Maintenance Benefits

n. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address the injury at the hands of ATP Dr. Corenman. Dr. Kuklo is neither authorized nor within the chain of authorized referrals.

Burden of Proof

o. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo.

App. 2012); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000).. Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on permanent total disability and on post-MMI medical maintenance benefits.

Overpayment

p. As stipulated, Respondents are entitled to recover an overpayment of $48,836.84 in **permanent medical impairment** benefits. The ALJ concludes that this recovery should be from **permanent total disability** benefits.

MMI and Permanent Total Disability Benefits

q. The Claimant reached MMI on March 17, 2016. The Claimant's PTD rate is $625.58 per week (less than the statutory maximum for FY 2014/2015), or $89.37 per day. The date of MMI, March 17, 2016, through the date of hearing, August 23, 2018, both dates inclusive, equals 890 days. At the daily rate, past due PTD benefits equal $79,539.30. Less the overpayment of permanent medical impairment benefits to be recovered by the Respondents, net past due PTD benefits equal $30,702.46.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the Claimant permanent total disability benefits of $625.58 per week, or $89.37 per day, from the MMI date of March 17, 2016, through the hearing date of August 23, 2018, both dates inclusive, a total of 890 days, in the aggregate amount of $79, 539.30, less the overpayment credit to the Respondents of $48, 836.84, in the net aggregate amount of $30,702.46, which is payable retroactively and forthwith.

B. From August 24, 2018 and continuing for the rest of the Claimant's natural life, Respondents shall pay the Claimant permanent total disability benefits of $625.58 per week.

C. Respondents shall pay the costs of authorized, causally related and reasonably necessary post maximum medical maintenance care, including care by Donald S. Corenman, M.D., D.C., and by Lisa Zwerdlinger, M.D. subject to the Division of Workers' Compensation Medical Fee Schedule. Respondents are not liable for the costs of Timothy R. Kuklo, M.D.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

DATED this_____day of September 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of September 2018, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Is Claimant entitled to TTD benefits from November 2, 2017 to April 3, 2018, when he was placed at MMI by his ATP?
- Did Respondents prove Claimant was responsible for termination of his employment?
- What is Claimant's average weekly wage? Is it $658.77 as proposed by Claimant, $299.50 as proposed by Respondents, or some other amount?

STIPULATIONS/RESOLVED ISSUES

At the beginning of the hearing, Respondents agreed to accept liability for Claimant's injury and admit compensability and medical benefits. Respondents agreed to cover reasonably necessary medical benefits including treatment received at Concentra, at Memorial hospital on November 29, 2017, at the Children's Hospital Thrombosis Clinic on and after November 30, 2017, and medications including factor injections Claimant required for a torn muscle and associated uncontrolled bleeding, subject to the fee schedule. Respondents agreed Claimant satisfied the threshold eligibility requirements (disability and wage loss) and is otherwise entitled to TTD from November 2, 2017 through April 2, 2018, unless he was "responsible for termination" of his employment.

FINDINGS OF FACT

1. Claimant worked for Employer as a drywall installer. He worked in a crew with his father and brother. Claimant and his family members did not work for Employer every day, but only when jobs were available. Employer's project manager, Gregory Steele, was pleased with their work and offered jobs when possible, but work not guaranteed in any given week. Mr. Steele would generally contact Claimant and his family through text messages or telephone calls. Most of the time Claimant was the primary point of contact due to language issues with Claimant's father. Claimant and his family were free to accept or decline any offered job with no impact on their eligibility for future work. The jobs were frequently in the Denver area, and Claimant typically commuted with his family members to the various job sites in their personal vehicles.

2. Wage records covering the year before Claimant's injury show he worked from November 2016 through the first week of April 2017 but did not work again until October 2017. Claimant earned gross wages of $19,480.50 in the 48-week period starting with the paycheck dated November 18, 2016 through November 3, 2017.[1]

[1] It appears the parties calculated their respective proposed AWW based on net rather than gross earnings. The ALJ has used Claimant's gross earnings as reflected in Claimant's Exhibit 7/47-58.

3. Claimant's average weekly wage is $405.84 per week.

4. Claimant injured his right leg while working for Employer on November 1, 2017. He formally reported the injury on November 3 and Employer referred him to Concentra. He also received evaluations and treatment at several other facilities. Initially, the injury was thought to involve the right knee. Subsequent workup and evaluation revealed Claimant suffered a muscular tear which led to uncontrolled bleeding due to his pre-existing hemophilia. The bleeding caused marked soft tissue swelling throughout the thigh, including the knee area.

5. Concentra took Claimant off work at the initial visit on November 3, 2017. On November 9 he was released to sedentary work with accommodations for the use of crutches. On November 16 he was released to light work, with lifting no over 20 pounds. Claimant's work as a drywall installer was physically demanding, likely falling in the medium to heavy category. Claimant could not perform his regular job duties after the injury and did not return to work for Employer after November 1, 2017.

6. Claimant texted Mr. Steele a photograph of the restrictions from Concentra on November 9. Employer was willing to accommodate Claimant's restrictions, but no formal offer of modified employment was made. Although Mr. Steele "reached out" to Claimant via text and voicemail more than once, the text messages submitted into evidence contain no offer of modified work. Nor does the record contain a written offer of modified employment in any other format, such as email or a letter. Mr. Steele told Claimant verbally on November 16 Employer would provide modified work, but Claimant "declined saying leg hurt too badly." Neither Mr. Steele nor any other management personnel heard from Claimant after that.

7. After Claimant's injury, Mr. Steele began communicating with Claimant's brother about work because Claimant was nonresponsive. On November 26, Claimant's brother texted Mr. Steele to decline future employment. Specifically, the text stated:

> Hey Greg, so we aren't going to be able to make it cause the van we got is breaking down. We can't make the trips no more. We decided to find jobs here in the springs. Thanks for everything though. Whenever we get a better van we will call you.

8. Respondents proved Claimant was responsible for the termination of his employment on November 26, 2017. Respondents failed to prove Claimant was responsible for termination of his employment before November 26, 2017.

CONCLUSIONS OF LAW

A. TTD Benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to

obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Respondent stipulated that Claimant was "disabled" and left work due to the injury, but assert TTD is barred because he was responsible for termination of his employment.

Section 8-42-103(1)(g) provides that a claimant who might otherwise be considered temporarily disabled is not eligible for TTD benefits if he or she was "responsible for termination of employment." *Kerstiens v. All American Four Wheel Drive*, W.C. No. 4-865-825-04 (August 1, 2013). The respondents must prove that a claimant was terminated for cause or responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). The respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). Whether the claimant acted volitionally or exercised control over the circumstances of the termination is a question of fact, which must be evaluated based on the totality of circumstances. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Claimant was responsible for termination of his employment on November 26, 2017. It is well-established that a claimant who voluntarily resigns his job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2008); *Kiesnowski v. United Airlines*, W.C. No. 4-492-753 (May 11, 2004). Claimant resigned (through his brother) on November 26, due to transportation and other logistical issues. There is no persuasive evidence Claimant's decision to resign was due to injury-related factors. Thus Claimant's eligibility for TTD benefits terminated on November 26, 2017.

The ALJ is not persuaded by Respondents' argument Claimant's TTD should be terminated before November 26 because he failed to report to work. A temporarily disabled claimant has no affirmative obligation to seek work within his restrictions, and the onus is on the employer to perfect an offer of modified employment. *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987); *Schlage Lock v. Lahr*, 870 P.2d 615 (Colo. App. 1993); *Vigil v. Denver Catholic Community Services*, W.C. No. 3-796-867 (April 29, 1993). A claimant's willingness to seek work "is irrelevant on the issue of entitlement to temporary disability benefits." *Cobb v. Terry Personnel Service*, W.C. No. 3-970-262 (October 22, 1991). Although Employer could have justifiably terminated Claimant for job abandonment or refusing to work, it did not do so. A claimant's "failure to begin" modified employment is only a terminating event if the offer was in writing. Section 8-42-105(3)(d)(I). Here, although it appears Mr. Steele verbally offered Claimant modified

work, there is no persuasive evidence of a written offer. Consequently, Claimant's failure to report to work after he was released to modified duty on November 9 does not affect his entitlement to TTD.

B. Average Weekly Wage

Section 8-42-102(2) provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity as a result of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

Respondents advocate averaging Claimant's earnings over the year before the injury, which is reasonable because it encapsulates a broad swath of earnings. Claimant's proposed methodology artificially inflates the AWW by excluding all weeks in which he did not work. Claimant's wages generally fluctuated based on the work available. There were many weeks he earned no wages, and the ALJ sees no persuasive reason that pattern would have changed had the injury not intervened.

The fairest method of computing Claimant's AWW is to average the 48 paychecks from November 16, 2016 through November 3, 2017. Claimant grossed $19,480.50 during that period, which equates to an AWW of $405.84, and a corresponding TTD rate of $270.56 ($19,480.50 ÷ 48 = $405.84 x 2/3 = $270.56).

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $405.84, with a corresponding TTD rate of $270.56.

2. Insurer shall pay Claimant TTD at the rate of $270.56 per week from November 2, 2017 through November 25, 2017.

3. Insurer shall pay statutory interest of 8% per annum on all indemnity benefits not paid when due.

4. Claimant's request for TTD benefits from November 26, 2017 to April 3, 2018 is denied and dismissed.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 11, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Respondents have proven by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S.

STIPULATION

The parties agreed that, if Claimant was an employee at the time of his injuries on December 19, 2017, his entitlement to medical and Temporary Total Disability (TTD) benefits will be considered at a future time.

FINDINGS OF FACT

1. Employer is a company that installs drywall on construction projects. Claimant began working with Employer on September 22, 2017 building framing and installing drywall on various projects. Claimant had in excess of 10 years of experience in the industry.

2. On September 20, 2017 Claimant executed a Subcontractor Agreement with Employer. The document specified that Claimant was a subcontractor of Employer who would provide labor and materials at the rate of $9.00 per sheet of drywall. Employer's president and part owner Patrick A. Hess testified that he reviewed the Subcontracor Agreement with Claimant. He remarked that Claimant had received an offer to work as an employee for Employer but rejected the proposal because he could earn more money as an independent contractor. Item eight of the Subcontractor Agreement specifically provided that Claimant agreed to permit only employees and supervisors covered by Workers' Compensation insurance on jobsites.

3. Because Employer maintains a policy that independent contractors must carry their own Workers' Compensation insurance, Claimant met with Travis Lease of Security Insurance Group to obtain insurance. Mr. Lease has provided a written statement noting that Claimant visited him on September 20, 2017 and requested insurance because he was working for himself. The insurance policy Claimant obtained identified him as operating under the business name of Noe Lopez Construction.

4. On September 20, 2017 Claimant also filed a Form W-9 to request a Taxpayer Identification Number. Claimant identified himself as Noe Lopez Construction and affirmed that he was the individual/sole proprietor of a single member LLC.

5. On September 22, 2017 Claimant met with representatives of Employer and submitted a Declaration of Independent Contractor Status Form. The Form provided that Claimant would operate as an independent contractor. Claimant would not receive Workers' Compensation benefits, was responsible for paying all federal and

state income taxes and would furnish Workers' Compensation insurance for any workers hired by Noe Lopez Construction. Claimant listed his trade name as Noe Lopez Construction and specified that he was the owner.

6. On September 22, 2017 Claimant began working on Employer's construction projects in Greeley and Fort Collins, Colorado. Claimant submitted invoices to Employer for work performed. When creating the invoices Claimant listed Noe Lopez Construction. The invoices provided a description of the work, unit price and amount of requested payment. As explained by Mr. Hess, Employer originally planned to pay Claimant by sheet of drywall, but because he did not have a partner, he was asked to do "back out work." Mr. Hess remarked that "back out work" could only be calculated on an hourly basis. Claimant received compensation at the rate of $24.00 per hour.

7. Mr. Hess confirmed that the majority of Employer's 40-60 person workforce is composed of employees. However, Employer also uses independent contractors to comprise its workforce. Mr. Hess outlined the differences between the employees and independent contractors who work for Employer. He remarked that supervisors could fire employees and direct them to complete a myriad of tasks. Employees have a specific start and end time every day, submit timecards and are told when they can take lunch breaks. In contrast, Claimant was an independent contractor who did not have to report when he was coming to work or taking a lunch break. Employer did not provide Claimant with any training or tools other than ladders and scaffolding.

8. On December 19, 2017 Claimant was working on a project at the Copper Leaf Apartments in Fort Collins, Colorado. While attempting to pass a ladder down to another worker, Claimant fell approximately 12 feet to the ground when a temporary railing failed. Claimant was transported by ambulance to the Poudre Valley Hospital in Fort Collins but then to the Medical Center of the Rockies in Loveland because of the severity of his injuries. He was diagnosed with a displaced and comminuted left anterior column acetabular fracture. Claimant also sustained various other injuries. Dr. Robert M. Baer performed an open reduction and internal fixation of the fracture on December 21, 2017.

9. Claimant was not required to work exclusively for Employer and was customarily engaged in an independent trade or occupation related to drywall installation. Claimant received a 1099 miscellaneous tax form from Employer that listed Noe Lopez Construction and reflected nonemployee compensation of $12,252. Claimant used the 1099 form to prepare his 2017 Federal Income Taxes. Claimant testified that the 1099 form did not represent all of his 2017 income because he also worked for another company. He noted that he earned approximately $900 per week in cash from the other entity. His total 2017 income was approximately $30,000-$40,000.

10. Claimant's testimony and tax documents reflect that he operated as an independent contractor throughout 2017. Claimant testified that he identified himself as self-employed in his 2017 Federal Tax Return and claimed deductions for various

business expenses. Claimant specifically took $3082 in deductions for truck expenses for traveling 5760 miles, $2250 for business insurance expenses, $2500 in work tool expenses and $360 for work phone expenses. Claimant commented that he drove approximately 10 miles each day for about 90 days for a total of 900 miles while working for Employer. However, because he deducted for a total of 5760 miles, he necessarily used his truck during 2017 for business activities unrelated to his work for Employer. Claimant also remarked that he paid $750 for his insurance for Employer but was unable to explain the remaining $1500 of his insurance deduction. Claimant further explained that he owned drills, screwdrivers, laser devices, tool belts, tool bags, work clothes and work shoes that he used for work. He commented that he had to purchase many power tools throughout the course of e year because they break and cost approximately $200-$400 each to replace. He thus incurred expenses of approximately $2500 for tools and supplies for the year 2017 even though he only worked for Employer for approximately three months at the end of the year. Finally, Claimant deducted $360 for a work cell phone but did not have a personal cell phone.

11. Claimant further confirmed at his deposition that he has previously worked under aliases and used different Social Security numbers. He has previously worked under the name of Sergio Macias for different employers.

12. On June 22, 2018 Project Foreman Blaine Mulnix testified through an evidentiary deposition in this matter. Mr. Mulnix was present at the Copper Leaf Apartments when Claimant was injured on December 19, 2017. He confirmed that Claimant was not an employee but an independent contractor. Mr. Mulnix explained that he awarded projects to Claimant and inspected the work upon completion. He did not work directly with Claimant and only saw him in the morning when he would arrive, possibly at lunchtime and at another two points during the day while completing his rounds. Mr. Mulnix explained that Employer did not supply Claimant or other independent contractors with tools, dictate work hours or provide any training. He detailed that with Claimant and other independent contractors he did not specify when they needed to be present at the jobsite. Claimant could choose to work certain days and not work for Employer on others.

13. Mr. Mulnix testified that Employer provided ladders and scaffolding to all independent contractors and subcontractors at a jobsite for purposes of safety and efficiency. He noted that the scaffolds are meticulously maintained, serviced and OSHA approved. Moreover, it would be inefficient for each independent contractor to move his own ladders and repeatedly build his own scaffolding at the jobsite.

14. Claimant testified at the hearing in this matter and through a post-hearing evidentiary deposition on June 15, 2018. He explained that he has approximately 10 years of experience framing and installing drywall. Claimant noted that he had previously worked for companies as an employee but not as an independent contractor. He provided his own tools while working for Employer, but Mr. Mulnix told him where to work every day. He worked approximately eight hours each day for Employer. Claimant explained that he recorded his daily hours on a form and earned $24.00 per

hour from Employer. Nevertheless, he acknowledged that he created invoices for Employer that included a unit price. Claimant stated that he did not understand the independent contractor forms he completed for Employer but received two days to review and complete the paperwork. Finally, Claimant acknowledged that his last Employer went out of business in 2015.

15. Respondents have proven that it is more probably true than not that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S. Initially, Claimant completed paperwork in which he acknowledged that he was an independent contractor responsible for his own Workers' Compensation insurance. On September 22, 2017 Claimant submitted a Declaration of Independent Contractor Status Form. The Form provided that Claimant would operate as an independent contractor. Claimant would not receive Workers' Compensation benefits, was responsible for paying all federal and state income taxes and would furnish Workers' Compensation insurance for any workers hired by Noe Lopez Construction. Furthermore, on September 20, 2017 Claimant executed a Subcontractor Agreement with Employer. The document specified that Claimant was a subcontractor of Employer who would provide labor and materials at a rate of $9.00 per sheet of drywall.

16. The record reflects that Claimant also operated as an independent contractor. Respondents have proven that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the services performed. Claimant was also not required to work exclusively for Employer. Claimant received a 1099 miscellaneous tax form from Employer that identified Noe Lopez Construction and reflected nonemployee compensation of $12,252. Claimant used the 1099 form to prepare his 2017 Federal Income Taxes. He testified that the 1099 form did not represent all of his 2017 income because he also worked for another company. He noted that he earned approximately $900 per week in cash from the other entity. His total 2017 income was approximately $30,000-$40,000. Because Claimant earned approximately $20.00-$30,000 during 2017 working for another entity his income was not significantly dependent upon continued employment with Employer.

17. Claimant also identified himself as self-employed in his 2017 Federal Tax Return and claimed deductions for various business expenses. Claimant specifically took $3082 in deductions for truck expenses for traveling 5760 miles, $2250 for business insurance expenses, $2500 in work tool expenses and $360 for work phone expenses. Claimant's tax documents thus reflect that he used his truck, drywall tools and phone to earn approximately $900 each week as an independent contractor for another entity.

18. The record also reveals that Claimant was free from direction and control in the services he performed. Mr. Hess outlined the differences between the employees and independent contractors who work for Employer. He remarked that employees have a specific start and end time every day, submit timecards and are told when they can take lunch breaks. In contrast, Claimant was an independent contractor who did not have to report when he was coming to work or when he was taking a lunch break.

Moreover, Mr. Mulnix credibly explained that he awarded projects to Claimant and inspected the work upon completion. He did not work directly with Claimant and only saw him in the morning when he would arrive, possibly at lunchtime and at another two points during the day while completing his rounds. He detailed that Claimant was not required to be at the jobsite on specified days or times. Claimant could choose to work certain days and not work for Employer on others.

19. Employer did not establish a quality standard for Claimant's drywall work. Mr. Mulnix did not work with Claimant or oversee his work. He simply inspected the work upon completion to address project specifications.

20. Claimant's payment arrangement with Employer also reflects that he operated as an independent contractor with Employer. Although Claimant received compensation at the rate of $24.00 per hour, his Subcontractor Agreement with Employer specified that he would provide labor and materials at a rate of $9.00 per sheet of drywall. Mr. Hess noted that Employer originally planned to pay Claimant by sheet of drywall, but because he did not have a partner, he was asked to do "back out work." Mr. Hess remarked that back out work could only be calculated on an hourly basis. Claimant also submitted invoices to Employer for work performed. He issued the invoices in his trade name of Noe Lopez Construction. The invoices provided a description of the work, unit price and amount of requested payment.

21. Employer also did not provide training to Claimant about drywall installation. Claimant had significant drywall experience and did not require supervision of his work. He acknowledged that he has approximately 10 years of experience framing and installing drywall. Mr. Hess and Mr. Mulnix also confirmed that Employer did not provide Claimant or other independent contractors with any training.

22. Employer did not provide tools or benefits to Claimant. Although Employer furnished ladders and scaffolding to all independent contractors for purposes of safety and efficiency, Employer did not provide Claimant with tools to complete his work. Claimant testified that he owned drills, screwdrivers, laser devices, tool belts, tool bags, work clothes and work shoes that he used for work. He commented that he has to replace many power tools throughout the course of a year because they break and cost approximately $200-$400 each.

23. The record thus demonstrates that Claimant was an independent contractor. Claimant completed extensive paperwork prior to working for Employer in which he agreed to operate as an independent contractor under the tradename Noe Lopez Construction. Claimant's testimony and tax documents establish that he was customarily engaged in an independent trade regarding drywall services. Finally, balancing the statutory factors in §8-40-202(2) C.R.S. reflects that Claimant operated as an independent contractor while working for Employer. Accordingly, Respondents have proven that Claimant was an independent contractor when he suffered injuries on December 19, 2017 at Copper Leaf Apartments. **Claimant's Workers' Compensation claim is thus denied and dismissed.**

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document.

5. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAP, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011).

6. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-

40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

7. As found, Respondents have proven by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S. Initially, Claimant completed paperwork in which he acknowledged that he was an independent contractor responsible for his own Workers' Compensation insurance. On September 22, 2017 Claimant submitted a Declaration of Independent Contractor Status Form. The Form provided that Claimant would operate as an independent contractor. Claimant would not receive Workers' Compensation benefits, was responsible for paying all federal and state income taxes and would furnish Workers' Compensation insurance for any workers hired by Noe Lopez Construction. Furthermore, on September 20, 2017 Claimant executed a Subcontractor Agreement with Employer. The document specified that Claimant was a subcontractor of Employer who would provide labor and materials at a rate of $9.00 per sheet of drywall.

8. As found, the record reflects that Claimant also operated as an independent contractor. Respondents have proven that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the services performed. Claimant was also not required to work exclusively for Employer. Claimant received a 1099 miscellaneous tax form from Employer that identified Noe Lopez Construction and reflected nonemployee compensation of $12,252. Claimant used the 1099 form to prepare his 2017 Federal Income Taxes. He testified that the 1099 form did not represent all of his 2017 income because he also worked for another company. He noted that he earned approximately $900 per week in cash from the other entity. His total 2017 income was approximately $30,000-$40,000. Because Claimant earned approximately $20.00-$30,000 during 2017 working for another entity his income was not significantly dependent upon continued employment with Employer.

9. As found, Claimant also identified himself as self-employed in his 2017 Federal Tax Return and claimed deductions for various business expenses. Claimant specifically took $3082 in deductions for truck expenses for traveling 5760 miles, $2250 for business insurance expenses, $2500 in work tool expenses and $360 for work phone expenses. Claimant's tax documents thus reflect that he used his truck, drywall

tools and phone to earn approximately $900 each week as an independent contractor for another entity.

10. As found, the record also reveals that Claimant was free from direction and control in the services he performed. Mr. Hess outlined the differences between the employees and independent contractors who work for Employer. He remarked that employees have a specific start and end time every day, submit timecards and are told when they can take lunch breaks. In contrast, Claimant was an independent contractor who did not have to report when he was coming to work or when he was taking a lunch break. Moreover, Mr. Mulnix credibly explained that he awarded projects to Claimant and inspected the work upon completion. He did not work directly with Claimant and only saw him in the morning when he would arrive, possibly at lunchtime and at another two points during the day while completing his rounds. He detailed that Claimant was not required to be at the jobsite on specified days or times. Claimant could choose to work certain days and not work for Employer on others.

11. As found, Employer did not establish a quality standard for Claimant's drywall work. Mr. Mulnix did not work with Claimant or oversee his work. He simply inspected the work upon completion to address project specifications.

12. As found, Claimant's payment arrangement with Employer also reflects that he operated as an independent contractor with Employer. Although Claimant received compensation at the rate of $24.00 per hour, his Subcontractor Agreement with Employer specified that he would provide labor and materials at a rate of $9.00 per sheet of drywall. Mr. Hess noted that Employer originally planned to pay Claimant by sheet of drywall, but because he did not have a partner, he was asked to do "back out work." Mr. Hess remarked that back out work could only be calculated on an hourly basis. Claimant also submitted invoices to Employer for work performed. He issued the invoices in his trade name of Noe Lopez Construction. The invoices provided a description of the work, unit price and amount of requested payment.

13. As found, Employer also did not provide training to Claimant about drywall installation. Claimant had significant drywall experience and did not require supervision of his work. He acknowledged that he has approximately 10 years of experience framing and installing drywall. Mr. Hess and Mr. Mulnix also confirmed that Employer did not provide Claimant or other independent contractors with any training.

14. As found, Employer did not provide tools or benefits to Claimant. Although Employer furnished ladders and scaffolding to all independent contractors for purposes of safety and efficiency, Employer did not provide Claimant with tools to complete his work. Claimant testified that he owned drills, screwdrivers, laser devices, tool belts, tool bags, work clothes and work shoes that he used for work. He commented that he has to replace many power tools throughout the course of a year because they break and cost approximately $200-$400 each.

15. As found, the record thus demonstrates that Claimant was an independent contractor. Claimant completed extensive paperwork prior to working for Employer in which he agreed to operate as an independent contractor under the tradename Noe Lopez Construction. Claimant's testimony and tax documents establish that he was customarily engaged in an independent trade regarding drywall services. Finally, balancing the statutory factors in §8-40-202(2) C.R.S. reflects that Claimant operated as an independent contractor while working for Employer. Accordingly, Respondents have proven that Claimant was an independent contractor when he suffered injuries on December 19, 2017 at Copper Leaf Apartments. *See Industrial Claim Appeals Office v. Softrock Geological Services, Inc*., 325 P.3d 560 (Colo. 2015) (whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer). **Claimant's Workers' Compensation claim is thus denied and dismissed.**

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant worked for Employer as an independent contractor. **Claimant's Workers' Compensation claim is thus denied and dismissed.**

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 12, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered a worsening of a work-related medical condition entitling him to reopen workers' compensation claim 5-004-293-01.

II. Determination of Claimant's authorized treating physician.

III. Whether Claimant is entitled to additional medical treatment.

FINDINGS OF FACT

1. Claimant is a 41 year old man who works for Employer as a cement truck driver.

2. On July 17, 2015 sustained an admitted industrial injury to his back and left wrist when he slipped and fell while exiting out of a cement truck (W.C. 4-991-664). Tanya Michelle Kern, MD diagnosed Claimant with a distal radius fracture of the left wrist, lumbar strain and thoracic myofascial strain. Claimant treated for his injuries with medication, physical therapy, occupational therapy and chiropractic treatment. Claimant continued to experience pain in his lumbar spine.

3. Claimant sustained a subsequent admitted industrial injury on October 26, 2015, (W.C. 5-004-293), which is the subject of Claimant's petition to reopen. While driving a cement truck, Claimant was rear-ended by a semi-trailer doing over 50 miles per hour.

4. Claimant treated with Tomm VanderHorst, MD as his authorized treating physician. On October 28, 2015, Dr. VanderHorst gave the following assessment: mild cervical strain, scalp contusion without evidence of concussion, mild headache, and exacerbation of pre-existing chronic low back strain from the July 17, 2015 injury. Dr. VanderHorst recommended Claimant continue chiropractic treatment and medications, and placed Claimant on temporary work restrictions. Claimant was subsequently diagnosed with tinnitus. On October 30, 2015, Dr. VanderHorst released Claimant to full duty work with no restrictions.

5. On November 5, 2015, Dr. Kern noted Claimant had been improving prior to the October 26, 2017 injury and placed Claimant at maximum medical improvement ("MMI") for his injuries related to the July 17, 2015 work injury. Dr. Kern opined Claimant did not require any permanent impairment rating, restrictions or maintenance care as a result of the July 17, 2015 injury.

6. On November 17, 2015, Claimant underwent a lumbar spine MRI which revealed edema in the anterior superior endplate of L3 and L4, minimal disc desiccation and disc

bulge at L2-L3, and mild disc bulge at L4-L5. Whitney J. Morgan, MD provided the following impression: "1. Edema in the anterior superior endplates of L3 and L4 may reflect bone contusion from recent injury versus discogenic endplate edema. No vertebral body height loss. 2. Mild degenerative changes in the lumbar spine without spinal canal or foraminal stenosis."

7. On December 15, 2015, Dr. VanderHorst noted Claimant had 12 physical therapy sessions and 8 sessions of chiropractic treatment, with no ongoing benefit from physical therapy. Claimant reported 8/10 back pain across the mid and low back, with no radiation, paresthesias or weakness. Dr. VanderHorst referred Claimant for a physiatry evaluation for his persistent low back pain.

8. Claimant continued to treat with Dr. VanderHorst and continued to report 7-8/10 back pain, with no radiation, paresthesias or weakness. Claimant continued to work full duty.

9. On April 16, 2016, Robert Kawasaki, MD performed bilateral L2-3 and L3-4 facet injections which were without immediate or long-term benefit. On April 18, 2016, Claimant reported to Dr. VanderHorst developing generalized muscle pain in both upper and lower extremities after the injections.

10. On May 2, 2016, Dr. VanderHorst referred Claimant to Rebecca Hawkins, PhD for six sessions of biofeedback.

11. Claimant sought treatment outside of the workers' compensation system at Denver Back Pain Specialist. On May 12, 2016, Claimant was seen by Jason Redington, PA-C, under the supervision of Scott Bainbridge, MD. Claimant denied having any radicular symptoms and weakness. On exam, PA-C Redington noted increased pain with lumbar extension and quadrant maneuvers bilaterally with pain produced in the mid to lower lumbar spine, as well as tenderness to palpation over L2-4 and moderate paraspinal muscle spasms bilaterally. PA-C Redington gave the following assessment: intervertebral disc degeneration and displacement in the lumbar region, low back pain, and lumbosacral spondylosis without myelopathy or radiculopathy. PA-C Redington recommended Claimant undergo medial branch block testing.

12. Claimant treated with Dr. Hawkins on June 23, 2016, July 19, 2016 and July 16, 2016. At each visit he reported 8/10 back pain. On July 26, 2016, Dr. Hawkins noted that when Claimant sat upright using good posture his EMG biofeedback readings were entirely normal and he did not appear to be guarding or over recruiting. She further noted that, except when slouching, there was no indication of neuromuscular dysfunction contributing to his low back pain to include guarding, hypertonicity, lack of flexion, relaxation phenomenon, or muscle spasm. It was her impression that no further treatment was needed. Dr. Hawkins stated, "…given his complaints of widespread muscle pain that would likely not be considered claims-related, I suggested [Claimant] consider following-up with his PCP to rule out an underlying medical condition..."

13. On July 8, 2016, Dr. Bainbridge performed medial branch blocks at levels L3-5. Claimant had a non-diagnostic response to the medial branch blacks.

14. On August 15, 2016, Dr. VanderHorst placed Claimant at MMI for the October 26, 2015 work injury. Claimant reported to Dr. VanderHorst constant 8/10 midline upper low back pain with no radiation into the lower extremities, no paresthesias, and no muscular weakness. Dr. VanderHorst noted Claimant was not taking any medications and had been working 13.5 hour days, 65 hours a week with overtime in the summer. His final assessment was, *inter alia*, chronic midline low back pain without sciatica. Dr. VanderHorst opined Claimant did not sustain any permanent impairment, and did not require any permanent restrictions or maintenance care.

15. Dr. Bainbridge performed an impairment rating on November 28, 2016. He opined Claimant was MMI as of that date. Claimant complained of 9/10 low back pain, as well as pain in his right thigh and calf that began approximately three months prior. Dr. Bainbridge reviewed the November 17, 2015 lumbar MRI and indicated the MRI revealed L2-3 disc protrusion with degenerative changes. Dr. Bainbridge gave the following assessment: other intervertebral disc displacement of the lumbar region, and L2-3 disc protrusion with discogenic pain. Dr. Bainbridge noted Claimant had a permanent injury, but was not taking any medications and continued to work. He assigned a 12% total combined whole person impairment, apportioning 6% to the July 2015 work injury. He noted,

> [Claimant] did have questions regarding future care, but given his functional level a lumbar fusion would not be indicated at this point. We also did discuss a clinical trial we are currently a site for that utilizes donor stem cells to treat lumbar discogenic pain. [Claimant] did express his interest in this option once his case is settled.

16. On December 13, 2016, Claimant underwent a Division Independent Medical Examination "(DIME") performed by J.E. Dillon, MD. Dr. Dillon noted she reviewed some medical records, but was not provided a complete medical record for review, including no imaging reports. Claimant reported low back pain with "vaguely described" radiation into the right leg and thigh. He denied paresthesias and saddle area symptoms. On exam, Dr. Dillon noted diffuse muscle tenderness in the lumbar region, and intact neurovascular function in the lower extremities with normal strength, sensation, reflexes. Dr. Dillon agreed with Dr. Bainbridge's MMI date of November 28, 2016. She opined that Claimant had residual low back pain with vaguely described right-sided lower extremity radiation, and assigned a total combined 13% whole person impairment. She did not specifically address restrictions or maintenance care.

17. Respondents filed a Final Admission of Liability on January 30, 2017 admitting to the 13% whole person impairment assigned by Dr. Dillon. Medical maintenance care was denied.

18. On April 19, 2017, Claimant returned to Dr. Bainbridge for reevaluation. Dr. Bainbridge noted Claimant returned with complaints of "increased low back pain," rating

the pain at 8/10. Dr. Bainbridge noted Claimant had been taking medication for hyperlipidemia and began to experience pain and weakness in his legs, which resolved when Claimant stopped taking the medication. Claimant reported taking ibuprofen once or twice per week to manage his pain, along with medication to aid in sleeping. On examination, Dr. Bainbridge noted upper lumbar pain with thoracolumbar flexion and extension. Dr. Bainbridge remarked, "After [Claimant] has settled his case, he may be a candidate for the Mesoblast study."

19. Claimant next returned to see Dr. Bainbridge on September 7, 2017. Claimant again reported back pain at the level of 8/10. No abnormal exam findings were noted. Dr. Bainbridge noted Claimant was a better candidate for a Relevient Study, and planned to follow up once Claimant's workers' compensation case was settled.

20. Claimant also sought treatment with Kevin Smith, MD, who performed bilateral L2-3 epidural steroid injections on October 6, 2017. The injections initially increased Claimant's pain, and then provided some relief before the pain ultimately returned to Claimant's normal level by mid-December 2017.

21. Claimant underwent a repeat lumbar spine MRI on November 10, 2017. A combination of Modic type 1 and type 2 endplate changes were observed along the anterosuperior margin of the L2 vertebral body with no protrusion, and mild Modic type 2 endplate changes on the anterior superior margin of the L4 endplate. David Solsberg, MD provided the following impression:

> 1. There are degenerative endplate changes at L3 and L4 more pronounced at the L3 level. 2. There is no fracture, bone lesion or malallgnment (*sic*). There is straightening of the normal lordosis and this may be seen with muscle spam or may be related to positioning. 3. There are small zygapophyseal joint effusions at L4-5. This may by physiologic or may be seen with mild synovitis or arthritis. 4. There is no protrusion. There is no stenosis.

22. On December 4, 2017, Dr. Smith performed a discogram at L2-3, L3-4 and L4-5. Claimant had a positive pain response at L2-3.

23. Claimant underwent a post-discography lumbar spine CT scan on December 4, 2017, which revealed a grade 3 annular tear at L2-3, grade 1 annular tears at L3-4 and L4-5, and mild sacroiliac arthritis.

24. On December 15, 2017, Claimant saw Adrian Sutter PA-C under the supervision of Giancarlo Checa, MD. Claimant reported 9/10 low back pain. PA-C Sutter diagnosed Claimant with lumbar disc herniation, lumbar disc degeneration and chronic pain syndrome. He noted, "We have discussed the stem cell option, but he cannot afford the out-of-pocket cost." PA-C Sutter referred Claimant for a surgical consultation.

25. On February 5, 2018, Claimant was seen at the Rocky Mountain Spine Clinic by David Whatmore, PA-C, under the supervision of Chad J. Prusmack, MD. Claimant reported having significant upper lumbar pain and some intermittent radiculopathy into

the legs since the October 26, 2015 injury. PA-C Whatmore reviewed the results of diagnostic testing, noting the discogram showed concordant pain response at L2-3, and the CT scan showed a grade 3 annular tear at L2-3. On exam, PA-C Whatmore noted some paresthesias and some weakness into the L3 distribution and diminished sensation bilaterally in the L3 distribution. He diagnosed Claimant with low back pain. He opined that if Claimant did not improve, Claimant could potentially require correction of the damaged disc at L2-3 with a decompression and minimally invasive lumbar fusion. A March 9, 2018 addendum by Dr. Prusmack noted he reviewed Claimant's chart, records and November 10, 2017 MRI, and agreed Claimant's injuries and subsequent need for surgery were caused by the October 26, 2015 injury.

26. Claimant filed a Petition to Reopen his claim on March 22, 2018, supported by the medical records of Dr. Smith and Dr. Checa.

27. On March 29, 2018, counsel for Respondents replied to Claimant's Petition to Reopen, declining to voluntarily reopen the claim, and designating Dr. VanderHorst as Claimant's authorized treating physician. Respondents specifically noted Drs. Prusmack, Whatmore, Sutter, Prospect, Checa and Smith are not authorized treating physicians.

28. On April 17, 2018, Dr. VanderHorst reevaluated Claimant in connection with Claimant's petition to reopen. He noted Claimant presented with interest in surgical intervention. Claimant reported experiencing continuing 8/10 pain in the upper lumbar region with some mild bilateral radiation. Claimant reported having constant bilateral calf discomfort and lateral thigh aches and tickling/tingling sensation in his lateral hip and thigh since undergoing bilateral L2-3 intraforaminal epidural steroid injections in October 2017. Dr. VanderHorst reviewed records of previous treatment and subsequent evaluations. He noted Claimant's November 10, 2017 MRI revealed degenerative endplates changes at L2 vertebral body and L4 endplate, and that the CT scan showed grade 3 annular tear at L2-3 and grade 1 annular tear at L3-5, and the lumbar discogram reported concordant pain at L2-3. Dr. VanderHorst referred to the MTG regarding discography, noting discography is accepted but rarely indicated and remains extremely controversial as an invasive diagnostic procedure to identify or refute a discogenic source of pain, particularly in symptomatic patients with annular tears.

29. On examination, he noted tenderness to percussion at L2-3 level midline, moderate tenderness to palpation of the bilateral paraspinous musculature at the same levels, mild discomfort with extension, and increased upper lumbar pain with forward flexion to knees. Lower extremity reflexes and sensation were symmetric. Dr. VanderHorst gave the following assessment: chronic midline low back pain and onset of sciatica following bilateral L2-3 intraforaminal steroid injection October 2017. He noted Claimant had a failed response to physical therapy, chiropractic, acupuncture, NSAID use, muscle relaxants, Lyrica, duloxetine, lumbar facet injections and lumbar epidural injections. Dr. VanderHorst stated,

> The location of his low back pain is primarily axial though he does report some bilateral thigh and calf symptoms including 'tickling sensation'

> bilaterally, without distinctly radicular component to these complaints and these later symptoms historically began following a non-authorized lumbar injection in October 2017. His pain level and location (as indicated on his self completed pain charts at each visit in our office) have shown no change in pain location or intensity from February 2016 to today.

30. Dr. VanderHorst noted that, although the discogram report indicated concordant pain at L2-3, it was unclear to him if there was a significant increase in Claimant's pain level, as no definitive pre-injection and post-injection pain levels were documented. Dr. VanderHorst noted Claimant continued to work his regular job duties, working 8-12 hours per day, and continued to perform normal activities of daily living. He remarked that, while he understood Claimant's desire to be pain free, additional intervention could put him at some level of risk. Dr. VanderHorst noted that Claimant's primary desire was to get rid of his pain, and reviewed with him that maintenance of normal life functions can be a wiser goal than elimination of pain. He ultimately referred Claimant to Dr. Roderick Lamond for a second opinion regarding lumbar surgical options.

31. Respondents denied authorization of the appointment with Dr. Lamond.

32. On June 18, 2018, John D. Douthit, MD performed an Independent Medical Examination ("IME") at request of Respondents. Dr. Douthit performed a medical record review and physically examined Claimant. Claimant reported back pain at the mid back at approximately the lower thoracic upper lumbar spine level, with pain going to the sides of his legs. On examination, Dr. Douthit noted no objective physical signs and a normal neurologic findings.

33. Dr. Douthit noted that the discogram produced concordant pain at L2-3, and the November 10, 2017 MRI revealed osteophyte formation and edema in the anterior space at L2-3, but more severe changes at L3-4. Dr. Douthit remarked that discograms are subjective tests and "cannot be depended upon to localize or identify the sole source of back pain." He opined that Claimant has low back pain with reactionary changes of the upper lumbar spine, related to his 2015 work injury, that Claimant remained at MMI, and disagreed with the recommendation of L2-3 fusion surgery due to insufficient correlation between the MRI, discogram, and the localization of pain.

34. Claimant testified at hearing that his back pain has worsened since being placed at MMI in November 2016. Claimant testified that he has experienced increased back pain and leg pain and tingling since the October 2017 injections. He testified that although he has worked full duty since shortly after the October 26, 2015 injury, at times it feels impossible to do his job, and participating in non-work recreational activities and chores is becoming increasingly more difficult. Claimant stated he desires to undergo the surgery recommended by Dr. Prusmack. He stated he has not incurred any additional injuries since October 26, 2015.

35. The ALJ credits Claimant's testimony and Dr. Prusmack's opinion, as supported by the medical records, over the opinions of Drs. VanderHorst and Douthit, and finds that Claimant's work-related condition has worsened since being placed at MMI.

36. Claimant has proven by a preponderance of the evidence that W.C. No. 5-004-293 should be reopened due to a change in Claimant's work-related condition.

37. The ALJ further finds that the right of selection did not pass to Claimant. Dr. VanderHorst is the authorized treating physician.

38. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Petition to Reopen

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Colorado recognizes the “chain of causation” analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

Claimant proved by a preponderance of the evidence he sustained a change in his condition that is causally related to the October 26, 2015 work injury. Claimant credibly testified his back and leg condition has worsened since being placed at MMI. Diagnostic tests taken subsequent to Claimant being placed at MMI reveal additional findings at level L2-3. During PA-C Whatmore’s February 5, 2018 examination, he noted paresthesias and weakness and diminished sensation into the L3 distribution, which was not reported by Claimant at or prior to being placed at MMI. Dr. Prusmack credibly opined that Claimant’s current condition and potential need for surgery is related to the October 26, 2015 work injury. While Dr. VanderHorst opined that the level and location of Claimant’s back pain has remained the same, he acknowledges Claimant has developed new leg symptoms and referred Claimant for a second surgical opinion. No

evidence was presented at hearing regarding an intervening injury. Based on the totality of the evidence, Claimant has proven it is more probable than not that he has suffered a worsening of his work-related condition, and his claim should be reopened.

Authorized Treating Physician

When a claim has been closed and the claimant seeks to reopen based on a worsened condition, the burden is upon the claimant to give notice to the respondent that additional benefits are sought, and such notice triggers the respondent's duty to designate an authorized treating physician. The right to select the physician passes to the claimant only if the respondent fails to authorize a physician upon notice the claimant seeks to reopen the claim. See *Twiggs v. Hoffman Structures*, W.C. No. 4-430-471 (ICAO December 11, 2001), *Gonzalez v. Crowley County Nursing Center*, W.C. No. 4-250-651 (ICAO November 27, 2000).

Claimant acknowledges Respondents authorized Dr. VanderHorst to see Claimant subsequent to the filing of Claimant's Petition to Reopen. However, Claimant argues that Respondents' refusal to authorize Dr. VanderHorst's referral to Dr. Lamond equates to a failure to authorize the care and treatment of Dr. VanderHorst, resulting in the right of selection passing to Claimant. The ALJ disagrees.

On March 29, 2018, Respondents declined to voluntarily reopen the claim, but specifically designated Dr. VanderHorst as the authorized treating physician. Dr. Dr. VanderHorst reevaluated Claimant on April 17, 2018. Respondents' subsequent denial of Dr. VanderHorst's referral to Dr. Lamond does not result in the right of selection passing to Claimant under these circumstances.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Claimant's position statement states it is premature to determine whether the potential fusion surgery is presently reasonably necessary, as no surgical request has been made. Dr. Prusmack has referenced a potential need for surgery in the event Claimant does not improve. The ALJ notes Claimant has yet to be evaluated by Dr. Lamond, as recommended by authorized treating physician Dr. VanderHorst. As Claimant has met his burden to reopen the claim, Respondents are liable for reasonably necessary and related medical treatment. However, the ALJ considers the issue of the reasonableness and necessity of a specific surgery withdrawn at this time and does not make a determination regarding any specific surgery.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen W.C. No. 5-004-293 is granted.

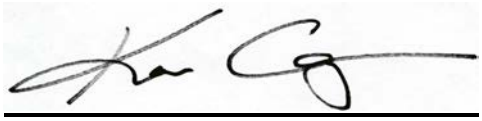
2. The right of selection did not pass to Claimant. Dr. VanderHorst is the authorized treating physician.

3. Respondents are liable for reasonably necessary and related medical treatment.

4. All matters not determined herein, including whether a fusion surgery is reasonably necessary, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 13, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven a preponderance of the evidence that his claim should be reopened based on a worsening of condition since being placed at MMI on February 28, 2014.

II. If the claim is reopened, whether Claimant has proven by a preponderance of the evidence he is entitled to temporary total disability benefits from June 30, 2016 and ongoing.

FINDINGS OF FACT

Based upon the evidence submitted, the ALJ enters the following findings of fact:

Procedural Background

1. The above captioned claim has been the subject of three prior hearings: August 7, 2014, March 23, 2016, and October 23, 2016. Following hearing, the ALJ issued detailed Findings of Fact, Conclusions of Law, and Order for the August 7, 2014 and October 23, 2016 hearings. Concerning the March 23, 2016 hearing, the Parties submitted a Stipulation and Motion for Approval, which the ALJ approved on April 28, 2016. The aforementioned Orders are final as neither party appealed the ALJ issued Orders. The undersigned ALJ takes judicial notice of the prior orders and incorporates relevant findings of fact, stipulated facts, conclusions of law and orders from the prior Orders into the findings of fact, conclusions of law and order in the present matter. The prior orders have been entered into evidence by Respondents in their hearing submissions without objection from Claimant.

Claimant's Admitted Work Injury

2. Claimant sustained an admitted work-related accident on September 15, 2011. At the time of the September 15, 2011 injury, claimant worked for the employer as a roofing salesperson. Claimant stepped off a curb while carrying a ladder on the date of injury and "rolled" his right ankle. Claimant reported the injury and medical treatment was provided by the respondents. As set forth below, Claimant would subsequently develop complex regional pain syndrome (CRPS) in his right lower extremity.

3. Claimant has treated with several authorized providers and their associates for his September 15, 2011 industrial injury, including Dr. Douglas Bradley (Claimant's primary ATP), Dr. Michael Simpson (Claimant's surgeon), Dr. Michael Sparr (Claimant's rehabilitation provider), and Dr. Scott Primack (Claimant's current rehabilitation provider for post-MMI medical treatment). Dr. Primack and other providers, including Dr. Levi Miller and Dr. Tashof Bernton at Colorado Rehabilitation &

Occupational Medicine (CROM) clinic have provided, *inter alia*, diagnostic testing and injections to treat Claimant's condition and maintain him at MMI.

Claimant's Initial Placement at MMI

4. Claimant reached maximum medical improvement (MMI) for his September 15, 2011 injury on February 28, 2014 according to Dr. Bradley. Dr. Bradley found Claimant would require post-MMI medical care due to ongoing complaints of pain in his right lower extremity. Dr. Bradley determined claimant had a 15% scheduled impairment rating for his right lower extremity work injury.

5. Respondents filed a Final Admission of Liability (FAL) on March 17, 2014 consistent with Dr. Bradley's reports. The Final Admission admitted to the February 28, 2014 MMI date and a 15% scheduled impairment rating of the right lower extremity. The Final Admission also admitted for post-MMI medical care.

Claimant's First Application for Hearing on Reopening

6. Claimant objected to the FAL and filed an application for hearing dated April 15, 2014 endorsing, among other issues, reopening of the claim based upon a change of condition. Claimant did not file a Notice and Proposal seeking an opinion regarding MMI and/or permanent impairment from a Division Independent Medical Examiner (DIME). Instead, Claimant filed the aforementioned application for hearing asserting his right lower extremity injury worsened less than two months after he was placed at MMI by Dr. Bradley. As part of his application for hearing, Claimant requested an order finding he was no longer at MMI and entitled to additional benefits, including temporary total disability benefits, medical benefits and disfigurement. Claimant's April 15, 2014 application for hearing was heard by Judge Walsh on August 7, 2014.

7. After the August 7, 2014 evidentiary hearing, Judge Walsh issued his Findings of Fact, Conclusions of Law and Order on September 19, 2014. In his order, Judge Walsh found that Claimant was alleging that his "condition worsened on or about March 11, 2014" and that he was requesting an "order declaring he is no longer at MMI as of March 11, 2014 and temporary total disability (TTD) benefits should be paid from March 11, 2014 and ongoing." ALJ Walsh addressed the alleged worsening of condition finding that Claimant's testimony regarding the frequency and location of his lower extremity pain along with the presence and frequency of cramping and the presence of a sleep disorder was incredible and unpersuasive. Consequently, ALJ Walsh concluded that Claimant failed to meet his burden of proof on his petition to reopen based on worsening of condition. While Judge Walsh did award addition disfigurement benefits as part of his September 18, 2014 full order, he denied and dismissed Claimant's request to reopen the claim as well as his request for temporary total disability benefits. That order became final twenty (20) days after it was served on September 19, 2014, because neither party filed an appeal.

Claimant's Second Application for Hearing on Reopening

8. On February 7, 2015 (less than five months after Judge Walsh denied his request to reopen his claim), Claimant filed a new petition to reopen along with an application for hearing. In his February 7, 2015 application for hearing, Claimant requested a determination of whether he was at MMI, whether he suffered a worsening of his condition, and a request for medical benefits. Claimant subsequently withdrew his February 7, 2015 application for hearing and did not proceed to hearing.

Post-MMI Medical Care

9. Respondents admitted for post-MMI medical care in their April 15, 2014 Final Admission of Liability. Post-MMI medical care has been regularly provided to Claimant from February 28, 2014 when he was placed at MMI to the present. For more than four years, Claimant has been provided post-MMI maintenance care from Dr. Bradley, Dr. Primack and providers associated with Dr. Primack. Post-MMI care has been directed at Claimant's persistent symptoms in the right lower extremity associated with his September 15, 2011 industrial injury.

10. On March 24, 2015, Dr. Bradley returned Claimant to Dr. Scott Primack for a follow-up evaluation of Claimant's persistent right lower extremity symptoms. Dr. Primack referred Claimant to Dr. Tashof Bernton in his office for completion of autonomic testing.

11. On May 6, 2015, Dr. Scott Primack, issued a report noting that Claimant completed autonomic testing with Dr. Bernton and the testing was "consistent for someone with complex regional pain syndrome" (CRPS). Dr. Primack noted Dr. Bernton suggested Claimant proceed with a lumbar sympathetic injection[1] and, if that injection improved his function, including the motion in his ankle, then Claimant would meet the diagnostic criteria for CRPS of the right lower extremity.

12. Claimant's persistent right lower extremity symptoms were present when Dr. Bradley found Claimant attained MMI on February 28, 2014 and they persisted after Claimant reached MMI. Dr. Primack and Dr. Bernton determined the persistent symptoms met the criteria for CRPS, which provided a name for the symptoms but did not change Claimant's MMI status. Given Claimant's clinical examination on May 6, 2015, coupled with the results of his autonomic testing and the "entire record," Dr. Primack opined was at MMI with an 8% impairment of the whole person for his 2011 work injury. Dr. Primack's report contained an MMI date and impairment award inconsistent with the reports of Dr. Bradley. Arguably, this conflicting MMI date and whole person impairment rating created an obligation on the part of Respondents to take action to file either an admission of liability or an application for hearing.

[1] Claimant would go on to receive multiple lumbar sympathetic blocks on a maintenance basis as administered by Dr. Stephen Scheper and CROM physicians, including Dr. Primack, Dr. Miller, and Don Fresques, NP ("NP Fresques").

Respondents' Application for Hearing

13. Respondents elected to file an application for hearing after receiving Dr. Primack's MMI and Impairment Rating. Dr. Primack's MMI date and impairment rating were inconsistent with Dr. Bradley's MMI date and impairment rating. Respondents requested a determination of when Claimant attained MMI and what permanent impairment he should receive for his September 11, 2011 work injury.

14. Hearing on Respondents' November 25, 2015 application for hearing was set for March 23, 2016. The parties and Judge Walsh convened the hearing via telephone, as a blizzard closed Interstate 25 between Denver and Colorado Springs that morning, preventing travel to Pueblo by Respondents' counsel. The parties, in a telephone conference, agreed to submit the matter to ALJ Walsh for an order on written argument. Following the hearing, the parties agreed to file a "Stipulation and Motion for Approval (for Resolution of the March 23, 2016 Hearing Set with Judge Walsh)" in lieu of written argument. In the stipulation, the parties agreed that Dr. Primack's May 6, 2015 medical report did not affect the closed status of the claim and respondents had no duty to act on the report from Dr. Primack. The parties agreed further that Respondents' March 17, 2014 Final Admission of Liability admitting for a February 28, 2014 MMI date with impairment and the September 18, 2014 Final Order issued September 19, 2014 by Judge Walsh "closed all issues except post-MMI medical treatment." BN 081. Claimant signed the stipulation, along with counsel. The stipulation was approved by Judge Walsh on April 28, 2016.

Claimant's Third Application for Hearing on Reopening

15. Claimant filed his third application for hearing on June 29, 2016. In the June 29, 2016 application for hearing, Claimant alleged his condition had worsened, that he was no longer at MMI, and that his claim should be reopened for additional TTD. Claimant clarified at hearing on October 20, 2016 that he was seeking an order finding he was entitled to TTD from June 29, 2016 forward due to a worsening of condition. In response to the June 29, 2016 application for hearing filed by Claimant, Respondents, asserted, *inter alia*, that Claimant remained at MMI according to the opinions of Drs. Bradley and Primack and, because his MMI status had not changed, he was not entitled to additional TTD.

16. During his testimony at the October 20, 2016 hearing, Claimant described his symptoms as persistent 8-9/10 pain, poor balance, lower extremity weakness, sensitivity to touch that spread up his right leg to the hip, and impaired sleep. Claimant received injections to maintain his pain complaints. Claimant testified on October 20, 2016 he was offered pain medication for his ongoing pain complaints he associates with his injury, but he preferred to use medical marijuana rather than prescription pain medications. Claimant testified on October 20, 2016 that he had new or different symptoms than what he experienced in the past.

17. In a January 11, 2017 Corrected[2] Findings of Fact, Conclusions of Law and Order, the undersigned ALJ found the evidence presented at the October 20, 2016 did not support Claimant's assertions. Rather, the undersigned found that careful inspection of the medical records demonstrated that Claimant's complaints were consistent with those he has had prior to and after MMI. As noted, Claimant attempted to reopen his claim for worsening in 2014 after Dr. Bradley placed Claimant at MMI. At the August 7, 2014 hearing before Judge Walsh, Claimant testified to the myriad of conditions that plagued him after Dr. Bradley placed him at MMI on February 28, 2014. The complaints as expressed then mirrored his past symptoms and his complaints at the October 20, 2016 hearing. Specifically, at the August 7, 2014 hearing, Claimant testified he had a change in the location of his pain. He testified that where his pain was isolated to the foot and toes prior to MMI changed to involve the entire right leg from the toes to the hip 10 days after MMI. Claimant also testified that he felt pain "more often following MMI during the August 7, 2014 hearing. ALJ Walsh determined that Claimant's assertion that he had more pain in a different location than when placed at MMI was not credible or persuasive since he had severe constant pain at or before MMI in the same locations, according to the medical records submitted. Similarly, Claimant's reports of spasm or cramping as a new condition were not credible or persuasive, since cramping had been a constant complaint since 2012. Claimant also reported his sleep had been disrupted since he was placed at MMI. However, evidence presented documented Claimant's sleep complaints prior to MMI. Claimant testified at the 2014 hearing he only slept for a little over an hour before his pain disrupts his sleep. Judge Walsh found Claimant had sleep disturbances that were well documented in the records and actively treated prior to MMI. Finally, Claimant testified in 2014 he was worsened because of new shooting pain. Based upon the evidence presented, Judge Walsh found that Claimant had well documented numbness and shooting pain throughout the records prior to MMI.

18. In addition to allegations of new or worsened complaints since MMI, Claimant also argued in his post hearing position statement following the August 7, 2014 hearing that his condition had worsened because his diagnosis changed after MMI and he was provided with post-MMI injections in excess of what was contemplated at MMI. Claimant asserted this constituted "strong evidence" that his condition had worsened and that he was no longer at MMI." Judge Walsh rejected this argument finding claimant failed to prove a worsening of condition.

19. In the January 11, 2017 Corrected Findings of Fact, Conclusions of Law and Order, the undersigned found Claimant's assertions raised during the 2014 hearing on reopening and rescission of MMI significant because Claimant made similar assertions during the October 20, 2016 hearing, namely that a new diagnosis after MMI and treatment after MMI for that condition compelled a reopening for worsening.

20. In the findings of fact, conclusions of law and order for the October 20, 2016 hearing, the undersigned compared the intensity, frequency and location of Claimant's pain complaints between 2014 and the October 20, 2016 hearing. Based

[2] Corrected Findings of Fact, Conclusions of Law, and Order were issued to correct a scrivener's error.

upon that review the undersigned found very little difference between Claimant's 2014 complaints and his complaints at the 2016 hearing.

21. While Claimant asserted in testimony at the October 20, 2016 hearing that he had new complaints of sensitivity to touch that began six months earlier, the undersigned ALJ found Claimant's sensitivity to touch, in general, was not a new complaint, concluding that Claimant's sensitivity to touch was an allegation he asserted during his 2014 hearing concerning reopening.

22. At the time of his October 20, 2016 hearing, Claimant's assertion that his sensitively was "spreading" up the leg was not convincing to the undersigned based in part on Judge Walsh's September 18, 2014 findings which reflected that Claimant reported pain extending into the hip girdle in 2014. Moreover, Claimant conceded that he was "exquisitely tender to even light touch" in 2014 when treating with Dr. Sparr. At the 2014 hearing, Claimant complained of sensitivity to jeans and shoes. In 2014, Claimant testified he began changing his shoes every three to four hours to cope with the sensitivity of his lower extremity, a routine he continued to follow in 2016 according to his October 20, 2016 testimony. Consequently, the undersigned found Claimant's problems with sensitivity likely extended beyond the ankle and into the leg as of 2014, when Judge Walsh denied the claim for reopening and rescission of MMI status.

23. Similarly, Claimant testified at the October 20, 2016 hearing testified he developed a problem with balance after he was placed at MMI for his 2011 injury. At the October 20, 2016 hearing, Claimant asserted his balance problem justified a conclusion that his condition had worsened after he was placed at MMI. At the October 20, 2016 hearing, Claimant testified he stumbles and falls because of balance issues. The undersigned, however, found the balance issue, like the sensitivity to touch, was not a new complaint. In the 2014 hearing before Judge Walsh, Claimant testified he developed a difficulty walking, balancing when standing, and climbing ladders. He testified around March 11, 2014, he lost his ability to climb ladders because of balance issues. He decided in 2014 he must use a cane to keep from falling. In the Order issued following the October 20, 2016 hearing, the undersigned found Claimant's balance issues were not a new problem for him. Rather, it was present in 2014, if not earlier, when Judge Walsh denied the request for a reopening and removal of Claimant's MMI status.

24. In the findings of fact, conclusions of law and order following the October 26, 2016 hearing, the undersigned found there was no evidence that Claimant worked since leaving work for Employer in 2013. Claimant testified at the October 20, 2016 hearing he had not earned a wage since leaving work for Employer in this matter. At the October 20, 2016 hearing, Claimant testified he tried out a job with another family employer (Calvin Turner Roofing), but after observing the job, he determined he could not perform the work. Accordingly, the undersigned concluded that no persuasive evidence was presented to establish that Claimant's ability to work had changed since being placed at MMI. His permanent restrictions remained in place and were unchanged. Even if Claimant's condition had worsened, there is no credible evidence that he had greater restrictions on his ability to work. During the October 20, 2016

hearing, Claimant maintained he has been unable to work in any capacity since 2013 due to his 2011 work injury.

25. In the Order issued after the October 20, 2016 hearing, the undersigned found that Claimant continued to treat with and be evaluated in follow-up appointments by Dr. Bradley and Dr. Primack. Prior to the October 20, 2016 hearing, neither Dr. Bradley nor Dr. Primack rescinded MMI and neither doctor reported a worsening of condition. To the contrary, the undersigned found Dr. Bradley continued to maintain his February 28, 2014 MMI date in reports written before and after Dr. Primack's May 6, 2015 report. Medical records from February 28, 2014 to August 2016 (the last report received prior to the October 20, 2016 hearing was from August of 2016), establish that Dr. Bradley consistently opined that Claimant was at MMI and he reached MMI on February 28, 2014. Moreover, Claimant's work restrictions remained in place and were not altered. Maintenance treatment from February 28, 2014 through the hearing on October 20, 2016 focused on controlling Claimant's persistent pain, primarily with injections.

26. In the Order issued following the October 20, 2016 hearing, the undersigned ALJ found Claimant's testimony regarding the alleged worsening of his condition unpersuasive**.** The undersigned found no physician treating Claimant since he was placed at MMI documented that his symptoms had changed or that his condition had deteriorated. Moreover, the undersigned found Claimant's symptoms, including his pain levels, were similar to those he experienced when he was placed at MMI. The evidence presented at the October 20, 2016 hearing persuaded the undersigned ALJ that Claimant continued to have symptoms consistent with a CRPS diagnosis as expected. Consequently, while Claimant's diagnosis was refined to CRPS, he failed to prove at the October 20, 2016 hearing that the affects (symptoms) caused by that condition had worsened with time. Similar to the conclusion reached by ALJ Walsh, the undersigned found that Claimant had failed to present sufficient objective evidence of a worsened condition at the October 20, 2016 hearing that would warrant removing Claimant from MMI and reopening the case for additional TTD benefits. Accordingly, Claimant's requests were denied and dismissed.

27. The January 11, 2017 Order was not appealed and became final on January 31, 2017.

Claimant's Petition to Reopen and Fourth Application for Hearing on Reopening

28. Approximately three months after the aforementioned Order became final, Claimant filed another Petition to Reopen his claim on April 25, 2017. In the Petition to Reopen, Claimant alleged a change in condition, error, and mistake. Claimant attached several reports from Dr. Primack's office for dates of service between February 2017 and April 2017.

29. On May 18, 2017, Claimant filed an Application for Hearing, endorsing the issues of reasonably necessary medical benefits and petition to reopen claim. In their Response to Application for Hearing, Respondents endorsed causation, law of the case,

and res judicata in addition to the issues listed by Claimant in his application for hearing. The matter was set for hearing on September 14, 2017; however, the parties reached a tentative settlement of the claim at an August 25, 2017 settlement conference. The September 14, 2017 Hearing was vacated. After cancellation of the hearing, Claimant changed his mind and the agreement to settle was not finalized.

Claimant's Fifth Application for Hearing on Reopening

30. Claimant filed a new application for hearing on September 14, 2017. In addition to the issues he applied for in his May 18, 2017 Application for Hearing (reasonably necessary medical benefits and petition to reopen), Claimant added the issues of TTD from June 30, 2016 and ongoing; Mistake/Error; no longer at MMI; and worsening of condition. Respondents filed their Response to Application for Hearing endorsing: "Law of the case; res judicata; causation; closure of issues with final orders from prior litigation of the same issues (generally, see the final order of the undersigned ALJ served on January 11, 2017); offsets, if any." The hearing on Claimant's September 14, 2017 Application for Hearing was set for March 8, 2018 at 1 p.m. The March 8, 2018 hearing was cancelled after the parties learned they were missing medical records necessary to prepare for hearing.

Claimant's Sixth Application for Hearing on Reopening

31. Claimant filed the Application for Hearing that is the subject of this Order on March 6, 2018. Claimant endorsed reasonably necessary medical benefits; petition to reopen, Temporary Total Disability from June 30, 2016 and ongoing; Mistake/Error; no longer at MMI; and worsening of condition. Respondents filed their response to the application for hearing on April 4, 2018 endorsing: "Law of the case; res judicata; estoppel; whether claimant remains at MMI; the relatedness of claimant's alleged worsening and need for continuing treatment; statute of limitations for new conditions; [and] a determination of work-related conditions." The Claim was set for hearing on June 28, 2018 at 1:00 p.m. in Pueblo.

32. As noted above, the parties, absent the Claimant appeared for the June 28, 2018 hearing where they submitted hearing exhibits which were admitted into evidence without objection. No witnesses testified at hearing. The parties requested permission to submit written arguments to the ALJ. The request was granted. The ALJ also permitted the parties to submit their written argument without a page limitation given the extensive prior litigation and the complexity of the claims and defenses presented. Claimant filed an unopposed motion to extend the deadline for filing written argument to August 17, 2018, which was granted. The written position statements were received on the amended deadline at which time the matter became ready for an order.

Claimant's Arguments for Reopening

33. In his April 25, 2017, Petition to Reopen, Claimant seeks reopening of his claim based on a change/worsening of condition, error and mistake. Claimant contends that the evidence is strongly in favor of his position that his claim should be reopened as

his diagnosis/pain has changed significantly since being placed at MMI. In support of his position, Claimant argues that after being placed at MMI, Claimant was discovered to have complex regional pain syndrome (CRPS). At first, the CRPS was confined to the Claimant's right leg, where he originally sustained an injury to his right ankle. However, the CRPS subsequently spread into his arm right arm, and more recently to the left arm causing worsening pain and the need for treatment to different areas of the body. Based upon a careful review of the voluminous records submitted in association with the claim, the ALJ agrees with Claimant that the record evidence supports a finding that his condition has changed and worsened since being placed at MMI and after the October 20, 2016 hearing.

34. Here, Claimant's primary treating physician Dr. Miller, has stated that the Claimant is not at MMI. He stated his opinions in detail in a letter dated October 13, 2017. For ease of reference, some of the significant statements by Dr. Miller in that letter are set forth here. Dr. Miller confirmed that the CRPS in Claimant's right leg and right upper extremity are both related to the work-injury. After stating that Dr. Primack diagnosed CRPS of the right leg on May 6, 2015, Dr. Miller went on to add the following:

> The patient later then developed right upper extremity symptoms and was evaluated by Dr. Bernton with a Comprehensive Consultation performed May 25, 2017, who, again, based upon objective testing, including autonomic test battery, thermography, as well as clinical presentation including signs and symptoms, diagnosed the patient with complex regional pain syndrome type 2 of the right upper extremity which meets the Colorado Workers Compensation criteria for CRPS.
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> * * *
>
> Yes, in my opinion, these two diagnoses are related to the Workers' Compensation injury of September 15, 2011, where the patient was working as a roofing salesman, stepped off a curb, resulting in ankle injury, receiving multiple surgeries, with signs and symptoms later developing into complex regional pain syndrome, and subsequently spreading unilaterally to the right upper extremity.

35. Dr. Miller then went on to explain that Claimant was no longer at MMI. According to Dr. Miller, "[Claimant's] condition has clearly worsened since [being placed at MMI]. As stated above, he subsequently has developed signs and symptoms consistent with complex regional pain syndrome type 2 in the right upper extremity." Claimant's changed diagnosis has precipitated additional treatment focused on curing and relieving him of the ongoing effects of his spreading CRPS.

36. Based upon the record evidence presented, the ALJ finds Dr. Miller's opinion that Claimant's condition has worsened to be supported by not only by his treatment records, but also the reports Dr. Bernton. Dr. Bernton's analysis of Claimant's CRPS and its eventual spread into both arms is sophisticated and favorable to the

Claimant. Some highlights of the treating records that document/support a change in Claimant's condition and a worsening of his diagnosis/pain include the following:

- A January 17, 2017, report form Dr. Miller wherein he noted Claimant's concern that his CRPS was "moving" based upon numbness and tingling in the right arm.

- A February 7, 2017 report of NP Fresques, co-signed by Dr. Miller documenting Claimant's persistent right upper extremity radicular symptoms in a C6 dermatomal which raised concern for migrating CRPS versus potential carpal tunnel or cervical radiculopathy as a cause for Claimant's ongoing symptoms.

- A March 30, 2017 report from Dr. Miller wherein he noted Claimant's ongoing right upper extremity symptoms were "similar to that in the lower extremity", including burning and aching on the lateral portion of the right arm across the radial aspect of the forearm and into the thumb and index finger. EMG testing was completed on this date which failed to "demonstrate evidence of medial neuropathy, i.e. carpal tunnel syndrome, nor evidence of acute denervation. Moreover, Claimant was noted to have "no clinical evidence of cervical radiculopathy. Consequently, thermography and QSART testing was recommended to assess for the spread of CRPS.

- A May 25, 2017 record of Dr. Tashof Bernton offering a very thorough opining documenting the spread of Claimant's CRPS into his right arm based upon both autonomic testing battery and stress thermography testing results conducted at that time. This report documents the start of the problems with the right arm. According to the report, "[Claimant] noted that six months ago he . . . started to have twitching of a finger on his right hand. This was followed progressively by increased pain in the upper extremity and he has ultimately developed swelling, pain, color difference and hyperglesia most prominent in the hand and ulnar distributions but diffusely throughout the hand and proximally into the upper extremity. He notes the presence of swelling, color difference, weather changes, decreased range of motion of the wrist and of the hand itself and some hyperalgesia. Patient denies any injury to the right hand or arm and notes he has had no problems with the hand or arm in the past." Dr. Bernton went on to note that the spread of CRPS from the right leg to the right arm is the second most common pattern seen. (Claimant's Exhibits, Pg. 450). Per Dr. Bernton, "[s]pread ipsilaterally of complex regional pain syndrome from an upper to lower or lower to upper extremity on the same side is the second most common pattern of spread of complex regional pain syndrome." (Claimant's Exhibits, Pg. 450). The most common pattern of spread, according to Dr. Bernton, is "mirror image" spread to the extremity on

the opposite side." Importantly, Dr. Bernton would conclude that Claimant had "complex regional pain syndrome type 2 of the upper extremity as a complication of his initial CRPS."

- In order to eliminate other possible causes for Claimant's right arm symptoms, an EMG was done. A report dated July 7, 2017, ruled out "a right median or ulnar neuropathy, cervical radiculopathy, brachioplexopathy, neurogenic thoracic outlet syndrome or generalized polyneuropathy." (Claimant's Exhibits, Pg. 445-6). Based upon the totality of the evidence presented, the ALJ finds that Claimant's CRPS best accounts for the pain he had been experiencing in his right arm up to the EMG study.

- An October 3, 2017, medical report indicating that Claimant has right CRPS, as well as a documented positive response to treatment for CRPS. (Claimant's Exhibits, Pg. 420).

- Dr. Miller's October 13, 2017 letter outlining Claimant's MMI status, the spread of his CRPS to the upper extremities and its relatedness to the index injury associated with this claim.

- Dr. Miller's continued express opinion on October 31, 2017, November 21, 2017, and January 16, 2018 that Claimant's right lower extremity CRPS had migrated into the bilateral upper extremities.

- The February 6, 2018, treatment report of Dr. Miller documenting that he administered a right L3 sympathetic block and a right stellate ganglion block based on the diagnoses of CRPS in the right arm and right leg. (Claimant's Exhibits, Pg. 395). The response to this treatment was diagnostic for CRPS as Claimant experienced warmth in the right upper extremity along with a visible decrease in the swelling of his right distal extremity, diminishment of allodynia and a slight improvement in his grip.

- A diagnostic stress thermography report of the upper extremities that was completed April 19, 2018. According to the report thermography testing demonstrated asymmetrical temperature differences that supported the diagnosis of CRPS. Accordingly, Dr. Bernton noted: "The findings in the upper extremities are clearly present for complex regional pain syndrome, including inability to fully close the fist and new area of left upper extremity involvement following IV placement." Dr. Bernton noted that even though Claimant's treatment is helping with the CRPS, the CRPS is still showing up on the diagnostic testing. "Integration of findings on thermographic imaging and clinical assessment indicate it is probable that mitigation of sympathetic instability has occurred in response to sympathetic blockade." "Patient

remains symptomatic and clear findings of complex regional pain syndrome remain, both clinically and with autonomic testing battery."

- A report from Dr. Bernton concerning the results of Claimant's April 19, 2018, autonomic testing battery of the upper extremity wherein Dr. Bernton noted that "with 3 points on the laboratory scale and 5 points on the clinical scale, this represents positive diagnostic result for complex regional pain syndrome."

- The April 19, 2018 "Comprehensive Medical Consultation" report from Dr. Bernton that was also written on the same day he did the diagnostic testing, April 19, 2018. This report contains an excellent encapsulation of the history and medical findings that establish the spread of Claimant's CRPS and the worsening of his condition/pain related to his September 15, 2011 industrial injury. The report contains reference to Claimant's development of an onset of "twitching of the finger of the right hand followed progressively by pain in the upper extremity developing into swelling, pain, color difference, and hyperalgesia." Findings were consistent with "complex regional pain syndrome, possibly type 2." The report goes on to indicated that Claimant also experienced an "onset of severe pain in the left forearm and wrist over the dorsoradial aspect following placement of the IV for one of his blocks in the left hand", which had been a "persistent" problem. Claimant pain was documented as being worse in both the upper and lower extremities with activity and worse in the lower extremity with prolonged standing or walking and better following blocks with medication." Physical examination demonstrated a significantly antalgic gait with "failure to go into toe off on the right foot" and with the right foot being externally rotated while ambulating. Examination of the upper extremity demonstrated "some hyperalgesia over the distal forearm on the right and also over the radial aspect of the distal forearm dorsally on the left." Claimant was unable to make a fist fully with either hand" and a tremor was present with extension of the fingers. "Asymmetry of coloration [was] noted and there is some fusiform swelling of the fingers…." Dr. Bernton opined that Claimant had CRPS in three of his limbs, and was likely in need of some additional treatment that had not been tried. According to Dr. Bernton, consideration of bisphosphonate (with due regard for potential side effects including osteonecrosis of the jaw) might prove helpful in this case."

- A report from a May 29, 2018 visit with Dr. Miller wherein he documented that, Claimant was seen for right L3 sympathetic block and right stellate ganglion block, which was done to treat CRPS of both the right lower extremity and the right upper extremity.

- A report from a June 5, 2018 follow-up visit with Dr. Primack wherein he documented the following: "[Claimant] underwent a repeat QSART per Dr. Bernton. This confirms CRPS which has migrated to his upper extremities. Claimant was assessed with "Complex regional pain syndrome, bilateral upper extremities and right lower extremity".

37. Given the above, the ALJ finds that Dr. Bernton performed diagnostic testing to confirm the spread of CRPS to the upper extremities, not once, but twice. Both tests yielded results consistent with the presence of CRPS in the arms, albeit not in the left upper extremity until April 29, 2018, following placement of an IV in the left hand for one of his blocks. Nonetheless, the evidence presented persuades the ALJ that Claimant's pain pattern had changed and he was definitively diagnosed with CRPS involving the right upper extremity by Dr. Bernton on May 25, 2017. Importantly, Dr. Bernton related Claimant's right upper extremity symptoms and treatment to his initial CRPS. While Dr. Miller raised concern for the potential that Claimant's CRPS had spread as early as February 2017, CRPS was not confirmed by objective diagnostic testing until Dr. Bernton completed both an autonomic battery and stress thermography testing on May 25, 2017. Accordingly, the ALJ finds that there was an objective change in Claimant's condition, both diagnostically and symptomatically following his placement at MMI as of May 25, 2017, after the October 20, 2016 hearing.

38. Dr. Rachel Basse conducted an independent medical examination (IME) of Claimant at the request of Respondents on February 27, 2018. As part of the IME, Dr. Basse reviewed all available medical reports from September 16, 2011 to February 13, 2018 and summarized them in her report. Dr. Basse concluded Claimant remains at MMI for his September 15, 2011 work injury and his upper extremity complaints are not related to the work injury and do not affect the MMI status of Claimant's September 15, 2011 work injury.

39. Dr. Basse found Claimant's upper extremity symptoms were first documented in the medical records on January 13, 2017 by Dr. Miller of Dr. Primack's office, more than five years after Claimant's injury. The symptoms and Claimant's alleged disability from his right upper extremity symptoms, began more than five (5) years after Claimant's September 15, 2011 work injury. Dr. Basse found it would be very odd for Claimant to develop symptoms in his right upper extremity related to his September 15, 2011 injury when the CRPS in his right lower extremity remained in the lateral aspect of his right leg. Dr. Basse found Claimant does not have CRPS symptoms in the medial portion of his right leg and foot. Dr. Basse opined the CRPS would have spread into the medial portion of his right lower extremity before it moved up into his right upper extremity. Further, Dr. Basse opined it would be unusual for Claimant to develop CRPS in his upper extremities more than five years after the work injury.

40. Dr. Basse also concluded that Claimant's right lower extremity CRPS may have burned itself out given the time and amount of treatment since Claimant was diagnosed with CRPS and his improved symptoms. Dr. Basse recommended that Dr. Primack's group reevaluate Claimant's right lower extremity CRPS to determine

whether Claimant continued to suffer from CRPS in this right leg. Dr. Basse recognized there are some parts of Claimant's history and physical exam that support a continuing diagnosis of CRPS in Claimant's right lower extremity, but the majority of his history and physical examination did not support a diagnosis of CRPS in his right lower extremity. Dr. Basse noted it had been three years since Claimant was tested for CRPS in his right lower extremity. Dr. Basse opined CRPS can and does "burn out" over time.

41. In an April 10, 2018 report, Dr. Primack agreed with Dr. Basse's recommendation and ordered CRPS testing. As noted above, testing, including a stress thermogram of both the upper and lower extremities, was conducted by Dr. Bernton on April 19, 2018, which testing results demonstrated that Claimant continues to experience symptoms from CRPS in both his right lower extremity and in this upper extremities. Dr. Bernton did not comment on Claimant's MMI status.

42. Dr. Primack evaluated Claimant again on June 5, 2018. Dr. Primack addressed the testing by Dr. Bernton, noting that Claimant's CRPS had migrated to the upper extremities. He also noted that Claimant was receiving regular injections to control his symptoms and was being prescribed Levorphanol, an opioid medicine designed to control his pain. Claimant reported the injections provided him with more pain relief than Levorphanol. Consequently, Dr. Primack reported he would start weaning Claimant off Levorphanol. Dr. Primack did not comment on Dr. Bernton's suggestion, as expressed on April 19, 2018 that Claimant may need of some additional treatment that had not been tried, including consideration of bisphosphonate, with due regard for its potential side effects. Dr. Primack did not address Claimant's MMI directly. Rather, he opined simply that overall Claimant was doing well status post injections.

43. Respondents contend that the evidence supports a finding that Claimant remains at MMI for the effects of his September 15, 2011 injury. As support for their contention, Respondents cite Dr. Primack's April 17, 2018 report wherein he noted: "I do believe the patient is still at Maximum Medical Improvement." Respondents also rely upon Dr. Bradley's March 8, 2018 report which indicates Claimant attained MMI on February 28, 2014 as well as Dr. Basse's opinion as stated in her February 28, 2018 report that in her opinion Claimant remains at MMI. Based upon a totality of the evidence presented, the ALJ is not persuaded. As cited, Drs. Basse and Primack reached their opinions regarding MMI prior to the completion of diagnostic testing by Dr. Bernton on April 19, 2018. The ALJ regards the results of Claimant's May 25, 2017 and April 19, 2018 diagnostic testing as key medical evidence that establishes that Claimant's condition had fundamentally changed and that he was experiencing new and worsening pain which in the eyes of Dr. Bernton warranted additional treatment that had not been tried.

44. Based upon the evidence presented, the ALJ is persuaded that Claimant's condition had objectively changed by May 25, 2017, when it was confirmed that his CRPS had spread to his upper extremities. To the extent that they differ from the opinions of Dr. Bernton, the ALJ finds the opinions of Drs. Primack, Bradly and Basse regarding the relatedness of Claimant's upper extremity symptoms to his CRPS

unpersuasive. Moreover, the evidence presented convinces the ALJ that Claimant's worsening CRPS diagnosis and symptoms, more probably than not, warranted additional curative treatment which he had not received by April 19, 2018, when repeat testing confirmed the presence of CRPS in the upper extremities for a second time, prompting Dr. Bernton to comment regarding Claimant's need for additional care. Accordingly, the ALJ finds that Claimant's condition was no longer stable and was likely to respond to and improve with further curative treatment as of May 25, 2017. Simply put, the ALJ finds that Claimant was no longer at MMI as of May 25, 2017. To the extent there is evidence to the contrary, including the opinions of Drs. Primack, Bradley and Basse, the Court has considered such evidence and finds it unpersuasive.

45. Claimant has proven by a preponderance of the evidence that he is entitled to additional TTD benefits beginning May 25, 2017 and continuing until such benefits can be terminated in accordance with law.

46. Respondents' reliance on res judicata or issue preclusion is misplaced as such doctrines do not apply where the issue involves reopening a claim. *Casias v. Interstate Brands Corporation*, W.C. No. 4-740-818-01 (March 21, 2013). This is especially true where the evidence here, involving the spread of the CRPS into the right and left arms, is different from the evidence that was presented at Claimant's prior hearings on reopening --- as none of Claimant's prior hearings involved a petition to reopen based upon the spread of CRPS into the upper extremities.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principles

A. The purpose of the Workers' Compensation Act of Colorado (Act) §§8-40-101, *et seq*. C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section* 8-40-102(1), C.R.S. The claimant bears the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-43-301(1), C.R.S.; *Faulker v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of a claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. A workers' compensation claim is decided on its merits. Section 8-43-201, *supra*.

B. In accordance with §8-43-215, C.R.S., this decision contains specific findings of fact, conclusions of law and an order. In rendering this decision, the ALJ has

made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice, or interest in the outcome of the case. Colorado Jury Instructions, Civil, 3:16. As found here, the ALJ credits the opinions of Dr. Bernton and the evidentiary record as a whole to conclude that Claimant continues to suffer from a medical condition requiring ongoing maintenance care, i.e. right lower extremity CRPS which subsequently spread to his upper extremities resulting in worsening symptoms and the need for additional curative treatment, including but not limited to the administration of bisphosphonate, that has not been attempted to date. Accordingly, the ALJ concludes that Claimant has proven that there has been a change in his condition and that he was no longer at MMI as of May 25, 2017. As found, the contrary opinions of Drs. Primack, Bradley and Basse, are unpersuasive. Based upon the evidence presented, the ALJ concludes that reopening of this claim is appropriate.

Reopening of the Claim

D. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based upon a change in condition. In seeking to reopen a claim the Claimant shoulders the burden of proving his/her condition has changed and that he/she is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo.App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or, as presented here to a change in a Claimant's physical condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo.App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (Industrial Claims Appeals Office, Oct. 25, 2006).

E. The question of whether a claimant has proven a change in condition of the original compensable injury or a change in his/her physical or mental condition which can be causally connected to the original compensable injury is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12, P.3d 844 (Colo.App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo.App. 1999); *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits relating to the original injury are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo.App. 2000); *Brickell v. Business Machines,*

Inc., 817 P.2d 536 (Colo. App. 1990)(reopening is appropriate if additional benefits are warranted). Reopening is not warranted if once reopened, no additional benefits may be awarded. *Richards v. Industrial Claim Appeals Office, supra.*; *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo.App. 1988).

F. In this case, the evidence presented persuades the ALJ that Claimant has proven that his work related condition, i.e. CRPS has worsened since being placed at MMI on February 28, 2014. At the time of MMI, Claimant was experiencing symptoms associated with right lower extremity CRPS only. He was maintained at MMI and the symptoms associated with his right lower extremity CRPS had not changed by the time of the October 20, 2016 hearing. Indeed, Claimant's symptoms in his right lower extremity were similar to those he experienced when he was placed at MMI and his pain levels similar to those he had at MMI. Consequently, the evidence presented during the October 20, 2016 hearing was insufficient to establish a worsening of condition to warrant reopening of the claim and the request to reopen the claim was denied and dismissed.

G. Subsequently, Claimant's CRPS spread to his upper extremities and he experienced worsening pain associated with that CRPS. By April 19, 2018, Dr. Bernton recommended new and different treatment that had not be tried previously. The ALJ is persuaded that the evidence presented establishes a causal link between Claimant's September 25, 2011 industrial injury, his lower extremity CRPS and its eventual spread to his upper extremities. Moreover, the evidence is persuasive of the fact that Claimant's condition has fundamentally changed and worsened as measured objectively by diagnostic testing on May 25, 2017. Moreover, the evidence presented convinces the ALJ that Claimant is in need of treatment designed to cure and relieve him form the continued effects of this upper extremity CRPS. Consequently, the ALJ concludes that Claimant's has proven a worsening of his condition. Therefore, the request to reopen this claim is GRANTED.

H. Because Claimant has proven that he is entitled to reopening based upon a change of condition, this order does not address the request to reopen based upon error or mistake.

Claimant's Entitlement to TTD

I. Pursuant to § 8-43-303(1), C.R.S. "[a]t any time within six years after the date of injury, . . . an administrative law judge may . . . review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change of condition . . ." Based upon the evidence presented, the ALJ concludes that Claimant filed his petition to reopen the claim within the prescribed statutory time limits. Nonetheless, Respondents assert that Claimant is not entitled to TTD pursuant to § 8-41-206, C.R.S. because any disability associated with the spread of CRPS to his upper extremities did not manifest for more than five years after the date of injury. Section 8-41-206, C.R.S. provides that "[a]ny disability beginning more than five years after the date of injury shall be conclusively presumed not to be due to the injury, except in cases of disability or death resulting from exposure to radioactive materials, substances, or machines or to

fissionable materials, or any type of malignancy caused thereby, or from poisoning by uranium or its compounds, or from asbestosis, silicosis, or anthracnosis." Because any perceived or founded disability was not caused any of the aforementioned materials, machines or substances and began five years after the September 25, 2011 injury, Respondents contend that Claimant precluded from receiving TTD. The ALJ is not convinced. Rather, the ALJ concludes that Respondents have misinterpreted the application of the aforementioned statutory provision to this case. In this case, Claimant's disability had manifest itself at the time he was placed at MMI as evidenced by permanent impairment and the imposition of restrictions. Consequently, his disability began inside of five years. The ALJ reads § 8-41-206, C.R.S. to indicate that any disability that does not "begin", i.e. manifest itself within five years from the date of injury is presumed not to arise from the injury except in those cases where disability is caused by exposure to radioactive materials, substances, or machines or to fissionable materials, or any type of malignancy caused thereby, or from poisoning by uranium or its compounds, or from asbestosis, silicosis, or anthracnosis. While the question of whether Claimant's condition worsened, thereby causing greater disability as evidenced by further impairment of Claimant's earning capacity (which may entitle Claimant to TTD) remains unanswered, the ALJ finds the evidence presented conclusive of the fact that his disability began less than five years after he was injured on September 25, 2011. Consequently, the ALJ finds and concludes that Respondents reliance on § 8-41-206, C.R.S. as a bar to TTD in this case is misplaced.

J. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo.App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

K. In this case, the medical record supports that Claimant was assigned 15% scheduled impairment of his leg at the hip by final admission of liability (FAL) filed March 17, 2014. In the medical report outlining Claimant's permanent partial impairment, Dr. Bradly noted the following restrictions: "This will affect his daily living activities and his job by limiting him to not lift over 65 lbs. or carry over 35 lbs. He is not to push over 100 lbs. or pull over 50 lbs." At the time of the report of MMI/impairment, Claimant had not been assessed as having CRPS in his upper extremities. Based upon the medical record evidence, the ALJ is persuaded that the spread of CRPS to Claimant's upper extremities, as definitively diagnosed on May 25, 2017, probably restricted the use of his arms thereafter, further impairing his wage earning capacity.

While the evidentiary record is devoid of references to specific upper extremity restrictions after May 25, 2017, the ALJ finds it reasonable to conclude that Claimant's upper extremity use was likely restricted beyond that allowed for by Dr. Bradly when he placed Claimant at MMI. Simply put, the medical record evidence regarding the condition of Claimant's arms along with the treatment employed to treat the pain associated with his upper extremity CRPS persuades the ALJ that Claimant was probably unable to lift 65 lbs., carry 35 lbs., push 100 lbs. or pull 50 lbs.

L. Based upon the evidence presented, the ALJ is persuaded that Claimant was "disabled" within the meaning of § 8-42-105, C.R.S. beginning May 25, 2017, during which time frame he experienced a wage loss. Thus, he is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Consequently, the ALJ concludes that Claimant is entitled to TTD benefits beginning May 25, 2017 and ongoing until such benefits can be terminated according to law.

Collateral Estopple (Issue Preclusion) & Res Judicata (Claim Preclusion)

M. Issue/Claim preclusion principles, although developed in the context of judicial proceedings, may be applied to administrative proceedings in Workers Compensation Claims. *Sunny Acre Villa Inc. v. Cooper*, 25P3d 44 (Colo.App.). Issue and claim preclusion work to preclude the relitigation of matters that have already been decided. *Argus Real Estate, Inc. v. E-470 Pub Highway Auth.,* 109 P3d 604, 608 (Colo. 2005). The doctrines are intended to promote judicial economy and to confirm the finality of judgments by preventing inconsistent decisions. *Argus,* 109 P3d at 608, 611. As found here, Respondents' reliance on res judicata or issue preclusion is misplaced in this case as the issues/claims begin litigated are different from those litigated at Claimant's prior hearings on reopening. Neither of the prior hearings involved a petition to reopen based upon the spread of CRPS into the upper extremities. Insofar as Respondents have failed to meet an element required to be established for the doctrines of issue preclusion/claim preclusion to apply, the ALJ concludes that Claimant is not estopped/precluded from litigating the issue of whether Claimant's cased should be reopened based upon a change/worsening of his diagnosis/condition.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim based upon a change/worsening of condition is GRANTED.

2. Claimant's request for additional TTD benefits after MMI is GRANTED IN PART. The evidence presented establishes that Claimant's condition changed/worsened on May 25, 2017. Consequently, Respondent-Employer shall pay Claimant, along with computed interest at a rate of 8% per annum on all amounts of

compensation not paid when due, TTD benefits from May 25, 2017 and ongoing until such benefits can be terminated according to law.

3. All matters not determined herein are reserved for future determination.

DATED: September 13, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Whether the recommended electric mobility scooter is reasonable and necessary medical treatment.

II. Whether Respondents failed to comply with WCRP 16, and if so, whether such failure mandates a finding that the electric mobility scooter is reasonable and necessary medical treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was born on April 14, 1993. On the date of the hearing, Claimant was 25 years old.
2. Claimant worked for Employer as a credit manager. On October 29, 2014, Claimant suffered an admitted work-injury to her right knee when she tripped while lifting a twin bunk bed mattress.
3. Throughout the course of her treatment, Claimant has undergone four surgeries on her right knee. Claimant's condition has progressed and she has been diagnosed with complex regional pain syndrome (CRPS) and being treated for such.
4. On February 8, 2018, shortly before the recommendation for an electric scooter was made, Claimant was evaluated by Dr. Kathy McCranie. Dr. McCranie evaluated Claimant and noted that although Claimant meets the Budapest criteria for clinical CRPS, she has not completed a diagnostic workup for this condition. Dr. McCranie also noted that review of Claimant's past medical history indicates a pre-existing history of significant psychological issues including Somatic Disorder and Conversion Disorder and that these conditions might be impacting Claimant's symptoms and prolonging her recovery. Based on her assessment, Dr. McCranie concluded that in addition to the additional diagnostic testing to confirm whether Claimant has CRPS, she recommended a psychiatric evaluation with review of past psychiatric history, and indicated that "*it is extremely important the patient's treatment be based on objective rather than subjective pain complaints*." (Emphasis added.) (Ex. A, p. 14).
5. There was no credible and persuasive evidence submitted that Claimant has undergone the additional diagnostic testing and psychiatric evaluation recommended by Dr. McCranie.
6. Dr. Thos Evans is an authorized treating physician (ATP) of Claimant and resides in Colorado. Claimant, however, was going to move to Washington.

7. On February 26, 2018, Dr. Evans wrote a letter regarding his assessment of Claimant and referring Claimant for further treatment at the Rehabilitation Institute of Washington. Dr. Evans also recommended Claimant pursue treatment through the specific CRPS program at the Institute. Dr. Evans indicated that his office would be sending all of Claimant's medical records to the Institute in Washington so they could take over her care.

8. Dr. Evans stated in his letter:

> [Claimant] has been dealing with severe CRPS symptoms in her right lower extremity following a series of right knee surgeries. She is extremely hypersensitive to light touch, especially around her right foot, and has allodynia and hyperalgesia of the right lower extremity. We have also noticed temperature discrepancies between her legs, and the right leg is often a bright purple color. This is one of the more severe CRPS cases we have seen here at the Steadman Clinic.

(Ex. 1, pg. 1).

9. In his February 26, 2018 letter, Dr. Evans also stated:

> [Claimant] will be moving to Seattle, we would like her to continue care with the Rehabilitation Institute of Washington, and we have recommended she pursue the specific CRPS program they have at this institute.

(Ex. 1, pg. 1).

10. In March, 2018, Claimant moved to Tacoma, Washington.

11. On March 12, 2018, despite transferring her care to another provider, but still being an authorized provider, Dr. Evans issued a "[p]rescription for [m]obility [s]cooter for [Claimant]." (Ex. 2, pg. 2). In attempting to explain the need for the mobility scooter, Dr. Evans stated:

> [Claimant] has been suffering from a severe CRPS flare after her right knee surgery on 8/11/17. She has been unable to transition off of crutches due to her severe leg pain. [Claimant] states any weight bearing on her leg increases her pain. She is having difficulty with mobility secondary to her pain. I recommended a scooter to allow for more mobility and limit her weight bearing on this leg. Please consider coverage of a scooter to increase her mobility while she is obtaining treatment of her CRPS pain.

(Ex. 2, pg. 3).

12. There is no credible and persuasive evidence establishing when the prescription for the electric scooter was provided to Respondents in an attempt to obtain prior authorization. (Ex. 2).

13. In addition, there is a lack of credible and persuasive evidence that a proper request for prior authorization for the electric scooter was presented to Respondents as set forth in Rule 16-10(E). To complete a proper request for prior authorization pursuant to Rule 16-10(E), the provider shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting medical documentation. Supporting medical documentation is defined as documents used in the provider's decision-making process to substantiate the need for the requested service or procedure. Although Dr. Ayyar's report indicates he reviewed additional documentation he received from Sedgwick, there is no indication the documentation was provided by Dr. Evans and was used in his decision making process, or whether the documentation was provided by Sedgwick to Dr. Ayyar for his consideration in rendering an opinion.

14. Therefore, there is no credible and persuasive evidence that anything other than the March 12, 2018, prescription from Dr. Evans was presented to Respondents at some point in time.

15. On March 19 or March 22, 2018, Respondents' referred the recommendation for an electric scooter to Dr. Ayyar to review the request. (Exhibit C).

16. On March 26, 2018, Dr. Ayyar issued a report and found the scooter was not reasonable and necessary. Dr. Ayyar explained:

> The request for a scooter 4WHLGO Go Elite for the right knee is not medically necessary. As noted on page 172 of the Colorado Chronic Pain Disorder Medical Treatment Guidelines, purchase or rental of articles of durable medicals to include the item in question should be done only if assessment by the physician and/or therapist has determined the effectiveness, compliance, improved, and/or maintained function by its application. Here, however, both the requesting provider's 03/12/18 prescription form and an IME report dated 02/18/18 suggested that the request for a scooter in question was being driven largely owing to the claimant's complaints of pain and the fact that the claimant was described as exhibiting pain dependent behaviors. It did not appear, in short, that the claimant had a bona fide gait or mobility deficit compelling provision of the device in question. Furnishing the claimant with the device in question would likely have minimized rather than maximized the claimant's day-to-day activity levels and functional levels. The request in question, thus, was at odds with page 172 of the Colorado Chronic Pain Disorder Medical Treatment Guidelines. Therefore, the request for scooter 4WHLGO Go Elite for the right knee is not medically necessary.

(Ex. C, p. 18).

17. Pursuant to the Colorado Medical Treatment Guidelines, the purchase of durable medical equipment is addressed. Although not directly on point regarding an electric scooter, the guidelines provide:

> It is recognized that some patients may require ongoing use of self-directed modalities for the purpose of maintaining function and/or analgesic effect. Purchase or rental of modality based equipment should be done only if the assessment by the physician and/or physical/occupational therapist has determined the effectiveness, compliance, and improved or maintained function by its application. It is generally felt that large expense purchases such as spas, whirlpools, and special mattresses are not necessary to maintain function.

See Department of Labor and Employment, Division of Workers Compensation, CCR 1101-3, Rule 17, Exhibit 9, Chronic Pain Disorder Medical Treatment Guideline, pg., 172.

18. On March 26, 2018, Respondents' notified Dr. Evans and the parties that the recommended mobility scooter was denied. (Ex. 5, pg. 9).

19. On July 9, 2018, Dr. Heather Kroll, Claimant's ATP at the Rehabilitation Institute of Washington issued a letter stating:

> [Claimant] is currently a patient at our clinic, participating in a structured intensive multidisciplinary program. She currently ambulates with forearm crutches and reportedly does well for short distances; however, longer distances are a struggle. Because of this, she would benefit from a mobility scooter to aid in travel for longer distances.

(Ex. 3, pg. 4).

20. Dr. Kroll's July 9, 2018, letter specifically notes that Claimant's mobility, as subjectively reported by Claimant, is limited to short distances. She also notes that the scooter will, according to Claimant, aid in travel for longer distances. But, Dr. Kroll fails to articulate how the electric scooter will improve Claimant's overall functioning, relieve her symptoms, or prevent the development of other problems. In other words, Dr. Kroll, who is currently treating Claimant at the Rehabilitation Institute of Washington, has failed to articulate a sufficient medical basis to support a finding that an electric scooter is medically reasonable and necessary.

21. On July 24, 2018, Claimant was evaluated by PA-C Kelsey Wozniak at the Rehabilitation Institute of Washington. Under the "Strength & Conditioning" section, PA-C Wozniak noted, "[Claimant] is still struggling with significantly increasing weight bearing on her R foot due to reported pain symptoms." (Ex. 4, pg. 7).

22. Claimant testified that prior to moving to Washington and beginning treatment with the Rehabilitation Institute of Washington, she was unable to ambulate without the use of crutches and unable to bear any weight on her right leg.

23. Claimant testified that she is currently able to function "better than it was." She testified that she is able to "get up and down" by herself. She is able to "put a little bit of weight" on her leg but is not able to "go far distances".

24. Claimant testified she is unable to stand on her own but with crutches can stand "10 to 15 minutes before [she] starts to really hurt." Claimant testified that she can walk with crutches "maybe a block before it starts to really hurt." Claimant also testified that she uses a manual wheelchair to travel longer distances.

25. Claimant testified that she believes the recommended mobility scooter would help her "to get out of the house" and for moving longer distances.

26. It is found that neither Dr. Evans nor Dr. Kroll credibly and persuasively explained how the use of an electric scooter would improve or maintain function for Claimant.

27. It is also found that neither Dr. Evans nor Dr. Kroll explained how the use of the electric scooter would be more effective than the manual wheelchair Claimant testified she uses when traveling longer distances.

28. Claimant has failed to establish by a preponderance of the evidence that an electric scooter is reasonable and necessary to cure or relieve her from the effects of her injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008).

I. Whether the recommended mobility scooter is reasonable and necessary medical treatment.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In this case, Claimant has failed to establish by a preponderance of the evidence that the electric mobility scooter is reasonable and necessary to cure or relieve Claimant from the effects of her industrial injury. Although Dr. Evans indicated that he recommended the scooter to allow for more mobility and to limit her weight bearing on her right leg which would reduce her pain complaints, (as self-reported by Claimant), the ALJ does not find his opinion to be persuasive that the electric scooter is medically reasonable and necessary. For example, there is no indication how being able to travel greater distances in an electric scooter will medically improve her condition or allow her to engage in activities of daily living, which she cannot perform while using crutches or a manual wheelchair. In addition, Dr. Evans failed to provide a credible and persuasive rationale as to why the electric scooter is medically reasonable and necessary in light of the issues raised by Dr. McCranie. He also failed to address how the use of an electric scooter is medically reasonable and necessary while Claimant is undergoing treatment in Seattle to increase her mobility and increase the use of her right lower extremity and not decrease the use of her right lower extremity.

As found, Claimant has crutches and she also has a manual wheel chair which she can use, if she thinks she needs it, to travel longer distances. Moreover, the use of an electric scooter seems contrary to the treatment being provided at the Rehabilitation Institute of Washington which is working with Claimant to increase the weight bearing and use of her right lower extremity.

In addition, Dr. McCranie opined that although Claimant meets the Budapest criteria for CRPS, she has not had sufficient diagnostic testing, nor a psychiatric evaluation, to assist in confirming a diagnoses of CRPS. In light of such, Dr. McCranie concluded that treatment recommendations should be based on objective data, instead of Claimant's subjective pain complaints.

Contrary to Dr. McCranie's opinion, which this ALJ credits and finds persuasive, Dr. Kroll and Dr. Evans appear to have prescribed the scooter based on Claimant's subjective pain complaints and not on objective data and the testing and evaluations recommended by Dr. McCranie.

Furthermore, Dr. Kroll, who is currently treating Claimant at the Rehabilitation Institute of Washington, failed to articulate the medical necessity for the electric scooter. As found, Dr. Kroll's July 9, 2018, letter specifically notes that Claimant's mobility, as subjectively reported by Claimant, is limited to short distances. She also notes that the scooter will, according to Claimant, aid in travel for longer distances. But, Dr. Kroll fails to articulate how the electric scooter will improve Claimant's overall functioning, relieve her symptoms, or prevent the development of other problems. What is missing from Dr. Kroll's recommendation for an electric scooter is how the electric scooter will provide additional mobility that will further alleviate Claimant from the effects of her industrial injury and that the need for such additional mobility is medically reasonable and necessary.

If Claimant was unable to use her crutches, was unable to safely ambulate with her crutches, or was developing other medical conditions due to the use of her crutches, those factors could be used to support a finding that an electric scooter is reasonable and necessary. But, those factors are not present in this case.

In addition, although Claimant testified that an electric scooter would allow her to get out of the house and allow her to travel longer distances, there was a lack of credible and persuasive evidence presented at hearing demonstrating where Claimant would use the electric scooter, where she would go with the electric scooter, and how she would transport her electric scooter anywhere else based on her inability to bear her full weight on her right lower extremity.

Therefore, the ALJ concludes Claimant has failed to establish by a preponderance of the evidence that an electric scooter is reasonable and necessary medical treatment at this time.

II. Whether Respondents failed to comply with WCRP 16, and if so, whether such failure mandates a finding that the electric mobility scooter is reasonable and necessary medical treatment.

Claimant contends Respondents failed to timely respond to Dr. Evans' prescription for the electric scooter and therefore payment for the scooter is deemed authorized and Respondents are responsible to pay for the scooter.

Workers' Compensation Rule of Procedure 16-10(C) provides that Respondents have seven (7) business days from receipt of the provider's completed request for prior authorization, as defined in section 16-10(E). The duty to respond to a provider's written request applies without regard for who transmitted the request. However, in order to trigger the time requirements of Rule 16-10(C), there must be a "proper request" as defined by section 16-10(E). A "proper request" pursuant to Rule 16-10(E) requires the following:

1. The provider shall concurrently explain the reasonableness and the medical necessity of the services requested,
2. The provider must also provide relevant supporting medical documentation, and
3. The supporting medical documentation is defined as documents used in the provider's decision-making process to substantiate the need for the requested service or procedure.

See WCRP 16-10(E)

As found, there is no credible and persuasive evidence establishing when the prescription for the electric scooter was provided to Respondents in an attempt to obtain prior authorization. In addition, there is a lack of credible and persuasive evidence that a proper request for prior authorization for the scooter was presented to Respondents as required by Rule 16-10(E).

To complete a proper request for prior authorization pursuant to Rule 16-10(E), the provider shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting medical documentation. Supporting medical documentation is defined as documents used in the provider's decision-making process to substantiate the need for the requested service or procedure. Although Dr. Ayyar's report indicates he reviewed additional documentation he received from Sedgwick, there is no indication the documentation was provided by Dr. Evans and was used in Dr. Evans' decision making process, or whether the documentation was provided by Sedgwick to Dr. Ayyar for his consideration in rendering an opinion. Therefore, the timing of any response is irrelevant.

Moreover, even if the request was proper, Respondents' denial was timely. Dr. Ayyar's report indicates he received a facsimile from Sedgwick on March 19, 2018, and the referral on March 22, 2018. Using either date, his report dated Mach 25, 2018, was mailed to Claimant and Dr. Evans on March 26, 2018. Therefore, even if there had

been a proper request, Respondents timely responded to the request pursuant to Rule 16.

In addition, even if Respondents failed to timely respond to a proper request for prior authorization for the electric scooter, the ALJ does not find such a failure mandates a finding that Respondents are liable for the disputed medical benefit pursuant to Rule 16, unless Claimant also establishes the medical benefit is reasonable and necessary to treat the work injury. And, Claimant has failed to establish by a preponderance of the evidence that an electric scooter is reasonable and necessary to treat her work injury.

Therefore, the ALJ concludes Claimant has failed to establish that Respondents violated Rule 16 and are responsible for payment for the electric scooter.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for an electric scooter is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 13, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-066-750-02

ISSUE

- Whether Respondents proved by a preponderance of the evidence that Claimant's indemnity benefits should be reduced by 50% due to Claimant's willful failure to obey a reasonable safety rule pursuant to C.R.S. section 8-42-112(1)(a) and (b).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a machine operator who Employer hired on November 18, 2004. Employer is a Colorado based steel contractor that employs shop laborers, including machine operators, fitters, welders, and fitter/welders.

2. Employer adopted and enforces to a company safety policy. Employer provides new employees a copy of its safety manual, and requires employees to certify they have reviewed the policies. Further, Employer's Safety Supervisor provides job safety training when an employee is first hired and when an employee starts a different position on the shop floor. Employer provides mandatory monthly safety training meetings often covering safe material handling practices. Employer has a seven-person safety committee. Employer enforces its safety rules, and when an employee receives written discipline for a safety rule violation, he or she loses their quarterly gain share for that quarter.

3. Claimant participated in new hire orientation and safety training. On January 7, 2015, Claimant certified that he reviewed the latest edition of Employer's safety manual. Claimant attended mandatory monthly safety meetings throughout his thirteen plus years with Employer.

4. Claimant attended three safety meetings exclusively devoted to safe material handling during the year prior to his work injury, including a meeting held less than a month before his injury. Kelly Miller, Employer's Quality Control Manager, ran the safety meetings and repeatedly emphasized that Employer's safe material handling policy required employees to set materials and material bins on flat, stable surfaces, which include floors and work horses. Outside of the safety meetings, Mr. Miller regularly reminded Claimant of safe material handling and counseled Claimant several times when he observed Claimant performing unsafe acts. Employer did not consider Claimant's prior unsafe acts to be serious enough to result in formal written discipline or loss of gain share.

5. Mr. Miller confirmed that Employer wrote up employees for unsafe material handling both before and after Claimant's injury.

6. On January 12, 2018, Hugo Carrazco, a fitter working on the shop floor with Claimant, placed a parts order requesting materials (angle irons) be brought to his work station. Claimant began moving the heavy angle irons from one side of the shop floor to Mr. Carrazco's workstation on the other side of the shop floor. Claimant gathered the angle irons in a bin next to Claimant's workstation. Claimant then used an overhead remote operated crane to hoist the bin and move it to a wheeled cart. Once Claimant lowered the bin onto the cart, he unhooked the bin from the crane so he could push the cart to the other side of the shop.

7. Mark Tanner, a fitter/welder, was walking by when he noticed Claimant by the cart. The bin was already on the cart, but Claimant still needed to push the cart to the other side of the shop. Because the bin of angle irons was heavy, Mr. Tanner helped Claimant push the cart towards Mr. Carrazco's workstation.

8. As the cart arrived at the east side of the shop, Mr. Carrazco walked by, and told Claimant to move the bin of angle irons to the floor of his workstation in front of a large stack of 3" x 3" metal tubes. He pointed to the floor to communicate non-verbally where he wanted the bin. Mr. Tanner, who was standing next to Claimant, heard Mr. Carrazco's instructions and described them as clear.

9. Mr. Tanner is a member of Employer's safety committee. He testified that if Mr. Carrazco had instructed Claimant to move the bin to the top of the stack of tubes, as Claimant claims, he would have immediately corrected those instructions because they created a dangerous situation and violated Employer's safe material handling policy. Mr. Tanner testified that he left to return to his own work and saw Mr. Carrazco walked over to his workstation and point directly at the ground in front of the stack of 3" x 3" tubes, again showing Claimant where he wanted him to move the bin.

10. The ALJ finds the testimony of Mr. Carrazco and Mr. Tanner regarding Mr. Carrazco's instructions to Claimant about where to place the bin is credible and persuasive. They each corroborated the same events, and their testimony is reasonable and consistent with Employer's policy and training.

11. After Claimant received Mr. Carrazco's instructions, Claimant hooked the metal bin to a second crane, and he hoisted the bin from the cart, moving the bin towards Mr. Carrazco's station. However, instead of lowering the bin to the floor, Claimant lowered the bin on top of a large stack of 3" x 3" heavy iron tubes.

12. The tubes were approximately five rows wide, of lengths differing between ten and twenty feet, and stacked approximately three feet high. A twenty foot 3" x 3" tube could weigh up to 100 pounds. The tubes are not truly flat, and do not sit square. An oil-based product used during the manufacturing process covers the tubes making them slippery. A stack of 3" x 3" tubes, such as the stack in front of Mr. Carrazco's workstation, is not a stable surface.

13. Claimant testified that the stack looked stable to him and that he tested its stability with his hand. Given the totality of the evidence, including the description above

of the stacked tubes and Employer's witnesses' testimony that the risk was obvious, the ALJ finds Claimant's testimony is not reasonable or credible. The ALJ also finds that Claimant's description of the events is unlikely.

14. Employer's witnesses testified that the stack of 3" x 3" tubes described above is an obviously dangerous surface to place material, such as a bin. They all recognized that whatever a worker placed on the stack could fall off, and/or cause the stack itself to shift, resulting in the entire load coming down.

15. On the date of the accident, directly behind the stack of 3" x 3" tubes was a stack of three equal length 14" x 6" tubes. The ALJ finds it more likely true than not that Claimant lowered the bin on the stack of 3" x 3" tubes. The bin did not lay flat on the 3" x 3" tubes; instead, it leaned against the larger and higher stack of 14" x 6" tubes.

16. Nathan Everson, a fitter whose station was next to Mr. Carrazco's station, saw Claimant lower the bin onto the 3" x 3" tubes. He recognized immediately that Claimant had created a dangerous situation. Before he could respond, Claimant pulled the bin toward himself, apparently trying to level the bin on the 3" x 3" tubes before unhooking the bin from the crane. At that time, the 3" x 3" tubes shifted and several of those tubes came down on Claimant's left leg. Claimant's left leg was wedged between an "L" piece of iron on the ground, and the fallen tubes, with other tubes landing on his leg, resulting in multiple left leg and ankle fractures.

17. Claimant's left leg was trapped under the pile of tubes, and he was in obvious distress. Several co-workers ran to the scene to help, including Mr. Miller, Mr. Everson, Mr. Carrazco, and Mr. Tanner. At the scene, Mr. Carrazco stated that he told Claimant to put the bin on the floor, not on the tubes. Mr. Everson heard this statement.

18. After emergency personnel came and took Claimant to the hospital, Mr. Miller conducted an accident investigation. He took several pictures of the aftermath showing there were two stacks of tubes, the 3" x 3" stack that had fallen over, and the 14" x 6" stack that remained upright. Mr. Miller also interviewed Mr. Everson, Mr. Tanner and Mr. Carrazco. The investigation report appends Mr. Carrazco, Mr. Everson and Mr. Tanners' witness statements.

19. Mr. Miller concluded that Claimant violated Employer's safe material handling safety rule. By putting the bin on the stack of 3" x 3" tubes, Claimant violated safe material handling training and company policy.

20. Claimant admitted that he intended to put the material bin on the 3" x 3" stack of tubes. Thus, the ALJ concludes that Claimant acted intentionally and that his intentional action directly resulted in his injuries.

21. The ALJ finds that Claimant's statements to the effect that he did not apprehend the risk of placing the bin on the stack of 3" x 3" tubes not credible or persuasive.

22. The ALJ finds that Respondents have met their burden of establishing that Claimant intentionally violated Employer's enforced safety policy and training concerning safe material handling, and that Claimant's injuries resulted therefrom.

CONCLUSIONS OF LAW

Section 8-42-112 (1), C.R.S., provides for a fifty percent (50%) reduction in benefits when an "injury is caused by the willful failure of the employee to use safety devices provided by the employer" or "(b) Where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." The term willful connotes deliberate intent. Mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). Moreover, Respondents bear the burden proof to establish that claimant's conduct was willful. *Lori's Family Dining, Inc. v. ICAO*, 907 P.2d 715 (Colo. App. 1995); *Johnson v. Denver Tramway Corp*., 115 Colo. 214, 171 P.2d 410 (1946).

The elements of proving a violation of Section 8-42-112(1)(b) include the following:

1) There must be a safety rule adopted by the employer.

2) The safety rule must be reasonable.

3) The safety rule must be known by the employee; i.e. "brought home" to the employee and diligently enforced. *Pacific Employer's Insurance Co. v. Kilpatrick,* 111 Colo. 470, 143 P.2d 267 (Colo. 1943)

4) The meaning and content of the safety rule must be specific, unambiguous and definite, clear and non-conflicting. *Butland v. ICAO*, 754 P.2d 422 (Colo.App. 1988).

5) The violation of the safety rule must be willful, done with deliberate intent by the employee. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Respondents carry the burden of proving each element justifying a reduction in compensation for willful failure to obey a reasonable safety rule. *Horton v. JBS Swift and Company*, W.C. No. 4-779-078 (2010); *Strait v. Russell Stover Candies*, W.C. No. 4-843-592 (2011). Whether Respondents met the burden of proof is one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). Here, the ALJ finds and concludes that Respondents have met their burden of proof.

Settled law provides that the alleged safety-rule "does not need to be formally adopted, does not have to be in writing, and does not have to be posted for reduction pursuant to section 8-42-112(1)(b) to apply. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). Rather, oral warnings, prohibitions, and directions are sufficient if heard and understood by the employee and if given by someone generally in authority. *Id.* Moreover, a safety rule, if sufficiently obvious to the claimant, can be based solely on common sense without any direction of the employer to

follow it. *Indus. Comm'n v. Golden Cycle Corp.*, 246 P.2d 902 (Colo. 1952). Finally, a willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that the conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation District*, W.C. No. 4-335- 104 (February 19, 1999).

An ALJ may infer willfulness from a variety of circumstantial evidence, including:

- The obviousness of the danger, *see Golden Cycle Corp.*, 246 P.2d at 906 ("the operator of a saw mill surely would not be held to liability for failure to post a notice reading, 'Keep your hands out of the buzz saw.'");

- The employee's knowledge of the safety rule and the deliberateness with which the employee performed an act prohibited by the rule. *See, e.g. Salamanca v. Golden Aluminum Co*., W.C. No. 4-416-802 (ICAO July 16, 2001).

The Industrial Claim Appeals Office has held that to establish that a claimant willfully violated the safety rule, "It is not necessary that the claimant specifically determined to break the rule. It is enough to show that knowing the rule; he intentionally performed the forbidden activity." *Romero v. Cherry Park Health Care*, W.C. No. 4-121-942 (ICAO Feb. 16, 1993).

In *Oldson v. Digital Communication*, W.C. No. 4-563-466 (2004), the Industrial Claim Appeals Office affirmed an ALJ's decision to reduce compensation benefits where claimant had not worn his seatbelt, and there was testimony that the injuries were caused or made more severe because of the failure to wear the seatbelt. The ICAO noted the following with regard to the determination of whether conduct is willful:

> Willfulness means that the claimant acted with deliberate intent. However, a finding of willfulness does not require the ALJ to find the claimant, having in mind the rule, determined to break it. Rather, it is sufficient to show that the claimant, knowing the rule, intentionally did the forbidden thing. *Stockdale v. Industrial Commission*, 76 Colo. 494, 232 P. 669 (1925). Willful conduct may be inferred from the circumstances, including evidence that the claimant was aware of the rule and the obviousness of the danger. *See Bennett Properties Co. v. Industrial Commission, 165 Colo. 135, 437 P.2d 548 (1968)*; *Gargano v. Metro Wastewater Reclamation District,* W.C. No. 4-335- 104 (February 19, 1999).

Applying these well-settled legal principles and rulings to the facts of this claim, the ALJ finds and concludes that Respondents have met their burden of proof, and Claimant's indemnity benefits should be reduced by 50% due to Claimant's willful violation of a safety rule. Claimant conceded that Employer trained him on safe material handling. He

conceded he reviewed the safety manual. In addition, he conceded that he intentionally placed the bin of angle iron on top of the stack of 3" x 3" tubes. Employer's frequent safe material handling training, constant reminders regarding safe material handling, and basic common sense dictate that placing a heavy bin on a large stack of different length tubes, several rows across, and several rows high, lubricated by oil and "bellied" in the middle, is inherently dangerous. Any force applied to such a stack could cause the stack to shift, and fall, which is what occurred in the instant case.

Claimant willfully violated a safety rule, and his indemnity benefits should thus be reduced by 50%.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have proven by a preponderance of the evidence that they are entitled to a 50% reduction of benefits pursuant to C.R.S. section 8-42-112(1)(a) and (d)

2. All matters not determined herein are reserved for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 12th day of September 2018.

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1259 Lake Plaza Drive, Suite 230, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **RANDALL J. HOLLAR,** Claimant, vs. **DOCUMART** Employer, and **CHUBB INDEMNITY INSURANCE COMPANY,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 4-960-165-07**

SUPPLEMENTAL ORDER FOLLOWING RESPONDENTS' PETITION TO REVIEW

The above captioned matter is before Administrative Law Judge (ALJ) Richard M. Lamphere on Respondents' PETITION TO REVIEW. Upon careful review of the petition, the ALJ is fully advised in the premises of the particular errors and objections raised by Respondents to the June 26, 2018 Findings of Fact, Conclusions of Law and Order issued by the undersigned ALJ. This "Supplemental Order" is being issued pursuant to C.R.S. § 8-43-301(5) following that review.

PROCEDURAL HISTORY

Hearing in the above captioned matter was held before Administrative Law Judge (ALJ), Richard M. Lamphere on May 15, 2018. The ALJ digitally recorded the proceeding in Courtroom No. 2 of the Colorado Springs Office of Administrative Courts between 1:00 and 4:51 p.m.

Claimant was present and represented by Aaron S. Kennedy, Esq. Kristin A. Caruso, Esq. represented Respondents. Testimony was taken from Claimant, Dr. Jack Rook, Dr. Miguel Castrejon and Dr. Kathleen D'Angelo. In addition to the aforementioned testimony, the ALJ admitted the following exhibits into evidence: Claimant's Hearing Exhibits 1-18 and Respondents' Hearing Exhibits A-N.

Following the presentation of evidence, the ALJ held the record open through June 4, 2018, to allow counsel time to file post hearing position statements in lieu of closing argument. The parties' position statements were timely received via electronic transmission after which the ALJ entered his Findings of Fact, Conclusions of Law and Order which was served upon the parties on June 26, 2018. On June 28, 2018, Respondents filed a Petition to Review alleging that the ALJ misapplied the law concerning the standard of proof necessary to overcome a Division Independent Medical Examination and otherwise abused his discretion in denying Respondents request for apportionment of Claimant's impairment rating as being inconsistent with the

facts as determined and the applicable law. Following the issuance of a briefing schedule, the parties submitted their respective briefs in support of and opposition to Respondents petition to review. Having received and carefully reviewed the parties post hearing pleadings, the ALJ agrees with Respondents that ¶ 28 of the June 26, 2018 Findings of Fact, Conclusions of Law and Order is poorly written and unartfully attributes statements to Dr. Castrejon that he did not testify to. As written, the paragraph does not convey what the ALJ had intended. Consequently, the ALJ believes that it is necessary to issue this Supplemental Order which supersedes both ¶ 28 of the Findings of Fact and ¶ F of the Conclusions of Law of the June 26, 2018 order.

While the ALJ is persuaded that the aforementioned amendments are necessary to clarify the ALJ's June 26, 2018 Order, the changes do not otherwise effect the Order articulated by the ALJ. Nonetheless, the ALJ makes the following amendments to the findings of fact and conclusions of law. Finding of Fact, ¶ 28 is amended to read as follows:

> 28. In his DIME report, Dr. Mathwich summarized Claimant's May 20, 2009, March 22, 2014 and December 8, 2015 MRI reports. In his DIME report, Dr. Mathwich noted the following regarding these MRI reports:
>
> > 5/20/09 MRI of lumbar spine. Lipomatosis of the dorsal epidural space L1-2 down to L5-S1 worse at L2-3 down to L4-5, particularly L4-5, with a posterior desiccated disc bulge at L4-5 contributing to the marked thecal sac effacement without evidence of cauda equine compression. There is bilateral neural foraminal narrowing at L4-5, worse on the left without evidence of nerve root impingement.
> >
> > 3/22/14 MRI lumbar spine. Severe spinal stenosis at L4-5 and bilateral foraminal narrowing without change since previous examination L5-S1 severe bilateral foraminal narrowing worse on the left. Mild to moderate central canal stenosis at L3-4. Mild central stenosis and right foraminal stenosis at T10-11.
> >
> > 12/8/15 MRI lumbar spine. Small left laminotomy defect at L5-S1 mild degenerative retolisthesis at L5-S1 anterior listhesis at L4-5, mild straightening and reversal of lordosis. L5-S1- moderately severe narrowing, mild facet arthropathy and right ligamentum flavum hypertrophic canal stenosis. There is severe bilateral bony foraminal stenosis. L4-5- moderate narrowing and diffuse disc bulging. Moderately severe facet arthropathy and broad posterior disc bulging is mild but with facet changes resulting in severe central canal stenosis. Moderately severe left foraminal stenosis. L3-4 mild facet arthropathy.

> Although Dr. Mathwich did not comment on it, the ALJ notes that both the March 22, 2014 MRI as well as the December 8, 2015 MRI reports document the existence of annular tearing in the radiologist's reports. Concerning this annular tearing, the March 22, 2014 MRI provides the following reference at the L4-5-disc level: "There is high signal intensity in the posterior annulus consistent with associated annular tear. The findings of Claimant's March 22, 2014 MRI were compared with the findings from 2009. The 2009 MRI report fails to reference any changes consistent with annular tearing. Consequently, the ALJ finds that Claimant's 2014 posterior annular tearing at the L4-5-disc level probably represents a new injury related finding. The December 8, 2015, MRI references the following regarding annular tearing at the L4-5-disc level: "Multifocal posterior annular tearing centrally and left subarticular with extension into the neural foramen" (emphasis added). The report alternatively described Claimant's left sided annular tearing as "near the exiting nerve L4 nerve root." The ALJ infers from Dr. Castrejon's testimony that Claimant's annular tearing was the likely cause of Claimant severe pain and Dr. Mathwich failed to appreciate the annular tearing as a pain generator when he (Dr. Mathwich) opined in his DIME report that the "MRI completed after his 12/27/13 incident correlate (sic) with those MRIs prior to the date and showed no significant acute changes or pathology which would be considered pain generators." Based upon the evidence presented, the ALJ finds that Dr. Mathwich failed to consider the presence of annular tearing when he opined that Claimant's MOI caused a "minor exacerbation" of Claimant's pre-existing spinal disease which he (Dr. Mathwich) opined "resolved very quickly."

Given the amendment to Finding of Fact, ¶ 28, the ALJ also amends ¶ F of the Conclusions of Law to read:

> The question of whether the Claimant has overcome the DIME physician's findings regarding causality, MMI and impairment is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, *supra*. In deciding whether Claimant has met his burden of proof, the ALJ is empowered, "[t]o resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). Moreover, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). In this case, the issue of whether Claimant was properly placed at MMI by Dr. Mathwich involves a complex medico-legal question regarding the cause of Claimant's low back symptoms and his need for a spinal fusion surgery. Claimant, through Dr. Rook, contends that Dr. Mathwich erred when he "took

it upon himself to re-write the legally determined compensability issues in this case, essentially doing his own causation analysis for a case that had already been litigated in front of an administrative law judge, who ruled that the patient's low back spinal condition was compensable and related to the injury that occurred at his workplace on December 27, 2013." The ALJ agrees with Respondent's position that, as part of the DIME process, Dr. Mathwich is permitted to address causation, regardless of the prior decision of ALJ Walsh. See, *Nunnally v. Eastman Kodak Co.*, W.C. No. 4-720-435 (ICAO, May 28, 2009); see also, *Holcomb v. FedEx Corp*., W.C. No. 4-824-259-05 (ICAO, March 24, 2017)(doctrine of issue preclusion inapplicable where the burdens of proof in two adjudications are not the same). While the ALJ agrees that Dr. Mathwich was permitted to address causation as part of the DIME completed in this case, the evidence presented is convincing that his conclusion that Claimant's MOI caused a "minor exacerbation" of pre-existing spinal disease, which "resolved very quickly" is erroneous and highly probably incorrect. To the contrary the ALJ is convinced that Claimant's MOI, more probably than not, caused additional traumatic injury to Claimant's lumbar spine which never completely resolved and simply regressed with time despite attempts at activity modification. Indeed, the MRI of 2014 and 2015 reveal previously undisclosed annular tearing which the ALJ finds/concludes, based upon the totality of the evidence presented, Dr. Mathwich failed to completely account for in addressing causality and before placing Claimant at MMI.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME opinion of Dr. Mathwich regarding maximum medical improvement is GRANTED. Claimant is found to have reached MMI effective September 22, 2016 as originally assigned by Dr. Castrejon.

2. Claimant's request to set aside the DIME opinion of Dr. Mathwich regarding permanent impairment is GRANTED. The 0% whole person impairment assigned by Dr. Mathwich is set aside and replaced by the 23% impairment rating assigned by Dr. Rook which is supported by Dr. Castrejon.

3. Respondents' request to apportion Claimant's 23% whole person impairment is denied and dismissed.

4. Claimant is entitled to maintenance care, including, but not limited to follow-up visits with Dr. Mitchell subject to Respondents right to challenge any future request for treatment on the grounds that it is not reasonable, necessary or related to Claimant's December 27, 2013 industrial injury.

5. Claimant is entitled to and Respondents shall pay disfigurement benefits in the amount of $3,500.00.

6. Respondents' request to recoup a stipulated $2,407.50 overpayment of indemnity benefits is denied and dismissed as moot since the MMI determination of Dr. Mathwich has been overcome and set aside.

DATED: September 17, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Did Claimant suffer a compensable work injury to his lumbar spine while working for Employer on or about February 24, 2018?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was injured while working as a cook for Employer ("Wingstop"). As a cook, his duties included moving boxes of chicken wings from the freezer to the defrost cooler, cooking and saucing the wings, then placing them in boxes for the customers.

2. The Claimant testified that at approximately 6:30 p.m. on Saturday, February 24, 2018, as he was carrying a case of chicken from the freezer to the defrost cooler, he slipped on an unknown substance on the floor. This caused him to twist his back and fall to his knees, falling forward onto the box of chicken he was carrying. He felt an immediate stabbing pain in his lower back and down his left leg. The pain was located across his lower back, mainly on his left side.

3. When Claimant tried to stand up, he was unable to. Instead, he fell back down to his knees due to his pain. He testified that the box of chicken weighed between 35 to 38 pounds; the weight was written on the box. No one directly witnessed the accident. At the time of the incident, the Claimant was wearing 'Shoes for Crews', which were non-slip shoes for persons in the food preparation business.

4. There were two other employees working this shift at Wingstop: Crystal Salazar and Tara (last name unknown). Crystal Salazar was the cashier and Tara was the shift leader. Claimant testified he does not believe either individual witnessed the injury, but Crystal heard him scream when he fell, and both Crystal and Tara immediately came around the corner where he had fallen. Since he did not have his own cell phone, he borrowed Tara's phone.

5. Tara called Brittney, the store manager, on her cell phone and then gave the phone to the Claimant so he could explain what happened. The Claimant testified that he told Brittany that he had slipped on the floor while carrying a box of wings from the freezer to the defrost cooler and hurt his back. Brittany directed him to seek care under his personal insurance. Claimant did so. Both Tara and Brittney, as the shift

leader and store manager, were the Claimant's supervisors.

6. Claimant attempted to work the remainder of his shift, but could not due to his back pain. Two days later, he sought treatment at St. Mary-Corwin emergency room. The emergency room gave him paperwork outlining this visit, which included an off-work slip. He took that paperwork back to Wingstop and gave it to the cashier on duty, who told him that she would give it to Brittany. Claimant did not see this cashier physically give the paperwork to Brittany. He was not directed where to seek treatment by anyone at Wingstop.

7. Claimant did not return to work until Thursday, March 1, and last worked on March 3, 2018. (Ex. G, p. 9). On March 4, 2018, Claimant went to Parkview Hospital emergency room. He did not give the paperwork from this visit to his employer, since he had received no response from his supervisor up to that point in time. He testified he still had not been directed by Wingstop at this point where to seek treatment.

8. The Claimant then followed up with his primary care physician, Dr. Sergio Murillo; this visit was paid for by Medicaid. Dr. Murillo eventually referred the Claimant for an MRI. Once he reviewed the results, Dr. Murillo told Claimant that he should seek treatment through the worker's compensation system.

9. The MRI of Claimant's lumbar spine taken May 4, 2018, under 'Impression' stated:

> 1. At the L4-L5 level, a central and left central lateral recess broad-based disc protrusion are noted with mild central canal stenosis and moderate left lateral recess stenosis. Focal disc desiccation and mild-to-moderate circumferential disc bulge component noted.
>
> 2. Mild disc desiccation and disc space narrowing at the L5-S1 level. No stenosis is noted. (Ex. 6, p 39).

10. At hearing, Claimant acknowledged signing documents when he was hired at Wingstop. These documents, signed 1/31/18, reflected that James LaCoursiere was the human resources contact. Wingstop also provided a list of designated treatment providers that employees should seek treatment with if they are injured on the job (Exhibit G1, G2).

11. Claimant was eventually treated by Respondents' authorized treating physician, Dr. Daniel Olsen, on April 30, 2018. Dr. Olsen's record notes that the Claimant had injured his back carrying a case of chicken which weighed between 35-45 pounds when he slipped and injured his lower back. Dr. Olsen recommended physical restrictions to include no lifting, carrying, pushing or pulling over 2 pounds and no bending, squatting. No lifting overhead. (Ex. 7, p. 45) Dr. Olsen's notes that "The cause of this problem is related to work activities." *Id.*

12. The Claimant was next by Dr. Olsen on June 4, 2018. Prior to this appointment, he had "no showed" several times with this ATP. The Claimant testified that the reason for the gap in treatment was that he had traveled to Parker, Colorado with his father to see his brother. While in Parker, his father was involved in a very serious motor vehicle accident, and could not travel back to Pueblo. Claimant testified that he had no other form of transportation, so he was unable to travel back to Pueblo until his father's condition improved. Claimant stayed in Parker and cared for his father until he was strong enough to travel back to Pueblo. Claimant testified that since he has no transportation of his own, it has made getting to and from medical appointments difficult.

13. The Claimant testified that the St. Mary Corwin emergency room record from February 26, 2018 (Ex. 4, p. 10) which noted that the Claimant "had prior intermittent back problems but nothing on a continuous basis" was incorrect. He testified that he did not tell the emergency room physician that he had preexisting back problems and has no idea where the physician would have gotten this information. He testified that he has never had, complained of, or received treatment for any preexisting back problems.

14. Claimant testified that he still has pain in his lumbar spine which radiates down his left leg to his foot. He thinks his condition has actually improved some since the injury. He has not had any previous injuries to his back, nor has he had any lumbar injury since the date of this industrial claim. Claimant also testified that he has a bad memory for specific dates. He testified that he had no knowledge who James LaCoursiere was, did not know he was the human resources representative for Wingstop. He had never heard Mr. LaCoursiere's name, and had never seen him prior to the date of the hearing.

15. As noted, Claimant had originally sought treatment at St. Mary Corwin emergency room on February 26, 2018. The ER report reflects that the Claimant "presented to the emergency department complaining of low back pain and achiness down his left posterior thigh. Started two days ago. After lifting had a sudden onset of pain that dropped into his knees….There is no direct trauma". (Ex. 4, p. 10)

16. The Parkview Hospital emergency room record dated March 4, 2018 reflects that the Claimant "presented with complaint of left lateral lower back pain. The patient states the pain started after he injured his back on February 25 after moving some heavy items". (Ex. 5, p. 17).

17. Claimant testified that he vaguely remembered speaking with a gentleman named Sean at some point after he was injured. He testified that he had a brief telephone conversation with Sean where he told him about his injury. He did not know who Sean was, did not know the purpose of the conversation, nor was he aware that Sean was the new manager of Wingstop. Between March 4, 2018 and April 30, 2018, the Claimant sought treatment with his primary care physician, Dr. Murillo, a 'couple of times'. He also had the MRI done at Dr. Murillo's request.

18. Jim LaCoursiere testified on behalf of the Respondents. Mr. LaCoursiere is the vice president of operations for Wingstop in the State of Colorado. He has never spoken to the Claimant personally, nor has he met the Claimant prior to the date of this hearing. Neither Brittany, Crystal Salazar or the Claimant notified Mr. LaCoursiere of Mr. Tindol's injury.

19. Mr. LaCoursiere testified that he did not receive notification of the Claimant's injury until March 17, 2018, when the new manager, Sean Bogardus, told him about the injury. He testified that Sean Bogardus took over management of the store where Claimant was injured in mid-March of 2018. He testified that Brittany and Tara were direct supervisors of the Claimant. He also testified that the Claimant was never given his own hard copy of the documents which he had signed on his first day of employment (Ex. G, pp. 1-2). Those documents stayed in the employment file.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability

D. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." A compensable injury is one which requires medical treatment or causes a disability. It. is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

E. The existence of a causal relationship between the Claimant's lumbar spine injury and his duties at Wingstop is a question of fact. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985).* Whether there is a sufficient "nexus" or causal relationship between the Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

F. The evidence shows that Claimant injured his lower back on February 24, 2018 when he slipped and fell while carrying a box of chicken wings from the freezer to the defrost cooler. While Respondent notes that this event was unwitnessed, the ALJ finds that it was credibly witnessed-by Claimant himself. The ALJ finds his testimony sufficient to prove that it occurred. While Claimant sincerely believed his two co-workers were on break, all he can really state is that they were out of his presence when he slipped. Like the proverbial tree in the forest, he still fell. There is also insufficient evidence that Claimant had previously injured or had treatment on his lumbar spine. To the extent one treatment note indicates prior intermittent back issues, Claimant has satisfactorily explained that he did not say this to the nurse. No medical record beyond this conversation indicate prior medical issues with his back.

G. Claimant's testimony is sufficiently persuasive on the mechanism of the injury, as well as when and how Claimant reported the injury. Immediately after he slipped and fell, he felt a sharp pain in his lumbar spine which was intense enough to

keep him from standing up. Right after the slip and fall, he used a co-worker's phone to call and notify the store's general manager, Brittany, of the injury. Upon speaking to Brittany and explaining that he had slipped and hurt his back while carrying a box of chicken wings, he was told by Brittany to seek treatment under his private health insurance. He did so two days later, on February 26, 2018, when he sought treatment at St. Mary-Corwin Hospital emergency room. This ER record reflects that the Claimant hurt his back two days before when lifting. Upon discharge from St. Mary-Corwin, the Claimant took the paperwork he had been given by the hospital to the store and gave it to a Wingstop cashier, who told Claimant she would forward it to Brittany.

H. The medical record from the Claimant's second emergency room visit at Parkview Hospital also notes that the Claimant hurt his back while lifting something on February 25, 2018. The Claimant testified that he is terrible at remembering dates. The ALJ finds that while Claimant is quite unsophisticated, he is sincere in describing the essential elements of the events as they unfolded. Yes, the events he describes at different times vary somewhat in their details, but the essential elements remain. Claimant's lack of sophistication also helps explain his lack of assertiveness in securing proper treatment through an Authorized Treatment Provider on a more timely basis.

I. Brittany, the store manager, apparently did not notify the human resource director, Jim LeCoursiere of Claimant's injury. This does not render his injury non-compensable. Claimant signed paperwork for the employer on his first day of his employment with Wingstop. (Ex. G, pp. 1-2) which reflected that Mr. LeCoursiere was the human resources contact. It also listed Authorized Treatment Providers in the event of an industrial injury. However, Claimant was never given his own copy of the documents he signed. Rather, they were kept in his employment file. Claimant, unsophisticated as he is, reasonably relied upon his chain of command to guide him through the process. This did not occur, although the ALJ finds Mr. LeCoursiere acted in good faith, and his testimony to be credible in its entirety.

J. The ALJ concludes that the Claimant has proven by a preponderance of the evidence, that his lumbar spine injury occurred within the course and scope of his employment with Respondent Employer Wingstop on Saturday, February 24, 2018. Clamant returned to work on Thursday, March 1, 2018.

ORDER

It is therefore Ordered that:

1. Claimant's back injury from February 24, 2018 is compensable.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 20, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether the respondents have demonstrated by a preponderance of the evidence that the claimant no longer needs maintenance medical treatment to prevent further deterioration to her physical condition pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), thereby allowing the respondents to withdraw their admission for those benefits.

FINDINGS OF FACT

1. The claimant suffered cumulative trauma to her bilateral upper extremities with an onset date of November 1, 2010. In 2012, the claimant underwent right elbow ulnar nerve transposition surgery. In early 2013, the claimant underwent left elbow ulnar nerve transposition surgery. These surgeries were performed by Dr. Thomas Dwyer. The claimant's employment with employer ended in May 2018.

2. On July 30, 2013, the claimant was placed at maximum medical improvement (MMI) by Dr. Jeffery Krebs. At the time of MMI, Dr. Krebs assessed permanent impairment of 12 percent whole person. With regard to post-MMI medical treatment, Dr. Krebs recommended that the claimant receive osteopathic adjustment to her neck, massage therapy, and continue prescription medications (including Norco, Gabapentin and Flexeril). Dr. Krebs indicated in his MMI report that the claimant should receive the recommended treatment for three years.

3. Since being placed at MMI, the claimant has continued to treat with Dr. Daniel Olson for osteopathic manipulation. The claimant testified that she receives treatment from Dr. Olson every two to three months. The claimant testified that she sought this ongoing medical treatment because she still has discomfort, especially with prolonged sitting. The claimant also testified that following treatment with Dr. Olson, she has improved function and is able to sleep. The claimant testified that she wishes to continue treatment with Dr. Olson because it helps with her symptoms.

4. On August 12, 2013, the respondents filed a Final Admission of Liability (FAL). With regard to post-MMI treatment the respondents admitted for "reasonable and necessary medical care, related to this work injury, by an authorized treating physician."

5. On March 3, 2014, the claimant began new employment with Sitel. The claimant's job duties with Sitel were similar to those she had while employed with the employer. However, the claimant was able to sit less and while working for Sitel. The claimant's symptoms from her injury in this case continued throughout her employment with Sitel. As a result, the claimant continued to seek treatment with Dr. Olson. The claimant's employment with Sitel ended in January 2017. The claimant testified that

although her employment with Sitel has ended, she continues to have the same symptoms she had when she was placed at MMI.

6. On April 27, 2017, the claimant returned to Dr. Dwyer and reported slight persistent symptoms in her left elbow and increasing pain and numbness in her left upper extremity. Dr. Dwyer opined that the claimant's left arm symptoms could be related to sensitive scar tissue from her left elbow surgery. At that time, Dr. Dwyer recommended an electromyography (EMG) study and a magnetic resonance image (MRI) of the claimant's left elbow.

7. On August 2, 2017, an MRI was taken of the claimant's left elbow and showed acute angulation of the ulnar nerve distal to the transposition as it exits the mediocollateral ligament, with scar tissue around the nerve.

8. On January 29, 2018, the claimant again sought treatment with Dr. Dwyer who noted that the claimant's left elbow MRI was "certainly abnormal". However, Dr. Dwyer did not make any conclusions regarding the cause of the claimant's symptoms and again recommended an EMG study. At that time, Dr. Dwyer also noted that the claimant experienced some temporary improvement from Dr. Olson's treatment.

9. On February 26, 2018, the claimant attended an independent medical examination (IME) with Dr. Thomas Moore. In connection with the IME, Dr. Moore reviewed the claimant's medical records, obtained a medical history from the claimant, and performed a physical examination. In his IME report, Dr. Moore noted that the maintenance medical treatment recommended by Dr. Krebs in 2013 was for three years. Therefore, Dr. Moore opined that the claimant's treatment should have ended in June 2016.

10. On March 9, 2018, the respondents sent a letter to the claimant notifying her that beginning April 6, 2018, the insurer would no longer cover post-MMI medical treatment. The respondents specifically stated that payment for post-MMI medical treatment was ending because the treatment was no longer reasonable, necessary, or related. In addition, on July 31, 2018, the claimant was notified by Dr. Olson's staff that the insurer would no longer pay for treatment.

11. On April 12, 2018, Dr. Michael Hehmann conducted an EMG study. Dr. Hehmann noted that the EMG results were normal.

12. The ALJ credits the medical records and the claimant's testimony and finds that the respondents' have failed to demonstrate that it is more likely than not that they are entitled to withdraw authorization for post-MMI medical treatment. The ALJ is not persuaded by the opinion of Dr. Moore that the claimant's post-MMI treatment should have stopped in June 2016 merely because Dr. Krebs' recommendations were for three years. The ALJ is also not persuaded that the claimant's employment with Sitel created an intervening event sufficient to end post-MMI medical treatment. On the contrary, the ALJ is persuaded that the claimant continued to experience the same

symptoms before, during, and after her employment with Sitel and these symptoms continue to be the result of her compensable occupational disease.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (the Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. Typically, a claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. However, in this case respondents issued an FAL for claimant's occupational disease admitting for post-MMI medical treatment. Section 8-43-201 C.R.S. provides, in part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification". Therefore, in this case the burden shifts to the respondents to prove by a preponderance of the evidence that the claimant no longer need post-MMI medical treatment.

3. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2010).

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an

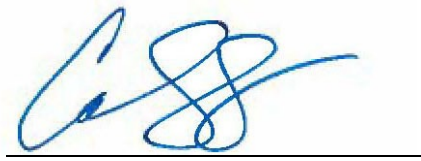
order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

7. As found, the respondents have failed to prove by a preponderance of the evidence that they should be allowed to withdraw admission of *Grover* post-MMI medical treatment. As found, the medical records and the claimant's testimony are credible and persuasive.

ORDER

It is therefore ordered that the respondents' request to withdraw *Grover* post-MMI medical treatment is denied and dismissed.

Dated: September 20, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that his hip condition is causally related to his February 23, 2017, work injury.

II. Whether Claimant established, by a preponderance of the evidence, that the right hip arthroscopy recommended by Dr. Brian White is reasonable and necessary to treat Claimant's February 23, 2017, work injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 21-year-old professional installer for Allied Insulation. (Hearing Transcript from Hearing on July 24, 2018, (hereinafter "T") 12:5-15) Part of Claimant's job requires the use of a pressurized hose with a spray-gun to spray foam insulation overhead, often on stilts. (T 12:26; 1-7 13:1-7)

2. On February 23, 2017, Claimant was on stilts and spraying foam insulation overhead using his right arm. While spraying foam insulation, with a back and forth motion, Claimant felt a pop in his right shoulder. Claimant reported his injury and was referred for medical treatment.

3. On February 24, 2017, Claimant went to Advanced Urgent Care and Occupational Medicine. Claimant was evaluated by Dr. Mary Louder. The medical report from that date indicates Claimant provided the following description of the accident:

> Pt sprays insulation in to the corners, ceilings and nearly always overhead. While he is doing this, he is typically standing on stilts. He frequently has to reach high and into awkward spaces. While working overhead today with back and forth motions and overhead, he felt a pop and pain in his right shoulder and on the "upper side" of his shoulder blade.

Respondents' Exhibit (hereinafter "R. Ex.") A.

4. As set forth in the medical report from the first visit, Dr. Louder physically examined Claimant's right shoulder and noted her examination and findings in detail. There is no indication in the medical report that Claimant complained of any other injuries at this visit. Based on Claimant's description of the work accident, his pain complaints which were limited to his right shoulder, and the

results of her physical examination, Dr. Louder diagnosed Claimant with a right shoulder strain. She prescribed motrin and directed Claimant to follow up with Dr. Parsons within the next week. (R. Ex. B, Bates 3)

5. Claimant described a very minor incident to Dr. Louder. He also described to Dr. Louder symptoms that were limited to his right shoulder. Despite this, Claimant went on to report virtually unrelenting symptoms involving his right shoulder as well as an expanding list symptoms involving other body parts.

6. On March 1, 2017, Claimant was evaluated by Dr. Parsons. Claimant advised Dr. Parsons that during the incident, he felt a pop in his right shoulder. He also complained of developing low back pain, which was not noted on his initial visit with Dr. Louder. Claimant stated his pain level was 9/10. There is no indication Claimant complained of right sided hip pain. Based on Claimant's presentation and her examination, Dr. Parsons diagnosed Claimant with an unspecified injury to his right shoulder and prescribed physical therapy and some additional medications for his right shoulder. (R. Ex. B, Bates 8)

7. On March 9, 2017, Claimant started physical therapy at Injury Care Colorado Physical Therapy. Physical therapist Jennifer Volger describes Claimant's pain complaints in detail, specifying the exact areas affected in Claimant's shoulder and arm, but nowhere in her report from March 9, 2017, does Ms. Volger document any hip complaints. (R. Ex. C, Bates 73-74)

8. At the March 9, 2017, physical therapy appointment, Claimant provided another description of the accident. As noted by the physical therapist, Claimant described the accident and his pain as follows:

> [Claimant] presents to PT with complaints of right shoulder pain following an injury he sustained at work when he was spraying foam insulation with his arm overhead. He reports that he felt a pop and pain when reaching overhead and across his body with the sprayer. The remainder of the day and the following day his pain persisted and he went in to see the physician. He is currently experiencing posterior shoulder and scap pain, pain into the top of his shoulder and he states that he has anterior shoulder pain when it is at its worst. He also has intermittent numbness/tingling sensations down his arm, more towards the fourth and fifth digits and medial aspect of his forearm.

There is no indication in this description of the accident that Claimant injured his right hip or back. Also absent from this description of the accident is any alleged mechanism of injury that could account for an injury to Claimant's low back or hip. (Ex. C, Bates 73-74)

9. On March 15, 2017, Claimant underwent additional physical therapy. The report from this visit indicates Claimant complained of shoulder pain. Again, there is no indication Claimant complained of hip or back pain. There is also no indication that Claimant had extremely high levels of pain which precluded him from

participating in physical therapy. As noted, the physical therapist was able to demonstrate various exercises and Claimant was able to perform those exercises. (Ex. C, Bates 75-76)

10. On March 15, 2017, after going to physical therapy, Claimant returned to Dr. Parsons. At this appointment, Claimant was still complaining of right shoulder pain and low back pain at 9/10. There is, however, no indication in the report that Claimant complained of any right sided hip pain. Based on Claimant's pain complaints, Dr. Parsons diagnosed Claimant with a shoulder strain and back strain. (R. Ex. B, Bates 11-13)

11. Claimant's pain complaints to Dr. Parsons of 9/10 pain, on March 15, 2017, and a lack of such debilitating pain during his PT appointment the same day, results in the ALJ finding the extent of Claimant's pain complaints as reported by Claimant to be suspect.

12. On March 17, 2017, Claimant underwent additional physical therapy. At this appointment, three weeks after his accident, Claimant complained of his shoulder and neck being in a lot of pain. He also complained of hip pain. (Ex. C, Bates 77)

13. On March 29, 2017, Claimant returned to Dr. Parsons. At this appointment, Claimant complained of pain in his neck and right upper extremity. He also rated his pain level at 8-9/10. He also complained of right groin pain. Due to Claimant's complaints of significant neck pain and radicular symptoms in his right upper extremity, Dr. Parsons ordered an MRI of his cervical spine. (Ex. B, Bates 21-23)

14. On April 18, 2017, Respondents filed a General Admission of Liability.

15. On April 21, 2017, Claimant underwent an MRI of his cervical spine.

16. On May 1, 2017, Claimant returned to Dr. Parsons. At this appointment, Claimant still rated his pain at 8-9/10. Dr. Parsons noted multiple pain behaviors. She also went over Claimant's cervical spine MRI results, which she described as normal. Due to Claimant's presentation, and what appear to be limited findings, she discussed with Claimant the possibility of a pain management consultation and made a referral for such to Ryan Mansholt, PAC. (Ex. C, Bates 29)

17. On May 17, 2017, Claimant returned to Dr. Parsons. Due to ongoing complaints of 8-9/10 shoulder and hip pain, she ordered an MRI of his shoulder and hip. However, she also noted the following discussion she had with Claimant regarding the lack of a mechanism of injury regarding his hip complaints:

> Long discussion regarding hip pain into inguinal area; his initial complaint was right shoulder pain. He is insistent that the right low back, hip, and inguinal pain are related to his injury although he had no mechanism of injury. I explained to him that the insurer may not recognize the above areas as part of the injury.

(R. Ex. B, Bates 31-34)

18. Throughout the medical records, Claimant describes the injury inconsistently throughout the records, only noting hip pain, and later changing the description to a “pop.”

19. Claimant did not report any hip pain until three weeks after his work accident. During that time, Claimant attended multiple appointments with his authorized treating physician (“ATP”) and physical therapist. Yet none of the records from these initial visits reflect any report of hip pain.

20. On May 31, 2017, Claimant underwent an MRI of his right shoulder. The MRI was read by Dr. Michael Kershen. His report indicates that there was some signal alteration concerning for a small free edge tear of the posterior superior labrum. Therefore, his impression was that there was a small posterior superior free edge tear of the labrum, but it was of indeterminate clinical significance. (R. Ex. J, Bates 241)

21. On May 31, 2017, Claimant also underwent an MRI of his right hip. The MRI of his hip was also read by Dr. Kershen. He concluded that while some of the findings may reflect a normal variant sulcus, it was difficult to entirely exclude a small partial tear of the hip labrum. Therefore, he did not conclude the MRI demonstrated a torn labrum. (R. Ex. J, Bates 242)

22. On June 13, 2017, Claimant starting treating with Dr. David Yamamoto. While treating with Dr. Yamamoto, Claimant complained of neck pain, right shoulder pain, right hip pain, and low back pain. On June 23, 2017, Claimant advised Dr. Yamamoto that his back pain was 7/10. Dr. Yamamoto noted that there was no documentation from the beginning documenting a back injury. Despite this comment, Dr. Yamamoto continued treating Claimant’s pain complaints, including his low back.

23. On August 23, 2017, Claimant returned to Dr. Yamamoto, with continued pain complaints, including low back pain which Claimant still rated at 7/10. Due to ongoing complaints of back pain, Dr. Yamamoto referred Claimant for an MRI of his lumbar spine. The MRI findings, as documented by the radiologist, were mild facet arthropathy and a minor L5-S1 disc bulge.

24. On September 21, 2017, Claimant returned to Dr. Yamamoto with the same pain complaints. Dr. Yamamoto stated in his report that Claimant is getting acupuncture, manual therapy, and physical therapy for his low back. Dr. Yamamoto noted in his report Claimant stated the treatment is helping. However, Claimant is still rated his back pain at 7/10, which is the exact same rating he has had while treating with Dr. Yamamoto. Based on Claimant’s contention that the treatment Dr. Yamamoto prescribed helped his back pain, which is in direct conflict with his pain rating, Dr. Yamamoto wrote a new prescription for physical therapy, manual therapy, and acupuncture. In other words, there is no indication – from a pain relief standpoint - that the treatment prescribed by Dr. Yamamoto was helping. Nevertheless, Dr. Yamamoto prescribed more treatment without reconciling Claimant’s statements that treatment is helping, but yet his pain complaints remained the same.

25. Due to Claimant's ongoing pain complaints regarding his right hip, Dr. Yamamoto referred Claimant to Dr. Brian J. White. Contrary to the findings of the radiologist who read the MRI, Dr. White stated that the MRI confirms a labral tear of Claimant's right hip. Dr. White also stated that based on his physical examination of Claimant, which he said fit the findings of a labral tear, he recommended Claimant undergo a right hip arthroscopy. However, Dr. White did not explain how the findings fit with a labral tear. (R. Ex. H, Bates 234).

26. On June 29, 2017, Claimant was evaluated by Dr. Ellman. Dr. Ellman stated he reviewed Claimant's MRI of his hip and said it "demonstrated a rather obvious posterior superior to superior labral tear that appears to be full-thickness." (R. Ex. G, Bates 226-230) However, Dr. Ellman's statement regarding the findings demonstrated by the MRI are contrary to the findings of the radiologist.

27. On October 4, 2017, Respondents had orthopedic surgeon, Dr. William Ciccone, review the matter. He was asked whether the current exams and findings of the various providers substantiated Claimant's shoulder and hip complaints. Dr. Ciccone reviewed Claimant's medical records and concluded that Claimant had no obvious findings one would associate with acute pathology on MRI imaging. He also concluded that while he thought it was possible Claimant suffered a right shoulder sprain / strain, he did not believe Claimant suffered a work-related hip injury. (R. Ex., Bates 145-253).

28. Dr. Ciccone was also deposed. During his deposition, he also testified that the MRI does not definitely show a torn labrum regarding Claimant's hip. (T., pg. 7) He also indicated that he did not think Claimant's right hip complaints were related to his work accident because Claimant:

> didn't have any complaints of hip pain at his initial evaluation and even after he was seen for complaints of hip pain there's really been no description of any mechanism of injury that he - - how he actually injured his hip. (T., pg. 9)

29. On February 20, 2018, Claimant underwent right shoulder surgery, which was performed by Dr. Armodios Hatzidakis. Although the preoperative diagnosis was "work related right shoulder strain with possible labral tear," his postoperative diagnosis noted a right shoulder strain with no evidence of labral or rotator cuff pathology. (R. Ex., Bates 270) It is noted that Dr. Hatzidakis' surgical findings were consistent with Dr. Ciccone's opinion that Claimant's MRI findings did not support a finding of acute pathology regarding his shoulder labrum or rotator cuff.

30. On April 20, 2018, Claimant presented to Dr. Rebekah Martin for a Respondent-sponsored Independent Medical Evaluation ("RIME") to address a Rule 16 denial of Dr. Tracy's recommendation that Claimant undergo L3-4 and L4-5 injections. Additionally, Dr. Martin addressed Dr. White's recommendation for hip surgery during her RIME. (R. Ex. Q)

31. According to Dr. Martin, a provider would expect Claimant's type of pain to be reported within the first dew days of injury, stating "When there's a significant injury, especially with some sort of tissue damage and tear usually people notice

something extremely quickly, usually within the first few days there in a -- have some sort of a report of severe pain somewhere." (T 49:3-7)

32. Upon identifying that Claimant's first report of hip pain was earlier than she initially identified in the records, Dr. Martin testified she still would have expected the hip pain to be reported sooner. Specifically, within the first few days of the injury. (T 29:3-7)

33. In her report, Dr. Martin summarized:

> The patient did not report hip pain within a reasonable amount of time following the incident. In addition, his hip symptoms are not consistent with any specific diagnosis. He is actually pointing out pain to the right lower quadrant rather than the groin region, which is not where hip pathology would be expected to be symptomatic. His right hip arthrogram did not even show a definitive tear to the labrum. Most importantly, the patient's mechanism of injury would not cause intra-articular pathology. Therefore, the patient is having hip pain of unclear etiology, and I would not relate his current right hip complaints to the incident on 2/23/17.

(R's Ex. Q, Bates 294)

34. At hearing, Claimant testified that he "was spraying with my right hand and it jerked me back so like pushed me in and it went like that. And I felt a pop in my hip, that it started bugging me and my shoulder was bugging me a lot, too. I was seeing my shoulder bugging me a lot. I started feeling immediate pain in those and then my back started hurting as well." (T 14:21-25; 15:1)

35. Dr. Martin opined that Claimant's mechanism of injury could not have caused the type of injury Claimant describes. (T 34:16-18) In order to cause a tear, there must be rotational force, and Claimant does not describe rotational force in his description of the injury. Dr. Martin explained:

> Typically with the way the hip joint is, you need to have some sort of rotational force. It's a ball and socket joint and you need to have some sort of rotation to put a lot of strain through the labrum and cause pathology or a tear. All the records as well as with the – what the patient is stating is I simply step back to steady myself. So I wouldn't – I wouldn't consider that enough force or having **any** rotational force to cause a tear. (T 34-35 (*emphasis added*))

36. Claimant did not credibly or persuasively describe a rotational force to his hip in any of his accounts of the accident.

37. Claimant also testified that he has to "awkwardly sit and maneuver around, or else I get pain in my hip." (T 18:7-11)

38. Dr. Martin found this sitting issue to be remarkable. She testified that Claimant described having to “sit on the edge of a chair and actually straighten his leg to find some sort of position of comfort.” (T 31:5-7)

39. She explained that this sitting behavior is not normal. Dr. Martin has seen hundreds of labrum tears, from large to small, and the size of the tear doesn’t necessarily affect how symptomatic a person is. “But I haven’t necessarily seen someone quite as painful and have such a gait impairment have to alter the way they’re sitting in a chair. There was several things that didn’t – I had not seen in other patients.”

40. Dr. Martin also testified that Claimant’s pain on examination was “more pronounced than what I would expect, especially for the limited objective findings.” (T 17-19)

41. Dr. Martin also performed range of motion testing. Initially, when Claimant was aware that the she was rotating his hip, both internal and external rotation caused him subjective pain. However, when Claimant was distracted, she performed the same test in a different manner using the foot, and Claimant did not have the same pain response. (T 32:4-14) She explained that this different response to the same mechanism is a “red flag.” (T 32:16-19)

42. Dr. Martin focused on trying to identify and diagnose the source of Claimant’s pain. On physical examination, Claimant indicated he was having pain in two locations, “a location just above the greater trochanter, which is the outer part of the hip where the bone sticks out” and then “rather than pointing to the groin area, which is very typical for hip pathology, he was actually pinpointing the right lower quadrant.” (T 31:16-22) Dr. Martin further testified that “I remember asking specifically twice ‘is this, are you sure this is where you’re having pain?’ Because it was a little bit surprising, it was higher than where I had anticipated.” (T 31:22-25)

43. Claimant filled out a pain diagram in which he circled the expected area of pain, but he did not point to that area on exam. (T 42:23-24) Dr. Martin explained that she puts more weight on where the patient actually points to their pain rather than where they draw it, because it is more accurate. (T 43:9-11) In this case, when Claimant’s areas to which he pointed did not match his pain diagram, Dr. Martin asked him twice to clarify where he was feeling pain.

44. She testified that, “I was surprised that it wasn’t a pinpoint area of pain, which is what I typically see with labrum tears.” (T 48:8-18)

45. Dr. Martin looked to the MRI report to further investigate Claimant’s issues, and she explained the radiologist’s findings “Outlines that some of the contrast was underneath the upper and the back part of the labrum.” And he goes on to say “This may reflect a normal variance, but it is difficult to entirely exclude a small partial tear, specifically of the labrum.” (T 33:4-8)

46. Based on the radiologist’s report, her examination of Claimant, and lack of formal diagnosis, Dr. Martin did not recommend Claimant undergo the recommended surgical repair to his hip labrum. She stated that before moving forward with

surgery, “the basis of that is to actually find a diagnosis, what is causing this person’s pain. I do not feel like that has been found in this case, which is the biggest issue. Another major issue that I have, the patient has had significant conservative care, which I think has been very appropriate, but now we’re at the point where if we have continued subjective complaints I think it’s very reasonable to do a hip injection and see if the patient actually has improvement. If there’s improvement with that, then we actually have – we’re a step closer to a diagnosis. If there’s no improvement, we still don’t have a diagnosis.” (T 33-34:1-6)

47. When asked about her opinion that the “Right hip arthrogram did not even show a definitive tear in the labrum” and asked specifically, “Now, it is your opinion that he does not have a tear?” Dr. Martin testified, “Probably no, correct.” (T 43:17-18)

48. Dr. Ciccone echoed these concerns in the report from his October 4, 2017, medical records review and opined that Claimant’s hip pain was unrelated to his work injury.

49. According to Dr. Ciccone, “I believe that Claimant’s hip pain is unrelated to work. While the Claimant did complain of right shoulder pain at his initial medical visits there were no complaints of hip pain until 5 weeks after the injury. I do not believe that Claimant suffered an injury to the right hip at work. While the Claimant may desire further orthopedic care, this should not be covered by worker’s compensation.” (R. Ex. K, Bates 252)

50. Ultimately, Dr. Ciccone and Dr. Martin both concluded Claimant’s hip complaints are unrelated to his work injury.

51. This ALJ finds the medical opinions of Dr. Martin as set forth in her report and hearing testimony to be credible and persuasive.

52. The ALJ also finds the medical opinions of Dr. Ciccone as set forth in his report and in his deposition testimony in which he opines that Claimant did not sustain a work related injury to his right hip to be credible and persuasive.

53. At hearing, Claimant alleged that “I mentioned it to [my ATP] and we believed it was just a strain that it would go away. And it didn’t go away, so I brought it up again to her, because it kept hurting a lot.” (T 16:17-19) The ALJ does not find this testimony to be credible. It is not logical that Dr. Louder and Dr. Parsons would choose to ignore symptoms reported by Claimant and not document those symptoms and injuries right after his accident when they are trying to determine the scope of his injuries and the proper course of treatment. Moreover, Drs. Louder and Parsons assessed Claimant as suffering from a shoulder – rotator cuff – strain up through March 15, 2017. If each physician was willing to document a shoulder strain, it does not make sense that they would intentionally not document an alleged hip strain.

54. Claimant also testified at hearing that immediately after the work accident, he had the sudden onset of stabbing hip pain. (T 15:6-22) It is not credible that Claimant had the immediate onset of stabbing hip pain and told his physicians

about his stabbing pain, but yet the physicians chose to not document his pain complaints regarding his right hip. Therefore, the ALJ finds that Claimant did not have the onset of hip pain immediately after his work accident. The ALJ also finds that Claimant did not tell Dr. Louder or Dr. Parsons about his alleged hip pain until Dr. Parsons documented it in her chart notes.

55. The ALJ does not find Claimant's testimony to be credible or persuasive.

56. Dr. Martin also addressed Claimant's shoulder condition during her IME. Although treatment for Claimant's right shoulder is not at issue, the ALJ finds Dr. Martin's opinions regarding Claimant's left shoulder to be relevant and insightful regarding the credibility and persuasiveness of her opinion regarding her causation assessment of Claimant's hip complaints and the request for hip surgery. Dr. Martin noted in her report the following:

> Given that no solid diagnosis was ever given to the [Claimant] in regards to his shoulder, it is very surprising to me that surgical intervention was pursued in the first place. The [Claimant] is now post-surgical, where very minimal findings were found during surgery with the exception of an inflamed subacromial/subdeltoid bursa. The [Claimant] is reporting no improvement to his shoulder pain, despite extensive conservative measures and surgical intervention. The only possible diagnosis for the pain that he is describing would be an irritation to the biceps tendon, not the bursa, given the [Claimant's] location of pain. The [Claimant] has had appropriate treatment thus far, and acute biceps tendonitis would have been expected to improve within a matter of weeks following the incident. I would not expect for the [Claimant] to have any permanent restrictions from an irritation to the biceps tendon, nor will he need any ongoing care. He has had extensive physical therapy for his shoulder.
>
> The [Claimant] also does not describe any lasting benefit from ongoing massage therapy or acupuncture therapy; therefore, it is not reasonable to continue with these treatments if they are not giving the [Claimant] any benefit.

57. The ALJ finds some similarities between the primarily subjective symptom based treatment provided to Claimant for his shoulder and the primarily subjective symptom based surgical recommendation for his right hip. Claimant complained relentlessly about his right shoulder and it was questionable as to whether the MRI showed any pathology, such as a torn labrum, which would be amenable to surgery. And, despite limited physical findings, he was prescribed surgery, underwent surgery - which failed to document a torn labrum – and did not get any relief from the surgery. Regarding Claimant's right hip, Claimant has complained of ongoing hip pain. And, even though there is not a documented mechanism of injury and there are limited physical findings - as described by Dr. Martin -

surgery is being recommended. The ALJ finds that under these circumstances, the prescribed hip surgery is not reasonable and necessary.

58. The ALJ finds that Claimant's pain complaints are of limited value in determining causation and determining whether surgery is reasonable and necessary.

59. The ALJ also finds it hard to reconcile the extent of diagnostic studies and medical treatment provided and prescribed in this case based on the mechanism of injury and Claimant's description of his symptoms as documented by his providers shortly after the accident.

60. Claimant has failed to establish by a preponderance of the evidence that he injured his right hip on February 23, 2017.

61. Claimant has failed to establish by a preponderance of the evidence that his hip problems are related to his February 23, 2017, work accident and injury.

62. Claimant has failed to establish by a preponderance of the evidence that the hip surgery recommended by Dr. White is reasonable and necessary.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ

determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established, by a preponderance of the evidence, that his hip condition is causally related to his February 23, 2017, work injury.

Claimant must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002).

In this case, Claimant suffered a compensable injury to his right shoulder which has been accepted by Respondents. Claimant now seeks a determination as to whether his right hip complaints are compensable. Claimant, however, has failed to prove, by a preponderance of the evidence, that his right hip complaints arose out of his employment. Claimant's failure, is based upon a number of findings which include, but are not limited to, the following:

- Claimant failed to report his hip injury until three weeks after his date of injury - and he was actively treating for his shoulder at this time.
- Dr. Martin and Dr. Ciccone both found Claimant's failure to report during this period of time indicates that any hip issues he may currently be experiencing are unrelated to his work injury. Dr. Martin opined that a hip injury with pain at a level Claimant described would probably be reported in the first couple of days after the injury.
- Dr. Martin credibly and persuasively explained that rotational force is necessary to cause a labral tear, and Claimant has not described a rotational force in any of his accounts of the accident. Therefore, even if Claimant had reported the injury sooner, his mechanism of injury could not have caused the symptoms he describes.
- Despite describing a very minor incident to Dr. Louder shortly after the accident, and despite describing symptoms that were limited to his right shoulder shortly after the accident, Claimant's reported symptoms have migrated to other body parts, including his back and right hip.

- Claimant's own ATP, Dr. Julie Parsons, agreed with Dr. Martin's conclusion that Claimant's injury could not have caused Claimant's hip symptoms. Notably, Dr. Parsons found, "He is insistent that the right low back, hip, and inguinal pain are related to his injury although he had no mechanism of injury. I explained to him that the insurer may not recognize the above areas as part of the injury." (R. Ex. B, Bates 34)
- The Claimant was not found to be credible regarding the cause, onset, and extent of his hip problems.

Therefore, the ALJ concludes Claimant has failed to establish by a preponderance of the evidence that Claimant's hip injury was caused by the accident that occurred on February 23, 2017.

II. Whether Claimant established, by a preponderance of the evidence, that the right hip arthroscopy recommended by Dr. Brian White is reasonable and necessary to treat Claimant's February 23, 2017, work injury.

Respondents are only liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra*.

Claimant failed to establish, by a preponderance of the evidence, that his hip condition was caused by, or is related to, his employment and work accident of February 23, 2017. Therefore, Claimant is not entitled to medical benefits to relieve him of his hip condition.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant did not sustain an injury to his hip as a result of his July 23, 2017, work accident.

2. Claimant's request for the hip surgery recommended by Dr. White is denied and dismissed.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 20, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that on February 6, 2018 he sustained an injury arising out of and in the course and scope of his employment with the employer.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve him from the effects of the injury.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits beginning February 8, 2018 and ongoing, until terminated by law.

- If the claimant proves entitlement to TTD, whether the respondents have demonstrated by a preponderance of the evidence that the claimant was responsible for the termination of his employment, thus ending the claimant's entitlement to TTD benefits.

- At hearing, the parties stipulated to an average weekly wage (AWW) of $1,134.44.

FINDINGS OF FACT

1. The employer provides payroll related services to various clients. One such client of the employer is Caminante Trucking. The claimant was hired by Caminante Trucking on November 1, 2017. At that time, the claimant became an employee of the employer.

2. Caminante Trucking has a contract to provide trucking services to the United States Postal Service (USPS). The claimant's job duties involved transporting bulk mail to and from USPS locations/annexes. Prior to his employment with Caminante Trucking, the claimant held a similar position with Albuquerque Trucking. The claimant testified that his employment with Albuquerque Trucking ended when that company's contract with the USPS ended and Caminante Trucking's contract began.

3. While employed with the employer, the claimant was assigned to drive the "scarlet route". Another driver, Jason, was assigned to the "main route". The claimant testified that on February 6, 2018, he began his day as he normally would and completed his first run of the scarlet route. However, when he returned to the USPS annex, he learned that his coworker, Jason, had failed to report for his shift. As a result,

the claimant was required to complete the remainder of his scarlet route runs, as well as the runs for the main route. The claimant also testified that he attempted to report Jason's absence to Caminante Trucking, but he was unable to reach anyone.

4. The claimant testified that it was on that same date, February 6, 2018, that after returning to the USPS annex, he lost his footing while he was climbing out of his truck, and fell to the ground. The claimant testified that he fell backwards and landed on his back, and struck his head. The claimant testified that he immediately felt a sharp pain in his low back and a pop in his neck, but he did not lose consciousness.

5. After the incident, the claimant communicated with a USPS employee, Mr. Rocha. At that time, the claimant told Mr. Rocha that he had fallen and hurt his back. Mr. Rocha encouraged the claimant to seek medical treatment. It is undisputed that the claimant's conversation with Mr. Rocha was not notification of the injury to the employer.

6. The claimant testified that he finished his shift on February 6, 2018 and reported for his scheduled shift on February 7, 2018. The claimant was able to complete both the scheduled scarlet route and the main route on the morning of February 7, 2018. Thereafter, the claimant was approached by his supervisor, Mr. Robles. The claimant testified that he did not tell Mr. Robles that he fell and hurt his back.

7. The claimant testified that Mr. Robles told the claimant that Caminante Trucking wanted him "to take some time off". The claimant testified that he asked Mr. Robles if he was fired and Mr. Robles informed the claimant that he should contact Juan or Carlos with Caminante Trucking.

8. At that time, Mr. Robles showed the claimant an email that the USPS sent to Caminante Trucking regarding various concerns. The claimant testified that the allegations contained in the email referencing him are not true. The claimant also testified that many of the allegations in that email pertain to the other driver, Jason. The ALJ finds the claimant's testimony on this issue to be credible and persuasive.

9. The claimant testified that he was not told that his employment was terminated. He was only told to "take some time off". The claimant learned that his employment with Caminante Trucking had been terminated when he attempted to access payroll information on the employer's website. Employment records entered into evidence indicate that the employer terminated the claimant's employment on February 7, 2018 because of a "physical fight [with] one of the postal workers". The claimant denies that he ever engaged in a verbal or physical altercation with anyone while employed with the employer. The ALJ finds this testimony to be credible and persuasive.

10. The claimant has not returned to work for the employer. Nor has the claimant obtained employment with any other employer.

11. On February 8, 2018, the claimant contacted the employer and reported the February 6, 2018 fall. The claimant testified that the employer scheduled him an appointment for medical treatment with Work Partners that same day.

12. On February 8, 2018, the claimant was seen at Work Partners by Dr. Lori Fay. At that time, the claimant reported aching, stabbing, and throbbing pain in his low back that was accompanied by tingling. In her physical exam, Dr. Fay noted that the claimant had no swelling, ecchymosis (bruising), or bony deformity. Dr. Fay also noted that the claimant had tenderness over the right paravertebral muscles down into the lumbosacral junction and increased tightness in the right paraspinous muscle. Dr. Fay diagnosed a low back strain/sprain and recommended rest, ice, heat, and over the counter anti-inflammatory medication. In addition, Dr. Fay placed the claimant on work restrictions that included no lifting, carrying, pushing, or pulling over five pounds.

13. On February 15, 2018, the claimant returned to Work Partners and was seen by Erica Herrera, PA. The claimant reported that he continued to have low back pain that was stabbing and sharp. In addition, the claimant also reported that he felt a 65% improvement in his symptoms. At that time, Ms. Herrera referred the claimant for massage therapy and chiropractic treatment with Dr. Christopher Angello. Ms. Herrera placed the claimant on work restrictions of no lifting, carrying, pushing, or pulling over eight pounds. The claimant testified at hearing that he continues to have these same work restrictions. The claimant also testified that he did not return for a third visit with Dr. Fay or Work Partners because his claim was denied by the respondents.

14. Although his claim was denied, the claimant obtained and continued to undergo chiropractic treatment with Dr. Angello into April 2018. The claimant testified that he discontinued treatment with Dr. Angello when he could no longer afford it.

15. The claimant testified that his current symptoms include low back pain with sharp pain when he moves from sitting to standing. The claimant also testified that he has tingling in his fingers, shooting pain into his legs, and his legs go to sleep easily.

16. At the request of the respondents, the claimant attended an independent medical examination (IME) with Dr. Douglas Scott on May 16, 2018. In connection with the IME, Dr. Scott reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Scott opined that the claimant suffered a low back sprain/strain on February 6, 2018. Dr. Scott also opined that the claimant was approaching maximum medical improvement (MMI) with no permanent impairment from his injury. With regard to the claimant's other symptoms, Dr. Scott opined that the claimant may have myogenic or neurogenic thoracic outlet syndrome, but that diagnosis would be unrelated to the claimant's work injury. Dr. Scott's testimony at hearing was consistent with his IME report.

17. The medical records entered into evidence indicate that the claimant told Dr. Fay that he did not have a history or back issues. However, the claimant was seen for back pain by Dr. Britta Seppi on July 29, 2014 and by Dr. Michael Pramenko on September 7, 2017.

18. During the IME, Dr. Scott specifically asked the claimant about these two visits. The claimant recalled that the 2014 visit with Dr. Seppi related to a muscle strain. The claimant testified that the 2014 strain resolved and he had no further issues. The claimant testified that he sought medical treatment in September 2017 because he had pain on his right side that he believed was caused by a kidney infection. However, the claimant did not have a kidney infection and Dr. Pramenko diagnosed musculoskeletal back pain that was likely caused by obesity.

19. Mr. Robles testified at hearing and identified himself as the claimant's supervisor. Mr. Robles testified that on February 7, 2018, he informed the claimant that his employment was terminated. Caminante Trucking chose to discharge the claimant because of the allegations listed in the email from the USPS. Mr. Robles agreed that the claimant was considered the scarlet route driver. Mr. Robles also confirmed that the claimant was required to complete both the scarlet and main routes on February 6 and 7, 2018 because the other driver, Jason, failed to report for work.

20. USPS employee, Mr. Rocha, testified at hearing. Mr. Rocha testified that the claimant informed him of his February 6, 2018 fall on that same date. Mr. Rocha shared that information with his direct supervisor. Thereafter, Mr. Rocha learned that he claimant had been "banned" from the USPS annex, was fired by Caminante Trucking, and that the employer would take no other action with regard to the February 6, 2018 fall.

21. Mr. Rapier, another USPS employee testified at hearing. Mr. Rapier testified that the email sent to Caminante Trucking was authored by him. Mr. Rapier further testified that Caminante Trucking was a risk of losing their contract with the USPS because of the actions of the claimant. However, Mr. Rapier was certain in his testimony that the claimant was the main route driver and not the scarlet route driver. The ALJ does not find Mr. Rapier's testimony to be credible or persuasive.

22. The ALJ credits the medical records, the testimony of the claimant, and the testimony of Mr. Rocha and finds that the claimant did fall while exiting his work vehicle while at work on February 6, 2016, resulting in a low back sprain/strain. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that the claimant suffered an injury that arose out of and in the course and scope of his employment with employer. Although the claimant had two prior instances of reported back issues, the ALJ finds that those prior issues are not related to the fall and related injury that the claimant suffered on February 6, 2018.

23. It is clear from the record that following the injury the claimant notified the employer on February 8, 2018 and was referred for medical treatment with Work Partners. The ALJ finds that the claimant has demonstrated that it is more likely than not that the medical treatment he received from Work Partners, and any providers referred to by Work Partners (including Dr. Angello) was authorized medical treatment.

24. The ALJ credits the medical records and the claimant's testimony and finds that the claimant has demonstrated that it is more likely than not that medical treatment he has received to treat his low back pain is reasonable and necessary to cure and relieve him from the effects of the work injury.

25. The ALJ credits the medical records and the claimant's testimony and finds that the claimant has demonstrated that it is more likely than not that as a result of his work injury he continues to have work restrictions of no lifting, carrying, pushing or pulling over eight pounds. The ALJ credits the claimant's testimony that he has not worked since his work injury. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that his wage loss was caused by his work injury.

26. The ALJ credits the claimant's testimony over the contrary testimony of Mr. Rapier and finds that the employer's decision to discharge the claimant was based upon untrue information received from the USPS. Therefore, the ALJ finds that the respondent has failed to demonstrate that it is more likely than not that the claimant is responsible for the termination of his employment.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (the Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. As found, the claimant has demonstrated by a preponderance of the evidence that on February 6, 2018, he suffered an injury that arose out of an in the course and scope of his employment with the employer. As found, the medical records and the testimony of the claimant and Mr. Rocha are credible and persuasive.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, the claimant has demonstrated by a preponderance of the evidence that the medical treatment he has received from Work Partners and Dr. Angello constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records and the testimony of the claimant are credible and persuasive.

7. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

8. As found, the claimant has demonstrated by a preponderance of the evidence that he continues to have work restrictions due to his work injury. As found, the claimant has demonstrated by a preponderance of the evidence that his wage loss was caused by his work injury. Therefore, the claimant is entitled to temporary total disability (TTD) benefits beginning February 8, 2018 and ongoing until terminated by law. As found, the medical records and the claimant's testimony are credible and persuasive.

9. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

10. As found, the respondents have failed to demonstrate by a preponderance of the evidence that the claimant is responsible for his termination of employment. The employer terminated the claimant's employment based upon untrue allegations presented to them by the USPS. As the claimant did not engage in the behaviors for which he was terminated, the ALJ concludes that the claimant did not exercise any volitional act that resulted in his termination. As found, the claimant's testimony is credible and persuasive.

ORDER

It is therefore ordered that:

1. The claimant suffered a compensable injury on February 6, 2018.

2. The respondents shall pay for reasonable and necessary medical treatment including treatment the claimant has received from Work Partners and Dr. Christopher Angello.

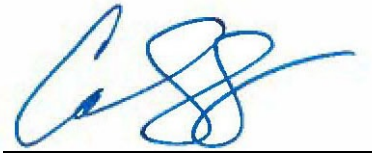
3. The claimant is entitled to temporary total disability (TTD) benefits beginning February 8, 2018 and ongoing until terminated by law.

4. The claimant's average weekly wage (AWW) for this claim is $1,134.44.

5. The claimant was not responsible for termination of his employment with the employer.

6. The insurer shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

Dated: September 20, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-046-462

ISSUE

➢ Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury on April 22, 2017.

STIPULATION

➢ If Claimant did sustain compensable injuries, then by stipulation of the parties, the medical care he received at Concentra is reasonable, necessary, and related medical treatment to cure and relieve him of the effects of those injuries.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Employer hired Claimant to work as a Chiropractor in its practice group. Claimant began working for Employer on April 17, 2017.

2. Claimant alleges a co-worker chiropractor, Dr. Rob Buechners, injured him at work when Dr. Buechners adjusted his spine on April 22, 2017. Claimant further alleges that he was training Dr. Buechners at the time, and that therefore his injury occurred during the course and scope of his employment.

3. According to Claimant, Dr. Jeremy Casagrande, the owner of the practice group, hired Claimant to help train Dr. Buechners, "to help get him up to speed." Claimant asked Dr. Buechners for the adjustment as a training exercise.

4. The great weight of the evidence contradicts Claimant's allegation that Claimant was training Dr. Buechners.

- Claimant testified that Dr. Doug Burson was present when Dr. Jeremy allegedly requested Claimant train Dr. Buechners. However, both Dr. Burson and Dr. Casagrande testified that Dr. Casagrande gave no such instruction.

- Claimant's job duties, as enumerated in his employment contract, do not include training other Chiropractors.

- Claimant's compensation agreement does not include anything about training other Chiropractors.

- When Claimant reported the incident in a May 5 note to Dr. Casagrande, Claimant did not mention Dr. Buechners' adjustment was part of any training or teaching Claimant was doing at Dr. Casagrande's direction.

- Dr. Casagrande testified that he was the only one who trained chiropractors in the practice group.

- Dr. Burson testified that chiropractors in the practice group learned new techniques by attending classes and practicing on mannequins and then other students in the class.

- Claimant presented no persuasive evidence that he told Dr. Buechners that his adjustment was for training purposes or that Claimant provided Dr. Buechners with any feedback or critique.

5. Claimant's reports to treatment providers also contradict his allegation that he was training Dr. Buechners when he received his adjustment.

- On May 11, 2017, Claimant reported to Health Images of Boulder for an MRI. He reported "Acute neck pain x3 weeks. Unknown trauma." In the same report, he indicated that his problem was "acute" and "non-traumatic."

- On August 9, 2017, Claimant saw Peter Gulla, D.C., at the "Concussion Place." Dr. Gulla recorded that after Employer hired Claimant, he began hearing complaints from mutual clients about a particular doctor and post-adjustment pain. Claimant "decided to have said provider adjust him to see if he experienced a similar response."

6. The great weight of the evidence supports a finding that Claimant asked Dr. Buechners for a "courtesy" adjustment for personal reasons not related to work.

- Claimant testified he moved his belongings to the Boulder area just before his job began.

- Dr. Buechners testified he provided a professional courtesy adjustment on Claimant, who asked for such due to a sore neck as he had been sleeping on a couch.

- Dr. Burson testified Claimant asked him for an adjustment a few days after Dr. Buechners adjusted him. Claimant told Dr. Burson his neck was sore from sleeping on a couch.

- Drs. Burson, Casagrande, and Buechners all testified that chiropractors at the practice group provided "professional adjustments" or "courtesy adjustments" on each other as a matter of course. They do these simply to

adjust each other; not to learn or practice new techniques. Employer does not require chiropractors to adjust each other.

7. Based upon the totality of the evidence, the ALJ credits Respondents' witnesses' testimony and exhibits over the Claimant's testimony and exhibits.

8. Claimant did not establish by a preponderance of the evidence that his symptoms and need for treatment arose out of his employment with Employer. The ALJ finds that Dr. Buechners adjusted Claimant as a professional courtesy. Such was not a requirement of his job, and provided no benefit to Employer. The benefit of the courtesy adjustment was strictly personal to Claimant.

9. The ALJ concludes that Claimant's testimony was neither credible nor persuasive.

10. The ALJ concludes that the testimony from Respondents witnesses was credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning

credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo.App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); §*8-41-301(I)(b), C.R.S.*

Respondents' witnesses credibly testified that the adjustment Claimant received was strictly personal and not part of his job duties or job expectations.

Claimant's injury was not caused by his work activities.

The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, Claimant's alleged injury occurred within the time and place limits of his employment relationship with Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury is deemed compensable.

The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while 'at work', does not mean that he sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

Under the Workers' Compensation Act (hereinafter Act), there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S.

Given the distinction between the terms "accident" and "injury." An employee can experience symptoms, including pain from an "accident" at work without sustaining a compensable "injury." This is true even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where the claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where Claimant involved in motor vehicle accident without resultant injuries, no compensable injury occurred). As found above, the ALJ is not persuaded that Claimant's need for care arose from a compensable incident at work on April 22, 2017.

The "arising out of" element is narrower than the "course" element and requires the claimant to prove that the injury had its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The "arising out of" test is one of causation and generally requires that the injury have its origin in an employee's work-related functions and be sufficiently related thereto so as to be considered part of the employee's service to the employer.

As presented, the evidence does not support that Claimant sustained a compensable injury on April 22, 2017 that arose out of or that was incidental to his service to Employer. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between his employment and the resulting conditions for which medical treatment was sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Because Claimant failed to establish he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim must be denied and dismissed. Accordingly, the claims for medical benefits need not be addressed.

ORDER

It is therefore ordered that:

1 Claimant failed to prove by a preponderance of the evidence he sustained a compensable injury that occurred in the course and scope and arose out of his employment for the employer.

2 Consequently, Respondents are not liable for any indemnity benefits, medical benefits or any other benefits under the Colorado Workers Compensation Act. Claimant's claims are denied and dismissed.

3 Any issues not determined herein are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 20, 2018

/s/ _ Kimberly B. Turnbow ___
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove a compensable left shoulder injury on March 28, 2018?
- If the claim is compensable, did Respondents prove Claimant was responsible for termination of his employment?
- If compensable, did Respondents prove the predicate elements for entitlement to a 50% reduction of indemnity benefits based on intoxication under § 8-42-112.5? If so, did Claimant prove by clear and convincing evidence his injury did not result from intoxication?

STIPULATIONS

If the claim is compensable, the parties stipulated:

1. Claimant's average weekly wage is $703.83, with a corresponding TTD rate of $469.22.

2. Claimant was disabled from his regular work and otherwise entitled to TTD benefits from March 29, 2018 through April 15, 2018, subject to Respondents' affirmative defenses of responsibility for termination and intoxication.

3. Claimant returned to work for a different employer on April 16, 2018, terminating TTD. He is entitled to temporary partial disability benefits to the extent he did not earn his preinjury wage, from April 16, 2018 until terminated according to law.

4. Evaluation and treatment for the left shoulder at Rocky Mountain Urgent Care on March 29, 2018, and subsequent care rendered by Dr. John Aschberger at Concentra, was reasonably necessary and authorized.

5. Dr. John Aschberger is Claimant's ATP.

FINDINGS OF FACT

1. Claimant worked for Employer as an apprentice electrician, beginning in December 2017. Claimant's job duties primarily involved electrical installation in new construction. When work was slow, he was assigned to work in the warehouse organizing equipment and supplies.

2. Claimant was working warehouse duties on March 28, 2018 moving boxes of materials He felt pain and a "weird pop" in his left shoulder while lifting a heavy box onto a shelf above shoulder level. Claimant finished his shift and did not report the incident that day because he initially "didn't think much of it" and "didn't think it would be a big

deal." That evening the pain increased significantly so he decided to report the injury the next morning.

3. When Claimant got to work the next day (March 29), his supervisor, John Kingsolver, called Claimant into his office. Mr. Kingsolver planned to speak with Claimant about job performance issues and "coach him on ways to improve his performance." Claimant immediately stated he had strained his shoulder lifting heavy items onto a shelf the day before. Mr. Kingsolver then took Claimant to Mike Garcia (Mr. Kingsolver's supervisor) to discuss the injury. Mr. Garcia had Claimant fill out an incident report, instructed him to take a post-injury drug test, and referred Claimant to Employer's designated provider, Rocky Mountain Urgent Care ("RMUC").

4. On the incident report, Claimant indicated he injured his "left shoulder" due to "lifting heavy objects awkwardly." He circled the left shoulder on the pain body diagram. He answered "yes" to the question whether he had previously injured that body part, and wrote "over six years ago I had minor shoulder injuries." No persuasive evidence was presented regarding any shoulder issues immediately before the incident.

5. Mr. Kingsolver and Mr. Garcia testified Claimant reported injuring his right shoulder. But Claimant identified his "left shoulder" as the injured body part on the incident report, and to the medical providers. The ALJ resolves this conflict by giving greater weight to Claimant's handwritten reports and his statements to providers.

6. Claimant saw NP Jovan Mack at RMUC on March 29, 2018 and reported left shoulder pain and reduced range of motion. He said he "was lifting pallets and boxes at work. The pain began yesterday but started hurting worse last night." Physical examination showed "moderate" limitations of left shoulder ROM in all planes. NP Mack put Claimant in a sling, prescribed NSAIDs, and restricted him to "light duty until cleared by PT."

7. Claimant also underwent a urine drug screen on March 29. On April 5, 2018, the results came back positive for marijuana and cocaine.

8. Employer terminated Claimant's employment on April 5. The reason for termination was stated on the paperwork as "we received results from the lab today 4-5-18 that he had failed his [drug] test so he will be terminated for violation of company policy." Although Mr. Kingsolver and Mr. Garcia had concerns about Claimant's job performance before the injury, they did not plan to terminate Claimant. The failed drug test was the direct catalyst for — and thus the proximate cause of — Claimant's termination.

9. When Claimant was hired by Employer he received materials to review, including an employee handbook. Under the heading "Drugs and Alcohol," the handbook states,

> The Company is committed to a safe, healthy, and productive work environment for all employees, free from the effects of illegal or non-prescribed drugs and alcoholic beverages. Use of drugs and alcohol alters employee judgment resulting in increased safety risks, employee injuries, and faulty decision making. Therefore, the possession, use, sale of controlled substances or alcohol on Company premises or during Company time is prohibited. This includes working after the apparent use of marijuana, ***regardless of marijuana's legal status***. Furthermore, working after the use of alcohol, a controlled substance, or abuse of any other substance is prohibited. (Emphasis in original).

10. Mr. Kingsolver interacted with Claimant "on most days," and there were no occasions he believed Claimant was under the influence of drugs or alcohol at work. He testified he would have "absolutely" taken immediate action if he had any evidence Claimant used drugs or alcohol at work or was intoxicated while working.

11. At hearing, Claimant admitted using marijuana and cocaine at a party the weekend before his injury. Claimant denied using any marijuana or cocaine at work or immediately before work. Respondents presented no persuasive evidence to contradict Claimant's timeline or establish he used drugs at work or immediately before work.

12. Claimant proved by a preponderance of the evidence he suffered a left shoulder injury on March 28, 2018.

13. Respondents failed to prove Claimant was responsible for termination of his employment. Specifically, Respondents failed to prove Claimant violated Employer's drug policy as set forth in the employee handbook. Respondents did not prove Claimant more likely than not used drugs at work or immediately before work, and the ALJ finds it at least equally likely Claimant used drugs during his free time on the weekend. Although Claimant's supervisors had other concerns about his performance, they planned to "counsel" him about those issues, and only decided to fire him after receiving the positive drug test.

14. Respondents proved the predicates to invoke the statutory presumption of intoxication under § 8-42-112.5(1). Claimant failed to overcome the presumption by clear and convincing evidence. Respondents are entitled to a 50% reduction of indemnity benefits.

CONCLUSIONS OF LAW

A. Compensability

To obtain medical or indemnity benefits, a claimant must prove he suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must prove an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must

prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally for either the claimant or respondents. Section 8-43-201.

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved he suffered a compensable injury to his left shoulder on March 28, 2018. The mechanism of injury and progression of symptoms described by Claimant are reasonable and uncontroverted by any persuasive countervailing evidence. Although there was conflicting evidence regarding whether Claimant initially reported right shoulder pain, he wrote "left" shoulder on the incident report and told NP Mack his left shoulder was injured. Examination of the left shoulder revealed restricted range of motion and NP Mack found the clinical presentation sufficient to warrant immobilizing Claimant's arm with a sling in putting him on work restrictions. The ALJ is not persuaded Claimant fabricated the injury in a "panic" over being confronted by his supervisor as argued by Respondents. Based on the evidence presented, the ALJ is persuaded Claimant probably experienced a painful pop in the left shoulder at work as he described. He did not report the injury immediately because he assumed it was not a "big deal" and would resolve on its own. But the pain worsened that evening and he realized he needed to see a physician. Claimant reasonably requested medical treatment the next day and Employer obliged. There is no persuasive evidence of any shoulder symptoms or limitations immediately before the incident, and the mere fact Claimant had some "minor" shoulder problems "over six years ago" is not dispositive of whether he had a discrete injury in March 2018.

B. Responsible for termination

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Respondent stipulated that Claimant was "disabled" and left work due to the injury, but assert TTD is barred because he was terminated for cause (*i.e.*, failing the drug test). Section 8-42-103(1)(g) provides that a claimant who might otherwise be considered temporarily disabled is not eligible for TTD benefits if he or she was "responsible for

termination of employment." *Kerstiens v. All American Four Wheel Drive*, W.C. No. 4-865-825-04 (August 1, 2013).

The respondents must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The mere fact that the employer discharged the claimant in accordance with its personnel rules does not automatically establish that the claimant acted volitionally or exercised control over the circumstances of the termination. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. App. 1987). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents failed to prove Claimant was responsible for termination of his employment. The reason for the termination was the positive drug test, and Respondents did not prove Claimant violated Employer's policy as set forth in the handbook. While many employers have so-called "zero tolerance" anti-drug policies that prohibit use of illegal drugs away from work, this is not one of those policies. The plain language of Employer's handbook explicitly prohibits use of drugs or alcohol *on Employer's premises or during work hours*. Although it also prohibits working "after" using drugs or alcohol, the ALJ interprets the term "after" to imply a temporal qualifier, meaning the employee may not work immediately after using drugs or alcohol. For example, an employee would violate this policy by smoking marijuana or drinking alcohol at home or in his car before going in to work. But the term "after" cannot reasonably be read in a literal sense to apply to an employee who merely used drugs or alcohol at any time in the past. A reasonable employee would not interpret this policy as prohibiting drug or alcohol use during the employee's free time away from work, unless they were still intoxicated when their shift began. Employer's policy appears intended to prevent employees from working under the influence of drugs or alcohol, and does not purport to regulate the employees' nonwork recreational activities. Claimant testified he used cocaine and marijuana at a party the weekend before his injury, and Respondents presented no persuasive evidence to the contrary.[1] There is no persuasive evidence Claimant used drugs at work or was under the influence at work, and the ALJ finds it at least equally likely Claimant used drugs during nonwork hours. Employer never conveyed to Claimant he could be fired for drug use on the weekend. Accordingly, Respondents failed to prove Claimant engaged in a "volitional act" he would reasonably expect to result in termination.

[1] The ALJ recognizes under § 8-42-112.5(1) an employee who tests positive for controlled substances after an injury is "presumed" to have been intoxicated at the time of the injury. But that presumption is confined to application of the 50% benefit reduction, and does not roam free in a claim to satisfy an employer's burden of proof in all other circumstances. Respondents cannot bootstrap the termination defense on the intoxication statute, but must affirmatively prove a volitional act leading to termination.

C. 50% reduction for intoxication

Section 8-42-112.5(1) provides indemnity benefits shall be reduced by fifty percent,

> [W]here the injury results from the presence in the worker's system, during working hours, of controlled substances . . . that are not medically prescribed . . . as evidenced by a forensic drug or alcohol test . . . . If the test indicates the presence of such substances . . . it is presumed that the employee was intoxicated and that the injury was due to the intoxication. This presumption may be overcome by clear and convincing evidence.

As found, Respondents proved the predicates to invoke the statutory presumption of intoxication under § 8-42-112.5(1), and Claimant failed to overcome the presumption by clear and convincing evidence. Claimant concedes he tested positive for marijuana and cocaine but argues Respondents did not prove the drugs were "above acceptable levels, or had any improper influence on his work performance." The ALJ is not persuaded by these arguments. Although the intoxication statute references a threshold level for alcohol, there is no minimum level for controlled substances. Respondents must only show the "presence" of drugs in Claimant's body, meaning the penalty applies to any level greater than "none." Nor must Respondents affirmatively prove Claimant was under the influence at the time of the injury. Rather, Respondents can rely entirely on the statutory presumption, as they have done here. *E.g.*, *City of Littleton v. Industrial Claim Appeals Office*, 370 P.2d 157 (Colo. 2016) (statutory presumption is "a substitute for evidence"). As such, it is incumbent on Claimant to rebut the presumption of intoxication by clear and convincing evidence, which Claimant failed to do.

ORDER

It is therefore ordered that:

1. Claimant's claim for a left shoulder injury on March 28, 2018 is compensable.

2. Insurer shall cover all medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including, but not limited to, charges from RMUC and Dr. Aschberger.

3. Claimant's average weekly wage is $703.83, with a corresponding TTD rate of $469.22.

4. Respondent's affirmative defense that Claimant was responsible for termination of his employment is denied and dismissed.

5. Insurer shall pay TTD benefits from March 29, 2018 through April 15, 2018 based on the stipulated TTD rate.

6. To the extent he earned less than his stipulated AWW, Claimant is entitled to TPD benefits from April 16, 2018 until terminated according to law. The parties did not present post-injury wage records, so no specific order regarding TPD may issue.

7. Insurer may reduce all nonmedical benefits by 50% pursuant to § 8-42-112.5.

8. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

9. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 19, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for his termination from employment; and

Whether Claimant has proven by a preponderance of the evidence that he is entitled to an order awarding temporary total disability benefits (TTD).

PROCEDURAL MATTERS

- The parties stipulated to an average weekly wage of $1,389.02, which would apply if Claimant were determined to be entitled to indemnity benefits.

- At the June 22, 2018, hearing, counsel for Claimant raised an oral motion to compel the production of Employer's computer hard drive. The ALJ reserved ruling and permitted Claimant to submit a written motion within 10 days from the date of hearing, at which point Respondents would have 10 days to file a response. Claimant did not file a written motion, as permitted. Counsel for Claimant renewed his oral motion to compel at the August 27, 2018, hearing, which the ALJ denied.

- The parties appeared for hearing on June 22, 2018. At the conclusion of the hearing, the parties had additional evidence to present and a second hearing date of August 13, 2018, was set. All the participant appeared for hearing on August 13, 2018, except Claimant. Claimant's counsel could not explain Claimant's absence, but counsel requested a continuance of the hearing date. The request for continuance was granted and the hearing was rescheduled to August 27, 2018, at which time the evidence presentation was concluded.

FINDINGS OF FACT

1. Claimant is a 37 year old man who worked for Employer as a floor manager. Claimant commenced employment for Employer in approximately May 2017.

2. Claimant worked as a manager at Employer on the date of injury, October 22, 2017. On that day, a fight broke out between employees of Employer and individuals attempting to enter the club. The fight occurred at approximately 2:00 a.m. Gunshots were fired, and Claimant's co-worker was shot. Claimant testified he was punched several times in the face.

3. Claimant continued to work after the injury. On November 4, 2017, Claimant was given permission to view surveillance videos of the fight by Michele Poague. Claimant thereafter attempted to download numerous surveillance videos to his Google Drive account. He attempted to download the videos during two shifts which began the evenings of November 4 and November *5*. On November 6, Employer could no longer access the surveillance videos Claimant copied (downloaded or

uploaded). Claimant offered to help retrieve the lost data, and the Employer accepted his offer. On November 9, 2017, Claimant left his physician's office where for the first time he received medical restrictions to not work, and left for the Employer's premises to retrieve the data. While attempting to retrieve the data on November 9 at the Employer's premises, he was arrested by Glendale PD for destruction of evidence related to the October 22 fight. Employer terminated Claimant on November 9, per the Employment Separation form Ms. Poague completed. In dispute is whether Claimant was responsible for his own termination as a result of violating company policy by copying videos without permission.

4. Michele Poague credibly testified at hearing. She is a management supervisor and human resources (HR) Manager. Ms. Poague reports directly to one of the owners, Debra Matthews, and handles HR and payroll matters. Ms. Poague testified that prior to the events relevant to Claimant's termination, Claimant was written-up for an incident of using excessive force against a customer. Claimant was alleged to have choked a customer who was not combative. That incident is the subject of a disciplinary write-up Ms. Poague prepared. Ms. Poague testified Claimant's termination was discussed internally at that time. She testified an incident of that type would normally have caused termination. However, they compromised with Glendale PD that it would not arrest Claimant, and Claimant would stay employed, if he attended training sessions at Glendale PD.

5. At the Employer's business, administrative password access was required to view saved surveillance videos, such as the ones in question from the October 22 fight, and the only people with access were Michelle Poague, Kevin Gulbranson, Jeff Orick and Maciek Trubowitz. The Employer's policies, providing for non-disclosure of confidential information, prohibited disclosure, distribution, transmission or copying of confidential information. This policy encompassed Employer's surveillance videos. The non-disclosure of confidential information policy is contained in writing and is shared with Employer's employees. Confidential information is defined as any information an employee learns of as a result of working for Employer that is not publicly available. Employer's surveillance system includes extremely sensitive information due to surveillance taken of inside the club and inside locker rooms.

6. On the evening of November 4, Claimant was writing a report of what happened on the night of the shooting and fight. Ms. Poague asked if it would be helpful for him to view the videos in conjunction with writing his report, and he stated it would. She asked Mr. Gulbranson, the IT manager, to log Claimant in and open the videos.

7. It is found that, consistent with Ms. Poague's testimony, Claimant did not ask to copy the videos, nor did she tell him he could copy videos. Ms. Poague never gave anyone permission to copy videos on to a personal device. Ms. Poague testified doing so would render secure files insecure, which was not allowed based on the confidentiality policy. Ms. Poague believed it was clear from their confidentiality policy that Claimant was not supposed to copy sensitive data. Ms. Poague allowed

other employees to view the videos to complete their statements regarding the October 22 fight. Ms. Poague was unaware of any other employee needing to copy Employer's videos.

8. Ms. Poague credibly testified that Employer's employees, Mr. Trubowitz and Mr. Gulbranson, were the only ones with authority to copy videos. Claimant, as one of Employer's managers himself, had been advised that all management employees required that any videos to be copied had to be accessed by either, Mr. Trubowitz and Mr. Gulbranson. Ms. Poague testified that she assumed that Claimant could not regain access at a later date, because he did not have administrative password access as a floor manager.

9. Ms. Poague went to work on Sunday, November 5, when Mr. Gulbranson informed her that Claimant's Google Drive was open on the computer and he was uploading files to his personal drive. Ms. Poague and Debbie Matthews, the owner, discussed terminating Claimant. Ms. Poague recommended Claimant's termination, but Ms. Matthews decided not to terminate him at that time. Ms. Poague did not speak with Claimant about his copying of videos, because she was not given authority to do so by Ms. Matthews. However, she left work on November 5, with no concerns about Claimant accessing the videos again, as she did not believe he had ability to access the videos.

10. On November 6, Ms. Poague was shown by Mr. Gulbranson the files accessed by Claimant. Based on Ms. Matthew's direction, Ms. Poague took no action on November 6 against Claimant for copying Employer's files.

11. On November 6, later in the day, another employee was preparing a report regarding the fight and shooting incident and needed to view a video to refresh his memory. Mr. Gulbranson informed Ms. Poague at that time that he could not access the video files. Ms. Poague testified that once she realized the files were gone, she became concerned and called Ms. Matthews. Ms. Poague recommended to Ms. Matthews that Claimant should be fired immediately because the video surveillance were missing. Ms. Matthews did not want to give permission to fire Claimant because she hoped that Claimant would retrieve the missing files.

12. Claimant was terminated on November 9, 2017, after Claimant was arrested, as noted on the termination form Ms. Poague completed. Ms. Poague testified she understood that she could terminate Claimant at that time, because if Glendale PD arrest someone on property they are trespassed and cannot return to the premises. Ms. Poague terminated Claimant for violating Employer's non-disclosure of confidential information policy by copying Employer's surveillance files.

13. Mr. Gulbranson testified credibly at hearing that he was the IT manager for Employer. He maintained cameras inside and outside, including on the dance floor and in the locker rooms at Employer's place of business. He stored videos for 8-10 days before the videos are overwritten but the surveillance system had the ability to

permanently save specific videos. Mr. Gulbranson saved videos for viewing on four computers. Mr. Gulbranson permitted Claimant to view the videos from a station in an upstairs conference room. Mr. Gulbranson saved videos believing that he was only providing limited password access. Mr. Gulbranson explained that any manager's password could access the computer, but additional access with an administrative password is needed to access saved videos. Mr. Gulbranson believed that the only people with knowledge of the administrative password were him, Ms. Poague, Mr. Orick, and Mr. Trubowitz.

14. Mr. Gulbranson agreed there could be some way of which he was not aware in which videos could have been accessed without the administrative password. Mr. Gulbranson saved videos of the October 22 incident to fulfill Glendale Police Department's requests. With Ms. Poague's direction, he allowed Claimant to view the videos. Mr. Gulbranson did not allow Claimant or any employee to copy files.

15. Mr. Gulbranson credibly testified he logged on to the computer and allowed Claimant to watch videos at approximately 6:30 p.m. on November 4. He testified he did not provide Claimant the administrative password, was unaware Claimant intended to view videos multiple times or copy videos. Mr. Gulbranson was not worried about logging off the computer before he left that night, because the computer would automatically log off after five minutes of inactivity.

16. On November 5 at 10 a.m., Mr. Gulbranson arrived at work and saw a Google Drive login associated with Claimant open. The open tabs on the computer showed what appeared to be multiple video files which had been copied to Claimant's Google Drive. Mr. Gulbranson observed from the computer screen that Claimant had attempted to upload 38 surveillance video files. When Mr. Gulbranson realized what had happened, he notified Ms. Poague.

17. Mr. Gulbranson arrived at work at 7 a.m. on November 6. He again noticed there were additional open files on the computer. Claimant's Google Drive was open. Mr. Gulbranson observed that there was a "New Folder" screen that had not previously existed, containing Employer's video files.

18. Mr. Gulbranson credibly testified that when he made this discovery, there did not appear to be any missing files. He left the computer as he found it and notified Ms. Poague of what he found. When later that day, he came back to the computer to allow another employee to view the videos for purposes of that person writing a police statement, the open screen and New Folder seen earlier was no longer there. Mr. Gulbranson assumed that instead of being simply copied, the files were actually dropped into the new folder, the folder was attempting to make a compressed file of the data into the Google Drive, and once the compression completed, it deleted the New Folder and the files were no longer on the computer. He notified Ms. Poague at this time the files were missing.

19. Mr. Gulbranson did not know how Claimant gained access to the files on the evening of November 5, but he speculated the only way was for Claimant to "hack" into the system. Claimant should have taken 15-20 minutes to view the videos he needed, and any other access was unauthorized.

20. Mr. Gulbranson purchased software to recover the lost files, although he could not be sure they recovered all files. Mr. Gulbranson had been impressed by Claimant's computer skills and believed Claimant to be more knowledgeable than him on IT issues.

21. Mr. Gulbranson credibly testified that Ms. Poague misunderstood that he spent six hours attempting to retrieve the missing files. Mr. Gulbranson further credibly testified that it would have been impossible for him to have deleted the files because the files went missing without him performing any activities on the computer.

22. Ms. Matthews terminated Claimant on November 9, and he was notified of his termination around November 11-12, when she notified him in texts that he had been trespassed and could not return to work.

23. Ms. Matthews testified that, initially, she did not want to terminate Claimant on the morning of November 5 after Claimant's first copy attempt. She did not believe he had taken the files, he could not access the files again, and she was not sure about his intent for copying the videos. When she was notified by Ms. Poague on November 6 of Claimant's second attempt to copy videos, Ms. Matthews agreed he needed to be terminated, she first wanted to work with Claimant to recover the data, which was attempted on November 9.

24. Ms. Matthews called the Glendale PD police chief on November 9. On that day, Claimant had been attempting to retrieve the data for several hours. Ms. Poague was worried that Claimant's retrieval effort was taking so long and in that process Claimant had taken apart Employer's computer. Ms. Matthews had previously informed Glendale PD there had been an issue with the videos being lost due to Claimant's actions. Therefore, Ms. Matthews notified Glendale PD on November 9 and asked if it was ok for Claimant to have taken apart the computer. She was told that was not ok, and that the police chief was going to send someone to stop what Claimant was doing.

25. Ms. Matthews credibly testified that no employee had permission to copy the surveillance videos, and if Claimant had requested permission, she would not have allowed it due to the videos being evidence in an attempted murder investigation. She also testified the non-disclosure of confidential information policies for Employer encompassed the surveillance videos Claimant made inaccessible. The videos were confidential and sensitive regardless of whether there had been a criminal investigation. She testified all managers are instructed that surveillance videos are considered to be confidential information. She testified that was discussed specifically in meetings involving Claimant. In her opinion, Claimant violated the

confidentiality policy of the Employer by trying to copy the surveillance videos. She testified Claimant could not have accessed the videos the second night with his floor manager password, and he would have had to "hack" the system to regain access.

26. Ms. Matthews testified Claimant's employment was already on thin ice due to the incident where he used excessive force on a customer. She testified his ultimate termination resulted from his unauthorized access and copying of videos, and regardless of whether he recovered the data, he would have been terminated. He also would have been terminated regardless of whether he had been arrested, although his being arrested led to him being considered trespassed as well.

27. Lt. Roy Martin with the Glendale PD testified at hearing. Officer Martin responded to the October 22 incident as the on-call commander that night. He testified there was still an open investigation and Glendale PD was utilizing Employer's surveillance video in the course of that investigation. Lt. Martin testified that the Glendale PD had requested video from Employer on several occasions. He testified that as of November 4-5, 2017, Glendale PD was still requesting video.

28. Lt. Martin testified that on November 9, he was notified there was an incident involving lost video relevant to the investigation of the October 22 fight. He went to Employer's premises with Sgt. Trace Warrick. He saw a computer hooked up to a docking station, and Claimant informed them he was trying to download video files. His understanding at that time was Claimant had worked on the computer, made the files inaccessible, and he was again working on the computer. Lt. Martin called the on-call District Attorney and was advised he had probable cause to arrest Claimant for a felony destruction of evidence. He testified his determination at the time of arrest was that Claimant acted intentionally to render the files inaccessible.

29. Tyler Mintz testified at hearing. He was a supervisor at Employer. He testified that on November 6, when he learned Claimant deleted files from Employer's computer, he called Claimant asking Claimant to "tell me something that is going to make me feel good about you deleting files off of our computer last night." Claimant told him he was having problems "wrapping his mind" around the shooting. Mr. Mintz then told him he should take some time off work.

30. Claimant testified at hearing and contended that he was granted permission to view videos because he needed to clarify how close he was standing to the employee who was shot. Claimant testified he could gain access to the surveillance videos with his floor manager password. Claimant testified he requested permission to copy the videos to watch them at home. He admitted Mr. Gulbranson logged him in to view videos on November 4.

31. Claimant maintained that he had no idea why Mr. Gulbranson logged him in if he had his own access to the videos. He testified he requested permission to copy videos so he could watch the videos to deal with his PTSD, and he did not want to take up time at work watching "hours and hours" of videos. Nonetheless, surveillance video on November 4 and 5 reflects that Claimant spent more than two

hours at work looking at the video. When asked about this time spent at work looking at the video, Claimant maintained that he was actively writing his statement for the Glendale PD when he was observed viewing the videos at work.

32. Claimant admitted he was uploading 38 video files to his Google Drive account during his November 4-5 shift. Claimant testified that during the November 5-6 shift, he attempted to compress the files to upload. He testified he compressed 41 files. Claimant testified he did not believe he required permission to copy the videos, even though he asked for permission to do so. Claimant testified he did not believe the files were potential evidence in the investigation of the October 22 fight, because he believed, and continues to believe, Glendale PD had all copies of the video they needed. Claimant admitted the videos were password protected.

33. Claimant admitted signing the Confidentiality Policy and Pledge. He agreed that "technically" surveillance videos of Employer was information that was "not otherwise publicly available." He later stated he would not agree videos would constituted confidential information. Claimant was asked if he has expertise in "hacking," and he denied as much.

34. Claimant testified he was not reprimanded for using excessive force against a customer, he did not receive additional training at Glendale PD as a result thereof, and he claimed the October 31, 2017, coaching and counseling form documenting the incident was fabricated after he was fired.

35. The ALJ finds and concludes that Respondents sustained their burden of proof to establish by a preponderance of the evidence that Claimant is responsible for his termination from employment. Therefore, since Claimant is responsible for his wage loss, he is not entitled to an order awarding TTD.

36. The ALJ finds the collective testimony of Michele Poague, Kevin Gulbranson, Debbie Matthews, Tyler Mintz, and Lt. Roy Martin was more credible than Claimant's testimony. The credible and persuasive evidence presented at hearing established that Claimant possessed a superior knowledge of computers than Employer's IT manager, human resources manager, and majority co-owner. The ALJ concludes Claimant was provided permission to watch surveillance video on a computer at work following a violent altercation, he was not given permission to upload confidential computer surveillance files to his personal Google drive account, and he used his superior computer knowledge to upload videos in violation of Employer's policies regarding the non-disclosure of confidential information.

37. The ALJ further finds the evidence establishes that Claimant, as a manager, was apprised of Employer's policies, and he was terminated as a direct result of both his violation of these policies, and his subsequent arrest for destruction of evidence, which was a direct result of his violation of the Employer's policies.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Temporary Total Disability Benefit (TTD)

4. To obtain TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 639 (Colo. App. 1997). A claimant must establish a causal connection between a work-related injury and a subsequent wage loss. Section 8-42-103(1)(a), C.R.S*.; PDM Molding, Inc. v. Stanberg,* 898 P.2d 542, 546, 546 (Colo. 1995).

5. Under Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., the claimant is precluded from receiving TTD if he is found to be responsible for his wage loss. The concept of "responsibility" in Sections 8-42-105(4) and 8-42-103(1)(g), is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). Fault does not require willful intent. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996)(unemployment insurance). The claimant is not at fault if the termination is due to claimant's physical or mental inability to perform assigned duties, but poor job performance can be claimant's fault. *Johnston v. Deluxe/Current Corporation*, W.C. No. 4-376-417 (Industrial Claim Appeals Office, June 7, 1999).

6. It is found and concluded that Respondents sustained their burden of proof to establish by a preponderance of the evidence that Claimant is responsible for his termination from employment. Since Claimant is responsible for his wage loss, he is not entitled to an order awarding TTD.

7. The credible and persuasive evidence presented at hearing established that Claimant possessed a superior knowledge of computers. The evidence established that Claimant had greater knowledge of computers than Employer, specifically, Employer's IT manager, human resources manager and the co-owner. It is concluded that Claimant had permission to watch a surveillance video on a computer at work following a violent altercation. Claimant was not given permission to upload confidential computer surveillance files and to transfer those files to Claimant's personal Google drive account.

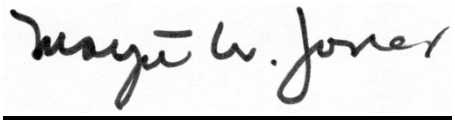
8. The evidence further established that Employer considered surveillance videos to be confidential information. Under Employer's policies, Claimant was expected to safe guard confidential information. Claimant, as a manager, was apprised of Employer's policies. Respondents established that Claimant was terminated from employment because of his actions in uploading confidential surveillance video to his personal Google account and being arrested and trespassed by the Glendale PD.

9. It is found and concluded that Claimant's actions uploading confidential surveillance videos was proven to be a volitional act which lead to his termination from employment, arrest and trespass by Glendale PD and wage loss. Since Respondents established that Claimant was responsible for his wage loss, Claimant is not entitled to an award of TTD.

ORDER

It is ordered that Claimant's claim for TTD is denied and dismissed.

DATED: September 25, 2018



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), CR.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Whether Claimant established, by the preponderance of the evidence, that she sustained a compensable injury to her left shoulder on January 27, 2018.

II. If claimant proved that she sustained a compensable injury to her left shoulder, did she also establish that the medical treatment she obtained at Parkview Hospital on and after February 11, 2018, is authorized, reasonable, necessary, and causally related to the January 27, 2018, left shoulder injury.

III. If claimant sustained a compensable injury to her left shoulder on January 27, 2018, did she prove that she is entitled to temporary total disability (TTD) benefits beginning January 27, 2018, through the present and ongoing.

IV. Whether Claimant's Average Weekly Wage is $289.77 or $392.31.

Because the ALJ concludes that Claimant failed to prove that she sustained a compensable injury, this order does not address issues II-IV above.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Employer operates a marijuana farm where marijuana plants are cultivated, harvested and processed for sale. The operation is spread over multiple buildings on twenty-seven acres; however, the restricted area where growing and processing occurs is limited to seven acres.

2. Claimant was hired to work inside as a cultivator by on September 1, 2017. Claimant's employment was probationary initially. At the end of her probationary period (around November 14, 2017), Claimant was hired as a full time employee. On January 3, 2018, Claimant received and acknowledged reviewing Employer's employee handbook. Section 4.5 of that handbook, "Safety," required claimant to report, "[A]ll accidents and injuries, regardless of how minor".

3. Claimant was paid a weekly salary of $850.00 at the time she was hired on December 1, 2017, following her probationary period. However, as explained by Brittney Kern, Claimant began having increasing and unacceptable attendance problems concerning her work around the middle of December 2017. According to Ms. Kern, Claimant would often come to work late, leave early and take multiple unexcused breaks. She was also using excessive sick time. Therefore, on January 16, 2018,

Claimant was taken off of her previous salary, and paid $9.81 per hour. This change was permanent.

4. Ms. Kern testified that she met with Claimant and explained this new policy, informing her that it was put in place due to excessive work absences, leaving her work station without cause or excuse, and unacceptable work performance. Ms. Kern met with Claimant and told her that she would not be paid for two days she had missed from work due to his change. Ms. Kern testified, and Claimant acknowledged during her testimony, that she was upset about this change in her rate of pay.

5. Claimant would frequently leave her work station inside employer's processing building where she would trim harvested marijuana plants to go outside. According to Claimant she like to work outside. Billy Osborn testified that employees of the farm were either designated as outside or inside workers. They were designated as such to avoid cross contamination/pollination of plants. Mr. Osborn testified that he would often find Claimant, who had been identified as an inside worker, outside in the barn or wandering the property. Mr. Osborn testified that he would instruct Claimant to go back inside and not to leave her work station; however, Claimant continued to leave her work station, occasionally later on the same day after she had been reprimanded for leaving her work area previously. Mr. Osborn testified that Claimant's unexcused absences from her work station had increased and she was missing more and more time from work.

6. Steven Ansley testified that he would frequently find Claimant outside, often in the barn where she would be engaged in activities unrelated to her position as a cultivator. According to Mr. Ansley Claimant reported being tired of being inside and asked to help with outside work so he allowed her to assist. Mr. Ansley testified that Claimant never reported to him that she had sustained an injury to her left shoulder at work and he never observed any behavior on Claimant's part after January 27, 2018 suggesting that she had sustained such an injury.

7. Manuel Gallardo, Claimant's immediate supervisor, testified that during November and December 2017 and January 2018, Claimant was assigned to work indoors in the processing area of the farm. Mr. Gallardo testified that Claimant would remove herself from the processing area by manipulating other managers for Employer. Mr. Gallardo testified that while he directed Claimant to stay indoors and complete her assigned duties, he had assigned her to inventory items in the barn. Mr. Gallardo also testified that after January 27, 2018, he never observed any evidence suggestive of the fact that Claimant suffered an injury to her left shoulder.

8. Based upon the testimony of Claimant's managers the ALJ finds that Claimant was frequently leaving her assigned workstation, generally without permission, to engage in activities unrelated to her position as a cultivator. Moreover, the testimony presented persuades the ALJ that these unexcused absences were increasing and that Claimant had been told repeatedly to return inside and attend to her assigned work duties.

9. On January 27, 2018, Claimant left her work station in the processing building after lunch in the early afternoon without permission. Claimant testified she went to the barn on Employer's property. Within the barn is a small storage room less than 20 feet by 16 feet, where shallow plastic trays measuring 8 feet long by 4 feet wide, and six inches deep, were stacked on their sides, resting against the walls of the room. These plastic trays were used in the spring to house young newly potted marijuana plants as they began to grow. The trays were not used for anything in January 2018, and there was nothing requiring their use on January 27, 2018. Employer did not direct Claimant to do any work with these trays. The trays were simply being stored in this room for the winter.

10. Claimant testified that she started cleaning the trays to inspect them for cracks and get them ready for the upcoming season. on January 27, 2018. In order to clean the trays, Claimant testified that she drag them while they lay flat on the ground about 10-12 feet into the center of the room. She testified that she would sweep the trays out, check the tray for cracks, wash the trays, and then move the trays into a stack of not cracked or stack of cracked trays. She testified she could not and did not lift the trays. Claimant could not recall how many trays she moved, inspected, or sorted, but estimated it was less than twenty (20).

11. Claimant testified that while she was moving one of these trays on January 27, 2018, she felt a pull and developed sharp, burning pain in her left shoulder. She thought she testified that she pulled a muscle and would take care of it on her own. The alleged incident was unwitnessed.

12. Claimant testified that she tried to tell Ms. Kern about her alleged injury on January 27, 2018, but that Ms. Kern was not available. Ms. Kern testified she was available and that she does not recall any attempt by Claimant to contact her that day. Claimant testified that she finished her January 27, 2018 shift a bit early, approximately 3:00 p.m. and left work. Claimant returned to work in the ensuing days completing her routine jo duties, on her normal shifts without any complaint or encumbrance. While Claimant had access to her managers both at work on January 27, 2018, and in the succeeding days, both in person (due to her return to work) and by telephone or text message, the record is devoid of any indication that she reported this alleged injury to anyone working at Employer. Indeed, Mr. Osborn, Mr. Ansley, Mr. Gallardo and Ms. Kern all testified that they were unaware that Claimant injured her shoulder as she never reported any injury to them. According to Ms. Kern, she learned about the alleged injury after being contacted by Insurer.

13. Claimant did not appear for work at the beginning of February 2018. Attempts to reach her by phone and text message failed. Consequently, Mr. Osborn contacted Claimant's sister, who is also an employee of the farm, to find out where Claimant was and if she was coming to work. Claimant's sister was able to reach her. After being contacted by her sister, Claimant reached out to Mr. Osborn informing him that she did not report to work because she was ill.

14. On February 8, 2018, Claimant was late to work. She told Mr. Osborn that she was late because she car trouble. On February 10 and 11, 2018, Claimant called off of work reportedly because she was sick. Claimant did not say or allege that she was late for work or ill because of the purported work injury occurring January 27, 2018.

15. Mr. Ansley, the maintenance manager for employer, testified that the storage trays Claimant alleges to have moved and cleaned on January 27, 2018, are not cleaned or used in the barn, as there is no water in the barn and no need to clean the trays when the trays were stored in the barn. The trays are just kept stacked on their sides against the walls in the barn for storage in the winter months. They were stored this way on January 27, 2018. The trays are only used when new plantings are put in the trays to grow in the spring time. Mr. Ansley was not at work on January 27, 2018, and he did not instruct Claimant to move any of the storage trays.

16. Brittney Kern, the human resource and general manager for Employer, testified that she hired Claimant as a probationary employee for the first 90 days of employment at an hourly rate. According to Ms. Kern, Claimant was brought on as a salaried employee around November 14, 2018. After attendance problems and absenteeism worsened in December 2017 and January 2018, Ms. Kern testified that it was not fair to other employees who were working and adhering to employer's attendance policy that Claimant remain a salaried employee. Consequently, Claimant was returned to an hourly employee on or about January 16, 2018.

17. On February 1, 2018, Claimant asked Ms. Kern why she was not paid for her missed days of work in January. Ms. Kern explained that she would not be paid for this time, and it was unfair to pay her for time she did not work when other salaried employees were working their expected days and hours. According to Ms. Kern, Claimant was upset, indicating that it was unfair not to pay her because she had missed work because her back was hurting. Per Ms. Kern, Claimant was clear that it was her back that was causing her symptoms and missed time from work. She did not tell Ms. Kern during this confrontation that she had suffered a left shoulder injury or that she missed time from work due the same. Claimant did not ask to file a workers' compensation claim nor did she request treatment for her shoulder.

18. During cross examination, Ms. Kern testified that the trays in question could not have been moved as Claimant described during her testimony. Ms. Kern explained the trays are very heavy and awkward, and cannot be moved by a single person. Per Ms. Kern, the trays did not need to be moved, cleaned, and sorted on January 27, 2018 as Claimant alleged. Moreover, Ms. Kern testified that the room where the trays are stored is very small, used for storage only, and as it is a storage room there are other items, including many pots and dirt, taking up the entire floor of the room. The room was full of equipment and supplies stored for winter. Consequently, Ms. Kern testified that there was no space in the room to move, or lay down, the stacked trays as Claimant alleged.

19. Claimant did not work on February 9 or 10, 2018, calling off sick. Ms. Kern testified Claimant reported that she missed these work days because her back was hurting. According to Ms. Kern, Claimant did not show any signs of or make any reference to a shoulder injury when discussing this lost time from work during a February 12, 2018 discussion.

20. On February 11, 2018, Claimant presented to the emergency room (ER) at Parkview Hospital with complaints of "left arm pain and tingling that [had] been fairly constant over the last two wks (weeks)." Claimant reported that she worked on a farm doing "manual labor". She could move her arm in all directions, and while she heard a pop in her left shoulder before the pain started she did not describe a specific inciting event for the onset of her pain nor did she mention that she was moving trays at work when that pop occurred. X-rays of claimant's left shoulder on February 11, 2018, were negative for acute osseous injury. A CT of the cervical spine was obtained and interpreted to demonstrate "[m]ultilevel age-related cervical disc degeneration, most pronounced at C3-C4, C5-C6 and C6-C7" in addition to "[a]symmetric erosive or inflammatory arthropathy of left C3-C4 facet joint, which can be seen in the setting of an inflammatory spondyloarthropathy such as rheumatoid arthritis or septic arthropathy". Claimant refused additional emergent imaging and thus, was discharged home with "very close outpatient follow-up and strict return precautions".

21. Claimant completed a Worker's Claim for Compensation form on February 12, 2018. In this form Claimant noted that she injured her left neck and shoulder while lifting and moving 4 x 8, thick plastic trays. According to Claimant, 2-3 vertebra where affected and she pulled a muscle down her shoulder. Claimant's claim for compensation was received by the Division of Workers Compensation Customer Services Unit on February 15, 2018.

22. Claimant returned to the ER at Parkview Hospital's Pueblo West facility on February 16, 2018, around 7:47 p.m. (1947) with complaints of a temperature and persistent shoulder and neck pain. The report from this date of visit indicates that Claimant had been seen the preceding Sunday "for the same thing" and that she had left shoulder pain from being "injured while 'lifting heavy trays at work'". The ER physician evaluating Claimant recommended additional lab work and an emergent MRI given the concern for septic arthropathy based upon the questionable fluid collection in the cervical spine noted on CT scan from February 11, 2018. Transport to Parkview Main via ambulance was recommended. Claimant refused. Consequently, she was instructed regarding the importance of further work up and told to go to the main emergency room that night for evaluation. She did not go.

23. Claimant returned to the ER at Parkview Hospital's main facility on February 18, 2018 at 8:13 a.m. (0813). She was evaluated by Dr. Brad Roberts. The report from this date of visit indicates that Claimant presented to the ER for pain in the left neck that radiates into the left shoulder. According to the history of present illness (HPI), Claimant reported that on January 27, 2018, she was "working on her farm and doing arduous work when she hurt her left shoulder". She stated that the pain radiated

from the shoulder up into the neck “making the muscles in those areas ‘rock hard’”. The note is devoid of a specific incident causing her shoulder pain. Moreover, the record indicates that Claimant was seen in the ER on February 16, 2018, at which time a CT scan revealed features consistent with septic arthropathy between C3-C4. Consistent with the ER note from February 16, 2018, the record from this date of visit indicates that Claimant was instructed to undergo additional imaging (MRI), but that this was not done. Accordingly, Claimant had returned for completion of the MRI study.

24. The aforementioned MRI was completed and interpreted to show C3 and C4 facet joint effusion and reactive marrow edema within the left C3-C4 in addition to epidural fluid collection and findings concerning for C3-C4 left septic arthroplasty with epidural extension and epidural abscess. Dr. Roberts consulted with neurosurgical services, specifically Dr. William Lu. Dr. Lu reviewed Claimant’s MRI concluding that the findings likely represented early onset epidural abscess. He recommended hospital admission and treatment through the infectious disease service, noting further that Claimant may need IV antibiotics and possible draining of the C3-C4 effusion.

25. Claimant’s suspected condition and proposed treatment plan were discussed with her at which time she became upset, anxious, restless, and tearful. She stated that she did not want to stay in the hospital because she wanted to smoke. Claimant smokes both cigarettes and marijuana. Dr. Roberts offered Claimant a nicotine patch and medication to assist with her anxiety. Claimant reported that she could not stay because she had partied all night the night before. Concern was raised by Dr. Lu for possible drug use because of Claimant’s worry about undergoing drug testing. The seriousness of Claimant’s condition was explained to her and a family member encouraged her to stay in the hospital. Nonetheless, Claimant elected to sign out against medical advice (AMA).

26. Claimant returned to the ER at 5:39 p.m. (1739) on February 18, 2018, following her self-discharge from the hospital against medical advice. She was evaluated in the ER by Dr. Timothy Varallo. Dr. Varallo noted that Claimant presented to the ER “requesting to be admitted for [an] abscess on [the] spine”. He noted further that Claimant was supposed to be admitted earlier but left AMA to “take care of things”. Dr. Varallo’s history of present illness (HPI) indicates that Claimant’s diagnosis was significant for C3-C4 septic arthropathy on MRI, that Claimant had an onset of pain in the left shoulder on January 27, 2018, that she believed was “precipitated by lifting heavy objects” and that subsequent evaluation with CT scan was concerning for septic arthropathy with recommendation for MRI. Claimant was admitted to the hospital and subsequently evaluated in the ER by Dr. Harshal Shah who noted that Claimant had “presented to the hospital with about a 2 weeks’ history of sudden onset neck pain associated with left shoulder pain” which she attributed to a “work-related injury when she was lifting very heavy trays”. Dr. Shah recommended that Claimant be consulted by the infectious disease services for antibiotic management for “septic arthritis of the c-spine”.

27. Claimant was subsequently evaluated by infectious disease specialist, Dr.

Michael Harris. Dr. Harris took a detailed history regarding Claimant's present illness, noting that she was "initially complaining of a somewhat abrupt onset of cervical neck pain which she says started around 2 weeks ago after she was carrying some heavy loads at her workplace". According to Dr. Harris, Claimant reported that "initially it felt like she pulled a muscle in her shoulder" and she "ended up having radicular-type symptoms with radiation and neuropathy-type pain down to her fingertips". Dr. Harris also obtained a social history at which time Claimant reported that she smoked one (1) pack of cigarettes every three days. Although she denied any drug use, including IV drugs, Claimant admitted that she smoked marijuana. She reported that she worked at a "grow farm which is where she was carrying heavy loads that *she says initially led to her neck pain*" (emphasis added). Claimant's upper extremity strength was graded as within normal limits and her sensory examination was "normal".

28. Claimant was discharged from the hospital following satisfactory arthrocentesis on February 22, 2018. While in the hospital, Claimant was never diagnosed with nor was she treated for any left shoulder injury/condition. To the contrary, treatment was focused to the cervical spine and the suspected infection/abscess at the C3-C4 facet joint. Based upon the evidence presented, the ALJ finds Claimant's suspected C3-C4 septic arthropathy unrelated to her work duties.

29. Upon Claimant's discharge from the hospital, an Employer's First Report of Injury was completed and Claimant selected Dr. Terrance Lakin as her designated provider.

30. Claimant saw Dr. Lakin, D.O. on March 13, 2018. After taking a detailed history regarding the purported mechanism of injury (MOI) and outlining Claimant's treatment to date, Dr. Lakin opined that he could not conclude that "manipulation of 40 pounds (sic) objects that she is not picking up, only scooting along the ground, would be significant enough to markedly exacerbated (sic) very significant cervical DJD (degenerative joint disease) and likely left shoulder DJD." While Claimant had a MOI that "could" be consistent with a soft tissue left shoulder strain, Dr. Lakin felt that there were "strong indications" that Claimant's symptoms were emanating from "progressive cervical and left shoulder degenerative osteoarthritis and perhaps a (sic) inflammatory spondylitis", in the absence of a significant work related MOI.

31. As noted above, Dr. Lakin testified by post hearing deposition. During his deposition, Dr. Lakin testified that Claimant did not disclose to him that she suffered a prior serious infection which required hospitalization and extensive treatment in July 2016. Dr. Lakin testified that disclosure of this information would be very important to a causation analysis in the instant claim as a prior infection increases the risk of subsequent infection.

32. Claimant also did not disclose to Dr. Lakin the fact that she had been hospitalized for what was felt by her treatment providers to be an abscess and cervical septic arthropathy from February 18-22, 2018, during her March 13, 2018 appointment. Although she did not provide information regarding her recent hospitalization, Dr.

Lakin's office accessed Claimant's prior medical records from Parkview Hospital at which time he discovered that Claimant had been hospitalized for a cervical spine abscess and infection.

33. During his deposition, Dr. Lakin stood by the conclusions he reached regarding the cause of Claimant's neck and shoulder symptoms reached after his March 13, 2018 examination. He testified:

> I believe that the imaging and the records at Parkview were indicating more of a septic joint that was two level facet septic joint level on the cervical spine. This seems more consistent with the inflammatory or perhaps rheumatoid arthritis or septic arthritis, and I believe the images even show that there were erosions on the facet joint, which indicates it was long-standing. She has very significant multilevel degenerative changes at that level also and throughout her C-spine. I think it's unfortunate that she has this, but I would say that the causation more is that process rather than -- and that she just perhaps noted it at work, and the predominant factor of this is it was going to happen to her anyway.

34. Dr. Lakin also explained, with medical literature support that claimant's spontaneous sepsis was caused by her underlying arthritis.

35. The ALJ finds the opinions of Dr. Lakin credible and persuasive.

36. Claimant sought a follow-up MRI of her cervical spine and was referred to Colorado Springs Imaging by nurse practitioner (NP) Dawn Evert. The follow-up MRI was completed on April 24, 2018. While the findings suggested "[m]oderate spondylosis of the C3-4 disc space with advanced hypertrophic arthropathy of the left facet joint and moderate to advanced arthropathy of the right facet joint, the study was noted to be "grossly limited" secondary to motion artifact. The ALJ finds this MRI study to be of limited relevance to the questions presented for determination.

37. Claimant also sought an MRI of the left shoulder through Colorado Springs Imaging on the referral of NP Evert. This study was completed on May 4, 2018, with findings of among other things, "moderate osteoarthritic changes with joint effusion and synovitis change" and "tendinosis/tendinopathy change rotator cuff without cuff tear". Given the degree of joint effusion and osteoarthritic change in conjunction with the degenerative changes present in the rotator cuff, surgical consultation was recommended.

38. The ALJ credits Dr. Lakin's opinions to find that while Claimant "could" have sustained a soft tissue injury to the shoulder, she most probably did not. The persuasive evidence presented establishes that Claimant's shoulder pain is more likely related to a combination of referred pain from her severe, progressive, non-work related cervical DJD, including the pain caused by the septic arthropathy at C3-C4 in addition to

the natural progression of the degenerative osteoarthritis in her left shoulder as evidenced by increasing joint effusion in the absence of rotator cuff tearing.

39. Claimant has failed to prove that she sustained a compensable injury to her cervical spine or left shoulder as a consequence of performing work duties for Employer, including pulling large plastic trays as she described.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). Although there is conflicting evidence in this case regarding Claimant's assigned work duties and the events leading up to Claimants alleged injury in this case, the ALJ finds that Claimant probably was moving

the trays as she described. Nonetheless, the medical record evidence presented fails to support a conclusion that Claimant's neck and shoulder symptoms are causally related to that activity. As found, the overwhelming evidence presented at hearing persuades the ALJ that Claimant suffers from pre-existing, progressive non-work related DJD in her cervical spine and the left shoulder as evidenced by significant effusion months after her alleged injury in the absence of any rotator cuff tearing. Based upon the medical record as a whole, the ALJ finds support for Dr. Lakin's conclusion that Claimant's neck and shoulder symptoms probably arose from a combination of the natural progression of these conditions rather than by pulling/dragging of the planting trays as Claimant asserts.[1]

D. Under the Workers' Compensation Act, an injured employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). While the ALJ is convinced that Claimant's alleged injury occurred "in the course" of her employment, the evidence presented fails to establish that Claimant's symptoms and need for treatment arose out of her employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.*

F. There is no presumption that an injury, which occurs in the course of employment, also arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In*

[1] The degree to which Claimant's non-work related septic arthropathy contributed to her neck/shoulder pain cannot be quantified. Nonetheless, the ALJ notes that the suspected arthropathy was located at the C3-C4 facet joint and Claimant reported lateral neck pain extending down the arm. The ALJ finds it reasonable to infer that the general malaise associated with a suspected infection warranting hospitalization likely intensified Claimant's radicular type pain leading her to the reasonable lay person conclusion that it was coming from her shoulder.

Re Question Submitted by the United States Court of Appeals, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996). As found, the totality of the evidence presented, including opinions of Dr. Lakin persuades the ALJ that Claimant's neck and shoulder pain is probably related to the natural progression of a pre-existing condition rather than any injury arising out of her employment with Beulah Valley Farms.

G. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo.App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo.App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo.App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo.App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Here, the totality of the evidence presented persuades the ALJ that Claimant's symptoms and need for treatment, including her February 18-22, 2018 hospitalization were probably related to her long standing pre-existing cervical and left shoulder DJD. While the ALJ is convinced that Claimant's need for treatment was reasonable and necessary, the persuasive evidence establishes that it was not related to an industrial cause. Because Claimant failed to establish her employment caused, aggravated, accelerated, or combined with a pre-existing infirmity or disease to produce the disability and/or need for treatment, she failed to establish the requisite causal connection between her employment and the alleged injury. Simply put, Claimant failed to prove that she suffered a compensable injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 26, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable work injury to his right knee on June 13, 2016?

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to an order awarding reasonably necessary and related medical benefits?

FINDINGS OF FACT

1. Claimant works as a police officer for the Employer. Claimant is presently working in the motorcycle unit. Claimant is a 48 year old male who is six foot nine inches tall weighing approximately 280 pounds,

2. In 1997, Claimant was attempting to pull over a traffic violator. He drove into a residential area, got out of his car and ran. Claimant pursued the traffic violator on foot and went over a side fence between two homes. His right leg landed in a hole and he sustained a tibial plateau fracture. He ultimately underwent surgery to repair the condition.

3. The tibial plateau fracture set in motion the onset of a progressive degenerative and arthritic process in the right knee.

4. Claimant injured his right knee again in 2004 when playing recreational basketball.

5. Claimant had a MRI scan of his right knee completed on February 6, 2004. The radiologist provided the following impression: (1) impacted subchondral fracture of lateral femoral condyle; small focal full-thickness chondral defect within the posterior lateral femoral condyle; (2) small slightly impacted subchondral fracture of central weight bearing surface of lateral tibial plateau and focal depression of subchondral bone involving a small region of the central tibial plateau; finding may be chronic in etiology as little associated surround marrow edema; and (3) a complete (grade 3) tear of anterior cruciate ligament; extensive edema adjacent superficial band of medial collateral ligament consistent with grade 1-2 MCL injury.

6. As a result, the injury resulted in an ACL tear, which Claimant had surgically repaired in 2004.

7. Claimant alleges he sustained another work injury to his right knee in 2009. Claimant was at monthly training for his motorcycle unit. He tried to support the bike with his right leg when he felt his knee jam. Claimant treated with Dr. Beatty on May 6, 2009. The diagnosis provided at that time was a right knee

sprain with underlying degenerative joint disease. Claimant alleged an injury without any significant precipitating trauma.

8. Claimant had another MRI scan of his right knee on May 13, 2009. The impression included tri-compartmental arthritis seen with near complete chondral loss in the lateral compartment. The tibial plateau fracture occurred in 1997 caused injury to the lateral compartment.

9. Claimant alleged a fourth injury to his right knee in November of 2015. He was working patrol and when getting out of the car, his knee was at an awkward angle. He experienced grinding and pain in the right knee.

10. Claimant again alleged an injury from a daily activity without any significant precipitating trauma. At this time, there was significant progressive arthritis in all three compartments of the knee due to the 1997 tibial plateau fracture.

11. The day after the incident in November of 2015, Claimant sought treatment with Dr. Gray at Rocky Mountain Medical Group. In the history section of the report, Claimant advised that he had not been able to completely straighten his knee for several years and had some popping in his knee as well.

12. A MRI was obtained on November 12, 2015. The impression included arthritis of the knee worse in the lateral compartment where there was evidence of both edema and eburnation. As a result, there was evidence of chronic findings in the right knee.

13. On December 1, 2015, Claimant sought treatment with PA-C Sakryd at the Steadman Hawkins Clinic. PA-C Sakryd evaluated Claimant and then noted they discussed the "natural history and progression" of Claimant's right knee issues. PA-C Sakryd also advised Claimant he may need a total knee arthroplasty.

14. Claimant subsequently saw Dr. Beatty on December 2, 2015. Dr. Beatty reviewed Claimant's knee history and current presentation. In the treatment plan, Dr. Beatty wrote as follows: "Unfortunately because of the tibial plateau fracture his knee is deteriorating quicker than expected and he's developed significant arthritis which most likely will need a knee replacement."

15. Dr. Faber performed a records review on December 11, 2015. In the history of present illness, Dr. Farber recorded that Claimant began to develop right knee pain after being transferred from a motorcycle officer to using a police vehicle. Claimant's knee was always in an abnormal position and he developed swelling and pain. For administrative purposes, the alleged date of injury was established as November 2, 2015.

16. Dr. Farber noted Claimant's long history of injuries to the right knee and his well-documented right knee lateral compartment chondral loss. Dr. Farber opined that Claimant had no recent acute traumatic injury and his current symptoms were suggestive of symptomatic osteoarthritis of the right knee, which pre-dated the alleged incident.

17. During krav maga arrest training on May 11, 2016, Claimant again alleged an injury to his right knee. Claimant planted on his right leg and kicked with his left leg. The alleged mechanism of injury failed to involve any significant trauma and instead appeared to be due to the underlying degenerative condition.

18. A MRI of the right knee was obtained on June 7, 2016, following the krav maga training incident. The impression was arthritis of the knee worse in the lateral compartment where there was evidence of both edema and eburnation, which was unchanged, and the reactive bone marrow edema was unchanged.

19. On June 13, 2016, Claimant alleged an injury to his right knee which is the alleged injury at issue in this case. Around midnight, the police department received a call from a woman that her nephew was trapped under a car in the garage and not breathing. Claimant was the first to arrive on the scene. Claimant attempted to lift the car while his sergeant put cinder blocks underneath the car to support it. During one of the lifts, Claimant heard a pop and experienced pain in his right knee.

20. The First Report of Injury listed a specific incident of assisting to lift a vehicle off of a subject that was trapped as the mechanism of injury on June 13, 2016.

21. There was no mention of an alleged occupational disease which occurred over time in the First Report of Injury.

22. Dr. Noonan, a treating orthopedic surgeon, examined Claimant on July 7, 2016. Dr. Noonan's impression included lateral compartment arthritis with degenerative lateral meniscus tear, mild medial compartment chondral degeneration and significant loss of range of motion. Claimant confirmed to Dr. Noonan that he never regained full knee range of motion after the tibial plateau fracture. Dr. Noonan opined that the tibial plateau fracture led to his arthritic changes and current condition.

23. During Claimant's July 20, 2016, visit with Dr. Beatty, they discussed Claimant's treatment options. Dr. Beatty noted that, while Claimant continued to have right knee pain, it had returned to baseline following the recent work injury. Dr. Beatty recommended Claimant talk to Employer about re-opening the 1997 case.

24. Dr. Beatty opined that the work injury on June 13, 2016, had returned to baseline and that Claimant's current right knee condition was related to the work injury and the 1997 tibial plateau fracture.

25. Claimant contacted the adjuster for the 1997 claim to see if the claim would be voluntarily reopened. Claimant was told that the claim would not be voluntarily reopened.

26. On August 9, 2017, Dr. Beatty changed his causation opinion that the right knee condition was due to the tibial plateau fracture in 1997. Dr. Beatty opined that Claimant's years of working as a police officer caused the need for Claimant to undergo a right knee replacement. Dr. Beatty opined Claimant's condition was due both to an acute event in 1997 and an occupational disease due to Claimant's ongoing work as a police officer.

27. No other physician supported Dr. Beatty's amended causation opinion.

28. Claimant admitted that he had been told and knew he would need a knee replacement dating to 2009.

29. Claimant filed a Workers' Claim for Compensation on November 6, 2017. Claimant did not allege that his knee condition was due to an occupational disease in his own statement about the cause of his condition.

30. Dr. O'Brien, an orthopedic surgeon, evaluated Claimant for an independent medical examination (IME.) He reviewed the information about Claimant's 1997 fracture. Dr. O'Brien explained the significance of the fracture is that it was comminuted, meaning it involved a fracture to the bone and to the cartilage. Dr. O'Brien testified that Claimant literally shattered his knee joint. The bone can heal back together but when cartilage is injured, it cannot be repaired and cartilage will not re-grow. Dr. O'Brien testified that Claimant's injury would cause damage to all three compartments but particularly affect the lateral compartment.

31. Dr. O'Brien credibly testified that in his experience, 100% of injuries like that one Claimant sustained in 1997 cause accelerated or premature severe degenerative arthritis. Dr. O'Brien added that Claimant would have required this total knee replacement regardless of whether he suffered any additional injuries after the tibial plateau fracture in 1997.

32. Dr. O'Brien explained that Claimant's 2004 ACL tear also was an accelerating factor that lead to Claimant's need for a knee replacement. Dr. O'Brien cited scientific data that found that 80% of patients with reconstructed ACL injuries develop arthritis and may require premature total knee arthroplasties.

33. Dr. O'Brien explained that the 2009 MRI demonstrated complete loss of cartilage in the outside compartment of the knee. Dr. O'Brien testified the results of the MRI would be expected based on Claimant's history of a 1997 tibial plateau fracture and 2004 ACL tear. Dr. O'Brien opined the 2009 injury was innocuous and all of the findings on the MRI were chronic and longstanding.

34. Dr. O'Brien also reviewed the November 2015 MRI scan. He testified the tearing was not abnormal but rather predictable and expected because of the fracture and other changes in the knee because of the 1997 injury.

35. Dr. O'Brien reviewed the June 2016 MRI scan and noted there was no significant change from the prior MRI and that the scans were essentially the same. The same radiologist reviewed both scans.

36. Dr. O'Brien testified that it was very common for one with arthritis in the knee to have episodes of pain with daily activities or innocuous injuries. Dr. O'Brien noted that Claimant was a candidate for a total knee replacement in 2015 when Claimant had end-stage arthritis, bone-on-bone contact, eburnation, bone edema and complete loss of cartilage. This opinion was also supported by Dr. Noonan, another orthopedic surgeon who reviewed the claim.

37. Dr. O'Brien testified that Claimant had a temporary aggravation of his pre-existing and longstanding right knee osteoarthritis after the injury on June 13, 2016. Dr. O'Brien found there was no substantial tissue breakage or yielding as a result of the work incident. He added that the aggravation should not be considered a causal factor leading to Claimant's need for a total knee replacement.

38. Dr. O'Brien opined there was no need for medical care related to the alleged injury in June of 2016.

39. No physician opined that lifting of the car in June of 2016 caused the need for a knee replacement.

40. Dr. O'Brien opined that Claimant did not suffer from an occupational disease. He pointed to orthopedic peer-reviewed journals and studies that fail to link occupations and arthritis. Dr. O'Brien explained that Claimant has incurable osteoarthritis that results in episodic pain, which is not the results of any identifiable trauma, but the predictable manifestation of Claimant's underlying condition.

41. In conclusion, based on the totality of the medical records and the opinions of Dr. O'Brien, it is found that Claimant's claim for a determination that he suffered a work injury on June 13, 2016, is denied and dismissed. Any claim

for medical treatment of right knee, either viscosupplementation or total knee replacement, is not reasonably necessary or related medical treatment.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act, Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions, the motives of the witness, whether the testimony has been contradicted and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

4. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal*

Indemnity Co., 124 Colo. 210, 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra.*

5. The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

6. As found, it is concluded that Claimant failed to prove by a preponderance of the evidence that he sustain a compensable work related injury or occupational disease on June 13, 2016.

Medical Benefits

7. Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra; Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). A claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990).

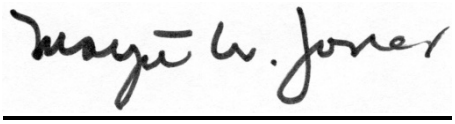
8. Claimant failed to establish by a preponderance of the evidence that the need for viscosupplementation or total knee replacement is reasonable, necessary, and related medical benefits

ORDER

1. Claimant's claim for a June 13, 2016, work injury or occupational disease is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

Dated: September 26, 2018



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS

W.C. No. 5-073-689-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 19 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 9/19/18, Courtroom 3, beginning at 8:30 AM, and ending at 11:39 AM).

Claimant's Exhibits 1 through 11 were admitted into evidence, without objection. Respondents' Exhibits A, B, C, G, H, J, K were admitted into evidence, without objection. Respondents' Exhibit I was voluntarily withdrawn. Claimant's objection to Exhibit D for hearsay was sustained. Claimant's objection to Exhibit E was withdrawn and Exhibit E was admitted into evidence. Claimant's objection to Exhibit F for hearsay was overruled and Exhibit F was admitted into evidence.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable injury on November 8, 2017. If so, what are the consequences of the injury: *i.e.,* entitlement to medical benefits, average weekly wage (AWW), and temporary partial disability (TPD). By agreement, the parties withdrew issues concerning temporary total disability (TTD).

The Claimant bears the burden of proof on all issues by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Stipulated Findings

1. At the commencement of the hearing, the parties stipulated to an AWW of $408.74, if the case is determined to be compensable.

Preliminary Findings

2. The Claimant was born on September 21, 1971. She began working for the Employer as a laundry specialist in June 2017, and she worked until her resignation in late December 2017.

Compensability

3. The Claimant's job responsibilities entailed picking up dirty sheets from the Employer's storage unit and then going to a designated laundry facility to wash them. In this regard, the Employer mainly serviced Airbnb's.

4. Jackie Mitchell, a supervisor with the Employer, would send money to the Claimant, via smart phone application, to the Claimant's personal bank account. The Claimant would then go to her personal bank, withdraw the specific amount of money in cash, and then drive to the laundry facility to deposit the money on a laundry card. These transfers would happen weekly and for varying amounts depending on the amount of laundry needed to be done. Proof of these transactions was required to be photographed by the Claimant and sent to Mitchell.

5. Mitchell went on maternity leave from the Employer from November 1, 2017 to December 1, 2017. Megan Gonzalez took over Mitchell's supervisory responsibilities while Mitchell was on maternity leave. Gonzalez claims that she left $100 in cash at the storage facility for the Claimant to load onto the laundry card. The Claimant denied knowing about the $100 and no one knows what happened to it. This could be an enduring mystery.

6. On November 8, 2018, the Claimant arrived at the Employer's storage facility around 6:45 AM. After picking up the dirty laundry, the Claimant claims that she forgot her debit card at her home and could not access her personal bank account without it, where money from Mitchell was left over. Gonzalez implies that there should not have been money left over. The Claimant then proceeded to drive to her home to pick up her debit card. After retrieving her debit card, she proceeded to her personal

bank to withdraw the funds necessary to do the laundry. On the way to the bank from her home, the Claimant was in a car accident caused by another driver (hereinafter "Tortfeasor"). The Claimant sustained injuries from the accident but returned to work, full time, shortly after.

7. Around late December 2018, the Claimant voluntarily resigned from her job with Employer explaining, in text, that it was because of "car problems." Neither Mitchell nor Gonzalez testified that the Claimant had advised them that she resigned because she could no longer do the work. The Claimant testified that she resigned because she started having trouble doing the laundry work. In this regard, the ALJ finds Mitchell and Gonzalez more credible than the Claimant.

8. The Claimant found temporary full time work in early 2018, and is currently employed by the Salvation Army as a clothing sorter. She claims this is lighter work.

9. From Nov 2017 to March 2018, the Tortfeasor's insurance paid for the Claimant's medical bills, up to a cap of $25,000.

Medical

10. On November 8, 2017, the Claimant went to Lutheran Medical Center several hours after the accident. The Claimant informed the doctors that there of a family emergency and she departed before imaging was performed. The next day she went to the Denver Health emergency room (ER). Cervical and thoracic spine x-rays were performed. She was prescribed Flexeril and Ibuprofen. The Claimant later went back to Lutheran Medical Center's ER. Lutheran performed a CAT scan of her head and neck. She was discharged with Vailum and Norco. The Claimant was referred to Antero Medical Group for evaluation

11. From November 21, 2017 to March 7, 2018, the Claimant regularly saw physicians at Antero Medical Group for follow-up and physical evaluation.

12. In at least eight medical questionnaires, in response to the question: Is your condition **work-related** (emphasis supplied)?" The Claimant answered: "**No.**" In her testimony, the Claimant offered no explanation for this inconsistency with her claim, nor did Respondents cross-examine her in this regard.

13. Claimant's Exhibit 4 is an Initial Medical Consultation report from Usama Ghazi, D.O., to Dr. Laura Graber, D.C., dated January 15, 2018. The second page of that report under "Occupational History," Dr. Ghazi writes "[t]he patient denies any history of work injuries" (Claimant's Exhibit.4, p. 5). While this may be one incident that does not undermine the Claimant's credibility by itself, the Claimant then repeatedly writes that **this is not a work related incident over several months on eight different health insurance claim forms** (emphasis supplied). In these eight health insurance claim forms, the Claimant indicates that her injury from the accident is not employment related. "Box 10" of these health insurance claim forms asks "Is Patient's

Condition Related To" followed by three options: "Employment, Auto Accident, and Other Accident." Next to each of these options is a box to mark "yes" or "no." "Box 12" of these forms also provides a spot for "Patient's or Authorized Person's Signature." The Claimant's evidence provides eight of these health insurance claim forms in which "Box 10" is marked with a "no" next to "employment" and where "Box 12" indicates "signature on file" with relevant dates. Details of these health insurance claim forms are as follow:
:

- Lutheran Medical Center's Emergency Department's service for 11/8/2018, signed and dated 3/15/18 (Ex. 7 p.67).
- Forte Health, DII Central, signed and dated 12/15/2017 (Ex. 7 p. 71).
- Colorado Rehab and Occ Med, signed and dated 1/15/18 by the Claimant and 2/15/2018 by Dr. Usama Ghazi. (Ex. 7 p. 72)
- Forte Health, Antero Medical for $350, signed and dated 12/22/2017 (Ex. 7 p. 73)
- Forte Health, Antero Medical for $450, signed and dated 12/22/2017 (Ex. 7 p. 74)
- Forte Health, Antero Medical, signed and dated 12/15/2017 (Ex. 7 p. 75)
- Forte Health, Antero Medical, signed and dated 1/19/2018 (Ex. 7 p. 76)
- Forte Health, Antero Medical, signed and dated 1/15/2018 (Ex. 7 p. 77)

14. The Claimant's own evidence explains why she may seek worker's compensation months after the accident. Claimant's Exhibit 3 contains multiple reports from Antero Medical Group where the Claimant was a patient from November 2017 to March 2018. In the report dated March 6, 2018, it is listed that "patient returns to clinic reporting that she has changed her representation. She was recently informed that she cannot get into Colorado Pain Clinic for '2 or 4 years' due to her insurance (Tortfeasor's) status" (Claimant's Exhibit 3, p. 19). After this report from Antero Medical Group, the Claimant obtained representation from counsel to file a Workers' Compensation claim in April 2018. During the hearing, the Claimant testified that the tortfeasor's insurance would only pay for $25,000, however, the ALJ draws a plausible inference that the Claimant decided to pursue a worker's compensation claim several months after the car accident because the tortfeasor's limit of $25.000 on medical was reached or close to being reached,

Ultimate Findings

15. Based on the totality of the evidence, especially the Claimant's denials of work-relatedness to medical providers, the ALJ does not find the Claimant's claim of a work-related injury as a result of the auto accident on November 8, 2017 credible. Also, the fact that the Claimant worked at her regular job with the Employer and continued to do so until she voluntarily resigned for "car problems," with nothing in writing that she felt she could no longer perform her job duties, further undermines her credibility. The fact that the Claimant is presently working full time at a lesser wage, $10.20 an hour, and seeks TPD benefits based on 2/3 of the differential between her pre-injury wage of $12 an hour and the present $10.20 an hour, in and of itself does not lead to a plausible inference that would affect the credibility of the Claimant's compensability claim. It is the confluence of events that happened in 2018, which causes the ALJ to draw a plausible inference, along with the totality of the other evidence, that the Claimant's

claim of work-relatedness is not credible: (1) the $25,000 limit on medical bills in the Tortfeasor's insurance was reached; (2) The Claimant's Worker's Claim for Compensation, dated April 5, 2018 was filed (the Claimant was working full time at a lesser wage at this time); (3) after the auto accident of November 8, 2017, the Claimant checked off "not work-related" at least eight times. The ALJ infers and finds that there are too many anomalies in the Claimant's version of events to render her version of compensable injuries credible.

16. On the other hand, the ALJ finds the testimony of Jackie Mitchell and Megan Gonzalez forthright and making sense. Indeed, their descriptions of the strange and apparently inefficient method of doing business tends to enhance their credibility. Their testimony, however, elevates the anomalies in the Claimant's version of events to a level of incredulity. Contrary to the Respondents' theory that this case is not compensable because the auto accident happened on a detour that took the Claimant outside the course of employment, the ALJ finds that the case turns on overall credibility and, as found herein above, the Claimant's claim is not credible.

17. For the reasons specified herein above, the ALJ finds that the Claimant has failed to prove that she suffered compensable injuries on November 8, 2017, arising out of the course and scope of her employment, thus, the Claimant has failed to sustain her burden of proof by a preponderance of the evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or

unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's claim is lacking in credibility on whether the November 8, 2018 incident amounted to a compensable event. The Claimant now claims the incident was work related and compensable injuries resulted there from, but the totality of the evidence shows that pursuing a workers' compensation claim was not her intention until recently.

b. The Claimant offers a theory positing that the incident was work related due to the awkward, yet consistent, business practice of withdrawing money from her personal bank while on company sent money, via a smart phone to the Claimant's bank account, after which the Claimant withdrew enough money from her account to add sufficient credits to the laundromat's laundry card. Even if the practice of driving from her home to the bank was within the course and scope of work, the Claimant's testimony and the credibility of the Claimant's claim is undercut by her own evidence.

c. As found, Claimant's Exhibit 4 is an Initial Medical Consultation report from Dr. Usama Ghazi, D.O., to Dr. Laura Graber, D.C., dated January 15, 2018. The second page of that report under "Occupational History," Dr. Ghazi writes "[t]he patient denies any history of work injuries." (Ex. 4 p. 5). While this may be one incident that does not undermine the Claimant's credibility in and of itself, the Claimant then repeatedly writes it is not a work related incident over several months on eight different health insurance claim forms. In these eight health insurance claim forms, the Claimant indicates that her injury from the accident is not employment related. "Box 10" of these health insurance claim forms asks "Is Patient's Conditioned Related To" followed by three options: Employment, Auto Accident, and Other Accident. Next to each of these options is a box to mark "yes" or "no." "Box 12" of these forms also provides a spot for "Patient's or Authorized Person's Signature." The Claimant's evidence provides eight of these health insurance claim forms in which "Box 10" is marked with a "no" next to "employment" and where "Box 12" indicates "signature on file" with relevant dates. Details of these health insurance claim forms are as follow:
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- Forte Health, Antero Medical for $350, signed and dated 12/22/2017 (Ex. 7 p. 73)
- Forte Health, Antero Medical for $450, signed and dated 12/22/2017 (Ex. 7 p. 74)

- Forte Health, Antero Medical, signed and dated 12/15/2017 (Ex. 7 p. 75)
- Forte Health, Antero Medical, signed and dated 1/19/2018 (Ex. 7 p. 76)
- Forte Health, Antero Medical, signed and dated 1/15/2018 (Ex. 7 p. 77)

d. As found, the Claimant's own evidence explains that she sought worker's compensation benefits months after the auto accident. because the Tortfeasor's insurance cap of $25,000 on medical benefits either ran out or was about to run out. As further found, Claimant's Exhibit 3 contains multiple reports from Antero Medical Group where Claimant was a patient from November 2017 to March 2018. In the report dated March 6, 2018, it is stated that "patient returns to clinic reporting that she has changed her representation. She was recently informed that she cannot get into Colorado Pain Clinic for '2 or 4 years' due to her insurance status" (Claimant's Exhibit 3 p. 19). After the report from Antero Medical Group, the Claimant obtained representation from counsel to file a Workers' Compensation claim in April 2018. As found, during the hearing, the Claimant testified that the Tortfeasor's insurance would only pay for $25,000 of medical bills. the ALJ drew a plausible inference that the Claimant decided to purrsue a worker's compensation claim several months after the car accident.

Compensability

e. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** A manner of conceptualizing the matter is, essentially, that a presumption of work-relatedness may arise when an unexplained injury occurs during the course of employment. However, it is incumbent to show that non-work related factors caused the injury. Nonetheless, proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000*); Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, it was not credible that the Claimant's injury arose out of or occur within the course and scope of the Claimant's employment with Employer. Therefore, as found, the Claimant did no sustain compensable injuries on November 8, 2017, within the purview of workers' compensation coverage.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App.

2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to meet her burden of proof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits arising out of theClaimant's accident on November 8, 2017, are hereby denied and dismissed.

DATED this_____day of September 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-068-179

ISSUES

- Whether Claimant proved, by a preponderance of the evidence, she sustained a right shoulder injury in the course and scope of her employment on December 15, 2017.

- If compensable, whether Claimant proved, by a preponderance of the evidence, that the right shoulder arthroscopy with rotator cuff repair, and decompression of subacromial space with partial acromioplasty, requested by authorized treating physician Joel B. Gonzales, M.D., is reasonable, necessary and related to the compensable injury.

STIPULATIONS

The parties stipulated at hearing that Claimant's average weekly wage ("AWW") at the time of her injury was $826, and that Claimant was not entitled at the time of hearing to any temporary partial or total disability benefits. Additionally, Claimant withdrew her request for change of physician.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 61 years old, having a date of birth of August 27, 1956, and has worked as a supervisor and cook for Employer since April 7, 1991, a period of approximately 27 years.

2. Claimant did not experience any medical symptoms or limitations related to her right upper extremity until her workplace accident on December 15, 2017.

3. On December 15, 2017, Claimant reported to work and started her shift at 5:00 a.m. Claimant's typical shift was from 5:00 a.m. to 1:30 p.m., Wednesday through Saturdays.

4. Claimant credibly testified that she mixed potatoes for the morning meal using an industrial mixer; she lifted the pot of potatoes from the floor mixer up to the top shelf on a cart that was approximately three feet high. Photographs of the industrial mixer and the cart appear at Claimant's Exhibit 3, pp. 5-7. Claimant credibly testified that she is 5 feet 3 inches in height. While lifting the bowl of potatoes to the top of the cart, Claimant felt burning and tearing

sensations in her right shoulder. She testified she immediately felt pain in her neck and shoulders, pain radiating down her arm, and tingling in her fingers.

5. On December 15, 2017, Claimant immediately filled out an "Employee Report of Injury" indicating that "lifting the big bowl of mashed potatoes out of the machine (heard a crack) . . . right shoulder hurt."

6. Claimant went to Urgent Care – American Family Care, where Johnny Shen, M.D. evaluated her. Dr. Shen recorded Claimant's history as follows:

> 61 y/o female presents to clinic for works comp. Pt reports that she works at a nursing home. Pt states that she was cooking mashed potatoes she picked up the bowl and bowl was too heavy. Pt states that she hurt her right shoulder/neck. Says pain radiates down to arm and has mild numbness/tingling.
> Neck pain
> Stiffness
> Shoulder pain

7. Following Claimant's evaluation, Dr. Shen issued a "WC 164" opining that Claimant's injury was consistent with a work-related mechanism of injury and illness. Dr. Shen assigned temporary work restrictions.

8. On December 20, 2017, Claimant returned to Urgent Care – American Family Care. Nurse Practitioner ("NP") Kimberly Rea took a history of illness noting:

> Shoulder pain [Onset: 5 Day(s) Sudden; frequency: Constant; Char.: Reports Neck pain, Tingling, Achy, Sharp, Lifting Injury; Location: Reports Right shoulder; Assoc. Sx: Reports Tenderness, Reduced range of motion, Back Pain; . . . Work comp injury – pt is very worried about her shoulder/trapezius area and radiation of pain into right arm. **She is requesting MRI and further evaluation because she thinks she tore something.** Has continued to work in the kitchen without restrictions and pain has not improved at all. Intensity: Min-7]
>
> * * *
>
> Normal musculoskeletal posture; ABNORMAL: Right trapezius and shoulder with + TTP and grimacing with movement all directions

NP Rea opined that Claimant's injury was related to a workplace injury and increased Claimant's temporary work restrictions to zero pounds lifting. NP Rea referred Claimant for an orthopedic evaluation.

9. On January 2, 2017, Claimant returned to Dr. Shen who noted that Claimant had not heard from the orthopedic referral and that Claimant wanted an MRI before she started physical therapy. Dr. Shen maintained Claimant's zero-pound lifting restrictions and again opined that Claimant's injury was work-related.

10. On January 4, 2018, Claimant went to Orthopedic Associates where Joel B. Gonzales, M.D., who took a history of present illness, performed a general exam and set forth the following:

> **History of Present Illness**
>
> 61-year-old right hand dominant female cook at eye [sic] liff rehabilitation center injured her right shoulder at work on 12/15/17 lifting a heavy bowl of mashed potatoes. Patient felt a tear in the posterior lateral aspect of the right shoulder as she lifted the bowl. Since that time she has had continued severe pain in the right shoulder. Pain seems to be in the cuff distribution, and anterior, occasionally she feels that the arm hurts all the way from the shoulder down to the elbow. No history of previous problems with the right shoulder. She has tried some formal physical therapy and anti-inflammatories but this is not improved.
>
> * * *
>
> **Treatment Plan:**
> Given her specific injury and examination we have recommended an MRI of the right shoulder to evaluate for rotator cuff tear. We'll set this up and see her back to review it and discuss further treatment.

11. On January 5, 2018, Claimant underwent an MRI at Health Images with a history set forth as "[a]cute lifting injury." The radiologist who read the scan recorded the following impression:

> 1. Large full-thickness tear of the distal supraspinatus and infraspinatus tendons measuring 4.2 cm transverse x 3.3 cm AP. Supraspinatus musculotendinous junction is retracted to the level of the glenoid and there is moderate fatty atrophy of the supraspinatus and infraspinatus muscles.

> 2. Moderately severe subscapularis tendinosis with partial tearing of the distal fibers of the subscapularis tendon.
>
> 3. High-grade partial tearing long head of biceps tendon.
>
> 4. Superior and posterior superior labral tear.
>
> 5. Subacromial impingement/rotator cuff impingement syndrome. . . .

12. On January 11, 2018, Claimant returned to Dr. Gonzales who noted, "since non operative measures have not given lasting relief and pain persists, arthroscopy with rotator cuff repair of the involved shoulder was advised." Dr. Gonzales submitted a request for:

> Requested Procedure: RIGHT SHOULDER ARTHROSCOPY WITH ROTATOR CUFF REPAIR, DECOMPRESSION OF SUBACROMIAL SPACE WITH PARTIAL ACROMIOPLASTY, DME COLD THERAPY AND ULTRASLING.
> Diagnosis: Strain of muscle(s) and tendon(s) of the rotator cuff of right shoulder, subsequent encounter Right

13. When Respondents received Dr. Gonzales' request for surgery, Insurer requested a peer review from Brian F. McCrary, D.O. Respondents' physician McCrary gave inconsistent opinions in his written report on the issue of causation. At one point, he opined that Claimant's mechanism of injury was "consistent with a mild strain or acute exacerbation of a preexisting degenerative condition at the right shoulder." Yet in a different part of the report, he opined that Claimant experienced a "short-term exacerbation of a preexisting condition."

14. Respondents also retained the services of Mark Failinger, M.D. He testified at hearing consistent with his report that Claimant's medical records were devoid of any problems in either shoulder, except for one record on February 11, 2014, for the right shoulder and another record on January 23, 2017, which concerned Claimant's left shoulder.

15. Dr. Failinger testified consistent with his report that Claimant was not at maximum medical improvement ("MMI"). He deemed Dr. Gonzales' recommendation for right shoulder surgery "reasonable." However, he opined that because Claimant had pathology preexisting her injury, her need for surgery did not relate to the December 15, 2017, events.

16. Dr. Failinger testified at hearing as an expert in orthopedics. He characterized Claimant's injury and symptoms as classic of a degenerative tear and that each event would bring on symptoms that would sometime go away, but at some point in time if the symptoms did not settle down, require treatment.

17. On cross-examination, Dr. Failinger agreed with Dr. Shen's December 15, 2017 opinion that related the work-related mechanism of injury to objective findings. He also testified that Dr. Shen was correct to assign temporary work restriction of 20 pounds based on Claimant's diagnosis.

18. Dr. Failinger agreed that NP Rea's conclusion that Claimant suffered a work-related injury on December 20, 2017 was appropriate. He also agreed that it was appropriate for NP Rea to increase Claimant's temporary work restrictions at the December 20, 2017 visit based upon Claimant's symptomatology.

19. Dr. Failinger conceded that although Claimant would have eventually required surgery on her right shoulder, he could not speculate when that need would arise. He also conceded that Claimant's symptoms that require treatment stem from Claimant's lifting event on December 15, 2017.

20. It was clear from the context of his testimony that Dr. Failinger misapprehended the circumstances of Claimant's mechanism of injury. He based his opinion on the assumption that Claimant was working with household-sized equipment. He was unaware that Claimant was working with an industrial sized mixer, the empty bowl of which weighed thirteen pounds, and which contained between fifteen and thirty pounds of potatoes. When Dr. Failinger saw photographs of the actual equipment Claimant was using, he expressed surprise and testified that when he formed his opinions, he did not think Claimant was using equipment like that pictured.

21. Claimant credibly testified that she continues to have numbness and tingling in her fingers, which was not present prior to the events of December 15, 2017, along with tightness in the area of her trapezius and the right side of her neck. Claimant credibly testified that she understood the risk of surgery, and still desired to have the surgery Dr. Gonzales recommended.

22. The ALJ finds it is more likely than not that Claimant injured her right shoulder when lifting an industrial sized mixing bowl full pot of potatoes from a low level to Claimant's shoulder level, to place the bowel onto the top shelf of a cart. Claimant's medical records are devoid of shoulder problems except for one visit in 2014 for right shoulder symptoms that quickly resolved. Claimant's original treating physicians opined that Claimant's mechanism of injury was consistent with the events and Respondents' expert Dr. Failinger opined that the events of December 15, 2017 brought on the symptoms for which Dr. Gonzales has requested surgery.

23. The ALJ is not persuaded by Respondents' experts' testimony to the contrary and finds the report of Claimant's treatment providers at Urgent Care – American Family Care and Orthopedic Associates more persuasive.

24. Additionally, to the extent that a subsequent authorized treatment provider Lynne Yancey, M.D., answered questions from Respondents indicating that she agreed with Dr. Failinger's findings on "objective pathology," Dr. Failinger opined that Claimant is still not at MMI and requires the surgery. Dr. Yancey does not opine on her two check marks to Respondents' letter and thus her opinions, to the extent they are contrary, are rejected.

25. Based on the totality of the evidence, the ALJ finds Claimant proved, by a preponderance of the evidence, that she sustained a right shoulder injury in the course and scope of her employment on December 15, 2017.

26. The parties have stipulated that Claimant's average weekly wage is $826 and that Claimant is entitled to no temporary total disability or temporary partial disability benefits.

27. The ALJ having found the Claimant's claim is compensable, it was Respondents' own expert that opined ATP Gonzales' recommendation for surgery was reasonable and, thus, when considering Claimant's testimony, in addition to the medical records along with that of Respondents' expert, the ALJ finds the surgery recommended by ATP Gonzales to be reasonable, necessary and related to Claimant's admitted industrial injury.

28. The ALJ finds all medical care rendered by Urgent Care – American Family Care, which referred Claimant to Health Images for an MRI, and Orthopedic Associates, where Joel B. Gonzales, M.D. evaluated her are reasonable, necessary and related. This includes Dr. Gonzales' request for surgery.

29. Any determination concerning other issues is premature at this time.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion. The ALJ may reject evidence contrary to the findings above as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions;

the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

In order to recover benefits a claimant must prove that she sustained a compensable injury. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work-related functions. *Finn v. Indus. Comm'n,* 165 Colo. 106, 437 P.2d 542 (1968). It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

Based on the totality of the evidence, the ALJ concludes that Claimant has sustained her burden of proving by a preponderance of the evidence that she sustained a right shoulder injury on December 15, 2017 and, therefore, is entitled to benefits under the Workers' Compensation Act.

Once compensability is established, Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *See Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ, and an ALJ's resolution should not be disturbed if supported by substantial evidence in the record.

Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Respondents designated Concentra as the authorized provider.

The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The ALJ concludes the medical care rendered Urgent Care – American Family Care and its referrals to Orthopedic Associates and Health Images are reasonable, necessary and related, as well as ATP Gonzales' request for right shoulder arthroscopy with rotator cuff repair, decompression of subacromial space with partial acromioplasty.

Claimant has established by a preponderance of the evidence that her earnings equate to an average weekly wage of $826.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her right shoulder on December 15, 2017.

2. Claimant's has established by a preponderance of the evidence an average weekly wage off $826.00 at the time of her on-the-job injury.

3. Respondents shall pay for all medical care rendered to date by the physicians at Urgent Care – American Family Care, including their referrals to Orthopedic Associates and Health Images and the subsequent transfer of care to Concentra Medical Centers, as the care rendered was reasonable, necessary and related, including ATP Gonzales' request for right shoulder arthroscopy with rotator cuff repair, decompression of subacromial space with partial acromioplasty.

4. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 25, 2018

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the surgery performed by Dr. John Serak on November 30, 2017 was reasonable, necessary, and causally related to the admitted injury of July 25, 2017?

II. Whether claimant is entitled to disfigurement benefits.

STIPULATIONS

I. The parties stipulated that if the surgery is found to be reasonably necessary and related to the admitted industrial injury of July 25, 2017, Claimant is entitled to a closed period of temporary total disability (TTD) benefits from December 1, 2017 to March 1, 2018.

II. The parties further stipulated to a TTD rate of $948.15.

FINDINGS OF FACT

1. Claimant is a 47 year old man employed by Employer as an elevator repair mechanic.

2. Claimant had a previous work-related low back injury in 2013 for which Claimant underwent conservative treatment in 2013 and 2014. Chad Prusmack, MD recommended Claimant undergo an L4-S1 fusion for the 2013 injury. Claimant did not undergo the fusion and subsequently returned to full duty work.

3. Claimant sustained an admitted industrial injury to his low back on July 25, 2017 when he attempted to steady an elevator machine that had begun to fall through the flatbed of a truck. Claimant lifted both hands overhead in an attempt to steady the machine, which weighed approximately 2200 pounds, and prevent it from falling on his co-worker. Claimant testified he immediately felt pain in his low back and right leg.

4. Claimant presented to Ron Rasis, PA-C at Concentra on July 25, 2017. Claimant reported he heard a pop and complained of low back pain and stiffness, and radiating pain with tingling and numbness down his right leg. PA-C Rasis diagnosed Claimant with a lumbar strain, referred Claimant for physical therapy, and assigned temporary work restrictions.

5. PA-C Rasis reevaluated Claimant on July 26, 2017. He noted Claimant denied a prior back injury, but did discuss with Claimant his review of prior medical records from the 2013 injury. PA-C Rasis noted Claimant informed him he was "virtually pain free for

4 yrs prior to his recent OJI." PA-C Rasis recommended Claimant undergo a lumbar MRI and referred Claimant to Dr. Burris, who was familiar with Claimant for ongoing claim management.

6. Claimant underwent the lumbar MRI on July 31, 2017. Andrew Olsen, MD gave the following impression: "1. Mild degenerative disc disease particularly at L3-4 and L4-5 superimposed on congenital narrowing of the central spinal canal on the basis of short pedicles. 2. There is no significant central spinal canal or neural foraminal compromise or evidence of neural impingement."

7. On August 1, 2017, Claimant sought treatment on his own at Dr. Prusmack's office. David Whatmore, PA-C evaluated Claimant and noted Claimant had treated with Dr. Prusmack for his 2013 injury, improved after conservative management, and had returned to work full duty. He noted Claimant's primary complaint from the 2013 injury was axial back pain, which had "basically resolved," and that at no time during the prior injury was right leg radiculopathy a major complaint. On examination, PA-C Whatmore noted positive right straight leg raise findings with radicular pain into the L5 distribution including the foot, dorsiflexion weakness of 3/5 "which is a completely new finding compared to prior exams," and increased axial back pain with bending.

8. PA-C Whatmore reviewed and compared Claimant's 2014 MRI to his recent July 2017 MRI, noting Claimant's 2014 MRI revealed three bulging discs at L2-3, L3-4 and L4-5. Regarding the 2017 MRI, he disagreed with the radiologist's findings of minimal degenerative issues in the spine stating, "I believe the patient has significant right-sided foraminal stenosis at the L4-5 level with marked narrowing of the foraminal diameter. The patient also has moderate facet arthropathy at the L4-5 level as well." PA-C Whatmore opined that Claimant had acute onset of right L5 radiculopathy with limb weakness due to the July 25, 2017 work injury. He recommended Claimant undergo a right L4-5 transforaminal epidural steroid injection. PA-C Whatmore noted that, if Claimant did not adequately improve with the injection, he may need a decompressive procedure of the foramen at L4-5 on the right side.

9. Claimant underwent a right L4-5 transforaminal epidural steroid injection on August 25, 2017.

10. Dr. Prusmack testified by deposition that he evaluated Claimant on September 7, 2017 and agreed Claimant required a decompression of the right L4-5 to relieve his right foot weakness.

11. On October 6, 2017, Dr. Prusmack submitted a request for authorization to perform an L4-5 and optionally L3-4 decompression surgery. Dr. Prusmack testified he considered the need for surgery urgent.

12. On October 12, 2017, Respondents denied the request for authorization of the surgery pursuant to WCRP 16. An independent medical examination (IME) was scheduled with Brian Reiss, MD for December 20, 2017.

13. Claimant returned to PA-C Whatmore for a follow-up visit on November 7, 2017. PA-C Whatmore noted,

> The patient has known stenosis in the lumbar spine at L3-4 and L4-5 and we have recommended that he undergo a decompression on the right side at L4-5 due to foot weakness that he has developed as a result of his original work injury.
>
> * * *
>
> The patient clearly has dorsiflexion weakness in the right foot at 3/5 and now has stated that he is having more issues with tripping and falling.
>
> * * *
>
> From a medical standpoint, I am concerned that the patient is now running the risk of permanent nerve root injury given the delay in undergoing surgery that Dr. Prusmack has recommended for the patient. This patient will move ahead with the evaluation as requested by Worker's Compensation and we reiterate our indication that the patient would benefit from a decompression on the right side of L4-5.

14. PA-C Whatmore reevaluated Claimant on November 15, 2017 and again commented on his concern in delaying the requested surgery stating, "I explained to the patient that I am concerned about this progressive weakness that he is developing in the leg with marked dorsiflexion weakness now into the left foot of 3/5."

15. Respondents obtained video surveillance of Claimant on November 24, 2017. The video surveillance footage was not offered as an exhibit at hearing. Drs. Serak, Prusmack and Reiss observed the video footage. Claimant is described as performing yard work, including walking, bending over, lifting a trash bag and cutting a bush. Dr. Serak testified he did not see Claimant dragging his foot on the footage, but that Claimant's presentation on the video did not mean Claimant was not suffering from radiculopathy or that he did not require surgery. Dr. Prusmack testified that the video clearly showed Claimant's foot drop, and that individuals with foot drop tend to adapt using other muscles. Dr. Reiss testified that Claimant's presentation on the surveillance footage was inconsistent with his reported symptoms and need for surgery.

16. On November 30, 2017, Claimant fell in his garage. Claimant testified at hearing that he and his co-worker drove to Claimant's residence to retrieve some tools. Claimant testified that while in the garage he stumbled because of leg weakness and fell to the ground.

17. Claimant's co-worker transported him to the emergency department at Sky Ridge Medical Center where he was seen by the neurosurgeon on call, John Serak, MD. Claimant presented with worsening right lower extremity weakness, including severe quadriceps weakness and weakness in dorsi and plantar flexion. Dr. Serak noted that the MRI evidenced severe central and foraminal stenosis from L3-5 as well

as some spondylolisthesis and severe facet arthropathy. Based on his examination of Claimant and the MRI findings, Dr. Serak determined Claimant should undergo an indirect decompression and fusion.

18. On November 30, 2017, Dr. Serak performed an L3-5 lateral lumbar interbody fusion with percutaneous pedicle screws.

19. In follow-up examinations with Dr. Serak on December 19, 2017 and February 8, 2018, Claimant reported improvement in back pain and almost complete resolution of leg pain and weakness. By April 12, 2018, Claimant reported complete resolution of right lower extremity pain and weakness, and some continued back pain that had not worsened. Claimant continued to report complete resolution of right leg symptoms in subsequent follow-up evaluations with Dr. Serak on June 25, 2018 and July 15, 2018.

20. Claimant was unable to attend the IME with Dr. Reiss as originally scheduled on December 20, 2017 due to undergoing surgery. Dr. Reiss subsequently performed the IME on January 31, 2018. Dr. Reiss reviewed Claimant's medical records and performed a physical examination. He concluded Claimant likely sustained a lumbar strain as a result of the July 25, 2017 industrial injury, which would have been expected to resolve in a few weeks. Dr. Reiss reviewed the actual film from the 2017 MRI and agreed with the radiologist's findings. Dr. Reiss opined that the 2017 MRI findings are most likely degenerative without any acute changes and, to the extent some moderate foraminal narrowing exists, it does not cause any significant compression of exiting nerve roots to account for weakness. Dr. Reiss opined that there was no pathology on the MRI to account for the need for any surgical intervention. He further opined that the surgery performed was not indicated for lower back pain, and was not the most appropriate surgery for nerve root pain and weakness. He concluded Claimant's current symptomatology and any potential restrictions or limitations are related to the surgery and no longer related to any effects of the work incident.

21. On May 25, 2018, Dr. Prusmack responded to a letter from Claimant's counsel inquiring as to Claimant's condition and status. Dr. Prusmack opined that Claimant's right lower extremity weakness was a consequence of his July 25, 2017 industrial injury, and that Claimant's right lower extremity deficit worsened to the extent that it became a foot drop. He further opined that the surgery performed by Dr. Serak was appropriately performed as an emergency and was reasonable, necessary and consequential to the July 25, 2017 industrial injury.

22. Dr. Serak testified by pre-hearing deposition. Dr. Serak was offered as an expert in neurosurgery. Dr. Serak completed a residency in neurosurgery and spine surgery in 2017. He is board eligible, but not board certified nor Level II accredited. Respondents did not stipulate to Dr. Serak's expertise. Based on Dr. Serak's training, the ALJ finds Dr. Serak possesses specialized knowledge which will assist the ALJ in determining a fact in issue. Accordingly, the ALJ finds Dr. Serak is qualified as an expert.

23. Dr. Serak testified his examination of Claimant revealed severe right lower extremity weakness which he believed was causing Claimant to fall. Dr. Serak explained that Claimant had compression of nerve roots in the lumbar spine causing dysfunction of the nerves resulting in the weakness to his right lower extremity. He testified the surgery he performed was urgent in nature due to the severity of Claimant's lower extremity weakness, and opined that Claimant was at risk for potential permanent long-term disability if the surgery had not been performed. Dr. Serak specifically opined that the surgery was reasonable and necessary for Claimant's condition based on Claimant's presentation at the emergency room on November 30, 2017 and his MRI findings. He testified the surgery was a success, with Claimant has experiencing good functional recovery. On cross examination, Dr. Serak testified he was unaware of Claimant's 2013 injury. He stated Claimant informed him of the July 2017 injury and Claimant related his progressive weakness to that injury. Dr. Serak acknowledged he could not determine the age of the pathology and he could not say for certain what caused the pathology.

24. Dr. Prusmack testified by pre-hearing deposition as an expert in neurosurgery. Dr. Prusmack testified that PA-C Whatmore works in consultation with Dr. Prusmack at Rocky Mountain Spine. He explained that, while PA-C Whatmore is not a radiologist, PA-C Whatmore reads approximately 10 MRI studies daily in his practice and has done so in the context of neurosurgery for the last 14 years. Dr. Prusmack further explained that the surgery performed by Dr. Serak was not the same surgery he recommended, but asserted there was a "very clear-cut need of surgical decompression and/or fusion" in Claimant's case to relieve nerve root impingement causing weakness in Claimant's right lower extremity.

25. Dr. Reiss testified by both pre-hearing deposition and at hearing as a Level II accredited expert in orthopedic surgery with a specialization in the spine. Dr. Reiss testified consistent with his IME report and continued to opine the surgery performed by Dr. Serak was not indicated for or related to the July 25, 2017 industrial injury. Dr. Reiss testified he performed an IME of Claimant in September 2014 for Claimant's 2013 injury. At that time, Dr. Reiss opined the recommended fusion surgery was not needed as there was no localization of the pain generator, Claimant had multiple levels of degenerative change, axial back pain without instability, and no significant neurologic involvement.

26. Dr. Reiss testified Claimant driving himself approximately from July 26 to November 29, 2017 and Claimant's assertion he had a foot drop during this time are inconsistent, opining that if a person had a "real foot drop, you really wouldn't want to be driving with your right foot." He testified that a person with foot drop would have to significantly modify their driving technique or use the other foot, as it would be difficult to bring the foot back up.

27. Dr. Reiss further testified the July 2017 MRI documented the following pathology: multiple levels of degeneration with multiple levels of different degenerative findings such as a "little bit of crowding, little bit of bulging, little bit of spurring, little bit of

thickening, all of which was degenerative, preexistent," and do not amount to significant nerve compression.

28. Dr. Reiss testified in his expert opinion the surgery Dr. Serak performed on December 1, 2017, was not reasonably needed to cure and relieve claimant from or related to the effects of the July 25, 2017 injury, stating,

> The surgery was performed at the L3-4 and L4-5 level. The proposed indirect decompression, if there was any compression, would have opened up the foramina, the exiting point of the third nerve and the fourth nerve. The third and the fourth nerve are the only ones that would have been affected by this procedure. The third and the fourth nerve go to the front of the thigh; they do not go into the buttock, posterior thigh, calf, or foot. If he was having numbness in any of his toes, it was not due to these nerves being compressed. If he was having sciatic pain, these nerves do not make up any part of the sciatic nerve, they make part of the femoral nerve, which is in the front of the thigh. These nerves would not have caused pain down his leg into his calf or his foot or numbness and tingling in his toes. So if he got better, that would be difficult to explain medically because the procedure performed did not do anything to the L5 or S1 nerve roots.

29. Claimant testified that after the July 25, 2017 he experienced pain and weakness in his right leg, and by late October 2017 he was having difficulty ambulating and had developed a problem with stumbling when walking. Claimant testified that following the July 25, 2017 injury he returned to light duty work for Employer and continued performing light duty work until he underwent surgery on November 30, 2017. Claimant further testified most of his leg pain resolved immediately after the surgery, and continued to improve. He stated that walking is no longer a problem and his weight lifting restrictions increased from 15 pounds to 65 pounds. Claimant testified he is basically performing the same duties now as before the injury. Claimant testified that the surgery costs were covered by his personal health insurance carrier.

30. Claimant's testimony is found credible and persuasive.

31. The ALJ finds the testimony of Dr. Serak and Dr. Prusmack more credible and persuasive than the testimony of Dr. Reiss.

32. The ALJ finds Claimant has proven by a preponderance of the evidence that the L3-5 lateral lumbar interbody fusion with percutaneous pedicle screws performed by Dr. Serak on November 30, 2017 was emergent and was reasonably necessary and related to the July 25, 2017 industrial injury.

33. The ALJ examined Claimant's mid-to-low back at hearing and finds that, as a result of his July 25, 2017 industrial injury, Claimant has a visible disfigurement to the body consisting of five surgical scars, the first three of which are circular, measuring approximately ¾ of an inch to an inch, both in length and width. The fourth scar, a bit

lower, is approximately ½ inch in length and width. The scars are darker than the surrounding skin, impressed into the low back, with texture on three of the four scars. On the left side there is a fifth surgical scar approximately two inches long, less than ¼ of an inch in width. It is also darker and indented in places. The ALJ finds Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation.

34. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As found, Claimant established by a preponderance of the evidence the surgery performed by Dr. Serak was reasonable, necessary and causally related to the July 25, 2017 industrial injury. Although Claimant had a prior back injury for which he underwent conservative treatment, Claimant reported being virtually pain free leading up to the July 25, 2017 injury and, more importantly, did not previously have right leg symptoms as a major complaint. Claimant credibly testified he had right leg symptoms immediately following the incident, and the medical records consistently document right leg complaints and findings of right leg weakness on examination. Claimant credibly testified that the weakness in his leg had progressed over time, which is corroborated by the medical records. On more than one occasion, PA-C Whatmore commented on his concern regarding the progression of Claimant's right leg symptoms, and the potential risk for permanent nerve root injury. Dr. Prusmack credibly opined that Claimant's right lower extremity weakness was a consequence of his July 25, 2017 industrial injury and that the need for surgery was urgent.

Although Dr. Prusmack originally requested a decompression surgery and Dr. Serak ultimately performed a fusion surgery, both Dr. Serak and Dr. Prusmack credibly testified the November 30, 2017 surgery involved indirect decompression, and was urgent, reasonable and necessary based on Claimant's exam findings and MRI findings. Claimant credibly testified that his right leg symptoms significantly improved after undergoing the surgery, which is corroborated by the medical records. Based on the totality of the evidence, Claimant has proven it is more probable than not that the surgery performed by Dr. Serak was reasonable, necessary and causally related to the July 25, 2017 work injury. Accordingly, Respondents are liable for the costs of the surgery.

Disfigurement

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view."

As found, Claimant has surgical scars as a result of his compensable injury. The ALJ concludes Claimant should be awarded $1,200.00 for this disfigurement.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the costs of the emergent surgery performed by Dr. Serak, including reimbursement to Claimant for any out-of-pocket expenses, and any expenses paid by Claimant's health insurance carrier for the surgery.

2. Respondents shall pay Claimant TTD from December 1, 2017 to March 1, 2018 at the rate of $948.15 per week.

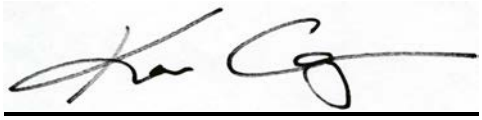
3. Respondents shall pay Claimant $1,200.00 for disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 26, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that his low back condition is related to his July 18, 2016, admitted work injury.

II. If it is found that the back condition is related, whether L5-S1 fusion surgery, ASIF with 1B cage requested by Dr. Birney, is reasonable, necessary, and related to the work incident of July 18, 2016.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 58-year-old man who was a field supervisor for Respondents. On July 18, 2016, Claimant was unchaining a concrete well pit from a back hoe. While unchaining the well pit, Claimant fell and hit the bucket and then landed in the well pit.
2. Despite Claimant alleging he fell approximately 12 feet, Claimant did not seek medical treatment after the fall until August 22, 2016, more than a month after the work incident.
3. On August 22, 2016, Claimant was evaluated by Dr. Kenneth S. Raper.
4. On October 27, 2016, Respondents filed a General Admission of Liability. Over time, Claimant has undergone a cervical fusion, left hip surgery, and treatment of the left shoulder under this claim.
5. Claimant now seeks an order approving an L5-S1 fusion. This was requested by Dr. Birney for treatment of degenerative disc disease with left foraminal stenosis and has been denied by Respondents. *Ex. C, Bates 17, Ex. B, Bates 14.*
6. Claimant has a prior workers' compensation injury involving his L5-S1. Surgery occurred under that claim, and was not successful. As of 2004, Claimant's diagnosis was failed back syndrome at L5-S1. At the close of that claim, a fusion was a possible option, and Claimant was provided a choice. As noted by his authorized treating physician at that time, Dr. G. Thomas Morgan, claimant had the choice of MMI or a "discography and possible lumbar fusion." As of July 27, 2004, Claimant chose MMI and it was noted that Claimant would prefer "not to undergo any further surgery at this time." *Ex. G, Bates 89.* Claimant was provided a 26% impairment rating, and settled that claim for $75,000. *Ex. R.*
7. Claimant testified that his prior back problems ultimately resolved, that his prior back

problems did not restrict him from performing his job duties, and that he had no back problems at the time of the July 18, 2016 incident. He also testified that his symptoms from his prior injury were limited to his right side, and that since the work incident, his symptoms were different and on the left. He testified that his pain in the left side is now a 4/10. He testified that he did not have any pain level on the left side prior to the work incident. He stated, "I didn't have any problems until I fell." The records show this is not a credible statement.

8. Despite Claimant's testimony at hearing, and statement to Dr. Birney that his back pain completely resolved after his 2003 back injury, records show Claimant continued to treat for his failed back syndrome after being placed at MMI in 2004.

9. As of February 22, 2005, he was taking OxyContin 20 mg b.i.d and Celebrex, and was prescribed ultracet by Dr. Morgan. *Ex. G, Bates 82.*

10. In addition, Claimant was treating with Dr. Michael Sparr. In Dr. Sparr's records, Claimant was described as having chronic lumbosacral pain and taking tramadol and hydrocodone for his chronic back pain on regular basis. *Ex. F, Bates 78, 80.*

11. On June 11, 2015, Claimant was seen by Dr. Sparr for medication management for his chronic lumbosacral pain. Dr. Sparr noted Claimant's daily routine in managing his chronic low back pain and his pain medication regimen. As set forth in his report, Claimant advised Dr. Sparr that his mornings were somewhat difficult due to his back pain. Claimant indicated that he would wake up with back pain and begin taking his medication in stages to help manage his back pain throughout the day. Claimant advised Dr. Sparr that he would start out by taking his tramadol. Then, approximately an hour later, he would take his hydrocodone and nabumetone. In order to help control his chronic back pain, Claimant would then take a second dose of his tramadol, hydrocodone, and nabumentone about 4 hours later. *Ex. F, Bates 80.*

12. On December 22, 2015, Claimant returned to Dr. Sparr for ongoing pain management regarding his chronic low back pain. Claimant again recited his daily medication regimen (taking his pain medications in the morning and then taking a second dose of his pain medications later in the day). *Ex. F. Bates 80.*

13. On May 16, 2016, one month prior to the work incident, Claimant complained of a flare-up in left sided gluteal and lateral thigh pain. He had pain in the left lateral gluteal region with radiation to the left hip and lateral thigh. He was still taking nambumeton, hydrocodone, and tramadol for his pain. Claimant was diagnosed with degenerative disc disease of the lumbar spine, lumbar disc derangement, trochanteric bursitis, and myofascial pain/myalgia.

The medical report also indicates:

> He has had a flareup in left-sided gluteal and lateral thigh pain. He is not certain what caused the flareup. He reportedly has stopped digging at this job as he felt it was too painful.") *Ex. F, Bates 76*.

This medical record is significant because it shows Claimant was symptomatic and his underlying back condition was getting worse. At this appointment, Claimant

was experiencing radicular symptoms in his left buttock and left lower extremity as well as disability. Claimant's increase in pain symptoms in his left buttocks - gluteal area – and thigh caused Claimant to increase his pain medication by doubling his use of hydrocodone. *Ex. F, Bates 76.* Claimant's worsening of his underlying condition was occurring only a month prior to the work incident. This note is also significant because it directly contradicts Claimant's testimony and statements to Dr. Birney regarding his alleged lack of symptoms before the July 18, 2016, work incident.

14. Claimant presented at hearing a series of pain drawings included in "Spinal Pain Sheets" completed by ATP Dr. Kenneth Raper under this workers' compensation claim. He argues that these show that he complained of his back from the beginning of treatment. Dr. Reiss testified that the symptoms documented in the initial charts are the same as those reflected in the May 16, 2016, notes from Dr. Sparr, confirming that these complaints existed before the work incident.

15. Dr. Sparr took up continued treatment, now under this workers' compensation matter. Claimant was also referred to Dr. Timothy Birney at Western Orthopedics.

16. On October 13, 2017, Claimant presented to Dr. Birney. Dr. Birney's report is captioned "New Complaint." As noted in Dr. Birney's report, Claimant advised Dr. Birney that although he had a prior back injury in 2003, which required surgery, "he had complete relief of his right lower extremity radicular pain without residual neurologic symptoms in the right lower extremity and "***no issues with back pain***." *Ex. 9. Bates 136*. [emphasis supplied.] Claimant's representation to Dr. Birney that he completely recovered from his 2003 back injury and did not have any residual back pain is not true. Dr. Birney did note, however, that on June 28, 2017, Claimant developed radiating pain and numbness in his left lower extremity without additional injury or overuse. *Ex. 10. Bates 136.* Dr. Birney also noted in his report that Claimant's back had been improving, but during September of 2017, Claimant had the spontaneous worsening of back pain, which has persisted, and Claimant also developed at that time "new radiating left lower extremity pain and numbness." *Ex. 10. Bates 137.* After this evaluation, Dr. Birney went on to perform a cervical fusion for Claimant under this workers' compensation claim.

17. It should also be noted that shortly after Claimant's first back surgery in November of 2003, and without any inciting event or accident, Claimant had a recurrent or spontaneous disc herniation at the L5/S1 level. *Ex. H. Bates 106*.

18. Dr. Birney, is also the physician who has recommended the lumbar fusion as well. In his January 29, 2018 report, he noted that he was following up after Claimant's January 11, 2018, cervical fusion, and would order post- surgical X rays three weeks in the future. He noted that then, Claimant "indicates he would like to then plan on lumbar surgery subsequently with respect to his issues of chronic left L5 radiculopathy that appears primarily related to left L5-S1 foraminal stenosis." *Ex. C, Bates 20.* That is, the symptoms on the left correspond with left L5-S1 degenerative foraminal stenosis. Dr. Birney's impression regarding the lumbar was, "work related, fall-induced, chronic low back pain secondary to an exacerbation including previous **asymptomatic** severe degenerative disk disease at L5-S1, status post distant right

L4-L5 and L5-S1 discectomies…Work-related **acute** left L5 radiculopathy in the context of L5-S1 formainal stentosis." *Ex. C, Bates 26.* [emphasis supplied]. Dr. Sparr's pre-injury records clearly show that Dr. Birney is mistaken: Claimant's condition was not asymptomatic and there were left sided radicular complaints prior to the work incident. Therefore, Dr. Birney's opinion that the need for surgery is due to an exacerbation of Claimant's asymptomatic underlying back condition based on the July 18, 2016, work accident is not found to be reliable or persuasive.

19. Dr. Birney's lumbar fusion request was reviewed by Dr. Michael Janssen on February 28, 2018. Dr. Janssen noted that he received and reviewed medical information regarding this matter. He took into consideration Claimant's contention that he fell 12 feet during the incident. Dr. Janssen concluded that the primary indication for the requested surgery was the degenerative pathology, which he concluded was secondary to the previous decompressive laminectomy in 2003 and not related to the work incident. He concluded that the surgery would not be related to the work incident. *Ex. B*.

    Dr. Janssen stated in his report the following:

> Most important though is that his history of low back pain in fairly chronic in nature and underwent a prior lumbar reconstruction surgery with a decompression at the L4-L5 and L5-S1 levels previously. This dates back to an in injury in the early 2000s. The patient underwent a decompression procedure for that, partial discectomy, and subsequently now has disc resorptive syndrome which is most likely foraminal encroachment.
>
> . . .
>
> After critical review of all this, it is clear that it is a reasonable indication for a patient with chronic L5 radiculopathy, vertical instability, and vertical collapse to consider indirectly opening up the foramen through an anterior lumbar interbody arthrodesis, but in this particular patient, in particular circumstances, the lack of any documentation that the underlying indications for surgery are directly related to this event on 07/18/16 is completely lacking. It appears more likely than not the only indications for surgery secondary to the chronic vertical instability of L5-S1, the foraminal stenosis at L5–S1, and secondary to the previous lumbar decompressive procedure that was performed many years ago…. The primary indications, in my professional opinion, for this recommended surgery is secondary to the previous decompressive laminectomy and not related to an incident on 07/18/16, based upon all the medical information provided to me.

    Ex. B., and Ex. 11 Bates 151-152.

20. Claimant was evaluated by Dr. Brian Reiss, who issued a report and testified as an expert at hearing. *Ex. A. Bates 1-13*. Dr. Reiss reviewed the medical records, evaluated and interviewed Claimant, and reviewed the diagnostic films himself. After this detailed review, he agreed with Dr. Janssen's conclusion. Claimant has "significant" degeneration of the lumbar spine, with severe degeneration at L5-S1, moderate disc space narrowing and osteophytes at L5-S1 and mild osteophytes at L3-4 and L4-5. *Ex. A, Bates 3.* Dr. Reiss testified that this spinal condition was not caused by the work incident of July 18, 2016. Dr. Reiss also testified that Claimant's pathology was not accelerated by the work incident.

21. The primary basis for the lumbar surgery request under this claim is Dr. Birney's understanding that the lumbar condition was aggravated by the work incident. This is disputed by respondents and Dr. Reiss. It is Dr. Reiss' opinion and conclusion that there is not an aggravation of the lumbar condition that warrants treatment under this workers' compensation claim. Dr. Reiss opined Claimant has moved to baseline or better for his degenerative lumbar spine, and points to the significant improvement in complaints and medication dependence following Claimant's left hip surgery. *Ex. F.* In review of Dr. Sparr's May 12, 2017 evaluation [*Ex. F, Bates 66]*, Dr. Reiss concluded, "this would indicate to me that any increased pain he was having after his work injury was probably more secondary to his hip and not due to his lower back. This would also point away from and L5 nerve irritation or an S1 joint dysfunction. In any case his pain level appears to be less than baseline prior to the work injury." *Ex. A, Bates 5, 6.*

22. Dr. Reiss explained that the surgery done at L5-S1 in 2004 predisposed Claimant for ongoing degeneration and collapse at that level, which did occur in this case. Dr. Reiss indicated that there is left foraminal stenosis that has developed and which could cause the current complaints. Dr. Reiss pointed to the documentation after the 2004 MMI to show that Claimant had ongoing treatment for chronic low back pain since that time, including ongoing pain medication. There was no documentation that Claimant's pain resolved. Dr. Reiss discussed the May 16, 2016, pre-injury record, pointing out that Claimant's medication intake had increased to tramadol 4 times per day because of increased pain to the left, and that this was interfering with Claimant's work. Dr. Reiss reviewed Dr. Birney's characterization of the back and his surgery recommendation. He pointed out that it did not appear that Dr. Birney reviewed prior records, and that his statement that the back was asymptomatic before the July 18, 2016, work incident was incorrect. Dr. Reiss also turned to the medical records to show that the symptoms which are the justification for Dr. Birney's surgical recommendation were not "acute" (in relation to the fall) and did not develop until late 2017. Dr. Reiss' opinion is consistent with the October 13, 2017, report from Dr. Birney where he documented that during September of 2017, Claimant had the spontaneous worsening of back pain, which has persisted, and that Claimant also developed at that time "new radiating left lower extremity pain and numbness." *Ex. 10. Bates 137*.

23. Dr. Reiss testified that Claimant clearly had a waxing and waning of his symptomatology in his back and the medical records document that. There is insufficient credible and persuasive evidence that the work incident itself changed

that. There is insufficient credible and persuasive evidence that the work incident caused the new symptoms down into the left leg and new irritation at L5. If the new symptoms into his left leg appeared after the work incident, more likely than not that is something that would have occurred with or without the work incident. Dr. Reiss did not believe the work incident changed the pre-existing condition at all. Dr. Reiss testified that the work incident did not aggravate the underlying condition or accelerate the need for treatment. He testified that the treatment for the low back is not to cure and relieve the effects of the work incident. Dr. Reiss credibly testified that the low back condition and treatment requested is not related to the work incident.

24. As found above, Claimant's testimony and statements to Dr. Birney that his back symptoms fully resolved after his prior work injury and that he did not have any back pain or left sided symptoms before his July 18, 2016, work incident is not found to be credible or reliable. Claimant's medical records document the following:

    a. On July 27, 2004, Claimant was evaluated by Dr. Morgan. Dr. Morgan noted that Claimant was evaluated by Dr. Illig and Dr. Illig noted that Claimant could either undergo a discography and a possible lumbar fusion or be placed at MMI with severe restrictions. As noted by Dr. Morgan, after surgery, Claimant suffered a recurrent disc herniation at the L5/S1 level. Dr. Morgan noted that Claimant did not want any additional surgery at that he was approaching MMI. He diagnosed Claimant as suffering from failed back syndrome, with a herniated disc at the L5/S1; status post microdisscectomy with a recurrent disc herniation at the L5/S1 level and scar tissue formation around the right S1 nerve root, as well as degenerative disc disease at the L4/5 level with an associated annular tear. *See Ex. G. Bates 85-90*.

    b. On August 12, 2004, Claimant was evaluated by Dr. McCranie. In her report, she noted Claimant's surgeon, Dr. Illig indicated Claimant may require additional surgery in the future and in the form of a fusion. *Ex. H. Bates 103, 107*.

    c. On August 17, 2004, Dr. Morgan placed Claimant at MMI and provided him a 26% impairment rating for his low back. Claimant's medical impairment rating was comprised of an 11% rating for structural defects of his lumbar spine and 4% for neurological deficits. The remainder was based on decreased range of motion. Ex. G. Bates 85-88.

    d. On August 25, 2004, Dr. Morgan discussed Claimant's MMI status and need for ongoing medications for at least one year.

    e. On or about October 7, 2004, Claimant settled his prior workers' compensation case on a full and final basis for $75,000.

    f. On February 22, 2005, Claimant returned to Dr. Morgan, for ongoing back pain. Dr. Morgan noted that Claimant was taking oxycontin and Celebrex. At that appointment, he also prescribed Claimant Ultracet for breakthrough pain.

    g. On June 11, 2015, Claimant was seen by Dr. Sparr for medication management for his chronic lumbosacral pain. Dr. Sparr noted Claimant's daily routine in managing his chronic low back pain and his pain medication regimen. As set

forth in his report, Claimant advised Dr. Sparr that his mornings were somewhat difficult due to his back pain. Claimant indicated that he would wake up with back pain and begin taking his medication in stages to help manage his back pain throughout the day. Claimant advised Dr. Sparr that he would start out by taking his tramadol. Then, approximately an hour later, he would take his hydrocodone and nabumetone. In order to help control his chronic back pain, Claimant would then take a second dose of his tramadol, hydrocodone, and nabumentone about 4 hours later. During this visit, Dr. Sparr examined Claimant's lumbar spine and noted mild to moderate myofascial tightness in his right greater than left lumbar musculature from L2 all the way through S1. Claimant was also tight and tender over the quadratus and lumborum musculature. He also noted Claimant had restricted flexion and extension and that facet loading testing was positive. *Ex. A. Bates 80*.

h. On December 22, 2015, Claimant returned to Dr. Sparr for ongoing pain management regarding his chronic low back pain. Claimant recited his medication regimen again (taking his pain medications in the morning and then taking a second dose or his pain medications later in the day). At this visit, Dr. Sparr noted full lumbar range of motion and facet loading was not positive. He did, however, note Claimant was tender across the gluteal and lumbar musculature, but the tenderness was not significant. *Ex. A. Bates 78*.

25. On May 16, 2016, one month prior to the work incident, Claimant complained of a flare-up in left sided gluteal and lateral thigh pain. He had pain in the left lateral gluteal region with radiation to the left hip and lateral thigh. He was still taking nambumeton, hydrocodone, and tramadol. But, Claimant doubled at times the amount of hydrocodone he was taking. The report from this visit provides:

> He has had a flareup in left-sided gluteal and lateral thigh pain. He is not certain what caused the flareup. He reportedly has stopped digging at this job as he felt it was too painful." Claimant was diagnosed with degenerative disc disease of the lumbar spine, lumbar disc derangement, trochanteric bursitis, and myofascial pain/myalgia.

Ex. F, Bates 76.

26. Claimant's testimony at hearing and representations to his physicians and medical providers regarding the onset and extent of his symptoms which tend to establish the work incident caused or aggravated his low back pain and radicular symptoms are not found to be credible or reliable. Moreover, the medical records upon which Claimant contends support his contention that he injured his back, or aggravated his preexisting back condition, are premised on the unreliable history Claimant reported and are therefore no more reliable than the history provided by Claimant.

27. The medical records of Dr. Raper are not a model of clarity, precision, or consistency. Despite this, Dr. Raper's initial hand written notes from August 22, 2016, contain a pain diagram which was completed by Dr. Raper. The pain diagram shows a human figure from the rear. The figure documents Claimant's pain complaints and that he was having pain in his low back, left buttocks, and the outer

portion of his left leg, which is consistent with lateral thigh pain. *Ex. 4. Bates 15*. As noted by Dr. Reiss during his testimony, these are the same complaints Claimant had on May 16, 2016, when he was evaluated by Dr. Sparr about a month before the work incident.

28. Moreover, the pain diagrams contained in Dr. Raper's records show a waxing and waning of back and radicular symptoms as reported by Claimant.

    For example:

    - On June 1, 2017, the pain diagram does not document any low back pain or radicular symptoms. *Ex. 4. Bates 37*
    - On July 17, 2017, the pain diagram demonstrates upper back pain, but no lower back pain or radicular symptoms. *Ex. 4. Bates 40.*
    - On August 25, 2017, the pain diagram again demonstrates only upper back pain and no lower back pain or radicular symptoms. *Ex. 4. Bates 43*.
    - On September 28, 2017, the pain diagram shows only some lower back pain, but not gluteal or radicular complaints. *Ex. 4. Bates 50*.
    - On November 2, 2017, the pain diagram indicates left sided back pain with radicular complaints which also appear to radiate around and to the front side of Claimant's left lower extremity.
    - On November 30, 2017, the pain diagram only demonstrates low back pain. *Ex. 4. Bates 58*.
    - On February 22, 2018, the pain diagram does not note any low back pain or radicular symptoms. *Ex. 4. Bates 61*.
    - On June 1, 2018, the pain diagram notes low back pain with radicular symptoms going all the way down Claimant's left leg and to his ankle. *Ex. 4. Bates 65*.

29. The July 18, 2016, work incident did not cause or result in an injury to Claimant's low back.

30. The July 18, 2016, work incident did not aggravate or accelerate Claimant's preexisting back condition.

31. The July 18, 2016, work incident did not cause the need for medical treatment for his low back.

32. The July 18, 2016, work incident did not accelerate Claimant's need for medical treatment for his low back.

33. Claimant's low back pain, radicular symptoms, and need for medical treatment are due to the natural progression of his preexisting back condition.

34. Claimant's need for medical treatment for his low back, including the surgery recommended by Dr. Birney, was not caused by the July 18, 2016, work incident.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. **Whether Claimant has proven by a preponderance of the evidence that his low back condition is related to his July 18, 2016, admitted work injury.**

II. **Whether L5-S1 fusion surgery, ASIF with 1B cage requested by Dr. Birney, is reasonable, necessary, and related to the work incident of July 18, 2016.**

According to C.R.S. §8-43-201, "(a) claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires Claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hosier v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007). Therefore, Claimant is not entitled to medical care that is not causally related to his work-related injury or condition. Respondents do not "implicitly" admit for a disputed condition by paying for medical benefits. *Hays v. Hyper Shoppes*, W.C. No. 4-221-570 (ICAO April 13, 1999). Respondents remain free to contest the compensability of any particular treatment. *Id.* As noted in *Ashburn, supra,* "it has generally been held that payment of medical services is not in itself an admission of liability. This is based on the sound public policy that carriers should be allowed to make voluntary payments without running the risk of being held thereby to have made an irrevocable admission of liability." Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *See* C.R.S. §8-41-301(1)(c); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). In other words, Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *See Wal-Mart Stores v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Therefore, Claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (ICAO May 10, 2007), "a showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary."

Claimant must prove a causal nexus between the claimed need for treatment and the work-related occupational disease or injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). While a pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment, *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990), the mere occurrence of symptoms at work does not require the ALJ to conclude that the industrial exposure caused the symptoms and consequent need for treatment, or that the industrial exposure aggravated or accelerated any pre-existing condition. Rather, the occurrence of the symptoms may be the result of a natural progression of a pre-existing condition that is unrelated to the employment, or may be attributable to some intervening cause. *See Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995).

Moreover, the mere fact Claimant experiences symptoms in a body part following a workers' compensation claim does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO August 18, 2005). The courts have long recognized that symptoms could represent the "logical and recurrent consequence" of the preexisting condition. *See Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO April 10, 2008); *F.R. Orr Construction, supra*. As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO October 27, 2008), simply because Claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The Panel in *Scully* noted that "correlation is not causation." Merely because there is a coincidental correlation between the claimant's work and his symptoms does not mean there is a causal connection between claimant's injury and his work.

Claimant has failed to carry his burden to prove by a preponderance of the evidence that his lower back condition and need for medical treatment is related to his July 18, 2016, work accident/injury.

Claimant had a prior workers' compensation injury involving his L5-S1. Surgery occurred under that claim, and was not successful. As of 2004, Claimant's diagnosis was failed back syndrome at L5-S1, which included a recurrent disc herniation at L5-S1. At the close of that claim, a fusion was a possible option, and Claimant was provided a choice. As noted by his authorized treating physician at that time, Dr. G. Thomas Morgan, Claimant had the choice of MMI or a "discography and possible lumbar fusion." As of July 27, 2004, Claimant chose MMI and it was noted that Claimant would prefer "not to undergo any further surgery at this time." Therefore, Claimant was placed at MMI and provided a 26% impairment rating. Claimant ultimately settled that claim in 2004 for $75,000.

Claimant testified that his back problems ultimately resolved after 2004 and that he had no back problems at the time of the July 18, 2016, incident. He also testified that his symptoms from his prior injury were limited to his right side, and that since the work incident, his symptoms were different and on the left. He testified that his pain in the left side is now a 4/10. He testified that he did not have any pain level on the left

side prior to the work incident. He stated, “I didn’t have any problems until I fell.” The medical records, however, demonstrated Claimant’s testimony, and statement to Dr. Birney, alleging that he had the complete resolution of his prior back injury before the July 18, 2016, work accident was not credible.

Despite Claimant’s testimony at hearing, and statement to Dr. Birney that his back pain completely resolved after his 2003 back injury, records demonstrated Claimant continued to treat for his failed back syndrome after MMI in 2004. As of February 22, 2005, he was taking OxyContin 20 mg b.i.d and Celebrex, and was prescribed ultracet by Dr. Morgan.

In addition, Claimant was treating with Dr. Sparr. In Dr. Sparr’s records, Claimant was described as having chronic lumbosacral pain and taking tramadol and hydrocodone for his chronic back pain on regular basis.

On June 11, 2015, Claimant was seen by Dr. Sparr for medication management for his chronic lumbosacral pain. Dr. Sparr noted Claimant’s daily routine in managing his chronic low back pain and his pain medication regimen. As set forth in his report, Claimant advised Dr. Sparr that his mornings were somewhat difficult due to his back pain. Claimant indicated that he would wake up with back pain and begin taking his medication in stages to help manage his back pain throughout the day. Claimant advised Dr. Sparr that he would start out by taking his tramadol. Then, approximately an hour later, he would take his hydrocodone and nabumetone. In order to help control his chronic back pain, Claimant would then take a second dose of his tramadol, hydrocodone, and nabumentone about 4 hours later.

On December 22, 2015, Claimant returned to Dr. Sparr for ongoing pain management regarding his chronic low back pain. Claimant again recited his daily pain medication regimen (taking his pain medications in the morning and then taking a second dose of his pain medications later in the day).

Then, on May 16, 2016, one month prior to the work incident, Claimant complained of a flare-up in left sided gluteal and lateral thigh pain. He had pain in the left lateral gluteal region with radiation to the left hip and lateral thigh. He was taking nambumeton, hydrocodone, and tramadol. He was diagnosed with degenerative disc disease of the lumbar spine, lumbar disc derangement, trochanteric bursitis, and myofascial pain/myalgia. It was noted by Dr. Sparr that Claimant had a flare-up in left-sided gluteal and lateral thigh pain. It was also noted that Claimant was not certain what caused the flare-up. This medical report is extremely significant, showing that Claimant was symptomatic and that his condition was worsening and that it was disabling. As set forth in the report, and as found, Claimant was beginning to experience radicular symptoms in his left buttock and left lower extremity due to his preexisting low back condition only a month prior to the work incident. In other words, Claimant was experiencing a worsening of condition based on the natural progression of his preexisting back condition. This medical report is also significant because it directly contradicts Claimant’s testimony and statement to Dr. Birney that his back pain from his 2003 back injury had resolved.

Consequently, the ALJ does not find Claimant's testimony and statements to his medical providers regarding the onset, extent, and cause of his symptoms which tend to relate his symptoms to the work accident to be credible or reliable.

Claimant was evaluated by Dr. Brian Reiss, who testified as an expert at hearing. Dr. Reiss reviewed the medical records, evaluated and interviewed Claimant, and reviewed the diagnostic films himself. After this detailed review, he agreed with Dr. Janssen's conclusion. Claimant has "significant" degeneration of the lumbar spine, with severe degeneration at L5-S1, moderate disc space narrowing and osteophytes at L5-S1 and mild osteophytes at L3-4 and L4-5. Dr. Reiss testified that this spinal condition was not caused by the work incident of July 18, 2016. Dr. Reiss also testified that Claimant's pathology was not accelerated by the work incident.

In addition, the primary basis for the lumbar surgery request under this claim is Dr. Birney's understanding that the lumbar condition was aggravated by the work incident. It was Dr. Reiss' opinion and conclusion that there was not an aggravation or acceleration of Claimant's lumbar condition due to the July 18, 2016, work accident that warrants treatment under this workers' compensation claim.

Dr. Reiss explained that the surgery done at L5-S1 in 2004 predisposed Claimant for ongoing degeneration and collapse at that level, which did occur in this case. Dr. Reiss indicated that there is left foraminal stenosis that has developed and which could cause the current complaints. Dr. Reiss pointed to the documentation after the 2004 MMI to show that Claimant had ongoing treatment for chronic low back pain since that time, including ongoing pain medication. There was a lack of credible and persuasive evidence that Claimant's pain resolved. Dr. Reiss discussed the May 16, 2016, pre-injury record, pointing out that Claimant's medication intake had increased to tramadol 4 times per day because of increased pain to the left, and that this was interfering with Claimant's work. Dr. Reiss reviewed Dr. Birney's characterization of the back and his surgery recommendation. He pointed out that it did not appear that Dr. Birney reviewed prior records, and that his statement that the back was asymptomatic before the July 18, 2016, work accident was incorrect. Dr. Reiss also turned to the medical records to show that the symptoms which are the justification for Dr. Birney's surgical recommendation were not "acute" (in relation to the fall) and did not develop until late 2017. Dr. Reiss' opinion is consistent with the October 13, 2017, report from Dr. Birney where Dr. Birney documented that during September of 2017, Claimant had the spontaneous worsening of back pain, which has persisted, and that Claimant also developed at that time "new radiating left lower extremity pain and numbness." The statement by Dr. Birney that Claimant's worsening back pain and the development of new radiating left lower extremity pain and numbness during September of 2017, a year after Claimant's work accident, is another example of Claimant's condition worsening on its own, without any type of inciting event. Again, this is consistent with the natural progression and worsening of his 2003 back injury and surgical procedure which was not successful and similar to Claimant having a spontaneous disc re-herniation at L5-S1 after his surgery in 2003.

Dr. Reiss testified that Claimant clearly had a waxing and waning of his symptomatology in his back and the medical records document that. There is a lack of credible and persuasive evidence that the work incident itself changed that. There is a

lack of credible and persuasive evidence that the work incident caused the new symptoms down into the left leg and new irritation at L5. If the new symptoms into his left leg appeared after the work incident, more likely than not that is something that would have occurred with or without the work incident. Dr. Reiss did not believe the work incident changed the pre-existing condition at all. Dr. Reiss testified that the work incident did not aggravate the underlying condition or accelerate the need for medical treatment. He testified that the treatment for the low back is not to cure and relieve the effects of the work incident. Dr. Reiss credibly testified that the low back condition and treatment requested is not related to the work incident. The ALJ credits Dr. Reiss' opinions and conclusions that the work accident of July 18, 2016, did not result in a low back injury. The ALJ also credits Dr. Reiss' opinions and conclusions that Claimant's work accident did not aggravate or accelerate Claimant's preexisting back condition and necessitate the need for medical treatment, which includes the surgery recommended by Dr. Birney.

Dr. Janssen also evaluated the request for surgery. The ALJ finds Dr. Janssen's conclusion to be credible and persuasive. Dr. Janssen concluded that:

> It appears more likely than not the only indications for surgery secondary to the chronic vertical instability of L5-S1, the foraminal stenosis at L5–S1, and secondary to the previous lumbar decompressive procedure that was performed many years ago.… The primary indications, in my professional opinion, for this recommended surgery is secondary to the previous decompressive laminectomy and not related to an incident on 07/18/16, based upon all the medical information provided to me.

After the July 18, 2016, work accident, Claimant did complain of increased back pain and worsening radicular symptoms at various times. Moreover, his reported symptoms waxed and waned. However, Claimant did not seek treatment for his work related injuries for approximately one month after the accident. And, the ALJ found Claimant to not be credible or reliable as it relates to statements regarding the extent of his pain and symptoms, the timing or onset of his symptoms, and the cause of those symptoms.

The ALJ concludes Claimant has failed to establish by a preponderance of the evidence that his low back condition was caused or aggravated by the work accident. Claimant has also failed to establish by a preponderance of the evidence that his need for medical treatment regarding his low back was caused or accelerated by his work accident. Therefore, the treatment of Claimant's back condition is not the liability of Respondents. Thus, the proposed fusion surgery is not reasonable, necessary, or related to treat the effects of the work incident of July 18, 2016.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

A. Claimant's low back condition is not related to the work injury that occurred on July 18, 2016.

B. Claimant's claim for medical benefits associated with his back condition are denied and dismissed, including the surgery requested by Dr. Birney.

C. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 26, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-990-890 & 5-063-873

STIPULATIONS

At the outset of the July 26, 2018 proceeding, the parties stipulated to consolidate the claims for the purposes of hearing. Respondent also stipulated that the surgery recommended by Dr. Walden on February 27, 2018 is authorized as medical treatment to cure and relieve the Claimant from effects of his December 4, 2017 industrial injury which has been assigned W.C. No. 5-063-873 (hereinafter the 2017 injury). Claimant stipulated that he is not seeking the April 13, 2017 surgical recommendation of Dr. Walden under either his 2015 or 2017 claim. The parties' stipulations are approved.

As part of its post hearing submission, Respondent conceded that should Claimant be determined to be at MMI for his August 12, 2015 injury underlying W.C. No. 4-990-890 (2015 injury) then he should be returned to the Division IME at some point for consideration of permanent impairment.

REMAINING ISSUES

I. Whether Respondent established by clear and convincing evidence that Dr. Tyler erred in concluding that Claimant is not at maximum medical improvement (MMI) for his 2015 injury?

III. Whether Claimant entitled to the surgery recommended by Dr. Walden on February 27, 2018 under his 2015 injury claim or his 2017 injury claim.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as a correctional officer for Employer. His duties include transporting offenders and/or their personal belongings about the facility in a designated prison vehicle when necessary. Claimant is also required to participate in a yearly pressure point control tactic (PPCT) refresher course.

2. Claimant suffered two on the job injuries as part of the aforementioned work duties/requirements.

Claimant's Admitted August 12, 2015- Left Shoulder Injury

3. On August 12, 2015, Claimant was assigned to transport some offenders. The job entailed picking up the inmates, their files and personal property from a loading dock on prison grounds. The ALJ understands from Claimant's testimony that these materials were sitting on the dock and from Claimant's position below the dock he had to lift them above his

chest to remove them from the dock. According to Claimant, he picked up the files with his right arm and put them on his right shoulder. He then grabbed the duffle bag with his left hand, lifted it slightly and began to pull it from the dock when he felt pain in his left shoulder. Medical documentation indicates the bag weighed approximately 15 lbs. *Ex.A*, pp. 1, 38.

4. Claimant's testimony is inconsistent with the mechanism of injury (MOI) he described to his authorized treating provider on August 12, 2015. During an appointment with Physician Assistant (PA) Steven Quakenbush on August 12, 2015, Claimant reported that he was "carrying a box of medical files on his right shoulder holding the files with his right hand and lifted the inmate's duffle bag, with the inmate's property in it, lifting straight up from the groun (sic) to his side". He also reportedly indicated that he carried the box and the duffle bag about 40 yards to the gate" and as he "approached the gate his left hand became numb and he put the box and the duffle bag down". Claimant rated his pain a six out of 10, and indicated he experienced this pain 90% of time. He was diagnosed with a shoulder/trapezius strain and was prescribed physical therapy along with prescription medications. *Ex.B*, pp. 9-10.

5. The following day, Claimant's pain had decreased to a 5/10, and he was only experiencing that pain 50% of the time. Physical therapy was giving him immediate relief. He had decreased reproducible pain upon physical examination. Nonetheless, Claimant was referred for a MRI and an orthopedic consultation, because the physical therapist suspected a tear in the left shoulder. *Ex.B*, pp. 12-13.

6. MRI was completed August 17, 2015. It revealed an anterior and superior labral tear with subchondral cyst superior bony glenoid. *Ex.B*, p. 15; Ex 7, p. 269

7. On October 16, 2015, Claimant underwent surgery with Dr. Keith Minihane. Dr. Minihane performed a labral repair.

8. On April 8, 2016, Claimant underwent a second surgery with Dr. Minihane. Dr. Minihane performed a subacromial decompression as well as a bursectomy. *Ex.B*, p. 29; Ex 7, p. 236.

9. On August 3, 2016, Claimant had another MRI.

10. On September 6, 2016, Claimant saw orthopedic surgeon Dr. David Weinstein for a second opinion regarding his left shoulder upon the request of a Dr. Daniel Olson, Claimant's authorized provider. Claimant reported no improvement following either of his two prior surgeries. Dr. Weinstein performed a physical examination. He found no atrophy or deformity in the left shoulder. He found well healed surgical wounds with no erythema or increased warmth. He found no specific tenderness in the biceps or anterior and posterior joint line. The biceps and triceps were intact. However, Dr. Weinstein did find moderate tenderness over the scapular rotators, trapezius and lateral deltoid. He also noted significant guarding during his physical examination.

11. Dr. Weinstein reviewed the MRI imaging from August 3, 2016. He found no evidence of any tearing at the rotator cuff or biceps, and no glenohumeral changes. He

found the labrum to be intact. He diagnosed myofascial pain. This diagnosis was based upon his physical examination, review of the MRI imaging and a diagnostic injection, all of which led him to conclude that the Claimant's ongoing symptoms were unrelated to any structural deficiencies.

12. Dr. Weinstein concluded that Claimant would be at MMI at his next appointment with Dr. Olson given his opinion that there was nothing more to do to help Claimant's condition other than home exercise and pain management. He did not think a third surgery would be beneficial.

13. Dr. Minihane reviewed the August 3, 2016 MRI and determined he had nothing further to offer Claimant. *Ex.B*, pp. 27, 35.

14. Claimant underwent a two rounds of injections with Dr. Dwight Leggett yet continued to have pain with activity as high as 9/10. Consequently, Dr. Olson referred him to Dr. Walden for another orthopedic evaluation.

15. Dr. David Walden evaluated Claimant on April 13, 2017. Dr. Walden's physical examination revealed a normal shoulder with no deficits other than mild atrophy of the deltoid. *Ex.B*, p. 39. X-rays were taken and revealed a healthy glenohumeral joint, evidence of previous surgery, no acute fractures or dislocations and no loose bodies. Dr. Walden interpreted the x-ray as essentially normal. *Ex.B*, pp. 37, 39. Nonetheless, he recommended a third shoulder surgery in the form of an anterior inferior capsular shift. *Ex.B*, p. 40. Dr. Walden recognized, however, that Claimant had underlying multidirectional instability in his left shoulder prior to the work incident. E*x.B*, p. 40.

16. On June 13, 2017, Claimant returned to Centura Centers for Occupational Medicine (CCOM) where he was evaluated by Dr. Thomas Centi. Claimant reported little change in the condition of his left shoulder to date. *Ex.B*, p. 41.

17. On September 28, 2017, Claimant saw Dr. Timothy O'Brien, M.D. for an independent medical examination (IME) at Respondent's request.

18. Claimant returned to Dr. Centi on October 10, 2017. He again noted little change in the condition of his left shoulder. Claimant told Dr. Centi that he felt his left shoulder was stable. He rated his pain at eight. *Ex.B*, p. 43.

19. On October 16, 2017, Dr. O'Brien issued a report following the September 28, 2017 IME. Dr. O'Brien was qualified as an expert in both orthopedics and occupational medicine at his post hearing deposition. *O'Brien Deposition*, pp. 5-6, Exhibit A.

20. As part of his IME, Dr. O'Brien reviewed relevant medical records, took a history from the Claimant and performed a physical examination. Dr. O'Brien concluded that the mechanism of injury (MOI) on August 12, 2015 was insufficient to produce any tissue breakage or yielding in the left shoulder and therefore, injury. *Ex.B*, p. 60.

21. In support of his opinion, Dr. O'Brien stated that the MRI studies show no evidence of acute injury. Instead, they show subchondral cysts. According to Dr. O/Brien,

the presence of subchondral cysts indicates underlying degeneration in the labrum and the hyaline cartilage overlying the labrum taking years to become evident. *Id.*

22. Dr. O'Brien stated that Claimant's initial complaints immediately after the work incident were localized in the trapezius as opposed to the labrum or rotator cuff, lending credence to his opinion that an acute labral tear did not occur. Indeed, Dr. O'Brien opines that labral tears would not be expected from the MOI described by Claimant during the IME. *Ex.B*, p. 61.

23. Dr. O'Brien pointed out that there is no evidence that Dr. Walden undertook a complete medical record review or causation analysis prior to recommending a third surgery in April 2017. *Ex.B*, p. 61.

24. On November 2, 2017, Claimant returned to CCOM and was evaluated by Dr. Centi. He reported a pain level of 5/10. He reported to Dr. Centi that he felt his left shoulder was stable. Dr. Centi noted that Claimant's condition had showed little change to date. He reviewed Dr. O'Brien's IME report with Claimant. Dr. Centi placed Claimant at MMI and instructed him to follow up with his personal care provider for continued care. He assigned no permanent impairment to the work injury. *Ex.A*, pp. 3-4.

25. Respondent filed a Final Admission of Liability (FAL) consistent with the opinions of Dr. Centi on November 13, 2017. *Ex.A*, p. 2. Claimant would object to the FAL and request a Division Independent Medical Examination (DIME) which would subsequently take place with Dr. John Tyler. However, before completion of the DIME, Claimant would suffer a second injury to the left shoulder.

Claimant's Admitted December 4, 2017- Left Shoulder Injury

26. On December 4, 2017, Claimant was participating in PPCT training when he reinjured his left shoulder. As part of a tactical handcuffing exercise, Claimant's left arm was forcibly pulled behind his back. Claimant felt a pop in the left shoulder and immediately developed extreme pain. The pain was so intense that Claimant could not get off of the ground. *Ex.B*, p. 40; *Hearing*, pp. 32, 35.

27. Claimant presented to his physician reporting that his left shoulder symptoms had "significantly increased" after the handcuffing procedure. *Ex.C*, p. 71. An MRI was ordered on December 7, 2017, to help distinguish between new injuries from December 4, 2017 and the Claimant's prior left shoulder injuries. *Ex.C*, p. 74.

28. MRI was completed on December 21, 2017. Imaging revealed a full thickness rotator cuff tear. *Ex.C*, pp. 78, 80, 92, 108.

29. On December 28, 2017, Claimant reported that he was having persistent popping in his left shoulder. *Ex.C*, p. 81.

30. On January 18, 2018, the Claimant returned to Dr. Walden. In addition to a rotator cuff tear, Dr. Walden noted that the MRI findings raised the potential for an acute re-

tear of the labrum. Dr. Walden recommended arthroscopic surgery for a rotator cuff repair and any acute changes to the labrum. *Ex.C*, p. 92.

31. On February 27, 2018, Dr. Walden's office submitted a recommendation for surgery, to include a subacromial decompression, rotator cuff repair and "likely" anterior inferior labral repair. *Ex.C*, p. 112.

Claimant's DIME with Dr. Tyler

32. On March 1, 2018, Claimant saw Dr. John Tyler for completion of the requested DIME as part of his 2015 injury. Dr. Tyler's specialty is physical medicine and rehabilitation (PM&R).

33. In the report generated following Claimant's DIME, Dr. Tyler stated that he was "not paid to review the entire chart which would have required at least 2 hours of review so only 1 hour of review was performed on the remaining records." He further noted that he would "skip through much of the follow-up visits, secondary to same, that [Claimant] had with CCOM and move on to the pertinent aspects of his diagnosis and future treatment". *Ex.C*, p. 121.

34. Dr. Tyler did not review Dr. O'Brien's IME report nor did he review existing records after December 6, 2017. *Ex.C*, p. 123. Because Claimant's MRI following his December 4, 2017 injury was not completed until December 21, 2017, the ALJ finds that Dr. Tyler was unaware of the extent of pathology existing in Claimant's left shoulder following the December 4, 2017 injury nor was he fully advised as to the surgical recommendation of Dr. Walden. Indeed, the record supports that Dr. Tyler understood the only surgery being recommended at the time of his DIME to be the capsular shift procedure recommended by Dr. Walden in April 2017. *Ex.C*, p. 122, 124.

35. Dr. Tyler found that the diagnostic injection administered by Dr. Weinstein in September 2016 pointed away from pathology in the rotator cuff. *Ex.C*, p. 122.

36. When asked by Dr. Tyler what symptoms Claimant was experiencing before the December 4, 2017 injury, Claimant did not include popping. Indeed, Dr. Tyler stated that Claimant informed him of having "new pathology also that he has suffered from the 2nd accident to the left shoulder." *Ex.C*, p. 123. Dr. Tyler made it clear he was only addressing "aspects" of the first injury.

37. Dr. Tyler concluded that Claimant was not at MMI for his 2015 injury. He reasoned that Claimant's acute onset of pain on August 12, 2015 indicated that he was entitled to the third surgical procedure recommended by Dr. Walden in April 2017. *Ex.C*, p. 124. As noted, Claimant stipulated that he is not seeking the April 13, 2017 surgical recommendation of Dr. Walden under either his 2015 or 2017 claim.

38. On March 14, 2018, the Claimant's primary complaint was popping in the left shoulder. *Ex.C*, p. 127.

39. On July 9, 2018, the Claimant's primary complaint was popping in the left shoulder. *Ex.C*, p. 139.

40. On June 20, 2018, Dr. O'Brien issued a supplemental report. He reviewed all relevant medical records since his first report, including the December 2017 x-ray and MRI reports, Dr. Walden's two reports from 2018, and Dr. Tyler's DIME report. *Ex.C*, pp. 135-37.

41. Dr. O'Brien opined that the MOI involved in Claimant's 2017 injury was of sufficient force and magnitude to cause acute tears in the rotator cuff and labrum. He stated that the December 21, 2017 MRI confirms a full-thickness rotator cuff tear and a possible labral tear. Dr. O'Brien concluded that the surgery recommended by Dr. Walden on February 27, 2018 should be provided under the 2017 claim. *Ex.C*, p. 137.

42. On July 3, 2018, the parties took the evidentiary deposition of Dr. O'Brien. Dr. O'Brien testified that at the time of his original IME he felt the Claimant was at MMI for his 2015 injury with no permanent impairment. *O'Brien Deposition*, pp. 6-7. He testified that any injury the Claimant suffered on August 12, 2015 would have been "quite minor" due to the mechanism involved. *O'Brien Deposition*, p. 7.

43. Dr. O'Brien agrees with Dr. Centi's November 2, 2017 date of MMI for the 2015 injury. *O'Brien Deposition*, pp. 7-9.

44. Dr. O'Brien testified that both he and Dr. Centi identified non-organic factors underlying Claimant's presentation. Specifically, his complaints of decreased strength were not verified by objectively determined atrophy. The presence of these non-organic factors made it impossible to determine if there were organic sources for Claimant's symptomology. *O'Brien Deposition*, pp. 12, 47.

45. Dr. O'Brien testified that the pathology targeted by Claimant's first surgery, including his labral tears, was not related to the August 12, 2015 date of injury. He testified that it takes a dislocation to produce an acute labral tear. Accordingly, he opined that Claimant's lifting of a duffel bag of average weight at chest level is "just not enough trauma to produce a labral tear." *O'Brien Deposition*, pp. 14-15.

46. Dr. O'Brien testified that the Claimant's first post 2015 injury MRI performed pre-surgery does not show any sign of acute tissue breakage or yielding. There is no bleeding, no effusion and no extra fluid in the joint. He elaborated that the presence of subchondral cysts in the area of the labrum indicates degeneration versus an acute injury. *O'Brien Deposition*, pp. 15-16.

47. Dr. O'Brien testified that the Claimant's primary complaints of hand numbness and trapezius pain made immediately after the 2015 injury are inconsistent with an acute labral tear. *O'Brien Deposition*, p. 17. Based upon the evidence presented, the ALJ finds that Dr. O'Brien believes that any labral tearing identified on MRI after Claimant's 2015 injury is degenerative in nature rather than acute.

48. At the outset of the Claimant's second surgery, Dr. Minihane was able to objectively confirm that the first surgery had stabilized the left shoulder. *O'Brien Deposition*,

pp. 17-18. During the second surgery, Dr. Minihane debrided scar tissue from the previous surgery and removed any bony or soft tissue structures that may have been impinging upon the rotator cuff. Dr. Minihane found rotator cuff disease but not enough to repair. *O'Brien Deposition*, p. 18.

49. Dr. O'Brien testified that he disagreed with Dr. Walden's April 2017 assessment that a third surgery was needed to address instability because Dr. Minihane had objectively ruled out instability as part of the 2016 surgery and because Dr. Walden completed his assessment of instability while the Claimant was awake whereas Dr. Minihane completed an objectively more accurate assessment while the Claimant was asleep. Moreover, Dr. Weinstein, who examined the Claimant in September 2016 as found no instability. *O'Brien Deposition*, pp. 20-21.

50. Dr. O'Brien testified that the December 21, 2017 MRI showed a new rotator cuff tear. He testified that this rotator cuff tear would have "definitely" appeared on the prior MRI imaging if it existed at the time of the MRI. *O'Brien Deposition*, pp. 24.-25, 36.

51. Dr. O'Brien testified that the December 21, 2017 MRI imaging shows no new frank labral tear. *O'Brien Deposition*, p. 25.

52. Dr. O'Brien testified that the surgery recommended by Dr. Walden on February 27, 2018 is a "completely different surgery" than that recommended in April 2017. The 2018 procedure is aimed at the rotator cuff, and Dr. Walden stated that he will address any other pathology he may find while the Claimant is under anesthesia, including in the labrum. *O'Brien Deposition*, pp. 25-26.

53. Dr. O'Brien testified that Dr. Walden's surgical recommendation in 2018 recognizes that the instability he recommended surgically treating in 2017 does not exist. *O'Brien Deposition*, p. 37.

54. Dr. O'Brien testified that he disagrees with Dr. Tyler's opinion that the Claimant is not at MMI for his 2015 injury. *O'Brien Deposition*, p. 27.

55. Dr. O'Brien testified that any causation opinions offered by Dr. Tyler are suspect because he did not review the entire medical record. *O'Brien Deposition*, pp. 27-28. Specifically, Dr. Tyler's failure to review any medical records after December 6, 2017 means that he did not appreciate that he was examining a completely different shoulder than existed prior to the December 4, 2017 work injury. *O'Brien Deposition*, p. 28.

56. Dr. Tyler's opinion regarding MMI is contradicted by Dr. Walden's 2018 opinion that there is no instability in the left shoulder. Dr. O'Brien testified that Dr. Tyler appeared to be "relying upon 'Walden 2017.'" *O'Brien Deposition*, p. 30.

57. Dr. Tyler's opinion that the two prior surgeries did not address the Claimant's problems because they were due to an anterior and inferior dislocation or subluxation is another way for Dr. Tyler to say the surgeries did not repair the instability. This position, however, is contradicted by the fact that Dr. Minihane was able to objectively verify a lack of instability when the Claimant was asleep for his second surgery. Dr. Tyler's position is also

contradicted by Dr. Weinstein's subsequent determination that no instability remained. *O'Brien Deposition*, pp. 32-33.

58. Dr. O'Brien testified that the Claimant could have experienced pain from his degenerative shoulder without there being any physiological change, i.e. tearing to the shoulder. *O'Brien Deposition*, p. 69.

59. Based upon the evidence presented, the ALJ finds that Respondents have overcome the MMI determination of Dr. Tyler by clear and convincing evidence. In finding that the MMI opinion of Dr. Tyler has been overcome, the ALJ credits the totality of the medical records and the opinions of orthopedic surgeon Dr. O'Brien. As noted, Dr. Minihane indicated that no further surgery was needed. Treating orthopedic surgeon Dr. Weinstein also indicated that further surgical intervention was not warranted and Claimant, by his own account, stated that his shoulder was stable as of October 2017. Consequently, the ALJ finds record support to conclude that Claimant, more probably than not, had reached the point in time when any medically determinable physical impairment as a result of his 2015 injury has become stable and when no further treatment was reasonably expected to improve the condition by November 2, 2017.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the voluminous record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the opinions of Dr. O'Brien are based upon a thorough review of the medicals records existing for both Claimant's 2015 and 2017 injuries. After careful review of the record evidence submitted for consideration, the ALJ

finds/concludes that the opinions or Dr. O'Brien are credible and persuasive. Conversely, the opinions expressed by Dr. Tyler as part of the DIME are not convincing as they are based upon a truncated records review and thus represent an incomplete understanding of the case.

Overcoming the DIME

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42- 107(8) (b) (III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI and/or causation is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). In other words, to overcome a DIME physician's opinion regarding MMI and/or the cause of a particular condition asserted to be related to Claimant's industrial injury, the party challenging the DIME must demonstrate that the physician's determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. The question of whether the Respondent has overcome the DIME physician's findings regarding causality and MMI is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, *supra*. In deciding whether Respondent has met their burden of proof, the ALJ is, as noted above, empowered, "[t]o resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). Moreover, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). In this case, the issue of whether Claimant was properly placed at MMI by Dr. Tyler involves a complex medico-legal question regarding the cause of Claimant's ongoing shoulder symptoms and his need for a third shoulder surgery.

E. Here, Dr. Minihane, felt that a third surgery was unwarranted as of the end of 2016. At this same time, Dr. Weinstein opined that the Claimant was at MMI and that his ongoing symptoms were myofascial as opposed to structural in nature. Dr. Weinstein agreed with Dr. Minihane that no further surgery was indicated. Dr. Walden did recommend a third surgery in April 2017 to address instability. But that recommendation was made in the face of a normal physical examination, a normal x-ray and objective evidence that the second surgery resolved any instability. There is no indication that Dr. Walden reviewed the medical history prior to making this recommendation to ensure reasonableness, necessity or causation. Finally, Dr. Walden recognizes that the Claimant had shoulder instability

preexisting the work injury but fails to reconcile the resulting causation issues concerning the proposed capsular shift procedure.

F. Dr. Tyler opted to skip through the progress notes from the authorized treating providers. If he had, he would have noted that the Claimant's reported symptomology has remained essentially the same from the end of 2016, when both treating surgeons on the case recommended no further treatment, to the date he was placed at MMI. In December 2016, the Claimant rated his active pain at eight and his resting pain at four. In January 2017, after having one round of injections, the Claimant again rated his active pain at eight. In March 2017, after a second round of injections, the Claimant rated his active pain at eight to nine and his resting pain at four to five. In April 2017, Dr. Walden's physical exam and x-ray revealed a normal shoulder. In October 2017, the Claimant told his treating provider that his shoulder was stable. In November 2017, the Claimant reported that his shoulder remained stable, and he was thus placed at MMI. Dr. Tyler was unable to see this plateau in the year leading up to MMI because he failed to adequately review the medical record.

G. Dr. Tyler also did not have for review medical records beyond December 6, 2017. Consequently, he did not possess the factual knowledge to support his opinion that there was "absolutely no reason why [Claimant] should not have been allowed to proceed forward with what was medically prescribed by Dr. David Walden". Had he reviewed records after December 6, 2017 he would have been apprised that the proposed surgery upon which he based his "Not at MMI" opinion is no longer being recommended by Dr. Walden or sought by the Claimant. Dr. Walden is now recommending a different surgery that does not include the anterior inferior capsular shift intended to address labral instability. Dr. Walden intends to only address acute rotator cuff and labral changes, if any, at this point in time. He does not discuss instability or the need for a capsular shift in either of his 2018 reports. Yet, that capsular shift is the only surgical recommendation of which Dr. Tyler is aware.

H. Finally, Dr. Tyler failed to reconcile Claimant's 2017 injury with his opinion that the Claimant is not at MMI for his 2015 injury. Again, he lacked the factual foundation to incorporate this new injury into his opinions because he did not review any medical records subsequent to December 6, 2017. The extensive medical records subsequent to that date include a new x-ray, a new MRI and two return appointments to Dr. Walden. As noted above, these records include a new and distinct surgical recommendation from Dr. Walden. Without seeing these records, Dr. Tyler is unaware that the shoulder he examined was completely different from the shoulder that existed prior to the 2017 injury. Because the ALJ concludes that Dr. Tyler's opinions concerning MMI are based upon an abbreviated medical records review and an incomplete understaning of the interplay betweeen Claimant's 2015 and 2017 injuries, the ALJ finds/concludes that his opinions are mistaken and highly probably incorrect. Accordingly, Respondents have presented clear and convincing evidence to overcome his MMI determination.

Burden of Proof Regarding Claimant's Entitlement to Additional Surgery

I. Claimant maintains that Respondent bears the burden to overcome Dr. Walden's 2018 surgical recommendation by clear and convincing evidence as part of its burden to overcome the DIME as to MMI. The ALJ concludes this assertion is incorrect. It is the Claimant's burden to prove entitlement to the currently recommended surgery under

his 2015 injury by a preponderance of the evidence. As noted above, the proposed surgery upon which Dr. Tyler bases his "Not at MMI" opinion is no longer being recommended. Indeed, Claimant stipulated at the outset of hearing that he was not seeking this proposed surgery under either claim. The DIME is totally unaware of the only surgery currently recommended or sought at this point in time. Because the surgery proposed in 2018 was not part of the DIME report or contemplated by the DIME, the ALJ concludes that the question of its authorization does not fall under the Respondent's burden to overcome the DIME as to MMI.

J. "As required by § 8–42–107(8), C.R.S. 2005, a DIME physician's opinions concerning MMI and permanent medical impairment are given presumptive effect. Both determinations inherently require the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are causally related to the industrial injury. Therefore, a DIME physician's determinations concerning causation are binding unless overcome by clear and convincing evidence." *Leprino Foods Co. v. ICAO*, 134 P.3d 475, 482-483 (Colo. App. 2005). The reasoning behind this rationale is that a DIME physician, or any physician for that matter, cannot fully assess MMI and permanent impairment without first determining what conditions are related to the work injury. This rationale does not extend to a DIME physician's determination(s) that specific medical treatment modalities are related to the industrial injury. While its position is that the Claimant's shoulder is at MMI for the 2015 injury, the Respondent does not challenge the relatedness of the shoulder "condition" to that claim. Obviously, Respondent has provided extensive treatment for the condition caused by Claimant's 2015 work injury. This difference between denial of a condition and denial of a treatment modality makes all the difference under *Leprino Foods Co.,* supra. DIME determinations regarding causation of conditions are subject to the heightened burden of proof whereas DIME opinions concerning the relatedness of specific treatment modalities are not. See *Moore v. American Furniture Warehouse*, W.C. No. 4-665-024 (ICAO, June 27, 2007)(the increased burden required by the DIME report did not apply to the claimant's entitlement to a particular medical treatment); *Briggs v. Willard Plumbing and Heating*, W.C. No. 4-526-000 (ICAO, March 9, 2007)(where the sole issue before the ALJ was the claimant's entitlement to medical benefits, we do not believe the claimant was required to overcome the DIME report by clear and convincing evidence). The Industrial Claim Appeals Office (ICAO) has recently affirmed on two separate occasions that the burden does not shift to the Respondent under facts similar to those presented here noting as follows: "Regardless whether a treating physician or the DIME physician recommended future medical treatment, the respondents were free to deny liability and place the burden on the claimant to prove by a preponderance of evidence that he needed future medical treatment." *Yuetter v. CBW Automation, Inc.*, W.C. 4-895-940-03, p.7 (ICAO, February 26, 2018). See also *Morris v. Olson Hearing and Plumbing Co.*, W.C. No. 4-980-171-2 (ICAO, July 6, 2018)(respondent not required to overcome a DIME's recommendations as to future treatment by clear and convincing evidence).

K. In this case, the persuasive evidence supports a conclusion that Claimant suffered a new and distinct injury to his left shoulder on December 4, 2017. In this regard, the ALJ again credits the opinions of Dr. O'Brien. The only ascertainable basis for the currently recommended surgery is a rotator cuff tear that did not exist prior to the 2017 injury. If there is any treatment to the labrum as part of this surgery, it will be to correct acute changes caused by the 2017 injury. Dr. Walden's plan in 2018 to address only acute

changes in the labrum indicates his recognition that the latent instability he focused upon in 2017 does not now exist. Unlike the mechanism of injury in 2015, the mechanism of injury in 2017 is of a force and magnitude sufficient to cause permanent physiological changes in Claimant's shoulder. Indeed, Claimant's own statements to his providers drive home the reality the he suffered a new and distinct injury. Based upon the evidence presented, the ALJ concludes that there is no causal connection between the surgery proposed in 2018 by Dr. Walden and Claimant's 2015 injury. Accordingly, the surgery recommended by Dr. Walden on February 27, 2018, is authorized as reasonable, necessary treatment for the Claimant's 2017 injury.

ORDER

It is therefore ordered that:

1. Respondent's request to set aside the MMI determination of Dr. Tyler that Claimant is not at MMI for his August 12, 2015 industrial injury underlying W.C. 4-990-890 is GRANTED. Claimant is determined to have reached MMI for this claim as of November 2, 2017. Claimant shall return to the DIME physician for consideration of permanent impairment related to W.C. 4-990-890 when appropriate.

2. Claimant's request that the surgery recommended by Dr. Walden on February 27, 2018 be provided under W.C. No. 4-990-890 is DENIED. Respondents shall authorize and pay for the surgery recommended by Dr. Walden on February 27, 2018 as treatment needed to cure and relieve Claimant from the effects of his December 4, 2017 industrial injury underlying W.C. 5-063-873.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2018

/s/ Richard M. Lamphere

Richard Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-061-214-001

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable work injury on October 24, 2017.

2. Whether Claimant is entitled to an order awarding reasonably necessary and related medical benefits.

3. Whether Claimant was disabled by is usual employment by the work injury and therefore is entitled to an order awarding temporary total disability benefit.

STIPULATION OF FACT

Claimant's average weekly wage is $1,292.85. This stipulation is approved and accepted by the ALJ.

FINDINGS OF FACT

1. Claimant was involved in a motor vehicle accident (MVA) on March 4, 2014, and sustained injuries to his neck, low back and right shoulder. He also suffered from headaches.

2. On June 17, 2014, Claimant continued to report cervical, thoracic and lumbar pain as well as persistent right shoulder pain and headaches while treating with Dr. Lichtenberg.

3. Claimant admitted he had been in the 2014 MVA, but denied suffering any injury to his neck. After initially denying he injured his neck as a result of the 2014 MVA, Claimant subsequently was forced to admit he actually injured his neck.

4. Claimant nevertheless continued to deny any injury to his right shoulder. Claimant bizarrely testified that the medical records were incorrect that he never complained of shoulder pain.

5. In fact, when confronted with Dr. Lichtenberg's report which documented that Claimant reported four out of ten pain in his right shoulder, Claimant testified that he had never treated with Dr. Lichtenberg and continued to deny any injury to his right shoulder. This testimony was directly inconsistent with the medical records.

6. Claimant admitted he pursued litigation and ultimately settled the 2014 motor vehicle claim.

7. After settling his 2014 MVA claim, Claimant was involved in a work-related MVA on July 27, 2016, and complained of neck and low back pain and headaches.

8. Claimant treated for his neck and low back injuries for the July 27, 2016, claim until at least the summer of 2017. As a result, Claimant had ongoing neck and low back medical treatment.

9. Claimant admitted that while he was still treating for his 2016 workers' compensation claim he was involved in a non-work-related MVA on April 14, 2017.

10. Claimant began treating for his non-work-related MVA, but he failed report to his physicians or insurance carrier that he had a prior workers' compensation claim. Specifically, Claimant failed to tell his new physicians that he has been treating for the same body parts leading up to and immediately before the MVA in 2017.

11. Dr. John Burris, a board-certified occupational medicine physician, performed an independent medical examination (IME) and a records review regarding both of Claimant's workers' compensation claims. Dr. Burris opined that after a review of all of Claimant's treatment records from his workers' compensation injury and his prior MVAs, it was clear that Dr. Higgins, who was treating Claimant for his April 2017 MVA, was unaware that Claimant had a prior injuries to the same body parts.

12. Dr. Burris opined that after reviewing Dr. Watson's Division IME report, that Claimant was improving from his July 2016 workers' compensation injury, when he was involved in a MVA in April 2017 and that Claimant's symptoms significantly worsened after that time.

13. Claimant admitted he settled his April 2017 MVA claim approximately a month prior to alleging another workers' compensation claim on October 24, 2017. As a result, Claimant settled his claim related to the prior MVA in 2017 and immediately alleged a new work injury to the same body parts.

14. Claimant also admitted he continued to have neck problems after he settled his April 2017 MVA claim. As a result, Claimant's neck problems continued despite receiving a settlement for the injury.

15. Claimant testified that on October 24, 2017, there was a 200 pound box of awning rolls that were stacked eight feet high and fell on top of his shoulder and rolled to his neck. This alleged injury occurred just a month or so after Claimant settled the prior MVA claim.

16. Claimant completed and signed the Employee Statement of Injury on October 26, 2017. Claimant wrote that he was lifting boxes from overhead to the ground to the forklift and injured his neck. He failed to mention anything falling on him in his written

description. As a result, Claimant's own initial written description of the incident was inconsistent with what he subsequently alleged occurred at work.

17. Claimant alleged that he reported his injury to Don Martinez on October 24, 2017. Don Martinez denied this allegation when speaking with Claimant's supervisor, Brett Martin.

18. Claimant reported to Concentra on October 26, 2017, that he experienced neck pain from lifting boxes down from overhead from a trailer to a forklift. This report is consistent with his Employee Statement, and inconsistent with his later allegations of an awning roll actually falling on him.

19. Claimant testified the October 26, 2017, medical record was incorrect in the description of the alleged mechanism of injury. As a result, he also alleged that his own written statement was incorrect as well.

20. Claimant failed to explain why there was such a discrepancy in the reporting of the alleged mechanism of injury.

21. Mark Ballinger, an employee of Awning Company of America, testified that he was working with Claimant, unloading a truck on October 24, 2017. Mr. Ballinger testified that the load, which was 18 feet to 20 feet long, was stacked funny and strapped against the wall. Mr. Ballinger testified that he assisted Claimant to restack them, so they did not fall. Mr. Ballinger testified that he did not see anything fall and strike Claimant in the shoulder or neck.

22. Mr. Ballinger also testified that there was no evidence that the straps holding the load had broken.

23. Mr. Ballinger testified that at no time during the unloading of the truck did Claimant state he had been injured. Finally, Mr. Ballinger testified that he did not notice anything that would suggest that Claimant had been injured during their time together.

24. The ALJ finds Mr. Ballinger's testimony credible and persuasive. As a result, a neutral employee from a different employer failed to support Claimant's allegation that he suffered a work injury in October of 2017.

25. Brett Martin, the operations manager for the employer, met with Claimant and credibly testified that he was first informed of the injury on October 26, 2017, two days after it allegedly occurred. Mr. Martin denied Claimant's allegation that the alleged incident was reported on October 24, 2017.

26. Mr. Martin spoke with Don Martinez as part of his investigation into Claimant's claim as to when the incident had been reported by Claimant. Mr. Martinez confirmed that Claimant did not report the work injury until October 26, 2017.

27. Claimant reported to Mr. Martin that he was moving long boxes from overhead to a forklift. Claimant never told Mr. Martin that a strap broke in the truck and something fell on him.

28. Claimant completed a written statement regarding the alleged injury on October 26, 2017. This written statement is consistent with what Claimant told Mr. Martin him, that nothing fell on him.

29. According to Mr. Martin, the medical release was signed by Claimant and dated October 25, 2017, and was given to Claimant at the same time, on October 26, 2017. The medical authorization initially was dated by Claimant as October 25, 2017, but was corrected to reflect the accurate date of October 26, 2017.

30. Furthermore, the medical release dated October 25, 2017, indicated in Paragraph 2 that Claimant received his injuries on October 26, 2017. Claimant further provided on the medical releases that he sustained his injuries on October 25, 2017. It is found that Claimant misdated the medical releases with the October 25, 2017, date.

31. On October 25, 2017, Claimant presented to Dr. Higgins, who had treated Claimant for the April 2017 MVA. Claimant reported to Dr. Higgins that "his neck pain has been worse with a constant pressure type headache present that has gradually gotten worse since his release from active care in July."

32. On October 25, 2017, Dr. Higgins reported that Claimant specifically denied any new trauma or injury. Claimant complained of bilateral neck pain and upper shoulder. Claimant did not allege a work injury when receiving medical treatment a day after the alleged work injury.

33. When confronted with the October 25, 2017 medical record which confirmed that Claimant had suffered no recent trauma, Claimant testified that the medical record was wrong and that he actually reported to Dr. Higgins that he injured himself at work. Claimant's testimony that he informed Dr. Higgins that he suffered a new work-related injury lacks credibility. Dr. Higgins inquired whether there was a new trauma, and Claimant denied any injury or event.

34. Dr. Burris, Respondents' IME, credibly testified that after a review of all the records, Claimant did not mention to his providers that something fell on him on October 24, 2017, until nearly a month later when he described the incident to Dr. Sacha.

35. Dr. Burris opined that based on Dr. Higgins' October 25, 2017, medical record, it was documented that Claimant had no new trauma or injury and that Claimant's symptoms were the result of a gradual worsening after being released from care from the MVA.

36. Dr. Burris credibly testified that after a review of all of the medical records and his prior medical evaluation that Claimant did not sustain an injurious event on October

24, 2017. In forming his opinion, Dr. Burris opined that Dr. Higgins' October 25, 2017 report is crucial in determining whether any injury occurred since Dr. Higgins had been treating Claimant for his MVA injuries and that Claimant denied any new injury and explained his increased pain as a gradual onset of pain from lack of treatment.

37. The ALJ credits Dr. Burris's testimony and Dr. Higgins' October 25, 2017, medical report and finds that Claimant did not sustain a new injury on October 25, 2017.

38. Dr. Burris testified that, after reviewing the April 14, 2017 CT scan and the December 26, 2017 MRI scan, there were no objective changes suggesting a new work injury. Dr. Burris testified that the radiologist who compared the before and after imaging studies reported that his opinion was Claimant's condition was "grossly unchanged."

39. Additionally, Dr. Burris evaluated Claimant one and a half months prior to his alleged October 24, 2017, injury, and Dr. Burris credibly testified that Claimant's complaints at that time were the same as his complaints after the alleged October 24, 2017 injury.

40. Dr. Sacha, Claimant's authorized treating provider, has continued to treat Claimant under this workers' compensation claim; however, Dr. Burris noted that it did not appear from Dr. Sacha's reports that he had knowledge of Dr. Higgins' treatment records and more specifically, the October 25, 2017 medical report,.

41. Given the lack of objective findings on imaging demonstrating any new injury and Claimant's similar subjective pain complaints before and after the alleged new injury on October 24, 2017, the ALJ finds that Claimant did not sustain any new injury on October 24, 2017.

42. On April 21, 2018, Claimant was involved in a bar fight and he was hit in the head between his eyebrows with a mug. He had a loss of consciousness and a resulting scar. Claimant was hospitalized on April 22, 2018.

CONCLUSIONS OF LAW

General Legal Principals

The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

In rendering a decision, the ALJ must make credibility determinations, draw plausible inferences from the record, and resolve essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* In determining credibility, the ALJ considers the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Credibility is a significant consideration when determining compensability. As found here, Claimant's contradictory reports to medical professionals and the lack of objective evidence of a new injury makes Claimant's claim unsustainable.

Compensability

A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2013). See City of *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000).

The credible and persuasive evidence established that Claimant had significant pre-existing injuries to his neck and shoulder dating back to at least 2014, when he was involved in a motor vehicle accident as documented in Dr. Lichenberg's medical records. Claimant's testimony to the contrary is not credible. The records are clear that Claimant has been treating for neck, back and shoulder problems dating back at least four years.

Claimant also provided inconsistent testimony about the alleged mechanism of injury. He initially admitted that nothing fell on him. However, he later changed the mechanism of injury and alleged that awning rolls fell on him. In addition to these credibility issues, Claimant's objective testing does not support that any new injury occurred. Similarly, Claimant's subjective Claimant's before and after October 24, 2017 were the same.

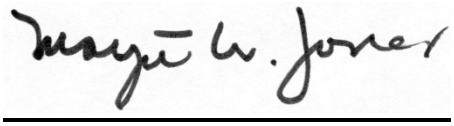
Based on all of the facts above and the significant credibility issues, the ALJ concludes that Claimant did not sustain any new work injury on October 24, 2017.

ORDER

1. Claimant failed to prove that he suffered a compensable injury on October 24, 2017. As a result, the claim is dismissed with prejudice.

2. Claimant's request for temporary disability benefits is also dismissed with prejudice.

Dated: This 26 day of September, 2018.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. In case 5-051-231-03 with date of injury of June 16, 2017, whether Claimant has established by a preponderance of the evidence that her claim should be re-opened due to mistake or change in condition.

2. In case 5-068-047 with date of injury of January 17, 2018, whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury.

3. Whether Claimant has established by a preponderance of the evidence that the arthroscopic right shoulder surgery recommended by Michael Hewitt, M.D. is reasonable, necessary, and causally related to her June 16, 2017 injury and worsened condition.

4. Whether Claimant has established by a preponderance of the evidence that a cervical MRI recommended by John Aschberger, M.D. is reasonable, necessary, and casually related to her new January 17, 2018 injury or her worsened condition and June 16, 2017 injury.

FINDINGS OF FACT

1. Claimant was employed by Employer in the position of qualified medical assistant personnel (QMAP). Claimant's job duties included assisting residents of a nursing home with medications, medical needs, and providing assistance with care.

2. In both June of 2017 and January of 2018, Claimant was so employed by Employer. Claimant no longer works for Employer and has been working full time as a phlebotomist since March of 2018.

3. On June 16, 2017, Claimant sustained a compensable injury. Claimant was assisting a large and combative patient on that date. As she attempted to assist the patient with standing up, the patient jerked her right arm backwards. Claimant felt a pop and pain in her trapezius on the top of her shoulder.

4. Respondents filed a general admission of liability and Claimant began conservative treatment for the injury.

5. On June 20, 2017 Deana Halat, N.P., evaluated Claimant. Claimant reported that she was assisting a heavy patient to stand up and that she pulled him forward and he resisted and that soon after she had pain in her right shoulder and later

on did not have strength in her right arm and hand. Claimant reported now that she was also having pain in her underarms. Claimant reported that her right trapezius and shoulder were bothering her and that she told her employer and was given some pain patches but that she had not improved. Claimant reported feeling weakness in her left arm as compared to the right and some numbness and tingling in her arm. Claimant reported that she had been getting massages to her upper back and shoulders from her family. On exam, NP Halat found tenderness in the supraspinatus muscle and in the trapezius muscle of the right shoulder. NP Halat assessed sprain of the right rotator cuff capsule and strain of the right trapezius muscle. NP Halat planned physical therapy three times per week for two weeks and planned follow up. NP Halat opined that the injury was work related after helping hold a patient up. *See* Exhibits 10, B.

6. On June 26, 2017, NP Halat evaluated Claimant. Claimant reported that she was not able to follow her restrictions because her employer was giving her heavier patients. Claimant reported she fell to the ground and was having even more pain after this second injury to her right arm. NP Halat continued the assessments of sprain of right rotator cuff capsule and strain of right trapezius muscle and planned an MRI of the right shoulder as well as an orthopedic specialist referral. NP Halat opined that the history and mechanism were consistent with the presenting symptoms and physical exam. *See* Exhibits 10, B

7. On July 3, 2017, Claimant underwent an MRI of her right shoulder. The findings included mild fusiform enlargement with intra substance edema in the anterior aspect of the infraspinatus tendon consistent with tendinosis with an intent tendon. Minimal hypertrophic degenerative changes were found in the acromioclavicular joint with a small superior osteophyte. Claimant was found to have a downward sloping lateral acromion with a flat undersurface and mild sub acromial sub deltoid bursitis. The impression provided was: tendinosis of the infraspinatus components with no full thickness rotator cuff tear, and a type II downward sloping lateral acromion with impingement on the infraspinatus tendon. *See* Exhibits 11, C.

8. On July 6, 2017, orthopedist Mark Failinger, M.D. evaluated Claimant. Claimant reported that on June 16 she was trying to help a very heavy and morbidly obese patient. Claimant reported that the patient always tries to resist. Claimant reported that after the patient had fallen, she tried to help him up and had pain and discomfort initially in her neck. Claimant reported that she kept getting placed back with this very obese patient and that it was very difficult to help him. Claimant reported that she had completed maybe eight sessions of therapy but still had pain in her neck and pain in the right ulnar fingers. Claimant reported no history of prior injury. On exam, Dr. Failinger found some mild tenderness of the right side of the neck with palpation. He found some discomfort on range of motion. Dr. Failinger noted that most of the pain was centered around the trapezius. Dr. Failinger noted that the MRI showed perhaps some mild sub acromial bursitis but no other obvious structural lesions. Dr. Failinger provided the impression of: right trapezial and periscapular pain; right upper extremity possible radiculopathy; and right shoulder rotator cuff tendinosis. Dr. Failinger opined that there was not a surgical lesion and that he thought most of Claimant's pain was coming from the periscapular

region and the area of the neck on the right side with numbness. Dr. Failinger injected Claimant's shoulder with a cortisone shot. Dr. Failinger recommended a consult with physiatry since he did not see a surgical lesion and opined that they could hopefully help with more of her pain than he could since it was a non-surgical problem. *See* Exhibits 12, D.

9. On July 7, 2017, NP Halat evaluated Claimant. Claimant continued to report right shoulder pain. Claimant also reported muscle pain in the forearm, joint pain, back pain, neck pain, joint swelling, and joint stiffness. NP Halat noted that this was not a surgical case per the orthopedist and referred to a physiatrist for evaluation and treatment. *See* Exhibits 10, B.

10. On July 24, 2017 Claimant was evaluated by physiatrist John Sacha, M.D. Claimant reported that she was at work pulling a patient forward and that as she pulled she felt an acute onset of pain localized to the right shoulder and right trapezius and then eventually to the bilateral neck. Claimant reported some numbness and tingling in the fourth and fifth digits of the right hand. Claimant reported her symptoms of pain were fairly constant and localized to the right trapezius, right anterior superior shoulder, and bilateral neck. Claimant reported no prior work comp, neck, shoulder, or motor vehicle accidents or injuries. On exam, Dr. Sacha found mild pain behaviors, positive Hawkins and neer tests on the right shoulder, diminished range of motion with internal rotation in the right shoulder, some trapezius spasm on neck examination, right greater than left. Claimant also had poor posture with forward protrusion of the neck. Claimant had mild pain with extension and external rotation on the right side. Dr. Sacha provided the impression of shoulder impingement and rule out cervical pathology versus myofascial pain. Dr. Sacha noted that it appeared Claimant had a shoulder injury and that he could not rule out the possibility that she also had a cervical injury. He recommended a trial of chiro and acupuncture and a topical pain cream. Dr. Sacha opined that he would see Claimant back in a couple of weeks and that if her symptoms were improving or resolving, it would help with causality but that if she was not improving he could not rule out further diagnostic studies including an MRI of the cervical spine. *See* Exhibits 12, E.

11. On August 4, 2017, NP Halat evaluated Claimant. Claimant reported that an injection in her right shoulder helped only slightly with her pain and that Dr. Sacha felt she had right shoulder impingement and recommended massage therapy and physical therapy. Claimant also reported that Dr. Sacha believed her symptoms might be related to her neck and that she might need additional diagnostic testing to evaluate for cervical involvement if she did not respond well to continued conservative care. *See* Exhibits 10, B.

12. On August 9, 2017, Dr. Sacha evaluated Claimant. He noted there was delay in authorization with the chiro and acupuncture so it was unclear what the clinical response was as of yet. Claimant reported some slight improvement of her symptoms with time and home exercises. Dr. Sacha again noted some mild pain with Hawkins and neer testing and some mild tenderness over the trapezius. Dr. Sacha recommended Claimant finish chiro and acupuncture before re-evaluation. *See* Exhibits 12, E.

13. On August 30, 2017, Dr. Sacha evaluated Claimant. Dr. Sacha noted that since last being seen, Claimant was doing great. Claimant reported that her symptoms were tolerable and improving with chiro and acupuncture. Dr. Sacha opined that further care was not indicated and he felt comfortable with duty a full duty trial. He noted that Claimant still had some soreness and stiffness with reaching overhead but that he anticipated that improving over time. On exam, Dr. Sacha noted some mild tenderness over the trapezius and mild pain with Hawkins and neer testing. He provided the impression of resolved shoulder impingement and secondary myofascial pain. Dr. Sacha opined that Claimant was approaching maximum medical improvement (MMI) with no evidence of permanent impairment. Dr. Sacha opined that Claimant was okay for a full duty work trial and discharged her with follow up as needed. He recommended Claimant have 6-8 visits further of chiro and acupuncture to use on an as needed basis for symptom control. Dr. Sacha anticipated a slight increase in soreness with Claimant's return to work. *See* Exhibits 12, E.

14. On September 6, 2017, NP Halat evaluated Claimant. Claimant reported that she continued to have pain in her shoulder and was not ready to return to full duty work because she could not push the cart. Claimant requested referral for a second opinion on her continued pain in the right shoulder, trapezius, and the radiation into her right deltoid and upper arm. Claimant was quite upset that she would have to go to full duty work because she believed she would have worse problems with her arm. Claimant reported pain at a 5/10. NP Halat referred Claimant for a evaluation and treatment with a second orthopedic specialist. *See* Exhibits 10, B.

15. September 20, 2017 NP Halat evaluated Claimant. Claimant reported that she returned to full duty work but that sometimes when she had to push her med cart off the elevator, she had to use her abdomen to help since the wheels got stuck. Claimant also reported that when at home; lifting to reach her microwave or cupboards caused her pain in the right side of her neck and trapezius area. Claimant reported she had not heard anything about the second orthopedic opinion that had been ordered. NP Halat opined that Claimant appeared more comfortable than before. On exam, Claimant had pain at the end range of rotation both left and right in her neck. Claimant had mild tenderness to palpation in the trapezius. NP Halat continued to assess shoulder impingement, sprain of right rotator cuff capsule, and strain of right trapezius muscle. NP Halat opined that Claimant was doing better but still had some pain in the upper back and right neck. NP Halat recommended Claimant continue remaining chiropractic and massage therapy under maintenance care as recommended by Dr. Sacha. NP Halat planned to discharge Claimant at maximum medical improvement with maintenance per Dr. Sacha. NP Halat opined that no impairment was indicated for the injury. NP Halat noted that if Claimant had any further problems, Claimant should notify her employer and was welcome to return to the clinic. NP Halat released Claimant from care. Nancy Strain, D.O. signed off on the September 20, 2017 report. *See* Exhibits 10, B.

16. On September 23, 2017, Trina Bogart, M.D. submitted form WC164, Physician's Report of Workers' Compensation Injury. Dr. Bogart indicated that Claimant

was able to return to full duty work on September 20, 2017 and that she reached MMI on September 20, 2017 with no permanent impairment. Dr. Bogart indicated that maintenance care after MMI was required to complete chiropractic. *See* Exhibit B.

17. On September 25, 2017, Claimant was evaluated by orthopedist Michael Hewitt, M.D. Claimant reported that she was assisting a patient, helping him stand and that she went to pull the patient upwards when she noted pain in her trapezius and lateral shoulder that increased later that day. Claimant reported no prior history of shoulder injury. Claimant reported that she had undergone a sub acromial injection with approximately 20-30% improvement in symptoms for one week. Claimant reported lateral sided shoulder pain without radicular symptoms or numbness. Dr. Hewitt found mild tenderness within the right sided trapezius musculature. Dr. Hewitt found shoulder impingement testing positive, mild AC tenderness, and moderate anterior impingement tenderness. Dr. Hewitt reviewed the MRI from July, 2017. Dr. Hewitt assessed right shoulder clinical impingement. Dr. Hewitt discussed treatment options for impingement including observation, activity modification, anti-inflammatory medications, physical therapy, repeat cortisone injection, and finally arthroscopy. After much discussion, Claimant stated that she wanted to proceed with arthroscopic sub acromial decompression and Dr. Hewitt opined that she was an appropriate surgical candidate. *See* Exhibits 13, F.

18. On October 13, 2017, Respondents filed a final admission of liability. Claimant did not timely request or file a notice and proposal to select an independent medical examiner but she did timely file an objection to the FAL and an Application for Hearing. On the Application for Hearing, Claimant endorsed medical benefits among other issues. *See* Exhibit K

19. On October 15, 2017, Dr. Hewitt submitted a request for surgery. *See* Exhibit 13.

20. On October 25, 2017, John Douthit, M.D. performed a medical records review. Dr. Douthit provided the impression that Claimant had suffered an injury to her neck and right shoulder after assisting a patient with a transfer. Dr. Douthit noted that Claimant has had pain in her shoulder and neck since and had not responded to physical therapy or injection. Dr. Douthit opined that the MRI was essentially normal. Dr. Douthit noted that Claimant had two orthopedic consultations with Dr. Failinger believing Claimant was not a surgical candidate and Dr. Hewitt recommending arthroscopic surgery and debridement. Dr. Douthit noted that the diagnosis appeared to be right shoulder strain with possibly some inflammatory process associated with the injury. Dr. Douthit opined that the surgical indications were very marginal and at the early date there was still opportunity for spontaneous recovery. Dr. Douthit recommended the injury be given 2-3 more months of rest and rest with respite to allow healing. He suggested no aggressive physical therapy or treatment and only maintain range of motion and that another sub acromial steroid injection may benefit. Dr. Douthit opined that if Claimant was not recovering an arthroscopic procedure after the first year might be considered. Dr. Douthit noted the red flags and doubted very much whether Claimant would benefit from surgery.

Dr. Douthit opined that her injury was very likely an inflammatory process and that an arthroscopy may do nothing more than aggravate. He did not recommend any further passive care such as acupuncture or chiropractic care. *See* Exhibits 14, G.

21. Despite the recommendation from Dr. Douthit of 2-3 months of rest and rest with respite to allow time for healing, Claimant continued to remain at full duty work and continued to work full duty for Employer.

22. On November 10, 2017, NP Halat evaluated Claimant. Claimant requested a copy of her MRI because she wanted another provider to evaluate since she was still continuing to have pain in her shoulder that radiated into her upper arm. Claimant reported that she was taking 1000 mg of Tylenol and then could work. NP Halat noted that it was confusing whether the surgery recommended by Dr. Hewitt was approved or denied. On exam, NP Halat found Claimant's right shoulder to be slightly drooped as compared to the left with tenderness in the bicipital groove, the deltoid, the supraspinatus, the trapezius, and in the superior shoulder. NP Halat found limited range of motion in all planes particularly painful in internal and external rotation. NP Halat found a positive Neer rotator cuff test and a positive lift off test. NP Halat opined that Claimant was at functional goal, but not at end of healing. NP Halat continued to asses shoulder impingement, sprain of right rotator cuff capsule, and strain of right trapezius muscle. NP Halat gave Claimant a copy of her MRI. NP Halat contacted the adjustor of record, but noted it sounded like Claimant was working with someone else named Becky. NP Halat planned to follow up with Becky regarding how to proceed. *See* Exhibits 10, B.

23. On December 11, 2017, Dr. Hewitt evaluated Claimant. Dr. Hewitt noted that Claimant was there to follow up on her right shoulder. Dr. Hewitt noted that in September Claimant was diagnosed with clinical impingement and that a recommended surgery had been denied. Claimant reported that her symptoms had deteriorated over the past three months and that she had no further trauma. Dr. Hewitt found on examination a significantly positive impingement test and mild rotator cuff weakness. Dr. Hewitt noted that Claimant was five months post work related injury and had undergone appropriate conservative management. He again opined that Claimant was an appropriate surgical candidate and noted a diagnostic response to a sub acromial injection. Dr. Hewitt noted that Dr. Douthit had denied surgery after a review of the case and that he had recommended repeat injections. Dr. Hewitt noted that Claimant had undergone 2 cortisone injections and Dr. Hewitt did not recommend further injections noting the orthopedic protocol of limiting to 2 injections per year. Dr. Hewitt also noted that Claimant's symptoms had not spontaneously resolved. Given the duration from the injury, Dr. Hewitt recommended proceeding with arthroscopic sub acromial decompression and noted he would re submit his request. *See* Exhibits 13, F.

24. On December 28, 2017 Pre-Hearing ALJ Michael Harr issued an Order. PALJ Harr granted Respondents' motion to strike the issue of medical benefits to the extent the issue constructively challenged the authorized treating physician's determination of maximum medical improvement.

25. On December 28, 2017, Claimant submitted an Application for Hearing in case 5-051-231-03. Claimant checked Petition to Reopen as an issue and noted that Claimant had been placed at MMI on 9/20/17 by an ATP but that another ATP put in a request for surgery on 9/25/17. Claimant wrote "mistake? Petition to Reopen? Claimant desires surgery from ATP Hewitt." *See* Exhibit 1.

26. Claimant was still working full duty for Employer during this time period. On January 17, 2018 Claimant was assisting a patient to the lunchroom by pushing a wheelchair. While maneuvering the wheelchair, Claimant felt pain in her right shoulder and upper back through her scapula.

27. On January 17, 2018, NP Halat evaluated Claimant. Clamant reported that she was pushing a large patient in a wheelchair to the lunchroom and afterwards she had pain in her right shoulder and upper back through her scapula. Claimant also reported a tingling sensation in her right dorsal hand and that her right ring finger was shaking. On exam, Claimant had tenderness in the anterior glenohumeral joint and in the trapezius muscle. Claimant had full range of motion with pain in the right shoulder. Claimant was assessed with: sprain of right hand and sprain of right elbow. NP Halat ordered occupational therapy for the shoulder impingement and right elbow sprain and right hand sprain. NP Halat opined that the incident was a work related injury due to pushing a large patient in a wheelchair. *See* Exhibits 15, B.

28. On January 26, 2018, NP Halat evaluated Claimant. Claimant reported that she was upset she was not getting any care for her continued and worsening right shoulder and arm pain. Claimant reported that now when she pressed her right ulnar wrist, pain shoots up her entire arm to the right side of her neck. Claimant reported pain at a 5/10 and often much worse. Claimant reported periodic numbness and tingling in her right arm as well. NP Halat noted that a prior MRI from July of 2017 showed tendinosis of the infraspinatus, a type II downward sloping lateral acromion, and impingement on the infraspinatus tendon. NP Halat noted that around that time surgery was discussed with Dr. Hewitt and that Claimant wanted to proceed with surgery. Claimant reported being unhappy that she had to go through therapy and everything else again and felt that things should be moving faster at this time. NP Halat noted that Claimant had a prior injury to the right shoulder with surgery recommended by Dr. Hewitt due to an MRI showing impingement. NP Halat referred Claimant to Dr. Hewitt for re-evaluation due to a re-injury of the right shoulder when pushing a large patient in a wheelchair. NP Halat also referred Claimant to pain management for expanding symptoms from the right wrist ulnar aspect radiating pain to the right neck. *See* Exhibits 15, B.

29. On February 8, 2018, Scott Richardson, M.D. evaluated Claimant. Claimant reported that she was pulling back on a wheelchair with a heavy client on board when she felt sudden pain in the right dominant shoulder area and that she had constant pain at a 6/10 at rest and at an 8/10 with movement. Dr. Richardson noted it was in the glenohumeral area plus trapezius and pectoral area and that Claimant had some neck pain on the right and occasional numbness in her arm. Claimant reported that after her June 2017 injury, a suggested surgery was denied and she was declared to be at MMI.

Claimant reported that the pain never went away from her prior injury and that she was still using Tylenol and had 7-8/10 pain but was released to regular duty. On exam, Claimant was diffusely tender to palpation at the glenohumeral, trapezius, and lateral pectoral areas. Dr. Richardson assessed right shoulder strain and referred Claimant to physical therapy. *See* Exhibit H.

30. On March 7, 2018 Claimant was evaluated by physiatrist John Aschberger, M.D. Claimant reported that she was pulling back on a wheelchair and had an onset of pain at the right trapezius and neck into the shoulder. Claimant reported a prior course of treatment for irritation at the trapezius and shoulder with a diagnosis of shoulder impingement. Dr. Aschberger noted that Claimant had an MRI scan showing findings consistent with impingement and that Dr. Hewitt had previously advised surgery which was denied and the case was closed. Claimant reported that her overall symptoms were low level but persistent and that she had an aggravation or recurrence when the incident involving the wheelchair occurred on January 17, 2018. Claimant reported that she felt a pop in the shoulder and had shaking in her hand which had since subsided. Claimant reported continued pain at the right shoulder anteriorly and superiorly as well as at the right trapezius. Claimant reported tightness at the anterior upper chest. Claimant reported some benefit with physical therapy. On exam, Dr. Aschberger found tightness at the trapezial musculature bilaterally and pain with shoulder abduction. Dr. Aschberger found right shoulder impingement positive for pain and positive hoffmann's test. Dr. Aschberger assessed: right shoulder impingement; upper back myofascial pain; triceps weakness, rule out radiculopathy; and increased reflexes, rule out myelopathy. Dr. Aschberger ordered a cervical MRI. He opined that if the MRI were negative further treatment options would include potential for repeat shoulder injection or follow up regarding shoulder surgical intervention. Dr. Aschberger recommended light work duty restrictions with no repetitive motion at the arm, no lifting more than 5 pounds to above chest height, and no repetitive cervical motion. *See* Exhibits 16, I.

31. On March 7, 2018, Dr. Richardson evaluated Claimant. Dr. Richardson noted that Claimant had seen Dr. Aschberger and that there was concern about pathology in the neck causing Claimant's arm symptoms. Dr. Richardson noted that a cervical MRI was ordered. Claimant reported constant pain in her right neck, trapezius area, shoulder, and down to her hand. Claimant reported that moving her neck seemed to cause pain in the arm. Claimant reported decreased sensation in the right ulnar forearm and ring/little fingers. *See* Exhibits 15, H.

32. On March 21, 2018, Dr. Aschberger evaluated Claimant. He noted that the cervical MRI was not authorized. Dr. Aschberger opined that Claimant did have some findings of concern on her physical examination and that prior to any surgical intervention at the shoulder, clearance of the neck would be required. Claimant reported continued pain. Dr. Aschberger assessed: right shoulder impingement, rule out C7 radiculopathy, rule out myelopathy. Dr. Aschberger opined that work restrictions should continue and opined that an MRI of the neck would be required prior to any additional intervention or more aggressive intervention for the shoulder. *See* Exhibits 16, I.

33. On March 29, 2018, Dr. Richardson evaluated Claimant. Dr. Richardson noted that the cervical MRI had been denied. Claimant reported constant pain in the right neck, trapezius area, shoulder area, and pain down her right arm with right hand weakness. Dr. Richardson assessed right shoulder strain, neck strain, and right shoulder impingement. He recommended massage therapy. *See* Exhibits 15, H.

34. On April 2, 2018, Claimant underwent an independent medical evaluation performed by Carlos Cebrian, M.D. Dr. Cebrian issued a report on April 17, 2018. Claimant reported that she was initially injured on June 16, 2017 when assisting a big and tall resident stand up. Claimant reported standing on his left side with her right hand holding his left hand and that there was another co-worker on his right side. Claimant reported that he was combative and while she was holding his hand he jerked his arm backwards causing her arm to go backwards and that she felt a pain and a pop and had pain in her right trapezius on the top of her shoulder. Claimant reported she was given a pain patch, two Tylenol, and finished her shift but that when she got home her arm was shaking and it was difficult to hold a glass of water. Claimant reported she was referred for treatment, had physical therapy, an MRI and underwent an injection that did not help. Claimant reported that she asked for a second opinion and was referred to Dr. Hewitt who told her she needed surgery. Claimant reported she continued to have pain over the next few months and was in constant pain. Claimant reported that on January 17, 2018 she had a second injury after pulling and twisting a resident backwards in a wheelchair to get him close to the wall and that she felt sharp pain in her right shoulder that increased for 30 minutes. Claimant reported currently that she had pain on the right side of her neck, in her right trapezius, and in her right shoulder and down her right arm, in her right shoulder blade, and in her right pectoral muscle and right scapular region. *See* Exhibits 17, J.

35. Claimant reported no prior right shoulder complaints and denied prior motor vehicle accidents. Dr. Cebrian reviewed medical records and performed a physical examination. Dr. Cebrian noted in the cervical spine that Claimant's range of motion was reduced in all movements and that she reported pain in all movements with increased pain on the right side. On cervical spine examination, Claimant was tender to palpation diffusely on the right side and tender into the trapezius. On right shoulder examination, Claimant reported pain in all movements and pain with impingement testing. Dr. Cebrian assessed right shoulder/trapezius strain. *See* Exhibits 17, J.

36. Dr. Cebrian opined that no further medical treatment was indicated for Claimant's June 16, 2017 claim and that she was appropriate placed at MMI on September 20, 2017 by Dr. Bogart. Dr. Cebrian opined that there had been no worsening of Claimant's claim related condition since being placed at MMI. Dr. Cebrian opined that the claim related diagnosis was right trapezius/shoulder strain and that the mechanism of injury was very mild and opined that from the beginning, Claimant's subjective complaints have been out or proportion to the objective findings. *See* Exhibits 17, J.

37. Dr. Cebrian opined that the July 3, 2017 MRI showed some tendinosis of the infraspinatus and showed a type II acromion impinging the infraspinatus with

osteophytes present and that the findings were not causally related to the June 16, 2017 incident and were incidental findings. Dr. Cebrian noted that Dr. Failinger opined there was obviously not a surgical lesion and that it was unclear whether Dr. Hewitt had the entire medical file indicating: minor mechanism, subjective complaints our of proportion, diffuse and non focal complaints. Dr. Cebrian further opined that arthroscopic surgery in the setting of sub acromial shoulder pain for impingement had not been shown to be superior to no surgery in studies. Dr. Cebrian opined that Claimant remained at MMI for the June 16, 2017 claim and was able to work in full and unrestricted capacity and that maintenance care was not indicated. *See* Exhibits 17, J.

38. Dr. Cebrian also opined that Claimant's right shoulder and upper extremity complaints attributed to the January 17, 2018 incident with the wheelchair were independent incidental and unrelated to the January 17, 2018 claim. Dr. Cebrian opined that there was not a mechanism of sufficient force to cause an injury or accelerate or aggravate a pre-existing condition and that the mechanism of injury was minimal. Dr. Cebrian opined that Claimant may have experienced symptoms of her prior right shoulder condition but that the mechanism on January 17, 2018 did not require any medical treatment or work restrictions. Dr. Cebrian opined that further evaluation, diagnosis, and treatment under workers' compensation was not medically reasonable, necessary, appropriate, or related. *See* Exhibits 17, J.

39. Several years prior to the June 2017 and January 2018 incidents, Claimant was involved in a motor vehicle accident.

40. On July 3, 2014, Claimant reported that she was very sore over her anterior chest and back of shoulders and neck after hitting a wall on June 30 at 20 mph. Claimant was noted to have a primary encounter diagnosis of whiplash injury of neck and sternum contusion. See Exhibit L.

41. On July 14, 2014, Claimant reported bilateral shoulder and neck pain for the past two weeks after a motor vehicle accident where she was the driver and hit a cement wall on the driver's side of the vehicle. Claimant reported that the air bags deployed and that an ambulance came to the scene and she was taken to the emergency room. Claimant reported pain in the shoulders and right neck that was worse when moving her shoulders or neck. Claimant reported that massage helped. Claimant was diagnosed with bilateral shoulder joint pain and with neck pain. See Exhibit A.

42. Claimant testified at hearing. Claimant testified credibly that her pain complaints were now at an 8/10 where as they were previously at a 5/10 at the time she was released at MMI. Claimant credibly testified that she had worsened after being placed at MMI. Claimant testified credibly that she is now on work restrictions and able to work within her restrictions for a new employer. Claimant testified credibly that after the motor vehicle accident in 2014 she had no treatment for her right shoulder or neck and no problems in those areas until June 2017.

43. Dr. Cebrian testified at hearing consistent with his independent medical examination report. He opined that Claimant's record showed prior problems with her neck and shoulder despite her denial of prior problems. Dr. Cebrian opined that Claimant's July 2017 MRI showed tendinosis which is a chronic change in a tendon due to wearing away and loss of elasticity. He opined that it also showed a type II acromion that can cause impingement. Dr. Cebrian opined that the MRI did not show any acute tear.

44. Dr. Cebrian testified that although Dr. Hewitt said Claimant had a diagnostic response to injection in the right shoulder, Claimant only reported 20-30% improvement and therefore the injection was not diagnostic. Dr. Cebrian opined that although Claimant says subjectively she has more pain, Claimant is not worse and the areas of pain and symptoms are the same or similar to symptoms before Claimant was placed at MMI. Dr. Cebrian opined that objectively, Claimant had not worsened before January of 2018 and has not worsened now. Dr. Cebrian opined that her complaints now were similar to complaints prior to MMI. Dr. Cebrian also opined that the January 2018 incident did not cause a new injury or new aggravation and opined that there was a minimal mechanism of injury. Dr. Cebrian noted that Claimant felt discomfort on this date due to her prior problem but that Claimant was just having ongoing symptoms and did not aggravate or suffer a new injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684

(Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Petition to Reopen

Mistake

An FAL which has not been challenged in accordance with statutory procedures constitutes an "award" for purposed of the reopening statute. Consequently an unchallenged FAL is binding unless the claim is reopened. *See* § 8-43-203(2)(d), C.R.S., *Berg v. Industrial Claim Appeals Office,* 128 P.3d P.3d 270 (Colo. App. 2005).

An "award" may be reopened on the ground of "mistake." *See* § 8-43-303, C.R.S. The party seeking to reopen bears the burden of proof to establish grounds to reopen. *See Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000).

The term "mistake" refers to any mistake whether one of law or fact. *Renz v. Larimer County School District Poudre R-1,* 924 P.2d 1177 (Colo. App. 1996). The authority to reopen is discretionary provided the statutory criteria have been met. *Berg v. Industrial Claim Appeals Office, supra*. In order to reopen based on mistake the ALJ must determine that there was a mistake that affected the prior award. If there was a mistake the ALJ must determine whether, under the circumstances, it is the type of mistake that justifies reopening the claim. *Travelers Insurance Co. v. Industrial Commission,* 646 P.2d 399 (Colo. App. 1981). Factors the ALJ may consider when determining whether a mistake warrants reopening include the potential for injustice if the mistake is perpetuated, and whether the party seeking to reopen could have avoided the mistake by the exercise of due diligence in the handling or adjudication of the claim. *Klosterman v. Industrial Commission,* 694 P.2d 873 (Colo. App. 1984); *Travelers Insurance Co. v. Industrial Commission, supra*.

In this case, Claimant was believed to have been improving and was placed at MMI and a Final Admission of Liability closed her case. At the time she was placed at MMI, Claimant had reported improved symptoms and the providers believed that she would continue to improve with maintenance chiropractic care. Although, eventually, they were proven wrong when Claimant did not continue to improve and when she worsened, the closing of the claim was not by "mistake." The ALJ fails to find that there was a mistake of fact or law to justify a re-opening of the claim. Further, if Claimant believed

Respondents to be mistaken when they placed her at MMI, she had the recourse to request a division independent medical examination to challenge the determination that she was doing better and was at MMI and could have avoided what she believes was a "mistake" by exercising due diligence and requesting a DIME. Additionally, although Claimant was never evaluated by the physician who signed off on the final report, Claimant had been regularly evaluated by NP Halat. NP Halat had made multiple referrals to MDs who had evaluated Claimant and had come to similar conclusions. The physician who signed off on the report implicitly agreed with the determinations made by NP Halat and the other providers. There was no mistake in the determination to place Claimant at MMI and to file a FAL.

Change in Condition

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

Claimant has established by a preponderance of the evidence that case 5-051-231-03 with an injury date of June 16, 2017 should be reopened due to a change of

condition. As found above, Claimant was placed at MMI on September 25, 2017. A FAL was filed closing her claim with no impairment on October 13, 2017. Claimant, at that time, had improved and was expected to continue to improve with her remaining chiropractic care visits. Claimant, at that time was working full duty. Although Dr. Hewitt saw Claimant on September 25, 2017 and recommended arthroscopy as an option, he also recommended other options including observation. On September 25, 2017 Dr. Hewitt noted moderate impingement.

After the FAL and after the case closed, Claimant worsened. In his medical records review performed on October 25, 2017, Dr. Douthit recommended 2-3 months of rest and rest with respite to allow Claimant healing. He recommended she only maintain range of motion. At the November 10, 2017 evaluated with NP Halat, Claimant was noted to have a slightly drooped shoulder on the right. At the December 11, 2017 evaluation with Dr. Hewitt, Claimant credibly reported that her symptoms had deteriorated over the last three months since she was placed at MMI. Dr. Hewitt found a significantly positive impingement test as opposed to the moderate impingement he noted in September. During this period of time, Claimant continued to work full duty without restriction for Employer, despite Dr. Douthit's recommendation of 2-3 months of rest and rest with respite.

During this time, while worsening from her original injury, Claimant experienced an incident on January 17, 2018 which caused her to worsen even further. On that date, Claimant had significant symptoms in the injured areas when pushing a patient in a wheelchair. Claimant is credible that her symptoms increased on this date. On a visit on January 26, 2018 Claimant was noted to be upset that she was not getting care for her worsening and continued right shoulder and arm pain.

The ALJ concludes that Claimant has established a worsening sufficient to reopen her claim for the June 16, 2017 injury. However, Claimant did not experience a new case/claim on January 17, 2018. Rather, on that date she was working full duty when recommended to be on rest and respite and her continued symptoms got even worse than before. As found above, Dr. Sacha had noted that if Claimant was not improved, a cervical MRI could not be ruled out back when evaluating Claimant for the June 16, 2017 injury. Dr. Hewitt recommended surgery twice for her right shoulder prior to January 17, 2018. Dr. Douthit even acknowledged that if after one year Claimant was not improved, shoulder surgery could be considered (although he doubted it would help much). Claimant's symptoms began to worsen shortly after she was placed at MMI and her case was closed. Although the physicians placed her at MMI when they believed she was doing better and believed she would continue to do better and could continue to improve with maintenance, she did not. Claimant worsened shortly after, continued to work full duty when she should have been on rest/respite/restrictions, and not surprisingly got worse. Pushing a patient and maneuvering a patient in a wheelchair while working with a worsening condition would be expected to increase symptoms and contribute to worsening.

Claimant has met her burden of proof to establish that her worsened condition now is causally related to her original work related injury on June 16, 2017. The need for

treatment was caused by the original injury. The ALJ finds that pushing the patient in the wheelchair on January 17, 2018 was not an intervening event or new injury but rather demonstrated the continued worsening of her original injury. The original injury left Claimant's body in a weakened condition and she was in a weakened condition when pushing the wheelchair. The claim is thus ordered to be re-opened based on Claimant's change of condition and worsened condition.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). As the case is ordered re-opened based on a worsened condition, Respondents are liable for medical treatment reasonable and necessary to cure and relieve the effects of Claimant's worsened condition and injury.

Claimant has established, by a preponderance of the evidence that the need for the right decompression shoulder surgery recommended twice by Dr. Hewitt was caused by her initial June 16, 2017 injury and her now worsened condition in her shoulder. The ALJ finds the surgery to be reasonable, necessary, and casually related to the June 16, 2017 injury. Although some providers hoped she would improve without surgery and although she improved slightly when placed at MMI, the ALJ finds it credible and persuasive that she has deteriorated to the point that surgery is necessary and related to the June 16, 2017 injury. Claimant has had persistent, and now worse, symptoms since the injury. Although Claimant had some symptoms in her right shoulder and neck following an earlier motor vehicle accident, the ALJ finds Claimant credible and persuasive that Claimant was able to work full duty and with no ongoing complaints prior to June 16, 2017. Claimant's right shoulder symptoms, although improved for a period of time, never subsided and are now worse. Dr. Hewitt has recommended surgery twice and even Dr. Douthit noted after a year it might be considered. The ALJ finds that Claimant has met her burden to show that the right shoulder surgery is reasonable, necessary, and causally related to the June 16, 2017 claim based on her now worsened condition.

Claimant has also established by a preponderance of the evidence that the need for a cervical MRI was caused by her initial June 16, 2017 injury. Claimant's cervical symptoms and symptoms into her digits were concerning prior to January 17, 2018. As found above, Dr. Sacha noted that if Claimant did not improve, a cervical MRI could not be ruled out when evaluating her for her June 16, 2017 injury. Although Claimant was placed at MMI on that claim when she was believed to be improving, she has worsened and the ALJ finds that a cervical MRI has now been recommended consistent with the note from Dr. Sacha that it may be needed if she did not improve. Claimant has thus established that a cervical MRI is reasonable, necessary, and causally related to her worsened June 16, 2017 injury. Claimant has had cervical concerns and symptoms dating back to the original injury that have now worsened. The MRI is reasonable, necessary, and casually related to the June 16, 2017 injury.

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish that she sustained a new injury or an aggravation to a pre-existing condition on January 17, 2018 when pushing a patient in a wheelchair. Rather, on that date, Claimant experienced symptoms at work as the result of the condition of her neck and right shoulder that had been injured on June 16, 2017 and had worsened between September and January. The incident on January 17, 2018 did not cause disability or need for medical treatment. Claimant already had disability and the need for medical treatment prior to this date based on her prior and worsened condition from her June 16, 2017 injury.

ORDER

1. Claimant has established by a preponderance of the evidence that her June 16, 2017 claim shall be reopened due to a change of condition.

2. Claimant has established, by a preponderance of the evidence, that the right shoulder surgery and cervical MRI are reasonable, necessary, and causally related to her worsened June 16, 2017 injury.

3. Respondents shall re-open claim 5-051-231-03 and authorize the right shoulder surgery and cervical MRI.

4. Claimant did not sustain a new injury/new aggravation on January 17, 2018. Rather, on that date she had continued and worsened symptoms from her original injury. Thus compensability in case 5-068-047 is denied.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2018 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant demonstrated by a preponderance of the evidence she sustained a compensable left shoulder injury on September 15, 2017?

STIPULATIONS

If the claim is found compensable, Respondents agree to provide reasonable, necessary and related medical care and to pay the Sacred Heart Hospital medical bill contained in Exhibit O.

FINDINGS OF FACT

1. Claimant is a 59 year old woman employed by Employer as a flight attendant. Claimant alleges she sustained a left shoulder injury while working for Employer on September 15, 2017.

2. Claimant had a prior non-work-related left shoulder injury in 2006. Claimant fell while ice skating and sustained a nondisplaced fracture of the greater tuberosity of the left humerus. Claimant testified the bone "healed perfectly" and she did not experience any residual left shoulder symptoms.

3. Claimant was also involved in a motor vehicle accident in November 2009 that caused an injury to her neck and wrist. Claimant testified she received treatment for her neck through 2016, and that she experienced residual neck symptoms.

4. On September 15, 2017, Claimant began a four-day trip as a flight attendant. The first leg of the trip was from Denver, Colorado to Salt Lake City, Utah.

5. Claimant testified that, upon boarding the plane on the first day, she put her luggage in the first-class closet. She testified Ms. Sandvik informed her she was not allowed to put her bags in the first-class closet and instructed Claimant to place her bag in an overhead bin. Claimant testified she told Ms. Sandvik that lifting over her shoulders caused her neck to hurt, but placed the bag in the overhead bin as instructed.

6. The first flight was completed without incident. After landing, Claimant and the other members of the flight crew, including flight attendant Cindy Sandvik, took a shuttle bus from the airport to a hotel in Salt Lake City. While traveling on the highway, a car in the far right lane cut off the shuttle bus, causing the shuttle bus driver to slam on his brakes to avoid a collision. No collision occurred. Clamant was seated immediately behind the driver with her carry-on baggage on the seat to her immediate right. Claimant testified she reached out with both arms to brace herself for impact, with the

left arm fully extended, and both arms made contact with the driver's seat. Claimant testified that the abrupt stop caused her bag to move to the console area of the shuttle bus. She testified that immediately thereafter the top of her left shoulder did not "feel right" and felt "awkward."

7. Claimant did not mention any alleged injury to the flight crew or report any alleged injury to Employer at that time. She retrieved her luggage and checked into the hotel, and subsequently completed the remaining three days of the flight itinerary performing her regular duties.

8. Ms. Sandvik testified that she did not say anything to Claimant regarding her bags on the first day of the trip, but did confront Claimant about putting her luggage in the first-class closet on the second day of the trip. Ms. Sandvik testified Claimant said she hurt her arm and that was why she was using the closet. Ms. Sandvik testified that since Claimant placed her luggage in the first-class closet on the first day of the trip as well, she assumed Claimant hurt her arm before the first day of their four-day trip.

9. Claimant continued working full duty until October 13, 2017. On October 13, 2017, Claimant presented to the UCHealth Emergency Department for dizziness, vertigo, and lightheadedness that began on a work flight. Claimant also complained of shoulder pain and asked to have her shoulder evaluated to ensure it was not broken. On examination, Claimant exhibited normal range of motion with tenderness in the proximal third of the humerus. The shoulder x-ray revealed mild acromioclavicular arthrosis with no fracture or dislocation. It was recommended Claimant follow-up with her primary care provider.

10. On October 17, 2017, Claimant saw her primary care provider, Anita Westafer, MD for a follow-up of her recent hospital visit. In addition to dizziness and vertigo, Claimant again reported left arm pain. Dr. Westafer noted,

> L shoulder broken in past ice skating at keystone, now 102017 a month of pain, had pushed double cart but didn't file on the job injury, then a car pulled out in front of her on way to hotel and driver slammed on brakes and didn't have accident but reached out with left arm and that worsened it.

Claimant testified Dr. Westafer erroneously reversed the sequence of events in her note, and that the reference to the shuttle incident should have come before the reference to pushing the double cart.

11. On examination, Dr. Westafer noted pain in the deltoid into the neck, and normal movement of all extremities. Dr. Westafer referred Claimant for an orthopedic evaluation and a brain MRI, which ultimately revealed Claimant suffered from a cerebral ischemia. Claimant was also referred to a neurologist who confirmed Claimant suffered a stroke on October 13, 2017. Claimant took a leave of absence from her position with Employer due to the stroke.

12. Claimant did not report her alleged injury to Employer until approximately mid-October 2017. Claimant testified she failed to report the alleged injury sooner because she has a high tolerance for pain, thought her symptoms would improve and that it would be "a nothing situation." Claimant testified she also did not want to be taken off of work due to the injury, as she is the sole financial provider in her household. Claimant testified she is aware of Employer's reporting protocols and that Employer requires immediate reporting of work injuries by contacting the manager on duty by phone. Claimant acknowledged she had three prior workers' compensation claims with Employer in 2007, 2016 and 2017, for an injured ribcage, food poisoning, and a spider bite, respectively. Claimant admitted that she reported each of those injuries to Employer immediately.

13. Ms. Sandvik testified Employer policy is to immediately notify the pilot and then contact the manager on duty whenever there is a work injury. She further testified that when an employee is injured, they fill out an Irregular Operations Report (IOR) online.

14. Claimant reported the injury to Employer by submitting an IOR online on or around October 13, 2017. Claimant indicated an injury date of September 15, 2017 and provided the following incident description: "Hotel shuttle driver had to slam on brakes to prevent hitting a car that came across three lanes of traffic in front of us. I extended my arms to the back of the drivers seat to brace for possible impact."

15. On November 2, 2017, Claimant presented to orthopedic specialist Christopher O'Grady, MD. She reported developing left shoulder symptoms on September 15, 2017 as a result of a car accident. On examination, Dr. O'Grady noted full range of motion in all planes, full strength, no tenderness to palpation, no atrophy, no laxity, and a positive empty can test. Dr. O'Grady gave the following assessment: possible rotator cuff tear and acute pain of the left shoulder. He ordered an x-ray and MRI of the left shoulder.

16. Respondents filed a Notice of Contest on November 27, 2017.

17. Claimant underwent an MRI of the left upper extremity on November 28, 2017 which revealed a low grade partial thickness tear of the subscapularis, age undetermined, and a SLAP type 2 tear of the superior labrum, age undetermined. There was also mild glenohumeral and moderate acromioclavicular osteoarthritis with a chronic appearance.

18. Claimant attended a follow-up evaluation with Dr. Westafer on January 3, 2018 requesting an extension of her medical leave due to continued dizziness. On examination of the shoulder, Dr. Westafer noted decreased and painful range of motion in the left shoulder and back. Dr. Westafer included an exhaustive list of differential shoulder diagnoses, but her ultimate assessment was pain of left shoulder joint. She recommended Claimant see an orthopedic specialist.

19. On July 20, 2018, F. Mark Paz, MD performed an independent medical record review at the request of Respondents. Dr. Paz reviewed Claimant's medical records dating back to December 2006, including the November 28, 2017 left upper extremity

MRI. Based on the history documented in the records, the findings on physical examination, and the radiographic findings, Dr. Paz opined that it was not medically probable that the left shoulder subscapularis partial thickness tear, SLAP lesion and/or acromioclavicular arthritis were causally related to, or aggravated or accelerated by, the September 15, 2017 incident. Dr. Paz concluded that the documented mechanism of injury did not correlate with the left shoulder diagnoses identified on the MRI.

20. Claimant testified she did not have any prior treatment to the deltoid area of her left shoulder. She stated she currently experiences pain, popping and range of motion deficits in her left shoulder, and wants to undergo left shoulder treatment.

21. The ALJ finds the opinion of Dr. Paz, as supported by the medical records, more credible and persuasive than the testimony of Claimant.

22. Claimant failed to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment.

23. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to establish, by a preponderance of the evidence, she suffered a compensable injury to her left shoulder on September 15, 2017. While Claimant purports she immediately felt an issue with her shoulder after the shuttle bus incident, Claimant did not report any alleged injury or seek treatment for her shoulder symptoms until approximately one month later. Claimant continued working full duty and was physically able to perform her regular job duties. Claimant only mentioned shoulder symptoms during an emergency room visit on October 13, 2017 for which her primary complaint was dizziness and nausea related to what was later determined to be a stroke. Claimant acknowledged she was aware of Employer’s policy to immediately report an alleged work injury, and that she had followed the policy in immediately reporting work injuries in 2007, 2016 and 2017. The ALJ is not persuaded by Claimant’s testimony as to her reasoning behind the significant delay in reporting the alleged

September 2017 injury, particularly when Claimant had three prior work injuries of seemingly varying severity that she reported promptly.

Regarding the MRI findings, the age of both the partial tear of the subscapularis and the SLAP tear of the superior labrum were undetermined. Dr. Paz credibly opined that September 15, 2017 did not cause, aggravate, or accelerate the partial subcapularis tear, SLAP tear, or acromioclavicular joint osteoarthritis. Based on the totality of the evidence, Claimant failed to prove she sustained a compensable injury by a preponderance of the evidence.

ORDER

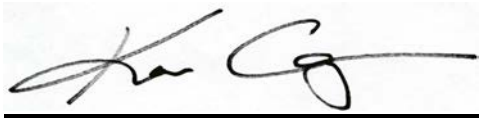
It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a compensable right knee injury on January 12, 2018?

STIPULATIONS

The parties stipulated to the following if the claim is compensable:

1. Claimant's average weekly wage is $1,560.88.

2. Claimant is entitled to a closed period of TTD benefits from January 12, 2018 to February 5, 2018.

3. Concentra is the ATP.

FINDINGS OF FACT

1. Claimant works for Employer as a delivery driver. He operates a tractor-trailer delivering food and supplies to restaurants in northern Colorado and southern Wyoming.

2. On January 11, 2018, Claimant began his shift at approximately 8:30 p.m. He made deliveries in Cheyenne, Fort Collins, Loveland, and Greeley. Between approximately 12:30 and 1:00 a.m. on January 12, he made a delivery to a Chick-fil-A restaurant in Fort Collins. While he was climbing down from the tractor cab, one of the steps broke, causing him to fall to the ground.

3. Claimant had noticed a problem with the step approximately one week earlier. He reported it to the dispatch manager, Gregory Nevicker, but repairs had not been completed by the time of his accident.

4. Claimant fell approximately two feet and landed on his right knee. He felt "intense" pain in the knee and remained on the ground for a moment or two. After the pain subsided, he got up and continued with the delivery. At that point, his knee was minimally painful and he did not think he had sustained any significant injury.

5. On the night of the injury, Claimant was working with a "helper," Juan Heide. When they arrived at the Chick-fil-A in Fort Collins, Mr. Heide went into the trailer to start moving product. Claimant gathered the paperwork and keys for the restaurant, exited the vehicle, and fell to the ground. Although Mr. Heide did not testify at hearing, the ALJ infers he did not observe Claimant's fall or see him on the ground. Claimant and Mr. Heide completed the Chick-fil-A delivery and made two or three other deliveries afterward. Claimant did not mention the accident to Mr. Heide.

6. Claimant completed his route and returned to the dispatch office around 9:00 a.m. He went into the office to turn in his paperwork and spoke with Joshua Yakes, the operations manager. Mr. Yakes told Claimant he needed to move the tractor trailer because the parking lot was being re-striped that day. Claimant left the office to move his truck, and Mr. Yakes went outside to check the area where he wanted Claimant to park.

7. When Claimant pulled into the parking area, he turned his vehicle too sharply and snapped the "pigtail" that runs from the tractor to the trailer. Mr. Yakes was standing near the truck and heard the pigtail snap. Claimant parked the truck and climbed down. Mr. Yakes mildly chastised Claimant for breaking the pigtail and reminded him about "basic driving skills." Claimant agreed he had turned too tightly and apologized for the damage.

8. Mr. Yakes then saw the broken step on the tractor, which was "pretty noticeable" because it was a new truck. He asked Claimant about it, and Claimant said the step had been broken for a couple of days. He did not mention the fall in Fort Collins earlier that night. Mr. Yakes called Penske, Employer's maintenance provider, about the step. Coincidentally, a Penske maintenance technician was already en route to repair the step. The ALJ infers Penske was coming to fix the step in response to Claimants' report to Mr. Nevicker several days before.

9. After the call to Penske, Mr. Yakes and Claimant walked approximately 100 yards back to the office. Chick-fil-A was a new account for Employer, so they discussed how the deliveries were going. Mr. Yakes noticed no pain behaviors or other indication of knee problems during the time they interacted in the yard that morning. Mr. Yakes "didn't really pay attention" when Claimant was climbing down from the tractor but recalled no obvious issue.

10. Employer has a policy requiring employees to report any work-related injury immediately "no matter how minor it may appear to you at the time." Claimant acknowledged awareness of this policy.

11. Claimant did not mention the incident to Mr. Yakes "because I thought it was a bruise, you know, nothing serious." The ALJ finds this testimony credible. The ALJ also infers Claimant was probably apprehensive about mentioning the incident since he had just been reprimanded for the broken pigtail moments before.

12. Later that evening, when he was getting ready to go to bed, Claimant's knee pain increased dramatically and it swelled noticeably. Claimant called a supervisor and was directed to the emergency room.

13. Claimant presented to the Swedish Medical Center emergency department the evening of January 13, 2018, and gave the following account of the accident:

> The patient reports fall from approximately 18 inch step out of his truck yesterday while at work. He landed directly on the right knee. He feels like the knee "was out of place" and popped back in. He now feels that it has subsequently "popped back out" again. 10/10 pain markedly worsened with

> any range of motion. He is unable to bear weight fully on the extremity. Denies prior or associate injury. Intermittent numbness in the right knee. This was an isolated injury.

14. On examination, right knee range of motion was "limited secondary to pain." The ER physician observed swelling of the right knee. Claimant could not tolerate a full ligamentous exam, but there was no grossly palpable patellar tendon disruption. X-rays were negative for fracture, dislocation, or obvious soft tissue abnormality. The ER physician noted Claimant "has a soft tissue swelling consistent with a soft tissue injury with reassuring x-rays." Since there was no fracture or obvious orthopedic injury, Claimant was given a knee immobilizer and crutches, prescribed medication, and released to "outpatient follow-up."

15. Employer referred Claimant to its designated facility, Concentra. He saw PA-C Jordan Maas at the initial visit on January 15, 2018, and described the accident as,

> He was stepping out of a semi truck with his left leg when the step broke and he fell, landing on his right flexed knee. Patient was initially able to walk but then when he got home later that day felt the knee "pop" out of place and then had excruciating pain and inability to bear weight. . . . He denies h/o prior knee injury.

16. Claimant was using crutches to keep weight off his right leg. The physical exam showed diffuse tenderness over the anterior knee and limited ROM in all planes. Patellofemoral apprehension test was positive; other tests were negative. PA-C Maas noted no ecchymosis or swelling. Claimant was advised to discontinue the immobilizer and given a hinged knee brace. PA-C Maas diagnosed a right knee contusion and ordered an MRI to rule out internal derangement. Claimant was adamant about not returning to work "until he knows what exactly is wrong with his knee," so PA-C Mass took him off work pending the MRI results.

17. Respondents filed a Notice of Contest on January 25, 2018.

18. Claimant returned to Concentra on January 29 and saw PA-C Jim Keller. His symptoms had improved somewhat but he was still having 5/10 pain in the right knee. PA-C Keller stated, "with the concurrence of Trina Bogart, MD, due to [Claimant's] w/c claim being denied, he is at MMI & able to return to work w/o restrictions & will f/u with his PCP for his R knee pain as needed."

19. Claimant saw Nurse Rachele Salter at Columbine Family Practice on January 31, 2018. Nurse Salter appreciated tenderness, limited ROM and edema of the right knee. She documented,

> [H]e was at work and came off the truck when the step gave way and he fell on his knee. Since then he has had a significant amount of pain. His knee will swell up and locks in place where he can't even move it. He filed a workmans comp case the day of the injury and he has seen the workmans comp doctor. They had suggested that he get an MRI but they are saying

> they will not pay for it. Nor have they offered him physical therapy. He is in a lot of pain and has not been able to go back to work yet due to the pain. He wants help but feels like his work is not helping him figure out what is wrong with his knee. He has never had a knee injury before and this is not a pre-existing condition. Financially he is struggling because he has not been able to work since the knee injury. I will order the MRI for now and I have recommended that he see a lawyer for options.

20. Claimant returned to work with Employer on February 5, 2018.

21. Dr. Lesnak performed a records review for Respondents on July 18, 2018. He noted no documentation of any abrasions, contusions or ecchymosis in the ER records. He noted Claimant "did not report any type of injury whatsoever to Mr. Yakes," and Mr. Yakes "noticed no physical abnormalities whatsoever." Dr. Lesnak opined Claimant "did not sustain any type of injurious event during work hours on 01/12/2018," and "any medical evaluations or treatments for any pain complaints/musculoskeletal pathology would appear to be completely unrelated to the alleged occupational injury." Dr. Lesnak indicated Claimant may have fabricated the injury "in retaliation for being reprimanded" about the pigtail.

22. Claimant had no known history of any right knee problems before the injury.

23. There is no persuasive evidence of any other injurious incident involving the right knee besides the incident at work on January 12, 2018.

24. Claimant proved by a preponderance of the evidence he suffered a right knee injury at work on January 12, 2018. Claimant's description of the incident at hearing was credible and his reports to medical providers were consistent. Although Claimant's failure to mention the incident to his coworker or Mr. Yakes is somewhat puzzling, his explanation is plausible. He felt "intense" pain immediately after striking the knee on the pavement, but the pain subsided within a few moments and he was able to resume working. He assumed he had a minor bruise and did not realize it was serious until that evening when the pain increased and the knee swelled. The ER physician observed knee swelling, an objective finding consistent with a recent injury. Dr. Lesnak's opinions, including his suggestion Claimant fabricated his injury in retaliation for being reprimanded, are not persuasive.

25. Claimant is entitled to TTD benefits from January 12, 2018 to February 5, 2018, per the parties' stipulation. Based on the stipulated AWW of $1,560.88, TTD is payable at the maximum rate of $948.15.

CONCLUSIONS OF LAW

To obtain medical or indemnity benefits, a claimant must prove he suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The claimant must prove an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, Claimant proved he more likely than not suffered a compensable injury to his right knee on January 12, 2018. His testimony regarding the incident was credible and he described the accident to multiple medical providers in a consistent manner. While the better practice would have been to report the injury when he returned to the dispatch office, Claimant's explanation for not doing so is plausible. The "intense" pain he felt immediately after striking his knee on the pavement subsided within a few moments and he was able to continue working. At that point, he did not believe he had any significant injury. He probably would never have mentioned the incident had the pain not flared severely later. The ALJ also notes Claimant had been reprimanded by Mr. Yakes for breaking the pigtail on his truck, and he probably did not want to increase friction with his manager by raising what he thought was a minor, temporary issue that would resolve on its own. It was not until that evening — when the pain increased and the knee swelled — that Claimant realized he had a serious problem with the knee. Dr. Lesnak's opinions, including his suggestion Claimant fabricated his claim in retaliation for being reprimanded, are not persuasive.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right knee injury on January 12, 2018 is compensable.

2. Respondents shall provide reasonably necessary medical treatment from authorized providers to cure and relieve the effects of Claimant's compensable injury.

3. Insurer shall pay Claimant TTD benefits at the rate of $948.15 per week from January 12, 2018 to February 5, 2018, per the parties' stipulation.

4. Insurer shall pay Claimant statutory interest of 8% per annum on all indemnity benefits not paid when due.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 28, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that his 20% lower extremity impairment rating should be converted to the whole person?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was hired as a machine operator for Employer on March 4, 2013. (Ex. A). On September 28, 2016, Claimant was injured while working for Employer when he fell, pinning his right foot between a stair rail and a large piece of machinery. (Ex. A, B). Claimant sustained a crushing type injury to his right ankle and foot, which also resulted in nerve damage to the nerves in his foot. (Ex. F, G)

2. Claimant's authorized treating provider ("ATP") was Terrence Lakin, M.D., at Southern Colorado Clinic. (Ex. B, F). Claimant was also treated by Lance Farnsworth, M.D., and Clark Johnson, DPM. (Ex. C, D, J, 3, 4). On April 16, 2017, Claimant underwent right ankle and foot surgery consisting of an arthroscopy with extensive debridement, Brostrom-Gould stabilization, and tenolysis by Dr. Johnson. (Ex. D, p. 27) Claimant then received post-operative care from Dr. Johnson and Dr. Lakin. (Ex. F, 2, 3, 4)

3. On August 29, 2017, Dr. Johnson diagnosed osteochondritis dissecans of the right ankle and right foot. (Ex. 3, p. 99). He did not provide any diagnoses beyond the right foot. On that date, Dr. Johnson recommended Claimant follow-up with Dr. Lakin for MMI determination and a possible impairment rating. On that date, the physician's notes for Claimant state: "Denies back pain." (Ex. 3, p. 98)

4. On October 1, 2017, Claimant wrote a five-page letter which he presented to Dr. Lakin at his impairment rating evaluation. (Ex. 2, pp.24-28). In his letter, Claimant lists a number of activities that he either cannot do, or is limited in doing, but makes no mention of having any issues with pain or swelling beyond his right foot. At no point is back pain mentioned as an issue.

5. On October 3, 2017, Claimant went through a Functional Capacity Evaluation ("FCE") for the diagnosis of "right ankle pain." (Ex. E, p. 30). The provider's notes indicate that the Patient's complaints that day were listed as "continued right ankle and foot pain." There was no indication within the FCE report that Claimant was having any issues to any body part beyond his right foot and ankle. (Ex. E).

6. On October 6, 2017, Claimant was seen by Dr. Lakin for an impairment rating. (Ex. F). On that date, Dr. Lakin documented Claimant's mechanism of injury, his initial complaints, and his treatment course. (Ex. F at pp. 43-44) There was no documentation of any issues or treatment beyond the right foot and ankle. Dr. Lakin performed a physical examination, noting only findings in Claimant's right foot and ankle regions. (*Id* at 45-46)

7. Dr. Lakin's 'assessments' at MMI were "Crushing injury to right lower leg. Right ankle status post arthroscopic debridement, primary repair of anterior talofibular and calcaneofibular ligaments. Right sural and right deep peroneal nerve injury." (Ex. F, p. 46). There is no reference in this report that Claimant had any issues or complaints of pain or dysfunction beyond his right foot and ankle regions. Dr. Lakin's impairment rating was entirely related to Claimant's right foot and ankle, including the nerves serving the right foot. (Ex. F, pp. 47-51). Claimant was assigned a 21% right lower extremity rating, which *if converted,* would convert to an 8% whole person rating. *Id.*

8. On the date of his impairment rating evaluation, Claimant filled out a pain diagram documenting for Dr. Lakin where his residual pain issues existed. (Ex. F, p. 52). Claimant's pain diagram identified issues only in his right foot and ankle area, with no residual issues in his left hip, left ankle, or low back. *Id.*

9. Respondents requested a Division Independent Medical Evaluation ("DIME"). Dr. Lloyd Thurston was selected as the DIME physician for this claim. (Ex. G). Dr. Thurston saw Claimant on January 9, 2018, and issued a report dated March 4, 2018. *Id.* In his report, Dr. Thurston identified Claimant's primary complaint as "constant pain in right ankle", his secondary complaint as "limited usefulness of the right foot/ankle". He also commented that Claimant had "continued nerve pain, tightness, and pain in the ankle." (*Id* at p. 55)

10. The DIME report made no reference to Claimant injuring his back in the initial injury, *or as the result of an altered gait.* Dr. Thurston documented Claimant's reported "current symptoms," which were limited to his right foot and ankle. (Ex. G, p.57), Likewise, his physical examination identified only findings in Claimant's right foot and ankle regions. Like Dr. Lakin, Dr. Thurston opined Claimant was at MMI on Oct 6, 2017. He assigned a 20% lower extremity rating for right foot range of motion deficits, arthritis, and nerve damage, which *if converted*, would convert to an 8% whole person rating. (*Id* at pp.60-62)

11. As part of the DIME process, Claimant filled out a pain diagram. (Ex. G, p. 63). Once again, Claimant only identified issues in his right foot and ankle areas.

12. On March 13, 2018, Insurer filed a Final Admission of Liability admitting to Dr. Thurston's right lower extremity scheduled impairment rating of 20% lower extremity. (Ex. H). Maintenance care was admitted within that admission.

13. On March 22, 2018, Claimant filed this Application for Hearing, exclusively on the issue of "conversion." (Ex. I). Claimant did not attempt to overcome any of Dr. Thurston's DIME opinions, including his MMI determination, or his opinion that Claimant's only ratable body parts were Claimant's right foot and ankle.

14. On May 17, 2018, Claimant answered interrogatories served on him by Respondents. (Ex. L) In response to the interrogatory requesting why Claimant believes his scheduled rating should be converted to a whole person rating, Claimant made no mention of having any pain or dysfunction in his low back, left hip or left ankle regions. Instead, Claimant references the provisional whole person rating provided by Drs. Lakin and Thurston, and refers the reader to their medical reports. (Id. at p.110)

15. At hearing, Claimant testified that he injured his back at the time of the injury. He further testified that at his visits with Dr. Lakin or Dr. Lakin's assistant he would occasionally mention that his back, hip or ankle were bothering him because of favoring his injured foot, but they would change the subject or just move on. He felt his providers were focusing on his right foot, and glossing over the other issues.

16. Claimant stated that during Dr. Lakin's impairment rating examination, Dr. Lakin did perform a more thorough exam than did Dr. Thurston. He acknowledged that he completed the pain diagram on the date of MMI, and on that date he did not have any problems beyond his right foot. Claimant did not recall whether he told Dr. Thurston about having back, hip or left ankle problems during the DIME evaluation. The symptoms he described were all with regard to his right ankle/foot, and that he did not specifically identify symptoms to his back, hip or left ankle. Claimant further admitted that when he saw Dr. Thurston for the DIME, he completed another pain diagram, and he did not indicate he had any issues beyond his right foot and ankle at that time.

17. At hearing, Claimant did recount the issues he currently suffers from, and reiterated the activities referenced in his letter to Dr. Lakin are either restricted or not possible to perform.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-

of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the Claimant nor in favor of the rights of Respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

B. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

Conversion from Scheduled Impairment to the Whole Person

C. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and Subsection (8) provides a DIME process for whole person ratings. The threshold issue is application of the schedule. This is a determination of fact based upon a preponderance of the evidence. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. Section 8-42-107(1)(a), C.R.S. However, a claimant may establish that his injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996).

D. "Functional impairment" is distinct from physical (medical) impairment under the *AMA Guidelines.* As noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or disabled. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or functional impairment, on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability.

E. Functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7, 2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Alberston's LLC, W.C. No. 4-692-947 (June 30, 2008).* "Referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005).* Nonetheless, mere symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997).

F. In this case the ALJ concludes that conversion of Claimant's admitted to scheduled lower extremity impairment rating to whole person impairment rating has not been shown. The medical evidence at MMI-and thereafter-clearly documents that Claimant's residual functional disability and impairment is entirely in his right foot region. This is documented clearly in the MMI and post MMI medical records of Dr. Farnsworth, the FCE, Dr. Lakin and Dr. Thurston. Additionally, Claimant filled out two separate pain diagrams, one at MMI, the other on the date of his DIME evaluation. Both documented that his only residual issues at and after MMI were in his right ankle and foot region.

G. Claimant argues he now suffers from low back functional impairment, left hip functional impairment, and left ankle impairment. Indeed he might. However, the ALJ is not persuaded that the symptoms he now complains of are causally related to his original ankle injury. Nor is the ALJ persuaded that the issues he now complains of are permanent in nature. There is simply an insufficient testimonial record to conclude that he suffers from anything but intermittent back and hip pain; the available medical reports don't even suggest that much. The evidence demonstrates that Claimant's complaints and treatment have been limited to his right foot and ankle. The ALJ therefore concludes that Claimant has not shown, by a preponderance of the evidence, that he has sustained residual "functional impairment" of bodily function which is not listed on the schedule of disabilities, which would warrant conversion to the whole person.

ORDER

It is therefore Ordered that:

1. Claimant's Application to convert his extremity impairment rating to the whole person is denied.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 4, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant has established by a preponderance of the evidence that the left hip arthroscopy recommended by Dr. Snyder is reasonable, necessary, and related to her work injury.

II. Whether Claimant's Average Weekly Wage is $116 or $514.90.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On August 31, 2017, Claimant sustained an admitted injury to her left hip while employed on behalf of Respondents as a Patient Care Technician.

2. On August 31, 2017, Claimant obtained medical treatment and was provided crutches. Due to her work injury, Claimant was unable to continue performing her regular job duties. (Clmt. Ex. 3, p. 51-52; Clmt. Ex. 3, pg. 7).

3. Respondents issued a General Admission of Liability on October 19, 2017, and provided medical treatment to address Claimant's left hip injury. (Clmt. Ex. 3, p. 7). At that time, Respondents also admitted for Temporary Total Disability ("TTD") benefits as of September 1, 2017, and an Average Weekly Wage ("AWW") of $514.90. *Id*.

4. Claimant's description of the August 31, 2017, incident has remained fairly consistent across the medical record and her testimony at hearing. Therefore, the ALJ finds Claimant to be credible.

5. On August 31, 2017, Claimant was at work on that date and was standing in a lunch line to get food for her patients with her weight on her right leg; when she shifted her weight to her left leg and twisted as she reached to get some food for a patient, she felt a pop and immediate pain in her left hip and across the region of her left groin. (Clmt. Ex. 5 at 23, 26; Clmt. Ex. 4 at 15, Resp. Ex. H at 38, HT., p.15-16). Claimant reported feeling her left hip pop out of place and this was evidently accompanied by acute severe pain and an inability to bear weight on the left leg. (Resp. Ex. H, p. 38).

Left Hip Arthroscopy

6. Claimant was first seen at UC Health on August 31, 2017. (Clmt. Ex. 8, pp. 35-51). Claimant would continue treating through UC Health as her Authorized Provider for the duration of her medical treatment, where her treating physician was Patrick Quigley, M.D. *Id*. at 52. Dr. Quigley referred Claimant for an orthopedic evaluation

on September 7, 2017. *Id*. Claimant was given crutches to assist with walking and restricted to sedentary duty. *Id*.

7. Claimant first presented to the Orthopaedic and Spine Center of the Rockies on September 13, 2017, for an initial evaluation where she was seen by Mark McFerran, M.D. (Clmt. Ex. 5, p. 23-24). Dr. McFerran did not find evidence of a traumatic event, rather indicating the likelihood of "a hip flexor tear, a hip flexor strain, or irritation of the hip with bursitis *or a labral tear in the hip*." *Id*. at 24 (emphasis added). Dr. McFerran recommended a left hip MRI. *Id*.

8. On October 22, 2017, Claimant underwent a left hip MRI. (Clmt. Ex. 9, p. 84). The results of this imaging were interpreted by Derek Burdeny, M.D. *Id*. Per the reading of Dr. Burdeny, the MRI revealed evidence of chondral delamination with "mild reactive marrow edema and small subcortical cyst deep to the subchondral plate of the anterior superior acetabulum." *Id*. Notably, Dr. Burdeny also found Claimant's acetabular labrum to be intact. *Id*.

9. Claimant returned to Dr. McFerren on October 30, 2017. (Clmt. Ex. 5, p. 25). Dr. McFerren noted that "the labrum itself looks pretty good" based upon his review of the MRI findings, but nonetheless noted that Claimant did have an injury to the articular cartilage in her left hip when she stepped on her foot. *Id*. Based upon that conclusion, Dr. McFerren opined that Claimant "probably needs a hip scope." *Id*. Dr. McFerren referred Claimant to Joshua Snyder, M.D. in order to obtain his opinion of the MRI results. *Id*.

10. Claimant was examined by Dr. Snyder on October 31, 2017. On physical examination, Dr. Snyder noted the following:

> A pleasant female alert and oriented x3, cooperative with the examination in no apparent distress. An uncomfortable hip is noted. She walks with an antalgic gait and utilizes crutches placing minimal weight on the left lower extremity. She has decreased range of motion and flexion up to about 100, internal rotation to 10, external rotation to 15 with severe pain and a positive impingement. Positive FABER and positive snapping hip.

(Clmt. Ex. 5, pp. 26-27).

11. Contrary to Dr. Burdeny's assessment, Dr. Snyder found edema within the superior acetabular dome, as well was stating that "there could be a small loose body or possible an os acetabui, which appears to be unstable with underlying articular cartilage damage. A small labral tear is noted as well." *Id*. at 26. Dr. Snyder subsequently refered to a "possible small labral tear," indicating that his concern was that Claimant also suffered from a loose body, chondral injury, and impingement in the left hip. *Id*. Dr. Snyder concluded that Claimant was unlikely to improve with conservative management, and that physical therapy could worsen Claimant's chondral injury should the identified loose body move within the joint. *Id*. Accordingly, Dr. Snyder recommended a "left hip arthroscopy, removal of loose body

or os, possible microfracture, possible labral repair and decompression of the acetabular and femoral neck lesions." *Id*. at 26-27.

12. There is no indication made by Dr. Snyder in his report that Claimant's pain complaints, symptoms, MRI findings, and physical examination were non-physiological or that there were concerns about Claimant suffering from a somatization disorder.

13. Dr. Snyder's surgical request was denied on November 10, 2017, citing a need for Dr. Quigley's assessment as to the relatedness of the surgery to Claimant's work injury. (Resp. Ex. R, p. 202). Dr. Quigley's causation assessment, completed on November 20, 2017, was inconclusive as to the relatedness of the surgery. (Resp. Ex. Q, pp. 195-96). Dr. Quigley found Claimant's diagnosis of left hip sprain to be "neither non-industrial nor industrial" as he indicated that the reported mechanism of injury "is not one that would have been expected to result in sufficient stress on the left hip to cause a sprain." *Id*. at 195. Dr. Quigley finally demurred that the "presence of industrial conditions has yet to be determined" and indicated that whether Claimant's injury was industrial or non-industrial would be best left to an independent reviewer rather than a treating physician "in order to avoid a conflict of interest." *Id*. at 196.

14. On January 15, 2018, Claimant attended an IME with Jack Rook, M.D. (Clmt. Ex. 4, pp. 15-22). Dr. Rook reviewed the medical record, took a patient history from Claimant, and performed a physical exam. *See id*. Dr. Rook concluded that based upon the history he obtained from Claimant, she must have sustained an acute injury on August 31, 2017. *Id*. at 21. In support of this conclusion, he cited Claimant's lack of relevant medical history or prior acute injuries to the left hip, Claimant's lack of physical limitations prior to that date, Claimant's not requiring medical attention for her left hip prior to that date, and the lack of other acute events around the same period which might provide an alternate explanation for the injury. *Id*. at 21-22. Dr. Rook opined that Claimant would require further medical treatment, "which in this case will be surgical in nature." *Id*.at 22. Dr. Rook further cautioned that should Claimant wait too long for the necessary treatment, she would be at risk for the development of accelerated arthritis within the left hip that would necessitate a future total hip replacement. *Id*.

15. On March 6, 2018, Claimant attended an IME on Respondents' request with Lawrence Lesnak, M.D. (Resp. Ex. C, pp. 7-19). Dr. Lesnak placed great emphasis upon Claimant's subjective pain complaints, as well as what he described as "multiple pain behaviors." *Id*. at 43. Dr. Lesnak opined that Claimant likely suffers from a somatic pain disorder, as he did not find her subjective pain complaints to be correlative with what he described as a lack of findings on imaging tests. *Id*. at 45. Dr. Lesnak additionally based this conclusion upon Claimant's "high level of somatic pain complaints" based upon her responses to Dr. Lesnak's psychosocial screenings that Claimant completed prior to the appointment. *Id*. Those screenings were not provided as part of Dr. Lesnak's report, nor were they submitted into the record elsewhere.

16. Despite the claim being admitted, Dr. Lesnak repeatedly emphasized his conclusion that Claimant did not sustain an injury on August 31, 2017. *E.g., id*. at 45. Dr. Lesnak was not convinced that Claimant shifting her weight from the right leg to the left in order to get some food for a patient would be sufficient to cause an injury of the kind and pain severity described by Claimant. *Id*. The presence of an injury and a surgery's relation to it notwithstanding, Dr. Lesnak in fact argued against providing any surgery for Claimant, finding her high level of somatic pain complaints rendered her not a surgical candidate "regardless of causality." *Id*.

Average Weekly Wage

17. On August 28, 2017, Claimant accepted a what was called a "new" position with Employer, as a Patient Care Technician, but on a PRN (as needed) basis and signed a job offer to that effect. (Resp. Ex. G, p. 36). This would be the same job Claimant was performing when she got hurt, (i.e., Patient Care Technician), but she would be working fewer hours. Claimant testified that she took this new position in order to work on an associate's degree set to begin September 4, 2017, with Pima Medical Institute that would ultimately result in a degree in radiology. Claimant testified that pursuant to that associate's program, she would have classes from 8 a.m. through noon Monday through Friday, with six to eight hours of homework daily. Claimant testified that this program also featured practical aspects where she would have to be able to stand 80% of the time and also assist with moving residents.

18. Claimant testified that she did not realize that she was accepting a position as a PRN (as needed basis), but rather thought that she was accepting merely part-time employment to be scheduled on Saturdays, and that she would work 12 hours each Saturday.

19. Claimant testified that she intended to maintain both her associate's program and her ongoing work for Employer for the duration of her associate's program.

20. The PRN position began September 10, 2017, and Claimant was to be paid $14.50 per hour. Per the testimony of Amy Lauridsen, the employees in that position who work on weekends would receive a $1.50 shift differential, increasing her rate of pay to $16 per hour. The shifts Claimant was set to work would be over the course of an eight hour work day, coming to a total of $136. Working one day per week, Claimant would thus have an average weekly wage of $136. Moreover, Ms. Lauridsen testified that Claimant's hours, as a PRN - as needed basis – were not guaranteed, and that Claimant would be called in as staffing is needed based on other staffing levels. Therefore, the ALJ finds that on the one hand there was no guarantee Claimant would be scheduled to work every Saturday, but on the other hand there was no guarantee that Employer would not request Claimant to work more than every Saturday based on their staffing needs.

21. After she began the PRN position, Claimant was assigned modified duty that accommodated her work restrictions due to her work injury. This modified duty was provided through February 24, 2018. Claimant testified that Employer informed her

that they would be unable to continue accommodating these restrictions and that she would need to go on medical leave. Claimant has not worked since that date.

22. Claimant was asked to withdraw from Pima Medical Institute associate radiology program on April 26, 2018, as she was unable to physically perform the tasks required of her as part of that program. Claimant testified that her director, Selina Muccio, told her that she needed to withdraw from the program due to her physical limitations. Therefore, Claimant withdrew from the program.

23. As of August 31, 2017, the date of the work injury, Claimant's work injury precluded her from performing her regular job duties as a Patient Care Technician on a full-time or part-time basis.

24. As of August 31, 2017, Claimant's work injury diminished her earning capacity because her injury prevented her from being able to perform her job duties as a Patient Care Technician or any other job which required similar physical abilities.

25. Claimant's work injury also precluded Claimant from completing her associate degree in radiology and she withdrew from such the program as of April 26, 2018.

Testimony

26. Ms. Amy Lauridsen testified at the hearing. Ms. Lauridsen testified, consistently with Claimant's testimony, that Claimant had accepted a position with Employer at reduced hours in order to begin working on a radiology program. Ms. Lauridsen testified that Claimant was set to work one day per week as a PRN, which she described as an as-needed employee who would work when required based on hospital staffing at the time. While she did not confirm Claimant's statement that those days were "guaranteed" to fall on Saturdays, she did note that Claimant evidently worked Saturdays consistently once the change in scheduling and employment status occurred. Ms. Lauridsen emphasized that schedules are not promised but did indicate that they would accommodate an employee's desire to work weekends as those days typically see fewer volunteers for open shifts.

27. Dr. Lawrence Lesnak testified by telephone at the hearing. Dr. Lesnak testified consistent with his report, emphasizing his conclusion that Claimant did not suffer an acute injury on August 31, 2017, and that Claimant does not require any form of surgery for any incident that occurred on that date. Despite the actual wording of Dr. Snyder's surgical request, Dr. Lesnak testified that the surgical request was actually based upon Claimant's subjective pain complaints and he further testified that no surgery should be provided upon that basis. Dr. Lesnak additionally testified that Claimant presented to her IME in a wheelchair, contrary to her normal use of crutches referenced elsewhere in the record.

28. In his testimony, Dr. Lesnak placed significant weight upon Dr. Burdeny's MRI findings which did not identify acutely abnormal pathology. In his estimation, Dr. Burdeny's initial MRI readings are to be given greater weight than those of Dr. Snyder, who subsequently identified pathology that rendered Claimant a surgical candidate. Dr. Lesnak found the suggestion that Claimant may require a labral repair entirely inappropriate, as he strongly emphasized that Claimant does not have a

labral tear. Based upon Dr. Burdeny's status as a radiologist, Dr. Lesnak indicated that he was far more inclined to trust those initial findings over Dr. Snyder's subsequent reevaluation which included physically examining Claimant and testing Claimant's hip joint in which he found Claimant had:

(i) a positive test result for impingement,

(ii) a positive FABER test, and

(iii) a positive snapping hip test.

29. On cross examination, Dr. Lesnak refused to concede that Dr. Snyder's surgical request was based upon Dr. Snyder's identification of acute pathology. Dr. Lesnak's responses to cross examination were evasive and he consistently chose not to respond directly to questioning, instead reverting back to his conclusions as to the surgical request rather than the question actually put to him at the time.

30. Dr. Lesnak was also asked whether he was a trained psychologist or psychiatrist. Instead of answering the direct question, Dr. Lesnak stated that: "I am not a board certified psychologist or psychiatrist, but I screen – or have the patients that I evaluate undergo the psychologic screens all the time. Dr. Lesnak was further asked what set of criteria he was relying upon in determining that Claimant could be suffering from a somatoform disorder. Dr. Lesnak stated that "the psychological screen says that she did just prior to my evaluation where she reported a high level of somatic complaints." (HT., pg. 74)

31. Dr. Lesnak is not a trained psychiatrist or psychologist. In addition, Dr. Lesnak admitted that that he is not familiar with the criteria for a somatic pain disorder listed in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Dr. Lesnak merely indicated that he requests those workers he examines to complete psychosocial screenings such as the ones completed by Claimant and makes his assessment on the basis of those screenings. Despite his admitted lack of familiarity with the criteria for a somatic pain disorder, Dr. Lensak concluded in his report that Claimant likely has an underlying somatic – somatoform – disorder, and suggested Claimant was embellishing or exaggerating her symptoms due to such disorder. In essence, Dr. Lesnak used the alleged results of the psychological screening tool as a sword to discredit Claimant and as a shield from having to personally demonstrate any expertise in diagnosing such a disorder.

32. Moreover, absent from Dr. Lesnak's report or testimony is any explanation why his physical examination did not include the physical tests conducted by Dr. Snyder, such as an impingement test, a FABER test, or a snapping hip test. Moreover, if he was unable to perform such testing, Dr. Lesnak did not address why the results of the testing noted by Dr. Snyder did not support Dr. Snyder's findings, opinions, and recommendation for surgery.

33. Claimant testified live at hearing. In addition to the testimony mentioned above, Claimant also testified as to the condition of her hip prior to August 31, 2017. Claimant testified that she had never experienced a problem with her left hip akin to the pain she began to experience on that date, denied any prior acute injuries to the joint, and indicated that since her injury her prior level of functionality has not

returned. Claimant testified that she has ridden horses for years until the August 31, 2017, incident, at which point the pain in her hip precluded her from returning to horseback riding. She further testified that prior to that date she had never experienced pain in her left hip or experienced any other acute injury while riding horses.

34. On cross examination, Claimant conceded that she arrived to her IME with Dr. Lesnak in a wheelchair. She explained that this was because she had slipped and fallen on ice while using her crutches on February 4, 2018. Claimant testified that she slipped and landed on her left side, causing an increase in pain and reduced ability to bear weight on her left leg.

35. The parties took the deposition of Dr. Rook after the hearing on July 31, 2018. (Rook Depo. pp. 1-37). Dr. Rook testified consistent with his report that he found Claimant to have sustained an acute injury on August 31, 2017, and concluded that Claimant would require the surgery recommended by Dr. Snyder to address that injury. *See id*. at 9. Dr. Rook found the reading of Claimant's MRI by Dr. Snyder to be persuasive, finding that Claimant's reported mechanism of injury would be consistent with her hip joint popping out of place, causing the bony injury cited on the MRI, as well as damaging her labrum. *Id*. at 10.

36. Dr. Rook found that Dr. Snyder's interpretation of the MRI showed significant pathology for a patient of Claimant's relatively young age. (Rook Depo., p. 12). Combined with Claimant's physical limitations in the aftermath of her August 31, 2017, injury and her reported pain, Dr. Rook found surgery to be the most reasonable course of treatment available. *Id*. Explaining his report's conclusion that surgery should not be delayed lest Claimant risk development of accelerated arthritis, Dr. Rook explained that allowing an unstable joint to continue moving uncorrected would cause further damage to the soft tissue in the joint, finding it "prone to accelerate a breakdown." *Id*. at 11.

37. Contrary to the opinions of Dr. Lesnak, Dr. Rook did not find his physical examination of Claimant troubling. (Rook Depo, p. 15). In fact, Dr. Rook considered Claimant's behaviors, reported pain, and limited range of motion to be consistent with the MRI findings. *Id*. Although their opinions differed markedly on this point, Dr. Rook testified that he reviewed neither Dr. Lesnak's report nor his testimony at hearing in reaching those conclusions. *Id*. at 18. Accordingly, Dr. Rook concluded that Dr. Snyder's request for surgery was reasonable, necessary, and related to the August 31, 2017 admitted injury. *Id*. at 15-16.

38. On cross examination, Dr. Rook noted that Dr. Snyder's request for surgical authorization was based at least in part upon possible pathology identified to be operated upon arthroscopically. (Rook Depo., p. 27). However, he noted that this is common when performing arthroscopies, as "[a] lot of times you can't tell until you get in there" what specific pathology will require operation. *Id*. Dr. Rook also opined that MRI interpretation often varies between the readings of orthopedists and radiologists, as had been the case with Dr. Snyder and Dr. Burdeny, respectively. *See id*.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. § 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

Medical Benefits

Claimant has the burden to prove her entitlement to medical benefits by a preponderance of the evidence. C.R.S. §8-43-201. Respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. C.R.S. §8-42-101(1)(a).

Claimant is not entitled to medical care that is not causally related to her work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is

causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

The ALJ concludes that Claimant has established by a preponderance of the evidence that the left hip arthroscopy requested by Dr. Snyder is reasonable, necessary, and related to Claimant's August 31, 2017 work injury.

The ALJ does not find Dr. Lesnak's opinions on this issue to be credible or persuasive. While portions of Dr. Lesnak's report and testimony may be well-founded in the evidence, his evasive testimony and particularly his delving into psychological and psychiatric matters to justify denying surgery were not found to be credible based on the medical record and testimony as a whole. There is no doubt that Claimant experienced pain as a result of her admitted injury, but the surgical request by Dr. Snyder did not refer to her pain as being the basis of his request. To the contrary, Dr. Snyder identified pathology and findings on physical examination that would require surgical intervention in order to correct.

Given that Claimant's pain is evidently explained by the presence of such pathology, labeling Claimant's pain complaints as forming a somatic pain disorder is simply inaccurate – that disorder characterizes pain whose source cannot be explained by objective findings, which is not the case here. Additionally, Dr. Lesnak made no attempt to explain how such a disorder would present itself only after a medically documented acute onset of pain and inability to bear weight upon the left leg. Moreover, Dr. Lesnak also evidently found this somatic disorder to be sufficiently serious to recommend against Claimant receiving surgery regardless of whether or not the need for such surgery was related to the August 31, 2017, injury. None of Claimant's treating physicians shared this concern, nor did any even address such a problem as being relevant.

The ALJ finds the opinions of Dr. Rook and Dr. Snyder to be persuasive. In his testimony, Dr. Rook stated that he found Claimant's physical examination to be entirely consistent with the MRI findings cited by Dr. Snyder, and that conclusion more adequately accounts for the evidence presented. Dr. Rook's report actually accounts for Claimant's acute onset of pain and instability on August 31, 2017, and deals specifically with the record generated subsequent to that event. Although Dr. Rook did not comment directly upon the opinions of Dr. Lesnak, one can see that he does not find the idea of a somatic pain disorder in Claimant's case to be a reasonable explanation. Moreover, neither Dr. Rook nor any of Claimant's treating physicians found Claimant's subjective pain complaints to be excessive under the circumstances, nor were those complaints focused on as possibly disqualifying her from being a good candidate for surgery. Additionally, as one of Claimant's treating physicians, the ALJ places significant weight upon the opinion of Dr. Snyder. Neither Dr. Rook nor Dr. Lesnak are orthopedists, and as such his opinion as to whether Claimant would require surgery is based upon his direct practice.

While the ALJ finds many of Dr. Lesnak's opinions to have been given in good faith, the manner in which he presented them and the reasons he cited as support for that position more closely resemble an attempt to deny surgery rather than to come to a factual determination of the issue. In comparison, the ALJ finds Dr. Rook's testimony

and report to be more consistent with the evidence both available in the record and elicited at hearing. Taken together, the opinions of Dr. Snyder and Dr. Rook are consistent with the record that Claimant experienced an acute medical event on August 31, 2017, that caused the immediate onset of pain and a marked change in Claimant's physical abilities from that date that have continued unabated ever since, and necessitated the need for surgery.

Therefore, the ALJ concludes Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Snyder is reasonable, necessary, and related to Claimant's August 31, 2017, work accident and injury.

Average Weekly Wage

The calculation of an injured worker's AWW is essential to determine the award of workers' compensation benefits. Section 8–42–102(1) describes the AWW as "the basis upon which to compute compensation payments." § 8–42–102(1), C.R.S. For example, permanent total and temporary disability benefit awards are calculated as a certain percentage of the worker's AWW subject to weekly maximum benefits specified in the statute. §§ 8–42–105(1), –106(1), –111(1); *see also* § 8–42–107(8)(d) (establishing permanent partial disability benefit awards as the percentage of the AWW multiplied by various factors including the medical impairment rating). *Avalanche Indus., Inc. v. Clark*, 198 P.3d 589, 591–92 (Colo. 2008), *as modified on denial of reh'g* (Jan. 20, 2009), *overruled on other grounds in Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

By statute, an injured worker's average weekly wage (AWW) is ordinarily calculated based on their earnings at the time of the injury. § 8-40-201(19)(a); § 8-42-102(2). However, § 8-42-102(3) grants the ALJ substantial discretion to modify the AWW if, for any reason, the statutorily prescribed methods will not fairly compute the wage in view of the particular circumstances of the case. *Pizza Hut v. Industrial Claim Appeals Office,* 18 P.3d 867 (Colo. App. 2001). The overall objective in calculating the AWW is to arrive at a "fair approximation of the claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993).

The testimony elicited at hearing indicated that prior to her injury, Claimant received an average wage of $514.90 for her work on behalf of Employer as a Patient Care Technician. Claimant, however, wanted to go to school to earn an associate degree in radiology. Days before her injury, Claimant accepted a position with Employer as Patient Care Technician, the same job, but on a PRN or as needed basis. At the time she accepted the part time employment, Claimant expected that she would net approximately one day of work per week, which would result in lower earnings given the reduction in hours that would accompany such a change to as-needed employment status. However, the reason Claimant accepted this position is because Claimant wanted to, and subsequently did, begin a program whereby she could earn an associate degree in radiology. However, due to the admitted injury Claimant sustained on August 31, 2017, Claimant was unable to continue performing her regular job duties. In addition, due to her work injury, Claimant was unable to continue working for Employer performing modified job duties, even on a PRN basis, and was unable to continue her

radiology program and obtain an associate degree. As such, after February 24, 2018, Claimant was unable to continue earning a wage with employer performing modified duty. And, after April 26, 2018, Claimant was also unable to continue her education and obtain an associate degree to further her career due to the work injury.

Furthermore, although Claimant anticipated going to school and working one day a week before she was injured, the work injury was disabling and prevented Claimant from being able to perform the job she was doing when she got hurt as well as the hours she was working each week. Therefore, the work injury and her restrictions, i.e., disability, diminished Claimant's ability to obtain and maintain the type of employment she had at the time of the accident and earn the wages she was earning at the time of the accident. Although Claimant anticipated only working one day a week, the work injury diminished Claimant's physical ability to work more if her circumstances changed and she wanted to, or needed to, work more than one day a week.

As Claimant's work restrictions and loss of both wages and her educational opportunity are linked inexorably to her admitted injury which prevents Claimant from being able to perform her regular job duties for any period of time, admitting to the lower rate would not accurately account for the wage loss and diminished earning capacity Claimant has suffered due to her work injury. Respondents have failed to establish and convince the ALJ that Claimant's AWW should be reduced based on the facts and circumstances of this case. Accordingly, the ALJ concludes that Claimant's AWW is $514.90 as initially admitted.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay for the left hip arthroscopy requested by Dr. Snyder, subject to the Medical Fee Schedule.
2. Claimant's Average Weekly Wage is $514.90.
3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has proven by a preponderance of evidence that she sustained a compensable left knee injury arising out of and in the course and scope of her employment on June 27, 2016.

2. Whether Claimant is entitled to temporary total disability benefits (TTD) from May 5, 2017, and ongoing until terminated by law.

STIPULATION OF FACT

The parties stipulate and agree that Claimant's average weekly wage is $806.52.

FINDINGS OF FACT

1. Claimant is a 62 year old female who worked as a shuttle driver for Employer. Claimant worked for Employer for ten years. On June 27, 2016,, she was loading a vehicle when her foot got caught on a passenger's luggage and she tripped and fell forward onto her left knee. Claimant called her manager and returned to Employer's property at the airport to report the incident.

2. Claimant was subsequently referred to Concentra Medical Clinic and was initially seen by Dr. Scott Richardson on June 29, 2016. Claimant denied any prior left knee injuries to Dr. Richardson. Dr. Richardson diagnosed Claimant with a left knee contusion, took x-rays and ordered an MRI without contrast.

3. The x-rays revealed advanced tricompartmental osteoarthritic changes with joint effusion. No dislocation was seen. Dr. Richardson anticipated maximum medical improvement (MMI) on October 1, 2016.

4. The MRI was completed on July 1, 2016, and revealed a chronic ACL tear along with a chronic macerated tear of the meniscus and/or prior partial meniscectomy. No fractures or other acute findings were identified on the MRI.

5. Prior to the June 27, 2016, incident, Claimant was involved in a motor vehicle accident on July 25, 2013 in which she injured her left knee when hitting the dashboard. At the time, Claimant treated with her primary care providers, Dr. Steven Archer and Panorama Orthopedic & Spine Center (Panorama).

6. Claimant was seen by Dr. Jared Foran with Panorama on August 15, 2013, and reported severe pain in the left knee that occurred constantly. Pain was aggravated by bending, climbing stairs, movement, walking and standing. Dr. Foran noted that Dr. Archer had previously given Claimant a cortisone injection which had temporarily helped with symptoms but Claimant had received no other treatment. Dr. Foran obtained x-rays which revealed severe

bone-on-bone arthritis in the medial compartment of the bilateral knees. She also had radio densities in the medial aspect of her proximal tibias consistent with possible stress reaction. Dr. Foran administered a second cortisone injection for diagnostic and therapeutic purposes which provided almost complete relief. Dr. Foran concluded that a substantial portion of Claimant's pain and maybe all of her pain was coming from her osteoarthritis.

7. He discussed pain control via anti-inflammatories, injections, weight loss and possible total knee replacement.

8. On June 25, 2014, Claimant was referred by Dr. Archer to Dr. Jeffrey Sabin at Precision Orthopedics for her low back and right leg. These records documented probable degenerative joint disease (DJD) n Claimant's right knee, as well.

9. After completion of the July 1, 2016, MRI, Claimant was referred to orthopedic surgeon Dr. Mark Failinger for further evaluation. Dr. Failinger evaluated Claimant on July 14, 2016, and reviewed her MRI and x-rays. He diagnosed Claimant with left knee severe DJD, tricompartmental and left knee contusion. He remarked that "this is end-stage arthritis unfortunately. She knows she is headed for a knee replacement. I am amazed that she has not had a knee replacement up to this point given the severity of arthritis." After discussing the various treatment options, he injected Claimant with cortisone for the knee pain.

10. Claimant followed up with Dr. Failinger on September 1, 2016. At this appointment, Dr. Failinger noted that Claimant was "confused" about what to do. He explained the various treatment options regarding her arthritis and that a total knee replacement would most likely not be covered under workers' compensation. Dr. Failinger also noted that Claimant had tried therapy and now wanted to proceed with "something else including viscosupplementation." Dr. Failinger again commented that Claimant had "end stage arthritis" and performed a second cortisone injection.

11. Claimant also treated with Dr. Archer after the June 27, 2016, incident. Claimant was initially seen on July 22, 2016, for what Dr. Archer described as a second opinion for left knee injury. Dr. Archer opined that Claimant needed to see an orthopedist for total knee arthroplasty of the left knee because she had end stage DJD aggravated by fall and torn meniscus.

12. Dr. Archer next saw Claimant on January 18, 2017. This appointment followed an episode of vaginal bleeding and a second fall onto the left knee. He noted a large area of bruising and swelling of the knee and Claimant was walking with a limp. The knee was swollen and painful. Dr. Archer ordered x-rays of the left knee which revealed moderate to severe osteoarthritis with multiple bone spurs and loss of the medial joint line space. No fracture or

dislocation was noted. The impression from the x-rays were probable soft issue contusion over the patella and advanced tricompartmental osteoarthritis with a knee effusion.

13. Claimant's next follow up was three months' later on April 26, 2017. At this appointment, it was suggested that Claimant get a second opinion regarding her knee injury and not from a workers' compensation provider.

14. Claimant's was then seen by Dr. Archer on May 16, 2017. At that time, Dr. Archer referred Claimant to Dr. Chris Isaacs, orthopedic surgeon, for evaluation for either arthroscopy or total knee arthroplasty. Claimant was to return to Dr. Archer for preoperative clearance. Claimant returned to Dr. Archer on June 20, 2017, for the scheduled preoperative testing and was cleared for the planned surgery. This note stated that Claimant had end stage DJD of the left knee and "had failed all conservative measures." Surgery with Dr. Isaacs was scheduled for July 12, 2017.

15. Claimant returned to Dr. Archer on September 6, 2017, where he noted that she did not have the scheduled knee surgery and no longer had medical insurance. There was no explanation provided for why the surgery did not proceed. Dr. Archer also commented that Claimant was feeling more depressed with poor motivation and had "retained a lawyer for her case against Hertz."

16. Claimant testified on her own behalf at the hearing. Claimant admitted that she had a prior left knee injury but denied any ongoing symptoms from the bone-on-bone arthritis diagnosed in 2013 and disputed the pre-existing ACL tear documented in the records. She also testified that Dr. Failinger had given her a prescription for physical therapy which was denied and that she had no other treatment since her last appointment with Dr. Failinger. Claimant requested authorization of treatment to complete the physical therapy purportedly prescribed by Dr. Failinger back on September 1, 2016.

17. Claimant acknowledged that she returned to office work for the Employer following the incident and continued to work in that capacity earning her regular wages until May 4, 2017, when she was told the position was no longer available.

18. At the request of Respondents, Claimant underwent an independent medical examination by Dr. William Ciccone on October 22, 2016. Dr. Ciccone examined Claimant and reviewed medical records. Dr. Ciccone's impression was left knee sprain/strain and left knee degenerative changes. Dr. Ciccone opined that Claimant had sustained a minor strain/sprain to the left knee as a result of the June 27, 2016, incident and that it had not aggravated or accelerated Claimant's underlying degenerative arthritis. He concluded that the findings on Claimant's July 1, 2016, MRI were chronic and not related to

the June 27, 2016, fall. He further opined that any residual pain after 10 to 12 weeks was related to the underlying arthritis, not the June 27, 2016, incident.

19. In Dr. Ciccone's April 11, 2018, deposition testimony, he reiterated that he did not believe Claimant's degenerative arthritis was aggravated or accelerated by the June 27, 2016, incident. He explained that degenerative arthritis is a progressive disease of the articular cartilage of the bones that, by nature, is progressive. It can be intrinsically genetic and takes time to develop. Once present, arthritis remains present and a bone-on-bone articulation in a joint can be painful. According to Dr. Ciccone, Claimant had ongoing progressive arthritis, noted in 2013, when a total knee replacement was discussed and her current pain was secondary to degenerative changes and not the event at work.

20. Upon his review of the 2016, MRI of Claimant's left knee, Dr. Ciccone noted degenerative changes within the joint, a chronic ACL tear, and abnormal medial meniscus changes. Dr. Ciccone explained Claimant's ACL tear was chronic and she may have had an injury in the past where she had torn the ACL. A torn ACL is something that does not heal and is always present on an MRI. Dr. Ciccone further explained that the radiologist noted the meniscal abnormalities compatible with chronic macerated tear, which is a degenerative change and not related to the June 2016, event.

21. With respect to the June 27, 2016, incident, Dr. Ciccone explained that if you have an event where you fall directly onto the front of your knee, you can suffer a minor sprain or strain on the front of the knee as you are tripping or falling. However, it was Dr. Ciccone's credible opinion that this event was not enough to exacerbate or accelerate the underlying degenerative changes that had already been occurring and preexisted the event. A minor injury could lead to some pain, which would suggest a few visits of physical therapy to get into a home exercise program to re-establish the strength around the knee to return to work activity but no other treatment would be necessary and no permanent impairment would result.

22. According to Dr. Ciccone, Claimant was "going to have persistent pain and symptoms due to the arthritic changes" which were unrelated to the June 27, 2016, incident. He opined that Claimant would have reached maximum medical improvement within 10-12 weeks following the incident, in approximately September or October of 2016, with or without physical therapy. Any ongoing symptoms she was experiencing after that time were related to the underlying DJD.

23. Dr. Ciccone added that as a result of the incident it would not have been necessary for Claimant to have any work restrictions that would have prevented her from returning to work in her role as a bus driver. Furthermore, it was Dr. Ciccone's opinion that any restrictions Claimant did need would be

related to the pain secondary to the arthritis and not any strain or sprain that may have resulted from the June 17, 2016, incident.

24. Dr. Ciccone's testimony and opinions regarding the cause of Claimant's symptoms is consistent with the medical records of Dr. Archer. Both Dr. Ciccone and Dr. Failinger opined that Claimant's need for a total knee replacement was due to her pre-existing degenerative arthritis and not related to the June 27, 2016, incident. Medical records from Dr. Archer and Dr. Foran support the conclusion that Claimant's underlying arthritis and need for a total knee replacement pre-dated June 27, 2016, and is not work-related.

25. The ALJ credits the opinion of Dr. Ciccone that Claimant did not aggravate or accelerate her underlying degenerative arthritis as a result of the June 27, 2016, incident and that her ongoing symptoms and any disability Claimant may have suffered are not related to the June 27, 2016,.

26. Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury as a result of the June 27, 2016, incident.

CONCLUSIONS OF LAW

General Legal Standards

1. The purpose of the "Workers' Compensation Act of Colorado" (Act), Title 8, Articles 40 to 47 C.R.S., is to ensure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to the employers without the necessity of any litigation. Section 8-40-102(1), C.R.S. Claimant, in a workers' compensation claim, has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-40-101, C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion and rejects evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness'

testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industr. Claim Appeals Offc*., 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industr. Claim Appeals Offc.*, 55 P.3d 186 (Colo. App. 2002). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof*). See Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959).

Compensability

4. A claimant is required to prove that an injury arose out of and in the course of the claimant's employment. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). *See also*, Section 8-41-301(1)(b) & (c) C.R.S. A claimant must also prove by a preponderance of the evidence that there is a proximate causal relationship between an incident/injury and the need for medical treatment, plus the entitlement to benefits Sections 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. ICAO*, 24 P.3d 29 (Colo. App. 2000).

5. The fact that a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc*., W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the logical and recurrent consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *see Chasteen v. King Soopers, Inc*., W.C. No. 4-445-608 (ICAP, Apr. 10, 2001*); see also Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, Oct. 27, 2008).

6. There is a distinction between the terms "accident" and "injury." The term accident refers to an "unexpected, unusual or undesigned occurrence." Section 8-40-201(1), C.R.S. A "compensable" injury is one which is disabling and entitles the claimant to compensation in the form of disability benefits. *City of Boulder v. Payne*, 426 P.2d 194 (1967); *Romero v. Industrial Comm'n*, 632 P.2d 1052 (Colo. App. 1981). No benefits flow to the victim of an industrial accident unless an "accident" results in a compensable "injury." *Id*.; Section 8-41-301, C.R.S. An injury that does not result in any lost time, does not result in a compensable claim. *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014).

7. Claimant admitted that she returned to work immediately following the June 27, 2016, incident and suffered no lost time from work until ten months later beginning on May 5, 2017. As found, Claimant's ongoing symptoms lasting more than 10-12 weeks after the incident and any disability she may have suffered are not related to the June 27, 2016, incident. Therefore, under *Loofbourrow, supra,* it is concluded that Claimant did not sustain a compensable injury.

8. When considering the totality of the evidence, the ALJ concludes that, even if there was a minor knee strain/sprain, Claimant failed to prove that her ongoing symptoms are causally related to the alleged work incident or caused any disability.

TTD

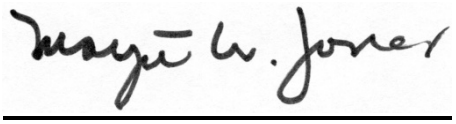
9. To establish entitlement to temporary disability benefits, the claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S.; *see Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo. App. 2001). As found, Dr. Ciccone credibly testified that the cause of Claimant's ongoing symptoms and any disability she may have suffered were related to Claimant's underlying degenerative arthritis not the June 27, 2016, incident.

10. Claimant has failed to prove any disability or wage loss related to a work injury and thus has no entitlement to TTD. *See, Culver, supra; Hendricks v. Keebler Co*., W.C. No. 4-373-392 (June 11, 1999).

ORDER

Claimant's claim for benefits under the Act is denied and dismissed.

Dated: September 7, 2018



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on July 10, 2017.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 11-12, 2017, Temporary Partial Disability (TPD) benefits for the period July 13, 2017 until July 28, 2017 and TTD benefits from July 29, 2018 until terminated by statute.

5. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for his July 29, 2017 termination from employment under §8-42-105(4) C.R.S. and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

6. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant failed to report his claim in writing until November 7, 2017 and thus should lose one day of compensation for every day he failed to report the claim in writing pursuant to §8-42-105(4) C.R.S.

7. Whether Respondents have established by a preponderance of the evidence that they are entitled to recover penalties for 39 days under §8-43-304, C.R.S. for Claimant's violation of PALJ Broniak's May 30, 2018 discovery order.

FINDINGS OF FACT

1. Employer is a landscaping company located in Littleton, Colorado. Peter Van has been the President of Employer since 2011. Employer operates year round. On a typical day, landscapers report to Employer's company office at 7:00 a.m. and are assigned to one of four work crews. Each crew has a project manager. The crew then drives together in a company truck to their designated project.

2. Claimant initially began working for Employer on April 1, 2016. However, Claimant regularly missed work without notifying Mr. Van. In fact, timesheets reflect that Claimant missed 56 days of work between April 1, 2016 and October 30, 2016. Claimant testified that he missed work because of appointments with attorneys and court

appearances. He also noted that on some days Employer did not have any work for him to perform. However, because of Claimant's repeated absences Mr. Van fired him at the end of October 2016.

3. Between April 2016 and October 2016 Claimant regularly requested lighter job tasks to protect his lower back. During the period Claimant occasionally told Mr. Van that his back hurt and he would obtain relief through massage or suction therapy. Claimant even showed Mr. Van suction marks on his back where he had received treatment.

4. On November 1, 2016, February 16, 2017, and April 10, 2017 Claimant sent text messages to Mr. Van requesting his job back. When Claimant spoke to Mr. Van by phone on April 10, 2017 he explained that he had changed his ways, would be a good worker and would not miss work. Mr. Van thus re-hired Claimant to the same position. Claimant's first day back at work was April 11, 2017.

5. Between April 11, 2017 and mid May 2017 Claimant worked on Project Manager Tony Ipson's crew. When he observed that Claimant did not perform the same tasks as the other landscapers. Mr. Ipson communicated with Claimant through his bilingual foreman. When Mr. Ipson inquired about Claimant's lack of contribution he responded that he was experiencing back issues. Claimant specifically noted that his back "always" hurt. Mr. Van confirmed that prior to July 10, 2017 Claimant continued to request lighter duty jobs because of his back problems.

6. Prior to July 10, 2017 Claimant continued to have attendance issues. He missed 14 days of work between April 10, 2017 and July 9, 2017.

7. Employer paid Claimant $130 per day for a 10-hour shift. If he worked less than a full day, he received a portion of his day rate. In the 13-week period between April 11, 2017 and July 9, 2017 Claimant earned a total of $7,696. Dividing $7,696 by 13 weeks yields an Average Weekly Wage (AWW) of $592.

8. Claimant testified that he injured his lower back at work on July 10, 2017 while lifting paver stones out of the back of a truck. He remarked that he informed his Manager Paco and Mr. Van about the injury while at the jobsite. He was unable to perform his job duties. Supervisor Derek Stevens drove Claimant back to Employer's office so he could return home for the day.

9. In contrast, Mr. Van explained that he was neither on the jobsite with Claimant on July 10, 2017 nor informed of a lower back injury. Furthermore, Claimant's time sheet for July 10, 2017 reflects that Employer paid him for working a full shift.

10. Claimant explained that he was unable to work on July 11-12, 2017 because of his lower back pain. He returned to work on July 13, 2017 but was unable to resume his regular job duties.

11. The record reflects that between July 11, 2017 and July 28, 2017 Claimant missed six more scheduled work shifts. Claimant failed to notify Mr. Van or his

supervisors that he was missing work for his back symptoms or any other reason. Mr. Van noted that Claimant's absences occurred during Employer's busy season and made operations difficult. He thus terminated Claimant from employment on July 29, 2017.

12. As of July 29, 2017 Claimant had not reported an injury orally or in writing to Employer, was not under work restrictions and had not sought medical care. After his termination Claimant did not contact Mr. Van or visit Employer's office to report a claim.

13. On November 7, 2017 Claimant completed a Workers' Claim for Compensation form with the aid of his attorney. Claimant asserted that he injured his lower back on July 10, 2017 when unloading sod from a truck while working for Employer. He noted that Antonio witnessed the incident. Claimant specified that he notified Employer on the day of the incident and returned to work on July 12, 2017.

14. On November 8, 2017 Claimant sent a letter and the Workers' Claim for Compensation form to Employer. Mr. Van remarked that Employer had not received any prior written or oral notice of Claimant's claim. He thus conducted his own investigation of any July 10, 2017 incident. Mr. Van spoke to his foremen and project managers. However, they were unaware that Claimant had suffered any injuries on July 10, 2017.

15. On November 17, 2017 Respondents filed a First Report of Injury. Employer noted "past employee indicates that an injury occurred on 7/10/17. Injury was not reported to employer." On December 5, 2017 Insurer filed a Notice of Contest challenging Claimant's claim.

16. On February 5, 2018 Claimant visited Denver Health Medical Center for an examination. He reported chills, a headache, a cough and nasal congestion. Stephanie R. Augustine, M.D. diagnosed Claimant with flu-like symptoms. Although Claimant was able to obtain medical treatment he did not mention any lower back symptoms or any work incident on July 10, 2017.

17. On April 17, 2018 Claimant returned to Denver Health for an examination. Claimant reported that approximately one year earlier he injured his lower back while lifting heavy stones at work. He specifically noted that he "felt a strong immediate pain in his low back centrally." He explained that he suffered pain on most days and work involving physical labor had become very difficult. Claimant's exam findings were limited to tenderness and lumbar spasm. He had a negative straight leg raise, normal sensation, no swelling and normal muscle tone. Jessica F. Wallace, PA diagnosed Claimant with chronic lower back pain including sciatica. She recommended a lumbar spine MRI.

18. On June 4, 2017 Claimant returned to Denver Health for an evaluation. PA Wallace continued to diagnose Claimant with chronic lower back pain including bilateral sciatica. A lumbar MRI revealed "no evidence of fracture or malalignment. Mild lower lumbar spine degenerative changes with low-grade canal and foraminal narrowing as above, but no nerve compression."

19. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his

employment with Employer on July 10, 2017. Claimant testified that he injured his lower back at work on July 10, 2017 while lifting paver stones out of the back of a truck. He explained that he immediately reported the incident to Employer and his symptoms prevented him from performing his regular job duties. However, the record reveals that Claimant suffered from pre-existing back issues that caused him to miss time from work and he significantly delayed reporting or seeking medical treatment for his condition.

20. Timesheets reflect that Claimant missed 56 days of work between April 1, 2016 and October 30, 2016. Claimant testified that he missed work because of appointments with attorneys and court appearances. However, Mr. Van credibly explained that Claimant occasionally mentioned back pain and he obtained relief through massage or suction therapy. Furthermore, when Mr. Ipson observed that Claimant did not perform the same tasks as the other landscapers, Claimant responded that he was experiencing back issues. Mr. Van confirmed that Claimant requested lighter duty job assignments because of his back condition.

21. Claimant did not complete a Workers' Claim for Compensation form until November 7, 2017. On November 8, 2017 Claimant sent a letter and the form to Employer. Mr. Van remarked that Employer had not received any prior written or oral notice of Claimant's claim. After Mr. Van conducted an investigation by speaking to his foremen and project managers there was no evidence that Claimant suffered any injuries on July 10, 2017. Although Claimant obtained medical treatment at Denver Health on February 5, 2018 he did not mention any lower back symptoms or note any work incident on July 10, 2017. Claimant finally reported a lower back injury to PA Wallace at Denver Health on April 17, 2018 or approximately nine months after the lifting incident at work. However, Claimant's physical examination findings were minimal and his MRI reflected only degenerative changes. Claimant was diagnosed with chronic lower back pain including sciatica.

22. The record reveals that Claimant suffered from pre-existing back issues that caused him to miss time from work prior to July 10, 2017. Moreover, Claimant significantly delayed reporting an injury and did not seek medical treatment until approximately nine months after the July 10, 2017 lifting incident. The temporal proximity between the July 10, 2017 incident and request for medical treatment creates an attenuated connection between Claimant's employment and lower back condition. It is thus speculative to attribute Claimant's degenerative back symptoms to his work activities for Employer. Claimant's job duties on July 10, 2017 thus did not aggravate, accelerate, or combine with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's Workers' Compensation claim is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job

function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on July 10, 2017. Claimant testified that he injured his lower back at work on July 10, 2017 while lifting paver stones out of the back of a truck. He explained that he immediately reported the incident to Employer and his symptoms prevented him from performing his regular job duties. However, the record reveals that Claimant suffered from pre-existing back issues that caused him to miss time from work and he significantly delayed reporting or seeking medical treatment for his condition.

8. As found, timesheets reflect that Claimant missed 56 days of work between April 1, 2016 and October 30, 2016. Claimant testified that he missed work because of appointments with attorneys and court appearances. However, Mr. Van credibly explained that Claimant occasionally mentioned back pain and he obtained relief through massage or suction therapy. Furthermore, when Mr. Ipson observed that Claimant did not perform the same tasks as the other landscapers, Claimant responded that he was experiencing back issues. Mr. Van confirmed that Claimant requested lighter duty job assignments because of his back condition.

9. As found, Claimant did not complete a Workers' Claim for Compensation form until November 7, 2017. On November 8, 2017 Claimant sent a letter and the form to Employer. Mr. Van remarked that Employer had not received any prior written or oral notice of Claimant's claim. After Mr. Van conducted an investigation by speaking to his foremen and project managers there was no evidence that Claimant suffered any injuries on July 10, 2017. Although Claimant obtained medical treatment at Denver Health on February 5, 2018 he did not mention any lower back symptoms or note any work incident on July 10, 2017. Claimant finally reported a lower back injury to PA Wallace at Denver Health on April 17, 2018 or approximately nine months after the lifting incident at work. However, Claimant's physical examination findings were minimal and his MRI reflected only degenerative changes. Claimant was diagnosed with chronic lower back pain including sciatica.

10. As found, the record reveals that Claimant suffered from pre-existing back issues that caused him to miss time from work prior to July 10, 2017. Moreover, Claimant significantly delayed reporting an injury and did not seek medical treatment until approximately nine months after the July 10, 2017 lifting incident. The temporal proximity between the July 10, 2017 incident and request for medical treatment creates an attenuated connection between Claimant's employment and lower back condition. It is thus speculative to attribute Claimant's degenerative back symptoms to his work activities for Employer. Claimant's job duties on July 10, 2017 thus did not aggravate, accelerate, or combine with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's Workers' Compensation claim is denied and dismissed.

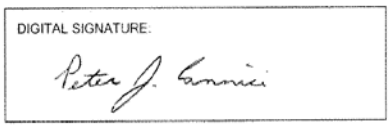
ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's Workers' Compensation claim is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 6, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-061-214-001

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable work injury on October 24, 2017.

2. Whether Claimant is entitled to an order awarding reasonably necessary and related medical benefits.

3. Whether Claimant was disabled by is usual employment by the work injury and therefore is entitled to an order awarding temporary total disability benefit.

STIPULATION OF FACT

Claimant's average weekly wage is $1,292.85. This stipulation is approved and accepted by the ALJ.

FINDINGS OF FACT

1. Claimant was involved in a motor vehicle accident (MVA) on March 4, 2014, and sustained injuries to his neck, low back and right shoulder. He also suffered from headaches.

2. On June 17, 2014, Claimant continued to report cervical, thoracic and lumbar pain as well as persistent right shoulder pain and headaches while treating with Dr. Lichtenberg.

3. Claimant admitted he had been in the 2014 MVA, but denied suffering any injury to his neck. After initially denying he injured his neck as a result of the 2014 MVA, Claimant subsequently was forced to admit he actually injured his neck.

4. Claimant nevertheless continued to deny any injury to his right shoulder. Claimant bizarrely testified that the medical records were incorrect that he never complained of shoulder pain.

5. In fact, when confronted with Dr. Lichtenberg's report which documented that Claimant reported four out of ten pain in his right shoulder, Claimant testified that he had never treated with Dr. Lichtenberg and continued to deny any injury to his right shoulder. This testimony was directly inconsistent with the medical records.

6. Claimant admitted he pursued litigation and ultimately settled the 2014 motor vehicle claim.

7. After settling his 2014 MVA claim, Claimant was involved in a work-related MVA on July 27, 2016, and complained of neck and low back pain and headaches.

8. Claimant treated for his neck and low back injuries for the July 27, 2016, claim until at least the summer of 2017. As a result, Claimant had ongoing neck and low back medical treatment.

9. Claimant admitted that while he was still treating for his 2016 workers' compensation claim he was involved in a non-work-related MVA on April 14, 2017.

10. Claimant began treating for his non-work-related MVA, but he failed report to his physicians or insurance carrier that he had a prior workers' compensation claim. Specifically, Claimant failed to tell his new physicians that he has been treating for the same body parts leading up to and immediately before the MVA in 2017.

11. Dr. John Burris, a board-certified occupational medicine physician, performed an independent medical examination (IME) and a records review regarding both of Claimant's workers' compensation claims. Dr. Burris opined that after a review of all of Claimant's treatment records from his workers' compensation injury and his prior MVAs, it was clear that Dr. Higgins, who was treating Claimant for his April 2017 MVA, was unaware that Claimant had a prior injuries to the same body parts.

12. Dr. Burris opined that after reviewing Dr. Watson's Division IME report, that Claimant was improving from his July 2016 workers' compensation injury, when he was involved in a MVA in April 2017 and that Claimant's symptoms significantly worsened after that time.

13. Claimant admitted he settled his April 2017 MVA claim approximately a month prior to alleging another workers' compensation claim on October 24, 2017. As a result, Claimant settled his claim related to the prior MVA in 2017 and immediately alleged a new work injury to the same body parts.

14. Claimant also admitted he continued to have neck problems after he settled his April 2017 MVA claim. As a result, Claimant's neck problems continued despite receiving a settlement for the injury.

15. Claimant testified that on October 24, 2017, there was a 200 pound box of awning rolls that were stacked eight feet high and fell on top of his shoulder and rolled to his neck. This alleged injury occurred just a month or so after Claimant settled the prior MVA claim.

16. Claimant completed and signed the Employee Statement of Injury on October 26, 2017. Claimant wrote that he was lifting boxes from overhead to the ground to the forklift and injured his neck. He failed to mention anything falling on him in his written

description. As a result, Claimant's own initial written description of the incident was inconsistent with what he subsequently alleged occurred at work.

17. Claimant alleged that he reported his injury to Don Martinez on October 24, 2017. Don Martinez denied this allegation when speaking with Claimant's supervisor, Brett Martin.

18. Claimant reported to Concentra on October 26, 2017, that he experienced neck pain from lifting boxes down from overhead from a trailer to a forklift. This report is consistent with his Employee Statement, and inconsistent with his later allegations of an awning roll actually falling on him.

19. Claimant testified the October 26, 2017, medical record was incorrect in the description of the alleged mechanism of injury. As a result, he also alleged that his own written statement was incorrect as well.

20. Claimant failed to explain why there was such a discrepancy in the reporting of the alleged mechanism of injury.

21. Mark Ballinger, an employee of Awning Company of America, testified that he was working with Claimant, unloading a truck on October 24, 2017. Mr. Ballinger testified that the load, which was 18 feet to 20 feet long, was stacked funny and strapped against the wall. Mr. Ballinger testified that he assisted Claimant to restack them, so they did not fall. Mr. Ballinger testified that he did not see anything fall and strike Claimant in the shoulder or neck.

22. Mr. Ballinger also testified that there was no evidence that the straps holding the load had broken.

23. Mr. Ballinger testified that at no time during the unloading of the truck did Claimant state he had been injured. Finally, Mr. Ballinger testified that he did not notice anything that would suggest that Claimant had been injured during their time together.

24. The ALJ finds Mr. Ballinger's testimony credible and persuasive. As a result, a neutral employee from a different employer failed to support Claimant's allegation that he suffered a work injury in October of 2017.

25. Brett Martin, the operations manager for the employer, met with Claimant and credibly testified that he was first informed of the injury on October 26, 2017, two days after it allegedly occurred. Mr. Martin denied Claimant's allegation that the alleged incident was reported on October 24, 2017.

26. Mr. Martin spoke with Don Martinez as part of his investigation into Claimant's claim as to when the incident had been reported by Claimant. Mr. Martinez confirmed that Claimant did not report the work injury until October 26, 2017.

27. Claimant reported to Mr. Martin that he was moving long boxes from overhead to a forklift. Claimant never told Mr. Martin that a strap broke in the truck and something fell on him.

28. Claimant completed a written statement regarding the alleged injury on October 26, 2017. This written statement is consistent with what Claimant told Mr. Martin him, that nothing fell on him.

29. According to Mr. Martin, the medical release was signed by Claimant and dated October 25, 2017, and was given to Claimant at the same time, on October 26, 2017. The medical authorization initially was dated by Claimant as October 25, 2017, but was corrected to reflect the accurate date of October 26, 2017.

30. Furthermore, the medical release dated October 25, 2017, indicated in Paragraph 2 that Claimant received his injuries on October 26, 2017. Claimant further provided on the medical releases that he sustained his injuries on October 25, 2017. It is found that Claimant misdated the medical releases with the October 25, 2017, date.

31. On October 25, 2017, Claimant presented to Dr. Higgins, who had treated Claimant for the April 2017 MVA. Claimant reported to Dr. Higgins that "his neck pain has been worse with a constant pressure type headache present that has gradually gotten worse since his release from active care in July."

32. On October 25, 2017, Dr. Higgins reported that Claimant specifically denied any new trauma or injury. Claimant complained of bilateral neck pain and upper shoulder. Claimant did not allege a work injury when receiving medical treatment a day after the alleged work injury.

33. When confronted with the October 25, 2017 medical record which confirmed that Claimant had suffered no recent trauma, Claimant testified that the medical record was wrong and that he actually reported to Dr. Higgins that he injured himself at work. Claimant's testimony that he informed Dr. Higgins that he suffered a new work-related injury lacks credibility. Dr. Higgins inquired whether there was a new trauma, and Claimant denied any injury or event.

34. Dr. Burris, Respondents' IME, credibly testified that after a review of all the records, Claimant did not mention to his providers that something fell on him on October 24, 2017, until nearly a month later when he described the incident to Dr. Sacha.

35. Dr. Burris opined that based on Dr. Higgins' October 25, 2017, medical record, it was documented that Claimant had no new trauma or injury and that Claimant's symptoms were the result of a gradual worsening after being released from care from the MVA.

36. Dr. Burris credibly testified that after a review of all of the medical records and his prior medical evaluation that Claimant did not sustain an injurious event on October

24, 2017. In forming his opinion, Dr. Burris opined that Dr. Higgins' October 25, 2017 report is crucial in determining whether any injury occurred since Dr. Higgins had been treating Claimant for his MVA injuries and that Claimant denied any new injury and explained his increased pain as a gradual onset of pain from lack of treatment.

37. The ALJ credits Dr. Burris's testimony and Dr. Higgins' October 25, 2017, medical report and finds that Claimant did not sustain a new injury on October 25, 2017.

38. Dr. Burris testified that, after reviewing the April 14, 2017 CT scan and the December 26, 2017 MRI scan, there were no objective changes suggesting a new work injury. Dr. Burris testified that the radiologist who compared the before and after imaging studies reported that his opinion was Claimant's condition was "grossly unchanged."

39. Additionally, Dr. Burris evaluated Claimant one and a half months prior to his alleged October 24, 2017, injury, and Dr. Burris credibly testified that Claimant's complaints at that time were the same as his complaints after the alleged October 24, 2017 injury.

40. Dr. Sacha, Claimant's authorized treating provider, has continued to treat Claimant under this workers' compensation claim; however, Dr. Burris noted that it did not appear from Dr. Sacha's reports that he had knowledge of Dr. Higgins' treatment records and more specifically, the October 25, 2017 medical report,.

41. Given the lack of objective findings on imaging demonstrating any new injury and Claimant's similar subjective pain complaints before and after the alleged new injury on October 24, 2017, the ALJ finds that Claimant did not sustain any new injury on October 24, 2017.

42. On April 21, 2018, Claimant was involved in a bar fight and he was hit in the head between his eyebrows with a mug. He had a loss of consciousness and a resulting scar. Claimant was hospitalized on April 22, 2018.

CONCLUSIONS OF LAW

General Legal Principals

The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

In rendering a decision, the ALJ must make credibility determinations, draw plausible inferences from the record, and resolve essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* In determining credibility, the ALJ considers the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Credibility is a significant consideration when determining compensability. As found here, Claimant's contradictory reports to medical professionals and the lack of objective evidence of a new injury makes Claimant's claim unsustainable.

Compensability

A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2013). See City of *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000).

The credible and persuasive evidence established that Claimant had significant pre-existing injuries to his neck and shoulder dating back to at least 2014, when he was involved in a motor vehicle accident as documented in Dr. Lichenberg's medical records. Claimant's testimony to the contrary is not credible. The records are clear that Claimant has been treating for neck, back and shoulder problems dating back at least four years.

Claimant also provided inconsistent testimony about the alleged mechanism of injury. He initially admitted that nothing fell on him. However, he later changed the mechanism of injury and alleged that awning rolls fell on him. In addition to these credibility issues, Claimant's objective testing does not support that any new injury occurred. Similarly, Claimant's subjective Claimant's before and after October 24, 2017 were the same.

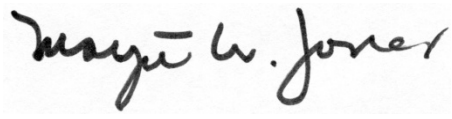
Based on all of the facts above and the significant credibility issues, the ALJ concludes that Claimant did not sustain any new work injury on October 24, 2017.

ORDER

1. Claimant failed to prove that he suffered a compensable injury on October 24, 2017. As a result, the claim is dismissed with prejudice.

2. Claimant's request for temporary disability benefits is also dismissed with prejudice.

Dated: This 26 day of September, 2018.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUE

Whether Claimant has produced substantial evidence that the continuing prescription for Wellbutrin or Bupropion requested by Authorized Treating Physician (ATP) John J. Aschberger, M.D. is a reasonable, necessary and causally related maintenance medical benefit that is designed to relieve the effects of her November 12, 2006 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. Claimant worked as a Firefighter Captain for Employer. On November 12, 2006 Claimant suffered an admitted industrial injury to her cervical spine during the course and scope of her employment.

2. Claimant underwent a course of conservative treatment involving multiple interventions and injections. On April 8, 2009 Authorized Treating Physician (ATP) Jill Castro. M.D. determined that Claimant had reached Maximum Medical Improvement (MMI). She assigned Claimant a 59% whole person permanent impairment rating. The impairment consisted of ratings for the cervical spine, lumbar spine and headaches. Dr. Castro did not assign a mental impairment.

3. On June 30, 2009 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Castro's MMI and permanent impairment determinations. The FAL also acknowledged "reasonable, necessary and related maintenance medical treatment subject to Respondent's right to challenge."

4. In a report dated March 9, 2012 Dr. Castro remarked that Claimant had been followed at the clinic for "chronic pain as it relates to her neck injury." She noted that Claimant continued to experience daily headaches, migraines, neck pain and referred facial pain. Claimant described the pain as "sharp, aching, throbbing, lancinating and vise-like." Dr. Castro added that Claimant was suffering "more depression as a result of the chronic pain." She thus prescribed Wellbutrin.

5. On February 10, 2014 John J. Aschberger, M.D. assumed care as Claimant's ATP. Dr. Aschberger noted that Claimant had suffered a neck injury during an obstacle course training exercise in 2006. He detailed that "she has a long and complicated history including performance of facet rhizotomies and surgical intervention with C5-C6 ACDF in September of 2010 and a follow-up fusion in 2012." Dr. Aschberger reviewed Claimant's current prescriptions including Wellbutrin 200mg.

6. Claimant continued to receive maintenance care through Dr. Aschberger. The care consisted of ongoing medial branch blocks, rhizotomies and medications. The maintenance treatment was directed at maintaining and controlling Claimant's cervical spine pain and chronic headaches.

7. On April 26, 2016 Claimant returned to Dr. Aschberger for an examination. Dr. Aschberger continued to prescribe hydrocodone, Floricet, Wellbutrin and Cymbalta. He also recommended repeated rhizotomies and prescribed a topical compound cream. Dr. Aschberger diagnosed chronic cervical pain but did not mention depression. He remarked that medications could be refilled as needed.

8. On July 7, 2016 Respondent requested Pharmacy Benefit Management Company IPS to complete a peer-to-peer drug utilization review. Avrom Simon, M.D. considered Claimant's medical records and had a peer-to-peer discussion with Dr. Aschberger. He recommended continuation of the Butalbital/Acetaninophen/Caffeine because they had decreased Claimant's pain and improved his function. Dr. Simon also noted that the Clonazepam, Diclofenac 3%, Tetracaine 10%, Versatile Base (cream) and Memantine should be discontinued. However, if they were continued they should be paid for outside of the Workers' Compensation system because they were unrelated to Claimant's compensable injury. Dr. Simon remarked that Claimant's Vicodin should also be gradually weaned and discontinued because it duplicated therapy. He summarized that detox should be considered for Claimant. Finally, Dr. Simon.commented that Claimant might be a candidate for cognitive behavioral treatment and/or a chronic pain management program.

9. In specifically addressing Claimant's Bupropion HCL ER Dr. Simon noted that it should be continued but paid for outside of the Workers' Compensation system. He concluded that the medication was unrelated to Claimant's November 12, 2006 industrial injury. Dr. Simon explained that Bupropion is a generic antidepressant designed for the treatment of mood disorders and depression. He commented that, although Claimant was receiving the Bupropion prescription to treat depression, it provided little benefit. However, Dr. Simon endorsed continuation of the medication until an alternative could be found to treat Claimant's depressive symptoms. In reviewing his peer-to-peer discussion with Dr. Aschberger, Dr. Simon stated that the "drug had been prescribed by others before and [Dr. Aschberger] inherited the patient." Dr. Aschberger mentioned that Claimant's list of medications was from her prior medical provider and suggested that she might be a candidate for a chronic pain management program. Dr. Simon concluded that Bupropion should be paid for outside of the Workers' Compensation system because it was not related to Claimant's industrial injury.

10. On July 14, 2016 Claimant returned to Dr. Aschberger for an examination. Claimant reported that she had been suffering headaches since her last rhizotomy. Dr. Aschberger noted that Claimant "look[ed] somewhat improved in terms of motion and pain behaviors." He diagnosed chronic cervical pain and headaches. Dr. Aschberger recommended tapering Claimant's Wellbutrin and referred her to Joel Cohen, Ph.D. for a psychological evaluation.

11. On August 19, 2016 Claimant visited Dr. Cohen for an evaluation. Dr. Cohen noted that Claimant recently separated from her employment and filed an EEOC claim against Employer. He commented that Claimant presented with symptoms of both moderate anxiety and depression. Dr. Cohen further noted that an increased presentation of emotional symptoms could be related to stress from Claimant's separation from employment. He diagnosed Claimant with somatic system disorder and "an injury-related diagnosis of adjustment reaction with mixed emotional features." Dr. Cohen did not directly attribute Claimant's ongoing depression to her work injury. He recommended six to eight additional sessions of cognitive behavioral therapy.

12. On November 15, 2016 Claimant returned to Dr. Cohen for an evaluation. Dr. Cohen noted that Claimant had recently experienced a "significant escalation" in headaches. He emphasized that Claimant should use cognitive behavioral therapy to alter her pain perspective, retain function and maintain mood stability while diminishing the stress-related elements to her problems. Dr. Cohen addressed whether Claimant's EEOC lawsuit against Employer and recent termination from employment were "causing her depression and stress and not her residual emotional issues around the original accident." He explained that he was recommending intervention not because of the Claimant's lawsuit and termination but instead based on "living with pain for an extended period of time and dealing with the impact that has had on quality of life and function."

13. On April 25, 2017 Claimant again visited Dr. Aschberger for an examination. Dr. Aschberger noted that Claimant was taking Wellbutrin and using two antidepressants. He remarked that Claimant would continue on her "current regimen." Dr. Aschberger expressed that he was uncertain why continued follow-up appointments with Dr. Cohen had been discontinued because Claimant had been approved for eight visits. He remarked that additional visits with Dr. Cohen "would be helpful for myself to judge tapering the medication."

14. On September 29, 2017 Claimant returned to Dr. Aschberger for an examination. Claimant reported increasing headache symptoms. Her current medications consisted of Wellbutrin, Cymbalta and Namenda. In addressing Claimant's psychiatric condition Dr. Aschberger commented that she was "negative for anxiety, suicidal thoughts, mood disorder, depression, suicide attempts [and] emotional problems." He did not diagnose any depression or other psychological issues related to Claimant's November 12, 2006 industrial injury.

15. On November 16, 2017 Kathy McCranie, M.D. conducted a records review of Claimant's case. After considering Claimant's medical history, Dr. McCranie addressed specific inquiries from Respondent. She considered the reasonableness, necessity and relatedness of Claimant's use of Bupropion or Wellbutrin. Dr. McCranie noted that Claimant was currently using 200mg of Bupropion twice daily. She explained that Claimant had used the medication prior to her November 12, 2006 industrial injury. Dr. McCranie specifically remarked that in January 2006 Claimant's medications included 100 mg of Bupropion and three tablets of 200 mg of Serzone at bedtime for depression. Although Claimant's dosage of Bupropion was lower prior to her industrial

injury, her dose of Serzone exceeded the maximum recommended amount. Dr. McCranie reasoned that Claimant was taking high doses of antidepressants prior to her industrial injury. She thus explained that "it is unlikely that 11 years postinjury the current use of antidepressants is still related to [Claimant's] work injury." Dr. McCranie remarked that it was "unclear" why Claimant's Bupropion 'was transferred into the Workers' Compensation arena."

16. The record reveals that Claimant began receiving Bupropion or Wellbutrin in 2001. Specifically, on April 2, 2001 Claimant visited Diane Grant, LPN at Kaiser Permanente. LPN Grant recommended a prescription for Wellbutrin SR 100 MG twice daily. Subsequent Kaiser records reflect that Claimant received or continued a prescription for Wellbutrin at the following evaluations: May 6, 2002, July 3, 2003, July 25, 2003, August 5, 2004, December 14, 2004 and January 14, 2005. At Claimant's most recent Kaiser evaluation prior to her work injury Kathryn Wood, RN prescribed Wellbutrin for "depression, major, single episode, complete remission." Claimant also received a prescription for nefazodone 200 mg three tablets at bed time.

17. Claimant testified at the hearing in this matter. She acknowledged that she utilized Wellbutrin prior to her work injury. However, Claimant noted that her depression symptoms after her November 12, 2006 injury are different from those she had previously experienced. She explained that her industrial injury completely changed her work and personal life. Claimant emphasized that she has suffered daily pain since her November 12, 2006 industrial injury.

18. Dr. McCranie testified at the hearing in this matter. She maintained that Claimant's current use of 200 mg of Wellbutrin twice daily is unrelated to her industrial injury. Dr. McCranie explained that Claimant had used Wellbutrin prior to her November 12, 2006 work injury and her present symptoms reflected her long-term diagnosis of depression. She noted that Claimant's use of the antidepressant Cymbalta also has a pain mitigation effect and is therefore reasonable. However, Wellbutrin does not have a concurrent pain mitigation effect and only impacts Claimant's pre-existing depression. Dr. McCranie thus summarized that Claimant's use of Wellbutrin is not related to her November 12, 2006 industrial injury. Nevertheless, she acknowledged that Claimant should be weaned from Wellbutrin through a tapering process and treatment with a psychotherapist.

19. Claimant has failed to produce substantial evidence that the continuing prescription for Wellbutrin or Bupropion requested by Dr. Aschberger is a reasonable, necessary and causally related maintenance medical benefit that is designed to relieve the effects of her November 12, 2006 industrial injury or prevent further deterioration of her condition. Initially, on November 12, 2006 Claimant suffered an admitted industrial injury to her cervical spine. On April 8, 2009 Dr. Castro determined that Claimant had reached MMI. She assigned Claimant a 59% whole person permanent impairment rating for her cervical spine, lumbar spine and headaches. Dr. Castro did not assign a mental impairment.

20. On March 9, 2012 Dr. Castro noted that Claimant was suffering "more depression as a result of the chronic pain." She thus provided a prescription for Wellbutrin. After Dr. Aschberger assumed Claimant's care as her ATP he continued Claimant's Wellbutrin prescription. On July 7, 2016 during a drug utilization review Dr. Simon commented that, although Claimant was receiving the Bupropion prescription to treat depression, it provided little benefit. However, Dr. Simon endorsed continuation of the medication until an alternative could be found to treat Claimant's depressive symptoms. He concluded that Bupropion should be paid for outside of the Workers' Compensation system because it was not related to Claimant's industrial injury. By July 14, 2016 Dr. Aschberger recommended tapering Claimant's Wellbutrin and referred her to Dr. Cohen for a psychological evaluation. Dr. Cohen recommended continuing intervention based on Claimant's chronic pain but did not directly attribute her ongoing depression to her work injury.

21. The record reveals that Claimant has suffered from pre-existing depression. She began receiving Bupropion or Wellbutrin in 2001. Specifically, on April 2, 2001 LPN Grant of Kaiser recommended a prescription for Wellbutrin SR 100 MG twice daily. Subsequent Kaiser records reflect that Claimant received or continued a prescription for Wellbutrin at numerous evaluations from 2002 into 2005. At Claimant's most recent Kaiser evaluation prior to her work injury RN Wood prescribed Wellbutrin for "depression, major, single episode, complete remission." Dr. McCranie persuasively explained that, although Claimant's dosage of Bupropion was lower prior to her industrial injury, her dose of Serzone exceeded the maximum recommended amount. Dr. McCranie reasoned that Claimant was taking high doses of antidepressants prior to her industrial injury. She thus explained that it was unlikely that Claimant's current use of antidepressants was still related to her work injury from 11 years earlier. Dr. McCranie remarked that it was "unclear" why Claimant's Bupropion 'was transferred into the Workers' Compensation arena." Similarly, Dr. McCranie testified that Claimant's current use of 200 mg of Wellbutrin twice daily is unrelated to her industrial injury. She explained that Claimant had used Wellbutrin prior to her November 12, 2006 work injury and her present symptoms reflected her long-term diagnosis of depression. However, Dr. McCranie acknowledged that Claimant should be weaned from Wellbutrin through a tapering process and treatment with a psychotherapist.

22. In contrast, Claimant testified that her depression symptoms after her November 12, 2006 injury are different from those she had previously experienced. She emphasized that she has suffered daily pain since her November 12, 2006 industrial injury. However, Claimant began receiving Wellbutrin for depression more than five years before her industrial injury and the persuasive testimony of Dr. McCranie reveals that the medication is thus designed to treat Claimant's pre-existing depression symptoms. Furthermore, although Dr. Aschberger has continued Claimant's Wellbutrin prescription, he has not directly attributed Claimant's chronic depression to her work injury and suggested a tapering program. Accordingly, it is speculative to connect Claimant's need for Wellbutrin to her November 12, 2006 industrial injury. Claimant has failed to produce substantial evidence that her current prescription for Wellbutrin is causally related to her industrial injury. Claimant's request for Wellbutrin is thus denied and dismissed. Nevertheless, the bulk of the evidence demonstrates that Claimant is

entitled to undergo a weaning program from Wellbutrin through a tapering process and treatment with a psychotherapist.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to medical maintenance benefits a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of her condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. As found, Claimant has failed to produce substantial evidence that the continuing prescription for Wellbutrin or Bupropion requested by Dr. Aschberger is a reasonable, necessary and causally related maintenance medical benefit that is

designed to relieve the effects of her November 12, 2006 industrial injury or prevent further deterioration of her condition. Initially, on November 12, 2006 Claimant suffered an admitted industrial injury to her cervical spine. On April 8, 2009 Dr. Castro determined that Claimant had reached MMI. She assigned Claimant a 59% whole person permanent impairment rating for her cervical spine, lumbar spine and headaches. Dr. Castro did not assign a mental impairment.

6. As found, on March 9, 2012 Dr. Castro noted that Claimant was suffering "more depression as a result of the chronic pain." She thus provided a prescription for Wellbutrin. After Dr. Aschberger assumed Claimant's care as her ATP he continued Claimant's Wellbutrin prescription. On July 7, 2016 during a drug utilization review Dr. Simon commented that, although Claimant was receiving the Bupropion prescription to treat depression, it provided little benefit. However, Dr. Simon endorsed continuation of the medication until an alternative could be found to treat Claimant's depressive symptoms. He concluded that Bupropion should be paid for outside of the Workers' Compensation system because it was not related to Claimant's industrial injury. By July 14, 2016 Dr. Aschberger recommended tapering Claimant's Wellbutrin and referred her to Dr. Cohen for a psychological evaluation. Dr. Cohen recommended continuing intervention based on Claimant's chronic pain but did not directly attribute her ongoing depression to her work injury.

7. As found, the record reveals that Claimant has suffered from pre-existing depression. She began receiving Bupropion or Wellbutrin in 2001. Specifically, on April 2, 2001 LPN Grant of Kaiser recommended a prescription for Wellbutrin SR 100 MG twice daily. Subsequent Kaiser records reflect that Claimant received or continued a prescription for Wellbutrin at numerous evaluations from 2002 into 2005. At Claimant's most recent Kaiser evaluation prior to her work injury RN Wood prescribed Wellbutrin for "depression, major, single episode, complete remission." Dr. McCranie persuasively explained that, although Claimant's dosage of Bupropion was lower prior to her industrial injury, her dose of Serzone exceeded the maximum recommended amount. Dr. McCranie reasoned that Claimant was taking high doses of antidepressants prior to her industrial injury. She thus explained that it was unlikely that Claimant's current use of antidepressants was still related to her work injury from 11 years earlier. Dr. McCranie remarked that it was "unclear" why Claimant's Bupropion 'was transferred into the Workers' Compensation arena." Similarly, Dr. McCranie testified that Claimant's current use of 200 mg of Wellbutrin twice daily is unrelated to her industrial injury. She explained that Claimant had used Wellbutrin prior to her November 12, 2006 work injury and her present symptoms reflected her long-term diagnosis of depression. However, Dr. McCranie acknowledged that Claimant should be weaned from Wellbutrin through a tapering process and treatment with a psychotherapist.

8. As found, in contrast, Claimant testified that her depression symptoms after her November 12, 2006 injury are different from those she had previously experienced. She emphasized that she has suffered daily pain since her November 12, 2006 industrial injury. However, Claimant began receiving Wellbutrin for depression more than five years before her industrial injury and the persuasive testimony of Dr. McCranie reveals that the medication is thus designed to treat Claimant's pre-existing

depression symptoms. Furthermore, although Dr. Aschberger has continued Claimant's Wellbutrin prescription, he has not directly attributed Claimant's chronic depression to her work injury and suggested a tapering program. Accordingly, it is speculative to connect Claimant's need for Wellbutrin to her November 12, 2006 industrial injury. Claimant has failed to produce substantial evidence that her current prescription for Wellbutrin is causally related to her industrial injury. Claimant's request for Wellbutrin is thus denied and dismissed. Nevertheless, the bulk of the evidence demonstrates that Claimant is entitled to undergo a weaning program from Wellbutrin through a tapering process and treatment with a psychotherapist.

ORDER

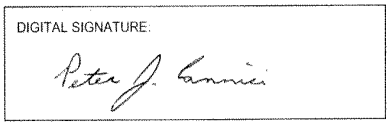
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for Wellbutrin is denied and dismissed. Nevertheless, Claimant is entitled to undergo a weaning program from Wellbutrin through a tapering process and treatment with a psychotherapist.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 2, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Respondent established, by a preponderance of the evidence, that they are entitled to withdraw their February 20, 2018 and March 6, 2018 General Admissions of Liability (GAL) which admitted liability for payment of medical and temporary total disability (TTD) benefits associated with a February 9, 2018 industrial injury.

II. If Claimant did suffer a compensable injury on February 9, 2018, whether she established, by a preponderance of the evidence, that the C4-5 cervical fusion surgery performed by Dr. Christopher Gallus on April 16, 2018 was reasonable, necessary and related to said February 9, 2018 injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as a heavy equipment operator maintaining county roads for Respondent-Employer. On Friday, February 9, 2018, approximately an hour and a half before the end of her shift, Claimant was pulling a ditch when the blade on the grader she was operating hit a large concealed rock adjacent to the roadway jolting the machine. Claimant's head jerked back and forth violently upon impact causing an immediate headache and the onset of severe neck pain.

2. Claimant returned to Respondent-Employer's equipment barn and without explaining what had happened, angrily reported to her supervisor that her neck was hurting and that she was going to quit her job. She finished up her shift and returned home where she took Advil for her headache and neck pain.

3. The following morning, Saturday, February 10, 2018, Claimant woke with the "worst pain ever". She had an appointment with her tax adviser during which she reportedly had constant shooting pain in the back of her head.

4. Claimant's headache persisted into Sunday. She described her head as feeling like a balloon on the verge of popping.

5. Claimant does not work weekends and the administrative offices of Respondent-Employer are closed.

6. On Monday, February 12, 2018, at approximately 6:00 a.m. Claimant called her supervisor Randy Aredondo reporting to him that her neck was "killing" her, that she wanted to see a doctor and would not make it in to work. She did not explain

what had happened on February 9, 2018. Claimant later called the Human Resources Department for Respondent-Employer and spoke to April Quintana. Claimant testified that she explained to Ms. Quintana that she hit a rock with her grader causing her to jerk her head and neck. The "Employer's First Report of Injury", completed by Ms. Quintana on February 12, 2018, indicates that Claimant was "blading a road in county motor grader" that she was "working on a bumpy road" and that she "jarred [her] neck and back". The report does not indicate that Claimant hit a rock while pulling a ditch.

7. Ms. Quintana provided Claimant with a choice of physicians to attend to her alleged injuries. Dr. David Arnett was among the physicians on the list. Dr. Arnett is also Claimant's personal care provider (PCP). Although she was reluctant to treat with Dr. Arnett initially, Claimant ultimately chose him over the other designated provider, the Regional Occupational Medicine Program (ROMP) Clinic in Alamosa, for what the ALJ infers was personal convenience given the distance she would have to travel to attend appointments at the ROMP Clinic.

8. Claimant presented to the offices of Dr. Arnett on February 13, 2018. The documented reason for her visit was recorded as: "Pt presents for neck/right shoulder pain x4 days. Pt unsure if it happened at work. WC related injury, heavy lifting over the last week". Physical examination revealed findings consistent with the following assessments: "Cervical spine stenosis long tract signs; affecting R leg; pain/radiculopathy; L4-5; R arm; sx suggest C5-6, 6-7. Cervical radiculopathy". Dr. Arnett requested an MRI.

9. While she was sitting in Dr. Arnett's waiting room, Claimant received a phone call from Staci Metter, an adjuster with Respondent-Employer's third party administrator. Ms. Metter testified that the purpose of her call was to gain a better understanding of how Claimant's injury occurred. According to Ms. Metter, she typed the contents of her conversation with Claimant into her computer as the two spoke. Ms. Metter testified that Claimant told that she felt her injury occurred because she was looking down while operating the grader. Ms. Metter testified that Claimant did not attribute her injury to hitting a rock and jerking back and forth violently. Claimant testified that she could not recall her exact words to Ms. Metter, but explained that she would have to look down to watch the ditch she was pulling but that looking down did not affect how the accident happened.

10. Respondent-Employer, through Ms. Metter filed a General Admission of Liability (GAL) on February 20, 2018.[1] Ms. Metter did not have any medical records in her possession at the time she filed the February 20, 2018 GAL. Ms. Metter testified that as Claimant was missing time from work she gave her the benefit of the doubt when filing the GAL.

11. An MRI of the cervical spine as recommended by Dr. Arnett on February

[1] An Amended GAL was filed on March 6, 2018 to reflect that the three-day waiting period for payment of TTD under § 8-42-103(1)(b), C.R.S. had been met, thus entitling Claimant to TTD as of February 10, 2018 rather than February 15, 2018.

13, 2018 was completed February 21, 2018. Findings from the MRI were interpreted as being consistent with "[m]oderate spinal canal stenosis at C4-5, C5-6 and C6-7 [which] may compress the C5, C6 and C7 nerve roots.

12. Following her MRI, Claimant was referred to and evaluated by Dr. Christopher Gallus on March 13, 2018. Dr. Gallus obtained the following history: "Patient is here to discuss neck pain that started on 2/9/2018. The patient works in construction and drives heavy equipment". "She was driving heavy machinery (Road maintainer) and hit a rock that was buried under ground. The machine completely stopped and jerked her head forward and then back". Dr. Gallus reviewed Claimant's MRI and after image review reached, among others, the following impression: "C4-5 moderate spondylosis. Disc osteophyte complex with central disc protrusion which is causing ventral cord compression". Dr. Gallus expressed concern for Claimant's situation because her MRI demonstrated cord compression, she was hyperreflexic on examination and was having difficulty with tandem gait. He noted that he would make an attempt to treat Claimant conservatively and should that fail to provide relief of symptoms he would recommend a C4-5 anterior cervical discectomy and fusion because this level demonstrated an "acute, central disc herniation with cord compression which does explain the patient's acute symptoms".

13. Claimant failed conservative care. Consequently, Dr. Gallus sought authorization to proceed with the recommended C4-5 discectomy and fusion surgery. Respondent-Employer requested an opinion from Dr. Wallace Larson. Dr. Larson was asked to review Claimant's prior medical history and opine as to whether Claimant's need for surgery, as recommended by Dr. Gallus, was causally related to her February 9, 2018 industrial incident.

14. Dr. Larson completed a medical records review and on March 26, 2018, he opined that the surgical procedure contemplated by Dr. Gallus was "not related as a direct result" to Claimant's February 9, 2018 work incident. Instead, Dr. Larson concluded that Claimant's February 21, 2018 MRI demonstrated "significant degenerative disc disease within the cervical spine. He opined that it was "unlikely" that Claimant need for surgery related to her work duties. Rather, Dr. Larson opined that Claimant's need for surgery was related to her falling from a horse in 2006 as well as the "natural progression of her pre-existing degenerative disc disease in the cervical spine". Claimant testified she never injured her neck in the fall from a horse. Dr. Larson does not cite to any records to corroborate his theory that Claimant injured her neck in 2006 and the records submitted at hearing are devoid of any indication that Claimant received treatment for her neck after falling from a horse.

15. It is unclear whether Dr. Larson actually reviewed the MRI film. His report simply indicates that he reviewed records including the February 21, 2018 MRI report. Based upon the content of the report and the specific assignment Dr. Larson was handed, the ALJ finds it probable that he did not review the images from Claimant's February 21, 2018 MRI. Nonetheless, he opined that there was "no objective evidence of acute injury."

16. Dr. Larson's opinions are in direct conflict with those of Dr. Gallus who both reviewed Claimant's MRI and examined her. As noted, Dr. Gallus opined, as a spine surgeon, that Claimant's MRI demonstrated a large "acute, central disc herniation with cord compression which [did] explain [Claimant's] acute symptoms" (emphasis added).

17. Based upon Dr. Larson's opinions Respondent-Employer denied Dr. Gallus' request for surgical authorization. Consequently, Claimant elected to proceed with surgery under her health insurance. She was taken to the operating room by Dr. Gallus on April 16, 2018 where he performed a C4-5 anterior cervical discectomy and fusion with structural titanium interbody device with local autograft and allograft. In his April 16, 2018 operative report, Dr. Gallus reiterated that he obtained, reviewed and compared Claimant's February 21, 2018 MRI with a previous study completed June 23, 2010. When compared the February 16, 2018 MRI demonstrated a large, new central disc protrusion which was causing ventral cord compression. According to Dr. Gallus, Claimant's described right arm paresthesia was "more myelopathic in nature as opposed to radicular". Claimant testified that the surgery provided instant relief of her symptoms.

18. Claimant does have a history of prior neck pain dating back to 2009 when she developed an insidious onset of pain in her neck and right arm with numbness extending to the right hand. Diagnostic workup revealed carpal tunnel syndrome along with a "very small amount" of stenosis at the entrance zone to the foramen at C6-7 and "mild" degenerative changes at the C4-5 and C5-6 spinal levels. Claimant was treated with spinal injections and underwent a carpal tunnel release.

19. Claimant saw Dr. Arnett on July 27, 2012. At that time, Claimant was also reporting a new onset of neck pain without any known trauma. Dr. Arnett documented that Claimant had known degenerative disc disease (DDD) since 2009 and was further noted to have a herniated disc (HD) at C6-7. Dr. Arnett discussed with Claimant that her pain was "due to DDD w/ R C6-7 radiculopathy."

20. Claimant saw Dr. James Wigington on January 29, 2013 for neck pain of one week in duration. According to Dr. Wigington's report, Claimant was known to have a history of cervical disease. The note from this date of visit reflects that Claimant would suffer periodic increases in her pain in the absence of trauma. Claimant's increased pain would respond to rest and medication but was prone to re-aggravation should she engage in certain activities such as truck driving.

21. On April 6, 2018, Respondent-Employer filed an Application for Hearing seeking to withdraw their prior GALs on the basis that Claimant's cervical spine condition is unrelated to an industrial cause but rather the natural progression of her underlying pre-existing progressive DDD leading directly to her need for surgery. Accordingly, Respondent-Employer contends that the GALs were filed by mistake as Ms. Metter did not have the benefit of reviewing medical records before filing the

admission(s).

22. In advance of the hearing to resolve the aforementioned issues, Respondent-Employer requested an independent medical examination (IME) of Claimant with Dr. Elizabeth Bisgard. Claimant presented to Dr. Bisgard on May 21, 2018 and she "finalized" her exam by written report on May 31, 2018. Dr. Bisgard obtained a history from Claimant which the ALJ finds is materially consistent with that she provided at hearing and other providers including Dr. Gallus. In her IME report, Dr. Bisgard references that Claimant followed-up with Dr. Gallus to "compare the MRI scan from June 2010 to the recent MRI from February 2018 and that Dr. Gallus concluded that Claimant had sustained an acute central disc herniation that was causing her symptoms. Nonetheless, Dr. Bisgard noted that she could not "state within a reasonable degree of medical probability that the onset of cervical symptoms is directly related to an incident at work. Contrary to the suggestion advanced by Dr. Larson that Claimant's symptoms and need for surgery were causally related to the natural progression of her pre-existing DDD, Dr. Bisgard simply noted that there were conflicting reports regarding the onset of symptoms and that the question of whether Claimant's need for surgery was related to a work related event would have to be determined based upon medical records she requested from Dr. Greg Poulter.

23. Claimant requested in IME with Dr. Timothy Hall. Dr. Hall evaluated Claimant on June 18, 2018. Dr. Hall notes in his IME report that he "specifically" asked Claimant for the year prior to the February 9, 2018 incident whether she had any "therapy, medication, or doctor visits regarding her neck" and the answer supplied was "No". Some of the notes from Claimant's PCP visits with Dr. Arnett bear this out. Indeed, Dr. Arnett's reports from January 24, 2014 and November 10, 2017, for example contain the following reference under his review of symptoms: "No Neck Pain". In addition, there is no testimony or medical records that suggest Claimant was recommended for neck surgery prior to the alleged injury in this case.

24. At hearing, Dr. Bisgard focused much her testimony around Claimant's pre-existing cervical DDD. She testified that based on the history Claimant provided regarding the onset of prior neck pain without an ensuing trauma, and the findings of the 2009 MRI it was inevitable that she would continue to have episodic bouts of neck pain without trauma. According to Dr. Bisgard, Claimant's history of waxing and waning symptoms leads to an inference that her cervical spine condition is progressive and her development of symptoms is related to the natural progression of this condition. Simply put, Dr. Bisgard testified that the degenerative changes found on the 2009 MRI would progress so that it was inevitable that Claimant would develop symptoms that would require surgery. Dr. Bisgard's testimony does not persuasively address the contrary opinion of Dr. Gallus that Claimant's acute C4-5-disc herniation explains her acute symptoms.

25. Dr. Bisgard also suggested that Claimant was not credible based on what she perceived were inconsistencies in what Claimant reported to the Adjuster and what she gleaned from the medical records concerning the mechanism of injury (MOI) as well

as Claimant's failure to report the injury sooner. Here, Dr. Bisgard requested during her IME that Claimant provide her details as to how she believed the February 9, 2018 injury occurred, and to whom and when did she report it. Claimant told Dr. Bisgard that, while operating a road maintainer, she was pulling dirt out of a ditch, that the blade of the maintainer hit a rock, which resulted in her head being jerked back and forth. Claimant told Dr. Bisgard that she experienced the immediate onset of severe pain, beginning from the base of her head and neck region around to the side of her head. Claimant also told Dr. Bisgard that, just prior to this reported incident, she was experiencing no pain whatsoever. Consequently, Dr. Bisgard testified that, if the incident at work occurred as Claimant described, then it was extremely likely that she knew that she just experienced an acute work injury and yet she did not report it as such after returning to the shop. Dr. Bisgard testified that, in 24 years of her experience treating injured workers, these workers know exactly what, where, when, and how an injury occurred which resulted from going from zero pain to extreme levels of pain. Given what she felt was overall conflicting evidence concerning Claimant's reported MOI and her delay in reporting an injury coupled with her pre-existing DDD, Dr. Bisgard opined that Claimant likely experienced another bout of insidious pain caused by the natural progression of her underlying condition and that her need for treatment, including surgical intervention, was not related to her work duties.

26. Based upon the totality of the evidence presented, the ALJ finds Claimant's testimony and the opinions of Dr. Gallus' credible and more persuasive than those of Drs. Larson and Bisgard. As noted, Dr. Larson did not examine Claimant and likely did not review Claimant's MRI images. He chose to ignore Dr. Gallus' contrary opinion that an acute C4-5-disc herniation was causing Claimant's symptoms. Similarly, Dr. Bisgard glossed over the presence of an acute disc herniation as the cause of Claimant's symptoms when expressing her opinion that Claimant's pre-existing DDD would inevitably become symptomatic and require surgery. Dr. Bisgard's suggestion that Claimant is not credible given what she referred to as "conflicting reports regarding the onset of symptoms" is not persuasive. The ALJ is convinced that the record contains ample (substantial) evidence to support Claimant's testimony regarding the MOI and onset of symptoms in this case. Moreover, the suggestion that Claimant's account of what occurred while she was blading the roadway is not believable because she reported that she did not know if her medical condition was work related or not and because she did not report it until the weekend passed is equally unpersuasive. Here, the ALJ finds Claimant's comments and actions reasonable in light of her lack of medical knowledge and the fact that she reported her injury on Monday after her symptoms did not subside over the weekend.

27. The ALJ credits the testimony of Claimant and the opinions of Dr. Gallus to find that while Claimant may have progressive DDD, she probably suffered an acute disc herniation at C4-5 when the blade of the grader she was operating hit a buried rock. The evidence presented persuades the ALJ that Claimant's acute disc herniation likely lead to her symptoms and eventual need for surgery. Accordingly, the ALJ finds Claimant's need for treatment, including the C4-5 cervical discectomy and fusion performed by Dr. Gallus on April 16, 2018, directly related to the above described

February 9, 2018 work accident.

28. Respondent has failed to establish by a preponderance of the evidence that Claimant did not sustain a compensable left calf and knee injury on December 25, 2015 entitling them to withdraw their March 30, 2016 General Admission of Liability (GAL).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

I. Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As found, the testimony of Claimant and the opinions expressed by Dr. Gallus are more persuasive that the contrary opinions of Drs. Larsen and Bisgard. Since Dr. Larsen's

opinion regarding the cause of Claimant's symptoms revolves around a limited record review while ignoring key evidence that Claimant suffered an acute disc herniation at C4-5 which explained her symptoms, the ALJ concludes that his opinions are unpersuasive. For largely the same reason, the ALJ is also unpersuaded by Dr. Bisgard's stated opinion that Claimant's acute symptoms and need for surgery are the inevitable consequence of her progressive DDD. While convenient, given Claimant's pre-existing DDD, the ALJ finds it unlikely that Claimant would spontaneously suffer an acute herniated disc in the absence of an inciting event. Here, the evidence presented overwhelmingly supports a conclusion that Claimant's symptoms came on suddenly after an inciting event. Furthermore, the suggestion that Claimant did not suffer a compensable injury to her neck because she reported she did not know if her condition was work related and because she waited two days to seek care are unpersuasive.

II. Respondents' Request to Withdraw the February 20 and March 6, 2018 General Admissions of Liability

D. Pursuant to § 8-43-201(1), C.R.S., Respondents bear the burden of proof regarding any attempt to modify an issue that previously has been determined by a general or final admission of liability or an order. *Section 8-43-201(1), C.R.S.*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to § 8-43-201 in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

E. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed the burden on respondents and made such a withdrawal the procedural equivalent of a reopening. In this case, Respondents, relying principally on the opinions of Dr. Larsen and Dr. Bisgard are seeking to modify an issue determined by the aforementioned GALs, specifically compensability. Therefore, the burden is on Respondents to prove that Claimant did not sustain a compensable injury.

F. To recover workers' compensation benefits, a claimant must suffer a compensable injury. A compensable injury is one which arises out of and in the course of employment. § 8-41-301(1)(b), C.R.S; *see City of Boulder v. Streeb*, 706 P.2d 786

(Colo. 1985). An injury occurs “in the course of” employment where the claimant demonstrates that the injury occurred within the time and place limits of his/her employment and during an activity that had some connection with work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is more narrow and requires a showing of a causal connection between the employment and the injury such that the injury has its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. S*ee Triad Painting Co. v. Blair, supra*. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957)(mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of employment). Rather, there must be a direct causal relationship between the employment and the injuries for which compensation is sought. § 8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

G. In this case, the evidence presented persuades the ALJ that Claimant likely had pre-existing, yet asymptomatic degenerative changes throughout the cervical spine at the time of her alleged injury. The evidence presented also convinces the ALJ that Claimant, more probably than not, suffered an acute disc herniation at C4-5 due to the sudden and unexpected jarring of her head and neck after hitting a concealed rock while grading the roadway. In addition to causing acute herniation at C4-5 the February 9, 2018, incident likely aggravated her underlying degenerative condition contributing to her overall neck pain. Because Claimant’s injury/symptoms arose as a direct consequence of hitting a concealed rock while engaged in her work related functions, i.e. pulling a ditch, the ALJ concludes that she sustained a compensable injury. Accordingly, the Respondent’s request to withdraw either the February 20, 2018 or March 6, 2018 GAL must be denied and dismissed.

III. *Medical Benefits*

H. A pre-existing condition “does not disqualify a claimant from receiving workers’ compensation benefits.” *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment “aggravates, accelerates, or “combines with” a pre-existing infirmity or disease “to produce the disability and/or need for treatment for which workers’ compensation is sought”. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo.App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

I. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while

performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo.App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found in this case, the totality of the evidence presented persuades the undersigned ALJ that Claimant's symptoms and need for treatment, including her C4-5 discectomy and fusion is causally related to an aggravation of her pre-existing DDD in addition to an acute cervical disc herniation caused by an unexpected jarring of the head and neck after hitting a hidden rock while operating her motor grader on February 9, 2018. In so concluding, the undersigned ALJ rejects Dr. Larsen and Dr. Bisgard's contrary opinions as unpersuasive.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish by a preponderance of the evidence that Claimant did not suffer a compensable injury while in the course and scope of her employment on February 9, 2018. Therefore, Respondents request to withdraw the previously filed February 20, 2018 or March 6, 2018, General Admissions of Liability is denied and dismissed.

2. Respondent shall pay for all medical expenses to cure and relieve Claimant from the effects of her February 9, 2018 cervical spine injury, including but not limited to the C4-5 discectomy and fusion surgery performed by Dr. Gallus on April 16, 2018.

3. All matters not determined herein are reserved for future determination.

DATED: October 4, 2018

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did Claimant establish by a preponderance of the evidence he was permanently and totally disabled as a result of his industrial injury and is entitled to receive benefits?

STIPULATIONS

The parties stipulated Claimant's average weekly wage as of July 20, 2016 was $845.46. This gives a TTD rate of $563.64 per week.

Claimant receives Social Security retirement in the amount of $722.00 per month as of May 2016.[1]

The Stipulations were accepted by the Court and are made part of this Order.

FINDINGS OF FACT

1. Claimant is 64 years old (DOB December 13, 1953).

2. Claimant testified he attended a few months of school. There was an indication in the record Claimant attended up to the equivalent of the sixth grade in Mexico.[2] There was no evidence in the record that Claimant completed a GED or equivalent) or received a certification of any type.

3. Claimant speaks Spanish and is able to read and write some Spanish. Spanish is spoken in his home. He is unable to read and write English.

4. For the past 30 years, Claimant has worked in the meatpacking industry. He worked for Employer for a number of years in the 1990s.

5. Claimant's medical history was significant in that he suffered injuries arising out of a motor vehicle accident in 1997. Claimant had permanent restrictions related to this accident, but returned to full-time work.

[1] There was a discussion at the outset of the hearing regarding the exact date on which Claimant began receiving Social Security benefits and counsel for the parties agreed to discuss the matter further. No agreement was apparently reached regarding this date, at least as referenced in the post-hearing submissions.

[2] The ALJ notes educational testing was not conducted by either party.

6. Claimant underwent a Functional Capacity Evaluation ("FCE") on March 8, 1999.[3] His diagnosis was listed as chronic low back pain. As a result of this evaluation, Claimant was placed within the light work category (exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly). Claimant had no restrictions for sitting and walking. Claimant could frequently stand and occasionally walk, crawl, stair climb, kneel, crouch, stoop and reach. He was not restricted from reaching with his right hand and was limited to reaching on an occasional basis with his left.

7. Claimant left Employer to work for another company in Fort Morgan for approximately one year. He then returned to Greeley and worked for Employer. In approximately 2003, he was laid off by Employer's predecessor company.

8. Gail Pickett performed a vocational assessment of Claimant on June 1, 2005. Ms. Pickett testified at hearing this was in connection with an ADA claim and she was hired by Claimant's counsel.[4] Ms. Pickett incorporated Dr. Branum's November 9, 1997 physical restrictions (no lifting from the floor, limited stooping, crouching, ladder climbing, kneeling, twisting, reaching of the left arm at or above shoulder level), as well as Dr. Wunder's July 19, 2002 restrictions (maximum lift, push, pull of 5 pounds-right arm; no lift for right hand) into her findings. Ms. Pickett concluded Claimant did not retain full access to the light work category (U.S. Dept. of Labor classifications) due to the restrictions to his right hand of 5 pound lifting. Claimant lost access to jobs within the very heavy, heavy and medium categories of work. Ms. Pickett noted Claimant had lost access to a broad range and class of jobs. All of Ms. Pickett's opinions were to a reasonable degree of vocational probability.

9. There was no evidence in the record that Claimant's upper extremity restrictions were ever rescinded.

10. Claimant returned to work for Employer in approximately 2010.

11. Claimant has been diagnosed with type II diabetes mellitus.

12. Claimant testified he took regular retirement when he reached 62 years of age, but also referred to getting insurance when he became eligible.

13. On September 25, 2015, Claimant suffered an admitted industrial injury when he fell backwards at work. Claimant testified he had finished cleaning his knives, stepped and fell backwards on water that was on the floor. Claimant injured his low back and right side. Claimant initially treated at Employer's in-house clinic. He received conservative treatments, including cold compresses, Biofreeze massage and rest.

14. On October 28, 2015, Claimant was evaluated by Dr. Smith at Banner

[3] Exhibit AA.

[4] Hearing Transcript ("Hrg. Tr"), p. 56:21-57:1

Health, the ATP for Employer. At that time, he complained of low back pain, going down into his buttock and pain in his right-sided chest. Dr. Smith noted pain in Claimant's back with full flexion and abduction in the shoulders. Slight scoliosis was noted to the right in the lumbar region, with palpable tenderness found. Dr. Smith's diagnoses were: sprain, thoracic spine; lumbosacral sprain, lumbar spine; contusion, back; muscle spasm. Claimant's restrictions included: no lifting from the ground to waist, keep all activities above waist level; no bending, twisting or stooping; sit down job mainly with frequent position changes and avoid prolonged standing or walking.

15. Dr. Smith oversaw Claimant's treatment, referring him for physical therapy ("PT") and chiropractic treatments. Claimant received chiropractic treatments from Scott Parker, DC. Claimant received ten (10) chiropractic treatments with Dr. Parker. The treatment notes reflected continuing low back pain complaints throughout. In the final evaluation and treatment on January 30, 2016, Dr. Parker's assessment was right lumbosacral/sacroiliac strain/dysfunction-slowly improving, but ongoing; lumbar degenerative changes-preferred documentation review.

16. Claimant was evaluated by Gregory Reichhardt, M.D. on February 19, 2016. At that time, he was complaining of an aching pain in his low back, with a feeling of pins and needles extending down the lateral thigh and calf, but not into the foot. He reported pain at the level of 4-5/10. On examination, his lumbar spine was tender to palpation, with trigger points over the elevator scapula and L5 paraspinals. Decreased range of motion ("ROM") was noted in all planes.

17. Dr. Reichhardt's diagnosis was lumbar contusion; DISH (diffuse idiopathic skeletal hyperostosis); rule out lumbosacral radiculitis; possible component of myofacial pain. Dr. Reichhardt recommended a lumbar MRI, as well as a trial of trigger point injections, which were administered at this appointment. Dr. Reichhardt also discussed with Claimant that the most important aspect of his treatment was an independent exercise program.

18. On February 29, 2016, Claimant underwent an MRI of his lumbar spine. The films were read by Sarah Jane Jess, M.D., whose impression was: multilevel degenerative disc disease and facet arthritis, worst at L2-3 and L5-S1 where there was mild bilateral foraminal stenosis; no spinal stenosis or nerve root compression was noted. The large anterior and lateral osteophytes could be due to DISH or other spondyloarthropathy. Chronic bilateral L5 pars defects were present.

19. Dr. Reichhardt performed electrodiagnostic testing on April 7, 2016. His diagnoses remained the same as the prior appointment, with the addition of peripheral polyneuropathy, which was possibly related to Claimant's diabetes. Dr. Reichhardt opined the EMG demonstrated frank denervation in the left S1 innervated muscles, as well as the lumbar paraspinals. Dr. Reichhardt noted this could be seen as lumbar radiculopathy, but did not meet the diagnostic criteria for lumbar radiculopathy.

20. Claimant was able to perform light duty tasks assigned by Employer after his injury. He cleaned the locker room and the cafeteria. Claimant testified he still had symptoms from his injury while doing this work.

21. A letter from Employer to Claimant, dated April 12, 2016 was admitted into evidence. The correspondence referenced Claimant's current restrictions consisting of: "maximum of 20 pounds for lifting, pushing and pulling; maximum of 10 pounds for repetitive lifting and carrying. Avoid prolonged and repetitive bending, twisting or stooping. May climb stairs occasionally". The ALJ noted these restrictions corresponded to the restrictions issued by Dr. Reichhardt. The letter gave Claimant notice that temporary assignments for all restricted duty jobs were limited to six months in duration. Further, if Claimant was unable to return to the active payroll in a regular full-time crewed position which matched his permanent restrictions, his employment would end.

22. Claimant returned to Dr. Smith on June 16, 2016. He reported his back pain was worse in the morning and experienced increased problems when bending, standing or walking more than 60 minutes and with prolonged sitting. On examination, Claimant exhibited no pain behaviors. Lumbar range of motion was restricted and painful at 15° of extension and 80° of forward flexion. Lateral motion was restricted in all planes. Claimant's reflexes were symmetric and equal at the biceps, triceps, patellas and Achilles.

23. Dr. Smith's diagnoses were: thoracic and lumbar pain, resolved; back contusion, improved; muscle spasm, resolved. Dr. Smith issued recommended activity restrictions, noting all of Claimant's work should be done in close to the body from knee to chest level. He was to avoid bending, twisting, stooping and reaching away from the body or above chest level. Claimant was to do no walking or standing more than 60 minutes without sitting for 45 minutes. Claimant's lifting was limited to 15 pounds or less, as was pushing and pulling. Claimant was not to perform bending, reaching, stooping or twisting. Dr. Smith confirmed Claimant was at MMI. The ALJ noted Dr. Smith consistently opined Claimant was restricted as to bending, reaching, stooping and twisting.

24. Claimant was evaluated by Dr. Reichhardt on September 9, 2016. At that time, tenderness to palpation of the lumbar spinewas found, with mild lumbar paraspinal muscle spasm was noted. Dr. Reichhardt's diagnosis was: lumbar contusion; DISH; possible lumbar radiculopathy; peripheral polyneuropathy and right knee pain. Dr. Reichhardt concluded Claimant was at MMI at that time and assigned a 17% whole person impairment rating. The ALJ concluded Dr. Reichhardt was of the opinion that the subject work injury was the cause of Claimant’s permanent medical impairment.

25. Dr. Reichhardt issued the following restrictions for Claimant: limit lifting, pushing, pulling and carrying to 20 pounds occasionally, 10 pounds frequently. Claimant was to perform no lifting or bending or twisting at the waist and limit bending and twisting at the waist on a rare basis, four times per hour, while not lifting. Dr.

Reichhardt also noted Claimant may require a restriction for stair climbing based on his knee condition, which was unrelated to the work injury. The ALJ concluded the restriction with regard to lifting, bending or twisting at the waist limited Claimant's ability to perform assembly type tasks.

26. On September 27, 2016, Claimant underwent a DIME, which was performed by Alicia Feldman, M.D. Claimant had subjective complaints of low back pain, right leg pain and left knee pain at the time. Dr. Feldman noted Claimant originally reported thoracic spine pain, however, that appeared to be resolved. Claimant had significant findings in his lumbar spine on the MRI scan, but Dr. Feldman opined these were all chronic and long-standing in nature, not related to work injury. Claimant had evidence of peripheral neuropathy on his electrodiagnostic exam, but no findings of radiculopathy and no nerve injury related to the work injury.

27. Dr. Feldman confirmed Claimant reached MMI and assigned an 18% whole person impairment rating. This included a loss of ROM totaling 13% in the lumbar spine, as well as a 5% impairment rating for six months of continued pain and rigidity. The ALJ concluded Dr. Feldman determined the subject work injury caused Claimant's permanent medical impairment.

28. Dr. Feldman concurred with Dr. Reichhardt's maintenance care recommendations. She also recommended a functional capacity evaluation to establish permanent work restrictions.

29. Claimant's permanent physical restrictions precluded his return to work in the position he held for Employer.

30. Ms. Pickett prepared a report of vocational assessment, dated March 20, 2017. In her report, Ms. Pickett noted Claimant did not know how to operate a computer or a smart phone. Ms. Pickett concluded Claimant did not have transferable skills outside of the meat industry. She stated he would be able to obtain entry-level jobs that fall into the light category work where he could meet the language barrier. She noted Dr. Reichhardt did not place work restrictions on him in terms of sitting, standing or walking.

31. Ms. Pickett opined Claimant may be able to perform production jobs in a manufacturing facility, as he had good hand dexterity and has been able to use tools throughout his work in the meatpacking industry. She found jobs were available in this category of work. Ms. Pickett stated Claimant should be able to work in a light janitorial position, such as cleaning offices. These jobs were within Claimant's work restrictions. Claimant could also potentially be a laundry attendant or work in a fast food restaurant in the kitchen setting or as a lobby attendant. Ms. Pickett also opined he would be able to work as a delivery driver for foods or as a lot attendant in a car dealership. There were jobs available within the light category. The ALJ was not persuaded that Claimant could perform all of the duties for those positions identified by Ms. Pickett, given his restrictions on bending/twisting/stooping and reaching away from the body.

32. Ms. Pickett concluded Claimant remained employable and his work-related injury placed him in to the light category of work. She believed he could earn wages in his local labor market.

33. Ms. Montoya prepared a report of vocational evaluation on March 22, 2017. She noted Claimant reported similar work activities for all of his employers, resulting in limited, if any, transferable skills. She noted the restrictions provided by Dr. Reichhardt and Dr. Smith were not consistent. Ms. Montoya opined that, in general, the limitations of Dr. Reichhardt would likely provide some limited return to work alternatives for Claimant, even though he was an unskilled worker of advanced age and Spanish-speaking, limited education. She stated Claimant may have difficulty performing some of the cleaning and preparations jobs, as the tasks typically performed within this range of work because of limitations in bending.

34. When considering the restrictions from Dr. Smith, Ms. Montoya stated Claimant was going to have a much more difficult time returning to work. Based on her vocational research in areas such as cleaning, food preparation and production, Ms. Montoya opined the physical limitations provided by Dr. Smith would eliminate Claimant's capacity to return to work within those areas.

35. Evidence of video surveillance of Claimant was admitted at hearing. This evidence was of Claimant's activities on April 2 and April 3, 2017.[5]

- On April 2, 2017 at 9:49 AM, Claimant lifted the hood and appeared to be pouring antifreeze from a yellow container into a blue van. He put the yellow container in a bag with his left hand.

- On April 3, 2017 at 8:21 AM, Claimant opened the passenger side door and cleans the window with a blue cloth. It was difficult to see, he appeared to go around to the other side and clean the driver's side window.

The ALJ found the activities depicted on the video were not dispositive as to whether Claimant could continually perform job duties which required him to lift 5 pounds with his right upper extremity. This video evidence was not conclusive as to whether Claimant could stand and/or walk for a period of longer than 60 minutes.

36. A letter from Employer (human resources department) to Claimant, dated April 13, 2017 was admitted into evidence. It listed Claimant's current restrictions as: lifting, carrying, pushing/pulling, repetitive motion restrictions, walking, standing, sitting or working close to body need to chest level; avoid bending/twisting/stooping/reaching away from the body or above level; no walking/standing greater than 60 minutes without sitting 45 minutes. The ALJ noted the upper extremity restrictions corresponded to the restrictions issued by Dr. Smith. This letter did not refer to a specific number of pounds for the lifting, carrying and pushing/pulling restriction. The letter requested medical

[5] Claimant confirmed it was his blue van that was depicted in the video.

documentation of Claimant's current condition and/or work restrictions on or before April 19, 2017. Claimant's employment would be terminated if he did not respond or if there were no available positions which he was able to perform within his current work restrictions.

37. Claimant did not return to work for Employer in a full-time crewed position after he reached MMI.

38. Claimant was evaluated by Dr. D'Angelo on May 30, 2017, at the request of Respondents. At that time, he was complaining of low back pain and right leg pain, as well as lack of strength in his leg. Dr. D'Angelo did not conduct range of motion measurements of Claimant's thoracic and lumbar spine. On ROM, Dr. D'Angelo noted excellent extension and flexion and full ROM with lateral flexion and twisting without any pain behaviors. Claimant's not work-related diagnoses included: diabetes; diabetic neuropathy; chronic alcoholism; hypertension; gastritis; osteoarthritis; degenerative spine disease; DISH. The diagnoses related to the work injury work were: lumbosacral contusion: at MMI; thoracic contusion: at MMI. Dr. D'Angelo opined Claimant's complaints were to degenerative spine disease and his underlying DISH.

39. Dr. D'Angelo noted she was at a loss from a physiological standpoint to explain Claimant's continued complaints of pain in view of benign lumbar spine examinations, which revealed no consistent objective findings of neurological deficits such as motor abnormalities. Given the mechanism of the of the injury, the lack of acute findings on EMG and MRI and lack of objective physical findings, Dr. D'Angelo could not understand the reason for the assignment of a permanent medical impairment rating and restrictions. The ALJ found this opinion to be less persuasive than the opinions offered by Dr. Reichhardt and Dr. Feldman; both of whom concluded Claimant sustained a permanent medical impairment related to the subject injury and had permanent physical restrictions.

40. Dr. D'Angelo testified as an expert in Occupational Medicine at the time of her deposition. She said Claimant moved fluidly during her examination and did not demonstrate distress and/or pain behaviors. She testified Claimant had a normal neurological examination and his activities depicted on the video were consistent with her findings on examination. Dr. D'Angelo said she could not causally link Claimant's back pain to the work injury. He had a prior history of leg pain and numbness prior to this injury, as well as degenerative changes to his spine.

41. Dr. D'Angelo reiterated her opinion that Claimant should not have any work restrictions. She also stated Claimant could perform the restrictions placed on him which were 10 pounds frequently, 20 pounds occasionally. Dr. D'Angelo said Claimant could lift occasionally 10 pounds from floor to waist and would not limit his bending and twisting. Dr. D'Angelo went on to testified that she saw no reason for reaching restrictions nor was there any reason for flexion, extension, twisting, stooping and squatting restrictions. The ALJ found Dr. D'Angelo was less persuasive than Dr. Smith, who evaluated Claimant on multiple occasions.

42. A Final Admission of Liability ("FAL") was filed on behalf of Respondents on July 12, 2017. The FAL admitted for the 18% medical impairment rating issued by Dr. Feldman. TTD benefits were paid through June 8, 2016. Respondents admitted to post-MMI care, as outlined Dr. Reichhardt's June 9, 2016 report.

43. On August 28, 2014, Dr. Reichhardt signed a note in which he deferred to Dr. Smith with regard to Claimant's restrictions.

44. On November 27, 2017, Dr. Smith testified as an expert in Occupational Medicine, which is the specialty in which she is board-certified. Dr. Smith testified when she initially evaluated Claimant on October 28, 2015, she issued restrictions of: no bending; carrying should be limited to 10 pounds; climbing and pulling should not be performed. Claimant was also instructed to alternate his positions frequently; work in close to the body; no repetitive bending, twisting, stooping.[6]

45. Dr. Smith modified Claimant's restrictions on November 18, 2015, increasing his lifting, carrying, pushing and pulling restrictions to 20 pounds. He could also occasionally climb stairs. These restrictions remained the same when Dr. Smith evaluated Claimant on March 16, April 19 and May 17, 2016. Dr. Smith testified that the restrictions for lifting, carrying, pushing and pulling remained the same. Also, Claimant had a reaching restriction with regard to working in close to the body at chest level above the shoulders or down to the floor. She said the reason for reaching restriction was that reaching in this way caused an arch to develop and put stress on the low back.[7]

46. Dr. Smith testified she reported a change in Claimant's restrictions on June 16, 2016. This was after he was placed at MMI and she had a conversation with him. Dr. Smith said her restrictions differed from Dr. Reichhardt's, whom Claimant told he could lift, push, pull 20 pounds. That was not what Claimant related to her and the inference was Dr. Smith simply adopted what Claimant told her. The ALJ was not persuaded by that testimony. Dr. Smith said Claimant would sometimes push and pull more than 20 pounds while he was in PT. She thought he should be able to lift, push, pull 20 pounds. When questioned whether the activity restrictions which said bending, reaching and stooping may not be performed, Dr. Smith stated this was simply carried through an electronic record. However, Dr. Smith stopped short of eliminating these restrictions and said this should be done no more than once every ten minutes. Dr. Smith also noted after looking at everything she would not normally recommend sitting for 45 minutes after an individual was walking and standing for 60 minutes. She amended this restriction to say the sitting requirement would be 10-15 minutes.

[6] Smith deposition, p. 6:2-7.

[7] Smith deposition, p. 18:2-22.

47. On cross-examination, Dr. Smith stated there were concerns about potential restrictions related to Claimant's bilateral knee pain complaints. She did not know if those complaints were from a work-related injury in August 2015.

48. Claimant testified he still has pain in his waist and right leg related to the injury. This pain comes and goes. The ALJ found Claimant to be a credible witness.

49. Claimant testified he has not worked since leaving Employer. He registered with the Colorado State Office of Rehabilitation. He also applied for work at King Food, dairies and restaurants, including fast food restaurants such as McDonald's. Claimant also applied for a job at Lowe's. He is helped by one of his daughters, who applies for him on the computer. No one has offered him a job.

50. Ms. Pickett testified at hearing as a vocational expert. She said if Claimant could not reach with his arms to work, except very close to his body, he was not employable.[8] Ms. Pickett believed Claimant was employable, based upon the restrictions issued by Dr. Reichardt. Ms. Pickett testified there were positions available within those restrictions. Ms. Pickett admitted she did not consider the restrictions issued by Dr. Branum or Dr. Wunder.

51. Following the hearing, Ms. Pickett was deposed on November 9, 2017. Ms. Pickett reiterated there were jobs available for Claimant within Claimant's commutable market based upon Dr. Reichardt's restrictions. She was advised of Dr. Smith's deposition and her testimony regarding Claimant's restrictions was summarized. The restrictions included: no lifting, pushing, pulling or carrying greater than 20 pounds (amended from 15 pounds). Claimant was also to work in close to the body from knee to chest, reaching approximately 12 to 18 inches from the body and no bending, twisting and stooping more often than 10 minutes.

52. Ms. Pickett identified potential jobs in the Greeley area, which she testified Claimant could perform within his restrictions. She performed this labor market research in August 2017. The jobs included:

- Assembling earrings (through an employment agency-Employment Solutions). This job required good manual dexterity. Spanish speaking was not a problem.

- Production operator (through Employment Solutions)-task included trimming plastics, which required reaching, but not extended reaching.

- Distortions Unlimited, a company which manufactured Halloween masks. This job involved trimming plastic from molded products with a utility knife.

[8] Hrg. Tr. p. 73:2-8; p. 73:16-20.

- ABM-various office cleaning positions. The job tasks depended on assignments, some only involved cleaning restrooms (cleaning mirrors, counters and toilets; emptying trash; sweeping and mopping floors). These positions required standing and walking and there was very little ability to sit for those positions. Ms. Pickett admitted Claimant was not capable of doing these jobs under Dr. Smith's restrictions, but could do some of those under Dr. Reichardt's restrictions.

- Laundry attendant for Embassy Suites. Ms. Pickett stated this position required 20 pounds of lifting and reaching within a dryer drum. She believed this was within the reaching restriction.

- Silver Mine Subs-Delivery Driver. Ms. Pickett said this job was within Dr. Smith's restrictions.

- Cintas-garment inspector. This job involved hanging garments to make sure these were clean and ready for packing and pick up. Ms. Pickett stated this job involved standing and walking, no sitting. She believed it fit within Dr. Smith's lifting and reaching restrictions.

53. On cross-examination, Ms. Pickett stated she was not aware Dr. Reichardt signed the note saying he deferred to Dr. Smith's restrictions. Ms. Pickett agreed some of the ABM cleaning jobs would not be consistent with Dr. Smith's restrictions. She agreed to the laundry attendant job might require Claimant to reach more than 18 inches in the dryer. Ms. Pickett agreed that she did not disclose her opinion in her written report that Claimant was permanently and totally disabled, if Dr. Smith's restrictions (at that time) were used. Ms. Pickett testified she was focused on Dr. Reichardt's restrictions when she did the labor market survey on August 24, 2017. She did not re-review Dr. Smith's restrictions.

54. Ms. Montoya testified as a vocational expert at hearing. Ms. Montoya testified the September 2015 injury was the reason Claimant lost his job. She agreed that if only Dr. Reichhardt's restrictions were used, there were light duty positions available for Claimant. Ms. Montoya opined Claimant would not be as competitive compared to the general labor market, given his age, limited education and inability to speak English.

55. Ms. Montoya testified she disagreed that Claimant could perform the tasks in some of the production positions, as these required twisting. These positions were similar to some of the positions in the meatpacking plants, including pick fat, pick lean, and pick bone. The ALJ credited this testimony, as well as inferring those assembly and production jobs which required twisting and bending were outside of Claimant's restrictions. Ms. Montoya noted there were many similarities to some of positions in the plant where Claimant worked and the light assembly positions proposed by Ms. Pickett. Ms. Montoya agreed with Ms. Pickett that Employer would be the most motivated to

accommodate an injured worker such as Claimant. Ms. Montoya opined that if restrictions given by Dr. Smith were used, Claimant was not employable.[9]

56. On cross-examination, Ms. Montoya stated she considered both what Claimant related as his physical restrictions, as well as the physician's opinions on the restrictions. She weighed the latter more heavily. Ms. Montoya testified Claimant had restrictions related to the left shoulder and lumbar spine, which were identified in the FCE dated March 8, 1999. Claimant's back issues did not affect his ability to do the job he was performing the time of the 2015 injury.

57. Ms. Montoya was deposed on January 11, 2018. Prior to the deposition, reviewed the depositions of Dr. Smith and Ms. Pickett. She also reviewed Ms. Pickett's notes.[10] Ms. Montoya reviewed specific jobs identified by Ms. Pickett as to whether these fell within the restrictions given by Dr. Smith. The potential jobs were as follows:

- For the earring assembly job, she was not able to provide an opinion, as was not able to locate this position.

- For the production operator position, this job was part of another job and required packaging, boxing and pulling molds; all of which were not within Claimant's restrictions. This was because of the standing, reaching and bending potential, as well as the fact that lifting ranged up to 30 pounds.

- Ms. Montoya stated the office cleaning position was not within Claimant's restrictions.

- With regard to the laundry attendant position, the reaching exceeded Dr. Smith's restrictions. Ms. Montoya contacted Embassy Suites and confirmed this job required standing for certain periods and there were no seated tasks. The job also required reaching in all directions, as well as kneeling, stooping and bending.

- The delivery driver position (Silver Mine Subs) required English-language ability, as well involving food preparation activity.

- For the garment inspector position, Ms. Montoya testified this job had reaching requirements for hanging. An individual needed to be able to perform repetitive motions over their entire shift, along with standing and walking, repeated bending, stretching, twisting and lifting.

[9] Hrg. Tr. p. 98:10-14.

[10] Claimant's counsel proffered these notes for admission during the deposition of Ms. Montoya. Respondents objected and the ALJ sustained the objection on the grounds that insufficient foundation was laid for the admission of the notes.

58. The ALJ was persuaded by Ms. Montoya's opinions that the potential jobs identified by Respondents' expert were either beyond Claimant's physical restrictions, not currently available, or ones for which he was not qualified. The ALJ found Ms. Montoya to be more credible than Ms. Pickett, as the specific jobs the latter identified did not have the complete descriptions of all the physical requirements.

59. Claimant's age, education and work experience were barriers to his re-employment and ability to earn wages

60. Claimant's restrictions, including 5-pound right-hand restriction, the lift, push, and pull restriction (either 15 or 20 pounds), the reaching restriction which required him to work close his body (no more than 18"), along with the bending, twisting and stooping restrictions precluded him from returning to labor market and earning wages.

61. Claimant met his burden of proof and established he is unable to earn wages in the same or similar employment.

62. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, there was extensive expert testimony presented by Claimant and Respondents. The determination of the permanent total disability benefits issue turned on the testimony of these experts.

Permanent Total Disability Benefits

To prove his claim that he is permanently and totally disabled, Claimant shouldered the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. §§ 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001).

The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The ability to earn wages inherently includes consideration of whether Claimant is capable of getting hired and sustaining employment. *Christie v. Coors Transportation Co.,* 933 P.2d 1330, 1335 (Colo. 1997). In weighing whether Claimant is able to earn any wages, the ALJ may consider various human factors, including Claimant's physical condition, mental ability, age, employment history, education, and availability of work that Claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (ICAO April 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether Claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995). In the case at bench, the ALJ determined Claimant met his burden of proof and established he was permanently and totally disabled as a result of his industrial injury.

As a starting point, the ALJ first considered Claimant's age, education and work experience to determine whether he satisfied his burden of proving he was entitled to PTD benefits. As found, Claimant was sixty-four years old and had limited education. (Findings of Fact 1-3). Claimant's employment over the last 30 years was in the meatpacking industry. (Findings of Fact 4). Both vocational experts agreed Claimant had, in general, a lack of transferable skills as a result of his work experience. (Findings of Fact 30 and 33). The ALJ concluded Claimant's age, education and work experience were barriers to his reemployment and ability to earn wages. (Findings of Fact 59).

Second, the ALJ considered Claimant's physical restrictions, which were the subject of a bona fide dispute, particularly whether Claimant could lift, push, pull and carry up to 20 versus 15 pounds occasionally and 10 pounds frequently. The ALJ found Claimant's restrictions provided by either Dr. Reichhardt or Dr. Smith precluded his return to work in the meatpacking industry. (Finding of Fact 29). As determined in Findings of Fact 8, 23-25, Claimant also had restrictions of bending and stooping. In this regard, Dr. Smith consistently restricted Claimant's bending, reaching and stooping while she was his ATP. (Findings of Fact 39). In addition to preventing Claimant's

return to work in the meatpacking industry, these restrictions limited Claimant's ability to perform the functions of those which required bending and stooping. (Finding of Fact 55). These restrictions limited Claimant's access to those jobs within the light job classification of the labor market that required bending and stooping, including some assembly positions.

The inquiry then turned to Claimant could lift, push, pull and carry up 15 pounds as opposed 20 pounds occasionally and 10 pounds frequently. At the time Claimant was placed at MMI, Dr. Smith issued restrictions which included: lifting limited to 15 pounds or less, as was pushing and pulling. (Finding of Fact 23). Dr. Reichhardt limited this aspect of Claimant's ability to lift up to 20 pounds. (Finding of Fact 25). However, then Dr. Reichhardt deferred to Dr. Smith's opinions with regard to Claimant's restrictions. (Finding of Fact 43). In her testimony, Dr. Smith equivocated somewhat, noting there were times when she observed Claimant lifting more than 20 pounds while doing PT. (Finding of Fact 46). She also believed Claimant was not required to rest for up to an hour after standing or walking, but could rest 10-15 minutes. In weighing this evidence, the ALJ determined that it was the combination of all of Claimant's restrictions, including 5-pound right-hand restriction, the lift, push, and pull restriction (either 15 or 20 pounds), the restriction form reaching away from his body, along with the bending and stooping restrictions which led to the conclusion that he could no longer earn wages. (Finding of Fact 60).

In this regard, the ALJ considered Respondents' argument that Dr. D'Angelo's opinions regarding Claimant's physical restrictions should be adopted. Dr. D'Angelo opined Claimant had no permanent restrictions as a result of the industrial injury. This ran counter to the opinions of Claimant's ATPs, as well as the DIME physician (Dr. Feldman). In this case, the ALJ determined the opinions of Dr. Reichhardt and Dr. Smith were more persuasive with regard to Claimant's restrictions. (Findings of Fact 23).

Third and finally, the ALJ weighed the testimony proffered by Claimant's and Respondents' experts. The ALJ was persuaded by Ms. Montoya's analysis of Claimant's restrictions and employability. The ALJ found Ms. Montoya's testimony was more persuasive than that offered by Ms. Pickett. (Findings of Fact 29 and 58). Based upon the testimony provided by Ms. Montoya, the ALJ determined he did not have the ability to earn wages in the same or similar employment.

The ALJ also reviewed the argument put forward by Respondents that Claimant still had access to the labor market and there were jobs available within his restrictions. Respondents also averred the video evidence showed Claimant could perform activities, including lifting more than 5 pounds with his right hand. As noted above, there was no evidence this restriction was ever lifted. (Finding of Fact 9). Further, the video evidence did not persuade the ALJ Claimant could consistently lift 5 pounds and perform job duties with the right upper extremity. (Finding of Fact 35).

As found, Claimant was able to work full time up to the September 25, 2015 injury. This work injury caused permanent restrictions, as well as a permanent medical

impairment. Claimant did not work after his termination from Employer, who utilized the restrictions issued by Claimant's ATPs. (Findings of Fact 21, 37 and 49). Under the "full responsibility rule, an employer takes a worker as he finds him, and cannot escape liability for the entire disability resulting from a compensable accident". See *Siegfried v. Industrial Commission,* 736 P.2d 1262, 1263 (Colo. App 1986) *[citing Colorado Fuel & Iron Corp. v. Industrial Commission,* 151 Colo. 18, 379 P.2d 153 (1962)].

The ALJ found Claimant's upper extremity and low back restrictions, as well as his activity restrictions limited his ability to earn wages. He also had restrictions related to a prior workers' compensation claim, along with non-occupational health conditions which limited him. The combination of all the conditions, including the subject injury which rendered him unable to earn wages.

In summary, the ALJ considered the totality of the circumstances regarding Claimant's work injury and its sequelae, as well as other relevant conditions. After applying the human factors to the case at bench, the Court found Claimant was unable to earn wages in his commutable labor market and thus, rendered permanently and totally disabled as a result of his industrial injury. *Weld County School Dist. Re-12 v. Bymer*, *supra,* 955 P.2d at 552-553. More particularly, the ALJ concluded as follows:

- Claimant worked for approximately 30 years in the meatpacking business. He had few transferable skills from this employment.

- Claimant is Spanish-speaking, with little formal education.

- Claimant had a work restriction of maximum push/pull of 5 pounds for the right arm from the 2005 injury. There was no evidence this restriction was ever lifted.

- Claimant was restricted from reaching away from his body as a result of the 2015 work injury.

- Claimant had permanent restrictions which included no repetitive bending, twisting, or stooping.

- Claimant sustained a permanent medical impairment as a result of the subject injury.

- Claimant has not worked since the termination of his employment with Employer.

- Claimant applied for positions at different employers, but has not been offered a job.

- Claimant continues to have persistent pain in his low back, which limits his activities.

Based upon the evidence presented in the case, Claimant is entitled to permanent total disability benefits, as he can longer earn wages in the same or similar employment. As found, Claimant receives regular social security retirement benefits to which Respondents are entitled to claim an offset.

ORDER

It is therefore ordered:

1. Respondents shall pay PTD benefits to Claimant beginning on September 9, 2016. Respondents are entitled to a credit for PPD benefits paid.

2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. Respondents are entitled to an offset for Claimant's receipt of Social Security retirement benefits. Counsel for the parties are ordered to confer regarding the amount of said offset, as well as the date on which said offset begins. Either Claimant or Respondents may file and AFH, if no agreement is reached.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 4, 2018

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-026-591-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer, Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 18, 2018 in Denver, Colorado. The hearing was digitally recorded (reference 9/28/18, Courtroom 3, beginning at 1:30 PM, and ending at 2:35 PM).

Claimant's Exhibits were admitted into evidence as Exhibits 1 through 7 (hereinafter "Claimant's Ex." followed by a page number), without objection. Respondent's Exhibits were admitted into evidence as Exhibits A through I (hereinafter "Respondents' Ex." followed by a page number).

ISSUES

The issues to be determined by this decision concern (1) Claimant's average weekly wage (AWW) at the time of injury for the purpose of calculating temporary total disability (TTD) benefits from September 26, 2016 (the last day that Claimant worked), and continuing, and (2) whether or not the Employer should be required to reimburse

the Claimant for the full amount of a year-long membership to Glenwood Hot Springs ("GHS") prior to proof of its use.

The Claimant bears the burden of proof on all issues by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the time of the Claimant's admitted injury, he worked as a delivery driver for the Employer. His duties as a delivery driver were not subject to seasonal variation. There was no persuasive evidence that there were spikes in the Claimant's earnings throughout the year.

2. Respondents admitted that the Claimant suffered a compensable injury to his mid-back on September 22, 2016, while loading bibs in the back room of a gas station & convenience store.

3. The Respondents ultimately filed a Corrected General Admission of Liability (GAL), dated January 26, 2018, admitting for medical benefits; an AWW of $1,255.62; and, TTD benefits of $837.08 per week from September 23, 2016 through "ongoing."

4. It is undisputed that the Claimant has been unable to work since the injury occurred, and that he has been following the course of treatment prescribed by the authorized treating physician (ATP).

Average Weekly Wage (AWW)

4. The Respondents' Corrected GAL admits for an AWW of $1,255.62 (Respondents' Ex. A, p. 1). The Claimant disputes this admission as not accurately reflecting his temporary loss of earnings.

5. At the time of the admitted injury, the Claimant's weekly wage was composed of a base pay rate, an overtime pay rate, and a commission fee (Claimant's Ex. 3, p. 9).

6. At the hearing, Respondents argued that the Claimant's AWW for the purpose of calculating temporary total disability benefits should be determined solely by

the Claimant's base wage on the date of injury. The ALJ finds that the Claimant's work is **not** seasonal nor are there any significant spikes in his yearly earnings.

7. The weekly wage that the Claimant earned at the time of the admitted injury, encompassed a base pay rate, an overtime pay rate, and a commission fee, all of which fairly reflected the Claimant's AWW.

8. Based on a review of Employer records for the nine months encompassed by January 1, 2016 through September 30, 2016, both dates inclusive, a total of 274 days, the Claimant's gross earnings were $50,215.50. Divided by 274 days, a daily rate of $183.27 is reached. Multiplied by 7 days, a weekly rate of $1,282.88 is reached. This exceeds the admitted AWW by $27.26 per week, the Claimant has proven, by a preponderance of evidence, and the ALJ finds that his average AWW is $1,282.88, thus, yielding a TTD rate of $855.02 per week, or $122.15 (rounded) per day; and that Employer has underpaid the Claimant by $17.95 per week, or $2.56 per day. The Claimant is entitled to this differential for every day encompassed by the Corrected GAL from September 26, 2016 through September 18, 2018, the hearing date, both dates inclusive, a total of 723 days. The aggregate amount of the differential equals $1,852.95.

GHS Membership

9. The Claimant has been in constant pain since his injury happened (Respondents' Ex. C).

10. To help remedy this pain, Bruce D. Lippman, M.D., who specializes in Family Medicine [the Claimant's authorized treating physician (ATP)], recommended that the Claimant engage in aqua therapy at a hot springs pool (Respondents' Ex. C, pp. 16-17, 22).

11. The Claimant gained a significant amount of weight after sustaining the admitted injury (Respondents' Ex. C, p. 26).

12. Wade Ceola, M.D., a Neurosurgeon, indicated that Claimant "should go to the gym 4 or 5 days a week" (Respondents' Ex. C, p. 26; Ex. H, p. 70). Dr. Ceola refused further surgery until the Claimant lost 100 pounds (Respondents' Ex. C, p. 25; Ex. H, p. 87; and, Ex. I, p. 126).

13. Dr. Lippman wrote a series of prescriptions to provide Claimant access to both a gym and aqua therapy at a hot springs pool (Respondents' Ex. C, pp.17, 22; Claimant's Ex., p. 45; Ex. 5, p. 49).

14. The first two prescriptions, dated February 7, 2018 and March 7, 2018, declare that the prescription is to last three months. (Claimant's Ex. 5, p. 48).

15. The most recent prescription, dated April 4, 2018, does not provide an end date. It states Claimant was "[r]eferred to hot springs pool for therapy. Need to use the gym and hot pool in the same location" (Claimant's Exhibit 5, p. 49).

16. Dr. Lippman felt that the initial prescription was not long enough, stating it was reasonable to extend it "[three] additional months, maybe six additional months." (Respondents' Ex. H, p. 92).

17. A location that possesses both a gym and a hot spring is necessary because prolonged driving causes the Claimant back pain (Claimant's Ex. C, pp. 29 and 32).

18. The ALJ infers and finds that, based on varying lengths of time specified in prescriptions, the Claimant mistakenly believed that the gym and hot pool prescription would extend for one-year.

18. Acting in good faith and in furtherance of his treatment to accelerate recovery, the Claimant purchased a year-long membership at GHS on June 4, 2018 for a total of $1,400.00 (Respondents' Ex. F, p. 53; Ex. 6, p. 50).

19. The Claimant has regularly used his membership at GHS for the months of June, July, and August 2018 (Claimant's Ex. 7, pp. 52 - 56).

20. As of the hearing, the Respondents have reimbursed the Claimant for $350.00 of the total amount of the gym membership, presumably based on earlier prescriptions.

21. The Respondents expressed concern that the Claimant would not use his gym pass on a regular basis, and therefore, that it would be a waste of money (Respondents' Ex. H, pp. 94-95).

22. The ALJ infers and finds that the Respondents' position concerning reimbursement of the full $1,400 is unclear other than Respondents indicating they would reimburse every 3 months for 3 months if the pool and gym membership continued to be medically warranted. In the meantime, the Claimant must make his credit card payments, with interest.

23. At the hearing on September 18, 2018, and at Dr. Lippman's deposition on August 9, 2018, Respondents stated that they were concerned about wasting money on an underutilized gym pass (Respondents' Ex. H, pp. 94-95). It is ambiguous how long the prescription was to last for, and how long access to GHS would be medically necessary for Claimant's recovery.

24. Two assertions were made at hearing, based upon the factual record. First, that GHS was the only location close to Claimant that had both a hot spring for aqua therapy and a gym where Claimant could pursue his weight loss goals. Second, that GHS required the purchase of a year-long membership. Since the Claimant has already been paid $350.00, then, in equity and good conscience, he should be reimbursed the remaining balance of $1,050.00, which he advanced. He relied on his imperfect understanding of the ambiguous and changing recommendations made by Dr. Lippman when he purchased the year-long membership at GHS.

Ultimate Findings

25. As found, the Claimant's correct AWW is $1,282.88. This exceeds the admitted AWW by $27.26 per week, which yields a TTD rate of $855.02 per week, or $122.15 (rounded) per day. Respondents underpaid the Claimant by $17.95 per week, or $2.56 per day. The Claimant is entitled to this differential for every day encompassed by the Corrected GAL from September 26, 2016 through September 18, 2018, the hearing date, both dates inclusive, a total of 723 days. The aggregate amount of the differential equals $1,852.95.

26. As found herein above, the Claimant relied on the sometimes ambiguous recommendations made by Dr. Lippman when purchasing the year-long membership at GHS. He acted in good faith to advance his medical treatment and ultimate recovery. In equity and good conscience, he should not be left "holding the bag."

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Substantial Evidence

a. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions

in the evidence. See *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice to accept the evidence offered regarding the wage earned by Claimant for nine months preceding the admitted injury at his job at the time of the injury, and that the Claimant's job was of a non-seasonal nature; and that the pre-payment of the Claimant's year-long membership was made in good faith and it is reasonably necessary to cure and relieve the effects of the Claimant's admitted injuries. The ALJ rejects any evidence to the contrary.

Average Weekly Wage

b. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, the Claimant has lost 100% of his wages since September 26, 2016. *See also Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, the Claimant's correct AWW is $1,282.88, thus the Claimant's average daily wage is $183.27 (rounded), which figure, multiplied by seven, yields the AWW of $1,282.88 (rounded). Based on the AWW of $1,282.88, Claimant's temporary TTD rate is $855.25. Since the indemnity admissions in the Corrected GAL, Respondents have been paying Claimant $837.08 weekly. Claimant has been underpaid in the amount of $18.17 per week, or $2.59 per day, in the aggregate total amount of $1,882.93.

GHS Membership

d. Under the Workers' Compensation Act, "[e]very employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment . . . as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." § 8-42-101(1)(a), C.R.S. As found, Dr. Lippman's conclusion was that access to a location with both a gym and a hot spring was reasonably needed at the time he wrote the most recent prescription on April 4, 2018, and GHS provided access to both of these facilities. As ultimately found, access to GHS was recommended by Dr. Lippman for a period of up to nine months at the time he made his recommendation, and the Claimant reasonably relied on these assertions—in good faith when he prepaid $1,400 for a year-long membership. It would be fundamentally unfair to require the Claimant to absorb the bill for his treatment. The treatment as found, is reasonably needed. In equity and good conscience, the Respondents should reimburse Claimant the full amount of the year-long membership

e. The Claimant should provide two things to the Respondents in order to verify that this treatment is reasonably needed for the full duration of the membership. First, evidence of his regular attendance at GHS in the same or a substantially similar

manner as he has already done, for the remaining duration of the membership, should be provided to the Respondents. Claimant should provide evidence that the final three months of his membership are reasonably needed to relieve him from the effects of his injury in the same manner as he has already done. The Claimant should have until March 8, 2019 to gather the required documentation. Failure to timely provide the required documentation could be deemed a violation of this order.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an occupational disease, the date of last injurious exposure, and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P2d 792 (1979). *People v. M.A.,* 104 P.3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on the AWW of $1,282.88; underpayment of average weekly wage by Respondents to Claimant in the total amount of $1,882.93 for the period from September 26, 2016 through September 18, 2018, inclusive; and, Claimant has sustained his burden of showing that his year-long membership to GHS is reasonably needed to relieve him from the effects of his injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents are liable for underpayment to the Claimant of temporary total disability benefits of $18.17 per week, or $2.59 per day, from the September 26, 2016, through September 18, 2018, both dates inclusive, a total of 727 days, in the aggregate amount of $1,882.93, which is payable retroactively and forthwith, From September 18, 2018, and continuing as provided by law, Respondents shall pay the Claimant $855.25 per week in temporary total disability benefits until and unless modification thereof is warranted by law.

B. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

C. As modified by this decision, the Corrected General Admission of Liability, dated January 26, 2018, shall remain in full force and effect.

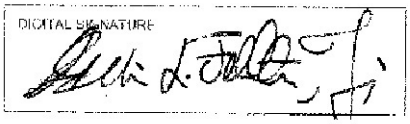
D. In addition to medical benefits admitted and paid, Respondents shall reimburse the Claimant in the amount of $1,050.00 for the year-long membership to GHS.

E. The Claimant shall provide Respondents with evidence of regular attendance at GHS for the prior six months by March 8, 2019, and again three months thereafter.

F. The Claimant shall provide Respondents with an authorized treating physician's prescription providing that the final three months of his gym membership is reasonably necessary to relieve him from the effects of his admitted injury by March 8, 2019.

G. Any and all issues not determined herein are reserved for future decision.

DATED this 9th day of October, 2018



EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a compensable injury to his right knee on January 22, 2018?

- If Claimant proved a compensable injury, did he prove the treatment he received through Colorado Occupational Medicine Partners was reasonably necessary to cure and relieve the effects of the injury?

STIPULATIONS

If the claim is compensable, the parties agreed Colorado Occupational Medicine Partners is the authorized provider. The parties reserved the issues of temporary disability benefits.

FINDINGS OF FACT

1. Claimant has worked for Employer as an overnight stocker since November 2007. The job is physically demanding, involving tasks such as unloading vehicles and stocking product. Claimant worked primarily in the meat department and frequently moved heavy pallets of frozen meat.

2. At approximately 2:30 AM on January 22, 2018, Claimant was using a manual pallet jack to move approximately 1,000 pounds of frozen product. He was pulling the pallet jack and pivoted on his right leg when he felt a "pop" in his right knee. He felt a "little bit" of pain in the right knee but was able to finish his shift. He did not report the incident because he did not think it was a serious issue that would require any treatment. His shift ended at approximately 6:30 AM, and Claimant went to his second job as an appliance "customizer" for Whirlpool. No incident occurred at Whirlpool that could have injured his right knee.

3. During that day, the pain in Claimant's knee increased significantly, to the point he had difficulty walking. He reported the injury to his foreman, Joseph, at the start of his next shift. Claimant completed an incident report describing the injury as:

> Moving product from meat cutting room to the floor with pallet jack and felt a tweak in my right knee but kept on working. I didn't think much about it. It wasn't until I got off work that I noticed wasn't able to stand correctly. I wasn't able to put full weight on my right knee.

4. Employer referred Claimant to its designated provider, Colorado Occupational Medicine Partners ("COMP"). Claimant saw Dr. Lugliani at COMP on January 23, 2018. Claimant explained to Dr. Lugliani, "he was pulling some product on a pallet. As he did so, he believes he might have twisted and felt pain in his right knee.

Since then, he has had some stiffness and difficulty with range of motion and pain with weightbearing."

5. Claimant has a history of right knee problems dating to an occupational injury at Penske in 2016. He received conservative treatment for that injury through Concentra. A right knee MRI on August 15, 2016 showed a mild impaction fracture at the medial femoral condyle, significant degenerative changes, and a complete root tear of the posterior horn of the medial meniscus. He saw an orthopedic surgeon, Dr. Cary Motz, who opined surgery would not resolve his symptoms. Dr. Motz gave Claimant a cortisone injection, which was very helpful. PT records show steady improvement. Concentra released Claimant at MMI with no impairment and no restrictions on October 20, 2016.

6. On June 7, 2017, Claimant saw his PCP for right knee pain and swelling. This was a continuation of the prior issues, with no new injury. Claimant was diagnosed with mild to moderate osteoarthritis of the right knee with a posterior loose body. He was referred for an orthopedic evaluation but did not follow through with it. At hearing, Claimant testified the pain and swelling improved after approximately three weeks so he did not feel he needed further evaluation or treatment.

7. There is no documentation or other persuasive evidence of further right knee treatment until the January 2018 incident. There is no persuasive evidence the knee interfered with Claimant's ability to perform his physically demanding job, or limited him in any other respect between October 2016 and January 2018.

8. Claimant told Dr. Lugliani about the prior injury at the initial visit:

> He adds that he did have a previous work injury to his right knee back in July 2016 . . . . He states that he did undergo an MRI scan of the right knee in this did show a meniscus tear. However, he improved with physical therapy and did not require surgery and was eventually placed at MMI without an impairment rating. He states he has not had any problems with that right knee until yesterday.

9. Physical examination showed tenderness along the anteromedial joint line and edema. Dr. Lugliani opined the "objective findings appear consistent with a work-related mechanism of injury." He requested Claimant's prior medical records, including the previous MRI. He referred Claimant to PT since he had "responded well" to therapy in the past. Dr. Lugliani imposed work restrictions of maximum 10 pounds lifting, and no crawling, kneeling, squatting, or climbing.

10. On February 21, 2018, Dr. Lugliani recommended a right knee MRI "to assess if there is progression of disease. If there is, I believe this is work-related. If there is no change, and the patient will be referred back to his PCP for further evaluation, management, and treatment."

11. Claimant had the MRI on April 20, 2018. It showed a macerated and displaced medial meniscal tear with almost complete disruption of the posterior root ligament, and high-grade degenerative changes in the medial compartment.

12. Claimant saw Dr. Wallace Larson for an IME at Respondents' request on May 30, 2018. Dr. Larson reviewed both MRIs and saw no acute changes or evidence of recent trauma. He noted "there does appear to be some progression of the degenerative condition, which is to be expected." He opined the mechanism of injury Claimant described would not cause or aggravate a torn meniscus. He agreed with Dr. Motz that meniscal surgery was not indicated, and concluded "it is likely the patient will need a total knee arthroplasty but this is not an occupationally related surgical indication."

13. Dr. Larson testified in a deposition on June 26, 2018 consistent with the opinions expressed in his IME report. He opined Claimant's symptoms were due to the natural progression of his underlying degenerative conditions, without contribution from the incident at work. He saw no evidence the accident aggravated or accelerated the underlying osteoarthritis or meniscal tear.

14. Claimant saw Dr. Timothy Hall for an IME at his counsel's request on July 20, 2018. Dr. Hall acknowledged Claimant's preinjury history, but opined the January 22 incident aggravated Claimant's symptoms and triggered the need for treatment. He thought the conservative care recommended by Dr. Lugliani was appropriate. Dr. Hall agreed the pre-existing degenerative changes "may be the source of his symptoms" but opined "they will need to be addressed in order to return [Claimant] to the comfort and functional level he enjoyed prior to this event." Dr. Hall thought the discussion regarding total knee arthroplasty was "premature" pending Claimant's response to conservative measures. He concluded "what we are treating here are symptoms that are reasonable, consistent with the mechanism of injury, and reported on a timely basis."

15. Dr. Larson testified in a post-hearing deposition on September 4, 2018. He disagreed with Dr. Hall and maintained his previously expressed opinion that Claimant's condition was simply a manifestation of a pre-existing degenerative condition.

16. Dr. Hall's opinions regarding causation and symptomatic aggravation causing a need for treatment are more persuasive than Dr. Larsen' opinions to the contrary.

17. Claimant's testimony regarding the accident and subsequent development and progression of symptoms is credible.

18. Claimant proved by a preponderance of the evidence he suffered a compensable aggravation of his pre-existing right knee condition on January 22, 2018.

19. Claimant proved the treatment he received at Colorado Occupational Medicine Partners and the April 20, 2018 MRI were reasonably necessary to cure and relieve the effects of his compensable knee injury.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must prove an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201.

If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere the fact that an incident at work causes symptoms does not automatically establish compensability. Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

A compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000). Even a minor "strain" can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment. The ICAO's decision in *Garcia v. Express Personnel*, *supra*, is instructive regarding the minimal extent of an injury that can satisfy the basic threshold requirement of compensability. In *Garcia*, the claimant felt pain in her abdomen and hip while lifting a piece of glass at work. The employer referred the claimant to Dr. Caughfield, who diagnosed a lumbar strain, but opined she had already reached MMI. The ALJ found that the claimant suffered a "minor back sprain," but also found the sprain had "resolved" within five days of the incident. The ALJ denied the claim on the theory that the claimant suffered no "injury." The ICAO reversed and held that the claimant had established a compensable injury as a matter of law:

> Where pain triggers the claimant's need for medical treatment, the claimant has established a compensable injury if the industrial injury is the cause of the pain. The term medical treatment includes diagnostic procedures required to ascertain the extent of the industrial injury.

> Here, the ALJ found there was an industrial accident which caused a minor lumbar strain. Further, the ALJ determined that when the injury was reported to the employer, the employer offered the claimant medical services from Dr. Caughfield, which the claimant accepted. Although Dr. Caughfield placed the claimant at MMI based upon his [ ] examination, the ALJ found with record support that Dr. Caughfield diagnosed a lumbar strain. Thus, the ALJ's findings compel the conclusion the claimant established a compensable injury which entitled her to an award of medical benefits. (Citations omitted).

As found, Claimant proved he suffered a compensable injury to his right knee on January 22, 2018 while moving a heavy pallet. The accident proximately caused a need for evaluation, diagnostic imaging, and conservative care. Claimant's description of the incident has been consistent throughout the medical records and in testimony. Although Claimant has a well-documented history of right knee problems, including a pre-existing torn meniscus, the symptoms were relatively quiescent immediately before the accident in January 2018. Claimant was last evaluated for right knee pain in June 2017, six months before the accident. He chose not to pursue further treatment at that time, which supports his testimony the symptoms had improved. Claimant worked two jobs with no apparent difficulty or limitation, at least one of which was physically demanding. The January 22, 2018 work accident significantly flared his pain and he reasonably requested treatment. Employer obliged the request and referred Claimant to its designated provider. At the initial evaluation with Dr. Lugliani, Claimant was forthcoming about the pre-existing condition. Dr. Lugliani noted edema in the knee and opined the objective findings were consistent with a work-related mechanism of injury. Dr. Lugliani recommended physical therapy to bring Claimant's symptomatology back to baseline. He subsequently ordered an MRI "to assess if there is progression of disease" and delineate the next steps in treatment. These facts are sufficient to cross the threshold for a compensable injury.[1]

B. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, the treatment Claimant received through COMP was reasonably necessary and proximately caused by the work-related aggravation. Dr. Lugliani reasonably recommended therapy since it had helped claimant resolve his prior knee problems without surgery. The April 20, 2018 MRI was reasonably necessary to investigate whether the incident had caused any structural change within Claimant's knee, and help Dr. Lugliani determine the appropriate course of care.

[1] The more challenging question would be: if surgery were recommended, would it be reasonably necessary and causally related to the compensable injury? But at present, no ATP has recommended surgery, Claimant is not requesting surgery, and that issue can be left for another day.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right knee injury on January 22, 2018 is compensable.

2. Respondent shall provide all reasonably necessary treatment from authorized providers to cure and relieve the effects of the industrial injury, including, but not limited to, evaluation and treatment at Colorado Occupational Medicine Partners, and the April 20, 2018 right knee MRI.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 5, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether the respondent has demonstrated by a preponderance of the evidence that on July 22, 2017, the claimant was not an employee of the employer, but rather an uncompensated volunteer.

- If the claimant is deemed an employee of the employer, whether the claimant has demonstrated by a preponderance of the evidence that she sustained an injury arising out of and in the course and scope of her employment with the respondent on July 22, 2017.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that medical treatment she received was reasonable and necessary to cure and relieve her from the effects of the injury.

- If the claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that the medical treatment she received was authorized.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that penalties shall be assessed pursuant to Section 8-43-408, C.R.S. for the employer's alleged failure to obtain and maintain worker's compensation insurance.

- If the claimant proves a compensable injury, whether the respondent has demonstrated by a preponderance of the evidence that the respondent is entitled to a statutory offset for the claimant's receipt of unemployment insurance benefits (UIB).

STIPULATION

- At hearing the parties agreed that if the claim is found compensable they will work to reach a stipulation regarding the claimant's average weekly wage (AWW).

FINDINGS OF FACT

Based upon the evidence and testimony presented at hearing, the ALJ makes the following Findings of Fact:

1. The respondent operates a towing business. Insurance companies and individual customers contact the respondent to request towing services. The respondent owns more than ten tow trucks.

2. The claimant met the respondent in June 2017 when the claimant was planning to move from the Denver, Colorado area to the Rifle, Colorado area. The claimant has prior experience as a commercial truck driver and holds a commercial driver's license (CDL).

3. The claimant completed an employment application for the respondent. In addition, the claimant submitted to a urinalysis at the direction of the respondent. Thereafter, the respondent offered the claimant a position driving a tow truck. The claimant accepted the respondent's offer of employment and began operating a tow truck for the respondent.

4. Mr. Adams testified that the claimant was not his employee, but an uncompensated "volunteer". Mr. Adams further testified that he agreed to take the claimant on as a volunteer to teach her the business so that the claimant could start her own towing business in Hotchkiss, Colorado.

5. The ALJ is persuaded by the claimant's testimony that she had no intention of starting her own towing business in Hotchkiss.[1] The claimant has a brother that lives in Hotchkiss, but she was not planning to move there in June 2017.

6. The ALJ is not persuaded by Mr. Adams' testimony that the claimant provided tow truck driving services as an uncompensated volunteer. On the contrary, it is clear from the claimant's testimony that she was hired by Mr. Adams to drive a tow truck and she was paid in cash for her services. The respondent paid all of his tow truck drivers in cash. The claimant credibly testified that she was paid an average of $500.00 per week while employed by the respondent.

7. The parties provided extensive testimony regarding the process used by the respondent to assign drivers to complete tows; what paperwork is completed; and how drivers are paid. Based upon that testimony the ALJ finds the following processes were followed. Mr. Adams would receive communications from insurance companies, dispatch companies, and individuals requesting services. These services included

[1] The ALJ notes that any such business would quite likely be in direct competition with the respondent. The ALJ finds it unconvincing that the respondent would agree to "teach [the claimant] the business" knowing that any such business would be a competitor for his business.

towing, tire changes, and unlocking vehicles. Based upon the service requested and the location of his drivers, Mr. Adams would assign a driver to complete the requested service. There is no persuasive evidence on the record to indicate that the claimant handled locked out vehicles or tire changes.

8. At the end of each week, Mr. Adams would collect the various service orders and organize them by the driver who completed the work. Each driver would then receive their specific packet of paperwork to review and complete. Once completed, the paperwork was returned to Mr. Adams. At that time, Mr. Adams would calculate the wages owed each driver and pay them in cash. After paying the drivers, Mr. Adams would then forward the completed paperwork to Ms. Hall and/or Ms. Adams for purposes of billing the respondent's customers.

9. The claimant received and returned paperwork and was paid in cash as described above.

10. Mr. Adams testified that in July 2017 his company did not carry workers' compensation insurance. Instead, his company had coverage that he had been advised "was the same" as workers' compensation insurance. Mr. Adams further testified that the claimant was not covered by his company's insurance because she was a volunteer tow truck driver.

11. On July 22, 2017, Mr. Adams assigned the claimant to tow a Ford F250 pickup truck in Rifle, Colorado. While loading the F250 onto her assigned tow truck, the claimant was lying on the ground attaching the safety chains as she had been trained. At that time, the winch on the tow truck released and caused the truck to roll back. As the claimant was underneath the truck when this occurred, the rear left tire of the F250 rolled on the claimant's right arm. The claimant was able to remove her arm from under the tire. However, the truck rolled a second time and the tire was on the claimant's chest. The claimant was able to extract herself from out from under the truck and called for help. Bystanders assisted the claimant in calling Mr. Adams and emergency services.

12. The claimant was transported by ambulance to Vail Valley Hospital. While at Valley View Hospital the claimant underwent various tests and imaging including: x-rays of her right humerus, pelvis, and chest; a CT angiogram of her chest, abdomen, and pelvis; an abdominal ultrasound; and an echocardiogram. The claimant was diagnosed with a laceration to her right arm; fractures on her 2, 3, 4, 5, 6 and 7 ribs; a pulmonary contusion, a small pneumothorax; and a cardiac contusion. The claimant was administered oxygen because of the damage to her lungs. The claimant's hospital stay lasted approximately six days.

13. Thereafter, the claimant received treatment from Dr. Dennis Eicher with New Castle Family Heath. The claimant first treated with Dennis Eicher on July 31, 2017. On that date, Dr. Eicher noted that the claimant had been diagnosed with multiple rib fractures, a contused lung, a contused heart, and an abrasion on her right arm.

14. On September 8, 2017, the claimant returned to Dr. Eicher who noted decreased range of motion in the claimant's right shoulder and deformity of the inner aspect of the forearm by the medial elbow. At that time, Dr. Eicher recommended that the claimant undergo physical therapy. However, the medical record of that date indicates that the claimant declined that treatment for financial reasons. As a result, Dr. Eicher instructed the claimant on generalized shoulder exercises.

15. The medical records entered into evidence indicate that Dr. Eicher cleared the claimant to return to work on September 11, 2017. However, the employer's records indicate that the claimant completed a tow on September 9, 2017. The ALJ finds that this was the claimant's first day back to work after her injury. From that date, the claimant continued to work for and be paid by the respondent in the same manner as she had prior to the July 22, 2017 injury.

16. The claimant completed tows for the employer from September 9, 2017 through October 21, 2017. After October 21, 2017, the claimant stopped responding to text messages from Mr. Adams asking her to complete tows. The claimant testified that she quit her employment when she did because of ongoing pain symptoms. In addition, the claimant testified that she could no longer perform her job duties because she felt afraid when walking behind a tow truck. The claimant testified that after she quit her position she moved to Hotchkiss.

17. The claimant testified that she applied for and received unemployment insurance benefits from October 2017 through May 2018. The claimant also testified that she received a total of $13,732.00 in unemployment insurance benefits. The claimant's unemployment claim was made against her prior employer, Calabrese Trucking, and not against the respondent.

18. Text messages entered into evidence demonstrate that the respondent regularly dispatched the claimant to complete tows. The text messages also include communication regarding the claimant returning to work after her injury because her finances were "getting very low". Also contained in these text messages is communication from Mr. Adams to the claimant regarding completing the claimant's "pay". The ALJ is not persuaded by Mr. Adams' testimony that when he texted "pay" to the claimant he actually meant "paperwork".

19. The claimant testified that she has incurred more than $100,000.00 in medical bills related to the July 22, 2017 injury. Records entered into evidence indicate that the actual cost of medical treatment incurred by the claimant as of the date of hearing totals $100.116.71.[2]

20. The ALJ credits the claimant's testimony over the conflicting testimony of Mr. Adams and finds that the claimant has demonstrated that it is more likely than not that she was an employee of the respondent. The claimant was hired and paid to operate the employer's tow truck. The claimant was not working as a "volunteer".

21. The ALJ credits the medical records and the testimony of the claimant and finds that the claimant was injured while operating a tow truck for the respondent. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that she suffered an injury that arose out of and in the course and scope of her employment with the respondent.

22. There is no persuasive evidence in the record to indicate that the respondent provided the claimant with a list of designated medical providers, upon learning of the claimant's work injury. Therefore, the ALJ finds that the claimant has shown that it is more likely than not that the choice of physician passed to her.

23. The ALJ credits the medical records and the testimony of the claimant and finds that the claimant has shown that it is more likely than not that the medical treatment she has received since the work injury is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

24. The ALJ credits the medical bills entered into evidence and the claimant's testimony and finds that the claimant has demonstrated that she has accrued medical bills totaling $100.116.71.

25. The ALJ credits the medical records and the testimony of the claimant and finds that the claimant has shown that it is more likely than not that she was unable to earn wages because of her work injury from July 22, 2017 until September 9, 2017.

26. The ALJ credits the claimant's testimony and finds that she stopped accepting work from Mr. Adams after October 21, 2017. The ALJ is not persuaded that the claimant was physically or emotionally prevented from working and earning wages after October 21, 2017. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she was unable to earn wages after October 21, 2017. On the contrary, it is clear from the claimant's testimony that she chose to stop working for the employer to move to Hotchkiss, Colorado.

[2] This total was calculated from the following: Vail Valley Hospital $94,324.34; Delta County Memorial Hospital $1,397.92; Mountain Radiology $2,273.20; City of Glenwood Springs $1,041.20; Areo Care $90.59; New Castle Family Health $871.00; prescriptions $118.46.

27. The ALJ credits the claimant's testimony that she received unemployment insurance benefits from October 2017 through May 2018. However, the ALJ finds that the respondent's request for an offset due to the claimant's receipt of unemployment insurance benefits is moot because the claimant did not suffer a wage loss related to her work injury during the same time she was receiving unemployment insurance benefits.

28. The ALJ credits the testimony Mr. Adams that he and his company did not have workers' compensation insurance coverage at the time of the claimant's July 22, 2017 injury. In addition, the insurance coverage the employer did have on July 22, 2017 did not cover the claimant.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (the Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation. . . under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

4. Under Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an

independent trade, occupation, profession, or business related to the service performed."

5. As found, the claimant provided services to the respondent and was paid for her services.[3] Therefore, the ALJ concludes that the claimant was an employee of the respondent. As found, the claimant's testimony is credible and persuasive.

6. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

7. As found, the claimant has demonstrated by a preponderance of the evidence that she suffered an injury that arose out of and in the course and scope of her employment with the respondent. As found, the claimant's testimony and the medical records are credible and persuasive.

8. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

9. There is no persuasive evidence in the record to indicate that the respondent provided the claimant with a list of designated medical providers, upon learning of the claimant's work injury. In the absence of a selection of physician by the respondent the claimant has demonstrated by a preponderance of the evidence that

[3] Even if the ALJ were to entertain the respondent's assertion that the claimant was an unpaid volunteer who agreed to operate a tow truck in exchange for training and experience but no pay, the ALJ concludes that the claimant would still be an employee under the Act. The ALJ reasons that even in the unpersuasive scenario purported by the respondent, the claimant was still compensated by the respondent in the form of training and experience.

choice of medical provider passed to the claimant. Therefore, the medical treatment the claimant received as a result of the July 22, 2017 work injury is authorized medical treatment.

10. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

11. As found, the claimant has demonstrated by a preponderance of the evidence that the medical treatment she received following the July 22, 2017 injury was reasonable and necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records and the testimony of the claimant are credible and persuasive.

12. As found, the claimant has demonstrated by a preponderance of the evidence that she has accrued medical bills totaling $100.116.71. As found, the claimant's testimony and the claimant's testimony and the medical bills entered into evidence are credible and persuasive.

13. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

14. As found, the claimant has demonstrated by a preponderance of the evidence that the July 22, 2017 work injury caused disability that resulted in a wage loss from July 22, 2017 to September 8, 2017. Therefore, the claimant is entitled to TTD benefits during for that period of time. As found, the medical records and the testimony of the claimant are credible and persuasive.

15. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she suffered wage loss after October 21, 2017. As found, the claimant's testimony is credible and persuasive.

16. As found, the respondents' request for an offset due to the claimant's receipt of unemployment insurance benefits is moot because the claimant is not entitled to TTD benefits for the period in which she received unemployment insurance benefits. As found, the claimant's testimony is credible and persuasive.

17. Section 8-43-408(1)(5), C.R.S., provides that in cases in which a claimant suffers a compensable injury and the employer failed to comply with the insurance provisions of the Colorado Workers' Compensation Act, the employer shall pay the Colorado uninsured employer fund an amount equal to twenty five percent (25%) of the compensation or benefits due to the claimant.

18. As found, the respondent did not have workers' compensation insurance at the time of the claimant's July 22, 2017 work injury. Therefore, the respondent shall pay the Colorado uninsured employer fund $25,029.18 (25% of the amount of $100.116.71 in medical benefits due to the claimant). The respondent shall also pay to the Colorado uninsured employer fund an amount equal to 25% of the TTD benefits due to the claimant for the period of July 22, 2017 through September 10, 2017.[4] As found, the medical bills entered into evidence and the claimant's testimony are credible and persuasive.

ORDER

It is therefore ordered that:

1. The claimant was an employee of the respondent on July 22, 2017.

2. On July 22, 2017, the claimant suffered an injury that arose of out and in the course and scope of her employment with the respondent.

3. The choice of medical provider passed to the claimant and medical treatment the claimant received as a result of the July 22, 2017 work injury is authorized medical treatment.

4. The respondent shall pay for reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury, this includes the $100.116.71 in outstanding medical bills that have accrued since the claimant's work injury.

[4] At this time, the ALJ is unable to calculate the actual amount owed related to TTD because the parties plan to reach a stipulation regarding the claimant's AWW. Once the parties have reached that stipulation the amount of TTD owed to the claimant as well as the 25% penalty due to the Colorado uninsured employer fund will be calculated by the DOWC.

5. The claimant is entitled to temporary total disability (TTD) benefits for the period of July 22, 2017 through September 8, 2017.

6. The claimant's request for TTD benefits beginning October 22, 2017 and ongoing is denied and dismissed.

7. The respondents' request for an offset due to the claimant's receipt of unemployment insurance benefits is denied as moot because the claimant is not entitled to TTD benefits for the period in which she received unemployment insurance benefits.

8. For failing to maintain workers' compensation insurance, the respondent shall pay the Colorado uninsured employer fund $25,029.18 The respondent shall also pay to the Colorado uninsured employer fund an amount equal to 25% of the TTD benefits due to the claimant for the period of July 22, 2017 through September 8, 2017.

9. The parties shall provide the DOWC with a copy of their stipulation regarding the agreed to average weekly wage (AWW) by forwarding a copy of the stipulation to Gina Johannesman, Trustee DOWC Special Funds Unit, gina.johannesman@state.co.us.

10. The respondent shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

11. All matters not determined herein are reserved for future determination.

12. In lieu of payment of the above compensation and benefits to the claimant, the respondent shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $130,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Gina Johannesman, Trustee; **OR**

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $130,000.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:

i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

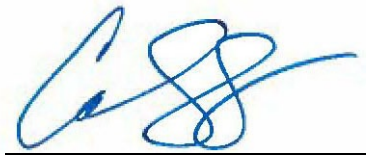
ii. Issued by a surety company authorized to do business in Colorado.

iii. The bond shall guarantee payment of the compensation and benefits awarded.

13. The respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

14. The filing of any appeal, including a petition to review, shall not relieve the respondent of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

Dated: October 11, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

W.C. No. 5-075-727-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AND DENYING CLAIMANT'S CORRECTED VERIFIED OBJECTION TO RESPONDENTS' MOTION

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

The above-referenced matter is scheduled for hearing on October 19, 2018, in Greeley, Colorado. On October 2, 2018, the above referenced matter was referred to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) with the Office of Administrative Courts (OAC) for a decision on the Respondents' Motion for Summary Judgment, filed on or about August 23, 2018; and, on Claimant's Corrected Verified Objection to Respondents' Motion for Summary Judgment, filed on or about September 24, 2018.

Hereinafter Efrain Velador shall be referred to as the "Claimant." JBS Holdings (apparently a holding company for Swift Beef Company) shall be referred to as the "Employer." All other parties shall be referred to by name.

ISSUES FOR SUMMARY JUDGMENT

The issues to be determined by this decision concern whether there is a genuine issue of disputed material fact concerning whether the Claimant can challenge, at an evidentiary hearing, Division Independent Medical Examiners (DIMEs), based on their

lack of specific specialty expertise to address the Claimant's impairment, contrary to the Claimant's alleged DIME rights.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

1. On May 1, 2018, Claimant's Authorized Treating Physician (ATP), Anjman Sharma, M.D., rendered the opinion that Claimant reached maximum medical improvement (MMI) and provided the Claimant with a permanent medical impairment rating of 7% of the left upper extremity (LUE) converted to 4% whole person (*See* Respondents' Summary Judgment Exhibit A).

2. On May 11, 2018, Respondents timely filed a Notice and Proposal to Select an Independent Medical Examiner to challenge the report of Dr. Sharma (*See* Respondents' SJ Exhibit B).

3. On June 28, 2016, the Claimant filed an Application for Hearing and Notice to Set endorsing the issue of "Determine propriety and effect of preemptive DIME and physician specialties and selection contrary to Claimant's DIME rights as expressed in AFL-CIO v. Donlon and Whiteside v. Smith, contrary to the Claimant's true treatment and diagnostic needs and extent of his occupational impairments" (*See* Respondents' SJ Exhibit C).

Verified Objection

4. The Claimant's Corrected Verified Objection to Respondents' Motion for Summary Judgment **fails to** state a genuine issue of disputed material fact relative to the issue the Claimant set for hearing for October 19. It sets forth an alleged legal argument that has previously been resolved by the Court of Appeals in another case involving the affiant-attorney herein.

5. The Claimant's Corrected Verified Objection, signed by the Claimant's attorney, under oath and penalty of perjury, is replete with scandalous invective, first attacking the validity of the Employer's holding company as part of a "worldwide re-structured conspiracy "to protect the assets of the former parent company as [named] and its worldwide subsidiaries from creditors and shareholders suits following the payment of 1.4 billion dollars by said Company's Founders and principals-the Bautista family-to stay out of prison following the discovery of their **longstanding pattern and practice of companywide corruption** (emphasis supplied)."

6. The Corrected Verified Objection further states under oath of Claimant's counsel: "Even more egregious, to fraudulently procure relief herein consisting of the nonexistent relief of striking Claimant's pending Application for Hearing or dispositive relief on the merits under OAC Rule 17, 'Respondents' **and their attorneys falsely and fraudulently delineate a number of other utterly ludicrous, biased, and concerted ALJ rulings and ICAP opinions, all of which serve only to depict how far said ALJs and ICAP members will go to grant Respondents whatever relief they seek, regardless of their entitlement thereto…."** To characterize these statements of Claimant's counsel as patently offensive to everyone in the workers' compensation system would be an enormous understatement. These statements on their face appear to be the uncorroborated musings, under oath, of a lawyer who is seriously ill and in need of treatment.

Ultimate Findings

7. Based on the totality of the items in the official file, documents, pleadings, motions, evidence, and the law applicable to the evidence, the ALJ finds that there is no genuine issue of disputed material fact relative to the hearing issue designated in the Claimant's Application for Hearing. In a non-published opinion involving other parties, but in which the affiant attorney herein was the losing attorney of record, the Court of Appeals, in denying the opposing side attorney fees, noted that Claimant's argument amounted to a "good faith" attempt to change the law, but found the existing DIME statutory provisions appropriate. *See Heinz v. Indus. Claim Appeals Office* (16CA2236, November 22, 2017) (Not Published Pursuant to C.A.R. 35 (e). In the present case, the Claimant is again trying to change the law through the vehicle of an evidentiary hearing before the Office of Administrative Courts (OAC), which is not the appropriate forum. An appropriate starting point would be with a bill to first be heard by a committee of the General Assembly. After the holding in *Heinz,* a matter in which affiant counsel herein was privy, the "good faith" attempt to change the law argument had already been used once, unsuccessfully. It cannot be expected that doing the same thing in the present case will result in a different outcome. The Claimant is not entitled to a hearing on the issue designated, which amounts to an effort to change the law. There is no justiciable controversy to be resolved by the hearing set for October 19. The only potential remedy would be to change the law—a prerogative reserved for the legislative branch of government. The Claimant is **not** entitled to a hearing on the issue designated in his Application for Hearing, dated June 28, 2018.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Summary Judgment contains attached documents. As further found, the Claimant's Corrected Verified Objection contains the sworn Verified Objection, signed under oath by the affiant-attorney; three computerized tax documents, and an unidentified printout from the Internet, purporting to show that the Employer herein is not really who it says it is.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. *See Drake v. Tyner*, 914 P.2d 519 (Colo. App. 1996). As found, the documentary evidence establishes that there is no genuine issue of disputed material fact with respect to the Findings herein above.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Respondents' Motion for Summary Judgment shows specific facts probative of a right judgment; and, the Claimant has failed to show that there is a genuine issue of disputed material fact for hearing, with respect to the Findings herein above.

d. Accordingly, an affirmative showing of specific facts probative of a right to judgment which is uncontradicted by counter-affidavits leaves a trial court with no

alternative but to conclude that no genuine issue of material fact exists. *Terrell v. Walter E. Heller & Co.,* 165 Colo. 463, 439 P.2d 989 (1968). As found, there are no affirmative showings by the Claimant which would support the proposition that there is, in fact, a genuine issue of disputed material fact.

e. The Corrected Verified Objection, as found in Finding No. 6 herein above, is replete with scandalous and libelous invective against almost all parties in the Colorado Workers' Compensation System, including the ALJs and ICAP [*e.g.,* "…'Respondents' and their attorneys falsely and fraudulently delineate a number of utterly ludicrous, biased, and concerted **ALJ rulings and ICAP opinions,** all of which serve only to depict how far said ALJs and ICAP members will go to grant Respondents whatever they seek…." A lawyer who repeatedly violated the state's (disciplinary) rule prohibiting undignified and discourteous conduct degrading to a tribunal was held accountable in discipline. *Board of Overseers v. Campbell,* 539 A.2d 28 (Me. 1987).

f. As found herein above, the Court of Appeals, in denying attorney fees, noted that Claimant's argument amounted to a "good faith" attempt to change the law, but found the existing DIME statutory provisions appropriate. *See Heinz v. Indus. Claim Appeals Office* (16CA2236, November 22, 2017) (Not Published Pursuant to C.A.R. 35 (e). The ALJ herein concludes that there is only one bite of the "good faith" apple. Affiant attorney has been told that an adjudicatory forum is not the right forum to change the law. A lawyer's repeated disobedience to court orders, rearguing matters on which the court had already ruled, was determined to be in violation of disciplinary standards. *See United States v. Lumumba,* 794 F.2d 806 (2nd Cir.); *cert denied* 479 U.S. 855 (1986). By innuendo and explicitly charged adjectives, affiant attorney has made unsubstantiated allegations, maligning opposing counsel and the adjudicators up the line in the system. Perhaps, the affiant attorney has been making scandalous and libelous accusations against most players in the Workers' Compensation System for such a long period of time that no one takes him seriously anymore. His use of unsubstantiated invective casts a dark shadow over the entire legal community. Perhaps, the affiant attorney should be put to the proof concerning his sworn allegations.

Burden of Proof

g. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Respondents have satisfied their

burden with respect to the proposition that there is no genuine issue of disputed material fact with respect to the issue concerning Claimant's view of how the DIME provisions should be changed.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents' Motion for Summary Judgment is hereby granted.

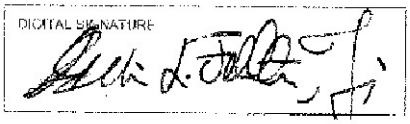
B. Claimant's Application for Hearing and Notice to Set, dated June 28, 2018, is hereby stricken.

C. The Division Independent Medical Examination sought by the Respondents may proceed, with or without the Claimant striking one of the three potential DIME examiners proffered by the Division of Workers' Compensation.

D. The hearing set for October 19, 2018, is hereby vacated.

E. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of October 2018.



_____

EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that the right total hip arthroplasty recommended by Dr. Brian White is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted April 7, 2017 work injury.

- Whether the claimant has demonstrated by a preponderance of the evidence that the intraarticular steroid injection of the right hip recommended by Dr. Michael Sisk is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted April 7, 2017 work injury.

FINDINGS OF FACT

1. In April 2017, the claimant was employed with the employer as an administrative assistant. On Friday, April 7, 2017, the claimant was returning from an errand, when she stepped over a parking curb and the lace of her right shoe became caught on a piece of rebar. This caused the claimant's foot to catch and she tripped, injuring her right hip.

2. The claimant testified that she did not feel any immediate pain in her right hip. However, over the course of the weekend she felt developing tightness in her hip that caused her difficulty walking. When these symptoms continued into Monday, the claimant sought medical treatment with her primary care provider, Frances Jenkins, PA.

3. The claimant first treated with Ms. Jenkins for this injury on April 13, 2017. On that date, the claimant reported pain in her right groin and right thigh. Ms. Jenkins diagnosed strain of the right flexor muscle of the right hip and referred the claimant for physical therapy treatment. On April 18, 2017, the claimant began physical therapy with John Pearson, PT at Pearson Physiotherapy Specialists.

4. The claimant testified that she underwent physical therapy treatment for approximately four weeks. However, physical therapy did not resolve the claimant's right hip pain. Subsequently, Ms. Jenkins ordered a magnetic resonance image (MRI) of the claimant's right hip

5. On May 26, 2017, an MRI of the claimant's right hip showed extensive tearing of the anterior superior labrum with associated anterior paralabral cysts; high grade chondral loss along the superior acetabulum, with underlying bone edema (which the radiologist opined was "most likely degenerative in nature"); and edema tracking within the medical portions of the obturator external muscle.

6. The claimant testified that based upon the May 26, 2017 MRI results Ms. Jenkins recommended that the claimant report her injury as a work injury. Based upon that recommendation, the claimant notified the employer in early May 2017 of the April 7, 2017 incident.

7. Once her injury was reported to the employer, the claimant's authorized treating physician (ATP) for this injury became Dr. Larry Kipe. The claimant began treatment with Dr. Kipe on June 1, 2017 and reported persistent pain in her right hip. On that date, Dr. Kipe noted that the right hip MRI showed a labral tear and referred the claimant to Dr. Brian White for an orthopedic consultation.

8. On August 2, 2017, the claimant was seen by Dr. White. Based upon the claimant's MRI results and the extent of the arthritis in the claimant's hip, Dr. White determined that the torn labrum could not be repaired arthroscopically. At that time, Dr. White recommended a right total hip replacement. The claimant testified that Dr. White was the first provider to inform her that she had hip dysplasia as well as arthritis in her right hip.

9. The claimant resides in Craig, Colorado. Dr. White's practice is located in Denver, Colorado. The claimant testified that Dr. White indicated to her that he could perform the recommended hip replacement surgery. However, Dr. White also informed the claimant that any of the orthopedic surgeons near her residence in Craig would also be qualified to perform the surgery.

10. After seeing Dr. White, the claimant returned to Dr. Kipe on September 7, 2017. On that date, Dr. Kipe referred the claimant to Dr. Michael Sisk for an orthopedic consultation. The referral order indicated that the claimant needed right total hip replacement. The claimant testified that Dr. Sisk has previously treated her for issues with her knees. The claimant also testified that she suggested Dr. Sisk to Dr. Kipe for referral because Dr. Sisk practices in Steamboat Springs Colorado, which is closer to the claimant's residence in Craig.

11. The respondents filed a General Admission of Liability (GAL) on September 14, 2017.

12. On September 19, 2017, Dr. Peter Weingarten reviewed the claimant's medical records in light of the request for authorization of the hip replacement surgery. Dr. Weingarten noted that the MRI showed long term chronic changes in the claimant's right hip. Dr. Weingarten opined that although the recommended surgery was reasonable treatment, the need for surgery was not causally related to the claimant's work injury. As a result, Dr. Weingarten recommended that the respondents deny authorization for the recommended surgery.

13. On September 29, 2017, Dr. Jon Erickson also performed a records review related to the recommended right hip arthroplasty. In his report, Dr. Erickson agreed with Dr. Weingarten that the abnormalities seen on the MRI were chronic and evidence of a preexisting condition. Dr. Erickson also noted that individuals with

advanced osteoarthritis of the hip joint can be "completely asymptomatic". Dr. Erickson opined that the claimant's April 7, 2017 injury was minor, and that hip arthroplasty would be treating her preexisting condition and not the minor work injury.

14. Based upon the opinions of Drs. Weingarten and Erickson, the respondents denied authorization for the right total hip replacement surgery.

15. The claimant was seen by Dr. Sisk on March 28, 2018. At that time, the claimant reported intermittent pain in her right groin that she described as pinching and burning. Dr. Sisk agreed with Dr. White's assessment that the claimant would not benefit from arthroscopic repair of her labrum, and the claimant would likely need a right hip arthroplasty. However, Dr. Sisk recommended that the claimant undergo an intraarticular steroid injection of the right hip before pursuing hip replacement.

16. On April 13, 2018, Dr. Erickson completed a second records review. This review was to address the recommendation by Dr. Sisk that the claimant undergo a steroid injection to her right hip. In that report, Dr. Erickson opined that the claimant was at maximum medical improvement (MMI) prior to treatment she received "for an exacerbation of her pain" on May 26, 2017. Dr. Erickson recommended denial of the requested injection as it was his opinion that it would be treating the claimant's preexisting condition and not the work injury. Dr. Erickson's testimony at hearing was consistent with his written reports.

17. On July 3, 2018, Dr. Weingarten authored a letter to the respondents' counsel regarding the etiology of the claimant's hip arthritis. Dr. Weingarten opined that the claimant's fall and hyperextension injury on April 7, 2017 "did not substantially alter the course and progression of the [claimant's] underlying condition." Dr. Weingarten also noted that although the claimant experienced a minor exacerbation of the arthritic changes in her right hip, the need for total hip arthroplasty was based upon the underlying arthritis and not the work injury.

18. The claimant testified that her current symptoms include tightness in her right hip, a lack of mobility, and gait changes. The claimant also testified that she has pain in her hip if she sits, stands, or walks for extended periods of time.

19. Throughout treatment of her symptoms related to the April 7, 2017 work injury, the claimant reported to her medical providers that she did not have right hip issues prior to this work injury. The claimant provided similar testimony at hearing.

20. Medical records entered into evidence indicate that the claimant reported right hip pain at a medical visit with Ms. Jenkins on August 24, 2015. In the medical record of that date, Ms. Jenkins noted that the claimant described the pain as radiating from the top of her hip bone. The claimant also reported that she had had the pain for approximately three weeks.

21. In addition, on November 9, 2015, the claimant was seen by Ms. Jenkins and complained of right sided low back pain. At that time, the claimant described two

falls onto her right hip. In that medical record, the claimant described the pain as "grabbing and 'sucking your breath out of you type pain' ".

22. The claimant testified that she did fall while working as a lifeguard for the City of Craig. The claimant testified that she recalls falling on her tailbone, not her right hip. In addition, the claimant testified that the pain she had after that fall was different from the pain she began to experience after the April 7, 2017 fall at work. The claimant also testified that what she had previously believed to be hip pain was in fact low back pain.

23. The ALJ is not persuaded by the claimant's testimony that she had no prior issues with her right hip. The ALJ credits the medical records that demonstrate that the claimant complained of right hip pain in August 2015 and then in November 2015 described falls onto her right hip. These medical records indicate that the claimant's right hip was not asymptomatic leading up to the work injury on April 7, 2017. The ALJ credits the opinions of Drs. Weingarten and Erickson and finds that the claimant's work injury was minor and the need for hip replacement surgery and/or hip injections is not causally related to the work injury.

24. Therefore, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the need for a total right hip replacement and/or right hip injections are related to the April 7, 2017 work injury. Similarly, the ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that the incident on April 7, 2017 aggravated, accelerated, or combined with the claimant's preexisting right hip condition to warrant medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the

testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008).

4. As found, the claimant has failed to prove by a preponderance of the evidence that the need for a right total hip replacement and/or right hip injections is related to the admitted April 7, 2017 work injury. As found, the incident on April 7, 2017 did not aggravate, accelerate, or combine with the claimant's preexisting right hip condition to warrant the need for medical treatment. On the contrary, the claimant's right hip symptoms were symptomatic prior to the work injury and the need for surgery and/or injections is related only to the claimant's preexisting condition. As found, the opinions of Drs. Weingarten and Erickson and the medical records are credible and persuasive.

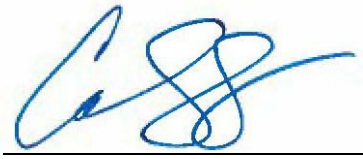
ORDER

It is therefore ordered:

1. The claimant's request for authorization of a right total hip arthroplasty is denied and dismissed.

2. The claimant's request for authorization of intraarticular steroid injections of the right hip is denied and dismissed.

Dated this 11th day of October 2018.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Did Claimant prove by a preponderance of the evidence the need for a total knee replacement is causally related to the March 23, 2016 work injury?

- Disfigurement.

PROCEDURAL HISTORY AND STIPULATIONS

Claimant suffered an admitted injury to her left knee on March 26, 2016. Due to ongoing symptoms, a left total knee arthroplasty has been recommended. Respondent denied the surgery as not causally related to the admitted accident. Claimant's ATP, Dr. Bradley, placed her at MMI in March 2017 because the knee replacement was denied. Respondent filed a Final Admission of Liability, to which Claimant timely objected and requested a DIME. The DIME has been held in abeyance pending the present litigation. The parties agree an arthroplasty is reasonably necessary, but disagree on causation. The parties stipulated if the knee replacement is deemed causally related to the admitted accident, Claimant is not at MMI and a DIME is unnecessary.

FINDINGS OF FACT

1. Claimant worked for Employer as a correctional officer. On March 23, 2016, she suffered an admitted injury to her left knee while escorting inmates in snowy conditions. Claimant thought she heard someone call her name, so she turned around. Her right leg slid on snow, and she twisted her left leg. She heard a pop and felt sharp burning pain in her left knee. She did not fall to the ground.

2. Claimant first obtained treatment the next day at the St. Mary Corwin emergency room. Physical exam showed tenderness of the medial and lateral joint lines but no obvious edema. McMurray's test elicited pain and clicking, suggesting a lateral meniscus tear. X-rays showed degenerative changes and knee joint effusion. The ER physician noted, "x-ray shows swelling inside the joint, nothing is acutely broken. I am concerned you may have torn the meniscus or other ligamenture." Claimant was placed in a knee immobilizer, given crutches, and referred for an orthopedic evaluation "as she is going to need an MRI."

3. Employer referred Claimant to its designated provider, Emergicare. She saw Dr. Bradley at the initial visit on March 25, 2016. Claimant complained of crepitus and localized aching in the left knee that worsened with activity. Examination showed lateral knee tenderness and she walked with an antalgic gait. Dr. Bradley diagnosed a left knee "sprain."

4. Claimant subsequently tried physical therapy with no significant benefit.

5. A left knee MRI on May 10, 2016 showed a horizontal tear involving the anterior horn and body of the lateral meniscus, and chondral degeneration of the lateral and medial femoral condyles.

6. Claimant was referred to Dr. Michael Simpson, an orthopedic surgeon. Because corticosteroid injections were contraindicated due to Claimant's diabetes, Dr. Simpson recommended an arthroscopic lateral meniscectomy and chondroplasty. He opined surgery was needed for "symptomatic lateral meniscal tear" which had failed conservative measures. Dr. Simpson also opined Claimant may continue to have knee pain despite surgery due to the underlying arthritis.

7. The surgery was initially denied by Respondent, but approved on reconsideration. On March 2, 2017, Dr. Simpson performed an arthroscopic lateral meniscectomy and chondroplasty. Intraoperatively, he noted a complex tear of the lateral meniscus and significant arthritis in all three compartments.

8. Claimant did not receive significant benefit from the surgery. She saw Dr. Simpson on April 17, 2017 for increasing pain due to "worsening of her underlying the arthritis." Dr. Simpson opined, "I believe the aggravation of her knee arthritis is directly related to her work related injury and subsequent need for lateral meniscal removal." He recommended viscosupplementation to try and forestall a total knee arthroplasty.

9. Viscosupplementation injections were ineffective, so Dr. Simpson recommended Claimant see a knee replacement specialist. He reiterated his belief the work injury and subsequent surgery aggravated Claimant's underlying arthritis, but stated he would "leave it to the expertise of Dr. Bradley and an arthroplasty surgeon" to make a final determination regarding causation of a potential knee replacement.

10. Claimant saw Dr. Michael Schuck on December 7, 2017, who determined Claimant was a candidate for a left total knee arthroplasty. Dr. Schuck further stated,

> With regard to causality, the patient states that her left knee problem began on the date of the work injury in March 2016. She had no trouble at all with the knee prior to the injury. No x-rays or MRI imaging exist from prior to the injury because she was not symptomatic at that time. It is possible that moderate osteoarthritis was present in the left knee prior to the injury, but the injury itself clearly accelerated her symptoms. For this reason, I feel that the work injury is directly related to her current knee problem.

11. Respondent obtained a peer review from Dr. Thomas Hoffeld after receiving Dr. Schuck's request for preauthorization of arthroplasty. Dr. Hoffeld concluded,

> Review of cited Colorado Guidelines shows the claimant has achieved all the indications for surgical intervention as requested. Upon review of these medical records which has excellent documentation, it is apparent that the requested left total knee replacement arthroplasty is medically necessary and appropriate as related to the compensable injury based on the clinical

information available for my review. The requested surgery as recommended for certification . . . .

12. Claimant saw Dr. William Ciccone II for an IME at Respondent's request on January 24, 2018. Dr. Ciccone opined Claimant suffered only a "minor sprain/strain" from the work accident. He believed the lateral meniscus tear was degenerative and not caused by the accident. He opined Claimant's poor result from arthroscopy was "not surprising" given her underlying arthritis. He stated "the knee arthroscopy may have aggravated the underlying degenerative arthritis, but in my opinion the need for the knee arthroscopy was not work-related." Dr. Ciccone "knee replacement is appropriate, however I do not believe that the need for the replacement is related to the slip at work."

13. Respondent denied the arthroplasty based on Dr. Ciccone's IME report. Because surgery was denied, Dr. Bradley put Claimant at MMI on March 1, 2018. At hearing, the parties agreed Dr. Bradley's declaration of MMI was based on administrative factors rather than a medical determination no further treatment was reasonably expected to improve her condition. The parties further agreed if the requested knee replacement is deemed injury-related, Claimant is not at MMI.

14. Dr. Ciccone testified in deposition consistent with his IME report. He maintained his opinion the March 2016 accident was minor and caused no objective structural damage to Claimant's knee. He reiterated a knee replacement is reasonable, but not causally related to the industrial accident.

15. There is no persuasive evidence Claimant's left knee was symptomatic or caused any functional limitations before the admitted accident in March 2016. Before the accident, she had no knowledge or perception of any knee problems. She maintained a physically demanding job and participated in a wide range of recreational activities without limitation, such as bowling, kayaking, hiking, riding horses, and dancing. Claimant credibly testified at hearing regarding numerous ways the injury has changed her symptoms, limitations, and functional abilities.

16. The causation opinions of Dr. Schuck, Dr. Hoffeld, and Dr. Simpson are credible and more persuasive than the contrary opinions expressed by Dr. Ciccone.

17. Claimant proved the March 2016 accident substantially aggravated her pre-existing arthritis, proximately causing disability and a need for medical treatment.

18. Claimant proved a left total knee arthroplasty is reasonably necessary and causally related to the March 26, 2016 industrial accident.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to

find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally, for the claimant or the respondents. Section 8-43-201.

A claimant is entitled to medical benefits if an accident "aggravates, accelerates, or combines with" a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant proved by a preponderance of the evidence the recommended total knee arthroplasty is causally related to the March 2016 accident. Although Claimant had pre-existing arthritis in her left knee, she was asymptomatic, required no treatment, and had no knee-related limitations. The industrial injury aggravated her condition and proximately caused the need for surgery, including the 2017 arthroscopy and the requested arthroplasty. The parties offer conflicting interpretations of whether the lateral meniscal tear was pre-existing or caused by the accident. The ALJ does not consider this issue dispositive because the accident either caused a new lateral meniscal tear or caused a pre-existing but asymptomatic tear to become symptomatic and disabling. Under either scenario, the March 2, 2017 surgery was reasonably necessary to treat the effects of the industrial injury. Unfortunately, arthroscopic surgery failed to alleviate Claimant's symptoms. The logical next step is a total knee arthroplasty, which is a direct and proximate consequence of the March 23, 2016 accident.

Given that additional surgery is contemplated, Claimant's request for disfigurement benefits is premature.

ORDER

It is therefore ordered that:

1. Respondent shall authorize and pay for the total knee arthroplasty recommended by Dr. Schuck.

2. Claimant's request for disfigurement benefits is denied without prejudice as premature.

3. The DIME process is terminated without prejudice to either party, pending a future declaration of MMI or other appropriate legal process following knee replacement surgery.

4. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 11, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-029-982-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 26, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 9/26/18, Courtroom 3, beginning at 1:30 PM, and ending at 2:30 PM). The official Spanish/English Interpreter was Hilda Gehrke.

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondents' Exhibits A through C were admitted into evidence, without objection. Exhibit D was withdrawn.

ISSUES

The issues to be determined by this decision concern whether the Claimant has overcome the opinion of Division Independent Medical Examiner (DIME), Lloyd Thurston, D.O. Dr. Thurston's opinion that the Claimant has an un-apportioned impairment rating of 18% left upper extremity (LUE), mechanistically converted to 11% whole person, as required by the AMA *Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. (hereinafter "AMA *Guides*"); and, that the Claimant was at maximum medical improvement (MMI) on Sept. 20, 2017.

To overcome the DIME of Dr. Thurston on the issue of whole person medical impairment rating and MMI, the Claimant would bear the burden of proof, by clear and convincing evidence., however, if the disputed degree of impairment is 25% left upper

extremity (LUE) [ATP Yusuke Wakeshima, M.D.] as opposed to 18% LUE [DIME Lloyd Thurston, D.O.], the Claimant's burden is by a preponderance of the evidence.[1]

At the conclusion of the hearing, the ALJ ruled from the bench and determined that the Claimant had not overcome the DIME's implied opinion that there was **no** whole person impairment rating or the DIME's MMI determination by clear and convincing evidence. Thereafter, the ALJ took the matter under advisement in order to prepare a written decision. After a consideration of the record as a whole, the ALJ hereby determines that the actual issue concerning permanent impairment to be determined concerns 25% LUE versus 18% LUE. Nonetheless, the DIME's determination of MMI is binding unless overcome by clear and convincing evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant was born on January 24, 1971 and at the time of the hearing was 47 years old.

2. The Claimant worked for nine years with Empire Fire & Safety as a service technician for fire extinguishers. The admitted work injury was on Oct. 28, 2016.

3. The Claimant underwent surgery on Nov. 8, 2016. He states that the surgery helped with his pain and he took pain medications after the surgery. The Claimant stated that on the day of the hearing he felt "75% okay" from how he felt before the incident.

4. The Claimant testified that as of the hearing date he could not lift weights without feeling a pain in his left wrist and left shoulder. He stated that the pain causes limitations in his daily life, for instance, the inability to change a tire when his wife requested. He also states that he cannot lift things that are heavier than 15 pounds.

5. The Claimant testified to having an ongoing pain on a scale of 4 out of 10 and the pain shoots up to an 8 out of 10 when he lifts things.

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[1] A DIME's scheduled rating has no presumptive effect. It is on a level playing field.

Authorized Treating Physician (ATP) Yusuke Wakeshima, M.D.

6. On Oct. 3, 2017, Dr. Wakeshima reported that the Claimant continues to have left wrist and shoulder pains. The Claimant then reported left wrist pain at 5 out of 10 and left shoulder pain at 4 out of 10.

7. Dr. Wakeshima assessed the Claimant to have a 25% LUE scheduled rating, which would mechanistically convert to 15% whole person impairment. He also concluded that the Claimant was at MMI as of September 20, 2017.

Division Independent Medical Examination (DIME) of Lloyd Thurston, D.O., Level II Accredited

8. On March 20, 2018, Dr. Thurston performed a DIME on the Claimant.

9. Dr. Thurston agreed with Dr. Wakeshima on the Claimant's MMI. date, however, Dr. Thurston incorrectly noted that Dr. Wakeshima placed the Claimant at MMI on October 3, 2017 instead of September 20, 2017. The ALJ finds that the Claimant reached MMI on September 20, 2017.

10. Dr. Thurston evaluated the Claimant using an Acumar digital inclinometer to record range of motion measurements on the Claimant's left shoulder and left wrist. Dr. Thurston concluded that the Claimant was at 18% regional impairment of LUE and 11% impairment of whole person.[2] Dr. Thurston's impairment rating was performed using the AMA *Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. Dr. Thurston did **not** render an opinion concerning which tiered rating {extremity or whole person) was appropriate.

Independent Medical Examiner (IME) by Elizabeth Bisgard, M.D., Level II Accredited.

11. On August 13, 2018, Dr. Bisgard conducted an examination of the Claimant. She concluded that "Dr. Thurston did not make any error in his calculations." Dr. Bisgard also agreed with Dr. Wakeshima that MMI was reached on September 20, 2017. Based on the range-of-motion (ROM) measurements taken that day, Dr. Bisgard concluded that the Claimant was at 23% impairment of the LUE. Dr. Bisgard did **not** render an opinion concerning the propriety of a whole person rating.

12. Dr. Bisgard was of the opinion that there were no errors in the rating methodologies of Dr. Wakeshima (25% LUE) or DIME Dr. Thurston (18% LUE).

[2] The AMA *Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. require a mechanistic conversion to a whole person rating regardless of whether a whole person rating is appropriate.

13. Dr. Bisgard also stated that the Claimant reported an average 3 out of 10 stabbing pain in wrist and when in use the Claimant's pain increased to 8 out of 10. On that specific day, the Claimant rated his pain 3 out of 10.

Ultimate Findings

14. From the standpoint of credibility, the ALJ places greater weight on the scheduled rating of ATP Dr. Wakeshima because of his more thorough familiarity with the Claimant's medical case. On a level playing field, it is more likely than not that Dr. Wakeshima's scheduled rating of 25% LUE is the more accurate reflection of the Claimant's scheduled disability than the 18% LUE rating of Dr. Thurston. The ALJ infers and finds that IME Dr. Bisgard's rating of 23% LUE is a compromise rating between the ATP's and the DIME's scheduled rating.

15. Examining the four corners of DIME Dr. Thurston's opinions, there is not even a hint that he is of the opinion that a whole person rating is more appropriate than a scheduled rating. Indeed, there are no medical opinions in evidence that indicate that a whole person rating is more appropriate.

16. The ALJ finds that Claimant's testimony, concerning his pain, credible but insufficient to overcome the DIME opinions on MMI and whole person impairment, by clear and convincing evidence. The MMI date of September 20, 2017 is undisputed unless the Claimant's testimony about pain could result in an unsupported inference that the Claimant is not at MMI. The ALJ rejects making such an inference.

17. The ALJ makes a rational choice, based on substantial evidence, to accept the 25% LUE scheduled opinion of ATP Dr. Wakeshima and to reject other scheduled ratings/opinions to the contrary, including the Claimant's implied opinion.

18. The Respondents have met their burden, by clear and convincing evidence that a whole person rating is **not** warranted. Also, the Respondents have established by clear and convincing evidence that the Claimant's date of MMI was September 20, 2017.

19. The Claimant has proven, by preponderant evidence that ATP Dr. Wakeshima's scheduled rating of 25% LUE is the appropriate measure of the Claimant's permanent scheduled disability.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the MMI date of September 20, 2017 is undisputed. *See, Annotation, Comment: Credibility of Witness Giving Uncontradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, from the standpoint of credibility, the ALJ placed greater weight on the scheduled rating of ATP Dr. Wakeshima because of his more thorough familiarity with the Claimant's medical case. On a level playing field, it is more likely than not that Dr. Wakeshima's scheduled rating of 25% LUE is the more accurate reflection of the Claimant's scheduled disability than the 18% LUE rating of Dr. Thurston. The ALJ infers and finds that IME Dr. Bisgard's rating of 23% LUE is a compromise rating between the ATP's and the DIME's scheduled rating. Therefore,

ATP Wakeshima's scheduled rating of 25% LUE is the most credible scheduled rating. The ALJ gives **no** weight or credibility to any of the mechanistic conversions to whole person ratings.

b. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, the Claimant's lay testimony about pain is not of the nature of nor sufficiency to overcome the medical opinions herein, or to bootstrap the Claimant's scheduled rating to a whole person rating.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the 25% LUE scheduled opinion of ATP Dr. Wakeshima and to reject other scheduled ratings/opinions to the contrary, including the Claimant's implied opinion.

Burden to Overcome DIME on Impairment Rating

d. A DIME physician must apply the AMA *Guides* when determining a claimant's medical impairment rating. §§ 8-42-101(3.7); 8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning a claimant's medical impairment rating and MMI date shall be overcome only by clear and convincing evidence. "Clear and convincing evidence" is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411

(Colo. App. 1995); *Camille L. Lafont v. WellBridge d/b/a Colorado Athletic Club*, W.C. No. 4-914-378-02 ([Indus. Claim Appeals Office (ICAO), June 25, 2015].

e. In *Wackenhut Corp. v. Indus. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000), the court noted that under the AMA *Guides* the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the *Guides*." Consistent with this concept, ICAO has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (ICAO. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (ICAO. August 12, 2002).

f. Ultimately, questions of whether the DIME physician properly applied the AMA *Guides*, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Indus. Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA *Guides* requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA *Guides* constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Indus.l Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009); *Linda Vuksic v. Lockheed Martin Corporation* W.C. No. 4-956-741-02 (ICAO, August 4, 2016). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, March 22, 2000).

g. In this case the Claimant has not provided any evidence that demonstrates that the DIME physical deviated from protocols or AMA *Guides*. In fact, the Claimant's own IME stated "Dr. Thurston did not make any errors in his calculations." (Respondents' Ex. C, p. 19). In fact, as found, there is **no** medical opinion which maintains that a **whole person** rating is appropriate in this case. The Respondents have met their burden, by clear and convincing evidence that a whole person rating is **not** warranted.

DIME's Maximum Medical Improvement (MMI)

h. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further

treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 (ICAO, October 27, 2011).

i. "Clear and convincing" evidence is established by showing that the truth of a contention is highly probable, *Askew v. Sears Roebuck & Co*., 914 P.2d 1049 (Colo. App. 1983), and free from substantial or serious doubt, *Metro Moving & Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995). The question of whether a party meets the "clear and convincing" burden of proof is a question of fact for the administrative law judge. *McLane Western, Inc. v. Indus. Claim Appeals Office*, 906 P. 2d 263 (Colo. App. 1999). In order to overcome a DIME opinion, there must be evidence which proves that it is highly probable that the DIME physician's opinions are incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P2d 411 (Colo. App. 1995). As found, ATP Dr. Wakeshima, DIME Dr. Thurston, and Dr. Bisgard all agreed on the MMI date of September 20, 2017. Furthermore, the Claimant has consistently expressed the same level of pain through all three medical evaluations as he did during the hearing. The Claimant has offered no contradictory evidence disputing the MMI date.

Burden of Proof: Scheduled vs. Scheduled Rating

j. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has met his burden with respect to the 25% permanent disability of the LUE.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has **not** overcome the Division Independent Medical Examination of Lloyd Thurston, D.O., by clear and convincing evidence concerning maximum medical improvement and impairment ratings.

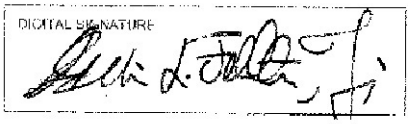
B. The Claimant reached maximum medical improvement on September 20, 2018.

C. The degree of the Claimant's permanent scheduled disability is 25% of the left upper extremity.

D. Respondents are entitled to a credit for an permanent disability benefits paid to date.

E. Any and all issues not determined herein are reserved for future decision.

DATED this 11th day of October 2018.



EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his left shoulder.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable, necessary, and related medical benefits to treat his left shoulder.

FINDINGS OF FACT

1. Claimant worked for Employer as a construction laborer.

2. On August 2, 2016, Claimant sustained an admitted compensable work-related injury to his right shoulder when he slipped and fell toward his right side while at a jobsite and landed on his outstretched right hand and arm. Claimant had immediate pain in his right shoulder that did not improve.

3. Employer referred Claimant for medical care and underwent treatment for his right shoulder. Claimant eventually underwent two surgeries on his right shoulder. The first surgery was in April of 2017 and the second was in December of 2017.

4. This claim involves the left shoulder. Claimant alleges he sustained a compensable injury to his left shoulder due to overuse following his August 2, 2016 injury to the right shoulder. Claimant concedes that there was no acute injury to his left shoulder, but argues an injury occurred due to overuse.

5. At his first evaluation for the right shoulder injury on August 9, 2016, Paul Ogden, M.D. placed Claimant on work restrictions of no lifting, pushing, or pulling with right arm and no raising the right arm above shoulder level. Dr. Ogden provided Claimant a sling and noted Claimant could wear the sling for comfort. *See* Exhibit 2.

6. By August 16, 2016 with Claimant's continued significant pain, an MRI of the right shoulder was scheduled. *See* Exhibit 5.

7. An August 22, 2016 MRI of the right shoulder demonstrated a full thickness tear of the posterior aspect of the supraspinatus and anterior portion of the infraspinatus. By mid-September 2016, Claimant had strongly positive impingement testing, difficulty, and pain in range of motion of the right shoulder. Craig Davis, M.D. recommended surgery. *See* Exhibits 7, G.

8. On October 4, 2016, Brian Mathwich, M.D. evaluated Claimant. Claimant reported continued pain in his right shoulder. Claimant reported he was continuing to work within his restrictions. Claimant reported that he took hydrocodone but it made his head fuzzy so he was taking ibuprofen, Tylenol, and some aspirin occasionally for the pain. Claimant remained on restricted duty work status with limited lifting, pushing, and pulling at 1 pound, no repetitive activity, and no raising the right arm above shoulder level. Dr. Mathwich noted that unfortunately the psychologist had not yet evaluated Claimant and that a psychological evaluation was wanted prior to surgery. *See* Exhibit 8.

9. On January 18, 2017 neurologist Simon Oh, M.D. evaluated Claimant. On physical examination, Dr. Oh found full range of motion with the exception of the right shoulder due to pain. *See* Exhibit I.

10. Concerns about cardiac issues, psychological issues, and alcohol issues delayed the surgery recommended by Dr. Davis. Claimant was eventually cleared to Dr. Davis' satisfaction to undergo the recommended right shoulder surgery. *See* Exhibit G.

11. Dr. Davis performed surgery on April 7, 2017. The procedure was right shoulder arthroscopy with extensive labral debridement and biceps tenodesis, arthroscopic double row repair of the rotator cuff, and subacromial decompression. *See* Exhibits 7, G.

12. On April 13, 2017, Kathryn Sears, M.D. evaluated Claimant. Claimant reported chest wall tenderness and evidence of direct trauma to the chest was present. It was noted that Claimant was following up for an injury sustained on March 27, 2017. Claimant's left shoulder was examined to compare to the right. The left shoulder exam had no tenderness, no muscle spasm, negative drop arm sign for rotator cuff integrity, negative apprehension test, and full range of motion with no weakness. *See* Exhibit 10.

13. On April 18, 2017, Timothy Abbott, P.A., evaluated Claimant. Claimant reported a lot of pain the first couple of days postop and gradual improvement since. Claimant reported needing occasional Percocet, usually only at night. Claimant reported compliance with wearing his sling, and that he had been doing home exercises. PA Abbott noted that physical therapy would begin in 2-3 days and discussed the importance of working on motion early. PA Abbott noted that Claimant would remain at no use of the right hand for work and continue in the sling. *See* Exhibits 7, G.

14. On May 26, 2017, PA Abbott evaluated Claimant. Claimant reported he had been doing therapy twice a week and felt it was helping somewhat but that he still had decreased motion. Claimant reported that he was wearing the right shoulder splint as advised and was compliant with his restrictions and had been able to work avoiding use of the right hand. Claimant reported having occasional pain but only taking Percocet at night. *See* Exhibits 4, H.

15. On June 20, 2017, Claimant underwent physical therapy. Claimant reported his symptoms were about the same. Claimant reported pain into his left shoulder as well.

The therapist noted that Claimant had difficulty progressing due to higher levels of pain in the right shoulder and the recent onset of left shoulder pain in the last 2 weeks. The therapist noted that Claimant was coming into therapy three days in a row and opined it was too much for Claimant and not beneficial as his therapy had to be modified. *See* Exhibit 14.

16. On June 22, 2017, Claimant underwent physical therapy. Claimant reported that his symptoms were about the same and that he was not told to take his medications daily. It was noted that active range of motion was more painful due to Claimant's left shoulder pain. The therapist noted Claimant would discuss the left shoulder pain with Dr. Ogden at his next visit as Claimant felt he was using the left arm too much at work. *See* Exhibit 13.

17. On June 23, 2017, PA Abbott evaluated Claimant. Claimant reported needing Percocet for pain fairly regularly and continued limitations of motion. Claimant reported he was working light duty wearing the sling to avoid overuse of the arm. PA Abbott noted Claimant was 10 weeks post op from a large rotator cuff repair and that with loss of motion, Claimant might be developing early frozen shoulder. A plan to have therapy work aggressively on motion was put in place. PA Abbot advised Claimant to decrease the Percocet use. *See* Exhibits 4, H.

18. On July 25, 2017, Dr. Davis evaluated Claimant. Dr. Davis noted that Claimant had been in therapy a couple of times per week and had been taking Percocet but was unable to fill the last prescription so had only been taking Advil. Claimant reported a lot of pain and weakness in the right shoulder and reported that he had been working one handed on a construction site. Dr. Davis was concerned with Claimant's slow progress, level of weakness with abduction and forward elevation, and loss of motion. Dr. Davis ordered a repeat MRI to assess the surgical repair. Dr. Davis gave Claimant tramadol as needed for pain, meloxicam to take regularly, and Terocin topical that he opined may diminish Claimant's need for the Tramadol. *See* Exhibits 7, G.

19. On September 29, 2017, PA Abbott evaluated Claimant. Claimant reported continued significant activity related pain in his right shoulder and difficulty lifting it up overhead. Claimant reported he had been working light duty mostly using his left arm and that he was not taking any medications because he ran out. Claimant was assessed with a partial re-tear of the rotator cuff after surgery as found by the August 3, 2017 MRI and it was noted that the size of the original tear placed Claimant at a high risk of re-tear from the onset. Claimant was referred to Dr. Faulkner. *See* Exhibits 7, 11.

20. On December 7, 2017, Claimant underwent surgery for his right recurrent rotator cuff tear performed by Nathan Faulkner, M.D. Dr. Faulkner noted that Claimant had a prior injury with a large rotator cuff tear and surgery in April of 2017 but that Claimant had persistent pain and weakness with a postoperative MRI showing a re-tear of the rotator cuff. *See* Exhibits 3, J.

21. On December 11, 2017, Dr. Ogden evaluated Claimant. Claimant reported he was not working due to no light duty. Claimant reported taking oxycodone every 2 hours, 2 tablets. Dr. Ogden placed restrictions on Claimant of sedentary work with sitting 90% of the time and no safety sensitive work, no driving, and no use of right arm. *See* Exhibit 2.

22. On December 20, 2017, Dr. Faulkner evaluated Claimant. Claimant reported that his pain had progressively improved since surgery and that he had been wearing his sling and doing home exercises as instructed. Dr. Faulkner recommended work restrictions per Dr. Ogden but recommended left hand work only and no lifting, pushing, or pulling greater than 2 pounds with the right operative arm. *See* Exhibit 3.

23. On December 28, 2017, Dr. Ogden evaluated Claimant. Claimant reported he was not working due to no light duty work. Claimant reported he was trying to minimize the use of the Vicodin and continued to be in a sling. Claimant reported that he had been having more pain in the left shoulder anteriorly particularly when his left arm was cold. Claimant felt the left shoulder was related to using it more at work since the original injury. On exam, Dr. Ogden found normal strength in the left shoulder with mostly negative testing. Dr. Ogden found tenderness at the anterior deltoid. Claimant remained on work restriction sf sedentary work sitting 90% of the time, no use of the right arm, no safety sensitive work, and no driving. Dr. Ogden added a work restriction of limited lifting with the left arm to 15 pounds and no overhead work. Dr. Ogden noted that Claimant was having left shoulder complaints, which were outside the scope of the injury and recommended limited use in the short term as the right arm was recovering but noted that if the left arm became more of a problem, it would be a different claim. Dr. Ogden recommended Voltaren gel on the left shoulder. *See* Exhibit 2.

24. On January 19, 2018, Dr. Faulkner evaluated Claimant. Claimant reported continued improvement and that he was taking only an occasional pain Percocet at night. Claimant reported he had not been back to work and had not started therapy yet. Dr. Faulkner recommended work restrictions of left hand work only with no lifting, pushing, or pulling greater than 5 pounds with the right operative arm. *See* Exhibit 3.

25. On January 30, 2018, Walter Torres, Ph.D. evaluated Claimant. Claimant reported that left arm overuse was generating pain in his left arm and that he saw his employer as pressuring him excessively and planned to quit. *See* Exhibit 12.

26. On March 26, 2018, Dr. Ogden evaluated Claimant. Dr. Ogden noted that Claimant had ongoing left shoulder pain which was not a part of the claim and for which Claimant had been seeing his primary care provider.

27. On April 23, 2018, Dr. Ogden evaluated Claimant and noted again that Claimant had ongoing left shoulder pain not related to the claim. Dr. Ogden noted work restrictions of limited pushing, lifting, pulling of right arm to 5 pounds, no reaching out or overhead with the right arm, and no impact tools or power tools with the right hand. See Exhibit 2.

28. Claimant worked light duty following the August 2, 2016 right shoulder injury until approximately October 21, 2016. Claimant testified that he did not engage in any heavy lifting, overhead lifting, or repetitive motion activity. Claimant was then off work from October 21, 2016 through March 21, 2017 for non-work related personal health conditions. Claimant underwent the first right shoulder surgery on April 7, 2017 and was off work until approximately April 20, 2017. From approximately April 20, 2017 through early December, 2017 Claimant worked light duty for Employer. Claimant then underwent a second right shoulder surgery in December of 2017 and was off work again following this second surgery.

29. Claimant testified that his left shoulder pain began 4-5 months after the first surgery, which would be approximately August/September of 2017. However, physical therapy records note reports of pain in June of 2017, then there are numerous treatment records from July to December that do not note any reports of left shoulder pain or limitations, then the first report of left shoulder symptoms made to a physician was reported by Claimant on December 28, 2017. The report of pain to a physician in December was approximately 6 months after the report of pain to a physical therapist in June. Despite seeing multiple providers in between June and December, no other left shoulder complaints are documented.

30. On April 18, 2018, Carlos Cebrian, M.D. performed an independent medical evaluation. Dr. Cebrian issued a report dated April 30, 2018. Claimant reported right shoulder pain, left shoulder pain, and left arm pain. Dr. Cebrian noted that Claimant was a poor historian with tangential and distracted speech. Claimant reported that his left shoulder and arm started to hurt 4 to 5 months after his first shoulder surgery and that he was having pain from his shoulder down to his elbow. Claimant reported that his left arm hurt 24 hours per day, 7 days per week and had been getting worse over the past 3-4 months. Claimant felt like it started to get worse in September of 2017. Claimant reported that he was at work on restrictions and was supposed to be doing light duty but that at some point he was sent to do cement work and was lifting garbage with his left arm, hammering pain chips off bars, moving trash bags, and moving containers with rubber caps for rebar primarily using his left arm. Claimant reported doing occasional overhead work cleaning walls, frames, and windowsills and that he did some vacuuming and sweeping. Claimant reported that his right shoulder was getting better and stronger with physical therapy. Claimant reported that he last worked on December 6, 2017. Claimant reported that between October 21, 2016 and March 21, 2017 he did not work, then worked between March 21, 2017 and December 6, 2017 but had one month off for his surgery. *See* Exhibit E.

31. Dr. Cebrian reviewed medical records and performed a physical examination. Dr. Cebrian assessed non-claim related diagnoses to include anxiety, depression, chest pain, syncope, unexplained weight loss, prediabetes, past history alcohol abuse, left 5th finger surgery, low back injury, sjogren's syndrome, anemia, and left shoulder pain. Dr. Cebrian assessed claim related diagnosis to include the right shoulder full thickness tear and two surgeries. Dr. Cebrian opined that Claimant was not

yet at MMI. Dr. Cebrian noted that Claimant was progressing well after the second right shoulder surgery and expected Claimant to be at MMI 6 months post-surgery which would be June 7, 2018. *See* Exhibit E

32. Dr. Cebrian noted that the left shoulder pain was diffuse and non-specific and may include myofascial pain, strain, or rotator cuff impingement. Although Claimant attributed the left shoulder complains to having to use the left arm more frequently after the first right shoulder surgery, Claimant reported he did not work between October 2016 and March of 2017, hadn't worked since December 6, 2017, and worked between March, 2017 and December, 2017 with approximately one month off for surgery. Dr. Cebrian opined that Claimant's activities had been limited and that Claimant had not performed repetitive activities with force and monotonous short cycle activities. Dr. Cebrian reviewed the Colorado Division of Workers' Compensation Shoulder Medical Treatment Guidelines. Dr. Cebrian opined that Claimant's left shoulder complaints, current symptoms related to the left shoulder, and the need for treatment of the left shoulder were independent, incidental, and unrelated to the August 2, 2016 claim and not due to his work for Employer. *See* Exhibit E

33. Dr. Cebrian opined that there was no mechanism of injury or exposure and that Claimant's activities did not rise to the minimum threshold for his left shoulder complaints to be work related. Dr. Cebrian agreed with Dr. Ogden that the left shoulder complaints were not causally related to the August 2, 2016 claim. *See* Exhibit E

34. On June 9, 2018, J. Stephen Gray, M.D. performed an independent medical examination. Claimant reported left upper extremity pain and right shoulder pain. Claimant reported constant bilateral shoulder pain at a 5/10 that was severe, sharp, and throbbing. Claimant reported the left shoulder pain radiated down into the left arm with sharp stabbing pain and pins and needles sensations. Dr. Gray noted that Claimant was not currently working. Dr. Gray reviewed medical records. Dr. Gray noted that Claimant seemed somewhat anxious and displayed some mild pain behaviors but seemed to give exceedingly good effort during range of motion measurements. Dr. Gray found Claimant's left shoulder to be moderately tender over the long head of the biceps, found positive impingement signs, and moderately positive biceps provocation maneuvers. Dr. Gray performed range of motion measurements on the left and found a 4% impairment of the left upper extremity. Dr. Gray assessed development of left shoulder pain, probably due to aggravation of pre-existing tendinitis and/or arthritis due to post-operative compensatory overuse. Dr. Gray opined that Claimant was not yet at MMI and that his left shoulder pain had not been treated adequately. *See* Exhibit 1.

35. Dr. Gray noted that despite the fact that Claimant reported that the left shoulder pain began 4-5 months after the first right shoulder surgery, there appeared to be little evidence that Claimant's return to work caused any symptomatology in the left shoulder. Dr. Gray noted that documented left shoulder pain developed several weeks after the second right shoulder surgery with no records of a fall or incident or new injury. Dr. Gray noted there was just an assumption that the onset of left shoulder pain was not related. Dr. Gray opined that there did not appear to be consideration that the complete

inability to use the right arm post operatively would be attributable for onset of the left shoulder pain. Dr. Gray pointed out activities including sleeping on the left shoulder, use of left arm to bathe, dress, prepare meals, eat, move around, get into and out of a car, driving, and participating in home exercise or physical rehab. Dr. Gray also pointed out that Claimant was not well-educated and had limitations in understanding spoken and written instructions and was not medically or relatively sophisticated. Dr. Gray opined that it could not be ruled out that poor understanding of body mechanics, fear of re injury on the right, clumsiness, or unsupervised participation in early post-operative rehabilitation placed Claimant at increased risk of aggravation of a pre-existing or a new injury of the left shoulder. Dr. Gray also noted there did not appear to be consideration that the left shoulder was somehow injured during the pre or post-operative period and was masked by heavy use of narcotics. Dr. Gray opined that Claimant might not have been able to recognize new left shoulder pain post operatively until his medication dosage lowered. Dr. Gray opined that the left shoulder pain was a direct result of compensatory overuse while protecting the right shoulder post operatively. Dr. Gray opined that while the onset of left shoulder pain could not be said to have been caused specifically by work activities, it was nonetheless attributable to compensatory overuse and should be considered a complication of the right sided work injury. *See* Exhibit 1.

36. Dr. Gray opined that with Claimant's return to work in the last few weeks with highly limited use of either upper extremity, it was not medically probable that the return to work caused any aggravation of the left shoulder condition as Claimant reported rather extreme limitation of his work activities. Dr. Gray opined Claimant was a good example of an "egg shell patient," with medical pre-disposition to aggravation of glenohumeral arthritis and/or poorly defined connective tissue. Dr. Gray opined that Claimant should be treated until stabilized to as close to his base line condition as possible. *See* Exhibit 1.

37. Dr. Gray testified at hearing and Dr. Cebrian testified by deposition.

38. Dr. Gray testified that Claimant was not a good historian. Dr. Gray testified that after surgery, Claimant was not using his right arm at all and his right arm was in a sling after the injury and after surgery. Dr. Gray testified that Claimant is right handed so having to use his left arm a lot was significant. Dr. Gray noted that Claimant has not had imaging yet on the left arm but that the examination was consistent with bicipital tendinosis and Claimant's range of motion was abnormal. Dr. Gray testified that Claimant returned to work really early after the first right shoulder surgery and did repetitive vacuuming, lifting, pushing carts, gathering random materials and putting into a chest height trash can. Dr. Gray testified that Claimant did a variety of activity with the left arm and had a repetitive injury to the left arm. Dr. Gray testified it was probably bicipital arthritis and maybe an aggravation of pre-existing arthritis. Dr. Gray testified that Claimant's pain was very typical for bicipital tendinosis but admitted that they did not yet know because there was no imaging done. Dr. Gray testified that Dr. Cebrian used overuse section of the guidelines that is meant for rotator cuff overuse but not meant for bicipital tendinosis or aggravation of arthritis. Dr. Gray testified that you don't have to do

overhead lifting to get tendinitis and that tendinitis is caused by forward repetitive flexion and reaching.

39. Dr. Cebrian testified that Claimant had pre-existing problems with widespread joint pain for which he was seeing an arthritis clinic. Dr. Cebrian noted a pre-existing positive SSA test and a diagnosis of Sjogren's syndrome, which can affect all the joints. Dr. Cebrian testified that after reviewing medical records and performing a physical examination he would give Claimant a general diagnosis considering the differential of left shoulder pain that could be myofascial, rotator cuff impingement, or just a strain. Dr. Cebrian testified that Claimant had nonspecific shoulder pain and opined it was not related to the August 2, 2016 claim. Dr. Cebrian testified that Claimant believed he had used his left arm more than previously due to the fact that Claimant wasn't using his right arm as much and that his pain was due to overcompensation. Dr. Cebrian testified that to assess the problem, he looked at the left shoulder and whether it would have developed that kind of problem based off the work related exposure at hand. Dr. Cebrian testified that Claimant may have been using his left arm more and primarily using his left arm for activities but that the activities performed were quite minimal and below any kind of threshold that would have established a causal relationship between his shoulder pain on the left side and work exposure. Dr. Cebrian testified that in terms of exposure there had to be a fair amount of activity involved, including overhead activity, repetitive movements, force, etc. He opined that Claimant did not have the type of activity to be at the threshold to cause shoulder pain on the left side. Dr. Cebrian testified that there was no information that Claimant engaged in the highly repetitive type of activity to cause his symptoms. Dr. Cebrian also testified that Claimant was doing a bunch of different activities as well. Dr. Cebrian testified that the causation analysis he used under the guidelines was for the shoulder including both rotator cuff and bicipital tendinosis. Dr. Cebrian testified that he disagreed with Dr. Gray's opinion.

40. Claimant testified at hearing. Claimant testified that after his first right shoulder surgery, he went back to light duty work and that he was doing very light duty but was given more work as time went by. Claimant reported that he told the physical therapist of his left shoulder pain and told Dr. Ogden several times of the left shoulder pain, but that Dr. Ogden told him to discuss it with his attorney. Claimant testified that he had no trauma or injury to his left shoulder and had no prior problems or treatments for his left shoulder. Claimant testified that his left arm pain started out as just feeling tired for a few months but that after about 5 months he realized it was not just tired.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance

of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability of Left Shoulder

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection

is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury to his left shoulder. Claimant has not established that his work duties caused his symptoms or that his employment aggravated or accelerated any pre-existing condition in his left shoulder. Dr. Cebrian and Dr. Ogden are found persuasive that the left shoulder complaints are not work related or related to the original compensable right shoulder injury. Claimant was not performing repetitive or significant activities with his left arm at work to cause his complaints or to cause objective pathology or changes in the natural condition of his left shoulder. Claimant has failed to establish that his left shoulder symptoms are a compensable consequence of his right shoulder injury. Claimant was off work for significant periods following his right shoulder injury. While at work, he was performing minimal duties that were not repetitive or forceful and were not sufficient to cause his symptoms or to cause symptoms from overcompensation/overuse. Claimant has thus failed to meet his burden. The opinion of Dr. Gray is not found as persuasive as the opinions of Dr. Cebrian and Dr. Ogden. Although Dr. Gray believes that Claimant's work duties could cause bicipital tendinitis due to forward repetitive flexion reaching while picking up trash and debris from construction sites, Claimant's testimony indicated he did not repetitively perform any single duties. Rather, the ALJ concludes from the totality of evidence that Claimant's job duties when at light duty work were varied and minimal.

Medical Benefits- Left Shoulder

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As Claimant has failed to meet his burden to establish a compensable injury to his left shoulder, his request for medical benefits is denied and dismissed.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury to his left shoulder.

2. As he failed to establish a compensable injury, Claimant is not entitled to medical benefits to treat his left shoulder. His request for medical benefits for the left shoulder is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 12, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence a left total knee arthroplasty is reasonably necessary and causally related to his September 30, 2015 industrial injury?

PRELIMINARY ISSUE

This case was the subject of a prior hearing in September 2017 in the context of Respondent's attempt to overcome the DIME regarding MMI. Although there is considerable overlap of the factual questions evidence presented in the two proceedings, the ALJ agrees with Respondent that the findings in the previous final order are not binding under the doctrine of issue preclusion. Notwithstanding the prior order, Claimant has the burden to prove by a preponderance of the evidence that the proposed arthroplasty is reasonably necessary and causally related to the admitted injury.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his left knee on September 30, 2015 while working for Employer as a firefighter. He was walking down a ramp while wearing 80+ pounds of firefighter gear. He turned at the bottom of the ramp and felt a painful pop in his left knee.

2. Claimant had a prior work-related injury to his left knee in 2006. Dr. Michael Hewitt performed an arthroscopic partial medial meniscectomy (40% of the posterior horn) and a patellar chondroplasty in August 2006. On April 19, 2007, Dr. Brian Beatty assigned a 22% lower extremity impairment rating and released him to full duties, with allowance for up to three cortisone injections over the next year.

3. The last documented treatment to the left knee was August 17, 2007, when Dr. Hewitt gave Claimant a cortisone injection. Dr. Hewitt indicated Claimant could "return to full running activities in the next three to four days. He will otherwise follow up in this clinic on an as needed basis." There are no subsequent treatment records until the September 30, 2015 injury.

4. Claimant worked as a firefighter without difficulty or limitation related to his knee from at least 2008 until the accident in September 2015. He also regularly participated in recreational activities such as golfing, mountain biking, and waterskiing. Claimant testified his knee was asymptomatic for many years before September 2015, which is corroborated by the medical records.

5. After the September 2015 injury, Employer referred Claimant to Concentra for authorized treatment. He initially saw Dr. Carlos Guerrero on September 30. The physical examination suggested a medial meniscus tear, so Dr. Guerrero ordered an MRI.

6. Claimant had an MRI of the left knee on October 7, 2015 which showed complex multidirectional tearing of the medial meniscus. The radiologist opined some of the findings could be related to the 2006 surgery but "given the complexity and appearance of the meniscus this is highly concerning for a recurrent tear." The MRI also slowed advanced osteoarthritis, primarily in the medial compartment.

7. Claimant saw Dr. David Walden, an orthopedic surgeon, on October 27, 2015. Dr. Walden referenced Claimant's 2006 injury and remarked, "reportedly he had no problems with regard to this knee following that procedure and was completely able to perform all elements of his firefighting job." Dr. Walden diagnosed an acute medial meniscus tear and left knee osteoarthritis. Dr. Walden opined "although the patient had prior knee surgery, he had been doing well for [a] number of years without any significant limitations (nine years)."

8. On November 11, 2015, Dr. Walden performed an arthroscopic partial medial meniscectomy to address a "substantial avascular tear of the posterior horn and body of the medial meniscus." He also observed "rather significant osteoarthritis" of the femoral trochlea, grade 2 and 3 osteoarthritic changes of the weight-bearing surface of the medial femoral condyle. He performed chondroplasties of the femoral trochlea, the medial femoral condyle, and medial tibial plateau.

9. Claimant progressed relatively well after surgery and was released to work without restrictions on January 26, 2016.

10. Unfortunately, Claimant had ongoing problems with his knee after going back to work. He returned to Dr. Walden's office in April 2016 complaining of "buckling, difficulty going down stairs, and stiffness after being seated for long periods of time or first thing in the morning." Dr. Walden recommended Orthovisc injections, which were done in May 2016.

11. Dr. Steve Danahey at Concentra put Claimant at MMI on September 13, 2016. Claimant reported the Orthovisc "has worn off. He is feeling the same constant pain. Walking downstairs is high pain for the patient as well as just walking. He was told he may need to consider a knee replacement." Dr. Danahey assigned a 10% lower extremity rating after apportionment of the 2007 rating. Dr. Danahey assigned permanent restrictions against kneeling, squatting, or jumping, and opined "I do not think he can perform the regular duties of a firefighter."

12. Claimant was considering a knee replacement at the time, but Dr. Danahey deferred that decision to an orthopedist. He noted that the 2006 injury and surgery "likely contributed significantly to the resultant arthritic changes in the left knee joint."

13. Claimant followed up with Dr. Walden on January 17, 2017. He reported the Orthovisc injections were "helpful and he was able to move around a great deal more with the help of those. They have gradually worn off, and he felt pain and stiffness in the knee and difficulty moving including kneeling, squatting, and pivoting motions." Dr. Walden gave Claimant a steroid injection and recommended another series of Orthovisc.

14. Dr. John McBride, an orthopedic surgeon, performed a record review for Respondent on January 25, 2017. Dr. McBride noted Claimant's extensive osteoarthritis undoubtedly preexisted the September 2015 injury. He opined the July 2006 surgery, which removed 40 percent of the medial meniscus, ultimately caused Claimant to develop medial joint osteoarthritis. He cited the Lower Extremity MTGs which state individuals with an intra-articular meniscus injury and/or surgery are at risk for later osteoarthritis. He opined the surgery by Dr. Walden was reasonable and related to the September 2015 injury, but ongoing treatment directed at symptoms of osteoarthritis was not causally related to the admitted injury.

15. Dr. McBride issued a supplemental report on February 1, 2017, and opined:

> I agree with Dr. Walden that the arthroscopy was reasonable and necessary for the acute degenerative meniscus tear, but his ongoing symptoms *at this time* are related to his ongoing osteoarthritis, which is what viscosupplementation is used for. The *potential* for a total knee replacement is related to his previous 40% partial medial meniscectomy in 2006. The bottom line is that the viscosupplementation, while it is reasonable and necessary with regards to his arthritis, is ***not related*** to the September 30, 2015 injury. (Emphasis in original).

16. Claimant saw Dr. Jack Rook for an Independent Medical Examination (IME) at the request of his counsel on March 13, 2017. Claimant recounted the history of the 2006 injury and told Dr. Rook he was having no problems with his left knee immediately before the September 2015 injury. After recovering from the 2006 surgery, Claimant returned to work as a firefighter with no restriction or limitation. Additionally, he "engaged in multiple sporting activities without any problems, including basketball, skiing, hiking, mountain biking, and golfing."

17. Dr. Rook disagreed with Dr. McBride that further treatment was not injury-related. He agreed the osteoarthritis was pre-existing but noted Claimant was "completely asymptomatic" before the September 2015 injury and engaged in physically demanding vocational and recreational activities without limitation. By contrast, "[s]ince he injured his left knee, he has been unable to engage in these activities due to ongoing and persistent left knee pain." Dr. Rook opined Claimant satisfies the criteria in the Lower Extremity MTGs for aggravated osteoarthritis. Dr. Rook opined Claimant was not at MMI and needed further treatment to address ongoing left knee pain and significant functional limitations, including a possible knee replacement.

18. Claimant saw Dr. John Tyler for Division IME on March 22, 2017. Claimant described a constant, dull ache "deep inside" the knee, aggravated by prolonged walking and going up and down stairs. On physical examination, Dr. Tyler noted slight atrophy of the left quadriceps muscles and tenderness to palpation along the medial joint line. There was "audible and tactilely noted crepitation that appears to be generated primarily if not completely in the medial joint space."

19. Dr. Tyler determined Claimant was not at MMI. He noted Claimant "was not having difficulties with any pre-existing osteoarthritic changes within the left knee until after the trauma suffered on September 30, 2015." Dr. Tyler opined

> "But if for the" injury of September 30, 2015, I believe this patient would continue to be able to work as a firefighter performing all the heavy lifting, climbing, crawling, etc. and responsibilities of that job and "if but for the" injury suffered, he would not have ongoing pain in the knee from pre-existing osteoarthritis. Secondary to same, though the arthritis did indeed build up over the years from his earlier medial meniscectomy, it was not a symptomatic factor in the level of this patient's functioning and quality of life, both vocationally and non-vocationally, until the injury of September 30, 2015. Secondary to same, surgical intervention toward the knee including the possibility of a total knee replacement at this time, should be entertained and I feel would be related directly to the injury of September 30, 2015.

20. Dr. Tyler further opined:

> I cannot state categorically that a total knee arthroplasty versus a partial knee arthroplasty is required at this time, as I am not a trained orthopedic surgeon and I will defer entirely to the judgment of Dr. Walden and Dr. Walden's partner who performs total knee arthroplasties and partial knee arthroplasties. If Dr. Walden and/or his partner feel that an arthroplasty is required, that arthroplasty would be directly related to the injury suffered in his September 30, 2015 injury.

21. Respondent conducted the surveillance of Claimant twice, on April 9, 2017 and April 22, 2017. The surveillance video shows Claimant working at his second job, and a barbecue truck operated by Claimant and his wife. The video shows Claimant standing for prolonged periods interacting with customers and serving food. Claimant can also be seen at various times lifting objects such as a drink cooler, and at one point stood on a chair after stepping up with his left leg.

22. Dr. McBride performed a third record review for Respondent on June 29, 2017. Besides Dr. Rook's report and Dr. Tyler's DIME report, he also viewed the surveillance video. Dr. McBride disagreed with Dr. Rook and Dr. Tyler regarding MMI. He maintained his opinion the osteoarthritis "indisputably" pre-existed the September 2015 injury. He also opined Claimant's activities on the video contradicted his reported limitations and undermined the DIME's conclusion that the injury aggravated his underlying arthritis.

23. Respondents deposed Dr. Tyler on August 16, 2017. Dr. Tyler reviewed the video surveillance and noted Claimant appeared to stand for longer than he would have expected. Dr. Tyler stated the video changed his mind regarding Claimant's ability to stand for prolonged periods but did not otherwise impact his assessment. Dr. Tyler did not retract or change his opinion that Claimant is not at MMI.

24. On November 2, 2017, the undersigned issued Findings of Fact, Conclusions of Law, and an Order finding Respondent failed to overcome the DIME regarding MMI. No final decision or formal request for authorization of surgery had been made as of the hearing date. Therefore, Claimant did not ask the ALJ to award any surgery.

25. Claimant returned to Dr. Walden on January 25, 2018, who opined a total knee arthroplasty was indicated and referred Claimant to Dr. Purcell.

26. Respondent wrote to Dr. Danahey on February 28, 2018 to get his opinion about the proposed arthroplasty. In "checkbox" form, Dr. Danahey opined the arthroplasty was reasonably necessary, but not related to the September 2015 accident. He provided no discussion or analysis but the ALJ infers he likely shares Dr. McBride's view regarding the underlying pre-existing arthritis.

27. Dr. Purcell submitted a request for preauthorization of left total knee arthroplasty on March 1, 2018. Respondent denied the request based on Dr. Danahey's opinion.

28. Claimant underwent another IME with Dr. McBride on May 30, 2018. Dr. McBride opined Claimant's residual pain after recovering from the 2015 meniscectomy is due entirely to the natural progression of his end-stage osteoarthritis. Consistent with his prior opinions, Dr. McBride opined a total knee arthroplasty is reasonably necessary but not related to the 2015 accident.

29. Dr. McBride testified at hearing consistent with the opinions expressed in his reports. He opined the total knee arthroplasty is reasonably necessary but is related to the 2006 partial meniscectomy rather than the September 2015 accident. He testified the 2015 injury neither aggravated nor exacerbated Claimant's pre-existing arthritis. He opined there is no objective evidence the September 2015 accident permanently aggravated or accelerated the arthritis.

30. Dr. Rook testified at hearing and emphasized the symptomatic aggravation caused by the injury and resulting change in Claimant's functional abilities. He opined the 2015 injury "tipped him over in terms of having constant pain as opposed to no pain." He concluded the arthroplasty is injury-related because "he did not need a knee replacement despite whatever arthritic changes he might have had prior to that [2015] injury because he had no functional loss, chronic pain or symptomatology from his [left] knee."

31. The ALJ credits Dr. McBride's opinion that the advanced osteoarthritis was probably caused by the 2006 meniscectomy, but also credits the opinions of Dr. Rook and Dr. Tyler that the September 2015 accident aggravated Claimant's pre-existing arthritis and proximately caused his current need for total knee arthroplasty.

32. Claimant proved by a preponderance of the evidence the proposed total knee arthroplasty is reasonably necessary and causally related to the industrial accident.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, for either claimant or respondents. Section 8-43-201.

The mere existence of a pre-existing condition does not disqualify a claim for medical benefits. A claimant with a pre-existing condition may recover benefits if an industrial accident "aggravates, accelerates, or combines with" the pre-existing condition to proximately cause disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). To prove an aggravation, a claimant does not have to show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is a sufficient basis for an award of medical benefits if it caused the claimant to need treatment he would not otherwise have required but for the accident. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016).

The Director has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure the quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP Rule 17, Exhibit 6 addresses lower extremity injuries including osteoarthritis. As the arbiter of disputes regarding treatment, the ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining whether requested treatment is reasonably necessary or injury-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

As found, Claimant proved the recommended left knee arthroplasty is reasonably necessary and causally related to the admitted injury. There is no doubt Claimant had advanced osteoarthritis in his knee before the September 2015 accident. As Dr. McBride explained, the arthritis probably resulted from the 2006 meniscectomy. But the critical factor for determining if, and when, to perform a knee replacement is not based on the mere presence or objective severity of Claimant's arthritis. Rather, it depends on when his symptoms and functional limitations rise to a level to warrant the procedure. The ALJ is persuaded the September 2015 accident aggravated Claimant's underlying

osteoarthritis and caused it to become symptomatic. Claimant had “end-stage” arthritis the day before the injury but had no symptoms, required no medical treatment, and could participate in a wide range of physically demanding activities. Since the date of injury, he has been continuously symptomatic, with attendant limitations and need for treatment. Although the prolonged standing depicted in the surveillance footage is somewhat inconsistent with Claimant’s description of his symptoms, it is unlikely Claimant would pursue a major surgery if he were not genuinely limited by a painful knee. Furthermore, Dr. McBride agreed Claimant needs a knee replacement despite the activities demonstrated on the surveillance video.

ORDER

It is therefore ordered that:

1. Respondent shall cover the left total knee arthroplasty recommended by Dr. Purcell.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 15, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

STIPULATION

The parties have stipulated to an Average Weekly Wage of $555.42. The ALJ approves the parties' stipulation.

REMAINING ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable work-related injury to his neck on August 1, 2017, and is therefore, entitled to reasonable, necessary and related medical benefits to cure and relieve him of the effects of said injury.

II. If Claimant established that he suffered a compensable injury to his cervical spine, whether he also established, by a preponderance of the evidence, his entitlement to temporary disability benefits.

III. Whether Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment thereby precluding his entitlement to TTD benefits beginning August 23, 2017 and ongoing.

Because the undersigned concludes that Claimant failed to prove that he sustained a compensable injury on August 1, 2017, this order does not address questions II-III as set forth above.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works for Employer as a welder/fabricator. On August 1, 2017, Claimant was working at a table in the work yard, reviewing fabrication plans. He stood up from the table and turned to walk to the tool house to get some materials. Claimant had taken a few steps when he struck the top of his forehead on the handle of a grain hopper.

2. Claimant explained that the handle had only recently been installed, and as such, was not anticipating its presence there. Claimant was not walking fast as he had not reached full speed when he struck the handle. Nonetheless, Claimant testified that he experienced a snapping in his neck and developed associated neck pain.

3. Claimant's impact with the grain hopper handle was witnessed by Jackie

Snyder, the daughter of Jeff Belveal, Claimant's employer. Snyder testified that she saw Claimant collide with the handle and recover quickly, telling her that he thought he was alright. She agreed that Claimant was not moving fast when he struck the handle. She did not observe Claimant's head and neck to snap backward after making contact with the handle.

4. The handle of the grain hopper in question consists of a metal pipe that extends to 54 inches above the ground. (Resp. Ex. G, p. 61). Video tape played in open court reveals that the handle in question is mobile and moves with very little force. Claimant agreed that there is play (give) in the handle. Ms. Snyder testified that the handle gave way when Claimant impacted it.

5. Ms. Snyder testified that Claimant did not express being injured nor did he act as if he had been. Rather, Ms. Snyder testified that Claimant joked about the incident with her and went about his work day. Claimant agreed that he treated the incident rather casually. He etched the phrase "midget killer" on the grain handle and evidently repeated the joke often. (Resp. Ex. G, pp. 59-60). Claimant testified that he didn't initially think much of the August 1, 2017 incident and simply moved on from it.

6. Jeff Belveal is the owner of Kutch Steel and Claimant's employer. Mr. Belveal was not present on the date of injury. He testified that the morning after the incident, Claimant reported to him that he had walked into the grain hopper handle. Mr. Belveal asked Claimant if wanted to see a medical doctor. Claimant declined, responding that it wasn't that bad. Claimant confirmed Mr. Belveal's testimony.

7. Claimant has a history of neck pain and stiffness. He testified that he had broken his neck in a motor vehicle accident (MVA) in 1977 requiring the application of a halo brace to restrict cervical rotation. He initially testified that after this injury incident, he had not sought any medical care for his neck for 40 years. However, on cross-examination Claimant admitted that he had previously sought intermittent chiropractic care for a stiff neck. Moreover, the record evidence reveals that Claimant sought medical care from Peak Vista on March 1, 2017 for a stiff neck. Claimant told the provider at Peak Vista on March 1, 2017 that he'd been experiencing neck pain for at least six years. He testified that he had been exposed to fleas and expressed a belief that his neck pain/stiffness was caused by Lyme Disease.[1]

8. Claimant also testified that about three days after the August 1, 2017, incident he "jumped out of the back of [his] pickup truck like I was 16 instead of 61" and when he landed on the ground, he heard and felt the vertebrae in his neck "stacking" up from the impact. Claimant testified that this incident jarred his neck and his pain increased substantially above what had persisted from the work incident days before. Claimant reported his worsening pain to Mr. Belveal, who testified that during their

[1]Claimant would continue to seek care at Peak Vista for neck pain on August 9, 2017 and August 30, 2017. Despite these visits taking place after running into the grain hopper handle, Claimant did not reference this incident to his medical providers as the cause of his pain. Rather, Claimant continued to attribute his neck pain/stiffness to Lyme disease.

discussion, Claimant attributed his neck pain to arthritis that had set in over the years following his 1977 MVA. Mr. Belveal specifically testified that Claimant never endorsed walking into the grain hopper handle as the cause of his neck pain.

9. Claimant sought chiropractic treatment from Dr. Francine Palmer on August 14, 2017, after jumping from the back of his pickup truck. At his first appointment with Dr. Palmer, Claimant specifically reported that his neck pain started "after jumping out of the back of a pickup 3 weeks ago." RE D, Bates 5. During this appointment, Claimant also completed paperwork on which he was asked whether his injury was work related and who was responsible for payment of the bill. Claimant indicated that he was solely responsible for the bill and did not attribute his need for chiropractic treatment to a work related cause. RE D, Bates 15. Claimant also referenced the 1977 MVA and his belief that his neck pain could be due to arthritis setting in. He told Dr. Palmer that he had experienced neck pain off and on for the last 16 years. RE D, Bates 16.

10. Claimant treated with Dr. Palmer for three additional visits, specifically on August 16, 2017, August 18, 2017, and August 23, 2017. At no time during any of these additional visits did he ever report that he had run into the grain hopper handle nor did he attribute his neck pain/stiffness to the same. RE D.

11. Claimant testified that his neck pain was significant and often interfered with his ability to work. Eventually he deemed the pain too intense to continue working. Thus, on or about August 22, 2017, he informed Belveal, by text message, that he was no longer able to work because he was having difficulty/pain with his neck. Claimant did not indicate that his inability to work was due to a work injury nor did he ask to file a workers' compensation claim. Claimant and Mr. Belveal both testified that Claimant had worked for Kutch Steel off and on for approximately 10 years. Claimant testified that sometimes he just decided he didn't want to work and that sometimes the work would slow down and Mr. Belveal would not need him to work. Mr. Belveal testified that it was Claimant's decision to leave his employment on August 22, 2017 and that he did not ask him to leave. Claimant testified that he intended to return to work once the problems with his neck had resolved, although he did not recall specifically whether he specifically informed Belveal of this intention to return.

12. Claimant and Mr. Belveal both testified that in late November 2017 or perhaps in early December 2017, Claimant called Mr. Belveal to request a copy of his wage records. Claimant needed this information in order to apply for Social Security disability benefits. When Claimant called Mr. Belveal to request the wage information, he did not indicate that he thought he had sustained a work injury after walking into the grain hopper handle.

13. Claimant presented to Peak Vista on December 1, 2017 with complaints of neck pain. He reported that he "bumped into a crate 3 months ago and reinjured his neck after a MVA in 1977."

14. On December 16, 12017 Claimant presented to the emergency department (ED) at St. Francis Medical Center for complaints of "chronic" neck pain since suffering a c-spine fracture approximately 30 years previously. On this date, Claimant reported that walked into a piece of steel at work and felt the pain in the back of his neck that had persisted for 4 months. Provider notes document some bilateral hand tingling which had developed in the week prior to Claimant's appointment. Claimant underwent a CT scan that did not immediately reveal definite evidence for acute cervical fracture. *Id*. at 43. The CT scan also revealed a chronic non-united fracture at the base of the dens, presumably remaining from Claimant's 1977 incident. Claimant was recommended to undergo MRI and referred to a neurosurgeon.

15. Claimant testified that after he received his wage records from Mr. Belveal he applied for Social Security disability benefits. Claimant's application for Social Security disability income (SSDI) was subsequently denied and he admitted on cross examination that it wasn't until after he had been denied SSDI that he contacted Mr. Belveal seeking to file a claim for workers' compensation benefits.

16. Claimant completed a Workers' Claim for Compensation form on December 29, 2017, alleging injuries to his neck after hitting his head on "pipe".

17. Respondents denied the claim.

18. Claimant continued to treat on his own after Respondents denied his claim. On January 16, 2018, he presented to UC Health where he reported that "he walked into a piece of steel". He explained that he turned to walk and hit his head so hard that he felt pain in the back of his neck". An MRI was performed. The MRI demonstrated "extensive degenerative changes of [the] cervical spine with resultant canal and foraminal stenosis and abnormalities at the C2 level "with question of changes related to remote injury (old fracture) or possibly underlying developmental abnormality (os odontoideum).

19. Claimant returned to UC Health on January 24, 2018 where he was evaluated by Dr. Ricky Medel. Dr. Medel diagnosed Claimant with a closed nondisplaced odontoid fracture with type II morphology and nonunion, stating that "[t]he patient has a history of an old C2 fracture, likely with nonunion. This was worsened 5-1/2 months ago when the patient hit his head". The report from this date of visit is devoid of Claimant's prior reported history of jumping from the back of his pickup truck and feeling as though the vertebrae in his neck stacked up upon impacting the ground.

20. Claimant returned to UC Health on January 31, 2018 at which time Dr. Medel recommended a C1-4 posterior cervical fusion. Dr. Medel discussed with Claimant that as part of his planned fusion surgery, he would perform a bilateral neurectomy at C2. Dr. Medel explained to Claimant that as a consequence of the C2 neurectomy he would experience posterior numbness in that nerve distribution. (Clmt. Ex. 8, p. 112). Claimant sought a second opinion from Dr. John Barker of the Rocky Mountain Spine Clinic. (Clmt. Ex. 10, p. 128). Dr. Barker recommended a posterior

fusion at C1-2 with interlaminar wiring and/or screw fixation and allograft. Dr. Barker informed Claimant that he would not undertake a lateral approach while performing his recommended procedure nor would he resect the C1 nerve in order to preserve sensation to the back of the head. Claimant elected to proceed with surgery with Dr. Barker.

21. Dr. Barker performed surgery on February 21, 2018. The surgery went well, and Claimant recovered. (Clmt. Ex. 9, pp. 126-27).

22. Respondents requested a records review from Dr. David Orgel. RE F. Dr. Orgel was asked to review records and provide an opinion as to whether the mechanism of injury (MOI) in this case, i.e. walking into the grain hopper handle was the likely cause of Claimant's neck complaints and need for posterior cervical fusion at C1-2.

23. In his records review report, Dr. Orgel outlined the type of cervical fracture Claimant sustained in his 1977 car crash. He also noted that the December 2017 x-rays taken at the University of Colorado Medical Center demonstrated 6 to 7 mm of motion through the C2 fracture site. According to Dr. Orgel, the MRI scan showed a possible signal change at C2 and the impression was that Claimant had an odontoid fracture type II. RE F, Bates 48. Dr. Orgel opined that the alleged MOI in this case, i.e., walking into the grain hopper handle is not consistent with causing a type II odontoid fracture. He also pointed out that the prior neck fracture from the 1977 MVA was consistent with that seen on more recent MRI and as such was preexisting and was likely becoming progressively more unstable given the motion through the fracture as seen on x-ray in 2017. RE F, Bates 52.

24. In Dr. Orgel's opinion, there is no objective medical evidence to support that Claimant likely sustained a type II odontoid fracture at C2 or any other work injury to his neck on August 1, 2017. Instead, Dr. Orgel opined that Claimant's symptoms are likely related to progressive instability caused by a preexisting and unhealed (non-union) C2 fracture associated with his 1977 MVA. Simply put, Dr. Orgel found no objective evidence to support a conclusion that Claimant had suffered any acute injury to his cervical spine at work on August 1, 2017. RE F, Bates 53.

25. Based upon the totality of the evidence presented, the ALJ credits Dr. Orgel's opinions to find that Claimant's cervical spine symptoms and need for surgery are likely the product of the natural progression of instability caused by his nonunion C2 fracture associated with his 1977 MVA rather than his walking into the hopper handle on August 1, 2017. While Dr. Medel and Dr. Barker's reports indicate that Claimant's C2 fracture, likely with nonunion worsened after Claimant hit his head, the ALJ finds that this conclusion is based upon Claimant's subjective reports alone. Nothing in the record presented persuades the ALJ that Dr. Medel or Dr. Barker reviewed Claimant's prior medical records, including those from Peak Vista or Dr. Francine Palmer in order to provide a comprehensive causation analysis. The ALJ finds that neither Dr. Medel nor Dr. Barker were in a position to assess causality without having the benefit of reviewing Claimant's past medical records, including those from Peak Vista and Dr. Palmer.

Consequently, The ALJ is not persuaded that the opinions of Dr. Medel and/or Dr. Barker constitute sufficient proof that Claimant suffered a work related "injury".

26. Based upon the evidence presented, the ALJ finds that while Claimant established that he had an "accident", i.e. he walked into the hopper handle while performing work duties, he failed to prove by a preponderance of the evidence that he suffered a compensable "injury" resulting in disability or the need for treatment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo.App. 2000)*; City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo.App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, the ALJ finds Claimant's evidence suggesting that he suffered a neck injury necessitating surgery unpersuasive.

Here, the evidence presented establishes that Claimant did not strike the hopper handle very hard and given the ease with which the handle moves, any impact would have been minimized further. Claimant admitted that within minutes after walking into the handle, he thought he was okay and was able to go about his work day without difficulty. Claimant joked about walking into the handle, calling it a "midget killer" and even writing these words in sandstone on the handle. He testified that he thought the whole incident was a "funny thing" and his demeanor while testifying demonstrates that he took the incident lightly. He also testified that when he informed his Employer of the incident the next day, he declined the medical care stating that it wasn't that bad. In fact, claimant testified that over the next several days, he felt better.

Subsequently, a few days or maybe a week or so later[2] Claimant testified that he jumped out of the back of his pickup truck and that when his feet hit the ground, he heard and felt his cervical vertebrae stacking up. It was after this non-work related incident that his neck pain returned and began to worsen and it was only then that he sought medical treatment, including chiropractic care. Claimant provided his treating providers with a couple of explanations as to what he attributed his neck pain to: first, he told his providers at Peak Vista that he believed his neck pain was due to Lyme disease and that he had been experiencing neck pain for six years. Secondly, he told his chiropractor, Dr. Palmer, that his neck pain started as a result of jumping out his pickup truck, which occurred shortly after the date of the alleged injury. He also told Dr. Palmer of his 1977 motor vehicle accident in which he sustained a cervical fracture and that he thought his pain could be the result of the arthritis that had begun to settle in. While Claimant apparently told Drs. Medel and Barker that he hit his head on a piece of pipe at work, this was long after the initial incident and shortly after he had been denied SSDI benefits. Furthermore, the evidence presented is devoid of any suggestion that either Dr. Medel or Dr. Barker relied upon anything other than Claimant's subjective historical report when they opined that Claimant's condition had worsened after hitting his head rendering any causation analysis on their part incomplete and unconvincing.

Compensability

D. As noted, Claimant bears the burden to prove that she suffered a Compensable injury. To sustain that burden, he must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); §8-41-301(I)(c), C.R.S. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place

[2] The ALJ finds that Claimant is not an accurate historian and was unable to provide specific dates and/or timelines for many of the events to which he testified.

limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment as a welder for Employer. Nonetheless, the question of whether the alleged injury "arose out of" Claimant's employment must be resolved before the injury is deemed compensable.

E. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties, does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo.App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). Moreover, under the Workers' Compensation Act there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo.App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S.

F. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an "accident" at work without sustaining a compensable "injury." This is true even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where the claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where Claimant involved in motor vehicle accident without resultant injuries, no compensable injury occurred). As found above, the ALJ is not persuaded that Claimant's neck pain and treatment, including his fusion surgery was caused by walking into the hopper handle. To the contrary, the overwhelming evidence presented persuades the ALJ that Claimant's neck pain and need for cervical treatment is probably related to the natural evolution of a chronic, preexisting, degenerative cervical spine condition generally and more specifically the progressive instability caused by an unhealed (nonunion) type II odontoid fracture at C2 following his 1977 MVA. Because Claimant failed to establish a

causal nexus between his alleged injury and his related functions, he failed to establish that he suffered a compensable injury. Accordingly, his claim must be denied and dismissed and his remaining claims need not be addressed.

G. Even if Claimant had established the requisite causal connection between his neck pain and walking into the hopper handle as he alleged, the evidence presented persuades the ALJ that an intervening event, i.e. jumping from his pickup truck a few days later would have severed the causal relationship between any such work injury and his need for treatment. It is well settled that the natural development of an intervening, nonindustrial injury, which is separate from and uninfluenced by an earlier industrial injury, is not compensated as part of the original industrial injury. *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Here, the expansion of symptoms to include numbness in the arms after jumping from the bed of a pickup and feeling the vertebrae "stack" up which prompted Claimant to seek chiropractic care, supports a conclusion that his worsening symptoms are probably associated with this event rather than bumping his head on the hopper as alleged. Indeed, Claimant reported as much to Dr. Palmer on August 14, 2017. Consequently, while Claimant likely benefitted from continued care, including surgery, the evidence presented persuades the ALJ that this treatment was probably unrelated to address any symptoms caused by the alleged August 1, 2017 industrial injury. Rather, the evidence presented persuades the ALJ that ongoing treatment, including the aforementioned fusion surgery was necessary (related) to address the probable aggravation/acceleration of the instability of Claimant's unhealed C2 odontoid fracture caused by jarring his neck after jumping from his pickup. Because Claimant failed to prove by a preponderance of the evidence that his need for medical treatment, including surgery, as performed by Dr. Barker, was causally related to his August 1, 2017 accident, Respondents' are not obligated to provide it.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

DATED: October 15, 2018

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on April 7, 2018.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his industrial injury.

FINDINGS OF FACT

1. Claimant is a 62 year old male who was born on May 8, 1956. He began working for Employer as a cashier on September 21, 2017. Claimant's job duties involve lifting and scanning items at a large warehouse store.

2. Claimant testified that on April 7, 2018 he was walking down a hallway from Employer's break room to the stairs when he slipped on small droplets of water on the floor. Claimant characterized the April 7, 2018 accident as a "significant event" in which he "significantly wind-milled" his arms, in a "Charlie Chaplin" like manner to maintain his balance and keep from falling. Claimant did not fall to the ground. He testified that he felt an immediate "twinge" following the slip incident. The event was captured on Employer's in-store security video.

3. On April 7, 2018 Claimant and Employer completed a First Report of Injury. Claimant also filled out an Associate Incident Report. The Incident Report specified that Claimant's right foot slipped in a puddle of water "twisting my mid-right back." Claimant declined medical treatment.

4. Claimant testified that following the slip incident he left work early because he had difficulties performing his job duties as a cashier. He specifically noted that he had trouble standing, walking and lifting because of pain in his mid-back area.

5. Claimant acknowledged that he has a history of lower back pain but has never previously suffered an injury to his lower back. He detailed that he now has pain in his mid-back, through the groin area, in the buttock and down to his right leg. Prior medical records from CHPG Primary Care specifically reflect that he suffered lumbar spine pain in the L3-L5 region. In fact, Claimant purchased an inversion table several years ago for treatment of his lower back symptoms.

6. Claimant explained that he resides on a 40 acre "working ranch." He raises dogs, cats and chickens. Claimant commented that he rents out the pasture area to other ranchers. In an April 12, 2018 Witness Statement co-worker Kari Shearer remarked that

Claimant talked about his ranch and had chores that included lifting 80 pound hay bales. Similarly, in an April 25, 2018 Witness Statement Manager Susan Enoch noted that, on the day after the slipping incident, Claimant "was home moving bales of hay." Claimant testified that he "could not recall" making the statements about hay bales to co-workers, but he might have made them when he "first got there."

7. On April 12, 2018 Claimant visited UC Health Urgent Care in Castle Rock, Colorado for an examination. He reported that he had slipped on a wet spot on a floor at work and twisted the right side of his lower back. Claimant remarked that he did not fall and the incident was captured on video. He noted continuing right-sided lower back pain with symptoms radiating into his right buttock and right upper back. Claimant commented that he suffered a lower back injury in 1979 but had a "chiropractic adjustment" and has not subsequently experienced back problems. Ryan Sharp, PA-C conducted a physical examination. Claimant exhibited decreased lumbar range of motion, tenderness and spasms. PA-C Sharp assigned work restrictions and prescribed medications.

8. On April 18, 2018 Claimant returned to UC Health for an evaluation. Physician's Assistant Jocelyn Cavender diagnosed Claimant with a lumbar strain and referred him to physical therapy. X-rays of the lumbar spine revealed "hypertrophic degenerative changes and significant disc space narrowing at the L4-L5 and L5-S1 levels." There was no acute fracture or compression deformity.

9. During the latter part of April 2018 Claimant continued to receive treatment at UC Health. Claimant reported persistent lower right-sided back symptoms. He received work restrictions and underwent physical therapy. For the period April 27, 2018 through May 21, 2018 Claimant underwent seven physical therapy sessions with No Limits Physical Therapy.

10. On May 16, 2018 Claimant returned to UC Health for an evaluation. He reported some improvement with physical therapy and was following the treatment plan. Claimant mentioned that a few years earlier he had some back discomfort, visited a chiropractor and purchased an inversion table. He used the inversion table periodically but started using it regularly and has obtained significant benefit. PA Cavender maintained Claimant's work restrictions and referred him for additional physical therapy.

11. On August 26, 2018 Claimant underwent an independent medical examination with Orthopedic Surgeon Timothy S. O'Brien, M.D. Claimant reported that on April 7, 2018 he slipped on one of the many fifty-cent-piece sized water droplets in Employer's break room hallway. Claimant described "cart wheeling" his arms to prevent falling and maintain his upright position. He noted that he would have struck a metal column or corkboard with a ledge if he had fallen to the ground. A physical examination revealed full lumbosacral range of motion.

12. Dr. O'Brien reviewed the full one hour and 59 minute security video of the April 7, 2018 incident. The video revealed that Claimant walked down the break room hallway on two occasions but did not slip and fall. Dr. O'Brien determined that there was no medical record documentation or surveillance video footage that support Claimant's

"representation that he sustained a work-related injury on April 7, 2018." He remarked that all of the medical records and video footage suggested that Claimant did not suffer any injuries on the date of the incident. Dr. O'Brien specified that there was simply no objective evidence that Claimant suffered a work injury on April 7, 2018. He commented that radiographs only revealed normal, age-related degenerative findings. Furthermore, there was no evidence of any tissue breakage or yielding. Dr. O'Brien explained that Claimant suffers from the progressive condition of "pre-existing and long-standing multilevel thoracolumbar spondylosis." He reasoned that Claimant is likely to experience episodic pain without an inciting or traumatic event.

13. Dr. O'Brien testified at the hearing in this matter. He maintained that Claimant did not suffer an industrial injury while working for Employer on April 7, 2018. Dr. O'Brien explained that Claimant simply bent forward and slipped a bit to the right but there was no actual mechanism of injury to cause his symptoms.

14. In-store security video reveals that on April 7, 2018 at 12:20:15 a.m. Claimant was walking up stairs while carrying a drink cup in his left hand. Claimant proceeded down the hallway out of sight. At 12:22:21 p.m., Claimant returned to view. At 12:22:23 p.m. Claimant was walking, slipped and bent slightly forward to less than 90 degrees, but did not wind-mill or cartwheel his arms. Claimant did not drop the vest from his right hand or the drink cup in his left hand. In fact, none of the liquid spilled from the cup. Claimant subsequently looked back at the floor, turned and continued down the stairs. At the end of the staircase, Claimant turned and proceeded back up the stairs, down the hall and out of sight.

15. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on April 7, 2018. Initially, on April 7, 2018 Claimant was walking down a hallway from Employer's break room to the stairs when he slipped on small droplets of water on the floor. He was diagnosed with a lumbar strain and reported persistent lower right-sided back symptoms. Claimant acknowledged that he has a history of lower back pain but has never previously suffered an injury to his lower back. He detailed that he now has pain in his mid-back, through the groin area, in the buttock and down his right leg.

16. Despite Claimant's testimony, the medical records, persuasive analysis of Dr. O'Brien and video surveillance reflect that Claimant did not suffer a compensable injury or aggravation of his pre-existing lower back condition during the course and scope of his employment on April 7, 2018. Claimant's prior medical records specifically reflect that he suffered lumbar spine pain in the L3-L5 region. In fact, he purchased an inversion table several years ago for treatment of his lower back symptoms. X-rays of the lumbar spine subsequent to April 7, 2018 revealed "hypertrophic degenerative changes and significant disc space narrowing at the L4-L5 and L5-S1 levels." There was no acute fracture or compression deformity.

17. Dr. O'Brien considered Claimant's medical history, performed a physical examination and reviewed the one hour and 59 minute security video of the April 7, 2018

incident. The video revealed that Claimant walked down the break room hallway on two occasions but did not slip and fall. Dr. O'Brien determined that there was no medical record documentation or surveillance video footage that support Claimant's "representation that he sustained a work-related injury on April 7, 2018." He remarked that all of the medical records and video footage suggested that Claimant did not suffer any injuries on the date of the incident. Furthermore, Dr. O'Brien commented that radiographs only revealed normal, age-related degenerative findings. There was also no evidence of any tissue breakage or yielding. Dr. O'Brien summarized that Claimant simply suffers from the progressive condition of "pre-existing and long-standing multilevel thoracolumbar spondylosis." He reasoned that Claimant is likely to experience episodic pain without an inciting or traumatic event.

18. In-store security video is consistent with Dr. O'Brien's determination. Claimant was walking, slipped and bent slightly forward to less than 90 degrees, but did not "windmill" or "cartwheel" his arms. He did not drop a vest from his right hand or the drink cup in his left hand. In fact, none of the liquid spilled from the cup. Based on Claimant's pre-existing, degenerative back condition, the persuasive analysis of Dr. O'Brien and in-store video footage, Claimant has failed to demonstrate that his work activities on April 7, 2018 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant's Workers' Compensation claim is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on April 7, 2018. Initially, on April 7, 2018 Claimant was walking down a hallway from Employer's break room to the stairs when he slipped on small droplets of water on the floor. He was diagnosed with a lumbar strain and reported persistent lower right-sided back symptoms. Claimant acknowledged that he has a history of lower back pain but has never previously suffered an injury to his lower back. He detailed that he now has pain in his mid-back, through the groin area, in the buttock and down his right leg.

8. As found, despite Claimant's testimony, the medical records, persuasive analysis of Dr. O'Brien and video surveillance reflect that Claimant did not suffer a

compensable injury or aggravation of his pre-existing lower back condition during the course and scope of his employment on April 7, 2018. Claimant's prior medical records specifically reflect that he suffered lumbar spine pain in the L3-L5 region. In fact, he purchased an inversion table several years ago for treatment of his lower back symptoms. X-rays of the lumbar spine subsequent to April 7, 2018 revealed "hypertrophic degenerative changes and significant disc space narrowing at the L4-L5 and L5-S1 levels." There was no acute fracture or compression deformity.

9. As found, Dr. O'Brien considered Claimant's medical history, performed a physical examination and reviewed the one hour and 59 minute security video of the April 7, 2018 incident. The video revealed that Claimant walked down the break room hallway on two occasions but did not slip and fall. Dr. O'Brien determined that there was no medical record documentation or surveillance video footage that support Claimant's "representation that he sustained a work-related injury on April 7, 2018." He remarked that all of the medical records and video footage suggested that Claimant did not suffer any injuries on the date of the incident. Furthermore, Dr. O'Brien commented that radiographs only revealed normal, age-related degenerative findings. There was also no evidence of any tissue breakage or yielding. Dr. O'Brien summarized that Claimant simply suffers from the progressive condition of "pre-existing and long-standing multilevel thoracolumbar spondylosis." He reasoned that Claimant is likely to experience episodic pain without an inciting or traumatic event.

10. As found, in-store security video is consistent with Dr. O'Brien's determination. Claimant was walking, slipped and bent slightly forward to less than 90 degrees, but did not "windmill" or "cartwheel" his arms. He did not drop a vest from his right hand or the drink cup in his left hand. In fact, none of the liquid spilled from the cup. Based on Claimant's pre-existing, degenerative back condition, the persuasive analysis of Dr. O'Brien and in-store video footage, Claimant has failed to demonstrate that his work activities on April 7, 2018 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant's Workers' Compensation claim is thus denied and dismissed.

ORDER

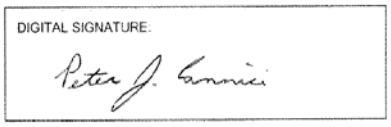
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it

within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 16, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has established by a preponderance of the evidence that he sustained an injury in the course and scope of his employment on November 11, 2017.

- Whether Claimant has established by a preponderance of the evidence that he is entitled to medical benefits because of a work-related injury.

FINDINGS OF FACT

1. Employer, a restaurant chain, hired Claimant on October 5, 2017, to begin working as a bar back when the restaurant opened. The "soft" opening occurred on November 8, 2017. Claimant's duties as bar back included stocking glassware, stocking drinks, preparing the bar for service, emptying trash, filling ice buckets, running food for the bar, and performing other tasks requested by the bartender. As a bar back, Employer paid Claimant an hourly rate plus a portion of the total bar sales. Claimant assisted Employer by performing some set-up work prior to the subject restaurant opening. Employer paid Claimant a higher hourly rate for this work.

2. Claimant alleges that he sustained an injury on November 11, 2017, while working as a bar back. At hearing, Claimant testified that the injury occurred when he lifted two racks each containing 36-49 glasses each from the floor underneath the bar sink. Claimant testified that he felt an immediate onset of pain while lifting up the racks. Claimant completed a worker's claim for compensation form dated November 16, 2017.

3. Claimant's reports of the mechanism of his injury are inconsistent.

   - Claimant reported on his Worker's Claim for Compensation Form that he was leaning over a sink doing dishes.

   - Claimant reported to the Boulder Medical Center that he "was bent over the bar sink and my back pain started. It progressed through the evening and now I can hardly move."

   - Claimant testified that his injury occurred immediately after he returned to the bar after delivering biscuits.

   - He also testified that he injured himself while taking out bar trash.

   - Claimant later testified that after the onset of pain, he carried glass racks from the bar to the sink in the back of the restaurant.

   - Dr. Miller, a medical provider from whom Claimant sought treatment, noted that Claimant reported he had repeatedly lifted racks, leading to his injury.

4. Claimant's reports of the timing of his injury are inconsistent.

- Claimant reported on his Worker's Claim for Compensation Form that he began work at 4:00 p.m. on November 11, 2017.

- Matthew Glassford, Employer's general manager at the restaurant, testified that Claimant was to begin work at 4:30 p.m., on November 11, 2017, but did not arrive until approximately 6:00 p.m.

- Claimant first testified that the bartenders told him to arrive for work at 6:00 p.m. He later changed his testimony to say Mr. Glassford told him to arrive at 6:00 p.m.

- Mr. Glassford credibly testified that Claimant requested to come in after 6:00 p.m. Claimant informed Mr. Glassford that his primary employment was in landscaping, and Mr. Glassford permitted Claimant to arrive at work late when his landscaping schedule conflicted with his restaurant schedule.

5. Claimant's testimony regarding reporting his injury to Employer is not credible.

- Claimant testified that after feeling the onset of pain he walked to a corner designated for the bar back, behind the bar. Claimant testified that, at that time, Mr. Glassford was standing beside the ice machine at the end of the bar, talking to customers. He inconsistently testified later that Mr. Glassford was alone at the ice machine. He testified that he made eye contact with Mr. Glassford and hand signaled his injury by placing both hands on his lower back and grimacing.

- Mr. Glassford testified that he was at the expediting window running the meal service from 5:45 p.m. until the kitchen and service had caught up with orders between 7:00 and 7:30 p.m. The expediting window is located approximately thirty feet from the ice machine and around a corner. The bar back corner is not visible from the expediting window.

- Mr. Glassford credibly testified that he did not see Claimant make any hand signal or facial expression to indicate that he had sustained an injury at any time on November 11, 2017.

- In Claimant's answers to interrogatories, he stated that he reported his injury to Mr. Glassford via Employer's messaging and scheduling service, ScheduleFly, pursuant to instructions Mr. Glassford previously gave him about how to report an injury by use of hand signals. Mr. Glassford testified that he did not train Claimant to use ScheduleFly or hand signals to report an injury.

6. Claimant testified that after he hand signaled Mr. Glassford, he received no response so he left the restaurant and smoked cigarettes in the alley for thirty minutes waiting for someone to come speak with him. Claimant provided no credible explanation

for why he thought someone would come to speak with him in the alley, especially given that Claimant admitted that Mr. Glassford did not respond to Claimant's hand signal. Contrary to his testimony, Claimant's answer to interrogatory number one states that Claimant went outside to see if his back pain would resolve.

7. Mr. Glassford testified the restaurant had recently opened, and November 11, 2017, was only the second high volume service for the new staff. Mr. Glassford testified that when he left the expediting window an employee informed him that Claimant was not fulfilling his bar back duties. Mr. Glassford asked two other employees for help finding Claimant, but they were unable to find him.

8. Claimant testified that when no one came outside to speak with him, he decided to leave work and went back into the restaurant to get his jacket. Before leaving, Claimant picked up his paycheck from the assistant manager, Michael Grimm, and told Mr. Grimm, "My back hurts. I'm outta' here." Claimant did not disclose to Mr. Grimm that he injured his back. When asked at hearing why he had not done so, Claimant testified that he thought Mr. Glassford had already discussed Claimant's injury with Mr. Grimm. Claimant provided no credible explanation for why he made that assumption.

9. The ALJ finds Claimant's assumption that Mr. Glassford and Mr. Grimm had already discussed his alleged injury to be unreasonable given that (1) he had not yet reported his injury to either of them, and (2) Claimant was aware that the restaurant was extremely busy at that time.

10. Claimant acknowledged at hearing that he was upset when he left the restaurant because he felt ignored, he felt unable to do his job due to pain, and that Employer was too busy to deal with him. When he reached his home, he opened his check, believed his pay was short and incorrectly calculated. He became more upset.

11. Claimant testified that he attempted to call the restaurant later that night, but no one answered the phone. However, in Claimant's answers to interrogatories, he never mentioned trying to call the restaurant. At 9:10 p.m., Claimant posted the following message on ScheduleFly to all of the restaurant's employees:

> Bullshit!! 6dollar base pay…..tip out for a bizzy Friday was shit…ohand Friday was below projected!meaning if we doubled that bizzy Friday…which it was bizzy you would still make crap.i applied for barbackand was running fucking biscuits….wtf.get a system and quit rushing everything and every1.the restaurant is short handed…every1 behind the scenes is talking so demand better base pay.the workers are the heroes not the people that can affordto open on pearl!!unprepared and reliant on us!!power to the poor!!!!!#smokescreenhustlefakelove.it was great to meet every1☺ moving on…peace;\

(Errors in original).

12. Claimant initially testified that the message included statements regarding both his injury and difficulty reaching management by phone. Claimant testified that the above message was how he reported his injury to Employer. However, he admitted on cross-examination that nothing in the message mentions an injury.

13. Claimant testified that he did not intend to quit his employment with the last sentence of the message, "moving on." However, Claimant sent the message after he left the restaurant in the middle of his shift. Mr. Glassford credibly testified that reading the message he understood that Claimant was quitting his job due to the numerous complaints he had working for Employer.

14. The ALJ finds that Claimant's actions are more consistent with a frustrated employee venting his anger than an injured employee reporting an injury. Claimant's testimony and statements are inconsistent with the records, with Mr. Glassford's testimony, and Claimant's other testimony and statements. No persuasive evidence supports Claimant's allegation of an injury.

15. Based on the totality of the evidence, the ALJ finds Claimant severed his employment with Employer no later than November 11, 2017 at 9:10 p.m. Even crediting Claimant's stated intention; a person could not reasonably expect to remain employed after sending the message quoted above.

16. On November 12, 2017, Mr. Glassford responded to Claimant's message. Claimant then replied to Mr. Glassford's message on November 12, 2017. The reply stated in part:

> Hey matt the mouth of south..lol.dont threaten me boy.why if I want to rant further do I need to see you and mike…im1guy;)your tough guy attitude doesn't mean shit to me.u might impress the young hostesses(in your mind)but your smoke didn't fool me.

(Errors in original).

Claimant's reply went on to accuse Mr. Glassford of failing to discuss wages when he hired Claimant, and sending a bar back to run biscuits rather than other employees. Notably, Claimant again failed to mention his alleged injury.

17. When Claimant sought medical care, he reported inconsistent symptoms.

- On November 13, 2017, Leah Treadwell, M.D. evaluated Claimant. Dr. Treadwell noted that Claimant reported pain in his mid-back, which began while bending over at work, and she diagnosed him with a thoracic strain.

- On November 21, 2017, Lori Miller, M.D. treated Claimant who reported mid-back and chest pain after repeatedly bending over a sink with heavy glass racks. Claimant also informed Dr. Miller that he lives and works on a farm doing chores and that he had another source of employment.

- On December 14, 2017, Claimant reported to Deborah Lund, M.D., that he was experiencing lumbar spine pain with no mention of mid-back or thoracic pain. Dr. Lund ordered an MRI of Claimant's lumbar spine. Claimant's MRI was normal and revealed no acute injury.

- At hearing, Claimant testified that his back is stiff from his low back up through his shoulder.

- Claimant did not testify to any current pain in his low back, mid-back, or chest.

18. Claimant has a pre-existing history of back problems. These include a discectomy at T5, surgery on his lumbar spine, a cervical strain, and a diagnosis of degenerative disc disease.

19. Claimant has filed at least three previous workers' compensation claims.

20. Based on the totality of the evidence, the ALJ finds Claimant incredible. The ALJ gives his testimony and reports of a work injury no weight.

21. Based on the totality of the evidence, the ALJ finds that Claimant has not met his burden of establishing by a preponderance of the evidence that he suffered a work injury.

22. Based on the totality of the evidence, the ALJ finds that Claimant has not established by a preponderance of the evidence that he is entitled to medical benefits.

CONCLUSIONS OF LAW

For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301(1)(c); *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the ALJ. *Faulkner*, 12 P.3d at 846. A compensable injury is an injury that "arises out of" and "in the course of" employment. *See* C.R.S. § 8-41-301(1)(b); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003); *Price v. Industrial Claim Appeals*, 919 P.2d 207 (Colo. 2012).

In deciding whether the claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Claimant failed to meet his burden to prove by a preponderance of the evidence that he suffered an injury proximately caused by and arising out of the course and scope of his employment. Claimant's testimony throughout the hearing was self-contradicting, inconsistent with exhibits, unreasonable, and inconsistent with Mr. Glassford's testimony. Conversely, Mr. Glassford's testimony was credible, reasonable, and consistent with the admitted exhibits.

Credibility is a significant consideration when determining compensability. In assessing credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

Claimant's actions following his injury are also inconsistent with a person who is attempting to report an injury. Claimant testified that after he signaled to Mr. Glassford, he walked outside in the alley and waited for someone to come meet with him to discuss the injury. Claimant did not speak to anyone, tell anyone where he was going, or tell Mr. Glassford that he was stepping outside. Claimant testified that he waited outside for over thirty minutes. It is unreasonable to think that standing outside of a busy restaurant in an alley without notifying anyone of his whereabouts will get the attention of a manager. Claimant knew that Mr. Glassford was inside the restaurant. If Claimant wanted to report an injury, he could have walked up to Mr. Glassford and reported an injury rather than stand outside. In fact, Claimant's answers to interrogatories state that he went outside to see if his back would get better, not to speak with anyone regarding an alleged injury.

In establishing causation, a claimant "must show that the industrial injury bears a 'direct causal relationship between the precipitating event and the resulting disability.'" *See Garcia v. CF&I Steel*, W.C. No. 4-454-548 (ICAO May 14, 2004). The respondents are liable for medical treatment that is reasonably necessary to cure and/or relieve an injured worker from the effects of an industrial injury. § 8-42-101(1)(a), C.R.S. The claimant must prove a causal nexus between the claimed disability, need for medical treatment, and the work related injury. *Singleton*, 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant has met the burden to establish the requisite causal connection and whether the medical treatment sought is reasonably necessary is one of fact for the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner*, 12 P.3d 844 (Colo. App. 2000).

ORDER

The ALJ orders the following:

1. Claimant has failed to prove that he sustained an injury in the course and scope of his employment on November 11, 2017.

2. Claimant's claim for benefits is therefore denied and dismissed.

3. Issues not expressly decided herein are reserved to the parties for future determination.

ENTERED this 16th day of October 2018.

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS

By: */s/ Kimberly Turnbow*
Administrative Law Judge

NOTE: If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Whether Claimant produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of John Tyler, M.D., that Claimant suffered a 0% permanent impairment rating due to her December 19, 2015, work injury.

II. Whether Claimant is entitled to reasonable and necessary medical maintenance benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On December 19, 2015, Claimant was working for Employer on an assembly line. While working, another employee was having difficulty managing an item on which he was working and bumped into the back of Claimant with his elbow.

2. On December 21, 2015, Employer completed an Employer's First Report of Injury. On the First Report of Injury, the mechanism of injury is described as:

> Another associate was trying to loosen a kit that's tubing was tangled and when he pulled really hard it came loose and he elbowed [Claimant] in back. The [Claimant] suffered an unk [unknown] injury to the mid/lower back and the [Claimant] did seek medical treatment.

Ex. 1

3. Claimant did not miss any time from work because of her low back injury. (Claimant's testimony; See also Exhibits B and F: Dr. Miller's medical records that released Claimant to regular work without restrictions.)

4. Claimant primarily treated with Dr. Matt Miller, Dr. Robert Kawasaki, Chiropractor Dr. Hauk, and psychologist Dr. Ron Carbaugh.

5. On December 21, 2015, Claimant was evaluated by Matthew Miller, M.D., at Front Range Occupational Medicine. Claimant described the incident and her complaints as follows:

> The [Claimant] complains of back pain. Coworker was struggling with a part and hit her in the back. Possibly with elbow. The pain is located in the mid/lower back. The pain is

> described as dull, aching, stabbing at times. The pain has been present 2 days. Pain level is 7 out of 10. The patient has not seen another provider for this problem.
>
> Numbness and tingling at times in the legs, left more than right. No bowel or bladder incontinence. Does feel like she can't empty bladder.

At this appointment, Claimant also indicated she has a history of a prior neck and back injury that occurred in 2002 and that she had some occasional problems due to such injury.

Dr. Miller physically examined Claimant and noted no bruising. Dr. Miller diagnosed Claimant as suffering from a contusion to her back. He also noted that the mechanism of injury is consistent with a back contusion and not a disc injury. Although Claimant was complaining of some lower extremity symptoms as well as urinary frequency, he thought the urinary frequency was due to a urinary tract infection – based on a urine test - and treated her for such. He returned Claimant to full duty and planned on seeing her in a few days. (Ex. 7.)

6. On December 23, 2015, Claimant returned to Dr. Miller complaining of increasing back pain of 8/10 and worsening urinary symptoms. Claimant also complained of numbness in a saddle distribution. Therefore, due to concerns for a cauda equina lesion, Dr. Miller ordered an MRI. Despite referring Claimant for an MRI, Dr. Miller did not assign any work restrictions and anticipated Claimant would reach MMI within one month. His assessment at that time remained as a back contusion. (Ex. 8.)

7. On December 23, 2015, Claimant underwent an MRI. The impressions were minimal lumbar spine degenerative changes, with no indication of disc herniation, foraminal narrowing, or spinal stenosis. (Ex. 9.) It was basically a normal MRI.

8. On January 4, 2016, Claimant returned to Dr. Miller. At this appointment, Claimant indicated her back pain was slightly better at 6/10 and her numbness had mostly resolved. Dr. Miller noted Claimant had continued pain complaints and tenderness of her low back as well as some decreased range of motion. Dr. Miller's neurological examination indicated Claimant's sensation in her lower extremities was intact in both lower extremities and that her lower extremity reflexes were normal. His assessment of Claimant's condition remained as a lumbar contusion and he did not assign any work restrictions. (Ex. 10.)

9. On January 11, 2016, Claimant returned to Dr. Miller and indicated she was getting worse. Claimant alleged she slipped on ice and had an increase in back pain, up to 7/10, and developed an increase in numbness in her left and right leg. Dr. Miller noted that sensation to light touch was intact except for decreased sensation in the dorsal foot. Dr. Miller returned Claimant to full duty but noted "If

not improved, may consider a second opinion. I'm surprised she isn't getting better given the mechanism of injury." (Ex. 11.)

10. On January 15, 2016, Claimant returned to Dr. Miller. Although she said her pain was better, 5/10, she still complained of pain with back extension and flexion. Dr. Miller noted a positive straight leg test on the left, but yet also noted a positive Waddell's sign for superficial tenderness. He also stated in his report that Claimant was walking with a normal gait. (Ex. 12.)

11. On January 22, 2016, Dr. Miller indicated that despite Claimant's minimal improvement and a "good looking MRI," he would refer her to Dr. Kawasaki for a second opinion.

12. On January 25, 2016, Claimant was evaluated by Dr. Kawasaki. At this visit, Claimant provided a much more dramatic description of her accident at work. As set forth in Dr. Kawasaki's report, he noted the following:

> She was struck on the back by another person. She indicates she was on the assembly line putting devices in packages. The coworker next to her was pulling a packaging off the assembly line but was stopped when the box recoiled secondary to being tethered. This caused the coworker to strike her across the back with the box. Another coworker got caught and fell over slamming into her getting her from behind. She was forced into the table into a forward flexed position. (Ex. 13.)

13. As found, the initial description of the accident noted in the medical records indicates Claimant was not sure what hit her in the back and thought it was someone's elbow. At this visit with Dr. Kawasaki, she provides a much more dramatic description of the incident. This new and revised description of the accident was neither noted by Dr. Miller in his notation from his initial examination of Claimant in which he described the mechanism nor noted in the Employer's First Report of Injury.

14. Dr. Kawasaki stated in his report that Claimant had radicular symptoms in all dermatomes of the left lower extremity and globally to the right. Dr. Kawasaki indicated that he reviewed Claimant's MRI and there were minimal degenerative findings and there were no findings that would explain Claimant's radicular complaints. In addition, Dr. Kawasaki did not indicate Claimant's alleged radicular symptoms followed any expected dermatomal pattern. Despite Claimant's complaints, which did not appear to be anatomically or physiologically consistent, Dr. Kawasaki recommended an EMG to determine if there was any evidence of radiculopathy. (Ex. 13.)

15. On February 4, 2016, Claimant began physical therapy at Physiotherapy Associates. At her first appointment, the report provides a slightly different mechanism of injury. The report indicates Claimant initially got hit in the back

during December of 2015. Then, shortly thereafter, but on the same day, someone had to catch their balance and grabbed onto Claimant. Therefore, this description provides two separate incidents on the first day that Claimant contends resulted in a back injury. The report also indicates that about a week or so later, Claimant noted a third incident when slipped on some ice and fell. Thus, this physical therapy report provides a third version of how Claimant contends she injured her back at work. (Ex. 15.)

16. Claimant continued going to physical therapy through February 23, 2016. As noted in the physical therapy records, Claimant complained of pain with all movement exercises. Therefore, the physical therapist spoke with Dr. Miller and Dr. Miller stopped physical therapy and decided to refer Claimant to a psychologist to assist in determining whether Claimant's physical complaints, which were not supported by objective findings, were psychologically based.

17. On or about February 12, 2016, Claimant attempted to be seen by her personal PCP due to complaints of back pain and loss of bladder control. Because Claimant could not be seen by her personal PCP, she was referred to the emergency room due to her complaints. (Ex. 16.) Therefore, on February 12, 2016, Claimant underwent another MRI. The history and reason for the second MRI documented on the report is: "Fall. Back pain. Left leg numbness. Loss of bladder control. Fell on ice 2 weeks ago." The MRI findings were basically the same as the first MRI and did not provide an anatomical or physiological explanation for Claimant's self-reported symptoms. (Ex. 17.)

18. On February 17, 2016, Claimant returned to Dr. Kawasaki and underwent an EMG in order to determine if there was any anatomic or physiologic basis for her radicular complaints. The EMG was negative and did not demonstrate any evidence of lumbar radiculopathy, lumbosacral plexopathy, or compression neuropathy. Dr. Kawasaki stated that Claimant continued to complain of pain in her low back as well as radicular symptoms down both of her lower extremities. Despite Claimant's subjective complaints, and reviewing the results of the diagnostic testing, Dr. Kawasaki noted the following:

    - She has no objective findings.
    - Radiographic evaluation with MRI was normal.
    - EMG nerve conduction studies are normal.
    - There is no clear objective evidence for her subjective complaints.

    There is no indication in this report Claimant advised Dr. Kawasaki at this visit that she fell on some ice 2-3 weeks ago and underwent a second MRI just 5 days earlier.

Because there were no objective findings to support Claimant's back pain and bilateral radicular complaints, Dr. Kawasaki referred Claimant to Dr. Ron Carbaugh for a psychological evaluation. (Ex. 18.)

19. On February 17, 2016, Dr. Miller noted that he spoke with Dr. Kawasaki and that the EMG was negative. He also indicated Claimant saw her personal PCP last week and was sent to the ER for another MRI. Although the results were not available, Dr. Miller noted that he anticipated it would be negative, but that he would review it. (Ex. 16.)

20. On February 18, 2016, Claimant returned to Dr. Miller. Although she did mention that she tried to see her primary care physician and because they could not see her, they sent her to the emergency department and she underwent another MRI, (which was negative), her symptoms remained the same. At this appointment, Dr. Miller indicated Claimant was approaching MMI.

21. On March 8, 2016, Claimant was evaluated by a psychologist, Dr. Ron Carbaugh. After evaluating Claimant, Dr. Carbaugh stated that:

> [Claimant's] behavioral presentation and subjective symptom report are both inconsistent with her psychometric testing profiles and results, similar to the discrepancy between her subjective physical complaints and her objective medical testing.

Dr. Carbaugh diagnosed Claimant as suffering from a somatic symptom disorder as well as a preexisting depressive disorder and he concluded Claimant had no psychological impairment related to the incident at work. (Exhibit G.)

22. On March 10, 2016, Claimant returned to Dr. Miller. As noted in his report, he spoke with Dr. Kawasaki and Dr. Carbaugh and despite Claimant's ongoing subjective complaints, he determined there was nothing else they could offer Claimant. Therefore, he placed Claimant at MMI and determined she suffered zero impairment. He did, however, recommend maintenance medical care of six sessions of chiropractic care and for Claimant to follow-up with Dr. Kawasaki for medications.

23. On April 4, 2016, Dr. Kawasaki agreed Claimant reached maximum medical improvement without restrictions despite her continued low back pain complaints and complaints of radicular symptoms. Dr. Kawasaki noted that his examination continued to reveal that Claimant's symptoms were non-focal and that there was no clear objective evidence for her subjective complaints. Dr. Kawasaki did, however, recommend Claimant discontinue tramadol and continue tizanidine when necessary. He also agreed to follow Claimant for medication needs for around 1 year. (Exhibit I.)

24. On April 6, 2016, Dr. Malinda Schlicht, at Kaiser, reported that Claimant's neurogenic symptoms were not explained by the MRIs of her lumbar spine. (Exhibit D.)

25. On April 27, 2016, Claimant reported a separate work-related injury to her mid back and shoulder for which she started to treat with Dr. Kristen Mason. Claimant testified that shortly thereafter she stopped treating with Dr. Miller and Dr. Kawasaki for the low back injury which is the subject of this claim. (*See* Exhibit 25.)

26. On December 13, 2017, Respondents filed a Final Admission based on Dr. Miller's and Dr. Kawasaki's reports. Respondents admitted for maintenance medical treatment "with the authorized treating physician that is reasonable, necessary and related to the compensable injury." (Exhibit 3.) Thereafter, Claimant requested a Division IME which was scheduled with Dr. John Tyler.

27. This claim was complicated when, on January 22, 2018, Claimant reported work-related back pain after she slipped on ice, jerked her body, but did not fall. Claimant reported this incident occurred during a break while at work. (See Exhibit 26, and Exhibit A.) Claimant followed up with Dr. Mason.

28. Dr. Mason reviewed records from the 2015 low back injury and prepared a report dated March 19, 2018. Dr. Mason concluded that due to the 2015 back injury, Claimant was not restricted with respect to the lumbar condition and may return to regular work; there was no permanent impairment; and Claimant did not require any medical treatment for her low back condition. (Exhibit J.)

29. On April 3, 2018, ALJ Eley issued a Prehearing order that allowed Dr. Tyler's Division IME to proceed and allowed Dr. Tyler to address both low back claims and to apportion, if appropriate, any impairment between the 2015 and 2018 incidents. (Exhibit O.)

30. On April 12, 2018, Dr. John Tyler performed the Division IME, and issued his report on April 13, 2018. He took a history from Claimant, examined the Claimant, reviewed the medical records, and reported that he agreed with Dr. Miller that Claimant reached maximum medical improvement on March 10, 2016, and that Claimant suffered 0% impairment. Dr. Tyler noted there was no objective evidence of any acute trauma to the lumbar spine and no pathology whatsoever on exam of the lumbar region. Dr. Tyler noted Claimant was moderately overweight and that her pain was due to her deconditioned state. Dr. Tyler also addressed the January 22, 2018, incident Claimant stated happened at work and concluded that "at most" Claimant suffered a short-term aggravation of her previous injury to the lumbar spine but there was never a specific injury that occurred on that date. Dr. Tyler did not address medical maintenance care other than to note that there was no evidence of acute trauma to the lumbar spine and no pathology in the lumbar spine region. Based on his statement that "there was no pathology whatsoever on exam of the lumbar region, it can be inferred that he did not think maintenance medical treatment was necessary. (Exhibit A.)

31. Dr. Tyler spent a considerable amount of time evaluating this case and analyzing Claimant's medical records. Dr. Tyler stated in his report that the day before IME he "spent well over 7 ½ hours in review of these medical records the night before today as well all of this morning to prepare for this [DIME] this afternoon." (Ex A,

pg. 2.) Although Dr. Tyler indicated that most of the medical records he reviewed were related to Claimant's 2016 claim, which he thought was still open, the salient point is that Dr. Tyler spent a significant amount of time critically reviewing Claimant's medical records in order evaluate this case and formulate his ultimate opinions and conclusions. Therefore, based on the totality of the evidence presented in this case, the ALJ finds Dr. Tyler's findings and conclusions to be highly credible and persuasive.

32. On May 1, 2018, Respondents filed an FAL which was consistent with Dr. Tyler's DIME report. The FAL indicated Claimant reached MMI on March 10, 2016, and that Claimant suffered zero impairment. Respondents also denied liability for maintenance medical treatment.

33. On August 1, 2018, Dr. John Hughes performed an independent medical examination at Claimant's request and Dr. Hughes prepared a report. Dr. Hughes agreed with Dr. Miller and Dr. Tyler that Claimant reached maximum medical improvement. Dr. Hughes "disagreed" with Dr. Miller and Dr. Tyler that there was no evidence of permanent impairment of the lumbar spine stemming from Claimant's work-related injuries of December 19, 2015, and Dr. Hughes rated Claimant with a 15% whole person impairment. Dr. Hughes admitted in his report, however, that his disagreement was a matter of opinion: "It is my opinion that Ms. Gries has a permanent lumbar spine permanent impairment." Dr. Hughes did not indicate that Dr. Tyler or Dr. Miller erred or made a mistake in determining Claimant did not suffer a ratable impairment under the AMA Guides. (Exhibit K.)

34. Claimant testified at hearing. She reported ongoing low back symptoms that remain similar to symptoms at the time of maximum medical improvement. Claimant admitted she did not miss time from work because of her injuries. Claimant admitted that she treated with multiple providers and that she told them all, including Dr. Tyler, about the nature and extent of her symptoms.

35. Claimant failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Tyler that Claimant reached MMI on March 10, 2016, with a 0% permanent impairment rating for her December 19, 2015, admitted industrial injury.

36. There is a lack of objective findings to support Claimant's subjective pain and radicular/neurological complaints. Moreover, the ALJ does not find Claimant to be reliable or credible regarding the onset of her symptoms, the extent of her symptoms, the duration of her symptoms, or the cause of her symptoms.

37. Claimant testified that she has obtained and paid for some chiropractic treatment on her own to relieve her from the effects of her industrial injury. Claimant also testified that she stopped treating with Drs. Miller and Kawasaki upon suffering another work related injury in 2016 for which she is seeing Dr. Mason.

38. Claimant testified that she would like to receive additional chiropractic treatment and medications, (i.e., medication management) which was recommended by Drs. Miller and Kawasaki when she was placed at MMI. However, the ALJ finds

that Claimant has failed to establish by a preponderance of the evidence that such treatment is reasonable and necessary to relieve Claimant from the effects of her industrial injury. The ALJ finds that Drs. Miller and Kawasaki are prescribing treatment for subjective symptoms which are neither reliable nor credible.

39. Respondents have also established by a preponderance of the evidence that Claimant is not entitled to maintenance medical treatment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of Claimant nor in favor of the rights of Respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met their respective burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

I. Whether Claimant produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of John Tyler, M.D., that Claimant suffered a 0% permanent impairment rating due to her December 19, 2015, work injury.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000), the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has even upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002). These cases embody the principle that the AMA Guides require the rating physician to use their medical expertise and clinical judgment in "analyzing the history and the clinical and laboratory findings to determine the nature and extent of the loss, loss of use of, or derangement of the affected body party, system or function," in order to determine whether the work accident caused any ratable impairment pursuant to the AMA Guides. (*See* AMA Guides, pg. 7.)

Consistent with the above principles, the Colorado Division of Workers' Compensation Impairment Rating Tips (Impairment Rating Tips) provide that permanent impairment ratings are only warranted when a specific diagnosis and objective pathology can be identified. See Desk Aid #11, General Principles 1. The Impairment Rating Tips summarize that:

> The existence of [the preceding] anatomic findings cannot be considered pathological unless there are clear physiologic ties and correlation with clinical findings in an individual patient. The mere presence of these changes is not a sufficient justification to attribute correlation to a non-specific spinal complaint. The physician should not rate findings by diagnostic imaging which have not been clearly defined as contributing significantly to the patient's condition. . . . Due to discrepancies between x-ray findings and pathological conditions, it is incumbent on physicians to carefully examine and apply other diagnostic tests as appropriate to identify the

> true pain generators in a patient and plan their treatment and impairment rating accordingly.

See Desk Aid #11, Spinal Rating 7.[1]

Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

As found, Claimant failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Tyler that Claimant suffered 0% permanent impairment as a result of her December 19, 2015 admitted industrial injury. Dr. Tyler took a history from Claimant, examined the Claimant, reviewed the medical records, and agreed with Dr. Miller that Claimant reached maximum medical improvement on March 10, 2016, and that Claimant suffered 0% impairment. Dr. Tyler found no objective evidence of any acute trauma to the lumbar spine and no pathology whatsoever on exam of the lumbar region. Dr. Tyler noted Claimant was moderately overweight and that her pain was due to her deconditioned state. Dr. Tyler's conclusions are supported by Claimant's treating physicians Dr. Miller, Dr. Kawasaki, and Dr. Mason who was treating Claimant for a different work injury – but still rendered an opinion regarding impairment in this case. Furthermore, MRIs and electrodiagnostic testing were normal. The persuasive medical records thus corroborate Dr. Tyler's permanent impairment determination.

In contrast, Claimant testified at hearing and Claimant only produced Dr. Hughes' medical opinion evidence contradicting the opinions of the treating physicians and Dr. Tyler's DIME determination. Dr. Hughes merely "disagreed" with Dr. Miller and Dr. Tyler that there was no evidence of permanent impairment of the lumbar spine stemming from Claimant's work-related injuries of December 19, 2015, and Dr. Hughes did not credibly and persuasively report that Dr. Tyler or Dr. Miller erred or made a mistake. The mere difference of medical opinion in this case does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. Also, Claimant's testimony at hearing did not constitute clear and convincing evidence to overcome the opinion of the DIME physician. As found, there is a lack of objective findings to support Claimant's subjective pain and radicular/neurological complaints. Moreover, the ALJ did not find Claimant to be reliable or credible regarding the onset, extent, duration, or cause of her symptoms. As found, Claimant provided numerous scenarios regarding how she hurt her back and such variance combined with a lack of objective findings to support her reported symptoms and complaints diminished Claimant's credibility and

[1] See also Desk Aid #11, Spinal Rating, *Updated May 2018.*

reliability as well as the opinions of her treating providers who relied on the history and statements provided by Claimant in making diagnoses and treatment recommendations.

Claimant contends in her post hearing submission that Dr. Tyler misapplied the AMA Guides by requiring Claimant to establish that she suffered a "significant" injury in order to qualify for a rating. The ALJ does not interpret Dr. Tyler's report in the same manner. Dr. Tyler stated in his report the following:

> There never was any direct trauma to the lumbar spine or its surrounding structures, that I can see based on review of these records, of any significance. The MRI scans she had of the lumbar spine do not show any acute trauma to the lumbar spine that would correlate with the trauma she suffered at the time of work dating back to December 19, 2015. Her exam on today's date shows no pathology whatsoever in the lumbar spine region…

The ALJ interprets Dr. Tyler's conclusions, when taken in context with the entire medical record, to mean that he concluded Claimant suffered a compensable injury at work but yet the incident did not result in any ratable impairment pursuant to the AMA Guides.

Claimant also appears to contend in her post hearing submission that Dr. Tyler erred by not providing Claimant a rating based on Claimant's subjective complaints of pain and radicular symptoms, her presentation of limited range of motion in her lumbar spine, and her receipt of medical treatment. The ALJ is not persuaded by this argument either. As found, Claimant was not a reliable historian regarding the onset, extent, duration, and cause of her symptoms. Therefore, the provision of medical treatment in response to her unreliable complaints, symptoms, and any presentation of limited range of motion of her lumbar spine, does not equate to clear and convincing evidence that Dr. Tyler erred in not providing Claimant an impairment rating under the AMA Guides.

Accordingly, the ALJ concludes that Claimant failed to produce unmistakable evidence free from serious or substantial doubt, (i.e., clear and convincing evidence), that Dr. Tyler's impairment determination was incorrect.

II. Whether Claimant is entitled to reasonable and necessary medical maintenance benefits.

a. Whether Claimant established by a preponderance of the evidence that she is entitled to any specific maintenance medical treatment.

Where the Respondents file an FAL admitting for maintenance medical treatment pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), this does not preclude them from later contesting their liability for a particular treatment. Rather, when the Respondents contest liability for a particular medical benefit, the Claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury. *See Grover v. Industrial Commission*, 759 P.2d at 712; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

In this case, Respondents filed an FAL on December 13, 2017, and admitted for maintenance medical treatment with "the authorized treating physician that is reasonable, necessary and related to the compensable injury." Therefore, Claimant is entitled to maintenance medical treatment that is reasonable, necessary, and related to relieve Claimant from the effects of her industrial injury or prevent further deterioration. *See Grover v. Industrial Commission, supra*; *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

The ALJ concludes, however, that Claimant failed to establish by a preponderance of the evidence that she is entitled to any specific medical treatment which has been recommended by an authorized treating physician and denied by Respondents. Dr. Miller did recommend maintenance medical care of six sessions of chiropractic care and for Claimant to follow-up with Dr. Kawasaki for medications. And, Claimant testified that she sought chiropractic care on her own through a chiropractor other than the one she was seeing under this claim. She also testified that she stopped seeing Dr. Kawasaki once she suffered another injury in 2016 and began treating with Dr. Mason and agreed to only get medication from Dr. Mason. Therefore, Claimant has not sought additional medication management from Dr. Kawasaki under this claim since that time. Based on the totality of the evidence, including the lack of any objective findings to support Claimant's subjective complaints, the failure of Claimant to provide reliable information regarding the onset, extent, duration, and cause of her symptoms, the opinion of Dr. Mason, and the opinion of Dr. Tyler in which he indicated there was no indication of any pathology whatsoever regarding Claimant's lumbar spine, the ALJ concludes that specific maintenance medical treatment in the form of chiropractic treatment or medication management is not reasonable and necessary to relieve Claimant from the effects of her industrial injury or prevent deterioration.

b. <u>Whether Respondents established by a preponderance of the evidence that Claimant is not entitled to maintenance medical treatment.</u>

Where the Respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for such modification. *See* Section 8-43-201(1), C.R.S.; *see also Barker v. Poudre School District*, W.C. No. 4-750-735 (March 7, 2012). Here, because Respondents had previously filed an FAL admitting for maintenance medical benefits, under § 8-43-201, C.R.S., Respondents had the burden to show by a preponderance of the evidence why they are no longer responsible for maintenance medical benefits in general.

In this case, Respondents, have met their burden. As set forth above, based on the totality of the evidence, including the lack of any objective findings to support Claimant's subjective complaints, the failure of Claimant to provide reliable information regarding the onset, extent, duration, and cause of her symptoms, and the opinion of Dr. Mason and Dr. Tyler that there was no evidence of any lumbar pathology whatsoever, the ALJ concludes that Respondents have established by a preponderance

of the evidence Claimant is not entitled to maintenance medical treatment that is reasonable, necessary, and related to relieve Claimant from the effects of her industrial injury or prevent further deterioration. *See Grover v. Industrial Commission, supra; Stollmeyer v. Industrial Claim Appeals Office, supra; Milco Construction v. Cowan, supra.*

Therefore, the ALJ concludes Respondents have established by a preponderance of the evidence that Claimant is not entitled to a general award of maintenance medical treatment.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to overcome the opinion of the DIME physician, Dr. Tyler, regarding the Claimant's impairment rating by clear and convincing evidence. Therefore, Dr. Tyler's 0% impairment rating for the lumbar spine is binding.

2. Claimant is not entitled to maintenance medical treatment.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 17, 2018.

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Respondents established by a preponderance of the evidence that they are entitled to withdraw either their final admission of liability (FAL) which admitted for maintenance medical treatment.

II. If Respondents, failed to carry their burden of proof, whether Claimant established, by a preponderance of the evidence, that her need for continued maintenance medical care is reasonable, necessary and related to her January 27, 1996 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On January 27, 1996, Claimant sustained an admitted work injury to her left buttock, and low back.

2. Claimant underwent a course of medical treatment for her injuries.

3. Ultimately, Claimant was placed at Maximum Medical Improvement (MMI) on or about October 1996, per the Division Independent Medical Examination performed by Alan B. Lichtenberg, M.D. on April 7, 2005.

4. Respondents filed a Final Admission of Liability admitting for maintenance medical benefits.

5. Thereafter, Respondents reached a full and final settlement agreement with Claimant regarding indemnity benefits. All issues under the claim closed with the exception of maintenance medical care. Claimant has received post MMI treatment to include injection therapy, physical therapy, massage therapy and prescription medications. Claimant testified that she continued to receive treatment after the aforementioned settlement with Dr. Timothy Hall.

6. Medical record review indicates that Dr. Hall provided maintenance treatment though 2016. A report from November 1, 2016 reflects that Dr. Hall provided Claimant with Botox injections. Claimant was to follow-up in one month; however, Claimant failed to do so.

7. On March 28, 2018, Claimant returned to Dr. Hall who indicated that he had last evaluated her on November 1, 2016. Based upon this history, the ALJ finds that there was a hiatus in care lasting approximately 16 months. Claimant returned to Dr. Hall on this date reporting continued depression, interrupted sleep, persistent anxiety and ongoing pain. Dr. Hall noted that Claimant was not taking any medication prescribed through his office, noting further that Claimant had been taking antidepressants, prescribed by a psychiatrist in Pueblo; however, was no longer taking them because Insurer had stopped paying for them and it was financially draining for her to cover the cost personally. Dr. Hall recommended repeat Botox injections as they "helped quite a bit with local symptoms" in the past.

8. Claimant testified that she continues to receive treatment from her psychiatrist, Dr. Brett Fouss, whom she sees about every two months. Dr. Fouss prescribes and Claimant is currently taking the following medications: Fetzima (antidepressant); Ambien (sleep medication); and Buspar (anxiety medication). Claimant testified that approximately 8 months prior to the hearing forming the basis for this order, Insurer stopped paying for these medications. According to Claimant, sudden withdrawal from the aforementioned medications poses an increased risk for stroke and death. Consequently, she testified that she refills the medications at her own cost

9. Claimant testified that she paid $64.95 cash for each Ambien prescription. Tr. 29:3-12. Claimant further testified that she paid $443.96 for each Fetzima prescription. Claimant also testified that she has not filled her prescription for Buspar, as Dr. Fouss provides her with samples.

10. On February 24, 2017, Claimant underwent an Independent Medical Examination (IME) with Dr. Carlos Cebrian at Respondents request. Dr. Cebrian testified as an expert in occupational medicine with accreditation as a Level II physician by the Colorado Department of Labor. Dr. Cebrian testified that he was experienced in performing causation assessments.

11. Dr. Cebrian conducted an extensive medical record review of Claimant's past treatment, to include review and analysis of Dr. Stephen Moe's psychiatric IME, Dr. Bart Goldman's IME, and Dr. Alan Lichtenberg's Division IME and Dr. Neil Pitzer's IME.

12. On November 20, 2001, Stephen A. Moe, M.D., conducted a psychiatric IME of Claimant. Dr. Moe opined that Claimant's "experiences of physical pain and depression are not the result of the injury on 1/27/96 but are instead due to causes entirely apart from injuries from her fall." According to Dr. Moe, Claimant's chronic pain disorder was the likely result of "long standing characterological deficits and/or pre-existing anxiety or mood disorder." Claimant has a history of depression and anxiety predating her industrial accident. She reported being diagnosed with anxiety and depression at age 25 to Dr. Cebrian.[1] He explained that with chronic pain disorders a minor injury similar

[1] Claimant confirmed her prior history of depression and anxiety, testified that she was first diagnosed in 1982 or 1983.

to the type Claimant experienced[2] "results in chronic symptoms and impairment not because of the initial injury but because of the pre-existing mental state of the person injured."

13. Dr. Moe opined that "[o]nce the pattern seen with Ms. Riccillo . . . [becomes] entrenched it is very difficult to reverse." He noted further that Claimant had identified with the illness role and would not improve "spontaneously." He explained that only with "firm limits on future treatment that in essence force her to confront her reluctance to return to work will she stand any chance of reversing her regression." Based upon the evidence presented, Claimant continued to treat actively for years following Dr. Moe's 2001 IME without lasting improvement. Moreover, she never returned to work.

14. On October 2, 2002, Dr. Goldman conducted an IME of Claimant. Dr. Goldman opined that Claimant's work-related diagnoses included a lumbar strain and piriformis syndrome. Dr. Goldman further opined that Dr. Moe's recommendations appeared accurate. Dr. Cebrian corroborated Dr. Goldman's opinions and testified that Dr. Goldman highlighted Claimant's chronic pain disorder with psychological factors affecting her physical condition as a non-work-related condition. Tr. 57:12-22.

15. Claimant also underwent an IME with Dr. Neil L. Pitzer on January 21, 2014. Dr. Pitzer opined that Claimant's work-related diagnosis was left buttock myofascial pain. Dr. Cebrian testified that Dr. Pitzer indicated that there was no objective evidence to support Claimant's wide spread pain complaints.

16. On April 7, 2005, Claimant underwent a Division IME with Dr. Alan Lichtenberg. Dr. Lichtenberg opined that Claimant's work-related diagnoses were low back pain, left buttocks pain, and left hip pain due to the slip and fall. Dr. Lichtenberg directly supported Dr. Moe's conclusions, noting that Claimant's "psychiatric diagnosis of pain disorder is the cause of her continuing chronic pain…In my opinion and the other IME doctors, psychiatric pain disorder is a pre-existing psychiatric condition."

17. As noted above, Dr. Cebrian most recently completed an IME of Claimant on February 24, 2017. After completing his records review and physical examination, Dr. Cebrian opined that while Claimant "may have had some psychiatric symptoms and diagnoses related to the 1/27/1996 claim, including depression and anxiety, her psychiatric symptoms are no longer proximately related to the 1/27/1996 claim." He opined that Claimant's ongoing complaints "are outside of the reasonable medical expectation for her claim-related conditions." He concluded that Claimant's primary condition was chronic pain disorder as pointed out by multiple physicians. He reiterated that "chronic pain disorders and somatic symptom disorders are not injury-related conditions" but rather, maladaptive coping mechanisms. He found no mechanical lesion that correlated with Claimant's ongoing symptoms. Accordingly, he concluded by indicating that there was no need for ongoing medical treatment under the claim while at

[2] Dr. Moe opined that based on her medical records, Claimant did not sustain anything "more than contusions" as a result of the January 27, 1996, incident.

the same time stressing that Claimant's "prognosis [was] poor while litigation and enabling medical support continues."

18. Dr. Cebrian largely repeated the opinions expressed in his IME report during his testimony at hearing. He testified that Claimant likely suffered a temporary aggravation of her pre-existing depression and anxiety which was appropriately treated under the workers' compensation claim. While he agreed that Claimant required continued medications to manage her depression and anxiety, Dr. Cebrian opined that the need for such prescription medication(s) and/or mental health treatment were unrelated to the 1996 industrial injury. Rather, Dr. Cebrian testified that Claimant's residual treatment needs are related to her non-work related chronic pain disorder and somatization. Claimant contends that her ongoing symptoms may be related to a head injury suffered during the 1996 accident.

19. The ALJ credits the content of the numerous IME reports issued in this case, as well as the opinions of Dr. Cebrian to find that Claimant likely suffers from non-work related somatization causing a chronic pain disorder. The evidence presented persuades the ALJ that Claimant's continued physical and psychiatric symptoms are probably emanating from an exaggerated response to her 1996 injury which has, over the ensuing years, been reinforced by the inadvertent actions of the medical providers attending to her.

20. Based upon the evidence presented, the ALJ is convinced that Claimant's current symptoms and need for continued treatment, including prescription medication are no longer related to her 1996 industrial injury.

21. The evidence presented also persuades the ALJ that ongoing medical treatment under this claim should be terminated to stop what the ALJ finds has been an over reliance on medical treatment providers buttressing Claimant's illness-role identification and reinforcing the ongoing manifestation of her non-work related somatoform/chronic pain disorder.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove her entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

C. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003)(a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

D. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, Claimant argues that she is entitled to ongoing maintenance medical treatment due to her continued complaints of depression, anxiety, and pain. Claimant contends that she suffered a severe head injury and subsequently developed psychological symptoms as a consequence. However, Claimant's treatment records establish a pre-existing history of anxiety, depression and chronic pain. Moreover, the claim related diagnoses in this case did not include a "severe head injury". In fact, multiple IME physicians diagnosed Claimant with a lumbar strain and left hip strain without reference to any head injury. Dr. Cebrian testified that he agreed with the previous IME physician's that the claim related diagnoses in this case include a lumbar strain, left hip contusion and myofascial pain. He also testified that these conditions resolved with time, an opinion the ALJ concludes is supported, in part, by Claimant's absence from treatment with Dr. Hall for approximately 16 months. Finally, Dr. Cebrian testified that Claimant's need for ongoing treatment is no longer reasonable, necessary, or related to the work-related conditions caused by her January 27, 1996 injury. Dr. Cebrain's testimony is supported by the opinions of Drs. Moe and Lichtenberg. In fact, when the evidence is viewed in its totality, it supports a conclusion that Claimant suffers from a somatic symptom disorder which is not injury related.

E. It is well settled that where respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), respondents are not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Moreover, when respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission*, *supra; Snyder v. Industrial Claim Appeals Office*, *supra.* Where, however, respondents attempt to modify an issue that previously has been determined by an admission of liability, they bear the burden of proof for such modification. *Section 8-43-201(1), C.R.S.*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the statute in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

F. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. The statute serves the same function in regard to maintenance medical benefits. The Supreme Court in *Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988), provided that after the respondents had admitted for maintenance medical benefits "the employer retains the right to file a petition to reopen, … for the purpose of either terminating the claimant's right to receive medical benefits or reducing the amount of benefits available to the claimant." The amendments to § 8-43-201(1), C.R.S., then, require that when the respondents seek a ruling at hearing that would serve as "terminating the claimant's right to receive medical benefits," they are seen as seeking to reopen that admission and the burden is theirs. In *Salisbury v. Prowers County School District*, *supra,* the Industrial Claims Panel held that where the effect of the respondents' argument is to terminate previously admitted maintenance medical treatment, the respondents have the burden, pursuant § 8-43-201(1), C.R.S., to prove that such treatment is not reasonable, necessary or related to the claimant's industrial injury. In this case, Respondent is seeking to withdraw their admission of liability to provide ongoing maintenance care based upon Dr. Cebrain's opinion that Claimant suffers from a somatic symptom disorder which is not injury related. While Claimant may require treatment for ongoing physical and psychiatric symptoms, the evidence

presented leads the ALJ to conclude that this treatment need is probably emanating from the continued manifestation of her non-work related chronic pain disorder that has been reinforced over the years by well-intended, but ill-advised attention from various medical providers. As found, the ALJ credits the testimony and opinions of Dr. Cebrian in conjunction with the IME reports of Drs. Moe and Lichtenberg to conclude that Claimant's need for ongoing treatment/medication to address persistent pain and continued depression and anxiety is no longer necessary to cure and relieve her of the effects of her industrial injuries. Indeed, the evidence presented persuades the ALJ that Claimant's current need for treatment is unrelated to her 1996 industrial injury. Accordingly, the ALJ concludes that Respondents have convincingly established that Claimant has no ongoing treatment need related to her 1996 injury, that all maintenance medical benefits should be terminated and that they be allowed to withdraw their admission for the same.

ORDER

It is therefore ordered that:

1. Respondents request to withdraw their FAL admitting for maintenance medical benefits is granted.

2. Claimant's request for continued care, including prescription medication to treat her ongoing depression and anxiety is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 19, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

STIPULATION

- The parties reserve the issue of authorized medical benefits for future determination.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on September 21, 2017.

2. Whether Respondents established by a preponderance of the evidence that Claimant is an independent contractor as defined in Section 8-40-202(b)(II), C.R.S. of the Act.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits beginning September 22, 2017, and ongoing.

4. Whether Claimant has established by a preponderance of the evidence that Dr. David Yamamoto is the authorized treating provider (ATP) as designated by Claimant on March 8, 2018.

FINDINGS OF FACT

1. Claimant began working for Employer on May 20, 2017. He was hired by Jeffery Radcliff as a lead painter. Mr. Radcliff is the owner and operator of Employer. There was no contract for employment. There was no anticipated end of Claimant's employment. Claimant was not hired to do a specific painting job. Claimant and Mr. Radcliff discussed becoming partners and owners of Employer.

2. Mr. Radcliff hired Claimant on an hourly basis. After it became difficult to calculate Claimant's hours each week, Mr. Radcliff began to pay Claimant a salary each week. Claimant began his employment making $20 to $25 per hour and subsequently was placed on salary making $1000 per week and a 1% bonus for each job.

3. Claimant was paid by personal check from PMR Services. Employer did not make payment to a company or other entity other than Claimant himself.

4. Mr. Radcliff paid Claimant two $800 checks after Claimant was injured and in the hospital. Claimant was paid a salary and not on a per job basis.

5. Claimant was designated as a 1099 non-employee for payroll purposes. Claimant credibly testified that he was thus designated because Mr. Radcliff did not have a payroll company set up to handle the payroll. Claimant credibly testified that he wanted to be an employee with a W-2 designation.

6. Mr. Radcliff did not contract with Joe Lutz Accounting to handle his payroll until after Claimant was hired.

7. Mr. Radcliff testified that Claimant requested to be a 1099 non-employee because Claimant did not want the state of Illinois to garnish his wages due to a child support lien. However, to the contrary, Claimant testified that he did not request the 1099 status. Claimant was deemed more credible on this topic than Mr. Radcliff. Claimant testified that the child support lien from Illinois does not reflect his true obligation. Claimant testified that he is working to fix the child support issue in Illinois.

8. Mr. Radcliff was the person at Employer who made the determination that Claimant was an employee. Mr. Radcliff testified that the only reason he did not consider Claimant an employee was because of Claimant's 1099 status. There was no other indication that Claimant was not an employee. Mr. Radcliff and Claimant were discussing becoming partners in Employer's business.

9. Mr. Radcliff determined when Claimant worked. Mr. Radcliff determined the number of hours Claimant worked each day and the number of days Claimant worked each week. Claimant did not have control over his work schedule.

10. Claimant was in the exclusive employ of Employer. Claimant did not perform work for another company. Claimant did not operate separate operations.

11. Claimant was not terminated from Employer.

12. Mr. Radcliff ordered business cards for Claimant. The cards were sent directly to Mr. Radcliff and then supplied to Claimant. The business cards identified Claimant's position at Employer as a Project Manager. Mr. Radcliff procured the business cards for Claimant so that Claimant could perform work on behalf of Employer, such as, giving quotes and estimates.

13. Prior to his employment with Employer, Claimant purchased a general liability policy through State Farm for a specific commercial painting job on which he worked. When Claimant began working for Employer, Mr. Radcliff informed Claimant he no longer needed the insurance policy. Claimant cancelled the policy effective July 13, 2017.

14. A general liability insurance policy was not a requirement of employment with Employer.

15. Employer arranged and paid for Claimant to attend training sponsored by Employer. Claimant completed the training on or about July 13, 2017. Claimant was given a plaque to commemorate the completion of his training.

16. When Claimant returned from training, he continued to work in a capacity of project manager. His job duties included: supervising other employees, contacting potential clients, performing job estimates for potential clients, interviewing candidates for employment, extending offers of employment, reviewing payroll records, and firing employees.

18. Claimant possessed the resumes of potential employees as part of his position as Project Manager.

19. Mr. Radcliff was directly in charge of Claimant's work for Employer. Mr. Radcliff the final say on when a job was done to the quality expected by Employer. Mr. Radcliff held Claimant to upholding the Employer's standard for work quality.

20. Employer provided the tools required to perform the jobs. Claimant provided his own hand brushes and drill because he preferred them to the tools Employer offered.

21. Claimant drove his personal truck for work. Employer outfitted Claimant's truck with magnets advertising Employer's name and contact information.

22. Employer maintains a website to instruct the public as to its services and to solicit business. That website states as part of Employer's promise to consumers, Employer "Only use in-house employees, never sub-contractors."

23. Mr. Radcliff testified that Employer does not have a policy against hiring independent contractors. He testified that it was not his practice to hire independent contractors. He also testified that he knew other franchises that employed independent contractors. This testimony is not credible as it contradicts the information on the Employer's website and other credible evidence supplied by Claimant concerning his employment status.

24. On September 21, 2017, Claimant was carrying a hose up a ladder when the ladder dislodged and slipped. Claimant fell from the second story on to the first story roof. Claimant's left leg was entangled in the ladder as he fell. Claimant suffered a compound fracture of his lower left leg and an injury to his left hand.

25. Mr. Radcliff called emergency services. Claimant was transported by ambulance from the work site to a landing area. Claimant was then taken by flight for life to St. Anthony's hospital.

26. Claimant underwent two surgeries on his left ankle. He was in the hospital for five days. Claimant continued to receive treatment from the surgeons at St. Anthony's.

27. On October 3, 2017, Claimant suffered several minor and one major heart attack. The heart attacks were a result of Claimant not being able to afford the blood thinning medication he was prescribed after surgery.

28. Claimant was in the hospital for three days recovering from the heart attacks.

29. Claimant has continued to receive medical care for his left ankle, left hand, left hip, and the heart issues.

30. Claimant has not returned to work since the date of his accident because he is unable to work. He has not been released to return to work by his doctors.

31. Neither Employer nor Insurer sent Claimant a designated provider list as required by WCRP 8-2.

32. Claimant designated Dr. David Yamamoto as his ATP on March 8, 2018. Respondents denied the designation of Dr. Yamamoto despite not having provided Claimant with the names of authorized providers.

33. The ALJ does not find Mr. Radcliff's testimony regarding Claimant's employment status persuasive. Claimant's payroll status was as a 1099 non-employee. However, Claimant did not request that status. Mr. Radcliff had Claimant as 1099 status because he did not yet have a payroll company. Mr. Radcliff considered Claimant an employee in every other aspect of their employment relationship besides the payroll designation.

34. The ALJ finds Claimant's testimony to be credible. Claimant was an employee of Employer. Claimant did not request 1099 status. Claimant worked as a manager and supervised other employees. Claimant was given significant responsibilities. Claimant was given extensive training in Employer's standards and practices. Claimant was paid personally. Claimant was paid at an hourly rate and then paid a salary. Claimant was supervised by Mr. Radcliff as to work schedule and quality of work. Claimant worked exclusively for Employer without a designation of an end of employment. Claimant did not enter into a written contract with Employer for a specific amount of work or duration. Employer provided tools and materials for Claimant to perform the job. Furthermore, Employer had a policy against using independent contractors for its painting jobs as stated on its website.

36. It is found that Claimant was an employee at the time of the injury. Following Claimant's attendance at corporate training in July 2017, Claimant was fully integrated in his responsibilities, duties, manner of work, supervision, and manner of payment.

CONCLUSIONS OF LAW

General legal principles

1. The purpose of the Act, Section 8-40-101, C.R.S. *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the alleged injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. See Section 8-41-301(1)(b) and (c), C.R.S. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected,

unusual, or undesigned occurrence." See Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO February 15, 2007). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). As found, Claimant established, by a preponderance of the evidence, that he suffered a compensable injury on September 21, 2017. The work-related accident caused Claimant's left ankle injury, left hip injury, left hand injury, and heart attacks. Claimant's testimony regarding the injury is found credible and persuasive.

Employment Status

The Act defines employee as "[e]very person in the service of any person, association of persons, firm or private corporation … under any contract of hire, express or implied." Section 8-40-202(1)(b), C.R.S. It continues, "any individual who performs services for pay for another shall be deemed to be an employee." Section 8-40-202(2)(a), C.R.S. The Act further defines nine criteria to prove that a person is not an employee and instead should be deemed to be an independent contractor. Section 8-40-202(2)(b)(II), C.R.S. In *Industrial Claims Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014), the supreme court held that the question whether an individual is engaged in an independent trade, occupation, profession, business can only be resolved by applying the totality of the circumstances test to evaluate the relationship between an employer and the putative employee. The court held that there is no single dispositive factor or set of factors.

As found, Respondents failed to establish by a preponderance of the evidence that Claimant is an employee of Employer. The evidence established that Claimant worked exclusively for Employer without a designation of an end of employment. Claimant was required to perform work to the quality standard set by Mr. Radcliff and Employer. Claimant was paid at an hourly rate and then paid a salary. Claimant did not enter into a written contract with Employer. Employer provided more than minimal training for Claimant by sending Claimant to the corporate offices for training. Employer provided tools and materials for Claimant to perform the job. Mr. Radcliff dictated the time of performance of Claimant's work; Claimant did not negotiate with Mr. Radcliff nor Employer regarding completion of the work. Mr. Radcliff and Employer paid Claimant personally instead of making checks payable to another entity. Mr. Radcliff and Claimant did not work under separate operations, and they discussed becoming partners in Employer.

Temporary Total Disability (TTD)

To establish entitlement to temporary disability benefits, the claimant must prove that the industrial injury has caused a "disability" and that he has suffered a wage loss that, to some degree, is the result of the industrial disability. Section 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick,* 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his temporary disability. *See Lymburn v. Symbosis Logic*, 952 P.2d 831 (Colo.App.1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." Id. Once the prerequisites for TTD have been met; e.g., no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring and there is no actual return to work, TTD benefits are designed to compensate for a temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission*, 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch*, 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant was temporarily and totally disabled from his September 21, 2017 injury. Claimant continues to be disabled from his usual employment as a result of the September 21, 2017, injuries.

Medical Benefits
Authorized Treating Physician

Respondents are not liable for medical treatment unless it is rendered for an injury "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Section 8-41-301(1)(c), C.R.S. Authorization refers to the physician's legal authority to treat the injury at respondents' expense, and not necessarily the reasonableness of the particular treatment. *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Section 8-43-404(5)(a)(I)(A), *supra*, allows the employer the right in the first instance to designate a list of at least four authorized treating physicians from which the injured worker can select a provider; the right to select however passes to a claimant where the employer fails to designate in the first instance. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

Furthermore, WCRP 8-2(A) states, "[w]hen an employer has notice of an on-the-job injury, the employer or insurer shall provide the injured worker with a written list of designated providers." The rule continues, "[a] copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury" (WCRP 8-2(A)(1). WCRP 8-2(E) states, [i]f the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing."

As found, Employer did not timely provide Claimant with a designated provider list. Claimant designated Dr. David Yamamoto as the ATP. Dr. David Yamamoto is Claimant's ATP.

ORDER

1. Claimant established by a preponderance of the evidence that he sustained a compensable injury on September 21, 2017.

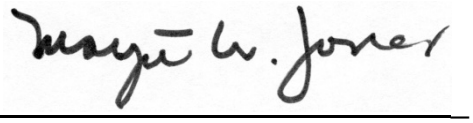
2. Respondents failed to establish that Claimant is an independent contractor as defined in Section 8-40-202(b)(II), C.R.S.

3. Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits beginning September 22, 2017, and continuing ongoing.

4. Claimant established by a preponderance of the evidence that Dr. David Yamamoto is the authorized treating provider (ATP) as designated by Claimant on March 8, 2018.

5. Any issues not determined in this decision are reserved for future determination.

DATED: October 19, 2018



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1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment with the employer on July 28, 2017.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that the medical treatment he received was reasonable medical treatment necessary to cure and relieve him from the effects of the work injury.

- If the claimant proves a compensable injury, what was the claimant's average weekly wage (AWW)?

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits beginning July 29,2017 and ongoing.

- If it is found that that claimant is entitled to TTD benefits, whether the respondents have demonstrated by a preponderance of the evidence that the claimant is responsible for termination of his employment, thereby ending TTD benefits.

FINDINGS OF FACT

1. The claimant's date of birth is June 24, 2002. He began his employment with the employer on June 6, 2017 when he was 14 years old. The employer has both farm operations and ranch operations. The claimant was hired to work full-time as a seasonal farm laborer. On June 23, 2017, the claimant's position was changed to ranch operations.[1] The claimant was paid $15.00 per hour in both positions.

2. The claimant testified that he injured his back at work on July 28, 2017. The claimant testified that he was injured while he was moving tree branches, stumps, and rocks. This task involved loading the items onto a flatbed pickup truck and then unloading the same items into the employer's "burn pile".

3. The claimant testified that to reach and lift the materials off of the truck bed it was necessary for him to stand on his toes. The claimant further testified that while he was lifting a log off of the truck in this way, he turned and felt pops in his upper, middle, and lower back. The claimant testified that the incident occurred at approximately 11:30 a.m. The claimant also testified that after he felt the pops in his back he called out to his coworker, David, but his coworker did not respond. As a

[1] The parties provided conflicting testimony regarding the reason for the change to the claimant's position on June 23, 2017. The ALJ addresses testimony regarding those conflicts later in this order.

result, the claimant testified that he walked to Mr. O'Brien's office (which is located close to the burn pit) to report the incident to Mr. O'Brien. The claimant testified that Mr. O'Brien responded by stating "okay" and the claimant returned to work. The claimant completed the remainder of his scheduled shift on that date.

4. The claimant also testified that at the conclusion of his work day on July 28, 2017, Mr. O'Brien presented him with paperwork regarding the lifting incident. At that time, the claimant was also provided with a list of medical providers. From that list the claimant selected Doctors on Call.

5. On July 28, 2017, the claimant initially treated at Doctors on Call with Dr. Guy Kovacevich. Beginning on that date, Dr. Kovacevich was the claimant's authorized treating physician (ATP) for this workers' compensation claim. On July 28, 2017, the claimant reported to Dr. Kovacevich that he did not have prior back issues. The claimant testified that this is accurate. The claimant also testified that although he is a long time competitive skier, he did not have any long-term medical treatment for any skiing related injuries.

6. At that first medical treatment appointment on July 28, 2017, Dr. Kovacevich diagnosed the claimant with sprain of the ligaments in the lumbar spine and sprain of the ligaments in the thoracic spine. Dr. Kovacevich prescribed cyclobenzaprine and referred the claimant to physical therapy. In addition, Dr. Kovacevich restricted the claimant from all work.

7. The claimant returned to Dr. Kovacevich on August 1, 2017. At that time, the claimant had not begun his prescription medication and had not started physical therapy. Dr. Kovacevich's recommendations remained the same.

8. On August 4, 2017, the claimant requested a change of physician from Dr. Kovacevich to Colorado Mountain Medical.

9. On August 8, 2017, the claimant was again seen by Dr. Kovacevich. At that time, the claimant reported that his symptoms had worsened and he was having shaking and weakness in his hands and occasionally numbness in his feet. Dr. Kovacevich noted that the claimant's heightened complaints of pain and inability to function were not consistent with the mechanism of injury or findings on physical exams. Dr. Kovacevich ordered magnetic resonance image (MRI) scans of the claimant's cervical, lumbar, and thoracic spines. In addition, Dr. Kovacevich recommended laboratory screening to rule out inflammation or possible infection. However, the claimant and his mother declined the additional blood tests.

10. The claimant testified that Dr. Kovacevich "screamed" at him at the August 8, 2017 appointment. The claimant also testified that Dr. Kovacevich's behavior on August 8, 2017 was the reason he requested a change of physician.

11. The claimant also sought medical treatment at Mountain Family Health Centers on August 8, 2017. At that time, the claimant was seen by Diane Purse, PNP. In the medical record of that date, the reason for that medical visit is listed as back pain. At that visit, the claimant's mother asked Ms. Purse questions regarding the blood tests recommended by Dr. Kovacevich.

12. The claimant's request for a change of physician was successful and Dr. Eric Olson with Colorado Mountain Medical became the claimant's ATP on August 9, 2017. The claimant was first seen at Colorado Mountain Medical on August 10, 2017 by Andrea Hutchinson, NP-C. On that date, the claimant reported that following the July 28, 2017 incident he had swelling along his spine. He also reported that he was having numbness and tingling in his lower extremities with weakness in his arms and legs. In addition, the claimant reported difficulty sleeping because of the pain in his spine. Ms. Hutchinson diagnosed acute midline back pain and noted that the claimant had muscular spasm in the right thoracic paraspinous area. She also recommended MRIs of the claimant's cervical, thoracic, and lumbar spine as well as continuation of physical therapy.

13. The claimant returned to Colorado Mountain Medical on August 15, 2017 and was seen by Dr. Olson. At that time, the claimant reported pain in the upper thoracic, lower thoracic, and lumbar spine. The claimant also reported numbness in his feet, with tingling in his toes. Dr. Olson opined that it was "highly unlikely that there is a discogenic injury", but agreed that MRIs would be reasonable.

14. On August 15, 2017, an MRI of the claimant's lumbar spine showed mild bilateral neural foraminal and lateral recess stenosis at the L4-L5 level secondary to a mild circumferential disc bulge with mild contact of the descending left L5 nerve roots in the lateral recess.

15. On August 16, 2017, the claimant was seen by Dr. Scott Raub at Vail Summit Orthopaedics. At that time, the claimant reported back pain with pain down both arms and both legs. The medical record of that date lists the cause of the claimant's back pain as "[w]ork lifting tree". Dr. Raub diagnosed acute thoracic back pain, and unspecified back pain laterally. At that time, Dr. Raub recommended an MRI of the claimant's thoracic spine.

16. On August 16, 2017, an MRI of the claimant's thoracic spine showed no evidence of degenerative disc disease, facet arthropathy, or stenosis.

17. The claimant returned to Dr. Olson on August 25, 2017 and reported sharp pain in the upper back and difficulty walking more than 200 feet. Dr. Olson noted that the claimant's MRI results showed minimal changes and "very mild' changes at that L4-L5 level. Dr. Olson also noted that the claimant's main discomfort was in his thoracic region. On that date, Dr. Olson referred the claimant to Dr. Raub. Dr. Olson also recommended that the claimant "try to normalize his activities as much as possible".

18. On September 1, 2017, the claimant returned to Vail Summit Orthopaedics and was seen by Dr. Ernest Braxton. At that time, Dr. Braxton noted that the claimant was suffering from cervical, thoracic, and low back pain. Dr. Braxton did not recommend surgical intervention because the claimant had not maximized conservative treatment and was "not skeletally mature". However, Dr. Braxton recommended that the claimant see a pediatric orthopedic surgeon.

19. On September 11, 2017, the claimant was seen at Children's Hospital Colorado by pediatric orthopedic surgeon Dr. Garg Sumeet. Dr. Sumeet noted that the claimant rated his pain at an 8 of 10, on a daily basis. At that time, Dr. Sumeet opined that the claimant's MRI findings were likely chronic in nature. He also opined that the claimant's symptoms were related to a muscle sprain/strain. Dr. Sumeet recommended that the claimant could improve his overall conditioning by engaging in activities such as walking, bicycling, swimming, yoga, and general free play. Dr. Sumeet also recommended a guided physical therapy program. If the claimant did not improve with conservative treatment, Dr. Sumeet further recommended that the claimant undergo evaluation for chronic pain.

20. On November 2, 2017, an MRI of the claimant's cervical spine showed straightening of the normal cervical lordotic curvature, (which the radiologist noted "can be seen with muscle spasm"), and normal appearance of the cervical discs and facet joints without evidence of fracture or stenosis.

21. On November 20, 2017, the claimant was seen by Dr. Seth Eisdorfer at the Multidisciplinary Chronic Pain Clinic at Children's Hospital Colorado. At that time, the claimant was diagnosed with chronic low back pain (without sciatica) and unspecified back pain laterally. Dr. Eisdorfer restricted the claimant to not more than 30 minutes of exercise, no lifting over 10 pounds, not running, and no contact sports. In addition, the claimant was not to be exposed to cold weather.

22. The claimant returned to Children's Hospital Colorado Pain Clinic on January 2, 2018. At that time, Dr. Eisdorfer opined that the claimant's pain was consistent with chronic pain syndrome and myalgia. The records from the Multidisciplinary Chronic Pain Clinic at Children's Hospital Colorado do not reference a work injury, or any acute incident or injury.

23. The claimant testified that his current symptoms include headaches, right leg pain, and a feeling that his "bones are grinding" when he moves. The claimant also testified that he cannot sit, stand, or walk for long periods. He is unable to reach down to open low cupboards and, at times, is unable to bend over while brushing his teeth. The claimant further testified that since July 28, 2017, he cannot participate in sports because he cannot run.

24. The claimant testified that he has been a competitive skier for many years. The medical records indicate that the claimant has sought medical treatment a number of times related to skiing. The claimant testified that he was required by his ski coaches to see a doctor any time he had an issue while skiing.

25. On April 29, 2016, more than a year before the incident at issue, the claimant sought treatment with Mountain Family Health Centers for back pain. On that date, the claimant was seen by Diane Purse, PNP. On that date, the claimant reported the onset of back pain four months prior. The claimant also reported that the pain was in his upper, middle, and lower back. The claimant denied any injury. Ms. Purse recommended heat and acetaminophen.

26. The medical records indicate that in the months before the July 28, 2017 incident, the claimant received physical therapy treatment with Joint Worx. On March 9, 2017, the claimant was seen at Joint Worx for "symptoms consistent with [sacroiliac joint] dysfunction". The claimant returned to Joint Worx on June 27, 2017 complaining of back pain form heavy lifting. The claimant testified that he was having muscle problems and his "manager" told him to go to physical therapy. The claimant testified that he did not recall which manager directed him to physical therapy.

27. Ms. Rimel is the employer's Director of Administration. Ms. Rimel testified that the claimant was hired as a seasonal farm laborer. The was a full-time position that would end in August 2017. Ms. Rimel also testified that when the claimant was hired, the parties discussed that the claimant would stop working for the employer when school started in mid-August. Ms. Rimel has children in the same school district as the claimant. She testified that school started on August 16, 2017. Therefore, the claimant's last day of work was scheduled to be August 15, 2017.

28. On June 23, 2017, the claimant and his mother met with Ms. Rimel regarding the claimant's employment. Ms. Rimel testified that the claimant informed her that he was resigning from his farm laborer position, but asked if there were any full-time available in ranch operations. At that time, the employer offered, and the claimant accepted, an "on call/as needed" position in ranch operations. The claimant began working in that capacity on Monday, June 26, 2017.

29. The claimant testified that he did not quit his farm laborer position. In his testimony, the claimant asserted that it was Ms. Rimel's decision to transfer him to the ranch position. The claimant agreed in his testimony that the ranch position was "as needed". However, the claimant also testified that he continued to work 40 hours, or more, each week. The payroll records entered into evidence indicate that the claimant's hours became variable after he began working in ranch operations on June 26, 2017.

30. Mr. O'Brien is the employer's Ranch Manager. Mr. O'Brien provided testimony that was consistent with Mr. Rimel's testimony that the claimant was working on an "as needed" basis in July 2017. With regard to the July 28, 2017 incident, Mr. O'Brien testified that at the end for the work day (at approximately 4:20 p.m.), the claimant reported that he believed that he hurt his back while moving branches. Mr. O'Brien testified that he and the claimant filled out paperwork regarding the incident. Mr. O'Brien then provided that paperwork to Ms. Rimel.

31. Mr. Klatte is the employer's Ranch Foreman. Mr. Klatte testified that on July 28, 2017, he worked with the claimant and another employee, David. Their job duties that day involved loading tree branches onto a flatbed pickup truck and then transporting and ultimately removing those same branches into the burn fire pit. Mr. Klatte testified that the branches were approximately six to seven feet long, and were from one half of an inch to an inch and one half in diameter. In his testimony, Mr. Klatte estimated that the braches weighed between 5 pounds and 30 pounds.

32. Mr. Klatte also testified that the claimant did not report any injury or issues to him. Mr. Klatte noted in his testimony that during the afternoon on July 28, 2017, it was raining. As a result, they could not continue their project moving the tree branches until the rain stopped. Mr. Klatte testified that he, the claimant, and David sat in the truck while they waited out the rain. At no time did the claimant mention to Mr. Klatte that he had injured himself.

33. On December 19, 2017, the claimant attended an independent medical examination (IME) with Dr. Albert Hattem. In connection with the IME, Dr. Hattem reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report Dr. Hattem opined that the claimant's pain complaints are not related to the July 28, 2017 alleged injury. In support of this opinion, Dr. Hattem noted that the claimant's MRIs are essentially negative. Dr. Hattem further opined that the claimant's subjective complaints are due to behavioral issues. Dr. Hattem's testimony by deposition was consistent with his written report.

34. The ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ credits the testimony of Ms. Rimel, Mr. O'Brien, and Mr. Klatte with regard to the nature of the claimant's employment and the events of July 28, 2017. The ALJ finds the medical records persuasive, specifically those that show that the claimant has a history of injuries related to skiing. In April 2016, the claimant complained of symptoms virtually identical to those he now asserts were caused on July 28, 2017. In the months prior to the July 28, 2017 incident, the claimant was undergoing physical therapy treatment for SI joint issues and back pain. The ALJ credits the opinion of Dr. Hattem that the claimant's pain complaints are not related to the July 28, 2017 alleged injury.

35. The ALJ finds that the claimant did not sustain an injury on July 28, 2017. The need for treatment of the claimant's back pain is related to his longstanding medical history and not due to any acute injury. The ALJ also finds that there was no aggravation nor acceleration of a preexisting condition on July 28, 2017. The ALJ also finds that no activity the claimant engaged in on July 28, 2017 while at work combined with a preexisting condition to necessitate medical treatment. For all of the foregoing reasons, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he was injured at work on July 28, 2017.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

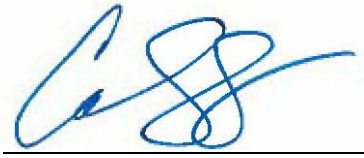
2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. As found, the claimant has failed to demonstrate by a preponderance of the evidence that he suffered an injury that arose out of and in the course and scope of his employment with the employer. As found, the opinion of Dr. Hattem, the medical records, and the testimony of the respondents' witnesses are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed.

Dated October 22, 2018.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUES

I. Whether Claimant is entitled to a one-time change of physician pursuant to Section 8-43-404(5)(a)(III), C.R.S.

FINDINGS OF FACT

1. Claimant sustained an industrial injury to her back on January 18, 2018. Claimant credibly testified she immediately reported the injury to her general manager and was given a list of medical providers on January 19, 2018, which she signed. The list Claimant received on January 19, 2018 is Claimant's Exhibit 1. The record also contains a copy of the same list, but initialed by Claimant (Exhibit D).

2. The designated provider list given to Claimant on January 19, 2018 lists the following providers: CCOM - Church Ranch, Concentra Medical Center - Thornton Parkway, US Healthworks Medical Group, Concentra Medical Center - Stapleton Drive North, North Suburban Medical Center, and Good Samaritan Medical Center. North Suburban Medical Center and Good Samaritan Medical Center are identified as hospitals. The document states, in relevant part, "If you feel that you need medical attention, the providers listed are available for treatment…For urgent care needs OR after clinic hours, you may seek treatment from the hospital Emergency Department listed OR the nearest qualified facility or provider."

3. Respondents allege Claimant was also provided another list of providers on January 19, 2018 (Exhibit C). This document, dated January 19, 2018, identifies Employer's third party administrator ("TPA"), and lists the following providers: Concentra Medical Center - Thornton Parkway, Concentra Medical Center - Thornton, Concentra Medical Center - North Denver (Stapleton Drive North), and US Healthworks Medical Group. The letter lists a P.O. Box address in Englewood, Colorado for Employer's TPA, and an address for Employer's Director of Risk Management in Denver, Colorado. The letter is not signed by Claimant. Claimant credibly testified she did not receive the letter dated January 19, 2018 contained in Exhibit C.

4. Claimant ultimately chose Concentra – Thornton Parkway as her designated medical provider and began undergoing physical therapy.

5. Claimant credibly testified she is dissatisfied with the treatment she has received at Concentra – Thornton Parkway, in part due to limitations in scheduling appointments. Claimant credibly testified Concentra only permits her to schedule appointments before 5:00 p.m., which conflicts with Claimant's work schedule. Claimant credibly testified she is required by Employer to arrange for another employee to cover her duties during scheduled medical appointments. Claimant credibly testified she reported her

complaints regarding scheduling appointments to Alixe Landry, Senior Resolution Manager with Employer's TPA. Claimant credibly testified she also is dissatisfied with the medical treatment because her condition has not improved and she feels as though she is "getting the runaround" by various doctors.

6. Claimant subsequently requested Employer send her a copy of the designated provider list. On April 16, 2018, Claimant received a different, undated, list identifying the following providers: CCOM - Church Ranch, Concentra - Thornton Parkway, US HealthWorks and Concentra – Stapleton Drive North (Exhibit E). The list also includes North Suburban Medical Center under "Emergency Care." The contact information for a TPA representative as a P.O. Box address in Englewood, Colorado. A section of the letter states that medical bills can be submitted to the TPA at different P.O. Box address in Clinton, Iowa. Claimant signed and dated this list on April 16, 2018.

7. An April 18, 2018 from Ms. Landry to Claimant requesting Claimant complete and return a HIPAA Medical Release Form lists the address of the TPA as the P.O. Box address in Clinton, Iowa.

8. On April 18, 2018, Claimant submitted written notice to Insurer of a request to change physicians. The written notice was submitted on the Division's Notice of One-Time Change of Physician & Authorization for Release of Medical Information form. Claimant requested to change physicians from Concentra- Thornton Parkway to Good Samaritan Medical Center. The document was signed by Claimant and dated April 18, 2018.

9. Claimant credibly testified she mailed the notice to Employer's TPA, Concentra - Thornton Parkway, and Good Samaritan Medical Center. Claimant credibly testified she personally addressed each envelope, attached the proper postage, and deposited the three envelopes in the United States mail on April 18, 2018. Claimant mailed notice to Employer's TPA at their P.O. Box address in Clinton, Iowa.

10. Claimant credibly testified she designated Good Samaritan Medical Center as her new provider because it is located between her work location and home. Claimant credibly testified she was unaware Employer intended to designate Good Samaritan Medical Center only for emergent care purposes.

11. Ms. Landry testified she did not become aware of Claimant's request to change physicians until April 27, 2018, when she received an e-mail from Claimant's counsel following up on Claimant's request. Ms. Landry testified that the mailed copy of Claimant's request was not received until May 16, 2018 because Claimant mailed the request to the address for bills processing, not claims processing. Ms. Landry testified she denied Claimants' request because Claimant's request was mailed to the wrong address, the request was received after the 90-day deadline, and Good Samaritan Medical Center is not listed on the designated provider list given to Claimant.

12. In an April 23, 2018 letter to Claimant's counsel from Ms. Landry, Ms. Landry denied Claimant's request for a change of physician and advised that further material should be directed to her attention at the P.O. Box address in Clinton, Iowa.

13. The ALJ finds that Claimant has met the requirements for a one-time change of physician under Section 8-43-404(5)(a)(III), C.R.S.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Change of Physician

Section 8-43-404(5)(a)(I)(A), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d

228 (Colo. App. 1999). However, the respondents must provide injured workers with a list of at least four physicians or corporate medical providers. §8-43-404(5)(a)(I)(A),C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S., defines "corporate medical provider" to mean a 'medical organization in business as a sole proprietorship, professional corporation, or partnership." The respondents must supply a copy of the written designated provider list to the injured worker “in a verifiable manner within seven (7) business days following the date the employer has notice of the injury.” W.C.R.P. 8-2(A)(1).

Section 8-43-404(5)(a)(III), C.R.S. provides that an employee may obtain a one-time change in the designated authorized treating physician if the following requirements are met:

(A) The notice is provided within ninety days after the day of injury, but before the injured worker reaches maximum medical improvement;

(B) The notice is in writing and submitted on a form designated by the director…

(C) The notice is directed to the insurance carrier or to the employer’s authorized representative, if self-insured, and to the initially authorized treating physician and is deposited in the United States mail or hand-delivered to the employer, who shall notify the insurance carrier, if necessary, and the initially authorized treating physician;

(D) The new physician is on the employer’s designated list or provides medical services for a designated corporate medical provider on the list;

(E) The transfer of medical care does not pose a threat to the health or safety of the employee.

Respondents argue Claimant’s request to change physicians should be denied for the following reasons: (1) Good Samaritan Medical Center is not on the designated provider lists dated January 19, 2018 or April 16, 2018, (2) Good Samaritan Medical Center was included on the other lists provided to Claimant as a hospital for emergent care services, not a provider; and (3) Claimant mailed the request to the wrong address and the request was not received until after the 90-day deadline. The ALJ is not persuaded.

The record reflects multiple provider lists. The provider list contained in Exhibit C dated January 19, 2018 does not include Good Samaritan Medical Center, nor does the list dated April 16, 2018. Claimant credibly testified she did not receive the provider list dated January 19, 2018 (Exhibit C), and the document is not signed by Claimant. The April 16, 2018 list, which Claimant acknowledges she received and signed, was sent to

Claimant three months after the date of injury. Claimant credibly testified the only list she received from Respondents during the seven days after the date of injury was the list contained in Exhibit 1, which includes Good Samaritan Medical Center. The list is signed by Claimant. A second copy of the list, Exhibit D, is initialed by Claimant. Thus, the ALJ determines Good Samaritan Medical Center is, in fact, on the employer's designated provider list.

Claimant credibly testified she was unaware that Good Samaritan Medical Center was included on the designated provider list solely as a hospital for emergent services. The language included in the document does not state Claimant is prohibited from designating Good Samaritan Medical Center as an authorized treating provider. No evidence was admitted at hearing as to the corporate structure of Good Samaritan Medical Center. Accordingly, there is insufficient evidence for the ALJ to determine that Good Samaritan Medical Center is not a provider within the meaning of Section 8-43-404(5)(a)(I)(A), C.R.S.

Claimant was credible in her testimony that she mailed notice to Employer's TPA on April 18, 2018, which is within 90 days of the date of injury. Although Claimant mailed the notice to an address provided on correspondence from Employer's TPA. Claimant's confusion regarding the mailing address was reasonable under the circumstances. Claimant mailed written notice to Employer's TPA and to Concentra-Thornton Parkway within 90 days of the date of injury, using the form designated by the director. As found, Good Samaritan Medical Center is on Employer's designated provider list. No evidence was presented at hearing indicating the transfer of medical care poses a threat to the health or safety of Claimant. Accordingly, Claimant has met the requirements entitling her to a one-time change of physician under Section 8-43-404(5)(A)(III), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's request for a one-time change of physician from Concentra Medical Center - Thornton Parkway to Good Samaritan Medical Center is GRANTED.

2. If Good Samaritan Medical Center refuses to treat Claimant, Claimant shall select another provider on the designated provider list.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

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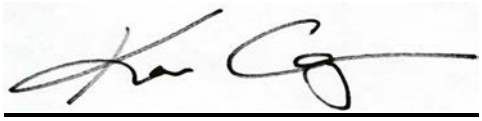
DATED: October 19, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-041-118-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer, Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 2, 2018 in Denver, Colorado. The hearing was digitally recorded (reference 10/2/18, Courtroom 5, beginning at 8:30 AM, and ending at 10:15 AM).

Claimant's Exhibits 1 through 12 were admitted into evidence without objection. Respondent's Exhibits A through W were admitted into evidence without objection.

The evidentiary deposition of John Burris, M.D., taken on September 24, 2018 (hereinafter referred to as "Burris Depo., followed by a page number) was placed in evidence in lieu of Dr. Burris' live testimony at hearing.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

Whether Claimant has overcome the Division Independent Medical Examiner's (DIME's) determination that the Claimant is not at maximum medical improvement. (MMI); and, post-MMI medical maintenance benefits. The DIME examiner was David Orgel, M.D.

The Claimant bears the burden of proof by clear and convincing evidence on MMI and degree of permanent medical impairment. The Claimant's burden on post-MMI medical maintenance benefits is "preponderant evidence."

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Admitted Work Injury on March 7, 2017 and Treatment

1. Respondents filed a Final Admission of Liability (FAL), dated August 1, 2018, admitting for medical benefits; an average weekly wage (AWW) of $257.95; temporary total disability (TTD) benefits of $171.96 per week from March 8, 2017 through May 30, 2017; TTD benefits of $371.96 per week from May 31, 2017 through July 5, 2017; zero permanent partial disability (PPD); and, denying post-MMI medical maintenance benefits.

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medications, engage in a home exercise program, and continue to apply ice and heat to the injury (Respondents' Exhibit E, pp. 51-52; Exhibit R, p. 320).

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Independent Medical Examinations (IMEs) of Elizabeth W. Bisgard, M.D. and John Burris, M.D.

14. Dr. Bisgard performed an IME on September 11, 2017 at the Claimant's request (Respondents' Exhibit F, p. 58). She concluded that the Claimant suffered a "permanent aggravation of her underlying arthritic condition" and therefore was entitled to an impairment rating of "18% whole person" (Claimant's Exhibit 1, p. 6). She recommended maintenance medication for the next six months and twelve visits with chiropractic Dr. Gridley, D.C., over the next year.

15. John Burris, M.D. saw the Claimant on June 29, 2017, at Respondents' request, and performed an IME (Respondents' Exhibit E, p. 41). Dr. Burris concluded that there was no objective basis for an impairment rating, that there was no basis for further treatment related to the injury, and that Claimant was at MMI on the date he performed his examination. (Respondents' Exhibit E, p. 56).

Division Independent Medical Examination (DIME) of David Orgel, M.D.

16. DR. Orgel performed a DIME on March 21, 2018 (Respondents' Exhibit A, p. 1). Dr. Orgel concluded that the Claimant "has a pre-existing psychological condition, most likely a conversion disorder or other somatoform disorder. This psychological condition is the primary driver of her delayed recovery after her m [sic] arch 2017 injury." (Respondents' Exhibit A, p. 1); Claimant's Exhibit 11, p.124).

17. Dr. Orgel based his conclusion, in part, on a psychological assessment performed by Clinical Psychologist Ron Carbaugh, Psy. D., done on March 28, 2013 and related to an injury on September 5, 2012 (Respondents' Exhibit A, p. 1; Exhibit K, p. 222). Dr. Carbaugh determined that 6 to 8 sessions of "pain and adjustment counseling" would be beneficial, as Claimant's "non-injury-related stressors in her life" might be affecting her recovery from the injury on September 5, 2012 (Claimant's Exhibit 2, p. 17).

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[Claimant] did not suffer any psychiatric injury related to her occupational injury on [March 7, 2017]" and that her current psychological issues were preexisting (Respondents' Exhibit A, p. 2). Furthermore, Dr. Kleinman concluded that "[Claimant's] Persistent Depressive Disorder is not related to the occupational injury and is responsible for what appears to be a prolonged recovery." (Respondents' Exhibit C, p. 15).

20. Dr. Orgel determined that the Claimant was at MMI at the time of his examination, March 21, 2018 Respondents' Exhibit A, p. 2).

Claimant's Offered Evidence at Hearing on October 2, 2018

21. The Claimant testified at the hearing. He felt that it was improper of Dr. Orgel to rely on Dr. Carbaugh's psychological assessment from 2013 because the "stressors" in Claimant's life during 2013 were more extreme than the stressors in her life at the time of Dr. Orgel's examination.

Ultimate Findings

22. The Claimant's testimony focused on discrediting the DIME finding that she was at MMI at the time of her examination. Claimant did this by attempting to show it was based on outdated medical information, particularly the psychological examination performed by Dr. Carbaugh.

23. The Claimant may be correct that the stressors in her life in 2013 were extreme as compared to now. However, it is unclear if that would have affected the DIME's findings. Dr. Orgel relied on more than the findings of Dr. Carbaugh's 2013 psychological assessment in arriving at his conclusion that Claimant was at MMI.

24. The Claimant was credible, however, while she offered her opinion, she has no medical training. Therefore, it is clear that her opinions are **not** based on reliable medical principles. Permanent impairment ratings and opinions concerning MMI must be based on the American Medical Association *Guides to the Evaluation of Permanent Medical Impairment,* 3rd, Ed., Rev.

25. A comparison of IME Dr. Bisgard's opinions and rating reveals a mere difference of opinion between Dr. Bisgard and DIME Dr. Orgel, which is not sufficient to overcome the DIME opinion. Dr. Bisgard's opinions did not and could not point to errors in DIME Dr. Orgel's opinions because her opinions pre-dated the DIME.

26. The Claimant has failed to establish that it is highly probable, unmistakable, and free from serious and substantial doubt that Dr. Orgel's DIME opinions are in error. Therefore, the Claimant has failed to overcome the DIME by clear and convincing evidence.

27. Concerning post-MMI maintenance medical benefits, the standard of proof is "preponderance of the evidence." In the present case, the ALJ finds that it is more likely than not that IME Dr. Bisgard's recommendations for post-MMI medical treatment are more persuasive and credible than DIME Dr. Orgel's opinions, if any. The ALJ makes a rational choice, between conflicting evidence, if any, to accept Dr. Bisgard's treatment recommendations and reject any opinions to the contrary.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). As found, the Claimant's testimony was credible, however, The Claimant may be correct that the stressors in her life in 2013 were extreme as compared to now. However, it is unclear if that would have affected the DIME's findings. Dr. Orgel relied on more than the findings of Dr. Carbaugh's 2013 psychological assessment in arriving at his conclusion that Claimant was at MMI.

As found, the Claimant was credible, however, while she offered her opinion, it was clear that she has no medical training. Therefore, her opinions are **not** based on reliable medical principles. Permanent impairment ratings and opinions concerning MMI must be based on the American Medical Association *Guides to the Evaluation of Permanent Medical Impairment,* 3rd, Ed., Rev.

b. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found in Ultimate Findings Nos. 24 and 25, the Claimant's lay testimony was insufficient to overcome medical opinion based on the AMA *Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). So long as the findings of fact are supported by **substantial evidence,** they will be upheld –even if an appellate tribunal would have reached a different conclusion if it had entered findings of fact. *See May D & F v. Indus. Claim Appeals Office,* 752 P.2d 589 (Colo. App. 1988). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, between conflicting evidence, if any, to accept Dr. Bisgard's treatment recommendations, and reject any opinions to the contrary.

Overcoming the Division Independent Medical Examination (DIME)

d. A DIME's findings of maximum MMI and permanent impairment rating "are dispositive unless they can be overcome only by clear and convincing evidence." *City of Manassa v. Ruff*, 235 P.3d 1051, 1059 (Colo. 2010); § 8-42-107(8)(b)(III), C.R.S. "Whether a party has met the burden of overcoming a DIME by clear and convincing evidence is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence." *Justiniano v. Indus. Claim Appeals Office*, 410 P.3d 659, 663 (Colo. App. 2016). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the Division IME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). To overcome the DIME physician's findings, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), October 4, 2001]. As found, the Claimant failed to meet her burden by "clear and convincing" evidence. The Claimant only offered her own testimony to attempt to establish that DIME Dr. Orgel's opinions were erroneous. As further found, Claimant's testimony failed to show that the DIME's findings were based on outdated medical information. Furthermore, because the DIME relied on information other than the psychological assessment performed in 2013, the Claimant failed to show how the determination that the DIME's findings were based on outdated medical information would have altered the DIME's ultimate conclusion. As found, the Claimant's permanent medical impairment is zero.

Maximum Medical Improvement

e. MMI is defined by statute as the point of time when (a) "any medically determinable physical or mental impairment as a result of the injury has become stable" and (b) "when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. As found, the Claimant reached MMI on March 21, 2018, as determined by DIME Dr. Orgel

Post-MMI Maintenance Medical Benefits

f. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical

treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address the injury.

Burden of Proof on Post-MMI Medical Maintenance Benefits

g. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant sustained her burden, by preponderant evidence on post-MMI medical maintenance benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has not overcome the findings of the Division Independent Medical Examiner, David Orgel, M.D., by clear and convincing evidence.

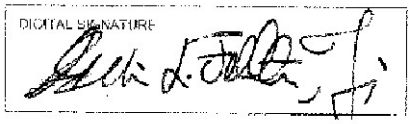
B. The Claimant reached maximum medical improvement on March 21, 2018, the date that Dr. Orgel performed the Division Independent Medical Examination.

C. Respondents shall pay the costs of post-maximum medical improvement maintenance medical care and treatment, subject to the Division of Workers' Compensation Medical Fee Schedule.

D. The Final Admission of liability, dated August 1, 2018, shall remain in full force and effect, however, the maximum medical improvement date is March 21, 2018.

E. Any and all claims for additional temporary disability benefits are hereby denied and dismissed.

DATED: October 24, 2018.



_____

EDWIN L. FELTER, JR.
Administrative Law Judge

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19. Dr. Orgel based another conclusion on the Psychiatric IME performed on March 9, 2018 by Robert E. Kleinman M.D. Dr. Kleinman's "overall opinion was that [Claimant] did not suffer any psychiatric injury related to her occupational injury on [March 7, 2017]" and that her current psychological issues were preexisting (Respondents' Exhibit A, p. 2). Furthermore, Dr. Kleinman concluded that "[Claimant's] Persistent Depressive Disorder is not related to the occupational injury and is responsible for what appears to be a prolonged recovery." (Respondents' Exhibit C, p. 15).

20. Dr. Orgel determined that the Claimant was at MMI at the time of his examination, March 21, 2018 Respondents' Exhibit A, p. 2).

Claimant's Offered Evidence at Hearing on October 2, 2018

21. The Claimant testified at the hearing. He felt that it was improper of Dr. Orgel to rely on Dr. Carbaugh's psychological assessment from 2013 because the "stressors" in Claimant's life during 2013 were more extreme than the stressors in her life at the time of Dr. Orgel's examination.

Ultimate Findings

22. The Claimant's testimony focused on discrediting the DIME finding that she was at MMI at the time of her examination. Claimant did this by attempting to show it was based on outdated medical information, particularly the psychological examination performed by Dr. Carbaugh.

23. The Claimant may be correct that the stressors in her life in 2013 were extreme as compared to now. However, it is unclear if that would have affected the DIME's findings. Dr. Orgel relied on more than the findings of Dr. Carbaugh's 2013 psychological assessment in arriving at his conclusion that Claimant was at MMI.

24. The Claimant was credible, however, while she offered her opinion, she has no medical training. Therefore, it is clear that her opinions are **not** based on reliable medical principles. Permanent impairment ratings and opinions concerning MMI must be based on the American Medical Association *Guides to the Evaluation of Permanent Medical Impairment,* 3rd, Ed., Rev.

25. A comparison of IME Dr. Bisgard's opinions and rating reveals a mere difference of opinion between Dr. Bisgard and DIME Dr. Orgel, which is not sufficient to overcome the DIME opinion. Dr. Bisgard's opinions did not and could not point to errors in DIME Dr. Orgel's opinions because her opinions pre-dated the DIME.

26. The Claimant has failed to establish that it is highly probable, unmistakable, and free from serious and substantial doubt that Dr. Orgel's DIME opinions are in error. Therefore, the Claimant has failed to overcome the DIME by clear and convincing evidence.

27. Concerning post-MMI maintenance medical benefits, the standard of proof is "preponderance of the evidence." In the present case, the ALJ finds that it is more likely than not that IME Dr. Bisgard's recommendations for post-MMI medical treatment are more persuasive and credible than DIME Dr. Orgel's opinions, if any. The ALJ makes a rational choice, between conflicting evidence, if any, to accept Dr. Bisgard's treatment recommendations and reject any opinions to the contrary.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). As found, the Claimant's testimony was credible, however, The Claimant may be correct that the stressors in her life in 2013 were extreme as compared to now. However, it is unclear if that would have affected the

DIME's findings. Dr. Orgel relied on more than the findings of Dr. Carbaugh's 2013 psychological assessment in arriving at his conclusion that Claimant was at MMI. As found, the Claimant was credible, however, while she offered her opinion, it was clear that she has no medical training. Therefore, her opinions are **not** based on reliable medical principles. Permanent impairment ratings and opinions concerning MMI must be based on the American Medical Association *Guides to the Evaluation of Permanent Medical Impairment,* 3rd, Ed., Rev.

b. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found in Ultimate Findings Nos. 24 and 25, the Claimant's lay testimony was insufficient to overcome medical opinion based on the AMA *Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). So long as the findings of fact are supported by **substantial evidence,** they will be upheld –even if an appellate tribunal would have reached a different conclusion if it had entered findings of fact. *See May D & F v. Indus. Claim Appeals Office,* 752 P.2d 589 (Colo. App. 1988). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, between conflicting evidence, if any, to accept Dr. Bisgard's treatment recommendations, and reject any opinions to the contrary.

Overcoming the Division Independent Medical Examination (DIME)

d. A DIME's findings of maximum MMI and permanent impairment rating "are dispositive unless they can be overcome only by clear and convincing evidence." *City of Manassa v. Ruff*, 235 P.3d 1051, 1059 (Colo. 2010); § 8-42-107(8)(b)(III), C.R.S. "Whether a party has met the burden of overcoming a DIME by clear and convincing evidence is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence." *Justiniano v. Indus. Claim Appeals Office*, 410 P.3d 659, 663 (Colo. App. 2016). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the Division IME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). To overcome the DIME physician's findings, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), October 4, 2001]. As found, the Claimant failed to meet her burden by "clear and convincing" evidence. The Claimant only offered her own testimony to attempt to establish that DIME Dr. Orgel's opinions were erroneous. As further found, Claimant's testimony failed to show that the DIME's findings were based on outdated medical information. Furthermore, because the DIME relied on information other than the psychological assessment performed in 2013, the Claimant failed to show how the determination that the DIME's findings were based on outdated medical information would have altered the DIME's ultimate conclusion. As found, the Claimant's permanent medical impairment is zero.

Maximum Medical Improvement

e. MMI is defined by statute as the point of time when (a) "any medically determinable physical or mental impairment as a result of the injury has become stable" and (b) "when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. As found, the Claimant reached MMI on March 21, 2018, as determined by DIME Dr. Orgel

Post-MMI Maintenance Medical Benefits

f. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals*

Office, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address the injury.

Burden of Proof on Post-MMI Medical Maintenance Benefits

g. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant sustained her burden, by preponderant evidence on post-MMI medical maintenance benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has not overcome the findings of the Division Independent Medical Examiner, David Orgel, M.D., by clear and convincing evidence.

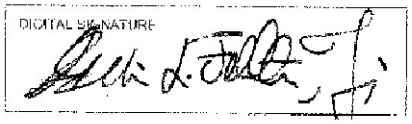
B. The Claimant reached maximum medical improvement on March 21, 2018, the date that Dr. Orgel performed the Division Independent Medical Examination.

C. Respondents shall pay the costs of post-maximum medical improvement maintenance medical care and treatment, subject to the Division of Workers' Compensation Medical Fee Schedule.

D. The Final Admission of liability, dated August 1, 2018, shall remain in full force and effect, however, the maximum medical improvement date is March 21, 2018.

E. Any and all claims for additional temporary disability benefits are hereby denied and dismissed.

DATED: October 23, 2018.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUE

- Did Claimant suffer a compensable injury arising out of and in the course of his employment on May 5, 2018?

FINDINGS OF FACT

1. Claimant worked for Employer as a groundskeeper at the St. Simeon Catholic Cemetery. He was injured on May 5, 2018 when a ruggedized "Club Car" used for grounds maintenance flipped on its side.

2. The accident occurred on a Saturday at approximately 10:00 AM. Although Saturday is normally Claimant's day off, he had come in to check on some ongoing vandalism and grave desecration issues. Claimant retrieved and buried a dead rat vandals had left on a grave, and was returning the Club Car to the maintenance area before going home. The accident occurred in a large parking lot where Employer stores vehicles and other pieces of equipment. The surface of the lot is loose gravel and packed road base.

3. Claimant testified to the following sequence of events leading to the accident: He was putting the Club Car away and heard a "ticking" noise coming from the front end while making a turn. He drove "five of six" figure eights in the parking lot, which allowed him to listen for the noise while making both left and right turns. Claimant testified he was driving "no more than" five to ten miles per hour with "just barely" the weight of his foot on the gas pedal. During one turn, a rabbit darted out from underneath a parked truck. Claimant swerved to miss the rabbit, causing the Club Car to flip over on its side.

4. There is no question Claimant suffered serious injuries in the accident but Respondent argues he was engaged in "horseplay" and was therefore outside the scope of his employment when the accident occurred.

5. After the accident, Claimant called 911 and drove himself to the main office in his personal vehicle. Claimant reported the incident to a co-worker, Sol Decker, who called the executive director, Gary Schaaf. Mr. Schaaf had been at the cemetery earlier that morning regarding the vandalism but was driving home when he received Ms. Decker's call. He turned around and returned to the cemetery.

6. When Mr. Schaaf arrived at the office, paramedics were tending to Claimant's injuries. Deputy Sheriff Lendi was also present and interviewed Claimant about the accident. Claimant told Deputy Lendi he had been driving the Club Car in the yard and swerved to avoid a rabbit that had hopped in front of him. He made no mention of doing figure eights or any maintenance issue with the vehicle.

7. Claimant was concerned about his eyeglasses, so Mr. Schaaf and Deputy Lendi went to the maintenance yard to look for them. Upon arriving at the accident scene, Mr. Schaaf immediately saw "clear evidence" of multiple figure eights that were not there earlier that morning. Mr. Schaaf was "surprised" to see the figure eight tracks because Claimant had said nothing about it earlier. The tracks "looked obviously like they were done at a high rate of speed and that they were fresh." Mr. Schaaf observed dirt pushed to the outside edges of the tire tracks, consistent with the vehicle sliding around the curves at high speed. Mr. Schaaf saw no indication the vehicle had swerved before tipping over; the tracks merely showed a tight turn leading directly to the overturned Club Car.

8. Mr. Schaaf took multiple photographs of the yard, the tracks, and the overturned Club Car. The photographs corroborate Mr. Schaaf's testimony, showing loose dirt flung several feet on the outside edge of the tracks, consistent with skidding through a turn. Additionally, the tracks appear deeper than one would expect from a slow-moving vehicle, again consistent with high speed.

9. Prior to being hired by Employer, Mr. Schaaf worked many years as an FBI agent. Before that, he was a police officer with the Los Angeles Police Department. His duties included crime scene and accident investigations. Mr. Schaaf's law enforcement and investigative background lend credence to his observations and conclusions regarding the cause of the accident. That said, the ALJ finds it does not require special training to conclude dirt flung several feet on the outside of a tire track indicates the vehicle was moving quickly.

10. Mr. Schaaf's observations were consistent with what Deputy Lendi documented in his accident report:

> In observing the lot, I noticed there were tire track impressions in the dirt which matched those of the Club Car and which were in both concentric circles and "figure-eight" patterns. I was able to follow one set of tire tracks directly back, from the rear left tire, as it entered a "figure-eight." Leading toward the Club Car, the tracks began a right-hand curve which appeared to get tighter, until it led to the Club Car in its resting location.

11. Deputy Lendi followed up with Claimant later that day and noted:

> I asked him what led to the crash. [Claimant] immediately defended, stating "there was a rabbit." I advised [Claimant] that I'd observed circles and "figure-eights," and he replied "driving in circles probably caused it," but then reaffirmed that a rabbit had run out in front of him. [Claimant] then stopped talking to me.

12. Based on the results of his investigation, combined with several prior employment-related issues, Mr. Schaaf decided to terminate Claimant. He offered Claimant the opportunity to resign instead of being fired, which Claimant accepted.

13. Claimant admitted he knew of Employer's policy prohibiting the use of company vehicles for personal purposes.

14. No persuasive evidence suggests Employer condones or tolerates horseplay or misuse of company vehicles. To the contrary, Mr. Schaaf testified credibly about another employee who was terminated for misusing a company truck to remove snow.

15. Crediting Mr. Schaaf's credible and persuasive testimony, the ALJ finds the Club Car overturned because Claimant was doing "figure eights" and tight turns at a high rate of speed. That activity had no legitimate connection to Claimant's work; it was a purely personal deviation. Claimant's testimony he was driving slowly is not credible. Nor is the ALJ persuaded Claimant was trying to listen for a noise coming from the front end, because, as Mr. Schaaf explained, the sound from the engine at high speeds would drown out any mechanical noise.

16. Claimant failed to prove he suffered an injury arising out of and in the course of his employment. Respondent proved Claimant's injuries occurred during a substantial personal deviation from his employment. The personal deviation was the proximate cause of the accident and resulting injuries.

CONCLUSIONS OF LAW

To establish a compensable claim, a claimant must prove the injury occurred while "performing service arising out of and in the course of his employment." Section 8-41-301(1)(b). The terms "arising out of" and "in the course of" are not synonymous. The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower, and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Rather, the question is whether the activity is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Id*. at 210. Whether an injury arises out of and in the course of employment are questions of fact for the ALJ. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998).

An employee can momentarily step outside the scope of employment by engaging in a purely personal deviation. When a personal deviation is asserted, the question is "whether the claimant's conduct constituted such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). The deviation must be "substantial" to remove the claimant from the course and scope of employment. *Kelly v. Industrial Claim Appeals Office*, 214 P.3d 516 (Colo. App. 2009).

One of the most common forms of deviation from employment is "horseplay." The Court of Appeals has enunciated a four-part test to analyze whether horseplay constitutes a substantial deviation from employment: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, i.e., whether it was commingled with the performance of a duty or involved an abandonment of duty; (3) the extent to which the practice of horseplay has become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). When a personal deviation

As found, Claimant failed to prove he suffered an injury arising out of and in the course of his employment. Instead, Respondent proved Claimant was engaged in a substantial deviation from his work that caused the accident. Mr. Schaaf's testimony was credible and persuasive. The tire tracks do not support Claimant's allegation he "swerved" to avoid a rabbit that ran out in front of him. The tracks are more consistent with the vehicle overturning because it was cornering too quickly. Claimant's testimony he was driving "no more than five to ten miles an hour" is not credible and his lack of candor regarding the speed he was traveling undermines the reliability of the rest of his testimony. Claimant had no legitimate work-related reason to be driving "figure eights" at high speed. At the time of injury, Claimant had stepped outside the course and scope of his employment and was performing an activity for his sole benefit.

ORDER

It is therefore ordered that:

1. Claimant's request for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 24, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Tyler, which provided a lumbar impairment rating of 13%?

II. Has Claimant shown, by a preponderance of the evidence, that he is totally and permanently disabled?

STIPULATIONS

The parties stipulated that Claimant's Average Weekly Wage ("AWW") is $1366.76. Claimant now receives Social Security Disability payments of $230.31. Therefore, if Claimant were declared to be Permanently and Totally disabled, his indemnity payments would be $679.95. The ALJ accepted these stipulations.

On the date of hearing, the ALJ also approved a written stipulation regarding Temporary Total Disability.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant is 56 years of age. He has a Bachelor's Degree in History. Claimant testified that after graduation he participated in a training program at the Hyatt Corporation and was employed by this company for 4 years. He subsequently installed burglar alarms for 16 years. He began working for AT&T in 1999, installng phone lines. For the past 4 years he was employed by Employer.

2. Claimant installed phones and internet service for Employer. This job required lifting up to 75 pounds, climbing ladders, squatting, kneeling and overhead work. Claimant would drive daily, from Trinidad, Colorado, to outlying sites.

3. Claimant sustained an admitted injury on January 21, 2016 when his work vehicle was rear ended by a vehicle driven by his supervisor. Claimant injured his neck and low back as a result of this accident.

4. Claimant initially treated with Dr. Paz in Trinidad, Colorado on February 25, 2016. Dr. Paz notes that Mr. James was driving a bucket truck which was totalled when rear ended by his supervisor. (Ex. 5, p. 121).

5. Claimant's care was subsquently transferred to Dr. Castrejon when Dr. Paz retired. Dr. Castrejon's initial examination was on November 1, 2016, (Ex. 1, p. 27).

6. Claimant's neck injury was treated by Dr. Murad at Parkview Neurological Services, (Ex. 4). An MRI was performed of the cervical spine, (Ex. 7, p. 132). It revealed canal stenosis at the C5-C6 and C6-C7 level. Dr. Murad performed a right C5-C6 and C6-C7 foraminotomy on October 17, 2016. (Ex. 5, p. 5)

7. In a 3-month follow-up exam, on February 15, 2017, the PA for Dr. Murad noted:

> He [Claimant] is now about four months out from surgery. He is quite happy with the results of his surgery. He has had complete relief of severe right upper extremity radicular pain. Severe neck tightness has improved significantly after physical therapy in Trinidad. He is no longer taking pain medication. (Ex. H. pp. 175-177).

8. Claimant testified that the surgery relieved the sharp pain in his neck and arms, though he still continues to experience cramping in the neck when utilizing his arms on a repetitive basis, overhead reaching or holding his neck in a stationary position. The cramping was described as a knot which becomes progressively worse.

9. Claimant was also treated by Dr. Murad for his low back injury. In the initial examination on March 30, 2016, Mr. James reported persistent low back pain radiating into the right leg. The pain increased when walking. A diagnosis of lumbar radiculopathy was provided.(Ex. 4, p. 85) Epidural steroid injections were administered at the L3-L5 level by Dr. Naalegowda. An MRI of the lumbar spine did not reveal significant central canal stenosis or nerve root impingement, (Ex. 4, p. 100).

10. Dr. Castrejon performed diagnostic studies with a finding of right L5 radiculopathy, (Ex. 1, pg. 20). Dr. Murad concurrs with the diagnosis providing an assessment of chronic lumbar radiculopathy; however, it is noted that "There is no severe nerve compression in the lumbar spine. All levels appear to be fairly well preserved without any significant degeneration." (Ex. 4, pg. 70).

11. At hearing, Dr. Olsen rendered the opinion that the January 13, 2017 electrodiagnostic study was completely normal. Specifically, although Dr. Castrejon reported that there were positive waves on the EMG table, they were only 1+. Dr. Olsen, who also is board certified in electrodiagnostic studies, indicated that electrodiagnostic evaluators rate positive waves from 1+ to 4+. As a result, 1+ would suggest that it is just 'barely there.' In addition, although Dr. Castrejon's study showed positive sharp waves, chronic positive sharp waves would be 1-300 microvolts. The units found on the studies, therefore, were clearly motor units that Dr. Castrejon had mistaken for positive sharp waves. Finally, although Dr. Castrejon noted that the EMG study showed polyphasics, 30% of normal individuals will have polyphasics as a normal finding. As a result, polyphasics in and of themselves are not diagnostic of a radiculopathy. Consequently, Dr. Olsen believed it was very important to have the lumbar MRI imaging corroborating the electrodiagnostic findings that Dr. Castrejon interpreted to be evidence of a radiculopathy.

12. Dr. Murad's office notes of January 10, 2018 state that "He [Claimant] has had chronic right L4 radiculopathy siince that time [of the foraminotomy] which is now manifested as more numbness and tingling." It was further noted in discussions with Claimant:

> We discussed the natural history of *lumbar radiculopathy.* Symptoms may be due to a structural pathology, which can be identified on MRI scans. However, at times, symptoms may be related to nerve injury as a result of *nerve stretching,* etc, *which cannot be seen on MRI. The latter may the the most likely cause of his current symptoms. As far as surgery is concerned, options are quite limited.* (Ex. 4, p. 71)(emphasis added).

13. In response to correspondence from Employer's attorney, Dr. Castrejon released Claimant to modified work with the employer, (Ex. 1, p. 16). The proposed job did not require lifting more than 10 pounds, repetitive extension or flexion of the neck, no repetitive bending or stooping and the ability to alternate sitting and standing, (Ex. 1, p. 16).

14. On a follow up examination on March 22, 2017, Claimant reported that he was able to alternate positions as tolerated in the modified work. However, his job was primarly computer work and making telephone calls. He described difficulty reaching forward and operating the computer keyboard as well as holding the phone between his cheek and shoulder. Dr. Castrejon's physical exam noted decreased cervical range of motion with right paraspinal tendonitis and muscle spasm. Trigger points were noted in the paraspinal musculature. Dr. Castrejon recommended an ergonomic evaluation of the work station and limited the use of computer for 15 minutes. He noted that Claimant may be unable to perform this work. Massage therapy was prescribed.(Ex. 1, pp. 14-15)

15. On April 3, 2017, Dr. Castrejon noted that Mr. James continued to experience pain when working beyond two to three hours, (Ex. 1, p. 11). On April 27, 2017, (Ex. 1, p. 3) he opined that the return to modified work was not successful. On June 23, 2017, Dr. Castrejon provided an opinion that Mr. James is only able to work 2 to 4 hours per day, (Ex. 1, p. 1).

16. A Functional Capacity Exam ("FCE") was performed at Colorado Pain and Rehab Center on March 9, 2017. (Ex. 2). It provided that Claimant can lift at less than the sedentary level of exertion, could sit for 30 to 40 minutes and stand for 20 to 30 minutes. He should frequently change posture. He can bend on an occasional basis within his limited range.

17. Dr. Olsen, after reviewing the FCE report, testified that Claimant probably was required to perform approximately 4-5 hours of testing. The report reflects that Claimant reported a pre-test pain level of 3.5 out of 10, and a post-test pain level of 3.5 out of 10 (Ex. F. p. 115). Dr. Olsen explained that when Claimant arrived to start the test, the evaluators would have asked him to rate his pain, and then after the four hours

of testing, the evaluators would have then asked him to rate his existing pain. Stated differently, on March 9, 2017, Claimant was able to perform 4-5 hours of testing during the FCE, without any increase in his reports of pain.

18. Dr. Olsen testified that the reports of symptoms that Claimant provided to Dr. Castrejon that Claimant believed resulted from performing this light duty work was inconsistent with how he tested out during the FCE that he performed in the same month. In that regard, Dr. Olsen testified as follows:

> A. No, it's not consistent. The FCE would have been, while limited, would have been much more involved than what he was doing at work. And, he was at the FCE and started with a pain of three-and-a-half and left with a pain of three-and-a-half. And at work he was doing significantly less activity –
>
> Q. For two hours?
>
> A. -- for two hours from report of symptoms that would be – that would not make medical sense, given the results he had from his neck surgery or the normal work above his lumbar spine.
>
> Q. But not making medical sense at the same time that he did five – four or five hours of FCE activities, which would be more than when he was doing light-duty work, no increase in pain, less activities during his light-duty work two hours, and he's got pain so bad that he has to leave and he has to take another day off?
>
> A. Correct.
>
> Q. No medical sense at all?
>
> A. And no basis for that flare-up. And it's inconsistent with his response. The FCE where he left that facility with pain of three-and-a-half over 10, and they didn't report any significant difficulties upon his departure.

19. In response to correspondence dated June 23, 2017, however, Dr. Castrejon adopted the restrictions provided in the Functional Capacity Evaluation. (Ex. 1, pg. 1). He further recommended that Claimant should avoid repetitive flexion or extension of the neck and should avoid static positioning of the cervical spine. Claimant should be limited to between 2 and 4 hours of work per day, given his unsuccessful return to modified employment.

20. Claimant testified that he can lift up to 10 pounds and on occasional basis lift more. When walking, he will usually stop after 15 to 20 minutes. He will stretch and then be able to continue. He develops pain when sitting too long which is relieved by standing. When standing, he will lean forward to stretch. After sitting for extended

periods, he will experience groin pain and numbness in his right leg when he commences walking. He experiences cramping in the neck when utilizing his arms on a repetitive basis or holding his neck in a stationary position. He develops problems with his neck when driving. He has difficulty sleeping as a result of neck and low back pain.

21. Dr. Castrejon placed the Claimant at maximum medical improvement on April 27, 2017. (Ex. 1, p. 3). Claimant completed a pain diagram for that office visit. In that pain diagram, Claimant did not notate having any kind of neck pain at all. Rather, Claimant indicated that he had a certain amount of low back pain, as well as pain in his right wrist (not alleged to be work-related).

22. Claimant was subsequently contacted by his employer and advised that there was no work for him in the Trinidad area. Claimant contacted the Colorado Division of Rehabilitation but was not provided any assistance. He submitted employment applications in Trinidad. These included a position with Cricket, AS Protection, manager at Kentucky Fried Chicken, Alert Patrol, Dish Network, Sodexo, LaQuinta and Holiday Inn. When submitting applications, Mr. James indicated that he had work restrictions, but did not specify any physical limitations.

23 Claimant received one response after submitting those applications for employment; from Sodexo who indicated that they were not interested. Per stipulation of the parties, Claimant has been awarded Social Security Disability benefits of $230.31 monthly.

24. In his report of MMI on April 27, 2017, Dr. Castrejon provided a whole person impairment of 35%. This combined a 20% impairment of the cervical spine and a 19% impairment of the lumbar spine. (Ex. 1, p. 4). The physical exam on that date noted a decreased range of motion of the cervical spine and paralumbar muscle spasm, (Ex. 1, p. 3). Range of motion measurements of the lumbar spine were found to be valid per the AMA Guidelilnes, (Ex. 1, p. 7).

25. Respondents then requested a DIME, which was performed by Dr. Tyler on September 19, 2017. In his physical examination, Dr. Tyler noted right paralumbar tenderness, trigger points in the parascapular regions and restricted mobility in the cervical spine. (Ex. 3, p. 63). He provided a diagnosis of post C4-5, C5-6 foraminotomies with resolution of radicular pain into the upper extremity, but continued segmental dysfunction of the cervical spine.

26. Dr. Tyler also indicates moderately severe obliquity in the lumbar region with noted secondary spasm, (Ex. 3, p. 64). By this time, Claimant had undergone three lumbar range of motion measurements. Claimant had his first lumbar range of motion testing with Dr. Castrejon on March 9, 2017 (Ex. F, p. 131). Claimant then had his second range of motion testing performed with Dr. Olsen on June 26, 2017 (Ex. A, p. 16). Claimant then had his final lumbar range of motion testing performed with Dr. Tyler on September 19, 2017 (Ex. D, p. 84).

27. Respondents prepared Exhibit N, which graphs the various measurements performed by each of these providers. Claimant demonstrated 5 degrees of lumbar extension with Dr. Olsen. At hearing, Dr. Olsen demonstrated what 5 degrees of a lumbar extension would be, which means Claimant barely extended his back at all. Given Claimant's normal lumbar MRI and normal EMG, Dr. Olsen did not believe that there was any plausible medical explanation for such limited range of motion in the lumbar extension.

28. Dr. Tyler's DIME opinion is that Claimant had a 17% impairment of the cervicial spine and a 13% impairment of the lumbar spine, combining for a total whole person impairment of 28%. The range of motion measurements of the lumbar spine were found to be valid per the AMA Guide, (Ex. 3, pp. 52-54).

29. Dr. Tyler observed the client shifting his weight from his right buttock to his left buttock at least every five minutes while sitting in the examining room. He was able to sit for the first 30 minutes of the exam, (Ex. 3, p. 63).

30. Dr. Olsen prepared a series of reports. (Ex. A). Claimant reported to Dr. Olsen that he had achieved an 80% improvement in his cervical problems following his surgery. Nevertheless, Claimant reported to Dr. Olsen that he continued to experience cramping pain in his neck at a level of 6-7 out of 10 on a daily basis (Ex. A, p. 13).

31. In a report dated June 26, 2017, (Ex. A, p. 8), Dr. Olsen indicated that the range of motion testing performed by Dr. Castrejon is not considered objective but rather self limited, even though the testing met the criteria for validity under AMA Guidelines (Ex. 1, p. 7). He opinioned that Claimant could comfortably lift up to 50 pounds on an occasional basis and 40 pounds on a frequent basis. Claimant would not need to alternate positions on a frequent basis.

32. In a report dated January 8, 2018, (Ex. A, pg 5), Dr. Olsen disagreed with the impairment rating provided by the DIME physician, Dr. Tyler. He noted that the range of motion measurements of the lumbar spine taken by Dr. Tyler differed from his own measurements. He opinioned that Dr. Tyler errored in determining the impairment rating for the lumbar spine, even though the test was deemed valid per the AMA Guides.

33. In reponse to correspondence from employer's attorney, Dr. Olsen generated a report dated February 5, 2018, (Ex. A, p. 3). He presents an opinion that Claimant was self limiting in the FCE performed on March 9, 2017, (Ex. 2). He recommended a second FCE to be performed at Select Physical Therapy indicating that a more current FCE would be medically necessary to determine Claimant's current level of functioning.

34. A second FCE was then performed at Select Physical Therapy on April 12, 2018, (Ex. C). It lasted 3 ¼ hours. The report provides that the result of the

evaluation were considered to be an accurate representation of his functional abilities, (Ex. C, pg. 1).

35. During the testing, elevated blood pressure and heart rate were detected requring Claimant to sit, breath, and stretch throughout the testing. On the treadmill test when the angle was increased by a 5% incline, his right knee buckled and he stepped off the treadmill. He reported pain in the right groin area but stated that he wanted to keep walking. The treadmill was reduced to a 0% incline. Claimant subsequently sat and stretched his low back, (Ex. C, p. 1). This FCE stated that Claimant is unable to sit, stand or walk on a frequent basis. He can lift up to 20 pounds but was placed in the sedentary level of exertion due to his inability to perform the full range of demands in the light category.

36. Dr. Olsen corresponded again with Respondent's attorney on May 2, 2018 (Ex. A, p. 1). In his report, he states that even though physical therapy did not identify inconsistencies in the testing, the symptoms reported while on the treadmill would be considered a significant inconsistency. He disagreed with the findings of the Functional Capacity Evaluation performed at Select Physical Therapy which stated that these are the minimal capabilities of the Claimant.

37. At hearing, Dr. Olsen testified that during the past 2 years, he has prepared two to three Independent Medical Examinations per month for Respondents' attorney. Dr. Olsen reviewed PA Glass' February 15, 2017 clinical note. Dr. Olsen stated that Claimant's reports to him of 80% improvement in his neck following surgery is consistent with PA Glass' clinical note, but inconsistent with Claimant's assertion that he was still having 6-7 out of 10 pain on a daily basis.

38. Dr. Olsen also reviewed Dr. Castrejon's January 10, 2017 clinical note in which Claimant reported to Dr. Castrejon that he was doing quite well following the surgery. Dr. Olsen believed that Dr. Castrejon's January 10, 2017, clinical note was consistent with Claimant's report to him that he experienced an 80% improvement in his cervical symptoms following the surgery, but inconsistent with him still having 6-7 out of 10 pain on a daily basis.

39. Dr. Olsen testified that walking at a 2 mph rate is the speed of an old shuffling man. Dr. Olsen also testified that there is no pathology emanating from Claimant's low back that could explain his inability to walk faster than 2 miles per hour and then have his right knee give out. Dr. Olsen testified that because Claimant is able to walk on his treadmill at home for 10-15 minutes at a time, he should have been able to perform the same treadmill testing during the FCE, but clearly did not.

40. Claimant, following the FCE, reported that his pain levels were 9 out of 10 (Ex. C, p. 48). As Dr. Olsen noted, most of the testing activities that Claimant was requested to perform was terminated early due to Claimant's complaints of pain. Dr. Olsen noted that Claimant, during his March 2017 FCE, exerted much more than he did for the April 2018 FCE. However, despite exerting more in the March 2017 FCE, his post-testing pain score was the same as his pretest score: 3.5 out of 10. After exerting

substantially less for the April 2018 FCE, Claimant's reports of pain were 9 out of 10. Once again, Dr. Olsen could not identify any plausible medical explanation why Claimant's pain scores after the April 2018 testing would be three times higher than the pain reports that he had following the March 2017 FCE.

41. Dr. Olsen also reviewed the pain diagram completed by Claimant himself for the April 27, 2017 office visit with Dr. Castrejon. Again, at that time, Claimant made no notations in the pain diagram indicating that he had any kind of cervical symptoms. Dr. Olsen testified that Claimant's pain diagram that he completed on April 27, 2017, is entirely consistent with Claimant's statements to Dr. Olsen that he had at least 80% improvement in his cervical problems following his surgery, but inconsistent with Claimant's statements that he was still experiencing 6-7 out of 10 pain on a daily basis.

42. Dr. Olsen disagreed with the diagnosis of lumbar radiculopathy provided by Dr. Castrejon, indicating that his interpretation of the EMG was incorrect and that his clinical notes are unreliable. The MRI of the lumbar spine was normal, and not consistent with any sort of nerve impingement. Given the lack of objective findings, Dr. Olsen was unable to come up with any diagnosis for Claimant's low back problems.

43. Dr. Olsen disagreed with the assessment of Dr. Murad and PA Glass that Claimant suffered from a chronic lumbar radiculopathy as reported January 10, 2018, (Ex. 4, p. 67). Dr. Murad had opined that even though the MRI showed minimal degeneration and no nerve compression, most likely the cause of the current symptoms are a nerve injury which cannot be seen on this diagnostic study, (Ex. 4, p. 72).

44. Dr. Olsen also disagreed with the opinion of DIME physician Dr. Tyler that Claimant had an impairment of the lumbar spine providing that there was no plausable explanation for the range of motion measurements taken by Dr. Tyler.

45. Dr. Olsen also disagreed with the results of both FCEs even though they were found to be valid. He opined that Claimant provided sub-maximal efforts during the testing.

46. Dr. Olsen was questioned about a surveillance photo taken of the Claimant on July 1, 2017, (Ex. M). He testified that the photo of Mr. James bending over was not consistent with any range of motion testing performed by Drs Castrejon and Tyler. Exhibit M shows the Claimant bending over, at near full flexion, to reach something on the ground with both knees bent, and in no apparent distress.

47. Michael Fitzgibbons prepared a Vocational Assessment for Claimant, (Ex. 8). Katie Montoya prepared a Vocational Assessment for Respondents, (Exhibit B). Both reports were prepared prior to the second FCE performed by Select Physical Therapy at the request of Dr. Olsen. Both Michael Fitzgibbons and Katie Montoya present an opinion that the medium work restrictions presented by Dr. Olsen (if accepted) provide for a variety of return to work options.

48. Mr. Fitzgibbons observed that the Claimant had applied for jobs in the limited market of Trinidad, Colorado and has not received any job offers. Claimant also contacted the Colorado Division of Vocational Rehabilitation, but had not received any job offers. He notes that Claimant is an older worker, age 55, which makes it more difficult to find employment.

49. Ms. Montoya presents an opinion that given the sedentary classification per the first FCE, it would be reasonable to investigate customer service and front desk clerk types. There may also be opportunities as a driver in the Trinidad area. It is her understanding that an additional FCE is outstanding and she elected to postpone labor market research until this document was received. She states that her opinion will be finalized upon receipt of the second FCE. Other than contemplating further labor market research, Ms. Montoya did not offer vocational sevices on behalf of the Employer to Mr. James.

50. The deposition of Michael Fitzgibbons, was taken on September 12, 2018. Mr. Fitzgibbons stated that Claimant does not have clerical/secretarial skills that can be utilized in a sedentary job, (Depo., p. 8). He further testified that the medical reports of Dr. Castrejon showed that Mr. James was not able to perform the light duty accommodations provided by his employer, (Depo, p. 10).

51. Mr. Fitzgibbons also reviewed the FCE performed at Colorado Pain and Rehabilitation Center on March 9, 2017, (Ex. 2). He noted that sitting was limited to 30 to 40 minutes per hour as well as the recommendation for frequent changes in postures. Sedentary work requires being seated most of the time while performing job tasks, (Depo., pg. 12).

52. Mr. Fitzgibbons testified that the second FCE performed on February 15, 2018 (Ex. C) also restricted sitting, standing and walking. Even through the material handling is at the light level, the restrictions of standing, walking and sitting placed the Claimant at the sedentary level. The limitation of sitting on an occasional basis would preclude sedentary work as it is customarily performed, (Depo., pp. 12-13).

53. Mr. Fitzgibbons reviewed the first page of the second FCE, (Ex. 6). He noted that because of elevated blood pressure and heart rate, it was necessary for Mr. James to take breaks during the testing so he could sit, breath and stretch. The Claimant would not able to engage in sedentary work activity without the need for breaks. From a vocational perspective, he opines that it is difficult to place someone if he is not able to engage in sedentary activity on a consistent basis, (Depo., pgs. 14-15). In order to be competitevely employable in Trinidad, Claimant would need to comply with the standard breaks that are customarily allowed in the workplace. (Depo., p. 21). Mr. Fitzgibbons testified that the second FCE was consistent with the report of Dr. Castrejon that Mr. James was only able to engage in activities for 2 to 4 hours, (Depo., p. 20).

54. Mr. Fitzgibbons tesified that Claimant had applied for employment in Trinidad, but was not offered any positions. Claimant had also contacted the Division of

Vocational Rehabilitation. Based on the restrictions provided by Dr. Castejon and both Functional Capacity Evaluations, it is the opinion of Mr. Fitzgibbons that Claimant does not have the residual capacity to maintain or sustain any type of employment in the Trinidad labor market, (Depo., pp. 20-21).

55. Mr. Fitzgibbons noted that Dr. Olsen had changed the material handling for the Claimant from medium level to the light level, with no postural limitations. Based on either the light or medium level or exertion, there would be jobs the Claimant could perform in Trinidad, (Depo., pp. 12, 24).

56. On April 10, 2018, Katie Montoya issued a Vocational Assessment report. In taking a history from Claimant, she noted that Claimant would "wake up and have coffee and stretch. He may walk 10 to 15 minutes on the treadmill at his home. He goes to his buddy's house in the mountains until noon and then will come home for the rest of the day….*Mr James identifed that he is always moving throughout the day*." (Ex. B, p. 33)(emphasis added).

57. Ms. Montoya further noted Claimant's efforts at seeking new work, once he was no longer in the employ of Qwest:

> Mr. James explained that he went to the Work Force Center, but they told him their policy is that they do not help while a person is on workers' compensation…..Mr. James explained that his entire work search has taken place in Trinidad…..Mr. James described that *he looked for work in November 2017 and <u>has not looked before or since</u> that time.* He did note that he would probably follow up with the Work Force Center for an assessment *once his workers' compensation case is done*. (Ex. B, p. 35)(emphasis added).

58. Ms. Montoya noted that the DIME physician, Dr. Tyler, provided an impairment rating, but did not define work restrictions. She therefore had only Dr. Olsen's and Dr. Castrejon's work restrictions to examine. In her view, Claimant is either a sedentary or medium classification, depending upon whose medical opinion to adopt. While she wanted to await the results of the then-pending second FCE before finalizing labor market research, she indicated that even if Claimant were restricted to 'sedentary' positions,Claimant could potentially serve as a cashier, delivery, or hotel front desk. If Claimant were at medium classification, even greater job opportunites would exist.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME Opinion/Lumbar Rating

D. The medical impairment determination of the DIME is binding unless overcome by clear and convincing evidence. Section 8-42-107(8), C.R.S. *See Qual-Med Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Cudo v. Blue Mountain Energy, Inc.,* W.C. No. 4-375-278 (ICAO, October 29, 1999). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it highly probable and free from serious or substantial doubt. As otherwise stated, clear and convincing evidence is defined as evidence which demonstrates that it is highly probable that the rating of the IME physician is incorrect. *Metro Moving & Storage Co., v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Clear and convincing evidence is evidence which is stronger than a preponderance, is unmistakable and is free from serious or substantial doubt. In re *Welker,* W.C. No. 4-

309-642 (Industrial Claim Appeals Office, 1998). See also DiLeo v. Koltnow, 613 P.2d 318 (1980). This enhanced burden of proof in overcoming a DIME reflects the underlying assumption that a physician selected independently by the Division of Workers' Compensation will provide a more reliable medical opinion.

E. The mere difference of opinion between medical experts is insufficient to overcome a DIME physician's rating by clear and convincing evidence. *In re Holmes* W.C. No. 4-527-829. (January 21, 2005). Repondents have failed to prove by a clear and convincing evidence that the 28% combined whole person medical impairment rating by Dr. Tyler is incorrect. The DIME physician's opinion is the only opinion the ALJ is required to afford any presumptive weight. *Harrison v. Wal-Mart Stores*, W.C. No. 4-522-344 (ICAO, April 18, 2003). See also, *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

F. Dr. Olsen raises serious, valid concerns about the inconsistency of Claimant's range of motion across several raters. In a perfect world, ranges of motion post-MMI would remain reasonably consistent with different physicians. There is a disparity here, but in the end, Dr. Olsen believes that the results are from submaximal effort by Claimant. Part of Dr. Olsen's conclusions stem from his own belief that Claimant's objective testing-MRI and Electrodiagnostics-shows no pathology. However, in this case, the ALJ is persuaded that Claimant's lumbar radicular complaints could indeed be from stretching of nerves in the lumbar region, which, according to Dr. Murad and staff, will not lend itself to diagnositic testing, and surgical alternatives are limited. This was by all accounts a violent traffic encounter, and the ALJ is not persuaded that this mechanism of injury could not have caused Claimant's symptoms.

G. While the ALJ acknowledges that Dr. Olsen might indeed be correct, in the end, it is a difference in medical opinions between he and Dr. Tyler. Dr. Tyler is the DIME physician, who conducted his exam within validity parameters. Dr. Tyler did not sense the submaximal efforts that Dr. Olsen did. Although not referenced in the DIME report, the photograph of Claimant bending over was taken more than two months before the DIME exam. The ALJ concludes that the 13% lumbar impairment rating assigned by the DIME physician has not been overcome by clear and convincing evidence.

Permanent Total Disability

H. In order to prove PTD, Claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. *Section 8-40-201(16.5)(a)*. A Claimant therefore cannot receive PTD benefits if he or she is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. See, *Lobb v. ICAO*, 948 P.2d 115 (Colo. App. 1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). In weighing whether Claimant is able to earn any wages, the ALJ may consider various human factors, including Claimant's physical condition, mental ability, age, employment history, education, and availability of work that the Claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer*, at 550, 556, 557.

The critical test is whether employment exists that is reasonably available to a claimant under his particular circumstances.

I. Claimant has significant subjective complaints and self-limiting restrictions. Claimant did have a neck surgery, and *has received an impairment rating from the DIME physician* which will remain undisturbed. By February, 2017, Claimant was reporting to his surgeon that he was very pleased with the results of the surgery, and that in fact he was taking no pain medications at the time. When Claimant was placed at MMI by Dr. Castrejon on April 27, 2017, Claimant, in his own pain diagram, did not notate that he was having any symptoms in his neck. It was only later that Claimant began reporting significant symptoms in his neck.

J. If the objective evidence does not establish the extent of Claimant's disability, then the remaining measure of Claimant's disability is the reliability of his subjective complaints. Such subjective complaints vary:

- In March 2017, Claimant underwent a 4-5 hour FCE with no self-reporting of increase in pain (both pain levels pre and post being 3.5), yet reports to Dr. Castrejon that if he performed two hours of light work (sitting at a desk and answering phones), he experienced such an increase in pain that he had to leave early and rest the following day.

- Reporting to the evaluating therapist during the April 2018 evaluation that less than 30 seconds into his treadmill test, he began to experience symptoms that he believed was causing his right leg to give out, yet reports being able to walk 10 to 15 minutes a day on a treadmill at home.

- Widely varying range of motion measurements among the different medical providers.

- Demonstrating 45 degrees of forward flexion to Dr. Olsen on June 26, 2017, yet less than one week later (July 1, 2017) being apparently able to flex his spine while upright, at least with knees bent.

K. Dr. Castrejon, did not challenge Claimant's reporting of his inability to perform two hours of light duty work in March 2017 by referencing the FCE that Claimant performed in March 2017 in which he did significantly more exertional activities with no increase in pain. Instead, he chose to simply accept Claimant's subjective complaints without reservation. Because Dr. Castrejon accepted without challenge Claimant's subjective complaints, he imposed significant permanent restrictions on Claimant.

L. Dr. Olsen, on the other hand, identified the numerous occasions when Claimant's subjective complaints were simply not consistent. His proposed restrictions included lifting up to 20 pounds on occasional basis, and no restrictions in terms of standing, walking, or sitting. Respondents submit that the greater weight of evidence establishes that Dr. Olsen's restrictions should be considered the most accurate permanent restrictions for Claimant.

M. As outlined above, if Dr. Olsen's restrictions are considered accurate, then there is no disagreement amongst the vocational experts as to whether Claimant would be able to continue to earn a wage. Both Ms. Montoya and Mr. Fitzgibbons have rendered the opinion that Claimant would still be considered employable in the Trinidad labor market if Dr. Olsen's restrictions are in fact accurate.

N. While insufficient evidence exists to prove to the ALJ, by clear and convincing evidence, that Claimant provided submaximal effort in his DIME exam, the ALJ does find that Claimant has put submaximal effort in his job search. He applied for a handful of positions in a small market for one month. He then quit trying, pending results of the Workers Compensation process. This falls far short of showing that someone in Claimant's position can earn no wages, regardless of which Vocational Expert one might find more persuasive. While Ms. Montoya's conclusions were not complete, pending the second FCE, the ALJ still finds her more persuasive than Mr. Fitzgibbons.

O. Claimant was seriously injured, through no apparent fault of his own, while at work. Claimant was then provided medical care to rehabilitate himself back to MMI. Modern medicine has its limits, so the final result has not been perfect, despite efforts made on behalf of his medical providers. As a result, Claimant has now been provided a whole person impairment rating for his back and neck, to compensate him for ***diminished*** earning capacity moving forward. It is the best the Workers Compensation system can do for him. Claimant has a good education, a good work history, and is mentally intact. He is capable of working, at a minimum, in a sedentary capacity, and more likely, medium capacity, and the ALJ so finds.

P. Claimant has not proven by a preponderance of the evidence that he should be considered permanently and totally disabled.

ORDER

It is therefore Ordered that:

1. Respondents have not overcome the DIME opinion of Dr. Tyler. Claimant's Whole Person Impairment rating is 28%.

2. Claimant has not shown that he is Permanently and Totally Disabled. His claim for Permanent and Total Disability is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 24, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

Whether the claimant has demonstrated by a preponderance of the evidence that the right ankle arthroscopy (with debridement, possible chondroplasty micro fracture and possible iliac crest bone marrow aspiration) recommended by Dr. Christopher Copeland is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted August 19, 2015 work injury.

FINDINGS OF FACT

1. The claimant began his employment with the employer in August 1990. In 2015, the claimant was working for the employer performing code inspections at construction locations.

2. On August 19, 2015, the claimant suffered an injury at work when he stepped down to inspect a foundation footer and stepped on a rock with his right foot. The claimant testified that by stepping down onto the rock he rolled of his right ankle which caused his right foot to roll up and to the inside. The claimant further testified that after the injury his right ankle was painful, swollen, and discolored.

3. The claimant reported the incident to the employer and was referred to Work Partners for medical treatment. The claimant first treated at Work Partners on August 20, 2015 and was seen by Daniel Meyer, PA. Mr. Meyer recorded that the claimant had pain in the right foot that was aching and sharp. On examination, Mr. Meyer noted that there was swelling in the claimant's right midfoot and bruising over the affected area. Mr. Meyer also noted that the claimant's ankle range of motion was "functional", but "limited by the injury to the lateral foot".

4. Also on August 20, 2015, x-rays were taken of the claimant's right foot and showed a linear fracture of the right fifth metatarsal (also referred to as a "Jones fracture"). Based upon the results of the x-rays, Mr. Meyer ordered a "cam" boot, crutches, and a knee scooter for the claimant. In addition, Mr. Meyer referred the claimant to Dr. Christopher Copeland for an orthopedic consultation.

5. The claimant was first seen by Dr. Copeland on September 11, 2015. At that time, Dr. Copeland noted that the claimant's symptoms were located in the right foot. Dr. Copeland also noted that a Jones fracture can be difficult to heal. As a result, Dr. Copeland discussed the claimant's options and it was agreed that they would pursue the conservative treatment of a cast on the claimant's right foot in an attempt to avoid surgery.

6. On December 18, 2015, a computed tomography (CT) scan of the claimant's right foot showed a partial union of the fracture at the claimant's fifth metatarsal, degenerative joint disease at the first metatarsophalangeal (MTP) joint, and an osteochondral lesion of the medial talar dome. In addition, the radiologist, Dr. Roy Erb, noted fragments beneath the medial malleolus. Dr. Erb opined that these fragments were probably related to trauma.

7. On December 22, 2015, the claimant returned to Work Partners and was seen by Mr. Meyer. At that time, the claimant reported pain anterior and medial to the tibia. Mr. Meyer noted the CT finding of the osteochondral lesion and deferred to Dr. Copeland for a discussion of causation and treatment.

8. On January 15, 2016, the claimant returned to Dr. Copeland. In the medical report of that date, Dr. Copeland noted that the claimant was complaining of right ankle pain. In addition, Dr. Copeland noted the finding of an osteochondral lesion on the CT scan. Dr. Copeland opined that the claimant's ankle symptoms potentially correlated to the osteochondral lesion and recommended a magnetic resonance image (MRI) of the claimant's right ankle.

9. On January 15, 2016, an MRI of the claimant's right ankle showed a full thinness chondral defect of the posterior medial talar dome with underlying subchondral marrow edema.

10. Following the MRI, the claimant was again seen by Dr. Copeland on January 22, 2016. Based upon the MRI results and the claimant's right ankle complaints Dr. Copeland recommended a diagnostic/therapeutic injection. On that date, Dr. Copeland administered an injection to the claimant's right ankle with anterior medial approach. Dr. Copeland opined that if the claimant's symptoms were confirmed to be coming from the ankle joint, the claimant would need to undergo arthroscopy with possible micro fracture.

11. On February 2, 2016, the claimant reported to Mr. Meyer that the January 22, 2016 injection provided relief. Also on that date, Mr. Meyer noted that the claimant's Jones fracture continued to heal.

12. On February 22, 2016, the claimant returned to Dr. Copeland who noted that the claimant's symptoms had not improved with conservative treatment. Dr. Copeland opined that the claimant's right ankle symptoms were related to the August 19, 2015 work injury. In support of his opinion, Dr. Copeland noted that the claimant had not had ankle problems prior to the injury. On that date, Dr. Copeland recommended that the claimant undergo right ankle arthroscopy with possible micro fracture. Dr. Copeland further opined that the claimant's need for right ankle surgery was related to his August 19, 2015 work injury.

13. The claimant testified that since the August 19, 2015 injury he has undergone three surgeries. Each of these surgeries had been performed by Dr. Copeland. The claimant's first surgery occurred on March 9, 2016. At that time, Dr. Copeland performed the recommended a right ankle arthroscopy with debridement, including micro fracture (due to the osteochondral lesion of the right ankle talus), and excision of bone at the distal tibia.

14. Despite conservative treatment, the claimant's Jones fracture was not healing and surgery was recommended by Dr. Copeland. On August 15, 2016, Dr. Copeland performed an open reduction and internal fixation (ORIF) of the claimant's right fifth metatarsal, with bone grafting of the Jones fracture, iliac crest bone marrow aspiration, peroneal brevis tendon repair, peroneal longus tenolysis, and superior peroneal retinacular reconstruction.

15. On January 9, 2017, the respondent asked Dr. Timothy O'Brien to review the claimant's medical records and opine regarding whether a recommended compound cream (specifically CMPD Ketamine/tramadol/gabapentin/salt stab) was reasonable medical treatment that was medically necessary and causally related to the claimant's work injury. With regard to the specific medical treatment recommended, Dr. O'Brien opined that the compound cream was not reasonable medical treatment.

16. In that same report, Dr. O'Brien further opined that the osteochondral lesion was an incidental finding on the CT scan of a preexisting condition. Dr. O'Brien further opined that the claimant's preexisting condition of an osteochondral lesion was not aggravated nor accelerated by the August 19, 2015 work injury. In support of his opinion, Dr. O'Brien noted that the claimant did not have ankle pain, swelling, or bruising at the time of his initial medical treatment for his work injury.

17. Subsequently, it was determined that the claimant's fifth metatarsal fracture was still not healing. As a result, Dr. Copeland recommended a revision surgery involving a repeat ORIF procedure with a separate incision for open grafting of the fifth metatarsal fracture, and iliac crest bone marrow aspiration.

18. On March 4, 2017, the claimant attended an independent medical examination (IME) with Dr. O'Brien. In connection with the IME, Dr. O'Brien obtained a history from the claimant, completed a physical examination, and again reviewed the claimant's medical records. In his IME report of that date, Dr. O'Brien opined that a revision of the ORIF procedure on the claimant's fifth metatarsal was reasonable medical treatment that was related to the claimant's August 19, 2015 work injury. In that same IME report, Dr. O'Brien reiterated his opinion that the recommended compound cream was not reasonable medical treatment.

19. On April 19, 2017, Dr. Copeland performed the recommended revision of the ORIF procedure with a separate incision for open grafting of the fifth metatarsal fracture, and iliac crest bone marrow aspiration.

20. Following the April 19, 2017 revision surgery, the claimant continued to undergo physical therapy which included range of motion exercises and increased weight bearing.

21. The respondent filed a General Admission of Liability (GAL) on September 28, 2017.

22. On October 17, 2017, the claimant returned to Dr. Copeland. At that time, Dr. Copeland noted that the claimant had "[i]ntermittent symptoms about the ankle and distal peroneal tendons lateral incision."

23. On January 12, 2018, the claimant's right ankle symptoms were also noted by Erica Herrera, PA with Work Partners. Ms. Herrera specifically noted that the claimant had tenderness over the lateral incision of the ankle, the peroneal tendons, the anterior ankle joint, and the lateral ankle joint.

24. Thereafter on February 14, 2018, the claimant was seen at Work Partners by Dr. Lori Fay to discuss whether the claimant had reached maximum medical improvement (MMI). At that time, Dr. Fay referred the claimant back to Dr. Copeland for additional evaluation to confirm whether the Jones fracture had healed.

25. On February 20, 2018, a CT scan of the claimant's right foot showed near-complete healing of the Jones fracture and stable bony osteochondral proliferation of the medial talar dome.

26. On March 13, 2018, the claimant returned to Dr. Copeland who noted that the claimant's fifth metatarsal fracture continued to heal. Dr. Copeland also noted that the claimant continued to have pain that was located in the anterior medial ankle joint. Dr. Copeland opined that the claimant's symptoms were generally "more ankle joint related" and might be caused by the osteochondral lesion. At that time Dr. Copeland recommended and administered a diagnostic injection to the claimant's right ankle joint.

27. On April 12, 2018, the claimant was again seen by Dr. Copeland. Dr. Copeland noted that the claimant complained of increased pain in the anterolateral ankle. Dr. Copeland reiterated his opinion that the claimant had pathology with the osteochondral lesion and recommended an additional MRI of the claimant's right ankle.

28. On April 23, 2018, an MRI of the claimant's right ankle showed that the osteochondral lesion of the medial talar dome had manifested as a surface osteophyte without osseous marrow edema.

29. The claimant returned to Dr. Copeland on April 24, 2018 to discuss the most recent MRI results. At that time, Dr. Copeland recommended and administered a diagnostic and therapeutic injection.

30. On May 3, 2018, the claimant was seen by Dr. Lori Fay with Work Partners. At that time, the claimant reported that the April 24, 2018 injection resulted in 50% improvement of his ankle symptoms.

31. The claimant was seen by Dr. Copeland on May 22, 2018. Based upon the April 23, 2018 MRI results, the claimant's response to the April 24, 2018 injection, and failure of other conservative treatment, Dr. Copeland opined that the claimant's right ankle symptoms were consistent with anterior lateral impingement. At that time, Dr. Copeland recommended that the claimant undergo a right ankle arthroscopy with debridement, possible chondroplasty micro fracture and possible iliac crest bone marrow aspiration.[1]

32. On July 3, 2018, the claimant attended a second IME with Dr. O'Brien. As with the prior IME, Dr. O'Brien reviewed the claimant's medical records, obtained a history, and performed a physical examination. In his July 3, 2018 IME report, Dr. O'Brien opined that the claimant's only injury on August 19, 2015 was the fracture of the right fifth metatarsal. Dr. O'Brien further opined that the claimant's need for the recommended right ankle surgery was not related to the August 19, 2015 work injury. Dr. O'Brien reiterated his opinion that the finding of a osteochondral lesion of the medial talar dome was an incidental finding. Dr. O'Brien further opined that the surgery would not be successful because the osteochondral lesion is not the cause of the claimant's right ankle symptoms. Dr. O'Brien's testimony by deposition was consistent with his written reports.

33. Based upon Dr. O'Brien's July 3, 2018 IME report the respondent denied authorization for the recommended right ankle surgery.

34. The claimant testified that immediately after the August 19, 2015 injury he reported ankle symptoms, including pain and swelling. In addition, the claimant testified that the cast he wore after the injury had to be adjusted and cushioned because his ankle was swelling inside the cast. The claimant credibly testified that although his medical treatment was primarily focused on his Jones fracture, he had ankle swelling and pain throughout his claim. The claimant also testified that his current right ankle symptoms include pain, stiffness, popping, and a feeling that the joint is swelling.

35. The ALJ credits the claimant's testimony at hearing, the medical records and the opinions of Dr. Copeland over the conflicting opinions of Dr. O'Brien. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that his right ankle symptoms are causally related to the August 19, 2015 work injury. The ALJ also finds that the claimant has demonstrated that it is more likely than not that the right ankle surgery recommended by Dr. Copeland is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury.

[1] This is a revision of the procedure performed on March 9, 2016.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

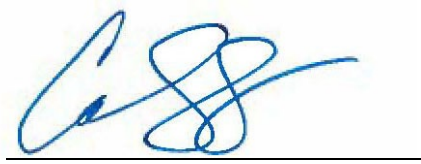
3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008).

4. As found, the claimant has demonstrated by a preponderance of the evidence that the recommended right ankle arthroscopy with debridement, possible chondroplasty micro fracture and possible iliac crest bone marrow aspiration is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted August 19, 2015 work injury. As found, the claimant's testimony, the medical records, and the opinions of Dr. Copeland are credible and persuasive.

ORDER

It is therefore ordered that the respondent shall pay for the recommended right ankle arthroscopy with debridement, possible chondroplasty micro fracture and possible iliac crest bone marrow aspiration, pursuant to the Colorado Medical Fee Schedule.

Dated October 25, 2018.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that she sustained an injury arising out of and in the course and scope of her employment with the employer on December 26, 2016 (WC 5-065-055).

- Whether the claimant has demonstrated by a preponderance of the evidence that she sustained an injury or developed an occupational disease that arose out of and in the course and scope of her employment with the employer, with a reported date of onset of September 24, 2017 (WC 5-058-479).

- If the claimant proves a compensable injury and/or occupational disease, whether the claimant has demonstrated by a preponderance of the evidence that medical treatment she received was reasonable and necessary to cure and relieve her from the effects of the injury and/or occupational disease.

- If the claimant proves a compensable injury and/or occupational disease, whether the claimant has demonstrated by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits beginning September 24, 2017.

- At hearing, the parties stipulated that if indemnity benefits are ordered, the claimant's average weekly wage (AWW) for both claims is $511.41.

FINDINGS OF FACT

1. The claimant began her employment with the employer in June 2015. The claimant worked in housekeeping at a hotel located in Telluride, Colorado.

2. The claimant's job duties included cleaning rooms, which included vacuuming, scrubbing bathroom fixtures and showers, sweeping, mopping, dusting, striping beds, making beds, and doing laundry. The hotel where the claimant was employed has 30 rooms. The claimant testified that during a normal shift she would clean nine to ten guest rooms. The claimant used a housekeeping cart to transport items from room to room to complete her tasks. The claimant testified that during an eight hour shift she would typically perform laundry duties for approximately two hours. The claimant is right handed, but would use both hands to complete her housekeeping duties.

3. The claimant testified that on December 26, 2016, she was pushing a housekeeping cart through a doorway when the cart became caught on the door knob. As a result, the cart rebounded into the claimant and hit her left wrist. The claimant testified that she reported the incident to the hotel manager the next day, December 27, 2016. Upon learning of the December 26, 2016 incident, the employer sent the claimant for medical treatment at Telluride Medical Center.

4. The claimant was first seen at Telluride Medical Center on December 29, 2016 and treated with Eric Johnson, FNP. At that time, the claimant reported pain in her left wrist that radiated up her arm. On examination, Mr. Johnson noted that there was no swelling, redness, or ecchymosis (bruising) of the claimant's left wrist. He also noted normal range of motion, but diminished strength of flexors and extensors and diminished grip "secondary to pain". On December 29, 2016, an x-ray of the claimant's left wrist showed no fracture. Mr. Johnson diagnosed a left wrist sprain and gave the claimant a wrist brace and recommended ibuprofen for the pain. In addition, Mr. Johnson assigned the claimant work restrictions of no lifting, carrying, pushing, or pulling with her left hand of more than 10 pounds.

5. On January 6, 2017, the claimant returned to Telluride Medical Center and was seen by Mr. Johnson. At that time, the claimant reported that she was feeling better and had improved by 80%. On examination, Mr. Johnson again noted no swelling, redness or ecchymosis and normal range of motion. In addition, Mr. Johnson noted that the claimant had normal strength of flexors and extensors, but "pain with resisted extension". Mr. Johnson instructed the claimant to continue to use the wrist brace. At that time, the claimant's work restrictions were increased to no lifting, carrying, pushing, or pulling with her left hand of more than 20 pounds.

6. The claimant was seen by Mr. Johnson for a third time on January 17, 2017. The claimant reported that she only had pain in her left wrist when lifting more than 20 pounds, but that even then the pain was a minimal dull ache. The claimant also reported that she wanted to return to full duty. On physical examination, Mr. Johnson noted normal range of motion, normal strength of flexors and extensors, with "minimal pain on extension". At that time, the claimant was released to full duty, with no work restrictions. Mr. Johnson instructed the claimant to return in one week when he anticipated she would be at maximum medical improvement (MMI).

7. On January 24, 2017, the claimant returned to Mr. Johnson and reported minimal pain, despite working full duty. The claimant also reported that she had "some difficulty when carrying heavy bags" but was "[a]ble to work without pain". Mr. Johnson placed the claimant at MMI on January 24, 2017 with no permanent restrictions and no permanent impairment.

8. While treating with Mr. Johnson, the claimant was able to return to work and work within her work restrictions. Once she was released to full duty on January 17, 2017, the claimant returned to all of her normal job duties as a housekeeper.

9. The claimant testified that when she was first seen by Mr. Johnson on December 29, 2016, her symptoms included numbness in her left wrist, and numbness in three of the fingers on her left hand. The claimant also testified that while treating with Mr. Johnson her symptoms did not improve. The claimant also testified that when she was placed at MMI she continued to have numbness and tingling her left wrist and these same symptoms continued between January 2017 and September 2017. However, the claimant did not receive any medical treatment during that time.

10. On September 24, 2017, the claimant notified the hotel manager that she had pain in her left wrist. The employer instructed the claimant to return to Telluride Medical Center for treatment. The claimant testified that she had increasing pain in her left wrist on that date because of the activity of completing laundry duties. Specifically, the claimant noted wrist pain when loading laundry onto the industrial iron.

11. The medical records entered into evidence indicate that on September 25, 2017, the claimant sought medical treatment with Montrose Memorial Hospital Emergency Department (ER) and was seen by Dr. David Dreitlein. At that time, the claimant reported left upper extremity pain that had started several weeks prior. She also reported to Dr. Dreitlein that she had sprained her left wrist at work several months prior. On that date, x-rays of the claimant's left wrist were interpreted by Dr. Dreitlein as negative. Dr. Dreitlein opined that the claimant's left wrist symptoms were related to the repetitive use of her hand at work and he suspected "early carpal tunnel syndrome". He recommended physical therapy and ibuprofen and instructed the claimant to follow up with her workers' compensation provider.

12. On September 27, 2017, the claimant was seen at Telluride Medical Center by Jana Faragher, FNP. The claimant reported pain in her left wrist that radiated up to her elbow (although it had previously gone as high as her shoulder). Ms. Faragher recorded that the claimant described the pain at "really sharp pain" that was accompanied by tingling and numbness. Ms. Faragher diagnosed a left wrist sprain and referred the claimant to physical therapy. In addition, Ms. Faragher placed the claimant on work restrictions of no lifting, carrying, pushing, or pulling over five pounds. The claimant testified that she did not return to work for the employer.

13. The claimant pursued physical therapy treatment with Mountain View Therapy. The claimant testified that physical therapy provided some relief of her symptoms.

14. On October 11, 2017, physician advisor, Dr. Jason Novak, opined that the claimant's September 2017 wrist complaints and related medical treatment were not causally related to the December 26, 2016 wrist sprain. Dr. Novak also opined that it was unlikely that the claimant would meet the criteria for cumulative trauma given her job as a housekeeper.

15. On October 5, 2017, the respondents filed a Notice of Contest related to the September 24, 2017 alleged injury.

16. Thereafter, the claimant independently sought treatment with Dr. Vineet Singh and was first seen by him on December 21, 2017. At that time the claimant reported left shoulder pain, wrist pain, and hand pain. On examination, Dr. Singh noted that the claimant's left wrist range of motion, sensation, and reflexes were all normal. However, Dr. Singh diagnosed carpal tunnel syndrome and opined that this diagnosis was related to the claimant's December 26, 2016 wrist injury. Dr. Singh recommended that the claimant undergo a carpal tunnel injection, with the possibility of carpal tunnel release surgery. On December 21, 2017, Dr. Singh administered the recommended injection.

17. The claimant returned to Dr. Singh on January 25, 2018. Dr. Singh recorded that the claimant was "improved" after the injection. He recommended that she continued with physical therapy, home exercise, and night splinting. The claimant testified that the injection administered by Dr. Singh provided her with five days of relief of her arm and wrist pain.

18. On January 16, 2018 and January 26, 2018, the respondents filed Notices of Contest related to the December 26, 2016 alleged injury.

19. On June 11, 2018 Torrey Beil, CDMS, QRC completed a job demands analysis (JDA) of the claimant's job duties. In her JDA report, Ms. Beil evaluated the required tasks and physical demands of the duties of a "room attendant". The duties identified in the JDA were the same as those described by the claimant in her testimony. Ms. Beil noted one risk factor present in the performance of the duties of a room attendant. That risk factor was up to three hours (but less than six hours) of elbow flexion over 90 degrees.

20. At the request of the respondents, on July 10, 2018 the claimant attended an independent medical examination (IME) with hand surgeon, Dr. Jonathan Sollender. In connection with the IME, Dr. Sollender reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Sollender opined that the claimant had "diffuse complaints inconsistent with any specific diagnosis". Dr. Sollender noted that the claimant suffered a minor injury on December 26, 2016 for which she was placed at MMI within a few weeks. In addition, based upon Ms. Beil's JDA, Dr. Sollender opined that there were insufficient risk factors in the claimant's job duties to establish a cumulative trauma claim.

21. Dr. Sollender's testimony by deposition was consistent with his IME report. Dr. Sollender specifically testified that elbow flexion (the risk factor identified by Ms. Beil in the JDA) is not related to the development of carpal tunnel syndrome.

22. The claimant testified that her current symptoms include pain from her left wrist to her shoulder, limited use of her left hand, inability to lift more than five pounds, and difficulty sleeping due to pain.

23. With regard to the incident on December 26, 2016 (WC 5-065-055), the ALJ credits the medical records of Mr. Johnson dated December 29, 2016 through January 27, 2017 and finds that the claimant has demonstrated that it is more likely than not that she suffered an injury to her left wrist on December 26, 2017. The ALJ credits the opinion of Mr. Johnson that the claimant reached MMI for that injury on January 27, 2017 with no permanent restrictions and no permanent impairment. The ALJ is not persuaded by the claimant's testimony that she continued to have symptoms after reaching MMI.

24. The claimant continued to work during treatment for the December 26, 2016 work injury. The ALJ is not persuaded that the claimant's inability to work beginning September 24, 2017 is causally related to the December 26, 2016 work injury. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she is entitled to TTD benefits related to the December 26, 2016 work injury.

25. With regard to the September 24, 2017 alleged injury/occupation disease, the ALJ credits the opinions of Dr. Sollender over the contrary opinion of Dr. Singh and finds that the claimant's December 26, 2016 injury did not worsen or become exacerbated in September 2017. The ALJ does not find the claimant's testimony regarding her ongoing and worsening symptoms to be credible or persuasive. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she suffered an injury and/or occupational disease in September 2017. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that she suffered a wage loss as the result of a work related injury and/or occupational disease.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also*

Subsequent Injury Fund v. Thompson, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no

statutory requirement that claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

December 26, 2016 incident (WC 5-065-055)

7. As found, the claimant has demonstrated by a preponderance of the evidence that she suffered an injury that arose out of and in the course and scope of her employment on December 26, 2016. As found, the medical records of Mr. Johnson dated December 29, 2016 through January 24, 2017 are credible and persuasive.

8. As found, the claimant continued working following the December 26, 2016 work injury and had no wage loss between the date of injury and being placed at MMI on January 24, 2017. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to TTD benefits beginning September 24, 2017. As found, the medical records are credible and persuasive.

September 24, 2017 incident/occupational disease (WC 5-058-479)

9. As found, the claimant has failed to demonstrate by a preponderance of the evidence that on September 24, 2017 she suffered an injury arising out of and in the course and scope of her employment. As found, the opinions of Dr. Sollender are credible and persuasive.

10. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she developed an occupational disease (with a date of onset of September 24, 2017) arising out of and in the course and scope of her employment. As found, the opinions of Dr. Sollender are credible and persuasive.

11. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she suffered a wage loss as the result of a work related injury and/or occupational disease. As found, the claimant is not entitled to TTD benefits beginning September 24, 2017.

ORDER

It is therefore ordered:

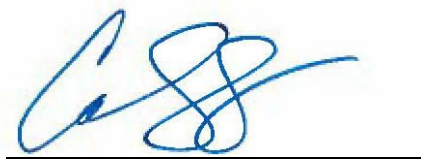
1. The claimant suffered a compensable injury on December 26, 2016.

2. The respondents shall pay for the medical treatment the claimant received from Telluride Medical Center following the December 26, 2016 injury and until she was placed at MMI on January 27, 2017. Such medical treatment is subject to the Colorado Medical Fee Schedule.

3. The claimant's claim related to an alleged injury/occupational disease with a date of onset of September 24, 2017 is denied and dismissed.

4. The claimant's claim for TTD benefits beginning September 24, 2017 is denied and dismissed.

Dated October 25, 2018.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Whether the opioid medications currently being prescribed to Claimant, including Suboxone, are medically reasonable and necessary and related to her worker's compensation injury.

- Whether maintenance treatment should be terminated.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 53-year-old (DOB: 6/26/1965) former employee of Employer who injured her right wrist on September 4, 2008 while trying to maneuver a gurney. Claimant reported to providers at the time that she felt a click in her wrist and had immediate pain.

2. Respondents admitted liability for the injury and provided extensive treatment including two surgeries by Dr. Kavi Sachar for Claimant's wrist injury. Claimant's authorized treating physician (ATP), Dr. Robert Kawasaki, eventually placed her at maximum medical improvement (MMI) on June 28, 2010 and gave a 19% upper extremity impairment rating. Respondents filed a final admission of liability admitting liability for this rating and admitted for reasonable and necessary maintenance treatment.

3. At MMI, Claimant was receiving seven different prescriptions including Avinza, Diclofenac, Baclofen, Bupivacaine, Vicodin, ibuprofen and Flector patches. She continued in maintenance treatment with Dr. Kawasaki and eventually underwent another surgery that consisted of a hardware removal on March 7, 2013. Her symptoms did not improve.

4. Eventually in 2014, Dr. Kawasaki attempted to wean claimant off her pain medications. However, Claimant insisted that medications were necessary for her to function. Dr. Kawasaki continued with his attempts to wean Claimant from her medications but Claimant continued to resist. On November 17, 2015, Claimant no longer wished to treat with Dr. Kawasaki and Dr. Kawasaki arranged to transfer her care to a different provider. On April 5, 2016, Dr. Kawasaki learned that Claimant's case was transferred to Dr. Samuel Chan for pain management. Claimant asked Dr. Kawasaki to provide one additional narcotic prescription for the period until Dr. Chan could evaluate Claimant. Dr. Kawasaki agreed but reiterated his concerns about Claimant's medication use and compliance. He also noted that Claimant's work up out ruled out CRPS.

5. Post MMI, Dr. Ron Carbaugh, PhD, performed a pain psychology evaluation of Claimant on May 12, 2014. Dr. Carbaugh's evaluation included administering a battery of tests, performing an initial intake interview, and examining Claimant. Dr. Carbaugh also reviewed Claimant's medical records as of that date. He concluded that Claimant focused on the need for additional medical assessment and intervention for her wrist and that she was clearly not coping well with her ongoing pain. He stated that Claimant was clearly

"not ready to accept more self-responsibility for symptom management at the present time." She felt that something her medical providers has missed diagnosing the "real" problem with her wrist and was quite anxious for a second surgical opinion. He opined that Claimant was a poor surgical candidate and diagnosed her with a somatic pain disorder.

6. Claimant followed up with Dr. Carbaugh on October 1, 2014 after undergoing another surgical consult and evaluation where the surgeon determined that she was not a candidate for further surgery. Despite this opinion, Claimant continued to believe that she needed more intervention for her wrist. Although Claimant admitted to pre-existing psychological issues, she claimed her condition had worsened because of the work injury. Dr. Carbaugh continued to treat Claimant through January 28, 2015. At this appointment, Dr. Carbaugh noted that Claimant's pain behavior remained relatively high and that it was very unlikely that she would be able to move toward more self-directed coping strategies until she was fully convinced of an absence of a surgically correctable situation in her wrist.

7. On January 12, 2015, Dr. Lawrence Lesnak conducted a Respondents sponsored medical examination. Dr. Lesnak reviewed all medical records to date, interviewed Claimant and conducted a physical examination. Dr. Lesnak ultimately agreed with Dr. Kawasaki and Dr. Carbaugh that Claimant was not a candidate for surgery or any further interventional treatments including injection trials. Dr. Lesnak also addressed Claimant's use of opioids for pain management. He observed that Claimant had several inconsistent/noncompliant random urine drug screens and, from the medical records was frequently noncompliant with medical appointments, etc. Based on that information she appeared to be a relatively poor candidate for treatment with opioid pain management, including Suboxone. However, he did believe that the transition to Suboxone might enhance a more effective wean from all opioid pain medications but stressed that the goal in switching should be to wean her from all opioid pain medications over the course of several months.

8. On January 13, 2016, Dr. Kavi Sachar evaluated Claimant for the last time. At this appointment, Claimant reported to Dr. Sachar that her wrist would intermittently have an area that pops out on the ulnar side but was unable to reproduce this phenomenon in the doctor's office. Her physical examination showed no deformity and full range of motion. She did have some tenderness over the TFCC but had no crepitation or instability and Dr. Sachar was unable to reproduce any pain. X-rays taken in the office revealed no visible bone loose bodies. Dr. Sachar discussed his findings with Claimant in detail and explained that there were no indications for any surgical intervention. He recommended that Claimant find a new pain management provider.

9. On April 22, 2016, Claimant began treating with Dr. Samuel Chan for pain management. Claimant reported to Dr. Chan her goal of being pain free; which he opined was not realistic. He stated this was especially so when there was not a specific pathology identified in multiple imaging studies including MRI arthrogram. Dr. Chan refilled Claimant's pain medications and had her complete a narcotic contract. He also advised her that at some point she would need to come off the narcotic medications because she had not demonstrated any significant functional gain. After approximately five months of

treatment, on September 12, 2016, Dr. Chan determined that Claimant's treatment should progress to a detox program. He noted that she had not had any significant functional improvement despite narcotic usage and that her clinical history revealed that she had been rather non-compliant. He felt the most appropriate course of treatment for Claimant was to proceed with a detox program despite her "protest and disagreement." Dr. Chan did not believe further narcotic medication was appropriate for Claimant and transferred her care.

10. In November of 2016, Claimant began treating with Mountain Medical Injury & Pain Professionals. At her initial evaluation after reviewing Claimant's records, Dr. Robert Fierrer noted that Claimant had "a long history of non-compliance and a normal MRI of the wrist." Dr. Fierrer decided either to move Claimant to Suboxone or to wean her off opiates entirely. The providers at Mountain Medical decided to pursue multiple tools to manage Claimant's pain and by March of 2017 had administered a nerve block and were considering a nerve stimulator. Mountain Medical providers referred Claimant to Dr. Giancarlo Barolat for consideration of the stimulator. Dr. Barolat ultimately recommended an ulnar nerve stimulator.

11. In response to the request for the ulnar nerve stimulator, Respondents scheduled Claimant for independent medical examination with Dr. Henry Roth and Dr. Robert Kleinman. Dr. Roth conducted an IME of Claimant on September 15, 2017 and opined Claimant's ongoing complaints of pain were not due to a work injury but the result of her behavioral health status. He found no medically objective evidence on physical examination or diagnostic studies to suggest a physiologic pain generator. Accordingly, Dr. Roth recommended against the neurostimulator and that all opioid medications be discontinued. In fact, he went further and recommended cessation of all maintenance treatment related to the worker's compensation claim. Dr. Roth wrote, "In my opinion cessation of narcotic medication and treatment under workers' compensation will improve [Claimant's] circumstances . . . .and improve her ability and necessity to take responsibility for her personal situation."

12. Dr. Kleinman examined Claimant on August 15, 2017 and issued his final report on September 18, 2017. Dr. Kleinman diagnosed Claimant with preexisting attention deficit disorder (ADD), depression, anxiety, and post-traumatic stress disorder (PTSD) all of which dated back to childhood or adolescence. Claimant was in psychotherapy and on medications for these conditions at the time of the injury and continuing after that injury. Dr. Kleinman noted that in her evaluation and treatment for the injury with Dr. Carbaugh, Claimant appeared to over report symptoms and this was consistent with psychological testing with Dr. Carbaugh who noted that Claimant appeared to have more emotional symptoms than objectively existed and that she "exhibited her symptoms dramatically to get attention and support." Dr. Carbaugh had also predicted that Claimant would have a poor surgical outcome based on psychological and psychosocial factors. Based on his review of the medical record, the IME recommendations from Dr. Roth, and his interview of Claimant in which she "under reported her psychopathology and minimized stressors," Dr. Kleinman concluded that Claimant would be a poor candidate for neuromodulation trial and implantation. He also

opined that the medical records did not support the ongoing use of psychotropic medications, as there was little indication that they were helping.

13. On December 7, 2017, in response to Dr. Roth's IME report and a specific request from Sedgwick for a weaning schedule, Nancy Beste, PA, a physician's assistant with Mountain Medical, issued a report. She stated Claimant had chronic but manageable pain. She reported that Claimant had obtained complete pain relief with a nerve block administered by Dr. Smith for at least a month and reiterated her belief that Claimant would benefit from a peripheral nerve stimulator. She believed continued Suboxone and some non-opiate pain management would be reasonable and necessary. However, she did discuss a gradual taper of the buprenorphine/naloxone with Claimant and Claimant agreed to slowly wean and taper the medication. Ms. Beste believed it would take several months for Claimant's neuro-receptors to adapt and allow for an accurate assessment of her baseline pain. Ms. Beste recommended medication to control Claimant's withdrawal and to help with heightened pain. Ms. Beste believed Claimant could be fully weaned by July of 2018 and possibly more quickly with the addition of micro doses of naltrexone.

14. On December 19, 2017, Dr. Robert Fierer with Mountain Medical documented that Claimant had pain at a level of 9/10 and referenced the IME recommendation that she be weaned off medications. Claimant's current level of Suboxone was 8-2 MG and 1.5 strips per day along with Lyrica three times per day. He indicated that Claimant was reluctant to try weaning as she believed her pain would increase. He nevertheless agreed to begin weaning "next month" but stated that he expected her pain to increase.

15. On February 12, 2018 Claimant had a follow up appointment with Dr. Fierer. Claimant reported her pain had continued to worsen with tapering of Suboxone. She reported her symptoms as 9/10. According to Dr. Fierer, Claimant was now very irritable and continued using Lidoderm patches and topical cream, brace, ice, heat and massage to manage. She was currently taking ¾ strip a day of Suboxone. Despite his own prior statement that he expected the pain to increase and Ms. Beste's statement that the weaning process could take through July of 2018, Dr. Fierre opined that there had been a fair amount of time with the decrease of Suboxone to determine if Claimant's pain was hyperalesia pain. He did not feel this was the case and that Claimant was "experiencing unnecessary pain that can be controlled for (sic)". He recommended slowly increasing her Suboxone until the pain was controlled. Claimant was also to continue Lyrica 100 mg 3 times a day, Cyclobenzaprine 10 mg, Zipsor 25 mg, Lidoderm patch and topical cream.

16. Dr. Roth testified via deposition on behalf of Respondents. Dr. Roth testified that he had examined Claimant almost nine years to the day after her initial work injury, which he described as a right wrist strain. Dr. Roth summarized Claimant's treatment prior to his IME and explained that Claimant had undergone extensive conservative treatment and four different surgical interventions with no improvement in her symptoms or function. According to Dr. Roth, if the areas in which the surgeries had been performed had been the cause of Claimant's pain, she would have experienced improvement in her symptoms because of those procedures. Indeed, Dr. Roth explained that if there was a physiological

basis for Claimant's symptoms, the passage of time alone should have resulted in some improvement of Claimant's condition. The lack of any improvement supported the conclusion that Claimant's symptoms were not physiologically based.

17. Dr. Roth believed there was no longer any medical need for ongoing opioid medications in the context of the worker's compensation claim. According to Dr. Roth, there was a complete absence of positive objective demonstration of an injury by x-ray, MRI, arthrogram, physical findings, the evaluations of three hand surgeons, and two physiatrists had previously opined that medications be weaned. Ultimately, Dr. Roth concluded that even though Claimant subjectively and psychologically may still need the medications, the worker's compensation system requires physicians to be able to demonstrate that any treatment is medically probably the result of the specific work event and pathology identified by objective means. In this case, that objective pathology simply did not exist.

18. Claimant testified on her own behalf at the hearing. Claimant testified that she was currently taking a combination 13 oral medications for pain, hypertension, and psychological issues and uses a patch and compound cream to treat her pain. At the time of hearing, Claimant did not have an active prescription for Suboxone but was planning to pick up a new prescription after the hearing. In addition to her medications, Claimant also uses a TENs unit for pain control. Claimant admitted that she had previously insisted on staying on pain medications while treating with Dr. Kawasaki because she was opposed to stopping all pain medications and not having anything done to fix her wrist. She testified that after beginning treatment with Mountain Medical, the peripheral nerve stimulator was mentioned and she believes that this a procedure that could provide her with pain relief other than being on "tons of medication." On cross-examination, Claimant admitted that after Respondents denied the request for the stimulator in June of 2017, she took no steps to pursue authorization. Instead, she has continued on increased medications. Claimant denied that Dr. Chan ever discussed a detox program with her. Claimant testified that she was against discontinuing all of her pain medications because her pain was too great to rely only on over the counter medications. She also testified that the cause of her pain needed to be identified and treated.

19. The ALJ finds Dr. Roth's opinions credible, persuasive, and supported by the medical records as well as the opinions of Dr. Kawasaki, Dr. Lesnak and Dr. Chan. Additionally, both Dr. Carbaugh and Dr. Kleinman agree that Claimant's pre-existing psychological conditions are influencing her physical presentation, were not aggravated by the work injury, and that there is a lack of objective evidence to explain her pain complaints.

20. Based on the credible and persuasive medical evidence, the ALJ finds that the opioid medications, including Suboxone as well as ongoing maintenance treatment of any kind are no longer medically reasonable and necessary or related to the September 4, 2008 work injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law.

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Maintenance Medical Benefits

Where the respondents file a final admission admitting for post-MMI medical treatment pursuant to *Grover v. Industrial Comm'n,* 759 P.2d 705 (Colo. 1988), respondents retain the right to contest liability for a particular treatment. When

respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury. Id. at 712; *Snyder v. Industrial Claim Appeals Offc.*, 942 P.2d 1337 (Colo. App. 1997). However, where the respondents attempt to modify an issue that previously has been determined by an admission, respondents bear the burden of proof for such modification. Section 8-43-201(1), C.R.S. (2018). This includes the termination of previously admitted maintenance medical benefits. *Arguello v. State of Colorado,* W.C. No. 4-762-736-04 (May 3, 2016); *Salisbury v. Prowers County School* District, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Accordingly, Respondents bore the burden of proof with respect to the reasonable necessity of any specific benefits at issue, while Claimant bore the burden of proving that specific medications being prescribed by Mountain Medical are reasonably necessary and causally related to the 2008 work injury. Respondents had the burden of proving that maintenance medical treatment in general was no longer medically reasonable and necessary.

As found, Claimant has no objective findings to support her subjective symptoms and has not achieved any functional improvement from any of the treatment modalities tried over the preceding ten years since the September 4, 2008 date of injury. The ALJ has credited the opinions of Drs. Roth, Kawasaki, Chan, and Lesnak that weaning of all opioid medications is medically reasonable and necessary in this claim. Additionally, the ALJ has credited the opinions of Dr. Roth, Dr. Carbaugh and Dr. Kleinman that Claimant needed to take self-responsibility for her symptom management and that cessation of not only opioid medications but of further treatment in the worker's compensation system is the only means to accomplish this end. Dr. Roth has further opined that Claimant's current treatment is not treating a specific pathology identified by objective means that can be related to the work injury. Therefore, any treatment that Claimant is receiving at this time is not causally related to the September 4, 2008 work injury.

ORDER

IT IS THEREFORE, ORDERED THAT:

1. Continued opioid medications, including Suboxone, are not medically reasonable and necessary to treat Claimant's work injury.

2. Ongoing maintenance medical treatment is no longer medically necessary or causally related to the September 4, 2008 work injury.

DATED this 24th day of October 2018.

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
1525 Sherman ST., 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at:** http://www.colorado.gov/dpa/oac/forms-wc.htm.

ISSUE

Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on July 15, 2017.

FINDINGS OF FACT

1. Claimant testified that on July 15, 2017, he went to work at the Westin DIA at 9:00 a.m. as part of his employment with Employer. Claimant worked until 8:30 p.m. On this date he worked in the laundry, gathering linens to be laundered, and also took out bags of trash. At the end of the day, his back was sore.

2. The next day, July 16, 2017, Claimant was scheduled to work at 3:00 p.m. but he could not get up as his "body was not responding." On Monday July 17, Claimant went to Employer's office on Federal Blvd. and spoke with Carlos Otero, a manager, to explain why he had missed work. Claimant's testified that he was instructed to fill out an accident report and to write down witnesses to his injury. His supervisor Christina Chavez was called into the meeting and advised Mr. Otero that Claimant had not called in to report an injury. Claimant did not fill out the accident report as requested by the Employer.

3. Claimant testified that he returned to the office on another occasion to ask for "help." He was told to come back when he was released to return to work. During the next few weeks he called Employer to ask for help with work he could perform. But he was not offered modified work. He advised Employer he was going to make a complaint about the company.

4. Claimant then sought work elsewhere and was hired to perform the same type of laundry and housekeeping work he performed at Employer. Claimant represented to his new employer he was capable of performing this type of work.

5. While Claimant was at work at his new job, he received a phone call from Victor Juarez at Employer advising him he should go to one of the designated physicians to receive treatment. Following receipt of this phone call, Claimant went to the respondent-employer's Yates Dr. office to talk to Mr. Juarez. After this meeting, Claimant filed a workers' claim for compensation at the Division of Workers' Compensation. On this claim form, Claimant stated he was injured on July 15, 2017 taking out laundry and trash and lifting heavy bags.

6. Claimant was given the designated provider list when he spoke with Mr. Juarez. When Claimant was asked why he had never gone to the designated physician to receive treatment, he stated he was waiting for Mr. Juarez to explain what help the

company was going to give him. When pressed, Claimant stated he was waiting to see if the company was going to give him money.

7. Claimant was asked to state specifically what time the accident or injury had occurred on July 15, 2017, and what he was doing at the time he was injured. Claimant could not provide a specific time, but he was performing these tasks all day long. Claimant explained that he believed the pain in his back was "residual." When asked to explain this, he stated that he believed his pain was related back to an incident which he alleges occurred in 2016 and that he had not had a separate injury on July 15, 2017. Upon further questioning, Claimant testified unequivocally that he was not claiming that he sustained an injury on July 15, 2017.

8. Additionally, Claimant testified that he expected to paid money for his claim of work injury. Claimant testified indicating a belief that everyone understood Claimant wanted to receive money for his work injury claim. Claimant appeared unconcerned with the question whether he had an injury and most concern with how Employer could be convinced or ordered to pay Claimant money.

9. Claimant rested his case on the basis of his own testimony. In light of Claimant's admission that he did not sustain an injury on the date of injury listed on Claimant's claim for compensation, Respondents moved to dismiss Claimant's claim.

10. The Court granted Respondents' motion to dismiss on the grounds that Claimant failed to sustain his burden of proof to establish by a preponderance of the evidence that he suffered an injury in the course and scope of his employment for Employer on July 15, 2017. The motion to dismiss is granted because Claimant admitted during his testimony that he did not suffer at work related injury on July 15, 2017, and because Claimant testified that he wanted and expected Employer to pay him money because Claimant had come forward with a claim of work injury.

CONCLUSIONS OF LAW

1. The purpose of the Act, Sections 8-40-101, C.R.S. (2018), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or

every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he or she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Section 8-41-301(1) (c), C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for the determination of the Judge. *Faulkner*, 12 P.3d. at 846. Here, Claimant's testimony does not support a finding that Claimant suffered a disability proximately caused by an injury arising out of and within the course and scope of his employment on July 15, 2017.

5. Claimant's testimony was conflicted and confusing. However, Claimant specifically testified under oath that he did not sustain a work related injury on July 15, 2017, and that he believed his back problems are "residual" from a 2016 injury event. The evidence claimant offered at the hearing in this matter does not support a claim that he sustained a work related injury on July 15, 2017. Claimant specifically denied that any injury took place on this date.

11. Additionally, Claimant testified that he expected to paid money for his claim of work injury. Claimant testified indicating a belief that everyone understood Claimant wanted to receive money for his work injury claim. Claimant appeared unconcerned with the question whether he had an injury and most concern with how Employer could be convinced or ordered to pay Claimant money.

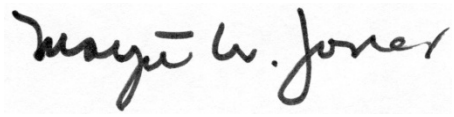
6. Therefore, it is concluded that Claimant has failed to carry his burden of proof to establish by a preponderance of the evidence that he sustained a compensable work related injury on July 15, 2017. Claimant's claim is therefore denied and dismissed.

ORDER

Claimant's claim for workers' compensation benefits is denied and dismissed, with prejudice.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), CR.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 25, 2018



Margot W. Jones
Administrative Law Judge
Office of Administrative Court
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Respondents are subject to penalties under Section 8-43-304, C.R.S. for failure to timely pay temporary total disability ("TTD") benefits pursuant to Section 8-42-105(2)(a), C.R.S.

II. Whether Respondents are subject to penalties for failure to pay mileage.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on April 5, 2017. Respondents initially denied the claim, filing a Notice of Contest on April 21, 2017. Respondents subsequently filed a General Admission of Liability on July 14, 2017 admitting for ongoing TTD starting April 6, 2017 at a rate of $509.39 per week. Respondents issued a TTD check to Claimant on July 14, 2017 for the time period April 6, 2017 to July 19, 2017 in the amount of $7,640.85.

2. Respondents were 15 days late in issuing Claimant's next TTD payment. The next TTD payment was issued on August 2, 2017 in the amount of $2,546.95 for the time period August 2, 2017 to August 17, 2017.

3. Claimant's next two TTD checks were issued timely, covering the time periods September 7, 2017 to September 20, 2017 and September 21, 2017 to October 4, 2017.

4. Claimant's next TTD payment should have been made on or before October 18, 2017. Respondents did not issue Claimant another TTD payment until February 1, 2018, 105 days late. The check was in the amount of $9,169.02 for the time period October 5, 2017 to February 7, 2018.

5. Claimant's next TTD payment should have been made on or before February 21, 2018. Respondents did not issue Claimant's next TTD payment until April 25, 2018, 63 days late. The check was in the amount of $6,112.68 for the time period February 8, 2018 to May 2, 2018.

6. Respondents did not pay interest on any of the late TTD payments.

7. On February 16, 2018, Claimant e-mailed a mileage reimbursement request to the adjuster on his claim, Cheryl Shelby. Ms. Shelby replied via email on the same day acknowledging receipt of the mileage reimbursement request. Claimant was not paid mileage until on or around August 29, 2018.

8. On April 18, 2018, Claimant's counsel sent Ms. Shelby a letter requesting payment of late TTD benefits.

9. On May 17, 2018, Claimant filed an Application for Hearing endorsing penalties. The Application for Hearing specifically lists multiple time periods at issue regarding late TTD payments and states, "Respondents have failed to pay timely pursuant to 8-42-105(2)(a); violation of 8-43-304(1.5); 8-43-305; 8-43-304. Failure to timely pay mileage."

10. Claimant's Case Information Sheet states the same information as the Application for Hearing. At hearing, Claimant did not indicate which statute or rule Respondents violated in with their failure to timely pay mileage.

11. Ms. Shelby, testified the first late payment of 15 days may have been due to the TTD check waiting on reserve. She testified subsequent delays in Claimant's TTD payments were likely caused by the payments "falling off" in Insurer's automated payment system. Ms. Shelby testified she was not aware of the second delay until she reviewed Claimant's file in February 2018. She stated that she may have had conversations with Claimant during such time period regarding the status of his claim, but was unaware Claimant had not been paid timely. Ms. Shelby testified she became aware of the third delay upon receiving the aforementioned April 18, 2018 letter from Claimant's counsel. Ms. Shelby testified she has since created "diary" reminders for herself to ensure Claimant is paid TTD every two weeks as required. She testified she is aware benefits are to be paid every two weeks to Claimant, and that people receiving TTD are not working and typically relying on the TTD payments. Ms. Shelby further testified she does not know why interest was not paid on the late payments.

12. Regarding Claimant's mileage request, Ms. Shelby initially testified she did not receive Claimant's mileage request until the day prior to the hearing, when it was forwarded to her by Respondents' counsel. When presented with Claimant's February 16, 2018 e-mail and her February 16, 2018 response, Ms. Shelby then testified she had, in fact, received Claimant's mileage request. She testified she forwarded the mileage request to be paid and thought the mileage had been paid. Ms. Shelby further testified she received a copy of Claimant's Application for Hearing and was aware failure to pay mileage was endorsed as an issue. Ms. Shelby testified she issued a payment of $906.04 to Claimant for mileage on or around August 29, 2018.

13. Claimant testified that, during each of the time periods in which his TTD payments were late, he called Ms. Shelby approximately once per week to notify her of the issue. Claimant testified that the late payments caused him to fall behind on his house and car payments and to cancel certain services, including cable television, because he could not afford to pay the bill without the TTD payment. Claimant testified he hired an attorney in March 2018 because his attempts to address the late TTD payments with Insurer had been futile, and he was experiencing financial hardship as a result of the late payments.

14. Claimant's testimony is found more credible and persuasive than the testimony of Ms. Shelby on the issue of whether Claimant repeatedly contacted the Insurer regarding the late payments.

15. Based upon the evidence presented, the ALJ finds Respondents were in violation of Section 8-42-105(2)(a), C.R.S. by failing to pay Claimant TTD at least once every two weeks as required on three separate occasions. There is nothing in evidence indicating the Director of the Colorado Division of Workers' Compensation determined Claimant's payments should be made at some other interval.

16. The ALJ finds Respondents cured their violation of Section 8-42-105(2)(a), C.R.S. with payments to Claimant on August 17, 2017, February 18, 2018 and April 25, 2018. Each of the payments were made prior to the May 17, 2018 Application for Hearing that endorsed penalties as an issue.

17. The ALJ finds Claimant provided clear and convincing evidence Respondents knew or reasonably should have known they were in violation of Section 8-42-105(2)(a), C.R.S. for the second and third late payments, in which Respondents were 105 days and 63 days late, respectively. Accordingly, Claimant has proven entitlement to an award of penalties for Respondents' late payments of TTD.

18. The ALJ further finds Claimant failed to establish entitlement to an award of penalties for Respondents' failure to pay mileage, as such penalty was not pled with specificity as required by Section 8-43-304(4), C.R.S.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Penalties

Whether statutory penalties may be imposed under Section 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1,000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

Section 8-43-304(4), C.R.S. provides respondents the opportunity to cure alleged violations within twenty (20) days of the mailing of an application for hearing asserting penalties. The statute states,

> If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

Clear and convincing evidence is evidence that is stronger than a preponderance, and is unmistakable and free from serious or substantial doubt. *DiLeo v. Koltnow*, 200 Colo. 119, 613 P. 2d 318 (1980).

TTD Payments

Section 8-42-105(2)(a), C.R.S. provides, in relevant part, that TTD "shall be paid at least once every two weeks, except where the director determines that payment in installments should be made at some other interval."

As found, Respondents were in violation of Section 8-42-105(2)(a), C.R.S. by failing to pay Claimant TTD at least every two weeks as required. The violation occurred on three separate occasions over the course of several months. As Respondents ultimately cured the violation by paying Claimant prior to the May 17, 2018 Application for Hearing, to sustain his burden of proof, Claimant was required to establish it was highly probable or free from serious doubt that Respondents knew or reasonably should have known they were failing to pay Claimant TTD in a timely manner as required.

The ALJ is persuaded the first late payment of 15 days was due to administrative oversight and it was not highly probable Respondents knew or reasonably should have known they were in violation. However, the ALJ is not persuaded administrative oversight is a plausible explanation for the second and third late payments, which came 105 days and 63 days late, respectively. Ms. Shelby testified she was aware Claimant was required to be paid at least every two weeks and attributed the delays to an error in Insurer's autopay system. Claimant credibly testified he made repeated attempts to contact Ms. Shelby during the lengthy delays to address the late payments. As such, Ms. Shelby's testimony that she was unaware Claimant was not being paid timely as required is not credible or persuasive. It was only after Claimant's TTD payments were considerably late on three separate occasions and Claimant retained the assistance of counsel that Ms. Shelby created a diary reminder to ensure Claimant was paid every two weeks as required. The totality of the evidence establishes it is highly probable Respondents reasonably should have known they were in violation in not paying Claimant timely for the time periods of October 18, 2017 to February 1, 2018 and February 21, 2018 to April 25, 2018.

Section 8-43-305, C.R.S provides that "[e]very day during which any…insurer… fails to perform any duty imposed by articles 40-47 of this title shall constitute a separate and distinct violation thereof." The purpose of section 8-43-305 is to address "ongoing conduct." *Spracklin v. Indus. Claim Appeals Office,* 66 P.3d 176, 178 (Colo.App.2002). When conduct is ongoing, imposition of a daily penalty is required. *Pueblo Sch. Dist. No. 70 v. Toth,* 924 P.2d 1094, 1097, 1100 (Colo.App.1996) (delay in paying bill for 645 days resulted in "645 separate offenses," and pursuant to predecessor statute to section 8-43-305, imposition of the penalty at a "daily rate" is "mandated").

Respondents failed to pay Claimant TTD benefits as required on three separate occasions, the second and third of which span several weeks. Respondents' violation

resulted in financial hardship for Claimant, causing him to be late on bills and cancel services. The ALJ concludes a penalty of $25.00 per day for the 105 days late from October 18, 2017 to February 1, 2018, and $50.00 per day for the 63 days late from February 21, 2018 to April 25, 2018 is appropriate for Respondents failure to timely pay TTD benefits.

Mileage Reimbursement

Mileage expenses for travel to attend medical appointments are recoverable as incidental to medical treatment under the Workers' Compensation Act. *Sigman Meat Co. v. Indus. Claim Appeals Office*, 761 P.2d 265 (Colo. App. 1988). WCRP 18-6(E) provides that the injured worker shall submit a request to the payer showing the dates of travel and mileage and explanation. The rule does not specify a time limit within which the insurer is required to pay for mileage. Additionally, Section 8-43-401(2)(a), C.R.S. provides that insurers shall pay benefits within 30 days of when any benefits are due, and if any insurer "knowingly delays payment of medical benefits for more than thirty days" then such insurer shall pay a penalty of eight percent of the amount of wrongfully withheld benefits. WCRP Rule 16-11(A) provides that all bills submitted by a "provider" are due and payable in accordance with the Medical Fee Schedule within thirty days after receipt of the bill by the payer.

Pursuant to Section 8-43-304(4), C.R.S. the party seeking penalties "shall state with specificity the grounds on which the penalty is being asserted." The failure to state with specificity the grounds on which a penalty is asserted subjects the claim to dismissal. *In Re Claim of Horiagon*, W.C. No. 4-985-020 (ICAP, Mar. 15, 2015); *see Salad v. JBS USA, LLC,* W.C. No. 4-886-842-04 (Mar. 5, 2014). The requirement for specificity serves two functions. First, it notifies the potential violator of the basis of the claim so that the violator may exercise its right to cure the violation. Second, the specificity requirement ensures that the potential violator will receive notice of the legal and factual basis for the penalty claim. *In Re Claim of Lovett*, W.C. 4-808-092-04 (ICAP, Aug. 30, 2013); *see Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Jakel v. Northern Colorado Paper Inc.*, W.C. No. 4-524-991 (Oct. 6, 2003).

Here, Claimant seeks penalties for “failure to timely pay mileage.” Claimant listed the general penalty provisions on his Application for Hearing and Case Information Sheet, but failed to specify the specific statute or rule on which penalties for failure to pay mileage is based. Claimant further did not specify the applicable statute or rule at hearing. Claimant’s general penalty allegations did not provide Respondents adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. As Claimant failed to plead penalties for failure to timely pay mileage with sufficient specificity, his request for penalties as related to mileage is denied and dismissed.

ORDER

It is therefore ordered that:

1. For their violation of Section 8-42-105(2)(a), C.R.S., Respondents shall pay a penalty in the amount of $25.00 per day for the 105 days late from October 18, 2017 to February 1, 2018, and $50.00 per day for the 63 days late from February 21, 2018 to April 25, 2018, for a total amount of $5,775.00.

2. The penalty is to be apportioned 75% to Claimant and 25% to the workers' compensation cash fund.

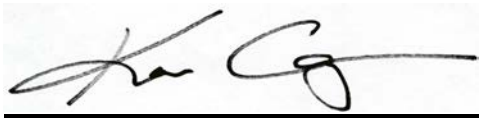
3. Claimant's request for penalties as related to Respondents' failure to timely pay mileage reimbursement is denied and dismissed.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 25, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Is this claim closed by a Final Admission of Liability dated November 15, 2017?

STIPULATIONS

The parties stipulated Claimant did not receive a copy of the November 15, 2017 FAL.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on December 6, 2016. He was placed at MMI by his ATP on August 28, 2017 with a 10% lower extremity rating.

2. Respondents filed Final Admission of Liability (FAL) on November 15, 2017 based on the ATP's MMI report. The FAL was addressed to all parties and the Division of Workers' Compensation (DOWC) on November 15. The certificate of service indicates the FAL was sent to Claimant at his home address and to Claimant's counsel addressed to: "Wes Hassler, 616 West Abriendo Ave., Pueblo, CO 81004." Claimant is represented by Stephen Johnston, Esq., with the same mailing address as Mr. Hassler.

3. The parties stipulated Claimant never received the FAL.

4. Claimant received PPD payments based on the FAL via direct deposit.[1] An initial payment of $2,949.30 was electronically deposited on November 3, 2017, two weeks before the FAL was sent. Claimant subsequently received the balance of admitted PPD in bi-weekly payments, ending on January 26, 2018.

5. No persuasive evidence was submitted to show Claimant received any direct deposit advices or other explanatory documentation regarding the PPD payments.

6. Claimant's counsel did not receive the copy of the FAL mailed to his office.

7. Claimant's counsel was unaware an FAL had been filed until he received a Motion to Withdraw filed by Respondents' counsel on January 8, 2018. Claimant's counsel was puzzled by the Motion to Withdraw because he believed the claim was ongoing. Ms. Malouff contacted the claims adjuster and was told Respondents had filed an FAL on November 15. Ms. Malouff requested a copy of the FAL from Respondents, and from the DOWC.

[1] Claimant had previously received temporary disability payments via direct deposit, from December 16, 2016 through May 31, 2017.

8. Respondents' counsel emailed Claimant's counsel a copy of the FAL on January 8, 2018.

9. The FAL emailed to Claimant's counsel contained all required attachments, including the objection forms and the ATP's MMI report, and the ALJ appreciates no technical errors or omissions. The only issues raised by Claimant are lack of receipt by Claimant and delayed receipt by his attorney.

10. The time to object to the November 15, 2017 FAL has not started to run because Claimant has never received a copy of it. Accordingly, the claim is not closed.

CONCLUSIONS OF LAW

An FAL provides a statutory mechanism for the respondents to initiate closure of a claim. Once an FAL is filed, the claimant must perfect an objection within thirty days or the claim will "automatically close." The purpose of an FAL is to notify the claimant of the exact bases on which benefits have been admitted or denied so the claimant "can make an informed decision whether to accept or contest the final admission." *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). To that end, due process requires that a claimant receive "actual notice" of an FAL before it can close a claim. *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996). The requirement of "actual notice" has repeatedly been interpreted to require receipt of the FAL itself, rather than mere knowledge of its potential existence. *E.g.*, *Duran v. Russell Stover Candies*, W.C. No.4-524-717 (April 13, 2004); *Meskimen v. Fee Transportation*, W.C. No. 3-966-629 (March 31, 2003); *Gonzales v. Pillow Kingdom*, W.C. No. 4-296-143 (July 12, 1999). If a claimant is represented, the claimant and the attorney must receive actual notice of an FAL before it can close a claim. *Hall v. Home Furniture Co*., 724 P.2d 94 (Colo. App. 1986). Lack of receipt by *either* the claimant *or* his attorney tolls the objection deadline until thirty days after it is received by each of them. *E.g.*, *Meskimen v. Fee Transportation, supra; Gonzales v. Pillow Kingdom, supra.*

As found, the November 15, 2017 FAL did not close Claimant's claim because he never received a copy of it. Although his attorney received a copy of the FAL on January 8, 2018, due process requires actual receipt by the claimant before the time to object begins to run.

The ALJ finds *Gonzales v. Pillow Kingdom*, W.C. No. 4-296-143 (July 12, 1999) instructive and persuasive in resolving this issue. In *Gonzales*, the respondents mailed an FAL to all parties but neither the claimant nor his attorney received it. Several months later, the respondents mailed another copy of the FAL to the claimant's attorney but not to the claimant. The attorney received the second copy of the FAL and failed to timely object. The ALJ determined the claim was closed. The ICAO reversed and held "an uncontested final admission of liability is not sufficient to close a claim unless the final admission is actually mailed to and received by the claimant."

It follows the ALJ disagrees with Respondents that receipt of the FAL by Claimant's attorney on January 8, 2018 started the thirty-day clock running. The caselaw cited above

requires actual receipt by *both* the claimant and his counsel. The case of *Henriquez v. K.R. Swerdfeger Construction*, W.C. No. 4-439-726 (May 5, 2003) cited by Respondents is distinguishable because in that case, the ALJ found the claimant had received the FAL when it was originally mailed.[2] Since the claimant had already received his copy, the time to object started running when the claimant's attorney finally received a copy of the FAL in the DOWC file ten months later.

The ALJ also rejects any suggestion that Claimant's receipt of PPD payments can substitute for receipt of the FAL. As noted, a claimant is entitled to an actual copy of an FAL rather than simply information from which he *might* glean an FAL has been filed. The mere receipt of electronic PPD payments would not provide Claimant a reasonable basis to "make an informed decision whether to accept or contest" an FAL he had never seen.

ORDER

It is therefore ordered that:

1. Claimant's claim is not closed by the November 15, 2017 FAL.

2. All issues not decided herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 26, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

[2] Although the claimant in *Henriquez* had denied receiving the FAL, the ALJ rejected the claimant's testimony on that point.

ISSUES

The issues set for determination included:

(1) Did Claimant sustain a compensable work-related injury to his cervical spine?

(2) If Claimant sustained a work-related injury, what medical benefits are related, reasonable and necessary to cure or relieve the effects of the industrial injury?

(3) If Claimant sustained a compensable injury, is he entitled to TTD benefits?

(4) What was Claimant's average weekly wage?

FINDINGS OF FACT

1. Claimant has worked for Employer for sixteen years as a commercial flooring installer and foreman. Claimant testified that his job is very physically demanding. His job duties included assessing job sites, stocking flooring material, removing existing flooring with power equipment or manually, as well as sanding and skimming the subfloor. Claimant also spread the glue and installed flooring. Some of the aforementioned tasks, such as removing carpet by hand and scraping the subfloor, required Claimant to work on his hands and knees.

2. Claimant testified they had been working on a project at Good Samaritan Hospital which was ongoing for three years. In the six months before November 2017, Claimant's work included removing the existing carpet on the fifth floor, which was particularly arduous, as power equipment could not be used to remove the carpet. Claimant testified they had to remove most of the existing carpeting by pulling it up in thin strips with pliers while on hands and knees.[1] After the demo was done, the floor was sealed with a concrete-based floor leveler using a 20 inch finishing trowel and the new floor was installed.

3. Claimant's supervisor, Manuel Contreras, testified at the hearing. Mr. Contreras stated Claimant was responsible for running the project, which included carrying materials, demoing flooring, prepping the substrate flooring and installing the new flooring. Claimant was a hands-on supervisor, who performed all of the above duties. Mr. Contreras testified Claimant was a great employee and very dependable. He stated Claimant's description of his job duties at the project was accurate.

[1] Claimant referred to pulling up the carpet as "demoing", which was a contraction of the word demolition. Hearing Transcript ("Hrg. Tr.") p. 20:6-9.

4. There was no evidence in the record that Claimant required treatment for his cervical spine before November 2017. There was no evidence that the degenerative condition present in Claimant's spine caused him to miss time from work before November 2017.

5. Claimant testified they had been demoing for six months on this job. They had progressed to the main area around the elevators and went to evening work, where they would work on 2-300 foot sections per night. They would demo the area, carry the boxes of flooring materials (which weighed 65 lbs.) and then install the flooring. After that, they would be done with the section.

6. Claimant testified they had been demoing straight for six months and he demoed carpet that night.[2] He woke up and felt pain in both of his shoulders on November 14, 2017. Although he experienced pain and discomfort related to his job in the past, Claimant testified that the pain he felt on November 14 , 2017 was unlike other pain he had experienced.[3] Claimant initially thought he pulled a muscle. He said that he felt the pain in the joints of both shoulders and while his muscles loosened up, the pain never went away. The ALJ found Claimant to be a credible witness and concluded Claimant's pain complaints resulted from the demo work performed on behalf of Employer the night before November 14, 2017.

7. Claimant testified he reported pain complaints to his supervisor (Mr. Contreras) on November 14th, who recommended Claimant see a doctor. On cross-examination, Claimant agreed he did not experience symptoms until after he left work. He did not have pain in his arms, shoulders or back while at work.

8. Mr. Contreras testified Claimant reported an injury to him on November 14, 2017 and said he was in excruciating pain. The ALJ noted this corroborated Claimant's testimony that he immediately reported that he was in pain. Mr. Contreras confirmed he told Claimant to see a doctor and after he didn't hear anything further, figured Claimant was just sore.

9. Claimant testified his shoulder muscles loosened when he went to work, but the pain did not go away. He continued working even though the pain was present and then sought treatment from his personal physician.

10. On November 21, 2017, Claimant was evaluated by Jeffrey Hilburn, PA-C at Partners in Health Family Medicine. Claimant complained of radiating pain to the arms bilaterally, which was aggravated by resting. Claimant described this as muscle pain, which radiated to his arms. PA-C Hilburn diagnosed Claimant with cervicalgia and acute pain of his left shoulder. He instructed Claimant to continue taking Naproxen, continue chiropractic treatment, as well as to consider a corticosteroid injection for his left shoulder.

[2] Hrg. Tr. p. 19: 9-20.

[3] Hrg. Tr. p. 21:4-10.

11. Mr. Contreras spoke to Claimant again sometime after November 14, 2017, but did not recall the date. Mr. Contreras told him that they needed to fill out the injury report and get with the office manager (Jennifer), in order to file the claim.[4] The ALJ inferred from this testimony that Mr. Contreras viewed Claimant's condition as potentially work-related and required the filing of a workers' compensation claim. Mr. Contreras testified this was the first injury Claimant reported as a workers' compensation claim.

12. The ALJ found that it was more probable than not that Claimant experienced shoulder, neck and arm symptoms the morning of November 14, 2017 as a direct result of his work for Employer the night before. The ALJ credited Claimant's testimony regarding his symptoms.

13. Claimant continued to experience symptoms and was referred to CCOM Church Ranch by Employer. On December 4, 2017, Claimant was evaluated by Lileya Sobechko, N.P. He was complaining of pain in the left trapezius, left side of posterior neck, left supraspinatus to and infraspinatus, left A-C joint, left upper arm and right shoulder. Claimant noted this was made worse by pulling, lifting, repetitive arm use and moving it. Limited range of motion ("ROM") was found in the left shoulder on examination. Pain on palpation was noted right there. ROM was normal for the cervical spine, with left posterior neck spasm noted.

14. NP Sobechko diagnosed Claimant with: sprain of ligaments of cervical spine, strain of left rotator cuff, myalgia and sprain of right shoulder joint. NP Sobechko prescribed Naproxen and Flexeril for muscle spasms, recommended starting physical therapy ("PT"), and restricted Claimant to lifting, pushing, and pulling of no more than 5 pounds. In her assessment, NP Sobechko opined that the cause of the injury was work-related and completed a WC 164 to this effect.

15. NP Sobechko ordered X-rays of the cervical spine and left shoulder, which were taken on December 4, 2017. The films were read by Michael Kershen, M.D., who found that Claimant had mild to moderate degenerative changes in his spine, with mild disc degeneration and spondylosis seen at the C6-C7 level.

16. Claimant stopped working in December 2017, due to his symptoms.[5] The payroll records admitted at hearing documented that Claimant was paid through December 15, 2017.[6] The ALJ was unable to determine the precise day on which Claimant stopped working.

17. Claimant was examined by James Fox, M.D. on December 22, 2017. At that time, Claimant had quite a bit of diffuse pain in his neck, shoulders, trapezius muscles, the upper back, arms and forearms, as well as his wrists and hands. Claimant was not working and also having difficulty sleeping. On examination, diffuse tenderness

[4] Hrg. Tr. p. 43:16-23.

[5] Exhibit C, p. 99.

[6] Exhibit H, p. 249.

of the cervical spine and muscles in the mid- to lower back was found, along with diffuse tenderness of the trapezius and rhomboid muscles bilaterally. Moderate tenderness of the deltoid muscles was noted, with moderate diffuse tenderness of the muscles of the upper arm and decreased grip strength was found.

18. Dr. Fox' diagnoses were: sprain of ligaments of cervical spine, subsequent encounter; strain of muscles and rotator cuff of left shoulder, subsequent encounter; myalgia; unspecified sprain of right shoulder joint, subsequent encounter; other polyosteoarthritis. Claimant was to continue PT two times per week and his dose of Flexeril was increased.

19. Dr. Fox specifically addressed the issue of causation and concluded Claimant's injury was work-related.[7] The ALJ credited this opinion. Dr. Fox ordered an MRI of Claimant's cervical spine and continued Claimant's restrictions, noting he was not working, as modified duty was not available.

20. Records of Claimant's earnings while working for Employer from 2016-2018 were admitted at hearing.[8] From January 1, 2017 to December 31, 2017, Claimant earned a total of $48,981.51, which included regular and overtime pay. When considering the entire year of gross earnings divided by 52 weeks, Claimant's average weekly wage was $ 941.95 per week. Claimant testified he made $29.00 per hour, which when multiplied by 40 hours gives an average weekly wage of $1,160.00 per week.

21. The ALJ concluded a more accurate representation of Claimant's average wage was to consider the six months prior to November 14, 2017, which included weeks in which he worked overtime hours, as well as weeks in which he did not. From August 4, 2017 through November 10, 2017, Claimant earned a total of $15,179.26. Over those 15 weeks, Claimant's AWW was $1,011.95. This gives a TTD rate of $674.63 per week.

22. Claimant underwent an MRI of the cervical spine on January 3, 2018 and the films were read by Patrick O'Malley, M.D. Dr. O'Malley's impression was: multilevel degenerative disc disease of the cervical spine. The most significant findings were at C6-C7, where there was moderate posterior disc bulging, causing mild to moderate spinal stenosis, severe left foraminal narrowing, and mild right foraminal narrowing. No other areas of spinal canal or neural foraminal stenosis were seen.

23. On January 17, 2018, Bryan Andrew Castro, M.D. at Cornerstone Orthopaedics & Sports Medicine, P.C. examined Claimant. Claimant noted he started experiencing pain in his shoulders and neck after scraping off on carpet. It started to develop and have numbness, tingling, some difficulty with moving his hands and grip strength, swelling in his hands, fingers and spasm. Dr. Castro noted Claimant's x-rays showed mild to moderate degenerative changes. The MRI highlighted similar findings-

[7] Exhibit 1, p. 2.

[8] Exhibit H.

disk degeneration and disc bulging resulting in biforaminal encroachment at C6-C7, which could be causing C7 compression.

24. Dr. Castro diagnosed Claimant with cervicalgia and upper extremity arm symptoms. He noted that only the C6-C7 level had any stenosis and the pain appeared to be in multiple myotomes. Dr. Castro stated Claimant's pain did not appear to be dermatomal or radicular in nature. Dr. Castro recommended an EMG and started Claimant on an oral steroid regimen, although he noted with hand numbness, tingling, grip strength and swelling in his fingers, this problem seemed to be arthritic.

25. Claimant was evaluated by Brian McIntyre, D.O. on January 30, 2018, at which time he reported left arm pain and a burning sensation. He also had burning pain in his right arm. Dr. McIntyre's diagnoses were: sprain of ligaments of cervical spine, subsequent encounter; neuralgia and neuritis, unspecified; myalgia; radiculopathy, cervical region; other polyosteoarthritis. Dr. McIntyre performed NCV and EMG testing. Dr. McIntyre noted this was an abnormal electrodiagnostic study. There was evidence of ongoing denervation (radiculopathy) affecting the left greater than the right, but bilateral C7 nerve roots were involved. There was also evidence of a mild demyelinating left median sensory neuropathy.

26. Claimant returned to Dr. Fox on January 9, 2018. The diagnoses were the same as the December 22, 2018 evaluation. Dr. Fox referred Claimant to Dr. Castro and continued Claimant's work restrictions.

27. On February 13, 2018, Claimant received a steroid injection which was administered by Bryan Gary Wernick, M.D. at St. Anthony North Hospital. The steroid mixture was injected at Claimant's C7-T1 interspace. In a follow-up evaluation on March 14, 2018, Dr. Castro noted that the injection provided relief to Claimant and although his symptoms had returned, these were much less severe than before the injection. Claimant was still experiencing right hand pain. Dr. Castro said the EMG highlighted a positive C7 nerve root level problem, which was consistent with disc herniation and some compression at the C6-C7 level. Dr. Castro recommended a second injection as an option for managing Claimant's symptoms. Surgical intervention was discussed as an option, if Claimant failed to respond to conservative treatment measures.

28. On March 21, 2018, Claimant returned to Dr. Castro. Although his symptoms had improved, he still reported significant and limiting right arm pain. Dr. Castro's diagnosis was: acute C6-C7 disc bulging, with acute C7 radiculopathy and denervation. The ALJ noted this was an acute finding and inferred this constituted evidence of an aggravation of the underlying condition of Claimant's cervical spine. Based on Claimant's report that he did not experience symptoms before November 14, 2017, Dr. Castro concluded that surgery would be causally related to Claimant's injury sustained through his work.

29. Dr. Castro recommended an anterior cervical discectomy and fusion (ACDF) surgery at C6-C7. He made this recommendation because Claimant's symptoms had not been fully resolved with more conservative treatment and because the EMG

revealed acute denervation. The ALJ inferred this was objective evidence to support the surgical recommendation. A request for authorization was sent to Insurer that day.

30. Claimant testified that he returned to work with restrictions on March 6, 2018.

31. Dr. Castro responded to questions posed by Insurer in a letter dated on April 6, 2018. Dr. Castro reviewed the November 21, 2017 medical report and noted he did not initially have this record. Dr. Castro stated there were findings suggestive of an acute injury and Claimant had also acute EMG findings. Dr. Castro noted did not have all the records at the initial evaluation when it was reported to him that it was related to a demo of a flooring job. The ALJ found this was not a retraction by Dr. Castro of his opinion as to the cause of Claimant's symptoms.

32. An Independent Medical Examination was conducted on June 4, 2018 by Peter L. Weingarten, M.D., at the request of Respondents.[9] Claimant related that pain in his shoulders developed while he slept and affected both shoulders. Claimant received treatment, but continued to experience cervical, trapezius and shoulders pain. On examination, Claimant did not manifest pain-related behavior. No spasm or tenderness was found in the cervical spine. Range of motion in the upper extremities was full, but slow.

33. Dr. Weingarten stated Claimant had significant degenerative arthritic changes at the C6-C7 level and these changes were potentially compressing the exiting nerve roots, which was confirmed by MRI. Electrophysiological testing showed radicular changes, both right and left, resulting from the C6-C7 nerve root impairment and compression. Dr. Weingarten found Claimant did not have evidence of an acute herniated disc, although there was evidence of a bulging disc. He said surgical intervention was indicated and appropriate, but it was not related to Claimant's work activities. Dr. Weingarten opined Claimant's work activities, although these involved in relatively heavy labor, did not constitute a proximate cause of his condition. He noted arthritic changes in the cervical spine were a common problem, frequently present at the C6-C7 level, but this did not qualify or constitute an injury.

34. Dr. Weingarten testified at hearing as an expert in Orthopedic Surgery, with a focus on cervical injuries and complaints. He is Level II accredited pursuant to the WCRP. Dr. Weingarten noted Claimant did not say he suffered an acute injury when he was evaluated. Dr. Weingarten opined there was no evidence of cumulative trauma, even though Claimant did a vigorous job.

35. Dr. Weingarten testified Claimant's x-rays showed evidence of degenerative changes throughout his cervical spine, which included arthritis and disc narrowing. The MRI also showed multilevel degenerative disc disease at the cervical spine. He noted that arthritic degeneration was determined by two factors: age and genetic predisposition. Dr. Weingarten concluded Claimant's pain complaints were

[9] Exhibit A.

caused by the arthritic condition in the cervical spine. Dr. Weingarten stated there was no causal link between work activities and the changes seen at the Claimant's cervical spine.

36. Dr. Weingarten also explained he believed the pain caused by Claimant's degenerative condition was caused or exacerbated by his bulging disc at C6-C7 level; he stated that a bulging disc can be caused by an acute injury or injury through repetitive stress and neither of these causes would have arisen from Claimant's work activities. Dr. Weingarten testified that Claimant's pain would be acute in the onset, had he suffered a herniated disc. The ALJ noted this was in response to a question whether pain would be acute if a disc bulge occurred as a result of an acute injury. Dr. Weingarten used the terms disc bulge and disc herniation interchangeably when discussing whether there was an acute injury. He did not provide an explanation vis a vis the disc bulge (as opposed to a disk herniation) at C6-C7 found on MRI as to why this would have become symptomatic. The ALJ found Dr. Weingarten did not specifically consider the work activities Claimant performed the night before he developed symptoms, nor did he address the lack of symptoms before Claimant worked that night. Therefore, his opinion was less persuasive than those expressed by Claimant's ATPs, including Dr. Fox and Dr. Castro.

37. Dr. Weingarten agreed with Dr. Castro's assessment that surgery is reasonable and necessary. Dr. Weingarten opined Claimant's symptoms were the result of the pre-existing degenerative changes.

38. Claimant testified his current symptoms include what he described as knots in both shoulders. He also experiences pain between the shoulder blades and his neck as if it is not aligned, along with pain shooting down the muscles of his arms.

39. Claimant successfully proved that, on balance, it is more probable than not that the condition of his cervical spine was exacerbated by his job duties and caused him to experience symptoms.

40. Claimant proved he is entitled to receive medical benefits to cure and relieve the effects of the industrial injury.

41. Respondents are required to provide treatment to Claimant to cure and relieve the effects of the industrial injury.

42. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §

8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability-Cervical Spine

Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Sections 8-41-301(1)(b) & (c), C.R.S. (2016). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). This case presented a question of whether Claimant's work activities aggravated a pre-existing condition.

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106* (Colo. App. 1971*)*. Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant asserted he sustained a compensable injury to his cervical spine. In Claimant's opening, counsel argued this was an occupational disease claim. However, this theory was not pursued in Claimant's post-hearing submission. Respondents averred Claimant failed to meet his burden of proof to prove he suffered an injury arising out of and in the course of his employment. Respondents focused on the fact that Claimant admitted the onset of symptoms did not occur work and there was no specific event which

caused his symptoms. Respondents relied upon the opinions of Dr. Weingarten and argued Claimant's symptoms were the result of degenerative changes in his cervical spine.

The ALJ determined Claimant's work aggravated the underlying condition of his cervical spine and thus, he suffered a compensable injury as a result of these work activities. As determined in Findings of Fact 1-3, Claimant testified that his job was physical in nature. The specific work he was doing for Employer immediately before he experienced symptoms included removing carpeting and working on his hands and knees. The strenuous nature of Claimant's work activities was corroborated by Mr. Contreras. (Finding of Fact 3).

The medical evidence in the record, including the MRI performed on December 22, 2017, established there were degenerative changes in Claimant's cervical spine. (Finding of Fact 22). No medical evidence was admitted at hearing which showed Claimant required treatment or missed time from work because of the degenerative changes in his cervical spine. (Finding of Fact 4). Claimant credibly testified that he experienced pain due to the strenuous nature of his job. Claimant articulated he would experience muscle soreness that would loosen up when he was working and testified this was part of the job.

However, Claimant testified the pain he experienced on November 14, 2017 was unlike what he had felt before. (Finding of Fact 6). As found, Claimant was engaged in the strenuous job activities while working for Employer immediately before he experienced symptoms. There was also evidence Claimant was working on that portion of the project, which involved work in the evening. (Findings of Fact 5-6). Thus, the evidence in the form of Claimant's testimony established that he performed the extremely heavy work of demoing the floor at Good Samaritan Hospital, working on his hands and knees, lifting cartons of flooring material which weighed on average 65 lbs., applying the floor leveler and installing the new floor. Claimant's testimony was corroborated by his supervisor, Mr. Contreras. (Finding of Fact 3). He performed those job duties work in the hours immediately before he developed symptoms in his cervical spine. (Finding of Fact 6). The ALJ concluded that it was more probable than not that the symptoms were the direct result of Claimant's work activities. (Finding of Fact 12).

In addition, the evidence in the form of opinions provided by Claimant's ATPs supported the conclusion he suffered a compensable injury. As found, Claimant's initial evaluation at CCOM, which was performed by NP Sobechko contained the conclusion that Claimant's work activities were the cause of his symptoms. (Finding of Fact 14). Dr. Fox also concluded that Claimant's work caused his condition. (Finding of Fact 19). Dr. Castro also opined that Claimant upon caused him to symptoms. (Finding of Fact 29). Dr. Castro noted Claimant suffered from acute C7 radiculopathy with denervation. The ALJ found this was an objective finding, which supported the inference that Claimant's job duties aggravated the underlying condition of Claimant's cervical spine and made it symptomatic. When Dr. Castro reviewed additional medical records, he did not change

his opinion regarding causation and noted Claimant had objective findings of an acute injury. (Finding of Fact 31).

The ALJ considered Dr. Weingarten's expert opinions when concluding Claimant's job duties aggravated his cervical spine. As determined in Findings of Fact 32-36, Dr. Weingarten opined Claimant's cervical spine had underlying pathology which was degenerative in nature and there was no acute incident which caused Claimant's symptoms. This was contradicted by Dr. Fox's and Dr. Castro's opinions, which the ALJ found more credible.

In addition, the ALJ concluded Dr. Weingarten's opinions were unreasonably circumscribed, in that he did not consider Claimant's specific physical activities immediately before the onset of symptoms. Dr. Weingarten also did not consider Claimant had worked into the night immediately before he developed symptoms. The ALJ also found Dr. Weingarten did not distinguish between a disc herniation and bulge. He did not provide an explanation of how the degenerative process would have caused the disc bulge present at C6-C7 to become symptomatic at that moment in time. Accordingly, the ALJ found Dr. Weingarten's opinions were less credible than those offered by Claimant's ATPs. On balance, the ALJ determined there was sufficient evidence introduced at hearing to establish the required causal connection between Claimant's work activities and his cervical spine symptoms.

Medical Benefits

Claimant is entitled to receive medical treatment that is reasonable and necessary to cure and relieve the effects of the injury. § 8-42-101(1)(a), C.R.S.; *Yeck v. Industrial Claims Appeals Office,* 996 P.2d 228 (Colo. App. 1999). Claimant bears the burden to prove by a preponderance of the evidence there was a causal relationship between the work-related injury and the condition for which treatment is sought. *Snyder v. Industrial Claims Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

The necessity and reasonableness of Claimant's medical treatment was not challenged at hearing. Dr. Castro opined that the ACDF surgery is reasonable and necessary. (Finding of Fact 29). Dr. Weingarten concurred with this opinion, agreeing that the surgery was reasonable and necessary given the condition of Claimant's cervical spinal and the fact that conservative measures had been tried. (Finding of Fact 35). Therefore, because Claimant suffered a compensable injury while working for Employer, Respondents must provide reasonable and necessary medical treatment (including the proposed surgery) to Claimant. (Finding of Fact 40).

Average Weekly Wage

§ 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW.

However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82. The rationale for the Court's decision was one of fairness and Justice Plank stated:

"The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage". *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the ALJ had discretion to calculate Claimant's wages based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a fairer calculation of Claimant's AWW.

In the case at bench, Claimant argued his AWW was $1,160.00 per week, based upon an hourly pay rate of $29.00 per hour and a work schedule of 40 hours per week. Respondents asserted Claimant worked a total of 1482 hours in the 45 weeks from January 1, 2017 through November 10, 2017. This averaged out to be 33 hours per week and multiplied by $29.00 per hour, Respondents calculated Claimant's average weekly wage as $957.00 per week. However, this methodology did not adequately factor in those weeks where Claimant worked overtime for Employer.

The ALJ reasoned that the calculation of AWW based upon the six months before Claimant's injury represented the fairest approximation of Claimant's wage loss, as it included weeks in which he was working overtime and those weeks when he worked less than 40 hours per week. Using this calculation, the ALJ determined Claimant AWW was

$1,011.95. (Findings of Fact 20-21). Pursuant to § 8-42-105(1), C.R.S. (2016), Claimant's TTD rate is $674.63 per week.

Temporary Total Disability Benefits

Pursuant to §§ 8-42-103, 8-42-105, C.R.S., Claimant is entitled to an award of temporary disability benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability lasts more than three regular working days. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to temporary disability benefits. Section 8-42-103, C.R.S.

Evidence was presented at hearing which established Claimant lost time from work as a result of his industrial injury. This evidence was in the form of Claimant's testimony, as well as medical records adduced at the hearing. (Findings of Fact 16-17,19). Claimant's ATPs also issued restrictions and at some point, Employer could not accommodate these restrictions. (Findings of Fact 14,19, 26). This was directly related to the injury he suffered at work. Accordingly, Claimant satisfied his burden of proof to establish that he was entitled to receive wage replacement benefits. As found, Claimant is entitled to receive TTD benefits from December 15, 2017 through March 5, 2008, when he testified he returned to work.

ORDER

It is therefore ordered:

1. Claimant proved he suffered a compensable injury on November 14, 2017, namely an aggravation of the preexisting degenerative changes in his cervical spine.

2. Respondents shall pay for medical benefits to cure and relieve the effects of Claimant's injury, including the surgery recommended by Dr. Castro.

3. Respondents shall pay TTD benefits from December 15, 2017 through March 5, 2018.

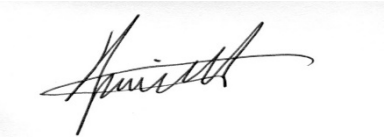
4. Respondents shall pay 8% statutory interest on all benefits not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 24, 2018



Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. What is Claimant's average weekly wage (AWW); and

2. Whether Claimant has proven by a preponderance of the evidence that the right of selection of medical provider passed to her.

FINDINGS OF FACT

1. Claimant injured her back on November 7, 2016, within the scope and course of her employment.

2. Claimant has been employed as a physical therapist for Employer for twelve years. Claimant was employed as a substitute therapist and was assigned to work in various hospital settings when a regular employee was out sick or on vacation. Claimant provided physical therapy services in different facilities. Claimant was paid by the hour for her work and the amount she was paid per hour varied depending on the facility she was assigned to work at.

3. Claimant was paid between $32.00 to $35.00 per hour depending on the facility and the contract rate with that facility. Claimant provided a W-2 of the wages she earned for 2016. Claimant's 2016 W-2 was representative of the amount that she earned for the past several years working for Employer.

4. Claimant's last day of work following her injury was November 18, 2016.

5. Claimant was injured on November 7, 2016, and thought that it would resolve itself or get better. On November 21, 2016, Claimant called in and reported her injury to Suzanne in the Employer's human resources office who advised her to go to urgent care.

6. Employer's first report of injury reflects that Employer was advised of Claimant's injury on November 7, 2016. Claimant was not provided the name of a specific doctor or treating facility to utilize for medical attention.

7. After speaking with Employer on November 21, 2016, Claimant went to On Point Urgent Care which was located near her home. On November 21, 2016, Claimant was evaluated and provided with medications and a referral to physical therapy.

8. Claimant began having increased symptoms of pain running into her toe and limping. When Claimant returned to the Urgent care, she was advised that she should see a designated workers' compensation doctor.

9. Claimant followed up speaking to the workers' compensation insurance adjuster, Trish Postell, in early December of 2016 and advised that the Urgent Care doctor said that she needed a workers' compensation doctor.

10. The insurance adjuster referred Claimant to Concentra as she had been seen there before. Claimant requested that she see Dr. Carrie Burns at Concentra who she had treated with for a previous workers compensation injury.

11. Claimant was not provided a choice of provider by the adjuster or Employer for this work injury.

12. Respondent filed a Notice of Contest on December 6, 2016, for further investigation for medical history and prior claims.

13. Claimant was evaluated by Dr. Burns at Concentra Medical Center on December 6, 2016.

14. Claimant was never provided with a designated provider list or written choice of physician by Employer or the workers compensation carrier.

15. Claimant first requested a change of physician on April 24, 2017, to Dr. Kristin Mason.

16. Claimant selected Dr. Mason from a list of providers after she researched the physicians provided to her by her counsel that provided medical care to injured workers.

17. Claimant was evaluated by Dr. Mason on May 30, 2017. Claimant selected Dr. Mason because she was a specialist in physical medicine and rehabilitation, was female and based upon the doctor's credentials. Claimant saw Dr. Mason and was impressed with Dr. Mason and appreciated that she had recommendations for care including providing an explanation of her injury and the length of recovery she could expect with Claimant's type of injury.

18. Dr. Mason diagnosed Claimant with an L4-5 central disk herniation with some intermittent L5 radiculopathic symptoms, currently in flare-up and with a history of multiple episodes of SI dysfunction with lumbopelvic obliquity, most obvious in the supine position with the right iliac crest elevated compared to the left, possible on the basis of spasms. Dr. Mason provided several treatment recommendations.

19. Respondent did not admit liability for Claimant's work injury until September 22, 2017. Respondent admitted for an average weekly wage of $799.13 per week and for temporary total disability benefits commencing on November 21, 2016.

20. After Respondent admitted liability for her injury, Claimant filed a request for change of physician to Dr. Kristin Mason on November 29, 2017, which was denied by the carrier on December 6, 2017 without explanation.

21. Claimant was off work and unable to work through June 11, 2017. Claimant returned to work on June 11, 2017, with work restrictions of no lifting over 35 pounds. Claimant's restriction limited the facilities that she could work at and therefore limited her hours and rate of pay.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

AWW

4. Section 8-42-102(2)(d), C.R.S. provides that where the claimant is paid by the hour, the claimant's AWW shall be determined by multiplying the hourly rate by the number of hours per day the claimant was working at the time of the injury.

However, Section 8-42-102(3), C.R.S. 2018, provides that, if "for any other reason" Section 8-42-102(2) (d) will not "fairly" determine the claimant's AWW, the ALJ may compute the AWW "by such other method" as will fairly determine the claimant's wage loss and diminished earning capacity.

5. The substantial credible evidence presented at hearing established that Claimant was paid by the hour, but at different rates at different facilities. Because Claimant's scheduled work varied depending upon the need of the Employer's clients and her weekly work assignments can be at different facilities, the best method for calculating Claimant's AWW is to use the W-2 for the year of her injury of 2016. Claimant's W-2 for 2016 showed earnings of $48,295.92 through November 18, 2016 (46 weeks) which makes her average weekly wage $1049.91 per week.

6. Respondents shall be liable for benefits under the Act based on an AWW of $1049.91.

Medical benefits/Right of selection

7. Respondents failed to provide Claimant with a list of designated providers that met the statutory requirement of 8-43-404(5) (a) (I) (A). The statute provides, as follows:

> …insurer shall provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers, or a combination thereof where available, in the first instance, from a list an injured employee may select the physician who attends said injured employee. At least one of the four designated physicians or corporate medical providers offered must be at a distant location from the other three designated physician or corporate medical providers at distinct locations without common ownership….If the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor.

8. In addition to the statutory requirements, W.C.R.P. 8-2 (A) provides that "when an employer has notice of an on-the-job injury, the employer or insurer shall provide the injured worker with a written list of designated providers from which the injured worker may select a physician or corporate medical provider. For purposes of Rule 8 compliance, the list will be referred to as the designated provider list. Rule 8 (A)(1) also indicates that a copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury. Respondent was aware of Claimant's injury on November 7, 2016, and on November 21, 2016, when Claimant was directed to urgent care.

9. Respondent's failed to provide a designated list of statutorily qualified medical

providers and as a result the right to select the treating physician passed to Claimant. Claimant properly requested and designated Dr. Kristin Mason on November 29, 2017, after that claim was admitted. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on the job injury has occurred, "the employer shall provide the injured worker with a written list in compliance with Section 8-43-404(5) (a) (I) (A), C.R.S." W.C.R.P. Rule 8-2(E) additionally provides the remedy for failure to comply with the requirement is that "the injured worker may select an authorized treating physician or the worker's choosing."

10. Respondents argue that Claimant waived her right to a change of physician. However, Claimant credibly testified that she never understood or knew that she had a right to choose her treating physician in the claim until she consulted an attorney and was advised of her right to select from the list provided by the employer or to select a provider if none was provided. In this claim, Claimant was sent to an Urgent Care and then to Concentra by her Employer and the adjuster. Claimant by agreeing to treat at Concentra at the adjuster's recommendation is not a knowing choice because no choice was ever provided. Claimant did not waive a right that she was not aware the law provided her.

11. Waiver is the intentional relinquishment of a known right. A waiver must be made with full knowledge of the relevant facts, and the conduct should be free from ambiguity and clearly manifest the intention not to assert the right. *Johnson v. Industrial Commission, Department of Health v. Donahue,* 690 P.2d 243 (Colo. 1984). Waiver may be explicit, or it may be implied where a party engages, "in conduct which manifests an intent to relinquish the right or privilege or acts inconsistently.

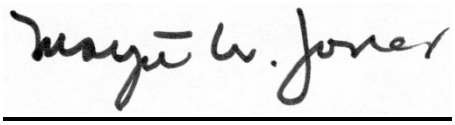
12. It is concluded that Claimant's participation in and with the medical care at Concentra, the medical provider her Employer provided to her, is not a knowing waiver of her right to select her treating physician as a matter of law. In this case, the right to select a physician passed to Claimant and she selected Dr. Kristin Mason to be her authorized treating physician.

ORDER

1. Respondents shall be liable for benefits under the Act based on an AWW of $1049.91.

2. Respondents shall be liable for reasonably necessary and related medical benefits provided by Dr. Kristin Mason.

DATED: September 4, 2018



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4 th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Have Respondents overcome, by Clear and Convincing Evidence, the DIME physician's opinion on the issues of causation and MMI?

II. Have Respondents overcome, by a Preponderance of the Evidence, the DIME physician's impairment rating for her right upper extremity?

III. Has Claimant shown, by a preponderance of the evidence, that she is entitled to ongoing medical benefits, specifically, Voltaren cream?

IV. Is Claimant entitled to an award for Disfigurement?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained a compensable injury to her right elbow on August 18, 2016. (Ex. A, B). The first report of injury was filed August 19, 2016. The report documents that Claimant "struck her right elbow on a door frame…" and that the injury was reported to her employer the same day.

2. Claimant first sought treatment eight days later, on August 26, 2016 at the Memorial Health System Occupational Health Clinic, where she was examined by Dr. Rosemary Greenslade. (Ex. 4, p. 25). It was documented by Dr. Greenslade that Claimant had "smashed" her right elbow against a wall while at work.

3. Claimant's pain had become worse in the following days, prompting her need for medical treatment. Dr. Greenslade diagnosed Claimant with "*traumatic* medial epicondylitis." (emphasis added). It was reported at the next visit on August 30, 2016 that Claimant was still having pain, but denied numbness, tingling, or radiating pain. She did complain of weakness in the affected extremity.

4. Dr. Greenslade performed an injection into Claimant's right medial common extensor tendon about the medial epicondyle at this visit. Claimant reported immediate pain relief due to the anesthesia. Dr. Greenslade increased Claimant's restrictions to "allow for more rest as hand writing aggravating tendonitis" and instructed Claimant to start physical therapy.

5. Claimant's symptoms had not resolved by her September 16, 2016 examination with Dr. Greenslade, who then recommended an EMG to test for possible ulnar nerve entrapment. (Ex. 4, p. 29).

6. Dr. Kenneth Finn performed an EMG/NCS on October 3, 2016. (Ex. 5, pp. 66-69). The study revealed evidence of ulnar neuropathy that Dr. Finn indicated was "consistent with the diagnosis of mild to moderate right cubital tunnel syndrome." Claimant reported to Dr. Finn that she had "struck" her right elbow on a door jamb while cleaning at work. *Id.* at 66. It was Dr. Finn's opinion that Claimant's symptoms were radiating in an ulnar fashion and diagnosed Claimant with a lesion of the ulnar nerve. *Id.* He recommended Claimant undergo orthopedic evaluation. Claimant again reported decreased grip strength and the dropping of items.

7. Claimant was evaluated by orthopedic surgeon Dr. Karl Larsen, on January 11, 2017. (Ex. 6, pp. 73-75). Claimant reported to Dr. Larsen that she had injured herself while cleaning at work, and that

> she [Claimant] pulled her right arm back "striking" her right posterior medial elbow and metal plates sticking out of the door jamb. She had immediate *burning* in the medial arm and hand and *numbness in the ulnar digits* of the hand. She is having *persistent burning discomfort* over the medial elbow as well as pain in the elbow, *especially with gripping activities*….(Ex. 6, p. 73)(emphasis added).

Dr. Larsen performed a physical examination of Claimant's right arm and indicated that Claimant had hypersensitivity over the medial elbow, and was exclusively tender over the ulnar nerve with a palpable tendency for the nerve to subluxate with elbow flexion. He could personally feel the nerve "riding forward" around the medial epicondyle. *Id.* at 74. Claimant's Tinel sign was positive and painful, and she also had a positive elbow flexion compression test. Dr. Larsen felt that, given the tendency of Claimant's ulnar nerve to subluxate, Claimant would be best served by having ulnar nerve transposition surgery. *Id at 74.*

8. Surgery was performed by Dr. Larsen on February 23, 2017. (Ex. 8). The procedures included right anterior submuscular ulnar nerve transposition and right flexor pronator origin lengthening. (Ex. 8, p. 107). The post-operative diagnosis was right ulnar neuropathy/ulnar neuritis at the elbow.

9. Dr. Larsen noted on April 5, 2017 that Claimant was making progress with her condition after surgery, but she was still complaining of a lot of soreness and tightness with some numbness in the right small finger still. (Ex. 6, p. 93).

10. Prior to the surgery, Dr. Greenslade spoke to Claimant's supervisor on November 8, 2016. (Ex. 4, p. 35). Dr. Greenslade was informed of the repetitive tasks that Claimant performs at her job with the employer. Dr. Greenslade opined that the

tasks performed by Claimant were not enough for her to meet the risk factors for cumulative trauma of the elbow pursuant to Rule 17(5). This information led Dr. Greenslade to believe Claimant's condition was not work related. She placed Claimant at MMI, effective November 14, 2016.

11. Dr. Greenslade concluded that Claimant did not suffer a permanent impairment as the result of her work injury. At the time of the exam, Claimant had no instability on valgus/varus testing, 5/5 strength throughout, and no visible bruising or swelling.

12. Claimant's EMG did show evidence of cubital tunnel syndrome, but Dr. Greenslade concluded that those findings were "unrelated to job duties associated with employment at UCH, patient only performs minimal repetitive motion as part of her job duties. She has another job as a CNA and does non-work related computer work which are more likely the etiology of her nerve entrapment as this work involves forceful torque/push/pulling."

13. Claimant's next appointment at the Memorial Health System Occupational Clinic occurred on May 5, 2017, after the claim was reopened due to Claimant's persistent condition. (Ex. 4, pp. 38-39). At this time, Claimant was "progressing slowly" with physical therapy, and was still having ulnar nerve neuralgia. She had improved, however, and expressed a desire to return to work. Dr. Lund also diagnosed Claimant with traumatic medial epicondylitis, along with right ulnar neuritis and status-post ulnar nerve transposition surgery. Dr. Lund documented on June 9, 2017 that Claimant continued to have decreased grip strength. *Id.* at 40.

14. Claimant was ultimately placed at MMI by Dr. Lund on October 6, 2017. (Ex. 4, pp. 51-57). Claimant, however, continued to complain of ongoing pain and symptoms in the ulnar nerve distribution. Dr. Lund opined at the MMI date that Claimant's condition "was related to the performance of her job duties on 08-18-2016 with greater than 50% medical probability." *Id.* at 55. Dr. Lund assigned a 1% extremity rating for range of motion loss. She also assigned 8% using Table 10 of the AMA Guides, Third Edition Revised ("AMA Guides") for Peripheral Nervous System Impairment, for a combined 9% rating.

15. Dr. Lund recommended Claimant continue using her Voltaren Gel for pain relief as maintenance care. *Id.* at 56.

16. Respondents filed a Final Admission of Liability ("FAL") admitting to Dr. Lund's findings on December 21, 2017. (Ex. B) Claimant filed an Objection to Final Admission of Liability and Notice and Proposal to Select DIME Examiner on December 29, 2017.

17. Dr. Anjmun Sharma performed the DIME on April 6, 2018. (Ex. 9). Dr. Sharma documented that Claimant had slipped and "smashed" against the wall, hitting her medial condyle, resulting in the development of persistent pain. A record review was also conducted.

18. On physical examination, Dr. Sharma documented tenderness at the medial epicondyle and tenderness over the scar area where she had the submuscular ulnar nerve transposition surgery. There was atrophy of the right elbow when compared to the left. Grip strength was markedly decreased in the right upper extremity compared to the left, which Dr. Sharma opined was related to the elbow flexor and extensor tendons.

19. Dr. Sharma assigned an 8% rating for range of motion loss of Claimant's right upper extremity. (Ex. 9, p. 117). Additionally, Dr. Sharma indicated that Claimant met the criteria for 'other disorders' of the right upper extremity, specifically grip strength, which was markedly decreased as a result of the surgery and the traumatic medial epicondylitis. Using Table 23 on Page 54 of the AMA Guides, Dr. Sharma assigned a 20% upper extremity rating for loss of grip strength for a combined upper extremity rating of 26%.

20. Respondents challenged the impairment rating of the DIME. Dr. Nicholas Kurz performed a medical records review, and give his opinion regarding Claimant's condition. (Ex. 1, Ex. C). In response to Respondents' inquiry, Dr. Kurz diagnosed Claimant with a "right elbow contusion." (Ex. C, p. 19). Dr. Kurz opined, "Dr. Lund incorrectly reopened this patient's claim as she was properly treated and healed from her minor elbow contusion" at that time. (Ex. C, p. 21). At the time the case was reopened, the proper procedure "would've been a one-time evaluation to determine causality, perform a thorough evaluation, to review job descriptions of the medical probability of a new injury." *Id*

21. Dr. Kurz focused on Claimant's variance of her described mechanism of injury. Dr. Kurz noted that "this patient had no qualifying impairable injury or any objective findings that would qualify for an impairment rating." (Ex C. p. 22).

22. Dr. Kurz therefore, disagreed with the rating assigned by Dr. Sharma. He also disagreed with the rating provided by Dr. Lund, stating that Claimant had nothing more than a minor elbow contusion for which she reached MMI on November 14, 2016. (Ex. C, p. 23). Dr. Kurz further stated that Claimant did not meet the criteria under Rule 17 for a repetitive injury. Kurz disagreed with Dr. Sharma's DIME findings because Claimant provided Dr. Sharma an inaccurate description of the mechanism of injury, and because he assigned Claimant an impairment rating absent objective findings.

23. Dr. Kurz identified several 'inconsistent' stories throughout the records regarding how the accident occurred. The August 18, 2016 Worker's Compensation

New Injury Report from UC Health stated that Claimant sustained a right elbow contusion. Claimant described that the mechanism of injury was "cleaning under toilet with shower brush and hit my elbow onto the door jam." (Ex. E, p. 43).

24. Dr. Kurz opined that Claimant told several inconsistent stories throughout the records regarding how the accident occurred. The August 18, 2016 Worker's Compensation New Injury Report from UC Health stated that Claimant sustained a right elbow contusion. Claimant described that the mechanism of injury was "cleaning under toilet with shower brush and hit my elbow onto the door jam." (Ex. E, p. 43).

25. In the Treating Physician's Report dated August 26, 2016, the mechanism was described as "injury to her right elbow when her arm slipped and smashed against a wall hitting her medial epicondyle." (Ex. E, p. 44)

26. On September 2, 2016, Claimant completed a medical history form for her physical therapist and described the mechanism as "I was cleaning under a toilet floor with a shower brush onto the door jam." (Ex. C, p. 19)

27. On January 11, 2017, orthopedist, Dr. Karl Larson documented Claimant's report that "she sustained an injury in the course of her work on 08/18/16 and she was cleaning her bathroom and something fell and she pulled back striking her right posterior medial elbow and medal plate sticking out of the door jam." (Ex. F, p. 94)

28. Dr. Kurz further noted that, in his March 20, 2017 IME report (at Respondents' request), Dr. John Sanidas, MD, states, "she was mopping the floor in the bathroom. She had a long handled mop, she was mopping the floor basically around the toilet but was basically mopping the whole bathroom. As she was doing this, according to her statement, the mop came up suddenly and she stepped back and then struck her right posterior medial elbow on the door to the bathroom. She did not hit the door or a door jam." (Ex. C, p. 19).

29. [However, the ALJ notes further, that the remainder of the above paragraph cited by Dr. Kurz reads as follows: "Because of the language (she is from Jamaica), there is some confusion. She actually hit where the door latch is shut on the mid-frame with some metal that was projecting out of it. She was standing and moving backwards at the time" (Ex. 6, p. 80)].

30. [The ALJ notes further that in Dr. Sanidas' IME report, under Causation, he elaborates:

> …..it is now more clear on a face-to-face evaluation since the patient was standing in a pediatric bathroom mopping the floor around the toilet, not necessarily down low in the toilet……In reviewing the patient's history, *I have nothing more that indicates that this patient is not giving an accurate summation of her injury*….Consequently, within a reasonable degree of

medical probability, I conclude from the records that *this patient's injury is work-related* as noted above. (Ex. 6, p. 85)(emphasis added).]

31. Then, during the DIME evaluation with Dr. Sharma on April 6, 2018, Claimant stated that she "slipped and fell, smashed against a wall hitting her medial condyle." (Ex. D, p. 32). [The ALJ finds that Claimant did not use the term "medial condyle" with Dr. Sharma; he was merely paraphrasing, in shorthand, her version of events.]

32. According to Claimant at hearing, "I was asked to clean a room. So the floor in the bathroom was kind of dirty so I sprayed and everything and I was using a shower brush to clean the floor and the brush flipped and my (inaudible) and I smashed my – I don't know if it was a metal plate, but I know I smashed it in the door – in the door jam."

33. Claimant specified that by "door jam" she was referring to "the frame yes, and the metal piece." She later stated, "to be honest, I don't know what I hit because my back was turned. So I don't know what I hit because my back was turned."

34. Dr. Kurz explained that Claimant's description of the injury is important because "the fall is substantially different than bumping your elbow. And bumping your elbow on the wall is different than bumping your elbow from a fall just because of the physics and the weight of all that."

35. Claimant underwent her own independent medical examination with Dr. Timothy Hall on June 6, 2018. (Ex. 10). Dr. Hall examined Claimant, and took a medical history from her directly. Dr. Hall's physical examination showed the right medial elbow to be very tender locally, and a positive Tinel's locally. Examination further revealed weak grip strength of the right hand as compared to the left. There was continued decreased sensation in an ulnar nerve distribution from the elbow down.

36. Dr. Hall diagnosed Claimant with "blunt trauma" of the right elbow resulting in chronic medial epicondylitis and ulnar neuropathy status post-surgical transposition. Dr. Hall explained that the different methods of rating Claimant's impairment as performed by Dr. Lund and Dr. Sharma would both be appropriate under the AMA Guides. However, he felt Dr. Lund's usage of the sensory deficit was done incorrectly and should have amounted to 20% for the sensory loss. Ultimately, Dr. Hall opined, *"Dr. Sharma's method of rating is reasonable and appropriate*. Not all that different from mine. *It is critical that the strength deficit be taken into account. This is the main impairment experienced by this patient as a consequence of the work-related injury." Id.* at 127 (emphasis added).

37. Dr. Sharma's deposition was taken by Respondents on August 24, 2018. Dr. Sharma addressed the issue of causation when asked his opinion of Dr. Kurz's diagnosis of a mere elbow contusion; instead it was a cubital tunnel disorder. Dr. Sharma explained that although injuries like Claimant's are typically repetitive in nature, any type of trauma to a nerve, including direct blunt force trauma, can cause this condition. (Depo. Tr. 9:6-18). Dr. Sharma further disagreed with the original placement of MMI by Dr. Greenslade, as he felt there was a documented injury that occurred at work. Claimant did not have any history that would lead him to believe Claimant's condition was caused by anything other than the trauma. (Depo. Tr. 10:4-19).

38. Dr. Sharma was asked how he reconciled the MMI report by Dr. Lund documenting good grip strength with his own testing, which documented decreased grip strength. Dr. Sharma cannot explain why Dr. Lund's note said what it did, but Dr. Sharma confirmed that he used an objective device called a Jamar dynamometer to measure Claimant's grip strength. He performed this testing himself, in his own office, and appropriately 'zeroed out' [calibrated] the device before testing Claimant's grip. The testing revealed markedly decreased grip strength on the right side as compared to the uninjured left side, resulting in a 20% rating for the grip strength. (Depo. Tr. 11:22 – 12:25).

39. Dr. Sharma was asked how we could know whether the Claimant was putting forth maximum effort or not. Dr. Sharma explained that the best way to test for this is by 'zeroing out' the dynamometer and performing the measurements three times to see if the ratings are consistent. (Depo. Tr. 13:3-12). Dr. Sharma opined that he felt the best way to rate Claimant's condition was based on her decreased grip strength, as that was her main complaint when he examined her. (Depo. Tr. p. 20:11-24). "And I felt in order to fairly and accurately represent the true impairment, that is the reason why I included the grip strength." (Depo. Tr. p. 20:24 – 21:1).

40. Dr. Sharma was also asked directly about the reported mechanism of injury and the minor variance of its reporting in the record. Dr. Sharma indicated that the most important variable is "more the impact than anything else" and not necessarily the fact that there are variations in how it was reported…. You know, what I saw that was consistent in the record is that there was some type of *direct acute trauma* to the elbow that resulted in the injury." (Depo. Tr. p. 18:1-22) (emphasis added). Ultimately, Dr. Sharma was asked whether anything regarding the information presented to him, particularly the report from Dr. Kurz, altered his opinions in any way. Dr. Sharma stated:

> Not really. I mean, I appreciate Dr. Kurz having a report, and I can understand why he had some concerns. However, I -- I don't feel that it's compelling enough to me to change anything in my report. I do not believe that I erred in any way. I believe that I addressed the issue, which was the right elbow, the fact that there was a deficit in range of motion and a deficit

in strength. And I believe that this is a fair and accurate representation of where functionally this patient is. (Depo. Tr. pp. 21:18 – 22:6).

41. Dr. Kurz also testified at hearing on behalf of Respondents. It was his opinion that traumatic medial epicondylitis is quite rare and that the odds of "bumping[1]" your elbow in the right place to cause Claimant's injury is low. Dr. Kurz testified that he felt Claimant was appropriately placed at MMI on November 14th of 2016 as previously indicated by Dr. Greenslade.

42. Regarding the impairment rating, Dr. Kurz testified that there must be objective findings for an individual to receive an impairment rating. Claimant's rating was based "purely off subjective complaints." The patient had a normal nerve conduction study and no physical findings of atrophy therefore the strength was subjective and not objective which is required for any impairment rating using the guidelines." (Ex. C, p. 22)

43. Elaborating on the nature of the objective/subjective findings, Dr. Kurz explained at hearing, "After the patient progressed and had the ulnar nerve transposition…a repeat EMG was done because she stated that she had no improvement, still had numbness and weakness and on that second one they were both normal. So there were no objective nerve findings that would equate to a sensory deficit or a motor or strength deficit."

44. Dr. Kurz indicated that he did not feel the Jamar dynamometer used by Dr. Sharma was an "objective" finding to warrant an impairment rating, in part because it was his opinion that the Claimant could see the gauge and consciously match it each time.

45. At hearing, Claimant testified that Dr. Sharma positioned the dynamometer readings' side facing him, so she was unable to see any readings. She further testified that she believed that Dr. Sharma was the only physician to use this device to test her grip. However, on cross examination, Claimant admitted that physical therapists had tested her grip strength, and she could not recall what kind of device they used.

46. For the Disfigurement component of the hearing, Claimant displayed her surgically scarred right elbow to the ALJ. The ALJ notes that there is a semi-circular scar surrounding the elbow, approximately 3" in length, 1/8" in width, darker than the surrounding skin, with stitch marks still visible.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

Overcoming the DIME / Causation and MMI

D. A DIME physician's findings of causation, MMI and impairment are typically binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). However, the same standard of clear and convincing evidence

does not apply to *scheduled ratings* imposed by a DIME. The burden of proof pertinent to a dispute concerning the impairment rating of a scheduled injury is a preponderance of the evidence. It is not by clear and convincing evidence. *Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007); *Ortiz v. Ingersoll-Rand Co.*, W.C. No. 4-981-218-04 (January 25, 2018); *see generally Wagoner v. City of Colorado Springs*, W.C. No. 4-817-985-03 (Oct. 21, 2013)(no presumptive weight afforded DIME physician concerning scheduled injuries), *aff'd Wagoner v. Industrial Claim Appeals Office*, Colo. App. No. 13CA1983 (Oct. 23, 2014)(NSOP).

E. Respondents and their expert rely heavily on variances in Claimant's reported mechanism of injury. The ALJ is not persuaded. The ALJ agrees with the testimony of Dr. Sharma that the most important factor in determining causation and whether the mechanism of injury caused the purported injury in this matter is the impact of the elbow against an object, regardless of whether she fell into it, smashed her arm into it, or something similar. The ALJ finds Claimant credible that she "smashed" her elbow against a hard object behind her that she could not see at the time, be it the door frame, door jamb, or some other hard object. As Dr. Sharma indicated, the medical records repeatedly documented a traumatic injury to the elbow, regardless of what specific object Claimant struck with the elbow.

F. This variance in documenting the precise mechanism is best explained by Respondents' own IME physician, Dr. Sanidas, who, noting the language barrier, observed:

> …..it is now more clear on a face-to-face evaluation since the patient was standing in a pediatric bathroom mopping the floor around the toilet, not necessarily down low in the toilet……In reviewing the patient's history, *I have nothing more that indicates that this patient is not giving an accurate summation of her injury*….Consequently, within a reasonable degree of medical probability, I conclude from the records that *this patient's injury is work-related* as noted above.

G. On the issue of Causation and MMI, the ALJ finds the opinions of Drs. Sharma, Hall, Lund, and Sanidas to be more persuasive than Drs. Kurz and Greenslade. Respondents have therefore failed to prove by clear and convincing evidence that Dr. Sharma erred in the MMI date he assigned. Respondents have also failed to prove, by clear and convincing, evidence that Dr. Sharma erred in finding Claimant's ongoing condition to be causally related to the August 16, 2016 industrial injury, for which Respondents have admitted.

Overcoming the DIME / Impairment Rating

H. A DIME physician is required to rate a claimant's impairment in accordance with the AMA Guides. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the AMA Guides do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola*, W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may

consider any technical deviation from the AMA Guides in determining the weight to be accorded the DIME physician's findings. Whether the DIME physician properly applied the AMA Guides to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett*, W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

I. Respondents assert that Claimant did not warrant an impairment rating, based upon Dr. Kurz's opinion that there was a lack of objective findings to warrant the rating. Dr. Lund, a Level II accredited physician, assigned an impairment rating. Dr. Hall, a Level II accredited physician retained by Claimant for an IME, agreed that Dr. Sharma's rating of Claimant's grip strength was the best way to take into account her loss of function as a result of this injury. Dr. Sharma, himself a level II accredited physician, also provided Claimant with an impairment rating for her condition. Three physicians, including Claimant's treating physician and a DIME, have found that Claimant's condition warrants an impairment rating.

J. Moreover, Dr. Kurz's argument that the Jamar dynamometer is not an "objective finding" is not persuasive. The available evidence suggests that the Jamar dynamometer was properly calibrated. The AMA Guidelines reference its proper usage, suggesting the proper settings to best "apply maximal force comfortably". Reliability of measurements requires readings to be within 20% of one another. Nothing suggests Dr. Sharma did not follow this protocol. The ALJ finds that this test is a reasonable, objective measure of grip strength, and that Dr. Sharma followed the proper protocol in so measuring.

K. While Dr. Kurz felt this test lacked objectivity, due to a possible submaximal effort by Claimant seeing the gauge, the ALJ is not persuaded. As Claimant testified, the side of the dynamometer facing her while it was being used did not display any readings, as that side of the device was facing Dr. Sharma. The ALJ further notes that Claimant is simply lacking in the requisite sophistication and guile to successfully game the system. In fact, the ALJ finds Claimant to have acted in good faith throughout the entire process, in providing the best history she could to all medical providers, cooperating in all testing protocols, and testifying at hearing. The ALJ finds, by a preponderance of the evidence, that the 26% upper extremity rating assigned by Dr. Sharma is appropriate and supported by the medical evidence.

Medical Benefits

L. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove by a preponderance of the evidence that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Ongoing medical benefits after MMI are the financial responsibility of Respondents as long as they are reasonable, necessary, and related to the industrial injury. *Grover v. Industrial Com'n of Colorado*, 759 P.2d 705 (Colo. 1988).

M. The ALJ finds that Claimant has established, by a preponderance of the evidence, that she is entitled to all ongoing reasonable, necessary, and related treatment for her injured right upper extremity. Specifically, the ALJ finds the Voltaren Gel to be reasonable, necessary, and related. Claimant was recommended this particular ongoing treatment when she was placed at MMI, and Claimant continues to suffer from the effects of the industrial injury. It should be noted that the ALJ is not limiting Claimant's ongoing medical care to the Voltaren; merely that it meets the criteria known to date.

Disfigurement

N. The ALJ finds that as a result of Claimant's work injury, Claimant has a visible disfigurement to the body as noted in Finding of Fact #46. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S. The ALJ orders that Insurer shall pay Claimant $750.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore Ordered that:

1. Respondents have not overcome the DIME opinion of Dr. Sharma. Claimant's upper right extremity rating is 26%.

2. Respondents shall pay for Claimant's ongoing medical care which is reasonable, necessary, and related to her work injury, including Voltaren cream.

3. Respondents shall pay $750.00 for Disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 29, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained compensable left shoulder and left knee injuries during the course and scope of his employment with Employer on August 2, 2017.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a Security Guard at a bank. On August 2, 2017 he caught his right foot on a table and tripped in the basement of the bank while performing his job duties. Claimant fell to the ground. He struck his left knee and left shoulder. Claimant also twisted his left ankle during the incident. He subsequently performed his job duties and completed his work shift.

2. On August 7, 2017 Claimant reported his injuries to Employer. He chose AFC Urgent Care for medical treatment.

3. Claimant has suffered a number of previous work-related injuries to his left ankle, left shoulder and left knee. The injuries occurred during the period 2011-2013 while Claimant was working for other employers. Moreover, on December 23, 2014 Claimant slipped on ice, fell and fractured his patella. He underwent open reduction and internal fixation of the fractured patella on January 2, 2015. Nevertheless, the medical records reflect that Claimant's last left knee treatment occurred on April 1, 2015. Moreover, Claimant testified that he did not have any left shoulder symptoms immediately prior to his August 2, 2017 work accident.

4. On August 22, 2017 Claimant visited AFC Urgent Care for an evaluation of his left shoulder and left knee symptoms. Claimant reported that he had fallen at work approximately two weeks earlier. He injured his left knee and left shoulder. Claimant noted that he had undergone left knee surgery about two years earlier. He remarked that his left shoulder remained stiff and his left knee had been "bothering him more since the fall." Left knee and left shoulder x-rays were normal with no evidence of fractures. Gregory Muench, M.D. diagnosed Claimant with a left shoulder sprain and a left knee contusion. He referred Claimant to an orthopedic specialist to evaluate his left shoulder and "to make sure his knee is OK."

5. Claimant remarked that he sought treatment from personal physician Stephen Shepherd, D.O. at CPHG Primary Care Highlands because he was unable to

obtain an appointment with an orthopedic specialist. On September 13, 2017 Claimant reported that he had fallen six weeks earlier and injured his left shoulder. He also noted continuing left knee pain. Dr. Shepherd prescribed pain medications.

6. On September 18, 2017 Employer completed a First Report of Injury. The document specified that Claimant injured his right shoulder when he ran into a table at work on August 2, 2017.

7. On January 15, 2018 Claimant returned to AFC Urgent Care for an evaluation of his left shoulder and left knee symptoms. However, Claimant's claim was closed because of non-compliance. AFC Urgent Care had called and left multiple messages for Claimant but did not receive any response.

8. Claimant explained that he attempted to schedule appointments with an orthopedic specialist recommended by AFC Urgent Care but never received a return telephone call from the specialist's office. He reasoned that, because he could not make an appointment with an orthopedic specialist, it was fruitless to return to AFC Urgent Care.

9. On February 7, 2018 Claimant completed a Workers' Claim for Compensation. He noted that he was injured when he tripped and fell at work on August 2, 2017. Claimant specifically injured his left shoulder and left ankle.

10. On June 22, 2018 Claimant underwent an independent medical examination with Timothy S. O'Brien, M.D. Claimant reported that, while working for Employer on August 2, 2017 he caught his right foot on the leg of a table and fell to the ground. He inverted his left ankle, struck his left knee and hit his left shoulder during the fall. In reviewing Claimant's medical records, Dr. O'Brien noted that Claimant had been involved in a motor vehicle accident on September 29, 2012 while on his way to work for another employer. He suffered neck and shoulder pain as a result of the accident. Claimant received conservative treatment in the form of physical therapy and injections. He reached Maximum Medical Improvement (MMI) on February 6, 2013 with a 4% whole person impairment rating. In recounting Claimant's treatment for the August 2, 2017 work incident Dr. O'Brien commented that diagnostic testing in the form of radiographs revealed a normal cervical spine, left knee and left shoulder. Physical examinations of the left shoulder, left knee and left ankle were normal.

11. Dr. O'Brien determined that Claimant suffered a minor left knee strain/sprain and a minor left shoulder strain/sprain as a result of his fall at work on August 2, 2017. He explained that Claimant did not immediately seek medical attention for his August 2, 2017 work injuries but waited until August 22, 2017 to obtain treatment. Upon receiving medical care Claimant's physical examination and radiographs were normal. Dr. O'Brien also noted that Claimant had a history of non-organic pain during treatment for his September 29, 2012 motor vehicle accident. Dr. O'Brien explained that approximately 98% of minor injuries similar to Claimant's heal within days. He reasoned that any injuries Claimant suffered on August 2, 2017 healed prior to his August 22, 2017 visit to AFC Urgent Care. Based upon the normal physical

examination on August 22, 2017 Dr. O'Brien commented that Claimant reached his "preinjury level of function" regarding his left shoulder and left knee symptoms. Claimant thus did not require any additional medical treatment and could resume his normal activities. Dr. O'Brien summarized that Claimant "healed expeditiously and uneventfully and without sequela" by August 22, 2017 for his minor August 2, 2017 left knee and left shoulder injuries.

12. On August 24, 2018 the parties conducted the post-hearing evidentiary deposition of Dr. O'Brien. He maintained that Claimant suffered a minor left knee strain/sprain and a minor left shoulder strain/sprain as a result of his fall at work on August 2, 2017. However, Claimant's injuries were self-limiting and self-healing. The injuries had resolved and Claimant did not require any additional medical treatment.

13. Claimant has established that it is more probably true than not that he sustained compensable left shoulder and left knee injuries during the course and scope of his employment with Employer on August 2, 2017. Initially, Claimant explained that on August 2, 2017 he caught his right foot on a table and tripped in the basement of a bank while performing his job duties. Claimant fell to the ground. He struck his left knee and left shoulder. He also twisted his left ankle during the incident. In an August 22, 2017 visit with UFC Urgent Care Claimant reported that he had fallen at work and injured his left knee and left shoulder. Dr. Muench diagnosed Claimant with a left shoulder sprain and a left knee contusion. He referred Claimant to an orthopedic specialist to evaluate his left shoulder and "to make sure his knee is OK." On September 13, 2017 Claimant reported to personal physician Dr. Sheperd that he fell six weeks earlier and injured his left shoulder. Finally, Dr. O'Brien determined that Claimant suffered a minor left knee strain/sprain and a minor left shoulder strain/sprain as a result of his fall at work on August 2, 2017. Accordingly, the bulk of the persuasive medical evidence reflects that Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered compensable left knee and left shoulder injuries on August 2, 2017.

14. Claimant has established that it is more probably true than not that he is entitled to receive reasonable, necessary and causally related medical treatment for his August 2, 2017 industrial injuries. The record reflects that Claimant is seeking medical treatment for his left shoulder and left knee. Respondents are not challenging a specific medical benefit but instead assert that Claimant's current symptoms are not related to the injuries and seek a denial of additional medical treatment. Relying on the opinion of Dr. O'Brien, Respondents assert that Claimant is not entitled to receive any additional medical treatment because his injuries have resolved.

15. Dr. O'Brien reasoned that any injuries Claimant suffered on August 2, 2017 healed prior to his August 22, 2017 visit to AFC Urgent Care. Based upon the normal physical examination on August 22, 2017 Dr. O'Brien commented that Claimant reached his "preinjury level of function" regarding his left shoulder and left knee symptoms. Claimant thus did not require any additional medical treatment and could resume his normal activities. Dr. O'Brien summarized that Claimant "healed

expeditiously and uneventfully and without sequela" by August 22, 2017 for his minor August 2, 2017 left knee and left shoulder injuries.

16. Relying on Dr. O'Brien's analysis requires a *de facto* finding that Claimant has reached Maximum Medical Improvement (MMI) regarding the August 2, 2017 injuries. Because Claimant is entitled to medical benefits until reaching MMI, a denial of all further medical treatment necessarily reflects an implicit determination that Claimant reached MMI for the effects of his industrial injuries. However, there has been no medical determination of MMI by an Authorized Treating Physician (ATP) or Division Independent Medical Examination (DIME) physician. Furthermore, the persuasive opinions of Claimant's treating doctors reflect that he requires continuing medical treatment for his left shoulder and left knee symptoms. Furthermore, although Dr. Muensch referred Claimant to an orthopedic specialist to evaluate his left shoulder and left knee, Claimant has been unable to obtain the treatment. The bulk of the persuasive evidence thus reveals that Claimant is entitled to continuing medical treatment, including evaluation by an orthopedic specialist, for his August 2, 2017 work injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that he sustained compensable left shoulder and left knee injuries during the course and scope of his employment with Employer on August 2, 2017. Initially, Claimant explained that on August 2, 2017 he caught his right foot on a table and tripped in the basement of a bank while performing his job duties. Claimant fell to the ground. He struck his left knee and left shoulder. He also twisted his left ankle during the incident. In an August 22, 2017 visit with UFC Urgent Care Claimant reported that he had fallen at work and injured his left knee and left shoulder. Dr. Muench diagnosed Claimant with a left shoulder sprain and a left knee contusion. He referred Claimant to an orthopedic specialist to evaluate his left shoulder and "to make sure his knee is OK." On September 13, 2017 Claimant reported to personal physician Dr. Sheperd that he fell six weeks earlier and injured his left shoulder. Finally, Dr. O'Brien determined that Claimant suffered a minor left knee strain/sprain and a minor left shoulder strain/sprain as a result of his fall at work on August 2, 2017. Accordingly, the bulk of the persuasive medical evidence reflects that Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered compensable left knee and left shoulder injuries on August 2, 2017.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a

causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The employer's obligation continues until the claimant reaches MMI. MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. However, the claimant may receive medical benefits after MMI to maintain his status or prevent a deterioration of his condition. *See Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Furthermore, §8-42-107(8)(b)(I) & (II), C.R.S. provide that the initial determination of MMI is to be made by an ATP. If either party disputes the ATP's MMI determination, the claimant must undergo a DIME. The statute also provides that the ALJ lacks authority to determine MMI until there has been a medical determination of MMI by an ATP or a DIME. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, W.C. Nos. 4-947-316-01, 4-935-813-03 (ICAP, July 31, 2015).

9. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical treatment for his August 2, 2017 industrial injuries. The record reflects that Claimant is seeking medical treatment for his left shoulder and left knee. Respondents are not challenging a specific medical benefit but instead assert that Claimant's current symptoms are not related to the injuries and seek a denial of additional medical treatment. Relying on the opinion of Dr. O'Brien, Respondents assert that Claimant is not entitled to receive any additional medical treatment because his injuries have resolved.

10. As found, Dr. O'Brien reasoned that any injuries Claimant suffered on August 2, 2017 healed prior to his August 22, 2017 visit to AFC Urgent Care. Based upon the normal physical examination on August 22, 2017 Dr. O'Brien commented that Claimant reached his "preinjury level of function" regarding his left shoulder and left knee symptoms. Claimant thus did not require any additional medical treatment and could resume his normal activities. Dr. O'Brien summarized that Claimant "healed expeditiously and uneventfully and without sequela" by August 22, 2017 for his minor August 2, 2017 left knee and left shoulder injuries.

11. As found, relying on Dr. O'Brien's analysis requires a *de facto* finding that Claimant has reached Maximum Medical Improvement (MMI) regarding the August 2, 2017 injuries. Because Claimant is entitled to medical benefits until reaching MMI, a denial of all further medical treatment necessarily reflects an implicit determination that Claimant reached MMI for the effects of his industrial injuries. However, there has been

no medical determination of MMI by an Authorized Treating Physician (ATP) or Division Independent Medical Examination (DIME) physician. Furthermore, the persuasive opinions of Claimant's treating doctors reflect that he requires continuing medical treatment for his left shoulder and left knee symptoms. Furthermore, although Dr. Muensch referred Claimant to an orthopedic specialist to evaluate his left shoulder and left knee, Claimant has been unable to obtain the treatment. The bulk of the persuasive evidence thus reveals that Claimant is entitled to continuing medical treatment, including evaluation by an orthopedic specialist, for his August 2, 2017 work injuries. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, W.C. Nos. 4-947-316-01, 4-935-813-03 (ICAP, July 31, 2015) (where the claimant had not reached MMI, ALJ's finding terminating all future medical treatment reflected an implicit determination that the claimant had reached MMI and was thus erroneous); *Davis v. Little Pub,* W.C. No. 4-947-977 (June 17, 2015).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable left shoulder and left knee injuries on August 2, 2017 during the course and scope of his employment with Employer.

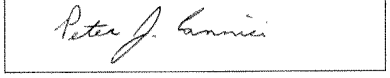
2. Claimant is entitled to continuing medical treatment, including evaluation by an orthopedic specialist, for his August 2, 2017 work injuries.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 29, 2018.

DIGITAL SIGNATURE:



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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that her need for continued maintenance medical care is reasonable, necessary and related to her May 28, 2016 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant sustained a compensable injury to her lower back on May 28, 2016. On this date, Claimant was lifting and lowering boxes of heavy 18" x 18" tiles off of a shelf. She estimated that the boxes weighed approximately 65 to 75 pounds. As Claimant was holding a box, she twisted to set it down and felt instant pain in her back along with a popping sensation. Claimant described symptoms, including pain across her lower back, into her hips, and down into her right leg immediately after this incident. A few days after her accident, Claimant developed pain in her left leg. She described her leg pain as both burning and stabbing. Claimant's explanation of the mechanism of injury is consistent with the initial emergency room note and the original note from CCOM.

2. The original note from CCOM dated May 31, 2016, three days after the incident, documents that Claimant was experiencing left leg symptoms in addition to the right leg symptoms she expressed at the emergency room three days prior. Again, this is consistent with Claimant's testimony regarding the onset of her symptoms. Nurse Theresa Kuhn indicated that Claimant's symptomatology was consistent with a lumbar radiculopathy. Claimant was diagnosed with a lumbar spine strain and radiculopathy.

3. Claimant underwent an MRI of her lumbar spine on June 10, 2016 that documented an L5-S1 disc bulge with focal disc herniation centrally with mild canal stenosis and moderate to severe bilateral foraminal stenosis along with facet disease at L4-5, L5-S1, and an L3-4 disc bulge.

4. Claimant was evaluated by Dr. James Bee of the Colorado Springs Orthopedic Group on August 3, 2016 for possible surgery. Claimant had a documented poor response to an epidural steroid injection. Consequently, Dr. Bee did not think Claimant was a good surgical candidate.

5. Claimant returned to CCOM where she was re-evaluated by her primary authorized treating provider (ATP), Dr. Daniel Olson, on September 6, 2016. Dr.

Olson's diagnoses at the time of this appointment continued to include radiculopathy of the lumbar region, strain of the lower back, and also a diagnosis of "other intervertebral disc displacement, lumbar region." He referred Claimant to Dr. Michael Sparr for pain management.

6. Claimant began treating with Dr. Sparr October 12, 2016. He diagnosed Claimant with numbness of the limbs and lumbago and recommended an EMG for further evaluation for radiculopathy. At Claimant's next visit, the EMG was performed and was interpreted as a "normal electrodiagnostic study of [the] bilateral lower extremities". Dr. Sparr noted that Claimant had reported a good response to Gabapentin (a nerve pain medication) and massage therapy. Because Claimant did not have evidence of a radiculopathy and her pain was diffuse, Dr. Sparr opined that injection therapy, including facet injections were unlikely to be beneficial. Accordingly, he "suggested" that Claimant continue with her "present course of treatment" including an additional upward titration of her Gabapentin. By this date of visit, Dr. Sparr had increased Claimant's dosage of Gabapentin to 300mg morning and night and 600 mg at noon. Claimant had not experienced side effects; thus, Dr. Sparr was planning to "continue the upward titration."

7. On November 30, 2016, Dr. Sparr recommended Claimant undergo a trochanteric bursa trigger point injection and a gluteal trigger point injection with the possibility of performing a right sacroiliac joint injection depending on the results of the trigger point injections. Authorization for the recommended injections was denied. Consequently, Dr. Sparr indicated he had nothing else to offer Claimant for treatment.

8. On March 27, 2017, Dr. Olsen placed Claimant at maximum medical improvement (MMI) because the only treatment left to try, as suggested by Dr. Sparr, was denied. At the time he placed Claimant at MMI, Dr. Olson recommended continued prescriptions for Gabapentin as maintenance care.

9. Claimant was allowed to return to Dr. Sparr on October 11, 2017 for ongoing medication management. Dr. Sparr noted that Claimant was advised to continue her medications upon MMI, which included the Gabapentin, Cyclobenzaprine, (Flexeril) and occasional Norco. However, Claimant reported to Dr. Sparr that she began losing her hair upon taking 900mg of gabapentin three times per day. Claimant testified to this, adding that the high dose of Gabapentin was also affecting her concentration. Accordingly, Claimant indicated that Dr. Olson had switched her from Gabapentin to Lyrica, 50mg three times per day and that this medication was helping with her burning symptoms. Dr. Sparr decided to increase Claimant's dose of Lyrica to 150mg twice per day and have her continue the Cyclobenzaprine for three times per day.

10. Claimant testified that she continues to take the Lyrica 150mg twice per day and that it helps reduce the burning pain and the pins & needles sensations going down and in her legs. According to Claimant, it does not help with the stabbing pain in the legs. Claimant reportedly has gone multiple days without taking the Lyrica while

waiting for approval for a prescription refill. Without this medication, Claimant testified that the aforementioned pain and sensory symptoms increase in intensity. She further testified that she continues to take the Cyclobenzaprine which is helpful in alleviating muscle spasms in her back.

11. On October 23, 2017, Claimant underwent a surgical evaluation with Dr. Andrew Castro. Dr. Castro diagnosed Claimant with lumbar radiculopathy; however, he did not feel that surgery would be the best treatment option for Claimant. Rather, he opined that she should "continue with the modalities which have been effective…." As of January 3, 2018, Dr. Sparr continued to prescribe Lyrica and Cyclobenzaprine. He also added Diclofenac gel for Claimant to apply to her low back and right hip three times daily to help manage what Claimant described is a feeling of increased pressure and shooting pains in the back and hip. Claimant testified that she currently applies 2 to 3 grams of Diclofenac gel twice a day to the affected area of the back and right hip.

12. The last record from Dr. Sparr in evidence is dated March 19, 2018. The report generated from this date of visit indicates that Claimant's 150mg dose of Lyrica was "therapeutically beneficial for her radicular leg pain." Dr. Sparr indicated that Claimant's pain was manageable with the current regimen of Cyclobenzaprine 10mg three times per day, Lyrica 150 mg twice per day, and application of the Diclofenac gel twice a day. Dr. Sparr's physical examination documented straight leg raising on the right aggravating Claimant's lower back, that Claimant had moderate sensitivity to deep palpation of her right middle rhomboid, gluteal muscles, and lumbar paraspinal muscles. He continued to recommend his regimen of medications based on his known history of Claimant's condition and his current physical evaluation of Claimant.

13. Claimant testified that she has a history of diabetes dating back to the 1990's. Claimant testified she last obtained diabetes treatment approximately one year prior to her hearing, that she had lost her insurance and had not re-established care. Although she had taken Glipizide to lower her blood sugar, she was not taking any medication to control her blood sugar and had not undergone a general physical in "years." She also testified that she has a sister who was mistakenly diagnosed with fibromyalgia when in reality she suffers from rheumatoid arthritis (RA). Nonetheless, Claimant testified that she has never been diagnosed with diabetic neuropathy or fibromyalgia.

14. Claimant also has a history of prior injuries to her back and neck. She sustained an injury to her mid back in 1992 as a certified nursing assistant (CNA) after a resident fell on her, which she testified resolved with medication and physical therapy. Claimant also suffered an injury to her upper back and neck in a motor vehicle accident in August of 2013.

15. Claimant underwent an independent medical examination (IME) with Dr. Allison Fall, an expert in physical medicine and rehabilitation (RM&R), at the request of Respondents on July 11, 2018. Dr. Fall was asked to address Claimant's maintenance treatment needs, including her ongoing medication usage. Claimant reported severe

"constant pain and burning in her back, hips, and legs; muscle spasms in her back, hips and legs; pain radiating up to the mid back; and difficulty sleeping". After completing a records review and physical examination, Dr. Fall opined that Claimant was suffering from "chronic low back pain with underlying degenerative changes". She also felt it "possible" that Claimant had a "non-work-related chronic pain disorder such as fibromyalgia".

16. Concerning maintenance medical care, Dr. Fall recommended an independent exercise program to manage Claimant's chronic pain. Specifically, Dr. Fall recommended that Claimant be afforded a "three-month health club membership with [a] pool". She also recommended that a TENS unit be purchased for home use.

17. Regarding Claimant's continued use of medications, Dr. Fall opined that ongoing prescriptions for Lyrica were not "medically reasonable, necessary and related to the work related injury". According to Dr. Fall, Claimant had no radiculopathy and her pins & needles paresthesia's were "nonphysiologic". She surmised that Claimant's persistent symptoms were more likely related to fibromyalgia and/or diabetes for which the Lyrica was "helping". Consequently, she opined that any continued prescriptions for Lyrica should be obtained outside the workers compensation system.

18. Dr. Fall also indicated that there was no medical indication for the gel, as Claimant did not have an ongoing inflammatory condition. She also noted that the area of application was "too widespread to be efficacious". Claimant reported relief with the usage of the gel and Dr. Sparr apparently felt it appropriate for Claimant to continue it based upon the content of his medical records.

19. With regard to continued use of Cyclobenzaprine, Dr. Fall opined that Claimant could resort to taking it "rarely" on an as-needed basis.

20. Claimant underwent a second IME with Dr. Timothy Hall, at the request of her counsel, on July 26, 2018. Claimant reported to Dr. Hall that the Lyrica had been very helpful in taking away the burning pain and pins & needles sensations that she experiences in her hips and back and allows her to be more functional. Without the Lyrica. Claimant reported that her pain is "distracting to the point of making work activities difficult". Dr. Hall opined that Claimant's usage of the Lyrica was reasonable, necessary, and related to the work incident. He explained that the fact that Claimant does not have a radiculopathy is not a "reasonable rationale for discontinuing the Lyrica in the context of the work injury" because Lyrica is not only used to treat radicular pain/symptoms, but also chronic myofascial and neuropathic pain which describes the presentation and quality of Claimant's pain/symptoms. Since the Lyrica has been used safely to prevent a deterioration in Claimant's function and allows her to be more active, Dr. Hall concluded that it should be provided as maintenance care in the context of her work-related injury. Dr. Hall did not address Claimant's use of Cyclobenzaprine or Diclofenac gel.

21. Dr. Fall testified that she disagreed with Dr. Hall's opinion concerning Claimant's continued use of Lyrica under the auspices of the workers' compensation system. She testified that Claimant does not have neuropathic pain caused by her work related injury as demonstrated by her "normal" EMG findings and lack of a diagnostic/therapeutic response to a cortisone injection. Rather, she testified that Claimant's ongoing neuropathic like pain and paresthesia's are emanating from the progression of Claimant's untreated diabetes and/or undiagnosed fibromyalgia. During cross examination, Dr. Fall admitted that she was not aware of any record/report providing a diagnosis of diabetic neuropathy. Moreover, she did not undertake any physical testing to assist in confirming whether Claimant may have fibromyalgia, testifying only that Claimant's widespread pain maybe suggestive of the diagnosis since some of Claimant's complaints and symptoms did not correlate with nerve impingement from a back injury.

22. Dr. Fall testified that Claimant's use of Cyclobenzaprine at three times per day is above suggested practice given its tendency to produce heavy sedation as a principal side effect. According to Dr. Fall, continued use of Cyclobenzaprine at a rate of two times a day on an as needed basis to control Claimant's intermittent work-related back spasms is reasonable and necessary. The ALJ finds from the evidence that Dr. Sparr, as Claimant's ATP, is more familiar with Claimant's dosing needs than is Dr. Fall who evaluated Claimant on one occasion.

23. Dr. Fall testified that Diclofenac gel is typically used four times per day on small areas of tendonitis or localized inflammation. According to Dr. Fall, Claimant's current use of Diclofenac gel is not reasonable, necessary or related to her industrial injury as it is being applied incorrectly to a generalized area of the body too large to be efficacious and for a non-inflammatory condition.

24. The ALJ credits the testimony of Claimant, the content of the medical records and the opinions of Dr. Hall to find that her continued symptoms are probably emanating from her May 28, 2016 industrial injury. The evidence presented persuades the ALJ that Claimant's use of Lyrica and Cyclobenzaprine are, to a reasonable degree of medical probability, improving her function and preventing deterioration of her condition. Dr. Fall's opinion that Claimant's ongoing burning pain and paresthesia's maybe related to untreated diabetes and/or undiagnosed fibromyalgia is speculative and unpersuasive. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence presented, that she is entitled to ongoing maintenance medical treatment in the form of ongoing prescriptions for Lyrica and Cyclobenzaprine. The dosage and frequency of these medications is left to the sound judgment of Claimant's ATP, Dr. Sparr.

25. While the ALJ is convinced that Claimant's continued use of Lyrica and Cyclobenzaprine, on a maintenance basis, is reasonable, necessary and related to her 2016 industrial injury, the evidence presented persuades the ALJ that the continued use of Diclofenac gel is not. Dr. Fall credibly testified that any benefit Claimant received from the Diclofenac gel was psychological or the result of the gentle massage

associated with the application of the medication, given that the medication would not be effective when spread over the area described as the application site by Claimant. As presented, the evidence establishes that Diclofenac gel is effective for localized, ongoing inflammation, which Claimant is not experiencing per the credible and unrebutted testimony of Dr. Fall. Indeed, Claimant's ongoing symptoms appear to be neuropathically driven rather than inflammatory in nature. Accordingly, Claimant has failed to prove an ongoing need for Diclofenac gel.

26. The evidence presented also persuades the ALJ that the remainder of Dr. Fall's maintenance treatment recommendations are reasonable, necessary and related to the May 2016 industrial injury. The ALJ is not convinced that these modalities should take the place of Claimant's prescriptions for Lyrica and Cyclobenzaprine. Rather, the ALJ finds that a gym membership and a TENS unit for home use should be used to augment the medication regimen currently being prescribed in an effort to reduce Claimant's ongoing dependence on medication.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential*

Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). Based upon the totality of the evidence presented, the ALJ concludes that Claimant is credible. He testimony is supported by the content of the medical reports and the opinions of Dr. Hall.

D. A claimant's need for medical treatment may extend beyond the point of maximum medical improvement where he/she requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*."

E. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the ALJ concludes that Claimant has met her burden to establish entitlement to ongoing prescriptions for Lyrica and Cyclobenzaprine. The ALJ is convinced that these medications continue to cure and relieve Claimant from the ongoing effects of her industrial injuries, specifically the neuropathic type pain and paresthesia's along with the muscle spasms she experiences in her back, hips and leg. Dr. Fall's opinion that Claimant's current symptoms are related to untreated diabetes and/or undiagnosed fibromyalgia are not convincing. Moreover, and importantly these medications are, by the evidence generated, preventing deterioration of Claimant's condition and allowing for greater functionality. Without these ongoing medications, the ALJ concludes that Claimant's present condition will likely deteriorate and she will lose her improved level of independence. The ALJ also concludes that the gym membership with a pool and the TENS unit for home purchase/use, as recommended by Dr. Fall, are reasonable, necessary and related adjuncts to Claimant's ongoing prescription medications. However, the evidence presented fails to establish that Claimant's continued use of Diclofenac gel is reasonable or related to her 2016 work injury. To the contrary, the weight of the

persuasive evidence persuades the ALJ that Diclofenac gel is used appropriately for localized inflammation whereas Claimant is currently applying it to a large area of great muscle mass to assist in control of neuropathic pain symptoms, including pressure and stabbing pain. Consequently, Respondents are not obligated to provide and pay for this treatment.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that she is entitled to maintenance medical benefits, including ongoing prescriptions for Lyrica and Cyclobenzaprine. She has also proven by a preponderance of the evidence that she is entitled to a three-month gym membership at a gym with a pool and a TENS unit for home use to supplement the ongoing use of these prescriptions medications. Accordingly, Respondents are liable to provide and cover the costs of this treatment.

2. Claimant has failed to establish that her continued need for Diclofenac gel is reasonable, necessary or related to her May 28, 2016 industrial injury. Consequently, Respondents are no longer liable to provide and pay for this prescription.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 30, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable work injury on September 14, 2017.

II. If Claimant established she sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence she is entitled to reasonable and necessary medical treatment related to the September 14, 2017 industrial injury.

III. Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 32 year old woman who worked for Employer as a customer service agent. Claimant's job duties included working self-ticketing kiosks, checking identification, and putting luggage on the conveyor belt. Claimant's position required the ability to lift and/or move items up to 70 pounds on a regular basis and repetitively lift and/or move weights of 40 to 50 pounds onto raised surfaces. Claimant testified her job required lifting bags four hours per day.

2. Claimant's pay records reflect Claimant earned an hourly wage of $13.97. Claimant testified she worked 40 hours per week.

3. Claimant has a pre-existing history of neck, back and shoulder problems dating back to 2011. An April 1, 2011 medical record notes complaints of constant left-sided pain. November 2013 records note bilateral cervical paraspinal muscle tightness, left-side body aches, and mid-back and trapezius muscle spasms. Claimant was prescribed cyclobenzaprine and tramadol.

4. On August 20, 2015, Claimant complained to Edward Parks, MD of right and left side pain that began approximately two years prior, radiating from her shoulder to her ankle with distal symptoms in the upper extremity. Dr. Parks' impression was bilateral leg pain. He remarked, "This is an interesting case. I cannot really say that there is an orthopedic explanation for her symptoms." Dr. Parks recommended Claimant undergo a neurologic workup and/or an examination with a rheumatologist for the treatment of fibromyalgia. Claimant testified she did not follow up with a rheumatologist or have a neurologic workup as recommended by Dr. Parks.

5. Claimant underwent physical therapy and chiropractic treatment. On February 10, 2016, Claimant complained of cervical spine pain, generalized in the left upper shoulder, posterior left cervical area and let medial upper thoracic region, and neck pain worse with repetitive movements. On April 14, 2016, Claimant reported to Tamara

Lynne Wristen, PA-C upper back pain from stress/tension. PA-C Wristen assessed Claimant with trapezius muscle spasm.

6. On July 29, 2017, Claimant complained to Grant Johnson, DC of low back and hip pain, neck pain, and right-hand weakness. Claimant's neck pain was on the right side. Dr. Johnson assessed, in part, cervicalgia, cervical segmental and somatic dysfunction, postural kyphosis cervicothoracic region, and muscle spasm of the neck.

7. Claimant regularly attended physical therapy at Denver Back Pain Specialists in 2017. The records mostly reflect complaints of lumbar pain and lumbar radiculopathy. However, on July 31, 2017, Claimant saw Amy Valenta, PT and complained of pain in her bilateral shoulder blades and weakness in the right upper extremity. Claimant reported that her symptoms began approximately three to four weeks prior and associated the symptoms with her new job for Employer. Claimant denied neck pain. PT Valenta's assessment was cervicalgia, radiculopathy of the cervical region, and pain in the thoracic spine.

8. Claimant alleges she sustained an industrial injury on September 14, 2017 while lifting and putting a bag on a conveyor belt. Claimant testified she immediately felt a sharp, severe, shooting pain then experienced irritation, swelling, tension and discomfort. Claimant did not report the alleged injury to Employer at the time and continued working her scheduled shifts. Claimant did not report the alleged injury to Employer until approximately one week later. Claimant testified she did not report the alleged injury to Employer sooner because she thought her symptoms would resolve. Claimant had been performing her regular job duties for approximately four or five days at the time of the alleged injury.

9. Claimant presented to authorized treating physician ("ATP") Braden Reiter, DO on September 21, 2017. Dr. Reiter noted the following regarding the mechanism of injury: "Patient states that on 9/14/2017 she works 6 hours throwing bags on the conveyor belts and started getting aching and pain through the left shoulder arm radiating up into the left neck this gradually got worse as the night went on." Claimant reported getting occasional shooting pain through her upper back, but denied any previous left shoulder and neck pain. On exam, Dr. Reiter noted left shoulder tenderness radiating to the left cervical paraspinal muscles, and decreased shoulder and cervical range of motion. He diagnosed Claimant with work-related left shoulder and cervical strains, placed Claimant on restricted duty of no lifting/pushing/pulling over 15 pounds, and referred Claimant for physical therapy and massage therapy.

10. At an October 3, 2017 physical therapy appointment, Claimant reported that her condition began "At work throwing bags longer than the 4hr time." The physical therapist noted decreased active range of motion, tenderness, and muscle spasms. An October 3, 2017 chiropractic note indicates Claimant reported injuring her left shoulder lifting 50 pound bags. The chiropractor noted reduced range of motion, hypertonicity, adhesions and trigger points in the neck and shoulders on the left.

11. On October 23, 2017, Claimant returned to Denver Back Pain Specialists with left shoulder and left upper extremity pain she alleged began on September 14, 2017. PT Valenta wrote, "She notes that she had been lifting bags incorrectly since she started working there but on the 14th she felt like everything flared to a level that she could not tolerate."

12. On October 26, 2017, Claimant presented to Steven Kolpak, MD at Denver Health. He noted Claimant was hurt lifting bags at work, "throwing bag on belt." His assessment was a left shoulder strain.

13. On October 31, 2017, Dr. Reiter increased Claimant's work restrictions to 25 pounds. Claimant continued to report left shoulder and cervical pain with some improvement.

14. On December 11, 2017, Felicia Doherty, PA at Denver Health released Claimant to work without restrictions.

15. On December 13, 2017, Claimant saw PT Valenta and complained of a huge increase in left shoulder pain after returning to work performing baggage duties.

16. On December 30, 2017, Claimant underwent a left shoulder MRI that revealed mild acromioclavicular joint arthritic changes and degenerative findings and tendinopathy without long head biceps tendinitis, dislocation or rupture. The MRI revealed an intact rotator cuff and no glenohumeral instability.

17. On January 10, 2018, PA Doherty assessed Claimant with chronic left shoulder pain and referred Claimant for an orthopedic evaluation.

18. On February 22, 2018, Claimant presented to Rose G. Christensen, PA-C under the supervision of Dr. Hatzidakis at Western Orthopedics. Regarding the mechanism of injury, Claimant reported feeling a severe pain in her shoulder when handling a medium-sized bag and doing a cross-body maneuver. PA-C Christensen noted Claimant initially thought it was an over-use injury. Claimant alleged her shoulder was 100% normal prior to the injury. Dr. Hatzidakis gave the following assessment: left shoulder strain with acromioclavicular joint strain and associated symptomatic arthrosis with possible labral tear versus capsular stretch injury with a possible thoracic outlet syndrome pathology. He noted imaging showed left-sided AC joint arthrosis with no fracture, subluxation, osteoarthritis, edema, or significant spurring. He recommended Claimant undergo a MRI with arthrogram and a workup for thoracic outlet syndrome ("TOS").

19. Claimant underwent the MRI post arthrogram on March 14, 2018. The MRI revealed mild acromioclavicular degenerative changes "with currently more conspicuous mild subchondral edema." Claimant's rotator cuff and biceps tendon were intact, and there was no evidence of a glenohumeral defect or labral tear.

20. On March 22, 2018, Claimant followed up with PA-C Christensen, who noted Claimant underwent an EMG that was negative, and that Claimant had also seen Dr. Stephen Annest, who did not suspect TOS. Claimant was assessed with a left shoulder strain with associated AC joint strain/pain with possible slight capsular stretch injury. PA-C Christensen administered a cortisone injection and recommended Claimant continue conservative care.

21. On March 1, 2018, Mark Failinger, MD performed an Independent Medical Evaluation ("IME") at the request of Respondents. Dr. Failinger reviewed medical records dating back 2003 and physically examined Claimant. Regarding the mechanism of injury, Claimant reported that her shift she lifted a particular bag, turned to throw the bag, and experienced a shooting pain. She reported to Dr. Failinger she had some soreness prior to the lifting the bag, but nothing significant. On exam, Dr. Failinger noted there was no involvement of Claimant's neck and no evidence of lesions. Dr. Failinger's impression was left periscapular subjective pain. He noted Claimant has a history of left-sided trapezial pain and discomfort, and ther symptoms appeared similar to discomfort noted in November 2013 and April 2016. Dr. Failinger further noted inconsistencies in the reported mechanism of injury, as Claimant did not report to Dr. Reiter a specific injurious event, and also denied to Dr. Reiter a previous history of left shoulder and neck pain. Dr. Failinger opined that Claimant had not been working the job for a long enough period of time to develop any cumulative trauma. Dr. Reiter noted he did not review Claimant's MRIs or EMG, but stated if the tests did not show objective evidence any specific pathology, Claimant was at maximum medical improvement with permanent restrictions.

22. On April 4, 2018, Claimant presented to Jonathan Bravman, MD at UC Health. He reviewed Claimant's MRI and diagnosed Claimant with anterior left shoulder pain consistent with biceps instability/tendonitis as well as distal clavicle osteolysis. Dr. Bravman recommended Claimant undergo a possible arthroscopic debridement, subacromial decompression, distal clavicle excision and biceps tenodesis.

23. On April 30, 2018, Claimant saw Martin Boublik, MD at UC Health. She denied having any previous problems with her left shoulder prior to September 14, 2017. Dr. Boublik reviewed imaging and noted mild AC joint arthropathy with type II acromion and no acute abnormalities. He gave the following impression: some left shoulder impingement, biceps tendinosis, and an element of acromioclavicular pain. He opined that Dr. Bravman's surgical recommendation was reasonable, but suggested in the alternative that Claimant undergo a further course of conservative treatment.

24. Dr. Failinger testified by pre-hearing deposition as a Level II accredited expert in orthopedic surgery. Dr. Failinger explained the December 30, 2017 and March 14, 2018 MRI findings. He testified the MRIs were normal, other than some early arthritic changes in the AC joint and a slight amount of fluid in the subacromial space. He testified neither MRI demonstrated evidence of an acute injury, and it was "highly, highly improbable" any pathology was caused by events in September 2017. Dr. Failinger testified he did not see a specific event noted in Claimant's medical records. Due to the

lack of injury, Dr. Failinger commented he would have been surprised if there was any pathology findings on the MRI. Dr. Failinger noted Claimant had similar pain symptomology before the alleged injury but did not see a reason or explanation for why the pain developed. Dr. Failinger testified Claimant had diffuse pain and, considering Claimant's examination with diffuse findings and fibromyalgia evaluation in 2015, there currently was no identifiable specific source of Claimant's pain and no pathology that an orthopedic surgeon could treat. Dr. Failinger testified there was no evidence Claimant had a specific injury on September 14, 2017. He pointed to Claimant's pain patterns, diffuse examination, nothing on examination that stood out as a specific pain generator, all of which were reinforced by a normal MRI and nerve study. Dr. Failinger diagnosed Claimant with pain without any identifiable injury that occurred.

25. Claimant acknowledged at hearing she had been treating for neck pain and spasms in the months leading up to the date of injury, and also had radiating pain on her left side for many years. She, however, described the pain as "sporadic" and "inconsistent," and testified she was previously able to go about her regular life and had no issues lifting bags or prior work restrictions. Claimant testified her current pain is more consistent and she can no longer participate in activities such as yoga. Claimant testified she informed her providers of her prior sciatic pain and radiating pain and denied a specific prior neck or shoulder injury. Claimant testified that, shortly before the alleged injury, she talked to her supervisor about working in the lobby instead of behind the counter. Claimant testified she did so because she wanted clarification on how long she was supposed to work behind the counter handling bags. Claimant testified she has been working as a cosmetologist since the alleged injury.

26. Kristina Trueworthy, Team Lead, testified that there is no set policy that provides employees perform one position for four hours. On the date at issue, Claimant was scheduled to be in the lobby for four hours assisting passengers.

27. The ALJ finds the testimony of Dr. Failinger, as supported by the medical records, more credible and persuasive than the testimony of Claimant.

28. Claimant failed to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused, aggravated, or accelerated by an injury arising out of and in the course of her employment with Employer.

29. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the

necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment

aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant failed to prove by a preponderance of the evidence she sustained a compensable injury on September 14, 2017. Claimant has a longstanding history of pre-existing neck and left shoulder problems. While such pre-existing condition does not, by itself, disqualify Claimant's claim, Claimant has not met her burden when considering the totality of the evidence. Claimant's MRIs revealed arthritic and degenerative changes with no acute injury. Claimant initially reported a gradual onset of pain more consistent with cumulative trauma, then later alleged a specific incident causing a sudden and sharp onset of pain. Despite her testimony that the pain she experienced pain was immediate, sharp, shooting and severe, Claimant continued working and did not report the alleged injury until one week later. Dr. Failinger credibly opined Claimant's symptomatology was similar to pain patterns Claimant had prior to the work incident. The ALJ is persuaded Claimant's current symptoms are a continuing manifestation of longstanding problems and, while Claimant may have experienced pain at work, there is insufficient credible and persuasive evidence establishing a causal nexus between Claimant's current condition and the alleged work injury.

As Claimant failed to prove she sustained a compensable injury, the remaining issues are moot.

ORDER

It is therefore ordered that:

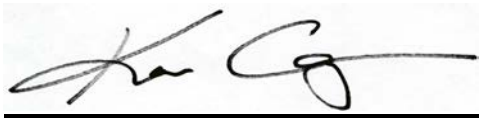
1. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 29, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable injury to her right knee on or about November 18, 2015?

II. If compensable, has Claimant shown, by a preponderance of the evidence, that the right knee arthroplasty and related treatment from Dr. Duffey was reasonable, necessary, and related to her work injury?

STIPULATIONS

The parties have agreed that if the injury is held compensable, Respondents would pay for all emergency room treatment which occurred on November 19, 2015.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 68-year-old female who worked for Employer as a caregiver for her elderly mother. Claimant began working for Employer in 2011, and was responsible for daily living needs 24 hours a day-seven days a week. Claimant's duties included cooking, feeding, shopping, bedside care of the patient, including lifting. Claimant testified at hearing that her mother is about 5' 3", and weighs about 230 lb.

2. On November 19, 2015, Claimant testified that she was pulling the patient out of her bed, so she could transfer her to the wheelchair. Claimant reported she felt pain in her right knee and it locked up on her. Claimant was taken to the emergency room by her husband and given pain medications. Claimant testified she went to the ER around 11:00 a.m. that morning to seek medical treatment.

3. On November 19, 2015, medical records show that Claimant was seen at the Parkview Medical Center Emergency Room. The report indicates claimant reported she noticed pain around 11a.m. when she was walking and that she denied any twisting or popping sound. Claimant indicated in the triage notes she was walking this morning and got a pain in the right knee and behind the knee, denies injury, and complained of persistent pain. (Ex. N, pp. 33-34).

4. X rays from this visit to Parkview showed the following under FINDINGS:

> There is medial and patellofemoral joint space narrowing with small osteophytes in all three compartments. There is diffuse osteopenia. There is no evidence of fracture or dislocation. There is mild

> anterior superficial *soft tissue swelling*. There is a mild joint *effusion.* (Ex. 3, p. 43) (emphasis added).

5. Claimant was told to see an orthopedist and she went to Dr. James Duffey with Premier Orthopedics for further evaluation. The ER note indicates Claimant was admitted at 15:17 hours. (Ex. N, p. 33)

6. On December 29, 2015, a MRI was conducted on Claimant's right knee. It revealed a subtle nondisplaced *stress fracture* of the medial tibial plateau, severe patellofemoral and moderate medial compartmental osteoarthritis and a *large joint effusion*. There was patellar tendinosis and intrasubstance signal within the posterior horn of the medial meniscus but not a tear. (Ex. 3, p. 14) (emphasis added).

7. Claimant apparently continued to work for the employer until she had her right knee surgery. In a note from her orthopedist, Dr. James Duffey, dated Dec. 10, 2015, under Subjective, it notes: "Barbara has developed insidious onset of right knee pain. It is *extremely painful* when she is weightbearing in certain degrees of flexion. *She is taking to using a walker because of the pain.* Anti-Inflammatories have failed to give her significant or lasting relief. (Ex. P, p. 57) (emphasis added).

8. On January 27, 2016, Claimant returned to Dr. Duffey. Conservative measures had failed. Under PLAN, Dr. Duffey noted:

> Barbara's greatest disability is from her knee pain at this point. It is quite severe and not responsive even to ibuprofen or hydrocodone. She is *going to use a walker* around the house. Physical therapy was discussed, but *she will not be able to tolerate therapy* because of the severe pain. *She is a candidate for a total knee arthroplasty* and would recommend that we *proceed promptly,* as I do not feel we are going to be able to control symptoms adequately until we proceed with this option. (Ex P, p. 55) (emphasis added).

9. On February 8, 2016, Claimant underwent a right knee total arthroplasty performed by Dr. Duffey with Premier Orthopedics. Primary diagnosis was osteoarthritis of the right knee. (Ex. 2).

10. Claimant first reported to the injury to Employer on February 16, 2016. A First Report of Injury was then filed with the Division of Workers' Compensation. This report indicated Claimant was assisting the patient with making breakfast when she turned and her knee gave out. The report indicates the injury occurred on November 15, 2015. (Ex. A, p. 1). Claimant testified at hearing that she did not initially report the injury because she didn't think she would need surgery.

11. Respondents filed a Notice of Contest on February 24, 2016, to further investigate compensability of the knee since this was the first time they had any knowledge of an alleged work injury. (Ex. B).

12. Due to no activity on the claim by Claimant to further pursue her claim, Respondents filed a motion to close the claim for failure to prosecute on November 30, 2017. A Show Cause Order was issued on December 15, 2017 stating Claimant's claim would close unless an Application for Hearing was re-filed. (Ex. C, D). [The ALJ notes that Claimant's current attorney is fairly new to this case].

13. On April 27, 2016, Dr. Wallace Larson, a board-certified, Level II accredited physician and orthopedic surgeon, performed an Independent Medical Examination at the request of Respondents. Dr. Larson examined Claimant and performed a record review. He ultimately opined claimant's right knee condition was not work-related and that there was no medical evidence of an injury to Claimant's right knee. Dr. Larson further opined that Claimant's degenerative osteoarthritis is not related to any occupational exposure and if it were, it would be inconsistent with the Colorado Division of Labor Medical Treatment Guidelines. (Ex. J, pp. 20-24)

14. Dr. Larson testified at the hearing. He again opined that Claimant's condition was not work-related. Dr. Larson testified that Claimant's condition was degenerative in nature. Based on the Medical Treatment Guidelines under Rule 17, Exhibit 6, page 67, he opined that Claimant's condition would fall under aggravated osteoarthritis.

15. Dr. Larson testified that claimant's activities would not fall under that of intensive physical labor as defined in the guidelines. There was no occupational relationship between Claimant's activities and baseline condition. When asked during his direct examination, Dr. Larson testified:

> **A. And the Division of Labor Guidelines address a few things. One of them is under aggravation of osteoarthritis, its whether there is an injury that causes an aggravation. In this particular case, there was no injury. The patient was – became aware of the pain at the time of this incident, but there is really no description, either to me or the emergency room physicians, of actual trauma. But even assuming, which probably isn't really the case, even assuming there was some trauma, the Division of Labor Guidelines said there should be a time frame of two years from the time of an injury until the development of osteoarthritis to be considered an aggravation. So these two factors, there was no injury and there was no two-year time frame. So I think pretty clearly under that section of the Medical Treatment Guidelines, this would not be considered work-related.** (HR. Tr. Pg. 43 ll 7-24)

16. Dr. Larson also testified that Claimant's weight could be contributing to her knee condition and symptoms she was experiencing in her knee which was indicated by the Treatment Guidelines. Dr. Larson also testified that the knee pain Claimant was experiencing could have occurred anywhere. The fact Claimant may have noticed it at work does not mean it rises to the level of a work-related injury.

17. Claimant had an incident involving her left knee on December 1, 2015. Claimant was seen at Centura Health Systems where she reported she was in her garage and had a sudden onset of acute pain in her left knee. Claimant reported she was not doing anything unusual. Claimant reported no prior knee problems. (Ex. S, pp. 103-105). Claimant testified at hearing that she was carrying something and fell down on that particular day. Claimant testified at hearing that she has not had medical issues in the past with her *right* knee until this incident.

18. Dr. Larson testified that Claimant would have required surgery regardless of the alleged incident on November 19, 2015, and her work activities did not accelerate or facilitate her need for surgery. Dr. Larson emphasized that Claimant was at high risk for osteoarthritis, due to gender, age, and BMI. He did not feel that Claimant had the sort of occupational hazards of repeat, heavy lifting which would lend itself to developing her condition due to her work. However, he was unable to articulate any evidence from the record that Claimant had corresponding issues with her *left knee.*

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

E. The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

F. Claimant is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that her symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

G. In this case, the ALJ finds that Claimant has met her burden. Further, the ALJ does not interpret the applicability of the Medical Treatment Guidelines ("Guidelines") the same as Dr. Larson. Specifically, the pertinent section of the Guidelines, Rule 17, Exhibit 6, (E)(2)(a)(iii) reads:

> Other causative factors to consider - Previous meniscus or ACL damage may predispose a joint to degenerative changes. There is strong evidence that an ACL injury increased the ten-year risk of developing Kellgren-Lawrence defined osteoarthritic changes compared to the uninjured knee. This risk is approximately fourfold both for minimal OA and for moderate to severe OA. There is good evidence that meniscal damage, even in the absence of knee surgery, is associated with a

> significantly increased risk of development of radiographic tibiofemoral OA within 30 months of its detection on MRI. There is strong evidence for previous knee injury as a significant risk factor for OA. A number of studies indicate that patients with ACL injuries and meniscus pathology are likely to develop degenerative osteoarthritis. Percentages range from approximately 25% to 50%. It is unclear whether the repair of ACLs significantly decreases the degenerative pathology. One study found more severe arthritis present in those with an ACL repair. *In order to entertain previous trauma as a cause, the patient should have medical documentation of the following: menisectomy; hemarthrosis at the time of the original injury; or evidence of MRI or arthroscopic meniscus or ACL damage.* ***The prior injury should have been at least 2 years from the presentation for the new complaints. In addition, there should be a significant increase of pathology on the affected side in comparison to the original imaging or operative reports and/or the opposite un-injured side or extremity***. (emphasis added).

In other words, this section of the Guidelines refers to the causation issue when there has already been a *prior injury* to the knee in question, thus triggering an analysis of whether any *osteoarthritis* occurring at least two years later *was caused by some earlier trauma.* Of course there was no traumatic change to her baseline. There is no baseline.

H. Herein, it is just the opposite. There is no two-year time frame to reference. Respondents argue today that there was *never a trauma* to the right knee, much less one occurring two years prior. *It's just a worn out knee, destined for replacement someday.* The ALJ concurs with this latter proposition-only. While Claimant had an end-stage osteoarthritic right knee, it became symptomatic as a result of the work incident which occurred in the course of Claimant's employment on November 19, 2015.

I. While the Claimant is not a particularly articulate historian, the ALJ finds her credible in describing what happened, what she did, and why she waited to report it. She felt immediate pain during the lift. So bad was the pain, she went right to the ER. The X Ray taken at the ER showed soft tissue swelling, and joint effusion. While the X Ray did not reveal any fractures that day, the MRI taken about a month later showed a stress fracture, and large effusion. Claimant remained in so much pain that she remained on a walker into December, and beyond, just to get around. During this period, Claimant was not sophisticated enough to understand the important distinction of a work injury versus a knee that just really started hurting.

J. Up until this incident, there is no evidence of significant injury, pain, or treatment to this right knee. And while the ALJ concurs with Dr. Larsen that this ticking time bomb could have gone off at any time, it didn't go off at just any time. It occurred while she was doing a heavy lift, and as a direct result of her job duties. That is when it became symptomatic. Thus, this was more than just the natural progression of her condition; it was an aggravation of her preexisting osteoarthritis. The ALJ finds her injury to be compensable.

Medical Benefits/Surgery by Dr. Duffey/Reasonable, Necessary and Related

K. A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

L. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993.

M. In this case, the ALJ finds that the arthroplasty performed by Dr. Duffey was reasonable and necessary. Dr. Duffey's plan dated January 27, 2016 is sufficient to establish the reasonableness and necessity. Even Dr. Larson concurs with this component. The ALJ further finds, by a preponderance of the evidence, that this surgery was related to her work injury.

Medical Benefits/Surgery by Dr. Duffey/Authorized Treatment Provider

N. Although compensable, all the medical treatment Claimant received was prior to the employer having any notice of a work-related injury. Respondents are allowed to designate an Authorized Treatment Provider under the Worker's Compensation Act. Here, Claimant did not even notify the employer of a potential work-related injury until after her surgery. Respondents were not given the opportunity to designate an ATP. Although they filed a Notice of Contest, Respondents were not given the opportunity to elect a provider. However, the ALJ has not been asked by the parties to issue a ruling on this issue, and declines to do so now, despite the facts found above.

Medical Benefits/Emergency Room Treatment on Date of Injury

O. The ALJ finds that, due to the emergent nature of Claimant's (*now held compensable*) injury, that it was reasonable and necessary to report straight to the emergency room for treatment. Assuming compensability were found, Respondents concede as much. The ALJ further finds, by a preponderance of the evidence, that this emergency room treatment was related to Claimant's work injury.

ORDER

It is therefore Ordered that:

1. Claimant's injury to her right knee on November 19, 2015 is compensable

2. Respondents will pay for all Emergency Room treatment rendered to Claimant on the date of her compensable injury.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 1, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUE

➢ Whether Claimant proved, by a preponderance of the evidence, that he suffered an indirect right-sided hernia, an indirect left-sided hernia, a direct right-sided hernia and an umbilical hernia, in the course and scope of his employment, with the Respondent Employer on August 29, 2017.

STIPULATIONS

At the time of hearing, the parties stipulated and agreed as follows:

- Claimant's average weekly wage is $319.44, with a corresponding benefit rate of $231.11.

- If the claim is compensable, the medical treatment provided by Concentra Medical Centers and its referrals is authorized, reasonable, necessary and related to the work injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 77-year-old man with an April 5, 1941 date of birth. Claimant was 76 years old on August 29, 2017.

2. In 2009, Claimant suffered a significant cardiac event. Claimant testified that following his heart attack, his treating cardiologist advised against lifting or strenuous activities due to cardiac-related issues.

3. Claimant's medical history includes benign prostatic hypertrophy and hiatal hernia.

4. On August 15, 2017, Claimant started working for Employer as a General Merchandise Associate. Claimant went through an orientation process in which he received training concerning Employer's policy requiring all work-related incidents or accidents to be reported to a salaried member of management. Claimant also received training on Employer's safety and security policies, including the policy requiring a "team lift" for lifts of more than 50 pounds.

5. On August 29, 2017, Claimant was working in the automotive department shelving three pallets of automobile batteries. Each pallet contained approximately twenty-five batteries, and each battery weighed between twenty-five and fifty pounds. The process of stocking the batteries took approximately one hour. After stocking the

batteries, Claimant felt "a slight pain" in his stomach and low back, which he attributed to sore muscles. Sometime the following month, Claimant was helping unload cat litter weighing approximately forty pounds from a truck and felt "the same pain" in the "left lower side of his stomach." He again attributed it to a "tweaked" muscle. Claimant described two additional incidents helping customers take one hundred-pound items off overhead shelves. Claimant experienced increased lower abdominal and scrotal pain after each lifting incident.

6. On November 7, 2017, Claimant presented to his personal care provider, Dr. Melissa Helms, complaining of lower left-sided abdominal pain that had been present for the past three months. Claimant was "wondering if it was a hernia." Claimant reported pain "mostly at night," worse when he bends over. He also complained of urinary leakage, with urinary frequency over the past six months. On physical exam, Dr. Helms diagnosed a small, fully reducible left inguinal hernia. Dr. Helms placed Claimant on lifting restrictions. The physical exam demonstrated no evidence of right-sided or umbilical hernias.

7. Claimant reported a work injury and requested medical treatment. Claimant selected Concentra Medical Centers to treat his diagnosed hernia.

8. Dr. Ted Villavicencio evaluated Claimant on November 14, 2017. Claimant gave Dr. Villavicencio a history of a gradual onset of pain in the left inguinal area. By history, lifting did not exacerbate his pain. Dr. Villavicencio Claimant with a left-sided inguinal hernia. Dr. Villavicencio did not document a right-sided or an umbilical hernia. Dr. Villavicencio referred Claimant to Dr. Weaver and restricted his work activities to no lifting in excess of ten pounds.

9. Employer offered Claimant modified employment within the physician-imposed restrictions, which Claimant accepted.

10. Dr. Villavicencio reevaluated Claimant on November 17, 2017. At this appointment, Claimant gave a past medical history of myocardial infarction, stent placement, with regular cardiac follow-up and no restrictions. Dr. Villavicencio also noted Claimant was tolerating working modified activity well. Claimant again complained of left-sided inguinal pain. Dr. Villavicencio again palpated and diagnosed only a left-sided inguinal hernia. Claimant remained on restricted work status.

11. Claimant treated with Dr. Villavicencio again on December 1, 2017. Claimant's pain complaints remained exclusively left-sided. The diagnosis remained left-sided inguinal hernia. Claimant's work status was modified duty "tolerating well." Claimant continued working restricted duty of no lifting in excess of ten pounds.

12. Claimant saw surgeon Dr. John Weaver for the first time on February 6, 2018. He noted Claimant had pain that had been present for six months and began with lifting at work. Dr. Weaver recommended a laparoscopic inguinal hernia repair.

13. Dr. Bryan Counts evaluated Claimant on January 8, 2018. Claimant's complaints continued to be of left-sided inguinal pain and scrotal pain. For the first time

Claimant's medical diagnosed an umbilical hernia, without obstruction and without gangrene. Dr. Counts noted that lifting did not exacerbate Claimant's complaints.

14. Dr. Villavicencio had Claimant complete a pain diagram in connection with his January 24, 2018, examination. Claimant marked only lower left-sided abdominal pain.

15. Claimant first complained of right-sided inguinal pain and "persistent" umbilical pain in his February 7, 2018, evaluation with Dr. Villavicencio. Claimant's February 7, 2018, pain diagram identifies bilateral lower abdominal pain. On February 28, 2018, Dr. Villavicencio imposed new work restrictions. Claimant was to work seven-hour shifts Monday, Tuesday, and Thursday, and four-hour shifts on Wednesday and Friday. Claimant was experiencing pain in his testicles, his lower stomach, and groin areas.

16. Dr. Weaver performed laparoscopic bilateral inguinal hernia repairs with ProGrip mesh placement on June 20, 2018. Dr. Weaver noted, "The patient had a small direct inguinal hernia and a fat-containing right indirect inguinal hernia. The patient also has a moderate sized left inguinal hernia." Dr. Weaver testified that he viewed the inguinal canal. Claimant had a small right direct hernia and a fatty component to an indirect inguinal hernia. On his left Claimant had a much larger fat containing indirect inguinal hernia. Dr. Weaver pulled the contents of the hernia out of the inguinal canal and placed mesh in the inguinal canals.

17. Dr. Weaver testified as an expert in general surgery and hernia repair. He has performed approximately 2,500 to 2,700 inguinal hernias in his career.

18. Dr. Weaver opined there is "absolutely" a causal relationship between lifting and inguinal hernias. With any type of lifting, one increases his intra-abdominal pressure, which puts more force on the inguinal canals, which causes the hernias to form. Dr. Weaver opined that lifting the car batteries probably caused Claimant's hernias.

19. Dr. Weaver opined lifting a number of automotive batteries, in and of itself, would be a significant enough strenuous event to cause inguinal hernias. Further, Claimant's subsequent lifting would have exacerbated the hernias and made them larger.

20. Dr. Weaver testified that Claimant's surgery was medically necessary. Small hernias cause no pain but become observable over time. Reasons to repair a hernia include ongoing and worsening pain, enlargement of the hernia, and incarceration of the hernia. Claimant's hernias required repair because his complaints and symptoms did not resolve. The repair was medically reasonable.

21. Dr. Cebrian is Level II accredited and testified by deposition for Respondents as an expert in occupational medicine. Dr. Cebrian is not a surgeon and does not repair hernias.

22. In his May 31, 2018, report, Dr. Cebrian outlined the risk factors for the development of direct hernias, indirect hernias and umbilical hernias. Dr. Cebrian opined it was not medically probable that Claimant's bilateral indirect inguinal hernias, direct right-sided hernia, and umbilical hernia related to his employment.

23. Dr. Cebrian testified that following Claimant's hernia diagnosis, his work activity was restricted. At that time, Claimant experienced only one area of pain - his left groin. Claimant underwent multiple subsequent examinations, and no provider identified an umbilical hernia or right-sided hernia for approximately five months. Claimant's work was restricted during that period. Dr. Cebrian opined there was no causative mechanism or exposure that would cause three additional hernias. Dr. Cebrian testified the development of four hernias suggested a systemic exposure caused the hernias.

24. Dr. Cebrian testified Claimant was not doing "clinically significant" lifting. "[Claimant] was doing a little bit of lifting, the lifting that he was doing was not significant." His lifting did not result in immediate pain complaints and it did not result in pain complaints in the three other areas where Claimant developed hernias. Claimant had pain complaints in only one specific area. Dr. Cebrian testified Claimant has other risk factors for developing hernias. These include (1) his age, which results in the weakening of the collagen in the abdominal wall, and (2) lower levels of testosterone, (3) his gender, (4) his prior hiatal hernia, (5) his history of straining to urinate, and (6) the development of four separate hernias.

25. Dr. Cebrian testified the recent medical literature indicates that single lifting events and forceful lifts do not cause hernias as once believed. The more recent literature talks about non-lifting, exposure-related incidents leading to inguinal hernias.

26. Dr. Weaver disagreed with Dr. Cebrian's statement that indirect hernias form if the internal inguinal ring does not seal properly. No evidence supports that all inguinal hernias are due to improper sealing of the ring, also known as patent process of vaginalis. The ring can seal properly and the patient can still develop an inguinal hernia.

27. Dr. Weaver opined that it would be unusual for congenital hernias to develop for the first time at age seventy-six.

28. Dr. Weaver disagreed with Dr. Cebrian that Claimant needed a "specific discomfort onset moment" for his hernias to relate to lifting. Dr. Weaver sees a variety of patients who do not develop pain until the evening of the day of lifting, or even within a couple of days.

29. Dr. Weaver testified that Claimant's lack of symptoms in his right groin and umbilicus when he first sought medical treatment are not significant to his causation analysis. Not all hernias cause pain. By the time Claimant saw Dr. Weaver, he did have bilateral complaints. That may have been due to Claimant's continued lifting at work, or the hernias may have just become symptomatic over time.

30. Dr. Weaver opined that increased abdominal pressure over time also causes umbilical hernias. Claimant's umbilical hernia was not symptomatic and Dr. Weaver did not repair it. Dr. Weaver explained that lifting or strenuous events cause both direct and indirect hernias. The presence of both types of hernias in Claimant did not affect Dr. Weaver's causation opinion.

31. The ALJ finds sufficient evidence to establish that it is more likely than not Claimant suffered bilateral indirect hernias, a right-sided direct hernia, and an umbilical hernia because of his work with Employer.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits, including medical benefits, by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000). Colorado's Workers' Compensation Act creates a distinction between the terms "accident" and "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." *See* §8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne,* 426 P.2 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury."

It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between his employment and his injuries. An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to causation. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ).

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the

weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part, or none, of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

As found, Claimant has proven, by a preponderance of the evidence, that his bilateral indirect inguinal hernias, right-sided direct hernia and umbilical hernia were caused by his work activities with Employer on August 29, 2017.

ORDER

It is therefore Ordered:

1. Claimant has established by a preponderance of the evidence that he has a compensable work injury of bilateral inguinal hernias and an umbilical hernia resulting from an August 24, 2017 work injury.

2. Respondents shall furnish authorized, reasonable, necessary, and related treatment, including reimbursement of the June 20, 2018 hernia repair surgery by Dr. Weaver.

3. Respondents shall compensate Claimant for temporary partial disability commencing February 28, 2018, until terminable by law.

DATED: October 30, 2018

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

STIPULATION

At the commencement of hearing, the parties stipulated that Claimant's average weekly wage, at the time of the alleged injury was $627.60, yielding a TTD rate of $412.22**.** The stipulation is approved.

REMAINING ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable left shoulder on September 21, 2017. The specific question to be answered in this regard is whether Claimant was in the course and scope of her employment or whether she engaged in a voluntary recreational activity at the time of her alleged injury.

II. If Claimant established that she suffered a compensable shoulder injury, whether she also established that she is entitled to all reasonable, necessary, and related medical treatment, including surgery to attend to her left shoulder injury.

III. Whether Respondents' established by a preponderance of the evidence that Claimant is responsible for her separation from employment thereby precluding her entitlement to TTD benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is Czech. Although English is her second language, she has completed a substantial amount of higher education in the United States involving English language courses. She received a bachelor of science degree in business administration and management from the University of Maryland University College in 2012, and a Master's degree in finance and financial management services from the same institution in 2017. Based upon the evidence presented, the ALJ finds that Claimant has excellent English language skills.

2. Claimant has a diverse work background having worked as a Logistics Officer in the Army of the Czech Republic, a payroll clerk for the Department of Defense/US Army and as a bookkeeping assistant for a roofing company before accepting a position with Employer as an Adaptive Reconditioning Program (ARP) Assistant.

3. Employer runs a federally funded project assisting soldiers injured in battle. As a ARP Assistant, Claimant was assigned to work with a Warrior Transition Unit

(WTU) at Fort Carson, Colorado to provide support for a recreational program designed to assist in the rehabilitation of these wounded soldiers.

4. Claimant was hired over the phone by Hannah Cowee, a Senior Program Manager for Employer's 14 Wounded Warrior Projects across the country. Claimant testified that she spoke with Ms. Cowee by phone regarding the position and after speaking with Ms. Cowee was aware that she would be Employer's only employee at the Fort Carson WTU. Ms. Cowee is stationed in Virginia and never had face to face contact with Claimant during the hiring process. In fact, Ms. Cowee and Claimant met for the first time at the hearing convened September 11, 2018.

5. Claimant testified that at the time she was hired she was not provided with a list of job duties and was unaware of her specific responsibilities. Ms. Cowee disputes this, testifying that when she and Claimant spoke telephonically, she explained both the scope of the work involved in the position as well as the required duties of the job. She also explained that she would serve as Claimant's supervisor. According to Ms. Cowee, Claimant's assigned work duties included working the phones, drafting memos and reports, arranging and facilitating meetings, assisting with event coordination and setting up and tearing down after adaptive sports activities. Ms. Cowee described Claimant's work duties as consisting of basic administration tasks which explained why her salary was relatively low.

6. Claimant began working for Employer on August 17, 2016.

7. Claimant testified that she understood Ms. Cowee to be her supervisor. She also testified that Ms. Cowee instructed her to take onsite direction from Mark Cattapan since she had no direct supervisor on site. According to Claimant, Mr. Cattapan was the site coordinator and was responsible for the Fort Carson reconditioning program. While he worked for another contractor and was technically not a supervisor, the ALJ understands from Claimant's testimony that she took direction from Mr. Cattapan since he was the site coordinator, she was without a direct onsite supervisor, she was hired as an assistant and was told to follow his lead. According to Claimant, Mr. Cattapan would often ask her to step up and fulfill the duties expected of his position when he was not available. Because she did not have a job description and was without an onsite supervisor, Claimant testified that she followed Mr. Cattapan's directives with the understanding that everything she was asked to do at the battalion level to benefit the soldiers was part of her job.

8. Claimant testified that from the beginning of her employment she participated in the activities that the wounded warriors were doing as part of their rehabilitation, both during working hours as part of her job and after working hours "for pleasure".

9. Claimant testified that she participated in therapeutic horseback riding, archery, air rifles, seated volleyball, wheelchair basketball, water polo, ping-pong among other adaptive reconditioning activities. According to Claimant, it was necessary to have a lead worker run and actively partake in the activity to supervise and guard the

soldier's safety. According to Claimant, she participated in at least five activities every week during her tenure with Employer.

10. Claimant testified that Exhibit 9 represented a sample of a monthly calendar of daily activities for the soldiers that she and Mark Cattapan prepared. She also testified that she provided some of these calendars to Ms. Cowee for review. Review of the calendars reflects that Claimant either acted as the point of contact (POC) for specific activities planned or the lead (L) worker running the activity. Claimant was identified as the leader of several activities in September 2017, including: Standing Volleyball, Horseback Riding, Hiking, and Walking & Outdoor ARP (Badminton & Frisbee Golf).

11. Claimant testified that Mark Cattapan assigned her to act as "lead" for horseback riding activities because he was not skilled in horseback riding, whereas she had familiarity and experience with it. Consequently, she accepted the lead position for this activity at his request. The programs therapeutic horseback riding activity was popular and generated heightened publicity for the WTU program. Claimant drafted a "Good News Story," essentially a one-page flier, regarding the activity which she forwarded to Ms. Cowee for review. The article is dated April 20, 2017. The article notes that therapeutic rides were conducted "bi-weekly" and contains a picture of Claimant on horseback. Claimant appears to be the only female in the picture and lists her name as a participant. Claimant testified that Ms. Cowee "absolutely" knew about her participation with the therapeutic riding activity because she shared the Good News Story with her.

12. Ms. Cowee acknowledged that she received the Good News Story, which she testified was sent to "command". The story did not get published nor was it sent to the Pentagon as suggested by Claimant. Ms. Cowee testified she did not pay attention to any of the captions adjacent to the pictures included with the article, because she was not interested in the name of the participants listed, only the story itself. Ms. Cowee testified further that even if she had paid attention to the pictures included with the article, she would not have known that Claimant's image was included because she had never met Claimant in person. She also testified that while she and Claimant were friends on Facebook, she would not have recognized her in the picture included with the article because her hair was different than the style she had in her Facebook postings.

13. On September 21, 2017, Claimant testified that she was asked, by Mark Cattapan to participate as a "caboose" to secure soldiers on a mountain bike ride, so she joined in to keep the soldiers safe during the activity. The activity involved riding bicycles around Fort Carson, but the riders also went through the gate onto a trail off base. Claimant was injured when she was thrown from her bike while traveling downhill on the aforementioned trail. Claimant flew off the bike landing directly on her left shoulder fracturing her collar bone.

14. Claimant notified Ms. Cowee of her injury later in the afternoon the same day of her accident. Ms. Cowee questioned why Claimant was participating in the biking activity since that was not part of her job. Claimant testified that this was the first time

she was told that she was not supposed to participate in the activities the soldiers were involved in.

15. In a series of text messages after reporting her injury, Claimant acknowledged that she "completely understood" that participating in physical activities was at her risk; however, indicated in another message that she did not know that she was not permitted to participate in physical activities as part of her job function.

16. Claimant summarized her testimony surrounding the events leading up to her left shoulder injury by affirming that she volunteered to be the leader at some events, but was asked, by Mr. Cattapan to either lead or participate in some activities, such as the therapeutic horseback rides and the September 21, 2017 biking activity where he requested that she be a "sweeper". Claimant also reiterated that she never felt the need to ask Ms. Cowee in advance for permission to lead events because "she told me to follow the lead/direction of the site coordinator", Mr. Cattapan. Finally, Claimant testified that she did not tell Ms. Cowee about her participation in the events because she assumed Ms. Cowee was aware of what she was doing in the program.

17. The evidence presented persuades the ALJ that Mr. Cattapan probably used Claimant for assistance to lead and/or participate in activities as necessary. Ms. Cowee has never spoken to Mr. Cattapan and he did not testify at hearing.

18. After reporting her injury, Respondent did not offer Claimant recourse to medical treatment, alleging that she had acted outside the scope of her employment. Consequently, Claimant sought care on her own. She was evaluated by orthopedic specialist, Dr. Paul Rahill on September 25, 2017. Dr. Rahill documented a history of a fall from a bike, noting that Claimant went over the handlebars "after striking a rock with her left front tire." X-rays were obtained which revealed a fracture in the "distal one third junctions of the middle third of the clavicle with significant displacement". Dr. Rahill opined that Claimant required urgent surgery which he performed. Based upon the evidence presented, the ALJ finds Claimant's medical treatment reasonable, necessary and related to her September 21, 2017 bike accident.

18. Ms. Cowee denied that she ever told Claimant that she was to take direction from the site coordinator. She testified that the onsite physical therapist was meant to be Claimant's direct contact/supervisor at the work site. According to Ms. Cowee, Claimant was to take direction from the therapist and work with the site coordinators as co-workers.

19. Claimant testified that a physical therapist was not hired and did not arrive on-site for months after she began her tenure with the WTU. She stressed that the team consisted of herself and one site coordinator (Mr. Cattapan) at first. A second site coordinator and a physical therapist were then added to the team later. Ms. Cowee confirmed this, echoing Claimant's testimony that there was no physical therapist present at the work site at the time of Claimant's hire. Ms. Cowee also testified that she did not know when the physical therapist eventually began working with the WTU. Nonetheless, Ms. Cowee testified that consistent with the government contracting

principal that “one contractor never reports to another contractor”, Claimant should have consulted her job description for direction rather than Mr. Cattapan in the absence of having a therapist to report to on-site.

20. The evidence presented persuades the ALJ that there was no therapist present at the work site for Claimant to report to when she began her employment with the WTU.

21. Ms. Cowee testified that she did occasionally receive calendars from Claimant. She also testified that the calendars were not something she needed. Based upon the evidence presented, the ALJ infers and finds that the calendars sent where not important to Ms. Cowee and she probably did not review them. This is especially likely when Ms. Cowee’s testimony that she was “absolutely” unaware that Claimant was asked to lead some of the recreational activities is considered as that information is clearly set forth on the sample calendar submitted for consideration. Contrary to Ms. Cowee’s assertion, the ALJ finds that Claimant was “open and obvious” regarding her participation in the events she coordinated as demonstrated by her attempts to let Ms. Cowee know what activities were scheduled, which activities she (Claimant) was leading and how successful they were as evidenced by the calendars and the Good News Story she forwarded to Ms. Cowee.

22. Ms. Cowee testified that the first time she knew that Claimant was actually participating in recreational activities was the day that she was advised of Claimant’s injury. She also testified that no one from Fort Carson ever advised her that Claimant was participating in recreational activities.

23. Based upon the evidence presented, the ALJ finds that had Ms. Cowee taken the time to review any of the materials sent to her by Claimant, she most probably would have understood that Claimant was leading specific adaptive sports activities either by volunteering for the assignment or being asked to assume the lead role by Mr. Cattapan.

24. The ALJ credits the testimony of Claimant to find that she was a poorly supervised employee who had little understanding of the job at hire and no direct onsite supervisor from whom to take direction when she reported for work. While discussions about Claimant’s job duties and her supervision were had, the ALJ is convinced that the conversations were probably so vague that they were insufficient to dissuade Claimant of a belief that she was to follow the lead of the onsite coordinator in the absence of having a physical therapist to report to. Under the circumstances presented, the ALJ finds Claimant’s actions in following the directives of Mr. Cattapan to lead and participate in a variety of activities reasonable. Indeed, the evidence presented persuades the ALJ that absent a full team, to include a physical therapist, Claimant’s actions were probably essential in furthering the stated mission of Employer.

25. Only after Claimant’s injury did Employer clarify that she was not authorized to participate in the program’s activities. By this date, Claimant had been participating in a substantial number of activities for months. She had sent Employer a Good News

Story about the therapeutic riding program which contained a picture of her with the indication that she was a participant. Moreover, she sent monthly calendars of the activities scheduled along with the indication that she was leading some of the activities. The evidence presented convinces the ALJ that by April 20, 2017, the date of the Good News Story, and probably sooner Employer had the information necessary to unequivocally advise Claimant that participation in the program's activities was outside the scope of her duties and she was not to join Mr. Cattapan or lead any activities herself. Yet, Employer failed to do so because Ms. Cowee did not "need" the calendars prepared by Claimant nor was she interested in knowing who was participating in the programs activities. Failure to review the aforementioned material constitutes a missed opportunity to take action to counsel Claimant that her participation was unauthorized and the failure to so advise reinforced Claimant's belief that her participation was sanctioned.

26. Based upon the evidence presented as a whole, the ALJ is persuaded that Claimant has proven by a preponderance of the evidence that her shoulder injury arose out of her participation in a work related function, namely while assisting with a therapeutic trail ride, which was sufficiently related to her duties as a ARP assistant so as to be considered part of her service to Employer. The evidence presented also persuades the ALJ that the injury occurred during the time and place limits of the employment relationship with the WTU. Contrary to Ms. Cowee's assertion, she did not issue a clear unambiguous directive that Claimant was never permitted to participate in the activities designed to assist with the wounded soldiers' rehabilitation. Accordingly, the ALJ finds the claimed injury compensable.

27. Claimant insisted that she had no interest in continuing her employment given the events that occurred after her injury. Consequently, she asked Ms. Cowee to terminate her; however, she asked that she not be separated for "bad cause".

28. In response to her request to be separated from employment, Employer sent Claimant a termination letter which indicated that she was being terminated for falsifying her timecards by engaging in recreational activities when her employer was led to believe she was working in her capacity as an administrative assistant. Ms. Cowee testified that a copy of the letter is not available because her computer "crashed", Employer got a new server and she lost some information, including the termination letter. Regardless, Claimant objected to the content of the letter and would not sign it because she did not believe that her participation in activities which she believed she was authorized to engage in supported the assertion that she was falsifying her timecards. Employer then sent Claimant a second, generic letter of separation which did not state the grounds for termination which Claimant signed ending her employment.

29. Claimant testified that she subsequently found the job description for her position on the internet which she downloaded and modified for purposes of publishing her resume on LinkedIn in an effort to secure a new job after her injury. Claimant started a new job on October 21, 2017, as the office manager and accountant for a private jewelry company.

30. Based upon the evidence presented, the ALJ finds that Claimant is responsible for her wage loss and her separation from employment with Employer. The evidence persuades the ALJ that Claimant effectively requested that she be separated from her employment because she was unhappy with Employer's handling of her injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Compensability

C. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

D. The phrases "arising out of" and "in the course of" are not synonymous and a

claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). As found, Claimant's alleged injury arose out of what the ALJ finds/concludes was a work related function, specifically assisting with a therapeutic trail ride. While Respondents seemingly concede that Claimant's injuries arose from her participation in the trail ride, they assert that Claimant was acting outside the sphere of her employment when she was injured because she violated an express employer directive not to participate in the WTU's program activities. Accordingly, Respondents argue that Claimant was outside the scope of her employment.

E. An employer may limit an employee's sphere of employment such that the employee is not acting within the course and scope of his employment if he/she violates the express limitations imposed by the employer. *Bill Lawley Ford v Miller,* 672 P.2d 1031 (Colo. App. 1983). Generally, an employer has a right to issue directives concerning what an employee may do, and when the employee may do it. *Id*. For purposes of determining the compensability of an injury, an employer's direction to an employee falls into one of two categories. *Id.* It may limit the sphere of the employment relationship, or it may simply regulate the employee's conduct while he/she is engaged in such employment. *Id.* A violation of a directive of the first type means that the employee is no longer within the sphere of employment, so that any injury occurring to the employee does not arise out of or in the course of his employment. *Id.* A violation of an order of the second type, while it may result in a reduced benefit under § 8–52–104, C.R.S. (1986 Repl. Vol. 3B), does not affect the compensability of an injury. *See Industrial Commission v. Funk,* 68 Colo. 467, 191 P. 125 (1920).

F. In order for an employer directive to remove conduct from the sphere of employment, it is necessary that the directive be clear and evidence an intent to remove conduct from the scope of employment. *Butland v. Industrial Claim Appeals Office*, 754 P.2d 422 (Colo. App. 1988). In this case, Respondents contend that Claimant took herself outside the sphere of employment because she violated her employer's directive not to participate in the programs rehabilitative activities and was injured as a result. The ALJ is not persuaded. Contrary to Respondents' assertion, the evidence presented does not support a conclusion that Claimant was issued a clear directive limiting the sphere of her employment to working the phones, drafting memos and reports, arranging and facilitating meetings, assisting with event coordination and setting up and tearing down after adaptive sports activities. While Ms. Cowee may have attempted to

communicate the policy regarding participation in the activities for the wounded warriors, the ALJ is convinced that the conversations were probably so vague that they failed to impress upon Claimant that she was not supposed to partake in or lead any such events. Respondents' assertion that Claimant's testimony is incredible because Ms. Cowee was available to her for any clarification of duties is unpersuasive. Ms. Cowee was not on the ground in Colorado. Rather, she was in Virginia available by phone only. Given the circumstances, including the scope of the WTU program and Claimant's lack of training/job knowledge, the ALJ finds/concludes that it is highly unlikely that Ms. Cowee, who the ALJ finds is charged with oversight for 14 different WTU programs, would have the time to make herself available by phone on a daily basis, perhaps multiple times a day, to address Claimant's concerns about her lack of supervision and answer questions about her specific duties. Indeed, Ms. Cowee did not feel it important to review any of the materials Claimant sent to her about the things she was doing in the job despite her assertion that she was Claimant's acting supervisor. More probably than not, Ms. Cowee, in an effort to allay Claimant's fears regarding her lack of having a direct supervisor on the ground in Colorado, her questions about specific job duties and the need to focus on her own duties generally told Claimant to follow the lead of Mr. Cattapan. Even if she was not to follow his lead, the evidence presented does not persuade the ALJ that Claimant was explicitly informed that she was never allowed to participate in the activities designed to assist in rehabilitation of the soldiers involved in the WTU. Consequently, the ALJ concludes that Claimant was in the course and scope of her employment when she injured her left shoulder after falling from her bike during a therapeutic ride designed to aid in the recovery of wounded veterans as part of the WTU's defined mission.

G. Alternatively, Respondents contend that the claim should be denied and dismissed because Claimant was engaged in a voluntary recreational activity at the time of her injury. Again, the ALJ is not persuaded. As noted above, to be compensable, an employee's injury must have been sustained while performing services arising out of and in the course of the employment at the time of the injury. Section 8-41-301(1)(b), C.R.S.; *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). Section 8-40-201 (8), C.R.S. 2017 excludes from the term 'employment' any "participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." In addition, § 8-40-301 (1), C.R.S. 2017 provides the term 'employee' will not cover a person "participating in recreational activity, who at such time is relieved of and is not performing any duties of employment, …" *See generally*, *McLachlan v. Center for Spinal Disorders*, W.C. No. 4-789-747 (July 2, 2010).

H. Together Sections 8-40-201(8) and 8-40-301(1) act "to remove participation in a voluntary recreational activity from the employment relationship." In *McLachlan*, the claimant voluntarily participated in a street hockey game organized by fellow employees during an employer sponsored retreat. When he hurt his shoulder playing, the injury was deemed not compensable because §§ 8-40-201(8) and 8-40-301(1) were construed to provide that participation in a recreational activity "presents the type of injury incurred during a deviation from employment so substantial as to remove it from the employment relationship …" In this case, Respondents assert

similarly that Claimant's participation in the trial ride during which she injured her shoulder was voluntary and the activity constituted a recreational pursuit, i.e. she was not performing any duties of employment when she was injured. Accordingly, Respondents argue that the claim should be denied. The common and ordinary meaning of the word "recreate" is "to give new life or freshness to." Webster's New Collegiate Dictionary, (1973). Thus, a "recreational activity" has been found to be "one which has a refreshing effect on either the mind or body." *Laurence White v. Denver School District #1*, W. C. No. 4-378-998 (September 16, 1999). Historically, an activity may be considered "recreational" for purposes of the Worker's Compensation Act even if the activity is also performed in the ordinary course of the claimant's regular duties. *Id*., *citing Dunavin v. Monarch Recreation Corp.*, 812 P.2d 719 (Colo. App. 1991) (off-duty ski instructor was engaged in "recreational activity" for purposes of § 8-40-301(1) while skiing on his free time). While the undersigned concludes that bike riding is "recreational" in nature, as are many of the activities that Claimant participated in during the ordinary course of her employment, the ALJ is cognizant that Claimant's motivation for participation is an important factor in determining whether Claimant's participation is voluntary. Indeed, the Courts have noted that it should not be understood that all participation in an activity which is "recreational" under an objective test necessarily mandates a denial of benefits. Rather, the Court of Appeals has noted that if the claimant's primary motivation for engaging in recreational activity is to satisfy the express or implied duties of employment the recreational activity would not be "voluntary" within the meaning of § 8-40-201(8). *See Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998) (where claimant's attendance at employer's Christmas party held at a bowling alley was not "voluntary" and resulting injuries were compensable). Consequently, performance of the activity would still constitute "employment" for purposes of § 8-41-301(1). Here, the totality of the evidence presented persuades the ALJ that Claimant's participation in the trial ride was to satisfy the express and/or implied duties of her employment as an ARP assistant and that her injury occurred during the time and place limits of the employment relationship during an activity connected with Claimant's job-related functions. Respondents contrary arguments, including the suggestion that Claimant's presence during the ride was not necessary because she had no medical training is unpersuasive. Claimant's presence was not requested to fulfill a medical role. Rather, her presence was requested to assure that the wounded warriors remained on task and everyone completed the ride safely. Based upon the evidence presented, the ALJ concludes that Claimant's left shoulder injury is compensable.

Medical Benefits

H. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve

the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her left shoulder. The evidence presented persuades the ALJ that this compensable "injury" is the proximate cause of Claimant's need for medical treatment, including her need for surgery.

Claimant's Separation from Employment & Entitlement to TTD

I. As Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply regarding her continued entitlement to TTD benefits. These identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if the claimant is responsible for his/her termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.,* W.C. No. 4-465-839 (ICAO February 13, 2002). Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo. App. 2000).

J. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008).

K. In this case, Claimant appears to argue that she was constructively discharged due to inconsistent and unrealistic performance standards, having conflicts with Employer over her supervision and Employer's failure to acknowledge the work relatedness of her injuries. "Constructive discharge" is established if an employee proves that the employer, by its illegal discriminatory acts, has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign. *Derr v. Gulf Oil Corp*., 796 F.2d 340, 344 (10th Cir. 1986). *Evenson v. Colorado Farm Bureau*, 879 P.2d 402 (Colo. App. 1993). The record evidence demonstrates

from the credible testimony that Claimant requested to be separated from her employment because she had no interest in working for Employer any longer. Considering the entire evidentiary record, the ALJ concludes that Claimant voluntarily terminated her employment in this case. Claimant exercised a degree of control over the circumstances resulting in her termination by volitionally choosing to sign the paperwork which would effectively terminate her employment. Indeed, she asked for such separation and Employer accommodated that request. The ALJ concludes that an any employee would reasonably expect such request to result in the loss of employment. Because her termination was not compelled by the natural consequence of the work injury, Claimant is "responsible" for her job separation. *Blair v. Art C. Klein Construction Inc., supra.; Longmont Toyota, Inc.*, *supra*.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her left shoulder on September 21, 2017.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation Medical Benefits Fee Schedule, to cure and relieve Claimant from the effects of her left shoulder injury, including, but not limited to the care provided by Dr. Paul Rahill, Practice Fusion, Pikes Peak Anesthesia and Centura Health.

3. Respondents have proven, by a preponderance of the evidence, that Claimant is responsible for her termination of employment.

4. All matters not determined herein are reserved for future determination.

DATED: October 26, 2018

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

and Exhibit E was admitted into evidence. Claimant's objection to Exhibit F for hearsay was overruled and Exhibit F was admitted into evidence.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable injury on November 8, 2017. If so, what are the consequences of the injury: *i.e.*, entitlement to medical benefits, average weekly wage (AWW), and temporary partial disability (TPD). By agreement, the parties withdrew issues concerning temporary total disability (TTD).

The Claimant bears the burden of proof on all issues by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Stipulated Findings

1. At the commencement of the hearing, the parties stipulated to an AWW of $408.74, if the case is determined to be compensable.

Preliminary Findings

2. The Claimant was born on September 21, 1971. She began working for the Employer as a laundry specialist in June 2017, and she worked until her resignation in late December 2017.

Compensability

3. The Claimant's job responsibilities entailed picking up dirty sheets from the Employer's storage unit and then going to a designated laundry facility to wash them. In this regard, the Employer mainly serviced Airbnb's.

4. Jackie Mitchell, a supervisor with the Employer, would send money to the Claimant, via smart phone application, to the Claimant's personal bank account. The Claimant would then go to her personal bank, withdraw the specific amount of money in cash, and then drive to the laundry facility to deposit the money on a laundry card. These transfers would happen weekly and for varying amounts depending on the amount of laundry needed to be done. Proof of these transactions was required to be photographed by the Claimant and sent to Mitchell.

5. Mitchell went on maternity leave from the Employer from November 1, 2017 to December 1, 2017. Megan Gonzalez took over Mitchell's supervisory

responsibilities while Mitchell was on maternity leave. Gonzalez claims that she left $100 in cash at the storage facility for the Claimant to load onto the laundry card. The Claimant denied knowing about the $100 and no one knows what happened to it. This could be an enduring mystery.

6. On November 8, 2018, the Claimant arrived at the Employer's storage facility around 6:45 AM. After picking up the dirty laundry, the Claimant claims that she forgot her debit card at her home and could not access her personal bank account without it, where money from Mitchell was left over. Gonzalez implies that there should not have been money left over. The Claimant then proceeded to drive to her home to pick up her debit card. After retrieving her debit card, she proceeded to her personal bank to withdraw the funds necessary to do the laundry. On the way to the bank from her home, the Claimant was in a car accident caused by another driver (hereinafter "Tortfeasor"). The Claimant sustained injuries from the accident but returned to work, full time, shortly after.

7. Around late December 2018, the Claimant voluntarily resigned from her job with Employer explaining, in text, that it was because of "car problems." Neither Mitchell nor Gonzalez testified that the Claimant had advised them that she resigned because she could no longer do the work. The Claimant testified that she resigned because she started having trouble doing the laundry work. In this regard, the ALJ finds Mitchell and Gonzalez more credible than the Claimant.

8. The Claimant found temporary full time work in early 2018, and is currently employed by the Salvation Army as a clothing sorter. She claims this is lighter work.

9. From Nov 2017 to March 2018, the Tortfeasor's insurance paid for the Claimant's medical bills, up to a cap of $25,000.

Medical

10. On November 8, 2017, the Claimant went to Lutheran Medical Center several hours after the accident. The Claimant informed the doctors that there of a family emergency and she departed before imaging was performed. The next day she went to the Denver Health emergency room (ER). Cervical and thoracic spine x-rays were performed. She was prescribed Flexeril and Ibuprofen. The Claimant later went back to Lutheran Medical Center's ER. Lutheran performed a CAT scan of her head and neck. She was discharged with Vailum and Norco. The Claimant was referred to Antero Medical Group for evaluation

11. From November 21, 2017 to March 7, 2018, the Claimant regularly saw physicians at Antero Medical Group for follow-up and physical evaluation.

12. In at least eight medical questionnaires, in response to the question: Is your condition **work-related** (emphasis supplied)?" The Claimant answered: "**No.**" In

her testimony, the Claimant offered no explanation for this inconsistency with her claim, nor did Respondents cross-examine her in this regard.

13. Claimant's Exhibit 4 is an Initial Medical Consultation report from Usama Ghazi, D.O., to Dr. Laura Graber, D.C., dated January 15, 2018. The second page of that report under "Occupational History," Dr. Ghazi writes "[t]he patient denies any history of work injuries" (Claimant's Exhibit.4, p. 5). While this may be one incident that does not undermine the Claimant's credibility by itself, the Claimant then repeatedly writes that **this is not a work related incident over several months on eight different health insurance claim forms** (emphasis supplied). In these eight health insurance claim forms, the Claimant indicates that her injury from the accident is not employment related. "Box 10" of these health insurance claim forms asks "Is Patient's Condition Related To" followed by three options: "Employment, Auto Accident, and Other Accident." Next to each of these options is a box to mark "yes" or "no." "Box 12" of these forms also provides a spot for "Patient's or Authorized Person's Signature." The Claimant's evidence provides eight of these health insurance claim forms in which "Box 10" is marked with a "no" next to "employment" and where "Box 12" indicates "signature on file" with relevant dates. Details of these health insurance claim forms are as follow:
:

- Lutheran Medical Center's Emergency Department's service for 11/8/2018, signed and dated 3/15/18 (Ex. 7 p.67).
- Forte Health, DII Central, signed and dated 12/15/2017 (Ex. 7 p. 71).
- Colorado Rehab and Occ Med, signed and dated 1/15/18 by the Claimant and 2/15/2018 by Dr. Usama Ghazi. (Ex. 7 p. 72)
- Forte Health, Antero Medical for $350, signed and dated 12/22/2017 (Ex. 7 p. 73)
- Forte Health, Antero Medical for $450, signed and dated 12/22/2017 (Ex. 7 p. 74)
- Forte Health, Antero Medical, signed and dated 12/15/2017 (Ex. 7 p. 75)
- Forte Health, Antero Medical, signed and dated 1/19/2018 (Ex. 7 p. 76)
- Forte Health, Antero Medical, signed and dated 1/15/2018 (Ex. 7 p. 77)

14. The Claimant's own evidence explains why she may seek worker's compensation months after the accident. Claimant's Exhibit 3 contains multiple reports from Antero Medical Group where the Claimant was a patient from November 2017 to March 2018. In the report dated March 6, 2018, it is listed that "patient returns to clinic reporting that she has changed her representation. She was recently informed that she cannot get into Colorado Pain Clinic for '2 or 4 years' due to her insurance (Tortfeasor's) status" (Claimant's Exhibit 3, p. 19). After this report from Antero Medical Group, the Claimant obtained representation from counsel to file a Workers' Compensation claim in April 2018. During the hearing, the Claimant testified that the tortfeasor's insurance would only pay for $25,000, however, the ALJ draws a plausible inference that the Claimant decided to pursue a worker's compensation claim several months after the car accident because the tortfeasor's limit of $25.000 on medical was reached or close to being reached,

Ultimate Findings

15. Based on the totality of the evidence, especially the Claimant's denials of work-relatedness to medical providers, the ALJ does not find the Claimant's claim of a work-related injury as a result of the auto accident on November 8, 2017 credible. Also, the fact that the Claimant worked at her regular job with the Employer and continued to do so until she voluntarily resigned for "car problems," with nothing in writing that she felt she could no longer perform her job duties, further undermines her credibility. The fact that the Claimant is presently working full time at a lesser wage, $10.20 an hour, and seeks TPD benefits based on 2/3 of the differential between her pre-injury wage of $12 an hour and the present $10.20 an hour, in and of itself does not lead to a plausible inference that would affect the credibility of the Claimant's compensability claim. It is the confluence of events that happened in 2018, which causes the ALJ to draw a plausible inference, along with the totality of the other evidence, that the Claimant's claim of work-relatedness is not credible: (1) the $25,000 limit on medical bills in the Tortfeasor's insurance was reached; (2) The Claimant's Worker's Claim for Compensation, dated April 5, 2018 was filed (the Claimant was working full time at a lesser wage at this time); (3) after the auto accident of November 8, 2017, the Claimant checked off "not work-related" at least eight times. The ALJ infers and finds that there are too many anomalies in the Claimant's version of events to render her version of compensable injuries credible.

16. On the other hand, the ALJ finds the testimony of Jackie Mitchell and Megan Gonzalez forthright and making sense. Indeed, their descriptions of the strange and apparently inefficient method of doing business tends to enhance their credibility. Their testimony, however, elevates the anomalies in the Claimant's version of events to a level of incredulity. Contrary to the Respondents' theory that this case is not compensable because the auto accident happened on a detour that took the Claimant outside the course of employment, the ALJ finds that the case turns on overall credibility and, as found herein above, the Claimant's claim is not credible.

17. For the reasons specified herein above, the ALJ finds that the Claimant has failed to prove that she suffered compensable injuries on November 8, 2017, arising out of the course and scope of her employment, thus, the Claimant has failed to sustain her burden of proof by a preponderance of the evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's claim is lacking in credibility on whether the November 8, 2018 incident amounted to a compensable event. The Claimant now claims the incident was work related and compensable injuries resulted there from, but the totality of the evidence shows that pursuing a workers' compensation claim was not her intention until recently.

b. The Claimant offers a theory positing that the incident was work related due to the awkward, yet consistent, business practice of withdrawing money from her personal bank while on company sent money, via a smart phone to the Claimant's bank account, after which the Claimant withdrew enough money from her account to add sufficient credits to the laundromat's laundry card. Even if the practice of driving from her home to the bank was within the course and scope of work, the Claimant's testimony and the credibility of the Claimant's claim is undercut by her own evidence.

c. As found, Claimant's Exhibit 4 is an Initial Medical Consultation report from Dr. Usama Ghazi, D.O., to Dr. Laura Graber, D.C., dated January 15, 2018. The second page of that report under "Occupational History," Dr. Ghazi writes "[t]he patient denies any history of work injuries." (Ex. 4 p. 5). While this may be one incident that does not undermine the Claimant's credibility in and of itself, the Claimant then repeatedly writes it is not a work related incident over several months on eight different health insurance claim forms. In these eight health insurance claim forms, the Claimant indicates that her injury from the accident is not employment related. "Box 10" of these health insurance claim forms asks "Is Patient's Conditioned Related To" followed by three options: Employment, Auto Accident, and Other Accident. Next to each of these options is a box to mark "yes" or "no." "Box 12" of these forms also provides a spot for "Patient's or Authorized Person's Signature." The Claimant's evidence provides eight of these health insurance claim forms in which "Box 10" is marked with a "no" next to "employment" and where "Box 12" indicates "signature on file" with relevant dates. Details of these health insurance claim forms are as follow:
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- Forte Health, Antero Medical, signed and dated 1/19/2018 (Ex. 7 p. 76)
- Forte Health, Antero Medical, signed and dated 1/15/2018 (Ex. 7 p. 77)

d. As found, the Claimant's own evidence explains that she sought worker's compensation benefits months after the auto accident. because the Tortfeasor's insurance cap of $25,000 on medical benefits either ran out or was about to run out. As further found, Claimant's Exhibit 3 contains multiple reports from Antero Medical Group where Claimant was a patient from November 2017 to March 2018. In the report dated March 6, 2018, it is stated that "patient returns to clinic reporting that she has changed her representation. She was recently informed that she cannot get into Colorado Pain Clinic for '2 or 4 years' due to her insurance status" (Claimant's Exhibit 3 p. 19). After the report from Antero Medical Group, the Claimant obtained representation from counsel to file a Workers' Compensation claim in April 2018. As found, during the hearing, the Claimant testified that the Tortfeasor's insurance would only pay for $25,000 of medical bills. the ALJ drew a plausible inference that the Claimant decided to purrsue a worker's compensation claim several months after the car accident.

Compensability

e. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo.

1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** A manner of conceptualizing the matter is, essentially, that a presumption of work-relatedness may arise when an unexplained injury occurs during the course of employment. However, it is incumbent to show that non-work related factors caused the injury. Nonetheless, proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, it was not credible that the Claimant's injury arose out of or occur within the course and scope of the Claimant's employment with Employer. Therefore, as found, the Claimant did no sustain compensable injuries on November 8, 2017, within the purview of workers' compensation coverage.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to meet her burden of proof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits arising out of theClaimant's accident on November 8, 2017, are hereby denied and dismissed.

DATED this 27 day of September 2018.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. 5-034-710

STIPULATIONS

- The parties stipulated to an average weekly wage of $1,651.14.

- The parties stipulate that, if the claim is found compensable, Claimant is entitled to temporary total disability benefits during the period from December 13, 2016, through March 27, 2017, and temporary partial disability benefits from March 28, 2017, through April 27, 2017.

ISSUES

- Did Claimant establish by a preponderance of the evidence that she sustained a mild Traumatic Brain Injury (TBI) that arose out of the course and scope of her employment with Employer and was causally related to an accident that occurred on or around October 2, 2016?

- If Claimant did establish compensability by a preponderance of the evidence, did Claimant establish an entitlement to medical benefits by a preponderance of the evidence?

FINDINGS OF FACT

1. On October 2, 2016, Claimant, who is currently 63 years old, was walking into the emergency room at the Employer to commence her work day as a pediatric Emergency Room nurse. Claimant was holding a box of toys when she tripped on the sidewalk of the ambulance bay and fell. Claimant testified that she struck the right side of her face.

2. Claimant did not seek any medical treatment on the date of accident and Claimant was able to work and perform her regular shift duties on October 2, 2016. Claimant testified that she informally consulted with a co-worker who was a resident in the ER about her alleged head injuries, but Claimant agrees that this was not a medical evaluation and that Employer does not condone informal medical assessments between co-workers.

3. Claimant reported the trip and fall incident to Employer's "Ouch line" on October 3, 2016. The "Ouch line" report indicates that Claimant reported a hematoma to the eyebrow and an elbow abrasion related to the fall. The report confirms that Claimant declined medical treatment. Claimant agreed that she did not necessitate any medical

treatment for her elbow or hematoma. The report does not indicate that Claimant was experiencing a headache or any other symptoms related to a TBI.

4. Claimant testified that after her trip and fall on October 2, 2016, she began to experience symptoms such as increased anger, having a slower reaction time, feeling dizzy, confused, dazed, that she had a hard time processing, she was distracted, had difficulties with communication, and she felt that she was letting down her co-workers. Claimant testified that her symptoms remained the same in the days and weeks after the alleged date of accident. Claimant denied that her symptoms worsened, changed, or improved in the days and weeks after the date of accident.

5. On November 9, 2016, Claimant had her annual performance evaluation at the Employer. Claimant testified that it was her worst performance review in the history of her career. Claimant testified that she believed that her poor evaluation at work was caused by the TBI that she sustained on October 2, 2016.

6. Claimant's performance evaluation dated November 9, 2016, indicates that Claimant was an "excellent RN" with a "great pediatric skill set." Claimant was counseled in her performance evaluation for having a:

> " . . . difficult time managing her assignment. She often tends to focus on other patients in the department when there are things needing to be done while there is a delay in orders on her patients. [Claimant] often tends to come across to her coworkers as negative. In huddles she often focuses on the negative aspects of things rather than looking for the positive. She is very vocal about these things and her attitude rubs off on other employees. [Claimant] makes snyde remarks to staff and does not communicate very well. [Claimant] seems to have a hard time keeping up with her tasks and will focus on things that aren't as important as other things to get done, is slow at triaging." *See Respondents' Exhibit OO.*

7. Although the performance evaluation was dated November 9, 2016, Claimant agreed that she had been made aware of the performance evaluation by at least November 2, 2016. Claimant agreed that her performance evaluation is based on her performance over a one-year period, yet Claimant maintained at hearing that all the negative aspects in her review were caused by her the accident that had occurred only one month prior to her review being finalized. Claimant was very upset with the negative 2016 review. Claimant testified that this was her first only negative review that she had ever received.

8. Claimant did not seek medical treatment for her alleged work related TBI injuries until December 13, 2016, almost 10 weeks after her date of accident. Claimant described at this evaluation with Dr. Sanders that she was experiencing excessive fatigue, sleepiness, memory problems, and that she felt slower at work. Claimant described to Dr. Sanders that she just recently undergone the worse evaluation that she had ever had in her career. Claimant testified that as of December 13, 2016, she was

experiencing headaches and had a difficult time managing her patient load. These complaints are not noted in Dr. Sanders' medical report. *Claimant's Exhibit 6.*

9. Claimant has a long of history of pre-existing anxiety, depression, and ADHD predating her date of accident. Claimant testified that she has been taking anti-depressants, Abilify and Effexor, since 2009 and has been taking Aderrall since 2009 for ADHD, and she has a script of Ambien for sleep medication. Claimant agreed that she has been taking medication to assist with problems with concentration and focus since 2005. Claimant has a history of migraines dating back to 2003. Claimant has been taking Topamax on a daily basis for headaches since 2003. Claimant has additionally been taking Imitrex for migraines as needed prior to October 2, 2016. Claimant alleges that her headaches have "changed" since her October 2, 2016, in terms of the location of the headache.

10. Claimant's psychiatric medical records date back to 2011. On August 10, 2011, Claimant consulted with Lisa McGloin, M.D. for a history of depression, which she reported had been going on for over 20 years. Claimant described a history of in-patient hospitalizations for possible suicidal ideations. Claimant additionally diagnosed a history of anxiety with "some spaciness/difficulty with word finding and sleep difficulties as well as decreased focus." *See Respondent's Exhibit E, p. 11*.

11. At an October 21, 2011 evaluation with Dr. McGloin, Claimant reported that she was feeling less anxious at work with an increased dose of Effexor. On May 9, 2012, Claimant was evaluated by Dr. McGloin and was seen for continued depression and difficulty with focus and concentration. At another appointment with Dr. McGloin on October 2, 2013, Claimant reported that she was feeling as though she "doesn't fit in at work."

12. On January 8, 2014, Claimant discussed with Dr. McGloin that she had experienced chest pain at work as a result of stress. At a May 20, 2015 evaluation with Dr. McGloin, Claimant reported that she was feeling stressed, tired, and unable to keep up at work. Dr. McGloin increased Claimant's dosage of Effexor and noted that Claimant should consider restarting Abilify. Claimant reported on her intake form that she felt nervous, anxious and on edge nearly every single day.

13. On September 8, 2015, Claimant reported to Dr. McGloin that she was scheduled to transition from nighttime work to daytime work based on a promotion. Claimant testified that when she worked day shifts for the Employer that she was in a managerial position. Claimant described to Dr. McGloin that she was interested in pursuing therapy in addition to psychiatric medication management.

14. On February 15, 2016, Claimant reported to Dr. McGloin regarding recent hallucinations that she had experienced including seeing things out of the corner of her eye, that she thought she heard someone calling her name in a public bathroom and she thought she heard music that was not there. Claimant reported that she had switched to

day shifts in mid-September and that her work was very stressful, that she was having difficulty getting along with coworkers and that she was feeling tired and exhausted.

15. The following month, Claimant reported to Dr. McGloin on March 16, 2016, that she was talking to her manager about her difficulties at work with getting support. Claimant completed a general anxiety disorder self-report where she noted that she was feeling "easily annoyed or irritable nearly every day especially at work."

16. At a May 9, 2016, evaluation with Dr. McGloin, Claimant reported that the previous month she had decided that she could no longer handle working the day shift in the charge nurse position secondary to "lack of support/respect" and in order to step down from the charge nurse position, Claimant was required to transition back to night shifts. Claimant reported to Dr. McGloin that she was experiencing fatigue, poor focus, depression, and that she was feeling stressed and overwhelmed. Claimant continued to report hallucinations including thinking that someone was calling her name when that was not actually happening. Dr. McGloin diagnosed Claimant with generalized anxiety disorder, social anxiety disorder, ADHD, major depressive disorder and insomnia.

17. When Claimant stepped down as the day shift charge nurse, she wanted to stay on the day shift, but her supervisor did not accommodate that request. Claimant was disappointed to be required to transition back to the night shift in the spring of 2016.

18. Claimant's medical records confirm that she qualified for the diagnosis of chronic migraine as of May 18, 2016. On June 10, 2016, Claimant emailed Dr. McGloin and reported that she had been seen for complaints related to dizziness on May 19, 2016. Claimant agreed that she sought medical treatment related to complaints of dizziness in May 2016, five months prior to the date of accident.

19. At a July 18, 2016, evaluation with Dr. McGloin, Claimant reported that returning to the night shift over the past couple of months had taken a toll on her, that she was feeling overwhelmed, having a hard time focusing, that she was having a difficult time prioritizing her work, that she felt she had many "piles" at work and home, that she felt unsupported and defeated in many areas, including at work and at home with relationships. Claimant continued to report that she felt as though her "brain is playing tricks on her" and she reported that she had thought she had seen a Dalmatian in the back of a truck and when she looked again there was no Dalmatian, that she continued to think that she heard her name being called when there was no one there.

20. Claimant agreed that she was having hallucinations in the months preceding the alleged date of accident and Claimant believed that these hallucinations were caused by stress at work and at home.

21. On September 20, 2016, Claimant was evaluated by Dr. McGloin, less than two weeks prior to the date of accident in this case. At this evaluation, Claimant continued to report a feeling of extreme hopelessness at work, feeling overwhelmed, that she felt

stuck, and that she had experienced such decreased energy, interest, motivation, and hopelessness that she had a moment of suicidal ideation at work. Claimant described that she was finding the EPIC system inefficient and difficult to use and was experiencing difficulty keeping up with her work-flow.

22. Claimant testified that the EPIC system was a new computer software program that was implemented at Employer in the spring of 2016 to manage medical record documentation. Claimant agreed that she had a difficult time learning the new EPIC software program. Claimant agreed that she felt she was falling behind at work in the months prior to the date of accident because of the transition to the EPIC system.

23. On May 19, 2016, Claimant was evaluated by Lori Kaufman, PA at Employer for complaints of chronic intractable headache and dizziness.

24. On November 2, 2016, one month after the alleged date of accident, Claimant returned to Dr. McGloin for a psychiatric evaluation. Claimant reported to Dr. McGloin that she was feeling "better than at last visit, depression improving. 'Less angry' at work, feels less stuck. Focus a little better." Claimant described that she had recently had a poor performance evaluation and that there were comments about her difficulty managing the high patient load and regarding her negativity on the job. Claimant expressed to her psychiatrist that she felt betrayed and unsupported at work.

25. The November 2, 2016, report from Dr. McGloin does not make any mention of Claimant's alleged work related accident, a possible head injury, and there is no discussion of any symptoms attributable to the accident. To the contrary, the November 2, 2016, report indicates that Claimant's psychiatric condition had improved since the month prior to the alleged date of accident. Claimant agreed at hearing that her concentration and focus in November 2016 had improved as compared to her ability to concentrate and focus in September 2016. The November 2, 2016, evaluation does not support Claimant's allegation that she had sustained a work related traumatic brain injury on October 2, 2016. The report further rebuts Claimant's allegation that she was suffering from post-concussive type symptoms in the days and weeks following October 2, 2016.

26. On November 15, 2016, Claimant underwent a mental health intake with Shannon Richardson, LCSW at Employer. Claimant testified that this was an extensive evaluation as it was an initial intake and the evaluation occurred pursuant to a referral from her personal psychiatrist, Dr. McGloin. Claimant was in the process of setting up a new counseling and therapeutic relationship with counselor Richardson. Counselor Richardson's lengthy report does not make any mention of Claimant's alleged October 2, 2016, traumatic brain injury. Claimant provided an extensive medical history to Counselor Richardson, including a history of her anxiety, excessive worry, that she felt as though she would start talking in a group and almost blackout, that she had been experiencing hallucinations, that her diagnosis of depression and ADHD dated back to 2003, that she had been hospitalized for suicidal ideation in 2009, and had treated with Dr. McGloin since 2011. Given this extensive medical history provided by Claimant at this medical

evaluation, it is significant that there is no mention in the intake history of Claimant's alleged traumatic brain injury stemming from an October 2, 2016, fall.

27. On December 2, 2016, Claimant was evaluated by another new personal provider, psychologist, Trina Seefeldt, Ph.D. Claimant again described a long history of depression, anxiety, ADHD, and complained of a depressed mood, sleep disturbance, feeling hopeless and helpless, and experiencing psychosocial stressors at work and at home. Claimant described to Dr. Seefeldt that she was struggling with relationships at work after changing from the day shift charge nurse position and returning to the night shift in the emergency room in May 2016. Claimant described that she wanted to attempt to resolve her workplace stressors. Claimant discussed that her husband had chronic health problems and was retired and that she was forced to continue working due to financial constraints. Again, there is no mention of Claimant's alleged traumatic brain injury or the fall of October 2, 2016.

28. At a March 6, 2017, evaluation with Dr. Seefeldt, Claimant reported that she was frustrated because she wanted to retire but was financially unable to afford to do so.

29. On March 9, 2017, Claimant underwent an independent medical evaluation with Dr. John Burris. Dr. Burris testified at the hearing regarding his evaluation of Claimant, his review of Claimant's medical records, and his opinion regarding the October 2, 2016, event at work. Dr. Burris opined to a reasonable degree of medical probability that he does not believe Claimant sustained a concussion, post-concussive syndrome, and/or traumatic brain injury as a result of the slip and fall on October 2, 2016.

30. Dr. Burris explained that the typical presentation for a TBI is for the symptoms to be at their worst in the immediate days and weeks following the accident. The majority of mild traumatic brain injuries resolve within a period of days and weeks. Claimant's medical records are not consistent with the typical presentation of a traumatic brain injury. Claimant's first medical evaluation with Dr. McGloin on November 2, 2016, following the October 2, 2016, date of accident, documents an improvement of symptomatology. Claimant reported that she was feeling less fatigued, less overwhelmed, having less anxiety, and did not report symptoms such as a headache or memory loss.

31. Claimant underwent a neuropsychological evaluation on January 25, 2018, with Jennifer Peraza, Psy.D. Dr. Peraza spent over 12 hours performing the evaluation and neurological workup of Claimant. Dr. Peraza's findings as a result of the neuropsychological evaluation were that Claimant did not demonstrate any cognitive deficits, which would normally be attributable to a traumatic brain injury or postconcussive syndrome. Dr. Peraza attributed any deficits noted during the evaluation to Claimant's preexisting diagnosis of ADHD and to Claimant's long-term preexisting use of Topamax for treatment of chronic migraines. Dr. Peraza further postured that Claimant likely had a learning disability and should undergo a comprehensive evaluation to assess for a learning disability. Dr. Peraza recommended additional psychotherapy for stress management and stress reduction techniques.

32. Dr. Burris testified that the neuropsychological evaluation supported his conclusion that Claimant did not suffer from a traumatic brain injury or post-concussive syndrome related to the October 2, 2016, slip and fall event. Claimant reported to Peraza at her evaluation that "her symptoms started gradually about 2-3 weeks after the fall." Claimant alleged that 2-3 weeks after the fall she began to experience "problems with distractibility, fatigue, slower thinking, and trouble remembering and completing tasks." Claimant's report of the temporal onset of her symptoms 2-3 weeks after her fall is not consistent with a typical presentation for a traumatic brain injury or post-concussive syndrome. It is not typical for symptoms to start 2-3 weeks after a traumatic event.

33. The Colorado Medical Treatment Guidelines support that TBI symptoms start immediately after a traumatic event and improve within a period of 2-3 weeks.

34. Claimant's further reports of symptoms related to feeling fatigued, having slower processing, difficulty completing tasks, and feeling distracted are all preexisting complaints that are well supported by Claimant's preexisting medical records with Dr. McGloin. Claimant has been reporting complaints related to fatigue, processing difficulties, and distractibility for years prior to her date of accident in this claim and Dr. McGloin's medical records document that these symptoms peaked at their worst in the two weeks prior to October 2, 2016. Dr. Burris further explained that all of Claimant's alleged TBI symptoms were symptoms that were attributable to her extensive prescription medication regimen that she has been utilizing for almost a decade. Dr. Burris agreed with Dr. Peraza's conclusion regarding the likely impact of Claimant's lengthy history of utilizing Topamax as causing memory deficits.

35. Claimant underwent an independent medical evaluation with Dr. Bennett Machanic at her own expense. Dr. Machanic testified that he did not have an opportunity to review any of Claimant's predate of accident medical records. Dr. Machanic had not reviewed any of the pre October 2, 2016, medical records from Dr. McGloin.

36. Dr. Machanic agreed that a typical presentation for traumatic brain injuries is that within the first 72 hours following the acute accident the patient will experience the worst onset of symptomatology. Dr. Machanic specifically agreed that Claimant's TBI symptoms should have been at their worst during the first week following the October 2, 2016, date of accident.

37. Dr. Machanic agreed that at best Claimant's findings are indicative of a "very mild traumatic brain injury." Dr. Machanic went on to agree that the symptoms related to the very mild traumatic brain injury were "spotty," but Dr. Machanic felt there were cognitive deficits that could not otherwise be explained. When confronted with Dr. Peraza's conclusion that the cognitive deficits could be related to an undiagnosed learning disability, Dr. Machanic disagreed, but was unable to provide the medical basis for his disagreement, conceding that he has little to no experience with learning disabilities. Dr. Machanic agreed that he did defer to Dr. Peraza's interpretation of the neuropsychological data compiled during the neuropsychological testing. Dr. Machanic

agreed that the prescription for Topamax that Claimant had been utilizing for more than 10 years could have caused at least some of the memory deficits noted during the neuropsychological evaluation.

38. It is found that Dr. Machanic's opinions are less credible and persuasive than the opinions expressed by Dr. Burris and reflected by the medical record. Dr. Machanic did not have the advantage of reviewing Claimant's medical records dating back to 2011. Dr. Machanic was unaware of Claimant's symptom complaints that long predated October 2, 2016, alleged TBI, including complaints related to fatigue, processing difficulties, feeling of being overwhelmed and disorganized, and forgetful. Although Dr. Machanic is a neurologist, he testified that he does not typically treat or manage TBIs. Dr. Burris testified that he is currently managing TBIs. Thus, Dr. Machanic's personal experience and credentials do not render him better suited to render an opinion on the alleged TBI diagnosis than Dr. Burris.

39. Claimant's testimony is not credible as it is not supported by the weight of the medical evidence. If Claimant had in fact sustained a TBI on October 2, 2016, it is probable that this would have been documented in either the November 2, 2016, report from Dr. McGloin, the November 15, 2016, report from Ms. Richardson, or the December 2, 2016, report from Dr. Seefeldt. All three of these evaluations addressed issues that are central to the symptoms that Claimant now associates as being caused by a TBI and as such the absence of documentation of the alleged TBI in these reports strongly weighs against Claimant's credibility.

40. Claimant's belief that her negative annual performance review was caused by her TBI is not credible. Claimant's performance review documents snyde comments and negativity, which are not symptoms associated with a TBI. Further, it is implausible to conclude that the negative review was based on one month of work performance as Claimant contends, rather than a year of performance, which is the nature of an annual review.

41. Dr. Burris' opinion that the course of medical treatment that Claimant underwent per the referral of the COSH clinic was not reasonable and necessary is credited. There is no indication that Dr. Sanders or any of the COSH providers were aware of Claimant's medical history and pre-date of loss complaints to Dr. McGloin or that these providers considered the temporal history of Claimant's alleged TBI presentation.

CONCLUSIONS OF LAW

1. The purpose of the Act, Section 8-40-101, C.R.S. *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably

true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. A "compensable industrial accident is one which results in an injury requiring medical treatment or causing disability." *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). It is undisputed that Claimant did not obtain medical treatment for almost ten weeks after the slip and fall on October 2, 2016, and that during this time period Claimant continued to work and perform her regular work duties. Claimant has failed to establish by a preponderance of the evidence that her October 2, 2016 injury caused an injury that required her to obtain medical treatment or caused a disability.

5. Claimant has failed to establish by a preponderance of the evidence that her industrial fall caused her to develop post-concussive syndrome or a mild TBI. The medical opinion of Dr. Burris is credited over the opinion of Dr. Machanic. Dr. Machanic rendered his opinions without the advantage of having reviewed the Claimant's pre-date of accident medical records. Claimant's pre-date of loss medical records document complaints that are identical to the post-accident complaints. Further, the temporal progression of Claimant's symptoms is not consistent with the typical presentation for a TBI in that Claimant's immediate presentation following the accident was better than her

presentation before the accident. Claimant's testimony is not credible and her allegation that her poor performance evaluation in November 2016 resulted from her TBI is not supported by the weight of the evidence.

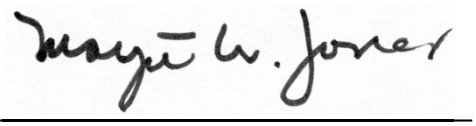
ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits for an October 2, 2016, date of accident is denied and dismissed.

2. Any issues not determined in this decision are reserved for future determination.

DATED: October 4, 2018



Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable injury to her left wrist and forearm, left ankle, an exacerbation of her temporomandibular joint ("TMJ") condition, and a left chest injury arising out of and in the course of her employment on September 10, 2017.

II. If compensable, whether the treatment requested by ATP Patrick D. Devanny for a left radial nerve decompression is related to the September 10, 2017 industrial injury and reasonably necessary to cure and relieve the Claimant of the effects of the injury.

III. If compensable, whether the Claimant demonstrated by a preponderance of the evidence that the treatment requested by ATP Michael Simpson of an arthroscopic debridement of Claimant's ankle, with an excision of the ossicle of her lateral malleolus and lateral ligament reconstruction to address instability, is related to the September 10, 2017 industrial injury and reasonably necessary to cure and relieve Claimant of the effects of the injury.

IV. If compensable, whether Claimant demonstrated by a preponderance of the evidence that the Respondent failed to tender the services of an "oral maxillary facial surgeon" when requested by authorized treating physician ("ATP") Kathryn Murray, D.O., on September 26, 2017, rendering the right to select a physician to Claimant who selected Reed H. Day, M.D.

V. If compensable, and if Claimant has established a refusal to treat for non-medical reasons, whether the request of Reed H. Day, M.D., to perform a lavage of the right TM joint with I.V. sedation, is related to the September 10, 2017 industrial injury and is reasonably necessary to cure and relieve Claimant of the effects of the injury.

VI. If compensable, whether Claimant was at maximum medical improvement ("MMI") on May 21, 2018, as opined to by ATP Murray, or whether she is not at MMI as opined to by ATP Simpson.

VII. If compensable, whether Claimant established an entitlement to temporary partial disability ("TPD") benefits for the time period between September 10, 2017 and April 19, 2018.

VIII. If compensable, whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability ("TTD") from April 20, 2018 ongoing, until terminated pursuant to statute.

STIPULATIONS

The parties agreed Claimant's average weekly wage is $1,158.40. Claimant agreed she is not claiming a discrete neck or back injury.

FINDINGS OF FACT

1. Claimant is a 42-year-old woman employed by Employer as a mental health counselor. Claimant alleges she sustained a compensable injury to her left wrist and forearm, left ankle, left chest, and an exacerbation of her TMJ condition during the course and scope of her employment on September 10, 2017.

Prior History

2. Claimant's medical history prior to the September 10, 2017 work injury is extensive. Medical records dating back to 2009 reflect frequent medical visits to primary care physicians and emergency departments for various purported medical issues, including complaints regarding body parts Claimant alleges were injured in the September 10, 2017 work injury.

3. In March 2012, Claimant reported feeling a sensation of heaviness "like a spasm" in her chest. In January 2015, Claimant reported having some chest pain secondary to falling along with knee, wrist and elbow pain. The medical records reflect complaints of bilateral ankle pain in June 2012 and bilateral lower leg swelling in June 2017.

4. In December 2014, Claimant underwent an excision of a symptomatic left wrist carpal ganglion cyst. Claimant also fell in December 2014, striking her left hand, elbow, knee, and chest. Claimant wore a left wrist brace for three months for what was initially thought to be a fractured wrist. It was later determined Claimant did not have a wrist fracture. April 2015 medical records note Claimant developed diffuse flexor tenosynovitis with multiple areas of tenderness and persistent thumb symptoms. May 2015 medical records reflect complaints of tenderness to palpation and restricted left wrist range of motion, as well as aching in the dorsal wrist and hand, and thumb numbness and tingling. In February 2017, Claimant reported bilateral arm soreness and numbness, and tingling radiation in both arms after falling on her back. May 2017 records document reports of occasional left elbow pain.

5. Claimant also has a longstanding documented history of facial pain, headaches, and TMJ syndrome. Claimant underwent a bilateral sagittal split osteotomy in 1994 and repeat jaw surgery in 2003 with a poor outcome. In approximately 2006 implants were placed in Claimant's cheeks and jaw.

6. Claimant's medical records from 2012 document complaints of head, facial, and right ear pain. 2014 medical records document complaints of intermittent headaches, left-sided facial numbness and tingling, facial droop, facial weakness, neuralgia pain of the right face, and right-sided symptoms. In November 2014, Claimant was assessed with Bell's palsy and, in December 2014, Claimant was diagnosed with "atypical facial

pain syndrome." In February 2015, Claimant reported experiencing jaw pain after what she reported was a whiplash injury as a result of a fall. Claimant continued to be seen throughout 2015 for complaints of "ongoing atypical facial pain," ear pain, right-sided face pain, right jaw pain, right neck pain, headaches and facial tenderness.

7. Claimant continued to report and seek treatment for facial and jaw pain and headaches leading up to the September 10, 2017 work injury. Medical records from March 2017 reflect reported chronic ongoing frontal and maxillary pain, as well as headaches and left-sided pain. On April 3, 2017, Claimant complained of left-sided headaches after hitting the left side of her forehead on a bar at the gym. She was assessed with chronic mixed headache syndrome and recent postconcussive injury.

8. On May 6, 2017, Claimant complained of pain in her cheek and reported feeling a pop after a chiropractic sinus adjustment. Claimant was seen by maxillofacial oral surgeon Donald Hull, DDS, who referred Claimant back to Reed Day, MD, DMD, who previously treated Claimant and performed a prior implant surgery. Claimant saw Dr. Day who noted no indications of an implant displacement. Claimant continued to see Dr. Day, reporting bilateral tenderness above her molars and popping/clicking of her right TMJ. On June 15, 2017, Dr. Day reviewed a MRI of the bilateral TMJ joints, which revealed some internal derangement on both sides. He noted the findings of the current MRI were similar to those of a 2008 MRI, and recommended splint therapy.

9. On June 25, 2017, Claimant underwent a bilateral maxillary alveoloplasty with smoothing out of Hydroxyapatite. On June 28, 2017, Claimant returned to Dr. Hull suspecting she had an infection. Dr. Hull determined there were no signs of infection. It was noted Claimant asked Dr. Hull if he would perform a TMJ surgery that "might" be indicated for her in the future. He explained to Claimant he did not perform elective TMJ operations, but that he would help her find a more local surgeon if a TMJ operation was recommended by Dr. Day.

10. On June 30, 2017, Claimant authored an e-mail to Employer's human resources department indicating she was approved for vacation November 26-30, 2017 stating, "I am planning on having my second surgery during that time, rather than having it next month."

11. Claimant's medical records also contain multiple references to potential psychological factors as related to Claimant's presentation. In April 2012, a physician noted that there was "a large psychiatric component to this patient's problems." In October 2012, Claimant made multiple visits to an emergency department with complaints of burns and blisters in her mouth and throat after drinking hot chocolate. Claimant reported concerns of developing cancer as a result of the incident. Claimant's exam was benign. The treating doctor questioned whether Claimant has paranoid schizophrenia and diagnosed Claimant with hypochondriasis, symptom magnification and psychosomatic complaints. In March and April 2015, it was suggested Claimant consider undergoing a psychological evaluation and be referred to chronic pain management.

September 10, 2017 Work Injury

12. On September 10, 2017, Claimant was working in a classroom with inmates when she slipped and fell on a flooded floor. The ALJ observed security video of the incident. The ALJ observed Claimant pushing a chair with her right hand while carrying papers in her left hand. A long rectangular table is located to Claimant's left. Claimant is observed slipping and falling forward, causing the chair to move forward. Claimant drops the papers out of her left hand and attempts to catch herself with her left hand and forearm on the nearby table. The table obstructs the view of Claimant's body as she falls to the ground. The ALJ was unable to see if Claimant struck any part of her chest on the table, or what body parts struck the ground. Claimant did not appear to strike her head on the table. No whiplash-type motion of the head is depicted. Claimant is observed immediately getting up after the fall and walking out of the room without assistance.

13. Claimant reported the incident to Employer and was evaluated on September 10, 2017 at Employer's designated medical facility at the Centura Health Urgent Care Center. Claimant reported that she fell forward and struck her right upper chest against the corner of a table. She complained of right upper chest pain, bilateral ankle pain (left worse than right), left elbow pain, and left wrist pain. Claimant denied any injury to her head and the review of systems was negative for headaches. On exam, Maria Lourdes Duran-Shy, NP noted full left elbow range of motion with a bruise distal to the left elbow, full left wrist range of motion with no swelling, no ecchymosis of the right anterior chest wall, and minimal swelling of the left ankle with no tenderness or joint instability. She diagnosed Claimant with acute bilateral ankle pain with suspected mild sprains, contusion of the right chest wall, left elbow pain, and left wrist pain. She noted all films were negative for fractures or dislocations, and the chest x-ray was normal.

14. Claimant attended a follow-up evaluation with Steven Quakenbush, PA-C on September 11, 2017. Claimant reported slipping and falling, hitting her anterior chest wall on the corner of a table, twisting both ankles, and landing on both outstretched wrists. Claimant again reported that she did not hit her head or back. She complained of "minimal residual anterior chest wall discomfort" and left ankle pain. On exam, PA-C Quakenbush noted no erythema, ecchymosis or abrasions of the chest, minimal upper sternal discomfort, minimal left elbow tenderness, no forearm pain, swelling or deformity, full range of motion of bilateral hands and wrists with no swelling, minimal left ulnar tenderness, and full left ankle range of motion with minimal residual swelling and minor tenderness with palpation. PA-C Quakenbush diagnosed Claimant with an ankle sprain, wrist sprain, and thorax contusion. He noted that the objective findings were consistent with the history of a work-related etiology. PA-C Quakenbush prescribed medication and recommended use of an ankle brace. He placed Claimant on temporary work restrictions of lifting/carrying/pushing/pulling no more than five pounds, and limiting walking and standing to no more than three hours per daily shift.

15. On September 12, 2017, Claimant presented to ATP Kathryn Murray, DO. Claimant reported slipping and falling, hitting her chest on a table, and then twisting and falling to the ground. Dr. Murray noted, "At this time her biggest complaint is the neck

pain. When she fell she did not hit her head and she had no loss of consciousness. She had no neck pain but neck pain has started over the last 1-2 days." Claimant complained of intermittent burning with numbness and tingling in all five fingers on both hands and bilateral ankle pain. Dr. Murray noted Claimant had a history of previous jaw surgeries and complaints of pain radiating from her neck up into her jaw and face. On exam, Dr. Murray noted full wrist range of motion with no bruising or swelling and minimal discomfort to palpation of the left ankle. Dr. Murray diagnosed Claimant with a work-related ankle sprain, thorax contusion, wrist sprain, and neck strain. She continued Claimant's work restrictions, ordered Claimant to wear a left ankle boot, and referred Claimant for physical therapy.

16. On September 14, 2017, Claimant saw ATP Robert Dixon, MD with complaints of right upper back and neck pain radiating into her right face, along with pain in the right anterior chest, left wrist, left hand, and left ankle. On examination, Dr. Dixon, noted some tenderness at the base of the left thumb with no bruising or swelling, no bruising on the chest, and left ankle swelling and tenderness. Claimant's diagnosis remained left ankle sprain, thorax contusion, left wrist sprain and neck strain.

17. On September 20, 2017, Claimant sought treatment at St. Francis Medical Center Emergency Department with complaints of gradually worsening chest pain, throat swelling, voice coarseness, and right-sided facial pain. Claimant denied neck stiffness and headache. Gregory Thacker, MD noted there was "[n]o external evidence of injury." He remarked, "I'm unsure of the exact etiology of her symptoms potentially could have mild upper respiratory infect that is unrelated to the trauma. Ultimately I do not feel there is any underlying significant traumatic injury."

18. On September 23, 2017, Claimant attended a dental appointment at Comfort Dental for a scaling, cleaning and a filling. The medical record contains no reference to the work incident and no complaints of any pain in Claimant's jaw or face.

19. Dr. Murray reevaluated Claimant on September 26, 2017. Claimant reported neck soreness, occasional popping in her left ankle, as well as right hip and left knee pain that began the week prior. Claimant reported improvement in her left elbow and left hand, with some remaining hand soreness. Dr. Murray noted Claimant underwent jaw surgery in July 2017 and remarked, "She denies hitting her face or her head with her fall. She has a burning sensation and a 'poking' sensation right side face…she states her face feels similar to where she was at prior to that surgery." Dr. Murray added right-side jaw pain to her diagnoses, and referred Claimant Dr. Sparr or Dr. Leggett for evaluation, and to an oral maxillary facial surgeon to evaluate Claimant's jaw pain.

20. On October 13, 2017, an appointment with the facial surgeon was scheduled for October 17, 2017 by Claimant pursuant to Dr. Murray's instruction, however the appointment was cancelled by Respondent who did not approve the visit. Claimant argues that since her evaluation was not approved, the right to select an oral maxillary facial surgeon passed to Claimant and she chose to start treating with Reed H. Day, MD, DMD.

21. On October 19, 2017, Dr. Murray noted Claimant resumed wearing an ankle brace and reported ankle swelling and a burning sensation underneath her left breast despite improvement in her chest symptoms. Claimant also reported experiencing a scratchy and poking sensation in the right maxillary region and that her left wrist felt strained but no longer bothered her. Dr. Murray ordered a left ankle MRI and changed Claimant's restrictions to limit walking/standing to four hours, and no standing or walking greater than an hour at a time without a 20 minute sitting break.

22. On October 20, 2017, Claimant underwent a left ankle MRI. Joseph Ugorji, DO interpreted the MRI and noted the following:

> 1. 10 mm triangular ossicle in the expected location of a normal variant os trigonum. Given the degree of swelling in this region a nondisplaced Sheperd's fracture/avulsion would have similar appearance…
>
> 2. 12 mm ossific structure subajacent lateral malleolous. Remote avulsive sprain of the anterior talofibular and calcaneofibular ligaments suspected…
>
> 3. Moderate fluid distension involves distal posterior tibial sheath and the flexor tendon sheaths….
>
> 4. Midfoot arthrosis…

23. Michael Sparr, MD evaluated Claimant on October 27, 2017 for consideration of trigger point injections and other treatment options. Claimant reported constant neck and upper back pain, a burning and poking sensation in her left chest, diffuse left ankle pain, and left thumb pain. On exam, Dr. Sparr noted no swelling or tenderness of the wrist with full range of motion and full ankle range of motion with moderate tenderness and swelling. He diagnosed Claimant with a sprain of the sternoclavicular joint and/or ligament, subluxation of sternocostal joint, costochondritis, and an ankle sprain. He recommended trigger point injections as well as possible costotransverse joint injections.

24. Claimant continued to treat with Dr. Murray who, on November 20, 2017, noted Claimant reported plans to see her surgeon in Arizona on November 27, 2017 for further evaluation of facial and jaw complaints.

25. Claimant saw Dr. Day in Arizona on November 27, 2017. Regarding the September 10, 2017 work incident, Claimant reported to Dr. Day that she slipped and fell, hit her chest, and then hit the concrete. Claimant complained of right TMJ pain. Dr. Day noted that a cone CT scan recently taken was normal with no fractures. He concluded Claimant suffered a right TMJ strain or sprain due to a deceleration injury from the work fall. He remarked, "There is some underlying pre-existing problems consistent with a preinjury stage for internal derangement of the right temporomandibular joint and it looks as though she aggravated that." There is no indication Dr. Day reviewed the security video of the incident. He recommended

Claimant continue splint use and, if the pain continued to be bothersome, a lavage of the right TMJ.

26. On November 27, 2017, Respondent was provided with a request for payment to provide treatment recommended by Dr. Day. Respondent denied the treatment on December 13, 2017.

27. Claimant returned to Dr. Sparr on January 23, 2018 with complaints of a "buggy feeling" over her left dorsal hand. Dr. Sparr noted Claimant did not mention upper extremity tingling during her last visit and was now reporting more diffuse pain. He opined that Claimant's upper extremity tingling symptoms were not likely related to the work injury.

28. On February 16, 2018, Claimant presented to Kenneth P. Finn, MD. Claimant complained of central and left neck pain radiating to her shoulder, as well as pain in her left arm, forearm and wrist. He noted that EMG results were normal with no evidence of cervical radiculopathy, plexopathy or peripheral nerve entrapment.

29. On March 9, 2018, Claimant presented to Patrick Devanny, MD, upon the referral of Dr. Murray. Claimant again reported experiencing "buggy" symptoms in the dorsum of her left hand. Dr. Devanny provided the following assessment: left wrist pain, left cubital tunnel syndrome, and compression of the left radial nerve. He recommended Claimant undergo an MRI of the left forearm to visualize the radial nerve.

30. On March 12, 2018, Claimant saw Michael Simpson, MD, upon the referral of Dr. Murray. He noted Claimant had continued to use an ankle brace with unchanged left ankle pain over last six months. Dr. Simpson concluded Claimant had a "pretty significant sprain of her ankle with residual synovitis." He noted, "She has some irritation in her foot which may be a little bit of a compression or traction neuritis of her superficial peroneal nerve." Dr. Simpson diagnosed Claimant with a sprain of the anterior talofibular ligament of left ankle and administered a corticosteroid injection. He recommended Claimant stop wearing the ankle brace. Dr. Simpson opined that Claimant may require arthroscopic evaluation and possible arthroscopic debridement of her ankle if she continued to be symptomatic.

31. Claimant returned to Dr. Simpson for reevaluation on April 11, 2018 complaining of unchanged symptoms. Claimant reported experiencing temporary relief post-injection. He recommended Claimant attempt to resume full activities as tolerated, noting that if Claimant's ankle did not allow for full activities, she would be an appropriate candidate for surgery. He further noted, "If she decides she does not want to pursue this, she probably could be placed at MMI with the recommendation of 6-9 months of maintenance care."

32. On April 10, 2018, Rachel L. Basse, MD performed an Independent Medical Evaluation ("IME") at the request of Respondent. Claimant reported to Dr. Basse that she hit her mid-chest and under her left breast during the September 10, 2017 fall. She complained of right jaw and ear pain, left ankle pain, left wrist symptoms, and neck and

back tightness. Claimant reported worsening of her left wrist and arm over the last six months. Dr. Basse performed an extensive and medical record review, interviewed and physically examined Claimant, and reviewed security video of the work fall.

33. Dr. Basse opined Claimant did not suffer any injury or exacerbation of her right jaw as a result of the work fall, noting Claimant had pre-existing TMJ issues and the mechanism of injury did not involve deceleration or direct trauma to the head or face.

34. Although Dr. Basse included "resolved contusion of the left chest" in her impressions, in the discussion section of the report, she opined Claimant's left chest symptoms were unrelated to the work fall, noting Claimant initially reported hitting her right chest, and the left chest complaints did not occur until greater than one month after the fall.

35. Regarding Claimant's left ankle, Dr. Basse opined Claimant sustained a sprain/strain that had probably resolved. She noted that the soreness and decreased range of motion present would be expected after demobilizing the ankle for several months. She recommended Claimant avoid surgery, return to an exercise regimen, and use anti-inflammatory agents occasionally. She further recommended Dr. Simpson review the ankle MRI as well as her IME report regarding Claimant's somatoform tendencies.

36. With respect to Claimant's left wrist, Dr. Basse opined Claimant sustained a resolved sprain/strain. She noted Claimant's early exams demonstrated full range of motion without ecchymosis or swelling or anatomic abnormalities, with some tenderness over the distal aspect of the wrist. Her exam of Claimant produced symptoms in a different location, more proximal than distal. She concluded Claimant's current symptoms were a result of increased usage of the upper extremity after being deconditioned and were not related to the work fall.

37. Dr. Basse opined Claimant is at maximum medical improvement ("MMI") with no permanent impairment. She concluded that, while Claimant did not appear to be consciously exaggerating her symptoms, there are unrelated psychological issues at play, noting Claimant's history as a "frequent utilizer of healthcare services" with somatoform tendencies.

38. Dr. Devanny reevaluated Claimant on April 18, 2018. He noted that an April 5, 2018 MRI of the left radial nerve was consistent with denervation of the pronator quadratus/radial tunnel syndrome and assessed left radial tunnel syndrome. He placed Claimant on restrictions of no lifting with or use of her left arm, and recommended Claimant undergo a radial nerve decompression of her dorsal forearm. Claimant was scheduled to undergo the surgery on May 7, 2018. The surgery was not authorized by Respondent.

39. Dr. Murray saw Claimant on May 21, 2018 after reviewing Dr. Basse's IME report. She noted Claimant's continued left ankle and left wrist/forearm complaints and Claimant's plan to proceed with wrist surgery under her own insurance. Dr. Murray did

not perform a physical examination, noting Claimant informed her there was "no point" in doing so because her case was done. Dr. Murray agreed with Dr. Basse's opinion that Claimant was at MMI with no impairment and no need for further medical treatment, noting Dr. Basse had access to approximately nine years of medical records and security video of the work incident that she did not. She further noted she personally spoke to Dr. Simpson regarding the IME report, and that he indicated he would not be interested in performing surgery on Claimant at that time.

40. In a June 12, 2018 letter, Dr. Simpson opined Claimant sustained a work-related ankle injury in the form of a "sprain of her anterior talonfibular ligament, an injury to a previous injured area, as well as an injury to the posterior process of her talus resulting in a symptomatic posterior process injury." He noted Claimant's ankle MRI revealed significant swelling in the posterior aspect of her ankle consistent with either a nondisplaced fracture or injury of a pre-existing os trigonum. He opined that, while Claimant does have pre-existing pathology in her ankle, not all of her current symptoms are a natural progression of a pre-existing condition. He concluded it was unclear if Claimant is at MMI, noting the next step for Claimant would be surgery, which he referred to as "entirely elective." Dr. Simpson noted that the medical records raise an issue of possible somatoform disorder, which he stated did not, by itself, preclude Claimant from being a surgical candidate. He opined Claimant needs appropriate mental health evaluation and concluded she would be at MMI if she refused the involvement of a mental health provider or chose not proceed with surgical intervention.

41. Dr. Basse testified at hearing on behalf of Respondent as a Level II expert in physical medicine and rehabilitation and chronic pain. Dr. Basse reviewed additional medical records subsequent to issuing her IME report. She testified Claimant sustained a resolved chest contusion that did not require treatment and that Claimant's current left-sided chest complaints are not related to the work injury. Dr. Basse testified Claimant suffered a work-related left wrist sprain/strain that has resolved and a left ankle sprain/strain. She testified that, while the referrals and medical care for the wrist were reasonable, no further treatment for the wrist is required. Dr. Basse opined that Dr. Devanny's recommendation for radial nerve surgery is not reasonable, and that ankle surgery is not necessary at this point, particularly without Claimant first undergoing a psychological evaluation. She testified that Claimant's work restrictions were more restrictive than those she would have assigned, but that the restrictions were reasonable and related to the work injury. Dr. Basse reiterated her opinion that Claimant's face or jaw did not sustain any injury in the September 10, 2017 fall, nor was her TMJ condition exacerbated or aggravated by the work incident. Dr. Basse testified that no deceleration injury was observed on the security video. Dr. Basse testified that because Claimant did not sustain any work-related injury or exacerbation of her TMJ condition, treatment for such condition was not and is not work-related.

42. Dr. Basse acknowledged Claimant appeared genuine in her complaints and was not consciously exaggerating her symptoms, but opined that there is some psychological component for Claimant's symptoms, noting Claimant had longstanding tendencies toward somatic symptom disorder. Dr. Basse agreed Claimant reached MMI as of the date determined by Dr. Murray.

43. Claimant testified at hearing that she hit her chest on a corner of a table when she slipped and fell, landing on both wrists and twisting both ankles. Claimant testified the medical records immediately following the work injury are incorrect in that they do not reflect her complaints of jaw pain, which she alleges she reported in her initial evaluations. Claimant testified she has never been diagnosed with a somatoform disorder or mental health issue. She further testified that, prior to the September 10, 2017 work injury, she had no problems with her left ankle, left wrist and forearm, left chest, or back and neck. She stated that, despite her pre-existing TMJ condition, leading up to September 10, 2017 she did not have tingling or pain in her jaw, just occasional popping. Claimant testified she currently experiences pain and a constant cold/icy/burning sensation in her left ankle. She wishes to undergo the surgeries recommended by Dr. Devanny and Dr. Simpson.

44. Employer accommodated Claimant's temporary work restrictions from September 12, 2017 until April 20, 2018. Claimant did not earn her full wages from September 10, 2017 to April 20, 2018 due to attending medical appointments during scheduled shifts. After Claimant was placed on "no use of left upper extremity" by Dr. Devanny on April 18, 2018, Claimant testified her Employer would no longer accommodate her work restrictions and she has not worked for Employer since April 20, 2018.

45. No evidence was offered at hearing indicating a Final Admission of Liability has been filed in this matter.

46. The ALJ finds the opinions of Dr. Murray and Dr. Basse, as supported by the medical records, more credible and persuasive than the opinions of Dr. Devanny and Dr. Simpson and the testimony of Claimant.

47. Claimant proved it is more probable than not she sustained a compensable injury on September 10, 2017 to her left wrist in the form of a sprain/strain and to her left ankle in the form of a sprain/strain.

48. Claimant failed to demonstrate by a preponderance of the evidence she sustained a compensable injury to her chest or an exacerbation of her TMJ condition as a result of the September 10, 2017 industrial injury. Dr. Day provided treatment to Claimant for an unrelated condition and is not an ATP for purposes of this matter.

49. Dr. Murray's opinion on MMI is not ambiguous or conflicting and, in the absence of a DIME, is controlling. Accordingly the ALJ finds, per Dr. Murray's opinion, Claimant reached MMI on May 21, 2018.

50. Claimant failed to prove by a preponderance of the evidence the wrist surgery recommended by Dr. Devanny, the ankle surgery recommended by Dr. Simpson, and the lavage procedure recommended by Dr. Day are related to the September 10, 2017 industrial injury and reasonably necessary to cure and relieve the effects of the industrial injury.

51. Claimant proved by a preponderance of the evidence she is entitled to TPD benefits September 10, 2017 to April 19, 2018 and TTD benefits from April 20, 2018 to May 21, 2018.

52. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Left Chest

Based on the totality of the evidence, the ALJ concludes Claimant failed to prove by a preponderance of the evidence she sustained a compensable injury to her left chest. Claimant initially reported striking her right chest during the fall and initially complained of right chest symptoms. There was no bruising, swelling or abrasions of the chest noted on any examination, and Claimant did not complain of left chest symptoms October 27, 2017. To the extent Dr. Basse opined Claimant sustained a chest contusion, Dr. Basse further credibly opined Claimant did not require any treatment for the contusion and her current left chest symptoms are not related to the September 10, 2017 industrial injury.

TMJ Condition

Based on the totality of the evidence, the ALJ concludes Claimant failed to prove, by a preponderance of the evidence, she suffered an exacerbation of her TMJ condition. Claimant has a longstanding history of TMJ issues leading up to the September 10, 2017 industrial injury. Claimant was underwent a cheek and jaw procedure in June 2017, just a few months prior to the industrial injury. She was planning on undergoing further TMJ treatment in November 2017, as indicated by the June 2017 medical records and Claimant's June 30, 2017 email to human resources. Claimant specifically denied hitting or striking her head during the fall at work. The ALJ observed no whiplash-type motion during Claimant's fall, which is consistent with Dr. Basse's observation of the security video of the incident. Dr. Basse credibly opined

there was no deceleration event or mechanism of injury to Claimant's face or jaw. To the extent Dr. Day opined Claimant suffered a deceleration injury that aggravated her TMJ condition, his opinion was based on Claimant's subjective representation of the mechanism of injury, and does not persuade the ALJ that Claimant's TMJ symptoms are a result of the September 10, 2017 industrial injury.

Left Wrist/Forearm and Left Ankle

Based on the totality of the evidence, the ALJ concludes Claimant proved by a preponderance of the evidence she sustained a compensable injury to her left wrist and left ankle, limited to a left wrist sprain/strain and a left ankle sprain/strain. Dr. Basse and Dr. Murray credibly opined Claimant sustained a left ankle sprain/strain and a left wrist sprain/strain as a result of the September 10, 2017 fall. There is insufficient credible and persuasive evidence Claimant sustained any further injury to her left ankle or left wrist/forearm as a result of the September 10, 2017 industrial injury. Dr. Basse credibly testified that Claimant has longstanding tendencies toward somatic symptom disorder.

Claimant had pre-existing left wrist and arm complaints, including February 2017 complaints of bilateral arm numbness, tingling and radiation, and left elbow pain in May 2017. By October 27, 2017, Dr. Sparr noted full range of motion of the left wrist with no swelling or tenderness. Dr. Sparr specifically noted on January 23, 2018 that Claimant's pain complaints had become more diffuse and opined that the tingling symptoms Claimant was now reporting to him were not related to the work injury.

Authorized Treating Physician

Section 8-43-404(5)(a) contemplates that respondents will designate a physician who is willing to provide treatment without regard to non-medical issues such as the prospects for payment in the event the claim is ultimately denied. *Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988). However, the fact that an ATP stops providing treatment based on the *medical determination* that further treatment is not warranted does not automatically authorize the claimant to change physicians. Rather, the claimant must seek applicable statutory remedies such as submitting a request for a change of physician or seeking a DIME. *See Bilyeu v. Babcock & Wilcox Inc.,* W.C. No. 4-349-701 (I.C.A.O. July 24, 2001), *aff'd., Bilyeu v. Industrial Claim Appeals Office,* (Colo. App. No. 01CA1505, April 11, 2002) (not selected for publication). Whether the ATP has refused to provide treatment for non-medical reasons is a question of fact for the ALJ. *Ruybal v. University of Colorado Health Sciences Center, supra.*

As found, Claimant failed to meet her burden to prove she sustained an exacerbation of her TMJ condition as a result of the September 10, 2017 industrial injury. Accordingly, the right of selection did not pass to Claimant and Dr. Day is not an authorized treating physician. Claimant sought treatment with Dr. Day for an unrelated condition.

MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. Section 8-42-107(8)(b)(I), C.R.S. provides that an ATP shall make the initial determination of MMI. The ATP's opinion is binding, and the parties may not litigate the issue of MMI, unless the party disputing the ATP's determination of MMI obtains a DIME. § 8-42-107(8)(b), C.R.S.; *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2003),*Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Postlewait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995).

A DIME is not a prerequisite to an ALJ's resolution of certain factual disputes such as who is an ATP, whether an ATP has made a determination of MMI, or the resolution of an ATP's conflicting or ambiguous opinions concerning MMI. *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996), *Monfort Transp. v. Industrial Claim Appeals Office of State of Colo.*, 942 P.2d 1358 (Colo.App. 1997); *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2003). However, an ALJ lacks jurisdiction to resolve conflicts between multiple authorized treating physicians on the issue of MMI in the absence of a DIME. *Town of Ignacio v. Industrial Claim Appeals Office, supra*; *Bath v. Adams County*, WC No. 4-584-461 (ICAO August 27, 2004); *Maravi v. The Brown Schools, Inc.*, WC No. 4-522-504 (ICAO August 21, 2003).

In the case at bench, there is no dispute as to whether Dr. Murray is an ATP. Dr. Murray's May 21, 2018 report placing Claimant at MMI is unambiguous. Dr. Murray's report indicates she was aware of the recommendations of other physicians for treatment at that time and still chose to place Claimant at MMI for all body parts. Although Dr. Devanny and Dr. Simpson are recommending additional treatment to cure and relieve Claimant, the ALJ does not have jurisdiction to resolve the conflicting opinions of the ATPs on the issue of MMI in the absence of a DIME. Accordingly, Dr. Murray's determination that Claimant reached MMI on May 21, 2018 is determinative for purposes of the ALJ's order.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Once an ATP makes a determination of MMI, the termination of medical care is triggered and the ALJ lacks jurisdiction to conduct a hearing concerning the accuracy of

the ATP's determination until a DIME is conducted. Section 8-42-107(8)(b)(III), C.R.S. 2006; *Story v. Industrial Claim Appeals Office, supra*; *Chapman v. American Medical Response*, WC No. 4-600-029 (ICAO September 15, 2006). Here, Dr. Murray, an ATP, placed Claimant at MMI. The finding of MMI by an ATP ended Claimant's entitlement to further treatment to cure and relieve the effects of her injury. See *Whiteside v. Smith*, 67 P.3d 1240, 1245 (Colo.2003) ("medical treatment automatically terminate[s] if the treating physician determines that the claimant has reached MMI").

As Claimant has been placed at MMI by Dr. Murray and no DIME has occurred, DIME, the ALJ does not have jurisdiction to order curative treatment in these circumstances. Even assuming, arguendo, ordering curative treatment was within the ALJ's jurisdiction, Claimant failed to prove by a preponderance of the evidence any additional curative treatment related to the September 10, 2017 industrial injury is reasonably necessary. As Claimant failed to prove she sustained a chest contusion or an exacerbation of her TMJ condition, further treatment for those conditions would not be related to the September 10, 2017 industrial injury. While Claimant met her burden in proving she sustained a compensable injury to her left wrist and left ankle, the preponderant evidence does not demonstrate the wrist surgery recommended by Dr. Devanny or the ankle surgery recommended by Dr. Simpson are related to the September 10, 2017 industrial injury and are reasonable and necessary to cure and relieve its effects.

Temporary Disability Benefits

To establish entitlement to temporary disability benefits, the claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanberg, 898 P.2d 542 (Colo. 1995)*. The term "disability," as used in workers' compensation cases, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Section 8-42-105(3), C.R.S. provides, in relevant part, that TTD benefits shall continue until the first occurrence of any one of the following: (a) the employee reaches maximum medical improvement; (b) the employee returns to regular or modified employment; or (c) the attending physician gives the claimant a written release to return to regular employment.

As found, Claimant proved by a preponderance of the evidence she is entitled to TPD from September 10, 2017 to April 19, 2018. While Claimant continued to work for Employer during such time period, she did not earn her full wages due to attending doctors' appointments during scheduled shifts. Also Claimant proved she is entitled to TTD from April 20, 2018 to May 21, 2018. The credible and persuasive evidence indicates Employer was no longer able to accommodate Claimant's work restrictions of no use of her left arm. As Dr. Murray placed Claimant at MMI on May 21, 2018, pursuant to Section 8-42-105(3), C.R.S., Claimant's benefits end as of that date.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury on September 10, 2017 limited to a left ankle sprain/strain and left wrist strain/sprain. Claimant did not suffer a compensable injury to her left chest or an exacerbation of her TMJ condition as a result of the September 10, 2017 industrial injury.

2. Dr. Day is not an ATP.

3. As ATP Dr. Murray placed Claimant at MMI as of May 21, 2018 and no DIME has occurred, the ALJ is bound by Dr. Murray's MMI determination of May 21, 2018.

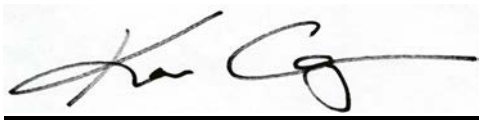
4. Claimant is not entitled to the left wrist surgery recommended by Dr. Devanny, the left ankle surgery recommended by Dr. Simpson, nor the TMJ surgery recommended by Dr. Day.

5. Claimant is entitled to TPD from September 10, 2017 to April 19, 2018 and TTD from April 20, 2018 to May 21, 2018.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 23, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

At the conclusion of the hearing, the ALJ took the matter under advisement. On October 25, 2018, the ALJ's Summary Order was mailed to the parties. On November 2, 2018, the self-represented Claimant mailed and filed a Request for Specific Findings of Fact and Conclusions of Law. Pursuant to the Claimant's Request, Full Findings of Fact, Conclusions of Law and Order are hereby issued.

ISSUES

The issues to be determined by this decision concern compensability of an alleged back injury of May 29, 2018, and medical benefits.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant alleges a work injury to her low back on May 29, 2018, at which time she was working for the Employer.

2. Medical records reveal that the Claimant has a long history of low back issues for which she received chiropractic and massage therapy:

- In a letter from her personal chiropractor, Moyer Total Wellness, Dr. Janea L. Rather, D.C., dated January 12, 2016, the Claimant was noted to have joint restrictions in the lumbar spine and sacroiliac joints, mild injury to her hips and low back, and had been diagnosed with mild lumbar joint dysfunction with myofascial pain syndrome of the low back musculature (Respondent's Exhibit B, pp. 10-12).
- On January 20, 2016, the Claimant reported trouble sitting and standing, which bothered her lower and upper back. (*See Id*. at p. 13).
- According to the letter authored by the Claimant's chiropractor, Dr. Randy Moyer, D.C., on August 20, 2018, the Claimant's treated for two motor vehicle accidents in 2015, and it lasted until April 2016 at which point the Claimant indicated that she was "pain free". (Respondent's Exhibit 9).

- Contrary to Chiropractic Dr. Moyer's opinion, medical records continue to show that the Claimant had low back complaints after April 2016. On July 19, 2016, she reported that her low back was "tight." (Respondent's Exhibit B, p. 17).
- On August 8, 2016, treatment the was focused on the Claimant's back, which was "tight," and it was noted that Claimant had just traveled. (*Id*. at p. 18).
- The Claimant reported low back pain on October 4, 2016 (*Id*. at p. 19).
- The Claimant reported her low back was "tight but better" and that she was going out of town on October 18, 2016 (*Id*. at p. 20).
- On March 31, 2017, the Claimant presented to her chiropractor for a "tune up". She denied any new injury or trauma since her last visit. At that time, the Claimant was assessed with "segmental and somatic dysfunction of lumbar region" and treatment was performed in her lumbar region (*Id*. at p. 22).
- The Claimant's massage therapist noted, "daily use of foam roller recommended for low back" for a tight back (*Id*. at p. 23).
- On May 5, 2017, the Claimant's massage therapist recommended another massage "needed in 3 weeks after long flight back home to Denver" (*Id*. at p. 24).
- The Claimant reported a "stiff and achy" low back on June 7, 2017. She was again assessed with "segmental and somatic dysfunction of lumbar region" by the chiropractor (*Id*. at p. 25).
- On July 5, 2017, the Claimant reported to her chiropractor that her low back was "doing 'ok, but needs a little tune up.'" She was once again assessed with "segmental and somatic dysfunction of lumbar region" (*Id*. at p. 27).
- On July 17, 2017, the Claimant's massage therapist noted "hypertension in area of concern with more noticeable HT in low back" (*Id*. at p. 29).
- On September 12, 2017, the Claimant reported "feeling tight in shoulders and lower back from traveling". Treatment was focused on her lower back (*Id*. at p. 31).
- On December 8, 2017, the Claimant reported that she felt "tight everywhere from sitting". She was once again assessed with segmental and somatic dysfunction of lumbar region". Chiropractic treatment was performed in the lumbar area (*Id*. at p. 34).

- On May 16, 2018, two weeks before the alleged work injury, the Claimant's massage therapist noted her "left low back still tight but improved since start of session". It was noted "another massage needed in 2-3 weeks" or "sooner if low back issue persists or worsens" (*Id*. at p. 37).

3. At hearing, the Claimant testified that she had just returned from a trip to the East Coast two days before.

4. According to the Claimant, her Employer was moving from one office building to another. Due to the move, employees, including the Claimant, were required to move their personal belongings to the new building.

5. The Claimant's first day in the new building was May 29, 2018. As she was lifting a box weighing approximately 4 lbs., containing her personal belongings, out of the trunk of her personal vehicle she felt a "tweak" in her low back (Respondent's Exhibit A, p. 1).

6. According to the Claimant, she weighed this same box of items and it weighed less than 4 lbs.

7. The Claimant reported the incident to her Employer and received a designated medical provider list on May 29, 2018.

8. The Claimant also testified that she scheduled an appointment to see her personal chiropractor the afternoon of May 29, 2018.

9. The Claimant further testified she was able to continue to work on May 29, 2018-- after the incident.

Medical

10. On May 30, 2018, the Claimant presented to the authorized treating provider (ATP), Midtown Occupational Health Services, for evaluation. The Claimant reported that she was moving offices and had to move some of her personal effects in boxes. She stated that she was moving one of the light boxes from her car to the new office when the alleged injury occurred. She was in a bent over position picking the box up when she felt pain in her lower back. The Claimant reported a history of scoliosis, but did not disclose her other low back issues (*See* Respondent's Exhibit E).

11. The Claimant was diagnosed with a lumbar strain and released to return to full duty work without restrictions (Respondent's Exhibit E, p. 62). Based on the Claimant's lengthy history of low back problems, the ALJ finds that the diagnosed lumber strain is attributable to the natural progression of her long-standing back problems; and, it did **not** amount to an acceleration or aggravation of her underlying back issues.

12. The Claimant returned to work and continued to work her normal job duties up through the date of hearing.

13. Lawrence Cedillo, D.O., saw the Claimant on May 30, 2018. He did not render an opinion concerning whether the May 29, 2018 incident aggravated or accelerated the Claimant's long-standing back problems.

14. The ALJ finds that the Claimant did not report her long-standing history of low back issues, for which she had been treating as recently as two weeks prior to the work incident, to either PAC (Certified Physician's Assistant) Kraus or Dr. Cedillo at Midtown.

Independent Medical Examination (IME) by Lawrence Lesnak, D.O.

15. Dr. Lesnak performed an IME of the Claimant on August 27, 2018 and issued a report. Dr. Lesnak also testified at the hearing and was accepted as a Level II Accredited physician, specializing in physical medicine and rehabilitation.

16. Dr. Lesnak reviewed the Claimant's medical records and performed a physical examination of the Claimant. He noted that the Claimant only reported a history of neck injury from prior motor vehicle accidents. He also noted that since May 2016, the Claimant had been receiving chiropractic treatments 1-3 times per month. He further noted that a medical report, dated May 17, 2018, indicated that the Claimant was going on vacation "tomorrow" and "moving offices – stressful transitions. Not focusing well. Not sleeping well" (Respondent's Exhibit A).

17. Dr. Lesnak testified that the Claimant's report to PAC Kraus on May 30, 2018 was consistent with her low back complaints, prior to the alleged work incident.

18. According to Dr. Lesnak, following the Claimant's May 30, 2018 evaluation with PAC Kraus, medical records indicate that her next treatment visit with anyone was not until June 26, 2018, at which point she saw her chiropractor at Moyer Total Wellness. Dr. Lesnak was of the opinion that this was more consistent with her "wellness" visits and treatment for an acute injury.

19. Dr. Lesnak was of the opinion that, while there may have been an incident, there was no evidence of any specific injury occurring on May 29, 2018. He further stated there was "no medical evidence to support that the patient had an actual injurious event occur on 05/29/18." He was of the opinion that without evidence of a specific injury related to work activities, no medical evaluations or treatments were reasonably necessary or causally related to the reported incident (Respondent's Exhibit A, p. 8).

20. The ALJ finds Dr. Lesnak's medical opinion that there was "no medical evidence to support that the patient had an actual injurious event occur on 05/29/18" to mean that the described May 29, 2018 incident of lifting a box weighing less than 4 lbs. was not sufficient to cause a compensable injury.

21. The ALJ credits Dr. Lesnak's opinion that the May 29, 2018 incident did not result in the need for medical treatment. The ALJ finds that the Claimant's symptoms and treatment following the May 29, 2018 incident were more likely the cause of the natural progression of the Claimant's long-standing pre-existing back issues.

22. Further, the ALJ finds the fact that the Claimant returned to her regular employment immediately following the incident, as such, she suffered no disability due to the May 29, 2018 incident.

Ultimate Findings

23. The ALJ finds the opinions of Dr. Lesnak credible and more persuasive than any medical opinion or lay testimony (The Claimant's testimony) to the contrary. As such, the ALJ finds that **no** compensable injury occurred as the result of the May 29, 2018 incident.

24. The Claimant's visit to Midtown on May 30, 201`8, was for the purpose of an evaluation not for medical treatment.

25. Between conflicting opinions and testimony, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Lesnak and to reject any opinions to the contrary.

26. The ALJ finds that the Claimant has failed to establish, by preponderant evidence that she sustained a compensable work-related injury on May 29, 2018.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within

the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Lesnak were credible and more persuasive than any medical opinions or lay testimony (The Claimant's testimony) to the contrary. As such, Dr. Lesnak's opinions support the proposition that **no** compensable injury occurred as the result of the May 29, 2018 incident.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions and testimony, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Lesnak and to reject any opinions to the contrary.

Compensability/Sufficiency

c. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, the light box lifting event of May 29, 2018 was neither disabling nor did it require medical treatment. As found, the Claimant's visit to Midtown on May 30, 201`8, was for the purpose of an evaluation not medical treatment.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain her burden on compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this 14th day of November 2018.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Whether Claimant has overcome, by clear and convincing evidence, the DIME opinion of Dr. Douthit regarding Claimant's impairment rating.

II. If the DIME has been overcome, what is the correct impairment rating for Claimant's back injury?

III. What is Claimant's disfigurement award for the scar on his lower back due to his work-related back surgery?

PROCEDURAL ISSUES

Respondents sought an order to recover an overpayment from Claimant. However, at hearing the parties were unable to agree on the amount of the overpayment and the record was not fully developed regarding this issue. (Respondents did not think there was a dispute between the parties regarding the amount of the overpayment.) The ALJ would have allowed Respondents to take the post-hearing evidentiary deposition of the adjuster to assist in developing the record and resolving the matter. However, the parties agreed to confer and attempt to resolve the overpayment issue after the hearing. It appears the parties have not resolved the matter. Therefore, the overpayment issue will be reserved, without prejudice to either party, and any party may file an Application for Hearing to resolve any remaining overpayment matter.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

A. Claim history and Claimant's medical treatment:

1. On November 14, 2014, Claimant sustained a compensable injury while performing duties arising in the course and scope of his employment for Employer. Claimant was sitting in his car on a dirt road located on the Uintah reservation in eastern Utah when a vehicle came over the crest of the road at high speed and collided into Claimant's stationary vehicle.

2. Respondents admitted liability for the claim and starting providing Claimant medical and temporary disability benefits.

3. Claimant's authorized treating provider (ATP) was Alisa Koval, M.D. This physician managed Claimant's care throughout his case.

4. Lief Anders Sorensen, M.D. was Claimant's pain management physician. He performed bilateral L5-S1 transforaminal epidural steroid injections (March 30, 2015), a lumbar intralaminar L5-S1 epidural steroid injection (April 22, 2015), bilateral L4-5 and L5-S1 facet injections (May 15, 2015) and bilateral L3, L4, and L5 medial branch injections (July 29, 2015). (Claimant's Ex. 3).

5. Claimant eventually underwent spinal surgery on January 17, 2017. His surgeon was Bryan A. Castro, M.D., who performed a partial laminectomy (L2, L3, L4, and L5), facetectomy with foraminotomies bilaterally (L2-3, L3-4, L4-5), lumber decompressions (L2-3, L3-4, L4-5), and decompression of nerve roots (L2, L3, L4, and L5). (Resp. Ex. J)

6. On August 22, 2017, Dr. Koval placed claimant at Maximum Medical Improvement and returned him to full duty. (Resp. Ex. L)

7. On October 16, 2017, Dr. Koval issued her report regarding Claimant's impairment rating. As set forth in her report, she provided Claimant a 27% whole person impairment rating.

8. On October 17, 2017, and before receiving Claimant's impairment rating from Dr. Koval, Respondents filed a General Admission of Liability, admitting to medical benefits and temporary total disability (TTD) benefits. Respondents admitted for TTD from June 4, 2015, through August 22, 2017, at a weekly rate of $881.65, and for a total of $102,145.45. Respondents also asserted an overpayment of TTD in the amount of $9,575.22 and indicated they would credit the overpayment against future permanent partial disability benefits. They also indicated that they were waiting to receive Claimant's impairment rating from Dr. Koval. (Respondents Ex. A)

9. Upon receipt of Claimant's impairment rating from Dr. Koval, Respondents requested a Division Independent Medical Examination (DIME), which was ultimately performed by Dr. John Douthit.

10. On March 12, 2018, Dr. Douthit performed the DIME and provided Claimant a 24% whole person impairment rating. (Resp. Ex. N.)

11. On March 27, 2018, Respondents filed a Final Admission of Liability ("FAL") admitting for the findings of the DIME which included the 24% impairment rating and a finding of MMI on August 22, 2017. Respondents also admitted for $102,145.45 in TTD benefits from June 4, 2015 through August 22, 2017. Respondents did not admit for any permanent partial disability ("PPD") benefits because they asserted Claimant exceeded the combined cap for PPD and TTD benefits for the 2014 date of injury. Respondents also asserted an overpayment in the amount of $9,572.22 and indicated it would be credited from future permanent partial disability benefits. (Resp. Ex. C, Bates Number 05)

12. On April 19, 2018, Claimant filed an Application for Hearing to overcome the DIME opinion regarding Claimant's impairment rating and for disfigurement benefits.

13. On May 18, 2018, Respondents filed a Response to Application for Hearing. As set forth in their Response, Respondents sought to recoup the asserted overpayment of $9,575.22 in TTD benefits from Claimant.

B. The ATP's impairment rating:

14. After a period of post-surgery therapy and recovery, Dr. Koval placed Claimant at MMI on August 22, 2017. She assigned a 27% whole person impairment rating on October 16, 2017. Dr. Koval's lumbar range of motion measurements resulted in the following impairment: lumbar flexion- 7%, lumbar extension- 5%, lumbar right lateral flexion- 4%, and lumbar left lateral flexion of 3%, which combined for 19% whole person impairment. (Claimant's Ex. 4.)

15. Using the AMA Guides Table 53 for Specific Disorder of the Spine, Dr. Koval assigned a rating of 10% whole person under section II(E). The two figures combined to 27% whole person impairment. (Claimant's Ex. 4.)

C. The DIME impairment rating

16. Claimant attended his DIME examination by John D. Douthit, M.D. on March 12, 2018. Dr. Douthit's lumbar range of motion rating broke down as follows: lumbar flexion- 4%, lumbar extension- 5%, lumbar right lateral flexion- 3%, and lumbar left lateral flexion of 3%, which combined for impairment due to lumbar range of motion of 15% whole person. (Resp. Ex. N.)

17. Dr. Douthit's measurements in all categories of lumbar range of motion show the same degree of motion repeated and unchanged throughout each maneuver, demonstrating none of the variability anticipated by the AMA Guides and experienced by practitioners conducting a thorough and complete examination. (Respondents' Ex. N; Hughes Dep. pg. 21, 35.)

18. Dr. Douthit's lumbar range of motion measurements were recorded on a Figure 75 or 78 from a different version of the AMA Guides, rather than on Figure 83 from the required AMA Guides, 3rd Edition (revised). (Resp. Ex. N, Douthit Dep. Pg. 33-34.)

19. According to Dr. Douthit's report, and testimony, using Table 53, he assigned a value for specific disorders of the spine of 11% whole person impairment. When combined, these ratings resulted in a 24% whole person impairment rating. (Resp. Ex. N., Douthit dep. pg. 36.)

The impairment rating by Dr. Hughes

20. On May 7, 2018, Claimant was seen by John S. Hughes, M.D., for purposes of rendering and independent whole person impairment rating under the AMA Guides. (Claimant's Ex. 5.)

21. Dr. Hughes's lumbar range of motion rating broke down as follows: lumbar flexion- 7%, lumbar extension- 5%, lumbar right lateral flexion- 4%, and lumbar left lateral flexion of 4%. When combined, the whole person impairment due to lumbar range of motion was found to be 20%, properly using Figure 83 of the AMA guides. (Claimant's Ex. 5.)

22. As to specific disorders of the spine, Dr. Hughes assigned a 15% whole person impairment pursuant to Table 53 IV(B) & (C). (Claimant's Ex. 5.)

23. Upon review of Dr. Castro's operative report and his own clinical examination, Dr. Hughes also assigned a 2% whole person impairment for residual radiculopathy related to Claimant's spinal stenosis. All these values were combined to a total impairment rating of 33% whole person, as properly recorded on Figure 84 of the AMA Guides, 3rd Edition (revised). (Claimant's Ex. 5; Hughes Dep., pg. 8.)

D. Claimant's testimony at hearing

24. At hearing, Claimant testified that the DIME examination seemed cursory and extremely short. According to Claimant, the DIME examiner did not use any instrumentation (neither inclinometer nor goniometer) to determine his lumbar ranges of motion, each motion was performed one time only, and he was never asked to lay on the exam table to perform supine straight leg raises.

25. Claimant testified that Dr. Douthit said he had not yet reviewed the medical file. Claimant testified to having an uneasy feeling about the examination, particularly when Dr. Douthit offered his unsolicited opinion that the Colorado's Workers' Compensation system was a sham and was "overly generous" to Claimants.

26. Claimant testified that Dr. Douthit packed his briefcase at the end of the examination and walked out of the office simultaneously. Claimant testified that it was his impression that Dr. Douthit was rushing through the examination.

Dr. Douthit's post-hearing testimony

27. The DIME examiner was unable to explain satisfactorily how he employed AMA Guides Table 53 and made his medical judgment to arrive at 11% impairment for specific disorders of the lumbar spine.

28. Dr. Douthit was not clear when asked to explain how he arrived at the impairment rating he provided Claimant for specific disorders of the spine. When asked about his Table 53 rating, he stated:

> I think I chose IV(C) which was 8 percent, and then three levels was only 11 percent.

(Douthit Dep., pg. 8, ln. 4-6).

29. Moments later Dr. Douthit stated:

> I selected IV(C), which was multiple levels operated with residual medical documented – no, that's not correct. That adding a percentage. It says single level operated without residual signs and symptoms, and I chose II(A) as the – as my primary one and then I added 3 percent – or 2 percent would be 11 percent

(Douthit Dep., pg. 9, ln. 6-16).

30. But that is not what Dr. Douthit's report says either. The DIME examiner continued to be unable to clearly articulate how he calculated that portion of Claimant's impairment rating.

31. According to Dr. Douthit's report, he rated Claimant using Table 53 IV(A) plus 2 points under IV(C) to total 11% whole person impairment, but even that is not clear when examining his report against his testimony. (Respondents' Ex. N)

32. Dr. Douthit's personal belief that range of motion testing should not be used in determining impairment, which is required by the AMA Guides, 3rd Edition, Revised, is clear. He testified:

> everybody knows it's a sham……So for us to sit here and discuss the validity of this is a little absurd.

(Douthit Dep., pg. 16, ln. 10-20).

33. Dr. Douthit disputes the validity of using range of motion measurements, as required by Colorado's version of the AMA Guides, to conduct an impairment rating. He refers to a later version of the AMA Guides (not proper for use in Colorado) to discount the use of lumbar range of motion testing in determining impairment:

> Range of motion is no longer used as the basis for defining impairment since current evidence does not support this is a reliable indicator of specific pathology or permanent functional status.

(Douthit Dep., pg. 15, ln. 21-25).

34. In the current case, it is not clear whether the DIME examiner conducted lumbar range of motion testing in the manner required by the AMA Guides. When asked about why a particular range of motion measurement documented on his range of motion worksheet was different than the range of motion number used in his final report, Dr. Douthit could not determine why the numbers did not match and he could not determine which number was based on an actual measurement and which number was an estimate. Surprisingly, he concluded the number he ultimately used was an estimate. His testimony regarding this matter is as follows:

> A- One might be these are inclinometer measurements, the other one was an estimation.

Q- Which one is the estimation, Doctor?

A- Well, the one in the report probably.

(Douthit Dep., pg. 31, ln. 6-10).

35. The range of motion measurements listed in the DIME report show no variability. The AMA Guides require range of motion measurement to be taken at least three times, and up to six, and they must be within a certain range of one another to be considered valid. In this case, Dr. Douthit documented range of motion measurements which have no variability. Dr. Douthit was asked about the lack of any variability:

Q- So he hit the exact same number six straight times?

A - The way I measured it"

(Douthit Deposition pg.31, ln 24 – pg.32, ln. 1).

Q- So this man was able to duplicate these six different clinical exams three times each and hit exactly the same number each and every time?

A - I measured them that way.

(Douthit Dep. pg. 32, ln. 21-25).

The DIME examiner's explanation regarding the uniform range of motion figures measurements set forth in his report, which provides the basis for the impairment associated with Claimant's decreased range of motion, appears evasive and is not found to be credible.

36. When Dr. Douthit was asked his opinion about using the version of the AMA Guides which are currently being used in Colorado, he continued to articulate his disagreement with using them to determine impairment as set forth in the following exchange:

Q - You don't seem very attached to the third edition revised. Can I say that? Would you agree?

A - That's a real news flash.

(Douthit Dep., pg. 34, ln. 12-15).

Q - We've been using Figure 83 from the third edition revised since 1990?

A - What other backward state is there that uses AMA Guide No. 3?"

(Douthit Dep., pg. 35, ln. 4-11).

37. Dr. Douthit also indicated that getting valid or accurate range of motion measurements is difficult for a number of reasons, many of which permeate most cases such as interrater variability. However, he also indicated that getting valid range of motion measurements in this case is difficult due to Claimant's morbid obesity. (Douthit Dep., pg. 16.)

38. The ALJ finds that the DIME physician does not believe in using the range of motion methods prescribed in Colorado's version of the AMA Guides for determining impairment and that it is the DIME physician's opinion that it is difficult to obtain valid range of motion measurements which reflect work related impairment in this case due to Claimant's obesity.

39. After being examined by both attorneys during his deposition, and after reviewing various records, Respondents' counsel asked Dr. Douthit whether he was still of the opinion that Claimant had a 24% whole person impairment rating. Dr. Douthit answered: "I think that is fair." (Douthit Dep., pg. 52.)

40. The ALJ finds that based on the testimony of Dr. Douthit, he provided an impairment rating that he thought was "fair" instead of providing an impairment rating pursuant to directives of the AMA Guides.

41. The ALJ finds that based on his biases and personal opinions, Dr. Douthit strayed from applying the proper methodology set forth by the AMA Guides in evaluating and rendering an impairment rating in this case.

Dr. Hughes' post-hearing testimony

42. Dr. Hughes testified he became Level 2 accredited in 1992 and has been so accredited ever since. He stated that he took additional time during Claimant's impairment rating examination because he was using that exam to instruct an occupational medicine resident fellow from the University of Colorado. (Hughes Dep. pg. 6, ln. 2-7).

43. Dr Hughes stressed the importance of reviewing the surgeon's report when rendering an impairment rating. According to Dr. Hughes, the surgeon's diagnosis is best because he actually sees the spine through the surgical incision wound and is in the best position to determine whether there is lumbar spinal stenosis. (Hughes Dep. pg. 8, ln. 15-20).

44. Dr. Hughes explained that after close review of Dr. Castro's operative report (Respondent's Ex. J) the four levels of laminectomy performed by Dr. Castro would constitute a primary level and three additional levels under proper implementation of Table 53 of the AMA Guides. (Hughes Dep. pg. 10, ln. 4-7).

45. Accordingly, Dr. Hughes assigned 15% whole person impairment according to Table 53 IV(B) & (C) for specific disorders of the spine. (Hughes Dep. pg. 10, ln. 20, pg. 11, ln 5.)

46. Dr. Hughes next described his testing of Claimant's lumbar range of motion. He explained he discontinued testing his testing of Claimant's lumbar flexion because his measured values were too variable, and Claimant was "kind of in distress." (Hughes Dep. pg. 15, ln. 9-15).

47. Dr. Hughes opted to use Dr. Koval's lumbar extension measurements because they were in general agreement with his own, which he states is recommended by the Division's Impairment Rating Tips. (Hughes Dep. pg. 16, ln. 6-21).

48. According to Dr. Hughes, he stated to himself “I'll go ahead and proceed with three measurements on extension, right lateral flexion, and left lateral flexion.” (Hughes Dep. pg. 16, ln. 15-17).

49. Doctor Hughes felt Claimant was “pushing hard” to give maximum effort during the testing. (Hughes Dep. pg. 18, ln. 1-3).

50. As to variability, Dr. Hughes noted that his repetitions of the measurements rendered “some intra-observation variability, as there almost always is.” (Hughes Dep. pg. 20, ln. 1-2).

51. According to Dr. Hughes it is almost impossible for an exam subject to be measured multiple times without variability, unless the examiner was really measuring only a single occasion or rounding his numbers. (Hughes Dep. pg. 20, ln. 16-21).

52. With regard assigning impairment for lower extremity to radiculopathy, Dr. Hughes noted the Dr. Castro (the surgeon) felt there was radiculopathy, both clinically and intraoperatively. (Hughes Dep. pg. 22, ln. 24, pg. 23, ln. 2).

53. Dr. Hughes also found radiculopathy manifested as numbness, pain, and muscular cramping in Claimant’s right lower leg in an L5 distribution. Thus, Dr. Hughes assigned 2% whole person impairment related to residual radiculopathy. (Hughes Dep. pg. 23, ln. 2-20) (Claimant’s Ex. 5)

54. Looking at the totality of the evidence, the ALJ concludes that the lumbar range of motion testing by the DIME examiner was not correctly done and did not render credible or reliable findings.

55. The ALJ concludes that the DIME examiner was not able to credibly explain how he made his determination and calculated an impairment rating under the AMA Guides regarding Claimant’s specific disorders of the lumbar spine.

56. Finally, the ALJ finds that the DIME examiner’s expressed disapproval for the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition (revised), which must be used in Colorado, combined with his overall testimony and evasiveness in testifying about the range of motion measurements documented in his report, and attachments, renders his conclusions regarding Claimant’s impairment rating to not be credible or reliable.

57. In contrast, the ALJ finds that Dr. Hughes conducted a knowledgeable and careful impairment rating of the Claimant, adhering closely to the AMA Guides.

58. The ALJ credits the clarity of Dr. Hughes’s report and testimony which demonstrates his review of Claimant’s medical records, his proper use of applicable forms for reporting his results, and his command of the methodology to be employed by Colorado physicians rendering an impairment rating under the AMA Guides.

59. In further support for finding against the DIME report, the ALJ takes specific note of the consistency of the whole person impairment ratings done by Dr. Koval and Dr. Hughes.

60. Claimant has a visible disfigurement to the body consisting of a surgical scar on his low back. The scar is approximately 4 ½ inches long and approximately ¼ inch wide.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has overcome, by clear and convincing evidence, the DIME opinion of Dr. Douthit regarding Claimant's impairment rating.

A DIME physician must apply the AMA Guides when determining Claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning Claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that

quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The question of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, 17 P.3d 202 (Colo. App. 2000).* In *Wackenhut*, the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Insofar as the ALJ finds that the DIME physician made one error with respect to their opinions regarding impairment, The ALJ is not required to dissect the overall opinion into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence. *Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-477 (November 16, 2006), *citing Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001).

Considering all of the evidence, the ALJ concludes Claimant has overcome the opinions of the DIME physician Dr. Douthit by clear and convincing evidence. It is the duty of the DIME examiner to evaluate all components of the Claimant's condition and determine the cause of each of those conditions as well as any impairment created by them pursuant to the AMA Guides. Dr. Douthit failed to do so in this case.

Dr. Douthit's report is unclear, contains typographical errors, and some of his findings are expressed on obsolete forms. Dr. Douthit also expressed his personal disapproval for the procedures and methodology to be used when rendering an

impairment rating based on decreased range of motion which is required by the version of the AMA Guides currently used in Colorado. His DIME examination and final conclusions appear to tainted with his bias against using range of motion measurements in determining an impairment rating in this case. As found, his repetition of claimed measurements in Claimant's lumbar range of motion without any evidence of expected human variability is not found to be reliable or credible. Moreover, his testimony regarding the range of motion measurements documented in his report was found to be evasive and not credible or reliable. In addition, he was unable to satisfactorily explain his findings and rating for the specific disorders of the lumbar spine.

The ALJ concludes that it is highly probable Dr. Douthit failed to follow the AMA Guides when rating Claimant's impairment. Therefore, the ALJ concludes Claimant has overcome the rating assigned by Dr. Douthit by clear and convincing evidence.

II. If the DIME has been overcome, what is the correct impairment rating for Claimant's back injury?

Where the ALJ determines that any part of the DIME physician's rating has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). Thus, once the ALJ determines that the DIME's rating has been overcome in any respect, the ALJ is free to calculate Claimant's impairment rating based upon the preponderance of the evidence. *See Lungu v. North Residence Inn*, W.C. No. 4-561-848 (March 19, 2004), and *Deleon v. Whole Foods Market, Inc.,* W.C. No. 4-600-477 (ICAO, November 16, 2006). The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols.

Dr. Hughes conducted a knowledgeable and careful impairment rating of the Claimant, adhering closely to the AMA Guides. The ALJ credits the clarity of Dr. Hughes's report, his review of Claimant's medical records, his proper use of applicable forms for reporting his results, and his command of the methodology to be employed by Colorado physicians rendering an impairment rating under the AMA Guides as was also demonstrated during his deposition testimony. Dr. Hughes convincingly and credibly set forth the basis for each and every component of the 33% impairment rating he provided Claimant.

The ALJ concludes Claimant overcame the rating assigned by Dr. Douthit by clear and convincing evidence. Claimant then established by a preponderance of the evidence that he suffered a 33% whole person impairment due to his work injury pursuant to the AMA Guides as determined by Dr. Hughes.

III. What is claimant's disfigurement award for the scar on his lower back due to his work-related back surgery?

As found, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional

compensation. Section 8-42-108 (1), C.R.S. The Claimant has a scar on his low back which is approximately 4 ½ inches long and ¼ inch wide. The ALJ concludes that Claimant is entitled to $1,000 for his scar.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay Claimant PPD benefits based upon a 33% whole person impairment rating.

2. Respondents shall pay Claimant $1,000 in disfigurement benefits due to the scar on his low back.

3. Any and all issues regarding the overpayment asserted by Respondents are reserved to the parties for future determination without prejudice to either party.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 8, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by clear and convincing evidence that she has overcome the opinion of Division Independent Medical Examiner (DIME) Dr. L. Barton Goldman regarding maximum medical improvement (MMI) for injuries sustained as a result of her May 5, 2012, work injury.

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to a disfigurement award.

PRELIMINARY MATTERS

Respondents' January 18, 2018, unopposed motion to hold the issue of permanent total disability in abeyance was granted.

FINDINGS OF FACT

1. On May 5, 2012, Claimant was employed by Employer when she was lifting a 12 X 12 box of tiles from a cart to a shelf. Upon lifting the box of tiles, Claimant heard a pop in her left shoulder and felt neck stiffness that resulted in pain. In May 2012, Claimant was a 21 year old female who resided in Roggen, CO. At the time of hearing in this matter, April 24, 2018, Claimant was 27 years old.

2. Respondents filed a General Admission of Liability on August 31, 2012. And, on December 6, 2017, Respondents filed a Final Admission of Liability admitting liability for an 11% whole person impairment pursuant to the DIME report of Dr. Goldman dated September 21, 2017. Dr. Goldman determined that Claimant was at MMI on September 21, 2017.

3. On May 5, 2012, Claimant treated with Dr. Bethany Wallace, D.O. Claimant reported the mechanism of injury and Dr. Wallace diagnosed Claimant with a torn trapezius, impingement syndrome of the left shoulder and left arm numbness due to myofascial tightness in the trapezius scalenes and scapular musculature. Claimant also treated with Dr. Alberto Denegri, M.D on May 7, 2012. Claimant was diagnosed with shoulder bursitis/tendonitis of the left shoulder.

4. On May 8, 2012, Claimant presented to Rocky Mountain Urgent Care. Claimant was referred to an orthopedist for evaluation of the left shoulder. Nevertheless, Claimant continued her treatment at Rocky Mountain Urgent Care with Dr. Bethany Wallace.

5. On May 16, 2012, Claimant was seen by Mountain View Orthopedics, Dr. Daniel Hamman. An MRI of Claimant's left shoulder was unremarkable. Claimant was referred to Dr. Andrew Smolenski for evaluation of Claimant's complaints of neck pain.

6. On August 16, 2012, Claimant was next seen by Dr. Smolenski. Dr. Smolenski referred Claimant for an MRI of the cervical spine with the promise of a recheck after the MRI results returned.

7. On November 26, 2012, Claimant treated with Dr. Wallace who noted continued neck and shoulder blade pain, which kept Claimant from sleeping. Claimant's main pain was at the base of the neck and top of the shoulder. Dr. Wallace made findings consistent with thorarcic outlet syndrome and recommended that Claimant be seen by the appropriate specialist.

8. On December 19, 2012, Claimant attended an Independent Medical Examination (IME) with Dr. Allison Fall requested by Respondents. Dr. Fall opined that Claimant was suffering from left upper quadrant strain with myofascial pain and dysfunction. Dr. Fall noted a prior history of similar symptoms, which had previously resolved in 2007, and subjective complaints outweighed by objective findings. Dr. Fall recommended pursuing an MRI of the cervical spine. Dr. Fall further opined that Claimant's injury was a nonsurgical problem.

9. On December 21, 2012, Claimant presented for an appointment with Dr. Wallace because of a sudden onset of pain in the left arm, numbness, tightness in the chest and difficulty breathing during a dry needling therapy session. Dr. Wallace noted anterior chest wall pain, difficulty catching breathing since the dry needling incident. Dr. Walllace's assessment was a syncopal episode secondary to stimulation during dry needling, left shoulder and trapezius strain, myofascial thoracic outlet syndrome and myofascial pain in the upper right quadrant. Due to Claimant's ongoing complaints, Claimant was referred to Dr. Anderson-Oeser for EMG testing of the left upper extremity and Dr. Stephen Annest for an evaluation of thoracic outlet syndrome.

10. Claimant presented to Dr. Stephen Annest on January 21, 2013. Dr. Annest diagnosed Claimant with left neck, shoulder and arm pain, neck pain, and upper and lower limb pain. Dr. Annest's assessment wasthat Claimant had physical findings consistent with entrapment at left brachial plexus. Claimant was to attend a follow-up appointment after undergoing an EMG and nerve blocks.

11. On February 11, 2013, Dr. Bennet Mechanic, M.D. performed an EMG and Nerve Conduction Study, which revealed a moderately advanced left distal median neuropathy consistent with clinical correlation for a fairly clear carpal tunnel syndrome. Additionally, Dr. Mechanic noted Claimant had proximal pathology over the lower brachial plexus, and the profile of the study might suggest a more distal plexopathy such as pectoralis minor syndrome.

12. On April 2, 2013, Claimant returned to Dr. Annest. Dr. Annest indicated that Claimant's MRI of the cervical spine revealed "no discogenic or spinal canal compression of nerves. She [Claimant] has no foraminal disease. She has abnormal MAC on left with normal C8 and both pec and scalene blocks gave significant relief of [symptoms] for a

short time." Claimant wanted to proceed with surgery. Claimant was advised of risks associated with surgery including damage to the phrenic nerves.

13. On April 4, 2013, Claimant underwent surgery to repair her brachial plexus entrapment with chronic left extremity pain. The surgery was performed by Dr. Annest and Dr. Richard J. Sanders. Claimant underwent a transaxillary pectoralis minor tenotomy, exploration and release of brachial plexus chest wall, transaxial first rib resection, neurolysis of C8-T1 nerve roots, neurolysis of lower trunk brachial plexus, dissection of anterior and middle scalene muscles. No complications occurred.

14. On May 7, 2013, Claimant returned to Dr. Annest reporting pain in the chest and axilla. The doctor assessed a possible resolving hematoma in the left anterior axilla below the incision.

15. In May 28, 2013, Claimant returned to Dr. Annest complaining of neck and arm pains. Claimant's incision sight was irritated without apparent infection.

16. On June 12, 2013, Dr. Wallace noted a diagnoses of left Thoracic Outlet Syndrome (TOS) with paresthesia of the left arm on Claimant's report.

17. On July 9, 2013, Dr. Annest noted that Claimant was a 22 year old female post April 4, 2013, surgery LT TAFRR with pec minor for clear findings of brachial plexus entrapment secondary to injury. After initial good response with improvement, Claimant had redeveloped pain and difficulty using the left arm. Claimant had been doing physical therapy but stopped in June because of recurrence of symptoms. Dr. Annest noted recurrent brachial plexus entrapment due to scarring. Dr. Annest recommended surgery, however, he indicated that the risk of nerve injury was increased because her first surgery occurred a few months earlier.

18. On August 9, 2013, Dr. Annest examined Claimant and diagnosed a recurrent brachial plexus entrapment due to a scar recurrence from her previous surgery. Claimant was experiencing pain in the left shoulder. Claimant's pain interferes with her activities and sleep.

19. Claimant started care with Dr. Anderson-Oeser on January 2, 2014. Dr. Anderson-Oeser noted that Claimant underwent a course of conservative treatment; therapy, surgery, and nerve blocks.

20. On March 19, 2014, Claimant returned to Dr. Annest. The doctor noted Claimant had left sided neck, shoulder and arm pain. The doctor noted scar tissue in the SC fossa and a recurrence of brachial plexus entrapment due to scar and intractable (sic). Dr. Annest informed Claimant that her continued symptoms would unlikely resolve without an additional surgery. Claimant opted to proceed with the second surgery.

21. On April 30, 2015, Claimant underwent a second surgery to repair the recurrent brachial plexus entrapment. The doctor performed left transaxillary pectoraliis major exploration

with neurolysis of brachial plexus and chest wall, supraclavicular exploration of brachial plexus with neurolysis of C5, C6, C7, C8 and T1, long thorarcic nerve phrenic nerve, neurolysis of upper middle lower trunk of entrapped scarred brachial plexus, arterial repair intraoperative arterial injury with bovine pericardial patch. During the axilla myofascial entrapment, which apparently was extensive, Dr. Annest removed in SC fossa severe muscular and scare entrapment of entire plexus 2 long thoracic nerves seen and dissected free, large phrenic nerve had to be mobilized in order to resect scarred anterior plexus. During the muscular excision, Claimant's subclavian artery was injured and repaired intraoperatively.

22. On May 18, 2015, Claimant returned to Dr. Annest. Claimant was instructed to continue treatment with a course of physical therapy.

23. On August 11, 2015, Dr. Annest noted that Claimant complained of neck, shoulder and arm pain with nerve irritation of brachial plexus. Claimant showed some weakness of grip and limitation in her range of motion.

24. Claimant attended a follow-up appointment with Dr. Annest on September 22, 2015. Claimant failed to respond to physical therapy. Dr. Annest suspected additional scar tissue from the April 30, 2015, surgery. Dr. Annest opined Claimant was a candidate "for a Latissimus flap surgery."

25. On October 4, 2015, a 25 year old Claimant was seen by Drs. Josianna V. Schwan and Rachel J. Groff. The October 4, 2015, medical report reflected that Claimant was seen for a history of TOS status postsurgical decompression with pain and weakness in the left arm. No evidence of acute DVT was noted in the left upper extremity, slow flow in the jugular vein and short segment focal wall thickening mid basilica vein suggestive of an old clot.

26. On October 6, 2015, Claimant underwent an injection for pain in Claimant's left upper extremity.

27. On October 10, 2015, Dr. Annest performed a third surgery to repair Claimant's recurrent brachial plexus entrapment due to scarring. Pre-operatively, Dr. Annest noted recurrent brachial plexus entrapment with intense left upper extremity, neck, shoulder and arm pain. This surgery resulted in injury to the phrenic nerve which required repair with microscope.

28. On October 27, 2015, at a postoperative appointment, Dr. Annest instructed Claimant to start physical therapy. Dr. Annest diagnosed brachial plexus disorder and phrenic nerve palsy. Phrenic nerve palsy is typically observed when a claimant reports experiencing difficulty breathing and shortness of breath. Dr. Fall commented during testimony that the partial severing of the phrenic nerve is not an insignificant matter, since the phrenic nerve controls the diaphragm.

29. After Claimant's third surgery, she started to experience chest pain at night. The first occasion Claimant experienced tachycardia was when she awoke in the recovery room after her second TOS surgery. Shortly after that, she experienced shortness of breath when she undertook mild activity. Claimant credibly testified that her chest pain was accompanied by heart palpitations and shortness of breath.

30. On December 8, 2015, Claimant was seen by Dr. Annest for TOS and complaints of crackling noises.

31. On January 11, 2016, Dr. Annest saw Claimant for complaints of chest pain at night.

32. On March 1, 2016, Claimant complained to Dr. Annest of muscle spasms in the left neck, headaches and tachycardia. Since Claimant's last appointment, Dr. Annest noted that Claimant had continuous headaches that were not eased through massage. Claimant was experiencing intermittent twitching and spasms in the neck with pain shooting down the arm. Claimant's arm was weak and Claimant had difficulty sleeping. Dr. Annest assessed Claimant with phrenic nerve palsy, stricture of artery, chest wall pain and shoulder joint pain and limb pain. Claimant persisted with intermittent tachycardia and palpitations.

33. On May 3, 2016, Claimant returned to Dr. Annest reporting decreased range of motion and strength in the left upper extremity and neck. Claimant also reported that she was being evaluated for arrhythmias. Dr. Annest recommended additional physical therapy.

34. Claimant returned to Dr. Annest on July 19, 2016, when Claimant had left arm, left shoulder, limb and upper back pain. Claimant was experiencing palpitation. Dr. Annest opined Claimant's arrhythmia was unrelated, her symptoms were related to her scarred brachial plexus and there was no surgical solution to Claimant's symptoms. Claimant reported she was going to see a cardiologist on July 26, 2016.

35. On July 26, 2016, Claimant presented to Andrew Cohen, M.D. for evaluation of her arrhythmias. Claimant reported palpitations and shortness of breath with activity. It was noted that Claimant wore a Holter monitor. The Holter monitor revealed sinus tachycardia. Dr. Cohen noted Claimant's symptom diary did not coincide with her reports of arrhythmias. Dr. Cohen did not note arrhythmia and the doctor tried to reassure Claimant.

36. On September 15, 2016, Claimant attended another IME with Dr. Fall. Dr. Fall opined Claimant was likely at MMI after the completion of physical therapy. Dr. Fall further opined that she agreed with Dr. Annest's opinion that Claimant's cardiac arrhythmia was not work related.

37. On September 22, 2016, Claimant met with Dr. Anderson-Oeser. Dr. Anderson-Oeser opined that Claimant would likely be at MMI within 4-6 weeks pending any further treatment recommendations.

38. On October 10, 2016, Claimant treated with Dr. Annest who made the assessment that Claimant's pulmonary and muscular-skeletal complaints are related to the surgical intervention involving the Claimant's injury to the phrenic nerve. In Dr. Annest's October 10, 2016, report, the doctor acknowledges that Dr. Fall has arrived at a contrary conclusion in her IME reports.

39. On October 20, 2016, Claimant returned to Dr. Anderson-Oeser. Claimant was referred for a QSART test due to Claimant's symptomology and potential for Chronic Regional Pain Syndrome (CRPS).

40. On December 6, 2016, Claimant was seen by a pulmonologist, Dr. Jeffrey S. Schwartz. Dr. Schwartz's assessment was that Claimant's complaints of shortness of breath are related to the left phrenic nerve dysfunction. Dr. Schwartz wanted another respiratory evaluation, with a chest x-ray and spirometry. The doctor noted that additional testing will require Insurer's approval.

41. On December 19, 2016, Claimant underwent another IME with Dr. Allison Fall. Dr. Fall noted left upper quadrant strain with myofascial pain and dysfunction; and prior history of similar symptoms resolved. Dr. Fall agreed with Dr. Smolenski that the risks of a subacromial injection were low and, if it would decrease pain, would be reasonable prior to resuming physical therapy, which would be needed for posture, stretching and strength. Dr. Fall also recommended electrodiagnostic evaluation, if parethesias persisted. Dr. Fall opined that there were likely ongoing psychological issues.

42. On February 13, 2017, Dr. Annest noted that Claimant's complaints of numbness and tingling in the left neck to fingers was worsening over the previous three months. Claimant had left chest wall and left sided pain. Claimant's left ulnar and radial fingers would alternate getting hot and cold.

43. On March 10, 2017, Claimant returned to the pulmonologist, Dr. Schwarz. Claimant was described as stable, yet she continued to have shortness of breath. Dr. Schwarz remained suspicious that Claimant left hemidiaphragm was paralyzed or paretic. The doctor indicated that Claimant still needed a spirometry test, but the doctor would conduct a "sniff test."

44. On April 12, 2017, Claimant attended a third IME with Dr. Fall. Claimant reported that her symptoms were the same since she last saw Dr. Fall on September 15, 2016. The doctor noted that Claimant had undergone thermogram testing, which indicated a temperature difference that could be consistent with CRPS. Claimant underwent a sympathetic block. Claimant's pain responded to the blocks reducing her pain from five or six out of ten to one out of ten. Her pain relief lasted six days. Dr. Fall opined that Claimant was at MMI due to no functional gains since her last IME. Dr. Fall maintained that additional ganglion blocks could continue to be administered as maintenance care.

45. On April 24, 2017, Dr. Annest noted that Claimant had one week of relief from pain following a stellate ganglion block. Claimant had an adverse reaction to a intravenous

narcotic injection. Claimant has limited range of motion and grip. Dr. Annest noted Claimant's chronic brachial entrapment of the left upper extremity with pain from the neck into the hand. Dr. Annest assessed Claimant to have brachial plexus disorder, left hand weakness, dyspnea, and CRPS type I of the left upper extremity.

46. On July 11, 2017, Claimant saw Dr. Schwarz continuing to complain of shortness of breath and shoulder pain. Claimant's "sniff test" showed normal left hemidiaphragm and Claimant's spirometry test was normal. Overall, Dr. Schwarz opined that there was no pulmonary basis for Claimant's shortness of breath and no respiratory issue.

47. On September 21, 2017, Claimant attended a 24-Month DIME with Dr. L. Barton Goldman. Dr. Goldman conducted an extensive medical record review of Claimant's treatment and conducted a physical examination.

48. Claimant informed Dr. Goldman of her symptoms of shortness of breath and palpitations at the DIME.

49. On October 2, 2017, Dr. Annest noted that Claimant had a stellate ganglion block from Dr. Warnick on September 13, 2017, which had produced good results substantially reducing Claimant's pain for a three week period. Dr. Annest recommended that Claimant continue to receive blocks from Dr. Warnick.

50. On January 8, 2018, Dr. Annest noted that Claimant received relief from the last block. Claimant was having difficulty sleeping and she was not in physical therapy. Claimant reported some shortness of breath that is worsening. Claimant was seen by Dr. Schwartz for pulmonary dysfunction. Claimant also had palpitation and was seeing Dr. Cohen for the doctor's cardiology expertise. Claimant was given medication for her arrhythmia symptoms, but the medication did not help her.

51. Dr. Goldman reviewed Dr. Fall's December 19, 2012, IME report, the September 5, 2013, medical record review report and April 21, 2017, IME report and opined that Dr. Goldman supported Dr. Fall's conclusions and recommendations.

52. Dr. Goldman supported Dr. Fall's opinions regarding the work relatedness of Claimant's symptoms. Dr. Goldman's DIME report reflects that the DIME doctor was fully apprised on Dr. Schwarz opinions indicating the pulmonologist had definitively rule out residual phrenic neuropathy or other work related explanations for Claimant's dyspnea from a pulmonary perspective. Dr. Goldman further opined in the DIME report that Dr. Cohen did not make a work related diagnosis to explain Claimant's chest pain and palpitation.

53. Dr. Goldman diagnosed Claimant with the following work-related conditions: 1. chronic left upper trapezius and shoulder girdle myofascial pain; 2. left disputed neurogenic TOS; 3. mild left lower trunk sensory brachial plexitis in the context of a dispute neurogenic thoracic outlet syndrome consistent with a clinically mild CRPS II, partially sympathetically mediated, as a result of diagnosis #2 above.; 4. iron deficiency anemia hopefully resolved.; 5. intermittent mixed tension/vascular headaches of myofascial

origin in association with diagnosis #1 and #2; 6. sleep dysfunction.; and 6. deconditioning pre-existing and exacerbated, with non-objectified complaints of tachycardia and palpitations.

54. Dr. Goldman opined that Claimant was at MMI on September 21, 2017. Dr. Goldman assigned Claimant an 11% whole person permanent impairment rating for her related May 5, 2012, work injury. Dr. Goldman opined that Claimant could be in a light work category.

55. Dr. Goldman further opined that Claimant does not have a CRPS type I diagnosis because Claimant's physical examination was not compelling in this respect. Dr. Goldman was aware that Claimant's symptoms may be temporarily more benign than usual as result of the short-term benefits from stellate ganglion blocks administered eight days earlier.

56. Dr. Goldman further opined that there is no work-related, medically probable objective diagnoses to explain the palpitations nor did the medications that have been tried, or are currently being prescribed, seem to be of help. Dr. Goldman opined that Claimant's palpitations likely reflect somatization and sensitization issues unmasked by this injury in addition to ongoing deconditioning.

57. Dr. Goldman recommended maintenance medical care to consist of additional ganglion blocks without sedation (3-6), combined with physical therapy, potential for trigger point injections, 6-8 cognitive behavioral sessions, practicing of biofeedback skills, and meditative approaches and follow-up appointments.

58. On June 12, 2017, Respondents filed a Final Admission of Liability admitting to Dr. Goldman's September 21, 2017, date of MMI and an 11% whole person permanent impairment rating. Respondents admitted to reasonable and necessary maintenance medical treatment.

59. On December 29, 2017, Claimant objected to Respondents' Final Admission of Liability and filed an Application for Hearing to overcome the DIME of Dr. Goldman and disfigurement.

60. Claimant continues to suffer from shortness of breath after her third surgery. Dr. Anderson-Oeser continues to treat Claimant's ongoing symptoms. Claimant testified that Dr. Anderson-Oeser has not placed her at MMI.

61. Claimant's symptoms worsened several days after seeing Dr. Goldman. Claimant does not believe she is at MMI.

62. On April 9, 2018, Dr. Anderson-Oeser provided deposition testimony. She testified that she does not agree with Dr. Goldman's determination of MMI because additional testing needs to be performed to address Claimant's heart and lung issues.

63. Dr. Anderson-Oeser testified that she recommended that Claimant see a psychologist specializing in pain management to help her deal with her chronic pain. But, Dr. Anderson-Oeser's recommendation was not authorized for four years and at the time of hearing Claimant had only begun beneficial psychological treatment for pain control.

64. It is found that Claimant failed to present clear and convincing evidence that Dr. Goldman's MMI determination is incorrect. Dr. Fall's medical opinions and testimony, in conjunction with the medical records, was found to be more credible and persuasive than the opinions of Dr. Andersen Oeser. Dr. Goldman's report was shown to be thorough, complete and without error wherein he has addressed all of Claimant's concerns and medical diagnoses.

65. The ALJ finds that as a result of her May 5, 2012, work injury, Claimant has a visible disfigurement to the body consisting of left shoulder, left chest, left back and left underarm scars. The left shoulder is downward sloping and has a horizontal scar three inches long and 1/8 inch wide. A left chest horizontal scar is two and ½ inches long and ¼ inch wide. The chest scar has a keloid and is discolored. On Claimant's left back, the scar is four inches long and ½ inch wide. This scar has a keloid and is discolored. On Claimant's left underarm, there is a scar one and ½ inches long and ¼ inch wide. The scar is discolored. Claimant's left hand turns red. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act, Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME opinion regarding MMI

4. Claimant contends that Dr. Goldman's DIME opinion on MMI is most probably incorrect. Claimant argues that her breathing difficulty and palpitations and her psycho-social issues impacting her physical condition have not been addressed. Claimant argues that Dr. Goldman erred in his determination of MMI as Claimant underwent an injection which reduced her pain and increased her range of motion during the DIME. Claimant argues that further testing needs to be completed to determine whether her sinus tachycardia and shortness of breath are related to the performance of her third surgery. Claimant contends that until the requisite testing is performed, she is not at MMI and requires additional treatment.

5. MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

6. Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific

treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

7. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

8. It is concluded Dr. Fall credibly testified that Claimant reached an endpoint in treatment, and that Dr. Goldman's determination of MMI on September 21, 2017 was appropriate. Dr. Fall further credibly testified that maintenance care could appropriately address Claimant's ongoing symptoms in relation to the admitted work injury. It is further concluded that Dr. Anderson-Oeser and Claimant failed to identify any clear errors in Dr. Goldman's DIME report.

9. Moreover, on July 19, 2016, Dr. Annest opined that Claimant's arrhythmia was unrelated. Dr. Fall, in her September 15, 2016 IME report, agreed with Dr. Annest that Claimant's cardiac arrhythmia was not work-related. Furthermore, Dr. Cohen, the cardiologist, noted that Claimant's Holter Monitor revealed sinus tachycardia. Dr. Cohen further credibly opined that Claimant's symptom diary did not coincide with her reports of arrhythmia. Claimant testified that she reported her symptoms of palpations and shortness of breath to Dr. Goldman. Even Dr. Anderson-Oeser testified that Dr. Goldman is familiar with Claimant's stellate ganglion blocks and would be aware of Claimant's decrease in symptoms during the DIME.

10. Dr. Anderson-Oeser further testified she agreed with Dr. Goldman's impairment rating.

11. It is concluded that Claimant remains at MMI for the May 5, 2012, injury as determined by Dr. Goldman. Claimant failed to demonstrate by clear and convincing evidence that Dr. Goldman's determination of MMI was invalid.

Disfigurement

12. The ALJ concludes that Insurer shall pay Claimant $2000.00 for her disfigurement.

ORDER

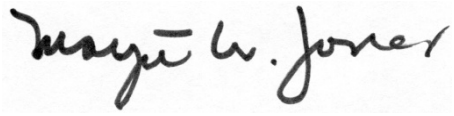
1. THE ALJ ORDERS that Insurer shall pay Claimant $2000.00 for that disfigurement.

2. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. Claimant failed to prove by clear and convincing evidence that the MMI determination of Dr. Goldman is incorrect.

4. All matters not determined are reserved for future consideration.

DATED: October 17, 2018



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4 th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did Claimant make a proper showing for a change of physician?

FINDINGS OF FACT

1. Claimant suffered admitted injuries in a rollover motor vehicle accident on June 28, 2016. He initially received treatment at the Lutheran Medical Center emergency department. Thereafter, Employer did not provide a list of designated providers, so Claimant saw his personal providers through Kaiser.

2. On March 30, 2017, Dr. Sean Haney, an orthopedist with Kaiser, stated "you mentioned worker's [sic] comp, our Department does not do workers comp so if this potentially a work comp claim you need to see another provider." The parties agreed to a change of physician to Dr. Updike, but he declined to accept Claimant as a patient. The parties have since been unable to agree on a different physician.

3. Claimant saw Dr. Tashof Bernton for an IME at Respondents' request on October 9, 2017. Dr. Bernton opined that claimant is at MMI with permanent impairment to the right Index finger and left shoulder. Claimant disagrees he is at MMI.

4. Claimant made a proper showing for a change of physician under § 8-43-405(5)(a). Kaiser is not willing to treat Claimant under his workers' compensation claim, and his desire for a Level II accredited ATP is reasonable.

5. At the hearing, the ALJ asked each party propose three Level II providers. Claimant proposed Dr. Carolyn Gellrick, Dr. John Hughes, and Dr. John Gray. Respondents suggested Dr. Marc Steinmetz, Dr. Matthew Brodie, and Dr. Scott Primack. All proposed physicians are fully accredited according to the Division's web site.

6. The ALJ finds it appropriate to start with the providers on Claimant's list because the right of selection had initially passed to him.

7. Claimant has not contacted any of his proposed physicians, so it is unknown whether they will accept him at this stage of his claim. It is reasonable to allow Claimant flexibility to choose any of his three proposed providers. If Dr. Gellrick, Dr. Hughes, and Dr. Gray are not willing to treat Claimant, Claimant may choose from Respondents' list of proposed providers.

CONCLUSIONS OF LAW

Section 8-43-404(5)(a)(VI)(A) allows a claimant to obtain a change of physician "upon a proper showing" to an ALJ. The statute does not define a "proper showing," and the ALJ has discretion to decide if the circumstances justify a change of physician. *Jones*

v. T.T.C. Illinois, Inc., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant is receiving reasonably necessary treatment while protecting the respondents' legitimate interest in being apprised of treatment for which they may ultimately be held liable. *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000).

As found, Claimant made a proper showing for a change of physician. Kaiser is not willing to treat him under his workers' compensation claim, and it is appropriate for Claimant to have a Level II accredited ATP.

ORDER

It is therefore ordered that:

1. Claimant's request for a change of physician is granted. Claimant may treat with Dr. Gellrick, Dr. Hughes, or Dr. Gray, at his option. If Dr. Gellrick, Dr. Hughes, and Dr. Gray are not willing to treat Claimant, Claimant may choose from Dr. Steinmetz, Dr. Brodie, and Dr. Primack.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 1, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that the C5-C6 anterior cervical decompression and fusion surgery recommended by Dr. Brian Witwer is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted August 15, 2017 work injury.

- At hearing, the parties stipulated to an average weekly wage (AWW) of $594.95. The ALJ approves and adopts the stipulation of the parties.

FINDINGS OF FACT

1. The claimant worked for the employer as a butcher. The claimant's job duties included meat processing of hogs and cattle. On August 15, 2017, the claimant was removing meat from an 800 to 900 pound cow. Specifically, he was removing meat from the scapula. To accomplish this task, the claimant held a hook in his left hand to hold the carcass while he used his right hand to pull the meat from the bone. While doing so, the claimant felt a pop in his left wrist and felt pain into his forearm. The claimant reported this incident to his floor manager and then returned to his assigned work tasks.

2. The claimant testified that although the initial pop was in his left wrist, he began to feel pain into his forearm, bicep, and shoulder. The pain began during the remainder of his shift on August 15, 2017. The claimant testified that during that evening he also began to experience some tingling. By the following morning he had pain from his wrist all the way up his left arm into his shoulder and neck.

3. The claimant was ultimately referred to Surface Creek Family Practice for treatment of his injury. On August 30, 2017 the claimant's first treated at Surface Creek Family Practice and was seen by Dan Burnell, PA-C. The claimant testified that the delay in obtaining medical treatment for his injury occurred because his floor manager did not initially believe that that claimant was injured at work.

4. On August 30, 2017, Mr. Burnell noted the claimant's mechanism of injury and listed the diagnosis as a left wrist sprain. At that time, Mr. Burnell recommended a wrist brace and over the counter pain medication. Thereafter, the claimant was seen by Mr. Burnell on September 20, 2017 and November 29, 2017. In the medical records of those dates Mr. Burnell added the diagnoses of tendonitis and "De Quervains". The claimant testified that he informed Mr. Burnell that he was experiencing pain from his wrist, up his arm and into his shoulder and neck. However, Mr. Burnell's medical reports do not list those symptoms.

5. Mr. Burnell referred the claimant to In Motion Therapy for physical therapy treatment. The claimant testified that physical therapy did not help with his symptoms. Due to the claimant's increasing pain symptoms, the claimant's physical therapist suspended treatment until further discussions could be had with Mr. Burnell. The claimant testified that Mr. Burnell informed him that the radiating pain up into his arm was a side effect of the wrist sprain.

6. On September 18, 2017, the respondents filed a General Admission of Liability (GAL) for the August 15, 2017 injury.

7. On December 28, 2017, the claimant was seen by Dr. Kevin Pulsipher with Surface Creek Family Practice. At that time, Dr. Pulsipher diagnosed carpal tunnel syndrome, De Quervains tenosynovitis, and lateral epicondylitis. Dr. Pulsipher referred the claimant to Dr. Michal Hehmann for a neurological consultation, and to Dr. Knutson for an orthopedic consultation. The claimant testified that when he was seen by Dr. Pulsipher in December 2017 he had pain beginning in his left fingers and radiating up his arm into his left shoulder.

8. On January 11, 2018, the claimant was seen by Dr. Hehmann who performed electromyography nerve conduction studies (EMG/NCS) on the claimant's upper extremities. Dr. Hehmann concluded that there were no signs of carpal tunnel; no signs of nerve entrapment at the elbow or wrist; and no signs of peripheral neuropathy. Dr. Hehmann also noted that the claimant had findings at the C5-C6 level (and possibly at the C6-C7 level) with radicular findings down the arm. Based upon those findings, Dr. Hehmann recommended a magnetic resonance image (MRI) of the claimant's cervical spine.

9. On February 22, 2018, an MRI of the claimant's cervical spine showed a moderate broad based disc protrusion at the C5-C6 level with mild cord flattening and narrowing of the cerebrospinal fluid (CSF) space anterior to the spinal cord.

10. Following the MRI, the claimant was seen by Dr. Pulsipher on February 27, 2018. On that date, Dr. Pulsipher noted a new diagnosis of cervical radiculopathy. In the medical record of that date, Dr. Pulsipher noted an "addendum to [history] of hauling several hundred carcasses for processing in meat plant". It appears that as of that date Dr. Pulsipher was relating the information about the claimant's work history to the most recent diagnosis of cervical radiculopathy.

11. Subsequently, the claimant was again referred for an orthopedic consultation. On March 26, 2018, the claimant was seen by orthopedic surgeon, Dr. Brian Witwer. At that time, the claimant reported aching, sharp and electrical like pain in his neck with radiating pain in his left arm along his shoulder, bicep, lateral forearm, and into his hand. Dr. Witwer noted that the MRI showed a large herniated disc at the C5-C6 level that was causing left greater than right foraminal stenosis. Dr. Witwer recommended that the claimant undergo a C5-C6 anterior cervical decompression and fusion surgery.

12. On April 18, 2018, Dr. Joseph Fillmore issued a physician advisor opinion. In that report, Dr. Fillmore opined that the claimant's radiculopathy is not related to an injury to the claimant's left wrist. Based upon the opinion of Dr. Fillmore, the respondents denied authorization for the recommended cervical surgery.

13. On May 16, 2018, the claimant was seen by Dr. Timothy Meilner with Surface Creek Family Practice. The claimant testified that he began treating with Dr. Meilner because Dr. Pulsipher was no longer treating workers' compensation patients. On that date, Dr. Meilner noted his understanding that the claimant felt a pop in his wrist at the time of the injury, but after four months of physical therapy for his wrist the claimant had no improvement. Dr. Meilner also noted that additional workup of the claimant's condition found that "the cause of his condition was in the [cervical spine]". Dr. Meilner recorded cervical radiculopathy as one of the claimant's work related diagnoses and referred the claimant to hand surgeon, Dr. Michael Rooks.

14. The claimant was first seen by Dr. Rooks on June 12, 2018. Dr. Rooks diagnosed post-traumatic flexor/extensor tendonopathies and cervical radiculopathy. Dr. Rooks also opined that the claimant's arm and neck symptoms could be related to the radiculopathy findings.

15. At the request of the respondents the claimant attended an independent medical examination (IME) with Dr. John Raschbacher on July 24, 2018. In connection with the IME, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Raschbacher opined that the claimant's current symptoms are not related to the August 15, 2017 injury to the claimant's left wrist. In support of this opinion, Dr. Raschbacher noted that the claimant's initial presentation was limited to the left wrist. Dr. Raschbacher also opined that the claimant suffered only a wrist sprain and had reached MMI for that sprain as of the date of the IME. Dr. Raschbacher's testimony at hearing was consistent with his IME report.

16. The ALJ credits the medical records and the opinions of Drs. Raschbacher and Fillmore and finds that the claimant's cervical spine related symptoms are not causally related to the admitted left wrist injury. The ALJ is not persuaded by the claimant's testimony that he reported symptoms to Mr. Burnell that were not included in the medical records. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the need for the recommended C5-C6 anterior cervical decompression and fusion surgery is necessary to cure and relieve the claimant from the effects of the admitted left wrist injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008).

4. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the recommended the C5-C6 anterior cervical decompression and fusion surgery is causally related to the admitted August 15, 2017 work injury to his left wrist. As found, the medical records and the opinions of Drs. Raschbacher and Fillmore are credible and persuasive.

ORDER

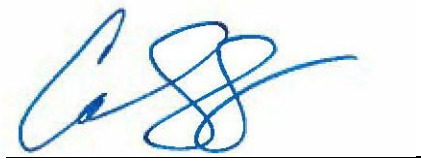
It is therefore ordered:

1. The claimant's request for a the C5-C6 anterior cervical decompression and fusion surgery is denied and dismissed.

2. As stipulated by the parties, the claimant's average weekly wage (AWW) is $$594.95.

3. All matters not determined here are reserved for future determination.

Dated November 1, 2018.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Who was the claimant's employer at the time of the admitted July 7, 2017 work injury?

- Whether the claimant has demonstrated by a preponderance of the evidence that the C4-C5 anterior cervical discectomy and fusion (ACDF) surgery performed by Dr. Robert Replogle on September 22, 2017 was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted July 7, 2017 work injury.

- Whether the claimant has demonstrated by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits beginning August 16, 2017 and ongoing until terminated by law.

- If the claimant demonstrates that she is entitled to TTD benefits, whether the respondents have demonstrated by a preponderance of the evidence that the claimant was responsible for termination of her employment, thereby ending entitlement to TTD benefits.

- What was the claimant's average weekly wage (AWW)?

- Whether the claimant has demonstrated by a preponderance of the evidence that penalties should be assessed against the respondents pursuant to Section 8-43-408, C.R.S. because of the respondents' failure to obtain and maintain workers' compensation insurance.

- Whether the claimant has demonstrated by a preponderance of the evidence that penalties should be assessed for the employer's alleged violation of Rule 16 for failure to authorize medical treatment.

- At hearing, counsel for the respondents attempted to argue a late reporting penalty. At that time, the ALJ reserved ruling on that issue. Upon further review of the hearing file and the record, the ALJ finds that the respondents failed to endorse that issue for hearing. Thus, the ALJ does not consider any argument from the parties on the issue of a late reporting penalty.

PROCEDURAL ISSUES

At the outset of the hearing on August 2, 2018, the respondents asked the ALJ to reverse various orders issued by Pre-Hearing Administrative Law Judges (PALJs) with the Division of Worker's Compensation. Specifically, the respondents made the following arguments:

- The respondents argued that PALJ Elsa Martinez Tenreiro's order dated July 5, 2018 was in error in not permitting the respondents to endorse the issue of withdrawing the general admission of liability. After listening to argument from counsel, the ALJ denied the request to overturn that ruling.

- The respondents argued that PALJ Elsa Martinez Tenreiro's order dated July 5, 2018 was in error in not permitting the respondents to endorse the issue adding witnesses. After listening to argument from counsel, the ALJ denied the request to overturn that ruling.

- The respondents argued that PALJ Elsa Martinez Tenreiro's order dated July 5, 2018 was in error in not ordering the claimant to provide a "provider list" for an alleged prior ulnar nerve injury, (an injury the claimant denied). After listening to argument from counsel, the ALJ denied the request to overturn that ruling.

- The respondents requested a continuance, disputing a ruling from PALJ Michelle S. Sisk dated July 23, 2018. The ALJ denied the respondents' motion.

- The ALJ also determined that her evidentiary rulings on any testimony or statements implicating the Colorado Dead Man Statute, C.R.S. Section 13-90-102 would be considered during the hearing based upon the circumstances and scope of the proffered testimony.

- Lastly, prior to the commencement of the August 20, 2018 continued hearing, the respondents argued that the claimant should be compelled to provide new insurance releases. The ALJ denied the respondents' motion.

FINDINGS OF FACT

Based upon the evidence and testimony presented at hearing, the ALJ makes the following Findings of Fact:

1. The claimant was hired to provide caregiver services to Mary Wales. The claimant met Ms. Wales through a shared neighbor. At that time, Ms. Wales was more than 90 years old. The claimant does not have specific certification or training as a caregiver.

2. The claimant began working as Ms. Wales' caregiver in approximately April 2016. Throughout this employment, all communication regarding the claimant's rate of pay, hours, time off, and job duties occurred between the claimant and Ms. Wales' daughter, Carolyn Cargile. The claimant's job duties included assisting Ms. Wales with food preparation and bathing, laundry, taking Ms. Wales to medical appointments, running errands, and walking Ms. Wales' dog. The claimant provided caregiver services for Ms. Wales in Ms. Wales' residence in Grand Junction, Colorado.

3. The claimant initially provided her services to Ms. Wales on a part-time basis. Ultimately, the claimant's hours were increased and she began working 24 hours per day, and was paid $230.00 per day. At the time of that scheduling change, the claimant and Ms. Wales' daughter, Ms. Cargile, negotiated that the claimant would work no more than 23 days per month. The claimant was paid these wages by checks from Ms. Wales personal checking account. However, these checks were signed by Ms. Cargile.

4. In February 2017, Ms. Cargile's accountant completed various documents with the State of Colorado indicating that Ms. Wales had employees. The documents included obtaining a Federal employer identification number (EIN), and an application for unemployment insurance with the Colorado Department of Labor and Employment. The individual who completed these documents at the direction of Ms. Cargile was Ms. Cargile's accountant and not Ms. Wales' accountant.

5. The documents prepared by Ms. Cargile's accountant list Ms. Wales as an employer, and utilize Ms. Cargile's mailing address in Vernal, Utah. Once these documents were processed by Ms. Cargile's accountant, taxes were withheld from the claimant's pay and wages were reported to the State of Colorado.

6. On May 10, 2017, the Colorado Department of Labor and Employment Division of Workers' Compensation (DOWC) send a letter to Ms. Wales at Ms. Cargile's Utah address. This letter notified the respondents of the necessity to obtain workers' compensation coverage. The document entered into evidence indicates that it was received on May 12, 2017. The ALJ infers that this document was received by Ms. Cargile in Utah as it is addressed to her Utah address. Despite the receipt of this notice, workers' compensation coverage was not obtained by Ms. Wales or Ms. Cargile.[1]

7. In late May 2017, the claimant requested time off because her mother was ill and ultimately died. Ms. Cargile approved this requested time off. The claimant returned to work for Ms. Wales on July 1, 2017.

8. On July 7, 2017, the claimant was injured while performing her normal job duties for Ms. Wales. At approximately 9:00 a.m. on that date, the claimant was assisting Ms. Wales with a shower and Ms. Wales was seated on the shower seat. However, Ms. Wales was seated too far forward on the seat, and the claimant was concerned Ms. Wales would fall. The claimant attempted to reposition Ms. Wales by moving Ms. Wales' knees and then by attempting to lift Ms. Wales under her arms. Both of these attempts were ineffective. While attempting to reposition Ms. Wales, the claimant felt a shooting pain down her left arm into her left index finger as well as across her shoulder blade and into her neck.

[1] However, the respondents later obtained workers' compensation coverage with Pinnacol Assurance after the claimant was injured.

9. Following the incident involving Ms. Wales' shower, the claimant assisted Ms. Wales into her recliner. It was the claimant's normal practice to utilize a "turntable" mechanism to assist Ms. Wales from her wheelchair to her recliner. During this process, Ms. Wales attempted to sit down, even though there was no chair upon which to sit. The claimant attempted to catch Ms. Wales in her lap by bending her knees to create a place for Ms. Wales to sit. The claimant again felt pain down her neck into her left arm. Despite the claimant's initial symptoms, she completed her shift on July 7, 2018, and worked as scheduled on July 8, 9, and 10, 2018.

10. The claimant immediately reported the July 7, 2017 incidents to Ms. Cargile by telephone on July 7, 2017. The claimant assured Ms. Cargile that Ms. Wales was fine, but that the claimant was injured. At that time, Ms. Cargile instructed the claimant to seek medical treatment. In addition, Ms. Cargile agreed to pay for medical treatment related to the injury.

11. Following the July 7, 2017 telephone call, the claimant sent a written summary of the incidents to Ms. Cargile. This written summary was mailed to Ms. Cargile on or about July 11, 2017.

12. The claimant sought medical treatment and was able to schedule an appointment on July 11, 2017 with St. Mary's Occupational Medicine. On that date, the claimant was seen by James Harkreader, NP. The claimant described the July 7, 2017 incident and reported that she had pain in her left hand, neck, and upper back. Mr. Harkreader diagnosed the claimant with left hand paresthesia, a cervical strain, and myofascial strain of the upper back. At that time, Mr. Harkreader recommended that the claimant undergo physical therapy. In addition, Mr. Harkreader ordered x-rays of the claimant's left wrist, cervical spine, and oblique muscles. In addition, Mr. Harkreader took the claimant off of work for one week.

13. The x-ray of the claimant's cervical spine x-ray showed cervical spondylosis that was most prominent at the C5-C6 and C6-C7 levels. The x-ray of the claimant's left wrist was normal.

14. On July 18, 2017, the claimant returned to Mr. Harkreader and reported continued numbness in her left arm and hand. Mr. Harkreader assessed left upper extremity paresthesia and opined the claimant's symptoms were coming from her neck. As a result, he ordered a magnetic resonance image (MRI) of the claimant's cervical spine. In addition, Mr. Harkreader made referrals to Dr. Robert Frazho (for nerve conduction studies) and to Dr. Kirk Clifford (for an orthopedic consultation). At that time, Mr. Harkreader determined that the claimant could return to modified duty, with a 20 pound lifting restriction.

15. The claimant attempted to obtain a workers' compensation number from the respondents because she understood that workers' compensation coverage was in place. However, Ms. Cargile failed to provide the requested information to the claimant. When the claimant was unable to obtain a workers' compensation number from the

respondents she reported the July 7, 2017 injury directly to the Colorado DOWC on July 24, 2017.

16. On August 8, 2017, an MRI of the claimant's' cervical spine showed a large cervical disc herniation at the C4-C5 level impinging on the cord, with canal stenosis and moderate to severe degenerative foraminal narrowing.

17. On August 8, 2017, a General Admission of Liability (GAL) was completed by Ms. Cargile and filed with the DOWC. In the GAL, Ms. Cargile identified herself as the claimant's employer and admitted for medical benefits. Specifically, Ms. Cargile noted in the GAL "[m]edical benefits only . . . short term only – doctor – x-ray – phy[sical] therapy".

18. The ALJ is not persuaded by the respondents' assertion that the GAL filed on August 8, 2017 was completed in an attempt to deny or dispute the claimant's claim for workers' compensation. On the contrary, the ALJ finds that Ms. Cargile understood that by filing a document titled General Admission of Liability she was admitting liability.

19. Following her injury and initial medical treatment with Mr. Harkreader, the claimant returned to work and attempted to continue to perform her job duties. However, because of the 20 pound lifting restriction assigned by Mr. Harkreader, the claimant was unable to continue her employment.

20. On August 14, 2017, the claimant was again seen by Mr. Harkreader. The claimant reported that she was unable to comply with the 20 pound lifting restriction while performing her job duties for Ms. Wales. Based upon this information the claimant was taken off of work completely by Mr. Harkreader.

21. On August 15, 2017, the claimant notified Ms. Cargile and she was unable to continue in her position because of her work restrictions. Thereafter, Ms. Cargile moved Ms. Wales from her residence in Colorado to a nursing home in Vernal, Utah.

22. The ALJ is not persuaded that the claimant was fired by Ms. Cargile. The ALJ finds as true the claimant's testimony that she informed Ms. Cargile that she was unable to continue the employment. The claimant testified that she has not worked since August 15, 2017.

23. Following the August 8, 2017 MRI, both Mr. Harkreader and Dr. Craig Stagg (also with St. Mary's Occupational Medicine) made referrals for the claimant to be seen by a neurosurgeon for consultation. Ultimately the claimant was referred to Dr. Robert Replogle with St. Mary's Neurosurgery.

24. On August 23, 2017, the claimant was first seen by Dr. Replogle who noted that the claimant had compression of her spinal cord from a large disc herniation and myelopathic symptoms. At that time, Dr. Replogle recommended that the claimant undergo surgery that would include C4-C5 anterior cervical discectomy and fusion (ACDF).

25. Dr. Replogle's office contacted Ms. Cargile by telephone and requested authorization for the recommended surgery because she was identified as having authority to authorize or deny the claimant's medical treatment for this claim. The ALJ finds no persuasive evidence in the record that Ms. Cargile was presented with a written request for authorization for the recommended surgery.

26. Upon learning of the recommended surgery, Ms. Cargile verbally notified St. Mary's Hospital that she was denying authorization for the surgery. In a handwritten notation made on a WC-164 form dated August 31, 2017, Ms. Cargile wrote:

> "I called St. Mary's [h]ospital with codes for said surgery. I was quoted [$]41,000 doctor [$]4,000 anesthesiologist overnight as out[ ]patient. I refused on the grounds that my Mom is 93 years old and as of 8/22 Mom (Mary) has been in a care center. She doesn't even remember Cindy McRobbie".

In her testimony, Ms. Cargile confirmed the information in the above notation and reiterated that she refused to authorize the recommended surgery.

27. Following Ms. Cargile's denial of authorization, the claimant chose to undergo the recommended surgery and did so on September 22, 2017. The cost of the surgery was paid for by the claimant and by the claimant's personal insurance.

28. At the request of the respondents, on January 13, 2018, the claimant attended an independent medical examination (IME) with Dr. F. Mark Paz. In connection with the IME, Dr. Paz reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Paz opined that the claimant's multilevel degenerative disc disease and multilevel degenerative joint disease predated the July 7, 2017 work injury. However, Dr. Paz further opined that the herniated disc at the claimant's C4-C5 level, the cord compression, and cervical myelopathy are related to the claimant's July 7, 2017 injury. Dr. Paz specifically noted that the incident on July 7, 2017 aggravated and accelerated the progression of the disc herniation, which resulted in the symptoms of left upper extremity discomfort and weakness. Dr. Paz was specifically asked to state his opinion regarding the reasonableness of the cervical surgery performed on September 22, 2017. Dr. Paz stated in his IME report that "the treatment for the herniated disc at the C4-5 level, was reasonable, necessary and causally related to the July 7, 2017, incident."

29. On May 14, 2018, Dr. Stagg determined that the claimant had reached maximum medical improvement (MMI). At that time, Dr. Stagg assessed permanent work restrictions of no lifting, pushing, or pulling greater than 30 pounds. In addition, Dr. Stagg assigned a whole person impairment rating of 19%.

30. Following the IME with Dr. Paz and Dr. Stagg's determination that the claimant had reached MMI, the respondents requested a Division-sponsored independent medical examination (DIME).[2]

31. Ms. Wales died on December 23, 2017. Ms. Wales' death certificate lists pneumonia and dementia as the cause of death.

32. On April 17, 2018, pleadings were filed to open a probate estate proceeding in Mesa County District Court for the Estate of Mary Wales. On June 8, 2018, attorney Charles F. Reams was appointed as the special administrator of Ms. Wales' estate.

33. Mr. Reams testified at hearing that in his role as the special administrator of Ms. Wales' estate he has the authority to represent any creditors of the estate, (which may potentially include the claimant). In addition, he has the authority to identify, locate, and garnish any estate assets.

34. Ms. Wales executed a Last Will and Testament on August 24, 2001 which directs that Ms. Wales' entire estate is to pass into the Mary E. Wales Revocable Trust. As evidenced by documents entered into evidence, Ms. Wales' trust (also dated August 24, 2001) appoints Ms. Cargile as trustee. At hearing, Ms. Cargile testified that she is the trustee of the Mary E. Wales Revocable Trust.

35. Ms. Cargile has asserted that her mother, Ms. Wales was the claimant's employer. Ms. Cargile further asserts that all actions she took on behalf of Ms. Wales were performed pursuant to a power of attorney. At hearing copies of a Durable Power of Attorney and a Medical Power of Attorney were admitted into evidence. However, these documents are not executed and no signed copies have been presented in this matter. The ALJ finds no persuasive evidence on the record that Ms. Cargile was acting as Ms. Wales' agent under a power of attorney.

36. Based upon records entered into evidence, the claimant's insurance, Rocky Mountain Health Plans has calculated that medical services totaling $64,580.36 have been billed related to the claimant's work injury and related surgery. In addition, as of the date of the hearing the claimant has personally paid a total of $8,996.00 for medical treatment.

37. The respondents have paid some of the claimant's medical expenses. Payments made by the respondents include: mileage payment to the claimant in the amount of $42.40; payment to St. Mary's Hospital in the amount of $1,170.25; payment of $728.20 to reimburse the claimant for the cost of x-rays; and payment of $500.00 as a travel advance for the claimant to attend the scheduled DIME. Payments for these medical expenses have been made from Ms. Wales' checking account, as signed by Ms. Cargile, as well as payments made by Ms. Cargile personally.

[2] On July 25, 2018, the claimant was informed that a DIME was scheduled with Dr. John Raschbacher. Based upon information submitted at hearing, the ALJ understands that the DIME was to have taken place on September 7, 2018.

38. The ALJ credits the claimant's testimony at hearing, the medical records, and the opinion of Dr. Paz that the need for cervical surgery is causally related to the claimant's July 7 2017 work injury. More specifically, the ALJ finds that the claimant has demonstrated that it is more likely than not that the lifting incident on July 7, 2017 aggravated, accelerated, and combined with the claimant's preexisting degenerative joint disease, resulting in the need for medical treatment including the need for surgery. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that the medical treatment she has received is reasonable and necessary to cure and relieve the claimant from the effects of the admitted July 7, 2017 injury.

39. The ALJ credits the claimant's testimony and the medical records and finds that she has demonstrated that it is more likely than not that she has not worked since August 15, 2017 because of her July 7, 2017 work injury and related permanent work restrictions. The ALJ also finds that the claimant has demonstrated that is it more likely than not that she has suffered a wage loss as a result of her work injury.

40. The ALJ finds no persuasive evidence in the record indicating that the claimant was responsible for termination of her employment. The claimant was unable to work because of her injury, and there was no further work available to her once Ms. Wales moved to Utah.

41. The ALJ credits the claimant's testimony and finds that the claimant has demonstrated that it is more likely than not that while she was providing caregiver services to Ms. Wales she earned $5,290.00 per month; (wages of $230.00 per day for 23 days each month). When this amount is multiplied by 12 months it results in annual wages of $63,480.00. The ALJ calculates an AWW of $1,220.77; ($63,480.00 divided by 52 weeks is a year)

42. The ALJ finds that the claimant has demonstrated that it is more likely than not that the respondents did not have workers' compensation coverage at the time of the claimant's July 7, 2017 work injury.

43. The ALJ finds no persuasive evidence in the record indicating that the respondents were provided with a written request for authorization related to the recommended ACDF surgery.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the

rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation. . . under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. The joint employment theory of liability in worker's compensation law recognizes that a single employee may complete work on behalf of two employers simultaneously. *Evans v. Webster*, 832 P.2d 951, 955 (Colo. App. 1991); *Laborers and Hod Carriers Union, Local No. 341 v. Groothius*, 494 P.2d 808, 813 (Alaska 1972); *Ocean Acc. & Guarantee Corp. v. U.S. Fidelity & Guaranty Co.*, 162 P.2d 609, 614 (Ariz. 1945). Larson's Workmen's Compensation Law § 48.41 at 8—553 (1995) defines joint employment as follows:

> Joint employment occurs when a single employee, under contract with two employers, and under simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or closely related to that for the other.

See Cook v. Recovery Corp., 911 S.W.2d 581, 581-82 (Ark. 1995).

6. Courts in different jurisdictions apply different versions of a multifactor test to evaluate whether two employers jointly employed an employee at the time of injury for the purpose of determining worker's compensation liability, but common components of those tests tend to include the (1) consent of the employee to work for both employers; (2) employers' control over the employee's work activities; and (3) power of the employers to terminate the work relationship. *Laborers and Hod Carriers Union*, 494 P.2d at 813; *Ocean Acc. & Guarantee Corp.*, 162 P.2d at 614; *Evans*, 832 P.2d at 955.

7. Furthermore, in situations where (1) an employee's work is for the common benefit of both employers; (2) it is difficult to distinguish which employer's interests are being furthered by the employee's actions; and (3) the work for both employers is identical or nearly so, courts have found that a joint employment situation

exists. *Brotherton v. White River Area Agency on Aging*, 220 S.W.2d 219, 221-24 (Ark. Ct. App. 2005) (finding that at the time of injury, the employee was engaged in a work task that was separable as to which employer's interest was being furthered, even though the employee performed the same task for both employers at different times); *Laborers and Hod Carriers Union*, 494 P.2d at 813; *Ocean Acc. & Guarantee Corp.*, 162 P.2d at 614; *Evans*, 832 P.2d at 955.

8. It is clear from the record that the claimant provided services to Ms. Wales and was compensated for those services. However, a question exists regarding the identity of the claimant's employer as of the date of the admitted July 7, 2017 work injury.

9. Based upon the testimony and evidence presented at hearing, the ALJ concludes that both Ms. Wales and Ms. Cargile employed the claimant. In reaching this conclusion the ALJ has considered the following facts. The ALJ finds no evidence of the existence of any executed power of attorney. All communication regarding the claimant's employment occurred between the claimant and Ms. Cargile. Ms. Cargile directed her personal accountant to draft documents identifying Ms. Wales' as the claimant's employer, yet used her own Utah address for those same records. Ms. Cargile identified herself as the claimant's employer on the GAL. Ms. Cargile personally paid some of the claimant's medical expenses, but also held signatory authority over Ms. Wales' bank account as checks were written from that account and signed by Ms. Cargile for the claimant's wages and reimbursement of some of the claimant's medical expenses.

10. Ms. Wales and Ms. Cargile sought a common benefit by employing the claimant to provide caregiver services to Ms. Wales. As the interest of each employer was identical, the interest of each was logically inseparable, and thus each interest was simultaneously furthered and a common benefit provided when the claimant carried out her duties.

11. It is not the intention of the ALJ that this order be construed to create a niche in the law for liability of adult children for their elderly parents. On the contrary, the ALJ's findings and conclusions in this case are factually specific and apply solely to this matter.

12. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008).

44. As found, the claimant has demonstrated by a preponderance of the evidence that the lifting incident on July 7, 2017 aggravated, accelerated, and combined with the claimant's preexisting degenerative joint disease, resulting in the need for

medical treatment including the need for surgery. As found, the claimant has demonstrated by a preponderance of the evidence that the medical treatment she has received is reasonable and necessary to cure the claimant from the effects of the admitted July 7, 2017 injury. As found, the claimant's testimony at hearing, the medical records, and the opinion of Dr. Paz are credible and persuasive.

13. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

14. There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

15. As found, the claimant has demonstrated by a preponderance of the evidence that she suffered a wage loss beginning August 16, 2017 that was caused by her work injury. Therefore, the claimant has demonstrated by a preponderance of the evidence that she is entitled to TTD benefits beginning August 16, 2017 and ongoing until terminated by law. As found, the claimant's testimony and the medical records are credible and persuasive.

16. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

17. As found, the claimant's AWW is calculated to be $1,220.77. As found, the claimant's testimony is credible and persuasive.

18. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault"

applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

19. As found, the respondents have failed to demonstrate by a preponderance of the evidence that the claimant was responsible for the termination of her employment. As found, the claimant was unable to work because of her injury, and there was no further work available to her once Ms. Wales moved to Utah. As found, the claimant's testimony is credible and persuasive.

20. Rule 16-11 WCRP allows respondents seven days to contest a recommended medical treatment. Previously the panel has addressed the requirement that Rule 16 request for preauthorization include documents included in the provider's decision making process. *Lichtenberg v. J.C. Penney Corp.*, W.C. No. 4-814-897 (July 19, 2012); *Cross v. Microglide*, W.C. No. 4-355-764 (September 2, 2003) aff'd, *Cross v. ICAO*, 03CA1807 (Colo. App. 2004) (not selected for publication).

21. If respondents fail to comply with the requirements of Rule 16-11, the requested treatment is deemed authorized. Rule 16-11(B) provides, in part:

22.

> [i]f the payer is contesting a request for prior authorization for medical reasons, the payer shall, within seven (7) business days of the completed request: (1) Have all submitted documentation . . . reviewed by a physician or other health care professional, as defined in section 16-5(A)(1)(a), . . .
>
> (3) Furnish the provider and the parties with a written contest that sets forth the following information: (a) An explanation of the specific medical reasons for the contest, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion; (b) The specific cite from the Medical Treatment Guidelines exhibits to Rule 17, when applicable; (c) Identification of the information deemed most likely to influence the reconsideration of the contest when applicable; and (d) A certificate of mailing to the provider and parties.

23. WCRP 16-10(E) provides that for an authorization request to be "complete" the medical provider "shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting medical documentation." WCRP 16-10(E) further identifies supporting medical

documentation as "documents used in the provider's decision-making process to substantiate the need for the requested service or procedure."

24. It is the claimant's burden to demonstrate that there was a "completed request" for purposes of assessing a penalty for violation of Rule 16. *See McDaniel v. Vail Associates. Inc.*, W.C. No. 3-111-363 (July 18, 2011). A respondent is not required to plead insufficiency of a request for authorization as an affirmative defense. *Id.*

25. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If respondent committed a violation of the statute, rule or order, penalties can be imposed only if respondents' actions were not reasonable under an objective standard. *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003).

26. As found, the claimant has failed to prove by a preponderance of the evidence that the respondents violated Rule 16. The respondents were not provided with a written request for authorization of the recommended ACDF surgery. Therefore, the requirements of Rule 16 were not triggered.

27. Prior to July 1, 2017, Section 8-43-408(1), C.R.S., provided that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits payable to the claimant were to be increased fifty percent.

28. However, effective July 1 2017, Section 8-43-408, C.R.S. was amended and the language regarding a fifty percent increase in claimant benefits was removed. The version of Section 8-43-408 C.R.S. in effect at the time of the claimant's July 7, 2017 work injury specifically states that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the employer is subject to a penalty and additional twenty-five percent of the benefits ordered, which is payable to the Colorado uninsured employer.

29. As found, the claimant has demonstrated by a preponderance of the evidence that the respondents did not have workers' compensation coverage at the time of the claimant's July 7, 2017 work injury. For their failure to obtain and maintain workers' compensation insurance, the respondents shall pay penalties of $18,394.09, to the Colorado uninsured employer fund; (which is an amount equal to 25% of the total medical bills[3] owed of $73,576.36) and penalties of $10,224.00 to the Colorado

[3] This amount is calculated as the total of $8,996.00 the claimant has paid out of pocket, plus the $64,580.36 in unpaid medical bills related to the claimant's treatment.

uninsured employer fund; (which is an amount equal to 25% of total unpaid TTD benefits owed[4] as of August 2, 2018).

ORDER

It is therefore ordered that:

1. Mary Wales and Carolyn Cargile were the claimant's employers at the time of her July 7, 2017 work injury. Therefore, both the Estate of Mary E. Wales and Carolyn Cargile are liable for payment of the claimant workers' compensation benefits.

2. Respondents shall pay for reasonable and necessary medical treatment, including the C4-C5 anterior cervical discectomy and fusion surgery performed by Dr. Robert Replogle on September 22, 2017.

3. The claimant is entitled to TTD benefits beginning August 1, 2017 and ongoing until terminated by law.

4. The claimant's AWW is $1,220.77, (resulting in TTD benefits in the amount of $817.92 per week).

5. The claimant's request for a fifty percent increase in indemnity benefits is denied and dismissed.

6. The claimant's request for penalties for the employers' alleged violation of Rule 16 denied and dismissed.

7. The respondents shall pay $28,638.09 to the Colorado uninsured employer fund for failure to obtain and maintain workers' compensation insurance. The check shall be payable to the Division of Workers' Compensation. The check shall be mailed to Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention Iliana Gallegos, Revenue Assessment Officer.

8. The respondents shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

9. All matters not determined herein are reserved for future determination.

10. In lieu of payment of the above compensation and benefits to the claimant, the respondents shall:

> a. Within ten (10) days of the date of service of this order, deposit the sum of $144,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to:

[4] With an AWW of $1,220.77, the claimant's TTD benefits are $817.92 per week. The ALJ calculates that during the 50 weeks between August 15, 2017 and the August 2, 2018 date of hearing a total of $40,896 in unpaid TTD benefits has accrued.

Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee; **OR**

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $144,000.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:

i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

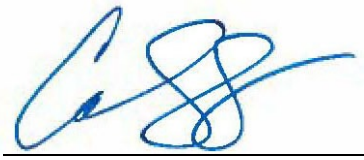
ii. Issued by a surety company authorized to do business in Colorado.

iii. The bond shall guarantee payment of the compensation and benefits awarded.

11. The respondents shall notify the Division of Workers' Compensation of payments made pursuant to this order.

12. The filing of any appeal, including a petition to review, shall not relieve the respondents of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

Dated: November 1, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

1. Determination of Claimant's permanent partial disability (PPD) rating attributable to his March 22, 2017 work related injury.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to a general award of reasonable, necessary, and related medical benefits post maximum medical improvement (Grovers).

FINDINGS OF FACT

1. Claimant is a 54-year-old male who is employed by Employer as a tree grounds-man.

2. On March 22, 2017, Claimant sustained an admitted work related injury. On that date, Claimant was pushing a tree log on a dolly and the dolly got stuck. When Claimant and a coworker tried to move it, the dolly tipped and the log rolled, pinning Claimant's left leg and ankle against a wall. Most of the trauma and blunt force was to Claimant's left ankle and left lower leg and there was no trauma to his left toes.

3. On March 23, 2017 Brian Beatty, D.O. evaluated Claimant. Claimant reported that a large trunk of a tree fell off a dolly and hit him in the left ankle and left lower leg with sudden pain. Claimant reported left ankle pain, swelling, stiffness, and bruising. On examination, Dr. Beatty found tenderness with swelling over the ankle and mild ecchymosis. Dr. Beatty found decreased range of motion of the ankle. Dr. Beatty diagnosed left ankle contusion/sprain and recommended ice, elevation, and immobilization. *See* Exhibits 2, D.

4. On March 27, 2017, Claimant underwent x-rays of his left ankle. The findings included no fracture or dislocation with well-maintained joint spaces. Vascular calcification in the distal left leg and foot as well as atherosclerotic vascular calcification was identified in the x-rays. *See* Exhibit 6.

5. On May 18, 2017, Claimant underwent an MRI of his left ankle that was interpreted by David Solsberg, M.D. Dr. Solsberg provided the impression of: extensive edema in soft tissues including the interosseous muscles of the foot that could be seen with cellulitis or marked edema and inflammation and could also be seen with regional sympathetic dystrophy. Dr. Solsberg recommended correlation with inflammatory markers and clinical findings. His impression continued with: bone marrow edema in the base of the third, fourth, and fifth metatarsal, cuboid, external cuneiform, navicular, middle cuneiform, and around the margin of the talonavicular joint including the anterior process

of the talus. Dr. Solsberg noted this could be seen with trauma or with a neuropathic arthropathy and also could be seen less likely with osteomyelitis and cellulitis. Dr. Solsberg opined that the effusions in the tendon sheaths were probably due to the cellulitis and/or edema and arthropathy with tenosynovitis. Dr. Solsberg noted vascular calcification like that shown on prior radiograph. Dr. Solsberg also found the talonavicular joint subluxed on this study. *See* Exhibit 6.

6. On May 24, 2017, Stuart Myers, M.D. evaluated Claimant. Claimant reported left foot and ankle pain. Claimant reported limited but some improvement. On examination, Dr. Myers found Claimant's skin to be intact but found swelling and tenderness in the posteromedial ankle and over the tarsometatarsal joints and naviculocuneiform joints. Dr. Myers provided the impression of possible posterior tib tendinitis or tendon dysfunction. Dr. Myers provided an airlift brace and a prescription for an anti-inflammatory medication. *See* Exhibit E.

7. On June 1, 2017, Dr. Beatty evaluated Claimant. Claimant reported feeling a little bit better but with continued left ankle pain and stiffness. On examination, Dr. Beatty found tenderness but no swelling or ecchymosis. Dr. Beatty noted that Claimant appeared to have a paronychia or a slight infection involving the great toe. Dr. Beatty continued to diagnoses left ankle contusion/sprain and noted treatment would include a boot, H-wave, and consult with Dr. Meyers. Dr. Beatty noted Claimant would follow through with the recommendations and brace from Dr. Meyers. Dr. Beatty noted that Claimant appeared to have a great toe infection and encouraged Claimant to see his personal physician to have it looked at especially since Claimant was a diabetic. *See* Exhibit D.

8. On June 2, 2017, Claimant was evaluated at Denver Health Adult Urgent Care. Sarah Hemeida, M.D. evaluated Claimant. Claimant reported that his problems began two weeks prior when he had a crush injury from a fallen tree stump while at work. Claimant reported that he was a diabetic, that the nail of his toe fell off, and that in the last week he developed severe pain, erythema, pulsating sensation, and appearance of purulent material, which had not drained. On examination, Dr. Hemeida found the left great toe with swelling and erythema that was well demarcated with evidence of slight ecchymosis to the base of the left great toe and the apex of the toe with bulging purulent appearing material and area of fluctuance. Dr. Hemeida diagnosed bacterial skin infection, cellulitis of toe of left foot and prescribed cephalexin and oxycodone. *See* Exhibit 3.

9. On June 16, 2017, Claimant was admitted to Denver Health after he returned with worsening left great toe problems. X-rays showed osteomyelitis of the distal phalanx of the left great toe. It was noted that Claimant had type 2 diabetes uncontrolled with evidence of calcified vessels on x-ray. Claimant reported an injury in March of 2017 when a tree stump fell on his left foot and that on June 2 he went to the emergency room when his nail fell off the toe and he had severe pulsating pain. Claimant reported having immediate change in the structure of his foot with flattening after the injury and that he

started using arch supports and he noticed rubbing against his shoes and open wound. *See* Exhibit F.

10. On June 19, 2018 Kristine Hoffman, DPM, operated on Claimant's left toe and performed a left hallux amputation at mid aspect of the proximal phalanx. History provided to Dr. Hoffman was that a crush injury trauma from the work injury caused arch collapse, flat foot, and lead to the Charcot arthropathy changes in the foot structure. Dr. Hoffman indicated that the foot deformity caused by the Charcot arthropathy placed the foot at a high risk of ulceration/amputation. *See* Exhibits 4, G.

11. On June 22, 2017, Dr. Beatty evaluated Claimant. Claimant reported mild ankle pain. Claimant reported that since the last visit he went to Denver Health emergency room for his left great toe infection and was placed on antibiotics. Claimant reported, however, that the infection became worse and he ultimately had to amputate his great toe on June 19. Dr. Beatty opined that the amputation was not work related. Dr. Beatty noted that Claimant was currently in a very large bandage covering the entire left foot and wearing a postop shoe and using crutches. Dr. Beatty noted that interventions for Claimant's ankle were on hold due to the infection and amputation of the great left toe. *See* Exhibit D.

12. On June 23, 2017, Dr. Hoffman evaluated Claimant. She assessed diabetic ulcer of left foot associated with type 2 diabetes; uncontrolled type 2 diabetes with neuropathy; and history of amputation of lesser toe, partial left hallux amputation on June 19, 2017. Dr. Hoffman noted that Claimant was feeling well with mild pain and was able to ambulate in surgical shoe with crutches. *See* Exhibit 4.

13. On July 5, 2017, Albert Hattem, M.D. performed a medical records review. Dr. Hattem opined that Claimant's great toe infection was not causally related to the March 22, 2017 work injury. Dr. Hattem opined that the injury was to the ankle and not to the great toe and noted that Claimant was first noted to have paronychia involving the great toe approximately 2.5 months out from the ankle injury. Dr. Hattem opined that the interval of time between the injury in question and the first presentation of infection in the toe does not support a causal relationship. Dr. Hattem opined that Claimant was an insulin dependent diabetic who was at a high risk for foot infections regardless of the March 22, 2017 injury. *See* Exhibit C.

14. On July 13, 2017, Dr. Beatty evaluated Claimant. Claimant reported mild ankle pain. Claimant reported that Dr. Meyers had ordered a special ankle brace and repeat MRI. Claimant had tenderness in the left ankle but no swelling or ecchymosis. Dr. Beatty planned to see Claimant after MRI and follow up with Dr. Meyers. *See* Exhibit D.

15. On July 26, 2017, Dr. Myers evaluated Claimant. Claimant reported persistent posteromedial pain as well as numbness in his plantar foot. Dr. Myers noted Claimant's unusual course with amputation of the great left toe. Dr. Myers opined that the injury was slow to heal given Claimant's comorbidities and need for amputation. Dr. Myers opined that the MRI clearly showed changes suggestive of diabetic neuropathy

and that given the irregularity of the third, fourth, and fifth TMT joints, the spectre of Charcot was raised. Dr. Myers opined that clearly, Claimant's diabetes and neuropathy were not caused by the injury, but that it was very possible and perhaps probable that Claimant's current degree of pathology was precipitated by the injury. Dr. Myers recommended a good brace to provide stability and minimize the risk of progression of the deformity. *See* Exhibit E.

16. On August 31, 2017, Dr. Beatty issued a letter in response to a letter sent to him by Claimant's attorney. Dr. Beatty disagreed with Dr. Hoffman's opinion that Claimant's current problems were related to an aggravation of his diabetic neuropathy from the trauma at work on March 22, 2017. Dr. Beatty opined that the work injury was not that serious. Dr. Beatty opined that when he first saw Claimant there was some mild swelling and mild bruising of the ankle and lower leg, which were the only areas, affected. Dr. Beatty noted there were no fractures. Dr. Beatty opined that the findings from MRI were very consistent with diabetic neuropathy and not with trauma and therefore disagreed with Dr. Hoffman's assessment and conclusions regarding causation. *See* Exhibit D.

17. On September 6, 2017, Dr. Myers evaluated Claimant. The impression provided was: left foot and ankle injury; great toe amputation; diabetic neuropathy; Charcot arthropathy; and posteromedial ankle pain. Dr. Myers opined that given Claimant's MRI findings suggesting denervation and x-rays showing some subluxation it was reasonable to describe Claimant's condition as early Charcot. Dr. Myers recommended a crow walker boot. Given Claimant's diabetic neuropathy, Claimant was noted to be at high risk for progression of cuboid prominence and ulceration. Dr. Myers noted that since the boot was custom made and specific for the charcot and diabetic neuropathy, the insurance company may not authorize it and reviewed with Claimant that if it was not authorized he could work through Medicaid to get it. Claimant wanted a second opinion and believed he needed surgery on the cuboid. *See* Exhibit E.

18. On September 21, 2017, Eric Lindberg, M.D. issued a letter. Dr. Lindberg noted that the MRI in July of 2017 showed some bony edema and some malalignment of the fourth and fifth metatarsal bases suggestive to be neuropathic. Dr. Lindberg opined that given Claimant's history of injury and the insulin dependent diabetes, placement in a crow boot walker was very reasonable and most likely related to the initial injury. *See* Exhibit 5.

19. On October 4, 2017, Claimant was evaluated at Denver Health. Claimant reported a lump on the bottom of his left foot and that he had the deformity for over a year Claimant reported that about the same time of his surgery on his left great toe, he also had a lump on his foot. Claimant reported wearing a custom brace but that he wanted to have surgery so that he no longer had to wear the brace. It was explained to Claimant that removing the soft tissue on the bottom of the left foot was not recommended, as it would put Claimant at risk for ulcerations and other problems. It was explained that following his injury, his foot structure changed and that it was positive he still had a foot after the injury he had. *See* Exhibit F.

20. On October 23, 2017, Dr. Hoffman evaluated Claimant. Dr. Hoffman assessed: gait abnormality; left foot pain; uncontrolled type 2 diabetes with diabetic peripheral angiopathy without gangrene with long-term use of insulin; diabetic polyneuropathy associated with type 2 diabetes; Charcot's arthropathy, diabetic; acquired pes planus, left. Dr. Hoffman noted the partial left hallux amputation and that the surgical site was well healed. Dr. Hoffman opined that the history of left foot trauma led to the left midfoot charcot/pes planus and that the foot deformity placed Claimant at a high risk of ulceration/amputation. *See* Exhibit 4.

21. On November 13, 2017, Alexander Jacobs, M.D. performed an independent medical evaluation. Claimant reported that he had diabetes for nine years first diagnosed after he suffered temporary bilateral blindness. Claimant reported he subsequently regained vision but that his left eye continued to be problematic. Claimant reported his left eye is virtually blind now. Claimant reported that with this injury, a large piece of tree trunk fell off a dolly and pinned him against the wall of a house with most of the trauma and blunt force to his ankle and lower leg. Claimant reported that he continued working, finished dragging the log back onto the dolly and out into the street and helped cleanup. Claimant reported being evaluated the next day. Claimant reported that his toe was not symptomatic at that time. Dr. Jacobs noted that there were neuropathic changes consistent with Claimant's diabetes and perhaps an early Charcot foot. Claimant reported about a month and a half after the injury he began to develop some toe symptoms and that he went to Denver Health for treatment where an infection and cellulitis was identified in the left great toe. Claimant reported that he went back two weeks later and was told the infection was in the bone and that they would need to do a distal toe amputation. Claimant reported that his recovery was fast and healed faster than they expected given his diabetes. Claimant reported he returned to work and was currently working full duty. Claimant reported that he was given a brace for his Charcot foot, the rocker deformity, and loss of arch on the left foot. *See* Exhibit A.

22. Claimant reported that approximately two years ago he had problems with an ingrown toenail on the left great toe and that a physician removed the nails of his left great toe, right great toe, and right fifth toe. Dr. Jacobs reviewed medical records and performed a physical examination. Dr. Jacobs noted that x-rays on March 27, 2017 of Claimant's left ankle showed vascular calcifications in the distal leg and foot as well as atherosclerotic vascular calcification. Dr. Jacobs also noted that an MRI from May 18, 2017 found extensive edema in the soft tissues of the interosseous muscles of the foot either cellulitis or marked edema and inflammation and correlation with inflammatory markers was recommended. Dr. Jacobs noted that the MRI also showed bone marrow edema in the third, fourth, and fifth metatarsal, cuboid, and external cuneiform, navicular and middle cuneiform and around the margin of the talonavicular joint frequently seen in neuropathic arthropathy. The MRI also noted vascular calcification. Dr. Jacobs noted that by June 2, 2017 Claimant had an x-ray done on his left foot for swelling and possible infection and that the notes incorrectly state this happened one week after trauma when it was 70 days after the trauma. Dr. Jacobs also noted that by June 16, 2017 when Claimant went to the emergency room, it was noted that his diabetic foot ulcer was getting

worse and that there was concern about possibly abscess formation and early osteomyelitis was shown by x-ray. After reviewing all the medical records and performing a physical examination, Dr. Jacobs provided the impression of: diabetes mellitus, type II, with neuropathy and calcific vascular changes in the left leg and foot; charcot foot, left; left eye blindness due to diabetic complications; ankle injury from March 22, 2017, essentially resolved; and osteomyelitis left great toe tip with amputation of distal phalanx with transection through the mid portion of the proximal phalanx; history of prior ingrown toenail left great toe with toenail removal and issues with right great toenail and right fifth toenail; hypertension; and lipid elevation. *See* Exhibit A.

23. Dr. Jacobs opined that the toe infection was not in any way, shape, or form causally related to the March 22, 2017 work injury. He opined that the original injury took place almost three months before the toe infection and that the original evaluation of the foot did not demonstrate any injury to the toe nor was Claimant symptomatic as far as the toe was concerned. Dr. Jacobs opined that infections of the toes that spread to the bone are the rule rather than the exception in diabetics. He opined that Claimant's Charcot foot was not unusual in diabetics and entails remodeling of the bone, loss of the arch, flattening of the foot, and a rocker foot type deformity. *See* Exhibit A.

24. On December 26, 2017, Dr. Beatty evaluated Claimant. Dr. Beatty noted that Claimant's work related injury diagnosis was left ankle contusion and sprain. Dr. Beatty noted Claimant had negative x-rays and a negative MRI showing no acute fracture to the left ankle. Dr. Beatty noted that Claimant underwent conservative care including ice, elevation, boot, crutches, and physical therapy. Dr. Beatty noted that on June 1, Claimant appeared to have a great toe infection and was encouraged to see his personal physician and that the toe ultimately had to be amputated. Dr. Beatty opined that this was a non-work event. Dr. Beatty noted that Dr. Myers did not believe Claimant had a surgical problem with the left ankle and had released Claimant. Dr. Beatty opined that Claimant was at maximum medical improvement. Dr. Beatty assessed ankle sprain and provided an impairment of 12% left lower extremity. Dr. Beatty rated Claimant under Table 37 for abnormal motion of the hind foot (ankle joint) noting lost motion in dorsi-plantar flexion and under Table 38 for abnormal motion of the hind foot (subtalar joint) noting lost motion in inversion-eversion. The ankle joint and subtalar joint are areas where the log landed on Claimant in the work injury. Dr. Beatty opined that maintenance care after maximum medical improvement was not required. *See* Exhibit D.

25. Claimant requested a Division Independent Medical Evaluation.

26. On April 19, 2018, Kenneth Finn, M.D. performed a Division Independent Medical Evaluation (DIME). Claimant reported that he was working as a grounds maintenance man and was hauling a large log when it fell and struck him on the left shin, ankle, and foot. Claimant reported acute pain, swelling, and bruising and that he was in a brace for several months. Claimant reported that his symptoms worsened and that shortly after his injury he ended up with a blister on his left foot and due to his underlying diabetes, it progressed to the point where he required a partial toe amputation. Claimant reported the amputation healed up very well but that his ankle continued to remain painful.

Dr. Finn diagnosed: chronic left ankle pain status post work related injury to the foot; partial great toe amputation; non-work related history of diabetes requiring insulin, and non-work related Charcot arthropathy. Dr. Finn agreed with Dr. Beatty that Claimant was at maximum medical improvement on December 26, 2017. However, Dr. Finn felt the ratable impairments included the left ankle as well as the partial amputation. Dr. Finn opined that although Claimant had an underlying medical condition putting Claimant at higher risk for developing foot ulceration and subsequent amputation, Claimant developed the issue within a short time frame of his trauma, initially losing his nail, and subsequently part of his toe. Dr. Finn thought there was a temporal relationship that would relate the two and felt the partial toe amputation would be a work related condition and ratable. Dr. Finn opined that Claimant had a 19% left lower extremity impairment, with 5% impairment for loss of the great toe and 15% loss for range of motion at the ankle. Dr. Finn recommended maintenance care including follow up with Claimant's orthopedic surgeon. *See* Exhibits 1, B.

27. Respondents applied for hearing to challenge DIME physician Dr. Finn's rating.

28. Dr. Jacobs testified at hearing. He opined that Claimant's left great toe partial amputation was not even remotely related to the March 22, 2017 work injury. Dr. Jacobs testified that Claimant's diabetes was not well managed prior to the injury and that Claimant already had calcification of vessels. Dr. Jacobs testified that the MRI showed Claimant's damaged nerves and dissolved bones/tendons with micro fractures, neuropathy, and restructuring into flat foot. Dr. Jacobs testified that Claimant's left foot has Charcot foot with the loss of arch consistent with diabetics. Dr. Jacobs testified that trauma could cause the problem, but that here, the log did not touch Claimant's left foot so trauma did not cause it. Dr. Jacobs noted that Claimant reported to the podiatrist that he had a flat foot with a lump on the bottom for one year in October of 2017 so that the protrusion and flatfoot were present prior to the work related injury. Dr. Jacobs opined that the DIME physician was wrong regarding the short time frame, that March 22, 2017 to June 19, 2017 was not a short time, and that there was not a close temporal relationship. Dr. Jacobs opined that Claimant would have had the toe ulcer without the work related injury and that Claimant had issues with his feet before. Dr. Jacobs testified that Dr. Finn was mistaken. Dr. Jacobs also opined that although Claimant needs a lot of care and maintenance if he wants to save his left foot and leg, none of it is required based on the March 22, 2017 injury. Dr. Jacobs testified that Claimant was getting better from the injury and doing fine until he developed a new problem in the left toe.

29. Dr. Jacobs further testified that Claimant's limitation in range of motion at the ankle was not due to the March 22, 2017 injury and was due to Claimant's Charcot foot. Dr. Jacobs opined that the Charcot foot and Charcot arthropathy was not work related so any measurement and rating for that provided by the DIME physician was incorrect. Dr. Jacobs opined that the DIME opinion may have been tainted by bad information. Dr. Jacobs testified that the DIME physician believed there was close proximity and there wasn't, the DIME physician didn't realize that Claimant had a toenail removed two years prior on his left great toe, and the DIME physician didn't realize that

Claimant had bilateral foot problems in 2011, neuropathic leg pain in 2012, and prior left top of foot pain and cellulitis of the left foot. Dr. Jacobs pointed out that Claimant told providers that he developed the toe infection/problem a week after his injury but that it was actually almost three months after his injury. Dr. Jacobs opined that the DIME physician erred.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME on Permanent Partial Disability (PPD)

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S.

Generally, the finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

However, the increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has stated in this respect that: Scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of § 8-42-107(8)(c), which states that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

Claimant thus has the burden of showing the extent of his scheduled impairment by a preponderance of the evidence. *Maestas v. American Furniture Warehouse and G.E. Young and Company*, W.C. No. 4-662-369 (2007); *Burciaga v. AMB Janitorial Services, Inc. and Indeminity Care ESIS Inc*., W.C. No. 4-777-882 (2010). Respondents are not required to overcome the scheduled impairment rating assigned by the DIME and the usual preponderance of the evidence burden of proof applies for Claimant to prove entitlement to benefits. *Id.*

After review of the credible and persuasive evidence, the ALJ concludes that Claimant's left great toe partial amputation is not related to his March 22, 2017 work injury and that rating the toe amputation is not appropriate. Evidence demonstrates significant problems in the left foot pre-dated the work related injury and that Claimant has been high risk for developing infection/amputation of his bilateral feet for some time due to his significant uncontrolled diabetes.

Claimant's left toe infection and ultimate amputation did not occur immediately following the work injury. Rather, he was showing slight improvement in his left ankle pain prior to the toe infection setting in. Additionally, Claimant reported symptoms consistent with Charcot foot in his left foot had been present for several months prior to the work related injury. Claimant also had his left great toenail removed well before the work related injury. The state of his left foot, which was highly susceptible to infection, including the removed toenail existed well before the work injury. X-rays taken shortly after the work related injury showed calcification and studies also showed neuropathy that pre-existed the work injury to his left ankle.

The opinion of Dr. Beatty is persuasive that Claimant sustained an ankle contusion/sprain that was not significant or consistent with fracture. Studies show no traumatic acute fracture occurred on the date of injury. Although an acute fracture or injury could possibly lead to Charcot foot or infection, here it did not do so. Rather, Claimant's pre-existing underlying condition caused him to develop the toe infection and ultimate amputation. Therefore, the DIME physician was incorrect to rate the toe amputation and Claimant has not established an entitlement to a scheduled rating for the toe amputation.

However, Claimant has established an entitlement to a scheduled rating for his left ankle that was injured. Claimant's left ankle never fully recovered from injury. Although his underlying condition diabetic condition may have contributed to his lack of recovery, Claimant's work related ankle sprain combined with his pre-existing condition caused his current disability. The ALJ finds persuasive the rating of Dr. Beatty of 12% lower extremity as the ankle sprain combined with Claimant's poor circulation and ability to heal due to his diabetes has caused impairment. Dr. Beatty rated Claimant under Table 37 for abnormal motion of the hind foot (ankle joint) noting lost motion in dorsi-plantar flexion and under Table 38 for abnormal motion of the hind foot (subtalar joint) noting lost motion in inversion-eversion. The ankle joint and subtalar joint are areas where the log landed on Claimant in the work injury. The ALJ finds it credible and persuasive that the lost

motion in these areas is ratable and work related. The rating for the toe amputation is not work related.

The opinion of Dr. Beatty is ultimately the most persuasive. Claimant's left toe amputation is not work related, but his left ankle injury did result in permanent range of motion loss in the ankle joint and subtalar joint resulting in a 12% scheduled left lower extremity impairment.

Medical Maintenance

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

Claimant has failed to establish, by a preponderance of the evidence that future medical treatment will be reasonably necessary to relieve the effects of his injury or prevent further deterioration of his condition. Here, the work related injury was limited to an ankle sprain and ankle contusion. Although Claimant's ankle was slow to heal and he has permanent impairment in range of motion in his ankle, there is insufficient evidence that future treatment is needed to relieve his injury or prevent it from deteriorating. Claimant has been determined to have sustained no fractures in his ankle and is not a surgical candidate for his ankle. The continued maintenance care recommended by the DIME physician was for follow up with orthopedics, however, the orthopedist has released Claimant.

Claimant, undoubtedly, will need significant medical care and follow up for his non work related diabetic condition in his left lower extremity. Claimant needed significant medical care for this condition prior to his work related injury. Prior to the injury he had calcification issues, an ingrown toenail removed, and uncontrolled diabetes for many years. He is a high risk for further infections and amputations due to his diabetic state. However, he has failed to show by preponderant evidence that further maintenance care is necessary for the left ankle sprain and contusion. Therefore, his request for a general award of "grover" medical benefits is denied.

ORDER

IT IS HEREBY ORDERED that:

1. Claimant has established, by a preponderance of the evidence, an entitlement to a 12% left lower extremity impairment rating for his March 22, 2017 work related injury.

2. Claimant's left great toe partial amputation is not work related.

3. Claimant has failed to establish, by a preponderance of the evidence, an entitlement to medical maintenance benefits.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 1, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-070-710-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 10, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 10/10/18, Courtroom 3, beginning at 8:30 AM, and ending at 11:15 AM),

Claimant's Exhibits 1 through 5 were admitted into evidence, without objection. Respondents' Exhibits A through G were admitted into evidence, without objection.

ISSUES

The issues to be determined herein concern whether the Claimant sustained a compensable injury on October 10, 2017. If so, what are the consequences of the injury: medical benefits, average weekly wages (AWW), and temporary partial disability (TPD) benefits. By agreement, the parties struck issues concerning temporary total disability. (TTD).

The Claimant bears the burden of proof on all issues by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant was born on July 21, 1966, and at the time of the hearing was 52 years old.

2. The Claimant worked as a Lessons and Studio Manager for the Employer.

Alleged Compensable Event

3. The Claimant alleges that he approached the Employer's Assistant Manager, Preston Nogar, to report numbers. Nogar proceeded to congratulate him and when the Claimant turned around, Nogar allegedly grabbed the Claimants butt. The Claimant claims that he turned around and told Nogar to stop and that he didn't want any part of their "games."

4. The Claimant then alleges that another coworker, Anthony Baughman, proceeded to follow him to his desk. At his desk, the Claimant states that Baughman tried to grab the Claimant's butt and the Claimant fell down when he was trying to save a guitar. The Claimant also alleges that several hours later, Baughman tried to "sexually" harass him again and he twisted Baughman's arm in self-defense.

5. Nogar and Baughman, as witnesses, reported a different set of events. First they indicate that none of the alleged "sexual harassment, " either verbally or physically, took place that day or any day while the Claimant was employed. Baughman alleged that the Claimant often bragged about his marital arts background and wrestled Baugham to the ground one day. Nogar claimed he was not at work on October 10, 2017, and that the incident between the Claimant and Baughman was "rough housing" and was not serious. Nogar stated that the type of altercation between the Claimant and Baughman was not typical and he had never witnessed anything like it. Nogar further testified that the Claimant had previous HR issues and since the altercation was on video, he was fired for fighting.

6. The Claimant called Patrick Davis as the rebuttal witness. Davis claimed to be in the Employer's store on October 10, 2017, and witnessed a male employee smack the Claimant on his butt. He testified that the Claimant turned around and clearly was angry and expressed his disapproval by shouting "stop" or "don't do that."

7. On February 28, 2018, the Claimant completed Worker's Claim for Compensation Form from the Colorado Department of Labor and Employment (CDLE). The Claimant alleged that the injury occurred when- "[he] had an altercation with a coworker that was sexually harassing him, walked away, coworker followed [him] and coworker tried to grab [him], and [he] tried to stop him and fell on top of him landing directly onto [his] knee" (Respondents' Exhibit A, p. 1).

8. The Employer alleged that they terminated the Claimant for "fighting with employees."

Relevant Medical

9. On October 12, 2017, the Claimant went to On Point Urgent Care for knee pain and was seen by Jonathan Mihok, D.O. The Claimant reported that "he was moving some boxes, one was falling and he tried to catch it but his knee 'gave out.'" Dr. Mihok preformed several X-Rays and prescribed some medicine.

10. On November 17, 2017, the Claimant went back to On Point Urgent Care for knee pain and was seen by Edwin Baca, M.D. On that day, Dr. Baca reported that the Claimant was no longer working and was pursuing a work injury claim although contrary to his prior visit. Dr. Baca took the following dictation during the visit:

> "[Patient] comes back into the office today for a follow up visit for his R Knee pain. [Patient] reports the knee pain is not improving and comes in today for a reevaluation of his R Knee. He notes there is not a valid WC Claim; however, he notes the injury happened at work and he has notified HR and they recommend filling out the proper WI paperwork to get a claim for the work injury. He notes that he has already retained an attorney and his counseled to attempt to go through WC for management. The [patient] notes today that he feels this is a valid work injury. The [patient] notes another coworker was playing around and fell directly onto his r anterior knee, injuring his r knee. He was initially seen in our office on 10/12/2017 with no mention of the injury happening at work. . . [Patient] reports that he was "fired" from his job because he wanted to file for a work injury claim."

(Claimant's Exhibit 2, p. 4). Dr. Baca prescribed a knee brace for support, cold therapy as needed, pain medication and to return for reevaluation.

11. The history given to Dr. Baca, concerning the events of October 10, 2017, is entirely inconsistent with the Claimant's testimony at hearing. The ALJ finds the history given to a medical provider for the purpose of receiving

treatment more reliable that the Claimant's testimony at hearing, which seems improbable as measured against a standard of reason and common sense.

Credibility

12. The Claimant undercuts his own credibility in his own exhibits. On October 12, 2017, the Claimant reported to Dr. Mihok that he injured his knee when "he was moving some boxes, one was falling and he tried to catch it but his knee 'gave out.'" On November 17, 2017, however, the Claimant reported to Dr. Baca that "another coworker was 'playing around' and fell, landing directly onto his anterior [right] knee, injuring his knee." This discrepancy is actually noted by Dr. Baca when he states that the Claimant "was initially seen in our office on 10/12/2017 with no mention of the injury happening at work." On Feb. 28, 2018, the Claimant modified his story once more to indicate that he "had an altercation with a coworker that was sexually harassing him, walked away, coworker followed me and coworker tried to grab me, and I tried to stop him and fell on top of him landing directly onto knee" (Respondents' Exhibit A, p. 1). The Claimant's description of the incident again changed during the hearing when he claimed that his manager sexually assaulted him and that five minutes later a different coworker who was not involved in the first assault followed him back to his desk. The Claimant adds that the coworker was trying to grab him at his desk and they fell on each other when he was trying to save a guitar from toppling over. The Claimant additionally adds that the same coworker attempted to sexually assault him a few hours' later and in self-defense the Claimant twisted his arm and made the coworker fall to the ground.

13. The ALJ finds the Claimant's version of events on October 10, 2017 entirely lacking in credibility. The ALJ further finds the testimony of Nogar and Baugham credible as found herein above.

Ultimate Findings

14. Based on the totality of the evidence, especially the Claimant's denials of work-relatedness to medical providers, the ALJ does not find the Claimant's claim of a work-related injury on October 10, 2017 credible. The fact that Claimant did not claim this as a worker's compensation issue until after he was fired, further reflects on his lack of credibility. Moreover, the Claimant also changed the description of the events as time progressed. The Claimant first told his doctor that the injury wasn't work related, only to change his story the next month when he visited the doctor after he was fired. Then he went on to describe the incident on a worker's compensation form as a "sexual assault" involving only one coworker. On the day of the hearing, the Claimant stated that there were three different incidents on that day, two different coworkers were involved and that he fell trying to save a guitar. The ALJ infers and finds that there are too many anomalies and inconsistencies in the Claimant's version of events to render his version of compensable injuries lacking in credibility. Furthermore, even if there was an injury

stemming from a physical altercation with a coworker, such event would be classified as "horseplay" and would be non-compensable.

15. On the other hand, the ALJ finds the testimony of Preston Nogar and Anthony Baughman to be more consistent, and although it may not be fully credible itself, it contradicts the inconsistent testimony of the Claimant. Indeed, their consistent descriptions and ongoing employment tends to enhance their credibility. Their testimony also elevates the anomalies in the Claimant's version of events to a level of incredulity. The Respondents' theory that this case is not compensable because it stems from non-compensable horseplay between co-employees seems likely. The ALJ finds that the case turns on overall credibility and, as found herein above, the Claimant's claim is not credible and if anything his injury arises from non-compensable horseplay.

16. Neither the Claimant nor the Respondent thought it was relevant to produce any relevant HR (Human Resources) documents concerning the Claimant's employment and termination; or, to discover the video that Nogar spoke about that supposedly depicted the altercation. Since this claim requires the Claimant to bear the burden of proof, by preponderant evidence, his claim lacks sufficient evidence for Claimant to sustain his burden. Coupled with the Claimant's lack of credibility, he failed to establish that hid injuries were clearly within the course and scope of employment.

17. For the reasons specified herein above, the ALJ finds that the Claimant has failed to prove that he suffered compensable injuries on October 10, 2017, arising out of the course and scope of his employment, thus, the Claimant has failed to sustain his burden of proof by a preponderance of the evidence.

18. The Claimant's knee injuries had no relation to his work-related functions. If anything, the injuries resulted from horseplay where the Claimant was the aggressor; and, this amounted to such a substantial deviation from work that it was outside the course and scope of employment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo.

App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's claim is lacking in credibility on whether the October 10, 2017 incident amounted to a compensable event; or, was horseplay wherein the Claimant was the aggressor.

Compensability and Horseplay Doctrine

b. A claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with employer. Section 8-41-301(1)(b) & (c), C.R.S*.; see Streeb*, 706 P.2d at 786. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *Pansy Hubbard v. City Market,* W.C. No. 4-934-689-01 (I.C.A.O Nov. 21, 2014). As found, the incident, at best, amounted to horseplay wherein the Claimant was the aggressor.

c. The "arising out of " element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.; City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). It is not essential to compensability that an employee's activity at the time of the injury result from a job duty if the activity is sufficiently incidental to the work to be properly considered as arising out of and in the course of the employment. *Panera Bread, LLC*

v. Indus. Claim Appeals Office, 141 P.3d 970 (Colo. App. 2006); *Mary Rodriguez v. Pueblo County* W.C. No. 4-911-673-01 (I.C.A.O Aug. 2, 2016). As found, the Claimant's injuries did not result from actions incident to his work duties.

d. If the Claimant's activity at the time of the injury constitutes such a substantial deviation from the circumstances and conditions of his employment that the activity is for the claimant's sole benefit, the injury does not arise out of and in the course of employment. *Kater v. Indus. Comm'n,* 728 P.2d 746 (Colo. App. 1986); *Mario Laroc v. Labor Ready, Inc.* W.C. No. 4-783-889 (I.C.A.O Feb. 1, 2010). As found, the Claimant's actions on October 10, 2017 amounted to such a substantial deviation from work duties that it was outside the course and scope of his employment.

e. Where, the alleged deviation from employment involves "horseplay," the courts apply a four-part test to determine whether the resulting injury is compensable. In *Lori's Family Dining v. Indus. Claim Appeals Office,* 907 P.2d 715, 718 (Colo. App. 1995), the Court of Appeals held that the relevant factors are:

(1) the extent and seriousness of the deviation;
(2) the completeness of the deviation, *i.e.,* whether it was commingled with the performance of a duty or involved and abandonment of duty;
(3) the extent to which the practice of horseplay had become an accepted part of the employment; and
(4) the extent to which the nature of the employment may be expected to include some horseplay.

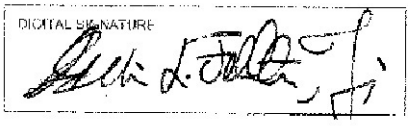
Mark Orist v. G4S Secure Solutions (USA), Inc. W.C. No. 4-886-126-01 [Indus. Claim Appeals Office (ICAO), August 17, 2012]. As found, the Claimant's injuries occurred "in the course of" employment. The issue presented here is whether the injury "arose out of" the Claimant's employment , *i.e.* whether there exists a causal connection between the work conditions and the injury. Since the Claimant departed from the scope of his employment by engaging in "horseplay," his injury does not arise out of employment. First, the Claimant's altercation with another coworker was a serious deviation from employment because physical altercations were not typical of his work place. As found, the Claimant was the aggressor. Second, the deviation was not commingled with any performance of duty. Although the Claimant testified that he fell because he was trying to save a guitar from falling, his testimony is not credible to that fact and not dispositive here. The root cause of the fall was the altercation that the Claimant initiated as the aggressor. Third, the practice of horseplay is not an acceptable part of employment as evidenced by the fact that the Claimant was fired for "fighting." Again, the Claimant attempted to justify that horseplay and harassment was common, but since his testimony is not credible, this element is also lacking. His version of events was simply not believable. Fourth, horseplay is not expected to be in the nature of musical instrument sales or musical lessons. Thus the Claimant's injuries did not arise out of his employment and therefore he did not sustain a compensable injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits arising out of the Claimant's October 10, 2017 incident, are hereby denied and dismissed.

DATED this 2nd day of November 2018.



EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-066-313-001

ISSUES

1. A determination of Claimant's Average Weekly Wage (AWW).

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period May 5, 2017 through April 10, 2018.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. based on Respondents' failure to accurately calculate his AWW or amount of disability benefits.

4. Whether Claimant has produced clear and convincing evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' unreasonable delay or denial of prior authorization pursuant to WCRP 16-11(F).

FINDINGS OF FACT

1. Claimant worked for Employer as a Carpenter. On May 1, 2017 he sustained an admitted industrial injury to his left hip during the course and scope of his employment. Clamant began receiving medical treatment for his injury and continued to work for Employer in a modified capacity because of temporary work restrictions.

2. On October 5, 2017 Claimant underwent an MRI of his left hip. The MRI revealed a vertical tear of the labrum along with degenerative changes and chondromalacia. Claimant's Authorized Treating Physician (ATP) recommended an arthroscopic labral reconstruction with Brian J. White, M.D. of Western Orthopaedics. Dr. White subsequently recommended surgical repair.

3. On October 25, 2017 Jennifer Laracca of Dr. White's Office sent a facsimile request to Insurer's Claims Adjuster Genie Gerardo regarding authorization for the proposed surgery. The document specified that the surgery would consist of "left hip; scope labral repair-reconstruction, femoral acetabular osteoplasty." The document listed CPT codes 29915, 29999 and 29914. The correspondence asked Insurer to pay "80% of billable charges for 29999-arthroscopic labral reconstruction." The facsimile request did not explain the reasonableness and medical necessity of the services requested and the record is devoid of supporting medical documentation.

4. Dr. White's office sent Claimant a document titled "Dr. White Hip Arthroscopy Surgical Packet." The document advised Claimant that the proposed surgery had not been fully coded by the America Medical Association and thus insurance companies would pay none or only a small amount of the cost. Claimant was therefore expected to pay for the procedure if Dr. White's request for reimbursement was denied. Claimant refused to sign the agreement.

5. The record reveals correspondence between Ms. Laracca and Ms. Gerardo regarding the requested surgery during January 2018. By February 28, 2018, e-mail correspondence between Forensic Claims Examiner Evie Maes of Claimant's counsel's office and Ms. Gerardo reflects that the proposed hip surgery had been authorized.

6. On March 21, 2018 Ms. Maes authored an e-mail that included Insurer's Adjuster Rick Davis as a recipient. Ms. Maes noted that Claimant's hip arthroscopy through had been approved by Insurer. However, she noted that Claimant had received a "hip arthroscopy financial contract" from Dr. White's office and the surgery would be canceled if Western Orthopedics did not receive a "Letter of Agreement" from Insurer. Ms. Maes remarked that the process did not "seem to be customary" and was "anticipating problems" in obtaining a letter from insurer.

7. Billing Manager Jackie Castillo from Dr. White's office testified that she became involved with Claimant's case on March 18, 2018. She noted that Dr. White's surgery scheduler Ms. Laracca had previously worked on Claimant's case but she became involved when payment could not be obtained. Ms. Castillo commented that Claimant was unwilling to sign paperwork that would obligate him to par for the proposed surgical procedure if payment was denied by Insurer. She remarked that she was trying to get Insurer to sign a Letter of Agreement because the requested surgical procedure involved an unlisted CPT code and there was thus no listed code for payment authorization.

8. Ms. Castillo testified that the proposed surgery was not yet fully coded and their office had been having a hard time getting reimbursed in most cases because they were using an unlisted code. Specifically, unlisted code 29999 was used by Dr. White's office to request reimbursement from insurers. Ms. Castillo noted that "it's basically not a real procedure code" and is referred to as a "dummy code."

9. On March 28, 2018 Respondents filed a General Admission of Liability (GAL) through Mr. Davis that acknowledged liability for medical benefits only. In the "Remarks" section of the GAL, Mr. Davis noted the following: "No lost time beyond the 3 day waiting period. No benefits currently due to injured worker. PPD not yet determined."

10. Ms. Castillo testified that beginning on April 24, 2018 she made multiple attempts to contact Mr. Davis to further arrange authorization. She explained that on April 25, 2018 she began e-mailing and leaving voicemails for Mr. Davis to request authorization but received no reply. By April 26-27, 2018 Ms. Castillo left voicemail messages with a manager of Insurer.

11. Mr. Davis testified that he began working on Claimant's claim at the end of March or beginning of April, 2018. His first record of communicating with Ms. Castillo was on April 19, 2018. They discussed approval for payment of the surgery that had been authorized. Mr. Davis explained that Ms. Castillo wanted Insurer to agree to pay for a dummy CPT code for Claimant's surgery because it was not a standard hip procedure. The dummy CPT code was 29999. Mr. Davis testified that an invalid CPT does not give a diagnosis code or procedure and therefore gets paid at zero percent.

12. Mr. Davis explained that there are two components for authorization of a procedure. The first is authorization to perform the procedure and the second is authorization for payment. Mr. Davis mentioned that he usually deals only with authorization to perform the procedure but anything to do with CPT codes is handled by someone else. Mr. Davis clarified that if a physician's office is contacting Insurer regarding billing and CPT codes, then authorization to perform the procedure has likely already been provided. He noted that it was his understanding from reviewing Claimant's file that the prior adjuster had authorized performance of the proposed surgery.

13. Mr. Davis testified that due to the billing difficulties with Dr. White's office, Insurer scheduled a second orthopedic evaluation with surgeon Nathan Faulkner, M.D. He commented that Insurer requested an evaluation with a second orthopedic surgeon to move forward with the surgery and restore Claimant to his preinjury status as quickly as possible. On May 14, 2018 Dr. Faulkner examined Claimant. He agreed with Dr. White that Claimant required hip surgery. However, because Dr. Faulkner did not perform the required surgery he recommended Claimant return to Dr. White. Notably, Dr. White is one of only two or three physicians in Colorado that performs the proposed surgical procedure.

14. Mr. Davis explained that, after the examination with Mr. Faulkner, it became clear that Claimant's only option for surgery was with Dr. White. Ms. Castillo sent Mr. Davis a Letter of Agreement requesting payment for the 29999 CPT code. Mr. Davis had to send the agreement to his supervisor and Employer for approval because the CPT code was not on the fee schedule.

15. Claimant continued working modified duty until he was laid off on April 20, 2018 due to a lack of work. Respondents filed a GAL on May 31, 2018 admitting to an Average Weekly Wage (AWW) of $895.00 and Temporary Total Disability (TTD) benefits from April 20, 2018 until "ongoing." Respondents provided wage records that covered a total of 14 weeks prior to Claimant's May 1, 2017 date of injury.

16. On June 13, 2018 Mr. Davis advised Ms. Castillo that Respondents would agree to the Letter of Agreement. Ms. Castillo signed the Agreement and faxed it to Mr. Davis for execution. On July 9, 2018 Claimant underwent the proposed surgery with Dr. White.

17. Claimant testified that he consistently earned overtime wages prior to his industrial injury. He explained that he worked approximately 9-11 hours each day and earned annual wages between $60,000-$70,000. Claimant noted that his work had been consistent for several years and he regularly earned overtime wages immediately before his May 1, 2017 hip injury.

18. Employer's Safety Manager Daniel Martin testified at the hearing in this matter. He explained that Employer provided Claimant with modified duty based on his work restrictions. He noted that Claimant was informed he could work up to 40 hours each week as long as work was available. Claimant, and approximately 20-30 other employees, was laid off by Employer on April 20, 2018 due to a lack of work.

19. Mr. Martin explained that Claimant's wages varied significantly from year to year based on available overtime. Overtime hours were never guaranteed and varied from project to project or between employees based on skillset. Mr. Martin commented that, even if Claimant had not been on modified duty, he would not have received overtime hours because his project was winding down.

20. On May 24, 2018 Claimant filed an Application for Hearing endorsing penalties under WCRP 16-11(F), WCRP 5-5(B) and WCRP 5-5(C). The 20 day period to cure any penalty was thus June 13, 2018.

21. Wage records for the 14 weeks prior to Claimant's May 1, 2017 industrial injury reveal that he earned a total of $18,397.66. Dividing $18,397.66 by 14 weeks yields an AWW of $1,314.12. However, Claimant asserts that his 2016 Form W-2 is a more accurate reflection of his earnings. Claimant's 2016 Form W-2 reflects wages of $70,509.16. Dividing $70,509.16 by 52 weeks yields an AWW of $1,355.95. Although Claimant seeks an AWW based on his previous year's earnings, the 14 weeks prior to his injury are a more accurate reflection of his wage loss after his May 1, 2017 work accident. Accordingly, an AWW of $1,314.12 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

22. Claimant has proven that it is more probably true than not that he is entitled to receive TPD benefits for the period May 5, 2017 through April 10, 2018. On May 1, 2017 Claimant suffered an admitted industrial injury and received work restrictions. The record reveals that Claimant was limited to working 40 hours per work while on modified duty employment. In contrast, Claimant testified that he consistently worked in excess of 40 hours each week for Employer prior to his injury. The wage records also reveal that Claimant regularly worked in excess of 40 hours per week prior to his industrial his injury but was generally limited to working 40 hours per week after May 1, 2017. Specifically, in the 14 weeks prior to his injury, Claimant worked 647.5 hours or an average of 46.25 hours per week. From May 5, 2017 through the date of the March 28, 2018 GAL Claimant worked a total of 1,801.5 hours in 48 weeks or an average of 37.53 hours per week. Accordingly, Claimant is entitled to receive TPD benefits to the extent that his AWW of $1,314.12 exceeded his weekly earnings during the period May 5, 2017 through April 10, 2018.

23. Claimant has failed to establish that it is more probably true than not that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' failure to accurately calculate his AWW or amount of disability benefits. Claimant's argument is premised on the assumption that Insurer was legally obligated to admit liability for a higher AWW and disability benefits. However, Insurer did not violate any provision of the Act when it initially failed to include Claimant's overtime pay in the AWW calculation. Although Insurer understated Claimant's AWW by over $400.00, the error does not support a claim for penalties. The reasoning of *Allison, Sanchez* and *Reves* reflects that, if a respondent admits liability, the respondent is only liable to pay benefits in accord with the admission. The amount of liability need not ultimately be determined to be correct to avoid penalties. Because §§8-42-102 & 8-42-105(1), C.R.S., WCRP 5.5(B) and WCRP 5.5(C) do not mandate an admission for a specific AWW or disability benefits, penalties cannot be imposed. There is simply no specific statutory violation in failing to admit for what is ultimately determined to be the correct AWW or amount of

disability benefits. Respondents conduct thus did not violate a provision of the Act or a Rule. Accordingly, Claimant's request for penalties is denied and dismissed.

24. Claimant has failed to demonstrate by clear and convincing evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' unreasonable delay or denial of prior authorization pursuant to WCRP 16-11(F). Initially, because Claimant filed an Application for Hearing endorsing penalties on May 24, 2018 and Respondents executed the Letter of Agreement on June 13, 2018, Respondents cured the potential penalty violation. Therefore, the record must reveal clear and convincing evidence that the violator "knew or reasonably should have known" of the violation in order to impose penalties. Claimant asserts that he waited 257 days from the date of the first request for authorization for left hip surgery until the surgery was completed. He noted that there were also multiple surgical requests after October 25, 2017. Despite Claimant's contention, the record reveals that the document dated October 25, 2017 did not constitute a completed prior authorization request, the surgery was approved sometime prior to February 28, 2018 and the majority of the delay in surgery was attributable to the use of a dummy code that required a fee agreement before proceeding.

25. The October 25, 2017 document requesting authorization for the proposed surgery specified that the procedure would consist of "left hip; scope labral repair-reconstruction, femoral acetabular osteoplasty." The document listed CPT codes 29915, 29999 and 29914. However, the facsimile request did not explain the reasonableness and medical necessity of the services requested and the record is devoid of supporting medical documentation. The document thus did not constitute a completed prior authorization request and trigger a response from Respondents within seven days. Nevertheless, the record reveals that the surgery had been authorized by February 28, 2018. Despite the authorization, the majority of the delay in surgery was attributable to the use of a dummy code that required a fee agreement before proceeding.

26. The record reveals that Dr. White's office used dummy code 29999 for Claimant's arthroscopic labral reconstruction. Ms. Castillo noted that she became involved in the matter in an attempt to have Insurer sign a Letter of Agreement because the requested surgical procedure involved an unlisted CPT code. Claimant also refused to sign a document from Dr. White's office that obligated him to pay for the procedure if Insurer denied the request for reimbursement. Mr. Davis explained that Ms. Castillo wanted Insurer to agree to pay for a dummy CPT code for Claimant's surgery because it was not a standard hip procedure. The dummy CPT code was 29999. Mr. Davis testified that an invalid CPT does not give a diagnosis code or procedure and therefore gets paid at zero percent. After an independent medical examination with Dr, Faulkner in an attempt to facilitate surgery, Ms. Castillo sent Mr. Davis a Letter of Agreement requesting payment for the 29999 CPT code. Mr. Davis sent the Agreement to his supervisor and Employer for approval because the CPT code was not on the fee schedule. On June 13, 2018 Mr. Davis advised Ms. Castillo that Respondents would execute the Letter of Agreement.

27. The protracted negotiations over the use of a dummy code for the proposed surgery constituted the majority of the delay in Claimant's surgery. Insurer's actions in delaying a response until June 13, 2018 were not objectively unreasonable. Insurer's conduct in delaying Claimant's requested hip surgery was predicated on a rational argument based in law or fact. The October 25, 2017 correspondence did not constitute a completed prior authorization

request, the surgery was approved sometime prior to February 28, 2018 and the majority of the delay was attributable to the use of a dummy code that required a fee agreement before proceeding with the proposed surgery. Accordingly, Claimant has failed to demonstrate by clear and convincing evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' unreasonable delay or denial of prior authorization pursuant to WCRP 16-11(F).

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Average Weekly Wage

4. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

5. As found, wage records for the 14 weeks prior to Claimant's May 1, 2017 industrial injury reveal that he earned a total of $18,397.66. Dividing $18,397.66 by 14 weeks yields an AWW of $1,314.12. However, Claimant asserts that his 2016 Form W-2 is a more accurate reflection of his earnings. Claimant's 2016 Form W-2 reflects wages of $70,509.16. Dividing $70,509.16 by 52 weeks yields an AWW of $1,355.95. Although Claimant seeks an AWW based on his previous year's earnings, the 14 weeks prior to his injury are a more accurate reflection of his wage loss after his May 1, 2017 work accident. Accordingly, an AWW of $1,314.12 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

TPD and TPD Benefits

6. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

7. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TPD benefits for the period May 5, 2017 through April 10, 2018. On May 1, 2017 Claimant suffered an admitted industrial injury and received work restrictions. The record reveals that Claimant was limited to working 40 hours per work while on modified duty employment. In contrast, Claimant testified that he consistently worked in excess of 40 hours each week for Employer prior to his injury. The wage records also reveal that Claimant regularly worked in excess of 40 hours per week prior to his industrial his injury but was generally limited to working 40 hours per week after May 1, 2017. Specifically, in the 14 weeks prior to his injury, Claimant worked 647.5 hours or an average of 46.25 hours per week. From May 5, 2017 through the date of the March 28, 2018 GAL Claimant worked a total of 1,801.5 hours in 48 weeks or an average of 37.53 hours per week. Accordingly, Claimant is entitled to receive TPD benefits to the extent that his AWW of $1,314.12 exceeded his weekly earnings during the period May 5, 2017 through April 10, 2018.

Penalties

8. A party may be penalized under §8-43-304(1), C.R.S. for up to $1,000 day for any failure, neglect or refusal to obey any lawful order of the director or panel. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. Ct. App. 2003). The moving party for a penalty bears the burden of proving that a person failed to take an action that a reasonable party would have

taken. *City of County of Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164-65 (Colo. Ct. App. 2002). Once the prima facie showing of unreasonableness has been made, the burden of persuasion shifts to the party who committed the alleged penalty to show that the conduct was reasonable under the circumstances. *See e.g. Pioneers Hosp. of Rio Blanco County v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Postlewait v. Midwest Barricade*, 905 P.2d 21, 23 (Colo. App. 1995).

9. The imposition of penalties under §8-43-304(1), C.R.S. requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAP, Nov. 17, 2004). The ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based in law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998).

10. Even if an insurer's actions are objectively unreasonable, a violation of §8-43-304(1), C.R.S. may be cured within 20 days after an application for hearing is filed. If a violation is cured no penalties may be imposed in the absence of "clear and convincing evidence" that the violator "knew or reasonably should have known" of the violation. §8-43-304(4), C.R.S. "Clear and convincing evidence" exceeds the preponderance standard and is evidence that "makes a proposition highly probable and free from serious doubt." *In re Barnes,* W.C. No. 4-632-352 (ICAP, Oct. 30, 2006). Whether a respondent's actions were objectively unreasonable and whether it knew or should have known of a violation are questions of fact for the ALJ. *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998).

Failure to Accurately Calculate AWW and Amount of Disability Benefits

11. In *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo. App. 1995) the court of appeals determined that the respondents' failure to admit liability for the correct temporary disability benefits did not support the imposition of penalties under §8-43-304, C.R.S. In *Allison* the respondents filed an admission of liability for TTD benefits but reduced the weekly disability payment based upon an asserted offset for the claimant's receipt of proceeds from a structured settlement. Although the claimant sought penalties because the respondents withheld the full weekly benefits, the court reasoned that the TTD statute does not create an express duty to pay benefits without regard to any applicable offsets. *Id.* at 624. The *Allison* court specifically noted that the respondents' obligations were limited "by statute only to admit or deny liability in a timely manner and pay benefits consistent with that admission." The claimant thus failed to establish a violation of the Act that would entitle him to recover penalties. *Id.*

12. In *Sanchez v. Pueblo Medical Investors,* W.C. No. 3-942-960 (ICAP, Dec. 14, 1998) the claimant sought penalties for the respondents' failure to include concurrent wages into her AWW. Relying on *Allison*, the ICAP reasoned that "where the respondents admit liability, they are only required to pay according to admitted liability." The ICAP thus "rejected the claimant's contention that if a respondent admits liability, the amount of admitted liability must

be correct to avoid penalties." There is therefore no specific statutory violation in failing to admit for what is ultimately determined to be the correct AWW. *Sanchez v. Pueblo Medical Investors,* W.C. No. 3-942-960 (ICAP, Dec. 14, 1998).

13. Similarly, in *Reves v. McCormick Excavation & Paving, LLC.*, W.C. No. 4-835-166-04 (ICAP, Jan. 2, 2013) the insurance adjuster intentionally omitted some of the claimant's actual wages and used her own calculation to approximate the claimant's earnings. Claimant was a seasonal employee with a short period of employment. The adjuster used the claimant's daily pay rate without including overtime pay. Relying on *Allison*, the ICAP explained that "if penalties cannot be imposed for an incorrect admission of TTD benefits, penalties cannot be imposed for an incorrect admission of AWW." The ICAP thus specified that "because the statute does not mandate an admission for a specific AWW, penalties cannot be imposed for failure to admit for a specific wage." *Reves v. McCormick Excavation & Paving, LLC.*, W.C. No. 4-835-166-04 (ICAP, Jan. 2, 2013).

14. Section 8-43-203(1), C.R.S. gives the respondents the option to admit or deny liability and require the claimant to prove his entitlement to benefits. Furthermore, the Act specifically assigns the claimant the burden of proving his entitlement to benefits. §8-43-201, C.R.S. Under the preceding statutory scheme, if a respondent admits liability for a claim, it need not be correct in order to avoid the imposition of penalties. Similarly, §8-42-102, C.R.S. does not describe a precise method for calculating a claimant's AWW and an insurer does not violate the Act when it fails to admit liability for a specific wage. *See Reves v. McCormick Excavation & Paving, LLC.*, W.C. No. 4-835-166-04 (ICAP, Jan. 2, 2013).

15. WCRP 5.5(B) provides that "an admission filed for medical benefits only shall state the basis for denial of temporary and permanent disability benefits within the remarks section of the admission." WCRP 5.5(C) specifies that "upon termination or reduction in the amount of compensation, a new admission shall be filed with supporting documentation prior to the next scheduled date of payment, regardless of the reason for the termination or reduction. An admission shall be filed within 30 days of any resumption or increase of benefits."

16. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' failure to accurately calculate his AWW or amount of disability benefits. Claimant's argument is premised on the assumption that Insurer was legally obligated to admit liability for a higher AWW and disability benefits. However, Insurer did not violate any provision of the Act when it initially failed to include Claimant's overtime pay in the AWW calculation. Although Insurer understated Claimant's AWW by over $400.00, the error does not support a claim for penalties. The reasoning of *Allison, Sanchez* and *Reves* reflects that, if a respondent admits liability, the respondent is only liable to pay benefits in accord with the admission. The amount of liability need not ultimately be determined to be correct to avoid penalties. Because §§8-42-102 & 8-42-105(1), C.R.S., WCRP 5.5(B) and WCRP 5.5(C) do not mandate an admission for a specific AWW or disability benefits, penalties cannot be imposed. There is simply no specific statutory violation in failing to admit for what is ultimately determined to be the correct AWW or amount of disability benefits. Respondents conduct thus did not violate a provision of the Act or a Rule. Accordingly, Claimant's request for penalties is denied and dismissed.

Respondents' Unreasonable Delay or Denial of Prior Authorization

17. WCRP 16-10(C) provides, in relevant part, that the payer shall respond to all providers requesting prior authorization within seven business days from receipt of the "provider's completed request as defined in Rule 16-10(E)." WCRP 16-10(E) specifies that "to complete a prior authorization request the provider shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting medical documentation." Under WCRP 16-11(E) the failure of a payer to timely respond to a request for prior authorization shall be "deemed authorization for payment of the requested treatment" unless the payer has scheduled an independent medical examination and notified the provider of the examination within the prescribed time period. Finally, WCRP 16-11(F) provides that any "unreasonable delay or denial of prior authorization" may subject the payer to penalties. An incomplete prior authorization request does not trigger an insurer's duty to respond. Thus no penalty can be imposed pursuant to §8-43-304(1), C.R.S. *See Skelly v. Wal-Mart Stores, Inc.,* W.C. No. 4-632-887 (ICAP, July 31, 2008).

18. As found, Claimant has failed to demonstrate by clear and convincing evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' unreasonable delay or denial of prior authorization pursuant to WCRP 16-11(F). Initially, because Claimant filed an Application for Hearing endorsing penalties on May 24, 2018 and Respondents executed the Letter of Agreement on June 13, 2018, Respondents cured the potential penalty violation. Therefore, the record must reveal clear and convincing evidence that the violator "knew or reasonably should have known" of the violation in order to impose penalties. Claimant asserts that he waited 257 days from the date of the first request for authorization for left hip surgery until the surgery was completed. He noted that there were also multiple surgical requests after October 25, 2017. Despite Claimant's contention, the record reveals that the document dated October 25, 2017 did not constitute a completed prior authorization request, the surgery was approved sometime prior to February 28, 2018 and the majority of the delay in surgery was attributable to the use of a dummy code that required a fee agreement before proceeding.

19. As found, the October 25, 2017 document requesting authorization for the proposed surgery specified that the procedure would consist of "left hip; scope labral repair-reconstruction, femoral acetabular osteoplasty." The document listed CPT codes 29915, 29999 and 29914. However, the facsimile request did not explain the reasonableness and medical necessity of the services requested and the record is devoid of supporting medical documentation. The document thus did not constitute a completed prior authorization request and trigger a response from Respondents within seven days. Nevertheless, the record reveals that the surgery had been authorized by February 28, 2018. Despite the authorization, the majority of the delay in surgery was attributable to the use of a dummy code that required a fee agreement before proceeding.

20. As found, the record reveals that Dr. White's office used dummy code 29999 for Claimant's arthroscopic labral reconstruction. Ms. Castillo noted that she became involved in the matter in an attempt to have Insurer sign a Letter of Agreement because the requested surgical procedure involved an unlisted CPT code. Claimant also refused to sign a document from Dr. White's office that obligated him to pay for the procedure if Insurer denied the request

for reimbursement. Mr. Davis explained that Ms. Castillo wanted Insurer to agree to pay for a dummy CPT code for Claimant's surgery because it was not a standard hip procedure. The dummy CPT code was 29999. Mr. Davis testified that an invalid CPT does not give a diagnosis code or procedure and therefore gets paid at zero percent. After an independent medical examination with Dr, Faulkner in an attempt to facilitate surgery, Ms. Castillo sent Mr. Davis a Letter of Agreement requesting payment for the 29999 CPT code. Mr. Davis sent the Agreement to his supervisor and Employer for approval because the CPT code was not on the fee schedule. On June 13, 2018 Mr. Davis advised Ms. Castillo that Respondents would execute the Letter of Agreement.

21. As found, the protracted negotiations over the use of a dummy code for the proposed surgery constituted the majority of the delay in Claimant's surgery. Insurer's actions in delaying a response until June 13, 2018 were not objectively unreasonable. Insurer's conduct in delaying Claimant's requested hip surgery was predicated on a rational argument based in law or fact. The October 25, 2017 correspondence did not constitute a completed prior authorization request, the surgery was approved sometime prior to February 28, 2018 and the majority of the delay was attributable to the use of a dummy code that required a fee agreement before proceeding with the proposed surgery. Accordingly, Claimant has failed to demonstrate by clear and convincing evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' unreasonable delay or denial of prior authorization pursuant to WCRP 16-11(F).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant earned an AWW of $1,314.12.

2. Claimant shall receive TPD benefits to the extent that his AWW of $1,314.12 exceeded his weekly earnings during the period May 5, 2017 through April 10, 2018.

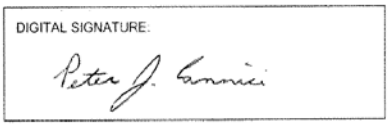
3. Claimant's request for penalties pursuant to §8-43-304(1), C.R.S. for Respondents' failure to accurately calculate his AWW or amount of disability benefits is denied and dismissed.

4. Claimant's request to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' unreasonable delay or denial of prior authorization pursuant to WCRP 16-11(F) is denied and dismissed.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 2, 2018.



Peter J. Cannici
Administrative Law Judge

ISSUE

I. Whether Respondents' have established by a preponderance of the evidence that Claimant's injury was caused by his willful violation of a safety rule adopted by Employer for the safety of the employee and are therefore entitled to reduce Claimant's compensation benefits by fifty percent (50%).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. This admitted claim involves a June 26, 2018 injury to multiple body parts.
2. On June 26, 2018, Claimant was working as an apprentice electrician when he was electrocuted and then fell approximately ten feet. Respondents allege Claimant committed a safety rule violation at the time of his June 26, 2018 industrial injury.
3. Respondents allege Claimant's injury was caused by his willful failure to obey the Employer's safety rules, including wearing electrical gloves and a hard hat and for working on an energized or "live" electrical wire.
4. In September 2017, Claimant was hired by Employer to work as an apprentice electrician. Prior to working for Employer, Claimant worked as an apprentice electrician for another employer for a little over one year.
5. When Claimant was hired, he signed Regency Electric's Company Policy ("the Policy"). The Policy provided, among other things, the following safety rules:

   > HARD HATS AND TOOL BELTS MUST BE WORN AT-ALL-TIMES, WHEN ON SITE. ELECTRICAL GLOVES AND SAFETY GLASSES ARE RQUIRED WHEN WORKING IN ENERGIZED ELECTRICAL PANELS.

   (Ex. F)
6. Claimant testified his job duties included general electrical work. Claimant testified he worked under the direction of a licensed, journeyman electrician, who essentially told him what to do, when to do it, and how to do it. Claimant testified that the journeyman electrician is allowed to work on energized equipment (or live wires), while he and other apprentice electricians are not allowed to work on live wires. Claimant testified apprentice electricians are required to work one-to-one with a journeyman electrician, but on many occasions, including his date of injury, he often worked with another apprentice electrician and one journeyman

electrician or just with another apprentice electrician and no journeyman electrician.

7. Claimant testified safety is fundamental in electrical work. Claimant testified no one from Employer told him not to work on energized or live wires, but it is just generally known in the field that apprentice electricians are not allowed to work on energized or live wires and he knew that. Claimant credibly testified that the journeyman on the job site is responsible for turning off any energized or live wires.

8. Claimant was provided safety gloves by Employer. However, the gloves were not "electrical gloves" which could protect against an electric shock if working on an energized electrical panel as referenced in the written Policy – safety rules- outlined above. Claimant was not working on an energized electrical panel when he was injured. The safety gloves provided to Claimant merely protected Claimant's hands against scrapes and cuts when working with electrical components such as conduit and wires, etc. Therefore, Claimant was not required at any time to wear the type of "electrical gloves" referenced in the Policy.

9. Claimant was also required to wear a hard hat, except when wearing it was not practical based upon the conditions in which he was working or the task that had to be accomplished.

10. Approximately 5 months before the accident, Employer started working on a commercial project on the 4th floor of the Catalyst building which is located in Denver. This is the project on which Claimant was working when he was injured. Pursuant to Denver Regulations, Employer was required to have one journeyman onsite for each apprentice electrician. Based on the testimony presented at hearing, Employer was not able to have a 1-to-1 ratio of journeymen to apprentices while working on the Catalyst project.

11. The Catalyst project required Claimant to help install conduit, junction boxes, wiring, and lighting, etc.

12. Claimant was working on the Catalyst building for approximately 3 months before the accident occurred. Up until the accident, the majority of the work Claimant performed at the Catalyst building involved working with electrical circuits and electrical components that were not energized at any time during the extensive project. In other words, the majority of the work Claimant performed day in and day out for months did not involve energized wire or electrical components that had to be turned off before Claimant could perform his work tasks.

13. Claimant's usual assortment of tools he carries also includes a "tic tracer" or "tester." This device is used to detect electricity in wires and other electrical components. However, Employer did not have a written or verbal rule that required Claimant to use his tic tracer or tester at any time, let alone before working with each and every electrical component he touched throughout each and every day.

14. Mr. Chad Thompson is a journeyman electrician who also works for Employer. While working on the Catalyst project, Mr. Thompson was Claimant's supervisor.

15. A few days before the accident, Mr. Ryan Seifried, who is one of the owners of Regency Electric, and a journeyman electrician, stopped by the Catalyst project because Mr. Thompson was unable to work that day and there was not a supervising electrician, i.e., journeyman, on the project. Mr. Seifried testified that while he was visiting the jobsite, he specifically reminded Claimant to not work on live wires.

16. Contrary to Mr. Seifried's testimony, Claimant credibly testified that Mr. Seifried did not discuss any safety issues, but did discuss having Claimant try to get other electricians who were working on other projects to work for Employer by touting their great compensation package which included generous benefits. Moreover, despite not having a journeyman electrician onsite that day, Mr. Seifried left after his visit and allowed Claimant and another apprentice to work without the supervision of a journeyman electrician.

17. Mr. Seifried also testified that while Denver technically requires a 1-to-1 ratio of journeymen to apprentices on each jobsite, Denver does not strictly enforce the regulation due to a shortage of journeyman electrician in the local labor market. However, Claimant credibly testified that despite Mr. Seifried's testimony that Denver does not really enforce the 1-to-1 ratio for journeymen to apprentices, his supervisor would routinely tell the apprentices to take a break when an inspector would arrive and would text them to return to the jobsite after the inspector left.

18. On June 26, 2018, Claimant, and another apprentice electrician, were working with Mr. Thompson on the Catalyst project. When Claimant arrived at work that morning, Mr. Thompson told Claimant and the other apprentice what work had to be done that day. Mr. Thompson told them that they also had to install two illuminated exit signs before noon, which was when the building inspector was going to arrive and inspect the work that had been performed.

19. After Claimant was told what to do, Mr. Thompson started performing other work at the jobsite and Claimant and the other apprentice started working on installing the exit signs.

20. As usual, the circuit on which Claimant was working was not energized and Claimant began installing the first exit sign. After the sign was hung and the wire run, Claimant tied in the final wire into a junction box or to the home run. Claimant then found Mr. Thompson and told him that he was finished installing the first sign. Mr. Thompson, who was in charge of the project and was managing the circuits in the electrical control room, went to the control room and turned the power back on. He then met Claimant and the other apprentice by the exit sign to confirm it was properly installed and illuminated.

21. Unbeknownst to Claimant, the circuit that controlled the power to the each of the exit signs also controlled the power to the lights in the electrical control room.

22. Upon Claimant successfully installing the first sign, Mr. Thompson left the area and went to do some work in the electrical control room while the power was on and the lights were on in the control room.

23. Mr. Thompson testified that he told Claimant and the other apprentice to tell him when they were ready to tie in the second light so he could de-energize the circuit. Claimant, however, disputes he was ever told to do so and the ALJ finds Claimant's testimony to be credible. Under Mr. Thompson's contention that Claimant and the other apprentice were told to come tell him when they were going to tie in the second sign and have him turn off the power, the ALJ is being asked to infer or find that both Claimant and the other apprentice decided to disregard such a command and both decided to work on the energized wires that controlled the exit sign.

24. Claimant credibly and persuasively testified that he assumed when Mr. Thompson left the area after seeing the first sign had been properly installed, that Mr. Thompson was going to the control room to turn off the power so Claimant and the other apprentice could safely install the second exit sign.

25. Unfortunately, Mr. Thompson did not de-energize the circuit. Instead, Mr. Thompson started working in the electrical control room since the circuit was energized and the lights were on and Claimant, thinking the circuit had been de-energized, began working on installing the second sign.

26. In order to tie in the wires to the junction box that was contained in the ceiling, Claimant had to climb up on a ladder and get his arms and head into a narrow space. Claimant was unable to perform this task without removing his hard hat. Therefore, Claimant removed his hard hat and climbed up the ladder and into the narrow space. While on the ladder, Claimant grabbed the energized wire which came from the control panel to tie into the wire from the sign at the junction box and while attempting to strip the wire, Claimant was electrocuted.

27. Due to being electrocuted, Claimant fell off the ladder and hit his head on the ground. Claimant suffered serious electrical burns to his hands and a laceration to his head.

28. When Claimant grabbed the energized wire, he had no idea it was energized. Claimant did not willfully intend to work with an energized wire while installing the second exit sign. Claimant reasonably believed the power was off and started installing the second exit sign as if the power had been turned off. There was a lack of credible or persuasive evidence submitted at hearing which indicated Claimant habitually, or even occasionally, intentionally worked with energized wires at any time, let alone at the time of the accident.

29. There was a lack of credible testimony or evidence presented at hearing which established Claimant knew the wires for the second exit sign were energized and that he intentionally tried to install the sign while the wires were energized.

30. Mr. Thompson testified that it was not unreasonable for Claimant to take off his hard hat to complete the task he was performing at the time of the accident and he was not enforcing the hard hat rule at that time. Claimant had to take his hard

hat off in order to tie in the wires of the exit sign at a junction box which was located in a confined area. Mr. Thompson also admitted that he was not enforcing the hard hat rule during this portion of the project due to the work that was being done.

31. The use of the safety gloves Employer provided Claimant would not have prevented the accident or Claimant's injuries. There was a lack of credible and persuasive evidence submitted at hearing that Claimant was required to wear the type of "electrical gloves" cited in the Policy which can prevent an electrical injury and would have prevented Claimant from being electrocuted on the day of the accident. Moreover, Claimant's gloves had worn out and he had been requesting new gloves from Employer for quite some time and had yet to receive them as of the day of the accident.

32. The ALJ does not credit Mr. Seifried's testimony that he specifically told Claimant a few days before the accident to not work on live wires and to double check everything. In essence, Mr. Seifried attempts to paint a picture of an Employer that implements and enforces safety rules for the safety of its employees and that Claimant is not only responsible for the accident, but was indifferent to the risks associated with working on energized wires. On the other hand, Mr. Seifried minimizes or downplays the Denver regulation that requires a one-to-one ratio between journeymen and apprentices. Mr. Seifried contends that Denver does not enforce the regulation in an attempt to insinuate that the regulation is unreasonable and not necessary for the safety of the apprentice electricians. However, despite his contention, Claimant credibly testified that when the ratio was not being followed, and an inspector was going to show up, his supervisor, i.e., a journeyman electrician, would tell the apprentices to "disappear" until the inspector left and then they would be sent a text message to return to the jobsite after the inspector left. Had the 1 to 1 regulation been followed by Employer, and the proper number of journeymen electrician been on the jobsite during the lengthy Catalyst project, Employer might have implemented and enforced safety measures and protocols and Claimant might not have been injured.

33. In addition, as credibly testified to by Claimant, Employer did not have a safety plan for managing work on "live circuits." Although the majority of the project was not energized, on the day of the accident, sections of the project were starting to be energized. Despite this change of events, there was no plan put in place by Employer or the managing journeyman to manage that risk. For example, Employer did not have a lock out tag out kit on the jobsite and did not require its use on any circuit that was energized and had to be turned off so work could be performed safely on the circuit.

34. There was some testimony offered by Mr. Thompson that there was a safety rule that required each electrician to test every component or wire with their tick tracer or tester before working on it and had Claimant done so, he would not have been injured. However, such testimony was very weak and neither credible nor persuasive. Mr. Thompson appeared to be uncomfortable while testifying about this alleged rule and used numerous qualifiers when testifying about this alleged rule and alleged enforcement of the alleged rule. Moreover, on cross

examination he was unable to convincingly and persuasively articulate when and how this alleged rule was specifically conveyed to Claimant and how he, or anyone else, enforced the alleged rule. In fact, he could not definitively confirm that he had ever seen Claimant use a tester at any time.

35. In addition, Claimant denied such a rule existed. Moreover, having such a rule in place on the Catalyst project and requiring Claimant to follow such a rule does not seem reasonable – on the Catalyst project - since the majority of the work Claimant performed involved circuits that had never been energized and did not have to be turned off. Therefore, based on the testimony presented at hearing, the ALJ finds the Employer did not have a rule that required Claimant to test each wire and electrical component before working on it and the Employer did not enforce such a rule.

36. Based on the evidence presented at hearing, the ALJ finds Claimant did not willfully violate any safety rules.

37. Based on the evidence presented at hearing, the ALJ finds Employer did not implement and enforce any of the safety rules Employer contends Claimant violated and alleges were the cause of his accident and injuries.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. Respondent, however, bears the burden of establishing Claimant's injury was caused by a willful violation of a safety rule. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. § 8-43-201 (2008) C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Safety Rule Violation

C.R.S. § 8-42-112(1)(a) provides for a 50% reduction in compensation to Claimant where Respondent proves that Claimant's injury was caused by the willful failure to obey any reasonable rule adopted by Employer for the safety of the employee.

The safety rule penalty is only applicable if the violation is willful. The question of whether Respondents proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not willful unless Claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.,* 171 Colo. 214, 171 P.2d 410 (1946); *In re Alverado,* W.C. No. 4-559-275 (ICAO December 10, 2003). Moreover, Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the Employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

The Respondents carry the burden of establishing all five elements of a safety rule violation, which are:

1. There must be a specific, unambiguous and definite safety rule adopted by the employer.
2. The safety rule must be reasonable.
3. The safety rule must be “brought home” to the employee and diligently enforced.
4. Violation of the safety rule must be willful.
5. The violation of the safety rule must be a cause of the claimant’s injury.

In this case, Claimant, as an apprentice electrician, knew he was not allowed to work on energized circuits or energized components such as the wire that he grabbed and attempted to strip while trying to install the second exit sign.

However, one of the primary elements Respondents must establish is that Claimant willfully violated a safety rule and the violation of that rule caused his injuries. As found, Claimant did not willfully work with energized wires while attempting to install the second exit sign. Claimant credibly testified that when he went to install the second exit sign, he thought Mr. Thompson had turned the circuit off and that he could safely install the second exit sign. And, based on the totality of the evidence, the ALJ finds Claimant's testimony to be credible and highly persuasive.

Respondents contend Claimant should have tested the wire to make sure it was not energized before installing the second exit sign. But, as found, there was no safety rule that required Claimant to test every wire or circuit before working on it. As found, the majority of the project involved Claimant working on circuits and items that had never been energized and did not have to be turned off. Therefore, Claimant's contention that such a rule did not exist – and was therefore not enforced – seems reasonable and consistent based on the totality of the evidence presented at hearing.

Respondents also contend Claimant could have confirmed with Mr. Thompson that he turned the power off before installing the second sign. However, Respondents contention of what Claimant could have done to prevent the accident is really an attempt to cast blame or assign negligence to Claimant. Such contention is not credible and persuasive evidence that Claimant willfully violated a safety rule.

Respondents also contend Claimant should have been wearing his hard hat at the time of the accident and that violation of that safety rule caused his head injury. However, as found, it was impractical for Claimant to perform the task he was performing at the time of the accident while wearing his hard hat. This finding was also supported by the testimony of Claimant's supervisor, Mr. Thompson. Mr. Thompson credibly testified that he was not enforcing the hard hat rule at the time of Claimant's accident due to the type of work Claimant was performing when the accident occurred. Therefore, Claimant did not violate the safety rule which required him to wear a hard had since it was not applicable at the time of the accident

Respondents also contend Claimant violated a safety rule that required Claimant to wear "electrical gloves" while working. However, as found, the Policy - safety rule - that required Employees to wear "electrical gloves" did not apply to Claimant. The rule only applied to Employees working on an energized electrical panel and Claimant, as an apprentice, was not allowed to work on an energized electrical panel, and was not working on an energized electrical panel at the time of the accident. Furthermore, the "electrical gloves" referenced in the rule are specialized gloves used for working on an energized panel and not the type of safety gloves that Claimant was provided by Employer and wore at times to prevent against cuts and abrasions. Moreover, the safety gloves provided by Employer to Claimant would not have insulated Claimant from being electrocuted. Lastly, Claimant's safety gloves had worn out and he had asked Employer for new gloves and had yet to be provided new safety gloves as of the day of the accident.

The ALJ concludes that Respondents failed to establish by a preponderance of the evidence that the Claimant's injuries resulted from his willful failure to obey any reasonable rule adopted by the Employer for his safety.

Based on the findings and conclusions above, the remaining elements necessary to establish a safety rule violation will not be addressed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have failed to establish that Claimant's injuries resulted from his willful failure to obey any reasonable safety rule adopted for the safety of the employees and therefore Respondents are not entitled to a reduction in benefits pursuant to §8-42-112(1).
2. Respondents shall pay the Claimant in full for all admitted temporary or permanent disability benefits with no reduction.
3. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.
4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 5, 2018

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove she suffered a compensable injury on November 19, 2017?
- If Claimant proved a compensable injury, did she prove entitlement to TTD benefits commencing December 4, 2017?
- Did Respondent prove Claimant was responsible for termination?
- Did Claimant prove the right shoulder surgery performed by Dr. Hunter on July 23, 2018 was reasonably necessary and causally related to her compensable injury?
- The parties stipulated to an average weekly wage of $1,094.41.
- The parties stipulated Dr. Schaler and Dr. Hunter are authorized providers.

FINDINGS OF FACT

1. Claimant worked for Employer as a convenience store manager for approximately 15 years.

2. Her claim arises from an incident on November 19, 2017. Claimant was working in the storeroom, placing stacks of 16-ounce paper cups into a box on a shelf at approximately eye level. She was using her right hand to remove the sleeves of cups from a box on a cart beside her and placing the sleeves in the box on the shelf with her left hand. The box extended slightly forward over the edge of the shelf. It became unbalanced, tipped and fell toward her. She raised her right arm quickly to stop the box, but it hit her forehead before she pushed it back onto the shelf.[1] Claimant was standing close to the shelf, so the box only fell approximately six inches before striking her head. Claimant does not allege a head injury but claims she injured her neck and right shoulder.

3. Claimant testified she felt "minor pain" in her neck immediately after the incident, which progressively worsened over the next few days.

4. Claimant was already receiving treatment for a prior work-related injury that occurred on October 3, 2016. She fell down several steps, landing on her hands and knees. Dr. Schaler was the ATP for the October 2016 claim. Claimant received conservative treatment, primarily physical therapy, a TENS unit, and medications. She was put on work restrictions of no more than ten pounds lifting and shifts no longer than eight hours. She continued working despite the restrictions and frequently exceeded the eight-hour shift limitation due to staffing issues at the store.

[1] The ALJ infers from conflicting evidence that the box likely weighed 20-30 pounds.

5. The primary injured areas from the October 2016 accident were the thoracic and lumbar spines, but the records also document scapular, trapezius and neck pain. For example, in June 2016 Claimant reported pain in multiple areas including the bilateral shoulders and neck. She had an IME with Dr. Rook on August 25, 2017, who observed, "she was repeatedly holding the right side of her neck during the history portion of today's evaluation." A physical examination on September 14, 2017 documented tenderness and tension in the trapezius and paracervical musculature. On October 11, 2017, Dr. Schaler documented "she continues to have back pain from her neck to her low back." His examination that day showed tenderness "along the spine in the paraspinal musculature from the neck to the SI region," and his diagnoses included "cervicalgia." Additionally, Claimant has a pre-injury history of fibromyalgia.

6. Claimant did not immediately report the November 19, 2017 incident to Employer or request any medical treatment. She saw Dr. Schaler on November 22, 2017 for an already-scheduled follow-up for the October 2016 injury. She had not planned to mention the incident with the box of cups, but Dr. Schaler saw her rubbing her neck and asked why. Dr. Schaler noted,

> On 11/13/17 [sic] she states she was working and went into the storeroom to grab some cups. When she pulled a sleeve of cups down from the shelf, it disrupted the balance of a box that fell down and hit her on the head. There was no LOC but this incident has caused neck pain which she ranks as 10/10 and shooting pain when she moves her head and neck. The pain is worse on the left than the right. The pain is both at the base of the neck and at the insertion of the paracervical neck musculature into the base of the neck. She complains of pain with turning her head from side to side.

7. Examination of her neck revealed "tense" muscles with tenderness along the paracervical spine, and reduced range of motion in all planes, particularly cervical flexion. There was no palpable focal cervical spine tenderness. Palpation of her back showed tenderness along the full length of the paraspinal musculature.[2] Dr. Schaler also documented "discomfort with some limitation in range of motion in the right shoulder especially with abduction and internal rotation."

8. Dr. Schaler reiterated the diagnosis "cervicalgia" he gave on October 11, but provided no other diagnosis relatable to November 19 incident. Dr. Schaler opined, "[Claimant] has not made much of any significant improvement in her work, in fact it may be a little worse. She continues to work long hours up to 10 to 13 hours a day as the work needs to get done and her boss has not been supportive in this regard. I do not think she is at MMI and would benefit from continuing therapeutic modalities such as PT, acupuncture, deep tissue massage and possibly chiropractic." Dr. Schaler did not suggest any of the treatment he recommended was related to the November 19 incident as opposed to the October 2016 injuries. He continued the same work restrictions of 10 pounds lifting with shifts limited to eight hours per day, 40 hours per week.

[2] The ALJ notes these exam findings are similar to those documented on October 11, 2017.

9. Claimant realized Dr. Schaler would document the incident in his report, so she decided to report it to Employer. She reported the accident to her manager, Kevin Ortiz, via telephone on November 24, 2017.

10. Claimant completed a written accident report on November 27, describing the accident as, "putting sleeves of 16oz cups into empty box overhead as I cannot lift over 10 lbs. The box got heavy in front and fell forward and landed on my head." She stated she suffered a "head/neck injury" which resulted in "neck pain." She said nothing about any shoulder issues.

11. Mr. Ortiz gave Claimant a designated provider list. She selected Dr. Schaler but did not immediately go to see him.

12. Also on November 27, Mr. Ortiz administered an oral swab drug test in compliance with Employer's policy mandating a post-accident drug screen. After swabbing her mouth, Claimant placed the swab in a vial Mr. Ortiz was holding in his hand. Mr. Ortiz then replaced the cap, sealed it and placed it into a sealed bag for transmission to the testing facility.

13. The drug test came back positive for cocaine. When the lab called to inform Claimant of the results, she argued with the individual and stated there was "no way" her test should have been positive for cocaine.

14. Claimant testified some of the liquid in the vial spilled out when Mr. Ortiz opened it. Mr. Ortiz testified he did not recall spilling any liquid. In any event, even if some of the liquid spilled, no persuasive evidence was presented to show if or how that could affect the test results.

15. In accordance with its "zero tolerance" drug policy, Employer terminated Claimant after learning of the positive drug test. The termination notice explained:

> Due to a failed drug test you are in violation of Policy No. 1-01-17. Your work-related injury was also reported a week late as you stated that you had a follow-up doctor's appointment due to a previous work-related injury, and it was at this time you stated to your doctor of the new work-related injury that took place at your store. However, this injury was never reported or documented tell me your direct supervisor or to the Loaf 'N Jug Division and the expectation is that you file a report within 24 hours of the injury and notify your direct report. You notified me of the injury on 11-27 [sic] because your doctor documented it and you believed it would be reported to Sedgwick and would get back to Loaf 'N Jug. You stated the injury took place on 11-19-17 at approximately 6am but again he did not report it to me until Friday 11-24-17.

16. Claimant was given a copy of the termination notice but refused to sign it. She wrote, "I am not guilty of doing any kind of drugs therefore I will not sign."

17. Claimant went to see Dr. Schaler the next day, on December 5, 2017. The impetus for the appointment was the positive drug test rather than any medical issue. She asked Dr. Schaler to administer another test to bolster her position she did not use drugs. Claimant did not mention any physical problems relating to the November 19 incident. She gave a urine sample, which ultimately came back negative for any illegal drugs.

18. Claimant next saw Dr. Schaler on December 14, 2017. The reason for the visit was listed as "pain in the left hand, wrist and forearm [that] seems to have progressed slowly since the accident when box fell on her at work on 11/13/17. She states in the last week the pain has become excruciating to the touch and pain with grabbing and lifting." The discussion of the left upper extremity is puzzling because Claimant described no injurious mechanism to her left wrist or forearm. Claimant's claim is based on alleged injuries to her neck and right shoulder, not the left wrist or arm. Dr. Schaler's report references no neck or shoulder symptoms.

19. Similarly, Claimant said nothing about her neck or shoulder when she saw Dr. Schaler again on December 26, 2017. Instead, the documented complaints and abnormalities were limited to the thoracic and lumbar spines and the SI joints. Dr. Schaler opined Claimant's ongoing symptoms were probably due to "worsening fibromyalgia" which was "triggered" by the October 2016 accident. He thought claimant was not yet at MMI (for the October 2016 injury) but explained: "at this point she will very likely have to live with some degree of pain." There is no indication he attributed any of her symptoms to the November 19 incident.

20. On January 25, 2018, Dr. Schaler placed Claimant at MMI. He opined, "[Claimant] has mild pre-existing myofascial pain [ ] which . . . was subsequently aggravated after her accident. The duration of her pain has now been 15 months since her accident on 10/2/16 [sic]. . . . She is likely at MMI and would benefit from an IME for a disability/impairment rating." The report contains no reference to the November 19 incident, nor any neck or shoulder symptoms.

21. Claimant subsequently saw Dr. Schaler on February 8, March 20, March 27, and April 5, 2018. None of his reports reference shoulder or neck problems.

22. Claimant saw Dr. John Burris for an impairment rating on March 8, 2018. She reported "diffuse pain over her entire posterior torso extending from the neck through the thoracic and lumbar spines into the buttocks in the back of both legs below the knees." She said her pain was "better with lying on her right side." Although the physical exam primarily focused on the thoracic, lumbar, and SI areas, Dr. Burris documented "full range of motion of the cervical spine with no localized muscle spasms or trigger points." He also noted no radiating symptoms into the upper extremities. Dr. Burris opined, "she has significantly elevated subjective complaints with no objective findings on examination, negative diagnostic workup, and a nonphysiologic presentation." He determined Claimant was at MMI with no impairment.

23. Dr. Schaler gave a diagnosis related to the right shoulder for the first time on April 16, 2018. At that visit, he documented "tense musculature along the base of the

right side of the neck to the shoulder" and "decreased [right shoulder] internal rotation and abduction with weakness and discomfort." Based on these findings, he diagnosed "pain radiating to right shoulder." He referred Claimant to physical therapy but did not indicate whether the referral was related to the November 2017 incident.

24. Claimant saw Dr. Timothy Hall for an IME on May 8, 2018 at the request of her counsel. Dr. Hall noted, "I have numerous records, but none of them appear to pertain to this [November 2017] date of injury." Claimant described severe right shoulder pain and limited range of motion. She also reported "a lot of neck pain, more right side and some left side." Dr. Hall observed, "she moves very stiffly. When she walks, there is very little arm swing. Her right shoulder is protracted and elevated compared to the left." The scalenes, upper trapezius, levator scapulae, and splenius capitis were severely tender with active trigger points. Cervical and right shoulder range of motion was markedly limited. Dr. Hall diagnosed a "whiplash-type injury" involving primarily the right lateral neck, myogenic thoracic outlet syndrome, a shoulder sprain with bicipital tendinitis, and periscapular cervicothoracic myofascial pain. He opined the diagnoses "relate directly to the November 19, 2017 event at work." Dr. Hall recommended a shoulder MRI to investigate any other pathology in the shoulder. He noted her situation was "complicated" by concussion symptoms, which he opined "would be hard to relate to the November 2017 event." Dr. Hall concluded Claimant was not at MMI, and recommended therapy for the neck and parascapular area.

25. Dr. Tashof Bernton performed an IME for Respondent on May 10, 2018. Claimant told Dr. Bernton "she felt a little tug at the right side of the neck" after the November 19 incident, but finished her shift and was only feeling "sore" at the end of the day. She provided no clear explanation of when her shoulder became painful. Regarding current symptoms, Claimant reported right arm pain "from her neck to her shoulder," with the worst pain in the shoulder. Her neck pain was predominantly right-sided. On examination, Dr. Bernton was most impressed with significant findings involving the right shoulder. She was tender over the anterior shoulder, proximal biceps attachment, and lateral shoulder. Shoulder range of motion was severely limited, and she had weakness with rotator cuff testing. Dr. Bernton observed, "at rest, the patient holds the shoulder flexed and the elbow flexed to 90 degrees and the shoulder internally rotated." He appreciated no specific tenderness on palpation of the neck, but there was increased trapezius tone on the right and tenderness in the right supraclavicular fossa.

26. Dr. Bernton searched Amazon.com and determined a sleeve of fifty 16oz cups weighs 1.7 pounds. So, if the box contained 16 sleeves of cups, that would be approximately 27 pounds plus the weight of the box. He noted, "the box did not fall off the shelf" and resulted in "a minimal impact that would not be anticipated to cause injury." Dr. Bernton pointed out Claimant's current complaints focused on the right side were inconsistent with Dr. Schaler's November 22, 2017 report, which documented neck pain "worse on the left than the right." He opined any accident-related shoulder complaints should have been the worst shortly after the incident, but noted there was "no indication of shoulder pain [ ] in the records."

27. Dr. Bernton ultimately concluded, “there is no reasonable mechanism by which the episode as described by the patient could result in her current complaints.” He further opined,

> The patient’s current complaints are centered in the shoulder. The clinical examination is most consistent with diabetic frozen shoulder/adhesive capsulitis, and possible right rotator cuff tear.
>
> There is no mechanism at all by which a box hitting the patient in the middle of the forehead would have anything to do with shoulder complaints, whether due to rotator cuff tear, adhesive capsulitis, or any other entity.
>
> Records clearly reflect subjective complaints out of proportion to objective findings multiple times with respect to the patient’s pre-existing complaints.
>
> To a reasonable degree of medical probability, it is my assessment that no injury requiring medical treatment was caused by the episode on November 19, 2017. To the extent that there was any injury at all (which I believe is not medically probable), it would have been a slight contusion to the forehead and potentially mild and self-limited muscular strain of the neck.
>
> The patient’s current complaints are not due to that episode. She appears to have predominantly focal problems in the right shoulder and associated muscle spasm. Most probable causes or diabetic frozen shoulder and possible rotator cuff tear.

28. Dr. Bernton recommended a shoulder MRI outside of the worker’s compensation claim but opined no treatment was warranted on a work-related basis.

29. Claimant saw Dr. Schaler on May 21, 2018 and described “chronic pain involving the right neck and shoulder as well as the mid to low back.” She could not abduct the arm above shoulder height. Dr. Schaler diagnosed “right rotator cuff syndrome” and referred Claimant for an MRI.

30. The MRI was performed on June 11, 2018. The report notes a history of “chronic right shoulder pain x6 months. No known injury.” The MRI demonstrated significant pathology including: (1) a large full thickness insertional tear of the supraspinatus tendon; (2) subscapularis, supraspinatus, and infraspinatus tendinosis with associated intrasubstance delamination; (3) a prominent SLAP tear of the biceps tendon anchor with marked attenuation of the posterior labrum; and (4) “relatively severe” acromioclavicular arthritis.

31. Claimant saw Dr. Schaler on June 13, 2018 to review the MRI. He noted, “she continues to have pain since a heavy box shelved in a storage room fell against her

right shoulder."[3] He referred Claimant to Dr. Hunter for a surgical evaluation. Dr. Schaler offered no opinion regarding the etiology of the pathology demonstrated on the MRI.

32. Claimant underwent a right shoulder arthroscopy with Dr. Hunter on July 23, 2018.

33. Dr. Hall and Dr. Bernton testified at the hearing to elaborate on the opinions expressed in their IME reports. Both physicians had the opportunity to review the MRI report and each other's IME reports before testifying. Both experts agreed the shoulder surgery was reasonably necessary but disagreed regarding causation.

34. Dr. Hall outlined his theory of how the incident caused Claimant's injuries. He opined the shoulder joint is most susceptible to injury during abduction and external rotation because the space between the acromion and the humeral head narrows. Based on Claimant's description of the incident, he believed the rotator cuff was torn when Claimant reached up to push the box back onto the shelf. He opined the bone marrow edema seen on the MRI suggests a traumatic tendon avulsion as opposed to a chronic tear. He opined being struck in the head and her head snapping backward likely caused the myofascial injury to the neck.

35. Dr. Bernton reiterated his opinion that the mechanism of injury described by Claimant caused no physiologic injury to her right shoulder. The box did not hit Claimant's shoulder and did not fall from any height. Raising her arm and pushing the box back onto the shelf would not cause any of the pathology on the MRI. Dr. Bernton opined the MRI findings were all degenerative, not traumatic. He explained the degree and extent of degenerative changes, the nature of the tears, osseous hypertrophy, thinning, marrow edema, and tendon delamination convinced him the pathology is unrelated to the November 19 incident. He also found the absence of reported right shoulder symptoms for many months "extremely significant" because if any of the significant findings occurred on November 19, they would have manifested much more quickly. Dr. Bernton concluded a degenerative rotator cuff tear "is the only conclusion that fits the data."

36. Dr. Bernton's opinions are credible and persuasive.

37. Claimant failed to prove that the November 19, 2017 incident caused a compensable injury. Although an accident occurred, it did not cause a need for medical treatment or disability. She suffered a minor neck strain that was not disabling and required no specific treatment. The July 23, 2018 arthroscopy was reasonably necessary but not causally related to the incident at work.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App.

[3] This history is inaccurate, as there is no persuasive evidence the box made contact with Claimant's right shoulder.

2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

As found, Claimant failed to prove she suffered a compensable injury on November 19, 2017. Although Claimant probably suffered a neck strain on November 19, she received no treatment for it. The November 22 office visit with Dr. Schaler was not prompted by the incident, but was simply the next scheduled visit for her October 2016 injury. Claimant did not even plan to mention the incident to Dr. Schaler, and it only came up because he noticed she was rubbing her neck and asked her about it. Dr. Schaler did not prescribe any treatment specifically related to the incident. Thereafter, she reported no significant neck symptoms for many months, consistent with a minor strain that resolved on its own. The ALJ can appreciate no substantial difference in Claimant's medical condition as documented before and after November 19, 2017, and there is no persuasive evidence the incident proximately caused a need for any treatment. Furthermore, Claimant returned to work with the same restrictions as before the incident, and kept working in the same capacity until she was terminated for unrelated reasons on December 4, 2017.

Although Claimant appropriately underwent surgery on her right shoulder, the ALJ is not persuaded the surgery was causally related to the November 19 incident. As an initial matter, the incident was relatively minor and not the sort of event the ALJ would expect to cause a torn rotator cuff, SLAP tear, or other significant pathology. In any event, the ALJ is more impressed by the dearth of documentation suggesting a significant shoulder injury for many months after the accident. Claimant did not reference a shoulder injury on the accident report she completed on November 27; she only listed her "neck" as the injured body part. Admittedly, Dr. Schaler documented "discomfort" and reduced right shoulder range of motion on November 22, but those findings appear incidental because Claimant did not report any right shoulder issues and Dr. Schaler provided no diagnosis related to the right shoulder. When she saw Dr. Burris in March 2018, she said nothing about any right shoulder injury. In fact, she told Dr. Burris her pain was better when laying on her right side, which seems unlikely if she was suffering from a painful

right rotator cuff tear or SLAP tear. After the November 22 note, Claimant's shoulder was not mentioned again until Dr. Schaler's April 16, 2018 note, when he documented "discomfort" and reduced ROM. Dr. Schaler gave a non-specific diagnosis of "pain radiating to right shoulder," but the report contains no suggestion the shoulder pain was related to the November 19 incident. Although the June 2018 MRI showed objective pathology, the ALJ is not persuaded any of the MRI findings were caused by the November 19, 2017 incident. The ALJ finds it unlikely a traumatic rotator cuff tear, SLAP tear, or other pathology severe enough to warrant surgery would go unmentioned and undocumented for several months despite multiple medical appointments. As Dr. Bernton persuasively explained, the right shoulder pathology is most likely chronic and degenerative, and Claimant's symptoms represent the natural progression of her underlying condition.

The November 19, 2017 incident did not proximately cause a need for treatment or disability. Accordingly, there was no compensable "injury."

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 6, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-070-414-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 25, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 9/25/18, Courtroom 3, beginning at 8:40 AM, and ending at 12:30 PM).

Ruling was reserved on Claimant's Exhibit 1, and it is hereby rejected in evidence in light of the fact that medical benefits are not germane because of the determination of non-compensability herein below. Respondents' Exhibits A through O were admitted into evidence, without objection.

At the conclusion of the hearing, the record was left open pending receipt of the written transcripts of the post-hearing evidentiary depositions of Craig Wenninger (referenced as "Wenninger Depo.," followed by a page number) and Brian J. Beatty, D.O (referenced as "Beatty Depo., "followed by a page number). Both depositions were taken on October 24, 2018 and written transcripts thereof were filed on October 29, 2018, at which time the matter was submitted for decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained an alleged compensable head injury on January 12, 2018. If so, what are the consequences of the injury: *i.e.,* entitlement to medical benefits, average weekly wage (AWW), and temporary partial disability (TPD) benefits.

The Claimant bears the burden of proof on all issues by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On January 12, 2018, the Claimant was working as a traffic control flagger on a project run by Northern Colorado Traffic Control (NCTC) near Boulder, Colorado. Claimant was employed by the Employer as a day laborer. NCTC engaged the Employer to provide workers to staff its construction projects.

2. The Claimant and the Employer agree that the Claimant had a tense encounter with a local resident driver on the afternoon of January 12, 2018. The parties characterize the encounter differently.

The Incident

3. The Claimant asserted in different points in her testimony that the driver hit her traffic control paddle; hit her body with his vehicle; and/or nearly hit her body with his vehicle.

4. The Claimant further asserted all of the following versions of the incident at different points in her testimony: That the driver approached her at “full speed;” that he accelerated and then braked suddenly before reaching her; that she had her back turned and could not see what behavior the driver engaged in but could only hear it; and that the driver was trying to scare her and apologized to her after the incident occurred.

5. The Claimant reported the encounter to Andy Horner, the responsible NCTC Traffic Control Supervisor (TCS), within minutes of the occurrence of the

incident. The Claimant then worked the remainder of her shift. She told TCS Horner that she was not injured and denied that she required medical treatment following the incident. The Claimant worked the following day, and every day, until February 7, 2018.

6. The Employer's understanding of the incident is based on the Claimant's reports and the reports and information obtained from NCTC employees and other employees following the incident.

7. The Claimant's first Employee Report of the Incident is dated January 24, 2017 [sic] (the Claimant identified the wrong year on the form as it was the first month of 2018. Neither party contends the incident or any matter related to this incident occurred prior to the start of 2018.

8. The Claimant reported the incident to the Colorado State Patrol (CSP) on January 26, 2018. Sergeant M. Hill stated at hearing that he began investigating the matter the same day.

9. The Claimant first sought medical attention related to the incident on January 27, 2018.

10. The Claimant submitted a corrected incident report, dated February 1, 2018. She submitted a third incident report, dated February 7, 2018.

11. On February 7, 2018, the Claimant was informed that two of the contractors who used the Employer to staff its projects, of which NCTC was one, had designated Claimant as "Do Not Return" (DNR) and consequently the Employer was the Claimant was effectively terminated by the Employer.

12. The Claimant has not worked for a wage since February 7, 2018.

13. The Employer's First Report of Injury form was dated February 15, 2018.

14. Sergeant Hill of the CSP completed his report regarding the incident on March 2, 2018. The report concluded that there was insufficient evidence to issue a citation to the driver, and that the officer's experience suggested that Claimant had not suffered an injury due to the incident. Sergeant Hill based these conclusions on his experience and on the Claimant's own reports of her behavior and the reports of others regarding her behavior subsequent to the incident.

15. The Claimant's Worker's Claim for Compensation was dated March 7, 2018.

Medical

16. Dr. Beatty conducted an Independent Medical Examination (IME) on July 18, 2018. Dr. Beatty considered reports from the Claimant's 2018 visits with a neurologist, a physical therapist, a primary care physician, and a chiropractor, all of which the Claimant alleges are for treatment related to the January 12, 2018 incident.

17. Dr. Beatty also considered two 2016 evaluations undertaken by the Colorado Division of Vocational Rehabilitation to assess the Claimant's work capabilities related to a separate worker's compensation claim: a physical evaluation at the Rocky Mountain Health and Back Center on October 3, 2016, by Susan Santilli, M.D., and a psychological evaluation by David Kalis, LCSW, Ph.D., a licensed psychologist on November 9, 2016 (collectively, the "2016 Evaluations").

18. The 2016 Evaluations found that the Claimant suffered from headaches, vague neurological complaints, gastrointestinal complaints, fatigue, confusion, memory problems, distractibility, and difficulty concentrating. The Santilli evaluation also found that the Claimant suffered from neck pain related to a car accident. At hearing, the Claimant denied being involved in a car accident in 2016. The Santilli evaluation further documented that the Claimant had suffered from lower back pain for 26 years.

19. IME Dr. Beatty diagnosed the Claimant with cervical strain, lumbar strain, and headaches. Dr. Beatty stated that the Claimant may have suffered an initial mild injury due to the incident but that the symptoms or consequences of any January 12, 2018 incident should have lasted 3-4 weeks at most and would have been expected to resolve no later than February 12, 2018. In attributing the Claimant's condition to the January 12, 2018 incident, Dr. Beatty relied on the Claimant's history, which the ALJ has found to be unreliable.

20. IME Dr. Beatty designated February 12, 2018 as the date of maximum medical improvement (MMI). He did not impose any restrictions related to the January 12, 2018 incident and did not find that there was any permanent impairment.

Ultimate Findings

21. The ALJ did not find the Claimant to be persuasive or credible because of the inconsistent nature of her claims and testimony. her written accounts related to the incident were inconsistent; her testimony was inconsistent with her written statements; and her testimony was self-contradictory.

22. The ALJ finds that the Claimant's ability to finish her shift following the incident and the fact that she continued to work every day for the Employer until she was informed that she had received multiple DNRs and could not be promised work on a regular basis, in part, detracts from her credibility.

23. The ALJ finds that the Claimant's failure to seek medical care for more than two weeks after the incident occurred suggests that the January 12, 2018 incident had at most a negligible effect on her physical well-being.

24. Between conflicting evidence, the ALJ makes a rational choice, based on substantial evidence, to reject the Claimant's testimony regarding the work-relatedness of her alleged injuryand to accept evidence to the contrary..

25. The ALJ finds that the preponderance of the evidence suggests that any negative health effects that Claimant suffered as a result of the January 12, 2018 incident were at most negligible. The ALJ infers and finds that the Claimant's current health problems have afflicted her from at least the time of the 2016 Evaluations, and perhaps prior to that time.

26. The ALJ finds that the IME Dr. Beatty's determination of no permanent impairment, and that MMI was reached on or before February 12, 2018, further "chips away" at the Claimant's assertion of suffering a work-related injury. Claimant offered no medical evidence in support of overturning or otherwise challenging the Dr. Beatty's determination of MMI and his zero permanent impairment rating.

27. The ALJ finds that there is no persuasive evidence to support a contention that the January 12, 2018 incident aggravated or accelerated any pre-existing condition from which the Claimant had already suffered at the time of injury.

28. The ALJ finds that there are too many anomalies in the Claimant's version of events, along with the confluence of events generally and the totality of other evidence, to render the Claimant's version of events credible and to find a compensable injury.

29. For the reasons specified herein above, the ALJ finds that the Claimant failed to prove that she suffered compensable injuries on January 12, 2018, arising out of the course and scope of her employment. She failed to meet her burden of proof by a preponderance of the evidence.

30. The Claimant was not a credible witness due to her changing and inconsistent recounting of the facts of the case. Because she was the only witness to the incident, her behavior subsequent to the incident, in conjunction with independent corroborating facts in evidence, provides the a great part of the basis for determining whether Claimant suffered a compensable injury

31. The Claimant offers a theory positing that the January 12, 2018 incident caused an injury resulting in vague complaints of migraine headaches and body aches.

There was no persuasive evidence, aside from Claimant's unsubstantiated and contradictory testimony, proffered in support of the finding of a compensable injury. In fact, the earliest medical report in evidence, the UC Health Services (UCHS) Emergency Room (ER) report, dated January 27, 2018, states that Claimant "has no evidence of injury on exam." It defies reason, under the facts of this case, to suggest that the Claimant sustained an injury related to the January 12, 2018 incident which did not manifest itself until after the January 27, 2018 ER examination.

32. Reports by the Claimant and NCTC employees support the contention that the Claimant was frightened or "shaken up" by the aggressive driving behavior exhibited by the resident driver on the afternoon of January 12, 2018. The Claimant's failure, however, to ask for or seek out medical care or otherwise officially report the incident for more than two weeks after it occurred supports a plausible inference that any harm she may have suffered was minimal and did not necessitate medical treatment in and of itself. This conclusion is further supported by the January 27 ER examination which found no evidence of injury to Claimant, suggesting that any harm caused by the January 12 incident had resolved by the time she sought medical attention on January 27, 2018.

33. There is no persuasive evidence to suggest that the complaints from which Claimant suffered at the time of the 2016 Evaluations, which are nearly identical to her present complaints, were aggravated or accelerated by the January 12, 2018 incident.

34. The ALJ finds that the totality of the circumstances surrounding the January 12, 2018 incident and its aftermath demonstrate that the Claimant lacks credibility in her claims against the Employer.

35. The ALJ further finds that there is no persuasive evidence to support the reasonable probability that the Claimant suffered a compensable work-related injury on January 12, 2018. Therefore, the ALJ finds that the Claimant failed to prove, by preponderant evidence, a compensable injury on January 12, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's assertion of sustaining a compensable work-related injury on January 12, 2018 lacks credibility. The totality of the evidence shows that the Claimant was dilatory in pursuing treatment for her supposed injury until she was informed that she could no longer expect regular employment from the Employer.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting evidence, the ALJ made a rational choice, based on substantial evidence, to reject the Claimant's evidence and testimony regarding the work-relatedness of the alleged injury, and accepted evidence to the contrary..

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain her burden of proving a compensable injury on January 12, 2018.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this_____day of November 2018.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Whether Claimant proved, by a preponderance of the evidence, that he sustained compensable injuries to his left upper extremity, his left shoulder, back and left ankle on September 13, 14, or 16, 2017 and/or on December 21, 2017.

II. If Claimant established that he suffered compensable injuries, whether he also established entitlement to reasonable, necessary and related medical care.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Background

1. On August 3, 2017 Claimant completed an employment application for an executive chef position with Employer. Respondents Exhibit H, page 1.

2. Claimant was hired with a start date of August 21, 2017. Respondents Exhibit H, page 5.

3. Claimant's salary was $55,000 a year, paid biweekly, at $2,115.38.

4. Based on that, the parties stipulated to an average weekly wage (AWW) of $1,057.69, while reserving the issue of TTD would start; should Claimant prove the compensable nature of his claimed injuries.

5. Claimant's work site was at the commercial kitchen inside of the Pueblo Convention Center. His co-workers included: Prep Cook/Kitchen Manager, Marella Wheaton, and Sous Chef, Natasha Romero. He also worked with Veronica Gomez who was brought on as a temporary cook to help the kitchen manage a heavy workload shortly after Claimant was hired.

Claimant's September 13, 2017, left elbow/arm Injury
W.C. No. 5-068-410

6. On September 13, 2017, Ms. Wheaton was exiting a walk-in cooler while carrying a heavy tray in her hands. Unable to use her hands to open the door, Ms. Wheaton testified that she backed into the door hard enough to break the seal so she could push the door open and go about her duties. She did not ram into the door in

order to force it open. According to Ms. Wheaton, the door is large (6 x 3 feet), heavy and naturally swings open fast. Claimant described the door as being 7 feet tall and 3 ½ to 4 feet wide, weighing approximately 200 pounds.

7. Unbeknownst to Ms. Wheaton, Claimant was on the other side of the door checking the temperatures of the kitchen's various freezers/coolers. As he was passing the cooler Ms. Wheaton was exiting, the door suddenly swung open hitting Claimant on the left arm. According to Claimant, the door hit him above the elbow while the outside handle hit him below the elbow. The incident gave rise to W.C. No. 5-068-410.

8. Claimant testified that after getting hit, his arm tingled for the balance of the day. Nonetheless, he did not seek immediate treatment and was able to finish his shift. Claimant testified that the next day he was unable to make a fist and could barely move his arm. Despite this claim, the evidence presented fails to demonstrate that Claimant asked to see a doctor. The evidence also establishes that he did not seek treatment on the day after this accident.

9. Ms. Wheaton testified that Claimant was very angry with her. He yelled that she didn't open the door correctly by knocking on it before exiting to warn others on the outside that the door would be opening. Ms. Wheaton apologized and went on with her day. When she saw Claimant at work in the days that followed this incident, she never observed any bruising on his arm.

Claimant's September 14, 2017, back, Shoulder and left Ankle Injury.
W.C. No. 5-058-861

10. Claimant testified that on September 14, 2017, he slipped on water and fell while stepping into a walk-in cooler. In describing how he fell, Claimant testified that his left foot slid forward, while his right foot stayed in place, as if he were going to do the splits. However, as this happened very quickly, Claimant explained that he extended backward, rotated slightly and fell on his buttocks and left upper back/side causing him to hit his head on a metal cart in the cooler. Claimant alleged injuries to his left upper back, left shoulder/arm and left ankle giving rise to W.C. No. 5-058-861.

11. Ms. Wheaton testified that she witnessed this incident. She testified that she and Claimant both walked over to the cooler to retrieve items necessary to finish a dessert. According to Ms. Wheaton, when Claimant stepped into the cooler he slipped on the stainless steel floor; went down on his right knee with the other leg behind him and slid to the back of the cooler where he hit some shelving. Per Ms. Wheaton, Claimant never fell onto his bottom, nor did he hit his head on anything. Ms. Wheaton asked if Claimant was 'OK', and he said he was, after asking her what he slipped on. Ms. Wheaton testified that she looked around the cooler floor but found nothing obvious to cause Claimant to slip.

12. Claimant disputes Ms. Wheaton's description of the event testifying that

Ms. Wheaton was not present when he slipped and fell, suggesting further that her testimony is unreliable because he would never do something as menial as going into a cooler to get a food item as others were there to do that for him.

13. Claimant would experience a second near fall later the same day in the same cooler after walking into it with two temporary workers.

14. Ms. Romero testified she worked as a sous chef for the employer from August 2017 to January 2018. She left Employer to take a lateral position at Parkview Hospital because she did not like the direction Claimant was taking the kitchen. At the time Claimant first slipped in the cooler, Ms. Romero was using a mixer that was located to the left of the cooler. She testified that she had a clean line of sight to the open cooler where she saw Claimant, Marella, and a temporary worker. Ms. Romero testified that she saw Claimant slip and slide in the cooler in a 'lunge' position. She did not see him fall or hit his head on anything.

15. As noted above, Claimant had a second incident where he almost fell in the same cooler, this time in the presence of two temporary workers, one of whom was Ms. Gomez.

16. Ms. Gomez testified she was a temporary cook for Employer. She and Claimant had worked together previously at El Pueblo Boys & Girls Ranch (El Pueblo). According to Ms. Gomez, Claimant reached out to her to see if she could work for Employer on a temporary basis as the Convention Center was particularly busy at the time. She accepted the position and so was present for Claimant's 'near fall' later in the day on September 14, 2017. Ms. Gomez testified that as she and Claimant were exiting the cooler, he slipped in a puddle of water. She 'caught' Claimant as he slipped and prevented him from falling. Ms. Gomez testified that Claimant appeared startled and was upset.

Claimant's September 16, 2017, back Injury
W.C. No. 5-057-385

17. On September 16, 2017, the Convention Center hosted a large banquet for retired military service members. A second chef, Tom Agius, was brought on to assist with the dinner service. Mr. Agius testified he was working the ovens behind Claimant and had his back to him. He testified that he was assigned to cook the chicken for plating by Claimant. Mr. Agius testified that as he removed a large pan of chicken from the oven, the juices sloshed to one end of the pan and began to burn his hand. Mr. Agius testified that while holding the pan, he stepped back in order to it and in process bumped into Claimant. He was unsure if he bumped into Claimant bottom to bottom or back to back; noting that it was possible that his elbow could have made contact with Claimant's back. While he was not sure how he contacted Claimant, Mr. Agius was adamant that the impact was not severe, describing it more as a slight "nudge". This incident gave rise to W.C. No. 5-057-385.

18. According to Mr. Agius, a few seconds after he bumped into Claimant, he let out a scream as if he was in agonizing pain. Ms. Wheaton, who was further down the service line testified that she witnessed this incident. Per Ms. Wheaton, Chef Agius was removing a pan of chicken from the lower oven and bumped into Claimant. She testified that seconds after the chef grazed Claimant, he let out a scream. Claimant disputes Ms. Wheaton's testimony asserting that the table she was working at would have blocked her view. Claimant contends that for reasons unknown, Ms. Wheaton is angry at Claimant suggesting further that her testimony is contrived.

19. Claimant testified the September 16, 2017 incident greatly increased the back pain caused by his September 14, 2017 slip and fall. Claimant testified that he completed the dinner service but left work at 9:30 p.m. due to increased back pain. Mr. Agius testified that Claimant continued working without apparent problems after being bumped in the back. He did not ask Claimant if he was hurt because he didn't think the tap on the back was significant.

Claimant's December 21, 2017 back injury
W.C. No. 5-066-267

21. On December 21, 2017, Claimant was tasked with preparation and service of a VIP breakfast. He expected to have assistance from the sous chef, Ms. Romero, as he was on restricted duty. He came to the kitchen early to discover that Ms. Romero had not reported to work. Rather than skip the service, Claimant testified that he chose to violate his physical restrictions and do his best to get breakfast out. Claimant testified that he was rushing to get things cooked and served. In doing so, he lifted three trays of uncooked bacon weighing an estimated 18 pounds from a rack and attempted to lower them to a kitchen island. Claimant testified he lost control of the weight and had to abruptly twist his body to get the trays onto the island. Claimant asserts that he aggravated his back condition in the process. This incident was unwitnessed and gave rise to W.C. No. 5-066-267.

The Medical Record Evidence

22. Claimant first sought care for the above referenced injuries on September 18, 2017. He presented to the offices of his family physician, i.e. Comfort Care Family Practice at 1:43 p.m. where he was evaluated by certified Physician Assistant (PA-C) Robert Dawson. Claimant reported that he was "walking into a dairy cooler with a co-worker when he slipped and fell due to water on the floor". According to the history provided, Claimant reported that "his left leg went out like the splits and he fell straight on his back hitting his head on a supply rack resulting in a small bump on the back of his head". He did not lose consciousness. He complained of a 4-day history of "mid back pain between [his] shoulder blades and left ankle pain along with shoulder pain." Claimant described the pain as constant, sharp, numbing and shooting. It extended from the back down the left arm to the hand. Claimant did not mention any injury to his left elbow from being hit by a cooler door on the job. Rather, at 1:59 p.m. he reported a second injury to his mid back after a co-worker fell into him. The report

taken as part of this injury includes the following history: “Pt is here for WC claim-he is executive chef for Pueblo Convention Center. Pt states he was at the serving counter when the chef behind him had a hot pan walking down the line when he slipped and fell into Casimiro’s back with his body”. Again, there is no mention in the record that Clamant reported an injury to his left arm/elbow from being hit by a cooler door at work.

23. Physical examination revealed a pleasant, morbidly obese 43-year-old male in no acute distress. Inspection and/or palpation of the left upper extremity revealed a “small contusion” on the lateral portion of the left elbow and tenderness throughout the joint with palpation. Several contusions were present on the mid and upper portions of the back, with the largest appearing on the left side of the upper back. Claimant also had tenderness to palpation (TTP) where he was struck by Chef Agius. Based upon the description of the event and the nature of Claimant’s contusion, it was suspected that he was struck by an elbow, as the contusion was consistent with focused blunt force trauma.

24. Claimant was evaluated by Nurse Practitioner (NP), Lileya Sobechko at the Centura Centers for Occupational Medicine (CCOM) on September 20, 2017. During this visit the following history was obtained: “The patient reports multiple injuries while at work 9/13, 9/14, and 9/16. He states that on September, 16 he was working, preparing the food plates and his co-worker collapsed, fell and hit his back in the area, where he already received steroid shot not long ago and his entire back started to hurt. Claimant verbalized concern “regarding possible disc displacement”. He also reported that he had seen his primary care provider (PCP) but that no imaging was performed. Physical examination revealed, pain to palpation of the lumbar and thoracic spine. Although range of motion was limited in both the lumbar and thoracic regions of the spine, no abrasions, bruising, swelling rashes or erythema was present. Moreover, no spasms were detected in the thoracic spine. Claimant was provided with work restrictions of no lifting, pushing or pulling greater than 5 pounds as well as a referral for x-rays and physical therapy.

25. Claimant returned to CCOM on September 21, 2017, where he was evaluated by Dr. Thomas Centi. The record from this visit constitutes the first time that Claimant’s report of being injured after being hit by a freezer door” appears in the record formally. Claimant described pain, tingling, and numbness in the left shoulder down the arm. He was provided with physical restrictions of no lifting, carrying, pushing, or pulling greater than 20 pounds with the left arm; however, the record is devoid of any specific treatment rendered to Claimant for this alleged injury. Rather, Claimant was simply scheduled for a return visit on September 26, 2017 @ 11:00 a.m.

26. Claimant was evaluated by Physical Therapist, Francis Osita Onukwuli for his back on the referral of NP Sobechko on September 21, 2017. Claimant exhibited thoracolumbar muscle tenderness/tightness. Formal physical therapy (PT) to include modalities, neuromuscular re-education, therapeutic exercise, gait training,

massage and manual therapy was recommended two times a week for 3-4 weeks.

27. Claimant was also seen at St. Mary Corwin Hospital for x-rays on September 21, 2017. The noted indication for x-rays of the forearm, elbow and lumbar spine was listed as left elbow, forearm and back pain "after fall". Based upon the evidence presented, the ALJ finds that the x-rays obtained September 21, 2017 were probably those requested by NP Sobechko after Claimant's September 20, 2017 appointment.

28. Elbow x-rays showed no fracture with mild elbow degenerative changes. There was no focal soft tissue abnormality nor any significant elbow joint effusion. Lumbar x-rays showed degenerative changes with minimal L1 compression deformity, age indeterminate.

29. Claimant was reevaluated by Dr. Centi on September 25, 2017. During this visit, Claimant reported that on September 14, 2017 he "slipped on a wet floor and fell backward hitting back and sstraing (sic) left side of back. Despite the passage of 11 days of time, Claimant reported ongoing pain and stiffness in his left shoulder and back. Claimant's spinal examination revealed no abrasions, bruising, erythema, wounds, rashes or swelling. His range of motion was normal and he had no pain to palpation. Focused examination of the thoracic spine yielded similar results, as well as "no spinal tenderness, left side muscle tenderness, no spasms, full range of motion (FROM) of the neck and upper extremity". There were no radicular symptoms but claimant demonstrated difficulty with full torsion and rotation movements. Dr. Centi assessed Claimant with a sprain of the ligaments of the thoracic spine and ordered physical therapy.

29. Claimant kept his September 26, 2017, appointment for follow-up on his left elbow/arm with Dr. Centi after seeing him on September 21, 2017. During this visit, Claimant reported continued, but improved, pain in the left arm and left neck. Physical examination of the left upper extremity yielded normal results. Claimant's restrictions were liberalized to no lifting, carrying, pushing or pulling greater than 30 pounds with the left arm. He was instructed to apply ice and add heat and take Ibuprofen 2-3 times daily.

30. Claimant returned to the offices of his PCP on October 3, 2017. During this encounter he reported ongoing back and left arm pain. He presented to re-establish care reporting that he wanted pain medication and an MRI performed. He reported that he was "kicked out" of CCOM because his injury was not work related. Examination revealed normal range of motion (ROM) but with left sided muscle spasms and tenderness in the upper back and thoracic region. Claimant was provided with non-narcotic medication and an order for "physical therapy for mid back pain".

31. Despite the suggestion that he was "kicked out" of CCOM, the medical record indicates that Claimant returned there for a follow-up appointment for his left

elbow/arm on October 4, 2017. Claimant's examination was unchanged from September 26, 2017. No treatment was directed to the arm/elbow and Claimant was placed at maximum medical improvement (MMI) and released to "regular" work duty without restriction.

32. Claimant was treated at Momentum Physical Therapy (Momentum) from his initial evaluation on October 17, 2017 to November 24, 2017. Treatment focused on Claimant's low back, upper back and left shoulder complaints based upon his report that he "had two accidents at work where [he] injured [his] left shoulder and upper back a month ago in a fall" and a second injury "where I fell on my back and injured my low back." Based upon the evidence presented, the ALJ finds it likely that Claimant's reported history concerning his second accident was documented incorrectly. The evidence presented supports that Claimant likely intended to impart to his therapist that a co-worker fell into his low back injuring it.

33. Claimant was discharged from therapy at Momentum on November 24, 2017, due to a "plateau of progress."

34. Dr. Douglas Bradly performed the initial evaluation of Claimant following the December 21, 2017 incident wherein he twisted abruptly to lower the trays of uncooked bacon to the kitchen island on January 5, 2018. Dr. Bradly obtained the following history: "Pt states he was injured by falling on his back at work, then reinjured himself on 12/21/17. Pt states he was on work restrictions at the time of second injury, he was grabbing trays from a shelf when he twisted wrong and felt pain and spasms throughout his back". Physical examination revealed "slight weakness on left arm, tenderness . . . [of] the left shoulder, decreased extension AROM of the left shoulder, decreased external rotation ROM of the left shoulder, moderate tenderness . . . to posterior paraspinals on the left [and] tenderness . . . to the thoracic paraspinal musculature". Following injections and x-rays of the thoracic spine, cervical spine and left shoulder, Claimant was assessed with strains of the low back, neck left shoulder and thorax and referred to physical therapy.

35. Based upon the medical record presented, the ALJ finds objective evidence to support Claimant's alleged injuries to his left elbow, upper back and low back. Indeed, examination by trained medical professionals revealed the presence of several contusions on the mid and upper portions of the back, with the largest appearing on the left side of the upper back, a small contusion on the left elbow and a contusion on the low back consistent with being stuck by an elbow, in addition to increased muscle tone (spasm) and decreased range of motion.

Claimant's Prior Work-Related Injury History

36. Claimant has a history of prior work related injury to his left side and back. In 2011, Claimant slipped and fell on some water in a bathroom while on a business trip. Similar to the injuries suffered in the current cases, Claimant sustained injuries to his thoracic spine and left side in the 2011 incident. Claimant went through

a Division Independent Medical Examination as part of his 2011 injury. He ultimately settled that case on a full and final basis.

Additional Findings

37. In challenging the compensable nature of Claimant's asserted injuries, Respondents cite to the similarities between the mechanism of injury (MOI) from 2011 and the current case involving Claimant's slip and fall on water in the cooler. Respondents also point to the similarities between Claimant's pain complaints and the pain diagrams he completed for the 2011 injury and the instant claims, to suggest that Claimant's current symptoms are emanating from pre-existing neck, shoulder, arm, back and ankle pain.

38. Respondents urge the ALJ to find Claimant's testimony incredible and unpersuasive because he made a "miraculous recovery" from his 2011 injury to return to work in a position requiring heavy lifting on a regular basis without interim medical care. Respondents further contend that Claimant is not credible because he has a sporadic job history, was fired from a job for not building working relationships with his team, is litigious and has/continues to use marijuana to control pain similar to that he is claiming is related to his current injuries. To find Claimant's testimony incredible for the aforementioned reasons requires the ALJ to ignore significant corroborating evidence, including the testimony of Ms. Wheaton and Chef Agius as well as the objective findings documented by unbiased/impartial medical professionals on physical examination.

39. Given the totality of the medical records and evidence presented, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that he sustained compensable injuries at work on the four occasions cited above.

40. Claimant's symptoms, need for treatment and disability, as exhibited by the imposition of work restrictions are related to the aforementioned work accidents. Moreover, the evidence presented persuades the ALJ that the treatment and physical restrictions imposed were reasonable and necessary to cure and alleviate Claimant of the effects of the aforementioned injuries.

41. Testimony or evidence to the contrary is unconvincing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers,

without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Compensability

C. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR*, et al., W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, *supra*; § 8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish, by a preponderance of the evidence, that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); Section 8-41-301(I)(b), C.R.S.

D. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

E. As noted it is Claimant's burden to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000* (Colo. App. 1986). In this case, there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred within the time and place limits of his employment as a chef for Employer. Rather, the question for determination here is whether Claimant's symptoms, need for treatment and disability arose out of and are sufficiently connected to his employment such that they may be deemed compensable.

F. In this case, Claimant asserts that he suffered four separate accidents causing injury to his left arm/elbow, left side, as well as his mid, upper and lower back. As found, the totality of the evidence presented, including the testimony of Ms. Wheaton and Chef Agius persuades the ALJ that the accidents giving rise to Claimant's asserted injuries occurred. Indeed, Ms. Wheaton conceded that the cooler door swung open and struck Claimant in the left arm/elbow. While she did not see any bruising/contusions to the arm/elbow, a trained medical professional documented a small contusion on the lateral portion of the left elbow along with tenderness throughout the joint with palpation for which self-treatment recommendations were made and work restrictions imposed. Ms. Wheaton also conceded that Claimant slipped in the cooler. While she testified that Claimant did not fall as he slipped forward, objective findings consistent with trauma, i.e. contusions on the mid and upper portions of the back, were present on medical evaluation four days later. Claimant testified that he fell. Ms. Wheaton disputes this, contending that he slid forward and hit the shelving in the back of the cooler. Although the testimony concerning this detail is inconsistent between Claimant and Ms. Wheaton, the ALJ is convinced that Claimant slipped in the cooler and either fell onto his back or struck the shelving in the rear of the cooler with his mid and upper back causing injury requiring medical treatment and the imposition of physical work restrictions. Concerning his back injury from being struck from behind by Chef Agius, the physical evidence is similar to that presented concerning Claimant's September 14, 2017 slip and fall. Specifically, Mr. Agius, similar to Ms. Wheaton, acknowledged that the accident happened. Although he characterized the contact as a "nudge", the medical documentation reveals that an unbiased medical professional documented that Claimant had tenderness to palpation where he had been struck and a contusion on the back which was consistent with being struck by an elbow. Claimant was referred to therapy and work restrictions were continued in an effort to ameliorate the effects of this injury. Finally, while the December 21, 2017 accident was unwitnessed, Dr.

Bradly's physical examination revealed "slight weakness on left arm, tenderness . . . [of] the left shoulder, decreased extension AROM of the left shoulder, decreased external rotation ROM of the left shoulder, moderate tenderness . . . to posterior paraspinals on the left [and] tenderness . . . to the thoracic paraspinal musculature", prompting him to perform injections, request x-rays, refer Claimant to physical therapy and continue his physical work restrictions. Based upon the totality of the evidence presented, the ALJ concludes that Claimant has established the requisite causal connection between his work duties and the injuries forming the basis of his claims. Consequently, the ALJ finds and concludes that these injuries are compensable.

Medical Benefits

G. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

J. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he probably sustained acute soft tissue injuries to the left elbow, low, mid and upper back in addition to a sprain of the thoracolumbar spines in injuries occurring on September 13, 14 and 16, 2017. Furthermore, the evidence presented persuades the ALJ that Claimant probably aggravated the condition of his thoracolumbar spine in the incident occurring December 21, 2017. The ALJ is convinced that these compensable "injuries" are the proximate cause of Claimant's need for medical treatment and the imposition of physical work restrictions. Moreover, the totality of the evidence presented establishes that the care

received was reasonable and necessary in light of Claimant persistent symptoms and functional decline.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that he sustained compensable injuries to his left elbow, left mid and upper back, and low back on September 13, 14, and 16, 2017 as well as a compensable aggravation of his thoracolumbar condition of December 21, 2017.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation Medical Benefits Fee Schedule, to cure and relieve Claimant from the effects of the aforementioned compensable injuries, including but not limited to the care provided at CCOM, Centura Center for Rehabilitation, EmergiCare, and Excel Physical & Occupational Therapy.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 7, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Has the Claimant established by a preponderance of the evidence that he suffered a work related injury on January 17, 2018?

2. Has the Claimant established by a preponderance of the evidence that he is entitled to medical care for a work related injury?

3. Has Claimant established by a preponderance of the evidence that he is entitled to temporary disability benefits?

4. Have Respondents shown, by a preponderance of the evidence, that Claimant's Workers Compensation benefits should be reduced by 50%, for his violation of C.R.S. 8-42-112(1)(d)?

5. Is the Claimant entitled to a change of physician from Dr. Bradley back to Dr. Dallenbach?

STIPULATIONS

At the beginning of the hearing, the parties agreed that Claimant's Average Weekly Wage ("AWW") is $648.00. The ALJ accepted this stipulation.

In Respondents' Position Statement, Respondents concur that Claimant may change his designated ATP from Dr. Bradley to Dr. Dallenbach, since both physicians are providers in the same facility. The ALJ accepts this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant began work for Employer in 2016 as a "Traffic Maintenance 1" ("TM1"). The position of TM1 requires that an employee have and maintain a commercial driver's license. (Ex. I, pg. 69).

2. Claimant testified the TM1 position is a very physical job, which included operating heavy equipment, lifting materials, fixing fences, fixing the roadways, and pouring asphalt. He would also repair guardrails, shovel asphalt and dig holes. Claimant testified he'd have to lift stacks of heavy guardrails weighting 190 pounds, and

rolls of wire for fencing which weighed 80 pounds. Claimant testified he could lift them on his own.

3. Claimant testified that on January 17, 2018 he started work at 7:00 a.m. He was on Highway 10 east of mile marker 13. Right before lunch, at about 11:30 a.m., he was working by himself. A co-worker was operating a motor grader about 150 yards away. All of the delineator posts were in the path of the grader. He was pulling up a whole section of these delineator posts. One post was lying on the ground. This post was not bent in any way, so Claimant did not think it was attached to the ground.

4. Claimant saw the post, exited his vehicle and ran over to pick it up. He thought it was lying on the ground, but it was actually buried into the ground. When he ran to grab it, while circling the post, he was pulled back by the post, because it was still buried in the ground. Claimant testified "it rang my bell" but that he was able to dislodge it, put it into the truck and headed east to do different job.

5. Claimant testified that even though he felt pain in his neck, and felt like he had been punched, he continued working that day until about 4:40 pm. Claimant didn't report the incident to his employer that same day. Instead he went home and went to bed early.

6. Claimant testified he fell asleep for a few hours. He then felt burning inside his fingers and into the palm of his hand. He felt like his fingers were "10 times bigger than they normally were."

7. Claimant testified he went to work the following day and advised his immediate supervisor of the incident. The supervisor asked him to "run the blade that day". He also asked the Claimant if he wanted to report it and go to see a doctor to see what's wrong. Claimant said he did.

8. Claimant worked the blade that day until 3:30 p.m. when his supervisor picked him up and took him to the shop. Claimant filled out a report and went home.

9. Claimant picked up his wife, who drove him to Pueblo, where he was seen by Dr. Dallenbach at Emergicare. Claimant testified he was having neck pain. The records from Dr. Dallenbach of January 18, 2018 note that Claimant reports "lumbar, thoracic spine; now-9; injury pain to the shoulder including tingling, numbness, tenderness and tingling, numbness stiffness and pain in the right hand: now -10". (Ex. 12 pg. 188). At this visit, Claimant did not disclose his prescription for Oxycodone nor did he report his history of chronic lumbar pain.

10. On this initial visit, on January 18, 2018, Claimant complained of tenderness in the neck, right shoulder, right elbow and right hand. Claimant underwent x-rays of the neck, thoracic spine, lumbar spine, shoulder, elbow and hand. All of the results were

normal. (Ex. 12, pp. 178-182). Regarding the cervical spine, there was facet sclerosis without significant hypertrophy. No evidence for acute cervical spinal fracture…and no prevertebral soft tissue swelling…. (Ex. 12, p. 184). *The diagnosis was strain of the neck, wall of thorax, fascia and tendons of the lower back, right shoulder, upper arm, and forearm.* (Ex. 12, p. 179). Dr. Dallenbach prescribed physical therapy, theragesic cream, Methocarbanol, and Ibuprofen. (Ex. 12, p. 175) (emphasis added).

11. On January 25, 2018 Claimant returned to Dr. Dallenbach. The physician's notes indicate that the Claimant "wouldn't let Dr. Dallenbach examine him thoroughly". (Ex. 12, p. 170). It was also reported the following: "severe subjective pain is more than observed pain, patient concerned, patient appears to be upset". (Ex. 12, p. 170). It was noted that Claimant was "unwilling to be examined or corporate (sic) until he was sure there was nothing else going on." Dr. Dallenbach spoke with Respondents' adjuster, Lisa Biggs. He requested "Stat MRIs" as the most expeditious way to proceed with the patient's care. (Ex. 12, p. 171).

12. On January 26, 2018 Claimant returned for care. This time, he was seen by Dr. Bradley. He continued to complain of pain in neck, shoulder, thoracic spine, arm and hand. He was given trigger point injections in the upper back. He was "taken through a full ROM following the procedure significant decrease in pain and increase in ROM". (Ex. 12, p. 164).

13. Claimant underwent an MRI at Parkview Medical Center on January 25, 2018. The 'impression' from this MRI was diffuse degenerative disc disease with no evidence of cord or nerve compression (Ex. H, p. 152). The radiologist didn't identify any acute pathology.

14. On follow up with Dr. Bradley on February 2, 2018, Claimant reported pain in the neck, hand, elbow, back and shoulder. He complained of sharp and shooting pain in right hand and began reporting numbness in his left hand as well. This was not previously reported as a symptom. (Ex.12, p. 156). Dr. Bradley referred the Claimant to Dr. Bhatti for evaluation. He recommended Claimant participate in physical therapy. Claimant was given the phone number to schedule physical therapy, if they did not contact him within 48 hours. (Ex. 12, p. 157).

15. On March 7, 2018 Claimant was seen again by Dr. Bradley. On exam, Claimant has all his previous complaints but now complained of *abnormal numbness in both extremities.* (Ex. 12, pg. 153). There is no new event or accident to explain this new symptom. Dr. Bradley recommended an EMG. The EMG performed on March 22, 2018 demonstrated carpal tunnel syndrome. It did not demonstrate any cervical radiculopathy. (Ex. F, p. 127).

16. On March 26, 2018 Dr. Bradley confirmed the reports that the EMG of the right upper extremity showed carpal tunnel syndrome.

17. Dr. Rauzzino examined the Claimant on May 21, 2018 for an IME at the request of Employer. Dr. Rauzzino has been a neurosurgeon for 18 years. In his practice, 90% of his time is spent treating patients and about 10% performing evaluations. He is a fellowship-trained neurosurgeon with special training in the spine. He performs all types of surgery on the neck and lumbar spine including discectomies, decompressions, and fusions.

18 As part of the IME process Claimant was asked to fill out a pain diagram. (Ex. A, p. 19; Depo. p. 9). Claimant noted diffuse pain in multiple myotomes and dermatomes. (Ex. A, p. 19). Dr. Rauzzino explained that the cervical spine is similar to a fuse box, insofar as specific nerves come out of the cervical spine, and go to specific places, and do specific things. For example, pain that shoots down the arm and goes to the thumb is typically a C6 problem, pain into the middle finger connotes a C7 problem and pain into the little finger is typically C8. (Depo. pg. 9).

19. Claimant's pain diagram noted pain in both arms, every part of his arm, every finger, and every part of the upper extremities. (Ex. A, p. 19 and Depo. pg. 9). In order to have this type of symptomatology, a person would have to have an injury or reaction from all of the cervical nerve roots of the cervical spine. (Depo. p. 9). When you see a pain diagram which shows diffuse pain in multiple myotomes and dermatomes, it makes the pain not likely relatable to a direct structural defect which would require treatment. (Depo. p. 9).

20. Dr. Rauzzino performed a physical examination. Claimant demonstrated breakaway weakness as to both of his upper extremities. Dr. Rauzzino felt that Claimant did not put forth maximal effort when tested. (Depo. p. 11). There was also apparent weakness while testing the C8 dermatome although Dr. Rauzzino had difficulty telling whether that was factual or due to lack of effort. (Depo. p. 11). Pain typically does not cause breakaway weakness or difficulty with hand intrinsics. (Depo. p. 12). Dr. Rauzzino opined that Claimant's strength was normal and he did not have any focal motor deficits. He felt this was consistent with the exams from the other neurosurgeons who treated Claimant. (Ex. A p. 12; Depo. p. 12). Dr. Rauzzino also performed sensory testing. Claimant told him all five fingers were numb. Since the nerves are overlapping, Dr. Rauzzino picked the middle to note the middle fingers had the most decrease in sensation. (Depo. p. 13).

21. Claimant also indicated he had chronic back pain. He described it as 75% back pain and 25% leg pain. Later he said no leg pain. Then he described some numbness in

his left thigh on the pain diagram. (Ex. A, p. 19; Depo. p. 15). Although Claimant has been prescribed Norco for chronic low back pain, Dr. Rauzzino did not detect any abnormalities on physical exam of the lumbar spine. Nor did he find any pathology which would justify the use of Norco. (Depo. p. 16).

22. Dr. Rauzzino reviewed the MRI from January 2018 to determine if there was a defect in the Claimant's cervical spine. The initial MRI was done by Front Range Diagnostic Radiology and was read by a Chiropractor. The other MRI was taken at Parkview Medical Center. According to Dr. Rauzzino was done on a machine which does not yield the best resolution. There was also possible patient movement during the test which rendered the images difficult to interpret (Depo. p. 18). In order to definitively determine whether there were any acute structural changes, broken bones, ruptured ligaments rendering the spine unstable, Dr. Rauzzino requested that a new MRI be taken on a high quality machine and read by a dedicated neuroradiologist. (Ex. A p.3; Depo. pp. 17-18).

23. The updated MRI was performed on June 27, 2018 and interpreted by neuroradiologist David Solsberg, MD. (Ex. H, pp. 150-151). Dr. Rauzzino opined that the MRI demonstrates that Claimant does not have an acute foraminal disc herniation anywhere in the cervical spine including at C6-7. (Depo. p. 19). Claimant has multiple levels of degenerative changes, but does not have an acute structural change to the spine which would be relatable to an injury. (Depo. p. 20).

24. An acute disk herniation which is focal would have a certain shape to it as it protrudes out. Claimant's discs are broader, which tend to be chronic. Dr. Rauzzino agrees with the Dr. Solsberg that there is not an acute focal disk herniation. (Ex. H, p. 151 and Depo. p. 20,). The MRI does show findings at multiple levels; however, they appear to be chronic in nature and not acute. Claimant has osteophytes which are chronic. There are protrusions at multiple levels but these are chronic which have existed for quite a period of time. (Depo. p. 22). These documented osteophytes take a long time to form. (Depo. p.22).

25. Claimant also has stenosis at multiple levels which occurs over time. This is a degenerative process that results in narrowing of the hole in the spine where the nerve roots exit. (Depo. p. 23). The bilateral foraminal stenosis with compression of the nerve roots described in the report was not a result of specific trauma, nor is it new. These findings are related to age and the degenerative process. (Depo. p. 24).

26. Dr. Rauzzino testified that the Claimant's report of lifting a delineator post off the ground (which Claimant thought was unattached) would not cause the disc protrusions or osteophytes seen on the MRI. This activity did not change the structure of the

Claimant's spine or change the disk protrusions or osteophytes. Such activity would not cause ongoing symptoms for a prolonged period of time because Claimant's spine is unchanged from what it was prior to the reported injury. (Depo. p. 24-25).

27. Dr. Rauzzino explained that Claimant's complaints of myofascial pain are subjective, and do not correlate anatomically. (Depo. p. 25). In order for Claimant to have all of the symptoms he reported on his pain diagram, all of the different nerve roots would have to have been injured, and that scenario is not realistic. That does not happen from the type of mechanism described by Claimant. There are not forces at play which would involve all of the nerve roots on both sides of Claimant's spine that go down both his arms. Dr. Rauzzino testified that Claimant's activity in picking up the delineator post did not realistically cause the claimant's reported complaints. (Depo. p. 25; Depo. Exhibit B/pain diagram).

28. On the pain diagram generated at the time of Dr. Rauzzino's IME, Claimant indicated he had weakness from the neck down through the shoulders and down both the right and left upper extremities. It indicated Claimant has aching in the neck and back area. It also indicated Claimant had numbness in both hands, with burning in the right hand. He also labeled shooting pain in his right and left shoulders and shooting pain in his right arm. (Ex. A, p. 19).

29. Dr. Rauzzino also notes that Claimant's complaints changed over time. When Dr. Rauzzino wrote his initial report, he was concerned about a disk herniation on the right. Then Claimant had left sided symptoms which came later. There's no reason for him to have left sided symptoms occurring later if he had a right sided disk herniation. (Depo. p. 26). The most recent MRI showed that Claimant doesn't have a disc herniation on either side, which makes his complaints even harder to explain. (Depo. pg. 26).

30. Dr. Rauzzino testified that the Claimant did not do anything to his cervical spine which would require treatment. There is no change in the structure of the spine (Depo. p. 27). Claimant's subjective complaints are difficult to understand because he has pain in so many areas. (Depo. p. 27). There is not a single treatment that would be helpful given the type of diffuse pain and the absence of an abnormality to cause it. (Depo. p. 27). Claimant is not a surgical candidate because he does not have an acute herniated disc or acute structural injury to his spine. (Depo. p. 29).

31. Claimant did undergo an EMG study. (Ex F. pg. 137). Dr. Rauzzino opined that the EMG ruled out any acute injury to the nerves coming from the cervical spine. (Depo. p. 27).

32. Dr. Rauzzino testified that the anatomical findings on the MRI likely were present for a long time, even a year earlier. (Depo. p. 45). Dr. Rauzzino does not believe the Claimant's current pain and symptoms arise from that disc pathology, because unless Claimant's anatomy is structurally changed in a permanent fashion, one would not

expect symptoms to persist. One would also expect the Claimant to have very specific symptoms specific to a particular nerve root. Claimant would not have diffuse pain for the entirety of both arms and both hands. (Depo. pg. 44).

33. Dr. Rauzzino explained that just because there is a central disc protrusion, this does not mean that protrusion would cause pain down both arms. (Depo. p.46). A central disc protrusion does not touch the nerve roots. It splits the nerve roots. So it would not be expected to produce pain on either side. (Depo. p. 46).

34. Claimant has central disc protrusions at several levels of the cervical spine (C3-4, C4-5 and C5-6). Dr. Rauzzino testified that these protrusions are not soft, malleable material. They are not pieces of soft extruded material. (Depo. p. 47). The discs are not floating or easily moved. Claimant did not cause injury to four different discs in the purported work event. According to Dr. Rauzzino this is not a reasonable conclusion to draw. (Depo. pp. 47, 58).

35. Dr. Rauzzino respectfully disagrees with the opinion of Dr. Massey that the MRI of the cervical spine showed a right C6-C7 disc herniation. Since there is no acute disc herniation at C6-C7, there would be no reason to do a C6-C7 epidural. (Depo. p. 52).

36. Dr. Rauzzino testified that if the Claimant injured a nerve root as the result of the work event, one would expect symptoms to occur immediately. The symptoms would not come on later. This is why the left sided pain was problematic, because it developed much later in the treatment when there was no new structural reason for it to occur. If the Claimant sustained an injury to the C7 nerve specifically, one would have expected that to be manifested immediately on the examinations. However, it was not. (Depo. p. 57).

37. Dr. Rauzzino testified that it is not reasonable to conclude that Claimant suffered an injury to all of the nerves coming out of the cervical spine due to the described work event. That would indicate an injury of such catastrophic proportions that he has not seen it in his 18 years of practice. (Depo. p. 58).

38. Lifting something that is stuck in the ground doesn't apply significant force to the nerve roots of the spine. Typically, if the spine fails, it fails in one space, just as a stick would snap when force is applied to it. It won't disintegrate. (Depo. p. 59). The same is true for the cervical or lumbar spine. It generally fails at the weakest point. The force described by the Claimant is not consistent with the kind of symptoms being reported by the Claimant.

39. While it is possible that Claimant could have reached for something that would result in a pulled muscle, that would be expected to resolve over time. Claimant's symptoms haven't improved. Instead the symptoms have expanded over time and have

moved to the opposite side of the body. Now they involve the left arm. The claimed mechanism of injury doesn't account for the Claimant's symptoms. (Depo. p. 59).

40. However, during his deposition, Dr. Rauzzino acknowledged that he had no reason to doubt that Claimant's symptoms, as noted by Dr. Dallenbach on January 18, 2018 (the day following the injury) were due to his injury the day before.

41. Dr. Rauzzino opined that Claimant's radiographic findings of chronic degenerative changes should not produce such pain that one could not participate in physical therapy. Such a refusal would be concerning for a psychological overlay and secondary gain. This is because there is nothing on Claimant's radiographs which would produce that kind of pain. (Depo. p. 63). The distribution of pain, the proportion of pain and the expanding nature of the complaints are all inconsistent with what is seen in imaging studies, and the mechanism of injury. (Depo. p. 64).

42. Claimant was referred by Dr. Bradley to Dr. Sana Bhatti, also a neurosurgeon, on March 5, 2018 and then again on April 2, 2018. The histories and exam findings on each exam are quite similar. (Ex. C, p. 84-91). Claimant reported neck pain and headache, "which feels like his head will explode." He rates his pain at 8/10, which is worsened with movement. He also complained of low back pain with complaints of numbness and parasthesisias in his hands and all fingers, which are worse on the right. Claimant complained of weakness in the right hand and difficulty sleeping. He had difficulty with daily activities such as getting dressed and brushing his teeth. "He feels his symptoms are worsening with time". (Ex. C, pp. 85, 90).

43. Dr. Bhatti also noted on physical exam on March 5, 2018 'give away' weakness in the deltoids. (Ex. C, p. 90) On March 5, 2018 Dr. Bhatti noted that Claimant was complaining of neck pain, headache and "has subsequently developed significant right arm pain with burning pain in the right hand with numbness and weakness. Dr. Bhatti stated "the etiology of his pain is unclear. (Ex. C, p. 91).

44. Upon follow-up, on April 2, 2018 Dr. Bhatti's assessment changed. He noted that Claimant now also complains of pain in the left shoulder and numbness in the left hand. He opined that the "etiology of this pain is unclear." (Ex. C, p. 85). After reviewing the EMG Dr. Bhatti concluded that the disc at C6-7 "does not explain his symptoms (sic) complex". Dr. Bhatti also noted that the EMG showed mild to moderate right carpal tunnel syndrome which he felt was an "incidental finding and not related to his symptoms". (Ex. C, p. 85). Dr. Bhatti concluded that Claimant does not have a condition amenable to surgical treatment.

45. The medical records from Dr. Solomon Villalon dating back at least to May 31, 2013 show that Claimant has been consistently seeing Dr. Solomon for the treatment of chronic low back pain (Ex. C, pp. 92-122). Dr. Villalon has noted complaints of chronic

low back pain, muscle spasm and tenderness in the lumbar area of the back. (Ex. D, pp. 92-122).

46. Dr. Villalon has also noted intermittent complaints of left sided leg pain and left-sided sciatica. (Ex. D, pp. 119, 120). Claimant's physical examinations by Dr. Villalon have also identified positive straight leg raises. (Ex. D, p. 120).

47. Claimant consistently reported that his pain level at its worst without medications ranged from 6 to 8 out of 10 without the medication, and at its least, 2 out of 10. Claimant repeatedly reported "relief with the Hydrocodone." (Ex. D, pp. 92, 98, 104, 106).

48. Pharmacy records show that Claimant filled prescriptions for Hydrocodone, Flexeril and Ibuprofen consistently between January 1, 2011 and May 18, 2016. (Ex. N, pp. 207-225). The pharmacy records for Star Mart Healthmart end in May 2016. However, the records from Dr. Villalon continue to document the prescriptions through April 2018. (Ex. D, pp. 92-107).

49. On February 10, 2015 Dr. Villalon discussed with Claimant the Consent for Chronic Opioid Therapy, and answered all of Claimant's questions. Claimant signed this consent form. (Ex. D, p. 114; Ex. 1, pp. 3-4)

50. On July 12, 2016 Claimant reported to Dr. Villalon that he has low back pain and muscle spasms secondary to his degenerative disc disease of the lumbar spine. Claimant also reported that he had started "to have numbness and pain down his left lower extremity including mild weakness. He reported relief from his back pain with Hydrocodone." (Ex. D, p. 107). At that time Dr. Villalon discussed a trial of Neurontin for the discomfort in his left leg. Claimant indicated he would like "to think about it". (Ex. D, p. 107). Dr. Villalon issued a prescription for "Norco x 3 mos." (Ex. D, p. 107).

51. Claimant was seen October 13, 2016 by Dr. Villalon and report that he "gets 50% relief with his Norco, Flexeril and Ibuprofen." On exam he continued to have muscle spasm, tenderness in the lumbar back and a "positive SLR on the left". Dr. Villalon again discussed using Neurontin for the sciatica but Claimant does not feel his discomfort is bad enough to take any medication for the problem. Norco was prescribed for another three months with instructions to continue the other meds and recheck in three months. (Ex D, p. 106).

52. Claimant testified at hearing he did not take all of the Hydrocodone prescribed for him by Dr. Villalon. He used it on as "as-needed" basis only- not every day. He also felt that he was not exceeding any allowable limits when he drove any commercial vehicles on days when he felt it was needed.

53. Pharmacy records from Star Drug Healthmart reflect that Claimant refilled his prescription for Hydrocodone every month, for four and a half years. (Ex. N, pp. 207-226). Dr. Villalon's medical records show Claimant repeatedly stating that he gets pain relief when taking the Hydrocodone, ibuprofen and flexeril. (Ex. D, pp. 92-122).

54. Claimant's Commercial Drivers License records were admitted. On April 7, 2015, the Claimant denied that he had a spinal injury or disease. He denied he had chronic low back pain and he denied narcotic or habit forming drug use. (Ex. O, p. 229). The examiner discussed Claimant's health condition with the Claimant and the handwritten entry states that Claimant "denies any medical condition." (Ex. O, pg. 229). Claimant's commercial license was renewed for only three months at that time due to high blood pressure concerns. (Ex. O, pp. 227-228).

55. Claimant made a similar representation two years earlier in the Medical Examination Report for Commercial Driver Fitness Determination dated April 8, 2013. (Ex. D, pg. 125). Claimant signed his name to a report wherein he denied having a spine injury, denied having chronic pain and denied taking narcotic or habit forming drugs. (Ex. D, pg. 125). Dr. Villalon also denied that Claimant had longstanding and chronic low back pain, spasm and radiculopathy.

56. Claimant testified that he was aware that he required a commercial driver's license in order to work as a Traffic Maintenance 1. Claimant acknowledged receipt of the Federal Motor Carrier Safety Regulations Pocketbook and agreed to familiarize himself with the contents of it on November 11, 2016. (Ex. M, p. 173). The regulations preclude the operation of a commercial vehicle by one who has taken controlled substances including opioids, unless a specific exemption applies. See, Part, 382.213.

57. Claimant attended one visit to Excel Physical and Occupational Therapy. (Ex. B, p. 66). Claimant denied any low back problems in the past. (Ex. B, p. 66). He told the physical therapist that *"he was perfectly healthy before all this happened".* (Emphasis added, Ex. B, p. 66). However, Claimant did not want to participate in physical therapy before seeing a spine specialist to be cleared for moving. (Ex. B, p. 69).

58. On the initial appointment with the physical therapist on February 5, 2018, the Claimant had high fear avoidance behavior and refused to move his neck, shoulders, elbows, forearms and hand/ fingers because everything increased his pain. *"Pt [patient] stated he would like to try the movements but he knows that everything will increase his pain"* (Ex. B, p. 67) (emphasis added). Claimant put his own therapy on hold until he was cleared by a specialist. (Ex. B, p. 69). Claimant also refused to undergo any passive range of motion testing of any of his extremities by Dr. Bradley. (Ex. B, p. 67).

59. At this February 5, 2018 appointment, Under Assessment/Plan, Dr. Bradley noted: "Strain of muscle, fascia and tendon at neck level, subsequent encounter", "Strain of muscle and tendon of wall of thorax", "Strain of muscle, fascia and tendon of

lower back“, “Strain of muscle, fascia and tendon at shoulder and upper arm level, right arm”, ”Strain of muscles of fascia and tendons at forearm level, right arm” Claimant was given work restrictions of lift/carry/push/pull of up to 2 lbs. (Id).

60. Claimant’s pain diagram on February 5, 2018 showed pain in the neck, low back and right arm. (Ex. 2, p. 43).

61. Despite Claimant’s apparent dissatisfaction with Dr. Bradley, Claimant attended regular follow up visits with his office on a regular basis. He was seen on March 7, 2018 (Ex. B, pp. 62-65). Claimant was again given work restrictions of lift/carry/push/pull of up to 2 lbs. His Assessment/Plan reads the same as February 5, 2018. (Id).

62. Claimant next visited Dr. Bradley on March 26, 2018. He was still assessed as a “Work Accident”, with the same work restrictions. His Assessment/Plan remained the same. He was noted to have a “general loss of motion of all extremities and spine”. Work restrictions remain unchanged. (Ex. B, pp. 56-60).

63. Claimant’s next visit was April 19, 2018. Work restrictions, Assessment remain unchanged. (Ex. B, pp. 50-55).

64. Claimant’s next visit to Dr. Bradley was May 14, 2018. At this exam, there were noted a number of abnormalities in his musculoskeletal exam. In addition to the prior diagnoses, he was also diagnosed with “generalized anxiety disorder”, and prescribed medication for it. MMI date is projected to be 9/10/18. Restrictions remain in place. (Ex. B, pp. 43-48)

65. At Claimant’s next visit of May 28, 2018, his existing 2-lb work restrictions were supplemented with standing and walking up to one hour a day, sitting up to 5 hours a day, and ‘working’ up to 6 hours a day. His MMI date was estimated to 8/10/18. (Ex. B, pp. 38-42).

66. Claimant’s next follow-up was June 11, 2018, with similar results as the May 28 visit.

67. Claimant next saw Dr. Bradley on July 2, 2018. His exam continues to note “ABNORMAL: Neck is stiff, Decreased cervical range of motion noted, Tender Posterior Neck Bilaterally” MMI date moved back to 9/10/18. (Ex. B, pp. 28-32).

68. Claimant underwent a C5,6,7 epidural injection with Dr. Benjamin Massey on July 31, 2018. Prior to the injection, Dr. Massey noted that Claimant had complained of weakness, numbness and tingling in his arms. Dr. Massey noted that upon exam, Claimant showed “decreased sensation medially and laterally along the right forearm into the hand and fingers to light touch compared to the left.” (Ex. 7, pp. 84-85).

69. Claimant's next visit to Dr. Bradley on August 6, 2018 notes that that he was given a steroid injection on 7/31/18, with noted improvement. Patient states that he is doing physical therapy at home and there is no improvement. He also states that he is trying to remain active. MMI date is set at 9/10/2018. His musculoskeletal exam was mostly normal, except for tenderness over the spine noted. Work Restrictions remain in place. (Ex. B, pp. 23-27). This 8/6/18 is last available report from Dr. Bradley.

70. On February 8, 2018 Claimant saw his own chiropractor, Dr. Youngren. On this date, Claimant tolerated a complete physical examination and series of x-rays. (Ex. 3, pp. 51-54). The exam was performed while Claimant was supine and also sitting up. The majority of the results were within normal limits. (Ex. 3, pp. 51-54) The pain diagram Claimant filled out was limited to pain in the head, neck, right shoulder and arm. (Ex. 3, p. 61). This pain diagram also varied from the one provided to Dr. Rauzzino. (Ex. A, p. 19).

71. Dr. Youngren then referred the Claimant to neurosurgeon Dr. Ted Villavicencio. (Ex. 3, p. 54). On March 22, 2018 Claimant was seen Dr. Villavicencio. (Ex. G. pp. 140-148). Claimant described his event of pulling on the delineator post. He complained primarily of neck and right shoulder and arm pain but also said the symptoms are "now moving into the left arm as well". He also talked about having blurred vision, difficulty with his speech and finding words". Claimant still reported being unable to participate in PT and rated his pain at 9 out of 10. (Ex. G, p. 140).

72. Claimant also gave Dr. Villavicencio a history of his low back. Claimant reported *"ongoing LBP as well as left anterior thigh numbness/pain since the incident at work. He reported trying Gabapentin, nerve medication, NSAIDS and activity modifications without relief".* (Emphasis added). (Ex. G, p. 140).

73. Dr. Villavicencio's examination was essentially normal, with normal strength in the upper extremities, normal sensation in the arms and legs, and essentially normal reflexes. (Ex. G, p. 141). Dr. Villavicencio found no surgical lesions, and recommended conservative care. He also arrived at the diagnosis of cervical degenerative disc disease- the same diagnosis reached by Dr. Rauzzino. (Ex G., p. 142).

74. At hearing, Claimant clarified that now he was not claiming an injury or aggravation to the low back from the work incident, nor is his carpal tunnel syndrome related to this injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

D. In this case, the ALJ finds Claimant to be credible overall. While issues of secondary gain have been raised, the ALJ does not see that this has been a driving force in Claimant's case. Claimant, quite reasonably, thought he could "shake off" the injury when it occurred, and did not report it the day it occurred. He did the following day, and the ALJ finds that he reported what he was feeling to Dr. Dallenbach upon examination. Claimant is far from a perfect historian, and his symptoms did wax and wane, confounding his providers on occasion. He reported relief from the epidural injection to Drs. Massey and Bradley, and the ALJ is hard-pressed to conclude that

Claimant underwent this procedure for dramatic effect. While his complaints of pain have often been out of proportion to his objective symptoms, it does not mean he was not experiencing them. Further, the ALJ finds that, while Claimant-and his personal physician-might well have been playing fast and loose with the painkillers for his back, his explanation is satisfactory: to wit; he was just hoarding them for a rainy day.

Compensability

E. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1) (b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

F. The ALJ finds Dr. Rauzzino to be credible and thorough in his diagnosis. He quite reasonably requested a state-of-the-art MRI for Claimant. Neither he, nor Dr. Bhatti, could identify a target that could be surgically repaired. The could not find an objective source of his symptoms. In effect, despite their best efforts, they could not find a way to help Claimant within their specialties. Dr. Rauzzino could not explain the persistence of Claimant's symptoms, if they were due to multiple muscle strains. Nonetheless, that is plainly the diagnosis of the ATP Dr. Bradley, who likewise imposed work restrictions consistent with this injury. Even Dr. Rauzzino did not doubt that the symptoms displayed the day following the injury were accurately stated by Dr. Dallenbach. Certain of Claimant's symptoms were observed by providers well after the fact. The ALJ finds, by a preponderance of the evidence, that Claimant suffered a compensable injury while at work.

Medical Benefits

G. The Claimant has the burden to prove her entitlement to medical benefits by a preponderance of the evidence. C.R.S. §8-43-201. The Respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. C.R.S. §8-42-101(1) (a). The Claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and

reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

H. In this case, the ALJ finds, by a preponderance of the evidence, that Claimant is entitled to Medical Benefits in connection with this case. As noted previously, there don't appear to be viable surgical alternatives, but the ATP will be tasked with sorting that out. As of this Order, Claimant appears to be suffering the continuing effects of a series of muscle strains incurred while twisting awkwardly and unexpectedly. He reported significant, if not total, relief from this epidural injection, which the ALJ finds was reasonable, necessary, and related to his work injury, despite a lack of a clear pathology in the most recent MRI. It certainly appeared on the MRI prior, which is what his providers had to work with at the time. Prior to this injury, Claimant had never experienced pain or injury to his cervical region, nor to his shoulders, arms, or hands. The ALJ has not heard of an alternative injury which would cause his ongoing symptoms, if indeed one exists.

Temporary Total Disability

I. To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998)

J. The ALJ finds, by a preponderance of the evidence, that Claimant is entitled to TTD benefits. He suffered a compensable injury, and has been placed on restrictions by his ATP which prevent him from returning to work. There is no evidence of modified duty being offered to him by employer. The work restrictions provided by his ATP remain in effect as of this Order.

Reduced TTD Benefits / Misrepresentation of Ability to Perform Required Work

K. C.R.S. 8-42-112(1)(d) provides for a 50% reduction in compensation:

> Where the employee *willfully* misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job *as a result of* the physical ability about which the employee willfully misled the employer. (emphasis added).

The ALJ does not find that Claimant *willfully* misled the DMV about his periodic issues with this back. As noted by Claimant, since Claimant's own personal physician did not see any 'red flags' with his continuing his CDL status, it would be quite a stretch to conclude that Claimant willfully did so anyway. Claimant quite reasonably relied upon his clearance by his own physician in making this CDL application. Assuming, arguendo, that Claimant willfully misled the DMV, there is nothing in the record showing that Claimant misled his *employer.* The ALJ reads the statute to require misleading the *employer,* and not the result of indirectly getting the job as a result of misleading a licensing authority.

L. Further, and as noted by Claimant, and assuming, arguendo, that Claimant willfully misled his employer by failing to disclose his back issues, *Claimant injured his neck and shoulders- not his lower back.* The ALJ reads this statute to apply only if Claimant had prior, significant issues with his *neck and shoulders, willfully* failed to disclose them *to his employer*, and then re-injured the *same body parts* <u>*as a result*</u> of his work duties. That did not occur here. The ALJ finds that the elements of this statute have not been proven by Respondents, by a preponderance of the evidence.

ORDER

It is therefore Ordered that:

1. Claimant's injuries from January 17, 2018 are compensable.

2. Respondents shall provide all reasonable, necessary, and related medical care to relieve Claimant of the effects of the work injuries. Such care includes, but is not limited to, the epidural injection provided by Dr. Massey.

3. Claimant's Average Weekly Wage is $648.00.

4. Claimant may designate Dr. Dallenbach as his Authorized Treating Physician.

5. Claimant is entitled to Temporary Total Disability Payments, effective January 19, 2018 and ongoing, until terminated by law. Such benefits are subject to any applicable offsets, but are not subject to a 50% reduction.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 8, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-075-853-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 17, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 10/17/18, Courtroom 5, beginning at 8:30 AM, and ending at 11:20 AM)

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection. Respondents' Exhibits A through D were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. which was filed, electronically, on October 22, 2018. On October 23, 2018, Respondents indicated that they had no objections to the proposed decision, at which time the matter was deemed submitted for decision. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability, specifically, whether the Claimant sustained a compensable to her left shoulder, arising

out of and in the course and scope of her employment with the Employer on March 21, 2018; and, whether the Employer provided the Claimant with list of authorized medical providers in accordance with § 8-43-404(5)(a)(I)(A), C.R.S.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The parties stipulated to the following fact prior to commencement of the hearing: that the Employer did not furnish a list of medical providers to the Claimant in accordance with § 8-43-404(5)(a)(I)(A)., C.R.S., and the ALJ so finds.

2. The Claimant was born on February 2, 1977 and was 41 years of age on the date of the hearing.

3. The Claimant was hired by the Employer on May 9, 2017 and employed as a Project Consultant. Claimant remains employed by Employer.

4. The Employer is a roofing company specializing in roofing, siding, and gutter installation and repair for residential, new construction, and commercial properties.

The Injury

5. On March 21, 2018, the Claimant was performing the final inspection of a roof at a residential property located at 4410 Bryant, St. Denver, CO 80211 on behalf of the Employer.

6. Michael Austell accompanied the Claimant at the inspection and was assisting the Claimant with material pick-up and final inspection of repairs.

7. Austell was the Claimant's supervisor on March 21, 2018.

8. The Claimant ascended a ladder on the side of the 4410 Bryant residence in order to inspect the roof and photograph repairs.

9. Around 11:30 AM, the Claimant began descending the ladder in order to photograph the underlayment of the roof and slipped on the lower rungs of the ladder.

10. As the Claimant fell, she reached up with her left arm and grabbed one of the rungs of the ladder above her in an attempt to brace her fall.

11. The Claimant immediately felt pain in her left shoulder after she made impact with the ground and yelled out an expletive.

Medical

12. On April 4, 2018, the Claimant presented to Angelique Poturalski, M.D. at Centennial Family Care with a chief complaint of left shoulder pain. The history noted that the Claimant believed her injury occurred approximately one-month prior with an incident involving a ladder. The ALJ infers and finds that the Claimant was actually referring to the March 21, 2018 incident.

13. On April 23, 2018, the Claimant returned to Centennial Family Care complaining of persistent left shoulder pain.

14. On April 23, 2018 Claimant also presented at Touchstone Imaging Highline for X-ray imaging of the left shoulder upon referral from Dr. Poturalski. The clinical indication described that the patient fell from a ladder injuring her left shoulder.

15. On April 30, 2018, Dr. Poturalski documented that the Claimant returned for continued left shoulder pain along with back muscle spasms, mostly on the left. The Claimant was waiting for a referral to an orthopedist for shoulder pain.

16. On May 4, 2018, the Claimant met with Steven E. Horan, M.D. at OrthoONE. Dr. Horan documented that the Claimant presented with left shoulder pain, weakness, and limited range of motion. The Claimant reported she slipped off a ladder and tried to catch herself from falling. Her full weight was hanging by her left arm. She originally thought it would get better with time, but it has not. The assessment included acute pain due to trauma and acute pain of the left shoulder.

17. Dr. Horan ordered an MRI (magnetic resonance imaging) of the left shoulder. The imaging study was performed on May 9, 2018. The indication accompanying the MRI was documented as shoulder pain after a fall from a ladder on March 21, 2018.

18. The Claimant returned to Dr. Horan on May 14, 2018. A Kenalog injection was administered to the left shoulder.

19. The Claimant returned to Dr. Horan again on May 23, 2018. The injection did not help and a decision was made to proceed with subacromial decompression.

20. On June 18, 2018, the Claimant presented to Centennial Family Care again due to continued back and neck pain. Surgery was noted to occur on July 12, 2018.

21. Dr. Horan performed debridement of the labrum, subacromial decompression, and distal clavicle excision at Rocky Mountain Surgery Center on July 12, 2018.

22. On July 24, 2018 Dr. Horan performed a post-surgical examination of the Claimant and noted the she could not sleep on her shoulder. A prescription for physical therapy (PT) was provided.

23. Between August 22, 2018 and September 5, 2018, the Claimant presented for four sessions of PT at ProActive Physical Therapy upon referral from Dr. Horan. Subjective complaints described that he Claimant fell from a ladder leading to the surgical procedure. The date of onset was noted as March 21, 2018.

The Notice of Injury

24. The Claimant verbally reported to her supervisor, Austell, that she fell off the ladder on March 21, 2018.

25. Due to pain in her left shoulder, the Claimant asked Austell to complete the inspection of the premises. Austell completed the inspection after which time he and the Claimant left the property.

26. A list of physicians was never provided to the Claimant and Austell did not refer the Claimant to any medical provider.

27. On April 23, 2018, the Claimant remitted email correspondence to the Employer's Employee Services Manager, Sharon Shockley. Claimant's correspondence identified that she slipped off a ladder at one of her builds on March 21,2018 and, as she was falling, reached up and grabbed the ladder and injured her left shoulder. She informed Shockley that she was unable to lift her arm above her shoulder height, and could not carry significant weight.

28. On April 25, 2018, the Employer's National Production Manager, Lucas Mullis, remitted email correspondence to the Claimant identifying that, "due to the time that has passed since the injury, the only option would be filing short-term disability." The ALJ finds that Mullis was mistaken in his interpretation of the law regarding work injuries.

29. On April 26, 2018, the Claimant completed a Colorado Department of Labor and Employment Worker's Claim for Compensation. She described that she had sustained an injury to her left shoulder on March 21, 2018 when she slipped off a ladder.

30. On June 8, 2018, the Employer filed a Notice of Contest "due to further investigation for medical records."

Michael Austell

31. Michael Austell was called to testify on behalf of Claimant. He was located near the Claimant at the time she slipped. He did not see the Claimant fall; however, he heard the Claimant yell an expletive.

32. Austell ran to the Claimant's location in response to hearing her shout an expletive.

33. Austell is not only the Claimant's supervisor, but is also Claimant's fiancée. The ALJ finds that this fact did not affect his credibility.

34. Austell witnessed demonstrable limitations in the Claimant's left shoulder immediately following her fall from the ladder. He performed the remainder of her job related duties at 4410 Bryant, St. Denver, CO 80211, including inspection of the garage and removal of the ladder from the residence. The Claimant has not returned to work since the March 21, 2018 injury.

35. Austell witnessed limitations in the Claimant's ability to perform household duties and activities of daily living (ADLs) since March 21, 2018, due to her left shoulder injury. Prior to March 21, 2018, Austell did not observe any complaints or limitations to the Claimants left shoulder.

Ultimate Findings

36. The the Claimant's overall presentation was persuasive and credible. As found, the testimony of the Claimant concerning her lack of physical symptoms and medical treatment prior to March 21, 2018 pertaining to her left shoulder was undisputed. Having reviewed the Claimant's medical records, the ALJ makes a rational choice to accept the overall consistency in her medical records that the mechanism of injury included slipping from a ladder supports her medical condition thereafter. The date of injury was March 21, 2018.

37. Austell's testimony – that he heard the Claimant scream at the job site and had to complete her job related duties due to her injury following her fall from the ladder is highly persuasive, credible, and undisputed.

38. The ALJ hereby finds the Claimant sustained a compensable injury on March 21, 2018.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Uncontradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was undisputed and the ALJ is not free to disregard any part of it. As further found, the Claimant's overall presentation was persuasive and credible. The testimony of the Claimant Austell concerning the nature of her injury, work related duties, and treatment was credible and persuasive.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, there were no conflicting testimonies, and the Claimant's reporting of the date and location of her injury to her medical providers was overall consistent. Although not required to do so and stand on the Claimant's burden of proof the Employer pointed to no plausible alternative event or injury that would make the Claimant's left shoulder condition non-compensable. The ALJ made a rational choice to accept the testimony of the Claimant and Austell. and to reject any evidence to the contrary.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred but for the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41- 301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399 (Colo. App. 2009); *Cabe/av. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained injuries on Mach 21, 2018, arising out of the course and scope of her employment for the Employer.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with regard to compensability of the March 21, 2018 incident.

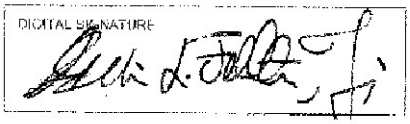
ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant sustained compensable injuries on March 21, 2018, arising out of the course and scope of her employment for the Employer.

B. Any and all issues not determined herein are reserved for future decision.

DATED this 8th day of November 2018.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on December 22, 2017.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable, necessary, and causally related medical benefits for the December 22, 2017 injury including the MRI of his wrist recommended by Dr. Pater.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from December 28, 2018 through January 2, 2018 and from February 10, 2018 and ongoing.

4. Whether Respondents have established that Claimant was responsible for his termination and that his TTD benefits should terminate due to responsibility for termination.

STIPULATIONS

Claimant's average weekly wage is $271.81.

FINDINGS OF FACT

1. Claimant was employed by Employer as a part time courtesy clerk with duties that included assisting in the front of King Soopers. Claimant regularly, as part of his job duties, bagged groceries.

2. On December 22, 2017, Claimant was working a scheduled part time shift. Claimant was bagging groceries for co-worker/cashier, Alex Vigil.

3. Video from that evening shows Claimant bagging at a check stand with cashier Mr. Vigil.

4. Claimant testified that while bagging for Mr. Vigil, he picked up a bag and felt a sharp pain in his wrist for about 30 seconds that then went away. Claimant testified that it was a sharp twinge in his wrist around the upper right part underneath his thumb and felt kind of fiery and sharp and then went away. Claimant testified that when it happened he was groaning a little bit and told Mr. Vigil that his wrist hurt a little bit.

5. Mr. Vigil testified that he recalled Claimant grimacing while Claimant was bagging groceries at his check stand. Mr. Vigil testified that he asked Claimant what happened and Claimant stated he may have hit his wrist while doing carts or could have hit it at home prior to work.

6. Claimant completed his shift the night of the 22nd and did not report an injury that night.

7. Claimant worked the next day, December 23, 2017. During his shift, his wrist became red, agitated, and painful. Claimant noticed a good pea size lump on his wrist toward the end of his shift under his skin on the upper right side of his wrist under his thumb. Claimant did not report an injury on the 23rd.

8. On December 24, Claimant attempted to "call in" before his shift due to the pain in his wrist but he was asked to come in anyways. Claimant worked that day. Claimant alleges that he reported his injury verbally to a front-end manager, Ms. Blake on the 24th.

9. Ms. Blake testified at hearing. She indicated that Claimant did not verbally report an injury to her on the 24th and that every time an injury is reported to her she follows the same protocol. Ms. Blake testified she will immediately take the reporting employee off the sales floor and have them fill out paperwork and that she brings the employee to management that is more senior.

10. On December 25, 2017, the store was closed. Claimant was not scheduled to work on December 26, 2017.

11. On December 27, 2017, Claimant went to the emergency room at Good Samaritan due to his wrist pain. At the emergency room, Claimant reported sharp right thumb pain at an 8/10 since the 23rd after bagging groceries at King Soopers. Claimant reported that the pain was worse with movement, that the swelling had gone down, but that the pain had not improved. X-rays of the right hand showed no fracture, dislocation, osseous, or soft tissue abnormalities. On examination, Claimant's right thumb was tender to palpation along the base with minimal swelling. Claimant's function was noted to be intact but limited by pain. Tendonitis was suspected and Claimant was placed in a thumb spica. It was recommended that Claimant follow up with his primary care provider if the pain continued. Claimant was placed on restrictions of working light duty or returning to work on January 5, 2018 if light duty was not available. *See* Exhibits 4, I.

12. On December 28, 2017, Claimant came into the store to provide Employer with the papers from his emergency room visit. Claimant filled out an "Associate Work Related Injury / Illness Report." Claimant reported that he was injured at the check stand while bagging groceries and that he had a strain (tendonitis) of his wrist. Claimant reported the injury occurred December 22, 2017 at 7:00 p.m. and that he reported it verbally to Kaylee on December 24 at 11:20 a.m. Claimant stated, "I was bagging groceries I believe check stand 13 for Alex Vigil. I lifted the groceries into the cart, then

a sharp pain erupted in my wrist which lasted for about 30 seconds." Claimant was provided with a designated medical provider list and was referred for treatment. *See* Exhibits L, M.

13. Ms. Blake (Kaylee) testified that she first learned of the alleged injury several days later when Claimant came into the store to turn in an injury report. Ms. Blake testified that when she asked Claimant what happened, Claimant shrugged his shoulders and stated "I don't know," and that he seemed nonchalant about the alleged injury.

14. On January 2, 2018, John Ogrodnick, M.D. evaluated Claimant. Claimant reported that on December 22, 2017 he was bagging groceries at King Soopers and may have lifted wrong as a sharp pain erupted in his wrist. Claimant reported that it did not feel too bad the next day but that on December 24 it was more painful. Claimant reported some slight improvement since visiting the emergency room and that his pain was 6/10 on the volar right wrist. Claimant reported a knot on his wrist that was very tender and that his thumb and index finger would go numb as if falling asleep. On examination, Dr. Ogrodnick found subtle fullness over the volar/radial right wrist, a pea-sized discreet tender nodule, positive carpal compression and Tinel's for localized tenderness, decreased grip strength, and tenderness over the first web space and the extensor policies. Dr. Ogrodnick recommended Claimant continue to splint, ice, and undergo therapy. He referred Claimant to therapy for muscle strain of tight wrist. He opined that Claimant could return to work with restrictions of no right handed lifting. *See* Exhibits 5, G.

15. On January 4, 2018, Claimant underwent occupational therapy. Claimant reported that he was bagging groceries when he felt a sharp pain in his right wrist. Claimant reported that he continued working for the next two days but his pain increased until he went to the emergency room and was given a wrist brace. The assessment was that Claimant's symptoms were consistent with a wrist sprain and possible cyst formation at scapholunate interval. Range of motion exercises and an orthotic support was recommended to stabilize and strengthen. *See* Exhibit 6.

16. On January 8, 2018, Dr. Ogrodnick evaluated Claimant. Claimant reported increasing pain after being tasked to clean the flour shelf, losing his balance while crouching, and falling forward on his outstretched right wrist to break his fall. Claimant reported right wrist pain at an 8/10 that was disturbing his sleep. Claimant remained tender on examination over the volar/radial right wrist with a soft semi-mobile pea sized mass. Claimant held his wrist in a guarded fashion and reluctantly performed some limited wrist range of motion. Dr. Ogrodnick assessed ganglion of wrist, right. Dr. Ogrodnick recommended consultation with an orthopedist and continued the work restrictions of no use of right hand. *See* Exhibits 5, G.

17. On January 17, 2018 orthopedist Timothy Pater, M.D. evaluated Claimant. Claimant reported that on December 22, 2017 he was bagging groceries when he felt a pop in his wrist and had a sudden onset of pain. Claimant reported that any movement aggravated the wrist pain. On exam, Dr. Pater found generalized swelling in the right

wrist, decreased range of motion, positive Watson test, and tenderness. Dr. Pater ordered an MRI of Claimant's joint upper extremity and recommended Claimant continue with work restrictions. Dr. Pater noted that Claimant had a painful pop in his right wrist while bagging groceries and that things had not sufficiently calmed down with immobilization and rest. Dr. Pater noted a report of a large mass lesion that had since regressed and may represent a ganglion cyst or some other structural abnormality such as a ligamentous tear. Dr. Pater recommended getting an MRI scan to see if there were any anatomical abnormalities. On the procedure form, right volar carpal ligament tear and ganglion cyst were noted as diagnoses and right wrist MRI was noted as recommended procedure. *See* Exhibits 7, J.

18. On January 22, 2017, Dr. Pater's office sent Insurer a request for authorization for the right wrist MRI. *See* Exhibits 7, J.

19. On January 22, 2018, Dr. Ogrodnick evaluated Claimant. Claimant reported feeling about the same with 5-6/10 wrist pain. Claimant reported that his modified duties included using a shop vacuum and restocking return or surplus items. Dr. Ogrodnick assessed muscle strain of right wrist and noted it was unusual that Claimant was not improving simply from rest. Dr. Ogrodnick noted that an MRI was pending and recommended follow up with Dr. Pater after the MRI. Dr. Ogrodnick noted that Claimant could return to work with the same restrictions. *See* Exhibits 5, G.

20. On February 9, 2018, Respondents filed a notice of contest for the reason that the injury/illness was not work related. *See* Exhibit 2.

21. On March 30, 2018, Claimant filled out a "3 Day or More Sick Pay Request" form. Claimant filled out part I- general information and part II requesting sick pay. Claimant signed below part I and part II. Claimant also filled out portions of part IV- physician's statement including date of illness, date first consulted, date first unable to work, that the condition was due to an employment injury, the dates partially disabled, the diagnosis, and that the treatment induced physical therapy. Claimant did not fill out portions regarding referrals, work restrictions, re-evaluation dates, and did not sign where it asked for physician signature. *See* Exhibits 3, M.

22. On April 12, 2018 Ellen Fuchigami, NP evaluated Claimant. NP Fuchigami diagnosed tendinitis of right wrist and noted that Claimant was placed off work for that day, April 12. NP Fuchigami referred Claimant to physical therapy and recommended Claimant avoid any activities involving repetitive use of his right wrist/hand for now. Claimant was provided with instructions for wrist tendinitis exercises. *See* Exhibits 9, H, M.

23. On April 23, 2018, NP Fuchigami issued a letter directed to Employer. NP Fuchigami noted that she saw Claimant once on April 12 for a complaint of right wrist pain and referred Claimant to physical therapy. NP Fuchigami noted that she did not determine Claimant to be disabled, partially or otherwise, and was unable to fill out paperwork regarding Claimant's absence from work starting four months ago. She noted

that Claimant had reported seeing a workers' compensation physician who might be able to complete paperwork and address the question of employment related injury. *See* Exhibits 9, M.

24. On May 3, 2018, Employer terminated Claimant's employment. The termination form checks reason code 43, discharged, dishonesty as the reason for termination. A behavior notice dated May 3, 2018 stated that Claimant had been out due to a wrist injury since December 22 and after the injury was denied, Claimant was told to fill out the 3-day or more sick pay form. The behavior notice alleges that when Claimant turned in the paperwork, it was determined to be falsified and that the doctor corroborated not having seen Claimant on the date listed on the paperwork. The behavior notice stated that Claimant was being terminated for dishonesty. *See* Exhibit M.

25. Claimant testified at hearing that prior to this incident he had no problems with his right wrist or hand. Claimant testified that when he was bagging he picked up a bag and felt a sharp pain in his wrist for about 30 seconds and that it went away. Claimant testified that the next day he worked but was kind of sore and the wrist got red and painful as his shift went on and that at the end of his shift on the 23rd he noticed a pea sized bump. Claimant testified that he was not sure what time the injury happened on the 23rd or what check stand he was at, but was absolutely sure that he was bagging for Mr. Vigil at the time the injury occurred.

26. Claimant testified that after he was referred to a workers' compensation doctor on December 28, 2017, it took a while to get in and the first appointment was January 2. Claimant testified that between the 28th and 2nd, he was not working and no light duty work was offered to him. Claimant testified that he worked light duty and was accommodated afterwards until February 9, 2018. Claimant testified that when his claim was denied on February 9, Employer did not accommodate his light duty work and told him he could not come back to work unless he was released to normal duty and that he was asked to get a 3 day release form filled out.

27. Claimant testified that the doctor didn't feel comfortable signing or filling out the form until she had done her own workup. Claimant testified that he turned in the form to Employer but that the doctor had not signed it. Claimant testified that Employer didn't accept the form because it was not signed or dated by a doctor and that he then got a letter from NP Fuchigami, dated April 23, 2018, to bring to Employer. Claimant testified that he picked up the April 23 letter at Kaiser and brought it to Employer.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to

benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of

whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ finds Claimant, overall, to be credible and persuasive. Claimant has met his burden to show that he sustained an acute work related injury to his wrist on December 22, 2017. Claimant's testimony and reports to medical providers throughout the claim has been consistent regarding the mechanism of injury. Although Claimant confuses the time of injury and the check stand he was working at, Claimant is credible that while working with Mr. Vigil he sustained an acute sharp pain to his wrist. Mr. Vigil confirmed Claimant groaning. Although Mr. Vigil testified that Claimant reported he could have hurt his wrist doing buggies or at home, the ALJ finds this not as persuasive as Claimant's credible testimony surrounding the acute incident while bagging. Overall, the ALJ finds Claimant's testimony surrounding the injury and acute nature of injury on December 22, 2017 to be persuasive and consistent with video showing him working as a bagger for Mr. Vigil on that date and consistent with Claimant's reports to various providers. Claimant has established, more likely than not, that he sustained a compensable injury.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Medical "treatment" encompasses both diagnostic and curative medical procedures. *Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949). Reasonable diagnostic procedures have been held to be a prerequisite to maximum medical improvement if they have reasonable prospect for defining claimant's condition and suggesting further treatment. *Villela v. Excel Corp.,* W.C. No. 4-400-281 (ICAO February 1, 2001). A Claimant bears the burden to establish by a preponderance of the evidence that the conditions for which they seek medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S.

Claimant has met his burden to establish that he sustained a work related injury to his wrist. Claimant is entitled to medical treatment reasonably necessary to cure and relieve the effects of the injury, including the MRI recommended by Dr. Pater. As found above, Claimant's authorized treating provider Dr. Ogrodnick sent Claimant by referral to orthopedist Dr. Pater who recommended an MRI. Claimant is entitled to a general award of medical benefits to treat his wrist and Respondents shall authorize the MRI recommended by Dr. Pater who is in the chain of referral from authorized treating provider Dr. Ogrodnick. Claimant shall be allowed to resume treatment.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Claimant has established, by a preponderance of the evidence, an entitlement to TTD benefits from December 28, 2017 through January 2, 2018 and from February 10, 2018 and ongoing until terminated by law. Claimant's wrist injury caused him to be medically incapacitated due to the restriction on the use of his hand. Employer did not offer Claimant light duty work or accommodate his restrictions between December 28 and January 2. Employer then started to accommodate Claimant and his work restrictions until February 9, 2018. Claimant's wage earning capacity was impaired and he was unable to perform his normal job duties due to the injury and restriction placed on the use of his injured hand. Claimant still needs medical treatment and has never been released from restrictions placed on him and has established an ongoing entitlement to TTD benefits from February 10, 2018 and ongoing.

Termination

Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.*

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). However, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. This is true even if the claimant is not specifically warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office, supra.*

Respondents have failed to establish, by a preponderance of the evidence, that Claimant was responsible for his termination. As found above, after his claim was denied, Claimant was told to submit a return to work form. Claimant filled out the paperwork himself. Although Claimant filled out part of the section that was intended to be filled out by a physician, Claimant did not sign the physician's name nor was there sufficient evidence to establish that Claimant tried to represent that the physician had actually filled out the form. Although Claimant may be unsophisticated, Claimant did not volitionally act to deceive Employer. Rather, Claimant attempted to comply with Employer's requirements by bringing in the document as directed and filling out the information that he could despite not being able to get a physician to sign it. Claimant filled out dates he was first treated for the injury and filled out the information he could. Claimant, significantly, did not fill out restrictions, recommended referrals or treatment, and did not sign the doctor's name. Although the section filled out was meant to be filled out by a physician, Claimant did not intend to pass off the information as from a physician and did not forge the physician's signature. Respondents have failed to establish anything other than a misunderstanding by Claimant as to what was required and have not established fraud or deceit on the part of Claimant.

ORDER

1. Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on December 22, 2017.

2. Claimant has established by a preponderance of the evidence an entitlement to reasonable, necessary, and causally related medical benefits for the December 22, 2017 injury including the MRI of his wrist recommended by Dr. Pater.

3. Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from December 28, 2018 through January 2, 2018 and from February 10, 2018 and ongoing.

4. Respondents have failed to establish that Claimant was responsible for his termination and that his TTD benefits should terminate due to responsibility for termination.

5. Respondents shall pay interest of 8% per annum on all benefits not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 8, 2018 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that a left shoulder MRI arthrogram and arthroscopy are reasonable, necessary and causally related to her June 13, 2016 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked as a Housekeeper for Employer. Her job duties involved cleaning guest rooms, emptying trash and maintaining restrooms.

2. Claimant testified that on June 13, 2016 she was pushing a cart full of cleaning supplies, sheets and towels on the second floor of Employer's hotel. She attempted to push the cart onto an elevator but its wheels became stuck in the crease of the elevator door. Claimant lifted the cart with her left hand but felt a pop and experienced pain in her left shoulder. She subsequently completed her work shift.

3. On June 22, 2016 Claimant visited primary care provider SCHC Monfort Family Clinic. Claimant reported that she had been suffering left arm pain for eight days. Her associated symptoms included left-sided back pain. Although Claimant noted that she worked in a hotel cleaning rooms, she denied any specific work injury. Hannah Sellnow, PA-C assigned Claimant a 15-pound lifting restriction for 10 days.

4. After Claimant returned to full duty employment she experienced increased left shoulder symptoms. Employer subsequently referred Claimant for medical treatment. Physical therapy improved her symptoms. However, while operating an arm bicycle during treatment Claimant suffered increased left shoulder pain. A subsequent left shoulder injection and medications did not alleviate Claimant's symptoms.

5. On October 12, 2016 Claimant visited Authorized Treating Physician (ATP) James E. Rafferty, D.O. at University of Colorado Health for an examination. Claimant reported the sudden onset of left-sided, anterior shoulder pain as she attempted to push and slide a heavy cleaning cart into an elevator. She also developed posterior left shoulder pain as a result of her physical therapy sessions. Dr. Rafferty noted that a September 6, 2016 MRI reflected a normal rotator cuff, biceps tendon and labrum. He diagnosed Claimant with a left shoulder strain that included myofascial and bicipital tendinitis. Dr. Rafferty summarized that the temporal association between the event at work on June 13, 2016 and the "sudden onset of symptoms supports work-relatedness."

6. On October 18. 2016 Claimant visited David A. Beard, M.D. for an examination. Claimant reported that while working for Employer on June 13, 2016 she pushed a cart and suffered left shoulder pain. Despite modified activities and medications

Claimant continued to suffer left shoulder symptoms. A left shoulder MRI did not reflect any evidence of "cuff, labral or biceps tendon tearing." A physical examination of the left shoulder revealed full range of motion "in all planes, including forward flexion, abduction, internal and external rotation." Dr. Beard diagnosed Claimant with left shoulder subacromial bursitis and administered a subacromial steroid injection to reduce inflammation.

7. On November 30, 2016 Claimant visited Eric E. Young, M.D. for an examination. Claimant reported that she felt a pop in her left shoulder while pushing a cleaning cart onto an elevator when working for Employer. She remarked that her left shoulder pain had persisted despite physical therapy and injections. A physical examination revealed full range of motion but rotator cuff strength was difficult to assess because of "sub-optimal effort." Dr. Young diagnosed Claimant with multidirectional instability of the left shoulder. He taped Claimant's left shoulder and she reported significant symptom relief. Dr. Young recommended additional physical therapy concentrated on left shoulder stabilization.

8. On December 9, 2018 Claimant returned to Dr. Rafferty for an evaluation. Dr. Rafferty noted that Dr. Young had diagnosed Claimant with "multidirectional instability and secondary impingement of the left shoulder." He assessed Claimant with a left shoulder strain that included myofascial and bicipital tendinitis, "multi-directional instability per Dr. Young" and impingement syndrome. In considering causation, Dr. Rafferty determined that multidirectional instability was not a work-related problem. However, he explained that the temporal association between Claimant's June 13, 2016 work incident and the sudden onset of pain suggested that her symptoms were work-related. Dr. Rafferty also remarked that Claimant's symptoms were "most likely multi-factorial in origin."

9. On January 24, 2017 Claimant returned to Dr. Young for an evaluation. She noted that left shoulder taping decreased her symptoms but physical therapy did not provide significant improvement. A physical examination of the left shoulder revealed nearly full range of motion but the humeral head could be "translocated anteriorly." Dr. Young recommended a left shoulder "arthroscopy with capsulorraphy."

10. On February 2, 2017 Claimant visited I. Stephen Davis, M.D. for an independent orthopedic evaluation. Claimant reported that she immediately experienced left shoulder pain while lifting a cart over an obstacle to an elevator while working for Employer. Dr. Davis reviewed Claimant's medical history and performed a physical examination. He noted that a left shoulder MRI from September 6, 2016 was normal "without apparent injury to the rotator cuff or the biceps." Upon examining the left shoulder, Dr. Davis remarked that there was "no apprehension with stress of the glenohumeral joint, and the degree of laxity with glenohumeral stress testing is symmetrical, comparing left to right shoulder." Dr. Davis determined that Claimant suffered a left shoulder strain/sprain injury and adhesive capsulitis from disuse as a result of her June 13, 2016 industrial incident. Although Claimant reported worsening left shoulder pain, she did not "present a history of shoulder instability subluxation or dislocation." Moreover, Claimant's left shoulder MRI was normal "with no objective

findings of specific structural damage." Furthermore, based on the physical examination Dr. Davis did not "appreciate the multi-directional instability as previously reported by Dr. Young." Dr. Davis summarized that "he was not convinced" that Claimant's left shoulder was unstable. He remarked that, if the June 13, 2016 lifting incident had caused a dislocation or subluxation, Claimant would have obtained prompt medical treatment. Although Dr. Davis noted that an MRI arthrogram might provide helpful information regarding future treatment, he disagreed with Dr. Young's request for an arthroscopic capsulorraphy.

11. On March 1, 2017 Claimant returned to Dr. Rafferty for an examination. Dr. Rafferty maintained that Claimant suffered a left shoulder strain, "multi-directional instability per Dr. Young" and impingement syndrome. He maintained that Claimant's June 13, 2016 work activities did not cause multi-directional instability. However, her multi-factorial symptoms were related to her work activities because of their temporal onset. Dr. Rafferty noted that there was no evidence that Claimant demonstrated generalized ligamentous laxity based on his examination of her extremities.

12. On June 26, 2017 Claimant visited Mark Grossnickle, M.D. at the request of her attorney. Dr. Grossnickle determined that Claimant suffered left shoulder instability with secondary impingement. He noted that Claimant's subacromial injection was likely ineffective because it did not address her underlying pathology. Dr. Grossnickle reasoned that Claimant would most likely require some type of capsulorraphy but recommended a return to Dr. Young because he is a subspecialist in shoulder surgeries. Dr. Grossnickle recommended a left shoulder MRI with contrast because the previous MRI had occurred in September 2016.

13. On March 14, 2018 Claimant underwent an independent medical examination with William Ciccone, M.D. Dr. Ciccone reviewed Claimant's medical records and performed a physical examination. He noted that Claimant complained of left shoulder pain after lifting a house-cleaning cart over an elevator threshold while working for Employer. He explained that lifting the back wheel of the cart was unlikely to cause a left shoulder injury. Specifically, lifting a cart would not cause multidirectional shoulder instability. Instead, shoulder instability is usually related to "genetics with shoulder capsular laxity." Furthermore, although Claimant exhibited pain to palpation in the interior and posterior aspects of the left shoulder, Dr. Ciccone emphasized that "palpation is not a finding associated with shoulder instability." Furthermore, he explained that Claimant's imaging studies were negative for any acute shoulder injury. Claimant thus did not likely suffer a dislocation or subluxation of her left shoulder on June 13, 2016. Dr. Ciccone concluded that Claimant did not warrant the proposed left shoulder surgery because she does not suffer from shoulder instability.

14. On May 30, 2018 the parties began the post-hearing evidentiary deposition of Dr. Ciccone. The parties completed Dr. Ciccone's deposition on August 8, 2018. He maintained that the left shoulder MRI arthrogram and arthroscopy was not reasonable, necessary or causally related to Claimant's June 13, 2016 industrial incident. He reasoned that the activity of lifting the cleaning cart would not likely cause shoulder instability, dislocation or a labral tear. Dr. Ciccone commented that, although an MRI

arthrogram might reveal a labral tear, the condition would not be related to her work activities based on the mechanism of injury. Furthermore, lifting a cart also would not aggravate any pre-existing condition because it was not an "instability event." Dr. Ciccone also detailed that Claimant did not exhibit the symptoms that would be associated with an unstable shoulder. Finally, Claimant's left shoulder MRI did not reveal any pathology.

15. Claimant has failed to establish that it is more probably true than not that a left shoulder MRI arthrogram and arthroscopy are reasonable, necessary and causally related to her June 13, 2016 admitted industrial injury. Initially, Claimant injured her left shoulder while working for Employer when she lifted a cleaning cart with her left hand because the wheels of the cart were stuck in the crease of an elevator door. Dr. Rafferty diagnosed Claimant with a left shoulder strain that included myofascial and bicipital tendinitis. He noted that the temporal association between the event at work on June 13, 2016 and the "sudden onset of symptoms supports work-relatedness." Claimant's left shoulder pain persisted despite physical therapy and injections. Dr. Young determined that Claimant suffered from multidirectional instability of the left shoulder. He subsequently recommended a left shoulder "arthroscopy with capsulorraphy." Moreover, both Drs. Davis and Grossnickle recommended an MRI arthrogram of Claimant's left shoulder to ascertain useful information for determining future treatment. However, the bulk of the medical evidence reflects that Claimant likely did not suffer left shoulder instability as a result of the June 13, 2016 lifting incident. Therefore, the requests for an MRI arthrogram and an arthroscopy are not causally related to Claimant's work activities.

16. Dr. Ciccone persuasively explained that lifting the back wheel of a cleaning cart was unlikely to cause a left shoulder injury. He summarized that the left shoulder MRI arthrogram and arthroscopy were not reasonable, necessary or causally related to Claimant's June 13, 2016 industrial incident. Dr. Ciccone reasoned that the activity of lifting the cleaning cart would not likely cause shoulder instability, dislocation or a labral tear. He commented that, although an MRI arthrogram might reveal a labral tear, the condition would not be related to her work activities based on the mechanism of injury. Furthermore, Dr. Davis determined that Claimant suffered a left shoulder strain/sprain injury and adhesive capsulitis from disuse as a result of her June 13, 2016 industrial incident. Although Claimant reported worsening left shoulder pain, she did not "present a history of shoulder instability subluxation or dislocation." Moreover, Claimant's left shoulder MRI was normal "with no objective findings of specific structural damage." Based on a physical examination Dr. Davis did not "appreciate the multi-directional instability as previously reported by Dr. Young." Finally, Dr. Rafferty maintained that Claimant's June 13, 2016 work activities did not cause multi-directional instability in her left shoulder. Nevertheless, he noted that Claimant's multi-factorial symptoms were related to her work activities based on temporal onset.

17. The preceding opinions from Drs. Ciccone, Davis and Rafferty reveal that, although Claimant experienced a left shoulder strain while lifting the cleaning cart on June 13, 2016, she did not suffer shoulder instability, dislocation or a labral tear that warranted an arthroscopy. Moreover, although an MRI arthrogram might reveal left shoulder structural changes, the mechanism of injury demonstrates that they would not be related to the June 13, 2016 incident. Claimant has thus failed to demonstrate that a left shoulder

MRI arthrogram and arthroscopy are causally related to her admitted industrial injury. Accordingly, Claimant's MRI and surgical requests are denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has failed to establish by a preponderance of the evidence that a left shoulder MRI arthrogram and arthroscopy are reasonable, necessary and causally related to her June 13, 2016 admitted industrial injury. Initially, Claimant injured her left shoulder while working for Employer when she lifted a cleaning cart with her left hand because the wheels of the cart were stuck in the crease of an elevator door. Dr. Rafferty diagnosed Claimant with a left shoulder strain that included myofascial and

bicipital tendinitis. He noted that the temporal association between the event at work on June 13, 2016 and the "sudden onset of symptoms supports work-relatedness." Claimant's left shoulder pain persisted despite physical therapy and injections. Dr. Young determined that Claimant suffered from multidirectional instability of the left shoulder. He subsequently recommended a left shoulder "arthroscopy with capsulorraphy." Moreover, both Drs. Davis and Grossnickle recommended an MRI arthrogram of Claimant's left shoulder to ascertain useful information for determining future treatment. However, the bulk of the medical evidence reflects that Claimant likely did not suffer left shoulder instability as a result of the June 13, 2016 lifting incident. Therefore, the requests for an MRI arthrogram and an arthroscopy are not causally related to Claimant's work activities.

6. As found, Dr. Ciccone persuasively explained that lifting the back wheel of a cleaning cart was unlikely to cause a left shoulder injury. He summarized that the left shoulder MRI arthrogram and arthroscopy were not reasonable, necessary or causally related to Claimant's June 13, 2016 industrial incident. Dr. Ciccone reasoned that the activity of lifting the cleaning cart would not likely cause shoulder instability, dislocation or a labral tear. He commented that, although an MRI arthrogram might reveal a labral tear, the condition would not be related to her work activities based on the mechanism of injury. Furthermore, Dr. Davis determined that Claimant suffered a left shoulder strain/sprain injury and adhesive capsulitis from disuse as a result of her June 13, 2016 industrial incident. Although Claimant reported worsening left shoulder pain, she did not "present a history of shoulder instability subluxation or dislocation." Moreover, Claimant's left shoulder MRI was normal "with no objective findings of specific structural damage." Based on a physical examination Dr. Davis did not "appreciate the multi-directional instability as previously reported by Dr. Young." Finally, Dr. Rafferty maintained that Claimant's June 13, 2016 work activities did not cause multi-directional instability in her left shoulder. Nevertheless, he noted that Claimant's multi-factorial symptoms were related to her work activities based on temporal onset.

7. As found, the preceding opinions from Drs. Ciccone, Davis and Rafferty reveal that, although Claimant experienced a left shoulder strain while lifting the cleaning cart on June 13, 2016, she did not suffer shoulder instability, dislocation or a labral tear that warranted an arthroscopy. Moreover, although an MRI arthrogram might reveal left shoulder structural changes, the mechanism of injury demonstrates that they would not be related to the June 13, 2016 incident. Claimant has thus failed to demonstrate that a left shoulder MRI arthrogram and arthroscopy are causally related to her admitted industrial injury. Accordingly, Claimant's MRI and surgical requests are denied and dismissed.

ORDER

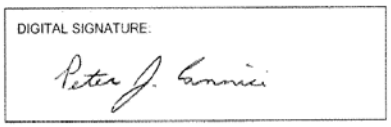
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's requests for a left shoulder MRI arthrogram and arthroscopy are denied and dismissed.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 7, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

I. Have Respondents overcome the DIME opinion on permanent partial impairment of Dr. Hall by clear and convincing evidence?

II. Is Dr. Hall's DIME opinion on permanent partial impairment supported by substantial evidence?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 41-year-old service manager who suffered an admitted injury from a slip-and-fall at work on July 3, 2015. Claimant reported injuries to her head, neck, back, right shoulder, right wrist, and knees. (Ex. B). Claimant's medical history reflects a history of neck, upper back, lower back and shoulder pain dating back to 2009, for which she sought treatment. (Ex. L). Claimant had chiropractic treatment for complaints of left neck pain, shoulder tightness, and low back pain as recently as December 11, 2014, prior to her report of this admitted injury.

2. Claimant received treatment for this injury at Concentra, beginning on July 6, 2015. (Ex. L). Claimant had conservative therapies for complaints which focused primarily in the neck and shoulders.

3. An MRI of the cervical spine on December 1, 2015 showed moderately pronounced C5-6 degenerative disc space height narrowing and minimal retrolisthesis of C5 on C6, central bulging discs at C3-4 and C4-5. (Ex. N).

4. Nicholas Kurz, D.O., placed Claimant at MMI on February 22, 2016, with no permanent impairment or work restrictions. (Ex. X). Claimant's diagnoses included: contusion of the left and right knees; neck strain; strain of the thoracic region; and trapezius strain. Dr. Kurz stated that Claimant had full cervical range of motion upon examination. Dr. Kurz indicated that Claimant should follow up with her primary care provider for "preexisting, non-work-related, degenerative issues."

5. Claimant underwent a DIME with Timothy Hall, M.D., on June 27, 2016. (Ex. Y). Dr. Hall found Claimant not to be at MMI. He recommended additional medical

evaluation of the neck, as well as physical and chiropractic therapy for the low back. Dr. Hall assigned a 10% cervical impairment rating, with a 4% impairment for the right shoulder, to combine for a provisional 14% whole person impairment rating. In this initial DIME report, Dr. Hall stated that there were clearly notes missing from his examination, including the MMI report from Dr. Kurz.

6. Eric Ridings, M.D., performed a "Respondent IME" on November 4, 2016. He opined that Claimant's cervical condition was *not causally related* to the reported mechanism of injury. (Ex. Z). Dr. Ridings also noted that Claimant, in his exam, showed "slight decrease in cervical range of motion" *Id at p.280.* He also noted that Claimant had been seeing a physiatrist, Dr. Jenks, for "cervical pain, shoulder pain…." *Id at p. 282.* Claimant had also been seen by orthopedist Michael Simpson in 2015 for "significant stiffness in her neck". *Id at p. 282.* Dr. Ridings indicated that Dr. Hall's IME report was missing medical records which would likely change his opinion on causation and relatedness of further treatment. It is unclear from the record what such records consist of.

7. Claimant underwent a "Claimant IME" with Miguel Castrejon, M.D., on December 6, 2016. (Ex. AA). Dr. Castrejon assigned Claimant a 12% impairment rating for the cervical spine, but with no impairment to other body parts.
8. A repeat MRI of the cervical spine, taken on September 25, 2017, showed cervical spondylosis with canal and foraminal narrowing at C5-6, and multilevel facet arthropathy. (Ex. N). An EMG of the left upper extremity was normal. (Ex. L).

9. On November 21, 2017, Claimant's chiropractor, Randy Knoche, D.C., reported that Claimant "was able to demonstrate virtual full range of motion during cervical rotation bilaterally." (Ex. CC).

10. Dr. Kurz saw Claimant for a follow-up visit on January 26, 2018. He placed Claimant at MMI on this date, again with no permanent impairment. (Ex. X). He found that Claimant had full cervical range of motion in all directions. He also noted that "the degree of impairment is not likely to change by more than 3% within the next year." Claimant was working full duty at this time without complaints and had no work restrictions. Dr. Kurz indicated that further treatment for the cervical spine would not be work-related and should be performed through Claimant's personal care physician.

11. Dr. Hall saw Claimant for a follow-up DIME on March 27, 2018. (Ex. Y). In this follow-up DIME report, Dr. Hall notes "I have received additional records". (Ex. Y, p. 277), but it is unclear what records those were. Dr. Hall opined that Claimant was at MMI effective January 11, 2018 with no recommendations for further medical treatment.

12. Dr. Hall's DIME notes from this 3/27/18 visit show:

> I met with Holly Phillips today. I went over the treatment she has had since I saw her in June 2016…..She is a little bit better, but is still symptomatic on a daily basis. She complains of *neck,* trapezius, and parascapular *pain,* a bit more left than right side. The pain usually increases with activity, but fixed positioning can flare it as well. (Ex. Y, pp. 278-279) (emphasis added).

13. Under Physical Examination, Dr. Hall notes:

> *Neck range of motion is limited and specifically evaluated on the worksheet.* There are *local trigger points* and adhesions bilaterally, mid and *upper* trapezius. She is *tight* through the levator scapulae and splenius capitus. *Id at 278.* (emphasis added)

14. Under Impression, Dr. Hall states:

> Chronic myofascial pain in the *cervicothoracic* area *related to fall.* (Ex. Y, p. 278) (emphasis added).

15. Under Discussion, Dr. Hall then states, in pertinent part:

> She still has daily problems with the neck and parascapular area with associated range of motion deficit. I have done range of motion, *which is valid.* She has an 8% range of motion impairment combined with a IIB table 53 impairment for a total of 12% whole person impairment. *Id at 278* (emphasis added).

16. Frank Polanco, M.D., performed an IME on August 2, 2018. (Ex L). At the time of examination, Claimant denied any preexisting relevant history other than migraines. Dr. Polanco agreed with the MMI date, and indicated that Claimant had no permanent impairment to any body parts. Dr. Polanco noted that the alignment of Claimant's spine was normal. He indicated that there were no findings to support that Claimant had a 'structural injury' to the cervical spine; therefore, she did not qualify for impairment under Table 53 of the *AMA Guides*.

17. Dr. Polanco noted that, according to the Division "*Impairment Rating Tips*," there must be objective evidence of pathology and impairment in order for a patient to qualify for a rating under Table 53. Dr. Polanco opined that, as there were no clinical findings supporting objective, work-related pathology, there should be no Table 53 rating. Dr. Polanco further indicated that the MRI findings were

degenerative in nature, and not work-related. Further, he opined that Claimant had no limitation in range of motion or function for the cervical spine.

18. Respondents took the deposition of Dr. Polanco on September 27, 2018. (Deposition Transcript of Polanco [Tr.]). Dr. Polanco testified as a Level II accredited physician in Colorado and expert in occupational medicine with 27 years of experience as a DIME panel examiner. (Tr., p.5). Dr. Polanco testified that Claimant had no specific dermatomal pattern to support her complaints of burning and stabbing shoulder pain, or radicular-type back pain into the left leg. (Tr., p. 8). Dr. Polanco opined that Claimant had *self-restricted* her cervical motion examination, as her observed greater range of motion when she was not aware she was being observed, than when she was conscious that her motion was being measured. (Tr., p.9).

19. Dr. Polanco testified that Claimant suffered a myofascial injury (consistent with the diagnosis of Dr. Hall) but did not suffer any 'structural' injury which would warrant a Table 53 diagnosis. (Tr., p.10). Dr. Polanco testified that, because the clinical examination findings and medical history did not support objective evidence of structural impairment, Claimant did not meet the criteria for a Table 53 diagnosis. Claimant was therefore ineligible for impairment under the *AMA Guides*. (Tr., pp. 11-13). Dr. Polanco testified that, without a Table 53 diagnosis, any deficit in range of motion was not a reportable impairment. Dr. Polanco testified that the findings, including retrolisthesis, on the MRI, were degenerative in nature and not related to the work injury. (Tr., p. 17). Dr. Polanco testified that Claimant did not report any history of preexisting neck issues during her examination.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every

item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002).

Overcoming the DIME regarding MMI and Impairment Rating, Generally

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* W.C. No. 4-782-625 (ICAO, May 24, 2010).

E. A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. §8-42-101(3.7); §8-42-104(8)(c) C.R.S. The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clean and convincing evidence, present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Indus. Claim Appeals Office* 17 P.3d 202 (Colo. App. 2000). Deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2006); *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. Aug. 2, 2005).

Overcoming the DIME/Dr. Hall's Range of Motion Measurements

F. Each physician who examined Claimant came up with different range of motion figures. Dr. Kurz came up with 0%. Dr. Castrejon came up with 8%. Dr. Ridings merely noted that in his narrative that Claimant had a "slight decrease of cervical range of motion", but his worksheet did not go on to calculate a percentage. Claimant's chiropractor at one point noted no diminution in range of motion. Dr. Polanco performed range of motion testing, and placed the figures on a worksheet, but declined to provide a range of motion numerical rating, since 1). He opined that Claimant self-restricted her own cervical range of motion, thus invalidating the data, and 2). Felt that Claimant did not meet the criteria for Table 53IIB anyway, so, in effect, 'what's the point?' Dr. Hall's initial provisional cervical range of motion rating, before MMI, was 10%.

G. For the range of motion component, the ALJ considers Dr. Hall's supplemental, post-MMI DIME from 3/27/18 as the official report that Respondents must overcome. Dr. Hall notes in his narrative that he *validated* his figures, i.e., they fell within tolerances. The ALJ's review of his worksheet confirms this. The validation ranges are designed to prevent a Claimant from 'sandbagging'. While imperfect, they exist for a valid reason. Dr. Polanco felt that Claimant was self-restricting. That is indeed a possibility that cannot be eliminated entirely. However, Dr. Hall made no such note of this, and Dr. Hall was appointed as the DIME physician. In the end, these two physicians hold differing opinions on Claimant's effort at this testing. The ALJ cannot conclude that Dr. Hall's range of motion figures are *highly probably incorrect,* based upon his alleged failure to notice that Claimant was self-restricting.

Overcoming the DIME/Applicability of Table 53IIB

H. In a nutshell, Respondents' case hinges on the inapplicability of Table 53IIB to Claimant's case. Dr. Polanco would require objective evidence of a structural pathology before the additional 4% rating could apply at all. Respondents would thereby limit Table 53IIB to such circumstances. The ALJ is not convinced of this interpretation. Table 53IIB refers to "Intervertebral Disc **or other soft-tissue lesions**". Claimant has a cervical muscle strain which has not resolved. She has reported pain for over two years. In its entirely, 53IIB reads:

> Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity *with or without muscle spasm*, associated with none-to-minimal degenerative changes on structural tests.

I. Parsing the language, 53IIB allows that *rigidity* can exist without the existence of muscle spasm. It also contemplates that a rating is possible ***without any changes*** *on structural tests.* To require objective changes on structural tests, as Respondents urge, would invalidate this provision entirely. In a given

case, if there are in fact structural changes noted, one then goes to 53IIC, with its correspondingly higher impairment ratings.

Physiologic Correlation and Rigidity

J. Under Section 8-42-107(8), “For purposes of determining levels of medical impairment, the physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation.” §8-42-107(8), C.R.S.; *see* also the Impairment Ratings Tips Sheet (Rev’d July 2016). In this instance, Table 53, II, B requires a medically documented injury (which the ALJ so finds), **and** a minimum of six months of medically documented pain (which the ALJ so finds) **and *rigidity***, with or without spasm…." (emphasis added).

K. Taber's Cyclopedic Medical Dictionary defines "**Rigidity**" as 1. *Tenseness,* immovability: *stiffness*; *inability to bend or be bent.* (emphasis added).

L. The American Heritage Stedman's Medical Dictionary defines "**Rigidity**" as 1. The quality of *stiffness **or** inflexibility*. (emphasis added).

M. Arguably, the *stiffness* which Claimant consistently reported-which carries a subjective component- to her providers for well over six months after her injury might not meet the criteria of anatomic or physiologic correlation. However, the *inflexibility,* which was documented by Dr. Hall’s range of motion calculations *does* constitute the needed physiologic correlation.

N. Further, Dr. Hall noted *trigger points* in the upper trapezius in his exam, and *tightness* in the lavatory scapulae and splenius capitus. This would constitute objective evidence of rigidity, albeit without spasm.

O. There is thus ample evidence in the records to support the DIME physician's findings of at least 6 months of pain and rigidity, up to and including the date of the DIME exam. Further, this unresolved cervical muscle strain to Claimant’s soft tissue-without objective evidence of structural changes- is within the orbit of pathologies contemplated by Table 53IIB.

P. The ALJ concludes that Respondents have not overcome the DIME opinion of Dr. Hall by clear and convincing evidence. Dr. Hall’s DIME opinion is supported by substantial evidence. Claimant’s Whole Person Impairment Rating is 12%, without apportionment.

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ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Hall has not been overcome. Claimant's Permanent Partial Impairment Rating for her cervical injury is 12% of the Whole Person, without apportionment.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 13, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUE

. Whether Claimant has demonstrated by a preponderance of the evidence that the right knee total arthroplasty recommended by Authorized Treating Physician Pinak Shulka, M.D. is reasonable, necessary and related to his June 15, 2017 admitted industrial injury.

FINDINGS OF FACT

1. Claimant works for Employer as an EREM team member. On June 15, 2017 Claimant's job duties involved repairing the liner of a lagoon embankment. While walking down the steep embankment he slipped on loose sand and fell to the bottom of the embankment. Claimant twisted his right knee and struck the ground when he fell. He experienced a pop and immediate pain in his right knee.

2. In 1985 Claimant twisted his right knee while walking in his yard. He underwent surgery to repair torn ligaments and insert a metal staple into his patellar tendon. Claimant was discharged from care sometime in 1986.

3. In 1996 Claimant suffered a second right knee injury when he tore his meniscus while bird hunting with his son. He had meniscal repair surgery and was discharged from care in late 1996 or early 1997. Claimant testified that he had no subsequent right knee problems or functional limitations after his surgery and was able to work full duty.

4. On June 19, 2017 Claimant underwent his initial evaluation with Authorized Treating Physician (ATP) Julia Trevino-Emerson, M.D. at Valley Medical Center. Dr. Trevino-Emerson noted Claimant presented with right knee pain that began after he fell on June 15, 2017 while walking down an incline at work. Claimant disclosed his two prior right knee surgeries. Testing revealed limited range of motion, swelling and pain in Claimant's right knee. X-rays reflected severe arthritis, a broken metal cannula from his prior surgery and a suprapatellar effusion. Claimant received crutches, a knee brace and work restrictions.

5. On June 20, 2017 Claimant began working restricted duty for Employer.

6. On June 26, 2017 Claimant returned to Dr. Trevino-Emerson for an evaluation. She diagnosed Claimant with a sprain of the Lateral Collateral Ligament (LCL) in his right knee. Dr. Trevino-Emerson recommended physical therapy.

7. On July 7, 2017 Claimant began physical therapy with Wes Harens, MPT CSCS at SCHC PT. Claimant reported a right knee injury after falling while working on a

lined lagoon. He disclosed his two prior right knee injuries. Mr. Harens found medial to lateral instability in Claimant's right knee.

8. On July 10, 2017 Claimant returned to Dr. Trevino-Emerson for an examination. Claimant reported that his right knee "locks up" and he has to "jiggle his knee with his hands in order to loosen the joint." He also noted that he is "unable to fully flex his knee." Dr. Trevino-Emerson remarked that the preceding symptoms were not present prior to Claimant's work injury. She suspected an LCL injury and recommended a right knee MRI.

9. On July 21, 2017 Claimant underwent a right knee MRI without contrast. However, the imaging was very limited because of the metallic artifact in his right knee.

10. On July 26, 2017 Claimant returned to Dr. Trevino-Emerson for an examination. He reported consistent pain with occasional popping in the right knee, tenderness over the lateral area and laxity of the LCL. After discussing the difficulties with the MRI Dr. Trevino-Emerson referred Claimant to an orthopedic specialist.

11. On August 17, 2017 Claimant began treatment with orthopedic specialist Pinak Shulka, M.D. at Great Plains Orthopaedics. Claimant reported right knee pain with popping that began in June 2017 after suffering a fall with a twisting motion. He disclosed his prior right knee injuries and surgeries. Dr. Shulka reviewed the diagnostic testing and assessed Claimant with a lateral meniscus tear. .He determined he would treat Claimant's work injury as an arthritic exacerbation that would likely require a knee replacement. However, Dr. Shulka first administered a right knee injection. He instructed Claimant to continue physical therapy.

12. On August 31, 2017 Claimant returned to Dr. Shulka for an examination. He noted that Claimant's right knee pain had persisted despite the injection. Dr. Shulka determined that it would be reasonable to attempt meniscal surgery. However. the procedure would not likely reduce Claimant's arthritic symptoms and could increase his symptoms to the point where he would require a total knee replacement. Dr. Shulka also commented that, despite preexisting arthritis, Claimant's right knee was asymptomatic prior to suffering his work injury.

13. On September 8, 2017 Claimant underwent right knee arthroscopic surgery with partial medial and lateral meniscectomy and plica excision with Dr. Shulka. Dr. Shulka noted significant arthritis but Claimant had been doing well until he suffered a new acute injury while at work. .He documented fraying of the medial meniscus, an oblique tear of the anterolateral meniscus and plica on the patellofemoral joint.

14. On September 22, 2017 Claimant returned to Dr. Shulka for his first post-operative visit. Claimant reported that the painful popping in his right knee had ceased. Dr. Shulka informed Claimant he would need a total knee replacement if the pain returned.

15. On December 5, 2017 Claimant reported to Dr. Shulka that he was slowly progressing with physical therapy. Dr. Shulka commented that Claimant's continuing symptoms were mostly due to his persistent arthritis. He recommended an injection and

more physical therapy. However, if the treatment did not relieve Claimant's symptoms, Claimant might warrant a a total knee replacement. Claimant received an injection.

16. On January 17, 2018 Claimant returned to Dr. Shulka to address his continuing right knee issues. Dr. Shulka diagnosed Claimant with osteoarthritis exacerbation in his right knee as a result of his work injury. .He remarked that Claimant's right knee arthritis exacerbation had not improved. Furthermore, all less invasive options, including arthroscopy and nonsurgical treatments, had failed. Dr. Shulka thus requested authorization for a right total knee arthroplasty.

17. On January 26, 2018 orthopedic surgeon Robert L. Messenbaugh, M.D. performed a records review of Claimant's case to assess the proposed right knee arthroplasty. He explained that Claimant suffered from the pre-existing condition of severe, advanced tricompartmental arthritis in his right knee. Dr. Messenbaugh remarked that Claimant began experiencing mechanical symptoms, including catching and locking, in his right knee. He commented that the mechanical symptoms could have been caused by an acute meniscus tear or the aggravation of an acute, lateral meniscus tear during Claimant's fall at work on June 15, 2017. However, Claimant's work accident did not cause any fracturing of his right knee or the severe, tricompartmental, osteoarthritis.

18. Dr. Messenbaugh explained that Dr. Shulka's September 8, 2017 partial meniscectomy was at least plausibly related to Claimant's June 15, 2017 fall at work. However, the surgery had no chance of providing any benefit for Claimant's severe, chronic, tricompartmental degenerative arthritis. Moreover, Dr. Messenbaugh concluded that the total right knee arthroplasty proposed by Dr. Shulka was necessary for Claimant's pre-existing degenerative osteoarthritis but not related to the June 15, 2017 work accident. Notably, the proposed surgery would have been required regardless of whether Claimant fell at work.

19. On February 15, 2018 Respondents denied liability for the total right knee arthroplasty proposed by Dr. Shulka. The denial was based on Dr. Messenbaugh's records review report.

20. On May 9, 2018 Dr. Shulka wrote a letter to Respondents specifically addressing the denial of the requested surgery and Dr. Messenbaugh's report. Dr. Shulka commented that Claimant "has had an exacerbation of his underlying osteoarthritis of the right knee which has not receded since the injury at work." He continued that Claimant "had been doing very well with the pre-existing arthritis prior to this exacerbation and had been working full-time without any issues or restrictions. While he did have pre-existing arthritis it seems that the injury has led to recalcitrant symptoms necessitating a total knee replacement in order to resolve."

21. On June 4, 2018 Dr. Shulka wrote a letter to Respondents" counsel. The letter was in response to a May 30, 2018 letter in which counsel again informed Dr. Shulka that his request for a total knee replacement had been denied. The correspondence also inquired as to whether Claimant had reached Maximum Medical Improvement (MMI) or suffered any permanent impairment. Dr. Shulka responded that Claimant had not

reached MMI because he was still suffering symptoms from his arthritis exacerbation as a result of his work injury. He noted that a total knee arthroplasty would improve Claimant's symptoms.

22. Claimant has demonstrated that it is more probably true than not that the right knee total arthroplasty recommended by Dr. Shulka is reasonable, necessary and related to his June 15, 2017 admitted industrial injury. Initially, on June 15, 2017 Claimant slipped on loose sand and fell down to the bottom of an embankment while performing his job duties for Employer. Claimant twisted his right knee and suffered immediate pain. He was diagnosed with a right knee LCL sprain. The record reflects that Claimant had undergone prior right knee surgeries and suffered from severe, pre-existing, degenerative osteoarthritis. However, Claimant credibly explained that he did not have any right knee problems or functional limitations after his 1997 surgery and was able to work full duty.

23. Claimant underwent physical therapy but continued to suffer right knee pain and occasional popping. Dr. Shulka reviewed the diagnostic testing and assessed Claimant with a lateral meniscus tear. .He determined he would treat Claimant's work injury as an arthritic exacerbation that would likely require a knee replacement. After additional physical therapy and injections failed to alleviate Claimant's symptoms, Dr. Shulka performed right knee arthroscopic surgery with partial medial and lateral meniscectomy and plica excision. Dr. Shulka noted significant arthritis but Claimant had been doing well until he suffered a new acute injury while at work. After continuing right knee problems, Dr. Shulka diagnosed Claimant with osteoarthritis exacerbation as a result of his work injury. .He remarked that Claimant's right knee arthritis exacerbation had not improved and all other treatment had failed. Dr. Shulka thus requested authorization for a right knee total arthroplasty.

24. Dr. Messenbaugh explained that Claimant suffered from the pre-existing condition of severe, advanced tricompartmental arthritis in his right knee. He explained that the right knee total arthroplasty proposed by Dr. Shulka was necessary for Claimant's pre-existing degenerative osteoarthritis but not related to the June 15, 2017 work accident. Notably, the proposed surgery would have been required regardless of whether Claimant fell at work and had no chance of providing any benefit for his chronic, tricompartmental degenerative arthritis. However, Dr. Messenbaugh failed to consider whether Claimant's June 15, 2017 work accident aggravated or accelerated his pre-existing right knee osteoarthritis. Specifically, Dr. Shulka noted that Claimant suffered an exacerbation of his underlying right knee osteoarthritis as a result of his work accident. Furthermore, prior to the June 15, 2017 accident Claimant had been working full-time without any issues or restrictions. Dr. Shulka summarized that, despite Claimant's pre-existing right knee osteoarthritis, his work injury caused "recalcitrant symptoms necessitating a total knee replacement." Based on the medical records and persuasive opinion of Dr. Shulka, Claimant's June 15, 2017 industrial injury aggravated, accelerated or combined with his pre-existing right knee condition to produce a need for medical treatment. Accordingly, Claimant's request for a right knee total arthroplasty is granted.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has demonstrated by a preponderance of the evidence that the right knee total arthroplasty recommended by Dr. Shulka is reasonable, necessary and related to his June 15, 2017 admitted industrial injury. Initially, on June 15, 2017 Claimant slipped on loose sand and fell down to the bottom of an embankment while performing his job duties for Employer. Claimant twisted his right knee and suffered immediate pain. He was diagnosed with a right knee LCL sprain. The record reflects that Claimant had undergone prior right knee surgeries and suffered from severe, pre-existing, degenerative osteoarthritis. However, Claimant credibly explained that he did not have any right knee problems or functional limitations after his 1997 surgery and was able to work full duty.

6. As found, Claimant underwent physical therapy but continued to suffer right knee pain and occasional popping. Dr. Shulka reviewed the diagnostic testing and assessed Claimant with a lateral meniscus tear. .He determined he would treat Claimant's work injury as an arthritic exacerbation that would likely require a knee replacement. After additional physical therapy and injections failed to alleviate Claimant's symptoms, Dr. Shulka performed right knee arthroscopic surgery with partial medial and lateral meniscectomy and plica excision. Dr. Shulka noted significant arthritis but Claimant had been doing well until he suffered a new acute injury while at work. After continuing right knee problems, Dr. Shulka diagnosed Claimant with osteoarthritis exacerbation as a result of his work injury. .He remarked that Claimant's right knee arthritis exacerbation had not improved and all other treatment had failed. Dr. Shulka thus requested authorization for a right knee total arthroplasty.

7. As found, Dr. Messenbaugh explained that Claimant suffered from the pre-existing condition of severe, advanced tricompartmental arthritis in his right knee. He explained that the right knee total arthroplasty proposed by Dr. Shulka was necessary for Claimant's pre-existing degenerative osteoarthritis but not related to the June 15, 2017 work accident. Notably, the proposed surgery would have been required regardless of whether Claimant fell at work and had no chance of providing any benefit for his chronic, tricompartmental degenerative arthritis. However, Dr. Messenbaugh failed to consider whether Claimant's June 15, 2017 work accident aggravated or accelerated his pre-existing right knee osteoarthritis. Specifically, Dr. Shulka noted that Claimant suffered an exacerbation of his underlying right knee osteoarthritis as a result of his work accident. Furthermore, prior to the June 15, 2017 accident Claimant had been working full-time without any issues or restrictions. Dr. Shulka summarized that, despite Claimant's pre-existing right knee osteoarthritis, his work injury caused "recalcitrant symptoms necessitating a total knee replacement." Based on the medical records and persuasive opinion of Dr. Shulka, Claimant's June 15, 2017 industrial injury aggravated, accelerated or combined with his pre-existing right knee condition to produce a need for medical treatment. Accordingly, Claimant's request for a right knee total arthroplasty is granted.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

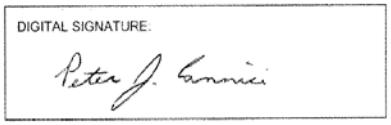
1. Claimant's request for a right knee total arthroplasty is granted.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you

mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 9, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that surgery recommended by Dr. Davis is reasonable, necessary, and causally related to her June 27, 2016 work injury.

STIPULATIONS

1. Claimant sustained a compensable work related injury on June 27, 2016.

FINDINGS OF FACT

1. Claimant was employed by Employer and was initially hired in 2008. In 2011, Claimant became an animal control officer for Employer. Claimant's duties included responding to calls to protect citizens and animals and could involve removing hinder some wildlife from the city, responding to bite calls, and removing dead animals.

2. On June 27, 2016 while so employed, Claimant responded to a call requesting removal of a snake. On arrival, the snake was on a sport utility vehicle's bumper. The tail of the snake was at one side and head at the other side of the bumper and the snake was the length of the bumper. The snake was approximately 3 feet long and the width of a baseball bat.

3. Claimant was unable to move the snake from the bumper due to the risk to personal property. Claimant was called back to the location later when the snake had moved off the vehicle. When Claimant returned, the snake was on a patio.

4. Claimant picked up the snake with a grabber tool provided by Employer. The tool has a trigger on one end and grabbers on the other end and is approximately 3 feet long. Claimant extended her right arm, grabbed the snake around its head, and lifted her right arm with the grabber and snake to about chest level.

5. Claimant felt a burning sensation in her right elbow when she lifted the snake. Claimant's right arm buckled and she had to use her left hand to support her right hand, which was still holding the snake and grabber. Claimant walked the snake with her arm extended through the condominium complex, across a grass area, more condominiums, and a road to reach open space area nearby. While walking, Claimant's elbow was burning. After she got to the open space area, Claimant released the snake and was able to lower her arm.

6. Claimant immediately called her supervisor to report the injury and was instructed to go to Concentra for medical treatment.

7. On June 27, 2016, Susan Wiechelman, PA evaluated Claimant. Claimant reported that she was lifting with her right arm fully extended as an animal control officer removing a snake. Claimant reported that when she pulled the trigger and grabbed and lifted the snake that weighed approximately 5 pounds, she felt a sharp bolt of pain from her elbow down into her right hand. Claimant reported pain at a 5/10. Claimant reported some numbness and tingling at first but that she now just had burning from the outside of the elbow that was worse with movement. Claimant reported her belief that she could still perform her job. PA Wiechelman opined that Claimant sustained an acute injury as a result of extending and lifting. PA Wiechelman noted that the symptoms were at the radial aspect of the right elbow and the ulnar aspect of the right elbow and were constant with burning and radiation to the right wrist. PA Wiechelman noted tenderness in the lateral epicondyle and medial epicondyle. PA Wiechelman assessed strain of right elbow and recommended ice, Tylenol, and bandit. PA Wiechelman opined that Claimant could return to regular duty work. *See* Exhibits 1, H.

8. On July 11, 2016, Claimant returned to Concentra. Casey McKinney, PA evaluated Claimant. Claimant reported improvement with slight pain when extending her arm out and holding onto items and that the pain began in her elbow and traveled down toward her anterior wrist. Claimant reported pain was still at a 4-5/10. Claimant reported mild overall improvement and that the bandit provided some relief. Claimant was noted to have tenderness over the lateral aspect of the right elbow worse with extension against resistance. The lateral epicondyle was tender and range of motion in flexion and extension were painful on exam. PA McKinney also assessed strain of right elbow and recommended physical/occupational therapy. PA McKinney opined that Claimant could continue working normal duty. *See* Exhibits 1, H.

9. Claimant first underwent therapy on July 11, 2016. Claimant reported pain at a 6/10 Claimant reported her right elbow was painful with any use. The therapist noted the symptom location as the lateral epi, extensor mass, and olecranon. On examination, the olecranon had moderate tenderness, the lateral epicondyle had moderate tenderness, and the common extensor tendon had mild tenderness. *See* Exhibit 3.

10. On July 18, 2016, PA McKinney evaluated Claimant. Claimant reported occupational therapy provided improvement and that she felt mild improvement overall. Claimant reported pain at a 3/10 but with continued burning from the outside of the elbow radiating to the right wrist worse with movement and particularly with a straight arm. Claimant continued to have tenderness over the lateral epicondyle and lateral aspect of the right elbow, and continued to have painful flexion and extension. PA McKinney continued to assess strain of right elbow and added the assessment of right lateral epicondylitis. PA McKinney referred Claimant to a hand specialist due to persistent lateral epicondyle symptoms. *See* Exhibits 1, H.

11. On July 22, 2016 orthopedic hand specialist Tracy Wolf, M.D. evaluated Claimant. Claimant reported that she had a long metal stick with a grabber and handles and was using the trigger to remove a snake that weighed about 5 pounds and that as she was extending and clamping she felt a jolt go up in her arm both volar and dorsal that turned into tingling and then burning. Claimant reported that her pain currently was mainly over the lateral aspect of the elbow and that she could not pick up anything if her elbow was in extension and was better when the elbow was flexed. Claimant reported some numbness and tingling occasionally in the small and ring finger but not all the time and that she gets some medial sided elbow pain not that bad any more that comes and goes. Claimant reported using a compression sleeve and counter force band over the elbow. Dr. Wolf found discomfort with full elbow extension on exam as well as tenderness laterally especially over the anterior lateral epicondyle. Dr. Wolf found slight tenderness over the anterior medial epicondyle. Dr. Wolf assessed right lateral epicondylitis with mild medial. Dr. Wolf discussed the importance of activity modifications to give it a chance to heal and that the best thing would be to use her left side as much as possible. Dr. Wolf performed a steroid injection into Claimant's right lateral epicondylar region. *See* Exhibits 1, H.

12. On July 25, 2016, Claimant returned to Concentra and was evaluated by Theodore Villavicencio, M.D. Claimant reported feeling good after the injection with much improvement and that her pain was at a 0/10. *See* Exhibits 1, H.

13. On September 9, 2016, Dr. Wolf evaluated Claimant. Claimant reported that the last injection helped and lasted for three weeks. Claimant reported that she traveled to South Africa and did a lot of packing and carrying suitcases that seemed to start bothering her. Dr. Wolf noted that Claimant had tenderness mainly over the anterior and lateral epicondylar region. Dr. Wolf continued to assess right lateral epicondylitis. Claimant hoped to get another injection since the last one helped so well. Dr. Wolf discussed that they could do one more injection and that Claimant should not use the arm and avoid repetitive wrist motion, lifting, and gripping. A second steroid injection was performed. Dr. Wolf noted that Claimant needed to gradually begin increasing use of her arm and be careful about re-flaring it. Dr. Wolf recommended Claimant wear a splint to remind her she is not to use her right arm and recommended wearing the splint/brace constantly up to 8 hours or greater per day. *See* Exhibits 1, H.

14. On September 9, 2016, Dr. Villavicencio evaluated Claimant. Claimant reported another injection earlier that day with Dr. Wolf. Dr. Villavicencio noted that Claimant was making good progress. *See* Exhibits 1, H.

15. On October 14, 2016, Dr. Villavicencio evaluated Claimant. Claimant reported much improvement and that she had been on vacation for the past several weeks and not using her forearm/elbow for difficult tasks. Dr. Villavicencio released Claimant to as needed care with Dr. Wolf and recommended she continue kinesiology tape of her right forearm when needed. Dr. Villavicencio recommended Claimant recheck in one month. *See* Exhibits 1, H.

16. On October 14, 2016, Dr. Wolf also evaluated Claimant. Claimant reported overall that the right lateral epicondyle was good but bothered her occasionally and that sometimes the pain was a little more distal in the muscle than where it previously was. Dr. Wolf noted Claimant still had a little tenderness over the anterior and lateral epicondyle and some into the extensor wad on exanimation. Dr. Wolf discussed the right epicondylitis with Claimant noting it was not completely gone, but 80% gone per Claimant. Dr. Wolf opined that there was a risk of recurrence and that in some people, it comes and goes. Dr. Wolf opined that they would not want to do another injection. Dr. Wolf opined that Claimant needed to be careful a lot so as to not cause it to flare. Dr. Wolf noted she would see Claimant back as needed. *See* Exhibit H.

17. On November 11, 2016, Dr. Villavicencio evaluated Claimant. Claimant reported overall being significantly improved with pain resolving. Dr. Villavicencio opined that Claimant had a normal examination with normal elbow appearance. He noted "lateral epicondyle, but not the olecranon bursa" on examination of the right elbow without explanation of meaning behind that statement. Dr. Villavicencio assessed strain of right elbow and history of right lateral epicondylitis. He opined that Claimant was at maximum medical improvement and released her from care. He indicated that he discussed functional restoration and post discharge plans with Claimant. Dr. Villavicencio filled out a physician's report of worker's compensation injury form listing maximum medical improvement at November 11, 2016 and noting that Claimant did not require maintenance care. He also opined that Claimant had no permanent impairment. *See* Exhibits 1, H.

18. On September 27, 2017, PA McKinney evaluated Claimant. PA McKinney noted that Claimant had been discharged approximately one year prior for right epicondylitis. Claimant reported that she continued to work in animal control until July of 2017 and that her left arm became progressively more sore over time in the medial and lateral elbow areas. Claimant reported stopping work as an animal control officer in July and beginning work in a phone bank in August where she has a head set and speaks on the phone and does not type or have any tasks with use of hand while working. Claimant reported that her elbow continued to ache with pain at a level of 8/10 and that it has seized up and frozen at times. Claimant denied any trauma or acute re-injury to her elbow. On examination, PA McKinney found Claimant to have tenderness in the lateral epicondyle and the medial epicondyle, pain with extension and flexion and pronation. PA McKinney assessed history of right lateral epicondylitis and strain of right elbow. PA McKinney opined that Claimant had symptoms and exam consistent with epicondylitis of the elbow, was working in a position that did not require use of her right arm, and had not sustained a new injury. PA McKinney opined that it was likely that this was a flare of Claimant's prior epicondylitis injury. PA McKinney recommended a recheck with Dr. Wolf under maintenance to consider repeat injection vs. other treatment. PA McKinney noted that Claimant was released from care but could return to the clinic under maintenance. *See* Exhibits 1, H.

19. On September 27, 2017, Dr. Villavicencio completed a physician's report of worker's compensation injury. He opined that Claimant reached maximum medical improvement on September 27, 2017 with no permanent impairment. He recommended

maintenance care including a one-time evaluation with Dr. Wolf to consider repeat injection versus other treatment. *See* Exhibits 1, H.

20. On November 10, 2017, Dr. Wolf evaluated Claimant. Dr. Wolf noted she had last seen Claimant in October of 2016 when Claimant was doing well following two injections. Dr. Wolf noted that unfortunately, Claimant's symptoms started reoccurring back in May. Claimant reported she had tried her splint and was doing stretches. On exam, Dr. Wolf found very slight tenderness over the anteromedial epicondyle, some tenderness in the anterolateral epicondyle, but the worst place along the posterior epicondyle. Dr. Wolf assessed recurrent right lateral epicondylitis. Dr. Wolf noted that Claimant would try one more injection since she responded previously. Dr. Wolf injected the posterior joint line and noted that the injection would not be the same place as the anterior in order to decrease the risk of any ligament or tendon injury. The injection was performed. *See* Exhibits 1, H.

21. On November 30, 2017, PA McKinney evaluated Claimant. Claimant reported that after the injection, her pain improved to a 4/10 from a 6/10 and that she was more capable of elbow extension but continued to have discomfort and weakness with full extension and with lifting objects while gripping them. PA McKinney noted that Claimant was at function goal but not at end of healing. PA McKinney recommended a referral to hand specialist Dr. Davis for a second opinion. *See* Exhibits 1, H.

22. On December 21, 2017, PA McKinney evaluated Claimant. Claimant reported continued discomfort and weakness with full extension and with lifting objects while gripping them and that her pain remained unchanged at 4/10. On exam, PA McKinney found tenderness in the lateral epicondyle and pain with extension. PA McKinney opined that roughly 50% of anticipated healing had taken place. PA McKinney again recommended referral for a second opinion with a hand specialist. *See* Exhibits 1, H.

23. On January 9, 2018, Craig Davis, M.D. evaluated Claimant. Claimant reported sudden pain in her right lateral elbow when using a long grasper to grab a snake. Claimant reported treatment included therapy, a forearm strap, and two steroid injections. Claimant reported that the injections both gave her excellent relief, lasting for a few months. Claimant reported that in May of 2017 she had a significant recurrence of pain which had gradually worsened and that recently she had significant activity related pain and a popping sensation over the lateral aspect of her elbow worse with activity. On examination, Dr. Davis found Claimant's right elbow to be tender directly over the lateral epicondyle and more distally over the extensor musculature of the dorsal forearm. He noted full motion but pain in extremes and pain with resisted wrist and finger extension and with varus stress of the elbow. Dr. Davis provided the impression of right lateral epicondylitis with recurrent pain following two previous injections. He noted that Claimant may have a significant tear of the extensor origin based on the mechanism of injury and that Claimant could also have an injury to the collateral ligament on the lateral side of the elbow based on the mechanism of injury. Dr. Davis recommended an MRI. *See* Exhibit 2.

24. On January 12, 2018 Allison Hedien, NP, evaluated Claimant at Concentra. Claimant reported the same constant pain and that it hurt to fully extend her arm. Claimant reported she felt unable to fully extend her arm due to stiffness and that her arm locked up at times when she tried to bend it. NP Hedien noted that Claimant had been seen by Dr. Davis for a second opinion and that Dr. Davis had recommended an MRI. Claimant reported no new concerns but frustration that her injury was 1.5 years old and never had any improvement. On exam, NP Hedien found tenderness in the lateral epicondyle, and pain in range of motion in all directions against resistance and pain on extension. NP Hedien requested an MRI of the right elbow and recommended ice/head/meds as helpful. NP Hedien noted an anticipated date of maximum medical improvement of March 30, 2018. *See* Exhibits 1, H.

25. On January 24, 2018, Claimant underwent an MRI of her right elbow that was interpreted by Steven Ross, M.D. The impression was low to moderate grade partial thickness tear of the common extensor tendon at the lateral epicondyle with distal delamination of the medial fibers approximately 5 mm. *See* Exhibit 4.

26. On February 16, 2018, PA McKinney evaluated Claimant. PA McKinney noted that the MRI was reviewed with Claimant and showed a partial tear of the extensor complex. Claimant reported the same constant pain and continued discomfort and weakness with full extension and lifting objects while gripping them. PA McKinney recommended Claimant follow up with Dr. Davis. PA McKinney noted that roughly 75% of anticipated healing had taken place and that Clamant was anticipated to reach maximum medical improvement on March 30, 2018. *See* Exhibits 1, H.

27. On February 27, 2018, Dr. Davis evaluated Claimant. He reviewed the MRI of Claimant's right elbow and opined that the MRI demonstrated a partial tear of the extensor origin at the lateral epicondyle after reviewing both the films and the report. He noted Claimant continued to have pain localized to the lateral epicondylar area. Claimant again was tender at the lateral epicondyle on exam. Dr. Davis provided the impression of chronic right lateral epicondylitis with a partial tear of the extensor origin at the lateral epicondyle. He opined that Claimant was a reasonable candidate for surgical intervention at this point for an extensor origin debridement and repair. Dr. Davis noted that approximately 80-90% of patients had significant improvement in symptoms post-operatively. Claimant indicated she would like to proceed with surgery. *See* Exhibit 2.

28. On March 13, 2018, Jonathan Sollender, M.D. issued a causation report after a medical authorization review. Dr. Sollender reviewed medical records. Dr. Sollender opined that since Clamant never returned with recurrent injury or complaints of any type once she was discharged at MMI in November of 2016, it seemed that Claimant's right elbow healed. Dr. Sollender opined that when Claimant stopped working for Employer on May 6, 2017 there were no lasting effects of her prior right elbow symptoms from 2016 and that he would have the 2016 claim put to rest in a closed fashion. Dr. Sollender opined that something Claimant did after stopping work for Employer caused a

new condition in September of 2017, not an aggravation of her old condition. *See* Exhibit I.

29. Dr. Sollender found it hard to believe at face value Claimant's report that she currently worked at a call center but had no requirement to use her hands for activity. Dr. Sollender opined that something must have contributed to her symptoms. He noted that Claimant's frustration and report of 1.5 years of symptoms with no improvement was factually inaccurate. Dr. Sollender opined that Claimant not returning from November of 2016 to September of 2017 showed that Claimant was doing fine and was not symptomatic at all. Dr. Sollender opined that the right lateral epicondyle release surgery would be reasonable and necessary care for Claimant's right lateral epicondylitis, but that it was not causally related to the injury. Dr. Sollender opined that with some other activity causing Claimant's current symptoms that started in September of 2017, the current symptoms were unrelated to the old claim. Dr. Sollender opined Claimant had done something unrelated to her employment with Employer to cause this new condition and that the surgery being requested was unrelated to the June 27, 2016 injury. *See* Exhibit I.

30. On March 22, 2018 Respondents filed a notice of contest indicated liability was being contested/denied for further investigation to determine causation/compensability. *See* Exhibit 6.

31. Respondents denied authorization for the surgery submitted by Dr. Davis. In response, Dr. Davis issued a letter on March 27, 2018. Dr. Davis indicated that Claimant's right lateral epicondylitis was clearly related to her job activities and reviewed the mechanism of injury and immediate pain. Dr. Davis opined that the injury and partial tear of extensor origin at the lateral epicondyle (documented by MRI on January 24, 2018) occurred on June 27, 2016. Dr. Davis disagreed with Dr. Sollender's opinion that Claimant's current symptoms were not work related. Dr. Davis noted that Dr. Sollender based his opinion on the fact that Claimant became asymptomatic after injection and then developed recurrent symptoms later but he opined that was entirely within the typical clinical course that occurs when a patient responds well to injection and then subsequently the injection gradually wears off. Dr. Davis noted that Claimant responded well to the injection and her case was closed but that when it wore off, her symptoms recurred as is typical and opined that Claimant's symptoms were a result of the initial injury. Dr. Davis opined that the current symptoms were directly related to the initial injury and that the condition should be covered. *See* Exhibit 2.

32. On April 17, 2018, Dr. Villavicencio filled out a physician's report of worker's compensation injury form. Dr. Villavicencio opined that Claimant was not at maximum medical improvement.

33. Dr. Davis and Dr. Sollender both testified by deposition.

34. Dr. Sollender testified by deposition on July 20, 2018. Dr. Sollender opined that the complaints Claimant reported in 2017 were not related to Claimant's 2016 injury.

Dr. Sollender opined that Claimant's work related diagnosis of lateral epicondylitis was treated successfully, that Claimant was released at MMI in November of 2016, and that no further care was deemed necessary. Dr. Sollender noted that the examination in November of 2016 reflected that Claimant was normal with no focal complaints requiring ongoing care. Dr. Sollender opined that Claimant developed similar symptoms almost a year later while working for a different employer. Dr. Sollender agreed with Dr. Davis that surgery was reasonable and necessary, but opined the surgery was not work related. Dr. Sollender opined that when placed at MMI, Claimant had good strength, no tenderness, and no difficulty with range of motion and that her complaints in January of 2018 were clearly different. He also testified that it was hugely significant that Claimant did not have any treatment between November of 2016 and September of 2017 and opined that Claimant clearly did not have any symptoms during those ten months until she started a new job. He opined that Claimant's lateral epicondylitis had fully resolved and that she had a new condition when she started her new job.

35. Dr. Sollender opined that Claimant's steroid injection would only provide two to three months of benefit but that other healing that goes on can provide permanent relief. He testified and opined that here, after the second injection, there were no symptoms or reports for ten months, showing that Claimant's work related condition healed and that something new occurred to cause her current complaints. Dr. Sollender also testified that he didn't think a singular injury of lifting a five pound snake would cause Claimant's condition. Dr. Sollender testified that if Claimant had torn her lateral epicondylar tendon insertion in June of 2016, Claimant would not have gotten better to be able to be placed at MMI in November of 2016 and would have had ongoing symptoms reported thereafter.

36. Dr. Davis testified by deposition on August 7, 2018. Dr. Davis testified that Claimant had damage to the tendon attachments over the lateral aspect of the elbow caused by lifting the snake. He testified that an activity involving forceful extension of a wrist or grasping or both puts a lot of strain on that particular muscle. Dr. Davis testified that in Claimant's case there was a device used at a distance and much more lever arm and much more force at the level of the hand and therefore much more force pulling on the muscles. Dr. Davis testified that it was also a relatively sudden activity because Claimant was trying to deal with an animal that was moving unpredictably and that a large amount of force pulling on the tendon attachment for a small amount of time is all that it takes to damage the tendon whether straining it or partially tearing it or completely tearing some of the fibers off the bone. Dr. Davis testified that in Claimant's case some of the fibers were torn off the bone as seen in the MRI.

37. Dr. Davis opined that the steroid injections decrease inflammation and make it feel better temporarily and last several months for most patients. Dr. Davis opined that when injections wear off symptoms can come back. He opined that Claimant had significant improvement temporarily following both injections. Dr. Davis opined that the lateral epicondylitis he saw Claimant for in January of 2018 was the same condition as the epicondylitis Claimant developed in June of 2016 and that simply the injection had worn off. Dr. Davis opined that Claimant was injured, had a partial tear in the tendon

when she lifted the snake, and had a number of treatments that gave her temporary relief, but no permanent cure. Dr. Davis noted the MRI showed a partial tear of the tendon where it should be attached to the bone and that he recommended surgery since Claimant had had several other conservative treatments. He testified that surgery would be to reattach the tendon to the bone. He opined that the tear occurred when Claimant lifted the snake.

38. Dr. Davis disagreed with Dr. Sollender's report. He noted that Dr. Sollender's opinion did not make sense to him and that he was not sure why Dr. Sollender concluded that this wasn't related or a continuation of the same condition. Dr. Davis reviewed the report from Dr. Villavicencio when Claimant was placed at MMI and noted that Claimant was feeling good at the time that she saw Dr. Villavicencio and was noted to be significant improved but he disagreed that no provision for maintenance care or further treatment was provided in the case that symptoms recurred. Dr. Davis opined that had it not been for Claimant's original injury with the snake, she would not have had symptoms in January of 2018 when she saw him. Dr. Davis testified that he had no issues with the timeliness of Claimant's complaints and that it was a very typical timeline with epicondylitis. Dr. Davis testified that Claimant's pain recurred in May of 2017 before starting work at the call center and that the pain was related to the original injury. Dr. Davis opined that there was no specific cutoff of when symptoms would be considered a recurrence versus an entirely new diagnosis but that if it was within the same year, then it would certainly be within the realm of how long a steroid injection might last and that if it was five years later, he would assume it was a new injury asymptomatic for five years. He opined that in Claimant's case, everything was within the year and within the typical length of time that a steroid injection might last.

39. Prior to her injury, Claimant received high ratings in her annual performance review for the position of Animal Control Officer. She was rated highly successful in 2012, successful in 2013, highly successful in 2014, and successful in 2015. *See* Exhibit 8.

40. In November of 2016, after her injury, Claimant was placed on a performance improvement plan. The plan noted that her performance at a needs improvement level was not acceptable and that she would be placed on a performance improvement plan for 365 days. The plan indicated that would provide Claimant time to demonstrate improvement in her performance and that the improvement would be sustainable. Claimant was advised that her performance had to demonstrate immediate, sustained, and significant improvement and that any unsatisfactory performance or inappropriate behavior would result in disciplinary action up to and including termination. *See* Exhibit C.

41. In June of 2017, Claimant resigned from employment with Employer effective July 1, 2017. Employer records note that she resigned prior to discipline. *See* Exhibits D, E.

42. Claimant testified at hearing that in November of 2016 she had a light dull pain in her right elbow but was able to work full duty despite decreased grip on the right.

Claimant testified that by February-March the pain had come back and got worse and her elbow started locking up. Claimant testified that the pain was the same type of pain and that it came back gradually. Claimant testified that during early 2017 she was working the same job in animal control and lifting dead animals off the roads.

43. Claimant testified that work was stressful at that time and that she thought it would be detrimental to her job in February of 2017 to seek more medical treatment or go to light duty work. Claimant testified that she has a high pain tolerance and kept working. Claimant testified that she was placed on administrative leave in May of 2017 and then resigned effective July 1, 2017.

44. Claimant testified that during the summer of 2017 she had continued pain in her right elbow and eventually sought treatment in September of 2017 because of the pain and locking of her elbow. Claimant testified that she sustained no new injuries, no acute instances of pain, and nothing new. Claimant testified that after the injections she underwent the pain was better in her right elbow but that the pain never went away and that she was never 100%.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations,

the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Medical "treatment" encompasses both diagnostic and curative medical procedures. *Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949). Reasonable diagnostic procedures have been held to be a prerequisite to maximum medical improvement if they have reasonable prospect for defining claimant's condition and suggesting further treatment. *Villela v. Excel Corp.,* W.C. No. 4-400-281 (ICAO February 1, 2001). A Claimant bears the burden to establish by a preponderance of the evidence that the conditions for which they seek medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S.

Claimant has established, by a preponderance of the evidence, that the right elbow surgery requested by Dr. Davis is reasonable, necessary, and causally related to her June 27, 2016 injury. Dr. Davis is found credible and persuasive that the mechanism of injury in lifting the snake with extension grabbers is consistent with the tear in Claimant's tendon shown by MRI. The ALJ finds, more likely than not, that Claimant partially tore the tendon off the bone at the time of the snake lifting incident. Further, it is credible and persuasive that despite improving by November of 2016 after two steroid injections, Claimant was not healed nor did her tear heal. Rather, Claimant is credible and persuasive that she was better but not 100% in November of 2016 and continued to have dull pain in her elbow. This is consistent with a medical record from October of 2016 showing that Claimant's right lateral epicondyle was overall good but bothered her occasionally and with the examination in October of 2016 showing continued tenderness over the anterior and lateral epicondyle and into the extensor wad. Claimant is credible and persuasive that she became more symptomatic again in February or March but deferred medical treatment due her stressful job situation and high pain tolerance. Dr. Davis is credible and persuasive that her condition and need for surgery is casually related to the June 2016 injury. This opinion is consistent with the opinion of PA McKinney who opined that it was likely Claimant's pain in September of 2017 was a flare of Claimant's initial epicondylitis injury. Dr. Sollender is not found as credible or persuasive. His belief that Claimant had no symptoms for 10 months and was healed from the original injury before sustaining a new injury is not substantiated by the credible testimony and evidence.

Claimant is credible that she had symptoms beginning in February or March that gradually got worse before she eventually sought medical treatment.

Although tears can sometimes heal on their own with conservative treatment and rest, Claimant's tear has not. This acute tear, sustained on June 27, 2016, requires surgical treatment as recommended by Dr. Davis. Dr. Davis is credible and persuasive and Claimant's symptoms and timeline are typical with epicondylitis and the typical clinical course. The credible and persuasive evidence establishes that the surgical recommendation is causally related to her original injury on June 27, 2016 where her tendon tore. Conservative treatment has not worked and the surgery is reasonable and necessary to cure and relieve the effects of her injury.

ORDER

1. Claimant has established by a preponderance of the evidence that surgery recommended by Dr. Davis is reasonable, necessary, and causally related to her June 27, 2016 work injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 12, 2018 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence a trial SCS is reasonably necessary post-MMI treatment to relieve the effects of his industrial injury?

- Did Respondents prove Claimant waived the right to seek an SCS by not pursuing it before MMI?

- Did Respondents prove Claimant's request for a trial SCS is barred by the equitable doctrine of laches?

FINDINGS OF FACT

1. Claimant suffered an admitted low back injury on July 17, 2014. He was shoveling sand off a conveyor belt when he felt a pop in his low back. He developed severe sciatic pain in the right leg that made it difficult to walk. He managed to finish his shift and went home. That night his right leg gave out and caused him to fall, so he went to the emergency room the next morning. The ER diagnosed "low back pain," prescribed muscle relaxers and Percocet, and advised him to avoid heavy lifting.

2. Approximately a month later, Claimant started treating with Dr. Frank Polanco. By that time, the pain was becoming more severe and radiating into the right buttock, calf, anterior thigh, and sciatic area. Dr. Polanco diagnosed a lumbar strain and ordered a lumbar MRI. The MRI was performed on August 29, 2014 and showed multilevel degenerative disc and facet changes.

3. Dr. Baptist took over as Claimant's ATP on September 19, 2014. After two months of physical therapy, Claimant was no better, so Dr. Baptist requested a repeat MRI.

4. The second MRI was performed on December 10, 2014. Compared to the prior study, it showed increased synovitis and reactive edema around the right L4-5 facet joint. The edema tracked into the L4-5 foramen, possibly irritating the exiting right L4 nerve root. There was also "borderline" central canal stenosis at L4-5.

5. A few days later, Dr. Scheper administered bilateral SI joint injections, which were not helpful.

6. Claimant saw Dr. Sparr on December 18, 2014 for bilateral lower extremity electrodiagnostic testing. Claimant described ongoing pain in his back, right buttock, and both legs, and numbness and tingling diffusely in his legs. The electrodiagnostic testing was "markedly abnormal," and Dr. Sparr opined, "the findings . . . are evidence of a long-standing process. He likely has sensory/motor, axonal and demyelinating peripheral neuropathy which has caused denervation diffusely within the lower extremity. These

findings are not related to his work in any way." Dr. Sparr discussed the findings with Claimant and noted, "he reports that he did not have lower extremity symptoms until after his work injury. I find that hard to fathom given the global nature of the findings and chronic denervation." Dr. Sparr told Claimant it was likely either diabetic or alcoholic polyneuropathy and referred him to his PCP.

7. Notwithstanding Dr. Sparr's suppositions, the ALJ received no persuasive evidence demonstrating Claimant was symptomatic or required any treatment for polyneuropathy before the accident at work. Moreover, Claimant maintained a physically demanding job with Employer for more 20 years.

8. Although Dr. Sparr thought Claimant leg pain was unrelated, he opined the low back pain was caused by the accident and recommended "aggressive physical therapy."

9. Dr. Shireen Rudderow took over as Claimant's ATP in January 2015 after Dr. Baptist left CSHP. At her initial evaluation on January 8, 2015, Claimant reported ongoing back pain and "occ[asional] shooting pain along L4 dermatome." Dr. Rudderow referred Claimant to Dr. Steven Murk for a neurosurgical evaluation. She also noted Dr. Sparr's opinions regarding the peripheral neuropathy, and recommended Claimant discuss it with his PCP.

10. Claimant returned to Dr. Rudderow on February 3, 2015, who noted, "Dr. Sparr told pt neuropathy from DM or alcoholism, was checked at PCP office recently (per pt does not drink and does not have DM)." Dr. Rudderow "explained to the patient again, his current symptoms are mostly from a reactive synovitis unrelated to his back strain."

11. Claimant saw Dr. Murk on February 18, 2015. Dr. Murk described Claimant's low back pain as "quite complex," with pain throughout the lumbar spine, and radiating pain and numbness into the leg. Claimant recounted the incident at work and the significant right lower extremity symptoms that developed immediately thereafter. He also told Dr. Murk about a prior 2009 work injury "where he was twisting, resulting in lumbar and low back pain, and says that from time to time his muscles will give me some trouble but his work comp case was closed, and overall he thinks things were going very well until the more recent injury in July."[1] After completing a physical examination, Dr. Murk opined Claimant had "very complex pain, most of which may well be myofascial in nature, with some elements of radiation of the right lower extremity . . . somewhat reminiscent perhaps of an L4 distribution." Noting that the December 2014 MRI showed possible L4 nerve root irritation, Dr. Murk requested a repeat EMG, a selective right transforaminal L4-five nerve root injection, and a selective facet block at L4-5.

12. Dr. Ross performed the recommended injections in April and May 2015, but they were not helpful.

[1] The ALJ received no persuasive evidence to contradict Claimant's assertion he was doing well with no significant low back or leg problems before the July 2014 admitted work injury.

13. A repeat EMG on June 22, 2015 was again consistent with polyneuropathy.

14. Claimant returned to Dr. Muck on July 10, 2015. Dr. Murk did not believe Claimant was a surgical candidate but referred him to Dr. Bhatti for a second opinion and consideration of an SCS.

15. Dr. Bhatti evaluated Claimant on July 14, 2015. Claimant described pain in the low back, right buttock, right anterior thigh, right posterior calf, and occasional left leg pain. He also complained of numbness in the right leg and right buttock. He reported right leg weakness "and states that it can give out on him." Lower extremity motor strength was normal except 4/5 strength with right ankle dorsiflexion. The right leg was painful on examination, and pinprick sensation was decreased on the right anterior foot. Claimant's gait was guarded, favoring the right leg. Straight leg raise was positive bilaterally. Dr. Bhatti diagnosed right L4 lumbar radiculopathy and lumbar degenerative disc disease. Dr. Bhatti concluded,

> About 70% of his pain is in the lower back. The etiology of his pain is unclear. He has mild multilevel degenerative disc disease. There is no evidence of neural compression on his lumbar spine MRI scan. . . . His EMG study is consistent with a peripheral polyneuropathy. I feel that we do not have a surgical option of treatment. . . . Patient may be a candidate for epidural spinal cord stimulation. I have recommended that he be evaluated for a trial for stimulation.

16. Dr. Bhatti referred Claimant to Dr. Lippert for the SCS trial, and to Dale Mann, Ph.D. for a pre-trial psychological evaluation.

17. Claimant followed up with Dr. Rudderow on July 21, 2015. She noted Claimant received no relief from injections or PT and his physical examination was "relatively unchanged in the last several months." She opined, "while a neuro-stimulator recommended by Dr. Bhatti may improve patient's pain, I believe he is stable from his work comp injury and it is appropriate to do an FCE at this time. The neurostimulator could be ordered under the patient's regular medical insurance, as a good portion of his findings are due to underlying medical problems."

18. Claimant saw Dr. Mann for the psychological evaluation on August 3, 2015. Claimant reported "no history of any alcohol abuse or treatment." Dr. Mann indicated the clinical interview and psychological testing showed Claimant was "currently experiencing minimal depression, minimal anxiety, average somatic distress, and moderately high functional distress." Claimant told Dr. Mann "he does hope to have his pain reduced to a level of 3-4, which seems reasonable." Dr. Mann saw no psychological contraindications to proceeding with the trial SCS.

19. Claimant was evaluated by Dr. Lippert[2] on September 11, 2015. Dr. Lippert noted "low back and bilateral leg pain, right greater than left." Based on his evaluation, Dr. Lippert opined Claimant "is a good candidate . . . for spinal cord stimulation trailing."

20. Respondents had Dr. Lippert's request reviewed by Dr. Scott Primack on September 18, 2015. Dr. Primack opined SCS was not related to Claimant's work injury. Dr. Primack concluded SCS may be reasonable to address the polyneuropathy, but opined, "in no way, shape, or form would a spinal cord stimulator be considered specific to this work injury."

21. Respondents denied the trial SCS based on Dr. Primack's report.

22. Claimant followed up with Dr. Rudderow on October 13, 2015. He was angry because the SCS was denied. He described severe functional limitations, primarily due to unremitting low back pain. He was still having numbness and tingling in his buttocks, and burning, achy pain in his feet and legs. Dr. Rudderow noted, "patient's peripheral neuropathy and back pain is significant and would recommend he pursue a neurostimulator through his private insurance. His peripheral neuropathy and synovitis is unrelated to his back injury."

23. Dr. Rudderow put Claimant at MMI on November 10, 2015 and recommended "pain management" for maintenance care. Dr. Rudderow referred Claimant to Dr. Baptist (who apparently had recently rejoined the CSHP occupational medicine practice) for an impairment rating.

24. Dr. Baptist evaluated Claimant on December 10, 2016 and opined,

> [T]his patient is a very complex patient, almost totally refractory to any treatment modalities. I think his prognosis for improvement is extremely poor. He does have a pre-existing polyneuropathy which undoubtedly contributed to his problems . . . . [H]is only helped for pain relief I believe at this point, it is the implantable spinal stimulator, as recommended by Drs. Murk, Leppard [sic] and Mann. I realize that he had an IME which opines that a spinal stimulator was not indicated; however, I do not agree with this, and I am currently siding with the other 3 specialists who did recommend it, confirmed the need."

25. Dr. Baptist's final work-related diagnosis was "lumbosacral myofascial pain with apparent L4 nerve root irritation and L4-5 facet involvement." Dr. Baptist recommended maintenance care and opined, "he must be allowed to get an implantable spine stimulator as specified above." Dr. Baptist assigned a 29% whole person impairment rating. Part of the rating was based on lower extremity neurologic deficits, which Dr. Baptist justified as follows:

> While it is true that the patient has a polyneuropathy of both lower extremities, these are demonstrably old. His MRI did confirm, or at least

[2] Some medical records reference Dr. Katherine Leppard, but Claimant has never seen Dr. Leppard and the ALJ finds those entries were intended to refer to Dr. Lippert.

> strongly suspected that there was sufficient inflammation and fluid collection at the L4 nerve roots to produce acute radiculopathy at that level. I will, therefore, use Table 49 to give a rating . . . .

26. The ALJ finds Dr. Baptist's rationale for the neurological component of the rating persuasive.

27. Respondents requested a DIME after receiving Dr. Baptist's rating. Dr. Richard Stieg performed the DIME on June 21, 2016. Dr. Stieg opined Claimant's presentation was exaggerated, "nonphysiologic," and inconsistent with objective findings. He diagnosed mild to moderate degenerative lumbar disk and facet disease without radiculopathy, peripheral neuropathy unrelated to the injury, somatic disorder with predominant pain, and evidence of symptom magnification. He assigned a 5% whole person impairment rating under Table 53. He did not include a neurological rating, because "while there are some suggestions that the patient may have radiculitis, there is no objective evidence for radiculopathy." He assigned no rating for lumbar range of motion based on to his perception of Claimant's exaggerated and nonphysiologic presentation.

28. Although not specifically an issue for the DIME, Dr. Stieg commented on the recommendation for an SCS. He agreed with Dr. Primack that,

> The patient is not a candidate for spinal cord stimulation. The majority of his leg symptoms are related to a polyneuropathy, which is not claim-related. The majority of his pain at any rate is in the back, not the legs, making him a poor candidate for response to spinal cord stimulation, which would be largely ineffective for nociceptive pain coming from back structures and ineffective for the symptoms in the legs due to the polyneuropathy.

29. Respondents filed a Final Admission of Liability based on Dr. Stieg's DIME report. Claimant challenged the FAL, and a hearing was held before ALJ Lamphere in February 2017. ALJ Lamphere found Claimant overcame the DIME rating by clear and convincing evidence, and awarded PPD based on Dr. Baptist's original 29% whole person rating. ALJ Lamphere's order also reserved jurisdiction over all issues not decided.

30. On May 31, 2018, Claimant applied for a hearing seeking approval of the trial SCS recommended by Dr. Lippert.

31. Dr. Rudderow testified in an evidentiary deposition on September 10, 2018 at Respondents' request. Dr. Rudderow reconsidered and changed some of the causation opinions expressed in her reports. When asked whether the SCS trial was related to Claimant's work injury, she opined, "I think a neurostimulator would help his back pain. I don't think it would help his neuropathy." When Respondents' counsel pointed out she had previously recommended Claimant pursue an SCS under his health insurance, Dr. Rudderow testified,

> I think my opinion then and my opinion now might slightly differ. Because of the time I wrote that, I did feel like most of his findings were from an

> underlying medical problem. But as I reflect on his injury, I think that his pain was real and his pain does seem to have been triggered by the Worker's Compensation injury. And if a neurostimulator would help that, I think it's reasonable.

32. Ultimately, Dr. Rudderow opined, "I think spinal stimulation is appropriate for pain management" for the underlying work-related back injury. Dr. Rudderow maintained that Claimant is at MMI, and does not expect the SCS to significantly increase his functioning, except incidentally due to pain relief.

33. Dr. Primack testified at hearing on behalf of Respondents. Dr. Primack testified, "the main contraindication for someone with spinal stimulation is . . . axial low back pain . . . . [T]he last thing that you ever want to do is to do a trial or implant for someone with back pain." He opined the purpose of an SCS is to remedy leg pain and "[it] does nothing for your back." He cited the Chronic Pain MTGs for the proposition that SCS is "never" appropriate for a patient with predominantly axial back pain. Dr. Primack reiterated SCS might be appropriate to Claimant's treat peripheral neuropathy but is not related to the admitted injury. Regardless of causation, Dr. Primack opined SCS "isn't a maintenance care procedure. That's like saying a hip replacement is maintenance care for hip pain, and there's no way we would treat such a dramatic procedure as maintenance care."

34. The opinions of Dr. Baptist, Dr. Lippert, Dr. Bhatti, and Dr. Rudderow (as expressed in her deposition) on the questions of reasonable necessity and causation are more persuasive than the contrary opinions expressed by Dr. Primack and Dr. Stieg.

35. Claimant proved a trial SCS is reasonably necessary post-MMI treatment to relieve the effects of his industrial injury.

36. Respondents failed to prove Claimant waived his right to pursue the trial SCS.

37. Respondents failed to prove Claimant's request for a trial SCS is barred by the equitable doctrine of laches.

CONCLUSIONS OF LAW

A. Claimant proved the trial SCS is reasonably necessary to relieve the effects of his industrial injury.

The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond MMI if the claimant requires further treatment to relieve the effects of the injury or prevent deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

As found, Claimant proved the trial SCS is reasonably necessary to relive the effects of his industrial injury. The ALJ credits the opinions of Dr. Baptist, Dr. Lippert, Dr. Bhatti, and Dr. Rudderow in finding the trial reasonably necessary and causally related to Claimant's admitted injury.

The ALJ recognizes surgery is frequently directed to "curing" a claimant's condition rather than simply "relieving" or preventing deterioration of their condition. But the type of treatment is not determinative of liability for post-MMI treatment. The dispositive question is the ***purpose*** for which treatment is provided rather than the "nature" of the treatment. *Milco Construction v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1992). If the treatment is designed to relieve the effects of the work injury, the insurer must cover it. Furthermore, liability is not limited only to treatment that "maintains" a claimant's condition. *Karathanasis v. Chili's Grill & Bar*, W. C. No. 4-461-989 (August 8, 2003); *Hayward v. UNISYS Corp.,* W.C. No. 4-230-686 (July 2, 2002), *aff'd, Hayward v. Industrial Claim Appeals Office*, (Colo. App. No. 02CA1446, January 9, 2003) (not selected for publication). Surgery can be a permissible form of post-MMI treatment, if it is undertaken for the purposes outlined in *Grover*. *E.g., Shipman v. Larry's Transmission Center*, W.C. No. 4-721-918 (August 25, 2008) (surgery to correct a leg-length discrepancy approved as post-MMI treatment); *Hayward v. UNISYS Corp., supra* (knee surgery may be curative or may be *Grover*-style maintenance treatment designed to alleviate deterioration of the claimant's condition).

Dr. Primack's opinions are unpersuasive because he relied on an outdated version of the MTGs.[3] The Chronic Pain MTGs were recently revised, effective November 30, 2017. Dr. Primack did not state which version he used, but the ALJ concludes he relied on the 2012 guidelines, for two reasons. First, he cited "section G," which tracks the 2012 version; the discussion of neurostimulation has been moved to section H in the 2017 version. Second, Dr. Primack stated SCS is unequivocally "contraindicated" to treat axial low back pain, which is consistent with the 2012 guidelines but not with the 2017 version.

A side-by-side comparison of the 2017 and 2012 versions of the Chronic Pain MTGs shows significant changes regarding the use of SCS to treat axial back pain. Whereas the 2012 MTGs simply state SCS is "not recommended" for patients with axial back pain, the 2017 guidelines distinguish between so-called "traditional" SCS and "high frequency" SCS. According to the 2017 MTGs, "There is some evidence that a high frequency, 10KHz spinal cord stimulator is more effective than a traditional low-frequency 50 Hz stimulator in reducing both back pain and leg pain in patients who have had a successful trial of an external stimulator. Two-thirds of the patients had radiculopathy and one half had predominant back pain." The ultimate conclusion in the 2017 MTGs is:

[3] Although Dr. Primack referenced both the Low Back Pain MTGs and the Chronic Pain MTGs, he stated the Chronic Pain guidelines are most appropriate to Claimant's situation. Indeed, the Low Back MTGs provide a very cursory discussion of neurostimulation and refer the reader to the Chronic Pain guidelines.

> Traditional SCS is ***not recommended***[4] for patients with the major limiting factor of persistent axial back pain. High-frequency stimulators ***may be used***[5] for patients with predominately axial back pain.

Dr. Primack's failure to mention or discuss the MTG revisions significantly detracts from the overall persuasiveness of his opinions.

Additionally, Claimant proved a causal nexus between his chronic leg pain and the industrial accident. Claimant's leg pain likely results from a combination of peripheral polyneuropathy and L4 nerve root irritation as noted by Dr. Baptist. It is impossible to tease out the precise percentage of contribution from each factor, but the ALJ is persuaded Claimant's injury substantially contributed to the persistence and severity of his leg pain. An injury need not be the sole cause of a claimant's need for treatment, as long as there is a "direct causal relationship" to the industrial accident. *Seifreid v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1996); *Munoz v. JBS Swift & Co. USA, LLC,* W.C. No. 4-780-871-03 (October 7, 2014); *Reynolds v. U.S. Airways, Inc*., W.C. No. 4-352-256, 4-391-859, 4-521-484 (May 20, 2003). Claimant's work accident either caused new pathology and led to the development of leg pain, or substantially aggravated his pre-existing polyneuropathy, or both. Thus, Claimant proved the requisite "direct causal relationship" to support an award of medical benefits.

Finally, the ALJ credits Dr. Baptist and Dr. Rudderow's opinions that a trial SCS is an appropriate form of post-MMI pain management. Both physicians persuasively opined Claimant's condition is stable and unlikely to improve. The SCS is primarily intended to relieve Claimant's pain, rather than cure any underlying pathology. The mere fact that palliative treatment may incidentally increase Claimant's level of function does not negate the fact it is being prescribed for a purpose consistent with *Grover*. Dr. Primack's opinions on this point are not persuasive because they are based on a misunderstanding of the law regarding the permissible scope of post-MMI benefits.

B. Claimant did not waive his right to pursue the trial SCS

A waiver is the intentional relinquishment of a known right, which may be express or implied. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988). To constitute an implied waiver, conduct must be free from ambiguity and clearly manifest the intent not to assert the benefit. *Burlington Northern Railroad Company v. Stone Container Corporation*, 934 P.2d 902 (Colo. App. 1997). Waiver is an affirmative defense and must be proved by a preponderance of the evidence. *E.g*., CRCP 8(c); *Pfaff v. Broadmoor Hotel*, W.C. No. 4-105-774 (October 15, 2003).

Respondents argue Claimant waived his right to pursue the trial SCS by failing to try the issue at the hearing before ALJ Lamphere. The disagrees with Respondents' argument, and finds *Hire Quest, LLC v. Industrial Claim Appeals Office*, 264 P.3d 632 (Colo. App. 2011) dispositive on this issue.

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[4] Emphasis in original.
[5] Emphasis added.

In *Hire Quest*, the parties had previously gone to hearing on the respondents' challenge to a DIME rating. The ALJ found the respondents failed to overcome the DIME and awarded PPD benefits. The claimant had not raised any issue of *Grover* benefits, so the ALJ did not address it. But the order expressly reserved jurisdiction over all issues not decided.

Six months later, a second ALJ held a hearing on the claimant's request for *Grover* benefits. Citing *Hanna v. Print Expediters*, 77 P.3d 863 (Colo. App. 2003), the second ALJ determined the claimant had waived the right to post-MMI medical benefits by failing to try the issue at the prior hearing. The ICAO reversed based on the reservation clause in the first ALJ's order. The Court of Appeals affirmed and held, "under the clear and unambiguous language of that order, the issue of *Grover* medical benefits was reserved for future determination and therefore not waived by claimant." The court further stated, "we are unwilling to presume that the reservation clause at issue here was 'mere surplus,' especially given the absence of any evidence in the record indicating that the first ALJ added that clause to his order without any basis for doing so."

The ALJ sees no meaningful distinction between *Hire Quest* and the situation in Claimant's case. ALJ Lamphere's order explicitly reserved jurisdiction over all issues not decided, which necessarily includes post-MMI medical treatment. Accordingly, the ALJ rejects Respondents' argument Claimant waived his right to pursue the trial SCS.

C. The trial SCS is not barred by laches

The equitable doctrine of laches may be used to deny relief to a party whose unconscionable delay in enforcing his rights has prejudiced the party against whom enforcement is sought. *Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103 (Colo. App. 2008); *Burke v. Industrial Claim Appeals Office*, 905 P.2d 1 (Colo. App. 1994). The prejudice "must necessarily result from reliance which is justifiable under the circumstances." *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 74 (Colo. 1996). The Respondents have the burden of proof to establish laches. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988).

Respondents presented no persuasive evidence to show they were prejudiced by Claimant's delay in pursuing the trial SCS. Although Respondents' counsel alleges several potential forms of prejudice, statements of counsel are not evidence. The ALJ is not persuaded by the assertion that Dr. Rudderow's changed opinions resulted from the delay in pursuing the issue. Dr. Rudderow clearly remembered Claimant's case and testified she changed her opinions based on further "reflection," rather than lack of familiarity. Thus, Respondents failed to prove laches.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for the trial SCS.

2. All issues not determined herein, or otherwise closed by operation of law, are reserved for future determination.

DATED: November 13, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

The issue addressed in this decision involves Claimant's entitlement to permanent impairment benefits. The specific question to be answered is:

I. Whether Respondent established, by a preponderance of the evidence, that Dr. Anjmun Sharma erred when he assigned impairment for loss of strength as part of his Division Independent Medical Examination rating.[1]

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was employed as a Firefighter Driver/Engineer by Respondent; specifically, the City of Colorado Springs Fire Department. He was hired in May, 1998. His job duties in 2016 included driving vehicles for the Fire Department, as well as performing all duties of a Firefighter. He initially injured his right elbow in March, 2016 while engaged in Respondent-sponsored exercise activities. He was performing a "tricep push up" and felt a pop in his right elbow. At the time he believed the injury to be minor; he applied ice and the situation was "tolerable." Then on or about September 6, 2016 Claimant injured his right elbow again. Respondent admitted liability for the injury.

2. Claimant initially presented to the City of Colorado Springs Occupational Health clinic on September 27, 2016. Paula Homberger, PA-C, reported, "…Mr. Meador was doing TRX at the station about 6 months ago and had a pop in his elbow. It was popping periodically, but would feel okay. He was doing a pull-up a few weeks ago & felt increased pain. He only notices pain with specific movements…" (Claimant's Exbs. pg. 93. Ms. Homberger diagnosed right lateral epicondylitis. She recommended physical therapy, use of Voltaren gel, and application of ice and heat. (Id.)

3. Claimant participated in physical therapy on October 17, 2016. The therapist noted that one of Claimant's symptoms was "Sharp pain with overhead activity, gripping 8/10." She noted that one of the long term goals of therapy was "80% better with grip." She recommended "Rest from gripping as much as possible." (Id. at 133).

4. In a physical therapy session on October 31, 2016, the therapist noted Claimant's objective findings included "Grip strength decreased. ROM [range of motion] same." (Id. at 132). In a "Symptom Review" sheet the therapist noted Claimant's

[1] Respondents did not contest any other part of the impairment rating issued by Dr. Sharma, including the range of motion aspect of the impairment rating.

strength was “worse” and the therapist hand-wrote “grip [decreased] to 55#...L side 100#.” (Id. at 131).

5. On November 17, 2016 Ms. Homberger noted Claimant was “…feeling about the same, a little worse today.” She referred him for an MRI of the elbow, and for evaluation by Dr. Larsen. (Id. at 82).

6. Also, on November 17, 2016 a physical therapist documented “painful grip.” (Claimant’s Exbs. at 125). A “Symptom Review” sheet noted one of Claimant’s “Primary Functional Deficits” was “handshakes.” (Id. at 124)

7. MRI of the right elbow was performed on November 21, 2016. (Id. at 176).

8. Claimant saw orthopedic surgeon Dr. Karl Larsen on December 7, 2016. Dr. Larsen reported, “…He is having persistent symptoms while he is working. It is painful for him to do gripping or lifting activities. He has intermittent popping about the elbow as well as intermittent numbness in the ulnar digits of the hand. He has had an MRI. He is here for discussion of additional treatment options.” (Id. at 37). Dr. Larsen reviewed the MRI and concluded, “…Mr. Meador has right elbow pain. He has what appears to be some type of traumatic aggravation of osteoarthritis possibly an injury to lateral ulnar collateral ligament and ulnar neuropathy likely related to his elbow effusion. I have recommended that we obtain electrodiagnostic studies to study his ulnar nerve.” (Claimant’s Exbs. at 38).

9. Dr. Larsen administered a corticosteroid injection on December 9, 2016. (Id. at 36).

10. Dr. Larsen saw Claimant on January 11, 2017 and reported, “…I saw Justin Meador today in followup for his right elbow traumatic aggravation of arthritis with ulnar neuropathy and lateral epicondylitis. The corticosteroid injection I performed last time relieved all of his pain symptoms. He still has some mild residual numbness and tingling but it is not severe and is less than it was before. His pain is starting to come back to some degree but it is nowhere near as bad as it was. He has improved motion but still cannot achieve full elbow extension…Right now, I think it remains to be seen how long the corticosteroid injection will last. If his symptoms return here over the next month or two, then I would advocate for repeat corticosteroid injection, possibly even with Dep-Medrol to see if we can get this to last longer. He is also going to keep an eye on his numbness and tingling. If it worsens, then I think he ought to consider ulnar nerve decompression or transposition…” (Id. at 33).

11. Dr. Michael Sparr performed electrodiagnostic testing of Claimant’s right upper extremity on January 19, 2017. Dr. Sparr concluded the testing was normal, but added, “…There are obvious abnormalities within the elbow. He may consider surgical intervention…” (Id. at 112).

12. Also on January 19, Claimant saw Dr. Jay Neubauer at CCOM Broadmoor. Dr. Neubauer noted, "…He continues to have both lateral and posterior elbow pain. Range of motion of the elbow is painful and he still does not have full extension. He has milder lateral elbow pain which is increased with repetitive gripping and touching the area…" (Id. at 69)

13. Claimant returned to Dr. Larsen on March 15, 2017 and the doctor noted Claimant was "…having persistent aching discomfort. He notices this when he bends his elbow. He cannot even drive his car to full distance to work without having to let go the steering wheel and shake his arm. His symptoms are combination of numbness in the ulnar side of his hand and aching discomfort in the elbow. He gets a lot of pain laterally especially if he tries to weightbear and twist on it. He has been able to continue in his job duties as a driver but is concerned about his ability to perform firefighter qualification which is coming up soon…" (Id. at 31). Dr. Larsen discussed surgical options but concluded, "…I still think we have not maximized the nonsurgical treatment and I recommend we go ahead and perform another elbow corticosteroid injection with a little bit of higher dose of steroid to see if we can get a more prolonged response…" Dr. Larsen administered another injection. (Id.)

14. On April 28, 2017 Dr. Larsen reported that, "…The corticosteroid injection we performed last time took several days to be effective but has given him very good pain relief…Mr. Meador is doing relatively well. It is unpredictable how long this injection will benefit him. As long as he is doing okay and can cope with it, that is probably the best answer. If for some reason he has persistent numbness and tingling and chooses to cope with this elbow pain which I thing (sic) would be a reasonable plan, then I think he probably would have to pursue treatment of his ulnar nerve to protect it and just work with the elbow arthritis until such point as he needs more aggressive treatment…He can have one more injection from my view, but again we are not going to achieve curative relief. We discussed the nature of corticosteroid injections and the limits on using corticosteroid injections. I do not think it is reasonable to consider 3 or 4 injections a year on a permanent basis as this is probably just going to lead to accelerated ligamentous and cartilage degeneration, so hopefully he will get a long period of relief from the last injection and we would not have to do anything…" (Id. at 29).

15. Claimant credibly testified that the two injections administered by Dr. Larsen gave good, but temporary, relief of the pain and swelling in his right elbow.

16. On July 11, 2017 Dr. Neubauer imposed temporary work restrictions; "…recommend no repetitive motions with R arm limit typing to less than 50%, limit work shifts to 2 days/week, limit lifting to 30 lbs." (Id. at 60). Up to this point, Claimant had consistently been released to regular duty work.

17. Claimant returned to Dr. Larsen on July 31, 2017 and the doctor noted, "…He is having persistent pain in his elbow. He is trying to return to work but cannot get his arm extended enough to appropriately handle the steering wheel. He does not have a lot of confidence and ability to use his elbow. He has been unable to work out because

of the persistent pain and popping posterolaterally. His numbness and tingling is not as bad as it was and really feels like he is not able to use his arm the way he wants to participate in a regular career as a firefighter. He is actually thinking about the potential that he might need to change to a different occupation…" (Id. at 26). On examination Dr. Larsen noted, "…He is quite tender over the radiocapitellar joint. I am able to feel popping and clicking consistent with crepitance and synovitis there both at pronosupination and attempted flexion and extension…" Regarding treatment options, Dr. Larsen noted, "…We could do one more corticosteroid injection but just for the couple of months benefit he might get, it may not be worthwhile. He would rather save that for later if he needs it. I think his decision point is just to see if he can change jobs and just live with his elbow as is or consider osteocapsular arthroplasty with arthroscopic debridement of the elbow joint and release of the capsule…" (Id.)

18. Claimant underwent a functional capacity evaluation ("FCE") on September 26, 2017. The examiner reported "…Grip tests indicate a 30% Right side deficit at position 2 when compared with the opposite hand, with less than 15% considered within normal limits." (Id. at 98). Claimant's overall level of effort during the FCE was deemed "reliable." (Id. at 100).

19. Claimant was examined by several physicians in conjunction with his claim for benefits from the Fire and Police Pension Association ("FPPA"). Dr. John McBride examined Claimant on October 4, 2017 and noted his complaints were; "…Right elbow pain. It is worse with lifting as well as with reaching, extension, and flexion of his elbow. His pain level was 3/10, but it goes up to 8/10 when he is attempting to reach, especially going overhead. He also has occasional numbness and tingling into his fingers mostly in the ulnar nerve distribution, but occasionally into his index finger." (Id. at 168). Dr. McBride concluded Claimant qualified for permanent occupational disability since Claimant was; "unable to lift, use right elbow fully to assist victim, perform CPR, fight fires, wear gear." (Id. at 174).

20. Dr. Sean Griggs examined Claimant on October 9, 2017 and noted, "…Strength on the right was limited due to pain." (Id. at 162). Dr. Griggs noted that, "…His EMG/nerve conduction study was negative for cubital tunnel syndrome; however, his physical examination is positive for this problem. This, too, is a problem that typically can be addressed and corrected surgically." (Id. at 163). Dr. Griggs opined Claimant qualified for temporary occupational disability even though "FCE at this time shows inability to work as Engineer." (Id. at 166). Dr. Griggs recommended; "He needs to have further evaluation as to the cause of this elbow pain and possible future treatment. (Id.)

21. Dr. Robert Rokicki examined Claimant on October 19, 2017. Dr. Rokicki reported, "…His chief complaint is right elbow pain, weakness of grip, an inability to lift or carry heavy objects, locking and clicking, swelling of the elbow, and numbness and tingling in the fourth and fifth fingers, which frequently awakens him at night." (Id. at 153). On examination, Dr. Rokicki noted "…Grip strength is diminished as is noted on his dynamometer testing…" (Id. at 156). Dr. Rokicki concluded, "…The specific duties

that he is incapable of doing are all related to firefighting. He is absolutely incapable of lifting heavy objects or anything that requires grip strength; essentially all the aspects of a firefighting job." (Id.) Dr. Rokicki recommended permanent occupational disability based on "…loss of grip strength, unable to lift heavy objects, marked limited motion." (Id. at 159).

22. Dr. Clarence Henke commented on November 15, 2017 that the FCE "…revealed profound weakness of right grip strength, light to medium lifting and carrying capabilities, and decreased range of motion in all planes." (Id. at 145). Dr. Henke recommended "…a treatment plan to include treatment by a hand physical therapist." (Id. at 151).

23. Claimant took a medical retirement from Respondent at the end of November, 2017.

24. Dr. Larsen met with Claimant on December 1, 2017 and noted, "…I would be very interested in hearing what kind of treatment any physician would like to recommend that is going to return Mr. Meador to the physical activities required in his duty as a firefighter. I would happily discuss these options with Mr. Meador and implement them if we agree that this was something that might benefit him. That being said my experiences over the past 15 years taking care of elbow conditions does not point to any such treatment that I am aware of on a routine basis and thus my interest in hearing other options…" (Id. at 124).

25. Dr. Neubauer placed Claimant at MMI on December 5, 2017 and issued a 5% upper extremity impairment rating, based solely on loss of range of motion. (Id. at 44-47).

26. Respondent filed a FAL consistent with Dr. Neubauer's findings on May 10, 2018. Claimant objected and requested a DIME.

27. Dr. Anjmun Sharma performed the DIME, according to the American Medical Association *Guides to the Evaluation of Permanent Impairment, 3rd Edition, Revised* (AMA Guides) on April 6, 2018. On physical examination Dr. Sharma noted, "…The grip strength was significantly reduced in the right side compared to the left side presumably because of the long flexors that could be impacted as a result of the traumatic arthritis. Overall, they do think that there is a significant impairment in the elbow and the physical examination findings certainly point to that as well objectively." (Id. at 13).

28. Dr. Sharma issued a 13% rating for loss of range of motion. He added, "…The patient does meet criteria for other disorders in the elbow, particularly reduction in grip strength. Referencing page 54, table 23 of the AMA Guides, the patient had a normal left hand at 50 kg of strength, the right hand had grip strength of 30 kg. This is divided by the normal hand, which is 50 kg and this case there is 20 divided by 50, which is 0.4 corresponding 40% strength index per page 54, table 23 corresponds to a

20% upper extremity impairment."[2] Dr. Sharma combined 13% for loss of range of motion with 20% for loss of grip strength to arrive at a total upper extremity rating of 30%. (Id. at 13).

29. Respondent applied for a hearing to challenge Dr. Sharma's impairment rating, in particular the grip strength element of his rating.

30. Dr. Sharma testified by deposition on July 6, 2018. He explained that he assigned 20 percent right upper extremity impairment for loss of grip strength in the right hand. According to Dr. Sharma he utilized a "Jamar dynamometer" (as is required by the AMA Guides) to measure Claimant's grip strength in both the injured and non-injured hand. He testified that he took three measurements from each hand, noting further that all three measurements from the same hand were consistent, i.e., "…they were all within 1 to 2 kilograms of each other." He then compared the readings from the affected right hand with the readings with of the left hand, acting as the baseline, to carry forward the impairment rating formula referenced at ¶ 28 above to arrive at the 20 percent impairment. According to Dr. Sharma, the grip strength measurements were "valid and reliable." (Id. at pg. 18, ll. 1-5).

31. The AMA Guides provide that, "Impairment ratings for loss of strength of the upper extremity due to various disorders of the peripheral or central nervous system are derived according to the guidelines described in Sections 3.1h and 4.1b[3] and to avoid duplication in the impairment, separate strength impairment values are not applied." (Claimant's Exbs. pg. 184).

32. Similarly, the AMA Guides also provide that "[h]and strength and its measurement are affected in the presence of amputations and loss of motion of the digits, and by disorders of bones, joints, and musculotendinous units" and that impairment associated with the aforementioned conditions are rated without separate strength values given. Indeed, AMA Guides provide, with emphasis, that "[i]t must be stressed that, in general, grip and pinch measurements are functional tests and are not to be used for evaluating impairment." However, the AMA Guides also provide that "if loss of strength is felt to represent an additional impairing factor not already taken into account, this may be measured and the loss rated…" (Claimant's Exbs. pg. 185).

33. The ALJ interprets the AMA Guides to provide that regardless of whether the primary condition to be rated is neurologic or as in this case, the probable result of a

[2] Based upon the evidence presented, the ALJ finds that Dr. Sharma properly applied the *AMA Guides*' formula for calculating loss of grip strength; normal strength [50] minus abnormal strength [30] = 20, then divide 20 by normal strength [50] to arrive at 0.4, or 40%. A strength index of 40% corresponds to 20% impairment of the upper extremity. (See Claimant's Exbs. pg. 186 for the formula, and Table 53 for determination of impairment).

[3] Pursuant to *Mendicelli v. Nor-Mar, Inc/Burger King*, W.C. No. 4-785-225 (ICAO 10/6/10), the ALJ takes administrative notice of the fact that Section 3.1h (pg. 39 of Chapter 3 of the AMA Guides) concerns "Impairment of the Upper Extremity Due to Peripheral Nervous System Disorders," and Section 4.1b (pg. 106 of Chapter 4 of the AMA Guides) concerns impairment ratings of "The Spinal Cord."

degenerative arthritic (bone/joint) condition affecting the musculo-tendinous units, the rating physician is given the discretion to rate loss of strength secondarily if this loss is felt to represent an additional impairing factor not otherwise accounted for by the rating associated with the primary impairing condition. In this case, Dr. Sharma was asked to explain why he elected to rate Claimant's loss of grip strength during his deposition. In doing so, the following colloquy took place;

> *Q: So, this would be the second paragraph. It says: It must be stressed that, in general, grip strength measurements are functional tests, and they are not to be used for evaluating impairment. And why did you choose to do that in this case?*
>
> *A: Yeah, that's a very good question, one that I had anticipated. I took into consideration that, while range of motion, in general, was used for impairment rating, that, there was a significant discrepancy in his ability to grip with his right. Now, I understand that grip strength, functionally, has multiple contributing factors -- forearm strength/tone -- but, because of the fact that he had had an elbow injury, that he had traumatic arthritis, that there was some discrepancy or some, you know, range of motion deficit -- that was the reason why I felt that that -- the grip strength was an accurate assessment of his functional ability, long-term. And so I felt that it would be important to include that, to provide a fair and balanced impairment rating for him, only because he -- his arm had been injured.*
>
> *He does have traumatic arthritis. I think, long-term, we had talked about in the report that, you know, he would need some type of definitive surgery in the future -- specifically, an elbow replacement -- but he and I had talked that that's probably not the best route with his age being so young at this point in time.*
>
> *And so, my -- my whole reason for including the grip strength -- was just to get an accurate assessment of what I thought his functional ability was, understanding that range of motion may not necessarily be enough to take into consideration a true impairment that he had in his upper arm.* (Depo. tr. pg. 18, l. 13 – pg. 20, l. 3).

34. Respondent commissioned a "medical record review" by Dr. William Ciccone. Dr. Ciccone did not examine Claimant. Rather, he reviewed Claimant's medical records and authored a report dated August 8, 2018. In his report, Dr. Ciccone opined, "…I disagree with Dr. Sharma's use of grip strength in his impairment rating as degenerative change in the elbow is not associated with a loss of grip strength and according to the Guides the use of strength in impairment is limited to that associated with nerve injury." (Respondent's Exbs. pg. 71). Dr. Ciccone further opined that, "…Within the AMA Guides the only times that the use of strength for impairment is discussed is in the

context of nerve injury. This claimant had no nerve injury that was work related. In fact, he had EMG studies that confirmed no nerve involvement and Dr. Sharma noted no muscle atrophy…" (Id.)

35. Based upon the evidence presented, the ALJ finds that Dr. Sharma credibly explained his rationale for rating grip strength. Indeed, he clarified that that the basis for "*including the grip strength -- was just to get an accurate assessment of what I thought his functional ability was, understanding that range of motion may not necessarily be enough to take into consideration a true impairment that he had in his upper arm."* (Depo. tr. pg. 18, l. 13 – pg. 20, l. 3). In this case, the evidence presented persuades the ALJ that Dr. Sharma correctly applied the AMA Guides in exercising his discretion to include Claimant's grip strength loss as part of his overall impairment rating. Consequently, the ALJ finds Dr. Sharma's testimony credible, persuasive and in keeping with the AMA Guides.

36. Dr. Ciccone's opinions to the contrary are not persuasive. The ALJ finds the opinions of Dr. Ciccone to constitute a mere difference of opinion as to whether it is appropriate to rate the loss of strength associated with and caused by Claimant's primary condition in this case. As found, Dr. Sharma's opinions are more persuasive than Dr. Ciccone's and in keeping with the AMA Guides. Accordingly, Respondents have failed to meet their burden of proving, by a preponderance of the evidence, that Dr. Sharma erred in including an impairment for Claimant's loss of strength in this case.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As found here, the opinions of Dr. Sharma regarding Claimant's grip strength impairment rating are more persuasive than the contrary opinions of Dr. Ciccone.

Overcoming the DIME Physician's Scheduled Impairment Rating

E. While a DIME physician's opinions are entitled to special weight on issues of MMI and whole person impairment, they are not entitled to any special weight when it comes to extremity ratings. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. APP.1998) (DIME provisions do not apply to the rating of scheduled injuries); see also, *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Wagoner v. City of Colorado Springs*, W.C. No. 4-817-985-03 (Oct. 21, 2013) (no presumptive weight afforded DIME physician concerning scheduled injuries), *aff'd Wagoner v. Industrial Claim Appeals Office*, (Colo. App. No. 13CA1983, Oct. 23, 2014) (not published pursuant to C.A.R. 35(e)). Consequently, for extremity ratings, a DIME opinion merely has to be rebutted by a preponderance of the evidence to be overcome.

F. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. § 8-42-107(8)(c), C.R.S.; *Wilson v. ICAO,* 81 P.3d 1117, 1118 (Colo. App. 2003). Deviations from the *AMA Guides* do not necessarily mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (Nov. 13, 2006). Rather, the ALJ must consider whether the deviation casts substantial doubt on the validity of that portion of the rating. *See Sutton v. Alpen Construction*, W.C. No. 4-225-415 (Apr. 1, 1997). Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *See In Re Goffinett,* W.C. No. 4-677-750 (Apr. 16, 2008).

G. Respondents assert that the evidence, including the opinions expressed by Dr. Ciccone, supports their contention that Dr. Sharma erred when he elected to provide a rating for loss of strength in this case. As found, the ALJ is not persuaded. Here, the ALJ concludes that Dr. Sharma properly exercised his discretion to include a loss of strength rating as part of Claimant's impairment based on the impact that his traumatic arthritis was having on the musculo-tendinous units, specifically the long flexors of the right hand, forearm and elbow. The evidence presented persuades the ALJ that Dr. Sharma did not believe that rating Claimant solely for range of motion loss adequately addressed the functional impairment of the upper extremity. Consequently, he chose to measure and rate Claimant's loss of strength, as provided for in the AMA Guides, because this impairing factor was not already taken into account by Claimant's documented range of motion loss. While Dr. Sharma's decision to rate loss of strength may not be typical or even preferred, the ALJ is not convinced that he deviated from the AMA Guides in this case, since the evidence presented supports Claimant's profound loss of strength and the AMA Guides clearly note that loss of strength can be measured and rated if it is "felt to represent an additional impairing factor not already taken into account" as explained by Dr. Sharma in this case. Contrary to Respondent's assertion, the ALJ concludes that Dr. Sharma clearly delineated the medical justification for his loss of strength rating. Accordingly, the ALJ is unable to conclude that Dr. Sharma erred in rating Claimant's loss of strength as part of his DIME. Based upon the persuasive evidence presented, the ALJ concludes that Respondents have failed in their effort to overcome Dr. Sharma's grip strength rating in this case.

ORDER

It is therefore ordered that:

1. Respondent's request to set aside that portion of Dr. Sharma's rating assigning impairment for loss of strength is denied and dismissed.

2. Respondent shall pay Claimant permanent partial disability benefits consistent with the 30% upper extremity rating issued Dr. Sharma.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 14, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-078-332-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 3, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 10/3/18, Courtroom 3, beginning at 8:30 AM, and ending at 11:45 AM).

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection. Respondent's objections to Exhibits 5, 6 and 16 were sustained and the Exhibits were refused. Respondents' Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ took the matter under advisement. On October 25, 2018, the ALJ's Summary Order was mailed to the parties. On November 2, 2018, the self-represented Claimant mailed and filed a Request for Specific Findings of Fact and Conclusions of Law. Pursuant to the Claimant's Request, Full Findings of Fact, Conclusions of Law and Order are hereby issued.

ISSUES

The issues to be determined by this decision concern compensability of an alleged back injury of May 29, 2018, and medical benefits.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant alleges a work injury to her low back on May 29, 2018, at which time she was working for the Employer.

2. Medical records reveal that the Claimant has a long history of low back issues for which she received chiropractic and massage therapy:

- In a letter from her personal chiropractor, Moyer Total Wellness, Dr. Janea L. Rather, D.C., dated January 12, 2016, the Claimant was noted to have joint restrictions in the lumbar spine and sacroiliac joints, mild injury to her hips and low back, and had been diagnosed with mild lumbar joint dysfunction with myofascial pain syndrome of the low back musculature (Respondent's Exhibit B, pp. 10-12).
- On January 20, 2016, the Claimant reported trouble sitting and standing, which bothered her lower and upper back. (*See Id*. at p. 13).
- According to the letter authored by the Claimant's chiropractor, Dr. Randy Moyer, D.C., on August 20, 2018, the Claimant's treated for two motor vehicle accidents in 2015, and it lasted until April 2016 at which point the Claimant indicated that she was "pain free". (Respondent's Exhibit 9).
- Contrary to Chiropractic Dr. Moyer's opinion, medical records continue to show that the Claimant had low back complaints after April 2016. On July 19, 2016, she reported that her low back was "tight." (Respondent's Exhibit B, p. 17).

- On August 8, 2016, treatment the was focused on the Claimant's back, which was "tight," and it was noted that Claimant had just traveled. (*Id*. at p. 18).
- The Claimant reported low back pain on October 4, 2016 (*Id*. at p. 19).
- The Claimant reported her low back was "tight but better" and that she was going out of town on October 18, 2016 (*Id*. at p. 20).
- On March 31, 2017, the Claimant presented to her chiropractor for a "tune up". She denied any new injury or trauma since her last visit. At that time, the Claimant was assessed with "segmental and somatic dysfunction of lumbar region" and treatment was performed in her lumbar region (*Id*. at p. 22).
- The Claimant's massage therapist noted, "daily use of foam roller recommended for low back" for a tight back (*Id*. at p. 23).
- On May 5, 2017, the Claimant's massage therapist recommended another massage "needed in 3 weeks after long flight back home to Denver" (*Id*. at p. 24).
- The Claimant reported a "stiff and achy" low back on June 7, 2017. She was again assessed with "segmental and somatic dysfunction of lumbar region" by the chiropractor (*Id*. at p. 25).
- On July 5, 2017, the Claimant reported to her chiropractor that her low back was "doing 'ok, but needs a little tune up.'" She was once again assessed with "segmental and somatic dysfunction of lumbar region" (*Id*. at p. 27).
- On July 17, 2017, the Claimant's massage therapist noted "hypertension in area of concern with more noticeable HT in low back" (*Id*. at p. 29).
- On September 12, 2017, the Claimant reported "feeling tight in shoulders and lower back from traveling". Treatment was focused on her lower back (*Id*. at p. 31).
- On December 8, 2017, the Claimant reported that she felt "tight everywhere from sitting". She was once again assessed with segmental and somatic dysfunction of lumbar region". Chiropractic treatment was performed in the lumbar area (*Id*. at p. 34).
- On May 16, 2018, two weeks before the alleged work injury, the Claimant's massage therapist noted her "left low back still tight but improved since start of session". It was noted "another massage needed in 2-3 weeks" or "sooner if low back issue persists or worsens" (*Id*. at p. 37).

3. At hearing, the Claimant testified that she had just returned from a trip to the East Coast two days before.

4. According to the Claimant, her Employer was moving from one office building to another. Due to the move, employees, including the Claimant, were required to move their personal belongings to the new building.

5. The Claimant's first day in the new building was May 29, 2018. As she was lifting a box weighing approximately 4 lbs., containing her personal belongings, out of the trunk of her personal vehicle she felt a "tweak" in her low back (Respondent's Exhibit A, p. 1).

6. According to the Claimant, she weighed this same box of items and it weighed less than 4 lbs.

7. The Claimant reported the incident to her Employer and received a designated medical provider list on May 29, 2018.

8. The Claimant also testified that she scheduled an appointment to see her personal chiropractor the afternoon of May 29, 2018.

9. The Claimant further testified she was able to continue to work on May 29, 2018-- after the incident.

Medical

10. On May 30, 2018, the Claimant presented to the authorized treating provider (ATP), Midtown Occupational Health Services, for evaluation. The Claimant reported that she was moving offices and had to move some of her personal effects in boxes. She stated that she was moving one of the light boxes from her car to the new office when the alleged injury occurred. She was in a bent over position picking the box up when she felt pain in her lower back. The Claimant reported a history of scoliosis, but did not disclose her other low back issues (*See* Respondent's Exhibit E).

11. The Claimant was diagnosed with a lumbar strain and released to return to full duty work without restrictions (Respondent's Exhibit E, p. 62). Based on the Claimant's lengthy history of low back problems, the ALJ finds that the diagnosed lumber strain is attributable to the natural progression of her long-standing back problems; and, it did **not** amount to an acceleration or aggravation of her underlying back issues.

12. The Claimant returned to work and continued to work her normal job duties up through the date of hearing.

13. Lawrence Cedillo, D.O., saw the Claimant on May 30, 2018. He did not render an opinion concerning whether the May 29, 2018 incident aggravated or accelerated the Claimant's long-standing back problems.

14. The ALJ finds that the Claimant did not report her long-standing history of low back issues, for which she had been treating as recently as two weeks prior to the work incident, to either PAC (Certified Physician's Assistant) Kraus or Dr. Cedillo at Midtown.

Independent Medical Examination (IME) by Lawrence Lesnak, D.O.

15. Dr. Lesnak performed an IME of the Claimant on August 27, 2018 and issued a report. Dr. Lesnak also testified at the hearing and was accepted as a Level II Accredited physician, specializing in physical medicine and rehabilitation.

16. Dr. Lesnak reviewed the Claimant's medical records and performed a physical examination of the Claimant. He noted that the Claimant only reported a history of neck injury from prior motor vehicle accidents. He also noted that since May 2016, the Claimant had been receiving chiropractic treatments 1-3 times per month. He further noted that a medical report, dated May 17, 2018, indicated that the Claimant was going on vacation "tomorrow" and "moving offices – stressful transitions. Not focusing well. Not sleeping well" (Respondent's Exhibit A).

17. Dr. Lesnak testified that the Claimant's report to PAC Kraus on May 30, 2018 was consistent with her low back complaints, prior to the alleged work incident.

18. According to Dr. Lesnak, following the Claimant's May 30, 2018 evaluation with PAC Kraus, medical records indicate that her next treatment visit with anyone was not until June 26, 2018, at which point she saw her chiropractor at Moyer Total Wellness. Dr. Lesnak was of the opinion that this was more consistent with her "wellness" visits and treatment for an acute injury.

19. Dr. Lesnak was of the opinion that, while there may have been an incident, there was no evidence of any specific injury occurring on May 29, 2018. He further stated there was "no medical evidence to support that the patient had an actual injurious event occur on 05/29/18." He was of the opinion that without evidence of a specific injury related to work activities, no medical evaluations or treatments were reasonably necessary or causally related to the reported incident (Respondent's Exhibit A, p. 8).

20. The ALJ finds Dr. Lesnak's medical opinion that there was "no medical evidence to support that the patient had an actual injurious event occur on 05/29/18" to mean that the described May 29, 2018 incident of lifting a box weighing less than 4 lbs. was not sufficient to cause a compensable injury.

21. The ALJ credits Dr. Lesnak's opinion that the May 29, 2018 incident did not result in the need for medical treatment. The ALJ finds that the Claimant's symptoms and treatment following the May 29, 2018 incident were more likely the

cause of the natural progression of the Claimant's long-standing pre-existing back issues.

22. Further, the ALJ finds the fact that the Claimant returned to her regular employment immediately following the incident, as such, she suffered no disability due to the May 29, 2018 incident.

Ultimate Findings

23. The ALJ finds the opinions of Dr. Lesnak credible and more persuasive than any medical opinion or lay testimony (The Claimant's testimony) to the contrary. As such, the ALJ finds that **no** compensable injury occurred as the result of the May 29, 2018 incident.

24. The Claimant's visit to Midtown on May 30, 201`8, was for the purpose of an evaluation not for medical treatment.

25. Between conflicting opinions and testimony, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Lesnak and to reject any opinions to the contrary.

26. The ALJ finds that the Claimant has failed to establish, by preponderant evidence that she sustained a compensable work-related injury on May 29, 2018.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply

to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Lesnak were credible and more persuasive than any medical opinions or lay testimony (The Claimant's testimony) to the contrary. As such, Dr. Lesnak's opinions support the proposition that **no** compensable injury occurred as the result of the May 29, 2018 incident.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions and testimony, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Lesnak and to reject any opinions to the contrary.

Compensability/Sufficiency

c. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, the light box lifting event of May 29, 2018 was neither disabling nor did it require medical treatment. As found, the Claimant's visit to Midtown on May 30, 201`8, was for the purpose of an evaluation not medical treatment.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain her burden on compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this 14th day of November 2018.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of November 2018, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered permanent impairment due to his work related injury.

II. Whether Claimant established by a preponderance of the evidence that his scheduled impairment rating should be converted to a whole person rating.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant suffered an admitted work-related injury while working for Employer on November 8, 2016. Claimant suffered an injury to his bilateral lower extremities when a number of the wheels of his 18-wheeler semi-truck rolled over and crushed his legs. Claimant was rushed to Parker Adventist Hospital for treatment for his crushed lower legs, where he was diagnosed with a distal tibial fracture and medial malleolar fracture of the left distal tibia. **Ex. 1:7**. Claimant also had extensive contusions across his lower extremities where the semi-truck ran over him. **Ex. 1:8**. Although Claimant did not have surgery due to his fractured tibia, he did go on to develop vascular problems, as well as other problems, due to the crush injury to his lower extremities.

2. Claimant was eventually discharged to Spalding Rehabilitation Hospital on November 10, 2016. **Ex. 1:8**. Claimant stayed at the Rehabilitation Hospital until November 25, 2016 and began receiving home nursing care. **Ex. 1:8**.

3. Claimant began treating with Midtown Occupational Clinic and Dr. Raschbacher on November 30, 2016. **Ex. 1:9**. Claimant also followed up with Dr. Thomas McDonough, M.D. for an orthopedic evaluation on December 6, 2016. **Ex. 1:9**. Dr. McDonough diagnosed Claimant with a metatarsal fracture on the left side. **Ex. 1:9**. Dr. McDonough declined to pursue surgery as x-rays showed that Claimant's fracture was healing. **Ex. 1:9**.

4. Claimant returned to Midtown Occupational Medicine on December 15, 2016 after his nurse case manager noted significant swelling in the left leg. **Ex. 1:9**. Dr. Lon Noel, M.D. recommended an ultrasound study of the left lower extremity, which was performed that day and showed no evidence of deep vein thrombosis. **Ex. 1:9**.

5. Claimant presented to Dr. Raschbacher on January 2, 2017. Dr. Raschbacher noted that Claimant had a non-infected appearing eschar on his left ankle and left knee. **Ex. 1:10**.

6. Claimant underwent another imaging study on January 6, 2017 of the lower extremities. The ultrasound again showed no DVT, but did show fluid collection in the left upper thigh. **Ex. 1:10**.

7. Claimant had his left upper thigh drained on February 2, 2017. **Ex. 1:10**. However, Claimant also complained of swelling in his left lower leg in a different area. **Ex. 1:10**. He continued to have fluid drained from his left lower extremity throughout early 2017. **Ex. 1:10-11**.

8. Claimant saw Dr. Braden Reiter, M.D. on March 10, 2017. Dr. Reiter noted Claimant's continued issues with swelling on the left side of his chest and tenderness around the left breast. **Ex. 1:12**.

9. Claimant followed up with Dr. Jeffrey Harr, M.D. on March 10, 2017. Dr. Harr performed a neurological examination which was "basically normal." **Ex. 1:12**. There was some left thigh swelling but otherwise Claimant's lower extremities did not appear deformed. **Ex. 1:12**. Dr. Harr, however, was concerned about potential venous insufficiency. **Ex. 1:12**.

10. Claimant underwent an EMG of the bilateral lower extremities, along with a bone scan. The bone scan noted moderately increased activity along the right ankle and moderate left mid-foot activity, but no evidence of a fracture. **Ex. 1:13**.

11. Claimant saw an infectious disease consultant Dr. Wendy Gill, M.D. on April 20, 2017. Dr. Gill diagnosed Claimant with left leg cellulitis - of his skin - and prescribed antibiotics. **Ex. H:128**. A follow up visit on May 3, 2017, Dr. Gill suggested Claimant might have lymphedema and noted that his cellulitis had improved. **Ex. H:130**. She recommended a course of doxycycline, an antibiotic. **Ex. H:131**.

12. Claimant presented to RIA Endovascular on July 13, 2017 to see William Grande, M.D. for an evaluation of his venous insufficiency. **Ex. J:144**. Dr. Grande diagnosed Claimant with class V venous disease related to, "a combination of benign central venous obstruction, related to his weight and superficial venous insufficiency." **Ex. J:144**. He recommended an ablation of both lower great saphenous veins. **Ex. J:145**.

13. Due to his work injury, Claimant underwent a radiofrequency ablation of the veins of both lower extremities on August 9, 2017. **Ex. J:151.**

14. Claimant continued to see Dr. Reiter and Dr. Grande for post-ablation vein care due to his work injury. He was eventually placed at MMI on November 16, 2017 by Dr. Reiter, who returned Claimant to full duty without permanent impairment. **Ex. E:58**. Dr. Reiter stated that Claimant did have a "resolving rash on both calves" but that there was no erythema or discharge. **Ex. E:58**. There was, however, swelling in both calves. **Ex. E:58.**

15. On January 29, 2018, Claimant was seen at the Medical Center of Aurora for a fever. **Ex. 1:17**. Claimant was noted as having a right lower extremity erythema with scabbing of the right lower extremity. **Ex. 1:17**. He was diagnosed as suffering from popliteal deep vein thrombosis ("DVT") and discharged with another round of antibiotics and a blood thinner Coumadin. **Ex. 1:17**.

16. Claimant returned to Dr. Reiter on February 12, 2018. Claimant reported that his leg was doing better. **Ex. D:60**. There was, however, swelling in the calves. **Ex. D:61**. At that time, Dr. Reiter again placed Claimant at MMI with no permanent impairment, and no restrictions. **Ex. D:61**. He did, however, recommend maintenance medications and for Claimant to follow up with his vascular specialist due to his work related vascular problems. **Ex. D:61.**

17. Claimant obtained an Independent Medical Evaluation with Dr. John Hughes, M.D. on March 8, 2018. **Ex. 2**. Dr. Hughes assessed Claimant with a work-related bilateral lower extremity crush injury, fractures of the left metatarsal, diffuse right lower extremity soft tissue crush with chronic DVT and venous insufficiency, and left thigh seroma due to the same. **Ex. 2:24**.

18. Dr. Hughes also assessed Claimant's skin. Dr. Hughes noted the numerous problems with Claimant's skin. He noted erythema, excoriation and scabs on the skin of both lower extremities. **Ex. 2:24**. Finally, Dr. Hughes noted that Claimant weighed 325 pounds compared to 310 pounds measured by Dr. Lesnak, which may be the result of fluid overload "in the setting of tense lower extremity edema." **Ex. 2:24**.

19. Dr. Hughes stated that Claimant was not at MMI for his work related conditions on the basis that Claimant has ongoing edema and probable systemic fluid overload. **Ex. 2:24**. Further, Dr. Hughes was concerned about an occult bacterial infection as well as findings suggestive of a nerve injury to one of Claimant's lower extremities. **Ex. 2:24**.

20. Dr. Hughes provisionally rated Claimant's bilateral lower extremities using Table 52, *Impairment of the Lower Extremity Due to Peripheral Vascular Disease*, from the *AMA Guide to the Evaluation of Permanent Impairment, 3rd Edition (Revised),* that would place Claimant's impairment rating in the 40-65% scheduled rating for each lower extremity for "marked edema" pursuant to Table 52. **Ex. 2:25**.

21. Dr. Hughes also stated that due to Claimant's work injuries, which included injuries to his vascular system due to the crush injury, Claimant should be restricted from standing and walking to no more than 2 hours in an 8-hour workday. **Ex. 2:25.** He also concluded that although Claimant would appear to be able to continue working as a truck driver, Claimant may have functional problems performing all aspects of his job such as chaining up the tires for mountain passes in winter conditions and walking or standing for more than 2-hours in an 8-hour workday. **Ex. 2: 25.**

22. The ALJ credits Dr. Hughes' opinions and finds them persuasive in finding that Claimant's injury caused a vascular injury and the vascular injury has resulted in functional impairment that impacts Claimant's vascular system and entire body, i.e., fluid overload, as well as his skin and that Claimant's injury and resulting functional impairment restricts Claimant from performing all aspects of his job, such as chaining up his truck tires during the winter and walking and standing for more than 2-hours in an 8-hour workday, etc.

23. Claimant also underwent a Division IME examination with Dr. Stanley Ginsburg, M.D. on March 29, 2018. **Ex. 1**. In order to make sure he properly evaluated the case, Dr. Ginsburg asked Claimant to return for an additional visit, at no charge, so he could clarify some historical points and re-examine Claimant's lower extremities and properly analyze Claimant's case and determine whether Claimant was at MMI and the extent of his impairment.

24. Dr. Ginsburg noted that Claimant filled out a form in his office stating that his legs were his problem. **Ex. 1:7**. Claimant characterized his problems as being of a "moderate severity" with itching, burning, pain, and swelling. **Ex. 1:7**. Dr. Ginsburg also examined Claimant's lower extremities.

25. Dr. Ginsburg also observed numerous problems with Claimant's skin which developed due to Claimant's work injuries. In addition to the marked edema of Claimant's lower extremities, Dr. Ginsburg noted that Claimant's skin had developed:

> [A] punctuate rash, some of which seems made up of small scab-like processes, and this rash is present bilaterally, primarily below the knees, but on the left it extends to the knee and above. There are scabs, however, of larger size on the right side in the distal right lower extremity below-the-knee and particularly just above the lateral malleolus, but more prominently so on the right and more prominently laterally. For the most part, skin above the knees seems more normal. There is a red coloring below-the-knee, which is more prominent on the right but is present on the left.

26. Dr. Ginsburg also reviewed the medical documentation. After evaluating Claimant on two occasions and reviewing Claimant's medical records, he agreed with Dr. Reiter that Claimant had reached MMI as of February 2, 2018. **Ex. D:21**. However, he disagreed with Dr. Reiter that Claimant did not have permanent impairment. Rather, Dr. Ginsburg opined that Claimant's bilateral lower extremities should be rated pursuant to the *AMA Guides* and Table 52, *Impairment of the Lower Extremity Due to Peripheral Vascular Disease*, due to the vascular injury that was caused by the crushing of his legs. Dr. Ginsburg reasoned that, "The patient does not use elastic supports, insofar as I know. I am not certain if this would be possible in any event, but I would classify this as 65% in each lower extremity" due to "marked edema," which was caused by the crush injury to Claimant's lower extremities and resulted in venous insufficiency. Therefore, Dr. Ginsburg provided Claimant a 65% lower extremity impairment rating for each lower extremity, which converted to 26% whole person impairment rating for each lower extremity and combined to a 45% whole person impairment rating. **Ex. 1 and D**.

27. Respondents obtained a records review from Dr. John Sanidas, M.D. on August 8, 2018. **Ex. C**. Dr. Sanidas did not examine Claimant's legs. **Ex. C.** He opined that he agreed with Dr. Ginsburg's Division IME Opinion that Claimant had reached MMI as of February 12, 2018. **Ex. C:18**. However, even though it does

not appear he reviewed any photographs of Claimant's legs in order to determine the extent of edema and skin problems, Dr. Sanidas disagreed with Dr. Ginsburg's scheduled impairment rating. Specifically, he agreed with the use of the *AMA Guide* and Table 52, *Impairment of the Lower Extremity Due to Peripheral Vascular Disease*, but disagreed with Dr. Ginsburg's assessment of a Class III impairment based on "marked" edema. **Ex. C:18**. Instead, Dr. Sanidas would have assessed a Class II impairment on the basis that Claimant experienced persistent edema of a "moderate" degree incompletely controlled by his elastic supports. **Ex. C:18**. Further, Dr. Sanidas noted that while Claimant did not have amputations he did have vascular disease which caused ulcers, which had healed at some point. **Ex. C:18**. Again, Dr. Sanidas disputed the classification of Claimant's edema as "marked," even though he could not see and evaluate the extent of Claimant's edema.

28. At hearing Claimant testified that he had suffered bilateral crush injuries to his lower extremities. Claimant testified he did not have any problems with his legs prior to the accident or any swelling or edema prior to the accident. But, after the accident, he developed swelling in both of his lower extremities, along with periodic ulcers and problems with his skin. Consistent with Dr. Hughes' concern of fluid overload, Claimant also testified that he felt his whole body was swelling. Claimant also testified that he experiences skin problems which includes flakiness and itching. He also testified that his skin continues to break open and bleed.

29. At hearing, Claimant showed his bilateral lower extremities to the ALJ and to Dr. Sanidas, who was present. Claimant's legs were very swollen. Moreover, Claimant's skin on his lower extremities looked severely impaired. His skin was red, flakey, dry, inflamed, and was very irritated. His skin also had numerous scabs, some of which looked like they had recently bled.

30. In order to show the condition of his legs and skin to the ALJ, Claimant had to get up from the witness stand and walk around the witness stand to appear in front of the ALJ. The ALJ was able to observe how Claimant walked due to the vascular insufficiency which has caused problems with his legs, skin, and ability to regulate his bodily fluid as described by Dr. Hughes and Claiamant. The ALJ noted that Claimant walked and carried himself in a manner that was impaired and in a way that extended beyond his lower extremities. In other words, Claimant's vascular insufficiency has impacted Claimant's overall functioning and movement of his entire body and caused more than just an altered gait or limp. While walking, Claimant's irregular body movement indicated that his overall body movement was labored and limited by pain, swelling, and overall discomfort.

31. The ALJ also noticed the extreme discomfort and despair exhibited by Claimant when he walked and as he pulled up each pant leg to show the swelling of his legs and his extensive skin problems.

32. Dr. Sanidas testified on behalf of Respondents at hearing. He reiterated his position that Claimant should have received a scheduled impairment rating for

his bilateral lower extremities. However, he disagreed regarding the classification of that impairment on Table 52. Specifically, he stated that Claimant's edema was "moderate" instead of "marked." He further stressed that Class 2 included "vascular damage as evidenced by a sign, such as that of… a healed ulcer." In his assessment, Claimant's legs had healed ulcers rather than superficial ulceration as he noted were indicated in a section of Class 3 of the AMA Guides. Therefore, he would have assessed a 35% lower extremity rating pursuant to the maximum value in Class 2 for each lower extremity.

33. Dr. Sanidas addressed Claimant's contention that his "whole body was swelling." Dr. Sanidas opined that whole body swelling was not consistent with Claimant's peripheral vascular disease or with the work injury generally. However, Dr. Sanidas did not explain the medical basis for such a conclusion.

34. On cross examination Dr. Sanidas admitted that his "mental picture" of Claimant's legs differed from his actual presentation in court. Dr. Sanidas had never before examined Claimant's legs. However, even after viewing Claimant's legs he maintained that Class 2 was appropriate on the basis that Claimant had healed ulcers rather than superficial ulcerations as required in Class 3. Therefore, he maintained his position that a 35% scheduled rating was appropriate for each lower extremity.

35. Braden Reiter, M.D. was Claimant's primary treating physician. Respondents took the post-hearing deposition of Dr. Reiter on September 26, 2018. Dr. Reiter explained that he did not give an impairment rating to Claimant on February 12, 2018 on the basis that Claimant did not have any impairment or limitations due to the fractures of his feet and ankle. **Reiter Depo. Pg. 6, ll. 21-25**.

36. Dr. Reiter explained that while there was swelling of Claimant's legs and "excoriations" where Claimant had scratched his legs, this was not something that required any acute treatment. **Reiter Depo. Pg. 7, ll. 5-14**. Dr. Reiter related Claimant's continued swelling to his morbid obesity as well as his venous insufficiency. **Reiter Depo. Pg. 7, ll. 15-25.**

37. Dr. Reiter stated that he did not use Table 52, *Impairment of the Lower Extremity Due to Peripheral Vascular Disease,* of the *AMA Guides* on the basis that he could not relate all of Claimant's peripheral vascular disease to the work injury. **Reiter Depo. Pg. 10, ll. 1-15**.

38. However, as stated below, Dr. Reiter's testimony generally supported the DIME physician's conclusion that an impairment rating was warranted and the functional impairment of Claimant's vascular system and skin. Dr. Reiter's post-hearing deposition testimony included the following:

    - When asked if Mr. Gregory had severe bilateral edema in his legs during the course of treatment and up through the point of MMI, Dr. Reiter conceded "yes, I did see it at times where it was – – I would say it was severe…" **Reiter Depo. Pg. 15, ll. 16-21**.
    - As for whether claimant's edema would fall under Class 2 or class 3, Dr. Reiter testified "I could see how he would give him a class 3 rating… The

good days I saw him, you know Class 2 would have been appropriate. So it's – – it's a hard thing to say.… They kind of fluctuated up and down." **Reiter Depo. Pg. 13, ll. 10-18.**

- Dr. Reiter testified: "In reading the other physicians' evaluations ..., I can see where they would bring up ... the chart with the needing the peripheral vascular disease impairment due to his ongoing swelling and his having had the venous ligations done. So I guess I could say that would probably be something that I would think could be added to this – – to give him impairment" **Reiter Depo. Pg. 16, ll. 11-20.**

39. Dr. Reiter also explained how the vascular injury suffered by Claimant has also resulted in the functional impairment of Claimant's skin. Dr. Reiter testified that Claimant's stasis dermatitis, which Dr. DeVito diagnosed in June of 2017 (due to venous insufficiency) and which was also diagnosed by Dr. Heinz in July of 2017, is a result of the blood not flowing properly through Claimant's arteries. He further explained that this abnormal blood flow causes abnormal pressure which in turn causes Claimant's skin to not function properly and break down. **Ex 2. Pg. 22; Reiter Depo. Pg. 12.** Therefore, the functional impairment of the skin results in ulcers, excoriations, itching, burning, and bleeding, etc.

40. Regarding Claimant's report of "whole body swelling" at hearing and to Dr. Hughes, Dr. Reiter opined that he was not aware of that complaint during his treatment of Claimant. **Reiter Depo. Pg. 14, ll. 1-11.** He also stated that based on his knowledge he did not think venous insufficiency or peripheral vascular disease were consistent with Claimant's reports of whole body swelling. However, he also testified that he is not a vascular specialist. **Reiter Depo. Pg. 14, ll. 12-16; Pg. 10, ll. 19-20.**

41. At hearing Claimant's legs were observed and they were extremely swollen, red, dry, flakey, and covered with scabs. Whether Claimant's legs were "moderately" swollen per Class 2 or "markedly" swollen per Class 3 is a medical determination. After viewing Claimant's legs, the ALJ finds that Dr. Ginsburg's and Dr. Hughes' opinions that Claimant suffered from "marked" edema – in Class 3 – is credible and persuasive and consistent with the medical evidence and what the ALJ observed at hearing.

42. Claimant also credibly testified at hearing that the injury has resulted in the following functional impairments:

    a. Resistance in his legs which makes it difficult to walk.

    b. Swelling in his legs.

    c. Development of open sores on his skin on his legs. Claimant indicated the open sores, when they occurred, would result in drainage that felt like water was rolling out of the sores and down his legs.

    d. Flakiness and itching of his skin.

e. Sores on his skin that would break open and start bleeding, which may be due to, or aggravated by, scratching which was caused by the itching of his skin.

f. Pain in his lower extremities which also makes it difficult to walk very far without stopping.

g. Difficulty with hygiene such as showering.

h. Difficulty getting dressed.

43. Claimant also explained his understanding of how he developed a second skin infection, i.e., cellulitis, over his legs, in March of 2018, due to the condition of his skin and how it ultimately went viral throughout his entire body. **See also Ex. 5. Pg. 26.**

44. The Court finds that Claimant's testimony at hearing was credible, reliable, and consistent with the medical evidence. Furthermore, as found above, Claimant's legs were viewed by the Court at hearing and the Court observed marked and severe edema which is consistent with the provisional impairment rating provided by Dr. Hughes and the ultimate impairment rating provided by Dr. Ginsburg pursuant to Table 52 of the AMA Guides.

45. The Court finds the testimony and opinions of Dr. Hughes and Dr. Ginsburg credible in that they physically examined Claimant, whereas Dr. Sanidas initially performed a records review and determined he could provide an impairment rating based on the extent of Claimant's edema based on the medical records he reviewed and then stood by such rating at hearing, despite his concession that Claimant's legs looked worse than he envisioned.

46. The Court finds credible and persuasive the opinion of the DIME physician, Dr. Ginsburg, and finds that under the AMA Guides, Table 52, *Impairment of the Lower Extremity Due to Peripheral Vascular Disease,* a Class 3 impairment of 65% for each lower extremity is appropriate given the degree of marked edema in Claimant's legs.

47. The ALJ credits Dr. Ginsburg's findings and conclusions regarding the extent of Claimant's impairment which was caused by the industrial accident and rated pursuant to the AMA Guides. As determined by Dr. Ginsburg, and found by the ALJ, the injury to Claimant's right lower extremity resulted in a 65% scheduled impairment rating, which equates to a 26% whole person impairment rating. The injury to Claimant's left lower extremity also resulted in a 65% scheduled impairment rating, which equates to a 26% whole person impairment rating. And, combining the 26% whole person impairment rating for his right lower extremity with the 26% whole person impairment rating for his left lower extremity results in a 45% whole person impairment rating. **Ex. D.**

48. Claimant's crush injury to his legs caused serious and permanent damage and functional impairment to his vascular system. The damage to his vascular system has resulted in marked edema in both lower extremities as well as pain. The injury has also resulted in fluid overload and swelling in areas beyond his

lower extremities. The marked swelling and pain functionally impairs Claimant's ability to walk, work (as described by Dr. Hughes), shower, and get dressed.

49. The damage to his vascular system has also resulted in damage and functional impairment to his skin. The functional impairment of his skin has resulted in his skin turning red, becoming inflamed and flakey, chronic itching, and breaking open and bleeding which then results in scabbing. The functional impairment to his skin has also resulted in the development of skin infections – cellulitis.

50. The ALJ finds Claimant has proven that it is more likely than not that he sustained a permanent impairment that is not contained on the schedule of impairment set forth at Section 8-42-107(2), C.R.S. The ALJ therefore finds Claimant has established that he is entitled to a 45% whole person award based on the impairment rating provided by Dr. Ginsburg.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see

also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Permanent Partial Disability Benefits

Section 8-42-107(1) states in pertinent part:

(a) When an injury results in permanent medical impairment and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section.

(b) When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section.

It is Claimant's burden of proof by a preponderance of the evidence to establish both that he suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is Claimant's burden to prove by a preponderance of the evidence the extent of the permanent impairment. *See Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691 (Colo.App. 2000); *Morris v. Olson Heating & Plumbing Co.*, W.C. No. 4-980-171-02 (July 6, 2018).

The term "injury" as used in the schedule of disabilities refers to the manifestation in a part or parts of the body which have been impaired or disabled as a result of the industrial accident. *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996) Therefore, when evaluating functional impairment, it is appropriate for an ALJ to look at, not only the alteration of Claimant's abilities by medical means, but also by non-medical means of the impact the injury has had on Claimant's capacity to meet personal, social and occupational demands. *See*, *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). The existence of permanent restrictions imposed by a doctor is some evidence which the ALJ may consider in determining the nature and extent of Claimant's functional impairment. *See, Strauch v. PSL Swedish Healthcare System, supra*. However, an ALJ may or may not find the existence of permanent restrictions to be persuasive when balanced against other evidence concerning Claimant's ability to function.

In addition, skin disorders are ratable under the AMA Guides as functional impairments of a body system and not as an impairment of the portion of the body the impaired skin covers. *See Galvan v. Elitch Gardens Park*, W.C. No. 4-806-495 (I.C.A.O. March 9, 2011) and *Kanyo v. Keebler Co.*, W.C. No. 4-417-093 (I.C.A.O. June 25, 2002); *See also* Chapter 13 of the AMA Guides; and *Serena v. SSC Pueblo*

Belmont Op Co., LLC, W.C. No. 4-922-344-01, (I.C.A.O. December 1, 2015)(ALJ can take judicial notice of the AMA Guides.)

Claimant credibly testified that he did not have any problems with his legs and skin prior to the accident. But, after the accident, Claimant developed swelling and pain in both of his lower extremities, along with periodic ulcers and problems with his skin. Consistent with Dr. Hughes' concern of fluid overload, which the ALJ credits, Claimant also indicated that he felt like his whole body was swelling. Claimant also testified that he experiences flakiness on the skin covering his legs and itching. He also testified that his skin continues to break open, bleed, and develop scabs.

At hearing, Claimant showed his bilateral lower extremities to the ALJ and to Dr. Sanidas who was also present. Claimant's legs were extremely swollen. Moreover, Claimant's skin on his lower extremities was severely impaired. His skin was red, flakey, dry, inflamed, and very irritated. His skin also had numerous scabs, some of which looked like they had recently bled.

In order to show the condition of his legs and skin in court, Claimant had to get up from the witness stand and walk around the witness stand to appear in front of the ALJ. The ALJ was able to observe how Claimant walked due to the vascular insufficiency which has caused problems with his legs, skin, and ability to regulate his bodily fluid as described by Dr. Hughes and Claimant. The ALJ noted that Claimant walked and carried himself in a manner that was functionally impaired and in a manner which extended beyond his lower extremities. In other words, Claimant's vascular insufficiency, which has caused his edema, pain, and fluid overload has impacted Claimant's overall functioning and movement of his entire body and caused more than just an altered gait or limp. While walking, Claimant's overall body movement was functionally limited and altered by pain, swelling, and overall discomfort.

The ALJ also credits Dr. Hughes' opinion as set forth in his report that Claimant's work injury has resulted in functional impairment which prevents Claimant from performing all aspects of driving a truck, such as putting on chains during the winter months and also functionally impairs Claimant's ability to stand or walk for more than 2-hours in an 8-hour workday. The ALJ also credits Claimant's testimony that his work related injury, which has resulted in pain and difficulty in moving his legs, functionally impairs his ability to walk, take a shower, and get dressed.

The ALJ also credits that portion of Dr. Reiter's testimony in which he described how the vascular insufficiency has caused Claimant's skin to become functionally impaired and break down. Dr. Reiter explained how the vascular injury suffered by Claimant has also resulted in the functional impairment of Claimant's skin. Dr. Reiter testified that Claimant's stasis dermatitis, which Dr. DeVito diagnosed in June of 2017 (due to venous insufficiency) and which was also diagnosed by Dr. Heinz in July of 2017, is a result of the blood not flowing through Claimant's arteries properly. He further explained that this abnormal blood flow causes abnormal pressure which in turn causes Claimant's skin to not function properly and break down. Therefore, the functional impairment of Claimant's vascular system and skin results in ulcers, excoriations, itching, burning, and bleeding, etc.

The ALJ also credits Dr. Ginsburg's findings and conclusions regarding the extent of Claimant's impairment which was caused by the industrial accident. As determined by Dr. Ginsburg, and found by the ALJ, the injury to Claimant's right lower extremity resulted in a 65% scheduled impairment rating, which equates to a 26% whole person impairment rating. The injury to Claimant's left lower extremity also resulted in a 65% scheduled impairment rating, which equates to a 26% whole person impairment rating. Combining the 26% whole person impairment rating for his right lower extremity with the 26% whole person impairment rating for his left lower extremity results in a 45% whole person impairment rating.

The ALJ also concludes that based on the totality of the evidence, Claimant has established by a preponderance of the evidence that his functional impairments which were caused by the industrial accident extend beyond the schedule. As found, Claimant's injury caused functional impairment to his vascular system. The damage to his vascular system caused marked and severe edema and chronic pain in his lower extremities as well as additional swelling over his entire body which functionally impaired Claimant's ability to walk, work, and manage his hygiene, such as shower. The damage to his vascular system also resulted in functional impairment to his skin. The vascular injury - venous insufficiency - caused Claimant's skin to break down and caused Claimant to develop skin ulcers, skin infections, and scabs.

Additionally, Claimant's overall presentation and testimony regarding his limitations and functional impairment regarding his ability to walk, shower and get dressed were consistent with the medical records and his physical presentation at hearing, regardless of whether permanent restrictions were imposed by a treating physician.

Therefore, the ALJ concludes Claimant has established by a preponderance of the evidence that he is entitled to a 45% whole person impairment rating due to his industrial accident.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The Respondent-Insurer shall pay Claimant permanent partial disability benefits based on a 45% whole person impairment rating.
2. The Respondent-Insurer shall pay statutory interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. Any and all issues not determined herein, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 14, 2018

/s/ *Glen Goldman*

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable injury to his right shoulder on February 16, 2018.

II. If Claimant established that he suffered a compensable right shoulder injury, whether he also proved by a preponderance of the evidence entitlement to reasonable, necessary and related medical benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as an over the road truck driver for Employer. He delivered materials between Denver and Salt Lake City. Claimant testified that on February 16, 2018, while driving to Salt Lake City, he stopped in Evanston, Wyoming to get some fuel and clean his windshield. Claimant was standing on the driver's side running board of the truck holding onto the mirror bracket with his right hand as he proceeded to clean the windshield with his left arm/hand. According to Claimant, the tractor door unexpectedly popped open and knocked him off balance causing him lose his footing on the running board. Claimant testified that he hung from the mirror with his right arm until he was able to regain his balance and close the door. Claimant testified that he experienced immediate pain in the right shoulder and has had constant pain and functional decline in the shoulder since the aforementioned incident. He cannot lift anything overhead and the pain affects the quality of his sleep.

2. Claimant inspected the door latch following the incident in question and noticed that the mechanism which comes out of the body of the truck and wraps around the pin, was closed. Claimant believes that the mechanism on the door failed to lock causing the door to pop open as he was holding/pulling on the mirror to wipe down the windshield with his left hand. Claimant was able to manually manipulate the mechanism to insure that it would lock around the pin so he could close the door and trust that it would stay shut. After he made sure the door was secure and the tractor-trailer was safe to drive, he continued on to Salt Lake City without stopping where he stayed the night. He drove back to Denver the next day.

3. Upon returning to Denver on February 17, 2018, Claimant testified that he verbally notified his on-duty supervisor, Keith Campbell, that he had hurt his shoulder. Claimant also completed a written statement regarding the incident. The written statement is date and time stamped "17FEB22:08", indicating that it was completed February 17 at 10:08 p.m. (Claimant's Exhibit 1, p. 1). It was Claimant's understanding

that Mr. Campbell would put the written statement in the operation manager's mailbox. Claimant testified that he wished to forego medical treatment for a few days to see if his shoulder pain would improve before he filled out any worker's compensation paperwork. He testified that he knew he had four days to complete the paperwork necessary to report his claim When his shoulder pain did not improve over the next few days, Claimant decided to notify his employer regarding his condition and complete the "ABF Freight Injured Employee Statement" on February 20, 2018.

4. Claimant provided the following statement regarding his alleged injury:

> I stopped at the Pilot truck stop in Evanston, Wyoming to get fuel and wash the windshield. When I exited the truck, I secured the door and began fueling. After fueling I climbed up on the running boards so I could dry the windshield where the squeegee wasn't effective. As I got onto the running boards, I used the mirror arms for support. As I began to dry the windshield, the driver's door popped open causing me to lose my footing. I was hanging by the mirror arm. I was able to regain my footing on the running board, but could not secure the door. I climbed down and physically manipulated the door latch to get it to work properly.

5. Upon his formal injury report, Claimant was afforded a list of authorized providers from which to choose to treat his injury. Claimant chose Dr. Frank Polonco as his authorized treating physician. He saw Dr. Polonco for an initial appointment on February 21, 2018.

6. Dr. Polanco obtained a medical history similar to that Claimant provided in his injured employee statement and at hearing. He also completed a physical examination which revealed painful range of motion of the right shoulder. Dr. Polanco diagnosed a right shoulder strain and referred Claimant for physical therapy. Claimant started physical therapy and was seen again by Dr. Polonco on February 23, 2018.

7. During Claimant's February 23, 2018 appointment, x-rays of the right shoulder were obtained. The x-rays demonstrated age related degeneration of the acromioclavicular (AC) joint. It was noted that Claimant had suffered an "acute injury", that maximum medical improvement (MMI) was unknown and Claimant's AC degeneration "may prolong his recovery". Claimant was restricted to no driving or overhead reaching and no lifting over 25 pounds.

8. Claimant returned to Dr. Polanco on March 9, 2018 with complaints of persistent 4/10 sharp and dull pain in the right shoulder and upper arm. Physical examination revealed a positive Hawkins test prompting Dr. Polanco to request an MRI of the right shoulder.

9. After approximately eight physical therapy sessions and prior to the MRI taking place, Claimant's medical treatment was cancelled by the Respondents. When the Claimant called his employer's risk manager to see why his treatment had been

canceled, he was told that his claim was denied and that he needed to use his private health insurance for any further treatment. The Claimant followed up with his general physician, Dr. Dara Lowe (Davita Medical Group, Claimant's Exhibit 8) on March 29, 2018. Dr. Lowe also recommended an MRI.

10. The recommended MRI was completed on April 20, 2018. It revealed a SLAP tear, fluid in the subacromium subdeltoid bursa and mild to moderate degenerative changes of the AC joint. Dr. Lowe referred the Claimant to an orthopedic surgeon, Dr. Kam. The Claimant testified that Dr. Kam recommended surgery to repair his shoulder. Claimant testified that he never underwent the surgery because his health insurance was also cancelled by Employer. Based upon the evidence presented, the ALJ finds Claimant's treatment with Dr. Polanco to be reasonable, necessary and a direct consequence of his right shoulder injury.

11. The last day Claimant worked for Employer was February 17, 2018. He has not returned to work as a truck driver for any other company since that time. He does have a second job as a freight agent where he solicits freight from customers and brokers it out to carriers. It is a sedentary job and he does no lifting to fulfill his duties as part of this job.

12. Although he testified that he has never had any prior medical treatment on his right shoulder, Claimant disclosed that he suffered a prior injury to the right shoulder in a motor vehicle accident approximately two weeks for the incident giving rise to the injury claimed in this case. According to Claimant, he rested his right arm and the pain associated with this prior injury subsided and he was left without limitation.

13. Claimant also admitted to three prior workers' compensation injuries, including an injury to his right knee, his neck and a remote injury in 1997 involving his right leg.

14. Cindy Barr testified as the lead resolution administrator for Employer. She has held this position for the past nine years. Ms. Barr investigated Claimant's reported injury, testifying that she had concerns about how the claim was reported. She took a recorded statement from Claimant during which she testified that Claimant was uncooperative and not forthcoming with regard to his injury. She testified that Claimant became angry and combative with her after she shut the recorder off. Claimant disputes Ms. Barr's characterization of the verbal exchange after the recording ended. He testified that he simply refused to answer questions about his medical condition because he is not a doctor and could not provide the information Ms. Barr was requesting.

15. Kurt Johnson testified as the acting operations manager for Employer at the time of Claimant's alleged industrial injury. He has 34 years of experience in the trucking industry. Although Mr. Johnson was living in Denver at the time of Claimant's alleged injury, he has since taken another position with Employer and has moved out of state. Mr. Johnson testified that he had given Claimant a warning with regards to his driving due to his involvement in a preventable jackknife accident in Wyoming on

January 21, 2018[1]. He testified that Mr. McArdle became upset and irate with him when he told him that the accident was preventable and that he would be receiving a warning letter. Mr. Johnson testified that Claimant said the company could "screw themselves," that he knew how to "fix this" by threatening to no longer drive in winter conditions. Mr. Johnson indicated that if the Claimant testified under oath to the Court that he was not angry or upset that would be "a lie." He also testified that he is not aware of any other instances where a door on a truck has popped open unless the door wasn't closed all the way. Mr. Johnson testified that Keith Campbell was a direct supervisor of Mr. McArdle at the time of the incident.

16. Keith Campbell testified as an operation supervisor for Employer. He was Mr. McArdle's direct supervisor at the time of the February 16, 2018 incident. He testified that he instructed Claimant to complete workers' compensation forms after Claimant told him about his injury. Mr. Campbell testified he provided Claimant with the necessary forms for completion but that he did not fill out worker's compensation paperwork as instructed. Claimant denies that he was given instructions to complete workers' compensation forms.

17. Mr. Campbell testified that he was not aware that Claimant ever provided any written statement to Employer nor was he aware that Claimant completed the ABF Freight Injured Employee Statement. He was also unaware that an ABF Freight Incident Investigation form was filled out and signed by the line haul driver Ops Supervisor (Claimant's Exhibit 1, Bates Stamp 03). Clearly, the date stamp on this document shows that the Claimant reported the incident to his supervisor on February 17, 2018 at 2100 hours (9:00 p.m.)

18. Dr. Polonco testified by deposition on August 28, 2018. Dr. Polonco is an expert in the field of occupational medicine and has worked in the field for over twenty-seven years. Dr. Polonco opined that the changes noted on the MRI of the right shoulder were suggestive on an acute injury. He testified that he originally thought that the Claimant sustained only a strain to his right shoulder but when his condition did not improve with physical therapy, he referred him for an MRI. He further opined that the mechanism of injury (MOI) as described by the Claimant was consistent with the findings on the MRI because "typically a labral tear is caused by an abduction type of an injury to the shoulder, similar to a throwing type motion. So hanging from a door would be a similar type mechanism of injury stressing the labrum." He explained that the fluid in the subacromium subdeltoid bursa indicates that there was an active bursitis or inflammatory process going on at the time of the MRI. The presence of fluid is suggestive of an acute and ongoing process. (Deposition of Dr. Polonco p. 9-10, ll. 10-2). In response to questioning regarding the likelihood that Claimant's labral tear was preexisting, Dr. Polanco testified while it was possible that Claimant's tear pre-existed the February 16, 2018 incident, by the history provided, Claimant was asymptomatic and not functionally limited prior to the February 16, 2018 incident. In assuming the tear to be preexisting, Dr. Polanco reiterated that the MOI, as asserted, "would have placed a strain on the labrum and would have aggravated a preexisting tear".

[1] This is the incident giving rise to Claimant's prior right shoulder injury as referenced in ¶12 above.

19. Dr. Polonco reviewed the surveillance of the Claimant which was taken on July 22, 2018. Dr. Polonco testified that even though it appeared the Claimant may have lifted over 25 pounds (with the assistance of another individual) in the video, the surveillance does not change his opinion with regards to causation of the Claimant's right shoulder injury. He explained that the 25 pound lifting restriction was merely a precautionary measure to prevent further injury and the actual weight of the bags the Claimant was seen lifting and/or manipulating is not exceptionally relevant because lifting from the ground to the waist position doesn't place an unusual load on the labrum. The weight restriction is more relevant to lifting above the waist and overhead. (Depo. Dr. Polonco, p. 31).

20. The ALJ has reviewed the surveillance video tape carefully. The video reveals that Claimant to be engaged in material handling with the assistance of another person to lift bags of top soil and a soil amendment to/from a loading pallet into the back of a pickup truck. It also depicts Claimant maneuvering these bags, albeit with difficulty, by himself. Finally, the video demonstrates Claimant to be engaged in lawn care involving the amendment and re-seeding of patches of his yard with soil and seed from a partially filled 5-gallon bucket. While the ALJ agrees with Dr. Polanco that Claimant likely exceeded his 25 pound lifting restriction by lifting and lowering the bags of soil/amendment onto the loading pallet and from the pallet into his truck, the ALJ finds no evidence that Claimant engaged in any lifting overhead. Indeed, all lifting appears to be below shoulder level. Based upon the testimony of Dr. Polanco, the ALJ finds the surveillance video tape of limited evidentiary value, especially as it relates to causation and Claimant's need for treatment.

21. Based upon the evidence presented, the ALJ is persuaded that Claimant's right shoulder injury was probably precipitated by his hanging from his right arm by the support bracket attaching the mirror to the truck door as described in the injured employee statement completed for Employer on February 20, 2018. While the MOI in this case is unusual, the ALJ finds it plausible and infers from the evidence presented, that although Claimant assumed he had secured the door, it had malfunctioned permitting it to pop open as he was wiping down the windshield of his truck. Accordingly, the ALJ finds that Claimant has met his burden of proof to establish by a preponderance of the evidence that he sustained an injury to his right shoulder arising out of and in the course of his employment as an over the road driver for Employer.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the

burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). When considered in its totality and in conjunction with Claimant's testimony, the ALJ concludes that the testimony of Dr. Polanco is credible and more persuasive than Respondents alternative theory that Claimant filed a retaliatory claim for being reprimanded after being involved in a preventable accident in order to obtain medical benefits for a pre-existing degenerative SLAP tear unrelated to any industrial cause.

Compensability and Medical Benefits

E. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately

caused by an “injury” arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff’d Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

F. The phrases "arising out of” and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). In this case, there is little question that Claimant’s alleged injuries occurred within the time and place limits of his employment and during an activity connected to his job-related functions as a truck driver for Employer. Rather, the question presented is whether Claimant’s alleged injury arose out of his employment.

G. The existence of a causal relationship between the Claimant’s right shoulder injury and his duties at ABF is a question of fact. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985).* The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The evidence presented supports a causal relationship between Claimant’s work duties, his right shoulder condition and his need for treatment. Indeed, the persuasive evidence demonstrates that Claimant probably injured his right shoulder after hanging by his right arm from the mirror bracket when the driver’s side door of his truck unexpectedly popped while he was cleaning the windshield of his semi-tractor. Respondent’s alternate theory, supported primarily by testimony of Ms. Barr and Mr. Johnson, suggesting that Claimant filed a retaliatory claim against Employer for being reprimanded for causing a preventable accident two weeks earlier is not persuasive. Rather, the ALJ credits the opinions of Dr. Polanco to conclude that the changes noted on MRI of the right shoulder are suggestive of an acute injury or an aggravation of an asymptomatic pre-existing condition, possibly a pre-existing, yet at the time of the February 16, 2018 incident, asymptomatic tear occurring two weeks earlier during Claimant’s prior accident in Wyoming. Consequently, this ALJ concludes that the Claimant has proven by a preponderance of the evidence that his right shoulder injury is compensable.

H. Once a claimant has established the compensable nature of his/her work

injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right shoulder. The evidence presented persuades the ALJ that this compensable "injury" is the proximate cause of Claimant's need for medical treatment, including his treatment with Dr. Polanco.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right shoulder on February 16, 2018.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation Medical Benefits Fee Schedule, to cure and relieve Claimant from the effects of her left shoulder injury, including, but not limited to the care provided by Dr. Polanco.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 16, 2018

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge

ISSUE

What is Claimant's average weekly wage (AWW) and should Claimant's AWW be increased to $900.00 per week.

FINDINGS OF FACT

1. Claimant suffered admitted work injuries on May 30, 2018, after falling from the bed of a truck to the ground while attempting to move a mattress for the Employer.

2. Respondents filed a General Admission of Liability on June 22, 2018, and admitted for an average weekly wage of $240.00. This amount was based on a daily rate of $120.00 for two days of employment.

3. Claimant testified at hearing that he responded to a Craig's List advertisement for the position of mattress delivery helper and contacted Tye Tennyson who hired him over the telephone. Claimant admitted he was hired at $120.00 per day.

4. It is undisputed that a Craig's List advertisement was published by the Employer's hiring manager, Tye Tennyson. In bold letters it states "We Need help NOW Mattress Delivery $120.00 flat Rate Cash (Denver)." In the body of the advertisement it stated: "$120 for the day Cash at the end of day". In the corner of the advertisement it stated: "compensation: Position pays helper $120.00 at end of day cash."

5. After being hired, Claimant showed up and performed the job duties of a delivery helper and was paid cash at the end of the day in the amount of $120.00. The following day, he showed up again to help deliver mattresses at which time he suffered his work related injury.

6. At hearing, Claimant was confused and inconsistent about the date of his work injury. After reviewing the medical records from Lutheran Hospital, he agreed that he was injured on May 30, 2018.

7. Claimant testified he had a subsequent conversation with Mr. Tennyson where he was told he was going to earn $150.00 per day on a full time basis.

8. Ronald Smith testified at hearing and is a close, personal friend of Claimant who took over Claimant's duties as a delivery helper after Claimant's work injury. Mr. Smith remains an employee of the Employer since May of 2018 and now makes $150.00 per day and works up to six days per week. He is now on the payroll of the Employer and

receives paychecks every two weeks. Mr. Smith agreed that initially he was paid $120.00 per day in cash. Subsequently, he underwent a background check and was hired on a full time basis by Mr. Tennyson. Mr. Smith agreed that he was not present when Mr. Tennyson hired Claimant.

9. Mr. Tennyson explained that employees are either hired as delivery helpers or drivers and can be hired on a temporary or permanent basis. Temporary employees are paid in cash on a daily basis. Permanent employees are paid by paycheck every two weeks. While permanent drivers can earn $150.00 per day, temporary delivery helpers only make $120.00 per day, and are typically only used for one or two days depending on the work load. Some temporary employees are hired as permanent employees after there has been sufficient time to evaluate their performance and they pass a background check. Mr. Tennyson testified the majority of temporary employees are used for only one or two days, and Claimant was only going to be used for two days.

10. Mr. Tennyson agreed he had a subsequent conversation with Claimant about the possibility of becoming a permanent employee and explained that a background check would need to be conducted first. They discussed how much permanent employees are paid. Additionally, Mr. Tennyson credibly testified that he had not determined to hire Claimant on a full time basis at that point because he only had one day to evaluate him and no background check had been conducted yet. However, Mr. Tennyson did conduct a background check of Mr. Smith and appreciated his work performance. Mr. Tennyson credibly explained that is why Mr. Smith was subsequently hired as a permanent employee, making up to $150.00 per day as a driver.

11. Steven Willingham, a supervisor for the Employer, credibly testified that he was present and was able to listen to the initial phone conversation when Mr. Tennyson hired Claimant. Claimant was hired at $120.00 per day as a temporary delivery helper and was only going to be used for two days. Claimant was not hired as a permanent employee and there had been no decision to make Claimant a permanent employee by the time Claimant suffered his injury on the second day of work.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado, sections 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefit by a preponderance of the evidence. See Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. The injured worker has the burden of proof by a preponderance of the evidence to establish entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. *See City of*

Boulder v. Streeb, 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000); *Kieckhafer v. Indus. Claim Appeals Office,* 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A*., 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

Average Weekly Wage

3. Section 8-42-102(1) C.R.S., governs how Claimant's AWW should be calculated. Where the employee is rendering service on a per diem basis, the weekly wage shall be determined by multiplying the daily wage by the number of days and fractions of days in the week during which the employee under a contract of hire was working at the time of the injury or would have worked if the injury had not intervened. Section 8-42-102(1)(c), C.R.S. Additionally, under Section 8-42-102(3), the ALJ has discretion to determine AWW by any method that will "fairly" calculate the claimant's earnings. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity as a result of the industrial injury. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993).

4. In this case, Claimant failed to demonstrate that he would have earned more than $120.00 per diem for two days of work as a delivery helper. While it is conceivable that Claimant was under the impression he was going to be hired on a permanent basis earning up to $150.00 as a delivery driver, the credible testimony of Mr. Tennyson and Mr. Willingham support the conclusion that at the time of Claimant's injury, Claimant was only hired on a temporary basis for $120.00 per diem for two days. It is concluded that there was no agreement between the parties or determination that Claimant would be hired on a permanent basis at the time of his injury.

5. Claimant attempts to rely on the testimony of Mr. Smith to support his allegations of increased AWW. However, the testimony of Mr. Smith actually supports the position of Respondents. The Employer had the opportunity to evaluate Mr. Smith's performance and Mr. Smith passed a background check, which explains why he subsequently made $150.00 per pay as a permanent driver. He only made $120.00 per diem as a temporary employee prior to going through this hiring process.

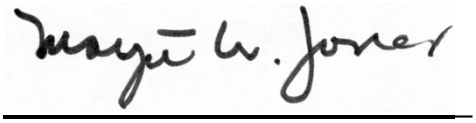
6. It is concluded that Claimant was hired as a temporary delivery helper for no more than two days, earning $120.00 per diem. The Respondents' average weekly wage calculation of $240.00 based on $120.00 per diem for two days of work, therefore, is consistent with the statutory formulation of Section 8-42-102(1)(c), C.R.S. and is a fair approximation of Claimant's actual wage loss and diminished earning capacity as a delivery helper for the Employer.

ORDER

Claimant has failed to demonstrate by a preponderance of the evidence that his admitted average weekly wage of $240.00 should be increased.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4 th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 15, 2018



Margot W. Jones
Administrative Law Judge
Office of Administrative Court
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the total right hip arthroplasty recommended by Dr. Dayton is reasonably necessary medical treatment related to the September 16, 2016 work injury.

FINDINGS OF FACT

1. Claimant is a 64 year old male who worked for Employer as a program manager.

2. Claimant has a documented prior medical history significant for chronic low back pain requiring continuous use of narcotic pain medications since approximately 2000, a three level lumbar fusion in May 2013, post fusion continued right sacroiliac pain and some right anterior thigh pain, and right hip trochanteric bursitis. Claimant has been a cigarette smoker for the majority of his life.

3. Claimant suffered an admitted right inguinal hernia at work on September 16, 2016. While lifting a desk weighing in excess of 200 pounds, Claimant attempted to kick cable cords with his right foot and immediately felt pain in his right groin area. Claimant testified he initially believed he pulled his groin but by the following day developed a noticeable bulge in his right groin area.

4. On September 19, 2016, Claimant reported the injury to Employer and was sent to Employer's designated provider at Salida Family Medicine. Claimant presented with complaints of right inguinal pain and bulging. Stephanie Earhart, M.D. did not document specific right hip complaints or exam findings. She assessed Claimant with a right inguinal hernia and referred him for a surgical evaluation with Karen Johnson, M.D. Claimant saw Dr. Johnson the same day, who also identified a right inguinal hernia requiring surgical repair. Dr. Johnson did not document right hip area complaints or exam findings.

5. On September 20, 2016, Claimant was seen by Susan Estes, N.P. at UCHealth for a follow-up of chronic low back pain and bilateral anterior thigh pain. Prior to the September 16, 2016 work injury, Claimant treated with NP Estes for pain management. NP Estes thought disc degeneration at L3-4 could be the source of Claimant's midline back pain that radiated outward down to the anterior and medial aspect of his thighs. On examination, NP Estes noted a negative FABER test as well as normal and non-painful hip range of motion.

6. Between October 3, 2016 and December 13, 2016, Claimant was evaluated by Mark Keller, M.D., Heather Eden Carmichael, M.D. and twice by Dr. Earhart. No specific right hip complaints or hip area exam findings were documented during this time period.

7. On January 10, 2017, Claimant underwent a right inguinal hernia repair performed by Maria Albuja Cruz, M.D.

8. Dr. Earhart performed a post-surgery evaluation on January 30, 2017. Claimant complained that since the surgery he continued to experience pain in the hernia region along with shooting pain into his scrotum on the right side. No specific right hip area complaints or exam findings were documented. Dr. Earhart was concerned about the possibility that some of Claimant's right inguinal/groin pain might be referred radiculopathy from his spine, noting Claimant may have sustained a new back injury as a result of the September 16, 2016 incident.

9. Between March 2, 2017 and June 26, 2017 Claimant underwent work-up and treatment at UCHealth for his groin and scrotum region, including a scrotal ultrasound, the administration of a somatic nerve injection for ilioinguinal neuralgia, a right ilioinguinal nerve block, and then the administration of a Transversus Abdominis Plane (TAP) block. This treatment did not completely relieve Claimant's ongoing groin area pain. During this same period, Claimant also underwent a lumbar MRI and received two sets of bilateral sacroiliac injections for his chronic low back pain. These injections also failed to fully relieve Claimant's groin pain. Positive FABER test results were noted by NP Estes on April 18, 2017 and Jennie Johnson, PA-C on May 8, 2017.

10. Claimant's pain medicine provider, Rachael S. Rzasa Lynn, M.D., subsequently recommended Claimant undergo an MRI of his right hip to rule out any injury to the hip resulting from the September 16, 2016 work injury.

11. On July 19, 2017, Dr. Earhart reevaluated Claimant, noting Claimant's chronic right inguinal/groin pain had not resolved, none of the injections had helped, and his surgeon suggested removing the hernia surgery mesh though Claimant was reluctant to pursue that procedure. Dr. Earhart further noted Claimant's pain management physician recommended a right hip MRI. Dr. Earhart did not identify any specific right hip issues on exam on that date. She noted that if pain management did not help, Claimant may need to return to his surgeon and have the hernia mesh removed.

12. On July 27, 2017, Claimant's pain management providers at UCHealth evaluated Claimant for issues that included coronary artery disease, hypertension, chronic pain, and right groin area pain. They did not document any specific right hip area complaints or findings. On July 28, 2017, Claimant called UCHealth checking on the authorization of the hip MRI and requesting a referral to a general surgeon for his hernia. The nurse at UCHealth explained to Claimant that Dr. Rzasa Lynn wanted to make sure there was nothing wrong with his hip first.

13. On August 4, 2017, Claimant underwent a right hip MRI that revealed an anterior superior labral tear, mild rectus femoris tendinosis and grade 2 cartilage fissuring of the acetabulum and femoral head.

14. On August 22, 2017, David Orgel, M.D., Insurer's physician advisor, reviewed a request that Claimant be referred to a hip orthopedist. Dr. Orgel noted Claimant's right hip MRI showed a "cam type morphology and a labral tear." Dr. Orgel opined Claimant had been appropriately treated for the inguinal hernia, reached maximum medical improvement (MMI), and additional treatment for his pre-existing chronic pain should be denied as non-work-related.

15. On August 24, 2017, Dr. Earhart reevaluated and opined Claimant's right hip labral tear was the cause of Claimant's continuous pain. She gave the following assessment: articular cartilage disorder of the pelvis/hip/femur and joint derangement of the pelvis/hip. Dr. Earhart agreed Claimant should see an orthopedic specialist for his right hip labral tear.

16. On September 7, 2017, Claimant presented to Amy Harlow, M.D. and Michael Rex Dayton, M.D., orthopedic surgeons at UCHealth. In conjunction with this evaluation, right hip x-rays were obtained, which revealed minimal osteoarthritis of the bilateral hips without significant joint space narrowing. Dr. Harlow noted she personally reviewed and interpreted Claimant's x-rays and MRI. She opined Claimant had right hip osteoarthritis as well as a possible right hip labral tear. Dr. Harlow wrote, "Given his extensive history of trying to identify the source of his pain, we would like to confirm that a surgical intervention would address the underlying problem." Drs. Harlow and Dayton recommended Claimant undergo a hip diagnostic injection and a total hip replacement if the injection completely relieved Claimant's pain, noting solely performing a labral repair may offer only minimal relief and may actually worsen Claimant's arthritis.

17. On September 11, 2017, Dr. Earhart noted Claimant's right hip range of motion was significantly decreased due to pain in the right groin area. She agreed Claimant should see Dr. Dayton and undergo a hip injection. Dr. Earhart opined that Claimant's symptoms were the result of the September 16, 2017 work injury stating,

> [Claimant's] right inguinal/groin pain was non-existent prior to his date of injury when he lifted a desk; his new inguinal hernia was obvious and was repaired, but the right inguinal/groin pain has persisted. [Claimant] is admittedly a chronic pain/low back pain patient, but it is entirely feasible and likely that he sustained the right hip labral tear at the same time as the hernia, but since was not visible it was unknown. It would cause pain in the same area as he is describing ongoing pain. I thus am still advising and requesting authorization for him to see a hip surgeon for evaluation, and to have surgery IF the hip specialist advises. If the hip surgeon does not believe that surgery is indicated/warranted, then I would advise that he is at MMI and would need to see a level 2 work comp provider for a permanent rating.

18. Claimant returned to Dr. Dayton for a follow-up visit on October 19, 2017. Dr. Dayton opined Claimant has right hip osteoarthritis with an associated labral tear and recommended Claimant consider another steroid injection or proceed with a total hip

replacement to address both the labral tear and osteoarthritis. Regarding the work-related nature of Claimant's condition Dr. Dayton stated, "[i]t is unclear how much of his hip pain and arthritis is related to his injury at work, but it is clear that contributed to and accelerated the degenerative process."

19. On October 31, 2017, Kathy McCranie, M.D. performed an Independent Medical Evaluation (IME) at the request of Respondents, reviewing medical records and physically examining Claimant. Claimant reported feeling a strain in his right groin when moving a 300-400 pound desk approximately six inches and kicking cables underneath the desk with his right foot. Claimant complained of deep groin pain radiating to the right hip. On exam, Patrick's maneuver and straight leg raise were negative. Hip rotation increased pain while axial compression did not. Referring to the MTG, Dr. McCranie noted labral tears may accompany impingement or result from high energy trauma, or overuse. She noted Claimant did not sustain a high energy trauma or overuse injury and, as such, Claimant's mechanism of injury did not cause or aggravate his osteoarthritis and associated labral tear. Dr. McCranie concluded Claimant solely sustained a right inguinal hernia as a result of the September 16, 2016 work incident and had reached maximum medical improvement (MMI) with 5% whole person impairment.

20. Claimant continued to see Dr. Earhart, who continued to opine Claimant's right hip condition was related to the September 16, 2016 work incident. On November 2, 2017 Dr. Earhart wrote,

> Given [Claimant] had no groin pain prior to lifting the desk, it makes sense that he injured the hip (right labral tear) at the time of lifting the desk, even though we only recognized the right inguinal hernia at that time. I believe the hip should be repaired or replaced (whatever the orthopedic surgeon advises) under work comp b/c of the definite onset of pain at time of lifting the desk.

21. On November 21, 2017, Dr. Earhart remarked that Claimant has a "new labral tear (from lifting desk) but also has underlying osteoarthritis which may preclude just repair of the labral tear. Of course the arthritis was pre-existing, but was ASYMPTOMATIC until the acute labral tear caused pain which is ongoing. (Emphasis not added). She further stated,

> I have seen prior labral tears of the hip with less trauma than might be expected, and they can be difficult to truly diagnose.
>
> ***
>
> I do not believe he is at MMI given that I believe the labral tear does date to his work comp injury date, and coincided with the right inguinal hernia, which masked discovery of the right hip labral tear. In addition, patient's admitted chronic pain/lumbar spine issues have complicated this case, but his right groin pain did not predate the date of injury.

22. On December 21, 2017, Dr. Earhart responded to a letter from Insurer within which Insurer supplied her with Dr. McCranie's IME report, and requested that she provide updated opinions. Dr. Earhart reiterated her opinion that Claimant's right hip labral tear was work-related. She agreed with Dr. McCranie that most labral tears are caused by higher force/impact, but noted that is not always the case, stating, "…certainly the force from lifting the desk would be enough to cause a larger tear with acute onset of pain- this matches his presentation." Dr. Earhart concluded Claimant reached MMI for the right inguinal hernia injury as of May 11, 2017, but was not at MMI for his right groin pain, which she opined "simultaneously occurred with the inguinal hernia but was not recognized until recent months as the cause of his ongoing pain." She wrote,

> I believe we cannot ignore or deny the fact that he had NO right inguinal pain prior to lifting the desk, and his persistent pain definitely can be attributed to and accounted for by a right labral tear, which he does have Claimant's pain medications he took for chronic back pain issues increased after the injury. (Emphasis not added).

23. Dr. Earhart advised that Claimant continue follow-up with an orthopedic surgeon and possibly see a second orthopedist hip specialist regarding the relatedness of the labral tear, noting patients do not always fit classic mechanisms of injury or the MTG.

24. Claimant returned to Dr. Dayton for a follow-up evaluation on February 1, 2018. Noting that Claimant failed nearly 12 months of conservative treatment, Dr. Dayton opined that Claimant's only option for both pain control and functional restoration was a total hip joint replacement.

25. Albert Hattem, M.D. reviewed Dr. Dayton's right hip joint replacement recommendation at the request of Insurer. In his report dated February 7, 2018, Dr. Hattem agreed with Dr. McCranie's opinion that Claimant's right hip condition was not causally related to the work injury. In support of this opinion, Dr. Hattem noted that lifting a desk was not a mechanism consistent with causing a labral tear, Claimant's labral tear was likely a degenerative issue, Claimant's failure to report any hip pain for more than ten months post injury did not support a causal relationship, and that it was even unclear to Dr. Dayton how much of Claimant's hip pain was the result of arthritis versus the work injury.

26. On June 27, 2018, Dr. McCranie performed an additional medical record review of medical records dating back to April 2013 noting complaints of chronic low back pain, bilateral anterior thigh pain, and trochanteric bursitis. She concluded Claimant's prior hip and thigh symptoms were likely the same pain Claimant described to her as part of his current symptomatology.

27. On July 16, 2018, Dr. Earhart continued to opine Claimant was not at MMI for the September 16, 2016 work injury due to his right hip labral tear. She again explained that Claimant's right hip labral tear was not initially identified due to the "overlap of

symptoms." Dr. Earhart opined that Claimant continued to need the right hip surgery. She also noted the risk of Claimant undergoing surgery if he continued smoking.

28. Dr. McCranie testified at hearing as a Level II expert in physical medicine and rehabilitation and pain management. Dr. McCranie continued to opine that Claimant's right hip labral tear was not caused or aggravated by the September 16, 2016 desk lifting incident. Dr. McCranie testified that labral tears can be degenerative or traumatic, and degenerative tears are more common in patients who are older. She stated traumatic labral tears are more frequently seen in younger patients, usually associated with contact sports or high impact or high velocity injuries such as motor vehicle accidents or falls that impact the hip such that there is a subluxation or dislocation of the hip. Dr. McCranie testified that Claimant's mechanism of injury was not consistent with a traumatic labral tear. Her opinion was based on her review of the MTG and medical literature, as well as Claimant having hip pathology prior to his date of injury, which she indicated suggested a symptomatic unrecognized degenerative hip condition. Dr. McCranie indicated that probably the most significant record supporting her causation opinion was the September 20, 2016 report from Ms. Estes, generated just four days after the work injury, which identified Claimant as having full, pain-free hip range of motion. Dr. McCranie explained that an acute labral tear would result in immediate and acute symptomatology including reduced and very painful range of motion, and that it is not medically probable Claimant would have full, pain free range of motion on exam four days after an acute labral tear.

29. Claimant testified at hearing that after his hernia surgery he continued to report pain in the area of his right groin and hip. Claimant acknowledged that, prior to the work injury, he had some pre-existing pain in his anterior right thigh as well as pre-existing SI pain that radiated to his low back, buttocks and legs bilaterally. Claimant stated, however, that he had no prior treatment to his hip, and that the pain he suffered in his right hip area as of September 16, 2016 was different from the pain that he suffered before the work injury. Claimant testified he has not yet scheduled the recommended hip surgery because he believes it should be covered under workers' compensation insurance.

30. Claimant's testimony is found credible and persuasive.

31. The ALJ finds the opinions of Claimant's authorized treating physicians Drs. Earhart and Dayton, as supported by the medical records and Claimant's testimony, more credible and persuasive than the opinions and/or testimony of Drs. McCranie, Hattem and Orgel.

32. Claimant proved it is more probable than not the total right hip arthroplasty recommended by Dr. Dayton is causally related to the September 16, 2016 work injury, and is reasonably necessary to cure and relieve Claimant from the effects of the work injury.

33. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally*

Parker v. Iowa Tanklines, Inc., W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008); Section 8-43-201(3), C.R.S.

While a right hip injury was not identified until 10 months post-work injury, the preponderant evidence persuades the ALJ the September 16, 2016 work incident caused Claimant's current need for hip surgery. Although Claimant had some pre-existing hip symptoms, Claimant credibly testified the pain he experienced after the work injury is different than his pre-existing hip and thigh pain. Following the September 16, 2016 work injury, Claimant initially and continuously reported pain in his right groin area. A right inguinal hernia was readily identified at Claimant's initial evaluation and thought to be the primary cause of Claimant's pain, thus becoming the focus of further evaluation and treatment. However, despite undergoing multiple modalities of treatment, Claimant continues to experience pain that has been present since the date of injury.

A right hip MRI provided objective evidence of a labral tear. Dr. McCranie and Dr. Hattem opine that the mechanism of injury would not cause a labral tear or otherwise aggravate Claimant's pre-existing degenerative condition. The ALJ credits Dr. Earhart's opinion that, while most labral tears are the result of high impact/force, that is not always the case, and was not the case for Claimant. Dr. Earhart credibly opined that Claimant sustained an acute labral tear as a result of lifting the desk on September 16, 2018, and that the tear caused Claimant's pre-existing arthritis to become symptomatic. Dr. Earhart further credibly opined that a labral tear would cause pain in the same area Claimant is experiencing ongoing pain, and that the labral tear was initially overlooked due to an overlap of symptoms. Although Dr. Dayton opined he could not discern "how much" of Claimant's hip pain and arthritis is related to the work injury, he specifically stated it was "clear" the work injury "contributed to and accelerated the degenerative process." That the September 20, 2016 exam was negative for specific hip complaints and findings is not dispositive proof Claimant did not sustain a hip injury on September 16, 2016, in light of the other credible and persuasive evidence.

The medical records clearly document Claimant's continued right hip symptoms. Claimant has undergone extensive treatment to no avail. Dr. Earhart and Dr. Dayton credibly and persuasively opined Claimant requires a total hip joint replacement, which Dr. Dayton concluded was the only option to control Claimant's pain and restore function. Based on the totality of the evidence, Claimant has met his burden to prove that the total right hip arthroplasty recommended by Dr. Dayton is related to the September 16, 2016 work injury and is reasonably necessary to cure and relieve Claimant from the effects of the injury.

ORDER

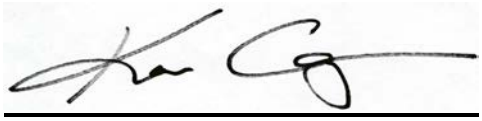
It is therefore ordered that:

1. The total right hip arthroplasty recommended by Dr. Dayton is reasonable, necessary and related to Claimant's September 16, 2016 work injury. Insurer shall authorize the proposed total right hip arthroplasty recommended by Dr. Dayton.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 16, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Have Respondents overcome, by clear and convincing evidence, the DIME opinion of Dr. Higginbotham on Claimant's Whole Person Impairment Rating?

II. If the DIME opinion has been overcome, what is the correct Whole Person Impairment Rating?

III. Have Respondents shown, by a preponderance of the evidence, that Claimant is responsible for a Safety Rule violation under C.R.S. 8-42-112(1)(a), thus reducing his applicable Workers Compensation benefits by 50%?

IV. Assuming such Safety Rule violation is shown, are Respondents nonetheless barred from asserting this defense, by failure to assert it when they filed their Final Admission of Liability?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant suffered admitted work related injuries when he rolled the cement mixer he was operating for employer on September 11, 2017. (Ex. A). At the time of the accident Claimant was treated for a laceration over his eye and complaints of wrist pain. (Ex. 4, p. 21).

2. Claimant's accident was described in Dr. Higginbotham's DIME report as follows, "the force of the rollover caused him to be thrown against the passenger door and window. He denies loss of consciousness. He hit his head against the cabin, causing an abrasion on the top of his head and a laceration above his left eye." (Ex. H, p. 55).

3. Claimant's initial visit to CCOM occurred on the date of the incident and he was seen by Steven Byrne, PA-C. (Ex. 4, p. 21). Little detail was provided in the First Report of Injury besides the diagnoses of "laceration left eyelid" and "laceration left hand".

4. On September 13, 2017, two days later, Claimant reported to the emergency room complaining of neck pain, although his range of motion in the neck was described as "normal". Imaging was taken which showed no acute abnormalities and conservative care was recommended. Intake reports from the ER note that at the time of the rollover, Claimant was unrestrained. (Ex. D, pp. 15-17).

5. Upon his return to CCOM on September 18, 2017, Claimant was reporting that he was "feeling much better but still having considerable amount discomfort through the left cervical paraspinal and posterior shoulder girdle." (Ex. 4, p. 22).

6. Claimant's initial visit with his ATP, Dr. Neubauer was September 25, 2017 (Ex. 4, pp. 26-29). At this visit, it was noted that he reported lower back and left leg pain. Claimant's neck paraspinals were tender to palpation, with pain in all planes upon range of motion. The paraspinals were tender in his lower and upper back. Physical therapy continued to be recommended.

7. Medical records indicate that Claimant improved from his diagnosed strain injuries. By October 23, 2017, Claimant was reporting 2-3 of 10 pain, reported by him as "mild", and consisting of mostly aching/stiffness/tightness. (Ex. F, p. 31).

8. In the interim, Respondents filed a General Admission of Liability ("GAL") on October 18, 2017 admitting for medical benefits, but denying Temporary Total Disability ("TTD") benefits as "*claimant was responsible for his own termination."* It is unclear from the record if Claimant was terminated for failure to wear his seat belt, or simply from rolling a full cement truck.

9. Claimant also underwent a short course of physical therapy between September 20 and October 16, 2017. (Ex. E, Ex. 6). Claimant reported having cervical pain, pain in both shoulders, and lower back pain. *Id.* As of his physical therapy visit on October 6, 2017, Claimant was still reporting a high level of pain with end range cervical motion and difficulty sleeping due to the neck pain. Claimant also reported that he continued to have low back pain and stiffness. *Id.* at 79.

10. Claimant returned to Dr. Neubauer on October 9, 2017, still complaining of ongoing neck and back pain. (Ex. 4, p. 30). It was noted that Claimant was having pain with activity and movement of his back and his neck, and the back was specifically described in this note as being *tight. (emphasis added).* Physical exam documented pain in the neck with all planes of motion. Examination of the back documented tenderness to palpation in the low back and buttocks and decreased/painful forward flexion, extension, rotation, and lateral flexion; the mid-back symptoms were no longer noted.

11. Dr. Neubauer recommended continued therapy, heat to the back and the neck, and also referred Claimant to Dr. Chad Abercrombie for chiropractic care. *Id.* at 32. Prior to his first appointment with Dr. Abercrombie, Claimant had another visit at CCOM with Dr. Neubauer on October 23, 2017 that documented ongoing complaints of back and neck pain that was described as "*aching/stiffness/tightness"* and that he was having *pain/stiffness* with activity and movement of the back and the neck. *Id.* at 35. (emphasis added).

12. Chiropractic care began on October 26, 2017, with Dr. Chad Abercrombie. At the initial visit, he reported overall improvement, but still had "some lower back, neck and left shoulder pain." (Ex. G, p. 50, Ex. 7, pp. 86-88). "Moderately" reduced range of motion was noted in his lumbar and cervical regions. A medical history noting a 2014 lower back lifting injury which "stabilized" and a 1993 motor

vehicle accident with residual left shoulder injuries is noted on the initial chiropractic intake. *Id.*

13. On November 29, 2017, Dr. Neubauer documented that Claimant was still reporting 3 out of 10 neck and low back pain and that "He continues to have *stiffness* with motion of the neck and low back…." (Ex. F, p. 40). When Dr. Neubauer placed Claimant at MMI on January 4, 2018, it was again noted that Claimant was reporting low back pain and tightness. *Id.* at 54. His closing comments indicated that Claimant still had neck and low back tightness, but he released Claimant at MMI with no impairment and instruction to finish his chiropractic care. *Id.* at 56. Dr. Abercrombie's final note from January 24, 2018 indicates that Claimant was greatly improved, but that he continued to have *minimal objective residual* problems as noted in his report. (Ex. 7, p. 89) (emphasis added).

14. By December 14, 2017, Claimant was reporting pain of 1 out of 10, reported as "mild" and intermittent, and noted increased pain in his lower back when lifting over 100 pounds. At the same time, Claimant reported he was not talking pain medications and was sleeping ok. (Ex. E, p. 45). Though Claimant by this time had been terminated by Employer, he was released to work without restrictions on December 14, 2017. (Ex. E. p. 47.)

15. On January 4, 2018, after completing a course of physical therapy, and continued conservative care, Claimant was released at MMI by Dr. Jay Neubauer at CCOM. Dr. Neubauer's report indicates that Claimant was reporting slight tightness in his neck and back which Claimant described as "infrequent," and therefore released Claimant at MMI with no impairment rating, but with a recommendation to continue chiropractic care under maintenance treatment. (Ex. C. pp. 12-14).

16. After his release at MMI, Claimant's chiropractor, Dr. Abercrombie released Claimant on January 24, 2018. (Ex. G. p. 53). At this time Dr. Abercrombie noted:

> Overall, he has responded very well to treatment noting very minimal symptoms at this time. He had some lower back stiffness this past week of unknown cause however denies pain, and the stiffness resolved. Otherwise, he denies neck or mid back symptoms. He is performing at this time all activities of daily living without difficulty.
>
> Examination on today's visit reveals normal spinal/paraspinal symmetry. Range of motion is full and all cervical, thoracic and lumbar planes and *without symptoms*. . . .

Id, (emphasis added).

17. In accordance with Dr. Neubauer's release at MMI, Respondents submitted a **Final** Admission of Liability, admitting for 0% impairment on January 25, 2018.

The Final Admission indicates that Claimant received $11,565.48 in TTD from September 12, 2017, through December 13, 2017, the date he was released to work without restrictions. (Ex. C). This FAL made no mention of any alleged violation of a safety rule. For reasons unclear from the record, this FAL appears to be a reversal of Respondents' prior position in the GAL, wherein all TTD had been denied due to his termination for cause.

18. The Final Admission of Liability admitted to a general award of maintenance care and the attached MMI report from Claimant's ATP indicated the claim related diagnoses were: 1.) laceration of the left eyelid; 2.) laceration of the left wrist; 3.) strain of muscle, fascia, and tendon at the neck; 4.) strain of muscle and tendon at the back wall of the thorax; 5.) strain of muscle, fascia, and tendon of the lower back, and; 6) sprain of interphalangeal joint of right middle finger. (Ex. 3, p. 14).

19. Claimant promptly objected and sought a DIME. The DIME exam occurred with Dr. Thomas Higginbotham on April 24, 2018. (Ex. H). At the time of the DIME, Claimant reported that he had been employed with Safeco, which contracted with Comcast placing underground digital cable. This full-time work required him to use a shovel and pick frequently. (Ex. H, p. 55). Dr. Higginbotham cites Claimant's subjective symptom checklist, which includes, "Clicking and popping and pain of the jaw; asthma with shortness of breath; muscle cramps; joint swelling, pain, and stiffness; depression and nervousness." (Ex. H, p. 59). Claimant also reported, "nausea, blurred vision, tingling of the hands and feet; swelling of the feet; trouble falling asleep and staying asleep; and mood swings;" in addition to *stiffness* in his lower back and a sharp pull in the left side of his neck and back when he increases his physical activity." *Id.* at p. 60.

20. Claimant's lack of a use of seatbelt was discussed with Dr. Higginbotham:

> He was the driver of a large cement truck, not wearing seatbelt and shoulder harness. He relates that the seatbelt mechanism was not functional. He had the intent of reporting the malfunction the morning he had his incident. However, he got busy with getting his vehicle prepped and then was assigned a delivery route. He was pressed to get his work down [done] and forgot about recording the seatbelt mechanism malfunction.

21. Dr. Higginbotham provided impairment ratings of 7% for the cervical spine resulting from 3% range of motion deficit, combined with 4% from Table 53IIB. He also assigned 10% for the lumbar spine, noting 5% from Table 53IIB and 5% range of motion deficit. These two ratings combined for a 16% impairment rating of the whole person. (Ex. H, pp. 62-63). This impairment rating was made in agreement the ATP, Dr. Neubauer, that Claimant had reached MMI on January 4, 2018. (Ex. H. p. 62).

22. Dr. Higginbotham's narrative of his physical exam makes several references to *tenderness* in the lumbar and cervical regions. At no point in his physical examination does Dr. Higginbotham refer to any symptom which would constitute *rigidity.* No observed stiffness, trigger points, spasm are noted anywhere in the

report. On Page 8 of his report (Ex. 9, p. 97) he states "There is <u>no</u> *muscle tone asymmetry or spasm*." It is unclear to the ALJ where the lack of spasm is noted to be *absent.*

23. Dr. Higginbotham further noted: "A TENS unit would be appropriate to *decrease discomfort and decrease spasm and assist with range of motion* as needed. (Ex. 8, p. 99) (emphasis added). At no point in his DIME exam does he indicate what *spasm* he is now referring to, its location, or duration.

24. In response to Dr. Higginbotham's report, on June 13, 2018, Respondents filed an Application for Hearing endorsing the issues of "Overcoming Division IME; and Failure to Utilize Safety Device/Violation of a Safety Rule; Causation; and Set-offs." (Ex. 1, p. 1).

25. In advance of the hearing, Respondents obtained a Medical Record Review from Dr. Kathy Fine McCranie. (Ex. 9). Respondents also obtained and disclosed a video demonstrating the functionality of the vehicle's seat-belt. (Ex. K).

26. Claimant also obtained an IME with Dr. Jack Rook. In his report dated September 3, 2018, Dr. Rook states that upon rolling his cement truck, Claimant fell 6 feet from the driver's seat to the passenger door, rotating as he fell and striking the back side of the passenger side door. Though Claimant denied loss of consciousness throughout the treatment records and his DIME with Dr. Higginbotham, Claimant reported to Dr. Rook that he probably did have a loss of consciousness. (Ex. 10, p. 111).

27. Dr. Rook's report also contains an opinion that Claimant's post-MMI job at Safeco was "more physically demanding than his cement truck driving job." (Ex. 10, p. 116). However, he further noted that although Claimant was able to lift 130 pounds at MMI, he was able to deadlift over 450 pounds prior to the accident, indicating a severe drop in functionality from his baseline. *Id*

28. On physical examination of the neck, Dr. Rook found moderate to severe tenderness associated with *increased muscle tone* on palpation of the left sternocleidomastoid muscle. *Id.* at 117. Evaluation of the lower back documented *increased muscle tone* with moderate tenderness of the left-sided lower paralumbar musculature overlying the L4, L5, and S1 facet joints. Back pain was increased when elicited with spinal extension and bending to the left. The same maneuver was negative on the right.

29. Dr. Rook also addressed the final chiropractic report from Dr. Abercrombie from January 24, 2018. He explained how Dr. Abercrombie's report documented increased muscle tone in the same muscles that Dr. Rook had identified eight months later. Dr. Abercrombie also found problems with the left-sided facet joints based on provocative testing at that visit. Dr. Rook identified those same findings on his examination. (Ex. 10, p. 118). "These constitute *objective findings* and therefore Dr. Higginbotham was correct in providing the patient with a table 53 rating." Dr. Rook disagreed with Dr. McCranie regarding her opinion on a lack of

objective findings, and her opinion was just that: a mere difference of opinion with the DIME physician.

30. Dr. McCranie testified at hearing. Dr. McCranie explained that Dr. Higginbotham's DIME report did not comply with the AMA Guides and Level II training, which require "objective" findings in order to provide an impairment rating. "Specifically, 'Impairment Ratings are given when a specific diagnosis and objective pathology is identified.'" (Ex. 9, p. 109, citing the Rating Tips found at Desk Aid 11, https://www.colorado.gov/pacific/cdle/workers-compensation-document-library-desk-aids-0).

31. In explaining her position, Dr. McCranie noted that the Claimant's records were devoid of any objective findings of pathology, and only reflected Claimant's *subjective* complaints of pain and occasional stiffness.

32. In noting a lack of objective support for Claimant's impairment rating, Dr. McCranie found that Claimant's sole diagnoses, which were echoed by Dr. Higginbotham, were muscular strains. She opined that, by their nature, muscle strains were temporary. (Ex. 9 p. 110).

33. After her medical records in this matter, Dr. McCranie testified at hearing that the records demonstrated what should be expected from diagnosed muscular strains, with a progression of conservative care to a release at MMI, but without any residual range of motion deficits. The lack of residual range of motion deficits are echoed in the January 4, 2018, MMI report of Dr. Neubauer, finding full range of motion in the back and noting *"The condition has resolved,"* (Ex. C, pp. 12-14) (emphasis added). Further the post-MMI release report of Dr. Abercrombie indicated transient low back stiffness "of unknown cause," with a complete resolution of symptoms and full range of motion in the lumbar, thoracic and cervical spines. (Ex. G, p. 53). Dr. McCranie opined that findings of mild tenderness and tightness on palpation are not objective findings that would support a rating under the AMA Guides or Level II training.

34. Dr. McCranie concluded her testimony by noting that available medical records, including Dr. Higginbotham's report, were devoid of objective evidence to support an impairment rating in accordance with the AMA guides and Level II training. Dr. McCranie clarified that Claimant's subjective complaints of stiffness and pain, coupled with the diagnoses of muscular strain injuries were insufficient to support a Table 53 rating.

35. Dr. McCranie also found that if Claimant was not entitled to a Table 53 rating, a range of motion rating would be inapplicable. [The ALJ notes that this statement is correctly supported by Desk Aid 11's tips on Spinal Rating, "Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established. (References: Spine section of the *AMA Guides, 3rd Edition (rev.)*; Level II Accreditation Curriculum, Spine and Pelvis Impairment)."]

36. Jason Gordon also testified at hearing. Mr. Gordon is the Human Resources and Payroll manager for Transit Mix Concrete. Mr. Gordon testified that the safety policies found at Exhibits I and J, contain numerous requirements concerning the consistent use of seat-belts. These requirements and safety procedures are consistently reinforced in regular driver training. Mr. Gordon noted that seatbelt use is specifically required in p. 109, and p. 111 of Exhibit J.

37. Mr. Gordon noted that if a seatbelt was not working at the time of pre-trip inspection, a vehicle would be deemed unsafe to operate and a driver would not be expected to utilize the vehicle.

38. Mr. Gordon further noted that Claimant never reported a seatbelt malfunction. Mr. Gordon indicated that drivers become very familiar with their vehicles through regular use. Though a pre-trip inspection has many small points, a driver should be able to complete the pre-trip inspection to ensure their vehicle was safe.

39. Respondents also presented the testimony of Curt Young. Mr. Young is a maintenance technician with Transit Mix. Mr. Young explained that Respondents' Exhibit K (video) demonstrates his opinion that the seatbelt was functional at the time of his inspection-months after the accident. This video was taken in June of 2018. Considerable effort was initially required to move this belt from its retracted position. Mr. Young indicated that no repairs had been conducted on the vehicle since Claimant's workplace accident.

40. Mr. Young testified that he was directed to assess the functionality of the seatbelt at the time he made the video, and that no one had touched the truck prior to that time.

41. Mr. Young noted that the air-supported driver's seat had lost all of its air, resulting in a fully lowered position. Mr. Young noted that because the pneumatic seat had dropped completely, the seatbelt was fully tensioned. Also, Mr. Young testified that the seatbelt was completely retracted and in the locked position when he inspected it. This, he opined, indicated that it was in a retracted, non-used, position when the accident occurred.

42. Mr. Young clarified that upon lifting the seat to relieve tension on the seatbelt, he was able to free the seatbelt from the locked position, and thus demonstrated that the seatbelt was functional. Mr. Young concluded that the seatbelt was fully functional at the time of the incident.

43. Claimant testified on his own behalf. Claimant testified that he had incurred multiple small cuts and bruises. He described his whole body as being sore after the accident. Claimant testified that he continues to experience neck and lower back symptoms that he attributes to the motor vehicle accident. Regarding the neck, Claimant continues to experience tightness and a pulling sensation in his neck when he attempts to turn to the right, indicating both ongoing tightness and pain.

44. Claimant reported ongoing tightness in his lower back throughout the day, and reported discomfort with prolonged sitting. Claimant testified that he continued to

have pain in his neck and back to this day. He has not sustained any new injuries to his neck or back since his work accident. Claimant testified that he never had problems with his neck or back prior to this incident. Moreover, although Claimant was limited to lifting up to 130 pounds, that remains functionally limiting to him. as he used to work out daily and was able to deadlift 455 pounds and squat 450 pounds.

45. At hearing, Claimant testified that he found the seatbelt "difficult to put on." Claimant admitted that he was not wearing a seatbelt at the time of the incident. Claimant stated that he noticed the seatbelt was more difficult to pull, requiring more force than usual, on Friday afternoon before the Monday accident. He assumed it would be easier to have it repaired the following Monday.

46. Before Claimant exited the yard that morning, he was already running late by about ten to fifteen minutes due to complications at the plant and having to wash excess concrete mix off his truck. Claimant then called dispatch to let them know he was running late. He testified that he wrestled with the seatbelt to put it on before leaving the facility. He then drove to his destination and stopped about five to eight miles from the destination to stop and check the consistency of the "slump"[1] to make sure it was exactly what the customer had ordered, which is required by the Employer. Claimant had to exit the vehicle to do this. If the slump is not correct, the purchaser is likely to reject it, which could result in a write up for the employee. Claimant checked the slump and it was still the proper consistency. He then, in the interest of time, proceeded towards his destination, without taking the time to struggle with the seat belt further. It was Claimant's intention to report the malfunctioning seatbelt after he returned to the yard from this visit.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case are not interpreted liberally in favor of either party. Section 8-43-201, C.R.S. (2016).

B. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. Pursuant to Section 8-43-215, C.R.S., the decision of the ALJ contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has discretion to make credibility determinations, draw plausible inferences from the record, and resolve conflicts in the evidence. *Davison v. Indus. Claim Apps. Office*, 84

P.3d 1023, 1025 (Colo. 2004). This decision does not address every item contained in the record, and incredible or implausible testimony or unpersuasive inferences that have not been specifically addressed have been implicitly rejected. *Magnetic Eng'ng, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 385, 389 (Colo. App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. Colorado Jury Instructions, Civil, 3:16 (2018). The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968); see also *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). To summarize, the ALJ finds the witnesses, including Claimant, to have testified sincerely and credibly at the hearing.

Overcoming a DIME Opinion, Generally

D. A DIME physician's findings of causation, MMI and whole person impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning impairment is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

E. Stated differently, to overcome a DIME physician's opinion regarding impairment, the party challenging the DIME must demonstrate that the physicians' determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* Proof of a deviation from the rating protocols provides some evidence from which the ALJ may infer that the DIME physician's rating has been overcome*. Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003).

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME

physician properly applied the AMA Guides. *See Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

Dr. Higginbotham's Application of Table 53IIB

G. Desk Aid 11, paragraph 1 states, "Impairment ratings are given when a specific diagnosis and objective pathology is identified. *(Reference: C.R.S. §8-42-107(8)(c)*. Further, when addressing Spinal Ratings, Desk Aid 11 states:

> In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established.

H. The medical records contain sufficient references to pain-*and rigidity*-from the date of the accident, up through Claimant's final visit with his chiropractor on January 24, 2018-a period of just over 4 months. The DIME exam occurred just over 7 months after the accident. All Dr. Higginbotham was required to do to support a Table 53IIB impairment rating was medically document some kind of *rigidity* in his physical exam of Claimant for his cervical and lumbar regions. *This he <u>did not</u> do*. At most, he noted Claimant's self-reported complaints of stiffness. Without further explanation or sufficient documentation of objective pathology, he then combined Claimant's range of motion values (which the ALJ finds have not been overcome) with the additional ratings from Table 53IIB. *This he <u>cannot</u> do.* Pain for 6 months is not enough to qualify, even when combined with 6 months of *self-reported* rigidity.

I. The ALJ concurs with Dr. McCranie in this case that there is simply no basis to apply Table 53IIB with the objective evidence available. There is not 6 months of medically documented *objective* pathology-expressed as *rigidity*-here. While Dr. Rook purports to have noted some objective evidence of rigidity at his IME months later, this was not known to Dr. Higginbotham at his DIME exam, since this report didn't yet exist. There is no evidence that Dr. Higginbotham supplemented his findings based upon what Dr. Rook may have observed. The ALJ finds, by clear and convincing evidence, that Dr. Higginbotham's DIME opinion has been overcome by Respondents, due to his improvident application of Table 53IIB to Claimant.

J. After the ALJ determines that the DIME physician's opinion has been overcome with clear and convincing evidence, the question of the Claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. Therefore, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the Claimant's

impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). In this case, as the reports and testimony of Dr. Abercrombie, Dr. McCranie, and Dr. Neubauer, constitute sufficient evidence. As the record is devoid of objective and persuasive findings sufficient to support an impairment rating, the ALJ accepts the 0% rating previously provided in accordance with the AMA Guides as explained herein.

Claimant's Willful Violation of Safety Rule

K. Section 8-42-112(1)(a), C.R.S. provides as follows:

> (1) The compensation provided for in articles 40 to 47 of this title shall be reduced fifty percent:
>
> (a) Where injury is caused by the willful failure of the employee to use safety devices provided by the employer

L. Whether the Respondents proved the Claimant's failure to use a safety device was a proximate cause of the injury is one of fact for determination by the ALJ. *Tatum-Reese Dev.Corp. v. Indus. Comm'n*, , 490 P.2d 94 (1971). Concurrence of an injury in conjunction with an alleged cause permits, but does not require, an inference of causation. See *Saikh v. Colo. Spgs. Transp.*, W.C. No 4-968-013-02 (ICAP Oct, 24, 2016).

M. Claimant has admitted that he was not wearing a seatbelt at the time of the accident. While the ALJ finds Mr. Young to be sincere and credible in his analysis of the seat belt operation at the time of he examined the wreckage, it is not necessary to decide if the seat belt was "fully operational" right after Claimant got back in after his "slump check", or if it required considerable effort to put it back on. The ALJ is prepared to find, by a preponderance of the evidence, that Claimant felt pressure to make his delivery, but that he also didn't try hard enough to belt in. If it could not be put on at all, all Claimant had to do was call dispatch, report the issue, and await instructions. The onus then would have fallen directly on Respondents to decide what to do next: Order him to drive on to his customer without a belt on, drive it back to the shop without a belt on, or sit and wait for a mechanic while his load of cement hardens- all bad choices, but not Claimant's to make. Claimant's choices were to either wrestle the seatbelt on, or call headquarters. He did neither.

N. Claimant argues that he had to follow two directives that are in direct conflict with one another, to wit: "Always wear your seat belt" vs. "*Do everything you can* to be on time for your first delivery." The ALJ is not persuaded that the latter is to be taken literally, at the expense of the former. To conclude otherwise would justify speeding, running red lights, and for that matter, skipping the "slump check" for quality, in order to "do everything you can". A more reasoned interpretation of the rule is simply to 'waste no time unnecessarily'.

O. Respondents have provided substantial evidence that they have, and consistently enforce the safety rules requiring the use of seatbelts by their drivers as noted in Exhibits I and J, and the testimony of Jason Gordon. Claimant's failure to wear his seatbelt at the time of the incident, despite wearing it earlier in the day, coupled with other cited testimony indicates that Claimant *willfully* violated an explicit and enforced safety rule in violation of §8-42-112(1)(a), and the ALJ so finds by a preponderance of the evidence.

P. Records in evidence, including the report of Dr. Higginbotham and Rook, indicate that Claimant was injured when he fell 6 feet or was thrown from his driving position to the passenger side door, landing on his left side. It is reasonable to infer from the records that the extent of Claimant's injuries to his head, neck, back and wrist was the direct result of his willful failure to wear his seatbelt. By a preponderance of the evidence, the ALJ finds that the extent and nature of Claimant's injuries were due to his lack of being belted in correctly.

Respondents' Waiver of the Safety Rule Provision, by Omitting it on the FAL

Q. The ALJ has made Conclusions of Law K through P in the event that a waiver to litigate the Safety Rule Violation is ultimately deemed not to have occurred. However, Claimant's contention deserves a full examination. Pursuant to § 8-43-203(2)(b)(II)(A):

> An admission of liability for final payment of compensation must include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection, and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on *any disputed issues that are ripe for hearing*, including the selection of an independent medical examiner pursuant to section 8-42-107.2 if an independent medical examination has not already been conducted. If an independent medical examination is requested pursuant to section 8-42-107.2, the claimant is not required to file a request for hearing on disputed issues that are ripe for hearing until the division's independent medical examination process is terminated for any reason. Any issue for which a hearing or an application for a hearing is pending at the time that the final admission of liability is filed shall proceed to the hearing without the need for the applicant to refile an application for hearing on the issue. (emphasis added).

R. According to this statute, the filing of a Final Admission of Liability results in *closure* of the claim if the Claimant does not object and either file for a DIME, or request a hearing on issues *ripe for hearing at the time of the filing of the final admission*. At the time Respondents filed their final admission of liability, there was no assertion of a safety rule violation. By filing a Final Admission of Liability, Respondents were not disputing whether Claimant violated a safety rule. For clarification *the ALJ finds herein that the*

safety rule violation was in fact, ripe for adjudication at the time of the FAL, as the term 'ripeness' is defined by *Jose Aguilera, WC 4-553-571 (2004)*:

> We held the term "ripe for hearing" refers to a disputed issue concerning which there is no legal impediment to immediate adjudication. Thus, the statutory reference to "ripeness" recognizes that although a party may be able to present a "legitimate factual dispute" concerning some aspect of the FAL, the law itself may impose a barrier to adjudication of the dispute pending the completion of a legal or procedural process. (emphasis added).

S. There were no *legal impediments* to "checking the box" for Safety Rule Violations at the time Respondents filed their FAL. A DIME was not pending at the time. Perhaps not unreasonably, Respondents wanted to await the potential DIME results to see if the safety rule violation would be worth pursuing. If so, they could have checked the box, then withdrawn it later if that were appropriate. Respondents certainly had no compunction about denying all TTD in the GAL, then reinstating it at the FAL. Things change. The ALJ finds that this safely rule violation issue did not suddenly become "ripe" after the FAL was filed, merely because the financial calculus had shifted once the DIME results came back. This issue, if Respondents wanted to assert it, was *ripe* at the time the FAL was filed.

T. Respondents cite *Arenas v. ICAO, 8 P. 3d 538 (Colo. App. 2000)* in support of their argument that a 50% intoxication penalty was made retroactive to the date the Claimant first received benefits, despite this not being listed in the GAL. By analogy, the safely rule penalty should apply similarly herein. The ALJ does not concur. The filing of a *GAL*, as in *Arenas*, does not have the same closure mechanism that a *FAL* does, as discussed above. Thus, despite the policy considerations of deterring employee misconduct as discussed in *Arenas,* this reasoning does not extend to this case where the defense, however meritorious, was omitted from the FAL.

U. Additionally, the ALJ finds that the equitable relief of *waiver* of Respondents' right to assert a safety rule violation also applies. Waiver is the intentional relinquishment of a known right and may either be established through a writing abandoning such right, or engaging in conduct which manifests an intent to relinquish a known right. It is likely that Respondents were well aware of Claimant's safety-rule violation, as he was reportedly terminated for cause on Respondents' initial GAL. When Respondents filed their FAL, this constituted a writing abandoning the safety rule violation defense. Had Claimant not objected and challenged MMI and the impairment rating, the claim would have closed on the final admission. At the time of the FAL, it remains possible that Claimant might not have asked for the DIME at all, had he known that this safety rule issue could then be added at the 11th hour. If so, Claimant relied to his detriment upon the FAL. Since Respondents had not asserted a safety rule violation at that time, they waived their known right to assert this defense.

V. The ALJ concludes that, despite the existence of a facts which support a safety rule violation, the failure of Respondents to cite it in their Final Admission of Liability constituted a waiver to asserting it, and they are barred from doing so now.

ORDER

It is therefore Ordered that:

1. The DIME report of Dr. Higginbotham has been overcome. Claimant's Impairment Rating of the Whole Person is 0%.

2. Respondents are barred from asserting the 50% penalty for Safety Rule Violation. No such penalty may be assessed against Claimant.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 19, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-069-177-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 5, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 9/5/18, Courtroom 3, beginning at 1:30 PM, and ending at 5:00 PM).

Claimant's Exhibits 1 through 13 (hereinafter "Claimant's Ex." followed by a page number) were admitted into evidence, without objection. Respondents' Exhibits A through I (hereinafter "Respondents' Ex." followed by a page number) were admitted into evidence, without objection.

At the conclusion of the hearing, the record was left open for the taking of, and filing a written transcript of the evidentiary deposition of Dr. Ryan Probasco, D.C. The deposition was taken on October 9, 2018, and a written transcript thereof was filed on October 29, 2018, at which time the ALJ took the matter under advisement. Respondents and the Claimant filed timely post hearing briefs. The matter was deemed ready for decision on October 29, 2018.

ISSUES

The issues to be determined by this decision concern whether or not the Claimant sustained compensable injury, arising out of the course and scope of his employment, on January 15, 2018, when he was hit by an automobile; if compensable, additional issues concern medical benefits; average weekly wage (AWW); temporary total disability (TTD) benefits; and, temporary partial disability (TPD) benefits.

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues,

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the time of the Claimant's injury, he worked as a roll-off driver for the Employer.

2. The Claimant began work on the date of the injury at the Employer's facilities as a roll-off driver at 5:00 AM on January 15, 2018 (Respondent's Ex. D at p. 9).

3. During the performance of his regular duties for the Employer, the Claimant was injured on January 15, 2018, after being hit by a car while crossing an intersection (Claimant's Ex. 1, p. 1).

4. At the site of the accident on January 15, 2018, driving conditions were poor. There was ice on the roads, traffic at the intersection was heavy, and it was snowing (Respondent's Ex. B, p.6; and, Claimant's Ex. 3, p. 6).

Compensability/The Incident

5. Shortly after the Claimant began work, he began driving his truck toward a job site (Respondent's Ex. D, p. 9).

6. The Claimant witnessed another driver hit the "crosswalk" at the intersection of Dillon Road and Highway 287 (Respondent's Ex. D, p. 9).

7. The Claimant then pulled his vehicle over, exited the vehicle, and crossed the road to check on the safety of the other driver (Respondent's Ex. D, p. 9; Claimant's Ex. 4, p. 7). At this time, the other driver indicated she was "ok" (Respondent's Ex. D, p. 9; Respondent's Ex. H, p. 19).

8. The Claimant then noticed another vehicle heading toward him (Respondent's Ex. D, p. 9; Claimant's Ex. 4, p. 7). The Claimant began running away from the vehicle and was hit by the vehicle (Respondent's Ex. D, p. 9; Claimant's Ex. 4, p. 7). The Claimant was subsequently taken to Good Samaritan Hospital and treated for injuries (Respondent's Ex. E, p. 11; Claimant's Ex. 4, p. 8).

Employer's "Good Samaritan" Policy

9. The Employer's "Employee Handbook," under the section entitled "Purpose," states that "honoring our commitments provides our stakeholders peace of mind . . . . This creates a safe and rewarding environment for our employees while **protecting the health and welfare of the communities we serve.**" (emphasis supplied) [Claimant's Ex. 6, p. 44]

10. The Employer's "Employee Handbook," under a subsection entitled "Safety," states "[w]e strive to assure complete safety of our employees, our customers, **and the public** (emphasis supplied) in all of our operations. Protection from accident or injury is paramount in all we do" (Claimant's Ex. 6, p. 44).

11. The Employer's "Employee Handbook," under a section entitled "health and safety," states " [Employer's] # 1 Operating Value, and first priority, is the safety of our employees, customers, and **others in the communities we serve**" (emphasis supplied) [Claimant's Ex. 6, p. 66)].

12. The Employer's "Employee Handbook," under the section entitled "Employees Who Drive on Company Business," states that there is an affirmative duty to stop a company vehicle "after an accident" (Claimant's Ex. 6, p. 67). The policy does not specify "an accident" involving a company vehicle. The ALJ infers and finds that the

only reasonable meaning of “stopping after an accident” is any accident involving another vehicle whether or not the employee (Claimant) was directly involved in the accident. Such a reading is consistent with the Employer’s community mindedness and what the ALJ labels as its “Good Samaritan” Policy.

13. The Employer's "Internet Brochure," entitled “[Employer’s] Culture Matters," includes numerous statements that indicate a focus on "safety" and "community" (Claimant's Ex. 7, pp. 96-115).

Course and Scope of Employment

14. Although the principal defensive argument of the Respondents was that the Claimant’s “Good Samaritan” actions of crossing an icy and busy intersection to help a motorist in distress were unsafe and removed him from the “course and scope of employment,” the Respondents argument in this regard is misplaced. Respondents never designated “safety violation” as an issue.

15. The Respondents’ supervisory witnesses testified that the Claimant’s actions were unsafe as far as they were concerned but they conceded that the Claimant’s actions amounted to a judgment call on his part.

16. The ALJ finds that the Claimant’s actions in helping a distressed motorist were in furtherance of his Employer’s “Good Samaritan” policy and, thus, were within the course and scope of his employment.

17. The ALJ finds that the Claimant sustained a work-related injury, during the course and scope of his employment, thus, he sustained a compensable injury on January 15, 2018, when he was hit by a vehicle on January 15, 2018, while attempting to help a distressed motorist in furtherance of his Employer’s “Good Samaritan” policy.

Medical Benefits, Temporary Total (TTD) and Temporary Partial (TPD) Benefits

18. After reporting the accident to his Employer, the Employer made no timely medical referrals.

19. The Claimant was taken to Good Samaritan Hospital[1] emergency room (ER) immediately after the accident occurred on January 15, 2018 (Respondent's Ex. D, p. 9; Claimant’s Ex. 8, p. 116)). At the Good Samaritan Hospital, the Claimant was examined by Travis James Guthrie, M.D. at 7:05 AM (Respondent's Ex. E; Claimant's Ex. 8). Dr. Guthrie gave the Claimant an X-Ray and CT Scan (Respondent's

[1] The name of the medical facility is fortuitous in light of the fact that Claimant was injured when acting as a “Good Samaritan” in furtherance of his Employer’s policies.

Ex. E). The Claimant was diagnosed with a strain of the lumbar region (Respondent's Ex. E, p. 14; Claimant's Ex. 8, p. 122). He was prescribed Valium, Colace, and Norco (Claimant's Ex. 8, p. 123). The ALJ infers and finds that Claimant's visit to the Good Samaritan Hospital was emergency care.

20. Subsequently, the Claimant saw Dr. Ryan K. Probasco, D.C. as his continuing chiropractic treatment provider. Dr. Probasco saw the Claimant on January 19, 2018 (Claimant's Ex. 9, p. 134). Dr. Probasco became the Claimant's authorized treating provider (ATP). Dr. Probasco recommended that the Claimant visit him for chiropractic treatment "3 times a week for 4 weeks" (Claimant's Ex. 9 at 136). The Claimant continued with chiropractic treatment until July 30, 2018 (Claimant's Ex. 9, p. 203). Dr. Probasco was not Level 1 Accredited at the time of the Claimant's visit (Probasco Depo., p. 8). Dr. Probasco cleared the Claimant to return to work "without restrictions" on March 1, 2018 (Respondent's Ex. G, p. 18). Dr. Probasco made no referrals.

21. The Claimant was examined by Jennifer Horsley, D.O. of New West Physicians on February 14, 2018 (Respondent's Ex. F, p. 15; Claimant's Ex. 10, p. 205). Dr. Dr. Horsley concluded that the Claimant still had residual hip and back pain from the accident and should continue to see his chiropractor (Respondent's Ex. F, p. 15; Claimant's Ex. 10, p. 205). Dr. Horsley referred the Claimant back to Dr. Ryan Probasco, D.C.

22. The Claimant was examined by Ann K. Smith-Rudnick, M.D. at "Injury Rehabilitation Specialists" on February 27, 2018 (Claimant's Ex. 12, p. 216). Dr. Smith Rudnick determined that the Claimant had a "cervical, thoracic and lumbar sprain/strain," "left lower rib and right hip injuries," "right hip sprain/strain," and "adjustment disorder due to accident, injuries and out-of-work status" (Claimant's Ex. 12, p. 216). The Claimant was instructed not to return to work during this evaluation and to attend physical therapy (PT) (Claimant's Ex. 12, p. 216).

23. The Claimant was examined by Tara Luke, N.P. (Nurse Practitioner) at "Injury Rehabilitation Specialists" on March 12, 208 (Claimant's Ex. 12, p. 218). Luke determined that Claimant was cleared to return to work at that time (Claimant's Ex. 13, p. 224).

24. The Claimant had a "follow-up visit" with Dr. Smith-Rudnick on April 26, 2018 (Claimant's Ex. 12, p. 219). Dr. Smith-Rudnick was of the opinion that most of the Claimant's injuries were resolved at the time, though she recommended that the Claimant see a neuropsychologist regarding his cognitive deficiencies (Claimant's Ex. 12, p. 219; Claimant's Ex. 13, p. 225).

25. Claimant was examined by Alexander Feldman, M.D. on July 26, 2018 (Claimant's Ex. 11) on referral from Dr. Smith-Rudnick (Claimant's Ex. 11, p. 206).

Dr. Feldman concluded that Claimant suffered a concussion and "mild cognitive impairment" related to the accident. (Claimant's Ex. 11 at 208).

26. The physicians described in Findings Nos.22 through 26 hereinabove were neither authorized nor were they in the chain of authorized referrals.

27. The ALJ finds that the Claimant suffered work-related injuries as a result of the January 15, 2018 and these injuries required medical treatment. The ALJ further finds that all of the medical treatment reflected in the evidence is causally related to the January 15, 2018 accident and it has been reasonably necessary to cure and relieve the effects of those injuries.

Average Weekly Wage (AWW)

28. From January 9, 2017 until January 7, 2018, Claimant earned a total of $72,544.77 gross (Claimant's Ex. 5) This results in an AWW of $1, 395.09 per week, or a daily total of $199.30. This results in a temporary total disability (TTD) benefit rate of $930.05 per week, which is less than the capped rate of $948.15 for Fiscal Year (FY) 2017/2018. $930.15 calculates to a daily rate of $132.88 per day.

Temporary Total (TTD) and Temporary Partial (TPD) Disability

29. Claimant was unable to work from January 15, 2018 through February 28, both dates inclusive, a total of 45 days. He had not been released to return to work, earned no wages, and had not been declared to be at maximum medial improvement (MMI), during this period of time. His disability began on the day of the injury January 15, 2018, and ended after Dr. Probasco, D.C. found that the Claimant could return to work "without restrictions" on March 1, 2018. During the period when the Claimant was temporarily and totally disabled, he is entitled to TTD benefits at the rate of $930.15 per week, or $132.88 per day, in the aggregate amount of $5,979.60. After March 1, 2018, the Claimant failed to establish temporary disability or a temporary wage loss.

Respondents' Witnesses

30. Adam Meyer, the Employer's operations manager, testified that the Employer had no specific policy to help people in distress other than the "Good Samaritan" policies outlined in Findings Nos.10 through 14 hereinabove. The ALJ finds that Meyer's testimony in this regard begs the question and is, therefore, not persuasive. Meyer further offered the opinion, without giving specifics, that the Claimant crossing the street to help a distressed motorist was not safe. The ALJ finds that Meyer's testimony lacks credibility for the reasons specified herein.

31. Josh Lopez, an operations supervisor with the Employer, offered the opinion that the Claimant's crossing a snowy intersection to help a distressed motorist was not safe. He offered no specifics nor did he point to a specific company policy concerning the crossing of intersections in the wintertime. Lopez ultimately conceded that the Claimant's actions amounted to a judgment call on the Claimant's part. In this regard, the ALJ finds that Lopez's opinion supports the fact that the Claimant was acting within the course and scope of his employment for the Employer.

Being a "Good Samaritan"/ Implementing Company Policy

32. The Claimant's medical benefits are compensable. The Claimant, a roll-off driver, was injured in an accident involving a vehicle on a day in which driving conditions were especially poor. The injury occurred while Claimant was clocked in, near his work vehicle, and while engaged in an activity sufficiently related to his employment. Claimant's position as a roll-off driver necessarily implicates that he might be involved in any number of duties related to driving on public roads. While the State of Colorado does not impose an affirmative duty on drivers to assist others involved in an accident, the Employer's broad commitment to community and safety support the proposition that the Claimant's response to another motorist's accident is within the actions contemplated by the Employer. The Employer cannot have its cake and eat it too. The ALJ infers and finds that the Employer enjoys a number of benefits by marketing itself as a company that supports safety in the communities it operates in. By having these broad operating values, the Employer has extended the Claimant's work-related functions to being a "Good Samaritan., at least as far as the Claimant's actions in the present case are concerned.

Ultimate Findings

33. As found, the Claimant's testimony was persuasive and credible. The testimony of Josh Lopez was persuasive and credible insofar as he was of the opinion that the Claimant made a judgment call with respect to crossing the snowy intersection to help a distressed motorist, at which time the Claimant's accident occurred. The ALJ finds the opinions of Dr. Ryan Probasco, D.C., with respect to the Claimant's release to return to work without restrictions on March 1, 2018 more persuasive and credible than the other opinions of physicians in the record, whose opinions establish compensability but are vague concerning a release to return to work without restrictions.

34. Between conflicting opinions and evidence, the ALJ makes a rational choice, based on substantial evidence, and resolves the conflicts in favor of the Claimant's testimony and the opinion of Dr. Ryan Probasco, D.C., concerning a full duty release on March 1, 2018, and rejects all opinions to the contrary.

35. As found hereinabove, the Claimant's injuries were sustained when he was struck by a vehicle, while assisting a motorist in distress, thus, furthering the Employer's "Good Samaritan" policies. Therefore, the Claimant's injuries arose out of the course and scope of his employment with the Employer. Consequently, he sustained compensable injuries on January 15, 2018.

36. The Claimant's authorized medical benefits are compensable. Claimant was entitled to select his medical provider because his employer. made no medical referrals when the Claimant reported the accident. Claimant selected Dr. Ryan Probasco, D.C., a chiropractor, who is not level 1 accredited. Therefore, the Respondents are only liable for the first twelve visits.

37. The Claimant's treatment at the Good Samaritan Hospital ER was of an emergent nature and, thus, authorized.

38. As found hereinabove, the physicians described in Findings Nos. 22 through 26 hereinabove were neither authorized nor were they in the chain of authorized referrals. Therefore, the Respondents are not liable for their costs.

39. All of the medical care and treatment for the Claimant's compensable injuries is causally related to the January 15, 2018 accident, and it is reasonably necessary to cure and relieve the effects thereof.

40. The Claimant's AWW is $1,395.09, thus, yielding a TTD rate of $930.05 per week, or $132.88 per day.

41. The Claimant experienced a 100% temporary wage loss during the period of time specified herein and he was, therefore, temporarily and totally disabled from January 15, 2018 through February 28, 2018, both dates inclusive, a total of 45 days.

42. The Claimant failed to prove any temporary disability from March 1, 2018 through the hearing date of September 5, 2018.

43. The Claimant bears the burden by a preponderance of the evidence on all issues heard. He sustained his burden on compensability; authorization of Dr. Ryan Probasco, D,.C; and, the causal relatedness and reasonable necessity of medical treatment related to the injuries sustained in the January 15, 2018 accident. He failed to prove the authorization of any medical providers other than Dr. Ryan Probasco, D.C.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was persuasive and credible. The testimony of Josh Lopez was persuasive and credible insofar as he was of the opinion that the Claimant made a judgment call with respect to crossing the snowy intersection to help a distressed motorist, at which time the Claimant's accident occurred. The ALJ finds the opinions of Dr. Ryan Probasco, D.C., with respect to the Claimant's release to return to work without restrictions on March 1, 2018, more persuasive and credible than the other opinions of physicians in the record, whose opinions establish compensability but are vague concerning a release to return to work without restrictions.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions and evidence, the ALJ made a rational choice, based on substantial evidence, and resolved the conflicts in favor of the Claimant's testimony and the opinion of Dr. Ryan Probasco, D.C., concerning a full duty release on March 1, 2018, and rejected all opinions to the contrary.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant's injury occurred while he was performing his work duties and implementing his Employer's "Good Samaritan" policy by helping a motorist in distress when he was hit by a vehicle. The Respondents' defense that the Claimant's actions were unsafe and, thus, outside the course and scope of his employment are without merit.

Emergent Medical Care

d. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's treatment at the Good Samaritan Hospital ER was of an emergent nature and the Respondents are liable for it.

Medical

e. An employer's initial right to select the treating physician is triggered once the employer has some knowledge of the facts concerning the injury or occupational disease with the employment and indicating "**to a reasonably conscientious manager**" that a **potential** workers' compensation claim may be involved. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). As found, The Employer made no medical referrals and the Claimant made a first selection of Dr. Ryan Probasco, D.C., as permitted by § 8-43-404 (5) (a) (I) (A), C.R.S. Pursuant to § 8-42-101 (3) (a) (III), C.R.S., Respondents liability for Dr. Probasco, D.C., who was not Level I accredited, is limited to no more than the first 90 days or the twelfth treatment, whichever came first.

f. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, Dr. Probasco, D.C. made no referrals. Consequently, treatment providers other than Dr. Probasco, D.C. were not authorized and the Respondents are not liable for their costs.

g. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to his injuries of January 15, 2018. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of his compensable injuries.

Average Weekly Wage (AWW)

h. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, Claimant's AWW is $1,395.09, thus, yielding a TTD rate of $930.05 per week, or $132.88 per day. *Also see Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, the Claimant sustained a temporary total wage loss from January 15, 2018 through February 28, 2018, both dates inclusive.

Temporary Disability

i. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 [Indus. Claim Appeals Office (ICAO), December 18, 2000]. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant's testimony and the opinions of Dr. Ryan Probasco, D.C., establish that the Claimant was temporarily and totally disabled from January 15, 2018 through February 28, 2018, both dates inclusive, a total of 45 days.

j. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant experienced a 100% temporary wage loss during the period of time specified herein and he was, therefore, temporarily and totally disabled from January 15, 2018 through February 28, 2018, both dates inclusive, a total of 45 days.

Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to compensability; medical benefits at the hands of Dr. Ryan Probasco, D.C. (limited to 90-days or 12 visits whichever comes first); AWW; and, TTD benefits from January 15, 2018 through February 28, 2018, both dates inclusive, a total of 45 days.

l. The Claimant failed to meet his burden with respect to the authorization of any medical providers other than Dr. Ryan Probasco, D.C. Therefore, Respondents are not liable for medical costs other than the Good Samaritan ER costs and the costs of Dr. Ryan Probasco, D.C.

m. The Claimant also failed to meet his burden with respect to temporary disability benefits from March 1, 2018, through the hearing date, September 5, 2018.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the medical costs of the Good Samaritan Hospital Emergency Room and for the causally related and reasonably necessary medical care and treatment of Dr. Ryan Probasco, D.C., limited to 90 days or 12 treatments, whichever came first, subject to the Division of Workers' Compensation Medical Fee Schedule. All other request for medical benefits are hereby denied and dismissed.

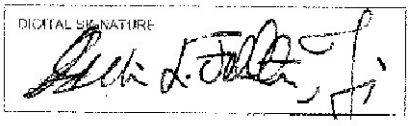
B. Respondents shall pay the Claimant temporary total disability benefits of $930.05 per week, or $132.88 per day, from January 15, 2018 through February 28, 2018, both dates inclusive, a total of 45 days, in the aggregate amount of $5,979.60, which shall be paid retroactively and forthwith.

C. Any and all claims for temporary disability benefits from March 1, 2018 through September 5, 2018 are hereby denied and dismissed.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of November 2018.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

- Whether Claimant established by a preponderance of the evidence that she was the common law spouse of Decedent?

- If Claimant is the common law spouse of Decedent, is she entitled to benefits?

STIPULATION

- The parties stipulated to an applicable average weekly wage of $737.85.

STATEMENT OF THE FACTS

1. This case involves a death claim and associated application for death benefits. Decedent was injured in the course and scope of his employment on May 30, 2017. After a protracted hospital stay, Decedent passed away on June 30, 2017 because of his work related injuries.

2. Decedent's death certificate indicates his marital status to be "divorced." The published obituary makes no mention of claimant as a surviving spouse.

3. Claimant filed a claim for death benefits on July 28, 2017. Claimant and Deceased legally married in the early 1980s. Claimant could not remember the precise year they married, but testified they were married only four or five months. They legally divorced on May 27, 1983. While married to Decedent, Claimant used Decedent's surname as her own. At the time of the divorce, Claimant successfully petitioned the court to restore her maiden name. Subsequently, Claimant never used Decedent's surname. Claimant and Decedent have no children together.

4. After their divorce, Claimant and Decedent dated and/or lived together off and on until December 2015. Claimant described the relationship in various ways during her testimony. During the 1980's after the divorce, Claimant testified that they dated off and on. The longest period of time they were consistently together was "two or three years, if that."

5. Claimant bought her house some time in approximately 1988 when she and Decedent were not together. The house was in her name alone. However, two or three years ago, Claimant added her daughter, C. G., to the deed.

6. Between approximately 1988 and 1991 or 1992, Claimant and Decedent remained apart. After 1991 or 1992, the two again began to date "off and on." During the 1990's, the two worked at the same packing plant. Claimant explained that they still saw each other and that he would come and stay with her on his days off.

7. Claimant alleges that Decedent moved back in "permanently" in

approximately 2000 or 2001. Claimant admits however that any time they fought; he would leave and stay with someone else. Generally, this would be a family member such as a sister or brother or one of his children. He would be gone for months at a time. During that period, they would still have lunch together at work on occasion.

8. Claimant testified Decedent helped her with bills. She did not consider that to be "rent." He gave claimant $100 per week in cash to help with bills such as gas, electricity, water and cable TV. He also bought some groceries but only when he was living there. When Decedent moved out, he stopped making any payments. Claimant offered no persuasive evidence that Decedent provided for her needs.

9. Claimant testified that she considered herself common law married. However, she did not state when, after their divorce, this alleged common law marriage allegedly commenced. Decedent sometimes called her his "old lady" but did not use the term "wife." They had a joint bank account, but Claimant also maintained her own separate bank account. She did not have access to Decedent's credit cards. They had no other accounts together, and the utilities at her house were in her name alone. Claimant and Decedent never filed joint tax returns. Decedent's tax returns identified himself as "single." In addition, despite Claimant's insistence she was common law married, she never filed a claim for widow's benefits with Social Security Administration. When asked specifically why she believed she was common law married, she responded: "Because we spent years together. We raised my [great-] grandson since A. was two years old. He is now nine."

10. Claimant receives social security retirement benefits of $900 per month, and she owns her house free and clear. She receives $120 per month from social services for support of her great grandson of whom she has sole custody. During the process to obtain this custody, she proceeded by herself and Decedent was not included in those legal proceedings. The ALJ finds it unlikely Decedent would not have been included in those proceedings if he were Claimant's husband.

11. Decedent moved out of Claimant's home in late 2015. Claimant testified that he left after an argument with her grandson Jeremiah stating that when all the "shit is done with Jeremiah," they would "see what happens. If he's going to go to rehab or what he's going to do, he says, then we'll see when I come home." Jeremiah had been living with Claimant from the time he was a late teen. Jeremiah is the father of the great grandson who now lives with Claimant in her custody. Shortly after that incident, Jeremiah went to jail where he remains. Claimant's daughter, C.G., testified inconsistently with Claimant regarding why Decedent moved out of Claimant's house. Claimant's testimony implies that Decedent made this decision on his own. However, C.G. testified that she asked Decedent to leave as he had made threats toward Jeremiah. The ALJ finds it unlikely that C.G. would ask her mother's husband to leave his own home. C.G. was unaware why Decedent did not move back into Claimant's house since Jeremiah was no longer there, and Claimant offered no persuasive explanation. Claimant's testimony was also inconsistent with that of Decedent's daughter, E.S. When

Decedent moved into E.S.'s house after this argument, he advised her he was moving out because he and Claimant had had a fight regarding Jeremiah. The uncontroverted evidence supports a finding that from that time through the date of his accident and subsequent death, Decedent lived with his adult daughter E.S., and never moved back into Claimant's house.

12. Claimant presented testimony from her neighbor, V.M., who lived in the house next to Claimant's house. She testified she knew Decedent from visiting over the fence and waving when he would go by. V.M. described her relationship with Claimant and Decedent over the last ten years as saying hello while doing yardwork, letting them know if their dog got out, coming over to borrow something, etc. In the 1980's and 1990's she described seeing Decedent's vehicle there frequently. V.M.'s testimony is of limited probative value because knew Claimant and Decedent only as superficial acquaintances. V.M. did not notice the times Decedent was admittedly not living at Claimant's house. Her references to Decedent referring to Claimant as his "wife" were limited to trite colloquial phrases and sayings made to her several times over the course of decades. V.M. gave no specific periods for these references. The last time she recalled any such statement was in 2013 or 2014. V.M. did not know Decedent was not the father of Claimant's daughter, and she mistakenly believed that Decedent was included in Claimant's legal battle to gain custody of her great grandson. Decedent's daughter E.S. testified that she did not know V.M. The ALJ finds V.M.'s testimony is not persuasive as to the common law status of Claimant and Decedent as her knowledge of the couple's lives is significantly limited. V.M. did not testimony that she ever heard Claimant refer to Decedent as her husband.

13. Dan Rinker is Employer's shop foreman and safety manager and worked in that capacity on the date of Decedent's accident. It was part of his job to notify Decedent's family of the accident, which he attempted to do once the ambulance left the yard. He pulled the most recent emergency contact form, dated February 24, 2017, from Decedent's personnel file. Decedent had not listed anyone as an emergency contact. Decedent's next most recent contact sheet, dated August 31, 2015, before he moved out of Claimant's house. That document listed Claimant as an emergency contact but did not identify her as his spouse. Mr. Rinker called Claimant to inform her of the accident. Claimant seemed surprised to receive the call because Decedent had been living with his daughter for approximately eighteen months.

14. Mr. Rinker went to the hospital to make sure someone was there for Decedent and to make sure the Insurer's claim information was available to hospital personnel. At the hospital, he was introduced to Claimant as "the person he had called." At no time during his interaction with her did Claimant indicate she was Decedent's wife. Mr. Rinker stated that Decedent's son picked up his paycheck and personal belongings from the company.

15. When Decedent was injured, Claimant only had a telephone number for Decedent's son, E.S.J. This fact is at odds with C.S.'s testimony that she and Claimant

had a close and loving relationship. It also conflicts with Claimant's testimony that she called A.S., another of Decedent's daughters, because "that is the only phone number I had."

16. C.S. testified that at the time Decedent was living with E.S., he was exploring affordable places to live other than with Claimant. C.S.'s testimony supports the inference that Decedent had no plans to move back into Claimant's house. When asked if she ever heard her father talk about Claimant as his wife, C.S. sidestepped the question and instead provided several other names he referred to her as, none of which indicated a spousal relationship. She testified that her father referred to Claimant as "the feo" (meaning "the ugly"), the babe, or the landlord. C.S. verified that during the 2000's, Decedent lived with his siblings, with E.S., and at times had his own apartments in Loveland, in Greeley and in Evans. The fact that Decedent referred to Claimant's place as his home is not dispositive. The ALJ notes that many people who live in rented residences refer to that location as their "home."

17. Decedent's adult son, E.S.J., testified that in the couple of years prior to his father's death they spoke frequently either in person or by phone, usually at least once a week. When E.S.J. would visit his father at Claimant's house, he noted that Decedent had his own rented room in which he kept all his belongings, such as pictures, knickknacks, cards, and other personal property. Decedent did not have any belongings or keepsakes in the common portions of the house. The main living areas contained Claimant's own possessions and pictures of her children and her family. He saw no pictures of Claimant and Decedent together displayed anywhere in the house. In his opinion, the relationship appeared to be one of convenience instead of an actual spousal relationship. E.S.J. based his opinion on their interactions with each other, as well as the fact that Claimant needed the help and Decedent was willing to rent from her and give her money, and his father had a place to rest his head after work. It was also convenient as it allowed Claimant, when things were not going well, to kick him out or let him walk out, which in E.S.J.'s experience is inconsistent with a marital relationship. Decedent also told E.S.J. during these visits that he had a couple of girlfriends that he would visit with and take out on dates.

18. Decedent and E.S.J. rode to work together every day during the last year of Decedent's life. During these rides, they would talk about their personal lives. Decedent told E.S.J. that there was nothing between him and Claimant. He told E.S.J. they were not getting back together and that he had no plans to move back into her house. The only reason deceased visited there was to visit the great grandson, and to help him if needed. Decedent referred to Claimant during these conversations as Margaret or "the landlord." His father specifically told him that for the last five years or so, he and Claimant were not together, they were not a couple, and he just rented the room from her there. He came and went as he pleased and paid her a set amount of rent, or money to help with bills. He never spoke of her as his wife to E.S.J.

19. On one specific occasion, Decedent specifically referred to himself as

single. Although E.S.J. does not recall exactly when, he was certain it was after Decedent moved out of Claimant's house. While discussing life insurance, E.S.J. understood that his father would never get married again and that he would just stay single and keep his daughters as beneficiaries.

20. When E.S.J. received messages from Claimant informing him of his father's accident, he called Claimant and found that she already knew which hospital he should go to. Claimant did not arrive at the hospital until after E.S.J. and his two sisters. While Decedent was hospitalized, E.S.J. made all medical decisions. Claimant never challenged him as to his authority to do that. Had she done so, E.S.J. testified it "wouldn't have sat good" with him or his sisters. E.S.J. was at the hospital "pretty much from start to finish" and he never referred to Claimant as Decedent's wife. He considers her just to be "Margaret." Claimant did not stay long after Decedent finally passed away. E.S.J. and his sisters were the last ones present in the hospital room.

21. Silvia Gomez testified on behalf of Respondents. Ms. Gomez and Decedent were married. It is unclear to the ALJ whether Ms. Gomez is the biological mother of E.S.J., C.S. and E.S. Ms. Gomez and Decedent legally divorced but the two stayed in touch. He visited her in South Dakota and he would send her money so she could come to Colorado to visit him. She described this as an ongoing intimate relationship, which continued through the time Decedent was injured. They spoke weekly when they were apart, and during their conversations, Decedent would refer to Claimant as his landlord. Decedent never represented to Ms. Gomez that Claimant was his wife.

22. The last time Ms. Gomez came to visit Decedent was in May 2017 shortly before his accident. They stayed together at E.S.'s house. During this visit, Decedent stated to her, in reference to the Claimant, "[S]he's not married to me, and I'm not married to her…" Ms. Gomez and Decedent planned for her to return in July to talk to a friend of Decedent's about tearing down the house she inherited from her mother. They planned to place a mobile home there and live together so Ms. Gomez could retire. Ms. Gomez testified she had received a call from C.S. and as a result, she felt threatened regarding her decision to testify at the hearing.

23. E.S. is Decedent's youngest adult daughter. E.S. visited Decedent prior to 2015 while he lived at Claimant's house. She described the living situation there as Claimant and Decedent having separate rooms. In Decedent's room were his personal belongings, pictures of his kids, his collectible eagles, his clothing and his gun safes. In the main part of the house, the only things displayed were pictures of Claimant's family and her Native American pictures. No pictures of Claimant and Decedent together appeared anywhere in his room or the main part of the house. E.S. observed nothing of the living arrangement to indicate that Claimant and Decedent were cohabitating as man and wife.

24. E.S. has lived in Colorado continuously since 2000 and has been in contact with family members continuously during that time. She testified that Decedent lived at

Claimant's "off and on" from 2000 to 2015. During that period, she was aware that her father also lived with a cousin, her sister, and with her. In addition, he had his own apartment on several occasions. Besides the times Decedent moved out of Claimant's house, there was also a time that Claimant moved out of her own house and lived at a house owned by her son. During this time, Decedent did not live with Claimant.

25. Decedent moved in with E.S. and her family in December 2015. Decedent discussed with E.S. that he had gotten into an argument with Claimant over Claimant's grandson and he wanted to stay somewhere else. E.S. testified that when he moved in, he brought "[e]verything of his. His gun safe, some important papers, clothes. The only thing I think he left behind were some knickknacks maybe." E.S. believed he intended to stay there indefinitely as he asked her permission to enclose the awning on the side of her house to create a safe place to store his tools, which in fact he did. He also had E.S. assist him with changing the mailing address on his bills so he would receive them at her address.

26. Sometime after he moved in, Decedent came home after work and found E.S. upset. He was concerned and E.S. explained she was worried that he was going to move back into Claimant's house. He stated to her he was not intending to move back to Claimant's and that he would stay with E.S. as long as she would let him stay. Decedent always referred to himself as single when speaking with E.S. He referred to Claimant as feo or as his landlord. E.S. was also aware that her father was dating other women. He had asked permission of E.S. to ask one of her friends on a date.

27. E.S. corroborated the incident E.S.J. testified to during a discussion regarding purchasing life insurance. Decedent stated he was never getting married again and would stay single. This conversation occurred at E.S.'s house in May 2017, just prior to Decedent's accident. Ms. Gomez was also present during the conversation as she was visiting from South Dakota. E.S. clarified that the insurance letter (which appears at Cl. Ex. 2, Bates 22) was from an insurance policy that was a benefit of one of Decedent's credit cards. E.S. received a bill in the mail and contacted the company. They requested that she send Decedent's death certificate, which she did.

28. E.S. testified regarding a journal Decedent kept and referred to as his notebook or "little black book." This is a book kept by the deceased in which he logged all payments he made on a weekly basis for bills, rent, etc., money he lent to family members or friends and payments they made to pay him back. The journal covers the period from December 2009 through the time of his death. Journal entries included payments to M.A., which E.S. presumes refers to Claimant. The vast majority of payments to MA are $100 per week. Beginning in roughly January 2016, regular entries of $100 payments to "Liz" began to appear. Decedent paid E.S. $100 every week after he moved in with her. This initial payment corresponds generally with the last documented payment to M.A. The ALJ entered into evidence an additional book identified as being in Decedent's handwriting. In this book, the entries were not marked through as the entries in the prior book were. E.S. had observed her father using the book in the

past. She testified that she observed him marking off payments as he made them. These final entries were not marked off, as they were entries Decedent had intended to make each week but did not make due to his accident. No planned future payments to M.A. appear in the additional notebook.

29. The two notebooks establish that Decedent made $100 weekly payments to Claimant (M.A.) with some regularity between July 8, 2010 and February 12, 2016. During that time, gaps exist during when Decedent did not make payments to Claimant. For example:

- In 2012, there were several months during which Decedent made the same regular payments of $100 per week C.S. rather than to Claimant.
- Beginning in January 29, 2016, Decedent documented $100 per week payments to E.S.
- The last documented payment to Claimant in any amount on February 12, 2016.
- From February 12, 2016 until June 23, 2017, Decedent paid or planned to pay E.S. $100 per week.
- When Decedent gave any additional funds to Claimant in addition to the $100 per week he paid for rent, Decedent recorded those amounts in his notebook.

30. The ALJ finds that Decedent paid Claimant rent when he keep a room at Claimant's house. The ALJ also finds that Decedent was not contributing to Claimant's support during the year and a half prior to his accident.

31. Claimant visited Decedent during the first week he was hospitalized, but then her visits diminished. Claimant was not involved in medical decisions regarding Decedent's care. Claimant was also not involved in planning Decedent's funeral.

STATEMENT OF APPLICABLE LAW

The purpose of the Workers' Compensation Act of Colorado (Act) §§8-40-101, *et seq*. C.R.S., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. The claimant bears the burden of proving by a preponderance of the evidence that she is entitled to death benefits. §8-43-201(1), C.R.S.; *Faulker v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be

interpreted neutrally, neither in favor of the rights of a claimant nor in favor of the rights of respondents. §8-43-201, C.R.S. A workers' compensation claim is decided on its merits. §8-43-201, *supra*.

In accordance with section 8-43-215, C.R.S., this decision contains specific findings of fact, conclusions of law and an order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice, or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

The determination of whether a common-law marriage existed is one of fact for determination by the ALJ. *In Re Custody of Nugent*, 955 P.2d 584, 588 (Colo. App. 1997) (determination of the existence of a common-law marriage turns on issues of fact and credibility).

According to section 8-41-503, C.R.S., dependency shall be determined as of the date of the industrial injury. Under section 8-41-501(1)(a), C.R.S., a widow is presumed wholly dependent unless it is shown that she was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support. Such presumptions may be rebutted by competent evidence. § 8-41-501(1), C.R.S.

The existence of a common-law marriage "is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship." *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987). Currently, recognition of the common-law marriage "serves mainly as a means of protecting the interests of parties who have acted in good faith as husband and wife." *Id.* at 664. This test contemplates the parties will exhibit conduct manifesting their agreement to become man and wife. The two most important factors demonstrating the parties' agreement are cohabitation and reputation among persons in the community that the parties hold themselves out as man and wife. Numerous behaviors may be considered as evidence of the parties' intention, including maintenance of joint bank accounts, ownership of joint property, use of the man's surname by the woman, and the filing of joint tax returns. However, none of these behaviors is determinative, and the court may

consider any type of evidence that manifests the intentions of the party. Conduct in the form of mutual public acknowledgment of marital relationship is not only important evidence of existence of mutual agreement, but is essential to establishment of common-law marriage. *People v. Lucero, supra*.

Evidence of whether the decedent provided financial support to the claimant is relevant in determining whether there was a common-law marriage. *Marquez v. LVI Environmental Services, Inc.*, W.C. No. 4-425-155 (April 5, 2001) *aff'd. LVI Environmental Services, Inc., v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA0731, November 1, 2001) (not selected for publication).

The very nature of a common law marital relationship makes it likely that in many cases express agreements will not exist. The parties' understanding may be only tacitly expressed, and the difficulty of proof is readily apparent. Courts have recognized that "the agreement need not have been in words." *Smith v. People,* 64 Colo. 290, 293, 170 P. 959, 960 (1918); *see also Rocky Mountain Fuel Co. v. Reed,* 110 Colo. 88, 130 P.2d 1049 (1942). Then the issue becomes what sort of evidence is sufficient to prove the agreement. If the agreement is denied or cannot be shown, its existence may be inferred from evidence of cohabitation and general repute. *See, e.g., Graham v. Graham,* 130 Colo. 225, 227, 274 P.2d 605, 606 (1954); *James v. James,* 97 Colo. 413, 414, 50 P.2d 63, 64 (1935). In such cases, the conduct of the parties provides the truly reliable evidence of the nature of their understanding or agreement.

The cases in Colorado have used language suggesting that such an agreement "may be proven by, and *presumed* from, evidence of cohabitation as husband and wife, and general repute," *Taylor v. Taylor,* 10 Colo.App. at 305, 50 P. at 1049 (emphasis added), interchangeably with language stating that "mutual consent may be *inferred* from cohabitation and repute," *Smith v. People,* 64 Colo. at 293, 170 P. at 960 (emphasis added). In applying these standards to particular facts, the Colorado Supreme Court has generally not treated evidence of cohabitation and repute as creating a presumption of a common law marriage. *See Graham v. Graham,* 130 Colo. 225, 274 P.2d 605 (1954); *Moffat Coal Co. v. Industrial Comm'n,* 108 Colo. 388, 118 P.2d 769 (1941). Instead, sufficient evidence of cohabitation and reputation may give rise to a permissible inference of common law marriage. *People v. Lucero,* 747 P.2d 660, 664 n.5 (Colo. 1987). Evidence concerning a common law marriage should be "clear, consistent and convincing." This requirement stresses that the parties must present more than vague claims unsupported by competent evidence. *People v. Lucero,* 747 P.2d 660, 664 n.6 (Colo. 1987).

Claimant has not established by a preponderance of the evidence that she was the common law spouse of Decedent. The case law requires that the proponent of a common law marriage must produce evidence of "cohabitation as husband and wife." Multiple witnesses testified that Decedent kept his own room in Claimant's house where he slept and kept his clothes and other possessions. Nowhere in Claimant's house were any pictures of the two together displayed, no joint possessions or keepsakes held out as

evidence of their alleged marriage. The evidence in the record is more indicative of a landlord-tenant relationship than a marriage. It is uncontroverted that Decedent came and went as he pleased and dated other women. He lived in a number of places at various times, and sometimes rented his own apartment. He planned to buy a mobile home and move in with his ex-wife S.G. in a place she inherited from her mother. This behavior is inconsistent with holding oneself out to the public as being a married man.

Substantial evidence in the record establishes that Decedent in fact did not hold himself out as Claimant's spouse. He did not indicate such a relationship on his employment documents or tax returns. He gave Claimant cash for rent or for "bills," but only when he actually lived in a room at the house. While Claimant testified that she and Decedent had a joint bank account, Claimant presented no persuasive evidence of such account. Further, because Decedent paid Claimant in cash, Claimant gave no plausible explanation of such account's purpose.

The evidence entered into the record supports the following reasonable inferences. The couple owned no joint property, never filed joint income tax returns, and Decedent did not list Claimant as his spouse on his employment documents. Claimant owned her own house since the 1980s and never added Decedent to the deed. However, Claimant added her daughter to the deed. Claimant maintained her own bank account and had no access to credit cards held by Decedent. Decedent filed tax returns indicating he was "single." Decedent was apparently excluded from legal custody proceedings in which Claimant sought sole custody of her great grandson. When Decedent and Claimant's grandson got into an argument, Claimant's daughter asked Decedent to leave the house, a request one would not expect a stepchild to make of her parent's spouse. Claimant could not recall what day they were married (or divorced) and offered no date as of which the two made a mutual decision or reached a mutual agreement to become common law married.

The ALJ finds and concludes Claimant made no showing of mutual consent as required under the law. Claimant did not use Decedent's surname at any time after they were legally divorced, though she did use it when they were married. She also never filed for Social Security widow's benefits when Decedent died. Decedent's death certificate does not list Claimant as a spouse. Decedent's published obituary does not mention Claimant. Claimant did not issue her own obituary of Decedent's life, nor did she make any follow up attempt to plan his funeral services. E.S.J. made all the medical decisions for his father during his approximately month long hospital stay. Claimant did not attempt to take over or even be involved in medical decision-making. When Decedent passed away, Claimant left the hospital and did not stay with Decedent's body as his children did.

Additionally, Claimant admitted that Decedent had not lived in her house for approximately eighteen months prior to his accident. According to section 8-41-503, C.R.S., dependency shall be determined as of the date of the industrial injury. Under section 8-41-501(1)(a), C.R.S., a widow is presumed wholly dependent unless it is shown that she was voluntarily separated and living apart from the spouse at the time of the

injury or death or was not dependent in whole or in part on the deceased for support. Such presumptions is rebuttable by competent evidence. § 8-41-501(1), C.R.S. The uncontroverted evidence is that Claimant and Decedent were living separate and apart for a year and a half prior to his accident. Substantial evidence in the record also rebuts any presumption of dependence. Claimant offered no persuasive evidence that Decedent was supporting her, even partially, at the time of his accident.

Rather, the evidence establishes that at the time of the accident, Claimant was not dependent on Decedent for support in any way. The fact that he would bring groceries if he came to visit on the weekends is insufficient to base a finding of common law marriage and/or spousal support. Though Claimant denies that Decedent paid her "rent" when he lived at the house, the evidence establishes otherwise. Once he moved out in December 2015, the regular payments of $100 per week Decedent previously made to Claimant ended and he began making $100 per week payments to E.S. with whom he was living from December 2015 until his injury in May 2017. Claimant has failed to establish that she received significant support from Decedent or that she was dependent upon Decedent in any manner at the time of the accident. Decedent's notebook is clear and persuasive evidence that he was not providing any support to Claimant. He recorded even the smallest of payments or loans made to family members in his notebook. There were no ongoing payments of any type to Claimant for a year and a half prior to his accident.

ORDER

The ALJ orders the following:

1. Claimant has failed to establish by a preponderance of the evidence that she was the common law spouse of Decedent on the date of his accident.

2. Claimant's claim for death benefits is therefore denied and dismissed.

November 19, 2018.

By: */s/ Kimberly Turnbow*
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

NOTE: If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable work injury.

- Whether claimant has proven by a preponderance of the evidence that medical benefits, including the knee surgery requested by Dr. Mark Failinger, are reasonable, necessary and related to her work injury.

- Determination of claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 48-year-old female who began working for Employer on January 30, 2018, as a Certified Nursing Assistant (CNA). Claimant concurrently worked as a CNA at the facility of employer B.

2. Employer's Director of Human Resources, Crystal Rose, testified that immediately after her hire, Claimant had attendance issues. Ms. Rose testified she phoned Claimant on February 27, 2018 and advised her that Employer was putting her on a performance plan due to her absenteeism. Ms. Rose instructed Claimant to sign the performance plan on March 4, 2018.

3. Claimant testified that on Saturday, March 3, 2018 she and coworker Doris Latorre were transferring a facility resident from the shower to his bed when Doris was unable to hold up her side of the weight and lost her grip. Claimant testified the resident fell on her and she felt pain in her back and felt and heard a "pop" in her right knee. Claimant testified that prior to this incident she never had back or right knee symptoms.

4. Claimant testified she reported this injury to her supervisor, Sarah, on March 3, 2018 but Sarah was unable to find the paperwork to report an injury. A co-worker advised Claimant to report the injury to Ms. Rose. Claimant offered no persuasive evidence to explain why Claimant did not report the alleged injury to Ms. Rose on March 4, 2018 when Ms. Rose instructed Claimant to sign her performance plan.

5. Claimant testified her low back hurt and her right knee became very swollen on March 4, 2018, and she was unable to work at Harmony Pointe from March 5, 2018 through March 9, 2018.

6. Claimant reported her injury to Ms. Rose on March 10, 2018, when their paths crossed in a hallway. Ms. Rose sent Claimant for evaluation and treatment.

7. Claimant presented to Concentra Medical Centers on March 12, 2018 for medical treatment. She reported injuring her back and right knee when a resident fell on

her during a transfer at work. She did not report feeling and hearing a "pop" in her knee. Claimant denied having prior low back and right knee symptoms. The Concentra report noted Claimant's right knee and low back were normal in appearance, though Claimant reported diffuse pain over the right knee. Her provider assessed a lumbar strain and right knee sprain.

8. Concentra's provider placed Claimant on work restrictions that Employer was able to accommodate. However, employer B was not able to do so. Claimant testified she sustained no wage loss from Employer, but had lost wages from employer B because she was not able to work for employer B while on restrictions.

9. Claimant underwent a right knee MRI on April 30, 2018, which revealed a complex tear of the posterior horn of the medial meniscus with radial components at the posterior root, Baker's cyst with mild rupture, and degenerative cartilage changes in the patellofemoral compartment.

10. Claimant presented to Dr. Mark Failinger on May 24, 2018 after referral by her authorized treating physician for an orthopedic evaluation. Claimant told Dr. Failinger she injured herself while performing a resident transfer at work. She denied having any prior right knee injuries or symptoms. She described experiencing knee pain and swelling, but did not report feeling and hearing a "pop" in the right knee.

11. Dr. Failinger reviewed Claimant's April 30, 2018 MRI and opined it showed a medial meniscus tear with medial compartment chondromalacia and some patellar chondromalacia. Dr. Failinger advised Claimant she could try a cortisone injection or proceed with an arthroscopy, but cautioned the results from the arthroscopy would depend on the amount of chondromalacia in the knee. Dr. Failinger also noted Claimant had thinning of the medial compartment and that results are not always as good with that condition. Claimant indicated she wanted to proceed with surgery.

12. Dr. Failinger requested approval to perform a knee arthroscopy, meniscectomy, and chondroplasty. Insurer denied the request.

13. Doris Latorre testified at hearing and confirmed she and Claimant worked together to transfer the resident. However, Ms. Latorre denied losing her grip on the resident, that he fell onto Claimant, and that Claimant had to hold up the resident's full weight. Ms. Latorre testified the event described by Claimant did not occur.

14. Ms. Latorre testified Claimant asked her for help on Saturday, March 3, 2018, and the two of them worked about eight hours together that day. Ms. Latorre testified that while working together *prior* to transferring the resident, Claimant had complained of back and knee pain. Ms. Lattore testified that after transferring the resident, Claimant told her she hurt her back but did not say anything about an injury to her right knee.

15. Claimant's reports to her treating providers that that she had no prior symptoms or injuries to her low back or right knee was inconsistent with her medical records.

16. Prior to her beginning her employment with Employer, Claimant treated at the Colorado Coalition for the Homeless on October 17, 2017 for right knee pain that began a month earlier when a power wheelchair ran into her. Records indicated Claimant's knee pain had been increasing since that injury. At that appointment, her provider gave Claimant a knee brace and advised Claimant to wear the brace during the daytime. Claimant testified she decided, against medical advice, that she did not need to wear the knee brace and therefore did not use it.

17. Claimant's medical records from Colorado Coalition for the Homeless detail chronic low back pain, with treatment starting in July 2011, with a note that her pain began in July 2005 following a motor vehicle accident. Claimant treated her low back pain consistently through September 2016.

18. The parties deposed Dr. Tim O'Brien on August 28, 2018. The parties stipulated that Dr. O'Brien is an expert in orthopedic surgery and is Level II accredited.

19. Dr. O'Brien testified he reviewed Claimant's medical records for Respondents. The review included records from before and after Claimant's alleged work injury, as well as radiology reports. Dr. O'Brien testified Claimant's MRI report noted degeneration of the meniscus but no evidence of an acute meniscal tear. The degeneration of the meniscus resulted in fissuring and fraying which occur over time.

20. Dr. O'Brien testified Claimant's described mechanism of injury would not likely cause the findings seen in Claimant's right knee MRI report. Dr. O'Brien explained that when a meniscus tears acutely, tissue breaks causing excessive fluid accumulation and effusion of the knee joint. Dr. O'Brien testified the reading radiologist did not observe those findings in Claimant's MRI. Dr. O'Brien noted that the March 12, 2018 records of Claimant's physical examination indicated the knee looked normal, and opined it would be virtually impossible for the right knee to look normal if the meniscus had torn acutely.

21. Dr. O'Brien testified that Claimant described having to stop a body falling towards the ground, and that such an incident could result in a minor strain or sprain. He based his opinion on Claimant's description of the incident and her subjective pain complaints.

22. Dr. O'Brien testified that regardless of what caused Claimant's meniscal tear, Dr. Failinger's surgical recommendation was not a reasonable approach to address Claimant's symptoms. Dr. O'Brien cited various medical studies detailing the risks and negative outcomes following arthroscopic surgery of an arthritic knee, such as Claimant's.

23. Dr. O'Brien reviewed Claimant's statements that she had been asymptomatic prior to her alleged injury. He opined that given the degree of degeneration and arthritis in her knee it was unlikely she would have had no symptoms as claimed.

24. Dr. O'Brien testified Claimant's alleged work injury, if it occurred, would have at most resulted in a minor injury that would have quickly resolved and the knee would have returned to its pre-injury level by April 10, 2018.

25. Claimant's wages from Employer for the 4.714 weeks from the time of her hire on January 30, 2018 to the period ending prior to the March 3, 2018 injury amounted to $776. Claimant's AWW from Employer equals $164.62 ($776 / 4.714).

26. Claimant's wages from Harmony Pointe for the 13 weeks from pay period beginning September 16, 2017 to pay period ending December 15, 2017, amounted to $6,526.85. Claimant's AWW from Harmony Pointe equals $502.07 ($6,526.85 / 13).

27. The ALJ finds Claimant's combined AWW from both jobs is $666.69 ($164.62 + $502.07).

28. The ALJ finds the testimony of Dr. O'Brien credible and persuasive. Dr. O'Brien had the benefit of reviewing Claimant's full medical history at the time he rendered his opinions on Claimant's injuries and need for medical treatment. Claimant's authorized treating providers had imperfect and incomplete information upon which to formulate opinions regarding diagnoses, causation and reasonably necessary medical treatment, because Claimant was not transparent regarding her medical history. Although Dr. O'Brien opined Claimant sustained an injury, he did so based on her description of the alleged incident and her subjective pain complaints. Based on the opinions of Dr. O'Brien, the ALJ finds the surgery recommended by Dr. Failinger is not reasonable, necessary and related to Claimant's alleged work injury.

29. The ALJ agrees with Dr. O'Brien that even if Claimant did sustain an injury, she would have returned to her baseline condition by April 10, 2018. Continuing medical benefits beyond that date would not be reasonable, necessary and related to Claimant's work injury.

30. The ALJ finds the testimony of Ms. Lattore to be more credible and persuasive than that of Claimant. Ms. Lattore had no motivation or incentive to testify in a dishonest manner and conceded Claimant indicated her back hurt after the resident transfer.

31. The ALJ finds the Claimant's testimony to be incredible and not persuasive. Claimant had motive and incentive to testify dishonestly and to report a fabricated injury. Claimant was a newly hired employee and immediately had attendance issues with Employer that were of such significance she was placed on an Action Plan less than one month after her hire. Claimant knew of the Action Plan on February 28, 2018 and was to sign the Action Plan on March 4, 2018. Claimant then alleged an injury on March 3, 2018, which her coworker testified did not occur as alleged. Claimant knew to report the injury to Ms. Rose but did not do so for nearly a week after the claimed injury, and only did so at that time when she happened to see Ms. Rose in the hallway. When Claimant presented for medical treatment she was not forthcoming with her treating providers regarding her medical history. She omitted the fact she had a right knee injury in the months prior to starting with Employer and that her medical provider prescribed a knee brace which Claimant claims not to have worn. Claimant also did not tell her treating providers she was treated for chronic low back pain dating back to a motor vehicle accident in 2005. The medical record reflects that when Claimant reported for treatment

after reporting her injury, her low back and right knee appeared "normal" with only mild diffuse pain. These findings are inconsistent with Claimant's reports of extreme pain and swelling. For these reasons, Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable work injury to her low back or right knee.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

General Legal Principles

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Claimant Did Not Sustain a Compensable Injury to her Low Back or Right Knee

A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation that requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury that occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable

probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2013). See City of *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000).

The fact that a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the logical and recurrent consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); see also *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008)(simply because a claimant's symptoms arise during the performance of a job function does not necessarily create a causal relationship based on temporal proximity).

As found, Claimant has failed to prove by a preponderance of evidence that she sustained a compensable injury to her low back or right knee.

Claimant Is not Entitled to Dr. Failinger's Requested Surgery or to Continuing Medical Benefits

Regardless of the filing of an admission for medical benefits or an order containing a general award of medical benefits, respondents retain the right to dispute liability for medical treatment on grounds that the treatment is not authorized or reasonably necessary. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Indus. Comm'n*, 723 P.2d 749 (Colo. App. 1986). The filing of an admission does not prevent respondents from contesting whether a claimant is in need of any continued medical treatment because of the compensable injury. *Ford v. Regional Transp. Dist.*, W.C. No. 4-309-217 (I.C.A.O., Feb. 12, 2009). Respondents remain free to dispute the cause of the need for medical treatment, and respondents' election to do so does not shift the burden of proof away from the claimant. See *Snyder*, supra; *Velarde v. Sunland Construction*, W.C. No. 4-412-975 (I.C.A.O., Dec. 4, 2001). This principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *Cf. HLJ Mgmt.*

Group, Inc. v. Kim, 804 P.2d 250 (Colo. App. 1990) (filing of admission does not vitiate respondents' right to litigate disputed issues on a prospective basis).

A claimant must prove a causal relationship between the work injury and the medical treatment for which he is seeking benefits. *Snyder*, 942 P.2d at 1339. Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). The claimant shoulders this burden and must establish his entitlement to benefits by a preponderance of the evidence. *Snyder*, 942 P.2d at 1339. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979).

As found, Claimant has failed to show it is more probably true than not that the knee surgery recommended by Dr. Failinger is reasonable and necessary to cure and relieve the effects of the claimed work injury.

As found, Claimant has failed to show it is more probably true than not that the need for medical treatment of her low back condition and symptoms is reasonable and necessary to cure and relieve the effects of the work injury.

Determination of Claimant's Average Weekly Wage

As found, Claimant's combined AWW from both jobs is $666.69.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury to her back or her knee. As a result, the claim is denied and dismissed with prejudice.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at:** http://www.colorado.gov/dpa/oac/forms-wc.htm.

DATED this 20th day of November, 2018.

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable industrial injury arising out of and in the course of his employment on April 19, 2018.

II. If Claimant sustained a compensable injury, whether he established, by a preponderance of the evidence, entitlement to reasonable and necessary medical benefits.

III. If Claimant sustained a compensable injury, whether he established, by a preponderance of the evidence, entitlement to temporary total disability benefits ("TTD").

IV. If Claimant sustained a compensable injury and is entitled to TTD benefits, determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant is a 44 year old man who works for Employer as an electrical maintenance worker. Claimant is responsible for repairing parking meters.

2. Claimant was involved in a motor vehicle accident during the course and scope of his employment on April 19, 2018 when he was rear-ended by a 2003 Honda Accord while slowing to a stop at the intersection of Sherman Street and 19th Street in Denver. Claimant was driving his work vehicle, a 2002 Ford Ranger pickup truck, and wearing a shoulder and lap seatbelt at the time of the accident. The airbags of Claimant's work truck did not deploy.

3. The driver and passenger of the Honda Accord fled the scene on foot. Claimant exited his vehicle and did not immediately experience any pain or identify any injury. The police report notes moderate damage to the front of the Honda Accord and slight damage to the back/bumper area of Claimant's work vehicle. The police report further notes there were no injuries and no ambulance was called.

4. Photographs from the accident scene show various items in the bed of Claimant's work truck, including two enclosed truck tool boxes and parking meter parts stacked above the brim of the truck bed. Approximately three parking meter parts are seen on the ground behind the truck, which fell out of the truck due to the impact. The bumper of the work truck is slightly bent at the middle and downturned. The hood of the Honda Accord is slightly pushed back.

5. Employer mounts video cameras in their work trucks to take video of both the exterior and interior of the vehicles. The DriveCAM video tracks time, lateral acceleration and forward acceleration of the work vehicle. The dash camera video of the incident shows Claimant's work truck slowing at an intersection, but not coming to a full stop, and then being pushed slightly forward into the crosswalk. The second camera, which was recording the interior of the vehicle, was occluded.

6. Claimant immediately notified Employer of the accident by calling the "ouch line." Claimant's supervisor, Michael Humenik, testified at hearing he went to the accident scene and asked Claimant if he was injured. Mr. Humenik testified Claimant said he felt fine and appeared to not be in any pain or distress. Mr. Humenik testified it is Employer's policy to send an employee for a medical evaluation under such circumstances as a precautionary measure. As such, Employer sent Claimant to Employer's designated healthcare facility, Denver Health.

7. Cynthia Kuehn, M.D. evaluated Claimant on the day of the accident. Claimant reported being rear-ended while stopped at a stop sign and that his vehicle was pushed 20-30 feet into the intersection. Claimant reported he did not hit his head, but was unsure if he blacked out. He complained of bilateral shoulder pain, lower and upper back pain, anxiety, numbness in his lower back, stiffness, difficulty lifting his arms above his shoulders, weakness in his hands, headaches, and his vision being out of focus. On examination, Dr. Kuehn noted reported tenderness in the paracervical muscles, trapezius muscles, paralumbar muscles and bilateral biceps, all without spasm. Claimant had good cervical and shoulder range of motion, along with a negative straight leg raise and full extension at the lumbar spine. Dr. Kuehn gave the following assessment: neck strain, lower back strain, bilateral shoulder strain and headache. She recommended Claimant use over the counter medications and released Claimant to full duty with instructions to return to the clinic if he felt he could not work full duty.

8. On April 23, 2018, Claimant returned to Dr. Kuehn reporting improved but continued pain in his neck, low back and shoulders, headaches, episodes of lightheadedness, and problems with his right eye focusing. She noted Claimant did not go to work the past few days, which she could not retroactively authorize. Dr. Kuehn noted minimal tenderness on exam without spasm and a normal evaluation of the right eye. She recommended Claimant undergo a trial of medical massage and placed Claimant on temporary work restrictions of no lifting greater than 15 pounds.

9. On April 26, 2018, Claimant returned to Dr. Kuehn for reexamination at the request of his supervisor, as Claimant had been missing work despite being released to modified duty. Claimant reported increased pain in his neck and upper back area, right shoulder pain, mild low back pain, mild headaches, and intermittent difficulties focusing with his right eye. Dr. Kuehn again noted reported tenderness on exam with no spasm. She prescribed Claimant Mobic and Robaxin and continued his work restrictions.

10. Dr. Kuehn reevaluated Claimant on May 15, 2018. Claimant reported improvement of his neck, lower back and right shoulder pain with massage therapy and medication. He complained of some right upper extremity weakness and intermittent

paresthesias, and increased low back pain when walking more than two blocks. Dr. Kuehn referred Claimant to physical therapy and increased his lifting restrictions to 20 pounds.

11. Respondents filed a Notice of Contest on May 16, 2018.

12. On July 6, 2018, Claimant returned to Dr. Kuehn reporting overall improvement. Dr. Kuehn wanted Claimant to attempt a trial of full duty work. She noted Claimant felt he was probably physically able to perform full duty work, but repeatedly expressed his desire to remain on leave under the Family and Medical Leave Act. Dr. Kuehn recommended Claimant complete his remaining sessions of physical therapy and ordered six additional sessions of massage therapy. She noted Claimant was making good progress and that the motor vehicle accident was "fairly low energy."

13. Insurer denied Dr. Kuehn's request for an additional six sessions of massage therapy.

14. On July 19, 2018, Dr. Kuehn again noted overall improvement in Claimant's pain. Claimant had been able to tolerate full duty work. Dr. Kuehn expected Claimant's mild residual symptoms to resolve. Dr. Kuehn placed Claimant at maximum medical improvement ("MMI") and recommended six additional massage therapy sessions over the next six months as maintenance treatment.

15. On July 30, 2018, Zachariah Weimer, MS, PE, conducted an accident reconstruction analysis. In drafting his report, Mr. Weimer reviewed the traffic accident reports, DriveCAM video, one photograph of the 2003 Honda Accord, two photographs of Claimant's work vehicle, a witness statement of Todd Brocesky, and the vehicle dimension, weight and specification data. He also conducted an in-person inspection of the Honda Accord at the police impound facility.

16. Mr. Weimer, a forensic engineer, testified at hearing as an expert in accident reconstruction. He testified the work truck's rear bumper was pushed down and in, while the Honda Accord sustained damage to the hood, front grill and right headlight. Mr. Weimer stated that the Honda Accord's reinforcement system, which is made of steel and is the actual structural component of the vehicle, was not damaged. Mr. Weimer testified the accident was not bumper-to-bumper, but rather an "underride impact," with the top edge of the Honda Accord's hood interacting with the bottom edge of the work truck's rear bumper. Specifically, there was bumper misalignment between the two vehicles at impact, with the Honda Accord going slightly under the Ford Ranger. Mr. Weimer testified that based on the overall minimal damage, and complete lack of damage to the reinforcement system of the Accord, the accident was low speed and low force.

17. Mr. Weimer explained Claimant's work truck was not at a stop and was traveling at 9 miles per hour at the time of the accident. He estimated the Honda Accord was going 8 – 12 miles per hour faster than Claimant's work truck at the time of the accident. Per Mr. Weimer's calculations, Claimant's work truck experienced a velocity change of

4.5 – 6 miles per hour, which he stated is considered a low severity and low speed impact. Mr. Weimer testified the collision was similar to that of a bumper car collision. He opined that no secondary contacts into the steering wheel, instrument panel or windshield would be expected by a belted driver under these conditions.

18. On August 7, 2018, Tashof Bernton, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Bernton interviewed and physically examined Claimant, as well as reviewed Claimant's medical records, the accident reports, and Mr. Weimer's accident reconstruction report. Claimant reported to Dr. Bernton that he may have lost consciousness for a few seconds during the accident. Claimant reported overall improvement, but some continued discomfort in his bilateral shoulders, pain in his lower back with lifting, leg cramps, headaches, and sensitivity to light. On examination, Dr. Bernton noted good back and shoulder range of motion with reported tenderness in the shoulders, and multiple positive Waddell signs. Dr. Bernton noted the clinical examination was entirely benign with the exception of prominent Waddell signs.

19. Dr. Bernton also administered a Battery for Health Improvement-2 psychological assessment. Claimant scored in the 10th percentile of self-disclosure, 87th percentile in somatic complaints, and 71st percentile in pain complaints. Dr. Bernton opined that Claimant's scores indicate a very high likelihood that somatoform complaints represent a significant portion of Claimant's pain complaints and are consistent with an individual who may be assuming a disabled identity. Dr. Bernton opined that the April 19, 2018 accident did not result in any injury sufficient to require medical care, and that Claimant's persistent subjective complaints are not supported by objective findings. Dr. Bernton concluded Claimant does not require work-related medical care, work-related restrictions, or permanent impairment.

20. Dr. Bernton testified by post-hearing deposition as an expert in internal medicine and occupational medicine. Dr. Bernton testified consistent with his IME report, continuing to opine Claimant did not sustain any injury as a result of the April 19, 2018 accident. Dr. Bernton explained that there were no objective abnormalities noted on Dr. Kuehn's evaluations of Claimant, only subjective complaints, which was consistent with his examination of Claimant. Dr. Bernton testified Claimant had the highest possible score, five out of five, on Waddell's signs, which is an indicator that psychologic factors likely play a large role in Claimant's pain complaints. Dr. Bernton testified one would not expect any injury to result from a low impact collision such as the April 19, 2018 accident, and there is no reasonable probability "at all" of shoulder complaints, neck complaints, low back complaints, leg cramps, light sensitivity, and headaches as a result of the incident. Dr. Bernton opined that Claimant's spectrum of complaints is not consistent with the mechanism of injury, and that his diffuse array of persistent physical complaints reasonable medical sequelae from a minor rear-end motor vehicle accident. Dr. Bernton stated that it is not medically probable the accident would have resulted in vision changes or injury to Claimant's eyes, optical pathways or brain, which indicates at least some of Claimant's medical history is either unreliable or due to psychological factors.

21. Dr. Bernton explained that the Battery for Health Improvement-2 test is designed to evaluate the presence of non-physically-based factors in a patient's pain presentation, and that Claimant's profile was,

> [v]ery strong in terms of presenting evidence for the presence of somatoform complaints. Meaning, this is an individual who is extremely likely to indicate the presence of physical problems that may be unrelated to any underlying physical pain generator and may be present on a psychological basis. And that is extraordinarily consistent with the remainder of the findings that we've discussed: The initial history, the lack of correlation between the mechanism of injury, and the patient's complaints and the patient's presentation; when he saw me, with multiple pain complaints and no findings on examination that were abnormal except for the multiple positive Waddell signs.

22. Dr. Bernton testified that, from his review of Mr. Weimer's report, the impact was of a nature routinely experienced by individuals on a daily basis without injury, and that the magnitude of force would not be anticipated to cause injury. Dr. Bernton opined Claimant had pain complaints without objective evidence of injury and Claimant did not sustain an injury in the accident sufficient to require medical treatment or cause disability. Dr. Bernton stated his opinion was "extremely strongly supported" by multiple factors, including the accident reconstruction analysis, Claimant's multiple complaints with no physical relationship to the incident, the persistence of complaints not to be expected even if there was a self-limited muscular strain, and psychological factors.

23. Claimant testified at hearing he was rear-ended when stopped at a stop sign. Claimant testified he had been sitting at the stop sign for approximately two to five minutes at the time of the collision. Claimant testified it is possible he struck his head and maybe lost consciousness for a few seconds, although there no bruises or bumps on his head. He testified it is also possible he struck his knees, arms and hands, but he did not notice any contusions on his knees. He stated he did not feel pain at the time of the accident, but later that evening began to experience pain, dizziness and blurred vision. Claimant testified he experienced "whiplash" symptoms with pain and stiffness in his neck and shoulders, headaches, blurred vision, leg pain and cramps, arm weakness, and low back pain. Claimant testified he continues to have a "little pain" in his shoulder, neck, back, and leg, along with back spasms and leg weakness. Claimant testified he does not feel as strong as he did before the accident, despite physical therapy and massage therapy being helpful. Claimant testified he did not have any injuries or treatment to his shoulders, back, neck or legs prior to the April 19, 2018 accident. Claimant agrees he is at MMI without work restrictions and without permanent impairment and wants to undergo the six additional massage therapy sessions recommended by Dr. Kuehn as maintenance treatment.

24. Claimant testified he did not work for approximately a week after the accident, then worked modified duty from late April 2018 to early May 2018. Claimant testified he also did not work from May 20, 2018 to July 19, 2018 due to the accident.

25. For the sixteen-week period from December 23, 2017 through April 14, 2018, claimant earned a total of $17,822.99 in gross wages, resulting in an average weekly wage of $1,113.94.

26. The ALJ finds the testimony and opinions of Dr. Bernton and Mr. Weimer, as supported by the medical records, police reports, accident photographs, and DriveCAM footage, more credible and persuasive than the testimony of Claimant, and the opinion of Dr. Kuehn, who relied on Claimant's subjective reporting of the mechanism of injury and symptoms.

27. The ALJ finds Claimant failed to prove, by a preponderance of the evidence, that he sustained an injury requiring medical treatment or causing a disability as a result of the April 19, 2018 motor vehicle accident.

28. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo.

App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968). Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Wherry v. City and County of Denver,* W.C. No. 4-475-818 (ICAO March 7, 2002).

The question of whether the claimant met his or her burden to prove a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury as a result of the April 19, 2018 motor vehicle accident. It is undisputed Claimant was involved in a rear-end motor vehicle accident during the course and scope of his employment on April 19, 2018. However, the mere fact the accident occurred does not, by itself, establish Claimant sustained an injury requiring medical treatment or causing disability. As revealed in the medical records and noted by Dr. Bernton, there is no objective evidence of an injury. The only exam findings are Claimant's subjective reports of an array of symptoms, including bilateral shoulder pain, back pain, back numbness, back stiffness, hand weakness, vision problems, headaches and leg cramps. On her initial evaluation of Claimant, Dr. Kuehn noted no muscular spasms, good cervical, lumbar and shoulder range of motion, and negative straight leg raise results. While Dr. Kuehn diagnosed Claimant with strains and recommended massage therapy, Dr. Kuehn's opinion appears to be based solely on Claimant's

subjective reporting of symptoms, which becomes problematic when considering the entirety of the evidence.

The nature and severity of Claimant's alleged injury is called into question due to various factors. In his reports to Dr. Kuehn and in his testimony, Claimant stated he was hit while stopped at a stop sign and pushed 20-30 feet into an intersection. DriveCAM footage of the incident clearly shows Claimant was not stopped at a stop sign, but was slowing to a stop at the time of impact. Both the DriveCAM footage and photographs from the accident scene do not show Claimant's vehicle being pushed 20-30 feet into an intersection. Mr. Weimer conducted a thorough analysis of the accident and credibly and persuasively opined that this was a low speed and low impact accident similar to a bumper car collision, and that no secondary contacts inside the vehicle would be expected by a belted driver.

Dr. Bernton credibly and persuasively testified there is no reasonable probability a low impact collision such as the April 19, 2018 accident would result in Claimant's diffuse and persistent array of physical complaints. Claimant had the highest possible score on Waddell's signs, which Dr. Bernton credibly explained is an indicator that psychologic factors likely play a large role in Claimant's pain complaints and is consistent with an individual who may be assuming a disabled identity. Thus, while Claimant may not be consciously misrepresenting his version of events and his reported symptoms, the ALJ is persuaded by Dr. Bernton's credible testimony, as supported by the medical records and accident reconstruction analysis, that Claimant's reported physical problems are unrelated to any physical injury caused by the April 19, 2018 accident.

Based on the totality of the evidence, Claimant failed to meet his burden to prove he suffered an injury sufficient to require medical treatment or cause disability. As Claimant failed to meet his burden to prove he sustained a compensable injury, the remaining issues are moot.

ORDER

It is therefore ordered that:

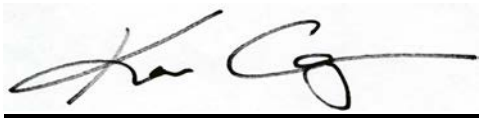
1. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 20, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that his right shoulder surgery performed on April 3, 2018 by Eric McCarty, M.D. was authorized, reasonable, necessary and causally related to his September 1, 2017 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 75-year-old male who works for Employer as a Courtesy Clerk. His job duties involve emptying trash, cleaning spills and retrieving shopping carts from Employer's parking lot.

2. On September 1, 2017 Claimant suffered an admitted industrial injury to his right shoulder during the course and scope of his employment. Claimant was retrieving shopping carts from Employer's parking lot. He used a safety strap that he secured onto the carts to keep them together. When Claimant pulled on the strap to secure the carts, he suffered a pain in his right shoulder area. He also heard a snapping sound in the right shoulder region.

3. Claimant reported the September 1, 2017 right shoulder incident to Employer and chose NextCare Urgent Care for treatment. He also designated Workwell Occupational Health Clinic Longmont as his authorized medical provider.

4. On September 5, 2017 Claimant visited David Kistler, M.D. at Workwell for an examination. Claimant reported that he injured his right shoulder area at work while securing a strap to shopping carts to retrieve them from Employer's parking lot. Dr. Kistler diagnosed Claimant with a sprain of the right shoulder joint and assigned work restrictions.

5. Claimant subsequently underwent conservative treatment for his shoulder symptoms. However, because Claimant continued to report pain and weakness, he underwent a right shoulder MRI on September 29, 2017. The MRI reflected a full-thickness tear of the right rotator cuff.

6. On November 2, 2017 Claimant underwent an independent medical examination with John R. Burris, M.D. Dr. Burris issued a report on November 2, 2018 and an addendum after reviewing additional medical records on March 17, 2018. He concluded that Claimant's work activities on September 1, 2017 did not cause his right rotator cuff tear.

7. Initially, Dr. Burris detailed the mechanism of Claimant's injury. Claimant reported that on September 1, 2017 he was retrieving grocery carts from Employer's

parking lot. After connecting six carts, Claimant applied a safety strap at waist level to a handle of the carts to hold them together. While pulling up on the strap Claimant felt pain in the right upper arm and shoulder region. Claimant demonstrated that, while holding his elbows to the side, he flexed his elbows in a "curl" type of maneuver. Dr. Burris explained that Claimant's position would "not put the rotator cuff at risk" and the force exerted on the strap would "not be sufficient to cause a rotator cuff injury." He reasoned that Claimant's normal range of right shoulder motion within days of the September 1, 2017 work incident and the frequency of rotator cuff tears in individuals in Claimant's age group suggested a high probability that the MRI findings existed prior to the September 1, 2017 work event. Furthermore, regardless of the cause of Claimant's right rotator cuff tear, Dr. Burris determined that Claimant would not benefit from surgical intervention because he exhibited full range of right shoulder motion.

8. Claimant continued to attend physical therapy and performed recommended home exercises. Nevertheless, Claimant's right shoulder symptoms continued to worsen. Dr. Kistler thus referred Claimant to Orthopedic Surgeon Joseph Hsin, M.D. at Cornerstone Orthopaedics and Sports Medicine for an evaluation.

9. On December 6, 2017 Claimant visited Dr. Hsin for an examination. Dr. Hsin noted that Claimant exhibited "good function and excellent range of motion" He cautioned that he could not guarantee that surgical repair of the rotator cuff would improve function or range of motion.

10. On December 13, 2017 Respondents filed a General Admission of Liability (GAL) acknowledging Claimant's right shoulder strain. However, Respondents specifically denied liability for any injury to Claimant's right rotator cuff. The GAL stated "the rotator cuff is not accepted."

11. Claimant testified at the hearing in this matter that he had been researching rotator cuff surgery in 2017 because of his continuing right shoulder symptoms. He specifically remarked that in a sample of 24 patients only two did well without surgery. Claimant thus sought to pursue surgical options.

12. On January 31, 2018 Claimant returned to Dr. Hsin for an examination. Dr. Hsin determined that Claimant's rotator cuff tear "appear[ed] to be amenable to repair." After discussing the "pro and cons of operative versus nonoperative treatment" Claimant sought to proceed with surgery. Therefore, on February 1, 2018 Dr. Hsin requested authorization for surgical repair from Insurer.

13. On February 1, 2018 Insurer denied Dr. Hsin's surgical request. Relying on the analysis of Dr. Burris, Insurer noted that Claimant's right rotator cuff tear was not related to his work activities for Employer.

14. On February 26, 2018 Claimant sought a surgical opinion from Eric McCarty, M.D. from outside of the Workers' Compensation system. Claimant had not been referred to Dr. McCarty by an Authorized Treating Physician (ATP). Dr. McCarty

determined that Claimant was a good surgical candidate and recommended surgery as soon as possible to prevent further right shoulder atrophy.

15. Claimant decided to proceed with surgery through his private Blue Cross/Blue Shield insurance with Dr. Mccarty. On April 3, 2018 Dr. McCarty performed Claimant's right rotator cuff repair.

16. On October 8, 2018 the parties conducted the pre-hearing evidentiary deposition of Dr. Burris. Dr. Burris maintained that Claimant's work activities on September 1, 2017 did not cause his right rotator cuff tear. He reiterated that Claimant's mechanism of injury would not cause a rotator cuff tear. Moreover, Claimant's MRI revealed degenerative and chronic changes in the right shoulder and did not suggest that an acute tear occurred on September 1, 2017. Although surgery was eventually recommended, Dr. Burris suggested that it proceeded with some expressed reluctance. He explained, "Dr. Kistler, discussed the findings of the MRI and said, you know, he's very functional. So, again, focusing on function, he didn't think that surgery was the – the best solution. And, likewise, orthopedic surgeon Dr. Hsin noted that he's got a full range of motion. He's got full function. Doesn't know that he would really benefit from surgery. And there's a chance that surgery could potentially make it worse. So at the time Dr. Hsin recommended conservative care." Dr. Burris thus noted that the surgery performed by Dr. McCarty was neither reasonable nor necessary.

17. Claimant has failed to establish that it is more probably true than not that his right shoulder surgery performed on April 3, 2018 by Dr. McCarty was authorized. Initially, on September 1, 2017 Claimant suffered an admitted industrial injury to his right shoulder while retrieving shopping carts from Employer's parking lot. Claimant reported the incident to Employer and chose NextCare Urgent Care for treatment. He also designated Workwell Occupational Health Clinic Longmont as his authorized medical provider. After receiving conservative treatment and diagnostic testing through Dr. Kistler at Workwell, Claimant continued to suffer right shoulder symptoms. Dr. Kistler thus referred Claimant to Orthopedic Surgeon Dr. Hsin at Cornerstone for an evaluation. As an ATP Dr. Hsin requested authorization for right rotator cuff surgery. However, relying on the analysis of Dr. Burris, Insurer noted that Claimant's right rotator cuff tear was not related to his work activities for Employer and denied the request.

18. Claimant did not subsequently submit a written request to change physicians. Instead, on February 26, 2018 Claimant sought a surgical opinion from Dr. McCarty outside of the Workers' Compensation system. Claimant had not been referred to Dr. McCarty by an ATP. Dr. McCarty determined that Claimant was a good surgical candidate and recommended surgery as soon as possible to prevent further right shoulder atrophy. Claimant decided to proceed with the surgery through his private Blue Cross/Blue Shield insurance. On April 3, 2018 Dr. McCarty performed Claimant's right rotator cuff repair.

19. The preceding chronology reflects that Dr. McCarty was not in the authorized chain of physician referrals. Instead, of proceeding within the Workers' Compensation system by seeking a change of physician through the procedures

delineated in W.C.R.P. Rule 8-7, Claimant sought treatment and surgery from Dr. McCarty because Insurer denied the surgical request of his ATP. Any treatment and medical expenses that Claimant incurred by proceeding with Dr. McCarty, including right shoulder surgery, were thus unauthorized. Because Claimant obtained unauthorized medical treatment through Dr. McCarty, Respondents are not liable for the costs of care and surgery. Dr. McCarty lacked the legal authority to treat Claimant with the expectation that Insurer would provide reimbursement. Claimant's request for Respondents' financial liability for treatment and surgery from Dr. McCarty is thus denied and dismissed. It is therefore unnecessary to determine whether Dr. McCarty's right rotator cuff surgery on Claimant was reasonable, necessary and related to the September 1, 2017 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

5. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

6. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

7. W.C.R.P. Rule 8-7 specifies the proper procedure when a claimant seeks to change medical providers. Specifically, W.C.R.P. Rule 8-7(A) delineates that "an injured worker may submit a written request to change physicians to the insurer or employer's authorized representative if self-insured. Such a request must be on the form prescribed by the division of workers' compensation." Under W.C.R.P. 8-7(b) the insurer then has 20 days from the date of the request "to either grant permission for the requested change of physician or object in writing on the form."

8. Section 8-43-404(7)(a), C.R.S. provides that "an employer or insurer shall not be liable for treatment provided pursuant to article 41 of Title 12, C.R.S. unless such treatment has been prescribed by an authorized treating physician." If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAP, June 18, 2010); see *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999)*; Pickett v. Colorado State Hospital,* 32 Colo. App. 282, 513 P.2d 228 (1973). The court in *Pickett* explained:

> The Workmen's Compensation Act does not permit an injured employee to change physicians or to employ additional physicians without notice to his

> employer or its insurer and consent of the Division of Labor. When an injured employee incurs unauthorized medical expenses, the employer or its insurer is not liable for such expenses.

Pickett, 32 Colo. App. at 285, 513 P.2d at 229-30.

A physician's status as "authorized" and whether a particular treatment was provided by an authorized physician are generally questions of fact for resolution by the ALJ. *In Re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAP, June 18, 2010); *see Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997).

9. As found, Claimant has failed to establish by a preponderance of the evidence that his right shoulder surgery performed on April 3, 2018 by Dr. McCarty was authorized. Initially, on September 1, 2017 Claimant suffered an admitted industrial injury to his right shoulder while retrieving shopping carts from Employer's parking lot. Claimant reported the incident to Employer and chose NextCare Urgent Care for treatment. He also designated Workwell Occupational Health Clinic Longmont as his authorized medical provider. After receiving conservative treatment and diagnostic testing through Dr. Kistler at Workwell, Claimant continued to suffer right shoulder symptoms. Dr. Kistler thus referred Claimant to Orthopedic Surgeon Dr. Hsin at Cornerstone for an evaluation. As an ATP Dr. Hsin requested authorization for right rotator cuff surgery. However, relying on the analysis of Dr. Burris, Insurer noted that Claimant's right rotator cuff tear was not related to his work activities for Employer and denied the request.

10. As found, Claimant did not subsequently submit a written request to change physicians. Instead, on February 26, 2018 Claimant sought a surgical opinion from Dr. McCarty outside of the Workers' Compensation system. Claimant had not been referred to Dr. McCarty by an ATP. Dr. McCarty determined that Claimant was a good surgical candidate and recommended surgery as soon as possible to prevent further right shoulder atrophy. Claimant decided to proceed with the surgery through his private Blue Cross/Blue Shield insurance. On April 3, 2018 Dr. McCarty performed Claimant's right rotator cuff repair.

11. As found, the preceding chronology reflects that Dr. McCarty was not in the authorized chain of physician referrals. Instead, of proceeding within the Workers' Compensation system by seeking a change of physician through the procedures delineated in W.C.R.P. Rule 8-7, Claimant sought treatment and surgery from Dr. McCarty because Insurer denied the surgical request of his ATP. Any treatment and medical expenses that Claimant incurred by proceeding with Dr. McCarty, including right shoulder surgery, were thus unauthorized. Because Claimant obtained unauthorized medical treatment through Dr. McCarty, Respondents are not liable for the costs of care and surgery. Dr. McCarty lacked the legal authority to treat Claimant with the expectation that Insurer would provide reimbursement. Claimant's request for Respondents' financial liability for treatment and surgery from Dr. McCarty is thus denied and dismissed. It is therefore unnecessary to determine whether Dr. McCarty's

right rotator cuff surgery on Claimant was reasonable, necessary and related to the September 1, 2017 industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for Respondents' financial liability for the treatment and surgery through Dr. McCarty is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 21, 2018.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his left shoulder on November 18, 2017.

2. Whether the left shoulder surgery recommended by Daniel White, M.D. is reasonable, necessary, and causally related to Claimant's November 18, 2017 injury.

FINDINGS OF FACT

1. Claimant is a forty-one year old manager for Employer who worked as a "rough neck" on an oil rig.

2. Claimant's duties included drilling fluid, maintaining equipment, pulling pipe, and generally ensuring the oil and gas drilling process functions smoothly. Claimant regularly lifted and moved heavy items including pipes.

3. On November 18, 2017, Claimant sustained an admitted work related injury to his left forearm and wrist. White at the top of a rig and unhooking a saddle from the blocks, the metal cable broke loose, swung freely, and pinned Claimant's left forearm and wrist against an I-beam. This crushed and pinned Claimant's left arm. Claimant pulled on his arm in every direction while alone on the platform. Claimant had no help and eventually was able to pull his arm out. Claimant testified that he felt the bones break on impact when he was pinned between the two pieces of metal. After getting free, Claimant climbed down a ladder with his severely broken arm.

4. Claimant was evaluated at the emergency department of Wyoming Medical Center on November 19, 2017. Claimant reported smashing his left arm between two plates of metal. Claimant reported pain at a 7/10 with all the pain localized in his forearm. Claimant was noted to have visible deformity to his left forearm with diminished grip strength. Claimant was given iv morphine for his pain. X-rays were taken and showed fractures of the ulnar styloid and distal radius. A closed reduction was performed and improved anatomical alignment was obtained. Claimant was placed in a splint and it was noted that he would need to follow up with orthopedics and likely would need an open reduction and internal fixation (ORIF) surgery. Claimant was also instructed to use a sling.

5. On November 21, 2017, Claimant underwent ORIF surgery performed by Daniel White, M.D. Dr. White noted the placement of screws and a plate. The

postoperative plan included elevating the wrist for the next week or so with follow up x-rays. Dr. White noted that Claimant would be planned for limited activity with the left wrist until evidence of fracture healing and then would progress with normal activities. *See* Exhibit C.

6. On December 5, 2017, Respondents filed a general admission of liability for the November 18, 2017 injury. *See* Exhibit 3.

7. On December 13, 2017, Claimant underwent occupational therapy. It was noted that he was involved in a traumatic crush with loss of function, loss of motion, and weakness and that Claimant presented in a wrist cock brace. Two months of skilled therapy was estimated to be needed. Goals of returning to his overall function prior to the injury were noted. *See* Exhibit 5.

8. On December 22, 2017 at occupational therapy, Claimant's wrist was stiff in all directions and he had trouble with in hand manipulation of putty. On December 26, 2017 at occupational therapy, Claimant was unable to make a tight fist yet. The therapist recommended continuing with rehabilitation and progression with advancement as tolerated. *See* Exhibit 5.

9. In January of 2018 occupational therapy notes show that Claimant continued to have stiffness and although overall was improving, was still unable to work due to his dysfunction. Claimant's range of motion was noted to be progressing slowly. *See* Exhibit 5.

10. On April 6, 2018, Claimant underwent therapy. Claimant reported left shoulder pain that he associated as being aggravated by the pulling motion during his injury and aggravation of prior clavicle fracture and presumed arthritis. Claimant reported left shoulder pain with reaching and lifting activity. *See* Exhibit D.

11. On April 18, 2018, Claimant underwent a work hardening session. Claimant reported that his left distal forearm/hand was caught between equipment with a pulling effort to free his arm. Claimant reported residual numbness and weakness at the left hand. Claimant reported left shoulder pain that he associated as being aggravated by pulling motion during his injury and believed it to be aggravation of a prior clavicle fracture and what he presumed was arthritis. Claimant continued at this visit to mention shoulder pain with lifting. Claimant reported that his pain was aggravated in the left shoulder with reaching and lifting activities and eased with activity modification. Claimant was found to have tightness/tenderness in the left pectoral major, mild crepitus at the AC joint, and shoulder hiking with overhead lifting. Claimant reported the ability to eliminate joint pain with overhead lifting when consciously maintaining good scapular positioning of the left shoulder. *See* Exhibits 6, D

12. On April 18, 2018, Claimant underwent a work hardening session. Claimant continued to mention shoulder pain with lifting but not enough to end activity. *See* Exhibits 6, D.

13. On April 20, 2018, Claimant underwent a work hardening session. Claimant reported more severe shoulder pain with most activities and was unable to join in most activities. *See* Exhibits 6, D.

14. On May 7, 2018, Dr. White ordered a CT scan of Claimant's left shoulder noting an injury to the left arm 6 months ago with a distal radius fracture and persistent shoulder pain despite therapy. Dr. White noted in the order a suspected biceps SLAP tear versus rotator cuff injury. *See* Exhibit 7.

15. The CT scan was performed on May 15, 2018. The impression provided by Michael Sloan, M.D. was subtle irregularity of the superior as well as the anteriosuperior and posterosuperior labrum compatible with the clinical suspicion of SLAP tear. *See* Exhibit 8.

16. On May 16, 2018, Dr. White evaluated Claimant. He noted that Claimant had been injured when his left arm was caught between two large pieces of metal and that Claimant had a Galeazzi fracture of the forearm. Dr. White noted that Claimant had been working with therapy and was progressing well except for persistent anterior left shoulder pain that had really limited Claimant's ability to functionally return to work. On examination, Dr. White found mild tenderness at the AC joint with a positive cross arm test, positive Yergason test, positive Speed's test, and positive O'Brien test with tenderness to palpation in the bicipital groove as well as significant tenderness in the pectoral biceps region. Dr. White reviewed x-rays noting a healed prior displaced clavicle fracture and very mild AC joint arthritis. Dr. White also reviewed the CT scan and noted that it revealed dye leak into the superior labrum region consistent with a SLAP tear. Dr. White provided the impression that Claimant was six months post left upper extremity trauma with persistent shoulder pain with evidence of a symptomatic SLAP tear and mild AC joint arthritis. Dr. White opined that Claimant had undergone therapy and tried conservative management but had persistent symptoms over six months. Dr. White recommended surgery to include AC joint resection, biceps tenodesis, and shoulder debridement arthroscopically. *See* Exhibits 7, F.

17. On July 11, 2018, Allison Fall, M.D. issued a Rule 16 review report. Dr. Fall opined that the requested surgery was not medically reasonable, necessary, and related to the work related injury. Dr. Fall noted first that there was no documented injury to the left shoulder and questioned causation. Dr. Fall also noted that even if there were a causal relationship, Claimant had not yet failed conservative treatment for the shoulder. *See* Exhibit A.

18. On August 16, 2018, Dr. Fall performed an independent medical examination. Claimant reported that his left arm was pinned between two pieces of metal, that he tried to pull it out but it was wedged in there, and that he used his knees and feet and eventually pulled out his left arm. Claimant reported that he had surgery within a few days and later underwent physical therapy for his forearm. Claimant reported that after physical therapy, Dr. White wanted him to do work conditioning. When he started work

conditioning, Claimant realized that when reaching with the left arm or stretching his arm behind his head, he had a hard time lowering his arm down, had discomfort in his shoulder, and thought he had probably injured his shoulder while pulling his arm out. Claimant reported a doctor told him his biceps was torn and that he had not had any injections or physical therapy addressing his shoulder. *See* Exhibit B.

19. Claimant reported he was "getting old" and that everything aches sometimes. Claimant was noted to be 41 years old. Claimant reported that he did not have any ongoing problems with his left shoulder before this incident. Claimant reported pain at a 3/10 worse in the morning. Claimant reported that he essentially had not been using his left arm very much and that it was weak diffusely. Dr. Fall reviewed medical records and performed a physical exam. Dr. Fall opined that Claimant sustained a Galeazzi fracture to his left distal radius as well as an ulnar styloid fracture that had healed after surgery. Dr. Fall noted that the records did not document any concerns about Claimant's shoulder or any symptoms in his shoulder immediately following the date of injury and opined it was unlikely that Claimant sustained an acute injury to his left shoulder at the time of his forearm fracture. Dr. Fall opined that the mechanism of injury of pulling his arm to the left side would not be expected to cause an injury to the labrum or biceps. She opined that there were no complaints regarding the left shoulder until five months after the injury, making it unlikely to be an acute injury. Dr. Fall further opined that even if Claimant had an injury to his left shoulder, surgery would not be indicated at this time given that Claimant had not had any conservative treatment to his shoulder. She opined that Claimant would likely benefit from some physical therapy addressing body mechanics and scapular stability outside of workers' compensation. *See* Exhibit B.

20. Claimant and Dr. Fall both testified at hearing.

21. Claimant testified that prior to this injury, he had to lift, push, and pull heavy items on a daily basis with weights of 25 to 100 pounds and could lift up to 400 sacks. He also testified that he had to pull and latch heavy pipe. Claimant testified that he worked approximately 84 hours per week and had a schedule that was on 14 days and then off 14 days. He testified that he was able to work full duty without problem. Claimant testified that on the day of the injury he worked with no problems. Claimant testified that the injury occurred approximately 17 hours into his shift and that it happened fast and he was not able to immediately move his arm out from the metal it was crushed in between. Claimant testified that he tried several times to get his arm out by moving it up, moving it to the side, and finally was able to get his boots up to push back and get his arm free. Claimant testified that it felt like forever but probably took about 5 minutes to free his arm. Claimant testified that he felt his arm break on impact and that it was throbbing in the forearm area and that he didn't notice pain anywhere else.

22. Claimant testified that he was in a sling until his surgery and after his surgery and was on pain medications. Claimant testified that he was not using his shoulder at all during this time because he was immobilized. Claimant testified that approximately 2-3 months after the injury, he was told to use his arm more and that he noticed pain in his shoulder with movement. Claimant testified that at one point he had to stop physical

therapy for 4 weeks because his break was not healing and he stopped to give it more healing time. Claimant testified that he thoroughly noticed the shoulder pain when he started work conditioning and that he struggled to lift even light weights.

23. Dr. Fall testified consistent with her written reports. She opined that Claimant did not sustain an acute shoulder injury and a lso that he had not yet had therapy or conservative care for his shoulder yet so surgery was premature. Dr. Fall opined that if Claimant had an acute labral tear she would have expected acute shoulder pain and swelling as well as difficulty moving and lifting the arm immediately after the injury. She opined that labral tears can be expected with aging. Dr. Fall also opined that the mechanism was not consistent with a labral tear and typically a labral tear involves some type of compression in the joint. She also opined that Claimant's complaints at her independent medical examination were not all that significant and she thought symptoms were more consistent with impingement or rotator cuff issues. Even if related to the injury, Dr. Fall opined surgery was not yet reasonable and necessary and that the problem could likely be easily addressed with exercise and therapy. Dr. Fall opined that going straight to surgery was a jump when therapy/injections/conservative treatment might fix.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations,

the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Left Shoulder- relatedness/compensability

A Claimant bears the burden to establish by a preponderance of the evidence that the conditions for which they seek medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. A claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established by a preponderance of the evidence that he sustained an injury to his left shoulder proximately caused by the November 18, 2017 work injury. Prior to November 18, 2017 Claimant is credible that he was regularly performing heavy work including lifting various heavy items and pipes without trouble. Claimant was working a vigorous schedule doing this heavy work. Now, Claimant is unable to lift items with his left shoulder without trouble. Claimant sustained a severe injury when his left forearm was crushed between two pieces of metal. This happened quickly and Claimant, alone, tried several ways to get his arm free. The ALJ finds, more likely than not, that his left shoulder was injured during this event. As found above, Claimant was immobilized for a period of time after his injury and after his surgery to fix the severe break in his forearm. Claimant then began physical/occupational therapy where he still had minimal movements to his forearm and wrist. Once Claimant was advised several months after the injury to use his left arm more, he began to notice discomfort in his left shoulder that was not present prior to the injury. As he began work hardening, it became apparent that Claimant could not perform the heavy lifting and work duties that he had performed prior to this incident. The opinion of Dr. Fall is not credible or persuasive that there was no acute injury to the left shoulder. Rather, the testimony of Claimant surrounding his function prior to the November 18, 2017 injury and his function as he began to use his left arm more is the most persuasive evidence. Preponderant evidence established an injury to the left shoulder on November 18, 2017.

Medical Benefits- surgery recommended by Dr. White

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.

Claimant has failed to establish, at this point, that the left shoulder surgery recommended by Dr. White is reasonable and necessary. Although the ALJ finds that the left shoulder was injured on November 18, 2017, there is insufficient evidence that more conservative measures have been taken to address the left shoulder prior to a surgical procedure. Records establish no therapy, injections, or any care to the left shoulder. Rather, all the care has been aimed at the severe and significant break in the forearm.

Respondents shall provide treatment aimed to cure and relieve the effects of Claimant's left shoulder injury. These treatments shall include conservative measures aimed at the left shoulder. This order does not preclude surgery in the future should conservative measures fail to cure and relieve the left shoulder. Any future specific medical benefits that are recommended may be subject to dispute by the parties as to whether the recommendations are, in fact, reasonable and necessary. However, the left shoulder injury is found to be causally related to the November 18, 2017 injury and Respondents shall provide treatment that is reasonable and necessary.

ORDER

1. Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his left shoulder on November 18, 2017.

2. Respondents shall provide reasonable and necessary medical benefits to treat Claimant's left shoulder injury.

3. The surgery recommended by Dr. White for Claimant's left shoulder is not yet reasonable and necessary, as Claimant has not had conservative treatment to his left shoulder.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 21, 2018 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issue raised at hearing concerns Claimant's entitlement to additional medical benefits. The precise question is whether Respondent's are liable to provide and pay for treatment, including surgery for a nonindustrial right hip condition, which Claimant contends is necessary to optimize her treatment for and recovery from her compensable left knee injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant suffered an injury to her left knee on November 18, 2016, when "she was loading 50 lb. mortar into a customer's vehicle. She was on the 3rd bag and turned to the left and heard a pop in her left knee." Liability for the injury was admitted and Claimant was referred for treatment.

2. Claimant was initially seen by Brian Sefcik, DO, on November 19, 2016. [Claimant Exhibit 7, p. 198]. X-rays of the knee were obtained and were interpreted as "showing minimal degenerative changes and preservation of joint spaces."

3. Claimant was referred to physical therapy (PT), which she started on December 20, 2016.

4. During the initial PT visit on December 20, 2016, besides reporting posterorlateral knee pain, Claimant reported "pain beginning at anterior left hip/groin in the past 3 weeks" which she believed was related to "walking different due to pain in knee". There were findings of antalgic gait and left knee strain with "suspected involvement of the hamstring muscles".

5. Claimant was seen by Douglas Bradley, MD, at Emergicare on December 23, 2016. There was documentation of the physician records of dull ache to the left hip without associated symptoms. The left hip pain was not addressed at this visit. It was also noted that she was no longer having antalgic gait.

6. Claimant returned to Emergicare in follow-up on January 7, 2017, at which time it was noted she had "intermittent L hip pain as well with a pain intensity of 2/10 in severity."

7. Claimant underwent MRI of the left knee on February 11, 2017. The imaging revealed "mild osteoarthritis of the left knee with chondromalacia patellae type

III, lateral patellofemoral spurring, lateral patellar tracking, moderate joint effusion, a "small horizontal tear on the body of the lateral meniscus" and a mild strain versus mucoid degeneration of the ACL. No Tear."

8. Claimant was seen at Emergicare on February 25, 2017. The record generated from this date of visit is devoid of any mention of complaints regarding her hips specifically. Physical examination revealed edema in the legs bilaterally, left greater than right.

9. Claimant returned to Emergicare on March 18, 2017, with continued complaints of "achy" pain in the left knee and with a new report that her "right knee and hip [were] also starting to feel sore as well". Claimant's right hip was "tender" to palpation as were both of her knees. Claimant was referred to Dr. David Walden for an orthopedic evaluation.

10. Claimant presented to the offices of Dr. Walden on April 17, 2017 where she was evaluated by Physician Assistant (PA), Rachel Cerchia. In the history of present illness provided by Claimant it is documented that she reported radiating pain "down the outside lateral portion of her left leg and now her opposite hip is bothering her." Claimant was assessed with "primary osteoarthritis of left knee." Claimant's MRI imaging was reviewed which, according to PA Cerchia, demonstrated osteoarthritic changes in the patellofemoral joint and a meniscal tear. PA Cerchia recommended MRI review with Dr. Walden.

11. Dr. Walden evaluated Claimant on April 25, 2017, after which he recommended arthroscopic surgery of the left knee. Dr. Walden noted: "I talked to her about a possible arthroscopic partial lateral meniscectomy versus repair. She understands that arthritis is not curable by arthroscopy." It was also noted motion at the right hip was painful and she had a slight antalgic gait.

12. Claimant underwent a partial lateral meniscectomy and chondroplasty of both the patellofemoral joint and medial femoral condyle with Dr. Walden on June 28, 2017. She was referred to post-surgical PT.

13. Claimant returned to Emergicare on August 17, 2017, with complaints of constant sharp pain affecting her pain along with an associated "locking" sensation in the hip. An injection of lidocaine mixed with 20 mg of Decadron was administered to the right hip (bursa) and SI joint.

14. Claimant was seen at Emergicare for follow-up on her left knee on September 7, 2017. During this visit, Claimant reported that her knee was not feeling "good" and her condition was otherwise unchanged since her last appointment. She also reported that her "gait [was] still off" along with continued pain to her right hip. Physical examination revealed an antalgic gait and tenderness over the right hip. Claimant was assessed with, among other diagnoses, sprain of the right hip for which an MRI was ordered.

15. The aforementioned MRI was performed on September 23, 2017. The MRI demonstrated the following right hip findings: Severe right hip degeneration; large hip effusion; marginal osteophytes; maceration of the labrum and bilateral trochanteric bursitis

16. Claimant returned to Dr. Walden's care on October 3, 2017, during which appointment Dr. Walden documented the following: ". . . she reports that her hip is become (sic) significantly worse (no pain prior to injury) and she believes that it is due to her left knee". Dr. Walden noted that Claimant's MRI "showed severe right hip degeneration, cam femoral acetabular impingement and trochanteric bursitis". Dr. Walden also noted that Claimant felt as though an altered gait "exacerbated her right hip". Finally, Dr. Walden stated:

> Although her knee is somewhat better, she is still getting some muscular pain around the leg. Hopefully these will improve with independent exercises but it is difficult to know… At this point, I would recommend that the patient utilize independent exercises for stretching and strengthening and over the counter remedies for her left knee. No further orthopedic care is indicated at this point with regard to the left knee. She can be placed at maximum medical improvement after her workup is complete with regard to her additional problems.

17. Based upon the evidence presented, the ALJ finds that Dr. Walden's mention that Claimant could be placed at maximum medical improvement (MMI) after workup of her "additional problems" is, more probably than not, a reference to her right hip condition.

18. The claimant was referred from Emergicare to Scott Primack, DO, who saw her on November 10, 2017, for a comprehensive consultation of her left knee pain and right hip discomfort. Upon completion of his workup, Dr. Primack stated:

> This is a very complicated case. There are work-related issues and non-work-related issues. First and foremost, from a causality prospective, as I reviewed with Ms. Houston, her right hip OA is not work-related. This is due to the mechanism of injury, the clinical examination, the imaging studies, and the pathophysiology of osteoarthritis of the hip. Therefore, treatment would not be considered work-related. She has been through a hip injection, but this did not give her significant pain control. This would make sense; in that her OA is rather severe. Her final common pathway at right hip would be a hip replacement. However, as I reviewed with Mr. and Mrs. Houston, this would not be considered work-related.

> In reference to the work-related left hip[1] problem, the claimant's options include an impairment rating versus viscosupplementation versus regeneration options such as mesenchymal stem cells or plasma—rich protein. A knee replacement would not be considered work-related given the mechanism of injury and degree of degenerative changes. The patient will weigh out her options for the left knee. . . . Another option would be for her to undergo her non-work-related hip replacement and see what that "does to her left knee".

19. Claimant was evaluated by Dr. Nakamura on February 23, 2018. X-rays of the right hip showed "advanced degenerative changes of the right hip with bone—on bone arthritis." After evaluation, Dr. Nakamura recommended a right total hip replacement "at some point" and "noted that she could also have a right hip steroid injection." He recommended the arthroplasty. At the left knee, he noted that she had degenerative joint disease and some point would need a total knee replacement. He added, "At this time, her hip is much worse than her knee. I recommend she hold off on treatment for her knee symptoms. She is going to have some stem cell therapy done in Denver, and I recommend that she continue with stem cell therapy in Denver."

20. Dr. Primack authored a letter concerning Claimant's condition on April 30, 2018. In his April 30, 2018 letter, Dr. Primack notes that Claimant suffers from a non-work-related right hip problem secondary to "osteoarthritis". He went on to state, "As a rehabilitation position, wanting to optimize Ms. Houston's recovery, I would recommend the right hip arthroplasty, gets done first." He goes on to state, "Once she recovers, we can talk about the care and treatment for her work-related left knee injury. This may include regenerative medicine as option".

21. Dr. Nakamura issued a similar letter on May 9, 2018, which stated:

> It is my medical opinion, that the patient, Erma Houston, date of birth 4-24-1967, should have a right total hip arthroplasty. From a rehabilitation position, we want to optimize Ms. Houston's recovery process. I recommend that she have a right hip arthroplasty procedure first, before addressing the left knee-work-injury issue. The patient's non-work-related right hip osteoarthritis is significant enough to be addressed initially. After patient has recovered from the hip procedure, we can discuss care and treatment for her work-related left knee injury.

[1] The ALJ finds that reference to "left hip" in the note is likely an error and that Dr. Primack probably meant to reference Claimant's "work-related left knee problem.

22. Respondents requested an independent medical examination (ME) with Dr. Eric Ridings. Dr. Ridings performed his IME on August 27, 2018, and he noted that "[Claimant] complained that her right hip pain is much more severe than her left knee pain and is progressively worsening". He agreed with Dr. Primack and Dr. Nakamura that Claimant's right hip pain is due to non-work-related severe end stage osteoarthritis and concurred that the appropriate treatment for that would be a right hip replacement surgery.

23. Dr. Ridings concluded that Claimant's left knee osteoarthritis was not caused, aggravated or accelerated by her meniscal injury and that the severity of her right hip arthritis is a contributor to the severity of her left knee complaints. Because the right hip arthritis is unrelated to Claimant's work duties and is, according to Dr. Ridings, a contributor to the severity of the osteoarthritic complaints in the left knee, he concluded that "any and all treatment directed toward the osteoarthritis of the left knee is also, therefore, not work related. Accordingly, Dr. Ridings concluded that any request for additional injection therapy is unrelated to this claim and should be performed outside of the workers' compensation system.

24. While Dr. Ridings provided a thorough analysis concerning the relatedness of Claimant's need for additional left knee treatment, to the original injury this case, the ALJ finds that his report does not address the precise question presented here. Indeed, Dr. Ridings report is devoid of any analysis concerning whether Claimant should be afforded a right hip arthroplasty on the theory that it is necessary to optimize the treatment of and recovery from her work-related left knee injury. Rather, Respondents argue that because Dr. Ridings opined that the only treatment recommended for the left knee relates to Claimant's personal degenerative condition, there is no causal connection between her need for the right hip surgery and her admitted left knee injury nor is there a medical basis to address Claimant's right hip condition before placing her at MMI for her left knee condition. Accordingly, Respondents urge the ALJ to deny the requested right hip arthroplasty.

25. The ALJ rejects Dr. Ridings opinions concerning the relatedness of her need for additional left knee treatment to her industrial injury as unconvincing. Based on the evidence presented, the ALJ credits the opinions of Dr. Primack to find that Claimant is not currently at MMI and remains a candidate for additional treatment designed to cure and relieve her of ongoing injury related pain and dysfunction. Moreover, the evidence presented persuades the ALJ that Dr. Primack and Dr. Nakamura are of the opinion that the efficacy of this treatment and Claimant's recovery from his knee injury cannot be optimized without first treating Claimant's right hip condition. Consequently, while Claimant's right hip arthritic condition is non-work-related in origin, the ALJ is convinced that her right hip condition must be addressed surgically, as ancillary to the work-related injury in this case, in order for her to achieve optimum treatment for and recovery from her compensable left knee injury. Consequently, the ALJ finds Respondents are liable for the recommended right hip arthroplasty.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant remains a candidate for additional treatment, including regenerative medicine options to cure and relieve her of the ongoing effects of her work-related left knee injury. Dr. Ridings' contrary opinions are not persuasive. As presented, the ALJ finds/concludes that the opinions expressed by Drs. Primack and Nakamura support a conclusion that addressing Claimant's right hip condition surgically will optimize the care/treatment necessary to improve Claimant's chances of having a

successful outcome concerning her left knee injury by enhancing her recovery and hastening MMI.

Claimant's Request for a Right Hip Arthroplasty

D. The claimant in a workers' compensation case bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nonetheless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). In other words, Respondents generally cannot be charged with the cost of treating non-work related conditions even if those conditions are discovered during the course of treatment for an industrial injury. See, *Antonio Prieto v. United Subcontractors, Inc.*, W.C. No. 4-572-001 (June 22, 2007), citing *5 Larson, Workers' Compensation Law*, § 94.03(5). However, the duty to furnish medical treatment under the workers' compensation act has been extended to include paying for treatment of non-work-related conditions when such treatment is necessary to achieve optimum treatment of the industrial injury. *Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949); *Public Service Co. v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999).

E. In concluding that Claimant has proven, by a preponderance of the evidence, that she is entitled to the right hip arthroplasty suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claims Appeals Panel in *Jamie Gardea v. Express Personnel Professionals,* W.C. No. 4-650-961 (October 28, 2011), instructive. In *Gardea,* Claimant sought the provision of a gastric bypass procedure after injuring his ankle in an industrial accident. At the time of his injury, Claimant weighed approximately 500 pounds. Surgery for the ankle was recommended but Claimant needed to lose a significant amount of weight for the surgery to be successful. Claimant failed in his bid to lose weight prompting his physician to recommend bypass surgery before placing him at MMI. Respondents denied a subsequent request for bypass surgery asserting that Claimant's need for this procedure was unrelated to his industrial injury and the facts of the case were distinguishable from the precedent set forth by the Court of Appeals in *Public Service*, supra. Respondents argued that because claimant was obese prior to his ankle injury, the need for bypass surgery was not "ancillary" to the work-related injury, as was the need for mental health treatment prior to proceeding with surgery as articulated in *Public Service*. In essence, respondents suggested that claimant's need for bypass surgery predated his industrial injury and because he needed it prior to injuring his ankle, there was no causal relationship to the work injury. In affirming the ALJ, the Panel found respondents' notion of the term "ancillary" overly narrow, concluding that it was not necessary for there to be a direct causal relationship in order for the bypass procedure to be compensable.

Rather, as the Panel noted, in affirming the ALJ, all that is necessary for such treatment to be compensable is a finding/conclusion that it is necessary to achieve optimum treatment of the industrial injury.

F. Here, the ALJ concludes that the evidence presented is analogous to the situation presented in *Gardea.* Similar to Mr. Gardea, whose weight problem was not directly causally connected to his industrial injury, Claimant suffers from non-work-related osteoarthritis in the right hip. Nonetheless, per the opinions of Drs. Primack and Nakamura, right hip surgery is necessary to optimize the care/treatment necessary to improve Claimant's chances of having a successful treatment outcome concerning her left knee injury by enhancing her recovery and hastening MMI. Akin to the ALJ's conclusion in Gardea, the undersigned credits the opinions of Drs. Primack and Nakamura as credible and persuasive to find/conclude that the recommended right hip surgery is necessary to achieve optimum treatment for the left knee injury in this case.

ORDER

It is therefore ordered that:

1. Respondents are liable for the costs associated with the recommended right hip arthroplasty in this case.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 21, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove his claim should be reopened based on a mistake, error, or change of condition?

- Did Claimant prove the left shoulder surgery performed by Dr. FitzPatrick on October 20, 2017 was reasonably necessary authorized treatment for his industrial injury?

- Did Claimant prove entitlement to TTD benefits commencing October 20, 2017?

FINDINGS OF FACT

1. Claimant worked for Employer as a distribution sales manager. He suffered admitted injuries on August 24, 2016 when he stepped backward through an open trapdoor and fell down a flight of approximately 20 wooden stairs.

2. Claimant's co-worker, Judson Carter, witnessed the accident. When Claimant came back up the stairs, he was obviously in pain and seemed to have trouble catching his breath. Claimant rested for a while, and then he and Mr. Carter went to the next stop on their schedule. Claimant remained in the vehicle because he was in too much pain to get out and walk around. Shortly after that, Claimant asked Mr. Carter to take him to the emergency room.

3. According to the ER report, Claimant complained of "left-sided rib, left hip/thigh pain, and mid-back pain." He was having difficulty breathing and speaking because of the rib pain. On physical examination, he had midline tenderness of the neck, tenderness around the ribs on the left side, tenderness to the left thigh, and the left great toe. He was reported to have full range of motion of all extremities.

4. The ER physician ordered essentially head to toe imaging. A head CT was normal. CT of the chest, abdomen, and pelvis showed no evidence of acute trauma. There were old, healed rib fractures, but no new fractures. Foot x-rays showed a nondisplaced fracture of the left big toe. The cervical spine CT showed degenerative changes with no acute abnormality. The ER physician diagnosed a left big toe fracture, cervical strain, thoracic spine strain, and thigh contusion. Claimant was given a prescription for Percocet, advised to wear a wooden sole shoe, and discharged.

5. Claimant had a lengthy history of medical issues before his industrial accident, including two motorcycle accidents several years ago, chronic low back pain and sciatica, right hip pain, gout, diabetes, cardiac conditions, and leukemia. Dr. Bryan Hynes has been his PCP since approximately 2011. Dr. Hynes' records are frustrating because they contain copious information that is obviously "cloned" from prior records. Once information is entered into Dr. Hynes' records, it frequently repeats continuously,

regardless of whether that issue was actually addressed at a particular visit. One such cloned note states Claimant exhibited,

> Multiple pressure points of the cervical/thoracic/lumbar spine and paraspinal muscles. Decreased range of motion secondary to pain and stiffness.

6. Those two sentences first appeared in Dr. Hynes' May 31, 2013 office note. At that appointment, Claimant was primarily concerned about a gout flare, with no indication of any neck problem. Dr. Hynes gave no diagnosis pertaining to the neck. The notation subsequently reappears in Dr. Hynes' January 21, 2016 record, when Claimant was seen for "dry cough, dizzy, lightheaded, nausea, and left ear feels itchy." Claimant's neck was "supple" with "full range motion." No cervical diagnosis was given. Nevertheless, those sentences repeat in every subsequent record.

7. To cut through the noise from cloned notes, ALJ carefully parsed Dr. Hynes' records to discern when various issues were first documented and when changes were made to the text entries. Based on that review, the ALJ finds Claimant had no significant neck symptoms before the work accident.

8. The day after his accident, Employer referred Claimant to its designated provider, CCOM. When he arrived at the clinic on August 25, 2016, Claimant was given a pain diagram to complete. Initially, he circled the entire body because he felt pain "all over." The staff asked him to re-do the form and mark specific areas that were most bothersome that day. Claimant marked the neck, right shoulder, both elbows, the right forearm, his low back and buttocks, lateral left thigh, and right Index finger, and left foot.

9. Claimant saw PA-C Steven Byrne at the first CCOM appointment. Claimant's chief complaints were described as "right shoulder pain, left ribs, hip, back, left thigh," but he also reported "overall body aches and pains." Mr. Byrne reviewed the ER records and noted, "with the exception of the fractured toe there does not appear to be any acute injury noted during the workup by the emergency department." On physical examination, Mr. Bryne noted "range of motion of both arms with some discomfort." Claimant's back was tender to palpation from the neck to the lumbosacral area. He was wearing a surgical shoe to support the broken toe. Mr. Byrne was most impressed with a "very large" hematoma on the left lateral thigh. He diagnosed a nondisplaced fracture of the left great toe, right shoulder contusion, and left thigh contusion.

10. Claimant next saw Mr. Byrne on August 29, 2016. He completed a pain diagram very similar to the one from the first appointment. Claimant marked his neck, right shoulder, bilateral ribs, mid back, low back and buttocks, left thigh, left knee, and left foot. Claimant had tenderness to palpation at the insertion of the left paraspinal muscles to the base of the skull, and along the paraspinals throughout the cervical spine. Mr. Byrne noted a "very large rigid fluid mass of the lateral thigh," and ordered a "stat" ultrasound to rule out hematoma or DVT.

11. Claimant returned to Mr. Byrne on September 1, 2016. His neck was tender to palpation along the paraspinals at the base of the skull. Mr. Byrne referred Claimant to Dr. Alex Romero for evaluation and potential evacuation of the large hematoma on the left thigh.

12. Mr. Byrne's note from September 7, 2016 states Claimant was "able to demonstrate near full range of motion of both arms above 90°." Neither Claimant nor his wife can recall Mr. Byrne examining Claimant's left shoulder or demonstrating full range of motion. Nor do they recall Claimant being capable of raising his left arm above 90° around that time.

13. Dr. Romero ultimately performed two hematoma evacuation surgeries in early October 2016.

14. Claimant followed up with CCOM on October 11, 2016. Mr. Byrne focused almost entirely on residuals from the hematoma surgeries. Despite the fact Claimant's corresponding[1] pain diagram reflects ongoing neck pain, Mr. Byrne stated, "He has recovered from the other injuries produced from this incident."

15. Claimant saw Mr. Byrne again on October 18, 2016. Although he marked continued neck pain on the pain diagram, Mr. Byrne stated, "with the exception of the hematoma . . . he has recovered from the other injuries that were sustained during this incident." Claimant felt ready to return to modified work, so Mr. Byrne released him to half days of sedentary duties.

16. Claimant's last visit with Mr. Byrne was on November 14, 2016. As he had done at every other visit, Claimant completed a pain diagram showing pain in his neck and left lateral thigh. Claimant indicated he was in pain 40% of the time and rated his pain that day as 4/10. Mr. Byrne stated, "The only residual from this injury is some achiness of the left five from where the hematoma [was] surgically evacuated. The patient feels that he is back to his pre-injury state for this injury. His pain level is 0." Mr. Byrne opined Claimant had fully recovered and was at MMI with no impairment, no work restrictions, and no need for further care related to the industrial accident. Claimant disagreed he had recovered and asked about additional therapy or other options. Mr. Byrne advised Claimant he had completed treatment for the work-related injuries and any ongoing symptoms were due to pre-existing problems, for which he should see his personal providers. Mr. Byrne told Claimant Dr. Olson would come in shortly to "sign off" on his release. Claimant was surprised because up to that point he assumed Mr. Byrne was a physician. Mr. Byrne left the exam room, and Claimant and his wife waited approximately 20 minutes for Dr. Olson. Eventually, a nurse entered, told them Dr. Olson would not be coming, and asked them to leave.

17. Respondents point to Claimant's pain diagrams as compelling evidence he did not injure his left shoulder in the August 2016 accident. Claimant consistently circled

[1] The pain diagram from that visit is dated "9-11-16," but the ALJ finds this was an error, because Claimant had no CCOM appointment on September 11, and there is no pain diagram dated October 11, 2016. The most likely explanation is Claimant mistakenly wrote "9-11" when he meant "10-11."

his left neck from the initial visit through the final visit on November 16, 2016, but never marked his left shoulder on any pain diagram.

18. Claimant and his wife explained at hearing why he did not mark left shoulder symptoms on the diagrams. Claimant explained he circled his entire body at the first appointment, but was asked to redo the form with specificity. Claimant then marked everything he could remember being addressed at the ER. At the next appointment, he tried to mark additional areas but was told he could not add new body parts. After that, he confined himself to areas he had previously noted, removing issues as they resolved, but not adding anything new. He mentioned the left shoulder to Mr. Byrne, but Mr. Byrne did not document it.

19. Claimant's wife corroborated Claimant's testimony about the reason for not marking the left shoulder on the pain diagrams. She also corroborated that Claimant reported left shoulder pain and limitation to Mr. Byrne before being released at MMI. Ms. Rinn further testified she observed Claimant having difficulty with his left shoulder, starting shortly after the accident. She observed that his shoulder continued to become more painful and more limiting over time.

20. Respondents filed a Final Admission of Liability ("FAL") on December 2, 2016. The FAL denied liability for post-MMI treatment as "not reasonable, necessary, or related to the compensable injury."

21. Claimant did not object to the FAL and the claim closed.

22. After receiving the FAL, Claimant spoke with his supervisor, Ray Young. Claimant told Mr. Young he was not recovered and wanted additional treatment, but nothing came of the conversation.

23. Claimant's neck and left shoulder pain steadily worsened during 2017. In January or February 2017, he had an appointment with a pain management specialist, Dr. Hess, regarding his ongoing neck and left shoulder pain. Unfortunately, Dr. Hess had a stroke, so Claimant's appointment was canceled. Approximately one month later, he saw Dr. Hess' partner, Dr. Bell. Over the next several months, [2] Claimant received steadily increasing doses of pain medication, to the point he eventually felt the medication was causing more problems than the pain.

24. In March 2017, Claimant saw Dr. Hynes and reported feeling "incapacitated with stress, depression, anxiety, panic as well as profound fatigue, shortness of breath, cardiac symptoms." Because of these multiple issues, Claimant was "overwhelmed and ready to have a breakdown." His cardiologist had recently suggested changing jobs because the stress was too much for his heart condition. Dr. Hynes took Claimant off work because "he is unable to work effectively at this point and needs a break." Although

[2] Claimant has several preexisting, non-injury related medical conditions, and the ALJ infers Dr. Bell was prescribing medications for a combination of preexisting and injury-related conditions.

Dr. Hynes did not mention it, the ALJ infers from Claimant's testimony that the progressive neck and left shoulder pain contributed to his incapacity at that time.

25. On May 15, 2017, Claimant met with Dr. Hynes to explore options besides simply escalating his pain medication. Claimant's complaints included "left shoulder pain." On examination, Dr. Hynes noted left shoulder tenderness to palpation and "minimal active or passive range of motion." He also appreciated popping and clicking of the shoulder, and "bogginess" of the tendons. He administered a left shoulder cortisone injection, which gave Claimant immediate relief.

26. Claimant returned to Dr. Hynes on June 1, 2017 and reported "increased neck pain and left shoulder pain for the last several months after he fell down some stairs." Claimant had "difficulty using the left shoulder" and characterized the pain as "incapacitating." The previous cortisone injection had helped "some," but he still had "significant inability to move the shoulder." On physical examination, "[the] cervical spine was particularly tender on the left side with markedly decreased range of motion." Dr. Hynes diagnosed "cervicalgia." He ordered MRIs of the left shoulder and cervical spine. Regarding the psychological issues, Claimant had received counseling which seemed to be helping. Although his mental status was "improving," he was not ready to return to work.

27. Claimant next saw Dr. Hynes on June 26, 2017. He said his neck and shoulder pain "has been getting much worse" and "is beyond what can be controlled with pain management at this point and is affecting his activities of daily living."

28. The MRIs were completed on July 14, 2017. The cervical MRI was not particularly notable, but the left shoulder MRI showed a full thickness supraspinatus tear, a small joint effusion, and mild to moderate degenerative changes of the left acromioclavicular joint.

29. On August 4, 2017, Claimant had a lengthy discussion with Dr. Hynes regarding his multiple medical issues, including the neck and shoulder injuries. Dr. Hynes noted,

> He does have a history of a fall while working when he stepped into a hole or opening on the floor which was not covered with a latch door and sustained multiple trauma including head injury, cervical injury with strain, left shoulder injury, left thigh, broken left foot. . . . [L]eft shoulder pain chronically and worsening over time found on MRI to have rotator cuff [tear] . . . . Patient continues to have chronic pain worsening in his neck and left shoulder since his accident. He never had this pain before the accident in these areas. . . . [T]he pain he is experiencing in his shoulder and neck is incapacitating and affecting his ability to return to work as well.

30. Dr. Hynes recommended an orthopedic evaluation of the left shoulder "due to worsening of pain."

31. Claimant followed up with Dr. Hynes on August 22, 2017 for daily left-sided headaches, severe left shoulder pain, and severe neck pain "which is getting worse." Dr. Hynes again documented "these problems . . . happened after he slipped and fell into a hole in the floor." He referred Claimant to Dr. FitzPatrick to evaluate the shoulder.

32. Dr. Hynes' note from September 20, 2017 documented Claimant's neck pain and headaches were "getting worse." He again noted Claimant "continues to have left shoulder as well as neck pain and headache ever since falling into a hole in the floor at work." Dr. Hynes administered several left paracervical trigger point injections.

33. Claimant was evaluated by Dr. Jennifer FitzPatrick, an orthopedic surgeon, on September 25, 2017. Claimant said he injured his shoulder "at work almost one year ago. Patient has multiple problems after he fell through a hole. . . . He continues to have left shoulder pain as well as neck pain." She also noted, "Patient reports no injury since the time of his work injury." Dr. Fitzpatrick personally reviewed the MRI and appreciated a full thickness supraspinatus tear and biceps tendinosis. She opined, "[the] examination and MRI findings are consistent with an acute tear within the last year." Dr. Fitzpatrick scheduled surgery for October 20, 2017.

34. Claimant met with Dr. Hynes on October 6, 2017 to discuss his work status. The report states,

> Patient with initial stress reaction that occurred in March with profound depression, anxiety, which incapacitated and in a way, such that he could not focus or concentrate or calculate or mentating appropriately for his job, became very agitated frequently which affected his ability to perform his duties or activities of daily living. The symptoms have improved and lessened but [are] still present. . . . He has also been told . . . he might be losing his job if he does not get back to work soon. Patient was seen by orthopedic surgery [and] is scheduled to have surgery on October 20 for a rotator cuff which is at this time severely painful. He is unable to use the left shoulder. He is in constant pain from his left shoulder, his neck, his back, and osteoarthritis in his legs which affects his ability to focus, concentrate, mentating, participate in work and in life generally. Patient will have surgery and then subsequent recovery period to rehabilitate from his surgery. . . . The patient at this point because of the multiple symptoms is still unable to perform his job even at a minimal level secondary to profound fatigue, severe pain, stress and anxiety, weakness, and does not feel he can perform any job at this time.

35. Employer terminated Claimant on October 17, 2017 because he had missed too much work and exhausted his medical leave.

36. Dr. FitzPatrick performed a left shoulder arthroscopy on October 20, 2017. She confirmed a full thickness tear involving the supraspinatus and superior border of the subscapularis. The biceps tendon and bicipital sling were unstable "due to injury." She opined, "This did appear to be a traumatic tear without evidence of degenerative nature

to the rotator cuff. It did appear that this had occurred within the last 1 to 2 years given the good quality of the tissue overall." She further opined, "it was evident . . . this is most likely a traumatic rupture of the left shoulder rotator cuff." Dr. FitzPatrick's opinions regarding the probable traumatic nature of the rotator cuff tear are credible and persuasive.

37. After surgery, Dr. Fitzpatrick entirely restricted Claimant from using his left arm, and advised he use a sling for six weeks.

38. Claimant returned to CCOM on November 16, 2017, but this time he saw Dr. Daniel Olson. Dr. Olson has treated Claimant since then. Dr. Olson noted, "It was felt by the provider here at the clinic that he had reached his underlying baseline and was released from care. However he continued to complain of left shoulder pain running up to his neck and down into his arm. He eventually had an MRI scan that showed a rotator cuff tear." Claimant also reported "continuing" pain in the left side of his neck. Claimant was still in a sling from surgery. On examination, there was tenderness to palpation in the scapular muscles and trapezius, and along the left side of the lateral neck into the occipital area. Dr. Olson indicated he would "check the status" of the claim because "he will need to restart PT soon for the left shoulder and to the neck." He also took Claimant off work.

39. Claimant's next appointment was November 30, 2017. CCOM had called Respondent-Insurer about the case but had received no response. Dr. Olson noted, "His wife now has insurance so he should be able to do some therapy through her insurance." He recommended physical therapy and acupuncture for the shoulder and neck, and continued the restriction of "off work."

40. On December 20, 2017, Dr. Olson referred Claimant to Dr. Caughfield for the headaches and neck pain. Although the ALJ received no records from Dr. Caughfield, it appears he saw Claimant in late January or early February 2018. According to Dr. Olson, Dr. Caughfield recommended Botox injections.

41. The most recent CCOM records submitted into evidence is dated April 6, 2018. Claimant was slowly improving, although his progress was hampered by lack of authorization for various treatment recommendations. Dr. Olson also liberalized Claimant's restrictions, allowing him to return to modified work requiring no over 5 to 10 pounds lifting with the left arm.

42. In his opening remarks, Claimant's counsel stated Claimant returned to work at a new job in April 2018. The ALJ presumes this was after Dr. Olson released him to modified duty. No evidence was presented to show the exact date Claimant returned to work.

43. Dr. Timothy O'Brien performed an IME for Respondents on February 6, 2018. Dr. O'Brien agreed with the MMI date originally assigned by Mr. Byrne. He opined Claimant suffered only a "minor cervical spine injury" in the accident but reached "the definitive end of healing" by November 14, 2016. Dr. O'Brien opined the lack of documented left shoulder symptoms after the accident shows Claimant did not injure his

left shoulder when he fell down the stairs. He disagreed with Dr. Fitzpatrick that the rotator cuff tear was traumatic, characterizing it as "chronic" and degenerative. He opined, "it would be nearly impossible for a rotator cuff tear to occur on August 24, 2016 and not be detected. . . . The reason [Claimant] did not note shoulder pain on the date of his injury . . . was due to the fact that he did not sustain a shoulder injury." He opined the mere fact Claimant's left shoulder pain developed some time after the work accident not establish a causal connection.

44. Dr. Olson testified at hearing on Claimant's behalf. Dr. Olson has been the supervising physician at CCOM in Pueblo for several years. He knew nothing of Claimant before he took over care in November 2017, even though CCOM's policy in 2016 was for a physician to see a patient after three visits. He acknowledged, "that was one of Steve Byrne's failings, he would keep the cases too long no matter how often we'd tell him you've got to send the cases to us." Based on his treatment of Claimant since November 2017 and his review of Mr. Byrne's records Dr. Olson opined Claimant should not have been put at MMI on November 14, 2016. Dr. Olson noted Claimant "primarily" fell on his left side, so "it doesn't surprise me that his left shoulder would be involved." He stated Mr. Byrne's notes were "not very complete as far as doing a good shoulder examination." Dr. Olson expressed "frustration" with Mr. Byrne because his MMI report did not track the contemporaneous pain diagram, "so I don't know where he got zero level pain from." Dr. Olson testified patients with rotator cuff tears usually present with pain in the shoulder and neck. He conceded the neck markings on the pain diagrams do not jump out as suggestive of a rotator cuff tear. But he also pointed out that shoulder and neck pain frequently occur together and "it's a challenge diagnostically to separate them."

45. Mr. Byrne testified in a deposition for Respondents between the first and second hearing. He did not recall seeing the first pain diagram where Claimant circled his entire body, but agreed, "my girls might have . . . given that back to him, told him to redo it." Mr. Byrne disputed Claimant had ever mentioned left shoulder pain to him. He testified he examined Claimant's left shoulder looking for rotator cuff pathology but found none. Mr. Byrne testified he "specifically" recalled Claimant said he had "no pain" and was "back to his pre-injury state" at the final appointment on November 14, 2016. He had no explanation for the discrepancy with the pain diagram from that date. Mr. Byrne testified Claimant presented as "straightforward" and "a very up front guy."

46. Dr. O'Brien testified at hearing consistent with his report. He emphasized the ER workup had been "meticulous" and documented no left shoulder problem despite leaving "no stone unturned." He described Mr. Byrne's exam as "very thorough." He opined Mr. Byrne's September 7, 2016 note documenting 90° of shoulder motion made it "almost 0%" likely Claimant had a rotator cuff tear at that time. He reiterated Claimant's injuries had resolved by November 14, 2016 and he was appropriately released at MMI. He thought the shoulder surgery was reasonable but in no way related to the work accident.

47. Claimant and his wife's testimony is credible and persuasive. Claimant's accounts of his interactions with Mr. Byrne are more credible than Mr. Byrne's testimony.

48. Dr. Olson's testimony is credible and persuasive.

49. Dr. O'Brien's opinions regarding causation of the neck and shoulder are not persuasive.

50. Claimant proved by a preponderance of the evidence he injured his neck and left shoulder in the August 24, 2016 accident, and the accident proximately caused his ongoing neck and left shoulder problems.

51. Claimant proved his neck and left shoulder injuries worsened after he was put at MMI in November 2016. Claimant was no longer at MMI as of September 25, 2017, when Dr. FitzPatrick recommended shoulder surgery.

52. The October 20, 2017 surgery was reasonably necessary and causally related to his industrial accident.

53. Dr. FitzPatrick was an authorized provider when she performed surgery. Mr. Byrne advised Claimant to follow up with his personal providers when he released Claimant in November 2016. Dr. FitzPatrick became authorized by the referral from Dr. Hynes.

54. The treatment recommended by Dr. Olson since November 21, 2017 was reasonably needed to treat Claimant's compensable injuries.

55. Claimant's worsened condition caused a greater impact on his work capacity as of October 20, 2017, the date of surgery. Claimant is entitled to TTD commencing October 20, 2017.

56. Claimant's counsel admitted at hearing Claimant returned to work in April 2018, and requested a closed period of TTD. No evidence was presented regarding the exact date Claimant returned to work.

57. Claimant's admitted average weekly wage is $2,802.23. The maximum TTD rate for his date of injury is $939.82.

CONCLUSIONS OF LAW

A. Reopening

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The allowance for reopening reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory

criteria have been met is left to the ALJ's discretion. *Id*. The party requesting reopening bears the burden of proof. Section 8-43-304(4).

Claimant requests his claim be reopened based on mistake, error, or a change of condition. Because the ALJ finds reopening is warranted on the grounds of change of condition, there is no need to address the error/mistake issue.

A "change in condition" refers either to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). If a claimant's condition is shown to have changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from an intervening cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001).

As found, Claimant proved his condition has worsened since the claim closed. Multiple providers documented progressive worsening of his neck and left shoulder pain during 2017, and provided treatment related to his increasing symptoms.

Claimant also proved his worsened condition is causally related to the admitted injury. The ALJ has no difficulty concluding Claimant's ongoing neck problems are causally related to the accident because he has consistently complained of neck pain, from the initial ER visit throughout his course of care. Dr. O'Brien's opinion the neck pain "resolved" by November 2016 is not persuasive and is belied by the November 14, 2016 pain diagram on which Claimant specifically noted ongoing left-sided neck pain. The ALJ also concludes the headaches are probably due to the neck pain.

The more challenging question here is causation of the left shoulder. Admittedly, Claimant did not indicate left shoulder pain on his pain diagrams between August and November 2016. But Claimant and his wife persuasively explained he mentioned left shoulder pain to Mr. Byrne more than once, but was led to believe he could not add new body parts to the claim. When Claimant first discussed these issues with Dr. Hynes several months later, he stated they were due to the fall at work. He said the same to Dr. FitzPatrick in September 2017. Dr. FitzPatrick persuasively opined the rotator cuff tear was traumatic rather than degenerative, and probably occurred within one to two years before surgery. Dr. FitzPatrick was in the best position to make that determination, having observed Claimant's tissues firsthand during surgery. Claimant's fall down the stairs was very traumatic, and there was no other known event within the last year or two equally or more likely causative. Respondents argue the tear must have developed after November 2016 because no left shoulder problems were documented before then. But there is no persuasive evidence of any traumatic event between November 2016 and October 2017. It is far more likely Claimant injured his rotator cuff when he fell down the stairs rather than a spontaneous and coincidental rupture with no identifiable cause, as postulated by Dr. O'Brien.

Claimant probably injured his left shoulder in the fall but did not focus on it immediately because the shoulder pain was less severe than the other injuries. Moreover, at that early stage, he probably had difficulty differentiating left neck from left shoulder pain. After the initial appointments at CCOM, inertia took over and prevented Claimant from revisiting the list of injured body parts. Claimant has a history of chronic pain and appears to be relatively stoic, so he probably resigned himself to some level of pain, hoping it would get better with time. Although Claimant remained symptomatic when Mr. Byrne released him, his left shoulder pain was probably less painful in November 2016 than it became over the ensuing several months. As Dr. Hynes repeatedly documented, Claimant's left shoulder became more painful and less functional as 2017 progressed, ultimately causing him to seek definitive treatment with surgery.

B. Medical treatment

Even if a claimant proves an error, mistake, or change in condition, he is not automatically entitled to have his claim reopened. Rather, reopening is only appropriate if additional medical or indemnity benefits will be awarded. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000).

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, the treatment Claimant received for his neck and left shoulder after being released by Mr. Byrne in November 2016 was reasonably necessary and causally related to the industrial accident.

Besides proving medical treatment was reasonably necessary and causally related, a claimant must prove the treatment was "authorized." "Authorization" refers to a physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8-43-404(5) gives the employer the right to select the claimant's treating physician "in the first instance." Once the respondents have exercised their right of selection, the claimant may not change physicians without permission from the insurer or an ALJ. *Giannetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). A physician who treats a claimant on referral from an ATP in the "normal progression of authorized treatment" becomes authorized. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Respondents argue that even if this claim is reopened, they are not liable for the shoulder surgery because Dr. FitzPatrick was not authorized. The ALJ disagrees with this argument, based on the rule enunciated in *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008). In *Cabela*, the Court of Appeals held that if an ATP determines a claimant's condition is not work-related and instructs the claimant to pursue treatment with personal physicians, the treatment will be deemed authorized if it is later determined the condition was compensable. The court held that "the risk of mistake by an ATP in concluding that an injury is noncompensable lies with the employer" rather than the claimant.

As found, Dr. Hynes became authorized because Mr. Byrne advised Claimant to follow up with his personal physicians when he released Claimant from care. Mr. Byrne apparently believed Claimant's ongoing pain in November 2016 reflected a pre-existing "baseline" condition, an opinion the ALJ has found to be erroneous. Therefore, under *Cabela*, Claimant's personal physician became authorized as of November 14, 2016. Dr. FitzPatrick subsequently became authorized on referral from Dr. Hynes.

C. TTD benefits

A claimant's entitlement to TTD benefits after a reopening is governed by *City of Colorado Springs Disposal v. Industrial Claim Appeals Office*, 954 P.2d 677 (Colo. App. 1997). *City of Colorado Springs* held that a worsening after MMI does not automatically entitle a claimant to additional TTD benefits, unless the worsened condition causes a "greater impact upon [the] claimant's temporary work capability." The dispositive question is whether the claimant proves "increased disability, as measured by [their] capacity to earn wages." *Friesz v. Wal-Mart Stores, Inc*., W.C. No. 4-823-944-01 (July 26, 2012). The ICAO has repeatedly held that *City of Colorado Springs* does not require a claimant to establish an "actual wage loss," and a claimant may recover TTD even if he not working immediately before his condition worsened. *E.g.*, *Hebert v. Blac Frac Tanks, Inc*., W.C. No. 4-919-279-01 (October 19, 2018); *Garcia v. Frontier Airlines*, W.C. No. 4-677-511 (August 17, 2011); *Moss v. Denny's Restaurants*, W.C. No. 4-440-517 (September 27, 2006). As the Panel explained in *Friesz v. Wal-Mart, supra*,

> [T]he critical issue in cases controlled by *City of Colorado Springs* is not whether the worsened condition actually resulted in additional temporary wage loss, but whether the worsened condition has had a greater impact on the claimant's temporary work "capacity." . . . It therefore follows that it is the impact on the claimant's work "capacity," not proof of an actual wage loss, which determines whether the claimant has established entitlement to TTD benefits in connection with a worsening of condition after MMI. [Internal citations omitted].

As found, Claimant's worsened condition caused a greater impact on his work capacity as of October 20, 2017, the date of surgery. Claimant was taken off work in March 2017 primarily because of anxiety, depression, and exhaustion, although the pain from his neck and left shoulder were at least contributing factors in his inability to work. Moreover, his mental status improved and he probably could have returned to work in some capacity

before October 2017 but for the severe and worsening neck and left shoulder problems. After surgery, Claimant required at least a brief period of convalescence during which he could not have worked in any capacity. After that, he was restricted from using his left arm for work tasks for six weeks. Dr. Olson thought the left shoulder and neck were bad enough to take Claimant completely off work, without regard to any unrelated medical conditions. The persuasive evidence demonstrates the surgery proximately caused a substantial additional reduction in Claimant's work capacity, which entitles him to TTD benefits.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim is granted.

2. Insurer shall cover reasonably necessary treatment to cure and relieve the effects of Claimant's compensable neck and left shoulder injuries, including but not limited to treatment rendered by Dr. Olson and his referrals, and the October 20, 2017 surgery performed by Dr. FitzPatrick.

3. Insurer shall pay Claimant TTD benefits at the rate of $939.82 per week, from October 20, 2017 until the date he returned to work in April 2018. Claimant shall provide Respondents with documentation of his return to work date as soon as possible, and no later than December 5, 2018. Respondents' obligation to pay TTD benefits is stayed pending receipt of the documentation from Claimant. Insurer shall pay the TTD benefits within 30 days of receiving the documentation from Claimant.

4. Insurer shall pay statutory interest of 8% per annum on all benefits not paid when due.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 21, 2018

s/Patrick C.H. Spencer II

Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion on the issues of MMI and Whole Person Impairment Rating of 12% for Claimant's admitted lumbar spine injury?

II. Has Claimant, by a preponderance of the evidence, overcome the DIME opinion that Claimant should not be awarded an Impairment Rating for her right shoulder, due to a lack of showing her shoulder injury was *causally related* to her admitted back injury?

III. If such shoulder injury is deemed to be work-related, shall Claimant be reimbursed past medical expenses in connection therewith, as well as maintenance treatment for her shoulder?

IV. If such shoulder injury is deemed to be work-related, shall Claimant be awarded for disfigurement?

V. Respondents have agreed that since this is an admitted injury to Claimant's lower back, she is entitled to medical maintenance treatment that is reasonable, necessary, and related to her back injury.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Accident

1. This is an admitted injury. On June 9, 2014, Claimant slipped on water and fell while answering the call light for a resident of Employer's nursing facility. Claimant was taken to the St. Mary Corwin Hospital Emergency Department where she complained of diffuse, non-radiating pain from her thoracic spine to lumbar spine, and in her left hip. The records from American Medical Response ("AMR") from June 9, 2014 [the date of the incident] documented that Claimant was complaining of severe pain at a level of 10 out of 10 at the time of the incident with pain radiating down her left leg with some hip pain. (Claimant's Ex. 5, p. 20). She had been lying in the same position from the time of the fall until the paramedics arrived. *Id.* The paramedics administered fentanyl to Claimant to alleviate the severe pain. *Id.*

2. An X-ray of Claimant's lumbar spine was taken and compared to a prior lumbar spine X-ray from September 6, 2013. The X-ray showed no acute findings and degenerative changes from L4-S1. Claimant was diagnosed with acute back pain and a left hip contusion.

Claimant's Prior Reports of Back Pain

3. Claimant had a prior work compensation claim for an injury on April 11, 2011. She ultimately underwent a Division IME with Dr. Jeffrey Jenks on February 8, 2012. At the time of the DIME, Claimant advised Dr. Jenks she was having continued pain in the left side of her neck, thoracic region, lumbosacral region and radiation into her left leg to her heel.

4. Claimant was seen by her primary care physician, Dr. Jamie Pollock, on August 27, 2013 for complaints of bilateral lower extremity numbness. She returned to Dr. Pollock on September 5, 2013 and was given a diagnosis of low back pain and radiculopathy. Dr. Pollock requested X-rays of Claimant's cervical and lumbar spine.

5. On September 6, 2013 Claimant presented to St. Mary Corwin to obtain the requested X-rays. On arrival, Claimant filled out an "Outpatient Fall Risk Tool" in which she checked a box indicating she was having difficulty with walking or balance. Notes from the visit indicate the reason for the X-rays was "LBP Radiculopathy." Claimant returned to Dr. Pollock on September 19, 2013 and assessed with "degeneration of lumbar or lumbosacral intervertebral disc"

6. As part of the discovery process in this case, Respondents sent Claimant a letter requesting that she disclose all healthcare providers who treated the parts of her body or the conditions alleged to be related to the claim. Claimant provided a list of medical providers but omitted Dr. Pollock from the list. At hearing, Claimant indicated that Dr. Pollack's name, possibly other medical providers, appeared on a second page, which was provided to her attorney. Claimant offered to retrieve a copy of this second page from her personal file at home, but this was not requested by any party. [The ALJ notes that the production, or non-production, of this alleged second page would be of extremely limited value to the fact finder. Without proof of prior conveyance, there would be no way to forensically determine when such second page was initially prepared].

Treatment Through Workers Compensation for Lumbar Injuries

7. Claimant presented to Dr. Terrence Lakin of the Southern Colorado Clinic/Occupational Medicine on June 10, 2014 to receive treatment for her work injury. Claimant described the events of June 9, 2014 to Dr. Lakin, and was diagnosed with a lumbar strain. Claimant filled out a medical history for Dr. Lakin. Therein, she indicated she never had back pain prior to the injury, and that she quit smoking in October, 2013. [The ALJ finds both statements to be misleading, at best]. (Ex. 6).

8. Dr. Lakin prescribed physical therapy, medications, and provided Claimant with temporary restrictions of no lifting more than 15 to 20 pounds, walking and standing as tolerated, with limited bending and no violent or physical patient contact. *Id.* Claimant continued with her physical therapy, but as of August 20, 2014, she continued to complain of pain at a level of 6 out of 10 along with tenderness over the L5-S1 region

and pain radiating into her left buttocks. *Id.* at 33. An MRI was recommended at this time.

9. A lumbar MRI was performed on August 22, 2014. (Ex. 7, pp. 246-247). The *Findings* showed:

> L4-L5: *Mild* right foraminal stenosis and minimal right lateral recess encroachment secondary to moderate right disc bulge and facet arthropathy. No definitive nerve impingement. No central canal or left foraminal stenosis.
>
> L5-S1: *Mild to moderate* left foraminal stenosis and minimal left lateral recess encroachment secondary to moderate left disc bulge and facet arthropathy. Possible impingement of the exiting left L5 nerve root. No central canal or right foraminal stenosis. (emphasis added).

10. Claimant was referred to Dr. Roger Sung for an orthopedic consultation on February 5, 2015. (Ex. 9, pp. 267-270). Claimant told Dr. Sung she had undergone physical therapy and injections, but nothing had relieved her pain. Dr. Sung noted Claimant had stated that prior to the June 9, 2014 accident she had never had any back related issues and never saw anyone for back related problems. Dr. Sung reviewed Claimant's MRI results with her and discussed that she had underlying degenerative changes which had been longstanding. Claimant told Dr. Sung she smoked a couple cigarettes a day, but she still felt very comfortable that she could quit. Dr. Sung recommended a L4-S1 anterior and posterior fusion.

11. Claimant underwent an EMG and nerve conduction test on February 17, 2015 with Dr. Dwight Caughfield. The EMG was normal, with no evidence of nerve entrapment or lumbar radiculopathy.

12. Dr. John McBride performed a Respondent Independent Medical Examination ("IME") on May 28, 2015. Dr. McBride noted Claimant had significant degenerative disc disease and recess stenosis at L4-L5 and L5-S1. He opined that the degenerative changes to be addressed by this surgical fusion had occurred over time; not from the June 9, 2014 fall. If Claimant did have an acute disc injury from her slip and fall, she would have responded more profoundly to epidural injections. Dr. McBride opined the cause of Claimant's pain was wear and tear of her lumbar spine, based on her BMI of 38, and an acute exacerbation with the slip and fall on June 9, 2014. Dr. McBride further opined Claimant would be a surgical candidate, unless further information regarding previous low back pain came to the surface.

13. Claimant returned to Dr. Sung on January 14, 2016, and advised him that none of her treatment provided lasting relief. She wanted to move forward with surgery. Dr. Sung requested an updated lumbar MRI, which was performed on January 25, 2016. This MRI was then compared to the August 22, 2014 MRI. Under *Findings*, it was then noted:

> L4-L5: There is *advanced* degenerative disc disease with disc desiccation and predominately right-sided disc space height loss with associated endplate

degenerative changes and degenerative spurring….. There is a posterior disc bulge with mild midline extension, mild to moderate right neural foraminal extension and mild left neural foraminal extension….

L5-S1: There is *advanced* degenerative disc disease with disc desiccation and predominately left-sided disc space height loss with associated endplate degenerative changes and degenerative spurring….There is *severe* left foraminal stenosis. (Ex. 9, p. 275) (emphasis added).

14. Claimant returned to Dr. Sung on February 25, 2016 and reported to him that she had quit smoking. Dr. Sung recommended Claimant undergo a L4-S1 fusion procedure. This request was denied by Respondents.

15. On February 28, 2016, Respondents obtained video surveillance of Claimant. This video surveillance clearly showed Claimant smoking a cigarette.

Claimant's Right Shoulder Injury

16. Claimant presented to Colorado Center for Orthopedic Excellence on August 29, 2016 and reported right shoulder pain and weakness. She indicated the symptoms started on or about July 16, 2016 when she fell onto her right shoulder. She felt the reason for her fall was numbness and tingling in her left leg that was *caused by* her June 9, 2014 low back injury. Dr. Ky Kobayashi reviewed a MRI of Claimant's right shoulder and found it to show a massive right shoulder rotator cuff tear. Surgical treatment for this claim was denied, and Claimant had it performed outside the Workers Compensation system.

Testimony of Dr. Sung

17. The parties herein went to hearing on August 16, 2016, on the issue of authorization of the surgery recommended by Dr. Sung. Claimant took the post-hearing evidentiary deposition of Dr. Sung on August 24, 2016. Dr. Sung testified he diagnosed Claimant with L4 to S1 degenerative disc disease, disc bulging, neuroforaminal stenosis and left leg radiculopathy. He recommended a L4-S1 anterior and posterior fusion to relieve claimant's pain down her leg and some of the pain in her low back.

18. Dr. Sung reviewed Claimant August 22, 2015 and January, 2016 lumbar MRIs. He testified that many the findings in the MRIs were degenerative in nature, and had been present prior to Claimant's fall of July 16, 2016.

19. Dr. Sung testified that he recommended that Claimant quit smoking entirely, prior to him performing the fusion surgery. He testified that with a fusion surgery it is necessary to get bone to heal to bone, and smoking inhibits this bone healing process. Dr. Sung testified that even smoking one a week was too much smoking If a patient was committed to getting better, they would quit smoking entirely. Dr. Sung's recommendation was for Claimant to quit smoking, be tested to prove nicotine sobriety, and then move forward with surgery.

20. Dr. Sung testified if Claimant were to start smoking following surgery, it would decrease the chance of spine fusion and increase the risk of infection. Dr. Sung testified he was concerned that Claimant would resume smoking after surgery, given her 23-year history of smoking 1 ½ packs a day. It was noted that Claimant had previously tried to stop smoking, but had been unsuccessful.

21. Dr. Sung initially testified Claimant's pain complaints were not related to a preexisting personal health condition. His basis for this opinion was that Claimant had no pain prior to the accident, and she had very clearly told him at her first visit she had never had back related problems. However, Dr. Sung also testified he did not review records from other medical providers, did not perform a detailed causation analysis, and was more focused on whether to perform surgery than determining how Claimant was injured. Dr. Sung testified he is not level II accredited by the Colorado Division of Workers' Compensation for purposes of making a causation analysis.

22. Dr. Sung was provided with the September, 2013 medical records indicating Claimant had low back pain and radiculopathy. He expressed surprise at the existence of these medical records. He testified that, based on those medical records, it was *difficult to tell* whether Claimant would have required a lumbar fusion in September, 2013.

23. Dr. Sung testified a patient's credibility and veracity plays an important role in his decision whether to perform an operation, because he has to believe the patient's subjective complaints of pain. Dr. Sung reviewed the letter from Claimant to Respondent's counsel in which she was asked to disclose her prior medical providers but declined to disclose her treatment with Dr. Jamie Pollock, her primary care physician. Dr. Sung testified this omission made Claimant less credible in his opinion, and it made him less comfortable making a decision to operate on Claimant based on her subjective pain complaints. Dr. Sung testified his level of confidence, based on Claimant's subjective complaints, was "low."

24. Dr. Sung testified Claimant was incorrect when she testified no one ever told her to stop smoking. Dr. Sung reviewed an interrogatory response by Claimant in which she stated "I don't feel my current smoking habits have anything to do with this claim. Smoking cessation was recommended by Dr. Sung, but I was never told that I had to stop smoking." Dr. Sung testified this was a false statement from Claimant and he had told her to stop smoking. Dr. Sung testified he had been shown a video of Claimant smoking on February 28, 2016, and the video was inconsistent with Claimant telling him on February 25, 2016 she had stopped smoking.

25. Dr. Sung testified that after reviewing Claimant's September, 2013 medical records he had to agree that Claimant's statement to him she never had prior low back pain was false. Dr. Sung testified that now that he has evidence Claimant had a prior back problem he cannot say whether the need for surgery is related to the June 9, 2014 injury. Dr. Sung testified that regardless of the causation issue, he would not presently operate on her because she continued to smoke.

ALJ Nemechek's Order on Fusion Surgery Originally Proposed by Dr. Sung, and other Authorized Treatment

26. ALJ Timothy Nemechek issued a Summary Order on November 30, 2017 finding Claimant failed to prove the recommended surgery was reasonable and necessary. In this Order, the ALJ summarized the findings of Dr. John McBride, who had performed an IME on behalf of Respondents.

> He (Dr. McBride) opined the degenerative changes in her lumbar spine had occurred over time and were *not the result* of the June 9, 2014 fall. *These were aggravated by the fall*.…The Medical Treatment Guidelines required a significant change in the radiographs over a period of two years to consider aggravation of a pre-existing osteoarthritis as an etiology. (Ex Q., Finding of Fact #14) (emphasis added).

In Finding of Fact #27, the ALJ found:

> Claimant had *degenerative changes* in her lumber spine, which were *exacerbated by the June 9, 2014 fall.* (emphasis added).

Lastly, in Finding of Fact #30 of his Summary Order, the ALJ found:

> Finally, Respondents requested an Order terminating Claimant's medical benefits, including any further treatment for her low back. The ALJ determined Respondents are not entitled to this relief. On balance, *the medical records showed Claimant's industrial injury aggravated her pre-existing degenerative condition for which she required treatment.* This conclusion was supported by Drs. McBride and Douthit. It is incumbent upon Claimant's ATPs to determine what treatment, if any, she requires to reach MMI. (emphasis added).

Continued Treatment / Knees and Shoulder

27. Claimant underwent right shoulder arthroscopic rotator cuff repair on March 24, 2017 with Dr. Kobayashi. Claimant's private insurance paid for this procedure.

28. Claimant presented to Dr. Lance Farnsworth on July 27, 2017 for follow-up of treatment for left knee osteoarthritis. Dr. Farnsworth had previously performed a right total knee arthroplasty in March, 2014. Claimant recovered with no complaints. Dr. Farnsworth discussed Claimant's option for the left knee and she elected to proceed with a total knee arthroplasty. The left knee surgery was performed on or about August 7, 2017. Claimant's private insurance paid for this procedure.

MMI and Impairment Rating by Dr. Lakin

29. Claimant returned to Dr. Lakin on January 19, 2018. In his report Dr. Lakin noted he reviewed the ALJ's Order denying Dr. Sung's surgery. (Ex. 6, p. 233, 235). Claimant continued complaining of lower back pain, reporting an 8 out of 10 level pain at the time

of MMI. *Id.* at 236. Physical examination of Claimant's back documented moderate to severe tenderness to palpation of paralumbar muscles with mild muscle spasms. *Id.* at 237. Dr. Lakin's final diagnosis regarding the back was a lumbar strain with aggravation of Claimant's underlying DDD/DJD. *Id.* Dr. Lakin's ongoing treatment during his assignment as an ATP notes that Claimant was prescribed Flexeril for back spasms.

30. Dr. Lakin assigned a 14% lumbar rating, 8% for range of motion loss combined with 7% for a Table 53IIC rating, based upon aggravation of her degenerative disc disease resulting from this fall. *Id.* at 238. Dr. Lakin based his impairment rating, in part, on an FCE performed that was deemed "relatively reliable". (Ex. 6, p. 221). The FCE reported that Claimant was experiencing lower back pain throughout the evaluation. *Id.* at 222. Dr. Lakin opined that given that Claimant had exhausted all means of treatment, except for surgical intervention, she had reached MMI, effective that day. Respondents contested Dr. Lakin's final report and applied for a Division IME.

Division IME by Dr. Watson

31. Dr. Robert Watson was selected as the DIME physician. A thorough records review is noted in his report. He conducted the exam on April 23, 2018. Like ATP Lakin, he opined that Claimant reached MMI for the lumbar spine on January 19, 2018. Dr. Watson noted Claimant had a history of left knee osteoarthritis, and she was very clear with him that her left knee was not injured as a result of her work injury.

32. Claimant reported having a fall on or about July 16, 2016 when her left leg went numb and caused her to fall and injure her right shoulder. Dr. Watson noted the injury occurred over 2 years after Claimant's work injury, and she had objective inconsistencies in her evaluations. She did not report left leg pain and numbness until at least December 29, 2014, but her EMG with Dr. Caughfield was negative for radiculopathy. She also had significant nonphysiologic findings in her evaluation.

33. Dr. Watson noted that his exam of Claimant's lower extremities was significant for inconsistent sensory changes throughout both the left and right lower extremities. Dr. Watson ultimately concluded:

> There does not appear to be a temporal relationship to the low back injury and the onset of her [Claimant's] complaints of left leg pain. Because of these inconsistencies, I am unable to say, within a reasonable degree of medical probability that her fall [and subsequent right shoulder injury] was related to her work injury. (Ex. 13, p. 321).

34. In his DIME report, Dr. Watson noted the Colorado Division of Workers' Compensation requires an impairment rating be given for all body parts listed on the DIME application form.

35. Dr. Watson provided a 33% left lower extremity impairment rating and 3% right upper extremity impairment rating, even though his report made clear these body parts were not related to claimant's work injury.

36. For the lumbar complaints, Dr. Watson provided 8% whole person lumbar impairment utilizing Table 53IIC of the *American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Ed.* Specifically, he found that two lumbar levels required a rating; the first level from Table 53IIC was for 7%, and the second level added 1%. Combined, this constitutes 8% from this Table. He then combined this 8% with a 4% whole person lumbar impairment for loss of range of motion. The total combined lumbar impairment rating was 12% of the whole person.

37. In this diagnosis component of his DIME opinion, Dr. Watson noted:

> 1. *Lumbosacral strain, aggravation of underlying degenerative disc disease* L4-5, L5-S1. (emphasis added).

He also noted:

> "[Claimant] has had previous difficulties with her low back in 2013 as documented by her private physician. However, there does not appear to be any record of her receiving treatment following this evaluation. There is no indication that she was independently disabled at the time of her work related injury." *Id.* at 322.

Ensuing Litigation

38. Respondents filed an Application for Hearing, contesting Dr. Watson's impairment rating for the lumbar spine. Claimant filed a Response to Application for Hearing, contesting Dr. Watson's impairment rating for the shoulder, and date of MMI.

39. The parties took the deposition of Dr. Watson on August 13, 2018. Dr. Watson testified the Application for DIME asked him to review claimant's lumbar spine, left lower extremity and right upper extremity. He testified the only body part that was related to Claimant's work injury was the lumbar spine and 12% whole person rating, but he still provided impairment ratings to claimant' left lower extremity and right upper extremity because the Division of Workers' Compensation requires him to provide ratings for every part listed on the Application for DIME.

40. Claimant testified at hearing. She described her slip and fall on water on June 9, 2014 in which she injured her low back. She testified that in May, 2015 she was out for an evening walk when she felt pain in her left lower back and her entire left leg went numb and caused her to fall. She testified she had another such fall in July, 2014 due to left leg numbness and landed directly on her right shoulder and was unable to move her arm away from her side following the fall. Claimant testified she had bad knees and longstanding knee pain but felt she could differentiate between knee pain and pain and numbness from her low back. She testified the left knee was not causing her pain at the time of her injury on June 9, 2014.

41. Claimant testified she never had radiating pain into her left leg prior to her work injury. She could only recall one prior instance of low back pain. Claimant testified she did not tell any of her workers' compensations providers of her prior low back pain or lower

extremity pain and numbness. At hearing, Claimant explained that he did not consider her prior back pain to carry great significance, since it did not impede her ability to work until her fall on 6/9/2014.

42. Claimant testified she did not lie to Dr. Sung regarding her smoking cessation and that Dr. Sung never told her to stop smoking.

Medical Opinions of Dr. Lesnak

43. Dr. Lawrence Lesnak reviewed Claimant's medical records to provide an opinion regarding Dr. Watson's impairment rating. He reviewed Claimant's records both prior to, and after, her June 9, 2014 work injury. He noted she had a history of low back pain and pain and numbness into her lower extremities. Dr. Lesnak noted Claimant's records documented nonorganic/nonphysiologic findings both before and after her injury.

44. Dr. Lesnak agreed with Dr. O'Brien that Claimant's slip and fall may have resulted in a "very mild" lumbosacral strain or sprain, but that any injury would have resolved no later than 3 months following the incident. Dr. Lesnak opined that Claimant's symptoms did not improve, and actually seemed to steadily worsen. Combined with a lack of objective findings to support her complaints would seem to strongly indicate the presence of significant psychologic/psychosocial issues.

45. Dr. Lesnak opined Dr. Watson's lumbar impairment rating was incorrect. He noted Claimant did not have a Table 53 diagnosis that would be related to her work injury given that there was no objective evidence of an injury to her spine and she reported no response to all diagnostic and non-therapeutic testing. Dr. Lesnak opined that this confirmed that Claimant's symptoms are not coming from her lumbar spine or SI joint.

46. Dr. Lesnak noted the only consistency in Claimant' claim had been her myriad subjective pain complaints, without any objective findings to support those complaints. No treatment directed at her lumbar spine provided any type of improvement in her subjective complaints or function.

47. Dr. Lesnak indicated that utilizing the *AMA Guides to the Evaluation of Permanent Impairment, 3rd Ed.* a patient with only subjective pain complaints does not qualify for a permanent impairment rating. Dr. Lesnak opined there was absolutely no evidence to indicate Claimant qualifies for any type of impairment rating related to her work injury.

Medical Opinions of Dr. O'Brien

48. Orthopedic surgeon Dr. Tim O'Brien reviewed Claimant's medical records in order to provide an opinion regarding Dr. Watson's impairment rating. Dr. O'Brien is board certified in orthopedic surgery and Level II accredited by the Colorado Division of Workers' Compensation. Dr. O'Brien was admitted as an expert in orthopedic surgery.

49. Dr. O'Brien opined claimant's June 9, 2014 injury caused a *minor and temporary* aggravation of her underlying degenerative disc disease. Dr. O'Brien testified the surgery recommended by Dr. Sung would not be reasonable, necessary and related to

claimant's work injury and opined claimant would have healed within 3 months of the date of injury.

50. Dr. O'Brien testified he had reviewed the DIME report of Dr. Watson. He disagreed with the ratings for Claimant's right shoulder and left knee. Dr. O'Brien testified it was clear Dr. Watson opined those body parts were not claim related and he was not aware of a Division requirement to provide impairment ratings for all body parts listed in the Application for DIME.

51. Dr. O'Brien testified there would have been no permanent impairment to Claimant's lumbar spine. Claimant would not have been entitled to a permanent impairment rating under Table 53 because she did not fail to heal, and her ongoing pain was not supported by objective findings.

52. Dr. O'Brien reviewed an Independent Medical Examination report that Dr. Jack Rook performed on behalf of claimant. Dr. O'Brien testified he disagreed with Dr. Rook's opinion claimant should undergo surgery because it was apparent he [Dr. Rook] had not reviewed all the medical records, and because Dr. Rook is not a surgeon.

Medical Opinions of Dr. Rook

53. Claimant went to Dr. Jack Rook for an independent medical examination which took place on July 9, 2018. (Ex. 14). Dr. Rook documented that Claimant continued to complain of constant low back pain that increases with prolonged sitting, bending, twisting, and prolonged standing. Physical examination documented a positive straight leg raise on the left, negative on the right. Dr. Rook recognized that Claimant was only placed at MMI given the denial of the lumbar fusion surgery.

54. Regarding Claimant's back, Dr. Rook diagnosed her with the following work-related conditions: chronic low back pain with left lower extremity radiculopathy; severe degeneration at the L4-5 and L5-S1 levels with retrolisthesis at L5-S1; severe left L5 neural foraminal narrowing; lumbar herniated disc; and lumbar spinal stenosis. He also noted that ALJ Nemechek had previously decided the issue of a permanent aggravation of Claimant's underlying condition when he denied Respondents' request to terminate all medical benefits for the back condition.

55. Claimant reported the same history of falls, sharp back pain, and the left leg numbness to Dr. Jack Rook during an IME on November 21, 2016. (Ex. 12, pp. 301-02). It was noted that Dr. Lakin had told Claimant that her left leg was giving out due to the spinal nerve root impingement identified on the lumbar MRI. *Id.* at 302. Dr. Rook indicated the MRI showed evidence of foraminal stenosis most significant on the *left* side at L5-S1. His physical exam documented an absence of left knee reflex, suggesting a left L4 radiculopathy that could account for the weakness of her left quadriceps seen on physical exam and her leg giving out on multiple occasions.

56. Dr. Rook performed a second IME on July 9, 2018 and he disagreed with Dr. Watson's assessment that the right shoulder was not work related. (Ex. 14, p. 340). Dr. Rook disagreed with the DIME's statement that there was not early documentation of

Claimant's left leg problems. Dr. Rook felt that the left hip x-rays taken on the date of the injury at the emergency room, and an MRI of the lumbar spine two months after the injury demonstrated possible nerve root impingement of the exiting left L5 nerve root at the L5-S1 level.

Disfigurement

57. Claimant displayed four arthroscopic surgical scars surrounding the upper portion of her right shoulder, each being approximately 10 mm by 1 mm, and each being darker than the surrounding skin.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals*

Office, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

D. The ALJ in this case finds that the medical opinions presented by both parties were presented credibly, professionally and in good faith. The *persuasiveness* of those opinions will be addressed for each issue moving forward. The ALJ concludes that Claimant is lacking in credibility and reliability as a medical historian. She claimed to have quit smoking, but she hadn't. Claimant wanted to 'finesse' her way to a fusion surgery, which could have caused harm to her. She got caught. Claimant now professes to distinguish between pre-existing back problems, and those which actually prevented her from working. This is perhaps a valid distinction, but it required her disclosure. The ALJ finds that Claimant wanted to 'finesse' her way to Workers Compensation benefits without making full disclosures. Her credibility has been compromised. However, as discussed herein, this does not mean Claimant was not seriously injured - nor does it mean she exaggerated her symptoms from day one. Nor could it possibly mean that the objective symptoms noted in testing and examinations did not occur.

DIME Process / Whole Person / Generally

E. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

F. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

G. A DIME physician's findings of MMI, causation, and impairment *of the whole person* are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must

be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

DIME Process / Scheduled Ratings / Burden of Proof

H. While a DIME physician's opinions are entitled to special weight on issues of MMI and whole person impairment, they are not entitled to any special weight when it comes to *extremity* ratings. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. APP.1998) (DIME provisions do not apply to the rating of scheduled injuries); see also, *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Wagoner v. City of Colorado Springs*, W.C. No. 4-817-985-03 (Oct. 21, 2013) (no presumptive weight afforded DIME physician concerning scheduled injuries), *aff'd Wagoner v. Industrial Claim Appeals Office*, (Colo. App. No. 13CA1983, Oct. 23, 2014) (not published pursuant to C.A.R. 35(e)). Consequently, for extremity ratings, a DIME opinion merely has to be rebutted by a preponderance of the evidence to be overcome.

DIME Physician's Assignment of Impairment Ratings to Left Knee and Right Shoulder

I. Respondents assert that the DIME should be overcome in its entirety, since the DIME physician assigned impairment ratings not only to Claimant's lumbar region (an admitted component of this claim) but also the knee (by all accounts, not causally related to this claim), and the shoulder (which the DIME says is not causally related, but for which Claimant differs). Then the DIME combined all three, then assigned a Whole Person rating for all of it. The ALJ does not concur with Respondents' analysis that this renders the DIME report a nullity. The Division's DIME request is not part of the record before the ALJ, but the DIME report, and Dr. Watson's testimony, indicates that the Division made such a request. Regardless of Dr. Watson's interpretation of the scope of his assignment, the ALJ interprets this DIME report as having additional calculations which are simply unnecessary - but which do not undermine the integrity of the report. Such calculations are not unlike provisional impairment ratings for a Claimant not yet at MMI. They can be disregarded, and the rest sorted out.

J. The Claimant's left knee impairment rating is easy. There is not even a dispute that the Claimant's left knee injury is not causally related to this work injury. The DIME report itself says so. The Impairment Rating for Claimant's left knee is zero.

K. Claimant's challenge the DIME's opinion that her right shoulder injury was not causally related to her June 9, 2014 injury. If Claimant's right shoulder is deemed related, it would be done so under the quasi-course of employment doctrine as a compensable consequence of the original injury:

> The quasi-course of employment doctrine was created to provide the requisite connection between the employment and an injury that would not otherwise be considered to have arisen out of and in the course of employment. *See* 1 *Larson's Workers' Compensation Law* § 10.05 et seq. (2002). It was designed to attenuate the usual requisites of compensability, and thus, injuries received while undergoing authorized medical treatment for an industrial injury are considered compensable even though they occur outside the ordinary time and space limits of normal employment.

Price Mine Serv., Inc. v. Indus. Claim Appeals Office of State of Colo., 64 P.3d 936, 938 (Colo. App. 2003) (emphasis added); *citing Excel Corp v. Indus. Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1993).

L. Even with the 'preponderance' burden of proof facing Claimant on this scheduled rating, Claimant's evidence falls short. The ALJ concurs with the DIME physician's ultimate conclusion that there is an insufficient temporal relationship to the low back injury and the onset of Claimant's left leg pain complaints. As noted, Claimant is a highly suspect historian, by her own admission. When she fell, she fell hard, and the ALJ is not prepared to now adopt Claimant's theory of why it occurred. Thus, the ALJ cannot conclude, by a preponderance, that Claimant then fell and injured her shoulder due to this back injury, and not due to failure of her left knee [which was badly in need of an arthroplasty], obesity, and a host of other possibilities.

M. Thus, since causation has not been shown on the right shoulder issue, the Impairment Ratings supplied by the DIME physician are merely surplus figures, and will be disregarded. The ALJ finds that Claimant's Impairment Rating for this injury for her right shoulder is zero.

DIME Opinion on MMI for Lower Back

O. Dr. Watson concurred with the ATP Dr. Lakin that Claimant had reached MMI on January 19, 2018. Dr. Lakin's reasoning, and adopted by the DIME, is that there is now nothing more that can be done to improve Claimant's condition, since the fusion proposed by Dr. Sung would not be performed. Make no mistake - Claimant's continued smoking and lack of candor about it brought this result upon her. For her conduct, she was rightfully deemed an unsuitable candidate for surgery by ALJ Nemechek. But contrary to Respondents' assertions, while ALJ Nemechek found the surgery not to be *reasonable and necessary,* he did **not** find that the proposed surgery was *unrelated* to her back injury. Quite the contrary. He found that this work injury aggravated her pre-existing degenerative back issues, resulting in her need for additional treatment - just not the fusion. Claimant was then directed to her ATP to try to bring her to MMI. This Order issued on 11/30/2017. Dr. Lakin concluded, less than two months later, that her medical options had been exhausted. Dr. Watson concurred.

P. Respondents presented opinions from medical experts - which the ALJ finds were sincerely and professionally rendered - that Claimant had already reached MMI a few months after her work injury. They are, however, exactly that: *opinions* which differ from the DIME's. Substantial evidence supports the DIME's MMI

determination, including the concurrence of the ATP who has treated Claimant since 2014, the records review, and the Summary Order of the ALJ. This ALJ finds that Respondents have not overcome the DIME opinion on MMI by clear and convincing evidence. Claimant's MMI date is January 19, 2018.

DIME Opinion for Impairment Rating on Lower Back

Q. A physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings. §8-42-101(3.7), C.R.S. Table 53IIB of the AMA Guides assigns whole-person ratings where an injured worker suffers an "intervertebral disc or other soft tissue lesion" in the lumbar spine which is unoperated, with a medically documented injury and, "[A] minimum of six months of medically documented pain and rigidity with or without muscle spasm." The determination of whether a claimant meets the criteria of Table 53IIC is made at the time of MMI and not at the time of any subsequent evaluation. *Lopez v. Cargill Meat Solutions*, W.C. Nos. 4-757-408 and 4-758-952 (Sept. 9, 2010). In order to receive a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established.

R. The ALJ finds that substantial evidence exists in support of the DIME physician's application of Table 53IIC. The subjective complaint of pain has been documented since the onset of the injury. There is ample evidence in the medical records to support objective symptoms of rigidity for well in excess of six months. This is an unoperated injury, with the likelihood of remaining unoperated. There is ample evidence of at least moderate degenerative changes on structural tests, as the MRI's have shown.

S. While Respondents' experts now assert this this was nothing more than a strain (thus removing it from Table 53IIC entirely), there is substantial evidence for the DIME to conclude otherwise: The ATP concluded quite similarly to the DIME, and ALJ Nemechek concluded that her preexisting lumber condition was aggravated by this fall, requiring additional treatment. The DIME may reasonably rely upon such opinions.

T. While Claimant has been found to be an unreliable historian, her prior back issues from 2013 as reported to her PCP were duly noted by the DIME. Claimant was less than candid about her smoking and existing back problems with Dr. Sung - and she paid the price for it. The DIME physician did not have to rely heavily upon Claimant's credibility to render his opinion. He reasonably relied, in part, upon the opinions of others - to include, derivatively, the opinions of Drs. McBride and Douthit. Once again, Respondents have presented well-reasoned medical opinions which differ from the DIME physician. Once again, they are merely differing *opinions*. Were Respondents facing a preponderance standard, arguably a different result could be reached. But the ALJ cannot conclude that Dr. Watson's application of Table 53IIC is highly probably incorrect. Therefore, the DIME's Impairment Rating opinion has not been overcome. The ALJ finds that Claimant's Whole Person Impairment Rating is 12%, without apportionment, for this work injury.

Disfigurement

U. Claimant's injury to her shoulder is not related to her work injury. Her Disfigurement award is $0.

Grover Medical Treatment

V. A claim for medical treatment beyond the point of maximum medical improvement is governed by *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). In *Grover*, the Colorado Supreme Court authorized maintenance care to maintain MMI or prevent further deterioration of a Claimant's Condition. An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended, nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v. ICAO*, 992 P.2d 701 (Colo. App. 1999). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993). Medical treatment must be reasonably necessary to cure and relieve the effects of an industrial injury §8-42-101(1)(a), C.R.S., *Snyder v. Indus. Claim. Apps. Office*, 942 P.2d 1337 (Colo. App. 1997) and must be causally related to the industrial injury. *Dependable Cleaners v. Vasquez*, 883 P.2d 583 (Colo. App. 1994).

W. Claimant has failed to prove entitlement to post-MMI medical treatment to her left knee and right shoulder. Those body parts were not injured as a result Claimant's work injury. However, Claimant is entitled to an award of post-MMI medical treatment for her lumbar spine that is reasonable, necessary and related to her work injury.

ORDER

It is therefore Ordered that:

1. Claimant's Whole Person Impairment Rating for her lumbar spine is 12%. Claimant reached Maximum Medical Improvement on January 19, 2018.

2. Claimant's request for a right shoulder impairment rating is denied and dismissed. Claimant's request for all medical costs in connection with her right shoulder injury is denied and dismissed.

3. Claimant's request for a disfigurement award is denied and dismissed.

4. Claimant is entitled to any medical maintenance benefits for her lower back which are reasonable, necessary, and related to her work injury.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 26, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Has Claimant made a "proper showing" that she is entitled to a change in her Authorized Treating Physician?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant suffered an admitted work injury to her right lower leg on June 13, 2017. She presented to Parkview Medical Center after "coming down a ladder when she thinks she missed a step causing her to fall down approximately 2 steps of the ladder." (Ex. A, p. 1).
2. Claimant was evaluated for a tibia plateau fracture, and placed into a knee immobilizer. The final diagnosis was "acute closed fracture of the right tibia and fibula." (Ex. A, pp. 10-11). Given the seriousness of Claimant's injury, she was admitted to Parkview Hospital.
3. A CT scan revealed additional fractures than what was noted on x-ray. (Ex. A, p. 8).
4. On June 14, 2017, Dr. Thomas performed surgery to repair the fractures, which consisted of open reduction and internal fixation. (Ex. A, p. 15)
5. After surgery, Claimant was treated by Dr. Agnes Flaum at the Pueblo Emergicare Clinic ("Emergicare"). (Ex. B). Claimant continued to treat with Dr. Flaum as an ATP through November 2017.
6. Claimant reported to Dr. Flaum sharp shooting pains, swelling, ecchymosis and tenderness in her right leg. (Ex. B, p. 16). Claimant was advised to keep her right leg elevated, and not to use it. (Ex. B, p. 18).
7. Dr. Flaum continued to document problems with severe swelling in Claimant's right leg, as well as ecchymosis and tenderness, (Ex. B, pp. 20, 23), which resulted in Dr. Flaum referring the Claimant to orthopedic surgeon Dr. David Walden on October 26, 2017, for consultation. (Ex. B, p. 27).
8. Dr. Michael Schuck, an orthopedic surgeon, evaluated Claimant on January 4, 2018. Dr. Shuck noted that Claimant's primary care provider was now "J. Douglas Bradley, M.D." Dr. Shuck also noted that "knee replacement surgery was discussed in detail." (Ex. C, pp. 33-35).
9. Dr. Schuck found that "because of the intraarticular nature of the fracture," the Claimant had developed post-traumatic arthritis in her right knee. In Dr. Schuck's

assessment, the Claimant continued to have "significant debilitating symptoms." As a result, Dr. Schuck recommended knee-replacement surgery. *Id*. On physical examination, her range of motion was limited, and joint effusion was present. (Ex. B, p. 35).

10. On January 19, 2018, Claimant was evaluated by Dr. Douglas Bradley, also with Emergicare. Dr. Bradley noted that Claimant has swelling and pain in her right knee and that she was "waiting for approval of surgery." (Ex. D, p. 36). Dr. Bradley prepared a lengthy report that also noted that Claimant should continue physical therapy; he also provided her with restrictions. It was noted that she was continuing light duty with her employer. At this date, MMI was estimated to "onset" 6/20/2018. *Id* at p. 36

11. On March 2, 2018, Dr. Bradley noted that Claimant has been using a cane and that Dr. Schuck was "planning on right total knee." (Exhibit D, p. 043). The notes still show that MMI was "onset" for 6/20/2018.

12. On March 12, 2018, Dr. Bradley again evaluated Claimant and recommended continued physical therapy. Notes continue to indicate that MMI had expected onset as of 6/20/2018. (Ex. D, p. 46). "Normal" range of motion appears in the physician's notes.

13. Claimant was evaluated by Dr. Timothy O'Brien at Respondents' request on March 13, 2018. Dr. O'Brien agreed with the recommended request for total knee replacement surgery on her right knee, and noted the likelihood that the tibial fracture became an accelerating event for her osteoarthritis. (Ex. E). Dr. Schuck's surgery was scheduled for May 17, 2018. (Ex. F).

14. During the examination of the Claimant, Dr. O'Brien observed the Claimant to walk "with an abbreviated stance phase on the right." (Ex 1, p. 4). Dr. O'Brien further documented that the Claimant was walking with a cane, and had "swelling diffusely about the right lower extremity…." *Id* at pp. 4-5. In addition to noting the swelling in Claimant's leg, Dr. O'Brien documented that the Claimant had significantly reduced range of motion in her right knee, especially when compared to her uninjured left knee.

15. Dr. O'Brien specifically stated that the fractures that the Claimant sustained are "devastating," and that in every patient he has treated with similar fractures, they have gone on to need a total knee replacement. (Ex. 1, pp. 5-6). Dr. O'Brien recommended a total knee replacement; however, he wanted the Claimant to undergo strengthening exercises before her surgery in order to have a good outcome.

16. On March 23, 2018, Dr. Bradley again saw the Claimant, and this time, his notes indicate that the Claimant had a 'normal' gait and stance. (Ex. D, p. 49). He noted, however, increased swelling, tenderness to right knee, and decreased range of motion and strength to right knee. While MMI was noted to

be “expected” on 6/20/2018, he fully documented that surgery for knee replacement was scheduled with Dr. Schuck.

17. On April 19, 2018, Dr. Bradley’s notes show that the Claimant was expected to reach MMI on June 20, 2018. (Ex. D, p. 52). On this visit, however, Dr. Bradley documented that the Claimant was using a cane, had an antalgic gait, as well as decreased range of motion in her right knee. *Id* at 53.

18. On May 16, 2018, Dr. Bradley’s notes again indicate that Claimant was going to reach MMI on 6/20/2018. (Ex. 2, p. 13).

19. The Claimant underwent total knee replacement surgery with Dr. Schuck on June 19, 2018. (Ex. 3, pp. 34-36).

20. Dr. Bradley then evaluated Clamant following the surgery, noting on July 9, 2018. “continued physical therapy.” (Ex. D, p. 58).

21. On August 20, 2018, Dr. Bradley’s notes indicate “Physical therapy [Frequency: Twice a Week]” At this visit MMI was now noted to be 9/20/2018. It was further noted as an addendum at 10:34 a.m.

> *Contact in IM-Dr. Schuck*. She [Claimant] should be able to do light duty. *Patient called*. Information given to her, trial light duty. Will send to Lifecare Center and see what their response is. (Ex. 2, p. 31) (emphasis added).

22. On September 17, 2018, Dr. Bradley noted that Claimant was “having some swelling in her leg other than that doing well since last visit and the pain is still present.” (Exhibit D, p. 60). Claimant was provided with continued restrictions at this visit.

23. Claimant has since returned to light duty work after the right knee replacement surgery, under restrictions given by Dr. Bradley.

24. Claimant has never formally requested a Change of Physician on the Division of Workers’ Compensation prescribed form. That process was bypassed, and an Application for Hearing on this issue was filed.

25. Claimant testified at hearing. She felt that Dr. Bradley delayed Claimant’s physical therapy for weeks after the physical therapy was arranged by Dr. Schuck, the surgeon. The Claimant further testified that her physical therapy was transferred to a facility connected with Dr. Bradley’s office. Claimant has drawn the inference is that Dr. Bradley wanted to financially benefit his office, by having the physical therapy relocated to a facility associated with him.

26. Claimant testified that she has gotten along well with all of her providers, with Dr. Bradley being the sole exception. Claimant no longer wants to be treated

by Dr. Bradley and does not feel that he pays adequate attention to her concerns.

27. The Claimant at the start of the hearing requested that her treatment either be transferred to the Hanson Clinic, or she would be willing to negotiate with the Respondents on a mutually agreeable provider, other than Dr. Bradley.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act) §§8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section* 8-40-102(1), C.R.S. The claimant bears the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-43-301(1), C.R.S.; *Faulker v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of a claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. A workers' compensation claim is decided on its merits. Section 8-43-201, *supra*.

B. In accordance with §8-43-215, C.R.S., this decision contains specific findings of fact, conclusions of law and an order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory,

opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice, or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ finds that Claimant's testimony seems sincere enough in describing her impressions and feelings, but lacking in specifics and persuasiveness.

Change of Physician

D. Section 8-43-404(5)(a)(VI)(A), C.R.S. (2018), allows for a change of physician, at any time, upon a "proper showing." "Section 8-43-404(5), C.R.S.,,,does not contain a specific definition of a 'proper showing.'" *Loza v. Ken's Welding*, W.C. No. 4-712-246 (January 7, 2009). "Consequently, it has been previously held that the ALJ possesses broad discretionary authority to grant a change of physician depending on the particular circumstances of the claim."

E. An unsatisfactory interaction between a claimant and her authorized treating physician *can* support a proper showing for a change of physician. *Szocinski v. Powderhorn Coal Co.*, W.C. No. 3-109-400 (December 14, 1998). "[E]vidence of a poor relationship between the claimant and the authorized treating physician *may* support a finding that the claimant made a proper showing for a change of physician."

F. However, an ALJ is not compelled to grant a change of physician based upon the Claimant's personal dissatisfaction with a physician. *Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985). An argument that a claimant has "lost confidence" in an ATP has been raised prior. *Loza v.Ken's Welding,* W.C. 4-712-246 (January 7, 2009); *Zolman v. Horizon Home Care, LLC, Inc.,* W.C. 4-636-044 (November 3, 2010). In *Loza,* the Panel affirmed the denial of a change of physician where the ALJ found Claimant had not introduced persuasive evidence that he developed mistrust of the ATP or had been unable to communicate with the physician

G. Initially, the ALJ concludes that Claimant has been sufficiently specific in her request, to wit: Anyone but Dr. Bradley, but would like the Hansen Clinic. The ALJ concludes that granting this request, as stated, would not necessarily lead to a disruption in Claimant's care. The ALJ further finds that the location of the facility, thus the drive required, is not a relevant factor in this case.

H. Secondly, while the Claimant did not avail herself of the process set forth by Rule 8-7 of the Rules of the Division, the ALJ will address the merits of her claim here, and not the procedural application of the Rules.

I. The ALJ concludes that Claimant has failed to prove she is entitled to a change in physician. Emergicare physicians have treated her since the date of the incident. The APT at issue, Dr. Bradley, has treated Claimant for the past nine (9) months. A prior Emergicare physician, Dr. Flaum, treated Claimant during 2017. Claimant has undergone two surgeries during the duration of the claim, albeit the initial procedure was prior to Claimant's first contact with Emergicare. The knee replacement appears to have been due to the referral from Dr. Bradley himself. Claimant has also now returned to work for the employer in a light duty capacity, with reasonable restrictions placed by her ATP. Claimant continues to receive uninterrupted post-surgical treatment. The file reveals that Dr. Bradley communicated appropriately with Dr. Schuck to monitor Claimant's post-surgical progress, then communicated that information to Claimant.

J. Claimant's allegations that Dr. Bradley's medical records were inaccurate on some issues several months ago are insufficient to now make a "proper showing." Claimant's concerns that the MMI date was "wrong" in certain records did not alter the care she actually received. While the ALJ's review of the medical records finds the projected MMI dates to have been inaccurate in hindsight, there is little cause for alarm. In all likelihood, the MMI date was simply carried over as a "placeholder" until her prognosis became more clear. At no point was Claimant actually, inappropriately, placed at MMI. Nor is there any evidence that her medical care was adversely affected.

K. Claimant did not testify she reviewed each medical record and then became concerned over this issue. Nor did she testify that her range of motion and gait notes (which the ALJ does conclude were likely inaccurate on a couple of occasions) caused any alarm at the time they were generated. This alarm appears to have arisen after the fact. Had Claimant expressed her concern to Dr. Bradley, the matter could likely have been cleared up in short order. Bare testimony that Dr. Bradley "wrote something down wrong" does not rise to the 'proper showing' required. Despite an after-the-fact review of the admittedly imperfect records, the ALJ concludes that Claimant's medical care was unaffected by these entries.

L. Any confusion regarding the locality of physical therapy did not deny such treatment itself, as Claimant acknowledged that she did actually receive the therapy. The notes from Dr. Bradley indicate that physical therapy was recommended. Claimant has not established that any physical therapy confusion was somehow the fault of Dr. Bradley. For all the ALJ is aware, Dr.

Bradley might not have the greatest bedside manner. While Claimant may be sincere in her subjective beliefs that Dr. Bradley harbored some ulterior financial motive in his recommendation of physical therapists, no evidence to this effect has been put forth. There is no reason to assume that this referral was anything more than Dr. Bradley being comfortable with the known quality of care Claimant would receive from them.

M. While Claimant has not made a "proper showing" to the ALJ that Dr. Bradley must be relieved as her ATP, nothing herein would prevent Claimant from negotiating an internal reassignment of a different ATP within Emergicare's ranks. Perhaps this would be better for everyone, but such process will not involve the ALJ.

ORDER

It is therefore Ordered that:

1. Claimant's request for a change of physician is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 27, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether Claimant has proven by a preponderance of evidence that he is entitled to reopen his claim due to a change in condition related to the work injury.

- Whether Claimant has proven by a preponderance of evidence that North Suburban chiropractic care is reasonable, necessary and related to his work injury. And whether any outstanding medical bills should be paid by Respondents.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 30-year-old part-time dockworker for Employer. He began working for Employer in 2010. Claimant's current position is dock lead and he supervises and manages the freight flow.

2. Claimant testified that he has continued to work full-duty for Employer.

3. Claimant had a prior lumbar spine injury in 2012 after a fall, and he injured his coccyx and low back. This injury to his low back occurred in the year before the work injury.

4. Claimant was operating a forklift for Employer at the time of the February 18, 2013 accident. Another employee was also driving a forklift and ran into Claimant's vehicle. Claimant initially reported to his physician that he was "tossed around a little bit."

5. On February 18, 2013, Claimant informed Dr. Jeffrey Hawke at HealthOne that he had pain over the tops of both shoulders into his upper back and across his low back. Dr. Hawke examined Claimant and diagnosed cervical, thoracic and lumbar strains.

6. Contrary to this medical report about being tossed around a little bit, Claimant testified that the other forklift struck Claimant's forklift and spun him around 180 degrees. Claimant testified that the impact was so severe that it caused him to hit his head on the back of the crossbar and then forward on the steering wheel. The other forklift was admittedly not going more than 9 miles per hour, which makes Claimant's testimony about the severity of the impact unlikely.

7. One month after the incident on March 19, 2013, Claimant continued to complain of neck, upper back and low back pain, reaching nine out of ten on the pain scale.

8. On March 26, 2013, Claimant underwent an MRI that revealed a shallow protrusion at L5-S1 with no nerve root abutment or impingement and no central canal stenosis. Claimant's provider released Claimant to work without restrictions.

9. On April 1, 2013, Claimant requested reinstatement of work restrictions, after returning to full duty.

10. Claimant also requested another lumbar spine MRI from a different facility because the first facility did not do a good job and likely missed something.

11. Dr. Chan. evaluated Claimant on May 3, 2013. Dr. Chan counseled Claimant that his clinical examination findings were most suggestive of myofascial type complaints. Dr. Chan instructed Claimant to continue with an active exercise program, emphasizing flexibility. On May 24, 2013, Dr. Chan reiterated that Claimant's examination indicated muscular pain and that the best treatment was an active exercise program. Dr. Chan repeatedly confirmed that Claimant's only injuries were muscular in nature.

12. Due to Claimant's ongoing complaints of significant pain, Claimant underwent an upper extremity EMG/NCS on July 26, 2013. The testing reported normal results. Dr. Chan found no evidence of cervical radiculopathy, brachial plexopathy, or neurogenic thoracic outlet syndrome on the EMG testing. Dr. Chan also reported no evidence of other peripheral entrapment neuropathy such as carpal tunnel syndrome, ulnar or radial entrapment neuropathy bilaterally. As a result, Dr. Chan and the other physicians continued to diagnose Claimant with nothing more than a muscle strain from the work injury.

13. On August 23, 2013, Dr. Hawke placed Claimant at MMI for his work injury. He assigned no impairment rating because Claimant's injury was muscular in nature and did not warrant an impairment rating. Dr. Hawke noted Claimant's lumbar strain had resolved and Claimant was at MMI for his cervical and thoracic strain. Dr. Hawke recommended maintenance care of following up with Dr. Chan for injections, massage therapy, and pain management. Respondents filed a Final Admission on August 28, 2013 based on Dr. Hawke's opinions.

14. Claimant did not object to the Final Admission and the claim closed.

15. Claimant initially testified that he had been treating with a chiropractor twice a week over the four years after reaching MMI. However, the medical records did not support Claimant's testimony. Rather, the medical records support a finding that Claimant went a long time without medical treatment and did not receive consistent chiropractic care.

16. Claimant ultimately admitted that he went a year and a half without any medical treatment immediately following his placement at MMI. This history of no treatment for at least a year and a half is inconsistent with a finding of an ongoing work injury. When Claimant did seek treatment with his private physicians, his complaints were of intermittent pain.

17. On September 21, 2016, three years post MMI, Claimant presented to HealthOne for evaluation of his prior muscle sprains. Claimant reported an increase in pain beginning over the last couple of months.

18. In an attempt to support the alleged reopening, Claimant testified at the hearing that his most pressing physical problem now was his lumbar spine. Specifically, the lumbar spine was the body part that was causing him the most pain. This report of intense pain in the lumbar spine was inconsistent with Claimant's work injury. Specifically, Claimant had admitted that his low back condition had resolved when he reached MMI. The ALJ finds Claimant's claim of worsened low back condition was unrelated to the work injury.

19. Claimant reported a new onset of left upper extremity numbness and tingling in 2016. Claimant underwent a cervical spine MRI on October 14, 2016, which was essentially normal. Claimant admitted that he developed left arm tingling for the first time a few weeks prior to his evaluation with his primary care physician in August 2016. The ALJ finds the left arm tingling was a new symptom unrelated to the work injury.

20. Claimant underwent another EMG/NCS on April 13, 2017, which revealed mild to moderate cubital tunnel on the left. This finding was not present on the original EMG taken in 2013. Dr. Drapeau found Claimant's cubital tunnel symptoms not related to the 2013 work injury because the 2013 EMG was negative. The ALJ finds Claimant's new diagnosis of cubital tunnel syndrome was unrelated to the original work injury.

21. Although Dr. Drapeau initially recommended reopening the claim, she later clarified that she based her initial recommendation on Claimant's statements that he was currently experiencing pain that he thought related to his 2013 work injury. Dr. Drapeau admitted she did not review Claimant's pre-existing records in order to determine whether Claimant's condition had worsened or whether Claimant's condition causally related to the 2013 injury.

22. Dr. D'Angelo, a Level II accredited occupational medicine physician, testified that after a review of the medical records and examination she agreed with Dr. Chan's assessment from 2013 that Claimant's injuries were limited to muscular or myofascial pain. Dr. D'Angelo credibly testified that Claimant's diagnosed myofascial pain from the 2013 injury could not have worsened three years later. Dr. D'Angelo further testified that the basis of myofascial irritation is from blunt trauma that causes biochemical changes, which in turn causes irritation of the muscle. Dr. D'Angelo continued that the inflammatory reaction dissipates and so does the musculature spasm.

23. Dr. D'Angelo credibly testified that Claimant's condition had not worsened between MMI in 2013 and 2016 when Claimant alleged his condition worsened.

- Dr. D'Angelo explained that Claimant experienced different symptoms, which did not mean his original injury was worse.

- Dr. D'Angelo also testified that based on Claimant's report of pain at the time of hearing compared to when he reached MMI, his pain levels had improved.

- Dr. D'Angelo testified that no further treatment would be necessary and Claimant should engage in an active exercise program because it would release the muscle tension.

24. Dr. D'Angelo testified that Claimant's current low back pain complaints are unrelated to his 2013 work injury. Dr. D'Angelo persuasively testified that Claimant's current low back pain is unrelated because the 2013 MRI showed no structural damage and no significant pathology.

25. Dr. D'Angelo also testified that Claimant worked two jobs for three years without restrictions, which would not be consistent with low back pain related to the 2013 injury. Dr. D'Angelo testified there is no medical basis to relate Claimant's low back pain to an injury from three years earlier.

26. Dr. D'Angelo also credibly testified Dr. Drapeau's acknowledgement that she did not have claimant's prior medical records from the initial 2013 would affect a causation analysis under the Medical Treatment Guidelines.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law.

The purpose of the Workers' Compensation Act of Colorado (Act), sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. §8-43-201, C.R.S. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

In order to reopen the claim for further benefits, claimant must prove a worsening of his condition related to the work injury. C.R.S. section 8-43-303(1) authorizes reopening of a claim based upon a change in condition. The claimant has the burden of proof by a preponderance of the evidence to establish a change in condition in order to have his claim reopened. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. Ct. App. 1997); *Savio House v. Dennis*, 665 P.2d 141 (Colo.App. 1983). The change of condition must be causally related to the industrial injury. *Lymburn*, 952 P.2d at 831; *Savio House*, 665 P.2d at 141.

Claimant was involved in a minor relatively low speed accident in 2013 and suffered nothing more than minor muscle strains. Minor muscle strains do not become worse three or four years later. Moreover, his low back condition had completely resolved when he was placed at MMI with a 0% rating on August 23, 2013. The 0% rating was appropriate, as claimant suffered nothing more than a myofascial injury. After being placed at MMI, Claimant did not seek any medical treatment for at least a year and a half. This delay in seeking medical care for a year and a half is inconsistent with an alleged ongoing work injury.

When claimant ultimately sought medical treatment with his personal providers, his complaints were limited with only intermittent pain reported. Contrary to Claimant's reports to his physicians, he had not be regularly treating two times per week with a chiropractor.

Claimant did not seek any formal care with the workers' compensation providers for nearly three years. Again, this is inconsistent with an ongoing work injury. When Claimant ultimately alleged a worsening of condition, he alleged that his primary problem was with his low back. However, Claimant reported that his low back condition resolved when he was placed at MMI in 2013. A resolved medical condition placed at MMI cannot subsequently worsen. In addition, Claimant had low back problems before the work injury.

Claimant developed new pain in his elbow/arm in 2016 and was diagnosed with cubital tunnel syndrome in 2017 based on objective EMG testing. The same type of objective EMG testing performed in 2013 was normal. As a result, Claimant had a new condition that developed in 2016 and was clearly not work-related.

Dr. Drapeau attempted to reopen the claim in September 2016, based on Claimant's statements that his current condition was both related to the original work injury from 2013 and had worsened over the last three years. Dr. Drapeau confirmed that she did not review any of Claimant's prior medical records from the 2013 claim to confirm what Claimant had told her.

Dr. D'Angelo credibly testified that based on the medical records and her examination, Claimant's condition had not worsened. Dr. D'Angelo persuasively testified that in 2013 Dr. Chan diagnosed Claimant with myofascial pain, a muscle strain. As such, the blunt trauma that Claimant suffered in 2013 had caused his muscles to hurt. Dr.

D'Angelo testified that this inflammatory reaction dissipates and the spasms cease. She confirmed that muscle injuries do not get worse three to four years after resolving.

Additionally, Dr. D'Angelo opined that even if Claimant's condition had "worsened" since 2013, none of claimant's complaints related to the 2013 injury. Dr. D'Angelo persuasively explained that the objective testing, including the MRI and EMG, was negative and claimant had no structural damage in which to relate his current complaints.

The ALJ finds and concludes Claimant has not met his burden of proving a worsening of condition related to the work injury in 2013.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant failed to prove by a preponderance of the evidence that his condition worsened from his 2013 work injury. Claimant's petition to reopen is denied and dismissed with prejudice.

2. Respondents are not liable for any outstanding chiropractic medical bills from North Suburban.

DATED this 27th day of November 2018.

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at:** http://www.colorado.gov/dpa/oac/forms-wc.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-070-787-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 17, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 10/17/18, Courtroom 5, beginning at 1:30 PM, and ending at 3:30 PM).

Claimant's offered no exhibits. Respondents' Exhibits A – C were objected to by the Claimant. During the hearing, the ALJ admitted only pg. 46 of Exhibit A and all of Exhibit C (a video) into evidence.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. The Claimant's opening brief was filed on October 22, 2018. Respondents' answer brief was filed on October 29, 2018. Claimant's reply brief was filed on October 29, 2018, at which time the matter was deemed submitted for decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable injury on January 23, 2018. If so, the consequences of the injury will be determined at another hearing, pursuant to the request of the parties.

The Claimant bears the burden of proof on compensability by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant was hired by the Employer as an Interior Aircraft Cleaner on January 1, 2018, and he began working on January 22, 2018.

Compensable Event

2. The Claimant arrived at the "Southwest Employee Parking Lot" in his sister's car on January 23, 2018. He arrived with his mother, Kesia Taylor, and his sister, Mariah Taylor.

3. While the Claimant and his family were approaching the Employee Shuttle, a woman whom he did not know came up to his sister and yelled "Who's Mariah." Claimant's sister replied "I am" and the unknown women then shouted "You're messing with my momma at work" and punched the Claimant's sister in the face. The Claimant's sister and the unknown woman then started to fight. While attempting to break up the fight, the Claimant's mother was attacked by an unknown man. The Claimant came to his mother's defense and he was assaulted with multiple punches, by a man.

4. After the altercation, the Claimant and his family went onto the shuttle bus. There was another altercation on the bus but the Claimant did not witness it because he was searching for his phone. The Claimant and his family then returned to their car and went to a gas station to meet with police officers and file a police report.

5. Although the Claimant was going to work on January 23, the altercation and subsequent actions of management intervened and the Claimant did not work on that day and he did not return to work thereafter.

6. The Claimant presented credibly and straight forwardly at hearing. His version of events during the incident is undisputed by any **credible** evidence. His actions after the incident, as described in paragraph 4 above, are consistent with the actions of a victim—not an aggressor. The ALJ finds the Claimant's testimony persuasive and credible,

7. According to the Claimant, he suffered injuries to his jaw, his left arm and has persistent paranoia and anxiety that has led him to develop Post Traumatic Stress Disorder (PTSD) from the assault.

8. The Claimant sought treatment at University Hospital (UCHSC) Emergency Room (ER) and he is now participating in therapy.

9. Gwen Osteen, Office Manager for the Employer, testified that the Employer contracts with Southwest for the parking lot and that the public cannot "technically" park there. Although the Employer does not own the parking lot, Osteen identified it as employee parking.

10. Osteen investigated the incident that took place in the parking lot on January 23, and processed statements of the employees that were involved in the incident

11. Diane Hernandez, Interior Aircraft Manager for the Employer, testified that there were employees in the parking lot that were not on schedule to work on January 23, 2018. When playing Exhibit C (a videotape of the incident), Hernandez purportedly identified several current and past employees in the video, both involved in the altercation and those who just witnessed it. Hernandez states that "everyone who was in the altercation was suspended until further notice" indicating that several of the people involved on both sides were employees. Hernandez purportedly identified the Claimant as the aggressor. The ALJ watched the video and could only observed vague, non-descript shadows, and the ALJ so stated on the record. The ALJ infers and finds that absent paranormal abilities (no foundation for such was laid), it would be **impossible** for Hernandez to identify anyone in the video. Therefore, the ALJ finds Hernandez's testimony lacking in credibility.

12. The Employer states that the Claimant was fired for misconduct for fighting in the parking lot. The Employer offered no company policies providing that being an assault victim was a ground for firing.

Ultimate Findings

13. The ALJ finds the testimony of the Claimant to be credible. His testimony concerning the altercation was internally consistent during the hearing and it was consistent with the Claimant's near contemporaneous statement attached to the police report, admitted into evidence (Respondents' Exhibit A, p. 46)..

14. On the other hand, the ALJ does not find Osteen and Hernandez to be credible. Osteen wavered on whether the employee parking lot was actually designated

for employees, when it was clearly established that it was designated for employees. Osteen later indicated that the parking lot in question was for the Employer's employees.

15. Hernandez indicated that she was able to identify employees from a grainy, short, and dark cell phone video. The video was not the entire clip of the altercation and Hernandez making brash sweeping judgments is not credible. The Employer investigated the matter as if it was inherently connected to its operations. As such, the assault was inherently connected to the Claimant's employment. Furthermore, the parking lot was designated as an employee parking lot and routinely had employees park and wait for shuttle before beginning work. As such, the injuries suffered by the Claimant arose out of the course and scope of his employment.

16. Between conflicting evidence, the ALJ makes a rational choice to accept the Claimant's testimony concerning the incident of January 23, 2018, based on substantial evidence, and to reject all evidence to the contrary.

17. The ALJ finds that the Claimant was the victim of an assault, which involved a "neutral force" within the meaning of workers' compensation case law, and not an imported danger of a personal nature.

18. Although the Claimant did not provide medical records or medical evidence of his injuries at the hearing, it is not needed for this sole issue of compensability. Sufficiency of an injury to be compensable is only that it necessitates medical treatment and does not require proof of disability.

19. The Claimant's lay testimony alone establishes compensability.

20. For the reasons specified herein above, the ALJ finds that the Claimant has proven that he suffered a compensable injury on January 23, 2018, arising out of the course and scope of his employment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. *Also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). As found in Finding No. 13 hereinabove, the Claimant was credible in his testimony. The Claimant's testimony is undisputed by any evidence other than Hernandez's paranormal, purported identification of everyone in the video, including the Claimant as aggressor. As found, Hernandez's testimony in this regard was not credible. Findings Nos. 14 and 15 herein above.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting evidence, the ALJ made a rational choice to accept the Claimant's testimony concerning the incident of January 23, 2018, based on substantial evidence, and to reject all evidence to the contrary.

Parking Lot Injuries

c. The courts have consistently ruled that a parking lot provided by the employer is considered to be an extension of the employer's premises, and that injuries occurring in such parking lots are within the course of employment. *See Matter of Welham,* 653 P.2d 760 (Colo. App. 1982). *Also see Stewart v. U.S.,* 716 F.2d 755 (10th Cir. 1982). As found the Claimant sustained his injuries in the Employer's parking lot—while the Claimant was waiting for the Employer's shuttle to take him to work. As ultimately found, the Claimant sustained his injuries in the course and scope of his employment

d. If special circumstances demonstrate a causal connection between the circumstances under which the work is performed and the "off premises" injury, the resulting injury arises out of and in the course of the employment. *Woodruff World Travel v. Indus. Claim Appeals Office,* 38 Colo. App. 92, 554 P.2d 705 (1976); *Flo Rodriguez v. Exempla Healthcare, Inc.* W.C. No. 4-705-673 [Indus. Claim Appeals Office (ICAO), April 30, 2008)]. Special circumstances may be found if the employer provides a parking area as a fringe benefit to the employees and the claimant sustains injury while using the lot. *Id.* It is not essential to a finding of compensability that the employer actually own or physically operate and maintain the lot for this exception to apply. *Id.* Similarly, special circumstances may be found where the employer, for its own benefit, intervenes in the employee's parking choices as a matter of policy. *Friedman's Market, Inc. v. Welham, supra.* In such circumstances selection or use of a parking area is not a purely personal choice. *Id.* Further, in order for an employee's action to "arise out of" the employment it is not necessary that the activity be a strict duty or requirement of the employment. *Panera Bread v. Indus. Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). Rather if the injury arises out of a risk that is reasonably incidental to the conditions and circumstances under which the employment is usually performed the resulting injury arises out of the employment. *Id.* As found, this parking lot injury arose from and in the course of the Claimant's employment.

“Neutral Force” as Opposed to Imported Danger

e. Citing *Horodysyj v. Karanian,* 32 P.3d 470 (Colo. 2001), Respondents argue that the Claimant’s victimization from the assault was a purely personal nature and outside the “course and scope of employment,” and, therefore it was not compensable. The ALJ concludes that this argument is inapposite to the facts in the present case. In *Horodysyk,* the Claimant’s boss sexually harassed her, and underlying the Supreme Court’s rationale is an undertone that this was personal and not an anticipated risk of employment. In the present case, the Claimant was assaulted by a stranger in the employer-provided park lot. The present facts are analogous to the facts in *Tolbert v. Martin Marietta,* 759 P.2d 17 (Colo. 1988), where the employee was raped on an elevator by a stranger, while leaving work. The Supreme Court determined that the woman could not sue in tort and was limited to her remedy under the Workers’ Compensation Act. To apply the holding in *Horodydyj* to the present case would undermine the beneficent purpose of the Workers’ Compensation Act and relegate the Claimant to a suit in tort against an unknown assailant who may be judgment proof. Such a situation would have a bad smell by affording the Claimant a meaningless remedy.

Compensability

f. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, the Claimant’s lay testimony alone establishes compensability.

g. In order for an injury to be compensable under the Workers’ Compensation Act, it must “arise out of” and “occur within the course and scope” of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury “arises out of’ employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured.” Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant established a compensable injury on January 23, 2018.

Compensability/Crime of Violence

h. Assaults are compensable under workers' compensation law if the assault arose out of employment. An assault could arise out of employment if it either bears an **inherent connection to the employment** or if it results from a "neutral force." *See e.g., Portofino Apartments v. Indus. Claim Appeals Office of State of Colo*., 789 P.2d 1117, 1119 (Colo. App. 1990); *In re Question Submitted by the U.S. Court of Appeals for the Tenth Circuit (Tolbert v. Martin Marietta)*, 759 P.2d 17, 21 (Colo. 1988). An assault that results from a neutral force is one that is not connected with an out-of-work incident, but rather "would have happened to the employee who happened to be in that particular place at that particular time." *Martin Marietta*, 759 P.2d at 21.

i. The first factor Colorado courts consider when determining whether an assault arose out of employment is time: Whether the assault occurred "at a time during which the worker is employed, doing what he or she may reasonably do[.]" *Martin Marietta,* 759 P.2d at 22. Here, the assault occurred when Claimant was arriving to work at a designed employee parking lot. Courts next consider whether the assault "occurred at a place where the worker may reasonably be." *Id*. at 23. Here again Claimant arrived at the approved and designed employee parking lot in order to be picked up by a shuttle to be transported to the airport to begin work. In fact this was so common that there were numerous employees waiting in the same area.

j. Finally, courts consider whether the assault was caused by a neutral force or by inherent connection to the employment. *Id*. Claimant did not have a personal relationship with assailants and did not know who assault him. However, the assailants were previous employees and the dispute arose from work related conditions. In fact, Employer and Respondent's witnesses claim that the altercation involved several employees, past employees and rose from a dispute at work. Although the Claimant was not a part of the dispute at work, there was an inherent connection with his employment. Furthermore, the altercation was so employment related that the Employer found it necessary to suspend the multiple employees who were on and off the clock during the altercation and conduct a full internal investigation. As found, the Claimant has proven that he suffered a compensable work-related assault as a victim of the assault.

Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A

"preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (Indus. Claim Appeals Office (ICAO), March 20, 2002). *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). The question of whether a claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *Streeb*, 706 P.2d at 786; *Faulkner,* 12 P.3d at 844; *Loofbourrow v. Indus. Claims Office*, 321 P.3d 548, 552 (Colo. App. 2011). As found, the Claimant met his burden of proof. on compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant suffered a compensable injury under the Worker's Compensation Act.

B. Any and all issues not determined herein are reserved for future decision.

DATED this 30th day of November 2018.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

STIPULATIONS

At the commencement of hearing, the parties stipulated that should the injury in this case be determined to be compensable, Claimant's average weekly wage, at the time of the injury was $973.15. The parties also agreed to hold the issue of Claimant's entitlement to temporary disability benefits in abeyance pending the outcome the compensability hearing. Finally, the parties stipulated that the only medical benefits requiring determination under the current application for hearing were Claimant's request for an EMG and physical therapy. The stipulations are approved.

REMAINING ISSUES

I. Whether Claimant sustained a compensable injury to her left elbow on June 13, 2018.

II. If Claimant sustained a compensable left elbow injury, whether she is entitled to physical therapy and an EMG under the June 13, 2018 claim.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works for Respondent-Employer as a recreational therapist. She regularly takes patients/inmates confined to the state mental hospital on recreational outings. Claimant uses a large 15 passenger van to transport these patients to and from the pre-selected activity venue. The van is equipped with power steering.

2. Claimant testified that on June 13, 2018, while driving the van to a patient luncheon, she was making a left turn with her left arm when she felt a pop and experienced immediate pain in her left elbow. Claimant did not strike her elbow or experience any direct trauma to her elbow while making the turn. Claimant did not immediately report her injury nor did she seek medical treatment despite claiming that the pop caused excruciating 10/10 elbow pain. Claimant continued to work. She did not report her alleged injury to her employer until June 22, 2018, 10 days later.

3. At the time she completed her on the job injury/exposure form on June 22, 2018, Claimant specifically reported that she had suffered an "occupational disease where repetitive motion, especially operating a van caused left elbow pain." She did not describe a specific event/incident involving a "pop" as the cause of her left elbow pain/dysfunction.

4. Claimant sought medical treatment from her personal physician on June 28, 2018, 16 days after her alleged driving injury, for nerve pain in her hand. She reported that she performed "physical work" and was "unable to type with her left hand." She also reported prior work related injuries involving rotator cuff surgeries. Claimant also complained of daily shoulder pain from driving, difficulty sleeping, fatigue, anxiety, indigestion, joint pain, muscle weakness, loss of strength, skin discoloration, tingling, hot flashes, and depression. While she testified that she reported her left elbow injury, the report from this date of visit does not mention the same and is devoid of any indication that Claimant complained of left elbow pain. Physical examination of her extremities was unremarkable. Claimant requested short term disability paperwork for her ongoing shoulder pain. The nurse practitioner who saw Claimant was unsure whether they could complete that paperwork or if the request should be deferred to occupational medicine or orthopedics.

5. On July 2, 2018, Claimant was evaluated, in conjunction with Physician Assistant (PA), Megan Southward, by Dr. Martha Ann Taylor who documented that Claimant was "driving a van, turned left and felt pain over the left lateral elbow". Claimant reported that she could not recall turning the wheel exceptionally fast, stating further that it was an old van requiring some force on the steering wheel to get it to turn. Careful review of this report fails to indicate that Claimant reported any popping sensation in the left elbow. Rather, the report from this date of visit indicates that Claimant reported she was simply driving the van and when she went to turn it she "must have strained my elbow or really tweeked (sic) it". Physical exam revealed normal range of motion, no swelling, no effusion, but some tenderness at the lateral epicondyle and bicipital insertion. Claimant was assessed with a left elbow, biceps and forearm strain. Occupational therapy was recommended.

6. Claimant went to occupational therapy on July 10, 2018. During this appointment, Claimant reported that she injured her left elbow while helping people in and out of the van at work rather than injuring it after experiencing a popping sensation while making a left hand turn with her left arm.

7. On July 12, 2018, Claimant was required to participate in a team building low ropes course at the behest of her supervisor. According to Claimant, participation in this exercise exceeded her physical limitations and violated her work restrictions. Claimant testified that she endured forceful jerking of her left arm/elbow resulting in severe pain extending from the elbow down the forearm and into the left hand. Claimant testified that previous to this her pain was confined to the area surrounding the left elbow.

8. Claimant was reevaluated by Dr. Taylor on July 16, 2018 after her participation in the aforementioned ropes course. During this appointment, Claimant reported that after the ropes course, she had an increase in her pain "over the left forearm into the wrist". Dr. Taylor ordered an MRI of the left elbow and wrist and referred Claimant to Dr. Karl Larsen, an upper extremity and hand specialist.

9. Claimant was seen by Dr. Taylor on July 30, 2018 at which time Claimant reported that the adjuster assigned to her case was questioning whether to cover the injury, indicating further that the injury was being contested as a "possible exacerbation of a previous shoulder injury for which she had surgery".[1]

10. Claimant was evaluated by Dr. Larsen on August 6, 2018. At this appointment, Dr. Larsen documented that Claimant was using her left hand to make a right hand turn rather than what consistently had been reported previously as her making a left hand turn. Based upon the evidence presented, the ALJ finds that the reference to Claimant making a right hand turn is probably a documentation error. The report also documents, for the first time, that Claimant "felt a painful pop in her elbow and developed reduced motion. The report from this encounter fails to reference Claimant's increased pain complaints extending down the left forearm into the wrist and hand after her participation in the ropes course. Indeed, the report is devoid of any mention of the ropes course or Claimant's testimony that she experienced violent jerking on the left arm as a consequence of her participation. Based upon the content of the report, the ALJ finds that Claimant, more probably than not, failed to mention her participation in the ropes course or her increased symptoms after.

11. Following his physical examination, Dr. Larsen opined that although Claimant was being treated for lateral epicondylitis, the contribution to her symptoms from it was "actually relatively minor". He expressed concern that Claimant's examination was indicative "for an injury to the pronator with possible irritation at the median nerve at that level". Without the additional information concerning, what the Claimant described was aggressive yanking on her arm during the ropes course or the results of the MRI, Dr. Larsen opined that turning a steering wheel "could" cause a pronator injury, assuming that some type of resistance was encountered while doing so. Dr. Larsen recommended an MRI and an electrodiagnostic (EMG) study.

[1] Claimant has a history of a prior admitted work related injury to her left upper extremity. On January 22, 2016 when she fell onto her hands and knees while working for Respondent-Employer injuring her shoulders in the process. On August 29, 2017, Claimant complained of shaking of her left hand and arm. Dr. Lakin noted that her new symptoms were unusual and extremely remote from the date of her fall. He believed Claimant's new symptoms were more likely related to carpal tunnel syndrome, an interosseous nerve dysfunction, or arthritic in origin so he referred her to Dr. Caughfield for evaluation and nerve conduction studies despite his belief that her symptoms were unrelated to her January 22, 2016 work injury. Claimant saw Dr. Caughfield on September 25, 2017, with complaints of stiffness and clumsiness in her left hand with distal volar forearm pain. Nerve conduction studies revealed evidence of an NMJ (neuromuscular junction) disorder such as myasthenia, so Dr. Caughfield recommended that Claimant be seen by a neurologist. Dr. Caughfield also agreed that Claimant's condition was not related to her January 22, 2016 work injury. Respondent-Employer denied the referral to the neurologist since both Dr. Lakin and Dr. Caughfield opined that the need for the referral was unrelated to the January 22, 2016 work injury. As a result, Claimant was placed at MMI and a final admission of liability filed. Claimant requested a DIME and asked that the DIME evaluate her bilateral shoulders, left arm, left hand, left wrist, right wrist, and right hand. Before the DIME occurred, Claimant agreed to settle her January 22, 2016 claim.

11. MRI of the left elbow was performed August 15, 2018. The MRI demonstrated a bifid biceps tendon. There was edematous change within the bone of the radial tubercle where the long head of the biceps tendon attached. There was fluid surrounding a complete tear, with minimal retraction, of the short head of the distal biceps tendon at its insertion. There was also a small amount of edema surrounding the ulnar nerve within the cubital tunnel, which the interpreting radiologist felt could explain Claimant's distal symptoms.

12. Claimant underwent an independent medical examination (IME) with Dr. Ridings on September 5, 2018 at the request of Respondent-Employer. Claimant reported to Dr. Ridings that while turning left she experienced an acute onset of a sharp pain at her left lateral elbow that extended down into the proximal volar forearm. Claimant did not report a pop. Upon obtaining a detailed history of Claimant's present illness, Dr. Ridings undertook an extensive review of her medical records. He also discussed with Claimant all of her job duties and obtained a listing of her current medical complaints. Based upon the information collected, Dr. Ridings opined that Claimant did not sustain a traumatic work related injury or an occupational disease to her left elbow on or about June 13, 2018.

13. Dr. Ridings explained that tearing of the distal biceps tendon from its attachment is a highly unusual diagnosis which he would typically expect to be related to an episode of significant trauma involving significant force opposing a voluntary contraction of the biceps muscle. Claimant's counsel concedes that the biceps rupture likely did not occur while driving but rather while Claimant was participating in a team building ropes course on July 12, 2018.

14. Respondent-Employer suggests that the forearm pain described to Dr. Taylor by Claimant from July 16, 2018 through September 11, 2018 is the same complaint she was having before being placed at MMI for her prior workers' compensation claim. Because Claimant had similar complaints and physical examinations of her left elbow and forearm as part of her prior workers' compensation claim, Respondent-Employer contends that the precipitating cause of her injury is a pre-existing health condition that the she brought to the workplace, namely neuropathic pain caused by a heretofore undiagnosed neuromuscular junction disorder such as myasthenia. Accordingly, Respondent-Employer argues that Claimant's injury does not "arise out of" the employment unless a special hazard of the employment combines with the pre-existing condition to contribute to the injury. See *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985). *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992). Because making a left hand turn in a van with power steering is not a special hazard of employment, Respondent-Employer contends that Claimant's left elbow injury does not arise out of her employment. Consequently, Respondent-Employer asserts that the claim must be denied and dismissed.

15. While the ALJ finds that Respondent's counsel correctly articulates the current state of the law concerning work place injuries precipitated by pre-existing

conditions, he is not persuaded that Claimant's 2018 left elbow injury was occasioned by a pre-existing condition she brought to the workplace. Rather, the evidence presented persuades the ALJ that Claimant's left elbow symptoms arose from a specific incident directly connected to her work duties as a van driver for Respondent-Employer on June 13, 2018 as opposed to a nondescript and undiagnosed, but supposed pre-existing condition.

16. Based upon the evidence presented, the ALJ finds that Claimant likely suffered a strain injury involving her left elbow and biceps on June 13, 2018, while turning the steering wheel of her work van. This "injury" prompted, what the ALJ finds was reasonable, necessary and related treatment, including one visit to occupational therapy. Nonetheless, the ALJ is convinced that Claimant suffered a second, more serious injury to her left elbow/forearm on July 12, 2018, as evidenced by the acute nature of the findings on her August 15, 2018 left elbow MRI, the need for which arose after Claimant's July 12, 2018 injury.

17. Based upon the evidence presented, the ALJ finds that this second injury, the compensability of which is not before the ALJ, constitutes an efficient intervening event which severed the causal connection between Claimant's June 13, 2018 industrial injury and her need for subsequent treatment, including additional physical therapy and an EMG. Indeed, the evidence presented persuades the ALJ that the need for additional physical therapy and diagnostic testing in the form of an EMG arose after Claimant's involvement in the ropes. Consequently, the ALJ is persuaded that the need for this treatment/testing is unrelated to Claimant's elbow/biceps stain occurring June 13, 2018. The contrary opinion of Dr. Larsen, to the extent that he opines on the cause of Claimant's need for treatment, is unpersuasive as it is based upon an incomplete understanding of Claimant's injurie(s) since she failed to inform him of her participation in the ropes course and the results of her MRI were pending.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a

workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

C. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

D. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). Based upon the evidence presented, the ALJ finds ample evidence to conclude that Claimant's left elbow/biceps injury occurred in the course of her employment on June 13, 2018. Indeed, Respondent does not challenge that Claimant's injury occurred in the scope of employment. Rather, Respondent argues that Claimant's injury did not "arise out" of his employment because it was precipitated by a personal preexisting condition which she imported to the workplace. Consequently, the ALJ has analyzed

the compensable nature of Claimant's injury pursuant to the decision announced by the Colorado Supreme Court in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014) and the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

E. In *City of Brighton*, the Colorado Supreme Court identified three categories of risk that cause injuries to employees: (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment related nor personal. 318 P.3d 496 (Colo. 2014). The second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to her employment. Idiopathic conditions have been defined to mean "self-originated." *Id.* at 503. Purely idiopathic personal injuries generally are not compensable unless an exception applies. *Id.* at 503. One exception is when a pre-existing or idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. Referred to as the "special hazard rule", the Colorado Court of Appeals held that a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of a pre-existing weakness and a hazard of employment." *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985). The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission, supra; Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See Ramsdell v. Horn, supra.* In order to be considered a special hazard, the employment condition cannot be a ubiquitous one; it must be a special hazard not generally encountered. *Id.* The rationale for this exception is that unless a special hazard of employment increases the risk or extent of injury, an injury due to a claimant's personal or idiopathic condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Gates, supra* at 7.

F. As found, the evidence presented persuades the ALJ that Claimant has established the requisite causal connection between her work duties as a van driver and her left elbow strain. In concluding as much, the ALJ finds Respondent's compensability defense rests principally on the suggestion that Claimant's 2016 left shoulder injury left her with a neuromuscular junction disorder giving rise to neuropathic pain that Respondent contends precipitated the injury in this case. As found above, the ALJ is not persuaded. Here, the evidence presented convinces the ALJ that Claimant's injury was caused by using her left arm to turn the wheel of an older van requiring more force than usual to maneuver. There is a dearth of evidence to support a conclusion that a pre-existing condition played any causative role in the development of Claimant's pain and/or her left elbow strain. Consequently, the ALJ is not persuaded that Claimant's injury arose out of a risk inherently personal to herself. Therefore, the

"special hazard" rule does not apply to the facts presented here. Moreover, the ALJ is not convinced by any suggestion that there is nothing unique about the van in question and as such, Claimant's injury is not compensable because it could have happened by driving/maneuvering any van outside of work. Merely because Claimant was engaged in activity, specifically driving/turning a passenger van, which is performed many times a day outside of work without incident does not compel a finding that Claimant's injury is not work-related. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). In keeping with the decision announced by the Court in C*ity of Brighton,* the ALJ concludes that Claimant's left elbow/biceps strain is causally connected to an employment risk tied directly to Claimant's work itself. Specifically, the risk associated with driving an older van requiring more effort than usual to maneuver. But for the condition of the van combined with Claimant's obligation to drive it, the ALJ concludes that the asserted injury probably would not have occurred. As noted above, the mere fact that Claimant had performed this activity without injury previously does not negate the causal connection between her work activity and her injury on June 13, 2018. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that her injury arose out of her employment. The injury is compensable.

Medical Benefits

G. Under § 8-42-101(1)(a), C.R.S. 2007, respondents are liable for medical treatment that may reasonably be needed at the time of the injury and thereafter during the disability to cure and relieve the employee from the effects of the injury. That includes furnishing treatment for conditions due to a natural development of the industrial injury. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002). In contrast, no liability exists when a later accident occurs as the direct result of an intervening cause. *Post Printing and Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). The determination of whether the need for medical treatment is the result of an independent intervening cause is a question of fact for resolution by the ALJ. *Owens v. Industrial Claim Appeals Office, supra.* As found, Claimant's participation in the ropes course on July 12, 2018 dramatically increased her symptoms and extended the indications of additional injury and need for treatment to body parts beyond the elbow. Consequently, the ALJ concludes that Claimant's participation in the ropes course constitutes an efficient intervening event which severed the causal connection between her June 13, 2018 industrial injury and the need for additional treatment including additional therapy and an EMG. Also as found, any suggestion that Claimant's need for additional therapy and the EMG based upon the opinions of Dr. Larsen is not unpersuasive as his diagnostic opinions were based upon an incomplete understanding of Claimant's injurie(s), since she failed to inform him of her participation in the ropes course and the results of her MRI were pending.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her left elbow on June 13, 2018, while driving a van as part of her work duties for Respondent-Employer.

2. Claimant's request for additional physical therapy and an EMG under the June 13, 2018 claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 30, 2018

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the spinal fusion surgery recommended by Michael Drewek, M.D. is reasonable, necessary, and causally related to her April 1, 2017 work injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a car salesperson and has been so employed for approximately 5 years.

2. On April 1, 2017 while so employed, Claimant was preparing a vehicle for a customer during a "lease buyout." Claimant took the car to wash and vacuum it and accidentally stepped out of the vehicle without putting in fully into park. The car began rolling away. Claimant attempted to get back into the car to put her foot on the brake and was knocked over by the vehicle. The rear tire rolled over her left leg which caused her to twist and fall onto her back and elbow.

3. Paramedics arrived on scene. Claimant reported left knee pain and tenderness. Claimant denied any head, neck, or back injury. Claimant reported a history of lower back surgery and told the paramedics that she felt like her back was having spasms due to laying on the ground for a while. *See* Exhibits 5, D.

4. Paramedics noted that Claimant was lying half on her back and half on her right side when they arrived. Claimant had no evidence of trauma or tenderness to her head, face, neck, back, or chest. Claimant's left knee showed multiple small abrasions that looked like tire marks with redness and hematomas beginning to form and her knee was tender all the way around. Claimant was transported to Swedish Medical Center. *See* Exhibits 5, D.

5. At the Emergency Department of Swedish Medical Center, Claimant reported knee pain due to being run over by a car. Claimant denied any other injury or trauma from the incident. Claimant reported no prior injuries to her left knee but reported a history of chronic back pain. She reported prior back/neck surgery and prior hip replacement. X-rays of her knee were taken and negative for fracture, dislocation, NV compromise, or compartment syndrome. Claimant was noted to be stable for discharge to home and was advised that the plain x-rays would miss soft tissue injuries but that an emergent MRI was not indicated and may be needed as an outpatient option for further evaluation of her knee. Claimant was discharged approximately 1.5 hours after her arrival. *See* Exhibits 6, E.

6. On April 7, 2017, Mary Zickefoose, M.D. evaluated Claimant. Claimant reported constant severe left leg pain since being run over by a car on April 1. Claimant reported that she had continued to work but that her knee was extremely swollen the day prior. Claimant reported a prior left hip replacement in 2013 with a repair in 2014, and a right hip labrum tear that had not yet been repaired. Claimant also reported her left elbow was bruised and swollen and that she jammed her 3rd and 4th fingers on her right hand. Claimant reported pain at a 4/10. Claimant reported prior left knee surgeries, bilateral shoulder surgeries, left hip replacement surgeries, a right ankle surgery, lower back surgery, and neck surgery. On examination, Dr. Zickefoose found Claimant's left lower extremity to be swollen from the knee down. She also found tender PIP joint in the right middle finger that was swollen, pain in both hips with internal and external rotation, swollen left knee, limping, and abrasions of the skin on the lateral aspect of the left knee. Dr. Zickefoose diagnosed crushing injury of left knee, crushing injury of left lower leg, contusion of left elbow, and pain in right hip. Dr. Zickefoose recommended an MRI of the left knee as well as an MRI of the right hip. *See* Exhibit 7.

7. On April 21, 2017, Dr. Zickefoose evaluated Claimant. Claimant reported continued pain in the left leg and that her April 19 left knee MRI showed tibial plateau fracture and meniscal tears. Claimant reported that her left lateral thigh was starting to hurt only with weight bearing. On examination, Dr. Zickefoose found Claimant's left knee to be swollen and found Claimant's buttocks to have spasms. Dr. Zickefoose diagnosed non-displaced fracture of lateral condyle of left tibia, complex tear of lateral meniscus, and pain in right hip. *See* Exhibit 7.

8. On May 8, 2017, Dr. Zickefoose evaluated Claimant. Claimant reported that she had a synvisc injection that day. Claimant reported that her symptoms were not getting any better and was concerned about her progress. Claimant had not yet received the right hip MRI comparison report. Claimant reported that her right hip pain and her low back pain were worse since lying down for a left knee MRI. Dr. Zickefoose questioned the SI joint vs. lumbar spine vs. hip joint as causing the pain. On examination, Dr. Zickefoose found Claimant's left knee to be swollen and Claimant's upper buttocks and lower back to have spasms bilaterally. Dr. Zickefoose diagnosed complex tear of lateral meniscus, non-displaced fracture of lateral condyle of left tibia, pain in right hip, and low back pain. *See* Exhibit 7.

9. On June 6, 2017, Claimant underwent an MRI of her lumbar spine. The impression provided was: protrusions and/or osteophytes and zygapophyseal joint arthritis at T12-L1, L1-2, L2-3, and L3-4; mild right lateral recess stenosis at T12-L1; mild left lateral recess and mild canal stenosis at L1-2; mild canal stenosis and severe left lateral recess stenosis at L2-3 with mild inferior left foraminal stenosis; severe canal, severe right, and moderate left lateral recess stenosis and mild right foraminal stenosis at L3-4; scoliosis present convex to the right with the apex at the L2-3 level with osteophytes present along the concave aspect of the curve. *See* Exhibits 10, H.

10. On June 7, 2017, Dr. Zickefoose evaluated Claimant. Claimant reported that she had an MRI of her back done the day prior. Claimant reported that she had no

long lasting relief of the pain in her left knee, that her back continued to hurt, and that her hip was extremely bad. Dr. Zickefoose noted a plan for Claimant to see Dr. Drewak for an opinion. Dr. Zickefoose noted that after reviewing the back MRI, she did not believe Claimant's pain was coming from the back, but wanted Dr. Drewak's opinion. *See* Exhibit 7.

11. On August 8, 2017, Michael Drewek, M.D. evaluated Claimant. Dr. Drewek assessed lumbar spine pain and lumbar stenosis. Dr. Drewek reviewed Claimant's imaging studies and recommended a bilateral L3-4 epidural injection. Dr. Drewek ordered a CT of the lumbar spine. *See* Exhibit 9.

12. On August 10, 2017, Dr. Zickefoose evaluated Claimant. Claimant reported that she had constant pain from her cervical spine down to the lumbar spine, dizzy spells at times when she looked down and back up, severe pain and muscle spasm with a hard time straightening up. Claimant reported that her leg continued to hurt and that the knee doctor suggested she might need a replacement. Claimant reported that the back doctor recommended a CT of her spine to evaluate whether the hardware had moved. On examination, Claimant had tender paraspinal muscles bilaterally from the cervical to the lumbar region. Dr. Zickefoose noted that she would await notes from the specialist. *See* Exhibit 7.

13. On September 8, 2017, Claimant underwent a CT scan of her lumbar spine. The impression was postsurgical changes of the lumbar spine and scoliosis changes with findings that mimic the prior MRI. *See* Exhibits 10, H.

14. On September 19, 2017, Dr. Drewek evaluated Claimant. Claimant reported mainly back pain that then shoots down into her legs. Clamant reported that the epidural injection did not help at all. Dr. Drewek reviewed the CT scan and noted that the imaging showed a solid fusion from her previous surgery years ago. Dr. Drewek discussed a L2-3, L3-4 TLIF surgery to help fix her deformity and to take out old screws from her previous surgery. Dr. Drewek noted that Claimant had severe deformity at the L2-3 level toward the left side and opined that the deformity was likely related to her trauma, as Claimant had no symptoms prior to the trauma. Dr. Drewek opined that Claimant clearly needed correction of the deformity at the L2-3 level because of loss of disc at the L2-3 level on the left side. Claimant reported that she wanted to proceed with the surgery of the L2-3, L3-4 TLIF with removal of hardware at L4-5. *See* Exhibits 9, G.

15. On September 25, 2017, Dr. Zickefoose evaluated Claimant. Claimant reported no improvement and that she was still having pain. Claimant reported that Dr. Drewek wanted to do surgery on her back. Dr. Zickefoose noted that Claimant would have to talk with Dr. Drewek and decide if she wanted to do surgery on her back first or her left knee first. *See* Exhibit 7.

16. On October 8, 2017, Douglas Scott, M.D. performed a utilization medical review regarding Dr. Drewek's surgical request. Dr. Scott reviewed medical records. Dr. Scott opined that Claimant did not injure her lower back on April 1, 2017 and that the first

responder specifically noted she had no injury to her back or neck. Dr. Scott noted that Claimant did not complaint of low back pain at office visits on April 7 and April 21. Dr. Scott noted that the CT scan of Claimant's lumbar spine showed degenerative changes at L1-2 and L2-3 and opined that the degenerative changes were pre-existing and probably accelerated mechanically by the prior fusion at L3-5 twenty years prior due to the mechanical shear stress experienced at the levels about Claimant's fusion. Dr. Scott opined that the shearing force was exacerbated by Claimant's scoliosis at L2. Dr. Scott opined that the lumbar fusion surgery requested by Dr. Drewek may be reasonable, but that it was not indicated to treat the effects of the April 1, 2017 injury. Dr. Scott opined that the surgery was to treat a complaint of low back pain with structural evidence of lumbar disc pathology that pre-existed Claimant's April 1, 2017 left knee injury. He opined that Insurer should deny authorization for the surgery because it was not related to or indicated to treat the effects of Claimant's April 1, 2017 injury. *See* Exhibits 11, I.

17. By November, Dr. Zickefoose noted that Claimant's back pain had gotten worse and was radiating on straight leg raise with stabbing pain in the right knee and down the lateral side of the calf. Dr. Zickefoose noted they were waiting for insurance authorization for back surgery. In December, Dr. Zickefoose noted that the back surgery was denied and that Claimant had scheduled an appointment with a lawyer. See Exhibit 7.

18. In 2018, Dr. Zickefoose continued to evaluate Claimant. Claimant's knee and low back pain continued to be noted. Dr. Zickefoose continued diagnoses pertaining to the knee and back and noted that Claimant had court dates scheduled. *See* Exhibit 7.

19. On March 20, 2018 Dr. Drewek evaluated Claimant. Claimant reported she was still fighting with workmens comp to get surgery approved. Dr. Drewek noted that Claimant was quite incapacitated by her back pain and lumbar radicular symptoms. Dr. Drewek noted that it was fairly clear that Claimant's problem was most likely related to the trauma from the work related injury as Claimant described she was not having problems prior to that event. *See* Exhibit 9.

20. Claimant had a long history of low back pain complaints and issues prior to the April 1, 2017 work injury including a fusion in 1995.

21. In August of 2011, Claimant was thrown down a flight of 15 stairs and had neck and back pain. An MRI of her lumbar spine was performed in September of 2011and showed multilevel diskogenic degenerative changes involving the lower thoracic and upper lumbar spines. At L1-2, Claimant had mild broad based disc bulging with more pronounced right foraminal component and mild facet hypertrophy. At L2-3 Claimant had mild broad based disk bulging, mild facet hypertrophy, and small right paracentral extruded component extending superiorly from the disc margin by approximately 7 mm. At L3-4 Claimant had mild to moderate broad based disc bulging with moderate facet degenerative and ligamentum flavum hypertrophy noted. Claimant had mild to moderate central canal stenosis and mild bilateral neural foraminal narrowing. *See* Exhibit C.

22. In December of 2014 following a revision of a left total hip arthroplasty performed in March of 2014, Claimant reported continued pain in the left hip area. Claimant reported left sided low back pain that was constant. In December of 2014, Claimant walked with a mild limp on the left and had a long legged gait on the left. Claimant had a little bit of weakness and pain with resisted straight leg raising. *See* Exhibit C.

23. In June of 2016, Claimant was evaluated for neck pain radiating down her back into her buttocks. On examination, Claimant was tender to palpation in her bilateral cervical musculature down into the thoracic and lumbar musculature. Claimant was advised to take over the counter medicine as needed for pain and to apply heat for up to 20 minutes 3 times daily. *See* Exhibit C.

24. Claimant testified at hearing. Claimant testified that in the 1990s she was involved in a serious motor vehicle accident where she was thrown through a windshield and down a 20-foot embankment with neck, back, arm, leg, and serious injuries. Claimant testified that she had a lumbar fusion surgery at that time and had occasional ongoing problems. She indicated that on the date of her April 1, 2017 injury, she had back spasms while on the ground after the car ran her over. Claimant testified that the focus at that time was on her left knee that had been run over. Claimant testified that she had increased pain in her back over the next few weeks that was definitely different than any pain she had before her injury.

25. Claimant testified that when she underwent an MRI in April of 2017 she had to lay on a hard flat table and that it hurt her back and that her back was again spasming. Claimant testified she did not have that type of back issue before the April 1, 2017 work injury. Claimant testified that she was not asymptomatic in her back and had very minor back pain before, but not the pain like she has now.

26. Dr. Scott also testified at hearing. He noted that Dr. Drewek wanted to fuse two levels, from L-2 to L4 and also wanted to remove old hardware at L4-5 from Claimant's prior fusion. Dr. Scott opined the surgery was not related to the April 1, 2017 injury and that the back pain was not due to the injury. Dr. Scott noted that Dr. Drewek's opinion was based partially on Claimant telling Dr. Drewek that she had no prior symptoms. Dr. Scott opined that if Claimant had a traumatic herniation at L2-3 on the left he would expect serious back pain with possible radiation into the left leg and that Claimant did not have such complaints. Dr. Scott opined that the condition of Claimant's lumbar spine was expected degenerative change due to the increased stress from her prior fusion in the 1990s and the stress over the time to the areas next to the prior fusion and the shear stress.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to

injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits- surgery recommended by Dr. Drewek

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.

Claimant has established by a preponderance of the evidence that the spinal fusion surgery recommended by Dr. Drewek is reasonable, necessary, and causally related to her April 1, 2017 work injury. Claimant is found credible and persuasive that when she was injured and her left leg was run over by the car, she twisted and fell backwards and that her back went into spasms while laying on the ground. Claimant was noted to have pain in both hips at her first evaluation with Dr. Zickefoose, spasms in her buttocks at her next appointment, and spasms in her upper buttocks and lower back at the third appointment with Dr. Zickefoose on May 6, 2017. Claimant is credible that she had back pain in the first few weeks following her work injury and that her back again

went into spasms when she had a left knee MRI on April 19, 2017 and had to lay flat on her back on a hard surface. As found above, Dr. Zickefoose noted on May 6, 2017 that Claimant's low back pain was worse. Dr. Zickefoose was uncertain whether the pain was coming from the SI joint, the lumbar spine, or the hip. Claimant is credible that at first after her injury she was unsure whether the pain was coming from her hip or her back. This is consistent with Dr. Zickefoose's records, showing Dr. Zickefoose was also unsure. Additionally, although Claimant has pre-existing history of low back problems including a low back fusion in the 1990s, Claimant is credible and persuasive that the April 1, 2017 work injury caused her new and different low back pain that did not exist prior to her injury.

The opinion of Dr. Drewek, overall, is credible and persuasive. Claimant was not having significant low back issues prior to the April 1, 2017 injury. Although Claimant had occasional issues with her low back and was not asymptomatic, Claimant was not symptomatic like she is now following injury. Dr. Drewek opined that the defect was likely related to trauma as Claimant had no symptoms prior to the injury. Although Respondents argue and note the equivocal language "likely related to trauma" due to "no symptoms" prior, the ALJ finds there is a significant change in symptoms after the trauma. Although Claimant had pre-existing back pain that she did not disclose to Dr. Drewek, Claimant is credible as to the degree of back pain and the difference in back pain following the April 1, 2017 injury. The symptoms were not to the severe degree they are now following injury and the difference in symptoms now and prior to April 1, 2017 support Claimant's contention that an injury or aggravation to her lumbar spine occurred on April 1, 2017. This is supported by the MRI studies that show a disc herniation that was not present on the 2011 MRI. Claimant had back spasms the date of injury and consistent reports of worse and ongoing back pain beginning one month after injury. Claimant has established, more likely than not, that she sustained an injury to her lumbar spine on April 1, 2017 and that the recommended surgery is casually related to her work injury.

Dr. Scott opined that the surgery was reasonable but not related and believed it was related to pre-existing degenerative issues. His opinion is not found to be persuasive. Although Claimant had pre-existing issues and degeneration in her lumbar spine, Claimant sustained an acute injury with new significant acute symptoms following her April 1, 2017 injury. The ALJ finds, more likely than not, that an acute injury or aggravation to Claimant's underlying lumbar spine occurred on April 1, 2017. Claimant's credible testimony, combined with the opinion of Dr. Drewek (although he believed she had no symptoms when she had low-level symptoms) is persuasive. Claimant had an acute event that took her low back problems to severe symptoms acutely on April 1, 2017. She has met her burden by a preponderance of the evidence.

ORDER

1. Claimant has established by a preponderance of the evidence that the lumbar fusion surgery recommended by Dr. Drewek is reasonable, necessary, and causally related to her April 1, 2017 work injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 30, 2018 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant has demonstrated by a preponderance of the evidence that the C3-4 disc replacement surgery requested by J. Paul Elliott, M.D. is reasonable, necessary and causally related to his admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 50 year old male who works for Employer as a plumbing foreman.

2. Claimant has a history of two prior cervical fusions. On March 11, 2014, Claimant underwent a C5-C6 anterior cervical discectomy and fusion ("ACDF"). By March 2015, Claimant continued to report neck pain as well as pain, weakness, numbness and tingling in his in left upper extremity and hand.

3. A July 11, 2015 cervical spine MRI revealed, in relevant part, mild residual bilateral foraminal narrowing at C5-C6, disc degeneration at C6-C7 with annular bulging and stenosis, annular bulging and uncinate ridging at C4-C5 with mild facet arthropathy and mild right-sided foraminal stenosis, and annular bulging and uncinate ridging at C3-C4 with mild facet arthropathy and mild central and bilateral foraminal stenosis.

4. On July 31, 2015, Claimant underwent an ACDF at C6-C7.

5. By February 15, 2016, Claimant was reporting that his arm pain resolved, but that he continued to experience some neck pain and headaches. William Biggs, M.D. noted that x-rays revealed Claimant was healing well, with degeneration above the areas of cervical fusion. Dr. Biggs recommended physical therapy and an epidural steroid injection ("ESI") if Claimant showed no improvement.

6. Claimant testified at hearing he did not recall Dr. Biggs' recommendation, but relocated few months later, and did not receive physical therapy or injections. Claimant testified that prior to March 20, 2017, although he had a history of previous fusions at C5-C6 and C6-C7 he had no symptoms, limitations, pain complaints or restrictions in his cervical spine or upper extremities leading up to the admitted industrial injury. The medical records are devoid of Claimant having any medical care for his cervical spine between February 15, 2016 and March 22, 2017.

7. On March 20, 2017, Claimant suffered an admitted industrial injury when he hit his head on a door jamb while ascending an 8-foot tall ladder. Claimant testified he "jammed" his head back and felt immediate pain in his neck. Claimant was carrying materials in each hand and wearing a hard hat at the time. He reported the incident to

Employer but did not seek medical care at the time because he was able to work the remainder of his shift. Claimant performed his usual job duties on March 21, 2017.

8. Subsequently, while unloading copper pipe with a co-worker, Claimant was struck on the right side of the head with a copper pipe measuring approximately 20 feet long and 2 inches in diameter. Claimant testified he fell to his knees for approximately five minutes after being hit. There are discrepancies in the record regarding exactly when the incident occurred. Claimant testified the incident occurred on March 22, 2017. An April 12, 2017 medical record notes Claimant was hit with the pipe "yesterday," while a May 24, 2017 medical record notes Claimant was hit with a copper pipe a week after the March 20, 2017 door jamb incident. Employer's First Report of Injury dated March 22, 2017 solely refers to Claimant "jamming" his head on a horizontal door frame while climbing a ladder.

9. Claimant sought medical treatment with authorized treating physician ("ATP") Brian Beatty, D.O. on March 22, 2017. Claimant reported experiencing an onset of neck pain after his head got caught on a piece of structure, pushing his head back and stretching his neck. He complained of neck stiffness. Dr. Beatty noted cervical spine x-rays revealed residual motion with increase in the interspinous space on the flexion compared to the extension view at both C5-6 and C6-7, which he opined may represent pseudarthrosis. On exam, Dr. Beatty noted tenderness and tightness without spasm. He diagnosed Claimant with a work-related cervical strain.

10. A March 31, 2017 cervical spine CT scan revealed, in relevant part, loosening of C6 screws and a fracture of the left C7 screw and mild scattered degenerative changes.

11. On April 12, 2017, Dr. Beatty noted Claimant "…was feeling fairly good with minimal pain up until yesterday when he was apparently hit upside the head with a 2 inch copper pipe by a coworker and developed increased pain and now is very sore." Dr. Beatty again diagnosed Claimant with a cervical strain and recommended Claimant proceed with physical therapy.

12. On May 20, 2017, Claimant underwent an MRI of cervical spine. The radiologist gave the following impression: "1. Moderate canal and moderate right foraminal stenosis are seen at C3-4 secondary to protrusion and osteophytes. 2. There is mild canal stenosis and a small protrusion at C4-5. 3. There is moderate right and mild left foraminal stenosis at the C6-7 level secondary to foraminal osteophytes."

13. During the course of care, Dr. Beatty referred Claimant to J. Paul Elliott, M.D. Dr. Elliott first evaluated Claimant on May 24, 2017. Claimant reported jamming his neck when hitting his head against a door jamb on March 21, 2017, and getting hit in the head with a copper pipe a week later, further aggravating his neck pain. Dr. Elliott noted Claimant had an acute onset of neck and trapezius pain following two work injuries and had experienced unremitting neck and trapezius pain since the incidents. Claimant denied upper extremity radiculopathy and focal weakness. Dr. Elliott noted Claimant has a history of ACDF at C5-C6 and C6-C7, and did well postoperatively with

minimal residual neck pain. On exam, Dr. Elliott noted cervical tenderness, reduced range of motion, and paraspinal and trapezius spasms. He reviewed the May 20, 2017 MRI, March 31, 2017 CT scan, and March 22, 2017 x-ray and concluded the imaging revealed C5-7 pseudarthrosis and residual spondylosis. Dr. Elliott opined that operative intervention was warranted to treat the workplace injury, as Claimant failed to experience relief with conservative measures. The surgery was not contested by Respondents.

14. On July 27, 2017, Dr. Elliott performed surgery comprised of:

1. Reoperation, removal of hardware C5-C6 anterior plate screw instrumentation and C6-C7 anterior plate screw instrumentation.
2. C5-C6 and C6-C7 anterior cervical diskectomy and removal of pseudoarthrosis with decompression of central canal and bilateral foraminal nerve root decompression.
3. C5-C6 and C6-C7 allograft arthrodesis.
4. C5-C6-C7 anterior plate screw instrumentation, Sofamor Danek Atlantis translational plate with fixed and variable screws.
5. Posterior C5-C6-C7 lateral mass screw rod instrumentation, Sofamor Danek vertex Instrumentation.
6. C5-C7 posterior spinal arthrodesis, local autograft and allograft, demineralized bone matrix.
7. Microdissection.

15. Both Respondents' expert and Claimant testified the purpose of the July 27, 2017 surgery was to address Claimant's neck pain and trapezius pain. Claimant testified that, while he experienced some relief from the surgery, it only decreased his pain level from an 8/10 to a 6/10.

16. On October 18, 2017 Respondents filed a General Admission of Liability.

17. On January 16, 2018, Dr. Beatty noted that, despite physical therapy, there had not been much improvement in Claimant's symptoms over the last month or two. Claimant complained of difficulty with any activity bending his neck for longer than 10 minutes and waking up four to five times per night. Dr. Beatty changed Claimant's prescription medications.

18. On January 25, 2018, Claimant reported to Dr. Elliott bilateral trapezii pain and neck pain that had not improved since the surgery. Claimant described the pain as tightness, denying radiculopathy, numbness/tingling or weakness. Dr. Elliott noted physical therapy and medications had not relieved Claimant's pain, and ordered a cervical CT scan and MRI for further evaluation.

19. Claimant underwent a cervical spine MRI on February 13, 2018, which revealed cervical spondylosis with multilevel foraminal stenosis, including moderate central stenosis at C3-C4, and a bony bridging across the disc spaces at C5-C7.

20. Dr. Elliott reevaluated Claimant on February 22, 2018. Claimant reported experiencing ongoing right greater than left trapezius pain since the July 2017 surgery. Dr. Elliott noted Claimant initially experienced improvement postoperatively, but plateaued about two months after the operation. He reviewed the February 13, 2018 MRI results, noting the MRI revealed C3-C4 right greater than left foraminal stenosis and no recurrent stenosis at C5-C7. Dr. Elliott recommended home cervical traction and a right C3-C4 transforaminal ESI for diagnostic and therapeutic purposes, and a C3-4 anterior cervical disc replacement if Claimant's symptoms ultimately did not improve.

21. On March 1, 2018, Dr. Beatty noted Dr. Elliott felt the surgery was doing very well, but that Claimant developed a spur at C3-C4 and was recommending an epidural steroid injection.

22. On April 17, 2018, Barry Ogin, M.D. performed a right C3-C4 transforaminal ESI and right C4-C5 transforaminal ESI. Dr. Ogin noted the following regarding the injection at the C3-C4 level:

> Interestingly, when I slowly injected contrast, there was filling of the C2-C3 facet space. Needle was repositioned slightly more inferior and additional filling was not documented though there was significant venous filling. The needle was repositioned slightly more medially and there was some filling along the lateral gutter of the epidural space. There was no obvious vascular uptake seen or spinal flow. The patient did report significant pain locally at the neck at that point. Given the challenge at the C3-C4 level, I did elect to proceed at the C4-C5 level as well as try to get better flow proximally.

23. Dr. Ogin noted that Claimant had reproduction of neck pain at the C3-C4 level in particular and reported that his pain went from 4-6/10 pre-injection to 1-2/10 post-injection. Dr. Ogin wrote, "This appeared to be good diagnostic response."

24. On April 19, 2018, Claimant reported to Dr. Beatty that the shooting pains down his right arm had resolved, but that he continued to experience a fair amount of pain and stiffness in his neck.

25. On April 30, 2018, Dr. Ogin noted that a co-worker dropped a large metal piece on Claimant's head, flexing Claimant's head forward. He further noted that he had performed a right-sided transforaminal ESI at C3-C4 and, because he was "unable to get satisfactory proximal flow," also at C4-C5 to improve the therapeutic yield. Claimant reported that his shoulder pain improved post-injection, but that he had developed new discomfort in his forearm. Claimant continued to experience some aching in his shoulders and neck. Dr. Ogin opined that Claimant's right lateral shoulder discomfort seemed to be related to some localized shoulder tendinopathy. He opined that Claimant

was likely approaching maximum medical improvement ("MMI") for his neck, and referred Claimant to Dr. Timothy Shea for pain management and cognitive behavioral training.

26. On May 17, 2018, Claimant reported to Dr. Beatty that his symptoms were about the same, with some of his right upper arm pain returning. Dr. Beatty noted he planned to set Claimant up with Dr. Elliott to see if there was anything that could be done surgically.

27. On May 21, 2018, Dr. Ogin noted Claimant continued to experience "baseline" pain along his neck with some radiation along his upper trapezius and lateral shoulder. He opined that Claimant would likely not get any lasting relief from further injections as Claimant seemed stable overall with fairly diffuse and axial pain.

28. On June 7, 2018, Dr. Elliott noted that Claimant initially had significant relief from the ESI but that his symptoms had since redeveloped. He reviewed the February 13, 2018 cervical spine MRI and CT scan and diagnosed Claimant with cervical spondylosis, opining that Claimant's right trapezius pain was attributable to right C3-4 foraminal stenosis. He noted that although Claimant remained "neurologically intact," he failed to experience lasting relief "with *myriad* conservative measures; thus, operative intervention is warranted for definitive treatment." (Emphasis not added). He noted Claimant elected to proceed with the surgery after discussion of the risks. He ordered Claimant to return to Dr. Beatty's office for medical clearance and that Claimant undergo cervical AP/lateral/flexion/extension x-rays to rule out dynamic instability.

29. On June 20, 2018 Dr. Beatty cleared Claimant for surgery.

30. On June 20, 2018, Dr. Elliott requested authorization for C3-C4 disc replacement surgery.

31. On June 27, 2018, Michael J. Rauzzino, M.D. performed a medical record review at the request of Respondents. Dr. Rauzzino did not interview or examine Claimant. Dr. Rauzzino opined that the proposed C3-C4 disc replacement surgery was not related to Claimant's admitted industrial injury. He noted the cervical MRI revealed previously existing pseudarthrosis without new injury. Dr. Rauzzino opined that because the C5-C7 fusion existed prior to the work injury, adjacent level disease was not caused by the work injury, specifically at C3-C4, as such level was not injured in the claim nor is adjacent to the C5-C7 fusion. Dr. Rauzzino further opined that the disc replacement surgery was not reasonable and necessary because a pain generator had not been clearly defined, noting that Dr. Ogin injected C4-C5 and C3-C4 and felt that the response was equivocal and that no further injections would be offered. Dr. Rauzzino further opined that the requested surgery could lead to worsening neck pain given Claimant's diffuse axial neck pain and facet arthropathy. He opined that no additional treatment was needed for Claimant's cervical spine under workers' compensation, stating he did not know that any additional treatment was likely to improve Claimant's pain complaints.

32. On June 29, 2018, Respondents denied Dr. Elliott's request for C3-C4 disc replacement surgery, relying on Dr. Rauzzino's report.

33. On September 12, 2018, Dr. Beatty noted that Claimant's symptoms were "quite severe," continued to worsen, and that Claimant opted to undergo cervical spine surgery with Dr. Elliott through his personal health insurance.

34. Dr. Rauzzino testified at hearing as a Level II accredited expert in neurosurgery. Dr. Rauzzino testified consistent with his IME report, continuing to opine that the recommended C3-C4 disc replacement is not reasonable, necessary or related to Claimant's work injury. Dr. Rauzzino testified Claimant's initial pain complaints centered on neck and trapezii pain without radiation to Claimant's arms, which he explained is more of a muscular or myofascial concern. Dr. Rauzzino stated that the imaging studies and medical reports did not support a finding of any acute injury to Claimant's C3-C4 level. Dr. Rauzzino explained that because there is a "skip level" at C4-C5, adjacent level disease could not explain any presence of C3-C4 pain, as level C3-C4 is not adjacent to the re-fused levels. Dr. Rauzzino testified that the noted disc bulging, facet arthrosis, and right sided foraminal stenosis were documented in records predating the work injury. Dr. Rauzzino acknowledged that his IME report did not contain reference to the copper pipe incident, stating that he had read about the incident, but that it did not change his opinion.

35. Regarding the reasonableness and necessity of the recommended surgery, Dr. Rauzzino noted that Dr. Ogin's injection report indicates that the C3-4 level was never adequately injected to allow a diagnosis that it was the pain generator. Dr. Rauzzino explained that Dr. Ogin's only effective injections occurred to Claimant's C4-C5 level, as Dr. Ogin was never able to achieve sufficient proximal flow at the C3-C4 level. Dr. Rauzzino opined that any injection to that level could not be considered diagnostic. Dr. Rauzzino testified the Medical Treatment Guidelines indicate that when facet arthrosis is found, which he described as arthritis in the back, a cervical disc replacement is inappropriate, or contraindicated. Dr. Rauzzino testified that because Claimant has presented with facet arthrosis throughout his neck since at least 2015, the cervical disc replacement would not be appropriate as it would not be anticipated to relieve Claimant's symptoms of diffuse neck pain. Dr. Rauzzino concluded that the surgery would not be expected to provide Claimant relief from his neck pain due to Claimant's diffuse axial neck pain without a specific radiculopathy and pre-existing arthritis.

36. Claimant testified his neck symptoms have not resolved since March 2017. Claimant testified he understands the risks of surgery, however, understanding those risks he still desires to pursue the recommended surgery as he does not want to live in pain.

37. The ALJ finds the testimony of Claimant credible and persuasive.

38. The ALJ finds the testimony and opinions of Drs. Elliott and Beatty, as supported by the medical records and Claimant's testimony, more credible and persuasive than the contrary opinion of Drs. Rauzzino and Ogin.

39. Claimant established it is more likely than not that the requested C3-C4 disc replacement surgery is related to Claimant's admitted work injury, and reasonably necessary to cure and relieve Claimant of the effects of the work injury.

40. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the Medical Treatment Guidelines is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the Medical Treatment Guidelines such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008); Section 8-43-201(3), C.R.S.

The ALJ concludes Claimant proved by a preponderance of the evidence the requested C3-C4 disc replacement surgery is reasonable, necessary and related to the admitted March 2017 work injury. While Claimant had two prior cervical fusions at C5-C6 and C6-C7, as well as pre-existing annular bulging at C3-C4 with mild facet arthropathy central and bilateral foraminal stenosis, Claimant was credible in his testimony that he did not have symptoms, limitations, or restrictions in his cervical spine or upper extremities leading up to the admitted industrial injury. Although a February 15, 2016 record references neck pain, no medical records were introduced at hearing indicating Claimant continued to seek treatment for any cervical spine issues leading up to the industrial injury. On March 20, 2017, Claimant hit his head on a door jamb and immediately thereafter experienced neck pain, which was later exacerbated when he was struck in the head with a 20 foot pipe at work. Despite discrepancies in the record regarding the exact date of the copper pipe incident, the ALJ is persuaded the incident did occur and exacerbated Claimant's condition. The work incidents and related July 2017 surgery aggravated and exacerbated Claimant's condition, causing the need for medical treatment, specifically, the recommended disc replacement surgery.

Claimant underwent surgery in July 2017 to address the neck pain that resulted from his work-related injuries, yet continued to consistently report neck and right upper extremity pain. Dr. Elliott, who is one of Claimant's ATP and has treated Claimant throughout the course of his claim, is of the credible opinion Claimant had a diagnostic injection at C3-C4, which supports his recommendation for disc replacement surgery. Claimant has undergone extensive conservative treatment with no lasting improvement. Dr. Elliott credibly and persuasively opined that the recommended surgery is warranted at this time. Dr. Beatty, also an ATP, has given Claimant surgical clearance. Claimant credibly testified he understands the risks and wants the surgery.

The ALJ has considered the Medical Treatment Guidelines as they apply to Claimant's case; however, based on the totality of the evidence, the ALJ concludes it is more likely than not Claimant's need for C3-C4 disc replacement is related to his work injury, and is reasonable and necessary to cure and relieve Claimant of its effects.

ORDER

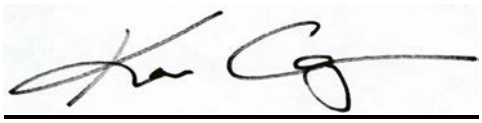
It is therefore ordered that:

1. Dr. Elliott's request for C3-C4 disc replacement surgery is reasonable, necessary and related to Claimant's work injury. Respondents shall pay for such surgery pursuant to the fee schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 30, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the total left knee replacement surgery recommended by Philip Stull, M.D. is reasonable, necessary, and causally related to her December 18, 2016 work injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a barista. As part of her duties, Claimant was required to make coffee, handle the register, and clean the dining area.

2. On December 18, 2016 while working and cleaning the dining room, Claimant slipped and fell on water that was on the floor.

3. Claimant was transported by ambulance from work to Parker Adventist Hospital. Claimant was diagnosed with distal radial and ulnar fractures of her left arm and a left tibial plateau fracture of her left leg. *See* Exhibit 11.

4. At the hospital, x-rays of her left knee showed minimally displaced lateral tibial plateau fracture. Thomas McDonough, M.D. evaluated Claimant on December 19, 2016. He noted overall that her clinical alignment was good but that Claimant had tenderness over the anterolateral tibial plateau. He noted the x-rays showed anterolateral tibial plateau fracture that was depressed about 5 mm. Dr. McDonough noted that he discussed options for Claimant's left knee that included operative and non-operative treatment and that Claimant selected non-operative treatment. Dr. McDonough opined that based on the fairly minimal disk depression, he felt that non-operative treatment would yield a satisfactory result. He noted that he also explained the risk of degenerative changes within the knee. Dr. McDonough opined that Claimant should be toe-touch weight bearing using a platform walker. *See* Exhibit 11.

5. After approximately three days at Parker Adventist Hospital, Claimant was transported to Littleton Adventist Hospital for physical rehabilitation. Claimant was discharged on approximately December 31, 2016.

6. At discharge, Claimant was independent with the use of a platform walker and had a hinged knee brace on her left knee. *See* Exhibit 5.

7. After discharge, Claimant was followed regularly by Carrie Burns, M.D. On March 20, 2017, Dr. Burns noted that Claimant was making progress with her left knee and was out of her brace. *See* Exhibit 6.

8. On April 14, 2017, Dr. McDonough evaluated Claimant. Claimant reported that her pain was improving and was mild at a 1-2/10. Claimant denied night pain and reported doing well with very little pain but that the pain was exacerbated by walking. Claimant also reported limitation of motion. Dr. McDonough noted on examination that alignment of her knee was good and that the x-rays showed the fracture to be in a good position and healing well. Dr. McDonough advised Claimant that she could be weight bearing as tolerated. *See* Exhibit A.

9. On April 20, 2017, Dr. Burns evaluated Claimant. A lot of focus was on Claimant's left hand, concern for CRPS, and thermogram. Dr. Burns noted that Claimant had been released by Dr. McDonough for her left knee but that Claimant was still having pain and decreased range of motion in her left knee. *See* Exhibit 6.

10. On May 15, June 8, and July 6 of 2017, Dr. Burns evaluated Claimant. At the May 15 visit, Claimant reported some pain in her left knee with prolonged walking and that she was starting to use lidocaine patches on her left knee when having a painful day. At the June 8 visit, Claimant reported she continued to be able to walk without assistive devices but got sore and tired. At the July 6 visit, Claimant reported that overall her knee felt better but there was a fair amount of stiffness and occasional instability. *See* Exhibit 6.

11. On July 26, 2017, Claimant was evaluated at the emergency department of Parker Adventist Hospital. The assessment and plan noted that Claimant presented with an altered mental status and had known alcohol ingestion as well as questionable medication overdose. On arrival, Claimant was hypoxic and a chest x-ray and CT showed a right sided submassive pulmonary embolism with pulmonary infarct. Claimant was found to have persistently abnormal vital signs and was considered to be septic. Claimant was admitted to the intensive care unit. *See* Exhibit B.

12. Claimant's daughter reported that the night prior Claimant appeared altered in a telephone conversation and that she had a neighbor check on Claimant. The neighbor reported multiple empty bottles of wine. Claimant's daughter went to Claimant's house and believed Claimant appeared intoxicated and Claimant stated she had fallen once. Claimant's daughter put Claimant to bed and stayed the night. Claimant's daughter found two empty bottles of wine in the trash but was unsure when they were consumed. At 11 a.m. Claimant's daughter attempted to wake Claimant and had difficulty arousing Claimant and when she awoke was still altered so the daughter called 911. It was noted that they could not do a review of systems with Claimant due to mental status. Claimant was unable to follow commands, appeared lethargic, had slurred speech with some nonsensical sentences and occasional purposeful statements. Claimant had normal range of motion, normal muscle tone, and was able to move all extremities independently. Claimant was assessed with acute pulmonary embolism, pneumonia of right lung due to infectious organism, sepsis due to unspecified organism, and altered mental state.

13. Claimant was not discharged until July 31, 2017. During her stay, her mental state improved. As her mental state improved Claimant endorsed that she had attempted suicide with pills and had taken excess flexeril and maybe a med that starts with an A. Claimant reported that she had a fall in December of 2016 with a left tibial plateau fracture and was cleared from care 2 months prior by Dr. McDonough. While hospitalized, Claimant had an orthopedic consultation with Russell Presley Swann, M.D. Claimant reported laterally sided knee pain only and worse pain since the fall Tuesday prior to arrival. On exam, Dr. Swann found the pain to be around the lateral joint line. He noted that x-rays showed a valgus posttraumatic alignment with mal-union of the lateral tibial plateau and concern of a medial femoral condyle fracture. Dr. Swann noted that a CT scan of the knee showed post traumatic degenerative joint disease of the knee with a fractured anterior medial based osteophyte but not structural to weight bearing. Dr. Swann found the left knee to have no corroborating pulmonary embolisms findings and no tenderness to palpation over the medial condyle, and no effusion. Dr. Swann found pain laterally where Claimant's posttraumatic deformity was. He assessed left posttraumatic tibial plateau fracture with fractured osteophyte. Dr. Swann felt that the changes were likely related to the old tibial plateau fracture which led to arthritic changes and that the new fracture was of a bone spur. He recommended no surgery but noted consideration of an elective left total knee arthroplasty in the future. *See* Exhibit B.

14. The CT scan of Claimant's left lower extremity showed her bones to be diffusely demineralized. No displaced fracture was identified. Irregularity of the posterior medial femoral condyle appeared to be due to marginal osteophytosis. Remote posttraumatic deformity of the lateral tibial plateau with a 4 mm subchondral depression was identified. There was a questionable non-displaced fracture plane extending through the posterior medical femoral condyle and an MRI was recommended for further evaluation. Advanced tri-compartmental osteoarthritis was also identified and was most severe in the patellofemoral compartment where there was bone on bone contact. *See* Exhibit B.

15. On August 11, 2017, John Aschberger, M.D. evaluated Claimant. Claimant reported persistent knee pain and increased aggravation with ambulation. On exam, Dr. Aschberger found crepitation through motion and difficulty with flexion in the left knee. Dr. Aschberger assessed left knee tibial plateau fracture and noted a further orthopedic follow-up was scheduled. *See* Exhibit 8.

16. On August 14, 2017, Dr. McDonough evaluated Claimant. Claimant reported that the pain was getting worse and was moderate to severe at a 7-8/10 exacerbated by walking and standing. Claimant reported that she recently had a fall at the end of July that had exacerbated her knee pain and that she had been doing relatively well until the fall at the end of July and since then she had been having persistent pain as well as mechanical symptoms. Claimant also reported night pain. Dr. McDonough opined that recent x-rays showed the tibial plateau fracture was healed. Dr. McDonough assessed: tibial plateau fracture, left, closed, with routine healing as a subsequent encounter; and other tear of lateral meniscus of the left knee as a current injury, initial encounter. He provided the impression that the tibial plateau fracture was healed with a

recent re-injury in July. Dr. McDonough recommended an MRI scan to evaluate the lateral meniscus. *See* Exhibit A.

17. On August 24, 2017, Claimant underwent an MRI of her left knee. The impression provided was: healed lateral tibial plateau fracture with mild to moderate chondromalacia in the lateral femoral tibial compartment; severe chondromalacia and moderate osteoarthrosis of the patellofemoral compartment; and degenerative fraying of the inner margin of the medial meniscus with intact lateral meniscus. *See* Exhibits 9, C.

18. On September 8, 2017, Dr. Aschberger evaluated Claimant. Claimant reported persistent irritation at the left knee and that Dr. McDonough was not advising surgery. Dr. Aschberger noted that Claimant was not a likely candidate for a total knee arthroplasty given her anticoagulation and recent pulmonary embolus as well as her upcoming scheduling of a cholecystectomy. See Exhibit 8. Dr. Aschberger recommended a second opinion with Dr. Stull to clarify for potential for future intervention. *See* Exhibit 8.

19. On September 29, 2017, Phillip Stull, M.D. evaluated Claimant. Claimant reported a work related injury to her knee in December that was treated non-surgically with bracing and rehab. Claimant reported rather rapid deterioration in her knee since and described intermittent lateral soreness, pain, swelling, grinding, and popping. Dr. Stull noted that a recent MRI was consistent with moderate arthritic changes in the lateral and moderate to severe arthritic changes in the patellofemoral compartment. Dr. Stull provided the impression of moderate to advanced arthritis, left knee and he provided a cortisone injection. Dr. Stull opined that ultimately, Claimant may be best served with a knee replacement but that it was certainly reasonable to start with a cortisone injection. *See* Exhibits 7, D.

20. On October 6, 2017, Dr. Aschberger evaluated Claimant. Claimant reported that Dr. Stull performed an injection that provided good relief in her left knee but that just recently she has had some recurrent sharp pain. On exam, Claimant had tenderness in the left knee at the joint line. Dr. Aschberger discussed with Claimant viscosupplementation and her likely need for a total knee arthroplasty. *See* Exhibit 8.

21. On November 10, 2017, Dr. Stull evaluated Claimant. Claimant reported improvement in her knee with the injection. On exam, Claimant's lateral joint line was tender and crepitant and Claimant walked with mild antalgia. Dr. Stull's impression was posttraumatic osteoarthritis, left knee with valgus alignment and some improvement with injection. He recommended a lateral unloader brace, physical therapy, and intermittent injections. *See* Exhibit 7.

22. On November 17, 2018, Dr. Aschberger evaluated Claimant. Claimant reported that she was holding off on a total knee replacement while she was on anticoagulation for her pulmonary embolus. Claimant reported she would be on anti-coagulation probably through the end of January. Dr. Aschberger opined that if Claimant had to continue on anticoagulation or did not wish to consider surgery for her left knee,

he would expect maximum medical improvement. However, he opined that if Claimant was a candidate and wished to proceed he would not anticipate maximum medical improvement until recovery from knee arthroplasty. Dr. Aschberger opined that given that Claimant had a tibial plateau fracture, which structurally affected the knee, he would consider a knee arthroplasty workers' compensation related. *See* Exhibit 8.

23. On January 5, 2018, Dr. Stull evaluated Claimant. Claimant reported increasing stiffness, swelling, and soreness as well as poor function in her knee over the last few weeks and asked if they would consider re-injecting her knee. Dr. Stull agreed and injected Claimant's knee again. *See* Exhibit 7.

24. On January 30, 2018 Eric Ridings, M.D. performed an independent medical examination. Claimant reported her work related injury in December of 2016 and her later hospitalization in July of 2017 for pulmonary embolism, pneumonia, and sepsis. Claimant reported at the time she had been walking around okay and not great but could walk for ¼ of a mile. Claimant reported that an orthopedic surgeon who saw her during her July 2017 hospitalization who told her she would need a total knee replacement within six months. Claimant reported that she then saw Dr. Stull who wanted to treat her non-surgically but also told her that at some point she would need a knee replacement. Claimant reported relief with two knee injections and knee brace and that she could currently walk 30 minutes before having some aching but that her knee can catch and feel as though it will buckle. She reported it was difficult to get up from a kneeling position. Dr. Ridings reviewed medical records and performed a physical examination. Dr. Ridings opined that as a result of her fall at work on December 18, 2016 Claimant sustained a tibial plateau fracture with 5 mm of depression of the lateral tibial plateau. He opined that Claimant had valgus alignment of the left knee and that within a reasonable degree of medical probability, Claimant sustained acceleration of osteoarthritis of the left knee due to her work injury which was advanced in the lateral compartment and moderate in the patellofemoral compartment. *See* Exhibit 5.

25. On April 6, 2018, Dr. Stull evaluated Claimant. Claimant reported increasing stiffness and pain and that her left knee was really quite bothersome at the time. Claimant reported that she was limping on the knee daily and had difficult with activities of daily living and difficulties with work activities due to the pain, stiffness, and swelling. Dr. Stull noted that Claimant had been through good trail of conservative measures over an extended period of time but had not had significant improvement. Dr. Stull provided another cortisone injection for short term pain relief, but recommended a total knee replacement. Dr. Stull opined that Claimant would be best served with a left knee replacement and he put in a request for authorization for surgery. *See* Exhibit 7.

26. On May 11, 2018, Mark Failinger, M.D. performed an independent medical examination. Claimant reported falling at work on December 18, 2016 after slipping on the floor that was slick due to melting snow. Claimant reported that she was taken to a hospital and diagnosed with a tibial plateau fracture and was told it would heal on its own. Claimant reported going to a rehabilitation hospital following her fall for one month. Claimant reported seeing Dr. McDonough who told her that her knee fracture had healed

after three to four months. Claimant reported that she was improving in the left knee but never had a pain free left knee since her fall. Claimant reported that when walking, the knee would be unstable and have some popping with pain and that she never got back to a normal walk or gait. Claimant reported developing a blood clot, respiratory arrest, sepsis, and mild pneumonia in July of 2017 and saw Dr. Swann in the hospital and that he recommended a knee replacement. Claimant reported she was unsure why she saw Dr. Swann and was told by someone that she had a fall. Claimant reported that she currently could walk only about 30 minutes before needing to take a break due to fatigue and tiredness, that her knee sometimes popped with pain, and that her strength was improving. *See* Exhibits 4, E.

27. On examination, Dr. Failinger found patellofemoral crepitus with range of motion, reduced range of motion, mild to moderate medial joint line tenderness, and lateral joint line tenderness. Dr. Failinger reviewed medical records. Dr. Failinger provided an opinion that Claimant's patellofemoral arthritis of the left knee joint was not related to the December 18, 2016 fall. Dr. Failinger opined that Claimant sustained what appeared to be a minimally depressed tibial plateau fracture related to the December 18, 2016 injury. Dr. Failinger noted that Claimant was clearly having deficits in range of motion at physical therapy even after she was released by Dr. McDonough. Dr. Failinger opined that Claimant appeared to have sustained a setback in July of 2017 when she had an apparent fall. Dr. Failinger noted no evidence on the August 2017 MRI of an acute new injury from a supposed fall in July of 2017. Dr. Failinger opined that although Claimant had an exacerbation of pre-existing problems, she did not have any new pathology from a July 2017 fall, if there was one. Thus, he opined that it appeared as though any of the complaints of osteoarthritis from the lateral compartment of Claimant's knee would be due to the December 2016 injury. Dr. Failinger noted that Dr. Swann felt at the hospital that the pain and problems in Claimant's knee were due to the fall in December of 2016 and that he had no corroborating notes and/or studies or films to refute that. Dr. Failinger also noted that he could not refute Dr. Stull's opinion that the need for the knee replacement was created by the December 2016 fall. *See* Exhibits 4, E.

28. Dr. Failinger opined, therefore, that if Claimant wanted to proceed, Claimant's total knee replacement would be due to an acceleration of her pre-existing arthritis (the patellofemoral arthritis) due to her December 2016 fall. Dr. Failinger noted that it was not clear at his examination that Claimant was experiencing pain and dysfunction sufficient to proceed with a total knee replacement or that the pain in the knee was interfering with her lift so much that she wanted to proceed with knee replacement. However, he opined that if Claimant felt the knee was affecting her life so significantly that she could no longer continue with her daily life as it is, a knee replacement was a reasonable request and the acceleration of her condition was due to the fall of December 2016, with reasonable medical probability. *See* Exhibits 4, E.

29. On May 23, 2018, Dr. Failinger issued an addendum to his independent medical examination report after reviewing additional records. Dr. Failinger opined that the additional records did not alter his opinion. He opined that it appears as though Claimant had pre-existing patellofemoral arthritis but the fall created tibial plateau and

some traumatic osteoarthritis with acceleration of her arthritis disease, which never fully resolved. Dr. Failinger opined that Claimant's decision whether or not to proceed with a total knee replacement would determine whether she should be placed at maximum medical improvement or have her case left open until she completes the total knee replacement. He opined that if Claimant's symptoms were manageable, she should live with the knee pain but if they were not management, she should proceed with the total knee replacement. *See* Exhibits 4, E.

30. On July 10, 2018, Dr. Stull evaluated Claimant. Claimant reported no change in her symptoms. Dr. Stull found the joint line tender on examination and mild to moderate valgus alignment. He also noted a small effusion. Dr. Stull provided the impression of advanced arthritis of the left knee and opined that Claimant required knee replacement surgery as conservative measures had failed. *See* Exhibits 7, D.

31. Dr. Failinger testified at hearing. Dr. Failinger opined that based upon Claimant's reports on April 14, 2017 to Dr. McDonough, a total knee replacement was neither reasonable nor necessary as a direct and proximate result of the December 18, 2016 industrial injury. Dr. Failinger testified that the pathology in Claimant's patellofemoral compartment was not a result of her December 18, 2016 injury. Dr. Failinger testified that it was not possible to determine whether Claimant's symptoms were from the arthritis in her lateral femoral compartment or from the patellofemoral compartment. Dr. Failinger testified that Claimant had osteoarthritis in three compartments of her knee, only one of which was related to the tibial plateau fracture from December of 2016. He pointed out that Claimant was doing fairly well on April 14, 2017 but that by August 14, 2017 her symptoms had changed quite a bit and she was no longer doing well. He testified that a medial femoral condyle fracture can make a previously asymptomatic condition symptomatic. Dr. Failinger opined that the lateral compartment arthritis was reasonably related to the injury and was sped up by her work related fall. Dr. Failinger noted that the lateral area and work related tibial plateau fracture was at 5 mm after healing and that they like to get it to 2 mm to avoid arthritis. Dr. Failinger testified that the higher the number the greater the chance of developing arthritis. However, he opined that there was no question that the patellofemoral arthritis had been ongoing for many years. Dr. Failinger noted that a total knee replacement was reasonable to get Claimant back to baseline but that the condition was not life threatening and that he didn't know which compartment was causing the symptoms that required the knee replacement.

32. Claimant also testified at hearing. She testified that she had no prior problems or treatment to her left knee before December 16, 2018. Claimant testified that after Dr. McDonough released her and in June of 2017 she was still having problems in her knee and that her symptoms ranged from day to day. She testified that some days she had a lot of pain and some days her pain was tolerable. Claimant testified that in June of 2017 she felt unsteady on her left leg and felt like it would buckle but that Dr. McDonough advised it would get better over time.

33. Claimant testified that she has been in knee pain since her December 18, 2016 injury and wants a knee replacement. Claimant testified that she had pain with standing and that her pain is exacerbated by walking and that she cannot walk more than ¼ of a mile.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a),

C.R.S. A Claimant bears the burden to establish by a preponderance of the evidence that the conditions for which they seek medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. A claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Similarly, the question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.

The question of whether the disability and need for treatment was caused by the industrial injury or an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). Similarly, the question of which of two injuries caused a need for medical treatment is one of fact for the ALJ. *University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001); *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). A claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

Claimant has established, by a preponderance of the evidence, that the left total knee arthroplasty recommended by Dr. Stull is reasonable, necessary, and causally related to her December 18, 2016 work injury. Claimant is credible and persuasive that she had symptoms in her left knee immediately following her injury that waxed and waned but never went away. Conservative measures including two cortisone injections have failed and have not provided long-term relief for Claimant. Claimant's arthritis was accelerated by her December 18, 2016 fall. Her lateral tibial plateau fracture healed, but with malunion, a 5 mm depression, valgus alignment, and posttraumatic arthritis.

Dr. McDonough opined in April of 2017 that Claimant's left knee alignment was good and that her fracture was in a good position and healing well. He released Claimant from care. Despite Dr. McDonough's release, Claimant clearly had continuing problems with her left knee in May, June, and July of 2017 noted by Dr. Burns. Her continued left knee symptoms included pain, decreased range of motion, stiffness, occasional instability, being sore and tired in the left knee, and using lidocaine patches on her knee on painful days. These continuing symptoms existed prior to her July 2017 hospitalization. Similarly, in August of 2017 Dr. McDonough opined that Claimant's tibial plateau fracture was healed with routine hearing and noted his suspicion of a new lateral meniscus tear. Testing later showed no lateral meniscus tear. Dr. McDonough's reports and opinions in this case are not credible or persuasive or consistent with the weight of

the credible testimony and evidence. Although he opined that Claimant's tibial plateau fracture was healed with routine healing, Dr. Swann's opinion is more persuasive and consistent with the opinions of other providers. Dr. Swann noted that Claimant's lateral tibial plateau fracture did not heal with routine healing but that Claimant had valgus posttraumatic alignment and mal-union of the lateral tibial plateau. A CT scan showed remote posttraumatic deformity of the lateral tibial plateau with a 4 mm subchondral depression. Consistent with Dr. Swann's opinion, Dr. Stull also opined that Claimant had posttraumatic osteoarthritis and valgus alignment of the left knee. Dr. Aschberger opined that Claimant's tibial plateau fracture had structurally affected her knee. Similarly, Dr. Ridings opined that the tibial plateau fracture had 5 mm of depression and that Claimant had valgus alignment of the left knee. Dr. McDonough's statements in both April of 2017 and August of 2017 that Claimant's fracture was in good position and healing well and that she was healed with routing hearing are inconsistent with the weight of the evidence and are not persuasive. Claimant's lateral tibial plateau fracture did not heal normally. She did not have normal structural alignment after her December 2016 injury.

Rather, after her December 2016 injury Claimant had continued symptoms in her left knee. The ALJ finds that these continued symptoms were due to Claimant's subchondral depression, valgus posttraumatic alignment of the knee, malunion of her fracture in the tibial plateau, and posttraumatic arthritis which were all caused by her lateral tibial plateau fracture and work injury. Although Dr. McDonough released Claimant in April of 2017, Claimant's symptoms and problems were not healed.

It is unclear whether Claimant fell prior to her July 2017 hospitalization. Claimant told others that she had fallen, but Claimant notably was non sensical during the time she made this report. However, even if she sustained a new fall in July of 2017, the need for her left knee treatment pre-dated July of 2017. Prior to July of 2017, she had ongoing symptoms and problems in her left knee. While hospitalized, Dr. Swann noted that Claimant's pain in the left knee was laterally and was located where her posttraumatic deformity was from the December 2016 fall. Similarly, in September of 2017 Dr. Stull noted lateral soreness. Although Dr. Failinger testified that he could not tell which compartment Claimant's symptoms were currently coming from, the records demonstrate consistent lateral symptoms immediately after the December 2016 injury, prior to July of 2017, and after July of 2017.

Respondents argue that Claimant's symptoms in her left knee could just as likely could be related to arthritis in a different compartment of the knee, unrelated to the December 2016 fall. Their argument is not persuasive. Rather, Claimant has established more likely than not, that the need for her total knee replacement is causally related to her December 2016 injury. The opinions of Dr. Aschberger, Dr. Swan, Dr. Ridings, and Dr. Stull are persuasive. Taken together with Claimant's credible testimony, Claimant has met her burden by a preponderance of the evidence.

ORDER

1. Claimant has established by a preponderance of the evidence that the total left knee replacement surgery recommended by Philip Stull, M.D. is reasonable, necessary, and causally related to her December 18, 2016 work injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 16, 2018 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant proved by a preponderance of the evidence he is entitled to an order awarding reasonably necessary and related medical benefits. Specifically, whether Claimant established by a preponderance of the evidence that Respondent failed to pay ATP David Reinhard MD and Select Physical Therapy for care and treatment Claimant received to treat his occupational injury?

2. Whether Claimant proved by a preponderance of the evidence that Has Claimant has reached Maximum Medical Improvement, and if so, has he has sustained permanent impairment and permanent partial disability as the result of his occupational injury, and what is the extent of such impairment and disability?

3. Is Claimant entitled to receive authorized, reasonable and necessary future ("Grover") medical care and treatment for his occupational injury?

4. Is Employer subject to penalties, pursuant to C.R.S. §8-43-408(1), for failing to procure and maintain Workers' Compensation insurance on July 8, 2015, the date that Claimant was injured?

5. Is Employer subject to pay interest on all amounts due, not paid when due?

All other issues set for hearing were withdrawn and reserved for determination at a later hearing.

FINDINGS OF FACT

1. On June 7, 2018, Claimant filed the application for hearing for which this hearing was set, and served the Respondent with a copy of said application by email to the following official address of the Employer he provided and which is on file with the OAC: j.pedersen.llc@gmail.com, and to jpeder13@hotmail.com, Respondent's previous address on file with the OAC. A copy of the transmission to Respondent of the application for hearing was submitted by Claimant and admitted into evidence by the ALJ at hearing.

2. Respondent did not file a Response to said Application for Hearing.

3. On July 6, 2018 the Office of Administrative Courts (OAC) set a hearing date and sent a Notice of Hearing to the Employer. OAC mailed the Notice of Hearing to the Employer at his surface address on file with the OAC: 7220 South Gaylord Street, #E, Centennial, CO 80112. OAC also electronically mailed the Notice of Hearing to the Employer at his address on file with the OAC: j.pedersen.llc@gmail.com. The Notice of Hearing specified that a hearing was scheduled for 1:30 p.m. on August 29, 2018. The Employer thus received notice of the scheduled hearing. A copy of the transmission to Respondent by the OAC

of said Notice of Hearing was submitted by Claimant and admitted into evidence by the ALJ at hearing.

4. Respondent Employer failed to attend or otherwise participate in the August 29, 2018 hearing; Respondent thus did not present any evidence or argument to the ALJ for consideration.

Relevant Prior Orders in this Claim

5. On May 13, 2016 ALJ Broniak issued a Summary Order in this claim. Claimant provided a copy of this Order to the ALJ at the August 29, 2018 hearing. In said Order, ALJ Broniak determined that on July 8, 2015 Claimant suffered industrial injuries when he fell from a ladder during the course and scope of his employment with Employer and that this claim was compensable. ALJ Broniak determined that Respondent was liable for all of Claimant's past reasonable, necessary and related medical treatment, subject to the Division of Workers' Compensation fee schedule. ALJ Broniak also ordered that Respondent was also financially responsible for all of Claimant's future reasonable, necessary and related medical treatment.

6. In said May 13, 2016 Order, ALJ Broniak found that Claimant worked 40 hours per week and earned $15.00 each hour with Employer. She determined that Claimant earned an Average Weekly Wage (AWW) of $600.00, and that his Temporary Total Disability rate was $400.00 per week. ALJ Broniak noted that Section 8-43-408(1), C.R.S. provides that an injured employee's benefits shall be increased by 50% when an employer fails to provide worker's compensation to employees under the insurance provisions of the Act. ALJ Broniak found that "The Respondent admitted he had no workers' compensation coverage on July 8, 2015. Thus, Claimant's compensation shall be increased by 50 percent. *See* § 8-43-408(1), C.R.S.") ALJ Broniak held that inclusion of said 50% penalty increased Claimant's benefit rate to $600.00 per week, and she so ordered.

7. Another hearing took place in this claim on December 28, 2016, ALJ Peter J. Cannici presiding. ALJ Cannici entered an Order on January 30, 2017. Claimant provided a copy of this Order to the ALJ at the August 29, 2018 hearing. In that Order, ALJ Cannici concluded and ordered that David Reinhard, M.D. was Claimant's authorized treating physician by referral from his prior authorized physician. Judge Cannici also awarded Temporary Partial Disability to the Claimant, which he computed by using the benefit rate of $600.00/week previously determined by ALJ Broniak.

8. The ALJ finds that determination of said issues in the referenced prior Orders are law of the case and control determination of those same issues in this hearing.

Claimant's Medical Treatment

9. David Reinhard, M.D., Colorado Rehabilitation and Occupational Medicine at 1390 S. Potomac Street, #128, Aurora, Colorado 80012 is Claimant's Authorized Treating Physician (ATP).

10. Dr. Reinhard initially evaluated and treated Claimant on April 18, 2017. Dr. Reinhard issued a billing statement on that date for $870.50. Dr. Reinhard provided follow up treatment to Claimant on May 23, 2017. Dr. Reinhard issued a billing statement on that date for $206.17. Dr. Reinhard next evaluated the Claimant on July 3, 2017, at which time he placed Claimant at MMI and issued an impairment report. Dr. Reinhard issued a billing statement for $355.00 for his July 3, 2017 services. Dr. Reinhard's medical records and billing charges for each of these three dates of service were offered as exhibits and accepted by the ALJ. The ALJ finds that Dr. Reinhard's evaluation and treatment on the above referenced dates were reasonable and necessary medical treatment for Claimant's occupational injury. The ALJ finds that Respondent owes, but has not paid Dr. Reinhard for any of his $1,431.67 in medical charges, and all such charges remain unpaid and outstanding.

11. On May 23, 2017, Dr. Reinhard referred Claimant to Select PT for physical therapy. The ALJ finds that Dr. Reinhard's referral of the Claimant to Select PT was reasonable, necessary, and authorized medical treatment for his occupational injury. Claimant testified that he attended the first session of physical therapy, but Select PT would not continue to schedule or treat him without receiving payment from Respondent for the treatment already provided. Claimant testified, and the ALJ finds, that Respondent owes but did not pay the medical bill for Claimant's first physical therapy session, in the amount of $242.00. Claimant testified, and the ALJ finds, that because Respondent has not paid for the Select PT charge, Select PT would not schedule him for further prescribed PT treatment.

12. Claimant testified, and the ALJ finds, that Respondent has not paid Dr. Reinhard for the $1,431.67 in charges made for care and treatment of Claimant's occupational injury, or Select PT for the $242.00 in charges for referred PT treatment.

MMI and Whole Person Impairment Rating

13. Dr. David Reinhard, Claimant's Authorized Treating Physician, is level II accredited. Dr. Reinhard issued a report on July 3, 2017, determining that Claimant was at Maximum Medical Improvement (MMI). His report of MMI, dated July 3, 2017, and related impairment worksheets, was offered by the Claimant and admitted by the ALJ. Dr. Reinhard reported: "[Mr. Stevens] receives a partial permanent impairment according to the Third Edition (Revised) of the AMA Guides to the Evaluation of Permanent Impairment. He has a Table 53 impairment for the thoracic injuries, which includes the left T2 and left T3 transverse process fractures. These are rated according to Table 53 IB which is 2% whole person. Since there are two levels of fracture, this would be a total of 4% whole person from Table 53 for the transverse process fractures. There are also two levels of

disk protrusions, including a T7-8 disk protrusion, which is rated from Table 53 IIB which is 2% whole person. For the additional level at T2-3, he receives a 1% whole person impairment from Table 53 IIF. When these various impairments from Table 53 are combined using the Combined Values Chart, the result is 7% whole person. There was also a range of motion impairment for the thoracic spine, which is 0% for angle of minimum kyphosis, 3% for thoracic flexion, 1.5% for right rotation, and 2% for left rotation. This yields a 6.5% range of motion impairment of the thoracic spine, which is rounded up to 7% whole person, per the Division of Workers' Compensation Impairment Rating Tips. The final overall impairment rating is found by combining the 7% Table 53 impairment of the thoracic spine with the 7% range of motion impairment, which yields a 14% whole person impairment using the Combined Values Chart. The 14% whole person impairment of the thoracic spine does not require any apportionment." The ALJ finds that Claimant has proven that it is more probably true than not that he is at MMI, that he sustained a 14% whole person impairment as rated by Dr. Reinhard, and that he is entitled to receive PPD benefits based on said 14% whole person impairment rating.

14. Claimant testified at hearing that he was born on July 3, 2017, and that on July 3, 2017, the date of MMI, he was 52 years old. The statutory age factor for a person aged 52 on the date of MMI is 1.16.

15. Respondent is liable to Claimant for Permanent Partial Disability / Medical Impairment based on said 14% whole person impairment rating, the statutory age factor of 1.16, and Claimant's benefit rate of $600.00 per week.

16. Dr. Reinhard also opined in his July 3, 2017 report that Claimant will require ongoing medical treatment in the future to cure and relieve the effects of his occupational injury. He reported: "Mr. Stevens is seen in follow up with regard to work-related injuries. My plan was to have him undergo active treatment. However, in lieu of doing that, we can go ahead and place him at Maximum Medical Improvement today. He does not have any permanent restrictions. *Future care, which could be done as maintenance care, would include 12 to 16 sessions of physical therapy, 16 to 20 sessions of chiropractic treatment, and possibly T2-3 and T7-8 epidural injections on the left. He may also require medications such as nonsteroidal antiinflammatory medications and opioid analgesic medications periodically for pain."* (emphasis added) The ALJ finds Claimant has proven through substantial evidence in the record that it is more probably true than not that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of the claimant's condition.

17. Dr. Reinhard's uncontroverted opinions referenced above are accepted by the ALJ and afforded great weight.

18. Claimant's counsel served Dr. Reinhard's July 3, 2017 MMI/impairment rating report on the Respondent Employer on July 28, 2017, and again on August 24, 2017 by emailing it to the email address of the Employer on

file with the OAC: j.pedersen.llc@gmail.com. Copies of these email transmissions were submitted to and received by the ALJ into evidence at hearing.

19. Respondent did not request a DIME to contest Dr. Reinhard's MMI impairment rating, or to controvert Dr. Reinhard's opinion that Claimant requires ongoing medical care as the result of his occupational injury. Thus, there "is no contrary medical opinion" (to the opinions contained in ATP David Reinhard, MD July 3, 2018 report) in the evidentiary record of this hearing.

20. Respondent has not filed the required "final admission"… "admitting liability for (Claimant's) related reasonable and necessary (future) medical benefits by an authorized treating physician."

21. Dr. Reinhard placed Claimant at MMI and issued his report of impairment on July 3, 2017. Respondent has not filed the required Final Admission from the date of Dr. Reinhard's report through the date of this hearing. Respondent has not admitted for or paid PPD benefits calculated on the 14% whole person impairment rating contained in Dr. Reinhard's report of July 3, 2017.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Past Medical Benefits Due and Unpaid

4. ALJ Broniak ordered that Respondent is liable for Claimant's authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. See, §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. Respondent is liable for payment of the treatment Claimant received from Dr. Reinhard, his authorized treating physician, in the amount of 1,431.67. Respondent is also liable for payment of the treatment Claimant received from Select PT, on referral from Dr. Reinhard, in the amount of $242.00. Pursuant to W.C. Rule 16-12, all medical bills are due and payable by Respondent within 30 days after receipt, unless contested pursuant to the provisions of said Rule.

MMI / Permanent Partial Disability / Medical Impairment Benefits

6. Claimant has reached MMI, and has been rated as having a 14% whole person impairment rating by his ATP, David Reinhard, M.D. Dr. Reinhard is Level II accredited by the Division of Worker's Compensation.

7. C.R.S. §8-42-107(b) provides that "When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section." Subsection (8)(d) provides that " Medical impairment benefits shall be determined by multiplying the medical impairment rating determined pursuant to paragraph (c) of this subsection (8) by the age factor determined pursuant to paragraph (e) of this subsection (8) and by four hundred weeks and shall be calculated at the temporary total disability rate specified in section 8-42-105.

8. In Claimant's case, the medical impairment rating is 14% whole person. The statutory age factor for an injured worker, age 52 as of the date of MMI, is 1.16. The temporary total disability rate in this claim is $600.00 per week (after taking into account the 50% increase provided by statute because Respondent Employer was uninsured). Under the statutory formula, the impairment rating of .14 (14%) is multiplied by the 1.16 age factor by 400 weeks, and by $600.00 per week. 0.14 x 1.16 x $600 x 400 = $38,976.00 in permanent partial disability /medical impairment benefits due.

9. Division of Workers Compensation Rule 5-5 (E)(1) provides that, "ADMISSIONS OF LIABILITY (1) Within 30 days after the date of mailing or delivery of a determination of medical impairment by an authorized Level II accredited physician, or within 30 days after the date of mailing or delivery of a determination by the authorized treating physician providing primary care that there is no impairment, the insurer shall either: (a) File an admission of liability consistent with the physician's opinion, or (b) Request a Division Independent

Medical Examination"**,** and to make timely payment for the PPD benefits such rating requires under the Act "within 30 days of when the benefits are due". (Rule 5-6). Respondent was served Dr. Reinhard's MMI report including his 14% impairment rating on July 28, 2017. However, Respondent has not filed a Final Admission consistent with Dr. Reinhard's opinion, or made payment of any of the PPD benefits such rating requires under the Act.

Post MMI Grover medical benefits

10. A claimant is entitled to future medical benefits where there is substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the effects of an industrial injury or prevent further deterioration of the claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). Claimant has proven by a preponderance of the evidence that he is entitled to receive such future medical treatment. Respondent Employer is liable for Claimant's future medical treatment. Dr. Reinhard continues to be Claimant's authorized treating physician.

11. C.R.S. 8-42-107 8(f) provides "In all claims in which an authorized treating physician recommends medical benefits after maximum medical improvement, and there is no contrary medical opinion in the record, the employer shall, in a final admission of liability, admit liability for related reasonable and necessary medical benefits by an authorized treating physician." There "is no contrary medical opinion" (to the opinions contained in the July 3, 2018 opinion of ATP David Reinhard, MD) in the evidentiary record of this hearing. However, Respondent has not filed a "final admission"… "admitting liability for related reasonable and necessary medical benefits by an authorized treating physician."

Penalty for Employer's Failure to Carry Worker's Compensation Insurance

12. Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. Section 8-43-408(1), C.R.S. provides that an injured employee's benefits shall be increased by 50% for an employer's failure to comply with the insurance provisions of the Act.

13. As found, ALJ Broniak determined that on July 8, 2015, the date of Claimant's injury, Respondent Employer was not covered by Workers' Compensation insurance. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act.

14. This 50% penalty has been calculated into the Permanent Partial Disability total noted above, by the increase in Claimant's benefit rate from $400.00 per week to $600.00 per week.

Interest on Benefits Due, not paid when Due

15. Pursuant to C.R.S. §8-43-410(2), all benefits due, not paid when due, bear interest at the rate of 8% per annum. Under § 8-43-410, interest on an award of compensation is a matter of statutory right and applies automatically on the date payment is due. *Beatrice Foods Co. v. Padilla*, 747 P.2d 685 (Colo.App.1987). The legislative purpose underlying the award of such interest is not to impose a penalty or award an additional benefit, but merely to secure to claimants the full value of the benefits to which they are entitled. See *Travelers Insurance Co. v. Savio*, 706 P.2d 1258 (Colo.1985).

Requirement for Posting Bond

15. Pursuant to Section 8-43-408(2), C.R.S. "In all cases where compensation is awarded under the terms of this section, the director or an administrative law judge of the division shall compute and require the employer to pay to a trustee designated by the director or administrative law judge an amount equal to the present value of all unpaid compensation or benefits computed at the rate of four percent per annum; or, in lieu thereof, such employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado. The bond shall be in such form and amount as prescribed and fixed by the director and shall guarantee the payment of the compensation or benefits as awarded. The filing of any appeal, including a petition for review, shall not relieve the employer of the obligation under this subsection (2) to pay the designated sum to a trustee or to file a bond with the director or administrative law judge." The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005). In this claim, it has been determined that Respondent was uninsured at the time of Claimant's injury; thus, the provisions of Section 8-43-408(2) are mandatory.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Respondent is liable for payment to Claimant of the following benefits, which are in addition to benefits due under previous Orders or which may be awarded in subsequent Orders:

1. Liability for Charges for Past Medical Treatment: Respondent is liable for and shall pay the charges for Claimant's past medical treatment from Dr. Reinhard, in the amount of $1,431.67 and from Select PT, in the amount of $242.00.

2. Liability for Future Medical Treatment. Respondent is liable for Claimant's future medical treatment reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of the Claimant's condition, pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

3. Permanent Partial Disability/Medical Impairment Benefits: Respondent shall pay to Claimant the amount of $38,987.00 for permanent partial disability benefits.

4. Statutory Interest Respondent shall pay statutory interest at the rate of eight percent per annum on all amounts due, not paid when due.

5. Pursuant to the provisions of C.R.S. §8-43-408(2), Respondent, in lieu of payment of the above compensation and benefits to Claimant, shall:

a. Deposit the sum of $60,000 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Gina Johannesman, Special Funds Unit Supervisor, 633 17th St, Suite 900, Denver, CO, 80202; or in lieu thereof,

b. File a bond in the sum of $60,000 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

6. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within

twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: __10/30/2018__.

_____/s/ Margot Jones_____
Margot Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has demonstrated by a preponderance of the evidence that the C3-4 disc replacement surgery requested by J. Paul Elliott, M.D. is reasonable, necessary and causally related to his admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 50 year old male who works for Employer as a plumbing foreman.

2. Claimant has a history of two prior cervical fusions. On March 11, 2014, Claimant underwent a C5-C6 anterior cervical discectomy and fusion ("ACDF"). By March 2015, Claimant continued to report neck pain as well as pain, weakness, numbness and tingling in his in left upper extremity and hand.

3. A July 11, 2015 cervical spine MRI revealed, in relevant part, mild residual bilateral foraminal narrowing at C5-C6, disc degeneration at C6-C7 with annular bulging and stenosis, annular bulging and uncinate ridging at C4-C5 with mild facet arthropathy and mild right-sided foraminal stenosis, and annular bulging and uncinate ridging at C3-C4 with mild facet arthropathy and mild central and bilateral foraminal stenosis.

4. On July 31, 2015, Claimant underwent an ACDF at C6-C7.

5. By February 15, 2016, Claimant was reporting that his arm pain resolved, but that he continued to experience some neck pain and headaches. William Biggs, M.D. noted that x-rays revealed Claimant was healing well, with degeneration above the areas of cervical fusion. Dr. Biggs recommended physical therapy and an epidural steroid injection ("ESI") if Claimant showed no improvement.

6. Claimant testified at hearing he did not recall Dr. Biggs' recommendation, but relocated few months later, and did not receive physical therapy or injections. Claimant testified that prior to March 20, 2017, although he had a history of previous fusions at C5-C6 and C6-C7 he had no symptoms, limitations, pain complaints or restrictions in his cervical spine or upper extremities leading up to the admitted industrial injury. The medical records are devoid of Claimant having any medical care for his cervical spine between February 15, 2016 and March 22, 2017.

7. On March 20, 2017, Claimant suffered an admitted industrial injury when he hit his head on a door jamb while ascending an 8-foot tall ladder. Claimant testified he "jammed" his head back and felt immediate pain in his neck. Claimant was carrying materials in each hand and wearing a hard hat at the time. He reported the incident to

Employer but did not seek medical care at the time because he was able to work the remainder of his shift. Claimant performed his usual job duties on March 21, 2017.

8. Subsequently, while unloading copper pipe with a co-worker, Claimant was struck on the right side of the head with a copper pipe measuring approximately 20 feet long and 2 inches in diameter. Claimant testified he fell to his knees for approximately five minutes after being hit. There are discrepancies in the record regarding exactly when the incident occurred. Claimant testified the incident occurred on March 22, 2017. An April 12, 2017 medical record notes Claimant was hit with the pipe "yesterday," while a May 24, 2017 medical record notes Claimant was hit with a copper pipe a week after the March 20, 2017 door jamb incident. Employer's First Report of Injury dated March 22, 2017 solely refers to Claimant "jamming" his head on a horizontal door frame while climbing a ladder.

9. Claimant sought medical treatment with authorized treating physician ("ATP") Brian Beatty, D.O. on March 22, 2017. Claimant reported experiencing an onset of neck pain after his head got caught on a piece of structure, pushing his head back and stretching his neck. He complained of neck stiffness. Dr. Beatty noted cervical spine x-rays revealed residual motion with increase in the interspinous space on the flexion compared to the extension view at both C5-6 and C6-7, which he opined may represent pseudarthrosis. On exam, Dr. Beatty noted tenderness and tightness without spasm. He diagnosed Claimant with a work-related cervical strain.

10. A March 31, 2017 cervical spine CT scan revealed, in relevant part, loosening of C6 screws and a fracture of the left C7 screw and mild scattered degenerative changes.

11. On April 12, 2017, Dr. Beatty noted Claimant "…was feeling fairly good with minimal pain up until yesterday when he was apparently hit upside the head with a 2 inch copper pipe by a coworker and developed increased pain and now is very sore." Dr. Beatty again diagnosed Claimant with a cervical strain and recommended Claimant proceed with physical therapy.

12. On May 20, 2017, Claimant underwent an MRI of cervical spine. The radiologist gave the following impression: "1. Moderate canal and moderate right foraminal stenosis are seen at C3-4 secondary to protrusion and osteophytes. 2. There is mild canal stenosis and a small protrusion at C4-5. 3. There is moderate right and mild left foraminal stenosis at the C6-7 level secondary to foraminal osteophytes."

13. During the course of care, Dr. Beatty referred Claimant to J. Paul Elliott, M.D. Dr. Elliott first evaluated Claimant on May 24, 2017. Claimant reported jamming his neck when hitting his head against a door jamb on March 21, 2017, and getting hit in the head with a copper pipe a week later, further aggravating his neck pain. Dr. Elliott noted Claimant had an acute onset of neck and trapezius pain following two work injuries and had experienced unremitting neck and trapezius pain since the incidents. Claimant denied upper extremity radiculopathy and focal weakness. Dr. Elliott noted Claimant has a history of ACDF at C5-C6 and C6-C7, and did well postoperatively with

minimal residual neck pain. On exam, Dr. Elliott noted cervical tenderness, reduced range of motion, and paraspinal and trapezius spasms. He reviewed the May 20, 2017 MRI, March 31, 2017 CT scan, and March 22, 2017 x-ray and concluded the imaging revealed C5-7 pseudarthrosis and residual spondylosis. Dr. Elliott opined that operative intervention was warranted to treat the workplace injury, as Claimant failed to experience relief with conservative measures. The surgery was not contested by Respondents.

14. On July 27, 2017, Dr. Elliott performed surgery comprised of:

1. Reoperation, removal of hardware C5-C6 anterior plate screw instrumentation and C6-C7 anterior plate screw instrumentation.
2. C5-C6 and C6-C7 anterior cervical diskectomy and removal of pseudoarthrosis with decompression of central canal and bilateral foraminal nerve root decompression.
3. C5-C6 and C6-C7 allograft arthrodesis.
4. C5-C6-C7 anterior plate screw instrumentation, Sofamor Danek Atlantis translational plate with fixed and variable screws.
5. Posterior C5-C6-C7 lateral mass screw rod instrumentation, Sofamor Danek vertex Instrumentation.
6. C5-C7 posterior spinal arthrodesis, local autograft and allograft, demineralized bone matrix.
7. Microdissection.

15. Both Respondents' expert and Claimant testified the purpose of the July 27, 2017 surgery was to address Claimant's neck pain and trapezius pain. Claimant testified that, while he experienced some relief from the surgery, it only decreased his pain level from an 8/10 to a 6/10.

16. On October 18, 2017 Respondents filed a General Admission of Liability.

17. On January 16, 2018, Dr. Beatty noted that, despite physical therapy, there had not been much improvement in Claimant's symptoms over the last month or two. Claimant complained of difficulty with any activity bending his neck for longer than 10 minutes and waking up four to five times per night. Dr. Beatty changed Claimant's prescription medications.

18. On January 25, 2018, Claimant reported to Dr. Elliott bilateral trapezii pain and neck pain that had not improved since the surgery. Claimant described the pain as tightness, denying radiculopathy, numbness/tingling or weakness. Dr. Elliott noted physical therapy and medications had not relieved Claimant's pain, and ordered a cervical CT scan and MRI for further evaluation.

19. Claimant underwent a cervical spine MRI on February 13, 2018, which revealed cervical spondylosis with multilevel foraminal stenosis, including moderate central stenosis at C3-C4, and a bony bridging across the disc spaces at C5-C7.

20. Dr. Elliott reevaluated Claimant on February 22, 2018. Claimant reported experiencing ongoing right greater than left trapezius pain since the July 2017 surgery. Dr. Elliott noted Claimant initially experienced improvement postoperatively, but plateaued about two months after the operation. He reviewed the February 13, 2018 MRI results, noting the MRI revealed C3-C4 right greater than left foraminal stenosis and no recurrent stenosis at C5-C7. Dr. Elliott recommended home cervical traction and a right C3-C4 transforaminal ESI for diagnostic and therapeutic purposes, and a C3-4 anterior cervical disc replacement if Claimant's symptoms ultimately did not improve.

21. On March 1, 2018, Dr. Beatty noted Dr. Elliott felt the surgery was doing very well, but that Claimant developed a spur at C3-C4 and was recommending an epidural steroid injection.

22. On April 17, 2018, Barry Ogin, M.D. performed a right C3-C4 transforaminal ESI and right C4-C5 transforaminal ESI. Dr. Ogin noted the following regarding the injection at the C3-C4 level:

> Interestingly, when I slowly injected contrast, there was filling of the C2-C3 facet space. Needle was repositioned slightly more inferior and additional filling was not documented though there was significant venous filling. The needle was repositioned slightly more medially and there was some filling along the lateral gutter of the epidural space. There was no obvious vascular uptake seen or spinal flow. The patient did report significant pain locally at the neck at that point. Given the challenge at the C3-C4 level, I did elect to proceed at the C4-C5 level as well as try to get better flow proximally.

23. Dr. Ogin noted that Claimant had reproduction of neck pain at the C3-C4 level in particular and reported that his pain went from 4-6/10 pre-injection to 1-2/10 post-injection. Dr. Ogin wrote, "This appeared to be good diagnostic response."

24. On April 19, 2018, Claimant reported to Dr. Beatty that the shooting pains down his right arm had resolved, but that he continued to experience a fair amount of pain and stiffness in his neck.

25. On April 30, 2018, Dr. Ogin noted that a co-worker dropped a large metal piece on Claimant's head, flexing Claimant's head forward. He further noted that he had performed a right-sided transforaminal ESI at C3-C4 and, because he was "unable to get satisfactory proximal flow," also at C4-C5 to improve the therapeutic yield. Claimant reported that his shoulder pain improved post-injection, but that he had developed new discomfort in his forearm. Claimant continued to experience some aching in his shoulders and neck. Dr. Ogin opined that Claimant's right lateral shoulder discomfort seemed to be related to some localized shoulder tendinopathy. He opined that Claimant

was likely approaching maximum medical improvement ("MMI") for his neck, and referred Claimant to Dr. Timothy Shea for pain management and cognitive behavioral training.

26. On May 17, 2018, Claimant reported to Dr. Beatty that his symptoms were about the same, with some of his right upper arm pain returning. Dr. Beatty noted he planned to set Claimant up with Dr. Elliott to see if there was anything that could be done surgically.

27. On May 21, 2018, Dr. Ogin noted Claimant continued to experience "baseline" pain along his neck with some radiation along his upper trapezius and lateral shoulder. He opined that Claimant would likely not get any lasting relief from further injections as Claimant seemed stable overall with fairly diffuse and axial pain.

28. On June 7, 2018, Dr. Elliott noted that Claimant initially had significant relief from the ESI but that his symptoms had since redeveloped. He reviewed the February 13, 2018 cervical spine MRI and CT scan and diagnosed Claimant with cervical spondylosis, opining that Claimant's right trapezius pain was attributable to right C3-4 foraminal stenosis. He noted that although Claimant remained "neurologically intact," he failed to experience lasting relief "with *myriad* conservative measures; thus, operative intervention is warranted for definitive treatment." (Emphasis not added). He noted Claimant elected to proceed with the surgery after discussion of the risks. He ordered Claimant to return to Dr. Beatty's office for medical clearance and that Claimant undergo cervical AP/lateral/flexion/extension x-rays to rule out dynamic instability.

29. On June 20, 2018 Dr. Beatty cleared Claimant for surgery.

30. On June 20, 2018, Dr. Elliott requested authorization for C3-C4 disc replacement surgery.

31. On June 27, 2018, Michael J. Rauzzino, M.D. performed a medical record review at the request of Respondents. Dr. Rauzzino did not interview or examine Claimant. Dr. Rauzzino opined that the proposed C3-C4 disc replacement surgery was not related to Claimant's admitted industrial injury. He noted the cervical MRI revealed previously existing pseudarthrosis without new injury. Dr. Rauzzino opined that because the C5-C7 fusion existed prior to the work injury, adjacent level disease was not caused by the work injury, specifically at C3-C4, as such level was not injured in the claim nor is adjacent to the C5-C7 fusion. Dr. Rauzzino further opined that the disc replacement surgery was not reasonable and necessary because a pain generator had not been clearly defined, noting that Dr. Ogin injected C4-C5 and C3-C4 and felt that the response was equivocal and that no further injections would be offered. Dr. Rauzzino further opined that the requested surgery could lead to worsening neck pain given Claimant's diffuse axial neck pain and facet arthropathy. He opined that no additional treatment was needed for Claimant's cervical spine under workers' compensation, stating he did not know that any additional treatment was likely to improve Claimant's pain complaints.

32. On June 29, 2018, Respondents denied Dr. Elliott's request for C3-C4 disc replacement surgery, relying on Dr. Rauzzino's report.

33. On September 12, 2018, Dr. Beatty noted that Claimant's symptoms were "quite severe," continued to worsen, and that Claimant opted to undergo cervical spine surgery with Dr. Elliott through his personal health insurance.

34. Dr. Rauzzino testified at hearing as a Level II accredited expert in neurosurgery. Dr. Rauzzino testified consistent with his IME report, continuing to opine that the recommended C3-C4 disc replacement is not reasonable, necessary or related to Claimant's work injury. Dr. Rauzzino testified Claimant's initial pain complaints centered on neck and trapezii pain without radiation to Claimant's arms, which he explained is more of a muscular or myofascial concern. Dr. Rauzzino stated that the imaging studies and medical reports did not support a finding of any acute injury to Claimant's C3-C4 level. Dr. Rauzzino explained that because there is a "skip level" at C4-C5, adjacent level disease could not explain any presence of C3-C4 pain, as level C3-C4 is not adjacent to the re-fused levels. Dr. Rauzzino testified that the noted disc bulging, facet arthrosis, and right sided foraminal stenosis were documented in records predating the work injury. Dr. Rauzzino acknowledged that his IME report did not contain reference to the copper pipe incident, stating that he had read about the incident, but that it did not change his opinion.

35. Regarding the reasonableness and necessity of the recommended surgery, Dr. Rauzzino noted that Dr. Ogin's injection report indicates that the C3-4 level was never adequately injected to allow a diagnosis that it was the pain generator. Dr. Rauzzino explained that Dr. Ogin's only effective injections occurred to Claimant's C4-C5 level, as Dr. Ogin was never able to achieve sufficient proximal flow at the C3-C4 level. Dr. Rauzzino opined that any injection to that level could not be considered diagnostic. Dr. Rauzzino testified the Medical Treatment Guidelines indicate that when facet arthrosis is found, which he described as arthritis in the back, a cervical disc replacement is inappropriate, or contraindicated. Dr. Rauzzino testified that because Claimant has presented with facet arthrosis throughout his neck since at least 2015, the cervical disc replacement would not be appropriate as it would not be anticipated to relieve Claimant's symptoms of diffuse neck pain. Dr. Rauzzino concluded that the surgery would not be expected to provide Claimant relief from his neck pain due to Claimant's diffuse axial neck pain without a specific radiculopathy and pre-existing arthritis.

36. Claimant testified his neck symptoms have not resolved since March 2017. Claimant testified he understands the risks of surgery, however, understanding those risks he still desires to pursue the recommended surgery as he does not want to live in pain.

37. The ALJ finds the testimony of Claimant credible and persuasive.

38. The ALJ finds the testimony and opinions of Drs. Elliott and Beatty, as supported by the medical records and Claimant's testimony, more credible and persuasive than the contrary opinion of Drs. Rauzzino and Ogin.

39. Claimant established it is more likely than not that the requested C3-C4 disc replacement surgery is related to Claimant's admitted work injury, and reasonably necessary to cure and relieve Claimant of the effects of the work injury.

40. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the Medical Treatment Guidelines is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the Medical Treatment Guidelines such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008); Section 8-43-201(3), C.R.S.

The ALJ concludes Claimant proved by a preponderance of the evidence the requested C3-C4 disc replacement surgery is reasonable, necessary and related to the admitted March 2017 work injury. While Claimant had two prior cervical fusions at C5-C6 and C6-C7, as well as pre-existing annular bulging at C3-C4 with mild facet arthropathy central and bilateral foraminal stenosis, Claimant was credible in his testimony that he did not have symptoms, limitations, or restrictions in his cervical spine or upper extremities leading up to the admitted industrial injury. Although a February 15, 2016 record references neck pain, no medical records were introduced at hearing indicating Claimant continued to seek treatment for any cervical spine issues leading up to the industrial injury. On March 20, 2017, Claimant hit his head on a door jamb and immediately thereafter experienced neck pain, which was later exacerbated when he was struck in the head with a 20 foot pipe at work. Despite discrepancies in the record regarding the exact date of the copper pipe incident, the ALJ is persuaded the incident did occur and exacerbated Claimant's condition. The work incidents and related July 2017 surgery aggravated and exacerbated Claimant's condition, causing the need for medical treatment, specifically, the recommended disc replacement surgery.

Claimant underwent surgery in July 2017 to address the neck pain that resulted from his work-related injuries, yet continued to consistently report neck and right upper extremity pain. Dr. Elliott, who is one of Claimant's ATP and has treated Claimant throughout the course of his claim, is of the credible opinion Claimant had a diagnostic injection at C3-C4, which supports his recommendation for disc replacement surgery. Claimant has undergone extensive conservative treatment with no lasting improvement. Dr. Elliott credibly and persuasively opined that the recommended surgery is warranted at this time. Dr. Beatty, also an ATP, has given Claimant surgical clearance. Claimant credibly testified he understands the risks and wants the surgery.

The ALJ has considered the Medical Treatment Guidelines as they apply to Claimant's case; however, based on the totality of the evidence, the ALJ concludes it is more likely than not Claimant's need for C3-C4 disc replacement is related to his work injury, and is reasonable and necessary to cure and relieve Claimant of its effects.

ORDER

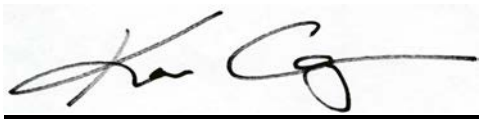
It is therefore ordered that:

1. Dr. Elliott's request for C3-C4 disc replacement surgery is reasonable, necessary and related to Claimant's work injury. Respondents shall pay for such surgery pursuant to the fee schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 30, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries to his head and cervical spine during the course and scope of his employment with Employer on January 13, 2017.

2. Whether Claimant has established by a preponderance of the evidence that his medical treatment was authorized, reasonable, necessary and causally related to his January 13, 2017 industrial injuries.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the periods January 19, 2017 through February 28, 2017 and May 27, 2018 until terminated by statute.

4. Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule on January 13, 2017 in violation of §8-42-112(1)(b) C.R.S. and his non-medical benefits should thus be reduced by fifty percent.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $939.00.

FINDINGS OF FACT

1. Claimant worked for Employer as a Quality Control Technician at an open quarry site in Morrison, Colorado. His job duties involved obtaining buckets of various materials mined at the quarry and testing them for quality and consistency. The samples that Claimant tested sometimes came from stockpiles of material within the quarry. To obtain a sample from the stockpiles, Claimant had to involve another employee operating a loader. The loader operator was responsible for using the loader to dig into the stockpile and make a smaller pile or pad from which the quality control technician could obtain his samples. The loader operator would also use his vehicle to flatten the surface of the pad.

2. Prior to the formation of the pad, Claimant was required to check the stockpile to make sure there were no oversized rocks that would compromise the sampling. Claimant testified that he was required to drive his pickup truck directly in front of the stockpile to check for oversized rock.

3. Claimant explained that, after checking for oversized rock, he was trained to make eye contact with the loader operator. The parties were then aware of each other's locations. Following "eye contact," Claimant noted that he was trained to drive and park at the same general area next to the stockpile.

4. On January 13, 2017 Claimant was asked to obtain a sample from the "57/67 three-quarter wash" stockpile. He thus made radio contact with Loader Operator Talmadge "T.J." Milan, Jr. Claimant then drove his pickup truck to the stockpile utilizing the "haul" road. Mr. Milan followed Claimant in his loader from about 15 feet behind. Each vehicle was traveling at approximately five miles per hour.

5. When Claimant arrived at the stockpile he turned right off the haul road so that he could drive in front of the materials and make necessary observations for oversized rock. Claimant commented that he drove approximately 10 feet in front of the stockpile.

6. Once Claimant made the necessary observations he turned right again. He intended to make a clockwise loop back to the east side of the stockpile next to the haul road. As Claimant turned away from the stockpile, he made eye contact with Mr. Milan. Mr. Milan was preparing to drive his loader into the stockpile to make the pad of quarry rock. Claimant did not make eye contact with Mr. Milan after he moved away from the front of the stockpile and pulled his truck behind the loader.

7. As Claimant was approaching his parking spot, Mr. Milan backed his loader away from the pad and articulated his vehicle to the left. The rear of the loader collided with Claimant's pickup truck. Claimant's vehicle was in motion at the time of the accident.

8. Employer had a written Health and Safety Manual. Section 4.3.2 of the Manual provides "each company operation or site will have unique considerations regarding traffic, movement, and control. Traffic rules should be developed at each site to regulate traffic flow and control common hazards, which may arise through normal operation either on or off company property. The traffic rule should be documented in a traffic control plan and should consider the operating environment, volume, and categories of vehicles being utilized at the facility." Section 4.3.2.5 of the Manual specifies "one of the things to be considered as part of this traffic control plan is controlled interaction with light vehicles and heavy mobile equipment by maintaining a prescribed minimum 25 yard separation distance." Employer published and disseminated its traffic policy to all employees.

9. Claimant testified that there were procedures to follow if light and heavy vehicles were within 75 feet of each other. Specifically, the drivers were required to make eye contact with each other or have radio communication.

10. Claimant reported the accident to Employer's Quality Control Manager John Cheever. Mr. Cheever inquired whether Claimant was doing "ok" and Claimant replied that he was fine.

11. Employer conducted an investigation of the January 13, 2017 accident. Mr. Cheever, Safety Manager Al Quist, and other members of Employer's management team discussed the accident further but did not draw any conclusions until they could review the DriveCam video from Claimant's truck. However, prior to viewing the DriveCam video

and based on Claimant's account of the accident, Mr. Cheever surmised that Claimant had not likely committed any rules violations.

12. After reviewing the DriveCam video on January 14, 2017, Mr. Cheever determined that Claimant's description of the accident was inaccurate and his vehicle was moving just before the collision. Mr. Cheever also concluded that it was apparent that Claimant had pulled within 25 yards behind the loader just before the collision without making any positive contact. Mr. Quist confirmed Mr. Cheever's findings after reviewing the DriveCam footage. He also noted that the distance between the back end of the loader and Claimant's pickup truck while loading in the pile was approximately 40 feet. He commented that the distance between the loader's back end after leaving the pad area and turning to the left and Claimant's pickup truck was about 23 feet.

13. Immediately following the accident, Claimant went to Employer's mining office to complete a short written statement about the accident. Claimant then returned to his lab and unloaded his samples. However, he was feeling nauseous. He testified that he vomited on the floor in one of the labs. Claimant then sat down for a time. He subsequently cleaned up his vomit by throwing it in a waste rock pile behind the trailer.

14. Approximately 30-45 minutes later Mr. Cheever arrived at the lab. He and Claimant then went to the mining office to prepare a written statement about the accident. Mr. Cheever, Claimant, Mr. Milan and others then went to the accident scene and attempted to recreate the event.

15. When finished at the scene of the accident, Claimant returned to the lab. However, Claimant did not feel well. He thus left work early at approximately 2:00 PM. Claimant called Mr. Cheever to inform him that he did not feel well and was leaving.

16. Claimant did not feel any better during the evening of January 13, 2017. On the following day Claimant reported to work for his normal Saturday shift. Claimant testified that he was still not feeling well. He was experiencing a headache, back and neck pain, dizziness and his "balance was not the greatest."

17. Claimant returned to work on Monday, January 16, 2017. Claimant and Mr. Cheever reviewed the video of the accident. Claimant remarked that he might have a concussion. He was released from any further work because of the weather.

18. Employer's Safety Recognition, Reward, and Consequences Policy (SRRCP) sets forth the different categories of safety violations and the corresponding possible penalties. Category 1 violations include violations that could lead to a fatality or serious bodily injury and may result in immediate termination.

19. On January 17, 2017 Employer's SRRCP committee had a conference call to discuss the January 13, 2017 accident. The committee concluded that Claimant violated Employer's safety rules and policies by driving behind the loader within the proscribed distance without making positive contact. Under the SRRCP, Employer

determined that Claimant's conduct constituted a Category 1 violation and terminated his employment.

20. On January 17, 2017 Mr. Cheever called Claimant with the intent of scheduling a termination meeting. However, Claimant explained that he was not feeling well and was at UC Health Urgent Care. Mr. Cheever asked Claimant to call him back when he was finished with the examination. However, approximately five minutes later, Mr. Cheever called Claimant and told him that he needed to seek treatment at authorized provider Concentra Medical Centers.

21. On January 17, 2017 Claimant visited Concentra for an examination. Claimant reported that he was a restrained driver in a pickup truck when he was struck by a loader. He had extreme pain between his shoulder blades and numbness in his arms. Claimant noted worsening dizziness, headaches, memory issues, confusion and headache pain. The Concentra nurse instructed Claimant to visit an emergency room.

22. On January 17, 2017 Claimant visited the North Suburban Medical Center Emergency Room. Claimant reported headaches, tingling to his right hand, neck pain, back pain and abdominal discomfort. He denied loss of consciousness. However, he endorsed headaches, tingling, dizziness, difficulty concentrating and difficulty walking. Claimant did not respond to commands correctly when prompted. He was diagnosed with post-concussive syndrome.

23. On January 18, 2017 Claimant returned to Concentra for an evaluation with Gary Zuehlsdorff, M.D. Claimant reported nausea but denied vomiting. He also noted blurred vision and photophobia. Claimant complained of muscle pain, back pain, neck pain and joint stiffness. He also mentioned headaches, dizziness, memory loss, confusion, tingling, numbness, impaired balance and poor coordination. A psychiatric screen was negative. Dr. Zuehlsdorff diagnosed headaches due to trauma, dizziness, neck strain, thoracic strain, chest wall strain, abdominal wall strain and a concussion. He restricted Claimant from any work activity.

24. On January 19, 2017 Mr. Cheever contacted Claimant and terminated his employment. On the following day, Claimant visited the St. Anthony's North Emergency Room. He reported worsening confusion, headaches, photophobia, neck pain, chest pain and abdominal pain. Claimant was admitted to the hospital for five days.

25. During the St. Anthony North admission numerous providers examined Claimant, performed diagnostic tests and conducted studies to determine the underlying cause of his subjective complaints. A Romberg balance test was negative and a finger nose finger test was normal. An EEG study that measures brain wave activity was inconsistent with Claimant's subjective complaints of confusion and altered mental status. A neurologist examined Claimant during his hospital stay and commented that "[p]er nursing, [Claimant] can vary significantly from talking normally with family to behavior I witnessed during exam. The range of his symptoms and behaviors are beyond typical concussion or pain behavior." On January 23, 2017 a nurse specialist remarked that

Claimant exhibited "intermittent, waxing and waning confusion," and that she was "unable to complete a meaningful psychiatric evaluation." A speech therapist commented that Claimant's deficits appeared "inconsistent and idiosyncratic." Claimant was ultimately diagnosed with post-concussive syndrome that included a significant functional component.

26. On January 27, 2017 Respondents filed a Notice of Contest challenging Claimant's January 13, 2017 claim. Because Claimant's claim was denied, he was required to seek treatment on his own for his continuing symptoms.

27. Claimant did not seek additional medical care after his discharge from St. Anthony North until he visited primary care provider Brandon Combs, M.D. on February 16, 2017. Claimant complained of headaches. During his August 17, 2018 deposition, Dr. Combs concluded that Claimant suffered a kinetic injury to his brain at the time of the January 13, 2017 accident. He further determined that Claimant's symptoms were consistent with post-concussive syndrome with significant functional overlay and were related to his January 13, 2017 work-related accident. Nevertheless, Dr. Combs acknowledged that Claimant intentionally performed poorly on diagnostic tests.

28. Dr. Combs explained that functional syndrome is a "catch all" term for symptoms that lack an obvious organic explanation. However, functional overlay may be an intensifying of symptoms associated with an underlying organic syndrome. Therefore, an individual with post-concussive syndrome may have functional overlay. Dr. Combs noted that the presence of an organic injury along with functional overlay can have a synergistic effect.

29. On April 5, 2017 and April 24, 2017 Claimant visited Physician's Assistant Christina Lee at Panorama Orthopedic. Following a physical examination and consideration of radiological studies, Claimant was diagnosed with cervical radiculopathy and chronic bilateral lower back pain with sciatica.

30. In June 2017 Claimant began to receive treatment from Neuropsychologist Alissa Wicklund, Ph.D. On August 20, 2018 Dr. Wicklund testified through an evidentiary deposition. After reviewing DashCam video of Claimant's January 13, 2017 industrial incident she determined that the accident was sufficient to support the diagnosis of a concussion. However, she explained that Claimant's symptoms were discordant with the mechanism of injury. Dr. Wicklund concluded that, in addition to post-concussive syndrome, Claimant's symptoms were explained by other factors such as depression, anxiety and somatic response to injury. She remarked that it is impossible to parse out what symptoms were psychological in nature from those associated with post-concussive syndrome. Dr. Wicklund saw Claimant for a final time on November 2, 2017. She did not administer neuropsychological testing because "on tests to assess suboptimal effort and malingering, scores are significantly impaired." Nevertheless, Dr. Wicklund concluded that Claimant was unable to work during the course of her treatment from June 22, 2017 until his last visit on November 2, 2017.

31. On January 26, 2018 Claimant underwent an independent medical examination with Neurologist Alexander H. Zimmer, M.D. Dr. Zimmer also testified at the hearing in this matter. Based on a review of Claimant's medical records and a physical examination, Dr. Zimmer concluded that Claimant did not suffer a concussion as a result of the January 13, 2017 accident. He noted that Claimant was involved in a low velocity accident and did not lose consciousness. Dr. Zimmer reasoned that Claimant's presentation, especially during his five-day admission at St. Anthony North, constituted atypical features for post-concussive syndrome. Moreover, Claimant's records are replete with inconsistencies and abnormal validity scores. Dr. Zimmer concluded that the majority of Claimant's symptoms were the result of "conscious or subconscious factors resulting in physical manifestations." Finally, he acknowledged that an individual can suffer from both post-concussive syndrome and a functional disorder.

32. Claimant subsequently underwent extensive psychological treatment for depression. On February 27, 2018 Claimant began to receive treatment from Neurologist Samantha Holden, M.D. Dr. Holden testified at the hearing in this matter.

33. Claimant reported to Dr. Holden that he was experiencing difficulty with balance and walking, photophobia, phonophobia, headaches, dizziness, poor sleep, irritability and personality changes. Dr. Holden diagnosed Claimant with post-concussive syndrome and Functional Neurological Symptoms Disorder with mixed symptoms. She explained that Functional Neurological Symptoms Disorder is primarily a neurological condition. In the past the condition has been referred to as hysteria and conversion disorder. Functional Neurological Symptoms Disorder involves neurological symptoms that are not necessarily associated with a clear structural cause but are a dysfunction of the neurological system. Dr. Holden described the Disorder as a software problem of the brain. She acknowledged that the Disorder can develop in the absence of a head injury and can be triggered by significant stress or emotional trauma.

34. Dr. Holden explained that it was "unclear if [Claimant] actually suffered a head injury." She further noted that Claimant had "significant depression and anxiety" and the accident was "an extremely stressful and traumatic event, with some symptoms of post-traumatic stress evident by history, with hypervigilance and re-experiencing." Dr. Holden explained that, although Claimant's symptoms were consistent with post-concussive syndrome, "there is significant functional overlay present." She noted that physical objective evidence is not available in the vast majority of mild traumatic brain injury cases. Finally, Dr. Holden testified that there is no way to separate or disentangle functional neurological symptoms from post-concussive syndrome.

35. Dr. Holden explained that symptoms associated with a Functional Neurological Symptoms Disorder will wax and wane. The degree of symptoms experienced depends very much on what the affected person's brain is doing. If the brain is under stress, the symptoms can be worse because there is less energy left over for required brain tasks. Dr. Holden was aware that physicians at St. Anthony's Hospital had suggested the possibility that Claimant's presentation could be explained by secondary gain. However, Dr. Holden commented that secondary gain is exceptionally rare and she

did not believe Claimant was demonstrating secondary gain. She remarked that Claimant was not malingering or faking an injury.

36. Dr. Holden suggested that Claimant's treatment for Functional Neurological Symptoms Disorder required an interdisciplinary team. She did not believe that Claimant required psychiatric treatment or had a psychiatric diagnosis. Dr. Holden recommended continued physical therapy, occupational therapy, speech therapy and treatment under her care.

37. Accident Reconstructionist Mark Leonard prepared a report and testified at the hearing in this matter. Mr. Leonard conducted an accident reconstruction of the January 13, 2017 crash by performing a 3D scan of the involved loader and pickup truck. He also considered the video of the accident. The footage showed accelerometer data and speed data for the pickup truck. While attempting to determine the Delta–V of Claimant's head at the time of the accident, Mr. Leonard utilized a formula to calculate the Head Impact Criterion (HIC). Claimant had a HIC of around .1. In contrast, the head injury criterion in the literature reflect that the minimum value for concussions is 250. There was thus insufficient force in the January 13, 2017 crash to cause a concussion.

38. Biomechanical Engineer John Smith also prepared a report and testified at the hearing in this matter. Mr. Smith explained that Mr. Leonard's calculations of force were inaccurate. Specifically, Mr. Leonard relied upon "Campbell's Equation" to calculate the amount of force. Campbell's Equation is only reliable if the crash involves a vehicle having a straight impact into an unmovable barrier. However, Campbell's Equation is invalid when involving two moving vehicles and/or a non-straight impact.

39. Mr. Smith also explained that there are five potential causes of head injury in a collision. The causes include: (1) translation of the head from side to side; (2) translation of the head from front to back, (3) rotation of the head from side to side; (4) rotation of the head from front to back, and (5) actual impact of the head with an object. He remarked that the studies establishing HIC criteria only consider impact of the head. Because the HIC criteria only measure values involving an impact of the head, Mr. Smith explained that the HIC calculation in the present case would be zero.

40. Claimant has demonstrated that it is more probably true than not that he suffered injuries to his head and cervical spine during the course and scope of his employment with Employer on January 13, 2017. Initially, on January 13, 2017 the rear of a loader struck Claimant's pickup truck while he was working at Employer's quarry. In his first visit to Concentra on January 17, 2017 Claimant reported pain between his shoulder blades and numbness to his arms. Claimant also noted worsening dizziness, headaches, memory issues, confusion and headache pain. By January 19, 2017 Claimant visited the St. Anthony's North Emergency Room. He reported worsening confusion, headaches, photophobia, neck pain, chest pain and abdominal pain. Claimant was admitted to the hospital for five days. During the St. Anthony North admission numerous providers examined Claimant, performed diagnostic tests and conducted studies to determine the underlying cause of his subjective complaints. Claimant was

ultimately diagnosed with post-concussive syndrome that included a significant functional component. He was subsequently also diagnosed with cervical radiculopathy and chronic bilateral lower back pain with sciatica as a result of the January 13, 2017 collision.

41. The persuasive medical records reflect that Claimant suffered both post-concussive syndrome and Functional Neurological Symptoms Disorder as a result of the crash. After his hospital discharge Claimant visited personal physician Dr. Combs for an evaluation. Dr. Combs concluded that Claimant suffered a kinetic injury to his brain at the time of the January 13, 2017 accident. He further determined that Claimant's symptoms were consistent with post-concussive syndrome including, significant functional overlay. The conditions were related to his January 13, 2017 work-related accident. Neuropsychologist Dr. Wicklund determined that the accident was sufficient to support the diagnosis of a concussion. However, she explained that Claimant's symptoms were discordant with the mechanism of injury. Dr. Wicklund concluded that, in addition to post-concussive syndrome, Claimant's symptoms were explained by other factors such as depression, anxiety and somatic response to injury. She remarked that it is impossible to parse out what symptoms were psychological in nature and from those associated with post-concussive syndrome. Neurologist Dr. Holden diagnosed Claimant with post-concussive syndrome and Functional Neurological Symptoms Disorder with mixed symptoms. She explained that Functional Neurological Symptoms Disorder has neurological symptoms that are not necessarily associated with a clear structural cause but are a dysfunction of the neurological system. Dr. Holden explained that symptoms associated with the Disorder will wax and wane. Although Claimant's symptoms were consistent with post-concussive syndrome Dr. Holden commented that he exhibited significant functional overlay. She noted that physical objective evidence is not available in the vast majority of mild traumatic brain injury cases. Finally, Dr. Holden explained that there is no way to separate or disentangle functional neurological symptoms from post-concussive syndrome.

42. In contrast, Dr. Zimmer explained that Claimant did not suffer a concussion as a result of the January 13, 2017 accident. He noted that Claimant was involved in a low velocity accident and did not lose consciousness. Dr. Zimmer reasoned that Claimant's presentation, especially during his five-day admission at St. Anthony North, constituted atypical features for post-concussive syndrome. Moreover, Accident Reconstructionist Mr. Leonard determined that Claimant had a HIC of around .1. He remarked that the literature reflected the minimum value for concussions was 250. There was thus insufficient force in the January 13, 2017 crash to cause a concussion. However, Mr. Smith explained that Mr. Leonard's calculations were incorrect. Moreover, the studies establishing HIC criteria only consider impact of the head but there are five potential causes of head injury in a collision. More importantly, Dr. Zimmer's opinion fails to account for the significant medical evidence reflecting that Claimant exhibited post-concussion symptoms as a result of the collision. Although the records reflect that Claimant's presentation involved a significant functional overlay, there is no way to separate functional neurological symptoms from post-concussive syndrome. Accordingly, Claimant suffered compensable head injuries while working for Employer on

January 13, 2017. The record also demonstrates that Claimant suffered cervical spine injuries as a result of the January 13, 2017 accident.

43. Claimant has established that it more probably true than not that his medical treatment was authorized, reasonable, necessary and causally related to his January 13, 2017 industrial injuries. Initially, Respondents authorized Claimant's care and treatment for his work injuries through Concentra and St. Anthony North Hospital. Because Respondents denied Claimant's claim on January 27, 2017 for non-medical reasons, he was permitted to seek treatment on his own for his continuing symptoms as a result of his work accident. Therefore, Claimant's care for his January 13, 2017 injuries with Dr. Combs, Dr. Wicklund, Panorama Orthopedics, Select Physical Therapy, the CU Balance Center, Dr. Murray and CU Anschutz was reasonable, necessary and related to the crash.

44. Claimant's symptoms have persisted and he has not reached Maximum Medical Improvement (MMI). Moreover, Claimant continues to suffer a myriad of post-concussive and neurological symptoms that warrant additional treatment. Dr. Holden persuasively suggested that Claimant's treatment for Functional Neurological Symptoms Disorder required an interdisciplinary team. She did not believe that Claimant required psychiatric treatment or had a psychiatric diagnosis. Dr. Holden recommended continued physical therapy, occupational therapy, speech therapy and treatment under her care. Accordingly, Claimant shall receive reasonable and necessary medical treatment for his symptoms that is designed to cure or relieve the effects of his January 13, 2017 industrial injuries.

45. Claimant has proven that is is more probably true than not that he is entitled to receive Temporary Total Disability (TTD) benefits for the periods January 19, 2017 through February 28, 2017 and May 27, 2018 until terminated by statute. The record reflects that Claimant has been unable to work since January 17, 2017. On January 17, 2017 Claimant was diagnosed with post-concussive syndrome. On the following day, Dr. Zuehlsdorf restricted Claimant from all work activities. Claimant continues to suffer symptoms and require medical treatment as a result of the January 13, 2017 crash. He is unable to perform his job duties and has not reached MMI. Claimant is entitled to an award of TTD benefits because his January 13, 2017 industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

46. Respondents have proven that it is more probably true than not that Claimant willfully failed to obey a safety rule on January 13, 2017 and his non-medical benefits should thus be reduced by fifty percent. Initially, Claimant drove his pickup truck to a stockpile to obtain testing samples. Mr. Milan followed Claimant in his loader from about 15 feet behind. Claimant intended to make a clockwise loop back to the east side of the stockpile next to the haul road. As Claimant turned away from the stockpile, he made eye contact with Mr. Milan. Mr. Milan was preparing to drive his loader into the stockpile to make the pad of quarry rock. Claimant did not make eye contact with Mr. Milan after he moved away from the front of the stockpile and pulled his truck behind the

loader. The rear of the loader collided with Claimant's pickup truck. Claimant's vehicle was in motion at the time of the accident.

47. Section 4.3.2.5 of Employer's Health and Safety Manual specifies "one of the things to be considered as part of this traffic control plan is controlled interaction with light vehicles and heavy mobile equipment by maintaining a prescribed minimum 25 yard separation distance." Employer published and disseminated its traffic policy to all employees. Claimant acknowledged that there were procedures to follow if light and heavy vehicles were within 75 feet of each other. Specifically, the drivers were required to make eye contact with each other or have radio communication.

48. By moving his pickup truck within 25 yards behind Mr. Milan's loader without making positive contact, Claimant violated Employer's reasonable safety rule. Specifically, after conducting an investigation and reviewing DriveCam video of the accident, Mr. Cheever concluded that it was apparent that Claimant had pulled within 25 yards behind the loader just before the collision without making any positive contact. Mr. Quist confirmed Mr. Cheever's findings after reviewing the DriveCam footage. He also noted that the distance between the back end of the loader and Claimant's truck while loading in the pile was approximately 40 feet. He commented that the distance between the loader's back end after leaving the pad area and turning to the left and Claimant's pickup truck was about 23 feet. Employer's SRRCC committee concluded that Claimant violated Employer's safety rules and policies by driving behind the loader within the proscribed distance without making positive contact. Under the SRRCP, Employer determined that Claimant's conduct constituted a Category 1 violation and terminated his employment. Claimant's activities demonstrate that he deliberately violated Employer's safety rule regarding maintaining a safe distance from heavy vehicles and failing to make positive contact on January 13, 2017. Accordingly, Claimant's actions constituted a willful failure to obey a reasonable safety rule adopted by Employer in violation of §8-42-112(1)(b) C.R.S. and warrant the reduction of his non-medical benefits by fifty percent.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered injuries to his head and cervical spine during the course and scope of his employment with Employer on January 13, 2017. Initially, on January 13, 2017 the rear of a loader struck Claimant's pickup truck while he was working at Employer's quarry. In his first visit to Concentra on January 17, 2017 Claimant reported pain between his

shoulder blades and numbness to his arms. Claimant also noted worsening dizziness, headaches, memory issues, confusion and headache pain. By January 19, 2017 Claimant visited the St. Anthony's North Emergency Room. He reported worsening confusion, headaches, photophobia, neck pain, chest pain and abdominal pain. Claimant was admitted to the hospital for five days. During the St. Anthony North admission numerous providers examined Claimant, performed diagnostic tests and conducted studies to determine the underlying cause of his subjective complaints. Claimant was ultimately diagnosed with post-concussive syndrome that included a significant functional component. He was subsequently also diagnosed with cervical radiculopathy and chronic bilateral lower back pain with sciatica as a result of the January 13, 2017 collision.

8. As found, the persuasive medical records reflect that Claimant suffered both post-concussive syndrome and Functional Neurological Symptoms Disorder as a result of the crash. After his hospital discharge Claimant visited personal physician Dr. Combs for an evaluation. Dr. Combs concluded that Claimant suffered a kinetic injury to his brain at the time of the January 13, 2017 accident. He further determined that Claimant's symptoms were consistent with post-concussive syndrome including, significant functional overlay. The conditions were related to his January 13, 2017 work-related accident. Neuropsychologist Dr. Wicklund determined that the accident was sufficient to support the diagnosis of a concussion. However, she explained that Claimant's symptoms were discordant with the mechanism of injury. Dr. Wicklund concluded that, in addition to post-concussive syndrome, Claimant's symptoms were explained by other factors such as depression, anxiety and somatic response to injury. She remarked that it is impossible to parse out what symptoms were psychological in nature and from those associated with post-concussive syndrome. Neurologist Dr. Holden diagnosed Claimant with post-concussive syndrome and Functional Neurological Symptoms Disorder with mixed symptoms. She explained that Functional Neurological Symptoms Disorder has neurological symptoms that are not necessarily associated with a clear structural cause but are a dysfunction of the neurological system. Dr. Holden explained that symptoms associated with the Disorder will wax and wane. Although Claimant's symptoms were consistent with post-concussive syndrome Dr. Holden commented that he exhibited significant functional overlay. She noted that physical objective evidence is not available in the vast majority of mild traumatic brain injury cases. Finally, Dr. Holden explained that there is no way to separate or disentangle functional neurological symptoms from post-concussive syndrome.

9. As found, in contrast, Dr. Zimmer explained that Claimant did not suffer a concussion as a result of the January 13, 2017 accident. He noted that Claimant was involved in a low velocity accident and did not lose consciousness. Dr. Zimmer reasoned that Claimant's presentation, especially during his five-day admission at St. Anthony North, constituted atypical features for post-concussive syndrome. Moreover, Accident Reconstructionist Mr. Leonard determined that Claimant had a HIC of around .1. He remarked that the literature reflected the minimum value for concussions was 250. There was thus insufficient force in the January 13, 2017 crash to cause a concussion. However, Mr. Smith explained that Mr. Leonard's calculations were incorrect. Moreover, the studies establishing HIC criteria only consider impact of the head but there are five potential causes of head injury in a collision. More importantly, Dr. Zimmer's opinion fails

to account for the significant medical evidence reflecting that Claimant exhibited post-concussion symptoms as a result of the collision. Although the records reflect that Claimant's presentation involved a significant functional overlay, there is no way to separate functional neurological symptoms from post-concussive syndrome. Accordingly, Claimant suffered compensable head injuries while working for Employer on January 13, 2017. The record also demonstrates that Claimant suffered cervical spine injuries as a result of the January 13, 2017 accident.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

11. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an Authorized Treating Physician (ATP) refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

12. As found, Claimant has established by a preponderance of the evidence that his medical treatment was authorized, reasonable, necessary and causally related to his January 13, 2017 industrial injuries. Initially, Respondents authorized Claimant's care and treatment for his work injuries through Concentra and St. Anthony North Hospital. Because Respondents denied Claimant's claim on January 27, 2017 for non-medical reasons, he was permitted to seek treatment on his own for his continuing symptoms as a result of his work accident. Therefore, Claimant's care for his January 13, 2017 injuries with Dr. Combs, Dr. Wicklund, Panorama Orthopedics, Select Physical Therapy, the CU Balance Center, Dr. Murray and CU Anschutz was reasonable, necessary and related to the crash.

13. As found, Claimant's symptoms have persisted and he has not reached Maximum Medical Improvement (MMI). Moreover, Claimant continues to suffer a myriad of post-concussive and neurological symptoms that warrant additional treatment. Dr. Holden persuasively suggested that Claimant's treatment for Functional Neurological Symptoms Disorder required an interdisciplinary team. She did not believe that Claimant required psychiatric treatment or had a psychiatric diagnosis. Dr. Holden recommended continued physical therapy, occupational therapy, speech therapy and treatment under her care. Accordingly, Claimant shall receive reasonable and necessary medical

treatment for his symptoms that is designed to cure or relieve the effects of his January 13, 2017 industrial injuries.

TTD Benefits

14. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

15. As found, Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule on January 13, 2017 and his non-medical benefits should thus be reduced by fifty percent. Initially, Claimant drove his pickup truck to a stockpile to obtain testing samples. Mr. Milan followed Claimant in his loader from about 15 feet behind. Claimant intended to make a clockwise loop back to the east side of the stockpile next to the haul road. As Claimant turned away from the stockpile, he made eye contact with Mr. Milan. Mr. Milan was preparing to drive his loader into the stockpile to make the pad of quarry rock. Claimant did not make eye contact with Mr. Milan after he moved away from the front of the stockpile and pulled his truck behind the loader. The rear of the loader collided with Claimant's pickup truck. Claimant's vehicle was in motion at the time of the accident.

Safety Rule Violation

16. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of

the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including "evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct." *Id.*

17. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez,* W.C. No. 4-561-352 (ICAP, Apr. 29, 2004). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

18. Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAP, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, § 35.04.

19. As found, Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule on January 13, 2017 and his non-medical benefits should thus be reduced by fifty percent. Initially, Claimant drove his pickup truck to a stockpile to obtain testing samples. Mr. Milan followed Claimant in his loader from about 15 feet behind. Claimant intended to make a clockwise loop back to the east side of the stockpile next to the haul road. As Claimant turned away from the stockpile, he made eye contact with Mr. Milan. Mr. Milan was preparing to drive his loader into the stockpile to make the pad of quarry rock. Claimant did not make eye contact with Mr. Milan after he moved away from the front of the stockpile and pulled his truck behind the loader. The rear of the loader collided with Claimant's pickup truck. Claimant's vehicle was in motion at the time of the accident.

20. As found, section 4.3.2.5 of Employer's Health and Safety Manual specifies "one of the things to be considered as part of this traffic control plan is controlled interaction with light vehicles and heavy mobile equipment by maintaining a prescribed minimum 25 yard separation distance." Employer published and disseminated its traffic policy to all employees. Claimant acknowledged that there were procedures to follow if light and heavy vehicles were within 75 feet of each other. Specifically, the drivers were required to make eye contact with each other or have radio communication.

21. As found, by moving his pickup truck within 25 yards behind Mr. Milan's loader without making positive contact, Claimant violated Employer's reasonable safety rule. Specifically, after conducting an investigation and reviewing DriveCam video of the accident, Mr. Cheever concluded that it was apparent that Claimant had pulled within 25 yards behind the loader just before the collision without making any positive contact. Mr. Quist confirmed Mr. Cheever's findings after reviewing the DriveCam footage. He also

noted that the distance between the back end of the loader and Claimant's truck while loading in the pile was approximately 40 feet. He commented that the distance between the loader's back end after leaving the pad area and turning to the left and Claimant's pickup truck was about 23 feet. Employer's SRRCC committee concluded that Claimant violated Employer's safety rules and policies by driving behind the loader within the proscribed distance without making positive contact. Under the SRRCP, Employer determined that Claimant's conduct constituted a Category 1 violation and terminated his employment. Claimant's activities demonstrate that he deliberately violated Employer's safety rule regarding maintaining a safe distance from heavy vehicles and failing to make positive contact on January 13, 2017. Accordingly, Claimant's actions constituted a willful failure to obey a reasonable safety rule adopted by Employer in violation of §8-42-112(1)(b) C.R.S. and warrant the reduction of his non-medical benefits by fifty percent.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. On January 13, 2017 Claimant suffered compensable head and cervical spine injuries while working for Employer. Claimant specifically suffered both post-concussive syndrome and Functional Neurological Symptoms Disorder as a result of the crash.

2. Respondents are financially responsible for all of Claimant's medical care through Concentra, North Suburban Medical Center and St. Anthony's North Hospital. Respondents are also liable for all of Claimant's medical treatment provided by Dr. Wicklund, Dr. Murray, Dr. Holden at CU Anschutz Medical Center, CU Balance Center, Select Physical Therapy, Panorama Orthopedics and CU Internal Medicine for dates of service between January 18, 2017 and February 16, 2018.

3. Claimant shall receive TTD benefits for the periods January 19, 2017 through February 28, 2017 and May 27, 2018 until terminated by statute.

4. Claimant committed a willful failure to obey a reasonable safety rule adopted by Employer in violation of §8-42-112(1)(b) C.R.S. Accordingly, his non-medical benefits shall be reduced by fifty percent.

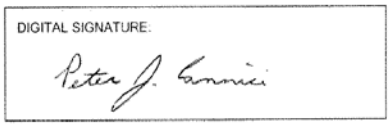
5. Claimant earned an AWW of $939.00.

6. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it

within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 3, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that the sacroiliac (SI) joint injection recommended by Dr. Kenneth Lewis is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 15, 2017 work injury.

- Whether the claimant has demonstrated by a preponderance of the evidence that the claimant's "base" average weekly wage (AWW) should be increased from $1,261.69 to $1,314.62.

- At hearing, the parties indicated their agreement that the claimant's AWW should be increased by $239.34 for COBRA related insurance coverage.

FINDINGS OF FACT

1. The claimant was employed by the employer in the oil and gas industry. The claimant suffered an admitted work injury on Wednesday, November 15, 2017. The injury occurred when the claimant was pulling hoses from a pond, slipped in the mud, and fell to the left and onto his back. The claimant testified that at the time of the fall he felt aching and throbbing pain in his low back on the left side. The claimant continued his job duties on November 15, 2017, despite continued pain in his back. The claimant notified the employer of his slip and fall the following day, November 16, 2017. The employer referred the claimant for medical treatment with Work Partners.

2. On November 20, 2017, the claimant first treated at Work Partners and was seen by Dr. Lori Fay. The claimant testified that he did not pursue treatment until that date because he hoped that his pain would resolve over the weekend. On November 20, 2017, Dr. Fay noted that the claimant was complaining of pain in his low back that was accompanied by numbness on his left side.

3. On December 6, 2017, the respondents filed a General Admission of Liability (GAL). In the GAL, the respondents admitted for medical benefits, temporary total disability (TTD) benefits, and an average weekly wage (AWW) of $1,261.69.

4. During this claim, the claimant consistently completed pain diagrams in which he indicated pain in his left low back. Dr. Fay has referred the claimant for various modes of treatment. This treatment had included physical therapy, chiropractic treatment, dry needling, acupuncture, use of a TENS unit, and pain medications (including gabapentin). The claimant testified that physical therapy did not improve his symptoms and chiropractic treatment made his symptoms worse.

5. On January 10, 2018, a magnetic resonance image (MRI) was taken of the claimant's lumbar spine. The MRI showed mild degenerative disc and facet changes from the L3 level through the S1 level. The radiologist noted there was no spinal stenosis or neural foraminal narrowing at any level.

6. On February 7, 2018, Dr. Fay referred the claimant to Dr. Kenneth Lewis with Western Rockies Interventional Pain Specialists. The claimant as first seen in Dr. Lewis' practice on February 22, 2018. At that time, the claimant was seen by Daniel Meyer, PA-C. Mr. Meyer noted that the claimant had complaints of a dully achy pain in his left posterior flank in the muscles adjacent to his lumbar spine. The claimant also reported numbness in his muscles. On examination, Mr. Meyer noted that the claimant was tender to palpation over the left sacroiliac (SI) joint and the corresponding piriformis muscle. Mr. Meyer also noted that the claimant demonstrated positive responses to left sided FABER, Gaenslen, and distraction/gapping maneuvers, which are indicators for SI joint pain. Mr. Meyer recommended that the claimant undergo medical branch block (MBB) injections at the L3 through S1 levels on the left side. He also opined that a left sided SI joint injection could be considered.

7. The medial branch block injections were initially denied by the respondents. However, authorization was ultimately provided and on June 6, 2018, Dr. Lewis examined the claimant and agreed with the injections recommended by Mr. Meyer. On that same date, Dr. Lewis administered left sided MBB injections from the L2 level through the L5 level.

8. On June 29, 2018, the claimant returned to Mr. Meyer and reported that the June 6, 2018 injections did not provide any relief of his symptoms. At that time, Mr. Meyer noted that the claimant continued to have low back pain at the level of his SI joint and below. Mr. Meyer again assessed the claimant's response to provocative maneuvers for SI joint dysfunction and noted the claimant demonstrated positive responses. Mr. Meyer opined that the claimant's primary source of pain was his SI joint and recommended an SI joint injection.

9. Dr. Lewis testified that February 22, 2018 Mr. Meyer followed the necessary protocol in examining the claimant and making recommendations for treatment, including injections. Dr. Lewis also testified that he has trained all of his PAs in the process he wants them to follow in examining patients. Ultimately, Dr. Lewis will make the final determination regarding what specific treatments he will administer. Dr. Lewis testified that the MBB injections that he administered on June 6, 2018 were unsuccessful. This leads Dr. Lewis to the conclusion that the claimant's pain generator is likely his SI joint. Therefore, Dr. Lewis continues to recommend an SI joint injection. Dr. Lewis described this injection as the "gold standard" for diagnosing SI joint pain.

10. At the request of the respondents, the claimant attended an independent medical examination (IME) with Dr. Allison Fall on August 22, 2018. In connection with the IME, Dr. Fall reviewed the claimant's medical records, obtained a history from the claimant and competed a physical examination. In her IME report, Dr. Fall opined that the recommended SI joint injection is not medically reasonable, necessary, or related to the claimant's work injury because the location of the claimant's pain is not consistent with the SI joint. In addition, Dr. Fall noted that during her examination of the claimant she was unable to complete a FABER maneuver. Dr. Fall agrees that claimant should undergo additional medical treatment, but not the treatment recommended by Dr. Lewis. Instead, Dr. Fall recommends additional physical therapy, increasing gabapentin, and trigger point injections. Dr. Fall's testimony at hearing was consistent with her written report.

11. The ALJ credits the claimant's testimony, the medical records, and the opinions of Dr. Lewis over the conflicting opinions of Dr. Fall. As a result, the ALJ finds that the claimant has demonstrated that it is more likely than not that the recommended SI joint injection is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury.

12. The claimant testified that while working for the employer, he worked fewer hours in the winter months because of the weather. The claimant asserts that his AWW should be calculated using his wages for the 16.43 weeks immediately prior to his injury. This amount is $21,599.24, which results in an average of $1,314.62 per week.

13. Payroll records entered into evidence indicate that the claimant earned $65,607.65 during the 52-week period of October 30, 2016 through October 28, 2017. When this total is divided by 52 weeks it results in an average of $1,261.69 per week.

14. The ALJ credits the payroll records reflecting the claimant's wages for the entire 52-week period prior to the claimant's work injury. Therefore, the ALJ finds that the appropriate calculation of the claimant's AWW is the amount previously admitted by the respondents of $1,261.69. The claimant has failed to demonstrate it is more likely than not that his AWW should be recalculated.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008).

4. As found, the claimant has demonstrated by a preponderance of the evidence that the SI joint injection recommended by Dr. Lewis is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the claimant's testimony, the medical records, and the opinions of Dr. Lewis are credible and persuasive.

5. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

6. As found, the claimant has failed to demonstrate by a preponderance of the evidence that his AWW should be recalculated. As found, the AWW of $1,261.69 (which is calculated by averaging an entire 52-week period) is the most accurate calculation of the claimant's AWW. As found, the payroll records are credible and persuasive.

ORDER

It is therefore ordered:

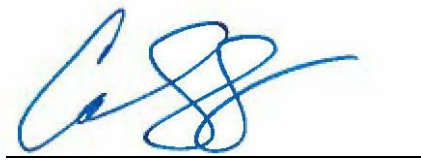
1. The respondents shall pay for the sacroiliac (SI) joint injection recommended by Dr. Lewis, pursuant to the Colorado Medical Fee Schedule.

2. The claimant's "base" average weekly wage (AWW) is $1,261.69.

3. The ALJ adopts the stipulation of the parties and $239.34 shall be added to the claimant's AWW for a **total** AWW of $1501.03.

4. All matters not determined here are reserved for future determination.

Dated December 3, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUE

Whether Claimant established by a preponderance of the evidence that he suffered a work related injury arising out of and in the course and scope of his employment while playing bubble soccer on March 18, 2018.

FINDINGS OF FACT

1. Employer operates Lutheran Medical Center, located at 8300 West 38th Avenue, Wheat Ridge, Colorado.

2. Claimant was hired as Director of Emergency and Trauma Services for Lutheran Medical Center on June 20, 2016. Claimant remained in that position through his date of injury. Claimant's office is located at Lutheran Medical Center. His customary office hours were Monday through Friday from 6:00 a.m. to 3:00 or 4:00 p.m.

3. Claimant's job duties as Director of Emergency and Trauma Services are described in Employer's "Clinical Director" job description form. Claimant's duties included "Building Team Spirit" among his 150 subordinates. His duties did not preclude him from organizing and attending recreational events away from Lutheran Medical Center, outside of work hours in the name of building team spirit.

4. Claimant and his management team organized a March 18, 2018, bubble soccer event for emergency department employees, their families and significant others. Bubble soccer is a recreational activity where people play soccer while wearing an inflated plastic bubble. The sole purpose was to have fun and boost morale.

5. The 150 emergency department employees under Claimant's supervision were invited to attend bubble soccer. Of the employees invited to attend, 18 employees actually attended bubble soccer.

6. Claimant's supervisor is the Chief Nursing Officer, Andrea Burch. Ms. Burch was invited to attend the bubble soccer event, but she chose not to attend without negative employment consequence. Claimant's management team included his clinical manager, his manager of coding and compliance, his trauma coordinator, his emergency department educator, and eight or nine charge nurses. Claimant's management team could choose not to attend bubble soccer, with no negative employment consequence.

7. Claimant would not have been punished for not attending the bubble soccer event. Claimant felt he should be there because he arranged it, had it authorized and paid for. Claimant did not have to attend every extracurricular event held in his department. The event was not mandatory for management.

8. Attendance and participation at the bubble soccer event was also not mandatory for non-management employees. No activities benefiting employer within the course and scope of the employees of the emergency and trauma services was conducted at the bubble soccer event, and no meetings were held. The event was to start at 2:00 p.m. on a Sunday afternoon. Employees could come late or leave early. No attendance was taken. Employees were not paid to attend the event. The employees who attended the event received no monetary or employment related benefit for attending, and those employees who chose not to attend were not penalized.

9. Employees were welcome to attend the bubble soccer event and participate in playing soccer, or attend the event and watch others play. Family members and significant others were invited, and Claimant brought his own teenage children. No one who attended was required to play soccer. Claimant's assistant attended but did not play soccer. Claimant was free to observe the event, he did not have to play soccer, but he voluntarily chose to play soccer.

10. On Sunday, March 18, 2018, Claimant fractured his right ankle while playing bubble soccer event Another player hit Claimant from behind causing him to forward somersault, and as he did, he rolled over his right ankle. Claimant's right ankle was his only injured body part. Claimant's bubble soccer injury occurred outside of his regular work hours, and off Employer's premises.

11. Following his bubble soccer injury, Claimant was taken to Lutheran Medical Center where he was ultimately diagnosed as sustaining a closed displaced fracture of the medial malleolus of his right tibia. On March 27, 2018, Claimant underwent right ankle surgery.

12. On April 2, 2018, Claimant was evaluated by William Woo, M.D. Claimant provided a detailed history of the bubble soccer event, and his injury. Importantly, Claimant told Dr. Woo that there was no specific agenda for the bubble soccer activity, and "[n]one of the participants were paid for this activity and none of the participants were required to attend."

13. On April 9, 2018, Insurer filed a Notice of Contest denying the claim as not work-related. On July 16, 2018, Claimant applied for hearing on compensability. On August 15, 2018, Respondents filed a Response to Application for Hearing, noting that Claimant was injured while participating in a voluntary recreational activity.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-201, C.R.S. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. Section 8-43-301(1), C.R.S.

2. The claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with the employer. Section 8-41-301(1)(b) and (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638

(Colo. 1991). The arising out of element is narrower and requires the claimant to show a causal connection between the employment and the injury such that the injury had its origins in the employee's work related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair, supra.*

4. In rendering a decision, the ALJ must make credibility determinations, draw plausible inferences from the record, and resolve essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office,* 84 P.3d 1023 (Colo. 2004). In determining credibility, the ALJ considers the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. Colorado Jury Instructions, Civil, 3:16.

Compensability/Voluntary Recreational Activities

5. By statute, the term "employment" specifically excludes a claimant's "participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." Section 8- 40-201(8), C.R.S. A person "participating in recreational activity, who at such time is relieved of and is not performing any duties of employment; is similarly excluded from the definition of an "employee." Section 8-40-301(1), C.R.S.

6. Accidents which occur while a claimant is engaged in voluntary and recreational activities are not compensable. *White v. ICAO*, 8 P.3d 621 (Colo. App. July 20, 2000). The determination of whether the activity was "recreational" and whether the claimant's participation was "voluntary" are questions of fact for the ALJ. *Id.; see also Dover Elevator Co. v. ICAO,* 961 P.2d 1141 (Colo.App. 1998).

7. The Colorado Supreme Court determined that the following factors should be considered in determining whether an activity is recreational in nature: (1) whether the injury occurred during working hours; (2) whether the injury occurred on the employer's premises; (3) whether the employer initiated the employee's exercise; (4) whether the employer exerted control over the employee's exercise; and (5) whether the employer stood to benefit from the employee's exercise*. Price v. ICAO,* 919 P.2d 207 (Colo. 1996) Here, as found, Claimant was injured while participating in a voluntary recreational activity when he fractured his ankle on Sunday, March 18, 2018, while playing bubble soccer.

8. The persuasive evidence includes that bubble soccer in this case was strictly a recreational activity that had no relation to Lutheran Medical Center's normal hospital business. The bubble soccer event occurred off of Employer's premises and outside of Claimant's normal working hours. There was insufficient evidence to support that Employer stood to benefit from Claimant playing bubble soccer, or that Employer exerted control over Claimant playing bubble soccer. Claimant's job duties as Director of Emergency and Trauma Services do not include playing bubble soccer. As such, bubble soccer was a recreational activity.

9. The persuasive evidence also confirms that Claimant's participation in bubble soccer on March 18, 2018, was voluntary. As found, the purpose of the event was to have fun and boost morale, the event was not mandatory, only 18 of an approximate 150 employees attended the event, non-employees were invited to attend and participate, attendance was not taken, no employee was compensated to attend the event, no employee was provided any specific employment benefit from participating in the event, no employee was reprimanded or penalized for not attending the event, no business was conducted during the event, and an employee could choose to attend the event and not play bubble soccer.

10. The event was not mandatory for any employees or management personnel. Claimant's own supervisor, Andrea Burch, who had ultimate responsibility over the emergency department, was invited to attend and elected not to attend without any consequence. At least two management level employee's under Claimant's supervision were invited to attend and elected not to attend, without consequence. Claimant was not directed to attend by anyone other than himself. Claimant felt he should attend because he and his team organized the event. This fact does not deem his attendance at the event as mandatory. Before obtaining counsel, Claimant told Dr. Woo that no one was required to attend. At hearing, Claimant specifically admitted that he could have elected to not attend the bubble soccer without any consequence to his job.

11. Furthermore, even if Claimant felt his attendance at the bubble soccer event was required due to his role as a manager and in setting the event up, his decision to actually play bubble soccer while attending the event was voluntary. It cannot be reasonably inferred that Claimant's participation in bubble soccer was implicitly or explicitly required.

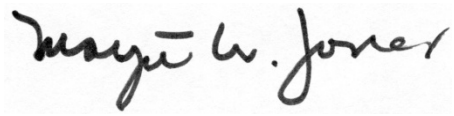
12. In an instructive voluntary recreational activity case, the Colorado Court of Appeals held that an accident occurring during a recreational event was not compensable even though the event was planned during company time and the employer paid for part of the event, where the claimant's participation in the event was voluntary, the event was held off of the employer's premises, and the only benefit to the employer was improvement of employee morale or achievement of goodwill between the employer and the employee. *See Wilson v. Scientific Software-Intercomp*, 738 P.2d 400 (Colo.App. 1987). That is precisely the circumstances in the case at hand. Claimant's injury occurred during a voluntary recreational activity, and his claim is denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge should enter the following order:

Claimant has failed to establish by a preponderance of the evidence that he sustained injuries arising out of and in the course and scope of his employment on March 18, 2018, while playing bubble soccer. Claimant's injury occurred during a voluntary recreational activity. Claimant's claim for workers' compensation benefits is therefore denied and dismissed.

This 3rd day of December, 2018.



Margot W. Jones

Administrative Law Judge

Office of Administrative Court

1525 Sherman Street, 4th Floor

Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-993-719

ISSUES

- Claimant seeks daily penalties pursuant to § 8-43-304 and § 8-43-305 for the Respondents' alleged violation of § 8-42-105 and § 8-42-106 and WCRP 5-6 for allegedly not paying temporary partial disability and temporary total disability benefits in the proper amounts starting on June 16, 2018 "and continuing."

- Respondents' defenses were § 8-42-304(4), C.R.S. (cure), application for hearing filed July 8, 2018, General Admissions of Liability filed July 12 and July 19, 2018 and benefits paid contemporaneously therewith.

Based upon the evidence received at hearing, the ALJ enters the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Claimant was injured on August 22, 2015 in the course and scope of his employment for Bridgestone Firestone.

2. Undersigned previously heard this case on November 15, 2017. Issues raised at that hearing was average weekly wage and whether Respondents owed Claimant any back TPD.

3. On January 29, 2018, a clerk in the Office of Administrative Courts mailed the Findings of Fact, Conclusions of Law and Order from the November 15, 2017 hearing to counsel for Claimant, former counsel for Respondents, and the Division of Workers' Compensation. A copy was not mailed to Respondent-Employer or Respondent-Insurer.

4. Summer Rainey is the adjuster on the case. Ms. Rainey testified she became the adjuster in 2016. Ms. Rainey testified she did not calculate the original AWW.

5. Ms. Rainey testified although normally her counsel supplies her with orders by ALJs; in this case her former counsel did not timely provide her with, nor did she receive a copy of the January 25, 2018 Findings of Fact, Conclusions of Law and Order until approximately May 9, 2018 when she filed the GAL. Ms. Rainey testified she was unaware an appeal had been filed. Ms. Rainey testified that when she filed the May 9, 2018 GAL she made payments.

6. The Order found Claimant's average weekly wage is $508.31. The Order found Claimant is entitled to benefits based on his average weekly wage of $508.31 for the period of time he was entitled to temporary partial disability benefits. Review of the Order does not establish a specific time for provision of temporary partial disability benefits other than noting Claimant was on an hourly restriction "April of 2016" through September 26, 2017.

7. Counsel for Claimant filed a Petition to Review. The Industrial Claims Appeals Office issued their Final Order on May 25, 2018. It mailed a copy of the final order to counsel for Claimant and former counsel for Respondents. The Office did not mail a copy to Employer or Insurer. Ms. Rainey testified her former counsel did not provide her with a copy of this Final Order, and she did not receive a copy until after she retained new counsel.

8. Review of the Final Order establishes ICAP increased Claimant's average weekly wage from the $508.31 to $525.92. Review of the ICAP Order does not establish any more detail with regard to the temporary partial disability benefit issue.

9. Prior to ICAP issuing its Order, on May 9, 2018 the adjuster filed a General Admission of Liability whereby she admitted to the average weekly wage as ordered by the January 25, 2018 order and retroactively paid temporary partial disability benefits from April 1, 2016 through September 18, 2017 at the temporary partial disability benefit rate of $19.66. Insurer sent Claimant a check for $1,505.87. Insurer had already paid Claimant $15,114.19 in PPD for dates January 6, 2016 through November 13, 2016. This time covered the period from April 1, 2016 through November 13, 2016.

10. On July 8, 2018, Claimant's counsel filed a new application for hearing alleging penalties. Claimant's counsel sent a copy to Respondents' former counsel but not to the adjuster. Ms. Rainey testified upon receipt of the new application for hearing, Insurer transferred the file to Respondents' new counsel. Ms. Rainey testified she reviewed the new application with new counsel and she timely filed an Amended General Admission of Liability on July 12, 2018. The Amended GAL reflected Insurer's admission to the average weekly wage as ordered by ICAP of $525.92 and payment of an additional amount in temporary partial disability benefits. The adjuster also increased Claimant's temporary total disability benefits to $350.61 per week retroactive to September 19, 2017 based upon the ICAP Order.

11. Ms. Rainey testified that on July 19, 2018, once additional wage information became available, Insurer filed a third General Admission of Liability whereby Claimant's temporary partial disability benefit rate was increased to $85.37 reflecting a total temporary partial disability benefit of $6,536.97. Insurer sent payment of that amount to Claimant.

12. Ms. Rainey testified had her former attorney provided her with the January 25, 2018 order prior to May 9, 2018, she would have made the appropriate filings and paid any amount appropriate amount due. Ms. Rainey testified if she had been provided with the May 25, 2018 ICAP order prior to July 12, 2018, she would have filed an admission and paid any amount due. Ms. Rainey testified if she had been provided with the additional information regarding hours on July 12 she would have admitted to and paid the TPD based on that information at that time.

13. The ALJ finds Ms. Rainey's testimony to be credible and persuasive.

14. The award of a penalty is not a matter of strict liability. When construing the assessment of penalties pursuant to section 8-43-304 an element of fault must be involved. Fault requires the application of a negligence standard measured by an objective standard of whether a reasonable insurer would or would not have taken a particular action under the circumstances.

15. The ALJ specifically finds the adjuster's actions in this case not "negligent." Based upon the lack of documentation provided to the adjuster a reasonable insurer would have taken the "actions" which occurred in this case.

16. Upon receipt of the specific Findings of Fact, Conclusions of Law and Order the adjuster filed the General Admission of Liability increasing the average weekly wage from the admitted average weekly wage of $507.07 to $508.31 and paid TPD benefits, which, in part, coincided with the time Insurer had paid PPD to Claimant. Upon receipt of the ICAP Order, the adjuster increased the average weekly wage from $508.31 to $525.92, again sending Claimant the requisite temporary partial disability benefit check increasing its prior payment of PPD benefits. When the adjuster received additional documentation, she filed a third General Admission of Liability and sent Claimant additional temporary partial disability benefits again increasing the amount of previously paid PPD benefits.

17. Neither party appealed the January 25, 2018 order, thus the order did not become final for purposes of imposition of liability and a duty to act by the adjuster until that order became final. The ICAP order dated May 25, 2018 became final when no party timely appealed to the Court of Appeals. Thus, for purposes of imposition of liability and a duty to act, the date began 30 days after May 25, 2018 -- on Monday June 25, 2018.

18. The ALJ finds the adjuster admitted pursuant to the ICAP order on July 12, 2018; 17 days after all appeals had been exhausted and paid the benefits based on the adjusted AWW.

19. The ALJ finds the adjuster did not know of the January 25, 2018 order until May 9, 2018 and acted promptly upon receipt. The ALJ also finds the adjuster was unaware of the May 25, 2018 ICAP order until she retained new counsel, and acted promptly upon receipt.

20. The ALJ finds the adjuster acted as a reasonable adjuster would have in similar circumstances.

21. The ALJ finds the adjuster's second and third GALs and payment of additional TPD occurred more than 30 days after all appeals had been exhausted. As such, the ALJ finds Respondents technically violated the rule and statute. However, Respondent's cured the technical violation within four to eleven days of Claimant's counsel filing its application for hearing alleging penalties, Claimant's burden of proof rose to the level of proving by clear and convincing evidence the adjuster knew or reasonably should have known she was in violation of the rule, statute and/or an ALJ's/ICAP order.

22. The ALJ finds Claimant did not establish by clear and convincing evidence the adjuster knew or reasonable should have known she was in violation because her former counsel did not provide her with a copy of the ICAP order. The ALJ finds it is not possible for an adjuster to take action when no information provided alerts the adjuster that a situation existed which required action. Therefore, no penalty is due or owed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

An Order of an ALJ is an "order made by the Director …" *Giddings v. ICAO*, 39 P.3d 1211 (Colo. App. 2001). The imposition of a penalty under § 8-43-304(1) is

governed by an objective standard of negligence. As such, it is measured by the reasonableness of the insurer's actions and does not require knowledge that the conduct was unreasonable or in bad faith. Thus, penalties may be assessed against an insurer neglecting to take action that a reasonable insurer would take to comply with either a lawful order or provision of the Workers' Compensation Act. *Pueblo School District v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Section 8-43-304(4) provides that if the violator cures the violation within 20 days of a request for the assessment of a penalty, the party requesting a penalty must establish by clear and convincing evidence the violator reasonably should have known they were in violation.

The ALJ concludes the July 12, 2018 General Admission was not filed within 30 days from the date the May 25, 2018 ICAP Final Order became final.

The ALJ concludes as a matter of law Claimant requested penalties on July 8, 2018, and as a matter of law the "violator" cured the violation within 20 days of the request for the assessment of a penalty.

The ALJ concludes as a matter of law the party requesting the penalty did not establish by clear and convincing evidence the violator reasonably should have known they were in violation. The ALJ concludes as a matter of law the "violator" in this case was not provided with a copy of the ICAP Final Order upon which a General Admission was predicated by either ICAP, Claimant's counsel or prior Respondents' counsel within 30 days from the Final Order becoming final: a condition precedent to being able to file the General Admission. Insurer paid the TPD owed based upon the January 25, 2018 Order initially on May 9 and then subsequently on July 12, and finally July 19.

No persuasive evidences supports a finding of malevolence or negligence on Respondents' part. Thus, any penalty assessed in this case would not serve to deter any future misconduct because the "misconduct" was not due to anything committed by the adjuster. Rather, Respondents' former counsel failed to provide Respondents with the specific Findings of Fact, Conclusions of Law and Order and the Final Order such that she could provide her General Admissions. Once Insurer received the Final Order, she filed admissions and paid benefits. Additionally, Claimant had already received PPD for part of the time in question.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for penalties is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

DATED: December 4, 2018

/s/ Kimberly Turnbow
Kimberly B. Turnbow,
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Have Respondents overcome, by clear and convincing evidence, the DIME opinion of Dr. Hall on the issue of causation and MMI for Claimant's right foot and cervical region?

II. Have Respondents shown, by a preponderance of the evidence, that Claimant was responsible for his own termination, thus permitting Respondents to withdraw their Admission of Liability for TTD benefits?

III. Has Claimant shown, by a preponderance of the evidence, that he should be reimbursed for the right ankle surgery performed by Dr. Maurer, and further treatment moving forward?

IV. Disfigurement for injuries to Claimant's right eyebrow and left chest area.

STIPULATION

Both parties agreed at hearing that Claimant's Average Weekly Wage is $893.83. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Injury

1. Claimant was hired on May 13, 2016, by Employer, a landscaping company with an estimated 15 to 20 employees. (Ex. A, pg. 1). Claimant was a heavy equipment operator and by all accounts, a good employee.

2. On December 22, 2016, Claimant was in the office on an extension ladder, working on ceiling tiles. His feet were approximately 6 foot off the floor; hence his head was approximately 11 to 12 foot above floor level. His co-worker Gloria Byers ("Byers") was on the floor holding the ladder. According to Claimant, Byers had dust in her eye and stepped away from the ladder, causing it to fall. According to Employer, Claimant did not adjust the ladder correctly as he was required to do. (Ex. AA, pg. 630-632). Regardless of any fault, this is an admitted work injury, with no safety rule violation alleged.

3. Byers was the only person physically present when Claimant fell. The details of what occurred is in conflict; nonetheless, Claimant "rode" the ladder quickly

down to the uncarpeted floor. After a few seconds, Claimant attempted to get up from the ground but Byers told him to stay down. Claimant did not lose consciousness. Laura Matthews, Employer General Manager and Mike Anders, Safety-Director and Claimant's supervisor, heard the crash of the ladder from the office and ran to the scene, arriving within seconds of the fall.

4. Matthews and Anders both testified that when they arrived at the scene, Claimant was standing up, holding a paper towel above his eye brow which had a cut and was bleeding. According to Anders, he asked Claimant if he was okay, and Claimant said yes. Claimant allegedly stated he did not want medical care and he had sustained much greater injuries from MMA fighting. According to Claimant's testimony, he does not recall the fall or what happened after the fall or the drive home the day of the fall.

5. Both Byers and Matthews testified that before the injury, Claimant came to work with facial and other bruises. Claimant indicated he was bruised from an MMA fight he had participated in. According to Byers, she and Claimant were friendly. Claimant freely discussed his MMA fighting with Byers, with him discussing several MMA fights he had competed in. According to Matthews' testimony, she does not really know what MMA fighting is. Claimant testified that he never told Matthews or Byers that he was an MMA fighter and that he was present for both of their testimony and both Matthews and Byers were lying.

6. Prior to his employment with Employer, Anders worked for 30 years at CDOT as the Maintenance Superintendent and Property Manager, managing workers' compensation claims. He also worked as an Emergency Medical Technician (EMT) and a voluntary fire fighter. While he is not a medical expert, Anders testified that he had sufficient experience to recognize if Claimant's injuries were emergent or if Claimant had been lying on the ground unconscious, Anders would have immediately called 911.

7. Both Anders and Matthews testified that they discussed and agreed that Clamant should be seen for medical care even though he declined treatment at the time. According to Anders, he went to get his truck and pick up Claimant to take him to CCOM, which is an Employer designated medical provider. Claimant began walking towards the truck and opened the door and then told Anders he would be right back. Claimant was gone a short time and came back with either his cell phone or his back pack which had been in the office. During the 10 to 15-minute drive to the doctor, Anders testified he and Claimant engaged in mundane conversation. According to Anders, Claimant was responsive and did not exhibit any signs of a head injury or cognitive issues. Claimant was not stuttering, or confused, or in a 'fog'.

Medical Treatment with ATP Dr. Centi and Foot Surgeon Dr. Simpson

8. Claimant entered into evidence photographs of the cut above his right eyebrow, apparently before he had stitches to close the wound. He also displayed a bruise to his left chest marked as photos taken on December 22, 2016, the date of injury. (Ex. 22, pg. 344 and Ex. 23, pg. 345)

9. Claimant completed paperwork and was seen by Steven Byrne, PA to Dr. Thomas Centi. Anders did not go into the exam room with Claimant. Under 'patient description' of the accident, PA Byers wrote: "[patient] states the [ladder] he was working on slipped causing him to twist his ankle and hit his head on the ladder rung." Claimant's primary concern at this time was the left eyebrow laceration. He was negative for headaches. (Ex. P, pg. 216)

10. On physical examination, Claimant was alert and oriented and there was no loss of consciousness. There was some mild swelling noted over the right ankle. An X-ray revealed no acute fracture, significant osteoarthritic changes, and old fractures that healed. Claimant was given 9 stitches in his eyebrow, and told to go home and rest and to "[w]atch for signs and symptoms of head injury and if these occur to respond to the emergency room department." (Id. at 217) PA Byers released Claimant to regular work duties the following day if he did not have any complications. There were no complaints of chest injury and no exam of the chest was done. (Id. at 218)

11. Anders then drove Claimant the 10 to 15-minute drive back to Employer's office, where Anders and Claimant again engaged in conversation until Claimant got into his truck at the office and drove home. At no time during the drive to or from the physician's office did Claimant show any signs of being fuzzy or forgetful, or complain of headaches. Nor did he display any signs of a traumatic brain injury, head injury, or memory loss to Anders, except for the cut above his eye.

12. Claimant returned to work the following day with no restrictions. He filled out and signed an "Employee Incident Form" in his own handwriting. He stated that he fell approximately 6 to 8 feet from an extension ladder. When asked to indicate any injuries on the pain diagram, Claimant stated "10 stitches to the left upper orbital, ankle injury to right side left upper chest." Claimant also marked on the body diagram his left eyebrow, right ankle and left chest to indicate his injuries. Claimant made no marks to indicate injury to his head or neck. (Ex. AA, p. 643)

13. Claimant worked the full day on December 23, 2016, working on inside improvements and loading trucks. (Ex. AA, pp. 676-677; Ex. BB, p. 696). On December 26, 2016, Claimant told Matthews he was going to go to Salida, and ski Monarch for New Years. According to Matthews, Claimant indicated that he could probably snowboard because a snowboard boot is enough support. Matthews advised Clamant

against trying to snowboard because he could cause further injury to his foot. (Ex. BB, p. 696)

14. On December 29, 2016, Claimant saw Dr. Centi for left chest pain, to have his stitches removed from the left eyebrow and right ankle pain and swelling. Claimant was again negative for headaches, and his neurological exam was normal. There were no abrasions or bruising noted to be on Claimant's face. There was no abrasion, swelling, erythema or rash present on Claimant's chest although Dr. Centi documented "*moderate ecchymosis"* to the left anterior chest wall with noted tenderness." (Ex. P, pp. 220 - 221) Dr. Centi restricted Claimant to modified duty, with restrictions of sitting 50% of the time, no climbing ladders or scaffolds, no lifting/carrying greater than 10 pounds and no pushing/pulling greater than 10 pounds. (Id. at 221)

15. On December 31, 2016, Claimant posted a photo of himself and another person on Facebook with a caption that reads: "Having fun in Salida with my wife brother sister in law and family I wish I could ski tomorrow but had an ankle injury dammit." (Ex. BB, p. 697)

16. By January 5, 2017, Dr. Centi reported that Claimant's eyebrow and face were doing "fine" and the chest wall was somewhat tender. Dr. Centi documented that the right ankle hurts and Claimant: "says that it seems to be constant. It is improved with medications. He feels it is improving slightly, ankle is the most problematic body part now." Claimant was negative for headaches. (Ex. P, p. 222) On exam, bruising was not present on the right ankle, but Dr. Centi documented decreased range of motion with dorsiflexion and plantar flexion and pain with inversion. There was no bruising or swelling to the face and the face wound was documented as healed. To the chest, Dr. Centi documented that bruising and erythema were not present but that to the chest wall claimant had "*mild ecchymosis and resolving, mildly tender anterior chest wall.*" (Ex. P, p. 223).

17. On January 12, 2017, Dr. Centi reported Claimant's primary problem was the right ankle and chest wall. Claimant was negative for headaches. (Ex. P, p. 224) There was no bruising to the face or chest but for the right ankle, "moderate edema, *resolving ecchymosis",* tenderness and loss of ROM were present. (Id. at 225). Dr. Centi referred Clamant for a right ankle MRI.

18. On January 19, 2017, Claimant had moderate right ankle pain, and the ankle was still swollen. Claimant was negative for headaches. Dr. Centi again noted that Claimant's ankle MRI was scheduled for January 24, 2017. Dr. Centi anticipated MMI on February 9, 2017.

19. On January 26, 2017, Dr. Centi reported Claimant's right ankle pain complaints as some progress with PT, but Claimant still had pain and bruising and the pain was often worse at the end of the work week. Claimant felt the ankle was

improving slightly. Claimant was negative for headaches and that Claimant "appeared to be healthy." Dr. Centi reported that the MRI showed an occult fracture to the ankle and he made an orthopedic referral to Alex Simpson, M.D. (Ex. P, pp. 235-236)

20. On February 3, 2017, Claimant was seen by Dr. Simpson, who documented that Claimant stated he injured his right ladder falling off a ladder 12/22/16. Clamant "states he is having minor pain today." (Ex. Q p. 243) Dr. Simpson documented that Claimant was having no back, chest or arm pain and that claimant reported "*no loss of consciousness* no weakness no numbness no seizures and *no headaches.* He reports no depression no sleep disturbances feeling safe in relationships . . .". As to psychiatric, Dr. Simpson documented*: "oriented to time and place and person Mood and Affect normal mood and affect and active and alert*." (Id. at 244) (emphasis added).

The 'Boot Incident'

21. During the February 3rd visit, Dr. Simpson ruled out ankle surgery; instead he noted:

This will just take time to feel better. I would recommend an ankle boot to allow the ankle to rest while he weightbears. *I would ask that his job accommodate his working with the boot on.* I would anticipate the boot be worn for six weeks. At that point we can transition to a lace up ankle brace plus or minus physical therapy. ***He does understand and agree.*** We will reach out to his Workers Comp team and let them know. (Ex. Q, pg. 245) (emphasis added).

22. Claimant, according to Matthews, called her from his cell phone on February 3, 2017 and told her that Dr. Simpson told him he was not to return to work for 6 weeks because Dr. Centi wanted Claimant's foot to heal. Claimant said nothing about the boot to her. (Ex. BB, p. 698) Matthews then emailed Dean Byers ("Byers"), who handles Employer WC claims and told him that Claimant went to the specialist today and "he's ordered him off duty for 6 weeks . . . just seems really out of the ordinary, but I've never dealt with this situation before so please let me know your thoughts." (Ex. BB, p. 698).

23. Claimant admitted that he called Matthews but claimed he told her that Dr. Simpson was only taking him off from work for "a day or two" not 6 weeks so that his foot could heal. According to Claimant, who was present during Matthews' testimony, Matthews was lying.

24. On February 8, 2017, Dr. Centi told Employer that the reason Dr. Simpson took Claimant off from work was that Claimant told Dr. Simpson that Employer would not allow him to work in a boot. (Ex. BB, p. 698)

25. On February 9, 2017, Claimant was seen by Dr. Centi who released him back to work with restrictions. In response, Claimant said he could not return to work because Dr. Simpson took him off of work. Dr. Centi told Claimant that he spoke with Dr. Simpson and it was agreed that Claimant could return to work because wearing the boot was not an issue with Employer. According to Dr. Centi, at this point Claimant became very confrontational with Dr. Centi, and told him that he had no right to speak with Dr. Simpson. Claimant used profanity at Dr. Centi and jumped down off the exam table and was pointing in his face yelling this is "wrong" this is "bullshit." (Ex. P, p. 238). As a result of this incident, Claimant's care was transferred to a new provider, Dr. Lakin. According to Dr. Centi's notes, the internal protocol at CCOM was not to assign a new ATP within CCOM; rather to assign Claimant to a new group entirely.

26. Matthews was in Dr. Centi's reception area on February 9, 2017, to discuss modified duty with Dr. Centi when Claimant came out from the exam area and into the front reception area, apparently without noticing Matthews' presence. Claimant was very upset and said to the front receptionist: "can you believe he's making be go back to work . . . . that's a bunch of shit, and carried on for quite some time to the receptionist." According to Matthews, Claimant got very confrontational with her, and he stated he won't go back to work and it is "hostile with Mike." Matthews responded by telling Claimant she was there to see Dr. Centi and it was not appropriate to discuss another employee in the waiting room. After Claimant left, Matthews met with Dr. Centi, who said that when he told Claimant he could go back to work, claimant became aggressive and began to use foul language towards him. (Ex. BB, p. 696)

27. At hearing, Claimant testified that Dr. Centi and Matthews were lying. The receptionist incident never happened. The confrontation with Dr. Centi admittedly happened, but according to Claimant he was angry because each and every time he saw Dr. Centi and his PA on that first visit, from 12/22/16 to 2/9/17, he told both the PA and Dr. Centi that he had four additional medical problems: headaches, neck pain, memory loss and fogginess. During each visit, Claimant contends that Dr. Centi responded by telling him he would not address those complaints because he wanted to treat "one thing at a time." Claimant claims his frustration with Dr. Centi had nothing to do with "the boot incident" or Dr. Centi releasing claimant back to work. Instead, it was the result of Dr. Centi ignoring his repeated complaints of headaches, neck pain, memory loss and fogginess.

Dr. Centi

28. Dr. Centi testified that Claimant did not complain of headaches, neck pain, memory loss and fogginess at all during the entire time he treated Claimant from his first visit with the PA on 12/22/16 until the 2/9/17 'boot incident'. Had Claimant complained of any of these symptoms, Dr. Centi would have not only documented those complaints, he would have treated them. He did not forget to document repeated complaints of headaches, neck pain, memory loss and fogginess. Nor did he refuse to treat those

complaints because he was too busy focused on the stitches in Claimant's eye, the chest bruise and the ankle fracture. Dr. Centi stated he would have treated these other symptoms, immediately, as he would never ignore symptoms of a potential brain or head injury for any patient. Dr. Centi also testified that claimant confronted and yelled at him specifically about his releasing Claimant to modified duty. At no time did Claimant yell or confront him about his purported refusal to treat Claimant's headaches, neck pain, memory loss and/or fogginess.

29. During the third day of hearing (after Dr. Centi had testified), Claimant submitted into evidence a "Visit Summary for Employer" dated 2/9/17. (Claimant's Ex. 24) This Summary includes a diagnosis of "head contussion [sic] headaches." [It is not clear to the ALJ if the reference is to "*contusion*" or "*concussion*."] Dr. Centi testified that an "Employer Visit Summary" is a printout out by the receptionist and handed to the Claimant at the end of a visit that the receptionist later sends to Employer because it contains his work restrictions.

30. Claimant testified at hearing that after he left Dr. Centi's office on 2/9/17 following the confrontation, he returned 2 hours later because he realized he had left the appointment without the "Employer Visit Summary." When he arrived at the office, he asked Dr. Centi's receptionist for the 'Employer Visit Summary' and she gave the record it to Claimant. According to Claimant's testimony, he noticed during the hearing that this record was missing, so he went home and got his copy of the record, which was later submitted into evidence.

31. As Dr. Moe later testified when asked about the significance of the record, it could mean that Claimant had a headache on that day, 2/9/17, and the record showed that Dr. Centi documented claimant's headache on the one day that Claimant had a headache. Or, Dr. Moe explained, it could mean when Claimant returned to Dr. Centi's office hours after the confrontation and asked for the Employer Visit Summary sheet he demanded that "headaches" be documented in the record, and the receptionist (or Dr. Centi) may have written down anything Claimant said 'just to get rid of him', given the nature of the confrontation that day. By this time, Claimant's care has been transferred to another medical provider. This record makes no mention of the Claimant's complaints of neck pain, memory loss or fogginess.

Other Medical Providers

32. Dr. Maurer documented that claimant was "negative for headaches" and "negative for neck pain" on each of his visits: December 29, 2017 (Ex. W, pg. 500), January 15, 2018 (Id. at 505), May 14, 2018 (Id. at 516), July 13, 2018 (Id. pg. 524), August 1, 2018 (Id. at 528). During each of these visits, Dr. Maurer documented that claimant was "alert and oriented x 3" and "in no acute distress" and "[m]ood and affect within normal limits. (Id. at 494, 500, 505, 516, 520, 524, 528). During each visit, Dr. Maurer documented what Claimant told him, and what Dr. Maurer told Claimant.

According to Dr. Maurer, Claimant understood. At no time did Dr. Maurer document fogginess, stuttering, confusion, memory loss or any other cognitive symptoms.

33. Claimant was seen by Dr. Simpson twice. The first time, February 3, 2017, Dr. Simpson documented that Claimant reports "no muscle weakness and no back pain" And, "no headaches. He reports no depression no sleep disturbances feeling safe in relationship. He reports no fatigue. [O]riented to time and place and person. Mood and Affect normal mood and effect and active and alert." No neck pain or cognitive symptoms were documented. (Ex. Q, pg. 244). The second encounter on March 15, 2017, Dr. Simpson reported that Claimant "states his ankle is feeling very badly . . . and his work has been really bad about his time off." And, Claimant "reports no weakness, no numbness, no seizures, no dizziness and no headaches. He reports no depression . . . no fatigue." (Ex. Q, p. 249).

34. Claimant's pain complaints to Dr. Castrejon (Claimants IME Physician), did not include any psychological injury, cognitive symptoms, memory loss, confusion, stuttering, or things such as forgetting music lyrics. (Ex M, p. 134). During Dr. Castrejon's exam, on September 13, 2017, Claimant was "in no acute distress. He is alert and oriented." (Ex. M, p. 134.)

Claimant's Employment, from DOI to 'Boot Incident'

35. From December 23, 2016 through February 6, 2017, Claimant was able to work his pre-injury job full time, operating a front-end loader. On direct examination, claimant suggested that Employer did not honor his work restrictions because Dr. Centi had given Claimant restrictions of no climbing ladders or scaffolding. Claimant originally testified that climbing up and down the "ladder" to get in and out of the front end loader was a violation of his restrictions. On cross-examination, Claimant admitted that while Dr. Centi did give him a 'no ladder' restriction, Dr. Centi also stated that Claimant "is able to climb in and out of *loader*." (Ex. P, p. 226)

36. Anders, Matthews, Byers and Dean all testified that Claimant's demeanor was no different during this time period than it was prior to the work injury. Claimant did not appear to be in a fog or a daze. Claimant did not act confused or experience memory loss. He did not complain of headaches, or stutter, nor was he forgetful. Claimant did not call in sick, or come in late, or leave early due to pain or injury. Robert Santiago ["Santiago"] and Edrick Chavez ["Chavez"] provided no testimony of Claimant's purported memory loss, dizziness, fogginess, confusion or any cognitive symptoms.

37. During this time period, there was one incident that occurred between Employer and Claimant. According to Matthews, On January 13, 2017 (before the ankle MRI), Claimant went to Matthews' office complaining that the physical therapist did not read his file, and moved his ankle in a way that was very painful. When Claimant told

him to stop, the therapist read the file and said "well no wonder" [and Claimant] said it was terribly painful and caused a lot of bruising and now they want to do an MRI." (Ex. BB, p. 697)

38. Following this incident, Burns went to Claimant's next appointment with Dr. Centi. Burns testified he went to advocate for Claimant, and make sure Dr. Centi was aware of the incident with the PT. After that appointment, Claimant told Matthews he was upset and that Burns said it was "suspect" that he would not allow him to go in the exam room with Dr. Centi for the exam. Matthews called Burns, with Claimant in her office, to discuss this incident. Burns apologized and said there was a miscommunication because he did not recall saying "that was very suspect." Claimant apologized for becoming upset and said he may have overreacted. (Ex. BB, p. 697) Both Matthews and Burns testified about this incident, with Burns explaining that Claimant knew Burns was going with him and he also knew it was because of the PT incident. Burns attends medical appointments with other injured workers when needed, because it is part of his job to do so. At hearing, Claimant denied saying he "may have overreacted", and he contends that both Burns and Matthews lied about this under oath.

Terrance Lakin, M.D. - Claimant's New ATP

39. At hearing, Dr. Primack explained that Claimant's medical treatment and diagnoses changed so “dramatically" after Claimant began treating with Dr. Lakin, it's as if the pre-and post-Dr. Lakin records indicate two claims with two different claimants.

40. After his last visit with Dr. Centi on February 7, 2017, Claimant did not return to work until mid-March 2017. During that time frame Claimant did not obtain medical treatment for his any cognitive symptoms, memory loss, amnesia, headaches or neck/arm pain.

41. Claimant was first seen by Dr. Lakin on March 1, 2017. During that initial visit, Dr. Lakin documented "WC accidental fall from a ladder", "*WC concussion with loss of consciousness of 30 minutes or less*." (Ex R, pp. 251 & 253) (emphasis added). Dr. Lakin repeats that there was a ‘Loss of Consciousness’ (“LOC”) for ‘30 minutes or less’ throughout his entire treatment of Claimant. (Ex. R). On the March 17, 2017, visit, Dr. Lakin took a "history of illness" and reported that *claimant presents with a "head, neck and chest injury. The symptoms began on 12/22/16. On a scale of 1 to 10, the intensity is described as a 7."* (Ex. R, pgs. 255 & 270) (emphasis added). This is repeated in Dr. Lakin's records. Both the ‘LOC for 30 minutes or less’ and the purportedly immediate onset of head, neck and cognitive complaints beginning on the DOI to continuing are also repeated by other providers for the remainder of this claim.

42. On March 23, 2017, Dr. Lakin reported that claimant "*complains of neck pain with hand paresthesias, headache, and cognitive changes since a fall at work 12/22/16."* Dr. Lakin states that Claimant does not recall much of the fall or much of that

day. He does not recall driving home that evening and has had several patches of memory loss for more than 24 hours. He has some amnesia about his evaluation and care at CCOM with Dr. Centi. (Ex. R, pp. 259 & 276) Claimant also told Dr. Lakin that his "headaches now since the fall are different, and that he has them 3 times per week. (Id. at 257, 267). Claimant's complaints expanded to numbness in both hands and feet, ringing into the left ear and pain in the mid-back where moving his neck or shoulders aggravate the pain and pain in the low back. (Ex. R, pp. 271-272)

43. It is unclear if Dr. Lakin reviewed any medical records from Dr. Centi during this time. Dr. Lakin referred Claimant for a brain and cervical MRI. Both were normal. (Ex. R, p. 273). He also referred him to Mr. Beaver for cognitive behavioral therapy,

44. On March 13, 2017, Claimant returned to modified duty in a clerical job approved by Dr. Centi. Matthews spoke to Claimant about her concerns of how he behaved toward in the reception area of Dr. Centi's office after the 'boot incident', and his claim that Mike Anders was hostile. According to her notes, Claimant told Matthews that he was just very frustrated that day, and that down the road he would "like to get with Mike [Anders] and get things right again." (Ex. BB, p. 702). Claimant testified that he did not have this conversation with Matthews and that Matthews was lying.

45. By March 29, 2017, Dr. Lakin noted that Claimant was seeing Dr. Staudenmayer for traumatic brain injury, and that Claimant was reporting poor sleep, decreased memory loss (forgets tasks at work and sometimes when he's driving.) (Id. at 277). By April 6, 2017, Dr. Lakin diagnosed cervicalgia, traumatic brain injury, vertigo, and a left chest wall contusion with a firm mass behind the left nipple. (Id. at 285)

46. Dr. Lakin sent Claimant to Dr. Caughfield for cervical injections and to Dr. Townsend, a neuropsychologist, and to Dr. Johnson for his left chest hematoma. (Ex. R, pg. 297) By May 16, 2017, Claimant continued to complain of neck and right ankle pain, and now also upper and low back pain. (Id. at 308)

47. Claimant was seen by Lisa M. Townsend, PsyD. on May 4, 2017, for a neuropsychological evaluation. Claimant reported to Dr. Townsend that he had a loss of consciousness, with amnesia, following a fall from a ladder. (Ex. T, p. 458). Dr. Townsend confirmed that *"medical notes obtained from Dr. Lakin's office support [claimant's] complaints of concussion."* (Ex. T, p. 458). Her overall impression was concussion with loss of consciousness less than 30 minutes, supported by Dr. Lakin and Claimant's "chief complaint" of "4 months of short-term memory loss" *since the 12/22/16 DOI*. (Id. at 461) Dr. Townsend could not explain claimant's stuttering. (Id.) Dr. Townsend ruled out post concussive syndrome (Ex. R, pg.309) and also ruled out traumatic brain injury (Ex. T, pg. 462)

48. On June 23, 2017, Dr. Lakin took Claimant off from work entirely because of Dr. Staudenmaier's recommendation that Claimant should not return to Employer's hostile work environment. (Ex R, p. 324). Insurer began paying TTD to Claimant as of June 23, 2017, because he was taken off from work, and no longer working modified duty. (Ex. B, p. 5)

49. On July 23, 2017, Dr. Lakin finally reviewed Dr. Centi's medical records. After doing so, Dr. Lakin changed his work related medical diagnoses to including only a cut above the eyebrow, ankle fracture and chest injury. He then opined that the neck, headaches, and cognitive complaints were not work related. Dr. Lakin also opined that if Claimant had a concussion (based upon Claimant's reported mechanism of injury), any symptoms had been resolved, based upon how functional he was on Dr. Centi's exams and the objective data which ruled out traumatic brain injury.

50. Dr. Lakin also explained that Claimant had denied having any pre-existing psychological conditions or taking any psych medication. Before the DOI, Dr. Lakin saw Claimant in March 2013 for a pre-employment physical examination. At this exam, Claimant denied pre-existing injury, including psych treatment. Dr. Lakin later discovered that Claimant had significant injuries with a prior right ankle tear in 2008 and a right hand injury in 2003. He was also on multiple medications prior to 12/22/16, including Adderall, Clonazapam, Suboxone, Lamictal, Belsomra and Mertazipine. Dr. Lakin noted, in response to inquiries:

> It is therefore highly suspected that he [Claimant] was not reporting conditions and medications truthfully and that he was wrongly medically qualified to work in a potentially hazardous job that he may have put himself and others at undue risk in a hazardous workplace. (Ex. R, pg. 345).

Claimant had been on Suboxone and Clonazepam for several years prior to the work injury. He was also taking Lamictal secondary to bipolar disorder and Adderall for his ADHD. (Ex. K, p. 102)

51. Dr. Lakin opined that Claimant would reach MMI after recovery from his chest wall hematoma excision, but that he was already at MMI for his right ankle as of July 23, 2017. (Ex. R, p. 346). This chest wall surgery was scheduled with Dr. Johnson for August 15, 2017. (Ex. R, p. 350

52. On August 4, 2017, Dr. Lakin reported that he talked to Dr. Staudenmayer on the phone that day. Dr. Staudenmayer "was adamant [sic] that patient can not return to the current employer due to a supervisor that is *inappropriate causing* the patient significant anxiety." (Ex. R, p. 354). Dr. Lakin, therefore, relying upon this recommendation, continued to keep Claimant off work. Dr. Staudenmayer later testified at hearing that the above-referenced supervisor was Tracy Matthews.

53. On August 15, 2017, Dr. Johnson removed the mass from Claimant's chest. He documented that Claimant, "who previously suffered a contusion to the left chest wall and was found to have a persistent pain mass in the subareolar of his left breast. Differential diagnosis was . . . hematoma and therefore the patient requested excision of the soft tissue mass." (Ex. U, p. 481).

54. Dr. Lakin placed Claimant at MMI September 27, 2017 with a 15% scheduled impairment for his right ankle/foot. Dr. Lakin detailed the treatment Claimant had and recommended medical maintenance with Dr. Staudenmayer for up to 6 more visits in 6 months. He was also to follow up with Dr. Clark Johnson, Podiatry for his right ankle follow up every 6 months if needed, conservative care with injections and braces and evaluation and consideration for arthroscopy if needed in 10-15 years.

55. In his MMI report, Dr. Lakin addressed Claimant's claim that he has difficulty concentrating, gets confused easily and has trouble forgetting words to songs he has written. Claimant reported being in a band and now music purportedly created headaches. Noise and lights from the band led to confusion and headaches and bright lights also supposedly gave Claimant a headache. (Ex. R, pp. 394-401)

56. On the date of MMI, 9/29/17, Claimant completed a pain diagram, similar to the one he had completed for Employer on 12/23/16, the day after his injury. This time he marked his head, both shoulders, his neck, his entire spine and his right ankle. (Id. at 405)

57. On October 24, 2017, Insurer filed a Final admission of Liability consistent with the opinions of Dr. Lakin, thereby terminating TTD as of September 26, 2017. (Ex. B, p. 5) On November 22, 2017, Claimant applied for a DIME for the right ankle, chest, neck and head. (Ex. C, p. 24).

DIME by Dr. Hall

58. Claimant underwent a DIME with Dr. Hall on January 22, 2018. Dr. Hall diagnosed post concussive syndrome with ongoing cognitive symptoms and dizziness, post concussive headaches vs. cervicogenic headache, forehead laceration, healed, neck pain, left breast contusion doing well, upper extremity symptoms and right ankle talus fracture. (Ex. J, p. 92). Dr. Hall opined that Claimant was not at MMI. In order to reach MMI, Claimant needed foot surgery with Dr. Maurer, facet work and consideration of rhizotomy, neuromuscular therapies to treat the neck and arm pain. (Ex. J, p. 93)

59. Dr. Hall did not opine that Claimant had a work related psychological injury, or that he needed any treatment of any kind for any psych condition, including PTSD from the sight of ladders. Nor did Dr. Hall opine that Claimant had a work related psychological condition of any kind. (Ex. J).

60. Dr. Hall's mechanism of injury is that Claimant hit the ground full force and twisted his ankle after falling 12 feet from a ladder. (Ex. J. p. 84) Claimant could not remember any details about the fall and only awakened up to his wife at home. Dr. Hall went through the mechanism of injury with Claimant who stated that he was "foggy" after the fall and "the fog has never lifted" after he fell 12 feet. "At least his face was almost that high and 'face-planted.'" (Ex. J, pp. 91-92)

61. According to Dr. Hall, based upon his conversations with Claimant and review of records, Claimant had a concussion with headaches and neck pain ever since the fall. Cognitively, Claimant is forgetful, cannot remember things, and has trouble word finding and explaining things. He loses track of his thought and has slurred speech.

62. Dr. Hall stated that "[u]nder the care of Alex Simpson, orthopedic surgeon," [Claimant] "was having headaches three times per week originating in the left eye, very sharp 8 to 10 pain level. (Ex. M, p. 88). Yet, Dr. Simpson documented that Claimant had no headaches during his evaluations of claimant. (Ex. Q, pp. 244, 249).

63. Dr. Hall relied upon a note from Dr. Staudenmayer, who diagnosed adjustment disorder, somatic symptom disorder with predominant pain and neuro-cognitive disorder "*due to traumatic brain injury."* (Ex. J, p. 89) Dr. Hall appears to have relied upon Dr. Staudenmayer's conclusion that Claimant could not return to work for Employer due to a supervisor that is inappropriate, causing Claimant significant anxiety. (Id. at 90)

64. Dr. Hall opined that Claimant has a work related neck injury with arm symptoms because "I can [sic] imagine how anybody could fall as this man did, lacerate his eye, have a contusion to his chest, and not have neck pain."

65. Dr. Hall did address Dr. Primack's original IME report. Therein, Dr. Primack opined that Claimant's neck complaints were not work-related. Citing Dr. Primack's original IME report, Dr. Hall stated that "Dr. Primack's "opinion seems to be based upon the fact that the record does not report/documented neck pain from 12/22/16 to 2/3/17." According to Dr. Hall, "this habit of drawing opinions from the record is fraught with difficulty. We are absolutely at the mercy of those doing the documenting. I have seen many records that simply do not document symptoms in an area especially where there are concomitant injuries that are taking up space. It is my opinion that his neck symptoms and arm symptoms are the direct consequence of the accident. (Ex. M, p. 93).

66. According to Dr. Centi's testimony, he did not fail to document Claimant's complaints of neck pain. Nor was he too busy treating Claimant's foot, eye and chest to pay attention to and treat claimant's neck pain-or headaches or cognitive complaints.

He did not document or treat complaints of neck pain, headaches or cognitive complaints because Claimant did not report those complaints to him.

67. Dr. Hall opined that Claimant's headaches were either the result of the concussion and the head injury, or they relate to claimant's neck injury. Dr. Hall testified in his deposition that: "I think he had a concussion when he fell and has had ongoing cognitive symptoms and reports of dizziness which are consistent and common symptoms of concussion. He got this headache, which is simply either a headache because you hit your head. It's really not that interesting a diagnosis. Or he could have cervicogenic headache, meaning the headache could be coming from the neck." (Ex. H, p. 51.

68. According to Dr. Hall, when he conducts a DIME, he interviews the Claimant to get his input and then he also reviews medical records to "iron [the discrepancies] out. And "so you weigh both sides of the coin . . . and we're stuck with the job of resolving the point of contention. So, by definition, that's what you do in a Division IME." (Ex. H, p. 52).

69. Dr. Hall testified that during the DIME, Claimant had "cervical range of motion limited in all planes." (Ex. H, p. 50). When Claimant saw Dr. Castrejon September 17, 2017, Dr. Castrejon reported that: "[e]xamination of the cervical spine reveals full range of motion, with the exception of mild decrease in right rotation and left rotation being limited by pain." (Ex. M, p. 134)

70. Dr. Hall admitted at his deposition that he was not aware Claimant had a pre-existing ankle/foot condition, or that he underwent surgery known as the Brostrom procedure. During his deposition, Dr. Hall had to "Google" 'Brostrom procedure' and testified afterwards that: "the patient had ankle reconstruction in 2008. So that's, I suppose, a type of ankle reconstruction." (Ex. H, p. 54).

71. During his deposition, Dr. Hall reviewed the 14-minute surveillance video. According to Dr. Hall, there is nothing in the video that would be inconsistent with the need for ankle surgery because Claimant did not "push off his right ankle. He sort of falls off his right foot onto his left." And, Claimant has never claimed "he could not walk." While Dr. Hall saw claimant crouch down he did not address that according to both Dr. Primack and Dr. Lakin it is the act of crouching down that demonstrates Claimant does not need ankle surgery.

72. Dr. Hall acknowledged that he did not correlate Claimant's level of functioning as documented in the medical records during the time the surveillance was taken and Claimant's level of functioning in the surveillance itself.

73. Dr. Castrejon reported that he did not review the initial emergency room records. As Dr. Primack explained, given the wrong mechanism of injury documented

by Dr. Castrejon, it was natural that Dr. Castrejon assumed that Claimant had gone to the emergency room. Dr. Castrejon also admitted that he did not review any medical records from the December 22, 2016 DOI through February 3, 2017, because he did not have them. He expressly retained the right to change his opinions once he received these initial treatment records. [The ALJ notes there is no record of this actually occurring].

74. Dr. Castrejon nevertheless opined that: "based solely upon the mechanism and the injuries sustained" (as stated in the records he did review) it is medically probable that Claimant sustained a LOC that has not left behind any neurological residuals but that the head injury resulted in post concussive headaches which remain symptomatic. According to Dr. Castrejon, Claimant carries a diagnosis of post concussive headaches. Again, Dr. Castrejon "requested clarification" to review the medical records, including the emergency room record, that he admittedly does not have that may *"alter [his] opinion regarding causation*" (Ex. M, pg. 142) (emphasis added)

75. Dr. Hall admitted there are no records that he reviewed that are consistent with Claimant having had a concussion. Dr. Hall did not know how Claimant traveled for medical care on the DOI. Dr. Hall admitted that there is no objective evidence that Claimant had a concussion post fall. When asked "what evidence do you have that you rely upon in your belief that Claimant had a concussion," Dr. Hall testified: "*Others mentioned it as a diagnosis along the way."* When asked "what 'others'," Dr. Hall testified: Dr. Castrejon had some mention of some potential concussive symptoms after the fall, and he brings up the concussion idea. That's a couple of mentions prior to him seeing me." (Ex. H, p. 55). When asked if he knew whether or not Dr. Castrejon actually reviewed any of Claimant's medical records immediately after the fall, Dr. Hall testified: "I can't tell you right now exactly what Dr. Castrejon reviewed but he's usually pretty thorough." (Id. at 55).

76. According to his deposition testimony, the other basis for Dr. Hall's opinion that Claimant had a concussion is that: "I recall it being in one on Dr. Lakin's reports." (Ex. H. pg. 55). Dr. Lakin's final opinion is that even if Claimant had a concussion initially, any symptoms had resolved based upon Claimant's level of functioning during his treatment with Dr. Centi. Claimant's injuries, according to Dr. Lakin, are the eyebrow cut that needed stitches, the foot/ankle injury for which no additional treatment is needed and a chest bruise with hematoma. When asked if he knew Dr. Lakin's current opinion is with respect to concussion, Dr. Hall first testified "no" and then said "Oh, wait a minute. I do know it. He doesn't think he had a concussion. When asked if he knew why Dr. Lakin now believes that Claimant did not have a concussion, Dr. Hall testified: "No." (Ex. H, pp. 55-56)

Dr. Primack

77. Claimant underwent an initial IME with Scott J. Primack, D.O., on June 12, 2017. Dr. Primack performed a medical records review. Dr. Primack teaches for the Colorado Division of Labor regarding "causality" determinations for work injuries. Dr. Primack explained the five steps to determining causality are mechanism of injury ("MOA") or exposure, diagnosis, intervening factors, medical literature and probability. The MOA/exposure is "critical" per the Level II teachings in assessing causality of a work related diagnosis. Medical record review and medical history and the correlation of the medical records and objective findings to claimant's subjective complaints and level of functioning are essential to determining causation and impairment for any Level II accredited physician, including a DIME physician.

78. Dr. Primak feels that this is a case where Dr. Hall did not comply with the five steps of causality. Nor did he review the complete medical record. Instead, the bases for his opinions stem from Claimant's subjective complaints that Dr. Hall failed to correlate with the medical records and then identify or explain the discrepancies. Dr. Lakin agreed that Dr. Hall's DIME opinions are wrong and that Dr. Hall's "most glaring error is that he is assuming the MOI to have caused injury, or using Correlation and not analysis of Causation." (Ex. R, p. 422). The delay in reporting cervical and cognitive complaints, the reliability of claimant in reporting history, the lack of objective findings and electrodiagnostic findings to correlate with Claimant's reported upper extremity complaints and the very obvious inconsistency of Claimant's reported pain and poor functionality verses that observed on video. (Id. at 423). As Dr. Primack explained, Dr. Hall's failure to correlate and explain these inconsistencies does not comply with the Level II accredited teachings that DIME physicians are required to comply with when performing a DIME and rendering a DIME opinion.

79. Dr. Primack explained that there is absolutely no mention made of any neck problems from 12/22/16 through 2/3/17. Claimant told Dr. Primack that he had immediate neck pain after the initial injury on 12/22/16. Claimant's cervical MRI demonstrated stenosis without any acute component to his injury. Claimant gave a different history to Dr. Lakin in late February 2017. A work related cervical injury is not consistent with the diagnosis of stenosis or the timeline from the initial mechanism of injury and also does not correlate with the medical records. The medical literature also does not support Claimant having neck symptoms 8 weeks following the initial injury. (Ex. K at 103). Dr. Primack also explained that there is absolutely no component of retrograde amnesia for the first 6 weeks following the fall. Issues regarding initial confusion and loss of cognition would be apparent and reported within the first 6 weeks, Claimant's neuropsychological testing ruled out TBI. (Ex. K, p. 103) Treatment for Claimant's cognition, cervical spine and headaches are not work related. Dr. Primack believed at the time that Claimant sustained a 6% impairment of the lower extremity and that Claimant was at MMI.

80. Dr. Lakin retracted the diagnoses that Dr. Hall relied upon for his DIME because there is no significant objective evidence or imaging of a head or cognitive injury, nor is there any support of these injuries in the neuropsychological testing. Claimant's reported symptoms are very subjective, lack support, and are more likely related to unrelated psychiatric diagnoses or associated medications that Dr. Hall does not take into consideration because he does not appear to be aware of them. (Id. at 422). And, if he did consider him, Dr. Hall did not address them or correlate them with Claimant's subjective cognitive complaints from the work injury, as he was required to do.

81. With regard to the neck, Dr. Lakin reiterated that a neck injury beyond myofascial tightness by exacerbation of pre-existing disease is not supported by Claimant's lack of reporting neck pain for several months (after he reviewed Dr. Centi's records from the 12/22/16 DOI to 2/9/17) and is greatly refuted by Claimant's high level of function, demonstrated range of motion and lack of symptoms on surveillance video. (Ex. R, p. 422)

82. On May 25, 2018, Dr. Centi agreed that the surveillance video shows Claimant's ankle is stable as of the date of the video and that no further treatment to the ankle/foot, including surgery, is needed. Dr. Centi also opined that Dr. Hall's DIME opinions are wrong and that Claimant was at MMI on September 27, 2017, for the work injury consisting of cut above the eye brow, chest contusion with hematoma and right ankle fracture.

83. On the 4/30/17 surveillance, Claimant was able to ambulate without any type of antalgic gait pattern. He was able to ascend and descend stairs. He was able to crouch in hyper-dorsiflexion at the ankles which places a high amount of load/force going through the ankle/subtalar joint area. He was also able to stoop into his truck and lift a tire out with one arm. After watching the surveillance and correlating Claimant's level of functioning with Claimant's medical records, Dr. Primack explained that the surveillance merely reiterated his opinion that there was no neck injury.

84. Dr. Lakin responded that he stands by his determination that Claimant reached MMI on September 27, 2017, with 15% right ankle impairment. In addition, Dr. Lakin changed his original opinion regarding medical maintenance to include consideration of surgical intervention for the right ankle. That opinion, according to Dr. Lakin, was no longer supported as Claimant demonstrated full function of his right ankle on video surveillance taken April 30, 2017, "*at the height of his symptoms and 4-5 months from his injury."* Claimant demonstrated ability to fully squat down for nearly 3 minutes while changing a vehicle license plate. The amount of stress placed on his right ankle, if he had persistent issues with it, would be more than enough to cause some modification of the position such as sitting down or kneeling rather than maintaining a squat position with pressure on the ankle. Even with an ankle brace and/or pain medications, one would likely conclude that if there was any significant pathology

limiting function, that he would have had some pain and antalgic gait following this task. Nothing of the sort was evident on video." (Ex. R, pp. 421-422)

85. After engaging in a causality determination and conducting an extensive records review, including watching the surveillance video and comparing Claimant's alleged level of functioning documented in the medical notes vs. vs. Claimant's level of functioning when he is now aware he is being videotaped, during the same period of time, Dr. Primack was "somewhat in shock." He concluded that "it is clear that Mr. Marez is consciously misrepresenting himself, which one would see as malingering. This finding is also correlated with the dramatic change in history and clinical findings from 2/9/17 to Dr. Lakin's initial visit on 2/28/17." (Ex. K, p. 117).

86. After Dr. Lakin also reviewed extensive medical and other records, including the DIME report of Dr. Hall, the medical records from Dr. Centi, the original ATP, and compared Claimant's level of functioning on video to Dr. Lakin's treatment of Claimant (and other providers) during the same time frame, and concluded that Claimant "is likely conscientiously misrepresenting himself." (Ex. R, p. 424)

Other Medical Opinions

87. James Ferrari, M.D., 1/30/18 PA orthopedist, arthroscopy with foot/ankle arthroscopy opined that further foot/ankle surgery with Dr. Maurer is not work related but the result of the natural progression of Claimant's osteoarthritis and spurring which were present before the DOI. It is inevitable that Claimant would need the surgery irrespective of this work injury which did not accelerate the need for the surgery. (Ex. L, p. 120). Dr. Maurer did not review the surveillance, but believes the mechanism of injury is that Claimant got his ankle/foot caught in the ladder, twisting it as he fell.

88. James P. Lindberg, M.D., surgeon, conducted a review of records and reviewed surveillance, concluding that it is "astonishing" that Dr. Hall, a physiatrist, was making surgical recommendations on an ankle when he does not even know what a Brostrom procedure is. After reviewing the video, Dr. Hall's opinion regarding Claimant needing work related foot surgery did not change, but as Dr. Lindberg explained, Dr. Hall is not familiar with the fact that chronic instability in an ankle can causes arthritis and osteophytes to form around the ankle joint. (Ex. M, p. 129)

89. Joseph Fillmore, M.D., 4/19/17 PA physiatrist, opined that Claimant's cervical and cognitive complaints are not work-related, as there was no documentation of an injury to the neck, or cognitively, and there was no original report of LOC. (Ex. L, p. 122)

90. James Ogsbury, M.D., 4/19/17 PA, spine surgeon, reported that because Claimant did not have symptoms of a concussion or a neck injury within the first month these symptoms are not casually related to the work injury. (Ex. L, p. 123). Claimant, according to Dr. Hall, has amnesia, cannot remember the fall and has been in a fog with

headaches since the date of injury and Dr. Centi simply failed to document these repeated complaints, or was too busy tendering to claimant's other injuries to address the head and cognitive complaints. Dr. Centi testified that this speculation by Dr. Hall that Dr. Hall bases his DIME opinions on is wrong, rendering the DIME opinions wrong.

Claimant's 5/3/18 Surgery with Dr. Maurer

91. On May 3, 2018, Claimant underwent right ankle arthroscopy with debridement and recession by Dr. Maurer. (Ex. W, p. 518)

92. Dr. Maurer first saw Claimant one year after the fall on December 15, 2017. The history Claimant gave to Dr. Maurer regarding the mechanism of injury is that he was at work on a ladder with a co-worker who had dust in her eye and she moved away from the ladder. As a consequence, the ladder slipped and he fell from the ladder. "He states that as he was falling his right ankle was caught in the ladder. He states that he had hyperdorsiflexted his right ankle. He then landed on the floor." (Ex. W, p. 492).

93. During the December 15, 2017, evaluation, Claimant complained of "deep and sharp pain over the anterior aspect of his right ankle. He also had edema and ecchymosis to the right ankle and foot. Dr. Maurer noted that Claimant underwent a right ankle ligament repair in 2005. He said nothing about the Brostrom procedure Claimant had undergone in 2008. Nonetheless, Claimant reported good results from this procedure.

Dr. Lakin's Opinion re: 'Hostile Work Environment'

94. On August 28, 2018, Dr. Lakin stated that *if the ALJ finds that there was no hostile work environment by Employer,* Dr. Lakin would not have taken Claimant off from work on June 23, 2017, based upon the recommendation of Dr. Staudenmayer. (Ex. R, p. 430) (emphasis added).

Dr. Herman Staudenmayer, and 'Hostile Work Environment'

95. Dr. Lakin referred Claimant to Dr. Staudenmayer, neuropsychologist, who evaluated claimant on March 20 and 28, 2017 for a work place fall with a 'LOC for 30 minutes or less', resulting in a broken foot, neck injury and concussion with residual symptoms of cognitive dysfunction and headaches. According to Dr. Staudenmayer, Claimant felt bad because nobody addressed his headaches or cognitive dysfunction that he has had since the DOI on 12/22/16.

96. Dr. Staudenmayer's opinions are admittedly based upon subjective tests and whatever Claimant tells him, including that Tracy Matthews continuously harassed him. Dr. Staudenmayer testified that one hundred percent of the basis for his opinions

that Employer work environment was a hostile one are what Claimant told him, plus two pieces of "corroborating information."

97. The first corroborating piece of information is that on April 11, 2017, Dr. Staudenmayer documented Claimant felt that Matthews was harassing him, because she was telephoning his physicians and asking them the "exact time" of Claimant's medical appointments. Dr. Staudenmayer reported that he himself had received such a call from Matthews and found her demeanor to be abusive and persistent." (Ex. Y, p. 545)

98. Matthews said that she contacted Dr. Staudenmayer on one occasion and the discussion was very brief. The sole reason she called Dr. Staudenmayer, however, was because Claimant handed Dr. Staudenmaier's business card to Matthews and specifically asked Matthews to call Dr. Staudenmayer and confirm the time of day his next appointment was scheduled because Claimant could not recall if it was scheduled for 11:30 a.m. or 1:30 p.m. Matthews denied that her demeanor was abusive or persistent; she was simply doing exactly what Claimant asked her to do in order to help him. Claimant testified that he never asked Matthews to call Dr. Staudenmayer, and that Matthews entire testimony regarding this request was a lie.

99. Dr. Staudenmayer testified at hearing that he "remembered" that Matthews called him to find out if Claimant had showed up for a specific appointment that had already taken place. When pressed, Dr. Staudenmayer admitted that Matthews "could have" contacted him to check the time of day that an appointment was scheduled for in the future. Dr. Staudenmayer agreed that Claimant's version (that Matthews was checking up on him to harass him) and Matthews' version, that she called Dr. Staudenmayer because Clamant asked her to, could not be reconciled. This was not merely a question of perception. Dr. Staudenmayer admitted only one person's version of why Matthews called Dr. Staudenmayer could be accurate. Dr. Staudenmayer testified that he believed Claimant's version and not Matthews'.

100. The second piece of corroborating information, according to Dr. Staudenmayer, is a statement contained in the Coburn Investigative Summary dated April 30, 2017. (Ex. I, p. 71) Dr. Staudenmayer testified that he did not have this report until it was sent to him on July 16, 2018, on Respondents' behalf. (Ex. Y, p. 575) The report states that the investigator interviewed Tracy Matthews on April 19, 2017 and that Matthews: "stated that Claimant was in an MMA fight prior to the date of injury; therefore, she was concerned with the claim and believed this was the cause of the injury." (Ex. I, p. 71). Matthews admitted that she was interviewed and told the investigator that Claimant was an MMA fighter in response to the investigator's question regarding what she knew about Claimant. Matthews testified that she did not tell the investigator that she believed MMA fighting was the cause of claimant's injury because Matthews never believed that. Matthews explained she knew Claimant was injured because she was present 15 seconds after the injury.

101. On April 11, 2017, Dr. Staudenmayer also reported that Employer was not honoring Claimant's work restrictions because Claimant had to stand most of the day, while his restrictions required him to be sitting most of the day. (Ex. Y, p. 545) During the time Claimant was telling Dr. Staudenmayer that Employer was not honoring his work restrictions, Claimant was actually working a modified job that had been approved by Dr. Lakin. That job was for claimant to do data entry, filing, sorting, shredding, opening and stamping mail, sorting invoices and bills, collating materials, dispatch and answer phones and assist customers operating POS system. This entire job involved sitting but Claimant was free to stand any time he wished. As noted, Dr. Lakin approved this job for Claimant. Thus, while Claimant was telling Dr. Staudenmayer that Employer was not honoring his restrictions because he was standing most of the day, Claimant was working modified duty for Employer in a job that permitted him to sit all day, and which was approved by Dr. Lakin. (Id.)

102. Employer witnesses Tracy Matthews and Mike Anders both testified that they each reprimanded Claimant for working in excess of his restrictions. Matthews documented that on March 13, 2017, Claimant was observed voluntarily getting an air compressor, start it up and help customers air up low tires. Claimant would have to be reminded to "stay within his restrictions." (Ex. BB, p. 702) Other times, Claimant voluntarily helped customers load items. Again, Employer had to remind him that he was not allowed to do that type of work per his physician. (Ex. BB, p.703)

103. And on May 5, 2017, Matthews documented that she observed Claimant in the retail yard putting tie-downs over the bed of a customer's truck. Matthews noted that Santiago and Anders also present. Matthews immediately went out and told Claimant to please let Mike Anders and Santiago care of that customer. Claimant became upset and said he was only trying to help and Matthews explained that "this is not part of your restrictions and I need you to follow your restrictions." (Ex. BB, p. 707) Anders also testified to this incident as well as other times when he had to remind Claimant to follow his work restrictions.

104. According to Santiago, an example of Employer's so-called "harassment" and "hostile work environment" was that very day when claimant was simply trying to help Santiago with tie-downs and Matthews came over and "reprimanded" Claimant, *i.e.*, made him stop working with the tie-downs. Santiago testified that Claimant was simply trying to help him, but Matthews would not permit claimant to do so. Santiago admitted he had no idea what Claimant's work restrictions was or what claimant's modified job was or even that claimant was on modified duty.

105. Also on April 11, 2017, Dr. Staudenmayer accepted Claimant’s new explanation regarding the reasons he changed treating physicians. According to this version, Claimant stated that Dr. Centi had him working full duty for 6 weeks after the DOI. And, Dr. Centi never addressed Claimant's headaches. At the same time, he saw Dr. Simpson who placed Claimant on full work restrictions and took him completely off

of work. Then Dr. Centi disagreed with Dr. Simpson that Claimant should be taken completely off from work and Dr. Centi released him to work with restrictions which his Employer did not honor.

106. Claimant testified that Mike Anders called him a gimp and a hop-along (on at least 2 occasions. The first time Anders supposedly did this was over the CB radio where multiple other employees would have heard this. Claimant testified that they probably had their radios turned down low. No witness, not even Santiago or Chavez, would corroborate this allegation. The second time Anders did this was supposedly when Anders was alone with Claimant. Anders denied ever referring to Claimant as a hop-along or a gimp, and testified that he did not believe those words have ever been a part of this personality. Claimant, who was present during Anders' testimony, testified that Anders was lying.

107. Claimant also testified that he reported the name-calling by Anders to Matthews, but Tracy Matthews did nothing about it. According to Claimant, Anders continued to call him hop-along and gimp. Claimant testified that Anders and Matthews, who both denied this, were lying and that Mike Anders did in fact call Claimant these names. Byers, who was friendly with Claimant, testified that Claimant referred to himself as hop-along, gimp and office bitch in conversation on more than one occasion. Claimant denied every calling himself these words and testified that Byers was lying.

108. Claimant claimed that some co-workers, specifically truckers, threatened to physically harm him. The truckers were not present to testify and there is no documentation in Dr. Staudenmaier's records about this alleged incident. Claimant testified that he reported the truckers' physical threats to harm him to Matthews and Matthews responded that he would have to figure out a way to get along with his co-workers.

109. Dr. Staudenmayer admitted that his opinions were based upon believing and accepting all of Claimant's subjective complaints and version of events as being true. Dr. Staudenmayer also admitted that some incidents could not be reconciled to differing perceptions and in the case of conflict, Dr. Staudenmaier's opinions are based upon Claimant's version as being the truth. The conflicting versions of such incidents between Claimant and Dr. Centi, Tracy Matthews, Mike Anders, Dean Burns and Gloria Byers were rejected by Dr. Staudenmayer as not being the truth.

110. On February 6, 2018, (14 months after DOI) Dr. Staudenmayer changed his diagnoses from adjustment disorder (which is essentially stress, per Dr. Moe) and somatic symptom disorder (believing pain symptoms exist even though there is no medical basis for those symptoms) to post traumatic stress disorder due to a fear of ladders. According to Dr. Staudenmayer, Claimant's PTSD was triggered when he had a panic experience when he saw an individual going up a ladder. Claimant had a flashback to his own trauma and as of the day of the third hearing, according to Dr.

Staudenmayer, Claimant is unable to climb up only a specific type of ladder- "the extension ladder." (Ex. Y, p. 562).

111. Dr. Staudenmayer did not offer any explanation why Claimant was able, for 6 months, to watch his co-workers walk up and down not only an "average extension ladder", but Claimant watched his co-workers go up and down on the very same extension ladder that he was injured on. This occurred every day, multiple times per day, from December 23, 2016 (the day after the DOI) through June 23, 2016-the date Dr. Staudenmayer took Claimant off from work for a “hostile work environment.”

112. On August 29, 2017, Claimant informed Dr. Staudenmayer that he felt he was not at MMI psychologically. Three months later, on November 28, 2017, in the absence of any reported symptoms that raised the issue of PTSD, Dr. Staudenmayer noted that Claimant "asked me if I had every diagnosed him with PTSD." Dr. Staudenmayer "checked [his] notes and did not see the diagnosis. My diagnoses have remained unchanged . . . "(Adjustment Disorder and Somatic Symptom Disorder). (Ex. N, p. 166)

113. Claimant returned to work for Employer from mid-March 2017 until June 23, 2017. During this time, no Employer witnesses, including Santiago and Chavez, testified about any cognitive problems Claimant had, including confusion, stuttering, memory loss, seeing flashing lights and amnesia. Nor did either witness testify as to any incidents of harassment by Employer including the alleged name calling by Anders.

114. Santiago’s examples of “harassment” were alleged incidents where Anders or Mathews reprimanded Claimant for taking too long of a break or for “trying to help.” But Santiago admitted he had no idea if claimant exceeded his work restrictions when “helping” or if Claimant was on a legitimate break when reprimanded. Santiago first claimed that he quit working for Employer because of the harsh way Claimant was treated, but later admitted that he quit because he found a higher paying job and also returned to Employer part-time after he quit. Chavez, was present at Employer only 35% of the time and he too did not testify to any incidents that supported Claimant’s harassment allegations. Both witnesses knew very little about Claimant’s work injury, restrictions, modified job duties, work hours or frequency or length of breaks.

Pre-existing Psychological Issues, John T. Hardy, M.D.

115. Claimant treated with Dr. Hardy for pre-existing psychological problems prior to the admitted work injury. Claimant was diagnosed with depression and has had periods of hypomania lasting up to 4-days, as an adolescent. He was also diagnosed with ADHD as a child and treated with a Dr. Sal Cruz until Dr. Cruz’ retirement. (Ex. O, p. 172)

116. According to Dr. Hardy, who took over for Dr. Cruz in March of 2012, during Claimant's "spells" he has reduced sleep, racing thoughts, impulsivity and "will

spend a $1,000 at the music store." Claimant had pre-existing "panic attacks with feelings of suffocation, racing thoughts at night and ADHD symptoms." (Id. at 172) He has also been manic a times and treated for panic disorder. (Id. at 185)

117. Dr. Hardy also noted that Claimant had a pre-existing diagnosis of agoraphobia, a fear of places and situations that might cause panic, helplessness or embarrassment. Claimant laughed about having agoraphobia, yet he is a musician that performs in front of crowds. (Ex. O, pp. 179,182) Claimant filled multiple anti-depressant prescriptions, and had ongoing had panic attacks and anxiety and compulsive behavior for years prior to the DOI.

118. On March 27, 2017 Claimant told Dr. Hardy he had been "severely injured" right before Christmas when he fell 15 feet from a ladder, sustained a concussion, got 27 stitches in his brow, fractured his ankle and had a terrible hematoma where he fell on the ladder rung. (Ex. O, p. 201) Claimant also complained that his work had become "an 'ugly place'" and his employer had him doing 8 hours per day of "nonsense work" (Id. at 202)

119. On November 28, 2018, Dr. Hardy noted that Claimant retained an attorney and was having trouble with "Tracy [Matthews] his boss." (Id. at 204) In February 2018, Claimant told Dr. Hardy that he was fired from Employer and his WC "doctor said 'he had to cut him loose" and says he was at MMI even though he remains with a broken ankle, some obvious post concussive problems including nightmares that bother him" and that he also has "pretty severe PTSD captured by [Dr. Staudenmayer]." (Ex. O, p. 206)

120. By May 2, 2018, Claimant told Dr. Hardy that his "workers' compensation hearing went well", but that he was unable to watch "'Funniest Videos' as he sees people falling in a different light." (Ex. O, pg. 209

Stephen Moe, M.D.

121. Claimant underwent an IME with Dr. Moe, psychiatrist, who reviewed the medical and employment records. He also attended this hearing, and listened to the testimony of all witnesses. Dr. Moe explained that Claimant has "3 points of injury:" eye, chest and foot. If there was any work related psych component to the injury, it would be a mild adjustment disorder which simply means "stress" due to pain which would have resolved itself a long time ago. However, Dr. Moe was also aware of inconsistencies in the medical records, and that some of the information Claimant reported to Dr. Moe contradicted the records, and was of "dubious validity." (Ex. N, p. 148)

122. Dr. Moe also explained that there was a "profound change" in Claimant's account of the injury and his symptoms after Claimant changed physician from Dr. Centi to Dr. Lakin. (Ex N, p. 164). There is no "medical explanation" for displaying a normal mental status with no signs of amnesia in the "minutes, hours, days and weeks after the

injury and then to report amnesia about the incident 2 months after the fact." (Ex. N, pg. 159) As did Dr. Lakin, Dr. Moe also documented Claimant's misrepresentation of his pre-injury psychiatric treatment and Claimant's demonstrated capacity to work after the DOI and his current claims of disability. (Ex. N, p. 161)

123. Dr. Moe opined that Claimant appeared to "be driven by motivated intent to be regarded as impaired/disabled" and that "even in giving the Claimant the benefit of the doubt in all situations involving uncertainty, I cannot explain some very important findings on the basis of unconscious mental mechanisms or simple misunderstandings." For example, the discrepancy between Claimant's demonstrated capacity to work right after his injury and his current report of multiple, independently disabling problems "suggests misappropriation of the injured role." (Ex. N, p. 163) Dr. Moe's IME report sets forth the indications that unconscious psychological effects and intentional exaggeration have influenced different elements of Claimant's post-injury complains." (Ex. N, p. 183)

124. With regard to the cause-and-effect relationship between Claimant's symptoms and his alleged grievances, according to Dr. Moe there are three possibilities: (i) claimant was subjected to the mistreatment by Employer as he claims, which would mean that Claimant's physical symptoms were magnified by psychological factors related to the work injury; (ii) Claimant believes that he was subjected to the mistreatment by Employers as he claims, but he was not subjected to these things, this means that physical symptoms were magnified by Claimant's perceptions; this would not be related to his work injury; (iii) Claimant intentionally manipulated events, by making false accusations of a hostile work environment (such as Anders calling him gimp and hop- along, and Matthews and Byers lying about his claims of being an MMA fighting, when Claimant never said such a thing).

125. Dr. Moe acknowledged that this was ultimately up to the "tier of fact." Dr. Moe also explained that if the ALJ found that in the cases of those incidents that cannot be explained away by differing perceptions, that it was Claimant who was being untruthful, then Claimant is malingering, which is, of course, not work-related. (Ex. N, p. 164) If Claimant intentionally manipulated these events because of his pre-existing psychiatric illnesses there is not a work-related psychological condition (and no hostile work environment). Dr. Primack tested Claimant's perception of his overall level of functioning and his psychological perception. The results showed the probability for somatization, given Claimant's longstanding history of psychological problems, opioid dependency, ADHD, bipolar disorder and their effects on pain. (Ex. K, p. 110)

126. In those instances that could not be explained away by differing perceptions, Dr. Moe chose to believe the Employer witnesses and Dr. Centi were being truthful, and not Claimant. Dr. Staudenmayer rejected this, believing that Claimant was telling the truth and Dr. Centi and all four employer witnesses were not being truthful (Ex. N pg. 164)

127. Dr. Moe also explained that Claimant does not have PTSD from the fear of ladders. Per the Diagnostic and Statistical Manual, 5th Edition ("DSM-5"), in order to meet the criteria for PTSD, an individual must suffer a "qualifying" trauma: "The person was exposed to death, actual or threatened serious injury or actual or threatened sexual violence." These "threats" in the DSM-5 "include, but are not limited to, exposure to war as a combat or civilian, threatened or actual physical assault, threatened or actual physical violence, being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war, natural or human-made disasters or severe motor vehicle accident. (Ex. N, p. 165). Dr. Moe testified that any traumatic event held responsible for PTSD must be on par with these examples. By comparison, Claimant's fall from a ladder at a relatively low height, while injurious, was not an accident which would engender the degree of distress that the traumas listed in the DSM-5 are prone to cause.

128. The vast majority of those who develop PTSD display prominent signs of emotional distress in the *immediate aftermath* of the traumatic event. It is generally accepted that PTSD does no arise months to years later in individuals who had previously shown no indication that they were emotionally traumatized by the event. Dr. Moe explained that there is no indication in the medical or employment records that Claimant developed PTSD symptoms. In fact, Claimant returned to work the day after the injury on December 22, 2016 and worked until June 23, 2017, where he observed co-workers working on the same ladder that Claimant was injured on.

129. Claimant testified that after he was injured on December 22, 2016, Employer harassed him and subjected him to a hostile work environment. While there are many components to these claims that can be explained by differing perceptions between Claimant and Employer, there are many other incidents that cannot be so explained.

130. Both claimant's IME physician, Dr. Castrejon and the Division IME physician, Dr. Hall, have not opined that Claimant had any work related psychiatric concerns, including PTSD. In his IME report of September 13, 2017, Dr. Castrejon stated: "Further psychological treatment is not indicated on an industrial basis." In his DIME report of January 22, 2018, Dr. Hall did not identify any psychiatric concerns.

131. Dr. Staudenmayer does not mention PTSD as a potential diagnosis until February 6, 2018. In making the PTSD diagnosis, Dr. Staudenmayer accepted Claimant's self-report of "having a recent panic experience when he saw an individual going up a ladder. He had a flashback to his own trauma. This trigger for Claimant's PTSD symptoms is notably different from both triggers Claimant reported to Dr. Moe: (i) that either his PTSD symptoms began within a few months of the DOI or (ii) they began after Claimant climbed atop his roof to fix a leak). (Ex. N, p. 167)

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

a. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

b. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

c. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

d. In summary, the ALJ finds much of Claimant's testimony to be less than reliable. There do appear to be issues of secondary gain which have manifested themselves, both in his testimony, and his reported symptoms, to Dr. Staudenmeyer in particular. Claimant's recall of events which occurred in the workplace is, stated mildly, highly suspect-regardless of whether it is a sincere difference in perception, or intentional. In contrast, the ALJ finds Claimant's co-workers to be sincere and credible, despite differences in the details as they recall them. The ALJ does not accept Claimant's claim that Tracy Matthews, Mike Anders, Gloria Byers, Dean Burns, and Dr. Centi are all lying. They aren't. Further, the ALJ finds that Edrick Chavez and Robert Santiago are sincere in their *perceptions*, but the *facts* they can testify to are of limited utility to the ALJ. They might have sincerely felt certain 'vibes' in the workplace, but vibes are insufficient to warrant a finding that a hostile work environment existed.

e. Despite the foregoing conclusions regarding Claimant's credibility, the ALJ finds that Claimant was hurt at work. The fall was not faked. The imaging studies taken along the way cannot be faked. The initial X-ray did not show the occult fracture, and as a result, Claimant did not receive the appropriate medical treatment initially. The pain in his ankle he reported was real, but was partially alleviated by the surgery. ALJ finds Claimant to be a sufficiently reliable medical historian, as to his right foot, chest, and neck to support the DIME opinion of Dr. Hall.

Overcoming Division IME, Generally

f. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005

g. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

h. "Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5). A finding of MMI is premature if a course of treatment has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990). Additionally, a finding that a claimant is not at MMI may rest solely upon recommendations for further diagnostic evaluation if such procedures have a reasonable prospect of diagnosing or defining the claimant's condition to suggest a course of further treatment. *E.g., Soto v. Corrections Corp*., W.C. No. 4-813-582 (ICAO, October 27, 2011).

i. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*. The elevated burden is evidence of the Colorado Legislature's intent to limit overcoming the DIME physician's opinion to those cases where it is more probable than not that the opinion was incorrect

j. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

Overcoming Dr. Hall's DIME Opinion on MMI

k. At hearing, Dr. Primack testified that Dr. Hall's DIME opinion should be overcome because Dr. Hall did not have an accurate understanding of the mechanism of injury. A review of the DIME Report, as well as Dr. Hall's deposition testimony, establishes to the satisfaction of the ALJ that Dr. Hall did have an accurate understanding of the mechanism of injury. Dr. Hall's DIME Report shows that he went through the mechanism of injury with the Claimant at the time of the DIME examination. Furthermore, Dr. Hall notes that he reviewed the IME Reports of Dr. Castrejon and Dr. Primack, as well as the treatment notes of Dr. Lakin. All of these Reports contain a description of the mechanism of injury. The medical records entered into evidence contain several descriptions of the incident that are all reasonably consistent. The descriptions of the mechanism of injury are also reasonably consistent with the eyewitness testimony provided at hearing by Gloria Buyers. There is not a slow-motion video of this work injury, but the ALJ finds that Claimant was on the ladder when it fell to the floor with him still on it. In the process, his right foot was impacted and twisted. His forehead struck the ladder with sufficient force to cause a cut. His chest hit the ladder hard enough to cause a cut, and with sufficient force to later require surgical removal of swollen tissue. Dr. Hall opined that Claimant strained his cervical area during the fall, and may have suffered a minor concussion (which cannot be effectively treated). The ALJ finds that Respondents have failed to provide sufficient evidence that Dr. Hall did not have an accurate description of the mechanism of injury.

l. Respondents also asserted at hearing that Dr. Hall's DIME opinion should be overcome because he did not review all of the pertinent evidence. However, Dr. Hall reviewed the medical records provided to him through the DIME process. These records included all of the records (and pain diagrams) generated as a result of

Claimant's treatment at CCOM between the date of injury and February 9, 2017. Given Dr. Hall's review of the CCOM records, he was aware of the early reporting provided by Claimant, including the physical examinations conducted by PA Byrne and Dr. Centi. Dr. Hall was aware of the lack of documenting of symptoms of headaches and neck pain in the CCOM records. Dr. Hall was aware of the incident at CCOM on February 9, 2017, wherein Claimant and Dr. Centi got into a verbal altercation. He was also aware that Claimant's medical care had been transferred to the Southern Colorado Clinic at Claimant's request.

m. Dr. Hall reviewed the IME report that Dr. Scott Primack issued on June 12, 2017. As such, Dr. Hall was aware that Dr. Primack had opined that Claimant's headaches, cognitive issues, and neck pain were not related to the mechanism of injury because, in Dr. Primack's opinion, they had not been sufficiently reported and/or documented early in the claim. Dr. Hall was aware that Dr. Primack opined that Claimant was at MMI for his ankle and facial laceration and that Dr. Primack was not recommending any additional treatment.

n. Dr. Hall also reviewed the Southern Colorado Clinic medical records that included the MMI and Impairment Rating Report authored by Dr. Terrence Lakin on September 27, 2017. He was aware of the physical examinations performed by Dr. Lakin, as well as the treatment he directed. Dr. Hall was aware of the causation opinions offered by Dr. Lakin as to the relatedness of the headaches and neck complaints. He was also aware of Dr. Lakin's opinions on MMI and future medical treatment.

o. At his deposition, Dr. Hall also reviewed the surveillance videos shot on April 18, 2017, and on April 27, 2017. At this deposition, he was also provided with the supplemental reports authored by Dr. Primak and Dr. Lakin after they had viewed the surveillance video. Having watched the surveillance video for himself, and having considered the opinions of Dr. Primack and Dr. Lakin, Dr. Hall opined that the video was not inconsistent with Claimant's physical presentation or his physical examination. Dr. Hall testified that the surveillance video and updated opinions from Dr. Primack and Dr. Lakin did not change his opinions.

p. Based upon his understanding of the mechanism of injury, and his review of the relevant evidence, Dr. Hall performed a causation analysis with an eye toward resolving the material disputes in the record. First, Dr. Hall identified that there was an issue whether Claimant's complaints of neck pain are related to the mechanism of injury. Second, Dr. Hall identified that there was an issue whether Claimant required any additional medical treatment for his right ankle condition.

q. In his DIME Report, Dr. Hall weighs the evidence on the issue of whether the neck pain is causally related to the fall that occurred on December 22, 2016. Dr. Hall notes Dr. Primack's position that the neck pain is not related, and cites to Dr. Primack's rationale. Dr. Hall then references the mechanism of injury and determines that this mechanism is highly likely to cause some form of neck injury.

r. Dr. Hall also acknowledges the lack of documentation of neck pain and headaches in the early medical records from CCOM. He determines that the lack of documentation in the CCOM records does not necessarily mean that Claimant did not injure his neck in the fall. Dr. Hall mentions that he has seen times when a symptom or condition was not documented by medical providers even though it was clearly present. He points out that this is especially true in situations where there are multiple injuries that may complicate the reporting of symptoms. He also determined that Claimant's neck pain is causally related to the fall on December 22, 2016. The ALJ finds this to be a plausible inference, in light of Claimant falling, striking the right side of his head, left side of his chest, and right ankle. It is not surprising that this mechanism of injury, striking the floor asymmetrically, could also strain his neck in the process. Dr. Hall opines that Claimant is not at MMI because he needs facet work, to be followed by a possible rhizotomy, and targeted physical therapy.

s. Dr. Hall also identified the issue of whether Claimant required any additional medical treatment for his right ankle condition as a material dispute. Dr. Hall noted the mechanism of injury that establishes Claimant's right foot as a compensable part of this claim. Dr. Hall reviewed the treatment notes of Dr. Simpson and Dr. Maurer, who provided orthopedic treatment for Claimant's right ankle. He also reviewed the future medical treatment recommendations of Dr. Primack and Dr. Lakin. He performed a physical examination of Claimant's right ankle and discussed the issue with Claimant. Dr. Hall opined that the "cleanout" procedure recommended by Dr. Maurer is a treatment option that is causally related to the work-injury, and has a reasonable chance of reducing Claimant's symptoms. Dr. Hall's opinion is consistent with the independent review done by Dr. Ferrari. Dr. Ferrari opined that the proposed surgery was a *reasonable* treatment option, given Claimant's symptoms and physical findings. However, Dr. Ferrari felt that the surgery should have been done under Claimant's private health insurance. In contrast, Dr. Primak opined that the surgery should not be performed as it was *not a reasonable* treatment option, regardless of causation. As such, the record establishes that Dr. Hall reviewed the relevant evidence and resolved discrepancies in the record as he performed his causation analysis.

t. The ALJ finds, in summary, that Dr. Primack has conducted a thorough, sincere, and professionally rendered analysis and critique of Dr. Hall's DIME report. In the end, however, Respondents have not shown, by clear and convincing evidence, that Dr. Hall did not follow the appropriate protocols and analysis in rendering his DIME opinion. Dr. Hall did have access to the appropriate records in the case, and his opinion remained essentially unchanged through his deposition, even when confronted with additional evidence. It is of no small concern to this ALJ how Claimant's diagnosis changed upon his reassignment to Dr. Lakin. In the end, however, Dr. Hall's DIME opinion is one of several, upon which reasonable minds might differ—but a DIME opinion is given greater deference under the Workers Compensation system. Were the burden of proof lower, a different result might arguably be reached. Respondents have not overcome Dr. Hall's DIME report on causation and MMI regarding Claimant's right foot and cervical region.

u. The ALJ further notes that Respondent argues that Claimant must overcome the DIME on the issue of a concussion. By his own position statement (and as made clear in Dr. Hall's deposition) Claimant is making no such attempt. The ALJ, however, does find that Claimant is now at MMI for any concussion symptoms which may have followed his work injury. There is no treatment to be offered at this point, nor is there an impairment rating to be assigned.

Withdrawal of Admission of Liability / Claimant Responsible for Own Termination

v. Claimant sustained an admittedly compensable injury on December 22, 2016. Claimant worked various modified duty assignments for Employer from the date of injury through June 22, 2017. During the light duty period, there was a significant amount of animosity, suspicion, and hostility between the Claimant and the Employer. Based upon what Claimant told Dr. Staudenmeyer (whose records were relied upon by Dr. Lakin), Dr. Lakin determined that the benefit of the modified duty was outweighed by the stress, and potential delay in recovery, it was causing Claimant. Dr. Lakin then took Claimant off of modified duty as of June 23, 2017. Respondents filed a General Admission of Liability, and ultimately a Final Admission of Liability, that admitted for TTD benefits beginning on June 23, 2017 and continuing until September 26, 2017. Claimant objected to the Final Admission and requested a DIME. The DIME was performed by Dr. Hall on January 22, 2018. Dr. Hall determined that Claimant is not at MMI and recommended additional medical treatment. Respondents then contested Dr. Hall's determinations, and filed Application for Hearing. In their Application for Hearing, Respondents state as follows:

> In addition, Respondents endorse that claimant was responsible for his termination as of the date his treating physician took him off from work based upon claimant's misrepresentation to the ATP that the employer, who offered claimant modified duty which claimant had been working, provided a hostile work environment. The ATP relied upon this misrepresentation by claimant as the employer's work environment was not hostile to claimant. Respondents are seeking an overpayment of the TTD/TPD paid to claimant has [sic] of the date the ATP took claimant completely. Overpayment.

w. Although Respondents state the issue as termination for cause, Claimant argues that the proper framework for this issue is withdrawal of the admission(s) of liability under C.R.S. 8-43-201(1). Under C.R.S. 8-43-201(1) a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order has the burden to prove by a preponderance of the evidence that such a modification should be made. *City of Brighton v. Rodriguez*, 318 P.3d 496 (2014). The ALJ concurs with Claimant on how this issue is to be framed.

Claimant Responsible for Termination

x. When a temporarily disabled claimant is responsible for termination of his employment, the resulting wage loss may not be attributed to the work injury. *See* § 8-42-103 (1) (g), §8-42-105 (4), C.R.S. 2004. *Liberty Heights at Northgate v. ICAO*, 30 P.2d 872 (Colo. App. 2001). The termination statutes, §8-42-103(1) (g) and §8-42-105(4), apply to both regular and modified employment. *See Colorado Springs Disposal v. ICAO*, 58 P.3d 1031 (Colo. App. 2002). An employee is responsible for termination if the employee precipitated the employment termination by a volitional act which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (ICAO, 2001). Thus, the determination of Claimant's responsibility for the termination of employment is not related to the concept of culpability, but requires only a "volitional act," or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corporation*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995)

y. Here, Claimant was responsible for his separation from employment effective June 23, 2017, by the volitional act of misrepresenting to Dr. Staudenmayer that Employer was harassing him at work. Things like 'not being welcome at an employee meeting' or 'not being invited to an employer party' or 'being reprimanded for taking too long of a break', may be misconstrued as a matter of one's perception. However, this does not objectively constitute a "hostile work environment". Not even close.

z. Additionally, numerous aspects to Claimant's claim of 'harassment' cannot be explained merely as differing perceptions. Either Mike Anders called Claimant hop-along and gimp, or he did not. The ALJ finds he did not. Either Claimant reported Anders' name-calling to Tracy Matthews and Matthews refused to address it, or Claimant never reported any such thing to Matthews. The ALJ finds that this was never reported to Tracy Matthews. Either Claimant told Gloria Byers and Tracy Matthews about his MMA fighting, or they are both lying. The ALJ finds that Byers and Matthews did not just make this up. Some sort of casual MMA conversations occurred, the details of which are consigned to the bin of history. Either claimant called Matthews and told her Dr. Simpson took him off from work for 6 weeks because his foot needed to heal or Matthews is lying about it. Matthews is not lying about it. Either Employer required Claimant to work in excess of his physical restrictions, or Employer reprimanded Claimant when he tried to do so. The ALJ finds that Employer, at all times pertinent, offered reasonable temporary duty to Claimant, and acted in good faith to prevent him from exceeding his reasonable work restrictions.

aa. The ALJ finds that Employer's employees did not, by any reasonably objective measure, harass Claimant in any instance that cannot be explained away by simply differing perceptions. Claimant's reports to Dr. Staudenmayer that Employer did these things are simply not true. Whether Claimant intentionally lied for financial gain or did so because of a preexisting psych condition is not determinative here. An employee is responsible for his own termination if the employee precipitated the employment

termination by a *volitional act* which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (ICAO, 2001). The determination of Claimant's responsibility for the termination of employment is not related to the concept of culpability, but requires only a "volitional act," or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corporation*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). The ALJ finds that Claimant should reasonably have expected that if he continued to complain of harassment and hostility (which the ALJ finds was not happening), that Dr. Staudenmayer would take him off from work. This is exactly what occurred. Claimant was fully capable of performing the reasonable modified duties assigned to him. He just chose not to.

bb. On June 23, 2017, when Dr. Lakin took Claimant off from work because Dr. Staudenmayer told him Claimant could not return to Employer's hostile work environment, it was Claimant who was responsible for that separation of employment, due to his own misrepresentations to Dr. Staudenmayer about the alleged 'hostility' in the workplace. Claimant essentially took himself out of the modified job he was doing for Employer and was responsible for his separation from Employer as of June 23, 2017 because of his claims of harassment. As such, Claimant's resulting wage loss, i.e., the wages he was earning working for modified duty for Employer, is not attributable to him being unable to work because of the ladder injury. Instead, it is attributable to the volitional act of reporting incidents of harassment and hostility that never happened to Dr. Staudenmayer. The ATP, Dr. Lakin, opined that he would never have taken Claimant off from work entirely effective June 23, 2017, if the ALJ were to find that Employer's work environment was not hostile. The ALJ finds that Claimant was responsible for the separation of employment beginning on June 23, 2017. Claimant, therefore, was not entitled to TTD as of that date. He was entitled to TPD, in the amount he was receiving before he self-terminated his employment.

cc. The law permits this remedy. In *Begordis vs. Liberty Mutual*, W.C. No. 4-780-399 (ICAO July 28, 2012), the ATP released claimant to full duty work on March 20, 2009 after claimant had been non-compliant with care. Later, the claim was litigated, and claimant argued that claimant should not have been placed at full duty in March 2009, and claimant was therefore entitled to TTD after March 20, 2009. In preparation for hearing, claimant wrote the ATP asking the ATP what claimant's restrictions would/should have been, if he wasn't released for noncompliance. The ATP responded with a list of restrictions claimant should have had, given his physical condition on March 20, 2009. At hearing, the ALJ determined that claimant should not have been released to full duty on March 20, 2009, and she awarded claimant TTD from March 20, 2009 until some future date. This case stands for the proposition that an ALJ can credit an ATP's opinion that the restrictions he did, or did not, give in the past were not appropriate. And, an ALJ can rule that the retroactive "change" in restrictions can affect a party's liability for lost wage benefits.

dd. The ATP, Dr. Lakin, opined that he would **not** have taken Claimant off from work on June 23, 2017, if Employer did not provide a hostile work environment to Claimant because of this injury. The ALJ finds that Employer did not provide a hostile

work environment or harass Claimant. The ALJ adopts the opinion of Dr. Lakin that he should not have taken Claimant entirely off from work as of June 23, 2017. Claimant's own volitional act removed him from employment. The ALJ finds Dr. Staudenmayer's opinions and testimony to the contrary to be wholly unpersuasive. Dr. Staudenmayer relied far too heavily on Claimant's unreliable version and perception of these events, to the exclusion of far more persuasive evidence. Claimant is in no further need of psychological treatment related to his work injury.

Medical Benefits

ee. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

ff. Claimant was placed at MMI by Dr. Lakin on September 27, 2017. At that time, Dr. Lakin opined that Claimant's right ankle condition was causally related to the December 22, 2016 work-injury. Dr. Lakin provided a permanent impairment rating for the right ankle. Dr. Lakin recommended future medical care for the right ankle as follows:

> Dr. Clark Johnson, Podiatry, or other foot/ankle specialist, - right ankle follow up every 6 months if needed, conservative care with injections, f/u imaging, AFO bracing/fitting and replacement for normal wear and tear. Evaluation/consideration of arthroscopy, arthrodesis if needed in 10-15 years. (Ex. 14, p. 185)

gg. Following MMI, Dr. Lakin did refer Claimant to Dr. Johnson for treatment of the right ankle. Dr. Johnson saw Claimant November 13, 2017. Dr. Johnson performed a right ankle intra-articular injection. Dr. Johnson noted that if the injection provided good, if short-term relief, then surgical re-evaluation would be medically indicated. The next day, Claimant contacted Dr. Johnson and indicated that there had been significant but short-term benefit. Based upon the diagnostic effect of the injection, Dr. Johnson referred Claimant to Dr. Mark Maurer for a surgical evaluation. (Ex. 14, pp. 191-195).

hh. Claimant began treatment with Dr. Maurer on December 15, 2017. Dr. Maurer provided conservative treatment in the form of additional injection, physical therapy, and diagnostics. However, on January 29, 2018, Dr. Maurer recommended a right ankle arthroscopy with synovectomy, with possible micro fracture if necessary. Dr. Maurer submitted his request for pre-authorization to Insurer. Insurer had the request reviewed by Dr. James Ferrari. Dr. Ferrari opined that the proposed surgery was a *reasonable* treatment option given Claimant symptoms and physical findings. However, Dr. Ferrari felt that the surgery should have been done under Claimant's private health insurance. As such, Insurer denied the request for pre-authorization.

ii. Claimant was then examined by Dr. Timothy Hall as part of the DIME process on January 22, 2018. At that time, Dr. Hall performed a physical examination of Claimant's right ankle and foot. Dr. Hall determined that:

> Regarding the ankle, there is abnormal range of motion documented elsewhere. He has tenderness at the talocrural joint along the left posterior malleolus. There is some crepitus with range of motion. Pulse is difficult to appreciate due to 1+ edema. There are color changes locally, likely from chronic edema. Again, he is wearing a boot. . .

jj. Because Claimant's right ankle and foot were still swollen, still discolored, and still functionally limiting over one year from the date of injury, Dr. Hall determined that the surgery recommended by Dr. Maurer was a reasonable treatment option for Claimant.

kk. On May 14, 2018, Dr. Maurer performed the recommended surgical procedure. Following the procedure, Claimant has continued to treat with Dr. Maurer. Dr. Maurer's medical records document that Claimant's pain levels have decreased since the surgery. Claimant is no longer wearing his walking boot. Claimant testified at hearing that the surgery has been beneficial and that he believes it was the right decision to proceed. The ALJ finds that Claimant has shown, by a preponderance of the evidence, that the right ankle surgery performed by Dr. Maurer on May 14, 2018 was reasonable, necessary, related to his work injury.

Disfigurement

ll. The ALJ finds and concludes that as a result of his work injury, Claimant has a visible disfigurement to the body consisting of 1) a well-healed, light, scar running adjacent to his right eyebrow, approximately 1" by 1 mm. 2) a crescent shaped 2" scar, reddish in color, surrounding his left nipple area. (Any disfigurement of Claimant's ankle is held in abeyance). Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

mm. The ALJ Orders that Insurer shall pay Claimant $800.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore Ordered that:

1. The DIME of Dr. Hall has not been overcome by Respondents. Claimant is not at MMI for his right ankle or his cervical region.

2. Claimant is responsible for his own termination, effective June 23, 2017. Respondents may withdraw their Admission of Liability to TTD benefits, effective this date.

3. Respondents will reimburse Claimant for the surgery performed on his right ankle by Dr. Maurer, and will pay for all reasonable, necessary, and related medical care to bring Claimant to MMI.

4. Respondents shall pay for all reasonable, necessary, and related medical care on Claimant's neck to bring him to MMI.

5. Respondents shall pay Claimant $800.00 for disfigurement.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 6, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she was disabled from her usual employment and suffered a wage loss during a closed period of time, January 3, 2017, to December 17, 2017, and is therefore entitled to an award of temporary partial disability.

2. What is Claimant's average weekly wage?

FINDINGS OF FACT

1. Claimant is a 54 year old female who sustained an admitted industrial injury on September 24, 2016. Claimant began her employment with Employer on March 15, 2015. Claimant's injury occurred when the driver of the electric cart she was riding in made a quick turn and threw her onto the concrete floor. Claimant was immediately placed off work.

2. After being released to work with restrictions of no lifting, pushing or pulling five pounds, Employer made a modified job offer to Claimant which offered work 8:00 am to 2:30 pm Monday through Thursday and 8:00 am to 12 Noon on Friday at the rate of $11.27, totaling 30 hours a week. The offer contemplated paying Claimant $338.10 a week.

3. Employer is a greenhouse with a seasonal work schedule. Work begins to ramp up in January and February. The peak season is March through June and July to December is the slow work period. In the slow season employees average 20 to 25 hours a week. Between February and September 2016, Claimant consistently worked in excess of 25 hours be week.

4. Claimant's post-injury weekly hours did not naturally decrease starting in July when the Employer's "slow period" of work began. From February 7, 2016, to September 17, 2016, a period of 224 days, Claimant earned a total of $18,632.66. This averages to $582.27 per week. Claimant also received a $250 annual bonus adding an additional $4.81 a week for a total of $587.08.

5. Claimant has demonstrated that it is more probably true than not that an accurate reflection of her AWW is based upon the 224 day period prior to her injury, including her bonus, for an AWW of $587.08. This period of time covers the slow and peak periods of employment in Employer's greenhouse business.

6. Respondents admitted to an AWW of $543.43. Respondents argues that the correct AWW is lower than the one they admitted. Respondents contend the correct AWW is $330.00. The ALJ finds that the correct AWW is $587.08

7. Wage records from before the injury compared to after injury establish that Claimant was scheduled fewer hours post-injury than the same period of time pre-injury. Claimant worked all the hours she was scheduled and was only absent for medical appointments. Claimant had doctor appointments, MRIs, physical therapy, psychology appointments in Thornton and Denver during her work day. Claimant never left work without permission and was never written up for returning to work untimely when taking off for medical appointments.

8. For example, Claimant's medical records and time cards illustrate several examples where Claimant did not come into work at 8:00am as scheduled in the modified job offer. Work related medical appointments conflicted with her work schedule as reflected in time cards and medical reports:

   a. on January 10, 2017, Claimant had an appointment with Dr. Parsons and arrived at work at 10:24am;

   b. on February 20, 2017, Claimant had an appointment with Dr. Parsons and arrived at work at 10:18am; and

   c. on May 3, 2017, Claimant had an appointment with Dr. Anderson-Oeser and arrived at work at 11:14am.

9. Starting on May 3, 2017, the authorized treating physician (ATP) limited Claimant's hours to eight hours per day and five days a week, or 40 hours per week. During this same period in 2016, before the injury, Claimant worked an average of 57 hours a week.

10. Claimant performed modified job duties which occasionally exceeded her restrictions. Claimant's restrictions impaired her ability to perform her regular employment. The modified duty offer provided for 30 hours of work a week, fewer hours than Claimant's regular work-week pre-injury.

11. Claimant's ATP never released her to regular work without restrictions until MMI.

12. Effective January 22, 2017, Employer lowered the hourly wage rate of all of it's' employees to $11.00 per hour. Employer provided notice to all employees of the wage rate change on January 17, 2017. On January 22, 2017, Claimant's hourly rate of $11.27 an hour was reduced to $11.00 an hour. Employer represented that its wage reduction was consistent with federal law governing wages paid by H2A Employers.

13. It is found that Respondents' January 22, 2017, wage reduction does not impact calculation of Claimant's AWW for a date of injury on September 24, 2016, nor

does it reduce Claimant's indemnity benefits award for the period January 3, to December 17, 2017.

14. Claimant took vacation starting December 18, 2017, to January 8, 2018. Claimant is not entitled to TPD for that period.

15. Claimant demonstrated that it is more probably true than not that her work injury to some degree contributed to her post injury wage loss. Claimant is entitled to TPD from January 3, 2017, to December 17, 2017, in the amount of $8,913.65. This calculation is based on an AWW of $587.08. The ALJ incorporates by reference the chart contained in paragraph 17 of Claimant's proposed findings of fact dated August 27, 2018.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-201, C.R.S. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. Section 8-43-301(1), C.R.S.

2. The claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with the employer. Section 8-41-301(1)(b) and (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. In rendering a decision, the ALJ must make credibility determinations, draw plausible inferences from the record, and resolve essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office,* 84 P.3d 1023 (Colo. 2004). In determining credibility, the ALJ considers the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. Colorado Jury Instructions, Civil, 3:16.

AWW

4. Section 8-42-102(2), *supra*, requires the ALJ to base Claimant's AWW on her earnings at the time of injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon her AWW on a date other than the date of injury.

Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), *supra*, grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

5. A fair approximation of Claimant's AWW is arrived at by considering Claimant's wages earned during the 32 weeks (224 days) prior to the date of injury, September 24, 2016. Based on that time period, the correct AWW is $587.08.

TPD

6. As found, commencing January 3, 2017, to December 17, 2017, Claimant was unable to return to the usual job due to the effects of the work injury. Section 8-42-103(1), *supra*, requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Thus, if the injury in part contributes to the wage loss, TPD benefits must continue until one of the elements of Section§8-42-106(2), *supra*, is satisfied. *Champion Auto Body v. Industrial Claim Appeals Office*, *supra.*

7. Claimant established by a preponderance of the evidence that Respondents are liable for an award of TPD commencing January 3, 2017, through December 17, 2017.

ORDER

1. Respondents shall be liable to pay to Claimant TPD from January 3, 2017, to December 17, 2017, in the amount of $8,913.65.

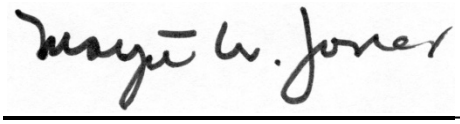
2. Claimant's AWW is $587.08.

3. Respondents shall be liable to Claimant for interest at the rate of 8% per annum on all amounts not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4 th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 6, 2018



Margot W. Jones
Administrative Law Judge
Office of Administrative Court
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained compensable lower back and finger injuries on September 25, 2017 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 3, 2017 until January 6, 2018.

5. Whether Employer is subject to penalties pursuant to §8-43-408(1), C.R.S. for failing to carry Workers' Compensation insurance on September 25, 2017.

6. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304, C.R.S. for Employer's failure to timely report his Workers' Compensation claim pursuant to §8-43-103(1), C.R.S.

7. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties for Employer's failure to timely admit or deny his Workers' Compensation claim pursuant to §8-43-203(2)(a), C.R.S.

FINDINGS OF FACT

1. Employer is a service establishment owned by Im Hoe. On July 26, 2017 Claimant began working for Employer.

2. On September 25, 2017 Claimant was working in the bar area of Employer's facility. Claimant testified that he injured his lower back, left little finger and right middle finger while changing a beer barrel in the bar area. Employer did not possess Workers' Compensation insurance on September 25, 2017.

3. Claimant immediately reported his injuries to General Manager Dong Gil Kim but was terminated on the following day. Mr. Kim informed Claimant that October 2, 2017 would be his last day working for Employer.

4. On October 2, 2017 Claimant drafted a letter to Mr. Hoe. He explained that he had been injured at work on September 25, 2017 at 11:00 p.m. He specifically

noted that he strained his back, sprained his left little finger and sprained his right middle finger. Claimant remarked that he reported his injuries to Mr. Kim and requested medical benefits. He stated that he would file a Workers' Compensation claim because he was uncertain about future treatment and recovery.

5. Employer did not respond to Claimant's request for medical treatment. Claimant thus obtained acupuncture and chiropractic treatment for his industrial injuries through personal providers. The chiropractic treatment included therapeutic massage and manipulation of Claimant's lower back. Claimant paid $60.00 to Yang Acupuncture and $2,743 to Kevin Hwang Chiropractic for a total of $2,803.

6. Claimant explained that he was unable to work for the period October 3, 2017 until January 6, 2018 because of his September 25, 2017 work injuries. The period consists of 95 days or 13.57 weeks.

7. For the period July 26, 2017 until October 2, 2017 Claimant earned total wages of $7050. The period covered 68 days or 9.71 weeks. Dividing $7050 by 9.71 yields an Average Weekly Wage (AWW) of $726.05. An AWW of $726.05 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

8. Claimant has established that it is more probably true than not that he sustained compensable lower back and finger injuries on September 25, 2017 during the course and scope of his employment with Employer. Claimant credibly testified that on September 25, 2017 he injured his lower back, left little finger and right middle finger while changing a beer barrel in Employer's bar area. In an October 2, 2017 letter to Employer Claimant explained that he was injured at work on September 25, 2017 at 11:00 p.m. He specifically noted that he strained his back, sprained his left little finger and sprained his right middle finger. Claimant reported his injuries to Mr. Kim and sought medical benefits for his injuries. Based on Claimant's credible testimony and a review of the record, Claimant suffered a disability that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer.

9. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. Because Employer did not respond to Claimant's request for medical care he obtained acupuncture and chiropractic treatment for his industrial injuries at his own expense. The chiropractic treatment included therapeutic massage and manipulation of Claimant's lower back. Claimant paid $60.00 to Yang Acupuncture and $2,743 to Kevin Hwang Chiropractic for a total of $2,803. All of the preceding medical treatment was reasonable, necessary and related to Claimant's September 25, 2017 industrial injuries. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of his lower back and finger conditions.

10. Claimant has proven that it is more probably true than not that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 3,

2017 until January 6, 2018. Claimant's credible testimony reveals that he was unable to perform his job duties between October 3, 2017 and January 6, 2018. The period covers 95 days or 13.57 weeks. Claimant was obtaining medical treatment for his lower back and finger symptoms. He is entitled to an award of TTD benefits because his September 25, 2017 industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Multiplying Claimant's AWW of $726.05 by 66.67% yields a weekly TTD rate of $484.06. Multiplying $484.06 for a period of 13.57 weeks yields a total TTD amount of $6,568.69.

11. Employer was uninsured on September 25, 2017. Accordingly, in addition to any other compensation or benefits paid or ordered, Employer shall pay an additional amount equal to 25% or $3,000 of the compensation and benefits to the Colorado Uninsured Employer Fund. If Employer fails to pay the Claimant indemnity or medical benefits as ordered, Employer shall pay an additional 25% penalty to the Colorado Uninsured Employer Fund of the Colorado Division of Workers' Compensation.

12. Claimant has failed to demonstrate that it is more probably true than not that he is entitled to recover penalties under §8-43-304, C.R.S. for Employer's failure to timely report his Workers' Compensation claim pursuant to §8-43-103(1), C.R.S. The record demonstrates that Claimant notified Mr. Kim of his September 25, 2017 work injuries on the date they occurred. Claimant also drafted a letter to Mr. Hoe on October 2, 2017 advising of his work injuries. However, Claimant has produced insufficient evidence that Employer failed to report the September 25, 2017 claim to the Division of Workers' Compensation within 10 days or advise Claimant that he might be entitled to Workers' Compensation benefits. Accordingly, Claimant's request for penalties pursuant to §8-43-103(1), C.R.S. is denied and dismissed.

13. Claimant has failed to establish that it is more probably true than not that he is entitled to recover penalties for Employer's failure to timely admit or deny his Workers' Compensation claim pursuant to §8-43-203(2)(a), C.R.S. Although Employer was informed of Claimant's work injuries, Claimant has produced insufficient evidence that he missed work as a result of the injuries. The record reveals that Claimant was terminated from employment on October 2, 2017 but is devoid of evidence that Employer was aware of Claimant's subsequent disability. Accordingly, Claimant's request for penalties pursuant to §8-43-203(2)(a), C.R.S. is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that he sustained compensable lower back and finger injuries on September 25, 2017 during the course and scope of his employment with Employer. Claimant credibly testified that on September 25, 2017 he injured his lower back, left little finger and right middle finger while changing a beer barrel in Employer's bar area. In an October 2, 2017 letter to Employer Claimant explained that he was injured at work on September 25, 2017 at 11:00 p.m. He specifically noted that he strained his back, sprained his left little finger and sprained his right middle finger. Claimant reported his injuries to Mr. Kim and sought medical benefits for his injuries. Based on Claimant's credible

testimony and a review of the record, Claimant suffered a disability that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. Because Employer did not respond to Claimant's request for medical care he obtained acupuncture and chiropractic treatment for his industrial injuries at his own expense. The chiropractic treatment included therapeutic massage and manipulation of Claimant's lower back. Claimant paid $60.00 to Yang Acupuncture and $2,743 to Kevin Hwang Chiropractic for a total of $2,803. All of the preceding medical treatment was reasonable, necessary and related to Claimant's September 25, 2017 industrial injuries. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of his lower back and finger conditions.

Average Weekly Wage

9. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

10. As found, for the period July 26, 2017 until October 2, 2017 Claimant earned total wages of $7050. The period covered 68 days or 9.71 weeks. Dividing $7050 by 9.71 yields an AWW of $726.05. An AWW of $726.05 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

11. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

12. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period October 3, 2017 until January 6, 2018. Claimant's credible testimony reveals that he was unable to perform his job duties between October 3, 2017 and January 6, 2018. The period covers 95 days or 13.57 weeks. Claimant was obtaining medical treatment for his lower back and finger symptoms. He is entitled to an award of TTD benefits because his September 25, 2017 industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Multiplying Claimant's AWW of $726.05 by 66.67% yields a weekly TTD rate of $484.06. Multiplying $484.06 for a period of 13.57 weeks yields a total TTD amount of $6,568.69.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

13. Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. Section 8-43-408(5), C.R.S., provides that, in addition to any other compensation or benefits paid or ordered, an employer that is uninsured at the time an employee suffers a compensable injury shall pay an additional amount equal to 25% of the compensation and benefits to the Colorado Uninsured Employer Fund. Section 8-43-408(6), C.R.S., further specifies that, if the uninsured employer fails to pay the Claimant indemnity or medical benefits as ordered, the non-insured Respondent shall pay an additional 25% penalty to the Colorado Uninsured Employer Fund of the Colorado Division of Workers' Compensation. If compensation is awarded the Judge shall compute and require the employer to pay a trustee an amount equal to the present value of all unpaid compensation or require the employer to file a bond within 10 days of the order. §8-43-408(2), C.R.S. The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005).

14. As found, Employer was uninsured on September 25, 2017. Accordingly, in addition to any other compensation or benefits paid or ordered, Employer shall pay an additional amount equal to 25% or $3,000 of the compensation and benefits to the Colorado Uninsured Employer Fund. If Employer fails to pay Claimant indemnity or medical benefits as ordered, Employer shall pay an additional 25% penalty to the Colorado Uninsured Employer Fund of the Colorado Division of Workers' Compensation.

Penalties for Employer's Failure to Timely Report Claim pursuant to 8-43-103(1), C.R.S.

15. Section 8-43-103(1), C.R.S. requires that an employer report an injury to the Division of Workers' Compensation (DOWC) within 10 days of notice or knowledge that an employee has suffered a lost-time injury. A "lost-time injury" is defined as one that causes a claimant to miss more than three shifts or three calendar days of work. *Grant v. Industrial Claims Appeals Office*, 740 P.2d 530 (Colo. App. 1987). An employer is deemed to have "notice" of an injury when the employer has some knowledge of the facts that would lead a reasonably conscientious manager to believe the claimant may seek benefits for the injury. *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984).

16. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304, C.R.S. for Employer's failure to timely report his Workers' Compensation claim pursuant to §8-43-103(1), C.R.S. The record demonstrates that Claimant notified Mr. Kim of his September 25, 2017 work injuries on the date they occurred. Claimant also drafted a letter to Mr. Hoe on October 2, 2017 advising of his work injuries. However, Claimant has produced insufficient evidence that Employer failed to report the September 25, 2017 claim to the Division of Workers' Compensation within 10 days or advise Claimant that he might be entitled to Workers' Compensation benefits. Accordingly, Claimant's request for penalties pursuant to §8-43-103(1), C.R.S. is denied and dismissed.

Penalties for Employer's Failure to Admit or Deny Liability

17. Section 8-43-203(1)(a), C.R.S. provides:

> The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee . . . within twenty days after a report is, or should have been filed with the division pursuant to section 8-43-101, whether liability is admitted or contested; except that, for purpose of this section, any knowledge on the part of the employer, if insured, is not knowledge on the part of the insurance carrier.

18. Section 8-43-203(2)(a), C.R.S. specifies that if such notice is not filed, "the employer, or if insured, the employer's insurance carrier, may become liable to the claimant, if successful on the claim for compensation, for up to one day's compensation for each failure to so notify." Because the claimant seeks the imposition of a penalty for

failure timely to admit or deny liability, the claimant bears the burden of proof to establish the circumstances justifying the imposition of the penalty. *See Pioneer Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005) (claimant seeking imposition of penalty under § 8-43-304(1) bore burden of proof to establish circumstances justifying a penalty).

19. Under the language of § 8-43-203(1)(a), knowledge of an insured may not be imputed to the insurer. *See State Compensation Insurance Fund v. Wilson,* 736 P.2d 33 (Colo. 1987); *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). Thus, an insurer is not responsible for admitting or denying liability until 20 days after it has knowledge of information that would require the employer to file a first report of injury with the DOWC under §8-43-101, C.R.S. Those circumstances include injuries that result in "lost time from work for the injured employee in excess of three shifts or calendar days." The mere knowledge that the claimant sustained an injury and that the injury resulted in restrictions resulting in a prescription for modified duty does not establish that the claimant missed work as a result of the injury or the number of days missed. *See Ralston Purina-Keystone v. Lowry,* 821 P.2d 910 (Colo. App. 1991); *Atencio v. Holiday Retirement Corp.,* W.C. No. 4-532-443 (ICAP Nov. 15, 2002).

20. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to recover penalties for Employer's failure to timely admit or deny his Workers' Compensation claim pursuant to §8-43-203(2)(a), C.R.S. Although Employer was informed of Claimant's work injuries, Claimant has produced insufficient evidence that he missed work as a result of the injuries. The record reveals that Claimant was terminated from employment on October 2, 2017 but is devoid of evidence that Employer was aware of Claimant's subsequent disability. Accordingly, Claimant's request for penalties pursuant to §8-43-203(2)(a), C.R.S. is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable lower back and finger injuries on September 25, 2017 during the course and scope of his employment with Employer.

2. Employer is financially responsible for payment of Claimant's medical expenses for the treatment of lower back and finger injuries as well as authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his September 25, 2017 industrial injuries. Claimant has incurred medical expenses totaling $2,803 for acupuncture and chiropractic care.

3. Claimant earned an AWW of $726.05.

4. Claimant shall receive TTD benefits for the period October 3, 2017 until January 6, 2018. The period covers 95 days or 13.57 weeks. Multiplying Claimant's

AWW of $726.05 by 66.67% yields a weekly TTD rate of $484.06. Multiplying $484.06 for a period of 13.57 weeks yields a total TTD amount of $6,568.69.

5. Claimant's request for penalties pursuant to §8-43-103(1), C.R.S. is denied and dismissed.

6. Claimant's request for penalties pursuant to §8-43-203(2)(a), C.R.S. is denied and dismissed.

7. Section 8-43-408(5), C.R.S., provides that in addition to any other compensation or benefits paid or ordered, an employer that is uninsured at the time an employee suffers a compensable injury shall pay an additional amount equal to 25% of the compensation and benefits to the Colorado Uninsured Employer Fund.

Section 8-43-408(6), C.R.S., provides that if the uninsured employer fails to pay the claimant indemnity and/or medical benefits as ordered, the non-insured Respondent shall pay an additional 25% penalty to the Colorado Uninsured Employer Fund of the Colorado Division of Workers' Compensation.

IT IS FURTHER ORDERED: Respondent-Employer shall pay the sum of $12,000 in compensation and benefits to Claimant.

IT IS FURTHER ORDERED: Respondent-Employer shall pay the sum of $3,000 to the Colorado Uninsured Employer Fund. The check shall be payable to the Division of Workers' Compensation, 633 17th Street, 9th Floor, Denver, CO 80202, Attention Iliana Gallegos, Revenue Assessment Officer.

In lieu of payment of the above compensation and benefits to Claimant, Respondent-Employer shall:

a. Deposit the sum of $15,000 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, 9th Floor, Denver, Colorado 80202, Attention: Gina Johannesman / Trustee Special Funds Unit; or

b. File a surety bond in the sum of $15,000 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation, penalties and

benefits awarded.

IT IS FURTHER ORDERED: Respondent-Employer shall notify the Division of Workers' Compensation, and Claimant, of payments made pursuant to this order.

IT IS FURTHER ORDERED: The filing of any appeal, including a petition to review, shall not relieve Respondent-Employer of the obligation to pay the designated sum to Claimant, to the trustee or to file the bond as required by paragraph (b) above. §8-43-408(2), C.R.S.

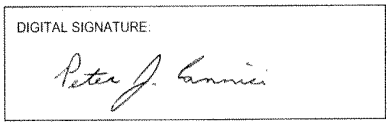
IT IS FURTHER ORDERED: Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or Order authorizing distribution provides otherwise.

IT IS FURTHER ORDERED: Pursuant to §8-42-101(4), C.R.S., any medical provider or collection agency shall immediately and forthwith cease and desist from any further collection efforts from Claimant because Respondent-Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

8. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 6, 2018.



_____
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant is entitled to a 29% whole person impairment rating, as determined by the Division Examiner, and if not, what is the correct scheduled and/or whole person impairment rating to which she is entitled.

II. Whether Claimant has established by a preponderance of the evidence that she is entitled to a disfigurement award, and if so, how much.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant, Debra Ball, is currently fifty-four years old. She worked as a bus driver for Employer. As a bus driver, Claimant dealt with customers and assisted in loading their luggage. Hrg. Tr. p. 16-17: 12-3.
2. On April 17, 2016, Claimant suffered an admitted injury to her right shoulder and rotator cuff while lifting a piece of luggage, which weighed approximately 50 pounds, onto a shelf. Hrg. Tr. p. 16-17: 8-15.
3. On April 22, 2016, an MRI revealed a massive and retracted full-thickness tear of her right rotator cuff. Cl. Ex. 6: 63; Ex. 3: 52; Ex. 1: 37.
4. As treatment for her industrial injury, Claimant underwent three surgeries to her right rotator cuff. Each surgery was performed by Dr. John Papilion of Advanced Orthopedic & Sports Medicine Specialists.
5. The first surgery to repair the damage to the various components of her rotator cuff was performed on June 6, 2016. The surgery required the placement of multiple sutures and anchors. Cl. Ex. 1: 1; 1:37. Dr. Papilion noted in the surgical report the postoperative diagnosis as:
    a. Large 5 cm tear of supraspinatus and infraspinatus tendon rotator cuff,
    b. Degenerative tear of the superior labrum,
    c. Chronic impingement, and
    d. AC joint anthropathy.
6. After surgery, Claimant underwent physical therapy as prescribed and ordered by Dr. Papilion of Advanced Orthopedic & Sports Medicine Specialists.

7. Due to pain and dysfunction of her cervical musculature, and the orders for physical therapy, which the ALJ infers were from Dr. Papilion since he signed off on the physical therapy notes which outline the "completed orders", the physical therapists treated Claimant's cervical musculature. Ex. 7.

8. The medical records submitted at hearing from Advanced Orthopedic & Sports Medicine Specialists, which were generated by various physical therapists and signed off on by Dr. Papillion, document the completed physical therapy orders directed towards Claimant's cervical musculature at various appointments. The "completed orders**,**" i.e., treatment, directed towards Claimant's cervical musculature in the form of physical therapy included:

    a. Neck stretches, scapular squeezes[1], and soft tissue mobilization of her cervical musculature to improve mobility on June 30, 2016. *(Ex. 7: 84-85)*

    b. Neck stretches and scapular squeezes on July 5, 2016. *(Ex. 7: 86-87)*

    c. Neck stretches and scapular squeezes on July 6, 2016. *(Ex. 7: 88-89)*

    d. Neck stretches and scapular squeezes on July 12, 2016. (Ex. 7: 90-91)

    e. Soft tissue mobilization to the cervical musculature, neck stretches, and scapular squeezes on July 13, 2016. *(Ex. 7: 92-93)*

    f. Soft tissue mobilization to the cervical musculature, neck stretches, and scapular squeezes on July 19, 2016. *(Ex. 7: 94-95)*

    g. Soft tissue mobilization to the cervical musculature, neck stretches, and scapular squeezes on July 21, 2016. *(Ex. 7: 99-100)*

    h. Neck stretches and scapular squeezes on July 26, 2016. *(Ex. 7: 101-102)*

    i. Soft tissue mobilization to the cervical musculature, neck stretches, and scapular squeezes on July 28, 2016. *(Ex. 7: 103-104)*

    j. Soft tissue mobilization to the cervical musculature, neck stretches, and scapular squeezes on August 2, 2016. *(Ex. 7: 105-106)*

    k. Neck stretches and scapular squeezes on August 4, 2016. *(Ex. 7: 107-108.)*

    l. Neck stretches and scapular squeezes on August 11, 2016. *(Ex. 7: 109-110.)*

    m. Neck stretches and scapular squeezes on August 12, 2016. *(Ex. 7: 111-112.)*

    n. Neck stretches and scapular squeezes on August 18, 2016. *(Ex. 7: 113-114.)(Also educated about sleeping position in order to accommodate her shoulder condition.)*

[1] Dr. Gray testified that the levator scapulae muscle is one of the primary muscles that is shared between the neck and the shoulder and is a significant focus when recovering and undergoing rehabilitation after shoulder surgery. Therefore, the ALJ credits Dr. Gray's testimony and finds that physical therapy directed towards Claimant's scapula musculature in the form of scapular squeezes is treatment of the levator scapulae and directed towards the musculature of Claimant's cervical spine.

o. Neck stretches and scapular squeezes on August 23, 2016. *(Ex. 7: 115-116.)*
p. Neck stretches and scapular squeezes on August 24, 2016. *(Ex. 7: 117-118.)*
q. Neck stretches and scapular squeezes on August 23, 2016. *(Ex. 7: 118-120.)*

9. Despite undergoing the first surgery, and despite undergoing physical therapy directed towards her shoulder, i.e., rotator cuff, as well as her cervical musculature, i.e., her neck, Claimant continued to have significant pain and dysfunction of the associated structures.

10. Due to ongoing pain and functional impairment, Claimant underwent another MRI. The MRI indicated the first surgery failed. The MRI demonstrated a persistent massive rotator cuff tear, edema in the posterior muscle belly, and superior migration of the humeral head and effusion of the shoulder joint. *Ex. 3: 52-3; Ex. 1: 37*.

11. After examining Claimant, listening to her reported physical complaints, and reviewing her MRI, Dr. Papillion concluded the prior repair failed and Claimant developed:

> [A] massive recurrent tear that was now felt to be irreparable with retraction to the glenoid rim. She has superior migration of the humeral head and pseudoparalysis. She has failed conservative treatment including extensive therapy, injections, and bracing. A repeat MRI reveals massive recurrent tear with atrophy and retraction. She is too young to consider for reverse shoulder arthroplasty. *Ex. 1: 37-38.*

12. On October 17, 2017, Dr. Papilion performed a second surgery, which was extensive, and involved a right shoulder superior capsular reconstruction. *Ex. 1: 37-40.* As stated by Dr. Jorge Klajnbart, who performed an IME on behalf of Respondents, even this second surgery was considered "somewhat of a salvage procedure, with a failed rotator cuff tear." Ex. D: 47.

13. The October 17, 2017, surgical report of Dr. Papilion supported Claimant's physical complaints of pain and functional impairment. As noted by Dr. Papilion, he found, among other things, the following:

    a. Moderate adhesions,

    b. The superior labrum was markedly frayed and there was poor attachment of the biceps, which required surgical repair,

    c. Massive recurrent rotator cuff tear, which was not felt to be repairable, in which numerous sutures were noted to be retained in the greater tuberoristy with no tissue attachment,

    Dr. Papilion then described all procedures performed, including the reconstruction of the superior capsule.

Nowhere in Dr. Papilion's surgical report or medical records does he contend that any portion of Claimant's pain complaints and functional impairments were "a direct consequence of her psychosomatic overlay," as indicated by Dr. Burris, and not due to the significant pathology noted during surgery.

14. Unfortunately, the right shoulder superior capsular reconstruction surgery also failed. Therefore, after the second surgery proved unsuccessful, Dr. Papilion ultimately recommended a reverse shoulder arthroplasty, which has been described as a "salvage procedure" by many of the physicians who have evaluated and/or treated Claimant. Even Dr. Klanjbart, Respondents' IME physician, indicated that Claimant should manage her expectations as to how successful the surgery will be at restoring Claimant's functioning because the shoulder replacement surgery will not result in a normal shoulder. *Ex. D: 47.*

15. On March 9, 2017, Claimant was evaluated by Dr. Mark Failinger, an orthopedic surgeon, for a second opinion regarding the reverse shoulder arthroplasty recommended by Dr. Papilion. After reviewing her medical records, physically examining Claimant, and taking into consideration her physical complaints, Dr. Failinger concluded that due to Claimant's limited shoulder motion, pain, and dysfunction, the only procedure left to perform to treat Claimant's injury was the reverse shoulder arthroplasty recommended by Dr. Papilion. He also stated that he completely agreed with the recommended surgery – which was deemed a salvage surgery. Absent from Dr. Failinger's report is any indication that any portion of Claimant's pain complaints and reported and observed functional impairments were based on subjective complaints which did not have an anatomical or physiological basis and were not supported by objective findings. There was no indication in his report that Claimant's symptoms and functional limitations were psychologically based. *Ex. 3.*

16. On July 19, 2017, Dr. Papilion performed the reverse shoulder arthroplasty. *Cl. Ex 1: 47.*

17. For treatment, Claimant has undergone an extensive amount of physical therapy which was directed towards her shoulder as well as her cervical musculature. The physical therapy directed towards Claimant's neck included neck stretches and soft tissue mobilization. Claimant also performed home therapy exercises, which included neck stretches, wall crawls, pulleys, and laying on a foam rolly. Claimant performed the home therapy exercises two to three times a day. She did physical therapy after all three of her surgeries. *Hrg. Tr. p. 19-22: 14-5.*

18. On December 12, 2017, Dr. Erik Tentori placed Claimant at maximum medical improvement (MMI). Pursuant to the AMA Guides, he provided Claimant a 40% extremity rating which equates to a 24% whole person rating. The 40% rating was comprised of a 30% rating for the artificial joint and an additional 14% for the decrease in shoulder range of motion. Dr. Tentori placed Claimant on modified duty and assigned a 15 lb. push/pull lifting restriction. *Cl. Ex. 4: 56- 60.*

19. On February 13, 2018, Respondents filed a Final Admission of Liability (FAL) admitting to the forty-percent scheduled impairment rating. Respondents also

admitted to reasonable and necessary maintenance medical treatment after MMI. *Cl. Ex. 8: 153.*

20. Claimant objected to the FAL on February 28, 2018. *Cl. Ex. 9: 157.* Claimant also requested a Division Independent Medical Examination (DIME).

21. Dr. Stephen Gray performed the DIME on April 10, 2018. In his report, Dr. Gray noted Claimant's current symptomatology and her reported functional impairments due to her work related injury. These symptoms and functional impairments included:

    a. Constant severe aching and throbbing right shoulder pain;

    b. Radiation of pain into her neck and down her right arm;

    c. Global neck pain with headaches;

    d. Pain down the middle of her upper back area;

    e. Weakness in her right arm;

    f. Increased right shoulder pain with essentially all activities, except writing and driving up to an hour;

    g. Difficulty bathing and getting dressed;

    h. Inability to perform anything but light housework;

    i. Inability to perform yard work;

    j. Inability to play or participate in various sports such as tennis, volleyball, softball, horseback riding, skiing, golfing, and fishing;

    k. Inability to enjoy sex; and

    l. Limited ability to play with her grandchildren.

22. Dr. Gray also noted in his physical examination that Claimant had muscle atrophy in the anterior shoulder and chest wall. Although Dr. Gray indicated that some of the atrophy may have been due to Claimant's prior mastectomy, he still attributed a portion of the atrophy to her shoulder and chest wall to her work injury. He also noted tenderness over all areas palpated on the right shoulder and all areas palpated proximal to the glenohumeral joint up into the right side of her neck. He also determined Claimant had decreased range of motion in her right shoulder and measured such pursuant to the AMA Guides.

23. Dr. Gray also physically examined Claimant's upper extremities. His examination revealed an essentially normal exam regarding her upper extremities.

24. Dr. Gray also recommended permanent restrictions. These restrictions included a 12-pound right hand lifting limit and no right handed overhead work.

25. There is no finding by Dr. Gray in his report or testimony that Claimant's symptoms and functional impairments are not physiologically or anatomically consistent with her work injury and not supported by objective findings. Instead, Dr. Gray testified that Claimant's symptoms and functional impairments are physiologically and anatomically consistent with her work injury and supported by

objective findings. The objective findings would include the documented massive rotator cuff tear, massive re-tear of her rotator cuff, and the three surgeries which included the shoulder replacement which was deemed a salvage surgery, combined with the expected impact – functional impairment - the injury had on the muscles which are shared with the shoulder and the neck. In addition, the distribution of Claimant's pain, symptoms, and functional impairments are consistent with her injury and extensive course of treatment.

26. In determining Claimant's impairment rating, Dr. Gray provided Claimant a 30% impairment of the right upper extremity due to the total reverse arthroplasty pursuant to Table 19 of the AMA Guides and the DOWC Impairment Rating Tips guidance. He also provided Claimant a 14% upper extremity impairment rating due to range of motion deficits. When combined, he provided Claimant a 40% right upper extremity rating which converts to a 24% whole person impairment rating. Dr. Gray also provided Claimant an additional 6% whole person impairment rating due to the functional impairment to Claimant's cervical spine musculature caused by the injury. Dr. Gray explained that the effects of Claimant's injury to her right shoulder along with the subsequent surgeries have had a "significant whole person effect on [Claimant's] condition and functioning." He added that these limitations qualify Claimant for a cervical spine rating due to a decrease in range of motion, despite the absence of a Table 53 diagnosis. He reiterated that he assigned the additional 6% whole person impairment rating under the AMA Guides:

> [D]ue to the effects on cervical range of motion secondary to the effects of the right shoulder condition and its effects and involvement on and of the structures proximal to the right glenohumeral joint. (Ex. 6: 74).

Dr. Gray concluded Claimant's total whole person impairment due to her work related injury pursuant to the AMA Guides was 29% whole person. Cl. Ex. 6: 74.

27. Dr. Gray was deposed on July 31, 2018. In support of his rating for the decreased range of motion of Claimant's cervical spine, Dr. Gray opined that the massive rotator cuff tear, the three surgeries, and the postoperative immobilization would certainly affect the muscles between the neck and shoulder. *Gray Depo Tr. p. 11-12: 21-7.* In support of his opinion, Dr. Gray explained that the shoulder and the neck have shared musculature, with the most important muscles being the trapezius, levator scapulae, subscapularis, and the intrascapular. *Gray Depo Tr. p. 26: 2.* Dr. Gray explained that the trapezius and levator scapulae act to stabilize the shoulder. Gray Depo Tr. p. 28: 7-10. When the shoulder is immobilized, Dr. Gray stated that the neck and shared muscles will compensate and "take over part of that function" causing the person to use shared muscles between the neck and shoulder to support the neck. *Gray Depo Tr. p. 28 14-16; Gray Depo Tr. p. 31:2-6.* Additionally, Dr. Gray noted Claimant was elevating her right shoulder during the examination, which further supported his finding that the shared cervical musculature were compensating for the loss of function in Claimant's shoulder. *Gray Depo Tr. p. 30: 16-22.*

28. In reviewing Claimant's medical records, Dr. Gray found multiple entries by physical therapists discussing attention to the neck. *Gray Depo Tr. p. 16: 7-11.* Dr. Gray also relied on a report from Dr. Failinger from March 9, 2017 that notes tenderness in the elevator scapulae and a lack of range of motion in Claimant's neck. *Gray Depo Tr. p. 17-18: 19-11; Failinger Report at Cl. Ex. 3:51-53.* Dr. Gray explained that the levator scapulae is one of the primary shared muscles between the neck and the shoulder and a "significant focus when recovering rehabilitation from a shoulder surgery, especially a total reverse [arthroplasty]." *Gray Depo Tr. p. 17-18: 19-11. Pg. 17-18.* Dr. Gray also relied on a physical therapy record from June 30, 2016, that noted Claimant had pain in her neck and was guarding her neck musculature. *Gray Depo Tr. p. 20-21: 25-7; Report at Cl. Ex. 7:84.*

29. The AMA Guides set forth how to rate medical impairment of the cervical spine. The AMA Guides divide impairment of the cervical spine into two categories. The first category is based on diagnosis-related factors involving structural abnormalities. *AMA Guides, pg. 78.* The second category is based on range of motion abnormalities. *AMA Guides, pg. 78-81.*

30. The Principles for Calculating Impairment contained in the AMA Guides direct the examiner in the method to be used in calculating impairment of the cervical spine. *AMA Guides, pg. 79*. The Principles provide that "***If applicable***, use Table 53" to obtain a diagnosis-based percentage of impairment. (Emphasis added.) *AMA Guides, pg. 79.* The Principles indicate the next step in determining impairment is to determine any abnormal range of motion and the amount of impairment associated with the abnormal range of motion. The Principles further provide that the evaluator is to combine the Table 53 rating [if applicable] with the range of motion rating to determine the total impairment of the cervical spine. *Id. at 81.* Consequently, if the examiner does not think there should be a table 53 Rating, because it is "not applicable," the cervical rating would be based solely on the abnormal range of motion deficits of the cervical spine.

31. There is no explicit declaration in the AMA Guides that a Table 53 diagnosis and rating is a prerequisite to providing an impairment rating based on abnormal range of motion of the cervical spine caused by an injury to the shoulder and its shared musculature with the neck.

32. When and how to rate medical impairment under the AMA Guides is based on each physician's reasonable interpretation and application of the AMA Guides.

33. In certain cases, there is a legitimate difference of opinion as to how the AMA Guides should be interpreted and applied. And, in certain cases, each opinion can be a reasonable and fully defensible interpretation and application of the AMA Guides regarding a particular injury.

34. In most cases, before providing a spinal rating for the lumbar, thoracic, or cervical spine, there must be a Table 53 diagnosis based rating. The assumed premise is that there must be an underlying identifiable diagnosis and injury to

the underlying spinal segment from which the abnormal range of motion flows in order to support a rating.

35. However, when and how to rate certain shoulder injuries which also impair the functioning of the neck musculature pursuant to the AMA Guides is not always clear. On the other hand, what does appear to be clear is that certain shoulder injuries can impact the cervical musculature and significant shoulder injuries can result in pain and abnormal range of motion of the cervical spine. Therefore, the Colorado Division of Worker' Compensation has issued Impairment Rating Tips in an attempt to address this issue.

36. The Impairment Rating Tips from the Division of Workers' Compensation set forth the Division's interpretation of how to apply the AMA Guides when rating significant shoulder injuries that also impair cervical range of motion. [2]

The Rating Tips provide an exception to the usual requirement to provide a diagnosis based Table 53 rating before rating spinal range of motion deficits. The General Principles section of the Rating Tips specifies that:

> [I]n shoulder cases with accompanying neck pain, the clinician must determine whether an additional objective work related Table 53 cervical pathology qualifies for a rating OR the symptoms the patient has are those expected from the shoulder pathology and do not qualify for an additional rating. [3]

This admonition is repeated in the Spinal Rating section:

> In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established. (References: Spine section of the AMA Guides, 3rd Edition (rev.). [4]

However, this statement is followed by an exception, which provides:

> In unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature, an isolated cervical range of motion impairment may be allowed if well-justified by the clinician. Otherwise there are no exceptions to the requirement for a corresponding Table 53 rating. [5]

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[2] See Division of Workers Compensation Desk Aid #11 – Impairment Rating Tips; Updated May 2018. Respondents' Exhibit G.
[3] *Id.*
[4] *Id*.
[5] *Id*.

In this case, Dr. Gray determined Claimant's work related injury caused severe shoulder pathology, which resulted in treatment being directed towards her shoulder and cervical musculature, and that Claimant's cervical range of motion deficits were causally related to her injury and ratable pursuant to the AMA Guides and the Colorado Division of Workers' Compensation Rating Tips.

37. The ALJ finds Dr. Gray's opinions as set forth in his report and testimony to be credible, persuasive, and well supported.

38. The ALJ also finds Dr. Gray's interpretation and application of the AMA Guides to the particular facts of this case to be credible, persuasive, and well supported.

39. The ALJ also finds Dr. Gray's interpretation and application of the AMA Guides to the particular facts of this case to be consistent with the Rating Tips issued by the Colorado Division of Workers' Compensation.

40. At hearing, Dr. John Burris testified on behalf of Respondents. He agreed that the objective medical evidence revealed severe shoulder pathology as a result of Claimant's industrial injury. *Hrg. Tr. p. 25: 4-9.* However, Dr. Burris opined that the symptoms extending beyond the shoulder were psychological in nature and unrelated to the industrial injury. *Hrg. Tr. p. 41-42: 23-3.*

41. Nonetheless, Dr. Burris also stated that the pain in the muscles beyond Claimant's shoulder act as a normal consequence for her severe shoulder pathology. *Hrg. Tr. p. 50: 21-24.* Dr. Burris testified that when a person tears a rotator cuff, it is common for the surrounding muscles to tighten up and compensate for the tear. *Hrg. Tr. p. 26: 17-21.* Of the surrounding musculature, Dr. Burris agreed that the affected muscles would include the trapezius, which he agreed acts as part of the cervical musculature. *Hrg. Tr. p. 50: 16-20; Hrg. Tr. p. 49: 6-9.*

42. Dr. Burris performed range of motion testing on Claimant's shoulder. He testified that his findings were not consistent with what one would expect from a reverse total shoulder arthroplasty. *Hrg. Tr. p. 34: 13-15.* However, contrary to his hearing testimony, four months after the reverse total shoulder arthroplasty, Dr. Burris evaluated Claimant on November 21, 2017. Dr. Burris stated in his report that Claimant's "examination is consistent with the expected outcomes from the reverse total shoulder arthroplasty." In the same report, Dr. Burris also stated that Claimant's "observed range of motion is consistent with her reverse total shoulder arthroplasty salvage procedure." *R Ex. B: 22.*

43. Moreover, in his November 21, 2017, report, Dr. Burris discussed Claimant's frustration with her current pain complaints and functional impairments. He indicated that the surgery did not provide a "significant" change in Claimant's subjective complaints or functional status. On the other hand, he indicated that a significant change was not expected because "it still does not appear that [Claimant] has realistic expectations for the nature of the outcome from her treatment" which is a "salvage procedure." In his report, he also indicated that Claimant has functional impairment which includes limiting her lifting to up to 20

pounds, limiting her repetitive overhead activities to an occasional basis, and avoiding high impact activities involving both upper extremities. *R Ex. B: 22.*

44. Dr. Burris was asked at hearing about the "significant psychological issues" he noted in his report which he appears to contend are the predominant cause of Claimant's pain complaints and functional impairments. He was then asked the following question:

> Are the significant psychological issues a reasonable explanation of why [Claimant] continues to complain of physical limitations and/or restrictions as opposed to objective medical pathology, in your expert opinion?

Dr. Burris then provided the following answer:

> In my latest role with my clinical practice, I do mostly delayed recovery. And in most cases like this where you have substantial delayed recovery and not (*sic*) response, doesn't respond to appropriate treatment, that's highly likely that that's a significant factor in continuation of symptoms.

Hr. Tr. pg. 47-48.

45. Dr. Burris' contention that Claimant's pain complaints, functional impairments, and disability are psychologically based, because she has not responded to appropriate treatment, is at odds with the objective findings that supported the underlying diagnoses to her shoulder and which supported the need for each of the three surgeries. The ALJ finds Dr. Burris' attempt to cloak Claimant's symptoms and functional impairments with the negative connotation that is sometimes associated with "delayed recovery" or delegitimize her symptoms and functional impairments by labeling them as psychologically based is also at odds with the objective pathology, the extent of the "salvage" surgeries which were performed in this case, and the medical record.

46. Claimant has had a psychological response to her work injury and her functional impairments which were caused by her work injury. However, even Dr. Lupe Ledezma, Ph.D, Claimant's psychologist, noted that there was no indication Claimant is intentionally trying to exaggerate or distort her symptoms which include chronic pain and functional impairment. *Ex. B: 6.* Dr. Ledezma's opinion that Claimant was not exaggerating or distorting her symptoms is supported by the objective medical evidence which established Claimant had a massive rotator cuff tear which required surgical repair, a massive re-tear of her rotator cuff, and two additional surgeries which have been defined as salvage surgeries.

47. The ALJ does not credit Dr. Burris' opinion that Claimant's pain and functional impairments are psychologically based and do not have an anatomic or physiologic correlation to her underlying injury and are not supported by objective findings.

48. Dr. Burris provided Claimant a 30% upper extremity rating pursuant to Table 19 of the AMA Guides. He did not assign any additional impairment for any decreased range of motion regarding Claimant's shoulder.

49. Dr. Burris' opinion that Claimant's rating for her reverse shoulder arthroplasty is limited to the 30% rating assigned for an arthroplasty pursuant to the AMA Guides is not found to be persuasive. Dr. Burris indicated in his report that he did not provide Claimant additional impairment for her decreased range of motion of her shoulder because Claimant gave minimal effort and the tables only apply to a normal joint, i.e., not a prosthetic joint. At hearing, he went further and indicated Claimant is not entitled to additional impairment for any decreased range of motion of her shoulder because pursuant to the AMA Guides the 30% rating for the prosthetic joint also encompasses any decreased range of motion. However, upon a review of the AMA Guides, such contention is unpersuasive. The AMA Guides specifically provide that "Arthroplasty impairment may be *combined* with impairments due to restricted range of motion." *See AMA Guides, pg. 51.* The AMA Guides also provide numerous examples demonstrating the method to be used when rating impairment when an artificial joint is involved. The examples demonstrate the provision of a specific rating for the artificial joint as well as the provision of additional impairment for any decreased range of motion. Moreover, Dr. Tentori as well as the Division Examiner, Dr. Gray, provided Claimant a rating for her artificial joint as well as the decreased range of motion of her shoulder. Therefore, the ALJ does not credit Dr. Burris' opinion that Claimant's impairment rating for her prosthetic shoulder joint is limited to a 30% upper extremity rating and that it is inappropriate to include additional impairment for any range of motion deficits of the shoulder joint pursuant to the AMA Guides.

50. Dr. Jorge Klajnbart also performed an IME for Respondents. On deposal, Dr. Klajnbart stated that physical therapy is a form of treatment. *Klajnbart Depo. p.17:1-5.* Dr. Klajnbart stated that soft tissue mobilization of the neck acts as treatment for the cervical musculature. *Pg. 17, 17-22*. After reviewing a physical therapy record stating that Claimant received soft tissue mobilization to her neck musculature, Dr. Klajnbart agreed this treatment acts as treatment to the cervical musculature. *Klajnbart Depo. p.17-22; Record at Cl. Ex. 7: 92.*

51. Dr. Klajnbart stated that while the Claimant may have received treatment to cervical musculature, she still should not have received a rating to her cervical spine without documentation of cervical or neck pain. *Klajnbart Depo. p.20-21:18-4.* However, Dr. Klajnbart agreed that statements in the records denoting neck pain or guarding of the neck would suffice as documenting cervical neck pain. *Klajbart Depo. p.22-23:18-4; Record at Cl. Ex. 7:84.*

52. Dr. Tentori met with Claimant on one occasion in which he put her at MMI and assigned a permanent impairment rating. *Tentori Depo. p.6:20-23*. Dr. Tentori explained that although he only focused on the patient's right shoulder, he did not have time to review all of Claimant's records to determine if other body parts were involved. Tentori Depo. p.10:16-23. Dr. Tentori explained that even had Claimant complained of symptoms in her neck, he only had a short time to examine and would not have been able to address anything other than the right shoulder. *Tentori Depo. p.11:16-25.*

53. Dr. Tentori explained while he had limited time to review Claimant's records, the three surgeries make it reasonable to conclude that a whole person impairment rating should apply. *Tentori Depo. p.14: 3-17.*

54. Dr. Tentori stated that he disagreed with Dr. Burris in that the impairment should be limited to the extremity. *Tentori Depo. p.23: 4-12.* Moreover, as set forth above, Dr. Tentori provided Claimant a 30% impairment rating for her artificial shoulder joint as well as an additional 14% impairment for the abnormal range of motion of her shoulder, which combined to a 40% impairment rating of the upper extremity. By providing Claimant additional impairment for her decreased range of motion, Dr. Tentori disagreed with Dr. Burris' methodology for limiting impairment to just the joint replacement rating of 30%, regardless of the impact the injury had on the functioning of the shoulder which limits the range of motion of the shoulder and upper extremity.

55. The physical therapy records show an extensive amount of physical therapy performed on Claimant. *Cl. Ex. 7: 84-152.* As found above, the treatment performed included soft tissue mobilization and stretches involving both the shoulder and neck - cervical musculature.

56. Claimant's testimony and statements to her medical providers is found to be credible and persuasive.

57. Since her injury, Claimant's symptoms and functional impairments include pain in her right arm, shoulder, back, and neck. She has also lost a significant amount of functioning of her shoulder. Furthermore, she also experiences frequent headaches. *Hrg. Tr. p. 17: 16-22-3.* Claimant also physically struggles to do simple tasks such as showering, washing, and blow-drying her hair. *Hrg. Tr. p.18 1-15.* In addition, Claimant has been provided restrictions which preclude or limit her from performing overhead work and activities and limits her ability to lift over 15 pounds with her right upper extremity and shoulder, whether performing work or other activities of daily living. *Cl. Ex. 4: 56- 60.* Claimant did not have these functional impairments prior to her injury. *Hrg.Tr. p. 17: 23-25.*

58. Claimant sustained a single, but significant, injury to her shoulder. The injury to her shoulder resulted in the following permanent symptoms and functional impairments:

    a. Constant severe aching and throbbing right shoulder pain;

    b. Radiation of pain into her neck and down her right arm;

    c. Global neck pain with headaches;

    d. Decreased cervical range of motion;

    e. Pain down the middle of her upper back;

    f. Weakness in her right arm;

    g. Right shoulder pain with essentially all activities, except writing and driving up to an hour;

    h. Difficulty bathing, showering, fixing her hair, and getting dressed;

i. Inability to perform anything but light housework;

j. Inability to perform yard work;

k. Inability to play or participate in various sports such as tennis, volleyball, softball, horseback riding, skiing, golfing, and fishing;

l. Inability to enjoy sex;

m. Limited ability to play with her grandchildren;

n. Restrictions issued by physicians which limit her ability to lift more than fifteen pounds using her right upper extremity and restricted her ability to do overhead activities with her right upper extremity and shoulder; and

o. The physical inability to perform overhead activities, which includes the inability to perform her regular job duties which required her to drive and handle passengers' luggage, such as lifting it overhead, as she was doing when she was injured.

59. Claimant's injury has resulted in effects and involvement on and of the structures proximal to the right glenohumeral joint. *Ex. 6: 74*

60. Claimant did not sustain a "loss of an arm at the shoulder" within the meaning of the schedule of disabilities in § 8-42-107(2)(a). Instead, Claimant sustained a whole person medical impairment rating which is compensable under § 8-42-107(8)(c).

61. Pursuant to the AMA Guides, Claimant's work injury resulted in a 29% whole person impairment rating.

62. In the disfigurement potion of the hearing, the ALJ noted a 4-and-a-half inch long and quarter inch wide surgical scar on Claimant's right shoulder. The ALJ also noted three arthroscopic surgical port scars and a marked indentation on the right shoulder compared to left. *Hrg. Tr. p. 52-53: 11-8.*

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met their respective burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Order of Analysis and Burden of Proof

In cases in which the ALJ finds functional impairment to the whole person and the DIME physician has assigned a whole person impairment rating, the DIME physician's rating is binding unless overcome by clear and convincing evidence. *See Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581, 583 (Colo. App. 2004).

Therefore, the initial issue to address is whether Claimant suffered an injury not listed on the schedule of disabilities.

I. Permanent Partial Disability Benefits

a. Whether Claimant Suffered Functional Impairment to the Whole Person.

The question of whether Claimant sustained a "loss of an arm at the shoulder" within the meaning of the schedule of disabilities in § 8-42-107(2)(a), C.R.S., or a whole person rating under § 8-42-107(8)(c), C.R.S., is one of fact for determination by the ALJ. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). In resolving this question, the ALJ must determine the situs of Claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System, supra*.

Moreover, the panel has repeatedly held that "functional impairment" need not take any particular form. *See Nichols v. LaFarge Construction*, W.C. No. 4-743-367

(October 7, 2009); *Aligaze v. Colorado Cab Co*., W.C. No. 4-705-940 (April 29, 2009); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Functional impairment may be evidenced by pain that limits use of a part of the body. *Spitzer v. Custom On Site Builders*, W.C. No. 4-739-406 (November 4, 2009). *Chavez v. Excel Corporation*, W. C. No. 4-491-549 (February 05, 2004); *Valles v. Arrow Moving & Storage Co.*, W.C. No. 4-265-129 (October 22, 1998). Moreover, there is no requirement that there must be permanent restrictions imposed by a doctor in order to support a finding as to whether Claimant has functional impairment as a result of an injury. *Martinez v. Pueblo County Sheriff's Office*, W.C. No. 4-806-129 (August 9, 2011). As set forth in *Martinez, supra*, "functional impairment is not merely assessed by medical means but rather can involve an overall assessment of the effect the injury has had on the claimant's ability to function in terms of movement and in the performance of activities at work and daily living." And, the term "injury" as used in the schedule of disabilities refers to the manifestation in a part or parts of the body which have been impaired or disabled as a result of the industrial accident. *Id.*

Therefore, when evaluating functional impairment, it is appropriate for the ALJ to look at, not only the alteration of Claimant's abilities by medical means, but also by non-medical means of the impact the injury has had on Claimant's capacity to meet personal, social and occupational demands. See, *Martinez, supra*, and *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Therefore, the existence of permanent restrictions imposed by a doctor is some evidence which the ALJ may consider in determining the nature and extent of Claimant's functional impairment. *See, Strauch v. PSL Swedish Healthcare System, supra*. Therefore, an ALJ may or may not find the existence of permanent restrictions to be persuasive when balanced against other evidence concerning Claimant's ability to function.

In this case, the ALJ concludes Claimant did not sustain a "loss of an arm at the shoulder" within the meaning of the schedule of disabilities in § 8-42-107(2)(a). Instead, the ALJ concludes Claimant sustained a whole person medical impairment rating which is compensable under § 8-42-107(8)(c).

In this case, Claimant suffered a significant injury to her right shoulder which resulted in significant functional impairment. As found, Claimant sustained a single, but significant, injury to her right shoulder. The injury to her right shoulder resulted in the following permanent symptoms and functional impairments:

a. Constant severe aching and throbbing right shoulder pain;

b. Radiation of pain into her neck and down her right arm;

c. Global neck pain with headaches;

d. Decreased cervical range of motion;

e. Pain down the middle of her upper back;

f. Weakness in her right arm;

g. Right shoulder pain with essentially all activities, except writing and driving up to an hour;

h. Difficulty bathing, showering, fixing her hair, and getting dressed;

i. Inability to perform anything but light housework;

j. Inability to perform yard work;

k. Inability to play or participate in various sports such as tennis, volleyball, softball, horseback riding, skiing, golfing, and fishing;

l. Inability to enjoy sex;

m. Limited ability to play with her grandchildren;

n. Restrictions issued by physicians which limit her ability to lift more than fifteen pounds using her right upper extremity and shoulder and restricted her ability to do overhead activities with her right upper extremity and shoulder; and

o. The physical inability to perform overhead activities, which includes the inability to perform her regular job duties which required her to drive and handle passengers' luggage, such as lifting it overhead, as she was doing when she was injured.

The ALJ concludes Claimant has established by a preponderance of the evidence that her functional impairment is not on the schedule of disabilities. Claimant did not sustain a "loss of an arm at the shoulder" within the meaning of the schedule of disabilities in § 8-42-107(2)(a). The ALJ concludes Claimant has established by a preponderance of the evidence that she sustained a whole person medical impairment rating which is compensable under § 8-42-107(8)(c).

b. Whether Respondents Overcame the Division IME by Clear and Convincing Evidence.

In cases in which the ALJ finds functional impairment to the whole person and the DIME physician has assigned a whole person impairment rating, the DIME physician's rating is binding unless overcome by clear and convincing evidence. *See Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581, 583 (Colo. App. 2004).

A DIME physician must apply the AMA Guides when determining Claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the Claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

Moreover, the questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. In addition, not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Furthermore, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

In this case, Dr. Gray provided Claimant a 29% whole person impairment rating pursuant to the AMA Guides. In arriving at the impairment rating, Dr. Gray provided Claimant a 30% impairment of the right upper extremity due to the total reverse arthroplasty pursuant to Table 19 of the AMA Guides and the DOWC Impairment Rating Tips guidance. He also provided Claimant a 14% upper extremity impairment rating due to range of motion deficits. When combined, he provided Claimant a 40% right upper extremity rating which converts to a 24% whole person impairment rating. Dr. Gray also provided Claimant an additional 6% whole person impairment rating pursuant to the AMA Guides due to the medical impairment to Claimant's cervical musculature which was caused by the injury. Dr. Gray explained that the effects of Claimant's injury to her right shoulder along with the subsequent surgeries have had a "significant whole person effect on [Claimant's] condition and functioning." He added that these limitations qualify Claimant for a cervical spine rating due to a decrease in range of motion, despite the absence of a Table 53 diagnosis. He reiterated that he assigned the additional 6% whole person impairment rating under the AMA Guides:

> [D]ue to the effects on cervical range of motion secondary to the effects of the right shoulder condition and its effects and involvement on and of the structures proximal to the right glenohumeral joint.

Dr. Gray was deposed on July 31, 2018. In support of his rating for the decreased range of motion of Claimant's cervical spine, Dr. Gray opined that the massive rotator cuff tear, the three surgeries, and the postoperative immobilization would certainly affect the muscles between the neck and shoulder. In support of his opinion, Dr. Gray explained that the shoulder and the neck have shared musculature, with the most important muscles being the trapezius, levator scapulae, subscapularis, and the intrascapular. Dr. Gray explained that the trapezius and levator scapulae act to stabilize the shoulder. Gray Depo When the shoulder is immobilized, Dr. Gray stated that the neck and shared muscles will compensate and "take over part of that function" causing the person to use shared muscles between the neck and shoulder to support the neck. Additionally, Dr. Gray noted Claimant was elevating her right shoulder during the examination, which further supported his finding that the shared cervical musculature were compensating for the loss of function in Claimant's shoulder.

In reviewing Claimant's medical records, Dr. Gray found multiple entries by physical therapists discussing attention to the neck. Dr. Gray also relied on a report from Dr. Failinger from March 9, 2017 that notes tenderness in the elevator scapulae and a lack of range of motion in Claimant's neck. Dr. Gray explained that the levator scapulae is one of the primary shared muscles between the neck and the shoulder and a "significant focus when recovering rehabilitation from a shoulder surgery, especially a total reverse [arthroplasty]." Dr. Gray also relied on a physical therapy record from June 30, 2016, that noted Claimant had pain in her neck and was guarding her neck musculature.

The AMA Guides set forth how to rate medical impairment of the cervical spine. The AMA Guides divides impairment of the cervical spine into two categories. The first category is based on diagnosis-related factors involving structural abnormalities. *AMA Guides, pg. 78.* The second category is based on range of motion abnormalities. *AMA Guides, pg. 78-81.*

The Principles for Calculating Impairment contained in the AMA Guides direct the examiner in the method to be used in calculating impairment of the cervical spine. The Principles provide that "***If applicable***, use Table 53" to obtain a diagnosis-based percentage of impairment. (Emphasis added.) *See AMA Guides, pg. 79.* The Principles indicate the next step in determining impairment is to determine any abnormal range of motion and the amount of impairment associated with the abnormal range of motion. The Principles further provide that the evaluator is to combine the Table 53 rating [if applicable] with the range of motion rating to determine the total impairment of the cervical spine. *Id. at 81.* Consequently, if the examiner does not think there should be a table 53 Rating, because it is "not applicable," the cervical rating would be based solely on the abnormal range of motion deficits of the cervical spine.

There is no explicit declaration in the AMA Guides that a Table 53 diagnosis and rating is a prerequisite to providing an impairment rating based on abnormal range of motion of the cervical spine caused by an injury to the shoulder and its shared musculature with the neck.

When and how to rate medical impairment under the AMA Guides is based on each physician's interpretation and application of the AMA Guides.

In certain circumstances, there is a difference of opinion as to how the AMA Guides should be applied when rating a particular injury. And, in certain circumstances, each opinion can be a reasonable, but merely a different interpretation and application of the AMA Guides to a particular injury.

In most cases, before providing a spinal rating for the lumbar, thoracic, or cervical spine, there must be a Table 53 diagnosis based rating. The assumed premise is that there must be an underlying and identifiable diagnosis caused by a specific discrete injury to the underlying structure of the spinal segment from which the abnormal range of motion flows.

However, the resulting functional impairment from an injury is not always clearly defined and confined. Thus, when and how to rate a shoulder injury which also impairs the functioning of the neck musculature pursuant to the AMA Guides is not always clear. However, what is clear is that certain shoulder injuries can impact the cervical musculature and significant shoulder injuries can result in pain and abnormal range of motion of the cervical spine which is ratable under the AMA Guides. Therefore, the Colorado Division of Worker' Compensation has issued Impairment Rating Tips in an attempt to address this issue.

The Impairment Rating Tips from the Division of Workers' Compensation set forth the Division's interpretation of how to apply the AMA Guides when rating a significant shoulder injury that also impairs cervical range of motion. [6]

The Rating Tips provide an exception to the usual requirement to provide a diagnosis based Table 53 rating before rating spinal range of motion deficits. The General Principles section of the Rating Tips specifies that:

> [I]n shoulder cases with accompanying neck pain, the clinician must determine whether an additional objective work related Table 53 cervical pathology qualifies for a rating OR the symptoms the patient has are those expected from the shoulder pathology and do not qualify for an additional rating.[7]

This admonition is repeated in the Spinal Rating section:

> In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established.

[6] See Division of Workers Compensation Desk Aid #11 – Impairment Rating Tips; Updated May 2018. Respondents' Exhibit G.
[7] Id.

> (References: Spine section of the AMA Guides, 3rd Edition (rev.).[8]

However, this statement is followed by an exception, which provides:

> In unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature, an isolated cervical range of motion impairment may be allowed if well-justified by the clinician. Otherwise there are no exceptions to the requirement for a corresponding Table 53 rating.[9]

In this case, Dr. Gray determined Claimant's work related injury caused severe shoulder pathology, which resulted in treatment being directed towards her shoulder and cervical musculature, and that Claimant's cervical range of motion deficits were causally related to her shoulder injury and ratable pursuant to the AMA Guides and the Colorado Division of Workers' Compensation Rating Tips.

The ALJ finds and concludes Dr. Gray's opinions as set forth in his report and testimony to be credible, persuasive, and well supported. The ALJ also finds and concludes that Dr. Gray's interpretation and application of the AMA Guides to the particular facts of this case to be credible, persuasive, and well supported.

The ALJ further finds and concludes that Dr. Gray's interpretation and application of the AMA Guides to the particular facts of this case to be consistent with the Rating Tips issued by the Colorado Division of Workers' Compensation.

The ALJ finds and concludes that the opinions in the record which are contrary to Dr. Gray's, as to the proper rating of Claimant's injury, are not found to be credible or persuasive. Such opinions are merely a difference of opinion as to the proper interpretation and application of the AMA Guides to the particular facts of this case.

The ALJ finds and concludes Respondents have failed to overcome by clear and convincing evidence the 29% whole person impairment rating provided by Dr. Gray. The ALJ concludes Claimant is entitled to the 29% whole person impairment rating due to her work related injury.

II. Whether Claimant has established by a preponderance of the evidence that she is entitled to a disfigurement award, and if so, how much.

Claimant is entitled to additional compensation if she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view. *See* § *8-42-108 (1), C.R.S.*

Due to her numerous surgeries, Claimant has a 4-and-a-half inch long and quarter inch wide scar on her right shoulder. Claimant also has three arthroscopic surgical port scars on her right shoulder. In addition, Claimant has a marked

[8] *Id*.
[9] *Id*.

indentation on her right shoulder compared to her left shoulder. Therefore, the ALJ Concludes Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view and it entitled to additional disfigurement in the amount of $2,000.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay Claimant permanent partial disability benefits based upon the 29% whole person impairment rating provided by Dr. Gray.
2. Respondents shall pay Claimant $2,000 in disfigurement benefits. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.
3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 10, 2018.

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Respondent has proven by a preponderance of the evidence that Claimant was responsible for her termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving Temporary Total Disability (TTD) benefits.

FINDINGS OF FACT

1. Claimant is a 55-year-old female who began working for Employer on July 27, 1987. She was employed for 31 years primarily in Employer's Department of Motor Vehicles.

2. On December 19, 2016 Claimant sustained a work-related injury to her right shoulder. Employer admitted liability for the claim, provided medical treatment and paid temporary indemnity benefits.

3. Claimant's right shoulder injury has required substantial treatment including surgery in January 2017 and manipulation under anesthesia in April 2017.

4. On December 20, 2017.Claimant was taken completely off work by Authorized Treating Physician (ATP) Alisa Koval, M.D. because of her right shoulder condition.

5. On January 18, 2018 Claimant underwent right shoulder surgery with James Johnson, M.D. The procedure included a rotator cuff revision, subacromial decompression, labral debridement, biceps tenotomy and distal clavicle resection.

6. Dr. Koval continued to prohibit Claimant from working through July 23, 2018. She specifically confirmed Claimant's work restrictions at appointments on February 1, 2018, February 22, 2018, March 5, 2018, and April 17, 2018.

7. Respondent paid Claimant Temporary Total Disability (TTD) benefits from December 20, 2017 through June 22, 2018. Respondent suspended TTD benefits from June 22, 2018 through July 23, 2018. The interruption was predicated on Respondent's June 25, 2018 General Admission of Liability (GAL) suspending benefits for Claimant's failure to appear for consecutively scheduled medical appointments pursuant to WCRP 6-1(A)(5). Employer resumed benefits pursuant to a July 31, 2018 GAL when Claimant returned to care effective July 23, 2018. Because the present hearing was conducted

pursuant to an Application for Expedited Hearing, OACRP 9-D prohibits the determination of any issues relating to the WCRP 6-1(A)(5) suspension of benefits.

8. On March 21, 2018 Claimant executed a Notice of Retirement with Employer. Claimant specified that her last day of employment would be May 31, 2018. The Notice was addressed to Claimant's supervisor, the Office of Human Resources and Employer's retirement plan. The Notice of Retirement was delivered to Employer in April 2018.

9. Claimant testified that she fell under the "Rule of 75" with respect to Respondent's retirement benefits. She explained that the Rule of 75 enables an employee to retire as early as age 55, without a retirement benefit reduction, provided the combined credited service and age at termination equal or exceed the sum of 75. Claimant remarked that she had been contemplating retirement since at least 2017, coordinated her retirement with Respondent for several months prior to submitting her Notice of Retirement and worked with Respondent's retirement office (DERP) to ensure that she could transition successfully into retirement.

10. Claimant further explained that in advance of her retirement she had planned a lengthy vacation with her husband to Florida and the Caribbean. Claimant left on June 4, 2018 for Florida then departed on a Caribbean cruise on July 1, 2018. Claimant returned to Colorado on July 15, 2018.

11. On July 23, 2018 Claimant visited Dr. Koval for an examination. Dr. Koval reduced Claimant's work restrictions to no reaching above shoulder level or away from the body and no use of the right arm.

12. On November 1, 2018 Dr. Koval determined that Claimant had reached Maximum Medical Improvement (MMI) for her right shoulder injury.

13. Respondent has proven that it is more probably true than not that Claimant was responsible for her termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits. Initially, Claimant suffered an admitted right shoulder injury on December 19, 2016. She underwent extensive medical treatment and received TTD benefits. On March 21, 2018 Claimant executed a Notice of Retirement with Employer. She had worked for Employer for approximately 31 years. Claimant remarked that she had been contemplating retirement since at least 2017, coordinated her retirement with Respondent for several months prior to submitting her Notice of Retirement and worked with Respondent's retirement office (DERP) to ensure that she could transition successfully into retirement. Claimant had also planned a long vacation to celebrate her retirement that extended from June 4, 2018 until July 15, 2018.

14. There is a lack of evidence that Claimant's right shoulder injury was the reason she resigned her position. Although Claimant was prohibited from performing her job duties at the time she submitted her Notice of Retirement, the record reveals that her industrial injury did not cause her to leave employment and suffer a wage loss. Claimant's

retirement was voluntary and unrelated to her work injury. She planned her retirement well in advance without considering her shoulder injury or work restrictions. Specifically, Claimant planned her retirement in the years preceding her resignation, voluntarily retired when reaching Respondent's Rule of 75 and celebrated her retirement with a vacation. The record thus reveals that Claimant precipitated her employment termination by a volitional act that she would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over her termination from employment. She is thus precluded from receiving TTD benefits after July 31, 2018.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and

(2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. Respondents assert that Claimant is precluded from receiving temporary disability benefits because she was responsible for her termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

6. In *Blair v. Art C. Klein Construction Inc.,* W.C. No. 4-556-576 (ICAP, Nov. 3, 2003), the ICAP determined that the claimant's voluntary resignation was not dispositive of whether she was responsible for her termination from employment. The ICAP reasoned that the pertinent issue is the reason the claimant resigned because the claimant is not "responsible" where the termination is the result of a work injury. *See Gregg v. Lawrence Construction Co.,* W.C. No. 4-475-888 (ICAP, Apr. 22, 2002); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAP Apr. 24, 2002). As noted in *Blair,* "if the claimant was compelled to resign from this employment such that it can be said the termination was a necessary and natural consequence of the injury, rather than the claimant's subjective choice, the claimant would not be at fault for the termination."

7. As found, Respondent has proven by a preponderance of the evidence that Claimant was responsible for her termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits. Initially, Claimant suffered an admitted right shoulder injury on December 19, 2016. She underwent extensive medical treatment and received TTD benefits. On March 21, 2018 Claimant executed a Notice of Retirement with Employer. She had worked for Employer for approximately 31 years. Claimant remarked that she had been contemplating retirement since at least 2017, coordinated her retirement with Respondent for several months prior to submitting her Notice of Retirement and worked with Respondent's retirement office (DERP) to ensure that she could transition successfully into retirement. Claimant had also planned a long vacation to celebrate her retirement that extended from June 4, 2018 until July 15, 2018.

8. As found, there is a lack of evidence that Claimant's right shoulder injury was the reason she resigned her position. Although Claimant was prohibited from performing her job duties at the time she submitted her Notice of Retirement, the record reveals that her industrial injury did not cause her to leave employment and suffer a wage loss. Claimant's retirement was voluntary and unrelated to her work injury. She planned her retirement well in advance without considering her shoulder injury or work restrictions. Specifically, Claimant planned her retirement in the years preceding her resignation, voluntarily retired when reaching Respondent's Rule of 75 and celebrated her retirement with a vacation. The record thus reveals that Claimant precipitated her employment termination by a volitional act that she would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over her termination from employment. She is thus precluded from receiving TTD benefits after July 31, 2018.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

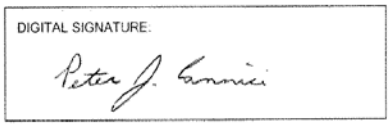
1. Based on Claimant's voluntary resignation from employment, she is precluded from receiving TTD benefits after July 31, 2018.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory*

reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 11, 2018.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant has shown, by a preponderance of the evidence, that she sustained a compensable injury to her right shoulder on June 9, 2017?

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to reasonable, necessary and related medical treatment for her right shoulder for an incident which occurred on or about June 9, 2017?

III. If compensable, is Dr. Castrejon the Authorized Treating Physician, even though Claimant is the owner of the Employer/Business, and failed to provide herself a designated provider list?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

History of Incident

1. Claimant testified she injured her right shoulder on Saturday, June 9, 2017 at her place of employment, Rio Grande Pharmacy, LLC, when reaching across a computer terminal/fax machine to place a basket containing patient prescriptions and insurance documents. In order to reach the shelf, Claimant testified she had fully extended her right arm and upper extremity while reaching across the office equipment. Claimant testified she heard a popping sound, grimaced in extreme pain and stepped away from the counter. Claimant testified the injury occurred in front of two other employees, although neither appeared at hearing.

2. Claimant's job duties included interpretation of prescriptions, insuring prescriptions were appropriate, opening childproof seals on containers, counting pills, placing labels on bottles, bagging the prescriptions, and putting prices on the bags. She would fill 80-200 per day. In June 2017, Claimant also had technicians, who entered the information into the computers, and pulled drugs from shelves and counted pills, although Claimant was responsible for overseeing all prescriptions going out of the pharmacy. Claimant's work counter was below shoulder height.

3. Claimant testified she has been a pharmacist for 42 years, in institutional settings such as hospitals, in academic settings, and in large retail settings. She testified that she purchased Rio Grande Pharmacy, LLC in March 2011, and is the sole pharmacist, owner and operator of the business. According to Claimant's testimony, the pharmacy was open Monday-Friday from 9:00 AM-6:00 PM and Saturday from 9:00 AM-1:00 PM during the period 2011- July 2018. During work hours in that period, Claimant took 1 hour each day for lunch with periodic breaks.

4. Claimant testified she had a significant history of injury to her right shoulder. She had previously undergone a right rotator cuff repair in January 31, 2011 by Dr. Steven Kitchen, an orthopedic surgeon, at San Luis Valley Hospital ("SLVH") in Alamosa, Colorado. Claimant testified that when she had purchased the pharmacy, her right arm was still in a sling for a few weeks.

5. However, she also testified that initially, business was slow and she was only filling approximately 80 prescriptions per day. Thereafter, business increased enough to add a half-day per week on Saturdays. Claimant further testified she had a complete recovery from that procedure, continued on with full time employment after purchasing her pharmacy, with no permanent impairment, restrictions, or loss of functionality.

Prior Medical History involving Claimant's Right Shoulder

6. On April 11, 2006, Claimant, as a result of computer work, complained of pain in left elbow, both wrists, and right shoulder. She was having trouble raising her shoulder higher than 90°, difficulty combing her hair, and lifting her arm laterally. Her shoulder problems continued through 2010. (Ex. A, p. 1). By April 28, 2010, it was noted that Claimant was having shoulder problems that began five years prior. (Ex. E, p. 11).

7. On December 1, 2010, Claimant saw Dr. Claud Bays. Claimant had chronic pain in the right shoulder for approximately five years. (Ex. F, pp.13-14). On January 10, 2011, an MRI of Claimant's shoulder showed a moderate joint effusion, either continuation of the effusion or a synovial-type cyst. There was a large rotator cuff tear with a 2 cm gap of the supraspinatus tendon and rotator cuff, with retraction. (Ex. G, p. 15).

8. Claimant underwent surgery on January 31, 2011, with Dr. Steven Kitchen. Dr. Kitchen performed a rotator cuff repair of the supraspinatus and

infraspinatus tendons, anterior subacromial decompression, and debridement of the bicep and labral tear. (Ex. H, pp. 17-18). After the surgery, Claimant recovered, but as of May 4, 2011, she continued to have limitation in her strength. (Ex. M, p. 27).

9. During the Spring of 2015, Claimant began experiencing pain in her right shoulder, but denied it was due to any accident or injury. She was diagnosed with bursitis of the right shoulder and prescribed eight (8) weeks of physical therapy. According to a treatment note dated February 29, 2016 from Rio Grande Hospital (RGH) Clinics, in Del Norte, Colorado, Claimant had been lifting her husband and developed constant right shoulder pain. (Ex. O, pp. 30-32).

10. According to an RGH treatment note, Claimant could not lift gallon jugs, and had to assist lifting her arm at times. According to Claimant, she continued to work full time, 5 ½ days per week during the entire period from March 2011 until March 30, 2016. Her pain was self-reported at 7/10 by this time, and she was prescribed tramadol. (Ex. Q, pp. 37-39).

11. On December 22, 2016, Claimant sought treatment from Kim Woodke, PA-C at RGH Clinic in Del Norte, for a flare up in her right shoulder after falling off a stool and landing on her right hip and shoulder. Pain was described as dull, constant, and sharp with exertion. (Ex. T, pp. 44-46). She was provided pain medication and told to follow up with her provider at SLVH. Claimant testified both flare ups treated at the RGH Clinic in Del Norte resolved without significant or permanent disability. There were no follow-up appointments at that clinic for either incident, nor were they mentioned in subsequent treatment records at SLVH.

12. On January 5, 2017, Claimant saw Dr. Blake Clifton, an orthopedist. Dr. Clifton noted that Claimant had undergone a rotator cuff repair in 2011, but had continuing pain over the last six months, with persistent weakness and pain in the right shoulder. She had pain at night, and with activity, decreased range of motion and strength. She was on hydrocodone-acetaminophen 10/325, 1 tablet three times daily. X-rays showed mild arthritic changes with slightly *high riding humeral head.* (Ex. U, pp. 47-49) (emphasis added).

13. A MRI performed January 13, 2017, showed a large full-thickness supraspinatus tendon tear with moderate muscle atrophy, intact infraspinatus tendon with mild muscle atrophy, mild acromiclavicular degenerative joint disease, mild bone marrow edema, biceps tendon tear,

labral degeneration and large joint effusion with synovitis. The tear was noted to be 3 x 5 cm left to right x 4.3 cm anterior to posterior. (Ex. W, pp. 59-60).

14. On January 27, 2017, Claimant's pain level was 5/10; she was having a dull, constant ache in the shoulder; and she was taking tramadol. Her pain was mostly at nighttime and with overhead activity. Dr. Clifton noted weakness with resisted abduction and external rotation, pain with overhead activity, positive Hawkins test. His assessment was a massive tear of the supraspinatus with small degenerative changes within the joint.

> We discussed treatment options and because of the type in [and] size of the tear with atrophy I do not think this is a repairable tear. At this point I recommend a steroid injection which she requested to proceed with. *She will eventually need a* ***reverse total shoulder arthroplasty*** *if conservative treatment does not help her.* (Ex. X, pp. 61-63) (emphasis added).

15. On March 7, 2017, Claimant presented to the emergency room at RGH with chest pain. One week prior, she had fallen on her right chest and right shoulder when she slipped on the ice. It was noted that she had chronic shoulder pain and *planned for a replacement in the future.* (Ex. Z, pp. 67 & 71) (emphasis added).

16. On April 19, 2017, Claimant saw orthopedist, Dr. Carissa Tripi at SLVH. Claimant complained of right shoulder pain, which was worsening. She had pain all the time, it popped, numbness and tingling down her arm, but denied any history of neck issues, limited range of motion, pain level was 7/10, and she was taking tramadol. Claimant had received a cortisone injection two months prior, which was still helping, but more so in the beginning. She had full range of motion, although pain with mid and upper ranges.

17. It was Dr. Tripi's interpretation of the MRI that there was a large full thickness tear involving at least the supraspinatus and infraspinatus, which was retracted in some areas medial to the glenoid. There was also atrophy located in the supraspinatus and infraspinatus areas. Dr. Tripi indicated that they could try continue conservative line of treatment, which may be in her best interest at her relatively young age versus a reverse total shoulder arthroplasty-which would need to occur at some point. She did not believe that arthroscopic surgery was a good option.

18. Claimant was noted to have excellent range of motion, and surprisingly excellent strength regarding her rotator cuff, even with the chronicity of the large tear. (Ex. AA, pp. 80-82). At hearing, Claimant testified at the time she saw Dr. Tripi, she couldn't lift her arm to comb her hair, she had to assist her arm to move it into position, she had modified her job, and the technicians were doing more of what was supposed to be her job. She could do work, as long as it was close to her body. Claimant indicated the reason she wanted to put off a total shoulder replacement was for personal reasons, both because her husband was significantly disabled, and she was a single pharmacist in her own business. Claimant sought no further treatment until her reported injury in this case.

Medical Treatment following the Incident of June 9, 2017

19. Once Claimant experienced the pain during the episode described in Finding of Fact #1, Claimant testified that after resting for several minutes, she resumed work for the rest of the day by supporting her right arm with her left, and slowing her rate of work. The next day was a Sunday, and she rested her shoulder. She returned to work on Monday, June 11, 2017 and Tuesday, June 13, 2017 repeating the same process of self-limiting work activities. By the evening of June 14, 2017, Claimant testified that her pain escalated to a point that she could no longer tolerate it by merely resting or using pain medication and she sought treatment at RGH Clinics emergency room in Del Norte.

20. On June 15, 2017, Claimant went to the emergency room at RGH at 2:35 a.m. Her pain was located in her shoulder, the pain was dull to the fingers, and she counted pills for her employment. Pain started in May, 2017. (Ex.DD, p. 93). Specifically, in her history, it is noted that her onset of pain was 'years' back, it was getting worse post-surgically. It was noted there was no recent injury, but records show Claimant reported to ER personnel a *"botched" rotator cuff surgery* in 2011. (Ex. DD, p. 95) (emphasis added). Claimant was prescribed Vicodin and told to follow up with an orthopedist.

21. An x-ray taken of the shoulder indicated a right anterior glenohumeral subluxation, an interval change compared to 03/07/2017 and chronic ossific rotator cuff tendinopathy. (Ex. DD, p. 98).

Medical Opinions

22. On July 12, 2017, Claimant went to see Dr. Castrejon in Colorado Springs. Dr. Castrejon testified Claimant fills out a patient questionnaire every time she is seen in his office. The questionnaire of July 12, 2017, notes the date of injury as June 14, 2017. It is also the first time the 'basket incident' is noted.

23. Claimant, as the owner/employer, did not have a Designated Provider list for Workers Compensation injuries. At the time Claimant saw Dr. Castrejon, she had not seen an orthopedic surgeon, despite instructions by the emergency room. Claimant listed her medications, which included tramadol. She was no longer taking any narcotic pain medication. Claimant notes her pain complaints indicate that compared to the time of the injury, she is better and her pain is 6/10. (Ex. EE, pp. 103-105). Dr. Castrejon's note of July 12, 2017 notes decrease range of motion, rotator cuff strength was 4/5 and no instability. Dr. Castrejon ordered an MRI arthrogram. (Ex.EE, pp. 100-101).

24. On July 22, 2017, an MRI without contrast was performed. Indication was chronic pain and limited range of motion with sharp pain following injury on June 13, 2017. The information indicates that the problem began in 2009. The MRI revealed post-operative changes, status post repair of supraspinatus with recurrent tear and medial retraction approximately 4 cm. There was *severe atrophy* of the infraspinatus and supraspinatus muscles, full thickness tear of the long head of the biceps with distal retraction, *advanced osteoarthritis* of the glenohumeral joint, with *associated loss of articular cartilage* associated with subacromial cyst formation extending into the coracoid process. Reactive bone marrow was noted. There was no evidence of joint effusion. (Ex. FF, pp. 107-108) (emphasis added).

25. Dr. Castrejon saw Claimant on August 14, 2017. Her pain was still 6/10; however, she indicated she was worse. She had new injuries and she bruised or cracked some ribs. Her shoulder pain remained dull and numb. (Ex. GG, p. 113).

26. Claimant noted her pain was tolerable after May of 2017, and she elected to wait for the total shoulder replacement until her work schedule had slowed down. Dr. Castrejon indicated in his testimony that he had limited medical records from January to the present. He noted that the event in

June of 2017 caused a change in her level of pain and functional ability, but he could not state within a reasonable certainty that the sole cause for the significant worsening was Claimant's right shoulder condition. This was based on *no acute changes* on the MRI, and *just prior to the June event, the recommendation for total shoulder replacement.* (Ex. GG, p. 112).

27. Claimant saw Dr. Castrejon on May 10, 2018, after which he issued a special report to Claimant's attorney. Dr. Castrejon had reviewed records from approximately early 2016 through present. The pain diagram filled out by Claimant on that date indicated she was working modified duty, her pain was worse, and her pain was now 10/10. She also noted pain in her right shoulder, back, left hip, left hand, and right foot. Claimant testified that she has osteoarthritis and has been treated for those areas as well. (Ex. II, pp. 115-125).

28. It was Dr. Castrejon's opinion that lifting her disabled husband, or helping with the care of her husband, was only a temporary problem. Claimant had returned to baseline, only to worsen again in early 2017. Dr. Castrejon notes the date of injury as June 14, 2017. He notes that she had a subluxation and that her shoulder had relocated, followed by a mild decrease in her pain level. Her pain was dull to sharp and stabbing, extending to the mid arm level of the biceps. She had sensation of numbness distal to the elbow, into the hand and fingers. She was not describing cervical pain, but trapezius tightness.

29. Activities with repetitive motion of the arm and reaching away from her body increased Claimant's symptoms, due to weakness and pain, and less difficulty lifting small objects with her arm close to her body. Claimant was unable to sleep on her right side, and her symptoms were minimally decreased with inactivity, rest and ice. He noted decreased range of motion, decreased rotator cuff strength, instability and positive labral test.

30. Dr. Castrejon opined that there was an association between the described work activities and the event of [June 14], 2017, due to significant worsening of her present condition. He determined that this association is industrial in nature, and substantially led to an aggravation of the underlying shoulder condition that would not have required further surgery, had it not been for the combination of work activities and the event of [June 14], 2017. Dr. Tripi's findings were contrary to his of July 12, 2017, and support the presence of a substantial worsening of her condition between April 19, 2017 and July 12, 2017. He would attribute these aforementioned

changes to the event of June 14, 2017. (Ex. II, pp. 115- 123).

31. At Respondents' request, Dr. William Ciccone, MD saw Claimant on August 8, 2018. He then issued a report on August 21, 2018. It was his opinion that Claimant had a shoulder rotator cuff arthropathy, which is a combination of a rotator cuff tear and osteoarthritis of the shoulder joint. He testified that Claimant had a rotator cuff repair in 2011. By 2016, Claimant was having difficulty and worsening of her problems, and had a significant supraspinatus tear noted in January 13, 2017, by MRI. He noted by April 19, 2017, Claimant was getting worse, as noted by Dr. Tripi's report. He did not believe that Claimant sustained an injury. There was nothing to indicate by the MRI findings, which he personally reviewed, between the January 13, 2017 and the July 22, 2017, to indicate there had been any acute event. The only difference between the two MRIs was no effusion, and osteoarthritis of the glenohumeral head.

32. It was Dr. Ciccone's opinion that the progression of the glenohumeral head arthritis occurs because the pre-existing rotator cuff tear creates a situation in which the glenohumeral head is no longer in the proper position in the joint, thereby, limiting the flow of synovial fluid. The synovial fluid bathes the cartilage, giving it nutrition. When that is compromised, it contributes to osteoarthritis- which Claimant now has. He did not believe the event of June 9, 2017 caused, accelerated, or aggravated the osteoarthritis. He notes that osteoarthritis symptomology includes popping, which is what he believes Claimant experienced, due to the joint incongruity, which then occurs due to osteoarthritis. Strength and range of motion will also decrease due to the rotator cuff tear, atrophy and osteoarthritis.

33. Dr. Ciccone disagrees with Dr. Castrejon that in April 2017, two months prior to the date of injury, Claimant could have good strength, good range of motion, and a perfect shoulder, but that her shoulder was so weak that this minor event of June 9, 2017 would have caused a subluxation. He noted there was no subluxation by x-ray, based on the alignment of the shoulder with the scapula. He also testified that had there been a subluxation, Claimant would not have been discharged from the RGH Emergency Room without treatment. (Ex. JJ, pp. 126-132).

34. Dr. Ciccone indicated that pursuant to the Medical Treatment Guidelines, the type of job duties Claimant described were below shoulder height, and would not meet the criteria which would aggravate or create a cumulative trauma disorder of the shoulder. Nor did he believe this incident caused an

injury. The need for the reverse total shoulder was not caused, aggravated, or accelerated by this event of June 9, 2017. (Ex. JJ, pp. 126-140).

35. Pharmacy records from City Market and Rio Grande Pharmacy show Claimant regularly filled prescriptions for tramadol prior to and after the alleged work accident. The only increase in medications occurred during specific flare-ups. (Ex. E, pp. 9-10; Ex. V, pp. 51-56).

Authorized Treating Provider

36. According to Claimant's testimony, she had never had a Workers Compensation claim filed since purchasing her business in March 2011. She did not know or understand how to proceed once she filed her claim, nor did her business manager. Claimant testified that she thought she could treat with any health care provider. Once she reported the claim to her business manager, Sam Kaufmann, he told her to do so. She further testified there was no list of designated providers, nor did Mr. Kaufmann provide her a list.

37. Claimant further testified that she now understands the requirement to provide a list of designated providers for other employees. Moving forward, she would not allow other employees to treat with their own choice of physician, but only because she learned the statutory rule in her case. Claimant also testified she lost confidence in the sole orthopedic group in her area, based upon her negative opinion of Dr. Tripi.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this instance, the ALJ finds Claimant to be sincere in recounting what occurred; her testimony is simply insufficient to prove compensability. Similarly, the ALJ finds both Dr. Castrejon and Dr. Ciccone to be sincere and professional in rendering their respective opinions; however, the ALJ must ultimately find which is more persuasive in light of the evidence.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

E. An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Indus. Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative

causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Indus. Comm'n*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation.

F. The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* WC 4-650-711 (ICAO February 15, 2007).

G. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn,* WC 4-663-169 (ICAO April 11, 2007), the panel stated "pain is a typical symptom caused by the aggravation of a pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

H. In this instance, Claimant has failed to meet her burden of proving she sustained a compensable injury on June 9, 2017. The ALJ finds Dr. Ciccone's testimony to be more persuasive than Dr. Castrejon's. It is unlikely the mechanism of injury described by Claimant could have caused an industrial injury. Claimant continued to work the day of the incident of June 9, 2017. Claimant's pain level remained consistent with her prior pain levels; medications did not change long term. There is no mention of this injury mechanism to ER personnel on June 15, 2017. There was no change in recommended treatment prior to or after the injury of June 9, 2017. Moreover, the need for a reverse total shoulder arthroplasty was recommended by Dr. Clifton in January 2017, and Dr. Tripi in April 2017 for pain relief. Claimant was fully cognizant of this fact, even referring to her 2011 rotator cuff surgery as being "botched" to ER personnel.

I. As noted by Dr. Ciccone, the 'popping' that Claimant says she experienced on June 9, 2017 was due to the pre-existing osteoarthritis, which caused the joint incongruity. The beginnings of this were already visible in January, wherein x-rays showed a slightly high riding humeral head. Claimant's shoulder, therefore, was not subluxed as a result of grabbing the basket with her arm. Further, the MRIs showed no significant differences pre and post-injury. In addition, Claimant had already experienced far more significant, recent trauma to this shoulder, including lifting her husband, and falling on this shoulder. The ALJ concludes, therefore, that Claimant has not suffered a compensable injury.

Medical Benefits

J. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

K. In this instance, the ALJ is prepared to find that the proposed reverse total right shoulder arthroplasty is reasonable and necessary, but not related to a work injury; rather, it is related to a pre-existing degenerative and chronic condition, which was not significantly aggravated by the incident at work on June 9, 2017.

Authorized Treating Provider

L. This issue is now moot, based upon the Conclusions of Law as found. However, on a purely advisory basis, the ALJ does find Claimant's testimony on this issue to be sincere and credible. Claimant did not understand the "ground rules" for an employer to provide a list of ATPs. Further, Claimant was not deliberately engaging in 'doctor shopping;' the list of available treatment providers in this region is limited. If this injury were found to have been compensable, the ALJ would have found the ATP to be Dr. Castrejon, who would have then overseen any orthopedic care recommended. While this result could possibly lead to some abuses, this is not the fault of the policy holder. Instead, it is the responsibility of the Insurer to educate the policy holder, and assist with preparing the ATP list, if the Insurer so desires.

ORDER

It is therefore Ordered that:

1. Claimant's claim for Workers Compensation benefits is denied and dismissed.

2. Claimant's request for medical benefits is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 12, 2018

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-073-519-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 14, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 11/14/18, Courtroom 4, beginning at 8:45 AM, and ending at 12:15 PM). The official Spanish/English Interpreter was Maria Fernanda Bravo.

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection. Claimant's Exhibits 10 and 11 were rejected. Respondents' Exhibits A through F were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed on November 21, 2018. No timely objections to the proposed decision were filed and the matter was deemed submitted for decision on November 27, 2018. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns an alleged willful "safety violation."

The Respondents bear the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the time of the Claimant's admitted injury, he worked as an insulation installer for the employer. His duties were to install insulation in residential and commercial buildings.

2. Respondents' admitted that Claimant sustained a work-related injury on March 31, 2018, when he fell from a height of approximately five feet and landed on the platform of a stairwell. His injuries include a C6 fracture with anterolisthesis of C6 on 7, comminuted left C& fact and vertebral body fracture along with bilateral C7 transverse process fractures. These injuries caused Mr. Rodriguez to be paralyzed essentially from the chest down.

3. The Respondents' ultimately filed a General Admission of Liability (GAL) dated June 12, 2018, admitting for medical benefits; asserting a Safety Rule Violation; admitting to an average weekly wage (AWW) of $959.50; and, exacting a 50% reduced temporary total disability (TTD) benefit rate of $319.84 per week from April 1, 2018, through "ongoing."

4. The Claimant's AWW is undisputed and it is also undisputed that the Claimant has been unable to work since the injury occurred.

Claimant's Injury

5. Although Mike Sventko was not present at the jobsite on the date of the injury, Sventko saw some pictures of the location where the Claimant fell. (Respondents' Exhibit C)

6. It is undisputed that the Claimant fell from a distance of approximately five feet and when he landed, felt a pop in his back and had a loss of bilateral function.

7. David Valenzuela believes that the Claimant was attempting to install insulation above a window in the stairwell, while standing on unsafely stacked drywall rather than using a ladder or safely stacked drywall. Valenzuela was not present at the time of the Claimant's fall.

8. Sventko' s belief that a safety violation occurred is based, in part, on pictures of what he deems to be unsafely stacked drywall that appears to have been damaged in the same vicinity as where the Claimant was located after his injury.

9. Valenzuela, project supervisor, opined that the damage sustained to the drywall could only have been caused by excessive weight, but that he does not know how much weight is necessary to cause damage to drywall.

10. In support of their position, Respondents' also rely on the medical record from the paramedics who indicates, "Pt. was working near a stairwell when he fell through an unfinished wall." This opinion of the paramedics is inadequately founded.

11. The Claimant disputes the Respondents' alleged mechanism of injury.

12. There were no visual witnesses to the injury at the time the Claimant fell, other than the Claimant himself – not Sventko or Valenzuela.

13. The Claimant testified that he did not fall in the manner that Sventko and Valenzuela allege. Instead the Claimant testified that he was walking down some stairs to get materials when he either tripped or slipped and fell to the stairwell landing.

14. The medical records from the Claimant's treating providers indicate that the Claimant either fell off a ladder or fell from stairs, landed on his feet, felt a pop in his back and had loss of bilateral function. Nothing in the medical records indicate that he was standing on stacked drywall that gave way, causing him to fall.

15. Although the records from the paramedics state that the Claimant fell through an unfinished wall, the stairwell where the Claimant was found is completely

unfinished. Sventko admitted that it is completely reasonable for the Claimant to have fallen through the unfinished wall while walking down the stairs.

Employer's Safety Rule

16. At hearing, Sventko testified that he had adopted a number of safety regulations which were contained in a manual in excess of 400 pages and instead of providing his employees with the manual, he and one of his supervisors, David Valenzuela, held regular weekly safety meetings where the employees were mandated to attend.

17. The employees would sign a sign-in sheet at the safety meetings. Sventko testified that the rule for employees to use ladders safely was a rule that he adopted and that was regularly conveyed to Rodriguez in Spanish. This meant that an employee should not take chances and use a ladder when necessary. No specific details on the use of a ladder in a safe manner were given. Indeed, Senko's testimony is based on an assumption that conflicts with the Claimant's version of events. Svenko assumed that the Claimant was working when a ladder should have been used. The Claimant's version of events rules out the need for a ladder. the Claimant testified that he was walking down some stairs to get materials when he either tripped or slipped and fell to the stairwell landing. The ALJ finds the Claimant's version of events credible as weighed against the opinions of Sventko and Valenzuela, which were based on their non-expert take on circumstantial evidence, which is disputed by the Claimant's direct recounting of events.

18. Sventko stated that he provided ladders for employees to use, and employees were also allowed to use their own personal stilts, however, this fact is irrelevant to the Claimant's version of the fall, which the ALJ finds credible. Indeed, Valenzuela conceded that the Claimant could have fallen in the manner the Claimant said he fell.

19. Sventko testified that employees were allowed to stand on stacked drywall as well, in addition to using ladders. However, he also stated that when the drywall has been shifted, it is not appropriate for someone to stand on the drywall.

20. Essentially, Sventko testified that it was a judgement call for the employee to make as to whether it would be appropriate to use a ladder or not, and when it was safe to stand on stacked drywall. This testimony is internally inconsistent with the allegations that the Claimant either should have used a ladder or not stood on drywall to prevent falling. The ALJ finds that an alleged safety violation, based on an alleged improper judgment call, is so vague and subjective on the part of the employer who alleges a safety violation as to be incapable of knowing.

21. Valenzuela, the Project Supervisor for the Employer was not on the jobsite on the date of the Claimant's injury, but Valenzuela about his involvement with the safety meetings. He regularly held the meetings He would ask if anyone had questions or didn't understand anything, and he would also conduct the safety meetings in Spanish so that the Claimant would understand. The ALJ finds that evidence of the content of safety meetings is a "red herring," in light of the Claimant's credible version of the fall.

22. The Claimant testified that he did not receive training from the Employer, and that he had to sign the safety sign-in sheets in order to get his weekly paycheck. The ALJ does not find the Claimant credible in this regard, however, it is not relevant to the Claimant's version of the fall. The ALJ does not subscribe to the maxim, *falso in unum, falso in omnibus."* Things are not that simple. Nonetheless, the ALJ finds that the Claimant's version of the accident credible.

Ultimate Findings

23. Despite some apparent anomalies in the Claimant's testimony, the ALJ finds his testimony credible and persuasive. None of the Respondents' witnesses (who were not present at the time of the Claimant's accident but ventured opinions based on faulty circumstantial evidence based on an erroneous assumption, as found herein above) were able to persuasively rule out the Claimant's version of the accident.

24. Essentially, the Respondents' version of the safety rule violated is "thou shalt be safe, and we'll be the judge of what is safe and unsafe." Such a rule or policy does not meet the threshold of an ascertainable safety rule or policy that can be proven to have been "willfully" violated.

25. It is legally irrelevant if the Claimant's accident was caused by his negligence or carelessness. It was not so caused. There was no "deliberate intent" on the Claimant's part to willfully violate a safety rule or policy.

26. Between conflicting versions of the accident, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's version of the accident, which involved an unfortunate mishap as opposed to a "willful violation of a safety rule or policy, and to reject any evidence to the contrary.

27. The Respondents have failed to prove, by a preponderance of the evidence, that the Claimant's admitted accident of March 31, 2018 was proximately caused by the Claimant's willful violation of a safety policy.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85** The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). As found, despite some apparent anomalies in the Claimant's testimony, his testimony was credible and persuasive. None of the Respondents' witnesses (who were not present at the time of the Claimant's accident but ventured opinions based on faulty circumstantial evidence based on an erroneous assumption, as found herein above) were able to persuasively rule out the Claimant's version of the accident.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of

conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting versions of the accident, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's version of the accident, which involved an unfortunate mishap as opposed to a "willful violation" of a safety rule or policy, and to reject any evidence to the contrary.

Safety Violation

c. Section 8-42-112 (1), C.R.S., provides for a 50% reduction in benefits if an employee is injured due to a **willful** safety violation. The term "willful" connotes deliberate intent, but mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *See Bennett Properties Co. v. Industrial Comm'n,* 165 Colo. 135, 437 P.2d 548 (1968); *Carlos Flores v. American Furniture Warehouse,* W.C. No. 4-939-951-01 [Indus. Claim Appeals Office (ICAO), April 30, 2015]. An alleged safety violation is an affirmative defense and it is the proponent's burden to prove it by a preponderance of the evidence**.** *See Lori's Family Dining, Inc. v. Indus. Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995); *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). As found, it is legally irrelevant if the Claimant's accident was caused by his negligence or carelessness. It was not so caused. There was no "deliberate intent" on the Claimant's part to willfully violate a safety rule or policy.

Burden of Proof

d. The burden of proof is placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v Jones*, 688 P.2d 1116 (Colo. 1984). As found, Respondents have failed to satisfy their burden with respect to a safety violation.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for a 50% reduction in benefits for an alleged safety violation are hereby denied and dismissed.

B. The General Admission of Liability (GAL), dated June 12, 2018, shall remain in full force and effect with respect to the admission of liability.

C. Temporary total disability benefits shall be **increased** by 50% from April 1, 2018 and continuing.

D. Based on the admitted average weekly wage of $959, the re-established temporary total disability benefit rate is $639.66 per week, or $91.38 per day, as opposed to the reduced rate of $319.97 per week, or $45.71 per day. Thus, the differential between the admitted rate and the re-established rate is $319.69 per week, or $45.67 per day.

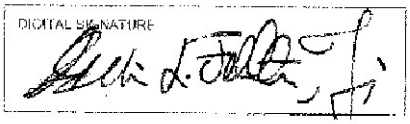
E. For the period from April 1, 2018 through the hearing date, November 14, 2018, both dates inclusive, a total of 228 days, Respondents shall pay the Claimant additional temporary total disability benefits in the aggregate amount of $10,412.76, which is payable retroactively and forthwith.

F. From November 15, 2018, and continuing until modification or cessation is warranted by law, Respondents pay the Claimant $639.66 in temporary total disability benefits.

G. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on indemnity benefits due and not paid when due.

H. Any and all issues not determined herein are reserved for future decision.

DATED this 12th day of December 2018.



EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

1. Did Claimant prove he suffered a whole person impairment?

2. Disfigurement.

3. Is Claimant barred from pursuing whole person impairment and disfigurement benefits by the doctrine of issue preclusion/collateral estoppel?

PREHEARING SUMMARY JUDGMENT ORDER

Before the November 7, 2018 hearing, the parties filed cross-motions for partial summary judgment on the issue of whether Respondents are bound by the DIME's whole person impairment rating as a matter of law. On October 30, 2018, the ALJ denied Claimant's motion and granted Respondents' competing motion. The hearing went forward on the merits of Claimant's request for "conversion."

The ALJ's findings and conclusions from the October 30, 2018 summary judgment order will not be repeated here. The October 30, 2018 order has been placed in the OAC file and is hereby incorporated in this order by reference.

FINDINGS OF FACT

1. Claimant suffered admitted injuries to his left leg on April 8, 2015 while working for Employer as a plumber. He was stepping up onto a scaffold and his left foot slipped into a gap between the ground and the front step of the scaffold, causing him to fall backward onto the ground. In the process of falling, he twisted his left leg and ankle.

2. Claimant's boss took him to Concentra, where he saw Dr. Walter Larimore. Claimant reported pain in the left ankle and left calf, and had difficulty bearing weight on the left leg. His left ankle was swollen and tender with limited range of motion. Dr. Larimore diagnosed a moderate left ankle sprain, splinted the ankle and gave Claimant crutches. He advised Claimant to remain nonweightbearing and released him to sedentary duties only.

3. Claimant returned to Concentra on April 13, 2015 and reported minimal improvement. He was not using crutches but was limping due to lateral ankle and calf pain. His left ankle remained swollen and painful. Examination of the left calf showed tenderness at the gastrocnemius and Achilles junction. Dr. Larimore added the diagnosis of gastrocnemius tendon strain. Ibuprofen was not helping, so Dr. Larimore prescribed naproxen instead. He also referred Claimant for physical therapy.

4. Claimant's ankle steadily improved over the next several weeks, but his calf remained painful with minimal relief from medication and therapy. Dr. Larimore referred Claimant for a lower leg MRI and an orthopedic consultation with Dr. Michael Simpson.

5. Claimant saw Dr. Simpson on May 18, 2015. Dr. Simpson reviewed the MRI and described it as "completely normal" with no evidence of a muscle tear. He saw no surgical pathology and expected Claimant's pain to resolve with time. He also stated, "If he continues to have pain, it may be prudent to have him evaluated by a pain management specialist to determine whether or not he has any neuropathic pain."

6. Claimant did not improve, and on June 8 he told Dr. Peterson at Concentra he was "becoming worse." Dr. Peterson ordered a "STAT" ultrasound, which ruled out DVT. Dr. Peterson referred Claimant to Dr. Jeffrey Jenks for electrodiagnostic testing.

7. Claimant had a repeat MRI on June 30 due to imaging artifacts in the first MRI. The second MRI showed "minimal Achilles tendinosis."

8. Dr. Jenks performed a left leg EMG on July 8, 2015, which showed peroneal neuropathy at the left fibular head. Testing of the lumbar paraspinals was normal with no evidence of denervation or motor changes. Dr. Jenks started Claimant on Neurontin and prescribed a topical compound analgesic cream.

9. Claimant began treating with Dr. Shimon Blau, a physiatrist, on July 20, 2015. He described ongoing left leg pain and weakness, aggravated by walking. The Neurontin was not helping, so Dr. Blau switched him to Lyrica.

10. In late October 2015, Claimant reported the pain had "started working its way up into his posterior thigh and buttocks."

11. Dr. Blau administered an ultrasound-guided injection of steroid and lidocaine on November 3, 2015. On follow up in December, Claimant told Dr. Blau the injection "did not help at all."

12. Claimant started experiencing low back pain in approximately November 2015. Claimant never noted low back pain on the pain diagrams he completed at Concentra. Claimant has admitted he first developed back pain "eight or nine months" after the injury.

13. In January 2016, Dr. Blau discontinued Lyrica and started Claimant on Cymbalta. He also refilled trazodone and referred Claimant back to Dr. Jenks for a repeat lower extremity EMG.

14. Dr. Albert Hattem took over as Claimant's primary ATP on January 14, 2016 due to "delayed recovery." Claimant told Dr. Hattem "overall since his injuries . . . he is unchanged despite considerable time and treatment." The physical examination was largely normal, except slight tenderness on the lateral aspect of the ankle and lower leg. Dr. Hattem advised Claimant if the repeat EMG were unchanged or improved, he would be at MMI.

15. Claimant saw Dr. Jenks for the repeat EMG on February 16, 2016. Although Dr. Jenks' report is not in evidence, Dr. Blau described it in his March 7, 2016 report. According to Dr. Blau, the EMG showed "findings and symptoms potentially consistent with a left L5 radiculopathy. This was based on _____ peroneus longus muscle."

16. Dr. Blau's March 7, 2016 report also contains what appears to be the first mention of low back pain in the Concentra records. Claimant described the back pain as "constant, aching and throbbing." Claimant also reported ongoing leg pain that was "more sharp in nature." He rated his pain at 7.5-9/10, but it is unclear whether he was referring to his back pain, leg pain, or both. Dr. Blau noted "he has tried Lyrica, Cymbalta, and trazodone in the past . . . and states these were not helping very much." Dr. Blau ordered a lumbar MRI.

17. Claimant followed up with Dr. Hattem on March 24. Dr. Hattem noted the repeat EMG "demonstrated no evidence of left peroneal neuropathy. This condition is now resolved and is at maximum medical improvement." He also opined the potential L5 radiculopathy was a "new finding" not causally related to the industrial accident. Dr. Hattem placed Claimant at MMI with no impairment, no restrictions, and no maintenance care. He advised Claimant to "consult with his personal physician outside of workers' compensation for non-claim-related lumbosacral radiculopathy."

18. Claimant has been treating with his primary care providers for leg pain since March 2016. The working diagnosis throughout the PCP records is "left L5 radiculopathy."

19. Claimant saw Dr. Stephen Gray for a Division Independent Medical Examination ("DIME") on April 11, 2017. Claimant complained of intermittent "severe" sharp, shooting, and stabbing pain across his entire lumbosacral region. Dr. Gray noted none of the Concentra pain diagrams identified low back pain. Claimant stated the back pain did not develop until "8 or 9 months after the original injury." He described stabbing pains and tingling in the posterior aspect of the left leg from the buttock into the heel. He complained of numbness laterally over the left thigh and calf area, and weakness "in the entire left leg." On exam, he was tender over the left iliac crest and iliolumbar ligament, and the left SI joint. Straight leg raise and tension signs were "equivocally positive" on the left. He had decreased sensation over the left L5 dermatome "consistent with L5 radiculopathy." Strength testing was "difficult to evaluate as there was a rather extreme breakaway weakness" when testing dorsiflexion and left knee extension. Left leg range of motion testing showed difficulty with eversion "consistent with his previous peroneal nerve palsy." He had significant difficulty with dorsiflexion, and his EHL was weak.

20. Dr. Gray agreed Claimant was at MMI on March 24, 2016. Dr. Gray's diagnoses included "left peroneal neuropathy, probably secondary to 4/8/15 work-related incident," and "lumbosacral radiculopathy, unclear relationship to [the industrial accident]." Dr. Gray struggled to sort out which symptoms were injury-related:

> This case proved to be quite difficult in regards to causation of the late complaint of low back pain and the late findings of the L5 radiculopathy. It seems reasonably clear that the left lower extremity peroneal neuropathy is

> related to the strain/sprain injury of the left lower extremity that occurred on 4/8/15. The late finding of an L5 radiculopathy throws a wrench or red herring into the thought process. To this examiner's knowledge an MRI scan was not obtained. Even if an MRI scan of the lumbar spine showed a corresponding disc lesion at the left L5 area, it would not answer whether there was ever a low back injury. [Claimant] was quite frank about the fact that his complaints of low back pain did not manifest until long after the initial injury. The first mention of back injury in the medical records occurred almost ½ a year after the injury . . . . Nevertheless, we have the electrodiagnostic studies that show a left leg peroneal neuropathy and then a later electrodiagnostic study that shows an L5 radiculopathy. This examiner did not have the benefit of reviewing a complete set of notes on the electrodiagnostic studies that were performed. . . . Even if this examiner did have complete raw data on the electrodiagnostic studies, it would require the input of Dr. Jenks to help answer the following question. Is it possible that the early study showing a peroneal neuropathy was limited by how far of the exam was done? Is it possible that what we are seeing is the result of a "double crush" phenomena? Is it possible that, if the earlier study had been performed all the way up into the proximal right lower extremity and pelvis, would this have shown an L5 radiculopathy?

21. Dr. Gray opined, "there ***may*** have been a relationship between the peroneal nerve injury and electrodiagnostic changes proximal to that, in the L5 spinal nerve root, which is partially where the peroneal nerve comes from." (Emphasis added). Dr. Gray assigned a 14% lower extremity impairment rating based on range of motion deficits and impairment of the common peroneal nerve. He indicated the neurological rating addressed "both the L5 radiculopathy and peroneal nerve changes." He did not assign a lumbar spine rating. Dr. Gray stated, "It is this examiner's opinion that impairment of the left lower extremity, in this case, should be considered on a whole person basis," but offered no further explanation for his opinion regarding whole person impairment.

22. Claimant underwent a lumbar MRI on April 21, 2017, which was essentially normal.

23. Insurer filed a Final Admission of Liability on May 17, 2017 based on Dr. Gray's DIME report. The FAL admitted for a 14% scheduled impairment of the left leg.

24. In May 2017, Claimant's PCP referred him to Dr. Christopher Malinky, an interventional pain management specialist. Claimant's primary complaint was left-sided low back pain radiating down his left leg. Dr. Malinky administered an L4-5 transforaminal ESI, which gave Claimant "0 relief." Dr. Malinky recommended a spinal cord stimulator trial since no previous treatment had helped Claimant's leg pain.

25. Claimant saw Dr. Mark Paz for an IME at Respondents' request in October 2017. Dr. Paz opined the left peroneal neuropathy had resolved per the EMG, and the L5 radiculopathy was not injury-related. Dr. Paz pointed out Claimant did not complain of low back pain until several months after the original injury, and opined the mechanism of injury

does not correlate to an L5 radiculopathy. Dr. Paz agreed Claimant was at MMI as of March 24, 2016, but disagreed with Dr. Gray's rating because it was based on conditions that are not related to the April 2015 accident.

26. Dr. Hattem testified in a deposition for Respondents on September 15, 2017. He does not believe Claimant's low back pain is work-related, as it did not manifest until well after the original injury. He also noted Claimant's pain from the work injury originated in the lower leg and radiated at times *upward*, which is not consistent with the later onset of L5 radiculopathy radiating from the back *downward*.

27. Dr. Paz issued a supplemental report on October 17, 2018. Dr. Paz stated Claimant displayed no gait abnormalities on direct observation at the October 9, 2017 IME. He also noted the records from Dr. Blau, Dr. Hattem, and Dr. Gray document normal gait. Dr. Paz opined Claimant's low back symptoms and documented left L5 radiculopathy are not causally related to the industrial accident.

28. Dr. Paz testified at hearing on behalf of Respondents. He reiterated and expanded on the opinions expressed in his IME report. He explained that symptoms of peroneal neuropathy are similar to those of L5 radiculopathy, but they are distinct entities and the EMG would be expected to differentiate easily between them. He maintained the peroneal neuropathy has resolved and the L5 radiculopathy is not related to Claimant's industrial injury.

29. The opinions of Dr. Hattem and Dr. Paz are more persuasive than opinions in the record to the contrary.

30. Claimant failed to prove by a preponderance of the evidence his low back pain and L5 radiculopathy are causally related to the April 8, 2015 industrial accident.

31. Claimant failed to prove he suffered functional impairment not listed on the schedule.

32. Claimant failed to prove he suffered an injury-related disfigurement. At hearing, he demonstrated a limp as the basis for a disfigurement award. But Claimant's treatment records repeatedly document normal gait, including PCP records as recently as July 17, 2017. Similarly, the DIME and Dr. Paz both documented normal gait. In any event, Claimant did not prove he developed a gait abnormality due to any injury-related condition. To the extent Claimant suffers from alteration of his gait, the ALJ finds it is probably related to his nonwork-related radiculopathy and not a consequence of his compensable injury.

CONCLUSIONS OF LAW

A. Claimant's claims for whole person impairment and disfigurement benefits are not barred by issue preclusion/collateral estoppel.

As an initial matter, Respondents argue Claimant's requests for whole person impairment and disfigurement based on low back pain and radiculopathy are barred by

the doctrine of issue preclusion/collateral estoppel. Specifically, Respondents point to the prior FFCLO dated March 22, 2018 that found Claimant failed to prove his low back and radicular symptoms were injury-related in the context of his request for *Grover* medical benefits.

Issue preclusion (*i.e.,* collateral estoppel) is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78, 84 (Colo. 1999). The doctrine's purpose is to relieve parties of the burdens of multiple lawsuits, to conserve judicial resources, and to promote reliance on and confidence in the judicial system by preventing inconsistent decisions. *Id*. Although issue preclusion was conceived as a judicial doctrine, it has been extended to administrative proceedings, where it "may bind parties to an administrative agency's findings of fact or conclusions of law." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). One requirement for the application of the doctrine is that the issue to be precluded must be identical to an issue already determined in the prior proceeding. *Id*.

Even assuming the identity of issues requirement is satisfied, the ALJ would not apply issue preclusion here, due to the unique circumstances of the case. Specifically, Claimant tried to litigate whole person impairment at the November 21, 2017 hearing, but Respondents objected on the basis Claimant had not properly disclosed his positions and evidence during discovery. The ALJ offered Respondents the option to try the issue at that time or reserve it for future determination, and Respondents elected to reserve the issue.[1] The ALJ's order at the outset of the November 2017 hearing essentially bifurcated the issues of impairment and *Grover* meds. That necessarily preserved Claimant's right to litigate the underlying factual elements of his claim for whole person impairment, including causation. It would be fundamentally unfair to explicitly advise Claimant an issue was being reserved, and then proceed to make factual findings that preclude him from litigating the reserved issue in the future. Had Claimant known that outcome was contemplated, he probably would have asked to continue the November 21, 2017 hearing and try all issues together in a later proceeding. Thus, the ALJ concludes Claimant is not precluded from addressing causation in conjunction with impairment and disfigurement.

B. Claimant failed to prove he suffered permanent impairment not listed on the schedule

The term "injury" as used in the context of permanent partial disability "refers to the manifestation in a part or parts of the body which have been impaired or disabled as a result of the industrial accident." *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has sustained a scheduled injury or a whole person impairment is a question of fact for determination by the ALJ. *Id.* In resolving

[1] The prior FFCLO contains the following discussion of this issue: "At the commencement of the hearing, Claimant argued he suffered a whole person impairment, and Respondents were bound by the DIME rating because they filed a Final Admission of Liability rather than requesting a hearing after receiving the DIME report. The ALJ concluded Claimant properly preserved that issue by endorsing "PPD" on his Application for Hearing, but did not give Respondents sufficient notice of his intent to try that issue through discovery. Respondents elected to reserve that issue for future determination.

this question, the ALJ must determine "the situs of the functional impairment," which refers to "the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co*., 942 P.2d 1390, 1391 (Colo. App. 1997). The schedule of disabilities refers to the loss of "a leg." Section 8-42-107(2)(a). To establish entitlement to a whole person rating, the claimant must show functional impairment to part(s) of her body other than the "leg." It is the claimant's burden to prove a non-scheduled impairment by a preponderance of the evidence. *Cassius v. Entegris*, W.C. No. 4-732-489 (March 26, 2010).

Functional impairment need not take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may show functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although medical opinions may be relevant to this determination, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

As found, Claimant failed to prove he suffered functional impairment not listed on the schedule. The primary factual basis for Claimant's whole person argument is the development of low back pain and radiculopathy. But the persuasive evidence does not show those symptoms are related to the admitted accident. Although a claimant is not required to present medical evidence to support his case, the presence or absence of expert opinion is a legitimate factor for the ALJ to consider. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). Dr. Hattem and Dr. Paz provided well-reasoned causation arguments and Claimant has no persuasive countervailing opinion evidence. Dr. Gray's conclusory statement that Claimant's rating "should be considered on a whole person basis" is not persuasive in the absence of more explanation. As Dr. Gray himself pointed out, the assessment of causation is "difficult" due to the conflicting EMG findings and evolving symptomatology. Claimant has some symptoms consistent with peroneal neuropathy, but no corresponding current EMG findings. He also has symptoms consistent with L5 radiculopathy and positive EMG findings, but no apparent spinal pathology per the lumbar MRI. Dr. Gray raised several valid questions in his report but failed to answer them. After reviewing all the evidence presented, the ALJ is persuaded Claimant's permanent impairment is limited to his left leg.

C. Claimant failed to show he suffered disfigurement because of the injury.

Under § 8-42-108(1), a claimant is entitled to additional compensation if they are "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." Disfigurement benefits are awarded for the observable consequences of an industrial injury. *Arkin v. Industrial Commission*, 358 P.2d 879 (Colo.

1961). A permanent limp caused by an industrial injury can be the basis for a disfigurement award. *E.g., Piper v. Manville Products Corporation*, W.C. No. 3-745-406 (July 29, 1993).

As found, Claimant failed to prove he suffered any injured-related disfigurement. At hearing, he demonstrated a limp as the basis for a disfigurement award. But Claimant's treatment records, including PCP records as recent as July 17, 2017, repeatedly document normal gait. Similarly, the DIME and Dr. Paz both documented normal gait. In any event, even giving Claimant the benefit of the doubt regarding the presence of a limp, he did not prove he developed a gait abnormality due to any injury-related condition. To the extent Claimant suffers from alteration of his gait, it is probably related to his nonwork-related lumbar radiculopathy and not a consequence of his compensable injury.

ORDER

It is therefore ordered that:

1. Claimant's request for whole person PPD benefits is denied and dismissed.

2. Claimant's request for a disfigurement award is denied and dismissed.

Date: December 17, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with this Findings of Fact, Conclusions of Law, and Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she is entitled to a general award of medical maintenance benefits for her September 21, 2014 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 50 year old woman who has worked for Employer as a deputy sheriff for approximately 25 years.

2. On September 21, 2014, Claimant sustained an admitted industrial injury while assisting an inmate who attempted to hang herself. Claimant lifted the inmate by her legs to relieve the pressure of the noose around the inmate's neck. Claimant estimates the inmate weighed approximately 300 pounds.

3. Claimant underwent treatment at Concentra. On September 23, 2014, Claimant presented with complaints of pain in her spine, left hip, left shoulder and left knee. Glenn Petersen, PA-C diagnosed Claimant with an acute cervical sprain, low back strain, left hip strain, left shoulder strain, and knee strain. Claimant began treating with medication, massage therapy, and physical therapy.

4. On December 22, 2014, Claimant presented to Kathy F. McCranie, M.D. for a physiatric evaluation. Claimant reported neck, left shoulder and low back pain. Dr. McCranie noted Claimant had two prior knee surgeries related to a 2009 work injury for which she was placed at maximum medical improvement ("MMI") on July 13, 2012 with 10% lower extremity impairment and a few months of maintenance treatment. She further noted, "[Claimant] states that her left knee hurt initially but now back to baseline which she describes as a constant burning sensation that has been there since the time of her knee injury. She states she has learned to live with this." Dr. McCranie's impression was as follows: (1) cervical pain status post strain with myofascial involvement, (2) left shoulder pain with intermittent locking, (3) intermittent low back pain with pelvic asymmetries and resolving left hip pain, and (4) status post left knee strain with prior history of left knee meniscal tear and repair x2, currently at baseline.

5. Claimant underwent a left shoulder MRI and cervical MRI on January 9, 2015. On January 16, 2015, Dr. McCranie noted the shoulder MRI revealed a small supraspinatus tendinosis, AC joint arthropathy with acromial morphology predisposing to impingement, mild subacromial subdeltoid bursitis, degenerative cysts within the posterolateral humeral head, and no evidence of rotator cuff or labral tear. The cervical spine MRI showed some focal left-sided findings at C3-4 and C4-5 and some mild

degenerative changes and a disk bulge causing some mild left neural foraminal compromise.

6. Claimant continued to undergo treatment for her neck and left shoulder, including massage therapy, physical therapy, acupuncture, chiropractic care, medication, and shoulder injections.

7. During a follow-up examination with Dr. McCranie on June 5, 2015, Claimant reported persistent pain in her left knee. Dr. McCranie opined further left knee treatment would likely be considered maintenance care from Claimant's 2009 injury, as Claimant had chronic left knee pain since her 2009 work injury and had returned to baseline by the time of Dr. McCranie's initial evaluation in December 2014. On July 8, 2015 Lacie Esser, PA-C noted Claimant was reporting a sharp pain in her left knee. PA-C Esser noted, "[Claimant] did have 2 previous surgeries on this knee…She is concerned that there is another tear in there because it feels the way it felt before the other surgeries. It is definitely worse now than before the injury in September." She recommended Claimant undergo a left knee MRI.

8. On July 30, 2015, a left knee MRI demonstrated markedly diminutive appearance of the posterior horn and body of the medial meniscus, primarily due to postoperative changes secondary to a prior partial meniscectomy.

9. On August 26, 2015, Claimant presented to Bryan Counts, M.D. Dr. Counts reviewed and compared the July 30, 2015 left knee MRI with a May 12, 2011 left knee MRI, noting the MRIs were "essentially the same except for further degenerative changes." Dr. Counts gave the following assessment: acute cervical sprain, left shoulder strain and knee strain. He opined chronic changes in Claimant's knee, including meniscal injury, were not related to the September 21, 2014 work injury.

10. Dr. Counts referred Claimant to Stewart Weinerman, M.D. for a second opinion on her shoulder and knee. Dr. Weinerman opined Claimant did not sustain a new left knee injury. He recommended Claimant undergo left shoulder surgery for a torn labrum.

11. On November 4, 2015, Claimant presented to Bryan Castro, M.D., who reviewed October 2, 2015 cervical spine x-rays and the January 9, 2015 cervical spine MRI, noting disc changes at C4-C5 with some foraminal narrowing on the left. He opined that surgical intervention was not recommended as Claimant's main symptoms were neck pain. He wrote,

> I discussed that some of her neck and trapezial and interscapular pains could be coming from the shoulder with the shoulder aggravating some of the muscles. We discussed however that the left arm symptoms that she gets intermittently with shooting pains down the left arm with numbness and tingling in her fingers are more likely from her neck.

Dr. Castro recommended Claimant undergo massage therapy and acupuncture or physical therapy, and obtain an EMG/NCS of the upper extremities.

12. The results of the EMG/NCS of Claimant's bilateral upper extremities were normal.

13. Claimant subsequently underwent a left shoulder arthroscopy with flap repair, performed by Dr. Weinerman on January 21, 2016. Claimant underwent physical therapy post-operatively.

14. On June 2, 2016, Respondent's physician advisor, John Raschbacher, M.D., performed a medical record review. Dr. Raschbacher noted Claimant's massage therapy to date exceeded that which was recommended by the Medical Treatment Guidelines, and that there was no record that the massage therapy had clearly improved Claimant's functional status. With regard to physical therapy, Dr. Raschbacher noted Claimant had been undergoing physical therapy since her 2014 injury. He opined that it was medically unlikely that physical therapy or massage therapy would improve Claimant's functional status, and that there was no clear medical indication for continuing therapy.

15. Dr. Castro reevaluated Claimant on June 29, 2016. He again opined Claimant was not a candidate for surgical intervention, as her pain was largely neck pain rather than radicular pain. He suggested Claimant return to physical therapy to try some range of motion and other exercises for her neck, and deferred to Dr. Weinerman as to whether Claimant shoulder undergo additional physical therapy for the shoulder. He released Claimant from his care, stating he would continue to see her on an as-needed basis.

16. Claimant's care was transferred from Dr. Counts to delayed recovery specialist Albert Hattem, M.D., who first evaluated Claimant on August 29, 2016. Claimant continued to complain of persistent left knee and left shoulder pain. On October 7, 2016, Dr. Hattem noted Claimant was at MMI for the left shoulder, as she was nine months post-SLAP repair and doing well. He opined Claimant was approaching MMI for the cervical spine, having completed a comprehensive course of conservative care. Dr. Hattem noted that, on September 6, 2016, Dr. Weinerman concluded Claimant's current left knee condition was claim-related and recommended arthroscopy; however, Dr. Hattem agreed with Dr. McCranie that Claimant's recurrent knee pain was likely not claim related, considering she had returned to baseline in December 2014.

17. Dr. McCranie discharged Claimant from her care on October 21, 2016, noting Dr. Hattem had taken over Claimant's care. She wrote prescriptions for medication and recommended Claimant continue and complete therapy, transition to an independent exercise program, and follow-up with Dr. Castro regarding cervical injections.

18. Claimant returned to Dr. Castro on November 16, 2016. Dr. Castro reiterated his opinion that there was no surgical indication for Claimant's neck. He recommended Claimant continue physical therapy and engage in a home exercise program consisting of stretching and range-of-motion exercises. He also made general recommendations regarding regular aerobic activity and exercises that Claimant could perform at the gym.

Dr. Castro released Claimant from his care, opining Claimant was at MMI "from a surgical standpoint."

19. Dr. Hattem reexamined Claimant on November 28, 2016. Claimant continued to have persistent left shoulder and neck discomfort that she rated 4/10. Dr. Hattem again reviewed Claimant's medical history, noting Claimant had since been discharged from care by both Dr. McCranie and Dr. Castro. He also noted Claimant completed chiropractic massage and physical therapy. Dr. Hattem referred Claimant for a functional capacity evaluation (FCE) to determine Claimant's permanent work restrictions pending MMI and an impairment rating.

20. Dr. Hattem placed Claimant at MMI on February 13, 2017. Dr. Hattem concluded Claimant completed a "comprehensive course of postoperative therapy" for the shoulder, and chiropractic massage and physical therapy for the neck. He continued to opine Claimant's recurring left knee pain was not claim-related. Dr. Hattem assigned an 8% upper extremity impairment for abnormal left shoulder range of motion and released Claimant to full duty work based upon the results of a January 26, 2017 FCE. He opined Claimant did not require any post-MMI medical monitoring or follow-up.

21. On August 7, 2017, Mark C. Winslow, D.O. performed a Division Independent Medical Examination ("DIME"). Claimant complained of pain, popping, swelling and locking of the left knee, as well as pain and limited range of motion of the neck and shoulder. On examination, Dr. Winslow noted limited shoulder range of motion with mild tenderness in the myofascial trapezius, restricted range of motion in the cervical spine with tenderness and several trigger points, and decreased range of motion of the knee with mild tenderness on the medial joint line. Dr. Winslow gave the following assessment: (1) status post labral tear with repair, (2) cervicalgia with ongoing complaints of pain, (3) low back pain with essentially complete resolution, and (4) left knee pain with previous meniscectomy, exacerbation currently back to previous baseline. He agreed Claimant reached MMI as of February 13, 2017 and assigned 13% whole person impairment for the cervical spine, and 9% upper extremity impairment (5% whole person) for the left shoulder.

22. Dr. Winslow opined Claimant's current knee pain is more likely due to her previous work injury than the September 21, 2014 work injury. In support of his opinion, he noted Claimant's symptoms were "very much like her previous knee pain," the imaging did not reveal new pathologic changes, and Claimant's range of motion at the DIME evaluation was better than it was at the time Claimant was discharged from her prior knee injury.

23. Regarding Claimant's neck, Dr. Winslow noted he reviewed medical records from Kaiser prior to the September 21, 2014 work injury that suggested Claimant had previous "intermittent and self-correcting" symptoms in the cervical region," specifically referring to an August 28, 2012 medical record that documented possible previous neck problems that included "recurrent self-limited episodes of neck pain in the past." He further noted, however, that a December 3, 2012 medical note indicated there was no neck pain or other concerns, and no active treatment was initiated. He opined that

Claimant, with her mild underlying degenerative joint disease, sufficiently strained the cervical region in the September 21, 2014 work incident, leading to "a rapid and sustained increase in her previously mild and intermittent symptoms." Dr. Winslow opined it was "entirely probable" Claimant would go on to have continued symptoms. Noting that treatment had been recommended by her providers for Claimant's ongoing symptoms, Dr. Winslow concluded additional medical treatment could be offered as maintenance. He wrote,

> The patient has ongoing symptoms. She has findings on clinical examination that suggests she has continued restrictions and cervical range of motion that have responded in the past and should response to chiropractic or osteopathic manual treatment. The patient reports that these treatments have been helpful-beneficial at allowing her to maintain her normal level of function and assist her to continue working her full capacity. In my opinion this should be continued up to 12 visits over the next 24 months to include massage therapy up to 12 visits during this same time frame. These are not offered to improve however to allow/assist the patient to continue her current level of function.

24. Respondent filed a Final Admission of Liability on December 15, 2017 admitting for Dr. Winslow's permanent impairment rating, but denying maintenance medical treatment based on Dr. Hattem's opinion.

25. On April 23, 2018, Respondent sent Dr. Hattem a letter asking for an updated opinion regarding maintenance medical benefits in light of Dr. Winslow's DIME report. In his April 26, 2018 response, Dr. Hattem continued to opine that maintenance medical treatment was not reasonably necessary stating, "At this time 3 ½ years post injury any current pain she may experience is likely due to pre-existing cervical spondylosis rather than to the remote work injury." Dr. Hattem wrote that he found it significant that Claimant had not sought treatment since undergoing the DIME, stating, "One would have expected the patient to seek medical attention if significant pain persisted."

26. Claimant testified Dr. Hattem evaluated her approximately four times in the 2.5 years of her treatment. Claimant she did not have neck symptoms or treatment to her neck prior to the September 21, 2014 work injury. She stated Dr. Hattem never discussed with her any pre-existing neck issues. Claimant testified she experiences ongoing pain and decreased range of motion in her neck and left shoulder, consistent with her work 2014 work injury. Claimant testified that her left shoulder also pops when rotated, causing additional pain and discomfort. Claimant acknowledged she has been working full duty and is able to perform her work duties. Claimant testified she would like to follow up with her treating physicians to discuss Dr. Winslow's recommendations. She has yet to seek additional treatment because Respondent denied maintenance treatment.

27. Dr. Hattem testified at hearing regarding his treatment of Claimant as well as his opinions regarding Claimant's need for maintenance medical treatment. Dr. Hattem was qualified as an expert in occupational medicine. He reiterated his opinion that medical

maintenance treatment for Claimant's September 21, 2014 work injury is not reasonable or necessary. In support of his opinion, Dr. Hattem pointed out that multiple years had passed since Claimant's work injury and shoulder surgery. Dr. Hattem testified Claimant exhausted what he considered to be reasonably necessary post-operative therapy for the neck and shoulder, noting Claimant had a complete course of post-surgical care for her shoulder, including 24 sessions of post-operative physical therapy. Dr. Hattem testified the FCE evidenced a high level of function, meaning the only treatment necessary to maintain such level of function would be engagement in an independent home exercise program.

28. Dr. Hattem further testified there was no cervical nerve impingement or other significant findings on Claimant's cervical MRI or the EMG/NCS, and that any neck complaints were axial in nature. Dr. Hattem opined that Claimant's persistent shoulder pain was residual pain from the labrum tear, and that it was not referred pain from the neck. Dr. Hattem testified that Claimant had not, in fact, received treatment to her shoulder or neck prior to the September 21, 2014 work injury, nor did she have pre-existing symptoms.

29. Claimant's testimony is found credible and persuasive.

30. The ALJ finds the opinions of Drs. Castro and Winslow more credible and persuasive than the opinions of Drs. Hattem, Raschbacher and McCranie.

31. Claimant has presented substantial evidence establishing it is more likely than not future medical treatment will be reasonably necessary to relieve the effects of Claimant's work injury and prevent further deterioration of her condition.

32. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App.

2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Maintenance Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. MMI exists when any medically determinable physical or mental impairment caused by the injury has become stable and no further treatment is reasonably expected to improve the claimant's condition. Section 8-40-201(11.5), C.R.S.; *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

The ALJ concludes Claimant established by a preponderance of the evidence she is entitled to a general award of medical maintenance benefits. Dr. Hattem opined that, based on the length of time passed since the work injury and surgery, Claimant's continued symptoms are now more likely due to pre-existing cervical spondylosis. While it is undisputed Claimant had a pre-existing cervical condition, she credibly testified she did not have prior symptoms or treatment to the cervical spine. The record corroborates Claimant's testimony to the extent there is no evidence of neck symptoms or treatment between February 2012 and the September 21, 2014 work injury. Dr. Winslow credibly opined that, to the extent Claimant did suffer from pre-existing mild and intermittent symptoms, the cervical strain sustained in the 2014 work incident was sufficient to increase such symptoms and result in continued symptoms.

Although Dr. Castro opined there are no surgical indications, he has repeatedly recommended Claimant continue physical therapy for her neck. While not a treating physician, Dr. Winslow did perform a through medical records review and physical examination and interview Claimant. Dr. Winslow also credibly and persuasively opined that additional treatment is reasonably necessary to keep Claimant's current level of function. Claimant credibly testified she continues to experience pain and limitations in her neck and shoulder, that she wishes to undergo maintenance treatment, and that she has not sought additional treatment due to Respondent denying maintenance treatment. The medical records evidence Claimant has been consistent with her complaints of ongoing symptoms. Although Claimant has returned to working full duty with no restrictions, based on the totality of the evidence, the ALJ is persuaded it is more likely than not additional medical treatment is reasonably necessary to maintain her current level of function and prevent further deterioration of her condition. Respondent retains the right to challenge the compensability, reasonableness and necessity of any specific treatment.

ORDER

It is therefore ordered that:

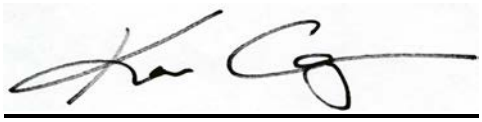
1. Respondent shall be liable for reasonably necessary and related post-MMI maintenance medical treatment for the September 21, 2014 work injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 18, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that his 18% scheduled right shoulder impairment rating should be converted to an 11% whole person impairment rating.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant works for Employer as a working foreman. Claimant specializes in above-ground and underground power distribution. Claimant suffered a compensable injury to his right shoulder on February 21, 2017, when he fell at work. *Ex. 1.*
2. Claimant came under the care of John Sanidas, M.D., and James Ferrari, M.D.
3. On April 4, 2017, Claimant underwent an MRI which established a massive rotator cuff tear, subluxed bicep tendon, a fraying of the labrum, a possible labral tear, and mild acromial clavicular arthrosis.
4. On June 22, 2017, Claimant underwent right rotator cuff shoulder surgery with Dr. Ferrari. The surgery included a repair of a rotator cuff, a distal clavicle resection, as well as debridement in the bicep tendon. *Ex.6.*
5. On November 13, 2017, Claimant returned to Dr. Ferrari. Dr. Ferrari noted Claimant was only occasionally symptomatic with mild-moderate aching pain in his shoulder. *Ex. B, pg. 74.*
6. On January 8, 2018, Dr. Ferrari evaluated Claimant approximately six months after his rotator cuff repair. He noted Claimant had "some weakness but not much pain or discomfort." He also noted Claimant was having "no pain at night." Based on Claimant's recovery, he did not think Claimant had to continue with formal physical therapy, but Claimant merely had to continue his strengthening exercises three times a week. And, although Claimant was doing mostly supervisory-type activities, Dr. Ferrari did not provide any formal work restrictions. He anticipated Claimant would be at MMI 3 months, i.e., April of 2018. *Ex. 7, pg. 32.*
7. On January 22, 2018, Claimant returned to Dr. Sanidas. Dr. Sanidas noted the following:

> The patient has no real complaints. He has minimal discomfort in his right shoulder. He gives no history of any numbness and tingling in his fingertips.

> . . .
>
> He has very excellent range of motion. His grip is 5/5. Sensation is intact. He has slight difference in resistant to gravity and resistance of his right upper extremity compared to his left.
>
> . . .
>
> The patient now can lift, push, pull, and carry up to 15 pounds. He is to finish out the physical therapy that he has left and I am giving him 3 more weeks at twice a week basically for strengthening. His range of motion is good at this point in time. As far as any medication, he can take those over-the-counter.

Ex. 8, pg. 63-64.

8. On February 5, 2018, Claimant continued undergoing physical therapy. His physical therapist noted that Claimant reported doing fine, had minimal pain, but was having difficulty lifting any weight overhead. The therapist also noted Claimant's range of motion did get worse as Claimant fatigued from performing therapy. *Ex. 8., pg. 66-67.*

9. On February 22, 2018, Claimant underwent physical therapy. He noted he was feeling better and can do more work. Although the physical therapy did not cause any increase in shoulder pain, his shoulder did fatigue. *Ex. 8, pg. 64.*

10. On February 28, 2018, Claimant underwent additional physical therapy. Claimant noted that he quickly fatigues with overhead motion and wanted to focus on improving his overhead motion first. Upon completion of physical therapy that day, the therapist noted that Claimant showed some fatigue with overhead activity. *Ex. 8, pg. 60-61.*

11. On March 14, 2018, Claimant underwent additional physical therapy. He noted it was his last session and would be seeing his surgeon in April. The physical therapist noted that during physical therapy, there was "no increase in pain," but that Claimant continued to hike his right shoulder when lifting more than 3 pounds overhead. It was also noted that Claimant will continue working on improving overhead range of motion. It was advised that Claimant should attempt to perform full overhead range of motion exercises with less weight instead of performing shorter overhead range of motion exercises with more weight. *Ex. 8, pg. 58-59.*

12. On April 2, 2018, Claimant returned to Dr. Ferrari. Dr. Ferrari specifically noted in his report on this date that Claimant's symptoms occur rarely, but when they do occur, they are due to strenuous activity. He also noted that when the symptoms do occur, the symptoms are limited to aching. This appears to be Dr. Ferrari's discharge report.

13. On April 9, 2018, Claimant returned to Dr. Sanidas. At this visit, Dr. Sanidas noted Claimant had:

> [V]ery minimal complaints about his right shoulder, occasional discomfort, but he can use it quite well.

He also performed a physical examination of his shoulder and noted:

> The patient has No tenderness to palpation of his right shoulder, anterior, posterior, posterolaterally, and laterally. He has very good range of motion. His grip is 5/5. Sensation is intact of his upper extremity. Strength testing is slightly less on the postoperative right as compared with the left.
>
> The patient can return to full duty. He is to return to this clinic in 2 weeks. If he tolerates full duty without any difficulty, consideration of discharge and impairment rating will be done.

Ex. A, pg. 39.

14. On April 23, 2018, Claimant returned to Dr. Sanidas. Dr. Sanidas had said approximately two weeks earlier, that if Claimant can tolerate full duty, without any difficulty, he will consider placing Claimant at MMI and discharging him from his care. At this appointment, Dr. Sanidas evaluated Claimant and concluded Claimant tolerated working full duty without any difficulty. He also determined Claimant reached MMI and discharged him from his care.

15. In his final report of April 23, 2018, Dr. Sanidas stated the following:

> [Claimant] has no complaints, occasionally slight discomfort in his right shoulder, otherwise, he has no complaints of any significant pain, discomfort, numbness, or tingling in his right upper extremity or fingers, and he has been working full duty without difficulty.
>
> He did well with physical therapy, a home exercise program, and now he is working full duty without any significant pain or discomfort.
>
> Has excellent range of motion. His grip is 5/5. Sensation is intact. His motor strength is 4 on the surgical side as compared with the uninjured left side.

Dr. Sanidas determined that pursuant to the AMA Guides, Claimant sustained an 18% impairment of the upper extremity which equals an 11% whole person rating. [1]

16. Claimant testified that after being placed at MMI, his right shoulder has continued to impact him functionally. He contends he has difficulty sleeping on his right side, requiring him to sleep on his left side or on his back. However, despite this testimony during his direct examination, Claimant admitted during cross examination that the medical records do not indicate he is having problems sleeping due to his shoulder injury and pain at night. *Hrg., pg. 33 L13 – 17.* Moreover, the lack of any pain at night and problems sleeping associated with any pain is specifically documented by Dr. Ferrari in his report of January 8, 2018, which specifically indicates that "There is no pain at night." *Ex. 7, pg. 32.*

17. Claimant also testified that he has pain at the area of his upper right shoulder when carrying objects on it and that he has limitations lifting objects above his head when using his right arm. He also said that due to his injury, he feels pain when attempting to do things behind his back, such as putting on a belt.

18. On the other hand, despite Claimant's contention that he has pain while doing certain aspects of his job, Claimant testified that he is still able to perform all essential functions of his job. *Hrg., pg. 20.* Moreover, Claimant's ability to perform the essential functions of his job is consistent with the statement in Dr. Sanidas' report noting Claimant stated that he has been working full duty without difficulty and Dr. Sanidas releasing Claimant to full duty without any restrictions.

19. At hearing, Claimant also prepared a pain diagram which was entered into evidence. Claimant identified having aching and burning pain on the front and back side of his right shoulder. He also indicated that his average pain level during the last week was 60% on a scale of 0% to 100%. *See Exhibit 10.* However, such contention regarding his pain levels is inconsistent with the medical records submitted at hearing and his own hearing testimony that he can perform all essential functions of his job.

20. Claimant did, however, admit at hearing that he was having no pain in his neck or his upper back as a result of his injury. *Hrg. Trans. 33 L22 – 34 L4.* He further admitted that on April 9, 2018 John Sanidas, M.D., documented that Claimant had very minimal complaints about his right shoulder, he had no numbness or tinging in his fingertips, he had no tenderness to palpation of his right shoulder, anterior, posterior, posterolaterally, and laterally. *Hrg, Trans. 28 L18 – 30 L21; Resp. Exh. A 38, 39.*

21. Claimant also admitted that there was never any indication or documentation in any medical report that he was having problems sleeping (*Hrg. Trans. 33 L13 – 17*), which correlates directly with Dr. Ferrari's report of January 8, 2018 which documented that Claimant in fact had no pain at night. *Exh. 7 pg. 32*.

[1] The 18% upper extremity rating was comprised of a 9% upper extremity rating due to range of motion deficits of the shoulder and a 10% upper extremity rating for the shortening of his distal clavicle and excision of the distal portion of the acromion. They combined to an 18% upper extremity rating.

22. Claimant admitted that as of MMI he was not given any restrictions. *Hrg. Trans. 33 L5 – 12.* He also admitted he was able to work his job full duty without modification or restrictions, and has never asked for any modification or restriction of his duties. *Exh. C; Hrg. Trans. 34 L6 – 35 L4.*

23. Claimant lastly admitted that his safety manager Mike Anderson had in fact spoke with him several times to see how he was doing. He admitted that Anderson accurately testified Claimant has worked full time and at full duty since being released to full duty, has not taken any time off from work due to his injury, has never complained of any pain while at work, and has never requested any modification or restriction of his duties due to his injury. *Hrg. Trans. 110 L18 – 111 L9.*

24. Claimant retained Dr. Ronald Swarsen, an occupational medicine specialist and Level II certified physician, to render an opinion on whether the Claimant's right shoulder girdle injury entitled him to a whole person impairment rating of 11%.

25. Over objection of the Respondents, Dr. Swarsen was permitted to testify as an expert.

26. Using the anatomical chart from Netters introduced as evidence, Dr. Swarsen identified the anatomical location of the areas of surgical intervention performed on Claimant by Dr. Ferrari. *Exhibit 11*. He testified that all locations were above the glenohumeral joint and were part of the Claimant's shoulder complex, not his arm.

27. On cross-examination Dr. Swarsen agreed that under the AMA Guides the evaluation of the shoulder impairment is found in the section in the AMA Guides related to the upper extremity. He testified that this does not change the fact that the Claimant's functional impairment and his surgical intervention were to the shoulder girdle, not his arm.

28. Respondents introduced the testimony of Mike Anderson and EJ Schmiel to Challenge the Claimant's testimony that he had functional limitation to his right shoulder girdle post-surgery. Neither witness testified to having medical expertise. Mr. Anderson testified that he had observed the Claimant after he returned to work and the Claimant did not complain of continuing problems with his right shoulder. On cross-examination he stated that he had observed the Claimant functioning at a construction site but could not state when. This assertion was contested by Claimant who said that the last time Mr. Anderson had been at a worksite where he was working was approximately three years ago.

29. Mr. Schmiel testified that he has not observed Claimant on the worksite but in the loading yard. He also testified that post-MMI he observed the Claimant in the yard where the majority of the work of loading was not performed by other co-employees, and not Claimant.

30. By his admission at hearing, Claimant is able to physically perform all of the essential functions of his job. Although Claimant alleges he has some difficulty putting heavy items on his right shoulder and working overhead, Claimant has not requested any accommodation to perform his job duties.

31. Even if the ALJ accepts as fact that Claimant's right shoulder is tender, and he has some pain when putting on a belt when attempting to get the belt through the belt-loops on the backside of his pants, the totality of the evidence presented, including Claimant's own testimony, persuades the ALJ that these symptoms are not functionally impairing. Accordingly, Claimant has failed to establish that he has a "functional impairment" beyond the schedule which would entitle him to "conversion" of his scheduled impairment to impairment of the whole person.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. *Section 8-43-201, C.R.S.*

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The ALJ has considered these factors and concludes, based upon the totality of the evidence presented, that while Claimant sustained a serious injury to his left shoulder, his testimony fails to establish that that he has suffered any decreased capacity to meet his personal, social or occupational demands. Consequently, his assertion that he is entitled to conversion of his scheduled upper extremity impairment to whole person impairment is unpersuasive.

In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive

arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo. App. 2000).

Conversion

When Claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S*. However, Claimant may establish that his injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether Claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. In the case of a shoulder injury, the question is whether Claimant has sustained functional impairment beyond the arm at the shoulder.

"Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or disabled. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. On the other hand, disability or functional impairment, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008*). Accordingly, "referred pain from the primary situs of the industrial injury to another part of the body may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005).* Nonetheless, symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical

impairment on the schedule or as functional impairment as a whole person, the issue is not whether Claimant has pain, but whether the injury has impacted part of the claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996).

Moreover, there is no requirement that there must be permanent restrictions imposed by a doctor in order to support a finding as to whether Claimant has functional impairment as a result of an injury. *Martinez v. Pueblo County Sheriff's Office*, W.C. No. 4-806-129 (August 9, 2011). As set forth in *Martinez, supra*, "functional impairment is not merely assessed by medical means but rather can involve an overall assessment of the effect the injury has had on the claimant's ability to function in terms of movement and in the performance of activities at work and daily living." And, the term "injury" as used in the schedule of disabilities refers to the manifestation in a part or parts of the body which have been impaired or disabled as a result of the industrial accident. *Id.*

Therefore, when evaluating functional impairment, it is appropriate for the ALJ to look at, not only the alteration of Claimant's abilities by medical means, but also by non-medical means of the impact the injury has had on Claimant's capacity to meet personal, social and occupational demands. See, *Martinez, supra*, and *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Therefore, the existence of permanent restrictions imposed by a doctor is some evidence which the ALJ may consider in determining the nature and extent of Claimant's functional impairment. *See, Strauch v. PSL Swedish Healthcare System, supra*. Therefore, an ALJ may or may not find the existence of permanent restrictions to be persuasive when balanced against other evidence concerning Claimant's ability to function.

Consequently, the ALJ concludes that an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm. See generally, *Walker v. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare System, supra; Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996).

Based upon the evidence presented, the ALJ finds that Claimant has failed to meet his burden to establish by a preponderance of the evidence that he has sustained functional impairment beyond the arm at the shoulder warranting conversion of his scheduled impairment to impairment of the whole person. At hearing, Claimant testified that since his admitted shoulder injury he has experienced some tenderness on the top of his shoulder when he places something heavy on it, has pain when reaching behind his back to put on a belt and in working overhead. Accordingly, Claimant asserts that he has functional limitations beyond the arm at the shoulder entitling him to an award of whole person impairment. The ALJ is not persuaded for the following reason: While Claimant may have tenderness on the top of his shoulder and alleged some difficulty working overhead, these symptoms have not caused "functional impairment" or disability.

In addition, Claimant's testimony regarding certain functional impairments is inconsistent with the information contained in his medical records and his hearing

testimony. For example, based on his pain diagram completed in court, Claimant attempts to assert that he has 6/10 shoulder pain on a regular basis. But, such is not supported by the medical records which document limited pain and discomfort brought on by strenuous activities. In addition, although Claimant contends he cannot sleep on his right shoulder, the medical records indicate Claimant has no pain at night. Although there is a difference between being unable to sleep on his right shoulder and having pain at night that interferes with sleeping, the ALJ does not find Claimant's self-serving statements at hearing, which are not fully supported by the medical records, to be persuasive in establishing functional impairment which extends beyond the arm at the shoulder.

Claimant has been returned to full duty and is able to perform all essential functions of his job. Claimant's functional capacity, as demonstrated by his ability to return to full duty substantially erodes his claims that he has functional impairment beyond the arm at the shoulder. While Claimant's right shoulder injury may have resulted in some tenderness on the top portion of his shoulder, some pain when attempting to put on a belt, and some difficulty performing certain work overhead, the injury has not resulted in any decreased capacity to meet his personal, social or occupational demands.

In addition, the ALJ is not persuaded by Dr. Swarsen's testimony. In essence, Dr. Swarsen's testimony established the location of the injury and surgery, but did not persuasively establish Claimant's injury resulted in functional impairment that extends beyond the arm at the shoulder.

Based upon a totality of the evidence presented, the ALJ concludes that the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder. Consequently, the ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that he has functional loss that would support an award of permanent disability benefits as a whole person.

ORDER

It is therefore ordered that:

1. Claimant's request for conversion of his scheduled upper extremity impairment to impairment of the whole person is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 18, 2018.

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a right Achilles tendon injury during the course and scope of her employment with Employer on April 14, 2018.

STIPULATIONS

The parties agreed to the following:

1. If Claimant's claim is compensable, all the medical treatment she received for her right lower extremity through Concentra Medical Centers, Colorado Orthopedic Consultants, Stuart Myers, M.D., including the April 19, 2018 right Achilles tendon surgery, Health Images and Kaiser Permanente is reasonable, necessary and causally related to her April 14, 2018 industrial Injury.

2. Claimant earned an Average Weekly Wage (AWW) of $1135.68, with a corresponding Temporary Total Disability (TTD) rate of $776.92.

FINDINGS OF FACT

1. Employer is a retail store. Claimant worked for Employer as a Custom Closet Market Manager. She did not work at a particular store but floated between seven locations. Claimant's job duties involved training employees, coaching employees and coordinating between the design team, store employees and the installation department.

2. Claimant explained that Employer's Handbook details seven foundational principles describing the conduct of its business. She detailed that one of the principles reflects that hiring one great employee is the equivalent of hiring three good applicants. Another principle involves employee communication and leadership. A third principle is creating an "air of excitement" or energy within Employer's store. Claimant remarked that the "air of excitement" involves the energy employees bring to the store and their interactions with customers. She commented that the "air of excitement" is designed to create an environment in which customers want to spend time in the store and shop. Claimant detailed that demonstrating items or opening packages for customers to touch creates an "air of excitement."

3. Claimant testified that on April 14, 2018 she arrived at Employer's store at approximately 9:00 a.m. to prepare for the store opening at 10:00 a.m. She explained that she was planning to conduct a team huddle to set the expectations and goals for the day. The team huddle is used to motivate employees, explain promotional sales and address concerns.

4. Prior to the team huddle Claimant was in the break room with Visual Sales Manager Jay Mendoza. Mr. Mendoza called for a team huddle at about 9:50 a.m. As they were walking to the huddle, they were discussing ways in which employees could engage customers. Mr. Mendoza suggested and demonstrated a "silly walk." Claimant described the "silly walk" as "hands out, legs out, teeter-totter, side-to-side."

5. When Claimant and Mr. Mendoza arrived at the team huddle they met approximately six to eight other employees. The group discussed having fun with customers and doing a silly walks. Another employee mentioned that sales associates might also "skip" to customers. Former employee Chris then inquired "what do you mean by skipping?" Claimant responded by demonstrating "skipping" and suffered a "pop" in her right lower leg. She noted that she did not fall, but leaned on a nearby desk. After the team huddle ended and the store opened to customers another employee helped Claimant to the break room because she was having difficulty walking.

6. Claimant explained that she was demonstrating "skipping" for other employees at the team huddle to increase the energy level in the store prior to the arrival of customers. She noted that they were discussing fun ways to engage with customers. Claimant remarked that she would not have skipped on April 14, 2018 if Mr. Mendoza had not demonstrated silly walking. She acknowledged that generally employees are not permitted to skip through the store and she doubted that she would ever skip in front of a customer.

7. After reporting her injury to Employer Claimant received treatment at Concentra Medical Centers on April 14, 2018 through Jerald Solot, D.O. He ordered crutches and assigned Claimant work restrictions.

8. On April 16, Claimant underwent a right ankle MRI. The MRI revealed a complete rupture of Claimant's Achilles tendon.

9. On April 17, 2018 Claimant visited Stuart H. Myers, M.D. of Colorado Orthopedic Consultants for an evaluation. Dr. Myers requested authorization for right ankle Achilles tendon surgery.

10. On April 19, 2018 Claimant underwent an open repair of her right Achilles tendon. Dr. Myers subsequently evaluated Claimant and referred her for physical therapy through Kaiser Permanente.

11. Claimant underwent physical therapy through Kaiser and continued to receive follow-up treatment from Dr. Myers. By May 21, 2018 Dr. Myers noted that Claimant was suffering from delayed wound healing and serous drainage. He referred Claimant to a wound care specialist through Kaiser.

12. On June 4, 2018 Claimant visited Edward Melkun, M.D. from Kaiser for her wound healing difficulties. He suggested possible surgery to clean and close the wound. Claimant subsequently received treatment from Dr. Melkun and Dr. Myers to improve the healing of her incision.

13. On October 15, 2018 Claimant underwent a right ankle full thickness skin graft with Dr. Melkun. The donor skin was removed from Claimant's right thigh. By November 6, 2018 Dr. Melkun noted the wound did not show any signs of infection and was healing.

14. Mr. Mendoza testified at the hearing in this matter. He noted that he was in Employer's break room with Claimant on April 14, 2018. They were discussing ways to create a fun and exciting environment at Employer's store. Mr. Mendoza called the team huddle before the store opened. He remarked that the purpose of the huddle was to review sales performance and discuss priorities for the day. Mr. Mendoza stated that he walked with Claimant and a few other employees from the break room to the huddle. He suggested and demonstrated a funny walk while transitioning from the break room to the team huddle. Mr. Mendoza testified he demonstrated the funny walk to lighten the mood and generate excitement about the day. However, he noted that the conversation was meant to be funny and not serious when greeting customers during business hours. Similarly, skipping during business hours would constitute a safety concern. Nevertheless, skipping down an aisle prior to business hours would not be harmful and could be viewed as a joke.

15. Mr. Mendoza acknowledged that the purpose of the huddle involved team building and generating excitement about the day. He remarked that he demonstrated the funny walk as part of his job duties to build rapport with other employees. Claimant's skipping also created excitement for employees as they began their shifts so they could more effectively engage customers.

16. Part-time Sales Associate Taylor Rhodes-Wilmere testified that she walked from the break room to the team huddle with other employees on April 14, 2008. She explained that the air of excitement is a sales technique in which employees present themselves to customers in an attempt to generate enthusiasm. Ms. Rhodes-Wilmere commented that the air of excitement never included physical activities. She remarked that the discussion from the break room to the huddle had a joking tone. The parties specifically mentioned walking through the store with customers in a fun and different way. However, the notion of skipping was not a serious suggestion. Skipping was simply not an activity that associates were permitted to perform while engaging customers.

17. Area Director Traci Heitz also testified at the hearing in this matter. She noted that she would not tolerate skipping in Employer's stores because it constituted a safety hazard. The air of excitement was used to motivate employees to greet customers but did not involve physical activities. Ms. Heitz explained that the air of excitement involved creating energy in the store through audio and visual presentations. In contrast, team building involves creating camaraderie among employees. She acknowledged that building rapport may include telling jokes. However, Ms. Heitz noted that Claimant's skipping was inappropriate and did not convey any benefit to Employer. Nevertheless, she agreed that generating excitement with other employees through a funny walk or skipping conveys a benefit to Employer.

18. Claimant has demonstrated that it is more probably true than not that she suffered a right Achilles tendon injury during the course and scope of her employment with Employer on April 14, 2018. Initially, on April 14, 2018 Claimant injured her right Achilles tendon while demonstrating "skipping" at a team huddle with other employees prior to opening Employer's store to customers. Claimant explained that she was demonstrating skipping to increase the energy level in the store prior to the arrival of customers. She noted that they were discussing fun ways to engage with customers. Mr. Mendoza also acknowledged that the purpose of the huddle involved team building and generating excitement about the day. He remarked that he demonstrated a funny walk on the way to the team huddle with other employees as part of his job duties to build rapport. Claimant explained that she would not have skipped on April 14, 2018 if Mr. Mendoza had not demonstrated silly walking. Mr. Mendoza acknowledged that Claimant's skipping also created excitement for employees as they began their shifts so they could more effectively engage customers. Claimant's right Achilles tendon injury occurred in the course of employment because it happened at work while at a team huddle with other employees and was connected to her work-related functions.

19. Claimant's right Achilles tendon injury also arose out of her employment because it did not constitute a deviation from employment so substantial as to remove it from the employment relationship. The deviation from employment activities was insignificant because Claimant's skipping was commingled with Employer's desire to create an air of excitement. Claimant credibly explained that she was demonstrating skipping for other employees at the team huddle to increase the energy level in the store prior to the arrival of customers. Similarly, Mr. Mendoza testified he demonstrated the funny walk to lighten the mood and generate excitement about the day. In contrast, Witnesses explained that skipping was a safety hazard and not permitted while customers were in Employer's store.

20. However, the team huddle occurred prior to business hours, was designed to build rapport and generated enthusiasm among employees. Creating an air of excitement encouraged customers to remain in the store and shop. Mr. Mendoza's funny walk and Claimant's activity of skipping prior to the store opening were designed to generate enthusiasm among employees and benefitted Employer by enhancing product sales. The nature of the air of excitement contemplated some level of horseplay prior to the opening of the store to customers in an effort to generate enthusiasm among employees and ultimately enhance the customer experience. The record thus reveals that Claimant was not acting for her sole benefit by skipping at the team huddle, but instead sought to benefit Employer by creating an air of excitement in compliance with Employer's foundational principles. Claimant's skipping at the team huddle therefore did not remove her from the employment relationship. Accordingly, Claimant's right Achilles tendon injury arose out of her employment duties for Employer on April 14, 2018.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

5. Regardless of the theoretical framework that is applied, the issue is whether the "claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing activity for his sole benefit." *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

6. When the employer asserts a personal deviation from employment activities "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship."

Roache v. Industrial Commission, 729 P.2d 991 (Colo. App. 1986); *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). However, ministerial actions for an employee's personal comfort do not constitute a substantial deviation from employment unless the personal need being met or the means chosen by the employee to satisfy his personal comfort is unreasonable. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008); *see Larson's Workers' Compensation Law,* §21.00. In *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 718 (Colo.App. 1995), the court announced the following four part test to analyze whether an activity constitutes a deviation or horseplay: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is a factual determination for the ALJ. *Id.*

7. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered a right Achilles tendon injury during the course and scope of her employment with Employer on April 14, 2018. Initially, on April 14, 2018 Claimant injured her right Achilles tendon while demonstrating "skipping" at a team huddle with other employees prior to opening Employer's store to customers. Claimant explained that she was demonstrating skipping to increase the energy level in the store prior to the arrival of customers. She noted that they were discussing fun ways to engage with customers. Mr. Mendoza also acknowledged that the purpose of the huddle involved team building and generating excitement about the day. He remarked that he demonstrated a funny walk on the way to the team huddle with other employees as part of his job duties to build rapport. Claimant explained that she would not have skipped on April 14, 2018 if Mr. Mendoza had not demonstrtaed silly walking. Mr. Mendoza acknowledged that Claimant's skipping also created excitement for employees as they began their shifts so they could more effectively engage customers. Claimant's right Achilles tendon injury occurred in the course of employment because it happened at work while at a team huddle with other employees and was connected to her work-related functions.

8. As found, Claimant's right Achilles tendon injury also arose out of her employment because it did not constitute a deviation from employment so substantial as to remove it from the employment relationship. The deviation from employment activities was insignificant because Claimant's skipping was commingled with Employer's desire to create an air of excitement. Claimant credibly explained that she was demonstrating skipping for other employees at the team huddle to increase the energy level in the store prior to the arrival of customers. Similarly, Mr. Mendoza testified he demonstrated the funny walk to lighten the mood and generate excitement about the day. In contrast, Witnesses explained that skipping was a safety hazard and not permitted while customers were in Employer's store.

9. As found, however, the team huddle occurred prior to business hours, was designed to build rapport and generated enthusiasm among employees. Creating an air of excitement encouraged customers to remain in the store and shop. Mr. Mendoza's funny walk and Claimant's activity of skipping prior to the store opening were designed to generate enthusiasm among employees and benefitted Employer by enhancing product sales. The nature of the air of excitement contemplated some level of horseplay prior to the opening of the store to customers in an effort to generate enthusiasm among employees and ultimately enhance the customer experience. The record thus reveals that Claimant was not acting for her sole benefit by skipping at the team huddle, but instead sought to benefit Employer by creating an air of excitement in compliance with Employer's foundational principles. Claimant's skipping at the team huddle therefore did not remove her from the employment relationship. Accordingly, Claimant's right Achilles tendon injury arose out of her employment duties for Employer on April 14, 2018.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

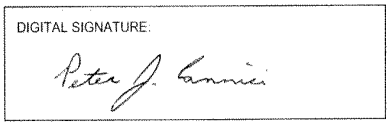
1. Claimant suffered a right Achilles' tendon injury while working for Employer on April 14, 2018.

2. All the medical treatment Claimant received for her right lower extremity through Concentra Medical Centers, Colorado Orthopedic Consultants, Stuart Myers, M.D., including the April 19, 2018 right Achilles tendon surgery, Health Images and Kaiser Permanente is reasonable, necessary and causally related to her April 14, 2018 industrial Injury.

3. Claimant earned an AWW of $1135.68, with a corresponding TTD rate of $776.92.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 19, 2018.



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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues set for determination included:

(1) Did Claimant overcome the opinions of the physician who performed the DOWC Independent Medical Examination ("DIME") [John Douthit, M.D.] regarding causation and relatedness by clear and convincing evidence?

(2) If Claimant overcame the DIME's opinion, did she prove that she sustained permanent medical impairment to her low back, including the SI joint?

(3) Is Claimant entitled to *Grover* medical benefits?

STIPULATIONS

The parties stipulated to the following facts: (a) Claimant is at maximum medical improvement; (b) Claimant is not seeking retroactive temporary disability benefits; (c) Claimant is not challenging Dr. Douthit's extremity rating; (d) Respondents have paid $74,544.99 in indemnity benefits to date. The Stipulations were accepted by the Court and are made part of this Order.

FINDINGS OF FACT

1. Claimant was employed as a home health LPN for Employer.

2. There was no medical evidence in the record that Claimant suffered an injury to her low back/hip or right SI joint before 2014.

3. Claimant suffered an admitted industrial injury when she was involved in a motor vehicle accident ("MVA") on November 14, 2014. She was a restrained driver, who was involved in a head-on collision with another vehicle. Claimant testified there was significant force associated with the impact and both airbags deployed in her vehicle. Claimant testified she felt pain all over after the accident, including her back and her right leg. The initial focus of her treatment was on her right leg and the tibial plateau fracture.

4. Claimant was transported by ambulance to Poudre Valley Hospital (University of Colorado Health). The EMS report and the initial documentation from University of Colorado Health documented right knee pain only.[1] Claimant complained of right knee and left foot numbness and tingling in the Emergency Department. Claimant underwent surgery (open reduction internal fixation) to repair the right tibial

[1] Exhibit C, pp.6-11 (Exhibit 1 to Dr. Anderson-Oeser's deposition.)

plateau fracture, which was performed by orthopedic surgeon Robert Baer, M.D. on November 14, 2014

5. An Employee's Report of Injury was completed on November 21, 2014 and signed by Claimant. In the injury description section, Claimant listed a right tibia plateau fracture and right lower leg to the right hip pain, which was caused by a head-on collision.

6. On December 2, 2014, Claimant was evaluated by Kevin O'Connell, M.D. In a pain diagram she completed, Claimant referenced burning in her hip and aching in her low back. Claimant testified that she advised Dr. O'Connell of pain in her low back and hip area early on when she treated with him. Dr. O'Connell's diagnosis was right tibial plateau fracture-closed. There was not a diagnosis related to the hip or low back.

7. In the physical therapy ("PT") notes authored by Jennifer Himot, PT, dated December 22, 2014, there was a reference to rib pain and reduced muscle strength in the right hip (abduction, adduction and extension). The references to reduced MMT in the right hip were reflected in PT Himot's notes through April 3, 2015.

8. Dr. O'Connell noted Claimant was making gradual progress to weight-bearing in the treatment note of January 20, 2015. Claimant reported right-sided costochondral soreness and x-rays were taken at that time. The x-rays were negative for fracture. Dr. O'Connell's record reflected claimant gradually advanced to weight-bearing. Dr. Baer noted Claimant was able to ambulate without a cane or crutch on February 11, 2015, but it was still recommended she use a cane.

9. When Claimant returned to Dr. O'Connell on March 24, 2015, it was noted she slipped in the bathroom while exiting the shower. Her right knee gave out and she impacted the right leg, as well as her right arm and shoulder. Dr. O'Connell's assessment continued to be specific to the right knee tibial plateau fracture, status post-ORIF. However, Dr. O'Connell also examined her right shoulder and right arm.

10. In the six evaluations of Claimant by Dr. O'Connell which occurred between April 30, 2015 and August 28, 2015, there was no reference to low back or hip pain, although a shoulder sprain was included in Dr. O'Connell's diagnoses. Claimant underwent surgery to remove the hardware in the right knee on August 5, 2015. She continued to receive PT following that procedure.

11. On October 9, 2015, Claimant returned to Dr. O'Connell and reported right hip discomfort, which she thought was attributable to her original right knee injury. Dr. O'Connell did not list a diagnosis for the low back or hip for this visit. Claimant also reported hip/low back, as well as right leg symptoms at the November 3, 2015 appointment with Dr. O'Connell. Were documented in a pain diagram she completed. O'Connell noted Claimant there were myalgias and joint swelling present at the time of the examination.

12. Claimant testified she felt pain in her hip and SI joint once she transitioned to weight-bearing on the right leg. The ALJ found the medical records corroborated Claimant's testimony that she was not weight-bearing for a period of time and the focus of her treatment was on the right knee. Her symptoms in the low back and hip area increased as she used her leg more.

13. In a treatment note, dated December 10, 2015, Dr. O'Connell noted Claimant was experiencing more pronounced right-sided low back pain at the SI areas radiating into the right groin. The symptoms were often triggered by movements of the right hip. Dr. O'Connell's diagnoses were: tibial plateau fracture, right, closed with routine healing; labral tear of hip, degenerative; sciatica neuralgia, right. Although Dr. O'Connell initially questioned whether the back complaints were causally related to subsequent to December 2015, he made referrals for evaluation and treatment of the low back/hip. Claimant was also referred for diagnostic testing, including an MRI of the low back. The ALJ inferred this supported the conclusion Dr. O'Connell believed Claimant's low back and hip condition were related to the industrial injury.

14. Claimant was referred for an MRI of the lumbar spine on December 23, 2015. Jeremy McCue, M.D. read the films and noted a small focal right foraminal protrusion at L3-L4, contacting the exiting right L3 nerve root. The disc did not cause a significant anatomic stenosis. Mild degenerative changes with annular fissuring was also noted at L4-5 and L5-S1. The ALJ found this MRI showed objective evidence of anatomic lesions in the lumbar spine.

15. On January 12, 2016, Claimant underwent arthroscopy of the right knee, which was performed by Robert Trumper, M.D. Grade IV post-traumatic osteoarthritis was identified at that time. The ALJ inferred the traumatic osteoarthritis resulted from the MVA.

16. Dr. O'Connell continued to oversee Claimant's treatment, as she treated for symptoms in the right knee, hip, right shoulder and neck. When Claimant returned to Dr. O'Connell on January 15, 2016, additional diagnoses included neck pain, radiculitis of the right cervical region; shoulder sprain, right; adjustment reaction; in addition to those identified in December 2015.

17. On February 10, 2016 Claimant was evaluated by Hans Coester, M.D. to whom she was referred by Dr. O'Connell. At that time, her chief complaints were listed as neck, shoulder, right arm and back pain. Dr. Coester found extension of Claimant's neck aggravated her pain, but she had no arm pain or weakness. She also had no weakness in her lower extremities. Dr. Coester noted Claimant had degenerative disc disease at multiple levels of the cervical spine. There was a small protrusion at C7-T1, without significant nerve root compression. Dr. Coester did not recommend any cervical treatment/intervention. Claimant's lumbar MRI scan showed mild degenerative disc disease at the L4-5 and L5-S1 level, but no nerve root compression. Dr. Coester did not recommend surgical intervention and thought the burning pain may be the result of

the meralgia paresthetica. He recommended a physiatry evaluation and possible nerve conduction tests.

18. On March 1, 2016, Jeff Raschbacher, M.D. (Occupational Medicine) reviewed a prior authorization request related to treatment of Claimant's right hip on behalf of Insurer. Dr. Raschbacher noted the hip was mentioned in June 2015 by an orthopedic physician and it was his opinion that given the nature of the injury, this could have caused a labral tear in the right hip, the force being transmitted up the extremity proximally from the knee. He recommended a review of the PT records before authorizing the treatment.

19. Claimant was evaluated by Brian White, M.D. on March 16, 2016 with a focus on the right hip pain. She complained of worsening right hip pain, as well as low back pain, without numbness, tingling, or any significant radicular symptoms. On examination (performed by Shawn Karns, PA-C), Claimant had a non-antalgic gait, with excellent lumbar range of motion ("ROM") and no midline or paraspinal muscular tenderness. The bilateral hip exam showed flexion of the right hip to be limited as compared to the left. Straight leg test was negative for low back pain radicular symptoms and FABER test was negative for SI joint pain. No tenderness was found to palpation over the greater trochanters.

20. PA-C Karns' concluded Claimant had findings consistent with right hip femoroacetabular impingement and labral tear. Due to the extent of her pain and failure of conservative treatment, she was a candidate for hip arthroscopy surgery. Dr. White's addendum noted Claimant had significant pain with anterior impingement maneuver, otherwise good ROM. The MRI showed a labral tear. Dr. White's assessment was: Claimant had an underlying labral tear likely from a subluxation event at the time of her injury. He recommended that Claimant lose weight before undergoing hip surgery.

21. On July 22, 2016, Claimant was evaluated by Kimberly Siegel, M.D. at UC Health. Dr. Siegel noted Claimant previously treated with Dr. O'Connell, whose most recent notes indicated Claimant was approaching nearing MMI with respect to all conditions, except for the right hip labral tear. Claimant was also to have a NCS/EMG to rule out right lumbar radiculitis. Claimant's pain diagram reflected pain in the right side of her low back, as well as radiating pain down the right leg. At the time of the evaluation, Claimant's gait demonstrated mild favoring of the right lower extremity. Cervical ROM was moderately limited in all planes and lumbar ROM was limited to about 30 to 40° flexion by right-sided low back pain. Extension was mildly limited and elicited pain, along with bilateral flexion.

22. Dr. Siegel's assessment was: labral tear of hip, degenerative; neck pain; low back pain with radiation, right; cervical myofascial pain syndrome; pain, right thigh. Dr. Siegel noted surgery was not recommended on Claimant's neck or back. Dr. Siegel opined Claimant was primarily having myofascial pain in her neck and back and thought some treatment (i.e. dry needling) directed specifically at this may be of some benefit.

The ALJ inferred Dr. Siegel was of the opinion that Claimant's low back required additional treatment, as evidenced by referrals made and this opinion was persuasive.

23. Claimant was evaluated by George Girardi, M.D. on May 9, 2016. Dr. Girardi noted Claimant had a history of low back pain going into the right hip, right groin and right anterior thigh. Her MRI demonstrated a right foraminal protrusion at L3-4, which correlated with her symptoms. On examination, Claimant was able to reproduce her pain with extension and had a positive Spurling's maneuver to the right side. Claimant also had discomfort with the straight leg test on the right side of the anterior thigh and groin.

24. Dr. Girardi's assessment was: neck pain, with right radicular symptoms potentially due to a C6-7 disc protrusion; low back pain, with right anterior thigh pain, with the disc protrusion at L3-4. Dr. Girardi ordered epidural steroid injections for the lumbosacral area, as well as the cervical, thoracic region.

25. Claimant was evaluated by Raymond Van den Hoven on August 17, 2016. She was complaining of pain in the right SI joint, buttock, lateral hip, and anterior thigh region, along with burning in the right anterolateral leg. On examination, Dr. Van den Hoven found right SI joint tenderness, along with piriformis and hip adductor tenderness. Hip flexion/adduction/internal rotation resulted in pain in the right anterior hip region, but no popping or catching was noted. Claimant's lumbar spine was not tender and there was no tenderness over the ASIS region. There was negative Tinel's over the lateral femoral cutaneous nerve near ASIS. FABER testing resulted in SI joint pain and anterior hip pain. Dr. Van den Hoven also noted sensitivity in the skin around anterior knee and medial shin, but normal sensation in L3 and L4 dermatomes above the knee.

26. Dr. Van den Hoven's impression was: no acute or chronic lumbar radiculopathy in the L3 through S1 myotomes, right lower extremity; no clinical evidence for meralgia parasthetica, right lower extremity; no tarsal tunnel syndrome, bilateral lower extremities; no fibular neuropathy in the knee or ankle, bilateral lower extremities; no peripheral neuropathy. Dr. Van den Hoven opined Claimant's pain appeared to be multifactorial and related to the right SI joint strain, tendinopathy of the right abductor tendons, right anterior hip labral tear, knee issues, with right thigh pain likely being somewhat related to all of these sources. The skin sensitivity was likely due to cutaneous nerve injuries, possibly post-surgical. Dr. Van den Hoven recommended consideration of right SI joint and right hip abductor tendon injections, along with resolving the right hip labral tear issues.

27. On October 18, 2016, Claimant underwent surgery for her right hip Adventist Hospital. Dr. White performed a right hip arthroscopy, with femoral osteoplasty, limited acetabular rim trimming, minor shaving chondroplasty, acetabular labral reconstruction and capsular closure.

28. Claimant returned to Dr. White on December 14, 2016. Claimant was described as doing really well with regard to the right hip, but having issues with her SI joint and knee on the ipsilateral side. Dr. White noted this was all stemming from the MVA. Dr. White thought Claimant's SI joint may come around with further PT. If she had continued pain, he recommended Jeffrey Donner, M.D. for an evaluation and possible injections.

29. In a follow-up to visit with PA-C Karns on February 9, 2017, he documented Claimant walked with a mildly antalgic gait, which she attributed to the knee. Mild tenderness was found over the greater trochanter. In PA-C Karns' assessment, Claimant was noted to be progressing well post-surgery, but still dealing with right knee and SI joint issues. If Claimant's hip bursa became more of an issue, a cortisone injection was recommended.

30. From February 13, 2017 through February 27, 2017, Claimant underwent three Hyalgan injections in the right knee. Relief was noted after those injections.

31 On February 15, 2017, Claimant was evaluated by Albert Hattem, M.D., at the request of Respondents. Claimant reported right leg pain and sensitivity, right-sided low back pain, right hip tenderness, along with upper back and neck tightness. Dr. Hattem's medical records summary stated there was a PT note from Orthopedic Center of the Rockies in which Claimant reported right rib, hip, low back, right knee and right ankle pain. On examination, Claimant's right knee revealed a well-healed surgical scar, with no swelling or skin discoloration. There was mild to decreased flexion and extension, but no crepitation noted. Claimant's right hip had well-healed surgical scars, very mild decreased range of motion and slight tenderness over the lateral aspect. Slight right paraspinous tenderness was noted in the lumbar spine. Claimant's cervical spine and bilateral shoulders had full range of motion, with mild use tenderness.

32. Dr. Hattem' diagnoses were: right bicondylar tibial plateau fracture, post-open reduction internal fixation by Dr. Baer on November 15, 2014; status post right knee hardware by Dr. Baer on August 5, 2015; post-traumatic osteoarthritis versus aggravation of pre-existing arthritis of medial femoral condyle right knee, status post right knee arthroscopic chondroplasty of the medial femoral condyle and chondroplasty of the patella performed by Dr. Trumper on January 12, 2016; right hip femoral acetabular impingement and labral tear, status post right arthroscopic femoral osteoplasty, limited acetabular trimming, chondroplasty, and acetabular labral reconstruction by Dr. White on October 8, 2016; myofascial cervical and shoulder/upper back pain; mechanical nonspecific low back pain.

33. Dr. Hattem opined Claimant would be at MMI for the right knee in a month, once she completed injections. He noted the right shoulder exam was unremarkable with full ROM and Claimant's right hip was approaching MMI. Claimant was at MMI for her neck and low back. Dr. Hattem stated Claimant's right knee, right hip and low back were causally related to the November 14, 2014 work injury. He did not believe the cervical spine complaints were related to the work injury.

34. Dr. Hattem testified as an expert in Physical Medicine and Rehabilitation at hearing. He is Level II accredited pursuant to the WCRP. He testified consistently with his report and noted on evaluation Claimant did not have objective evidence of pain in the lumbar spine, including radiculopathy. He said the MRI was negative for acute pathology and Claimant had a small disc protrusion.

35. Dr. Hattem took issue with Dr. Anderson-Oeser's conclusion that a positive Faber's test and pain to palpation were objective signs. Dr. Hattem testified there was no objective evidence to establish Claimant's SI joint was involved in this case because the SI joint injection was not diagnostic, Claimant's pain complaints were subjective, and the FABER test could have been positive for Claimant's right hip pathology. Also, Claimant's arthritic knee could have caused the antalgic gait. He also concluded there was no objective evidence to establish a permanent impairment for Claimant's low back because myofascial back pain is not entitled to a permanent impairment rating. Dr. Hattem stated Claimant was not entitled to a permanent medical impairment rating for low back/hip. Dr. Hattem testified this was consistent with Dr. Siegel's findings and noted Dr. Siegel did not rate Claimant's lumbar spine.

36. On cross-examination, Dr. Hattem admitted he did not perform provocative maneuvers when he evaluated Claimant. He agreed that in his report he concluded the low back was injured as a result of the motor vehicle accident. He admitted the mechanism of injury in this accident could cause an injury to the hip/low back and the right SI joint had required treatment.

37. On April 10, 2017, Claimant was evaluated by Dr. Siegel, who concluded she was at MMI and evaluated her permanent medical impairment. Dr. Siegel noted Claimant continued to have right low back pain, which was felt to stem from right SI joint inflammation or dysfunction. Dr. Siegel referred Claimant to Dr. Donner, but she had not been evaluated by that physician. Dr. Siegel's diagnoses were: sprain of right hip; tibial plateau fracture, right, closed, with routine healing; traumatic arthritis of the knee, right; ACL laxity, right; pain of right thigh; low back pain with radiation, right; cervical myofascial pain syndrome; and chronic myofascial pain.

38. Dr. Siegel assigned a permanent medical impairment rating to Claimant's right knee and right hip. Dr. Siegel assigned a 39% extremity impairment rating for the right knee, which included range of motion loss (11%) and Table 40 diagnoses (arthritis and ACL loss. Dr. Siegel assigned a 25% impairment to the hip, which included the right hip flexion, abduction and abduction, as well as internal and external rotation. The lower extremity impairments combined to a total of 54%, which corresponded to a 22% whole person impairment. Dr. Siegel noted Claimant's right low back pain had been felt to stem from right SI joint inflammation or dysfunction. However, Dr. Siegel did not perform range of motion testing on Claimant's lumbar spine and did not detail in her report why Claimant would or would not be entitled to a medical impairment for the lumbar spine/SI joint.

39. Dr. Siegel opined Claimant required maintenance treatment, including a follow-up with Dr. White, as well as completion of the remaining PT for her hip. Claimant was also to receive maintenance/adjustment/replacement of the knee brace, as well as viscosupplementation injections for the knee. Claimant was to follow-up with Dr. Trumper every 2-4 years to monitor functional status of right knee, as well as to continue with her prescription meds. The ALJ credited Dr. Siegel's opinion with regard to Claimant's need for maintenance treatment for her hip and knee. Claimant was authorized to follow-up with Dr. Donner possible right SI joint injection, per the prior referral. The ALJ inferred Dr. Siegel was of the opinion that treatment for the SI joint was reasonable, necessary and related to the industrial injury.

40. On June 1, 2017, Claimant was evaluated by Chris Kottonstette, PA-C. At that time, she described pain over the SI joint, including pain of the posterior sacral sulcus and along the SI joint line. Single leg standing increased her pain on the right. Shear and compressive force in the supine position increased her pain and there was a positive Lasegue's test, along with increased pain at 30° elevation during the straight leg raise. Dr. Donner was in to examine the patient, reviewed her imaging studies and treatment plan. PA-C Kottonstette noted they would set Claimant up for a right SI joint injection, as well as potential discography determine whether the two annular tears contributing to her back pain. The right SI joint injection was performed on June 28, 2017.

41. The ALJ noted there was nothing in the record to confirm Dr. Donner requested authorization for an additional procedure (injection) from Insurer. There was no follow-up with Dr. Donner after the first injection and no record in which he recommended further injections.[2]

42. Claimant underwent a DIME which was performed by Dr. Douthit on July 10, 2017. Claimant complained of pain in the right knee, low back pain and sacroiliac joint pain, which she referenced as near the sacrum. She also complained of hypersensitivity in the lower leg. Claimant stated her shoulder and hip pain had resolved. On examination, Dr. Douthit found the right knee was stable in both the Lachman and drawer maneuvers. There was no collateral ligament instability. There was limitation in range of motion of the right hip on extension, internal rotation and external rotation, along with mild atrophy of the gluteus muscle.

43. Dr. Douthit stated he was missing some of the early records and relied on Dr. Hattem's report for the records of the first year. This is not proscribed by the AMA Guides. Dr. Douthit said he did not find records that she was complaining of low back pain in the months after the accident and the first records that were noted were in December 2015. This was contradicted by evidence in the record. Claimant had no neurological findings and limited motion was from volitional guarding of the lumbar

[2] Dr. Anderson-Oeser was asked about an SI joint injection which Claimant underwent on June 28, 2017. (Deposition of Dr. Anderson-Oeser, p. 29:10-16.) There was no evidence before the Court which showed Dr. Donner saw Claimant after that time.

spine. Also, there were no medical imaging studies to indicate an injury to the SI joint occurred and the MRI finding of the lumbar spine did not demonstrate convincing evidence of an associated back injury.

44. Dr. Douthit noted the MRI showed mild labral tearing of the right hip and x-rays were equivocal/open to interpretation. He assigned 12% scheduled impairment for the mild loss of range of motion of the right hip. Dr. Douthit determined Claimant sustained a 25% impairment of the lower extremity for the right knee, which included 12% related to loss of range of motion, 10% impairment for arthritis and 5% for the possibility of attenuation of the cruciate ligament. The 25% impairment was added/combined to the 12% extremity rating for the hip which equaled 34% impairment of the lower extremity and 14% whole person impairment. Dr. Douthit did not find objective medical evidence of permanent injury of the lumbar spine, shoulder, neck or SI joint and did not assign an impairment rating to those areas of the body.

45. Claimant underwent three Hyalgan injections in the right knee in September 2017. Dr. Trumper opined Claimant would require a total knee replacement and the strategy was to defer that procedure as long as possible.[3]

46. A record review was prepared by Mark Failinger, M.D., dated December 10, 2017. After reviewing Claimant's course of treatment, Dr. Failinger opined Claimant sustained a high-energy injury to her knee which created, with reasonable medical probability, post-traumatic arthritis. This arthritis progressed with time and would not imrove. Dr. Failinger agreed with Dr. Trumper's opinion that the Claimant had a high chance that the knee had progressed to arthritis, which would, with medical probability, become recalcitrant to conservative measures, including those she had undertaken to this point. A knee replacement was the next most reasonable step, with one repetition in Claimant's lifetime. The ALJ concluded Claimant will require continuing treatment for her right knee, including possible joint replacement surgery.

47. On December 14, 2017, Claimant was evaluated by Dr. Anderson-Oeser, who performed an IME at the request of her attorney. At that time, Claimant reported an aching sensation in the right posterior shoulder girdle, along with aching pain to the lower lumbar region, including the right sacroiliac and buttocks, left buttocks and posterior thigh. She also reported burning sensation over the lateral aspect of the right lower extremity to her ankle and numbness over the right knee. The ALJ noted these latter complaints were not reported to Dr. Douthit. On her examination, Claimant's gait was mildly antalgic. Her cervical ROM was within functional limits. Claimant was tender over the lower lumbar SI joints, bilateral PSIS and bilateral sacroiliac joints, as well as right gluteal muscles. The FABER test was positive on the right.

48. Dr. Anderson-Oeser opined, based on the mechanism of Claimant's injury and the fact that she reported pain in the low back and SI region from the onset, these were causally related to the vehicle accident of November 14, 2014. Dr. Anderson-

[3] Exhibit G, p.185.

Oeser testified that a lumbar rating was appropriate for SI joint injuries. Dr. Anderson-Oeser assigned a 9% impairment of the lumbar spine due to loss of range of motion and a 5% impairment of the lumbar spine based on Table 53 II(B); for a total of 14% spinal impairment. The ALJ credited the opinion offered by Dr. Anderson-Oeser with regard to Claimant's permanent impairment in the lumbar spine/SI joint.

49. Dr. Anderson-Oeser testified as an expert in Physical Medicine and Rehabilitation, the specialty in which she is board-certified. She is Level II accredited pursuant to the WCRP. Dr. Anderson-Oeser testified that this MVA caused the front-end of the dashboard to push the femur up into the hip socket, which transferred the forces across Claimant's sacrum. This can cause an injury to the SI joint, as well as low back pain. Dr. Anderson-Oeser opined that the mechanism of injury involved in an MVA can cause injury to the SI joint and spine.[4] Dr. Anderson-Oeser concluded Claimant had a problem on the right SI joint and myofacial pain in the lower lumbar region. The ALJ credited this opinion.

50. Dr. Anderson-Oeser testified Claimant's SI joint could have constant irritation, if it was not moving appropriately. On examination, Claimant had positive Faber's sign on the right, along with tenderness to palpation. Dr. Anderson-Oeser agreed there was a subjective element to these findings. There was also spasm of the gluteal muscles, along with a loss of ROM in the lumbar spine. On the question of whether Claimant initially reported low back/hip/SI joint problems, Dr. Anderson-Oeser referenced will the pain diagram Claimant completed for Dr. O'Connell, as well as the initial report of injury. She did not recommend a DIME physician relying on the medical records summary, as Dr. Douthit did in this case. The ALJ inferred Dr. Anderson-Oeser reviewed the initial report of symptoms at as supportive of the conclusion that there was an injury to this area of body and thus, potential impairment. Also the evidence of muscle spasm and loss of ROM were objective findings. The ALJ found Dr. Anderson-Oeser's opinions to be more persuasive than Dr. Hattem.

51 Dr. Anderson-Oeser opined Claimant was at MMI for the SI joint and low back condition. She believed these conditions could be treated as part of medical maintenance.

52. Claimant suffered an injury to her low back, and right SI joint as a result of the November 14, 2014 MVA.

53. There was agreement amongst the physicians, including Dr. Douthit, Dr. Hattem and Dr. Anderson-Oeser that Claimant did not sustain a permanent medical impairment to her cervical spine or right shoulder. The dispute in the case centered on the lumbar spine and right SI joint.

54. Claimant proved she is entitled to post-MMI medical treatment, including treatment for the right knee.

[4] Deposition of Dr. Anderson-Oeser, p. 8:5-17.

55. No ATP, including Dr. Siegel, recommended further injections for Claimant's right SI joint after June 2017.

56. Claimant failed to prove she required additional treatment for her right SI joint at this juncture.

57. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Overcoming the DIME

In resolving the issues, the ALJ notes the question of whether Claimant overcame Dr. Douthit's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence". § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*. The elevated burden is evidence of the Colorado Legislature's intent to limit overcoming the DIME physician's opinion to those cases where it is more probable than not that the opinion was incorrect.

The crux of the issue represented by the case is whether Dr. Douthit's opinion that Claimant did not sustain a permanent impairment to the lumbar spine (including the SI joint) was more probably wrong. The ALJ considered the arguments proffered by Claimant and Respondents with regard to Dr. Douthit's opinion. Claimant asserted that Dr. Douthit's conclusions were erroneous because he did not review Claimant's treatment early records where she reported low back pain. Respondents' argued that the Dr. Douthit's opinions were not overcome by clear and convincing evidence, as there was a lack of objective evidence to support the conclusion there was a lumbar spine/SI joint injury. Respondents also asserted the MRI did not show evidence of an acute lumbar injury and on the occasions when Claimant had an antalgic gait, this was related to her knee injury. Respondents relied upon the testimony of Dr. Hattem to support their contentions. In the case at bar, the ALJ determined Claimant met her burden to overcome Dr. Douthit's opinion.

There are two facets to the ALJ's reasoning; first, there was a sufficient quantum of evidence introduced that Dr. Douthit's conclusions vis a' vis the lumbar spine were erroneous. As found, Dr. Douthit relied upon Dr. Hattem's summary of the early treatment records, which does not constitute an error *per se.* However, this lessened the weight of Dr. Douthit's opinion. Dr. Douthit went on to conclude that Claimant did not complain of low back pain initially, (which is contrary to the records) as part of his conclusion Claimant sustained no permanent medical impairment for lumbar spine.

As determined in Findings of Fact 3, 5-7, 11, Claimant complained of low back/hip pain in the initial aftermath of this accident. Claimant also referenced low back pain in her report of injury (Finding of Fact 5) and testified she had low back pain after the accident. There were also references to hip pain in the PT notes admitted into evidence. (Finding of Fact 7). The medical evidence in the record supported the

conclusion Claimant had low back and right sided hip/leg pain following the accident. To the extent Dr. Douthit based his opinion that Claimant did not sustain an injury to the low back/hip as a result of the MVA because there were no complaints initially, this conclusion was erroneous.

In addition, the records of Dr. Siegel (an ATP) indicate she believed that Claimant suffered an injury to her low back/SI joint, which required diagnostic testing and treatment for these areas of the body. The ALJ credited Dr. Siegel's opinions in this regard. (Finding of Fact 22.) Medical records from other physicians confirmed Claimant had symptoms and treatment involving the lumbar spine and SI joint. As found, Dr. O'Connell initially questioned causation with regard to the hip and low back complaints. (Finding of Fact 13). However, the medical evidence in the record indicated Dr. O'Connell referred Claimant for diagnostic testing (MRI) as an ATP. (Findings of Fact 13-14). Other ATPs who opined that the hip, low back and right leg complaints were related to the subject accident included Drs. Girardi, White, Van den Hoven, and Donner (ATPs). Even Respondents' IME physician, Dr. Hattem, determined Claimant's low back was injured in the subject accident. (Finding of Fact 33.)

To be sure, there was not a uniform consensus between the doctors regarding the source of Claimant's pain complaints during the course of her treatment. Several physicians identified a labral tear in Claimant's hip as the pain generator. Also, there was a delay before Claimant's treatment focused on the hip and lumbar spine. On balance, the ALJ was persuaded that based upon the evidence, including the physicians' opinions, the MVA caused an injury to Claimant's lumbar spine and SI joint which required treatment. (Finding of Fact 52).

Second, the ALJ credited Dr. Anderson-Oeser's opinion that Claimant's low back and SI joint were causally related to the subject accident and Claimant sustained a permanent medical impairment to that area of her body. At the time of her evaluation, Dr. Anderson-Oeser had reviewed Dr. Hattem's report, as well as Dr. Douthit's. Dr. Anderson-Oeser's opinion on causation was supported by Dr. Raschbacher, as well as by Respondents' expert, Dr. Hattem who in his initial report concluded the hip and low back were related. Dr. Siegel, who was an ATP, also concluded Claimant's SI joint pain was related to the subject accident and referred Claimant to Dr. Donner for an evaluation and treatment. (Finding of Fact 34). All of these physicians concluded Claimant had an SI joint diagnosis which supported the ALJ's conclusion that Claimant was entitled to a rating for the low back/SI joint under the AMA Guides. Dr. Anderson Oeser testified, which provided a rationale and support for the conclusion Claimant suffered a permanent medical impairment to the lumbar spine and the basis for rating. This was the most complete explanation that opinion of all the opinions within the record. The ALJ credited Dr. Anderson Oeser's opinion that Claimant was entitled to a Table 53II(B) impairment under the AMA Guides and concluded Claimant's total impairment was 14% whole person. (Finding of Fact 48).

Therefore, after considering the totality of the medical evidence, the ALJ concluded Claimant sustained a permanent medical impairment to lumbar spine (including the SI joint) and was entitled to a permanent medical impairment rating. Since Dr. Douthit's conclusion that Claimant did not have lumbar impairment was based, at least in part, on the erroneous belief Claimant did not complain of symptoms, his opinion was overcome. Accordingly, Claimant is entitled to additional PPD benefits for the injury to the lumbar spine/SI joint which was injured in the subject accident.

Grover Medical Benefits

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). As found, Claimant's traumatic injury to the right knee caused post-traumatic arthritis. (Finding of Fact 46). The medical evidence revealed Claimant may require knee joint replacement for the right knee and Respondents are liable for said treatment. Claimant proved she is entitled to continuing treatment to maintain MMI for the right knee. (Findings of Fact 45, 53). In this regard, Claimant's ATP, Dr. Siegel, opined Claimant required maintenance medical treatment at the ALJ credited this opinion. (Finding of Fact 39).

Claimant offered the opinion of Dr. Anderson-Oeser to support her contention that she requires maintenance treatment for her SI joint and low back. The ALJ concluded Claimant failed to prove entitlement to those medical benefits to either maintain MMI or prevent deterioration. (Findings of Fact 54-55). As found, Dr. Siegel referred Claimant to Dr. Donner and she was evaluated by PAC Kottonstette at Dr. Donner's office on June 1, 2017. Claimant underwent one injection, but there was no evidence in the record Claimant returned to Dr. Donner after that time. Claimant failed to prove the efficacy of said injection, such that a further SI joint injection would be warranted. Based upon this failure of proof, Claimant's claim for additional medical benefits for the low back and SI joint is denied.

ORDER

It is therefore ordered:

1. Claimant met her burden to overcome the DIME physician's findings with regard to causation and medical impairment by clear and convincing evidence.

2. Respondents shall pay PPD benefits to Claimant based upon a 14% whole person impairment to lumbar spine.

3. Respondents are entitled to a credit for PPD benefits paid.

4. Claimant's recovery is subject to the combined PPD/TTD limits of $81,435.67 (§ 8-42-107.5, C.R.S.), as her medical impairment does not exceed 25%.

5. Respondents shall pay reasonable and necessary post-medical treatment, including treatment for post-traumatic arthritis in the right knee.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 17, 2018

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury to his low back on February 13, 2018.

II. What is the Claimant's average weekly wage.

III. Whether Claimant is entitled to temporary total disability benefits from March 6, 2018, and ongoing, less any applicable offsets including unemployment benefits that Claimant has received.

IV. Whether Claimant is entitled to temporary partial disability benefits from February 14, 2018, through March 5, 2018, less any applicable offsets.

STIPULATIONS

I. The parties stipulated that Dr. Tomm Vanderhorst is the authorized treating physician.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 29-year old male who worked for the Martin Marietta Materials, Inc. (Employer) as a mixer driver. He was hired on February 27, 2017, His employment with Employer was formally terminated on or about May 14, 2018. *R. Ex. H pp. 146 & J p. 151.*

2. Claimant has alleged that he injured his back on February 13, 2018, when he drove his cement mixer over a bump or transition in the road. He alleged that he flew up in his seat, while he was wearing his seatbelt, came down and his back hit the lumbar bar, he heard a pop, and felt shooting pain. Since then he has had problems bending over and also has tingling in his low back. *R. Ex. J p. 157 – 158; Tr. pp. 40 – 41.*

3. The truck that Claimant drove was known as truck 623. The driver's seat had been replaced approximately 3 ½ years before the alleged incident. The previous seat had lasted 8 years before it had to be replaced. The seat involved in this claim appeared worn from a cosmetic standpoint. Specifically, there was a section of the upholstery towards the outside bottom of the seat cushion that was torn, and a section of foam was missing from the cushion. However, upon testing for failure analysis, all mechanical and air adjustments of the seat were functioning properly. The section of missing foam did not alter the seated position

of the driver in any meaningful way and would not have decreased the performance of the seat. The missing foam is not under the seated position, but on the side of the cushion, i.e., leg/thigh bolster, and would mainly be noticeable only when entering or exiting the seat. *R. Ex. A p. 3; Tr. pp. 114 – 116.*

4. The seat is equipped with manual controls to adjust the location of the seat fore and aft, the height of the front and rear of the seat cushion, the tilt of the seat and the angle of the arm rests. The seat includes air controls to adjust the height of the seat. The seat back consists of a tubular steel frame with horizontal cross members. It is equipped with an optional triple lumbar support. There is an additional sheet metal plate welded between the lower and middle cross members to hold the three air chambers in place. There is no metal bar located in the area of the lumbar air chambers. The whole structure is covered with a thick high density molded foam cushion underneath the seat upholstery. In the lower lumbar area this foam is approximately 1.25 inches thick. R*. Ex. A p. 2; Tr. pp. 104 – 110.*

5. Claimant began complaining about the seat in his truck on or about January 31, 2018. When he talked to Nate Kaspar about it, Mr. Kaspar asked Claimant if he was writing it up. Claimant is required by federal law to conduct a Pre & Post Trip Inspection Report of his truck before and after he drives it each day. On February 1, 2018, Claimant began remarking on every Pre & Post Trip Inspection Report that he completed between that date and February 13, 2018, the alleged date of injury, that the truck needed a new seat. *R. Ex. J p. 161 - 170 & K pp. 171 – 172; Tr. pp. 31 - 33 & 76 -77.*

6. On February 6, 2018, Rudy Alvarado rather than Claimant drove truck number 623. He remarked on the pre & post trip inspection form that the yellow ABS light was on, but he made no mention of the need for a new seat. *R. Ex. J p. 165.*

7. Both Claimant and Mr. Alvarado on each of the days they drove the truck between February 1, and 13, 2018, certified that they had conducted the required pre-trip inspection and found the truck in safe mechanical condition. If they could not certify the truck to be in safe condition it would be taken out of service for repairs. The employer prioritizes the vehicles to be taken out of service based upon the trucks that have safety or operational issues first. When a truck is taken out of service for reasons such as safety, operational issues or routine maintenance the mechanics review the pre-trip/post-trip inspections in order to address items that are listed on the pre-trip inspection forms that were not safety sensitive or serious enough to have downed a truck and have it taken out of service. *R. Ex. J pp. 161 – 170; Tr. pp. 33, & 77 – 81.*

8. Claimant initially called Patrick Reeves to report his injury on February 13, 2018, after he had finished his cement pours for the day and had returned to the Quivas plant. He testified he told Mr. Reeves that the location of the accident was as he was coming off I-70 on to 6th Ave he was injured on 6th Avenue**.** *Tr. pp. 21 - 22 & 39.*

9. The next day on February 14, 2018, Claimant met with his direct supervisor Nate Kaspar to formally report his accident. Claimant testified he recalled formally

reporting his alleged accident that day but did not recall completing the incident/injury report. *See R. Ex. J pp 157-159.* The incident/injury report was not signed by Claimant, and Claimant testified that he did not recognize the handwriting in the incident/injury report as his. Mr. Kaspar testified he witnessed Mr. Kaspar filing out the incident/injury report in Claimant's own handwriting. Claimant recalled speaking to someone at The Healthbridge deciding to initially try home care and modified duty to see if he would get better. Mr. Kaspar made the notations about the decision to initially pursue home care and modified duty on the third page of the incident injury report. Claimant indicated on the report that the specific street location of the incident was on I-70 before the 6th Avenue exit. The hand written incident report indicated that:

a. Claimant was driving down I-70 toward 6th Avenue doing 50 mph when he hit a bump in the road and flew up in his seat.

b. He had a seatbelt on.

c. He came down and hit the lumbar bar and heard a pop and felt shooting pain.

d. Since the incident, he could not bend over.

e. He had tingling in his low back and tightness from his tailbone to the center on both sides. *R. Ex. J pp. 157 - 159; Tr. pp.40 - 41 & 71 – 72.*

10. As found above, Claimant was asked at the hearing whether he completed the handwritten incident/injury report. Claimant testified that he could not recognize the handwriting in the report as his. However, Claimant's personal calendar was submitted into evidence. *R. Ex. K.*[1] The ALJ finds that the handwriting contained in the calendar and incident/injury report look similar and have comparable characteristics. For example, the written number 7 on the accident/injury report, which is written numerous times, is written with a line in the middle. R. *Ex. J pp. 157-159.* Consistent with the writing in the accident report, Claimant wrote the number 7 on his calendar – in the February 22nd box - with a line in the middle. *R. Ex. K pp.172.* In addition, Mr. Kaspar credibly testified that Claimant completed the handwritten incident/injury report. Therefore, the ALJ finds that Claimant did complete the accident report and his testimony that he does not recognize his own handwriting, which provides a description of the incident occurring in a location which is different than his later accounts as to where he was driving when the incident occurred, diminishes Claimant's overall credibility.

11. Claimant contends he continues to suffer from back pain. He testified he cannot sit longer than 45 minutes at a time, stand longer than 1 hour at a time, he cannot lift over 10 pounds and he gets shocking pain down his leg which has caused him to fall at least 3 times since the date of injury. *Tr. pp. 37 - 38.*

12. Claimant rents a room in his home through Airbnb. He does the cleaning for the room including changing the sheets. He also moved a 65-inch television by

[1] A more legible copy of Claimant's calendar was submitted into evidence via a flash drive and CD and are part of the record.

himself on or about April 3, 2018, which aggravated his back pain. Even the attempt to move this large TV by himself is inconsistent with his reported limitations and presentation at hearing. *R. Ex. D p. 110; Tr. pp. 30 - 31 & 50 – 51.*

13. Despite the claim that the accident was so significant that he is still suffering symptoms 9 months after the accident, he does not know where the accident occurred. But, Claimant has reported at least 3 different possible locations where he said it occurred. *Tr. pp. 53 – 58.*

14. On February 16, 2018, Claimant was seen by Dr. Vanderhorst, reporting that on February 13, 2018, at approximately 2 p.m. he was driving on the interstate in a cement truck when he hit an unexpected bump which caused him to bounce up in his seat and then back down. Claimant told Dr. Vanderhorst the airbag pillow for the lumbar support was not operational and as result his lumbar area impacted the horizontal bar ledge in the unit and he heard a pop. He had immediate soreness across his lumbar region. He reported persistent soreness since then. On examination that day there was no abrasion or ecchymosis of the thoracic, lumbar or sacral region. X-rays revealed no sign of acute injury. *R. Ex. C pp. 96 – 102; Tr. pp. 44 – 45.*

15. On February 21, 2018, Claimant and Nate Kasper drove the route where Claimant explained he experienced the injury. They were trying to locate the bump or transition in the road that he alleges caused him to fly up in the seat as he explained in his original description of the incident. They did not locate any large bumps on I-70 that would cause Claimant to fly up in his seat as mentioned in his original statement. As they transitioned onto 6th Avenue no large bumps were identified. According to Nate Kaspar, as they were driving eastbound on 6th Avenue, Claimant mentioned he would look like an ass if no bumps or dips were identified along the route. On 6th Avenue two expansion joints were clearly visible on the 6th Avenue overpass at Sheridan Boulevard. As they drove over them Claimant advised Mr. Kaspar that he thought that might have been it but believed that he must have been in the center lane, because of traffic merging on from Sheridan. Consequently, they took the exit at Federal, went west on 6th Avenue to Wadsworth, and got back onto 6th Avenue eastbound to experience the expansion joints in the center lane. They followed a dump-truck in the center lane over the transition at Sheridan. They did not notice any violent bumping or jarring of the dump-truck, nor did the transition seem extreme in the pick-up truck in which they were riding. It was stressful for Claimant to be riding with his supervisor looking for the location of his alleged accident. Claimant was running out of roadway to find a bump or transition in the road when he was riding with Mr. Kaspar because he would have had to turn off 6th Avenue onto Santa Fe in 3 more exits in order to go to Quivas when he proclaimed the location as Sheridan and 6th Avenue. *Tr. pp. 52 - 58 & 72 – 76.*

16. According to the notes of Claimant's recorded statement taken on February 22, 2018, by Casey Garrison, Claimant told him the accident took place on February 13, 2018 at 2 p.m. on Sixth Avenue around Kipling headed eastbound. He indicated he was driving a truck. The lumbar airbag was not working. There was

a bar going across the seat on the inside. He hit a bump and slammed down hurting his back when he hit the bar. *R. Ex. H p. 146.*

17. Claimant also testified that the lumbar air bag in the seat was not working and that there was a bar in the seatback which was digging into his lower lumbar back. After Claimant reported his alleged injury the shop mechanics removed this seat and found the lumbar airbag was inflating and there was no protruding bar. Statements made about the seat condition by Claimant are not supported by and are inconsistent with the physical data. *R. Ex. A pp. 1 – 5; Tr. p. 133.*

18. Tim Eakins an expert in accident reconstruction and failure analysis testified credibly and persuasively consistent with his report that:

    a. There was no lumbar bar,

    b. The lower cross member of the seat frame was located below the area of the lumber air bags,

    c. Due to the geometry of the human body and the seat it is unlikely that Claimant could strike his back on the lower bar,

    d. The seat's air system functioned properly in testing under various loaded conditions, and

    e. There were three lumbar airbag chambers which were all functioning properly and the vertical height adjustment to the air ride seat was functioning properly.

    See R. Ex. A pp. 2 – 7; Tr. pp. 130 – 132.

19. The statements made by Claimant about the location of where the accident occurred varied greatly. The difference between the Claimant's written statement and the location he pointed out to Nate Kaspar is approximately 7 miles. Tim Eakins also drove the route and found no significant bump or transition of the magnitude of which would have caused Claimant to fly out of his seat. The seat was designed with an air suspension to bounce or float with a person sitting on the seat when travelling over uneven surfaces not to eject a person. *R. Ex. A p. 6; C p. 96; H p. 146; & J pp. 157 – 158; Tr. pp. 127 - 129, & 132 – 133.*

20. Mr. Eakins analyzed the Trimble data pertaining to truck number 623. It reflected the location of the truck at approximate one-minute intervals by latitude and longitude. This demonstrated where the truck was being driven throughout the day of February 13, 2018. It also reflected the speeds and times. The statements by Claimant regarding the speed of the vehicle and that he was travelling 50 mph as he approached I-70 is not supported by the Trimble data which showed he was actually travelling at between 62 and 65 mph. *R. Ex. A pp. 25 - 56; Tr. pp. 123 - 125 & 133.*

21. Mr. Eakins obtained Google earth and Google drive photos of the entire route utilizing the latitude and longitude information from the Trimble date. He examined the photos on his computer and he did not find any significant bumps or transitions on the road surfaces between the Spec Agg and Quivas plant over

the route that Claimant traveled.[2] Mr. Eakins also indicated that the expansion joints at the Sheridan overpass were in good shape. According to Mr. Eakins, that section of 6th Avenue had been completely redone within the last 5 years. He further indicated that those 2 expansion joints are the only expansion joints that are encountered over the entire route and would be logical for Claimant to blame them as the cause in the absence of finding anything else. Mr. Eakins testified that the expansion joints at the Sheridan location were very good and were in the top 10% of the more that 70 expansion joints that he encountered on the way to DIA recently. *R. Ex. A pp. 6 - 7, & 25 – 77; Tr. pp.124 – 130.*

22. Mr. Eakins and his associate are both of similar size to the Claimant. Both attempted to deliberately get their backs to strike the lower cross member with their backs to no avail. *R. Ex. A pp. 5 – 7; Tr. pp. 119 -120 & 151 – 152.*

23. Claimant returned to see Dr. Vanderhorst on February 21, 2018, for follow-up of his left posterior thoracic strain and lumbar contusion. He returned to work that day but did not work Monday or Tuesday because of the severe cold. He reported he definitely felt improvement though. He was still having episodes of tightness and spasms at times. He walked with a normal gait. *R. Ex C p. 93 – 94.*

24. Claimant returned to see Dr. Vanderhorst on February 28, 2018, for recheck of his thoracic and lumbar strains. He continued in physical therapy and felt positive about his progress. He stated that in therapy the TENS unit felt great. He was interested in that for home use. He had reduced the use of Flexeril and Vicodin to two at bedtime only. He had two tablets left of the Flexeril and about five of the Vicodin and did not want additional of either. Claimant reported there were times when he no longer experienced pain and other times his pain would get to a level of 6/10. On examination his pain was at the level of 1/10. He had somewhat increased pain after repetitive activities such as picking up the trash at work or sitting longer than 20 minutes. He felt better if he was active and moving. He requested that he be allowed to do sweeping. He was hoping to have an increase in his work hours as he was currently working only about four hours per day. His gait was normal. He was given a prescription for a TENS unit for home use. He was allowed to do broom work and sweeping. He was reminded of the need to alternate right and left sided activities. He was to be rechecked in approximately 10 days and may well be able to start driving again as he would be off the muscle relaxants and narcotics. *R. Ex C pp. 88 – 89.*

25. Claimant did not return to see Dr. Vanderhorst after his claim was denied. He did see Dr. Lipnick 4 times between March 19, 2018 and June 21, 2018. He has not

[2] The ALJ does not find the Google satellite imagery or Google Drive Imagery to be very persuasive in establishing the condition of the roadway on the date and time of the alleged incident. For example, the vantage point of the satellite imagery looking downward would appear to be unable to detect and demonstrate with sufficient precision the extent of any vertical protrusions or indentations of the roadway which could cause a bump and significantly impact the truck and its driver. Or, if such can be done, there was no testimony explaining how. Moreover, there is no way for the ALJ to determine when each picture of the roadway Mr. Eakins obtained from Google Drive Imagery was taken. However, even though the ALJ did not find the satellite and Google drive imagery to be very persuasive, the ALJ did find the remainder of Mr. Eakins' evaluation, testing, and opinions to be highly persuasive. Moreover, the ALJ also found Mr. Eakins' testimony to be credible.

had any medical treatment for his alleged injury since June 2018. *R. Ex. pp. 118 – 127; Tr. pp. 49 – 50.*

26. The ALJ finds the testimony of Nate Kaspar to be credible and highly persuasive. Mr. Kaspar testified he witnessed Claimant completing the incident injury report on the day after the alleged incident in his own handwriting. On February 21, 2018, Claimant and Nate Kaspar drove the route where Claimant explained he had experienced the injury trying to locate the bump or transition in the road where Claimant alleged he experienced the injury. They did not locate any bump or transition on the route which would have caused Claimant to fly out of his seat.

27. The ALJ also finds the opinions of Tim Eakins to be credible and highly persuasive for a number of reasons:

    a. Mr. Eakins' testimony is consistent with the physical evidence presented which demonstrated that there was no lumbar bar located within the seat in the area of the lumbar air chambers. The seat back frame cross member was located in a position which was lower than where one would sit in the seat. There was a sheet metal plate that held the 3 lumbar air chambers in place. The entire seat back was covered with a thick high density molded foam cushion, which measured approximately 1.25 inches thick in the lower lumbar area, and the foam was covered with upholstery.

    b. The seat had only been in service for approximately 3.5 years. Upon testing the seat for failure analysis all mechanical and air adjustments of the seat were functioning properly including the lumbar air chambers. In addition, the lumbar chambers are an option for the chair and the chair can be ordered without the lumbar chambers. In other words, the chair is meant to safely operate with or without lumbar air chambers. Furthermore, efforts made by Mr. Eakins and his associate to deliberately get their backs to strike the lower cross member were unsuccessful.

    c. Personally driving and examining the road surface of the route Claimant travelled reflected the road surface was in good condition, and there were no significant bumps or transitions which would have caused Claimant to fly out of his seat. Although Mr. Eakins did not drive the route on the date of the alleged incident, the evidence does not establish that the delay in viewing the expansion joints which allegedly caused the incident changed in any way between the date of the accident and the date they were observed by Mr. Eakins.

28. The ALJ does not find the testimony of Claimant to be credible or persuasive for a number of reasons:

    a. Claimant made inconsistent statements about the location of the bump or transition on the road. He does not know where the alleged bump or transition is located and could not find a bump or transition in the roadway sufficient to have caused him to fly out of his seat when he rode with his supervisor approximately a week after the alleged injury for the purpose of showing him where the incident had allegedly occurred. It is probable if

Claimant had sustained a serious enough injury that he claimed to still be suffering the effects of 9 months later, he would have been aware of where it happened and he and his supervisor would have been able to find the area of the roadway that caused the incident.

b. Claimant contended that both the seat suspension and the lumbar air supports were not working yet upon testing for failure analysis all mechanical and air adjustments of the seat were functioning properly. Moreover, even if any of the lumbar air cushions were not inflated, the chair would have still performed safely and not subjected Claimant to injury based on a bar hitting him in the lumbar spine due to going over a bump in the road.

c. Claimant contends he cannot sit longer than 45 minutes at a time, stand longer than 1 hour at a time and that he gets shocking pains down his leg which have caused him to fall at least 3 times since the alleged date of injury. Yet, he was observed sitting for greater than 45 minutes at a time while in the courtroom for a hearing that lasted almost 4 hours; he rents out a room in his home to guests through Airbnb which he cleans the room and changes the bedding between guests; and he aggravated his alleged back pain when lifting a 65-inch television by himself on or about April 3, 2018. It is unlikely he would consider lifting the TV by himself if he were suffering from the effects of his alleged injury as he contends.

d. Claimant testified that he was unable to identify his handwriting on the accident/injury report. Most people are able to identify their own handwriting. Moreover, Mr. Kaspar credibly testified Claimant completed the accident report. In addition, the ALJ finds the handwriting used in the accident/injury report and Claimant's calendar to be similar. Therefore, Claimant's testimony that he could not identify whether the handwriting on the accident/injury report was his is not found to be credible and diminishes Claimant's credibility.

e. Claimant provided his handwritten calendar to Respondents in an attempt to establish certain events occurred before the alleged incident, such as needing a new seat before the alleged incident. Generally, calendars are kept to remind people of future events. If, however, someone thinks documentation of an event or series of events will be needed to establish something in the future, they may use a calendar to record events concurrently with the event being recorded. And, some people will use a calendar after the fact to document what they contend happened in the past, so they can use the reconstructed timeline of events to help establish something. In this case, Claimant testified that the primary purpose of his calendar was to remind him of future events. However, the entry on February 1, 2018, indicates: "Started writing seat up in inspection book." To this ALJ, this entry is written in the past tense and in a manner that indicates the calendar entry of February 1, 2018, was not created contemporaneously with the event of reporting the defective seat at work. Instead, it appears the entry was written later in an attempt to either

recreate what happened in the past and/or to use the entry as self-serving documentary evidence to support Claimant's contention that the seat was defective before the alleged incident and that he documented it in his personal calendar. Moreover, if the seat was in such disrepair that it needed to be repaired right away, why did Claimant document in his calendar that he "Started writing" it up? Usually, most people do not know what is going to happen in the future. In other words, how would he know he would have to continue writing it up, unless he had already done so.

In addition, Claimant was also asked why there were no entries on his calendar for January of 2018. Claimant's testified that he merely did not have anything to document that month.

Claimant called a rebuttal witness to refute Respondents' contention that the calendar was recently created and provided to Respondents in order to support or bolster certain contentions being made by Claimant in this claim. Claimant's counsel indicated the witness, Ms. Jennifer Marsallo, works for a law firm Claimant previously contacted to inquire about legal services involving this claim. Claimant's counsel indicated that as part of the inquiry, Claimant provided Ms. Marsallo his personal calendar which was submitted by Respondents.

Ms. Marsallo testified that she has been a paralegal for 12 years and works on personal injury and workers' compensation cases in Nebraska. She testified that Claimant did provide his calendars to her via email on May 18, 2018. There was no indication during Ms. Marsallo's direct examination that she had a personal relationship with Claimant or anyone in his family.

Respondents' counsel asked Ms. Marsallo how she knows Claimant since she works for a law firm in Nebraska. Ms. Marsallo testified that she knows Claimant because she is dating Claimant's father. The fact that the relationship between this witness and Claimant, and Claimant's father, was not brought out during direct examination, but was left to be discovered, if at all, though effective cross examination, negates the credibility and persuasiveness of the testimony provided by this witness. Moreover, even if the same calendars were provided to this witness on May 18, 2018, this fact does not establish that the information contained in the calendars was documented contemporaneously with the occurrence of each event as alleged by Claimant and was not added at a later date to create self-serving evidence.

Therefore, the ALJ does not find Claimant's testimony regarding the entries in his calendar, and when they were made, to be credible.

f. Claimant's contention that driving over an expansion joint at the Sheridan location caused his back injury - even if the seat pneumatics were not working and he drove across the expansion joint at a slight angle while changing lanes - is not plausible. In essence, Claimant is asserting that merely driving on a well maintained roadway and driving over an

expansion joint in a cement truck like the one he was driving will exert sufficient force to the driver to almost eject the driver out of the seat and cause a back injury.

29. Based on the totality of the evidence, the ALJ does not find Claimant's testimony and statements to others regarding the alleged incident to be credible.

30. The ALJ finds Claimant did not injure his low back while working and driving his cement mixer truck on February 13, 2018.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Where the medical evidence is subjected to conflicting inferences; it is the ALJ's sole prerogative to resolve the conflict. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

Compensability

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work- related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms.

Ultimately, the question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Claimant, has failed to prove that he ran over a bump or transition joint anywhere on the route that he travelled on February 13, 2018, from Spec Agg to Quivas, and that he flew out of his seat while wearing his seat belt and then came down striking a lumbar bar contained within his seat.

The ALJ found Mr. Kaspar's testimony to be credible and persuasive. Mr. Kaspar credibly testified that when he and Claimant went to look for the location of the incident, they were unable to find any road conditions which could have caused the incident described by Claimant.

The ALJ also found Claimant was not credible and therefore his testimony and statements regarding the alleged incident and cause of his back problems were not found to be credible. As found, Mr. Kaspar credibly testified that Claimant completed the handwritten incident/injury report. Claimant, however, was unwilling to confirm that he completed the incident/injury report. In addition, Claimant's testimony regarding his calendar was not found to be credible. Lastly, Claimant's testimony regarding the alleged defects with the seat which allegedly caused his back injury was not found to be credible in light of the testimony provided by Mr. Eakins. The seat did demonstrate wear and was missing some foam one of the leg/thigh bolsters. However, as testified to by Mr. Eakins, and demonstrated at the hearing, the seat still functioned properly.

The ALJ found Mr. Eakins' testimony and opinions to be credible and persuasive. Claimant's seat was functioning properly both in terms of the air ride system and the lumbar air support cushions. The seat was designed to bounce or float with the person sitting on it. The air ride absorbs or negates jarring effects of driving over uneven surfaces. It was not designed to eject persons. The seat did not have a lumbar bar. The lower cross member of the seat back frame was located lower than a person's lumbar region would be located when sitting in the seat. Considering the geometry of the seat it is unlikely that Claimant's back could have contacted the lower member of the seat back frame, especially, when also considering the foam padding, the 3 lumbar air bag chambers, and the upholstery that covered the seat back. In addition, Mr. Eakins drove the route involved in this case on a regular basis since he lives in the area and also drove the route while investigating this matter. Mr. Eakins never came across any defects or conditions in the road which could cause an

incident like the one described by Claimant. Moreover, the transition or expansion joint Claimant contends caused the incident was insufficient to cause the event as described by Claimant. The persuasive and credible evidence demonstrates that Claimant did not sustain an injury in the manner he described.

The ALJ concludes Claimant failed to establish by a preponderance of the evidence that he suffered an injury attributable to driving over a transition or bump somewhere on I-70 or 6th Avenue between Spec Agg and Quivas while he was in the course and scope of his employment.

Claimant's claim for workers' compensation is, therefore, denied and dismissed and the remaining issues need not be addressed.

ORDER

Based upon the forgoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant did not suffer a compensable back injury.

2. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 21, 2018.

/s/ Glen Goldman

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained an injury not on the schedule of impairment, and is thus entitled to a whole person permanent impairment rating.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to a general award of future medical benefits ('grover meds").

3. Determination of disfigurement sustained as a result of Claimant's work injury.

FINDINGS OF FACT

1. Claimant is employed by Respondent as a firefighter with demanding physical job requirements and duties.

2. On January 12, 2016, Claimant responded to a structure fire where there were reports of parties trapped inside. There was a lot of fire, smoke, and traffic communication on the radios at the scene.

3. Claimant went inside the structure to begin searching. During the search, Claimant fell partway through the floor inside the structure as the floor was burned through. Claimant's right leg went through the floor and was wrenched backwards. Claimant's left leg remained on the surface of the floor. Claimant was able to pull himself out of the hole. After he pulled himself out, a mayday was called on the radio and they knew there was a person unaccounted for. Claimant swapped out his oxygen bottles and went back in the structure. While back inside, Claimant tripped and hit his left knee and later when taking off his gear discovered a nail had punctured his knee through his gear.

4. Claimant was taken from the scene of the fire to Denver Health Medical Center. Claimant's back and hip area as well as the front of his leg and abdomen area were bothering him. At the ER, Claimant reported pain in his right groin area. Claimant had a puncture in his left knee and abrasions to his right knee. *See* Exhibits 9, B.

5. The next day, Claimant found it hard to walk. The interior of his right leg had large bruises and he also had large bruises on his abdomen where it caught when he went through the floor. Claimant reported that he was in a lot of pain the day following the fire.

6. On January 14, 2016, Stephen Danahey, M.D. evaluated Claimant at Concentra. Claimant reported worsening right hip/groin pain as well as continued pain in his left knee. Claimant reported pain in his right hip/groin/right buttocks at a 4/10 level worse with sleeping position. Claimant was able to squat to 45 degrees but had pain with lunges in the hip to groin area. Claimant had tenderness at the anterior hip joint, gluteus maximus, and gluteus minimus. Dr. Danahey assessed groin strain and puncture would of left knee and referred Claimant to physical therapy. *See* Exhibits 7, C.

7. On January 27, 2016, Dr. Danahey evaluated Claimant. Claimant reported 4-6/10 worsening right hip/groin pain that had started radiating into his right lower back. Claimant attributed his pain to having his right leg fall through the floor. Claimant reported that the pain was worse with internal rotation of his right hip and with walking and that it sometimes felt like the right hip wanted to pop backwards. Dr. Danahey assessed strain of right piriformis muscle and sacroiliac joint dysfunction of right side and referred Claimant to a chiropractor. *See* Exhibits 7, C.

8. On March 4, 2016, Dr. Danahey evaluated Claimant. Claimant reported 4/10 right hip/right lower back pain radiating into his right buttocks. Dr. Danahey continued to assess groin strain, strain of right piriformis muscle, and sacroiliac joint dysfunction and recommended an MRI of the right hip and the lumbar spine. *See* Exhibits 7, C.

9. On March 16, 2016, Dr. Danahey evaluated Claimant. Claimant had tenderness to palpation in his right lower back with mild restriction, tenderness to palpation in the anterior aspect of his right hip with mild flexion. Dr. Danahey reviewed the MRIs of the lower back and right hip and referred Claimant to a physical medicine and rehabilitation physician, noting a request for Dr. Aschberger. *See* Exhibits 7, C.

10. On April 18, 2016, Dr. Danahey evaluated Claimant and noted that Claimant had seen Dr. Aschberger who felt most of Claimant's symptoms were intrinsic to the right hip and not the low back. On May 9, 2016, Dr. Danahey evaluated Claimant and noted a hip injection was pending and that there was some consideration for a right hip arthroscopy. On May 27, 2016, Dr. Danahey evaluated Claimant, noted Claimant continued to be in therapy for the hip, and had continued discomfort in the anterior aspect, mostly with internal rotation. *See* Exhibits 7, C.

11. On June 15, 2016, Dr. Danahey evaluated Claimant and noted that Claimant had a right anterior CT guided hip injection and that Claimant had significant discomfort with the injection and that Claimant's anterior hip still hurt. At a June 22, 2016 evaluation with Dr. Danahey, Claimant reported he did well with the injection and was overall improved. On July 20, 2016, Claimant reported to Dr. Danahey that he was improved but still had mild discomfort over the anterior and lateral aspect of his right hip and Claimant planned to resume physical therapy. By August 24, 2016, Claimant reported to Dr. Danahey that he was having a lot of right hip discomfort and that Dr. Schwappach had put in a request for a right hip replacement and that he was going in for a second opinion. Claimant reported at the August 24, 2016 evaluation that he was in

constant pain and felt pressure constantly like the hip was going to pop out of socket. *See* Exhibits 7, C.

12. On June 22, 2016, John Schwappach, M.D. evaluated Claimant. Dr. Schwappach noted that Claimant had recently undergone a right hip cortisone injection which caused some discomfort initially but that overall claimant was much improved and did not feel the pain and discomfort previously exhibited. Dr. Schwappach reviewed a right hip MRI scan with Claimant that confirmed right hip osteoarthritis and some synovitis debris within the hip joint. Dr. Schwappach discussed various treatment options with Claimant. *See* Exhibit 10.

13. In August of 2016, Dr. Schwappach evaluated Claimant and requested a right total hip arthroplasty. Dr. Schwappach noted decreased range of motion of the right hip in abduction, flexion, and internal and external motion. Dr. Schwappach opined that Claimant had failed non-operative management including physical therapy and cortisone injections and should have a total hip arthroplasty. *See* Exhibits 10, E.

14. On November 3, 2016, Dr. Danahey evaluated Claimant. Claimant reported that both Dr. Schwappach and Dr. Melberg recommended a total right hip replacement. Claimant reported that he continued to have constant hip pain. Claimant reported that he had no back pain and no limping. Dr. Danahey noted mild motion limitations in the right hip with pain and discomfort with motion. *See* Exhibits 7, C.

15. On January 5, 2017, Dr. Schwappach evaluated Claimant. Dr. Schwappach noted that Claimant had end stage osteoarthritis of the right hip and that Claimant's arthritis was causing disabling pain and functional disability. Dr. Schwappach noted Claimant's gait included a noted limp on the right. Dr. Schwappach noted that various treatment options were discussed and that Claimant decided to proceed with right total hip replacement. *See* Exhibits 10, E.

16. Ultimately, on January 9, 2017, Claimant underwent a right total hip arthroplasty performed by Dr. Schwappach. *See* Exhibits 10, 11, E.

17. On January 23, 2017, Dr. Schwappach evaluated Claimant. Claimant reported he was having no pain in his right hip, but some muscle soreness along the outside of his right thigh and right knee. Claimant was noted to be walking with a cane. X-rays showed a well aligned, well fixed hip with no evidence of loosening, wear, or osteolysis. Dr. Schwappach noted that Claimant was pleased with the post-operative recovery thus far and that Claimant reported near resolution of his pre-operative symptoms. *See* Exhibits 8, E.

18. At physical therapy on February 16, 2017, Claimant reported a pain level of 0/10 and that he had been performing all daily activities and home construction projects without pain or difficulty. His lower extremity functional scale score was noted to be 71/80. It was noted that Claimant had achieved his work related goals of walking and sitting for prolonged periods as well as lifting 30 pounds 15 times safely. *See* Exhibit 13.

19. On February 23, 2017, Dr. Schwappach evaluated Claimant. Claimant reported that he was having no pain in the right hip but some muscle soreness along the outside of his right thigh. Claimant reported that he was back to work at the Denver Fire Department on light duty and that he was walking without assistance. Claimant reported that he was completing physical therapy twice per week with significant improvement in range of motion and that he had no new complaints. *See* Exhibit E.

20. On March 8, 2017, Dr. Danahey evaluated Claimant. Claimant reported mild anterior discomfort in his right hip but that he was otherwise doing well. Claimant was found to have full hip motion. *See* Exhibit C.

21. On April 7, 2017, Dr. Danahey evaluated Claimant. Claimant felt like his hip was doing great and improving very well and that he had only intermittent pain in the hip. Claimant reported, however, that he had recently (approximately two weeks) started noticing an intermittent interior leg, groin, and testicular pain that radiated down into the leg stopping at about the knee causing his knee to cramp. Claimant reported some right lower back pain and gluteal discomfort. See Exhibit C. Claimant's right hip was found to have near full flexion, and his exam showed full lumbar extension, full lumbar forward flexion, full squat, and full cross leg position. Dr. Danahey planned an ultrasound of the inguinal and an ultrasound of the scrotum. *See* Exhibits 7, C.

22. On April 13, 2017, Dr. Schwappach evaluated Claimant. Claimant reported that he was doing well overall but had been experiencing pain in his groin, testicular area, and occasionally in his hip joint. Claimant reported that he was doing physical therapy once per week and that he was working on range of motion. Claimant reported that physical therapy also provided him with dry needling and massage to help with scar tissue build up. Dr. Schwappach recommended physical therapy twice per week for six more weeks for improved strength and range of motion and anticipated MMI in 6-10 weeks. *See* Exhibits 10, E.

23. On May 10, 2017, Dr. Danahey evaluated Claimant. Claimant reported some right lower back and gluteal tightness resulting in a slight antalgic gait when arising from a seated position but that otherwise he was progressing well. Dr. Danahey noted that the CTs of the inguinal and scrotum were negative. Claimant reported physical therapy was twice per week and that he was exercising to build the muscle up which was helping. Claimant reported joint pain and muscle pain but no back pain. Dr. Danahey noted right hip near full to full flexion with very good strength and balance. Dr. Danahey also noted the lumbar extension was full, lumbar flexion was mildly tight, and the pelvic squat was excellent. *See* Exhibits 7, C.

24. On May 16, 2017, Claimant underwent therapy with Denver Fire Department Physical Therapy. Claimant reported that he was continuing to improve and continued to add light leg machine weight lifting without increased pain or soreness. Clamant reported that he wanted to try light tennis with his wife that day. The therapist noted that Claimant was able to deep squat pain free after treatment. *See* Exhibit 14.

25. On July 1, 2017, Dr. Schwappach evaluated Claimant. Claimant reported that he was doing well. Claimant reported that when he is sitting and goes to stand up he feels like he needs to adjust before he is able to walk. Claimant continued to report complete resolution of his preoperative symptoms. Dr. Schwappach noted that Claimant could be weight bearing as tolerated with full range of motion and that Claimant had reached MMI with respect to his right total hip replacement. *See* Exhibit E.

26. On July 12, 2017, Dr. Danahey evaluated Claimant. Dr. Danahey noted that Claimant reported mild discomfort but overall that he was doing well. Dr. Danahey noted that Dr. Schwappach had felt Claimant was at/near MMI for the right hip. Claimant reported no back pain and was found to have near full right hip motion. *See* Exhibits 7, C.

27. On August 10, 2017, Claimant underwent therapy at Denver Fire Department Physical Therapy. Claimant reported that he had been doing his own training and that his hip and lateral thigh had been getting tighter making it hard to do squatting. See Exhibit 14.

28. On August 17, 2017, Dr. Schwappach evaluated Claimant. Claimant reported that he was having pain and weakness in the medial aspect of his right thigh that radiated to his knee. Claimant reported that he was exercising three times per week and completing physical therapy two times per week as well as receiving dry needling treatments. Claimant reported he was also using a tens unit. Claimant wanted to discuss other options to improve the weakness and pain he was experiencing. Dr. Schwappach continued to opine that Claimant had reached MMI for his right total hip replacement and that Claimant could be weight bearing as tolerated with full range of motion. *See* Exhibit E.

29. On August 23, 2017, Dr. Danahey evaluated Claimant. Claimant reported his hip was doing well and that Dr. Schwappach had released him. On exam, Dr. Danahey noted the right hip had near full-to-full motion. Claimant showed Dr. Danahey jumping forward from a one-legged position on the right and believed he had difficulty with it. Claimant reported that he had done a functional test in therapy and did not do well on a portion of the exam. Dr. Danahey noted that he would review the testing and have Claimant continue in therapy at the fire department physical therapy program. *See* Exhibits 7, C.

30. On September 22, 2017, Claimant underwent therapy at Denver Fire Department Physical Therapy. Claimant reported that he was continuing to improve and that he was eager for full duty work. *See* Exhibit 14.

31. On November 8, 2017, Dr. Danahey evaluated Claimant. Claimant reported good and bad days and achiness with weather changes. Claimant reported he was going to physical therapy in the firefighter program and that he was getting some dry needling to the right anterior thigh and the lower back muscles. Claimant reported muscle tightness

around the right hip. Dr. Danahey noted mild motion limitations in the right hip but good range of motion and that Claimant was progressing well. Dr. Danahey opined that Claimant was close to being able to do the physical requirements of his job, but not quite all the way yet. Dr. Danahey noted that Claimant was nearing MMI and that he planned to do an impairment rating of the right hip in the next visit or two. Dr. Danahey gave a similar opinion on December 1, 2017 where he noted Claimant's flexion of the right hip was near full, Claimant had good squatting, good extension, and good abduction of the hip. *See* Exhibits 7, C.

32. On November 20, 2017, Dr. Danahey requested a prescription for an H-wave machine for Claimant to use for 30 minutes, twice per day, seven days a week. Dr. Danahey noted the H-wave would be for home use for a 30-day trial. Respondent changed the rental to a purchase and purchased an H-wave for Claimant's use. *See* Exhibit J.

33. On December 18, 2017, Dr. Danahey evaluated Claimant. Claimant reported some mild IT discomfort but otherwise that he was doing very well. Claimant reported that he was using the H-wave machine and would have dry needling that day. Claimant reported he was going to test the next day. Dr. Danahey opined that Claimant's right hip motion was very good and that Claimant was at his functional goal and ready for discharge. *See* Exhibit C.

34. On December 19, 2017, Claimant passed the fit for duty evaluation required by Employer in order for Claimant to return to work. The fit for duty evaluation is a physically demanding test. Claimant passed all sections of the test including ladder evolution, forcible entry, high-rise evolution, hand line advance and pull, overhaul, equipment carry, ventilation, and victim rescue. Claimant completed the evaluation in 9 minutes and 17 seconds. *See* Exhibits 16, H, I.

35. After passing the test, Claimant returned to work full duty as a firefighter.

36. On December 27, 2017, Dr. Danahey evaluated Claimant. Dr. Danahey noted that Claimant overall had done well after surgery but had a very lengthy rehabilitation and had some persistent achiness. Claimant reported no joint pain, no muscle pain, no back pain, no joint stiffness, no muscle weakness, no limping, and no night pain. Dr. Danahey found on physical examination that Claimant's right hip had mild/moderate motion limitations in all planes. Dr. Danahey opined that Claimant was at maximum medical improvement (MMI) and released Claimant to full duty work without work restrictions. On the right hip range of motion, Dr. Danahey noted a 0% impairment for flexion, a 4% impairment for extension, a 6% impairment for abduction, a 0% impairment for adduction, a 3% impairment for internal rotation, and a 5% impairment for external rotation. Dr. Danahey opined that the total impairment for Claimant's right hip was 34% lower extremity that may be converted, if applicable, to a whole person impairment of 14%. Dr. Danahey opined that no maintenance care was currently indicated. *See* Exhibits 7, C.

37. On January 30, 2018, Respondent filed a final admission of liability admitting to a 34% scheduled impairment of the right lower extremity. In the FAL, Respondent denied maintenance medical care. *See* Exhibits 2, F.

38. On February 22, 2018, Claimant objected to the final admission of liability. Claimant later applied for hearing.

39. On April 19, 2018, Jorge Klajnbart, D.O. reviewed Claimant's medical records and issued a medical opinion letter. Dr. Klajnbart opined that there was no full consensus as to medical maintenance treatment and agreed that medical maintenance was not reasonable or necessary other than consideration of a radiograph at the two year mark from the surgery, or in January of 2019. Dr. Klajnbart opined that it was well documented in the medical records that Claimant had complete resolution of his preoperative symptoms in the right hip and opined that Claimant appeared to have a well-fixed total hip arthroplasty. *See* Exhibit D.

40. Claimant testified at hearing. Claimant testified that after his injury it was hard to walk, he had large bruises on his interior right leg and on his abdomen where he fell through the floor. Claimant testified that after surgery, he went to physical therapy to maintain his baseline and that he continued to have pain in his groin area, hip girdle, and lower back but that dry needling helped. Claimant testified that the dry needling as well as H-wave, massage, and cupping were all done after surgery. Claimant testified that the dry needles were placed inside his leg, in his hip, on his lower back area, and on the lower right side of his abdomen all the way to his back. He testified that massage was done on his hip, back, and the front side of his surgical scar and that cupping was done to the exterior of the IT band. Claimant testified that his IT band continued to give him problems. Claimant reported that now he could not jog, play tennis, play basketball, run, or cut and that he was 85-90% improved but not 100%. Claimant testified that those activities cause pressure on his right hip. Claimant testified that he still attends physical therapy. Claimant reported that his IT and lower back affect his walking and that he tries not to sit too long because he gets tight. Claimant testified that when he passed the fit for duty test he had to make some modifications from how he used to perform certain maneuvers. Claimant testified that his right groin pain goes from the right testicle up to the right mid abdomen over to the right hip and through the back.

41. Claimant testified that he had been working out 3 times per week including using a stair stepper and doing squats and leg extensions. Claimant testified that his work with Denver Fire Department Physical Therapy helped him to continue with his full time work and physically demanding job.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See*

§ 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Scheduled versus whole person impairment

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the “injury” is enumerated in the schedule set forth in subsection (2) of the statute, “the employee shall be limited to the medical impairment benefits as specified in subsection (2).” If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall “be limited to medical impairment benefits as specified in subsection (8),” or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.*

Section 8-42-107(2)(w), C.R.S., provides for scheduled compensation based on "loss of a leg at the hip or so near thereto as to preclude the use of an artificial limb." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the leg at the hip and the consequent right to PPD benefits awarded under § 8-42-107(8)(c). Whether the claimant met the burden of poof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Maestas v. American Furniture Warehouse,* WC No. 4-662-369 (June 5, 2007).

Conversion of a scheduled injury rating into a whole person rating is a question of fact for an ALJ and is not a medical determination for the authorized treating physician. *Eacker v. True Value Hardware*, W.C. No. 4-661-379 (Feb. 15, 2007). The ALJ must determine whether the claimant has proved beyond a preponderance of the evidence that his injury resulted in functional impairment to a portion of the body not listed on the schedule. *O'Connell v. Don's Masonry*, W.C. No. 4-609-719 (ICAO Dec. 28, 2006); *Lovett v. Big Lots,* W.C. No. 4-657-285 (ICAO Nov. 16, 2007) (affirmed at Colo. App. No. 07CA2375). The term "injury," as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Warthen v. ICAO*, 100 P.3d 581 (Colo. App. 2004); *Strauch*, 917 P.2d at 368. The mere fact that a claimant may have physical injury to structures adjacent to the extremity does not compel a finding of functional impairment beyond the extremity. *Lovett supra.* It is not the location of the physical injury or the medical explanation for the loss that determines the issue, but rather where the impairment lies. *Id.*

In this case, claimant has failed to establish, by a preponderance of the evidence, that he sustained functional impairment to a part of the body not located on the schedule. Claimant completed, and passed, a rigorous Fit for Duty Evaluation. The evaluation consisted on 10 phases, each requiring compound movements utilizing the entire body. This test required claimant to repeatedly lift heavy weights, move in multiple planes of motion, demonstrate flexibility, exhibit endurance and, most importantly, exhibit excellent functional ability. In completing the Fit for Duty Evaluation, claimant has demonstrated the ability to complete the essential functions of a firefighter. In completing the Fit for Duty Evaluation, claimant has also shown a lack of overall functional impairment, and has shown no impairment extending from the extremity into the whole person.

Additionally, Claimant's testimony failed to establish functional ability or functional loss beyond the leg at the hip. Claimant testified to feeling pressure, feeling fatigue and feeling pain during the Fit for Duty Evaluation and at other times following his surgery. Although Claimant has felt different sensations and has been afraid of certain movements, Claimant's overall function shown by medical records and employment testing is extremely high. Claimant has failed to show a loss of functional ability in the whole person. As found above, Claimant is working full duty as a firefighter. Claimant also exercises regularly. Claimant's abilities to complete physically demanding job duties and regularly exercise show that claimant has minimal functional impairment and that there is no functional impairment extending beyond his lower extremity and into his whole person.

The assessments of the treating physicians at MMI also support the conclusion that Claimant has no loss of function beyond the extremity. Both Drs. Danahey and Schwappach released claimant to full duty without any restrictions. Additionally, both treating physicians concluded that claimant had made a complete recovery and released Claimant to full duty as a firefighter, a job that is physically demanding. Releasing a firefighter to full duty shows excellent functional ability in the patient, not someone who has functional impairment beyond their extremity. Claimant has failed to establish by preponderant evidence that his injury is not on the schedule of impairments. His request to convert his impairment rating to a whole person rating is denied.

Medical Maintenance Benefits

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). Even if medical maintenance benefits are awarded, Respondents retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

Claimant has established, by a preponderance of the evidence, an entitlement to a general award of medical maintenance benefits. Claimant's testimony is credible and persuasive that work with Denver Fire Department Physical Therapy has helped maintain his condition, that it relieves tightness from his injury, and that it prevents deterioration of his condition and allows him to continue working full duty at a physically demanding job. Additionally, medical evidence establishes that Claimant may need future x-rays to check his hip replacement. This medical care, and future benefits, will help relieve the effects of the injury and prevent further deterioration of Claimant's condition. Claimant is entitled to a general award of medical maintenance benefits for his right hip. Respondents retain the right to contest any specific treatment in the future.

Disfigurement

Due to his January 12, 2016 work injury, Claimant has visible disfigurement to the body. The disfigurement includes a scar on his right hip area from his right hip total arthroplasty. A large portion of the scar is covered by underwear, but exposed to public view is a portion of the scar measuring approximately 1" by ¼ of an inch. Claimant's testimony that the scar remains discolored is credible and consistent with the surgical records. Claimant has therefore sustained serious permanent disfigurement to areas of

the body normally exposed to public view, which entitles Claimant to additional compensation. §§ 8-42-108(1), C.R.S. Respondent shall pay Claimant $400 for the disfigurement.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to establish by a preponderance of the evidence that his injury is not on the schedule of impairment. Claimant is not entitled to a whole person impairment rating and his permanent impairment remains at 34% scheduled lower extremity.

2. Claimant has established by a preponderance of the evidence a general entitlement to future medical maintenance benefits. Respondents retain the right to dispute any specific treatments in the future.

3. Claimant sustained slight disfigurement as a result of his injury. Respondents shall pay Claimant $400.00 for the disfigurement described above.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 20, 2018

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Was Claimant an employee or an independent contractor when he fell from a roof on November 30, 2017?
- If Claimant was an employee, that the accident arise out of and occur within the course of his employment?
- What is Claimant's average weekly wage?
- Is Claimant entitled to TTD benefits from December 1, 2017 through February 28, 2018?
- The parties stipulated, if this claim is compensable, the treatment Claimant received from Swedish Medical Center was reasonably necessary authorized treatment.

FINDINGS OF FACT

1. Employer is a general contractor in the business of building and remodeling homes. Bryan Pruitt is the sole owner of the company.

2. On November 30, 2017, Claimant suffered multiple serious injuries when he fell from a roof at one of Employer's projects. After the accident, Claimant was transported by ambulance to the Swedish Medical Center emergency department. He was diagnosed with multiple fractures including an unstable T10 fracture. He was admitted to the intensive care unit and underwent a T8 to T12 pedicle screw rod fixation surgery to stabilize the spine on December 4, 2017. He was transferred to the Spaulding rehabilitation unit on December 14 and eventually discharged on December 21.

3. Claimant convalesced at home for approximately the next two months. Despite ongoing symptoms, he returned to work with Employer on March 1, 2018 in essentially the same capacity as before the accident.

4. Employer has been in business since 2000. Mr. Pruitt is a licensed General Contractor who performs carpentry and remodeling work. He primarily does residential projects, such as framing basements, decks, cabinets, trim work, etc. He has no permanent employees and labels everyone who works for him as an independent contractor.

5. In the summer of 2017, Claimant was working on a remodel project for Alvarado Construction. The project lasted from June through August 2017. Mr. Alvarado paid him an hourly rate and Claimant was responsible for his own taxes.

6. Claimant first met Mr. Pruitt during the project with Alvarado Construction. When the project with Alvarado Construction ended, Claimant contacted Mr. Pruitt to see if he had any work available.

7. Mr. Pruitt testified he told Claimant he was an independent contractor. Claimant denied being told he was an independent contractor.

8. Mr. Pruitt considers everyone who works for him an independent contractor and generally has everyone sign a written independent contractor agreement. He testified he gave Claimant an independent contractor agreement but Claimant never signed or returned it. No copy of any such independent contractor document was presented at the hearing — relating to Claimant or any other individual. Mr. Pruitt admitted he allowed Claimant to work without signing any documents.

9. Claimant first worked on a project for Employer on October 24, 2017. Claimant worked a few days on different residential sites from October 24, 2017 to October 28, 2017. Employer paid Claimant $20.00 per hour regardless of the tasks performed. Claimant was not guaranteed any number of hours. Mr. Pruitt and Claimant both understood Employer would withhold no taxes from his wages.

10. Mr. Pruitt typically texted Claimant with instructions regarding when and where to report to work the following day. Claimant was not instructed when to stop work. Claimant drove his personal vehicle to work, and was not reimbursed for mileage or gas. Claimant frequently used his own tools on job sites such as hand tools and an air compressor. Employer also provided some tools and equipment. For example, Claimant used a Bobcat provided by Employer to backfill a foundation and grade terrain. Claimant also used Employer's nail gun, and Employer provided a crane when putting trusses on a roof.

11. Employer frequently gave Claimant instructions on how to do his job. For instance, Mr. Pruitt directed Claimant what length to cut building material. He also instructed Claimant to supervise other workers. Mr. Pruitt assisted Claimant in installing roof trusses on a home and gave Claimant instructions on the installation of a subfloor. On one occasion, Mr. Pruitt directed Claimant to pick up a worker at Labor Ready to help Claimant in his work, at Employer's expense.

12. Prior to 2000, Claimant operated a construction business under the name "Flint Construction." At present, Claimant has no trade name or business registered with the Colorado Secretary of State. He has no business bank account and has not had one since approximately 2000.

13. Claimant has been marginally employed for many years since closing Flint Construction. He sporadically performed "odd jobs" for friends and family members. He also worked occasionally for construction companies such as Employer. Claimant did not file a tax return between 2009 and 2017 because he did not make enough money to owe taxes.

14. Claimant worked 36 hours during the period of October 24-28, 2017 and billed his time on an invoice dated November 8, 2017 from "Flint Construction." The invoice is captioned "*Service Contractor & Invoice.*" It lists Claimant's home address and an email address of flintconst@comcast.net. Claimant pulled the invoice template off the internet so he had something to give Employer. The total invoice was for $720 ($20 x 36 hours), from which Claimant subtracted "$252 for draw." The "draw" represented money Employer had advanced Claimant when he was short on funds. Mr. Pruitt initially advanced Claimant $200 on October 27, 2017 via check payable to "Tom Flint." On another occasion, Mr. Pruitt gave Claimant $52.00 in cash because Claimant had no money for food or gas money to get home. After subtracting the $252.00 advance, the balance on the invoice was $468.00.

15. Employer paid Claimant $468 on November 16, 2017 via check payable to "Tom Flint."

16. On November 30, 2017, Claimant reported to work at a job site on Ash Street, but Mr. Pruitt had enough help at that site so he directed Claimant to another job on South Sherman Street. Claimant's accident occurred at the South Sherman Street location later that night.

17. Claimant arrived at the Sherman Street job site around 10:00 or 10:30 AM on November 30. Claimant understood Employer wanted him to complete a "punch-list" on the property. Mr. Pruitt primarily wanted Claimant to finish the fireplace and redo some window reveals. Claimant also believed he needed to address a small section of the roof that was out of alignment due to an architectural error. Claimant thought the roof issue had to be remedied that day because the roofers were coming the next day.

18. Mr. Pruitt stopped by the site mid-afternoon to check Claimant's progress. Mr. Pruitt was upset because Claimant had not yet finished the fireplace. Claimant testified that the work on the fireplace was extensive and took considerable time to ensure it would pass inspection. Mr. Pruitt testified he told Claimant to go home but Claimant denies being told to leave.

19. Claimant left the job site to get something to eat after Mr. Pruitt left. He returned sometime after 4:00 PM and started working on the roof. At approximately 9:30 PM, Claimant slipped on a loose piece of OSB on the roof and fell approximately 15 feet to the ground.

20. Mr. Pruitt subsequently paid Claimant in cash for the hours he worked on November 30, 2017.

21. Employer did not provide Claimant a Form 1099 for work performed in 2017.

22. Claimant returned to work with Employer on March 1, 2018. The record documents Claimant worked 42 hours in March 2018.

23. On March 30, 2018, Employer paid Claimant $625 for work performed between March 1 and March 29. The check was payable to "Tom Flint."

24. The preponderance of evidence shows Claimant was an employee rather than an independent contractor.

25. Claimant proved his injury arose out of and occurred within the course of his employment.

26. Claimant proved he is entitled to TTD benefits from December 1, 2017 through February 28, 2018.

27. Claimant's average weekly wage is $303.31 per week, with a corresponding TTD rate of $202.21.

CONCLUSIONS OF LAW

A. Claimant was an employee rather than an independent contractor.

Section 8-40-202(2)(a) provides that "any individual who performs services for pay for another shall be deemed to be an employee . . . unless such individual is free from control and direction in the performance of the service . . . [and] is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

Once a claimant shows they performed services for pay, the burden shifts to the putative employer to show the claimant was an independent contractor. The Act creates a balancing test to overcome the statutory presumption of employment and establish independence. *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998). Section 8-40-202(2)(b)(II) sets forth several factors the General Assembly considers particularly "important" in distinguishing employees from independent contractors. *Industrial Claim Appeals Office v. Softrock Geological Services Inc*., 325 P.3d 560, 565 (Colo. 2014). No single factor is dispositive and the determination must be based on the totality of evidence in any given case. *Id*.

As found, the persuasive evidence shows Claimant was Employer's employee and not an independent contractor. The ALJ does not doubt Mr. Pruitt personally considered Claimant an independent contractor. Nor does the ALJ doubt Claimant was happy to receive wages with no withholding. But the parties' mutual willingness to avoid payroll taxes and other employment-related obligations it is not dispositive of whether Claimant was, in fact, an independent contractor.

After considering the totality of circumstances, including the factors enumerated in § 8-40-202(2)(b)(II), the ALJ concludes Claimant was an employee at the time of his accident. The most significant factors in the ALJ's mind are: (1) Claimant was not "customarily engaged in an independent trade or business." Claimant's prior contracting business was defunct, with no active license, bank account, or significant jobs, for many years before his accident. He occasionally performed small "odd jobs" for friends and family, but it was not regular or substantial. (2) Employer paid Claimant an hourly rate rather than a fixed or contract rate. (3) Employer paid Claimant personally and not in the name of any business. (4) Employer never sent Claimant a 1099 or other appropriate tax

documentation consistent with being an independent contractor. (5) Employer provided some tools Claimant needed to complete his work. (6) Mr. Pruitt frequently oversaw Claimant's work and instructed him on how to complete tasks, including what length to cut material and how to install a subfloor. He also instructed Claimant to pick up a day laborer on at least one occasion. (7) Mr. Pruitt typically directed Claimant when to start work each day. (8) On the day of the accident, Claimant had reported to work at one job site, but Employer had enough help at that site and directed Claimant to the Sherman Street address where his accident occurred. (9) There is no persuasive evidence of any limitation on Employer's ability to terminate Claimant if his work was deemed unsatisfactory. (10) Mr. Pruitt claims he sent Claimant an independent contractor agreement, but did not produce it at hearing. Regardless, he admitted Claimant never signed the agreement, but was allowed to work anyway.

Although the record contains evidence from which an independent contractor relationship could be inferred, on balance, the evidence persuades the ALJ Claimant was an employee. Claimant was not "contracted" to perform any specific job or series of jobs, but was essentially hired on an open-ended basis to perform whatever tasks Employer had available. Claimant went from job to job at Employer's direction, with no prior negotiations about cost and simply the agreement he would be paid $20 per hour to work as long as it took to complete the job. That arrangement is far more akin to an employer-employee relationship than an independent contractor situation.

B. Claimant's accident arose out of and occurred within the course of his employment.

To establish a compensable claim, a claimant must prove the injury occurred while "performing service arising out of and in the course of his employment." Section 8-41-301(1)(b). The terms "arising out of" and "in the course of" are not synonymous. The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower, and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Rather, the question is whether the activity is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Id*. at 210. Whether an injury arises out of and in the course of employment are questions of fact for the ALJ. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998).

An employee can momentarily step outside the scope of employment by engaging in a purely personal deviation. When a personal deviation is asserted, the question is "whether the claimant's conduct constituted such a deviation from the circumstances and

conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). The deviation must be "substantial" to remove the claimant from the course and scope of employment. *Kelly v. Industrial Claim Appeals Office*, 214 P.3d 516 (Colo. App. 2009).

As found, Claimant proved the accident arose out of and occurred in the course of his employment. Although the parties offered conflicting testimony regarding whether Mr. Pruitt actually wanted Claimant to work on the roof, there is no requirement that the injurious work activity be a strict requirement of employment. The ALJ is persuaded Claimant genuinely believed the roof issue needed to be addressed before the roofers came the next day. Claimant was on the roof to further Employer's business and had no non-work-related reason to be up there. Claimant would not have been in a position to be injured but for his work. The ALJ finds a sufficient nexus between Claimant's work and his fall to satisfy the "arising out of" and "course and scope" requirements.

C. Claimant is entitled to TTD benefits from December 1, 2017 through February 28, 2018.

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

As found, Claimant proved he left work on November 30, 2017 due to the accident, was disabled by his injuries, and suffered a wage loss commencing December 1, 2017. Although Claimant had no formal restrictions, his disability was too obvious to necessitate work restrictions. It would have been impossible for Claimant to work while he was in the hospital recovering from his injuries. Once commenced, TTD benefits continue until a terminating event occurs, which in this case was his return to work on February 28, 2018.

D. Claimant's AWW is $303.31

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss

and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

The record contains minimal documentation from which to determine Claimant's average weekly wage. Claimant was paid $20 per hour, but his hours fluctuated greatly based on availability of work. The only pre-injury wage documentation in the record covers five days in October 2017. He worked 36 hours between October 24, 2017 and October 28, 2017, for total wages of $720. The record also documents Claimant worked 42 hours in March 2018, for a total of $840. Claimant was paid in cash for some hours, but the ALJ finds the testimony regarding cash payments too vague and unreliable to use for AWW calculation.

The ALJ concludes the most reasonable way to calculate Claimant's AWW is to average his documented earnings over a period of 36 days, resulting in an average daily wage of $43.33. (10/24/17 through 10/28/17 = 5 days + 31 days in March 2018 = 36 days. $720 + $840 = $1,560 ÷ 36 days = $43.33/day x 7 = $303.31 per week).

Applying the foregoing methodology, Claimant's AWW is $303.31 per week, with a corresponding TTD rate of $202.21.

ORDER

It is therefore ordered that:

1. Claimant's claim is compensable.

2. Insurer shall pay Claimant TTD benefits at the rate of $202.21 per week from December 1, 2017 through February 28, 2018.

3. Insurer shall pay statutory interest of eight percent (8%) per annum on all benefits not paid when due.

4. Insurer shall cover all medical treatment from authorized providers reasonably necessary to cure and relieve the effects of Claimant's compensable injury, including but not limited to charges from Swedish Medical Center.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 24, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated by a preponderance of the evidence that the cervical Botox injections recommended by Dr. Brittany Matsumura are reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury.

FINDINGS OF FACT

1. The claimant began his employment with the respondent in 2007 as a patrol officer. The claimant provided testimony regarding three separate work related incidents that led to injuries of his back and neck.

2. The first incident occurred on May 27, 2016. While the claimant was attempting to place a drunk individual into the back of his patrol car, he felt a twist in his back.

3. Following the May 27, 2016 incident, the claimant received medical treatment with Dr. Robert James McLaughlin. The claimant was first seen by Dr. McLaughlin on June 1, 2016. At that time, the claimant described the May 2016 incident as resulting in a pop and pain in his mid and low back. Dr. McLaughlin recommended a muscle relaxer, heat, and physical therapy.

4. The second incident occurred on November 27, 2016. The claimant testified that an individual high on methamphetamine was in walking into traffic and he had to take steps to move the individual out of the road. In doing so, the claimant was struck in the face with a full Gatorade bottle. This resulted in a lip laceration and pain in the claimant's neck and back.

5. Following the November 27, 2016 incident the current workers' compensation claim was opened. The claimant continued to treat with Dr. McLaughlin following the November 27, 2016 incident. On December 6, 2016, Dr. McLaughlin noted that the claimant suffered cervical and lumbar strains. He recommended the use of ibuprofen and chiropractic treatment.

6. During this time, the claimant sought chiropractic treatment with Dr. Ben Dorenkamp. The claimant reported to Dr. Dorenkamp that following the November 27, 2018 incident his neck and upper back were achy and stiff.

7. On February 22, 2017, Dr. McLaughlin referred claimant to Dr. Mitchell Burnbaum for electromyography (EMG) testing. On March 1, 2017, the claimant was seen by Dr. Burnbaum for the recommended EMG. Dr. Burnbaum noted that the

testing was unremarkable. However, Dr. Burnbaum recommended a magnetic resonance image (MRI) of claimant's spinal cord.

8. On March 10, 2017, an MRI of the claimant's cervical spine showed mild multilevel facet arthropathy with mild bilateral neural foraminal narrowing at the C5-C6 level. Following the MRI, Dr. McLaughlin referred the claimant to Dr. Kirk Clifford for a surgical consultation.

9. On March 29, 2017, the claimant was seen by Dr. Clifford and reported neck pain, low back pain, and headaches. Based upon the March 10, 2017 MRI results and his physical examination of the claimant, Dr. Clifford opined that the claimant had cervicalgia with mild cervical spondylosis and an L5-S1 disk displacement with persistent lumbago. Dr. Clifford recommended that the claimant continue with nonsurgical treatment such as physical therapy, yoga and core strengthening exercises. Dr. Clifford did not believe that the claimant should undergo injection therapy or surgery.

10. On April 3, 2017, the claimant was involved in a third incident in which he was chasing a suspect on foot. While attempting to jump over a bush, the claimant's foot got caught and he fell. He continued his pursuit of the suspect and fell a second time in some gravel. The claimant testified that following this third incident his neck and back pain increased immensely.

11. On April 12, 2017, the claimant returned to Dr. McLaughlin. At that appointment Dr. Clifford's recommendations were discussed. In addition, the claimant reported the most recent incident of April 3, 2017. Dr. McLaughlin identified further injury to the claimant's lumbar and cervical spines.

12. On May 23, 2017, a second MRI was taken of the claimant's cervical spine. This MRI showed mild neural foraminal narrowing from the C5-C6 level though the C7-T1 level. The radiologist noted in the MRI report that the MRI was unchanged from the prior March 10, 2017 MRI.

13. Subsequently, Dr. McLaughlin referred the claimant to Dr. Brittany Matsumura. The claimant was first seen by Dr. Matsumura on July 25, 2017. At that time, the claimant described his cervical pain as burning with occasional radiation. Dr. Matsumura recommended the claimant see Dr. Kenneth Lewis for interventional spine evaluation and treatment. Dr. Matsumura specifically noted that the claimant might benefit from cervical epidural steroid injections (ESIs) or medial branch blocks (MBBs). Dr. Matsumura also recommended a new cervical MRI.

14. On August 9, 2017, the claimant was first seen in Dr. Lewis' practice by Chelsea Olson, FNPC. The claimant reported to Ms. Olson that he had constant neck pain and headaches. Ms. Olson recommended that the claimant undergo an ESI at the C6-C7 level, with possible consideration of later MBBs from the C3 level to the C6 level.

15. Dr. Lewis administered a right sided C6-C7 ESI on September 8, 2018. When the claimant returned to Ms. Olson on October 10, 2017, he reported that the ESI did not provide him with any pain relief. At that time, Ms. Olson again recommended consideration of MBBs at the C3 through C6 levels.

16. Dr. McLaughlin also referred the claimant to Dr. Chad Prusmack with Rocky Mountain Spine Clinic. On September 12, 2017, the claimant was seen by David Whatmore, MMS/PAC with Rocky Mountain Spine Clinic. Mr. Whatmore noted that the claimant was experiencing axial neck pain and low back symptoms. With regard to the claimant's cervical symptoms, Mr. Whatmore recommended that the claimant undergo a diskogram of the cervical spine. The purpose of the diskogram would be to determine whether there were injuries to the claimant's cervical spine.

17. At the request of the respondents, on October 20, 2017 Dr. John Burris reviewed the claimant's medical records. In his report Dr. Burris opined that the claimant's symptoms do not follow the referral pattern for facet mediated pain. As a result, Dr. Burris noted that the recommended set of MMB injections were not reasonable, medically necessary, or causally related to the claimant's November 27, 2016 work injury.

18. On October 24, 2017, Dr. Burris saw the claimant for an independent medical examination (IME). In connection with the IME, Dr. Burris reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Burris noted that the claimant's symptoms were diffuse and involved his entire spine and extremities, but did not follow a neuroanatomical pattern. In addition, Dr. Burris noted that the exam was nonspecific with no evidence of radiculopathy. Dr. Burris diagnosed a myofascial irritation of the cervical and lumbar spines from the November 27, 2016 incident. Dr. Burris also opined that the April 3, 2017 incident further aggravated the claimant's symptoms, but that aggravation was only temporary. Dr. Burris noted that it was his opinion that the claimant reached maximum medical improvement (MMI) on December 27, 2016. In addition, Dr. Burris opined that the claimant did not require further medical treatment or work restrictions.

19. Ultimately the claimant underwent the recommended C3 to C6 MMBs. These injections were administered by Dr. Lewis on February 20, 2018. On February 22, 2018, the claimant reported no notable improvement from the MBBs. At that time, Dr. Lewis recommended a C6-C7 interlaminar cervical ESI.

20. On March 6, 2018, the claimant underwent the recommended right interlaminar C6-C7 ESI. However, the claimant again had no pain relief from the ESI.

21. On May 15, 2018, the claimant returned to Dr. Matsumura and reported neck pain and headaches. Dr. Matsumura discussed with the claimant that the injections with Dr. Lewis did not improve his pain. Dr. Matsumura diagnosed the claimant with cervical dystonia/torticollis. She specifically noted that the claimant

exhibited a chin turn to the right with right shoulder elevation. To treat the cervical dystonia, Dr. Matsumura recommended that the claimant undergo Botox injections. Dr. Matsumura also opined that the claimant's headaches were cervicogenic in nature and could be reduced by the Botox injections.

22. On May 21, 2018, Dr. Burris was asked to again review the claimant's medical records. Dr. Burris was specifically asked to opine regarding the Botox injections recommended by Dr. Matsumura. Dr. Burris opined that the recommended Botox injections are not reasonable, medically necessary, or causally related to the claimant's November 27, 2016 work injury. In support of his opinion, Dr. Burris noted what he considered to be inconsistencies in the claimant's medical exams performed by various providers. Dr. Burris also noted that without consistent findings, the recommended treatment does not meet the Colorado Medical Treatment Guidelines for Botox injections.

23. On October 2, 2018, the claimant attended an IME with Dr. Kathy McCranie. In connection with the IME, Dr. McCranie reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In her IME report, Dr. McCranie opined that the three incidents the claimant experienced caused strains to his cervical, thoracic, and lumbar musculature. Dr. McCranie also opined that the claimant's headaches were likely cervicogenic. Dr. McCranie noted that on exam the claimant showed no evidence of cervical dystonia and that the claimant did not have torticollis. Dr. McCranie opined that the recommended Botox injections were not reasonable or necessary to treat the claimant's cervical symptoms. Dr. McCranie also opined that the claimant reached maximum medical improvement on May 21, 2018, with evidence of permanent impairment of the cervical and lumbar spines. Dr. McCranie's testimony at hearing was consistent with her written report.

24. The respondents have denied the recommended Botox injections.

25. The claimant testified that his current symptoms include back pain, neck pain, severe pain and cramping in his hands, a feeling of deadness in his legs, and severe migraines. The claimant also testified that the pain medications he takes leave him feeling "foggy" and "in a haze". He would like to undergo the recommended Botox injections so that he can get back to work.

26. The ALJ credits the medical records and the opinions of Drs. Burris and McCranie over the contrary opinion of Dr. Matsumura. The ALJ finds that the claimant does not have symptoms consistent with cervical dystonia. In addition, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the recommended Botox injections constitute reasonable medical treatment necessary to cure and relieve the claimant from the admitted work injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008).

4. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the recommended Botox injections constitute reasonable medical treatment necessary to cure and relieve the claimant from the admitted work injuries. As found, the medical records and the opinions of Drs. Burris and McCranie are credible and persuasive.

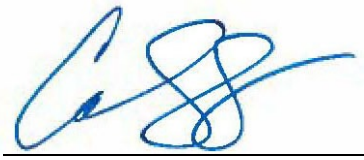
ORDER

It is therefore ordered:

1. The claimant's request for cervical Botox injections is denied and dismissed.

2. All matters not determined here are reserved for future determination.

Dated December 27, 2018.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

Whether the claimant has demonstrated by a preponderance of the evidence that the lumbar fusion surgery recommended by Dr. Kirk Clifford is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted May 15, 2017 work injury.

FINDINGS OF FACT

1. The claimant worked for the employer as a bricklayer. The claimant testified that on May 15,2017 he was performing his job duties as a bricklayer laying large blocks. The claimant testified that while he was lifting one of these blocks overhead his "back gave out" and he felt a pop in his back. The claimant also testified that the pain caused him to collapse and fall to the ground.

Medical Treatment Prior to May 15, 2017

2. Prior to the May 15, 2017 injury involving the claimant's back, the claimant had a longstanding history of low back pain and long term use of opioids to treat that pain.

3. Medical records entered into evidence indicate that the claimant suffered a fall in the 1990s that caused him back pain. However, more recently on April 1, 2016, x-rays were taken of the claimant's back because of "chronic midline back pain". At that time, the x-rays showed advanced degenerative spondylolysis.

4. On February 23, 2017, the claimant's primary physician, Dr. Jeffrey Krebs, noted that the claimant suffered from chronic midline back discomfort with degenerative spondylolisthesis in this lumbar spine. At that time, the claimant was using the prescription drug "Norco" to treat his pain.

5. On April 7, 2017, the claimant was seen by Dr. Krebs and reported numbness and tingling down his left leg. Based upon these complaints, Dr. Krebs referred the claimant for electromyography (EMG) testing of the claimant's left leg.

6. On April 18, 2017, the claimant was seen by Dr. Michael Hehmann for the recommended left leg EMG. Dr. Hehmann noted that there were no signs of peripheral neuropathy. However, Dr. Hehmann did note that the claimant had significant L5-S1 findings with acute denervation. As a result, Dr. Hehmann recommended a magnetic resonance image (MRI) of the claimant's lumbosacral spine.

7. On May 5, 2017, an MRI was taken of the claimant's lumbar spine. At that time, the claimant was complaining of back pain and left radiculopathy. The lumbar spine MRI showed congenital canal stenosis with epidural fat space prominence and

degenerative spondylosis causing severe stenosis and moderately severe right neural foraminal stenosis at the L4-L5 level. In addition, the MRI showed entrapment of the cauda equine and moderate left neural foraminal stenosis at the L5-S1 level.

8. The claimant returned to Dr. Hehmann on May 11, 2017 to discuss the MRI results. At that time, Dr. Hehmann noted that the claimant had significant changes and severe findings in his low back. Dr. Hehmann recommended that the claimant be seen by neurosurgery or orthopedic specialists for surgical consultation. The claimant's injury at work occurred four days later.

Medical Treatment May 15, 2017 and After

9. Following the claimant's feeling of popping and pain in his back on May 15, 2017, the claimant's supervisor, Mr. Guisinger, transported him to St. Mary's Hospital emergency department for treatment. At that time, the claimant reported no radiating pain down his legs and no bladder or bowel issues. The claimant also reported that he had had similar symptoms in the past that were treated with Norco. X-rays of the claimant's lumbar spine showed no acute abnormalities. The claimant was diagnosed with acute bilateral low back pain without sciatica.

10. Following the injury, the claimant's authorized treating physician (ATP) became Dr. Kurtis Holmes. The claimant was first seen by Dr. Holmes on May 18, 2017. At that time the claimant reported numbness down both legs. Dr. Holmes diagnosed a herniate nucleus pulposus of the lumbosacral spine and ordered a magnetic resonance image (MRI) of the claimant's lumbar spine.

11. On May 22, 2017, and MRI of the claimant's lumbar spine showed severe spinal canal and right sided foraminal stenosis a the L4-L5 level relate to a broad based disc extrusion and facet hypertrophy. In addition, there was moderate to severe left sided foraminal stenosis at the L5-S1 level secondary to an eccentric disc extrusion. Finally, the MRI also showed moderate spinal canal stenosis at the L2-L3 and L3-L4 levels related to broad based disc protrusions along with moderate bilateral foraminal stenosis at these same levels.

12. Subsequently, Dr. Holmes referred the claimant to Dr. Jim Youssef with Spine Colorado for a surgical consultation. The claimant was first seen by Dr. Youssef on August 14, 2017. At that time, Dr. Youssef recorded that the claimant was experiencing back pain with bilateral lower extremity radiculopathy that was burning and aching. Dr. Youssef noted surgical treatment of the claimant's symptoms would be complicated by his long term use of opioids. Dr. Youssef recommended the claimant undergo bilateral transforaminal epidural steroid injections (TFESIs) at the L5-S1 level and pursue physical therapy. According to the August 14, 2017 medical record, the claimant was reluctant to pursue the recommended injections and physical therapy.

13. On September 14, 2017, Dr. William Faragher administered an L5-S1 interlaminar ESI.

14. On October 2, 2017, the claimant returned to Dr. Youssef and reported that he did not get any relief from the September 14, 2017 injection and developed a headache as a result of the injection. The claimant also reported that he had been attending physical therapy and felt that was helping him reduce his use of opioids.

15. On October 18, 2017, the claimant continued to complain of low back and left leg pain. At that time, Dr. Youssef recommended EMG testing of the claimant's left lower extremity.

16. On December 6, 2017, Dr. James Santos administered the recommended left lower extremity EMG. The EMG was read as normal with no evidence of lumbosacral radiculopathy, peripheral neuropathy, or compressive neuropathy. Following the EMG, Dr. Youssef recommended surgical intervention that would include interbody fusion from L3 to S1 and decompressive laminectomies.

17. At the request of the respondents, on December 21, 2017, Dr. Michael Janssen reviewed Dr. Youssef's surgical recommendation. In his report, Dr. Janssen opined that the recommended surgery was reasonable to treat the claimant's symptoms. However, Dr. Janssen also opined that the claimant's need for surgery was not related to the May 15, 2017 incident at work. On the contrary, it was Dr. Janssen's opinion that the need for surgery was related to the claimant's long standing multilevel severe degenerative disk disease. Based upon the opinions of Dr. Janssen, the respondents denied authorization for the surgery recommended by Dr. Youssef.

18. On February 15, 2018, the claimant returned to Dr. Holmes and reported that physical therapy was helping with his symptoms. The claimant requested a second opinion regarding his low back. Based upon that request, Dr. Holmes referred the claimant to Dr. Kirk Clifford for a surgical consultation.

19. On March 27, 2018, the claimant was seen at Dr. Clifford's practice by Todd Ousley, PA-C. At that time, Mr. Ousley assessed that the claimant had lumbar spondylolisthesis and stenosis with neurogenic claudication. Mr. Ousley recommended that the claimant undergo a L4-L5 and L5-S1 TFESI. Dr. Ousley also addressed the possibility of a lumbar interbody fusion from L2 to S1.

20. On April 12, 2018, the claimant was seen by Dr. Clifford. At that time, Dr. Clifford administered the recommended left L4-L5 and L5-S1 TFESI.

21. On May 8, 2018, the claimant reported to Dr. Holmes that the injection only helped for one week. At that time, Dr. Holmes deferred to Dr. Clifford for surgical recommendations.

22. On May 24, 2018, the claimant returned to Dr. Clifford and reported that the recent injection provided him with minimal relief. On that date, Dr. Clifford recommended that the claimant undergo a L2-3, L3-4, L4-5 right sided anterior lumbar fusion followed by a L2-S2 instrumentation with lumbopelvic fixation and L5-S1 transforaminal interbody fusion and a L4-5 laminectomy.

23. On June 7, 2018, Dr. Janssen reviewed the surgery recommended by Dr. Clifford. Again Dr. Janssen noted that while the recommended surgery might be reasonable to treat the claimant's symptoms, the surgery is not related to the work injury. Dr. Janssen reiterated his opinion that the claimant's need for surgery is related to the claimant's long standing preexisting condition. Dr. Janssen also opined that the work injury on May 15, 2017 did not exacerbate the claimant's preexisting condition. The respondents denied authorization for the surgery proposed by Dr. Clifford.

24. On July 31, 2018, Dr. Janssen was asked to again review the surgery recommended by Dr. Clifford. Dr. Janssen stated that the claimant's need for surgery recommended was related to his longstanding preexisting degenerative disk disease. Following this report by Dr. Janssen, the respondents denied authorization for surgery.

25. On September 4, 2018, the claimant attended an independent medical examination (IME) with Dr. Michael Rauzzino. In connection with the IME, Dr. Rauzzino reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Rauzzino opined that the claimant's symptoms are related to longstanding and progressive chronic degenerative changes. Dr. Rauzzino also opined that the claimant's symptoms are not related to the May 15, 2017 workplace injury. In support of this opinion, Dr. Rauzzino notes that the claimant was experiencing similar symptoms prior the May 15, 2017 incident, including the need for an MRI only 10 days before the injury. With regard to the surgery recommended by Dr. Clifford, Dr. Rauzzino opined that it is a reasonable procedure to treat the claimant's back symptoms, but unrelated to the work injury.

26. The claimant's friend, Mr. Jacobson, testified at hearing. Mr. Jacobson testified that prior to the May 15, 2017 injury the claimant was able to go fishing with him. In additional they would go to football games together. Mr. Jacobson testified that since the claimant's injury they are unable to do those things together.

27. The claimant's supervisor, Mr. Guisinger testified that he had heard the claimant often complain of back pain in the year prior to the May 15, 2017 injury.

28. The claimant testified that his current symptoms include severe pain in his back down into his heel and incontinence. The claimant also testified that these are different and worsening symptoms compared to what he experienced prior to the May 15, 2017 injury at work.

29. The ALJ credits the medical records, particularly those dated prior to the claimant's work injury. The ALJ also credits the opinions for Drs. Janssen and Rauzzino and finds that the recommended surgery, while likely reasonable treat the claimant's symptoms, is not causally related to the May 15, 2017 work injury. The claimant sought medical treatment for his low back, including an MRI and EMG testing just prior to the work injury. Just days before the claimant's injury, Dr. Hehmann recommended a surgical consultation to treat the claimant's symptoms. The ALJ finds that the claimant's need for surgery is unrelated to the May 15, 2017 work injury. The

ALJ is likewise persuaded by the opinion of Dr. Janssen and finds that the claimant's work injury on May 15, 2017 did not exacerbate the claimant's preexisting condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the lumbar fusion surgery recommended by Dr. Clifford is necessary to cure and relieve the claimant from the effects of the work related injury. As found, the claimant's need for surgery is related to his longstanding low back condition, and not the May 15, 2017 work injury. As found, the claimant's May 15, 2017 work injury did not aggravate, accelerate, or combine with his preexisting low back condition to necessitate surgery. As found, the medical records and the opinions of Drs. Janssen and Rauzzino are credible and persuasive.

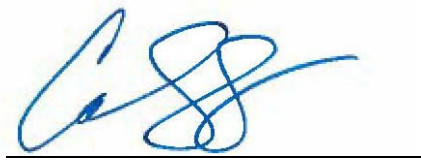
ORDER

It is therefore ordered:

1. The claimant's request for the lumbar fusion surgery recommended by Dr. Clifford is denied and dismissed.

2. All matters not determined here are reserved for future determination.

Dated December 28, 2018



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUES

- Did Claimant injure his right knee while working for Blanco on or about August 11, 2017?
- If Claimant proved an injury, was Claimant an employee or an independent contractor?
- What is Claimant's average weekly wage?
- Is Claimant entitled to TTD benefits from the date of injury through January 11, 2018?
- Medical benefits.

FINDINGS OF FACT

1. Blanco Remodeling ("Blanco") is a sole proprietorship that performs commercial remodeling services. Lorenzo Blanco is the sole owner of the company. Blanco has no permanent employees and utilizes "subcontractors" to perform its work.

2. In the summer of 2017, Claimant worked with Blanco Remodeling on a project at Grand River, a large apartment complex in northeast Colorado Springs. On approximately August 11, 2017, Claimant fell on a staircase while retrieving his tools from the job site, injuring his right knee.

3. The critical threshold question is whether Claimant was Blanco's employee or an independent contractor.

4. Cortland Partners ("Cortland") was the general contractor on the Grand River project. Blanco Remodeling was one of several subcontractors retained by Cortland. The workers were organized into small crews, and each crew was assigned several apartment units. The individual unit assignments were made by Cortland. Each crew was responsible for completing the entire scope of work for each of its units.

5. Claimant was the "manager" of his crew. As such, Claimant directly supervised and was responsible for everyone in his crew. Claimant typically met his crew each morning in Pueblo at approximately 6:30 AM and they drove together in Claimant's SUV to the job site in Colorado Springs. They usually worked from approximately 8:00 AM until 5:00 or 6:00 PM, with a one-hour lunch break. Based on conflicting evidence, the ALJ finds that Claimant engaged most, if not all, the men who worked on his crew.

6. Blanco paid Claimant a fixed rate of compensation based on the tasks completed in each apartment unit. For example, Blanco paid $160 for Demo, $60 for

Framing, $75 for Electrical Rough, $50 for Plumbing Rough, $100 for Drywall, and $500 for Paint. Cortland's project manager, Carlos Almonte, inspected the units each week to verify the completed item, after which Cortland would release payments to Blanco. Blanco, in turn, generally paid Claimant each week, although some payments were delayed because Cortland was late in transmitting payment to Blanco.

7. Blanco paid Claimant directly for all work completed by his crew. The funds were transferred electronically to Claimant's personal bank account by direct deposit. Claimant would then pay his crew from those funds. The documentary evidence shows payments in various amounts, ranging from $810 to $4,010. Claimant estimated net earnings of approximately $300 per week after paying his crew.

8. On at least one occasion, Blanco paid Claimant in advance for work not yet completed.

9. Cortland provided most materials used on the project. Occasionally, Claimant purchased small amounts of material from Home Depot, for which he was later reimbursed by Blanco. Claimant contacted Blanco for advance approval of any material purchases over $1,000.

10. Lorenzo Blanco was rarely on the job site with Claimant. Mr. Blanco did not supervise Claimant or direct him when or how to complete the work.

11. There is no persuasive evidence Blanco provided Claimant any training.

12. Cortland required that all workers on-site wear a T-shirt or other clothing conspicuously identifying the contractor for whom they worked. To satisfy this requirement, Claimant and his crew wore T-shirts on the job site emblazoned with the words "Blanco Remodeling." The T-shirts were provided by Blanco.

13. Claimant provided his own tools for the job. Claimant used his vehicle to tow a cargo trailer containing tools and equipment. There is no persuasive evidence Blanco provided any tools.

14. There is no persuasive evidence of any limitation on Claimant's freedom to work for other individuals, although it appears he worked exclusively with Blanco from July through mid-August 2016.

15. Claimant and Blanco completed no paperwork regarding their arrangement, and their working relationship was based on a "gentleman's agreement."

16. At hearing, Blanco presented testimony from Jorge Casana, who had worked with Blanco in a similar capacity as Claimant. Mr. Casana persuasively testified he believed he was a "subcontractor" and not Blanco's employee. Mr. Casana persuasively testified the managers had to report any accidents or injuries on the job site to Mr. Almonte, with the expectation the injured worker would ultimately file a claim with their own insurance carrier.

17. The preponderance of persuasive evidence shows Claimant was an independent contractor and not Blanco's employee.

18. Claimant failed to prove his injuries arose out of an employer-employee relationship.

CONCLUSIONS OF LAW

Section 8-40-202(2)(a) provides that "any individual who performs services for pay for another shall be deemed to be an employee . . . unless such individual is free from control and direction in the performance of the service . . . [and] is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

Once a claimant shows they performed services for pay, the burden shifts to the putative employer to show the claimant was an independent contractor. The Act creates a balancing test to overcome the statutory presumption of employment and establish independence. *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998). Section 8-40-202(2)(b)(II) sets forth several factors the General Assembly considers particularly "important" in distinguishing employees from independent contractors. *Industrial Claim Appeals Office v. Softrock Geological Services Inc*., 325 P.3d 560, 565 (Colo. 2014). No single factor is dispositive and the determination must be based on the totality of evidence in any given case. *Id*.

After considering the totality of circumstances, including the factors enumerated in § 8-40-202(2)(b)(II), the ALJ concludes Claimant was an independent contractor and not Blanco's employee at the time of his accident. The most significant factors in the ALJ's mind are: (1) Blanco paid Claimant a fixed rate per task rather than on an hourly basis; (2) Blanco paid Claimant for all completed work and Claimant divided the payment among himself and his crew; (3) Claimant managed his crew with no input from Blanco, (4) Claimant provided workers for his crew without direction from Blanco; (5) Claimant set his own work schedule; (6) Blanco did not supervise Claimant or otherwise direct the performance of his work; (7) Claimant provided his own tools; (8) Blanco provided Claimant no training; and (9) Blanco and Claimant completed no employment-related documents such as an I-9 or W-4.

Although the record contains evidence from which an employer-employee relationship could be inferred, on balance, the evidence persuades the ALJ that Claimant was free from Blanco's direction and control in the performance of his work and was engaged in an independent trade performing remodel work.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 28, 2018

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-086-600-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 11, 2018, in Denver, Colorado. The hearing was digitally recorded (reference:) 12/11/18 Courtroom 3, beginning at 8:39 AM, and ending at 12:00 PM).

Claimant's Exhibit 1 was not admitted into evidence due to a lack of foundation. Claimant's Exhibit 2 was admitted into evidence without objection. Claimant's Exhibit 3 was initially not admitted into evidence due to a lack of foundation and was later withdrawn by the Claimant. Respondents' Exhibit A through C were admitted into evidence without objection. Respondents' Exhibit D was admitted into evidence over the Claimant's objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed on, electronically on December 18, 2018. Counsel for the Claimant was given two working days within which to object as to form. No timely objections having been filed, the matter was deemed submitted for decision on December 21, 2018. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable injury arising out of and in the course of his employment on August 13, 2018; and, if compensable, the extent to which the Claimant is entitled to reasonably necessary and causally related medical treatment to cure and relieve the effects of his compensable injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant was employed by the Employer when he sustained an injury to his low back on August 13, 2018. The injury consisted of a temporary aggravation and acceleration of a pre-existing low back condition.

2. Prior to the August 2018 injury, the Claimant's medical records document pre-existing low back pain dating back to 2015 with prescriptions for cyclobenzaprine and prescription strength ibuprofen from January 2015 continuing until the injury on August 13, 2018.

The Incident

3. On August 13, 2018, the Claimant was working for the Employer folding mats. The Claimant was folding a "king" mat. A "king" mat is approximately 6 feet by 20 feet and weighs 45 kilograms, which is equal to 99.2 pounds.

4. The Claimant folded the mat, lifted it on to his left shoulder, and then felt his he alleges that the mat fell on top of him.

5. The Claimant testified that while he had prior low back pain, it was not as severe as it was on August 13, 2018.

6. The Claimant was taken by ambulance to the emergency room (ER) on August 13, 2018 and he remained in the ER overnight. He received several medications and underwent imaging. Lumbar spine x-rays, a thoracolumbar MRI (magnetic resonance imaging), and a thoracolumbar spine CT, none of which showed any acute process. John Raschbacher , M.D., testified at hearing that imaging would not necessarily show a lumbar strain (Claimant's Exhibit 2).

7. Following the ER, the Claimant was directed by Respondents to seek treatment at Concentra. The treatment with Concentra was authorized and has already been paid for by Respondents. This treatment and costs thereof are not in dispute.

8. On October 5, 2018, Trina L. Bogart, M.D. of Concentra noted that on August 13, 2018, the Claimant was single-handedly lifting a king size carpet roll when he felt a blockage in the muscles of the lower back on both sides and the back of his left leg blocked up too. The Claimant immediately fell forward onto the floor and the carper roll fell and possibly landed on his back but he could not recall details. This is consistent with the Claimant's testimony at hearing regarding the mechanism of injury (Respondents' Exhibit B, pp. 41-43).

9. Dr. Bogart noted that the Claimant was seeing a psychologist for treatment of PTSD (post-traumatic stress disorder) due to this work injury. On examination, Dr. Bogart noted that the Claimant's subjective complaints and objective findings were inconsistent. She noted that the Claimant had to crawl onto the exam table only using his upper body while his legs were extended stiff. Dr. Bogart assessed the Claimant with a lumbar strain (Respondents' Exhibit B, pp. 43-44).

10. On October 11, 2018, NP (Nurse Practitioner) Kathy Okamatsu of Concentra noted that "It was apparent that if the pt thought he was being observed, he would change his demeanor and begin crying and appearing to be in pain." The Claimant was also observed getting into a vehicle without difficulty despite his appearance in the office of having to use a walker and being unable to move his legs to climb on the examination table (Respondents' Exhibit C, pp. 69-70).

11. John Burris, M.D. of Concentra examined the Claimant on October 25, 2018. Dr. Burris noted that the Claimant was a very poor historian. The Claimant denied any prior low back symptoms. Dr. Burris noted that the Claimant's pain diagram showed a pain distribution in a nondermatomal pattern. The Claimant denied any numbness or weakness in the extremities. Dr. Burris noted that the Claimant was sitting on the examination table with no evidence of discomfort and could bend fully at the waist and hold his left leg out behind them. Dr. Burris was of the opinion that the Claimant had persistent subjective low back complaints that were out of proportion to his examination, which revealed no objective findings (Respondents' Exhibit B, pp. 38-40).

Respondents' Independent Medical Exam (IME) of John Raschbacher, M.D.

12. Dr. Raschbacher examined the Claimant for an IME on November 27, 2018. He noted that the injury occurred when the Claimant was folding a king mat, lifted it, and had sudden pain in his back, he seemed to be locked, he could not move and he fell down. The Claimant denied any prior low back pain, depression, or anxiety. The Claimant told Dr. Raschbacher "I might be becoming disabled." Dr. Raschbacher

observed the Claimant moving and gesturing with no difficulty while discussing his injury. In contrast, once he began examining the Claimant, the Claimant was unable to move, could not lie down flat, could not bend his knees, and was in great pain. Dr. Raschbacher was of the opinion that the Claimant's pain behaviors were fairly florid. Dr. Raschbacher concluded: "I do not see any clear evidence that it is likely that an injury actually occurred" (Respondents' Exhibit D).

13. According to the Claimant, he is better now and his back pain has improved since the injury occurred on August 13, 2018.

14. At hearing, Dr. Raschbacher mistakenly testified that the Claimant did not tell him he fell down. This mistake was a harmless error because Dr. Raschbacher's opinions in his IME report were written based on the Claimant saying he fell down. Dr. Raschbacher's opinion regarding the Claimant's pre-existing condition and future medical treatment is, nonetheless, credible and persuasive.

15. According to Dr. Raschbacher, the Claimant exhibited. According to Dr. Raschbacher, if the Claimant had been injured the way he described, then he would have had contusions, bruising, or swelling when he was seen at Ardas on August 15, 2018 and he did not have any evidence of an injury at that time.

16. Dr. Raschbacher further testified that if the Claimant had suffered a lumbar strain, then he did not need any further medical treatment and was back to the level of his pre-existing condition (back to baseline). This opinion is partially corroborated by the Claimant's statement to Dr. Raschbacher that his back pain was a little better now and the Claimant's testimony that he has improved.

17. The ALJ finds that the Claimant's testimony and the medical records document a pre-existing condition but that the Claimant's testimony and the medical records from the ER support a finding that the Claimant temporarily aggravated his pre-existing condition on August 13, 2018, but returned to baseline shortly thereafter.

Ultimate Findings

18. Insofar as the Claimant attempted to establish long-term effects of August 13, 2018 incident, the ALJ does **not** find the Claimant's testimony credible. His testimony is refuted by the IME opinion of Dr. Raschbacher, which the ALJ finds credible with the exception of that portion of Dr. Raschbacher's opinion that **no** injury occurred on August 13. As found, there was a temporaery acceleration and aggravation of the Claimant's underlying back condition.

19. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to substantially accept Dr. Raschbacher's

opinions, the opinions of the Concentra doctors, the Claimant's testimony in minor part, and to reject any contrary opinions.

20. The Claimant has proven by a preponderance of the evidence that he sustained a work-related aggravation of his underlying back condition on August 13, 2018 and this compensable injury arose out of the course and scope of his employment with the Employer herein, however, it amounted to a temporary acceleration and aggravation of his pre-existing low back condition.

21. After the injury, the Claimant was transported by ambulance to the ER due to his severe pain. The ALJ finds that this treatment was reasonably necessary, causally related to the August 13, 2018 aggravation of the Claimant's pre-existing condition, and of an emergent nature.

22 As of August 14, 2018, once released from the ER, the medical records and Dr. Raschbacher's testimony convincingly reveal that the Claimant had returned to his pre-existing baseline. The ALJ finds that as of August 14, 2018 the Claimant was at baseline for his pre-existing condition. Therefore, no further benefits after August 14, 2018 are causally related to the compensable August 13, 2018 work injury, and any treatment thereafter is not reasonably necessary to cure and relieve the effects of the August 13, 2018 injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App.

2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, insofar as the Claimant attempted to establish long-term effects of August 13, 2018 incident, the ALJ did **not** find his testimony credible. His testimony was substantially refuted by that portion of Dr. Raschbacher's which minimized the eftects of the August 13. incident. As further found, Dr. Raschbacher's opinions, insofar as not inconsistent with a temporary aggravation, were credible and persuasive.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and opinions, the ALJ made a rational choice, based on substantial evidence, to substantially accept Dr. Raschbacher's minor part, and to reject any contrary opinions.

Compensability

c. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the

body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, the temporarily accelerating and aggravating event of August 13, 2018, required medical treatment in the ER and followup evaluations with Concentra. Therefore, the event of August 13, 2018, was sufficient to be compensable.

d. An injury must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant's termporarily accelerating/aggravating insult to his low back arose out of the course and scope of his employment for the Employer and was, therefore, compensable.

Medical

e. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's visit to the ER on August 13, 2018, was of an emergent nature. Therefore, Respondents are liable for the costs thereof.

f. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim*

Appeals Office, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, after August 14, 2018, the Claimant had returned to the baseline of his pre-existing low back condition and medical treatment thereafter was and is not causally related to the August 13, 2018 incident. Therefore, the Respondents are not liable for any medical care and treatment after August 14, 2018, with the exception of evaluations at Concentra thereafter.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant sustained his burden on compensability and medical care and treatment on August 13, 2018, including the ER. The Claimant failed to sustain his burden with respect to medical care and treatment

ORDER

IT IS, THEREFORE, ORDERED THAT:

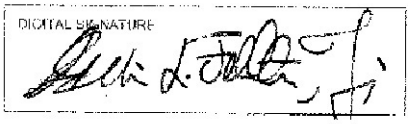
A. The Claimant sustained a temporarily accelerating and aggravating injury to his low back on August 13, 2018. He returned to the baseline of his pre-existing condition on August 14, 2018.

B. Respondents shall pay the costs of the Claimant's ER treatment and evaluations at Concentra, subject to the Division of Workers' Compensation Medical Fee Schedule. Respondents are entitled to credit for payments already made.

C. Any and all claims for medical benefits after and including August 14, 2018, are hereby denied and dismissed.

D. Any and all issues not determined herein are reserved for future decision.

DATED this 31st day of December 2018.



EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she suffered a compensable occupational disease.

II. If Claimant proved she suffered a compensable occupational disease, whether Claimant proved by a preponderance of the evidence she is entitled to medical treatment that is reasonable, necessary and related to the occupational disease, including a right ankle surgery proposed by Dr. Stuart Myers.

FINDINGS OF FACT

1. Claimant is a 52 year old woman who has worked for Employer, a floral wholesaler, since 2012. Claimant works as a selector. She is responsible for selecting various materials and items including, among other things, flowers, boxes of greens, cases of vases, jugs of chemicals and preservatives, and hard goods to fulfill retail client orders. Employer does not have a computer inventory system. As such, Claimant must physically search the facility to find the items to fulfill the client orders. Employer's facility is approximately the size of a grocery store, housing five coolers, a greenhouse, shelving, a process floor, and sales desks.

2. Claimant places the items on carts to transport to the sales desks. The carts are three-tier wooden carts custom-made for Employer. They are made of 2x4s, 2x6s, oriented strand board, bolts and fasteners. All four wheels are swivel castors on metal mountings with metal axels. There is no fixed wheel pivot point on the swivel castors. Claimant testified the carts are old, with splintering wood and compromised wheel mountings. She testified the wheels on the carts are old and flat, which prevents the wheels from spinning cleanly and makes it more difficult to turn the carts. Claimant testified that, several years ago, she began to experience general aches and pains due to pushing the carts, so she took it upon herself to lubricate the cart wheels with WD-40.

3. Claimant estimated the carts weigh approximately 100 pounds when empty. Claimant testified she uses her whole body to push and steer the carts, pushing off with her legs. She testified she locks the left side of her body and puts her right foot out as far as she can for leverage to pivot. Claimant testified the route she takes to the main cooler necessitates four left turns. Employer's facility has concrete flooring which contains cracks and holes in various areas. Metal ramps are located at the entry way of each cooler, requiring almost every order to be pushed over a ramp. Claimant estimates she walks two to five miles at a brisk pace through Employer's facility each day.

4. Claimant testified she began experiencing a burning and stabbing pain in her right Achilles in the summer of 2017, which she attributes to the performance of her

work duties for Employer. Claimant testified she did not sustain any acute ankle injury outside of work in 2017, or participate in any recreational activities in 2017 that involved injury to her right lower extremity.

5. Claimant testified that in mid-summer 2017 her sales manager inquired about Claimant's limping. Claimant spoke to her supervisor, Dana Daniel, about her right ankle in approximately late July 2017 because the pain was spreading and her hip was beginning to hurt. She further testified she informed Dana that she needed to find a different way of working or a different line of work. Claimant was not offered any workers' compensation documents at the time.

6. Claimant suggested to Employer getting an operational cart that was easier to maneuver. In late July 2017, Claimant ordered a new cart and was reimbursed for the cart by Employer. Claimant testified that her ankle pain slightly decreased with use of the new cart, but did not fully resolve.

7. Claimant testified that her ankle pain did not increase through the fall of 2017, as fall is a slower time at work. She stated that throughout the fall she treated her ankle with rest and home remedies. However, in mid-December 2017, Claimant testified her ankle pain increased to the point she could no longer wear "normal" closed-back shoes due to the swelling on the back of her ankle. Claimant requested to see a workers' compensation doctor in late January 2018 and began treating with Concentra.

8. Claimant presented to Bryan Counts, M.D. on February 2, 2018 for an initial evaluation. On her intake paperwork, Claimant reported getting injured "during the course of repeated tasks" due to "[c]hronic physical work stress." Claimant reported to Dr. Counts noting pain over her right Achilles tendon in mid-August 2017 with gradual swelling. Dr. Counts noted, "Her job is fast pace, spends hours per day pushing carts with floral items on them. No concurrent activities. No h/o bone spurs or Achilles rupture in the past. Feels better with rest, worse with pushing carts." On exam, Dr. Counts noted swelling, minimal tenderness over the distal Achilles and anteromedially to the tendon insertion, and mildly reduced dorsiflexion. Thompson and Homan's test were negative. Dr. Counts diagnosed Claimant with an Achilles tendon injury. He opined that there was, "[g]reater than 50% prob this is a work related injury, overuse mechanism form (*sic*) pushing carts at work." Dr. Counts further noted on his WC-164 form that his objective findings were consistent with history and/or work-related mechanism of injury. He referred Claimant for physical therapy and to Stuart Myers, M.D. for an orthopedic specialist evaluation.

9. Claimant began physical therapy on February 2, 2018. Her intake forms note she pushes and pulls heavy carts and loaded pallets and maneuvers large carts all day with lots of walking and walking for most of the day. The physical therapist noted,

> Patient reports she started to feel her Achilles in the summer of last year. It then became worse in December. She notes that the pushing and being on her feet for prolonged periods is catching up with her…Patient reports

being unable to participate fully in one or more community or life events due to impairments associated with current injury.

10. Claimant presented to Dr. Myers on February 13, 2018. Claimant reported experiencing pain and swelling in her Achilles for several months. Dr. Myers noted, "She has been wearing a croc type shoe without a heel counter, which seems to be making her feel better. The pain is worse with application of any pressure with prolonged standing or walking…Prior to beginning this job, she had no such discomfort." On exam, Dr. Myers noted swelling, tenderness at the insertion of the Achilles and on the calcaneus. He further noted that he personally reviewed prior radiographs that revealed a small enthesophyte at the insertion of the Achilles on the calcaneus. Dr. Myers gave the following impression: insertional Achilles tendinitis and painful calcaneal enthesophyte. He recommended Claimant continue physical therapy and provided a heel lift.

11. On March 2, 2018, Claimant underwent a right ankle MRI. Jeffrey Weingardt, M.D. gave the following impression:

1. Moderate, distal Achilles tendinitis with interstitial tearing.
2. Mild Haglund's deformity of the posterior calcaneus with retrocalcaneal bursitis. Concomitant Haglund's syndrome may be present.
3. Probable scarring of the anterior talofibular and calcaneal fibular ligaments.
4. Posterior subtalar joint effusion with probable intra-articular chondral body as described.
5. Mild peroneal and tibialis posterior tenosynovitis.
6. Retrocalcaneal and retro-Achilles bursitis.

12. On March 13, 2018, Dr. Myers noted Claimant remained unable to wear any shoes with a closed heel and had significant limitations in terms of activities. He noted he personally reviewed the March 2, 2018 MRI images and MRI report. Dr. Myers gave the following impression: intra-articular loose body of the subtalar joint of uncertain significance, subtalar joint effusion, peroneal and posterior tib tenosynovitis, not likely contributory, and insertional Achilles tendinosis/tendonitis/interstitial tearing. He provided Claimant a brace and updated her physical therapy prescription, but noted that such treatment alone was not likely to return Claimant to full activity. Dr. Myers discussed two additional treatment options, a platelet-rich plasma ("PRP") injection or surgery involving debridement of Achilles, FHL transfer, removal of the intra-articular body in the subtalar joint. He recommended Claimant first proceed with a PRP injection.

13. Dr. Myers performed a PRP injection of the right Achilles tendon sheath and retrocalcaneal bursa on April 6, 2018. As of a follow-up appointment with Dr. Myers on April 10, 2016, Claimant reported that she had yet to feel any beneficial effect from the injection. Dr. Myers ordered Claimant to continue wearing a walking boot for two more weeks, then begin physical therapy. On April 11, 2018, Dr. Counts noted Claimant was having moderate post-injection pain.

14. On April 12, 2018, Jill Adams performed a Job Demands Analysis and Risk Factors Analysis at the request of Respondents. Ms. Adams noted Claimant spent 15-20% of her work time in supply management, and the remaining 80-85% of her time performing selector duties. Ms. Adams assessed the physical demand requirements of the job in the light to medium category. Lifting 1-5 pounds was frequent to constant, lifting 5-20 pounds was frequent, and lifting up to 25 pounds was occasional. Lifting between 26-50 pounds was noted as infrequent, and lifting 51-100 pounds was noted as "never." Ms. Adams determined that Claimant's total body pushing and pulling with respect to the carts was 1-25 pounds of force, frequent to constant.

15. Claimant testified that Ms. Adams conducted the job demands analysis on a slow day, and arrived at 9:00 a.m. Claimant begins her shift at 7:00 a.m. Claimant had already pulled all of the morning orders by the time Ms. Adams arrived to conduct the job demands analysis. Claimant testified that Ms. Adams only brought a notepad and cell phone with her, and that Ms. Adams did not push any carts.

16. Ms. Adams testified at hearing as an expert in vocational evaluation and assessment. Ms. Adams testified that she interviewed Claimant, observed Claimant performing her duties, and also observed other workers performing selector job duties. She testified that she looked at the carts and that she believes she pushed some of the carts as well. Ms. Adams testified that an empty cart did not weight much or require much force to push. She further testified that she typically uses a force gauge to determine the amount of force required, and believes she did so in Claimant's case, but is not certain. Ms. Adams did not bring scales with her or use the scales on site to weigh anything but, rather, estimated the weight of items by looking at them. She acknowledged that she was unaware of the total weight of the carts, empty or otherwise. Ms. Adams' report includes the Medical Treatment Guidelines risk factors for upper extremity cumulative trauma. She stated these guidelines have no relevance to Claimant's work injury, and were included as part of the standard form used.

17. On April 27, 2018, Insurer's physician advisor, Andrew Parker, M.D. opined that Claimant's Achilles condition was not work-related. Dr. Parker noted that the job requirements defined in her workplace environment and the job demands analysis did not suggest any increased risk for Achilles tendinitis, and that all of the MRI findings were chronic and did not suggest a specific workplace injury.

18. Respondents filed a Notice of Contest on May 1, 2018.

19. Dr. Myers reevaluated Claimant on May 23, 2018. He noted that because Claimant's claim had "closed," he was seeing her free of charge to follow-up on the PRP injection. Dr. Myers noted that Claimant received no benefit from the PRP injection and continued to experience persistent insertional discomfort with swelling. He opined that Claimant would benefit from surgery and encouraged Claimant to pursue surgery once she obtained health insurance.

20. On September 14, 2018 Paul Stone, M.D. performed an independent medical examination ("IME") at the request of Respondents. Dr. Stone interviewed Claimant,

performed a physical examination, and reviewed medical records and the job demands analysis. Claimant reported to Dr. Stone that her pain began in July 2017, but that she did not feel she should take any time off of work due to it being wedding season. She reported her job duties involved pushing heavy carts weighing 100-150 pounds when empty and 250-300 pounds when full of flowers. Dr. Stone noted that the job demands analysis indicated Claimant's total body pushing and pulling was up to 25 pounds, which was 10 times less than what was reported to him by Claimant. Dr. Stone agreed with Dr. Parker that Claimant's diagnoses were degenerative in nature. He concluded that the amount of pushing Claimant performed as noted in the job site analysis was not consistent with the aggravation of a pre-existing condition. Noting Claimant's condition would likely worsen over time, Dr. Stone highly recommended that Claimant pursue surgery outside of the workers' compensation system.

21. On September 21, 2018, Dr. Myers issued a report responding to multiple questions from Claimant's counsel. The report includes a thorough explanation of Claimant's condition, analysis of causes, and recommended treatment. Dr. Myers explained that Claimant's condition is comprised of both acute and chronic components. He stated that the interstitial tearing (which he noted could also be described as tendinosis) was chronic, and that the chronic process could have acute exacerbations leading to tendinitis. Dr. Myers concluded that the mild peroneal and tibialis posterior tenosynovitis and the Haglund's deformity were not caused, aggravated, or accelerated by Claimant's work duties. He did opine, however, that the retrocalcaneal bursitis with which the Haglund's deformity is associated, was exacerbated by Claimant's work activities. Dr. Myers opined that it is medically probable Claimant's diagnosis of retrocalcaneal and retro-Achilles bursitis was aggravated by her work duties, specifically the use of closed-back shoes and any activity consisting of forceful plantarflexion of the ankle, including pushing and lifting of heavy objects.

22. Dr. Myers further opined that Claimant's Achilles tendinitis with interstitial tearing was aggravated or accelerated by Claimant's work duties, stating,

> Achilles tendinitis with interstitial tearing, also referred to as Achilles tendinosis or Achilles tendinopathy, is an overuse condition. Although there are a myriad of predisposing factors for this condition, the sine qua non is repetitive microtrauma with an incomplete healing response. The Achilles tendon is the primary plantar flexor of the ankle. Any repetitive activity involving plantarflexion of the ankle will lead to increased pain and dysfunction in the presence of Achilles tendinopathy/tendinosis.
>
> * * *
>
> Symptoms can be precipitated or exacerbated by a specific injury but more frequently developed insidiously and in the absence of a specific inciting event. The ultimate cause is overuse – repetitive microtrauma to the tendon – from activities related to forceful plantarflexion of the foot. These include lifting and pushing. There is

> no specific amount of force that has been shown to cause – or not cause – mictrotrauma in this fashion. This threshold depends completely on the individual patient.

23. Dr. Myers further explained that the precise force, frequency or distance Claimant pushed the carts was not dispositive to a causation opinion stating, "There is no way of knowing how much force and how much repetition would be needed to cause repetitive microtrauma to the Achilles tendon in any given patient. There is no fixed threshold for causing microtrauma that leads to interstitial tearing and Achilles tendinopathy/tendinosis."

24. Dr. Myers continued to opine that surgery is indicated for Claimant, and that Claimant's need for surgery is related to her work duties.

25. Claimant testified the treatment she has received thus far has not improved her condition and that she wants to undergo the surgery proposed by Dr. Myers. Claimant testified she is unable to wear normal shoes and experiences pain when she walks. She stated she struggles to perform her job duties, as she now walks slower, and typically has to immobilize her ankle with the walking boot prescribed by Dr. Myers a few hours into her shift. Claimant further testified that she cannot garden or walk her dog without experiencing pain. Claimant testified that one of her hobbies is walking her dogs. Her home is surrounded by a gradual incline and a steeper incline. She testified that she typically does not take the steep incline when walking her dogs.

26. Regarding prior right lower extremity issues, Claimant testified she sustained a right ankle sprain on a hike in September 2013 that did not involve any injury to her Achilles. She stated she did not seek medical treatment for the injury, and wore a walking boot given to her by a co-worker. Claimant testified that in 2015 she had pain in her right Achilles that she attributed to wearing high-top hiking boots. The pain resolved once Claimant began wearing low-top hiking boots.

27. Claimant's testimony is found more credible and persuasive than the testimony of Ms. Adams.

28. The ALJ finds the opinion of Dr. Myers, as supported by Claimant's testimony and the medical records, more persuasive than the contrary opinions of Drs. Parker and Stone.

29. Claimant proved it is more likely than not she suffered a compensable occupational disease as a result of her work duties.

30. Claimant provided it is more likely than not she is entitled to reasonably necessary medical treatment related to the occupational disease, including the ankle surgery proposed by Dr. Myers.

31. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to

produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The ALJ concludes Claimant has established by a preponderance of the evidence the hazards of her employment aggravated and accelerated her right Achilles and ankle condition. Although Claimant suffered a right ankle sprain in 2013, and experienced some Achilles pain in 2015, no evidence was offered at hearing indicating Claimant continued to experience Achilles symptoms leading up to the onset of symptoms in summer 2017. Claimant credibly testified the Achilles pain she experienced in 2015 resolved once she changed from wearing high-top hiking boots to low-top hiking boots.

Claimant has been consistent in her reports regarding the nature of her work and onset of symptoms. Claimant credibly explained her work duties, which require pushing heavy, difficult-to-maneuver carts loaded with multiple items throughout a large facility over ramps and uneven surfaces. Maneuvering the carts requires pushing off with her legs, frequently using her right foot and leg to pivot for leverage to make multiple left turns. Dr. Counts, an authorized treating physician, credibly and persuasively opined that Claimant suffered a work-related overuse injury from pushing carts at work. Dr. Myers, also an authorized treating physician in this case, examined Claimant on multiple occasions, personally reviewed the imaging, and issued a very thorough analysis of each aspect of Claimant’s condition. Dr. Myers credibly and persuasively

explained that Claimant's primary condition, Achilles tendinitis with interstitial tearing, is an overuse condition resulting from repetitive microtrauma from activities related to forceful plantarflexion of the foot, including pushing and lifting of heavy objects. Dr. Myers credibly and persuasively opined that Claimant's work activities exacerbated and aggravated Claimant's Achilles tendinosis with interstitial tearing and retrocalcaneal bursitis. Dr. Myers further credibly and persuasively explained that the precise force, frequency and distance Claimant pushed the carts was not dispositive to a causation opinion, as the threshold for causing the type of microtrauma that results in Claimant's condition can be different for each individual.

The opinions of Drs. Parker and Stone heavily rely on the job demands analysis, which was credibly called into question by Claimant. Ms. Adams arrived to Employer's facility two hours after Claimant had begun her shift and already completed the morning orders. Ms. Adams herself acknowledged that she did not weigh any items and was uncertain if she did, in fact, use a force gauge. Claimant credibly testified Ms. Adams did not have a force gauge with her during the observation. The ALJ is persuaded the job demands analysis is not an accurate representation of the physical demands of Claimant's job.

The ALJ acknowledges that no evidence was presented indicating Claimant was required to wear closed-back shoes for her position, that the shoes Claimant wore at work were distinct from those she wore when she was not working or those generally worn in other occupations. As such, the ALJ does not consider Claimant's use of closed-backed shoes a hazard associated with Claimant's vocation. However, the ALJ is persuaded the repetitive pushing of heavy carts as required by her position is a peculiar risk and a hazard that Claimant would have been equally exposed to outside of this employment. Although Claimant participates in walking her dogs on different inclines surrounding her home, there is insufficient credible and persuasive evidence such activity is the cause of Claimant's condition. Based on the totality of the credible and persuasive evidence, Claimant has established it is more likely than not Claimant's work duties aggravated and exacerbated her right Achilles condition, causing the need for medical treatment.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Claimant has established entitlement to reasonable, necessary and related medical care by a preponderance of the evidence. Claimant has failed conservative treatment, including physical therapy, medication, a walking boot and PRP injection.

Claimant credibly testified she continues to experience pain and limitations in her activities and cannot wear normal shoes. Dr. Myers credibly and persuasively opined that Claimant requires surgery and that it is medically probable the need for surgery is related to Claimant's work duties. Even Respondents' IME, Dr. Stone, highly recommends Claimant undergo the proposed surgery, albeit outside of the workers' compensation system. As such, Respondents shall be liable for reasonable and necessary medical treatment to cure or relieve the effects of Claimant's occupational disease, including the surgery propose by Dr. Myers.

ORDER

It is therefore ordered that:

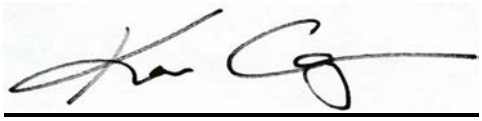
1. Claimant has established by a preponderance of the evidence she suffered a compensable occupational disease to her right ankle and Achilles.

2. Respondents shall pay for reasonable and necessary medical treatment related to the occupational disease, including treatment received to date by authorized providers, and the surgery proposed by Dr. Myers.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 6, 2018



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

W.C. No. 5-055-251-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AND DENYING SUMMARY JUDGMENT IN FAVOR OF CLAIMANT.

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

A hearing on the merits in the above-referenced matter is scheduled for January 18, 2019, in Greeley, Colorado. On September 24, 2018, a Prehearing Conference was held before Prehearing Administrative Law judge (PALJ) Michelle S. Sisk, concerning Respondents' Motion to Strike Claimant's Notice and proposal to Select a Division Independent Medical Examiner (DIME). Citing §§ 8-42-107.2 and 8-42-107 (8) (c), C.R.S., Respondents argued that the Claimant's Notice and Proposal was untimely. The Claimant cited the holding in *Harman-Bergstedt, Inc. v. Loofbourrow,* 320 P.3d 327 (Colo. 2014) for his argument that the time limits to object to the Final Admission of

Liability (FAL) and to file a Notice and Proposal did **not** apply. Citing *Williams v. Devereux Cleo Wallace,* W.C. No. 4-620-507 [Indus. Claim Appeals Office (ICAO), August 10, 2006], which held that the timely filing of a Notice and proposal for a DIME was a jurisdictional prerequisite for a DIME, PALJ Sisk granted Respondents Motion to Strike the Claimant's Notice and Proposal in a Prehearing Order, dated October 2, 2018.

On November 9, 2018, the Claimant filed a Motion for Summary Judgment which, in essence, amounts to an appeal of PALJ Sisk's Prehearing Order.

On November 19, 2018, Respondents filed a Response to Claimant's Motion for Summary Judgment and their Cross-Motion for Summary Judgment in Respondents' favor.

ISSUES FOR SUMMARY JUDGMENT

The issues to be determined by this decision concerns whether there are genuine issues of disputed material fact concerning whether the Claimant exceeded the statutory time limits regarding the filing of a Notice and Proposal to Select a DIME which is undisputed; and, whether the holding in *Loofbourrow* dispenses with the time limits to file a Notice and Proposal to Select a DIME when a Medical-Only FAL, with a maximum medical improvement date and a denial of temporary and permanent disability benefits was filed by the Respondents.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Undisputed Facts

1. Claimant suffered an admitted industrial cervical spine injury on August 25, 2017.

2. Respondents filed a "Med-Only" Final Admission of Liability (FAL) on June 22, 2018, admitting for medical benefits only; a maximum medical improvement (MMI) date of June 7, 2018; and, denying any temporary disability and permanent impairment benefits (Exhibit 1, attached to Claimant's Motion for Summary Judgment).

3. On September 5, 2018, forty-four days after the FAL, the Claimant objected to it and filed a Notice and Proposal to Select a DIME (Claimant's Exhibit 2)

4. On September 24, 2018, the parties participated in a Prehearing Conference before PALJ Michelle Sisk, on Respondents' Motion to strike Claimant's Notice and Proposal to Select a DIME. Relying up, (ICAO, September 5, 2018) and *Williams v. Devereux Cleo Wallace*, *supra,* PALJ Sisk granted Respondents' Motion to Strike, finding that the Claimant's untimely Notice and Proposal rendered the DIME procedure "jurisdictionally deficient" (Claimant's Exhibit 3).

5. The Claimant filed an Application for Hearing to appeal PALJ Sisk's Order to the OAC. Hearing is set for January 18, 2019. Also, Claimant's Motion for Summary Judgment is a *de facto* appeal of PALJ Sisk's Order.

Ultimate Finding

6. It is undisputed that there is no genuine issue of material fact. The Claimant's Motion for Summary Judgment and the Respondents' Cross Motion for Summary Judgment present a purely legal issue, *i.e.,* does the holding in *Loofbourrow* and the constellation of case law holdings make the time limits for filing a Notice and Proposal for a DIME inoperative?

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Claimant's Motion for Summary Judgment is supported by documents. As further found, the Respondents Response and Cross Motion for Summary Judgment are supported by documents.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the documentary evidence establishes that the facts in the present case are undisputed.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, neither party contends that there are genuine disputed issues of material fact, and the ALJ finds that there are no genuine issues of disputed, material fact.

Effect of Holding in *Loofbourrow*

d. This case concerns the correct interpretation of the holding in *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014). The undersigned ALJ was the trial judge in *Loofbourrow* and was affirmed up the line beyond the Industrial Claim Appeals Office. *Loofbourrow* involves a uniquely unusual set of circumstances. The Claimant herein asserts that the decision in *Loofbourrow* eliminates the obligation for a claimant to file a timely Notice and Proposal to begin the DIME process following the filing of a FAL. Contrary to this assertion, PALJ Sisk determined that the Claimant's interpretation of the *Loofbourrow* decision was overreaching, and the Claimant was not entitled to a DIME for failure to comply with the jurisdictional time limits to file a Notice and Proposal. There are no genuine disputed issues of material fact in these circumstances.

e. *Loofbourrow* addressed the sole issue of whether the claimant could be entitled to an award of TTD benefits without having challenged, by means of a DIME, the initial treating physician's assessment that she had reached MMI. The claimant in *Loofbourrow* had not suffered wage loss and had not originally filed a claim. As a "non-lost time" claim, no claim was reported to the Division, and no position admitting or denying the claim was ever filed. There was no FAL filed by respondents in *Loofbourrow*. The insurance carrier was entitled to pay medical expenses without admitting or denying liability, as permitted by § 8-43-101 (2), C.R.S. This only raises a legal issue. There is no genuine issue of disputed material fact.

f. In contrast to the facts in *Loofbourrow,* a FAL was filed herein. § 8-43-203(2)(b)(II) (A), C.R.S. states, "An admission of liability for final payment of compensation must include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant

should provide written objection, and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission **if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing, including the selection of an independent medical examiner** (emphasis supplied) pursuant to § 8-42-107.2 if an independent medical examination has not already been conducted." Respondents' FAL herein complies with these requirements.

g. The Division of Workers' Compensation (DOWC) "Final Admission Form" includes clear language that a claimant must file an objection and a Notice and Proposal for a DIME within thirty calendar days of the date of the FAL, if there is disagreement with the FAL. The form states, "Otherwise, your claim will be closed as to the issues admitted in the Final Admission of Liability." In the case of *Williams v. Devereux Cleo Wallace,* W.C. 4-620-507 (ICAO, August 10, 2006), the claimant filed a timely objection to the FAL, but did not file a Notice and Proposal. ICAO struck the claimant's later attempt to initiate the DIME process.

h. § 8-42-107.2(a)(II)(b) , C.R.S., reads: "(b) If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request, on a form prescribed by the division by rule, and shall propose one or more acceptable candidates for the purpose of entering into negotiations for the selection of an IME. Such notice and proposal is effective upon mailing via United States mail, first-class postage paid, addressed to the division and to the last-known address of each of the other parties. **Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability** (emphasis supplied… (2), the authorized treating physician's findings and determinations shall be binding on all parties and on the division."

i As found, Respondents filed a FAL on June 22, 2018. Claimant did not The ALJ concludes that the Claimant's objection and Notice and Proposal were **untimely.**

j. In his Summary Judgment Motion, the Claimant argues that decisions of ICAO support the conclusion that a claimant who has not received temporary benefits and has no permanent impairment is free from the jurisdictional obligations of filing an objection and a Notice and Proposal for a DIME in order to challenge a FAL and proceed with a DIME. The *Loofburrow* Court was clear that they were addressing a narrow issue. Eliminating a claimant's jurisdictional obligations was not included. There was no FAL in that case, and claimant's responsibilities in light of a FAL were not considered. The narrow issue in that case was only whether the claimant's claim for

TTD was barred by not having first proceeding through the DIME process, considering that the respondents had not filed a FAL.

k. *Gibson v. Atlantic Relocation Systems and Liberty Mutual,* W.C. No. 5-020-939-01 (ICAO, September 5, 2018) states that, "if a party wishes to challenge the authorized treating physician's MMI determination, the impairment, or both, the party must request a DIME in accordance with the procedures established in §8-42-107.2, C.R.S." ICAO included a long discussion of the facts, history and findings of *Loofbourrow* in its analysis in *Gibson.* In that matter ICAO warned against taking the language of *Loofbourrow* out of context and reading it too broadly, as claimant argues herein. The finding in *Gibson* was that a **timely** objection and request for a DIME entitled the claimant to the DIME process. The *Gibson* Panel found that a claimant placed at MMI with a zero percent impairment rating and no wage loss or lost time is entitled to the DIME process, but that claimant is bound by the jurisdictional requirements of that DIME process. There is no genuine issue of disputed material fact in this situation.

l. ICAO, in *Gibson*, specifically addressed the opinions cited in claimant's motion, including *Kazazian v. Vail Resorts*, W.C. No.4-915-969-03 (ICAO April 24, 2017). *See also Trujillo v. Elwood Staffing*, W.C. No. 4-957-118-02 (ICAO, June 22, 2017) and compare *Ramirez-Chavez v. In-Out Oil Field Services*, W.C. No. 5-019-466-01 (April 12, 2018). ICAO recognized these decisions as "divergent" from the findings of *Gibson,* and stated, "To the extent prior orders of the Panel conflict with this interpretation of *Loofbourrow*, we choose not to follow them." *Kazazian* was ruled upon on April 24, 2017. Since that time, case law has developed that make clear that a "non-loss time" claim with no impairment is entitled to the DIME process. Unlike the *Kazazian*, respondents, the Respondents herein do not argue that a claimant is not entitled to the DIME process by virtue of the zero amounts admitted to in the FAL. The Claimant is not entitled to the DIME process because he did not timely file his objection to the FAL and the Notice and Proposal for a DIME.

m. When construing a statute, the ALJ must give effect to the General Assembly's purpose and intent as reflected in the plain language of the statute. *People v. Luther*, 58 P.3d 1013 (Colo.2002). The ALJ should not depart from the plain meaning unless it leads to an absurd result. *Colo. Dep't of Soc. Servs. v. Bd. of County Comm'rs*, 697 P.2d 1 (Colo.1985). As discussed by the Court of Appeals in *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004) an obvious purpose of the 1998 legislation establishing time frames for requesting a DIME was to encourage the prompt adjudication of issues requiring a DIME. *Citing Lobato v. Indus. Claim Appeals Office,* 94 P.3d 1173, (Colo.App., 2003) (there was no requirement to file a DIME request within a certain time until the 1998 amendments).

n. Summary judgment may be sought in a workers' compensation proceeding. OACRP Rule 17 allows an ALJ to enter summary judgment where there are no genuine disputed issues of material fact. *Lanza v. WalMart Stores, Inc*., W.C. 4-707-313 (ICAO, September 24, 2007). Summary judgment is a drastic remedy and is appropriate only if there is no disputed issue of material fact and the movant is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P. 2d 97 (Colo. App. 1999). Once a moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. *Lanza, supra.* As found, it is undisputed that there is no genuine issue of disputed material fact.

o. The Claimant concedes that he did not file either an objection to the FAL or a Notice and Proposal for a DIME until 75 days after the FAL was mailed.. Because the Claimant had not lost time and no permanent disabili (PPD), there was neither TTD nor PPD admitted on the FAL. The ALJ concludes that *Loofbourrow* cannot be expanded to eliminate statutory jurisdictional time requirements for the Claimant herein. PALJ Sisk's Prehearing Order is correct. To quote Justice Oliver Wendell Holmes, Jr., jurisdictional time limits are "a concession to the shortness of life."

Burden of Proof

p. The burden of proof is placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Respondents have sustained their burden with respect to their Cross-Motion for Summary Judgment. The Claimant has failed to sustain his burden with respect to his Motion for Summary Judgment.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents' Motion for Summary Judgment, requesting a denial of Claimant's untimely request for a Division Independent Medical Examination is hereby granted.

B. Claimant's Motion for Summary Judgment is hereby denied and dismissed.

C. Any and all issues not determined herein are reserved for future decision.

DATED this 17th day of December 2018.

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EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*/